ORIGINAL

IN THE
COURT OF APPEALS OF INDIANA

CAUSE NO. 31A01-1703-PC-547

Lawrence Nunley, #198710

Appellant/Petitioner,

vs.

State of Indiana,

Appellee/Defendant.

Appeal from the Superior Court
Of Harrison County

Trial Cause: 31D01-1009-PC-011

The Honorable
Joseph Claypool
Presiding Judge

APPELLANT'S APPENDIX
VOLUME III

Lawrence E. Nunley
DOC #198710
Wabash Valley Corr. Fac.
P.O. BOX 1111
Carlisle, Indiana 47838

STATE OF INDIANA)
) SS:
COUNTY OF HARRISON)

IN THE SUPERIOR COURT

OF HARRISON COUNTY

LAWRENCE NUNLEY,

PETITIONER,

-v-

STATE OF INDIANA,

RESPONDENT.

CAUSE NO 31D01-1009-PC-011

REQUEST FOR STATUS UPDATE

Comes now the Petitioner, Lawrence, E. Nunley, *pro se*, and respectfully moves this Honorable Court to notify him of the status of his pending motions. In support, Petitioner states to this Honorable Court as follows.

1. Mr. Nunley has a pending post-conviction petition, and he has filed multiple motions with this court, including a motion for specific discovery, a motion to procure the original record from the Indiana Court of Appeals for introduction into evidence at the post-conviction hearing, and requests for the issuance of subpoenas.

2. Approximately 60 days have passed since the motions were filed, and the Petitioner has not been notified if the Court has ruled.

3. Mr. Nunley needs to know the status of his requests because the hearing date is less than 4 months away and these preliminary matters must be resolved in time for Mr. Nunley to properly and adequately prepare for the hearing. This is particularly true with the identification of the person responsible for preparing the transcript of the deposition of A.Y.

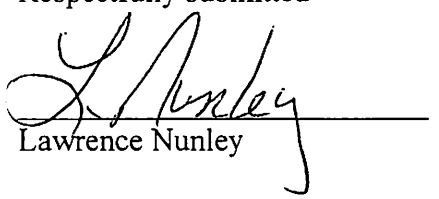
4. As noted in his motion for specific discovery, Mr. Nunley needs to subpoena the person responsible for preparing the transcript in order to properly authenticate it. The State agreed to the admission of Mr. Nunley's highlighted copy of the transcript could be admitted providing that it was true and accurate in all other respects. Thus, Mr. Nunley must still authenticate the transcript by subpoenaing the person who prepared it. Neither Ms. Schultz nor the State has provided the name and address of the person responsible for preparing the transcript.

5. Mr. Nunley's understanding is that subpoena requests are typically required at least 60 days prior to the hearing. That date is rapidly approaching.

6. Mr. Nunley brings this motion in good faith and believes that he is entitled to the relief sought

WHEREFORE, Mr. Nunley asks this Honorable Court to notify him of the status of his pending motions, petitions, and requests, and for all other relief deemed just and proper.

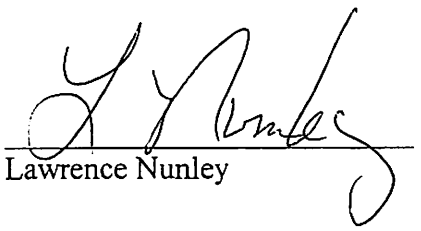
Respectfully submitted



Lawrence Nunley

CERTIFICATE OF SERVICE

I, Lawrence Nunley, hereby affirm that on this 2nd day of March 2016, I served a true and accurate copy of the foregoing Motion for Specific Discovery upon the Prosecuting Attorney for Harrison County by ordinary first class, postage prepaid, United States Mail, in accordance with **T.R. 5**.



Lawrence Nunley

IN THE HARRISON SUPERIOR COURT

STATE OF INDIANA

LAWRENCE NUNLEY,
PETITIONER

VS. CAUSE NO.: 31D01-1009-PC-11

STATE OF INDIANA,
RESPONDENT

COURT'S RESPONSE TO PETITIONER'S REQUEST FOR ISSUANCE OF SUBPOENAS:

The pro-se Petitioner has requested the issuance of subpoenas to two witnesses to be present at an evidentiary hearing. In support of Petitioner's request, he has submitted affidavits in support. The two witnesses he wishes to subpoena are his counsel at the trial of the underlying criminal case and his counsel on his direct appeal of his conviction.

Petitioner is required (shall) specifically state by affidavit the reason the witnesses are to be called and the witnesses expected testimony. The Petitioner has stated a reason for the witnesses to be required to testify and the expected testimony. The testimony the Petitioner is expecting from the witnesses goes far beyond the pale of reason of what could be the expected testimony of prior legal counsel.

Based upon the request of the Petitioner and his accompanying affidavits, the expected testimony cannot be expected to be relevant or probative. Therefore, the Petitioner's request for subpoenas is denied.

IT IS THEREFORE ORDERED that the Petitioner's Request for Issuance of

Subpoenas is hereby **DENIED**.

SO ORDERED this 11th day of March, 2016.

HON. JOSEPH L. CLAYPOOL, JUDGE
HARRISON SUPERIOR COURT

Cc:
Petitioner
Respondent

IN THE COURT OF APPEALS
OF THE STATE OF INDIANA

LAWRENCE NUNLEY,	)	
	)	
Appellant,	)	
	)	
v.	)	CAUSE NO.: 31A01-0902-CR-88
	)	
	)	
STATE OF INDIANA	)	
	)	
Appellee,	)	

PETITION FOR RECORD OF PROCEEDINGS

Comes now Judge Joseph L. Claypool, and respectfully requests that the court forward the Record of Proceedings from the above appeal to the Harrison County Superior Court.

In support, the undersigned would show the court as follows:

1. The petitioner, Lawrence Nunley, has a Petition for Post-Conviction Relief pending in the Harrison County Superior Court, under Case 31D01-1009-PC-11.

2. The post-conviction court must review the record of proceedings from this direct appeal in order to rule on the pending petition for post-conviction relief.

WHEREFORE, the undersigned respectfully requests that the court order the Clerk of the Indiana Court of Appeals to forward the Record of Proceedings in this case to the following:

c/o Judge Joseph L. Claypool
Harrison County Superior Court
1445 Gardner Lane, N.W.
Corydon, Indiana 47112

Dated this 11th day of March, 2016.

Respectfully submitted:

HON. JOSEPH L. CLAYPOOL, JUDGE
HARRISON SUPERIOR COURT

IN THE HARRISON SUPERIOR COURT

STATE OF INDIANA

LAWRENCE NUNLEY,
PETITIONER

VS. **CAUSE NO.: 31D01-1009-PC-11**

STATE OF INDIANA,
RESPONDENT

ORDER ON PETITIONER'S MOTION FOR SPECIFIC DISCOVERY

Petitioner requests the Court order the State of Indiana or Ms. Susan Schultz, his counsel at the trial court level, provide a true and accurate copy of the deposition taken of the victim A.Y. in the criminal action in cause number 31D01-0805-FA-389, which concluded in the conviction of Petitioner. Petitioner states in his motion that he is in possession of the requested document; however, the document has been altered (highlighted) and he fears it would not be admissible because of this alteration.

The Respondent, in its response to the Petitioner's Motion for Specific Discovery, concedes that it would **not** object to Petitioner's highlighted copy being introduced into evidence provided that, prior to any such stipulation, the Respondent be given the opportunity to inspect Petitioner's document and that it is a complete and accurate copy of the deposition.

Based upon the Respondent's response, the Court orders the Petitioner to provide a copy of the deposition in Petitioner's possession to the Respondent for review prior to the hearing on this matter.

IT IS THEREFORE ORDERED that the Petitioner is to provide the Respondent with a copy of the requested deposition and Petitioner's Motion for Specific Discovery is **DENIED.** However, if the Respondent does not stipulate to its admission, the Petitioner may make a further request.

SO ORDERED this 11th day of March, 2016.

HON. JOSEPH L. CLAYPOOL, JUDGE
HARRISON SUPERIOR COURT

Cc:
Petitioner
Respondent

IN THE HARRISON SUPERIOR COURT

STATE OF INDIANA

LAWRENCE NUNLEY,
PETITIONER

VS. **CAUSE NO.: 31D01-1009-PC-11**

STATE OF INDIANA,
RESPONDENT

ORDER ON PETITIONER'S MOTION TO AMEND PETITION FOR POST-CONVICTION RELIEF

Pursuant to the Indiana rules of procedure for post-conviction relief, the Court grants Petitioner's Motion filed with this Court.

IT IS THEREFORE ORDERED that the Defendant's Motion to Amend Petition for Post-Conviction Relief is hereby **GRANTED**.

SO ORDERED this 11th day of March, 2016.

HON. JOSEPH L. CLAYPOOL, JUDGE
HARRISON SUPERIOR COURT

Cc:
Petitioner
Respondent

STATE OF INDIANA	)	IN THE SUPERIOR COURT
	) SS:	
COUNTY OF HARRISON	)	OF HARRISON COUNTY
LAWRENCE NUNLEY,	)	
	)	
PETITIONER,	)	
	)	
-v-	)	CAUSE NO 31D01-1009-PC-011
	)	
STATE OF INDIANA,	)	
	)	
RESPONDENT.	)	

ORDER

This cause comes before the Court on the motion for an Order Requesting to Have the Original Record of Proceedings Removed from the Appellate Court to be Entered into Evidence in the Post-Conviction Court filed by petitioner, *pro se*, which said motion is more particularly in the following words and figures; to wit:

(H.I)

The court examined, considered, and being duly advised in the premises now grants said motion.

THERFORE, IT IS ORDERED, ADJUDGED AND DECREED by this court that the Clerk of the Indiana Supreme/Appeals Court is ordered to transmit the original record filed in Cause No. 31A01-0902-CR-00088, to the trial court for use in Post-Conviction proceedings.

SO ORDERED this day of March 11, 2016.

Judge

(E-10)

FILED
APR 27 2016
CLERK, HARRISON SUPERIOR COURT

STATE OF INDIANA)
) SS:
COUNTY OF HARRISON)

IN THE SUPERIOR COURT
OF HARRISON COUNTY

LAWRENCE NUNLEY,
PETITIONER,

-v-

STATE OF INDIANA,
RESPONDENT.

CAUSE NO 31D01-1009-PC-011

SECOND REQUEST FOR SPECIFIC DISCOVERY

Comes now the Petitioner, Lawrence, E. Nunley, *pro se*, and respectfully moves this Honorable Court to **ORDER** the State of Indiana to provide him with the name and address of the person responsible for the taking depositions in underlying trial cause. In support, Petitioner states to this Honorable court as follows:

1. As noted in his first motion for specific discovery, Mr. Nunley needs to subpoena the person responsible for preparing the transcript in order to properly authenticate it. The State agreed to the admission of Mr. Nunley's highlighted copy of the transcript could be admitted providing that it was true and accurate in all other respects. Thus, Mr. Nunley must still authenticate the transcript by subpoenaing the person who prepared it. Neither Ms. Schultz nor the State has provided the name and address of the person responsible for preparing the transcript, which prevents Mr. Nunley from requesting a subpoena.
2. Mr. Nunley's understanding is that subpoena requests are typically required at least 60 days prior to the hearing. That date is rapidly approaching.

