No. 17-5329

In the United States Court of Appeals for the Sixth Circuit

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

RONALD W. PAUL,
Defendant-Appellant.

On Appeal from the United States District Court
for the Middle District of Tennessee
No. 2:12-cr-00005 (The Hon. Aleta A. Trauger)

BRIEF FOR THE UNITED STATES

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STATEMENT REGARDING ORAL ARGUMENT

The government does not oppose Defendant-Appellant Ronald W. Paul's request for oral argument.

STATEMENT OF JURISDICTION

Defendant-Appellant Ronald W. Paul appeals from the final judgment in this criminal case. The district court (Haynes, J.), which had jurisdiction under 18 U.S.C. § 3231, entered its judgment on July 1, 2015. Judgment, R.128, Page ID #395.[1] Paul filed a timely notice of appeal on July 10, 2015. Notice of Appeal, R.131, Page ID #436. On May 24, 2016, this Court remanded for further proceedings in light of the Supreme Court's decision in *Nichols v. United States*, 136 S. Ct. 1113 (2016). On remand, the district court (Trauger, J.) sustained one count of conviction but vacated two others. Order, R.176, Page ID #1208. On March 21, 2017, Paul filed a timely notice of appeal. Notice of Appeal, R.177, Page ID # 1209. This Court has jurisdiction under 28 U.S.C. § 1291.

ISSUE PRESENTED

Whether the district court correctly denied Paul's motions to dismiss the indictment on the ground that Paul's sex offense conviction under Tennessee law required him to register under the federal Sex Offender Registration and Notification Act ("SORNA"), 42 U.S.C. §§ 16901 *et seq*., regardless of the

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[1] Similar to Paul's brief ("Br."), the government's abbreviations refer to the district court's docket entry ("R."), the PageID range ("#"), the trial transcript ("Tr."), and the government exhibit number ("GEX"). The government's appendix ("App.") filed alongside this brief reproduces the cited trial exhibits, including one defense exhibit.

validity of a Tennessee state court judgment purporting to excuse Paul from a requirement to register as a sex offender under state law.

STATEMENT OF THE CASE

Following a three-day trial, a jury convicted Ronald W. Paul on three counts of traveling in interstate and foreign commerce and knowingly failing to update his sex offender registration, in violation of 18 U.S.C. § 2250(a). The district court subsequently vacated two counts following a remand from this Court. Paul was sentenced to two months of incarceration, which he had already served; fourteen months in a halfway house; and five years of supervised release. Judgment, R.128, Page ID #396-98; Sentencing Tr., R.130, Page ID #429-30; 433.

I. Relevant Facts

A. Paul's Sex Offense Conviction

In 1995, a Robertson County, Tennessee jury heard facts establishing that over a four-year period, Paul raped and sexually abused his stepdaughter, who was eleven when the sexual assaults began. *State v. Paul*, No. 01C01-9511-CC00358, 1997 WL 578969, at *1 (Tenn. Crim. App. Sept. 19, 1997). Following his arrest, Paul tried to hire someone to kill his stepdaughter and her mother. *Id.* at *1 n.2. But when Paul learned that the individual he had solicited to commit the murders was in fact an undercover agent for the Tennessee Bureau of

Investigation ("TBI"), Paul withdrew his request. *Id.* The jury convicted Paul on three counts of rape, one count of aggravated sexual battery, and two counts of sexual battery. *Id.* at *1. Paul was sentenced to 32 years of incarceration. *Id.* The Tennessee Court of Appeals affirmed, rejecting Paul's sole argument on appeal that the trial court erred in admitting a nurse practitioner's testimony identifying Paul as the perpetrator. *Id.*

Some procedural complications ensued. In 1999, Paul timely delivered to prison authorities a *pro se* state post-conviction petition alleging ineffective assistance of trial and appellate counsel, but he addressed the envelope to the wrong city. *Paul v. State*, 75 S.W.3d 926, 927 (Tenn. Crim. App. 2001). The Robertson County Circuit Court dismissed Paul's petition as untimely, but the Tennessee Court of Criminal Appeals reversed. *Id.* at 929. In 2002, Paul (now assisted by counsel) filed an amended post-conviction petition, which resulted in the Robertson County court granting him a "delayed appeal" of his 1995 conviction and dismissing without prejudice his other claims. *State v. Paul*, No. M2002-00810-CCA-R3-CD, 2003 WL 716269, at *1 (Tenn. Crim. App. Mar. 3, 2003). But the Tennessee Court of Criminal Appeals dismissed that delayed appeal and concluded that the Robertson County court erred in "summarily" dismissing Paul's remaining ineffective assistance of counsel claims. *Id.* at *2.

In 2006, the Robertson County court entered a 55-page order addressing Paul's various post-conviction claims. *Paul v. State*, No. 9310 (Robertson Cnty Cir. Ct. July 14, 2006) (unpub.) (appended to this brief as addendum A). The court rejected most of those claims, but held that Paul's appellate counsel had been ineffective in failing to challenge on direct appeal the admissibility of TBI tape recordings related to the murder-for-hire scheme. *Id.* at 48-52. The court therefore ordered a new trial, *id.* at 55, and Paul was released from custody.

The following year Paul and the state of Tennessee entered a plea agreement. App. 1-2 (admitted at trial as Def. Ex. 1; *see* Trial Tr., R.139, Page ID #773-74) Under that agreement, the five counts of which Paul had been convicted in 1995 were dismissed, and Paul agreed to plead no contest to one count of rape and to receive a time-served sentence of 11 years and 11 months. *Id.* at 1. One of the special conditions under the plea agreement was that Paul would not have to register as a sex offender under Tennessee law. *Id.* On February 16, 2007, the Robertson County court entered a judgment against Paul consistent with the terms of the plea agreement, including a notation that "nor shall the defendant be required to comply w/ the sexual offender registry." Robertson County Judgment, R.22-1, Page ID #37.

B. Paul's Failure to Register in Compliance with Federal Law

Paul was released from state custody on July 10, 2006, App. 1 (plea agreement), and registered as a sex offender seven days later at the Jackson County (Tennessee) Sheriff's Office, Trial Tr., R.139. Page ID #666; GEX 1. When Paul first registered on July 17, 2006, Lisa Meadows, who was the sex offender registration officer at the Jackson County Sheriff's Office, spent 30 minutes reviewing the requirements with Paul to ensure that he understood his registration obligations and then provided him with a copy of the registration instructions. Trial Tr., R.139, Page ID #664-68. Paul signed a form under penalty of perjury indicating that he had read and understood various reporting requirements for sex offenders, including the requirement under Tennessee law that he report in person to a law enforcement agency within 48 hours of a change of address. Trial Tr., R.139, Page ID #646-48; GEX 1. Paul complained to Meadows that he did not know why he had to register, but she told him that the TBI—not she—was responsible for determining who was required to register. Trial Tr., R.139, Page ID #665.

On February 27, 2007 (which was 16 days after entry of the Tennessee judgment that included the notation that he did not have to register, *see* Robertson County Judgment, R.22-1, Page ID #37), Paul registered again at the Sheriff's Office. Trial Tr., R.139, Page ID #666. At that time, he updated his

registration form with a change of address. Trial Tr., R.139, Page ID #665; GEX 2. Paul continued to register at the Jackson County Sheriff's Office at regular intervals throughout 2007, 2008, and up to March 2009, each time acknowledging a duty to register under state law. GEX 3-11. On a number of these occasions, Paul complained that he did not understand why he was required to register. Trial Tr., R.139, Page ID #680; 695; 723.

The registration form Paul signed in March 2009 indicated that he was classified as a "violent sexual offender[]" under Tennessee law and therefore required to register four times a year, in March, June, September, and December. *Id.* at #706; GEX 11. That form also indicated that violent sex offenders must pay an annual $150 administrative fee, which Paul paid. Trial Tr., R.139, Page ID #706.

Following his March 2009 registration, Paul did not register until December 31, 2009. *Id.* at #655. The December 2009 registration form that Paul signed included a notification that under federal law "persons with sex offense convictions must register . . . in each jurisdiction (state or territory)" in which they reside, and that a failure to do so could subject an individual to prosecution "under federal law, 18 U.S.C. § 2250 . . . which may be independent of any additional state law violations." GEX 12, App. 51. Paul did not register again after December 2009. Trial Tr., R.139, Page ID #645.

In October 2010, Deborah Gillihan, a jail administrator for the Jackson County Sheriff's Office, noticed that Paul had failed to report for a number of months. *Id.* at #710; 713. She called a phone number listed for next of kin on his most recent registration form, and reached Deborah Hancock, Paul's daughter. *Id.* at #711. Two days later, Gillihan received a call from Paul, who told her that he was in the Philippines. *Id.* Gillihan subsequently used information from the files of the Jackson County Sheriff's Office and Paul's flight itineraries (provided by the United States Marshal Services, *see* GEX 13 and GEX 21 (stipulation that GEX 13 is accurate)) to create a calendar showing when Paul had registered at the Sheriff's Office and when he was abroad in the Philippines. *Id.* at #714-16. In addition to travel in 2007 and 2008, Paul spent approximately four months in the Philippines in 2009; eleven months there in 2010 and 2011; and three months in 2012. GEX 14, App. 66-71. During April 2011, Paul was living with his daughter in Tennessee and went in person to register vehicles at a Jackson County office, Trial Tr. R.139, Page ID #721; 731, but did not register as a sex offender at the Jackson County Sheriff's Office.

II. Procedural History

In May 2012, a federal grand jury indicted Paul on one count of knowing failure to update a registration as required under federal law between March and May 2011, in violation of 18 U.S.C. § 2250. Indictment, R.1, Page ID #1-2. Paul moved to dismiss the indictment, principally arguing that his 2007 state court judgment excused any state duty to register as a sex offender and that federal law did not impose any duty to register distinct from the state requirement. Mtn. to Dismiss, R.22, Page ID #32-36. The district court denied that motion. Order, R.34, Page ID #73. The district court granted Paul's motion for reconsideration to address an additional argument Paul raised, but again denied the motion to dismiss the indictment. Order, R.37, Page ID #78-80. The case proceeded to trial but ended in a mistrial. Minute Entry, R.59, Page ID #134.

In January 2013, a federal grand jury returned a superseding indictment charging Paul with three violations of § 2250. Indictment, R.65, Page ID #194-95. In addition to charging (as Count Three) the failure to register in the spring of 2011, Counts One and Two charged failure-to-register offenses in July 2009 and October 2009, respectively. *Id.* Paul again moved to dismiss the indictment, making the same principal argument but also claiming that the government could not collaterally attack the validity of the Tennessee state court judgment.

Mtn. to Dismiss, R.80, Page ID #240-53. The government contended that Paul was required to register under Tennessee law because the state court judgment was invalid, but that in any event Paul's duty to register under federal law was "separate and distinct" from his registration obligation under Tennessee law. Gov. Response to Mtn. to Dismiss, R.85, Page ID #266. The district court denied Paul's motion, concluding that Paul had a duty to register under federal law as a result of his Tennessee rape conviction, which "was unaffected by the disputed state court judgment absolving him of his state duty to register." Mem. Opinion, R.88, Page ID #287. The district court therefore did not reach the parties' contested arguments about the validity of the state court judgment. *Id.* at #287-88.

Before trial, the government filed a motion in limine to preclude Paul from arguing that the state court judgment excused him from the legal obligation to register as a sex offender. Mtn. in Limine, R.95, Page ID #301-02. Paul did not file a response. The district court ruled that Paul could not offer the state court judgment as a legal defense, but could rely on that judgment to "explain why he did what he did," Trial Tr., R.138, Page ID #486, *i.e.*, the jury could consider the judgment in deciding whether Paul knowingly failed to update a registration, *see, e.g.*, Trial Tr., R.140, Page ID #873 (jury instruction explaining Paul's theory of defense that he "was in possession of a valid Tennessee judgment . . . that

excluded him from the obligation to register . . . under Tennessee law; and as such, he did not knowingly fail to register under [federal law]").

The case proceeded to trial. A conviction under § 2250(a) requires the government to prove that a person (1) "is required to register under [SORNA]," (2) "travels in interstate or foreign commerce," and (3) "knowingly fails to register or update a registration as required by [SORNA]." *United States v. Trent*, 654 F.3d 574, 579 (6th Cir. 2011). Paul stipulated that his rape conviction required him to register under SORNA and that he had engaged in foreign travel. Trial Tr., R.139, Page ID #659-60; GEX 23, 21. Having heard the other evidence recounted above, the jury convicted Paul on all three counts.

Paul appealed, raising arguments materially identical to those raised in his opening brief. *Compare* Appellant Brief, No. 15-5754 (filed Oct. 30, 2015) *with* Appellant Brief, No. 17-5329 (filed May 2, 2017). While that appeal was pending, the Supreme Court held in *Nichols v. United States*, 136 S. Ct. 1113 (2016), that a sex offender who abandoned his residence in the United States and moved abroad without reporting that change of address to any authorities had not violated SORNA and therefore could not be prosecuted under 18 U.S.C. § 2250. *Id.* at 1117-18. After soliciting additional briefing from the parties on *Nichols*, this Court determined that the "issue of residence" in Paul's case was "not adequately litigated" below. Order, No. 15-5754 (May 24, 2016) at 1. The

Court therefore remanded for "further proceedings in light of *Nichols*." *Id.* Judge Merritt concurred, but would have further held that *Nichols* required dismissal of Counts One and Two. *Id.* at 2-7.[2]

On remand, the district court analyzed whether, under *Nichols*, Paul's convictions were sound. *See* Memorandum, R.175, Page ID #1192-1207. It vacated Counts One and Two, reasoning that those counts improperly charged a failure to register before Paul had traveled in foreign commerce. *See id.* at #1202-05. In contrast, the district court concluded that the evidence adequately supported his failure-to-register conviction on Count Three because Paul was residing in Tennessee between March 31, 2011 and May 5, 2011. *Id.* at #1205-07. The district court upheld that conviction and concluded that the "interests of justice" did not require a new trial on that count. *Id.* at #1206-07.

[2] Paul incorrectly states (Br. 20) that this Court "vacated" his convictions based on *Nichols*. But the Court did not vacate the judgment; it ordered only a remand for further proceedings. *Cf. United States v. Powell*, 847 F.3d 760, 782 (6th Cir. 2017) (Court "vacate[s]" convictions and remands for entry of acquittal on one count and "further proceedings" on other counts); *see also United States v. Zimny*, 846 F.3d 458, 472 (1st Cir. 2017) (concluding that a limited remand "for further investigation" was preferable to "vacating [the defendant]'s conviction outright and ordering a new trial"). The district court appropriately treated this Court's order as a limited remand to consider only the effect of the *Nichols* decision on Paul's case. *See* Memorandum, R.175, Page ID #1193-94.

III. Ruling Presented For Review

Paul now renews his challenges to the district court's orders denying his first motion to dismiss the indictment (R.34), denying that motion on reconsideration (R.37), and denying his motion to dismiss the superseding indictment (R.89). Paul also appeals the district court's order sustaining his conviction on Count Three following remand from this Court (R.176), but does not challenge the district court's conclusion that *Nichols* requires neither acquittal nor a new trial on that count.

SUMMARY OF ARGUMENT

1. The federal Sex Offender Registration and Notification Act ("SORNA"), 42 U.S.C. §§ 16901 *et seq.*, creates a federal duty for a federally-defined sex offender to register in the jurisdiction where he resides, works, or studies. § 16913. SORNA also imposes federal punishment for the failure to do so. 18 U.S.C. § 2250(a). Paul violated § 2250(a) because his 2007 Tennessee rape conviction required him to register under SORNA, he traveled in foreign commerce, and he knowingly failed to update his sex offender registration. The fact that a notation on the 2007 Tennessee judgment purported to excuse Paul from the obligation to register as sex offender under Tennessee state law is immaterial to Paul's independent federal duty to register under SORNA.

