

No. 21-7522

IN THE
SUPREME COURT OF THE UNITED STATES

Jerry W. Phillips PETITIONER

VS.

Supreme Court, U.S.
FILED

DEC 08 2021

OFFICE OF THE CLERK

State of Tennessee/Martin Frink Warden RESPONDENT(S)

ON PETITION FOR WRIT OF CERTIORARI TO TENNESSEE CRIMINAL COURT OF
APPEALS

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QUESTIONS PRESENTED

1. CAN CONVICTIONS OF AGGRAVATED SEXUAL BATTERY BE SUSTAINED WHEN THE STATE OF TENNESSEE FAILED TO PROVE THE ESSENTIAL ELEMENTS OF THE CRIME AS DESCRIBED BY THE CHARING INSTRUMENT (GRAND JURY INDICTMENT)
2. CAN CONVICTIONS OF AGGRAVATED SEXUAL BATTERY BE SUSTAINED WHEN THE STATE OF TENNESSEE USED EVIDENCE THAT IS AT "VARIANCE" WITH THE THE CHARING INSTRUMENT (GRAND JURY INDICTMENT)
3. CAN A CLAIM OF INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL BE RECOGNIZED FOR TRIAL COUNSEL'S FAILURE TO OBJECT TO THE TRIAL COURTS USE OF A JURY SELECTION PROCESS THAT DOES NOT COMPLY WITH THE MANDATORY REQUIREMENTS SPECIFIED BY THE LEGISLATIVE BODY OF THE STATE OF TENNESSEE UNDER THE CONTROLLING PROVISIONS OF TENN. R. CRIM. P. RULE 24
4. IS APPELLATE COUNSEL INEFFECTIVE FOR FAILING TO ALLOW PETITIONER TO HAVE INPUT ON ISSUES PRESENTED FOR DIRECT APPEAL REVIEW
5. IS THE TENNESSEE CRIMINAL COURT OF APPEALS IN ERROR BY USING A STANDARD OF APPELLATE REVIEW THAT WAS NOT IN AFFECT AT THE TIME THE ALLEGED CRIMES PETITIONER WAS CONVICTED ALLEGEDLY OCCURRED IN VIOLATION OF CONSTITUTIONAL FIFTH AMENDMENT RIGHTS AND EX POST FACTO PROTECTIONS

LIST OF PARTIES

ALL PARTIES APPEAR IN THE CAPTION OF THE CASE OF THE COVER PAGE

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IN THE
SUPREME COURT OF THE UNITED STATES
PETITION FOR CERTIORARI

Petitioner respectively prays that a Writ of Certiorari issue to the review the judgment below

OPINIONS BELOW

The opinion of the highest state court to review the merits appears at Appendix A that is the opinion of the Tennessee Criminal Court of Appeals opinion issued in denial of Petitioner's Direct Appeal State v. Phillips, No. E2011-00674-CCA-R3-CD, 2012 Tenn. Crim. App. LEXIS 220, 2012 WL 1143831, (Tenn. Crim. App. Apr. 5, 2012) and Appendix D the the opinion of the Tennessee Criminal Court of Appeals in denial of Petitioner Post-Conviction Appeal reported in Jerry Phillips v. State of Tenn. Crim. Court of Appeals 2017 Tenn. Crim. App. LEXIS 713 No. E2016-01083-CCA-R3-PC February 23, 2017, Session August 14, 2017, Filed. The opinion of the United States District Court for the Eastern District of Tenn. appears at Appendix G and is reported at Jerry Phillips Petitioner v. Raymond Byrd Respondent United States District Court for the eastern District of Tenn. 2020 3:18-CV-00062-RLJ-HBG October 8, 2020, Filed

JURISDICTION

The date on which the highest state court decide my case was August 14th 2017. A copy of that decision appears at Appendix D

A timely motion for Permission to Appeal to the Tenn, Supra was thereafter denied on January 18, 2018 and a copy of the denial appears at Appendix E

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

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

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STATEMENT OF THE CASE

Comes now Jerry W. Phillips Pro Se before this Honorable United States Supreme Court seeking “**Certiorari**” of the opinion reported by the Tennessee Court of Criminal Appeal (**Court of Appeals**) at Knoxville in State v. Phillips, No. E2011-00674-CCA-R3-CD, 2012 Tenn. Crim. App. LEXIS 220, 2012 WL 1143831, (Tenn. Crim. App. Apr. 5, 2012) (Appendix A) denying Petitioner’s “**Direct Appeal**” confirming convictions of Four (4) counts of “**Aggravated Sexual Battery**”.

An “**Application**” for “**Permission to Appeal**” the Court of Appeals decision to the Tennessee Supreme Court (“**TSC**”) was denied in August of 2012 (Appendix B).

A Pro Se motion for Post-Conviction Relief as provided for under **Tenn. Code Ann. 40-30-101 was filed in August of 2013.**

Based on the fact that the State Subpoenaed the original “**Trial Judge**” as a witness in response to Petitioner’s Post-Conviction Petition special **Judge Paul Summers** was appointed to hold an evidentiary hearing concerning Petitioner’s Post-Conviction Petition. This hearing was conducted on **April 7th 2016** and denied in **May of 2016**. The unreported opinion of the Post-Conviction Court appears at Appendix C.

Appeal of Petitioner’s Post-Conviction Relief Petition was denied August 14th 2017 Appendix D and permission to appeal to the Tenn. Supra was denied January 18th 2018 Appendix E

Petitioner’s 28 U.S.C. § 2254 Writ of Habeas Corpus was filed in February 2018 and denied by the “United States District Court for “The Eastern District of Tenn. at Knoxville as cited in Jerry W. Phillips, Petitioner, v. Raymond Byrd, Respondent. The Eastern District of Tennessee 2020 U.S. Dist. LEXIS 187057 No. 3:18-CV-00062-RLJ-HBG October 8, 2020. A copy of this denial appears at Appendix G and no “**Certificate of Appealability**” was granted by the District Court.

Petitioner’s “Application for a “**Certificate of Appealability**” was denied June 4th 2021 by the

Sixth Circuit Court of Appeals as cited in JERRY WAYNE PHILLIPS, Petitioner-Appellant, v. RAYMOND BYRD, Warden, Respondent-Appellate. UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT 2021 U.S. App. LEXIS 16800 No. 20-6259 June 4, 2021, Filed. A copy of this denial appears at .Appendix H.

Petitioner's motion for rehearing under Rule 60 of Fed. R. Crim. P. that was reviewed as an application for "**En Banc Review**" was denied in September of 2021. A copy of this denial appears at Appendix I

The denial of Petitioner's "Direct Appeal" by the Court of Appeals is in "**Direct Conflict**" with **Fifth (5th) and Fourteenth (14th) Amendment Rights**" as guaranteed by the **Constitution of the United States and the State of Tennessee's Constitutions** respectfully.

Too ensure compliance with Pinholster, 563 U.S. 181-82. that review under 28 U.S.C. § 2254(d)(1) is limited to the "Record before the State Court that Adjudicated the Federal Claim" and Sheppard v. Bagley 657 F. 3d 338, 343-44 (6th circuit 2011) that "If a claim has been adjudicated on the merits by a state court, a Federal Habeas Petitioner" must overcome the limitations of § 2254(d)(1) "Using the record that was before the state court" All claims, arguments for Certiorari will be made using Trial, Appellate, and Post-Conviction Records" as "**Certified by Respondents Rule Five (5) Materials**" filed by the State of Tenn. in response to Petitioner's 28 U.S.C. § 2254 Writ of Habeas Corpus filed in February 2018 .

On Direct Appeal Petitioner's challenged the "**Sufficiency of the Evidence**" to sustain the "Convictions". This appeal was denied as a result of a "Poorly" and "Insufficiently Argued", "**Direct Appeal Brief**" prepared by Appellate Counsel¹ in conjunction with the wrong standard of "**Direct Appellate Review**" by the Court of Appeals. The "**Trial Evidence**" in the instant case consisted of "**Testimony**" that was erroneously evaluated by the Court of Appeals.