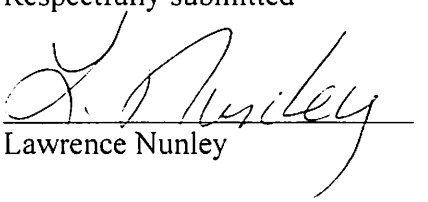
3. Unless the State of Indiana is prepared to stipulate to the authenticity of the depositions, Mr. Nunley needs to submit a request for subpoena for the person responsible for transcribing the depositions in order to meet the evidentiary requirements. Mr. Nunley cannot comply with the trial rules and/or the rules governing post-conviction remedies without the name and address of the person responsible for transcribing the depositions.

4. Mr. Nunley believes that the person who transcribed the deposition is Shelia Young.

5. Mr. Nunley brings this motion in good faith and believes that he is entitled to the relief sought

WHEREFORE, Mr. Nunley asks this Honorable Court to notify him of the status of his pending motions, petitions, and requests, and for all other relief deemed just and proper.

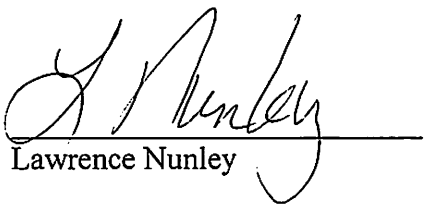
Respectfully submitted



Lawrence Nunley

CERTIFICATE OF SERVICE

I, Lawrence Nunley, hereby affirm that on this 25 day of April 2016, I served a true and accurate copy of the foregoing Motion for Specific Discovery upon the Prosecuting Attorney for Harrison County by ordinary first class, postage prepaid, United States Mail, in accordance with **T.R. 5**.



Lawrence Nunley

IN THE SUPERIOR COURT FOR THE COUNTY OF HARRISON

STATE OF INDIANA

LAWRENCE NUNLEY,
PETITIONER

VS. **CAUSE NO. 31D01-1009-PC-11**

STATE OF INDIANA,
RESPONDENT

RESPONSE TO SECOND REQUEST FOR SPECIFIC DISCOVERY

COMES NOW the State of Indiana, by Mark A. Kiesler, Chief Deputy Prosecutor, and files its response to Petitioner's Second Request for Specific Discovery, and in support thereof states and alleges:

1. The State has received Petitioner's Second Motion for Specific Discovery, in which the Petitioner is requesting "the name and address of the person responsible for preparing the transcript."
2. As stated in the State's original Response to Petitioner's Motion for Specific Discovery, "the State has been unable to locate its copy of said deposition." This fact remains unchanged.
3. Further, the State is unaware as to who the court reporter was for the transcript in question.
4. As stated in its previous response, the State would be willing to stipulate to the admission of Petitioner's copy if it is a complete, true, and accurate copy, but that the State would request inspection first. However, the Defendant has failed to provide a copy of said transcript to the State.

5. Without first viewing a copy of the transcript, the State cannot stipulate to its admission.

Respectfully Submitted,

Mark A. Kiesler #28634-31
Chief Deputy Prosecutor
Harrison County Prosecutor's Office
1445 Gardner Lane NW
Corydon, Indiana 47112
(812) 738-4241

CERTIFICATE OF SERVICE

I hereby certify that I have served a copy of the foregoing document by United States Mail, postage prepaid, this 28th day of April, 2016, in accordance with the Indiana Rules of Trial Procedure upon:

Lawrence Nunley #198710
Wabash Valley Correctional Facility
6908 South Old Highway 41
Carlisle, Indiana 47838

Mark A. Kiesler

STATE OF INDIANA	)	IN THE SUPERIOR COURT
	) SS:	
COUNTY OF HARRISON	)	OF HARRISON COUNTY
LAWRENCE NUNLEY,	)	
PETITIONER,	)	
-v-	)	CAUSE NO 31D01-1009-PC-011
STATE OF INDIANA,	)	
RESPONDENT.	)	

FILED
APR 29 2016
Sally A. White
CLERK, HARRISON SUPERIOR COURT

NOTICE TO THE COURT THAT PETITIONER IS NOT RECEIVING NOTIFICATION OF ORDERS

Comes now the Petitioner, Lawrence, E. Nunley, *pro se*, and respectfully notifies this Honorable Court that he has not been receiving copies of the Court's orders in this cause of action. Nunley states to this Honorable Court as follows:

1. Mr. Nunley has a pending post-conviction petition, and he has filed multiple motions with this court, including a motion for specific discovery, a motion to procure the original record from the Indiana Court of Appeals for introduction into evidence at the post-conviction hearing, and requests for the issuance of subpoenas.

2. Some time elapsed and Mr. Nunley had not received notification of the disposition of the motions. Therefore, Nunley requested a case chronology from the clerk of the court.

3. The clerk of the court sent the requested case chronology; however, the case chronology does not include the court's ruling on the motions. The case chronology has a brief description below a .pdf or .doc icon. But, that description

does not indicate if the court granted or denied the motion The case chronology, therefore, does not notify the Petitioner of the status of his motions.

4. Petitioner subsequently filed a Request for Status Update. This Honorable Court ordered the court clerk to send the Petitioner a case chronology because all of the motions had been ruled upon. The case chronology still does not indicate the way in which the court ruled.

5. Petitioner still has not been notified of the court's rulings.

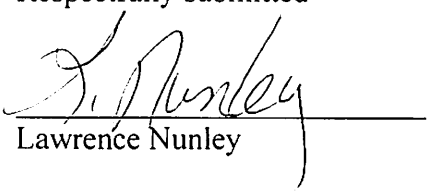
6. Petitioner should be receiving copies of the actual orders, which are presumably attached to the digital version of the case chronology as indicated by the icons that appear in the entries.

7. Petitioner asks this Honorable Court to order the court clerk to provide him with copies of the actual orders from the court, and to supply Petitioner with timely copies of future orders when they are made.

8. Such an order will keep Petitioner reasonably informed and simultaneously eliminate repetitive or unnecessary filings, which will serve judicial economy.

WHEREFORE, Mr. Nunley asks this Honorable Court to take notice of the aforementioned points; and to order the court clerk to provide him with copies of the actual orders from the court, as well as to supply Petitioner with timely copies of future orders when they are made; and for all other relief deemed just and appropriate in the premises.

Respectfully submitted



Lawrence Nunley

CERTIFICATE OF SERVICE

I, Lawrence Nunley, hereby affirm that on this 27 day of April 2016, I served a true and accurate copy of the foregoing Motion for Specific Discovery upon the Prosecuting Attorney for Harrison County by ordinary first class, postage prepaid, United States Mail, in accordance with **T.R. 5**.

L. Nunley

Lawrence Nunley

STATE OF INDIANA	)	IN THE HARRISON SUPERIOR COURT
	) SS:	
COUNTY OF HARRISON	)	CAUSE NO 31D01-1009-PC-011
LAWRENCE NUNLEY,	)	
	)	
PETITIONER,	)	
	)	
-v-	)	
	)	
STATE OF INDIANA,	)	
	)	
RESPONDENT.	)	

FILED

AUG 15 2016

Sally A. White
CLERK, HARRISON SUPERIOR COURT

OFFER OF PROOF

Comes now the Petitioner, Lawrence Nunley, *pro se*, pursuant to Ind. Evid. Rule 103(B)(2)(c), and respectfully submits his offer of proof regarding the evidentiary ruling on witness testimony. In support, Nunley states:

1. On July 14, 2016, an evidentiary hearing was held. As a preliminary matter, Nunley, once again, notified this Court that he was not receiving the filings and rulings associated with the above-captioned cause of action. This Court promised to take corrective steps to ensure proper service in the future. The Court then notified Nunley that the subpoenas for the attorneys alleged to be ineffective were denied. When Nunley attempted to explain that their testimony was a critical component to establishing his ineffective assistance claims, the Court asked him if he thought they were going to admit to malpractice.

2. Initially, Nunley notes that questions regarding the effective representation of counsel is a mixed question of fact and law. *Strickland v. Washington*, 466 U.S. 668, 698, 80 L. Ed. 2d 674, 104 S. Ct. 2052 (1984); *State v. Van Cleave*, 674 N.E.2d 1293, 1296 (Ind. 1996).

3. Therefore, an evidentiary hearing is typically required to develop all of the facts relevant to the claim, as an ineffective assistance of counsel claim revolves around the unique facts of that case and many of those facts may exist outside of the record. See *Lloyd v. State,* 717 N.E.2d 895

(citing *Sherwood v. State*, 453 N.E.2d 187, 189 (Ind. 1983) and *Hough v. State*, 690 N.E.2d 267, 272-73 (Ind. 1997), reh'g denied, cert. denied, 525 U.S. 1021, 119 S. Ct. 550, 142 L. Ed. 2d 457 (1998). See also 24 C.J.S. Criminal Law § 1633(b) (While a post-conviction petitioner is not ordinarily entitled as a matter of right to an evidentiary hearing, courts are encouraged, and ordinarily required, to hold such hearings when the petition alleges ineffective assistance of counsel...).

3. An evidentiary hearing is required because "[a] fair assessment of attorney performance requires that every effort be made . . . to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. *Strickland v. Washington*, 466 U.S. 668, 698, 80 L. Ed. 2d 674, 104 S. Ct. 2052 (1984); *Woods v. State,* 701 N.E.2d 1208 (Ind. 1998).

4. Only counsel can enlighten this Court regarding trial strategy/tactics and/or the reasoning behind the acts/omissions.

5. Counsel's reasoning is particularly relevant and probative, based upon the current precedent. Our Supreme Court has said that "[e]ven 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.'" *Woods v. State*, 701 N.E.2d 1208, 1212 (Ind. 1998) (citing *Kimmelman v. Morrison*, 477 U.S. 365, 383-387, 106 S.Ct. 2574, 91 L.Ed. 2d 305 (1986)).

6. Nunley believes that denying him the opportunity to question his attorneys is tantamount to precluding him from meeting his burden of proof.

7. During the July 14, 2016 hearing, this Court ordered Nunley to submit interrogatories to the attorneys in order to attempt to reconstruct the circumstances/reasoning of the challenged conduct from counsel's perspective at the time.

8. Nunley believes that interrogatories are inapplicable in this situation and insufficient to establish his claims.

9 T.R. 33 states, in pertinent part, that "Any party may serve upon any other party written interrogatories to be answered by the party served or, if the party served is an organization including a governmental organization, or a partnership, by any officer or agent, who shall furnish such information as is available to the party. Interrogatories may, without leave of court, be served upon the plaintiff after commencement of the action and upon any other party with or after service of the summons and complaint upon that party." T.R. 33(A).

10. Nunley believes that the word. "party" is a term of art that encompasses only the Plaintiffs and Defendants in the cause of action. Neither attorney is a "party" to the post-conviction action.

11. This Court has interpreted this rule's use of the word, "party," as being synonymous with the word, "person."

12. Moreover, the use of interrogatories permits the witnesses a significant amount of time to formulate responses to the questions. The Attorneys have ample time to conduct legal research, consult notes/files, and formulate favorable responses justifying the challenged conduct. Nunley believes that this is not conducive with uncovering the truth. This Court has already indicated that neither counsel will "admit to malpractice," which was the basis for denying the subpoenas in the first place. If this assessment is true, the interrogatories only provide the attorneys with the time and the platform to justify the challenged conduct by developing some hypothetically strategic justification that Nunley cannot probe or refute. This is a violation of Due Process.

13. As Justice Clark endeavored to explain in *Breithaupt v. Abram*, 352 U.S. 432 (1956):

> [D]ue process is not measured by the yardstick of personal reaction... of the most sensitive person, but by the whole community sense of 'decency and fairness" that has been woven by common experience into the fabric of acceptable conduct. It is on this bedrock that this court has established the concept of due process.

