

ORIGINAL

No. 22-5577

FILED
SEP 02 2022

OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE
SUPREME COURT OF THE UNITED STATES

MARVIN DAVIS - PETITIONER

VS.

KEVIN GENOVESE, Warden - RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI TO

THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT
(NAME OF COURT THAT LAST RULED ON MERITS OF THIS CASE)

PETITION FOR WRIT OF CERTIORARI

MARVIN DAVIS, # 248020

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QUESTION(S) PRESENTED

(1) WHETHER THE TRIAL COURT ERRED IN ALLOWING THE CHILD VIDEO INTERVIEW AND WHETHER T.C.A. SECTION 24-7-123 IS [UN]CONSTITUTIONAL?

(2) WHETHER THE PETITIONER WAS DENIED THE RIGHT GUARANTEED TO HIM BY THE SIXTH AMENDMENT TO THE UNITED STATES CONSTITUTION TO THE EFFECTIVE ASSISTANCE OF COUNSEL?

- (2)-A: ERROR TO OBJECT TO PREJUDICIAL HEARSAY STATEMENTS,
- (2)-B: ERROR BY CONTINUALLY REFERRING TO THOSE STATEMENTS,
- (2)-C: ERROR TO FOLLOW UP ON A RULE 412 MOTION,
- (2)-D: ERROR TO CROSS-EXAMINE THE CHILD FORENSIC INTERVIEWER.

LIST OF PARTIES

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

RELATED CASES

State v. Mallard, 40 S.W.3d 476, 479 (Tenn. 2001)

State v. Ackerman, 397 S.W.3d 617 (TCCA 2012)

Maryland v. Craig, 497 U.S. 836, 844 (1990)

Schad v. Arizona, 501 U.S. 624 (1991)

Coy v. Iowa, 487 U.S. 1012 (1988)

Strickland v. Washington, 466 U.S. 668, 690, 104 S.Ct. 2052, 80 L.Ed 679 (1984)

William v. Taylor, 529 U.S. 362, 405 ~ 406 (2000)

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Marvin Davis v. Kevin Genovese, Warden, # 21-58216 (6th Cir. 6/6/2022)

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State of TN. v. Marvin Davis, W2013-00656-CCA-R3-CD (TCCA 12/5/2014)

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Tennessee Rules of Evidence 803(26)

Tennessee Code Annotated Section 24-7-123

**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.

OPINION BELOW

[v] For the Federal Courts:

The opinion of the United States Court of Appeals appears at Appendix A to the Petition and is unpublished.

The opinion of the United States District Court appears at Appendix B to the Petition and is unpublished.

[v] For the State Courts:

The opinion of the highest state court to review the merits on direct appeal appears Appendix C to the Petition and is unpublished.

The opinion of the highest state court to review the merits on post-conviction appeal appears Appendix D to the Petition and is unpublished.

JURISDICTION

[v] For cases from Federal Courts:

The date on which the United States Court of Appeals decided my case was June 6, 2022.

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

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

[v] For cases from State Courts:

The date on which the highest state court denied my case was 11/16/2016. A copy of that decision appears at Appendix C.

[v] A timely application for permission to appeal was filed and denied on 3/9/2017 without opinion.

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

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Fifth Amendment to the United States Constitution

Sixth Amendment to the United States Constitution

Fourteenth Amendment to the United States Constitution

Article II Section 1 and 2 of the Tennessee Constitution

STATEMENT OF CASE

Your Petitioner/Appellant, Marvin Davis, ("Petitioner" and/or "Davis" hereafter) an indigent pro se Tennessee inmate, appeals the judgment of the United States Court of Appeals, Sixth Circuit, denying his 28 U.S.C. Section 2254 Petition for a writ of habeas corpus. Davis's notice of appeal was construed as an application for a certificate of appealability ("COA" hereafter). Davis moved to proceed in forma pauperis on appeal which was denied as moot when the United States Court of Appeals denied COA. Marvin Davis v. Kevin Genovese, Warden, # 21-58216 (6th Cir. 6/6/2022). Appendix A.

Davis was convicted of rape of a child and sentenced to 25 years of imprisonment. State v. Davis, W2013-00656-CCA-R3-CD (TCCA 5/1/2014). Appendix D. Davis appealed, challenging the admission of videotaped forensic interview of the victim in the basis that the state statute allowing its admissibility was unconstitutional. Id. at *5. The Tennessee Court of Criminal Appeals ("TCCA" hereafter) determined that the claim was waived by Davis's failure to raise it in the trial court. Id. Nevertheless, the court reviewed the claim for plain error and found none. Id. at *5-9. In a second assignment of error, Davis asserted that the evidence was insufficient to support his conviction. Id. at *9. The TCCA rejected this claim and affirmed. Id. at *11.

As to the issue number # 2, Davis filed a petition for post-conviction relief, claiming that counsel was ineffective for failing to object to hearsay evidence, emphasizing the hearsay evidence by using the same phrasing during cross-examination, failing to schedule a hearing pursuant to Tennessee Rule of Evidence 412, and failing to cross-examine the forensic interviewer about the use of leading questions. Davis v. State, W2015-02129-CCA-R3-PC (TCCA 11/16/2016). Appendix C. Following a hearing the trial court denied the petition. The TCCA affirmed, id., and the Tennessee Supreme Court denied an appeal on 3/9/2017.

Then, Davis timely filed his habeas petition in November 2017, raising the following claims: (1) the trial court erred by admitting the victim's videotaped forensic interview under state law and the state allowing its admission is unconstitutional; and (2) trial counsel was ineffective for (a) failing to object to hearsay statement, (b) referring to the hearsay statement, (c) failing to follow up on a Rule 412 motion, and (d) failing to cross-examine the forensic interviewer. In response, The Respondent argued that Davis's first claim was procedurally defaulted and that the state court's adjudication of his ineffective-assistance claims was not unreasonable.

