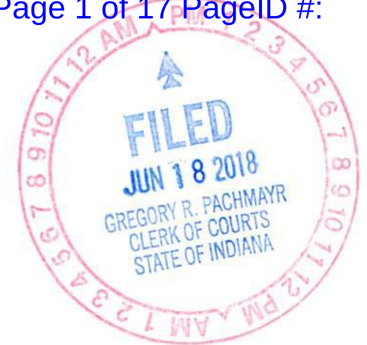

ORIGINAL

IN THE
SUPREME COURT OF INDIANA

No. ______________________________

Lawrence Nunley, #198710	Appeal from the Court of Appeals No. 31A01-1703-PC-547
Appellant,	In the Harrison Superior Court
-vs-	Cause No. 31D01-1009-PC-011
State of Indiana,	The Honorable Joseph Claypool Presiding Judge
Appellee.	

PETITION TO TRANSFER OF APPELLANT

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

Appellant *Pro Se*

QUESTIONS PRESENTED ON TRANSFER:

I. Whether trial counsel was ineffective in violation of **the Fifth, Sixth**, and **Fourteenth Amendments** of the **United States Constitution** and **Article One,, Sections Twelve, Thirteen,** and **Twenty-Three** of the **Indiana Constitution.**

II. Whether appellate counsel was ineffective in violation of **the Fifth, Sixth**, and **Fourteenth Amendments** of the **United States Constitution** and **Article One,, Sections Twelve**, **Thirteen,** and **Twenty-Three** of the **Indiana Constitution.**

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BACKGROUND AND PRIOR TREATMENT OF ISSUES

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. Between November 18, 2008 and November 21, 2008, a jury trial was held. At the conclusion of the jury trial, Nunley was found guilty on all counts. On January 15, 2009, 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.

On September 24, 2010, 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. The State filed its answer on October 14, 2010. Final Amendments to the petition were filed on January 14, 2016. The State filed its answer to the amended petition on January 22, 2016. The State generally denied the material allegations and did not plead any affirmative defenses.

Evidentiary hearings were held on July 14, 2016 and January 12, 2017. During the hearing, Nunley entered the original record on appeal. He also presented the live testimony of his trial and appellate attorneys. The State did not pose any questions of trial counsel. The only questions posed to appellate counsel were related to the State Public Defender's withdrawal. The post-conviction court gave the parties 30 days to tender proposed findings of fact and conclusions of law. Nunley timely tendered his proposed findings on February 3, 2017. The State did not tender any legal arguments to the post-conviction court. On March 2, 2017, the post-conviction court denied the Petition for Post-Conviction Relief.

During post-conviction proceedings, Nunley presented the live testimony of his trial and appellate attorneys: Susan Schultz and Matthew McGovern, respectively. Schultz testified that she conducted depositions in preparation for trial, including a deposition of the alleged victim, A.Y. She explained that depositions can be used for the purposes of impeachment or formulating questions for the witness. She also admitted that her trial strategy was to convince the jury that the A.Y., was lying about what happened. She recalled that there was no medical, forensic, or scientific evidence in this case. She unequivocally stated that the only way Nunley could be convicted was if the jury believed A.Y.'s testimony. She characterized A.Y. as a critical witness. She also testified that she believed she had an obligation to point out inconsistencies in A.Y.'s testimony.

Schultz further testified that A.Y. was permitted to write down a portion of her testimony and that portion of her testimony was entered into evidence. She could not recall a similar instance, in her 35 years of experience, where a witness was permitted to write down a portion of her testimony. She further admitted that since the jury was permitted to take exhibits with them to the jury room, it placed undue emphasis on that portion of A.Y.'s testimony.

Nunley's appellate counsel, Matthew McGovern, also testified that he had never seen an instance in which a witness was permitted to write down a portion of their testimony. He thought it was unusual and believed it could have placed undue emphasis on that portion of her testimony. He did not think it was appropriate. He had no recollection of considering the issue for presentation on appeal.

ARGUMENT I
INEFFECTIVE TRIAL COUNSEL

Failure to Impeach A.Y.

