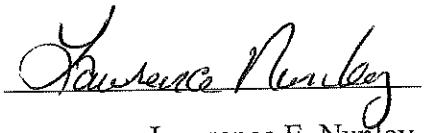
IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF INDIANA
TERRE HAUTE DIVISION

Lawrence Nunley,)
)
Petitioner,)
)
-vs-) Cause No. 2:19-cv-00012-JRS-DLP
)
Richard Brown, Warden,)
Wabash Valley Corr. Fac.)
)
Respondent.)

NOTICE OF APPEAL AND REQUEST
FOR A CERTIFICATE OF APPEALABILITY

A. NOTICE OF APPEAL

Notice is hereby given that Lawrence E. Nunley, Petitioner *pro se*, hereby appeals to THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT from the order dismissing his Petition for a writ of Habeas Corpus on the 30th day of March 2020.



Lawrence E. Nunley

B. REQUEST FOR CERTIFICATE OF APPEALABILITY

TO THE HONORABLE JUDGES OF THE SEVENTH CIRCUIT:

Comes now the Petitioner, Lawrence Nunley, *pro se*, and respectfully requests that the SEVENTH CIRCUIT COURT OF APPEALS issue a certificate of appealability in the above-captioned case of action. In support, Nunley states to this Honorable Court as follows:

1. Nunley is a state prisoner, seeking to appeal from the denial of a Petition for a writ of Habeas Corpus, pursuant to 28 U.S.C. § 2254. Therefore Nunley must obtain a certificate of appealability, 28 U.S.C. § 2254 (c) (1).

2. To obtain a certificate of appealability, Nunley must show "That jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further." Buck v. Davis, 137 sct. 759,773 (2017).

Reasonable jurists could disagree with the District Court's decision and/or the issues should be decided by the Seventh Circuit Court of Appeals. Nunley presents the following:

CLAIM I : DENIAL OF THE RIGHT TO PRESENT A DEFENSE

On direct appeal, Nunley argued that the exclusion of evidence, pursuant to a state evidentiary rule, violated his federal constitutional right to present a defense. The Supreme Court of the United States has held that a defendant's constitutional right to present a defense must not be abridged by evidence rules that are arbitrary or disproportionate to the purposes they are designed to serve. Holmes v. South Carolina 547 U.S. 319, 326 (2006). The Indiana Supreme Court has explained the right to present a defense as follows:

> [W]hen the defendant's Sixth Amendment right to present a defense collides with the State's interest in promulgating rules of evidence to govern the conduct of it's trials, the merits of the respective positions must be weighed, [and] the State's interest must give way to the defendant's rights if it's rules are "mechanistically" applied to deprive the defendant of a fair trial.

Hubbard v. State, 742 N.E.2d 919, 922 (Ind. 2001), *quoting Huffman v. State*, 543 N.E.2d 360, 375 (Ind. 1998).

The State relied heavily on testimony from A.Y. to make its case against Mr. Nunley. In fact, A.Y. and Nunley were the only two present when the incident is alleged to have happened. There was no medial or forensic evidence to corroborate the allegations. There were no other witnesses. Thus, A.Y. was the only witnesses who could attest to the elements of the crime and assist the prosecution in proving each and every element of the offense charged beyond a reasonable doubt. A.Y. was a critical witness. She was so critical to the State's case that Mr. Nunley's attorney told the jurors: "This whole case, the whole issue revolves around whether she's a credible witness, whether you can believe her or not. And, as I said, if you believe her, then he should be found guilty. If you don't believe her, then he should be found not guilty." (R. 45). Indeed, the State's entire case was a credibility contest between Mr. Nunley and A.Y.

Mr. Nunley's attorney was aware of this fact and put forth a trial strategy that A.Y. had fabricated the allegations. In an attempt to impeach A.Y., counsel sought to introduce evidence that A.Y. had falsely accused another adult male in her life [R. 377-380]. She pleaded with the trial court, asking "[w]ell the problem is, how the heck are you gonna attack the credibility of a kid who admits she lied if you can't ask her if she lied?" (R. 380). Defense counsel also asked, "[w]ell, then I would like to know how you can establish that somebody lied if you can't ask them when they're testifying if they've lied? ***I mean that's the whole issue of credibility here.***" (R. 715) (emphasis added).

The excluded evidence went to the heart of the State's case, as Mr. Nunley's conviction rests entirely upon a single accusation made by a single witness. Evidence that A.Y. falsely accused another individual about a physical assault and made this accusation to the police would have decimated the State's case.

The Respondent contends that Nunley's claim was adversely decided by the United States Supreme Court in *Nevada v. Jackson*, 569 U.S. 505, 509 (2013). (Return, pp. 10-11). The Respondent asserts:

> On trial for rape, the [Jackson] tried to present police reports and officer testimony to show that the victim had accused him of assaulting her before, which the police could not corroborate. The trial court excluded the evidence under a Nevada statute that generally precludes extrinsic evidence of specific instances of the witness's conduct to attack her credibility. On federal habeas, the defendant argued that the trial court violated his constitutional right to a defense. The Ninth Circuit agreed and granted a conditional writ of Habeas Corpus.
>
> The Supreme Court reversed because the state court's decision was reasonable.... The Supreme Court reasoned that "[t]he admission of extrinsic evidence of specific instances of a witness' conduct to impeach the witness' credibility may confuse the jury, unfairly embarrass the victim, surprise the prosecution, and unduly prolong the trial."

(Return, pp. 10-11) (internal citations omitted). The Respondent goes on to state that the same reasoning applies in this case. However, Mr. Nunley's case is distinguishable. Unlike *Jackson*, Mr. Nunley's accuser admitted that she falsely accused someone else. She recanted the accusation herself. The witness prior accusation in *Jackson* merely could not be corroborated. Mr. Nunley does not believe that the Supreme Court wanted to design a rule that would make a witness's credibility virtually unchallengeable. This is the type of mechanistic application that has been explicitly forbidden by the United States Supreme Court in previous cases. *See e.g.*, *Chambers v. Mississippi*, 410 U.S. 284 (1973) and *South Carolina v. Holmes*, 547 U.S. 319 (2006).

The Respondent contends that "[t]he Court has '***[o]nly rarely... held*** that the right to present a complete defense was violated by the exclusion of defense evidence under a state rule of evidence." (Return, p. 10) (emphasis added). Thus, the Respondent admits that there have

been occasions when the court has ruled that way. This case presents a situation that rises to the level of one of those rare circumstances requiring such a ruling. After all, the only evidence against Mr. Nunley is a bald accusation by a single witness. As counsel asked during the trial, "[H]ow you can establish that somebody lied if you can't ask them when they're testifying if they've lied? I mean that's the whole issue of credibility here." (R. 715).

Our nation is at a crossroads, and the rule of law is under attack. Popular sentiments, such as the #metoo movement, have caused us to dispense with time honored principles, such as "innocence until proven guilty" beyond a reasonable doubt. In today's world, criminal defendants do not enjoy the presumption of innocence; they are guilty until proven innocent, especially if charged with a sexual offense. Popular culture demands retribution at the mere mention of this type of infraction. And, the judiciary is bending to the will of the mob by permitting convictions without corroborative evidence. Now, the Respondent wants this Court to determine that relevant evidence aimed at demonstrating that a witness is not credible – when that witness's testimony is the only evidence against the defendant – can be arbitrarily or mechanistically excluded, even when the entire defense theory is to demonstrate that the witness has fabricated the story. Such a ruling sets the stage for unfettered prosecutions without traditional legal safeguards. Mr. Nunley believes that the right to present a complete defense is fundamental to American jurisprudence.

The Respondent argues that Mr. Nunley's claim is harmless. (Return, p. 13). During closing arguments, the prosecutor made the following statements:

> So, I'm gonna talk about a few reasons as to why you should believe [A.Y.]. First of all, she has no reason to lie. She's six years old. I submit she hasn't even been taught how to lie. She knows what's the truth and what's a lie. When you tell the truth, you don't get into trouble. When you tell a lie, you get into trouble she said Her and [Mr. Nunley] were friends. She wanted to spend the night at his

house. She liked going over there and playing wiht the Nintendo. She liked hanging out with Kiki. She has no reason to lie.

In Indiana, these remarks about A.Y.'s credibility invade the province of the jury and constitute misconduct. *Ulrich v. State*, 550 N.E.2d 114, 115 (Ind. Ct. App. 1990) ("By stating that the victim was reliable and credible, the expert witness invaded the province of the jury."); *Schlomer v. State*, 580 N.E.2d 950, 957 (Ind. 1993). The State's misconduct notwithstanding, this line of argument opened the door to the attack on A.Y.'s credibility.

Following the state prosecutor's lead, the Respondent contends that "There was not even a reasonable possibility that the jury would have thought that A.Y. was lying about what Nunley did to her because she had lied about what another man did to her." (Return, p. 14). Although the Respondent concedes that A.Y. lied to the police and to the prosecutor about what she had accused someone of doing, the Respondent asks this Court to invade the province of the jury. As previously noted, this entire case was a credibility contest. Determining whether or not a witness is a credible witness falls within the province of the jury. Credibility determinations impact the way in which the evidence is received. The jury need not determine that A.Y. is lying because of her false accusation against the other Eddie. They need only determine that her testimony is as credible as Mr. Nunley's when viewed in context of her propensity to lie and her inconsistent statements.

In support of its plea for this Court to invade the province of the jury, the Respondent argues that A.Y. "did not recant one year later when she was forensically interviewed or at trial." (Return, p. 14). The Respondent suggests that a recantation is necessary to reveal a lie, which certainly is not true. Furthermore, A.Y. did embellish her story. During the forensic interview one year later, A.Y. made additional allegations that she had never mentioned until that interview. The same jury convicted Nunley of those charges. The Court of Appeals determined

that those allegations "lacked sufficient indicia of reliability," and the Court vacated the charges. However, the jury took those allegations to be true. If the jury had been told that the contents of that interview were not credible, would they have still convicted Nunley on the remaining charges? The fact that the Respondent – and the State in prior proceedings – continue to cite this evidence after it has been determined that it should not have been entered at trial because it lacked credibility demonstrates just how damaging it was. The jurors did not receive the evidence in a vacuum, and the evidence about that interview could have easily tipped the scales.

Furthermore, if this issue is viewed in conjunction with other errors, such as the confrontation violation and the inconsistent statements outlined *infra*, this issue becomes more significant still. Thus, the writ should issue.

CLAIM II: DENIAL OF THE RIGHT TO CONFRONTATION

Mr. Nunley claims that he was denied his right to confrontation. The Respondent argues that this court is "procedurally barred" from reviewing Mr. Nunley's claims for failing to object to the admission of evidence because Mr. Nunley failed to fully and fairly present this claim to the state courts. (Return, pp. 15).

The term, "procedural default" refers to two separate but closely related circumstances where a federal court is barred from considering the merits of a petitioner's claims: "(1) [when] that claim was presented to the state courts and the state-court ruling against the petitioner rests on an adequate and independent state law ground[;] or (2) [when] courts would now hold the claim procedurally barred." *Perruquet v. Briley*, 390 F.3d 505, 514 (7th Cir. 2004) (citations omitted); C*onner v. McBride*, 375 F.3d 643, 648 (7th Cir. 2004) (citations omitted).

Regarding the first circumstance, the procedural default doctrine bars federal court review of a state court ruling when four requirements are met: (1) A petitioner has actually

violated a state procedural rule. *See, e.g., Lee v. Kema*, 534 U.S. 362, 382 (2006); (2) the procedural violation provides an 'adequate' and 'independent' state ground for denying petitioner's federal constitutional claim. *See Coleman v. Thompson*, 501 U.S. 722, 729-732, 735 (1991); *Harris v. Reed*, 489 U.S. 255, 260, 262 (1989); (3) The highest state court to rule on the claim clearly and unambiguously relied on a procedural violation as its reasons for rejecting the claim. *See, Coleman*, 501 U.S. at 733, *citing Harris v. Reed*, 489 U.S. 255, 263 (1989); and (4) The State had adequately and timely asserted the default as a bar to federal *habeas corpus* relief. *See, e.g., Gray v. Netherland*, 518 U.S. 152, 165-166 (1996).

The default that occurs in the second circumstance is rooted in the exhaustion requirement. *See, Connor*, 375 F.3d at 648, *citing Coleman v. Thompson*, 501 U.S. 722, 735 n.1 (1981). As has long been the case, *Ex parte Royall*, 117 U.S. 241 (1886), *habeas* relief cannot be granted unless the petitioner has "exhausted the remedies available in the court's of he State' 28 U.S.C. § 2254(b)(1)(A). "The exhaustion doctrine is designed to give the state courts a full and fair opportunity to resolve constitutional claims before these claims are presented to federal courts.... *O'Sullivan v. Boerckel*, 526 U.S. 838, 845 (1999). "To provide the state with the necessary 'opportunity,' the petitioner must 'fairly present' his claim to each appropriate state court (including a state supreme court with powers of discretionary review), thereby alerting that court to the federal nature of the claim." *Baldwin v. Reese*, 541 U.S. 27, 29 (2004) (citations omitted). To fairly present a claim, a brief must "present both the operative facts and legal principles that control each claim." *Wilson v. Briley,* 243 F.3d 325, 327-328 (7th Cir. 2001) (listing four factors this circuit uses to determine whether a claim has been fairly presented); *See also Verdin v. O'Leery*, 972 F.2d 1467, 1473-1474 (7th Cir. 1992).[1]

[1] Reviewing courts should consider whether petitioner's argument to the state courts: (1) relied on pertinent federal cases employing constitutional analysis; (2) relied on state cases applying constitutional analysis to a similar factual

The Respondent asserts that Mr. Nunley "argued that the trial court violated his right to confront A.Y. for the same reasons that it denied his right to present a defense (Ex. C at 29-31)." (Return, p. 16). The Respondent suggests that the presentation was somehow invalidated because he "did not raise a separate Confrontation Clause argument" in his Petition to Transfer. (Return, p. 16). The Respondent cites to no legal authority in support of the notion that a habeas petitioner fails to fairly present a claim because it was not delineated as a separate claim or was inextricably intertwined with other claims. Rather, the Respondent merely argues that the reasoning was based upon state law. (Return, p. 16).

The Respondents assertion violates the purpose of a petition for transfer. As the Supreme Court of Indiana said "… Appellate Rule 57(G)(4) should ***not*** be read to require a party to repeat all of the arguments made in the brief to the Court of Appeals. A Petition to Transfer constitutes a request to our court to review a decision of the Court of Appeals in its entirety, the request is that the ***entire appeal*** be transferred to our court and be before us as though had not been reviewed by the Court of Appeals." *Lockridge v. State,* 809 N.E.2d at 844 (emphasis added).

The Respondent does not assert that Petitioner failed to make an adequate argument to the Indiana Court of Appeals. Rather, the Respondent faults Petitioner for failing to repeat the arguments in the Petition for Transfer or making the arguments separately. (Return, pp. 15-17). However, *Lockridge, supra* makes it clear that this is an invalid proposition. Moreover, the Supreme Court's summary denial of discretionary review stated that the "The Court… reviewed… all briefs filed in the Court of Appeals…." Thus, this Court should assume that the Supreme Court of Indiana denied Petitioner's issues on their merit. *Harrington v. Richter*, 562 U.S. 86, 99 (2011) ("When a federal claim has been presented to a state court and the state court

---

situation; (2) asserted the claim in terms so particular as to call to mind a specific constitutional right; or (4) alleged a pattern of facts that is well within the mainstream of constitutional litigation.

has denied relief, it may be presumed that the state court adjudicated the claim on the merits in the absence of any indication or state law procedural principles to the contrary."); *Johnson v. Williams*, 133 S.Ct. 1088, 1094 (2013) (same). *See also, Sangathe v. Maass*, 314 F.3d 376, 377-78 (9th Cir. 2002) (habeas review not precluded though highest state court did not address the claim in opinion because lower state court addressed claim on the merits); *McGee v. Bartow*, 893 F.3d 556, 567 (7th Cir. 2010) (no procedural default because operative facts and legal principles regarding petitioner's due process claim were presented to state court in connection with separate claim).

The fact that the state appellate court did not independently address the merits of his claim is irrelevant: a claim is exhausted as long as the brief presented to the state courts included the claim. *Castille v. Peoples*, 489 U.S. 346, 351 (1983); *Wallace v. Duckworth*, 778 F.2d 1215, 1223 (7th Cir. 1985). Petitioner unquestionably presented the substance of his claim, citing the operative facts and relevant law, which is all that is required.[2]

The Respondent makes no argument on the merits of this argument. The Respondent has, therefore, waived the right to do so. *United States v. Leichtnam,* 948 F.2d 370, 375 (7th Cir. 1991); *United States v. Menesses*, 962 F.2d 420, 425-426 (5th Cir. 1992). *See also*, *Buck v. Davis*, 137 S.Ct. 759 (2017) (holding that the government had waived its argument by not asserting it in the lower court).

---

[2] *See e.g., Trevino v. Texas*, 509 U.S. 562, 566-567 (1992) (per curium)(petitioner effectively presented his equal protection claim to the state court even though his assertion of his rights may have been "inartful[l]); *Porter v. Gromley*, 112 F.3d 1308, 1315 (7th Cir. Ill.. 1997) (petitioner's direct appeal brief adequately alerted state court to legal and factual basis of claim, thereby avoiding default); *Schneider v. Ohio*, 85 F.3d 335; 339 (8th Cir. 1996) (rejecting state's argument that state court pleading should be strictly construed as challenging ineffective assistance only at sentencing and not at guilt stage; "The requirement that federal habeas claims must have been presented in state court is not meant to trap a petitioner who has poor drafting skills. The stakes in habeas corpus are too high for a game of legal gotcha"); *Jones v. Washington*, 15 F.3d 671, 674-675 (7th Cir. 1994) (petitioner presented "substance of" claim to the state courts, and factual and legal elaboration in federal pleadings did not result in "new claim."; *Myers v. Yist*, 897 F.2d 417, 420-421 (9th Cir. 1990) (substantial compliance found based upon alternative arguments made in state court briefs); *Dillon v. Duckworth,* 751 F.2d 895, 902 (7th Cir. 1984) (federal claims were subissues of state claims).

In the direct appeal brief, Nunley unquestionably raised a confrontation argument. (Ex. K, pp. 17-32). Subsection C of his argument is entitled, "The Presentation of this Evidence Violated Mr. Nunley's Right of Confrontation." Mr. Nunley then relied upon the Sixth Amendment and *Crawford v. Washington*, 541 U.S. 36, 124 S.Ct. 1354 (2004) in support of his proposition. Mr. Nunley presented the following:

> The Sixth Amendment guarantees that "[i]n all criminal prosecutions, the accused shall enjoy… the right to be confronted with the witnesses against him." U.S. Const. Amend. VI. The united States Supreme Court revisited its analysis of the right of confrontation under the Sixth Amendment in *Crawford v. Washington*, 541 U.S. 36, 124 S.Ct. 1354 (2004). In so doing, the Court expanded the scope of the Sixth Amendment. The *Crawford* Court held that the right of confrontation applies to all testimonial statements whether these statements were sworn or unsworn. *Crawford,* 541 U.S. at 51-52. Further, the Court concluded that "the Framers would not have allowed admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had had a prior opportunity for cross-examination." *Id.* at 53-54. The Court noted that "the text of the Sixth Amendment does not suggest any open-ended exceptions from the confrontation requirement to be developed by the courts." *Id.* at 54. Instead, the Court held that the right of confrontation may only admit those exceptions established at the time of the founding. *Id.*

(Ex. K, pp 29-30).