The United States District Court determined that Davis's constitutional claim relating to the admission of the video interview was procedurally defaulted because it was deemed to be waived by the Tennessee Court of Criminal Appeals ("TCCA"). To the extent that Davis was asserting that the admission of the video violated Tennessee law or Tennessee's Rules of Evidence, the District Court determined that the claim raised a non-recognizable issue of state law. The District Court further determined that

the state court did not unreasonably deny Davis's ineffective-assistance-of counsel claims. The District Court denied Davis's habeas petition and declined to issue a COA. Marvin Davis v. Michael Parris, Warden, # 2:17-cv-02846-MSN-tmp (8/6/2021). Appendix B.

Davis filed a timely notice of appeal was construed as an application for a certificate of appealability ("COA" hereafter). Davis moved to proceed in forma pauperis on appeal which was as moot when the United States Court of Appeals denied COA. Marvin Davis v. Kevin Genovese, Warden, # 21-58216 (6th Cir. 6/6/2022). Appendix A.

REASONS FOR GRANTING THE PETITION

(1) WHETHER THE TRIAL COURT ERRED IN ALLOWING THE CHILD VIDEO INTERVIEW AND WHETHER T.C.A. SECTION 24-7-123 IS [UN]CONSTITUTIONAL?

(2) WHETHER THE PETITIONER WAS DENIED THE RIGHT GUARANTEED TO HIM BY THE SIXTH AMENDMENT TO THE UNITED STATES CONSTITUTION TO THE EFFECTIVE ASSISTANCE OF COUNSEL?

- (2)-A: ERROR TO OBJECT TO PREJUDICIAL HEARSAY STATEMENTS,
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(1) WHETHER THE TRIAL COURT ERRED IN ALLOWING THE CHILD VIDEO INTERVIEW AND WHETHER T.C.A. SECTION 24-7-123 IS [UN]CONSTITUTIONAL?

As to the Video Interview:

Petitioner states that the forensic video interview of the child was admitted as evidence at trial in violation of his constitutional right to due process; therefore, T.C.A. Section 24-7-123 which allows for the introduction of such video is unconstitutional because the statute violates his right to confront witness, violates the separation of powers doctrine, violates his right to a jury trial and the presumption of innocence, and violates his due process rights.

The TCCA addressed this claim on direct appeal and opined:

The defendant asserts that the trial court erred in admitting the video recording of the victim's forensic interview pursuant to Tennessee Code Annotated section 24-7-123. This section provides for the admissibility of the video recording of a forensic interview of a child under the age of thirteen during which the child described any act of sexual contact performed on or with the child if certain requirements are met. Tenn. Code Ann. section 24-7-123(a). The video recording "may" be admitted if:

(1) The child testifies, under oath, that the offered video recording is a true and correct recording of the events contained in the video recording and the child is available for cross examination;

(2) The video recording is shown to the reasonable satisfaction of the court, in a hearing conducted pre-trial, to possess particularized guarantees of trustworthiness. In determining whether a statement possesses particularized guarantees of trustworthiness, the court shall consider the following factors:

- (A) The mental and physical age and maturity of the child;
- (B) Any apparent motive the child may have to falsify or distort the event, including, but not limited to, bias or coercion;
- (C) The timing of the child's statement;
- (D) The nature and duration of the alleged abuse;
- (E) Whether the child's young age makes it unlikely that the child fabricated a statement that presents a graphic, detailed account beyond the child's knowledge and experience;
- (F) Whether the statement is spontaneous or directly responsive to questions;
- (G) Whether the manner in which the interview was conducted was reliable, including, but not limited to, the absence of any leading questions;
- (H) Whether extrinsic exists to show the defendant's opportunity to commit the act complained of in the child's statement;
- (I) The relationship of the child to the offender;
- (J) Whether the equipment that was used to make the video recording was capable of making an accurate recording; and
- (K) Any other factor deemed appropriate by the court;

(3) The interview was conducted by a forensic interviewer who met the following qualifications at the time the video recording was made, as determined by the court:

- (A) Was employed by a child advocacy center that meets the requirements of section 9-4-213(a) or (b);

- (B) Had graduated from an accredited college or university with a bachelor's degree in a field related to social service, education, criminal justice, nursing, psychology or other similar profession;
- (C) Had experience equivalent to three (3) years of full-time professional work in one (1) or a combination of the following areas:
 - (i) Child protective services;
 - (ii) Criminal justice;
 - (iii) Clinical evaluation;
 - (iv) Counseling; or
 - (v) Forensic interviewing or other comparable work with children;
- (D) Had completed a minimum of forty (40) hours of forensic training in interviewing traumatized children and fifteen (15) hours of continuing education annually;
- (E) Had completed a minimum of eight (8) hours of interviewing under the supervision of a qualified forensic interviewer of children;
- (F) Had knowledge of child development through coursework, professional training or experience;
- (G) Had no criminal history as determined through a criminal records background check; and
- (H) Had actively participated in peer review;

- (4) The recording is both visual and oral and is recorded on film or videotape or by similar audio-visual means;
- (5) The entire interview of the child was recorded on the video recording and the video recording is unaltered and accurately reflects the interview of the child; and
- (6) Every voice heard on the video recording is properly identified as determined by the court.

Tenn. Code Ann. section 24-7-123(b).

In the present case, an evidentiary hearing was held prior to trial during which multiple witness, including the victim, testified. However, above mentioned TCA section 24-7-123 is contrary to the Tennessee Rules of Evidence ("TRE") which is based on the Federal Rules of Evidence ("FRE"). In other words, the violation of TRE is considered in violation of "FRE."

