The Governor's Council for Judicial Appointments

State of Tennessee

Application for Nomination to Judicial Office

Name: Camille R. McMullen

Office Address: 5050 Poplar; Suite 1403
(including county) Memphis, Tennessee 38119 (Shelby County)

Office Phone: 901-537-2984 Facsimile: Not applicable.

Email Address: [redacted]

Home Address: [redacted]
(including county) Memphis, TN 38119 (Shelby County)

Home Phone: [redacted] Cellular Phone: [redacted]

INTRODUCTION

The State of Tennessee Executive Order No. 87 (September 17, 2021) hereby charges the Governor's Council for Judicial Appointments with assisting the Governor and the people of Tennessee in finding and appointing the best and most qualified candidates for judicial offices in this State. Please consider the Council's responsibility in answering the questions in this application. For example, when a question asks you to "describe" certain things, please provide a description that contains relevant information about the subject of the question, and, especially, that contains detailed information that demonstrates that you are qualified for the judicial office you seek. In order to properly evaluate your application, the Council needs information about the range of your experience, the depth and breadth of your legal knowledge, and your personal traits such as integrity, fairness, and work habits.

The Council requests that applicants use the Microsoft Word form and respond directly on the form using the boxes provided below each question. (The boxes will expand as you type in the document.) Please read the separate instruction sheet prior to completing this document. Please submit your original hard copy (unbound) completed application (*with ink signature*) and any attachments to the Administrative Office of the Courts as detailed in the application instructions. Additionally you must submit a digital copy with your electronic or scanned signature. The digital copy may be submitted on a storage device such as a flash drive that is included with your original application, or the digital copy may be submitted via email to john.jefferson@tncourts.gov .

THIS APPLICATION IS OPEN TO PUBLIC INSPECTION AFTER YOU SUBMIT IT.

PROFESSIONAL BACKGROUND AND WORK EXPERIENCE

1. State your present employment.

I am the Presiding Judge of the Tennessee Court of Criminal Appeals.

2. State the year you were licensed to practice law in Tennessee and give your Tennessee Board of Professional Responsibility number.

I was licensed to practice law in 1998. My BPR Number is 018202.

3. List all states in which you have been licensed to practice law and include your bar number or identifying number for each state of admission. Indicate the date of licensure and whether the license is currently active. If not active, explain.

I am licensed to practice law in Tennessee only.

4. Have you ever been denied admission to, suspended or placed on inactive status by the Bar of any state? If so, explain. (This applies even if the denial was temporary).

No.

5. List your professional or business employment/experience since the completion of your legal education. Also include here a description of any occupation, business, or profession other than the practice of law in which you have ever been engaged (excluding military service, which is covered by a separate question).

Upon completion of law school, I was a law clerk for the Honorable Joe G. Riley (Ret.) on the Tennessee Court of Criminal Appeals. After the conclusion of my clerkship, I became a criminal investigator, which was followed by employment as an assistant district attorney general in the District Attorney General's Office for the Thirtieth Judicial District in Tennessee (Memphis). After four years at the District Attorney General's Office, I became employed with the United States Attorney's Office for the Western District of Tennessee as an Assistant United States Attorney (Memphis). After seven years as an Assistant United States Attorney, I was appointed to become a judge on the Tennessee Court of Criminal Appeals (present employment).

6. If you have not been employed continuously since completion of your legal education, describe what you did during periods of unemployment in excess of six months.

Not applicable.

7. Describe the nature of your present law practice, listing the major areas of law in which you practice and the percentage each constitutes of your total practice.

As the Presiding Judge of the Tennessee Court of Criminal Appeals, my work is separated between writing legal opinions and the administration of court business. Eighty percent of my work comprises ruling upon criminal appeals from across the State of Tennessee. Twenty percent of my work is dedicated to case management and coordinating the dockets with the appellate court clerks for each of the grand divisions. I am also responsible for conducting our court meetings, publication of cases, and effecting court policy.

8. Describe generally your experience (over your entire time as a licensed attorney) in trial courts, appellate courts, administrative bodies, legislative or regulatory bodies, other forums, and/or transactional matters. In making your description, include information about the types of matters in which you have represented clients (e.g., information about whether you have handled criminal matters, civil matters, transactional matters, regulatory matters, etc.) and your own personal involvement and activities in the matters where you have been involved. In responding to this question, please be guided by the fact that in order to properly evaluate your application, the Council needs information about your range of experience, your own personal work and work habits, and your work background, as your legal experience is a very important component of the evaluation required of the Council. Please provide detailed information that will allow the Council to evaluate your qualification for the judicial office for which you have applied. The failure to provide detailed information, especially in this question, will hamper the evaluation of your application.

Before becoming an appellate judge, I served as both a state and federal prosecutor for eleven years. As an assistant district attorney, I handled all aspects of prosecuting criminal cases; tried over seventy (70) jury trials for crimes ranging from assault to murder; served as the lead prosecutor in the daycare death cases in Shelby County (1999-2000); and was a member of the Violent Crimes Prosecution Unit. As an assistant district attorney, I learned how to evaluate the strengths and weaknesses of a case and engaged in effective plea bargaining when necessary. As an Assistant United States Attorney, I prosecuted white collar, firearms, drug, economic and fraud related crimes. I was the lead prosecutor in approximately twenty (20) jury trials. I was also in charge of the Fraudulent Identity Strike Team (FIST), which was a coordinated effort between the private and public sector law enforcement agencies to target identity theft related crimes. My primary responsibility was to conduct and coordinate investigations with federal agencies leading to criminal prosecution through federal complaints, informations, indictments,

and subsequent appeals. I authored over eighty (80) briefs to the Sixth Circuit Court of Appeals. I also argued over twenty (20) cases before the Sixth Circuit, eight (8) of which were published. The cases, while not legally significant, are listed below.

United States v. Jason Settles, 394 F.3d 422 (6th Cir. 2005).

United States v. Robin Rochelle Lucas, 357 F.3d 599 (6th Cir. 2004).

United States v. Jacqueline Yagar, 404 F.3d 967 (6th Cir. 2005).

United States v. Micheal Patterson, 340 F.3d 368 (6th Cir. 2003).

United States v. Janell Cage, 458 F.3d 537 (6th Cir. 2006).

United States v. Eubilez Cruz, 461 F.3d 752 (6th Cir. 2006).

United States v. Lonnie Davis, 458 F.3d 505 (6th Cir. 2006).

United States v. Altonio Paulette, 457 F.3d 601 (6th Cir. 2006).

I was appointed as an appellate judge in 2008, retained by statewide election in 2014, and again retained in 2022, having received the highest number of votes of any intermediate appellate court judge. In my role as an appellate judge, I serve on a twelve-member court that holds mandatory jurisdiction and resolves all direct and collateral appeals of criminal matters across the State of Tennessee. I am responsible for reviewing and issuing opinions for appeals from trial court decisions across Tennessee. As part of this process, I review appellate briefs submitted by the Attorney General's Office and Defense Counsel. Upon review, I, along with two other judges, rule upon the issues raised in the briefs and determine whether the law has been properly applied. I have authored a minimum of 1500 legal opinions. I have participated in countless opinions as a panel member of the Court.

9. Also separately describe any matters of special note in trial courts, appellate courts, and administrative bodies.

Please see answers to questions eight and ten.

10. If you have served as a mediator, an arbitrator or a judicial officer, describe your experience (including dates and details of the position, the courts or agencies involved, whether elected or appointed, and a description of your duties). Include here detailed description(s) of any noteworthy cases over which you presided or which you heard as a judge, mediator or arbitrator. Please state, as to each case: (1) the date or period of the proceedings; (2) the name of the court or agency; (3) a summary of the substance of each case; and (4) a

statement of the significance of the case.

I have served as an appellate judge from 2008 to present. During that time, I have been involved in a number of noteworthy cases. A list of some of the cases that represent my work follows:

State v. Samantha Scott, No. M2018-01852-CCA-R3-CD, 2020 WL 262992, at *6 (Tenn. Crim. App. Jan. 16, 2020), appeal granted (June 4, 2020), rev'd, State v. Scott, 619 S.W.3d 196, 204-05 (Tenn. 2021). Tennessee Supreme Court agreed with the dissenting opinion written by Judge McMullen that the majority of the intermediate court misapprehended the inevitable discovery doctrine. "The ultimate test is whether the evidence would have been discovered through an independent, proper avenue that comports with the Fourth Amendment. Whether law enforcement could have obtained a search warrant is not the same inquiry as whether law enforcement ultimately would have obtained that search warrant or whether law enforcement inevitably would have discovered the evidence through lawful means. We must not conflate these important distinctions." Scott, 619 S.W.3d at 205.

State v. A.B. Price et.al., No. W2017-00677-CCA-R3-CD, 2018 WL 3934213, at *1 (Tenn. Crim. App. Aug. 14, 2018), rev'd, 579 S.W.3d 332 (Tenn. 2019). A consolidated appeal analyzing the Public Safety Act ("the PSA"), which, as relevant here, see Tenn. Code Ann. §§ 40-28-301,-306, changed how non-criminal or "technical" violations of probation are handled in Tennessee. These provisions require the Tennessee Department of Probation and Parole ("the department") to develop, among other things, a single system of graduated sanctions for technical violations of community supervision and an administrative review process for objections by the probationer to imposition of such sanctions. Dismissed by Tennessee Supreme Court based on lack of standing.

State v. Wright, No. M2019-00082-CCA-R3-CD, 2020 WL 3410247, at *1 (Tenn. Crim. App. June 22, 2020), appeal denied (Oct. 13, 2020). A direct appeal challenging convictions of first-degree murder and arguing, inter alia, that the trial court erred in denying the Defendant's motion to dismiss based on a violation of the Interstate Compact on Detainers (ICD) and in admitting the Defendant's social media posts.

State v. Whited, 506 S.W.3d 416 (Tenn. 2016); Tennessee Supreme Court adopting the dissenting position of Judge McMullen regarding lascivious conduct and reversing convictions for especially aggravated sexual exploitation of a minor.

Jernigan v. State, No. M2019-00182-CCA-R3-PC, 2020 WL 4728117, at *1 (Tenn. Crim. App. Aug. 14, 2020). A post-conviction appeal challenging, inter alia, the State's failure to disclose the existence of a "notebook" compilation containing over 6000 text messages between the victim and the Petitioner, in violation of Rule 16 of the Tennessee Rules of Criminal Procedure and in violation of Brady v. Maryland, 373 U.S. 83, 83 S. Ct. 1194 (1963).

State v. Tyshon Booker, No. E2018-01439-CCA0R30CD, 2020 WL 1697367, at *1 (Tenn. Crim. App. Apr. 8, 2020), appeal granted (Sept. 16, 2020). Direct appeal analyzing, inter alia, whether the process of transferring a juvenile to criminal court after a finding of three statutory factors by the juvenile court judge violates the Defendant's rights under Apprendi v. New Jersey, 530 U.S. 466 (2000) and whether the trial court erred in finding that the Defendant was engaged in unlawful activity at the time of the offense and in instructing the jury that the Defendant had a duty to retreat before engaging in self-defense and holding "that a causal nexus between a defendant's unlawful activity and his or her need to engage in self-defense is necessary before

the trial court can instruct the jury that the defendant had a duty to retreat."

State v. Decosimo, No. E2017-00696-CCA-R3-CD, 2018 WL 733218, at *8 (Tenn. Crim. App. Feb. 6, 2018), overruled by State v. Decosimo, 555 S.W.3d 494 (Tenn. 2018). Certified question analyzing the fee system in Code section 55-10-413(f) and concluding that it violated principles of due process. We held that even though TBI forensic scientists did not qualify as judicial or quasi-judicial officers under the test originally established in Tumey v. Ohio, 273 U.S. 510, 522 (1927), an "inherent conflict" existed "between the requirement that a forensic scientist be neutral and objective and Code section 55-10-413, which deposits the monies received from" forensic blood testing for the presence of drugs and alcohol "directly to the TBI, rather than the State general fund." We further observed that Code section 55-10-413(f) "create[d] a mechanism whereby the TBI forensic scientists have a pecuniary interest in BADT fees in the form of continued employment, salaries, equipment, and training within the TBI," and that this mechanism "calls into question the trustworthiness of the TBI forensic scientists' test results."

11. Describe generally any experience you have serving in a fiduciary capacity, such as guardian ad litem, conservator, or trustee other than as a lawyer representing clients.

Not applicable.

12. Describe any other legal experience, not stated above, that you would like to bring to the attention of the Council.

Not applicable.

13. List all prior occasions on which you have submitted an application for judgeship to the Governor's Council for Judicial Appointments or any predecessor or similar commission or body. Include the specific position applied for, the date of the meeting at which the body considered your application, and whether or not the body submitted your name to the Governor as a nominee.

I applied for the current position I hold, the application was submitted May 23, 2008, and I was appointed in June of 2008.

EDUCATION

14. List each college, law school, and other graduate school that you have attended, including dates of attendance, degree awarded, major, any form of recognition or other aspects of your education you believe are relevant, and your reason for leaving each school if no

degree was awarded.

Austin Peay State University, 1989-1993, BA (Political Science); Austin Peay State University, Student Government President (1993); Austin Peay State University, Southern Region of Africa Study Abroad Program (1993); University of Tennessee at Knoxville, College of Law, 1993-1996, (Juris Doctor); Tennessee Association of Public Interest Law (TAPIL) Fellowship (1994); McClure International Fellowship (1995); Ray Jenkins Trial Competition Semi-Finalist (1995); Order of the Barristers (1996).

PERSONAL INFORMATION

15. State your age and date of birth.

I am 52 years old. My birthday is [redacted] 1971.

16. How long have you lived continuously in the State of Tennessee?

I have resided in Tennessee for the entirety of my adult life.

17. How long have you lived continuously in the county where you are now living?

I moved to Shelby County in 1998, following law school and marriage to my husband.

18. State the county in which you are registered to vote.

I am registered to vote in Shelby County.

19. Describe your military service, if applicable, including branch of service, dates of active duty, rank at separation, and decorations, honors, or achievements. Please also state whether you received an honorable discharge and, if not, describe why not.

I have not served in the military.

20. Have you ever pled guilty or been convicted or placed on diversion for violation of any law, regulation or ordinance other than minor traffic offenses? If so, state the approximate date, charge and disposition of the case.

No.

21. To your knowledge, are you now under federal, state or local investigation for possible violation of a criminal statute or disciplinary rule? If so, give details.

No.

22. Please identify the number of formal complaints you have responded to that were filed against you with any supervisory authority, including but not limited to a court, a board of professional responsibility, or a board of judicial conduct, alleging any breach of ethics or unprofessional conduct by you. Please provide any relevant details on any such complaint if the complaint was not dismissed by the court or board receiving the complaint.

To my knowledge, I have had one complaint filed against me with the Board of Judicial Conduct over ten years ago. It was filed by the mother of a defendant whose case I had prosecuted and subsequently, upon collateral appellate review of his conviction, I served as a judge. The complaint was dismissed.

23. Has a tax lien or other collection procedure been instituted against you by federal, state, or local authorities or creditors within the last five (5) years? If so, give details.

No.

24. Have you ever filed bankruptcy (including personally or as part of any partnership, LLC, corporation, or other business organization)?

No.

25. Have you ever been a party in any legal proceedings (including divorces, domestic proceedings, and other types of proceedings)? If so, give details including the date, court and docket number and disposition. Provide a brief description of the case. This question does not seek, and you may exclude from your response, any matter where you were involved only as a nominal party, such as if you were the trustee under a deed of trust in a foreclosure proceeding.

No.

26. List all organizations other than professional associations to which you have belonged within the last five (5) years, including civic, charitable, religious, educational, social and fraternal organizations. Give the titles and dates of any offices that you have held in such organizations.

Alpha Kappa Alpha Sorority Inc., (Phi Lambda Omega and General Member) (1990-present).

WILLOW (Women In Leadership Leaning On Wisdom) (General Member) (2021-present).

Christian Brothers High School Board of Directors (2018-present).

27. Have you ever belonged to any organization, association, club or society that limits its membership to those of any particular race, religion, or gender? Do not include in your answer those organizations specifically formed for a religious purpose, such as churches or synagogues.

    a. If so, list such organizations and describe the basis of the membership limitation.

    b. If it is not your intention to resign from such organization(s) and withdraw from any participation in their activities should you be nominated and selected for the position for which you are applying, state your reasons.

I believe my sorority and WILLOW limit membership to women. If required, I will resign upon nomination and selection to the Tennessee Supreme Court.

ACHIEVEMENTS

28. List all bar associations and professional societies of which you have been a member within the last ten years, including dates. Give the titles and dates of any offices that you have held in such groups. List memberships and responsibilities on any committee of professional associations that you consider significant.

Tennessee Judicial Conference, Vice President (2023-2024), Tennessee Judicial Conference/Tennessee Bar Association Bench Bar Committee (2022-2025); Board of Judicial Conduct, Member (2018-present) (oversees disciplinary complaints lodged against state judges); Rules Commission, Judicial Liaison (2018-present) (serves as the judicial liaison to the advisory commission which makes recommendations to the Tennessee Supreme Court on amendments to the rules of state practice and procedure); Memphis, Tennessee, and National Bar Associations; Memphis and Tennessee Bar Fellow; National Association of Women Judges; National Bar Association Judicial Council (2022-2023) (chair of the educational outreach committee); Tennessee Lawyers Association for Women; Leo Bearman, Sr., Inns of Court (Master) (Emeritus Member).

29. List honors, prizes, awards or other forms of recognition which you have received since your graduation from law school that are directly related to professional accomplishments.

Distinguished Service Award (District Attorney General's Office) (2000); Outstanding Service Award (United States Marshall's Office, Western District of Tennessee) (2008); Dedicated Service Award "6¢ Law and Order Stamp" (United States Postal Inspection Office) (2008); Certificate of Superior Contributions (United States Secret Service) (2008); National Bar Association, Ben F. Jones Chapter, A.A. Latting Award for Outstanding Legal Service (2013); Chair's Award for Outstanding Service (NBA Judicial Council) (2022); Marion Griffin-Francis Loring Award (Association for Women Attorneys) (2024).

30. List the citations of any legal articles or books you have published.

Not applicable.

31. List law school courses, CLE seminars, or other law related courses for which credit is given that you have taught within the last five (5) years.

Appellate Criminal Practice Primer: Overview of the Rules of Appellate Procedure (9/12/2019); Association for Women Attorneys Women in Law & Leadership Conference: Supreme Court Update (9/27/2019); Diversity in Appellate Litigation: Perspectives from the Bench & Bar (4/12/2021); The Pathway to Presiding Judge: A Panel of Female Presiding Judges in Tennessee (10/24/2023).

32. List any public office you have held or for which you have been candidate or applicant. Include the date, the position, and whether the position was elective or appointive.

Not applicable.

33. Have you ever been a registered lobbyist? If yes, please describe your service fully.

No.

34. Attach to this application at least two examples of legal articles, books, briefs, or other legal writings that reflect your personal work. Indicate the degree to which each example reflects your own personal effort.

I have attached two legal opinions to this application. Each opinion represents my work entirely, with minor edits by the other two judges who participated on the panel.

ESSAYS/PERSONAL STATEMENTS

35. What are your reasons for seeking this position? ***(150 words or less)***

During my fifteen-year tenure as an appellate judge, I have acquired the experience and developed the skills necessary to be a justice on the Tennessee Supreme Court. I have an appreciation for all aspects of the job including the ability to listen with an open mind to the litigants as well as the other justices on the Court. I value deeply cordiality and civility in the courts and have learned the importance of being able to disagree without being disagreeable. I am dedicated to the rule of law and committed to producing the best legal opinions to guide the bench and bar. I have a proven record of being service oriented and people driven and seek to further transparency of the court system by increasing civic education. For these reasons, I seek to utilize my skills and experience to serve Tennessee at the highest level of the judiciary.

36. State any achievements or activities in which you have been involved that demonstrate your commitment to equal justice under the law; include here a discussion of your pro bono service throughout your time as a licensed attorney. ***(150 words or less)***

As a former prosecutor and current judge, my ability to participate in pro bono work has been limited by our ethical rules and potential conflicts of interest. Nevertheless, I believe my commitment to equal justice under the law has been demonstrated by my lifelong dedication to public service. I have also served the community through mentorship and education programs and various other forms of community outreach. I am a frequent speaker for bar associations and community organizations. I have mentored college and law students, coached two different high school mock trial teams to regional championships; and served as a regular judge for college and law school mock trial competitions. I have supported rehabilitation and re-entry programs at the women's prison and served as a regular speaker at their graduations. I have recently been selected to serve as a judicial liaison for the Memphis Area Legal Services Access to Justice Annual Fundraising Campaign.

37. Describe the judgeship you seek (i.e. geographic area, types of cases, number of judges, etc. and explain how your selection would impact the court. ***(150 words or less)***

I am seeking to serve as one of five justices of the Tennessee Supreme Court (Western or Eastern Grand Division). The Tennessee Supreme Court is the court of last resort in Tennessee and has discretionary authority to accept review of all types of cases. These cases usually involve a conflict within the intermediate appellate courts or issues that have not been previously resolved. The primary role of the Court is to ensure fair and consistent application of the law throughout the State. I would add to the Court by bringing over eleven years of experience as a criminal law practitioner and fifteen years of experience as an appellate court judge. I would also bring a different background, life experience, and perspective to the issues that come before the Court, which would serve to enrich the decisions of the Court and foster public confidence in the judiciary.

38. Describe your participation in community services or organizations, and what community involvement you intend to have if you are appointed judge? ***(250 words or less)***

I will rely, in large part, upon the answers given in question 36 for my community service. I will also note that through my sorority I participate in a wide range of community service activities including reading to children at various schools and at the library. If I am appointed to become a justice, my overarching goal would be to continue to foster public confidence in the judiciary. I would highlight programs such as the SCALES project (Supreme Court Advancing Legal Education for Students), use advancements in technology to make the courts more accessible to the public, and promote what is good about the court system and the judiciary through civic education programs.

39. Describe life experiences, personal involvements, or talents that you have that you feel will be of assistance to the Council in evaluating and understanding your candidacy for this judicial position. ***(250 words or less)***

I am the proud daughter of a decorated military veteran and a lifelong educator. Growing up as a military dependent, I observed the sacrifice my father made for his country and learned to appreciate service over self. Through the constant relocation and exposure to different environments and people, I cultivated a genuine appreciation for multiple viewpoints and perspectives, which is integral to the judicial decision-making process. I came to value an awareness of each decision's implications on others, broadly and long term. I developed a deep understanding of the importance of upholding the rule of law, a strong sense of integrity, and a desire to ensure equal justice for all. I believe all of these personal traits enhance my role as a jurist and are important to maintaining public trust and confidence in the justice system.

40. Will you uphold the law even if you disagree with the substance of the law (e.g., statute or rule) at issue? Give an example from your experience as a licensed attorney that supports your response to this question. ***(250 words or less)***

Yes, I will uphold the law even if I disagree with the substance of the law. The following cases are examples of when I was required to uphold the law, and did so, even when I disagreed with it. Prior to the reform of the drug-free school zone laws, I disagreed with mandatory minimum sentences imposed in such cases and expressed concern about such laws in State v. Peters, No. E2014-02322-CCA-R3-CD, 2015 WL 6768615, at *11 (Tenn. Crim. App. Nov. 5, 2015)(McMullen, J.)(concurring), where a twenty-year-old first-time offender was convicted and ordered to serve 15 years imprisonment at 100%. Additionally, in State v. Major, No. M2021-01469-CCA-R3-CD, 2023 WL 7166314, at *6 (Tenn. Crim. App. Oct. 31, 2023), I joined the majority in concluding that probable cause existed to support a search of a car based on a positive alert from a trained narcotics dog, even though the dog was not trained to distinguish between marijuana and hemp. However, I wrote separately to highlight how the legalization of hemp has fractured the foundation underlying the rule that a drug detection dog sniff is not a search subject to Fourth Amendment protections. I further explained how the issue

had not been presented fully to the court, and that until it is, law enforcement will be left in limbo as to whether current practice is constitutional.

REFERENCES

41. List five (5) persons, and their current positions and contact information, who would recommend you for the judicial position for which you are applying. Please list at least two persons who are not lawyers. Please note that the Council or someone on its behalf may contact these persons regarding your application.

A. Judge Joe. G. Riley (Ret.): [redacted]
B. Mike Keeney, Attorney: [redacted]
C. Susan Hatley, College & Career Technical Education Teacher, Mark Luttrell Transition Center: [redacted]
D. Judge Loyce Lambert Ryan (Ret.): [redacted]
E. Dr. Dustin Fulton, Asst. Dean of Admissions for the University of Tennessee Health Science Center: [redacted]

AFFIRMATION CONCERNING APPLICATION

Read, and if you agree to the provisions, sign the following:

I have read the foregoing questions and have answered them in good faith and as completely as my records and recollections permit. I hereby agree to be considered for nomination to the Governor for the office of Judge of the [Court] Supreme Court of Tennessee, and if appointed by the Governor and confirmed, if applicable, under Article VI, Section 3 of the Tennessee Constitution, agree to serve that office. In the event any changes occur between the time this application is filed and the public hearing, I hereby agree to file an amended application with the Administrative Office of the Courts for distribution to the Council members.

I understand that the information provided in this application shall be open to public inspection upon filing with the Administrative Office of the Courts and that the Council may publicize the names of persons who apply for nomination and the names of those persons the Council nominates to the Governor for the judicial vacancy in question.

Dated: December 11, 2023.

Signature

When completed, return this application to John Jefferson at the Administrative Office of the Courts, 511 Union Street, Suite 600, Nashville, TN 37219.

THE GOVERNOR'S COUNCIL FOR JUDICIAL APPOINTMENTS
ADMINISTRATIVE OFFICE OF THE COURTS

511 UNION STREET, SUITE 600
NASHVILLE CITY CENTER
NASHVILLE, TN 37219

TENNESSEE BOARD OF PROFESSIONAL RESPONSIBILITY
TENNESSEE BOARD OF JUDICIAL CONDUCT
AND OTHER LICENSING BOARDS

WAIVER OF CONFIDENTIALITY

I hereby waive the privilege of confidentiality with respect to any information that concerns me, including public discipline, private discipline, deferred discipline agreements, diversions, dismissed complaints and any complaints erased by law, and is known to, recorded with, on file with the Board of Professional Responsibility of the Supreme Court of Tennessee, the Tennessee Board of Judicial Conduct (previously known as the Court of the Judiciary) and any other licensing board, whether within or outside the State of Tennessee, from which I have been issued a license that is currently active, inactive or other status. I hereby authorize a representative of the Governor's Council for Judicial Appointments to request and receive any such information and distribute it to the membership of the Governor's Council for Judicial Appointments and to the Office of the Governor.

Camille R. McMullen

Type or Print Name

Signature

December 11, 2023
Date

018202
BPR #

Please identify other licensing boards that have issued you a license, including the state issuing the license and the license number.

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE
July 24, 2019 Session

STATE OF TENNESSEE v. TYSHON BOOKER

Appeal from the Criminal Court for Knox County
No. 108568 G. Scott Green, Judge

No. E2018-01439-CCA-R3-CD

During a botched robbery, sixteen-year-old Tyshon Booker, the Defendant-Appellant, shot and killed the victim, G'Metrick Caldwell. Following extensive hearings in juvenile court, the Defendant was transferred to criminal court to be tried as an adult.[1] At trial, the Defendant admitted that he shot the victim several times in the back while seated in the backseat of the victim's car; however, he claimed self-defense. A Knox County jury convicted the Defendant of two counts of first-degree felony murder and two counts of especially aggravated robbery, for which he received an effective sentence of life imprisonment. In this appeal as of right, the Defendant raises the following issues for our review: (1) whether the process of transferring a juvenile to criminal court after a finding of three statutory factors by the juvenile court judge violates the Defendant's rights under Apprendi v. New Jersey, 530 U.S. 466 (2000); (2) whether the State's suppression of alleged eyewitness identifications prior to the juvenile transfer hearing constitutes a Brady violation, requiring remand for a new juvenile transfer hearing; (3) whether the juvenile court erred in transferring the Defendant to criminal court given defense expert testimony that the Defendant suffered from post-traumatic stress disorder (PTSD) and was amenable to treatment; (4) whether the trial court erred in finding that the Defendant was engaged in unlawful activity at the time of the offense and in instructing the jury that the Defendant had a duty to retreat before engaging in self-defense; (5) whether an improper argument by the State in closing arguments constitutes prosecutorial misconduct requiring a new trial; (6) whether evidence of juror misconduct warrants a new trial and whether the trial court erred in refusing to subpoena an additional juror; and (7) whether a sentence of life imprisonment for a Tennessee juvenile violates the United States and Tennessee Constitutions.[2] Discerning no reversible error, we affirm.

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[1] On February 19, 2016, the juvenile court severed the Defendant's case from co defendant Bradley Robinson for purposes of the transfer hearing. While the record contains lengthy discussions regarding the codefendant, including his statement implicating the Defendant in this crime, the codefendant did not testify at the Defendant's trial. The disposition of the codefendant's case is not reflected in the record.

[2] We have reordered the Defendant's issues for clarity.

Tenn. R. App. P. 3 Appeal as of Right; Judgments of the Criminal Court Affirmed

CAMILLE R. MCMULLEN, J., delivered the opinion of the court, in which ROBERT L. HOLLOWAY, JR., and TIMOTHY L. EASTER, JJ., joined.

Mark E. Stevens, District Public Defender, and Jonathan Harwell (at trial and on appeal) and Chloe Akers (at trial), Assistant Public Defenders, for the Defendant-Appellant, Tyshon Booker.

Herbert H. Slatery III, Attorney General and Reporter; Jeffrey D. Zentner, Assistant Attorney General; Charme Allen, District Attorney General; and Takisha M. Fitzgerald and Phillip Morton, Assistant District Attorneys General, for the Appellee, State of Tennessee.

OPINION

Juvenile Court Proceedings

Two days after the offense, November 17, 2015, the Knox County Juvenile Court ordered the Defendant's "fingerprint card" to be released to the Knoxville Police Department (KPD) for use in the investigation of the victim's death. On the same day, the juvenile court signed an order for attachment after finding probable cause that the Defendant committed the delinquent and unruly offense of first-degree murder. On November 18, 2015, a juvenile court magistrate signed an attachment for the Defendant. On November 23, 2015, a probable cause hearing was conducted in Knox County Juvenile Court. Based on the testimony of Detective Clayton Madison of the KPD Violent Crimes Unit, the juvenile court determined there was probable cause as to the Defendant and the co defendant. On November 19, 2015, the State filed a motion to transfer the Defendant to Knox County Criminal Court to be tried as an adult. The Defendant filed a motion in opposition to this motion on January 4, 2016, arguing that "[t]ransfer would expose him, upon conviction, to an automatic life sentence of at least fifty-one years[,]" which he asserted was unconstitutional.

The Defendant's transfer hearing occurred on February 26, 2016, and June 9-10, 2016. Linda M. Hatch testified that she lived next door to the Defendant and that he went to school with her daughters. Sometime prior to the offense, Hatch picked up the Defendant as he was "walking up the road and needed a ride." From that point on, the Defendant came over to her house "almost daily." She called the Defendant "son" and treated him like "one of [her] kids." She was aware that the Defendant had a Facebook account. At some point during "the week of November the 6th," Hatch observed the

Defendant in possession of his brother's pistol, and she admonished him. Although the Defendant returned his brother's gun, the Defendant had another gun, a nine millimeter, "[w]ithin days." Hatch observed the Defendant shooting the gun on her back porch "several times," and she believed the Defendant had only a few bullets left. Prior to the offense, Hatch had set up a camera on her kitchen table to record the Defendant and his friends because she had become suspicious that they were stealing money from her daughter. The camera captured the Defendant with a nine millimeter gun as well as codefendant Robinson, whom Hatch knew as "Savvy," with a .32 caliber gun. The State played the video recording for the juvenile court, which was admitted as an exhibit to the hearing.

On the day of the offense, the Defendant texted Hatch at 3 p.m., and again at 6:11 p.m., stating, "Hey, please come get me right now from where you dropped us off." She understood this to be the place where she dropped off the Defendant and the codefendant the previous Friday. By the time Hatch responded to the Defendant, he was no longer at the location. The next morning, the Defendant came to her house "very upset, very nervous." Hatch said the Defendant wanted to talk to her, and she asked, "Ty, what's wrong?" The Defendant replied, "Mom, I f----- up[,]" and "Mom, I killed a man." The Defendant told Hatch he "shot him with that gun." "[The Defendant] said that [the codefendant] had it planned to rob this guy, and he didn't even know him. And he said that it just went wrong." The Defendant also told her that they were going to get him for "overkill," and he "shot him a lot." The Defendant said, "when the [victim] was fighting to try to get away from [the codefendant]," [the codefendant] told him to shoot, and he "just kept shooting." The Defendant told Hatch that he shot the victim four or five times, and he saw the victim "laying there dead." The Defendant also told her that he threw the gun away.

Hatch testified that the Defendant came back to her house the following morning, and he "wasn't so upset." She said the Defendant told her, "They don't even have the right descriptions. They have no clue it was us." She said the Defendant was "back to kind of being his cool, sweet, charming self."

On cross-examination, Hatch testified that the first time she met the Defendant, he was walking down the street with a ripped trash bag, and she stopped and asked him if he needed a ride. She said the Defendant was upset because he had just gotten in a fight with his mother, and she had told him to get out of the car. Hatch told the Defendant that he could text her anytime, and she would give him a ride or bring him food. She primarily communicated with the Defendant through Facebook Messenger because he could use it through Wi-Fi. She described the Defendant as "very intelligent and so, so sweet," and she said that the Defendant wanted to be a rapper. She described her love for the Defendant as that of a mother to a child. She lectured the Defendant "many a times" on staying away from "doing drugs or robbing people or being involved in any of that behavior[.]" Hatch

testified that "it all went downhill" when the Defendant started hanging out with the codefendant, who was on the run for a violation of probation. Hatch also described the day that the Defendant was arrested in her home. After the police arrested the Defendant and left Hatch's house, she left to pick up the codefendant and informed the police, who showed up to arrest him. A few days later, Hatch went to the police station to give her statement.

