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IN THE  
INDIANA COURT OF APPEALS

APPELLATE NO.: 31A01-0902-CR-088

LAWRENCE NUNLEY, APPELLANT/PARTY BELOW	)	APPEAL FROM THE HARRISON SUPERIOR COURT
	)	
VS.	)	TRIAL COURT CASE NO. 31D01-0805-FA-389
	)	
STATE OF INDIANA, APPELLEE/PARTY BELOW	)	THE HONORABLE ROGER D. DAVIS, JUDGE

TRANSCRIPT OF EVIDENCE

VOLUME IV OF IV  
PAGES 751 TO 915

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COURT REPORTER  
HARRISON SUPERIOR COURT

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**DEFENSE WITNESS - WITNESS #1, LAWRENCE NUNLEY (CROSS)**

1 swiped them from him and put them away so they wouldn't have them.

2 So they were in my possession so I'm assuming they're mine.

3 Q When did you take them from your son?

4 A Uh, I've been taking them ever since I found him with the first one. And I  
5 found him with the first one when I lived in Greenville.

6 Q So you confiscated all six of those DVDs from your son?

7 A No ma'am, that is not what I said. I said I confiscated some of them  
8 from...

9 Q Some of them were yours?

10 A Some of them may..., yeah. Some of them was mine. Some of them uh,  
11 one of them I was given to by Tonya.

12 Q One of the six found at the Harrison House was given to you by Tonya?

13 A Probably, because that's all that there was.

14 Q And when Detective Wibbels found these DVDs at the Harrison House,  
15 you were aware of the allegations against you by Tonya. Is that correct?

16 A Yeah. I'd forgotten it because it had been over a year ago. I didn't know  
17 exactly what, why, you know, he was there. He asked me about porn and  
18 I told him where it was at.

19 Q Mr. Nunley, Detective Wibbels specifically asked you, when he talked to  
20 you, if those six DVDs were yours, yes or no?

21

22 MS. SCHULTZ: Objection, your Honor. This assumes facts not in  
23 evidence.

24 THE COURT: Overruled.

25

**DEFENSE WITNESS - WITNESS #1, LAWRENCE NUNLEY (CROSS)**

1 STATE RESUMES CROSS EXAMINATION OF LAWRENCE NUNLEY:

2 Q Detective Wibbels asked you if those six DVDs were yours?

3 A I'm not sure whether he did. He, it's possible that he could have uh, you  
4 know, under the, under the situation, you know, circumstances, I'm not  
5 really sure what all he asked.

6 Q Well, let me play this back for you. He searches your apartment and finds  
7 these six DVDs.

8 A No ma'am, he did not search my apartment to find them. I told him where  
9 they was because he asked me if I had any, and I told him "yes".

10 Q Okay. So Detective Wibbels has the DVDs in the case, right? And he  
11 showed them to you, yes?

12 A Yes ma..., no, he didn't show them to me. He just picks them up and uh,  
13 picks them up and takes them in there and arrests me.

14 Q He finds the DVDs and immediately arrests you?

15 A No. They had a warrant when they got there.

16 Q Okay, did he ever ask you about those DVDs?

17 A I don't know. I don't remember him doing..., he may have. I'm not sure.

18 Q You don't remember Detective Wibbels asking you about those DVDs?

19 You told him that you that you got them a week ago from a man named  
20 Mike.

21 A No, I did not say that. I absolutely did not say that.

22 Q Would you have said that you'd gotten them a week ago from anyone?

23 A No, absolutely not.

24 Q Mr. Nunley, was, you heard Detective Wibbels about the storage shed. Is

25

**DEFENSE WITNESS - WITNESS #1, LAWRENCE NUNLEY (CROSS)**

1 that right?

2 A Yes ma'am.

3 Q And was the stuff in the storage shed yours?

4 A Some of it was, yes. Most of it actually.

5 Q You, it's your testimony to this jury that you forgot that one of the six  
6 pornographic DVDs found in the Harrison House was given to you by  
7 Tonya?

8 A No, I never one time said I forgot that. I was never one time asked. You  
9 just now asked me where I got them, and I told you.

10 Q So it's your testimony that Detective Wibbels never asked you about those  
11 DVDs?

12 A Uh, he may have asked me about them. He didn't ask me where I got  
13 them. He didn't ask me, or I didn't state that I got them from some guy  
14 named Mike. I never said any of that, no ma'am, I did not.

15 Q You did not have a discussion with Detective Wibbels about where those  
16 came from?

17 A I don't recall him ever asking me where they came from, no. I actually told  
18 him where they were located so he didn't have to search to find them. I  
19 mean I told them where they were. It was a little bitty room. It wasn't like,  
20 you know...

21 Q Mr. Nunley, you sat here and watched that DVD with the jury, didn't you?

22 A Yes ma'am.

23 Q So it's your testimony that you did not show that movie to Annie Young?

24 A I absolutely did not show that movie to Annie Young.

25

**DEFENSE WITNESS – WITNESS #1, LAWRENCE NUNLEY (CROSS)**

1 Q And you've heard Annie Young testify and say that you made her suck on  
2 your weenie-bob. Are you telling this jury that that did not happen?

3 A That did not happen.

4 Q And all the other things that Annie Young said, they did not happen?

5 A No ma'am, they did not happen.

6 Q And you have had somebody who you now say was at your apartment  
7 that entire time and this is the first time you're gonna bring that up to this  
8 jury?

9 A It's the first time I had an opportunity to bring it up to the jury.

10 Q It's the first time you brought it up to anyone in law enforcement?

11 A I was never asked to begin with. And when I talked to my attorney, I told  
12 her that. She had, Mr. Wibbels had statement from Michelle that she was  
13 there. He told her that uh, she was lying, is according to what she, the  
14 statement says that I've not seen.

15 Q When did uh, Detective Wibbels get that statement from Michelle?

16 A I have no clue.

17 Q Would you surprise you to know that that was not until a full year after?

18 A No, it wouldn't surprise me to know it was a full year after because I was  
19 never asked, and then the police officer, Bowling, when I talked to him,  
20 was never brought up, I was never asked if anyone was there. And Mr.  
21 Wibbels was not involved in it until a year after.

22 Q Okay. But you have never told anyone in law enforcement that there was  
23 someone there with you the whole night?

24

25

**DEFENSE WITNESS - WITNESS #1, LAWRENCE NUNLEY (CROSS)**

1 MS. SCHULTZ: Objection, asked and answered about ten times.

2 THE COURT: Well, he can answer it one more time.

3

4 WITNESS RESUMES ANSWER:

5 A No. I didn't speak to anyone with, in law enforcement about the thing  
6 until, except for Officer Bowling, and I was pretty upset whenever the  
7 accusation was made. I went and talked to him, it was never brought up.  
8 I didn't think about it because I was pretty upset that somebody would  
9 even say that.

10 Q Mr. Nunley, are you gonna let this jury believe that you would go through  
11 this entire trial knowing there was a witness that you never told us about?

12

13 MS. SCHULTZ: Objection. It calls for a supposition.

14 THE COURT: Uh, I'll sustain it. I think it's already been answered.

15 THE STATE (MS. FLANIGAN): That's all I have, Judge.

16 THE COURT: Redirect?

17 MS. SCHULTZ: No, Judge. We have nothing further.

18 THE COURT: I'm sorry?

19 MS. SCHULTZ: Nothing further.

20 THE COURT: Okay. Come up. We've got some questions from  
21 the jury.

22

23 BENCH CONFERENCE:

24 THE COURT: Any objections to any of that?

25

**DEFENSE WITNESS - WITNESS #1, LAWRENCE NUNLEY (CROSS)**

1 MS. SCHULTZ: No.

2 THE STATE (MS. FLANIGAN): Okay. One more.

3 MS. SCHULTZ: One more? Oh.

4 THE STATE (MS. FLANIGAN): I think that's beyond the scope.

5 THE COURT: Any objection?

6 MS. SCHULTZ: I don't have any objection to it.

7 THE STATE (MS. FLANIGAN): I guess, go ahead.

8 THE COURT: Just a minute. Don't go away. Don't go away. Any  
9 objections?

10 MS. SCHULTZ: Oh, that one..., yes.

11 THE STATE (MS. FLANIGAN): That State doesn't.

12 MS. SCHULTZ: Yeah. Well, Judge, on this one, I think that what  
13 we're, you're getting close to his prohibited evidence because the other  
14 allegations of the Simler kid, was the day he was babysitting. So I don't want to  
15 get into this one.

16 THE COURT: Okay, so this is the only one that you have an  
17 objection to?

18 MS. SCHULTZ: No.

19 MS. LAUREN WHEATLEY: Well, we think if he answers a certain  
20 way, then he opens the door.

21 THE COURT: Well, uh...

22 MS. SCHULTZ: Yeah, that's why I have an objection to the  
23 question.

24 THE COURT: So uh, okay, you're objecting to this question?

25

**DEFENSE WITNESS – WITNESS #1, LAWRENCE NUNLEY (CROSS)**

1 MS. SCHULTZ: I'm objecting to that question.

2 THE COURT: All right, I'll sustain that question.

3 MS. SCHULTZ: I think it's totally irrelevant.

4 THE COURT: More questions. So, do you object to this question?

5 THE STATE (MS. FLANIGAN): I think it opens the door.

6 MS. LAUREN WHEATLEY: Yes.

7 MS. SCHULTZ: Well, if you ask him, and then there's a Protective  
8 Order, and you'll have to (unintelligible)..., so maybe we could just tell him that,  
9 just, just don't answer.

10 THE COURT: Which, which question do you object to? Both of  
11 them?

12 MS. SCHULTZ: Both.

13 THE COURT: All right. So both of them?

14 MS. SCHULTZ: Oh, well, I know, on this second part, "why does it  
15 not surprise you"...., if he should say, I know what the answer to that question is,  
16 that she lies all the time.

17 MS. LAUREN WHEATLEY: (unintelligible)

18 THE COURT: So you don't...

19 THE STATE (MS. FLANIGAN): No.

20 THE COURT: Both sides? Is that right? It looks like it says, "Is the  
21 defendant". Is there an objection?

22 MS. SCHULTZ: I, I have an objection to the question, yes.

23 THE COURT: All right.

24 THE STATE (MS. FLANIGAN): I think it could be..., I mean I think if

25



**DEFENSE WITNESS - WITNESS #1, LAWRENCE NUNLEY (JURY QUESTIONS)**

1 Susan objects to it, that's...

2 THE COURT: Okay, so those we're not gonna ask. Okay.

3 (BENCH CONFERENCE ENDS)

4

5 THE COURT: Okay. Mr. Nunley, the jurors have some questions  
6 for you.

7

8 **QUESTIONS BY JURY:**

9 Q Were charges filed against Tonya for destroying your property?

10 A Uh, no sir. I think they listed it as criminal mischief.

11 Q If not, why weren't any filed? That's, I guess, if you know.

12 A I'm not sure about that. I called once and asked, and they said it was in  
13 the Prosecutor's Office.

14 Q And the next question is a similar question, a little bit different. Did the  
15 defendant bring any charges, you, Mr. Nunley, did you bring any charges  
16 against Tonya Caves for property destruction?

17 A Yes. Like I said, I called the police office, the police station, and called 9-  
18 1-1, actually, and uh, told them that she was there tearing up all my stuff,  
19 and she was just leaving as I was talking to them on the phone. And I told  
20 them, the police officer, he filled out a report, took pictures uh, took  
21 pictures of my hand where she tried to hit me with it. And then he said  
22 that the Prosecutor's Office would get a hold of me, but they never did.

23 Q Now speak up, speak up, all right?

24 A Okay.

25

**DEFENSE WITNESS – WITNESS #1, LAWRENCE NUNLEY (JURY QUESTIONS)**

1 Q Uhm, so you, the next question was, why was there no charges against  
2 Tonya for beating your vehicles, and you basically answered that. You  
3 don't know.

4 A I'm not sure.

5 Q And uh, I think you've answered this one. Did you contact the police for  
6 Tonya's destruction of your property?

7 A Yes sir.

8 Q Okay. Did Annie sleep through the entire night at your house?

9 A Yes sir, she did.

10 Q That's a "yes"?

11 A Yes sir.

12 Q Okay. What time did Annie take her bath?

13 A Annie did not have a bath at my house.

14 Q And the next question, did Ed and Tonya have a relationship at any time?

15 That's you, did you and Tonya have a relationship at any time?

16 A Yes sir.

17

18 THE COURT: Uh, any other questions uh, will not be asked. Okay.

19 Uh, does the State have any additional questions as a result of those questions?

20 THE STATE (MS. FLANIGAN): I do, Judge.

21 THE COURT: All right.

22

23 **CROSS EXAMINATION BY STATE OF INDIANA (MS. FLANIGAN) ON JURY**

24 **QUESTIONS:**

25

**DEFENSE WITNESS - WITNESS #1, LAWRENCE NUNLEY (JURY QUESTIONS)**

1 Q Mr. Nunley, was it your testimony here that you had called the police  
2 office, called the, you called the Sheriff's Department after the police  
3 report, to ask them about what had happened to the case?

4 A Yeah. To the best of my knowledge that's where I called. I called up  
5 here. I don't know if it was the Sheriff's Department or uh, Corydon. I  
6 think I looked it up on the phone book, and I couldn't tell you exactly which  
7 number it was that I called.

8 Q Okay, and what did they tell you?

9 A They said it was in the Prosecutor's, the Prosecutor's Office. Uh, they  
10 would handle it.

11 Q And you don't remember who told you that?

12 A No ma'am, I sure don't. I just went ahead and bought another side  
13 window and a couple of tail lights and uh, the rest of the windshield, you  
14 know, took that part off my motorcycle.

15 Q So what part, what part of this motorcycle is damaged?

16 A Just the windshield. The front windshield, she hit it with a ball bat and  
17 knocked it off, off, off my motorcycle.

18 Q And there windows knocked out of your truck?

19 A Side window, yes. The driver's side window and two tail lights.

20 Q And you did not follow up beyond one phone call about that?

21 A No.

22 Q And are you sure that you would've, would you have been able provide  
23 Officer Walden with specific information about where Tonya would be  
24 living?

25

**DEFENSE WITNESS - WITNESS #1, LAWRENCE NUNLEY (JURY QUESTIONS)**

1 A I knew where Tonya lived, yes. Approximately. I knew who she lived with.

2 Q So if Officer Walden had asked you where Tonya lived, you would've  
3 been able to tell him?

4 A Not where she lived at, but who she lived with, I could've told him the  
5 name. I don't know the person that she lived with.

6 Q So Officer, you would've been able to tell Officer Walden how to make  
7 contact with Tonya?

8 A Uhm, I could've gave her her phone number, but he didn't ask for that.

9 Q You said you'd been there before and gotten porn at her house. Was she  
10 not living there then?

11 A No ma'am, she wasn't living there. She'd moved out of there.

12 Q So it's your testimony that you could give Officer, you gave Officer Walden  
13 uh, Tonya's phone number?

14 A No, I did not. He didn't ask for it.

15

16 THE STATE (MS. FLANIGAN): That's all I have, Judge.

17 THE COURT: Ms. Schultz?

18

19 **CROSS EXAMINATION BY DEFENSE ON JURY QUESTIONS:**

20 Q Mr. Nunley, when she came and damaged your property, you immediately  
21 called the police. Is that right?

22 A Uh, immediately..., I came outside and was trying to figure out what she  
23 was doing and why she was doing it. And uh, she was running, yelling  
24 and screaming at me. Uh, and so I just, I said, "You can't pay for it.