¹ Appellate Counsel was not Trial Counsel

The “**Analysis of Evidence**” confirming his trial convictions is based on “**Evidence**” of crimes not charged by the “**Grand Jury Indictment**” and “**Evidence**” of crimes dismissed by “**Directed Verdicts of Acquittal**”. This analysis is “**Insufficient Specifically**” as to **Counts Four (4) and Five (5)** of the “**Grand Jury Indictment**” as defined by the states “**Bill of Particulars**”. Additionally considering the “**Major Inconsistencies of Trial Testimony**” introduced by the State concerning **Counts Two (2) and Three (3)** of the “**Grand Jury Indictment**” without any “**Significant Explanation**” as to why the “**Trial Evidence**” was different than the testimony concerning the same alleged incidents given at the June 16th 2009 preliminary hearing counts two (2) and three (3) should be dismissed also.

Petitioner is also seeking “**Certiorari**” on the “**Ineffectiveness of Trial Counsel**” for failure to object to the “**Trial Courts Abuse of Discretion**” in conducting the “**Jury Selection Process**”. Trial Counsel relied on the “**Trial Court**” to implement the correct jury selection process and made no objections even though the process implemented by the trial court in the instant case was entirely outside the “**Mandatory Provisions**” established by the “**Legislative Body**”.

Even though this “**Unmandated Jury Selection Process**” was used for an undetermined number of years without any challenge from any of the “**Practicing Attorney’s**” within this “**Circuit Courts**” five (5) county area of authority “**Trial Counsels**” total unawareness of the mandatory provisions provided by the legislative body thru **Tenn. R Crim. P. Rule 24** and complete reliance on the trial court concerning the jury selection made trial counsel ineffective.

Appellate Counsel was also ineffective “**By His Own Admission**” for refusing to present claims concerning the “**Trial Courts Abused of Discretion**” in the jury selection process in a motion for a new trial or for “**Direct Appeal Review**” as instructed to do so by Petitioner. A background of this case is as follows.

PRE-TRIAL BACKGROUND

Petitioner's current convictions are the result of two (2) different investigations the first of which began in October of 2007 and lasted until March of 2008. This initial investigation was ruled **"Unfounded"** by the **Tennessee Department of Child Services (Dcs)** after an investigation conducted by the Dcs office and the **La Follette Police Department** a city located in Campbell County Tennessee.

The initial complaint alleged that two (2) minor children were being neglected because their parents Beverly and Curtis Paul were using and selling drugs. After a drug screen administered by Dcs investigators it was determined that both parents were positive for use of various drugs.

The initial complaint also alleged that Petitioner had abused the minor female child J.W² named in the complaint who is the grandchild of Petitioner's common-law wife Patricia Wilson, Beverly Paul's mother. The complaint failed to describe the nature of abuse committed against J.W.

Because of the "Positive Drug Screen" J.W. and her younger brother C.P. were taken into Dcs custody and eventually placed in the custody of Pamela Beaver the sister of Curtis Paul. Curtis Paul is the biological father of C. P. his son with Beverly and at the time the step-father of J.W.!

In March of 2009 in Pamela Beaver filed a complaint with the **"Child Service Department"** in the city of **Branson Missouri**. Pamela Beaver on instructions from this department contacted the **La Follette Tennessee Police Department** and filed a complaint against Petitioner. Using this complaint Detective Jason Henegar of the La Follette Police Department, was able to start a new investigation against Petitioner.

On June 5th 2009 based on an **"Arrest/Warrant Affidavit"** filed by Jason Henegar, Petitioner was arrested and charged with "Aggravated Sexual Battery" of J.W.

The **"Arrest/Warrant Affidavit"** alleged, "That on more than one occasion the defendant

² In Accordance with common practice the minor victim of these allegations shall be referred to by her initials

touched the child's breast and on occasions had removed the child's pants and underwear and kissed the child's vagina". See Exhibit One (1).

The "Arrest/Warrant Affidavit" describes two (2) different "Sexual Violations" under Tennessee Law. The statement that "**On more than one occasion the defendant touched the child's breast**" constitutes a violation of Tenn. Code Ann. 39-13-504(a)(4) while the statement that "**On occasions the defendant removed the child's pants and underwear and kissed the child's vagina**" constitutes a violation of Tenn. Code Ann. 39-13-522 as defined by Tenn. Code Ann. 39-13-501(7)

Under Tennessee Law "**A person touching the vagina of another person with their tongue**" constitutes the sexual act of "**Cunnilingus**" and is "**Sexual Penetration**" under Tenn. Code Ann. 39-13-501(7). When this sexual act is committed against a person under thirteen (13) years of age it is considered "**Rape of a Child**" under Tenn. Law. See Tenn. Code Ann. 39-13-522

At the time the offenses were alleged to have occurred "**Aggravated Sexual Battery**" Tenn. Code Ann. 39-13-504(a)(4) was a lesser included offense under Tenn Code Ann. 39-13-522 even though Tenn. Code Ann. 39-13-504(a)(4) required different "**Essential Elements**" than Tenn. Code Ann. 39-13-522. Because the intent of the Tennessee legislature was that a violation of Tenn. Code Ann. 39-13-504(a)(4) should be subject to "**Consecutive Sentencing**" the Tennessee legislature amended Tenn. Code Ann. 40-18-110, so that "**Aggravated Sexual Battery**" Tenn. Code Ann. 39-13-504 is no longer a lesser-included offense Tenn. Code Ann. 39-13-522. This amendment went into effect in 2009.

On June 16th 2009 at a Preliminary hearing J.W. testified that the allegations within the Arrest/Warrant Affidavit alleging that Petitioner "**On occasions removed her pants and underwear and kissed her vagina**" had not happened and further testified she had "**Never told anyone these acts had occurred**". The Preliminary Hearing testimony as recorded by the "**Preliminary Hearing Transcript Attachment 22 Item 2 Exhibit 8 of Respondents Rule Five Materials**" stated that

Petitioner touched her with his hands on top of her clothing and never undressed her or himself.

As a result of this testimony the allegations that Petitioner **“Removed J.W.’s pants and underwear and kissed her vagina”** do not appear in the **“Indictment”** or **“Bill of Particulars”**.

On July 6, 2009, a Campbell County grand jury indicted Petitioner for six counts of **“Sexual Contact as defined by Tenn. Code Ann. 39-13-501(6)** that constitutes **“Aggravated Sexual Battery Tenn. Code Ann. 39-13-504(a)(4)”** Because the **“Grand Jury Indictment”** failed to describe the nature of **“Offenses”** Petitioner was **“Indicted”** for Trial Counsel filed a motion for a **“Bill of Particulars”** See Exhibit three (3) that was received on November 6th 2009 ten (10) days before the onset of Petitioner’s trial of November 19th 2009. See Exhibit four (4).

The primary evidence against Petitioner consisted of testimony by the ³alleged victim, J.W. and her mother Beverly Paul, There was no **“DNA”** or other **“Forensic Evidence”** in support of the **“States”** case. J.W.’s testimony was summarized by the Court of appeals in State v. Phillips, No. E2011-00674-CCA-R3-CD, 2012 Tenn. Crim. App. LEXIS 220, 2012 WL 1143831, (Tenn. Crim. App. Apr. 5, 2012) as follows:

J.W., was ten years old at the time of trial. J.W. testified that she currently lives with her aunt but that she had lived with her parents. Before living with her parents, she had lived with her grandmother. When she lived with her parents, she would often go back to her grandmother’s house to spend the night. Her grandmother’s boyfriend, the Defendant, lived there with her grandmother. While staying at her grandmother’s house, the Defendant touched J.W.’s “private parts” on several different occasions. The State asked J.W. to indicate on a diagram exactly where the Defendant touched her. J.W. indicated the “booby” area and “where she goes to pee” as the places where the Defendant touched her. She stated that the Defendant touched her “booby” with his hand and “where [she] pee[s]” with his tongue and hand.

