UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
TERRE HAUTE DIVISION

LAWRENCE NUNLEY,
Petitioner,
v.

RICHARD BROWN, Warden,
Wabash Valley Correctional Facility,
Respondent.

No. 2:19-cv-00012-JRS-DLP

RETURN TO ORDER TO SHOW CAUSE

Respondent Richard Brown, Warden of the Wabash Valley Correctional Facility, respectfully requests this Court to deny Petitioner Lawrence Nunley's petition for a writ of habeas corpus because his claims are procedurally defaulted and/or meritless.

JURISDICTION

Nunley, identified by prisoner number 198710, is in Respondent's custody. Nunley challenges his confinement for his 2008 Harrison County, Indiana, convictions for child molesting and dissemination of matter harmful to minors. He is serving a sentence of 71 years and nine months and could be released as early as October 12, 2043. He seeks a writ of habeas corpus under 28 U.S.C. § 2254.

EXHAUSTION

Nunley has completed direct and post-conviction review.

STATEMENT OF THE FACTS

This Court presumes that the state courts correctly found the facts unless

Nunley rebuts that presumption with clear and convincing evidence. *See* 28 U.S.C. § 2254(e)(1). The Indiana Court of Appeals described Nunley's crimes:

> Nunley lived with his teenage son and his son's girlfriend, K.S. K.S. sometimes babysat six-year-old A.Y. A.Y.'s mother, T.C., testified A.Y. "loved [K.S.] to death." (Tr. at 534.) On April 13, 2007, A.Y. asked to spend the night at Nunley's residence. When T.C. dropped off A.Y., Nunley told her K.S. was on the way there. T.C. was under the impression that K.S. would be watching A.Y. According to A.Y., K.S. and her boyfriend were there for only a brief time that night.
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> Sometime during the evening, Nunley called A.Y. back to his bedroom and showed her a pornographic video. A.Y. was wearing a tee shirt and panties. He took off her panties and licked her vagina. He also made her suck on his penis.
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> The next day, T.C. and R.C.[, A.Y.'s stepfather,] picked up A.Y. After they had been in the car for a few minutes, A.Y. told them she and Nunley had a secret. A.Y. would not say what it was, so T.C. tried to trick her into telling by saying, "That's okay. I know what the secret is." (*Id.* at 537.) Then A.Y. wanted to tell them, but she did not want to say it out loud, so her parents gave her a pencil and an envelope to write on. Her note indicated she "was sucking his weenie-bob and he was licking my pee-pee." (*Id.* at 626.)
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> After reading the note, T.C. turned the vehicle around and went back to Nunley's residence. She took a bat and started hitting Nunley's motorcycle and truck so he would come outside. Nunley came to the door. T.C. yelled at him and accused him of molesting A.Y. Nunley denied her accusations.
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> T.C., R.C., and A.Y. then went to the Washington County Police Department to make a report. They spoke to State Trooper Kevin Bowling. Trooper Bowling first attempted to interview A.Y. alone, but that did not work well, so T.C. stayed in the room with her while A.Y. answered questions. A.Y. said Nunley made her watch a "bad movie." (*Id.* at 626.) Trooper Bowling asked her what she meant by that, and she said, a "naked movie." (*Id.*) T.C. showed him the note A.Y. had written. T.C. believed she left the note with Trooper Bowling, but Trooper Bowling had no record or recollection of what happened with the note. Trooper Bowling referred the case to the Department of Child Services.
>
> Authorities tried to arrange a forensic interview of A.Y., but T.C. did not immediately follow through. The interview was finally conducted on April 18, 2008, a little over a year after A.Y. was molested.

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

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

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

T.C. testified as to why she did not immediately bring A.Y. for a forensic interview: "I had second thoughts ... just because of the fact of putting my daughter through this. And not only that ... there's a side of you that thinks maybe if you just don't acknowledge it, that it'll go away." (*Id.* at 549.) A juror asked, "[W]hat made you continue to think about it? What, was it brought up by [A.Y.]?" (*Id.* at 569). T.C. responded, "No, it wasn't brought up by [A.Y.]. It was brought up by other people. Uhm, there were other allegations that I had heard about." (*Id.*) Nunley objected and moved for a mistrial, because T.C. had been instructed not to refer to any other allegations against him. The trial court denied the motion for mistrial because T.C. did not specify the nature of the allegations, and it instructed the jury to disregard T.C.'s answer.

The videotape was played for the jury. The video was difficult to understand in some places, but Black testified she was able to understand what A.Y. was saying to her during the interview. The prosecutor therefore asked Black to recount how A.Y. had said Nunley had touched her. Black testified A.Y. said Nunley "touched her on her pee-pee with his weenie-bob, his hand and his tongue," that he "made her put his weenie-bob in her mouth and suck it," and that he made her watch a video with naked people in it. (*Id.* at 613.) Detective

> Wibbels also testified concerning A.Y.'s allegations made during the interview.
>
> Nunley testified in his own behalf. He claimed T.C. called and asked if he could watch A.Y. while she went to Corydon. He asserted T.C. did not bring any extra clothes for A.Y., and he did not think A.Y. would be spending the night. He claimed A.Y. fell asleep on the couch soon after arriving, and then his friend, Michelle Cayton, came over to Nunley's residence to spend the night, leaving shortly before T.C. picked up A.Y. Nunley claimed he was in a relationship with T.C., and when T.C. came to pick up A.Y., she asked to move in with him. He would not let her, and she was angry when she left. Although Nunley voluntarily spoke with the police, he never told them Cayton had been at his residence on the night in question.
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> The jury found Nunley guilty as charged.