14. Nunley is not being provided with that "sense of decency and fairness" embodied by basic Due Process principles. If Nunley were represented by an attorney, the subpoenas would have been issued without question.

15. As a *pro se* litigant, Nunley has the same burden as counsel. *See, e.g., Whatley v. State*, 937 N.E.2d 1238, 1240 (Ind. Ct. App. 2010), *citing Evans v. State*, 809 N.E.2d 338, 344 (Ind. Ct. App. 2004), *trans. denied, Ross v. State*, 877 N.E.2d 830, 833 (Ind. Ct. App. 2007); *see also, Wright v. State*, 772 N.E.2d 449 (Ind. Ct. App. 2002). Yet, he is not being given the same opportunities to meet that burden.

16. In order for the subpoenas to be granted, Nunley was required to demonstrate to this Court that the testimony was relevant and probative to the issues presented in the post-conviction petition.

17. Nunley's Affidavit in Support of Request for Subpoena for Susan Schultz clearly and unequivocally stated that Ms. Schultz would "testify that her decision not to impeach the State's key witness was not a tactical one. Rather, it was merely an oversight. Ms. Schultz will testify that her failure to object to the admission of written testimony was not tactical. Rather, it was the result of her failing to realize the detrimental impact associated with emphasizing the testimony. Ms. Schultz will further testify that she did not have a strategic reason to fail to object to the introduction of State's Exhibit 2 or the instances of vouching for A.Y.'s credibility. Ms. Schultz will provide the Court with insight to her thoughts and views as they existed at the time of trial to aid in its determination of the issues before the Court. Furthermore, Ms. Schultz will also authenticate documents from her files for admission into evidence at the hearing."

18. This testimony is relevant and probative to the issues presented in Nunley's petition. In fact, Ms. Schultz's expected testimony would clearly establish Nunley's claims of ineffective assistance. Therefore, this Court should have issued the subpoena.

19. Similarly, Nunley's Affidavit in Support of Request for Subpoena for Jon McGovern

clearly and unequivocally stated that Mr. McGovern would "testify that there was no strategic reason that he failed to raise issues related to Mr. Nunley's sentence. Mr. McGovern simply neglected to present a sentencing issue. Mr. McGovern will further testify that his failure to raise the issues related to the undue emphasis of A.Y.'s testimony and the vouching for A.Y.'s credibility were not strategic but were simply oversights. He just did not recognize the error; therefore, he did not make a strategic decision not to present the issue. Mr. McGovern will also authenticate the briefs that he submitted for admission into evidence."

20. This testimony is relevant and probative to the issues presented in Nunley's petition. In fact, Mr. McGovern's expected testimony would clearly establish Nunley's claims of ineffective assistance. Therefore, this Court should have issued the subpoena.

21. Nunley is making this offer of proof for the purpose of properly preserving the denial of issuance of subpoenas for appellate review.

Respectfully submitted,

L. Nunley

Lawrence Nunley

CERTIFICATE OF SERVICE

I, Lawrence Nunley, hereby affirm that on this 10TH day of August 2016, I served a true and accurate copy of the foregoing Offer of Proof upon the Prosecuting Attorney for Harrison County by ordinary first class, postage prepaid, United States Mail, in accordance with **T.R. 5**.

L. Nunley

Lawrence Nunley

IN THE SUPERIOR COURT FOR THE COUNTY OF HARRISON

STATE OF INDIANA

LAWRENCE NUNLEY,
PETITIONER

VS. **CAUSE NO. 31D01-1009-PC-11**

STATE OF INDIANA,
RESPONDENT

MOTION TO STRIKE

COMES NOW the State of Indiana, by its (Deputy) Prosecutor, and files its Motion to Strike Defendant's Request for Admissions from Susan Schultz, and in support thereof states and alleges:

1. On or about August 15, 2016, the State received Petitioner's Request for Admissions from Susan Schultz;

2. Pursuant to Trial Rule 36(A), "A party may serve upon any other party a written request for the admission....";

3. Susan Schultz is not a party to this matter, and thus, cannot be required to complete a Request for Admissions in this matter;

WHEREFORE, the State of Indiana, by its (Deputy) Prosecuting Attorney, respectfully requests the Court to strike Petitioner's Request for Admissions from Susan Schultz, and to issue

an Order finding that Susan Schultz is not required to respond to Petitioner's Request for Admissions, and for all other relief that is just and proper in the premises.

Respectfully Submitted,

(Deputy) Prosecuting Attorney
Harrison County Prosecutor's Office
1445 Gardner Lane NW
Corydon, Indiana 47112
(812) 738-4241

CERTIFICATE OF SERVICE

I hereby certify that I have served a copy of the foregoing document by United States Mail, postage prepaid, this 22nd day of August, 2016, in accordance with the Indiana Rules of Trial Procedure upon:

Lawrence Nunley #198710
Wabash Valley Correctional Facility
6908 South Old Highway 41
Carlisle, Indiana 47838

(Deputy) Prosecuting Attorney

IN THE HARRISON SUPERIOR COURT

LAWRENCE NUNLEY,
PETITIONER,

VS. CAUSE NO. 31D01-1009-PC-011

STATE OF INDIANA,
RESPONDENT

OBJECTIONS TO REQUESTS FOR ADMISSIONS

Now comes Susan Schultz, recipient of Request for Admissions From Susan Schultz, as filed by Petitioner, and objects to the Requests for Admissions served on her by first class mail. Her objections are based on the following facts:

1. The provisions of TR 37 limit the use of Requests for Admissions to parties to an action. She is not a party to this Petition for Post Conviction Relief. Furthermore, she has not been served with a copy of the Petition nor is she aware of the contents of that petition.

2. She has no independent recollection of the specific facts referred to in the requests submitted to her. In order to truthfully respond to the Requests, it would be necessary to review a transcript of the trial to refresh her memory of the proceedings.. She has no copy of the transcript and has never viewed a copy of the transcript.

Wherefore, Susan Schultz objects to the Requests to Admit and requests this Court for the entry of its order quashing the Requests.

Susan Schultz

Susan Schultz 15667-14
127 E. Chestnut St. Suite 1
Corydon, IN 47112
(812) 738-1900

CERTIFICATE OF SERVICE

I affirm that on the 30th day of August, 2016 I served a copy of the foregoing on Lawrence Nunley by first class mail and in person on the Harrison County Prosecutor.

Susan Schultz

Susan Schultz

IN THE HARRISON SUPERIOR COURT

STATE OF INDIANA

LAWRENCE NUNLEY
PETITIONER,

VS. CAUSE NO. 31D01-1009-PC-011

STATE OF INDIANA,
RESPONDENT

ORDER QUASHING REQUESTS FOR ADMISSION

Susan Schultz, having filed her objections to requests for admission submitted to her by Lawrence Nunley, the Court being duly advised;

IT IS THEREFORE ORDERED that the Requests for Admissions served upon Susan Schultz are hereby Quashed. Susan Schultz shall have no obligation to respond to those requests.

SO ORDERED this 12 day of September, 2016.

Honorable Joseph Claypool, Judge
Harrison Superior Court

Distribution:

Lawrence Nunley
Harrison County Prosecutor
Susan Schultz

STATE OF INDIANA	)	IN THE HARRISON SUPERIOR COURT
	) SS:	
COUNTY OF HARRISON	)	CAUSE NO 31D01-1009-PC-011
LAWRENCE NUNLEY,	)	
PETITIONER,	)	
-v-	)	
STATE OF INDIANA,	)	
RESPONDENT.	)	

FILED

SEP 19 2016

Sally A. Whites
CLERK, HARRISON SUPERIOR COURT

MOTION TO RECONSIDER PREVIOUS RULING AND CLARIFY INCONSISTENT RULINGS BY THIS HONORABLE COURT

Comes now the Petitioner, Lawrence Nunley, *pro se* and respectfully asks this Honorable Court to reconsider its previous ruling and to clarify the inconsistent ruling made by this Honorable Court. In support, Nunley states:

1. On July 14, 2016, an evidentiary hearing was held. As a preliminary matter, Nunley, once again, notified this Court that he was not receiving the filings and rulings associated with the above-captioned cause of action. This Court promised to take corrective steps to ensure proper service in the future. The Court then notified Nunley that the subpoenas for the attorneys alleged to be ineffective were denied. When Nunley attempted to explain that their testimony was a critical component to establishing his ineffective assistance claims, the Court asked him if he thought they were going to admit to malpractice.

2. The Court subsequently ordered Mr. Nunley to obtain counsel's testimony through interrogatories.

3. Upon his return to the prison, Mr. Nunley tendered an offer proof, based in part on the fact that interrogatories were limited to the parties and should not be used for counsel's testimony.

4. Since this Court determined that discovery procedures were valid for obtaining the testimony of his trial and appellate attorneys, Mr. Nunley sent Susan Schultz a request for admissions, pursuant to T.R. 36.

5. Ms. Schultz objected, based on the fact that she was not a party and admissions were limited to the parties and that she had insufficient information upon which to admit or deny the items presented in the request.

6. The Court then quashed the Request for Admissions.

7. First, the Court's ruling with regard to the Request for Admissions is inconsistent with its demand that Mr. Nunley use interrogatories to obtain counsel's testimony. As Mr. Nunley pointed out in his offer of proof, interrogatories are limited to the parties. Yet, when Ms. Schultz made this point, the Court quashed the request and informed her that she need not answer.

8. By her own admission, Ms. Schultz is not a party in this cause. Therefore, Ms. Schultz has no standing to object., Any objection tendered by her is inappropriate. The State did not object, presumably based on this Court's ruling.

9. Furthermore, Ms. Schultz's objection does not comport with T.R. 36. T.R. 36(A) specifically states that insufficient information cannot form the basis of an objection. Under this rule, Ms. Schultz must make an attempt to obtain the information or state that it would be unreasonably burdensome for her. Ms. Schultz did not do this. This

Court provided Ms. Schultz with the opportunity to consult her files and the record when crafting the answers to the interrogatories/admissions, but she failed to take advantage of that opportunity.

10. Counsel claims not to have an independent recollection of this matter; however, she told the State Public Defender that she did not know why she failed to impeach A.Y. and that she was willing to testify that it was a mistake. (see attached).

11. Petitioner notes that this Court did not provide him with an opportunity to respond to the objection prior to ruling.

12. As previously noted, Mr. Nunley notes that questions regarding the effective representation of counsel is a mixed question of fact and law. *Strickland v. Washington*, 466 U.S. 668, 698, 80 L. Ed. 2d 674, 104 S. Ct. 2052 (1984); *State v. Van Cleave*, 674 N.E.2d 1293, 1296 (Ind. 1996).

13. Therefore, an evidentiary hearing is typically required to develop all of the facts relevant to the claim, as an ineffective assistance of counsel claim revolves around the unique facts of that case and many of those facts may exist outside of the record. See *Lloyd v. State,* 717 N.E.2d 895 (citing *Sherwood v. State*, 453 N.E.2d 187, 189 (Ind. 1983) and *Hough v. State*, 690 N.E.2d 267, 272-73 (Ind. 1997), reh'g denied, cert. denied, 525 U.S. 1021, 119 S. Ct. 550, 142 L. Ed. 2d 457 (1998). See also 24 C.J.S. Criminal Law § 1633(b) (While a post-conviction petitioner is not ordinarily entitled as a matter of right to an evidentiary hearing, courts are encouraged, and ordinarily required, to hold such hearings when the petition alleges ineffective assistance of counsel…).

