IN THE UNITED STATES DISTRICT COURT
FOR THE 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, Northwestern Correctional Complex,	)	**Honorable Eli J. Richardson**
	)	**Honorable Magistrate Barbara D. Holmes**
Respondent.	)	

PETITIONER'S REPLY IN SUPPORT OF
AMENDED PETITION FOR WRIT OF HABEAS CORPUS

Now comes Petitioner, Timothy Guilfoy, by and through his attorneys, Kathleen T. Zellner & Associates, P.C., and for his reply in support of his amended petition for writ of habeas corpus, states as follows:

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

The state refused to disclose a copy of the videotaped forensic interviews of J.A. and T.A. to the defense prior to trial on the basis that the interviews were not evidence the state would use at trial. (ECF No. 37-1 at 32 ("Simply put, statements of witnesses are not generally discoverable. The [recorded interview] is nothing more

than a statement of a prospective witness.")). Nevertheless, the state asked that the discs of the interviews be admitted as exhibits "for identification purposes" during its case-in-chief. (ECF No. 37-8 at 69–71). During closing argument, the state invited the jury to view the recorded interviews during deliberations and argued that it should find Petitioner guilty based, in part, on the interviews. (ECF No. 37-9 at 3–4, 57). The jury made a request for equipment to watch the interviews during deliberations and subsequently watched them prior to rendering a verdict. (ECF No. 31-10).

Petitioner's trial attorney did not object to the state's reference to, and/or invitation for, the jury to watch the recorded interviews, even though the interviews were clearly inadmissible under Tennessee law. Because the evidence was inadmissible, trial counsel's failure to object constitutes deficient performance. Counsel's deficient performance allowed the state to improperly bolster T.A.'s and J.A.'s trial testimony. Because the state's case hinged on the accusers' credibility and the evidence was closely balanced, counsel's deficient performance prejudiced the defense. Petitioner was therefore denied effective assistance of counsel as secured by the Sixth Amendment.

In both Petitioner's direct and postconviction appeals, the state appellate court concluded that the recorded interviews were improperly admitted. (ECF No. 37-18 ("[T]he record clearly demonstrates that the trial court erred in admitting the recordings of the interviews into evidence[.]"); ECF No. 37-33 at 17). However, the court denied relief because, it held, (1) Petitioner failed to identify any prejudice from

the admission of J.A.'s recorded interview, and (2) the details of each elected offense corresponded to incidents both J.A. and T.A. testified to at trial. (ECF No. 37-33 at 17). For the reasons set forth in Petitioner's amended petition and memorandum, the state appellate court's denial of relief involves both an unreasonable application of clearly established Federal law and is based on an unreasonable determination of the facts. 28 U.S.C. § 2254(d). (ECF No. 31; ECF No. 32 at 25–44).

Respondent's argument that Petitioner failed to identify prejudice caused by the jury viewing J.A.'s recorded interview is belied by the record

First, Respondent contends that the appellate court reasonably concluded that Petitioner did not identify the prejudicial effect of J.A.'s interview because he did not reference it with specificity in his appellate brief. (ECF No. 39 at 21). Respondent's argument is not supported by the record. Petitioner argued in his brief that *both* T.A.'s and J.A.'s recorded interviews were inadmissible prior consistent statements (ECF No. 37-30 at 32–35) and/or inadmissible hearsay. (ECF No. 37-30 at 35–42). It is well established under Tennessee law that prior consistent statements are ordinarily inadmissible because their admission poses a danger that the jury would be influenced by the repetitive nature or content of the out-of-court statements instead of the in-court, under-oath testimony. *E.g.*, *State v. Tizard*, 897 S.W.2d 732, 747 (Tenn. Crim. App. 1994); *State v. Herron*, 461 S.W.3d 890, 904–05 (2015).[1]

[1] Indeed, Petitioner's appellate attorney argued on direct appeal that the improper admission of the recorded interviews served only to bolster the credibility of Petitioner's accusers and "to allow the jury, during their deliberations, to view the unchecked testimony [*sic*] of the [Petitioner's] accusers just prior to reaching their decision." (ECF No. 37-15 at 61).

Counsel further argued that given "the limited nature of the proof" against Petitioner, the admission of the interviews was prejudicial. (ECF No. 37-30 at 42). Petitioner's postconviction appellate brief was more than sufficient to apprise the appellate court of the nature of the prejudice caused by trial counsel's deficient performance, and any contention to the contrary should be rejected. *O'Sullivan v. Boerckel*, 526 U.S. 838, 844 (1999) ("Section 2254(c) requires only that state prisoners give state courts a *fair* opportunity to act on their claims.") (emphasis in original).

In any event, Respondent's reliance on minor discrepancies between Petitioner's state-court appellate briefs and his habeas petition is a non-starter. The language in the appellate briefs and habeas petition need not be identical. *Green v. Nelson*, 595 F.3d 1245, 1254 (11th Cir. 2010). Indeed, a petitioner may reformulate claims made in state court, and need not present the identical claims in federal court so long as the substance of the argument remains the same. *Williams v. Holbrook*, 691 F.2d 3, 6 (1st Cir. 1982); *Chambers v. McCaughtry*, 264 F.3d 732, 738 (7th Cir. 2001). Here, where Petitioner argued in state court that his attorney was deficient for failing to object to the admission of the interviews and that the deficient performance prejudiced him by rendering a conviction far more likely, the notion that Petitioner has not adequately presented his claim in state court is untenable.

