No. 18-9120

IN THE

SUPREME COURT OF THE UNITED STATES

RUSSELL FREY — PETITIONER

(Your Name)

VS.

STATE OF ILLINOIS — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

ILLINOIS SUPREM COURT

(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

RUSSELL FREY

(Your Name)

P.O. BOX 99

(Address)

PONTIAC, ILLINOIS 61764

(City, State, Zip Code)

(Phone Number)

Now comes the defendant Russell Frey in this Writ of Certiorari, Petion in which he asks the Supreme Court to grant based on the facts set forth in this Petition. The defendant Russell Frey was convicted following a jury trial of three counts of predatory criminal sexual assault of a child and was sentenced to an aggregate term of fifty years in prison.The defendant's conviction was affirmed by the Appellate COurt Febryary 15,2018.

Issue Presented for Review

1.)Does the defendant Russell Frey deserve a new trial or conviction vacated based on counsels overall health and his performance overall violated defendant's Frey's constitutional right to the Effective Assistance of trial counsel?

The state acknowledges that when it read the letter to the jury the state added the phrase,"so they can be around children again," despite the fact that such a phrase was not contained in the letter.State brief at 21) According to the State,there was no error here because jury probably inferred that the additional phrase was merley the State's opinion of what would be "the logical implication of the defendant's proposal" and the jury was not misled because the letter was ultimately published to the jury (State Brief at 21) The State should not be permitted to add facts not in evidence in a misguided effort to tell the jury what the defendant meant to imply.See United States V. Garcia,439 F .3d 363,366-68(7th Cir.2006) (THE Presumption of innocence is violated ... when the jury is encouraged (or allowed)to consider facts which have not been received in evidence"). The State then argues that any error in admitting the letter evidence was harmless.(StateBrief at 21-22)In doing so,the State asserts that it does not have to prove the srror was harmless beyond a reasonable doubt because this issue is not concerning a constitutional error.(State Brief at 21) Rather, the State argues,because this is an evidentiary issue the question is whether there is a "reasonable probability...that the jury would have acquitted the defendant absent the error.People V. Pelo,404 I11.App.3d 839,865(4th Dist.2010),citing IN re E.H.,224 ILL.2d 172,180(2006).(State Brief at 22) The State's point is well taken as the language in E.H. sense plain.224 I11.2d at 180.However,it should be noted that the reasonable doubt standard has been applied to harmless error analysis involving an evidentiary issue preserved for review.See People v.Burhans,2016 IL App(3d)140462 32 (harmless beyond reasonable doubt standard applied to erroneous admission of testimony).And,as argued in the Opening Brief, this srror did not impact Frey's constitutional right to a fair and impartial trial.(Opening Brief at32-33) In any event,Frey maintains that the error was not harmless under either standard where two jury notes show that the evidence was at least closley balanced and two jury's who believed Frey was not proven guilty on all three counts may have been persuaded to find him guilty based on this irrelevant,prejudicial letter evidence.(C319,321)(Opening Brief at 35)

III. The cumulative effect of the errors in this case deprived Frey of a fair trial and denied him due process of law.

The STate makes no argument regarding this issue in its brief.

LIST OF PARTIES

[X] All parties appear in the caption of the case on the cover page.

[ ] All parties do not appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

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IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

[ ] For cases from **federal courts**:

The opinion of the United States court of appeals appears at Appendix _____ to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

The opinion of the United States district court appears at Appendix _____ to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

[ ] For cases from **state courts**:

The opinion of the highest state court to review the merits appears at Appendix _____ to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

The opinion of the _____ court appears at Appendix _____ to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

JURISDICTION

[ ] For cases from federal courts:

The date on which the United States Court of Appeals decided my case was _____.

[ ] No petition for rehearing was timely filed in my case.

[ ] A timely petition for rehearing was denied by the United States Court of Appeals on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including _____(date) on _____(date) in Application No. A-_____.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

[X] For cases from state courts:

The date on which the highest state court decided my case was September,26.2018. A copy of that decision appears at Appendix X A.