14. An evidentiary hearing is required because "[a] fair assessment of attorney performance requires that every effort be made . . . to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. *Strickland v. Washington*, 466 U.S. 668, 698, 80 L. Ed. 2d 674, 104 S. Ct. 2052 (1984); *Woods v. State,* 701 N.E.2d 1208 (Ind. 1998).

15. Only counsel can enlighten this Court regarding trial strategy/tactics and/or the reasoning behind the acts/omissions.

16. Counsel's reasoning is particularly relevant and probative, based upon the current precedent. Our Supreme Court has said that "[e]ven 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.'" *Woods v. State*, 701 N.E.2d 1208, 1212 (Ind. 1998) (citing *Kimmelman v. Morrison*, 477 U.S. 365, 383-387, 106 S.Ct. 2574, 91 L.Ed. 2d 305 (1986)).

17. Nunley believes that denying him the opportunity to question his attorneys is tantamount to precluding him from meeting his burden of proof.

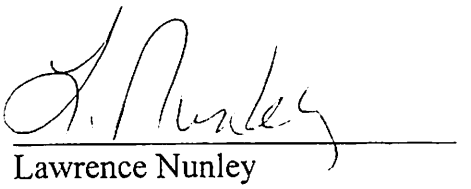
18. Therefore, Mr. Nunley asks this Court to ORDER Ms. Schultz to respond to the Request for Admissions and to clarify the inconsistency between Mr. Nunley's required use of interrogatories and his inability to use a Request for Admissions.

19. In the alternative, Mr. Nunley asks this Court to reconsider the denial of the issuance of subpoenas for his trial and appellate attorneys.

20. Mr. Nunley brings this motion in good faith and believes that he is entitled to the relief sought herein.

WHEREFORE, Mr. Nunley prays that this Court will ORDER Ms. Schultz to respond to the Request for Admissions; clarify the inconsistency between Mr. Nunley's required use of interrogatories and his inability to use a Request for Admissions; or, alternatively, issue subpoenas for trial and appellate counsel to testify at the evidentiary hearing; and for all other relief deemed just and appropriate in the premises.

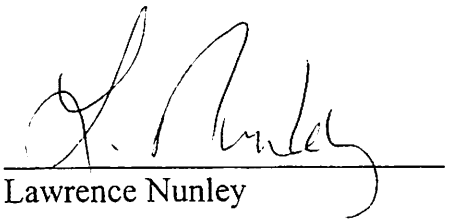
Respectfully submitted,



Lawrence Nunley

CERTIFICATE OF SERVICE

I, Lawrence Nunley, hereby affirm that on this 15th day of September 2016, I served a true and accurate copy of the foregoing Motion to Reconsider Previous Ruling and Clarify Inconsistent Rulings by this Honorable Court upon the Prosecuting Attorney for Harrison County by ordinary first class, postage prepaid, United States Mail, in accordance with T.R. 5.



Lawrence Nunley

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. On the other hand, being eight years old and reluctant to discuss the allegations, she may have simply lied about not recalling what occurred. This is not like the situation where a defendant initially denies knowledge of what occurred, but then recalls details after learning what evidence the police have. In light of the number of different occasions on which A.Y. said she performed oral sex on Nunley, the State could have portrayed this one instance of A.Y.'s professed inability to recall as an unwillingness to revisit the traumatic event. Schultz does not know why she failed to use this impeachment evidence, and is willing to testify that it was a mistake. However, her overall cross-examination of A.Y. was otherwise well-executed, and Nunley's allegation that Schultz "didn't seem to try" is not supported by the record.

Even if counsel performed deficiently by failing to use A.Y.'s prior inconsistent statement, her overall performance was likely "reasonable considering all the circumstances." ***Strickland***, 466 U.S. at 688. In addition, considering all the evidence, I do not believe there is a reasonable probability the jury would have acquitted Nunley of the oral sex charge if they knew A.Y. had indicated she did not recall it six weeks earlier.

Criminal Rule 4

Nunley was arrested on April 30, 2008, and his trial began on November 18, 2008, about 6 ½ months later. Thus, the only applicable provision is Criminal Rule 4(A), which requires a defendant to be released on his own recognizance if detained for six months, "except where a continuance was had on his motion[.]" Nunley's trial was originally set for September 16, 2008, well within the six-month window, but was continued twice on his motion. Thus, his right to be tried or released from custody within six months of his arrest was not violated.

Conclusion

I do not believe there are any meritorious post-conviction issues. I cannot show that trial counsel performed deficiently, because her overall performance was objectively reasonable. In addition, I do not believe I could establish a reasonable probability that the result of the trial would have been different if the defense had been conducted differently.

I recommend that the Indiana Public Defender withdraw its appearance under Ind. Post-Conviction Rule 1(9)(c).

IN THE HARRISON SUPERIOR COURT

STATE OF INDIANA

LAWRENCE NUNLEY,
PETITIONER,

VS. CAUSE NO. 31D01-1009-PC-011

STATE OF INDIANA,
RESPONDENT

OBJECTION TO INTERROGATORIES

Now comes Susan E. Schultz and objects to the interrogatories submitted to her by Lawrence E. Nunley pursuant to T.R. 33. This objection is based upon the provisions of T.R. 33 which indicate that "any party may serve upon any other party written interrogatories to be answered by the party served". Susan Schultz is not a party to these proceedings and is not subject to the provisions of T.R. 33 in this action.

Wherefore, Susan Schultz objects to the interrogatories submitted to her and requests this Court for the entry of its order quashing the interrogatories.

Respectfully Submitted,

/s/ Susan E. Schultz

Susan E. Schultz 15667-14
127 E. Chestnut St. Suite 1
Corydon, IN 47112
(812) 738-1900
Seschultzlawoff3@aol.com

CERTIFICATE OF SERVICE

I certify that on the 14th day of November, 2016 I served a copy of the foregoing by first class mail on the Harrison County Prosecutor and on Lawrence Nunley.

/s/ Susan E. Schultz

Susan E. Schultz

IN THE SUPERIOR COURT FOR THE COUNTY OF HARRISON

STATE OF INDIANA

LAWRENCE NUNLEY,
PETITIONER

VS. CAUSE NO. 31D01-1009-PC-11

STATE OF INDIANA,
RESPONDENT

MOTION TO STRIKE

COMES NOW the State of Indiana, by its (Deputy) Prosecutor, and files its Motion to Strike Petitioner's First Set of Interrogatories for Susan Schultz, and in support thereof states and alleges:

1. On or about November 15, 2016, the State received Petitioner's First Set of Interrogatories for Susan Schultz;

2. Pursuant to Trial Rule 33(A), "Any party may serve upon any other party written interrogatories to be answered by the party served;"

3. Susan Schultz is not a party to this matter, and thus, cannot be required to complete an interrogatory in this matter;

WHEREFORE, the State of Indiana, by its (Deputy) Prosecuting Attorney, respectfully requests the Court to strike Petitioner's First Set of Interrogatories for Susan Schultz, and to issue an Order finding that Susan Schultz is not required to respond to Petitioner's First Set of Interrogatories, and for all other relief that is just and proper in the premises.

Respectfully Submitted,

(Deputy) Prosecuting Attorney
Harrison County Prosecutor's Office
1445 Gardner Lane NW
Corydon, Indiana 47112
(812) 738-4241

CERTIFICATE OF SERVICE

I hereby certify that I have served a copy of the foregoing document by United States Mail, postage prepaid, this 5th day of November, 2016, in accordance with the Indiana Rules of Trial Procedure upon:

Lawrence Nunley #198710
Wabash Valley Correctional Facility
6908 South Old Highway 41
Carlisle, Indiana 47838

(Deputy) Prosecuting Attorney

IN THE HARRISON SUPERIOR COURT

STATE OF INDIANA

LAWRENCE NUNLEY,
Petitioner

VS.

CAUSE NO.: 31D01-1009-PC-11

STATE OF INDIANA,
Respondent

ORDER DENYING PETITIONER'S MOTION IN PART AND GRANTING IN PART

Comes now the petitioner, Lawrence Nunley, pro se and files a Motion to Reconsider Previous Ruling and Clarify Inconsistent Rulings by this Honorable Court on September 19, 2016. The Court being duly advised in the premises now finds that the petitioner's motion is denied as to this Courts order quashing requests for admission dated September 1, 2016 therefore, Ms. Susan Schultz has no obligation to respond to requests for admissions. The Court further finds that the defendant may refer to I.C. 35-37-5-2 in his request to issue subpoenas, which will be considered by this Court upon proper submission.

IT IS THEREFORE ORDERED that the defendant's Motion to Reconsider Previous Ruling is hereby **DENIED** in part, and;

IT IS THEREFORE ORDERED that the defendant shall refer to I.C. 35-37-5-2 in his request to issue subpoenas.

SO ORDERED this November 16, 2016.

HON. JOSEPH L. CLAYPOOL, JUDGE
HARRISON SUPERIOR COURT

cc:
State of Indiana
Lawrence Nunley

FILED
NOV 28 2016

To: The Harrison County Clerk of Courts

from: Lawrence Nunley Doc# 198710

Pursuant to In. Code 35-37-5-7, (b), (4),

I am requesting that you provide me with (4) blank Subpoenas for Cause no. 31D01-1009-PC-011, which is scheduled for hearing on January 12, 2017 in the Harrison Superior Court at 9 am.

The Subpoenas may be sent to me at the following address

Lawrence Nunley
198710 E-313
WUCF P.O. Box 1111
Carlisle In 47838

Thank You for Your Time and assistance in this matter. Included is a self addressed envelope.

Sincerely,
L. Nunley
Lawrence Nunley

IN THE HARRISON SUPERIOR COURT

STATE OF INDIANA

LAWRENCE NUNLEY,
PETITIONER,

VS. CAUSE NO. 31D01-1009-PC-011

STATE OF INDIANA,
RESPONDENT

ORDER QUASHING INTERROGATORIES

This matter having come before the Court upon Objection to Interrogatories filed by Susan Schultz following service of interrogatories upon her by Lawrence Nunley; the Court having examined the file and having determined that Susan Schultz is not a party to this action and is not subject to the provisions of T.R. 33 permitting the filing of interrogatories upon parties to an action;

IT IS THEREFORE ORDERED that the interrogatories to Susan Schultz are quashed and she is under no obligation to submit answers to those interrogatories.

SO ORDERED November 27, 2016.

JUDGE, HARRISON SUPERIOR COURT

DISTRIBUTION:

Lawrence Nunley
Prosecutor
Susan Schultz

STATE OF INDIANA	) FILED	IN THE SUPERIOR COURT
	) SS:	
COUNTY OF HARRISON	DEC 12 2016	OF HARRISON COUNTY
LAWRENCE NUNLEY,	Sandy A. Whitis CLERK, HARRISON SUPERIOR COURT	
PETITIONER,	)	
	)	
-v-	)	CAUSE NO 31D01-1009-PC-011
	)	
STATE OF INDIANA,	)	
	)	
RESPONDENT.	)	

REQUEST FOR ISSUANCE OF SUBPOENAS

Comes now the Petitioner, Lawrence E. Nunley, *pro se*, pursuant to **Ind. Post-Conviction Rule 1(9)(b)**, and requests this Court to issue subpoenas for witnesses at an evidentiary hearing in the above-captioned cause. In support of this motion, Petitioner states:

1. Petitioner previously requested subpoenas for trial and appellate counsel in order to obtain testimonial evidence regarding counsels strategic considerations and reasons for failing to act in accordance with prevailing professional norms.

2. This Court denied Petitioner's subpoena request and specifically instructed the Petitioner to obtain counsels' testimony through interrogatories.

3. After researching the issue, Petitioner filed an offer of proof, indicating that interrogatories were inappropriate with regard to trial and appellate counsel because they were not parties.