It is true that Petitioner *additionally* argued that the admission of T.A.'s recorded interview violated his constitutional rights to a unanimous verdict and double jeopardy: "*Moreover*, as explained above, the sloppy redaction of the interview of T.A. made the admission of the interviews constitutional error as the [Petitioner]

was denied the right to a unanimous verdict. His protections against double jeopardy were also violated[.]" (ECF No. 37-30 at 42) (emphasis added). However, Petitioner did not thereby abandon his claim of ineffective assistance based on the inherent prejudice which resulted from the admission of the out-of-court statements contained in *both* recorded interviews. Respondent offers no support for any such argument and, indeed, such a conclusion would be illogical.

It should also be noted that Respondent's contention that Petitioner failed to sufficiently argue that he was prejudiced by the jury viewing J.A.'s recorded interview contradicts his concession that Petitioner properly exhausted his claim in state court. (ECF No. 39 at 18). Exhaustion and the procedural-default doctrine are inseparable. *Edwards v. Carpenter*, 529 U.S. 446, 452 (2000). If a habeas petitioner procedurally defaults on his claim, then he has not properly exhausted it and federal habeas review is unavailable. *Woodford v. Ngo*, 548 U.S. 81, 92–93 (2006). By admitting that Petitioner exhausted this claim and it is properly before this Court, Respondent has ceded any argument that Petitioner defaulted his ineffective assistance claim as to J.A.'s recorded interview.

Finally, as Respondent admits in his answer, the state "court's opinion still addressed the issue of J.A.'s video[.]" (ECF No. 39 at 21). Given that the state court ruled on the merits of Petitioner's claim as to J.A., any argument that Petitioner failed to adequately address prejudice during his state court proceedings must be rejected.

The state court implicitly held that trial counsel's performance was deficient.

Strickland is a two-pronged inquiry. First, a defendant must show that counsel's representation fell below an objective standard of reasonableness, *i.e.*, that counsel's performance was deficient. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). Second, the defendant must show that counsel's deficient performance prejudiced the defense. *Id.*

Petitioner maintains that the state court implicitly held that defense counsel's performance was deficient. This is based on the fact that the court explicitly held on direct appeal—which holding was referenced in the postconviction appeal—that "the record *clearly* demonstrates that the trial court erred in admitting the recordings of the interviews into evidence[.]" (ECF No. 37-18 at 19) (emphasis added). An attorney's failure to object to prejudicial and clearly inadmissible evidence has no strategic value and constitutes deficient representation. *Lyons v. McCotter*, 770 F.2d 529, 534 (5th Cir. 1985); *Byrd v. Trombley*, 352 F. App'x. 6, 10–12 (6th Cir. 2009). By holding that the recorded interviews were clearly inadmissible, the state court effectively held that counsel was deficient for failing to object to the prosecution's reliance on them at trial.

Respondent's answer to the petition contends that the state court reasonably applied *Strickland* by foregoing an analysis of trial counsel's deficient performance and instead assessing only the prejudice prong. (ECF No. 39 at 22). To clarify, Petitioner does not dispute that it is proper for a court to dispose of an ineffective assistance of counsel claim based on one of two prongs without addressing the other. That is not the impetus of Petitioner's claim for habeas relief. Rather, Petitioner's

contention is that the state court unreasonably applied *Strickland* by utilizing a sufficiency-of-the-evidence analysis and refusing to consider the prejudicial impact of the inadmissible interviews.

Notably, AEDPA deference applies only to a prong actually adjudicated by the state court. *Holland v. Rivard*, 800 F.3d 224, 237 (6th Cir. 2015) (citing *Rayner v. Mills*, 685 F.3d 631, 636–39). Therefore, even if the state-court ruling is construed as not addressing the deficiency prong, whether trial counsel's performance was deficient is subject to *de novo* review. *Id.* Respondent does not defend trial counsel's failure to object to the recorded interviews; indeed, it is difficult to conceive of a reasonable strategy that would include failing to prevent such prejudicial evidence from going to the jury. The record compels the conclusion that trial counsel's performance was deficient.

> ***The state court's decision is contrary to, and/or involves an unreasonable application of,*** **Strickland**, ***because it utilized a sufficiency of the evidence analysis and failed to consider the prejudicial effect of the interviews.***

Respondent devotes much of his answer to arguing that the record supports the state trial court's conclusion that Petitioner's right to a unanimous jury verdict was not violated because the State's election of offenses mirrored the alleged victims' trial testimony. (ECF No. 39 at 22–26). Per Respondent, because the election of offenses was sufficient, Petitioner failed to establish any prejudice based on trial counsel's failure to object to the introduction of the forensic interviews. (ECF No. 39 at 26).

