IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT JACKSON
Assigned on Briefs April 4, 2023

RONNELL BARCLAY v. STATE OF TENNESSEE

Appeal from the Criminal Court for Shelby County
No. 14-05798 Jennifer Johnson Mitchell, Judge

No. W2022-00406-CCA-R3-PC

Petitioner, Ronnell Barclay, appeals as of right from the Shelby County Criminal Court's denial of his petition for post-conviction relief, wherein he challenged his convictions for rape of a child, aggravated sexual battery, and sexual exploitation of a minor by electronic means. On appeal, Petitioner asserts that he received ineffective assistance of trial counsel because counsel (1) did not communicate to Petitioner that the victim made a new disclosure on the first day of trial; (2) failed to request a continuance after the State informed the trial court and Petitioner of the new disclosure; and (3) incorrectly informed Petitioner of his potential exposure at trial as a result of the new disclosure. Following our review, we affirm in part; however, we remand the case to the post-conviction court for further findings of fact and conclusions of law relative to the exposure issue.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Criminal Court Affirmed in Part; Reversed in Part; Case Remanded

ROBERT L. HOLLOWAY, JR., J., delivered the opinion of the court, in which J. ROSS DYER and JILL BARTEE AYERS, JJ., joined.

Shae Atkinson, Memphis, Tennessee, for the appellant, Ronnell Barclay.

Jonathan Skrmetti, Attorney General and Reporter; Katharine K. Decker, Senior Assistant Attorney General; Steve Mulroy, District Attorney General; and Leslie Byrd, Assistant District Attorney General, for the Appellee, State of Tennessee.

OPINION

Factual and Procedural Background

a. Proof at Trial

Petitioner was convicted by a Shelby County jury of rape of a child, aggravated sexual battery, and sexual exploitation of a minor by electronic means and sentenced to an effective thirty-five years in confinement. *See State v. Ronnell Barclay*, No. W2017-01329-CCA-R3-CD, 2019 WL 994181 (Tenn. Crim. App. Feb. 28, 2019), *perm. app. denied* (Tenn. Apr. 30, 2019). On direct appeal, this court summarized the evidence presented at trial as follows:

> The testimony received at trial demonstrated that since her parents' separation, the victim lived in Memphis, Tennessee, with her mother, Sandra Jones. When the victim was around the age of seven, her father, Keith Owens, began dating someone and settled down. At that point, the victim began to visit Mr. Owens's home, also in Memphis, on a regular basis. Around the time that the victim reached the age of nine, Mr. Owens married Sandra Owens. Mrs. Owens had three sons, of which [Petitioner] is the eldest. [Petitioner] is approximately twelve years older than the victim. Ms. Jones and Mr. Owens remained friends, and they had an arrangement for the victim to get to know her new family. When Ms. Jones's employment changed, she arranged for Mr. Owens to pick up the victim after school from time to time. As part of this arrangement, [Petitioner] and the victim's middle step-brother would pick the victim up from school when Mr. Owens was unavailable.
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> The victim grew close to [Petitioner] and called him by his nickname "JJ." When Mr. and Mrs. Owens married, [Petitioner] was serving in the military and lived in Colorado with his wife and three children. [Petitioner] separated from his wife and moved to Memphis to live with Mr. and Mrs. Owens for a month. When [Petitioner] moved back in with Mr. and Mrs. Owens, the relationship between [Petitioner] and the victim changed. [Petitioner] began to act like something other than a step-brother, and their relationship began to incorporate sexual contact. Eventually, [Petitioner] moved out to his own apartment, which he shared with the victim's middle step-brother, but his relationship with the victim continued.
>
> Mr. Owens and Ms. Jones had forbidden the victim from having a phone, but [Petitioner] had secretly given her a phone when she was twelve

years old so that they could communicate. The victim hid the phone from her parents and talked to [Petitioner] using the Facebook and ooVoo applications. On Facebook, the victim used a fake name. However, the victim's identity was not fully concealed because everyone that she interacted with on Facebook knew her real identity and she had posted pictures of herself on Facebook. On these apps, [Petitioner] and the victim exchanged explicit pictures. At the time, the victim liked exchanging explicit pictures. [Petitioner] and the victim also video chatted on more than one occasion. During multiple video chats, [Petitioner] asked the victim to "play" with herself, the victim complied, and [Petitioner] would "play" with himself as well.

On the morning of Saturday, March 29, 2014, Ms. Jones received a text message from [Petitioner], then twenty-four years old, stating that he would like to take the victim, then twelve years old, and her youngest step-brother to Chuck E. Cheese. Ms. Jones allowed the victim to go to Chuck E. Cheese with [Petitioner]. When [Petitioner] arrived to pick up the victim, Ms. Jones looked out the window to make sure that it was [Petitioner]'s car and did nothing more because she trusted [Petitioner]. Two or three hours later, [Petitioner] brought the victim back to Ms. Jones's house.

Later that night, Ms. Jones and the victim were sitting on the couch, and Ms. Jones felt a vibration coming from the seat cushions of the couch. She asked, "What is that?" The victim responded, "Nothing." Ms. Jones told the victim to get up, and Ms. Jones searched the couch. She found a cell phone. Ms. Jones looked through the phone and found explicit messages and an explicit picture exchanged between [Petitioner] and the victim. Ms. Jones then called Mr. Owens and arranged to speak with him in person the next day. Ms. Jones and Mr. Owens showed the phone and its contents to Mrs. Owens. Soon thereafter, Ms. Jones and Mr. Owens went to the police and filed a report.

The police came to Ms. Jones's house and spoke with the victim. The victim told the police that she had been "touched" by [Petitioner] but that she had not sent any nude pictures. Ms. Jones also took the victim to the Memphis Child Advocacy Center to be interviewed. When Teresa Honory at the Child Advocacy Center asked the victim about pictures exchanged between the victim and [Petitioner], the victim said that she had not sent any nude pictures to [Petitioner]. However, the victim admitted to Ms. Honory that she had sent a clothed picture of herself to the [Petitioner]. The victim also told Ms. Honory that [Petitioner] had digitally penetrated her. At a

different point during the conversation, the victim told Ms. Honory that [Petitioner] had given her a hug that she did not like.

