

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE  
AT NASHVILLE  
Assigned on Briefs May 9, 2023

**FILED**  
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**JAMES WILLIAM MABE v. STATE OF TENNESSEE**

**Appeal from the Circuit Court for Warren County**  
**No. 15-CR-521      Larry B. Stanley, Jr., Judge**

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**No. M2022-01242-CCA-R3-PC**

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Petitioner, James William Mabe, appeals the denial of his post-conviction petition, arguing that the post-conviction court erred in denying his petition alleging ineffective assistance of counsel at trial. Following our review of the entire record and the briefs of the parties, we affirm the judgment of the post-conviction court.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Affirmed**

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

James Bradley Hannah (on appeal), Smithville, Tennessee; Brandon J. Cox (at post-conviction), Smithville, Tennessee, for the appellant, James William Mabe, Jr.

Jonathan Skrmetti, Attorney General and Reporter; Caroline Weldon, Assistant Attorney General; Chris Stanford, District Attorney General; and Thomas J. Minor and Marla Holloway, Assistant District Attorneys General, for the appellee, State of Tennessee.

**OPINION**

**Factual and Procedural Background**

Petitioner was indicted on three counts of rape of a child and three counts of aggravated sexual battery for sexually abusing his six-year-old stepdaughter. The State sought convictions based upon alternative theories of how the offenses occurred. This court's summary of the relevant facts from the direct appeal follows:

At the trial, the victim's father, a county correction officer, testified that the victim was eight years old at the time of the March 2016 trial and that he and

the victim's mother had two additional children. He said that he and the victim's mother married in 1989 and divorced in 2011. He said that he remarried in 2011 and that his current wife had children from a previous marriage. He said the victim's mother married [Petitioner] sometime after the 2011 divorce. The victim's father said that during the divorce proceedings, he and the victim's mother agreed to share custody of the victim and that the arrangement worked well for everyone. He said that, additionally, he always picked up the victim from her mother's home when the victim's mother needed and that if he were working, the victim's stepmother, picked up and dropped off the victim.

The victim's father testified that on January 8, 2015, the victim was scheduled to go to her mother's home for a few hours and that the victim's stepmother drove the victim to the agreed-upon location. He said he was scheduled to pick up the victim after he left work. He said that after the victim's stepmother dropped off the victim, the victim's stepmother called him at work. He said that she asked him to go to the investigator's office and that she was already there with an investigator when he arrived. He said that she and the investigator told him that the victim had disclosed earlier that [Petitioner] had "molested or raped" the victim. He said that he took the victim to the sheriff's office, the Child Advocacy Center (CAC), and Our Kids Center.

The victim's father testified that he discussed the allegations with the victim's mother and that the victim's mother did not believe the victim. He said that as a result, he was concerned the victim would continue to have contact with [Petitioner], and he obtained an order of protection prohibiting the victim's mother and [Petitioner] from having contact with the victim. He said that the victim's mother was prohibited from having contact with the victim initially but that at the time of the trial, the victim's mother was allowed supervised visitation with the victim. He said the supervised visits were ordered at the request of the Department of Children's Services (DCS).

The victim's father testified that the victim had changed since she disclosed the allegations. He said that the victim began knocking on his bedroom door at night, crying and scared. He said that this initially occurred five or six nights weekly and lasted for a long period of time. He said the victim said she was scared of [Petitioner] and feared what might happen if she returned to her mother's home.

On cross-examination, the victim's father testified that although the custody

arrangement was for equally shared custody, any deviation from the parenting plan involved the victim's coming to his home. He said that the victim's mother mostly did not work but that she had worked between late 2013 and the end of 2014. He said the victim disclosed the allegations on January 8, 2015, and that the victim immediately went to the CAC and to Our Kids Center the following week. He said that the victim never had difficulty sleeping before her disclosure but that she had difficulty afterward.

The victim's father testified about a previous incident in which Terry Steele and the victim were "playing," that Mr. Steele pinched the victim's buttocks, that the victim reported feeling uncomfortable due to the pinch, and that the victim's father discussed it with Mr. Steele. The victim's father said that Mr. Steele apologized. The victim's father did not know about the victim's accusing the boys from Mr. Steele's neighborhood of "pinning her down on the bed." The victim's father agreed that the victim accused a boy at her school of pinching or slapping her buttocks, that the victim's father talked to the victim's teacher, that the boy was "notorious for doing that" to several children, and that the victim's father told the victim to "slap" the boy and report it to her teacher in the future. He said the incident resolved itself.

The victim's stepmother testified that she worked as a hospice nurse and as a part-time jail nurse. She said that she and the victim had a good relationship and that they had never had a "big blow-up," although the victim's stepmother did not always agree with the victim's decisions. The victim's stepmother said that on January 8, 2015, around 4:00 or 5:00 p.m., she drove the victim to meet the victim's mother in order for the victim to spend a few hours with the victim's mother before the victim's mother went to work that evening. The victim's stepmother recalled that her son went with them and that her son was the first person to mention someone had inappropriately touched the victim. The victim's stepmother said that the victim's mother was not at the meeting location and that while they waited, the victim saw a "semi[-]truck," which the victim thought belonged to [Petitioner]. The victim's stepmother assured the victim that if [Petitioner] were with the victim's mother, the victim did not have to go with the victim's mother because of an order of protection the victim's mother obtained against [Petitioner] after a domestic incident unrelated to this case. The victim's stepmother said that her son stated that the victim had told him that [Petitioner] had placed [Petitioner]'s hands down the victim's pants while she was napping and "touched" the victim's "privates." The victim's stepmother said that the victim shook her head at her stepbrother as though she did not want her stepbrother to say anything about the incident. The

victim's stepmother said that she asked the victim if those events occurred and that the victim shook her head indicating yes. The victim's stepmother recalled that the victim was nervous and embarrassed, that the victim's stepmother asked if it felt as though anything "went inside of her body," and that the victim said she felt a finger and burning. The victim's stepmother said she asked the victim how many times this occurred, that the victim would not answer the question directly, and that the victim said this occurred when the victim lived at Mr. Steele's home and at the home across from the "cattle barn or the cows." The victim's stepmother said that the victim's mother arrived before the victim could provide any additional information. The victim's stepmother said that she encouraged the victim not to mention to the victim's mother what they had discussed until the victim's stepmother could talk to the victim's father because the victim's mother feared what might happen. She said she felt powerless to prevent the victim from going with the victim's mother because [Petitioner] and the victim's father were not there.

The victim's stepmother testified that after the victim left with the victim's mother, she contacted Warren County Sheriff's Investigator Travis Thaxton. She said that at Investigator Thaxton's request, she met him at the sheriff's office, that she called the victim's father and requested he come to the investigator's office, and that she told the victim's father what the victim reported earlier that day. She said that a city police officer came to the sheriff's office and completed a police report and that afterward, the victim's father drove to pick up the victim. The victim's stepmother said that the officer scheduled an appointment at the CAC for the next day.

The victim's stepmother testified that on January 9, 2015, the victim underwent a forensic interview at the CAC and that the victim was examined physically at Our Kids Center approximately two weeks later. The victim's stepmother said that she provided the victim's medical history to the nurse practitioner who examined the victim and that about four years earlier, the victim experienced a thirty-minute seizure at home, received treatment from a neurologist, had not experienced any additional seizures, and no longer took medication. The victim's stepmother said that the victim did not have memory problems and that the seizure occurred when the victim was in preschool. Based upon the victim's disclosure, the victim's stepmother also reported to the nurse practitioner that digital penetration occurred on more than one occasion and that the victim was shown pornography.

The victim's stepmother testified that she was present during the victim's

examination at Our Kids Center and that the victim repeated the same allegations the victim made on January 8, 2015. The victim's stepmother said that the victim had complained of painful urination since the victim's stepmother had known the victim and that the issue was ongoing. She said that she treated the victim's complaint with baking soda baths and ointment and that the problem resolved itself until the victim presented again with the same symptoms. The victim's stepmother said that at the time of the trial, the victim complained less frequently.

On cross-examination, the victim's stepmother testified that the victim had not taken seizure medication for approximately two years. She said that when the victim saw the semi-truck on January 8, the victim became scared. The victim's stepmother said that the incidents alleged by the victim occurred in the summer, which was months before the victim's disclosure. The victim's stepmother denied that she told the victim not to report the allegation to the victim's mother. The victim's stepmother said that she told the victim not to tell her mother that night because the victim said she had told her mother previously, but her mother did not do anything about the allegation. The victim's stepmother stated that the criminal charges related to the order of protection the victim's mother obtained against [Petitioner] were dropped soon after the order was obtained.