The above cited testimony is in direct conflict with the testimony given at the June 16th 2009 Preliminary Hearing by J.W. where she **“Testified”** that Petitioner had not **“Touched her where [she] pee[s]” with his tongue** and that she had not told anyone that he had done so as she testified concerning counts four (4) and five (5) of the indictment. Additionally the testimony of **“Touching**

³ Even though Petitioner was convicted by jury trial he is exerting a claim of innocence and will refer to J.W. as the alleged victim

Her Breast" while playing with a race track upstairs is not a charged offense within the "**Indictment or the Bill of Particulars**". As testified to the allegation of "**Touching Her Breast**" while playing with "**The Race Track**" constitutes an entirely different offense thereby creating an "**Indictment Variance**".

Petitioner will show the "**Errors**" within the analysis given by the Court of Appeals in State v. Phillips, No. E2011-00674-CCA-R3-CD, 2012 Tenn. Crim. App. LEXIS 220, 2012 1143831, (Tenn. Crim. App. Apr. 5, 2012). This opinion was upheld by the District Court in Jerry W. Phillips, Petitioner; v. Raymond Byrd, Respondent. The Eastern District of Tennessee 2020 U.S. Dist. LEXIS 187057 No. 3:18-CV-00062-RLJ-HBG October 8, 2020, Filed.

ERRORS OF TENNESSEE CRIMINAL COURTS ANALYSIS OF THE EVIDENCE

A person touching the vagina of another person with their tongue does not constitute an offense of "**Aggravated Sexual Battery**" under **Tenn. Code Ann. 39-13-504(a)(4)** . The physical act of a person placing their "**Lips, Mouth, or Tongue**" on the "**Vagina**" of another person is the "**Sexual Act**" of "**Cunnilingus**" and is considered "**Sexual Penetration**" under **Tenn. Code Ann.39-13-522(7)**. When this act is committed on a person less than thirteen (13) years of age it is a violation of **Tenn. Code Ann. 39-13-522 "Rape of Child"** as defined by **Tenn. Code Ann. 39-13-501(7)** that states the act of Sexual Penetration,

"Means sexual intercourse, cunnilingus, fellatio, anal intercourse, or any other intrusion, however slight, of any part of a person's body or of any object into the genital or anal openings of the victim's, the defendant's, or any other person's body, but emission of semen is not required

As stated earlier "**Aggravated Sexual Battery Tenn. Code Ann. 39-13-504**" requires proof of different "**Essential Elements**" than "**Tenn. Code Ann. 39-13-522**" The evidence cited by the Court of Appeals can not sustain a conviction of "**Aggravated Sexual Battery**" as to counts four (4) and

Five (5) because the “**Testimonial Evidence**” submitted by the state as to counts four (4) and five (5) of the **Indictment** describe the act of “**Rape of a Child**” under **Tenn. Code Ann. 39-13-522** a crime Petitioner was not charged with by the “**Indictment or the States Bill of Particulars**”.

The Preliminary Hearing testimony was that Petitioner did not touch her vagina with his “**Lips, Mouth or Tongue**”. Petitioner’s position is that the analysis of the evidence by the Court of Appeals is in direct conflict with established precedents and procedural rules and creates an “**Indictment Variance**”.

An “**Indictment Variance**” crosses the line when the variance creates a substantial likelihood a defendant may be convicted of an “**Offense**” other than that charged by the grand jury. A variance between an indictment or a subsequent “**Bill of Particulars**” and the “**Evidence**” presented at trial are not fatal unless it is both “**Material and Prejudicial**”. The variance is not to be regarded as material when the indictment and proof substantially correspond. A material variance occurs only if the prosecutor has attempted to rely upon theories and evidence at the trial that were not fairly embraced in the allegations made in the charging instrument.

The Court of Appeals is relying on this “**Indictment Variance**” to sustain Petitioner’s convictions. Also the District Court has erroneously upheld this “**Indictment Variance**” in direct conflict with established precedents and procedural rules. Petitioner submits he is entitled to relief under 28 U.S.C. § 2254(d)(1)(2) because the “**Analysis**” of the “**Trial Testimonial Evidence**” results in a decision contrary and involved an unreasonable application of clearly established law and resulted in a decision based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding as provided for under 28 U.S.C. 2254(d)(1) and (2).

This standard is intentionally difficult to meet. Woods v. Donald, 575 U.S. 312, 135 S. Ct. 1372, 1376, 191 L. Ed. 2d 464 (2015) (quotation marks omitted). A district court may only grant habeas relief under the “**Contrary to Clause**” where the state court decides a question of law or materially

indistinguishable set of facts conversely to the Supreme Court. Williams v. Taylor, 529 U.S. 362, 405-06, 120 S. Ct. 1495, 146 L. Ed. 2d 389 (2000). The Court may only grant relief under the unreasonable application clause when the state court applied the correct legal principle in an "**Objectively Unreasonable**" manner, not when the state court's decision was simply erroneous or incorrect.

The AEDPA likewise requires heightened respect for state factual findings. Herbert v. Billy, 160 F.3d 1131, 1134 (6th Cir. 1998). Where the record supports the state court's findings of fact, those findings are entitled to a presumption of correctness which may be rebutted only by clear and convincing evidence. 28 U.S.C. 2254(e)(1). In the instant case the lower courts confirmation of Petitioner's current convictions are "**Indisputably Rebutted**" by clear and convincing evidence under 28 U.S.C. 2254(e)(1) using the records that are before this Honorable Court.

The record clearly establishes that the trial evidence presented by the state consists of facts concerning crimes not contained within the indictment.

In the June 4th 2021 decision handed down by Judge Stranch denying Petitioner's application for a COA Appendix G from the U.S. Sixth Circuit Court of Appeals Judge Stranch stated that "**Phillips**" does not establish that the use of the "**Mouth**" rather than the hands, to touch the intimate parts of a person "**Would Fail**" to qualify as "**Sexual Contact**" under the statute merely because it could also support a charge of rape. This statement is in direct conflict with the concerned statutes because under the definitions as quoted in Tenn. Code Ann. 39-13-501(6) and Tenn. Code Ann. 39-13-501(7) the statute clearly defines that sexual contact Tenn. Code Ann. 39-13-501(6) and sexual penetration under Tenn. Code Ann. 39-13-501(7) require proof of completely different "**ESSENTIAL ELEMENTS**" and different "**PHYSICAL ACTS**" of conduct by an assailant.

ANALYSIS OF THE TENNESSEE CRIMINAL COURT OF APPEALS

At this point Petitioner will present for review the Court of Appeals "Analysis" of the "Trial Evidence" using the records that were before the Court of Appeals and the District Court using Respondents Rule Five (5) Materials.

The testimony concerning allegations that allegedly occurred in the Attic are all part of Count Four (4) of the indictment. Counts Two (2) and Three (3) of the indictment concern the allegations that allegedly occurred in Stephanie's Bedroom. Count Five (5) of the indictment concerns the allegations that allegedly occurred in a tent in the backyard. The allegations that allegedly occurred on the couch in the living room concern Count One (1) of the indictment.

The Court of Appeals reported on page four (4) of State v. Phillips, No. E2011-00674-CCA-R3-CD, 2012 Tenn. Crim. App. LEXIS 220, 2012 WL 1143831, (Tenn. Crim. App. Apr. 5, 2012) (See Appendix A) the following evaluation of the Trial Testimony in denial of Petitioner's Direct Appeal, as to Count Four (4) of the Indictment, as recorded by the trial transcript contained in Attachment Two (2) Item Seven (7) page 69 line 22 thru Page 79 line 10 of Respondents Rule Five (5) Materials,

On one occasion, while living with her parents, she went over to her grandmother's house to visit. The Defendant asked her to go up to the attic with him and play with a race track. While playing with the race track, he began rubbing her breasts with his hand. Then he asked her to go into her uncle's room that was also located in the attic. Once in that room, he asked J.W. to lay on the bed, and he removed her pants and underwear. Then he placed his mouth "where [she] pee[s]." J.W. stated that she asked the Defendant to stop but that he did not stop until he saw from the window J.W.'s grandmother walking toward the house.