Initially, Nunley contends that trial counsel was ineffective for failing to impeach A.Y., the alleged victim in this case. During the post-conviction proceedings, Schultz testified that her trial

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

The Indiana Court of Appeals held that "Nunley's trial counsel made strategic choices of how best to cast doubt on A.Y.'s trial testimony." *Nunley v. State*, Cause No. 31A01-1703-PC-547, slop. Op. p. 9, ¶ 14. However, Schultz did not articulate any of the reasons cited by the Indiana Court of Appeals as being a strategic consideration by her at the time of trial. "It is not the role of a reviewing court to engage in post hoc rationalization for an attorney's actions 'by constructing strategic defenses that counsel does not offer' or engage in Monday morning quarterbacking." *Harris v. Reed*, 894 F.2d 871, 878 (7th Cir. 1990). This Court has similarly found that "even if a decision is hypothetically a reasonable strategic choice, it may nevertheless constitute ineffective assistance if the purported choice is actually "made due to unacceptable ignorance of the law or some other egregious failure rising to the level of deficient attorney performance. *Brewington v. State*, 7 N.E.3d 946 (Ind. 2014), (Section III(C)).,

"A failure to impeach constitutes ineffective assistance when there is a reasonable probability that, absent counsel's failure, the jury would have had a reasonable doubt of the petitioner's guilt." *United States v. Orr*, 636 F.3d 944, 952 (8th Cir. 2010), *quoting Whitfield v. Bowersox*, 324 F.3d 1009, 1017 (8th Cir. 2010). "In cases which turn largely on questions of credibility… '[t]he jury's estimate of the truthfulness and reliability of a witness may well be determinative of guilt or innocence, and it is upon such subtle factors as the possible interest of the witness in testifying falsely that a defendant's life or liberty may depend.'" *State v. Bowens*, 722

N.E.2d 368, 370 (Ind. Ct. App. 2000), *quoting Lewis v. State*, 629 N.E.2d 934, 937-938 (Ind. Ct. App. 1994).

A.Y.'s trial testimony was the crux of the case against Nunley, and trial counsel's strategy was to demonstrate to the jury that A.Y.'s account was fabricated. Schultz testified that she did not have a strategic reason for failing to impeach A.Y.; therefore, Schultz's failure to impeach A.Y. was constitutionally deficient performance, resulting in prejudice to Nunley. The Court of Appeals decision to the contrary contravenes existing authority and is an unreasonable determination of the facts.

Failing to Object to A.Y.'s Written Testimony

Nunley alleges that 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. Schultz had no recollection of whether or not she objected, but she agreed with Nunley's proposition that the written testimony placed undue emphasis on A.Y.'s testimony. (PC Vol. II, p. 31). Schultz also admitted that A.Y.'s testimony was critical to the State's case. (PC Vol. II, p. 28). Schultz offered no strategic reason for failing to object.

Indiana law has historically prohibited written testimony. For instance, in *Thomas v. State*, 259 Ind. 537, 289 N.E.2d 508 (1972), this Court noted that " [i]n most jurisdictions, depositions are not permitted in the jury room for the reason that undue influence would most likely be placed on that particular testimony." *Id.* at 539. The Court went on to state, "An exhibit consisting of a writing which contains prior statements of a witness or the contents of his testimony or similar matter will not usually be sent to the jury room. To put such a writing where the jury could study it at their leisure would be to invite them to give undue weight to a portion of the evidence." *Id., quoting The ALI Model Code of Evidence* (1942), Rule 105, clause (m). This Court went on to reverse the case

for sending a deposition to the jury room, holding that the jury could improperly give it undue weight. *Id.* at 541.

The presiding judicial officer, *sua sponte,* entered the written pages into evidence. This fact alone emphasized the written testimony. The judge signaled to the jurors that this evidence was to be considered more important because it was the judge's evidence.

Schultz did not have a strategic reason to refrain from interposing an appropriate objection. Schultz testified that the written testimony placed undue emphasis on the most critical portion of A.Y.'s testimony. The trial record reveals that 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). The then presiding judge's comments on this topic indicate that a properly interposed objection would have been sustained.

A.Y.'s written testimony placed undue emphasis on the most critical part of her testimony against 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. 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.

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.

This Court should grant transfer to prohibit written testimony to be taken to the jury room because it permits the jury to give undue weight to a portion of one particular witness's testimony.

Separation of Witnesses Violation

Nunley also alleges that his attorney was ineffective for failing to object to violations of the separation of witnesses order. 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.

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).[1]

In *Jiosa v. State*, 755 N.E.2d 605 (Ind. 2001), this Court noted 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). Therefore, a properly interposed objection would have prevented A.Y. from interacting with her parents or excluded the testimony. *Id* at 608. There is case authority prohibiting counsel from acting as a "conduit among witnesses." *Id.* at 608, *citing United States v. Rhymes*, 218 F.3d 310 (4th Cir. 2000).

In this case, 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.