*State v. Mabe*, No. M2016-02096-CCA-R3-CD, 2017 WL 4708097, at \*1-3 (Tenn. Crim. App. Oct. 18, 2017).

The victim testified after her father and her stepmother. Her testimony about the crimes as summarized by this court follows:

The victim testified that she was age eight and that she was home schooled, although she went to school the previous year. She said that before the incidents occurred, her mother lived at Mr. Steele's home for a while and that [Petitioner] came there sometimes. She said that at one point, the victim's mother lived with [Petitioner] "close to some cows."

The victim testified that on the day her stepmother drove her to meet her mother, she saw a truck she thought belonged to [Petitioner] because he was a truck driver. She said she did not expect [Petitioner] to be there. She said that while they waited for her mother, her stepbrother told her stepmother that [Petitioner] had "touched" her, that she told her stepbrother [Petitioner] had touched her, and that she did not remember what she told her stepmother while they were inside the car. The victim did not think she went with her

mother that day and did not recall going to the sheriff's office. She recalled going to the CAC and said she went to the CAC for them to "help [her] with the problem . . . [w]hat [[Petitioner]] did." She remembered the interview at the CAC and said the woman showed her the cameras and the microphone inside the interview room. She said that she watched the video recording of the interview and that nothing was missing from or changed in the recording. She said, though, that after watching the recording, she told the prosecutor that she may have misunderstood the woman who asked questions.

The victim testified that during the interview, she discussed living at Mr. Steele's home. She said that when her mother and [Petitioner] lived at Mr. Steele's home, she, [Petitioner]'s daughter from a previous relationship, her mother, and [Petitioner] lay in a bed together at night and that [Petitioner] "touched" her. She did not recall who she lay beside but said [Petitioner] touched her "[f]ront and back." The victim was shown a drawing of a girl, displaying the front and back of the body, and was asked to circle the areas [Petitioner] touched. The victim circled the genital and buttock areas. She said that she was unsure with what [Petitioner] touched her, that she felt something "inside" her "front," and that she thought it had to be [Petitioner]'s hand. The victim said she told her mother and her stepmother about this incident. The victim said she told her mother about this incident when she and her mother were "putting up cans" in the refrigerator at Mr. Steele's home. The victim said she told her mother that [Petitioner] "touched" her, although not where [Petitioner] touched her.

The victim testified that she did not recall any additional incidents occurring at Mr. Steele's home but said that an incident occurred at a place near "where there were cows," which she remembered because she and her mother lived next to the cows. She said that at the home beside the cows, she, [Petitioner]'s daughter, and [Petitioner] lay in [Petitioner] and the victim's mother's bed to take a nap when the victim's mother was at work. The victim recalled wearing underwear and a shirt. She said that she awoke from her nap when [Petitioner] "touched" her and that [Petitioner]'s hand was inside the "front" of her "pants." She said she felt [Petitioner]'s hand inside her. When asked if [Petitioner] touched her buttocks during this second incident, she said, "I think both of the times it was the front." She thought [Petitioner] touched her buttocks but was unsure.

The victim testified that another incident occurred in the living room at the home beside the cows. She said that she and [Petitioner] were sitting in a rocking and reclining chair with a purple blanket over them, that they were

watching Scooby-Doo, and that she thought [Petitioner]'s brothers were there. She said that [Petitioner] "touched" her when they were covered by the blanket. She said that [Petitioner]'s hand went "in her pants" and on her "front" private area. She denied [Petitioner] touched her buttocks and said she did not think anything went inside of her. The victim did not recall any incidents involving Mr. Steele or a boy at her school.

On cross-examination, the victim testified that she suffered from nightmares that began a long time ago. She recalled having a seizure but denied she had difficulty sleeping because of it. She said that when her mother lived at Mr. Steele's home, the victim, her mother, [Petitioner], and [Petitioner]'s daughter slept in a large bed and that Mr. Steele slept in another bedroom. The victim said that sometimes she slept in a Hello Kitty bed. She recalled [Petitioner]'s being sick and sleeping with a machine that covered a portion of his face. Relative to the incident the victim described at Mr. Steele's home, she thought [Petitioner] was awake when he touched her.

The victim testified that when her mother lived at the home near the cows, she and [Petitioner]'s daughter slept in the same bed at night but that she slept in her mother's bed at naptime. She said that when her mother lived near the cows, [Petitioner] and "Mr. Earl" cared for her when her mother was at work. Relative to the incident in which she watched Scooby-Doo, she thought "a few" of [Petitioner]'s brothers were there but was unsure of the number. She said that she was familiar with [Petitioner]'s truck because he took her to work with him once when her mother lived at Mr. Steele's home.

On redirect examination, the victim testified that [Petitioner] showed her a cell phone on the same day of the incident that occurred in bed at the home near the cows. She said that [Petitioner] showed her a video recording of a man with "his hand under a [naked] girl's bottom and she got up and walked away." She said that [Petitioner] asked her to tell him what occurred in the recording. On recross-examination, she stated that she thought the cell phone belonged to her mother and was blue. She agreed that every time [Petitioner] touched her, she was asleep or about to go to sleep.

*Id.* at \*3-4.

The victim's forensic interview recordings were played during the testimony of M'Lee Hudgins, a forensic interviewer with the CAC, who conducted the victim's interviews on January 9, 2015, and February 5, 2015. This court's summary of the two interviews follows:

In the January 9 recording, the victim stated that her stepmother brought her to the CAC to talk about [Petitioner]'s touching her "privates." The victim said [Petitioner] touched her on two occasions, once at her mother's home and once at Mr. Steele's home. She explained that she "felt a finger . . . inside" her "front one." The victim was shown a drawing and circled the vaginal area when asked to identify her front one. She said that [Petitioner] "rubbed" her "back one," which she identified as her buttocks, that he touched her under her clothes with his hands, that she did not feel anything enter her buttocks, and that this occurred when her mother was at work. She said that a couple days later, she told her brother about the incident, that he mentioned it to the victim's stepmother in the car, and that the victim told her stepmother about the incident. The victim said the incident occurred when she lay in bed with [Petitioner] and [Petitioner]'s daughter at naptime.

The victim explained that one incident occurred when she, [Petitioner], and [Petitioner]'s daughter were in [Petitioner's] and the victim mother's bed. The victim said that she had taken naps with [Petitioner] previously but that [Petitioner] had not touched her. The victim said that [Petitioner] began touching her when they were taking a nap and that "he did the front first." The victim said that it felt as though [Petitioner]'s finger was inside her, that it was "going around and around," and that it felt strange. She said that after the touching, [Petitioner] showed her a "gross video" on his cell phone, that the video showed a naked girl sitting on a sofa with a man touching her "back private part," and that [Petitioner] asked, "Do you think she did not feel good?" The victim said that she responded, "Whatever," that she had to say something to [Petitioner], and that [Petitioner] "would have got on to her" if she did not respond. She said [Petitioner]'s daughter was asleep in the bed when [Petitioner] showed her the video. The victim thought [Petitioner] showed her a second video but could not recall its contents. She said that [Petitioner] did not say anything when he touched her. She said that she removed her pants during naptime but wore underwear and a long-sleeve shirt and that [Petitioner] removed his black short-sleeve shirt with blue letters but wore shorts or underwear. She denied touching [Petitioner]'s body.

The victim stated that another incident occurred when the victim's mother and [Petitioner] lived at Mr. Steele's home, which she said was before the incident at the home near the cows. She said that [Petitioner] touched her front part when she lay in bed with her mother and [Petitioner]. The victim said [Petitioner]'s daughter was either sleeping with them or with Mr. Steele.



She said that her stomach hurt, that her mother said she would rub the victim's stomach, that [Petitioner] began rubbing the victim's stomach instead, and that the victim did not trust [Petitioner]. The victim said that [Petitioner] touched the "front" inside her clothes and that [Petitioner] "went way down." She said that she "did not hardly remember" whether she felt [Petitioner]'s finger but said later that "there was a finger . . . that went inside and did something." She said it felt as though the finger went "around and around." She said that she thought she was age six at the time of this incident and that she was age seven at the time of the interview.