2. Paul was not precluded from putting on a defense when the district court prevented him from arguing to the jury that the Tennessee judgment legally excused him from registration as a sex offender under federal law. The district court properly determined that such a defense was legal in nature, and therefore not the province of the jury. In any event, Paul articulated that very argument to the jury and otherwise made ample use of the Tennessee judgment in his defense.

ARGUMENT

I. THE DISTRICT COURT CORRECTLY DENIED PAUL'S MOTIONS TO DISMISS THE INDICTMENT BECAUSE PAUL VIOLATED A FEDERAL DUTY TO REGISTER AS A SEX OFFENDER, IRRESPECTIVE OF THE VALIDITY OF THE TENNESSEE STATE COURT JUDGMENT.

Paul argues (Br. 26-54) that he did not violate his duty to register under the federal Sex Offender Registration and Notification Act ("SORNA"), 42 U.S.C. §§ 16901 *et seq.*, because he had no such duty. That argument rests on two premises: (1) the obligation to register as a sex offender under SORNA arises only when there is an obligation to register under state law, and (2) Paul had no obligation to register under state law. The first premise is flawed, as the district court concluded, so there is no need to address the second. SORNA's plain language, its purpose, and relevant authorities interpreting the statute establish that SORNA creates a federal registration duty that is independent of state law.

Paul violated that federal duty when he failed to update his sex offender registration. The validity of the Tennessee judgment purporting to excuse Paul from registering under state law is immaterial to his duty to register under federal law.

A. Standard of review.

This Court reviews the denial of a motion to dismiss the indictment for abuse of discretion. *United States v. Coleman*, 675 F.3d 615, 619 (6th Cir. 2012). When, as here, a defendant challenges a district court's "purely legal determinations" such as the applicability and construction of SORNA, the Court reviews such determinations *de novo*. *United States v. Felts*, 674 F.3d 599, 602 (6th Cir. 2012).

B. SORNA creates a federal duty to register as a sex offender that is independent of state law.

Whether a sex offender's duty to register under SORNA arises under federal law or is instead, as Paul contends (Br. 33), "solely a function of his status under state law" is a question of statutory interpretation for which the Court looks primarily to the statute's language and structure. *See United States v. Roman*, 795 F.3d 511, 515 (6th Cir. 2015); *United States v. Miller*, 734 F.3d 530, 540 (6th Cir. 2013). The language and structure of SORNA's many interlocking provisions establish both a federal duty for sex offenders to register and federal punishment for a failure to do so.

1. Consider first the registration requirement. SORNA imposes, as a matter of federal law, a mandatory requirement that every sex offender "register, and keep the registration current, in each jurisdiction where the offender resides, where the offender is an employee, and where the offender is a student." 42 U.S.C. § 16913(a). The statute provides that a sex offender "shall initially register" either "before completing a sentence of imprisonment with respect to the offense giving rise to the registration requirement" or, "if the sex offender is not sentenced to a term of imprisonment," "not later than 3 business days after being sentenced for that offense." § 16913(b).

Federal law also determines who is required to register. Most basically, SORNA requires registration of an "individual convicted of a sex offense." 42 U.S.C. § 16911(1). The statute thus makes clear that federal "registration requirements are predicated on convictions," not on the existence or absence of a state-law registration requirement. Office of the Att'y Gen., U.S. Dep't of Justice, *The National Guidelines for Sex Offender Registration and Notification* (*National Guidelines*), 73 Fed. Reg. 38,030, 38,050 (July 2, 2008). Accordingly, Paul's *conviction* for rape under Tennessee law gave rise to his federal duty to register as a sex offender.

Moreover, instead of relying on state-law definitions, SORNA federally defines "sex offense," § 16911(5), and federally classifies sex offenders in "tiers"

according to the severity of their sex offense conviction, § 16911(2)-(4). These tiers, in turn, establish the number of years a sex offender must register as a matter of federal law, § 16915, and how many in-person visits a sex offender must make annually, § 16916. In short, SORNA creates and carefully prescribes a federally-defined sex offender's federal registration requirements.

SORNA also establishes a federal punishment for failure to comply with this federal registration requirement. *See* 18 U.S.C. § 2250. The statute's plain language indicates it reaches only a person who is required to register "under" SORNA and who knowingly fails to register or update a registration "as required by" SORNA. § 2250(a)(1) and (3). The jurisdictional element of § 2250(a) ensures that the federal government can only prosecute an individual whose sex offense conviction arose under federal law or who has traveled in interstate or foreign commerce. § 2250(a)(2). SORNA does not, however, "draw[] a sharp initial distinction between state sex offenders . . . and federal sex offenders." *See* Br. 28. Section 2250 applies only to a sex offender who has, and has violated, a federal registration requirement, and does not extend to any state-law sex offender whose conviction does not require registration "under" SORNA. § 2250(a)(1); *see also National Guidelines*, 73 Fed. Reg. at 38,046 (noting that in setting "minimum national standards," SORNA established a "floor,"

not a "ceiling," and that states may still "require[] registration by broader classes of convicted offenders than those identified in SORNA").

Interpreting the duty to register under SORNA as arising under federal law—and therefore distinct from any state-law requirement—is consistent with and facilitates SORNA's purpose. *See United States v. Zabawa*, 719 F.3d 555, 560-61 (6th Cir. 2013) (a statute should be construed so as not to frustrate its purpose). Congress enacted SORNA in 2006 to "establish[] a comprehensive national system for the registration of [sex] offenders." 42 U.S.C. § 16901; *United States v. Utesch*, 596 F.3d 302, 306 (6th Cir. 2010). Faced with "a patchwork of federal and 50 individual state registration systems," *Reynolds v. United States*, 565 U.S. 432, 435 (2012), Congress created a uniform federal registration duty to deal with "loopholes and deficiencies" that had resulted in an estimated 100,000 "missing" or "lost" sex offenders, H. Rep. No. 109-218 (Pt. 1), pp. 20, 23, 26 (2005). Predicating a duty to register as a sex offender under SORNA—and a violation of that duty—on a state-law registration requirement (and violation) would frustrate SORNA's purpose by re-imposing the very patchwork SORNA was designed to replace. *Cf. United States v. Del Valle-Cruz*, 785 F.3d 48, 55 (1st Cir. 2015) (noting that in light of SORNA's purpose of establishing greater uniformity, it would be "illogical" to allow individual states to determine the scope of the federal registration requirement).

As the Supreme Court has recognized, SORNA "punishes violations of its requirements instead of violations of state law." *United States v. Kebodeaux*, 133 S. Ct. 2496, 2505 (2013) (punctuation omitted). This is so because SORNA creates a "federal duty to register [that] is not dependent on whether [a sex offender] has a duty under state law to register." *United States v. Morales*, 258 F.R.D. 401, 405 (E.D. Wash. 2009). It follows that a sex offender's failure to register under federal law subjects that sex offender to federal punishment, regardless of any state-law requirements. *See United States v. Gould*, 568 F.3d 459, 464 (4th Cir. 2009) ("[Defendant]'s failure to register in Maryland was a federal crime under 18 U.S.C. § 2250(a), subject to federal punishment[.]" (emphasis omitted)); *see also United States v. Hann*, 574 F. Supp. 2d 827, 833 (M.D. Tenn. 2008) ("Conviction for failure to register under § 2250(a) is predicated on the defendant's duty to register under [42 U.S.C.] § 16913.").

That view is consistent with two sets of decisions that are relevant here. First, it is consistent with the decisions of this Court—and every court of appeals to have decided the issue—that a sex offender's federal duty to register does not depend on whether a state has implemented reforms called for under SORNA.[3]

[3] SORNA directed states to implement various reforms and permitted states until July 27, 2009, to comply. 42 U.S.C. § 16924. Failure to "substantially implement" SORNA's reforms results in the loss of ten percent of funds otherwise available to a state under the Omnibus Crime Control and Safe Streets Act. § 16925.

Felts, 674 F.3d at 603-04 (holding that the "duty of an offender to register is independent of whether or not the state has implemented SORNA" and concurring with reasoning in cases from six other circuit courts). Those cases recognize that a state, in choosing not to implement SORNA (and thereby foregoing federal funding), may have different registration requirements than what SORNA mandates, but that the state's "failure to implement a federal law . . . does not give sex offenders a reason to disregard their federal obligation to update their state registrations." *United States v. Shenandoah*, 595 F.3d 151, 157 (3d Cir. 2010), *abrogated on other grounds by Reynolds*, 565 U.S. 432. Thus, SORNA imposes a federal duty to register as a sex offender and federal punishment for failing to do so, which no state action or inaction can alter.

Second, interpreting SORNA to impose a federal registration obligation independent of any state-law requirement follows from the Supreme Court's recent decision in *Nichols*. The Court in *Nichols* twice emphasized the difference between the specific (and in that case more limited) registration requirements that SORNA imposed and the separate duties imposed by the state (there, Kansas). *See* 136 S. Ct. at 1118 (explaining that Kansas law, but not SORNA, imposed "a duty to notify, among other entities, 'the registering law enforcement agency or agencies *where last registered*'" (quoting Kan. Stat. Ann. § 22-4905(g)); *id.* at 1119 (referring to same state-law registration obligation when noting that

the Court's interpretation of SORNA "in no way means" that Nichols would be able to "escape punishment" by leaving the country without informing the jurisdiction where he had been living). *Nichols*, in short, underscores that federal and state-law registration duties are separate and that the presence (or absence) of one does not necessarily affect the other.

2. Paul's contrary arguments lack merit. Although Paul appears to acknowledge that SORNA creates a distinct federal duty to register as a sex offender, *see, e.g.*, Br. 23 & 30, he contends that the "real-world application of SORNA"—under which a federally-defined sex offender typically registers at a state facility—entails that a sex offender's "legal status under SORNA is solely a function of his status under state law," *id.* at 31-33. His contention is flawed for several reasons.

First, it ignores the language and structure of SORNA, which nowhere predicates the federal duty to register, or the federal punishment for failing to register, on a violation of any state-law duty. *See* Mem. Opinion, R.88, Page ID #287 ("SORNA does not contain any language that ties a federal obligation to register as a sex offender under SORNA to an obligation to register as a sex offender under state law."). Congress can mandate compliance with state-law requirements as a matter of federal law, *see Kebodeaux*, 133 S. Ct. at 2502; *United States v. Sharpnack*, 355 U.S. 286, 293-94 (1958), but did not do so when it

enacted SORNA. Instead, SORNA directs federally-defined sex offenders to register in the jurisdictions—states and various federal enclaves, *see* 42 U.S.C. § 16911(10)—where they reside, work, or study, § 16913. That individuals required to register under SORNA often do so at a state facility does not transform that federal registration requirement into a state-law obligation.

Paul's suggestion (Br. 46-47) that Section 16913(a)'s "plain language" ties the federal registration requirement "directly" to a state-law registration requirement is incorrect. He quotes the statutory language correctly—*see* Br. 46 (Section 16913(a) requires a sex offender to register in "each jurisdiction where the offender resides, . . . is an employee, [and] is a student")—but draws the wrong inference. If Congress sought to link the federal registration requirement to state registration laws, it could have done so explicitly by imposing a federal registration requirement only on those persons "required to register in a jurisdiction's sex offender registry," the language Congress used in 42 U.S.C. § 16919(a). Instead, Congress required any sex offender with a qualifying sex offense conviction to register wherever in the county he resides (or works or studies) without regard to state-law registration requirements. *See* § 16913(a).

Section 16919 also undermines Paul's claim (Br. 27, 52) that SORNA does not create a federal registration system. He is correct that the statute did not duplicate the existing state systems by creating a parallel system of federal

registration facilities. But the national registry that SORNA did create encompasses both "each sex offender" as defined under federal law and "any other person required to register in a jurisdiction's sex offender registry." 42 U.S.C. § 16919(a). Thus, even if Paul falls outside the second category as a result of the Tennessee judgment, he still falls squarely within the first category—and thus squarely within SORNA's federal, national registry.

Similarly, that SORNA urges covered jurisdictions to implement various reforms—and withholds funds from jurisdictions that do not substantially implement those reforms, *see supra* note 3—is a feature of the statute distinct from the federal registration duty. Paul confuses (Br. 29) these two different statutory features by lumping them together and describing SORNA as a "dual state/federal statute." To be sure, the features complement each other in an effort to establish a comprehensive national registry of sex offenders. But they operate distinctly. Registering as a sex offender under SORNA is a federal *requirement* with which a sex offender can comply by registering in a state or other SORNA jurisdiction. 42 U.S.C. § 16913. By contrast, a given state may decide whether to implement SORNA, with the only consequence being the loss of federal funds. § 16925; *see Shenandoah*, 595 F.3d 157 (acknowledging that states may never implement SORNA). The federally-defined sex offender's duty

to register under SORNA does not turn on whether a state has substantially implemented SORNA. *Felts*, 674 F.3d at 603-04.

But under Paul's theory, it would. That theory is both under- and over-inclusive. In Paul's view, a state's decision to ignore SORNA and impose no registration obligations for any defendant convicted of a sex offense would excuse all those defendants from any registration obligation under either state or federal law. Conversely, his view would appear to impose a *federal* registration duty even when state law required registration as a prophylactic measure in the absence of any sex offense conviction. *See National Guidelines*, 73 Fed. Reg. at 38,046 (states may "require[] registration by broader classes of convicted offenders than those identified in SORNA"). Neither view finds support in SORNA's plain language or structure.

Paul's reading of SORNA would also subvert the statute's purpose. That reading—that a registration obligation arises "under SORNA" only for an offender with a state-law registration obligation—risks a return of the ineffective "patchwork" that precipitated SORNA's enactment in the first place. *See Reynolds*, 565 U.S. 435; *see also supra* at 17. Congress imposed a standalone federal registration duty on sex offenders in light of "the lack of basic uniformity and effective operation among the various States in administering sex registry programs." H. Rep. No. 109-218 (Pt. 1), p. 24. Paul's interpretation of SORNA

would reintroduce that disuniformity by relying on the quirks of state registration systems to determine the scope of federal criminal liability under Section 2250. Indeed, it is precisely for a case such as this one, involving an offender convicted of raping his minor stepdaughter, that Congress sought to legislate a comprehensive national sex offender registry. *See id.* at 22 (noting, in a section addressing the need for SORNA, that "sexual victimization of children is overwhelming in magnitude and largely unrecognized and underreported").

Furthermore, no case law supports Paul's reading of SORNA. Paul's claim (Br. 29) that courts have "wrestled with" whether § 2250(a) either imposes an independent federal duty to register or relies on a state-law registration obligation is inaccurate. As described above, courts have consistently interpreted SORNA to create an independent federal duty.[4] Other than Justice Thomas's dissenting opinion in *Kebodeaux*, Paul relies (Br. 29-30) for this claim

[4] In addition to the cases cited above, see also *United States v. Billiot*, 785 F.3d 1266, 1269 (8th Cir. 2015) ("Although SORNA requires states to 'maintain a jurisdiction-wide sex offender registry,' SORNA imposes an independent *federal* obligation for sex offenders to register that does not depend on, or incorporate, a state-law registration requirement."); *Kennedy v. Allera*, 612 F.3d 261, 263 (4th Cir. 2010) ("SORNA lawfully imposes, as a matter of federal law, registration obligations directly on sex offenders."); *United States v. Goguen*, -- F. Supp. 3d --, 2016 WL 6495436, at *5 (D. Me. 2016) (circuit precedent "makes clear that an offender's obligation to register under the federal SORNA statute is separate from the offender's duty to register under state law. Thus, even though Mr. Goguen was not required to register under Maine's sex offender registry law, he still needed to register federally under SORNA.").

only on *United States v. Waybright*, 561 F. Supp. 2d 1154, 1164-65 (D. Mont. 2008) (holding that SORNA's registration requirement in 42 U.S.C. § 16913, as applied to offenders who had not traveled out of state, violated the Commerce Clause). But the Ninth Circuit explicitly disapproved of the reasoning in *Waybright*, *United States v. George*, 625 F.3d 1124, 1129 n.2 (9th Cir. 2010), *vacated on other grounds*, 672 F.3d 1126 (9th Cir. 2012), before entirely repudiating it, *see United States v. Cabrera-Gutierrez*, 756 F.3d 1125, 1129-32 (9th Cir. 2013) (reaffirming the holding in *George*). Paul repeatedly quotes the dictum from *Kebodeaux* that the government appears to have prosecuted a sex offender under SORNA only when that offender has also violated state registration requirements, but overlooks the clause in the same sentence acknowledging that SORNA punishes not violations of state law, but violations of its own, federal requirements. 133 S. Ct. at 2505.

