IN THE UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF TENNESSEE, NASHVILLE DIVISION

United States of America ex rel. TIMOTHY GUILFOY, TOMIS ID 00499702,	)	
Petitioner,	)	
v.	)	**Case No. 18-CV-1371**
MICHAEL PARRIS, Warden, Northwest Correctional Complex,	)	**Honorable Eli J. Richardson**
Respondent.	)	**Honorable Magistrate Barbara D. Holmes**

MEMORANDUM OF LAW IN SUPPORT OF
AMENDED PETITION FOR WRIT OF HABEAS CORPUS

Now comes Petitioner, Timothy Guilfoy, by and through his attorneys, and for his memorandum of law in support of his separately filed amended petition for writ of habeas corpus, states as follows:

INTRODUCTION

Petitioner stands wrongfully convicted of one count of rape of a child and three counts of aggravated sexual battery. Petitioner's first trial resulted in a hung jury after he introduced evidence demonstrating that he was not physically present in the State at the time of the alleged incidents. The State moved forward with a second trial after Petitioner refused to plead guilty to offenses he did not commit. The complaining witnesses' mother "modified" her testimony on retrial by not testifying with precision as to when Petitioner was present at the home where the alleged abuse

occurred. Petitioner was thereafter convicted. He was ultimately sentenced to a total effective term of 40 years' imprisonment.

Petitioner was denied his right to effective assistance of counsel during the course of the proceedings that resulted in his convictions. Specifically, in a case that hinged entirely on the credibility of the alleged victims, Petitioner's trial attorney failed to prevent the jury from watching inadmissible, highly prejudicial videotaped forensic interviews of the complaining witnesses that improperly bolstered their trial testimony. Moreover, trial counsel failed to object to improper opinion testimony that accounted for the flaws and inconsistencies in the accusing witnesses' versions of events. Petitioner was therefore denied his rights as secured by the Sixth and Fourteenth Amendments to the United States Constitution.

Additionally, during deliberations the jury was exposed to extraneous, prejudicial facts that were not properly admitted into evidence, *i.e.*, the videotaped forensic interviews of the alleged victims. Thus, Petitioner's constitutional rights to an impartial jury, confrontation, cross-examination, and the effective assistance of counsel were also violated.

As a result of these constitutional violations, Petitioner respectfully requests that this Court issue a writ of habeas corpus ordering that he be brought before the Court to be discharged from his unconstitutional confinement and relieved of his unconstitutional convictions and sentences.

A. STATEMENT OF FACTS

Indictment and pretrial motions

By way of a superseding indictment, Petitioner was charged with four counts of aggravated sexual battery against J.A., three counts of rape of a child against T.A., and one count of aggravated battery against T.A. (T.R. 38–46).[1]

Before trial Petitioner filed a motion to compel the State to provide him with copies of the videotaped forensic interviews of the alleged victims. (T.R. 21–24). The State filed an objection to the motion in which it argued that the videotaped interviews were not discoverable pursuant to Tennessee Rule of Criminal Procedure 16(a)(1). (T.R. 28-33). In filing the motion the State represented that the videotaped interviews were not material to preparing the defense and / or that it was not intending to use the videotaped interviews in its case-in-chief at trial. (T.R. 29–30); Tn.R.Crim.P. 16(a)(1)(F). The videotaped interviews were never produced to the defense.

Trial

State's case-in-chief

Jennifer, J.A. and T.A.'s mother, testified that in about 2005 she and her three daughters moved in to live with her father at the Biltmore Apartments in Nashville.

[1] Petitioner refers to the record on appeal herein but does not file it as an exhibit so as to protect the identities of the alleged minor victims. Petitioner shall cite to the technical record as "T.R. __," and to the trial transcripts as "T.T. __." Petitioner shall cite to the closing argument, which was not included in the original appellate record, as "Cl. __." Petitioner shall cite to the transcripts from the post-conviction hearing as "P.C.T.__." Any reference to exhibits is to the exhibits attached to Petitioner's amended petition.

(T.T. 172–73). Petitioner lived in the apartment next door. (T.T. 176). Petitioner and Jennifer would visit with each other, and Jennifer's daughters would play in the small music studio set up in Petitioner's apartment. (T.T. 178). Jennifer testified that her daughters enjoyed going to Petitioner's residence. (T.T. 180).

After living in the Biltmore Apartments for no more than a year, Jennifer and her daughters moved into a small one-bedroom house on Saturn Drive in Nashville with Jennifer's father. (T.T. 175, 250). Jennifer testified that Petitioner moved back to his hometown of Kirkwood, Missouri within a few months of when she moved out of the Biltmore Apartments. (T.T. 180, 184–85). Jennifer and Petitioner, who Jennifer described as a "really good friend," remained in touch via telephone. (T.T. 182, 185).

Petitioner visited Jennifer and her daughters after he had moved. (T.T. 182). Jennifer's daughters became very attached to Petitioner, and they would get excited when they heard that Petitioner was coming for a visit. (T.T. 183).

Jennifer testified that when she and her children initially moved into the house on Saturn Drive there was not enough room for everyone that lived there to have a separate bedroom. (T.T. 190). At first Jennifer's daughters slept in the living room in bunk beds, on a futon, and / or on a couch that pulled out into a bed. (T.T. 190–92). The bunk beds were later moved into the dining room. (T.T. 204).

Jennifer testified that Petitioner worked in marketing and returned to Nashville to work at events such as the CMA festival. (T.T. 199–200). Petitioner helped Jennifer obtain work at some of those events. (T.T. 200). When Petitioner

would come into town he would stay at Jennifer's residence to earn extra money off of the per diem that he was not spending. (T.T. 201–02). Jennifer and her daughters liked having Petitioner stay at their house. (T.T. 202).

Jennifer remembered seeing Petitioner on the top bunk bed with J.A. on one occasion. (T.T. 203). According to Jennifer she woke up in the morning and saw Petitioner in bed with T.A. on multiple occasions. (T.T. 205). Jennifer did not say anything to Petitioner upon making these observations. (T.T. 206). At no time while they lived on Saturn Drive did J.A. or T.A. disclose to her that any sexual abuse had occurred. (T.T. 206).

There came a time when Jennifer and Petitioner discussed Jennifer's desire to move out of Nashville. (T.T. 207). Petitioner told her he had considered investing in a home and renting it out. (*Id.*). Petitioner subsequently purchased a house in Clarksville and rented it out to Jennifer for $700 per month. (T.T. 208). According to Jennifer, Petitioner was aware that she might not always be able to pay the rent, but he told her that she would never have to worry about "just being kicked out of the house." (T.T. 208–09). Jennifer denied that Petitioner ever told her she would have to leave the house, or that she had a certain amount of time to find somewhere else to live prior to when she reported any disclosures of abuse. (T.T. 210–11).

Without specifying an approximate date, Jennifer testified that one school morning "they"—ostensibly her daughters—were on the phone with Jennifer's dad. (T.T. 219). Jennifer yelled at them that it was time to get off of the phone and get to the bus. (*Id.*). Per Jennifer, after the girls got on the bus her father called back and

told her that J.A. had told him what had happened. (T.T. 220). Jennifer then went and removed her children from school. (*Id.*). Based on what J.A. and T.A. told her she contacted police. (T.T. 221).

On cross examination, Jennifer agreed that Petitioner was open about his friendship with her and her daughters. (T.T. 230–31). Jennifer acknowledged meeting and spending time with Petitioner's siblings and friends. (T.T. 231–32).

Jennifer conceded that there was an extended period of time after Petitioner moved back to Kirkwood that he was working entry level positions during which he did not travel back to Nashville for business. (T.T. 235–36). It was only after Petitioner obtained a mobile outdoor marketing job that his work would bring him back to Nashville. (*Id.*).

Jennifer confirmed that she never saw any behavioral changes in either J.A. or T.A. that caused her concern. (T.T. 236–37). Neither of them seemed frightened around Petitioner. (T.T. 237). As for sleeping arrangements, Jennifer testified that Petitioner "was very much welcome and part of our family, so he would go to sleep wherever he felt comfortable to go to sleep." (T.T. 240). When the children were young they would fight over who would get to sleep with Petitioner. (T.T. 241). There were no doors between the living and dining rooms where the children slept. (T.T. 251).

Jennifer agreed that there was a five-page contract governing her lease of the home in Clarksville, and that nowhere in the written document did it indicate that Jennifer would not be evicted if she could not afford to pay the rent. (T.T. 234). The

agreement also provided that Jennifer was to make rental payments on the 15th and 30th of each month by depositing money directly into a bank account. (T.T. 233).

Although Jennifer could not recall with certainty, she agreed it was possible that she was not able to pay rent in September and October. (T.T. 244–45). Jennifer testified that she paid Petitioner "some money" for rent around November. (T.T. 246). Jennifer worked at a convenience store in December and January, during which time she was able to pay rent. (T.T. 246). She was fired in February, although she disputed that she was not able to pay anything toward rent that month. (T.T. 246–50). Jennifer agreed that her inability to consistently pay rent caused Petitioner concern, and that she had proposed paying some of her past-due rent out of her tax return. (T.T. 247–48).

Jennifer conceded that the weekend before she contacted police, she and Petitioner "possibly" discussed her delinquent rent, Petitioner was having a hard time financially, and he appeared worried about making mortgage payments. (T.T. 254-255).

J.A. testified that when she and her sisters lived on the house on Saturn Drive, she normally slept in the top bunk. (T.T. 15). J.A.'s oldest sister, A.A., normally slept on the bottom bunk, and J.A.'s middle sister, T.A., usually slept on the bed. (*Id.*).

J.A. testified that one night when she was halfway asleep, Petitioner got into her bed and touched her private with his hand. (T.T. 17–18). J.A. could not remember if she was wearing pajamas or her "regular clothes" when this occurred. (T.T. 18–19). She also could not remember if she was lying on her side or her back. (T.T. 21).

Per J.A. on one of these occasions she got up, went to the bathroom, and then went to sleep with her sister. (T.T. 20).

After prompting by the State, J.A. could not recall doing something else on other occasions after Petitioner allegedly touched her. (T.T. 22). The State led J.A. as follows:

> Q: Do you remember telling Anne or telling me about a time that he did that, and you got up and went and got in your sister's bed?
>
> A: Yes. But I am not quite sure like what happened.
>
> Q: What do you remember about getting out of your bed and going and getting in your sister's bed?
>
> A: I'm not really sure what happened.

(T.T. 23).

J.A. further testified to a third touching, which allegedly occurred while she was sitting on the couch in Petitioner's lap. (T.T. 25). According to J.A., Petitioner put his hand down the back of her pants and then around to the front under her legs. (*Id.*). J.A. testified that this occurred in the living room while her sisters were playing. (T.T. 27).

Per J.A., Petitioner did not say anything to her when he allegedly touched her. (T.T. 31). She also admitted to not knowing whether Petitioner was awake when the incidents occurred. (*Id.*). J.A. was "pretty sure it happened more" but could not specify how many times. (T.T. 32).

J.A. did not tell anybody about the alleged abuse until after she and her family moved to Clarksville. (T.T. 34–35). J.A. testified that she told her grandfather about what had happened while she was visiting him, and that he told her to tell her

mother. (T.A. 35). J.A. did not tell her mother about the abuse for several days after that. (T.A. 36). One morning before school, her grandfather called the house. (T.A. 37). According to J.A., while she and T.A. were waiting for the bus their mother came outside and asked J.A. what had happened to her. (T.T. 38). Per J.A., after she told her mother what happened to her, her mother began to cry. (T.T. 39). J.A. and T.A. got on the bus and went to school. (*Id.*). J.A.'s mother then came and picked them up around ten o'clock or so. (*Id.*).

On cross examination, J.A. clarified that her two older sisters were in the room when she was sitting on Petitioner's lap and he allegedly touched her bottom and private. (T.T. 46–47). J.A. further testified that she believed that her mother, her mother's boyfriend, her grandmother, and her grandfather were all present in the one-bedroom home when this incident occurred. (T.T. 49–50).