The forensic interview is considered hearsay and the only time it can be introduced at trial is pursuant to Rule 613(b) and 803(26) of the TRE. In State v. Ackerman, 397 S.W.3d 617 (Tenn.Crim.App. 2012), the TCCA in Nashville, Tennessee, decided on a similar situation that occurred in that case. In that decision, the TCCA stated, "because the video recording is hearsay and does not satisfy the requirements for admission as a prior inconsistent statement via Rule 803(26) or as a past recollection recorded via Rule 803(5), it should not have been admitted." *Id.* at 639. The Ackerman court found the error to be harmful and remanded the case back to the trial court for a new trial.

In Petitioner's case, there was nothing mentioned nor was there a hearing conducted in regards to proper admission of the video pursuant Rules 613(b) and 803(26) of the TRE. By the time the forensic interviewer testified on the stand at the trial, which is the point when the video and related transcripts were submitted as evidence, the victim, Maria Miller had already testified. If a hearing was conducted regarding the correct way to introduce these videos using the rules of evidence, the court would have determined that the testimony of Maria at trial was one-hundred percent consistent with what she had stated in the forensic interview. Because the testimony was [consistent] with the video, then per Rules 613(b) and 803(26), that video was not to be introduced. Therefore, the Petitioner asserts that the forensic video and its accompanying transcript were [improperly admitted] as evidence pursuant to TRE as well as FRE and case as decided Ackerman.

The second question is whether T.C.A. section 24-7-123 is unconstitutional and violates the separation of powers doctrine as established by the Tennessee Constitution Article II, section 1 and 2?

In this case at hand, a video of the forensic interview and its accompanying transcript were both introduced as evidence at trial. This evidence were submitted per T.C.A. section 24-7-123. As outlined in this statute, which went into effect on July 1, 2009, a pre-trial hearing was held to determine the truthfulness of the video. This hearing was held on September 10, 2012. After being satisfied that the video met the standards listed in that statute, the Judge gave his approval to allow the video at trial. On appeal, the TCCA decided that "Section 24-7-123 does not strike at the very heart of a court's exercise of judicial power." State v. Mallard, 40 S.W.3d 476, 479 (Tenn. 2001). Therefore, the defendant (Petitioner) has failed to show that the statute violates the separation of powers doctrine." State v. Davis, No. W2013-00656-CCA-R3-CD.

The Petitioner avers that T.C.A. section 24-7-123 in unconstitutional because it is in conflict with existing Rules 613(b) and 803(26) of the Tennessee Rules of Evidence ("TRE"), and as well as FRE (Federal Rules of Evidence) and case law as decided in State v. Ackerman, 397 S.W.3d 617 (TCCA 2012), therefore this statute

violates the separation of powers clause of the Tennessee Constitution. "[T]he legislature can have no constitutional authority to enact rules, either of evidence or otherwise, that strike at the very heart of a court's exercise of judicial power." *State v. Mallard*, 40 S.W.3d 476, 480-481 (Tenn. 2001). Only the Supreme Court has the inherent power to promulgate rules governing the practice and procedure of the courts of this state ... and this inherent power exists by virtue of the establishment of a Court and not by largess of the legislature ..." *Id.* at 481.

When comparing the two questions above, it is clear to see how they truly overlay one another. The court allowed the prosecution to side-step the proper admission of the forensic interviews and allowed them to introduce the video via T.C.A. Section 24-7-123. In the Petitioner's case, the Tennessee Legislature has clearly overstepped their bounds and directly impacted rules that should be exclusively governed by the Supreme Court, the only entity who has the inherent power to promulgate rules governing the practice and procedure of the courts of the state per Tennessee Constitution Article II, section 1 and 2. It is because of that statute that this video was erroneously admitted as evidence. The State Court's determination of this issue violates the Petitioner's 6th and 14th Amendments to the United States Constitution.

ARGUMENT

A. Whether the trial court erred in admitting the video taped, forensic interview of the child victim.

The first issue is whether the admission of video evidence in this case was in error and whether that error was harmful. The prosecution in this case filed a motion to be allowed to introduce a video taped forensic interview of the victim pursuant to T.C.A. Section 24-7-123. This statute allows the video recording for a forensic interview of a child less than thirteen years of age to be introduced into evidence. A pretrial hearing is held which requires the child to be available for cross examination in order for the court to determine the trustworthiness of the testimony. It also requires that the qualifications of the interviewer be validated. The constitutionality of this statute will be discussed later in the second part of this claim. (see section B below). The interview was taken by Patricia Lewis of the Memphis Child Advocacy Center. Ms. Lewis testified after the victim, Maria Miller had testified. During Ms. Lewis's testimony, the forensic interview was then admitted as evidence and was played for the jury.

Is is due to the admission of this video that the Petitioner asserts his 6th Amendment right which is made applicable through the 14th Amendment, was violated. "In all prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him." *Maryland v. Craig*, 497 U.S. 836, 844 (1990); United States Constitution, Amendment VI. Even though Maria Miller had testified at trial, the introduction of the forensic interview as well as the introduction of the associated transcripts served as additional testimony from the victim. This additional testimony was available to the jury in the deliberation room.

The Petitioner was denied due process in that the victim's testimony was presented to the jury three times: Firstly, she testified in front of the jury; Secondly, her video interview was then played for the jury during the testimony of Ms. Lewis, the forensic interviewer, who testified after the victim testified; Thirdly, the printed transcripts of the video interview were made available and given to the jury during deliberations so they could review over them at their choice. This procedure is not followed with any other witness, and there is no policy or court rule that would allow it. This practice is not needed to protect the child and does nothing but simply bolsters the state's case and prejudice to outcome of the case. No one in any case is allowed to testify three times about the same thing without being confronted or cross examined. The Petitioner was not allowed to testify three separate times. Due process demands fundamental fairness and the rationality that is an essential component to that fairness. *Schad v. Arizona*, 501 U.S. 624 (1991); United States Constitution, Amendment V. This practice did violate the Petitioner's constitutional right to due process.