25

**DEFENSE WITNESS - WITNESS #1, LAWRENCE NUNLEY (JURY QUESTIONS)**

1 You're gonna go to jail."

2

3 COURT REPORTER: Judge, we're having recording problems.

4 THE COURT: Just a minute. Hang on. Uh, I'll tell you what, we're

5 gonna stop for a minute and try to sort that out and make sure it's working right.

6 Members of the jury, during this recess, you're not to permit anyone to talk to you

7 or in your presence on any subject matter connected with the trial. Do not form

8 or express a final opinion on the case until it's submitted to you. You'll be in the

9 jury room.

10 (JURY EXITS COURTROOM)

11 (OFF RECORD)

12

13 THE COURT: That seemed like it went away.

14 THE STATE (MS. FLANIGAN): It did. I just moved this

15 microphone.

16 THE COURT: You know, sometimes static will be caused by

17 electronic items and..., does anybody have a...

18 MS. SCHULTZ: It's those...

19 MS. LAUREN WHEATLEY: Billy's the only one, and he's been

20 sitting back. So...

21 COURT REPORTER: And that's a different sound too.

22 MS. LAUREN WHEATLEY: Yeah, that's, yeah, that's a different

23 sound than Billy's cell phone, or his cell phone.

24 THE COURT: Okay, so is it coming through the speakers, Sharon?

25

**DEFENSE WITNESS - WITNESS #1, LAWRENCE NUNLEY (JURY QUESTIONS)**

1 Can you hear, is it.., it's being amplified? Well, who knows. We're just gonna  
2 have to have the system looked at and see what happens. Okay, anything  
3 before we bring the jurors in?

4 THE STATE (MS. FLANIGAN): No, Judge.

5 MS. SCHULTZ: No.

6 THE COURT: All right. Bring them in, Sharon

7 (JURY RETURNS TO COURTROOM)

8

9 THE COURT: All right, ladies and gentlemen, please be seated.

10 Okay, obviously we're gonna have to have somebody to look at the uh, sound  
11 equipment, the amplification and so forth. Sorry about that. It's been working  
12 pretty good. You all heard it. Didn't know it was gonna act up when you all were  
13 here. Okay. I think you were asking questions, Mr. Schultz.

14

15 DEFENSE RESUMES CROSS EXAMINATION ON JURY QUESTIONS:

16 Q Yes. I asking Mr. Nunley about the uh, report of the damage to his  
17 personal property. You called and report it to 9-1-1?

18 A Yes ma'am.

19 Q And the officer responded within a short period of time after you called?

20 A Yeah. It wasn't very, very long at all, really. I don't remember exactly how  
21 long, but not long.

22 Q By, by the time he got there, Tonya was already gone?

23 A Yes ma'am.

24 Q Okay, and he took a report?

25

**DEFENSE WITNESS - WITNESS #1, LAWRENCE NUNLEY (JURY QUESTIONS)**

1 A Yes.

2 Q And did he indicate to you that you had to take any other action if the  
3 charges were to be filed against Tonya?

4 A No.

5

6 MS. LAUREN WHEATLEY: Objection, leading, Judge.

7 THE COURT: Overruled.

8

9 WITNESS RESUMES ANSWER:

10 A No, he didn't. He just said that the Prosecutor would handle that, ask  
11 them what they was gonna do. I was pretty upset.

12 Q Okay. So you reported it.

13 A Yes ma'am.

14 Q You didn't think there was anything else you had to do to take care of it?

15 A I never reported nothing like that before, so I didn't have no clue.

16 Q Were you ever contacted by the police or anybody else with respect to  
17 that charge...

18 A No, no ma'am.

19 Q And to the best of your knowledge, nothing ever happened to her?

20 A I wouldn't have a clue if it did. Uh, to my knowledge, no, I don't know.

21 Q Nobody has ever told you?

22 A No.

23 Q Nobody has contacted you as a victim for input into that case?

24 A No.

25

**DEFENSE WITNESS - WITNESS #1, LAWRENCE NUNLEY (JURY QUESTIONS)**

1 MS. SCHULTZ: No further questions.

2 THE COURT: That bring up anything new?

3 THE STATE (MS. FLANIGAN): It does.

4 THE COURT: All right.

5

6 **RECROSS EXAMINATION BY STATE OF INDIANA (MS. FLANIGAN) ON**

7 **JURY QUESTIONS:**

8 Q Mr. Nunley, uhm, you were pretty upset about that, right?

9 A Yes ma'am.

10 Q Okay. And Officer Walden came out and you said you could've provided

11 Tonya's phone number, but didn't?

12 A I had Tonya's phone number. I didn't, he didn't ask for it. I didn't think

13 about giving..., I didn't really know her last, if her last name was Caves or

14 Fentress. She used both of them.

15 Q Okay. If Officer Walden wrote in his report that you could not give the

16 police an address or phone number for Tonya Caves, would that be a

17 mistake in this police...

18

19 MS. SCHULTZ: Objection, your Honor. We're talking about

20 suppositions again. If he wrote it. That fact is not before the court. I mean there

21 has been no offer of that.

22 THE COURT: Sustained.

23

24 **STATE RESUMES RECROSS EXAMINATION ON JURY QUESTIONS:**

25



**DEFENSE WITNESS - WITNESS #1, LAWRENCE NUNLEY (JURY QUESTIONS)**

1 Q Okay. Mr. Nunley, you were very upset. Did you love this Harley?

2 A It's not actually a Harley. It's a customized Honda. And I don't know if  
3 you can really love a machine, but I really liked my motorcycle, yes.

4 Q Okay. And she has violated it, right?

5 A Yes ma'am.

6 Q And you had Tonya's phone number?

7 A Yes.

8 Q And you did not offer that up to the police?

9 A No. He didn't ask for it. He just took pictures. I told him who it was and  
10 what she was driving.

11 Q You had a way to give to this officer to contact Tonya and you didn't  
12 provide it.

13 A Not that I'm aware of, no.

14

15 THE STATE (MS. FLANIGAN): That's all I have, Judge.

16 THE COURT: Anything else, Ms. Schultz?

17 MS. SCHULTZ: Nothing else.

18 THE COURT: Ladies and gentlemen of the jury, any other  
19 questions? Okay. You may return to your seat. Uh, well, now it's lunchtime  
20 pretty much. I hear you're going back to Cracker Barrel. So, or at least most of  
21 you. So uh, uhm, it's the same procedure as before. During this lunch recess,  
22 it's your duty not to permit anyone to talk to you or in your presence on any  
23 subject matter connected with the trial. Do not form or express any final opinion  
24 on the case until the case is submitted to you. And uh, if there's one or two that

25

1 want to go somewhere else for lunch, or do something else at lunch, that's fine.

2 And you said it was really uh, efficient yesterday, Sharon?

3 BAILIFF: Yes, it was.

4 THE COURT: And so you think you'll have, be back by one  
5 o'clock? Or very shortly thereafter?

6 BAILIFF: Yeah. It shouldn't be too much longer.

7 THE COURT: Okay. So be back no later than one-fifteen. No later  
8 than one-fifteen, because Sharon tells me you all have got..., they were just right  
9 on the double, on top of things. So, those of you that go to lunch separately, no  
10 later than one-fifteen. Uh, let's try to be back at uh, one o'clock, everybody else,  
11 because they just might be back by one. Okay.

12 (JURY EXITS COURTROOM)

13 (OFF RECORD; LUNCH RECESS)

14

15 THE COURT: Okay, Sharon, are we on? Karen, are we on?

16 COURT REPORTER: Uh huh.

17 THE COURT: Okay, all right. The record will reflect the jury is not  
18 present. The lawyers are present. The defendant is present. Preliminary  
19 matters before we bring the jury in?

20 THE STATE (MS. FLANIGAN): No, Judge.

21 MS. SCHULTZ: No.

22 THE COURT: Okay. Uh, all right, bring the jury in.

23 (JURY RETURNS TO COURTROOM)

24

25

**STATE'S REBUTTAL - WITNESS #1, WILLIAM WIBBELS (DIRECT)**

1 THE COURT: Okay, have a seat, ladies and gentlemen. I hope  
2 lunch was good. All right. Uh, we're with the defendant. The next witness?

3 MS. SCHULTZ: Judge, we would rest at this point.

4 THE COURT: Okay. Ladies and gentlemen of the jury, the  
5 defendant rests its case. Rebuttal by the State?

6 THE STATE (MS. FLANIGAN): Yes, Judge. The State would call  
7 Detective William Wibbels.

8 THE COURT: All right. Do you solemnly swear or affirm the  
9 testimony you're about to give shall be the truth and nothing but the truth, so help  
10 you God?

11 WITNESS: I do, sir.

12 THE COURT: Please be seated, Officer.

13  
14 **REBUTTAL EVIDENCE BY STATE OF INDIANA:**

15 **DIRECT EXAMINATION OF WILLIAM WIBBELS BY STATE OF INDIANA (MS.**  
16 **FLANIGAN):**

17 Q Detective Wibbels, did you take a statement from Ed Nunley?

18 A Yes, I did.

19 Q When was that?

20 A That was on Thursday, May 29<sup>th</sup>, 2008.

21 Q Did you complete a report reflecting the interview?

22 A Yes, I did.

23 Q Did you ask him who was present in his home the night Annie slept over?

24 A Yes, I did.

25

**STATE'S REBUTTAL - WITNESS #1, WILLIAM WIBBELS (DIRECT)**

1 Q Who did he tell you?

2 A Kyle Nunley, and his girlfriend, Kirsten Sanders, for a short period of time.

3 Q Did he tell you that any other person was present?

4 A No.

5 Q Did he ever mention Michelle Cayton was present that night?

6 A No.

7 Q Did you locate six pornographic DVDs in Ed's house, including Sex Ed  
8 Tutor?

9 A Yes, I did.

10 Q Did Ed Nunley tell you where he got the six DVDs?

11 A Yes.

12 Q Where did he state he got those pornographic DVDs?

13 A He received them from a man named Mike, unknown last name, that had  
14 previously lived at the Harrison House.

15 Q Did he ever mention to you that he got one of the six pornographic DVDs  
16 from Tonya Caves?

17 A No.

18 Q Did he tell you that he wasn't really into porn?

19 A Yes.

20 Q Did he ever tell you that he got pornography from Tonya Caves?

21 A No.

22 Q During the course of another investigation, did you have the opportunity to  
23 speak with Michelle Cayton?

24 A Yes, I did.

25

**STATE'S REBUTTAL - WITNESS #1, WILLIAM WIBBELS (DIRECT)**

1 Q When was that?

2 A June 14<sup>th</sup>, 2008.

3 Q Was Ed Nunley mentioned?

4

5 THE COURT: What was the date?

6 WITNESS: June 14<sup>th</sup>, 2008.

7 THE COURT: Okay.

8

9 STATE RESUMES DIRECT EXAMINATION OF WILLIAM WIBBELS:

10 Q Was Ed Nunley mentioned?

11 A Yes.

12 Q What...

13 A Excuse me, it was June 12<sup>th</sup>, I'm sorry. June 12<sup>th</sup>, 2008.

14 Q Was Ed Nunley mentioned during that?

15 A Yes.

16 Q What did she say about Ed Nunley?

17

18 MS. SCHULTZ: Objection, hearsay.

19

20 BENCH CONFERENCE:

21 THE COURT: Uh, okay, where are we going with that? What do  
22 you think he's gonna say?

23 THE STATE (MS. FLANIGAN): I know what he's gonna say. That  
24 she told him that she was there the night that (unintelligible).

25

**STATE'S REBUTTAL - WITNESS #1, WILLIAM WIBBELS (DIRECT)**

1 THE COURT: So, he's gonna say that she was there?

2 THE STATE (MS. FLANIGAN): That's what she told Bill on June

3 12<sup>th</sup>.

4 THE COURT: That would be consistent with the defendant's

5 testimony.

6 THE STATE (MS. FLANIGAN): Uh huh, right.

7 THE COURT: Okay. What's the point of that anyhow?

8 THE STATE (MS. FLANIGAN): If she then uh, recanted that on  
9 October 30<sup>th</sup>, 2008, without prompting by the State, she called us out of the blue  
10 and said she wasn't there. So that is inconsistent. In order to present the entire  
11 picture of that to the jury, I think we have to put in both sides.

12 MS. SCHULTZ: I have to think they have to call her if they want to  
13 do that, because that's hearsay.

14 THE STATE (MS. FLANIGAN): But it's all opened by his case.

15 MS. SCHULTZ: He didn't know if they were (unintelligible)...., she  
16 told the police. ...thought that.

17 THE STATE (MS. FLANIGAN): He's the one that brought up  
18 Michelle Cayton today though.

19 MS. SCHULTZ: Yeah, but he hasn't brought up everything she told  
20 everybody else in their lifetime.

21 THE COURT: Okay. All right. Uh, what's the basis for, are you  
22 offering it for the truth of the matter?

23 THE STATE (MS. FLANIGAN): I'm offering it to impeach the  
24 defendant, that she was not there, to impeach his statement. And in order to do

25

**STATE'S REBUTTAL - WITNESS #1, WILLIAM WIBBELS (DIRECT)**

1 that, I can put on that she called on October 30<sup>th</sup>, 2008 and said she wasn't  
2 there. That's clearly okay to impeach him. But in order to put in the full picture, I  
3 think you have to put in both the calls.

4 MS. SCHULTZ: Whether that's impeachable, what she said...

5 THE COURT: Okay. Was there..., okay.

6  
7 (BENCH CONFERENCE ENDS)

8  
9 THE COURT: Okay. Uh, restate your uh, question. Hang on here  
10 a minute before you answer it. And uh, you..., go ahead. Restate your question.  
11 Ms. Schultz, you can put on the record the nature of your objection.

12  
13 STATE RESUMES DIRECT EXAMINATION OF WILLIAM WIBBELS:

14 Q What did Michelle Cayton tell you when you spoke to her on July, June  
15 12<sup>th</sup>, 2008 about whether, about Ed Nunley?

16  
17 MS. SCHULTZ: And, Judge, we would object to that on the basis of  
18 hearsay. If the State wants to bring in what she said, then they should have her  
19 here and ask her whether she was there or not. They should not bring it in  
20 through this officer.

21 THE COURT: Okay. And your response to that?

22 THE STATE (MS. FLANIGAN): This is being offered, Judge, this  
23 and another question, to impeach the defendant. Uhm, that they have to viewed  
24 together by the jury in order to give a fair picture of what happened. Uh, so I'm

**STATE'S REBUTTAL - WITNESS #1, WILLIAM WIBBELS (DIRECT)**

1 offering this and the other to impeach the defendant.

2 THE COURT: Okay. I'm gonna allow it over the defendant's  
3 objection. You may answer the question.

4

5 WITNESS RESUMES ANSWER:

6 A Ms. Cayton told me that she was at Ed Nunley's house the night that  
7 Annie came over.

8 Q Was that the only time you spoke to Michelle Cayton?

9 A No.

10 Q When did you uh, when did you speak to her again?

11 A I spoke to her..., she called me on the telephone on October 30<sup>th</sup>, 2008 at  
12 two-ten in the afternoon.