Respondent's argument fails for the same reasons that the state court's decision unreasonably applies *Strickland*. Under Tennessee law, the prosecution must elect the facts upon which it is relying to establish the charged offense if evidence is introduced at trial indicating that the defendant has committed multiple offenses against the victim. *E.g.*, *State v. Brown*, 992 S.W.2d 389, 391 (Tenn. 1999). The election requirement protects the defendant's state constitutional right to a unanimous jury verdict by ensuring that jurors deliberate and render a verdict based on the same evidence. *Id.*

Here, the state appellate court held that the improper admission of the forensic interviews did not prejudice Petitioner because the prosecution's elected offenses corresponded with the alleged victims' trial testimony. (ECF No. 37-33 at 17). According to the state court's rationale, the improper admission of the forensic interviews would have prejudiced Petitioner only if the interviews supplied the sole evidentiary basis for one (or more) of the prosecution's elected offenses of which he was convicted. In other words, the appellate court held that the accusers' trial testimony provided a sufficient basis for the jury to convict Petitioner of the elected offenses, which in turn precluded a finding of prejudice.[2]

The state court decision entirely misapprehends prejudice under *Strickland*. "[P]rejudice under *Strickland* does not turn on a sufficiency-of-the-evidence analysis.

[2] The appellate court doubled down on its incorrect application of *Strickland* in its order denying Petitioner's petition for rehearing. The court reaffirmed that the evidence "was sufficient to uphold each of the Petitioner's convictions" and refused to "engage in speculation" as to the basis for the jury's verdict. (ECF No. 37-36 at 4).

Rather, to establish prejudice, a petitioner must show 'there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'" *Newmiller v. Raemisch*, 877 F.3d 1178, 1204 (10th Cir. 2017) (quoting *Strickland*, 466 U.S. at 694). "[W]hether there was enough evidence to legally support a conviction does not answer whether there was a reasonable probability of a different result arising from counsel's deficient performance." *Id.* (citing *Crace v. Herzog*, 798 F.3d 840, 849 (9th Cir. 2015); *Saranchak v. Sec'y, Pa. Dep't of Corr.*, 802 F.3d 579, 599 (3d Cir. 2015)). *See also*, *Richey v. Mitchell*, 395 F.3d 660, 687 (6th Cir. 2005), *judgment vacated on other grounds by Bradshaw v. Richey*, 546 U.S. 74 (2005) (noting that the "prejudice inquiry is not the same as the sufficiency of the evidence analysis").

Here, the state court wholly failed to assess the prejudicial impact of the forensic interviews. Nowhere in its orders did the appellate court consider the likelihood that the jury's exposure to the interviews contributed to its finding of guilt or, conversely, the likelihood of a different outcome had trial counsel properly objected to the introduction of the interviews. The appellate court's omission is especially glaring given the tenuous nature of the prosecution's case, which hinged entirely on the credibility of the alleged victims without any independent corroboration.[3]

The state court's opinion suffers from another logical fallacy. The state court concluded that the prosecution's election of offenses precluded a finding of prejudice because the election mirrored J.A.'s and T.A.'s trial testimony. Yet the election of

[3] Again, it is worth noting that Petitioner's first trial resulted in a hung jury.

offenses did *nothing* to limit the jury's consideration of the recorded interviews. In other words, the election of offenses did not preclude the jury from relying on the improperly admitted, out-of-court interviews, rather than the in-court testimony, to find Petitioner guilty. And, especially given that the jury asked to watch the recorded interviews (which were not subject to any cross examination) during deliberations, it is not only probable, but overwhelmingly likely that the videos contributed to the jury's finding of guilt.

AEDPA deference is no bar to finding relief in this case. In *Crace*, the defendant argued that his trial attorney was ineffective for failing to request an instruction on a lesser included offense. *Crace*, 798 F.3d at 843. The Washington Supreme Court held that *Strickland* required it to presume that the jury would have reached the same verdict even if instructed on a lesser offense. *Id.* Specifically, the state court held that (1) the jury must have found that the prosecution proved the elements of the charged offense beyond a reasonable doubt, (2) the evidence was sufficient to support the verdict, and (3) an instruction on a lesser included offense would therefore not have made a difference. *Id.* at 847.

The 9th Circuit rejected the state court's methodology as a "patently unreasonable application of *Strickland*" unworthy of deference under AEDPA:

> The Washington Supreme Court in essence converted *Strickland's* prejudice inquiry into a sufficiency-of-the-evidence question—an entirely different inquiry separately prescribed by *Jackson v. Virginia*, 443 U.S. 307, 324, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979). This is so because, under the Washington Supreme Court's approach, a defendant can only show *Strickland* prejudice when the evidence is insufficient to support the jury's verdict—a circumstance in which the defendant does not need to rely on

> Strickland at all because Jackson already provides a basis for habeas relief… And conversely, if the evidence is sufficient to support the verdict, there is categorically no *Strickland* error, according to the Washington Supreme Court's logic. By reducing the question to sufficiency of the evidence, the Washington Supreme Court has focused on the wrong question here—one that has nothing to do with *Strickland*.