Two cases, which have similar concept to this issue, have been heard by the United States Supreme Court. In *Maryland v. Craig*, 497 U.S. 836, 844 (1990), a statute of Maryland allowed the testimony of a child sex abuse case to be presented to the jury by one way, closed circuit television. Under this arrangement, the child was not able to see the defendant, but the defendant and the jury in the court room could see the child. The defendant remained in electronic communication with his attorney. To invoke this procedure, the statute required that the court make a finding that the child would suffer "serious emotional distress" if required to testify in the courtroom such that she could not "reasonably communicate." Once the procedure is invoked and the finding is made, the prosecutor, defense counsel and victim go to another room where the closed circuit television equipment is located while the judge, jury and defendant remain in the courtroom. The defense counsel was entitled to cross examine the victim.

The expert testimony in the case had suggested that the victim, and other children which were alleged to have been abused by Craig, the defendant, would have some considerable difficulty in testifying in Craig's presence. One child would suffer anxiety, another wouldn't be able to communicate effectively, another would withdraw and curl up, another would become highly agitated and refuse to talk or be unresponsive if he did talk. *Craig*, *supra*, 842. The reported testimony did not reveal why the children would have these reactions, i.e. whether they were afraid of the defendant because they had been abused, or whether they were lying and afraid to face her.

In Petitioner Davis's case, even with defense counsel present and available to cross examine the victim after her direct testimony, the court said that the Confrontation Clause of the 6th Amendment was compromised, and a particularized need had to be shown before the victim would be allowed to testify outside of the presence of the defendant. Because the Maryland statute made such a provision, the court upheld it. There is no such provision in the Tennessee statute that would allow for the same testimony to be provided multiple times to the jury without the ability to cross examine each time, especially hearsay testimony. (More detail about this matter below).

The important public policy in this case is, obviously, the protection of children

from trauma. However, as Justice Scalia pointed out in his dissent, this was not a qualification of the Confrontation Clause, but a denial of it. "The purpose of the Constitution is to stand against the tide of current public opinion, not give in to it." Craig, *supra*, 842.

Craig was preceded by the case of *Coy v. Iowa*, 487 U.S. 1012 (1988), which held that a statute cannot create a presumption of trauma in a case of child sexual abuse. The Iowa statute allowed the court to place a screen or mirror between the defendant and the witness or confine the defendant to another room in any child abuse case. The trial court. The trial court had placed a screen between the thirteen year old victims and the defendant. The Supreme Court ruled that this was a denial of confrontation absent a showing of a particularized need. There was no testimony at trial showing that the reactions of the children would be to testifying in the presence of the defendant. Iowa argued that trauma can be presumed. The Supreme Court said that it cannot.

In both of these cases, the defendant is present when the child testifies, and counsel is available to cross examine, and, yet, the Court required the showing of a particularized need. These cases show that confrontation entails more than just the ability to cross examine. In Petitioner Davis's case, the testimony of Maria Miller was identical to that of the video and of the transcripts of the video. There was no particularized need that required the court to present the video and the printed transcripts as additional evidence during the trial in the Petitioner Davis's case.

Further, it is important to acknowledge that admission of a child video statement pursuant to the statute in question (T.C.A. Section 24-7-123) would be a violation of the hearsay rule. Hearsay is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove truth of the matter asserted. Rule 801, Tennessee Rules of Evidence ("TRE"), is based on the Federal Rules of Evidence ("FRE"). (In other words, the violation of TRE is considered in violation of "FRE.")

In 2012, the Tennessee Court of Criminal Appeals made a determination in the case of *State v. Ackerman*, 397 S.W.3d 617 (TCCA 2012), which is of a very similar situation, in which the forensic interviews were declared inadmissible hearsay. "To be admissible, as substantive evidence via Rule 803(26), a statement must first be admissible as a [prior inconsistent] statement via Rule 613(b)." *Id.* at 638. "Because the video recording is hearsay and does not satisfy the requirements for admission as a prior inconsistent statement via Rule 803(26) or as a past recollection recorded via Rule 803(5), it should not have been admitted." *Id.* at 639. The court in Ackerman found the error to be harmful and remanded the case back to the trial court for a new trial. This error was also harmful to the Petitioner.

During the trial, the child testified in court about about the incident. Her testimony was identical to her statement previously made in the video of the forensic interview. Until the witness has offered testimony, the court cannot intelligently make a ruling on whether or not the trial testimony was inconsistent with the prior statements made in the video of the forensic interview. Since they were not inconsistent, the video should not have been allowed.

The video evidence was offered for no other purpose than substantial evidence

and no instruction was given by the trial judge that it should be treated in any other way. Thus, the video bolstered the child's credibility. Accordingly, just as in Ackerman, the Petitioner Davis should be entitled to a new trial due to the substantial violation against the Petitioner Davis's 6th and 14th Amendments to the United States Constitution from this error. The Petitioner is entitled to habeas corpus relief and writ of certiorari.

B. Whether T.C.A. Section 24-7-123 is Unconstitutional.

The second issue whether T.C.A. Section 24-7-123 is [un]constitutional. Forensic interview of child victims are considered hearsay. "Hearsay is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Tenn. R. Evid. 801. "Hearsay is not admissible except as provided by these rules or otherwise by the law." Tenn. R. Evid. 802. A forensic interview of a child victim may be admissible under certain exceptions as provided by Tenn. R. Evid. 613(b) and 803(26).

Tenn. R. Evid. 613(b) reads as follows:

Extrinsic of Prior Inconsistent Statement of Witness. "Extrinsic evidence of a prior inconsistent statement by a witness is not admissible unless and until the witness is afforded an opportunity to interrogate the witness thereon, or the interest of justice otherwise require." Tenn. R. Evid. 613(b).