The case was transferred to the Special Victims Unit of the Memphis Police Department because it involved the use of the internet. Sergeant James Taylor became involved and retrieved all of the data and messages stored on the phone possessed by the victim. Sergeant Taylor found explicit conversations between [Petitioner] and the victim, which included the victim sending [Petitioner] pictures of her breasts and her vagina. Sergeant Taylor's investigation focused on the one reported digital penetration of the victim and the electronic solicitation of the victim. Sergeant Taylor was not aware of a penile penetration at the time that he charged the case and sent it to the District Attorney's office.

In November of 2014, a Shelby County grand jury returned an indictment charging [Petitioner] for rape of a child in Count One; aggravated sexual battery in Count Two; and exploitation of a minor in Counts Three through Eight. Count One alleged that [Petitioner] sexually penetrated the victim between the dates of January 1, 2014, and March 30, 2014. Count Two alleged that [Petitioner] engaged in sexual contact with the victim between the dates of January 1, 2014, and March 30, 2014.

On February 27, 2017, the morning of trial, the prosecutor informed defense counsel that the victim had just revealed that a penile penetration had occurred on March 29, 2014. Prior to the morning of trial, [Petitioner] and defense counsel were only notified of allegations pertaining to one digital penetration and were under the impression that Counts One and Two were alternate theories of the same offense. Without any request for a continuance from [Petitioner], the case proceeded to trial.

The victim's trial testimony differed substantially from the statements that she had given to the police and Ms. Honory at the Child Advocacy Center. The victim testified that the first encounter between [Petitioner] and the victim occurred at the home of Mr. and Mrs. Owens. The victim was lying on her bed watching television when [Petitioner] came into the room and got into bed with her. The situation seemed strange to the victim. She asked what [Petitioner] was doing, and he responded that he was "laying" with her. So, she put some "covers" between her and [Petitioner] to create some distance. [Petitioner] scooted toward the victim and put his arm around her. The victim did not mind because there was "cover" between them. According to the victim, nothing else happened that night.

According to the victim, on a different occasion, [Petitioner], the victim, and the victim's youngest step-brother were all lying on the floor watching a movie in a different bedroom of Mr. and Mrs. Owens' house. The victim's youngest step-brother got in the top of a bunk bed and went to sleep. [Petitioner] and the victim remained on the floor, the victim took off her own pants, and [Petitioner] tried to put his penis inside the victim's vagina. The victim told [Petitioner] that it was hurting and told him to stop. [Petitioner] stopped and did not penetrate the victim, penilely or digitally.

At a later date, [Petitioner] and the victim were watching television in the den of Mr. and Mrs. Owens' home. The victim lay on the couch with her feet propped up on a table, and [Petitioner] rested his head on her stomach. [Petitioner] reached down the victim's pants and digitally penetrated the victim. The victim testified that, on a family trip to Gatlinburg, [Petitioner] began "hitting on" her in front of ten other people and that [Petitioner] tried to have sex with her while another person was in the room.

When [Petitioner] gave the victim a phone, he failed to give her a charger. So, the victim told [Petitioner] to tell her mother, Ms. Jones, that he was going to take the victim and her younger step-brother somewhere as a ruse for bringing her a phone charger. [Petitioner] called Ms. Jones and told her that he would like to take the victim and her younger step-brother to Chuck E. Cheese. [Petitioner] picked the victim up, but they did not go to Chuck E. Cheese. Instead, they went to his apartment. Alone in the apartment, they went upstairs to [Petitioner]'s room and "had sex," which included oral sex and unprotected vaginal intercourse. At the time, the victim was twelve years of age. [Petitioner] had told the victim that he would take her to Miami, and she said she wanted to go with him.

The victim admitted that, initially, she did not want to talk to the police and did not want to get [Petitioner] into trouble. The victim admitted that she lied and did not tell the truth when she spoke with Ms. Honory at the Child Advocacy Center because she did not want to get [Petitioner] in trouble. The victim also admitted that she had falsely accused a different step-brother of touching her inappropriately. She explained that the false accusation was an attempt to get attention.

At the end of the State's case-in-chief, the trial court inquired, "[W]hich incident are you relying on for purposes of Count One and are you talking about the same incident for Count Two or is that an alternative theory

for the same offense? Are you talking about separate offenses?" The prosecutor responded,

> []For Count One[,] I'm going to use . . . the last occurrence when she testified that he penetrated her vaginally with his penis . . . on March 29th . . . [a]t his apartment . . . . As for Count Two . . . I'm going to elect the time when he attempted to penetrate her with his penis, and she said he tried to put it in and it hurt her.[]

[Petitioner] raised no objection to the election of offenses.

[Petitioner] elected not to testify. The defense put on proof that a social media account can easily be faked. Dr. Melissa Janoske, an assistant professor at the University of Memphis, teaches social media from a public relations perspective. While testifying, Dr. Janoske used a fake name and created an email address using a fake name and a Facebook account using a fake name. Also, she used her personal Facebook account to add the fake Facebook account as a friend. She then demonstrated how to send messages between the fake Facebook account and her personal account. During her messaging demonstration, Dr. Janoske illustrated the ease of finding a picture on the internet and sending it between the accounts. Dr. Janoske also testified that explicit pictures of a penis were readily available on the internet, but she refrained from downloading an explicit picture on a computer owned by the State.

Mrs. Owens also testified for the defense. She stated that she had known the victim since 2009, and she gave her opinion on the victim's truthfulness by saying, "[A]s far as [the victim's] truthfulness, my opinion is that . . . I wouldn't trust her . . . . [I]f it's something that would be a negative reaction, she's not going to tell the truth."

Id. at *1-4 (footnotes in original omitted). The jury found Petitioner guilty as charged. *Id.* at *4. After a sentencing hearing, the trial court ordered that Petitioner serve twenty-seven years for rape of a child, which was a statutorily-mandated Range II sentence, and eight years for aggravated sexual battery, to be served consecutively. *See* Tenn. Code Ann. § 39-13-522(b)(2)(A). After merging the six convictions for sexual exploitation of a minor by electronic means into two remaining convictions, the trial court ordered respective sentences of eight and three years, to be served concurrently with the other sentences, for a total effective

sentence of thirty-five years at one hundred percent service. *Ronnell Barclay*, 2019 WL 994181, at *4.

b. Motion for New Trial Hearing[1]

