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

TIMOTHY GUILFOY,	)	
	)	
Petitioner,	)	
	)	
v.	)	**No. 3:18-cv-01371**
	)	**Judge Richardson**
MIKE PARRIS, WARDEN	)	**Magistrate Judge Holmes**
	)	
	)	
Respondent.	)	

RESPONDENT'S ANSWER TO PETITION FOR WRIT OF HABEAS CORPUS

I. PRELIMINARY STATEMENT

Pursuant to this Court's order and Rules 4 and 5 of the Rules Governing § 2254 Cases in the United States District Courts ("Habeas Rules"), Respondent submits the following answer to the amended petition for writ of habeas corpus filed under 28 U.S.C. § 2254. (ECF No. 31, Page ID# 254-278; ECF No. 32, Page ID# 343-411.) Petitioner, Timothy Guilfoy, challenges his confinement under judgments of convictions from the Davidson County Criminal Court for aggravated sexual battery and rape of a child. (ECF No. 31, Page ID # 255.) For the reasons stated, this Court should dismiss the petition with prejudice.

On information and belief, this is Petitioner's first application for a writ of habeas corpus under 28 U.S.C. § 2254 challenging his custody under the state-court judgment in question here. The petition is timely filed under 28 U.S.C. § 2244(d)(1).

To Respondent's knowledge, all pertinent recorded, transcribed state-court proceedings related to Petitioner's convictions and sentences have been filed with the Clerk of Court as

attachments to Respondent's Notice of Filing Documents. (ECF No. 37.) Specifically, the technical records, transcripts, and exhibits of Petitioner's direct appeal and post-conviction proceedings have been filed with the Clerk of Court as attachments to the Notice of Filing Documents. *Id.* The briefs and opinions from Petitioner's state appellate proceedings have also been filed as attachments to the Notice of Filing Documents. *Id.*

II. ISSUES PRESENTED FOR REVIEW

Petitioner raises the following claims in his habeas petition:

1. Trial counsel was ineffective by failing to prevent the jury from viewing the forensic interviews of the victims. (ECF No. 31, Page ID# 260-64; ECF No. 32, Page ID# 367-86.)

2. Petitioner was denied his rights to an impartial jury, confrontation, cross-examination, and counsel because the trial court permitted the jury to view the videotaped forensic interviews of the victims. (ECF No. 31, Page ID# 265-67; ECF No. 32, Page ID# 386-402.)

3. Trial counsel was ineffective by failing to object to improper testimony from Ann Post. (ECF No. 31, Page ID# 268-70; ECF No. 32, Page ID# 403-09.)

Petitioner exhausted Claims 1 and 3, and they are properly before the Court on habeas review. Petitioner did not exhaust his state court remedies for Claim 2. At this time, he may no longer raise the claims in state court, so they are technically exhausted but procedurally defaulted.

III. STATEMENT OF THE CASE

A Davidson County Grand Jury indicted Petitioner for three counts of aggravated sexual battery against J.A.; two counts of aggravated sexual battery against T.A.; four counts of aggravated sexual battery against A.A.; and four counts of rape of a child against A.A.[1] (ECF No.

[1] The state courts referred to the victims by their initials to protect their privacy, and Respondent will do the same.

37-1, Page ID# 435-47.) The State later entered a nolle prosequi as to these charges. (*Id.* at Page ID# 483.)

On March 8, 2011, the State obtained a superseding indictment charging Petitioner for four counts of aggravated sexual battery against J.A.; one count of aggravated sexual battery against T.A.; and three counts of rape of a child against T.A. (*Id.* at Page ID# 472-79.) The first trial on these charges resulted in a hung jury. (ECF No. 37-4, Page ID# 716.)

Following a retrial, a jury convicted Petitioner of aggravated sexual battery as charged in Counts 1, 2, and 3; of assault as a lesser-included offense of aggravated sexual battery in Count 4; rape of a child as charged in Counts 6 and 7; and aggravated sexual battery as a lesser-included offense of rape of a child in Count 8.[2] (ECF No. 37-8, Page ID# 1260-61.)

The trial court imposed a ten-year sentence for each aggravated sexual battery conviction; a twenty-year sentence for each rape of a child conviction; and a six-month sentence for the assault conviction. (ECF No. 37-4, Page ID# 731-34, 736-38.) The trial court imposed partial consecutive sentencing for a total effective sentence of seventy years. (*Id.*)

Petitioner raised numerous issues on direct appeal to the Tennessee Court of Criminal Appeals, including a claim that the trial court erred by admitting the forensic interviews of T.A. and J.A. *State v. Guilfoy*, No. M2012-00600-CCA-R3-CD, 2013 WL 1965996, at *1, 14-15 (Tenn. Crim. App. May 13, 2013) ("*Guilfoy I*"). The recordings were admitted into evidence for identification purposes without objection from Petitioner, but they were not played for the jury in open court. *Id.* at *8. During closing argument, the prosecutor referenced the interviews and told the jury, "[I]t's your decision whether you want to watch them or not, but should you decide to,

[2] The State entered a nolle prosequi to Count 5. (ECF No. 37-4, Page ID# 724.)

we have the capacity, or the Court does, to get a TV and all that to play those, those forensic interviews." *Id.* at *14.

The court reviewed the issue for plain error because Petitioner failed to make a contemporaneous objection to the introduction of the interviews. *Id.* at *14-15. The court concluded that while it was error to admit the interviews, Petitioner was not entitled to plain error relief because the record did not demonstrate that the jury ever watched the interviews. *Id.* at *14. The court explained that because the record did not contain any indication that the jury requested the viewing equipment or any other indication that the jury watched the recordings, Petitioner had failed to establish the first factor for plain error review: that the record clearly established what occurred in the trial court. *Id.* The court further concluded that since the record contained no indication that the jury watched either interview, Petitioner could not show that the erroneous admission of this evidence adversely affected one of his substantial rights. *Id.* at *15.

The court also merged several of Petitioner's convictions. *Id.* at *1, 15-21. The court concluded that while the State attempted to elect two discrete incidents of criminal conduct for Counts 1 and 2, the proof showed only a single incident of criminal conduct. *Id.* at *18. The court then merged Counts 1 and 2 into a single conviction for aggravated sexual battery. *Id.* at *19. For Counts 3 and 4, the court concluded that the touchings constituted a single offense because they occurred in short succession as part of a single criminal episode. *Id.* at *21. The court therefore merged the convictions in Counts 3 and 4 into a single conviction for aggravated sexual battery. *Id.* For Counts 6 and 7, the court again concluded that the State's election split a single episode of criminal conduct into two offenses and merged the convictions into a single conviction for rape of a child. *Id.* at *20. The court remanded the case for a new sentencing hearing. *Id.* at *24.

The Tennessee Supreme Court declined Petitioner's application for discretionary review of this decision. (ECF No. 37-21, Page ID# 2380.) On remand, the trial court imposed an effective sentence of forty years. (ECF No. 37-22, Page ID# 2455.)

Petitioner timely filed a petition for post-conviction relief, along with two supplements to the petition. (*Id.* at Page ID# 2442-54, 2456-59, 2461-63.) At the evidentiary hearing, post-conviction counsel attempted to call a member of the jury from Petitioner's trial to testify that the jurors viewed the forensic interviews during deliberations. (ECF No. 37-23, Page ID# 2477-82.) The post-conviction court ruled that the juror's testimony was inadmissible under Tenn. R. Evid. 606.[3] (*Id.* at Page ID# 2480, 2481, 2483.) Following the evidentiary hearing, the post-conviction court denied post-conviction relief. (ECF No. 37-22, Page ID# 2465-68.)