Tenn. R. Evid. 803(26) reads as follows:

Prior Inconsistent Statements of a Testifying Witness. A statement otherwise admissible under rule 613(b) if all of the following conditions are satisfied:

- (A) The declarant must testify at the trial or hearing and be subject to cross-examination concerning this statement.
- (B) The statement must be an audio or video recorded statement, a written statement signed by the witness or a statement given under oath.
- (C) The judge must conduct a hearing outside the presence of the jury to determine by a preponderance of the evidence that the prior statement was made under circumstances indicating trustworthiness.

Tenn. R. Evid. 803(26).

The crux of Tenn. R. Evid. 613(b) and 803(26) is that a forensic interview of a child victim may be admissible only when it contains prior inconsistent statements. If the victim testifies consistently, then the video is not to be admitted. The recording was not introduced under the Tenn. R. Evid. 613(b) and 803(26) exception, but through T.C.A. Section 24-7-123, which would permit a trial court to admit the interview whether

or not there are prior inconsistent statements. Therefore, T.C.A. Section 24-7-123 is unconstitutional because it is in conflict with existing rules of evidence and case law. This conflict violates the separation of powers clause of the Tennessee Constitution Art II, Section 1 and 2.

Tennessee Constitution Art II, Section 1 states: "The powers of the Government shall be divided into three distinct departments: the Legislative, Executive, and Judicial." Tennessee Constitution Art II, Section 1. Further, Tennessee Constitution Art II, Section 2 reads as follows:

Limitations of Powers - No person or persons belonging to one of these departments shall exercise any of the powers properly belonging to either of the others, except in the cases herein directed or permitted.

Tennessee Constitution Art II, Section 2

"[T]he legislature can have no constitutional authority to enact rules, either of evidence or otherwise , that strike at the very heart of court's exercise of judicial power." State v. Mallard, 40 S.W.3d 476, 480-481 (Tenn. 2001). The rules of evidence are an integral part of the rules of practice and procedure. Only the Supreme Court has the inherent power to promulgate rules governing the practice and procedure of the courts of this state ... and this inherent power exists by virtue of the establishment of a Court and not by largess of the legislature ..." Id. at 481. The statute is in direct conflict of Tenn. R. Evid. 613(b) and 803(26) because it allows any forensic interview, whether or not there are prior inconsistent statements, to be allowed at trial. Therefore, T.C.A. Section 24-7-123 is void as it attempts to carve out a hearsay exception for which the rules of evidence would otherwise prohibit. Due to the separation of powers doctrine, T.C.A. Section 24-7-123 should be declared as void and unconstitutional and the Petitioner Davis should be granted habeas corpus relief and writ of certiorari.

Therefore, the trial court erred in admitting the video taped, forensic interview of the child victim, and the Tennessee Code Annotated Section 24-7-123 is unconstitutional.

(2) WHETHER THE PETITIONER WAS DENIED THE RIGHT GUARANTEED TO HIM BY THE SIXTH AMENDMENT TO THE UNITED STATES CONSTITUTION TO THE EFFECTIVE ASSISTANCE OF COUNSEL?

Your Petitioner Davis was denied the right guaranteed to him under the 6th Amendment to the United States Constitution to effective assistance of counsel. At trial the Petitioner was represented by Jane Sturdivant and Sanjeev Memula. The Petitioner contends that during the court of the trial, these attorneys failed him in many ways. To begin with, counsels failed to object to hearsay statements that were introduced at trial by several of the State's witnesses regarding the victim's disclosure statements. In addition to that, counsels continually repeated the statement that was made in regards to him having "freaked" on the alleged victim. The continual unneeded repeating of this statement was damaged to the Petitioner's defense. Further, trial counsels failed to follow up on a very important 412 motion that could have introduced reasonable doubt. Trial counsels also failed to prepare for a proper cross-examination of the State's witness, Patricia Lewis. Petitioner Davis asserts that counsels' representation fell below prevailing norms of the effective assistance of counsel as outlined in the United States Supreme Court in *Strickland v. Washington*, 466 U.S. 668, 690, 104 S.Ct. 2052, 80 L.Ed 679 (1984).

On appeal, the Petitioner argued these issues in the Tennessee Court of Criminal Appeals (TCCA). On November 16, 2016, the TCCA rendered their decision to affirm the Post-Conviction Court's denial decision. In their decision, the TCCA determined that the Petitioner Davis failed to prove prejudice for each of the issues he presented. The Petitioner contends that the TCCA's denial of Post-Conviction relief is contrary to *Strickland v. Washington* because he had presented errors that counsel had made and the related prejudice to the outcome of his trial that were the results of these errors.

ARGUMENTS:

(2)-A: ERROR TO OBJECT TO PREJUDICIAL HEARSAY STATEMENTS.

The Petitioner Davis was denied the effective assistance of counsel when his trial counsels failed to object to hearsay statements introduced during trial that were in regards to the alleged victim's disclosure.

"Hearsay is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Tenn. R. Evid. 801(c). "Hearsay is not admissible except as provided by these rules or otherwise by law." Tenn. R. Evid. 802. Rules 803 and 804 of the Tenn. R. Evid. provide exceptions to the general rule of inadmissible hearsay. Herein mentioned Tennessee Rules of Evidence ("TRE") is based on Federal Rules of Evidence ("FRE") even their listing orders. The Petitioner Davis asserts that during his trial, defense counsels, Jane Sturdivant and Sanjeev Memula, failed to object to two instances where a hearsay

statement was introduced by a witness testifying on the stand. The Petitioner contends that neither of these instances would qualify as an exception.

The first instance occurred while Shuntonya Scruggs was on the stand. During her direct examination by Ms. Abby Wallace, the Assistant District Attorney General for the State, she was asked why she had taken her daughter to LeBonheur Children's Hospital. Her response was, "Because she told me that morning that 'Marvin had freaked on her'" (T.Tr. page 16, lines 5 and 6). Ms Scruggs reference to what Maria, the victim, had said was clearly hearsay and was not met with any objection.