With regard to the alleged incidents in the bunk bed, J.A. testified that when she and her sisters were sleeping in the dining room they did not have much privacy. (T.T. 68). J.A. was pretty sure she was seven or almost eight when the charged acts occurred, but she could not really remember whether it was winter, spring, summer, or fall. (T.T. 70–72).

J.A. agreed that she and her sister T.A. were happy to see Petitioner when he came to visit, and that she would want to spend time with him. (T.T. 55). Petitioner never said anything to her that made her feel uncomfortable. (T.T. 57).

Contrary to what J.A. had testified, T.A. testified that she normally slept in the bottom bunk while her older sister, A.A., slept in the bed. (T.T. 95). T.A. also would sometimes sleep on the futon in the living room. (T.T. 96).

According to T.A., on one occasion Petitioner got into bed with her. (T.T. 99). She could not remember if this occurred in the lower bunk or the futon. (*Id.*). When Petitioner got into the bed, T.A. was already lying down. (*Id.*). T.A. testified that Petitioner rolled her over, put his hand down her pants, and touched her private part with his finger. (T.T. 99–100). T.A. testified that Petitioner's finger went inside her private part. (T.T. 101). T.A. then went and slept in her older sister's bed. (T.T. 102).

T.A. testified to a second alleged incident during which Petitioner got into T.A.'s bunk bed, put his hand over her so she could not move, and then touched the inside of her private part with his finger. (T.T. 103). T.A. described the touching as "where the tampon goes." (T.T. 106). T.A. testified that the incident concluded when Petitioner "just stopped, I guess, or I went to bed." (T.T. 104). T.A. then testified that a similar touching occurred on another occasion, after which she got up and went to the bathroom. (T.T. 104–05). T.A. indicated there was a third similar touching in the lower bunk bed, during which she was wearing khaki pants that zipped up and buttoned. (T.T. 107).

Per T.A., Petitioner never said anything to her during these incidents, and he never said anything about it the next day. (T.T. 109).

T.A. never told any adult about what was happening to her. (T.T. 113). T.A. testified that J.A. told their grandfather about what had happened to her, and at

some point their mother found out. (*Id.*). According to T.A., she and J.A. were on their way to the bus stop when her mother came out and asked them what had happened. (T.T. 114). J.A. told her and all three of them started crying. (*Id.*). J.A. and T.A. went to school, and then their mother came and picked them up early. (T.T. 115).

On cross examination, defense counsel impeached T.A. with her testimony from Petitioner's first trial wherein T.A. denied that Petitioner put his finger "where the tampon goes." (T.T. 134). T.A. was also impeached with a statement she made prior to her physical examination, in which she reported that Petitioner had touched her on the "outside" of her private. (T.T. 136).

T.A. testified that her grandfather occasionally slept on the futon in the living room adjacent to the dining room, and that Petitioner may have touched her while her grandfather was in the next room. (T.T. 144, 149).

T.A. could not remember what time of year any of the charged acts allegedly occurred. (T.T. 146, 151, 154). She could also not account for how Petitioner was able to unzip and remove her pants with only one hand. (T.T. 154). T.A. agreed that Petitioner never threatened her, never asked her any questions that made her feel uncomfortable, never pressed his body up against her, and never showed his private parts to her. (T.T. 158).

Hollye Gallion, a pediatric nurse practitioner, testified that she conducted a physical exam of J.A. and T.A. in 2009. (T.T. 337). Gallion's exams of both children

were normal, meaning she did not find any injuries to the genital area or bottom. (T.T. 341, 345).

The State called Anne Fisher to testify. Mrs. Post testified to her qualifications as a forensic interviewer of alleged victims of sexual abuse. (T.T. 361–64). Mrs. Post further testified that she interviewed J.A. and T.A. in 2009. (T.T. 365). The State elicited the following testimony, to which the defense did not object:

> Q: Is it realistic to expect that you'll get every detail from every incident?
>
> A: Certainly not. It depends, too, on the age of the child. Very little children, we expect to capture only very limited information about any event that happens in their lives. And there are lots of things that can disrupt a kid's memory of an abuse event. Trauma can disrupt memory, for example.
>
> And events that are very similar can be very hard to separate. I think we all know that for [*sic*] our own experience. If you have the same event over and over in your own life, it can be very difficult to provide a narrative detailed account of one specific incident of the same event.

(T.T. 364–65).

The State then asked Mrs. Post the following:

> Q: Mrs. Post, did you interview two children in the Advocacy Center in the Spring of 2009 named [J.A.] and [T.A.]?
>
> A: I did.
>
> Q: Did I ask you to review their interviews in preparation for your testimony today?
>
> A: Yes.
>
> Q: I want to hand you this item that's previously been marked for identification as No. 3, and ask if that appears to be the disk of the interview that I asked you to review?

A: It appears to be.

Q: Subject to some redactions, does that accurately reflect the content of your interview with [J.A.]?

A: It does.

Q: If that can be marked as an exhibit to her testimony.

The Court: That was No. 3 that was previously marked for identification only.

Q: Thank you, Judge, yes.

* * *

Q: Did I also ask you to review your interview with [T.A.]?

A: You did.

Q: Again, subject to some—what does that appear to be?

A: It appears to be that interview that I reviewed.

Q: And subject to some redactions, does that appear to accurately reflect the content of your conversation with [T.A.]?

A: It does.

Q: Your Honor, I'd ask to make that an exhibit to her testimony. Those are my questions.

The Court: All right. Which was also previously identified and admitted for identification purposes only. Now it is an exhibit.

(T.T. 365–67). The State did not ask Mrs. Post any substantive questions about the interviews. The videos were not played for the jury. (*Id.*). The defense did not cross examine Mrs. Post. (T.T. 367).

During closing argument, the State commented to the jury:

> One thing I do want to mention is, remember the forensic interviews, those tapes, that we did not play those. For one thing, we're lucky to get these to work to play the ones that we did. But

> those are video. And we don't have the capability out here. In the back, in the jury room, should you—obviously, it's your decision whether you want to watch them or not, but should you decide to, we have the capability, or the Court does, to get a TV and all that to play those, those forensic interviews, the girls by themselves, with the interviewer in March, April, 2009, when that occurred.

(Cl. 3-4).

During deliberations—outside of Petitioner's presence and without his knowledge—the jury foreperson informed a court officer that the jury wanted to view the videotaped forensic interviews of J.A. and T.A. Exhibit J at ¶¶ 5–6; Exhibit I at ¶ 14. A court officer wheeled a television and DVD player into the jury room. Exhibit J at ¶ 7. The jury then watched the videos. Exhibit J at ¶ 10.

Defendant's case-in-chief

Francene Guilfoy, Petitioner's mother, testified that in January of 2006 Petitioner moved from Nashville back home to Kirkwood, Missouri, where he lived with her. (T.T. 387–89). From January 2006 through May 2007, Petitioner held various part-time jobs. (T.T. 389–90). In May of 2007, Petitioner was hired by BP to do mobile marketing. (T.T. 390).

In 2008 Petitioner became interested in investing in real estate. (*Id.*). Petitioner looked at homes in the St. Louis area and Tennessee, and he eventually purchased a rental home in Tennessee. (*Id.*).

From December of 2008 to March of 2009, Petitioner was unemployed and still living with Francene. (T.T. 392). During that time Petitioner was looking for work.

(*Id.*). Per Francene, Petitioner expressed depression over not having a job and not being able to pay his bills. (T.T. 393).

Francene testified that Petitioner traveled to Tennessee for a two to three-day trip, and arrived home on the night of March 11, 2009. (T.T. 395). Prior to leaving for the trip Petitioner told his mother that he was going to confront his tenant about her rent situation. (T.T. 397).

Tony Guilfoy, Petitioner's brother, likewise testified to Petitioner's depressed state and efforts to find a job between December of 2008 and March of 2009. (T.T. 426–27). According to Tony, prior to March 24, 2009, he and Petitioner had a heated argument concerning money Petitioner had previously lent to him. (T.T. 427–28).

Patrick Guilfoy, Petitioner's father, testified that prior to Petitioner's visit to Clarksville in March of 2009, he had a conversation with Petitioner about helping with the mortgage on Petitioner's rental property. (T.T. 436–37). Patrick told Petitioner that he could not help with the mortgage, and that he encouraged Petitioner to evict Jennifer and get rid of the house. (T.T. 437).

Matthew Jaboor testified that in about January of 2009, he traveled with Petitioner to Petitioner's home in Clarksville to help Petitioner finish the basement of his rental property. (T.T. 409–10). According to Matthew, J.A. and T.A. were very excited when he and Petitioner arrived at the home, gave Petitioner a hug, and then almost immediately took them to the basement to see their new bikes. (T.T. 411). Matthew testified that J.A. and T.A. were constantly trying to be around them by helping clean up or paint. (T.T. 412).

Verdict and sentencing

The jury convicted Petitioner on one count of assault, four counts of aggravated sexual battery, and two counts of rape of a child. (T.T. 443–44). Petitioner was subsequently sentenced to a total effective term of 70 years to be served in the Tennessee Department of Corrections. (T.R. 266–73).

Direct Appeal

Petitioner raised nine issues in his direct appeal. In one issue Petitioner argued that the State's election of offenses on several counts was constitutionally inadequate. The appellate court agreed and, as a result, (1) merged two of Petitioner's convictions for aggravated sexual battery as to J.A. into a single conviction, (2) merged two of Petitioner's convictions for rape of a child as to T.A. into a single conviction, and (3) merged Petitioner's conviction for assault as to J.A. into one of the aggravated sexual battery convictions. *State v. Guilfoy*, No. M2012-00600-CCA-R3-CD, 2013 WL 1965996, *15-21 (Ten. Crim. App. May 13, 2013).

Insofar as the instant proceedings are concerned, Petitioner argued that the trial court committed plain error by "admitting" the videotaped forensic interviews of J.A. and T.A. In ruling on this issue the appellate court held, "[T]he Defendant has failed to establish the prerequisites for plain error relief. 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…Additionally, because the record contains no indication that the jury watched either of the recordings of the forensic interviews, the Defendant cannot

demonstrate that the erroneous admission of this evidence adversely affected one of his substantial rights." *Id.*, *14-15 (emphasis in original).

As to Anne Fisher Post's testimony concerning memory, Petitioner argued that Mrs. Post was not qualified to offer such expert opinions and that her testimony violated the Tennessee Rules of Evidence. The appellate court rejected this issue, holding that because trial counsel failed to raise an objection the issue had been waived. *Id.*, *12-13.

The appellate court rejected the remaining issues raised in Petitioner's appeal and remanded the case to the trial court to amend the judgment to reflect the mergers of his convictions. *Id.*, *24.

Petitioner filed an application for permission to appeal in the Supreme Court of Tennessee. The application was denied on November 5, 2013.

On March 28, 2014, Petitioner was resentenced to a total effective term of 40 years.

Petition for post-conviction relief

On February 20, 2014, Petitioner filed a petition for post-conviction relief. In the post-conviction petition, Petitioner alleged that he was denied his constitutional right to the effective assistance of counsel where his trial attorney, *inter alia*, (1) failed to object to the "admission" of the videotaped forensic interview of his accusers as substantive evidence, and (2) failed to object to Mrs. Post's opinion testimony that it was not realistic to expect children to remember details of the alleged abuse.

A hearing was held on the claims in the petition. With regard to the "admission" of the videotaped interviews, Petitioner endeavored to present the testimony of the foreperson of the jury to testify that the jury watched the interviews during deliberations. (P.C.T. 4–5). The State objected to the juror's testimony under Tennessee Rule of Evidence 606(b). (P.C.T. 3, 6–8). The post-conviction court ruled that it would not allow the juror to testify. (P.C.T. 8).