The brief then goes on to place these facts into context with the legal principles with the operative facts of this particular case. Mr. Nunley explained that he was unable to meaningfully cross-examine A.Y. in front of the jury. (Ex. K, p. 30). Mr. Nunley refers to previous facts developed in the preceding sections of this argument. (Ex. K. pp, 17-32). Without an adequate ability to confront A.Y.'s accusations on cross-examination at trial, the State violated Mr. Nunley's right of confrontation by admitting into evidence the drumbeat repetition of A.Y.'s accusations. (Ex. K., p. 31).

It is unreasonable to suggest that, in the 16 pages of argument presented on this issue that Mr. Nunley did not present the operative facts and legal principles governing his claims. In a separate section and with clear citation to United States Supreme Court precedent, he clearly alerted the state courts to the federal nature of the issue above. Thus, it was fairly presented in the original brief. According to the Supreme Court of Indiana, a Petition to Transfer under the *Rules of Appellate Procedure* is a request to review all of the arguments, including the 16-page argument on this confrontation issue. Thus, the issue is fairly presented.

Since the Respondent has waived any argument on the merits of the claim by failing to present an argument other than procedural bar, Mr. Nunley asks this Court to review the arguments set forth by counsel in the Brief of Appellant, and rule in his favor on this violation of his confrontation rights. (Ex. K, pp. 17-32). Mr. Nunley notes that if this Court finds that he fairly presented his claims to the state court that the Respondent has not presented any cause as to why the writ should not be granted on this issue. Thus, the writ should issue.

CLAIM III: INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL

The right to effective counsel is rooted in the Sixth Amendment of the United States Constitution. "The Sixth Amendment recognizes the right to the assistance of counsel because it envisions counsel's playing a role that is critical to the ability of the adversarial system to produce just results." *Strickland v. Washington*, 466 U.S. 668, 685 (1984). "The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Id.* at 686.

To establish ineffective assistance, a defendant is required to show: (1) that counsel's performance was deficient; and (2) that counsel's deficient performance prejudiced him.

Williams v. Taylor, 529 U.S. 362, 370-391 (2000), *citing Strickland v. Washington*, 466 U.S. 668, 692 (1984). Deficient performance is a performance, which falls below an objective standard of reasonableness. *Id. citing Strickland*, 466 U.S. at 687. The objective standard of reasonableness is based on prevailing professional norms. *Strickland,* 466 U.S. at 687.

Strickland also requires a demonstration of prejudice. Prejudice is an inherent component of a fundamentally unfair or unreliable trial. A fair trial has been denied a defendant when his conviction or sentence has resulted from a breakdown in the adversarial process, which rendered the result unreliable. *Lockhart v. Fretwell,* 506 U.S. 364, 369 (1993), *citing Strickland*, 466 U.S. at 686. The Seventh Circuit Court of Appeals has emphasized:

> Prejudice is found where the result of the proceeding can be rendered unreliable, and hence the proceeding itself unfair, even if the errors of counsel cannot be shown by a preponderance of the evidence to have determined the outcome.

Baer v. Neal, 879 F.3d 769 (7th Cir. 2018), quoting *Strickland*, 466 U.S. at 694.

To prevail, Mr. Nunley must show the chance of prejudice to be better than negligible. *Canaan v. McBride*, 395 F.3d 376, 383 (7th Cir. 2005), *quoting United States ex rel Hampton v. Leibach,* 347 F.3d 219, 246 (7th Cir. 2003) ("Even if the odds that the defendant would have been acquitted had he received effective representation appear to be less than fifty percent, prejudice has been established as long as the chances of acquittal are better than negligible."). Or, as the United States Supreme Court noted in *Wiggins*: "[T] he 'prejudice' prong is satisfied if there is a reasonable probability that at least one juror would have struck a different balance." *Wiggins,* 539 U.S. at 527-528.

Failure to Impeach A.Y.

The Respondent incorrectly asserts that Nunley failed to identify the inconsistent statements made by A.Y. during state collateral proceedings. (Return, p. 18). The Respondent

then suggests that the state courts "could have" held that Nunley failed to meet his burden of proof because Nunley did not point to specific inconsistencies. (Return, pp. 18-19). This assertion is objectively untrue.[3] The State advanced the same argument in its responsive brief in state court. (Ex. L, pp. 19-22). The state court tacitly rejected this claim by deciding the merits of the claim rather than holding Nunley had failed to make a cogent argument and/or had waived it.

The Respondent admits, in the next paragraph, that the state court found the merits of the claim, despite the hypothetical ability to deny the claim on some other ground. (Return, p. 19). This court is not tasked with evaluating the validity of some hypothetical ruling. Rather, this court is tasked with evaluating whether or not the decision on the merits of Nunley's claim was: (1) contrary to or an unreasonable application of clearly established federal law; or (2) based on an unreasonable determination of the facts. *See,* 28 U.S.C. §2254(d); *Williams (Terry), supra; Miller-El 1, supra.*

The state court ruled on the merits of Nunley's claim and denied it on the grounds that "Nunley's trial counsel made strategic choices of how best to cast doubt on A.Y.'s trial testimony." (Ex. N, p. 9). This determination is the heart of this instance of counsel's ineffectiveness. Moreover, this determination is an unreasonable determination of the facts, violates clearly established federal law, and should appropriately be overturned by this Honorable Court.

The Respondent suggests that "[t]he record supports the court's conclusion." (Return, p. 19). The Respondent then highlight's A.Y.'s trial testimony, without pointing to any tactical or strategic reasoning offered by counsel for the failures. Indeed, there are none.

---

[3] Nunley included specific instances in the Brief of Appellant. (See, Ex. K, p. 9). He also reiterated the specific instances in his reply brief and disputed the same disingenuous arguments advanced by the Respondent here. (Reply Ex. K, pp. 3-7). Nunley also provided record citations for the inconsistent statements. *Id.*

During the post-conviction proceedings, Schultz testified that her trial strategy was to convince the jury that A.Y., was lying about what happened. (PC Vol. II, p. 27). She recalled that there was no medical, forensic, or scientific evidence in this case. (PC Vol. II, p. 27). She unequivocally stated that the only way Nunley could be convicted was if the jury believed A.Y.'s testimony. (PC Vol. II, p. 27). She characterized A.Y. as a critical witness. (PC Vol. II, p. 28). She also testified that she believed she had an obligation to point out inconsistencies in A.Y.'s testimony. (PC Vol. II, p. 28).

When a petitioner shows that counsel's actions actually resulted from inattention or neglect, rather than reasoned judgment, the petitioner has rebutted the presumption of strategy, even if the government offers a possible strategic reason that could have, but did not, prompt counsel's course of action. *Rompilla v. Beard*, 545 U.S. 374-395-396 (2005) (O'Connor, J. concurring; *Wiggins v. Smith*, 539 U.S. at 526-527; *Kimmelman v. Morrison*, 477 U.S. 365, 385 (1986).

The post-conviction court denied relief, attributing the failure to strategy. (App. Vol. III, p. 82). The Court of Appeals did the same. (Ex. N, p. 9). However, this was not a strategic consideration. In fact, Ms. Schultz believed that she had an obligation to point out inconsistencies in A.Y.'s testimony. (PC Vol. II, p. 28). The state courts' assigning strategic reasoning to counsel's decision is contrary to clearly established federal law. Schultz told the State Public Defender's office that she "does not know why she failed to use this impeachment evidence, and is willing to testify that it was a mistake." (App. Vol. III, P. 35).

As previously noted, when a petitioner shows that counsel's actions actually resulted from inattention or neglect, rather than reasoned judgment, the petitioner has rebutted the presumption of strategy, even if the government offers a possible strategic reason that could

have, but did not, prompt counsel's course of action. *Rompilla v. Beard*, 545 U.S. 374-395-396 (2005) (O'Connor, J. concurring; *Wiggins v. Smith*, 539 U.S. at 526-527; *Kimmelman v. Morrison*, 477 U.S. 365, 385 (1986).

As one federal court put it, "It is not the roles of a reviewing court to engage in post hoc rationalization for an attorney's actions "by constructing strategic defenses that counsel does not offer." Or engage in Monday morning quarterbacking. *Harris v. Reed*, 894 F.2d 871, 878 (7th Cir. 1990). *See also, Wiggins v. Smith*, 539 U.S. at 526-527 (holding that post hoc rationalizations are forbidden under *Strickland*). The Indiana Supreme Court has similarly found that "even if a decision is hypothetically a reasonable strategic choice, it may nevertheless constitute ineffective assistance if the purported choice is actually "made due to unacceptable ignorance of the law or some other egregious failure rising to the level of deficient attorney performance. *Brewington v. State*, 7 N.E.3d 946 (Ind. 2014), (Section III(C)). Similarly, the Seventh Circuit Court of Appeals has said that "[t]actics are the essence of the conduct or litigation; much scope must be allowed to counsel, but if no reason is or can be given for a tactic, the label tactic will not prevent it from being used as evidence of ineffective assistance of counsel." *Harris v. Reed*, 894 F.2d 871, 878 (7th Cir. 1990)*Miller v. Anderson*, 255 F.3d 455 (7th Cir. 2001). *See also, United States v. Zarnes*, 33 F.3d 1454, 1473 (7th Cir. 1994); *United States v. Booker*, 981 F.2d 289, 295 (7th Cir. 1992); *Kellogg v. Scurr*, 741 F.2d 1099, 1102 (8th Cir. 1984).

In other words, Nunley does not have to overcome all possible legal strategy. The only strategic considerations that matter are the ones specifically invoked by counsel. If counsel did not act or refrain from acting, as a tactical matter, the Courts should not assign a hypothetically reasonable strategy to counsel's conduct. Ms. Schultz offered no strategy or tactical

considerations for her failures to impeach. Thus, the Respondent's hypothetical, "Counsel could have competently determined that it was not worth the risk" must similarly fail. (Return, p. 20).

Despite the Respondent's assertions to the contrary (Return, p. 18), Nunley did identify the inconsistent statements made by A.Y. In the Reply Brief of Appellant, Nunley wrote the following:

> The State faults Nunley for not identifying the alleged inconsistencies between A.Y.'s deposition and her trial testimony. However, Nunley did identify the inconsistencies to both the trial court and in the Statement of Facts of the Brief of Appellant. On page 9 of the Brief of Appellant, Nunley included:
>
> 7 Ms. Schultz was queried about A.Y.'s testimony. Ms. Schultz testified that there was no medical, forensic, or scientific evidence implicating Mr. Nunley in the alleged criminal activity. Ms. Schultz further testified that the only inculpatory evidence against Mr. Nunley was A.Y.'s testimony.
>
> 8 Therefore, Ms. Schultz testified that she viewed A.Y. as a critical witness and that she held that view going into trial.
>
> 9 Ms. Schultz conducted a deposition of A.Y. but she did not use the deposition to impeach A.Y. at trial. However, Ms. Schultz testified at the evidentiary hearing that she had an obligation to impeach A.Y. since she was a critical witness. Ms. Schultz also admitted that A.Y. did not testify consistently with her deposition testimony.
>
> 10 Although Ms. Schultz could not recall whether or not she impeached A.Y., the trial record unequivocally demonstrates that she did not impeach A.Y. (R. 417-500). For instance, A.Y. testified during her deposition that [], her mother told her what to remember and what to say to the police. (DA 215). Then she denied that her mother told her what to say. (DA 215). A.Y. testified during her deposition that she spent the night with Nunley lots of times, but that this was the first time she had done so without her mother. (DA 206-207). A.Y. also said that the only thing she could remember was Nunley licked her pee-pee and she screamed. A.Y. did not remember seeing or touching Nunley's genitalia. (DA 218-21, 223, 231, 238, 239). A.Y. could not remember what she wrote down on a piece of paper. (DA 213, 239).She also testified during her deposition that Nunley did not hurt her.(DA 240). The deposition testimony differs from A.Y.'s trial testimony. (R. 417-500). Other inconsistencies regarding the details of the events also arise between the deposition and trial testimonies.
>
> 11 Discrepancies exist about: (1) the time of day A. Y. arrived at Mr. Nunley's residence (DA 207-208, 210, 211, 229-230, 233, Pretrial Hearing 29, R. 459-461); (2) who was at Mr. Nunley's home when A.Y. arrived (DA 207, 208, 210, 229, 230, 231, 233; R. 427, 428, 459, 460, 461, 498); (3) the reason A.Y. ended up in Mr. Nunley's bedroom (Pretrial Hearing 23, 32; R. 430, 463-465); what was written on the note (DA 213, 231, 239; Pretrial Hearing, p. 36-39, 86; R. 435, 441-443, 448-451, 477, 479-480).

12 In her deposition, A.Y. repeatedly denies knowledge of Nunley doing anything but licking her vagina once and making her watch a bad movie. (DA 218-221, 224, 231, 238, 239). She could not remember seeing or touching Mr. Nunley's penis. (DA 231, 238, 239).

In ¶ 11 and ¶ 12, Nunley identified the specific discrepancies, replete with page citations. The State faults Nunley for failing to analyze these discrepancies. (Appellee's Brief, p. 19). Then The State next advances a disingenuous argument that the discrepancies between the deposition testimony and the trial testimony are not necessarily impeaching. (Appellee's Brief pp. 19-22).

On cross-examination, Detective Wibbels conceded that A.Y. had made some contradictory statements, "but the meat and potatoes are the same though. (Tr. 774). In closing argument, the prosecutor said "Detective Wibbels, I think, put it right on when he said 'the meat and the potatoes were always the same.' Ladies and gentlemen, the meat and potatoes is, 'He made me suck on his weenie-bob. He licked my pee-pee.'" (R. 797) In rebuttal closing argument, the prosecutor told the jury:

You'd remember like Detective Wibbels said, and how he tends to put things in plain speech, you'd remember the meat and potatoes. All that other stuff, you're not gonna remember. The meat and potatoes. "He made me suck on his weenie-bob, and he made me lick his pee-pee(sic)." Did that ever change? April 14th, 2007, April 18th 2008, November 14th 2008, last Friday. Ms. Schultz talked about, Anne was in here.

(R. 813).

A.Y. testified at a pretrial hearing that Nunley licked her "pee-pee" and made her suck his "weenie-bob." (R. 26). However, less than two months before trial, A.Y. indicated throughout her deposition that she could not recall performing oral sex on Nunley, or even seeing his penis. (DA 218-221, 231-232, 238-239).

So, to answer the prosecutor's question to the jury, "Yes, that did change." The prosecutor and the police agree that the "meat and potatoes" if it happened, the meat and potatoes of the story will stay the same. In this case, the story changed repeatedly. Due to the nature of the deposition questions, it would have been natural for A.Y. to recall that she had performed oral sex on Nunley if that had actually occurred.

The State contends that "little would be gained by proving A.Y. had said she did not remember Nunley's penis on the day she gave her deposition, because the child's reluctance to describe Nunley's penis is not a straightforward sign of fabrication." (Appellee's Brief, p. 21). The State asks this Court to substitute the State's judgment (or its own) for that of the jury. The State does not argue that the jury could not have chosen to disbelieve A.Y.'s story because she failed to recall the "meat and potatoes" of her own story. That is not the role of this court. The role of this court is to assess whether or not the jury could have disbelieved A.Y. if they had been told about the discrepancies in her testimony. The jury could have, especially when one considers that the prosecution made such a point that, if it happened, you'd remember the "meat and potatoes." (Tr. 774, 797, 813).

> Moreover, A.Y. stated that she was told what to say and what to remember. (DA. 215).

(Ex. M, pp. 3-5).

Mr. Nunley notes that the federal courts have long considered a failure to impeach a viable ground for relief. *Peoples v. Lafler*, 734 F.3d 503 (6th Cir. 2013) (finding ineffective assistance of counsel for failing to impeach); Whitfield *v. Bowersox*, 324 F.3d 1009, 1017 (8th Cir. 2003) (finding constitutionally deficient performance of trail counsel based upon an ineffective cross-examination); *Driscoll v. Delo*, 71 F.3d 701, 711 (8th Cir. 1995) (finding ineffective assistance for failing to impeach witness); *Moffett v. Kolb*, 930 F.2d 1156 (7th Cir. 1991) (finding ineffective assistance for failing to impeach with police reports; *United States v. Myers*, 892 F.2d 642 (7th Cir, 1990) (same); *Sparman v. Edwards*, 26 F.Supp.2d (EDNY 1995) (finding ineffective assistance for failing to cross-examine victims about inconsistencies in their statements to the police and trial testimony); *Gonzales-Soberal v. United States*, 244 F.3d 273 (1st Cir. 2001) (finding ineffective assistance for failing to use two pieces of documentary evidence with which to impeach the government's two chief witnesses).

In *Driscoll*, the Eighth Circuit Court of Appeals held "As the Supreme Court recognized in *Strickland,* 'some errors will have had a pervasive effect on the inferences to be drawn from the evidence altering the entire evidentiary picture'.... *Driscoll v. Delo*, 71 F.3d at 711, *quoting Strickland,* 466 U.S. at 695-96. The *Driscoll* Court went on to hold, "We agree with the district court that counsel's failure to impeach... was a breach with so much potential to infect other evidence that, without it, there is a reasonable probability that the jury would find reasonable doubt of Driscoll's guilt. Therefore, his trial counsel's omission amounted to a deprivation of Driscoll's Sixth Amendment right to counsel. *Driscoll v. Delo*, 71 F.3d at 711.

Mr. Nunley's claim was also viable under Indiana case authority. For instance, in *Ellyson v. State*, 603 N.E.2d 1369 (Ind. Ct. App. 1992), this Court reversed in a similar circumstance. In *Ellyson*, the defendant was convicted based upon the rape victim's testimony. Because the State's case relied upon this one witness, this Court concluded that any evidence that pointed toward the victim's not having sexual intercourse or that the defendant was not in the victim's bed that night would undermine confidence in the outcome. Because trial counsel failed to lay the appropriate predicate to impeach, counsel was ineffective. *Id.* at 1375.