At the motion for new trial hearing, Petitioner argued that he had insufficient notice of the charges as a result of the new disclosure of penile penetration on the morning of trial. Trial counsel discussed with the trial court that, until the morning of trial, he anticipated evidence would be introduced of sexual touching or penetration occurring on March 8, 2014, which had been indicted as rape of a child and aggravated sexual battery as alternative theories of guilt. He said that Petitioner's original counsel had the same impression. Trial counsel stated that the discovery materials also reflected that on March 30, 2014,[2] Petitioner took the victim to his home instead of a planned outing to Chuck E. Cheese but that nothing of a sexual nature had happened. Counsel noted that he had advised Petitioner of his exposure at trial based upon the offenses' merging for a total sentence of twenty-five years but that the trial court had imposed more than thirty years based upon the two separate incidents. Counsel stated that "that wasn't certainly what [Petitioner] prepared for and it wasn't what we advised him for," although the two incidents fell under the "broad umbrella" of the indictment. Counsel emphasized that they had been "focused on March 8th and not really paying attention to March 30th because it [didn't] appear to be legally relevant what happened that day, especially as goes to the trial." Counsel noted that he did not think the State had done anything unprofessional but that, regardless, Petitioner had been left "trying to wing a defense" on the day of trial. Counsel stated Petitioner may have taken the twelve-year plea offer if he had known he faced more than thirty years at trial.

Upon questioning by the trial court about whether the State intended for Counts 1 and 2 of the indictment to reflect one incident, the prosecutor stated that she had not prepared the indictment, that the victim had given her "many, many different stories now at this point" and that she did not know which facts the State would use in the election of offenses until after the victim's testimony. The prosecutor agreed, though, that her theory of the case before the morning of trial was that one incident had occurred. The prosecutor noted that the victim believed she was in love with Petitioner and that they would marry; accordingly, the victim had made limited disclosures in order to protect Petitioner. She stated that the discovery materials contained text messages planning the Chuck E. Cheese

[1] To assist in the resolution of this proceeding, we take judicial notice of the record from Petitioner's direct appeal. *See* Tenn. R. App. P. 13(c); *State v. Lawson*, 291 S.W.3d 864, 869 (Tenn. 2009); *State ex rel. Wilkerson v. Bomar*, 376 S.W.2d 451, 453 (Tenn. 1964).

[2] The proof at trial indicated that the incident occurred on March 29, 2014; trial counsel may have misspoken here.

trip and a gap in communication before additional messages asking if the victim was okay, which led her to ask the victim about the event again during their pretrial discussion.

The prosecutor told trial counsel about the new disclosure and opined that "[i]t didn't seem to be any problem." She said that counsel did not discuss with her needing to reset the trial or seem concerned that the facts were "completely different from [counsel's] theory of the case."

When the trial court asked trial counsel why he did not seek a continuance, counsel responded that the case had been reset many times over a period of years, and counsel "didn't think there was any chance of getting one, not with a case that had been set for trial that long, and not when [counsel] had been brought on board . . . to try the case, that [original counsel] had advised and prepared." Counsel reiterated that he thought the new disclosure would be the single incident elected to support both Counts 1 and 2."

The trial court noted that it was "very much concerned" and "disturbed" about the notice issue, that the case had been pending between November 2014 and February 2017, and that the court was unaware until the motion for new trial hearing that the case had not always relied upon two incidents. The court stated that the victim's testimony reflected her emotional ties to Petitioner and that the victim had not been "overly cooperative" with the State. The court said that trial counsel had an obligation to object and to ask for a continuance or guidance from the court, but he did not do so. The court concluded that although the situation did not "smell good," the proof in the case was overwhelming, and the jury had the opportunity to assess the victim's credibility. The court found that the State gave Petitioner late notice and that Petitioner chose not to request a continuance. The court concluded that Petitioner waived the issue for failure to object and that both parties entered the trial "with full knowledge of what was coming." The court denied the motion for new trial, and Petitioner timely appealed.

c. Direct Appeal

Relevant to the post-conviction proceedings, on direct appeal, Petitioner argued that he received insufficient notice to prepare a defense, arguing that "the first two counts of the indictment were based on only one act by [Petitioner] and that when the State chose to pursue a conviction of a different act using the same indictment, they ran afoul of the notice requirements of the United States and Tennessee Constitution." *Id.* at *5. This court concluded that Petitioner had waived consideration of the issue by failing to "ask for a continuance, move for a bill of particulars, notify the trial court, or take any step toward a resolution of the problem prior to trial." *Id.* This court further concluded that plain error relief was unwarranted because the open indictment charged Petitioner with rape of a child and aggravated sexual battery occurring between January 1, 2014, and March 30, 2014,

which "put [Petitioner] on notice that any sexual penetration or sexual contact between the aforementioned dates was subject to prosecution by the State." *Id.*

d. Post-conviction Proceedings

After this court affirmed Petitioner's convictions, he filed a timely post-conviction petition, which appointed post-conviction counsel subsequently amended. In relevant part, Petitioner asserted that trial counsel provided ineffective assistance by failing to (1) communicate to Petitioner that the victim had made a new disclosure on the day of trial that penile penetration had occurred and "that the offer was still on the table"; and (2) request a continuance in order to investigate, discuss with Petitioner, and defend against the new disclosure.

At the post-conviction hearing, trial counsel testified that he had been practicing law for between four and a half and five years at the time of Petitioner's trial. He stated that he transitioned to private criminal defense work in 2016 after almost four years of being a prosecutor. Counsel was appointed to Petitioner's case in November 2016, and the trial occurred in February 2017. He noted that the Public Defender's Office originally represented Petitioner. Counsel met with Petitioner in court a few times and at the jail several times.

Counsel agreed that Petitioner was charged with rape of a child, aggravated sexual battery, and six counts of sexual exploitation of a minor by electronic means and that the indictment covered from January 1, 2014, until March 30, 2014. Counsel stated that, until the morning of trial, the facts underlying the case were that Petitioner and the victim were in an improper relationship and that, either on a family trip or at Petitioner's apartment, Petitioner digitally penetrated the victim. Petitioner had given the victim an old cell phone with the ability to be used over Wi-Fi, and they communicated using various applications.

Trial counsel testified that his understanding was that the State was "covering [its] bases" by charging multiple theories of culpability. He stated that this also reflected the State's impression of the case, to his knowledge. Counsel noted his belief that the State "really had no idea what version of events [the victim] was going to give when she testified" and opined that the charges in Counts 1 and 2 "was less about what the jury would come back with and more about" how the victim testified.

Trial counsel testified that the defense theory was to show that the victim had the "demonstrated capability" to falsify online profiles. He stated that the victim created an eHarmony dating account and a Facebook account using the name "Deshauna," which was the name of her older cousin. He said that the victim also had a Match.com dating account

and that, in all the accounts, she "was initiating conversation with men at an inappropriate age online and pretending to be older."