Petitioner called his trial attorney, Bernie McEvoy, to testify at the hearing. Mr. McEvoy confirmed that no pre-trial hearing was held concerning the admissibility of the videotaped forensic interviews, that he did not object to their admission, and that he did not submit a limiting instruction to guide the jury's consideration of the evidence. (P.C.T. 11–12). As to why he did not object, Mr. McEvoy testified that he thought that the videotaped interviews were admissible as prior consistent statements bearing on the alleged victims' credibility once they had been impeached. (P.C.T. 32–33). Mr. McEvoy testified that he failed to notice that a limiting instruction had not been given to the jury. (P.C.T. 33).

As to Anne Fisher Post's testimony, Mr. McEvoy agreed that he did not object to her testimony concerning memory. (PC.T. 26). He also agreed that the defense's theory, at least in part, was the implausibility of the accusations as described by J.A. and T.A. (P.C.T. 26). Mr. McEvoy conceded that Mrs. Post's testimony bolstered J.A.'s and T.A.'s credibility. (P.C.T. 26–27).

On August 13, 2014, the post-conviction court issued a written ruling denying the petition, in conclusory fashion, based on Petitioner's failure to establish prejudice.

Post-conviction appeal

The State appellate court affirmed the denial of Petitioner's post-conviction petition. With regard to the "admission" of the videotaped forensic interviews, the court held as follows:

> As a preliminary matter, we note that the Petitioner has not identified any prejudice he suffered as a result of the admission of J.A.'s forensic interview. As such, we will limit our analysis to the admission of T.A.'s forensic interview, which included the forensic interviewer's summary statement of events that happened in both Davidson and Montgomery Counties.
>
> * * *
>
> On direct appeal, this court stated, "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." As such, this court concluded that the Petitioner had failed to satisfy the first requirement of plain error review – that the record clearly established what happened at trial.
>
> It is not clear from the record why T.A.'s forensic interview was introduced into evidence. Nevertheless, this court has previously determined that the trial court erred in admitting the recording. While the State argues in this appeal that the interview was properly admitted as a prior consistent statement, the State concedes that the trial court did not issue a proper limiting instruction.
>
> However, despite trial counsel's failure to object to the introduction of the video or request a limiting instruction, the Petitioner has failed to demonstrate that he was prejudiced by its introduction as substantive evidence. . . As discussed above, the forensic interviewer's summary statement did not violate the Petitioner's right to a unanimous jury verdict because the State provided an election of offenses. The details of each elected offense corresponded to incidents both J.A. and T.A. described in their trial testimony. The Petitioner has failed to prove that there was a reasonable probability that the outcome of the trial would have been different had the forensic interview not been

> introduced as substantive evidence. Accordingly, the Petitioner is not entitled to relief.

Guilfoy v. State, No. M2014-01619-CCA-R3-PC, 2015 WL 4880182, *11–12 (Ten. Crim. App. Aug. 14, 2015) (citations omitted).

Concerning the admission of Anne Fisher Post's opinion testimony about children's memory, the appellate court held as follows:

> [T]he admission of Mrs. Post's testimony was error. She did not testify as an expert witness but offered testimony that was "specialized knowledge" she gathered from her experience as a forensic interviewer. Moreover, we note there is nothing in the post-conviction record to indicate that trial counsel did not object for strategic reasons. Even if this were deficient performance on the part of trial counsel, the Petitioner has failed to establish any resulting prejudice. Like the social worker in *Bolin*, Mrs. Post's testimony addressed the narrow issue of why the victims could not provide details of when the events occurred. It did not address inconsistencies in the victims' descriptions of what occurred during the abuse or address the "implausibility" of their allegations, the core of the Petitioner's defense theory during the second trial. Admittedly, there was no conclusive medical evidence that either victim had been sexually abused, but the medical evidence did not rule out the possibility of abuse. Further, the victims told several people about the abuse—their grandfather, their mother, Mrs. Post, and Ms. Gallion—over a period of several weeks. Also, they testified about the abuse during the first trial. Trial counsel specifically addressed the inconsistencies between their testimonies at both trials during cross-examination. Accordingly, the Petitioner has failed to demonstrate that he was prejudiced by trial counsel's failure to object to Mrs. Post's testimony and is not entitled to relief.

Id., *16 (citations omitted).

Petitioner filed a petition for rehearing. With regard to the videotaped forensic interviews, Petitioner argued that a "summary statement" made by Mrs. Post during the T.A.'s forensic interview, which included reference to an uncharged act in another

county, resulted in prejudice. Specifically, Petitioner maintained that the jury's verdict mirrored the summary statement as opposed to T.A.'s trial testimony.

In denying the petition for rehearing, the appellate court held as follows:

> The Petitioner's claim that the jury based its verdict on the interviewer's summary statement is without merit. . . [T]he State specifically elected offenses underlying each count of the indictment which included facts that corresponded with the [*sic*] T.A.'s description of the event at trial. Such election ensured that the jury was deliberating on the same evidence, not on extraneous evidence admitted at trial. Further, this court will not engage in speculation as to the jury's reasoning when rendering a verdict. This court has already held that the evidence was sufficient to uphold each of Petitioner's convictions, as merged on direct appeal, for conduct against T.A. Petitioner has presented no proof, and we will not assume, that the jury's verdict was based on the forensic interview's [*sic*] summary statement as opposed to T.A.'s trial testimony.

Guilfoy v. State, No. M2014-01619-CCA-R3-PC, (Ten. Crim. App. Sep. 25, 2015) (citations omitted).

Petitioner filed an application for permission to appeal in the Supreme Court of Tennessee. The application was denied on February 18, 2016.

Petition for writ of error coram nobis

On or about December 15, 2016, a juror—Hilary Hoffman, the foreperson of the jury that presided over Petitioner's trial—agreed to provide an affidavit about the recorded interviews. In summary, Mrs. Hoffman averred that during deliberations, she informed an individual she believed to be a court officer that the jury wanted to view the recorded interviews. Exhibit J at ¶ 6. An individual Mrs. Hoffman believed to be a court officer brought a television and a DVD player into the jury room, and the jury viewed the recorded interviews. Exhibit J at ¶¶ 7–10.

Based on Mrs. Hoffman's affidavit, Petitioner filed a petition for writ of error coram nobis in State court. The petition alleged that Mrs. Hoffman's affidavit is newly discovered evidence which establishes that Petitioner's jury in fact viewed the recorded interviews. Moreover, the petition further alleged that the recorded interviews were not admitted into evidence at Petitioner's trial, because they were not received nor played in open court. Finally, the Petition alleged that by watching the recorded interviews, the jury was exposed to extraneous prejudicial information which violated Petitioner's fundamental right to due process. The error-coram-nobis court dismissed the petition, from which Petitioner appealed.

Error coram nobis appeal

On appeal, Petitioner argued, as he had in the petition for writ of error coram nobis, that the jury was exposed to extraneous prejudicial information where it viewed the video recordings. Petitioner also argued that the trial court improperly responded to the jury's request to watch the recorded interviews outside Petitioner's presence and without his knowledge. Petitioner maintained that the jury's exposure to prejudicial extraneous information and the manner in which the trial court responded to the jury's request to watch the videos denied Petitioner's due process right to a fair trial.

The appellate court again denied Petitioner relief. This time, the court held that Petitioner's petition for writ of error coram nobis was time barred. Specifically, the court held that Petitioner had not raised a cognizable claim for error-coram-nobis relief because it was not based on any subsequent or newly discovered evidence. The

court further held that Petitioner raised the issue of the jury viewing extraneous prejudicial information in his motion for new trial, on direct appeal, at his post-conviction proceedings, and in an appeal of his post-conviction proceedings. *Guilfoy v. State*, No. M2017-01454-CCA-R3-ECN, 2018 WL 3459735, *3 (Ten. Crim. App. July 17, 2018).

Petitioner filed an application for permission to appeal in the Supreme Court of Tennessee. The application was denied on November 14, 2018.

B. General Legal Principles

(a) *Exhaustion of State Remedies*

A writ of habeas corpus may not be granted unless the petitioner has exhausted available state-court remedies. 28 U.S.C. § 2254(b)(1). A habeas petitioner satisfies the exhaustion requirement when the highest court in the state in which the petitioner has been convicted has had a full and fair opportunity to rule on the claims. *Rust v. Zent*, 17 F.3d 155, 160 (6th Cir. 1994). To determine whether a petitioner "fairly presented" a federal constitutional issue to the State court, the district court looks to the petitioner's (1) reliance upon federal cases employing constitutional analysis; (2) reliance upon state cases employing federal constitutional analysis; (3) phrasing the claim in terms of constitutional law or in terms sufficiently particular to allege a denial of a specific constitutional right; or (4) alleging facts well within the mainstream of constitutional law. *Whiting v. Burt*, 395 F.3d 602, 613 (6th Cir. 2005).

(b) ***Standard of Review***

This Court's review of Petitioner's claims are governed by 28 U.S.C. § 2254. *Harrington v. Richter*, 562 U.S. 86, 100 (2011). Under 28 U.S.C. § 2254(d), "an application for a writ of habeas corpus . . . shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim –

> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or,
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding."

C. CLAIMS FOR RELIEF

I. PETITIONER WAS DENIED HIS RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL WHERE HIS ATTORNEY FAILED TO PREVENT THE JURY FROM WATCHING THE VIDEOTAPED FORENSIC INTERVIEWS OF J.A. AND T.A. DURING DELIBERATIONS AND CONSIDERING THEM AS SUBSTANTIVE EVIDENCE

Petitioner was denied his right to effective assistance of counsel where his attorney failed to prevent the jury from watching the videotaped forensic interviews of J.A. and T.A. during deliberations and considering them as substantive evidence. The videotaped interviews were never properly admitted into evidence. The videotaped interviews were also inadmissible under Tennessee law. Trial counsel's failure to object to (1) the State's ambiguous reference to the videotaped interviews during trial, and (2) the State's invitation to the jury to watch the videotaped interviews during deliberations, therefore constitutes deficient performance. Trial counsel's deficient performance prejudiced Petitioner because the videotaped interviews improperly bolstered J.A.'s and T.A.'s credibility and likely made the difference between conviction and acquittal. The State court's conclusion to the contrary involves an unreasonable application of *Strickland* and its progeny, as well as an unreasonable determination of the facts.

(a) *Petitioner exhausted his available State-court remedies by fairly presenting this claim*

Petitioner alleged in his post-conviction petition that his trial attorney was ineffective for not objecting to the admission of the videotaped forensic interviews as substantive evidence. Petitioner reiterated this argument in the Tennessee Criminal

Court of Appeals on appeal from the denial of his post-conviction petition. In doing so Petitioner cited the specific constitutional amendment at issue, *i.e.*, the Sixth Amendment, and he also employed the analytical framework established in *Strickland* for assessing claims of ineffective assistance. By relying on Federal cases employing constitutional analysis and phrasing the claim in terms of constitutional law or in terms sufficiently particular to allege the denial of a specific constitutional right, Petitioner "fairly presented" the constitutional issue to the State court. *Whiting*, 395 F.3d at 613; *Clinkscale v. Carter*, 375 F.3d 430, 438 (6th Cir. 2004) (holding that citation to the Sixth Amendment and *Strickland* fairly presented ineffective assistance claim to State court).

Although Petitioner did raise this issue in his permission to appeal to the Tennessee Supreme Court, doing so was not necessary to exhaust his State remedies. *Smith v. Morgan*, 371 Fed. Appx. 575, 579, 2010 WL 1172473, *4-5 (6th Cir. 2010). This is because Rule 39 of the Rules of the Supreme Court of Tennessee deems a litigant to have exhausted all available State remedies by presenting the claim to the Court of Criminal Appeals. *Id.*; *Adams v. Holland*, 330 F.3d 398, 402 (6th Cir. 2003) ("Rule 39 clearly removed Tennessee Supreme Court review as an antecedent for habeas purposes.").

Petitioner has therefore exhausted his State remedies with regard to his claim that he was denied effective assistance of counsel where his trial attorney failed to prevent the jury from watching the forensic videotaped interviews of J.A. and T.A. during deliberations and considering them as substantive evidence.