(Ex. E at 2–6) (footnotes omitted). *Nunley v. State*, 916 N.E.2d 712, 714–16 (Ind. Ct. App. 2009) (footnotes omitted).

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

> (1) whether the trial court committed reversible error by admitting A.Y.'s hearsay statements via the videotape of her interview and the testimony of several witnesses; (2) whether the trial court abused its discretion by excluding evidence A.Y. had accused her mother's boyfriend of attacking her and then later recanted; (3) whether the prosecutor committed misconduct by stating in her closing argument that A.Y. had not been taught how to lie; and (4) whether the trial court abused its discretion by denying Nunley's motion for a mistrial after T.C. referred to other allegations against Nunley.

(Ex. E at 6). The court first held that T.C.'s, R.C.'s, and Trooper Bowling's testimony about what A.Y. wrote on the envelope was admissible but that A.Y.'s forensic interview was not (Ex. E at 8–12). The court reversed Nunley's child molesting convictions in Counts 3 and 4, which were based solely on the interview, but "conclude[d] that the admission of the evidence was harmless error as to Counts 1,

2, and 5 because it was merely cumulative of other properly admitted evidence, including A.Y.'s own trial testimony" (Ex. E at 12–13).

Next, the court held that the trial court properly excluded evidence that A.Y. had falsely accused her mother's boyfriend of attacking her (Ex. E at 13–14). The court concluded that the evidence was not admissible under Indiana Evidence Rule 608(b) and did not deny Nunley his right to present a defense (Ex. E at 14). The court also held that Nunley waived his argument that the prosecutor committed misconduct during closing argument by not moving for a mistrial (Ex. E at 16–17). And the court held that the trial court did not abuse its discretion when it denied a mistrial after T.C. referred to "other allegations" because T.C. was not specific and the court admonished the jury (Ex. E at 17–18).

Nunley filed a petition to transfer to the Indiana Supreme Court, raising two issues (Ex. F). First, he argued that the trial court violated his right to present a defense when it excluded evidence about A.Y.'s false allegation (Ex. F at 6–8). And second, he argued that the trial court abused its discretion when it admitted hearsay (Ex. F at 8–10). The Indiana Supreme Court asked the parties to submit additional briefing on Indiana Evidence Rule 608 (Exs. B at 4, G, H). Nunley argued that the trial court violated his right to cross-examination (Ex. G). The court denied Nunley's petition on March 4, 2010 (Ex. B at 4).

On September 24, 2010, Nunley filed a petition for post-conviction relief (Ex. I at 1). After a hearing, the post-conviction court denied Nunley's petition on March 2, 2017 (Ex. I at 6). On appeal, Nunley argued that he received ineffective

assistance from his trial and appellate counsel (Ex. K). Specifically, Nunley contended that his trial counsel was ineffective for the following reasons: not impeaching A.Y., not objecting when the trial court allowed A.Y. to write down and read part of her testimony, not objecting to the admission of the pornographic DVD that Nunley showed A.Y., not objecting to an alleged violation of the separation of witnesses order, not objecting to alleged vouching testimony, and the cumulative effect of the errors (Ex. K at 18–29). And Nunley contended that his appellate counsel was ineffective for the following reasons: inadequately arguing that Nunley was denied his right to present a defense, not raising double jeopardy, not raising abuse of sentencing discretion, not raising sentence inappropriateness, not raising A.Y.'s written testimony, not raising an alleged violation of the separation of witnesses order, not raising the admission of the DVD, and not raising the issue of alleged vouching testimony (Ex. K at 29–40).

The Indiana Court of Appeals affirmed the post-conviction court, concluding that Nunley did not receive ineffective assistance from his trial or appellate counsel (Ex. N at 20). The court held that Nunley waived his claims that his trial counsel was ineffective for not objecting to alleged vouching testimony and because of the cumulative effect of counsel's alleged errors because Nunley did not make a cogent argument with citations to the record and relevant authority, which Indiana Appellate Rule 46(A)(8)(a) requires (Ex. N at 13). The court also held that Nunley waived his argument that his appellate counsel was ineffective for not arguing that Nunley was denied his right to present a defense because Nunley did not make a

cogent argument (Ex. N at 15). Nunley raised the same claims in a petition to transfer to the Indiana Supreme Court, which the court denied on August 9, 2018 (Exs. J at 9, O).

On January 8, 2019, Nunley filed a petition for a writ of habeas corpus in this Court (D.E. 2). On January 14, 2019, the Court ordered Respondent to answer Nunley's petition by March 18, 2019 (D.E. 6). On March 13, 2019, the Court granted Respondent's motion for an extension of time to April 17, 2019, to answer Nunley's petition (D.E. 13).

ARGUMENT

I.
Standard of Review

Nunley is not entitled to a writ of habeas corpus unless "[h]e is in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2254(a). For claims that the state court "adjudicated on the merits," he must show that the adjudication "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court" or "based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d). The Court presumes that the state court adjudicated his federal claims on the merits, *Harrington v. Richter*, 562 U.S. 86, 99 (2011), and reviews "the last reasoned opinion on the claim[s]," *Ylst v. Nunnemaker*, 501 U.S. 797, 803 (1991).