Counsel testified that the victim had given many different accounts of the relevant events and that, during closing arguments, he prepared a sixty-three-slide presentation pointing out the inconsistencies in the victim's statements. He noted that the victim's statements to the prosecutor were "all different." He stated that he also pointed out parts of the statements that were consistent but did not make sense; counsel cited as an example that Petitioner allegedly "made his move on" the victim during a family vacation in front of "13 or 14 other people there at the time." Although counsel considered the victim's statement that a sexual encounter occurred at Petitioner's apartment to be more plausible, he noted that Petitioner lived with a roommate who also could have discovered them. Counsel elaborated that the events the victim described "would not be the way you would prey upon someone if you were going to do so . . . almost begging to get caught[.]" Counsel stated that the victim's messages did not "seem consistent or realistic to [counsel], such as saying that her first sexual experience did not hurt at all" and that the messages supposedly authored by Petitioner "seemed . . . to be in the tone of an 11 or 12 year old [.]" Counsel noted, though, that one could characterize the tone as "he was grooming her and [speaking] to her as she spoke to him." Counsel stated that he presented each of these arguments to the jury during closing "as best [h]e could."

Trial counsel testified that Petitioner's mother or brother provided him with the information about the victim's dating application profiles, as well as informing counsel of the incident in which the victim accused Petitioner's "middle brother" of sexual touching, which she later recanted. Counsel elicited at trial that the victim disclosed the alleged sexual touching by the middle brother to a friend during a sleepover.

Trial counsel testified that he and his law partner spoke with Petitioner's family and hired an expert, who was a professor of social media, to discuss the victim's ability to create a false Facebook profile impersonating Petitioner and to find photographs of male genitalia on the internet. He stated that the expert created a false Facebook account in real time for the jury at trial. Counsel stated that, although Petitioner maintained his innocence at all times during the representation, Petitioner asked counsel not to subpoena records from the internet provider related to the Facebook account and indicated that the Facebook account was, in fact, his. Counsel noted that the victim could have accessed Petitioner's Facebook account from the cell phone he gave her and used it "to make realistic fakes." Counsel stated that their theory was that the victim used the Facebook exchanges to create a fantasy of a relationship.

Trial counsel testified that he had Petitioner's mother ask Petitioner's youngest brother whether he remembered Petitioner's taking the victim and him to Chuck E. Cheese.

The youngest brother did not recall the occasion, and counsel concluded that he would not be a favorable witness.

Trial counsel testified that the State had an open plea offer to Petitioner when he began his representation; although he could not remember the terms of the offer with certainty due to the passage of time, he thought the offer was for twelve years. Counsel stated that Petitioner had indicated he would accept an eight-year offer and that counsel "was begging" the prosecutor to agree to the reduced sentence the weekend before trial. He said that he and the prosecutor exchanged text messages and that she was going to speak to the victim and her mother one last time about the sentence. Counsel noted that he believed that the victim made the new disclosure during one of the prosecutor's discussions with her about the plea negotiations. Counsel agreed that an eight-year offer "never was put on the table."

Trial counsel testified that he wanted Petitioner to accept the State's plea offer but that "[Petitioner] really wanted to take it to trial." Counsel said that he brought his law partner, who sat second chair at trial, to their last jail visit thinking "that maybe a fresh perspective, a different face, might help settle it" but that his law partner also failed to convince Petitioner to accept the offer.

Trial counsel stated,

> Again, I can't remember exactly what the offer was, but I know that whatever the offer was, I communicated it to him several times. Although, I will say not as forcefully as I would do it now. It was my first trial as a criminal defense attorney and I was trying really hard not to pressure him . . . . [M]y understanding was that [Petitioner and original counsel's] fall out of [rapport] had been that [original counsel] had pushed him really hard to take the offer, and I think [Petitioner] felt like [original counsel] thought he's guilty . . . . So, I was trying to walk a tight rope of not pushing him too hard because it's his decision and because I didn't want to lose [rapport] with him. I would do it more strongly today, but I wanted him to take the offer. I didn't think it was as good an offer as I wanted, but the exposure was just so high that I really wanted him to take it.

Trial counsel testified that he reviewed with Petitioner the benefits and drawbacks of going to trial versus pleading guilty. Counsel stated, though, the following:

> [] I want to be clear that I got it wrong . . . So, what I was discussing with him was his exposure, you know, especially in terms of sentence. Here's the pro of taking the offer and here's the con. This is the time you can get if you

> go to trial, but I always thought that the penile vaginal rape and the aggravated sexual battery were going to merge, specifically because they had always been alleged as one incident . . . . The exposure that I told him is lower than what he got when the narrative changed, and what was one event became two events and they were able to make an election and hit him with stacked time. That was not something that I saw coming. I don't think I could have seen it coming. Maybe a more experienced attorney would have, I keep myself up at night over that, but the exposure I had always accounted for was the 25 years on the rape.

Counsel stated that he also emphasized to Petitioner that juries "will just come up with a verdict on their own, they'll set aside things, even things that had been clearly proven." He said that he also explained Petitioner's parole eligibility and that "even if it's 100 percent time, it's really 86 percent time in Tennessee." Counsel agreed that he reviewed the elements of the offenses with Petitioner, including the anticipated evidence and "what we thought would merge and how that would [a]ffect time."

Trial counsel testified that he told Petitioner that he

> was just scared to death of the Facebook evidence. There was so much of it and, honestly, the scariest thing about the Facebook evidence [was] it's so much of it, it's so mundane. It's not all sex, sex, sex. It's, "Hey, do you like this song?" or, "Hey, can I borrow your cell phone charger?" It doesn't even seem like the sort of thing people would make up. There is a very realistic, just, sense of the day-to-day conversation between two people . . . . And I thought that we might be able to sell the jury on this is fake . . . . I feel like Facebook was a very trusted institution at the time, so trying to show the jury, "Look, this can be faked" was a big part of it.

Counsel stated that he also conveyed to Petitioner that it "would be a real credibility decision" based upon the victim's testimony. Counsel opined that the prosecutor did not want to go to trial based upon them both being "in the dark about what was going to happen" but that, in light of the new disclosure, she could not accept Petitioner's request for an eight-year sentence.

Trial counsel testified that the prosecutor informed him on the morning of trial of the new disclosure. Counsel added that, although the discovery materials included Facebook messages in which the victim and Petitioner planned to go to his apartment together under the guise of going to Chuck E. Cheese, they did not reflect that anything sexual happened on that occasion.