Id. at 847, 849. Likewise, in the instant case, the Tennessee Court of Criminal Appeals' focus on the sufficiency of the evidence—by way of the prosecution's election of offenses—sidesteps the only pertinent inquiry: whether there is a reasonable probability that the outcome would have been different in the absence of counsel's deficient performance. *E.g.*, *Walker v. Hoffner*, 534 F. App'x. 406, 412 (6th Cir. 2013) (quoting *Strickland*, 466 U.S. at 694). The state court's approach therefore unreasonably applies *Strickland*.

For all the reasons set forth in Petitioner's amended petition and accompanying memorandum, the prejudice flowing from the jury's viewing of the recorded interviews is obvious. As a result of trial counsel's errors, the jury watched two otherwise inadmissible forensic interviews that included detailed, inflammatory accounts of the alleged abuse. Moreover, the alleged victims' statements alluded to other out-of-court statements "corroborating" the abuse. Because none of the witnesses were asked any questions about the interviews' substance and the interviews were not played at trial, the out-of-court statements were not subjected to the rigors of cross examination. *Especially* given that the jury asked to watch the interviews during deliberations, any claim that the interviews did not contribute to the jury's verdict is patently unreasonable.

"[W]here the only evidence of the crime or the defendant's guilt is the testimony of the victim, our circuit has been especially willing to find prejudice from deficient representation because '[t]he lack of physical evidence confirming sexual activity meant that this was necessarily a close case at the trial level.'" *Vasquez v. Bradshaw*, 345 Fed. Appx. 104, 119 (6th Cir. 2009). Such is the case here. The prosecution's case depended entirely on the alleged victims' testimony; there were no witnesses to the alleged abuse (other than the purported victims), and no physical evidence substantiated the allegations. The state court's failure to take the closeness of the evidence into consideration—as well as the abdication of its responsibility to assess the prejudicial effect of the recorded interviews—involves an unreasonable application of *Strickland* and requires habeas relief.

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

The recorded interviews of J.A. and T.A. were not evidence at Petitioner's trial. While discs ostensibly containing the interviews were marked as exhibits "for identification purposes," the interviews were not played in open court and none of the witnesses were asked any substantive questions about the interviews. Yet—unbeknownst to Petitioner at the time—the jury made an off-the-record request to watch the unadmitted interviews during their deliberations. The trial court not only facilitated the jury's request by providing the means for it to watch the interviews,

but it also hindered Petitioner's future efforts at obtaining relief by failing to put the jury's request on the record.

For the reasons set forth in Petitioner's amended petition and memorandum, the jury's exposure to the extrajudicial forensic interviews violated Petitioner's fundamental right to a fair trial by impartial jurors, as well as his constitutional rights to confrontation, cross examination, and counsel. *E.g.*, *Parker v. Gladden*, 385 U.S. 363, 364–65 (1966); *Turner v. Louisiana*, 379 U.S. 466, 472–73 (1965); *Gentile v. State Bar of Nevada*, 501 U.S. 1030, 1075 (1991) (plurality opinion). The jury's exposure to the extraneous information raises a presumption of prejudice which, in this case, cannot be rebutted. *E.g.*, *Remmer v. United States*, 347 U.S. 227, 229 (1954). The state court's denial of relief on this issue is arbitrary and capricious and involves an unreasonable application of clearly established Federal law, as well as an unreasonable determination of the facts.

In response, Respondent contends that Petitioner's claim is procedurally barred and that he cannot show cause and prejudice to overcome the default. Specifically, Respondent claims that Petitioner did not fairly present his claims in state court and did not exhaust his state-court remedies. (ECF No. 29–30). Respondent's arguments are without merit.

Respondent should be estopped from asserting a procedural bar.

As demonstrated in his amended petition and memorandum, the State has frustrated the vindication of Petitioner's rights relative to the forensic interviews at every turn. First, the State refused to produce the interviews to Petitioner prior to

trial on the basis that the interviews were merely "witness statements" and not evidence. (ECF No. 37-1 at 32). Next, contrary to its pretrial position that the interviews were not evidence, the State made a vague request of the trial court that the discs of the interviews be marked as exhibits for identification purposes. (ECF No. 37-6 at 41, 118). In closing argument, the State invited the jury to watch the "not-evidence" interviews during its deliberations. (ECF No. 37-9 at 4). Then, the jury made a request for equipment to watch the videos—which was provided to it—*off the record and without Petitioner's knowledge*. (ECF No. 31-9 at 4). Neither the prosecution nor the trial court memorialized the jury's request on the record.[4]

The State's position concerning the interviews continued to evolve after Petitioner was convicted. When Petitioner argued on direct appeal that the trial court improperly admitted the interviews as substantive evidence (ECF No. 37-15 at 48), the State disingenuously argued that the record did not establish that the jurors viewed the interviews.[5] (ECF No. 37-16 at 43–44). The appellate court agreed and

[4] The Tennessee Court of Criminal Appeals has adopted ABA Standard 15-4.2, which provides that if a jury requests a review of certain testimony or evidence, they be conducted to the courtroom and notice be provided to the prosecutor and counsel for the defense. *State v. Jenkins*, 845 S.W.2d 787, 794 (Tenn. Crim. App. 1992); *see also State v. Mays*, 677 S.W.2d 476, 479 (Tenn. Crim. App. 1984) ("The proper method of fielding questions propounded by the jury during deliberations is to recall the jury, counsel, the defendant(s), and the court reporter back into open court and to take the matter up on the record.") That procedure was obviously not followed here.