A decision is contrary to federal law if "the state court arrives at a conclusion opposite that reached by [the Supreme Court] on a question of law" or "confronts

facts that are materially indistinguishable from a relevant Supreme Court precedent and" reaches an opposite result. *Williams v. Taylor*, 529 U.S. 362, 405–06 (2000). A decision is also contrary to "clearly established precedent if the state court applies a rule that contradicts the governing law set forth in [Supreme Court] cases." *Id.* at 405. But "a run-of-the-mill state-court decision applying the correct legal rule from [Supreme Court] cases to the facts of a prisoner's case" is not. *Id.* at 406. For example, if "a state-court decision on a prisoner's ineffective-assistance claim correctly identifies *Strickland* as the controlling legal authority and, applying that framework, rejects the prisoner's claim[,] … the state-court decision would be in accord with … *Strickland* as to the legal prerequisites for establishing an ineffective-assistance claim." *Id.*

A state court unreasonably applies federal law if the court "correctly identifies the governing legal rule but applies it unreasonably to the facts of a particular prisoner's case." *Id.* at 407–09. An unreasonable application of federal law is different than an incorrect application of federal law. *Richter*, 562 U.S. at 101 (citing *Williams*, 529 U.S. at 410). So "even a strong case for relief does not mean the state court's contrary conclusion was unreasonable." *Id.* at 102 (citing *Lockyer v. Andrade*, 538 U.S. 63, 75 (2003)). This Court "must determine what arguments or theories supported or … could have supported[] the state court's decision; and then it must ask whether it is possible fairminded jurists could disagree that those arguments or theories are inconsistent with the holding in a prior decision of [the Supreme Court]." *Id.* Nunley must show that the state court's ruling "was so lacking

in justification that there was an error well understood and comprehended in existing law beyond any possibility of fairminded disagreement." *Id.* at 103. The standard is difficult to meet. *Id.* at 102.

II.
Nunley's claim that he was denied his right to present a defense is meritless.

The Indiana Court of Appeals' decision that Nunley was not denied his right to present a defense was not contrary to or an unreasonable application of clearly established federal law or based on an unreasonable factual determination. At Nunley's trial, he wanted to impeach A.Y. with evidence that she had falsely accused another man of physically assaulting her (Trial Tr. 377–85, 715–18). The State objected under Indiana Evidence Rule 608(b), which generally prohibits extrinsic evidence "to prove specific instances of a witness's conduct in order to attack or support the witness's character for truthfulness" (Trial Tr. 378–81, 384, 717). The trial court excluded the evidence (Trial Tr. 385).

On appeal, Nunley argued that the trial court violated his Sixth Amendment right to present a defense when it excluded the evidence of A.Y.'s unrelated recantation (Ex. C at 16–19). The court of appeals rejected his argument, citing *Saunders v. State*, 848 N.E.2d 1117, 1122 (Ind. Ct. App. 2006) (Ex. E at 14). In *Saunders*, the defendant contended that the trial court violated her Sixth Amendment right to confront witnesses when it excluded evidence under Indiana Evidence Rule 608. 848 N.E.2d at 1122. The *Saunders* court acknowledged "that the evidence rule preventing evidence of specific acts of untruthfulness must yield to a

defendant's Sixth Amendment right of confrontation and right to present a full defense" but held that the defendant's constitutional rights were not violated. *Id.* (citing *State v. Walton*, 715 N.E.2d 824, 827 (Ind. 1999)).

The state court's decision in this case is not contrary to federal precedent. Although the Constitution gives "criminal defendants 'a meaningful opportunity to present a complete defense,'" the Supreme Court has "recognized that 'state and federal rulemakers have broad latitude under the Constitution to establish rules excluding evidence from criminal trials." *Nevada v. Jackson*, 569 U.S. 505, 509 (2013) (quoting *Crane v. Kentucky*, 476 U.S. 683, 690 (1986); *Holmes v. South Carolina*, 547 U.S. 319, 324 (2006)). The 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." *Id.* (citing *Holmes*, 547 U.S. at 331; *Rock v. Arkansas*, 483 U.S. 44, 61 (1987); *Chambers v. Mississippi*, 410 U.S. 284, 302–03 (1973); *Washington v. Texas*, 388 U.S. 14, 22 (1967)). The Court has never held that the Sixth Amendment prevents a trial court from applying a state evidentiary rule to exclude extrinsic evidence of specific instances of a witness's conduct to attack her credibility.