Trial counsel testified that "[i]t still seemed like it was one offense alleged to have occurred at a different place, at a different day, it's still one offense. Although . . . that was ambiguous and we recognize the ambiguity." Counsel said that he spoke to Petitioner "in the back" and verified that Petitioner had no alibi for "either day." Counsel noted that they had already looked for an alibi for "any identifiable day" that would have supported the "she's-a-liar theory."

Trial counsel testified that the new disclosure did not change the defense strategy and that the victim's continual changing of her story "played into it." Counsel said that he and Petitioner discussed what could change in the impending trial if they requested a continuance. Counsel stated,

> So, we recognized there was ambiguity, that in trial [the victim] might make this two separate events. It seemed like the story was always evolving, always being pushed to be a better story. That's what, me as a defense attorney, I feel like you tell one story, it doesn't make sense, . . . prosecutor or police generally argue, "Well, that doesn't make sense. Are you sure it didn't happen this way? Are you sure, maybe, you weren't at that cabin? Maybe you weren't just in your bedroom?" You know, I hate that that happens, and so I felt like, given time, this is going to become an even better story. Eventually, she's going to say that this was two separate events, and if that happened--and this is what I discussed with [Petitioner] in the back right before we decided we're going to trial today--was, I said look, if [the prosecutor], for one heartbeat of a second, can get her to say this is two separate events and we get a reset, then they're coming back with a superseding indictment and then you're not looking at [aggravated sexual] battery plus rape, you're looking at rape, plus rape, plus [aggravated sexual] battery, you know, or at least rape plus rape. So, it was looking like he could, effectively, double his exposure on a rape from 25 to 50 years, and that was when we collectively came to the conclusion if this is eventually going to two events, we cannot give them time for a superseding indictment.

Counsel said that Petitioner chose to proceed under his advice.

Trial counsel testified that he was prepared to defend against either allegation of digital penetration and that "[s]trategically, [he] liked the idea that no one on the State's side knew exactly what [the victim] would say, and that she kept giving different versions . . . that she had not told the same story twice." Counsel stated that there were no mitigating circumstances, such as mistake of age, and that the defense was "all-or-nothing." Counsel noted his doubt that the jury would believe that Petitioner would fondle the victim but stop before having intercourse. He reiterated that, after the victim's new disclosure, he

mistakenly believed the facts would only establish that one incident occurred and that he advised Petitioner about his exposure at trial accordingly. Counsel did not discuss with Petitioner how the new disclosure could change the merger of convictions or consecutive sentencing; he noted that he "should have and did not."

The following exchange occurred:

> Q. Once that disclosure was made, do you recall if that changed the offer at all towards him?
>
> A. I think it did, but I don't recall.
>
> . . . .
>
> Q. [Trial counsel], you were saying that you felt that the offer was so unattainable that you weren't exactly sure after that disclosure, that you could remember exactly, I believe it's not a misstatement that you thought it was still on the table; is that correct?
>
> A. That's my recollection, I think so. I think we still had a 12-year offer. I don't know if it's in the file, but it think it was a 12-year offer.

Trial counsel stated, though, that after explaining the risk of a superseding indictment and the possibility of two rape convictions and a fifty-year sentence, "[i]t seemed to have no impact on [Petitioner's] drive to take it to trial, he still didn't want the deal . . . . He was saying, 'I'm innocent, I didn't do this, I'm not going to go down for this, they're not going to believe her.'" Counsel said that the State "had no superior position and understanding of the case" on the day of trial and that rescheduling the defense expert would have been difficult. He noted that the defense

> already had years of contemplation at this point about whether or not to take the plea . . . . There wasn't a lot of benefit to resetting it, not for us. Our theory wasn't going to change, it was just another date, we didn't have an alibi, and we were going to be coming back on a different day saying she's a liar, having given the State more time to prepare, perhaps more time to get a superseding indictment. So that's what I told [Petitioner] and together we came to the decision to just go for it that day.

On cross-examination, trial counsel testified that he conducted three or four criminal trials before he worked in criminal defense, although he had not handled any trials for Class

A or B felonies or sexual offenses. He stated that he had negotiated cases as a defense attorney and "thousands" of cases as a prosecutor, including rape cases.

When asked again whether the plea offer remained open after the victim's new disclosure, trial counsel replied, "I think so. But it's been a long time, I really don't remember." Counsel stated that he had no assurances that the offer would have remained open if he had asked for a continuance, and he believed "that specific offer would be revoked." Counsel noted, though, that he "didn't think they were going to revoke all offers and say trial or nothing." Counsel agreed that he discussed with Petitioner that the rape of a child charge could result in a twenty-five-year sentence, that the plea offer was for twelve years, and that Petitioner rejected the offer knowing he faced at least twenty-five years.

Upon questioning by the post-conviction court, trial counsel testified that, when he learned of the victim's new disclosure, he interpreted it as the victim's alleging a different method of penetration during the same incident she had been describing all along. He noted that, in light of the victim's changing statements, he and the prosecutor would not have been surprised if the victim had denied knowing Petitioner at trial or had alleged that they had sex on multiple occasions.

Trial counsel testified that it was fair to say that the victim had mentioned two different locations and a "couple of different time frames" in the discovery materials. Counsel did not recall the victim's stating in the discovery materials that, on a separate occasion, Petitioner attempted unsuccessfully to penetrate her vagina. He noted that the victim's original statement that nothing happened during the Chuck E. Cheese incident did not make sense in light of the amount of "elaborate" planning that took place. Counsel stated that the event was "on [his] radar as far as[,] is she going to say something happened here? And [they] were always preparing for that date to be significant, or potentially significant." He stated that, as part of the general strategy of discrediting the victim, he explored whether an alibi existed for the Chuck E. Cheese date in order to ascertain whether the event generally did not occur. Counsel noted that Petitioner and his brother picked the victim up from school most days and that Petitioner's regular access to the victim created opportunity for a rape but that counsel used this fact to cast doubt on the victim's stories about Petitioner's abusing her during family vacations and other risky situations.

Trial counsel testified relative to the continuance issue that he was concerned about the victim's possibly disclosing additional instances of rape and the victim's story becoming more "complete or more cohesive" if the State had additional time to prepare her for trial. He agreed that it was a strategic decision to advise Petitioner not to seek a continuance.