[5] Petitioner characterizes the State's position as "disingenuous," because not only did the State invite the jury to watch the interviews during closing, but presumably, as custodian of the discs containing the interviews, it would have known that the jury requested to watch the interviews when it made the discs available for the jury to watch.

denied relief on that basis. (ECF No. 37-18 at 19–20). Then, when Petitioner tried to call a juror to testify at his postconviction hearing that the jury watched the interviews, the State objected, effectively precluding Petitioner from obtaining the proof necessary to raise this issue. (ECF No. 37-23 at 3–6). Moreover, the postconviction judge—the same judge who granted the juror's request to watch the recorded interviews at trial—*refused to let Petitioner even make an offer of proof as to what the juror would testify*. (ECF No. 37-23 at 6–8).

Finally, after Petitioner was able to obtain an affidavit from a juror to establish that the jury indeed watched the videos, the State argued that the limitations period had run and barred Petitioner from obtaining relief. (ECF No. 37-44 at 16–19). The state appellate court agreed. (ECF No. 37-46 at 4).

Respondent should be estopped from asserting any procedural bar. Judicial estoppel prevents a party from prevailing in one phase of a case on an argument and then relying on a contradictory argument to prevail in another phase. *E.g.*, *New Hampshire v. Maine*, 532 U.S. 742, 749 (2001). Three factors inform whether to apply the doctrine in an applicable case: (1) whether a party's later position is clearly inconsistent with its earlier position; (2) whether the party has successfully persuaded a court to accept that party's earlier position, such that judicial acceptance in a later proceeding creates the perception that one of the two courts was misled; and (3) whether an unfair advantage or detriment would result. *Id.* at 750. Here, all three factors favor the application of estoppel.

First, as detailed above, the State has taken inconsistent positions concerning the interviews at every turn. Pretrial, the State refused to produce videos of the interviews to the defense on the basis that they were not evidence and therefore not discoverable.[6] At trial the State shifted course and used the recorded interviews as evidence of Petitioner's guilt, but then on appeal duplicitously claimed that the record did not establish that the jury had watched them.[7] Then, the State prevented Petitioner from obtaining the proof he needed to establish that the jurors watched the interviews during the postconviction hearing by objecting to the juror's testimony. Finally, in the error coram nobis proceedings, the State blamed Petitioner for not obtaining a sworn statement from the juror sooner—a statement Petitioner would have had in his postconviction proceedings had the State not objected in the first place.[8] In short, the State, by way of Respondent, cannot be permitted to assert a

[6] Again, if the State intends to use forensic interviews in its case-in-chief, a pretrial hearing is required where the court must determine that the statements possess particularized guarantees of trustworthiness. Tenn. Code Ann. § 24-7-123(b)(2). Moreover, the recording is discoverable pursuant to the Tennessee rules of criminal procedure. Tenn. Code Ann. § 24-7-123(c).

[7] One wonders how the recorded interviews could be deemed anything other than extrinsic evidence when the record failed to establish in the first instance that the jury had ever watched them. After all, if evidence was admitted at trial for the jury's consideration, should not that fact be obvious on the face of the record?

[8] In the error coram nobis proceedings, the State argued that Petitioner should have obtained the juror's affidavit sooner. (ECF No. 37-44 at 12). In so arguing, the State failed to recognize that there was nothing Petitioner could do to compel any juror to provide an affidavit. The only means of compulsion available to him was to subpoena a juror to testify at the postconviction hearing, which is precisely what he did.

procedural bar where its conduct is what frustrated Petitioner's efforts to timely raise his claim in the first instance.

The second and third factors are also present. The state postconviction court accepted the State's position that the juror's testimony was objectionable, preventing Petitioner from obtaining the evidence needed to allege his extraneous-evidence claim. And, the State has obtained an unfair advantage by, *inter alia*, avoiding the merits of Petitioner's claim that the recorded interviews were not evidence and therefore improperly viewed by the jury.

Judicial estoppel may be used to overcome the assertion of procedural bar in habeas proceedings. *Russell v. Rolfs*, 893 F.2d 1033, 1038 (9th Cir. 1990). Estoppel exists to prevent a litigant from "playing fast and loose with the courts." *Whaley v. Belleque*, 520 F.3d 997, 1002 (9th Cir. 2008) (citation omitted). Specifically, Respondent cannot argue here, in federal court, that Petitioner failed to exhaust his state court remedies, where it objected to Petitioner's efforts to exhaust his state court remedies during his postconviction hearing. Respondent's procedural bar argument should be rejected.

A petition for writ of error coram nobis was proper to exhaust Petitioner's state-court remedies.

Turning to the merits of Respondent's answer, Respondent claims that a petition for writ of error coram nobis is "a state law remedy and not a means for exhausting a federal claim." (ECF No. 39 at 29). Respondent does not cite any support for this proposition. And, contrary to Respondent's position, the Tennessee Court of Criminal Appeals has held that a petition for writ of error coram nobis is a

proper vehicle for vindicating a federal constitutional claim. *E.g.*, *Freshwater v. State*, 354 S.W.3d 746, 750–51 (Tenn. Crim. App. 2011). Respondent's argument is therefore a nonstarter.