More recently, the Supreme Court of Indiana reached a similar conclusion in *State v. Hollin*, 970 N.E.2d 147 (Ind. 2012). In *Hollin*, the Supreme Court of Indiana stated, "[a]t his hearing for post-conviction relief Hollin made a number of claims alleging ineffective assistance of counsel, one of which we find particularly compelling, namely, counsel failed to present evidence that would have impeached Vogel's credibility." *Id.* at 152. The Supreme Court of Indiana went on to affirm the reasoning of the post-conviction court, which concluded that the case was essentially a credibility contest and that the outcome would likely have been different if counsel had impeached Vogel. *Id.*

This is exactly what occurred in this case. During her opening statements, Ms. Schultz informed the jury "This whole case, the whole issue revolves around whether she's a credible witness, whether you can believe her or not. And, as I said, if you believe her, then he should be found guilty. If you don't believe her, then he should be found not guilty." (R. 45). Ms. Schultz affirmed during her post-conviction testimony that A.Y. was a critical witness and that her strategy was to persuade the jury that her story was fabricated. (PC Vol. II, p. 26, 28). The Court of Appeals admitted that this was the defense. (Ex. N, pp. 8-9). Thus, impeaching A.Y. was critical to successfully defending Mr. Nunley. (PC Vol. II, p. 26, 28). If the jury had the

opportunity to consider A.Y.'s inconsistent deposition testimony and pretrial statements, they likely would not have believed A.Y.'s testimony. This is particularly true of the testimony relating to Count 2.

Richard Caves testified that after they picked A.Y. up from Nunley's residence, she wrote that Nunley made her suck his penis and did something to her "pee-pee." [Tr. 508]. 4 Tonya's testimony corroborated this, although the alleged note was missing by the time of trial. [Tr. 538]. On cross-examination, Tonya admitted she did not recall A.Y. saying Nunley had threatened to hurt anyone if she did not perform sex acts. [Tr. 566]. A State Police trooper testified that a few hours after A.Y. and Tonya left Nunley's residence, they showed him a note in child's writing that said, "I was sucking his weenie-bob and he was licking my pee-pee." A.Y. repeated these allegations to the trooper. [Tr. 626-27]. A forensic interviewer testified that a year later, A.Y. said Nunley touched her "pee-pee" with his penis; hand, and tongue, and made her suck his penis. [Tr. 613]. A videotape of this interview was played to the jury. [Tr. 598]. Detective Wibbels also told the jury what A.Y. said during the interview, including that Nunley had made her suck his penis. [Tr. 688-89]. On cross-exam, :Detective Wibbels conceded that A.Y. had made some contradictory statements, :'but the meat and potatoes are the same, though." [Tr. 774]. In closing argument, deputy prosecutor Wheatley said, "Detective Wibbels, I think, put it right on when he said 'the meat and the potatoes were always the same.' Ladies and gentlemen, the meat and the potatoes is, 'He made me suck on his weenie-bob. He licked my pee-pee."' [Tr. 797]. In rebuttal closing argument, deputy prosecutor Flanigan told the jury:

> You'd remember like Detective Wibbels said, and how he tends to put things in plain speech, you'd remember the meat and potatoes. All that other stuff, you're not gonna remember. The meat and potatoes. "He made me suck on his weenie-bob and he made me lick his pee-pee (sic)." Did that ever change? April 14th, 2007. April 18th, 2008. November 14th, 2008, last Friday. [Tr. 813].

However, less than two months before trial, A.Y. indicated throughout her deposition that she could not recall performing oral sex on Nunley, or even seeing his penis. [App. 218-21, 231-32, 238-39]. Yet, Schultz did not point this out.

"A failure to impeach constitutes ineffective assistance when there is a reasonable probability that, absent counsel's failure, the jury would have had a reasonable doubt of the petitioner's guilt." *United States v. Orr*, 636 F.3d 944, 952 (8th Cir. 2010), *quoting Whitfield v. Bowersox*, 324 F.3d 1009, 1017 (8th Cir. 2010). "In cases which turn largely on questions of credibility… '[t]he jury's estimate of the truthfulness and reliability of a witness may well be determinative of guilt or innocence, and it is upon such subtle factors as the possible interest of the witness in testifying falsely that a defendant's life or liberty may depend.'" *State v. Bowens*, 722 N.E.2d 368, 370 (Ind. Ct. App. 2000), *quoting Lewis v. State*, 629 N.E.2d 934, 937-938 (Ind. Ct. App. 1994). *See also*, *Napue v. Illinois*, 360 U.S. 264, 269 (1959).

Under Ind. Evidence Rule 613, a witness's credibility may be attacked by showing that at some time before testifying, the witness made a statement inconsistent with her trial testimony. Ind. Evidence Rule 801(d)(1)(A) excludes from the definition of hearsay sworn inconsistent statements made in a prior legal proceeding, including a deposition, if the declarant testifies at trial and is subject to cross-examination.

The Indiana Rules of Evidence do not define the term, "inconsistent," and Indiana case authority offers no clear test for determining whether a prior statement is sufficiently inconsistent with trial testimony to justify its admission. Miller, *Indiana Evidence*, §§ 613.101 and 801.407 (3rd Ed. 2007). Cases decided under the federal rules suggest that a prior statement need not flatly contradict in-court testimony to be deemed inconsistent. Miller, § 801.407. The additional safeguards provided by Rule 801(d) (prior statement made under oath, right to cross-examine)

appear to justify a generous definition of inconsistency. *United States v. Bingham*, 812 F.2d 943, 946 (5th Cir, 1987).

1 Kenneth S. Broun, *McCormick on Evidence* § 34 at pg. 211 (7th ed. 2013) says prior statements "disavowing knowledge" or "denying recollection" of facts now testified to should be considered inconsistent statements.

A.Y. made a number of statements that were inconsistent with her trial testimony, including "denying recollection" of events that she claimed happened to her. (DA 218-221, 231-232, 238-239). In fact, less than two months before trial, A.Y. indicated throughout her deposition that she could not recall performing oral sex on Nunley, or even seeing his penis. [App. 218-21, 231-32, 238-39]. Due to the nature of the deposition questions, it would have been natural for A. Y. to recall that she had performed oral sex on Nunley if that had actually occurred.

Under the Indiana Rules of Evidence, the inconsistencies between A.Y.'s deposition testimony and her trial testimony are exempted from being considered hearsay. Ind. Evidence Rule 801(d)(1)(A). A.Y.'s deposition testimony was therefore admissible to impeach her credibility under Ind. Evidence Rule 613.

The Respondent admits that A.Y.'s testimony constituted disavowing knowledge (Return, p. 19), but claims that it does not matter because "the state could have rehabilitated her with her deposition testimony that she was reluctant to talk about Nunley's penis, that she had told everyone the truth, and that she had not been coached (D A App. Vol. II, 215-17, 226, 237, 240). Counsel *could have* competently determined that it was not worth the risk. (Return, pp. 19-20). In other words, the Respondent asks this court to substitute its judgment for that of the jury's. The State asserts the hypothetical as fact. The reality, however, is that even if the State *could*

have possibly "rehabilitated" A.Y., the determination of whether or not her testimony was to be believed was a question of fact for the jury. Article 1 § 19 of the Indiana Constitution makes the jury the sole decider of the facts and the law. Perhaps the jury could have decided that the inconsistencies did not matter. It is equally possible that at least one juror decides the inconsistencies add up to reasonable doubt.[4] *That* is for the jury to decide.

A.Y.'s trial testimony was the crux of the case against Mr. Nunley, and trial counsel's strategy was to demonstrate to the jury that A.Y.'s account was fabricated. Ms. Schultz testified that she did not have a strategic reason for failing to impeach A.Y.; therefore, Ms. Schultz's failure to impeach A.Y. was constitutionally deficient performance, resulting in prejudice to Mr. Nunley. The state court's ruling that counsel made a strategic decision is an unreasonable determination of the facts that is unsupported by the evidence. In so doing, the state courts have extended *Strickland's* rationale regarding strategic and tactical decisions to non-strategic considerations. This is contrary to and/or an unreasonable application of *Strickland* and its progeny. This Court should reverse as a result.

A.Y.'s Written Testimony

Mr. Nunley alleges that Ms. Schultz should have objected to A.Y.'s being permitted to write down a portion of her testimony, which was then entered into evidence by the Judge, *sua sponte*, and made available to the jury during deliberations. A.Y. was capable of testifying and articulating her story to the jury. She had testified about the incident before. There was no reason she could not do it during the trial. Moreover, there were other methods available, such as closed-circuit television, which would have protected Nunley's right to confrontation while removing A.Y. from the courtroom to testify in a more comfortable setting.

[4] This is particularly true when one considers other evidentiary inconsistencies, such as Richard Caves' denial of assisting A.Y. with the note even though A.Y. testified that he helped her. (R. 479, 480).

The record on this subject is clear. Prior to lunch, A.Y. was permitted to write a portion of her testimony, even though she had previously answered the questions. (R. 438, 444). The written testimony was a staged/planned event. The witness asked, "Are we still gonna do the writing deal? (R. 440). The prosecutor had a tablet and crayons, waiting on her request. (R. 440). Prior to A.Y. writing down her testimony, Schultz indicated that she had no objection. (R. 440). The Judge entered the writings into evidence just before the lunch recess. (R. 444).

Following the lunch break, A.Y. began writing testimony again. (R. 449). The State entered the writings into evidence. (R. 454). The State moved to admit State's Exhibits 3, 4, 5 and also moved to admit Court's Exhibits 1 and 2. The Court made it clear that 1, 2, and 5 were part of her testimony and published the documents to the jury. (R. 454-455). These documents were available to the jury during deliberations as all exhibits are and were labeled as Joint Exhibits. (PC. Vol. II, p. 31, Joint Exhibits). Ms. Schultz did not interpose an objection to any of the writings being entered into evidence. (R. 449-455).

Ms. Schultz had no recollection of whether or not she objected,[5] but she agreed with Mr. Nunley's proposition that the written testimony placed undue emphasis on A.Y.'s testimony. In fact, during her post-conviction testimony, Schultz testified as follows:

> Q. Okay. Prior to this trial, had you ever seen a witness be permitted to write down a portion of their testimony?
>
> A. I don't – I don't recall ever having been – having seen that happen. I know that in some occasions people will draw diagrams or pictures of what they're testifying about, but as far as actually writing down their testimony instead of stating it to the jury, I have never seen that happen before. Before or since.
>
> Q. Did you find that odd?

[5] Since Schultz failed to articulate a strategic or tactical reasoning for her failure to object, the state court's reliance upon her "strategic decision" as a basis for denial is the sort of post-hoc rationalization proscribed by both the U.S. Supreme Court and the federal districts. *See e.g., Wiggins v. Smith, supra*; *Harris v. Reed, supra*; *Miller v. Anderson, supra*, *United States v. Zarnes, supra*; *United States v. Booker, supra*; and *Kellogg v. Scurr, supra.* This has been discussed in detail in the Failure to Impeach section of Nunley's ineffective assistance claims and those arguments are incorporated herein by reference for the sake of brevity.

A. Yeah, I think it's pretty odd. Different anyway.

Q. Do you think that it placed undue emphasis on a portion of her testimony?

A. Well, if you think about it from the prospective (sic) that the jury is allowed to take the exhibits and the Judge uses that as an exhibit, then I would think that it perhaps could because what I had seen so many times in trials is if a jury has a question about something, you don't want to replay a witness's testimony – just one witnesses' testimony and put additional emphasis on that part of the testimony. So it would seem to me that if you're showing that to the jury, you are putting more emphasis on that specific piece of testimony that the witness gave as opposed to everything else that was admitted during the trial.

(PC. Vol. II, pp. 30-31)

The Respondent asserts that "Nunley did not show a reasonable possibility that the trial court would have sustained his counsel's objection." (Return, p. 21). Nunley disagrees and believes that a properly interposed objection by counsel would have needed to be sustained as a matter of law.

In fact, the trial court had already sustained an objection on the same grounds. The trial record reveals that Ms. Schultz interposed an objection to the jurors' being allowed to re-watch the Comfort House video outside of the courtroom on the grounds that it placed undue emphasis on the importance of the testimony over other evidence. (R. 615). The then presiding judge sustained the objection with a lengthy explanation, stating that the law prohibits the jury from rehearing testimony without a specific request and then only when there is a dispute about the testimony. (R. 616-618). It stands to reason that the then presiding judge's comments on this topic indicate that a properly interposed objection would have been sustained. Thus, the Respondent's assertion that "[i]t is reasonable for a court to hold that counsel was not ineffective for not raising a meritless objection" is wholly without merit. (Return, p. 21).

The Respondent adopts the state court's reasoning in *Schaffer v. State*, 674 N.E.2d 1 (Ind. Ct. App. 1996), as cited in the state court's opinion. (Return, p. 21). First, Schafer made it clear "that Indiana law is 'distinctly biased' against trial procedures which tend to emphasize the testimony of any single witness. *Id.* at 5, *citing Hopkins v. State*, 582 N.E.2d 345, 353-354. Moreover, Nunley distinguished the facts of this case from the exceptions in *Schafer* in his appellate brief as follows:

> Unlike the situations permitted in the existing case authority, permitting A.Y. to write down a portion of her testimony was significantly more egregious because: (1) the then presiding judge initiated the written testimony's being introduced into evidence, thereby alerting the jurors of its particular importance; (2) it had a theatrical quality that bolstered the account of how A.Y. initially revealed the alleged incident to her parents; and (3) the written testimony was available to the jurors during deliberations, permitting the jurors to refer to that portion of the testimony over and over again.

(Ex. K p. 24).

As noted above, the theatrical quality of A.Y.'s being permitted to write a portion of her testimony bolstered the testimony regarding the way in which she initially revealed the incident to her parents. According to the trial record, Tonya and Richard Caves picked up A.Y. from Nunley's house and, while in the car A.Y. revealed that she and Nunley had a secret. (R. 436, 477-78, 508, 537). A.Y. would not reveal the secret, but she is alleged to have written it on an envelope for her parents after Richard Caves helped her write it. (R. 437, 450-451. 477-478, 479, 480, 508, 538, 558). After confronting Nunley with a baseball bat (R. 540), Tonya Caves went to the police and is alleged to have provided A.Y.'s note revealing the secret to a an Indiana State Police Trooper, Kevin Bowling (R. 452, 481, 511-512, 626, 635). The envelope was allegedly lost and was not introduced at trial.

A.Y.'s testimony in the courtroom bares a remarkable similarity to the way in which she is alleged to have revealed the secret to her parents. Thus, the theatrics serve to highlight the version of the initial reveal, which served to validate an incident that would have otherwise been viewed with skepticism. This is especially true when one considers the "loss" of the envelope coupled with the fact that A.Y. testified that she told her parents out loud what had happened in the car then stated that she wrote it down with Richard's help. (R. 450, 479, 480). The jurors would be more apt to credit the initial reveal because they watched the planned/staged event of wanting to write the testimony unfold before their eyes.

Furthermore, the Respondent's assertion that "Nunley cannot ask this Court to second-guess the state court's determination of state law" is equally without merit. The state court's determination was not merely one of state law. Indiana's prohibition on written testimony is based upon the Model Rules of Evidence. For instance, in *Thomas v. State*, 259 Ind. 537, 289 N.E.2d 508 (1972), the Supreme Court of Indiana noted that "[i]n most jurisdictions, depositions are not permitted in the jury room for the reason that undue influence would most likely be placed on that particular testimony." *Id.* at 539. The Court went on to quote the Model Rules of Evidence as follows: "An exhibit consisting of a writing which contains prior statements of a witness ***or the contents of his testimony*** or similar matter will not usually be sent to the jury room. To put such a writing where the jury could study it at their leisure would be to invite them to give undue weight to a portion of the evidence." *Id.*, *quoting The ALI Model Code of Evidence* (1942), Rule 105, clause (m) (emphasis added). (Ex. O, p. 7). Moreover, this issue directly impacted Nunley's rights under the United States Constitution to effective counsel, a fair trial, as well as Due Process of Law and Fundamental Fairness. The error of which Nunley complains was significant enough to rise to the level of structural error. A "state procedural rule is not

adequate to bar federal review if that 'state procedural rule frustrates the exercise of a federal right.'" 623 F.3d at 742 (Pet. App. 6a) (quoting *Hoffman v. Arave*, 236 F.3d 523, 531 (9th Cir.), *cert. denied*, 534 U.S. 944 (2001)); *see also Staub v. City of Baxley*, 355 U.S. 313, 319-20 (1958); *Reece v. Georgia*, 350 U.S. 85, 88-90 (1955).

Neither the state courts nor the Respondent take into account that the written testimony was highlighted and given greater importance by the fact that the presiding judicial officer, *sua sponte,* entered the written pages into evidence. This fact mandates a finding of undue emphasis and structural error.[6]

Indiana has long recognized that respect for the presiding judge "can lead [jurors] to accord great and perhaps decisive significance to the judge's every word and intimation. It is therefore essential that the judge refrain from any actions indicating any position other than strict impartiality. *Kennedy v. State*, 280 N.E.2d 611, 620-621 (Ind. 1972). *See also,* Ind. Judicial Conduct Cannon 3(B)(4). Moreover, the United States Supreme Court has said that "[b]oth the appearance and reality of impartial justice are necessary to the public legitimacy of judicial pronouncement and thus to the rule of law itself." *Williams v. Pennsylvania,* 136 S.Ct. 1899, 1909 (2016),

The appearance of impartiality was certainly breached when the judge, *sua sponte*, entered evidence against Nunley for the jury to consider. The appearance of the judge formally entering evidence against a criminal defendant without a request by one of the parties is tantamount to bias, or at least the appearance of it. "A biased tribunal *always* deprives the

[6] Nunley did not say the word bias during state court proceedings, but supplied the substance of the claim presented here, which is permissible. *See e.g., Jones v. Washington*, 15 F.3d 671, 674-675 (7th Cir. 1994) (petitioner presented "substance of" claim to the state courts, and factual and legal elaboration in federal pleadings did not result in "new claim.").

accused of a substantial right," constituting a structural error. *Bracey v. Grumley*, 520 U.S. 899 (1997), *Gomez v. United States*, 490 U.S. 858, 876 (1989).

In *McCoy v. Louisiana*, 132 S.Ct. 1500 (2018), the United States Supreme Court reversed a claim of ineffective assistance of counsel, holding that the Sixth Amendment guarantees a defendant the right to choose the objective of his defense and to insist that his counsel refrain from admitting guilt, even when counsel's experienced-based view is that confessing guilt offers the defendant the best chance to avoid the death penalty. Notably, the United States Supreme Court deviated from the standard ineffective assistance of counsel analysis under *Strickland* and its progeny and held that conceding guilt when the Defendant wanted to maintain his innocence was a structural error and the Defendant need not show prejudice on this issue. The same is true here. Because the undue emphasis on the witness testimony was the result of a showing of bias against Mr. Nunley by the then presiding judicial officer, the issue becomes a structural error that cannot be remedied.

This Court must recognize – as the previously cited legal authorities do – that jurors accord great respect to the judge. This necessarily means that the error was exacerbated. Nunley faced the undue emphasis that necessarily results by having the state's key witness write down the most critical portion of her testimony and allowing the written testimony to be available to jurors during deliberations. However, greater emphasis still was placed on this testimony because it would have been viewed as the "Judge's evidence." After all, the jurors saw the judge, without prompting, enter those pages into evidence and instructed that they be labeled as either the "Court's Exhibits" or "Joint Exhibits." (R. 444). This act had a profound effect on these proceedings and eviscerated the rights accorded to Nunley by the United States Constitution.