[ ] A timely petition for rehearing was thereafter denied on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including _____(date) on _____(date) in Application No. A-_____.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

STATEMENT OF THE CASE

The state charged defendant with three counts of predatory criminal sexual assault of a child,in violation of 720ILCS 5/11-1.40(a)(1). C197. Count 1 alleged that in January 2012,defendant,who was seventeen years of age or older,committed an act of sexual penetration on his daughter,S.T.,who was under thirteen years of age.Id.;see also R230-31,R581.2 Counts 2 and 3 alleged that defendant committed two additional acts of sexual penetration on S.T. In February 2012.C197.

At all relevant times, defendant was thirty-five years old and S.T. was twelve years old. See 1491.Defendant and S.T."s mother Brandi T., were unmarried,seeR229,R579,and their custody arrangement called for S.T. to stay with defendant every other weekend,R235-37. In January 2012,S.T.visited defendant at 1613 West Chicago Street,in Lee County,Illinois,referred to as the "Woodland Shores house," where defendant lived in a basement apartment.R239-40. In February 2012, S.T.visited defendant his parents house at 518 West 9th Street,also in Lee County.R243. On March 7,2012, S.T.informed Brandi T. that defendant had "raped" her. R244-45 Brandi T. immediately took S.T. to the hospital R247 On their way to the hospital S.T. told Brandi T.that on her last visit with defendant in February 2012,at defendant's parents house defendant pushed her against a washing machine in the bathfoom,took off her pants,and sexually assaulted her.also described a prior incident of sexual assault that occurred in defendant's bedroom at the Woodland Shores house.At the hospital S.T.complained of pain in her pelvic region and when urinating.The emergency room physician did not perform a pelvic exam,both to avoid further traumatizing S.T.and because the emergency room was ill equipped.About a week later,another physician examined S.T. and noted no obvious signs of physical trauma,althougy the doctor explained that it is very uncommon to have any physical signs of abuse.The hosiptal contacted the Department of Children and Family Services,which in turn contacted Brandi T. to arrange for S.T. to be interviewed at a local children's advocacy center.On March 9,2012 Brandi T. took S.T. to the Shining Star Children's Advocacy Center, where she was interviewed by trained child forensic interviewer Traci Mueller. An audio-visual recording of the interview was played for the jury at trial.During the interview, S.T.recounted three incidents in which defendant sexually assaulted her between January and February 2012.The first assault occurred in defendant's basement bedroom at the Woodland Shores house in January 2012.S.T.told Mueller that she and defendant were watching a movie in the living room,and that when they got up to go into defendant's bedroom,defendant told her to take off her pajamas Defendant undressed as well,and put his bad spot into her bad spot. The second and third assaults occurred at defendant's parents house in February 2012.The second took place in the attic bedroom that S.T.shared with her half-sister when visiting there. S.T. told Mueller that she was cleaning the room when defendant came in and had her take off her clothes.Defendant then took off his pants applied lotion to his penis,and again put his bad spot inS.T."s bad spot.The third assault occurred in the bathroom.S.T.stated that she was doing a puzzle in the living room when she got up to use the bathroom. When she exited the bathroom,defendant grabbed her arm