In fact, the Supreme Court specifically addressed this issue in *Jackson*. On trial for rape, the defendant tried to present police reports and officer testimony to show that the victim had accused him of assaulting her before, which the police could not corroborate. *Jackson*, 569 U.S. at 507. The trial court excluded the evidence under a Nevada statute that generally precludes extrinsic evidence of

specific instances of the witness's conduct to attack her credibility. *Id.* at 509. On federal habeas, the defendant argued that the trial court violated his constitutional right to present a defense. *Id.* at 508. The Ninth Circuit agreed and granted a conditional writ of habeas corpus. *Id.*

The Supreme Court reversed because the state court's decision was reasonable. *Id.* at 509, 512. The state court "recognized and applied the correct legal principle." *Id.* at 509 (quotation marks and citation omitted). The court also applied a state statute supported by Supreme Court precedent and "akin to the widely accepted rule of evidence law that generally precludes the admission of evidence of specific instance of a witness' conduct to prove the witness' character for untruthfulness." *Id.* at 509–10 (citing *Clark v. Arizona*, 548 U.S. 735, 775 (2006); Fed. Rule Evid. 608(b)) (citation omitted). The Supreme Court reasoned that "[t]he admission of extrinsic evidence of specific instances of a witness' conduct to impeach the witness' credibility may confuse the jury, unfairly embarrass the victim, surprise the prosecution, and unduly prolong the trial." *Id.* at 511. Because no Supreme Court decision "clearly establishes that the exclusion of such evidence for such reasons in a particular case violates the Constitution," the state court was entitled to "the substantial deference that AEDPA requires." *Id.* at 511–12.

The same reasoning applies here and shows why the Indiana Court of Appeals reasonably applied clearly established federal law. The court held that the evidence was inadmissible under Indiana Evidence Rule 608(b) (Ex. E at 14). Indiana's evidentiary rule, like Nevada's, is "akin to the widely accepted rule of

evidence law that generally precludes the admission of evidence of specific instance of a witness' conduct to prove the witness' character for untruthfulness." *Jackson*, 569 U.S. at 509–10 (citing *Clark*, 548 U.S. at 775; Fed. Rule Evid. 608(b)) (citation omitted). The court also "recognized and applied the correct legal principle," *id.* at 509, by citing *Saunders* (Ex. E at 14), in which the court acknowledged "that the evidence rule preventing evidence of specific acts of untruthfulness must yield to a defendant's Sixth Amendment right of confrontation and right to present a full defense," *Saunders*, 848 N.E.2d at 1122 (citing *Walton*, 715 N.E.2d at 827). Because the court is entitled to "the substantial deference that AEDPA requires," *Jackson*, 569 U.S. at 511–12, Nunley is not entitled to a writ of habeas corpus.

And the state court's decision is more than just reasonable: it is correct. Nunley wanted to impeach A.Y. with evidence that she had recanted after telling the police that another man had physically (but not sexually) assaulted her (Trial Tr. 377–85, 715–18). But "the Confrontation Clause guarantees an *opportunity* for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish." *Delaware v Fensterer*, 474 U.S. 15, 20 (1985) (citing *Ohio v. Roberts*, 448 U.S. 56, 73 n.12 (1980)). The right "may, in appropriate cases, bow to accommodate other legitimate interests in the criminal trial process." *Chambers*, 410 U.S. at 295 (citing *Mancusi v. Stubbs*, 408 U.S. 204 (1972)). Trial courts have "wide latitude … to impose reasonable limits on … cross-examination based on concerns about, among other things, harassment, prejudice,

confusion of the issues, the witness' safety, or interrogation that is repetitive or only marginally relevant." *Delaware v. Van Arsdall*, 475 U.S. 673, 679 (1986).

Nunley had an opportunity to effectively cross-examine A.Y. (Trial Tr. 458–500). He had her admit that she could not remember some of the details "because it was such a long time" (Trial Tr. 461–63, 465–66, 469, 476–77). He highlighted inconsistencies in her testimony (Trial Tr. 464–65). He asked if her parents had told her what to tell the police (Trial Tr. 483–84). And he showed her reluctance to describe Nunley's penis (Trial Tr. 488–89). He also testified and denied committing any crimes (Trial Tr. 727–55). The trial court did not prevent Nunley from presenting a defense.

Even if Nunley could show a Sixth Amendment violation, any error was harmless. "For reasons of finality, comity, and federalism, habeas petitioners 'are not entitled to habeas relief based on trial error unless they can establish that it resulted in actual prejudice.'" *Davis v. Ayala*, 135 S. Ct. 2187, 2197 (2015) (quoting *Brecht v. Abrahamson*, 507 U.S. 619, 637 (1993)). A habeas petitioner is entitled to relief "only if the federal court has 'grave doubt about whether a trial error of federal law had 'substantial and injurious effect or influence in determining the jury's verdict.'" *Id.* at 2197–98 (quoting *O'Neal v. McAninch*, 513 U.S. 432, 436 (1995)). This requires "more than a 'reasonable possibility' that the error was harmful." *Id.* at 2198 (quoting *Brecht*, 507 U.S. at 637).

Nunley cannot show that he was actually prejudiced by the exclusion of the evidence that A.Y. had recanted an allegation that another man had physically

assaulted her. 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. The incidents were not similar. In June of 2008, A.Y. saw Eddie Foreman violently attack her mother and then reported to police that he had attacked her too (Trial Tr. 379–80). She did not allege that Foreman had sexually assaulted her (Trial Tr. 379–80). Approximately six weeks later, she brought a note to the prosecutor's office, explaining that Foreman had not attacked her and "she did not want to see him get in trouble for something he didn't do" (Trial Tr. 379–80).