The victim stated that [Petitioner]'s touching her did not feel right but that [Petitioner] did not say anything about the incidents. She said she told her mother about [Petitioner]'s touching her privates but that her mother acted as though she did not care.

The victim stated that the first incident was at Mr. Steele's home, that "squirrels jumped over" his home, and that they lived at Mr. Steele's home during the summer. She said that the second incident occurred at another home when it was summer.

During the February 5 forensic interview, the victim stated that "something else came up" but that she could not remember. She said that other than the two incidents she discussed in the previous interview, she almost fell asleep in a living room chair while watching Scooby-Doo, that [Petitioner] touched her "front private," that she could not remember if he touched her under her clothes, that she could not remember if anything entered her body, and that she did not think [Petitioner] said anything during the incident. She described the chair as a rocking chair and said that she and [Petitioner] were reclined in it. She said that she and [Petitioner] lay on their backs and that [Petitioner] did not want her to touch his body. She thought her mother was at work but was unsure. She said that [Petitioner] wore a black shirt with "blue stuff" on it and that she wore a Barbie shirt and pants. She said she and [Petitioner] were under a purple blanket during the incident.

*Id.* at \*4-5.

The testimony of the victim's mother was summarized as follows:

The victim's mother testified that the victim was born on September 19, 2007, and that she and the victim's father shared custody of their children when they divorced. She said that she and [Petitioner] married in February

2011 and that they divorced in July 2015. Relative to the incident the victim described at Mr. Steele's home, the victim's mother said that Mr. Steele was the victim's great uncle and that she and [Petitioner] lived with Mr. Steele twice during their marriage. The victim's mother recalled living at Mr. Steele's home in June 2011 and between November 2013 and June 2014. She said that between November 2013 and June 2014, she, [Petitioner], the victim, and [Petitioner]'s daughter lived at Mr. Steele's home. The victim's mother said that during this time, she worked nights from 11:00 p.m. to 7:00 a.m. and that [Petitioner] and Mr. Steele cared for the victim when the victim's mother worked.

The victim's mother testified that [Petitioner] suffered from renal failure, that the children slept at night when she worked, that [Petitioner] was capable of caring for the victim when he was not hospitalized, and that "there on the end," [Petitioner] required assistance bathing. The victim's mother recalled coming home from work and getting the victim ready for school and said that Mr. Steele drove the victim to school and that she picked up the victim from school. The victim's mother said that during the summer months, [Petitioner] cared for the victim and [Petitioner]'s daughter and that sometimes the children lay in bed with her to nap.

The victim's mother testified that when the victim mentioned the home near the cows, the victim was talking about the home near the stock barn, where they lived between June 2014 and November 2014. The victim's mother said that she, [Petitioner], the victim, and [Petitioner]'s daughter lived at the home, that the victim's mother lost her job due to illness, and that she began working the day shift on the weekends for a new employer. She said that when she worked, [Petitioner] cared for the victim, that she later began working the night shift, and that their neighbors, Jean and Earl Collins, assisted with childcare, although [Petitioner] was the primary care provider when the victim's mother worked. The victim's mother said that [Petitioner] had a cell phone when they lived at the home near the cows, that he did not allow her to use his cell phone, and that she did not know the phone's contents.

The victim's mother testified that she learned of the victim's allegations on January 9, 2015, when a deputy delivered an order of protection preventing her from having contact with the victim. The victim's mother said that the allegations were shocking but that she believed the victim after she and the victim spoke in July 2015. The victim's mother said that during the six months between the victim's allegations and her speaking to the victim, the

victim's mother questioned the veracity of the allegations because [Petitioner] always "petted" the victim and treated the victim more favorably than [Petitioner]'s daughter. The victim's mother said that she expressed her reservations to the DCS investigator and to law enforcement and that as a result, DCS obtained an order of protection.

The victim's mother testified that the victim told her that the incidents occurred when the victim's mother was at work on the weekends. The victim's mother said that the victim reported an incident in which the victim was in a rocking chair watching Scooby-Doo when they lived at the home near the cows. The victim's mother said that at the time, they had a rocking recliner in the living room, that the victim watched Scooby-Doo movies on a laptop computer, and that they had a purple throw blanket.

The victim's mother testified that after speaking with the victim in July 2015, the victim's mother confronted [Petitioner] about the allegations by calling him a child molester because the victim had alleged that he touched the victim's private area and digitally penetrated the victim. She said that [Petitioner] responded, "God had a big eraser and he would forgive you for anything." She said that afterward, she had little contact with [Petitioner]. She said that she wanted her visitation rights reinstated and that the decision to reinstate lay with DCS, not the victim's father.

On cross-examination, the victim's mother testified that she worked nights mostly when she lived at Mr. Steele's home between November 2013 and June 2014, and that [Petitioner] worked for a construction company. She said that [Petitioner] left for work at 4:00 or 4:30 a.m. and returned home between 6:00 and 7:00 p.m. but that [Petitioner] became ill and was admitted into the hospital for treatment periodically. She said that [Petitioner] worked for a few months after moving into Mr. Steele's home before becoming ill. She recalled [Petitioner] began sleeping with a "sleep apnea machine" when he became ill and said he slept on his side and with pillows in front of his stomach. She said that when [Petitioner] became extremely ill, she assisted him with dressing and bathing. She said that before [Petitioner] became too ill to work, he injured himself at work and later fell asleep while driving because of accumulated fluid. She agreed [Petitioner] fell asleep often as result of his illness and sleep apnea. She said that [Petitioner] had difficulty moving around and breathing at times when the fluid accumulation was high.

The victim's mother testified that when she and [Petitioner] lived at Mr. Steele's home, she had custody of the victim 40% of the time. The victim's

mother said that [Petitioner]'s older daughter visited the home when the daughter wanted and that the victim's brother visited periodically but did not stay overnight.

The victim's mother testified that when they lived at the home near the cows, the victim was in her custody about 50% of the time. She said that [Petitioner] was in and out of the hospital and not working at this time. She said that she usually did not take the victim to Mr. and Mrs. Collins's home because the victim was asleep when she left for work. The victim's mother said that the victim stayed with Mr. and Mrs. Collins infrequently because the victim usually wanted to go to the victim's father's home when the victim's mother was at work.

The victim's mother testified that [Petitioner] kept his cell phone with him when [Petitioner] was hospitalized and that the phone was black with a red case. She said her phone was white. She agreed the victim had accused others of touching her, including Mr. Steele, and that the victim's mother saw Mr. Steele pinch the victim's buttocks. The victim's mother said that she, the victim's father, and Mr. Steele discussed the incident immediately. The victim's mother agreed that the victim accused Mr. Steele's neighbors of pinning the victim on a bed and that the allegation was false. The victim's mother agreed that the victim accused a boy at school of slapping the victim's buttocks and said that she spoke to the victim's teacher about the incident. The victim's mother said that the victim had suffered nightmares and that the victim might have had a nightmare once every three months when the victim was at her home. The victim's mother said that the victim did not wake up screaming when the victim had a nightmare but told her about it the next morning.

The victim's mother testified that [Petitioner] took the victim to work once and that the victim rode in the dump truck, not a semi-truck. The victim's mother said that the victim liked [Petitioner] and that the victim never showed fear or apprehension when she was around [Petitioner]. The victim's mother said the last time [Petitioner] and the victim were alone occurred when [Petitioner] picked up the victim at the county fair in September 2014. She said this occurred when they lived at the home near the cows.

*Id.* at \*6-7.

According to Lisa Milan, a forensic social worker at Our Kids Center, the victim underwent a physical examination on January 21, 2015, between the two forensic

interviews. The victim had a history of a seizure but no history of genital abuse. She reported a history of burning with urination, constipation, itching, and redness in the genital area. The victim had a normal examination without acute or chronic signs of trauma. Ms. Milan stated that the finding did not exclude the possibility of sexual abuse and that negative findings were expected in the majority of abuse cases. She said that only about seven percent of children had abnormal physical examinations after an incident of sexual abuse. *Id.* at \*7-8

Petitioner testified and denied digitally penetrating the victim or rubbing her genitals. *Id.* at \*8. He primarily testified about his health issues:

[Petitioner] said that he suffered from stage five renal failure and that dialysis kept him alive. He said that he fell from a silo at work, that he lay on the ground for hours before anyone found him, and that high blood pressure during this time resulted in kidney damage. He said that as a result of his condition, he suffered from swelling, could not consume more than one liter of fluid per day, had decreased sexual desires, and experienced insomnia. He said he had undergone dialysis four to five times per week since May 2015.