The second instance occurred while Dr. Karen Lakin was on the stand. While she was under direct examination by Ms. Wallace, she was asked about that she had learned from Maria, the victim. Her response was, "Maria was interviewed and she was interviewed alone after I had just introduced myself as spoke to her mother. And when I asked her why she was there, she told me that she had been brought to the clinic because her aunt's boyfriend and this is what she actually said to me was that her aunt's boyfriend had freaked on her." (T.Tr. page 58, lines 12~19). Again, this was not met with any objection be defense counsels regarding the hearsay nature of this statement.

Statements such as these cannot be made because they are not admissible via Rule 613(B) nor 803(26)(B) of the TRE since they would have to be considered a prior inconsistent statement and would have to have been audio or video recorded, or given under oath. An objection should have been made by the defense counsels and if the prosecution desired to have it admitted, then a hearing out of the presence of the jury would need to be conducted to determine whether the statements were made "under circumstances indicating trustworthiness," per Rule 803(26)(C). When a jury hears statements such as these made during the trial, they are going to assume that they are truthful and that the victim actually had made that exact statement. There is nowhere on the record where alleged victim is actually quoted making that statement. It is not in the forensic interview, nor did she admit to this statement during trial. The only place in the record where it appears to come up is from the mother's complaints and the testimony of Dr. Lakin.

The trial judge Honorable Robert Carter, Jr., who tried this case certainly knows what hearsay is. On page 112, line 19 from the Transcripts of the Proceedings, when Ms. Fitzpatrick was testifying for the defense, she stated how she heard the Petitioner says, "I didn't do that." This was immediately objected to by the prosecution and sustained by the court. Then again page 113, line 3, she starts to tell the court what the Petitioner had said when the Judge interrupts her, stating that she cannot tell them what somebody had said. If an objection was made by the defense counsel, it should have also been sustained unless this is an one-side rule that works only in the favor of prosecution.

The defense had a duty to protect their client from such hearsay statements being made during the course of his trial, but in Petitioner's case the trial counsels failed to do so. They failed to object, therefore, these statements were more than likely viewed by the jury as truthful to the Petitioner's guilt, undermining the defense and causing prejudice to the outcome of the Petitioner's trial.

Therefore, under the standard of *Strickland v. Washington*, 466 U.S. 668, 690, 104

S.Ct. 2052, 80 L.Ed. 679 (1984), Petitioner Davis was denied the effective assistance of counsel when his trial counsel failed to object to hearsay statements introduced during trial that were in regards to the alleged victim's disclosure.

(2)-B: ERROR BY CONTINUALLY REFERRING TO THOSE STATEMENTS,

Petitioner Davis's counsels rendered an ineffective assistance of counsel by continually referencing the term "freaked" in reference to the victim's disclosure statement; trial counsels exacerbated the prejudicial effect of the hearsay statement.

The Petitioner asserts that his own counsels caused prejudice when they continually referred to the alleged victim's disclosure statement on multiple occurrences during trial, while cross-examining the State's witnesses. These references by defense counsels further added to the previous issue discussed where they failed to object to the statements as hearsay, thus building on the prejudice that resulted in the Petitioner's conviction.

The first instances of this occurred when the State's witness, Shuntonya Scruggs, was being cross-examined by defense counsel, Jane Sturdivant. Ms. Sturdivant was harmful and prejudicial to defense by making this reference twice during her cross-examination. The first time, she asked Ms. Scruggs, "Do you remember being asked the question, at any time after she told you that Marvin had freaked on her, did you check any of her genital area or anything like that?" (T.Tr. page 21, lines 16 through 19). Next, a few minutes later, after a small bench conference was held regarding that question, and asked Ms. Scruggs once again, "At any time after you told - after she told you that Marvin had freaked on her, did she check any of her genital area or anything like that?" (T.Tr. page 23, lines 20 through 23).

As a defense attorney, Ms. Sturdivant should have known her wording wisely in order to avoid references or statements that could inflame the jury and prejudice to the defense. These statements are hearsay in the first place and defense counsel erred by failing to object to them when they were introduced by the State's witnesses; Rather, defense counsels continued to refer to the "Marvin freaked on her"-statement. By continuing to repeat this statement added credibility to a statement constituting inadmissible hearsay, offering the statement to the jury for the truth of the matter asserted.

The second instance of this occurred when Dr. Karen Lakin was being cross-examined by defense counsel, Mr. Sanjeev Memula. The following was exchanged during the cross-examination:

- Q. Do you remember writing a history on this?
- A. Yes. And I may have to go back and look at it again.
- Q. Yes. Page two of your history.

A. Yes. Yeah that history did come from the mother.

Q. Okay. Because it says ten year old who disclosed to mom -

A. Six.

Q. Six year old who disclosed to mom that Marvin freaked on her and put his thing in the victim's -

A. Vagina.

Q. Vagina. The incident occurred last Friday, the 21st. So you're saying you got that from the mother?

A. The mother.

Q. And not the child?

A. Right. The only thing that I got from the child is what's in quotation marks.

(T.Tr. page 68, lines 16 through page 69, line 11.)

As one can see from the above exchange, Mr. Memula's line of questioning was to determine what information came from the mother when Dr. Lakin was working up a history for Maria. These errors made by trial counsel of continually bringing in this statement bolstered the credibility of the statement, thus possibly leading the jury to think that Maria actually made that statement, and that if a child of 6 years of age can make such a statement, then it must be true. The Petitioner asserts that this error added prejudice the outcome of the jury's decision.

Therefore, under the standard of *Strickland v. Washington*, 466 U.S. 668, 690, 104 S.Ct. 2052, 80 L.Ed. 679 (1984), Petitioner Davis was denied the effective assistance of counsel when his trial counsel failed by referencing the term "freaked" in reference to the victim's disclosure statement, trial counsel exacerbated the prejudicial effect of the hearsay statement.