Here, by contrast, A.Y. reported to her parents the next day that Nunley had molested her (Ex. E at 3). She did not recant one year later when she was forensically interviewed or at trial, where she unequivocally testified that Nunley "made me suck on his weenie-bob" and "licked my pee pee" (Ex. E at 4; Trial Tr. 450). She also testified that he showed her a movie in which "boys and girls were doing bad stuff to either other" without their clothes on (Trial Tr. 431). Nunley corroborated parts of A.Y.'s testimony by admitting that he was alone with her that night and that he owns a pornography collection (Trial Tr. 732, 734–35, 741–44, 748–49, 750–51, 753).

If the trial court had admitted evidence about the Foreman incident, it could have backfired for Nunley. For example, it could have made A.Y. a more sympathetic victim because she witnessed her mother's attack and might have had a reason for initially lying about Foreman attacking her too. The evidence also could

have bolstered A.Y.'s credibility because it would have highlighted the fact that she recanted about Foreman just six weeks later but consistently described Nunley's molestation for years. Because the Indiana Court of Appeals reasonably applied clearly established federal law, the trial court did not violate Nunley's Sixth Amendment rights, and any error was harmless, Nunley is not entitled to a writ of habeas corpus.

III.
Nunley's claim that he was denied his right to confrontation is procedurally defaulted and meritless.

Nunley procedurally defaulted his argument that he was denied his right to confront A.Y. To preserve his claim for federal habeas review, he had to give the state courts a fair opportunity to address it. *Baldwin v. Reese*, 541 U.S. 27, 29 (2004) (citing *Duncan v. Henry*, 513 U.S. 364, 365 (1995)). He had to "'fairly present' his claim[s] in each appropriate state court (including a state supreme court with powers of discretionary review), thereby alerting that court to the federal nature of the claim[s]." *Id.* (citing *O'Sullivan v. Boerckel*, 526 U.S. 838, 845 (1999); *Duncan*, 513 U.S. at 365–66). In Indiana, that means presenting his argument in a petition to transfer to the Indiana Supreme Court. *See Hough v. Anderson*, 272 F.3d 878, 892 (7th Cir. 2001). He had to present to the state court "both the operative facts and controlling law." *Anderson v. Benik*, 471 F.3d 811, 814 (7th Cir. 2006) (citing *Ellsworth v. Levenhagen*, 248 F.3d 634, 639 (7th Cir. 2001)). "A mere 'passing reference' to a constitutional issue certainly does not suffice." *Chambers v.*

McCaughtry, 264 F.3d 732, 738 (7th Cir. 2001) (citing *Fortini v. Murphy*, 257 F.3d 39, 44 (1st Cir. 2001)).

In the Indiana Court of Appeals, Nunley tangentially 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). In his petition to transfer to the Indiana Supreme Court, however, he did not raise a separate Confrontation Clause argument (Ex. F). Instead, he argued that the court of appeals' decision contravened *Modesitt v. State*, 578 N.E.2d 649 (Ind. 1991), which is not a Sixth Amendment case (Ex. F at 10–11). In *Modesitt*, the Indiana Supreme Court overruled *Patterson v. State*, 324 N.E.2d 482 (Ind. 1975), in which the court "held that prior out-of-court statements, not under oath, were admissible as substantive evidence if the declarant was present and available for cross examination at the time of the admission of such statements." 578 N.E.2d at 651–54. The court held that

> a prior statement is admissible as substantive evidence only if the declarant testifies at trial and his subject to cross examination concerning the statement, and the statement is (a) inconsistent with the declarant's testimony, and was given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition, or (b) consistent with the declarant's testimony and is offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive, or (c) one of identification of a person made after perceiving the person.

Id. at 653–54. The holding was explicitly based on state law. *Id.* at 652–54; *see Estelle v. McGuire*, 502 U.S. 62, 67–68 (1991) ("[I]t is not the province of a federal habeas court to reexamine state-court determinations on state-law questions.").

Because Nunley did not fully and fairly present a federal claim in state court, he is procedurally defaulted from raising it in federal court. Even if he could raise this claim, it is meritless and any error was harmless for the same reasons as his argument that he was denied the right to present a defense. He is not entitled to a writ of habeas corpus.

IV.
Nunley's claim that his trial counsel was ineffective is meritless.

Respondent has not waived (or forfeited) his right to respond to Nunley's claim that his trial counsel was ineffective (*see* D.E. 2 at 6–7). A party waives a claim by intentionally relinquishing or abandoning a known right. *United States v. Olano*, 507 U.S. 725, 733 (1993) (citations omitted). And a party forfeits a claim by failing to timely assert a right. *Id.* (citations omitted). Respondent did neither.

Nunley argued in the Indiana Court of Appeals that the State had waived any response to his claim that his trial counsel was ineffective by not presenting any evidence or argument in the post-conviction court (Ex. K at 15–16). Contrary to Nunley's assertion (D.E. 2 at 6), the state court did address his waiver argument. The court rejected Nunley's contention because "[t]he State filed an answer to Nunley's petition, asserted denials of his claims, and actively participated in the hearing" (Ex. N at 6 n.1). This Court will not second-guess a state court's answer to a state-law question. *Estelle v. McGuire*, 502 U.S. 62, 67–68 (1991). Even so, this is Respondent's first opportunity to address Nunley's claim that he is entitled to a writ of habeas corpus, which is not the same question as whether he was denied

ineffective assistance of counsel. *See Harrington v. Richter*, 562 U.S. 86, 105 (2011). Respondent is not waiving his right to respond to Nunley's claims.