[Petitioner] testified that when he and the victim's mother lived at Mr. Steele's home, he was in stage four kidney failure, that he slept excessively, and that he retained more fluid than he had before reaching stage four. He said that at this time, he was unable to bathe himself, the skin on his legs and feet would "bust" from the swelling, and he was unable to dress himself. He said that he stopped working in April 2013, about one month before they moved out of Mr. Steele's home. He said that just before he stopped working, he fell asleep while driving his truck and struck another vehicle, which resulted in his sustaining additional kidney injuries. He recalled sleeping with a pillow on his chest to prevent any injuries if the victim's mother kicked him while asleep. He said that he also began sleeping with a sleep apnea machine and that he slept facing the machine because of the cords. He said that he suffered cramps in his arms, fingers, legs, and feet, that the cramps kept him awake at night, and that the cramps caused soreness, making it difficult to walk. [Petitioner] stated that immediately after he stopped working and when he lived at Mr. Steele's home, he spent more than one month in the hospital to remove excess fluid. He said that after he and the victim's mother moved into the home near the cows, he spent fifteen days in the hospital.

[Petitioner] testified that just before he and the victim's mother moved out of Mr. Steele's home, [Petitioner] slept in "the big bed in the back" with the

victim's mother and that the victim and [Petitioner]'s younger daughter slept in Mr. Steele's bedroom with Mr. Steele, although Mr. Steele stayed awake late watching television in the living room. [Petitioner] said that after they moved to the home near the cows, the victim did not stay at the home frequently. He said that his condition worsened after they moved and that he went to the hospital monthly.

[Petitioner] testified that the victim's allegations against the boy at her school and the boys in Mr. Steele's neighborhood occurred when [Petitioner] and the victim's mother lived at Mr. Steele's home. He said that the victim's allegations against Mr. Steele's neighbors appeared false because the victim and the boys mostly played outside and only in the living room inside the home. [Petitioner] said that based upon the victim's mother's discussion with the victim's teacher, the alleged incident with the boy at school did not occur. [Petitioner] said that before his illness prevented him from working, the victim's mother was home with the children but that after he was unable to work, she began working. He recalled that the victim's mother helped him into bed before she left for work at night and that the victim and his daughter slept with Mr. Steele because Mr. Steele was able to help the children if they needed something during the night. [Petitioner] said that the victim would "not hardly sleep" in his bedroom "because of the squirrels," which the victim thought were "monsters running across the house." He said that the victim had difficulty sleeping the entire duration of his relationship with the victim's mother. He recalled the victim's sleeping about three hours per night and waking early.

[Petitioner] testified that he and the victim's mother separated one month before the trial and that the victim's mother's position about their relationship changed after speaking with DCS employees at the courthouse on the day of the DCS hearing. He said he thought the victim's mother had been threatened with permanently losing her visitation rights if she did not say she believed the victim. Relative to the incident at the home near the cows in which the victim described watching Scooby-Doo and sitting in a living room chair, [Petitioner] stated that they did not have a television. He said that the victim's mother had a laptop computer, that the computer did not belong to him, and that the victim's mother sometimes allowed the victim to watch videos on the computer.

On cross-examination, [Petitioner] testified that he worked most of the time he and the victim's mother lived at Mr. Steele's home and that he helped paint Mr. Steele's home when they moved into the home. He denied, though,

that his “ability to do things was . . . sound” and said that his brothers painted the home with his limited assistance. He said that he began receiving disability benefits around January 2015 and that his kidney disease prevented him from working. He said, though, a friend who owned a construction company offered to allow him to work when he felt well enough. He denied attempting to arrange employment in an effort to have the GPS monitoring as required as a condition of his pretrial release removed.

[Petitioner] testified that he witnessed Mr. Steele’s pinching the victim’s buttocks. Relative to the victim’s accusation against Mr. Steele’s neighbors, [Petitioner] said the allegation was never “proven to be true.” He said the victim’s mother talked to the boys’ grandmother, who said the victim’s allegations were not true. [Petitioner] did not believe the victim’s allegations. Relative to the incident with the boy at the victim’s school, [Petitioner] said that he did not speak to the teacher, that nobody knew if the victim told the truth, and that the school would have done something if the boy had a history of inappropriate conduct.

[Petitioner] testified that the victim’s mother obtained a divorce because DCS forced her to file for divorce. He said that he did not realize DCS had forced the divorce until the last DCS hearing. He said the victim’s mother continued living with him without interruption until one or two months before the trial. He clarified that after the victim’s mother obtained the divorce, the victim’s mother obtained a separate home but that the victim’s mother continued to stay at his home.

[Petitioner] disputed taking naps when he and the victim’s mother lived at Mr. Steele’s home. He said that although he had taken naps, the victim’s mother usually slept with the children on the bed during the day. He said that he worked during the day through the week and on Saturdays from the time they moved into Mr. Steele’s home until about one month before they moved to the home near the cows. He said he also worked occasionally on Sundays during this time. [Petitioner] stated that when he and the victim’s mother lived at the home near the cows from June to November 2014, the victim and his daughter were at Mr. and Mrs. Collins’s home. He said the children never stayed alone with him.

On redirect examination, [Petitioner] testified that although it was impossible to recall the victim’s mother’s work schedule when they lived at Mr. Steele’s home, she worked five jobs. Relative to Mr. Steel’s neighbors, [Petitioner] said that the victim alleged the boys attempted to kiss her when she was at

Mr. Steele's home but that "we" were there and that the home was small. He said he did not know what occurred at the boys' grandparents' home. [Petitioner] agreed the victim's mother spoke to the grandparents immediately. He said that the police never examined his cell phone and that to his knowledge, the police never examined the victim's mother's cell phone.

*Id.* at \*8-9.

Petitioner called three witnesses to rebut the State's proof. The first witness lived next door to Petitioner when Petitioner and the victim lived at the home near the cows:

Earl Collins testified that he lived next door to [Petitioner] and the victim's mother when they lived at the home near the cows and that the victim and [Petitioner]'s daughter often stayed at Mr. Collins's home. He recalled that he and his wife first began babysitting the children in June 2014. He said that the children came to his home three or four times per week, that they arrived early in the morning and stayed all day, and that he cared for the children because [Petitioner] was unable to care for the children due to [Petitioner]'s health and because the victim's mother worked. Mr. Collins recalled that the victim's mother dropped off and picked up the children. He said that the children were never out of sight when they were at his home. He said the children stayed at his home until the victim's mother picked them up and that they never went home during the day. He said he never saw [Petitioner] alone with the victim. Mr. Collins said that he and his wife cared for the children the entire time [Petitioner] and the victim's mother lived at the home near the cows. Mr. Collins denied the victim mentioned [Petitioner]'s touching her or being afraid of [Petitioner]. Mr. Collins denied witnessing any inappropriate behavior or contact between [Petitioner] and the victim.

*Id.* at \*10. Petitioner's adult daughter testified to her observations while Petitioner lived with Mr. Steele and while he lived in the house near the cows:

Courtney Mabe, [Petitioner]'s adult daughter, testified that she and [Petitioner] had a good relationship. She said that when she came to visit [Petitioner] at Mr. Steele's home, she slept on the sofa. Ms. Mabe recalled that her younger sister and the victim slept together and that the victim sometimes slept with Mr. Steele. She said, though, that [Petitioner] and the victim's mother slept in their bed and that Mr. Steele slept with the victim and Ms. Mabe's younger sister. Ms. Mabe said that if [Petitioner] and the



victim's mother were gone, the victim and Ms. Mabe's younger sister slept in [Petitioner] and the victim's mother's bed.

Ms. Mabe testified that after [Petitioner] and the victim's mother moved to the home near the cows, she visited [Petitioner] every weekend. She said that she never saw the victim alone with [Petitioner] and that she and the victim spent a lot of time together when they were both at the home. Ms. Mabe babysat the victim when needed and said the victim never acted "skittish" or scared around [Petitioner] and did not report any inappropriate contact with anyone.

