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

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

PETITIONERS RESPONSE TO RESPONDENT'S RETURN TO ORDER TO SHOW CAUSE AND REQUEST TO GRANT WRIT

Comes now the Petitioner, Lawrence Nunley, *pro se*, and respectfully submits his Traverse, responding to the Respondent's Return to Order to Show cause, as follows:

I. Legal Standards Governing Federal Review

As noted by the Respondent, 28 U.S.C. § 2254(d) provides a standard for when relief can be granted for claims adjudicated on the merits in state court: Relief should be granted when the state court adjudication "resulted in a decision contrary to, or involved an unreasonable application of, clearly established Federal law as determined by the Supreme Court of the United States" §2254(d)(1), or "was based on an unreasonable determination of the facts in light of the evidence presented in the State Court proceeding." §2254(d)(2). The United States Supreme Court interpreted that language in *Williams (Terry) v. Taylor*, 529 U.S. 362 (2000)..

The Court held that §2254(d)(1)'s "contrary to" clause required the rejection of state court decision, which were "substantially different from the relevant precedent of this Court."

The court gave an example of a misinterpretation of *Strickland v. Washington*, 466 U>S. 668, 694 (1984):

> If a state court were to reject a prisoner's claim of ineffective assistance of counsel on the grounds that the prisoner had not established by a preponderance of the evidence that the result of his criminal proceeding would have been different, that decision would be "diametrically different," "opposite in character or nature," and "mutually opposed" to our clearly established precedent because we held in *Strickland* that the prisoner need only demonstrate a "reasonable probability that... the result of the proceeding would have been different.

Williams v. Taylor, 529 U.S. at 405-406 (2000) (Opinion of O'Connor, J.).

The Court then considered the situation in which a state court correctly identifies the applicable Supreme Court precedent and the standards contained in that precedent, but applies them unreasonably to the facts of the case. The Court held that this situation requires relief under §2254(d)(1): "A state court decision that correctly identifies the governing legal rule but applies it unreasonably to the facts of a particular prisoner's case certainly would qualify as a decision 'involving an unreasonable application... of clearly established Federal law.'" *Williams (Terry) v. Taylor*, 529 U.S. at 407-408. In *Wiggins v. Smith*, the State court unreasonably applied *Strickland* when it afforded deference to counsel's professed strategic decision to curtail their investigation into petitioner's background without assessing whether that decision was reasonable under the circumstances. *Wiggins v. Smith*, 539 U.S. 510, 527-528 (2003).

The Court held in *Williams (Terry)* that an incorrect application of law is not the same as an unreasonable application of law. But the reasonableness of the state court decision is evaluated objectively by the reviewing court, not by any sort of "majority rule" analysis. The Court specifically rejected the standard of the Fourth Circuit, which had focused on whether

"reasonable jurists" would find the state court determination to be reasonable. *Williams (Terry) v. Taylor*, 529 U.S. at 409-410.

While *Williams (Terry)* did not enunciate standards for the reasonableness determination, it did provide an illustration of the proper analysis when it applied the standard to the decision of the Virginia Supreme Court in Mr. Williams' case, and found that court's decision to be an unreasonable application of clearly established federal law. In reaching this conclusion, the Court examined the reasoning of the Virginia Supreme Court both as to the legal standard, which it applied, and as to the application of that standard to the facts of the case. The court found two aspects of the Virginia Court decision to be unreasonable: First, the Virginia Supreme Court applied the wrong legal standard when it held that the prejudice standard of *Strickland, supra* had been modified by *Lockhart v. Fretwell*, 506 U.S. 364 (1993). Second, it failed to evaluate the evidence in the case properly in accordance with the correct standard when it found that the failure of Mr. Williams' counsel to present penalty phase evidence did not prejudice him. *Williams (Terry) v. Taylor*, 529 U.S. at 413-414. Accordingly, the United States Supreme Court reversed Mr. Williams' death sentence.

The United States Supreme Court subsequently expanded on its analysis of 28 U.S.C. §2254(d):

> AEDPA does not "require state and federal courts to wait for some nearly identical factual pattern before a legal rule must be applied." *Carey v. Musladin*,...127 S.Ct. 649, 656...(2006) (KENNEDY, J. concurring in judgment). Nor does AEDPA prohibit a federal court from finding an application of a principle unreasonable when it involves a set of facts "different from those of the case in which the principle was announced." *Lockyer v. Andrade*, 538 U.S. 63, 76...(2003). The statute recognizes, to the contrary, that even a general standard may be applied in an unreasonable manner. *See, e.g., Williams (Terry) v. Taylor*, 529 U.S. 362.... (finding a state-court decision both contrary to and involving an unreasonable application of the standard set forth in *Strickland v. Washington*....

Panetti v. Quarterman, 127 S.Ct. 2842, 2858 (2007).

In addition to the situation where a state court decision is "contrary to" or "an unreasonable application of clearly established federal constitutional law, 28 U.S.C. §2254(d)(2) provides that a state court decision must be reversed, and relief must be granted if the state court proceeding "resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding." The application of this standard was discussed in *Miller-El v. Cockrell*, 537 U.S. 322 (2003)(*Miller-El I)*:

> Factual determinations by state courts are presumed correct absent clear and convincing evidence to the contrary, §2254(e)(1), and a decision adjudicated on the merits in a state court and based on a factual determination will not be overturned on factual grounds unless objectively unreasonable in light of the evidence presented in the state court proceeding [citations omitted]. Even in the context of federal habeas, deference does not imply abandonment or abdication of judicial review. Deference does not by definition preclude relief. A federal court can disagree with a state court's credibility determination and, when guided by AEDPA, conclude the decision was unreasonable or that the factual premise was incorrect by clear and convincing evidence.