A series of Facebook messages between the Defendant and Hatch were also admitted into evidence. Several of these messages included references to the Defendant selling drugs, but Hatch testified that she was trying to figure out what the Defendant had so she could tell her husband. She said that she did not report this to the police. Hatch also sent the Defendant pictures of marijuana and wrote "Yummy" under one of the pictures. In another set of messages, the Defendant wrote, "I need some weed[,]" to which Hatch responded, "You want to go in half?" She explained that she was asking this on behalf of the codefendant. She also messaged the Defendant, "Flower man just called taking orders[,]" which she explained was the man down the street asking if anyone wanted to buy marijuana. In another message, Hatch sent the Defendant a link to a picture of breasts, which she said was in reference to an exotic cake that she made. She denied a sexual relationship with the Defendant. Hatch admitted taking several "sexy pictures" of the Defendant but explained that the Defendant asked her to take those pictures. Hatch testified that she did not get paid for her testimony.

KPD Officer James Wilson testified that he was working patrol on the day of the offense when he received a call of a shooting on Linden Avenue. Upon arrival, he observed the victim, "laying partially in the car and partially out of the car." Officer Wilson noticed that the victim had been shot and called for medical attention. Officer Wilson then secured the area where he observed shell casings and canvassed the neighborhood. The State introduced several photographs of the victim's car, one of which depicted a handgun in the driver's side floorboard.

Timothy Schade, a KPD crime scene technician and certified latent print examiner, testified that he also responded to the shooting call and took several photographs of the crime scene, most of which showed cartridge casings. Schade also recovered four casings from inside the car and one from outside, and he processed several items from inside the car for fingerprints. The victim's car was towed to the KPD's Forensic Unit garage, and Schade processed the car for fingerprints with magnetic powder. One set of prints matched Kevaugh "Lil Kill" Henry, but the other seven sets did not appear in the Automated Fingerprint Identification System (AFIS). Schade eventually fingerprinted the Defendant, and he was able to match the Defendant's prints to six identifications "on or around the passenger side door" of the victim's car. He found "three finger or palm prints on the exterior of the car that matched [the Defendant]" and one from the interior of the car near the armrest matching the Defendant. He also found five sets of prints matching the

codefendant that were located on or around the exterior door on the front passenger side of the victim's car.

On cross-examination, Schade explained that the first casing was recovered on the street outside the rear passenger side of the car. The second casing was recovered from "the little section on the passenger side rear door that you would use to grab the door to shut it." The third casing was found in the floorboard of the front passenger seat. The fourth casing was recovered from the floorboard of the front driver's seat, and the fifth was recovered from the floor of the rear driver's side. A sixth shell casing was never recovered.

Schade further explained that people do not always leave fingerprints behind when they touch a surface. He matched prints taken from a Powerade bottle recovered from the victim's car to the victim, but he was unable to match the prints recovered from a Coke bottle or the gun to anyone. Schade testified that there are variables that determine why one fingerprint might be lighter and another might be darker. He said that he "couldn't scientifically say whether a print was left today or yesterday or last week." On redirect examination, Schade testified that Kevaughn "Lil Kill" Henry's prints were lighter than the other prints on the car.

Dr. Phillip Axtell, a licensed psychologist, testified that he received a court order to evaluate the Defendant. He was told not to ask the Defendant about his arrest or the events on the day of the crime, which limited his evaluation to treatment recommendations. He conducted a psychosocial evaluation of the Defendant based on a sixty to ninety-minute clinical interview. He recommended "[t]reatment and counseling, primarily to deal with stress, benefit from counseling or therapy to help [the Defendant] cope with memories from previous traumatic events, individual and/or group therapy, therapy to give him extra coping skills." He said these services could be provided "in a detention facility, in-patient, or as an outpatient basis." He said that PTSD was a possible diagnosis, and his report was admitted as an exhibit to the hearing.

Justin Campbell, the Court Division Coordinator for first-time offenders in juvenile court, supervised the Defendant for offenses including disorderly conduct, false report, curfew violation, and an active runaway petition. Although the Defendant was "very well[-]mannered and respectful," he did not follow through on his probation requirements.

Dr. Keith Cruise, an Associate Professor of Psychology at Fordham University, evaluated the Defendant regarding his "current mental health functioning," "exposure to traumatic events and possible current traumatic stress reactions," and "possible rehabilitation." Dr. Cruise conducted evaluations of the Defendant in January and May 2016. As part of his first evaluation, Dr. Cruise met with the Defendant at the detention center for six hours. He described this as a "structured interview" in which he reviewed

mental health symptoms. He also interviewed members of the Defendant's family. He conducted the second evaluation to "provide additional information about possible rehabilitation services and an update to any opinions from [his] initial report." Dr. Cruise also reviewed the Defendant's Department of Children's Services (DCS) school records, his arrest report, his juvenile social file, the petition from this case, Dr. Axtell's report, and a letter from Natchez Trace. Dr. Cruise described significant events from the Defendant's life, including the loss of his father before he was born, growing up in what he called a "war zone," witnessing family violence, being shot at, and experiencing the deaths of his aunt and his grandfather.

Dr. Cruise diagnosed the Defendant with three disorders: PTSD, Moderate Cannabis Use Disorder, and Conduct Disorder. He described the death of the Defendant's grandfather as the "turning point" for his PTSD. Dr. Cruise opined that an adult correctional facility would be "ill-equipped" to respond to the Defendant's mental health needs. The Defendant was accepted into Natchez Trace youth facility, which Dr. Cruise stated would have appropriate treatment options for the Defendant. Dr. Cruise believed that the Defendant was amenable to treatment, and he noted that the Defendant was willing to participate in trauma-based treatment.

On cross-examination, Dr. Cruise acknowledged the Defendant's school suspensions beginning in 2011 through 2015, noting that the Defendant's school suspensions decreased after his grandfather's death. Dr. Cruise also noted that the Defendant was a member of "The Chain Gang," which he concluded was not a real gang. Dr. Cruise stated that he did not look at the Defendant's Facebook page as part of his evaluation, and he opined that the Defendant was truthful throughout his interviews.

In determining whether to transfer the Defendant to criminal court, the juvenile court considered the factors as outlined in Tennessee Code Annotated section 37-1-134(a)(4). In regard to part (A), whether there was probable cause to believe that the child committed the delinquent act as alleged, the juvenile court reasoned, in pertinent part, as follows:

> I've heard a lot of people in my lifetime try to define what reasonable grounds means. I've heard it called probable cause. I've heard it called a balancing test. I heard [defense counsel]--I listened very carefully to her--refer to it as a preponderance of the evidence. We know that it does not approach the level of moral certainty. It doesn't get there.

> I tend to try to break things down simply. What it means to me is [] it reasonable for me to believe based on the evidence that I heard that [the Defendant] was there and took the victim's life. Is it reasonable for me to believe that.
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> I don't have to be certain. I don't have to be sure. I don't have to ultimately know the answer, but is it reasonable to believe. And in examining whether it's reasonable for me to believe I must look at possibilities.
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> I think the fingerprints through all that confusion and all of the testimony and all of the slides and the breakdown--all the fingerprints really tell us is that at some point at sometime he was at or in that car. We know that. No doubt.
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> Then we look at the testimony of Ms. Hatch. And for the record, I find parts of her testimony despicable. That's the nicest thing I can say about my feelings about her relationship with this young man. Despicable.
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> I believe in my heart Ms. Hatch is one of the reasons that we're sitting here today. I believe he was allowed to be at Ms. Hatch's when he didn't need to be there. I believe he was into bad things with Ms. Hatch. I believe he and the other young men were in an enterprise with Ms. Hatch and were running wild.
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> I was offended, disturbed, creeped out by Ms. Hatch. But I also believe he told her, "Mama, I 'effed' up. I killed a man." I believe he said that. I believe she heard that. Despite the improper nature of their relationship, despite the obvious enterprise that they were in, despite the fact she creeps me out, I believe that this young man told her that. I believe those were his fingerprints on the car that day. From those two things I find reasonable grounds to believe that he committed the delinquent act.

The juvenile court observed that part (B) of the statute was not in dispute in the Defendant's case and stated that there was "reasonable grounds to believe that [the Defendant] is not committable to an institution for the developmentally disable or mentally ill." Regarding part (C), whether there was probable cause to believe that the interests of the community required that the child be put under legal restraint or discipline, the juvenile court stated that it agreed with both mental health experts "completely" and that it "[did not] doubt for a minute that the adverse childhood experiences [the Defendant] suffered

could have led to [PTSD]." The juvenile court also agreed that the Defendant suffered from Cannabis Use Disorder and Conduct Disorder.

The juvenile court then engaged in an extensive analysis of each of the six factors under section 37-1-134(b), and concluded, in pertinent part, as follows:

> The extent and nature of the child's prior delinquency records. They don't tell us a whole lot here. There's not a whole lot of history here from delinquency.
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> If I looked at the ACS records, if I listened to the reports and the information that the psychologists had been given -- although I have to weigh their opinion by what they've not been told -- I think they were both at a very unfair disadvantage. They were not allowed to question the child about the acts or the things that lead up to the acts, because the defense was attempting to put on a defense to the reasonable grounds to believe that it happened. So they're not going to let their experts ask questions about the facts leading up to that day. And I think that made it tougher for them to do their job.
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> But I think the extent and nature of the child's prior delinquency records is not of great importance here, because he just had his first brush with the court system and wasn't – I don't think there's a lot there that's going to change and help me make my decision one way or the other as to whether the interests of the community require that the child be put under legal restraint and discipline.
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> "The nature of past treatment efforts and the nature of the child's response thereto." Well, there hasn't been much – hasn't been any, and what little he was tried to be given here he didn't play. He was off running wild at Ms. Hatch's and smoking dope and selling dope and playing on the Internet and shooting guns off the back porch of the house with her watching.
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> "Whether the offense was against a person or property with greater weight in favor of the transfer given to an offense against a person." This was murder. A person died, and his life meant something. And what the statute is talking about here is when you hurt someone or you take someone's

life, there's a greater weight in favor of transfer. Not much any defense team can do with that except point out that's pretty much the case in all murders.

I think the important question here --now, let me talk about (6) first before I get to (5), which I think may be the more important factor in this case. "Would the child's conduct be a criminal gang offense."

. . . .

I don't know if five people in a "Chain Gang" makes it a gang or not, but I'm not too worried about it one way or the other in this case. It's a factor, and it's an important factor in Knoxville, particularly with the level of organization we seem to have out there. I can't tell in this particular case whether it makes a whole lot of difference or not.

I think what's more important is the people that were there that day acted in concert. I don't have any idea if they're officially in a gang. I don't have any idea where to draw that line; if five people make a gang, if it takes 20. No one has ever told me. But there's certainly some argument each way on factor number (6) whether this was a gang offense. And I can understand the defense's position that it was just a group of kids hanging out together. I don't know where you draw that line.

But again, I think the possible rehabilitation of the child is what this case comes down to in my mind. And the General hinted at it in her argument twice, that he's 17 years and three months old. He has 21 months left. What's available out there to rehabilitate someone to make them a productive citizen that I would feel safe about putting out in the community? What's available out there to do that in 21 months? Because if I keep him here when he's 19, he walks. He does whatever he wants to. So 21 months? How can I take a person whose conscience has been so killed that the taking of a human life has so little value, how can he be rehabilitated in 21 months with the time I got left?

Based on the testimony I've heard, I must conclude that he can't. The decision will be to transfer him and try him as an adult.

Accordingly, on June 10, 2016, the juvenile court entered an order for the Defendant to be transferred to criminal court to be tried as an adult.

Criminal Court Proceedings

On July 27, 2016, a Knox County grand jury indicted the Defendant for two counts of first-degree felony murder (counts 1 and 2) and two counts of especially aggravated robbery (counts 3 and 4). On September 23, 2016, the Defendant filed a motion to dismiss counts 1 and 2 of the indictment, arguing that, if the Defendant was convicted on these counts, he would face an automatic life sentence of at least fifty-one years. The Defendant argued, "Such an automatic sentence, imposed without consideration of [the Defendant's] unique characteristics or the general nature of juvenile development, and without regard to whether he himself intended to kill, would be unconstitutional."

Trial. On January 22, 2018, the Defendant's eight-day jury trial began. Phyllis Caldwell, the victim's mother, testified that she last saw her son alive on Sunday, November 15, 2015, when he left for work. She communicated regularly with her son by his cell phone, which was 865-216-[xxxx]. She continued to text the victim, but he stopped responding. She informed the police that the victim had an Apple cell phone, but she never saw that phone again. She continued to pay the victim's phone bill for several months after his death to assist the police investigation. Michael Mays, an employee of Knox County Emergency Communications District, explained that two 911 calls were made on the day of the offense, a recording of which was admitted into evidence and played for the jury. A computer aided dispatch (CAD) report, which generates all activity pertaining to 911 calls, was also admitted into evidence. The first call from Alneshia Allison was received at 5:23 p.m. She reported that someone had been shot and was hanging out of his car. Allison testified at trial and confirmed the substance of the 911 call. The second call was received from Ralph Hunter, who also testified at trial. On the day of the offense, Hunter was sitting on his front porch on Linden Avenue and heard gunshots. When he looked up the street, he saw "two young men running from a maroon car that was parked on the opposite side of the street." Hunter initially heard two gunshots and then "a few more" soon thereafter. On cross-examination, Hunter explained that he heard a total of six or seven gunshots with only "a matter of seconds" between the first two shots and the second four shots.

Sergio Rosles lived on Linden Avenue and had two dogs. He also had several video cameras set up around the outside of his house. Rosles testified that on the day of the offense he "suddenly heard about three gunshots." He looked outside his front window and saw "two or three" people running on the right side of a car. Rosles later reviewed the video surveillance from his home camera system and provided it to the police. The State introduced this video into evidence and played it for the jury. The parties agreed that, although the time stamps on Rosles's videos were not accurate, they were useful for computing the correct times for when events occurred. Rosles explained that, at an hour, seven minutes, and seventeen seconds into the video, the video shows a red car and "two

people running to the yellow house." He stated that the police arrived five to ten minutes later.

The video also shows four camera angles around Rosles's house. One of the camera angles shows Rosles's front porch, and his dog can be seen sitting on the porch. Three of the cameras show the streets around Rosles's house. At 6:52:26, a car can be seen pulling over and stopping on Linden Avenue near Rosles's house. At 6:54:00, Rosles's dog jumps. The parties agreed that this was the moment that the first shots were fired. People can be seen running from the car, but they are unidentifiable. A police cruiser, which was later determined to be KPD Officer Jimmy Wilson's vehicle, arrives on the scene at 7:00:06.

KPD Officer Jimmy Wilson, the first officer to arrive at the scene on Linden Avenue, testified that he was less than half a mile from the crime scene when he received the shots fired call. He then activated his emergency recording equipment and responded to the scene. Officer Wilson explained that his police cruiser was in "full record mode" with both audio and video at that time. The video reflects that he received the call at 5:24 p.m. Upon arrival, Officer Wilson secured the scene and determined that the victim did not have a pulse. He observed shell casings inside the victim's car as well as a firearm laying inside the car. He never saw or heard a cell phone from inside the car while he was at the crime scene. He explained that the victim "had his feet and from about his hips down to his feet inside the car," and "his shoulders and his head [were] resting on the ground outside the car as if he was in the driver's seat and had just simply fallen out on his body facing westbound." Officer Wilson also assisted in canvassing the neighborhood for information and searching for the suspects with his K-9 partner. The State introduced the full cruiser recording, which shows Officer Wilson arriving at the victim's car at 17:25:30 or 5:25:30 p.m. The parties agreed that Officer Wilson's cruiser video had an accurate time stamp. The State also introduced screen shots showing when Officer Wilson activated his camera into full record mode and when he left the crime scene.

KPD Sergeant Jeremy Maupin assisted at the crime scene and spoke to witnesses in the area, one of whom heard gunshots and the other who saw the suspects fleeing from the victim's car. He also observed a surveillance video from the Thumbs Up Market, which showed two individuals in dark clothing running westbound through the alley, but he was not able to recover this footage.

Timothy Schade, an expert in the field of a latent fingerprint examination, described the different processes for obtaining latent prints and the variables involved with leaving a fingerprint behind. Schade also responded to the scene on Linden Avenue and took hundreds of photographs of the crime scene and the evidence collected. The first set of photographs depicted the victim's car at the crime scene. Several of the exhibits showed cartridge casings, a gun on the front driver's side floorboard, a t-shirt and a glove on the

front passenger's side floorboard, a Coca-Cola bottle, a Powerade bottle, and a phone charger. Schade did not recover a cell phone from the car. A set of photographs showing the evidence after Schade collected the items from the victim's car, a set of photographs showing the victim's car after it was taken to KPD's garage, and a set of photographs showing the fingerprints left on the victim's car were also admitted into evidence. Schade recovered five spent shell casings from the crime scene. He also recovered a plastic container holding several pills. Schade explained that he used magnetic powder to recover fingerprints from the victim's car.

Schade went to the Defendant's house and took pictures which showed rounds of ammunition recovered from a headboard in the front bedroom of the Defendant's house and two cell phone covers. Schade also took pictures of the items taken from the codefendant after he was arrested, which included a backpack, a gun, cartridges, and a cell phone. Schade also went to the Medical Examiner's office, fingerprinted the victim, performed a gunshot residue kit on the victim, and collected all the evidence from the victim, which included the following: clothing, six spent rounds collected from his body, a package of Swisher Sweet Cigarillos, a baggie of marijuana, and $835 in cash. Four spent cartridge casings, a nine millimeter, two Lugers, and an FC nine millimeter, were also admitted into evidence. The gun that was recovered from the victim's car, a SCCY nine millimeter was also admitted into evidence, and Schade noted that he took buccal swabs from the Defendant and the codefendant.

Schade recovered three sets of prints from the outside of the victim's car which belonged to Kevaughn "Lil Kill" Henry, the codefendant, and the Defendant. He specifically compared the fingerprints of J'Andre Hunt to the latent prints from the items recovered from the scene, which were not a match. Schade fingerprinted the Defendant following his arrest, and these print cards were entered into evidence. Schade matched the Defendant's fingerprints to the following areas of the victim's car: "above the wheel well on the passenger side and behind the rear door going towards the back of the car[,]" the passenger side armrest on the interior side of the door, and the exterior side of the rear passenger door. Schade confirmed that these prints belonged to the Defendant.

On cross-examination, Schade testified that, when he arrived on the scene, the front doors of the victim's car were open, and the rear doors were closed. Schade did not move the gun found in the front driver's side floorboard before photographing it, but he could not say whether someone else had moved it. The gun had nine rounds in the magazine and one in the chamber, and there were no usable prints obtained from the gun. Schade could not opine when each set of fingerprints was left on the victim's car. He focused mainly on taking prints from the passenger side of the car. He did not dust the driver's side of the car for fingerprints, and he did not test any of the items found in the trunk of the victim's car.

KPD Officer Edward Johnson, another latent print examiner, testified that he verified Schade's fingerprint examinations and reached the same result. Officer Johnson also personally collected the fingerprints of J'Andre Hunt and determined that they did not match any of the latent prints taken from the victim's car.

J'Andre Hunt testified that he met the victim through Kevaughn "Lil Kill" Henry, one of his older friends whom he knew as "Kill." Hunt did not know the Defendant at the time, and he did not recognize the Defendant at trial. He also did not know the codefendant. Hunt denied being in the victim's car on the day of the offense, and he testified that he did not shoot the victim or try to rob him. He confirmed that he went to the police station on the night of the offense and provided them with a statement, fingerprints, and a buccal swab. On cross-examination, he agreed that he had been in the victim's car several different times, and he acknowledged that he told the police during his interview that they would find his fingerprints in the victim's car. Hunt stated that the victim would come over to his house twice a week, and they would "chill in the driveway" and smoke weed. He was not aware that the victim was selling pills or drugs, and he communicated with the victim primarily through Facebook.

Alex Brodhag, an expert in firearm identification and examination with the Tennessee Bureau of Investigation (TBI), performed a "muzzle to gun and distance determination" on a jacket worn by the victim to determine the distance from the muzzle of the gun when it was fired to the victim's clothing. Brodhag was only able to determine that there was gun powder residue in five out of eight holes in the victim's jacket. The presence of gunpowder indicated that the gun was shot within six feet of the victim, and his report reflecting such was admitted into evidence. On cross-examination, Brodhag could not explain why some of the holes did not have gunpowder residue around them. He agreed one explanation was that the gunpowder residue could have fallen off prior to it being tested. He also stated that, without the suspect firearm, he could not determine the distance from which the shots were fired at the victim.

KPD crime technician Stephanie Housewright went to the home of Linda Hatch on November 20, 2015, and took several photographs, which were entered into evidence. The photographs showed the back of the house, the back porch, and two nine millimeter shell casings, which she collected as evidence.

Kim Lowe, a forensic biologist for the TBI, testified that she created DNA profiles for the victim, the Defendant, and the codefendant, and her report was admitted as an exhibit. She matched the t-shirt and the glove found in the victim's car to the codefendant. The Powerade bottle contained only the DNA of the victim and an unknown female. The victim's jacket tested positive for the DNA of the victim, but the results as to the major contributor were inconclusive. Agent Lowe also tested the swabs from the rear and front

passenger headrests, which were inconclusive. On cross-examination, Agent Lowe confirmed that none of the items that she tested were positive for the Defendant's DNA. She also established that the victim's jacket was transported multiple times from the inception of the case based on the chain of custody records.

Linda Hatch provided testimony at trial which was consistent with her testimony from the juvenile transfer hearing. Additionally, Hatch testified that when the Defendant came to her house the morning after the offense, the following occurred:

> And when I had my children to leave the room, he had his head bowed in his hands and he was crying a little bit. And I said "Ty, honey, what's wrong?" And he said, "momma, I f--ked up." And I said, "what? Baby, what? What, Ty fly, what's wrong?" And he was trying to talk. And I said "it's okay. Is it you and mom? Is it you and your mom? Is it you and your brother?" "No, momma. I've f--ked my life up." And I said "what have you done, Ty? What did you do?" And he said "momma, I killed a man." And I said "what, Ty? What? No you didn't." And he said "yes, I did, momma. We killed him." And I said "you killed who?"
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> And I thought my mind was totally in denial because my Ty wouldn't do that. And he said "momma, momma, I shot a man and I killed him and I didn't mean to. And I'm sorry.". . . And I said "what do you mean you killed someone, Ty?" And he said, "momma, it went so wrong. We were just supposed to meet the man, get some weed, take his money. We wasn't supposed to hurt him. Savvy said we would just take his drugs and money."
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> And I said "let's slow down and go back." "Ty, did you take that gun and shoot--did you kill somebody with that gun?" He said, "yeah." "But I didn't mean to, mom." He said, "Savvy called the boy up and set it up. Said he would meet us and we would just get it, you know, get his money. Get the weed. And we would go. But it went bad." And I said, "like what happened? What happened, Ty? What happened?" And he said when he got there it happened so fast, momma. It happened so fast. He said he pulled up. We got--we was just going to, you know, get in and he said Savvy grabbed him and was going to hold him and I was just going to grab, you know, was going to grab the money, grab the weed, and we were gonna go. And he fought and he broke loose. Savvy couldn't hold him. And momma, Savvy said shoot him. Shoot him, Ty. And Ty said, "I pulled the trigger and when I pulled it, I couldn't stop. It just kept shooting. And when I stopped-

> -when I let go--when I realized what was going, I had emptied all the bullets." And I said "how do you know you killed him? You could have wounded him. You could have scared him. That don't mean [sic] you killed him, Ty." And he said, "momma, he was dead. That n---er, we left him dangling dead and we took off running. He was dead."

The Defendant also told Hatch that he threw the gun away and took off running after he shot the victim. He said his brother bought him a clip of hollow point bullets, and that he "blew [the victim's] chest out[.]" Hatch saw the Defendant the following day and described his demeanor as "very proud, happy, almost very swag cool" that morning. The Defendant told Hatch that the news had the wrong description of the suspects. He also told Hatch that he had shot the victim in the back.

The next day, the Defendant was arrested at Hatch's home, and shortly thereafter, the codefendant was arrested. Hatch subsequently provided the police with the video of the Defendant, the codefendant, and another friend, "Ears Tate," walking around her house, which was entered into evidence. The video showed Ears Tate with the Defendant's gun "stuck down his pants." Ears Tate pointed the gun at the codefendant and said "boom, boom, boom, boom," and the Defendant said, "give me back my gun."

Hatch also provided the State with copies of Facebook messages between her and the Defendant, which were admitted as an exhibit. Hatch could not recall when she gave these messages to the State. The Defendant's name on Facebook was "Ty Hellabands Booker." In these messages, Hatch and the Defendant talked about tattoos, the Defendant's gun, and drugs. The parties stipulated that "Hatch first provided the State of Tennessee with a set of Facebook messages previously introduced into this record at trial in August of 2017."

On cross-examination, Hatch testified that she thought of the Defendant as one of her children. She asked the Defendant what kind of drugs he had so that she could tell her husband what the Defendant was bringing into her home. Hatch denied asking the Defendant if he wanted to "go in half" on buying "weed[,]" but explained that her niece had sent these messages from her phone. Hatch also sent the Defendant pictures of marijuana and told him that the "flower man" was "taking orders." She explained that this referred to one of the Defendant's friends selling marijuana. Hatch also sent the Defendant a link to an image of a woman's breasts, which she explained was to get the Defendant's opinion on a cake that she was making. Hatch also took what she described as "sexy" photographs of the Defendant and sent them to him. Hatch said she never smoked weed with the Defendant and that her relationship with the Defendant was "absolutely not" sexual.

A custodian of records for Sprint, Tom Koch, testified and authenticated four call detail records associated with the victim's phone number, (865) 216-[xxxx], which were denoted in central standard time. The first three calls were made to the same number, (865) 227-[xxxx], later determined to belong to the Defendant's girlfriend, Jada Mostella. These calls occurred at the following times: (1) 16:03:33 and ended at 16:04:04; (2)16:10:32 and ended at 16:11:04; and (3) 16:18:08 and ended at 16:18:45. The fourth call was made to (865) 577-[xxxx], later determined to belong to the Defendant's friend, Shanterra Washington, and occurred at 16:18:57 and ended at 16:19:58. There were no further outbound calls made from this number. Koch agreed that the "non-entries" would indicate that the phone was off or outside the range of cell service. Jada Mostella testified and confirmed her phone number, as reflected in the first three calls on the victim's cell phone. At the time of the offense, Mostella was dating the Defendant. She also knew the codefendant, but she did not know the victim, Kevaughn "Lil Kill" Henry or J'Andre Hunt. Shanterra Washington testified and confirmed her home phone number, as reflected in the fourth call on the victim's cell phone. She said the Defendant was her best friend and that she knew the codefendant. She did not know the victim or Kevaughn "Lil Kill" Henry, and that she was familiar with J'Andre Hunt.

Kevaughn "Lil Kill" Henry testified that he knew the Defendant and the victim, and that he had been in the victim's car prior to his death. Henry had viewed the Defendant's Snapchat account in the summer of 2015, and observed the Defendant shooting a gun that "looked like a 9 mm[,]" from someone's back porch. Henry believed that the codefendant was with the Defendant in the video. Henry explained that Snapchat videos disappear within 24 hours after being uploaded, and he did not save this video. He said he informed the State of the video "somewhere pretty early in [the Defendant's] case." Henry also provided a statement to the police after the victim was killed. Henry testified that he was good friends with the victim, and that he was not involved in the victim's death. On cross-examination, Henry agreed that his fingerprints were found on the victim's car and that he was initially a suspect.

Tiffany Springer lived in South Knoxville with Linda and Heath Hatch and her little brother. She met the Defendant at school and described him as an older brother. She testified that he came to her house every day after he met Linda Hatch. Springer also knew the codefendant and Ears Tate, and she acknowledged that they referred to themselves as the "Chain Gang." Prior to the offense, Springer observed the Defendant and the codefendant in possession of a gun, but she never saw them shoot a gun. On the morning after the offense, the Defendant came to Springer's home to speak to Hatch. Springer overheard the Defendant say, "'I f'ed up my life.'" She also heard him say, "'I didn't know what to do, I panicked so I just--I kept going. I kept pulling it.'" Springer stated that when the Defendant came back to her house the next morning, he "wasn't acting the same as he did on Monday." On cross-examination, Springer stated that she had discussed the

Defendant's arrest and the events surrounding it many times with her mother. Springer saw the Defendant smoking marijuana, but she never saw her mother smoking with the Defendant. Springer had a Facebook account in November 2015, but she never communicated with the Defendant via Facebook Messenger. She was aware that her mother communicated with the Defendant through Facebook Messenger, but she never used Hatch's Facebook Messenger to communicate with the Defendant about drugs.

Heath Hatch, Linda Hatch's husband, was a maintenance technician and worked a 6:00 a.m. to 4:00 p.m. shift. He saw the Defendant and the codefendant in his home multiple times, and he observed the Defendant with a "black 9 mm." The Defendant told Heath that the gun was not working properly, and Heath inspected the gun and tried to disable it, but he was unable to do so. Heath never saw the Defendant fire the gun, but he did observe several shell casings in his backyard. Heath testified on cross-examination that he was not aware of his wife smoking marijuana with the Defendant.

Detective Thomas Thurman with the KPD Violent Crimes Unit responded to the scene of the offense the following morning and identified two public information press releases regarding the crime and the suspects, which were admitted as exhibits. Detective Thurman also participated in the interviews of J'Andre Hunt and Kevaughn "Lil Kill" Henry. Detective Thurman received information regarding the Facebook accounts of the Defendant and the codefendant, and he used their fingerprints to apply for arrest warrants. Although Detective Thurman executed a search warrant of the Defendant's residence, it did not produce anything of value to the investigation. Detective Thurman also interviewed Hatch, retrieved a video from her laptop, and unsuccessfully attempted to locate the victim's cell phone. Detective Thurman also confirmed that the murder weapon was never recovered. In regard to Hatch, Detective Thurman said that she told him to "write [her] check bigger," during an interview, that he told her they were "working on getting [her] processed" as an informant, and that she was never officially an informant. Hatch also wanted KPD to pay her for her son's basketball that was destroyed when the police arrested the Defendant.

Christine Fitzgerald, the Employee Benefits and Risk Management Director for the City of Knoxville, testified that Detective Thurman filed a claim for damaged property belonging to Linda Hatch, which was approved for $30. Hatch signed a release of claims liability. KPD Sergeant Andrew Boatman testified that Hatch had not acted as a controlled informant for the KPD in the past or at the time of the Defendant's trial. Neither Heath Hatch nor Springer served as confidential informants for the KPD. On cross-examination, Sergeant Boatman testified that the KPD does not keep records of every person who "raises the possibility of acting as a confidential informant with anyone in the police department." Sergeant Boatman was also qualified as an expert in narcotics distribution and investigation, and he testified that the victim had "Roxicodone 30s" in his car on the night

that he was killed. He stated that it was possible, based on the items recovered from the victim and his car, that the victim was engaged in the "distribution or possession with the intent to distribute controlled substances."

Patricia Resig, an expert in the field of firearms, examined the following from the crime scene: a nine millimeter Luger caliber bullet recovered from the victim's right shoulder; a fired nine millimeter caliber bullet recovered from the victim's right chest wall; a fired nine millimeter caliber bullet recovered from the victim's right chest cavity; a fired nine millimeter caliber bullet recovered from the victim's left chest wall; a fired nine millimeter caliber bullet recovered from the victim's stomach; and a fired nine millimeter caliber bullet recovered from the left sleeve of the victim's jacket. The bullet recovered from the victim's right chest cavity was a hollow point bullet, indicating that it was Federal ammunition, and the other bullets were consistent with Winchester ammunition. Resig determined that the six bullets "display[ed] consistent class characteristics," and that there was "[s]ome agreement of the individual characteristics [which] could have been fired through the same unknown barrel."

In regard to the five shell casings recovered from the crime scene, Resig determined that there was "a lack of sufficient matching individual characteristics[,]" but opined that "all the casings could have been fired in the same unknown gun." Four of the casings recovered from the crime scene were nine millimeter Luger caliber Winchester cartridge casings, and one was a nine millimeter Luger caliber Federal cartridge case. Resig also examined the cartridges recovered from Hatch's back porch, and she determined that both were nine millimeter Luger caliber Federal cartridge cases. She determined that these two cartridge cases and one cartridge case recovered from the crime scene were fired from the same unknown firearm. She determined that the other four cartridge casings recovered from the scene could have been fired from the same firearm. Resig also examined the nine millimeter SCCY semi-automatic handgun recovered from the victim's car, and she determined that none of the cartridge casings recovered from the crime scene were fired from that gun. Lastly, Resig examined a .32 caliber handgun which was previously identified and introduced as the gun that was confiscated from the codefendant when he was arrested. She testified that this gun would not fire nine millimeter ammunition; therefore, it did not fire any of the casings recovered from the crime scene or from Hatch's back porch. Resig's report of her findings was admitted as an exhibit at trial.

The parties entered a stipulation and agreed that "[i]n June [] 2015 Tyshon Booker and [the codefendant] were observed in each other's company."