On cross-examination, Ms. Mabe testified that she was unsure whether [Petitioner] and the victim's mother worked between November 2013 and June 2014. Ms. Mabe said that the victim's mother was always home with the children when [Petitioner] was home and that when [Petitioner] and the victim's mother were gone, Ms. Mabe cared for the children or the children went to Mr. Collins's home. Ms. Mabe said that at the home near the cows, she slept in the same room with the victim and Ms. Mabe's younger sister. She said that [Petitioner] did not work when they lived at the home near the cows. She said that Mr. and Mrs. Collins did not care for the victim and Ms. Mabe's younger sister when Ms. Mabe was at the home. She said that sometimes the victim went to Mr. and Mrs. Collins's home because the victim liked talking to them, even though Ms. Mabe, the victim's mother, and [Petitioner] were home.

*Id.* Petitioner's brother testified that he often visited Petitioner when he lived at Mr. Steele's home:

Richard Mabe, [Petitioner]'s brother, testified that he and [Petitioner] had a good relationship. Mr. Mabe said that when [Petitioner] and the victim's mother lived at Mr. Steele's home, Mr. Mabe visited the home often. Mr. Mabe said he visited the home near the cows a couple of times. He said that he never saw the victim at the home near the cows but that at Mr. Steele's home, the victim and [Petitioner]'s younger daughter played. Mr. Mabe said he never saw the victim show any fear of [Petitioner].

*Id.*

Based on the evidence, the jury convicted Petitioner of three counts of attempted rape of a child and three counts of aggravated sexual battery. The trial court merged the attempted child rape convictions with the aggravated sexual battery convictions and

sentenced Petitioner to an effective twenty-two-year sentence at 100% service. On direct appeal, this court affirmed the judgments. *See, e.g., id.* The opinion and judgment were entered on October 18, 2017. No application for permission to appeal was filed.

Petitioner filed a *pro se* petition for post-conviction relief on October 22, 2018,<sup>1</sup> alleging ineffective assistance of trial counsel. Counsel was appointed, and an amended petition was filed alleging that trial counsel: (1) failed to object to hearsay statements made by the victim's father and the victim's stepmother during their trial testimonies; (2) failed to request investigative services and adequately prepare for trial; (3) failed to object to the admission of the video recording of the victim's two forensic interviews or failed to demand a pretrial hearing on their admission; (4) failed to disclose a conflict of interest; and (5) failed to submit proposed jury instructions.

### *Post-Conviction Hearing*

Trial counsel testified that he was "substituted in" as Petitioner's counsel a few months before the original trial date. Trial counsel filed a motion to continue the trial. He estimated that he had four months to prepare. Later in his testimony, trial counsel recognized a copy of the State's response to his discovery request which was entered on November 9, 2015. Trial counsel agreed that the State's response was entered near the time he was appointed to the case. The trial was held in March 2016.

Trial counsel testified that the case originated in general sessions court. Petitioner was taken into custody after the preliminary hearing but was later released on bond. To gain an understanding of the allegations and the State's theory of prosecution, trial counsel reviewed the preliminary hearing transcript. Although there was no physical evidence and the victim did not sustain any physical injuries, trial counsel explained that the case was difficult to defend because it was "a he said-she said" case and was a credibility contest between the victim and Petitioner.

Because Petitioner was out on bond pending the trial, trial counsel met Petitioner "at least a dozen" times during the four months he was preparing for trial including "at least two times" at Petitioner's home the weekend before trial. Their meetings in trial counsel's office varied in length but the meetings at Petitioner's house lasted "several hours." Trial counsel recalled that Petitioner's brother and adult daughter were present in the meetings held in Petitioner's home. Trial counsel discussed with Petitioner the nature of the offenses, potential defenses, and whether Petitioner should testify. Trial counsel advanced the theory that the offenses did not occur and recommended that Petitioner

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<sup>1</sup> Petitioner stated in the *pro se* petition that he delivered the petition to prison authorities for mailing on October 16, 2018, the day before the end of the one-year limitation period.

testify.

To that end, trial counsel prepared Petitioner for his testimony by drafting a general outline of topics so that it would be easier to change course during the trial. They had a “mock” direct examination. Trial counsel acknowledged that he was “less thorough” about cross-examination because it is “generally kind of hard to predict.” Trial counsel did the same for Petitioner’s brother and Petitioner’s adult daughter who both testified for the defense at trial. Petitioner’s brother and a neighbor were called to refute two of the incidents. Petitioner’s brother testified that he would have been present at the time for one of the offenses but did not observe Petitioner improperly touch the victim.

Although discovery had already been provided to original counsel, trial counsel testified that he filed a motion for discovery in the event something had not been turned over to him from original counsel. The State’s discovery response identified ten witnesses. Petitioner went over the witness list with Petitioner who advised him to talk to the victim’s mother and Terry Steele. In addition to the victim’s mother and Mr. Steele, trial counsel spoke with the forensic interviewer, M’Lee Hudgins; a third witness, Alicia Cantrell; and possibly a fourth witness, Blayton Hobbs. Trial counsel did not speak with the victim, her father, or her stepmother; however, he stated that he was “roughly” aware of their anticipated testimonies and the testimonies of the remaining State’s witnesses.

Trial counsel confirmed that he did not file a motion for an investigator because there was no physical evidence, the victim sustained no physical injuries, and the case rested on the credibility of the victim and Petitioner; therefore, there was not much for an investigator to do. In hindsight, trial counsel testified that he “definitely would have asked for an investigator.” He explained that he “immediately” requests an investigator “as a matter of course *now* on A felonies.” However, trial counsel conceded that an investigator would not have made a difference in Petitioner’s case in light of the evidence. On cross-examination, trial counsel reiterated that “at the time,” there was nothing more he could have done to better prepare for the trial and agreed that he did everything an investigator would have done.

For instance, trial counsel looked into Petitioner’s medical condition and with some considerable effort, obtained some of Petitioner’s medical records. Trial counsel testified that Petitioner was in “very poor” health due to kidney failure. He slept with a breathing mask and suffered from erectile dysfunction which trial counsel used to refute “the idea that Petitioner could have snuck out of his bed and . . . touched the victim.” Trial counsel did not introduce Petitioner’s medical records because Petitioner’s medical condition was addressed by Petitioner and the victim’s mother through their testimonies which were not disputed by the State.

Further, in terms of alternative defenses, trial counsel testified that it was difficult to develop an alibi defense because of the broad time range of the offenses. Trial counsel recalled that there were no specific dates for the alleged offenses; instead, the indictment gave ranges of dates for each of the counts. The State isolated the counts by location. The victim gave specific accounts of the offenses corresponding to each count based on where the offense occurred. Trial counsel stated that procuring the work schedules of Petitioner and the victim's mother would not have been useful or sufficient to establish an alibi because the time range of the offenses could not be narrowed.

As for the claim concerning the failure to object to hearsay statements about the sex abuse allegations, trial counsel acknowledged that he did not object to any alleged hearsay statement made by the victim's father, her stepmother, or her mother. Trial counsel was questioned about specific portions of their testimonies. At trial, the victim's father testified that he was informed by the stepmother and the investigator that the victim had been "molested" by Petitioner. Trial counsel agreed that the statement was "potentially" hearsay. Trial counsel explained that he did not object because this information was not "surprising" to the jury. He found that it was not detrimental to Petitioner, and did not wish to draw attention to it by objecting. He added that there was a strategic reason for not objecting indiscriminately:

I don't like to object to things that I know I have – are not useful. I hear different things from different people, but they don't like "lawyer tricks." So if you're objecting too often to things that aren't really important, you look like a tricky lawyer and then the jury doesn't trust you.

The victim's father later testified that the victim had voiced fear of Petitioner. Trial counsel testified that the statement was admissible as a present sense impression and he did not object because that he called on defense witnesses to refute the statement that the victim was afraid of Petitioner.

Next, trial counsel was questioned about the victim's stepmother's testimony. At trial, the stepmother testified to what her son had learned from the victim about the allegations. Trial counsel acknowledged that this portion of her testimony was potentially "double hearsay" or hearsay within hearsay. The stepmother also testified to what the victim told her about the offenses and where they occurred. When the stepmother asked the victim whether Petitioner "went inside her," the victim replied that he had and that "it burned." Trial counsel testified that the statements appeared to be hearsay and that he did not object. When asked whether having the statements come in before the victim testified was harmful to Petitioner, trial counsel replied that it was "potentially" harmful.