and pulled her back into the bathroom,pushing her against a washing machine that was in the room.Defendant told her to take off her clothes lay down on the floor,and put her legs over his shoulders.Defendant then put his penis in her vagina.In addition to describing the three charged acts of sexual assault,S.T.also recounted a similar incident that occurred when she was on a week-long road trip with defendant,who was a long-haul truck driver.S.T. was unable to recall how old she was when that incident occurred,but Brandi T.testified that the incident would have occurred when S.T. was eight or nine years old.S.T. explained that she and defendant were playing a game on a laptop in the cab of defendant's semi-truck,with the winner of each game having to remove an item of clothing.Eventually,both S.T.and defendant were completely undressed.At that point,defendant told S.T.to lay down on the bottom bunk behind the cab's seats.Defendant made S.T.put her mouth and hand on his penis until he ejaculated.He then made S.T.get on her hands and knees on the bed,put lotion on both of their bad spots and then placed his bad spot into her bad spot. At trial S.T. described the three charged sexual assaults and the uncharged,prior assault.Her account of the January 2012 sexual assault at the Woodland Shores house differed slightly,in that she did not describe watching a movie beforehand but instead recalled that she was cleaning her sisters room-similar to the account she gave to Mueller of the bedroom incident at her grandparents house-------when defendant,who had been watching her, told her to come into his bedroom,where the assault occurred.S.T.'s testimony also differed from her interview with Mueller with respect to the number of times defendant sexually assaulted her in the bathroom of her grandparents house.Although she described only a single bathroom incident to Mueller,she testified at trial to two such incidents The first occurred while she was taking a shower.Defendant had come into the bathroom to use the toilet,and when he was finished,he opened and closed the door to make S.T. think he had left.When S.T. got out of the shower,defendant grabbed her arm and told her to lie down He then took off his pants,held her arms down,and sexually assaulted her.The seconed incident occurred while S.T.was in the bathroom doing laundry,when defendant picked her up and put her on the washing machine, took their pants off,and sexually assaulted her.A clinicial psychologist later testified for the State about the various reasons why child victims of sexual abuse often only gradually disclose the full extent of the abuse over time and mix up bits and pieces of various incidents when recounting the abuse.The state alsd presented testimony that defendant had sexually abused his stepson,C.P.,between October 2008 and JUly 2009,when C.P.,then eleven or tweelve years old,lived with defendant.C.P.testified that he was in his bedroom playing a video game when defendant came in and made a bet with him that the loser of the video game would have to give the winner oral sex.After C.P. won the game,defendant put his hand in C.P.'s pants and touched his penis.Defendant stopped when C.P. told him to. The trial court allowed C.P.'s testimony about the prior act of sexual abuse as propensity evidence under 725 ILCS 5/115-7.3.After considering the factors enumerated in 725 ILCS 5/115-7.3(c),including the proximity in time between the charged offenses against S.T.and the prior act against C.P.,and the degree of factual similarity between the charged and uncharged acts,the trial court concluded that the probative value of C.P.'s testimony was not substantially outweighed by any risk of

unfair prejudice to defendant.In particular,in addressing the degree of factual similarity between the charged and uncharged acts,the court noted that defendant had a similar family relationship with S.T.and C.P.;that S.T.and C.P. were of similar ages;and that both children were in defendant's care when defendant abused them. The entirety of C.P.'s testimony spanned just seventeen pagse,and th portion of his dircet examination testimony recounting defendant's abuse of him amounted to just over three pages of a total trial transcript that encompassed approximately 600 pages of testimony.In turn,the State's closing argument, covering approximately twenty-seven pages of transcript, devoted just two paragraphs to discussing C.P.'s testimony.Defendant testified and denied ever sexually assaulting S.T.He clamied that he never took S.T. with him on a trucking trip alone.and he denied ever being alone with S.T.during any of her visits,He also denied ever abusing C.P.On cross examination,the state asked defenandant about a letter that he had written to the State's Attorney,Anna Sacco-Miller,who had previously represented defendant during pre-trial proceedings in the case before becoming the State's Attorney.In the letter,defendant suggested the creation of a sex offender court in which first-and second-time sex offenders would report to court once a week and counseling two times a week along with probation and ten year registry and six months to a year in county jail with no day-for-day credit,and if they complete all of the program,the offenses would be taken off there recored. DEFENDANT admitted that he wrote the letter,but claimed that he did so only as a concerned cirizen who had encountered sex offenders while in pretrial custody,and not as a sex offender himself.He also emphasized that,in the letter,he referred to sex offenders using the pronoun they,not I or we,and that he did ask to participate in the proposed sex offender program. Before trial,defendant moved to bar admission of the letter,arguing that it was not relevant because it contained no factual admisssions and had no tendency to make the existence of any fact at issue more probable or less probable.At a hearing on the motion, defendant further argued that the letter could not be accurately characterized as evidence of his guilt mind or consciousness of guilt. Defendant also argured that,in light of the propensity evidence that the court had ruled admissible,allowing the state to introduce the letter would put defendant in extreme danger of prejudice.The state conceded that the letter did not contain a direct admission of guilt by the defendant.But, noting that evidence is relevant so long as it has a tendency to make a fact at issue more or less probable,the state argued that defendant's letter suggesting a leniency program for first-and second time sex offenderes met that standard because the jury could infer that defendant wrote the letter because he had a guilty mind and was conscious of his guilt IN addition,the state noted that defendant had not identified any risk of prejudice from the letter except for the possibility that the jury would view it as demonstrating his consciousness of guilt, but the state argued that such prejudice could not be considered undue for purposes of rule 403,because that's how it is with all evidence in a jury trial.The trial court denied the motion, concluding that the letter was relevant and that its probative value outweighed any risk of undue prejudice.