Petitioner testified that he met with trial counsel three times before trial for about thirty minutes each. Petitioner had received the discovery materials from original counsel, and he recalled briefly reviewing it with trial counsel. Petitioner stated that, prior to trial, trial counsel discouraged him from testifying by telling him that if the State caught him in a lie, he would receive a harsher sentence. Petitioner noted that he "wanted to go to trial regardless" and that counsel presented Petitioner with a plea offer for twelve years for the first time on the day of trial. Petitioner said that his "mindset was already set on . . . not taking a 12, getting a[n] eight because [Petitioner was] still stuck on the fact, like, there's nothing they ha[d] on [Petitioner] because [he] didn't do anything."

Petitioner said that his mother had urged him to accept an offer of eight years and that, after counsel failed to arrange such an offer, counsel "never told [him] about a new story, he never told [him] about anything else." Petitioner said that he responded, "Just forget it, let's go to trial." Petitioner added, though, that he would have accepted the twelve-year offer if he had known "something changed."

Petitioner agreed that, "when [he was] with [trial counsel], it was always the fact that [Petitioner was] going to trial because . . . [he] didn't have an option, at that point, because [he] didn't have an offer[.]" Petitioner stated that trial counsel let him decide whether to accept the plea offer; he noted, though, that "with [Petitioner] being naive, like, [his] mindset was still . . . go to trial."

Petitioner testified that he was unaware of the new disclosure until the victim testified at trial. He denied that trial counsel ever communicated the new disclosure to him or discussed the possibility of a continuance. Petitioner stated that, had he known of the new disclosure prior to trial, he would have asked to "get a little time to talk to [his] people to see . . . what would be the best thing." He noted that he would have considered his three children in the decision. Petitioner said, "To go to trial was a joint decision, yes, mainly . . . based on . . . what I knew about the digital penetration."

Petitioner recalled trial counsel's telling him that he did not believe Petitioner would be convicted of his "first two charges." Petitioner denied that counsel ever discussed merger of convictions or consecutive sentencing. Petitioner stated that counsel informed him that the State had the burden of proof, but he denied that counsel explained what the State had to prove. Petitioner similarly denied that counsel ever gave an opinion about the likelihood that he would be convicted. Petitioner said that counsel told him about the plea offer and gave Petitioner the option to accept the offer or continue to jury selection; Petitioner chose to continue to trial.

On cross-examination, Petitioner acknowledged that he also met with trial counsel for a few minutes during court settings in the holding room. Petitioner stated that counsel

asked him about possible alibis; Petitioner noted that the only thing he did was go to work. Petitioner denied discussing the Facebook account with counsel and said that he would have "gladly" provided counsel with his cell phone. Petitioner did not recall the victim's admitting on the witness stand that she had falsely accused Petitioner's brother.

Petitioner agreed that he maintained his innocence and "demanded" a trial, even after he received the twelve-year plea offer. He further agreed that he knew about the Facebook messages in the discovery materials that discussed the Chuck E. Cheese trip. Petitioner affirmed that the victim had initially alleged that digital penetration occurred at a certain location, and that was what he thought the proof at trial would address. Petitioner agreed that he was still facing the same charges when the allegations changed. Petitioner further agreed that trial counsel explained to him that, if he asked for a continuance, the State could charge an additional count of rape and Petitioner could face fifty years instead of twenty-five.

Petitioner denied that he decided it was better to proceed to trial, even in light of the changed circumstances. He said, "I wanted to go to trial so that I could be scott-free. But after talking to my people, s--t, they telling me how the justice system is, I was like, man, I just want to go home at [my] earliest convenience." Petitioner added, though, that if he had known "s--t was changing the way it was," he would have accepted the plea offer. He acknowledged that he never told trial counsel or the trial court that he wanted to accept the offer before trial began. He agreed that he proceeded to trial because he maintained his innocence and because counsel had advised him about the danger of a delay.

Petitioner indicated that, although he understood the rape charge was unchanged by the nature of the penetration that occurred, he felt more concerned about "[w]hat goes on in prison with that charge" based upon the allegation of penile penetration, which would have made him more willing to accept the plea offer. He stated that he wanted to enter an Alford plea, but he acknowledged that he never communicated that to trial counsel. Upon questioning by the post-conviction court, Petitioner testified that trial counsel never told him whether he had tried to obtain an eight-year offer or that the State had refused an eight-year offer.

Jessica Shurson testified that she prosecuted Petitioner's case during her previous employment with the District Attorney General's Office. Ms. Shurson said that she met with the victim and the victim-witness coordinator twice before trial. Ms. Shurson stated that the victim was initially "very reluctant" to discuss what the victim considered to be her romantic relationship with Petitioner, although the victim disclosed penetration and touching in addition to the materials found on the cell phone. Although Ms. Shurson could not remember the exact timeframe in which the victim disclosed penile penetration for the

first time, she deferred to the trial transcript that it occurred the day of trial. Ms. Shurson stated that she immediately told defense counsel about the disclosure.

Ms. Shurson denied that the victim ever recanted an allegation; she noted that, as was typical for young victims who gained distance from perpetrators of sexual abuse, the victim initially "downplayed" events to protect Petitioner but felt comfortable disclosing "the extent of what went on" as time passed. Ms. Shurson recalled that the victim said Petitioner had penetrated her on "numerous occasions" and that "the story . . . became more filled out as time went on."

On cross-examination, Ms. Shurson testified that she remembered "the case moving from a type of penetration that a victim might think of as not as big of a deal, but . . . that's still rape, and then moving to something more serious." She agreed that all of the alleged incidents occurred within the timeframe specified in the indictment.

Upon questioning by the post-conviction court, Ms. Shurson denied that the new disclosure changed negotiations; she said, "I was hopeful it would, that we could settle it without . . . making [the victim] testify, but . . . as far as I knew, there was no change. There was never much negotiation I don't think. [Petitioner] was never interested to pleading to anything."

On redirect examination, the following exchange occurred regarding plea negotiations:

> Q. Just an omitted question. Ms. Shurson, was there -- and you don't have to remember exactly what it was, but was there an offer in the case?
>
> A. I'm sure there was at some point. There would have been an offer.
>
> Q. And after . . . that penile disclosure the day of trial, was that offer revoked at any point or that was still on the table?
>
> A. I -- I don't remember if -- I don't think it came to that. I -- I think it was more of . . . the victim is now telling . . . me the full extent of everything that happened. Are you interested in negotiating a settlement now, and there was no interest. I don't believe it came to an offer that was revoked or something like that.