Trial counsel was then asked about the victim's mother's testimony. Trial counsel

specifically recalled the victim's mother's testimony about an incident occurring while the victim and Petitioner were watching a television show. Trial counsel did not object because a defense witness was going to refute the presence of a television where the offense occurred. The victim's mother also testified what the victim told her about being digitally penetrated. Although he recognized that it is common for there to be no physical evidence in child rape cases, trial counsel opined that the lack of physical evidence may have undermined the victim's testimony about being digitally penetrated as reflected in the jury's verdict to convict of the lesser-included offense of attempted rape of a child. Based on the verdict, trial counsel replied that it was "fair" to say Petitioner was not prejudiced by the failure to object to the victim's mother's testimony.

Trial counsel agreed that not every hearsay statement is offered for the truth of the matter asserted. He agreed further that the State is given some leeway to explain its position on the case. Trial counsel was familiar with what the victim said in her forensic interviews and what she told other people about the abuse was not "super detrimental." Trial counsel reiterated that there was not "much point" drawing attention by objecting when the statements concerned something the jury was going to hear from the victim.

Trial counsel did not file a motion to exclude the forensic interview recordings. He did not recall whether a hearing was held. He talked about the recordings with the prosecutor at a Christmas party. Trial counsel testified that he was related to the prosecutor by marriage. The prosecutor cited case law the State was relying on to admit the recordings. Trial counsel read the case and researched the issue further. He was "sure" that he reviewed the relevant statute and determined that challenging the admission of the forensic interview recordings would not be "fruitful." Trial counsel did not find the interviews to be detrimental to Petitioner because the victim's account of the crimes would be exhibited to the jury. He likewise did not find that objecting to the interviews would have made a difference in the case. He agreed that there was a tactical decision not to challenge the forensic interview recordings. Trial counsel explained that "if [the victim] testified to something differently [from the interviews] [he] could immediately impeach her credibility on the fact that that changed." Trial counsel prepared for the victim's testimony by timestamping a list of statements that he found to be "significant" so that if the victim testified differently, he could "quickly isolate the place on the recording" and use it to impeach her. Trial counsel found this method to be "more effective." Trial counsel did not recall from the trial transcript whether "technical difficulties" affected the accuracy of the recordings. He did not recall any part of the recordings being edited.

Trial counsel testified that at the time of the trial, the prosecutor was married to his aunt. Trial counsel told Petitioner the "entire story" of his connection to the prosecutor. He maintained that he apprised Petitioner "right up front so [he] wouldn't be dealing with 'Oh, there's a conflict' question right at trial." Due to the size and complexity of the case,

trial counsel did not want there to be a conflict. Trial counsel also contacted the Board of Professional Responsibility (“BPR”) because he had never tried a case against the prosecutor. The BPR informed trial counsel that there would not be a conflict “as long as we’re not spouses.” According to trial counsel, Petitioner was “okay” with the relationship and did not object to being represented by trial counsel.

Petitioner testified that his grounds for relief included trial counsel’s “fail[ure] to adequately spend time with him prior to trial.” Petitioner testified that he visited trial counsel in counsel’s office four times but had to wait ten to fifteen minutes before he actually met with trial counsel. Petitioner stated that the longest meeting lasted no more than thirty minutes. Petitioner denied that trial counsel used the meetings to discuss issues in his case. Petitioner described the meetings as “scattered” and trial counsel as “totally confused.” For instance, Petitioner did not recall trial counsel discussing possible issues with hearsay statements among the State’s witnesses. Petitioner remembered telling trial counsel that the victim’s testimony was different from her testimony “in the small courts.” Petitioner thought trial counsel obtained a copy of the transcript from the “small courts” or the preliminary hearing, but he could not be certain.

Petitioner acknowledged that trial counsel called Petitioner’s brother Richard and his daughter Courtney to testify, but took issue with trial counsel’s failure not to call his other brother Harold and Harold’s wife as defense witnesses. Petitioner confirmed that trial counsel advised him to testify. He did not recall a “mock” direct examination as testified to by trial counsel. Instead, Petitioner recalled trial counsel handing him a sheet of paper with a list of potential questions.

Petitioner testified that trial counsel never talked to him about requesting an investigator. Petitioner opined that an investigator “would have helped a lot” in developing a timeline of the offenses. In terms of his health issues, Petitioner testified that he did not talk to trial counsel about his medical records and whether they would be helpful at trial. He recalled that trial counsel got “some” but not all of his medical records. He recognized that the medical records from one particular doctor would have been harder to obtain but insisted that trial counsel could have obtained all the medical records.

Petitioner maintained that he first became aware that trial counsel was related to the prosecutor after the guilty verdict and the day before sentencing. He denied that trial counsel told him before trial or as soon as trial counsel was appointed. Petitioner concluded his testimony by stating that he “didn’t have a chance” with the jury when the victim’s father testified in his sheriff’s uniform at trial.

Following the hearing, the post-conviction court made findings of fact and conclusions of law in a written order denying post-conviction relief. Although the post-

conviction court found trial counsel's failure to object to hearsay statements regarding the victim's claim of abuse to be deficient, the court found that the "statements did not add anything new to the State's case and were cumulative and therefore, not prejudice (sic) to [Petitioner]." The post-conviction court found the remainder of Petitioner's claims against trial counsel "did not fall below the standard of care or professional norms so as to make this representation ineffective." It is from this judgment Petitioner appeals.

### **Analysis**

Petitioner contends the post-conviction court erred in denying his petition for relief. On appeal, he claims trial counsel was ineffective in failing to object to the hearsay testimony of the victim's father, the victim's stepmother, and the victim's mother; failing to request the services of an investigator; failing to object to the admission of the forensic interview or request a hearing on its admission; and failing to apprise him of a conflict of interest with the prosecuting attorney. He also claims that the cumulative effect of these errors warrant relief. The State responds that the post-conviction court properly denied Petitioner relief, that Petitioner waived his claim regarding the admission of the forensic interviews, that no actual conflict of interest existed between trial counsel and the prosecutor, and that no relief is warranted under the doctrine of cumulative error.

Before we can address these issues on the merits, we must address the untimeliness of Petitioner's notice of appeal. The post-conviction court entered its order denying relief on August 2, 2022. Petitioner had thirty days from the entry of that order to perfect his appeal, or until Thursday, September 1, 2022. *See* Tenn. R. App. P. 4(a). The notice of appeal has a filed-stamped date of September 8, 2022, but was mailed via certified registered mail on September 2, 2022. *See* Tenn. R. App. P. 20(a) ("[f]iling shall not be timely unless the papers are received by the clerk within the time fixed for filing or mailed to the office of the clerk by certified return receipt mail or registered return receipt mail within the time fixed for filing"). Based on the date of the certified registered mail receipt date, the notice of appeal was late by one day. Neither party addressed the notice of appeal and instead, considered it timely filed. As such, Petitioner has not moved to accept his late-filed notice of appeal nor explained the untimely filing. We recognize however, that "in all criminal cases the 'notice of appeal' document is not jurisdictional and the filing of such document may be waived in the interest of justice." Tenn. R. App. P. 4(a). In the interest of justice, we grant waiver of the notice of appeal requirement. *Thomas v. State*, No. E2021-01338-CCA-R3-PC, 2022 WL 16631309, at \*4-5 (Tenn. Crim. App. Nov. 2, 2022) (waiver granted in the interest of justice where post-conviction appellant filed notice of appeal thirty-one days after post-conviction court entered order denying relief and appellant offered no explanation for the untimely filing or requested waiver of the notice of appeal filing requirement).

Under the Post-Conviction Procedure Act, a criminal defendant may seek relief from a conviction or sentence that is “void or voidable because of the abridgment of any right guaranteed by the Constitution of Tennessee or the Constitution of the United States.” T.C.A. § 40-30-103. Because the right to effective assistance of counsel is safeguarded by the Constitutions of both the United States and the State of Tennessee, the denial of effective assistance of counsel is a constitutional claim cognizable under the Post-Conviction Procedure Act. *See* U.S. Const. amend. VI; Tenn. Const. art. I, § 9; *Howard v. State*, 604 S.W.3d 53, 57 (Tenn. 2020).

“Appellate review of an ineffective assistance of counsel claim is a mixed question of law and fact that this Court reviews de novo.” *Phillips v. State*, 647 S.W.3d 389, 400 (Tenn. 2022) (citing *Dellinger v. State*, 279 S.W.3d 282, 294 (Tenn. 2009)). As an appellate court, we are bound by the factual findings of the post-conviction court unless the evidence in the record preponderates against those findings. *Howard*, 604 S.W.3d at 57 (citing Tenn. R. App. P. 13(d)); *see also Arroyo v. State*, 434 S.W.3d 555, 559 (Tenn. 2014); *Fields v. State*, 40 S.W.3d 450, 456, n.4 (Tenn. 2001). The same does not hold true for the post-conviction court’s conclusions of law which are reviewed de novo with no presumption of correctness. *Howard*, 604 S.W.3d at 57; *Holland v. State*, 610 S.W.3d 450, 455 (Tenn. 2020).