On post-conviction appeal to the Tennessee Court of Criminal Appeals, Petitioner argued *inter alia* that trial counsel was ineffective by failing to object to the admission of the victims' forensic interviews. *Guilfoy v. State*, No. M2014-01619-CCA-R3-PC, 2015 WL 4880182, at *1, 11-12 (Tenn. Crim. App. Aug. 14, 2015) ("*Guilfoy II*"), *perm. app. denied* (Tenn. Feb. 18, 2016). He asserted that he was prejudiced because the jury considered the interviews as substantive evidence, which violated his right to a unanimous jury verdict and his protection against double jeopardy. *Id.* Specifically, he argued that the jury's verdicts were premised on a summary comment from the forensic interviewer in T.A.'s interview instead of the evidence at trial. *Id.*

The court limited its analysis to the admission of T.A.'s forensic interview because Petitioner failed to allege any prejudice stemming from the introduction of J.A.'s forensic interview. *Id.* The court concluded that Petitioner was not deprived of his right to a unanimous jury verdict because the State made an election of offenses that corresponded to J.A.'s and T.A.'s

[3] Petitioner did not challenge the post-conviction court's ruling in the post-conviction appeal.

trial testimony. *Id.* at *12. The court therefore concluded that Petitioner had failed to establish prejudice based on trial counsel's failure to object to the interviews. *Id.*

Petitioner filed a petition to rehear, which the Court of Criminal Appeals denied. (ECF Nos. 37-35, 37-36.) The Tennessee Supreme Court declined discretionary review of this decision. (ECF No. 37-39, Page ID# 3536.)

On January 17, 2017, Petitioner filed a petition for writ of error coram nobis. (ECF No. 37-40, Page ID# 3584-3602.) He attached the affidavit of jury foreperson Hilary Hoffman, who attested that the jury viewed the video recordings of the victims' forensic interviews.[4] (*Id.* at Page ID# 3603-04.) The coram nobis court dismissed the petition, finding that it was time-barred and failed to state a cognizable claim for relief. (*Id.* at Page ID# 3652-54.)

On appeal, the Tennessee Court of Criminal Appeals affirmed the judgment of the coram nobis court. *Guilfoy v. State*, No. M2017-01454-CCA-R3-ECN, 2018 WL 3459735, at *1 (Tenn. Crim. App. July 17, 2018) ("*Guilfoy III*"), *perm. app. denied* (Tenn. Nov. 14, 2018). The Tennessee Court of Criminal Appeals also denied Petitioner's petition to rehear. (ECF No. 37-48, Page ID# 3791-92.) The Tennessee Supreme Court declined discretionary review. (ECF No. 37-51, Page ID# 3830.)

Shortly after he filed his petition for writ of error coram nobis in state court, Petitioner filed a petition for writ of federal habeas corpus under 28 U.S.C. § 2254 in the United States District Court for the Western District of Tennessee, along with a supporting memorandum. (ECF No. 1, Page ID# 1-22; ECF No. 2, Page ID# 130-178.) On February 8, 2017, Petitioner filed a motion to stay the proceedings pending the exhaustion of his coram nobis proceedings. (ECF No. 6, Page

[4] In the affidavit, Ms. Hoffman's first name is spelled "Hillary," but there is a strike through the second "l" in her name. (ECF No. 37-ECN TR, Page ID# 67-68.) Therefore, Respondent will utilize the corrected spelling of her name.

ID# 184-87; ECF No 7, Page ID# 188-99.) On August 15, 2017, the district court granted the motion to stay and administratively closed the case. (ECF No. 11, Page ID# 211-12.)

On December 7, 2018, Petitioner moved to lift the stay and to reopen the case. (ECF No. 12, Page ID# 213-15.) On December 13, 2018, the district court granted the motion to lift the stay and transferred the case to this Court. (ECF No. 13, Page ID# 216-17.)

On June 5, 2019, Petitioner filed an amended habeas petition and a supporting memorandum. (ECF No. 31, Page ID# 254-78; ECF No. 32, Page ID# 343-411.) Respondent now submits this answer to the amended petition.

IV. FACTUAL SUMMARY

A. Trial

At trial, the victims' mother ("Mother") testified that she and her three daughters, J.A., T.A, and A.A., all lived in a house in Nashville on Saturn Drive with the victims' grandfather. *Guilfoy I*, 2013 WL 1965996, at *2. Mother was friends with Petitioner, and he would visit the family at the house on Saturn Drive. *Id.* Petitioner subsequently moved to Missouri, but he would stay with Mother and her family on trips back to Nashville. *Id.*

Mother testified that her daughters slept in the main room of the house, and their sleeping accommodations included a bunk bed, a futon, and a couch that pulled out into the bed. *Id.* She said that J.A. typically slept in the top bunk of the bunk bed. *Id.* Mother knew that Petitioner would sleep in the girls' beds because she would see him in one of their beds in the morning. *Id.*

J.A. testified that Petitioner would sometimes sleep in her bunk with her when he visited. *Id.* at *4. On one occasion, Petitioner touched her "private" with his hand, touching her skin after placing his hand down the front of her pants. *Id.* Petitioner's hand moved, and she got up and went to the bathroom. *Id.* Upon her return, she went to sleep with one of her sisters. *Id.*

J.A. testified about a separate occasion in which she was sitting on Petitioner's lap on the couch. *Id.* Petitioner placed his hand down the back of her pants and then slid his hand under her legs. *Id.* He touched J.A.'s "private" on her skin. *Id.* J.A. referred to the genital region on a drawing of a girl's body as the area she referred to as her "private." *Id.*

T.A. also testified that Petitioner slept in her bed at the house on Saturn Drive when he visited. *Id.* at *5. T.A. said that in one incident, Petitioner got into her bed, "rolled [her] over and put his hand down [her] pants." *Id.* Petitioner touched her "private part" with his finger on her skin, and Petitioner's finger "went inside [her] private part." *Id.* T.A. left her bed and got into bed with her older sister. *Id.*

T.A. testified that on a different occasion, she was in her bunk bed when Petitioner started touching her. *Id.* at *6. She attempted to get up, but Petitioner held her down. *Id.* He touched her private part with his finger, and T.A. "just started crying." *Id.* She got up and said she needed to go to the bathroom, and she did not return. *Id.* T.A. said that Petitioner touched her on "[t]he inside." *Id.* She said that this episode made her "want to puke." *Id.*

In response to the abuse, T.A. began wearing khaki pants to bed because they did not have an elastic waistband. *Id.* On one occasion when she was wearing these pants, Petitioner touched her. *Id.* He unzipped and unbuttoned her pants and "touched [her] with his finger on [her] private part on [her] skin on the inside." *Id.*

Mother testified that in May 2008, she, the girls, and Petitioner planned a camping trip to celebrate the birthdays of J.A. and Mother. *Id.* at *2. Both J.A. and T.A. testified that the camping trip occurred after the touchings about which they testified. *Id.* at *4, 6.

Mother later decided to leave Nashville and move to Clarksville. *Id.* at *3. Petitioner had expressed an interest in real estate, and when Mother told him she was interested in moving to

Clarksville, he purchased a home there and allowed her to rent it from him. *Id.* The rent was $700 a month, and Petitioner told her that she "wouldn't ever have to worry about just being kicked out of the house." *Id.* Mother said that Petitioner knew she might not always be able to pay rent and that he was welcome to spend the night at the house. *Id.*

The family moved to Clarksville in September 2008. *Id.* Mother could not pay September's rent, so Petitioner said she could pay it later by increasing the rent in subsequent months. *Id.* Mother paid part of the rent in October and November, and she paid the full rent in December and January. *Id.* In early March 2009, Petitioner told Mother that he was struggling to make his mortgage payments. *Id.* at *4. She denied that he told her that if she could not pay the rent, he would have to get a tenant who could afford rent. *Id.*

After the family moved to Clarksville, J.A. told her grandfather about how Petitioner abused her. *Id.* at *4. Her grandfather urged her to tell Mother about the abuse, but she declined because she did not think Mother would believe her. *Id.*