Nor, as Paul appears to claim, do the cases presuppose that a defendant prosecuted under § 2250 necessarily violated a state-law registration requirement. Paul characterizes (Br. 45) this Court's decision in *Felts*, which held in relevant part that the duty to register under SORNA is a federal obligation independent of Tennessee's implementation of SORNA's reforms, as "entirely premised on the assumption" that the sex offender was required to register under state law. But this Court has not described its precedent in this

manner in *Felts* or any of the other cases Paul cites, *see id.* at 45-46 (citing *Trent*, 654 F.3d 574 and *United States v. Harper*, 502 F. App'x 447, 450 (6th Cir. 2012) (unpub.)), and Paul offers no rationale for reading that assumption into those cases.

Finally, Paul's interpretation of SORNA creates practical problems. Suppose, for example, that a defendant is convicted for a sex offense under Tennessee law. Suppose further that federal law classifies that Tennessee conviction as a tier II sex offense, subjecting the defendant to a 25-year registration requirement, *see* 42 U.S.C. § 16915, but that Tennessee law requires registration for only 15 years. Under Paul's reading of SORNA, that defendant would only be required to register for 15 years because after that point he would no longer have any state-law registration obligation regardless of the longer registration period specified under SORNA. But that reading, which would allow a state to hamstring the more stringent federal registration requirement, contravenes SORNA's goal of "strengthening and increasing the effectiveness of sex offender registration laws." *Gould*, 568 F.3d at 464.

C. Paul violated his federal duty to register as a sex offender.

An individual violates 18 U.S.C. § 2250(a) when he (1) "is required to register under [SORNA]," (2) "travels in interstate or foreign commerce," and (3) "knowingly fails to register or update a registration as required by

[SORNA]." *United States v. Trent*, 654 F.3d 574, 579 (6th Cir. 2011). Paul stipulated at trial that his 2007 Tennessee rape conviction qualified as a sex offense under SORNA and that he traveled in foreign commerce to the Philippines. *See* Trial Tr., R.139. Page ID #659-60. The Tennessee rape statute under which Paul was convicted constitutes a tier III offense, *see* Presentence Investigation Report, R.137, ¶ 24, which requires Paul to register as a sex offender four times a year for his lifetime. 42 U.S.C. §§ 16915, 16916. The jury heard evidence that Paul reported regularly in 2007 and 2008, but only registered twice in 2009, and then did not register again. Those facts established that Paul knowingly failed to update his registration.

Paul's argument to the contrary did not persuade the jury and should not persuade this Court. Indeed, Paul did not appeal, and therefore has not preserved any challenge to, the sufficiency of the evidence supporting his conviction, including the trial evidence establishing that he knowingly failed to update his sex offender registration in violation of federal law. Furthermore, at this point in the litigation, the sole count before this Court involved Paul's failure to register between March 31, 2011 and May 5, 2011. *See supra* at 11. By that time, Paul had signed his December 2009 registration form on which he acknowledged a separate federal duty to register under SORNA. *See* GEX 12, App. 46-51.

D. The validity of the Tennessee state court judgment does not affect Paul's federal duty to register as a sex offender.

Relying principally on the unpublished decision in *United States v. Starnes*, 501 F. App'x 379 (6th Cir. 2012), Paul argues that this Court must treat as valid the language from his 2007 Tennessee rape conviction that purports to excuse him from the duty to register as a sex offender under state law. Br. 33-43. That argument, however, rests on the premise that the duty to register under SORNA arises only when a sex offender has a state-law registration requirement. And as explained above, that premise is faulty: SORNA creates a federal duty to register as a sex offender independent of any state-law requirement. Although there are reasonable arguments that the condition from the Tennessee judgment purporting to excuse Paul from registration under Tennessee law is invalid, *see* Gov. Resp. to Mtn. to Dismiss, R.85, Page ID #259-68, the validity of the state-court judgment is immaterial to Paul's federal duty to register under SORNA.[5]

Accordingly, this Court need not address Paul's federalism-based arguments. Paul argues (Br. 50-54) that treating his 2007 Tennessee state

[5] Paul repeatedly points (Br. 15, 23, 26, 32, 44, 47) to the government's statement during opening that "federal law requires that you follow the state law." Trial Tr., R.139, Page ID #615. That statement is indeed inaccurate to the extent it implies that the federal duty to register under SORNA depends on state-law registration requirements. But to the extent this inaccurate statement amounted to error, which Paul does not claim, it is harmless for two reasons. First, it is a statement concerning the law, about which only the district court is authorized to instruct the jury. *See United States v. Gaudin*, 515 U.S. 506, 513 (1995); *see* Trial

judgment as invalid in the absence of any court order to that effect would violate the Constitution's Full Faith and Credit Clause and the Tenth Amendment, and that a federal law requiring someone in his position to register would violate the anti-commandeering principle articulated in *Printz v. United States*, 521 U.S. 898 (1997). But this Court has rejected a number of those arguments in the SORNA context. *See, e.g.*, *Felts*, 674 F.3d at 606-08 (finding that Congress has not commandeered Tennessee nor any state through SORNA); *United States v. Stock*, 685 F.3d 621, 626 (6th Cir. 2012) (rejecting claim that SORNA violated the Tenth Amendment). In any event, the arguments are beside the point. Even assuming *arguendo* that Paul had no state-law duty to register because of the 2007 Tennessee judgment, he still violated his independent federal duty to register under SORNA.

Paul's federalism-based arguments are also misconceived. For one thing, Paul's arguments undermine principles of federalism because, in his view, a defendant's plea agreement executed in state court for a state criminal law offense could foreclose federal prosecutors and federal courts from assessing whether that defendant's subsequent conduct violated an independent federal

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Tr., R.140, Page ID #864 (jury instructions) ("It is also my duty at the end of the trial to instruct you on the law applicable to the case."). Second, the statement, which was favorable to Paul's theory of the case, may well have made it more difficult for the government to secure a conviction in this case.

law. Paul, however, identifies no authority to support such a far-reaching conception of federalism. Moreover, neither any provision in SORNA nor the district court below failed to give the Tennessee judgment the "force and effect" it deserved (*see Desjardins v. Desjardins*, 308 F.2d 111, 116 (6th Cir. 1962)) under the Full Faith and Credit Clause because neither predicated Paul's federal registration obligation on Tennessee law or on the specific Tennessee judgment in Paul's state case. Similarly, Paul's Tenth Amendment commandeering argument (Br. 52-53) lacks merit because county officials in Tennessee regularly register sex offenders who have no obligation to register under Tennessee law (because their sex offense conviction occurred in another jurisdiction) just as county officials in other states register sex offenders whose convictions arose under Tennessee law.

Paul's as-applied constitutional vagueness challenge, apparently premised on a lack of notice on account of the Tennessee state judgment (*see* Br. 47-49), also lacks merit. To succeed on a void-for-vagueness claim under the Due Process Clause, a defendant must establish that the challenged criminal statute either "fails to provide a person of ordinary intelligence fair notice of what is prohibited, or is so standardless that it authorizes or encourages seriously discriminatory enforcement." *United States v. Williams*, 553 U.S. 285, 304 (2008). A defendant urging the invalidation of a federal statute on vagueness

grounds must overcome "the strong presumptive validity that attaches to an Act of Congress." *Skilling v. United States*, 561 U.S. 358, 403 (2010) (quoting *United States v. Nat'l Dairy Products Corp.*, 372 U.S. 29, 32 (1963)). Paul fails to do so here.

The multiple provisions in SORNA identifying, as a matter of federal law, who must register, how often, where, and the punishment for failing to do so do not render the statute unconstitutionally vague, *see United States v. Bruffy*, 466 F. App'x 239, 244 (4th Cir. 2012) (unpub.) (rejecting vagueness challenge to SORNA), and Paul does not appear to argue otherwise. Instead, he contends (Br. 49) that vagueness arises when he reads on the face of his Tennessee state judgment that he is not required to register as a sex offender under state law. That contention fails for three reasons. First, Paul's argument confuses his conviction for rape under Tennessee law with a collateral consequence—having to register as a sex offender—that flows from that conviction. Paul correctly notes (Br. 49) that SORNA predicates registration on the underlying conviction. *See* 42 U.S.C. § 16911(1). But his conviction—which encompasses only his adjudication of guilt for rape under Tennessee law, *see* Black's Law Dictionary, "conviction" (10th ed. 2014)—clearly brings him within the scope of SORNA's sex offense definition. *See* 42 U.S.C. § 16911(5). Second, Paul's vagueness challenge relies on the same faulty premise that plagues his other arguments.

Paul had no reason to consider state-law registration requirements when determining whether he had an independent federal-law obligation to register under SORNA.

Finally, the relevant facts demonstrate that Paul cannot succeed on his as-applied vagueness claims. The defendant bears the burden to "prove the statute was misleading 'as applied to his particular case.'" *United States v. Lechner*, 806 F.3d 869, 875 (6th Cir. 2015) (citation omitted). In December 2009, however, Paul signed a registration form that that specifically advised him of a separate federal duty under SORNA to register, which carried separate federal punishment for any failure to register. *See* GEX 12, App. 51. Thus, even assuming some initial uncertainty concerning his federal registration obligations, that uncertainty had long since dissipated by the spring of 2011, the date of Paul's failure to register.

Nor can Paul use his vagueness challenge as a vehicle to rehash the trial evidence. The jury heard evidence that Tennessee authorities informed Paul that he was required to register under state law, and Paul signed registration documentation acknowledging his state-law, and in one case, federal-law, registration requirements. *See* Trial Tr., R.139, Page ID #664-68; GEX 3-11. Moreover, Paul registered for a period of time, paid the administrative fee, but then simply stopped. Trial Tr., R.139, Page ID #645, 706. This was more than

sufficient evidence for the jury to conclude (as it necessarily did) that Paul was on notice of, and violated, his federal registration requirement. Paul was free to argue, as he did, that the 2007 Tennessee judgment meant that he lacked notice of that requirement, but the jury did not credit his argument.[6]

II. PAUL WAS NOT PRECLUDED FROM MAKING A DEFENSE.

Paul briefly argues (Br. 54-55) that the district court precluded him from making a defense when it granted the government's motion in limine and prevented Paul from arguing that the 2007 Tennessee state judgment excused him from a registration requirement. That argument is meritless.

A. Background

The government filed a pretrial motion in limine to preclude Paul from arguing that he was not legally required to register under federal or state law. Mtn. in Limine, R.95, Page ID #301-02. The government argued that in light of the district court's denial of Paul's motion to dismiss the indictment on the ground that the Tennessee judgment did not excuse Paul from the federal duty to register, Paul should not be allowed to argue that legal question to the jury.

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[6] Paul does not argue that any inconsistency between Tennessee law and SORNA "render[ed] it impractical, or even impossible, for [him] to register under federal law." *Felts*, 674 F.3d at 605; *see* 18 U.S.C. § 2250(c) (providing affirmative defense to Section 2250 prosecution where "uncontrollable circumstances" prevented a sex offender from registering). For good reason, as the trial evidence established that Paul was able to register at the Jackson County Sheriff's Office without incident.

Id. at 301 (citing *United States v. Gaudin*, 515 U.S. 506, 513 (1995)). The government acknowledged that whether Paul knew he had to register was a factual question for the jury. *Id.* at 302. Paul did not file a response.

At a hearing before jury selection, the district court agreed with the government's view, reasoning that Paul could not argue that the Tennessee judgment provided a legal defense but that he could state what the Tennessee judgment said and "use it to explain why he did what he did." Trial Tr., R.138, Page ID #486. Paul told the district court that he had no objection to that view, and the district court granted the government's motion. *Id.*

B. Standard of Review

Where a party objects to a district court's evidentiary ruling, which includes a ruling on a motion in limine, this Court reviews for abuse of discretion. *United States v. Poulsen*, 655 F.3d 492, 510 (6th Cir. 2011). In the absence of a contemporaneous objection, this Court reviews an evidentiary ruling for plain error. *United States v. Kelly*, 204 F.3d 652, 655 (6th Cir. 2000). Plain error exists if there is an "(1) error (2) that 'was obvious or clear,' (3) that 'affected defendant's substantial rights' and (4) that 'affected the fairness, integrity, or public reputation of the judicial proceedings.'" *United States v. Vonner*, 516 F.3d 382, 386 (6th Cir. 2008) (en banc) (citation omitted).

C. The district court did not err by limiting Paul's use of the Tennessee state law judgment to whether Paul knowingly failed to register under federal law.

Paul contends that the district court erred in its evidentiary ruling because the jury should have heard his argument that the Tennessee state judgment excused him from any federal duty to register as a sex offender, and that such error precluded him from making a defense. That contention misunderstands the law and overlooks the fact that Paul was still able to rely on the state-law judgment in his defense case. Paul failed to object below, so plain-error review applies. But even if the arguments from Paul's motions to dismiss were construed to preserve this claim, the district court's considered ruling was not an abuse of discretion.

Paul's intended jury argument—that the Tennessee state-court judgment legally excused him from a federal registration duty under SORNA—is a purely legal question, to be resolved by a judge. *See Gaudin*, 515 U.S. at 513. Paul concedes (Br. 55) that whether a predicate sex-offense conviction requires the sex offender to register under SORNA is "ordinarily" a purely legal question, but suggests that his case involves "unique and unprecedented facts" distinguishing it from the ordinary case. Not so. The question for the first element of § 2250—whether a defendant was required to register under SORNA—required a legal determination that is outside the province of the jury.

And for the reasons discussed above, the district court correctly determined that the Tennessee state judgment did not absolve Paul from the federal duty to register under SORNA.

To be sure, Paul was not required to stipulate—as he ultimately did, *see* Trial Tr., R.139, Page ID #659-60—that the first element was satisfied. He could have contested the first element and required the jury to find the *fact* that he was convicted of rape under Tennessee law. But Paul was not permitted to ask the jury to nullify the district court's *legal* determination that the Tennessee judgment excused him from any federal registration obligation.

Most importantly, the district court's ruling did not prevent Paul from putting on a defense. Paul could—and did—argue to the jury that the Tennessee judgment facially appeared to excuse him from any state-law registration requirement. Trial Tr., R.139, Page ID #635-36 (Paul opening statement). That argument properly put before the jury the question of whether Paul had *knowingly* failed to register. Indeed, Paul went beyond that and actually told the jury that "if he had no obligation to register under the Tennessee statute, he had no obligation to register under the federal statute." *Id.* at #638. Paul emphasized how he complained about his registration requirement in light of his state plea agreement and the language in the Tennessee judgment. Trial Tr.,

R.140, Page ID #842-46 (Paul closing argument). Paul, in short, put on the very defense that he now claims he was precluded from making.