Dr. Darinka Mileusnic-Polchan, the Chief Medical Examiner for Knox County, testified as an expert in forensic pathology. Dr. Mileusnic-Polchan performed the autopsy on the victim and confirmed that he had four gunshot wounds to the back of his body. She

also found "a lot of money" on the victim's body. Dr. Mileusnic-Polchan examined the jacket that the victim was wearing, and she testified that there were several holes in the jacket that matched up to the victim's gunshot wounds. She used a mannequin to demonstrate the trajectory of the bullets. The toxicology report revealed that the victim had a marijuana metabolite in his system when he died. The victim's manner of death was homicide, and his cause of death was multiple gunshot wounds.

The Defendant testified that he was in the victim's car on November 15, 2015, along with the codefendant. However, the Defendant said that he did not intend to rob the victim. The Defendant insisted that he shot the victim because he thought the victim was going to shoot him or the codefendant. The Defendant described his background at trial. He grew up with his mother and four brothers. His father was killed two weeks before he was born. He described his relationship with his mother as "rocky," and he stated that he would get kicked out of the house when he argued with his mother. The Defendant had a close relationship with his grandfather, who was stabbed to death. The Defendant grew up in East Knoxville, but his family moved to South Knoxville prior to the offense. The Defendant attended South Doyle High School, went to school "from time to time," and regularly smoked marijuana with his friends.

The Defendant met Linda Hatch on July 29, 2015, after his mother kicked him out of the car and Hatch offered him a ride. He got in Hatch's car, and she told him that she was his neighbor and her daughter was always talking about him. The Defendant stated that he and Hatch smoked marijuana while he was in her car. After that, the Defendant began going to Hatch's house daily. He spent the night at Hatch's house, and she gave him tattoos and bought him things. They smoked marijuana and drank alcohol together. The Defendant communicated with Hatch through Facebook Messenger, and he described several of the messages sent between them. He did not communicate with her daughter, Springer, through Hatch's Facebook account. The Defendant sold crack cocaine, and Hatch helped him find buyers. The Defendant also described two sexual encounters that he had with Hatch. The Defendant testified that he had a nine millimeter gun in November 2015, and that he shot it at Hatch's house. He said the codefendant also had a gun, but it did not function correctly.

The Defendant described the events leading up to the death of the victim as follows. The codefendant showed the Defendant a Snapchat video from the victim inviting him to smoke marijuana, and the victim eventually picked them up in his car. The codefendant sat in the front-passenger seat, and the Defendant sat in the back-passenger seat. The Defendant stated that he had never seen the victim or his car prior to the day of the offense. The Defendant could not recall when the victim picked them up, and he did not know how long they were in the victim's car. He said his gun was hidden under his shirt on his right hip, so the victim would not have known that he had a gun. The victim asked them if they

knew where to buy marijuana, and he offered them Oxycodone pills. They each took two pills, and the victim drove them to a different house and gave the codefendant money to buy marijuana. The Defendant and the victim waited in the car and listened to music while the codefendant went inside to get the marijuana. The victim then drove to a gas station and bought cigars to smoke the marijuana.

The Defendant stated that he planned to meet his girlfriend, Jada Mostella, later that day, and he used the victim's cell phone to call her. He also planned to stop by his grandfather's house on Linden Avenue, and he asked the victim to take him there. The Defendant, the victim, and the codefendant rode around in the victim's car "smoking and listening to music[,]" and the Defendant tried to call Mostella again. He also tried to call his friend, Shanterra Washington. The Defendant stated that he was trying to call again when they pulled up to his grandfather's house on Linden, and he saw the victim reach over to the codefendant's pockets. The Defendant had the victim's phone in his right hand when the codefendant and the victim began to fight. The codefendant said, "F—k," and hit the victim. The codefendant told the Defendant that the victim had a gun, and they continued to wrestle for the gun. The Defendant said the victim was holding the codefendant with his right arm while "bobbing and weaving," and the codefendant was swinging at the victim. "[The victim] started mushing [the codefendant] while reaching underneath his seat." The Defendant said he "felt the need to help [the codefendant]," and the codefendant "put [his] hands up like [he] was gonna swing on [the victim]." The victim said, "So you all are going to gang me[,]" and reached for his gun. Asked if there was anything preventing the Defendant from getting out of the car at that point, the Defendant replied, "Yeah, my friend that's preventing--I'm not about to leave [the codefendant], we came here together, we're gonna leave together." The Defendant pulled out his gun as he saw the victim turn towards him with a gun. The Defendant said he was scared, and he thought the victim was going to shoot him or the codefendant, so he shot the victim. The Defendant said the victim "didn't stop" so the Defendant shot him several more times. Eventually, the victim "stopped coming for [them][,]" dropped his gun, opened his door, and fell out. The Defendant and the codefendant then got out of the car and ran. As the Defendant was running, he threw away the gun and the victim's cell phone. He had not realized he still had possession of the victim's phone until he was running from the car. When he was unable to reach Hatch, he called his mother to get a ride home. The next morning, the Defendant went to Hatch's house and told her that he shot someone. He denied telling her that he had tried to rob the victim, and he insisted that he told her the same thing that he was telling the jury.

On cross-examination, the Defendant agreed that it "made sense" that fingerprints belonging to him and the codefendant were found on the victim's car. The Defendant also stated that he did not know Kevaughn "Lil Kill" Henry and that neither Kevaughn "Lil Kill" Henry nor J'Andre Hunt were in the victim's car with them on the day of the offense.

The Defendant had the gun in his right hand and the victim's cell phone in his pocket when he got out of the car. The Defendant was unaware that the victim had cash in his right pocket, and he did not see where the victim had the pills. The State introduced one of the Defendant's Facebook posts, which said, "I been thru it all…robbed n---as, got robbed, shot at, shot back, couple n---az got whacxed [sic]. I done been thru it all." The Defendant explained that these were rap lyrics, and the defense played the song for the jury. On redirect examination, the Defendant stated that he never intended to steal the victim's cell phone, and that he did not know he had it until after the fight.

Following submission of the above proof, the jury found the Defendant guilty as charged, and upon merging count two into count one, the trial court imposed a sentence of life imprisonment. On March 16, 2018, the trial court conducted a sentencing hearing during which several of the victim's family members gave statements about the impact of the victim's death on their lives. A psychological evaluation and follow-up examination conducted by Dr. Keith Cruise was also admitted as an exhibit to the hearing. Following merger of counts three and four, the trial court imposed a twenty-year sentence to be served concurrently to count one, for an effective sentence of life imprisonment.

On May 29, 2018, the Defendant filed a "Motion for Evidentiary Hearing and New Trial Based on the Jury's Misconduct and Exposure to Extraneous Information." In an accompanying affidavit, defense counsel averred that, following the verdict, the Knox County Public Defender's Office sent letters to the petit jury asking to discuss certain aspects of the Defendant's case. Defense counsel subsequently spoke to juror Lambert, who told them that the jury looked up information regarding the number of years the Defendant would serve for a life sentence in Tennessee during deliberations. Following this discussion, defense counsel attempted to contact the other jurors. Investigator Gerald Witt of the Knox County Public Defender's Office also provided an affidavit stating that he contacted juror Lambert, and she told him that the jurors looked up "terminology" relevant to the Defendant's case and shared that information with the entire jury. The State subsequently filed a "Motion to Prohibit Inquiry into Validity of Verdict." At a hearing held on June 1, 2018, the trial court agreed to subpoena juror Lambert to testify at the Defendant's motion for new trial regarding potential juror misconduct during deliberations.

On June 12, 2018, the Defendant filed a "Motion to Subpoena Additional Juror to Testify at Evidentiary Hearing on Jury Misconduct." Defense counsel asserted that they had received information from a second juror, who stated that "several jurors had been using Google to look up terms during deliberations." Investigator Witt provided another affidavit stating that this juror told him that jurors had looked up the "Webster meaning" of certain words that it was unclear about. At a June 22, 2018 hearing, the Defendant argued that it was necessary for the court to subpoena a second juror to testify as well, but the trial court denied the Defendant's request.

On July 2, 2018, the trial court conducted a hearing on the Defendant's motion for new trial. Juror Lambert testified that she was one of twelve jurors who heard and decided the Defendant's case. Lambert testified that the jury looked up the definition of terms on the internet during deliberations. She testified, in relevant part, as follows:

> The only thing that we looked up was the life sentence and how many years it involved, whether it was a 20[-]year sentence or--but we figured out--found out in the State of Tennessee it's 51 years automatic.
>
> . . .
>
> As far--and then the only other thing was-- that we looked up was terminology and it's been so long that I honestly could not tell you what the exact words were, but it was just a definition. I do know that. It was a definition and it had to--it was a medical word was one of them.
>
> . . .
>
> I don't recall what the word was, but it was a medical word that someone didn't understand, so we just Googled the word to find out what the definition was.

Juror Lambert explained that this occurred in the jury room and that "somebody got on their phone and looked this up[.]" Although only one person used his or her phone to look up this information, all of the jurors heard it. She could not recall the medical term that the jury looked up, but she stated, "It was a term that had come up in trial." Lambert asserted that the jury did not look up anything concerning the Defendant or the facts surrounding his case. She said both terms were looked up during the jury's deliberations, but she believed that the jury followed the trial court's instructions during deliberations and in rendering its verdict. The Defendant argued for the need to subpoena the second juror to determine what other possible terms the jury looked up during deliberations, which was denied by the trial court.

The trial court denied the Defendant's motion for new trial by written order on July 24, 2018. On August 8, 2018, the Defendant filed a timely notice of appeal, and this case is now properly before this court for our review.

ANALYSIS

I. Apprendi Violation. As an issue of first impression in Tennessee,[3] the Defendant contends that the juvenile transfer hearing process as outlined in Tenn. Code Ann. § 37-1-134(a)(4), violates the holding in Apprendi v. New Jersey, 530 U.S. 466 (2000). In Apprendi, the United States Supreme Court held that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." 530 U.S. at 490, 120 S. Ct. 2348. This concept applies to any fact that will "expose the defendant to a greater punishment than that authorized by the jury's verdict." Id. at 494, 120 S.Ct. 2348; see also Blakely v. Washington, 542 U.S. 296, 303, 124 S.Ct. 253, (2004) (clarifying that for purposes of Apprendi, the "statutory maximum" is the maximum term of imprisonment a court may impose "solely on the basis of the facts reflected in the jury verdict or admitted by the defendant"). The Defendant argues, based on the principles espoused in Apprendi, that the findings of the juvenile court judge at the transfer hearing exposed him to "the possibility of vastly increased punishment, from incarceration until age nineteen to life imprisonment." As such, the Defendant insists this is a "straightforward" violation of his Sixth Amendment right to a jury trial and the Fourteenth Amendment due process requirement of proof beyond a reasonable doubt. In response, the State contends that Tennessee's juvenile transfer procedure does not violate Apprendi. The State relies on the historic role of Tennessee juvenile courts and the majority view of other jurisdictions that have rejected Apprendi's application to juvenile transfer proceedings. Based on the following reasoning and analysis, we agree with the State, and conclude that the Tennessee juvenile hearing transfer statute does not fall within the scope of Apprendi.

We review issues of constitutional law de novo with no presumption of correctness attaching to the legal conclusions reached by the courts below. State v. Davis, 266 S.W.3d 896, 901 (Tenn. 2008); State v. Burns, 205 S.W.3d 412, 414 (Tenn. 2006). "Neither the Fourteenth Amendment nor the Bill of Rights is for adults alone." See In re Gault, 387 U.S. 1, 14 (1967) (applying various due process rights to juvenile proceedings including notice of charges, right to counsel, right of confrontation and cross-examination, and privilege against self-incrimination); In re Winship, 397 U.S. 358 (1970) (proof-beyond-reasonable-doubt standard applies to delinquency proceedings); Kent v. United States, 383 U.S. 541, 562 (1966)(holding that the [adjudication] "hearing must measure up to the essentials of due process and fair treatment"); Breed v. Jones, 421 U.S. 519 (1975) (double jeopardy protection applies to delinquency proceedings); but see McKeiver v. Pennsylvania, 403

[3] But see Brandon Mobley v. State, No. E2010-00379-CCA-R3-PC, 2011 WL 3652535, at *19 (Tenn. Crim. App. Aug. 18, 2011), aff'd in part, rev'd in part, 397 S.W.3d 70 (Tenn. 2013) (concluding that counsel was not ineffective in failing to challenge juvenile transfer hearing based on Apprendi)(citing Gonzales v. Tafoya, 515 F.3d 1097, 1110-13 (10th Cir. 2008)).

U.S. 528, 545 (1971) (plurality opinion holding that a trial by jury is not constitutionally required for juvenile court adjudications).

Juvenile courts in Tennessee have exclusive original jurisdiction over children alleged to be delinquent. Tenn. Code Ann. § 37-1-103(a)(1) (2011); State v. Hale, 833 S.W.2d 65, 66 (Tenn. 1992). A juvenile court may transfer a child to be dealt with as an adult in the criminal court of competent jurisdiction after a petition has been filed alleging delinquency based on conduct that is designated a crime and before hearing the petition on the merits. Tenn. Code Ann. §37-1-134(a) (2014). The disposition of the child *shall* be as if the child were an adult if the child is sixteen years old or more at the time of the alleged conduct and the charged offense is, inter alia, first degree murder. Id. (emphasis added). At the time of the instant offense, in determining whether to transfer the child to criminal court, the juvenile court was required to find "reasonable grounds to believe" that (A) the "child committed the delinquent act as alleged;" (B) the "child is not committable to an institution for the developmentally disabled or mentally ill;" and (C) the "interests of the community require that the child be put under legal restraint or discipline." Id., §37-1-134(a)(1), (4)(A)-(C). Additionally, in determining whether to treat a juvenile as an adult as outlined in section (a)(1), the court must also consider, among other matters, the following:

> (1) The extent and nature of the child's prior delinquency records;
>
> (2) The nature of past treatment efforts and the nature of the child's response thereto;
>
> (3) Whether the offense was against person or property, with greater weight in favor of transfer given to offenses against the person;
>
> (4) Whether the offense was committed in an aggressive and premeditated manner;
>
> (5) The possible rehabilitation of the child by use of procedures, services and facilities currently available to the court in this state; and
>
> (6) Whether the child's conduct would be a criminal gang offense...if committed by an adult.

Id., 37-1-134(b). Hearings pursuant to this part *shall be conducted by the court without a jury*, in an informal but orderly manner, separate from other proceedings not included in § 37-1-103, and pursuant to Rule 27 of the Tennessee Rules of Juvenile Procedure. Tenn.

Code Ann. § 37-1-124 (a) (emphasis added). A transfer to criminal court pursuant to this section "terminates the jurisdiction of the juvenile court over the child with respect to the delinquent acts alleged." Tenn. Code Ann. § 37-1-134(c). Moreover, regardless of the seriousness of the offense, any child shall be released from a juvenile court's jurisdiction upon the child's nineteenth birthday. Tenn. Code Ann. § 37-5-103 (4)(A)(b)-(c), (B)-(D)(2011).

In Burns, 205 S.W.3d at 417, the Tennessee Supreme Court cited favorably the reasoning of McKeiver and concluded that article I, section 8 of the Tennessee Constitution does not provide a juvenile defendant with a jury trial upon appeal of a determination by juvenile court to transfer jurisdiction to criminal court. In Burns, the Tennessee Supreme Court characterized the juvenile court system as follows:

> "[T]he system for dealing with juvenile offenders *as juveniles* is separate and distinct from the criminal justice system. On those occasions when a juvenile is transferred to criminal court to be tried *as an adult,* he or she is afforded the full panoply of constitutional rights accorded to criminal defendants, including jury trials. Defendant in this case is not, however, being tried as an adult. He is being tried within the context of a system that was designed to avoid much of the trauma and stigma of a criminal trial. We agree with the United States Supreme Court that "one cannot say that in our legal system the jury is a *necessary* component of accurate factfinding." A jury's "necessity" is further attenuated in the context of juvenile delinquency proceedings, which are aimed not at punishing the youthful offender, but at rehabilitating him. We are also persuaded that the McKeiver decision is correct in its concern for the juvenile court's "ability to function in a unique manner" in the absence of a jury. Finally, we agree with Justice Blackmun's observation that, "[i]f the formalities of the criminal adjudicative process are to be superimposed upon the juvenile court system, there is little need for its separate existence. Perhaps that ultimate disillusionment will come one day, but for the moment we are disinclined to give impetus to it."

Burns, 205 S.W.3d at 417 (emphasis in original) (internal citations omitted). Finally, we are mindful that juvenile proceedings are not "criminal prosecutions." Id. at 418 (citing Childress v. State, 133 Tenn. 121, 179 S.W. 643, 644 (1915) (recognizing that "proceedings before a juvenile court do not amount to a trial of the child for any criminal offense" and that "the proceedings in a juvenile court are entirely distinct from proceedings in the courts ordained to try persons for crime")); see also Breed v. Jones, 421 U.S. at 535 (recognizing that juvenile transfer statutes represent an attempt to impart to the juvenile-

court system the flexibility needed to deal with youthful offenders who cannot benefit from the specialized guidance and treatment contemplated by the system).

In Apprendi v. New Jersey, the adult defendant fired several .22-caliber bullets into the home of an African-American family that had recently moved into a previously all-white neighborhood. 530 U.S. at 469-71. The defendant was subsequently arrested, admitted that he was the shooter, and upon further questioning, admitted that "even though he did not know the occupants of the house personally, 'because they are black in color he [did] not want them in the neighborhood.'" Id. Although he was later indicted on multiple counts, none of the counts referred to the hate crime statute, and none alleged that the defendant acted with a racially biased purpose. Id. The parties entered into a plea agreement, and the State reserved the right to request the court to impose a higher "enhanced" sentence on the ground that the shooting offense was committed with a biased purpose, as described in the hate crime statute. The defendant, correspondingly, reserved the right to challenge the hate crime sentence enhancement on the ground that it violated the United States Constitution. Id. The trial court accepted the plea agreement. Following an evidentiary hearing on the issue of the defendant's "purpose" for the shooting, the trial court enhanced the defendant's sentence based on the hate crime statute upon finding "that the crime was motivated by racial bias" and that the defendant's actions were taken "with a purpose to intimidate" as provided by the statute. The defendant appealed, arguing, *inter alia,* that the Due Process Clause of the United States Constitution required that the finding of bias upon which his hate crime sentence was based must be proved to a jury beyond a reasonable doubt. Id. The United States Supreme Court agreed and reasoned due process of law guaranteed "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury," which entitled a criminal defendant to "a jury determination that [he] is guilty of every element of the crime with which he is charged, beyond a reasonable doubt." Id. (internal citations omitted). Under Apprendi, "Any fact that increases the penalty to which a defendant is exposed constitutes an element of a crime," Apprendi v. New Jersey, 530 U.S. at 483, n. 10, and "must be found by a jury, not a judge[.]" Cunningham v. California, 549 U.S. 270, 281 (2007); see also Gall v. United States, 552 U.S. 38, 51 (2007); Alleyne v. United States, 570 U.S. 99 (2013); and Jones v. United States, 574 U.S. 948 (2014).

The Defendant argues in effect that the findings of the juvenile court pursuant to the juvenile transfer statute, are equivalent to the sentencing enhancement that was struck down as unconstitutional in Apprendi. We respectfully disagree. State and federal courts across the nation facing challenges to juvenile transfer laws have repeatedly refused to apply the Apprendi rule to waiver hearings on the following grounds: (1) waiver hearings only determine a jurisdictional matter; (2) waiver hearings do not adjudicate guilt or culpability; (3) the unique nature of the juvenile-justice system warrants different constitutional requirements; (4) and the history of juvenile transfer shows judicial fact-

finding is constitutional. See MARK KIMBRELL, IT TAKES A VILLAGE TO WAIVE A CHILD ... OR AT LEAST A JURY: APPLYING APPRENDI TO JUVENILE WAIVER HEARINGS IN OREGON, 52 Willamette L. Rev. 61, 91-92 (2015); but see Commonwealth v. Quincy Q, 434 Mass. 859, 864, 753 N.E.2d 781, 789 (2001), overruled on other grounds by Com. v. King, 445 Mass. 217, 834 N.E.2d 1175 (2005). Upon our review, we now join the majority and decline to apply Apprendi to the Tennessee juvenile transfer process.[4]

As an initial matter, we conclude that Tennessee juvenile transfer hearings are dispositional, rather than adjudicatory. As noted in our principle authority, juvenile proceedings are not criminal prosecutions, and transfer determinations do not determine guilt or innocence. The transfer statute and the resulting findings of the juvenile court function only to determine the most appropriate forum to address the conduct for which the juvenile defendant is charged. We additionally conclude that even if Apprendi applied to the juvenile hearing transfer process, there can be no violation of the Defendant's Sixth Amendment right to a jury trial in this case. There is no question that the juvenile transfer

[4] United States v. Miguel, 338 F.3d 995, 1004 (9th Cir. 2003) (Apprendi inapplicable because it does not create a per se increase of a defendant's punishment; rather, it establishes jurisdiction only); Gonzales v. Tafoya, 515 F.3d 1097, 1110-1116 (10th Cir. 2008) (comprehensive review of other jurisdictions' analyses of Apprendi's applicability to juvenile court transfer proceedings and noting that "forty-five states and the District of Columbia have enacted statutes allowing judges to transfer juveniles to adult court after making specified findings" and that "amenability and commitment findings have not traditionally been made by juries"); Morales v. United States, No. 09 CIV 5080 LAP, 2010 WL 3431650, at *9 (S.D.N.Y. Aug. 31, 2010); Parks v. Sec'y, DOC, No. 311-CV-1213-J-39, 2014 WL 6610750, at *7 (M.D. Fla. Nov. 21, 2014) (holding, "with the twin considerations of historical practice and respect for state sovereignty, Apprendi and its progeny have not been extended by the United States Supreme Court to apply to a prosecutor's pre-trial jurisdictional charging decision"); State v. Andrews, 329 S.W.3d 369, 372-75 (Mo. 2010), as modified on denial of reh'g (Jan. 25, 2011) (juvenile certification as an adult did not equate to sentence enhancement but instead determined jurisdiction); Kirkland v. State, 67 So. 3d 1147, 1149-50 (Fla. Dist. Ct. App. 2011)(explaining that the 6th Amendment right to a jury trial does not attach "to every state-law 'entitlement' to predicate findings," "Apprendi and subsequent cases are based on the 'historic jury function of deciding whether the State has proved each element of the offense beyond a reasonable doubt," and that, so far, "the Court has not extended the Apprendi and Blakely [v. Washington, 542 U.S. 296 (2004)] line of decisions beyond the offense-specific context that supplied the historic grounding for the decisions"); State v. Rudy B., 149 N.M. 22, 243 P.3d 726 (2010) (Apprendi does not apply to the evidentiary hearing to determine whether a juvenile adjudicate as a youthful offender should be sentenced as a juvenile or as an adult); State v. Read, 397 N.J. Super. 598, 610, 938 A.2d 953, 960 (App. Div. 2008) (recognizing that transferring a juvenile to criminal court "substantially increases his sentencing exposure," but nonetheless holding that "the requirement of jury fact-finding based on proof beyond a reasonable doubt does not apply to a pretrial determination such as whether to waive a complaint against a juvenile to adult court."); Perkins v. Commonwealth, 511 S.W.3d 380, 388 (Ky. Ct. App. 2016) (citing Caldwell v. Commonwealth, 133 S.W.3d 445, 452-53 (Ky. 2004) (employing a rational basis test to determine that the classification of juveniles does not violate the state or federal equal protection clauses);Villalon v. State, 956 N.E.2d 697, 702 (Ind. Ct. App. 2011).

statute exposed the Defendant to greater punishment. The Defendant's focus here however is misplaced because the statutory maximum sentence for purposes of Apprendi is not release upon the Defendant's nineteenth birthday as argued by the Defendant. The Apprendi rule applies only to statutes that enhance sentences beyond the prescribed statutory range for a given offense. See id. at 494 n.19 (majority opinion); In re M.I., 989 N.E.2d 173, 191-92 (2013). In this case, the Defendant was convicted by a jury of first-degree felony murder, which, for juvenile offenders, is statutorily punishable by a maximum sentence of life without parole, see Charles Everett Lowe-Kelley v. State, No. M2015-00138-CCA-R3-PC, 2016 WL 742180, at *9 (Tenn. Crim. App. Feb. 24, 2016) (noting that "Miller did not hold that a juvenile can never be sentenced to life without the possibility of parole" before upholding the juvenile defendant's consecutive life sentences as constitutional), perm. app. denied (Tenn. June 23, 2016)). Even applying the substance over form test to our analysis, as argued by the Defendant, we are not convinced Apprendi was intended to be so broadly construed. Accordingly, under these circumstances, the Defendant has failed to establish a violation of his Sixth Amendment right to a jury, and he is not entitled to relief.

II. Juvenile Transfer Hearing. Although the Defendant concedes that "there was sufficient evidence to find probable cause that [he] had committed a crime," he contends that the juvenile court erred in transferring his case to criminal court. Noting that the juvenile court "correctly" narrowed the issue at the hearing to "the possible rehabilitation of the child," he argues that there was no evidence supporting the juvenile court's "untutored intuition as to the futility of treatment," especially in light of the defense expert's opinion to the contrary. The State argues, and we agree, that there were reasonable grounds to believe that the Defendant committed a juvenile act for which he could be tried as an adult. Accordingly, the juvenile court properly transferred the Defendant to criminal court to be tried as an adult.

This court reviews a juvenile court's findings in determining whether reasonable grounds exist to establish the criteria in Tenn. Code Ann. § 37-1-134 (a) for an abuse of discretion. State v. Kayln Marie Polochak, No. M2013-02712-CCA-R3-CD, 2015 WL 226566, at *38 (Tenn. Crim. App. Jan. 16, 2015) (citations omitted). In making the determination of whether a juvenile court properly transferred a case, this Court has held:

> The court is only required to find that there are "reasonable grounds" upon which to base a finding that a juvenile is not amenable to rehabilitation. The juvenile court, in its role of Parens patriae, is placed in a unique position with regard to the persons appearing before it. The juvenile judge is experienced in the evaluation of youthful offenders and is given a wide range of discretion

> in attempting to establish the most beneficial course of action in rehabilitating those offenders. In making a decision whether a juvenile is amenable to treatment or rehabilitation, the juvenile judge may consider many factors including testimony by expert witnesses, the type of facilities available, length of stay in these facilities, the seriousness of the alleged crime, and the attitude and demeanor of the juvenile.

State v. Strickland, 532 S.W.2d at 920; State v. Layne, 546 S.W.2d 220, 224 (Tenn. Crim. App. 1976); State v. Christopher Bell, No. W2014-00504-CCA-R3-CD, 2015 WL 1000172, at *4 (Tenn. Crim. App. Mar. 4, 2015). "The court can in good faith rely on all or none of these factors as long as there are reasonable grounds supporting the decision." Christopher Bell, 2015 WL 1000172, at *4. "This court has also stated that a defendant's conduct surrounding the offenses and the serious nature of the offenses impact that defendant's amenability for rehabilitation." Id. (citing State v. Robert William Holmes, No. 01C01-9303-CC-00090, 1994 WL 421306, at *3 (Tenn. Crim. App. Aug. 11, 1994).

The Defendant takes issue with the juvenile court's finding that he could not be properly rehabilitated by the time he turned nineteen and was released from juvenile custody. The Defendant focuses solely on his expert witness's testimony, and he asserts, "the State's evaluating expert did not offer any testimony that would have supported the Juvenile Court's conclusion that treatment would be inadequate." Although the Defendant argues that the juvenile court limited its decision to (b)(5) based on the juvenile court's comment that it was the "more important factor in this case," we disagree. The record shows that the juvenile court conducted a thorough transfer hearing that spanned three days. Not only did the juvenile court order a psychological evaluation of the Defendant, which was performed by Dr. Axtell, the court also heard extensive testimony from the Defendant's independent expert, Dr. Cruise. The juvenile court also heard testimony from the Defendant's supervisor for the first offender program, who testified that the Defendant did not follow through on his probation requirements. The juvenile court considered Dr. Cruise's testimony and agreed with both mental health experts "completely." However, when the juvenile court considered Tenn. Code Ann. § 37-1-134(b)(5), the Defendant's potential for rehabilitation, the juvenile court struggled with the amount of time left to rehabilitate the Defendant based on his age. After weighing the amount of time before it lost jurisdiction over the Defendant based on his age against the seriousness of the crime and the safety of the community, the juvenile court determined that the Defendant should be transferred to criminal court to be tried as an adult. Because the record shows the juvenile court had "reasonable grounds" to believe that the Defendant committed first degree felony murder and that the interests of the community required that the Defendant be put under legal restraint, the Defendant is not entitled to relief.

III. Brady Violation in Juvenile Court. The Defendant contends the State withheld "evidence that the shooting was perpetrated by two individuals who were not [the Defendant]" until "well after" the Defendant's juvenile transfer hearing. He asserts that this information was material to his transfer hearing and, by not providing the information, the State violated his right to a "fair transfer hearing." He argues that the "relevant inquiry" is not whether this information was provided by or useful at his trial in criminal court, but "whether the information would have been useful at the transfer hearing." He asserts that such information was both relevant and material because: (1) "the State's inculpatory evidence consisted merely of fingerprint evidence and of Linda Hatch's testimony[,]" and (2) "the decision to transfer was explicitly predicated on the Juvenile Court's confidence that [the Defendant] was indeed guilty of murder as alleged by the State." The Defendant maintains that Brady applies to juvenile transfer hearings and that the juvenile court ordered the State to turn over exculpatory material to the Defendant. The Defendant states that the Brady information was material because (1) it was third party culprit evidence, and (2) it could have been used to "cast doubt over the competence and thoroughness of the investigators."

In response, the State contends that Brady does not apply to juvenile transfer hearings. Alternatively, the State argues that even if Brady does apply to juvenile transfer hearings, the Defendant has failed to establish the materiality of the proof at issue. The State argues that the evidence presented at the juvenile transfer hearing was "more than enough to at least establish probable cause" and that the alleged Brady material would have been "frail disputing proof." The State also asserts that the Defendant had the "purported Brady proof" by the time of his trial in criminal court but that he was "no longer interested in this proof" at that time and instead he testified that he shot the victim in self-defense.

Throughout the contentious proceedings and the numerous filings of the parties in this case, the juvenile court repeatedly stressed its concern to avoid "trial by ambush" and compared the transfer hearing to a "probable cause hearing on steroids[.]" In its December 10, 2015 order, the juvenile court ordered the State to "provide the defense with copies of discovery that the State intend[ed] to use at the transfer hearing, as well as exculpatory discovery as defined under Brady, at least two (2) weeks prior to the transfer hearing." At the same time, the Defendant filed a motion to dismiss based on a violation of Brady, arguing that the State failed to turn over information pertaining to Kevaughn "Lil Kill" Henry, whose fingerprints were also found on the victim's car and who provided a recorded interview to police. The juvenile court determined that there had not been a Brady violation; however, it again ordered the State to "give [the Defendant] anything [it had] with regard to Mr. Henry." Following transfer to criminal court to be tried as an adult, on November 23, 2016, the Defendant filed yet another motion to dismiss the indictment based on a Brady violation, arguing that "the State suppressed material exculpatory evidence . . .

that an eyewitness identified two other people as the perpetrators--from the defense at the transfer hearing in Juvenile Court[.]" The trial court held a hearing on the Defendant's motion on February 10, 2017.

Clayton Madison, a detective in the KPD Violent Crimes Unit, testified that around 11:30 p.m. on the night of the offense, the victim's brother received a call from someone named "Junkyard," who told him that he saw J'Andre Hunt and Jaquez Hunt running from the victim's car at the time of the offense. The victim's brother notified KPD of this information the same night and sent them an email with two photographs showing Kevaughn "Lil Kill" Henry, J'Andre Hunt, and Jaquez Hunt. The photographs were admitted into evidence at the hearing. Within two days of the offense, Detective Madison conducted recorded interviews of J'Andre Hunt, Kevaughn "Lil Kill" Henry, and the codefendant, all of which were admitted into evidence. Kevaughn "Lil Kill" Henry denied involvement in the offense and explained that his fingerprints were on the victim's car because the victim had picked him up from a restaurant a day or two before the offense. J'Andre Hunt denied involvement in the offense and claimed he was at home watching football at the time, which was later confirmed by his mother. J'Andre Hunt further advised that his cousin, Jaquez Hunt, was at work at the time of the offense, which was later confirmed by independent investigation. Detective Mason also confirmed that there were no identifiable fingerprints of J'Andre Hunt and Jaquez Hunt at the crime scene. Detective Madison attempted to speak to "Junkyard," but he refused to provide his real name and denied making any statements to the victim's brother. Finally, the codefendant confirmed that he was in the victim's car when the Defendant robbed the victim of his watch and phone and that the Defendant shot the victim in the process.

Detective Madison was pressed by defense counsel regarding when he provided the information confirming the identity of J'Andre Hunt and Jaquez Hunt as well as the photograph of them with Kevaughn "Lil Kill" Henry, but he could not recall the exact date. He "assume[d]" that the State had this information prior to the Defendant's transfer hearing. The Defendant also introduced as exhibits to the hearing a discovery response filed by the State on September 21, 2016, in criminal court, a subsequent discovery response filed on September 30, 2016, a discovery request filed in juvenile court by the Defendant on November 23, 2015; an order from the juvenile court on December 10, 2015, requiring that Brady information be turned over prior to the transfer hearing; and a set of emails sent between the prosecutor and defense counsel on September 27, 2016.

Defense counsel explained to the trial court that the Brady violation concerned information that was not provided prior to the June 10, 2016 juvenile transfer hearing, which deprived the Defendant of a fair transfer hearing. On September 21, 2016, she was notified that the State had an "eyewitness who put two other people at the scene" and that they had interviewed J'Andre Hunt. Upon further requesting the information via email,

she received it on September 30, 2016, four months after the transfer hearing. Defense counsel stressed that the juvenile court had previously ordered the State to provide the defense "anything you got with regard to Mr. Henry." The defense vigorously argued that the photograph showing Kevaughn "Lil Kill" Henry with J'Andre and Jaquez Hunt was Brady material and that the State violated the juvenile court order by failing to produce it before the transfer hearing.