One morning in Clarksville, after the victims had taken the school bus to school, the victims' grandfather told Mother that J.A. had told him "what happened." *Id.* at *3. After speaking with her father, Mother picked up the victims from school. *Id.* She spoke with J.A. and T.A. and subsequently called 911. *Id.* She testified that she called police about the allegations on or around March 15, 2009. *Id.*

J.A. testified that after her grandfather spoke with Mother, she told Mother about the abuse. *Id.* at *4. She said that she and T.A. then went to school but that Mother came and picked them up a short time later. *Id.* Mother took the girls home and "called the cops." *Id.* J.A. said that she was later interviewed by a woman named Anne and that the interview was videotaped. *Id.* She

also said that she visited a doctor. *Id.* She did not remember what she said to the doctor, but she testified that she would have told the truth. *Id.*

T.A. testified that she remembered J.A. telling her grandfather about the abuse, and she recalled speaking with Mother as the girls waited for the bus. *Id.* at *6. T.A. testified that J.A. told Mother what Petitioner had done, and Mother, J.A., and T.A. all started to cry. *Id.* However, the girls got on bus and went to school. *Id.*

T.A. said that Mother later picked them up early from school, and they went to the District Attorney's Office. *Id.* At the office, T.A. spoke with Anne Fisher. *Id.* After the interview with Ms. Fisher, T.A. was examined by a doctor. *Id.*

Mother testified that as part of the investigation into the abuse, she made several recorded phone calls to Petitioner in March 2009. *Id.* at *3. She said that she and her family lived in the Clarksville house for about one more month. *Id.*

Hollye Gallion, a pediatric nurse practitioner with the Our Kids Center in Nashville, performed medical examinations on J.A. and T.A. on April 21, 2009. *Id.* at *7. In conjunction with the exams, Ms. Gallion reviewed the medical history reports that the victims gave to a social worker. *Id.* She said that J.A. reported that "a guy named Tim" had touched the outside of her buttocks and the outside of her "tootie" with his hands. *Id.* J.A. explained that she "pee[d]" out of her "tootie." *Id.* J.A. reported that the touching occurred in her "old house in Nashville" and that she was around six or seven years old at the time of the abuse. *Id.*

Ms. Gallion testified that J.A.'s physical examination was "normal," and she did not find "any injuries or concerns of infection." *Id.* She described the results of the physical examination as consistent with J.A.'s reported medical history, adding that "[t]ouching typically doesn't leave any sort of evidence or injury." *Id.*

Ms. Gallion said that T.A. reported in her medical history that Petitioner had touched the outside of her "too-too" with her hand, and T.A. said that she "pee[d]" from her "too-too." *Id.* After they physical examination, Ms. Gallion concluded that T.A.'s genital area and "bottom" "looked completely healthy and normal." *Id.* Ms. Gallion said that T.A.'s "physical exam was very consistent with what her history was." *Id.*

Anne Fisher Post was a forensic interviewer at the Montgomery County Child Advocacy Center. *Id.* at *8. She testified that she conducted forensic interviews of J.A. and T.A. *Id.* These interviews were recorded and introduced as evidence at trial, although they were not played for the jury in open court. *Id.*

The defense first called Francene Guilfoy, Petitioner's mother. *Id.* at *9. She testified that Petitioner moved to Nashville in August or September 2005 for an internship at Sony Records. *Id.* After the internship ended in January 2006, Petitioner returned to his parents' house in Missouri. *Id.* Petitioner obtained a "mobile marketing" job in May 2007, which required him to travel to various events to promote a client's product. *Id.* Ms. Guilfoy said that Petitioner traveled to Nashville "[p]eriodically" in the time period between returning to Missouri and obtaining his new job. *Id.* Ms. Guilfoy testified that Petitioner purchased a rental property in Tennessee in 2008. *Id.*

Ms. Guilfoy said that Petitioner lived with her and her husband between December 2008 and March 2009. *Id.* Petitioner was unemployed, and Ms. Guilfoy described him as "depressed." *Id.* She testified that in March 2009, she overheard Petitioner and his brother get into a heated argument over money that Petitioner's brother owed him. *Id.*

Ms. Guilfoy said that Petitioner went to Tennessee in March 2009. *Id.* Petitioner said that the purpose of his visit was "to confront his tenant about the rent situation," and Ms. Guilfoy knew that Mother was his tenant. *Id.*

Ms. Guilfoy testified that she knew when Petitioner returned to visit Nashville, he would sometimes stay with Mother. *Id.* She was also aware that Petitioner slept with T.A. and J.A. *Id.* She said Petitioner told her that it was "uncomfortable," that he did not "like it," and that "he told [Mother] to stop it." *Id.*

Matt Jaboor testified that he went with Petitioner to Clarksville to assist with work on the rental house in January 2009. *Id.* Mr. Jaboor described T.A. and J.A. as excited to see Petitioner, and Mr. Jaboor said that the victims gave Petitioner a hug. *Id.* Mr. Jaboor said that the girls were constantly trying to help and "to be around" Mr. Jaboor and Petitioner. *Id.* Mr. Jaboor said that he slept in the basement alone, and Petitioner slept upstairs. *Id.* On one occasion, Mr. Jaboor went upstairs to use the bathroom and observed Petitioner sleeping on a couch alone. *Id.*

Tony Guilfoy, Petitioner's older brother, testified that he had met Mother on three occasions. *Id.* at *10. The victims were present for one occasion and were excited to see Petitioner. *Id.* Tony had a similar job to Petitioner's in mobile marketing, and he said that he was allotted a per diem for food and lodging when he traveled.[5] *Id.* He testified that he was allowed to keep the per diem if he stayed with a friend instead of at a hotel. *Id.* Tony testified that on March 24, 2009, before Petitioner received a phone call from Mother, he and Petitioner had a heated argument about money. *Id.*

[5] Several witnesses share the surname "Guilfoy." To avoid confusion, Respondent will refer to these witnesses by their first names. Respondent intends no disrespect by doing so.

Patrick Guilfoy, Petitioner's father, testified that he knew of Petitioner's rental property in Clarksville. *Id.* Patrick was aware that, beginning in December 2008, Petitioner was not being paid rent for this property. *Id.* Patrick said that Petitioner traveled to Clarksville to check on the rental property just before March 12, 2009. *Id.* He testified that he told Petitioner he should evict the tenant for failure to pay rent and that he should get rid of the house. *Id.* Patrick said that Petitioner responded that he knew what he should do but that the tenant was his friend. *Id.*

B. Post-Conviction Hearing

At the post-conviction hearing, Bernard McAvoy, ("trial counsel"), testified that he did not object to the introduction of the victims' forensic interviews and did not request a limiting instruction.[6] *Guilfoy II*, 2015 WL 4880182, at *7. Trial counsel recalled reviewing the forensic interviews and redacting references to incidents that occurred outside of Davidson County or involved a third victim, A.A. *Id.*

Trial counsel did not object to the admission of the forensic interviews because he believed that they were admissible as prior consistent statements regarding the victims' credibility after they were impeached. *Id.* He expected the trial court to provide a limiting instruction to the jury and failed to notice that no instruction was given. *Id.*

Trial counsel's theory of defense for the second trial was to illustrate "the implausibility of the allegations." *Id.* He testified that, during the first trial, he cross-examined the victims' mother extensively about the particular dates of the offenses, created a large diagram of these dates, and introduced evidence that Petitioner was not in Nashville on the dates in question. *Id.* Trial counsel

[6] Respondent has limited his summary of the evidence to the testimony germane to the issues raised in the federal habeas petition. A further description of the evidence presented at the post-conviction hearing may be found in the opinion of the Court of Criminal Appeals. *Guilfoy II*, 2015 WL 4880182, at *7-8.

did not use this technique in the second trial because he anticipated that the State would have repaired the weakness in its case regarding the lack of specificity with the dates of the offense and been prepared for trial counsel to challenge the dates. *Id.* His strategy for the second trial was to present the case in a different manner "because if we tried the same case twice the State would be able to anticipate everything we did." *Id.*

Trial counsel confirmed that he did not object to the testimony of Ann Post. *Id.* at *8. He agreed that her testimony could have bolstered the victims' testimony. *Id.*

Petitioner's sister, Kathleen Byers, testified that she attended both trials. *Id.* While the jury was deliberating during the second trial, she asked trial counsel if she had time to get lunch before the jury returned. *Id.* Trial counsel said that she likely had time because the jurors had requested a television and viewing equipment be brought into the jury room so that they could "watch the video." *Id.*

V. APPLICABLE LAW

Under the Antiterrorism and Effective Death Penalty Act ("AEDPA"), when a state court has adjudicated a federal constitutional claim on the merits, the writ of habeas corpus may issue in just two instances: (1) if the state-court decision "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) if the state-court decision was "based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding." 28 U.S.C. § 2254(d)(1)-(2).