If Respondent is not estoppped from asserting a procedural bar, then cause and prejudice excuses Petitioner's default.

a. *Murray* cause

In his Answer, Respondent does not address "cause" for Petitioner's putative default under *Murray v. Carrier*, 477 U.S. 478 (1986). Under *Murray*, a petitioner can show cause for procedural default if he demonstrates that an objective factor external to the defense impeded counsel's efforts to comply with the State's procedural rules. *Id* at 488. Such objective impediments to compliance with a State's procedural rules include a showing that the factual or legal basis for a claim was not reasonably available to counsel or that "some interference by officials" made compliance impracticable. *Id.* (citing *Reed v. Ross*, 468 U.S. 1, 16 (1984); quoting *Brown v. Allen*, 344 U.S. 443, 486 (1953)).

As set forth *supra* and throughout Petitioner's amended petition and memorandum, Petitioner's access to the factual basis for his claim was impeded by the State on multiple occasions. First, the State—whether it be through the prosecution, the trial court, and/or trial court personnel—responded to the jury's request to watch the interviews without memorializing that request on the record, and without Petitioner's knowledge that the request was made. Of course, the Tennessee Court of Criminal Appeals cannot consider matters which do not appear on the record. *E.g.*, *State v. Galloway*, 696 S.W.2d 364, 368 (Tenn. Crim. App. 1985).

Petitioner could not, therefore, have raised the extraneous-evidence issue on direct appeal.

Furthermore, when Petitioner attempted to call a juror to testify to establish whether the jury watched the interviews during his postconviction hearing, the State objected to the juror's testimony, which objection was sustained. Petitioner was therefore thwarted again—through no fault of his own—in his efforts to obtain testimony from one of the only witnesses with personal knowledge of whether the jury watched the interviews. Absent such testimony, Petitioner had no recourse to allege his extraneous-evidence claim in the postconviction proceedings. *E.g.*, *Grant v. State*, 507 S.W.2d 133, 136 (unsupported conclusory allegations in a postconviction petition do not justify or require an evidentiary hearing).

Conduct attributable to the State that impedes trial counsel's access to the factual basis for making a claim is the type of factor that ordinarily establishes the existence of cause for a procedural default in making a claim later asserted in a federal habeas corpus proceeding. *Strickler v. Greene*, 527 U.S. 263, 283–84 (1999) (citing *Murray*, 477 U.S. at 488). Here, the State suppressed Petitioner's access to the jury having watched the recorded interviews by not memorializing its request to do so on the record and objecting when Petitioner attempted to call a juror at his postconviction proceedings. Petitioner has established cause under *Murray*.

b. *Martinez* cause

In the alternative, Petitioner can establish cause excusing his alleged procedural default under *Martinez v. Ryan*, 566 U.S. 1, 9 (2012). Specifically, for the

reasons set forth in his amended petition and memorandum, Petitioner's postconviction attorney was ineffective for failing to assert the extraneous-evidence claim in Petitioner's postconviction proceedings.

Respondent maintains that cause under *Martinez* is not available because the constitutional claim postconviction counsel failed to assert is not a claim of ineffective assistance of trial counsel. (ECF No. 39 at 31–32). However, this is too narrow a reading of *Martinez* and is not supported by the legal principles underpinning the decision.

In *Martinez*, the Supreme Court addressed whether a habeas court may excuse procedural default of an ineffective assistance of trial counsel claim where the claim was not raised due to the ineffectiveness of postconviction counsel. *Id.* at 5. The state court appointed an attorney to represent the defendant in his initial postconviction proceedings. *Id.* at 6. The attorney filed a statement asserting she could find no colorable claims for relief. *Id.* The action for postconviction relief was dismissed. *Id.* The defendant subsequently filed a second petition for postconviction relief and alleged several grounds for ineffective assistance of trial counsel. *Id.* at 6–7. The postconviction court dismissed the petition because the defendant failed to raise the claims of ineffective assistance in his initial postconviction motion. *Id.* at 7. The state appellate court affirmed the dismissal. *Id.* The defendant then filed a petition for writ of habeas corpus alleging the same ineffective assistance claims. *Id.* The district court denied the petition on the basis that the claims were procedurally defaulted in state court, and the Ninth Circuit affirmed. *Id.* at 7–8.

On appeal, the Supreme Court distinguished the type of constitutional claim for which the defendant sought relief. Specifically, the Court noted that Arizona required claims of ineffective assistance of trial counsel to be raised in state collateral proceedings, rather than on direct appeal. *Id.* at 6. The Court was especially concerned that, under those circumstances, where an attorney errs in initial-review collateral proceedings, it is likely that no state court at any level will hear the merits of the defendant's claim. *Id.* at 10. Moreover, the Court held, if postconviction counsel's errors do not establish cause to excuse the procedural default in a federal habeas proceeding, no court will review the defendant's claims. *Id.* The Court therefore held that a defendant may establish cause by showing that his initial-collateral-review attorney's errors caused procedural default of an ineffective assistance of trial counsel claim. *Id.* at 13–14. In so holding, the Supreme Court stressed the importance of effective assistance of counsel to our criminal justice system. *Id.* at 12.