Count four (4) of the indictment as defined by the states Bill of Particulars reads,

Count 4 Incident occurred between January 1st 2007 and November 1st 2007 at the residence the victim;s Grandmother Patricia Wilson, in La Follette Tennessee, in the "Attic room on the bed", defendant touched the victim's private area where she pee

Nowhere in Count Four (4) of the "Indictment or Bill of Particulars" is Petitioner charged with that "While playing with the race track, he began rubbing her breasts with his hand". The only preliminary hearing testimony concerning the "Race Track" is given on page Thirty-Three (33) at line(s) Nine (9) thru Ten (10) as recorded by the "Preliminary Hearing Transcript" recorded by

Attachment 22 Item 2 Exhibit 8 of Respondents Rule Five Materials. Review of this testimony will establish that “**No Offense**” was alleged to have occurred while playing with the “**Race Track**” Because this allegation was not presented for “**Grand Jury Review**” it is not a charged offense within the indictment. Additionally the preliminary hearing testimony of J.W. denying the occurrence of “**Removing her pants and underwear and placing his mouth “where [she] pee[s]”** was not presented for “**Grand Jury Review**” and is not a charged offense within the indictment and is in direct conflict with her June 16th 2009 Preliminary Hearing testimony where she testified Petitioner had not “**Removed her pants and underwear and placed his mouth “where [she] pee[s]”** as recorded by Attachment Twenty-Two (22) Item Two (2) Exhibit eight (8) page Forty-Eight (48) thru page Fifth-Two (52) of Respondents Rule Five (5) Materials. The deviations in testimony at trial from that given at the Preliminary Hearing put Petitioner in an “**Undefendable**” position at trial because the defense was unprepared to dispute the changed testimony because it was denied to have occurred at the Preliminary Hearing and no such allegations appear in the Indictment See Exhibit (2) or are any allegations of this type defined by the Bill of Particulars See Exhibit (4).

The direct trial testimony as recorded by Attachment Two (2) Item Seven (7) page 70 line 19 thru 21 of Respondents Rule Five (5) Materials concerning the charged offense within the indictment was that Petitioner “**Did not touch her private area where she pee's**” as alleged by the “**Indictment**” and “**Bill of Particulars**”. Base on this “**Direct Testimony**” the “**Essential Elements**” of “**Aggravated Sexual Battery**” under **Tenn. Code Ann. 39-13-504(a)(4)** or “**Sexual Contact**” as charged by the indictment are unproven by the state. This trial testimony is also in violation of basic rules of “**Criminal Estoppel**”.

The fifth (5th) amendment to the U.S. Constitution states “No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment by a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or

public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself; nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation" and the fourteenth amendment to the U.S. Constitution states "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. The evidence provided in support of this count of the indictment are indisputably violations of Petitioner's fifth and fourteenth constitutional rights.

Base on this "Direct Testimony" the "**Essential Elements**" of this charge of the indictment are unproven by the state and this count of the indictment should be dismissed with prejudice.

COUNTS TWO (2) AND COUNT THREE (3) OF THE INDICTMENT

The Court of Appeals stated on page four (4) in State v. Phillips, No. E2011-00674-CCA-R3-CD, 2012 Tenn. Crim. App. LEXIS 220, 2012 WL 1143831, (Tenn. Crim. App. Apr. 5, 2012) (See Appendix A) the following evaluation of the Trial Testimony in denial of Petitioner's Direct Appeal, as to Counts Two (2) and Three (3) of the Indictment as recorded by Attachment Two (2) Item Seven (7) page(s) 79 Line 12 thru page 87 Line 13 of Respondents Rule Five (5) Materials,

In another instance, J.W. and the Defendant were in a downstairs bedroom in the house, and J.W. was laying on her back on the bed. The Defendant pulled down her pants and underwear and rubbed "where [she] pee[s]" with his hand for "a couple of minutes." On that same day, the Defendant touched her breasts over her clothes.

Count Two (2) and Three (3) of the indictment read,

Count 2 Incident occurred between January 1st, 2007 and November 1st 2007 at the residence of the victim's Grandmother Patricia Wilson, in La Follette Tennessee, in the Stephanie's room on the bed, defendant touched the victim's "private area where she pee's".

and Count Three (3) of the indictment as defined by the Bill of Particulars states

Count 3; Incident occurred between January 1st, 2007 and November 1st 2007 at the residence the victim's Grandmother Patricia Wilson, in La Follette Tennessee, in the Stephanie's room on the bed, defendant touched the victim's "boob".

Nowhere in Count Two (2) or Count Three (3) does the "**Indictment or the Bill of Particulars**" charge Petitioner with "**Pulling down J.W.'s" pants and underwear**". Consequentially the allegation of "**Touching her breasts over her clothes on the same day**" as presented through testimony concerning Count Three (3) can not be construed as a separate "**Incident of Sexual Contact**". Testimony at the preliminary hearing and trial both describe the allegations concerning Count Three (3) as "**One On going Event**" in conjunction with the allegations of Count Two (2)

To establish "**Separate Offense(s)**" the State is required to present evidence that "**One Incident Ended**" and that a period of "**Time**" or a change of "**Location**" occurred creating a "**Specific Space and/or Time**" between the offenses. None of these elements are present in the "**Evidence**" presented at trial. Additionally Attachment Two (2) Item Seven (7) page Two-Fifty-One (251) Lines Ten (10) thru Twelve (12) of Respondents Rule Five (5) Materials show that the State "**Failed to Qualified**" the required "**Election of Offense(s)**" during closing arguments. During closing arguments the state included Count Three (3) as an "**After Thought**" of Count Two (2) without any "**Qualifying Distinctions**" between the Two (2) offenses See Exhibit five (5). The failure of the state to qualify the offense(s) by ⁴Election is meant to be viewed as a "**Strategic Vehicle**" employed by the state as a means to avoid objection by the defense while getting "**Inadmissible Evidence**" into the trial record.

4 To be construed only as a statement of fact and not an additional claim for relief

The fifth (5th) amendment to the U.S. Constitution states “No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment by a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself; nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation” and the fourteenth amendment to the U.S. Constitution states “All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. The evidence provided in support of this count of the indictment are indisputably violations of Petitioner's fifth and fourteenth constitutional rights.

Base on the “Direct Testimony” concerning counts two (2) and three (3) of the indictment count two (2) if not dismissed should be remanded for a new trial while count three (3) should be dismissed with prejudice.

COUNT ONE (1) OF THE INDICTMENT

The Court of Appeals stated on page four (4) in State v. Phillips, No. E2011-00674-CCA-R3-CD, 2012 Tenn. Crim. App. LEXIS 220, 2012 WL 1143831, (Tenn. Crim. App. Apr. 5, 2012) (See Appendix A) the following evaluation of the Trial Testimony in denial of Petitioner's Direct Appeal, as to Count One (1) of the indictment as recorded by Attachment Two (2) Item Seven (7) page(s) 87 Line 14 thru page 92 Line 13 of Respondents Rule Five (5) Materials.

J.W. also testified that on a different occasion she and the Defendant were sitting on the couch watching Care Bears. At one point, the Defendant unzipped his pants and asked J.W. to put her mouth "where he goes to pee." She did so "[f]or a second," then stopped. The Defendant asked her to do it again, but J.W. left to go play or watch television.