CONCLUSION

The district court's judgment should be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 8,598 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared on a proportionally spaced typeface using Microsoft Word 2013 in 14-point Calisto MT font.

/s/James I. Pearce

CERTIFICATE OF SERVICE

I certify that, on June 1, 2017, I served an electronic copy of the Brief for the United States on counsel for appellant via the Court's ECF system:

Isaiah S. Gant
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Nashville, TN 37203

s/ James I. Pearce

DESIGNATION OF DISTRICT COURT RECORD

The government designates following documents from the district court record:

Docket No.	Document	Page ID #
R-1	Indictment	1-2
R-22	Motion to Dismiss the Indictment	32-36
R-22-1	Robertson County (Tennessee) Judgment	37
R-27	Government Response to Motion to Dismiss	40-41
R-33	District Court Memorandum in Support of Order	61-66
R-34	Order Denying Motion to Dismiss	73
R-35	Motion for Reconsideration	75-76
R-37	Order Regarding Motion for Reconsideration	78-80
R-59	Minute Entry Noting Mistrial	134
R-65	Superseding Indictment	194-96
R-80	Motion to Dismiss the Indictment	240-253
R-85	Government Response to Motion Dismiss	259-70
R-88	District Court Memorandum in Support of Order	284-88
R-89	Order Denying Motion to Dismiss	294-95

R-95	Government's First Motion in Limine	301-02
R-112	Exhibit List	362-63
R-128	Judgment in a Criminal Case	395-401
R-130	Sentencing Transcript	405-35
R-131	Notice of Appeal	436
R-137	Presentence Investigation Report	451-80
R-138	Transcript of Jury Trial Proceedings (Day 1)	481-597
R-139	Transcript of Jury Trial Proceedings (Day 2)	598-780
R-140	Transcript of Jury Trial Proceedings (Day 3)	781-892
R-175	Memorandum	1192-1207
R-176	Order	1208
R-177	Notice of Appeal	1209

The government also designates the following trial exhibits, which are identified in the exhibit list (R-112) and reproduced in the government's appendix:

Exhibit No.	Appendix Page
Defense Exhibit 1 (July 17, 2007 Robertson County Plea Agreement)	1
Government Exhibit 1	3
Government Exhibit 2	6

Government Exhibit 3	9
Government Exhibit 4	12
Government Exhibit 5	15
Government Exhibit 6	18
Government Exhibit 7	21
Government Exhibit 8	24
Government Exhibit 9	28
Government Exhibit 10	34
Government Exhibit 11	40
Government Exhibit 12	46
Government Exhibit 13	52
Government Exhibit 14	65
Government Exhibit 21	72
Government Exhibit 23	73

ADDENDUM A: July 14, 2006 Robertson County (Tennessee) Court Order (Unpublished)

IN THE CIRCUIT COURT FOR ROBERTSON COUNTY, TENNESSEE
AT SPRINGFIELD

RONALD PAUL

Petitioner

v.

245747

STATE OF TENNESSEE

Respondent

Post-Conviction

ORDER

I. INTRODUCTION

This matter came before the Court for a hearing on the Petitioner's *pro se* and amended petitions for post-conviction relief. Having reviewed the case file, the post-conviction petitions and having conducted an evidentiary hearing, the Court finds that petitioner received ineffective assistance of appellate counsel. Therefore, for the reasons set out below, the petitioner's petition for post-conviction relief is granted

II. PROCEDURAL BACKGROUND

This matter has an long and protracted procedural history. Following a jury trial which concluded on January 13, 1995, the petitioner was convicted on one count (Count One) of aggravated sexual battery, on three counts (Counts Two , Four and Six) of rape, and on two counts (Counts Three and Five) of sexual battery At the April 28, 1995 sentencing hearing, the petitioner

was sentenced to eight years in Count One, eight years in Count Two (consecutive to Count One), one year in Count Three (concurrent with Count Two but consecutive to Count One), eight years in Count Four (consecutive to Counts One, Two and Three), one year in Count Five (concurrent with Count Four but consecutive to Count One) and eight years in Count Six (consecutive to Counts Four, Five, Two, Three and One) for an effective sentence of thirty (30) years with credit for time served.

On May 24, 1995, the petitioner filed his motion for a new trial in which he alleged seven bases for relief. On June 6, 1995, the trial court conducted a hearing on the motion for new trial and later denied the motion by Order dated June 19, 1995.

Trial counsel was relieved as counsel by order dated June 19, 1995. The Public Defender's Office was appointed as counsel for appeal. Notice of appeal was filed on June 21, 1995.

The judgment of the trial court was affirmed by the Court of Criminal Appeals in State v. Ronald Paul, No. 01C01-9511-CC-00358 (Tenn. Crim. App. filed Sept. 19, 1997 at Nashville). The Tennessee Supreme Court denied the Rule 11 application by Order dated April 20, 1998.

The *pro se* petition for post-conviction relief was filed on April 23, 1999 after having been mailed to the wrong city. The post-conviction court dismissed the petition as time barred on June 2, 2000. The Court of Criminal Appeals reversed finding that the petition was deemed "filed" when placed in the hands of the prison authorities and therefore not time barred, and remanded the matter for further proceedings on the post-conviction petition. Ronald Paul v. State, No. M2000-1653-CCA-R3-PC (Tenn. Crim App filed June 29, 2001 at Nashville).

In March 1999 amended judgments were entered as to the rape convictions to reflect service at 100% pursuant to Tennessee Code Annotated Section 39-13-523.

Counsel was appointed and an amended petition for post-conviction relief was filed on February 15, 2002. On February 22, 2002, the post-conviction court conducted a hearing on petitioner's motion for delayed appeal pursuant to Tennessee Code Annotated Section 42-32-11. At the hearing the petitioner asked the Court to consider the sole issue of the performance of appellate counsel; to grant a delayed appeal based on the inadequacy of appellate counsel's performance; and to dismiss without prejudice the remaining post-conviction claims. Because the sole issue raised on appeal was deemed waived by the Court of Criminal Appeals, the Court granted relief under this alternative statute without ruling on the post-conviction petition. On appeal, the Court of Criminal Appeals found that it lacked jurisdiction to hear this "delayed appeal" and dismissed the appeal.

The matter again returned to the Robertson County Court for further proceedings on the post-conviction petition. A second amended petition for post-conviction relief was filed on August 31, 2004. On April 1, 2005, the Court conducted a hearing on the post-conviction petition.

III. FACTUAL BACKGROUND

In order to understand the history of this case, it is useful to review the trial testimony and the testimony at the February 22, 2002 hearing on the motion for delayed appeal along with the testimony presented at the post-conviction hearing. The relative respective evidence is summarized below.

A. Trial

The jury trial in this matter began on January 9, 1995. The trial court heard the testimony of the following witnesses as summarized below.

Jo Ann Gregory

Jo Ann Gregory testified that she was employed by the Springfield Police Department as a police officer. She described her training including medical training as an EMT and a licensed practical nurse. At the time of hearing she held the position of domestic relation violence officer and had been in the position for five years. In her position Gregory said she handles all adult and child sexual abuse cases and follows up on domestic violence situations.

Gregory explained that she has an office in the child advocacy center where interviews of children can be conducted with a reduction in the trauma they experience. She testified that when a complaint of sexual abuse is made, she must determine whether a case is founded or unfounded.

Officer Gregory said she first met the Dana DeMoss and Holly DeMoss in 1989. She did not see them again until March 1991. In 1991 Gregory received a referral from Springfield Middle School and went to the school to interview Holly and Dana. However, following the interview, no further action was taken.

On May 5, 1994, Gregory learned from Nancy Paul (Petitioner's wife) that Dana had made allegations of sexual abuse against the petitioner, Ronald Paul. She said as a result of these allegations she later interviewed the victim. In her opinion, the victim had not contradicted herself over the course of their interviews and meetings. The victim was also examined at the Our Kids Clinic by nurse practitioner Julie Rosehoff.

After their first meeting Gregory asked the victim to do a pretext phone call. Though the victim was hesitant and did not want to speak with the victim again, Gregory worked with the victim to prepare her for such a call Gregory explained that such calls are used in an attempt to get the perpetrator to incriminate himself. On June 10, 1994, Gregory initiated a pretextual phone call

between the victim and petitioner while she listened in on earphones. Gregory conceded that the victim told some deliberate untruths in the phone call. The tape recording was played to the jury.

Officer Gregory interviewed petitioner on June 14, 1994 at the Springfield Police Department. Gregory said she "let him go" after the interview. A tape recording of the interview was played to the jury.

Gregory testified that after the telephone call she decided to charge petitioner so she took the case to the grand jury in the July 1994 term. Gregory said she personally served the arrest warrant on petitioner on August 9, 1994. She took him into custody at his home and read his Miranda rights. Once Gregory was in jail, Gregory met the victim and the victim's mother at petitioner's residence. According to the victim and her mother, they had been kicked out of the house in February and had not been allowed to get their personal possessions out of the house. The two took their personal items and allowed Gregory to conduct a search. Gregory said she was searching specifically for diaries written by the victim about her episodes with the petitioner. No diaries were found during the search.

Officer Gregory stated that from February 5 when the victim and her mother vacated the house, petitioner lived in the residence with Holly Fischer (victim's sister), Noel Fischer (Holly's husband) and their son.

On cross-examination Gregory spoke of the pretext phone call. She admitted that the prepared the victim for the interview. Among the preparation, Gregory and the victim made notes as to what to say, including the victim telling petitioner she wanted to come back and live with him. Officer Gregory agreed that petitioner made no threats against the victim during the phone call. She also acknowledged that petitioner said on the tape that he still loved the victim and victim's mother

and did not want the divorce.

When asked about the interview she conducted with petitioner at the police station, Gregory said she usually tried to interview the accused prior to the issuance of a capias. However, in this case she was already convinced that petitioner was guilty of rape of the victim. She said the main reason she wanted to speak with petitioner is her fear for the safety of the victim and victim's mother.

Gregory said she asked the victim whether she had had sex with an individual named Steven Price but had not asked about others and had not followed up by speaking with Mr. Price. She stated she did not feel it was necessary in this case even because the victim denied any sexual relations with Price. Gregory also knew about a restraining order that was part of the divorce case. She admitted the order required petitioner to stay away from Ms. Paul but did not mention the victim. However, Gregory told petitioner to stay away from the victim.

Upon questioning by trial counsel, Gregory recalled a March 1991 allegation made by Holly DeMoss (now Fischer), the victim's sister, that their stepfather had inappropriately touched she and her sister (the victim). During this process, Gregory learned that Holly and the victim had made claims of abuse against their biological father, Warren DeMoss. However, those allegations had not previously been disclosed to the girls' mother The 1991 investigation ended following the interview with the girls. The follow up report indicated the allegations against petitioner were determined to be unfounded by the Child Protective Investigative Team (made up of law enforcement, DHS, mental health, juvenile court, and the DA's office).

Gregory agreed that false accusations are sometimes made in sexual abuse cases. She also conceded that many times these type of complaints surface in divorce cases or are used for revenge.

However, she added that every case she has brought has resulted in a guilty verdict. Two hung juries resulted in guilt convictions upon retrial. Gregory said she does not charge people until she believes in her own mind that they are guilty.

On re-direct Gregory said such allegations made during a divorce can be "red flags." She also again acknowledged that accusations can be made as a way for divorcing parents to get back at each other.

Gregory also responded to her failure to interview Steve Price. She indicated the victim's sexual contact with peers (Price or others referenced) was irrelevant to her. Her inquiry focused on whether petitioner had sexual contact with the victim.

Julie Elizabeth Rosehoff

Julie Rosehoff testified that she is employed by Vanderbilt Medical School in the Our Kids Center program. as a family nurse practitioner. She explained that Our Kids Clinic evaluates children with allegations of sexual abuse. In her position she also teaches physicians about child sex abuse cases.

After describing the examination process and the types of physical injury they see in sexual cases, Rosehoff testified that she examined the victim on May 26, 1994. As part of the intake procedure, a social worker with the clinic interviewed the victim's mother to take a history. Reading from the history, Ms. Rosehoff said Ms. Paul informed the social worker that her husband (petitioner) of seven years had kicked her and the victim out of their home in January 1994. Ms. Paul also told the social worker that once they were kicked out she started asking the victim about possible sexual abuse by the petitioner. These questions, Ms. Paul told them, arose when she started

thinking about how the petitioner's actions toward the victim had changed during the year. According to Ms. Paul's statement to the social worker, Ms. Paul recognized that petitioner was getting more jealous of the victim's contact with boys. The history given by Ms. Paul also indicated the victim first told her mother that petitioner only made passes at her. However, since making that statement, the victim had told Ms. Paul that petitioner had had penial (sic) vaginal intercourse with her. Ms. Paul believed the last incident occurred in November 1993 but had started when the victim was nine years old. Ms. Paul said there were also concerns of sexual and physical abuse by the victim's biological father, Warren DeMoss. Ms. Paul told them the victim had no physical complaints but had begun to show a drop in her school performance over the past year and a half.

Rosehoff testified that she also took a physical history of the victim and concluded the victim was a very healthy child. The exam revealed no genital or rectal trauma and revealed no exposure to sexually explicit materials. Rosehoss said victim was negative to previous sexual experiences and no problems with masturbation. She added that victim had no history of self inserting things into her vagina, no history of urinary tract infections, no history of vaginal or rectal bleeding, no history of vaginal discharge or infections. The history also contained a note that "father [Warren DeMoss] made passes at her when she was seven years old" but indicated no investigation.

During an interview process with the social worker, the victim described sexual contact by her father and step father. Her father touched her when she was seven years old. Victim reported digital contact to her breasts, genitalia and rectum. Victim also reported genital contact with possible penetration and an episode of bleeding. As to the petitioner, the victim claimed fondling of her breast, genitalia and rectum and penile genital contact with possible penetration. Victim reported multiple episodes of molest Victim denied any other perpetrators and any consensual sex

with peers.

Ms. Rosehoff also examined the victim's genital area. She noted that victim is developing normally but did find deep notching in the hymen at the 3:00 and 9:00 positions. She explained that notching can be normal. Rosehoff found no anal tears or scarring. She also conducted a bimanual examination which involved insertion of her fingers into the victim's vagina.

Although Rosehoff testified that this examination does not rule out the possibility of penetration due to the notching, she could not tell the difference from a normal variation or a residual from injury. She added that both are possible and that she could not state for sure.

On cross examination Ms. Rosehoff said she did not ask the victim whether she had been exposed to sexually explicit materials but had relied on statements of the victim's mother.

Maxie Gilleland

Maxie Gilleland testified that he is a special agent with the Tennessee Bureau of Investigation and spends 95% of his time in undercover operations. In that role Gilleland participated in a solicitation for murder case involving petitioner. Gilleland said he had been involved in a total of 47 such investigations relating to solicitation for murder.

Gilleland explained he had one conversation with petitioner and a cooperating individual named Derrick from the jail. Gilleland spoke briefly with Derrick on the undercover line at the TBI then spoke with petitioner at length. The entire conversation with petitioner was tape recorded.

When the tape was offered into evidence, defense counsel objected claiming the tape included a conversation between the agent and another person who had not testified. The state conceded that the portion of the conversation with Derrick was not relevant to the present case. The

Court conducted a jury out hearing during which trial counsel indicated Derrick was on the tape telling Gilleland that "he [petitioner] wants – he wants the daughter – he wants the daughter taken off." Counsel asked the state to point to a place in the transcript where the petitioner used such words. The state responded that the petitioner may not have said those exact words but that it was very clear what the petitioner was talking about. The Court ordered that the tape be redacted to exclude the conversation with Derrick.