In response, the State advised the trial court that they had provided the defense with Kevaughn "Lil Kill" Henry's statement. She further explained that she did not consider the statement of J'Andre Hunt to be exculpatory because he denied fleeing from the scene and investigation subsequently confirmed that he had an alibi. Additionally, given the other evidence of the Defendant and the co defendant's guilt, she did not believe information pertaining to J'Andre Hunt was exculpatory. She also insisted that prior to the transfer hearing she was unaware whether there was a true eyewitness to the "suspects fleeing the scene" information or whether this was an investigative technique employed by the officers. Upon later speaking with Officer Madison, she provided the information in discovery to the defense concerning "Junkyard's" statements and then categorized it as Brady material.

Although the trial court agreed that the information qualified as Brady material, it denied the Defendant's motion to dismiss the indictment reasoning as follows:

> The question before this Court is, one, has there been a Brady violation? And typically, folks, we're always considering whether or not there's been a Brady violation after a trial has occurred and whether or not that impacted a defendant's right to a fair trial. That's the standard. Just because the State may or may not have turned over some piece of information which may or may not have been exculpatory does not automatically, if that fact is proven, equate to having a new trial.
>
> I think it is significant that [the Juvenile Court] was not required to find proof beyond a reasonable doubt. As the fact finder in Juvenile Court, he was required to find probable cause. He had to find the other criteria, as required by the statute, but he was required to find probable cause. So the question becomes, does the fact that the Defense did not have the information that they now have in preparation of their defense for [the Defendant] before the trier of fact in this court, the jury, does that equal and equate to their right to have this case dismissed at this juncture and sent back to Juvenile Court? This Court finds that it does not.
>
> The Due Process Clause of the Fourteenth Amendment to the United States

Constitution and the "Law of the Land" Clause of Article I, section 8 of the Tennessee Constitution afford all criminal defendants the right to a fair trial. In Brady v. Maryland, 373 U.S. 83, 87 (1963), the United States Supreme Court held that "suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or punishment, irrespective of good faith or bad faith of the prosecution." Evidence that is "favorable to an accused" includes both "evidence deemed to be exculpatory in nature and evidence that could be used to impeach the state's witnesses." Johnson v. State, 38 S.W.3d 52, 55-56 (Tenn. 2001). Favorable evidence has also been defined as "evidence which provides some significant aid to the defendant's case, whether it furnishes corroboration of the defendant's story, calls into question a material, although not indispensable, element of the prosecution's version of the events, or challenges the credibility of a key prosecution witness." Id. at 56-57 (quoting Commonwealth v. Ellison, 376 Mass. 1, 379 N.E.2d 560, 571 (1978)). This also includes "favorable information that would have enabled defense counsel to conduct further and possibly fruitful investigation regarding the fact that someone other than the appellant killed the victim." Johnson v. State, 38 S.W.3d at 56 (citing State v. Marshall, 845 S.W.2d 228, 233 (Tenn. Crim. App. June 30, 1992.)). In Gumm v. Mitchell, 775 F.3d 345, 364 (6th Cir. 2014), the United States Court of Appeals for the Sixth Circuit held,

> Prosecutors are not necessarily required to disclose every stray lead and anonymous tip, but they must disclose the existence of "legitimate suspect[s]," D'Ambrosio v. Bagley, 527 F.3d 489, 499 (6th Cir. 2008). "Withholding knowledge of a second suspect conflicts with the Supreme Court's directive that 'the criminal trial, as distinct from the prosecutor's private deliberations, [be preserved] as the chosen forum for ascertaining the truth about criminal accusations.'" United States v. Jernigan, 492 F.3d 1050, 1056-57 (9th Cir.2007) (en banc) (quoting Kyles v. Whitley, 514 U.S.419, 439 (1995)).

Rule 206 of the Rules of Juvenile Practice and Procedure governs discovery issues in juvenile court and provides, in pertinent part, that "[e]ach juvenile court shall ensure that the parties in delinquent and unruly proceedings have access to any discovery materials consistent with Rule 16 of the Rules of Criminal Procedure." Tenn. R. Juv. Prac. & Proc. 206(a). However, a "juvenile court transfer hearing 'is the exact counterpart of the General Sessions preliminary hearing to the extent of the issue of probable cause.'" State v. Dennis Joe Hensley, No. E2005-01444-CCA-R3-CD, 2006 WL 2252736, at *8 (Tenn. Crim. App. Aug. 7, 2006) (citing State v. Womack, 591 S.W.2d 437, 443 (Tenn. Ct. App. 1979)). "[T]here is no provision for discovery, as such, as a part of a pre-trial 'probable cause hearing,'" and "the reception of evidence at such a hearing should properly be confined to issues before the court at the time." Womack, 591 S.W.2d at 443. The Advisory Commission Comment to Rule 206 provides, in pertinent part, as follows:

> [D]iscovery rules do not apply to preliminary examinations and hearings. Therefore, this rule would not apply to any probable cause hearing in juvenile court with the caveat that this rule is not the exclusive procedure for obtaining discovery. Please note that some discovery may be critical in a transfer hearing. The Court should use its discretion in granting access to information necessary to defend or prosecute a transfer case. *The state must disclose any exculpatory evidence to the child's attorney per* Brady v. Maryland, 373 U.S. 83 (1963).

Tenn. R. Juv. Prac. & Proc. Rule 206 Advisory Comm'n Cmt. Rule 206 (emphasis added). Accordingly, it is within the discretion of the juvenile court to grant access to information necessary to defend or prosecute a transfer case, and obviously, the State must disclose any exculpatory evidence to the child's attorney per Brady. This is consistent with our principle holdings above, concluding that a juvenile transfer hearing is a critical stage in the proceedings which "must measure up to the essentials of due process and fair treatment." Kent v. United States, 383 U.S. at 560-62; see also State v. Iacona, 2001-Ohio-1292, 93 Ohio St. 3d 83, 92, 752 N.E.2d 937, 947 (Ohio 2001) (holding that the State is under a constitutional duty to "disclose to a juvenile respondent all evidence in the state's possession favorable to the juvenile respondent and material either to guilt or punishment that is known at the time of a mandatory bindover hearing. . . and that may become known to the prosecuting attorney after the bindover"). Accordingly, we conclude that the Defendant was indeed entitled to Brady material at the transfer hearing.

We must now determine if the evidence that was not disclosed at the transfer hearing constitutes Brady material and the effect, if any, the nondisclosure had on the determination of the juvenile court to transfer the Defendant to be tried as an adult. Evidence is considered material "if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." Kyles, 514 U.S. at 433 (citation omitted); State v. Edgin, 902 S.W.2d 387, 390 (Tenn. 1995). As the United States Supreme Court explained,

> [The] touchstone of materiality is a "reasonable probability" of a different result, and the adjective is important. The question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence. A "reasonable probability" of a different result is accordingly shown when the government's evidentiary suppression "undermines confidence in the outcome of the trial."

Kyles, 514 U.S. at 434 (quoting United States v. Bagley, 473 U.S. 667, 678 (1985)). The

burden of proving a Brady violation rests with the defendant, and the violation must be proved by a preponderance of the evidence. Edgin, 902 S.W.2d at 389 (citing State v. Spurlock, 874 S.W.2d 602, 610 (Tenn. Crim. App. 1993)). In order to establish a Brady violation, the defendant must show the existence of four elements: (1) that the defendant requested the information (unless the evidence is obviously exculpatory, in which case the State is bound to release the information whether requested or not); (2) that the State withheld the information; (3) that the withheld information was favorable; and (4) that the withheld information was material. Johnson v. State, 38 S.W.3d at 56.

The record clearly establishes that the Defendant requested the State to disclose Brady material in juvenile court prior to the transfer hearing, which was supported by the order of the juvenile court. Emails exchanged between defense counsel and the State establish that the Defendant did not know about two other potential suspects interviewed by the police or that they had photographs of these same individuals with Kevaughn "Lil Kill" Henry until September 27, 2016, well after the Defendant's transfer to criminal court. Detective Madison confirmed that he received this information from the victim's brother on the night of the offense. Although Detective Madison could not recall when he provided this information to the State, the evidence was in the possession of the police prior to the transfer hearing, and they failed to provide it to the defense. See State v. Jackson, 444 S.W.3d 554, 594 (Tenn. 2014) (citing Kyles 514 U.S. at 439; Johnson, 38 S.W.3d at 56). Nevertheless, we conclude that the information concerning the other potential suspects was neither favorable nor material to the Defendant's transfer hearing. Detective Madison testified that he interviewed J'Andre Hunt and Jaquez Hunt, both of whom were quickly eliminated as suspects based on their alibis and other information discovered by the police. These individuals did not appear to be legitimate suspects, but rather, stray leads that were dismissed early in the case. See Bagley, 527 F.3d at 499. Additionally, at the Defendant's transfer hearing there was testimony that the Defendant had confessed to Hatch that he shot the victim in the back as a result of a robbery gone "bad." The Defendant's fingerprints were also found in several areas of the exterior and interior of the victim's car, which was consistent with the Defendant's confession to Hatch. This evidence was more than enough to support the juvenile court's finding of probable cause, and we do not believe that the information about two potential suspects that were abandoned very early into the case would have impacted the decision to transfer to criminal court to be tried as an adult. Accordingly, the Defendant is not entitled to relief.

IV. Defendant's Duty to Retreat before Engaging in Self-Defense. The Defendant concedes that he was engaged in unlawful activity at the time of the offense; specifically, the possession of a weapon as a minor. He argues, however, that this offense is "not the kind of illegal activity that is contemplated by the [self-defense] statute." Although he acknowledges that State v. Perrier, 536 S.W.3d 388 (Tenn. 2017), declined to address the necessity of a causal nexus between the unlawful activity and the need to

engage in self-defense, he insists that the trial court erred in instructing the jury that he had a duty to retreat because there was not a causal nexus between his status as a minor in possession of a firearm and the need for him to defend himself and codefendant Robinson. Based on the physical fight between the codefendant and the victim, the Defendant argues the jury should have been instructed that he had "no duty to retreat" before using force against the victim. He argues further that the error was not harmless because the State relied heavily on the Defendant's duty to retreat before using force against the victim in its closing arguments. Lastly, the Defendant argues that allowing the trial court to make the factual finding of whether a defendant was engaged in unlawful activity under a clear and convincing standard, rather than allowing a jury to make this determination under a beyond a reasonable doubt standard, violates his constitutional rights to due process and a jury trial.[5]

In response, the State contends that the plain language of the self-defense statute does not require a causal nexus between a defendant's unlawful activity and his need for self-defense. The State asserts that, even if this Court imposes a causal nexus requirement, the Defendant has not established a nexus here because the Defendant's illegal possession of a firearm was connected to the "use of force," and minors in possession of handguns are similar to felons in possession of handguns. Regardless, the State argues any error in the jury instruction was harmless because the evidence of the Defendant's guilt was overwhelming.

A defendant in a criminal case has a constitutional right to a correct and complete charge of the law. State v. Dorantes, 331 S.W.3d 370, 390 (Tenn. 2011) (citing State v. Faulkner, 154 S.W.3d 48, 58 (Tenn. 2005); State v. Farner, 66 S.W.3d 188, 204 (Tenn. 2001); State v. Garrison, 40 S.W.3d 426, 432 (Tenn. 2000)). It follows then that trial courts have a duty in criminal cases to instruct the jury on the law applicable to the facts of a case. State v. Clark, 452 S.W.3d 268, 294-95 (Tenn. 2014) (citing State v. Thompson, 285 S.W.3d 840, 842 n.1 (Tenn. 2009); State v. Burns, 6 S.W.3d 453, 464 (Tenn. 1999)). Whether jury instructions are sufficient is a question of law that this court reviews de novo with no presumption of correctness. Clark, 452 S.W.3d at 295 (citing State v. Hawkins, 406 S.W.3d 121, 128 (Tenn. 2013); Nye v. Bayer Cropscience, Inc., 347 S.W.3d 686, 699 (Tenn. 2011)). When reviewing challenged jury instructions, this court must "view the instruction in the context of the charge as a whole" in determining whether prejudicial error has occurred. Id. (citing State v. Rimmer, 250 S.W.3d 12, 31 (Tenn. 2008); State v.

[5] The Defendant acknowledges that the Tennessee Supreme Court rejected this issue in Perrier, which held that the trial court makes the determination of whether a defendant was engaged in unlawful activity such that the 'no duty to retreat' instruction would not apply. He has preserved this issue in the event of further litigation. As we are bound by Perrier, the Defendant is not entitled to relief as to this issue.

Hodges, 944 S.W.2d 346, 352 (Tenn. 1997)). An instruction is prejudicially erroneous and requires reversal when "the instruction alone infected the entire trial and resulted in a conviction that violates due process," see State v. James, 315 S.W.3d 440, 446 (Tenn. 2010), or "when the judge's charge, taken as a whole, failed to fairly submit the legal issues or misled the jury as to the applicable law," see State v. Majors, 318 S.W.3d 850, 864-65 (Tenn. 2010). Id. "[A] person is entitled to a jury instruction that he or she did not have to retreat from an alleged attack only when the person was not engaged in unlawful activity and was in a place the person had a right to be." Perrier, 536 S.W.3d at 401 (footnote omitted).

Tennessee's self-defense statute provides as follows:

> (b)(1) Notwithstanding §39-17-1322, a person who is not engaged in unlawful activity and is in a place where the person has a right to be has no duty to retreat before threatening or using force against another person when and to the degree the person reasonably believes the force is immediately necessary to protect against the other's use or attempted use of unlawful force.
>
> (2) Notwithstanding § 39-17-1322, a person who is not engaged in unlawful activity and is in a place where the person has a right to be has no duty to retreat before threatening or using force intended or likely to cause death or serious bodily injury, if:
>
> (A) The person has a reasonable belief that there is an imminent danger of death or serious bodily injury;
>
> (B) The danger creating the belief of imminent death or serious bodily injury is real, or honestly believed to be real at the time; and
>
> (C) The belief of danger is founded upon reasonable grounds.

Tenn. Code Ann. § 39-11-611. The Tennessee Pattern Jury Instructions on self-defense provide, in relevant part, as follows:

> Included in the defendant's plea of not guilty is *[his][her]* plea of self-defense.
>
> If a defendant was in a place where he or she had a right to be, he or she would have a right to *[threaten][use]* force against the *[deceased][alleged victim]* when and to the degree the defendant reasonably believed the force

was immediately necessary to protect against the alleged victim's *[use][attempted use]* of unlawful force. **[Remove this bracketed language if the trial court finds the defendant was engaged in unlawful activity after a hearing. See Comment Two**: The defendant would also have no duty to retreat before *[threatening][using]* force.**]**

[If a defendant was in a place where he or she had a right to be, he or she would also have a right to *[threaten][use]* force intended or likely to cause *[death][serious bodily injury]* if the defendant had a reasonable belief that there was an imminent danger of death or serious bodily injury, the danger creating the belief of imminent death or serious bodily injury was real, or honestly believed to be real at the time, and the belief of danger was founded upon reasonable grounds. **[Remove this bracketed language if the trial court finds the defendant was engaged in unlawful activity after a hearing. See Comment Two**: The defendant would also have no duty to retreat before *[threatening][using]* force likely to cause *[death][serious bodily injury]***]**.]

7 Tenn. Prac. Pattern Jury Instr. T.P.I.-Crim. 40.06(b) (emphasis in original).

The trial court in the Defendant's case removed the bracketed language from the Tennessee Pattern Jury Instruction after finding that the Defendant was engaged in unlawful activity to wit: minor in possession of a firearm, see Tenn. Code Ann. § 39-17-1319, and, therefore, had a duty to retreat. It provided the following instruction to the jury:

Included in the defendant's plea of not guilty is his plea of self-defense.

The defendant would have a right to threaten or use force against the deceased when and to the degree the defendant reasonably believed the force was immediately necessary to protect against the alleged victim's use or attempted use of unlawful force.

The defendant would also have a right to threaten or use force intended or likely to cause death or serious bodily injury if the defendant had a reasonable belief that there was an imminent danger of death or serious bodily injury. The danger creating the belief of imminent death or serious bodily injury was real or honestly believed to be real at the time, and the belief of danger was founded upon reasonable grounds.

> The law of self-defense requires that the defendant must have employed all means reasonably in his power, consistent with his own safety, to avoid danger and avert the necessity of taking another's life. This requirement includes the duty to retreat if, and to the extent, that it can be done in safety.

The statute at issue here, Tenn. Code Ann. Section 39-11-611(b), does not define "unlawful activity" and is therefore not unambiguous. Additionally, while the Perrier court declined to address the causal nexus issue, in answering the question of whether the "unlawful activity" language modifies the entirety of the claim of self-defense or only applies to the no-duty-to-retreat qualification, it "examin[ed] the history and language of the statute because the statutory language is *not clear and unambiguous*." Perrier, 536 S.W.3d at 398 (emphasis added). In doing so, the Court observed that "[t]he abandonment of the duty to retreat was '[t]he primary distinction' between the common law and the statutory law of self-defense." Id. at 399 (citing 11 DAVID L. RAYBIN, TENNESSEE PRACTICE: CRIMINAL PRACTICE AND PROCEDURE, § 28:36 Self-defense (Dec. 2016 Update)). Based on State v. Renner, 912 S.W.2d 701, 704, (Tenn. 1995), the Perrier court determined that the phrase, "is in a place where the person has a right to be," was related to the "true man" doctrine. "The 'true man' doctrine is simply another term for the no-duty-to-retreat rule, and it provides that one does not have to retreat from a threatened attack."

> [T]his doctrine applies only: (1) when the defendant is without fault in provoking the confrontation, and (2) when the defendant is in a place where he has a lawful right to be and is there placed in reasonably apparent danger of imminent bodily harm or death.

Perrier, at 399 (citations omitted). The Defendant argues that the "engaged in unlawful activity" phrase is "an elaboration of the 'without fault in provoking the confrontation' requirement from the true man doctrine." He insists that the "without fault" language does not refer to fault in general, but rather, fault in causing the confrontation at issue. We agree. At common law, the "true man" doctrine's primary prerequisite was that only "one without fault" is permitted to use deadly force. R. CHRISTOPHER CAMPBELL, UNLAWFUL/CRIMINAL ACTIVITY: THE ILL-DEFINED AND INADEQUATE PROVISION FOR A "STAND YOUR GROUND" DEFENSE, 20 Barry L. Rev. 43, 55 (2014) (citing Beard, 158 U.S. at 561). The common law cases to address the "without fault" requirement acknowledge that "the party in the wrong must do the retreating. Our law is more favorable to the man who is in the right, and places a less burden upon him in homicide cases than upon the man who is in the wrong and *produces* the occasion." Voight v. State, 109 S.W. 268, 270 (Tex. Crim. App. 1908)(emphasis added). Additionally, "[i]t is one of the fundamental principles of the law of homicide, whenever the doctrine of self-defense arises, that the accused

himself must always be reasonably *free from fault, in having provoked or brought on the difficulty in which the killing was perpetrated*." Storey v. State, 71 Ala. 329, 336 (1882)(emphasis added).

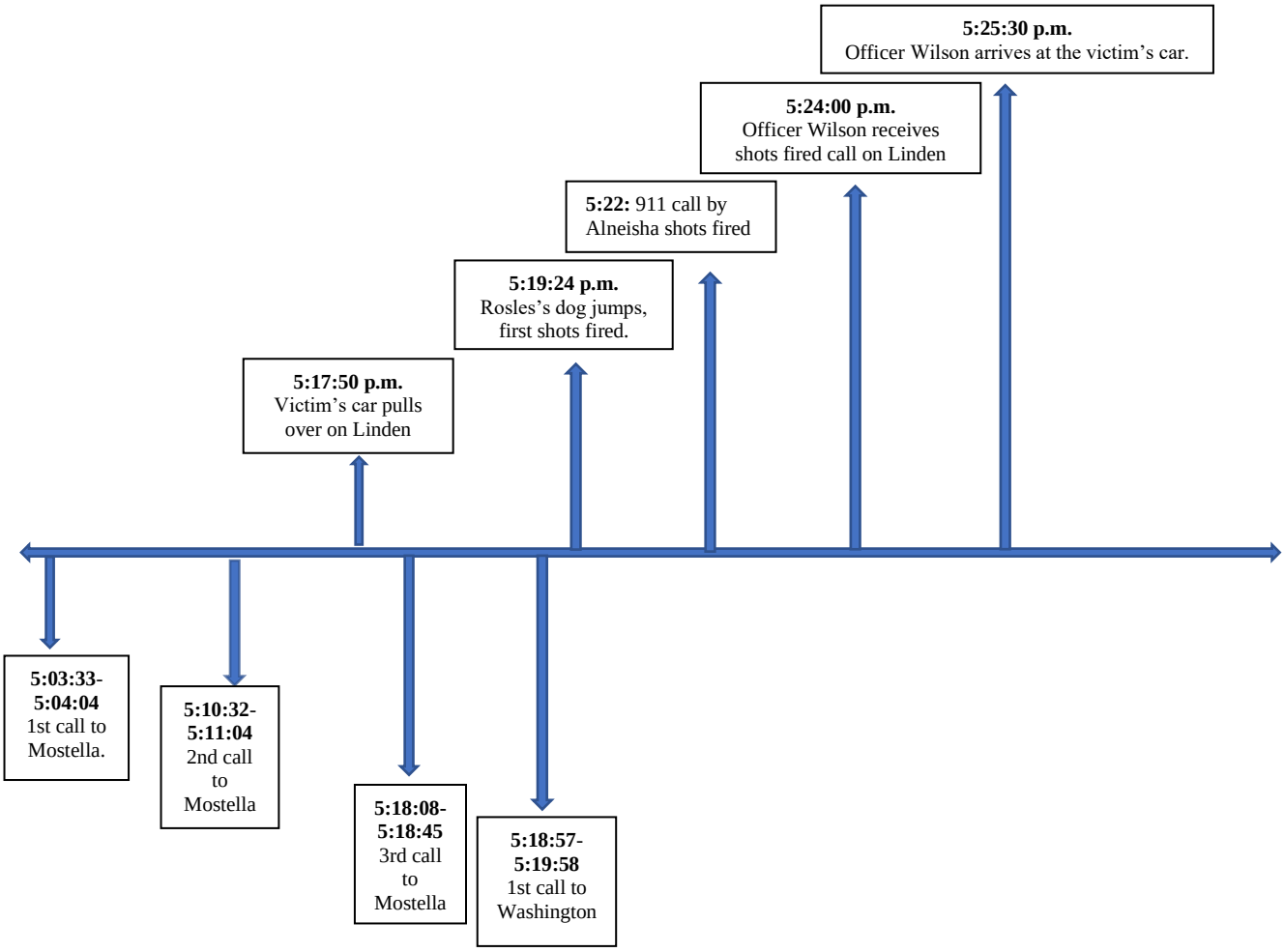
To interpret the statute without a nexus between the "unlawful activity" and the duty to retreat would lead to absurd results. For example, if a defendant had failed to file her income taxes or failed to timely file her vehicle registration or failed to renew her gun license, then she would be unable to avail herself of Tennessee's self-defense statute. As one court has explained, application of the self-defense statute without a nexus to the conviction offense would nullify virtually every claim of self-defense. See Mayes v. State, 744 N.E.2d 390, 392 (Ind. 2001) (citing Oregon v. Doris, 51 Or. 136, 94 P. 44, 53 (1908) ("[T]o hold that the mere fact that a person accused of a homicide was armed at the time, and that because of the misdemeanor resulting therefrom [possession of a concealed weapon] he shall be deprived of any right of self-defense, would lead to the absurd and unjust consequence in practically all cases of depriving the accused of any defense...."); South Carolina v. Leaks, 114 S.C. 257, 103 S.E. 549, 551 (1920) (In a prosecution for homicide "[t]he causal connection between the unlawful act of gambling and the encounter arising during the progress of the game between the participants is too remote to destroy the right of self-defense."); West Virginia v. Foley, 128 W.Va. 166, 35 S.E.2d 854, 861 (1945) ("Whether [defendant] had a license to carry a pistol on the occasion he was armed is not relevant in the least to the common law right to arm for self-defense.")). Accordingly, we conclude that a causal nexus between a defendant's unlawful activity and his or her need to engage in self-defense is necessary before the trial court can instruct the jury that the defendant had a duty to retreat.

We must now determine whether there was a causal nexus between the Defendant's unlawful activity and his need to engage in self-defense, and what effect, if any, it had in this case. Arguably, the Defendant's status as a juvenile in possession of a handgun, a violation of Tenn. Code Ann. § 39-17-1319, could be the cause of the confrontation at issue in this case. In other words, but for the Defendant's illegal possession of the handgun as a minor, the victim would still be alive. However, status offenses such as this will rarely qualify as unlawful activity because a person's status alone cannot provoke, cause, or produce a situation. Nevertheless, in our view, the proof here overwhelming established a causal connection between the Defendant's robbery of the victim and the Defendant's perceived need to engage in self-defense. Because the Defendant was engaged in unlawful activity, to wit robbery, at the time of the offense, he had a duty to retreat, and was therefore not entitled to the protection of the Tennessee self-defense statute. Accordingly, the trial court properly instructed the jury, and the Defendant is not entitled to relief.

V. <u>Prosecutorial Misconduct Based on False Statements in Closing Argument.</u> As we will explain in more detail below, the parties in this case relied heavily on the Rosles' video footage, the dashcam footage from the patrol car, and the cell phone records to establish a timeline for the offense. At the core of the Defendant's claim of prosecutorial misconduct is the State's miscalculation of these times during closing argument. The Defendant specifically argues that the State misstated the evidence regarding the timing of the shooting and the timing of the four phone calls made to the Defendant's girlfriends. In stating these times inaccurately, the State argued the Defendant made two calls on the victim's phone *after* the shooting, which the Defendant argues directly contradicted his testimony and undercut his credibility. The Defendant acknowledges that he failed to object to the State's closing argument and argues for plenary review given the unique circumstances of this case.

In response, the State contends that the Defendant waived this argument and that he is not entitled to plain error relief because defense counsel "made a conscious and considered strategic decision not to object to this argument because he did not believe that he had a good-faith basis for objection and had to 'let it go.'" Additionally, the State asserts that the Defendant should have anticipated the use of the timing because of the lengths the State went to in order to establish it and because the Defendant presented his own theory of the timing during his closing argument. Alternatively, the State argues that, even if this Court was to review this issue under the plain error doctrine, the Defendant would nevertheless not be entitled to relief because "the [D]efendant presents no evidence whatsoever that the State intentionally miscalculated, intentionally misled the jury or the court, or intentionally misstated the evidence." For the reasons that follow, we agree with the State, and conclude that the Defendant is not entitled to relief.

Based on the evidence adduced at trial, we have created the below timeline to illustrate the events on the day of the offense to better understand the position of the parties on this issue.



As previously noted, the Rosles's video did not have accurate time stamps. In an effort to ascertain the timing of events, the parties subtracted the time lapse between the arrival of Officer Wilson as shown on the Rosles's video, 7:00:06, from the dog jump, 6:54:00, which was six minutes and six seconds (6:06). Officer Wilson's arrival on the scene as accurately reflected on his dashcam, 5:25:30, minus the 6:06 time lapse from the Rosles's video, reflects that the dog jumped at 5:19:24. The parties agreed that the first shot occurred when the dog jumped. At closing argument, however, the State deduced that the first shot occurred at "5:18 something[.]" The State specifically argued, and the Defendant now contests, the following excerpts from their closing argument:

> So we say that puts the time of the first shot at 5:18, and here's how we get there. Right there at the bottom you'll see 5:25:30 is when Officer Wilson rolls up to -- to the scene.

> And so if you look, and I urge you to do this, look at Mr. Rosles's video and you'll see Officer Wilson show up at 16:07:06. So that's over six minutes after the first shot that Officer Wilson shows up, okay? So if he shows up at 5:35 [sic], 5:19 plus a little bit more, 5:18 something is going to be the time that that first shot was made. And that's very important.

The State capitalized further from its timeline and additionally argued the following:

> We say the cell phone records, Mr. Cook [sic] told you a whole lot about, shows that this defendant used that cell phone twice *after* the killing. (emphasis added). And I say that because when you do the extrapolation, if I can call it that, when you match up these videos and go back over six minutes from the time Officer Wilson arrived, that gives you the time – the approximate time, within seconds I suggest to you, of when those first shots were fired Okay? And that rolls it back to 5:18 going on 5:19.
>
> He calls his female friends and that phone was turned on and off again 28 times up through the end of these records through November 30th. And these are the four calls that are pertinent, and if you will see, and remember you've got to add an hour, but those last two outbound calls from that phone were to two different females. One at 5:18, almost 5:19, and one at a minute apart 5:19, almost 5:20.
>
> Now, [the Defendant] would have you believe that he was done using that phone long before this skirmish broke out in the car. Well, think of it this way, if you add back the 97 seconds, before the five -- little over five minutes, six minutes, that's at seven and a half minutes or there abouts, if that -- according to his testimony that phone would have no longer been used by him. And these records show that he is not telling the truth about that.

As an initial matter, the record reflects that the Defendant failed to object during closing argument. Technically, as argued by the State, the failure to make a contemporaneous objection at the time these comments were made resulted in waiver of these issues. See Tenn. R. App. P. 36(a); Tenn. R. Evid. 103(a)(1). It is well-recognized that a defendant's failure to object to a prosecutor's comments during closing argument rarely results in a reversal of the conviction:

> Unobjected to closing arguments warrant reversal only in exceptional circumstances. United States v. Smith, 508 F.3d 861, 864 (8th Cir. 2007). Accordingly, like the United States Court of Appeals for the Eighth Circuit,

> "[w]e bear in mind that fleeting comments that passed without objection during the rough-and-tumble of closing argument in the trial court should not be unduly magnified when the printed transcript is subjected to painstaking review in the reflective quiet of an appellate judge's chambers." United States v. Mullins, 446 F.3d at 758.

State v. Banks, 271 S.W.3d 90, 132, n.30 (Tenn. 2008). We note that "where a prosecuting attorney makes allegedly objectionable remarks during closing argument, but no contemporaneous objection is made, the complaining defendant is not entitled to relief on appeal unless the remarks constitute 'plain error.'" State v. Thomas, 158 S.W.3d 361, 413 (Tenn. 2005) (citing Tenn. R. App. P. 36(b); State v. Smith, 24 S.W.3d 274, 282 (Tenn. 2000)); see State v. Pack, 421 S.W.3d 629, 648 (Tenn. Crim. App. 2013) (holding that because the defendant failed to make a contemporaneous objection during closing arguments, he not only had to establish that the comments were improper but also that they constituted plain error); State v. Gann, 251 S.W.3d 446, 458 (Tenn. Crim. App. 2007) (concluding that the defendant's failure to make a contemporaneous objection during the State's closing argument waived plenary review and allowed for consideration under plain error review only). The Defendant relies on State v. Hawkins, 519 S.W.3d 1 (Tenn. 2017), and State v. Zackary James Earl Ponder, No. M2018-00998-CCA-R3-CD, 2019 WL 3944008 (Tenn. Crim. App. Aug. 21, 2019), perm. app. denied (Tenn. Dec. 5, 2019), for the proposition that plenary review is appropriate in this case. However, those cases are readily distinguishable and generally involved the prosecutor's use of information in closing argument that was objected to pre-trial, which sufficiently preserved the issue for appellate review. Accordingly, we review this issue under plain error only.

The plain error doctrine states that "[w]hen necessary to do substantial justice, an appellate court may consider an error that has affected the substantial rights of a party at any time, even though the error was not raised in the motion for a new trial or assigned as error on appeal." Tenn. R. App. P. 36(b). In order for this court to find plain error,

> "(a) the record must clearly establish what occurred in the trial court; (b) a clear and unequivocal rule of law must have been breached; (c) a substantial right of the accused must have been adversely affected; (d) the accused did not waive the issue for tactical reasons; and (e) consideration of the error is 'necessary to do substantial justice.'"

Smith, 24 S.W.3d at 282 (quoting State v. Adkisson, 899 S.W.2d 626, 641-42 (Tenn. Crim. App. 1994)). "It is the accused's burden to persuade an appellate court that the trial court committed plain error." State v. Bledsoe, 226 S.W.3d 349, 355 (Tenn. 2007) (citing U.S. v. Olano, 507 U.S. 725, 734 (1993)). "[T]he presence of all five factors must be established by the record before this Court will recognize the existence of plain error, and complete

consideration of all the factors is not necessary when it is clear from the record that at least one of the factors cannot be established." Smith, 24 S.W.3d at 283.

The Tennessee Supreme Court has consistently held that "'closing argument is a valuable privilege that should not be unduly restricted.'" State v. Reid, 164 S.W.3d 286, 320 (Tenn. 2005) (quoting State v. Bane, 57 S.W.3d 411, 425 (Tenn. 2001)); see State v. Cauthern, 967 S.W.2d 726, 737 (Tenn. 1998). Closing argument gives each party an opportunity to persuade the jury of their theory of the case, see 11 DAVID L. RAYBIN, TENNESSEE PRACTICE: CRIMINAL PRACTICE AND PROCEDURE § 29.2, at 97 (2008), and to highlight the strengths and weaknesses in the proof for the jury. Banks, 271 S.W.3d at 130 (citations omitted). "[P]rosecutors, no less than defense counsel, may use colorful and forceful language in their closing arguments, as long as they do not stray from the evidence and the reasonable inferences to be drawn from the evidence or make derogatory remarks or appeal to the jurors' prejudices." Banks, 271 S.W.3d at 131 (internal citations omitted). A prosecutor's comments during closing argument must be "'temperate, predicated on evidence introduced during the trial, relevant to the issues being tried, and not otherwise improper under the facts or law.'" State v. Johnson, 401 S.W.3d 1, 20 (Tenn. 2013) (quoting State v. Middlebrooks, 995 S.W.2d 550, 557 (Tenn. 1999)).