13 Q Was that, had you tried to get in touch with her?

14 A No ma'am.

15 Q Okay, and what did she tell you then?

16 A She told me that she was mistaken. She was not at Ed Nunley's house  
17 that night. And I uh, and she was not there that night.

18 Q Okay. Other than Michelle Cayton's recanted story, during the course of  
19 the investigation, did you ever hear that Michelle Cayton was present at  
20 Ed Nunley's house April 13<sup>th</sup>, 2007?

21 A No, I did not. The victim did not mention it. The victim's mother did not  
22 mention it. She did not tell Trooper Bowling. She didn't say it at the  
23 Comfort House. Ed Nunley didn't tell it to me. And, most importantly, he  
24 did not say he was, that Michelle Cayton was at his house.

25



**STATE'S REBUTTAL - WITNESS #1, WILLIAM WIBBELS (CROSS)**

1 THE STATE (MS. FLANIGAN): That's all I have, Judge.

2 THE COURT: Okay. Cross?

3

4 **CROSS EXAMINATION OF WILLIAM WIBBELS BY DEFENSE:**

5 Q Officer, do you, would you have expected the victim's mother to know?

6 She wasn't there that night either, was she?

7 A No. But uh, she would've, maybe Annie would've said, "Hey, this girl  
8 named Michelle was there or a woman was there, or somebody was  
9 there."

10 Q Did anybody ask Annie if Michelle was there?

11 A Well, it's been asked multiple times. "Was anyone else at the home?"  
12 Kirsten and Kyle was the only answer.

13 Q And the victim, Annie, has given various statements as to whether Kyle  
14 and Kirsten were there and when they were there, has she not?

15 A There are some things that maybe they were there for a short period. Uh,  
16 a short period of time, but maybe not. But the meat and the potatoes are  
17 the same though.

18 Q And did you verify whether Kyle and Kirsten were there?

19 A Yes.

20 Q And were they there that night?

21 A They both said uh, they, one said they couldn't recall, and the other one  
22 said, "We may have left early to go to a date."

23 Q Okay.

24

25

**STATE'S REBUTTAL - WITNESS #1, WILLIAM WIBBELS (CROSS)**

1 MS. SCHULTZ: No other questions.

2 THE STATE (MS. FLANIGAN): Nothing further, Judge.

3 THE COURT: Any questions by the Jury? All right. Oh, wait a  
4 minute. There is a question. Hang on.

5

6 BENCH CONFERENCE:

7 THE COURT: It's hard to really make out. I may have to just ask  
8 them to say what the question was. What do you think the question is?

9 MS. SCHULTZ: Why he would've contacted her in the first place.

10 THE STATE (MS. WHEATLEY): And he stated earlier, and he  
11 could say it again. If not, that's gonna open the door that he was on another  
12 investigation.

13 THE STATE (MS. FLANIGAN): He was talking to her in another  
14 investigation.

15 THE COURT: "...did not state Michelle was present." In other  
16 words, why were they talking to her?

17 THE STATE (MS. FLANIGAN): Yeah.

18 MS. SCHULTZ: Uh huh.

19 THE COURT: Okay.

20 (BENCH CONFERENCE ENDS)

21

22 THE COURT: Okay. Uh, I think I understand the question.

23

24 QUESTION BY JURY:

25

**STATE'S REBUTTAL – WITNESS #1, WILLIAM WIBBELS (JURY QUESTIONS)**

1 Q If the defense did not state Michelle was present the night A.Y. was at the  
2 house, then when was she mentioned so she could be contacted? So I  
3 think the question is getting at, how did Michelle come up. And I think that  
4 was kind of answered. Is that sort of the question? Okay, all right. Uh, in  
5 other words, why did Michelle come up..., I think you already answered  
6 this.

7 A It was part of another investigation.

8 Q Okay, that's how you ended up talking to Michelle?

9 A Yes.

10

11 THE COURT: All right, okay. That answers the question. All right.  
12 Okay uh, all right, any other questions, ladies and gentlemen of the jury? Any  
13 questions by the State or the defendant?

14 THE STATE (MS. FLANIGAN): No, Judge.

15 THE COURT: All right. You may step down.

16 WITNESS: Thank you, sir.

17 THE STATE (MS. FLANIGAN): Judge, the State will rest its rebuttal  
18 case.

19 THE COURT: All right. And uh, okay, in view of that then uh, we're  
20 gonna stop for a few minutes before we move on to the next part. Uh, during  
21 this recess, it's your duty not to permit anyone to talk to you or in your presence  
22 on any subject matter connected with the trial. Do not form or express an  
23 opinion on the case until it's finally submitted to you. Okay, you'll be in the jury  
24 room for a few minutes.

25

1 (JURY EXITS COURTROOM)

2

3 THE COURT: The jury is out of the courtroom. The defense is  
4 rested. The State has rested its rebuttal. Uh, any further final instructions from  
5 the State?

6 THE STATE (MS. FLANIGAN): No, Judge.

7 THE COURT: Any final instructions from the defense?

8 MS. SCHULTZ: No.

9 THE COURT: Now I assume you want me to take that one out  
10 about the defendant not testifying?

11 MS. SCHULTZ: Absolutely.

12 THE COURT: Okay. And that'll be taken out. Any other changes  
13 requested in the proposed final instructions?

14 THE STATE (MS. FLANIGAN): No.

15 THE COURT: None by the State. By the defense? And you...

16 MS. SCHULTZ: No, I don't believe so, Judge.

17 THE COURT: Okay, and then we've got that, those verdict forms.  
18 Any issues with the verdict forms?

19 MS. SCHULTZ: I would ask that you put the not-guilty ones on top.  
20 Or, or have, when you give them, to give them to them together, Count "1" with  
21 the guilty and not-guilty together, and then Count "2" with the guilty and not-guilty  
22 together.

23 THE COURT: Okay. We'll give them together concerning counts.  
24 Uh, anything else about, about anything else?

25

1 THE STATE (MS. FLANIGAN): Yes, Judge. There is one issue  
2 that we did not address, and that's this, the question of this Comfort House DVD.  
3 It's got the State's Exhibit "2" and State's Exhibit "9". Two was from last Friday's  
4 hearing, nine is from today. You wanted us...

5 THE COURT: Oh, they were told that when we talked about it.

6 THE STATE (MS. FLANIGAN): Right. But you wanted us to make  
7 a record for, in case there's any appellate issues that they're one and the same  
8 exhibit, and I didn't know if we, that you thought we had covered that when we  
9 talked about it earlier.

10 THE COURT: Well, I did. But we can talk about it again. Okay,  
11 you're saying that State's Exhibit "2"..., is that what it is?

12 THE STATE (MS. FLANIGAN): State's Exhibit "2" from 11-14-08 is  
13 the Comfort House DVD. That's one and the same of State's Exhibit "9" of the  
14 trial exhibits.

15 DEFENDANT: All right. And then, and then the record..., we're on,  
16 aren't we Karen?

17 COURT REPORTER: Yes.

18 THE COURT: And then the record should reflect that we had a  
19 hearing on Friday, November the..., what was the date?

20 THE STATE (MS. FLANIGAN): Fourteenth, Judge.

21 THE COURT: November the 14<sup>th</sup>, and that was the hearing to take  
22 up a variety of issues, including the uh, video tape issues under Indiana Code  
23 35-37-4-6, and that very video tape was marked and introduced into evidence.  
24 That's why it's got an evidence sticker from November the 14<sup>th</sup>. And it's also got

25

1 an evidence sticker for the trial on uh, not on the DVD itself, but on the uh, but on  
2 the uh, on the package that it was in. So, okay, all right. Are there any other  
3 issues you all think..., is there anything else?

4 MS. SCHULTZ: No, Judge.

5 THE STATE (MS. FLANIGAN): No, Judge.

6 THE COURT: Uh, so we simply need to uh, take one instruction  
7 about the defendant not testifying out of there, re-run those, get copies made for  
8 the jury uh, come back for final arguments. We're ready to go basically. Is that  
9 right?

10 THE STATE (MS. WHEATLEY): Judge, we need to set up the,  
11 Elmo. So if we could have at least fifteen minutes.

12 THE COURT: You'll have it.

13 MS. LAUREN WHEATLEY: Thank you.

14 THE COURT: Okay.

15 (OFF RECORD)

16

17 THE COURT: So uh, all right. Uh, everybody is ready to go with  
18 final arguments?

19 MS. LAUREN WHEATLEY: Yes, Judge.

20 DEFENDANT: All right, Susan, you ready to go?

21 MS. SCHULTZ: Yes. The only thing that I would inquire is it's my  
22 understanding that the State intends to uh, divide this up between the two  
23 attorneys, and I would like some guidance from the Court as to how their time is  
24 going to be split up or what they're doing?

25

1 MS. LAUREN WHEATLEY: I'm going to do a kick-butt job.

2 THE COURT: Uh, the only I ever thought about putting the time  
3 limit on uh, lawyers talking in closing arguments was after suffering through  
4 several hours of incoherent closing argument. Uh, but I got over that. Uh, so  
5 that's been several years ago. I'm still over it. So I really wasn't planning on  
6 putting any time limits on either side.

7 MS. SCHULTZ: Well, you know, when they do that, sometimes I  
8 feel like I'm a little handicapped because they both did their, their crack and  
9 there's no limitation on it. You know what I mean?

10 THE STATE (MS. FLANIGAN): Well, Ms. Schultz, I can say that I,  
11 in rebuttal, and I know that I am to restrain from anything but what you've  
12 brought up in your closing, since rebuttal argument. And I, as an officer of the  
13 court, I think I have to stick to that. So you think that Lauren and I both are going  
14 to give the same closing, that's not what's...

15 MS. SCHULTZ: Oh, no. That's not what I mean.

16 MS. LAUREN WHEATLEY: And I can tell the court that I'm not  
17 gonna be up there for hours.

18 MS. SCHULTZ: Okay.

19 MS. LAUREN WHEATLEY: We're just as tired as you are, Susan.

20 MS. SCHULTZ: Good.

21 THE COURT: The particular argument I was thinking about, it was  
22 so long and incoherent that we had to have a break in between the one lawyer's  
23 closing argument.

24 MS. SCHULTZ: You had to take a break during the closing?  
25

1 THE COURT: Not the two lawyer's closing arguments.

2 MS. SCHULTZ: You had to take a break during one of them's

3 closing...

4 THE COURT: That's right, that's exactly right.

5 MS. SCHULTZ: You won't have to do that with...

6 THE STATE (MS. FLANIGAN): You want to share with us who that

7 was?

8 THE COURT: No, I don't. I'm sure there are people that

9 remember. I thought, I believe they thought less of it than I did.

10 THE STATE (MS. FLANIGAN): Was it Jenny?

11 THE COURT: No, it wasn't Jenny.

12 MS. LAUREN WHEATLEY: Was it Shawn Donahue?

13 THE COURT: No, it wasn't Shawn. Okay, so are you ready?

14 MS. SCHULTZ: We're ready.

15 MS. LAUREN WHEATLEY: Yes, Judge.

16 THE COURT: All right.

17 (JURY RETURNS TO COURTROOM)

18

19 THE COURT: Please be seated, ladies and gentlemen. All right,

20 ladies and gentlemen of the jury, we have now reached the point where the

21 lawyers will make their final arguments to you. And first will be the State of

22 Indiana.

23 MS. LAUREN WHEATLEY: Thank you, Judge.

24

25



**CLOSING ARGUMENT BY STATE OF INDIANA**

**1 CLOSING ARGUMENT BY STATE OF INDIANA (MS. WHEATLEY):**

2           May it please the Court, counsel, members of the jury. "He made me  
3 suck on his weenie-bob. He licked my pee-pee." This is the statement that  
4 eight-year-old Annie Young told you two days ago. She wrote this out two days  
5 ago. She was so scared to write it and then to read it. Yet that is what she told  
6 you, that that man, Ed Nunley, did to her on April 13<sup>th</sup>, 2007. Ladies and  
7 gentlemen, it's been a long week. You've heard a lot of testimony. You've seen  
8 a lot of things. Some things you probably don't want ever want to see again.  
9 And we appreciate the fact that you sat here, you've listened, you've taken notes  
10 and you've asked questions. And so right now I'm gonna go through a little  
11 recap of what you heard over these last few days.

12           First, today you've heard from Ed Nunley, whose date of birth is October  
13 23<sup>rd</sup>, 1966. He's clearly over the age of twenty-one. He said that he and Tonya  
14 Caves were friends. He allowed Annie Young to stay at his house on April 13<sup>th</sup>,  
15 2007. He said that Tonya picked Annie up the next day. She came back and  
16 she damaged his motorcycle, his truck and his home. Today he told you that  
17 Michelle Cayton was at his house all night. You heard that he never told Trooper  
18 Bowling, he never told the Harrison County Officer Chris Walden, and he never  
19 told Detective Bill Wibbels anything about Michelle Cayton. Serious allegations  
20 against him, yet he never mentioned Michelle Cayton.

21           He told you that, that Michelle and Annie had talked. They had talked that  
22 next day. But remember, when Annie was asked about Michelle? She said,  
23 "Who's Michelle?"

24           Ed Nunley admitted to you that he had six pornographic DVDs in his  
25

**CLOSING ARGUMENT BY STATE OF INDIANA**

1 possession. But when asked, he said he wasn't into porn. When asked today  
2 where he got them, he gave a couple different stories. But when he was asked  
3 by Detective Billy Wibbels, he stated, "From a guy named Dave?" Admitted that  
4 he let his teenage son and his teenage son's teenage girlfriend live with him. Yet  
5 he had numerous children's movies.

6 He told the police that Tonya had damaged his property, but he didn't  
7 offer where she lived. They would've been there. He didn't offer up her cell  
8 phone, though he knew it. So, so much damage that he's told you, when he  
9 went to talk to the police, he had to tape up his windows. We know he's clearly  
10 not a man with a lot of money because we know that he was evicted from his  
11 house in Palmyra. He couldn't pay his storage unit rental. That's why there were  
12 two locks on it. But yet isn't calling the police, isn't making any other calls to try  
13 to get Tonya Caves charged with that crime, or get that money back, get his  
14 restitution for that? Why isn't he doing that, ladies and gentlemen? Because he  
15 does not want to bring up that subject again because he knows exactly what he  
16 did to Annie Young on April 13<sup>th</sup>, 2007.

17 You heard from Detective William Wibbels, Billy. Eleven years of  
18 experience at the Indiana State Police. Approximately seventy-five sex-crimes  
19 cases that he's investigated. At least half of those involving children. Detective  
20 Wibbels said on April 18<sup>th</sup>, 2008, he got the case and he ran with it. We know  
21 that to be true. He observed Annie at the Comfort House. He's been at the  
22 Comfort House numerous times before. The Comfort House. It's comfortable  
23 for children. It's a lot easier to get children to talk in that sort of setting, in that  
24 sort of facility.