Martinez's rationale applies with equal force here. Petitioner had no ability to raise his extraneous-evidence claim on direct appeal. The inherent nature of an extraneous evidence claim is that some extraneous influence, *i.e.*, an improper, off-the-record influence, was brought to bear on the jury's deliberations. *E.g.*, *Fletcher v. McKee*, 3554 F. App'x. 935, 937–38 (6th Cir. 2009). Moreover, jury deliberations are shielded from public scrutiny. *E.g.*, *Tanner v. United States*, 483 U.S. 107, 119–20 (1987). If a jury is exposed to extraneous evidence, that exposure almost always occurs off-the-record and, at least initially, without any party's knowledge. That is

certainly true here, where the jury's request for equipment to view the recorded interviews occurred off the record and without Petitioner's knowledge. Given that Petitioner had no opportunity to raise the extraneous-evidence issue until his initial collateral review proceedings, the ineffective assistance of his postconviction counsel in failing to assert the issue constitutes cause excusing his alleged procedural default.

Failing to apply *Martinez* here would be arbitrary and unreasonable. As Justice Scalia wrote in his dissent in *Martinez*, there is no distinction between an inability to raise an ineffective assistance of counsel claim until collateral review and many other types of claims, including those based on newly discovered evidence of a constitutional violation. *Martinez*, 566 U.S. at 19–20, n. 1 (Scalia, J., dissenting) (restricting *Martinez* to ineffective assistance of trial counsel claims would go "against all logic"). The same concerns guiding the decision in *Martinez* are present here. Unless postconviction counsel's ineffective assistance constitutes "cause," no court at any level—whether it be state or federal—will consider the merits of Petitioner's claim. And, the right to an impartial jury free from extraneous influence is at least as fundamental as the right to an effective trial attorney, and arguably more so given that a jury's exposure to extraneous evidence results in a presumption of prejudice. *Remmer v. United States*, 347 U.S. 227, 229 (1954).

In summary, Respondent should be estopped from asserting a procedural bar. In the alternative, Petitioner can establish cause to overcome procedural default under either *Murray* or *Martinez*. For all the reasons set forth in Petitioner's

amended petition and memorandum, the jury's exposure the extraneous interviews prejudiced him. Habeas relief is required.[9]

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

During the prosecution's case, the State elicited improper opinion testimony from Mrs. Post concerning children's memory and the effect of trauma on a child's ability to recall abuse. As argued in Petitioner's amended petition and memorandum, trial counsel's failure to object to this testimony—especially in combination with his failure to prevent the jury from watching the inadmissible forensic interviews—prejudiced Petitioner and constitutes ineffective assistance of counsel. Moreover, the state court's circumvention of the clear error—that Mrs. Post addressed only the issue of why the alleged victims could not provide details of *when* the abuse occurred—involves a patently unreasonable determination of the facts.

Similar to Issue I, Respondent disputes that the state court implicitly held that trial counsel's performance was deficient. (ECF No. 39 at 34). However, Respondent fails to offer any defense of trial counsel's failure to object to Mrs. Post's inadmissible testimony. And, as noted by the state appellate court, trial counsel failed to offer a conceivable trial strategy that would account for his failure to object. (ECF No. 37-

[9] Respondent has not disputed that the interviews were extraneous, or that Petitioner's postconviction attorney was ineffective for failing to raise the issue. Respondent has also not addressed the presumptive prejudice of the interviews, apart from arguing that it was not an unreasonable application of federal law for the state court to hold that Petitioner was not prejudiced by them in response to Petitioner's first claim.

33 at 24). In the absence of even a hypothetical trial strategy that would include failing to exclude evidence that could serve only to bolster the alleged victims' testimony, the only conclusion that can be drawn is that counsel's performance was deficient.

In defending the state court's decision as to prejudice, Respondent adopts the same rationale set forth by the state court. Per the state court and Respondent, Mrs. Post's inadmissible testimony did not prejudice Petitioner because "she only addressed the issue of why the victims could not provide details of when the abuse occurred." (ECF No. 39 at 35). However, as pointed out at length in Petitioner's previous filings, this contention is flat out inconsistent with the record. The exchange at issue is as follows:

> Q: Now, I want to just ask you a little bit about what you can expect from a forensic interview. You have testified that you hope – they're designed to give the best and most accurate information possible. 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*?
>
> 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 that same event*.

(ECF No. 37-8 at 68–69) (emphasis added). Mrs. Post's testimony was not limited to an alleged victim's ability to recall *when* an incident occurred. Rather, she testified directly to an alleged victim's ability to provide a "narrative detailed account" of specific incidents of abuse, and opined that there are "lots of things that can disrupt a kid's memory of an abuse event." Simply put, the suggestion that Mrs. Post's testimony was limited the alleged victims' ability to recall the date of the abuse is a total fabrication.