Citing *Miller-El I*, the Court in *Collins v. Rice*, 365 F.3d 667, 685 (9th Cir. 2004) found the appellate court's determination that the trial judge properly accepted proffered "neutral" bases for peremptory challenges was not supported by the record, commenting:

> Contrary to the assertion in the dissent, we have not substituted our own judgment for that of the state court. "Even in the context of federal habeas, deference does not imply abandonment or abdication of judicial review. Deference does not by definition preclude relief. A federal court can disagree with a state court's credibility determination and, when guided by AEDPA, conclude the decision was unreasonable or that the factual premise was incorrect by clear and convincing evidence." *Miller-El,* 123 S.Ct. at 1041; see also *Hall v. Dir of Corrs*, 343 F.3d 976, 9-84, n.8 (9th Cir. 2003) ("AEDPA, although emphasizing proper and due deference to the state court's findings did not eliminate federal habeas review. Where there are real, credible doubts about the

> veracity of essential evidence and the person who created it, AEDPA does not require us to turn a blind eye.").

Also applying *Miller-El I*, the Court in *Parsad v. Greiner*, 337 F.3d 175, 180-181 (2nd Cir. 2003), found that the state court's determination that a petitioner was not "in custody" for Miranda purposes was an unreasonable determination of the facts presented to the state court.

Explaining its ruling that the state court decision that the petitioner's plea agreement had not been breached was an unreasonable determination of the facts, the court in *Gunn v. "Ignacio*, 263 F.3d 965 (9th Cir. 2001), stated the standard as follows: "We read the 'unreasonable determination of the facts' criterion to require 'more than mere incorrectness,' such that the state court's fact finding is so 'clearly erroneous' as to leave us with a 'firm conviction' that its determination was mistaken on the evidence." *Id.* at 970, *citing Torres v. Prunty,* 223 F.3d 1103, 1107-1108 (9th Cir. 2000). See also *McClain v. Prunty*, 217 F.3d 1209, 1223 (9th Cir. 2000) (Finding state court decision that prosecutor's "race neutral" reasons justified peremptory strike was unreasonable determination of the facts.

When it revisited Mr. Miller-El's case, the Supreme Court found that the Texas court's determination of the facts was unreasonable under §2254(d)(2): "The state court's conclusion that the prosecutors; strikes of Fields and Warren were not racially determined is shown up as wrong to a clear and convincing degree; the state court's conclusion was unreasonable as well as erroneous. *Miller-El v. Dretke*, 525 U.S> 231, 266 (2005) (*Miller-El II)*

Finally, if a legal issue has not been considered by the state court, this court must review it *de novo*. *Wiggins v. Smith*, 539 U.S. at 531.

II. ARGUMENT

Lawrence Nunley is a prisoner, who is currently confined at the Wabash Valley Correctional Facility in Carlisle, Indiana, which is operated and controlled by the Indiana Department of Correction. Mr. Nunley has filed a *pro se* petition, pursuant to 28 U.S.C. § 2254, seeking habeas relief from his state court convictions. The legal standards, governing 28 U.S.C. § 2254 cases have been laid out Section I, *supra*. It is significant to note that *pro se* pleadings are held to a less stringent standard than briefs by counsel and are read generously, "however inartfully pleaded." *Haines v. Kerner*, 404 U.S. 519, 520 (1972) (per curium). *See also, Branham v. Meachum,* 77 F.3d 626, 628-629 (2nd Cir. 1996).

CLAIM I: DENIAL OF THE RIGHT TO PRESENT A COMPLETE DEFENSE

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

CLAIM II: DENIAL OF THE RIGHT TO CONFRONTATION

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(Ex. K, pp 29-30).

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

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

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

CLAIM III: INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL

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

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

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

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

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

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

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

Failure to Impeach A.Y.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(R. 813).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

A.Y.'s Written Testimony

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(Ex. K p. 24).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(R. 445).

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

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

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

Thus, the writ should issue.

Separation of Witnesses

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

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

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

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

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

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

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

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

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

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

Cumulative Effect

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

CLAIM IV: INEFFECTIVE ASSISTANCE OF APPELLATE COUNSEL

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

Right to Present a Defense

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

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

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

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

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

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

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

Double Jeopardy

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

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

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

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

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

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

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

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

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

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

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

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

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

Sentencing

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

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

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

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

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

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

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

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

(R. 911)

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

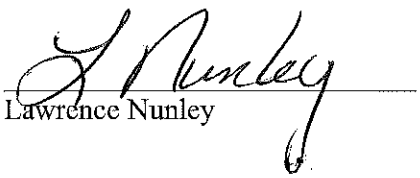
Failure to Argue the issue of the Separation of Witnesses Violation

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

V. CONCLUSION

For all of the foregoing reasons, the writ for a petition of habeas corpus should be **GRANTED**.

Respectfully submitted



Lawrence Nunley

CERTIFICATE OF SERVICE

I, Lawrence Nunley, hereby verify, under the penalties for perjury a true and accurate copy of the foregoing Reply to Respondent's Return to Order to Show Cause was served upon the Office of the Attorney General, counsel for the Respondent, via the electronic filing system piloted at the Wabash Valley Correctional Facility on this 11th day of June 2019. The preceding date represents the date that Nunley placed the document in the prison's interdepartmental mail system with a request for prison officials to E-File the document. According to the "prison mailbox rule," the document is deemed filed on that date.

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