**CLOSING ARGUMENT BY STATE OF INDIANA**

1           Based upon his training and experience, he told you that it did not appear  
2 that Annie had been coached. He did say that it's probable for a child to reveal  
3 more details at the Comfort House, because it is a comfortable setting. He told  
4 you exactly what he watched, and you saw the interview as well with Annie at the  
5 Comfort House. He did say that it was hard for her to hear, but, hard to hear her,  
6 but he could make out pretty much everything. And he specifically heard her say  
7 that the defendant touched the inside of her pee-pee with his hand, he touched  
8 her pee-pee with his penis. She said "weenie-bob". Licked her pee-pee, and  
9 made her suck his weenie-bob. Detective Wibbels also told you that he heard  
10 specific details about the bad movie she watched. Naked people, people  
11 sucking weenie-bobs and whipped cream coming out of those weenie-bobs.  
12 Based upon that info, Detective Wibbels went to where the defendant was living  
13 at the Harrison House. And while there, he recovered six pornographic videos.  
14 Sex Ed Tutor. One of those videos, a video that Annie identified was the one  
15 that the defendant showed her that night, was in the possession of the  
16 defendant. Unfortunately, ladies and gentlemen, you had to view some of that  
17 video. And you saw exactly what was on there. And you saw the pee-pees, the  
18 weenie-bobs and the whipped cream coming out of those weenie-bobs. More  
19 unfortunately, Detective Wibbels had to watch all four-plus hours of that and the  
20 scenes at the end with the pictures, he said. And he stated to you, numerous  
21 scenes with naked people, naked men and women in numerous scenes of  
22 ejaculation.

23           Detective Wibbels also stated that he applied for and obtained a search  
24 warrant for a storage rental facility that Ed Nunley had rented. He said he went

25

**CLOSING ARGUMENT BY STATE OF INDIANA**

1 there and Ed Nunley's name was on the lease. And in that storage facility was a  
2 portable DVD player, exactly like the one that Annie had described.

3 Detective Wibbels, with his eleven years of experience and numerous  
4 schoolings and numerous hours of further education, testified about DNA. He  
5 said it is uncommon to find DNA in these types of cases. Detective Wibbels  
6 about a bath being a DNA stew. It's especially uncommon, because if one's  
7 going to take a bath, and that was alleged, then of course DNA is going to be on  
8 that person. Being in someone's home, you're going to get the DNA of the other  
9 person. Detective Wibbels said that he too would not have asked for a physical  
10 exam. He didn't want to put Annie through that, especially since penetration had  
11 been alleged at that point. No ejaculation had been alleged. And Detective  
12 Wibbels said that it is almost impossible to get fingerprints off of a body. He said  
13 this isn't C.S.I. And I think we can all agree with that.

14 Detective Wibbels got on the stand again. He specifically said that Ed  
15 Nunley never mentioned Michelle Cayton to him. He spoke with Michelle Cayton  
16 on October 30<sup>th</sup>, and she called him specifically and said, "Eh, I was wrong. I  
17 was never at that home." Did you see Michelle Cayton here today?

18 You did see Trooper Kevin Bowling. He testified that he has eight years  
19 of experience with the Indiana State Police. On April 14<sup>th</sup>, 2007, he was  
20 dispatched to the Washington County Sheriff's Department. He said that he  
21 normally works Washington and Scott County, and sometimes Harrison. And  
22 there they met with Richard Caves, Tonya Caves and Annie Young. He stated  
23 he specifically spoke with Tonya and Annie. When asked what happened, Annie  
24 told him that Ed showed her a bad movie, that there were naked people in the

25

**CLOSING ARGUMENT BY STATE OF INDIANA**

1 movie. Tonya told him that Annie had stated in the car that she had a secret.  
2 And Tonya told him what Annie had said, and how she was scared to tell her  
3 parents. And so instead she said that she wanted to write it down. Trooper  
4 Bowling asked Annie specifically about the note that she gave to her parents in  
5 the car. She said yes, Ed did that.

6 Trooper Bowling asked Annie if she took a bath. And I asked him, "Well,  
7 why did you ask that?" He said that because lots of times, evidence can be  
8 washed away. And this happens lots of time. She did say that she did take a  
9 bath. Annie then said that she knew that Mommy did something bad at Ed's  
10 house. Trooper Bowling asked Tonya about that, and she freely told Trooper  
11 Bowling what she did. Tonya said, "I went there." She went there to confront  
12 him and she freely told him what damage she did to his property. And, ladies  
13 and gentlemen, I submit to you it could've been much, much worse. Imagine  
14 what you would've thought.

15 Trooper Bowling took a report and forwarded it to C.P.S. He followed his  
16 protocol and referred it to a detective. Most importantly, Trooper Bowling told  
17 you he recalls seeing the note. He recalls that it was on a white envelope. It  
18 was written in pencil, and that it was in a child's handwriting. He said he knew it  
19 was a child's handwriting because the words were misspelled, but he still recalls  
20 what they said. He remembers seeing it. He does not remember what  
21 happened to it. We don't know. We do know that on that note, written in pencil,  
22 in a child's handwriting, Trooper Bowling clearly recalls the words, "He licked my  
23 pee-pee, made me suck his weenie-bob."

24 You've heard from Donna Lloyd Black. She's the executive director at the

25

**CLOSING ARGUMENT BY STATE OF INDIANA**

1 Comfort House. She told you about the Comfort House. It's a neutral, safe  
2 environment for children. She has specialized training, approximately two  
3 hundred hours of training in how to talk to children, making sure that it's not  
4 unduly suggestive. So they feel comfortable talking, not in a leading  
5 environment. Her job, she said, is to ensure the best interest of the child.

6       You saw the video. If you want, you can have the chance to watch it  
7 again. But in that video, you saw how, how Donna was just getting to know  
8 Annie a little bit. And they were just talking about girls, boys, girl parts, boy parts.  
9 And Annie pointed out that she called girl, girl private parts a pee-pee, and boy  
10 private parts a weenie-bob. And she drew for you her house and where she  
11 lived at the time. She talked about her dolls, and her mom. She mentioned her  
12 brother. And she mentioned Eddie, and where she went and she stayed the  
13 night. Donna told you that she was able to hear Annie the entire time. At times  
14 the hearing was not very good on our part. I'm sure that Donna told you that she  
15 could hear Annie and she could understand Annie the entire time.

16       They talked about Eddie's home, where different things were located in  
17 Eddie's house. They talked who stayed at Eddie's house. Annie specifically  
18 mentioned Kiki.

19       Donna talked with Annie about the events that occurred on April 13<sup>th</sup>,  
20 2007. The last time that Annie had stayed the night. The only time that Annie  
21 had stayed the night at Ed's house. Annie stated that Ed touched her pee-pee  
22 with his weenie-bob. Annie told her that he touched the inside of her pee-pee  
23 with his hand. He licked her pee-pee, and he made her suck his weenie-bob.  
24 She stated that he took her panties down. She had on a tee shirt. He had on a

**CLOSING ARGUMENT BY STATE OF INDIANA**

1 tee shirt and red shorts, and he took those down. When asked about the  
2 weenie-bob, Annie specifically told us, she even drew it for you.

3 Annie stated that Ed had showed her a bad movie with naked people,  
4 people sucking on weenie-bobs, and whipped cream coming out of weenie-bobs.  
5 Annie described Ed's weenie-bob as peach with a line and squashy. And Donna  
6 wrote down "squashy."

7 You heard from Tonya Caves, the mother of Annie Young. She stated  
8 that on April 13<sup>th</sup>, 2007, she took Annie to Ed Nunley's house, and that was  
9 located in Palmyra in Harrison County, Indiana. Annie wanted to go there. She  
10 wanted to spend the night. She liked playing with Kiki. Kiki was a teenager.  
11 She had a bag of clothes with her for Annie. And Tonya told you that she  
12 thought that Kiki was going to be there. In fact, she asked Ed that, and Ed  
13 confirmed that yes, Kiki would be there. Kiki lived there. She dropped her off,  
14 picked her up the next day. Fine with Ed, you know, came in, talked with Ed a  
15 little bit, she said. "Oh, she had her bath?" "Yes, she's had a bath." Okay,  
16 Annie seemed fine.

17 In the car with Annie, Annie states, in the back seat, "Mommy, Eddie and I  
18 have a secret." Tonya is not really thinking about it. "Oh, what's the secret?" "I  
19 can't tell you." "Well, why not?" "I'm scared." At this point Tonya told you that  
20 she used a little bit of reverse psychology and said, "Oh, I already know the  
21 secret. Mommy knows the secret. How about you tell me? I'll see if it's the  
22 same one that Eddie told me." She still said that she was too scared. She said  
23 that she'd rather write it down. Tonya said that someone gave her a scrap piece  
24 of paper, a pen or a pencil and handed it back to her, and that Annie had wrote

25

**CLOSING ARGUMENT BY STATE OF INDIANA**

1 something down.

2 Now Tonya stated at this time that Annie was six years old. She was in  
3 kindergarten. She'd been to preschool. And she could, she could write. She  
4 had to phonetically sound out words and they weren't always spelled right, of  
5 course. But she could generally understand what she was writing. Annie  
6 handed Tonya the note, who was driving. Richard, her husband, who was  
7 separate with, but she said they were kind of working things out. He was sitting  
8 in the passenger seat. Tonya told you that she read that note, and she was  
9 shocked. She couldn't even tell Richard what it said, she was so stunned. She  
10 said at some point in time she handed the note to Richard. And she just made  
11 the decision to turn around, because she was going back to Ed's house to  
12 confront him. And that's exactly what she did. She parked at the bottom of the  
13 driveway, and she told you that she was a little bit in the roadway. And she  
14 grabbed a bat and she went up there to confront him. And she told you exactly  
15 what she did. She busted his motorcycle, she busted the windows of his truck,  
16 and she was trying to get him to come out of that house. She was beating on  
17 this trailer. And she told you, she wasn't using the best of language. She was  
18 upset. She believed her daughter. She had not reason not to. Because as we  
19 talked about before, who was in the best position to know their children and if  
20 their children are telling the truth or lying? And that's a parent. And Tonya  
21 Caves believed everything that her daughter had written on that note, as horrible  
22 as it was. And she wanted to confront the man that did that to her daughter.

23 Tonya stated that she was yelling at him. He eventually came out of the  
24 house and she left. She stated she waited at the end of the driveway because

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1 she wanted to talk to the police. She stated she waited a little bit, approximately  
2 twenty minutes and then she left. And she stated she headed up to the  
3 Washington County Sheriff's Department. She lived in Washington County and  
4 that's where she went. She immediately asked for a State Trooper because she  
5 knew the crime had occurred in Harrison County. It did take awhile for a state  
6 trooper to get there, and she spoke with Kevin Bowling. She handed him the  
7 note, he read it, and she told you that she gave the note to Trooper Kevin  
8 Bowling. Tonya told you that the first time she heard about the naked movie was  
9 when Annie was telling the trooper. Tonya also told you that she never coached  
10 Annie on what to say. She didn't even have porn in her home. She admitted to  
11 you that she was reluctant at first to follow up with this investigation. It was hard  
12 to come to terms with that had happened to her daughter. And, frankly, and I  
13 quote, "She just wanted it to go away."

14 Richard Caves, Annie's step-father, he considers her his daughter. She  
15 called him Daddy. Testified that he didn't even know Ed Nunley. He'd had no  
16 dealings with him. He went, on April 14<sup>th</sup>, 2007, to Ed's home. He stayed in the  
17 car when Tonya went in to get Annie. Tonya was in the home approximately five  
18 minutes, came out, and Annie got in the car. She said, "Mommy, Ed and I have  
19 a secret." You know what happens next. Richard said that, he said, "Oh, you  
20 know", Tonya said, "You can tell me the secret." "No, I'm too scared." "Oh, I  
21 already know the secret. Mommy knows. How about you tell me? To see, to  
22 see if it's the same thing that Eddie told me." "I'd rather write it down." Richard  
23 said that, yes, his daughter could write. Didn't spell everything out correctly, but  
24 she could. She was in kindergarten. She could do it.

**CLOSING ARGUMENT BY STATE OF INDIANA**

1 Annie handed Tonya the note and he could tell by the look on her face  
2 something was wrong. When she showed him the note, he was stunned. He sat  
3 in the passenger seat as Tonya turned around, went back to his house, Ed's  
4 house. Richard said he stayed in the car with Annie. He could hear hollering,  
5 and he could hear what sounded like metal beating metal. He said Tonya was  
6 upset. Who wouldn't be? He said they went to Salem, to the Sheriff's  
7 Department in Washington County. And he stated that they all went in there to  
8 talk with the trooper. It did take awhile for the trooper to get there. And then  
9 Annie and Tonya talked to the trooper alone. And Richard Caves told you that  
10 he didn't ask. He had heard more than he wanted to hear. He didn't talk about it  
11 to Annie. He certainly didn't tell Annie what to say.

12 Ladies and gentlemen, you heard from Annie Young. Eight years now, six  
13 years old at the time this horrible crime happened to her. She told her that her  
14 date of birth was June 24<sup>th</sup>, 2000. And right now, she's in the second grade.  
15 She said that her and Eddie Nunley were friends. He had a Nintendo at his  
16 house and he had some different games than she had. She'd been to his house  
17 before. They were friends. She wanted to go to his house because she liked  
18 playing with Kiki. Kiki would play with her. And Kiki lived there too, along with  
19 Kyle.

20 She stated that she took some clothes to stay the night. She stated that  
21 at some time during that night, she had gone back to Ed Nunley's bedroom, and  
22 she told you that on a small T.V., this, watched Ed Nunley put in this DVD, Sex  
23 Ed Tutor, and made her watch it. We know that she knew this DVD player  
24 because she in fact showed Ms. Schultz how to use it. She opened it up for her,

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**CLOSING ARGUMENT BY STATE OF INDIANA**

1 showed her how to put the DVD in. She specifically said, "This was the DVD he  
2 made me watch." She talked about what was in it. Naked people, weenie-bobs,  
3 pee-pees. I asked her, "Why was that a bad movie?" And she said, "Naked  
4 people, weenie-bobs, pee-pees." I asked her, "Is it like the movies you have?"  
5 "No." "Have you ever seen a movie like that before?" "No." I asked her what her  
6 favorite movies was, and she said Scooby Doo. I said, "Would you have rather  
7 watched Scooby Doo?" "Yes." Ladies and gentlemen, after what we watched  
8 yesterday, I think we all would've rather watched Scooby Doo.

9 She described his bed as a queen-sized bed. She said that she had a tee  
10 shirt and panties on. She stated that he took her panties off. Ladies and  
11 gentlemen, you saw how hard it was for her to tell you about what happened.  
12 We had to take a few breaks. I'll admit to you, I probably needed them more  
13 than she did. And she just stated, "Can I just write it down?" The exact same  
14 thing that she did with her parents, because still, even in front of the man who  
15 did it to her, it was so hard to tell you what happened. Because let's face it, this  
16 is different. This is a different plan than the Comfort House, with the drawings  
17 and the hand prints on the wall. It's different than talking with Trooper Bowling  
18 and Mommy. It's different than being in the car with Mommy and Daddy. It's  
19 different when people are just looking at you, waiting on, for you to say anything.

20 She told you that Eddie told her not to tell Mommy, that Mommy and  
21 Daddy would get in trouble. She thought that meant he was going to call the  
22 cops on them. She told you that she thought that Eddie would hurt Mommy and  
23 Daddy. And she told you that she told Eddie to stop, and that she didn't like it.  
24 She did not like it when he made her suck on his weenie-bob, and he licked her

**CLOSING ARGUMENT BY STATE OF INDIANA**

1 pee-pee.