(2)-C: ERROR TO FOLLOW UP ON A RULE 412 MOTION,

The Petitioner Davis was denied the effective assistance of counsel by counsels' failure to follow up on a Rule 412 Motion.

The Petitioner asserts that he was denied the effective assistance of counsel by

counsel's failure to follow up on a Rule 412 Motion that would have introduced other statements made by the victim that she had been "messed with" by others, thus impeaching the witness and creating reasonable doubt.

Prior to trial, Petitioner's counsels filed a "Rule 412 Motion To Introduce Reputation Or Opinion Evidence Of The Victim's Sexual Behavior And Specific Instances Of The Victim's Sexual Behavior."

(This Motion was filed on 6/7/2012 along with several other Motions such as "Motion For Production of Department of Human Services records for In Camera Inspection Prior to Trial;" "Motion for Bill of Particulars;" "Motion in Limine;" "Motion for pre-trial Morgan Hearing;" and "Defendant's Request For Jury Instruction on Lesser-Included Offenses.")

The Rule 412 Motion offered proof that during the course of their investigation, the defendant learned from the defense witness Vurvum Fitzpatrick, the great aunt of the alleged victim, that Maria Miller had told her in the past that "she had been messed with" by her brother, Demonte Miller, also known as "Tay Tay." In addition, she had also said that she had been messed with by Korianna Ice, the daughter of a friend of her mother's, Christy Scott. The Motion was a request for the court to grant permission for the defense to raise this evidence during cross-examination of Maria and her mother Shuntonya Scruggs. The motion would have shown that Maria had engaged in sexual encounter with individuals other than the Petitioner, and that those instances caused the injury found during the examination at LeBonheur Hospital on January 28, 2011. At trial, Dr. Karen Lakin presented evidence that Maria had a deep cleft may or may not have been the result of sexual activity. As it was uncertain what caused the damage to Maria's hymen, the Petitioner's trial counsels should have set the motion to introduce these prior accusations into evidence to effectively challenge that uncertainty.

The Petitioner Davis points to the Tennessee Rules of evidence, Rule 412(c)(4)(i) in regards to specific Instances of Conduct. The Rule states:

(c) Specific Instances of Conduct. Evidence of specific instances of a victim's sexual behavior is admissible unless admitted in accordance with the procedures in subsection (d) of this rule, and the evidence is:

(4) If the sexual behavior was with persons other than the accused;
(i) to rebut or explain scientific or medical evidence.

Section (d) of Tennessee Rules of Evidence Rule 412 outlines the procedures regarding motions filed under this rule. In section (d), it states that "the court shall hold a hearing in chambers or otherwise out of the hearing of the public and the jury to determine whether the evidence described in the motion is admissible. The hearing shall be on the record, but sealed except for the limited purposes of facilitating appellate review." Tenn. R. Evid. 412(d)(2).

In his order denying post-conviction relief, honorable Judge Carter stated, "Mr. Memula had no explanation for why the motion, though filed, had not been heard. On

cross-examination, it was suggested that since no injuries or physical findings were presented at this trial, the 412 evidence would not be admissible to show the source of these injuries." The order denying relief was factually incorrect. During the post-conviction evidentiary hearing, Mr. Memula had recalled that the victim had an injury which was described as a "hymenal notch." (P.C. Evid. Hearing, page 20). The record shows that Dr. Karen Lakin clearly testified to a "deep notch" being present in Maria's hymen at the "one o'clock" position. (VI R., 61-62).

The hymen notch could have been explained by other sexual activity with other individuals. The Petitioner was denied the effective assistance of counsel when trial counsel failed to introduce other explanations of the source of the victim's injury to the jury. Mr. Memula did not remember having a hearing on Ms. Strudivant's Rule 412 Motion.

Therefore, under the standard of *Strickland v. Washington*, 466 U.S. 668, 690, 104 S.Ct. 2052, 80 L.Ed. 679 (1984), Petitioner Davis was denied the effective assistance of counsel when his trial counsel failed to follow up on a Rule 412 Motion.

(2)-D: ERROR TO CROSS-EXAMINE THE CHILD FORENSIC INTERVIEWER.

The Petitioner was denied the effective assistance of counsel by trial counsels failure to prepare for a cross-examination of the State's witness, Patricia Lewis, the Child Forensic Interviewer.

The Petitioner asserts that he was denied the effective assistance of counsels by their failure to prepare for a cross-examination of the State's witness, Patricia Lewis, regarding the contents of the forensic interview. During trial, Ms. Lewis testified regarding how a forensic interview is conducted and that they use what they call, the RACAT protocol. On direct examination by Ms. Wallace, she was asked what kind of questions she asks during an interview. (page 83, line 20 through page 84, line 25). Her response was that it is best to ask open ended questions. She stated that they also use multiple choice questions, focused recalled questions, and free recall questions. Ms. Wallace further asked her why it was important to ask open ended questions and not questions that would box them in. Ms. Lewis responded by saying that it's kind of like leading the child and they feel that they are boxed in, having to choose one answer or another.

In review of the transcripts of the Forensic Interview, there appears to be several instances within the content of that interview where it appears that Ms. Lewis is indeed leading Maria, rather than asking such open ended questions. Defense counsel could have prepared some strong cross-examination, highlighting these instances where Maria appeared to be led in an effort to discredit Ms. Lewis. A well prepared cross-examination could have elicited testimony that may have provided some impeachment material toward the reliability of the forensic interview. Such examples of leading questions during that interview are as follows:

Example-1: Forensic Interview Transcripts ("F.I.Tr." hereafter), page 10;

Q: Okay. And you call him your uncle. I'm gonna call him what you call him. Marvin Davis, your uncle. You're saying he touched your coochie. What about the booty? Did he touch that or he did not?

A: He did.

(*Rather than ask her if he touched her anyplace else, she specifically asks about the "booty.")

Example-2: T.I.Tr., page 13;

Q: Okay. Were you still laying on your stomach when he put his thing in you?