(b) ***Applicable law***

The Sixth Amendment guarantees a defendant in a criminal prosecution the right to have the assistance of counsel for his defense. U.S. Const., amend VI. The right to counsel is the right to effective assistance of counsel. *McMann v. Richardson*, 397 U.S. 759, 771, n. 14 (1970). The right to effective assistance of counsel is meant to assure fairness in the adversarial criminal process. *United States v. Morrison*, 449 U.S. 361, 364 (1981). Unless the accused receives the effective assistance of counsel, "a serious risk of injustice infects the trial itself." *Cuyler v. Sullivan*, 446 U.S. 335, 343 (1980).

The proper standard for attorney performance is that of "reasonably effective assistance." *Strickland v. Washington*, 466 U.S. 668, 687 (1984) (citing *Trapnell v. United States*, 725 F.2d 149, 151–52 (2nd Cir. 1983)). In order to show that a defendant was denied reasonably effective assistance, he must first show counsel's representation fell below an objective standard of reasonableness. *Id*. at 687–88. In order to make that showing a defendant must overcome the presumption that the at-issue conduct "might be considered sound trial strategy." *Id*. at 689 (quoting *Michel v. Louisiana*, 350 U.S. 91, 101 (1955)). Bearing in mind that counsel's function is to make the adversarial testing process work, a court must determine whether, in light of all of the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance. *Id*. at 690.

In addition to showing deficient performance, a defendant claiming that he was denied ineffective assistance must also demonstrate that his attorney's deficient

performance resulted in prejudice. *Id*. at 691–92. The test for prejudice is whether there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Id*. at 694. A "reasonable probability" is a probability sufficient to undermine confidence in the outcome. *Id*.

In determining prejudice, a court hearing an ineffectiveness claim must consider the totality of the evidence before the jury. *Id*. at 695. A verdict weakly supported by the record is more likely to have been affected by errors than one with overwhelming evidentiary support. *Id*. at 696.

(c) ***Petitioner was denied effective assistance of counsel where his trial attorney failed to prevent the jury from viewing the videotaped interviews and considering them as substantive evidence.***

(i) ***Deficient performance***

Trial counsel's failure to object to the State's reference to the videotaped forensic interviews during trial constitutes deficient performance on several fronts.

As a threshold matter, the videotaped forensic interviews were never properly admitted into evidence. The State made an ambiguous request that the discs containing the interviews be made exhibits to Mrs. Post's testimony. The State did not ask, however, that the videotaped interviews be admitted into evidence. Nor did the State elicit testimony from Mrs. Post concerning any statements made by J.A. or T.A. during their interviews. And, most importantly, the videos were never published to the jury in open court. Because the interviews were never played in open court, they were never admitted into evidence. *State v. Henry*, No. 02C01-9611-CC-00382, 1997 WL 283735, *4 (Ten. Crim. App. May 29, 1997); *Turner v. Louisiana*, 379 U.S.

466, 473 (1965) ("In the constitutional sense, trial by jury in a criminal case necessarily implies at the very least that the 'evidence developed' against a defendant shall come from the witness stand in a public courtroom where there is full judicial protection of the defendant's right to confrontation, of cross-examination, and of counsel.").

Setting aside the fact that the videotaped interviews were never properly admitted into evidence, the videos were otherwise inadmissible. In Tennessee, the videotaped forensic interview of a child under thirteen years of age is admissible for any relevant purpose if certain statutory conditions are met. Tenn. Code Ann. § 24-7-123(a). In pertinent part, before such a videotaped interview may be so admitted the trial court must conduct a pre-trial hearing to determine whether the interview possesses particularized guarantees of trustworthiness. Tenn. Code Ann. § 24-7-123(b)(2). Significantly, a videotaped interview deemed admissible in accordance with the statute is discoverable under the Tennessee rules of criminal procedure. Tenn. Code Ann. § 24-7-123(c).

Here, the State did not request a pre-trial hearing to determine the admissibility of J.A.'s and T.A.'s forensic interviews prior to trial. Thus, the trial court did not make the requisite pre-trial determination that the interviews possessed particularized guarantees of trustworthiness required by the statute as a condition precedent to their admission.

The State also forfeited its ability to seek admission of the videotaped forensic interviews pursuant to the statute where it failed to produce them to the defense pre-

trial. As noted, *supra*, Petitioner filed a motion to compel the State to produce the videotaped interviews of J.A. and T.A. (T.R. 21–24). The State objected to the motion on the basis that videos were not discoverable. (T.R. 28–33). By objecting to Petitioner's motion on the basis that the videos were not discoverable, the State represented to the trial court and the defense that it would not be seeking the admission of the videos under the statute as substantive evidence.

During Petitioner's post-conviction hearing, his trial attorney testified that he thought he did not object to the "admission" of the videotaped interviews because he thought that once J.A. and T.A. were impeached, the videotaped interviews were admissible as prior consistent statements. (P.C.T. 32–33).

The prior consistent statements were not, however, admissible to rehabilitate J.A.'s and T.A.'s credibility. Under Tennessee law, prior consistent statements may be admitted to rehabilitate a witness whose testimony is attacked on cross-examination as a "recent fabrication" or "deliberate falsehood." *State v. Benton*, 759 S.W.2d 427, 433 (Tenn. Crim. App. 1988). However, in order to be admissible, the prior consistent statement must have been made *before* any improper influence or motive to lie existed. *State v. Herron*, 461 S.W.3d 890, 905 (2015) (citing *Sutton v. State*, 291 S.W. 1069 (Tenn. 1927)); *State v. Sandell*, No. 03C01-9606-CC-00237, 1998 WL 282260, *6 (Ten. Crim. App. Jan. 26, 1998) (Tipton and Summers, JJ., concurring) ("[T]he record reflects that the defendant was attempting to show that the motive existed at the time of the *initial* accusation and carried forward through the trial. Under these circumstances, the prior consistent statements did not rebut this

attack—no statement was shown to have occurred before the motive to fabricate was implied to have arisen.").

Here, to the extent Petitioner imputed to J.A. and T.A. a motive to fabricate the allegations, the putative motive was based on his ongoing dispute with J.A. and T.A.'s mother concerning past-due rent and the prospect of having to evict her. This motive pre-dated J.A.'s and T.A.'s forensic interviews. Thus, the statements made during the forensic interviews would not have been admissible to rebut a claim to fabricate based thereon.

Additionally, as noted by the State appellate court, even if trial counsel did believe the statements to be admissible as prior consistent statements bearing on credibility, he did not request a limiting instruction to guide the jury's consideration of the evidence. Not only does trial counsel's failure to request a limiting instruction belie his post-hoc justification for not objecting to the videotaped interviews, but it also means that the jury was left to use the videotaped interviews for any purpose it saw fit.

An attorney's performance is not objectively reasonable unless it might be considered sound trial strategy. *Hodge v. Hurley*, 426 F.3d 368, 385 (6th Cir. 2005). An attorney's failure to object to prejudicial, inadmissible evidence that could only harm his client's case does not constitute "sound trial strategy." *Byrd v. Trombley*, 352 F. App'x. 6, 10–12 (6th Cir. 2009). In the instant case, because there is no conceivable justification for failing to object to the videotaped forensic interviews,

trial counsel's performance was without question unreasonable under prevailing professional norms.

(ii) *Prejudice*

This is a very unique case. As the result of trial counsel's deficient performance, Petitioner's jury watched videotaped forensic interviews of the alleged victims during deliberations which were never produced to the defense, referenced only in passing at trial, never published to the jury in open court, and never formally admitted into evidence.[2] The prejudice inuring to Petitioner by virtue of the jury watching the videotaped interviews is readily apparent.

First, the videotaped forensic interviews improperly bolstered J.A.'s and T.A.'s trial testimony. Generally speaking, out-of-court statements consistent with the declarant's trial testimony are deemed inadmissible hearsay pursuant to both Tennessee and Federal law. *E.g., State v. Braggs*, 604 S.W.2d 883, 885 (Tenn. Crim. App. 1980); *Tome v. United States*, 513 U.S. 150, 156–57 (1995). Allowing prior consistent statements to bolster a witness' testimony "would pose a danger of the jury being influenced to decide the case on the repetitive nature of or the contents of the out-of-court statements instead of on the in-court, under-oath testimony." *Herron*, 461 S.W.3d at 905 (2015) (quoting *State v. Tizard*, 897 S.W.2d 732, 747 (Tenn. Crim. App. 1994)). That concern is especially salient here, where the prior consistent statements were (1) not subject to cross examination, (2) memorialized on videotape,

[2] To this day Petitioner has never seen the redacted videotaped interviews that the jury watched during deliberations.

and (3) made available to the jury to watch (and re-watch) during deliberations. Given that the jury asked to watch—and did in fact watch—the videotaped interviews during deliberations, a very real danger exists that Petitioner was convicted based upon J.A.'s and T.A.'s out-of-court statements rather than their sworn in-court testimony.

Second, the videotaped interviews contained details of the alleged abuse not testified to by J.A. or T.A. at trial that improperly enhanced their accusations and prejudiced Petitioner. Several of the statements would have been objectionable had they been testified to at trial.

The following excerpts of T.A.'s videotaped interview illustrate this prejudice:

> Mrs. Post: Okay. Tim Guilfoy. And tell me about Tim.
>
> T.A.: Everyone thought he was nice and everything until we told my mom. She was crying and everything. So now some of the people know my mom told and everything, *they've had that same thing happen to them sometimes.*

(T.A. interview, p. 10) (emphasis added).[3] Although T.A.'s statement is somewhat vague, the emphasized portion suggests that she had knowledge of other alleged victims beyond herself and J.A.

* * *

> Mrs. Post: And tell me what you remember about the first time.
>
> T.A.: He went in there—*at first actually it happened to my little sister, [J.A.]*, and she—I went in there one time—we were waking up to the park, and she asked me. And *I said no*. And the other night she asked me again. And *I said yeah*. So the first time it really didn't happen, but *the second time she asked me and I said*

[3] References are to the pages of T.A.'s and J.A.'s transcribed interviews.

> *yeah*. And so that night I slept, and then he came in there and slept with me and touched me.

(T.A. interview, pp. 27–28) (emphasis added). The emphasized portions of T.A.'s narrative constitute double-hearsay that suggests there was an on-going dialogue between T.A. and J.A. concerning the alleged abuse before they reported it to their grandfather. T.A. did not testify to these statements at trial, and they served no purpose other than to improperly bolster T.A.'s and J.A.'s accusations.

* * *

> Mrs. Post: What color underwear did you see him in?
>
> T.A.: He would wake up when I was halfway awake—when I was awake—red striped underwear.
>
> Mrs. Post: Red striped. Did you ever see any other kind?
>
> T.A.: I think I seen blue ones.
>
> Mrs. Post: Blue ones?
>
> T.A.: Yeah. The red ones were red and white.
>
> Mrs. Post: Okay.
>
> T.A.: *I had a black light. I could see the white because the white like shows up, like glows up*.

(T.A. interview, pp. 33—34) (emphasis added). The emphasized portions of this section of T.A.'s interview contain far greater detail than what she testified to at trial, during which she initially testified that she could not remember what Petitioner was wearing during the alleged abuse until the State "refreshed" her recollection. (T.T. 166–67).

* * *

> Mrs. Post: Okay. If he stayed for like three nights, did the touching happen one time during that visit or more than one time?
>
> T.A.: All three of those nights.
>
> Mrs. Post: All three of the nights. Okay. *Did you see him touch somebody else?*
>
> T.A.: *No. All I know is my sisters told me. I told my sisters. And we all knew about it.*

(T.A. interview, p. 35) (emphasis added). The emphasized portions of this excerpt from T.A.'s interview imply that her "sisters" "all knew" that Petitioner was abusing them, *i.e.*, they had ongoing discussions about the alleged abuse. Again, these statements constitute double hearsay that improperly bolstered T.A.'s and J.A.'s accusations. Moreover, this excerpted statement was particularly damaging because it suggested that Petitioner allegedly abused A.A., T.A. and J.A.'s oldest sister.