If viewed as the "Court's exhibits," the customary respect for the judge emphasizes the writings as evidence against Nunley, which was endorsed by the presiding judge. Moreover, the fact that the State moved to formally enter the "Court's Exhibits" into evidence (R. 454-455) sent the jurors the message that the Judge was aligned with the State and helping with the prosecution of Nunley, thereby negating Nunley's presumption of innocence.

If viewed as "joint exhibits," the writings become tantamount to a stipulation in the jurors minds. This is also prejudicial. "When a defendant's own lawyer puts in the offending evidence, it is in the nature of an admission against interest, more likely to be taken at face value. *Buck v. Davis*, 197 N.E.2d 1, 20 (2017). Thus, whether these writings are emphasized and deemed credible because they are the judge's evidence or because trial counsel agreed to the evidence, Nunley's presumption of innocence was all but negated at this point.

This point of prejudice was recognized by the trial court. After the jury had left the courtroom for the lunch recess, the judge stated:

> These are joint not in the sense that uh, Ms. Schultz is agreeing to it, but in the sense of identify it as the pieces of paper the witness Annie Young, wrote on, which is in effect her test… part of her testimony.

(R. 445).

Thus, the trial court recognized the legal ramifications of identifying them as "Joint Exhibits." Yet, when the written testimony was labeled as an exhibit, it was labeled as a joint exhibit. The jury was never given an admonishment or limiting instruction to curtail the effect of the identification of these exhibits as the "Court's Exhibits" or "Joint Exhibits," even though the judge obviously understood that the term "Joint Exhibits" carries a connotation of agreement.

The Respondent asks this Court to ignore these facts and the undoubtedly pervasive effect on the trial, dismissing it as a mere state law issue. (Return, p. 21). However, the Supreme

Court has recognized the inherently prejudicial nature of this type of circumstance. *See*, *Bracey, supra; Gomez, supra* and *McCoy, supra.*

Thus, the writ should issue.

Separation of Witnesses

During state post-conviction proceedings, Mr. Nunley alleged that Tonya Caves, Richard Caves, and A.Y. intentionally violated the separation of witnesses order. The Respondent agrees with Mr. Nunley's presentation of the facts, but indicates that since the prosecuting attorney did not report a violation to the court, then no violation occurred. (Return, p. 21-22). Both the Respondent and the state courts failed to properly analyze this issue or account for all of the facts associated with this issue.

First, no one has considered that there were multiple violations. The record clearly indicates that A.Y. was with her parents outside of the courtroom without the presence of the prosecutor. This was indicated by the prosecutor when she told the Judge that A.Y. would "have to come back, obviously, after lunch. She's here with her parents. I know there's a separation of witnesses. Do you want to… have they left already?" (R. 446). The fact that the prosecutor was not certain if they had already left means that A.Y. and her parents were together. This uncertainty also indicates that they were not in the presence of the prosecutor. Furthermore, both prosecutors were in the courtroom at the time. (R. 446).[7] Thus, this is a separation of witnesses violation to which the prosecuting attorney could not have attested to the nature of the conversations. There are many other instances – during recesses for example – when A.Y. was

[7] There is also evidence that out of courtroom discussions occurred. During the testimony, the prosecutor asks, "Can you tell me *again*." (R. 440) The "again" indicates that she had told her before. The reasonable inference, based upon context, is that the prosecutor had discussed this matter outside the courtroom with A.Y. earlier that day. Although this is not a violation, it demonstrates that A.Y. was accustomed to talking about her testimony outside of the courtroom and would have easily discussed it with her parents.

not on the stand and was with her parents in violation of the separation of witnesses order. Again, the prosecutors were in the courtroom and cannot attest to the nature of the conversations.

Next, A.Y. was alone with her parents outside the presence of the prosecutor. (R. 445-446). After the court was recessed for lunch, the prosecuting attorney went to lunch with the three witnesses, thereby facilitating the violation. (R. 445-446). In reviewing whether or not a properly interposed objection would have been sustained, this Court should look to established precedent on this issue. In *Jiosa v. State*, 755 N.E.2d 605 (Ind. 2001), the Supreme Court of Indiana stated: "Where a party is without fault and a witness disobeys an order directing a separation of witnesses, the party shall not be denied the right of having the witness to testify, but the conduct of the witness may go to the jury upon the question of his credibility." *Id.* at 607. But, the *Jiosa* court went on to note that the exclusion of testimony for a violation of a separation order when there is "consent, connivance, procurement, or knowledge of the party seeking the witness' testimony." *Id.* at 607-608 (internal federal citations omitted).

A properly interposed objection would have prevented A.Y. from interacting with her parents, facilitated by the prosecutor, during the lunch recess. As the *Jiosa* court noted: witnesses may be excluded "if the party is at fault.... *Id* at 608. There is case authority prohibiting counsel from acting as a "conduit among witnesses." *Id.* at 608, *citing United States v. Rhymes*, 218 F.3d 310 (4th Cir. 2000).

In this case, A.Y. and her parents were alone together during the lunch recess. The prosecuting attorney went to lunch with A.Y. and her parents. A.Y. was in the middle of her testimony and had refused to answer multiple questions. When she returned to the stand after the recess, she answered questions that she previously would not answer. The Respondent and the state court's consider this speculation. It is not speculation, it is inference.

The Respondent does not even address the prosecutor's facilitation of the separation of witnesses order or explain how it provides reasonable assurance that there was no collusion between the witnesses. On the contrary, it would seem from the way in which A.Y.'s testimony unfolded, that she was provided with appropriate answers during the recess.

Ms. Schultz did not articulate any strategic reason for not objecting to the violation of the separation of witnesses order, although she did theorize that the court's admonishment not to discuss the case was a sufficient protection. This reasoning is not tactical and does not demonstrate regard for Nunley's rights.

A properly interposed objection would have been sustained. At a minimum, the jury should have been instructed that A.Y. had interacted with Tonya and Richard during the recess in violation of the separation of witnesses order. However, the jury remained unaware of this fact, and counsel failed to advance an argument regarding witness collusion despite the circumstantial evidence supporting such a claim.

Cumulative Effect

During state post-conviction proceedings, Nunley prompted the court to review the cumulative impact of the instances of ineffective assistance of counsel presented to the court. The State asserts that this "claim" is procedurally barred because the state court ruling against the petitioner rests on an adequate and independent state law ground. (Return, p. 23). The procedural default doctrine bars federal court review of a state court ruling when four requirements are met: (1) A petitioner has actually violated a state procedural rule. *See, e.g., Lee v. Kema*, 534 U.S. 362, 382 (2006); (2) the procedural violation provides an 'adequate' and 'independent' state ground for denying petitioner's federal constitutional claim. *See Coleman v. Thompson*, 501 U.S. 722, 729-732, 735 (1991); *Harris v. Reed*, 489 U.S. 255, 260, 262 (1989);

(3) The highest state court to rule on the claim clearly and unambiguously relied on a procedural violation as its reasons for rejecting the claim. *See, Coleman*, 501 U.S. at 733, *citing Harris v. Reed*, 489 U.S. 255, 263 (1989); and (4) The State had adequately and timely asserted the default as a bar to federal *habeas corpus* relief. *See, e.g., Gray v. Netherland*, 518 U.S. 152, 165-166 (1996).

Initially, Nunley notes that procedural default is an affirmative defense, which must be proven by the Respondent and can be waived. *See Kaczmarek v. Rednour*, 627 F.3d 586, 591-592 (7th Cir. 2010); *Perruquet v. Briley*, 390 F.3d 505, 519 (7th Cir. 2004). The Respondent bears the burden of proving the adequacy of a state procedural bar in order to preclude habeas review…" *Hooks v. Ward*, 184 F.3d 1206, 1217 (10th Cir. 1999). The Respondent has done little to prove its contention that Nunley's claims are procedurally barred. The Respondent baldly asserts that the issue is waived, citing only Rule 46(A)(8)(a) of the *Indiana Rules of Appellate Procedure*. (Return, p. 23). The Respondent wholly failed to demonstrate the necessary components for a state procedural rule to be an adequate and independent state ground that bars federal habeas review.

Although a state procedural rule is sufficient to foreclose review of a federal question, an inquiry into the adequacy of such a rule to foreclose review is itself a federal question. *Douglas v. Alabama*, 380 U.S. 415, 422, 85 S.Ct. 1074, 13 L.Ed 2d 934 (1965). To qualify as an adequate and independent state ground to bar review, the State procedural rule must represent a "firmly established and regularly followed" state practice. *Lee v. Kemna,* 534 U.S. 362, 376 (2002). A state rule that "is invoked 'infrequently, unexpectedly or freakishly'" fails the test of adequacy. *Miranda* 394 F.3d at 995; *Prihoda*, 910 F.2d at 1383. In addition, the Supreme Court has stated that there are "exceptional cases in which exorbitant application of a generally sound rule renders

that state ground inadequate to stop consideration of a federal question. *Lee*, 543 U.S. at 376, *citing Davis v. Wechsler*, 263 U.S. 22, 24 (1923).

Next, Nunley did not actually violate the state rule. The Court of Appeals declined to review this issue because Nunley did not cite to any authority or argue how he was prejudiced by the cumulative impact of attorney errors. (Ex. N., p. 13; Return, p. 23). However, Nunley began this section of his brief by noting that "*Strickland* demands that courts assess the cumulative impact of errors, rather than simply considering the errors individually." (Ex. K, p. 28). Thus, Nunley did cite to authority – the seminal case of *Strickland* – in support of his "claim." Moreover, cumulative impact is not a separate claim and treating it as such violates *Strickland*. Indeed, the United States Supreme Court made it clear "a court hearing an ineffectiveness claim ***must*** consider the totality of the evidence before the judge or jury." *Strickland*, 466 U.S. at 695. The *Strickland* Court also made it clear:

> Some errors will have had a pervasive effect on the inferences to be drawn from the evidence, altering the entire evidentiary picture, and some will have had an isolated, trivial effect. Moreover, a verdict or conclusion only weakly supported by the record is more likely to have been affected by errors than one with overwhelming record support. Taking the unaffected findings as a given, and taking due account of the effect of the errors on the remaining findings…." *Strickland*, 466 U.S. at 695-696.

"The ultimate focus of the inquiry must be on the fundamental fairness of the proceeding whose result is being challenged." *Cullen v. Pinholster*, 563 U.S. 170, 131 S. Ct. 1388 (2011). This focus can be seen in the more recent case of *Wearry v. Cain*, 136 S.Ct. 1002 (2016) in which the United States Supreme Court held that the state post-conviction court improperly evaluated the materiality of each piece of evidence in isolation rather than cumulatively. *See also, Washington v. Smith*, 219 F.3d 620, 632-633 (7th Cir. 2000); *Hernandez v. Cowan*, 200 F,2d 995, 999-1000 (7th Cir. 2000) and *Williams v. Washington*, 59 F.3d 673, 680 (7th Cir. 1995);

Cagle v. Mullin, 317 F.3d 1196, 1221-1222 (10th Cir. 2003).

Both federal and state courts have recognized the requirement to assess the course of the defense and the cumulative impact of attorney error. Cumulative error can result in prejudice, even when individual errors are not sufficiently egregious. *Earls v. McCaughtry*, 379 F.3d 489, 495-496 (7th cir. 2001); *Silva v. Woodford*, 279 F.3d 825, 834 (9th Cir. 2002); *Henry v. Scully*, 78 F.3d 51, 53 (2nd Cir. 1996); *Pennycuff v. State*, 745 N.E.2d 804, 816-817 (Ind. 2001); *McCullough v. State*, 973 N.E.2d 62 (Ind. Ct. App. 2012).

If a court is required to look at the totality of evidence and assess the individual errors of an ineffectiveness claim to assess how they impacted the overall fairness of the proceedings, as the United States Supreme Court demands, Nunley had no obligation to do anything. The Indiana Court of Appeals should have already been making such an assessment. The fact that the state court specifically declined to do what *Strickland* mandates makes it clear that the state courts were evaluating Nunley's ineffective assistance of counsel claim in a manner that violates *Strickland* and its progeny.

Nunley's claim was fairly presented to the state courts. To fairly present a claim, a brief must "present both the operative facts and legal principles that control each claim." *Wilson v. Briley*, 243 F.3d 325, 327-328 (7th Cir. 2001) (listing four factors this circuit uses to determine whether a claim has been fairly presented); *See also Verdin v. O'Leery*, 972 F.2d 1467, 1473-1474 (7th Cir. 1992).[8] Neither the Respondent nor the state court assert that Nunley failed to present the operative facts or the governing legal principles of his individual claims of error. The individual claims are addressed on the merits. Thus, it is unreasonable to assert that Nunley

[8] Reviewing courts should consider whether petitioner's argument to the state courts: (1) relied on pertinent federal cases employing constitutional analysis; (2) relied on state cases applying constitutional analysis to a similar factual situation; (2) asserted the claim in terms so particular as to all to mind a specific constitutional right; or (4) alleged a pattern of facts that is well within the mainstream of constitutional litigation.

somehow failed to fairly present the operative facts and the governing legal principles of his claim that the cumulative impact of the individual errors required reversal. After all, the cumulative impact of the individual errors alleged necessarily incorporates the individual claims themselves. The only difference is that the court should have viewed the totality of error against the totality of the evidence presented at trial, as *Strickland* and its progeny have demanded in prejudice assessments for over three decades.

Since the state courts did not address this matter on the merits, this court can review the cumulative impact of the errors *de novo*. As one court eloquently stated:

> Under the… [AEDPA] we may grant the writ as a general rule only if the state court's decision on the merits was either contrary to or involved an unreasonable application of clearly established federal law, as determined by the Supreme Court of the United States. [citing *Williams*, 529 U.S. 362]. The statute (28 U.S.C. § 2254(d)(1)) however acknowledges an exception. "By its very language, [2254(d)] is applicable only to habeas claims that were adjudicated on the merits in state court." *Newton v. Million*, 349 F.3d 873, 878 (6th Cir. 2003) [omitted.] If the state court did not assess the merits of a claim properly raised in a habeas petition, the deference due under AEDPA does not apply. *Maples v. Stegall*, 340 F.3d 433, 436 (6th cir. 2008). And we conduct [our] review de novo. *McAdoo v. Elo*, 365 F.3d 487, 498 (6th Cir. 2004).

Lyell v. Renico, 470 F.3d 1177, 1181-1182 (6th Cir. 2006).

In this case, the cumulative impact of attorney errors undoubtedly rises to the level of prejudice needed to reverse. Lawrence E. Nunley was convicted by the uncorroborated testimony of a single witness. There is no DNA, medical, or forensic evidence linking Nunley to any criminal wrongdoing. There are no videos, or eyewitness accounts. There are no admissions or statements against penal interest, implicating Nunley. The only evidence in this case is the account given by A.Y.

During trial counsel's opening statement to the jury, she said: "This whole case, the whole issue revolves around whether she's a credible witness, whether you can believe her or not. And, as I said, if you believe her, then he should be found guilty. If you don't believe her, then he should be found not guilty." (R. 45). Ms. Schultz affirmed during her post-conviction testimony that A.Y. was a critical witness and that her strategy was to persuade the jury that her story was fabricated. (PC Vol. II, p. 26, 28). The Court of Appeals admitted that this was the defense. (Ex. N, pp. 8-9). Thus, impeaching A.Y. was critical to successfully defending Mr. Nunley. (PC Vol. II, p. 26, 28). The State also recognized that A.Y.'s credibility was central to the case. During closing arguments, In closing argument, one of the deputy prosecutors argued that the jurors should believe A. Y.' s testimony because "she hasn't even been taught how to lie." [Tr. 797]. Thus, impeaching A.Y. was critical to successfully defending Mr. Nunley. (PC Vol. II, p. 26, 28).

The jury was unable to consider many things that called A.Y.'s credibility into question. First, trial counsel requested permission to question A.Y. regarding her false report to police that her mother's boyfriend, Edward Foreman, physically assaulted her, but the trial court determined it would not allow such questioning. [Tr. 3 77 -85]. A.Y. testified during her deposition that [], her mother told her what to remember and what to say to the police. (DA 215). Then she denied that her mother told her what to say. (DA 215). A.Y. testified during her deposition that she spent the night with Nunley lots of times, but that this was the first time she had done so without her mother. (DA 206-207). A.Y. also said that the only thing she could remember was Nunley licked her pee-pee and she screamed. A.Y. did not remember seeing or touching Nunley's penis. (DA 218-21, 223, 231, 238, 239). A.Y. could not remember what she wrote down on a piece of paper. (DA 213, 239). She also testified during her deposition that Nunley did not hurt her. (DA

240). The deposition testimony differs from A.Y.'s trial testimony. (R. 417-500). Other inconsistencies regarding the details of the events also arise between the deposition and trial testimonies.

There are also Discrepancies exist about: (1) the time of day A. Y. arrived at Mr. Nunley's residence (DA 207-208, 210, 211, 229-230, 233, Pretrial Hearing 29, R. 459-461); (2) who was at Mr. Nunley's home when A.Y. arrived (DA 207, 208, 210, 229, 230, 231, 233; R. 427, 428, 459, 460, 461, 498); (3) the reason A.Y. ended up in Mr. Nunley's bedroom (Pretrial Hearing 23, 32; R. 430, 463-465); what was written on the note (DA 213, 231, 239; Pretrial Hearing, p. 36-39, 86; R. 435, 441-443, 448-451, 477, 479-480). In her deposition, A.Y. repeatedly denies knowledge of Nunley doing anything but licking her vagina once and making her watch a bad movie. (DA 218-221, 224, 231, 238, 239). She could not remember seeing or touching Mr. Nunley's penis. (DA 231, 238, 239).

Additionally, the Court of Appeals determined that A.Y. had made accusations against Nunley that were not credible. On direct review, the Court of Appeals held that evidence of the videotaped interview[9] of A.Y. at Comfort House a year after the alleged offenses should not have been admitted because it lacked sufficient indicia of reliability.[10] However, the Court of Appeals concluded the admission of this evidence was harmless as to the other counts, which were based on A. Y.' s original allegations, "because it was merely cumulative of other properly admitted evidence, including A.Y.'s own trial testimony." *Nunley v. State*, 916 N.E.2d 712, 719 (Ind. Ct. App. 2009), *trans. denied.* This decision does not contemplate the many inconsistent statements that were not presented to the jury. Moreover, Nunley faced an additional stigma, stemming from

[9] This evidence also included the testimony of Donna Black, the Comfort House interviewer. The Court vacated the charges that stemmed directly from this evidence.

[10] To give this Court perspective, approximately $^1/_3$ of all of the evidence "lacked sufficient indicia of reliability," according to the Court of Appeals on direct review.

the multiplicity of counts. This pervasive stigma would not have been present, if the evidence that the Court of Appeals determined was not credible would not have been presented to the jury.

The fact that A.Y.'s testimony was considered to be curative of any possible error arising from the inclusion of evidence that "lacked sufficient indicia of reliability" only serves to highlight how important A.Y.'s testimony was in this case.