During the discussion about the tape redaction, the trial counsel renewed his objection to the entire line of evidence about the TBI tape recorded conversation. The Court indicated it had already ruled on the evidence but noted the objection.

When the jury returned the state explained to the witness Gilleland that the tape would pick up after a conversation with another person described to the jury as Derrick. The tape was played for the jury.

After the conversation with petitioner, Gilleland said he called Elizabeth Lewis and recorded the conversation. When the state attempted to introduce the tape recording, trial counsel again objected claiming it was irrelevant The state argued it was competent to admit as a hearsay exception as a statement of a co-conspirator. Trial counsel responded that the petitioner was not being tried for conspiracy. The state further argued that the evidence goes to explain the petitioner's "act to pursue this act which is something that shows his intent in this case." The trial court overruled the objection. The tape was played for the jury.

Gilleland testified that the solicitation went no further. He said he was notified the following day that he should shut the operation down. The undercover had been blown and the participants backed out.

On cross-examination, Gilleland admitted that he received information the following day that the petitioner wanted to call it off. He also conceded that no money changed hands. Gilleland agreed that neither petitioner nor Normus Lewis had been charged or would be charged with a crime resulting from these conversations.

On re-direct Gilleland testified about the requirement in law of taking a "substantial step" to commit an offense. Withdrawals, he said, make prosecution unlikely.

Jo Ann Gregory (recall)

Jo Ann Gregory was recalled to clarify her earlier testimony as to when she learned of the divorce proceedings between petitioner and Ms. Paul. She stated that she suddenly recalled Ms. Paul had contacted her a couple of weeks prior to the allegations of sexual abuse and told her the victim had been having a lot of problems. She said she offered or made Ms. Paul aware of counseling services.

On cross examination she recapped her contact with the victim and Ms. Paul leading up to the allegations. She agreed that she went to their home in 1989 on a 911 call, went to the school in March 1991 to inquire into allegations, went to speak with her in 1992, and that another officer spoke with them in February 1994. Gregory also conceded that the victim made no disclosures of sexual abuse on any of these occasions.

Dana DeMoss (alleged victim)

Dana DeMoss testified that at the time of the hearing she was sixteen years old and resided with her mother in Springfield, Tennessee. Prior to moving to Tennessee, the victim lived with her

biological father in Pennsylvania. At a young age, her mother left the home and did not return for some time. During her absence she remained with her father. She said her father sexually abused she and her sister Holly. The contact included inappropriate touching but also lead to intercourse.

When asked to explain her life in petitioner's home, Ms. Demoss said it was "sickening" and that petitioner was cruel to her mother. She, her sister and her mother lived in the home with the petitioner.

Ms. DeMoss stated she had not told anyone about the allegations against the petitioner earlier because he had threatened her and she was afraid of what he would do. She said petitioner threatened on many occasions to kill her and her mother if the victim told anyone. According to DeMoss the petitioner would say she "owed" him. She said she heard the TBI tape in court and took the threats seriously. DeMoss said there was violence in the home as petitioner would beat her mother.

The witness testified that she had not told her mother earlier about the sexual abuse because she feared she would cause a divorce. The witness then detailed the events surrounding each of her claims of sexual abuse by petitioner.

Spring of 1990

DeMoss testified that in the spring of 1990 she was in the sixth grade. She recalled making what she called her first "C" on her report card. DeMoss said that petitioner punished her by making her masturbate him but rubbing his penis to completion. According to the witness, this incident occurred in the living room. She recalled wearing shorts. After she finished masturbating the petitioner, the victim said petitioner started touching her private parts. She said he stuck his finger in her vagina.

DeMoss gave general testimony about this type of conduct when her mother would be at work or asleep. She said this kind of thing happened many times.

June 13, 1993

Next, the victim testified about an incident occurring on June 13, 1993, the date of her sister's wedding. DeMoss said on that date she had asked her friend Leigh Ann to stay the night so that petitioner could not do anything to her. However, the friend did not stay the night. She said the petitioner came downstairs to her bedroom and began touching her. He put his finger in her vagina and started touching her.

October 1993

In October 1993, DeMoss recalled that she and the petitioner were in their Dodge Ram van. She said she saw this cute guy and was looking at him. According to DeMoss petitioner asked her if she would like for the boy to touch her like he does. At that point, petitioner started touching her breasts and vagina with his fingers and hands. She did not recall that he penetrated her on that occasion but said he touched her over and under her clothes.

The testimony then turned to the diaries Ms. DeMoss kept. She testified that she kept two copies of a diary in which she documented the things petitioner did to her. She maintained two copies so that she had a backup diary. DeMoss said in February of that year they were thrown out of the house and were not able to get many of their belongings. She did not get her blue or green diary when she left.

November 29, 1993

DeMoss testified that she returned from the Civil Air Patrol junior boot camp. She said petitioner reminded her that he paid for the camp and that as a result she owned him. On this occasion she was in her room writing in her diary when petitioner came downstairs to her bedroom. She testified that petitioner made her have sexual intercourse with him for paying for the trip. She further explained that the sexual intercourse involved his penis and her vagina. She described it as brutal.

December 1993

The witness testified that on this occasion the petitioner let her drive to school on what she described as a cold day. As she pulled the vehicle into the parking lot, she said petitioner asked her if she was ready to give him some. She said he "just touched her like always" on the breasts, vagina stomach, head, etc. with his finger.

January 1994

Next, DeMoss recalled that in January 1994 an incident occurred in her bedroom. She said the petitioner made her have sexual intercourse with him. When asked if anything else happened, she responded that he performed oral sex on her and wanted her to perform it on him.

DeMoss testified that activity between she and petitioner began when she was in fifth grade when she first moved to Tennessee. Some of the first conduct occurred when she lived in Davidson County.

The witness acknowledged her participation in the pretext telephone call arranged by Officer Gregory. She also admitted she told some untruths in the conversation in an attempt to get petitioner to talk about the sexual contact. She added, however, that she was a truthful person. She denied

having sex with certain named males.

In general testimony near the end of her direct examination, the witness said she had performed oral sex on the petitioner more than once and that he made her swallow his cum.

On cross-examination the witness admitted that she had had discipline problems at school with some of them resulting in suspensions from school. She also conceded that her prior school records contained grades of "C" in several subjects even though she had earlier testified that one of the claims of sexual abuse resulted as punishment for getting her first "C."

Ms. DeMoss was asked about an argument she had with petitioner over accusations that she was smoking. The argument occurred on the day of her sister's wedding which was also the date given for one of the sexual allegations. She denied that she asked her friend to stay the night because she was in trouble for smoking rather than inviting her friend to stay the night so that petitioner would not sexually abuse her.

Although Ms. DeMoss earlier stated that she kept two diaries (blue one and green one) in case one was lost, she testified during cross-examination about the contents of her "blue" diary and admitted that her diaries contained different entries. The green diary which was not found contained the entries about her sexual abuse, she added.

The witness testified that the petitioner and Ms. Paul had continuing domestic relation issues. According to DeMoss, some of the incidents involved physical altercations. She described the day she and her mother were told to leave the home and explained that they were not able to get all of their belongings.

When the divorce proceedings were initiated, DeMoss told her mother about the incidents of sexual contact. She said she lead her mother to believe there were only two episodes so that her

mother would not be mad at her. The witness could not recall the exact date she told her mother but stated that her mother finally came to realize there were more than two episodes.

DeMoss said she did not care that her sister Holly did not believe her claims of sexual abuse by petitioner. She denied having a conversation with Jamie Paul (petitioner's daughter from a previous marriage) about being sexually active with boys. She said Jamie Paul was lying. DeMoss similarly denied having a conversation with her sister Holly about engaging in sexual activities with boys. She denied having sex with Terry Manus, Keith Dickerson Bubba Knight, Bo Rogers, or Steve Price. DeMoss said she had a boyfriend at the time of the hearing but that she had only kissed him on the cheek.

On re-direct the witness talked about incidents in which petitioner threw various items when he became angry.

The State rested; however, were permitted by the Court to reopen the proof as to Dana DeMoss to establish venue. The venue issue was raised by trial counsel in a motion for judgment of acquittal. Trial counsel argued jeopardy had attached.

Jamie Paul

Jamie Paul testified that she is petitioner's daughter and resided in Fort Lauderdale, Florida. Paul described a one-on-one occasion with Dana DeMoss during Thanksgiving 1993. According to Paul, the conversation was friendly and including, among other subject, boys and sex. The witness said DeMoss told her she was dating a 23 year old boy but also told her about other relationships. In the discussion DeMoss told Paul that she had had sex with other boys.

The witness said the petitioner and her mother divorced when she was 13 or 14 and that she lived with petitioner for almost one year during the separation. Paul testified that her father is a good father and never did anything inappropriate to her.

On cross-examination, the witness said she was not aware of violence in the home. She said DeMoss told her once that petitioner had slapped her but that she deserved it.

Keith Dickerson

Keith Dickerson testified that he had vaginal sexual intercourse with DeMoss on one occasion when he was sixteen and DeMoss was fourteen.

Lisa Farris

Lisa Farris testified that she was employed by the Department of Human Services in Springfield, Tennessee. Farris received a referral in May 1994 regarding Dana DeMoss. Some of the allegations related to sexual abuse by petitioner. Ms. Farris detailed her discussion with DeMoss about these incidents.

On cross-examination Farris said DeMoss told her specifics of some of the claims of sexual misconduct by the petitioner. She said DeMoss also told her that petitioner watched "dirty movies." Farris went into detail about other incidents and conversations not contained in her report.

Nancy Paul

Nancy Paul testified that she was married to petitioner and that Dana DeMoss is her daughter by her marriage to Warren DeMoss. When Ms. Paul moved to Tennessee she was still married to

Mr. DeMoss but was seeing petitioner. She said she "heard" they were divorced but had never received papers. Ms. Paul thought that something would have been said when she and petitioner obtained their marriage license.

Ms. Paul said she had older children by another marriage. Those children were 25 and 28. She and the children's father divorced. Next, she married Warren DeMoss. Paul then said she really did not marry DeMoss. Instead she lived with him. She said she left DeMoss and went back to Pennsylvania to care for her sick father Next, she married Dave Kemall.

Ms. Paul continued with her marriage history and the men she married and divorced over the years. During this time she had no knowledge that the girls had been sexually molested by Warren DeMoss.

Trial counsel repeatedly questioned Ms. Paul about her divorces. Ms. Paul could not state with certainty when any of her divorces took place. Further, she could not state whether she was divorced when she married petitioner.

Ms. Paul testified as to when she first learned of claims of sexual abuse by her daughters and more specifically claims made by her daughter Dana against petitioner. She also described the time period in which she and Dana were forced to leave petitioner's residence.

Further direct examination and cross-examination focused on the time periods of the incidents, the relationship between she and petitioner and the relationship between petitioner and Dana and Holly DeMoss. She also said she tolerated the alleged violence of petitioner because she was trying to keep a roof over the girls' heads.

J.W. Frazier

J.W. Frazier testified that he attended Springfield High School. He knew Dana DeMoss and her mother. In March 1994, he recalled giving Dana a ride home. He, Dana, Ms. Paul and others were sitting around the kitchen table when Ms. Paul began to ask Frazier what was left in petitioner's house. She asked him about lamps, dining room table and other items. He said Ms. Paul made the remark in an angry tone that she "would get him back."

Holly Fischer

Holly Fischer testified that she was formerly Holly DeMoss, Dana's sister. She said her father Warren DeMoss had sexually molested her. She did not know if her father sexually molested Dana but knew he physically abused Dana.

Holly recalled an episode about the report card and Dana receiving a "C." As a result Dana was grounded and was described as mad.

Ms. Fischer said she never saw petitioner walking around naked as described by Dana. She said he would work in the garage and oftentimes have no shirt on but was never running around the house naked.

The witness also talked about when Ms. Paul knew about allegations against Warren DeMoss. She also testified about a conversation with Dana in which Dana said she was afraid she was going to end up pregnant. She said she was sleeping with Steven Price, a boy up the street. Holly said Dana could have been lying because she really doesn't tell the truth.

Ms. Fischer's husband, Noel, also testified in this case. His testimony is not summarized in this Order but is included in the record.

Petitioner Ronald Paul

Petitioner testified that he was born on June 2, 1940 and gave a history of his educational and employment history. He talked about his children and his eventual marriage to Ms. Paul. Petitioner was asked about his relationship with his step-daughters, Dana and Holly. He was asked about each of the allegations made by Dana. Petitioner vehemently denied each and every allegation. When asked about specific episodes, he explained that on some occasions Dana would get herself into trouble and would be punished for certain conduct. However, he again denied that the punishment was rape or sexual contact with him.

Petitioner was questioned about the tape recording of a conversation between he and Dana. He explained that he and Dana had had a conversation about her having sex with particular boys. He said he knew she was having sex with boys and discussed the dangers. Petitioner said he wanted her to have safe sex due to AIDS and other diseases. He explained that condoms will not protect you from certain diseases. Petitioner admitted that he had been very strict with Dana. In fact, he believed that his strict atmosphere may have pushed her to have sex with boys as a type of revenge or punishment. He gave his explanation as to each statement contained in the tape recording. He denied that the tape contains admissions that he was having sex with Dana.

Petitioner was asked about the TBI tape to which he responded he was angry at the victim and Ms. Paul for taking his property while he was incarcerated. He said he never wanted them killed but simply wanted them "roughed up" so that they would not take his property away.

When cross-examination of the petitioner began, the state began by asking petitioner about the murder for hire plot and the resulting tape recording. The cross-examination is peppered with repeated references to the solicitation tape recording. Even when the questioning turned to the allegations or the relationship petitioner had with Mr. Paul, the solicitation topic surfaced again and

again.

Petitioner was also questioned about his defenses and justifications. He maintained that Ms. Paul and Dana DeMoss were acting in revenge and in an attempt to punish him.

Again, the petitioner was asked about the TBI tape. The state read portions of the transcript to petitioner and asked questions about those specific portions. He was then asked to explain each portion read to him.

He again denied making any admissions in the tape recording of the conversation instigated by Gregory between petitioner and Dana. He repeatedly disagreed with the state's interpretation of the tape recording.

Following petitioner's testimony, Deborah Allen and Terry Menus testified. Their testimonies are contained in the record and were considered by this Court. However, based on the issues before this Court, their testimony is not summarized herein.

B. February 22, 2002 Hearing[1]

The trial court heard testimony relating to a motion for delayed appeal at a hearing conducted on February 22, 2002. Although the testimony was limited to the issue surrounding the request for a delayed appeal, the testimony is nonetheless intertwined with the subsequent post-conviction proceedings. Therefore, a summary of this testimony is useful in the consideration of these post-

[1]As noted above, this case has an unusual procedural sequence. Following the direct appeal in this case, the case proceeded in the post-conviction posture. On February 22, 2002, the Court convened to hear evidence relating to post-conviction claims. However, as the record demonstrates, following the testimony of the petitioner, trial counsel and appellate counsel, the Court concluded a delayed appeal was perhaps the proper avenue of relief for the petitioner.

However, the Court of Criminal Appeals disagreed and remanded the case for further post-conviction proceedings. Nonetheless because the testimony taken at the February 22, 2002 hearing directly related to the post-conviction claims at that time, the Court will consider the testimony given at that hearing to the extent it is relevant and is appropriate to do so.

conviction claims.

Petitioner Ronald Paul

Petitioner testified that he was convicted following a jury trial and was incarcerated. He affirmed that he was represented at trial by Mark Walker and on appeal by Fred Love. Petitioner said he had never seen Mr. Love and had never had contact with him. He testified that he realized his case had been appealed when he received a copy of the brief.