* * *

> Mrs. Post: How did that feel to your body?
>
> T.A.: I was shaking.
>
> Mrs. Post: You were shaking?
>
> T.A.: It didn't feel good at all.
>
> Mrs. Post: Okay. *When he put his finger inside, I think I heard you say that it hurt you.*
>
> T.A.: *Yeah.*
>
> Mrs. Post: *When he didn't put his finger inside, did it hurt or just make you shake or something else?*
>
> T.A.: *It made me shake very bad.*

(T.A. interview, p. 36) (emphasis added). These are details to which T.A. did not testify at trial and which are particularly likely to inflame the passion and prejudice of the jury.

Likewise, the following excerpts from J.A.'s videotaped interview demonstrate the prejudice to Petitioner from the jury being allowed to watch it:

> Mrs. Post: So Tim came into your room. And what did he do exactly?
>
> J.A.: Well, it was different things he did at different times.
>
> Mrs. Post: Okay. Tell me about one time.
>
> J.A.: Well, he—all the time he puts his hand up *our* shirt, then puts it down *our* private.
>
> Mrs. Post: Okay. So did Tim put his hand up your shirt?
>
> J.A.: (Moves head up and down.)
>
> Mrs. Post: What did he do with his hand up your shirt?
>
> J.A.: *Rubbed my belly*.
>
> Mrs. Post: Rubbed your belly?
>
> J.A.: Uh-huh.

(J.A. interview, p. 17) (emphasis added).[4] J.A. did not testify that Petitioner rubbed her belly at trial, or that Petitioner put his hand up her shirt. Moreover, as with several portions of T.A.'s interview, J.A.'s statement that Petitioner allegedly put his

[4] Both T.A.'s and J.A.'s forensic interviews were redacted to exclude references to uncharged acts allegedly committed in a different jurisdiction. Petitioner and undersigned counsel have never been provided with the redacted transcript of J.A.'s videotaped interview that was submitted to the jury. Undersigned counsel has done her best to identify the likely content of J.A.'s redacted videotaped interview by identifying those portions related to the charged acts at issue.

hand up "our" shirt and down "our" private connotes either personal knowledge of, or prior conversations regarding, Petitioner's alleged abuse of J.A.'s sisters.

* * *

> Mrs. Post: When he was rubbing your belly, how did that feel to your body?
>
> J.A.: *Uncomfortable.*
>
> Mrs. Post: Uncomfortable. Okay. All [*sic*] right. How about when he was rubbing your privates?
>
> J.A.: *Really uncomfortable.*

(J.A. interview, p. 20) (emphasis added). J.A. did not testify that the alleged touching made her feel "uncomfortable," which is a detail the jury likely viewed as substantiating her memory of the alleged abuse.

* * *

> Mrs. Post: And you told me about that happening on the top bunk in your room. Did it happen somewhere else?
>
> J.A.: Uh-uh.
>
> Mrs. Post: So only on the top bunk?
>
> J.A.: Well, he didn't touch *us* there when *we* were sitting down (indicating), but he rubs *our* back and then touches there. But everyone is awake, though.
>
> Mrs. Post: When everyone is awake he rubs your back and touches your butt; is that what you're pointing to?
>
> J.A.: Uh-huh.
>
> Mrs. Post: Well, tell me about that part.
>
> J.A.: He just rubs *our* backs. *My sister told me that he rubbed her back, and he did this to me, too.* And he put his hands down in *our* butt.

(J.A. interview, p. 24) (emphasis added). Again, the emphasized portions of the interview constitute double hearsay which impermissibly suggests that J.A., T.A., and possibly A.A. had ongoing discussions about the alleged abuse.

* * *

> J.A.: My grandpa thought something was going on. He would tell my nana, but my nana didn't think something was going on. But then I told my grandpa, and he knew that something was going on.

(J.A. interview, p. 26). Obviously, J.A. would not have been allowed to testify at trial as to what her grandfather "thought" or "knew." The statement was prejudicial, because it imputed knowledge or a belief to J.A.'s grandfather that Petitioner had been abusing his granddaughters.

The prejudice flowing from the jury's viewing of these videotaped interviews is incalculable. The videotaped interviews are more detailed than what J.A. and T.A. testified to at trial, and they include reference to uncharged acts. The interviews were not conducted in accordance with the rules of evidence and, as a result, they are replete with statements that would have been objectionable had they been testified to at trial. Finally, the videos were never subject to confrontation in the form of cross examination because they were never even played in open court. Trial counsel's failure to prevent the jury from watching the unadmitted, prejudicial videos undermines confidence in the outcome and constitutes ineffective assistance.

(d) ***The State court's denial of relief involves an unreasonable application of clearly established Federal law and an unreasonable determination of the facts.***

Petitioner argued that his trial attorney was ineffective in failing to object to the "admission" of the videotaped forensic interviews in his petition for post-conviction relief. Petitioner reiterated the argument on appeal before the Tennessee Court of Criminal Appeals.

In addressing Petitioner's claim, the appellate court first attempted to sidestep the issue by holding that Petitioner had not argued that he was prejudiced by the jury's viewing of J.A.'s videotaped interview. *Guilfoy*, 2015 WL 4880182, at *11. The court therefore limited its analysis to the jury's viewing of T.A.'s videotaped interview. *Id*.

The appellate court's conclusion that Petitioner did not adequately challenge his trial attorney's ineffectiveness for failing to prevent the jury from watching both videos was unreasonable. Petitioner maintained in his brief:

> The most egregious of the improperly admitted evidence *were the video [sic] taped forensic interviews of each of the Defendant's accusers* which were admitted as substantive evidence and given to the jury as part of their deliberations. Mr. Guilfoy challenged the admission of the *videos* primarily on the grounds they were hearsay and there was no exception to the hearsay rule to allow for their admission. In addition, they were not prior inconsistent statements but prior consistent statements and there is no exception to the hearsay rule allowing for the admission of a prior consistent statement in its entirety as substantive evidence.

(Petitioner's Brief on Appeal, pp. 27-28) (emphasis added). Petitioner went on to argue that the only purpose the videos served was to improperly bolster the complaining witnesses' testimony. (Petitioner's Brief on Appeal, pp. 2–4; 35). Finally,

Petitioner argued that the videos were particularly prejudicial given the "limited nature of the proof against" him. (Petitioner's Brief on Appeal, p. 42). Thus, Petitioner clearly challenged the prejudicial effect of both videos, and not just the videotaped interview of T.A.

In ruling on the substance of Petitioner's ineffective assistance claim, the appellate court did not explicitly hold that trial counsel's performance was deficient. However, the court did reiterate its holding from the direct appeal that the trial court erred in "admitting" the videos. *Guilfoy*, 2015 WL 4880182, at *11–12. The court also noted that, to the extent trial counsel believed that the videotaped interviews would have been admissible as prior consistent statements, no limiting instruction was submitted to the jury. *Id*. Thus, the appellate court implicitly held that trial counsel's performance was unreasonable for failing to object to the "admission" of the videotaped interviews.

However, the appellate court denied Petitioner's claim of ineffective assistance based on his failure to show prejudice. In doing so the court emphasized that J.A.'s and T.A.'s testimony corresponded with the details of each offense the State elected at trial. *Id*. at 12. In denying Petitioner's petition for rehearing, the court further held that the evidence was sufficient to support Petitioner's conviction and that it would not "assume" that the jury's verdict was based on the forensic interviews. *Guilfoy v. State*, No. M2014-01619-CCA-R3-PC, 3–4 (Ten. Crim. App. Sep. 25, 2015).

The appellate court's focus on the sufficiency of the evidence does not comport with the requisite analysis of prejudice under *Strickland*. "The touchstone of the

prejudice inquiry is the fairness of the trial and the reliability of the jury or judge's verdict in light of any errors made by counsel, not solely the outcome of the case." *Johnson v. Scott*, 68 F.3d 106, 109 (5th Cir. 1995) (citing *Strickland*, 466 U.S. at 696). "Likewise the sufficiency of the "untainted" evidence should not be the focus of the prejudice inquiry." *Id.*

Furthermore, by noting that it would not "assume" that the jury's verdict was based on the forensic interviews, the appellate court abdicated its responsibility to consider the prejudicial impact of the evidence trial counsel improperly failed to prevent the jury from considering. This is fatal to the court's *Strickland* prejudice analysis. *Elmore v. Ozmint*, 661 F.3d 783, 868 (4th Cir. 2011) (holding that State court's failure to acknowledge or obey *Strickland*'s requirement to consider the totality of the evidence in determining whether, but for counsel's error, a different verdict would have been reached constituted an unreasonable application of *Strickland*).

The appellate court's determination of the facts, *i.e.*, that the videotaped interviews played no role in the verdict, is also unreasonable. The foreperson of Petitioner's jury was prepared to testify that the jury requested the equipment to watch—and did in fact watch—the videotaped interviews during deliberations. The appellate court's steadfast refusal to even entertain the notion that the videotaped interviews influenced the jury's verdict is contrary to what actually took place.

Meanwhile, the appellate court had no difficulty speculating as to the jury's use of the videotaped interviews to Petitioner's detriment. In holding that the

erroneous admission of Mrs. Post's opinion testimony about memory did not prejudice Petitioner, the appellate court noted that "the medical evidence did not rule out the possibility of abuse" and the alleged victims told several people about the abuse, including Mrs. Post.[5] *Guilfoy*, 2015 WL 4880182, *16. The only statements the alleged victims made to Mrs. Post to which the jury was exposed were the videotaped forensic interviews. Thus, the appellate court relied on the videotaped interviews to rebut Petitioner's claim of prejudice from the erroneous admission of Mrs. Post's unqualified opinion testimony; but, when it was called upon to assess the prejudice of the videotaped interviews themselves, the court was unwilling to "speculate" as to what effect the videos might have had on the jury. Such inconsistent, arbitrary use of the videotaped interviews in passing on the fairness of Petitioner's trial—in addition to being contrary to *Strickland*—runs counter to the touchstone of due process, which is the protection of the individual against arbitrary action of government. *Wolff v. McDonnell*, 418 U.S. 539, 558 (1974).

The State's case against Petitioner turned on T.A.'s and J.A.'s credibility. There were no independent witnesses to the alleged abuse. There was no physical evidence corroborating T.A.'s and J.A.'s accounts of the alleged offenses. Moreover, there was ample reason to question the veracity of their allegations, including but not limited to (1) the delay between the alleged offenses and T.A.'s and J.A.'s disclosure of the alleged abuse; (2) the children's murky and at times inconsistent

[5] It is ironic, to say the least, that the appellate court relied on evidence it held to be improperly admitted in assessing the prejudicial effect of other improperly admitted evidence.

recollections of the charged conduct; (3) the children's continued affection for Petitioner and excitement at the opportunity to see him, even after the alleged events occurred; (4) the implausibility of such abuse being perpetrated within feet of members of T.A. and J.A.'s family without anyone witnessing it; and (5) the existence of a motive to fabricate the allegations against Petitioner based on his ongoing dispute with T.A. and J.A.'s mother over rent. The closeness of the evidence is demonstrated by the fact that Petitioner's first trial resulted in a hung jury. *United States v. Stevens*, 935 F.2d 1380, 1406 (3rd Cir. 1991); *United States v. Paguio*, 114 F.3d 928, 935 (9th Cir. 1997); *United States v. Beckman*, 222 F.3d 512, 526 (8th Cir. 2000). Under such circumstances, it was patently unreasonable for the appellate court to conclude that there existed no reasonable probability that the videotaped forensic interviews affected the outcome of the trial.