When a claim of ineffective assistance of counsel is made, the burden is on the petitioner to show (1) that counsel’s performance was deficient and (2) that the deficiency was prejudicial. *Strickland v. Washington*, 466 U.S. 668, 687 (1984); *see Lockhart v. Fretwell*, 506 U.S. 364, 368-72 (1993); *Kendrick v. State*, 454 S.W.3d 450, 457 (Tenn. 2015). Deficient performance is representation that falls below “an objective standard of reasonableness” as measured by prevailing professional norms. *Kendrick*, 454 S.W.3d at 457 (quoting *Strickland*, 466 U.S. at 688); *see also Baxter v. Rose*, 523 S.W.2d 930, 932-33 (Tenn. 1975). To show prejudice, a petitioner must demonstrate a reasonable probability that, but for counsel’s deficient performance, the outcome of the proceeding would have been different. *Strickland*, 466 U.S. at 694; *Kendrick*, 454 S.W.3d at 458. A reasonable probability is “a probability sufficient to undermine confidence in the outcome.” *Strickland*, 466 U.S. at 694. Reasonable probability is a lesser burden of proof than preponderance of the evidence. *Kendrick*, 454 S.W.3d at 458 (citing *Williams v. Taylor*, 529 U.S. 405-06 (2000)).

Failure to satisfy either prong results in the denial of relief. *Strickland*, 466 U.S. at 697; *Nesbit v. State*, 452 S.W.3d 779, 786-87 (Tenn. 2014). Accordingly, if 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)). “[T]he petitioner is required to prove the *fact* of counsel’s alleged error by clear and



convincing evidence.” *Phillips*, 647 S.W.3d at 401 (quoting *Dellinger*, 279 S.W.3d at 294 (emphasis in original)); *see also* T.C.A. § 40-30-110(f); Tenn. Sup. Ct. 28, § 8(D)(1).

***Failure to object to hearsay statements regarding the victim’s allegations of sexual abuse***

Petitioner contends the post-conviction court erred in not finding prejudice in trial counsel’s failure to object to the testimonies of the victim’s father, her stepmother, and her mother regarding the factual allegations of the case because their statements constituted hearsay. Petitioner argues that their testimonies bolstered the victim’s credibility in a case with no physical evidence. The State responds that the post-conviction court properly denied this claim because the State’s case did not rest on the hearsay statements, and their exclusion would not have changed the outcome of the trial. We agree with the State.

Hearsay “is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.” Tenn. R. Evid. 801(c). Generally, hearsay is inadmissible, but there are numerous exceptions to this rule, including exceptions for statements of the declarant’s then existing state of mind, sensation, or physical condition. Tenn. R. Evid. 802, 803(3).

Here, the post-conviction court found deficiency but no prejudice for the following reasons:

[Trial counsel] objected to certain questions asked by the State during the trial. There were questions asked by the State which [trial counsel] did not object. Some questions asked by the State could have been objectionable as to hearsay. [Trial counsel] states that he intentionally did not object to certain questions for strategic reasons. This was reasonable as to certain questions, i.e., hearsay questions that mentioned the television in the home. The Court finds that hearsay statements regarding the child’s claim of abuse were objectionable and should have been objected to. However, the Court finds that these statements did not add anything new to the State’s case and were cumulative and therefore, not prejudice (sic) to the [Petitioner].

This court agrees with the post-conviction court’s determination of no prejudice. The State did not rely upon hearsay testimony to establish the elements of the charged offenses. The record shows that none of the three witnesses testified to uncharged conduct or matters irrelevant to the case. The jury heard the testimony of the victim who was the source of the alleged hearsay statements and the failure to object to the statements “did not create a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceedings would have been different.” Moreover, after hearing the evidence at trial, the jury acquitted Petitioner of the most serious charge of rape of a child and instead convicted

him of the lesser-included offense of attempted rape of a child in counts 1 through 3. Petitioner has not established that an objection based simply on hearsay or double hearsay, would have been successful. In at least one instance, Petitioner has not overcome the strong presumption that trial counsel exercised reasonable judgment in not objecting to the victim's father's statement. Trial counsel stated that the victim's father's testimony of the victim being fearful of Defendant was admissible as a statement of the victim's state of mind. Tenn. R. Evid. 803(3). He also had a tactical reason for not objecting – there were three defense witnesses who contradicted this statement.

While we agree with the post-conviction court's ultimate conclusion in finding no prejudice, we find that trial counsel's decision not to object was a tactical decision. At the post-conviction hearing, trial counsel explained his strategy accordingly: "So if you're objecting too often to things that aren't really important, you look like a tricky lawyer and then the jury doesn't trust you." Given the nature of the charges and the substance of the complained-of statements, trial counsel's strategy to withhold from objecting continuously was a reasonable one. *See Stovall v. State*, No. W2016-01981-CCA-R3-PC, 2017 WL 2179963, at \*6 (Tenn. Crim. App. May 16, 2017) (trial counsel's decision not to object to hearsay was reasonable trial strategy where counsel did not want to alienate the jury). We decline to second-guess trial counsel's strategy, and grant relief based on a sound, yet unsuccessful, tactical decision. *See Granderson v. State*, 197 S.W.3d 782, 790 (Tenn. Crim. App. 2006). Petitioner is not entitled to relief.

### ***Failure to request an investigator and to prepare adequately for trial***

Next, Petitioner contends that trial counsel's failure to request an investigator was deficient and prejudicial because an investigator would have been helpful in narrowing the timeframe in which the crimes occurred thereby allowing him to assert an alibi defense. Petitioner also contends that trial counsel's failure to introduce his medical records showed inadequate preparation and that his meetings with trial counsel were inadequate. The State argues that the post-conviction court properly denied this claim based on Petitioner's failure to demonstrate prejudice. We agree with the State.

Although trial counsel does not have an absolute duty to investigate particular facts or a certain line of defense, counsel does have a duty to make a reasonable investigation or to make a reasonable decision that makes a particular investigation unnecessary. *Strickland*, 466 U.S. at 691. A reasonable investigation does not require counsel to "leave no stone unturned." *Cribbs v. State*, No. W2006-01381-CCA-R3-PD, 2009 WL 1905454, at \*49 (Tenn. Crim. App. July 1, 2009). Rather, "[r]easonableness should be guided by the circumstances of the case, including information provided by the Petitioner, conversations with the Petitioner, and consideration of readily available resources." *Id.* Deference to the tactical decisions of counsel applies only if counsel makes those decisions after adequate

preparation for the case. *Cooper v. State*, 847 S.W.2d 521, 528 (Tenn. Crim. App. 1992).

In denying Petitioner relief as to this claim, the post-conviction court rejected Petitioner's claim that his case was prejudiced by trial counsel's failure to request an investigator:

This was not a factually complex case. There is no reason to believe an investigator would have been furnished by the state. There is no proof that an investigator would have provided mitigating facts that would have been admissible at trial and there is no proof an investigator would have found impeachable evidence to use against the State's witnesses.

The evidence does not preponderate against these findings. This was not a case complicated by physical or scientific evidence. It was a credibility contest between the victim and Petitioner. Petitioner claims that an investigator would have developed a timeline of the offenses in order to establish an alibi defense but the record clearly shows that the State isolated and distinguished the offenses based on where the offenses occurred, and Petitioner has not shown what an investigator would do to establish an alibi defense or undermine the outcome of the trial. *Mabe*, 2017 WL 4708097, at \*13; *see also, e.g., Black v. State*, 794 S.W.2d 752, 757-58 (Tenn. Crim. App. 1990) (failure to call an omitted witness shows lack of prejudice).

Petitioner relies on trial counsel's post-conviction testimony that "in hindsight," he would have requested an investigator because he does so presently as a matter of course in cases involving Class A felonies. Trial counsel's testimony regarding what he would do *now* as a matter of course has no bearing on the reasonableness of trial counsel's performance *then* at the time of trial. *Strickland*, 466 U.S. at 689 (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").