A: (No audible response).

Q: And his thang, what you call his thang? What do you call his thang in you?

A: Um

Q: Where is that?

A: Um

Q: Do you understand that? You said he put his thank in you. What thang?

A: (No audible response).

Q: Okay. You called it a pee, a thang, and you called it a middle ... okay ...

(* Here, the interviewer is not getting the answer that she wanted from Maria, so she simply provides Maria with the answer).

Example-3: T.I.Tr., page 15; In regards to how her legs were, Ms. Lewis asked:

Q: How was your legs, like when you were on your stomach? Were they straight like this girl, or were your legs some other way?

A: Like straight.

Q: Okay. All right. Uh, and did he ever move your legs at all from each other?

A: (No audible response).

Q: Tell me about that.

A: He had moved my legs.

(* Here, at the suggestion that he moved her legs, Maria agreed).

Example-4: T.I.Tr., page 17;

Q: Did your uncle ever say anything after he finished doing this to you?

A: (No audible response).

Q: Did he say anything to you before he started?

A: (No audible response).

Q: Okay. Did he ever tell you about telling somebody about what happened? What did he say?

A: He told me not to tell anybody.

Q: Okay, did he say what would happen if you told somebody, or he just said don't tell nobody?

A: He just said don't tell.

(* Once again, Maria does not give the desired response, therefore Ms. Lewis leads her into the desired answer).

Example-5: T.I.Tr., page 22:

Q: Okay. I think I asked you this at first, and you don't have to change your answer. I asked you ... I'm talking about the time you were on the couch. Let's talk about that first. When ... when Marvin put his thang on top of your coochie, what did it feel like? Do you know? Can you explain it to me? Did it hurt or it did not or what?

A: (No audible response).

Q: What made it hurt? What was hurting?

A: Him.

Q: What to you mean him? What was hurting?

A: My coochie.

Q: Your coochie was hurting. Okay. Was your coochie hurting on top or inside or something else?

A: I don't know.

Q: Do you know what was hurting?

A: (No audible response).

Q: You don't? Okay. What about the time upstairs? Did your coochie hurt at all then? What made it hurt?

A: Him.

(* As one can see in this exchange, Maria seems to be getting confused by the questions. However, Ms. Lewis is asking her leading questions in order to obtain the desired results).

The above five examples show how Maria was led through the forensic interview to provide the specific answers that were desired. Ms. Lewis had talked about asking open ended questions and not boxing the child into requiring them to choose one answer or another. These examples prove that statement false, as Maria is not only boxed into having to choose one answer over another, she was also prompted by the interviewer and lead toward specific answers.

Petitioner's trial counsels had a duty to give their clients the best defense possible. This is only possible through diligent research, investigation, and preparation. Counsels failed to prepare for the witness and offered no cross-examination. Failing to cross-examine this witness should be considered as ineffective assistance of counsel. Doing nothing is not a sound trial strategy. The Petitioner Davis was denied his 6th Amendment right to the effective assistance of counsel when they decided to do nothing with this State's witness. This failure resulted in additional prejudice which effected the outcome of the trial.

The State alleged that the Petitioner Davis failed to meet the requirements of Strickland, however, the Petitioner asserts that he has met both of the Strickland components when he addressed his issue in the Post-Conviction Court. To meet the first component, the Petitioner points out that counsel failed to object to two (2) instances where hearsay statements were introduced by a witness testifying during trial. Neither of these instances would have qualified as an exception to the hearsay rule and were not admissible via Rule 613(B) nor 803(26)(B) of the Tenn. Rules of Evidence since they were not prior inconsistent statements. Next, defense counsels referred to the alleged victim's disclosure statement of multiple occurrences during trial,

while cross-examining the State's witnesses, repeatedly bringing up the statement that "Marvin had freaked on her." The jury's constant reminder of this statement by the Petitioner's own trial counsels may led the jury to believe that his own counsels thought that he was guilty of the crime. Next, counsels failed to follow up on the Rule 412 Motion that would have introduced other statements made by the victim that she had been "messed with" by others. Such information could have been used to impeach the witness and create reasonable doubt. In addition to these issues, trial counsels also failed to prepare for any cross-examination of the State's witness, Patricia Lewis, regarding the contents of the forensic interview. This failure left nothing to introduce that would have discredited the methods used when conducting a forensic interview. A thoroughly researched and well prepared cross-examination could have impeached the credibility of that interview. These failure are more than enough to meet the first Strickland component.

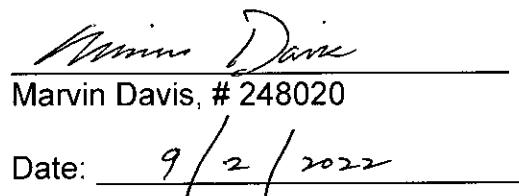
To meet the second Strickland component, it is fair to say that had these errors not occurred during the course of the trial, it is possible that the outcome of this trial would have been different. More specifically, had the jury had the opportunity to hear that the alleged victim had also made accusations that she had been "messed with" by other peoples other than the Petitioner, such evidence would have provided reasonable doubt into the minds of the jury and with reasonable doubt, they could not convict the Petitioner. There are reasonable probability that the outcome of the trial would have been different under *William v. Taylor*, 529 U.S. 362, 405 ~ 406 (2000). This probability is more than enough to satisfy the second component of Strickland.

Therefore, under the standard of *Strickland v. Washington*, 466 U.S. 668, 690, 104 S.Ct. 2052, 80 L.Ed. 679 (1984), Petitioner Davis was denied the effective assistance of counsel when his trial counsel failed to prepare for a cross-examination of the State's witness, Patricia Lewis, the Child forensic interviewer.

CONCLUSION

The Petition for writ of certiorari should be granted.

Respectfully submitted,



Marvin Davis, # 248020
Date: 9/2/2022