In *Byrd v. Trombley*, 352 F. App'x. 6 (6th Cir. 2009), the defendant was convicted of molesting his stepdaughter. The defendant's first two trials resulted in a hung jury. *Id*. at 7. The defendant testified in his own defense. *Id*. at 7–8. On appeal, the defendant argued that his attorney's failure to object to the introduction of a ten-year-old forgery conviction during his testimony constituted ineffective assistance of counsel. *Id*. at 8. The 6th Circuit held there was a reasonable probability that but for the defense counsel's unreasonable failure to challenge the admissibility of the forgery conviction there was a reasonable probability that the defendant would not have been convicted. *Id*. at 12. In so holding the 6th Circuit emphasized that there was no direct evidence corroborating the abuse and that the

jury's verdict turned on whether it deemed the alleged victim or the defendant to be more credible. *Id*. at 13.

Likewise, the evidence in the instant case was close and hinged on credibility. By failing to object to the videotapes, Petitioner's trial attorney allowed the jury to make credibility determinations based on the out-of-court interviews rather than the evidence that was actually developed and presented at trial. This undermines confidence in the conduct of the trial process and the finding of guilt. The State court's conclusion to the contrary involves an unreasonable application of *Strickland* and an unreasonable determination of the facts. Habeas relief is therefore appropriate.

II. PETITIONER WAS DENIED HIS RIGHTS UNDER THE SIXTH AMENDMENT, INCLUDING HIS RIGHT TO COUNSEL, CROSS EXAMINATION, AND CONFRONTATION, WHERE THE JURY WAS EXPOSED TO EXTRINSIC INFORMATION IN THE FORM OF THE VIDEOTAPED FORENSIC INTERVIEWS

Petitioner was denied the fundamental right to have the jury adjudicate his guilt or innocence based solely on the evidence admitted in open court. The videotaped interviews were not admitted as evidence at Petitioner's trial. Although CDs which ostensibly contained the recorded interviews were "marked as exhibits to" Mrs. Post's testimony, she was not asked any questions about the content of the interviews. Nor was she cross-examined on the content of the interviews. Most importantly, the recorded interviews themselves were never received as exhibits nor published to the jury in open court prior to the close of evidence. The videotaped interviews where therefore highly prejudicial extrinsic information to which the jury

was exposed when it watched the interviews during deliberations, in violation of Petitioner's rights under the Sixth Amendment. The State court's decision to the contrary involves both an unreasonable application of clearly established Federal law and an unreasonable determination of the facts in light of the evidence presented in the State court proceedings.

(a) ***Petitioner exhausted his available State-court remedies by fairly presenting this claim to the State courts***

Petitioner alleged in his petition for writ of error coram nobis newly discovered evidence that the jury at his trial was exposed to prejudicial extraneous information, consisting of the recorded forensic interviews of the alleged victims conducted in the spring of 2009. Petitioner alleged that the recorded interviews were not evidence at his trial since they were not admitted nor published in open court during his trial. In support of his claim, Petitioner attached an affidavit from the foreperson of jury who attested that the jury asked court personnel to view the recorded interviews, and then watched the videos during deliberations.

Petitioner reiterated his constitutional claim on appeal as follows:

> This appeal concerns a single issue. Appellant filed a Petition for Writ of Error Coram Nobis almost five years after the expiration of the applicable statute of limitations. The predicate for his Petition was discovery that during deliberations, the jury that convicted him watched forensic video recordings of appellant's accusers. The videos had not been viewed in the courtroom during the trial and had been shown to the jurors at the request of the jury foreperson. More to the point, the jury that convicted appellant was exposed to and considered extraneous prejudicial information prior to rendering its verdict.
>
> * * *

> "Every criminal defendant has a constitutional right to a trial 'by an impartial jury.' Jurors must render their verdict based only upon the evidence introduced at trial, weighing the evidence in light of their own experience and knowledge. When a jury has been subjected to either extraneous prejudicial information or an improper outside influence, the validity of the verdict is questionable." *State v. Adams*, 405 S.W.3d 641, 650 (Tenn. 2013) (internal citations omitted).

(Petitioner's Brief on ECN Appeal at 4–5, 16–17). Petitioner further argued that when a juror has been exposed to extraneous prejudicial information, prejudice is presumed, and the burden shifts to the State to demonstrate that the extraneous information was harmless beyond a reasonable doubt. (Petitioner's Brief on ECN Appeal at 22). Petitioner's argument tracks analysis employed by federal courts in analyzing a claim that a defendant's Sixth Amendment right trial by jury was violated by the jury's exposure to extraneous information. *E.g.*, *United States v. Delaney*, 732 F.2d 639, 642 (8th Cir. 1984). By phrasing the claim in terms sufficiently particular to allege a denial of a specific constitutional right, and/or alleging facts well within the mainstream of constitutional law, Petitioner "fairly presented" his constitutional claim to the State courts.

As noted, *supra*, although Petitioner did raise this issue in his permission to appeal to the Tennessee Supreme Court, doing so was not necessary to exhaust his State remedies. *Smith*, 371 Fed. Appx. at 579, 2010 WL 1172473, *4–5; *Adams*, 330 F.3d at 402 (6th Cir. 2003). Petitioner has therefore exhausted his State remedies with regard to his claim that he was denied his constitutional rights under the Sixth Amendment where the jury was exposed to highly prejudicial, extraneous evidence during deliberations.

(b) ***Applicable law***

The Supreme Court has long held that "the evidence developed against a defendant shall come from the witness stand in a public courtroom where there is full judicial protection of the defendant's right to confrontation, of cross-examination, and of counsel." *Parker v. Gladden*, 385 U.S. 363, 364–65 (1966); *see also*, *Turner v. Louisiana*, 379 U.S. 466, 472–73 (1965). "Few, if any, interests under the Constitution are more fundamental than the right to a fair trial by "impartial" jurors, and an outcome affected by extrajudicial statements would violate that fundamental right." *Gentile v. State Bar of Nevada*, 501 U.S. 1030, 1075 (1991) (plurality opinion) (citing *Sheppard v. Maxwell*, 384 U.S. 333, 350–51 (1965)). A jury's consideration of extrinsic information raises a presumption of prejudice, and the government bears the burden of showing beyond a reasonable doubt that the extrinsic information did not contribute to the conviction. *Remmer v. United States*, 347 U.S. 227, 229 (1954); *United States v. Hines*, 696 F.2d 722, 730–31 (10th Cir. 1982); *United States v. Duckworth*, 727 F.2d 643, 646 (7th Cir. 1984); *Delaney*, 732 F.2d at 642; *United States v. Littlefield*, 752 F.2d 1429, 1431–32 (9th Cir. 1985); *United States v. Williams*, 809 F.2d 75, 81 (1st Cir. 1986); *United States v. Ronda*, 455 F.3d 1273, 1299–1300 (11th Cir. 2006); *but c.f. United States v. Pennell*, 737 F.2d 521, 532 (6th Cir. 1984).

(c) ***Petitioner's rights under the Sixth Amendment were violated where his jury was exposed to extraneous prejudicial evidence when it watched the recorded forensic interviews of the alleged victims***

As described in detail, *supra*, Mrs. Post conducted forensic interviews of J.A. and T.A. During Mrs. Post's trial testimony, the State had her identify the discs

which contained the interviews she was asked to review prior to trial. The State then asked that the discs be "marked as an exhibit" and "made as an exhibit" to Mrs. Post's testimony. (T.T. 365–67). The State did not ask Mrs. Post any substantive questions about the interviews. (T.T. 360–67). The videos were not played for the jury. (*Id.*). The defense did not cross examine Mrs. Post. (T.T. 367). Under these circumstances, the videotaped interviews were not evidence at Petitioner's trial.

In *State v. Henry*, No. 02C01-9611-CC-00382, 1997 WL 283735 (Ten. Crim. App. May 29, 1997), law enforcement covertly recorded conversations between the defendant and an undercover informant during which the defendant ostensibly sold the informant cocaine. *Id.*, *1. At the State's request, the audio recordings were admitted into evidence. *Id.*, *2. However, neither the State nor the defense requested that the tapes be played for the jury. *Id.* The trial court refused a request by the jury to listen to the recorded conversations during deliberations. *Id.*

On appeal, the defendant argued that because the tapes were admitted into evidence, the trial court erred by refusing to allow the jury to hear them during deliberations. *Id.*, *3. The appellate court rejected the defendant's contention. *Id.*, *4. In doing so, the court distinguished between the physical tapes and the recorded conversations. The court held that regardless of whether the tapes themselves were entered into evidence or were made exhibits for the purpose of identification only, the *contents* of the tapes were not played for the jury and, therefore, were not in evidence. *Id.*

Henry is consistent with the well-established rule that the evidence developed against a defendant must come from the witness stand in a public courtroom where there is full judicial protection of the defendant's right of confrontation, cross-examination, and counsel. *Parker*, 385 U.S. at 364–65 (1966). The jury's consideration of evidence not properly admitted at trial—such as the jury's consideration of the recorded forensic interviews during deliberations at the conclusion of Petitioner's trial—violates the Sixth Amendment. *E.g.*, *Fullwood v. Lee*, 290 F.3d 663, 682 (4th Cir. 2002) (quoting *Irvin v. Dowd*, 366 U.S. 717, 722 (1961)).

In *United States v. Noushfar*, 78 F.3d 1442 (9th Cir. 1996), the defendants were convicted of conspiring to smuggle Persian rugs into the United States. During the undercover investigation that led to the defendants' arrests, customs agents recorded many potentially incriminating conversations with the defendants. *Id*. at 1444. The trial court allowed the jury to take with them to the jury room fourteen tapes that had not been played during the defendants' trial. *Id*. The jurors subsequently requested and were provided with a tape recorder. *Id*. On appeal, in finding that the trial court had erred, the 9th Circuit stated, "[T]his error undermines one of the most fundamental tenets of our justice system: that a defendant's conviction may be based only on the evidence presented during the trial. Sending the tapes to the jury room is akin to allowing a new witness to testify privately, without cross-examination, to the jury during its deliberations." *Id*. at 1445. The court reversed the defendants' convictions, describing the error as a "structural." *Id*. "Sending unplayed tapes to the jury room is such a defect. It violates the basic framework of the trial system,

which requires that evidence be presented and tested in front of the jury, judge and defendant." *Id.*

Similarly, in *United States v. Hans*, 738 F.2d 88 (3rd Cir. 1984), a witness testified at a pretrial hearing that windbreakers shown to her by the prosecution were similar to those worn by the robbers. *Id.* at 91–92. The windbreakers were marked for identification at trial but were "never actually introduced into evidence." *Id.* at 92. During deliberations, the jury sent a note to the trial court asking to inspect the windbreakers. *Id.* The trial judge granted the request. *Id.* On appeal, the Third Circuit held that in doing so, the trial court erred by permitting the jury to rely on items not admitted into evidence to reach its verdict. *Id.* The court held that the error was prejudicial because, *inter alia*, had the government asked the witness substantive questions about the windbreakers, the witness would have been subject to cross examination as to whether they were the windbreakers actually worn by the robbers. *Id.* at 92–93.

Here, the videotaped interviews of J.A. and T.A. were not evidence at Petitioner's trial. Neither J.A. nor T.A. were asked by the State to testify to what they told Mrs. Post during the interviews. The State did not ask Mrs. Post to testify to any of the statements J.A. or T.A. made to her during the interviews. Mrs. Post was not subject to cross examination on the interviews, and the State failed to ask that that the interviews be admitted into evidence.[6] And, of course, the videotaped

[6] It bears repeating that the videotaped interviews were withheld from the defense by the State on the basis that it was not going to use them as evidence at Petitioner's trial.

interviews were not played for the jury in open court. Thus, the jury's act of watching the videotaped interviews during deliberations runs afoul of the Supreme Court's edict that "the evidence developed against a defendant shall come from the witness stand in a public courtroom where there is full judicial protection of the defendant's right to confrontation, of cross-examination, and of counsel." *E.g.*, *Gamache v. California*, 562 U.S. 1083 (2010) (Sotomayor, J., on denial of petition for writ of certiorari) (citing *People v. Gamache*, 48 Cal. 4th 347, 396, 227 P.3d 342, 386 (2010)) (holding that it was "indisputably error" for court personnel to give jury a videotape that had not been admitted into evidence).