Furthermore, Petitioner's poor health was uncontroverted; thus, trial counsel's decision not to introduce Petitioner's medical records was reasonable. The jury was well-aware that Petitioner suffered from kidney failure, was receiving dialysis, and experienced erectile dysfunction. *Mabe*, 2017 WL 4708097, at \*6-9. Petitioner has failed to demonstrate that counsel's decision not to introduce the medical records was deficient. Further, Petitioner cannot complain that trial counsel failed to introduce his medical records or request an investigator when he has failed to offer the same evidence at post-conviction. This court will not speculate as to the evidence that trial counsel might have introduced at trial. *Black*, 794 S.W.2d at 757-58.

Contrary to Petitioner's assertion, the record shows trial counsel was prepared for trial. Trial counsel met with Petitioner to discuss the case and prepare for trial at least a dozen times and met Petitioner in his home for several hours the weekend before trial. Trial counsel called several witnesses as requested by Petitioner including Petitioner's brother, Petitioner's adult daughter, and the neighbor who looked after the victim. All three witnesses spent considerable time with Petitioner and the victim when they lived at both locations. *Mabe*, 2017 WL 4708097, at \*10. Each witness testified that they had never observed Petitioner touch the victim inappropriately and each witness testified that the victim had never acted scared or fearful of Petitioner. *Id.* Petitioner is not entitled to relief.

***Failure to object to the admission of the victim's forensic interview recordings pretrial***

Petitioner contends that a hearing was required under the statute and that trial counsel's failure to file a motion to object to the admission of the forensic interview recordings was deficient. He argues that the deficiency was prejudicial because the recordings served to bolster the victim's testimony much like the hearsay statements of her parents and her stepmother. The State contends this issue is waived because Petitioner is raising it for the first time on appeal. Although both trial counsel and Petitioner testified at the post-conviction hearing about counsel's decision not to move for the exclusion of the forensic interview recordings, the issue was not specifically raised in the petition for post-conviction relief nor did the post-conviction court make findings relative to this claim. Thus, we agree that the issue is waived. Waiver notwithstanding, Petitioner's claim would fail on the merits because under a de novo review, trial counsel's performance was not prejudicial.

Under Tennessee Code Annotated section 24-7-123 a video recording of a forensic interview of a child under the age of thirteen where the child describes any act of sexual contact performed with or on the child by another may be admitted as substantive evidence if certain requirements are met. T.C.A. § 24-7-123(a). The video recording "may" be admitted if:

- (1) The child testifies, under oath, that the offered video recording is a true and correct recording of the events contained in the video recording and the child is available for cross examination;
- (2) The video recording is shown to the reasonable satisfaction of the court, in a hearing conducted pretrial, to possess particularized guarantees of trustworthiness.

*Id.* § 24-7-123(b)(1)-(2). In determining the "particularized guarantees of trustworthiness,"

the trial court considers a number of factors such as the child's maturity and motive, the device used to record the interview, and the professional qualifications of the forensic interviewer. *Id.* § 24-7-123(b). The interview "may be considered for its bearing on any matter to which it is relevant evidence at the trial" of the defendant. *Id.* § 24-7-123(a).

We agree with the State that the record is somewhat inadequate because it is unclear whether the State filed a motion in limine or the court conducted a hearing to determine the trustworthiness of the recordings. We know only that trial counsel did not file a motion to exclude. However, because this is post-conviction, this court reviews Petitioner's claim for deficiency and prejudice under *Strickland*. In order to obtain relief, Petitioner must show that counsel's failure to challenge the recordings fell below the range of competence and that but for trial counsel's deficiency, the trial court would have granted a motion to exclude the recordings. The record here does not support Petitioner's claim for relief.

Trial counsel testified that he researched the authority on forensic interview recordings and determined that a motion to challenge the admission would not be "fruitful." Rather than litigate a futile motion, trial counsel developed a strategy to discredit the victim. His strategy in cross-examining the victim was to point out inconsistencies between her trial testimony and her forensic interviews. To that end, trial counsel took copious notes of the forensic interviews and was prepared to question the victim when her trial testimony was inconsistent with the statements she gave in the two interviews. This was a well-reasoned strategy based on thorough preparation. We decline to second-guess the strategy with the benefit of hindsight.

In addition, Petitioner has not established that he would have prevailed in excluding one or both of the forensic interview recordings but for the alleged deficiency. Petitioner offers no argument for challenging the recordings under the statute. To the contrary, the victim testified under oath at trial as to the accuracy and authenticity of the recording of the forensic interview; she was subject to cross-examination; and she testified before the recordings were exhibited to the jury. *Id.* § 24-7-123(b)(1); *Mabe*, 2017 WL 4708097, at \*3. Likewise, trial counsel testified that he did not recall any alterations or edits to the forensic interview recordings. Because Petitioner has not proven that the failure to object prejudiced him, he is not entitled to relief.

### ***Conflict of interest with the prosecuting attorney***

Petitioner claims that it is "likely" trial counsel's decision not to object to the admission of the forensic interview recordings was influenced by his familial connection to the prosecuting attorney, who was married to trial counsel's aunt at the time of trial. The State counters that the post-conviction court impliedly accredited trial counsel's testimony that he disclosed the relationship to the prosecuting attorney before trial and that Petitioner

waived any issue regarding a conflict by proceeding to trial with trial counsel. We agree with the State.

Effective representation presumes conflict-free representation. *Strickland*, 466 U.S. at 692. Prejudice is presumed in a limited context if the defendant demonstrates that counsel “actively represented conflicting interests” and that “an actual conflict of interest adversely affected his lawyer’s performance.” *Id.* (quoting *Cuyler v. Sullivan*, 446 U.S. 335, 350 (1989)). Conflict of interest “includes any circumstances in which an attorney cannot exercise his independent professional judgment free” from competing interests. *Frazier v. State*, 303 S.W.3d 674, 682 (Tenn. 2010) (citing *State v. Culbreath*, 30 S.W.3d 309, 312 (Tenn. 2000)); *see also State v. White*, 114 S.W.3d 469, 476 (Tenn. 2003). Counsel with such a conflict is subject to disqualification. *State v. Tate*, 925 S.W.2d 548, 553 (Tenn. Crim. App. 1995).

The post-conviction court did not make any specific findings regarding this allegation but clearly rejected Petitioner’s testimony regarding when he was informed of the relationship. Trial counsel testified that he immediately informed Petitioner upon appointment and reached out to the BPR which found no conflict with the representation.

Trial counsel testified that he discussed the admission of the forensic interview recordings with the prosecutor at the family Christmas gathering who referenced the legal authority the State would rely on to advance the admission of the recordings. Trial counsel did not rely solely on the prosecutor’s knowledge of the law in deciding not to challenge the recordings. He researched the case law, reviewed the statute, and determined that it would not be “fruitful” to challenge the recordings. As we have addressed in Petitioner’s earlier claim on the admission of the forensic interview recordings, the evidence does not show deficiency or prejudice. The proof shows instead that trial counsel exercised “independent professional judgment free” of any competing interest when deciding not to challenge the admission of the interview recordings. Further, the decision to use the forensic interview recordings as a map for impeaching the victim’s credibility was a reasonable strategy entitled to deference based on trial counsel’s informed preparation. Petitioner is not entitled to relief.

### ***Cumulative Error***

Finally, Petitioner argues that he is entitled to post-conviction relief because the cumulative effect of trial counsel’s errors resulted in a “fundamentally unfair trial.” The cumulative error doctrine recognizes that there may be many errors committed in trial proceedings, each of which constitutes mere harmless error in isolation, but “have a cumulative effect on the proceedings so great as to require reversal in order to preserve a defendant’s right to a fair trial.” *State v. Hester*, 324 S.W.3d 1, 76 (Tenn. 2010). To

warrant relief under the cumulative error doctrine, there must have been more than one actual error committed during the trial proceedings. *State v. Herron*, 461 S.W.3d 890, 910 (Tenn. 2015) (citing *Hester*, 324 S.W.3d at 77). After considering Petitioner's issues and finding no error, we need not consider the cumulative effect of any alleged errors. Indeed, because we have concluded that trial counsel's representation was not ineffective, there is no aggregate effect of multiple errors. Petitioner was therefore not deprived of a fair trial. He is entitled to no relief.

### **Conclusion**

For the foregoing reasons, the judgment of the post-conviction court is affirmed.

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JILL BARTEE AYERS, JUDGE