2 An eight-year-old little girl was able to describe a penis. She specifically  
3 said that it was peach, it was light red on top, and that it was soft. And she drew  
4 the length of it. I submit to you it's probably not something she's going to forget  
5 any time soon.

6 She talked to you about what happened in the car with her Mommy and  
7 Daddy, about how she did not want to tell her Mommy and Daddy out loud  
8 because she was so scared. But yet she felt more comfortable writing it down.  
9 She said that it was on an envelope and that it was a pencil that Eddie had given  
10 her. She told you that she talked to the trooper as well. And she remembers  
11 talking to the lady at the Comfort House.

12 Ladies and gentlemen, the defendant is charged with a number of crimes.  
13 He's charged with Child Molest. And we have to prove to you that the defendant,  
14 Lawrence Nunley, knowingly or intentionally performed or submitted to deviate  
15 sexual conduct. You'll have an instruction as to what deviate sexual conduct is.  
16 But I'm pretty sure we can all agree that he touched the vagina of Annie Young  
17 with his mouth, when Annie Young is a child under fourteen years of age, and  
18 when he was at least twenty-one years of age. So let's just go through these  
19 and check them off one by one.

20 We know the defendant, Lawrence E. Nunley, better known as "Eddie",  
21 because Annie Young pointed him out. So did Tonya Caves. Knowingly or  
22 intentionally. He absolutely knew what he was doing. Performed or submitted to  
23 deviate sexual conduct with Annie Young, he specifically touched the vagina of  
24 Annie Young with his mouth. "He licked my pee-pee." She wrote it, she said it

25

**CLOSING ARGUMENT BY STATE OF INDIANA**

1 and she told others. When Annie Young was a child, absolutely a child, six  
2 years old at the time, and Ed Nunley was at least twenty-one years of age.

3       The next count, Child Molest as an "A" Felony. We have to prove to you  
4 that the defendant, Ed Nunley, knowingly or intentionally performed or submitted  
5 to deviate sexual conduct with Annie Young, namely had Annie Young put her  
6 mouth on his penis, when she was a child under fourteen, when he was at least  
7 twenty-one. Ladies and gentlemen, the defendant, Ed Nunley, Annie pointed  
8 him out. Knowingly or intentionally. I hate to be crass, ladies and gentlemen,  
9 but let's face it; his penis didn't exactly just fall into her mouth now did it?  
10 Performed or submitted to deviate sexual conduct with Annie Young, namely had  
11 her put her mouth on his penis. "He made me suck on his weenie-bob." How  
12 did he put her mouth on it? "He made me suck on his weenie-bob." When she  
13 was a child, six years old, and he was at least twenty-one years of age.

14       The next count we have to prove to you is Child Molest, another "A"  
15 Felony, that says the defendant, Lawrence Nunley, knowingly or intentionally  
16 performed or submitted to deviate sexual conduct with Annie Young, namely he  
17 put his hand in the vagina of Annie Young. If you recall, on the Comfort House  
18 video, she says that specifically. Detective Wibbels remembers it, and he told  
19 you it could've just been like this. Didn't even have to be a penetration. But  
20 either way, Annie Young, in the comfortable environment of the Comfort House,  
21 told Donna Black that that's what happened, that the defendant, Eddie Nunley,  
22 put his hand in her pee-pee. And she specifically said inside of her pee-pee.

23       The next count we have to prove to you is Child Molest. The defendant,  
24 Lawrence E. Nunley, knowingly or intentionally performed or submitted any

25

**CLOSING ARGUMENT BY STATE OF INDIANA**

1 fondling or touching of Annie Young, or Lawrence Nunley, with the intent to  
2 arouse or satisfy the sexual desires of Annie Young or of Lawrence E. Nunley  
3 when Annie Young was a child. Ladies and gentlemen, we know the defendant,  
4 Lawrence Nunley, knowingly and intentionally. We know that he performed and  
5 submitted to any fondling or touching, specifically he touched her pee-pee, his  
6 hand went inside her pee-pee. His weenie-bob touched her pee-pee. He licked  
7 her pee-pee. And he made her suck on his weenie-bob. With the intent to  
8 arouse or satisfy the sexual desires. And we certainly don't think he's trying to  
9 satisfy her. He's trying to satisfy him, or his own sexual desires with those  
10 perverted actions. And she was definitely a child.

11       The next thing that we have to..., the defendant is charged with is that  
12 Lawrence E. Nunley knowingly or intentionally displayed matter that is harmful to  
13 minors in an area to which Annie Young had visual, auditory or physical access  
14 when she was not accompanied by her parents or a guardian. The defendant,  
15 Ed Nunley, knowingly or intentionally. Annie specifically told you how this DVD  
16 player worked. She specifically told you that she identified this DVD as being the  
17 one that he put in the DVD player and made her watch. Ladies and gentlemen, I  
18 submit to you, yesterday you had to watch approximately fifty, fifty-five minutes.  
19 That DVD is over four hours long. At no point in there, I submit to you, is it any  
20 where close to being acceptable for any minor to watch. There's no educational  
21 value. The only thing that is is harmful, harmful to Annie. And she knew it. She  
22 said it was a bad movie. It was a bad movie with naked people, weenie-bobs,  
23 and whipped cream coming out of weenie-bobs. And, ladies and gentlemen, we  
24 all saw that. How would a six-year-old at the time know what anything looked

**CLOSING ARGUMENT BY STATE OF INDIANA**

1 like coming out of a penis? Let alone anything is coming out of a penis, if she  
2 had not seen that horrible video. Was it harmful to minors? Absolutely.

3 Ladies and gentlemen, we have to prove to you that a matter or  
4 performance is harmful to minors if it describes or represents in any form nudity,  
5 check, sexual conduct, check, sexual excitement, check, or sado-machostic  
6 abuse. Considered as a whole, and thank goodness we didn't have to watch all  
7 four-plus hours, that Detective Wibbels told us, as a whole, it appeals to the  
8 prurient interest in sex of minors. I don't know about you ladies and gentlemen,  
9 prurient is not a word that I use in everyday vocabulary, so let me just give you a  
10 small definition of it. Marked by arousing or unwholesome interest or desire.  
11 Titillating, if you will. And I believe that we could check that. Is patently offensive  
12 to prevailing standards in the adult community as a whole with respect to what is  
13 suitable matter or performance before minors. Would you show it to your own  
14 kids? Would you want them watching it at school? I think we can safely answer  
15 that no. Considered as a whole, it lacks serious literary, artistic, political or  
16 scientific value for minors. Detective Wibbels mentioned yesterday to us, before  
17 he had to go home and watch all of it, that he didn't think that he was gonna see  
18 War and Peace and the end or any poetry. There definitely wasn't any literary  
19 value.

20 Ladies and gentlemen, I submit to you that Ed Nunley is guilty of all of  
21 these charges. But I submit to you more that he is guilty of so much. He is guilty  
22 of taking away a little girl's innocence. It's hard for her to talk about it. You saw  
23 her tears. You saw her. She just did not want to talk about it. You saw how she  
24 didn't even want to walk by him. He took away her innocence and so much

**CLOSING ARGUMENT BY STATE OF INDIANA**

1 more. Would she have rather watched Scooby Doo that night? Absolutely.  
2 Instead did she had to watch Sex Ed Tutor? Yes.

3 Ms. Schultz told you in her opening statement that if you believed the  
4 defendant, if you believed the victim, then the defendant is guilty. If you don't  
5 believe her, then the defendant is not guilty. So I'm gonna talk about a few  
6 reasons as to why you should believe Annie Young. First of all, she has no  
7 reason to lie. She's six years old. I submit she hasn't even been taught how to  
8 lie. She knows what's the truth and what's a lie. When you tell the truth, you  
9 don't get into trouble. When you tell a lie, you get into trouble, she said. Her and  
10 Eddie were friends. She wanted to go spend the night at his house. She liked  
11 going over there and playing with the Nintendo. She liked hanging out with Kiki.  
12 She has no reason to lie.

13 She's not been coached. If she were coached, she would probably come  
14 in here and say exactly, tell you exactly what happened and there you go. But  
15 that's not what happened. She cried. She begged not to tell what happened.  
16 She didn't want to talk about it. She just wanted to write it down. Was that  
17 coaching? No. There definitely were some statements that were a little bit off.  
18 She may have said something at times and maybe said something else.  
19 Detective Wibbels, I think, put it right on when he said "the meat and the  
20 potatoes were always the same".

21 Ladies and gentlemen, the meat and the potatoes is "He made me suck  
22 on his weenie-bob. He licked my pee-pee." I ask that you believe Annie Young.  
23 And you believe her parents because they believed her. They had no reason not  
24 to. Tonya and Ed were friends. Richard doesn't even know Eddie. They

25



**CLOSING ARGUMENT BY STATE OF INDIANA**

1 believed their child. No one, except for Ed Nunley, has a reason to lie about this.  
2 And how could you lie? How could you make this up? "He made me suck on his  
3 weenie-bob. He licked my pee-pee". And, ladies and gentlemen, I ask that you  
4 find him guilty of doing just that. Thank you.

5

6

7

THE COURT: Okay.

8

MS. SCHULTZ: Judge, could we have a side bar, please?

9

THE COURT: Yes.

10

11 BENCH CONFERENCE:

12

MS. SCHULTZ: During the trial I was prohibited from bringing in

13

any evidence that Annie lied to the state trooper. And yet she's, in her final

14

argument, and says, "Annie doesn't even know how to lie." I find that

15

extremely...

16

MS. LAUREN WHEATLEY: I did not say that.

17

MS. SCHULTZ: Yes, you did.

18

MS. LAUREN WHEATLEY: I did not say that she is not taught to lie

19

at six years old. I said a six-year-old has not been taught to lie.

20

MS. SCHULTZ: I think we need to go back and listen to it, because

21

heard you say...

22

MS. LAUREN WHEATLEY: I don't think you...

23

MS. SCHULTZ: ...and the door was opened...

24

THE COURT: Well, the evidence is over with.

25

**CLOSING ARGUMENT BY DEFENSE**

1 MS. SCHULTZ: After we finish with the jury, I'd like to make a  
2 record on the objection to that.

3 THE COURT: Okay.

4 MS. SCHULTZ: I would like to ask for a special instruction, and  
5 there was evidence that was not presented to the jury.

6 THE COURT: Okay.

7 MS. SCHULTZ: And I just want to make a record.

8 (END OF BENCH CONFERENCE)

9  
10 **CLOSING ARGUMENT BY DEFENSE (MS. SCHULTZ):**

11 Good afternoon, ladies and gentlemen. This is my only chance that I get  
12 to talk to you. And as it always happens, I know I'll forget to tell you something  
13 that I wanted to say. And I'll try to be uh, as brief as possible. I know you have a  
14 big ahead of you, because it is going to be your responsibility to determine who  
15 you want to believe in this courtroom and who you think is not being totally  
16 forthright with you and maybe has forgotten what happened, or is intentionally  
17 misrepresenting facts to you.

18 So I'd like to start off with some of the general principles that we have uh,  
19 in the State of Indiana and also in our whole country. And the first one would be  
20 that under the law of this state, a person charged with a crime is presumed to be  
21 innocent. To overcome the presumption of innocence, the State must prove the  
22 defendant is guilty of each essential element of the crime charged, beyond a  
23 reasonable doubt. A defendant is not required to present any evidence to prove  
24 his innocence or to prove or explain anything. And I think that the concept here,

25

**CLOSING ARGUMENT BY DEFENSE**

1 and it's very important, is that he is not required to prove he is innocent. The  
2 State is required to prove he is guilty. So if there is a question there as to  
3 whether he's guilty or not, then you must find him not guilty, because the State is  
4 the one that has the burden. And this burden to prove, upon the State to prove  
5 beyond a reasonable doubt that he is guilty of the crime is a strict and heavy  
6 burden. The evidence must overcome any reasonable doubt concerning his  
7 guilt. But it doesn't mean that the defendant's guilt must be prove beyond all  
8 possible doubt. A reasonable doubt is a fair, actual and logical doubt based  
9 upon reason and common sense. And I guess we would all ask you to use some  
10 of that here today, common sense, past experiences in life to determine who you  
11 believe and who you don't believe.

12 Now, with respect to the uh, specific elements of the offenses, I'd like to  
13 make a couple of comments. We all saw that horrible, horrible video tape  
14 yesterday. It certainly was not something that was pleasant to watch. And I will  
15 tell you that I believe that that video tapes fit within the definition of..., let's see...,  
16 it fits within the definition of uh, matter harmful to a minor. There's no doubt in  
17 my mind. I don't think there's any doubt in anybody's mind that that movie fits in,  
18 in that definition. But the issue with respect to that offense is whether that movie  
19 was shown to this child by Mr. Nunley.

20 Now when, when you looked at this movie, you've seen the outside of it.  
21 And on the outside of this we have a picture of a naked girl holding what looks  
22 like a, some kind of pornographic magazine or something. We have another  
23 naked girl, and there's a penis in the picture, and her mouth, and stuff running  
24 out of her mouth. Uh, all of the things that Annie described that she saw on the

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**CLOSING ARGUMENT BY DEFENSE**

1 movie she could have seen on the cover of that DVD, or the label on the DVD,  
2 except for the fact that she said she saw naked men doing things to each other.  
3 Now I, the portion of the movie that we watched, doesn't see any naked men  
4 doing anything with each other. And I think she..., I can't really remember  
5 exactly what she said about the naked men. I believe that she had said that they  
6 were, they were touching each other's penises or licking each other's penises.  
7 I'm not sure exactly what she said about the naked men. But I do recall, she  
8 said there were naked men doing things to each other. We didn't see any of  
9 that in the portion that we watched. The officer testified that that was  
10 representative of the whole line. I asked him about the naked men, he didn't  
11 recall any specifics that stuck out like that. Did she watch that movie? I have no  
12 idea. Did she that, the label on the disc? She could've done that. We all know  
13 how kids are. We know that she was in Ed's bedroom by herself. She was there  
14 by herself in the morning watching Scooby Doo. She knew how to play the video  
15 tape, this tape player right here. She knew how to play. She showed me how to  
16 play it. She said when you pop this up, this thing opens up and the disc goes  
17 right in it. But that tape would've been, or the DVD would've been in there when  
18 she picked up the video player. She could've seen it. She could've been looking  
19 around the bedroom and found it. We don't know how she saw it. We do know  
20 that she said she watched four hours of it. And I would suggest to you that that  
21 is highly improbable that any person would sit there for four hours with a child  
22 and watch a movie of this sort with a child for four hours, and that the child would  
23 continue to watch it. Now I, I grant you that a child of this age probably doesn't  
24 have a good concept of what four hours would be. But she didn't say four

**CLOSING ARGUMENT BY DEFENSE**

1 minutes, and she didn't say a half a hour. She said four hours. Now mind you,  
2 she got there about ten-thirty at night. After she got there, she played video  
3 games and she took a bath, and then she went to bed, or went to the bedroom.  
4 And then there was four hours. Well, that takes up an awful lot of the night  
5 looking at that. So I don't think she watched the video for four hours. It's  
6 questionable in my mind as to whether she even watched the video or all, or  
7 whether it was this video that she watched. She picked the movie up because of  
8 the cover on the DVD. Not because somebody showed her the contents and  
9 said, "Did you see this?" And she said she saw it. She looked on the cover on  
10 the DVD. And that's what she identified it from. We've also heard from the, from  
11 Mr. Nunley that the DVD player doesn't work, and had to have this cord in order  
12 for it to work. And also, one of the other remarkable things that I find about this  
13 particular DVD is, whenever a person who is charged with child molestation, in  
14 other words a pedofile, if this person is a person who is interested in children, in  
15 sex with children, wouldn't it make more sense that he would have video tapes  
16 with children in them as opposed to video tapes of all adults? That would seem  
17 logical to me. And there was nothing about any child pornography or a child  
18 acting out pornography on this pornographic movie that we saw a part of.