Petitioner stated there were issues he wanted to raise on appeal but never had the opportunity to discuss those with Mr. Love. At a minimum he believed the issues in the motion for a new trial should have been raised in the appeal.

Mark Walker

Mark Walker testified that he served as trial counsel for petitioner. Walker recalled that the trial lasted approximately five days. He further recalled filing a motion for new trial in which he raised seven issues. Mr. Walker gave an explanation as to why he raised each issue. He explained generally that he was aware petitioner's trial was a significant one; that petitioner had significant allegations against him and that the punishment was going to be extensive if petitioner was found guilty. Walker explained that he was as careful as possible throughout the trial so as to perfect every possible issue for appeal. At the conclusion of the trial Walker noted the issues he believed shouldbe raised on appeal. Those issues, he said, were contained in the motion for new trial. Mr. Walker withdrew as counsel following the motion for new trial. He did not recall having any conversations with appellate counsel, Fred Love.

On cross-examination Walker testified that he has conducted a cursory review of the transcript in preparation for the hearing. Upon his review he found no additional issues he would have raised in his motion for new trial.

Mr. Walker recalled the issue relating to the admission of the tape recording of the conversation between the TBI Agent and petitioner relating to solicitation of someone to murder the victim and the victim's mother. Walker conceded that the admissibility of the tape was challenged in a motion to suppress heard before Judge Walton and had further been challenged before Judge Wedemeyer as to the weighing of the probative value against the prejudicial effect. He agreed both judges ruled against petitioner.

Fred Love

Fred Love testified that he was an Assistant Public Defender and had been assigned the petitioner's case. Mr. Love recalled filing a brief on the "primary issue" he believed to have merit concerning the admissibility of hearsay statements made by the alleged victim to a health care worker. Reading from the Court of Criminal Appeals opinion, Love stated "[s]ole issue on appeal is whether the testimony of a nurse practitioner which identified the appellant as the perpetrator of sex offenses upon the victim was error." Mr. Love said that at the time of the appeal he reviewed the motion for new trial but filed by trial counsel could not now recall how many issues had been raised in the motion.

Love said he could not recall having any contact with the petitioner in preparation of the appellate brief. He stated that his practice was to send a letter to the client but he had no independent recollection of sending a letter. Mr. Love added that their office files are destroyed after five years and therefore he could not review the petitioner's file.

Mr. Love conceded that the sole issue he raised on appeal had not been included in the motion for new trial.

On cross-examination, Mr. Love explained that at the time he believed the issue he raised was significant enough to be considered under the plain error doctrine. This doctrine was the basis for presenting the issue to the Court of Criminal Appeals.

Love said he reviewed the motion for new trial, reviewed the transcripts thoroughly and "racked [his] brain . . . looking for an issue that had merit." He said in his judgment the only issue he thought the appeals court would rule as error was the issue he raised.

Mr. Love said he was familiar with the other issues at the time but he simply did not believe they had merit. He said he received advice early in his career from an appellate judge that if you raise too many issues without merit "you tend to water down your credibility on the issues that do have merit." Love said his choice and judgment was to focus on the issue he thought was "a winner." He concluded that the other issues raised in the motion for new trial were not presented because in his judgment they were without merit.

C. Post-Conviction Hearing

On April 1, 2005, the Court conducted an evidentiary hearing on the post-conviction petitions. At the hearing the Court heard testimony from Petitioner Ronald Paul, Francis Brown, and Mark Walker.

Petitioner Ronald Paul

Petitioner Ronald Paul testified that at the time of the hearing he was 64 years old and was incarcerated at Morgan County, Tennessee. He testified that his trial counsel was Mark Walker. According to petitioner, Mr. Walker came to visit him on a couple of occasions. He was first

represented by Mike Jones but due to a conflict was forced to withdraw. Petitioner said that Mike Jones had done most of the investigation including interviewing witnesses and matters relating to a polygraph examination.

The meetings with Mr. Walker took place at the county jail. Petitioner said he had been incarcerated since being arrested. Walker discussed a little about the case on one occasion. On another occasion, Walker discussed a plea offer of eight (8) years at 30%. Walker told him he believed they had a good chance of prevailing at trial and that they could not give him any more than what they were offering.

Petitioner said in discussing the offer with Walker he told Walker he did not want to plead guilty to anything he had not done and was guilty of nothing. Because Walker told him he could get nothing more at trial than the offer, he told Walker they might as well go to trial.

Petitioner said his original judgment reflected the sentence for each conviction. He understood that he would be eligible for parole after serving 30%. Although he had a parole hearing in 1997 at which parole officer recommended parole, he was denied parole.

Later he learned that he was told by prison personnel the judgment was amended to order service of the rape convictions at 100%. He never went to court regarding the amendment of the judgment.

Petitioner testified that Walker never told him he would have to serve 100% of the rape convictions if convicted. He was told 30% on every occasion. Walker told him he would not receive any more than the "court" had offered.

He opined that Walker did not adequately prepare for trial. Walker failed to subpoena witnesses for trial. Those witnesses who appeared were there voluntarily.

He testified that at trial Walker told him (during trial on third day) he was not qualified to be at the trial because he was a divorce lawyer and had done no criminal cases. Petitioner said nothing because he felt it was too late.

During trial petitioner was upset with performance of counsel. He was told that if he made a move or sound he would be removed to the courtroom. He said he shook his head during the trial in response to testimony and upon motion of DA Morris was told he could be removed from the courtroom.

Walker never seemed to put up objections during the trial. Petitioner believed Walker should have objected to the TBI tape. He could not recall but believed Walker may have asked for a jury-out hearing on the issue.

Petitioner did not recall Walker moving for a mistrial and did not recall any discussion in Court about a mistrial. Petitioner said he recalled an objection by Walker to notes being used by a witness which had been taken by someone else.

In summary, petitioner failed to make appropriate objections and did not move for mistrial though he felt there were several times when such a motion should have been made. For example, when the DA "coached" a witness or was leading a witness. Petitioner said he had difficulty recalling each complaint he had against counsel due to the passage of time between the trial and the post-conviction hearing.

Upon reviewing the motion for new trial, Petitioner recalled discussing the motion and contents with Walker. He said he believed those to be the issues he wanted raised at the motion for new trial hearing.

Petitioner reviewed in court the judgment orders and noted the sentence and 30% service. In 1999 Petitioner was told that he would have to serve his sentence "day for day" even though the

petitioner.

Petitioner acknowledged that the 20 year offer had been made to him in two different forms. Petitioner also said he was in court when the tape recording of the telephone conversation between petitioner and his step daughter took place. Petitioner denied the conversation contained anything about sex acts.

At the time of the post-conviction hearing petitioner could not recall the issues raised in the motion for new trial. He added that he did not recall any issue about the 100% service until 1999. He again stated that had he known about the 100% service statute it would have factored into his consideration and "might have changed his mind considerably" even though he maintained his innocence.

Francis Brown

Francis Brown testified that she is the 39 year old daughter of petitioner. She resides between Alabama and Korea due to military service. In 1994, Ms. Brown was a potential witness in the trial but did not observe any of it.

Ms. Brown had contact with Mr. Walker about the case on various occasions. A few days into trial Walker told her he was a divorce attorney and had not done a criminal case before. He told her he was tried by the DA that it was cut-and-dried and would only take a couple of days.

Brown said she talked to Walker about witnesses who had information and passed the information along to him. To her knowledge, he never interviewed those witnesses. The names of the witnesses were given by Ms. Brown. Though attempted neither post-conviction counsel nor Brown were able to locate the witnesses for the hearing.

In 2001 the witness wrote letters to the Court. In the notes/letters, Ms. Brown had the names of the purported witnesses. Ms. Brown reviewed the notes and testified that she recalled informing Walker about the following potential witnesses: Tracy Wells and Jeanie Massey, Keith Dickerson, Billy Smith, Bubba Knight, and Todd Ballou. Brown said she had attempted to locate those witnesses prior to the hearing but had been unsuccessful.[2]

On cross-examination Ms. Brown testified that her husband serves in the U.S. Army. She stated that she works for an office relating to golf sales.

Mark Walker

Mark Walker testified that he has been licensed to practice law since October 1986. At the time of trial Walker had been practicing approximately 9 years, had engaged in criminal practice and had tried a "few" criminal and civil cases. He went on to define the number of jury trials as about four.

Walker said he was appointed to represent petitioner in October 1994 prior to the trial in January 1995. Previous attorney Michael Jones provided Walker with his file and results of his investigation. Walker was also provided with a witness list that appeared to him to have been provided by petitioner and petitioner's family. Walker had also been in contact with family members and obtained additional witness names. He did not personally interview all of the witnesses.

[2] Ms. Brown testified that she had been unable to locate/contact these witnesses to secure their attendance at the post-conviction hearing. Petitioner asked the Court to allow an offer of proof as to Ms. Brown's understanding as to what information these witnesses had or their purported testimony had they been called.

Mr. Walker said he personally interviewed some of the witnesses while a younger attorney in his office interviewed other witnesses. He added that an investigator with the public defender's office had interviewed some witnesses. Walker reviewed those notes from the file. He did not interview Jeanie Massey who was a minor; however, he Massey's mother was interviewed. He did not interview Keith Dickerson and had no recollection of a person named Todd Ballou. After learning that Billy Smith was actually Bubba Knight, Mr. Walker interviewed Knight and possibly subpoened him for trial.

Walker agreed that neither Tracy Wells nor Jeanie Massey were subpoened to court. Walker said he had a reason why he did not subpoena Jeanie Massey. Wells was not called because her knowledge was based on hearsay she had learned "through the grapevine."

Walker testified that he had investigated the issue of bigamy and raised the issue at trial. He recalled that the victim's mother, Nancy Paul, testified over two days. During Ms. Paul's testimony counsel called into doubt whether Ms. Paul was actually divorced from her previous husband so as to create a legal stepfather relationship in the present case for the purposes of the incest charges. He believed this cross-examination resulted in the state's decision to nolle Counts Seven and Eight.

Mr. Walker testified that only two settlement offers had ever been made in this case. Both offers were reduced to writing and presented to petitioner on settlement day. Walker said each offer was for twenty years but required pleas to different offenses charged in the indictment. It was his understanding that the sentences would be Range I at 30%. The plea relating to the rape charges did not reference the multiple rape statute. Walker recalled he brought the multiple rape statute into the discussions about the plea. Even though the offer said 30% he wanted petitioner to know about the statute.

To that end, prior to going to trial Walker discussed with petitioner that if was convicted of more than one count of rape he would have to serve his entire sentence. Walker did not recall the judgment forms and sentences reflected on those orders. He said he had no explanation as to why the judgment forms reflected 30%.

Walker remembered the suppression hearing and the resulting order issued by Judge Walton. He also recalled Judge Walton's indication that the suppression ruling did not foreclose a challenge to the evidence under the evidentiary balancing test. Thereafter, Walker filed a motion *in limine* to make such a challenge. Walker's notes reflect the motion was argued on the morning of the first day of trial. He said he conducted research on January 6, 1995 regarding probative value versus prejudicial effect. He also had notes of the judge's ruling on the motion before the trial began.

Walker was directed to the portion of the transcript reflecting the testimony of the TBI Agent. Walker said he did not ask for a jury-out hearing at that point because the issue had been addressed in his motion *in limine* presented on the morning of trial.

Walker denied telling family members that he was not qualified to try this case. He said he never used the language cut-and-dried. He did have private discussions with petitioner that based on his review of the state's proof there was a great likelihood he could face conviction. Petitioner told him he had no guilt whatsoever and would not accept the offers.

Walker testified that he prepared a motion for new trial. He said he believed the issue surrounding the TBI tape recording was an issue warranting appellate review. Similarly, he opined that the issue surrounding "force" and "coercion" as necessary elements of the offense warrants appellate review. He said he heard no evidence at trial that supported these elements.

When asked about the election issue, Walker said he did not raise the issue because he found no basis for doing so. He testified that he was aware of the issue generally and cautiously listened

to the testimony of the victim relating to specific instances of sexual conduct. However, he concluded that no basis existed to raise the issue at the time. He added that had he felt it should have been raised he would have done so.

The TBI tape issue was vitally important in this case which is why he filed motion to suppress and argued motion *in limine*.

On cross-examination Mr. Walker testified that at the time he was appointed to the case he looked to the future with an understanding that he might find himself in a post-conviction setting one day. As a result of this understanding he said he applied himself the best he could and spent a significant amount of time on the case. He added that this attention to the case was one reason he brought in David Pollard, a younger associate, to assist.

Walker said Pollard provided a supporting role during the trial. As trial progressed and the testimony unfolded, Pollard busily tracked down some of the teens whose names had surfaced during the testimony. Pollard also provided assistance in other areas.

When asked if he should have called other witnesses, Walker said in hindsight he could think of no other witness he should have called.

Walker recalled the December 8, 1994 discussions about plea offers. He again testified that both offers were different forms of a 20-year offer. Each offer contemplated a guilty plea under a different count or counts with different resulting conditions. At that time of these discussions Walker was aware of multiple rape statute and noted it on the plea offer. He testified he discussed the statute with the petitioner because he believed the petitioner should know about the statute and its possible effect on any sentence he might receive.

Walker said that petitioner, however, never seriously entertained pleading guilt to anything. He said petitioner maintained his defense that he did not do any of the alleged conduct and that the

victim and her mother were liars. Their allegations, petitioner told Walker, were made up out of spite and bitterness. Walker denied ever discussing the eight year offer mentioned by petitioner during his testimony. He opined that petitioner may have concluded that twenty years at 30% would result in an effective sentence of eight (8) years.

Walker reviewed the subpoenas filed in this case and counted at least 17 subpoenas issued at his request. He subpoened those he believed were necessary in the case and made the decision not to call one witness who was housed in the Robertson County Jail. Walker said he did not believe this witness would be a good one. Another witness he sought to subpoena had moved to Ohio.

When asked about his law practice and comments made about his lack of experience, Walker responded that divorce cases were part of his practice but that he had also taken criminal cases at that time. He added that at the time of petitioner's trial he had represented men charged with sexual offenses (e.g. rape of a child, sexual assault) in Davidson County. He denied ever making the comment that he was a divorce lawyer and not qualified to represent petitioner.

In response to questions about the tape recording of a conversation between petitioner and the victim that had been arranged by authorities, Walker noted that the tape was the subject of a suppression hearing. The tape contained discussions about sexual relations. However, the trial court denied the motion to suppress. He said the evidence was admitted at trial and was damaging. Walker agreed that the conversation was recorded in an attempt by authorities to get petitioner to make admissions about the sexual conduct.

Walker said he raised everything in the motion for new trial he believed should be the subject of appellate review. He said he orally raised the issue relating to the TBI tape conversation. Mr. Walker agreed that the TBI tape had been the subject of a motion to suppress, a motion *in limine* on the morning of trial and objections at trial. Walker agreed that motive and intent were hotly

contested in this trial. As a result he was motivated to keep the TBI tape from the jury.

Walker was specifically asked about his claim that the evidence was insufficient as to the necessary elements of force or coercion as charged in the indictment. The state questioned Walker about various portions of the trial transcript of the victim's testimony and asked him to agree that the testimony illustrated an atmosphere of fear. Walker agreed that portions of the victim's testimony referenced threats, violence in the household, brutal intercourse, etc.

Mr. Walker said he never used the term "cut-and-dried" in any form during his representation. As to Walker's experience at the time, Walker said he did not recall the judge saying that "everybody has to start somewhere."

Walker said he spoke with Ms. Brown within days of being appointed to the case. According to Walker, they talked about witnesses and possible proof along with the bigamy issue. Mr. Walker reiterated that the bigamy issue was addressed at trial and likely resulted in the nolle of two incest counts.