Count One (1) of the indictment as defined by the Bill of Particulars reads,

Count 1 Incident occurred between January 1st 2007 and November 1st 2007 at the residence of the victim's Grandmother Patricia Wilson, in La Follette Tennessee, in the living room on the couch, defendant touched the victim's "private area where she pee's".

Nowhere in the indictment or the "Bill of Particulars" is Petitioner charged with "**Unzipping his pants and asking J.W. to put her mouth "where he goes to pee."**" This count of the indictment received a "**Directed Verdict of Acquittal**", as recorded by Attachment Two (2) Item Seven (7) page(s) Two-Two-Five (225) thru Two-Two-Seven (227) of Respondents Rule Five (5) Materials See Exhibit Six (6).

A Directed Verdict of Acquittal is not the same as a jury verdict of "**Not Guilty**" A Verdict of Acquittal means the "**Trial Court**" is satisfied that the state failed to prove its case "**Beyond A Reasonable Doubt**" However an acquittal brings the same protections as a not guilty verdict as related to "**Double Jeopardy Protection**" In the head notes cited by the Tennessee Supreme Court in State of Tenn. v. Jereme Dannuel Little Supreme Court of Tenn .at Knox.402.S.W.3d 202; 2013 Tenn. LEXIS 309 No. E2009-01796-SC-R11-CD September 4, 2012, Session March 22, 2013, Filed Editorial Information: Prior History the Tenn, Supra stated the following,

Evidence that a defendant committed an alleged crime other than that for which he is on trial should not be admitted when he has been acquitted of such alleged other crime. More recently, the Tennessee Court of Criminal Appeals described the Holman rule as follows: Evidence of a crime for which the defendant was acquitted can never be admissible as evidence of a prior crime in a trial, despite its relevance on issues other than propensity.

Evidence of a crime for which a defendant was acquitted can never be admissible as evidence of a prior crime in a trial. Using this principle the **Court of Appeals** is in "**Error**" using "**Evidence of a**

crime for which the defendant was Acquitted” to uphold a criminal conviction because such evidence “**Can never be Admissible**” as evidence of a prior crime in a trial despite its relevance on issues other than propensity. In the instant the use of this evidence by the Court of Appeals is a “**Direct Violation**” of Petitioner's protection against “**Double Jeopardy**” as well as Petitioner's Fifth (5th) and Fourteenth (14th) Amendments of the Constitution of the United States and violates the Petitioner's “**Rights of Due Process of Law**” that

No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

COUNT FIVE (5) OF THE INDICTMENT

The Court of Appeals stated on page four (4) in State v. Phillips, No. E2011-00674-CCA-R3-CD, 2012 Tenn. Crim. App. LEXIS 220, 2012 WL 1143831, (Tenn. Crim. App. Apr. 5, 2012) (See Appendix A) to Count Five (5) of the indictment as recorded as by Attachment Two (2) Item Seven (7) page(s) Ninety-Two (92) Line Fourteen (14) thru page One-o-One (101) line Six (6) of Respondents Rule Five (5) Materials in denial of Petitioner's Direct Appeal reads,

On yet another occasion, the Defendant and J.W. were in the backyard while her grandmother was at the store, and the Defendant set up a tent. The Defendant asked J.W. to come into the tent, at which point he pulled down her pants and underwear and put his mouth “where [she] go[es] pee.” She stated that his tongue was “going around.” J.W. did not tell her grandmother about these incidents because the Defendant told her not to tell anyone.

Count Five (5) of the indictment as defined by the Bill of Particulars reads

Count 5; Incident occurred between January 1st, 2007 and November 1st 2007 at the home of the victim;s Grandmother Patricia Wilson, in La Follette Tennessee, in the tent in Grandmother's backyard, defendant touched the victim's “private area where she pee's”.

Nowhere in the “**Indictment or Bill of Particulars**” is Petitioner charged with “**Pulling down her pants and underwear and putting his mouth “where [she] go[es] pee**. Because of the

preliminary hearing testimony of J.W. denying the occurrence of “**Removing her pants and underwear and placing his mouth “where [she] pee[s]”** this allegation was not presented for “**Grand Jury Review**” and is not a charged offense within the indictment. The direct trial testimony of the alleged victim as to count five (5) is that Petitioner “**Did not touch her where she pee’s**” as alleged in the “**Bill of Particulars** See Attachment Two (2) Item Seven (7) page Ninety-Nine (99) line Eleven (11) thru Thirteen (13) of Respondents Rule Five (5) Materials .

The fifth (5th) amendment to the U.S. Constitution states “No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment by a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself; nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation” and the fourteenth amendment to the U.S. Constitution states “All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. The evidence provided in support of this count of the indictment are indisputably violations of Petitioner’s fifth and fourteenth constitutional rights.

Base on this “Direct Testimony” the “**Essential Elements**” of this charge of the indictment are unproven by the state and this count of the indictment should be dismissed with prejudice.

PETITIONER'S ANALYSIS

Petitioner has indisputably shown that the “Analysis” put forth by the Court of Appeals is riddled with numerous “Allegations” of crimes not contained within the indictment and “Crimes” that received a **Directed Verdict** of “**Acquittal**”. The Court of Appeals reached this opinion using a standard of review not in effect at the time the alleged crimes Petitioner was convicted of were alleged to have occurred by the “**Arrest/Warrant Affidavit**” or Indictment See Exhibit One (1) and Exhibit Two (2) . The evidence in the instant case is “**Circumstantial**” in nature, however the Court of Appeals regarded this evidence as “**Direct Evidence**” under “*State v. Dorantes* 331 S.W. 3d 370, 379 (Tenn. 2011) (Citing *State v Hanson*, 279 S.W. 3D 265, 275 (Tenn. 2009) where the “**Tennessee Supreme Court**” adopted the standard that “**Direct and Circumstantial**” evidence should be treated the same when weighing the “**Sufficiency**” of the “**Evidence**”.

Under Ex Po Facto analysis Petitioner submits that it's improper to “**Retroactively**” apply a new “**Standard of Review**” established by a new “**Legal Precedent**” set by the United States Supreme Court that has detrimental affect on a defendant in a criminal case when the crime alleged occurred prior to the enactment of the new precedent. The law in “**Affect**” at the time the alleged crime was alleged to have occurred is the controlling law or rule that should establish the standard of review.

The Ex Post Facto Clause protects liberty by preventing governments from enacting statutes with “**Manifestly Unjust and Oppressive Retroactive Effects**”. Extending a limitations period after the state has assured a man that he has become safe from its pursuit seems to most of us unfair and dishonest. In such a case, the government has refused to play by its own rules. It has deprived the defendant of the “fair warning,” that might have led him to preserve exculpatory evidence. And a Constitution that permits such an extension, by allowing legislatures to pick and choose when to act “**Retroactively**”, risks both arbitrary and potentially vindictive legislation, and erosion of the separation of powers.