In order to be entitled to relief on appeal, the defendant must "show that the argument of the prosecutor was so inflammatory or the conduct so improper that it affected the verdict to his detriment." State v. Joseph L. Ware, No. M2018-01326-CCA-R3-CD, 2019 WL 5837927, at *10 (Tenn. Crim. App. Nov. 7, 2019) (citing State v. Farmer, 927 S.W.2d 582, 591 (Tenn. Crim. App. 1996)). This court must consider the following factors when determining whether the argument of the prosecutor was so inflammatory or improper to negatively affect the verdict:

> (1) the conduct complained of viewed in the light of the facts and circumstances of the case; (2) the curative measures undertaken by the court and the prosecution; (3) the intent of the prosecutor in making the improper arguments; (4) the cumulative effect of the improper conduct and any other errors in the record; and (5) the relative strength and weakness of the case.

Joseph L. Ware, 2019 WL 5837927, at *10 (citing State v. Chalmers, 28 S.W.3d 913, 917 (Tenn. 2000) (citations omitted)).

We conclude that the Defendant has failed to establish that a substantial right of his was adversely affected. In review of this issue, we recognize that the parties were dealing with "extrapolations" and deductions to discern a timeframe, a process which naturally lends itself to imprecision. Nevertheless, there can be no question that the State erroneously calculated the time of the first shot as 5:18, rather than 5:19:24. This is

significant because it directly contradicted the Defendant's version of events; specifically, his testimony that he used the victim's phone to call his girlfriends before the shooting occurred. Based on the misstatement by the State, it is conceivable that the Defendant was deemed less credible by the jury, and the State argued this exact point in closing. While this misstatement of the evidence was indeed improper, we are not convinced that it impacted the verdict in this case so as to deprive the Defendant of his due process right to a fair trial. Our review of the State's closing argument shows that the prosecutor mentioned the time of the shooting twice, which was fairly isolated compared to the length of the closing argument. When the prosecutor first mentioned how they calculated the first shot, she qualified the estimated time and encouraged the jury to look at the video and make the calculation for themselves. The bulk of the State's closing argument focused not on the time of the first shot but on the proof at trial; namely, the Defendant's confession to Hatch, fingerprint and DNA evidence inside and outside the victim's car, and the multiple gunshot wounds inflicted to the back of the victim. Accordingly, even assuming that this case boiled down to a credibility contest between Hatch and the Defendant, the State's error in misstating the time of the first shot by a minute and twenty-four seconds could not have tipped the credibility scale so much so to have changed the outcome of the trial. Having failed to establish plain error, the Defendant is not entitled to relief.

VI. Juror Misconduct. The Defendant argues that the trial court erred in denying his motion for new trial because the jury received extraneous, prejudicial information when, during deliberations, it looked up the "meaning of a life sentence in Tennessee" and a "medical word." He insists that "the mere fact that the jury sought this information out, in direct contravention of the judge's instructions, is strong evidence that it played some part in the deliberations," and that the State failed to carry its burden of showing that the exposure was harmless. The Defendant additionally argues that the trial court had an obligation to subpoena the second juror and conduct a hearing to ascertain what, if any, additional terms were looked up by the jury during deliberations. The Defendant requests de novo review of this issue and a remand of this case for a new trial or an evidentiary hearing at which the second juror, and possibly other jurors, would be called to testify. In response, the State agrees that the jury was exposed to extraneous information, but it argues that the jury's exposure to extraneous information was harmless. The State argues that the standard of review for the trial court's determination that the jury was not exposed to extraneous, prejudicial information is for an abuse of discretion. It further contends that the trial court did not abuse its discretion in declining to subpoena the second juror to testify at an evidentiary hearing because the Defendant failed to show that her testimony would have been "competent, material, and admissible." We agree with the State.

A defendant's right to a fair trial is guaranteed by the Sixth Amendment to the United States Constitution and by article I, section 9 of the Tennessee Constitution. Additionally, this court has said that every defendant is assured "'a trial by a jury free of . . .

disqualification on account of some bias or partiality toward one side or the other of the litigation.'" State v. Akins, 867 S.W.2d 350, 354 (Tenn. Crim. App. 1995) (quoting Toombs v. State, 270 S.W.2d 649, 650 (Tenn. 1954)). Moreover, "[j]urors must render their verdict based only upon the evidence introduced at trial, weighing the evidence in light of their own experience and knowledge." State v. Adams, 405 S.W.3d 641, 650 (Tenn. 2013) (citing Caldararo ex rel. Caldararo v. Vanderbilt Univ., 794 S.W.2d 738, 743 (Tenn. Ct. App. 1990)). If the jury has been exposed to extraneous prejudicial information or subjected to an improper outside influence, the validity of the verdict is questionable and a new trial may be warranted. Id. (citing State v. Blackwell, 664 S.W.2d 686, 688 (Tenn. 1984)). Whether the constitutional right to an impartial jury has been violated is a mixed question of law and fact which we review de novo, granting a presumption of correctness only to the trial court's findings of fact. Id. at 656 (citing Fields v. State, 40 S.W.3d 450, 458 (Tenn. 2001)).

"A party challenging the validity of a verdict must produce admissible evidence to make an initial showing that the jury was exposed to extraneous prejudicial information or subjected to an improper outside influence." Adams, 405 S.W.3d at 651 (citing Caldararo, 794 S.W.2d at 740-41). Tennessee Rule of Evidence 606(b) explains what types of evidence may be used to challenge a verdict:

> **Inquiry Into Validity of Verdict or Indictment.** Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon any juror's mind or emotions as influencing that juror to assent to or dissent from the verdict or indictment or concerning the juror's mental processes, except that a juror may testify on the question of whether extraneous prejudicial information was improperly brought to the jury's attention, whether any outside influence was improperly brought to bear upon any juror, or whether the jurors agreed in advance to be bound by a quotient or gambling verdict without further discussion; nor may a juror's affidavit or evidence of any statement by the juror concerning a matter about which the juror would be precluded from testifying be received for these purposes.

Tenn. R. Evid. 606(b) (emphasis added). In short, Rule 606(b) "bars juror testimony and affidavits concerning jury deliberations but permits testimony and affidavits pertaining to extraneous prejudicial information, outside influence, and agreed quotient verdicts." Akins, 867 S.W.2d at 355 (citing Tenn. R. Evid. 606(b)).

The threshold inquiry is whether or not the information is "extraneous" and, (2) if "extraneous, whether or not said information was prejudicial, and (3) finally, if both extraneous and prejudicial, whether said extraneous prejudicial information had an

influence on the jury. Kelli Whiteside v. Michael A. Hedge, No. E2004-02598-COA-R3-CV, 2005 WL 1248975, at *3 (Tenn. Ct. App. May 26, 2005) (citing Patton v. Rose, 892 S.W.2d 410, 414 (Tenn.Ct.App.1994); Cavalier Metal Corp. v. Johnson Metal Controls, 124 S.W.3d 122 (Tenn. Ct. App.2003)). "Extraneous information is information coming from a source outside the jury." State v. Clayton, 131 S.W.3d 475, 480 (Tenn. Crim. App. 2003) (citing State v. Coker, 746 S.W.2d 167, 171 (Tenn. 1987); NEIL P. COHEN ET AL., TENNESSEE LAW OF EVIDENCE, § 6.06[4], at 6-51 (4th ed. 2000)). "[E]xtraneous prejudicial information is information in the form of either fact or opinion that was not admitted into evidence but nevertheless bears on a fact at issue in the case." Adams, 405 S.W.3d at 650 (citing Robinson v. Polk, 438 F.3d 350, 363 (4th Cir.2006); State v. Blackwell, 664 S.W.2d 686, 688-89 (Tenn. 1984); see also 27 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 6075 (2d ed.2012)). "[C]lear and convincing evidence of prejudice is required to meet the standards of Tennessee Rules of Evidence 606(b)." Id.

When it is shown that a juror has been exposed to extraneous prejudicial information or an improper influence, a rebuttable presumption arises and the burden shifts to the State to explain the conduct or demonstrate that it was harmless. State v. Smith, 418 S.W.3d 38, 46 (Tenn. 2013) (citing Adams, 405 S.W.3d at 651; Walsh v. State, 166 S.W.3d 641, 647 (Tenn. 2005)). Because of the potentially prejudicial effect of a juror's receipt of extraneous information, the State bears the burden in criminal cases either to explain the conduct of the juror or the third party or to demonstrate how the conduct was harmless. Id. at 46. Error is harmless when "it appears beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." Id. (quoting State v. Brown, 311 S.W.3d 422, 434 (Tenn. 2010); Neder v. United States, 527 U.S. 1, 15 (1999)).

In State v. Adams, the Tennessee Supreme Court utilized the analysis in Walsh v. State, 166 S.W.3d 641 (Tenn. 2005) as well as "factor tests" employed by several federal circuit courts of appeals to provide the "proper framework for determining the probable, objective effect upon a verdict of a juror's exposure to either extraneous prejudicial information or an improper outside influence." 405 S.W.3d 641, 654 (Tenn. 2013). The Tennessee Supreme Court listed following factors to aid in the determination of whether the State has rebutted the presumption of prejudice:

> (1) the nature and content of the information or influence, including whether the content was cumulative of other evidence adduced at trial; (2) the number of jurors exposed to the information or influence; (3) the manner and timing of the exposure to the juror(s); and (4) the weight of the evidence adduced at trial.

Id. "No single factor is dispositive. Instead, trial courts should consider all of the factors in light of the ultimate inquiry—whether there exists a reasonable possibility that the extraneous prejudicial information or improper outside influence altered the verdict." Id. (citing Walsh, 166 S.W.3d at 649).

The State does not dispute that the testimony of juror Lambert established that the jury in the Defendant's case was exposed to extraneous information. Based on the following analysis of the Adams factors, the trial court determined that this extraneous information was harmless:

> When applying these factors to the conduct which occurred in this case this Court finds the same to be harmless and holds that this conduct did not alter the verdict returned by this jury.
>
> The nature and content of the information learned from extraneous sources did not impact the verdict in this case. The extraneous information consisted of learning the definition of certain medical terminology, and the jury's receipt of the definition of a "life sentence" in Tennessee which equals a sentence wherein an offender must serve fifty-one (51) calendar years before becoming eligible for parole. Ms. Lambert was unable to specify what medical terms were "googled", and it would be pure speculation to assume that some unknown medical term adversely affected the verdict. Likewise, this Court has carefully considered whether or not the information about the duration of a life sentence could impact the jury's verdict and finds that within the context of this case, that this information did not impact the verdict. Most significantly, none of the extraneous information imparted was about [the Defendant].
>
> Based upon the testimony received, it does not appear to be in dispute that all twelve (12) jurors learned about the extraneous information. Nor does there appear to be dispute that the information was acquired after deliberations began.
>
> When considering factor four, this Court finds that the evidence of [the Defendant's] guilt is simply overwhelming, to wit: [the Defendant's] finger and palm prints were found upon multiple locations from both within and without the car where the homicide occurred; the victim was killed by multiple rounds from a 9 mm handgun where video evidence proved [the Defendant] possessed such a weapon within days preceding the homicide; the DNA of co-defendant (Bradley Robinson) was found on multiple items within the front seat of the vehicle; a 9 mm casing found within the crime

> scene matched a casing recovered from a location where [the Defendant] fired his 9mm weapon; the cellular phone records from the victim's phone prove the last usage of the phone prior to the victim's death was the placement of calls to individuals connected to [the Defendant]; [the Defendant] testified and admitted to firing the shots that killed [the victim] and to fleeing while in possession of the victim's cell phone after firing the shots; [the Defendant] admitted to Linda Hatch that he shot [the victim] in the course of a robbery that "went bad"; and the victim was shot at least six (6) times with five (5) entry wounds within the victim's back.

Upon our de novo review, State v. Smith, 418 S.W.3d at 48, we agree with the trial court, and conclude that the exposure to the extraneous information in this case was harmless. While it was highly improper for the jury to research this information in violation of the instruction of the trial court, the victim's cause of death was not in dispute, and as such, medical terms did not play a significant role in this case. Similarly, the meaning of a life sentence in Tennessee did not bear on the guilt or innocence of the Defendant. Because this information was not prejudicial, the Defendant is not entitled to a new trial on this issue. As to whether the trial court erred in refusing to subpoena the second juror to testify, we conclude that the trial court properly determined that it was unnecessary to do so. The affidavit of the second juror did not reveal anything that would "add to or supplement" the testimony of juror Lambert. It stated generally that the jury used Google to look up terms and the Webster dictionary definition of certain words. See e.g. State v. Keith Waggoner, No. E2018-01065-CCA-R3-CD, 2019 WL 4635589, at *20 (Tenn. Crim. App. Sept. 24, 2019) (internal citations omitted)(noting that inquiry into juror misconduct is not justified by potentially suspicious circumstances and that something more than unverified conjecture must be shown). Accordingly, we similarly conclude that the trial court did not abuse its discretion in not subpoenaing the second juror, and the Defendant is not entitled to a new evidentiary hearing on this matter.

VII. Constitutionality of Automatic Life Sentence for Juvenile. The Defendant argues that "an automatic sentence of life imprisonment (with release no sooner than fifty-one years) is unconstitutional for a juvenile." He invites this court to extend the United States Supreme Court's reasoning in Roper v. Simmons, 543 U.S. 551 (2005), Graham v. Florida, 560 U.S. 48 (2010), and Miller v. Alabama, 567 U.S 460 (2012), to hold that automatic life sentences, even with the possibility of parole, are unconstitutional for juveniles. While we understand the Defendant's argument, we must reject his invitation as we are bound by court precedent. See State v. Walter Collins, No. W2016-01819-CCA-R3-CD, 2018 WL 1876333, at *20 (Tenn. Crim. App. Apr. 18, 2018), appeal denied (Aug. 8, 2018), cert. denied, 139 S. Ct. 649 (2018) (collection of cases rejecting claim that a juvenile's mandatory life sentence in Tennessee, which requires service of fifty-one years

before release, violates Miller and its progeny). Accordingly, the Defendant is not entitled to relief.

CONCLUSION

Based on the above authority and analysis, we affirm the judgments of the trial court.

_____

CAMILLE R. MCMULLEN, JUDGE

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT JACKSON
March 7, 2023 Session

JOSEPH LANGLINAIS v. STATE OF TENNESSEE

Appeal from the Circuit Court for Chester County
No. 19-CV-20 Donald H. Allen, Judge

No. W2022-00317-CCA-R3-PC

The Petitioner, Joseph Langlinais, appeals from the denial of his petition seeking post-conviction relief from his convictions of rape of a child, aggravated sexual battery, and attempted rape of a child, for which he received an effective sentence of twenty-eight years in prison. State v. Langlinais, No. W2016-01686-CCA-R3-CD, 2018 WL 1151951 (Tenn. Crim. App. Mar. 2, 2018). In this appeal, the Petitioner argues (1) that the post-conviction court deprived this court of meaningful appellate review because it failed to consider certain issues as raised in his petition and failed to provide sufficient findings of fact in its order denying relief; (2) that the Petitioner was deprived of his Sixth Amendment right to the effective assistance of counsel under United States v. Cronic, 466 U.S. 648, 658, 104 S. Ct. 2039 (1984), or alternatively, Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052 (1984); (3) that trial counsel was ineffective based on eighteen separate grounds; and (4) that the cumulative effect of trial counsel's errors entitles him to relief. After a thorough review of the record, we conclude that the aggregate effect of trial counsel's errors requires a new trial. Accordingly, we reverse the order of the post-conviction court, vacate the Petitioner's convictions, and remand for a new trial.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Reversed, Vacated and Remanded

CAMILLE R. MCMULLEN, J., delivered the opinion of the court, in which ROBERT W. WEDEMEYER and ROBERT H. MONTGOMERY, JR., JJ., joined.

William D. Massey and Seth Segraves, Memphis, Tennessee, for the Petitioner-Appellant, Joseph Langlinais.

Jonathan Skrmetti, Attorney General and Reporter; Jonathan H. Wardle, Senior Assistant Attorney General; Jody S. Pickens, District Attorney General; and Alfred Earls, Assistant District Attorney General, for the Appellee, State of Tennessee.

OPINION

The facts giving rise to the Petitioner's convictions stem from his engagement in various sex-related crimes committed in 2012 against his girlfriend's twelve-year-old sister. Law enforcement first became aware of the offenses in 2015, and the victim at that time recounted the details of the crimes to a forensic examiner. The victim advised that her sister and the Petitioner were going to teach her about sex and that while in the back of the Petitioner's truck, the Petitioner sucked the nipple of her breast, allowed her to perform fellatio on him, and attempted to penetrate her vaginally with his penis. Law enforcement interviewed the Petitioner in the parking lot of a business where he had been doing maintenance work, and the Petitioner made numerous incriminating statements which were audio recorded. On March 30, 2016, a jury convicted the Petitioner of rape of a child, aggravated sexual battery, and attempted rape of a child, and he received an effective sentence of twenty-eight years in prison. State v. Langlinais, No. W2016-01686-CCA-R3-CD, 2018 WL 1151951 (Tenn. Crim. App. Mar. 2, 2018).

On July 15, 2019, the Petitioner filed a pro se petition seeking post-conviction relief. The State filed a response on July 22, 2019, and on July 25, 2019, post-conviction counsel filed their notice of appearance. On April 6, 2020, the first amended and supplemental petition for post-conviction relief was filed which contained 23 issues, multiple sub-issues, supporting citation and excerpts from the trial transcript, and was over 118 pages in length. On May 5, 2020, the State filed an equally extensive response to the amended petition and denied each of the Petitioner's claims. Notably, the State likened the Petitioner's case to one "in which there [was] no true defense" because "[i]t was undisputed that the [Petitioner] drove a twelve-year-old girl to a park in Chester County for the purpose of engaging in sex with the twelve-year old girl" and her sister. The State further moved for dismissal of the petition because it was not verified via the Petitioner's signature as required by statute. In addition to addressing each of the Petitioner's claims, the State accused post-conviction counsel of "fly specking" the record in search of every conceivable inconsistency to attribute to the ineffectiveness of trial counsel. Finally, because the proof at trial established that the Petitioner admitted to the crimes as charged, the State argued the claims raised in the post-conviction petition were "strategic choices" and "virtually unchallengeable." On May 22, 2020, a second supplemental petition was filed to include the Petitioner's signature verifying the issues as stated in the petition.

On September 9, 2021, an evidentiary hearing was held, and the Petitioner presented two witnesses: trial counsel and Attorney Claiborne Ferguson, a criminal trial specialist. Trial counsel began practicing law in 2000, and he focused exclusively on civil law. In

2008, trial counsel began his criminal practice and participated in murder and rape of a child cases. Trial counsel had attended various continuing legal education courses, and he was familiar with the criminal adversarial process. Trial counsel represented the Petitioner from general sessions court to first tier appellate review. Trial counsel waived the preliminary hearing at the general sessions level because he believed generally that preliminary hearings were not beneficial for a defendant. He also had "an idea" of what the State was going to produce at trial based on the forensic interview of the victim. As such, he believed it was not in the Petitioner's best interest to give the State an opportunity to do a "rehearsal run" at the preliminary hearing. Trial counsel stated that at the time of the Petitioner's trial, he was familiar with the elements of the offense of rape of a child and the definition of sexual penetration. Nevertheless, trial counsel agreed that he asked a series of questions during trial and to Investigator Crouse including: "Was anybody raped here?" and "Do you feel like [the Petitioner] ever had intercourse with [the victim]?" Trial counsel explained his reasoning for posing the questions as follows:

> Well, because I couldn't ask the jury. I'm operating down here in a small town. Jason Crouse is an investigator. He's a lifelong member of this community. There's a statutory definition of what occurred and then there's a community definition of rape. I thought it would be beneficial to [the Petitioner] to plant the idea in the jury's mind, and I know this kind of goes to jury nullification, but that's not exactly what I had in mind, but I wanted to get an idea from Jason Crouse what he felt about the activities that occurred because I thought it might be a good reflection of how the jury was going to view it.

Trial counsel said that he had had several conversations with Investigator Crouse prior to trial during which trial counsel could have asked Investigator Crouse the above questions. However, trial counsel wanted to "kind of catch [Investigator Crouse] by surprise [at trial] to get his honest – without thinking about it, his honest opinion as to whether he actually thought a rape occurred." Trial counsel acknowledged that Investigator Crouse testified at trial that the Petitioner had intercourse with the victim as defined by law, and Investigator Crouse further explained that intercourse was "if part of [the Petitioner's] penis goes inside [the victim's] body, that's considered intercourse." Trial counsel further agreed that it was not helpful to ask Investigator Crouse if he heard the victim testify during trial that intercourse never happened, and Investigator Crouse clarified, "No, sir. She testified that [the Petitioner] put his penis inside her mouth."

Trial counsel said the defenses available in a rape of a child case were "very limited" because it was "essentially a strict liability crime." Trial counsel testified that the only available defense was "intent" and even that was "very shaky." Trial counsel wanted to "plant the seed with the jurors that while this may have happened, the [Petitioner] did not

intend for that action to happen." In other words, the trial strategy was to "always show the jury that [the Petitioner] had an intention to do one thing and something else entirely happened." When pressed further, trial counsel said the "primary defense" was that "it just did not happen . . . . Everybody agreed something did happen. But you - - the defense was always going to be what did [the Petitioner] intend to do that day . . . ." Trial counsel did not request the court to instruct the jury as to any inaccuracies in Investigator Crouse's testimony because he did not want to place any more emphasis on it. Trial counsel later explained that he did not ask the trial court to correct the inaccuracy because he had gotten what he thought was "some pretty good testimony" from Investigator Crouse, and at that point, Investigator Crouse "was bowing up on" trial counsel, so he did not press him further on the issue.

Trial counsel denied that consent, apology, remorse, that "it didn't feel like it was right," and that the Petitioner was a follower were defenses to a rape of a child case. Trial counsel said that he was trying to "cultivate some sympathy from the jury and the Court" by suggesting that the offense was not the Petitioner's idea. He further agreed that the list of questions posed by post-conviction counsel were sentencing factors. Trial counsel agreed those factors could imply the Petitioner's guilt.

At the time of the Petitioner's trial, trial counsel was familiar with the rape shield law. He acknowledged that he filed a Rule 412 motion at trial, which was admitted into evidence as an exhibit. Trial counsel agreed that the motion was not timely filed. Although he could not recall the specifics of why he filed the motion, trial counsel agreed that he filed the motion to show that the victim and her sister "had had sex together previously so that [the Petitioner] would not have been teaching them anything about sex." Trial counsel further agreed that this was not relevant, and he ultimately withdrew the motion noting to the trial court that he may have to raise the issue at a later time during trial. Pressed about his understanding of Rule 412 given his actions, trial counsel explained that the Petitioner had charges in two jurisdictions, and trial counsel was attempting to limit the victim's testimony about unindicted crimes. The victim's sister was also "under the threat of indictment." Trial counsel ultimately agreed that he was prohibited from asking the victim about prior sexual conduct by the trial court, that he would not have asked the victim about such acts because it was not relevant, and that it would not have been beneficial to the Petitioner's case to do so.

Trial counsel said he filed a motion to amend the indictment at trial, admitted as an exhibit to the hearing, because he believed the State was uncertain about the victim's age at the time of the offense. Asked why he did not style his motion under Rule 7(c) of the Tennessee Rules of Criminal Procedure seeking a bill of particulars, trial counsel noted that it was not incumbent upon him to assist the State in determining the correct date for the offense. Moreover, there were two active investigations in Madison and Chester

County, and he was "attempting to create as much confusion about when these activities might have occurred and what the State was trying to prove." He also argued pre-trial that if the State "didn't tighten up the date," the Petitioner would be denied the opportunity to present an alibi defense. Although trial counsel had not filed a notice of alibi, and his motion to amend the indictment was heard two days prior to trial, trial counsel maintained that an alibi was a potential defense.

In regard to the motion to suppress the Petitioner's statement to police, exhibit three, trial counsel acknowledged generally the legal requirements under the Fifth Amendment. He did not know why the motion was heard only two days prior to trial; but he knew that there was going to be an evidentiary hearing in the matter and reminded post-conviction counsel that there was indeed a hearing. Post-conviction counsel then questioned trial counsel about statements made during the hearing concerning the Petitioner's cell phone. Trial counsel acknowledged that during the hearing he did not know whether the cell phone was going to be used in his investigation. Trial counsel believed the Petitioner voluntarily gave the police his cell phone and that the police had returned the Petitioner's phone prior to trial. Trial counsel did not know if anything incriminating had been retrieved from the Petitioner's phone. However, trial counsel said he had an agreement with the district attorney "in principle" that nothing gleaned from the phone was going to be used at trial. Trial counsel filed the motion to suppress in the event "a handshake with the DA" was insufficient on appeal.

Post-conviction counsel pointed to statements from the district attorney at the motion to suppress hearing such as "this is the first I've heard of a cell phone is today" and the fact that neither the State nor the trial court could tell from trial counsel's motion to suppress what evidence it sought to suppress. Trial counsel acknowledged that he was not certain of what he wanted to suppress either because he did not know exactly what was on the Petitioner's cell phone. Trial counsel attributed any confusion in the motion to suppress to the fact that he wanted to advise the court that the Petitioner's phone was seized in relation to another case and not the instant case. Trial counsel denied that the confusion indicated unfamiliarity with the Petitioner's case. He said it "just indicates that there was evidence seized in one jurisdiction that could possibly impact the trial in another jurisdiction." Trial counsel said that he had open file discovery with the State, which is why he did not file a motion in limine to limit the evidence to be offered by the State. Trial counsel believed the motions he filed in this case were "entirely appropriate" and that he had "more information than the State did[.]" Without explaining his reasons, trial counsel believed if some of the motions were pushed too aggressively, then it could have "opened up an entirely different Pandora's box."

Trial counsel was "in contact" with the Petitioner "all the time" for approximately six or eight months regarding the contents of the Petitioner's cell phone. Asked why he did

not ask Investigator Crouse any questions concerning Miranda warnings or coercive conduct, trial counsel said that it was not necessary because, based on the recordings, the Petitioner was clearly not in custody at the time of the statement. Trial counsel testified that he knew the purpose of a motion in limine and when to file such a motion. Trial counsel agreed that allowing the jury to hear the age of the victim's older sister was neither relevant nor beneficial to the Petitioner's case. He further acknowledged that the State argued "you've got two underage girls" in this case. He acknowledged that the age of the victim's older sister was offered into evidence through the testimony of the victim.

Trial counsel further agreed that the sex life of the Petitioner and the victim's older sister was admitted during trial; but he explained this testimony was helpful because he anticipated testimony that the "motivation" of "some of the parties was to teach" the victim about sex and that she was going to watch. Trial counsel believed that it was helpful for the jury to know the Petitioner and his girlfriend, the victim's older sister, had a sex life before the instant offense and that sex was "nothing out of the ordinary." Trial counsel explained that if the jury "did the math" the Petitioner would have been seventeen years of age. Asked if this conduct was inadmissible under Rule 404(b) as improper propensity evidence, i.e. having sex with one underage girl when he is on trial for having sex with another underage girl, trial counsel said that, with the benefit of hindsight, it would not have been beneficial for the jury to hear the evidence.

Asked why he did not file a motion in limine to exclude the fact that the victim's older sister became pregnant with the Petitioner's child, trial counsel explained that they were married at the time of trial. Trial counsel agreed that "in a vacuum" it may not have been beneficial for the jury to hear this evidence. However, trial counsel believed it demonstrated that the Petitioner and the victim's older sister had a deeper commitment to each other and engaged in more than casual sex. In trial counsel's view, this evidence bolstered the Petitioner's credibility and showed that he was "taking responsibility for what he did." Similarly, although it may have had a "negative impact," trial counsel believed that it was important for the Petitioner to testify about "having sex while others watched" or "taking videos of sex" because of the conservative make-up of the jury. Trial counsel's objective was to "be up front . . . and disclose that this couple having sex in front of someone else was not necessarily unusual."

In regard to the Rule 404(b) issue concerning the tapes admitted into evidence containing sexual misconduct involving other minors, trial counsel testified that he could understand the disc containing the recording, and that it played on his equipment. He agreed that other sexual misconduct involving other minors would not be beneficial to the Petitioner's case, particularly when he is charged with the same offense. Trial counsel opined that, based on this court's direct appeal opinion, this court heard the entire disc. However, trial counsel did not believe the portion of the tape containing the improper

conduct was played for the jury. Trial counsel agreed that he initially objected when he thought he heard the word "video" when the recording was being played for the jury. From that point, trial counsel believed only the portion containing the conversation between the Petitioner and Investigator Crouse was played for the jury. Trial counsel testified that there was a conversation with the trial court as to whether he could hear the sound. Trial counsel said he could hear it, but he could not understand the words. Asked why he agreed to the admission of the recording (exhibit one from trial), trial counsel said his agreement was "couched on the agreement that he had with the District Attorney that that portion would not be played." He agreed, with hindsight, that the better practice would have been to redact the recording as noted in this court's opinion on direct appeal. However, trial counsel had no reason to move to redact the recording because the equipment he initially listened to the recording on was "crystal clear," and the copy of the disc trial counsel had pre-trial was not difficult to hear. Trial counsel relied on his agreement with the district attorney, and trial counsel believed the district attorney "stuck to it."

At the end of the Petitioner's trial, trial counsel made a motion for judgment of acquittal and a motion for directed verdict because "some jurisdictions like one; some jurisdictions like the other." Trial counsel agreed that he may have told the trial court that he would rely on the district attorney general for the specific rule number. When advised that directed verdicts had been abolished pursuant to Rule 29(g), trial counsel said that he had been made aware of the rule change some time ago.

Trial counsel was again asked about his defense theory and explained as follows:

> He had no intention to have sex with [the victim] . . . . Well, I couldn't get past the event because everybody who was there would testify to the same thing. We had what was tantamount to at least two confessions. So, I didn't have the first defense, it just didn't happen.
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> So, conceding in my preparation that something happened, you have to look at what you're left with, and in a rape of a child, again, it's almost strict liability statute. So, you have to find the narrow hole that you can punch and[,] in this case, it was intent. He just - - and a little bit colored by maybe he didn't know who was doing what.

When confronted with the fact that the State was going to offer proof that the Petitioner penetrated the victim, trial counsel said his only defense was the Petitioner's testimony. Trial counsel reiterated when "we don't have the defense of it didn't happen, so we are left with . . . what are the circumstances?" Trial counsel said the Petitioner was believable, talkative, and "a good old boy." Trial counsel thought the Petitioner would connect with the jury, and he believed it was in the Petitioner's best interest to "simply tell

the jury what happened." Trial counsel agreed that the primary issue in the case was whether the victim placed the Petitioner's penis in her mouth. Trial counsel agreed that the victim testified at trial that she "put her head over [the Petitioner's] penis," and that she did not say the Petitioner placed his penis inside her mouth. When confronted with the testimony by Investigator Crouse that the "victim did say she inserted it and that came in before the jury," trial counsel said, "If it's in there it came in." Trial counsel acknowledged that he may not have argued *mens rea* or intent in voir dire, opening statement, or closing argument.

Trial counsel denied that the Petitioner's statement during the motion to suppress hearing that the Petitioner had not heard the recording of his statement to the police prior to the hearing was evidence of trial counsel's failure to review discovery with the Petitioner. Trial counsel insisted that he had reviewed the recording of the Petitioner's statement to the police with the Petitioner and his mother. Trial counsel was asked why he objected based on speculation during the motion to suppress when the Petitioner testified that he had not heard the recording. Trial counsel explained that, while he did not agree that the Petitioner had not heard the recording, if that was the Petitioner's testimony, then the district attorney should be required to stop questioning the Petitioner about it. When pressed further about his precise language to the trial court that the Petitioner "ha[d]n't heard" the recording, trial counsel replied, "that's just semantics." Trial counsel denied that the Petitioner was being dishonest with the trial court. Trial counsel explained that there were multiple recordings involved in the case and that the Petitioner may not have known to which recording the district attorney referred. Trial counsel said he did not remember if he ever received the recording between the Petitioner and Investigator Crouse because it was not used. Trial counsel had the recording between the Petitioner and Michael Lewis, the victim's father, during which Lewis was wearing a wire while the police listened to his discussion with the Petitioner. Trial counsel said he listened to the Lewis recording within a few days of the recording and did not recall when he listened to the recording from Investigator Crouse. Trial counsel explained that the two recordings "tracked" one another and that he was familiar with both.

Because trial counsel and the district attorney had arranged pre-trial the evidence that was going to be admitted, trial counsel opined that it was a "clean" trial with very few objections. Trial counsel testified that he was also familiar with voir dire or the jury selection process. Post-conviction counsel directed trial counsel to a series of questions from the State's voir dire and the fact that the State reminded the jury of those questions during closing argument. Specifically, during voir dire, the State inquired of each juror whether they could imagine any circumstance under which it would be okay for an adult to have sex with a twelve-year-old child and whether each juror had children or young girls. Trial counsel acknowledged that such questions "theoretically" may be considered "extracting commitments from a jury as to a course of action," and were "misleading[.]"

However, trial counsel did not believe the trial court would have sustained an objection to those questions. Moreover, trial counsel did not believe the question was legally objectionable. Asked if the State was "linking up [the victim] to the juror's family members," trial counsel said that was "really gray" and that "it was not prohibitive to … try to get the jurors to identify with your victim." However, trial counsel did not believe it was appropriate to "start naming names." Trial counsel said while these questions were personally objectionable, they were not legally objectionable. Trial counsel opined that the State "did not cross the line."