The Indiana Court of Appeals' decision that Nunley did not receive ineffective assistance of trial counsel is not contrary to *Strickland v. Washington*, 466 U.S. 668 (1984). Under *Strickland*'s "highly deferential" standard, Nunley had to convince the state court that his "counsel's representation fell below an objective standard of reasonableness" and "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 688–89, 694. The court correctly identified *Strickland* as the controlling precedent and applied the proper framework (*see* Ex. N at 7). To obtain federal habeas relief, Nunley must overcome a "doubly deferential" standard: "the question is not whether counsel's actions were reasonable. The question is whether there is any reasonable argument that counsel satisfied *Strickland*'s deferential standard." *Richter*, 562 U.S. at 105. Nunley cannot meet his burden.

A. Impeaching A.Y.

The state court reasonably determined that Nunley's trial counsel was not ineffective for failing to impeach A.Y. with her deposition testimony. Nunley argued that "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," but he did not cite any statements, much less inconsistent statements, from A.Y.'s deposition (Ex. K at 22). The court could have reasonably held that Nunley did not carry his burden to prove that his counsel performed deficiently or

prejudiced him because he did not present any evidence. *See Burt v. Titlow*, 571 U.S. 12, 23 (2013) (quoting *Strickland*, 466 U.S. at 689) (holding that "the absence of evidence cannot overcome the 'strong presumption that counsel's conduct [fell] within the wide range of reasonable professional assistance.'"). Even in his habeas petition, Nunley does not identify the allegedly inconsistent statements in A.Y.'s deposition (*see* D.E. 2 at 7).

The state court nonetheless considered counsel's cross-examination performance and reasonably concluded that it was constitutionally sufficient:

> Nunley's defense at trial was that A.Y. fabricated her claim that Nunley molested her. A.Y. was six years old when Nunley molested her in April 2008, and she gave her deposition over a year later when she was seven. Nunley's trial counsel made strategic choices of how best to cast doubt on A.Y.'s trial testimony. A.Y. cried during her direct examination and did not want to discuss the molestation because it was "too scary." Trial Tr. p. 438. A.Y. was similarly reluctant to answer questions about the molestation during her deposition and stated that she did not want to remember it.

(Ex. N at 8–9).

The record supports the court's conclusion. A.Y.'s deposition testimony was not necessarily inconsistent with her trial testimony, at least on the most damaging details. During the deposition, she testified that Nunley "licked my pee-pee" and "made me watch a nasty show" (DA App. Vol. II 219–20, 236). Although she testified that she did not remember Nunley making her do anything else, she also testified that she did not want to remember because it makes it easier, that "[i]t's better not to remember," and "I don't want to know any of it anymore after this" (DA App. Vol. II 218–19, 221, 231, 238–39). Had Nunley's counsel impeached A.Y. with her

deposition testimony that she could not remember sucking Nunley's penis, 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 (DA App. Vol. II 215–17, 226, 237, 240). Counsel could have competently determined that it was not worth the risk.

Instead, Nunley's counsel had A.Y. admit on cross-examination that she could not remember some of the details "because it was such a long time" (Trial Tr. 461–63, 465–66, 469, 476–77). Counsel highlighted inconsistencies in A.Y.'s testimony (Trial Tr. 464–65). Counsel asked if A.Y.'s parents had told her what to tell the police (Trial Tr. 483–84). And counsel showed A.Y.'s reluctance to describe Nunley's penis (Trial Tr. 488–89). Nunley has not shown that counsel performed deficiently or prejudiced him. Because the Indiana Court of Appeals reasonably applied *Strickland*, Nunley is not entitled to a writ of habeas corpus.

B. A.Y.'s written testimony

The state court reasonably determined that Nunley's trial counsel was not ineffective for not objecting when the trial court allowed A.Y. to write down and read part of her testimony. A.Y., who was eight years old during Nunley's trial, cried during her testimony and was reluctant to orally describe Nunley's molestation (Trial Tr. 423, 432–33, 435, 437, 443–44). It was "too scary" because of "all the people" (Trial Tr. 438). She felt more comfortable writing her answers and then reading what she wrote: "He made me suck on his weenie-bob," and "He licked my pee pee" (Trial Tr. 441–43, 449–50). The court admitted the papers as exhibits

and published them to the jury without any objection from Nunley's counsel (Trial Tr. 444–45, 453–55).

On post-conviction, Nunley argued that his counsel should have objected to the procedure. The Indiana Court of Appeals held that counsel did not perform deficiently or prejudice Nunley (Ex. N at 10). The court observed that Indiana law gives trial courts discretion to allow children to testify under special conditions (Ex. N at 9) (citing *Shaffer v. State*, 674 N.E.2d 1, 5 (Ind. Ct. App. 1996)). Nunley cannot ask this Court to second-guess the state court's determination of state law. *See Estelle*, 502 U.S. at 67–68. It is reasonable for a court to hold that counsel was not ineffective for not raising a meritless objection. *See Warren v. Baenen*, 712 F.3d 1090, 1104 (7th Cir. 2013) (citing *United States v. Stewart*, 388 F.3d 1079, 1085 (7th Cir. 2004); *Steward v. Gilmore*, 80 F.3d 1205, 1212 (7th Cir. 1996)). Because Nunley did not show a reasonable possibility that the trial court would have sustained his counsel's objection, the state court reasonably applied *Strickland*.