The importance of this testimony heightens the error that resulted from allowing A.Y. to write down a portion of her testimony, which was published to the jury and made available to them during deliberations. A.Y.'s written testimony was planned/staged, which is indicated by the fact that A.Y. asked about it and the prosecutor had a tablet and crayons, waiting on her request. This theatrical reenactment of the alleged initial reveal of the allegation by A.Y. to her parents added credibility to a story that would have otherwise been viewed skeptically. The jurors minds would likely have wondered why there was no note, if the note was actually written. However, seeing A.Y. request to write her testimony in court only served to minimize the jury's skepticism as they witnessed that same behavior unfold in front of them.

This served to place undue emphasis on the most critical part of A.Y.'s testimony. The jurors were not allowed to re-watch the video of the Comfort House interview because the Judge determined that this would place undue emphasis on A.Y.'s version of the events. This demonstrates how important that the inclusion of evidence that "lacked sufficient indicia of reliability" was to these proceedings. Moreover, it stands to reason that if the jurors wanted to re-watch the Comfort House interview, they also would review the written testimony that was available to them in the jury room.

A.Y.'s written testimony was not only improperly emphasized by the theatrical reenactment of the initial reveal to her parents but also by the fact that the Judge aligned himself

with the prosecution when he took the written testimony and entered it into evidence without prompting from one of the parties. He said it was the "Court's Exhibits" or "Joint Exhibits." The prosecution subsequently moved to enter the "Court's Exhibits" into evidence, thereby further demonstrating to the jurors that the Court and the State were on the same team. This has two effects, which are prejudicial to Nunley: (1) the jurors will give added weight to the written testimony because it is the Judge's evidence; and (2) the Judge has lent the authority of the bench to the State by adopting a prosecutorial role and entering evidence against Nunley, thereby eroding the presumption of innocence.

The pervasive impact of these errors combine to deny Nunley a fair trial as guaranteed by the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution. Therefore, the writ should issue.

CLAIM IV: INEFFECTIVE ASSISTANCE OF APPELLATE COUNSEL

Just as criminal defendants are afforded the right to the assistance of counsel at trial, this Court has held that they have the right to counsel on direct appeal from a criminal conviction. *Douglas v. California*, 372 U.S. 353 (1963), *Halbert v. Michigan*, 545 U.S. 605 (2005), and *Evitts v. Lucey*, 469 U.S. 387, 396-97 (1985). That means that such a defendant also has a due process right to effective assistance of counsel on such first-tier review. *Id.* at 396-97.

Right to Present a Defense

As previously noted, the Respondent bears the burden of proving the adequacy of a state procedural bar in order to preclude habeas review…" *Hooks v. Ward*, 184 F.3d 1206, 1217 (10th Cir. 1999). The Respondent has done little to prove its contention that Nunley's claims are procedurally barred. The Respondent baldly asserts that the issue is waived, citing only Rule 46(A)(8)(a) of the *Indiana Rules of Appellate Procedure*. (Return, p. 24). The Respondent

wholly failed to demonstrate the necessary components for a state procedural rule to be an adequate and independent state ground that bars federal habeas review.

Although a state procedural rule is sufficient to foreclose review of a federal question, an inquiry into the adequacy of such a rule to foreclose review is itself a federal question. *Douglas v. Alabama*, 380 U.S. 415, 422, 85 S.Ct. 1074, 13 L.Ed 2d 934 (1965). To qualify as an adequate and independent state ground to bar review, the State procedural rule must represent a "firmly established and regularly followed" state practice. *Lee v. Kemna,* 534 U.S. 362, 376 (2002). A state rule that "is invoked 'infrequently, unexpectedly or freakishly'" fails the test of adequacy. *Miranda* 394 F.3d at 995; *Prihoda*, 910 F.2d at 1383. In addition, the Supreme Court has stated that there are "exceptional cases in which exorbitant application of a generally sound rule renders that state ground inadequate to stop consideration of a federal question. *Lee*, 543 U.S. at 376, *citing Davis v. Wechsler*, 263 U.S. 22, 24 (1923).

Furthermore, Nunley did not violate the rule. During state post-conviction procedures, Mr. Nunley asserted "that Mr. McGovern did not raise the issue regarding the denial of defense well. Specifically, Mr. Nunley contends that Mr. McGovern should have advanced an argument that state procedural rules cannot be mechanistically applied to preclude a complete defense." (Ex. K., p. 29). Mr. Nunley alleged that the original argument, which was submitted into evidence during post-conviction proceedings, did not go far enough. Specifically, he argued that "[l]imiting criminal defendants' ability to present evidence to the *State's* theory – without being allowed to develop an alternative and independent theory of the case – violates the due process principles established by the United States Supreme Court." (Ex. K. p.31). And, if "Mr. McGovern advanced an argument that the denial of this testimony through the mechanistic

application of state evidentiary rules is unconstitutional, denying Mr. Nunley the opportunity to present a complete defense, it would have prevailed." (Ex. K. p.31).

Mr. Nunley did not need to cite to the trial record in support of his contentions because they were already presented on appeal. The issue here is that Mr. McGovern did not go far enough in his argument and Mr. Nunley's arguments were designed to build upon the original arguments. This should be sufficient. *See e.g., Schneider v. Ohio*, 85 F.3d 335; 339 (8th Cir. 1996) (rejecting state's argument that state court pleading should be strictly construed as challenging ineffective assistance only at sentencing and not at guilt stage; "The requirement that federal habeas claims must have been presented in state court is not meant to trap a petitioner who has poor drafting skills. The stakes in habeas corpus are too high for a game of legal gotcha");

The arguments detailed in Claim 1 are relevant to this claim and are incorporated herein by reference.

Double Jeopardy

The Respondent argues that appellate counsel could not have prevailed on this issue because the precedent cited had been "impliedly overruled." (Return, p. 25). Prior to this decision; however, the case cite had been explicitly upheld by the Court of Appeals.

Mr. Nunley was alleged to have shown A.Y. a pornographic movie. (R. 432, 469-470). During the movie. Mr. Nunley is alleged to have "licked [A.Y.'s] pee- pee" and made her "suck on his weenie bob." (R. 450, 472, 497). Thus, all acts were part and parcel of a single confrontation with a single victim. Thus, the sentences violate double jeopardy principles. Common law support for this proposition is found in *Bowling v. State*, 560 N.E.2d 658 (Ind. 1990). In *Bowling*, the Supreme Court of Indiana stated:

> Appellant contends he was charged, convicted and sentenced for both deviate sexual conduct and the touching, fondling, and caressing of the minor child. He claims this conduct did not represent two separate occasions but took place simultaneously on one occasion. He cites *Ellis v. State*, (1988) Ind., 528 N.E.2d 60 wherein the Court held that a trial court erred in sentencing an appellant for both child molesting, a class C felony, and child molesting, a class D felony, inasmuch as the two acts of molestation occurred in "the identical incident to support both charges. *Id.* at 61. We held that the imposition of two sentences for the same injurious consequences sustained by the same victim during a single confrontation violated both Federal and State double jeopardy prohibitions, citing *Hansford v. State*, (1986) Ind., 490 N.E.2d 1083.
>
> We find appellant's contention in this regard to be correct and therefore remand this case with instructions to the trial court to set aside the class C felony conviction.

Bowling, 560 N.E.2d at 660.

Despite the state court's and the Respondent's contentions to the contrary, *Bowling* was still in full force and effect at the time of Mr. Nunley's sentencing and direct appeal. Proof of this contention is readily seen in the *Kocielko v. State*, 938 N.E.2d 243 (Ind. Ct. App. 2010), *clarified on reh'g*, 943 N.E.2d 1282 (Ind. Ct. App. 2011), *trans. denied*. In *Kocielko*, the appellant argued that he could not receive consecutive sentences for deviate sexual conduct and fondling when the acts took place in one confrontation involving one victim. *Id.* The Court of Appeals agreed with this position and remanded the case back to the trial court for resentencing. On rehearing, the Court of Appeals reconsidered its prior ruling and upheld its reliance upon the single incident analysis. In so doing, the Court of Appeals held:

> *Bowling* nonetheless espoused a sentencing rule that has not been explicitly rejected, i.e., a sentence must reflect the episodic nature of the crimes committed. 560 N.E.2d at 660. Indeed, this "single incident analysis" for sentencing purposes has been embraced in other contexts. *See Beno v. State*, 581 N.E.2d 922 (Ind. 1991) (holding it improper to impose consecutive sentences for multiple drug dealing convictions based on nearly identical state sponsored

> sales as part of an ongoing operation); Ind. Code § 35-50-1-2 (imposing a limitation upon the aggregate sentence to be imposed for an "episode of [nonviolent] criminal conduct"). Cf. *Serino v. State*, 799 N.E.2d 852, 857 (Ind. 2003) (observing that "consecutive sentences seem necessary to vindicate the fact that there were separate harms and separate acts against more than one person."). Clearly, the *Bowling* court gave consideration to the episodic nature of a single victim in a single confrontation. ***Therefore, unless instructed to the contrary, we should do the same.***

Kocielko, 943 N.E.2d at 1283 (emphasis added) (brackets and quotations in original).

In this case, as in *Bowling and Kocielko*, the State has alleged a single confrontation against a single victim. Assuming, *arguendo*, the State's assertions are true, Mr. Nunley is said to have licked A.Y.'s vagina and had her suck on his penis. During this single confrontation, Mr. Nunley was charged with two separate instances of molestation.

As the Indiana Court of Appeals pointed out in *Kocielko*, the episodic nature of this incident must be taken into consideration. The Indiana Court of Appeals emphatically stated, in its opinion on rehearing that "unless instructed to the contrary," they had an obligation to consider the episodic nature of an event and prohibit consecutive sentences under the circumstances found in this case. *Id.* at 1283. The decision in *Kocielko* reaffirms that Mr. McGovern should have relied upon *Bowling*, which makes it clear that consecutive sentences, under the circumstances found here, cannot stand. Thus, if Mr. McGovern had raised this issue, the Indiana Court of Appeals would have remanded this matter back to the trial court for the imposition of concurrent sentences. Thus, appellate counsel was ineffective for failing to raise this issue.

Mr. McGovern testified at the evidentiary hearing that he was not familiar with *Bowling*. (PC Vol. II, p. 42). He did not recall researching the issue or considering it as an issue. (PC Vol. II, p. 42). Where counsel's acts and/or omissions demonstrate a lack of familiarity with the law

crucial to his client's case, they are not deemed mere strategy decisions and may constitute ineffective assistance. *Smith v. State*, 396 N.E.2d 898, 901 (Ind. 1979); *Clayton v. State*, 673 N.E.2d 783, 786 (Ind. Ct. App. 1996); *Patton v. State*, 537 N.E.2d 513, 518 (Ind. Ct. App. 1989).

Mr. McGovern's unfamiliarity with *Bowling* negates any strategic consideration with regard to this issue. As previously noted, "even if a decision is hypothetically a reasonable strategic choice, it may nevertheless constitute ineffective assistance if the purported choice is actually "made due to unacceptable ignorance of the law or some other egregious failure rising to the level of deficient attorney performance. *Brewington v. State*, 7 N.E.3d 946 (Ind. 2014, (Section III(C) Ineffective Counsel). Had this issue been presented to the Court of Appeals, it would have prevailed just as it did in *Kocielko,* which was decided well after Mr. Nunley's appeal. This would have resulted in an additional 35-year reduction in sentence. Therefore, Mr. McGovern's failure to raise the double jeopardy claim is deficient performance, which substantially prejudiced Mr. Nunley. Mr. McGovern was, therefore, ineffective in this regard.

Sentencing

The Respondent contends that Nunley's appellate counsel was not ineffective for challenging Nunley's sentence. (Return, p. 26). Nunley disagrees.

The trial court found two (2) aggravating circumstances: (1) Mr. Nunley was in a position of care, custody or control of the victim, and (2) Mr. Nunley's "criminal history," identified as prior allegations for which Mr. Nunley was never arrested or charged. The court found no mitigating circumstances. Mr. Nunley was sentenced to consecutive terms of incarceration.

Mr. McGovern should have presented the issue that Mr. Nunley's sentence was inappropriate. Again, he did not recall researching possible sentencing issues. (PC Vol. II, p. 42-44). When a petitioner shows that counsel's actions actually resulted from inattention or neglect,

rather than reasoned judgment, the petitioner has rebutted the presumption of strategy, even if the government offers a possible strategic reason that could have, but did not, prompt counsel's course of action. *Rompilla v. Beard*, 545 U.S. 374-395-396 (2005) (O'Connor, J. concurring; *Wiggins v. Smith*, 539 U.S. at 526-527; *Kimmelman v. Morrison*, 477 U.S. 365, 385 (1986).

Counsel should have known that Nunley had a state constitutional right to have the appellate court review and revise sentences. This authority is bestowed upon that Court pursuant to Article VII, Section 6 of the Indiana Constitution, Ind. Const. Art VII § 6, *Love v. State,* 741 N.E.2d 789, 795 (Ind. Ct. App. 2001). This constitutional responsibility is independent from the Court of Appeals' general appellate jurisdiction. *Id.*; *Perry v. State*, 751 N.E.2d 306, 309 (Ind. Ct. App. 2001). Prior to January 2003, the vehicle for this Court's authority under Article VII, Section 6 was Appellate Rule 17(B), which allowed the Court to revise a sentence only if it was manifestly unreasonable. Recognizing that Rule 17(B) was "an almost impossible standard to meet," the Supreme Court of Indiana modified it in 1997 to allow more meaningful review. *Bluck v. State*, 716 N.E.2d 507, 515-516 (Ind. Ct. App. 1999). In a further effort to realize the broad powers under Article VII, Section 6, the Supreme Court of Indiana abrogate Rule 17(B) in favor of the current rule under Appellate Rule 7(B). Under this new rule, the Court of Appeals has the authority to revise an accused's sentence if it is inappropriate in light of the nature of the offense and the character of the offender. Ind. App. R. 7(B). The Supreme Court of Indiana noted that the shift to the broader language of Rule 7(B) "changed its thrust from a prohibition on revising sentences unless certain narrow conditions were met to an authorization to revise sentences when certain broad conditions are satisfied." *Neale v. State*, 826 N.E.2d 635, 639 (Ind. 2005). Thus, the Court of Appeals' authority under Article VII, Section 6 and Rule 7(B) is considerably broad. *See e.g., Childress v. state*, 848 N.E.2d 1073, 1079-1080 (Ind. 2006).

Indeed, the Indiana Supreme court has revised a sentence even when it found that all of the trial court's aggravating factors were proper. *See Buchanan v. State*, 767 N.E.2d 967, 973-974 (Ind. 2002).

As the trial court acknowledged, Mr. Nunley had no prior convictions. (R. 931). Rather, the court relied upon an uncharged, unsubstantiated allegation which had gone untested by the criminal justice system and which Mr. Nunley vigorously denied. (R. 910-911).[11] During the sentencing pronouncement, the Court said:

> The, uh, Court finds that the defendant does have a history of criminal behavior and specifically I'm talking about Kimberly Simler. The Court heard sworn testimony with respect to uh, the offenses that uh, the defendant allegedly committed Kimberly Simler. (sic). That the defendant was present, the defendant's attorney was present, and the witness was subject to cross-examination.

(R. 911)

The trial court was referring to a hearing related to the admissibility of this evidence at the current trial. The trial court found that the evidence was not admissible. This evidence was not tested in a manner that would allow the truth of the allegations to rise to the level of criminal history. The State offered no evidence regarding the truth of these allegations.

This case runs afoul of the principles outlined in *Carmona v. State*, 827 N.E.2d 588, 599 (Ind. Ct. App. 2005). In *Carmona*, this Court noted that it was "hard pressed to see how [the defendant] could have proven a negative" and ultimately concluded that where a defendant "vigorously contests" his criminal history and that criminal history is highly relevant to his

[11] Nunley did not admit the allegations, the allegations remained untested, and the Court did not find that the allegations were proven beyond a reasonable doubt. Therefore, the Court violated *Blakely v. Washington*, 542 U.S. 296 (2004) when it enhanced Nunley's sentence in this way. *See also*, *Cotto v. State*, 829 N.E.2d 521, 524-525 (Ind. 2005) (Without more, a history of arrests, is insufficient to qualify as criminal history and violates *Blakely)*.

sentence, it is incumbent upon the State to produce affirmative evidence to support a criminal history alleged in a PSI.

In this case, like in *Carmona*, Mr. Nunley was left to try to prove a negative. The PSI indicated that he had no criminal history. Yet, the judge used an allegation that was not even charged as criminal history. This is improper. *See also Green v. State*, 850 N.E.2d 977, 988-989 (Ind. Ct. App. 2016). Therefore, Mr. Nunley should be remanded for resentencing. *Comer v. State*, 839 N.E.2d 721, 730 (Ind. Ct. App. 2005).

Both the Indiana Court of Appeals and the Supreme Court of Indiana have held in child molestation cases with one victim and several acts of molestation that the lack of a criminal history will render consecutive or enhanced sentences unreasonable. In *Serino v. State*, 798 N.E.2d 852, 857-858 (Ind. Ct. App. 2003), the Supreme Court of Indiana made this determination and cited other cases coming to the same conclusion:

> *Kien v. State*, 782 N.E.2d 398 (Ind. Ct. App. 2003) (consecutive forty-year sentences for three counts of child molestation ordered to be served concurrently); *Haycraft v. State*, 760 N.E.2d 203 (Ind. Ct. App. 2001) (190-year aggregate sentence for eight counts of child molestation, obscenity and contributing to the delinquency of a minor reduced to 150 years); *Walker v. State*, 747 N.E.2d 536 (Ind. 2001) (consecutive forty-year sentences for two counts of child molestation ordered to be served concurrently; *see also Bluck v. State*, 716 N.E.2d 507 (Ind. Ct. App. 1999) (consecutive sentences totaling seventy-six years remanded for resentencing).

In *Harris v. State*, 897 N.E.2d 927 (Ind. 2008), the Supreme Court of Indiana revised Harris' consecutive 50-year sentences and ordered them to run concurrently. The *Harris* court determined that the ongoing nature of the crimes and the defendant's position of trust justified aggravating the sentences, but the aggravators were insufficient to also run the sentences consecutively. Unlike *Harris*, Mr. Nunley's crimes resulted from a single incident and were not ongoing in nature.

In this case, Mr. Nunley stands convicted of two counts of child molestation. Moreover, as articulated more fully below, the nature of the offenses should not be considered such that the lack of criminal history pales in comparison.

Mr. Nunley did not harm A.Y. in a manner more than is inherent in the criminal offenses. The underlying criminal acts are as follows: (1) that Mr. Nunley licked A.Y.'s vagina, and (2) that Mr. Nunley made A.Y. suck his penis. (R. 450, 472, 497). There is nothing inherent in the commission of these crimes that is more severe or harmful than what is inherent in the commission of the offenses themselves. In *Fointno v. State*, 487 N.E.2d 140 (Ind. 1986) the Supreme Court of Indiana held that a sentence was manifestly unreasonable given the defendant's lack of criminal history and that the defendant did not brutalize the victim, "except as is inherent in the commission of the crimes." *Id.* at 148. In so holding, the Indiana Supreme Court declared that *"a rational sentencing scheme should punish more severely those who brutalize the victims of their crimes." Id.* (emphasis added).