The witness reviewed the judgment documents and noted the Range I references. He also reviewed the amended judgments relating to the rape counts. Walker was sure that the multiple rape statute was in effect at the time of petitioner's trial and recalled discussing it with petitioner during plea negotiations. He agreed that the new judgment forms accurately reflected the law in effect at the time relating to sentencing in multiple rape cases. Walker had no knowledge as to how the new judgment forms surfaced.

Walker said he carefully listened to the testimony of the victim to be sure it matched the allegations contained in the indictment. He was "on alert" to raise the election issue should the facts warrant it. Even though at the conclusion of the proof he found no basis to require election, he did raise a challenge to venue on one count.

Mr. Walker said he did not recall having any contact with the public defender office or the asstistant public defender who was assigned to the appeal. A number of pleadings Walker had prepared in the case were made exhibits to his testimony.

On re-direct, Walker reiterated that upon conclusion of the proof he believed that neither force nor coercion had been adequately shown. When asked specifically about testimony relating to Count 6, Walker agreed he did not move to require election even though there was reference to "vaginal" or "oral" sexual contact.

Walker had no knowledge of a notice by the state of its intent to seek enhanced punishment. On re-cross he admitted he knew of no requirement that the state give notice of enhanced punishment relating to the multiple rape statute.

IV. POST-CONVICTION CLAIMS

As noted above, the petitioner filed his *pro se* petition for post-conviction relief on April 23, 1999. Following the appointment of counsel, the petitioner filed an amended petition for post-conviction relief (February 15, 2002) and a second amended petition for post-conviction relief (August 31, 2004).

A. *Pro Se* Petition

Petitioner's *pro se* petition for post-conviction relief was filed on April 23, 1999.[3] In his petition he claimed generally that he received the ineffective assistance of trial and appellate

[3] The timeliness of the *pro se* petition was the subject of a prior ruling by this post-conviction court (See order filed June 2, 2000 finding that the Tennessee Supreme Court denied permission to appeal petitioner's conviction on April 20, 1998 and that the petition was not filed until April 23, 1999) and subsequent opinion in the Court of Criminal Appeals. According to the Court of Criminal Appeals, even though the file stamped date fell outside the statute of limitations, the petitioner's act of placing the pro se petition in the hands of a prison official was sufficient to constitute a timely filing.

counsel. In his attached memorandum of law, he makes the following specific claims:

1. Trial counsel's inexperience (both lack of knowledge and representation) denied petitioner his due process rights. Within this claim, petitioner claims trial counsel made statements (unknown to petitioner at the time of trial) concerning his ability to represent petitioner.

2. Both trial counsel and appellate counsel were unqualified to be effective in a criminal prosecution case.

3. Trial counsel was ineffective in failing to question witnesses. As a result of this failure:

   A. "No fact findings were made by the trial counsel to support his defense strategy, even if he had had one."

   B. Trial counsel failed to show that the same evidence used against petitioner was used previously used by this alleged victim and victim's mother to prosecute petitioner's step daughter's biological father.

   C. Trial counsel failed to show that the alleged victim "made-up this charge in an attempt to help her mother fight against a bigamy charge."

4. Trial counsel failed to present evidence of the conspiracy between petitioner's wife and step-daughter (alleged victim).

5. Trial counsel failed to "remain an active advocate."

6. Trial counsel was ineffective in failing to require the state to elect which sexual acts it would rely upon for convictions.

7. Appellate counsel was ineffective in failing to properly perfect an appeal on the merits; failing to communicate with petitioner about the appeal; and failing to present the appealable issues to the Court of Criminal Appeals.

B. Amended Petition

In his first amended petition filed following the appointment of counsel, the petitioner alleges the following grounds:

1. Trial counsel failed to include in the Motion for New Trial a challenge to the introduction of a tape recording of a conversation between petitioner and a TBI Agent because the tape was more prejudicial than probative.

2. Appellate counsel failed to raise the Motion for New Trial issues in the direct appeal and therefore petitioner was denied the effective assistance of appellate counsel.

3. Appellate counsel also failed to challenge the introduction of the tape recording of the TBI Agent and petitioner.

C. Second Amended Petition

In his second amended petition for post-conviction relief, petitioner adds the following additional claims for relief:

1. Trial counsel was ineffective for failing to properly object to the admittance of any and all testimony relating to Petitioner's involvement in an alleged murder for hire.

2. Trial counsel was ineffective failed to raise in his Motion for New Trial the issue of the introduction of the tape recorded conversation between the TBI Agent and petitioner as being more prejudicial than probative. (Petitioner acknowledged the issue was orally raised at the hearing on the Motion for New Trial).

3. Trial counsel was ineffective for failing to require the State to elect which offenses it was relying upon to support Petitioner's convictions.

4. Petitioner's constitutional right to a fair trial was violated when the trial court failed to exclude any and all testimony under Tennessee Rule of Evidence 404(b), including that of TBI Agent Gilliland, relating to the petitioner's alleged involvement in a murder for hire.

5. Appellate counsel was ineffective for failing to include in the appeal the issues raised by trial counsel in the Motion for New Trial.

6. Appellate counsel was ineffective in failing to appeal the issue of the State's failure to make an election as to which of Petitioner's offenses it was relying upon to support Petitioner's convictions.

7. Appellate counsel was ineffective in failing to challenge on appeal the issue of the introduction of the tape recording between petition and the TBI Agent.

8. Appellate counsel was ineffective for failing to properly communicate with petitioner regarding the contents of the appeal.

9. Petitioner's right to Due Process was violated when the trial court amended (without notice to Petitioner) the judgment order from 32 years at 30% to reflect the rape convictions must be served at 100% pursuant to Tennessee Code Annotation Section 31-13-523(2) Petitioner avers that said code section should not apply to him as he was convicted of the three (3) rape charges in the same indictment and as to the same victim and had no previous or subsequent convictions for rape.

V. DISCUSSION

Initially, the Court recognizes that the petitioner has the burden of proving the allegations of fact by clear and convincing evidence. See Tenn. Code Ann. § 40-30-110(f) (formerly § 40-30-210). Clear and convincing evidence means evidence in which there is no serious or substantial doubt about the correctness of the conclusions drawn from the evidence.

Here, the petitioner's claims can be divided into two general areas of consideration. First, he claims that he received the ineffective assistance of counsel both at trial and on appeal. Secondly, he claims certain constitutional deprivations. Each category will be addressed separately below.

1. Ineffective Assistance of Counsel at Trial

In his first ground for relief, the petitioner claims he did not receive effective assistance of counsel at the trial level.[4] When a petitioner seeks post-conviction relief on the basis of ineffective assistance of counsel, he must first establish that the services rendered or the advice given were below the "range of competence demanded of attorneys in criminal cases." Baxter v. Rose, 523 S.W.2d 930, 936 (Tenn. 1975). Second, he must show that the deficiencies "actually had an adverse effect on the defense." Strickland v. Washington, 466 U.S. 668, 693 (1984). Should the petitioner

[4] Petitioner also made certain claims of ineffective assistance of counsel in his *pro se* petition. Those claims will be addressed within this discussion.

fail to establish either factor, he is not entitled to relief. Our supreme court described the standard of review as follows:

> Because a petitioner must establish both prongs of the test, a failure to prove deficiency or prejudice provides a sufficient basis to deny relief on the ineffective assistance claim. Indeed, a court need not address the components in any particular order or even address both if the defendant makes an insufficient showing of one component.

Goad v. State, 938 S.W. 2d 363, 370 (Tenn. 1996).

On claims of ineffective assistance of counsel, the petitioner is not entitled to the benefit of hindsight, may not second-guess a reasonably based trial strategy, and cannot criticize a sound, but unsuccessful, tactical decision made during the course of the proceedings. Adkins v. State, 911 S.W.2d 334, 347 (Tenn. Crim. App. 1994). Such deference to the tactical decisions of counsel, however, applies only if the choices are made after adequate preparation for the case. Cooper v. State, 847 S.W.2d 521, 528 (Tenn. Crim. App. 1992). When reviewing a defense attorney's actions, this Court may not use "20-20" hindsight to second-guess counsel's decisions regarding trial strategy and tactics.

With this standard in mind, the Court will address each specific ground of ineffective assistance of counsel raised by petitioner

Failure to Interview Witnesses

Among petitioner's claim is that trial counsel failed to interview certain witnesses. At the post-conviction hearing, the petitioner conceded that none of the named witnesses could be located for the hearing. However, he wanted to elicit testimony from Ms. Brown (petitioner's daughter) about particular witnesses whose names she had given to counsel. Upon the state's objection, the

Court permitted petitioner to make an offer of proof.

It is well settled that when a petitioner complains that counsel is ineffective for failing to call a witness, petitioner must have the witness testify at the post-conviction hearing. Rickie Boyd v. State, No. W2005-01599-CCA-R3-PC (Tenn. Crim. App. filed May 1, 2006 at Jackson)(citing Black v. State, 794 S.W.2d 752, 757 (Tenn. Crim. App. 1990). The petitioner carries the burden of proving the allegations in his petition. Here, he has failed to meet that burden.

Even if the Court accepted the testimony in the offer of proof during Ms. Brown's testimony, the Court cannot conclude that any of the witnesses were material to the point that failure to present them or interview them constituted a deficient performance on the part of trial counsel.

Election of Offenses

Petitioner also alleges trial counsel was ineffective for failing to require the state to elect which offenses it was relying upon to support Petitioner's convictions. Petitioner correctly cites State v. Brown, 992 S.W.2d 389 (Tenn. 1999) for the general proposition that when a defendant has been charged with multiple offenses against a victim, the prosecution must elect the particular episode or set of facts it intends to rely on when presented to the jury. Election is necessary to assure the jury verdict is unanimous

In the present case, the petitioner claims trial counsel was ineffective for failing to require an election. In support of his argument he cites to the testimony relating to each episode of charged conduct as set out in the indictment. His claim focuses on testimony of the victim that she also performed oral sex on a number of times.

Earlier in this Order the Court summarized the victim's testimony as to each incident. The testimony was specific as to time and the specific act of sexual misconduct claimed. She did,

however, make minimal statements that she performed oral sex on a number of occasions.

Upon review, the Court concludes that the testimony clearly highlighted each episode of sexual conduct alleged in the indictment. The testimony was specific as to the type of contact or act and was also specific as to date. In most instances the victim gave additional specifics as to where it occurred and in some events what she was wearing on that date.

The general responses relating to oral sex were too general to reasonably result in confusion. Therefore, no election was required. Because election was not necessary, trial counsel was not ineffective for failing to force the state to elect. This issue is without merit.

Admission of TBI Tape Recording of Murder for Hire Plot

The majority of the petitioner's claims focus in some manner on the introduction of the TBI tape introduced during the testimony of TBI Agent Gilleland. He specifically claims trial counsel was ineffective in failing to raise the issue in writing in the motion for new trial though it was orally raised. He further claims trial counsel was ineffective for failing to object to the admission of any and all of the testimony in the TBI tape.

The record indicates TBI Agent Gilleland was contacted by a man identified as "Derrick" from the Robertson County Jail. At the introduction of the tape, Derrick is heard saying to Gilleland (in the presence of petitioner) that he [petitioner] wants the daughter "taken off." Derrick also states on the tape "he said he would give us $500 in the next couple of days if we can get that done. I guess I'll let you talk to him." Derrick is then heard saying to petitioner "It don't cost nothing to talk" and adds "No, he said it don't cost nothing just to talk, you know, cause he ain't sure if he's going to do it or not." This introductory portion of the tape was the subject of an out of jury hearing based on trial counsel's objection which resulted in redaction of this portion.

The tape captures a conversation between petitioner and Agent Gilleland. Gilleland testified that petitioner solicited him to commit the murder of his stepdaughter (prosecuting victim) and his wife, Ms. Paul. The plot involved a third person whose taped conversation was also played to the jury. The TBI tape of the conversation was played to the jury during the state's case-in-chief. However, it was repeatedly referenced throughout the trial with various witnesses. The cross-examination of the defendant went almost directly to the issue of the murder for hire plot and resulted in significant additional testimony on the subject.

Petitioner claims counsel was ineffective for failing to object to the introduction of any and all evidence relating to the murder for hire plot and for failing to bring the issue in the motion for new trial.

The record indicates trial counsel first challenged the TBI statement in a motion to suppress hearing before Judge Walton. Judge Walton denied the motion to suppress but noted that his ruling did not preclude a challenge to the admissibility of the evidence via the evidentiary balancing test of probative value versus prejudicial effect. In fact his ruling seemed to urge such a challenge.

To that end, trial counsel then filed a motion *in limine* challenging the introduction of the evidence with a claim that the prejudical effect outweighed the probative value. Trial counsel testified that the motion was heard on the morning of trial. However, the transcript does not contain any reference to a motion *in limine* and did not reflect a ruling by the trial court. Trial counsel stated that the trial court denied the motion but did not state the grounds for admitting the evidence.

Trial counsel again objected to the evidence when Agent Gilleland testified. Initially, trial counsel objected to certain portions of the tape relating to the man named Derrick. During a jury out hearing on that issue, trial counsel stated, "Judge, I don't think I have to renew this at this time, but I want to object to the entry of this in that it is more prejudicial than probative. You have

already ruled. I just want to make sure that that is on the record." The trial court (Judge Wedemeyer) responded as follows:

> The record will reflect that defense counsel has objected not only to what he stated in the last few moments, but to this entire evidence and Judge Walton has already ruled that it is admissible, and this Court has ruled it is admissible.

This brief comment by the trial judge is our only glimpse into the basis for his ruling on this evidence. Nothing in the record indicates the balancing test was performed by the trial judge or what rule of evidence he applied. Perhaps most significantly the record contains no indication the trial court found what relevant issue the evidence tended to prove. This brief response by the trial court was additionally not wholly accurate.

Judge Walton clearly stated in his ruling on the legal challenge to the TBI statement in the motion to suppress that he was solely ruling on issues of suppression. He specifically stated that its admission under the evidentiary balancing test remained at issue. Therefore, he had not ruled on its admissibility as noted by the trial court (Judge Wedemeyer).

Viewing the performance of counsel relating to the admission of this damaging evidence, the Court finds counsel was not ineffective in this respect. First, counsel filed a motion to suppress because the statement had been taken by a government agent. Secondly, he filed a motion to exclude the evidence because the probative value was outweighed by the prejudicial effect. Finally, he objected again at trial to the admission of the testimony at all. Counsel was diligent in his challenge to this evidence. Counsel's performance clearly falls within the standard range of acceptable representation as required by Strickland and Baxter.

The Court makes the same conclusion as to petitioner's claim that counsel was ineffective in failing to raise the issue in writing in the motion for new trial. While it is true the written motion

did not contain such a claim, the issue was orally raised by trial counsel at the hearing on the motion for new trial. The Court finds this reference sufficient to preserve the issue. Therefore, this claim is similarly without merit.

Petitioner makes other general remarks about counsel's performance in his *pro se* petition. However, he offered no proof on additional post-conviction claims of ineffective assistance of counsel. Therefore, any remaining issues are deemed duplicative or waived.

2. Ineffective Assistance of Counsel on Appeal

Next, the petitioner claims appellate counsel was ineffective for failing to raise certain issues in the direct appeal and for failing to communicate with petitioner. Before addressing these specific issues, the Court believes it is useful to recapitulate the history of this case relating directly to the adequacy of appellate counsel's performance.

a. Motion for Delayed Appeal

As discussed above in this Order, the Court conducted a hearing on petitioner's motion for a delayed appeal. Petitioner's counsel sought the alternative avenue of relief based on his assertion that appellate counsel's performance on the direct appeal was so deficient that it effectively deprived the petitioner of any appeal at all. The basis of petitioner's claim derived from appellate counsel's decision to pursue a single issue on appeal. The issue related to hearsay statements of a victim to a public official and had not been raised in the motion for new trial. The Court of Criminal Appeals determined that because the issue had not been raised in the motion for new trial, it was deemed waived.