For all of the reasons stated in Argument I, *supra*, the presumption of prejudice that attaches to the jury's exposure to the extraneous videotaped interviews cannot be rebutted. *Hall v. Zenk*, 692 F.3d 793, 799 (7th Cir. 2012) (citing *Remmer*, 347 U.S. at 229) ("There is no doubt that *Remmer* itself established a presumption of prejudice applicable when third-party communications concerning a matter at issue in a trial intrude upon a jury."). The presumption of prejudice, although not insurmountable, weighs heavily in favor of the defendant. *United States v. Scull*, 321 F.3d 1270, 1280 (10th Cir. 2003). To rebut the presumption of prejudice, the State must carry the heavy burden of showing that the jury's exposure to the extraneous information was harmless. *Remmer*, 347 U.S. at 229.

Here, not only is the prejudice from the jury's exposure to the videos not harmless, but the prejudice inuring to Petitioner as a result of the jury having watched the videotaped interviews is readily apparent. As a threshold matter, the

interviews were not conducted in accordance with the rules of evidence and, as a result, they are replete with statements that would have been objectionable had they been testified to at trial. The statements in the videos were not elicited from the witness stand and/or played in open court, and therefore were not subject to the crucible of cross examination. The videotaped interviews improperly bolstered J.A.'s and T.A.'s trial testimony to the extent they were consistent with their trial testimony. The interviews contained details of the alleged abuse not testified to by either alleged victim that improperly enhanced their accusations against Petitioner. The interviews included inflammatory descriptions of the alleged abuse not testified to at trial that were likely to arouse the passion and prejudice of the jury. Finally, the interviews included references to uncharged acts and allusions to potential uncharged acts of abuse committed against T.A. and J.A.'s other sister. In short, it is difficult to conceive of evidence more inherently prejudicial than the unadmitted videotaped interviews.

(d) ***The State court's denial of relief involves an unreasonable application of clearly established Federal law and an unreasonable determination of the facts.***

(i) ***The State court's refusal to consider the merits of Plaintiff's constitutional claim involves an unreasonable determination of the facts and a misapplication of law.***

Petitioner raised this issue in a petition for writ of error coram nobis after he was able to obtain an affidavit supporting it. On December 15, 2016, the foreperson of the jury—Hilary Hoffman—provided an affidavit to Petitioner's counsel indicating that she believed that the jurors needed to examine every item of available

information in order to render a verdict. Exhibit J at ¶ 5. Mrs. Hoffman then informed a person she believed to be a court officer that the jury wanted to view the videos. Exhibit J at ¶ 6. In response to her request, an individual wheeled a television and DVD player into the jury room, and the jury watched the videos. Exhibit J at ¶¶ 7, 10. No one ever informed Petitioner that the jury had requested equipment to watch the recorded interviews, and no such request was made on the record. Exhibit I at ¶ 14. Although Petitioner subsequently learned through an investigator that the jury had watched the videos, the jurors did not explain to the investigator how they were able to do so. Exhibit I at ¶¶ 16–17.

In affirming the denial of relief, the appellate court did not address the merits of Petitioner's constitutional claim. Instead, the court held that Petitioner's claim was time barred because it was filed beyond the one-year limitations period for filing a petition for writ of error coram nobis. *Guilfoy*, 2018 WL 3459735, *2–3. In a similar vein, the court held that Petitioner did not state a cognizable claim for relief because it was not based on new evidence and therefore involved an issue that could have been raised on direct appeal or in a petition for post-conviction relief. *Id*. The court therefore refused to toll the limitations period to Petitioner's claim. *Id*.

The appellate court's ruling involves an unreasonable determination of the facts and a misapplication of the law because, prior to Mrs. Hoffman's affidavit, Petitioner did not have the evidence needed to file his petition. Under Tennessee law, a criminal defendant filing a petition for writ of error coram nobis must file affidavits in support of the petition. *State v. Hart*, 911 S.W.2d 371, 374 (Tenn. Crim. App. 1995)

(citing *Ross v. State*, 130 Tenn. 387, 390–94, 170 S.W. 1026, 1027–28) (1914)). "An affidavit, like the testimony of a witness, must be relevant, material and germane to the grounds raised in the petition; and the affiant must have personal knowledge of the statements contained in the affidavit." *Id.* (citing *State v. Byerley*, 658 S.W.2d 134, 141 (Tenn. Crim. App. 1983)). Affidavits which fail to meet these criteria—including the personal knowledge requirement—do not justify the granting of an evidentiary hearing because, even taken as true, they would not justify relief. *Id.* (citing *State v. Todd*, 631 S.W.2d 464, 466–67 (Tenn. Crim. App. 1981)). Thus, even where a petitioner has prior knowledge of certain evidence, if that evidence does not become available until later due to a change in factual circumstances, the evidence qualifies as newly discovered. *E.g.*, *Payne v. State*, 493 S.W.3d 478, 485–86 (Tenn. 2016) (citing *Brunelle v. State*, No. E2010-00662-CCA-R3-PC, 2011 WL 2436545, *10 (Tenn. Crim. App. June 16, 2011) (holding that petitioner could have sought coram nobis relief after a report, known to petitioner but sealed at the time of trial, became available).

Petitioner's petition for writ of error coram nobis was, contrary to the appellate court ruling, based on new evidence in the form of Mrs. Hoffman's affidavit. At the time the jury rendered its verdict, Petitioner did not know that it had watched the videotaped interviews. Petitioner subsequently learned through an investigator that the jury had watched the videos, but an affidavit from the investigator would not have satisfied the personal knowledge requirement. When Petitioner attempted to obtain that evidence at his post-conviction hearing, the post-conviction court refused

to let the juror testify. It was not until Mrs. Hoffman agreed to sign an affidavit that the evidence became available to Petitioner and, therefore, qualifies as newly discovered. Petitioner's claim was therefore cognizable.

Since fundamental fairness is the central concern of the writ of habeas corpus, the arbitrary manner in which the State courts have treated Petitioner vis-à-vis the videotaped interviews—especially in combination with the misdirection of the prosecution concerning its use of the videos—"compels review regardless of possible procedural defaults." *Murray v. Carrier*, 477 U.S. 478, 502 n. 8 (Stevens, J., concurring) (citing *Rose v. Lundy*, 455 U.S. 509, 543–44 (1982) (Stevens, J., dissenting)) ("Although a constitutional claim that may establish innocence is clearly the most compelling case for habeas review, it is by no means the only type of constitutional claim that implicates "fundamental fairness" and that compels review regardless of possible procedural defaults.")

The State courts and the prosecution have essentially played a shell game with the videos. Prior to trial, the State refused to disclose the videos to the defense on the basis that it did not intend on using them at trial. Then—contrary to its pretrial representations—the State made a vague request that discs containing the interviews be marked as exhibits to Mrs. Post's trial testimony and invited the jury to watch the interviews as part of its deliberations.[7] When Petitioner tried to argue

[7] Overarching all of this, of course, is that Petitioner's trial attorney fell asleep at the switch by failing to (1) object to the State's vague reference to the videos during trial, (2) object to the jury's consideration of the videos on the basis that they were inadmissible and had not been produced prior to trial, and/or (3) providing a limiting

that the videos were improperly admitted on appeal, the State argued—and the appellate court accepted—that Petitioner could not establish prejudice because he could not show that the jury actually watched the videos. Petitioner then tried to call a juror at his post-conviction proceedings to establish that the jury watched the videos; the post-conviction court, at the State's urging, refused to let the juror testify. Then, when Petitioner finally had access to an affidavit to support his claim that the jurors watched the videos, the State court deemed the issue procedurally defaulted. Far from trying to deliberately bypass state procedures, Petitioner has endeavored at every turn to bring the State court's attention to the jury's improper use of the videos and resultant unfair prejudice.

(ii) ***In the alternative, Petitioner can establish cause and prejudice to overcome the default.***

If a petitioner procedurally defaults on a claim in state court, he can still obtain federal review of the claim if he can show cause for the procedural default and prejudice resulting from the constitutional error. *E.g.*, *Lucas v. O'Dea*, 179 F.3d 412, 418 (6th Cir. 1999) (citing *Coleman v. Thompson*, 501 U.S. 722, 750 (1991)). Attorney error that amounts to ineffective assistance of counsel can constitute "cause" under the cause and prejudice test. *Id*. (citing *Gravley v. Mills*, 87 F.3d 779, 785 (6th Cir. 1996)). Specifically, ineffective assistance of post-conviction counsel can establish cause to excuse a Tennessee defendant's procedural default of a substantial claim of

instruction to guide the jury's consideration of the evidence if admissible for a limited purpose.

constitutional dimension. *E.g.*, *Sutton v. Carpenter*, 745 F.3d 787, 795–96 (6th Cir. 2014).

Here, Petitioner can establish cause and prejudice to overcome the procedural default based on the ineffective assistance of his appellate and post-conviction attorney, Jay Martin. Mr. Martin represented Petitioner in his direct appeal and post-conviction petition. Exhibit I at ¶¶ 16, 25. Prior to Petitioner's direct appeal, Mr. Martin informed Petitioner that the interviews were not evidence in Petitioner's case because they were not published to the jury during trial. Exhibit I at ¶ 19. After the appellate court denied Petitioner's direct appeal, Petitioner asked Mr. Martin to try to get affidavits from jurors to established that the jury had viewed them. Mr. Martin informed Petitioner that none of the jurors would sign affidavits. However, he told Petitioner that he would call at least one of the jurors to testify at Petitioner's post-conviction hearing to establish that the jury had watched the videos. Exhibit I at ¶ 26. Mr. Martin thereafter subpoenaed the jury foreperson, Mrs. Hoffman, to testify at the hearing, the purpose of which was to establish that the jury was exposed to extraneous information. Exhibit I at ¶ 27.

After Petitioner's post-conviction petition was denied, Mr. Martin assured Petitioner on multiple occasions that he would raise the court's improper refusal to let Mrs. Hoffman testify on appeal. Exhibit I at ¶¶ 29, 31. On January 15, 2015, Mr. Martin emailed a copy of the brief to Petitioner's sister. The draft did not include any argument about the post-conviction court's refusal to allow Mrs. Hoffman to testify. However, Mr. Martin indicated that he had additional argument to add to the brief,

including the issue of the judge's failure to allow Mrs. Hoffman's testimony. Exhibit I at ¶ 32. Mr. Martin subsequently filed the brief without Petitioner having had an opportunity to review it. Exhibit I at ¶ 33. The brief did not raise the issue regarding the post-conviction court's refusal to allow Mrs. Hoffman to testify. Exhibit I at ¶ 38. When Petitioner confronted Mr. Martin about the failure to include the issue, Mr. Martin responded that he did not need to raise the juror issue because the appellate court "would read the transcript and see what happened." Exhibit I at ¶ 41. Later, Petitioner learned that Mr. Martin had accepted a position with the Davidson County District Attorney's Office—the very office that prosecuted Petitioner—and that Mr. Martin had been offered the position before he had filed Petitioner's brief. Exhibit I at ¶¶34–35, 42–43.[8]

In order to demonstrate deficient performance of appellate counsel, a defendant must show that his appellate attorney made an objectively unreasonable decision choosing to raise other issues instead of the issue the defendant asserts should have been raised. *E.g.*, *Webb v. Mitchell*, 586 F.3d 383, 398–99 (6th Cir. 2009). In order to make that showing, the defendant must demonstrate that the omitted issue was "clearly stronger than issues that counsel did present." *Id*. at 399 (citing *Smith v. Robbins*, 528 U.S. 259, 285 (2000)). To show prejudice, the defendant must

[8] The Tennessee Board of Professional Responsibility has opened a formal investigation into Petitioner's claim that his attorney labored under a conflict of interest about which he failed to disclose to Petitioner at the time he represented Petitioner in his post-conviction appeal.

establish a reasonable probability that, but for his counsel's failure to raise the issue, he would have prevailed. *E.g.*, *Robbins*, 528 U.S. at 285.