19       With respect to the other aspects of this case uh, one in particular I'd like  
20 to point out to you is in Jury, or the Count "3". Mr. Nunley is charged with the  
21 criminal deviate sexual conduct, namely that he put his penis in the vagina of  
22 A.Y. Now when the Court defined this for you earlier, the uh, deviate sexual  
23 conduct, it was defined as a sex organ of one person and involving that of  
24 another person, and the penetration of the sex organ or another person or by an

25

**CLOSING ARGUMENT BY DEFENSE**

1 object. And I would suggest to you that before, that the State has not proven  
2 that charge at all. The definition requires that, that he had penetrated the sex  
3 organ of the child. The defendant's hand is accused of having penetrated the  
4 sex organ of the child. And when I asked the officer, Officer Wibbels, when he  
5 was testifying, specifically about medical evaluations, and he indicated that he  
6 could put her hand in her vagina without penetrating her. Well, you know, he  
7 told us that that is possible. If that's what happened, then Mr. Nunley did not  
8 commit this specific offense, because in order to prove this offense, they have to  
9 prove that his hand penetrated her vagina.

10 Now, I would like to talk a little bit about the parents of Annie Young. I  
11 think we can all agree that they certainly are not model parents of the year. And  
12 I'd like to talk a little bit first about what we know her mother, Tonya. The Court  
13 has instructed you that uh, Tonya has a conviction for a bad check. And we, this  
14 evidence is put in for impeachment purposes, meaning when a person has been  
15 convicted of a crime involving dishonesty, which Check Deception is, then it's a  
16 reflection on their willingness to tell the truth. And you were told that she was  
17 convicted of that offense, and you were also told that Richard, her husband and  
18 the child's step-father, was convicted of an offense of False Informing. And that  
19 also is another dishonesty-type offense.

20 Now, Tonya, we know from the evidence that's been presented, back at,  
21 in April of 2007, she was married to Richard Caves. She indicated she wasn't  
22 living with Richard Caves at that time, but she was living with someone named  
23 "Hank". And then she went on to tell us how she had spent the night with  
24 Richard that night, after she dropped Annie off, because they were trying to work

25

**CLOSING ARGUMENT BY DEFENSE**

1 out their marriage. She also indicated that she had known Mr. Nunley for  
2 approximately six months, I believe is what she said. Mr. Nunley indicated it was  
3 a shorter period of time than that, but obviously she hadn't known him for very  
4 long. She also indicated that she thought that uh, Kirsten or Kiki would be there  
5 that night to watch the child when she dropped her off. And she wasn't there.  
6 She wasn't, she wasn't there to watch her when she dropped her off. But she  
7 left the child alone with this man that night, and there's some question as to how  
8 long the child was supposed to stay. Now, Mr. Nunley indicated he understood  
9 that she was going to be back shortly because..., and Tonya Caves indicated  
10 that she was going to be there for overnight. But she left her there, and then she  
11 came back the next morning. And we know whatever happened, and there's a  
12 couple of versions of this, whatever happened, she was extremely upset with Mr.  
13 Nunley. It could've been because she was upset because he didn't let her move  
14 in with him, as he indicated. Or because she had learned from the child what the  
15 child claims had happened to her.

16 We know that Tonya and Richard don't agree on a lot of things that  
17 happened. If you will recall the testimony of Tonya, she indicated that Richard  
18 was with her both when she dropped the child off and when she picked her up.  
19 Richard said he was not there when she dropped the child off. He was there  
20 when she picked the child up in the morning. They both agree, everybody  
21 agrees in this case that Tonya and Richard and Annie, that the three of them  
22 were in their car together when they left the house.

23 Annie described how she wrote the note. Annie described asking her  
24 step-father how to spell the word "weenie-bob". I specifically asked her about

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**CLOSING ARGUMENT BY DEFENSE**

1 that, and she specifically told me that she couldn't write it; she had to ask, and  
2 Richard helped her spell it. And Richard said, "I didn't help her spell." And  
3 Tonya said, "We didn't help her spell it." But she supposedly wrote this on this  
4 piece of paper. I suggest to you that if she wrote this on a piece of paper, and  
5 she is a child in kindergarten, and she has a lot of trouble reading, a little less  
6 trouble writing, then she probably had to have some help spelling those words. It  
7 would certainly be nice if we had the note in front of us that we could look at, if it  
8 even exists. The question is what it was written on. Was it on an envelope or  
9 was it on a scrap of paper? There is certainly questions to what happened to  
10 this note.

11 Some of the other things that, that are different in the testimony of Tonya  
12 and Richard uh, relate to the conversations with Officer Bowling. Richard  
13 indicated that he was there in the room when Officer Bowling initially talked to  
14 Tonya and Annie. And the officer said that he wasn't there. Tonya said he  
15 wasn't there. Uh, there was, there was the testimony with respect to the  
16 conversations that went on in the car, and I think it's pretty obvious to all of us  
17 that wherever the conversation was going on in the car from Ed Nunley's house  
18 on the way to Salem to the police station, it wasn't one that was particularly  
19 friendly towards Ed Nunley. Whether it was because Tonya was mad because  
20 he wouldn't let her move in, or she was upset because she thought her child had  
21 been molested. Anything that was said about Ed Nunley would not have been  
22 said too kindly that night.

23 Tonya indicated that when she came back to the house to pick uh, Annie  
24 up in the morning, that Annie was in the bedroom playing uh, or watching a



**CLOSING ARGUMENT BY DEFENSE**

1 movie, I believe she said, and that she was acting normal, regular self. Richard  
2 indicated that when they came out to the car, she was acting strangely and he  
3 knew she was upset. There's a lot of difference in their testimony. They didn't  
4 say a whole lot of things, but what they did say, there was a lot of differences in  
5 what they said.

6 With respect to Annie's testimony, there, there is a lot of variation in her  
7 testimony as to what she told various people. If you will recall, she talked about  
8 this several times. First she made the note in the car. She talked to Officer  
9 Bowling. She talked to Comfort House. Uh, she later came into court and  
10 testified here. And there were some other conversations. She gave a deposition  
11 for me, and we don't have the content of that full deposition. I just mentioned it  
12 because she did in fact do that. So, throughout all this time, there's one thing  
13 that's important to remember with all of these instances, and all of the  
14 statements that she gave, each and every time her mother either was taking her  
15 to uh, the place where she made the statement, was with her when she made  
16 the statement, or was immediately preceding that. So her mother was there all  
17 the time. And I asked her if her mother told her what to say, and she said, "Yes,  
18 she told me to tell the truth." And I asked her if she told her what the truth was,  
19 and Annie said, "Yes." Her mother told her what the truth was.

20 So, Tonya was certainly there. Tonya was certainly in a position to be  
21 able to coach this child. And whether she did or not is the decision that you will  
22 have to make. There are so many things that have gone on in this case. So  
23 many different statements of what had happened, that it's really, really hard to  
24 figure out what the truth so. Fortunately, the dozen of you, and I believe that

**CLOSING ARGUMENT BY DEFENSE**

1 when you get your heads together and talk about all these things, then  
2 collectively, the twelve of you will be able to make a good decision on this.

3 I would just like to go back through some of Annie's testimony and, and  
4 the various things that she did say about what had happened to her. And I'll start  
5 first with her incident in the car. She wrote the note, she said there was oral sex,  
6 she had to perform oral sex on him, he performed oral sex on her. Her mother  
7 indicated and, and Annie said that uh, in the car that nothing else happened to  
8 her. This was the only thing that happened to her. And she wrote the note in the  
9 car. Then when she went and talked to Officer Bowling, she indicated that there  
10 had been oral sex performed on her, she performed oral sex on him, she saw  
11 the nasty movie, and she also indicated there that she had taken a bath. Uh,  
12 now the bath is kind of mysterious too because it's, it's hard to understand when  
13 she took the bath, whether it was before the sex or whether it was after the sex.  
14 I think we have information from Annie on both, both ways.

15 When she went to the Comfort House, she extended her story even more.  
16 And her mother went to the Comfort House. And in that instance, she said there  
17 was oral sex performed on her, she performed oral sex on him, she watched the  
18 movie, she saw the whipped cream, that the hand was in her vagina, and she  
19 indicated also that his penis had touched her vagina. Now, this is the first time at  
20 the Comfort House that I recall uh, that she had talked about her underwear.  
21 And in this particular instance, she indicated that he had taken her underwear  
22 down to her knees and that was how he had accomplished uh, baring her private  
23 parts in order to do this. And when she later testified her in court, I recalled very  
24 graphic testimony that she gave that he took her underwear off and threw them

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**CLOSING ARGUMENT BY DEFENSE**

1 on the dresser.

2 Also, at the Comfort House interview, she indicated that she went into the  
3 bedroom to sleep, and she very distinctly described how he came back to the  
4 bedroom and then stopped... (unintelligible)..., because he had his boots on  
5 when he back there. Yet when she talked about it here in court, she was saying  
6 that what she said was that he took her back to the bedroom.

7 There's also a lot of variation in the Comfort House and the testimony  
8 here today as to whether uh, there was anybody else there. When she talked to  
9 the Comfort House, she talked about Kiki and Michael, and I don't know where  
10 Michael came into this picture, but we didn't hear anything about Michael in  
11 court. We heard about uh, Kyle and Kiki being there. We didn't hear anything  
12 about Michael.

13 In the testimony here in court, she was also very graphic when she talked  
14 about uh, what she saw in the movie. Uh, in neither instance did she mention  
15 that there was any intercourse going on. She didn't talk about any intercourse.  
16 Now granted this child may not know what the word "intercourse" means. But if  
17 someone had asked her or if she were to describe what had happened, she  
18 certainly would know or recognize when she saw a penis being inserted into a  
19 vagina. And she did not mention anything at all like that.

20 I would like to comment a little bit on the police investigation and the time  
21 lag that happened in this case. We have a mother who picked a child up and  
22 reports immediately to the police that something has happened. There's an  
23 allegation that something had happened, and the police take immediate action.  
24 Officer Bowling called C.P.S. and tells them what's going on. He reports it as he

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**CLOSING ARGUMENT BY DEFENSE**

1 is required to. He goes to, contacts Ed Nunley and says, "Ed, come on up and  
2 talk to me because there's an allegation that's been made against you." And he  
3 tells Ed what the allegation is. But he stated he told him exactly what he was  
4 charged with doing. And yet Ed comes up there and talks to him. He doesn't try  
5 to hide from the police. He goes and talks to them.

6 The police then, apparently, do nothing. From April the 14<sup>th</sup>, 2007 until  
7 April the 18<sup>th</sup>, 2008, one year and four days later before anything else is done.  
8 And that's when Officer Wibbels indicated that he was contacted by C.P.S., and  
9 he went that day to the Comfort House for the interview of Annie by Donna  
10 Black. So by that time a lot of the evidence was gone. A lot of people's  
11 memories are fading. If you asked me what I did a year ago today or a specific  
12 night, it would be very difficult to remember exactly what I did. And we have this  
13 time lag. And because of the time lag, there's no opportunity to get physical  
14 evidence. At that point in time, if there was any injury to the child, you couldn't  
15 find it on a medical exam because a year has passed. If there was any DNA on  
16 the child, we wouldn't find it at that time because a year has passed.

17 So there was no medical evaluation. There was no attempt to take any  
18 other uh, information, and there was no immediate forensic examination of the  
19 child. An interview by the Comfort House. Now I will grant you that that was not  
20 the entirely the police officer's fault. The mother had a lot of responsibility in this  
21 and she chose not to carry out her responsibility and get this child to the Comfort  
22 House and let them talk to her immediately and find out immediately in the  
23 comfort and safety of the Comfort House what had really happened. Why was  
24 there this delay? I don't know. I do not hear a satisfactory explanation for that.

25

**CLOSING ARGUMENT BY DEFENSE**

1           The State has made an issue in this case of what Mr. Nunley did with  
2 respect to the property damage to his house. He called the police immediately  
3 when that happened. They came out and investigated. He anticipates that  
4 they're going to do something. He contacts them and they say they have uh,  
5 turned it over to the Prosecutor's Office, the same Prosecutor's Office that we  
6 have here in Corydon. It's in Harrison County, so it both goes to the same place.  
7 And nothing happened. So what does a citizen do when the police don't do their  
8 job and the prosecutor doesn't do their job? There's not a whole lot they can do.  
9 They sit and wait for the police to do their job and to file the charges that they  
10 anticipated that they were going to do.

11           In summary, in this particular case, we have heard that Annie was  
12 exposed to some kind of pornography, and I believe that she probably was. The  
13 question is, who was the person that exposed her to that pornography? Was it  
14 her Mom? We have testimony from Mr. Nunley that he went to her mom's house  
15 and there was pornography there, and that she gave him a video or DVD there.  
16 So that, that is a place where she could have been exposed to it. We know that  
17 she was around a fair number of men. Her mother indicated she was with Hank,  
18 and Annie lived there with Hank. Uh, she was also regularly in contact with her  
19 step-dad, Richard. You know, when she was talking to the people at the Comfort  
20 House, she talked about Mom's new boyfriend, Eddie. So we know that there  
21 were other people involved in their life. I have no doubt that she has at some  
22 point been exposed to pornography. But the question that I have in my mind is  
23 whether it occurred here at Ed Nunley's house on April the 15<sup>th</sup> of 2007.

24           The State has not satisfied me in proving that he is guilty beyond a  
25

**FINAL ARGUMENT BY STATE OF INDIANA**

1 reasonable doubt. And I would ask also that you find that the State has not  
2 proven to you that he is guilty beyond a reasonable doubt on each and every one  
3 of these counts.

4

5 **FINAL ARGUMENT BY THE STATE OF INDIANA (MS. FLANIGAN):**

6 Ladies and gentlemen, thank you again for your time and attention to this.  
7 I stood up here uh, Tuesday, it seems a lot longer than that, and asked you if  
8 you were firmly convinced that Ed Nunley committed all the elements, would you  
9 be able to return a verdict of guilty. And that's exactly what I'm standing back up  
10 to do. And really what I need to do, to do at this time is to discuss or rebut Ms.  
11 Schultz's argument.

12 One argument is that Annie might've just seen this laying out somewhere  
13 at Ed's. Sex Ed Tutor. She said she couldn't believe that it would be four hours,  
14 but how long did it feel like when we watched that here? It felt a lot longer than  
15 four hours, didn't it? Imagine if there were six? How long a minute of that would  
16 be?

17 Ms. Schultz was, said she was unconvinced by us just showing that cover  
18 to Annie and saying, "Is this the movie?" So, what would the defense have us  
19 do? Would the defense have us put that video in here in front of you and make  
20 her watch that again and re-subject her to that? Absolutely not. Absolutely not.