The post-conviction court denied relief in a written order, in which it found that trial counsel was "very credible" and "candid . . . about potential mistakes he thought he made or things that could have been done differently." The court noted trial counsel's testimony

that the State had offered a plea agreement for a twelve-year sentence and that counsel had communicated with the State in an effort to obtain an agreement for an eight-year sentence. Counsel stated that he "really wanted [Petitioner] to take" the twelve-year offer.

Relative to the victim's disclosure on the day of trial, the post-conviction court noted trial counsel's testimony that he and Petitioner discussed the disclosure, that Petitioner did not have an alibi for "either day," that counsel advised Petitioner not to ask for a continuance due to the risk of the State's filing a superseding indictment adding additional counts of rape, and that Petitioner decided not to seek a continuance. The court also noted counsel's statement that "to their theory it was yet another story" the victim told and that Petitioner would have been exposed to an additional twenty-five-year sentence had he been charged and convicted of a second count of rape of a child.

The post-conviction court found that Petitioner had failed to prove that trial counsel did not communicate the new disclosure. The court noted that Petitioner's post-conviction testimony was inconsistent and that Petitioner had admitted the decision not to request a continuance was "a joint one[,] which t[old] this court there was a discussion about a continuance." The court stated that, "[w]here the attorney's acts or omissions are based on sound legal strategy, [c]ourts apply deference to a wide range of reasonable actions" and denied relief on Petitioner's claim that counsel did not communicate the new disclosure to him.

Relative to Petitioner's exposure at trial, the post-conviction court stated the following:

> Trial [c]ounsel testified that when it came to [Petitioner's] exposure he got it wrong. He explained that he was discussing the pros and cons of accepting the offer the State had made versus going to trial. Trial [c]ounsel explained that he was specific about what he could be sentenced to if he went to trial and was convicted. However, he testified that he always thought that the penile vaginal rape and the aggravated sexual battery were going to merge because they had always been alleged as one act. The exposure he told his client was lower than it actually was. He explained further that the offer Petitioner received was lower than the sentence he received when "the narrative changed." He testified that what was one event became two events and after the election of offenses the two offenses "were stacked" for a much greater sentence. He admitted that he had only accounted for 25 years on the rape.

The post-conviction court found that counsel's failure to "explain Petitioner's additional exposure" was deficient. However, the court concluded that no reasonable probability existed that the error would have led to a different result.

The post-conviction court found that trial counsel's advice relative to the decision not to seek a continuance was based upon counsel's "professional legal strategy." The court noted that counsel was prepared for trial because the new disclosure did not change the defense strategy and that, after explaining the risks of a continuance, Petitioner wanted to proceed to trial. The court concluded that counsel's advice not to seek a continuance was not deficient. Petitioner timely appealed.

Analysis

On appeal, Petitioner asserts that he received ineffective assistance of counsel because counsel (1) did not communicate to Petitioner that the victim made a new disclosure on the first day of trial; (2) incorrectly informed Petitioner of his potential exposure at trial as a result of the new disclosure; and (3) failed to request a continuance after the State informed the trial court and Petitioner of the new disclosure. The State responds that counsel was not deficient and that Petitioner was not prejudiced.

In order to prevail on a petition for post-conviction relief, a petitioner must prove all factual allegations by clear and convincing evidence. *Jaco v. State*, 120 S.W.3d 828, 830 (Tenn. 2003). Post-conviction relief cases often present mixed questions of law and fact. *See Fields v. State*, 40 S.W.3d 450, 458 (Tenn. 2001). Appellate courts are bound by the post-conviction court's factual findings unless the evidence preponderates against such findings. *Kendrick v. State*, 454 S.W.3d 450, 457 (Tenn. 2015). When reviewing the post-conviction court's factual findings, this court does not reweigh the evidence or substitute its own inferences for those drawn by the post-conviction court. *Id.*; *Fields*, 40 S.W.3d at 456 (citing *Henley v. State*, 960 S.W.2d 572, 578 (Tenn. 1997)). Additionally, "questions concerning the credibility of the witnesses, the weight and value to be given their testimony, and the factual issues raised by the evidence are to be resolved by the [post-conviction court]." *Fields*, 40 S.W.3d at 456 (citing *Henley*, 960 S.W.2d at 579); *see Kendrick*, 454 S.W.3d at 457. The post-conviction court's conclusions of law and application of the law to factual findings are reviewed de novo with no presumption of correctness. *Kendrick*, 454 S.W.3d at 457.

The right to effective assistance of counsel is safeguarded by the Constitutions of both the United States and the State of Tennessee. U.S. Const. amend. VI; Tenn. Const. art. I, § 9. In order to receive post-conviction relief for ineffective assistance of counsel, a petitioner must prove: (1) that counsel's performance was deficient; and (2) that the deficiency prejudiced the defense. *Strickland v. Washington*, 466 U.S. 668, 687 (1984);

see State v. Taylor, 968 S.W.2d 900, 905 (Tenn. Crim. App. 1997) (stating that the same standard for ineffective assistance of counsel applies in both federal and Tennessee cases). Both factors must be proven for the court to grant post-conviction relief. *Strickland*, 466 U.S. at 687; *Henley*, 960 S.W.2d at 580; *Goad v. State*, 938 S.W.2d 363, 370 (Tenn. 1996). Accordingly, if we determine that either factor is not satisfied, there is no need to consider the other factor. *Finch v. State*, 226 S.W.3d 307, 316 (Tenn. 2007) (citing *Carpenter v. State*, 126 S.W.3d 879, 886 (Tenn. 2004)). Additionally, review of counsel's performance "requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." *Strickland*, 466 U.S. at 689; *see Henley*, 960 S.W.2d at 579. We will not second-guess a reasonable trial strategy, and we will not grant relief based on a sound, yet ultimately unsuccessful, tactical decision. *Granderson v. State*, 197 S.W.3d 782, 790 (Tenn. Crim. App. 2006).

As to the first prong of the *Strickland* analysis, "counsel's performance is effective if the advice given or the services rendered are within the range of competence demanded of attorneys in criminal cases." *Henley*, 960 S.W.2d at 579 (citing *Baxter v. Rose*, 523 S.W.2d 930, 936 (Tenn. 1975)); *see Goad*, 938 S.W.2d at 369. In order to prove that counsel was deficient, the petitioner must demonstrate "that counsel's acts or omissions were so serious as to fall below an objective standard of reasonableness under prevailing professional norms." *Goad*, 938 S.W.2d at 369 (citing *Strickland*, 466 U.S. at 688); *see also Baxter*, 523 S.W.2d at 936.