C. Separation of witnesses

The state court reasonably determined that Nunley's counsel was not ineffective for not objecting to an alleged violation of the separation of witnesses order. During a lunch break on the first day of trial, the court suggested that one of the prosecutors go to lunch with A.Y. and her family to ensure that they did not violate the separation of witnesses order (Trial Tr. 445–46). When the prosecutor returned from lunch, she did not report a violation of the order (Trial Tr. 447). On post-conviction, Nunley contended that his counsel should have objected to A.Y.

eating lunch with her parents (Ex. K at 25–27). The Indiana Court of Appeals held that trial counsel was not ineffective because there was no evidence that the testimony of one witness influenced the testimony of another witness, which is what a separation of witnesses order is meant to prevent (Ex. N at 12). Nunley's argument was based on "pure speculation" (Ex. N at 12).

The state court's decision is reasonable. It is reasonable for a court to hold that counsel was not ineffective for not raising a meritless objection. *See Warren*, 712 F.3d at 1104 (citing *Stewart*, 388 F.3d at 1085; *Steward*, 80 F.3d at 1212). As the court explained, in Indiana, "[t]he purpose of a separation of witnesses order is to prevent the testimony of one witness from influencing that of another" (Ex. N at 12). This is a matter of state law that this Court cannot question. *See Estelle*, 502 U.S. at 67–68. The record supports the court's conclusion that Nunley's argument was speculative: The trial court suggested that a prosecutor attend lunch with eight-year-old A.Y. and her parents to ensure that they would not violate the purpose of the separation of witnesses order (Trial Tr. 445–46). After lunch, the prosecutor did not have anything to report (Trial Tr. 447). So there was no basis for Nunley's counsel to object, and there is no basis for Nunley to show that the state court's decision was unreasonable. *See Burt*, 571 U.S. at 23 (quoting *Strickland*, 466 U.S. at 689) (holding that "the absence of evidence cannot overcome the 'strong presumption that counsel's conduct [fell] within the wide range of reasonable professional assistance.'").

D. Cumulative impact

Nunley's claim that he was prejudiced by the cumulative effect of his trial counsel's alleged errors is procedurally defaulted. The Indiana Court of Appeals concluded that Nunley waived this argument by not citing any authority or presenting a cogent argument as Indiana Appellate Rule 46(A)(8)(a) required him to do (Ex. N at 13). The court's "decision rests on a state law ground that is independent of the federal question and adequate to support the judgment. This rule applies whether the state law ground is substantive or procedural." *Coleman v. Thompson*, 501 U.S. 722, 729 (1991) (citations omitted). Nunley does not acknowledge his procedural default or offer a reason to excuse it. *See id.* at 750. He is not entitled to a writ of habeas corpus.

V.
Nunley's claim that his appellate counsel was ineffective is meritless.

The Indiana Court of Appeals' decision that Nunley did not receive ineffective assistance of appellate counsel is not contrary to *Strickland v. Washington*, 466 U.S. 668 (1984). Under *Strickland*'s "highly deferential" standard, Nunley had to convince the state court that his "counsel's representation fell below an objective standard of reasonableness" and "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 688–89, 694. The court correctly identified *Strickland* as the controlling precedent and applied the proper framework (*see* Ex. N at 13–14). To obtain federal habeas relief, Nunley must overcome a "doubly deferential" standard: "the question is not whether counsel's actions were reasonable. The question is

whether there is any reasonable argument that counsel satisfied *Strickland*'s deferential standard." *Richter*, 562 U.S. at 105. Nunley cannot meet his burden.

A. Right to defense

Nunley's claim that his appellate counsel was ineffective for not arguing well enough that Nunley was denied his right to present a defense is procedurally defaulted. The Indiana Court of Appeals held that Nunley waived this argument by "not cit[ing] to any portion of the record where he attempted to have this alleged evidence admitted at trial" (Ex. N at 15). Because Indiana Appellate Rule 46(A)(8)(a) requires appellants to cite to the relevant portion of the record, the court concluded that Nunley's "claim is waived" (Ex. N at 15). The court's "decision rests on a state law ground that is independent of the federal question and adequate to support the judgment. This rule applies whether the state law ground is substantive or procedural." *Coleman v. Thompson*, 501 U.S. 722, 729 (1991) (citations omitted). It does not matter that the court nonetheless addressed the merits of Nunley's claim because "a state court need not fear reaching the merits of a federal claim in an alternative holding." *Harris v. Reed*, 489 U.S. 255, 264 n.10 (1989). Nunley does not acknowledge his procedural default or offer a reason to excuse it. *See Coleman*, 501 U.S. at 750.

Even so, the state court reasonably applied *Strickland* when it addressed Nunley's claim despite his waiver. The court concluded that Nunley's appellate counsel did raise the argument that Nunley argued he should have, but the court rejected it (Ex. N at 15–16). The record supports the court's conclusion. In the

Indiana Court of Appeals, Nunley's appellate counsel specifically argued that "rules of evidence must yield to a defendant's right to present a defense" and that "the exclusion was based upon a blanket application of Rule 608(b)," supporting his argument with citations to relevant authority (Ex. C at 17–19). In his petition to transfer to the Indiana Supreme Court, he framed the first issue as "whether the trial court violated Nunley's right to present a defense when it mechanistically applied Indiana Evidence Rule 608(b) to preclude Nunley from introducing evidence … ." (Ex. F at 2). This is precisely the argument that Nunley claims his counsel should have made (D.E. 2 at 12–13). Nunley is not entitled to a writ of habeas corpus.