A state-court decision is contrary to clearly established federal law if the state court applies a rule that contradicts the governing law set forth by the United States Supreme Court. *Williams v. Taylor*, 529 U.S. 362, 364-65 (2000). Only the decisions of the Supreme Court, and not lower courts, constitute "clearly established federal law." *Lopez v. Smith*, 135 S. Ct. 1, 4 (2014); *Parker*

v. Matthews, 567 U.S. 37, 48-49 (2012). The Supreme Court has held that "'clearly established Federal law' for the purposes of § 2254(d)(1) includes only the holdings, as opposed to the dicta, of this Court's decisions.'" *Woods v. Donald*, 135 S. Ct. 1372, 1376 (2015) (quoting *White v. Woodall*, 134 S. Ct. 1697, 1702 (2014)). Additionally, "clearly established federal law" includes only Supreme Court precedent at the time the state court adjudicated the issue. *Greene v. Fisher*, 565 U.S. 34, 38 (2011).

A state-court decision unreasonably applies federal law "if the state court identifies the correct governing legal principle from the Supreme Court's decisions but unreasonably applies that principle to the facts." *Williams*, 529 U.S. at 364-65. "'[A]n *unreasonable* application of federal law is different from an *incorrect* application of federal law.'" *Harrington v. Richter*, 562 U.S. 86, 101 (2011) (quoting *Williams*, 529 U.S. at 410) (emphasis in *Williams*). A petitioner is not entitled to habeas relief "so long as 'fairminded jurists could disagree' on the correctness of the state court's decision." *Richter*, 562 U.S. at 101 (quoting *Yarborough v. Alvarado*, 541 U.S. 652, 664 (2004)). The role of the habeas court is to "determine what arguments or theories supported . . . the state court's decision; and then it must ask whether it is possible fairminded jurists could disagree that those arguments or theories are inconsistent with the holding in a prior decision of" the Supreme Court. *Richter*, 562 U.S. at 102. "[R]elief is available under § 2254(d)(1)'s unreasonable-application clause if, and only if, it is so obvious that a clearly established rule applies to a given set of facts that there could be no 'fairminded disagreement' on the question." *Woodall*, 134 S. Ct. at 1706-07 (quoting *Richter*, 562 U.S. at 103).

To demonstrate that a state court's adjudication was based on an unreasonable determination of the facts, a petitioner must both establish the "unreasonable determination" and show "that the resulting state court decision was 'based on' that unreasonable determination." *Rice*

v. White, 660 F.3d 242, 250 (6th Cir. 2011). A habeas court may consider only "the record that was before the state court that adjudicated the claim on the merits" when evaluating the merits of an AEDPA claim. *Cullen v. Pinholster*, 563 U.S. 170, 181-82 (2011). A state court's findings of fact are presumed to be correct unless they are rebutted by clear and convincing evidence. *Benge v. Johnson*, 474 F.3d 236, 241 (6th Cir. 2007). The factual determination of a state court "'is not unreasonable merely because the federal habeas court would have reached a different conclusion in the first instance.'" *Burt v. Titlow*, 571 U.S. 12, 15 (2013) (quoting *Wood v. Allen*, 558 U.S. 290, 301 (2010)).

Section 2254(d) "demands an inquiry into whether a prisoner's 'claim' has been 'adjudicated on the merits' in state court; if it has, AEDPA's highly deferential standard kicks in." *Davis v. Ayala*, 135 S. Ct. 2187, 2198 (2015) (quoting *Richter*, 562 U.S. at 103). AEDPA "'erects a formidable barrier to federal habeas corpus relief for prisoners whose claims have been adjudicated in state court.'" *White v. Wheeler*, 136 S. Ct. 456, 460 (2015) (quoting *Burt*, 571 U.S. at 16). The standard for relief under § 2254(d) "is a difficult to meet and highly deferential standard for evaluating state-court rulings, which demands that the state-court decisions be given the benefit of the doubt." *Pinholster*, 563 U.S. at 181 (internal quotation marks and citations omitted).

A federal court may not grant a writ of habeas corpus on behalf of a state prisoner unless, with certain exceptions, the prisoner has exhausted available state remedies by fairly presenting the same federal claim sought to be redressed in a federal habeas court to all levels of state-court review. *See* 28 U.S.C. §§ 2254(b), (c); *see also Pinholster*, 563 U.S. at 181; *Baldwin v. Reese*, 541 U.S. 27, 29 (2004); *Wagner v. Smith*, 581 F.3d 410, 418 (6th Cir. 2009). The exhaustion requirement "reflects a policy of federal-state comity." *Picard v. Connor*, 404 U.S. 270, 275-76 (1971). It is "designed to give the state courts a full and fair opportunity to resolve federal

constitutional claims before those claims are presented to the federal courts." *O' Sullivan v. Boerckel*, 526 U.S. 838, 845 (1999).

In order to properly exhaust a claim, a petitioner must have fairly presented the claim through "one complete round of the State's established appellate review process." *Id.* Tennessee Supreme Court Rule 39 eliminated the need to seek review in the Tennessee Supreme Court in order to "be deemed to have exhausted all available state remedies." Thus, presentation to the Tennessee Court of Criminal Appeals is sufficient for exhaustion under 28 U.S.C. § 2254(b). *See Adams v. Holland*, 330 F.3d 398 (6th Cir. 2003).

The procedural default doctrine is ancillary to the exhaustion requirement. *See Edwards v. Carpenter*, 529 U.S. 446, 452-53 (2000). In general, there are two principal forms of procedural default barring federal habeas corpus review of a petitioner's constitutional claims. *See Seymour v. Walker*, 224 F.3d 542, 549-50 (6th Cir. 2000). First, a claim will be technically exhausted but procedurally defaulted if a petitioner failed to present the claim in state court and there is no longer a state-court remedy available. *See Coleman v. Thompson*, 501 U.S. 722, 732 (1991). Second, a claim is procedurally defaulted if the state court decided the claim "on a state law ground that is independent of the federal question and adequate to support the judgment." *Id.* at 729-30.

In order to excuse either form of procedural default, the petitioner must show "cause for the default and actual prejudice as a result of the alleged violation of federal law, or demonstrate that failure to consider the claims will result in a fundamental miscarriage of justice." *Id.* at 750. Cause for a procedural default depends on some objective factor external to the defense that interfered with the petitioner's efforts to comply with the procedural rule. *Id.* at 752-53; *Murray v. Carrier*, 477 U.S. 478, 488 (1986). A fundamental miscarriage of justice occurs "where a

constitutional violation has probably resulted in the conviction of one who is actually innocent." *Carrier*, 477 U.S. at 496.

VI. ARGUMENT

A. The State Court's Rejection of Petitioner's Claim That Trial Counsel was Ineffective by Failing to Prevent the Jury From Watching the Recordings of the Victims' Forensic Interviews was not Unreasonable Under 28 U.S.C. § 2254(d).

Petitioner argues that trial counsel was ineffective by failing to prevent the jury from watching the videotaped forensic interviews of T.A. and J.A. during deliberations and from considering them as substantive evidence. (ECF No. 31, Page ID# 260-64; ECF No. 32, Page ID# 367-86.) Petitioner exhausted this claim in state court, and it is properly before this Court on habeas review.