At the hearing on the motion for delayed appeal, appellate counsel testified that he was assigned to the case for appellate purposes in his role as assistant public defender. Counsel said he thoroughly reviewed the motion for new trial along with the transcript of the evidence. Even following his desperate attempt to find issues with merit, counsel said he came to the conclusion that only the sole issue he raised on appeal had merit. Although he acknowledged reviewing the motion for new trial, he opined that none of the issues had merit. As such, he made the decision not to injure his credibility with the appellate court by bringing issues without merit. Appellate counsel hoped the court would accept review of the issue under the plain error doctrine even though the issue had not been raised in the motion for new trial.

At the conclusion of the hearing the Court found (for the purposes of a delayed appeal) that counsel's performance was so deficient that the appeal taken was essentially no appeal at all. Having found that petitioner has been denied the right to an appeal the Court granted the motion. The resulting appeal and subsequent proceedings are summarized elsewhere in this Order. The Court would note however the appellate court's recognition of this finding of ineffective assistance of counsel but also that court's directive that the Court must also find a showing of prejudice as a result of the inadequate performance by appellate counsel.

Applying those findings of ineffective appellate counsel to the present case, the Court additionally reviews counsel's performance in light of the entire record and against the backdrop of the *pro se* petition for post-conviction relief, the amended petition (which resulted in the delayed appeal hearing) and a second amended petition which raised additional claims against appellate counsel.

b. Post-Conviction Claims

Petitioner claims counsel was ineffective for failing to raise the issues preserved by trial counsel in the motion for new trial as well as the issue raised oral at the motion for new trial relating to the TBI tape recorded conversation. In his second amended petition the petitioner also claims appellate counsel erred in not raising the issue of election of offenses and failure to properly communicate with him.

Failure to Raise Issues on Appeal

The thrust of the petitioner's claims against appellate counsel is that counsel failed to bring an adequate appeal by failing to include the issues preserved in the motion for new trial along with the issue of election and the issue of introduction into evidence of the tape recorded conversation between a TBI Agent and petitioner relating to an alleged murder for hire plot.

Initially, the Court recognizes that failure to assert all arguable issues on appeal is not *per se* ineffective assistance of counsel. State v. Matson, 729 S.W.2d 281, 282 (Tenn. Crim. App. 1986). "Counsel is not constitutionally required to argue every issue on appeal, or present issues chosen by his client." Id. (quoting State v. Swanson, 680 S.W.2d 487, 491 (Tenn. Crim. App. 1984)). "[A]ppellate counsel are not constitutionally required to raise every conceivable issue on appeal." Carpenter v. State, 126 S.W.3d 879, 887 (Tenn. 2004).

In Carpenter, the Tennessee Supreme Court set out a "non-exhaustive list" of factors which "is useful in determining whether an attorney on direct appeal performed reasonably competently in a case in which counsel has failed to raise an issue." Id. at 888. The Court listed the following specific factors or considerations:

1) Were the omitted issues "significant and obvious"?
2) Was there arguably contrary authority on the omitted issues?
3) Were the omitted issues clearly stronger than those presented?
4) Were the omitted issues objected to at trial?
5) Were the trial court's rulings subject to deference on appeal?
6) Did appellate counsel testify in a collateral proceeding as to his strategy and, if so, were the justifications reasonable?
7) What was appellate counsel's level of experience and expertise?
8) Did the petitioner and appellate counsel meet and go over possible issues?
9) Is there evidence that counsel reviewed all the facts?
10) Were the omitted issues dealt with in other assignments of error?
11) Was the decision to omit an issue an unreasonable one which only an incompetent attorney would adopt?

Id.

Failure to Communicate with Petitioner

First, the Court notes appellate counsel acknowledged that he did not meet with the petitioner and had not met him at the time of the February 2002 hearing. While counsel said it was his practice to send a letter to clients about their appeal, he could not recall whether he sent one to petitioner. Because his office files are purged every five years, he could not provide a file document to support his standard practice. Petitioner similarly testified that he had never met appellate counsel and only learned of the appeal when he received a brief from the appellate court.

The testimony itself establishes petitioner's claim that counsel's performance fell below acceptable standards. It cannot be disputed that failure to communicate with the client at all is not acceptable standard of practice among appellate attorneys. However, under the second prong of the analysis, petitioner must also show that he was prejudiced by the deficient performance. Petitioner's claim here is that appellate counsel failed to communicate with him about the appeal. Appellate

counsel testified as to his basis for raising the sole issue and it does not appear the failure of counsel to discuss appellate issues with petitioner would have prejudiced petitioner. This claim is without merit.

Election of Offenses

The merits of the election issue were addressed above in the context of trial counsel's performance and whether the claim substantively had merit. Because we found the claim had no merit, we similarly conclude here that appellate counsel was not deficient in failing to raise the issue on appeal.

Admission of TBI Tape of Alleged Murder for Hire Plot

Appellant counsel's failure to raise a challenge on direct appeal to the introduction of the TBI tape relating to a murder for hire during the state's case in chief is significantly more troublesome to the Court. As discussed above in the issue relating to trial counsel's performance, this tape recording of a purported murder for hire plot was introduced in the state's case-in-chief, was referenced significantly throughout the trial and was the subject of a jury question once deliberations had begun.

Even though this Court concluded trial counsel did all he could do to prevent its admission and to preserve the issue, the Court must now make an independent analysis of the introduction of this tape and the obligations of appellate counsel relating to a proper review or appeal of such a ruling.

In John C. Johnson vs. State, No. M2004-0265-CCA-R3-CO (Tenn. Crim. App. filed March 22, 2006 at Nashville) the Court of Criminal Appeals reviewed a claim by Johnson that his appellate counsel was ineffective for failing to raise an issue on appeal. In that petitioner claimed appellate counsel should have appealed the issue of the trial court's decision not to charge certain lesser

included offenses. The post-conviction court in Johnson conducted a review of the lesser included offenses and concluded that the evidence was clearly sufficient to support second degree murder (indicted charge- first degree murder); therefore, error, if any, was harmless. Conducting a substantive analysis of the underlying issue petitioner claimed should have been appealed, the Court found that the error was not harmless. Accordingly, the Johnson court held that appellate counsel was deficient in failing to raise the issue on appeal and that petitioner was prejudiced by this deficiency. Post-conviction relief was granted and the case was remanded for a new trial.

This Court recognizes the distinction between an issue relating to lesser included offenses as in Johnson compared to an evidentiary ruling as in the present case. The Court further recognizes that deference is usually given by the appellate courts to evidentiary rulings of a trial court. Such deference however usually follows a finding that the trial court considered the appropriate law and rule(s) of evidence, analyzed the facts and proposed evidence in light of the law and rules and makes a specific finding as to why the evidence should be admitted or excluded. In the absence of such findings, it is unreasonable to conclude that such deference would be given.

In the instant case, the appellate court never had the opportunity to decide whether to give such deference because the issue was not presented to them in the direct appeal. In this analysis this Court must determine whether the admissibility of this evidence and the ruling resulting in its admittance warranted an appellate review such that counsel was ineffective in failing to include the issue in an appeal.

As discussed above in this Order, the petitioner was being tried on multiple counts of sexually related offenses against his step-daughter At trial the jury heard the testimony of several witnesses including the victim, the victim's mother (petitioner's estranged wife), a domestic relation officer, and the petitioner, among others. The only forensic evidence was the testimony of a nurse

practitioner who examined the victim. Her findings were inconclusive. She could not state with certainty whether any sexual contact had occurred.

The record is replete with references to the stormy relationship between the petitioner, his wife (victim's mother) and the victim. If believed, the evidence indicated the marriage involved some physical abuse and anger. In February 1994 the petitioner ordered his wife and the victim to leave the home. Divorce proceedings were initiated. Additional testimony referred to Ms. Paul's possible bigamy. In fact, two counts of the indictment relating to incest charges were dismissed following Ms. Paul's testimony in which she could not state with certainty whether she was divorced from her prior husband such that a legal step-daughter relationship actually existed. Revenge was asserted as a motive for the actions of the alleged victim and her mother.

By giving this brief recap, this Court does not pass judgment on the credibility of any of these witnesses. It is within the jury's purview to give weight to the testimony and judge credibility as they feel the evidence merits. However, this lack of physical or forensic evidence of sexual contact makes this case a credibility contest.

The point of this analysis is that this credibility contest was interjected with evidence in the case-in-chief (third witness in state's proof) that petitioner had allegedly solicited someone to murder the victim and Ms. Paul. Fuel is added to the fire when the trial court failed to identify the issue or issues the evidence tended to prove or disprove and failed on the record to conduct the balancing test of any evidentiary rule. It is not clear whether the balancing was done at all and if so whether the balancing was conducted under Rule 403 or 404(b) – noting the two different standards.

This Court is not attempting to second guess a trial court's evidentiary ruling but is required to examine the record at this post-conviction level to determine if the petitioner is entitled to relief

on one or more alleged grounds. Looking at the trial transcripts it is not evident that the testimony goes to any substantive issue such that it would have been admissible in the state's case-in-chief in this rape and sexual battery case Because no ruling was placed on the record, we can only speculate as to the basis for its admission.

The state makes only scant reference to its basis for seeking admittance of the evidence. In the suppression hearing transcript, the state indicated it could find no law to support admission but noted that the evidence went to the defendant's state of mind. Clearly, such a basis would not warrant admission of this evidence. Later in the transcript the state argues the evidence goes to the petitioner's consciousness of guilt. While closer, this position fails to take into account the necessity of a finding under the rules of evidence.

Again, the TBI tape of a murder for hire plot was admitted in the state's case-in-chief during the testimony of the third witness – Agent Gilleland. The evidence was referenced in the victim's testimony and in other witness testimony in the record. Because the testimony was admitted in the state's case-in-chief the defendant was subject to intense and prejudicial questioning about the murder for hire. In fact, the subject was raised almost immediately by the state in the cross-examination. Following a couple of brief general questions, the state again played the tape for the jury. Immediately thereafter, petitioner was cross-examined extensively about the statements made in the tape. The sexual offenses were secondary to the murder for hire evidence. Perhaps most telling is the jury's request for additional information about the tape recording. When the jury returned for deliberations, they asked the Court for information about the man named Derrick and wanted information on how Gilleland and petitioner were brought together.

In this case the Court has reviewed the performance of appellate counsel and the explanations given in his testimony at the hearing on the motion for delayed appeal. The Court

notes counsel's responses that he had reviewed the record and had diligently searched for issues before arriving at his sole appellate issue. The Court also notes counsel's testimony that he had been told by an appellate judge that the wisest choice was to bring only the best issues so as not to lose credibility. This Court could easily use this testimony in light of the applicable law to find that counsel made certain tactical decisions and therefore was not ineffective.

However, such a finding would be hollow in light of the pervasiveness of the TBI tape's effect on the trial. The evidence effectively became the overriding theme of the case. The Court concludes that the tape's admission in this case in the case-in-chief is highly suspect. Certainly, the "mini-trial" conducted on the murder-for-hire plot illuminates the need for review of the trial court's ruling on the issue. The absence of a ruling on the record only solidifies this conclusion. This Court believes any review of the record by a competent appellate counsel would lead to the conclusion that this issue (raised orally at the motion for new trial hearing and not hidden in the record) should be raised on direct appeal.

Based on this reasoning, the Court finds that appellate counsel's failure to raise this issue on direct appeal constituted ineffective assistance of appellate counsel. Further, the Court must also find that this failure resulted in significant prejudice to the petitioner. The petitioner has met his burden of establishing this claim by clear and convincing evidence. Accordingly, the petitioner is entitled to relief on this issue.

3. Constitutional Deprivations

Petitioner makes two claims of constitutional deprivations in addition to the ineffective assistance of counsel claims. First, he claims his right to a fair trial was violated when the trial court failed to exclude under 404(b) the TBI tape recorded conversation. Secondly, maintains he was

denied his due process rights when he did not receive notice that the judgment forms (reflecting Range I offender at 30% service) were going to be amended to reflect 100% service pursuant to TCA 39-13-523.

TBI Tape Recording

The issues surrounding the introduction of the TBI tape have been extensively addressed in this Order. Because post-conviction relief has been granted on other grounds also dealing with the TBI tape, it is unnecessary to further analyze the tape's introduction as an impingement on petitioner's constitutional right to a fair trial.

Amendment of Judgment Without Notice

The petitioner claims his constitutional right to Due Process was violated when the petitioner's judgments were amended without notice. The technical record includes judgment forms which were completed following the trial. The judgments accurately reflected the respective convictions and the manner of service of the sentence. However, the rape convictions indicated the petitioner was sentenced as a Range I offender to serve at 30%.

Petitioner testified that he first became eligible for parole in 1999 and went before the parole board. His request for parole was denied. However, during that time period he was informed that his judgments had been amended to indicate petitioner was to serve his sentence at 100% pursuant to TCA 39-13-523 (multiple rape statute).

Petitioner claims this *sua sponte* amendment of the judgment forms without notice violated his due process rights. This court disagrees.

At the time of trial the multiple rape statute found in Tennessee Code Annotated Section 39-13-523 was in effect. Section 39-13-523 provides that: (b) Notwithstanding any other provision of law to the contrary, a multiple rapist or a child rapist, as defined in subsection (a), shall be required to serve the entire sentence imposed by the court undiminished by any sentence reduction credits such person may be eligible for or earn.

The technical record is clear that the judgment forms completed following the sentencing hearing noted Range I standard offender at 30% for the three rape convictions. Further, it cannot be disputed that the amended judgment forms dated March 24, 1999 indicate 100% service. Petitioner testified he learned of the amended judgments in 1999 but was not told why the change was made or who made the change.

The transcript does reveal however that the multiple rape statute was discussed with the petitioner during the plea/settlement process. At that time one of the proposed plea offers included a noted reference to the statute. Trial counsel testified at the post-conviction hearing that the statute existed at the time of trial and that he discussed the statue with petitioner. Trial counsel further testified that he noted the statute on the plea offer so that petitioner would understand the possible consequence to a plea that mentioned 30% service but would fall under the purview of the rape statute.

Regardless of what petitioner knew or had been told at the time, the law in effect mandated full service of the sentence in multiple rape convictions. An error in the judgment form which flew in the face of the statute was an erroneous judgment form but not a ground for relief. The petitioner cannot claim he is entitled to the benefit of such a mistake or error. Even had he been put on notice of the error and the Court's intention to amend the judgment, he would have had no argument to negate the multiple rape statute and its applicability to this case.

Because the amended judgment was merely a correct statement of the law, petitioner has no basis for a claim his due process rights were violated by failure to receive notice and an opportunity to be heard. This claim is without merit.

The Court notes that petitioner also claimed the multiple rape statute did not apply to him because the offenses involved the same victim and arose in the same indictment. However, petitioner failed to submit any authority to support his position. Therefore, this claim is waived or otherwise without merit.

In conclusion of this review, the Court finds that any remaining issues raised were not supported by additional proof or specifically pursued by petitioner and are therefore deemed waived.

VI. CONCLUSION

For the foregoing reasons the Court concludes that the petitioner's petition for post-conviction relief is **GRANTED**. A new trial is hereby **ORDERED** in accordance with Tennessee Code Annotated Section 40-30-101, et seq. The defendant shall be released pending trial upon the posting of a bond in the amount of $25,000.00. The case is set on **August 25, 2006 at 9:00 a.m.** for entry of a scheduling order.

John H. Gasaway, III
Circuit Judge