The crimes Petitioner was convicted of allegedly occurred between January 1st 2007 and November 1st 2007 well before Dorantes or Hanson, thus the precedents cited by the Court of Appeals are not applicable. (See Appendix A *STATE OF TENNESSEE v. JERRY PHILLIPS* COURT OF

CRIMINAL APPEALS OF TENNESSEE, AT KNOXVILLE 2012 Tenn. Crim. App. LEXIS 220 No. E2011-00674-CCA-R3-CD January 24, 2012, Session April 5, 2012, Filed)

In the June 4th 2021 decision handed down by Judge Stranch denying Petitioner's application for a COA from the U.S. Sixth Circuit Court of Appeals Judge Stranch stated that The Ex Post Facto Clause does not apply to judicial decisions, and the Tennessee courts have consistently applied the Dorantes standard retroactively to crimes that occurred before its announcement. Petitioner submits for review that this opinion is conflict with U.S. Const. art. I, § 10 that "**Prohibits states from passing any ex post facto law.**" A statute which increases the punishment for a crime after its commission is one example of an ex post facto law. However, an adapted precedent which operates to the change the standard of appellate review to the "**Substantial Disadvantage**" of a defendant would qualify as an ex post facto law and should not be "**Retroactively Applied**". Requiring a Petitioner to overcome a higher standard of review than the one in affect at the time the alleged crimes were to alleged to have occurred would be "**Disadvantages**". In applying Dorantes in the instant case the Court of Appeal violated Petitioner's right to "**Due Process of Law**" and "**Equal Protection of Law**"

In deciding if a new standard of review "**Substantially Disadvantages**" a defendant, a court compares the standard of punishment set forth in the new statute with that in the old statute. The ex post facto clause looks to the standard of "**Review**" prescribed by the standard in effect at the time the offense occurred. In **State v. Dorantes**, 331 S.W. 3d 370, 379 (Tenn. 2011) (citing **State v. Hanson**, 279 S.W.3d 265, 275 (Tenn. 2009) Tenn. Adopted the standard that "**Direct and Circumstantial Evidence**" should be treated the same when weighing the sufficiency of the evidence. In the case at bar the crimes Petitioner was convicted of occurred three (3) years prior to the adaptation of Dorantes. The Dorantes standard of review violated Petitioner's "**Protection**" against "**Ex Post Facto**", where it's "**Improper to apply a new precedent of law against a defendant in a criminal case when the**

crime alleged, occurred prior to the enactment of the new precedent, the law in "Affect" at the time the alleged crime was alleged to have occurred is the controlling standard. In the instant case the **Circumstantial Evidence** rule in effect at the time of the allegations made against Petitioner was the, "**Exclusion of every other reasonable hypothesis except that of the defendant's guilt, provided the defendant's guilt is established beyond a reasonable doubt**".

INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL

Petitioner submits his trial and appellate counsels were ineffective under the Strickland analysis where a claim of "**Ineffective Assistance of Counsel**" must pass the two prong analysis of **Strickland v. Washington**, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2D 674 (1984); "**First, the defendant must show that counsel's performance was deficient.**" Strickland at 687. "**Second, the defendant must show that the deficient performance prejudiced the defense.**"

Before presenting any arguments concerning the ineffectiveness of trial counsel concerning counsels lack of objections to the trial courts abuse of discretion Petitioner would inform this Honorable Supreme Court that due to ⁵Appellate Counsels documented refusal to pursue the trial issue claims as instructed to do so by Petitioner first pursuit of this claim occurred after the ruling by the Tennessee Supreme Court in State of Tenn. v. Dominic Frausto Supreme Court of Tenn. at Knox. 463 S.W.3d 469; 2015 Tenn. LEXIS 272 No. E2011-02574-SC-R11-CD April 1, 2015 January 8, 2015, Session

In support of prong one of Strickland Petitioner submits that trial counsel was ineffective by his own admission at Petitioners April 7th 2016 Post-Conviction hearing for not being aware of the proper jury selection process established by Tenn. R. Crim. P. rule 24 mandated by the Tennessee legislative body that had been in affect for three (3) years prior to Petitioner's trial and relied "**Exclusively**" on the Trial Court to determine the jury selection process.

Prior to Petitioner's November 2009 trial the jury selection process used by the "**Eighth Judicial Criminal Circuit Court**" in and for Campbell County Tennessee at Jacksboro had been challenged by Attorney Dale Potter a new Attorney within the Eighth Judicial Circuit Public Defenders

⁵ Different Counsel Than Trial Counsel

Office where Petitioner's Trial Counsel "Charles Herman" held a "**Supervisory Position**". Mr. Potter was unfamiliar with jury the selection process implemented by the sitting Judge of the "**Eighth Judicial Criminal Circuit Court**", so when the process was used at the onset of the August 2009 trial of Mr. Potter's client "Dominic Eric Frausto" Mr Potter objected. Not being completely informed as to the correct jury selection process under Tenn. R Crim. P. Rule 24 Mr. Potter was unable to describe any violations of the jury selection process being used by the Court.

Trial Counsels "**Supervisory Position**" within the Eighth Judicial Circuit Public Defenders Office makes it reasonable to believe that Mr. Herman had knowledge that Mr. Potter an Attorney under Mr. Herman's "**Supervisory Preview**" had challenged the trial courts jury selection process. Even after the process was challenged by an attorney under Mr. Herman's supervisory preview, Mr. Herman failed to do any research into the jury selection process to determine if Mr. Potter was correct in his objections but chose instead to continue to rely on the Eighth Judicial Circuit Criminal Courts Trial Court Judge to determine the jury selection process with no regard of its correctness.

Petitioner shared a cell with Dominic Eric Frausto, in April/May 2010, and in discussing their cases Petitioner noticed his jury selection process was similar to Frausto's. Petitioner had "Legal aides researched the Jury Selection process for Petitioner and through this research it was determined that Petitioner's jury was "Impaneled" in violation of "Tenn. R. Crim. P. Rule 24".

At the time of Petitioners trial "The Tennessee Rules of Criminal Procedure were laws of this State "in full force and effect." Tenn. Dep't. of Human Servs. v. Vaughn, 595 S.W.2d 62, 63 (Tenn. 1980). "Any other construction would thwart, frustrate and emasculate" the rules, id., which are "designed . . . to ensure a 'just determination of every criminal proceeding,'" id.(quoting Tenn. R. Crim. P. 2); see also State v. Hodges, 815 S.W.2d 151, 155 (Tenn. 1991). Suggestions and recommendations for changing the rules may be submitted to the Advisory Commission on Rules of Practice and

Procedure. State v. Coleman, 865 S.W.2d 455, 458 (Tenn. 1993). Moreover, supplementary rules of criminal procedure may be adopted to address issues for which no other procedure is prescribed, so long as such rules are consistent with constitutional principles, statutes, and generally applicable procedural rules. State v. Reid, 981 S.W.2d 166, 170 (Tenn. 1998); see also Tenn. Code Ann. 16-3-407 (2009). Being unaware of the “Mandatory Jury Selection Process” made trial counsel unprepared and ill equip for Petitioner’s trial.

In support of prong two of Strickland ⁷ Trial Counsels failure to object to the unsanctioned jury selection process was “**Prejudicial**” to Petitioner’s “Jury Selection” because it allowed the “Trial Court” to “**Abuse its Discretion**” and “**Determine**” the jurors that made up Petitioner’s “**Trial Jury**” instead of the parties at bar. This was “**Prejudicial**” because the Trial Court removed four (4) “**First Round Jurors**” that had passed “*Voir Dire*”. These jurors were removed at the trial courts discretion without “**Cause or Input**” and no objections from the “**States Attorney or Defense Counsel**”.

Petitioner’s claims different than those of controlling case of State of Tenn. v. Dominic Frausto Supreme Court of Tenn. at Knox. 463 S.W.3d 469; 2015 Tenn. LEXIS 272 No. E2011-02574-SC-R11-CD April 1, 2015 January 8, 2015, Session where Frausto the challenged the ability of Trial Counsel to utilize “**Jury Challenge’s**” during voir dire while Petitioner’s claims focus on the “**Seating**” and “**Replacement**” of jurors. Manipulation of the jury selection process by the Trial Court outside established guidelines of Tenn. R. Crim. P. Rule 24 allowed the ⁸“**Trial Judge**” to determined jurors and not the “**Parties at Bar**”. Petitioner contends that this “**Abuse of Discretion**” amounts to “**Jury Tampering**” either inadvertently or by design and violated Petitioner’s “**Constitutional Right to Due Process**” and “**Equal Protection**” under the “**Tennessee and U.S Constitutions**”.

The trial court claims to have done a random drawing to determine the jurors. However this claim is not supported by the trial record. If a “**Random Drawing**” was conducted by the trial court to

⁷ To be construed only as a statement of Fact.