Because both the nature of the offenses and the character of the offender warrant concurrent sentences, the Court of Appeals would have reversed Mr. Nunley's sentence. Pursuant to the case authority cited in itemization 100, the Court of Appeals would likely have ordered the sentences to be served concurrently.

The Indiana Constitution gave Mr. Nunley the right to have the appellate courts review his sentence. Curiously, Mr. McGovern did not present a sentencing issue. Mr. McGovern's decision was not strategic. Since the issue would likely have prevailed, Mr. McGovern was ineffective for failing to raise this issue on appeal. Mr. Nunley was prejudiced because his sentence would have been reduced by more than fifty percent.

Failure to Include the underlying issue of A.Y.'s Written testimony.

Mr. Nunley contends that Mr. McGovern should have raised the issue that A. Y.'s written testimony unduly emphasized a critical portion of her testimony.

Mr. McGovern testified at the evidentiary hearing that, other than in this case, he had not encountered a trial where the State's key witness was permitted to write down a portion of her testimony. (PC Vol. II p. 37-38). Mr. McGovern further testified that A. Y.'s testimony was improperly emphasized as a result.(PC Vol. II p. 37-38). Yet he did not raise this issue or indicate a valid strategic reason for failing to do so. (PC Vol. II p. 37-41).

This issue was presented in detail in the arguments related to counsel's ineffectiveness. Those facts and arguments are incorporated herein by reference.

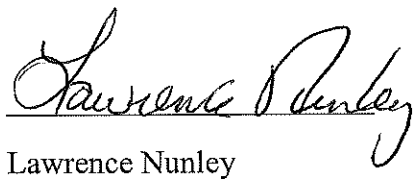
Failure to Argue the issue of the Separation of Witnesses Violation.

Mr. Nunley maintains that Mr. McGovern should have advanced the argument regarding the separation of witnesses violation detailed in Nunley's ineffective assistance of counsel claim. This issue was presented in detail in the arguments related to counsel's ineffectiveness. Those facts and arguments are incorporated herein by reference.

V. CONCLUSION

For all of the foregoing reasons, A Certificate of Appealability should issue.

Respectfully submitted,



Lawrence Nunley

CERTIFICATE OF SERVICE

I, Lawrence Nunley, hereby verify, under the penalties for perjury a true and accurate copy of the foregoing document was served upon the Office of the Attorney General, counsel for the Respondent, via the electronic filing system piloted at the Wabash Valley Correctional Facility on this 21st day of April 2020. The preceding date represents the date that Nunley placed the document in the prison's interdepartmental mail system with a request for prison officials to E-File the document. According to the "prison mailbox rule," the document is deemed filed on the date.

Lawrence Nunley

Lawrence Nunley #198710
Wabash Valley Correctional Facility
P.O. BOX 1111
Carlisle, Indiana 47838

IN THE
UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
TERRE HAUTE DIVISION

Lawrence Nunley,
Plaintiff,

VS.

Richard Brown,
Defendant.

CAUSE NO. 2:19-cv-00012-JRS-DLP

DOCKETING STATEMENT

Comes now the Plaintiff, Lawrence Nunley, pro se, and for his Docketing Statement, alleges and says:

Jurisdiction for civil actions by state prisoners is conferred upon the United States District Court under and by virtue of 28 U.S.C. 2253 The United States District Court for the SOUTHERN District of Indiana, TERRE HAUTE Division had jurisdiction pursuant to 28 U.S.C. 94(b) in that plaintiff was confined at the Wabash Valley Correctional Institution, located in Sullivan County, Indiana.

That the District Court entered its Judgment, dismissing the plaintiff's pro se civil action with prejudice on March 30, 2020

The United States Court of Appeals for the Seventh Circuit has jurisdiction of this appeal pursuant to Rule 4, of the Federal Rules of Appellate Procedure. Plaintiff simultaneously has filed his Notice of Appeal in this matter with the District Court.

L. Nunley

Plaintiff/ Pro Se
DOC 198710
Wabash Valley Correctional Facility
Post Office Box 2222
Carlisle, IN 47838

(B-3)

CERTIFICATE OF SERVICE

I, Lawrence Nunley, hereby verify, under the penalties for perjury a true and accurate copy of the foregoing document was served upon the Office of the Attorney General, counsel for the Respondent, via the electronic filing system piloted at the Wabash Valley Correctional Facility on this 21st day of April 2020. The preceding date represents the date that Nunley placed the document in the prison's interdepartmental mail system with a request for prison officials to E-File the document. According to the "prison mailbox rule," the document is deemed filed on the date.

Lawrence Nunley

Lawrence Nunley #198710
Wabash Valley Correctional Facility
P.O. BOX 1111
Carlisle, Indiana 47838

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
TERRE HAUTE DIVISION

LAWRENCE NUNLEY,	)	
	)	
Petitioner,	)	
	)	
v.	)	No. 2:19-cv-00012-JRS-DLP
	)	
RICHARD BROWN,	)	
	)	
Respondent.	)	

Order Denying Petition for a Writ of Habeas Corpus

In his petition for a writ of habeas corpus, Lawrence Nunley challenges his 2008 Harrison County convictions for child molesting and disseminating matter harmful to a minor. For the reasons explained in this Order, Mr. Nunley's petition for a writ of habeas corpus is **denied**, and the action is dismissed with prejudice. In addition, the Court finds that a certificate of appealability should not issue.

I. Background

District court review of a habeas petition presumes all factual findings of the state court to be correct, absent clear and convincing evidence to the contrary. *See* 28 U.S.C. § 2254(e)(1); *Daniels v. Knight*, 476 F.3d 426, 434 (7th Cir. 2007). The Indiana Court of Appeals summarized Mr. Nunley's offense as follows:

> Nunley lived with his teenage son and his son's girlfriend, K.S. K.S. sometimes babysat six-year-old A.Y. A.Y.'s mother, T.C., testified A.Y. "loved [K.S.] to death." (Tr. at 534.) On April 13, 2007, A.Y. asked to spend the night at Nunley's residence. When T.C. dropped off A.Y., Nunley told her K.S. was on the way there. T.C. was under the impression that K.S. would be watching A.Y. According to A.Y., K.S. and her boyfriend were there for only a brief time that night.
>
> Sometime during the evening, Nunley called A.Y. back to his bedroom and showed her a pornographic video. A.Y. was wearing a tee shirt and panties. He took off her panties and licked her vagina. He also made her suck on his penis.

The next day, T.C. and R.C. picked up A.Y. After they had been in the car for a few minutes, A.Y. told them she and Nunley had a secret. A.Y. would not say what it was, so T.C. tried to trick her into telling by saying, "That's okay. I know what the secret is." (*Id.* at 537.) Then A.Y. wanted to tell them, but she did not want to say it out loud, so her parents gave her a pencil and an envelope to write on. Her note indicated she "was sucking his weenie-bob and he was licking my pee-pee." (*Id.* at 626.)

After reading the note, T.C. turned the vehicle around and went back to Nunley's residence. She took a bat and started hitting Nunley's motorcycle and truck so he would come outside. Nunley came to the door. T.C. yelled at him and accused him of molesting A.Y. Nunley denied her accusations.

T.C., R.C., and A.Y. then went to the Washington County Police Department to make a report. They spoke to State Trooper Kevin Bowling. Trooper Bowling first attempted to interview A.Y. alone, but that did not work well, so T.C. stayed in the room with her while A.Y. answered questions. A.Y. said Nunley made her watch a "bad movie." (*Id.* at 626.) Trooper Bowling asked her what she meant by that, and she said, a "naked movie." (*Id.*) T.C. showed him the note A.Y. had written. T.C. believed she left the note with Trooper Bowling, but Trooper Bowling had no record or recollection of what happened with the note. Trooper Bowling referred the case to the Department of Child Services.

Authorities tried to arrange a forensic interview of A.Y., but T.C. did not immediately follow through. The interview was finally conducted on April 18, 2008, a little over a year after A.Y. was molested.

Donna Lloyd Black conducted the forensic interview of A.Y. at Comfort House. A.Y.'s interview was videotaped. Comfort House has an observation room for representatives from the prosecutor's office, law enforcement, and the Department of Child Services. Black can communicate with them by two-way radio, but a child being interviewed cannot see or hear the people in the observation room. Detective William Wibbels was in the observation room during A.Y.'s interview.

Nunley was charged with four counts of Class A felony child molesting: Count 1 alleged he touched A.Y.'s vagina with his mouth, Count 2 alleged he made A.Y. put her mouth on his penis, Count 3 alleged he put his hand in A.Y.'s vagina, and Count 4 alleged he touched A.Y.'s vagina with his penis. He was also charged with one count of Class D felony dissemination of matter harmful to minors, which alleged he showed A.Y. a pornographic movie.

At the time of trial, A.Y. was eight years old. A.Y. started crying at several points during her testimony and needed multiple breaks. A.Y. stated it was hard to say what had happened and that she could only write it. The prosecutor then had her write down what happened and read it to the jury. She testified she saw Nunley's penis when he made her suck on it and he licked her "pee pee." (Tr. at 450.) A.Y.

> testified he forced her to do these things by threatening to hurt her parents or call the police.
>
> T.C. testified as to why she did not immediately bring A.Y. for a forensic interview: "I had second thoughts ... just because of the fact of putting my daughter through this. And not only that ... there's a side of you that thinks maybe if you just don't acknowledge it, that it'll go away." (*Id.* at 549.) A juror asked, "[W]hat made you continue to think about it? What, was it brought up by [A.Y.]?" (*Id.* at 569). T.C. responded, "No, it wasn't brought up by [A.Y.]. It was brought up by other people. Uhm, there were other allegations that I had heard about." (*Id.*) Nunley objected and moved for a mistrial, because T.C. had been instructed not to refer to any other allegations against him. The trial court denied the motion for mistrial because T.C. did not specify the nature of the allegations, and it instructed the jury to disregard T.C.'s answer.
>
> The videotape was played for the jury. The video was difficult to understand in some places, but Black testified she was able to understand what A.Y. was saying to her during the interview. The prosecutor therefore asked Black to recount how A.Y. had said Nunley had touched her. Black testified A.Y. said Nunley "touched her on her pee-pee with his weenie-bob, his hand and his tongue," that he "made her put his weenie-bob in her mouth and suck it," and that he made her watch a video with naked people in it. (*Id.* at 613.) Detective Wibbels also testified concerning A.Y.'s allegations made during the interview.
>
> Nunley testified [on] his own behalf. He claimed T.C. called and asked if he could watch A.Y. while she went to Corydon. He asserted T.C. did not bring any extra clothes for A.Y., and he did not think A.Y. would be spending the night. He claimed A.Y. fell asleep on the couch soon after arriving, and then his friend, Michelle Cayton, came over to Nunley's residence to spend the night, leaving shortly before T.C. picked up A.Y. Nunley claimed he was in a relationship with T.C., and when T.C. came to pick up A.Y., she asked to move in with him. He would not let her, and she was angry when she left. Although Nunley voluntarily spoke with the police, he never told them Cayton had been at his residence on the night in question.
>
> The jury found Nunley guilty as charged.

Nunley v. State, 916 N.E.2d 712, 714–16 (Ind. Ct. App. 2009) ("*Nunley I*") (footnotes omitted).

On appeal, Nunley raised four issues, which the Indiana Court of Appeals reordered and restated:

> (1) whether the trial court committed reversible error by admitting A.Y.'s hearsay statements via the videotape of her interview and the testimony of several witnesses; (2) whether the trial court abused its discretion by excluding evidence A.Y. had

> accused her mother's boyfriend of attacking her and then later recanted; (3) whether the prosecutor committed misconduct by stating in her closing argument that A.Y. had not been taught how to lie; and (4) whether the trial court abused its discretion by denying Nunley's motion for a mistrial after T.C. referred to other allegations against Nunley.

Id. at 716. The court first held that the testimony about what A.Y. wrote on the envelope was admissible but that A.Y.'s forensic interview was not. *Id.* at 716–19. The court reversed Mr. Nunley's child molesting convictions in Counts 3 and 4, which were based solely on the interview, but "conclude[d] that the admission of the evidence was harmless error as to Counts 1, 2, and 5 because it was merely cumulative of other properly admitted evidence, including A.Y.'s own trial testimony." *Id.* at 719.

Next, the court held that the trial court properly excluded evidence that A.Y. had falsely accused her mother's boyfriend of attacking her. *Id.* at 720–21. The court concluded that the evidence was not admissible under Indiana Evidence Rule 608(b) and did not deny Mr. Nunley his right to present a defense. *Id.* at 721. The court then held that Mr. Nunley waived his argument that the prosecutor committed misconduct during closing argument by not moving for a mistrial. *Id.* at 722. Finally, the court held that the trial court did not abuse its discretion when it denied a mistrial after T.C. referred to "other allegations" because T.C. was not specific and the court admonished the jury. *Id.*

Mr. Nunley filed a petition to transfer to the Indiana Supreme Court, raising two issues. Dkt. 14-6. First, he argued that the trial court violated his right to present a defense when it excluded evidence about A.Y.'s false allegation. *Id.* at 6–8. Second, he argued that the trial court abused its discretion when it admitted hearsay. *Id.* at 8–10. The Indiana Supreme Court asked the parties to submit additional briefing on Indiana Evidence Rule 608. Dkt. 14-2 at 4. Mr. Nunley

argued that the trial court violated his right to cross-examination. Dkt. 14-7. The court denied Mr. Nunley's petition on March 4, 2010. Dkt. 14-2 at 4.

Following his direct appeal, Mr. Nunley filed a petition for post-conviction relief in state court. He asserted that both his trial and appellate counsel provided ineffective assistance of counsel in several respects. *Nunley v. State*, 2018 WL 2325438 (Ind. Ct. App. May 23, 2018) ("*Nunley II*"). The trial court denied Mr. Nunley's petition following a hearing, and the Indiana Court of Appeals affirmed. *Id.* at *9. The Indiana Supreme Court denied Mr. Nunley's petition to transfer. Dkt. 14-10 at 9.

Mr. Nunley next filed the instant petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 with this Court raising several issues.

II. Applicable Law

A federal court may grant habeas relief only if the petitioner demonstrates that he is in custody "in violation of the Constitution or laws . . . of the United States." 28 U.S.C. § 2254(a). The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") directs how the Court must consider petitions for habeas relief under § 2254. "In considering habeas corpus petitions challenging state court convictions, [the Court's] review is governed (and greatly limited) by AEDPA." *Dassey v. Dittmann*, 877 F.3d 297, 301 (7th Cir. 2017) (en banc) (citation and quotation marks omitted). "The standards in 28 U.S.C. § 2254(d) were designed to prevent federal habeas retrials and to ensure that state-court convictions are given effect to the extent possible under law." *Id.* (citation and quotation marks omitted).

A federal habeas court cannot grant relief unless the state court's adjudication of a federal claim on the merits:

> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d).

"The decision federal courts look to is the last reasoned state-court decision to decide the merits of the case, even if the state's supreme court then denied discretionary review." *Dassey*, 877 F.3d at 302. "Deciding whether a state court's decision 'involved' an unreasonable application of federal law or 'was based on' an unreasonable determination of fact requires the federal habeas court to train its attention on the particular reasons—both legal and factual—why state courts rejected a state prisoner's federal claims, and to give appropriate deference to that decision[.]" *Wilson v. Sellers*, 138 S. Ct. 1188, 1191-92 (2018) (citation and quotation marks omitted). "This is a straightforward inquiry when the last state court to decide a prisoner's federal claim explains its decision on the merits in a reasoned opinion." *Id.* "In that case, a federal habeas court simply reviews the specific reasons given by the state court and defers to those reasons if they are reasonable." *Id.*

"For purposes of § 2254(d)(1), an unreasonable application of federal law is different from an incorrect application of federal law." *Harrington v. Richter*, 562 U.S. 86, 101 (2011). "A state court's determination that a claim lacks merit precludes federal habeas relief so long as fairminded jurists could disagree on the correctness of the state court's decision." *Id.* "If this standard is difficult to meet, that is because it was meant to be." *Id.* at 102. "The issue is not whether federal judges agree with the state court decision or even whether the state court decision was correct. The issue is whether the decision was unreasonably wrong under an objective standard." *Dassey*, 877 F.3d at 302. "Put another way, [the Court] ask[s] whether the state court decision 'was so lacking

in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement.'" *Id.* (quoting *Richter*, 562 U.S. at 103).

III. Discussion

Mr. Nunley raises four claims in his petition. The first two—that he was denied his right to prevent a defense and his right to confrontation—were last discussed by the Indiana Court of Appeals on direct appeal in *Nunley I*. The third and fourth claims—ineffective assistance of trial counsel and ineffective assistance of appellate counsel—were last discussed by the Indiana Court of Appeals on post-conviction review in *Nunley II*. The Court addresses each claim in turn.

A. Denial of a Defense

"The Constitution guarantees criminal defendants a meaningful opportunity to present a complete defense." *Nevada v. Jackson*, 569 U.S. 505, 509 (2013) (per curiam) (internal citation and quotation omitted). Mr. Nunley argues he was deprived of his opportunity to present a complete defense when the trial court excluded evidence of an unrelated recantation A.Y. made.

Shortly before Mr. Nunley's trial, A.Y.'s mother had been dating a man named Eddie Foreman. Foreman violently beat her, resulting in serious injuries. DA App.[1] at 202, 251. A.Y. witnessed the incident and called the police. *Id.* at 202. A.Y. initially told police that Foreman injured her, too, because "I just wanted him to go to jail really, 'cause he deserved it." *Id.* at 202-03. About six weeks later, A.Y. went to the prosecutor's office with a note that stated Foreman had not assaulted her and "she did not want to see him get in trouble for something he didn't do." Tr. 379-80.

[1] The Court uses the following citation format throughout this Order: "Tr." – Trial Transcript; "DA App." – Direct Appeal Appendix; "PCR Tr." – Post-Conviction Hearing Transcript.

Mr. Nunley's counsel sought to introduce evidence of this incident to attack A.Y.'s credibility. *Id.* at 378. The State objected, citing Indiana Rule of Evidence 608(b). That rule provides:

> Except for a criminal conviction under Rule 609, extrinsic evidence is not admissible to prove specific instances of a witness's conduct in order to attack or support the witness's character for truthfulness. But the court may, on cross-examination, allow them to be inquired into if they are probative of the character for truthfulness or untruthfulness of another witness whose character the witness being cross-examined has testified about.

The trial court excluded the evidence, stating that part of the reason for the rule was to avoid "hav[ing] a series of mini trials about …any instances that a person might've lied in their entire lifetime so that there wouldn't be a trial about a hundred collateral matters." Tr. at 382, 385.