4. Petitioner then sent a Request for Admissions to trial counsel. Trial counsel objected based on the fact that she is not a party. Although trial counsel was without standing to make such an objection and the State did not object, this Court sustained trial counsel's objection and quashed the admissions.

5. Petitioner then requested reconsideration and clarification regarding the seemingly inconsistent ruling, as trial counsel's objection was framed in the same manner as Petitioner's original objection and reasoning in his offer of proof. Petitioner waited 30 days but did not receive a response.

6. Therefore, Petitioner sent interrogatories to trial counsel. Trial counsel objected for the same reasons. The State followed with a Motion to Strike.

7. Petitioner then received a response to his Motion for Reconsideration and Clarification, instructing Petitioner to look at 35-37-5-2.

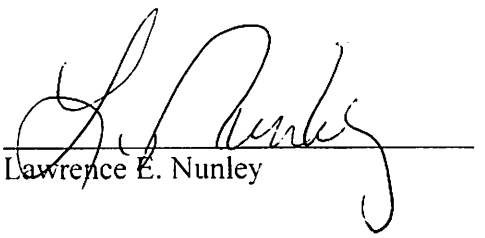
8. Petitioner obtained a copy of the statute and requested subpoenas from the court clerk. The Court clerk sent blank subpoenas that were unsigned and did not bare the seal of the court.

9. Petitioner has submitted his affidavits in support of his request for subpoenas and has also submitted the filled out subpoenas for trial and appellate counsel.

10. Petitioner asks this Court to ORDER that the Court's seal be affixed and the subpoenas be appropriately signed and served upon trial and appellate counsel.

WHEREFORE, Petitioner respectfully requests that this Court issue subpoenas for witnesses at an evidentiary hearing in this case pursuant to the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution and Article One, Sections Twelve, Thirteen and Twenty-three of the Indiana Constitution.

RESPECTFULLY SUBMITTED THIS 7th DAY OF DECEMBER, 2016.



Lawrence E. Nunley

STATE OF INDIANA	)	IN THE SUPERIOR COURT
	) SS:	
COUNTY OF HARRISON	)	OF HARRISON COUNTY
LAWRENCE NUNLEY,	)	
	)	
PETITIONER,	)	
	)	
-v-	)	CAUSE NO 31D01-1009-PC-011
	)	
STATE OF INDIANA,	)	
	)	
RESPONDENT.	)	

AFFIDAVIT IN SUPPORT OF
REQUEST FOR ISSUANCE OF SUBPOENA

Comes now Petitioner, Lawrence E. Nunley, being first duly sworn upon his oath, deposes and says the following:

1. I am the petitioner Cause No. 31D01-1009-PC-011, which is a post-conviction proceeding in the Harrison Superior Court.

2. Susan Schultz's testimony is required at the post-conviction relief evidentiary hearing.

3. Susan Schultz's address is: 127 E. Chestnut, Suite1, Corydon, IN 47112.

4. Susan Schultz's testimony is required for the post-conviction relief claim for the following reason(s): Ms. Schultz represented Mr. Nunley during the pretrial, trial, and sentencing phases of the proceedings. Mr. Nunley has raised multiple issues regarding trial counsel's effectiveness. Therefore, Ms. Schultz will testify regarding the acts and omissions underlying the allegations of ineffective assistance. For instance, Ms. Schultz will testify that her decision not to impeach the State's key witness was not a tactical one. Rather, it was merely an oversight. Ms. Schultz will testify that her failure to object to the admission of written testimony was not tactical. Rather, it was the result of her failing to realize the detrimental impact associated with emphasizing the testimony. Ms. Schultz will further testify that she did not have a strategic

reason to fail to object to the introduction of State's Exhibit 2 or the instances of vouching for A.Y.'s credibility. Ms. Schultz will provide the Court with insight to her thoughts and views as they existed at the time of trial to aid in its determination of the issues before the Court. Furthermore, Ms. Schultz will also authenticate documents from her files for admission into evidence at the hearing.

FURTHER THE AFFIANT SAYETH NAUGHT.

Lawrence E. Nunley

AFFIRMATION

I, Lawrence E. Nunley do hereby affirm, under the penalties for perjury pursuant to **Ind. Code 35-44-2-1**, that the foregoing representations are true and correct to the best of my knowledge and belief.

Lawrence E. Nunley

STATE OF INDIANA	)	IN THE SUPERIOR COURT
	) SS:	
COUNTY OF HARRISON	)	OF HARRISON COUNTY
LAWRENCE NUNLEY,	)	
	)	
PETITIONER,	)	
	)	
-v-	)	CAUSE NO 31D01-1009-PC-011
	)	
STATE OF INDIANA,	)	
	)	
RESPONDENT.	)	

AFFIDAVIT IN SUPPORT OF
REQUEST FOR ISSUANCE OF SUBPOENA

Comes now Petitioner, Lawrence E. Nunley, being first duly sworn upon his oath, deposes and says the following:

1. I am the petitioner Cause No. 31D01-1009-PC-011, which is a post-conviction proceeding in the Harrison Superior Court.

2. Matthew Jon McGovern's testimony is required at the post-conviction relief evidentiary hearing.

3. Matthew Jon McGovern's address is: 5444 E. Indiana Street, #375, Evansville, IN 47715.

4. Matthew Jon McGovern's testimony is required for the post-conviction relief claim for the following reason(s): Mr. McGovern represented Mr. Nunley during the direct appeal. Mr. Nunley has alleged that Mr. McGovern's representation of him was ineffective for failing to raise issues and for failing to raise issues well. Mr. McGovern will testify at the evidentiary hearing that the acts and omissions alleged in the petition were not strategic. Rather, they resulted from ignorance or unfamiliarity with certain aspects of the law, were simply oversights, and/or were not considered. For instance, Mr. McGovern will testify that there was no strategic

reason that he failed to raise issues related to Mr. Nunley's sentence. Mr. McGovern simply neglected to present a sentencing issue. Mr. McGovern will further testify that his failure to raise the issues related to the undue emphasis of A.Y.'s testimony and the vouching for A.Y.'s credibility were not strategic but were simply oversights. He just did not recognize the error; therefore, he did not make a strategic decision not to present the issue. Mr. McGovern will also authenticate the briefs that he submitted for admission into evidence.

FURTHER THE AFFIANT SAYETH NAUGHT.

Lawrence E. Nunley

AFFIRMATION

I, Lawrence E. Nunley do hereby affirm, under the penalties for perjury pursuant to **Ind. Code 35-44-2-1**, that the foregoing representations are true and correct to the best of my knowledge and belief.

Lawrence E. Nunley

CERTIFICATE OF SERVICE

I, Lawrence Nunley, hereby affirm that on this 8th day of January 2016, I served a true and accurate copy of the foregoing Request for Subpoenas and supporting Affidavits upon the Prosecuting Attorney for Harrison County by ordinary first class, postage prepaid, United States Mail, in accordance with **T.R. 5**.

Lawrence E. Nunley

Harrison Superior Court. 1394 **SUBPOENA**

STATE OF INDIANA, HARRISON COUNTY, SS:

RECEIVED
DEC 13 2016
RODNEY V. SEELYE
Sheriff of Harrison County

The State of Indiana, to the Sheriff of Harrison County County Greeting:

You are hereby commanded to summon

Susan Shultz
127 E Chestnut St suite 1
Corydon In 47112 phone (812) 738-1900

to personally appear before the Judge of the Harrison Superior Court on January 12, 2017 9 AM now holding at the Justice Center in Corydon, Indiana, then and there to testify on behalf of the Plaintiff in a certain suit pending in said Court, wherein

Lawrence Nunley Plaintiff,

and State of Indiana Defendant,

and herein you may not fail at your peril.

Witness, the Clerk of said Court, this 12 day of Dec 2016

Sally A. Whitis Clerk

I hereby certify that the above is a true copy of the original Subpoena.

Sheriff of County.

HARRISON CO. SHERIFF DEPT.
DEFENDANT(S) SIGNATURE
Susan Schultz
DATE: 12-13-16 TIME: 13:44
OFFICER'S SIGNATURE
no mc

Harrison Superior Court. **SUBPOENA**

STATE OF INDIANA, HARRISON COUNTY, SS:

The State of Indiana, to the Sheriff of Madison County Greeting:

You are hereby commanded to summon

Matthew Jon McGovern
4326 South Scatterfield Street Suite 308
Anderson In. 46013 Phone (812)842-0286

to personally appear before the Judge of the Harrison Superior Court on January 12, 2017 9:00am now holding at the Justice Center in Corydon, Indiana, then and there to testify on behalf of the Plaintiff in a certain suit pending in said Court, wherein

Lawrence Nunley Plaintiff,

and State of Indiana Defendant,

and herein you may not fail at your peril.

Witness, the Clerk of said Court, this 12
day of Dec 2016
Sally A. Whitis Clerk

I hereby certify that the above is a true copy of the original Subpoena.

Sheriff of County.

STATE OF INDIANA	)	IN THE SUPERIOR COURT
	) SS:	
COUNTY OF HARRISON	)	OF HARRISON COUNTY
LAWRENCE NUNLEY,	)	
PETITIONER,	)	
-v-	)	CAUSE NO 31D01-1009-PC-011
STATE OF INDIANA,	)	
RESPONDENT.	)	

FILED
FEB - 3 2017
CLERK, HARRISON SUPERIOR COURT

TENDER OF PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

Comes now the Petitioner, Lawrence Nunley, *pro se*, and tenders these Findings of Fact and Conclusions of Law in connection with the above-entitled proceedings, pursuant to **Indiana Rules of Trial Procedure 52 (C)** and **Rule P.C. 1, sec. 6.**

Respectfully submitted,

L. Nunley

Lawrence Nunley

CERTIFICATE OF SERVICE

I, Lawrence Nunley, hereby certify that I have, this 3rd day of February 2017, I served upon the Prosecuting Attorney's Office for Harrison County, a copy of the above and foregoing Proposed Findings of Fact and Conclusions of Law, pursuant to **T.R 5(B)(1)**; by first class, postage prepaid, United States Mail.

Respectfully submitted,

L. Nunley

Lawrence Nunley

STATE OF INDIANA	)	IN THE SUPERIOR COURT
	) SS:	
COUNTY OF HARRISON	)	OF HARRISON COUNTY
LAWRENCE NUNLEY,	)	
	)	
PETITIONER,	)	
	)	
-v-	)	CAUSE NO 31D01-1009-PC-011
	)	
STATE OF INDIANA,	)	
	)	
RESPONDENT.	)	

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This matter comes before the Court upon Mr. Nunley's Petition for Post-Conviction Relief. Evidentiary hearings were held on July 14, 2016 and January 12, 2017. The evidence of both parties has been submitted and heard; this matter is now ripe for ruling. The Court now finds:

Findings of Fact

Procedural Facts

1 On May 19, 2008, Mr. Nunley was charged with Counts I-III, Child Molesting as Class A felonies; Count IV, Child Molesting, a Class C felony; and Count V Disseminating Matter Harmful to a Minor, a Class D felony. (DA 9-13).[1]

2 Between November 18, 2008 and November 21, 2008, a jury trial was held. At the conclusion of the jury trial, Mr. Nunley was found guilty on all counts. (DA 71-75).

3 On January 15, 2009, Mr. Nunley was sentenced to 35 years incarceration on each Counts I-III; 4 years and 8 months on Count IV; and 21 months on Count V. The Court Ordered Count III to run concurrently with Counts I and II, but all other counts were ordered to be served consecutively, for an aggregate 76 years and 4 months. (R. 911, DA 83)

[1] References to the trial transcripts will be to "R"; References to the Direct Appeal Appendix will be to "DA."