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[1] Significantly, A.Y. the record reveals that A.Y. was in the hall with her parents while the courtroom discussion was taking place, thereby obviating the "protections" of the prosecutor's attending lunch with A.Y. and her parents to "ensure" that the case was not discussed, which the Court of Appeals relied upon. *Nunley v. State*, Cause No. 31A01-1703-PC-547, slop. Op. p. 9, ¶ 22. The Court of Appeals did not address the State's being a conduit for improper communications between A.Y. and her parents or the fact that A.Y. answered questions she previously could not answer prior to the lunch break.

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.

Schultz did not have a strategic reason for not objecting to the violation of the separation of witnesses order. A properly interposed objection would have been sustained.

Failure to Object to State's Exhibit 2

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. The Court of Appeals agreed with Nunley that Indiana Evidence Rule 901 requires evidence to be properly authenticated. *Nunley v. State*, Cause No. 31A01-1703-PC-547, slop. Op. p. 9, ¶ 19. However, the Court denied Nunley's claim on the basis that A.Y. had identified the DVD as being the DVD Nunley showed her. *Nunley v. State*, Cause No. 31A01-1703-PC-547, slop. Op. p. 9, ¶ 20. This assertion is factually incorrect.

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). 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).

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). Thus, under the Indiana Rules of Evidence, a properly interposed objection would have been sustained as a matter of law.

The Court of Appeals did not even consider the fact that A.Y. had no viable means of identifying this DVD as the one that Nunley allegedly showed her. She did not know the name of the movie and did not remember the picture on the DVD. This Court should grant transfer because the Court of Appeals ruling lessens the burden of the State with regard to evidence authentication.

Failure to Object to Vouching Testimony

The Court of Appeals stated that this claim was waived because Nunley failed to provide a record citation to the vouching testimony. However, in his reply brief, Nunley provided the page citations. On page 11 of the reply brief, Nunley states "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. (R. 686-687, 688-689, 711)." Therefore, the Court of Appeals basis for waiver is incorrect, and this Court should consider the issue as presented in the Brief of Appellant.

Cumulative impact

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 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 Nunley was not significant enough to mandate reversal on an individual error, the totality of error certainly does.

ARGUMENT II: INEFFECTIVE ASSISTANCE OF APPELLATE COUNSEL

Appellate Counsel's Failure to Raise Issues Well

Nunley asserts that McGovern did not raise the issue regarding the denial of defense well and asked to revisit the issue to correct a manifest injustice. *State v. Huffman,* 643 N.E.2d 899 (Ind. 1994). 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.

The Court of Appeals opinion violates United States Supreme Court authority. *Holmes v. South Carolina*, 547 U.S. 319, 3.26 (2006), *Chambers v. Mississippi*, 410 U.S. 284, 302, and *Washington v. Texas*, 388 U.S. 14, 19 (1967). These cases have made it clear that Nunley had the right to present evidence in support of his defense.

Had McGovern advanced an argument that the denial of this testimony through the mechanistic application of state evidentiary rules is unconstitutional, denying Nunley the opportunity to present a complete defense, it would have prevailed.

Appellate Counsel's Failure to Raise Issues

a. Sentencing Issues

Initially, Nunley contends that McGovern should have advanced sentencing arguments, challenging the: (1) double jeopardy violation, (2) use of improper aggravators, and (3) the appropriateness of the sentence.

1. Double Jeopardy

Nunley asserted that, because all acts were part and parcel of a single confrontation with a single victim, the sentences violate double jeopardy principles. He cites to *Bowling v. State*, 560 N.E.2d 658 (Ind. 1990) in support of this proposition. The Court of Appeals rejected this argument,

stating that *Bowling* "was impliedly overruled by our supreme court in *Richardson v. State*, 717 N.E.2d 32 (Ind. 1999). The Court of Appeals stops its inquiry there and contravenes the holding in *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 that *Bowling* should be followed unless the Court was specifically instructed to reject it. *Kocielko*, 943 N.E.2d at 1283.

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, Nunley is said to have licked A.Y.'s vagina and had her suck on his penis. During this single confrontation, Nunley was charged with two separate instances of molestation.

As the Indiana Court of Appeals pointed out in its opinion on rehearing in *Kocielko*, "unless instructed to the contrary," the Court 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 McGovern could have relied upon *Bowling*, which makes it clear that consecutive sentences, under the circumstances found here, cannot stand. Thus, if 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.