Even if counsel's performance is deficient, the deficiency must have resulted in prejudice to the defense. *Goad*, 938 S.W.2d at 370. Therefore, under the second prong of the *Strickland* analysis, the petitioner "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id*. (quoting *Strickland*, 466 U.S. at 694) (internal quotation marks omitted).

1. Failure to communicate new disclosure

Relative to trial counsel's alleged failure to communicate the new disclosure to Petitioner, the post-conviction court credited trial counsel's testimony and found that counsel promptly discussed the disclosure with Petitioner. The court noted that Petitioner acknowledged that a discussion about a continuance took place, which would only have been necessary after counsel informed him of the disclosure. The record does not preponderate against the court's findings in this regard. We note that witness credibility is the province of the post-conviction court, and we will not disturb its factual findings. *See Fields*, 40 S.W.3d at 456; *Kendrick*, 454 S.W.3d at 457. Petitioner has not demonstrated

that trial counsel's performance was deficient. Petitioner is not entitled to relief on this basis.

2. Continuance

Relative to trial counsel's failure to request a continuance, we agree with the post-conviction court that the decision to proceed with trial was tactical and reasonable based upon the circumstances. Trial counsel testified that the new disclosure did not change the overall defense strategy and, in fact, allowed counsel to use the late disclosure as an illustration of the victim's changing stories. Counsel stated that he was already generally aware of the facts underlying the Chuck E. Cheese incident and had explored whether Petitioner had an alibi for that date. Counsel also correctly stressed to Petitioner that a continuance would allow the State time to obtain a superseding indictment charging a second count of rape of a child, which could have merited consecutive sentencing and almost doubled Petitioner's sentencing exposure at trial. Given the proof adduced at trial, we note that the likelihood of such a conviction was high. Counsel's advice was not deficient, and Petitioner is not entitled to relief on this basis.

3. Potential exposure at trial

Petitioner did not include the issue concerning trial counsel's advice about his potential exposure at trial in the post-conviction petition or in the amended petition. Generally, issues not raised in the post-conviction petition are subject to waiver. *See, e.g.*, *Matthew B. Foley v. State*, No. M2018- 01963-CCA-R3-CD, 2020 WL 957660, at *7 (Tenn. Crim. App. Feb. 27, 2020) (citing *Lonnie Lee Angel, Jr. v. State*, No. E2018-01551-CCA-R3-PC, 2019 WL 6954186, at *7 (Tenn. Crim. App. Dec. 18, 2019)). However, this court may extend appellate review to issues presented for the first time at the post-conviction hearing "if the issue was argued at the post-conviction hearing and decided by the post-conviction court without objection." *Holland v. State*, 610 S.W.3d 450, 458 (Tenn. 2020) (citations omitted). The exposure issue was raised at the post-conviction hearing and addressed by the post-conviction court.

We agree with the post-conviction court that counsel's performance was deficient. Trial counsel stated at the motion for new trial hearing that, to his understanding, the discovery materials suggested that the digital penetration upon which the indictment was based occurred on March 8, 2014. Although the victim had provided separate locations where the incident occurred, counsel and the prosecutor understood her statements to refer to the same event.

Trial counsel further discussed at the motion for new trial and the post-conviction hearing that he had noted the March 30, 2014 Chuck E. Cheese encounter in his

investigation, although the victim had maintained until the morning of trial that nothing sexual had occurred on that date. At the post-conviction hearing, trial counsel testified that he had investigated whether Petitioner had an alibi for all of Petitioner's encounters with the victim as part of his strategy to generally discredit the victim and challenge the Facebook messages' veracity. This included the Chuck E. Cheese encounter. Counsel was also cognizant of the fact that the State would likely obtain a superseding indictment charging an additional count of rape of a child if Petitioner received a continuance.

Despite knowing that the Chuck E. Cheese encounter occurred on an identifiable date apart from the March 8 allegations, that the encounter would justify a separate rape of a child charge, and that the encounter fell within the timeframe contained in the existing indictment, trial counsel failed to realize and inform Petitioner that the victim's new allegations might provide the basis for the State to elect separate incidents for Counts 1 and 2, which would result in no merger and the potential for consecutive sentencing. Counsel candidly acknowledged his mistake multiple times at the post-conviction hearing. Consequently, his underestimating Petitioner's exposure at trial fell below an objective standard of reasonableness for criminal defense attorneys and constitutes deficient performance. *See Goad*, 938 S.W.2d at 369; *Thomas T. Nicholson v. State*, No. E2009-00213-CCA-R3-PC, 2010 WL 1980190, at *20 (Tenn. Crim. App. May 12, 2010) (concluding that, relative to a plea agreement, trial counsel's performance was deficient when counsel mistakenly told the petitioner that his release eligibility was thirty percent and did not advise the petitioner that the relevant parole board did not grant parole to sex offenders).

Further, we note that trial counsel's initial advice about Petitioner's exposure at trial was erroneous even before the new disclosure occurred. Tennessee Code Annotated section 39-13-522(b)(2)(A) provides that a defendant who is convicted of rape of a child and is otherwise a Range I, standard offender must be sentenced as a Range II, multiple offender. The sentencing range for a Range II offender convicted of a Class A felony is twenty-five to forty years. Tenn. Code Ann. § 40-35-112(b)(1). Petitioner's maximum sentencing exposure on Count 1 was forty years solely on count one, which was readily apparent by reading the rape of a child statute. Trial counsel should have advised Petitioner that he risked a forty-year sentence if convicted of rape of a child, and counsel's advice was deficient in this regard.

The post-conviction court attempted to address trial counsel's erroneous advice, but its conclusions of law are based upon a mistaken assessment of Petitioner's potential exposure; consequently, we vacate the post-conviction court's judgment in this regard. *See Kendrick*, 454 S.W.3d at 457. We conclude that it is necessary to remand the case to the post-conviction court for further findings of fact and conclusions of law in light of

Petitioner's actual sentencing exposure.[3] On remand, the post-conviction court may hear additional argument or testimony from the parties to aid in its consideration of the issue.

Conclusion

Based on the foregoing and the record as a whole, the judgment of the post-conviction court is affirmed in part, reversed in part, and remanded for further proceedings consistent with this opinion.

_____
ROBERT L. HOLLOWAY, JR., JUDGE

[3] In so doing, we do not intend to opine on the merits of this issue.