21 Detective Wibbels went to the Harrison House, found this tape. Found six  
22 really. Found six. Ed Nunley sat on that stand today and said, and he'd gotten  
23 one from Tonya. Convenient, isn't it? Convenient he'd gotten one from Tonya.  
24 But when Detective Wibbels talked to him back in April, he said he'd gotten them

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**FINAL ARGUMENT BY STATE OF INDIANA**

1 from a man named Mike. He sat on the stand today and said he absolutely did  
2 not tell Detective Wibbels he got them from a man named Mike. The only  
3 explanation is that this is the DVD that Annie saw. On this DVD player, which  
4 was found in a search warrant executed at Ed Nunley's storage unit. And Ms.  
5 Schultz said Annie was able to work it. She was working it. She was familiar  
6 with it. It seems almost admitted that that was the one that was in his bedroom  
7 that night.

8 Ladies and gentlemen, and another brief issue I want to talk about is the  
9 penetration issue. I just want you to remember when you're deliberating, that  
10 Detective Wibbels, I asked him, if you recall, if the hand could've penetrated the  
11 labia, which I would submit to you is a sex organ. So when you're talking about  
12 penetration of the sex organ with an object, recall that testimony from Detective  
13 Wibbels.

14 I will admit that there have been several progressions of Annie's  
15 disclosure of this crime. Annie was six years old. You have not heard one iota,  
16 one speck, one word of testimony why she would have any reason to lie on Ed  
17 Nunley. He was a friend. "I loved to play with Kiki. I loved to play with his  
18 Nintendo."

19 Ms. Schultz said that story is changing, and she tried to point out some  
20 specific incidents. Underwear on the dresser, underwear around the knees.  
21 Think in your head, and Ms. Schultz even admitted to this before I bring it up to  
22 you, where were you on April 13<sup>th</sup>, 2007? What clothes did you have on? You're  
23 grown adults. You don't know. And you all sat here and told me, or we talked in  
24 *voir dire* about the fact that none of..., although some of you have relatives who

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**FINAL ARGUMENT BY STATE OF INDIANA**

1 have been abused, none who have children who have been abused. So  
2 imagine, Tonya is a mother of a little girl who discloses this to her. And Richard  
3 is the father of the little girl. That's traumatic. He was traumatized. Tonya was  
4 traumatized. Richard was traumatized. You can't remember what you did on  
5 April 13<sup>th</sup>, 2007. You don't know what clothes you had on. You know what  
6 happened if this happened to you? You'd remember like Detective Wibbels said,  
7 and how he tends to put things in plain speech, you'd remember the meat and  
8 the potatoes. All that other stuff, you're not gonna remember. The meat and  
9 potatoes. "He made me suck on his weenie-bob and he made me lick his pee-  
10 pee." Did that ever change? April 14<sup>th</sup>, 2007. April 18<sup>th</sup>, 2008, November 14<sup>th</sup>,  
11 2008, last Friday. Ms. Schultz talked about, Annie was in here. This week in  
12 front of you, you saw her, you observed her, and you'll get an instruction on how  
13 to judge the credibility of a witness. You've seen a lot of witnesses in this case,  
14 including Mr. Nunley. He was a witness. A witness on his own behalf. You have  
15 to judge their credibility.

16 You saw that little girl come in here. If you believe that was a show or an  
17 act or something she put on, or that her mom put her up to, then she must be an  
18 awfully good actress. And if she were an awfully good actress, if she was putting  
19 it on, if her mom had put her up to it, she was lying on Ed Nunley, it would've all  
20 matched, because they would've gotten their stories together. Every time Annie  
21 would've given the exact same story. She wouldn't have given one story to the  
22 police, and a more detailed story at the Comfort House. And yet another...., and  
23 additional details and different things. And you know what? There is nothing the  
24 State of Indiana, Ms. Wheatley and I would like to have than that note. Nothing

25



**FINAL ARGUMENT BY STATE OF INDIANA**

1 more we'd like to have than that note. And if somehow Tonya Caves and  
2 Richard Caves and Annie were making up some sort of story to try to frame Ed  
3 Nunley for child molest, I think we'd have it. Because when it got lost, they  
4 would've made up a new one. It would've been found. They would've brought  
5 us another one and said, "Oh, hey, the note turned up at the house." They never  
6 got that note back. Think about that.

7       And if Tonya Caves somehow was mad at Ed, was trying to frame him for  
8 a child molest, why would she run immediately to the Washington County  
9 Sheriff's Department and not do anything for a year? Why wouldn't she have  
10 called every police agency, every child protective agency, called the Prosecutor's  
11 Office, called the news, if nothing was being done and she was trying to frame  
12 him up? You heard her, "But I just couldn't take it anymore. It wouldn't go away.  
13 I had to come back. I had to bring Annie to C.P.S."

14       You saw two people sit on that stand that I submit to you that you should  
15 reflect very deeply on their testimony. And the first is little Annie Young. At  
16 some point it seemed like Ms. Wheatley and I practically had to push her up to  
17 the stand, and that was not fun. If Annie was coached or trying to lie on Ed  
18 Nunley, she would've marched up there. At one point she stood up and said,  
19 "Judge, I can't say it. I'm scared."

20       The other person, Mr. Nunley himself. You heard him say a lot of things  
21 today. Frankly, you heard him come up, or give us an alibi. Just think about  
22 that, ladies and gentlemen. You've been charged with three Class "A" Felonies,  
23 a Class "C" Felony, a Class "D" Felony, and you've had an alibi...

24

25

**FINAL ARGUMENT BY STATE OF INDIANA**

1 MS. SCHULTZ: Judge, I hate to interject here, but I did not raise  
2 the issue on, this issue on my final argument, and I don't believe it's proper  
3 rebuttal.

4 THE STATE (MS. FLANIGAN): I'll move on.

5  
6 STATE RESUMES FINAL ARGUMENT:

7 Thank about those two testimonies. And please remember what Ms.  
8 Schultz told you in her opening. "If you believe Annie Young, then you should  
9 find my client guilty." And remember what I told you, that if we come back and  
10 we would be able to check off every element of every crime, I ask that you use  
11 your common sense, if you're firmly convinced, which I believe at this point  
12 there's been evidence to do that, that you return a guilty verdict on each and  
13 every count against Ed Nunley for what he did to that six-year-old girl who did  
14 nothing to him, except go over there to spend the night. Thank you.

15  
16 THE COURT: Okay. There's one more thing that we have to do,  
17 which is Final Instructions. We're gonna take just a little break, not very long.  
18 Not enough to wander around in the parking lot or anything. And during this uh,  
19 recess, you're not to permit anyone to talk to you or in your presence on any  
20 subject matter connected with the trial. Do not form or express an opinion on the  
21 case. We need the final instructions. It's just a couple of minutes, folks. It won't  
22 be long.

23 (JURY EXITS COURTROOM; RECESS)

24 THE COURT: The jury has left the courtroom. We're still on the

25

1 record. Everybody else is present. Okay, Ms. Schultz, I think you had a request.

2 MS. SCHULTZ: Yes, Judge. During their closing argument, the  
3 State started commenting on Annie's truthfulness. And I believe that the  
4 statement that the State made was that she does not know how to lie. We had  
5 attempted to introduce in evidence in this case specifically that Annie had lied to  
6 the police officer in filing a false report, accusing another man in her father's life  
7 of physically assaulting her. We were denied the opportunity to present that  
8 evidence to the jury. I believe that the State has gone beyond the bounds of  
9 what should be permitted in this case in making their comments on Annie's  
10 truthfulness. And in indicating that she doesn't know how to lie, and I would ask  
11 that the Court give the jury an additional instruction which tells me that evidence  
12 is, is available that Annie Young has previously filed a false report with the  
13 police, accusing someone else of a crime.

14 THE COURT: Okay. The State's response?

15 MS. LAUREN WHEATLEY: First of all, Judge, the uh, defense has  
16 not overcome the burden of even getting that evidence in. That evidence in  
17 general is not allowed under the rules of evidence. And that was already argued,  
18 and you, your Honor, ruled upon that. Second of all, we don't believe that we  
19 opened the door to get that in because I specifically said "a six-year-old taught  
20 how to lie". This supposed statement given to the police officer, where she did  
21 not tell the truth, was in June of 2008 and she was not a six-year-old at that point  
22 in time. We absolutely can talk about truthfulness because, in fact, the  
23 instructions reflect on the credibility, and credibility of a witness. So we can talk  
24 about veracity and truthfulness in our closing. And once again, closing remarks

25

1 are not evidence. That's all they are, are closing remarks. We do not believe  
2 that we've opened the door, nor has the defense overcome the presumption to  
3 even allow that evidence in, your Honor.

4 THE COURT: Anything else, Ms. Schultz?

5 MS. SCHULTZ: No. Except to say that I believe that the  
6 statements made by, been made by the prosecutor is prosecutorial misconduct.

7 THE COURT: Say again?

8 MS. SCHULTZ: I believe it is prosecutorial misconduct to make a  
9 statement like that to the jury.

10 MS. LAUREN WHEATLEY: And, Judge, on that matter we  
11 absolutely object. We, there was no misconduct on our part.

12 THE COURT: Okay. All right. Okay uh, anything else? Everybody  
13 ready?

14 MS. SCHULTZ: Ready.

15 MS. LAUREN WHEATLEY: Yes, Judge.

16 THE COURT: Go get the jury and bring them back. What I plan to  
17 do is uh, remind the jury that there's been uh, a considerable discussion about  
18 who to believe and who not to believe, and who might've been lying or telling the  
19 truth. Uh, and uh, that's been discussed by both sides, which it has. Uh, and it's  
20 up to them to decide who to believe. And they have an instruction that talks  
21 specifically about that. Number eighteen. Also to remind them that the unsworn  
22 statements or comments of the lawyers on either side are not evidence. It's up  
23 to them to determine the facts and so forth. So, that's what I'm gonna tell them.  
24 Uh...

25

**FINAL INSTRUCTIONS**

1 THE STATE (MS. FLANIGAN): Judge, you want us to take down  
2 this evidence before they come for final instructions?

3 THE COURT: That's fine. Yeah, please take it away. Give those  
4 exhibits back to Karen. Make sure, Karen, you've got them all.

5 BAILIFF: Judge?

6 THE COURT: Yes?

7 BAILIFF: I've got one in the bathroom.

8 THE COURT: I'm ready for them whenever they're ready.

9 BAILIFF: Okay, they're about ready.

10 THE COURT: All right.

11 (JURY RETURNS TO COURTROOM)

12 THE COURT: Have a seat, ladies and gentlemen. Okay, Sharon,  
13 hand out those instructions. There's a spot, there should be a spot in your  
14 binder, a tab there for Final Instructions. And uh, Sharon is gonna give you a  
15 copy of them. And uh, and then uh, you get those put in your book and then  
16 we'll uh, and then we're gonna talk about those. Okay, everybody got them? All  
17 right.

18

19 FINAL INSTRUCTIONS READ TO THE JURY BY JUDGE:

20 And uh, under the Constitution of Indiana, the jury has a right to determine  
21 both the law and the facts. The Court's instructions are your best source in  
22 determining the law. In deciding this case, you must determine the facts from a  
23 consideration of all the evidence and look to these instructions from the Court for  
24 the law of the case and find your verdict accordingly. All of the law of this case

25

**FINAL INSTRUCTIONS**

1 has not been embodied in any one instruction. Therefore, in construing any  
2 single instruction, you should consider it with all other instructions given.

3       The crime of Child Molesting is defined by law as follows: A person, at  
4 least twenty-one years of age, who with a child under fourteen years of age,  
5 performs or submits to deviate sexual conduct commits Child Molesting, a Class  
6 "A" Felony, as charged in Count "1". Before you may convict the defendant, the  
7 State must have proved each of the following elements beyond a reasonable  
8 doubt: The defendant, Lawrence E. Nunley, knowingly or intentionally, performed  
9 or submitted to deviate sexual conduct with A.Y., namely touched the vagina of  
10 A.Y. with his mouth, when A.Y. was a child under fourteen years of age, and  
11 when Lawrence E. Nunley was at least twenty-one years of age. If the State  
12 failed to prove each of these elements beyond a reasonable doubt, you must find  
13 the defendant not guilty of the crime of Child Molesting, a Class "A" Felony, as  
14 charged in Count "1".

15       The crime of Child Molesting is defined by law as follows: A person of at  
16 least twenty-one years of age, who with a child under fourteen of age, fourteen  
17 years of age, performs or submits to deviate sexual conduct commits Child  
18 Molesting, a Class "A" Felony, as charged in Count "2". Before you may convict  
19 the defendant, the State must have proved the following elements beyond a  
20 reasonable doubt: Number one, the defendant, Lawrence E. Nunley,  
21 knowingly..., num, number two, knowingly or intentionally; number three,  
22 performed or submitted to deviate sexual conduct with A.Y., namely had A.Y. put  
23 her mouth on his penis; number four, when A.Y. was a child under fourteen  
24 years of age; and number five, when Lawrence E. Nunley was at least twenty-

**FINAL INSTRUCTIONS**

1 one years of age. If the State failed to prove each of these elements beyond a  
2 reasonable doubt, you must find the defendant not guilty of Child Molesting, "A"  
3 Felony, as charged in Count "2".

4       The crime of Child Molesting is defined by law as follows: A person at  
5 least twenty-one years of age who, with a child under fourteen years of age,  
6 performs or submits to deviate sexual conduct commits Child Molesting, a Class  
7 "A" Felony, as charged in Count "3". Before you may convict the defendant, the  
8 State must have proved each of the following elements beyond a reasonable  
9 doubt: Number one, the defendant, Lawrence E. Nunley; number two, knowingly  
10 or intentionally; number three, performed or submitted to deviate sexual conduct  
11 with A.Y., namely put his hand in the vagina of A.Y.; number four, when A.Y. was  
12 a child under fourteen years of age, and when; number five, when Lawrence E.  
13 Nunley was at least twenty-one years of age. If the State failed to prove each of  
14 these elements beyond a reasonable doubt, you must find the defendant not  
15 guilty of the crime of Child Molesting, a Class "A" Felony, as charged in Count  
16 "3".

17       Child Molesting is defined by law as follows: A person who, with a child  
18 under fourteen years of age, performs or submits to any fondling or touching of  
19 either the child or the older person with the intent to arouse or satisfy the sexual  
20 desires of either the child or the older person commits Child Molesting, a Class  
21 "A" Felony, as charged in Count "4". Before you may convict the defendant, the  
22 State must have proved each of the following elements beyond a reasonable  
23 doubt: The defendant, Lawrence E. Nunley, knowingly or intentionally, performed  
24 or submitted to any fondling or touching of A.Y. or Lawrence E. Nunley with the

**FINAL INSTRUCTIONS**

1 intent to arouse or satisfy the sexual desires of A.Y. or Lawrence E. Nunley when  
2 A.Y. was a child under fourteen years of age. If the State failed to prove each of  
3 these elements beyond a reasonable doubt, you must find the defendant not  
4 guilty of the crime of Child Molesting, a Class "C" Felony, as charged in Count  
5 "4".