Claims of ineffective assistance of counsel are analyzed under the two-part test established in *Strickland v. Washington*, 466 U.S. 668 (1984). First, a petitioner must show that trial counsel performed deficiently, which means "that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the [petitioner] by the Sixth Amendment." *Id.* at 687. This is often referred to as the "performance prong." Second, a petitioner "must show that the deficient performance prejudiced the defense," which "requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Id.* This is often referred to as the "prejudice prong."

"Surmounting *Strickland's* high bar is never an easy task." *Padilla v. Kentucky*, 559 U.S. 356, 371 (2010). The legal standard articulated in *Strickland* is "highly demanding." *Kimmelman v. Morrison*, 477 U.S. 365, 382 (1986). A petitioner must meet both prongs of the test, but courts are not required to conduct an analysis under both; thus, a court need not address the question of

competence if it is easier to dispose of a claim due to lack of prejudice. *Strickland*, 466 U.S. at 697.

To establish that trial counsel's performance was deficient, a petitioner must show that trial counsel's "advice was not 'within the range of competence demanded of attorneys in criminal cases.'" *Strickland*, 466 U.S. at 687 (quoting *McMann v. Richardson*, 397 U.S. 759, 770, 771 (1970)). In other words, a petitioner must demonstrate "that counsel's representation fell below an objective standard of reasonableness." *Strickland*, 466 U.S. at 688. With respect to the prejudice prong, a petitioner must demonstrate a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different," *i.e.*, that "the factfinder would have had a reasonable doubt respecting guilt." *Strickland*, 466 U.S. at 694-95.

The reviewing court's scrutiny of counsel's performance is highly deferential. *Id.* at 689. The court must strongly presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. *Id*. at 690. "Strategic choices by counsel, while not necessarily those a federal judge in hindsight might make, do not rise to the level of a Sixth Amendment violation." *Burton v. Renico*, 391 F.3d 764, 774 (6th Cir. 2004). Only if counsel's acts and omissions, examined within the context of all the surrounding circumstances, were outside the "wide range" of professionally competent assistance, will petitioner meet this initial burden. *Kimmelman*, at 386. The focus is on the adequacy or inadequacy of counsel's actual performance, not counsel's hindsight potential for improvement. *Coe v. Bell*, 161 F.3d 320, 342 (6th Cir. 1998).

"Establishing that a state court's application of *Strickland* was unreasonable under § 2254(d) is all the more difficult" because both standards are "highly deferential." *Richter*, 562 U.S. at 105. When the state court correctly identified and attempted to apply the *Strickland*

standard, review of the decision under AEDPA is "doubly deferential." *Leonard v. Warden, Ohio State Penitentiary*, 846 F.3d 832, 848 (6th Cir. 2017). "The pivotal question" is not whether trial counsel's performance was deficient but "whether the state court's application of the *Strickland* standard was unreasonable." *Richter*, 562 U.S. at 101.

In the post-conviction appeal, Petitioner argued that the admission of the videos as substantive evidence was unlawful, and he asserted that he was prejudiced because the admission of the recordings as substantive evidence deprived him of the right to a unanimous jury verdict and failed to protect him against a double jeopardy violation. (ECF No. 37-30, Page ID# 3176.) ("The prejudice against [Petitioner] included violations of his right to a unanimous verdict and his protections against double jeopardy.") He also argued that the videos included a comment from the forensic interviewer about uncharged conduct, and he contended that the jury could have based its verdict on the interviewer's comment instead of the evidence at trial. (*Id.*) The Court of Criminal Appeals accurately summarized Petitioner's prejudice argument and correctly identified and applied *Strickland* to analyze his claim. *Guilfoy II*, 2015 WL 4880182, at *9, 11-12.

The court observed that Petitioner did not allege any prejudice he suffered from the admission of J.A.'s forensic interview and therefore stated that it would limit its analysis to the admission of T.A.'s forensic interview. *Id.* at *11. The court referenced its holding on direct appeal that the trial court erred by admitting the video but that the record failed to show that the jury ever watched the video. *Id.* at *11 (quoting *Guilfoy I*, 2013 WL 1965996, at *14). The court noted that Petitioner "attempted to correct this gap in the record" by calling Kathleen Byers, who testified that trial counsel informed her that she had time to get lunch because the jury had requested equipment to view the video. *Id.* at *11 n.4.

The court observed that it was unclear from the record why T.A.'s interview was admitted as evidence and that it had previously concluded that the admission of the video was error. *Id.* (citing *Guilfoy I*, 2013 WL 1965996, at *14). However, the court did not address whether trial counsel's performance was deficient. Instead, the court simply focused its analysis on the prejudice prong of *Strickland*.

The court concluded that Petitioner had "failed to demonstrate that he was prejudiced" by the admission of the video as substantive evidence. *Id.* at *12. The court explained that "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." *Id.* The court opined that this election "corresponded to incidents both J.A. and T.A. described in their trial testimony." *Id.* The court therefore concluded that Petitioner had "failed to prove that there was a reasonable probability that the outcome of the trial would have been different had the forensic interview not been introduced as substantive evidence." *Id.*

Petitioner first argues that the state court unreasonably limited its analysis to T.A.'s forensic interview because his brief shows that he challenged the prejudicial effect of both recordings. (ECF No. 32, Page ID# 380-81.) While Petitioner referred to "interviews" and "videos" in the plural form in his brief, T.A.'s forensic interview was the only interview he referenced with any specificity. (ECF No. 37-30, Page ID# 3162-76.) Based on Petitioner's emphasis on T.A.'s forensic interview, and failure to cite to any portions of J.A.'s interview, it was not unreasonable for the state court to interpret his brief as raising only a challenge to T.A.'s forensic interview. In any event, the state court's opinion still addressed the issue of J.A.'s video, as the court concluded that Petitioner failed to establish prejudice because the State's election of

offenses "corresponded to incidents both J.A. and T.A. described in their trial testimony." *Guilfoy II*, 2015 WL 4880182, at *12.

Petitioner next argues that the state court implicitly held that trial counsel's performance was deficient. (ECF No. 32, Page ID# 382.) However, in *Strickland*, the Supreme Court opined that "a court need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies." *Strickland*, 466 U.S. at 697. The Court explained that "[i]f it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed." *Id.*

That is precisely the course that the Court of Criminal Appeals followed here. The court observed that "'[f]ailure to establish either prong [of the *Strickland* test] provides a sufficient basis to deny relief.'" *Guilfoy II*, 2015 WL 4880182, at *11 (quoting *Carpenter v. State*, 126 S.W.3d 879, 886 (Tenn. 2004)). The court then proceeded to analyze Petitioner's claim for prejudice. *Id.* at *11-12. The court's analysis was not an implicit holding that trial counsel was deficient but was instead a proper application of *Strickland's* directive that a court could dispose of a claim based on lack of prejudice alone. And the state court's conclusion that Petitioner failed to establish prejudice was not unreasonable.

The record fully supports the state court's conclusion that Petitioner's right to a unanimous jury verdict was not violated because the State's election of offenses mirrored the trial testimony of J.A. and T.A. As the court explained, "[t]rial courts may admit evidence of other sexual crimes when an indictment charges a number of sexual offenses but does not allege the specific date such offenses occurred." *Guilfoy I*, 2013 WL 4880182, at *10 (citing *State v. Rickman*, 876 S.W.2d 824, 828 (Tenn. 1994). However, the State is then "required 'to elect the particular offenses for

which convictions are sought.'" *Id.* (quoting *State v. Shelton*, 851 S.W.2d 134, 137 (Tenn. 1993)). The election requirement serves three purposes: (1) to permit the defendant to prepare for trial and defend against the specific charges; (2) to provide protection against double jeopardy violations; and (3) to ensure "'that the jury's verdict may not be a mater of choice between offenses, some jurors convicting of one offense and others, another.'" *Id.* (quoting *State v. Burlison*, 501 S.W.2d 801, 803 (Tenn. 1973)).