Trial counsel did not follow-up to the State's voir dire questions because "it would have hammered home the point that we have an adult having sex with a child," and trial counsel wanted to "diminish that chatter as much as possible." Trial counsel also explained that he had to "choose his battle" because he was conceding that sex occurred, but the Petitioner did not intend for it to happen. Moreover, trial counsel did not believe any juror would openly concede a circumstance under which it was appropriate for an adult male to have sex with a 12-year-old girl. Finally, trial counsel testified that he used every peremptory strike he had during voir dire.

Trial counsel said he did not ask any questions during his first round of voir dire because the jury was "[T]oo conservative. Way too conservative." He explained that he did not ask the jury about potential bias or prejudice because he wanted to connect with the jury on a more basic level and simply appeal to their sense of justice and whether they could give the Petitioner a fair trial. Trial counsel did not ask 10 of the 12 jurors and the alternate any questions because he believed the district attorney had covered it. Trial counsel said he was from the area and knew most of the jurors. He was confident they would listen to the facts and, while conservative, they were "going to do everything they could to give [the Petitioner] a fair trial." Trial counsel was asked to explain his response to a juror who said during voir dire that she "thought she had heard it all." Trial counsel explained that his response, "he thought he had too," was another way of connecting with the jury.

Trial counsel acknowledged that in opening statement he agreed with "most everything" the district attorney said in his opening statement. Trial counsel explained the district attorney stated the facts of the case "pretty accurately." Trial counsel did not explicitly address the "core" of his defense theory in his opening statement. He did not explain to the jury that the Petitioner did not know that it was the victim, instead of her sister, engaged in fellatio. Trial counsel was certain he addressed this aspect of his defense theory during the direct examination of the Petitioner and during closing argument. When confronted with the fact that the jury did not hear the Petitioner's defense theory until the Petitioner testified, trial counsel disagreed. When pressed on this issue, trial counsel believed the jury hearing the defense theory from the Petitioner's mouth was more

powerful. Trial counsel did not mention intent in his opening statement because he did not know how the victim was going to testify. Trial counsel said the victim's "stories had been a little bit inconsistent. And quite frankly, he was a little surprised at her testimony. It was more beneficial to the Petitioner than he had expected."

Over the State's objection, Attorney Claiborne Ferguson was permitted to testify as a criminal trial specialist and to provide his opinion regarding trial counsel's performance in this case. Attorney Ferguson testified that he was a criminal defense attorney with an exclusive criminal defense practice. He had been practicing law since 2000, and was certified by the National Board of Trial Advocacy as a criminal trial specialist. He listened to the testimony of trial counsel throughout the post-conviction hearing. Based on his review of the transcripts from the voir dire, opening statements, trial testimony, sentencing, and motion for new trial. He said he had reviewed the material and had formed an opinion as to the case.

Attorney Ferguson opined that trial counsel was trying to "run a defense of jury nullification," and that jury nullification was not a defense in Tennessee. He said there was only one reasonable defense in this case, a lack of mens rea or intent to commit the offenses charged. Upon his review of the transcript, Attorney Ferguson said nowhere does it show or suggest that trial counsel argued intent as a defense. Attorney Ferguson testified there was no basis to support trial counsel's waiver of the preliminary hearing, and he believed that trial counsel should have had the preliminary hearing to obtain the testimony of the victim and her sister. Attorney Ferguson further believed that trial counsel should have had an investigator attempt to talk with the victim, so he could develop a defense theory. Attorney Ferguson opined that trial counsel had a "substandard understanding of the Rules of Criminal Procedure [and the] Rules of Evidence." Attorney Ferguson opined that while none of the issues raised in the post-conviction alone supported ineffectiveness of counsel, when taken together, the first prong of Strickland had been satisfied because trial counsel's conduct fell below a reasonable standard of care for criminal defense attorneys. He testified further that upon listening to the testimony of trial counsel during the hearing, trial counsel had "no understanding of how to protect the appellate record, [or] how to make the appropriate appellate record[.]"

Attorney Ferguson opined that it was plain error for the State to "link up" their questions from voir dire and the closing argument, and that there were "hundreds" of cases from this court so holding. He testified that rape of a child is not a strict liability offense because there is always an issue of intent in criminal defense. He opined that trial counsel was overly deferential to the prosecutor such that it injured his client, the Petitioner. Attorney Ferguson opined that trial counsel did not engage in any meaningful questions during voir dire. Although he recognized that trial counsel used all of his peremptory strikes, Attorney Ferguson did not know "what he got out of them." In other words, there

was no way to know how trial counsel knew to effectively use his strikes because no questions were asked.

Attorney Ferguson testified that trial counsel's opening statement was "subpar" and "strange" because trial counsel appeared to be asking jurors questions. There was no meaningful, informative opening statement given. He further opined that a motion in limine or an objection to the age of the victim's older sister should have been made because her age was not relevant, sex between the Petitioner and the victim's older sister was not a crime, and it enabled the State to prejudice the jury in its closing argument. Attorney Ferguson believed that trial counsel asked open-ended questions of the victim, which allowed her to provide a narrative answer. This was deficient because it enabled the victim to provide speculative answers. For example, when the victim interjected that the Petitioner had to know that it was her engaged in fellatio because "it was a different hand touching him," and she and her sister did not look alike and had a difference in weight. Attorney Ferguson said trial counsel should have followed up to impeach the victim because she did not observe the Petitioner observe that it was her during fellatio. Finally, none of the "open ended" questions related to the defense theory of lack of intent, and trial counsel did not impeach the victim. As such, Attorney Ferguson opined that trial counsel's cross-examination of the victim fell below reasonable standard of care.

Attorney Ferguson testified that trial counsel elicited from Investigator Crouse other crimes from other charges. Throughout this section of his testimony, Attorney Ferguson generally referred to propensity evidence in the case without specifically identifying it and without conducting a 404(b) analysis. Attorney Ferguson believed trial counsel's reason for admitting the other act evidence belied logic because trial counsel did not argue the same reasoning or point in his closing statement. Attorney Ferguson testified that Investigator Crouses' cross-examination "wasn't good" but did not fall below the Strickland standard or meet the second prejudice prong. Attorney Ferguson further opined that trial counsel failed to preserve the record for appeal in regard to the recording of the Petitioner's statement.

In his view, there was no cross-examination concerning the defense theory. Moreover, Attorney Ferguson emphasized that it was a misstatement of the victim's testimony that the Petitioner placed his penis in her mouth and should have been objected to. This was significant because it undermined the defense theory of a lack of intent to commit the offense, even though it was not really raised in this case. Attorney Ferguson said trial counsel's comments that Petitioner was remorseful implied guilt and supported a defense theory of jury nullification and not a lack of intent. According to Attorney Ferguson, trial counsel never argued intent to the jury, never told the jury that intent was a viable defense, and never corrected the State in their voir dire regarding the elements of the offense. The only defense presented by trial counsel was that the Petitioner was "a

good old boy, he's really sorry, let him go home." When asked if he had an opinion if this was a McCoy violation, Attorney Ferguson replied, "it is not necessarily on all four corners with McCoy, which, again, was a death penalty case . . . [however] it all but was an admission of guilt." Asked by the post-conviction court to point to where in the transcript trial counsel says the Petitioner was guilty, Attorney Ferguson stated that there was a "tacit flow" of jury nullification throughout the case.

Attorney Ferguson opined that trial counsel's closing overall did not have a "road map" or defense. Although trial counsel testified at the post-conviction hearing that his defense was intent, Attorney Ferguson said the transcripts from the trial clearly show it was jury nullification. Put simply, Attorney Ferguson said that if trial counsel's defense theory was a lack of intent to commit the offense, then it was deficient performance because trial counsel never mentioned it at trial. On the other hand, if trial counsel's defense theory was jury nullification, it was not permitted by law and illegal. On cross-examination, Attorney Ferguson testified that he had been paid $2,500 for his work on the case. Attorney Ferguson conceded that he had not listened to the recording of the Petitioner's confession in this case, but he had read a transcript of it. In an exchange with the post-conviction court, Attorney Ferguson acknowledged hearing trial counsel say during his testimony that his defense in this case was lack of intent. However, Attorney Ferguson explained that trial counsel took that position only after trial counsel had a conversation with Attorney Ferguson prior to the hearing, and trial counsel was "on notice" of Attorney Ferguson's position.

On February 8, 2022, the post-conviction court sent a written letter to the parties. Within the letter, the post-conviction court denied the petition and reasoned as follows:

> [Trial counsel] testified that he had been licensed to practice law since 2000, and that he represented [the Petitioner] at both the preliminary hearing and at the trial court level. He testified that he believed that it was in his client's best interest (Trial strategy) (in original) to waive the preliminary hearing, since he had seen and reviewed the statement of [the minor victim's name] (the 12[-]year[-]old alleged victim) which she gave to the forensic examiner and officer, and was aware of the statement his client had given to the police. He testified that he had experience trying several criminal cases and had received formal trial court training[] and had personally observed other attorneys trying criminal cases as well. I find his testimony credible.
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> He testified that he understood the elements of the offenses for which his client had been charged and indicted, and that he did full discovery of the State's evidence against [the Petitioner]. He testified that he interviewed the witnesses, including investigating Officer Jason Crouse.

[Trial Counsel] testified that he and his client developed a trial strategy[,] and he knew what his client was going to say if he took the witness stand. His defense was that [the Petitioner] "didn't initiate any sexual contact" with the 12[-]year[-]old child [victim name] and that he didn't have any intent or knowledge of having any sexual contact or sexual penetration with [the victim], the much younger sister of his girlfriend, [name of victim's older sister]. He said that he understood that consent was not a defense to the charges of Rape of a Child and Aggravated Sexual Battery, since the victim was under 12 years of age. (Emphasis in original).

[Trial Counsel] testified that he had fully investigated the case before the trial and had considered all potential defenses. He also filed various pre-trial motions, including a Motion to Suppress his client's statement to the law enforcement officer, and a Motion to Suppress other evidence in the case. Those motions were denied by the Court at a hearing on March 28, 2016.

Trial Counsel also testified that his client had told him that there was "some incriminating evidence" on his cell phone when he gave it to the police officer and when he made "incriminating statements to the police officers as well.["] Although his client was not in custody when he made those incriminating statements, which were audio recorded by the police, counsel was nevertheless attempting to keep any incriminating videos, photos, or statements out of evidence at the trial by filing and arguing these motions to suppress. (Emphasis in original).

In the audio recording of [the Petitioner's] statements to police, he acknowledged and admitted that he had kissed [the victim] (who he knew was 12 years old at the time) and had "sucked on her breast", and that both [the victim] and her sister [victim's older sister] had both performed fellatio (oral sex) on him, and that [the victim] had "nicked" his penis with her teeth. He also admitted that he had "kind of half-way tried to put his penis in her vagina" and that it was "the worst mistake of his life."

At trial, the victim [the victim] described in great detail what [the Petitioner] did to her sexually that night which included his sucking her nipple (breast), placing his penis inside her mouth, and trying to put his penis into her vagina, and telling her not to tell anyone about what had happened.

Investigator Jason Crouse also testified about the admissions and statements that [the Petitioner] made to him, in which he admitted to everything [the victim] had accused him of doing.

[The Petitioner] also testified at his trial about the sexual events which occurred between he, his girlfriend [victim's older sister] and her younger sister [the victim] that night in his car. He also acknowledged that he was aware that [the victim] was 12 years old at the time, and that [the victim] and [the victim's older sister] did not look alike and that there was a difference in their weights and sizes.

The Court notes that both [the victim] and Investigator Jason Crouse, were both credible witnesses at the trial. The Court also notes that [the Petitioner's] own testimony at his trial and his statements to police in which he acknowledged all three instances of sexual contact between himself and the victim, was corroborating to the State's witness' testimonies. [Emphasis in original].

[Trial Counsel] also testified that he and his client had reviewed the audio recording of his client interview with the police prior to the trial and that he could understand what was being said by the officer and [the Petitioner]. He said it was "crystal clear" when I listened to it pre-trial, which is the reason why he filed a motion to suppress the audio recorded statement, which the Court denied.

He testified further that it was part of his defense strategy to show that [the Petitioner] never had "any intention" to have sexual contact with [the victim]. Defense theory was that [the victim] was just "suppose to watch" while he and her sister [victim's older sister] had sex in the car. Defense theory was that [the Petitioner] never "knew" that [the victim] was going to participate in any sexual acts, but simply going to watch as he and [victim's older sister] had sex in his car. [Emphasis in original].

[Trial Counsel] also testified that he and his client had discussed what [the Petitioner's] testimony would be as part of the trial strategy. He stated that he knew beforehand what his client's testimony was going to be from the witness stand.

Trial [C]ounsel also testified that he used all of his challenges during the Jury selection process. He also testified that he did not believe the prosecutor's questioning of jurors during voir dire examination was

objectionable or improper, or that the prosecutor's closing arguments to the jury were objectionable, improper or had "crossed the line." The Court credits [trial counsel's] testimony in this regard.

The [P]etitioner called Attorney Claiborne Ferguson to testify about his review of the trial court transcript and record, and his opinions concerning [trial counsel's] performance at the Jury trial of [the Petitioner].

He opined that the "lack of Mens Rea" on [the Petitioner's] part was the only defense that was appropriate in this case, and that Jury nullification was not a defense.

He opined that [trial counsel] failed to make objections to comments by the prosecutor during his closing arguments, and that [trial counsel's] performance during voir dire examination and opening statement were both "substandard[.]"

Mr. Ferguson also opined that the four pre-trial motions filed by trial counsel were either untimely or insufficient. He also criticized [trial counsel's] cross-examination of the alleged victim [name of victim]. He also criticized the cross-examination of Investigator Crouse by [trial counsel]. He also criticized trial counsel's performance during his closing arguments to the Jury. [Emphasis in original].

Attorney Ferguson testified that in his opinion [trial counsel's] performance as trial counsel was "sub-par" and "insufficient." He also testified that he had "no concern" or criticism over the Jurors who were selected to hear the criminal case against [the Petitioner], and who ultimately found the [Petitioner] guilty on the three charges. He stated that [the Petitioner] didn't get a fair trial. He also stated that he was being paid $2,500 to testify at the post-conviction hearing in this matter.

After careful review of the entire trial transcripts and all the evidence in this case, the Court finds that none of the trial counsel's actions or omissions were so serious as to fall below the objective standard of reasonableness under prevailing professional norms. The Court finds that [trial counsel's] representation was appropriate and that he provided [the Petitioner] with reasonably effective assistance. **Most importantly**, the Court further finds that the [P]etitioner has failed to show that there is a reasonable probability that, but for trial counsel's performance, the result of the proceeding would have been different. The proof in this case against the

> [Petitioner] was very compelling, overwhelming and sufficient to support the guilty verdicts. In fact, [trial] counsel did argue to the Jury that his client didn't have the requisite "Mens Rea" in the matter, and that they should find him not guilty. The Jury rejected that argument. [Emphasis in original].
>
> The Court credits the testimony of Trial counsel [] and finds that his representation of [the Petitioner] at trial was sufficient and appropriate.

On February 14, 2022, the order denying post-conviction relief was filed, and the Petitioner subsequently filed a timely notice of appeal. This case is now properly before this court for review.

ANALYSIS

I. Sufficiency of the Record. As a threshold matter, the Petitioner contends the record is insufficient for appellate review because the post-conviction court failed to make sufficient factual findings regarding several claims of ineffective assistance of counsel. The Petitioner further claims that the post-conviction court failed to consider several claims of ineffective assistance of counsel raised by the Petitioner. Specifically, trial counsel's failure to familiarize himself with Rule 412 of the Tennessee Rules of Evidence and subsequent failure to comply with the ten day notice requirement prior to trial, trial counsel's failure to familiarize himself with Rule 7 (c) of Tennessee Rules of Criminal Procedure; trial counsel's failure to file motions in limine to preclude testimony on three separate issues pursuant to Rules 401, 402, and 403, trial counsel's failure to file motions in limine to preclude testimony regarding five separate issues pursuant to Rule 404(b); trial counsel's failure to move for redaction of parts of the Petitioner's statement pursuant to Rule 404(b); trial counsel's failure to understand the purpose of opening statements and inappropriately asking questions of the jurors during opening statements; trial counsel's repeated concessions of guilt in opening statements, in the closing argument, and the breach of the duty of loyalty; trial counsel's ineffective appellate advocacy; and trial counsel's cumulative errors.[1]

In response, the State contends the record is sufficient for this court's review. Given the structure, volume, and overlap of the issues contained in the petition, the State argues the post-conviction court should be given some "leeway." The State submits the post-conviction court's letter fairly summarized the evidence offered at the hearing and credited the testimony of trial counsel. The post-conviction court then concluded, with emphasis,

[1] We have renumbered the Petitioner's issues for clarity. This section addresses the Petitioner's issues raised in section four of his brief.

that the Petitioner "failed to show that there is a reasonable probability that, but for trial counsel's performance, the result of the proceeding would have been different." Because the Petitioner had asked the post-conviction court to consider the cumulative effect of the alleged errors, and considering that he still opted to argue the cumulative effect of counsel's supposed deficiencies rather than arguing that any single one prejudiced case on appeal, the State argues "it is entirely fitting that the post-conviction court considered the prejudicial effect as a whole rather than prejudice created by each allegation of deficient conduct individually." Finally, even if the post-conviction court should have made more findings of fact, the State submits reversal is not required because the record is "sufficient for meaningful appellate review."

The Post-Conviction Procedure Act requires the post-conviction court to make factual findings and conclusions of law with regard to each ground raised in the petition. Tenn. Code Ann. § 40-30-111(b) (mandating that the court "shall set forth in the order or a written memorandum of the case all grounds presented and shall state the findings of fact and conclusions of law with regard to each ground"); see also Tenn. Sup. Ct. R. 28, § 9(A). The reasoning behind the requirement is to establish a basis adequate for appellate review. Strouth v. State, 755 S.W.2d 819, 822 (Tenn. Crim. App. 1986) (order denying post-conviction relief was sufficiently clear to permit appellate review, even if it lacked desired specificity on some points); Davis v. State, No. M2019-01017-CCA-R3-PC, 2020 WL 4282733, at *6 (Tenn. Crim. App. July 27, 2020). Accordingly, "[n]oncompliance by the post-conviction court does not warrant a reversal if the record is sufficient to effectuate a meaningful appellate review." Rickman v. State, 972 S.W.2d 687, 692 (Tenn. Crim. App. 1997). A failure to make a finding on a question of fact which is not dispositive of the legal issue of ineffective assistance of counsel does not require a remand to the trial court. State v. Swanson, 680 S.W.2d 487, 489-90 (Tenn. Crim. App. 1984).

We agree with the Petitioner and note that the post-conviction court's order denying the petition is somewhat unorthodox. The actual order states that the Petitioner failed to prove the allegations in his petition by clear and convincing evidence, that trial counsel rendered services within the range of competence demanded of attorneys, that the Petitioner failed to show that trial counsel was deficient or that any alleged deficiency prejudiced the Petitioner, and incorporated the post-conviction court's February 8, 2020 letter to the parties containing its "full findings with regard to each specific claim of the Petitioner[.]" We acknowledge further that the February 8 letter did not address in seriatim the twenty-three issues raised in the post-conviction petition. Nevertheless, the February 8 letter summarized the testimony of trial counsel, Attorney Ferguson, and specifically referenced "the four pre-trial motions filed by trial counsel were either untimely or insufficient." Additionally, as pointed out by the State, the Petitioner asked the post-conviction court to consider the cumulative effect of the alleged errors rather than arguing that any single one prejudiced case. Moreover, based on the evidence from the post-

conviction hearing, most, if not all of the claims raised by the Petitioner required the post-conviction court to determine the propriety of trial counsel's strategic decisions throughout his representation of the Petitioner, and the post-conviction court determined that trial counsel's testimony in that regard was credible. The February 8 letter and the actual order also clearly show that the post-conviction court determined that the Petitioner had failed to establish that trial counsel was deficient or that trial counsel's deficiency prejudiced his case. Accordingly, we conclude the record is sufficient for meaningful appellate review.

II. Applicable Legal Framework. In section two of his brief, the Petitioner alleges trial counsel was deficient based on eighteen separate grounds for relief.[2] Each ground focuses primarily on trial counsel's alleged deficient performance. Section two does not provide this court with any corresponding argument regarding the prejudicial effect of trial counsel's alleged deficiency to his case.[3] Instead, in section three subsection one of his brief, the Petitioner generally argues under Strickland v. Washington, that "[e]ach error of trial counsel is distinctly interrelated, and the [Petitioner] was prejudiced, if not by each of these individual errors, the avalanche as a whole." Additionally, in section three subsection two, the Petitioner argues the cumulative effect of trial counsel's errors was so pervasive that this court should presume prejudice under United States v. Cronic, 466 U.S. 648, 104 S. Ct. 2039 (1984), because trial counsel entirely failed to subject the prosecution's case to meaningful adversarial testing. Accordingly, we must now determine whether to review the Petitioner's Sixth Amendment ineffective assistance of counsel claims pursuant to Strickland or Cronic.

A claim for post-conviction relief based on alleged ineffective assistance of counsel and presents mixed questions of law and fact. Mobley v. State, 397 S.W.3d 70, 80 (Tenn. 2013) (citing Calvert v. State, 342 S.W.3d 477, 485 (Tenn. 2011)). In order to prevail on a petition for post-conviction relief, a petitioner must prove all factual allegations by clear and convincing evidence. Jaco v. State, 120 S.W.3d 828, 830 (Tenn. 2003). A post-conviction court's findings of fact are conclusive on appeal unless the evidence in the

[2] As pointed out by the State, although this section of the Petitioner's brief purports to present nineteen grounds for relief, we note only eighteen grounds because the brief does not include a ground for number twelve.

[3] The Petitioner's argument appears to be twofold: (1) that prejudice should be presumed pursuant to United States v. Cronic, as discussed in this section, because trial counsel failed to subject the prosecution's case to meaningful adversarial testing; and (2) that prejudice should be presumed pursuant to Rickman v. Bell, 131 F.3d 1150 (6th Cir. 1997) (quoting United States v. Cronic, 466 U.S. 648, 654 n.11 (1984)), as discussed in subsection (14), failure to give effective opening statement, and subsection (16), failure to give an effective closing argument by failing to present a defense. Accordingly, we will address prejudice under Rickman v. Bell, separately in those sections.

record preponderates against them. Calvert, 342 S.W.3d at 485 (citing Grindstaff, 297 S.W.3d at 216; State v. Burns, 6 S.W.3d 453, 461 (Tenn. 1999)). "Accordingly, we generally defer to a post-conviction court's findings with respect to witness credibility, the weight and value of witness testimony, and the resolution of factual issues presented by the evidence." Mobley, 397 S.W.3d at 80 (citing Momon v. State, 18 S.W.3d 152, 156 (Tenn. 1999)). However, we review a post-conviction court's application of the law to its factual findings de novo without a presumption of correctness. Id. (Grindstaff, 297 S.W.3d at 216; Finch v. State, 226 S.W.3d 307, 315 (Tenn. 2007); Vaughn v. State, 202 S.W.3d 106, 115 (Tenn. 2006)).

The right to effective assistance of counsel is protected by both the United States Constitution and the Tennessee Constitution. U.S. Const. amend. VI; Tenn. Const. art. I, § 9. In order to prevail on an ineffective assistance of counsel claim, the petitioner must establish that (1) his lawyer's performance was deficient and (2) the deficient performance prejudiced the defense. Goad v. State, 938 S.W.2d 363, 369 (Tenn. 1996); Strickland v. Washington, 466 U.S. 668, 687 (1984). A petitioner successfully demonstrates deficient performance when the petitioner establishes that his attorney's conduct fell "below an objective standard of reasonableness under prevailing professional norms." Goad, 938 S.W.2d at 369 (citing Strickland, 466 U.S. at 688; Baxter v. Rose, 523 S.W.2d 930, 936 (Tenn. 1975)). Prejudice arising therefrom is demonstrated once the petitioner establishes "'a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.'" Id. at 370 (quoting Strickland, 466 U.S. at 694).

In assessing an attorney's performance, we "must be highly deferential and should indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." Burns, 6 S.W.3d at 462 (citing Strickland, 466 U.S. at 689). "[S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation." Strickland, 466 U.S. at 690-91. In addition, we must avoid the "distorting effects of hindsight" and must "judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct." Strickland, 466 U.S. 689-90. "No particular set of detailed rules for counsel's conduct can satisfactorily take account of the variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how best to represent a criminal defendant." Id. at 688-89. However, "'deference to matters of strategy and tactical choices applies only if the choices are informed ones based upon adequate preparation.'" House v. State, 44 S.W.3d 508, 515 (Tenn. 2001) (quoting Goad, 938 S.W.2d at 369).

The prejudice showing is in most cases a necessary part of a Strickland claim. Weaver v. Mass., 582 U.S. 286, 137 S. Ct. 1899, 1910 (2017). The reason is that a defendant has a right to effective representation, not a right to an attorney who performs his duties mistake-free. Id. (citations and internal quotation marks omitted). As a rule, therefore, a violation of the Sixth Amendment right to effective representation is not "complete" until the defendant is prejudiced. Id. Under Strickland, "[b]ecause a petitioner must establish both prongs of the test, a failure to prove either deficiency or prejudice provides a sufficient basis to deny relief on the ineffective assistance claim." Goad, 938 S.W.2d at 370.

In United States v. Cronic, 466 U.S. 648, 104 S. Ct. 2039 (1984), the Supreme Court of the United States recognized "a narrow exception" to Strickland's requirement that a defendant must prove prejudice to establish ineffective assistance of counsel. Cronic acknowledged the existence of "circumstances that are so likely to prejudice the accused that the cost of litigating their effect in a particular case is unjustified." Id. at 658, 104 S. Ct. 2039. Those circumstances include: (1) "the complete denial of counsel"; (2) when "counsel entirely fails to subject the prosecution's case to meaningful adversarial testing"; and (3) when circumstances are such that "the likelihood that any lawyer, even a fully competent one, could provide effective assistance is so small that a presumption of prejudice is appropriate without inquiry into the actual conduct of the trial." Id. at 659-60, 104 S. Ct. 2039; Howard v. State, 604 S.W.3d 53, 58 (Tenn. 2020). In these instances, the process is presumptively unreliable, and proof of actual prejudice is not required.

In this case, the Petitioner relies on the second Cronic exception: he contends that trial counsel "entirely fail[ed] to subject the prosecution's case to meaningful adversarial testing." The Supreme Court has explained "[w]hen we spoke in Cronic of the possibility of presuming prejudice based on an attorney's failure to test the prosecutor's case, we indicated that the attorney's failure must be complete." Bell v. Cone, 535 U.S. 685, 696-97, 122 S.Ct. 1843 (2002); see also Fla. v. Nixon, 543 U.S. 175, 190, 125 S.Ct. 551 (2004). To trigger the second Cronic exception, an attorney must completely fail to challenge the prosecution's case, not just individual elements of it. The Court in Bell further noted that when applying Strickland or Cronic, the distinction between counsel's failure to oppose the prosecution entirely and the failure of counsel to do so at specific points during the trial is a "difference ... not of degree but of kind." Bell v. Cone, 535 U.S. at 697, 122 S.Ct. 1843. Under this rationale, when counsel fails to oppose the prosecution's case at specific points or concedes certain elements of a case to focus on others, he has made a tactical decision. By making such choices, defense counsel has not abandoned his or her client by entirely failing to challenge the prosecution's case. Such strategic decisions do not result in an abandonment of counsel, as when an attorney completely fails to challenge the prosecution's case. Under the Court's reasoning, then, Cronic is reserved only for those

extreme cases in which counsel fails to present any defense. Phillips v. White, 851 F.3d 567, 580 (6th Cir. 2017) (quoting Miller v. Martin, 481 F.3d 468, 473 (7th Cir. 2007)) (to trigger the second Cronic exception, "counsel's performance [must be] so defective that he may as well have been absent"; "'non-representation, not poor representation, triggers a presumption of prejudice.'"); U.S. ex rel. Madej v. Schomig, 223 F. Supp. 2d 968, 971-72 (N.D. Ill. 2002) ("the standard is extremely high for a petitioner asserting that his counsel entirely failed to subject the prosecution's case to meaningful adversarial testing"; to satisfy that standard, "counsel's performance must move beyond patent ineffectiveness into rank incoherence."); United States v. Holman, 314 F.3d 837, 839 n. 1 (7th Cir. 2002)("Cronic only applies if counsel fails to contest any portion of the prosecution's case; if counsel mounts a partial defense, Strickland is the more appropriate test.").

Upon our review, the record shows that trial counsel attempted to represent the Petitioner's best interest and filed various pre-trial motions including a motion for exculpatory evidence; motion for disclosure of impeaching evidence; motion to make the arrest history of State's witnesses available; motion to suppress evidence; and a motion to suppress the Petitioner's statement. Trial counsel also participated in voir dire and exercised each of his peremptory strikes on behalf of the Petitioner in selecting a jury. At trial, trial counsel presented an opening statement, cross-examined witnesses, moved for judgment of acquittal at the close of the State's proof which resulted in dismissal of one of the counts, and presented closing argument. Although trial counsel's performance very well may have been "subpar" as stated by Attorney Ferguson, we cannot say that trial counsel "entirely fail[ed] to subject the prosecution's case to meaningful adversarial testing." As will be discussed more fully below, trial counsel made various tactical decisions throughout this case. In making such choices, however, trial counsel did not abandon the Petitioner by entirely failing to challenge the prosecution's case as required for this court to presume prejudice under Cronic. Accordingly, we will now turn to review each of the Petitioner's claims applying the traditional legal framework under Strickland.

III. Ineffective Assistance of Counsel Claims. The Petitioner first argues that trial counsel was ineffective in advising the Petitioner to waive the preliminary hearing. He acknowledges, however, that failure to conduct a preliminary hearing, taken alone, is rarely sufficient to sustain a finding of ineffective assistance of counsel. State v. Harmon, No. M2004-00453-CCA-R3-PC, 2005 WL 1353325 (Tenn. Crim. App., June 8, 2005). Nevertheless, the Petitioner insists that trial counsel's advice to waive the preliminary hearing provided no strategic or tactical advantage to the Petitioner and hampered his cross-examination of the victim. According to the Petitioner, this decision set the tone for the entirety of trial counsel's representation. In response, the State contends that trial counsel had legitimate strategic reasons to waive the preliminary hearing and was not deficient in this regard. Here, trial counsel testified at the post-conviction hearing that a preliminary

hearing could be more beneficial for the State than the defense. Trial counsel also said that he had already reviewed the affidavit of complaint and the transcript of the forensic interview of the victim. Trial counsel anticipated that he would receive open file discovery from the State, so he would not learn anything new from the preliminary hearing. Finally, trial counsel did not want to give the prosecutor or the witnesses a "dress rehearsal" for their testimonies and did not want to alert the prosecutor or the witnesses to what questions he might ask at trial, and he did not want to preserve any testimony that could be used later if a State's witness became unavailable. This Court will not second-guess trial counsel's reasonable strategic decisions on review. Therefore, we conclude that trial counsel was not deficient in advising the Petitioner to waive the preliminary hearing. Smith v. State, 757 S.W.2d 14, 17-18 (Tenn. Crim. App. 1988); Hatmaker v. State, No. 03C01-9506-CR-00169, 1996 WL 596949, at *6 (Tenn. Crim. App. Oct. 18, 1996). He is not entitled to relief as to this issue.

2. The Petitioner alleges that trial counsel was deficient in his "failure to understand the elements of the charged offense and included definitions." The extent of the Petitioner's claim here is that during closing arguments trial counsel twice asked the jury to consider, "Was anyone raped?" The Petitioner asserts this question was asked with the intent to illustrate the image of "forced rape" and force is not an element of rape of a child. In response, the States contends the post-conviction court credited the testimony of trial counsel at the post-conviction hearing that he knew the elements of the offense of rape of a child. Our law certainly permits trial counsel wide latitude in arguing their cases to the jury. State v. Cauthern, 967 S.W.2d 726, 737 (Tenn. 1998). Trial counsel's decisions on how or what to argue in opening or closing argument are strategic, and virtually unchallengeable, unless they are ill-informed or based on inadequate preparation. However, labeling a trial tactic "strategic" does not insulate it, perforce, from Strickland review. Lovett v. Foltz, 884 F.2d 579 (6th Cir.1989) (per curiam). "[E]ven deliberate trial tactics may constitute ineffective assistance of counsel if they fall outside of the wide range of professionally competent assistance." Martin v. Rose, 744 F.2d 1245, 1249 (6th Cir.1984) (internal citation omitted).

At the post-conviction hearing, trial counsel said he asked these types of questions because he "couldn't ask the jury" and he was "operating down here in a small town." Trial counsel further explained that "there's a statutory definition of what occurred and then there's a community definition of rape." Trial counsel admitted, "I know this kind of goes to jury nullification, but that's not exactly what I had in mind[.]" Trial counsel also said he was hoping the jurors would remember when they were teenagers. The record also shows that trial counsel believed that rape of a child was "essentially a strict liability offense" and presented an underlying theme of jury nullification. Trial counsel also discussed the rape of a child statute and how it may be misinterpreted. While the post-conviction court appears to have accredited trial counsel's testimony that he understood the elements of the

charged offense and included definitions, we are not so sure. As opined by Attorney Ferguson, the record belies trial counsel's statement that he understood the elements of the offense of rape of a child because trial counsel never expressly argued intent to the jury. In other words, trial counsel never explained the elements of the offense to the jury or that the State was required to prove the Petitioner intent to commit the act. If intent was indeed the defense, as stated by trial counsel, it is unclear why trial counsel did not expressly argue it. We note further that this issue appears to overlap with subsection 16, that trial counsel was deficient in failing to present in closing argument the Petitioner's defense that he did not know it was the victim who put her mouth over the Petitioner's penis, which we will discuss more fully below. In any case, we conclude that the Petitioner has failed to establish clear and convincing evidence in support of this claim.