4 On direct appeal, the Indiana Court of Appeals dismissed Counts III and IV, thereby reducing Mr. Nunley's sentence by a period of 4 years and 8 months. Mr. Nunley's revised sentence is 71 years and 9 months. His projected EPRD is April 13, 2044.

5 On September 24, 2010, Mr. Nunley filed a Petition for Post-Conviction Relief and requested the Assistance of the State Public Defender. Michael Sauer, a Deputy State Public Defender, filed an appearance but subsequently withdrew with this Court's approval.

6 On January 14, 2016, Mr. Nunley amended his post-conviction petition. The amended petition, alleging several issues related to both ineffective assistance of trial counsel; and ineffective assistance of appellate counsel.

7 Underlying the specific instances of ineffectiveness raised in the petitions are other sub-issues requiring legal analysis in order to resolve the prejudice prong of *Strickland.*

8 At the beginning of the hearing held on January 12, 2017, Mr. Nunley introduced the record into evidence. The Court also took judicial notice of the records in Cause No. 31D01-0805-FA-389.

Substantive Facts

4. Ms. Susan Schultz was appointed by the court to represent Mr. Nunley, in cause number 31D01-0805-FA-389, during the pretrial, trial, and sentencing phases of the proceedings.

5. Ms. Schultz testified at the evidentiary hearing that she met with Mr. Nunley multiple times, conducted depositions to ascertain the facts, and developed a general trial strategy to show that Mr. Nunley did not commit the crimes alleged.

6. In 8(a)(1) and 9(a)(1) of the petition, Mr. Nunley alleges that trial counsel was ineffective for failing to impeach A.Y.

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 on September 30, 2008, 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).

13. In 8(a)(2) and 9(a)(2) of the petition, Mr. Nunley alleged that Ms. Schultz was ineffective for failing to object to A.Y's being permitted to provide written testimony, which was introduced as Joint Exhibits 1, 2 and 3 and State's Exhibit 5.

14. During A.Y.'s testimony, the prosecutor asked her about what happened to her the night she stayed with Nunley. (R. 433). The record indicates that the witness started crying and became nonresponsive. (R. 433). After a bench conference, the court was recessed. (R. 434).

15. When the trial resumed, the prosecutor asked A.Y. to tell her what happened. (R. 435). A.Y. responded, "It's hard to say. I can only write it." R. 435). A.Y. later told the judge that there were too many people in the courtroom and that she couldn't answer in front of them. (R. 438). Another bench conference was had and again the court called for a recess.

16. When the trial resumed, A.Y. was permitted to respond to questions in writing. (R. 441-443). Those writings were entered into evidence as "Joint Exhibits or Court's exhibits because they're in effect testimony." (R. 444). After the lunch recess, A.Y. wrote down an answer to a question and then read it out loud. (R. 450). That written statement was entered as

State's Exhibit 5. (R. 454). A.Y. later drew a picture of Nunley's penis, which was entered as Joint Exhibit 3. (R. 493). A.Y. described Nunley's penis as soft and approximately ten inches in length. She claims to know because she counted the numbers on a ruler. (R. 493; Joint Exhibit 3).

17. A.Y. was permitted to provide written testimony without objection from counsel. (R. 441-443, 450, 454, 493). In fact, defense counsel caused Joint Exhibit 3 to be introduced into evidence. A.Y.'s written testimony was sent to the jury room (R. 455).

18. Ms. Schultz testified at the evidentiary hearing that A.Y. was permitted to write down part of her testimony and that it was entered into evidence. Moreover, she testified that prior to Mr. Nunley's trial, she had never seen a witness write down a portion of their testimony.[2] Ms. Schultz further testified that A.Y.'s being permitted to write down her testimony was odd because it places emphasis on that testimony and letting it go back to the jury is like hearing testimony over and over, which is improper.

19. Although Ms. Schultz could not remember whether or not she objected, the trial record demonstrates that she did not object. (R. 441-443, 450, 454, 493).

20. In 8(a)(3) and 9(a)(3) of the petition, Mr. Nunley alleges that Ms. Schultz was ineffective for failing to object to violation of the separation of witnesses order. During A.Y.'s testimony, the trial was recessed for lunch. (R. 445). Immediately after the recess, the prosecutor advised the court that A.Y. was there with her parents, who were also witnesses. (R. 445-446). The judge instructed the prosecutor to go to lunch with A.Y. and her parents so that the prosecutor could inform the court that the separation of witnesses' violation was harmless. (R. 446). The State agreed. (R. 446). Defense counsel did not object to the violation of the separation

[2] Ms. Schultz has been a practicing attorney for 35 years.

of witnesses or the State's ex parte communication with witnesses during the trial. After the lunch break, A.Y. answered questions that she had previously refused to answer.(R. 449-450).

21. Ms. Schultz was queried about her failure to object to the violation of the separation of witnesses order. She testified that she did not think it was a violation because the judge admonished the State not to talk about the case.

22. In 8(a)(4) and 9(a)(4) of the petition, Mr. Nunley alleged that Ms. Schultz was ineffective for failing to object to State's Exhibit 2. A.Y. testified that State's Exhibit 2 was the DVD that Nunley showed her (R. 432). However, A.Y. did not view the DVD, had not marked the DVD, and did not identify the name of the DVD that Nunley was alleged to have shown her. When asked how she knew it was the same DVD, A.Y. testified, in part, "I had it memorized, but I don't remember it now." (R. 469).

23. Ms. Schultz was queried about the reason that she did not object. Ms. Schultz testified that it was not part of her strategy to allow evidence to be admitted without proper authentication.

24. During the testimony of William Wibbels, the State entered the DVD into evidence (R. 662, State's Exhibit 2). Trial counsel did not object. (R. 662). A.Y.'s testimony lacked a sufficient basis to serve to introduce the DVD into evidence. Therefore, an objection would have served to exclude this evidence. Without this evidence, the jury would likely have acquitted Nunley of Count 5. Thus, counsel was ineffective for failing to interpose an appropriate objection to the admission State's Exhibit 2.

25. In 8(a)(5) and 9(a)(5) of the petition, Mr. Nunley alleges that Ms. Schultz should have objected to the vouching testimony of William Wibbels. Detective Wibbels vouched for the credibility of A.Y. when he testified that he did not feel that A.Y. had been coached and that he

believed her. Such testimony unduly prejudiced Nunley because it validated the testimony of the State's key witness. Trial counsel did not object to this testimony, request an admonishment, or motion for a mistrial.

26. In 8(a)(6) and 9(a)(6) of the Petition, Mr. Nunley contends that even if the individual errors of counsel do not rise to a level of ineffective assistance, the cumulative effect of these errors lead to the conclusion that Nunley was denied effective representation and a fair trial.

27. In 8(b)(1) and 9(b)(1) of the petition, Mr. Nunley alleges that his appellate attorney, Matthew Jon McGovern, was ineffective for failing to raise issues well. Specifically, Mr. Nunley asserts that Mr. McGovern's failure to cite to relevant United States Supreme Court Authority, which precludes state courts from mechanistically applying state evidentiary rules. Mr. Nunley also claims that Mr. McGovern's reliance upon trial counsel's "preservation of the issue" after the close of evidence was misplaced. This was a critical error that only served to hurt Nunley's claim. Appellate counsel should have argued that Nunley had a right to present a defense by attacking the credibility of A.Y., the State's key witness. A.Y. had falsely accused someone else of criminal wrongdoing, which could have directly impacted the jury's view of her testimony against Nunley. Preventing Nunley from establishing this fact was tantamount to the denial of his right to present a defense.

28. In 8(b)(2) and 9(b)(2) of the petition, Mr. Nunley alleges that Mr. McGovern was ineffective for failing to raise sentencing issues, that A.Y's written testimony unduly emphasized a critical portion of her testimony, the violation of the separation of witnesses order, the admission of State's Exhibit 2, and improper vouching testimony.

29. Mr. McGovern testified that he read the trial transcript and confirmed that A.Y. was permitted to write down a portion of her testimony. Prior to Mr. Nunley's trial, Mr. McGovern had never seen a witness write down a portion of their testimony. He further testified that it was very unusual, and that it is improper for the court to cause the jury to place undue emphasis on the testimony or part of the testimony of a particular witness. Mr. McGovern characterized the written testimony as the most critical portion of A,Y,'s testimony. Mr. McGovern could not recall whether he considered the possibility that the written testimony added to A.Y.'s credibility.

30. Mr. McGovern had no specific recollection about whether or not he researched the issues that Mr. Nunley claims he should have raised.

31. Mr. McGovern testified that he was not familiar with *Bowling v, State* and did not recall whether or not he researched a potential double jeopardy issue.

32. The State presented no evidence in support of the affirmative defenses of *res judicata*, waiver, and laches.

33. Additional facts will be supplied as needed in the Conclusions of Law section below.

Conclusions of Law

34. The law is with the Petitioner and against the State.

Standards for Ineffective Counsel

35. The right to effective counsel is rooted in the Sixth Amendment of the United States Constitution. *Taylor v. State*, 840 N.E.2d 324, 331 (Ind. 2006). "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.

36. In the state of Indiana, ineffective assistance of counsel claims are governed by the two-part test announced in *Strickland*. *Perez v. State*, 748 N.E.2d 853, 854 (Ind. 2001). First, the defendant must show that counsel's performance was deficient by falling below an objective standard of reasonableness and the resulting errors were so serious that they resulted in a denial of counsel guaranteed under the Sixth Amendment. *McCorker v. State*, 797 N.E.2d 257, 267 (Ind. 2003). Second, the defendant must show that the deficient performance prejudiced the defense. *Id.* Prejudice is shown with a reasonable probability that but for counsel's unprofessional errors, there is a reasonable probability that the result of the proceeding would have been different. *Id.* A reasonable probability for the prejudice requirement is a probability sufficient to undermine confidence in the outcome. *Wesley v. State*, 768 N.E.2d 1247, 1257 (Ind. 2003).

37. The standard or review for a claim of ineffective assistance of appellate counsel is the same as for a claim of ineffective assistance of trail counsel. *Wrinkles v. State*, 749 N.E.2d 1179, 1203 (Ind. 2001). Our Supreme Court has recognized three categories of alleged appellate counsel ineffectiveness: (1) denying access to an appeal, (2) failing to raise issues, and (3) failing to raise issues competently. *Bieghler v. State*, 690 N.E.2d 188, 193-195 (Ind. 1997). Mr. Harrell's claims that appellate counsel failed to raise issues on appeal is reviewed as a *Bieghler* type two issue. Our Supreme Court has noted the need for a reviewing court to be deferential to appellate counsel's judgment on this issue:

> [T]he reviewing court should be particularly sensitive to the need for separating the wheat from the chaff in appellate advocacy and should not

> find deficient performance where counsel's choice of some issue over others was reasonable in light of the facts of the case and the precedent available to counsel when the choice was made.

Bieghler , 690 N.E.2d at 194. Further, Indiana courts have approved of the two-part test used by the Seventh Circuit to evaluate these claims: (1) whether the unraised issues are significant and obvious from the face of the record, and (2) whether the unraised issues are "clearly stronger" than the raised issue. *Id.*, *quoting Gray v. Greer*, 800 F.2d 644, 646 (7th Cir. 1986). Otherwise stated, to prevail on a claim of ineffective assistance of appellate counsel, :"a defendant must show from the information available in the trial record or otherwise known to appellate counsel that appellate counsel failed to present a significant and obvious issue and that this failure cannot be explained by any reasonable strategy." *Ben-Yisrayl v. State*, 738 N.E.2d 253, 260-261 (Ind. 2000).