In short, the election requirement protects a defendant's right to a unanimous jury verdict. *See Shelton*, 851 S.W.2d at 137 ("A defendant's right to a unanimous jury before conviction requires the trial court to take precautions to ensure that the jury deliberates over the particular charged offense, instead of creating a 'patchwork verdict' based on different offenses in evidence.") When the State's election of offenses includes "[a]ny description that will identify the prosecuted offense for the jury," a defendant's right to a unanimous jury verdict is not violated. *Id.* at 138.

Here, the transcript shows that the State's election of offenses clearly corresponded to the testimony of T.A. and J.A. Petitioner was charged in Counts 6-8 with three counts of rape of a child against T.A., and he was charged in Counts 1-4 with four counts of aggravated sexual battery against J.A.[7] (ECF No. 37-8, Page ID# 1186-87, 1184-86.) For Count 6, the State elected an offense when Petitioner touched T.A. "on the inside of her genitals after she tried to get up from her bed, and he held her down by putting his arm across her torso." (*Id.* at Page ID# 1186.) In this incident, [Petitioner] "put his hand down the front of her sleeping pants and moved it around,

[7] The Court of Criminal Appeals merged the convictions in Counts 1 and 2 into a single conviction for aggravated sexual battery; merged the convictions for Counts 3 and 4 into a single conviction for aggravated sexual battery; and merged the convictions for Counts 6 and 7 into a single conviction for rape of a child. *Guilfoy I*, 2013 WL 1965996, at *19, 21, 20.

and she started to cry. This incident occurred on the bottom bunk of the bunk beds." (*Id.*) For Count 7, the State elected an offense when Petitioner touched T.A. "on the inside of her genitals, when he put his hand down the front of her sleep pants and moved it around. This incident concluded when [T.A.] felt like she was going to, quote, puke, and she got up and went to the bathroom." (*Id.*)

At trial, T.A. testified that she frequently slept in "[p]ajama pants, just plain like basketball shorts." (ECF No. 37-6, Page ID# 909.) The sleep pants had a "stretchy," "elastic" waistband, which allowed Petitioner to touch her private by "pull[ing] the pants." (*Id.*) She described an instance of abuse when she was in her bunk bed, and Petitioner entered the room and "started touching" her. (*Id.* at Page ID# 912.) T.A. was wearing "[e]lastic band pants, pajama pants," and Petitioner touched her private part with his finger. (*Id.* at Page ID# 913, 912.) T.A. "tried to get up, but [Petitioner's] hand just went over [her] and like held [her] so [she] couldn't get up." (*Id.* at Page ID# 912.) T.A. said that she started crying after this incident. (*Id.*) T.A. also said that she felt like she wanted "to puke," so she "got up and said [she] had to go to the bathroom and left and stayed away." (*Id.* at Page ID# 913.)

In Count 8, the State elected an incident when Petitioner touched T.A. "on the inside of her genitals after he unbuttoned and unzipped her, quote, uniform pants and put his hand down the front of her pants." (ECF No. 37-8, Page ID# 1187.) At trial, T.A. testified that she began wearing her khaki uniform pants to sleep in an effort to stop the abuse. (ECF No. 37-6, Page ID# 915.) She said that these pants differed from her ordinary pajama pants because they did not "have the elastic and they are buttoned up and zipped up." (*Id.*) T.A. then described an incident that occurred while she was wearing her uniform pants. (*Id.* at Page ID# 916.) T.A. said that Petitioner

"unzipped" and "unbuttoned" her pants while she was on the bunk bed, and he touched the inside of her private part with his finger. (*Id.*)

For J.A., the State elected an incident for Count 1 when Petitioner touched her "on the outside of her genitals on the skin, when he put his hand down the front of her sleeping pants." (ECF No. 37-8, Page ID# 1184-85.) This "incident occurred on the top bunk of the bunk beds in the dining room," and it "concluded when [J.A.] got up and went to the bathroom." (*Id.* at Page ID# 1185.) For Count 2, the State elected an incident when Petitioner touched J.A. "on the outside of her genitals, on the skin, when he put his hand down the front of her sleeping pants." (*Id.*) This "incident occurred on the top bunk of the bunk beds in the dining room, and the incident concluded when [J.A.] got up and moved to her sister's bed." (*Id.*)

At trial, J.A. testified that she sometimes slept in the top bunk of a bunkbed in the dining room. (ECF No. 37-6, Page ID# 822-24.) She said that she typically slept in pajama pants or comfortable shorts. (*Id.* at Page ID# 828.) Her "comfortable shorts" had a "stretchy," elastic waistband. (*Id.*) J.A. recalled an incident when she was in the top bunk, and Petitioner got into her bed and touched her "private" "[o]n the skin." (*Id.* at Page ID# 827.) He placed his hand down the front of J.A.'s pants and "put it on [her] private." (*Id.* at Page ID# 829.) She testified that she "got up and went to the bathroom" and then "went to sleep with [her] sister." (*Id.*) She further testified that Petitioner's hand was on the "[o]utside" of her private. (*Id.* at Page ID# 829-30.)

For Count 3, the State elected an offense when Petitioner touched J.A.'s "buttocks on the skin when he put his hand down the back of her pants as she sat on his lap in the living room." (ECF No. 37-8, Page ID# 1185.) For Count 4, the State elected an offense when Petitioner touched J.A.'s "genitals on the skin when he put his hand down the back of her pants and moved his hand under her buttocks to touch her genitals as she sat on his lap in the living room. (*Id.* at Page ID#

1185-86.) J.A. testified about an incident in which she was sitting on Petitioner's lap on the couch in the living room. (ECF No. 37-6, Page ID# 834, 836.) Petitioner put his hand "in the back of [her] pants" and touched her buttocks. (ECF No. 37-5, Page ID# 834, 835.) He then moved his hand "under [her] legs" and touched her "private" "[o]n the skin." (*Id.* at Page ID# 834-36.)

The State's election of offenses sufficiently described the prosecuted offense for the jury and was sufficient "to ensure that each juror [was] considering the same occurrence." *Shelton*, 851 S.W.2d at 138. Since the election adequately protected Petitioner's right to a unanimous jury verdict, it was not unreasonable for the state court to conclude that Petitioner failed to establish any prejudice based on trial counsel's failure to object to the introduction of the forensic interviews.

Petitioner raises several challenges the state court's conclusions in its order denying his petition to rehear. (ECF No. 32, Page ID# 382-83.) He argues that it was unreasonable for the state court to find that the evidence was sufficient to support his conviction and to state that it would not assume that the jury's verdict was based on the forensic interviews. (*Id.* at Page ID# 382.)

The state court made these findings in response to Petitioner's argument that the state court overlooked or misapprehended the material fact that the jury's verdict on the charges involving T.A. mirrored the forensic interviewer's summary statement instead of T.A.'s trial testimony. (ECF No. 37-36, Page ID# 3449.) He asserted that because T.A.'s testimony described only instances of conduct that included penetration, and the jury convicted him of aggravated sexual battery in Count 8, the jury necessarily based its verdict on the forensic interviewer's summary statement instead of T.A.'s testimony. (*Id.*) In essence, Petitioner was asking the court to conclude that his right to a unanimous jury verdict was violated by attempting to probe into the logic behind

the jury's verdict. However, the court had concluded that Petitioner was not deprived of a unanimous jury verdict because the State's election corresponded to T.A.'s trial testimony and "ensured that the jury was deliberating on the same evidence, not on extraneous evidence admitted at trial." (*Id.* at Page ID# 3450.) Having reasonably rejected Petitioner's argument that he suffered prejudice because he was denied the right to a unanimous jury verdict, it was not unreasonable for the court to further decline Petitioner's request to revisit that conclusion by improperly speculating as to the reasoning for the jury's verdict. *See State v. Davis*, 466 S.W.3d 49, 76 (Tenn. 2015) (stating that in the case of inconsistent verdicts, the court would "'not upset a seemingly inconsistent verdict by speculating as to the jury's reasoning if we are satisfied that the evidence establishes guilt of the offense upon which the conviction was returned'") (quoting *Wiggins v. State*, 498 S.W.2d 92, 94 (Tenn. 1973)).