A review of the prosecution's closing argument further highlights the unreasonable determination of the facts involved in the state court's denial of relief. During closing argument, the prosecutor argued, "Now, you heard [Mrs. Post] testify that sometimes it's hard for children to distinguish specific instances when they occur over and over again over the course of months or years, and they're very much alike." (ECF No. 37-9 at 41). Thus, not only does Mrs. Post's actual testimony contradict the state court's conclusion that her testimony was directed solely at *when* abuse occurred, but the prosecutor also relied on it for a completely different reason—to account for the alleged victims' inability to give detailed accounts of the separate acts of abuse.

Respondent also confusingly argues (and the state court found) a lack of prejudice because, "while there was no conclusive medical evidence that the victims had been sexually abused, the evidence did not exclude this possibility." (ECF No. 39 at 35). An argument that a normal medical exam does not foreclose abuse is not proof that abuse occurred; if anything, the negative medical exams support a finding of

reasonable doubt, not guilt. Ms. Gallion's testimony offers no aid to Respondent's argument or the state court's infirm decision.

Lastly, Respondent maintains that the record supports the state court's conclusion that J.A. and T.A. "told multiple people about the abuse over a period of several weeks." (ECF No. 39 at 35). Respectfully, the state court's reliance on this "evidence" is nonsensical. Neither J.A. nor T.A. testified to what it was they told others about the alleged abuse and, even if they had, that testimony would not strengthen the prosecution's case to the point of negating the prejudicial effect Petitioner suffered from Mrs. Post's improper opinion testimony.[10] The irrelevance of J.A. and T.A. having testified that they told others "about the abuse" only reaffirms that the state court failed to reasonably assess the prejudice of trial counsel's deficient performance under *Strickland*.

One final note in response to Respondent's answer is necessary. As did the state appellate court, Respondent relies on the fact that J.A. and T.A. told Mrs. Post about the alleged abuse to dispel any prejudice from Mrs. Post's inadmissible opinion testimony. (ECF No.37-33 at 24–25; ECF No. 39 at 35). Neither J.A. nor T.A. testified to what it is they told Mrs. Post. For example, the prosecution questioned J.A. as follows:

[10] By way of example, when questioning J.A., the prosecution asked her, "[D]id you ever tell a grownup about what Tim was doing?" To this question, J.A. responded, "I told my grandfather." (ECF No. 37-6 at 35). Neither the state court nor Respondent offer any explanation as to how such testimony negates Mrs. Post's prejudicial opinion testimony, which ostensibly was offered to account for the alleged victims' inability to provide details concerning the abuse.

> Q: Do you remember telling Anne or telling me about a time he did that, and you got up 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.

(ECF No. 37-6 at 23). J.A. later agreed with the prosecutor that she spoke with Mrs. Post, and Mrs. Post asked questions about what Petitioner had done. (ECF No. 37-6 at 39–40). But *J.A. never testified to what it was she told Mrs. Post*. Likewise, Mrs. Post did not testify as to what J.A. or T.A. told her about the alleged abuse. (ECF No. 37-8 at 69–71).

The only "evidence" of what J.A. and T.A. told Mrs. Post about the alleged abuse came from the recorded interviews which the jury watched during deliberations. The state appellate court held—and Respondent has claimed—that Petitioner has failed to show he was prejudiced by the jury watching the recorded interviews, *i.e.*, that the interviews did not contribute to his conviction. Yet, in the same breath, the state court and Respondent rely on the interviews to negate the prejudice caused by Mrs. Post's improper opinion testimony. The state court—and Respondent—cannot have it both ways. Either the forensic interviews did not contribute to the verdict and therefore had no bearing on the prejudice flowing from Mrs. Post's inadmissible testimony, or the interviews did (improperly) contribute to the verdict and thereby negated the importance of Mrs. Post's opinions concerning the memory of abuse victims.

The State court's denial of relief resulted in a decision both unreasonably applying *Strickland* and involving an unreasonable determination of the facts. Habeas relief is therefore required.

CONCLUSION

For the reasons stated herein and in Petitioner's separately filed amended petition for writ of habeas corpus and memorandum in support thereof, 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 18, 2020

/s/ Kathleen T. Zellner
Kathleen T. Zellner
Admitted *Pro Hac Vice*
Kathleen T. Zellner & Associates, P.C.
1901 Butterfield Road, Suite 650
Downers Grove, Illinois 60515
(Ph) 630-955-1212
attorneys@zellnerlawoffices.com
Counsel for Timothy Guilfoy

Certificate of Service

I hereby certify that on June 18, 2020, I filed the foregoing **Petitioner's Reply in Support of Amended Petition for Writ of Habeas Corpus** using the Court's CM-ECF system. The ECF system will electronically forward the filing to:

Meredith Wood Bowen
Tennessee Attorney General's Office
P.O. Box 20207
Nashville, TN 37202-0207
(Ph) (615) 741-1366
Email: meredith.bowen@ag.tn.gov

Richard Davison Douglas
Tennessee Attorney General's Office
P.O. Box 20207
Nashville, TN 37202-0207
(615) 741-4125
Fax: (615) 532-4892
Email: davey.douglas@ag.tn.gov

/s/ Kathleen T. Zellner
Kathleen T. Zellner