Failure to Impeach: 8(a)(1) and 9(a)(1) of Petition

38. As noted in itemizations 6-12, Ms. Schultz conducted depositions in this case and A.Y.'s trial testimony was inconsistent with her deposition testimony and pretrial statements.

39. Initially, This Court 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).

40. 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.

41. Mr. Nunley's claim is also viable under Indiana case authority. For instance, in *Ellyson v. State*, 603 N.E.2d 1369 (Ind. Ct. App. 1992), the Court of Appeals 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.

42. More recently, the Supreme Court of Indiana reached a similar conclusion in *State v. Hollin*, 970 N.E.2d 147 (Ind. 2012). In *Hollin*, our Supreme Court 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 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.*

43. 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. Thus, impeaching A.Y. was critical to successfully defending Mr. Nunley. 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.

44. "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).

45. "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).

46. 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.

47. The Indiana Rules of Evidence do not define the term, "inconsistent," and Indiana case authority offers no clear test fro 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).

48. 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.

49. 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).

50. 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.

51. 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.

Failing to Object to A.Y.'s Written Testimony: 8(a)(2) and 9(a)(2) of Petition

52. 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 and made available to the jury during deliberations.

53. In analyzing whether trial counsel was ineffective for failing to object, "the standard is whether the trial court would have been required to sustain the objection had one been made, or conversely, whether the trial court would have committed prejudicial error if it overruled the objection." *Ross v. State*, 877 N.E.2d 829, 835 (Ind. Ct. App. 2007).

54. Mr. Nunley notes "that Indiana law is 'distinctly biased' against trial procedures which tend to emphasize the testimony of any single witness. *Schaffer v. State*, 674 N.E.2d 1, 5 (Ind. Ct. App. 1996),*citing Hopkins v. State*, 582 N.E.2d 345, 353-354.

55. "However, recognizing the potential trauma facing a child in court, Indiana trial courts have permitted children to testify under special conditions despite the possibility that it would emphasize their testimony." *Id.* at 5. The *Schaffer* Court went on to note that the appellate courts have upheld decisions to allow children to testify with a support person sitting behind them[3], a guardian sitting next to them[4], or via two-way, closed-circuit television[5]. *Id.* "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. We will reverse the trial court's if there is a clear abuse of such discretion." *Id.*

---

[3] *Stanger v. State*, 545 N.E.2d 1105, 1112 (Ind. Ct. App. 1989)
[4] *Hall v. State*, 634 N.E.2d 867, 841-842 (Ind. Ct. App. 1994)
[5] *Brady v. State*, 575 N.E.2d 981, 989 (Ind. 1991)

56. Although the *Schaffer* court denied Schaffer's claim predicated upon allowing a child witness to testify in a smaller courtroom, it recognized the viability of an undue emphasis claim.

57. 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.

58. In denying the claim, the *Schaffer* reasoned that "[n]othing in the record indicates that the trial court made any comments or took any action to emphasize the children's testimony." *Schaffer*, 674 N.E.2d at 5-6.

59. In this case, however, the fact that the presiding judicial officer, *sua sponte,* entered the written pages into evidence is an act that emphasized the testimony.

60. Moreover, Ms. Schultz did not have a strategic reason to refrain from interposing an appropriate object. Ms. Schultz testified that the written testimony placed undue emphasis on the most critical portion of A.Y.'s testimony. The trial record reveals that Ms. Schultz interposed an objection to the jurors' being allowed to rewatch 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).

61. The then presiding judge's comments on this topic indicate that a properly interposed objection would have been sustained.

62. A.Y.'s written testimony placed undue emphasis on the most critical part of her testimony against Mr. Nunley because it was available to the jurors during deliberations. The written testimony was further emphasized by the manner in which it was admitted into evidenced during the trial. Finally, the written testimony presented the juror with a near reenactment of the way in which A.Y. was said to have initially revealed the alleged molestation to her parents.

63. The written testimony undoubtedly impacted the jurors decision regarding guilt. Absent this testimony there is a reasonable possibility of a different result. When one considers this issue in conjunction with the impeachment evidence that the jurors did not have the opportunity to consider, there is an even stronger possibility of a different result.

Separation of Witnesses Violation: 8(a)(3) and 9(a)(3) of the Petition

64. Mr. Nunley complains that Tonya Caves, Richard Caves and A.Y. intentionally violated the separation of witnesses order during the lunch recess in violation of Due Process and Fundamental Fairness principles.

65. The record clearly indicates that the violation of the separation was done and that the prosecuting attorney went to lunch with the three witnesses, thereby facilitating the violation. (R. 445-446).

66. Mr. Nunley is mindful of the Supreme Court of Indiana's view on a separation of witnesses order. In *Jiosa v. State*, 755 N.E.2d 605 (Ind. 2001), our Supreme Court 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.

67. 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).

68. 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).

69. In this case, 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.

70. The prosecutor's facilitation of the separation of witnesses order does not provide 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.

71. Ms. Schultz did not have a strategic reason for not objecting to the violation of the separation of witnesses order.

72. 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.

Failure to Object to State's Exhibit 2: 8(a)(4) and 9(a)(4) of the Petition

73. Mr. Nunley alleges that trial counsel was ineffective for failing to object the Sex Ed Tutor DVD from being admitted into evidence as State's Exhibit 2.

74. The requirement of authentication as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the item in question is what its proponent claims. Ind. Evidence Rule 901(a). An item may be authenticated by a method provided by the evidence rules, statute or state constitution. Ind. Evid. R. 901(b)(10).

75. The State attempted to use A.Y., a witness with purported knowledge of the DVD, to authenticate the DVD in accordance with the rules of evidence. Ind. Evid. R. 901(b)(1).

76. A.Y. testified that State's Exhibit 2 was the DVD that Nunley showed her (R. 432). However, A.Y. did not view the DVD, had not marked the DVD, and did not identify the name of the DVD that Nunley was alleged to have shown her. When asked how she knew it was the same DVD, A.Y. testified, in part, "I had it memorized, but I don't remember it now." (R. 469).

77. A.Y.'s testimony is insufficient to authenticate the DVD. *See, e.g., Valdez v. State*, 2016 Ind. App. LEXIS 249, P15 (exhibits properly excluded where defendant produced no evidence that these documents were what he said they were).

78. Thus, under the Indiana Rules of Evidence, a properly interposed objection would have been sustained. Since the DVD is the only tangible evidence of Count V is the DVD. Mr. Nunley was undoubtedly prejudiced by the admission of this inculpatory evidence. This is especially true considering the inconsistencies in A.Y.'s statements.

Failure to Object to Vouching Testimony: 8(a)(5) and 9(a)(5) of the Petition

79. Mr. Nunley asserts that the State impermissibly offered testimony from Detective Wibbels' vouching for the veracity and truthfulness of A.Y.

80. Vouching testimony is clearly inadmissible under the Indiana Rules of Evidence. Ind. Evidence Rule 704(b); *Farris v. State*, 818 N.E.2d 63 (Ind. Ct. App. 2005); *Powell v. State*, 714 N.E.2d 624 (Ind. 1999); *Dietrick v. State*, 641 N.E.2d 679 (Ind. Ct. App. 1994).

81. If Ms. Schultz had interposed an objection to this testimony the trial could would/should have sustained the objection. Clearly, this testimony was inadmissible. It is equally clear that the prejudicial effect of a police officer testifying that because of their experience they are able to tell when someone is telling them the truth and then vouching for the veracity of A.Y. was prejudicial to Mr. Nunley and had the effect of bolstering A.Y.'s credibility so that it could not be effectively attacked on cross-examination.

82. Ms. Schultz testified that she did not have a strategic reason to allow such testimony.

83. Ms. Schultz's performance was deficient for failing to object, and Mr. Nunley was prejudiced by the bolstering testimony of Detective Wibbels.

Cumulative impact

84. Strickland demands that courts assess the cumulative impact of errors, rather than simply considering the errors individually. This court finds that nature of the errors are significant and that the errors operate in tandem to deny Mr. Nunley a due process of law and a fair trial as guaranteed by the Sixth and Fourteenth Amendments of the Untied States Constitution. Therefore, even if the prejudice to Mr. Nunley was not significant enough to mandate reversal on an individual error, the totality of error certainly does.

Appellate Counsel's Failure to Raise Issues Well: 8(b(1) & 9(b)(1) of the Petition

85. Mr. Nunley asserts 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.

86. Initially, this Court notes that regardless of appellate counsel's performance, this Court has the power to revisit any prior decision to correct a manifest injustice. *State v. Huffman,* 643 N.E.2d 899 (Ind. 1994).

87. At issue here are prior false accusations made by A.Y. against another person. This evidence was relevant to detracting from A.Y.'s credibility and supporting the Defense's theory that her story was fabricated.

88. The 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. *Holeems v. South Carolina*, 547 U.S. 319, 3.26 (2006).

89. Certainly, allowing the *Defense's* theory of the case to be submitted to the jury is equally as important as permitting the State's theory to be presented. Indeed, this was the very premise of *Chambers* wherein the United States Supreme Court held:

> The excluded testimony was highly relevant to a critical issue in the punishment phase of the trial … . [S]ubstantial reasons existed to assume its reliability. … The statement was against interest … . Perhaps most important, the State considered the testimony sufficiently reliable to use it against [the co-defendant], and to base a sentence of death upon it.

90. This decision is in line with the general Due Process framework established by the United States Supreme Court. In *Breithaupt v. Abram*, 352 U.S. 432 (1956), for example, Justice Clark endeavored to explain the labyrinth of the due process test as follows:

> [D]ue process is not measured by the yardstick of personal reaction... of the most sensitive person, but by the whole community sense of 'decency and fairness" that has been woven by common experience into the fabric of acceptable conduct. It is on this bedrock that this court has established the concept of due process.

The United States Supreme Court has also state the following:

> For all its consequence, "due process" has never been, and perhaps can never be, precisely defined. "[U]nlike some legal rules,: this court has said due process "is not a technical conception with a fixed content unrelated to time, place and circumstances." *Cafeteria Workers v. McElroy*, 367 U.S. 886, 895, 6 L.Ed. 2d 1230, 81 S.Ct. 1745. Rather, the phrase expresses the requirement of "fundamental fairness," a requirement whose meaning can be as opaque as its importance is lofty. Applying the Due process Clause is therefore an uncertain enterprise, which must discover what "fundamental fairness" consists of in a particular situation by first considering any relevant precedents and then by assessing the several interests that are at stake.

Lassiter v. Department of Social Services, 452 U.S. 18 (1981).

91. Limiting 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. Regardless, *Chambers* and *Holmes* have made it clear that Mr. Nunley had the right to present evidence to the jury that another person committed the crime.

92. The state relied heavily on testimony from A.Y. to make its case. A.Y. and Mr. Nunley were the only two people in the room when the incident was alleged to have occurred. Since there is no medical or forensic evidence linking Mr. Nunley to any criminal activity, denying Mr. Nunley the ability to present crucial evidence that would have impacted the credibility of a critical State's witness rises to the level of the denial of a defense.

93. Had 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.

94. Thus, Mr. McGovern was ineffective in this regard.

Appellate Counsel's Failure to Raise Issues Well: 8(b(2) & 9(b)(2) of the Petition

a. Sentencing Issues

95. Initially, Mr. Nunley contends that Mr. McGovern should have advanced sentencing arguments, which were clear and obvious from the face of the record. Mr. McGovern should have advanced arguments challenging the: (1) double jeopardy violation, (2) use of improper aggravators, and (3) the appropriateness of the sentence.