The State's closing argument made no mention of the letter. After defense counsel discussed the letter in his closing argument-urging the jury to "read it closely" and notice that defendant never said that he is a sex offender or that he wants to be considered for participation in suggested sex offender program, the State briefly addressed the issue in its rebuttle argument, discounting defendant's reliance on the pronouns used, (remarking that defendant "was one pronoun away from saying give me a break"), and urging the jury to read the letter and take from it what you want. The jury found defendant guilty on all counts and the trial court imposed consecutive sentences totaling fifty years in prison.

REASONS FOR GRANTING THE PETITION

FOE THE FOREGOING REASONS, AND THOSE IN THE BRIEF, RUSSELL FREY RESPECTFULLY REQUESTS THAT THIS COURT GRANT HIS PETITION FOR WRIT OF CERTIORARIXX AND RESPECTFULLY REQUESTS THAT THIS COURT REVERSE HIS CONVICTIONS AND REMAND THE CAUSE FOR A NEW TRIAL

ARGUMENTS

The stste argues that the trial court did not abuse its discretion because the uncharged offense against C.P,was generally similar to the charged offenses against S.T.where,according to the state,Frey's familial relationship with S.T. (father)and C.P. (step-father)was similar,C.P.andS.T.were similar in age at the time of the abuse (eleven or twelve) and Frey's actions towards S.T. and C.P. occurred in similar locations.The state essentially mirrors the trial court's reasoning. The state cites People v Raymond,404 Ill.App.3d 1028,1047(1st Dist.2010),to support its argument that the facts listed above are far more relevant then any other factor when determining the probative value of uncharged acts in cases involving children.But a careful reading of Raymond shows that it never found that those of facts are far more relevant than other facts in a record.Instead,Raymond explained that other types of facts are often simpley not present in child sex cases because the relevant facts would likely focus on details such as the relationship between the parties,the age of the victim,and where the parties went to have their encounters.Raymond,404 ILL. App.3d at 1048.Raymond did not find that certain facts are more relevant than others.Rather,it it made clear that a proper analysis involes a factual comparison based on the evidence in the record.Raymond,404 ill.App.3d at thus in this case, where more facts are available on the record a proper determination of the probative value of the uncharged act extends beyond comparing the ages of the children their realationship with the defendant,and the location of the acts.Raymond,404 ill. App.3d at 1050.Notably,the state's does not confront these other factual comparisons in its behalf. Indeed,the factual differences between the C.P.incident and the charged offenses are significant The charged offenses involved sexual penetration of a twelve-year old girl whereas the C.P. incident involved the fonlding of a boy's genitals.It was alleged that during the charged acts with S.T.Frey would would use lotion,use sexually charged language and expose himselfe. In contrast it was not alleged that the incident with C.P. involved lotion, self exposure or sexual penetration.And according to C.P.Frey stopped him when C.P. told Frey he was uncomfortable as opposed to Frey refusing to stop when S.T.tried to get him to stop. The state then attempts to disitinguish People v Smith,406 ill.App.3d 747 (3d Dist.2010) by arguring that Smith focused mostly on the enormous lapse in time between the charged and uncharged offenses and the fact that uncharged crime was more severe than the charged offense. In order to avoid repeating arguments already made,Frey directs this court to his original discussion of Smith and notes that the fact that one court admitted or excluded evidence based on the particular facts before it does not necessarily mean that the same result applies in another case with different facts." Raymond, 404 ill. App.3d at 1047.Finally, the state argues the admission of the uncharged offense did not cause undue prejudice and posed no significant risk that the jury convicted Frey because it viewed him as a bad person rather than becauses it found him guilty of