Mr. Martin rendered ineffective assistance of counsel where he failed to argue in Petitioner's post-conviction petition that Petitioner was denied his rights under the Sixth Amendment where the jury was exposed to extraneous information, *i.e.*, the videotaped interviews. Under *Henry*, *supra*, the interviews were not evidence because they were not published to the jury during Petitioner's trial. Had Mr. Martin raised the issue of the jury's exposure to extraneous information, he would have been able to present Mrs. Hoffman's testimony at Petitioner's post-conviction hearing under Tennessee Rule of Evidence 606(b). ("Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations… except that a juror may testify on the question of whether extraneous prejudicial information was improperly brought to the jury's attention[.]"). A straightforward application of *Henry* would have compelled the conclusion that by watching the videotaped interviews not published and/or testified to at Petitioner's trial, the jury was exposed to extraneous information.

Mr. Martin's failure to couch the issue as the jury having been exposed to extraneous information was unreasonable because it was an easier claim on which to prevail than the ineffective assistance claims he did raise. Upon establishing that the jury was exposed to extraneous information, the court would have presumed prejudice and the burden would have shifted to the State to show the information was

harmless. *E.g.*, *Walsh v. State*, 166 S.W.3d 641, 647 (Tenn. 2005). This standard would have been much more favorable to Petitioner who, in order to prevail on his ineffective assistance claims, would have had to have overcome a "heavy measure of deference to [trial] counsel's judgments." *Strickland*, 466 U.S. at 691. Then, once Petitioner established deficient performance, he still would have shouldered the burden of demonstrating a reasonable probability that, but for his trial attorney's errors, the outcome of the trial would have been different. *Id*. at 696.

For all of the reasons set forth above, the State would not have been able to show that the jury's exposure to the videotaped interviews was harmless. On the contrary, the jury was likely influenced a great deal by improperly watching the forensic interviews. In short, the videotaped interviews improperly enhanced the alleged victims' trial testimony, contained references to uncharged acts, and included inflammatory descriptions of abuse not testified to at trial—and it all occurred without the interviews being subject to challenge by way of cross examination at trial. Mr. Martin's failure to raise the issue in Petitioner's post-conviction petition thus constitutions ineffective assistance of counsel and constitutes cause and prejudice such that the claim is cognizable on Federal habeas review. *E.g.*, *Gravley*, 87 F.3d at 785–85 (finding cause and prejudice to hear petitioner's constitutional claims where his trial attorney was ineffective in failing to preserve them).

III. PETITIONER WAS DENIED HIS RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL WHERE HIS ATTORNEY FAILED TO OBJECT TO MRS. POST'S OPINION TESTIMONY CONCERNING THE MEMORY OF AN ALLEGED VICTIM OF CHILD SEX ABUSE

Petitioner was denied his right to effective assistance of counsel where his attorney failed to object to improper opinion testimony elicited by the State during its direct examination of Mrs. Post. Specifically, trial counsel did not object when Mrs. Post testified (1) that it is not realistic to expect a child to provide every detail concerning alleged abuse; (2) that only very limited information about any event happening to little children can be "captured;" (3) that "lots of things," including trauma, can disrupt memory; (4) that very similar events can be hard to separate; and (5) it can be very difficult to provide a narrative detailed account of one specific incident when other similar incidents have occurred.

Mrs. Post's testimony was inadmissible under Tennessee law. Petitioner's trial attorney's failure to object to it therefore constitutes deficient performance. Petitioner was prejudiced by his attorney's deficient performance because Mrs. Post's opinions improperly bolstered J.A.'s and T.A.'s credibility by accounting for deficiencies in their trial testimony. Particularly when coupled with trial counsel's failure to prevent the jury from viewing the highly prejudicial videotaped forensic interviews, trial counsel's deficient performance prejudiced Petitioner. The State court's conclusion to the contrary involves an unreasonable application of *Strickland* and its progeny, as well as an unreasonable determination of the facts.

(a) ***Petitioner exhausted his available State-court remedies by fairly presenting this claim***

Petitioner alleged in his post-conviction petition that his trial attorney was ineffective for not objecting to Mrs. Post's testimony. He re-urged the issue on appeal from the denial of his post-conviction petition. Petitioner cited the specific constitutional provision at issue in support of his argument, and employed the analytical framework established in *Strickland*. Petitioner therefore fairly presented his claim in State court and therefore exhausted his State-court remedies as to this issue.

(a) ***Applicable law***

The law applicable to Petitioner's claim is set forth in *Strickland* and is detailed in Claim I, *supra*. In short, in order to demonstrate ineffective assistance of counsel, Petitioner must show that his attorney's performance was deficient and that he was prejudiced by his attorney's substandard representation. *Strickland*, 466 U.S. at 687–92.

(c) ***The State court's denial of relief involves an unreasonable application of clearly established Federal law and an unreasonable determination of the facts.***

(i) ***Deficient performance***

Trial counsel's failure to object to Mrs. Post's opinion testimony was patently deficient.

Under the Tennessee Rules of Evidence, a trial court is to disallow testimony in the form of an opinion or inference if the underlying facts or data indicate a lack of trustworthiness. Tenn. R. Evid. 703. There are several factors for a court to consider

in determining whether an expert's opinion is sufficiently reliable, including (1) whether scientific evidence has been tested and the methodology with which it has been tested; (2) whether the evidence has been subjected to peer review or publication; (3) whether a potential rate of error is known; (4) whether the evidence is generally accepted in the scientific community; and (5) whether the expert's research in the field has been conducted independent of litigation. *State v. Copeland*, 226 S.W.3d 287, 301 (Tenn. 2007).

In addition to the requirements for expert testimony generally, Tennessee law has limited the extent to which expert opinion testimony may be utilized to bolster the testimony of an alleged victim of child sex abuse. For example, Tennessee law prohibits the admission of expert testimony concerning child sexual abuse syndrome on the basis that it invades the province of the jury to assess the victim's credibility. *State v. Ballard*, 855 S.W.2d 557, 563 (Tenn. 1993); *State v. Schimpf*, 782 S.W.2d 186, 193–94 (Tenn. Crim. App. 1989). Similarly, an expert may not testify that child sex abuse victims commonly recant their accusations. *State v. Anderson*, 880 S.W.2d 720, 730 (Tenn. Crim. App. 1994). An expert also may not testify that a sexually abused child often delay disclosure of the abuse. *State v. Bakari*, Case No. M2010-01819-CCA-R3-CD, 2012 WL 538950, *8–9 (Tenn. Crim. App. Feb. 15, 2012).

Given that the State failed to establish Mrs. Post's qualifications to offer the at-issue expert opinions, and further given that her testimony clearly went to the reliability and/or credibility of J.A.'s and T.A.'s accusations, her opinions were inadmissible under Tennessee law. Petitioner's trial attorney failed to testify to any

strategic benefit to be gained by not objecting to Mrs. Post's testimony, and no reasonable trial strategy contemplates the failure to prevent the jury from considering inadmissible evidence that could only bolster the State's case. Petitioner's trial attorney thus clearly rendered deficient performance by not objecting to Mrs. Post's opinion testimony.

(ii) *Prejudice*

Petitioner was plainly prejudiced by Mrs. Post's inadmissible opinion testimony. Mrs. Post's testimony concerning memory offered an explanation for the shortcomings in J.A.'s and T.A.'s trial testimony. Moreover, the jury was left with the impression that Mrs. Post's testimony was supported by her years of experience and carried with it the imprimatur of expert knowledge.

Especially troubling is Mrs. Post's contention that trauma, *i.e.*, sexual abuse, can disrupt a child's memory. Accepting that testimony as true, any impeachment of an alleged child sexual abuse victim is rendered meaningless because the abuse itself impedes the victim's ability to remember it. Thus, to the extent a child's memory of the charged conduct is inconsistent or implausible, the jury is invited to disregard those deficiencies by assuming that the abuse occurred in the first instance.

That the State recognized the need to introduce Mrs. Post's plainly inadmissible opinions demonstrates their prejudicial effect. For example, as noted, *supra*, during J.A.'s direct examination the State questioned her as follows:

> Q: Do you remember telling Anne or telling me about a time that he did that, and you got up and went and got in your sister's bed?
>
> A: Yes. But I am not quite sure like what happened.

> Q: What do you remember about getting out of your bed and going and getting in your sister's bed?
>
> A: I'm not really sure what happened.

(T.T. 23). J.A.'s difficulty in remembering details of what allegedly happened would normally call into question the veracity of her testimony. But, in light of Mrs. Post's opinion testimony, the deficiencies in J.A.'s testimony could be explained by her age, the trauma she endured, or her inability to separate out one incident of abuse from an ongoing pattern of abuse inflicted over an extended period of time.

As noted in Claim I, the evidence in this case was close and turned completely on the jury's assessment of J.A.'s and T.A.'s credibility. Trial counsel's failure to object permitted the jury to hear "expert" testimony the only effect of which was to improperly bolster J.A.'s and T.A.'s accusations. Particularly in combination with trial counsel's ineffectiveness as set forth in Claim I, the failure to object to Mrs. Post's testimony undermines confidence in the outcome of Petitioner's trial.

(iii) *State court decision*

In ruling on this claim, the Tennessee Court of Criminal Appeals once again did not explicitly hold that counsel's performance was deficient. However, the court did hold that the admission of Mrs. Post's testimony was error. *Guilfoy*, 2015 WL 4880182, *16. It also noted that trial counsel failed to testify to any strategic reason for not objecting to Mrs. Post's testimony during the post-conviction proceedings. *Id*. Thus, the court implicitly held that trial counsel's performance was deficient.

However, the court held that trial counsel's deficient performance was not prejudicial. Specifically, the court held, "Mrs. Post's testimony addressed the narrow

issue of why the victims could not provide details of when the events occurred. It did not address inconsistencies in the victims' descriptions of what occurred during the abuse or address the "implausibility" of their allegations, the core of the Petitioner's defense theory during the second trial." *Id.* The court concluded, "Trial counsel specifically addressed the inconsistencies between their testimonies at both trials during cross-examination. Accordingly, the Petitioner has failed to demonstrate that he was prejudiced by trial counsel's failure to object to Mrs. Post's testimony[.]" *Id.*

The State court's ruling was based on an unreasonable determination of the facts. Mrs. Post did not limit her opinions to the "narrow issue of why the victims could not provide details of *when* the events occurred." Rather, Mrs. Post's testimony explicitly went to a child's ability to remember details concerning alleged abuse generally, and even went so far as to suggest that a child's inability to provide details about a single event indicates an ongoing pattern of abuse.

Similarly, the State court's reliance on the fact that trial counsel "addressed" the inconsistencies in J.A.'s and T.A.'s testimony also fails. The effect of Mrs. Post's testimony was to nullify any deficiencies in the alleged victims' accounts of what took place. Mrs. Post's testimony effectively rendered meaningless defense counsel's efforts at undermining J.A's and T.A.'s accusations.

Also as in Claim I, the State court's decision involves an unreasonable application of *Strickland*. The State court wholly failed to evaluate the prejudicial impact of Mrs. Post's testimony in light of the closeness of the evidence. The State court also failed to consider the prejudicial impact of failing to object to Mrs. Post's

testimony in combination with the prejudicial impact of failing to prevent the jury from viewing the videotaped forensic interviews. Both errors bolstered the complaining witnesses' testimony in what was otherwise a close case that turned on their credibility. Thus, no fair-minded jurist could conclude that trial counsel's performance did not undermine confidence in the outcome of Petitioner's trial. Habeas relief is therefore required.

CONCLUSION

For the reasons stated herein and in Petitioner's separately filed amended petition for writ of habeas corpus, Petitioner respectfully requests that this Court grant the writ, discharge him from his unconstitutional confinement, and grant any and all other relief deemed just and appropriate.

Respectfully submitted,

Date: June 5, 2019

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Certificate of Service

I hereby certify that a true and correct copy of the foregoing has been sent via the Court's electronic filing system, *or*, if not registered, sent via U.S. Mail, postage prepaid, to:

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this 5th day of June, 2019.

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