3. The Petitioner alleges trial counsel' failure to comply with the ten-day notice requirement of Rule 412 demonstrated a lack of basic knowledge required for litigating a rape of a child case. Specifically, the Petitioner claims trial counsel's Rule 412 motion failed to include an offer of proof and was untimely. In response, the State contends trial counsel testified at the post-conviction hearing that he did not actually want to introduce evidence of the victim's alleged other sex acts and that the Petitioner did not put forth any evidence below of what trial counsel could have or should have presented at the post-conviction hearing.

Tennessee's rape shield rule, which is found in Tennessee Rule of Evidence 412, "recognizes that, despite the embarrassing nature of the proof, sometimes the accused can only have a fair trial if permitted to introduce evidence of the alleged victim's sexual history." Tenn. R. Evid. 412, Advisory Comm'n Cmts. (1991). Rule 412's "purpose is to exclude all evidence regarding the complainant's prior sexual behavior unless the procedural protocol is followed, and the evidence conforms to the specifications of the Rule." State v. Brown, 29 S.W.3d 427, 430 (Tenn. 2000).

The provisions of Rule 412 as relevant here provide in pertinent part:

> (c) Specific Instances of Conduct. Evidence of specific instances of a victim's sexual behavior is inadmissible unless admitted in accordance with the procedures in subdivision (d) of this rule, and the evidence is:
>
> (1) Required by the Tennessee or United States Constitution, or
>
> (2) Offered by the defendant on the issue of credibility of the victim, provided the prosecutor or victim has presented evidence as to the victim's sexual behavior, and only to the extent needed to rebut the specific evidence presented by the prosecutor or victim, or

. . . .

(4) If the sexual behavior was with persons other than the accused,
. . . .

(ii) to prove or explain the source of semen, injury, disease, or knowledge of sexual matters[.]

(d) Procedures. If a person accused of an offense covered by this Rule intends to offer under subdivision (b) reputation or opinion evidence or under subdivision (c) specific instances of conduct of the victim, the following procedures apply:

(1) The person must file a written motion to offer such evidence.

> (i) The motion shall be filed no later than ten days before the date on which the trial is scheduled to begin, except the court may allow the motion to be made at a later date, including during trial, if the court determines either that the evidence is newly discovered and could not have been obtained earlier through the exercise of due diligence or that the issue to which such evidence relates has newly arisen in the case.
> (ii) The motion shall be served on all parties, the prosecuting attorney, and the victim; service on the victim shall be made through the prosecuting attorney's office.
> (iii) The motion shall be accompanied by a written offer of proof, describing the specific evidence and the purpose for introducing it.

Tenn. R. Evid. 412(c)(1), (4)(ii), (d)(1)(i)-(iii).

As we understand the Petitioner's claim, he is not asserting that trial counsel should have filed a Rule 412 motion. Rather, the Petitioner is asserting this claim because trial counsel had no grounds to file a Rule 412 motion and did so anyway. In addition, the Petitioner claims trial counsel failed to comply with the above mandates of Rule 412. Our review of the trial court transcript shows that on March 21, 2016, nine days before the Petitioner's March 30, 2016 trial, trial counsel filed a Rule 412 motion requesting a pretrial hearing to determine the admissibility of the victim's prior sexual behavior. The motion was not accompanied by a written offer of proof, describing the specific evidence and the purpose for introducing it. On March 28, 2016, two days before trial, a hearing was held on the Rule 412 motion. The State explained to the court that its "theory of the offense [was] three participants and not just the [Petitioner] and the victim alone, but there was a third person involved in the sex acts [on the night of the offense]. That would be the

victim's older sister,[] who is now the [Petitioner's] wife []." Trial counsel agreed with the State and noted "that would be an issue we address at trial" and that he would need a decision about the sexual activity of both girls. The trial court asked trial counsel about his failure to comply with Rule 412 and the fact that as a minor, the victim could not provide consent. Trial counsel said he "understood" but the victim was seven-years old when "the incident" occurred with her sister and that the statements of the victim and her sister in the instant case alleged that "they were going to teach the victim about sex when she's twelve years old." Asked how that was admissible, trial counsel replied, "Why did [the Petitioner] need to teach [the victim] about sex when she's been having sex for five or six years with her sister?" Again, the trial court pressed trial counsel about his failure to comply with the ten-day filing requirement under Rule 412, and his failure to include in his motion any alleged prior sexual acts of the victim. Trial counsel initially replied, "I don't have an answer for that question." After further questioning from the trial court, trial counsel capitulated and said, "We'll withdraw that motion."

At the post-conviction hearing, trial counsel agreed that he filed the motion to show that the victim and her sister "had had sex together previously so that [the Petitioner] would not have been teaching them anything about sex." Trial counsel further agreed that this information was not relevant, that he ultimately withdrew the motion, and that he told the trial court in error that he may have to raise the issue at a later time during trial. When further pressed about his understanding of Rule 412 based on his actions, trial counsel explained that the Petitioner had charges in two jurisdictions, and trial counsel was attempting to limit the victim's testimony about unindicted crimes. The victim's sister was also "under the threat of indictment."

Upon our review, we acknowledge that the post-conviction court failed to expressly address the Rule 412 motion in its order denying relief. Although the 412 motion was untimely, the transcript from the hearing on the motion demonstrates that trial counsel was attempting to admit evidence of the victim's prior sex acts with her sister to rebut the victim's anticipated testimony that the Petitioner and her older sister asked her if she wanted to learn about sex. At the motion hearing, it was clear that trial counsel was attempting to admit the evidence of sex between the sister's to impeach the victim's anticipated testimony. However, the trial court denied the motion because it determined that the anticipated testimony was not relevant, and trial counsel ultimately withdrew the motion. At the post-conviction hearing, there was no proof offered to establish that had trial counsel complied with the procedural requirements of Rule 412, the outcome of the trial would have been different. Accordingly, the Petitioner has failed to establish prejudice as a result of trial counsel's alleged deficiency, and he is not entitled to relief.

4. The Petitioner argues that trial counsel "did not know what a motion for a bill of particulars" was because trial counsel filed a motion to amend the indictment to

include a more specific date and time. In support of this issue, the Petitioner points out that two days prior to trial, trial counsel addressed the court on the issue and stated "it's not just one incident. It's several incidents. They overlap." Because the indictment is clear that the alleged acts occurred on one day and in one county, the Petitioner argues that trial counsel did not know the allegations the Petitioner was facing two days before trial and was clearly unprepared. Trial counsel testified at the post-conviction hearing that he knew what a bill of particulars was and intentionally styled the motion as something more "vague." Trial counsel also believed the State was uncertain about the victim's age at the time of the offense and did not wish to aid the State in determining the correct date for the offense. Moreover, there were two active investigations in Madison and Chester County, and trial counsel was "attempting to create as much confusion about when these activities might have occurred and what the State was trying to prove." Trial counsel's decision to label the motion as a motion to amend, rather than a bill of particulars appears to be based on a reasonably informed trial tactic or strategy. Accordingly, the Petitioner has failed to establish that trial counsel was deficient in labeling the motion to amend the indictment or that but for trial counsel's alleged deficiency, the result of the proceeding would have been different.

5. The Petitioner argues that trial counsel's failure to "properly draft, investigate, and litigate multiple motions to suppress [is] evidence of the ineffective representation provided throughout the trial process." The Petitioner argues that Kimmelman v. Morrison, 477 U.S. 365, 106 S. Ct. 2574 (1986), and Phillips v. State, 647 S.W.3d 389 (Tenn. 2022), set the standard for failure to file a motion to suppress and are inapplicable because trial counsel filed a facially defective motion to suppress. The Petitioner asserts the motion filed by trial counsel contained a single paragraph alleging vague constitutional violations, did not allege any facts, did not allege the evidence that was seized or sought to be suppressed. The Petitioner argues trial counsel did not know the evidence he sought to suppress, the evidence the State was seeking to introduce, or the basic facts surrounding the seizure of the Petitioner's cell phone until the motion to suppress was heard two days prior to trial. Based on this, the Petitioner contends trial counsel placed the Petitioner on the stand unprepared to testify. Finally, the Petitioner insists the above demonstrates that trial counsel's lack of preparation and understanding of the adversarial process. The State argues the Petitioner is not entitled to relief because he failed to put forth proof of its success on the motions to suppress at the post-conviction hearing pursuant to Kimmelman and Phillips.

Upon our review, the record shows that two days prior to trial, the trial court conducted hearings on all of the pre-trial motions filed by trial counsel on behalf of the Petitioner. In regard to the motion to suppress evidence and the motion to suppress the Petitioner's statement, trial counsel advised the court that they "could be handled together." Trial counsel also explained that the instant case overlapped with another case charging the

Petitioner with patronizing prostitution that originated in Madison County. Trial counsel believed the cases overlapped because during the patronizing prostitution case, the Petitioner's cell phone was taken by the police. Trial counsel was uncertain whether any information was taken from the cell phone seized in the Madison County case and used in the instant, Chester County case. On the morning of the hearing, Investigator Crouse advised trial counsel that he did not obtain any information from the Petitioner's cell phone, and if he did, it was not going to be used in the instant case. For reasons unknown, trial counsel nevertheless announced to the trial court that the Petitioner "certainly can take the stand." The hearing proceeded with Investigator Crouse testifying that he took a statement from the Petitioner on June 15, that he spoke with the Petitioner strictly about the instant, Chester County case, not the Madison County case, and that the Petitioner was not in custody at the time he gave the statement. Trial counsel cross-examined Investigator Crouse, who confirmed that he was unaware of any evidence that had been seized from the Petitioner's cell phone. Investigator Crouse further confirmed that there was a joint investigation conducted with the Madison County Police Department; however, the only information shared was regarding the instant case.

Following Investigator Crouse's testimony, trial counsel called the Petitioner to the witness stand to testify without qualification that his testimony would be limited to the motion. The Petitioner testified that he was detained in a hotel room in March 2015 by the Jackson Police Department (JPD). He entered an agreement with them which allowed him to leave so long as he turned over his cell phone. The JPD kept his cell phone for four months, and shortly thereafter, the Petitioner was indicted with the instant offenses. Trial counsel asked the Petitioner questions concerning how the statement in the instant case was obtained, and the Petitioner testified that the police did not have his cell phone at the time the statement was given and that they did not ask him about any information they had taken off of the cell phone. During cross-examination by the State, the Petitioner testified that he gave the statement to Investigator Crouse on June 15, 2015, that it was his voice on the recording, that the officers told him he was not under arrest or in custody at the time, and that he continued to speak with them freely. Although he had not listened to the recording, the Petitioner further agreed that he "made some statements and some admissions" about an incident with the victim on the recording. The Petitioner was unaware the he was being recorded at the time. At this point, trial counsel objected based on speculation. The record does not show a ruling from the trial court. The Petitioner was aware of the recordings of statements he made to the victim's father and the police; however, he had not listened to either recording. The State continued during cross-examination with the following exchange:

> STATE: Did you – based on your recollection, do you remember speaking to them about what you're charged with as far as an incident involving yourself, [the victim's older sister], and [the victim]?

PETITIONER: Yes, sir.

STATE: At no time were you ever forced to give statements to law enforcement, were you? You were never told they were going to do anything to you if you didn't speak, did they?

PETITIONER: No, sir.

STATE: Okay. So, when you spoke to them did you admit that something did take place between you and [the victim]?

PETITIONER: Yes, I did.
. . . .

STATE: Was that you voluntarily telling that to law enforcement as far as they didn't put words in your mouth, did they? Did you tell them what happened?

PETITIONER: Yes.
. . . .

STATE: Did you make descriptions of what happened and how it happened, where it happened, and when it happened?
PETITIONER: Yes.

STATE: Okay. And I guess later, you even took Investigator Crouse to the location where that incident occurred; correct?

PETITIONER: Yes.

Trial counsel argued to the court "the primary focus of the motions is information that may or may not have been taken from the cell phone. . . . we object to any evidence that directly came from that cell phone or anything that was derived from it later on" as fruit of the poisonous tree. Trial counsel then stated "[t]he motion is not much addressing what [the Petitioner] told investigators because that does appear to be voluntary and proper[.]" At the post-conviction hearing, trial counsel acknowledged that during the hearing he did not know whether the cell phone was going to be used in his investigation. Trial counsel believed the Petitioner voluntarily gave the police his cell phone and that the police had returned the Petitioner's phone prior to trial. Trial counsel did not know if anything incriminating had been retrieved from the Petitioner's phone. Trial counsel

acknowledged that he was not certain of what he wanted to suppress because he did not know exactly what was on the cell phone, even though it had been returned to the Petitioner. Trial counsel attributed any confusion in the motion to suppress to the fact that he wanted to advise the court that the Petitioner's phone was seized in relation to another case and not the instant case.

Based on the above testimony, we can conceive of no legitimate tactical or strategic reason why trial counsel filed a motion to suppress evidence or statements in this case. Trial counsel conceded before the trial court that he knew the Petitioner was not in custody at the time the statements were given, and that the Petitioner had given the statements in this case voluntarily. We find it mind-boggling that trial counsel placed the Petitioner on the witness stand and subjected him to cross-examination by the State to achieve trial counsel's goal of notifying the trial court of potential evidence from another case. This action enabled the State to elicit and confirm the Petitioner's admission to "something" that happened with the victim. We cannot condone trial counsel's action. We conclude that the record preponderates against the post-conviction court's finding that trial counsel actions fell within the objective standard of reasonableness under prevailing professional norms. However, the Petitioner does not argue how he was prejudiced by trial counsel's deficient act. Accordingly, we conclude that while trial counsel was deficient in filing the above motions to suppress the Petitioner's statement/evidence and in calling the Petitioner to testify in this regard, the Petitioner has failed to demonstrate prejudice stemming from this deficiency.

6. The Petitioner argues trial counsel's failure to file several motions in limine was objectively unreasonable and ineffective. The Petitioner asserts that trial counsel was (A) ineffective in failing to file a motion in limine to prevent the jury from hearing the age of the victim's older sister; (B) in failing to file a motion in limine to prevent the jury from hearing about the victim's older sister's sex life with the Petitioner or their proclivity for involving others in their sex life; and (C) in failing to file a motion in limine regarding the victim's older sister's subsequent pregnancy. The Petitioner insists this deficiency enabled the State to have its theme of "sex with two minor girls." In response, the State argues trial counsel's decision not to file a motion in limine was not ineffective because, as part of his defense strategy, trial counsel wanted to show that the Petitioner was also young when he began having sex with the victim's older sister and that the Petitioner married the victim's older sister when she got pregnant to take responsibility for what he had done. The State asserts this testimony was also offered to show that Petioner was not a sex obsessed teenager.

Objections to the admission of evidence are generally made when the evidence is offered. Pullum v. Robinette, 174 S.W.3d 124, 135-37 (Tenn. Ct. App. 2004). They may, however, be raised earlier, for example by pretrial motions in limine. "In limine " means

"[o]n the threshold; at the beginning; or preliminarily." Id. (quoting BLACK'S LAW DICTIONARY 787 (6th ed.1990)). A motion in limine affords parties a means of "requesting guidance from the trial court prior to trial regarding an evidentiary question which the court may provide, at its discretion, to aid the parties in formulating their trial strategy." Duran v. Hyundai Motor Am., Inc., 271 S.W.3d 178, 192 (Tenn. Ct. App. 2008).

Although neither federal nor Tennessee procedural rules specifically authorize motions in limine, they have long been used and have been recognized as useful in management of cases. The court's authority in Tenn. R. Civ. P. 16 to manage a case through pretrial conferences and orders includes the discretion to rule on evidentiary issues raised in pretrial motions. Pullum v. Robinette, 174 S.W.3d at 135-37 (citing Advisory Commission Comments (2003) to Rule 16.02(6) ("pretrial conferences may greatly facilitate the efficient use of juror time by encouraging the pretrial resolution of evidentiary and other issues....")).

The Tennessee Rules of Evidence provide that all "relevant evidence is admissible," unless excluded by other evidentiary rules or applicable authority. Tenn. R. Evid. 402. Of course, "[e]vidence which is not relevant is not admissible." Id. Relevant evidence is defined as evidence "having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Tenn. R. Evid. 401. Even relevant evidence, however, "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." Tenn. R. Evid. 403.

Tennessee Rule of Evidence 404(b) provides as follows:

Other Crimes, Wrongs, or Acts. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity with the character trait. It may, however, be admissible for other purposes. The conditions which must be satisfied before allowing such evidence are:

> (1) The court upon request must hold a hearing outside the jury's presence;
> (2) The court must determine that a material issue exists other than conduct conforming with a character trait and must upon request state on the record the material issue, the ruling, and the reasons for admitting the evidence;
> (3) The court must find proof of the other crime, wrong, or act to be clear and convincing; and
> (4) The court must exclude the evidence if its probative value is outweighed by the danger of unfair prejudice.

A. The Petitioner asserts that trial counsel was ineffective in failing to file a motion in limine to prevent the jury from hearing the age of the victim's older sister. At the post-conviction hearing, trial counsel acknowledged that the age of the victim's older sister, sixteen, was offered into evidence through the testimony of the victim. Trial counsel agreed that allowing the jury to hear the age of the victim's older sister was neither relevant nor beneficial to the Petitioner's case. He further acknowledged that the State argued "you've got two underage girls" as the theme of their closing argument. Moreover, the proof at trial, in context, showed that the Petitioner was nineteen years old and the victim's older sister was sixteen years old at the time of the offense. Given their respective ages, trial counsel did not believe that teenagers having sex was a crime. We agree that the age of the victim's older sister had no probative value to any issue of consequence in the case. However, any error in admission of this error was harmless. Contrary to the Petitioner's claims, the State did not use "two underage girls" as their theme in this case. The record reveals that the State twice referred to the age of the victim's older sister in closing argument. The State also noted in its close that sex between the Petitioner and the victim was "okay," but only became a problem when the victim became involved. Accordingly, the Petitioner has failed to demonstrate deficient performance or prejudice arising therefrom as to this issue.

B. The Petitioner asserts that trial counsel was ineffective in failing to file a motion in limine to prevent the jury from hearing about the victim's older sister's sex life with the Petitioner or their proclivity for involving others in their sex life. At the post-conviction hearing, trial counsel testified that the sex life of the Petitioner and the victim's older sister was admitted during trial. Trial counsel first explained his familiarity with the community and his belief that the jury was conservative. Given the make-up of the jury, trial counsel believed it was important to show the jury that the Petitioner and his girlfriend, the victim's older sister, had a sex life before the instant offense and that sex was "nothing out of the ordinary." Trial counsel further believed the testimony was helpful and offered in anticipation of the testimony that the victim's older sister wanted "to teach" the victim about sex and that the victim was only going to watch.

Additionally, from our review of the trial transcript, the Petitioner testified that he and the victim's older sister had been dating for a year, had an active sex life, and that it was not unusual for them to engage in sexual intercourse with someone watching. The Petitioner testified that he did not know the victim was joining the Petitioner and the victim's older sister on the night of the offense, and that it was "sprung on" him while they were in the truck that the victim wanted to learn about sex. The victim also testified that it was her intent to watch the Petitioner and her older sister on the night of the offense, until her sister French kissed her. We conclude that introduction of this evidence was relevant to establish why the Petitioner would not be alarmed with having the victim watch him engaged in intercourse with her older sister. In other words, the Petitioner's prior active

sex life with the victim's sister which involved having someone watch while they were engaged in sex was consistent with what the Petitioner thought the victim was going to do that night: that is watch them have sex and not participate. Admission of this evidence was also relevant because it was consistent with the Petitioner's belief that the victim's sister, not the victim, performed fellatio on him that night. Accordingly, the Petitioner has failed to establish deficient performance of prejudice stemming from this alleged deficiency. He is not entitled to relief.

C. The Petitioner asserts that trial counsel was ineffective in failing to file a motion in limine regarding the victim's older sister's subsequent pregnancy with the Petitioner's child. At the post-conviction hearing, trial counsel explained that the Petitioner and the victim's older sister were married at the time of trial. Trial counsel agreed that "in a vacuum" this testimony may not have been beneficial to the Petitioner's case. However, trial counsel believed it demonstrated that the Petitioner and the victim's older sister had a deeper commitment to each other and engaged in more than casual sex. In trial counsel's view, this evidence bolstered the Petitioner's credibility and showed that he was "taking responsibility for what he did." Similarly, although it may have had a "negative impact," trial counsel believed that it was important for the Petitioner to testify about "having sex while others watched" or "taking videos of sex" because of the conservative make-up of the jury. Trial counsel's objective was to "be up front . . . and disclose that this couple having sex in front of someone else was not necessarily unusual." In our view, this was a reasonably informed trial strategy. Accordingly, we conclude that the Petitioner has failed to demonstrate deficient performance or prejudice as to this issue.

Finally, in regard to each of the above issues, we further conclude that the Petitioner has not shown that he was prejudiced by trial counsel's failure to file any of the above motions in limine because he has not shown that any such motion would have been granted by the trial court or that the jury's verdict would have changed had a motion in limine been granted. Bailey v. State, No. W201900678-CCA-R3-PC, 2020 WL 3410245, at *10 (Tenn. Crim. App. June 19, 2020). The Petitioner is not entitled to relief.

7. The Petitioner argues trial counsel was ineffective in failing to file a motion in limine under Rule 404(b) to exclude proof of other bad acts concerning Petitioner's sexual misconduct with other minors as contained in his recorded statement. Specifically, the Petitioner asserts trial counsel failed to move to exclude evidence of the Petitioner's alleged sexual misconduct with other minors, the Petitioner's sexual conduct with the victim's older sister when she was a minor, or specifics regarding the Petitioner's sexual relationship with the victim's older sister. The Petitioner argues further that trial counsel failed to move to redact portions of or move to exclude entirely the recording of the

Petitioner's statement pursuant to Rules 403 and 404(b).[4] The Petitioner insists the recording contained references that were clearly not relevant and highly prejudicial. Moreover, trial counsel failed to object to the recording which contained bad acts and was of low audio quality. Finally, although the Petitioner concedes that it is unclear what the jury heard from the poor audio quality, the State was able to use in closing argument the words "two underage girls" from Investigator Buckley who did not testify at trial. In response, the State emphasizes that it remains unclear which of these acts the jury actually heard, that trial counsel testified that the jury never heard any of the other bad act evidence, and that this court's opinion on direct determined the same. The State further argues that trial counsel was not deficient concerning the unredacted audio recording because trial counsel admitted that it is unclear how much of the bad acts the jury actually heard and the closing remark was referring to the instant case, not some other bad act.

In regard to trial counsel's failure to file a motion in limine pursuant to Rule 404(b) to preclude references to other sexual misconduct involving other minors contained in the Petitioner's recorded interview with law enforcement and his failure to move to redact the Petitioner's recorded interview of the same, trial counsel testified at the post-conviction hearing that he did not file a motion in limine under Rule 404(b) to exclude proof of other bad acts or a motion to redact the same because trial counsel had an agreement with the district attorney that that portion of the recording would not be played, that he relied on his agreement with the district attorney, and that he believed the district attorney "stuck to it." Trial counsel agreed, in hindsight, that the better practice would have been to have redacted the recording as noted in this court's opinion on direct appeal. However, trial counsel explained that unlike the equipment used to play the recording at trial, the equipment he used initially to listen to the recording was "crystal clear," and he could understand the recording. In any case, trial counsel did not believe the portion of the tape containing the improper conduct was played for the jury.

We need not tarry long in resolving this issue. No one disputes that the Petitioner's recording with law enforcement contained inadmissible bad act evidence pursuant to Rule 404(b). However, we are unable to conclude that trial counsel was deficient in not filing a motion in limine to preclude or a motion to redact the Petitioner's other bad acts from the recorded interview with law enforcement. While certainly the better practice would have been to redact the recording prior to trial, trial counsel's reliance on his agreement with the district attorney to play only the admissible portion of the recording and not the portion of the recording containing the other bad acts did not fall below an objective standard of reasonableness under prevailing professional norms. Additionally, on direct review of this

[4] The Petitioner's brief has separate subsections for each of these issues identified as subsection 2.6.2., and 2.7. Because we consider them to be related, we have combined these issues for clarity.

case, we concluded that the Petitioner was not entitled to plain error relief because the record did not demonstrate what occurred in the trial court and consideration of the issue was not necessary to do substantial justice based on the overwhelming evidence of the Petitioner's guilt. In denying relief, we observed "the trial court found that the inadmissible portions of the tape 'never came in as evidence' and that 'there was no reference . . . to other evidence in other cases.'" State v. Langlinais, No. W2016-01686-CCA-R3-CD, 2018 WL 1151951, at *6-8 (Tenn. Crim. App. Mar. 2, 2018). "Unlike this court, which can review the disc at its leisure, the trial court heard the recording once, in the courtroom, through equipment which provided substandard sound quality to the point that defense counsel described the recording as 'unintelligible.'" The trial court found that there were no audible references to any bad acts in the portion of the recording which was put before the jury, and given the widespread agreement that the recording was barely audible, the record as it stands does not preponderate against that finding. Id. Accordingly, the Petitioner has failed to establish any prejudice stemming from this alleged deficiency. He is not entitled to relief.

8. The Petitioner contends that trial counsel demonstrated his "unfamiliarity with the criminal trial process" by stating that he was "unsure" if the motion for judgment of acquittal could be referred to as a motion for directed verdict. While it is true that motions for directed verdicts have been abolished and replaced by motions for judgment of acquittal, see Tenn. R. Crim. P. 29(a), the record shows that at the close of the State's proof, trial counsel said, "we would like to make a motion for, some judges call it a directed verdict and some call it a judgment of acquittal, as to one of these counts, and I'll have to rely on my colleague to tell me[.]" In so moving, trial counsel was successful in dismissing count three of the indictment. At the post-conviction hearing, trial counsel explained that he called the motion a directed verdict because other jurisdictions still refer to it that way. As we see it, the Petitioner does not argue that trial counsel was deficient, in substance, in arguing the motion for judgment of acquittal; but rather, he focuses on trial counsel's lack of knowledge as to the proper title or form for the motion. Accordingly, the Petitioner has failed to establish deficient performance or prejudice, and he is not entitled to relief as to this issue.

9. Based on the Petitioner's testimony during the motion to suppress hearing stating that he had not reviewed the recording of the statement, the Petitioner argues that trial counsel failed to meet with and to review discovery with Petitioner. At the post-conviction hearing, trial counsel testified and denied that the Petitioner's responses at the motion to suppress hearing were evidence that he had not reviewed the recorded statements with the Petitioner. Trial counsel said that he had reviewed the discovery with the Petitioner and explained that the Petitioner may have been confused as to which recording the State referred at the hearing. There was no other proof offered at the post-conviction hearing as to this issue. As such, we conclude that the Petitioner failed to present clear and

convincing evidence of any fact establishing any deficiency that resulted in prejudice. He is not entitled to relief.

10. The Petitioner argues that trial counsel was deficient in failing to prepare the Petitioner to testify at trial and subsequently eliciting prior bad acts through the Petitioner's testimony. In support of this issue, the Petitioner relies on the testimony of Attorney Ferguson, who opined that trial counsel did not prepare the Petitioner to testify. At the post-conviction hearing, trial counsel and Attorney Ferguson testified. The Petitioner did not testify. See Tenn. Code Ann. § 40-30-110(a) ("The petitioner shall appear and give testimony at the evidentiary hearing if the petition raises substantial questions of fact as to events in which the petitioner participated...."); Timothy Evans v. State, No. E2017-00400-CCA-R3-PC, 2018 WL 1433396, at *4 (Tenn. Crim. App. Mar. 22, 2018) (concluding that because the petitioner did not testify at the post-conviction hearing, he did not support the factual allegations regarding his claim that trial counsel failed to adequately prepare him for cross-examination by clear and convincing evidence). Trial counsel was not asked directly if or how he prepared the Petitioner to testify at trial. Attorney Ferguson testified that he had listened to trial counsel's testimony at the post-conviction hearing and reviewed the trial transcripts. Attorney Ferguson had not interviewed the Petitioner. Other than the brief interaction prior to the hearing, Attorney Ferguson had not interviewed trial counsel. Based on this proof, we conclude that the Petitioner failed to present clear and convincing evidence of any fact establishing any deficiency that resulted in prejudice. He is not entitled to relief.

11. The Petitioner argues that trial counsel was deficient in failing to adequately prepare for and cross-examine the State's witnesses. Here, the Petitioner maintains that trial counsel did not conduct a vigorous cross-examination. In support, the Petitioner cites to instances during the trial where trial counsel's questions of the victim were "open ended" and not leading. According to the Petitioner, the most damaging example of trial counsel's open-ended questions was during the victim's cross-examination and the victim stated that the Petitioner did not penetrate her, but he tried to. The Petitioner further points to the exchange with Investigator Crouse during which Investigator Crouse explained his definition of intercourse, mischaracterized the victim's earlier testimony, and trial counsel failed to correct it.

Trial counsel's decision regarding whether to cross-examine a witness regarding an issue "is a strategic or tactical choice, if informed and based on adequate preparation." Lawrence Warren Pierce v. State, No. M2005-02565-CCA-R3-PC, 2007 WL 189392, at *7 (Tenn. Crim. App. Jan. 23, 2007) (citing Hellard v. State, 629 S.W.2d 4, 9 (Tenn. 1982)); see Rachel Kay Bond v. State, M2018-01324-CCA-R3-PC, 2019 WL 4508351, at *20 (Tenn. Crim. App. Sept. 19, 2019). "[S]trategic decisions during cross-examination are judged from counsel's perspective at the point of time they were made in light of the

facts and circumstances at that time." Johnnie W. Reeves v. State, No. M2004-02642-CCA-R3-PC, 2006 WL 360380, at *10 (Tenn. Crim. App. Feb. 16, 2006) (citing Strickland, 466 U.S. at 690). "Where an attorney accidentally brings out testimony that is damaging because he has failed to prepare, his conduct cannot be called a strategic choice: an event produced by the happenstance of counsel's uninformed and reckless cross-examination cannot be called a 'choice' at all." Fisher v. Gibson, 282 F.3d 1283, 1296 (10th Cir. 2002).

Our review of trial counsel's entire cross-examination of the victim shows that trial counsel was indeed deferential to the victim given her status as a minor and an alleged sexual assault victim. During cross-examination, trial counsel established that the victim had previously asked her older sister about sex, the timeline of the events on the night of the offense, that it was dark at the time, that the victim's sister, not the Petitioner, asked the victim if she wanted to learn about sex, that the victim believed she was only going to watch and not participate in the activity that night, that the sexual contact was initiated by the victim's older sister, that the victim and her sister were positioned on opposite sides of the Petitioner, that the victim' sister was engaged in fellatio with Petitioner while the victim watched "down there," and that the victim "then performed oral sex on the [Petitioner]." The cross-examination further established that the victim could not see the Petitioner's face while she was so engaged because the Petitioner was not talking to her. At the post-conviction hearing, trial counsel testified that he cross-examined the victim in this way for the jury to hear in the victim's own words how the Petitioner never actually sexually penetrated her. Although trial counsel elicited from the victim that the Petitioner "did not penetrate her, but he tried to," this was not the sole evidence established in support of the attempted rape of a child conviction (count four) as implied in the Petitioner's brief. On direct examination, the victim clearly testified that the Petitioner "tried to stick his penis in me." Investigator Crouse also testified that in the recorded interview with the Petitioner, "[e]verything that [the victim] ... had accused [the Petitioner] of, he admitted to." On the recording, the Petitioner was asked if he had penetrated the victim's vagina with his penis, and the Petitioner can be heard to clearly respond "yes and no, if that makes sense." The Petitioner continued to explain that "he kind of half-way tried to put it in her[.]" Langlinais, 2018 WL 1151951, at *3. Moreover, while the Petitioner points to various other open-ended questions throughout trial counsel's cross-examination of the victim which may have been ill-crafted, the record shows that trial counsel's cross-examination of the victim was not deficient or prejudicial. He is not entitled to relief as to this issue.

In regard to trial counsel's cross-examination of Investigator Crouse, the Petitioner relies on the following exchange from trial:

> TRIAL COUNSEL: And based on your investigation in this case, do you feel like [the Petitioner] ever had intercourse with [the victim]?

INVESTIGATOR: Yes.
TRIAL COUNSEL: You think he had intercourse?
INVESTIGATOR: What I consider to be intercourse, yes.
TRIAL COUNSEL: Can you explain that?
INVESTIGATOR: Well, intercourse is if his - - part of his penis goes inside of her body, that would be considered intercourse.
TRIAL COUNSEL: Did you hear [the victim] testify this morning that that never happened?
INVESTIGATOR: No, sir. She testified that he put his penis inside her mouth.