⁸ Trial Court and Trial Judge are used interchangeably

determine jurors why is it not recorded as part of the “**Trial Record**” as it should be? The initial drawing of prospective jurors by the **Court Clerk** is recorded. However there is no recorded record of any random drawing as claimed by the trial court to determine jurors. Without a recorded record of this procedure any claim made by the State concerning a “**Random Drawing**” by the Trial Court cannot be validated and can not be construed as part of the trial record.

Removal of first round jurors by the Trial Court outside the provisions of the “**Legislative Mandate**” should be considered “**Jury Tampering**” by the “**Trial Court**” either by “**Design or Inadvertently**” either way constitutes “**Prejudice** to the “**Judicial Process**”. Unlike the situation in Frausto where trial counsels ability to adequately use his juror “**Challenge's**” is deemed not to be of “**Constitutional Dimension**” the Trial Courts “**Abuse of Discretion**” of choosing jurors at the “**Courts Discretion**” and removing “**Jurors**” not 1). **Dismissed for Cause**, 2). **Challenged by Defense Counsel or the State and** 3) **Not replaced for cause or back struck by the Trial Court** is in-disputably a sustainable claim of “**Prejudice to the Judicial Process and Jury Tampering**” either inadvertently or by design, and raises the “**Abuse of Discretion**” to a level of “**Constitutional Dimension**”.

The Post-Conviction Court, Court of Appeals and the Federal District Court have taken two (2) positions that Petitioner holds as being incorrect. Position one (1) is that Trial Counsels “**Overall Legal Experience**” combined with Counsels ability to function within the “**Unsanctioned Jury Selection Process**” that Trial Counsel was not “**Ineffective**” for failure to objected to the “**Unsanctioned Jury**” selection process. Considering Trial Counsels experience including time on the bench as a Judge the position taken by the Court of Appeals and the District Court are undermined by Trial Counsels admitted “**Unawareness**” of the basic and “**Fundamental Process**” of the “**Mandated Legislative Requirement** ” in selecting a “**Trial Jury**”. Considering all the accumulated years of experience and practice Trial Counsels failure to recognized the “**Correct Jury Selection Process**”

versus the “**Unsanctioned Jury Selection**” implemented by the trial court shows that Counsel was “**Uninformed**” concerning “**Mandatory Legislative Mandates**”. Clearly this is “**Ineffective Assistance of Counsel** under the **Strickland “Doctrine”**. Counsels ability to function within the unsanctioned jury selection process as cited by the Court of Appeals is not the issue at bar. The issue for review is “**Counsels Unawareness**” of the “**Mandatory Legislative Jury Selection Process**” and Counsels failure to object to the irregular jury selection process implemented by the trial court. Counsels ability to function within the “**Unsanctioned Process**” has no “**Curative or Probative Value**”.

Position two (2) is the Court of Appeals disregard for element two (2) of the Tennessee Supreme Courts ruling in State of Tenn. v. Dominic Frausto Supreme Court of Tenn. at Knox. 463 S.W.3d 469; 2015 Tenn. LEXIS 272 No. E2011-02574-SC-R11-CD April 1, 2015 January 8, 2015, Session where the Tenn. Supre concluded that Frausto had established that deviations from Rule 24(d) resulted in prejudice to the judicial process. In Jerry Phillips v. State of Tenn. Crim. Court of Appeals 2017 Tenn. Crim. App. LEXIS 713 No. E2016-01083-CCA-R3-PC February 23, 2017, Session August 14, 2017, Filed the Court of Appeals stated that “ There is no dispute in this case that the trial court followed the same procedure as utilized in the Frausto case and that the jury selection process deviated from Rule 24.3. However, the post-conviction court noted that Frausto was decided on April 1, 2015, and that the Petitioner's application for permission to appeal was denied by our supreme court in 2012. The post-conviction court then held that trial counsel was not ineffective for failing to object the jury selection procedures holding that Frausto did not entitle the Petitioner to post-conviction. Additionally the Court of Appeals fails to address the Advisory Commission Comments of Subdivision (d) that permits trial judges to seat more than twelve prospective jurors for purposes of voir dire 3 possibly but not necessarily a number equal to twelve plus the number of peremptories to each side and the number

of alternates available. All of these persons in the jury “Universe” could be questioned at once. Note that if the separate entities procedure of Rule 24(f)(2)(B) is used, challenges are initially made to only the first twelve seated. Note also that under this procedure replacement jurors will be seated in the panel of twelve in the order of their selection.

This is Petitioner's main argument that has not be pursued by his various counsel nor have the courts addressed the undocumented claim that the trial court did a random drawing to determine what jurors to eliminate. The trial record supports Petitioner's position that the trial court chose jurors at the court discretion and this is a violation of Petitioners Fifth and Fourteenth amendment rights

Trial Counsels failure to object to the “**Trial Courts Abuse of Discretion**” in the instant was Prejudicial toward Petitioner because with the “**Original Four (4) First Round Jurors**” on the jury instead of the ones chosen by the Trial Court outside the guidelines of Tenn R. Crim. P. Rule 24 its entirely reasonable to conclude that a different verdict could have been reached. Its clear on the face of the record and the Court of Appeals that as in Frauto Petitioner's constitutes “**Prejudice the Judicial Process**”, and in cases where a determination of “**Prejudice the Judicial Process**” Petitioner would be entitled to a new trial.

INEFFECTIVE ASSISTANCE OF APPELLATE COUNSEL

As to prong one of Strickland concerning Appellate Counsel. Like Trial Counsel in the instant Appellate Counsel was unaware of the correct “**Mandated**” jury selection process proscribed through Tenn. R. Crim. P. Rule 24. Prior to Petitioner's hearing asking for a new trial Petitioner had advised Appellate Counsel that there were issues with the jury selection process used by the trial court that Petitioner wanted to pursue in the motion for a new trial.

Appellate Counsel adamantly refused to raise these issues and advised Petitioner that the implementation of the jury selection process was determined by the trial court and was correct and that

even if there was an issue it would fall into the post-conviction area of review. Appellate Counsel also advised Petitioner that raising any issue that challenged Judge Sexton's authority in his court would not be a wise thing to do. Petitioner did not agree with any of this and requested that if Appellate Counsel would not raise the issues for review under the new trial motion that he would be able to raise it on direct appeal as "Plain Error". Appellate Counsel agreed and ensured Petitioner that he would raise the jury selection issues as plain error for direct appeal review. The appellate record will sustain that appellate counsel failed to raise the issue for "**Direct Appellate Review**" even after being instructed several times by Petitioner to raise it for "**Direct Appeal Review**". Instead Appellate Counsel lied to Petitioner and said he would raise the jury issue on appeal but didn't do so. When asked by Post-Conviction Counsel why he did not raise this issue on Direct Appeal Appellate Counsel stated,

I'll be perfectly honest, because I don't think anybody here thought it was an issue then. I mean, we were doing it that way and at-at that time, it wasn't something, I don't think, you can prospectively look at people and say, okay, we should have known this. Maybe we should have, and if we should have, I'll certainly take any criticism that's due[.]Appellate counsel also recalled trying a second degree murder case in the Eighth Judicial District during this same time period and picking the jury this same way. (See Jerry Phillips v. State of Tenn. Crim. Court of Appeals 2017 Tenn. Crim. App. LEXIS 713 No. E2016-01083-CCA-R3-PC February 23, 2017, Session August 14, 2017, Filed Page seven of Appendix D)

it should also be noted that the court of appeals issued a "Show Cause Order" against Appellate Counsel. This order is available for review in Attachment 12 item 1 of respondents rule five (5) materials.

As to prong Two (2) of Strickland Appellate Counsel in addition to being unaware of the "**Mandated Jury Selection Process**" Appellate Counsel violated a basic duty of an "**Attorney to his Client**" by refusing to do what was reasonably requested of him by Petitioner, **See ("As a matter of "Professional Responsibility" an attorney owes a "**Duty of Loyalty**" to his client. This duty encompasses an "**Obligation to defer to the client's wishes on major litigation decisions.**").** This was prejudicial to Petitioner in that it denied Petitioner the opportunity to pursue a "**Colorful**" claim on

Direct Appeal by Right that may have led to a new trial.