On appeal, the court rejected the argument that the exclusion of this evidence violated Mr. Nunley's Sixth Amendment right to present a defense. *Nunley I*, 916 N.E.2d at 720. It held that the trial court properly excluded the evidence under Indiana Evidence Rule 608(b). *Id.* It relied on another Indiana Court of Appeals case, *Saunders v. State*, 848 N.E.2d 117, 1122 (Ind. Ct. App. 2006), which correctly identified the Sixth Amendment right. The *Saunders* court stated "that the evidence rule preventing evidence of specific acts of untruthfulness must yield to a defendant's Sixth Amendment right of confrontation and right to present a full defense." *Id.* However, in upholding the trial court's decision to not allow extrinsic evidence for impeachment, it noted that the Indiana Supreme Court had "limited this exception to very narrow circumstances—specifically prior false accusations of rape." *Id.* (citing *State v. Walton*, 715 N.E.2d 824, 827 (Ind. 1999)).

"[S]tate and federal rulemakers have broad latitude under the Constitution to establish rules excluding evidence from criminal trials." *Jackson*, 569 U.S. at 509. A state's rules of evidence give way to a defendant's right to present a complete defense only when those rules (1) "'infringe upon a weighty interest of the accused'" and (2) "'are arbitrary or disproportionate

to the purposes they are designed to serve.'" *Hanson v. Beth*, 738 F.3d 158, 163 (7th Cir. 2013) (quoting *Holmes v. South Carolina*, 547 U.S. 319, 324 (2006)).

The Supreme Court decision in *Jackson* is particularly instructive. On trial for rape, the defendant tried to present police reports and officer testimony to show that the victim had accused him of assaulting her before, which the police could not corroborate. *Jackson*, 569 U.S. at 507. The trial court excluded the evidence under a Nevada statute that generally precludes extrinsic evidence of specific instances of the witness's conduct to attack her credibility. *Id.* at 509. On federal habeas, the defendant argued that the trial court violated his constitutional right to present a defense. *Id.* at 508. The Ninth Circuit agreed and granted a conditional writ of habeas corpus. *Id.*

The Supreme Court reversed because the state court's decision was reasonable. *Id.* at 509, 512. Like the Indiana Court of Appeals here, the state court "recognized and applied the correct legal principle." *Id.* at 509 (quotation marks and citation omitted). The court also applied a state statute supported by Supreme Court precedent and "akin to the widely accepted rule of evidence law that generally precludes the admission of evidence of specific instance of a witness' conduct to prove the witness' character for untruthfulness." *Id.* at 509–10 (citing *Clark v. Arizona*, 548 U.S. 735, 775 (2006); Fed. Rule Evid. 608(b)). "The constitutional propriety of this rule cannot be seriously disputed." *Id.* at 510. The Supreme Court reasoned that "[t]he admission of extrinsic evidence of specific instances of a witness' conduct to impeach the witness' credibility may confuse the jury, unfairly embarrass the victim, surprise the prosecution, and unduly prolong the trial." *Id.* at 511. Because no Supreme Court decision "clearly establishes that the exclusion of such evidence for such reasons in a particular case violates the Constitution," the state court was entitled to "the substantial deference that AEDPA requires." *Jackson*, 569 U.S. at 511–12; *see also Kubsch v. Neal*, 838, F.3d 845, 859 (7th Cir. 2016) (noting that to prove a Sixth Amendment

violation, "the proffered evidence must be essential to the defendant's ability to present a defense; it cannot be cumulative, impeaching, unfairly prejudicial, or potentially misleading"). Thus, the Indiana Court of Appeals' decision that Nunley was not denied his right to present a defense was not contrary to or an unreasonable application of clearly established federal law.

Further, even assuming there was a constitutional violation, any error was harmless. As the Supreme Court has explained,

> For reasons of finality, comity, and federalism, habeas petitioners are not entitled to habeas relief based on trial error unless they can establish that it resulted in actual prejudice. Under this test, relief is proper only if the federal court has grave doubt about whether a trial error of federal law had substantial and injurious effect or influence in determining the jury's verdict. There must be more than a reasonable probability that the error was harmful.

Davis v. Ayala, 135 S. Ct. 2187, 2197 (2015) (internal quotations and citations omitted). Here, the Court harbors no grave doubt about whether exclusion of the prior accusation and recantation had a substantial influence on the jury's verdict. The recanted accusation was not similar to A.Y.'s accusation against Mr. Nunley. A.Y. had seen Foreman physically attack her mother and was motivated to lie about the incident because she thought he deserved to be in jail. However, she recanted her statement six weeks later because she knew lying was wrong. With Mr. Nunley, A.Y. never wavered from her recounting that Mr. Nunley had molested her, and A.Y. had always enjoyed going to his house before the incident. Thus, if anything, evidence of the prior accusation and recantation may have had the effect of bolstering A.Y.'s credibility.

In summary, the Indiana Court of Appeals did not unreasonably apply *Jackson*, *Holmes*, or any other clearly established federal law, and habeas relief is not warranted for this claim.

B. Right to Confrontation

Mr. Nunley next argues that his right to confrontation was violated when the trial court permitted the drumbeat repetition of hearsay evidence to bolster A.Y.'s testimony. The respondent

contends that Mr. Nunley procedurally defaulted this claim by not presenting it to the Indiana Supreme Court.

If a petitioner in custody pursuant to a state court judgment raises a claim on federal habeas review without first presenting it through "one complete round of the State's established appellate review process," that claim is procedurally defaulted. *O'Sullivan v. Boerckel*, 526 U.S. 838, 845 (1999); *see also see also Hicks v. Hepp*, 871 F.3d 513, 530−31 (7th Cir. 2017). The petitioner must "'fairly present' his claim in each appropriate state court (including a state supreme court with powers of discretionary review), thereby alerting that court to the federal nature of the claim." *Baldwin v. Reese*, 541 U.S. 27, 29 (2004) (citing *Boerckel*, 526 U.S. at 845). The petitioner must present "both the operative facts and controlling law." *Anderson v. Benik*, 471 F.3d 811, 814 (7th Cir. 2006) (internal citation omitted).

Mr. Nunley raised a Sixth Amendment Confrontation Clause argument in his brief to the Indiana Court of Appeals, dkt. 14-3 at 29-31, but he did not renew that argument in his brief to the Indiana Supreme Court. Rather, he argued that the drumbeat repetition through witnesses and video of A.Y.'s accusation contravened an Indiana Supreme Court decision, *Modesitt v. State*, 578 N.E.2d 649 (1991). Dkt. 14-6 at 8-10. There, the Indiana Supreme Court modified a state evidentiary rule. *Modesitt*, 578 N.E.2d at 653–54. It was not a Sixth Amendment case.

In response, Mr. Nunley argues that he sufficiently raised the claim in his brief to the Indiana Court of Appeals and that this was fair presentment to the Indiana Supreme Court due to Indiana's Rules of Appellate Procedure. Under Indiana Rule of Appellate Procedure 58, if the Indiana Supreme Court grants transfer on a case, it then has "jurisdiction over the appeal and all issues as if originally filed in the Supreme Court." Mr. Nunley argues, then, that because the issue was argued in his brief to the Court of Appeals, it was necessarily presented to the Indiana Supreme

Court, and he was not required to resubmit those claims in his petition to transfer. Dkt. 19 at 13−14. But that was the same scenario presented to the Supreme Court in *Boerckel*. There, the respondent raised several constitutional issues in his brief to the Illinois Appellate Court but did not include those claims when he filed his petition for leave to appeal to the Illinois Supreme Court. *Boerckel*, 526 U.S. at 840. The Court held that "a prisoner who fails to present his claims in a petition for discretionary review to a state court of last resort" has not "*properly* presented his claims to the state courts," resulting in procedural default of those claims. *Id.* at 848.

Because Mr. Nunley did not raise this claim in his petition to transfer to the Indiana Supreme Court, the claim is procedurally defaulted.

C. Ineffective Assistance of Trial Counsel

Mr. Nunley alleges that trial counsel rendered ineffective assistance of counsel for various reasons. To succeed on a claim that trial counsel was ineffective, a petitioner must show that counsel's performance was deficient and prejudicial. *Maier v. Smith*, 912 F.3d 1064, 1070 (7th Cir. 2019) (citing *Strickland v. Washington*, 466 U.S. 668, 689−92 (1984)). Deficient performance means that counsel's actions "fell below an objective standard of reasonableness," and prejudice requires "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 688, 694.

The Indiana Court of Appeals correctly articulated the *Strickland* standard in Mr. Nunley's post-conviction memorandum decision. *Nunley II*, 2018 WL 2325438 at *3. The Court addresses each of Mr. Nunley's allegations.

1. The State's Waiver

Mr. Nunley first argues that the respondent waived its ability to challenge his ineffective assistance of trial and appellate counsel claims by not presenting evidence or legal argument during

post-conviction proceedings. Dkt. 2 at 6. The Indiana Court of Appeals rejected this argument, noting that "[t]he State filed an answer to Nunley's petition, asserted denials of his claims, and actively participated at the hearing." *Nunley II*, 2018 WL 2325438 at *3, n.1. Whether an Indiana court should have enforced Indiana's waiver rule against the State on post-conviction review is not a matter for this Court. *Washington v. Boughton*, 884 F.3d 692, 701 (7th Cir., 2018) (state court's conclusion that rests on interpretation of state law "is iron-clad on habeas review"); *Estelle v. McGuire*, 502 U.S. 62, 67−68 (1991) ("[I]t is not the province of a federal habeas court to reexamine state-court determinations on state-law questions.").

2. Failure to Impeach A.Y.

Mr. Nunley's first allegation against his trial counsel is that she failed to impeach A.Y. with inconsistent statements she made in her deposition. Mr. Nunley's counsel testified at the post-conviction hearing which occurred on January 12, 2017, more than eight years after Mr. Nunley's trial. She testified that the only way the jury could convict Mr. Nunley was if they believed A.Y., so pointing out inconsistencies to challenge her credibility was part of her trial strategy. PCR Tr. 27−29. She could not recall if she used the deposition to impeach A.Y. because of the passage of time, *id.* at 28, and Mr. Nunley did not try to refresh her memory with the deposition.

The Indiana Court of Appeals held that trial counsel was not ineffective for failing to impeach A.Y. with the deposition, stating:

> Nunley's trial counsel made strategic choices of how best to cast doubt on A.Y.'s trial testimony. Counsel had to tread carefully given A.Y. 's young age and her emotional state at trial. A.Y. cried during her direct examination and did not want to discuss the molestation because it was "too scary." Trial Tr. p. 438. A.Y. was similarly reluctant to answer questions about the molestation during her deposition and stated that she did not want to remember it.

Nunley II, 2018 WL 2325438 at *4.

Mr. Nunley names several instances of alleged inconsistencies in A.Y.'s deposition. Dkt. 19 at 21. The most serious inconsistency is that, during her deposition, A.Y. did not say anything to support Count 2. Dkt. 15-1, DA App. at 10 (alleging Mr. Nunley committed child molesting by putting A.Y.'s mouth on his penis). She testified during her deposition that Mr. Nunley "licked my pee-pee" and "made me watch a nasty show." DA App. at 219−20, 236. When prompted as to whether anything else occurred, she stated she did not remember because "[i]t's better not to remember." *Id.* at 224.When told she would have to remember the details for the deposition, she responded, "And then the case is finally cut open. … Am I free from it finally?" *Id.* An eight-year-old child's reluctance to disclose specific details during a deposition does not indicate that she fabricated that allegation. From the moment she got in her parents' car the day after the assault, A.Y. struggled to articulate the facts surrounding the molestation. She had to write down the details of what happened in order to describe what happened to her parents, and—as will be discussed below—to the jury. Mr. Nunley did not ask trial counsel about this (or any) specific inconsistency from the deposition. Thus, the Indiana Court of Appeals' reasoning that it was a strategic choice for trial counsel to "tread carefully given A.Y.'s young age and her emotional state at trial" did not run afoul of *Strickland*. Applying the high deference that AEDPA requires, the Indiana Court of Appeals' ruling on this specific allegation was not unreasonable.

Mr. Nunley's other examples of inconsistencies are much less compelling. He states A.Y. said her mother told her what to say to the policeman after the incident, but the exchange reveals that A.Y. was likely just confused by the line of questioning:

Q. Was your mom there with you when you talked to him?

A. Yeah.

Q. Did she tell you what to tell the policeman?

A. No.

Q. Okay.

A. She told me what to remember and stuff.

Q. What did she tell you?

A. Pretty must all what to remember, pretty much all she told to say.

Q. Okay, when she said what to remember, did she say exactly what she wanted you to remember?

A. Yeah, yeah. Yeah, she wanted me – Yeah.

Q. Can you tell me how she told you?

A. Well, she said it in a nice way, a really nice way, pretty much a nice way.

Q. Okay, can you give me an example of what she told you?

A. What I told her?

Q. No, what – what your mom told you?

A. She told me just to remember what the bad things that Ed Nunley did and stuff like that.

Q. Okay. And did she tell you what the bad things were that you were supposed to tell the policeman?

A. No, she really didn't much knew of – She didn't have to tell me.

…

Q. Okay, so when you went and talked to policeman, did you tell them the truth, everything that you told him?

A. Yeah.

DA App. at 214-16. At trial, A.Y. testified that her parents told her to tell police the truth, but did not tell her what to say. Tr. 484. Similarly, A.Y.'s mother testified that she told A.Y. to tell the police officer the truth, but not to exaggerate any details. Tr. 545. This may have been what A.Y. meant when she said her mom "in a really nice way" told her to say what Mr. Nunley did to her.

Other inconsistencies alleged by Mr. Nunley were not inconsistencies at all. Mr. Nunley alleges that A.Y. said in her deposition that she had spent the night at his house with her mother several times, but—consistent with her trial testimony—A.Y. actually stated in the deposition that she spent the night only once. DA App. at 206-07. Mr. Nunley also alleged that A.Y. said in her deposition that he did not hurt her. *Id.* at 240. But A.Y. never accused Mr. Nunley of physically injuring her when he molested her.

The Indiana Court of Appeals reasonably concluded that trial counsel was not ineffective for failing to impeach A.Y. with minor inconsistencies in her deposition, and habeas relief is not warranted on this basis.

3. Failure to Object to A.Y.'s Written Testimony

Mr. Nunley alleges that trial counsel was ineffective for failing to object to A.Y. being allowed to write down a portion of her testimony describing the molestation and further for not objecting when the trial court *sua sponte* admitted the written notes as exhibits. Trial counsel testified at the post-conviction hearing that submitting the written testimony to the jury was unusual and placed undue emphasis on that part of her testimony. PCR Tr. 31.

The Indiana Court of Appeals held that trial counsel was not ineffective for not objecting "when the trial court allowed a distraught eight-year-old child to write her testimony down on a piece of paper." *Nunley II*, 2018 WL 2325438 at *5. It further held that Mr. Nunley could not show prejudice from the trial court's admission of the statements into evidence because "A.Y.'s written

statements were consistent with what she had reported to her parents and law enforcement officers, which evidence was also admitted at trial." *Id.* In concluding this, the court relied on Indiana law which gives trial courts discretion to permit "'children to testify under special conditions despite the possibility that it would emphasize their testimony. ... As a result, the manner in which a party is entitled to question a witness of tender years, especially in embarrassing situations, is left largely to the discretion of the trial court.'" *Id.* (quoting *Shaffer v. State*, 674 N.E.2d 1, 5 (Ind. Ct. App. 1996)).

Again, this Court cannot second-guess the state court's determination of state law. *Estelle*, 502 U.S. at 67−68 (1991). In light of Indiana's rules permitting flexible questioning of child witnesses, the Indiana Court of Appeals reasonably concluded that trial counsel was not ineffective on this basis.

4. Failure to Challenge Violation of the Separation of Witnesses Order

Mr. Nunley next challenges his trial counsel's failure to object to A.Y. having lunch with her parents, arguing this amounted to a violation of the court's separation of witnesses order. A.Y. particularly struggled during the first part of her testimony—crying repeatedly and stating she did not want to describe the incident in front of so many people. Tr. 438. The court took a break, and asked one of the prosecutors to go to lunch with A.Y. and her parents to ensure they did not violate the separation of witnesses order by discussing the case. Tr. 446. Once trial resumed, A.Y. wrote down and read aloud her testimony about the incident. Tr. 449-50.

Because she was able to testify more effectively after lunch, Mr. Nunley believes that she was coached during the recess. His trial counsel testified at the post-conviction hearing that she did not object because, as the trial court said, the point of sending the prosecutor to lunch with A.Y. and her family was to ensure the separation of witnesses order was *not* violated. PCR Tr. 34.

The Indiana Court of Appeals rejected this claim, noting first that Mr. Nunley's contention that A.Y. was coached over the break was "pure speculation." *Nunley II*, 2018 WL 2325438, at *5. It noted that the trial court's purpose was to prevent any violation of the separation order, that the trial court asked the prosecutor whether anything happened during the break, and that it was clearly appropriate for the court to allow A.Y. to have lunch with her parents given how stressful the trial was. *Id.*

The Indiana Court of Appeals reasonably applied *Strickland* in its determination that trial counsel was not ineffective on this basis.

5. Cumulative Impact

Mr. Nunley's final allegation against his trial counsel is that he was prejudiced by the cumulative effect of trial counsel's errors. The Indiana Court of Appeals concluded that Mr. Nunley waived this argument by not citing any authority or presenting a cogent argument as Indiana Appellate Rule 46(A)(8)(a) required him to do. *Nunley II* 2018 WL 2325438 at *6. The respondent argues that Mr. Nunley has procedurally defaulted this claim. One type of procedural default occurs when "the decision of [the state] court rests on a state law ground that is independent of the federal question and adequate to support the judgment." *Walker v. Martin*, 562 U.S. 307, 315 (2011) (citation and internal quotation marks omitted). "This rule applies whether the state law ground is substantive or procedural." *Coleman v. Thompson*, 501 U.S. 722, 729 (1991) (citations omitted).

"In assessing the adequacy of a state procedural ruling, federal courts do not review the merits of the state court's application of its own procedural rules. Instead, we ask whether the rule invoked was firmly established and regularly followed." *Crockett v. Butler*, 807 F.3d 160, 167 (7th Cir. 2015) (citations and quotations marks omitted). Indiana courts regularly find waiver by

invoking Indiana Appellate Rule 46(A)(8)(a). *See, e.g. Lacey v. State*, 124 N.E.3d 1253, 1257 n. 8 (Ind. Ct. App. 2019); *Cherry v. State*, 57 N.E.3d 867, 876-77 (Ind. Ct. App. 2016); *Casady v. State*, 934 N.E.2d 1181, 1190 (Ind. Ct. App. 2010) (all finding waiver under Ind. Appellate Rule 46(A)(8)(a) for failing to cite to the record or relevant legal authority). Accordingly, the Court finds this claim to be procedurally defaulted.

In summary, the Indiana Court of Appeals' determination that trial counsel did not render ineffective assistance of counsel for any of the reasons alleged by Mr. Nunley was a reasonable application of *Strickland*. Habeas relief is not warranted on this basis.

D. Ineffective Assistance of Appellate Counsel

Mr. Nunley raises six claims of ineffective assistance of appellate counsel. The Indiana Court of Appeals correctly identified the *Strickland* framework for these claims.