The decision not to raise this issue was not strategic. McGovern testified at the evidentiary hearing that he was not familiar with *Bowling.* (PC Vol. II, p. 42). He did not recall researching the

issue or considering it as an issue. (PC Vol. II, p. 42). Where counsel's acts and/or omissions demonstrate a lack of familiarity with the law crucial to his client's case, they are not deemed mere strategy decisions and may constitute ineffective assistance. *Smith v. State*, 396 N.E.2d 898, 901 (Ind. 1979); *Clayton v. State*, 673 N.E.2d 783, 786 (Ind. Ct. App. 1996); *Patton v. State*, 537 N.E.2d 513, 518 (Ind. Ct. App. 1989).

2. *Nunley's Sentence is Inappropriate*

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

McGovern could have presented the issue that Nunley's sentence was inappropriate. Again, he did not recall researching possible sentencing issues. (PC Vol. II, p. 42-44). The Indiana Court of Appeals agreed that it had the constitutional authority to review and revise sentences. *Nunley v. State*, Cause No. 31A01-1703-PC-547, slop. Op. p. 9, ¶ 38.

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

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

2016). Therefore, Nunley should be remanded for resentencing. *Comer v. State*, 839 N.E.2d 721, 730 (Ind. Ct. App. 2005).

Both the Indiana Court of Appeals and this Court 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), this Court made this determination and cited other cases coming to the same conclusion.

The Court of Appeals did not consider or analyze that there is nothing inherent in the commission of Nunley's alleged 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) this Court 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, this Court declared that *"a rational sentencing scheme should punish more severely those who brutalize the victims of their crimes." Id.* (emphasis added).

Similarly, in *Sanchez v. State,* 938 N.E.2d 720 (Ind. 2010), this Court reversed a sentence for crimes more egregious than those for which Nunley stands convicted. Despite Sanchez's having multiple victims, the *Sanchez* court held that these events supported enhanced sentences, but not consecutive ones. *Id.* at 722.

The facts of Mr. Nunley's claims are not nearly as egregious as those detailed in *Sanchez.* Like Sanchez, Nunley did not harm A.Y. in a manner more than is inherent in the criminal offenses, and he did not use force. The State alleged that Mr. Nunley licked A.Y.'s vagina, and (2) that Mr. Nunley told A.Y. to 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. Nunley lacks a criminal history. Because both the nature of the offenses and the character of the offender warrant concurrent sentences, the Court of Appeals would have

reversed Nunley's sentence. Pursuant to the case authority cited in itemization 100, the Court of Appeals would likely have ordered the sentences to be served concurrently.

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

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

The Court of Appeals did not address this issue and Nunley asks this Court to consider the entirety of the issue as presented in the Brief of Appellant.

c. Failure to Include the underlying issue of the separation of witnesses violation

The Court of Appeals did not address this issue and Nunley asks this Court to consider the entirety of the issue as presented in the Brief of Appellant.

d. Failure to Include the underlying issue regarding the admission of State's Ex. 2

The Court of Appeals did not address this issue and Nunley asks this Court to consider the entirety of the issue as presented in the Brief of Appellant.

e. Failure to Include the underlying issue of Vouching Testimony

The Court of Appeals did not address this issue and Nunley asks this Court to consider the entirety of the issue as presented in the Brief of Appellant.

Conclusion

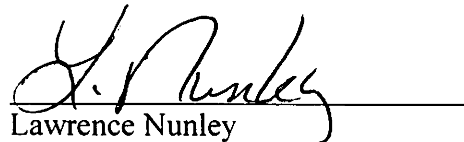
For all of the foregoing reasons, this Court should accept transfer, reverse the decision of the Court of Appeals, and remand this matter for a new trial.

Respectfully submitted,

Lawrence Nunley

Word Count

I, Lawrence Nunley, hereby verify under the penalties for perjury that the foregoing Brief of Appellant is less than 4,200 words; to wit: 4,154 words, according to the electronic word count feature in *Microsoft Word.*

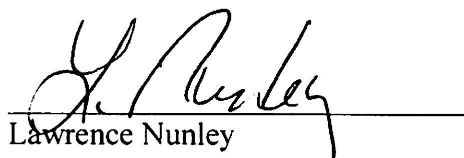


Lawrence Nunley

Certificate of Service

I also verify under the penalties for perjury that on this 18th day of June 2018, I served a true and accurate copy of the foregoing Petition to Transfer upon the Office of the Attorney General, by depositing the same in the **United States Mail**, first-class postage prepaid and affixed, properly addressed as follows:

Office of the Attorney General
Indiana Government Center South
Fifth Floor
302 W. Washington Street
Indianapolis, Indiana 46204



Lawrence Nunley