B. Double jeopardy

The state court reasonably determined that Nunley's appellate counsel was not ineffective for not raising a violation of Indiana double jeopardy. The court rejected Nunley's claim because it rested on bad law, so appellate counsel could not have prevailed on that theory (Ex. N at 16–17). The court's determination that Nunley relied on precedent that had been "impliedly overruled" is based on state law, so this Court will not second-guess it. *See Estelle v. McGuire*, 502 U.S. 62, 67–68 (1991) ("[I]t is not the province of a federal habeas court to reexamine state-court determinations on state-law questions."). It is reasonable for a court to hold that counsel was not ineffective for not raising a meritless issue. *See Warren v. Baenen*, 712 F.3d 1090, 1104 (7th Cir. 2013) (citing *United States v. Stewart*, 388 F.3d 1079, 1085 (7th Cir. 2004); *Steward v. Gilmore*, 80 F.3d 1205, 1212 (7th Cir. 1996)).

Because the state court reasonably applied *Strickland*, Nunley is not entitled to a writ of habeas corpus.

C. Sentencing

The state court reasonably determined that Nunley's appellate counsel was not ineffective for not challenging Nunley's sentence. The court rejected Nunley's argument that his counsel should have contended that the trial court abused its sentencing discretion by considering an aggravating circumstance because, under Indiana law, trial courts may consider uncharged criminal conduct as an aggravating circumstance (Ex. N at 18). And the court rejected Nunley's argument that his counsel should have contended that his sentence was inappropriate because Nunley's sentence is not inappropriate (Ex. N at 18–20). Each of these conclusions is based on a state-law determination, which this Court will not second-guess. *See Estelle*, 502 U.S. at 67–68; *Miller v. Zatecky*, 820 F.3d 275, 277 (7th Cir. 2016). Again, it is reasonable for a court to hold that counsel was not ineffective for not raising a meritless issue. *See Warren*, 712 F.3d at 1104 (citing *Stewart*, 388 F.3d at 1085; *Steward*, 80 F.3d at 1212). Because the court reasonably applied *Strickland*, Nunley is not entitled to a writ of habeas corpus.

D. Remaining claims

Nunley's remaining claims that his appellate counsel was ineffective overlap with his claims that his trial counsel was ineffective (D.E. 2 at 16). The state court reasonably rejected Nunley's arguments that his appellate counsel was ineffective for the same reasons that it reasonably rejected his arguments that his trial counsel

was ineffective (Ex. N at 13 n.3). The state court's decision is not contrary to or an unreasonable application of clearly established federal law or based on an unreasonable factual determination. Nunley, therefore, is not entitled to a writ of habeas corpus.

CONCLUSION

The Court should deny Nunley's petition for a writ of habeas corpus.

Respectfully submitted,

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EXHIBITS TO RESPONDENT'S RETURN TO ORDER TO SHOW CAUSE

Pursuant to Rule 5 of the Rules Governing Section 2254 Cases in the United States District Courts, Respondent submits the following as Exhibits to his Return to Order to Show Cause filed in this case:

Exhibit A: Chronological Case Summary, *State v. Nunley*, No. 31D01-0805-FA-389;

Exhibit B: Docket, *Nunley v. State*, No. 31A01-0902-CR-88;

Exhibit C: Brief of Appellant, *Nunley v. State*, No. 31A01-0902-CR-88;

Exhibit D: Brief of Appellee, *Nunley v. State*, No. 31A01-0902-CR-88;

Exhibit E: Opinion, *Nunley v. State*, No. 31A01-0902-CR-88;

Exhibit F: Petition to Transfer, *Nunley v. State*, No. 31A01-0902-CR-88;

Exhibit G: Supplemental Petition to Transfer, *Nunley v. State*, No. 31A01-0902-CR-88;

Exhibit H: Supplemental Response, *Nunley v. State*, No. 31A01-0902-CR-88;

Exhibit I: Chronological Case Summary, *Nunley v. State*, No. 31D01-1009-PC-11;

Exhibit J: Docket, *Nunley v. State*, No. 31A01-1703-PC-547;

Exhibit K: Brief of Appellant, *Nunley v. State*, No. 31A01-1703-PC-547;

Exhibit L: Brief of Appellee, *Nunley v. State*, No. 31A01-1703-PC-547;

Exhibit M: Reply Brief, *Nunley v. State*, No. 31A01-1703-PC-547;

Exhibit N: Memorandum Decision, *Nunley v. State*, No. 31A01-1703-PC-547; and

Exhibit O: Petition to Transfer, *Nunley v. State*, No. 31A01-1703-PC-547.

CERTIFICATE OF SERVICE

I certify that I have electronically filed the foregoing document. I also certify that on April 17, 2019, I served the foregoing document upon the following person through First Class U.S. Mail, postage prepaid:

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/s/ Jesse R. Drum
Jesse R. Drum