1. Failure to Raise Defense Well

Mr. Nunley alleges that his appellate counsel failed to raise his denial of defense argument well. The Indiana Court of Appeals first noted that his claim was waived pursuant to Indiana Appellate Rule 46(A)(8)(a) for failing to cite to any portion of the record to support this claim. The respondent argues that Mr. Nunley therefore procedurally defaulted the claim due to the fact that the state court's decision rests on an independent state law ground. Dkt. 14 at 24, citing *Coleman*, 501 U.S. at 729.

Because the Court addressed Mr. Nunley's denial of defense claim above, the Court will bypass the procedural default question. *See Brown v. Watters*, 599 F.3d 602, 610 (7th Cir. 2010) (concluding that it is appropriate to bypass a "difficult" procedural default question and "proceed to adjudicate the merits" when it is "clear" the petition should be denied on the merits).

As discussed at length in section A, the Indiana Court of Appeals properly applied federal law on direct appeal when it determined that exclusion of evidence about A.Y.'s recantation did not violate Mr. Nunley's Sixth Amendment right to present a defense. Further, Mr. Nunley's arguments largely mirror those put forth by his appellate counsel on this issue. *Compare* dkt. 2 at 12-13 *with* dkt. 14-3 at 17-19. Because there was no Sixth Amendment violation, appellate counsel was not ineffective for the way he presented this claim.

2. Double Jeopardy

Mr. Nunley alleges appellate counsel was ineffective for failing to raise a double jeopardy claim. He argues that because all three acts involved a single confrontation with a single victim, convictions on Counts 1, 2, and 5 violate the Double Jeopardy Clause. In support, he relies on an Indiana Supreme Court case, *Bowling v. State*, 560 N.E.2d 658, 660 (Ind. 1990), where the court held that "imposition of two sentences for the same injurious consequences sustained by the same victim during a single confrontation violated both Federal and State double jeopardy prohibitions," requiring that one of the defendant's child molest convictions be set aside (citing *Ellis v. State,* 528 N.E.2d 60 (Ind. 1988)).

Rejecting this claim, the Indiana Court of Appeals stated:

> But the authority that Nunley relies upon, *Bowling v. State*, 560 N.E.2d 658 (Ind. 1990), was impliedly overruled by our supreme court in *Richardson v. State*, 717 N.E.2d 32 (Ind. 1999). *See Vermillion v. State*, 978 N.E.2d 459, 465 (Ind. Ct. App. 2012) (stating that "when *Richardson* was decided in 1999, it abrogated a number of cases that articulated the 'single incident' reasoning found in Bowling. However, *Richardson* made no mention of *Bowling*."). The *Vermillion* court held that "[a] trial court may impose consecutive sentences for separate and distinct crimes that arise out of a single confrontation involving the same victim—subject to *Richardson's* double-jeopardy protections, other sentencing mandates, and our abuse-of-discretion review." *Id.* at 466; *see also* Ind. Code § 35–50–1–2.

Nunley II, 2018 WL 2325438 at *7. Notably, although the *Richardson* Court did not mention *Bowling*, it included *Ellis*—the case the Indiana Supreme Court relied upon in *Bowling*—in its list of double jeopardy cases abrogated by its decision. *Richardson*, 717 N.E.2d at 49, n. 36.

The Indiana Court of Appeals' determination that Mr. Nunley relied on precedent that was "impliedly overruled" is based on state law, making it a decision that this Court cannot second-guess. *Estelle*, 502 U.S. at 67-68; *see also Miller v. Zatecky*, 820 F.3d 275, 280 (7th Cir. 2016) ("A federal court cannot disagree with a state court's resolution of an issue of state law."). Habeas relief is not warranted on this issue.

3. Failure to Challenge Sentencing

Mr. Nunley alleges that appellate counsel was ineffective for failing to challenge his sentence. The Court of Appeals rejected the claim on post-conviction review. With respect to Mr. Nunley's contention that the trial court abused its discretion for aggravating his sentence based on uncharged criminal conduct, the court noted that "[i]t is well-established that trial courts may consider previous criminal activity, even though uncharged, in the determination of aggravating circumstances at sentencing." *Nunley II*, 2018 WL 2325438 at *8 (internal quotation and citation omitted). With respect to Mr. Nunley's argument that appellate counsel should have challenged the appropriateness of his sentence pursuant to Indiana Appellate Rule 7B, the court rejected that claim, finding "[h]ad appellate counsel raised the issue, our court would almost certainly have concluded that Nunley's sentence was not inappropriate in light of the nature of the offense and character of the offender." *Id.*

As with the previous issue, the Court of Appeals' analysis is based on state sentencing jurisprudence, which the Court has no authority to disagree with. *Miller*, 820 F.3d at 277.

4. Failure to Impeach A.Y., Challenge the Introduction of A.Y.'s Written Testimony, and Challenge the Separation of Witnesses

Mr. Nunley's remaining claims overlap with the ineffective assistance of trial counsel claims discussed above. The Indiana Court of Appeals found that because Mr. Nunley had not shown that his trial counsel was ineffective for failing to raise those issues, appellate counsel was not ineffective for failing to raise them either. *Nunley II*, 2018 WL 2325438 at *6, n. 3. This was a reasonable application of federal law.

In summary, the Court of Appeals reasonably applied *Strickland* when it determined that appellate counsel was not ineffective.

IV. Certificate of Appealability

"A state prisoner whose petition for a writ of habeas corpus is denied by a federal district court does not enjoy an absolute right to appeal." *Buck v. Davis*, 137 S. Ct. 759, 773 (2017). Instead, a state prisoner must first obtain a certificate of appealability. *See* 28 U.S.C. § 2253(c)(1). "A certificate of appealability may issue . . . only if the applicant has made a substantial showing of the denial of a constitutional right.'" 28 U.S.C. § 2253(c)(2). In deciding whether a certificate of appealability should issue, "the only question is whether the applicant has shown that jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further." *Buck*, 137 S. Ct. at 773 (citation and quotation marks omitted).

Further, where a claim is resolved on procedural grounds (such as procedural default), a certificate of appealability should issue only if reasonable jurists could disagree about the merits of the underlying constitutional claim *and* about whether the procedural ruling was correct. *Flores-Ramirez v. Foster*, 811 F.3d 861, 865 (7th Cir. 2016).

Rule 11(a) of the Rules Governing Section 2254 Proceedings in the United States District Courts requires the district court to "issue or deny a certificate of appealability when it enters a final order adverse to the applicant." Mr. Nunley's claims are procedurally defaulted or meritless. Jurists of reason would not disagree with this Court's resolution of his claims, and nothing about the claims deserves encouragement to proceed further.

The Court therefore **denies** a certificate of appealability.

V. Conclusion

Mr. Nunley's petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 is **denied**, and a certificate of appealability shall not issue. Final judgment in accordance with this decision shall issue.

IT IS SO ORDERED.

Date: 3/30/2020

JAMES R. SWEENEY II, JUDGE
United States District Court
Southern District of Indiana

Distribution:

LAWRENCE NUNLEY
198710
WABASH VALLEY - CF
WABASH VALLEY CORRECTIONAL FACILITY - Inmate Mail/Parcels
Electronic Service Participant – Court Only

Jesse R. Drum
INDIANA ATTORNEY GENERAL
jesse.drum@atg.in.gov

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
TERRE HAUTE DIVISION

LAWRENCE NUNLEY,	)	
	)	
Petitioner,	)	
	)	
v.	)	No. 2:19-cv-00012-JRS-DLP
	)	
RICHARD BROWN,	)	
	)	
Respondent.	)	

FINAL JUDGMENT

The Court now enters final judgment. The petitioner's petition for a writ of habeas corpus is denied, and the action is dismissed with prejudice.

Date: 3/30/2020

JAMES R. SWEENEY II, JUDGE
United States District Court
Southern District of Indiana

Laura A. Briggs, Clerk

BY: _____
Deputy Clerk, U.S. District Court

Distribution:

LAWRENCE NUNLEY
198710
WABASH VALLEY - CF
WABASH VALLEY CORRECTIONAL FACILITY - Inmate Mail/Parcels
Electronic Service Participant – Court Only

Jesse R. Drum
INDIANA ATTORNEY GENERAL
jesse.drum@atg.in.gov

*** PUBLIC DOCKET ***

APPEAL,HABEAS,CLOSED

U.S. District Court
Southern District of Indiana (Terre Haute)
CIVIL DOCKET FOR CASE #: 2:19-cv-00012-JRS-DLP

NUNLEY v. BROWN
Assigned to: Judge James R. Sweeney II
Referred to: Magistrate Judge Doris L. Pryor
Cause: 28:2254 Petition for Writ of Habeas Corpus (State)

Date Filed: 01/08/2019
Date Terminated: 03/30/2020
Jury Demand: None
Nature of Suit: 530 Habeas Corpus (General)
Jurisdiction: Federal Question

Petitioner

LAWRENCE NUNLEY

represented by **LAWRENCE NUNLEY**
198710
WABASH VALLEY - CF
WABASH VALLEY CORRECTIONAL FACILITY - Inmate Mail/Parcels
6908 S. Old US Hwy 41
P.O. Box 1111
CARLISLE, IN 47838
PRO SE

V.

Respondent

RICHARD BROWN
Warden, Wabash Valley Corr. Fac.

represented by **Jesse R. Drum**
INDIANA ATTORNEY GENERAL
302 West Washington Street
Indiana Government Center South, Fifth Floor
Indianapolis, IN 46204
317-234-7018
Email: jesse.drum@atg.in.gov
ATTORNEY TO BE NOTICED

Date Filed	#	Docket Text
01/08/2019	1	CONSENT to Prisoner E-Service by LAWRENCE NUNLEY located at WVCF. Pursuant to General Order 2013-1, documents submitted by LAWRENCE NUNLEY to the court for filing will generate a Notice of

		Electronic Filing that will constitute official service upon registered users of CM/ECF. If any parties to the case are not registered CM/ECF users, the Clerk of the Court will mail the document via U.S. Postal Service on behalf of the inmate. **NOTE: The E-Filing Program does not affect the obligation of other parties to serve copies of documents in accordance with the Federal Rules of Civil Procedure.** (DJH) (Entered: 01/08/2019)
01/08/2019	2	PETITION for Writ of Habeas Corpus, filed by LAWRENCE NUNLEY. (No fee paid with this filing) (DJH) (Entered: 01/08/2019)
01/08/2019	3	MOTION for Leave to Proceed in forma pauperis, filed by Petitioner, LAWRENCE NUNLEY. (DJH) (Entered: 01/08/2019)
01/08/2019	4	AFFIDAVIT in Support of Motion re 3 MOTION for Leave to Proceed in forma pauperis filed by Petitioner, LAWRENCE NUNLEY. (DJH) (Entered: 01/08/2019)
01/08/2019	5	MAGISTRATE JUDGE's NOTICE of Availability to Exercise Jurisdiction issued. (DJH) (Entered: 01/08/2019)
01/14/2019	6	ORDER TO SHOW CAUSE (State Conviction) - LAWRENCE NUNLEY's petition for a writ of habeas corpus challenges the petitioner's conviction and sentence in Indiana state court case number 31D01-0805-FA-000389. The petitioner's motion to proceed in forma pauperis, dkt. 3 , is denied as presented. He shall have until February 14, 2019, in which to renew his motion to proceed in forma pauperis by attaching a copy of the transactions associated with his institution trust account for the 6-month period preceding the filing of this action on January 8, 2019. Respondent is ORDERED to enter an appearance by January 24, 2019. If respondent argues that all claims in the petition are subject to one of the procedural bars for dismissal outlined in Rule 5(b), respondent is ORDERED to file a motion to dismiss based on a complete procedural bar by February 25, 2019. If Track 1 does not apply, respondent is ORDERED to answer the petition by March 18, 2019. The Court does not anticipate extending respondent's deadlines absent respondent specifically setting forth extraordinary circumstances (SEE ORDER FOR ADDITIONAL INFORMATION AND DEADLINES). Signed by Judge James R. Sweeney II on 1/14/2019. (DMW) (Entered: 01/15/2019)
01/16/2019	7	NOTICE of Appearance by Jesse R. Drum on behalf of Respondent RICHARD BROWN. (Drum, Jesse) (Entered: 01/16/2019)
01/29/2019	8	MOTION for Leave to Proceed in forma pauperis, filed by Petitioner LAWRENCE NUNLEY. (Attachments: # 1 Exhibit)(JRB) (Entered: 01/29/2019)
01/29/2019	9	Entry - The petitioner's motion for leave to proceed in forma pauperis, dkt. 8 is denied. The petitioner's inmate trust account certification reflects that he has sufficient funds to pay the $5.00 filing fee for this action. The petitioner shall have through February 21, 2019, in which to pay the Five Dollar filing fee to the clerk of the court. Signed by Judge James R. Sweeney II on 1/29/2019. (DMW) (Entered: 01/30/2019)

02/12/2019	10	NOTICE to the Court re filing fee, filed by Petitioner LAWRENCE NUNLEY (DMW) (Entered: 02/12/2019)
02/14/2019	11	RECEIPT #IP063962 for Habeas filing fee in the amount of $5.00, paid by Petitioner. (REO) (Entered: 02/14/2019)
03/11/2019	12	First MOTION for Extension of Time to April 17, 2019 , filed by Respondent RICHARD BROWN. (Attachments: # 1 Text of Proposed Order)(Drum, Jesse) (Entered: 03/11/2019)
03/13/2019	13	ENTRY GRANTING RESPONDENT'S MOTION FOR EXTENSION - The Court GRANTS the motion, dkt. 12 , and gives Respondent up to and including April 17, 2019, within which to file a response to the petition for a writ of habeas corpus. Signed by Judge James R. Sweeney II on 3/13/2019. (DMW) (Entered: 03/14/2019)
04/17/2019	14	RETURN TO ORDER TO SHOW CAUSE, re 13 Order on Motion for Extension of Time to File, filed by RICHARD BROWN.. (Attachments: # 1 Exhibit A - CCS, # 2 Exhibit B - DA Docket, # 3 Exhibit C - DA Appellant's, # 4 Exhibit D - DA Appellee's, # 5 Exhibit E - DA Opinion, # 6 Exhibit F - DA Pet. to Trans., # 7 Exhibit G - DA Supp. Pet. to Trans., # 8 Exhibit H - DA Supp. Trans. Resp., # 9 Exhibit I - PCR CCS, # 10 Exhibit J - PCR Docket, # 11 Exhibit K - PCR Appellant's, # 12 Exhibit L - PCR Appellee's, # 13 Exhibit M - PCR Reply, # 14 Exhibit N - PCR Memo Decision, # 15 Exhibit O - PCR Pet. to Trans.)(Drum, Jesse) (Entered: 04/17/2019)
04/17/2019	15	NOTICE of Filing *of State Court Record of Proceedings* by RICHARD BROWN (Attachments: # 1 State Court Record Direct Appeal Appendix Volume 1 of 2, # 2 State Court Record Direct Appeal Table of Contents, # 3 State Court Record Direct Appeal Transcript Volume 1 of 4, # 4 State Court Record Direct Appeal Transcript Volume 2 of 4, # 5 State Court Record Direct Appeal Transcript Volume 3 of 4, # 6 State Court Record Direct Appeal Transcript Volume 4 of 4, # 7 State Court Record Direct Appeal Supplemental Transcript, # 8 State Court Record Direct Appeal Exhibits, # 9 State Court Record Post-Conviction Appendix Volume 1 of 3, # 10 State Court Record Post-Conviction Appendix Volume 2 of 3, # 11 State Court Record Post-Conviction Appendix Volume 3 of 3, # 12 State Court Record Post-Conviction Table of Contents, # 13 State Court Record Post-Conviction Transcript Volume 1 of 1) (Drum, Jesse) (Entered: 04/17/2019)
04/18/2019	16	SEALED *Direct Appeal Appendix Volume II*, filed by Respondent RICHARD BROWN. (Drum, Jesse) (Entered: 04/18/2019)
04/29/2019	17	MOTION for Extension of Time, filed by Petitioner LAWRENCE NUNLEY. (MAT) (Entered: 04/29/2019)
04/29/2019	18	Order - The petitioner's motion for extension of time, dkt. 17 is granted. The petitioner shall have through June 17, 2019, in which file a reply to the respondent's return to the order to show cause. Signed by Judge James R. Sweeney II on 4/29/2019. (DMW) (Entered: 04/30/2019)

06/12/2019	19	Reply re 14 Return to Order to Show Cause, filed by LAWRENCE NUNLEY. (DMW) (Entered: 06/12/2019)
12/03/2019	20	Correspondence REQUESTING COPY of Case Docket Sheet, filed by Lawrence Nunley. (Attachments: # 1 Docket Sheet) (TMC) (Entered: 12/03/2019)
01/23/2020	21	Correspondence REQUESTING COPY of Case Docket Sheet, filed by Lawrence Nunley. (Attachments: # 1 Docket Sheet) (TMC) (Entered: 01/23/2020)
03/30/2020	22	Order Denying Petition for a Writ of Habeas Corpus - Mr. Nunley's petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 is denied, and a certificate of appealability shall not issue. Final judgment in accordance with this decision shall issue. SEE ORDER. Signed by Judge James R. Sweeney II on 3/30/2020.(KAA) (Entered: 03/30/2020)
03/30/2020	23	FINAL JUDGMENT - The Court now enters final judgment. The petitioners petition for a writ of habeas corpus is denied, and the action is dismissed with prejudice. Signed by Judge James R. Sweeney II on 3/30/2020.(KAA) (Entered: 03/30/2020)
04/21/2020	24	NOTICE OF APPEAL as to 22 Order, 23 Closed Judgment, filed by Petitioner LAWRENCE NUNLEY. (No fee paid with this filing) (AAS) (Entered: 04/21/2020)
04/21/2020	25	MOTION to Proceed on Appeal in forma pauperis, filed by Petitioner LAWRENCE NUNLEY. (AAS) (Entered: 04/21/2020)
04/21/2020	26	SEVENTH CIRCUIT TRANSCRIPT INFORMATION SHEET by LAWRENCE NUNLEY re 24 Notice of Appeal (AAS) (Entered: 04/21/2020)
04/21/2020	27	Jurisdictional Statement by LAWRENCE NUNLEY. (AAS) (Entered: 04/21/2020)
04/21/2020	28	DOCKETING STATEMENT by LAWRENCE NUNLEY re 24 Notice of Appeal (AAS) (Entered: 04/21/2020)
04/21/2020	29	DESIGNATION of Record on Appeal by LAWRENCE NUNLEY re 24 Notice of Appeal (AAS) (Entered: 04/21/2020)
04/21/2020	30	MOTION for Certificate of Appealability, filed by Petitioner LAWRENCE NUNLEY. (LBT) (Entered: 04/22/2020)
04/22/2020	31	PARTIES' SHORT RECORD re 24 Notice of Appeal **- Instructions for Attorneys/Parties attached.** (LBT) (Entered: 04/22/2020)

Case #: 2:19-cv-00012-JRS-DLP