Appellate Counsel was "Ineffective" as explained under **HERIBERTO BALDAYAQUE, Petitioner-Appellant, v. UNITED STATES OF AMERICA, Respondent - Appellee. UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT 338 F.3d 145; 2003 U.S. App. LEXIS 15063 Docket No. 02-2611.**

By refusing to do what was requested by Petitioner, Appellate Counsel violated a basic duty of an attorney to his client. **See In re Agent Orange" Prod. Liab. Litig., 800 F.2d 14, 17 (2d Cir. 1986)** ("As a matter of professional responsibility, an attorney owes a duty of loyalty to his client. This duty encompasses an obligation to defer to the client's wishes on major litigation decisions.").

Appellate Counsel failed to comply with Rule 1.1 of the Connecticut Rules of Professional Conduct, which requires an Attorney's to "Provide competent representation to a client, [which] requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation." (emphasis added).

As⁹ further proof of Appellate Counsel's ineffectiveness this Honorable should consider the statements proven on the face of the record that Petitioner put before the District Court on page four(4) of Petitioner's "Amended Reply Brief" Document 36 that is available for review by this Honorable Court as Appendix F where Appellate Counsel erroneously raised Count one (1) of the indictment for appellate review Attachment 14 item1 page, 5 paragraph 3 of Respondents Rule Five Materials ¹⁰Count one (1) reads,

1; Incident occurred between January 1st. 2007 and November 1st 2007 at the residence of the victim's Grandmother Patricia Wilson, in La Follette Tennessee, in the living room on the couch, defendant touched the victim's "private area where she pee's". RNFD, ATT. 1 EBM 6

As proven by use of the record Petitioner has established that this count of the indictment

⁹ Not to be construed as an additional ground for relief but only as a statement of fact

¹⁰ Count one is distinguished from the other counts of the indictment by the "In the living-room on the Couch descriptions"

received a “Directed Verdict of Acquittal” and Appellate Counsels presentation of count one of the indictment for Appellate Review is an inexcusable error that was and is a highly prejudicial error. Taken in conjunction with Appellate Counsels other documented mistakes Petitioner has established that Appellate Counsel was Ineffective in his execution of Petitioner's Direct Appeal

REASONS OF GRANTING THE PETITION

Upon denial of his Direct Appeal Petitioner attempted to challenge the Appellate Courts denial concerning the “Sufficiency” of the “Trial Evidence” to sustain these convictions in the Tenn. Supreme Court. This attempt was denied by the Tenn. Supra. The denial by the Tenn. Supra made any and all arguments re-viewable by the District Court because Petitioner is not required to argue decisions of the Court of Appeals in a lower state court venue. After Direct Appellate review the next step is the Supreme Court and then the Federal Courts if necessary.

In the instant Petitioner has indisputably shown that the Court of Appeals cited evidence of crimes that Petitioner was not charged with and not convicted of in support of the Court of Appeals denial of Petitioner's Direct Appeal. Counts four (4) and five (5) of the indictment allege

Count 4 Incident occurred between January 1st 2007 and November 1st 2007 at the residence the victim;s Grandmother Patricia Wilson, in La Follette Tennessee, in the “Attic room on the bed”, defendant touched the victim's private area where she pee's

Count 5; Incident occurred between January 1st 2007 and November 1st 2007 at the home of the victim;s Grandmother Patricia Wilson, in La Follette Tennessee, in the tent in Grandmother's backyard, defendant touched the victim's “private area where she pee's”.

When asked directly by the states attorney if Petitioner had touched her in these areas with his hand(s) her direct testimony was “No” See **Attachment Two (2) Item Seven (7) page 70 line 19 thru 21 of Respondents Rule Five (5) Materials and Attachment Two (2) Item Seven (7) page Ninety-Nine (99) line Eleven (11) thru Thirteen (13) of Respondents Rule Five (5) Materials.**

Her testimony was that Petitioner “Did not touch her private area where she pee’s” as alleged by the “**Indictment**” and “**Bill of Particulars**”. Base on this “**Direct Testimony**” the “**Essential Elements**” of “**Aggravated Sexual Battery**” under **Tennessee Code Ann. 39-13-504(a)(4)** and Sexual Contact as defined **Tennessee Code Ann. 39-13-501(6)** as charged by the “**Indictment**” are unproven by the state.

Petitioner would request that this Honorable Court take into consideration the combination of all the errors committed by Trial Counsel namely Counsels failure to object to any of the evidence presented to the Jury as well as Counsels failure to introduce the Preliminary Hearing Transcript into the trial record so that the Jury could review the inconsistencies of the testimonial evidence was prejudicial toward Petitioner.

Petitioner has shown using the records that were before the “**State and District Court**” that counts four (4) and five (5) of the indictment as defined by the states “**Bill of Particulars**” are “**Unsustainable**” as supported by the evidence cited in the “**Analysis of the Tennessee Criminal of Appeals**” opinion as cited in in State v. Phillips, No. E2011-00674-CCA-R3-CD, 2012 Tenn. Crim. App. LEXIS 220, 2012 WL 1143831, (Tenn. Crim. App. Apr. 5, 2012) and as cited in Jerry W. Phillips, Petitioner, v. Raymond Byrd, Respondent. The Eastern District of Tennessee 2020 U.S. Dist. LEXIS 187057 No. 3:18-CV-00062-RLJ-HBG October 8, 2020, Filed.

Petitioner has unequivocally shown that the “**Evidence**” produced by the state at trial as contained within “**Respondents Rule Five Materials**” is entirely different than the evidence presented at the “**Probable Cause Preliminary Hearing**” of June 16th 2009. The evidence presented for “**Grand Jury Review**” contain none of the “**Evidence**” produced at trial concerning “**Counts Four (4) and Five (5)** of the indictment and is a violation of Petitioner’s Fifth (5th) and Fourteenth (14th) Amendment Rights” as guaranteed by the Constitution of the United States and the State of Tennessee’s Constitutions respectfully.

The Court of Appeals position, one that the District Court agrees with stating that Trial Counsels ability to function within the unmandated jury selection implemented by the trial court made trial counsel effective is a position that can not be seriously considered by this Honorable Supreme Court.

The ultimate result of the unman-dated jury selection process implemented by the trial court that remained in effect for many years was that this trial judge could basically just pick and choose jurors at his on discretion with no recourse for the parties at bar other than to just accept the trial courts selection of jurors. The trial courts implementation of its own personal jury selection process that allowed the trial court to determine the final members of the jury at the trial courts discretion is an issue that that needs to be addressed by this Honorable Supreme Court, to ensure the “Public” that this type of judicial abuse will not be tolerated by any **“State or Federal Court”**.

The arrogance of this trial court taking into its own hands the creation of a **“Trial Court Procedural Rule”** that was used and went unchallenged for years for fears of retaliation by practicing attorney’s within this trial courts area of authority in total disregard by of procedures established and **“Mandated”** by the **“State Legislation Body”** shows a total disrespect for the established laws of the State of Tennessee and is a Direct Violation of this Petitioner's right to trial by a fair and impartial jury selected by the parties at bar and not by the trial court.

Based on the undeniable facts **“Proven”** by the records that were before the lower State and Federal Courts Petitioner would pray this Honorable Supreme Court in the interest **“Public Safety”** to ensure that the rights as **“Guaranteed”** to all Citizens of the United States by the **“United States Constitution”** and the accompanying **“Amendments”** will be safe guarded against violations by State and Federal Courts by this Honorable Supreme Court.

CONCLUSION

Respectfully submitted to the Honorable United States Supreme Court for review by Jerry W. Phillips.

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