the charged offenses. The state acknowledges that C.P. testified about details of the uncharged incident at trial and the state brought it to the jury's attention durging closing arguments. The state can not show that the other evidence was overwhelming or that the outcome of the trial would have been the same had the other sex crime evidence been excluded.People v Lindgren,79 ill. 2d 129,141 (1980); People v Johnson,406 App.3d 805,819(1st Dist.2010). Indeed,unlike Frey,the srate does not proviede an analysis of the evidence presented by both parties at trials and fails to address the two jury notes that clearly indicate the jury viewed the evidence as closely balanced,not overwhelming,People v Aguirre,291 Ill.App. 3d 1028,1035 (2d Dist.1997). Thus,the state's argument should not persuade. Where the evidence against Frey was not overwhelming, the error in admittting the other sex crime evidence involving C.P. was not harmless and could very have convinced the jury to base their decision not on a dispassionate weighing of the evidence,but on there belief that the defendant is a bad person deserving of punishment.As a result,this court should reverse Frey'sconvictions and remand for a new trial.

II.The trial court erred in admitting into evidence a letter written by Frey to his former counsel and then-current State's Attorney of Lee County in which he made suggestions regarding the treatment of sex offenders.The letter contained no admissions and any negligible probative value was extremely outweighed by substantial unfair prejudice.

The State argues that the trial court did not abuse its discretion because the jury could have reasonably inferred that the letter "exhibited"a consciousness of guilt"on the part of Frey. (State brief at 19-20)The state Cites Poeole V Gacho,122 ILL.2d 221*245-46(1988),to support this argument.(State Brief at20) This case is distinguishable.In Gacho,the defendant wrote a letter while he was in jail pending trial that stated,"I still believe I can escape from here one way or the other."122 Ill.2d at 245. The State introduced the letter at trial and defendant objected to the State's cross-examination of him regarding the contents of the letter.Id.The defendant argued that the State was introducing evidence of another crime by reading the contebts of the letter.ID. The Appellate court found that it was proper and relevant testimony as tending to show consciousness of guilt.Gacho,122 Ill.2d at 246. Here,the contents of the letter are hardly comparable to an explicit expression of a desire to escape jail while waiting for trial. See People V Moore,2015 IL App(1st)140051,26(noting that (e)vidence of flight is admissible as tending to demonstrate a defendant's consciousness of guilt"),citing People V Harris,52 Ill.2d 558,561(1872)

The state also cites People VPrather,2012 IL App(2d)111104, 22, and argues that evidence does not have to include admissions or be conclusive to be properly admitted at trial. Frey never argued that evidence must be conclusive to be properly admitted. However,evidence must have probative value that outweighs its prejudicial nature and the letter evidence fails that test.See Maffett VBliss,329 Ill App. 3d 562,574(4th Dist.2002) ("if a piece of evidence has slight probative value,any prejudicial effect on the jury may require exclusion") (Opening Brief at 34-35)

CONCLUSION

The petition for a writ of certiorari should be granted. For the foregoing reasons, and those inthe brief Russell Frey requests that this court reverse his convictions and remand the cause for a new trial.

Respectfully submitted,

Russell Frey

Date: 11-16-18