At trial, the victim testified that after the Petitioner "sucked on [her] nipple," he pulled off his shorts and pulled out his penis. The victim's older sister then began to touch and rub the Petitioner's penis with her hands. The victim said she then began to do "the same thing" "because they were teaching [her] what to do." The victim agreed that she touched and rubbed the Petitioner's penis with her hand. The victim's older sister then "licked the side of his penis with her tongue[,]" and the victim did the same thing. The victim said her sister was teaching her, and the Petitioner was "just sitting there." There was no direct testimony in the record from the victim that the Petitioner "put his penis inside [the victim's] mouth." At the post-conviction hearing, trial counsel said that he did not request the court to instruct the jury as to any inaccuracies in Investigator Crouse's testimony because he did not want to place any more emphasis on it. Trial counsel later explained that he did not ask the trial court to correct the inaccuracy because he had gotten what he thought was "some pretty good testimony" from Investigator Crouse, and at that point, Investigator Crouse "was bowing up on" trial counsel, so he did not press him further on the issue. We cannot agree that trial counsel's line of questioning and decision not to correct Investigator Crouse's mischaracterization of the victim's testimony was informed and based on adequate preparation. The testimony trial counsel elicited from Investigator Crouse was damaging because the purported defense theory was that the Petitioner did not know that it was the victim instead of her older sister who was engaged in fellatio with him. Without the accidentally elicited testimony from Investigator Crouse, there was no direct evidence of the Petitioner's intent to commit the offense of rape of a child. Accordingly, we conclude that trial counsel was deficient in cross-examining Investigator Crouse and in failing to correct his mischaracterization of the victim's testimony. The more difficult question, however, is whether trial counsel's deficiency resulted in prejudice to the Petitioner's case. In our view, the record provides sufficient circumstantial evidence of the Petitioner's intent to engage in rape of a child including the lighting in the truck, the close proximity of the victim, and the difference in size, hands, and weight of the sisters. Because the Petitioner has failed to establish prejudice stemming from trial counsel's deficiency, he is not entitled to relief.

12. The Petitioner argues trial counsel was deficient in failing to object to improper questions posed by the State in voir dire which led to improper closing arguments by the State. Specifically, the Petitioner contends the State asked improper questions of the venire including "whether or not they knew or had a child or grand-child that was 12-years old," and "whether they thought it was appropriate for a 12-year-old to have sex with an adult." The Petitioner asserts these questions "left the realm of hypothetical regarding impartiality and crossed into an attempt to exact a promise in violation of [State v.] Coe, 655 S.W.2d 903, 911 (Tenn. 1983)." As related to these alleged errors, the Petitioner also argues trial counsel was deficient in failing to ask any questions during voir dire regarding the jurors' ability to be fair and impartial. The State contends the questions were appropriate because the State immediately followed up with questions concerning whether the juror/s would be comfortable sitting on a jury involving those facts and that the prosecutor never exacted commitments from the jurors as argued by the Petitioner. The State further contends that trial counsel was not deficient in his questioning of the venire.

"The ultimate goal of voir dire is to ensure that jurors are competent, unbiased and impartial." Smith v. State, 357 S.W.3d 322, 347 (Tenn. 2011) (quoting State v. Hugueley, 185 S.W.3d 356, app. 390 (Tenn. 2006)). "By posing appropriate questions to prospective jurors, a defense lawyer is able to exercise challenges in a manner that ensures the jury passes constitutional muster." William Glenn Rogers v. State, No. M2010-01987-CCA-R3-PD, 2012 WL 3776675, at *36 (Tenn. Crim. App. Aug. 30, 2012) (citing United States v. Blount, 479 F.2d 650, 651 (6th Cir. 1973)). Tennessee Rule of Criminal Procedure 24 provides in part that only the initial remarks by counsel can include information about the general nature of the case, and this information must be non-argumentative. Tenn. R. Crim. P. 24(a)(2). Questioning of potential jurors by counsel is limited to "questions for the purpose of discovering bases for challenge for cause and intelligently exercising peremptory challenges." Id. at (b)(1). As this court has previously recognized, trial counsel's "actions during voir dire are considered to be matters of trial strategy," which is generally entitled to deference "unless counsel's decision is shown to be so ill-chosen that it permeates the entire trial with obvious unfairness." William Glenn Rogers, 2012 WL 3776675, at *36 (quoting Hughes v. United States, 258 F.3d 453, 457 (6th Cir. 2001)). However, trial counsel cannot assert trial strategy as a defense for failure to object to comments which constitute error of law and are inherently prejudicial. Moreover, while an attorney may not extract a pledge by asking a prospective juror how they will vote, State v. King, 718 S.W.2d 241, 246 (Tenn. 1986) (upholding trial court's restriction of trial counsel's question to venire, "If you had to vote right now, how would you vote?"), this court has held that it is not improper for the State to ask a prospective juror if they can follow the law and sign their name to a death verdict if the State has met its burden. Detrick Cole, 2011 WL 1090152, at *13. Finally, even if a petitioner were to establish that trial counsel's performance during voir dire was objectively unreasonable, he would not be

entitled to post-conviction relief unless he establishes that the resulting jury was not impartial. Smith, 357 S.W.3d at 348.

The record shows that throughout the first round of voir dire, the prosecutor generally asked the jurors if they had any children or grandchildren. The prosecutor also stated, "you're going to hear some proof about some things that happened when young [victim's name] was 12 years old[.]" Have you known anybody . . . that that has happened to or they've told you that that has happened to them or have known somebody who's been accused of doing that to other people?" When the first juror [Brown] responded affirmatively, the prosecutor followed up with questions including when it occurred, how was the situation handled, and how did the juror feel about it. When the juror responded, "I don't like it[,]" the prosecutor stated, "I would be worried if you did say you like child rape. Nobody likes it." The prosecutor ultimately asked if the juror would be comfortable sitting on the jury or if the case might "hit too close to home." The same juror replied, "It might."

The next juror [Adams] was asked, "The nature of this case is . . . dealing with allegations of child rape and aggravated sexual battery of a girl who was 12 years old at the time. Do you have any grandchildren?" When this juror replied yes, the prosecutor asked, "So you have some experience with – any little girls about 12 years old? You have experience with them?" The juror replied yes, and the prosecutor asked, "Is it going to pose a problem for you in the case here today? Do you think you can be fair and open minded?" The juror replied, "I can be fair." In response to another juror, [Armour] who said that she had an older granddaughter, the prosecutor explained, "The reason I say that is because it's – if you're on the jury as you're hear the proof in the case, there's going to be things that happened to the girl, alleged to have happened to this girl, when she was 12-years old, okay? Do you think that you would have a problem sitting on a jury knowing – you don't know the whole case, but just the little bit I shared with you, do you see any issue with that?" The prosecutor again asked questions of the jurors concerning whether they "knew anyone who had been accused of doing something sexual to a child or had had that happened to them as a child." He then asked follow-up questions as to whether the jurors had "any strong feelings about it to the point where you might be so prejudiced that you couldn't be a fair juror." The record shows the entire venire was asked the same set of questions within the same context.

Because of the nature of the case, it was reasonable for the prosecutor to ask these questions of the venire. We further agree that had trial counsel objected to these questions, the trial court likely would have overruled the objection. When the prosecutor's statements are read in context, it is clear he was trying to determine whether the jurors would be incompetent or biased based on the subject matter of the case and how the prosecutor would present the evidence—mainly through the testimony of a young child. Id. While the record

does not show how the parties exercised their peremptory strikes, the jurors who expressed skepticism as to their ability to be fair and impartial were struck from the venire. Accordingly, the prosecutor's inquiry was not only a proper inquiry for voir dire but helped to select jurors who were competent and unbiased. Our consideration of section sixteen discussing the prosecutor's reference back to these questions in his closing argument notwithstanding, the Petitioner has failed to establish that trial counsel was deficient in failing to object to the prosecutor's examination during voir dire or that the resulting jury was not impartial.

However, on the heels of what appears to be the second round of voir dire, the prosecutor asked, "Just as a general question, knowing what little you know about it, I'm just going to ask people at random, [name of juror], how do you feel about – just knowing what little you know, the accusation of a man about [age] 19, 20 accused of sexually penetrating or sexually touching a 12-year old girl? Are you ok with that?" The prosecutor also asked a variation of this question, "[t]he allegation is you have a 12-year-old girl and a guy who was 19, almost 20 years old. Would it ever be – do you ever think it would be okay or acceptable to you for a man that age to have sex with a girl aged 12[?]" All of the jurors were asked this question, and each juror responded, "No, sir." There were no follow-up questions to this line of questioning.

Here, the State contends trial counsel did not extract a commitment from the jurors because he never asked the jurors to guarantee a verdict of guilt or to commit to a conviction if certain facts came out. The State argues that the prosecutor was merely trying to assess the jurors' general attitudes about child rape and that the Petitioner has failed to show that the resulting jury was not impartial. We disagree. This line of questioning had absolutely nothing to do with whether the potential jurors could perform their duties without regard to bias or prejudice. Because intent is an element of the offense of rape of a child and must be proven before a conviction is sustained, the question was an improper statement of the law and misleading to the jury. State v. Clark, 452 S.W.3d 268, 296-97 (Tenn. 2014) (holding that the generic *mens rea* statue applies to both elements of rape of a child: sexual penetration and the age of the child). The question went beyond determining whether the jurors could be fair and impartial and improperly sought to influence the jury on a key element in this case, the Petitioner's intent, and exceeded the proper scope of voir dire. The questioning also invited the prospective jurors to pre-judge the facts of the case, which is improper. Finally, the questioning also appears to be for the sole purpose of pre-conditioning the jury in anticipation of the Petitioner's defense and a blatant attempt to extract a commitment from the jury, which will be more fully discussed in the closing argument section. While the questioning did not explicitly ask the jurors for a guarantee to convict the Petitioner, the question required the jurors to forecast how they were going to receive the evidence in this case. As such, we conclude that the prosecutor's questions were improper, and that trial counsel's performance was deficient in that he failed to object.

However, because the Petitioner has failed to establish that the ultimate jury empaneled was not impartial, the Petitioner has failed to demonstrate prejudice as a result of trial counsel's deficiency. Accordingly, he is not entitled to relief.

13. We apply the same legal standard as set forth above to the Petitioner's claim that trial counsel was deficient in failing to ask any questions during voir dire relevant to the jurors' ability to be fair and impartial. At the post-conviction hearing, trial counsel testified that he was "from that area" and that he already knew most of the jurors or their families because this was a "small town." Trial counsel said he observed the jurors during the prosecutor's voir dire, that the prosecutor's questions covered everything that he had to ask, and that some of trial counsel's questions were designed to connect or build a relationship with the jury. Trial counsel also stated that he knew the make-up of the jury was conservative and that he used all of the preemptory strikes available to him. Based on our review of the record, trial counsel exercised a reasonably informed strategy in his examination of the jury during voir dire. We note here that the Petitioner does not claim that trial counsel should have struck a particular juror from the panel or that the resulting jury was impartial. Accordingly, we conclude that the Petitioner has failed to establish deficient performance or prejudice. He is not entitled to relief.

14. The Petitioner argues trial counsel was deficient in failing to prepare for, understand the nature of, and effectively give a cohesive opening statement. The purpose of an opening statement is to set forth each side's "respective contentions, views of the facts and theories of the lawsuit." Tenn. Code Ann. § 20-9-301 (2011). Waiver of or even "scant" opening statements have been held to be valid strategic decisions by this court. See Aaron Jermaine Walker v. State, No. 03C01-9802-CR-00046, 1999 WL 39511, at *2, Hamilton County (Tenn. Crim. App., Knoxville, Jan. 28, 1999), perm. to appeal denied (Tenn. 1999) (citing Bacik v. Engle, 706 F.2d 169, 171 (6th Cir.1983)). Moreover, this court has previously acknowledged that overstatement or misstatement during opening statement may have an adverse effect. State v. Zimmerman, 823 S.W.2d 220, 225 (Tenn. Crim. App. 1991). At the post-conviction hearing, trial counsel explained that his opening statement was limited because the prosecutor had described most of the facts accurately, and the defense would have to eventually concede that something happened-but trial counsel did not want to commit to what the proof was going to show. We conclude that trial counsel's opening statement was based on well-informed trial strategy, and the Petitioner is not entitled to relief.

15. The Petitioner contends that trial counsel was deficient in failing to object to the State's improper closing arguments. The Petitioner cites three sections of the State's

closing, as detailed more fully below, and argues "the State piggybacked from its prior improper voir dire" regarding their familiarity with 12-year-old girls and their views on a 12-year-old girl having sex with an adult man. The Petitioner further argues the State improperly commented on the statement by Investigator Buckley from the Petitioner's recorded interview. The State contends the prosecutor's comments were not improper as they were in response "to the unspoken subtext that was ever-present throughout the trial: the defense playing to the sympathies of the jury." The State insists the prosecutor never asked the jury to send a message to the community or for any other improper purpose.

The Tennessee Supreme Court has stated that closing argument is a "valuable privilege that should not be unduly restricted." Terry v. State, 46 S.W.3d 147, 156 (Tenn. 2001) (citing State v. Sutton, 562 S.W.2d 820, 823 (Tenn. 1978) (citation omitted)). As a result, attorneys have considerable leeway in arguing their positions during closing arguments. Id. The closing argument, however, "must be temperate, must be predicated on evidence introduced during the trial of the case, and must be pertinent to the issues being tried." Russell v. State, 532 S.W.2d 268, 271 (Tenn.1976). In State v. Goltz, this Court recognized general areas of prosecutorial misconduct in the context of closing argument, including arguments calculated to inflame the passions or prejudices of the jury, arguments which would divert the jury from its duty to decide the case on the evidence, by injecting issues broader than the guilt or innocence of the accused under the controlling law, and to intentionally referring to or arguing facts outside the record. State v. Goltz, 111 S.W.3d 1, 6 (Tenn. Crim. App. 2003). Thus, the State must not engage in arguments designed to inflame the jurors and should restrict its comments to matters properly in evidence at trial. State v. Hall, 976 S.W.2d 121, 158 (Tenn. 1998). However, this Court has previously recognized that "[t]he decisions of a trial attorney as to whether to object to opposing counsel's arguments are often primarily tactical decisions." Derek T. Payne, 2010 WL 161493, at *15.

"A criminal conviction should not be lightly overturned solely on the basis of the prosecutor's closing argument." Banks, 271 S.W.3d at 131. "An improper closing argument will not constitute reversible error unless it is so inflammatory or improper that i[t] affected the outcome of the trial to the defendant's prejudice." Id. at 131; see Harrington v. State, 385 S.W.2d 758, 759 (1965) (the "general test" for determining whether there is reversible error "is whether the conduct could have affected the verdict to the prejudice of the defendant"). Tennessee courts have recognized five factors that must be considered in determining if the improper arguments had a prejudicial effect upon the verdict:

> (1) the conduct complained of in light of the facts and circumstances of the case;
> (2) the curative measures undertaken;
> (3) the intent of the prosecutor in making the improper remarks;

(4) the cumulative effect of the improper conduct and any other errors in the record; and
(5) the relative strength or weakness of the case.

Hawkins, 519 S.W.3d at 48 (citing State v. Jackson, 444 S.W.3d 554, 591 n.50 (Tenn. 2014)).

At the top of the State's closing argument, the prosecutor stated that "the Petitioner put his penis in the victim's mouth." [misstatement of the proof at 162, Prosecutor said the Petitioner "put his penis in [the victim's] mouth" again at 163.]. After explaining to the jury that consent was not a defense to this case, the prosecutor commented as follows:

> The law recognizes the same thing that I talked about this morning; when I asked the question, can you think of any situation where it's okay for a 20-year-old to have sex with a 12-year-old? You all told me, no, and the law agrees with you. It's the same thing.
>
> Even if the 12-year-old comes running and begging for sex, the adult is supposed to be the adult and say, no, stop, don't do that. Did that happen in this case? No.
>
> . . . .
>
> And he acted either intentionally, knowingly, or recklessly based on the description that [the victim] gave and also based on the description you heard both in the recording and from what I went over with Investigator Crouse about, the [Petitioner] pretty much agreed with [the victim's] rendition of what happened.
>
> There's also mention that [victim's older sister] also agreed with the rendition of what happened. This was a sexual threesome. Basically, everybody doing sex acts to each other three ways, two sisters and him. Two of which are underage. But [the victim] is 12. [The victim] that is. She has no business having sex with her older sister and with her older sister's boyfriend. He's a grown man.

After summarizing the proof supporting the other counts in the indictment, which amounted to seven pages of their closing argument in the transcript, the prosecutor stated:

> I asked you when we – when we were picking a jury, have any of you had experience with a 12-year-old girl, and here's the reason I asked that. I

> want you to think about the 12-year-old girls that have been in your life, that you've raised up, nieces, daughters, granddaughters, what have you. How easily influenced are they? What if their older sister leads them into doing something? What if an adult male asks them to do something? What if they find themselves in the back seat of a truck with two other people getting ready to engage in sexual stuff?

In the State's rebuttal closing argument, the prosecutor stated:

> But it's sort of like what Investigator Buckley said in the recording. You know, here's what it looks like, dude, you're an of age guy, you're an adult. These are two underage girls who are sisters, and you're just doing these sexual things to them?" And his response at the time, "Yeah. Well, we had this fantasy of a threesome. Me and [the victim's older sister] talked about it." Brought [the victim] into that.

Although trial counsel testified at the post-conviction hearing that the prosecutor's comments were zealous but did not cross the line and that the trial court would not have sustained an objection to them, we disagree. In our view, the prosecutor's comments were "calculated to inflame the passions or prejudices of the jury" and designed to "divert the jury from its duty to decide the case on the evidence, by injecting issues broader than the guilt or innocence of the accused." Goad v. State, 938 S.W.2d at 370. Accordingly, we conclude that trial counsel's failure to object to the prosecutor's improper comments during closing argument fell below an objective standard of reasonableness under prevailing professional norms.

In determining whether the Petitioner's convictions should be reversed based on the prosecutor's improper comments, factor (2) weighs in favor of reversal because no curative measures were undertaken. See Alfred Calvin Whitehead, No. M2019-00790-CCA-R3-PC, 2020 WL 2026010, at *5 (Tenn. Crim. App. Apr. 27, 2020). Next, we will evaluate factor (1), the conduct complained of in light of the facts and circumstances of the case, and factor (5) the relative strength or weakness of the case. The evidence at trial establishing the Petitioner intentionally, knowingly, or recklessly engaged in sex with a child under age 13 included the victim's testimony that she was 12 years of age at the time of the offense, that she and her older sister performed fellatio on the Petitioner, and that the Petitioner knew it was the victim performing fellatio on him given the lighting in the truck, the positioning of the victim and her sister on each side of the Petitioner, and the difference in size and weight between the victim and her sister. The proof further supporting the elements of the offenses in the indictment was offered in the form of a recorded interview between the Petitioner and law enforcement during which the Petitioner admitted that he "sucked on [the victim's] breast," that "'something like' both sisters performing fellatio

and the victim hurting him with her teeth occurred, and that the Petitioner "halfway attempted to' penetrate the victim vaginally." Langlinais, 2018 WL 1151951, at *3. However, according to the Petitioner, the victim's sister began to perform oral sex on him while the victim watched. The Petitioner testified that he was "not really paying attention" and that as far as he knew, only the victim's sister performed fellatio on him. He testified that the victim's sister habitually bit him during oral sex. When the Petitioner looked up, the victim was sitting nude on his lap and at that point he "was just done." Langlinais, 2018 WL 1151951, at *4. The Petitioner explained that he told Investigator Crouse "yes and no" when asked if he penetrated the victim because he was confused.

As far as factor (3), the intent of the prosecutor in making the improper remarks, it appears the prosecutor was attempting to negate trial counsel's underlying jury nullification theme. However, the comments were improper because the prosecutor asked the jurors to put their own minor female relatives in the victim's place in considering how susceptible the victim was to peer pressure. The prosecutor's improper comments were also a misstatement of the law because they suggested that rape of a child was a strict liability offense: that is all the law required to convict was a minor and an adult male engaged in sex. As to factor (4), the cumulative effect of the improper conduct and any other errors in the record, we conclude that although the prosecutor's comments were improper, they were not "so inflammatory or improper" so as to affect the "outcome of the trial to the Petitioner's prejudice," nor did they deprive Petitioner of a fair trial. Banks, 271 S.W.3d at 131. In other words, the failure to object to these statements did not create a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different." Strickland, 466 U.S. at 694.

16. The Petitioner contends that trial counsel was deficient in failing to present in closing argument the Petitioner's defense that the Petitioner did not know it was the victim who put her mouth over the Petitioner's penis. Citing Rickman v. Bell, the Petitioner argues that prejudice should be presumed based on the underlined comments below demonstrating trial counsel's bias against him, trial counsel's breach of the duty of loyalty, and trial counsel's open hostility toward the Petitioner. 131 F.3d 1150, 1156-60 (6th Cir.1997) (holding that Cronic applied where defense counsel "combined a total failure to actively advocate his client's cause with repeated expressions of contempt for his client for his alleged actions"). The Petitioner additionally argues that trial counsel made multiple comments which inferred the Petitioner's guilt in violation of McCoy v. Louisiana, 138 S.Ct. 1500, 1508 (2018).

The following underlined comments during trial counsel's closing are at issue:

> Well, we got through this thing in a day. But I'm going to tell you, this is my favorite part of the trial—and the reason that it is because I have

been living with this case for nearly a year and in just a few minutes, I get to take that burden off my shoulder and hand it to you and let you wrestle with it.

. . . .

It was a stupid idea. It was a stupid idea cooked up by a bunch of young people. [Victim] is 12. She plays no role in that. But [victim's older sister] and [the Petitioner] should know better.

And the General has referred to [the Petitioner] time and time again as a 20-year-old man, a grown man, a 20-year-old man. The truth is, he was a 19-year-old boy. Just a big ole dumb boy from Montezuma.

Now, how smart is he? I don't know. He – he's gone to Jackson State, but I can tell you this, I've been dealing with this young man for a year, and I can tell you, he's not very clever. He is just about what you see, and he is a follower, and followers tend to get their butts in trouble.

‘ ‘ ‘ ‘

And [the Petitioner] told you, we had done that before with other people, people had watched us, I thought [the victim] was going to watch us as well. It was not unusual. Is it right? No. It's not right. They should have known better. We've got two teenagers, a 17-year-old and a 19-year-old. They should have known better, but you know what? 17-year-olds and a 19-year-olds do stupid things. Somewhere right now 17-year-olds and a 19-year-olds are doing stupid things. So, they go somewhere to complete this act.

They get started. [Victim] tells one version. The Petitioner tells another. I wasn't there. I don't have a version.

. . . .

I have two daughters. I have two daughters. If I have knowledge that somebody has raped one of my daughters, we are not going to wait three years to do something about it. I assure you that's not going to happen. But it did in this case.

. . . .

> I'm going to ask you on behalf of [the Petitioner] to find him not guilty. Let this young man walk out of this building, go home to his family, and put this episode behind him, an episode that he is remorseful for, the only person in the whole group who's ever apologized is [the Petitioner]. And the General's asking you to punish him for that. He has remorse for it. He told you. It occurred to me when this got out of hand that this is wrong. [The Petitioner] has apologized.
>
> Thank you for your time. If I said anything that was offensive, hold that against me, don't hold it against [the Petitioner]. This was a – this is—this is probably the most difficult case to try. I think my colleague, General Gilliam, would agree, and I'm going to commend him right here in front of everybody, he did a great job. These are hard, hard things to talk about. Hard things to talk about. We'd rather not. Thank you for your time.

As an initial matter, we agree that trial counsel did not expressly argue in closing argument that it was the victim, not the Petitioner, who placed her mouth over the Petitioner's penis. Nor did trial counsel expressly challenge the *mens rea* element of rape of a child or explain to the jury that the State was required to prove the Petitioner's intent to engage with sex with the victim in order to convict him of rape of a child. Instead, trial counsel twice asked the jury, "Was anybody raped?" Given this comment, it is clear that trial counsel argued jury nullification, which was improper. Trial counsel additionally corrected the prosecutor's misstatement regarding the Petitioner's age. By referring to the Petitioner as "a big ole dumb boy," it appears trial counsel was attempting to cast the Petitioner as a follower and minimize the Petitioner's role in the offense. Trial counsel also recounted the proof as it came into the case, rebutted the prosecutor's statements regarding why the Petitioner gave the statements in the recording with law enforcement, addressed reasonable doubt, questioned why the victim's parents waited so long to report the offense, addressed the fact that the victim's father was angry with the Petitioner and the victim's sister for getting married over his objection and sought revenge by putting the Petitioner in prison. However, most, if not all, of trial counsel's argument in closing did not address the defense of intent, which was a viable defense based on the proof adduced at trial. There is no reasonable strategy or tactic to explain why trial counsel failed to do so. Accordingly, we conclude that trial counsel's decision not to pursue the defense of intent in this case fell below an objective standard of reasonableness under prevailing professional norms.

As to the prejudice prong, we find trial counsel's performance readily distinguishable from Rickman. In Rickman, trial counsel pursued a strategy of attempting to portray his client as a "sick" and "twisted" individual to mitigate the death sentence. Trial counsel's strategy in Rickman involved repeated attacks on his client's character,

eliciting damaging character evidence about his client, making disparaging comments to any witness who spoke favorably about his client, and apologizing to the prosecutors for his client's crime. Id. at 1157. The Sixth Circuit concluded that counsel's performance was "outrageous" because his attacks on Rickman equaled or exceeded those of the prosecution. Id. The court found that the defendant was effectively deprived of assistance of counsel in light of the severity of counsel's conduct. Id. at 1160. Here, trial counsel's comments during closing argument were not so outrageous to compel this court to presume prejudice. Accordingly, we are unable to conclude that trial counsel's performance amounted to the constructive denial of counsel based on his hostility towards his client at trial, and he is not entitled to relief. See Moss v. Hofbauer, 286 F.3d 851, 860-61 (6th Cir. 2002) (noting precedent of applying Cronic only where the constructive denial of counsel and the associated collapse of the adversarial system is imminently clear).

Based on trial counsel's reference to the victim as "the victim," trial counsel's comment "If I have knowledge that somebody has raped one of my daughters," and trial counsel's comment that this was "an episode that [the Petitioner] was remorseful for," the Petitioner argues further that trial counsel impliedly conceded his guilt in violation of McCoy v. Louisiana, 138 S. Ct. 1500 (2018). In McCoy, trial counsel stated in his opening statement that his client had undoubtedly committed the murders of which he was accused, in an effort to spare his client a sentence of death. 138 S. Ct. at 1505. Defendant McCoy's clear and insistent objection to his counsel telling the jury he had committed the murders was ignored by counsel. Id. at 1511-10. The United State Supreme Court concluded that this decision was McCoy's alone and should not have been ignored by his trial counsel, was in violation of his constitutional rights, and entitled McCoy to post-conviction relief. Id. at 1510-12. As an initial matter, the Petitioner's own defense witness, Attorney Ferguson, testified that this case was "not necessarily on all four corners with McCoy, which, again, was a death penalty case . . . [however] it all but was an admission of guilt." Asked by the post-conviction court to point to where in the transcript trial counsel says the Petitioner was guilty, Attorney Ferguson stated that there was a "tacit flow" of jury nullification throughout the case. We conclude that McCoy is distinguishable from the instant case. Here, trial counsel never expressly conceded the Petitioner's guilt, and trial counsel's comments do not rise to the functional equivalent of a guilty plea. We know of no case authority extending McCoy in the context of "tacit" jury nullification, and we decline to do so here. Accordingly, the Petitioner is not entitled to relief.

17. The Petitioner argues trial counsel was deficient in failing to preserve and present issues in his motion for new trial. In his brief, the Petitioner essentially repeats the issues as raised in his petition and on appeal and argues that trial counsel was deficient in failing to include those issues in his motion for new trial. In addition, the Petitioner argues that trial counsel was deficient in failing to include whether the introduction of the recording violated the Confrontation Clause of the Sixth Amendment concerning the right

of the accused to confront witnesses by physically facing witnesses and cross-examining witnesses. At the post-conviction hearing, the Petitioner did not offer any proof as to this specific issue. As we see it, the Petitioner relies collectively on the issues raised herein in support of this claim. To that extent, we conclude the Petitioner is not entitled to relief for the same reasons as stated in the corresponding sections of this opinion. As to the Confrontation Clause issue, we rejected this claim in the Petitioner's direct appeal on plain error review. Langlinais, 2018 WL 1151951, at *8. In doing so, we reasoned that the recording at issue contained statements and questions from Investigator Crouse, Investigator Buckley, and statements made by the Petitioner. Although Investigator Buckley did not testify at trial, we noted that "the Confrontation Clause does not bar statements lacking assertive content, such as commands or questions." Id. We further noted that the statements questions and statements of investigators were offered only to give context to the Petitioner's own statements. Accordingly, we conclude that the Petitioner failed to present clear and convincing evidence of any fact establishing any deficiency that resulted in prejudice. He is not entitled to relief.

18. The Petitioner argues trial counsel was deficient in failing to prepare and present an appeal. As grounds, the Petitioner asserts trial counsel "waived every issue with regard to the [recording] for purposes of Rule 404(b)" and trial counsel's failure to "make a clear record on appeal." To establish ineffective assistance of counsel on appeal, the petitioner must demonstrate that appellate counsel was deficient in failing to adequately pursue or preserve a particular issue on appeal and that, absent appellate counsel's deficient performance, there was a reasonable probability that the issue "would have affected the result of the appeal." Campbell v. State, 904 S.W.2d 594, 597 (Tenn. 1995). When a claim of ineffective assistance of counsel is premised on the failure to preserve an issue on appeal, the reviewing court should determine the merits of the omitted issue. Carpenter, 126 S.W.3d at 888. In subsection seven, we determined that the Petitioner failed to establish deficient performance or prejudice stemming therefrom based on trial counsel's failure to object to, move to exclude, or move to redact the recording of the Petitioner's interview with law enforcement at trial because it was reasonable to rely on the district attorney's assurance that only the admissible portions of the recording would be played. We further concluded that the Petitioner was not prejudiced based on this ground because the inadmissible portions of the tape never came in as evidence, and there was no reference to other evidence in other cases at the Petitioner's trial. For the same reasons, we conclude the Petitioner has failed to establish that trial counsel, acting as appellate counsel, was deficient or that the Petitioner suffered any prejudice from this alleged deficiency. He is not entitled to relief.

IV. Cumulative Effect of Alleged Errors. The Petitioner argues he was prejudiced by the cumulative effect of trial counsel's errors and this court should presume prejudice pursuant to Cronic. We have already determined that there was not a complete breakdown

of the adversarial process in this case, and thus decline to presume prejudice under Cronic. The Petitioner further asserts that trial counsel was ineffective based upon the doctrine of cumulative error and argues that the aggregate total of trial counsel's errors, while not individually prejudicing his trial, did amount to prejudice when taken as a whole.

The cumulative error doctrine recognizes that in some cases there may be multiple errors committed during the trial proceedings, which standing alone constitute harmless error; however, considered in the aggregate, these errors undermined the fairness of the trial and require a reversal. State v. Hester, 324 S.W.3d 1, 76 (Tenn. 2010). Consideration should be given to the nature and number of the errors, their interrelationship, any remedial measures by the trial court, and the strength of the State's case. Id. (quoting United States v. Sepulveda, 15 F.3d 1161, 1196 (1st Cir. 1993)). In the context of claims of ineffective assistance of counsel, multiple instances of deficient performance by counsel may be considered together in assessing whether the petitioner suffered prejudice. Corino Pruitt v. State, No. W2019-00973-CCA-R3-PD, 2022 WL 1439977, at *97 (Tenn. Crim. App. May 6, 2022); Tommy Dale Adams v. State, No. M2018-00470-CCA-R3-PC, 2019 WL 6999719, at *31 (Tenn. Crim. App. Dec. 20, 2019); Sylvester Smith v. State, No. 02C01-9801-CR-00018, 1998 WL 899362, at *24 (Tenn. Crim. App., at Jackson, Dec. 28, 1998).

We have concluded that trial counsel was deficient based on five separate grounds: in filing a motion to suppress and placing the Petitioner on the witness stand to testify; in cross-examining Investigator Crouse and eliciting testimony mischaracterizing the victim's testimony that the Petitioner put his penis in her mouth; in failing to object to the prosecutor's comments in voir dire concerning their views on a 12-year-old girl having sex with an adult man; in failing to object to the State improperly relating back to the question in voir dire about their own minor female relatives; and in failing to expressly pursue in closing argument that rape of a child required the State to prove that the Petitioner intended to commit the sexual act to sustain the conviction.

We must now determine if there is "a reasonable probability that, but for [these five] errors, the result of the proceeding would have been different." Strickland, 466 U.S. at 694, 104 S.Ct. 2052. In this case, the Petitioner did not genuinely contest his convictions of aggravated sexual battery or attempted rape of a child. As such, the sole issue to be resolved by the jury was whether the Petitioner intended to engage in fellatio with the victim. While bizarre, we do not consider trial counsel's filing of the motions to suppress his statement or other evidence in this case to have much bearing on the ultimate issue. More importantly, and as previously discussed, trial counsel's failure to object to the prosecutor's improper comments to the jury during voir dire mislead the jury into believing that rape of a child was a strict liability offense, which it is not. This deficiency was not corrected by trial counsel in voir dire, opening statement, or closing argument. The deficiency was compounded when trial counsel failed to correct Investigator Crouse's

mischaracterization of the victim's testimony that the Petitioner, not the victim, placed the Petitioner's penis in her mouth. The deficiency was further compounded when trial counsel failed to explain to the jury in his closing argument the elements of the offense. Given the unique facts of this case, we conclude these issues collectively establish "a prejudice of such magnitude that we can reach no conclusion other than the errors cumulatively prejudiced [the Petitioner's] right to a fair proceeding. Smith, 1998 WL 899362, at 24.

CONCLUSION

Although the Petitioner was charged with heinous crimes, the Federal and State constitutions provide him with the right to effective assistance of counsel. We conclude that trial counsel's aggregate failures to perform his duties in a reasonably competent manner deprived the Petitioner of this constitutional right. Accordingly, upon review of the entire record, we conclude that the evidence preponderates against the findings of the post-conviction court. We reverse the judgment of the post-conviction court, vacate the Petitioner's convictions, and remand this matter for a new trial on all counts.

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CAMILLE R. MCMULLEN, JUDGE