96. There is no question that Mr. McGovern could have raised sentencing arguments, regardless of whether or not the issues were properly preserved. On direct review, the Court of Appeals has the constitutional authority to review and revise sentences. This authority is bestowed upon the appellate courts, 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 the Court of Appeals' authority under Article VII, Section 6 was Appellate Rule 17(B), which allowed the Court of Appeals to revise a sentence only if it was manifestly unreasonable. Recognizing that Rule 17(B) was "an almost impossible standard to meet," our Supreme Court modified it in 1997 to allow more meaningful review. *Bluck v. State*, 716 N.E.2d 507, 515-516 (Ind. Ct. App. 1999).

97. In a further effort to realize the broad powers under Article VII, Section 6, our Supreme Court abrogated 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. Rule 7(B). Our Supreme Court 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 sentences 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); *Gregory v. State*, 644 N.E.2d 543, 545 (Ind. 1994).

1. Double Jeopardy

98. 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*, our Supreme Court 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.

99. *Bowling* was still in full force and effect at the time of Mr. Nunley's sentencing and, to date, has not been overturned. 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).

100. 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.

101. 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 could 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.

102. Mr. McGovern was not familiar with *Bowling*. 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).

103. Mr. McGovern's unfamiliarity with *Bowling* negates any strategic consideration with regard to this issue. 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.

2. Mr. Nunley's Sentence is Inappropriate

104. 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.

105. Mr. McGovern could have presented the issue that Mr. Nunley's sentence was inappropriate.

106. The Indiana Court of Appeals has the constitutional authority to 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," our Supreme Court 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, our Supreme Court 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). Our Supreme Court 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).

107. As the trial court acknowledged, Mr. Nunley had no prior convictions. Rather, the court relied upon an uncharged, unsubstantiated allegation which had gone untested by the criminal justice system.

108. 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), our Supreme court 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).

109. 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.

110. 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).

111. 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.

112. 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.

b. *Failure to Include the underlying issue outlined in 8(a)(2) and 9(a)(2)*

113. 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.

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

115. For the reasons enunciated in itemizations 52-63, this Court finds that if this issue had been raised, it likely would have prevailed. Mr. McGovern was, therefore, ineffective in this regard.

c. Failure to Include the underlying issue outlined in 8(a)(3) and 9(a)(3)

116. Mr. Nunley contends that appellate counsel should have raised the issue regarding the violation of the separation of witnesses order.

117. For the reasons enunciated in itemizations 64-72, this Court finds that if this issue had been raised, it likely would have prevailed. Mr. McGovern was, therefore, ineffective in this regard.

d. Failure to Include the underlying issue outlined in 8(a)(4) and 9(a)(4)

118. Mr. Nunley contends that appellate counsel should have raised the issue that State's Exhibit 2 should not have been admitted into evidence.

119. For the reasons enunciated in itemizations 73-78, this Court finds that if this issue had been raised, it likely would have prevailed. Mr. McGovern was, therefore, ineffective in this regard.

e. Failure to Include the underlying issue outlined in 8(a)(5) and 9(a)(5)

120. Mr. Nunley claims Mr. McGovern should have raised the issue regarding Detective Wibbels vouching for A.Y.'s truthfulness.

121. For the reasons enunciated in itemizations 79-83, this Court finds that the issue would likely have prevailed. Therefore, Mr. McGovern was ineffective for failing to raise this issue.

CONCLUSION

For all of the foregoing reasons, this matter is reversed and a new trial is ordered. As an aside, Mr. Nunley is also entitled to be resentenced to concurrent terms, but this measure is obviated by the ordering of a new trial. Mr. Nunley's post-conviction petition is hereby **GRANTED**.

So ORDERED this _____ day of _____, 2017.

_____
Judge, Harrison Superior Court**

STATE OF INDIANA	)	IN THE SUPERIOR COURT OF
	) SS:	
COUNTY OF HARRISON	)	OF HARRISON COUNTY
	)	
LAWRENCE NUNLEY	)	
	)	
PETITIONER,	)	
	)	
-v-	)	CAUSE NO. 31D01-1009-PC-011
	)	
STATE OF INDIANA,	)	
	)	
RESPONDENT	)	

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This matter comes before the Court upon Nunley's Petition for Post-Conviction Relief. Evidentiary hearings were held on July 14, 2016 and January 12, 2017. The Court finds the following:

1. On May 19, 2008, Nunley was charged with Counts I—III, Child Molesting as Class A felonies; Count IV, Child Molesting, a Class C felony; and Count V Disseminating Matter Harmful to a Minor, a Class D felony. Susan Schultz was appointed by the court to represent Nunley during the pretrial, trial, and sentencing phases of the proceedings.

2. Between November 18, 2008 and November 21, 2008, a jury trial was held and Nunley was found guilty of all counts.

3. On January 15, 2009, Nunley was sentenced to an aggregate 76 years and 4 months.

4. On direct appeal, Nunley was appointed Matthew McGovern as appellant counsel. The Indiana Court of Appeals dismissed Counts III and IV, reducing Nunley's sentence by a period of 4 years and 8 months. His revised sentence is 71 years and 9 months.

5. On September 24, 2010, Mr. Nunley filed a Petition for Post-Conviction Relief and requested the Assistance of the State Public Defender. James Michael Sauer, a Deputy State Public Defender, filed an appearance but subsequently withdrew with this Court's approval.

6. On January 14, 2016, Nunley amended his post-conviction petition, alleging both ineffective assistance of trial counsel; and ineffective assistance of appellate counsel.

CONCLUSIONS OF LAW

7. In Indiana, ineffective assistance of counsel claims are governed by the two-part test announced in *Strickland v. Washington*, 466 U.S. 668, 685 (1984). And incorporated to Indiana in *Perez v. State*, 748 N.E.2d 853, 854 (Ind. 2001). The defendant must show that counsel's performance was deficient by falling below an objective standard of reasonableness and the resulting errors were so serious that they resulted in a denial of counsel guaranteed under the Sixth Amendment. *McCorker v. State*, 797 N.E.2d 257, 267 (Ind. 2003). Second, the defendant must show that the deficient performance prejudiced the defense. *Id.*

8. The standard or review for a claim of ineffective assistance of appellate counsel is the same as for a claim of ineffective assistance of trail counsel. *Wrinkles v. State*, 749 N.E.2d 1179, 1203 (Ind. 2001).

9. The performance of Schultz does not fall below an objective standard of reasonableness, nor did any imperfections in her defense of Nunley materially prejudice him.

10. The decision on how, when or even if to impeach a distraught minor witness is related directly to the trial strategy of counsel and anticipating and observing the jury's reactions at that moment in time.

11. Similarly, Shultz's specific instances of not objecting to items or testimony entered into evidence are not in essence error, and are the result of her judgement as counsel at that time.

12. Further, requiring an upset child witness not to have lunch with her parents during a trial, could justifiably be interpreted as unreasonable, and objecting to allowing it could therefore be unreasonable and not deficient performance.

13. McGovern's choice of argument's to the Appellant Court are within his discretion as counsel and what he finds relevant to pursue on behalf of his client. Nunley's arguments and the testimony presented at hearing do not indicate that the performance of Appellant counsel do not fall below an objective standard of reasonableness.

14. Any sentencing issue or possible defense not claimed would likely have had no effect on the appellate court's decision or result in a change in sentence.

15. Nunley's sentence is appropriate under the circumstances.

CONCLUSION

For the above reasons, Nunley's Petition for Post-Conviction Relief is DENIED.

So ORDERED this 2nd day of March, 2017.

Honorable Joseph Claypool
Judge, Harrison Superior Court

CC: Prosecutor
Defendant

STATE OF INDIANA)
) SS:
COUNTY OF HARRISON)

IN THE SUPERIOR COURT

OF HARRISON COUNTY

FILED
MAR 15 2017
CLERK, HARRISON SUPERIOR COURT

LAWRENCE NUNLEY,)
)
PETITIONER,)
)
-v-) CAUSE NO 31D01-1009-PC-011
)
STATE OF INDIANA,)
)
RESPONDENT.)

MOTION TO PROCEED ON APPEAL *IN FORMA PAUPERIS*

Comes now the Petitioner, Lawrence Nunley, *pro se*, pursuant to Ind. Appellate Rule 40, and respectfully asks this Court to grant him permission to proceed *in forma pauperis* on the appeal from the denial of post-conviction relief. In support, Nunley states to this Honorable Court as follows:

1. On March 2, 2017, this Honorable Court denied Nunley's post-conviction petition in the above-captioned cause.
2. Nunley is appealing this final judgment to the Indiana Court of Appeals.
3. This court allowed me to proceed *in forma pauperis*, during the post-conviction proceedings, although no specific declaration has been made for the record.
4. This Court did not charge me any filing fees or any other costs associated with litigating my *pro se* motions.
5. I am currently incarcerated at the Wabash Valley Correctional Facility.
6. Due to my incarceration, I am unable to pay the $250.00 filing fee and other costs associated with this appeal.
7. I do not have a source of meaningful employment, and I only earn a monthly stipend

from working a prison job.

8. I have not had meaningful employment since my arrest. I do not have any businesses or real estate. I do not receive any money from rental properties, pensions, or any source of business.

9. I do not have any bank accounts, stocks, bonds, securities, or other assets that would permit me to pay the filing fees associated with this appeal.

10. I do not have any dependents.

I, Lawrence Nunley, hereby state under the penalties for perjury that I have read the foregoing ten (10) numbered paragraphs, that I know the contents thereof, and that they are true and correct to the best of my knowledge, belief and understanding.

L. Nunley

Lawrence Nunley

CERTIFICATE OF SERVICE

I, Lawrence Nunley, hereby certify that I have, this 15th day of March 2017, I served upon the Prosecuting Attorney's Office for Harrison County, a copy of the above and foregoing Motion to Proceed on Appeal *In Forma Pauperis*, pursuant to **T.R 5(B)(1)**; by first class, postage prepaid, United States Mail.

Respectfully submitted,

L. Nunley

Lawrence Nunley

IN THE HARRISON SUPERIOR COURT

STATE OF INDIANA

LAWRENCE NUNLEY,
Petitioner

VS.

CAUSE NO.: 31D01-1009-PC-011

STATE OF INDIANA,
Respondent

ORDER GRANTING

Comes now the petitioner, Lawrence Nunley, pro se, and files a Motion to Proceed on Appeal *In Forma Pauperis* on March 15, 2017. The Court being duly advised in the premises now finds that the petitioner's motion shall be granted.

IT IS THEREFORE ORDERED that the petitioner shall proceed *in forma pauperis* on his appeal.

SO ORDERED this March 23, 2017.

HON. JOSEPH L. CLAYPOOL, JUDGE
HARRISON SUPERIOR COURT

cc:
Petitioner
Respondent

VERIFICATION

I, Lawrence Nunley, hereby verify that the documents contained in the Appellant's Appendix, Volume III are true and accurate copies of the record on appeal.

L. Nunley
Lawrence Nunley

CERTIFICATE OF SERVICE

I, Lawrence Nunley, verify that on the 16th day of October, 2017, I served a true and accurate copy of the foregoing Appellant's Appendix, Volume III upon the Appellee by depositing the same in the **United States Mail**, first-class postage prepaid and affixed, properly addressed as follows: Curtis Hill, Office of the Attorney General, IGCS, Fifth Floor, 302 W. Washington Street, Indianapolis, IN 46204

L. Nunley
Lawrence Nunley