Petitioner next argues that the state court's decision that the forensic interviews did not affect the verdict was based on an unreasonable determination of the facts because the jury foreperson was prepared to testify that the jury viewed the videos during deliberations. (ECF No. 32, Page ID# 383.) But the jury foreperson did not in fact testify at the post-conviction hearing. Although Petitioner could have challenged the post-conviction court's ruling regarding the admissibility of the jury foreperson's testimony on post-conviction appeal, he did not do so. It was therefore not unreasonable for the court to conclude that "Petitioner has presented no proof, and we will not assume, that the jury's verdict was based on the forensic interviewer's summary statement as opposed to T.A.'s trial testimony." (ECF No. 37-36, Page ID# 3450.)

Finally, Petitioner contends that the state court's decision was unreasonable because the court later relied on the forensic interviews to conclude that the admission of Anne Post's

testimony did not prejudice Petitioner.[8] (ECF No. 32, Page ID# 383-84.) Petitioner points to the state court's observations "'that the medical evidence did not rule out the possibility of abuse'" and that the "victims told several people about the abuse, including Ms. Post", and he asserts that the only statements the victims made to Ms. Post to which the jury were exposed were the videotaped forensic interviews. (*Id.* at Page ID# 384 (quoting *Guilfoy II*, 2015 WL 4880182, at *16).)

Contrary to Petitioner's assertion, there is no indication that the state court relied on the forensic interviews when addressing Ms. Post's testimony. The court does not cite to any portion of the forensic interviews, let alone state that the interviews support the conclusion that the victims spoke to Ms. Post. *Guilfoy II*, 2015 WL 4880182, at *16. Moreover, the state court's conclusion is supported solely by the testimony at trial.

J.A. agreed that she talked to "a lady named Anne" who asked her "a whole bunch of questions about the things that [Petitioner] had done[.]" (ECF No. 37-6, Page ID# 848-49.) T.A. also agreed that she spoke with someone named "Anne Fisher," and she agreed that Ms. Fisher asked her "a whole lot of questions about [Petitioner] and the stuff that happened with him[.]"[9] (*Id.* at Page ID# 925.) And Ms. Post testified that she was a forensic interviewer, that she interviewed children regarding allegations of abuse, and that she conducted forensic interviews with J.A. and T.A. (ECF No. 37-8, Page ID# 1178, 1182.)

The state court's opinion and the testimony at trial illustrates that the court did not employ an "inconsistent, arbitrary use of the videotaped interviews" in analyzing Petitioner's claim of

[8] In Claim 3 of the amended petition, Petitioner argues that trial counsel was ineffective by failing to object to portions of Ms. Post's testimony. Respondent will fully address this argument *infra* in Section VI.C.

[9] The record reflects that Ms. Post's full name is "Anne Fisher Post." (ECF No. 37-7, Page ID# 63.)

ineffective assistance of counsel. (ECF No. 32, Page ID# 384.) The state court correctly identified Petitioner's prejudice argument to allege that he was deprived of the right to a unanimous jury verdict, and the court concluded that the State's proper election of offenses preserved this right. When viewed through the doubly deferential lens of AEDPA and *Strickland*, the state court's decision was not unreasonable. Petitioner is not entitled to relief, and the Court should deny Claim 1.

B. Petitioner's Claims That he was Denied the Rights to an Impartial Jury, Confrontation, and Cross-Examination are Procedurally Defaulted, and he Cannot Show Cause and Prejudice to Excuse the Default.

Petitioner argues that he was denied his rights to an impartial jury, confrontation, cross-examination, and the assistance of counsel, in violation of the Sixth and Fourteenth Amendments to the United States Constitution, when the trial court allowed the jury to view the videotaped forensic interviews of J.A. and T.A. (ECF No. 31, Page ID# 265-67; ECF No. 32, Page ID# 386-402.) The Court should dismiss this claim as procedurally defaulted.

Petitioner states that he exhausted this claim in state court via his error coram nobis proceedings. (ECF No. 32, Page ID# 387-88.) While his appellate brief includes an argument that he was denied the right to a trial by an impartial jury, (ECF No. 37-43, Page ID# 3718-19), it does not include any arguments that he was denied the rights of confrontation, cross-examination, or the effective assistance of counsel. More importantly, a petition for writ of error coram nobis is a state law remedy and not a means for exhausting a federal claim. It is a particularly fact-intensive remedy, as relief is available based only on newly discovered evidence and a finding that a defendant was not at fault for failing to present the evidence at the proper time and "that such evidence may have resulted in a different judgment." Tenn. Code Ann. § 40-26-105(b). Therefore,

Petitioner failed to fairly present these claims in state court and did not exhaust state-court remedies.

At this time, Petitioner may no longer raise these claims in a petition for post-conviction relief due to the one-year statute of limitations, the "one petition" rule, and the rule that a ground for relief is waived if it could have been but was not presented in a prior proceeding. Tenn. Code Ann. § 40-30-102(a) (stating that a petition for post-conviction relief must be filed within one year of the date of the final action of the highest state appellate court to which an appeal is taken); Tenn. Code Ann. § 40-30-102(c) (providing that the post-conviction statute contemplates the filing of only one petition); Tenn. Code Ann. § 40-30-106(g) (stating that "[a] ground for relief is waived if the petitioner personally or through an attorney failed to present it for determination in any proceeding before a court of competent jurisdiction in which the ground could have been presented unless" one of two narrow exceptions apply).

Petitioner failed to present these claims in state court, and he no longer has any available state-court remedies. Therefore, these claims are technically exhausted but procedurally defaulted. *See Atkins v. Holloway*, 792 F.3d 654, 657 (6th Cir. 2015) ("[W]hen a petitioner fails to present a claim in state court, but that remedy is no longer available to him, the claim is technically exhausted, yet procedurally defaulted.") Petitioner makes no argument that cause and prejudice exist to excuse the default of his claims that he was denied the rights of confrontation, cross-examination, and counsel. Accordingly, the Court should dismiss these allegations as procedurally defaulted.

Regarding cause and prejudice to excuse the default of his claim that the jury was exposed to prejudicial extraneous information, Petitioner argues that "ineffective assistance of post-conviction counsel can establish cause to excuse a Tennessee defendant's procedural default of a

substantial claim of constitutional dimension." (ECF No. 32, Page ID# 398-99.) He asserts that he can show cause and prejudice based on the ineffective assistance of his appellate and post-conviction counsel to raise a claim that he was denied his Sixth Amendment right to an impartial jury because the jury was exposed to extraneous information. (*Id.* at Page ID# 399, 401.) This argument is unavailing.

Ineffective assistance of post-conviction counsel cannot serve as cause to excuse the default of any substantial claim of "constitutional dimension," as Petitioner contends. (ECF No. 32, Page ID# 398-99.) In *Martinez v. Ryan*, the Supreme Court held that the ineffective assistance of post-conviction counsel may provide cause to excuse the procedural default of an *ineffective-assistance-of-trial-counsel claim.* 566 U.S. 1, 9 (2012) (Emphasis added). "To overcome the default, a [petitioner] must . . . demonstrate that the underlying ineffective-assistance-of-trial-counsel claim is a substantial one, which is to say that the [petitioner] must demonstrate that the claim has some merit." *Id.* at 14 (citing *Miller-El v. Cockrell*, 537 U.S. 322 (2003)). In *Trevino v. Thaler*, the Court held that *Martinez*'s exception also applies when a state's procedural framework "makes it highly unlikely in a typical case that a defendant will have a meaningful opportunity to raise a claim of ineffective assistance of trial counsel on direct appeal." *Id.* at 569 U.S. 413, 429 (2013). The Sixth Circuit has held that the *Martinez*/*Trevino* rule applies in Tennessee. *Sutton v. Carpenter*, 745 F.3d 787, 792 (6th Cir. 2014).

Significantly, *Martinez* applies only to ineffective assistance of trial counsel claims, and it does not extend to other claims of error. *See Abdur'Rahman v. Carpenter*, 805 F.3d 710, 714 (6th Cir. 2015). Petitioner's argument that post-conviction counsel was ineffective by failing to raise a claim that the jury was exposed to extraneous information in violation of Petitioner's Sixth

Amendment rights does not allege a claim of ineffective assistance of trial counsel. (ECF No. 32, Page ID# 401-02.) Therefore, *Martinez* does not apply to excuse the default.

Martinez also would not apply to post-conviction counsel's failure to raise a claim of ineffective assistance of direct appeal counsel. In *Davila v. Davis*, 137 S. Ct. 2058, 2065 (2017), the Supreme Court expressly declined to extend *Martinez* "to allow a federal court to hear a substantial, but procedurally defaulted, claim of ineffective assistance of appellate counsel when a prisoner's state postconviction counsel provides ineffective assistance by failing to raise that claim."

Finally, *Martinez* would not apply to Petitioner's assertion that post-conviction appellate counsel was ineffective by failing to challenge the post-conviction court's ruling on the admissibility of Ms. Hoffman's testimony. (ECF No. 32, Page ID# 400.) "The Court in *Martinez* was clear that its exception only applied (1) during *initial-review* collateral proceedings and (2) to excuse default for claims of ineffective assistance of counsel at *trial*." *Young v. Westbrooks*, 702 F. App'x 255, 268 (6th Cir. 2017) (citing *Martinez*, 566 U.S. at 15) (emphasis in *Young*). Therefore, Petitioner's challenge to the performance of his post-conviction appellate attorney would not fall within the ambit of *Martinez*. *See Young*, 702 F. App'x at 268 ("Since Young takes issue with his post-conviction *appellate* counsel's failings, not the performance of his *initial-review* counsel, the *Martinez-Trevino* exception cannot apply to excuse the default of *any* of his claims, be they claims of ineffectiveness of trial or appellate counsel.") (Emphasis in original).

Since Petitioner cannot show cause and prejudice to excuse the default of this claim, the Court should dismiss it as procedurally defaulted.

C. The State Court's Conclusion That Petitioner was not Prejudiced by the Admission of the Testimony of Anne Post was not Unreasonable Under 28 U.S.C. § 2254(d).

Petitioner argues that trial counsel was ineffective by failing to object to the improper opinion testimony of Anne Post. (ECF No. 31, Page ID# 268-70; ECF No. 32, Page ID# 403-09.) Petitioner fully exhausted this claim in state court, and it is properly before this Court on habeas review.

At trial, the State asked Ms. Post the following question: "What is your experience in the area of interviewing children who have perhaps been subjected to a number of instances of abuse over a fairly lengthy period of time, beginning when they are very young? Is it realistic to expect that you'll get every detail from every incident?" (ECF No. 37-7, Page ID# 1181.) Ms. Post answered:

> 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 [from] 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.

(*Id.* at Page ID# 1181-82.)

The Court of Criminal Appeals concluded that Ms. Post's testimony was admitted in error but that the error was harmless. *Guilfoy II*, 2015 WL 4880182, at *16. The court explained that she did not testify as an expert, but her testimony was "specialized knowledge" she gained from her experience as a forensic interviewer. *Id.* The court noted that there was nothing in the record to indicate that trial counsel made a strategic decision not to object, but the court did not conclude that trial counsel was deficient. *Id.* Instead, the court focused on the prejudice prong of *Strickland*,

opining that "[e]ven if this were deficient performance on the part of trial counsel, the Petitioner has failed to establish any resulting prejudice." *Id.*

The court noted that Ms. Post's testimony was limited to "the narrow issue of why the victims could not provide details of when the events occurred." *Id.* The court observed that her testimony "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 remarked that while there was no conclusive medical evidence of sexual abuse, the medical evidence did not eliminate the possibility of abuse. *Id.* The court further noted that the victims told their grandfather, their mother, Ms. Post, and Ms. Gallion about the abuse over a period of several weeks, in addition to testifying about the abuse at the first trial. *Id.* The court pointed out that trial counsel "specifically addressed the inconsistencies between their testimonies at both trials during cross-examination." *Id.* The court therefore concluded that "Petitioner has failed to demonstrate that he was prejudiced by trial counsel's failure to object to Ms. Post's testimony." *Id.*

Petitioner asserts that the state court implicitly held that trial counsel was deficient. (ECF No. 32, Page ID# 407.) However, the fact that the state court only performed an analysis of prejudice merely shows that it followed *Strickland*'s directive that a court may dispose of a claim on the basis of a lack of prejudice alone. *Strickland*, 466 U.S. at 697. And the state court's conclusion that Petitioner failed to establish prejudice was not unreasonable.

Here, Ms. Post did not attempt to vouch for the credibility of the victims, nor did she address any of the inconsistencies in the victims' description of the abuse. She also did not attempt to show that the victims' allegations were plausible, nor did she offer testimony that the victims had exhibited residual characteristics or behavioral traits similar to other victims of such abuse.

Cf. State v. Ballard, 855 S.W.2d 557, 561-63 (Tenn. 1993) (concluding that expert witness testimony that victims exhibited "symptom constellations" consistent with sexual abuse was reversible error). Instead, as the state court observed, she only addressed the issue of why the victims could not provide details of when the abuse occurred.

Moreover, while there was no conclusive medical evidence that the victims had been sexually abused, the evidence did not exclude this possibility. Ms. Gallion testified that J.A.'s physical examination "was completely consistent" with her medical history in which she said that she had been touched on her buttocks and her private. (ECF No. 37-8, Page ID# 1159, 1158.) She explained that just because a physical examination was "normal" did not "mean that the touching didn't occur." (*Id.* at Page ID# 1159.) She further explained that "[t]ouching typically doesn't leave any sort of evidence or injury," so she would not have expected to find injuries to the victim in her medical examinations. (*Id.* at Page ID# 1160, 1159.)

Ms. Gallion also testified that T.A.'s physical examination was not inconsistent with the history that she had been touched in her private area. (*Id.* at Page ID# 1162-63.) She explained that children who had alleged sexual penetration "[t]ypically . . . also have completely normal exams." (*Id.* at Page ID# 1163.) She said it was "[a]bsolutely" possible for digital penetration of the vagina to have occurred without any resulting injury. (*Id.* at Page ID# 1165.)

Finally, the record fully supports the state court's determination that the victims told multiple people about the abuse over a period of several weeks. J.A. testified that she initially told her grandfather about the abuse. (ECF No. 37-6, Page ID# 842, 844.) J.A. and T.A. both testified that the victims told Mother about the abuse. (*Id.* at Page ID# 846-47, 923.) J.A. and T.A. further testified that they told Ms. Post about the abuse. (*Id.* at Page ID# 848-49, 925.) And Ms. Gallion testified that when both J.A. and T.A. came for medical examinations, a social worker interviewed

them to obtain a medical history. (ECF No. 37-8, Page ID# 1156, 1160.) J.A. and T.A. both indicated that Petitioner had touched them in their private areas. (*Id.* at Page ID# 1156-57, 1161.)

Under the doubly deferential lens of AEDPA and *Strickland*, the state court's rejection of Petitioner's ineffective-assistance-of-counsel claim was not unreasonable. Petitioner is not entitled to relief, and the Court should deny Claim 3.

VII. CONCLUSION

For the above-argued reasons, the Court should dismiss the habeas petition with prejudice.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that the foregoing Answer was filed electronically on October 1, 2019. A true and correct copy of that filing will be electronically forwarded via the ECF system to:

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