6 The crime of Dissemination of Matter Harmful to Minors is defined by law  
7 as follows: A person who knowingly or intentionally displays matter that is  
8 harmful to minors in an area to which minors have visual, auditory or physical  
9 access, unless each minor is accompanied by the minor's parent or guardian,  
10 commits Dissemination of Matter Harmful to Minors, a Class "D" Felony, as  
11 charged in Count "5". Before you may convict the defendant, the State must  
12 have proved each of the following elements beyond a reasonable doubt: The  
13 defendant, Lawrence E. Nunley, knowingly or intentionally displayed matter that's  
14 harmful to minors in an area to which A.Y. had visual, auditory or physical  
15 access when A.Y. was not accompanied by her parent or guardian. If the State  
16 failed to prove each of these elements beyond a reasonable doubt, you must find  
17 the defendant not guilty of Dissemination of Matter Harmful to Minors, a Class  
18 "D" Felony, as charged in Count "5".

19 A matter or performance is harmful to minors if, number one, it describes  
20 or represents in any form nudity, sexual conduct, sexual excitement or sado-  
21 masochistic abuse; number two, considered as a whole, it appears to the  
22 prurient interest in sex of minors; number three, it is patently offensive to the  
23 prevailing standards in the adult community as a whole with respect to what is  
24 suitable for or performance before minors; and, number four, considered as a

25



**FINAL INSTRUCTIONS**

1 whole it lacks serious literary, artistic, political or scientific value for minors.

2 Under the law of the State, a person charged with a crime is presumed to  
3 be innocent. To overcome the presumption of innocence, the State must prove  
4 the defendant guilty of each essential element of the crime charged beyond a  
5 reasonable doubt. The defendant is not required to prove, present any  
6 evidence, or prove his innocence, or prove or explain anything.

7 The burden is upon the State to prove beyond a reasonable doubt that the  
8 defendant is guilty of the crime charged. It is a strict and heavy burden. The  
9 evidence must overcome any reasonable doubt concerning the defendant's guilt,  
10 but it does not mean that a defendant's guilt must be proved beyond all possible  
11 doubt. A reasonable doubt is a fair, actual and logical doubt based upon reason  
12 and common sense. A reasonable doubt may arise either from the evidence or  
13 from a lack of evidence. A reasonable doubt exists when you are not firmly  
14 convinced of the defendant's guilt after you have weighed and considered all the  
15 evidence. A defendant must not be convicted on suspicion or speculation. It is  
16 not enough for the State to show the defendant is probably guilty. On the other  
17 hand, there are very few things in this world do we know with absolute certainty.  
18 The State does not have to overcome every possible doubt.

19 The State must prove each element of the crime by evidence that firmly  
20 convinces each of you and leaves no reasonable doubt. The proof must be so  
21 convincing that you rely and act upon it in this matter of the highest importance.

22 If you find there is a reasonable doubt that the defendant is guilty of the  
23 crime, you must give the defendant the benefit of the doubt and find the  
24 defendant not guilty of the crime under consideration.

25

**FINAL INSTRUCTIONS**

1 It is for the jury to determine the weight and credit to be given the  
2 statements made by A.Y., Trooper Kevin Bowling, Tonya Caves, Richard Caves  
3 and A.Y.'s video-taped statements made at the Comfort House on April 18<sup>th</sup>,  
4 2008. In that, in making that determination, the jury shall consider the following:  
5 The mental and physical age of the person making the statement or video tape,  
6 the nature of the statement or video tape, the circumstances under which the  
7 statement or the video tape was made, other relevant factors.

8 The evidence must be judged and considered from your memory of the  
9 testimony of the witness and such exhibits as may have been admitted for your  
10 examination. The unsworn statements or comments of counsel on either side of  
11 the case should not be considered as evidence in this case. It is your duty to  
12 determine the facts from the testimony and evidence admitted by the Court and  
13 given in your presence, and you should disregard any and all information you  
14 may derive from any other source.

15 THE COURT: Now, I might add at this point, that there's been a  
16 discussion by the lawyers in opening and closing arguments about who's telling  
17 the truth. Uh, now I've told you before uh, and I've just said so again, it's, the  
18 evidence has to be judged and considered from your memory of the testimony.  
19 Uh, and I told you before in Preliminary Instruction Number "18", and I would,  
20 and I'm gonna refer to that here a little bit later, but uhm, Preliminary Instruction  
21 Number "18", among other things, was the one that talked to you about how you,  
22 the fact that you're the exclusive judges of the evidence, that it's your duty to  
23 decide the value you give to the exhibits you receive and the witnesses you hear.

24 And there's also a discussion in that preliminary instruction about uh, what

**FINAL INSTRUCTIONS**

1 you do when you have conflicting testimony. And uh, I'll just read again a part of  
2 that and refer you to the entire instruction. When you have conflicting testimony,  
3 you must determine witnesses, which of the witnesses you will believe and which  
4 of them you will disbelieve. And it's not up to the lawyers to decide the truth. It's  
5 up to you to decide who's telling the truth.

6 **COURT CONTINUES READING FINAL INSTRUCTIONS:**

7 Neither sympathy nor prejudice for or against either the alleged victim or  
8 the defendant in this cause should be allowed to influence you in whatever  
9 verdict you may find.

10 These instructions do not contain any information concerning the  
11 penalties that could be imposed upon a conviction. The Judge is solely  
12 responsible for assessing the penalty within a broad range of possibilities. The  
13 law has been so written that you may make your decisions without being  
14 influenced by the apparent severity or leniency of the sentence.

15 Your verdict must represent the considered judgment of each juror. In  
16 order to return a verdict of guilt or innocence, you must all agree. It is your duty  
17 as jurors to consult with one another and to deliberate with a view toward  
18 reaching an agreement, if you can do so without violence to individual judgment.

19 Each of you must decide the case for yourself. But do so only after an  
20 impartial consideration of the evidence with your fellow jurors. In the course of  
21 your deliberations, do not hesitate to reexamine your own views and change your  
22 opinion if convinced it is erroneous, but do not surrender your honest conviction  
23 as to the weight or effect of the evidence solely because of the opinion of your  
24 fellow jurors or for the mere purpose of returning a verdict.

**FINAL INSTRUCTIONS**

1           After you return a verdict, you're under no obligation to discuss it or the  
2 reasons for it with anyone. After you have retired to your jury room, the Bailiff of  
3 this Court will be in attendance, but she cannot be present in your jury room  
4 during any of your deliberations. Should you at any time during your  
5 deliberations of the cause leave the jury room, you must leave in a body, and at  
6 all times be in the charge of the Bailiff. While you're absent from the jury room,  
7 you must not talk about this case among yourselves, with the Bailiff or with any  
8 other person or persons.

9           During your deliberations, should you have any questions, you should put  
10 them in writing and deliver them to the Bailiff, who will deliver them to the Court.  
11 Most often the Court cannot answer your questions except by re-reading the  
12 Court's instructions. As the Court is sending the Court's instructions with you to  
13 the jury room, you may be able to answer your questions by reviewing the  
14 Court's instructions.

15           The Court will be sending to the jury room all exhibits admitted into  
16 evidence during the trial.

17           THE COURT: And, you know, there was that one uh, DVD, yes,  
18 that uh, I, you know, there was a question from one or more of you about  
19 replaying that. And I've told you what the circumstances would be. Uh, you  
20 know, that it wouldn't be replayed unless you made a specific request. And I  
21 talked to you about that. Uh, I'm not asking you to look at it again or to look at  
22 any other evidence again in particular. I'm simply, would remind you at this  
23 point, and let's pick up with this instruction.

24           COURT CONTINUES READING FINAL INSTRUCTIONS:

**FINAL INSTRUCTIONS**

1           When there's a disagreement among jurors concerning the nature of  
2 testimony given during a trial, the jurors may request the Court to have the  
3 disputed testimony reread or replayed for the jury. If there is no disagreement or  
4 dispute among jurors about testimony, the Court will not reread or replay the  
5 testimony from the jury, for the jury. If the jury requests the Court reread or  
6 replay the testimony without indicating there's a dispute or disagreement among  
7 the jurors about the testimony, the Court will not reread or replay the testimony.  
8 If the jury indicates or states there's a disagreement or dispute among jurors  
9 about certain testimony, the Court will reread or replay that testimony for the jury.

10           THE COURT: That would include the DVD. If there's a dispute or  
11 disagreement about what was in that evidence.

12           COURT RESUMES READING FINAL INSTRUCTIONS:

13           The Court is submitted to you possible, forms of possible verdicts you  
14 may return in this case. These forms will be supplied to you when you retire to  
15 the jury room for deliberations. Upon retiring to the jury room, you will select one  
16 of your members as foreperson. The foreperson will preside over your  
17 deliberations and must sign and date the verdicts to which you all agree. Do not  
18 sign any verdict form for which there is not a unanimous agreement. The  
19 foreperson must return all verdict forms into open court. When you've agreed  
20 upon a verdict, you will inform the Bailiff you've agree. You will remain in the jury  
21 room until the Bailiff, on order of the court, conducts you into open court where  
22 your verdicts will be reviewed and read.

23           If at any time any juror realizes you have person knowledge of any fact  
24 that is material to this case, you shall inform the Bailiff immediately.

25

**FINAL INSTRUCTIONS**

1 In the preliminary instructions previously given, the Court has already  
2 instructed you as to the credibility of witnesses, and the matter of weighing the  
3 testimony and evidence received. The charges are not any evidence of guilt.  
4 The definitions of knowingly and intentionally, deviate sexual conduct, minor and  
5 matter. You have copies of these instructions and they are Preliminary  
6 instructions Numbers 18, 15, 10, 11, 12 and 13. These instructions will not be  
7 reread to you and you'll keep them in mind as they are applicable to the trial, and  
8 your deliberations.

9 The alternate juror, Claude Rottet, shall not take part in or participate in  
10 any deliberations of the jury in any way whatsoever, unless he replaces a regular  
11 juror. Replacement of a regular juror shall only occur by order of the Court.  
12 Regular members of the jury shall not ask questions of the alternate juror  
13 concerning evidence, his recollection of the evidence, or induce or cause him to  
14 participate in deliberations in any way whatsoever.

15 THE COURT: He'll be with you, but he won't take any part. He has  
16 to just stay silent. Okay, ladies and gentlemen, uh, there's always one more  
17 thing. This doesn't involve you. Ms. Bailiff? Do you solemnly swear or affirm  
18 under the penalties for perjury to keep the jury in this case together in the jury  
19 room in this courthouse, to furnish them with food as directed by the Court, and  
20 to permit no person to speak or communicate with them, to speak or  
21 communicate with them yourself only by order of the Court, or to ask them  
22 whether they have agreed upon a verdict, and to return them into Court when so  
23 agreed or when so ordered by the Court?

24 BAILIFF: I do.

**FINAL INSTRUCTIONS**

1 THE COURT: Do you further solemnly swear or affirm under the  
2 penalties of perjury you will not communicate to any person the state of the  
3 deliberations of the jury, so help you God?

4 BAILIFF: I do.

5 THE COURT: Ms. Bailiff, you're ordered to provide food to the jury  
6 as they request and when they request it, to take them on breaks as they request  
7 it and when they request it. And I might add, that the rules now change. Nobody  
8 goes to dinner on their own. Okay? Everybody goes together wherever you go,  
9 except to the bathroom. If you go on a break, you all go. If you go to dinner, you  
10 all go. That's, those are the rules. Now the rules change. Okay? Now, uh, in  
11 order to uh, you know, make arrangements to do things, you know, you need to  
12 try to decide a little in advance if you feel like you're gonna be around for uh,  
13 dinner, then you, you know, try to let Sharon know as soon as possible, if it's  
14 apparent to you that you're gonna be here for dinner. I'm not making any  
15 suggestion about how long you should deliberate. That's entirely upon to you.  
16 Okay? But please keep in mind, the Bailiff will need a little bit of advance notice  
17 for certain things. Thank you very much, ladies and gentlemen. And Ms. Bailiff,  
18 here are the verdict forms.

19 (JURY EXITS COURTROOM; OFF RECORD)

20 THE COURT: Are we on?

21 COURT REPORTER: You're on.

22 THE COURT: Okay. The record will reflect the prosecutors are  
23 present, the defendant is present, the defendant is present with his attorney.  
24 The following question was received about five minutes or so, ten, ago. It reads,

1 and the lawyers have seen it, quote, "The jurors have a disagreement regarding  
2 information on the Comfort House video. Is it possible to review the video with  
3 just the angle of Annie Young and Donna Lloyd Black?" And off the record, I  
4 think that both sides have agreed that uh, that the video should be uh, shown  
5 again with just that angle. Is that correct uh, prosecutors?

6 THE STATE (MS. FLANIGAN): Yes, Judge.

7 THE COURT: Ms. Schultz?

8 MS. SCHULTZ: Yes.

9 THE COURT: All right. And so what I would propose to do, as  
10 soon as you all have it ready to do, it is to uh, to read this to them and tell them  
11 yes, and we'd proposed to do it now, unless there's a problem with that. And if  
12 they don't have a problem with it, we'll go ahead and play it for them. And, and  
13 uh, now do you...

14 THE STATE (MS. FLANIGAN): I just want to have it launched,  
15 Judge, because sometimes it gets fuzzy.

16 THE COURT: That's uh, oh, Susan, and the rest of you, I've got a  
17 newspaper up here, you know, if you all want to look at it after we finish.

18 MS. SCHULTZ: All right.

19 THE COURT: I've been looking at it a little bit here and there.  
20 Okay, we have another question from the jury. This question says, "On Count  
21 four, it states he used his penis. But in the Final Jury Instruction Number Six, it  
22 doesn't state a body part. Should penis be considered?" Okay, now in Count "4"  
23 in the Preliminary Instructions, the Preliminary Instruction, the elements  
24 instruction for Count "4" did not refer to the way in which..., Count "4" is the

25



1 fondling and touching count, and it didn't refer specifically to how the touching  
2 and fondling occurred. But a uh, Preliminary Instruction Number "4" laid out a  
3 full description of Count "4", and then Count "4", it did say "touch the vagina of  
4 A.Y. with his penis." And that's the accusation that is the basis of Count "4".

5 Does everybody agree with that?

6 THE STATE (MS. FLANIGAN): Yes, Judge.

7 MS. SCHULTZ: Yes.

8 THE COURT: You..., okay, and Ms. Schultz, you agree with that.

9 For the record, the jury is not present. The defendant, defendant's attorney is  
10 present, the prosecutor's are present. So uh, so for this particular, I would  
11 suggest that we instruct them that, that is true, that the uh, that, that Final Jury  
12 Instruction Number "6", which refers to Count "4", does not spell out the  
13 underlying facts, but that Preliminary Instruction Number "4" does spell out  
14 exactly the way in which the State alleges the defendant committed this crime,  
15 and the jury should refer to the original uh, Preliminary Instruction Number "4",  
16 Count "4", and I'd refer to them that and refer them to the elements. Is that okay  
17 with the State and the defendant?

18 MS. SCHULTZ: That's okay with us.

19 THE STATE (MS. FLANIGAN): That's fine, Judge.

20 THE COURT: All right. Okay, and you're ready with this viewing?

21 THE STATE (MS. FLANIGAN): Yes.

22 THE COURT: Okay, bring the jury in. Here's something for you.

23 Order to bring them in with their notebooks and pencils.

24 (JURY RETURNS TO COURTROOM)

25

1 THE COURT: Please be seated, ladies and gentlemen. Okay uh,  
2 now everybody's got their notebooks. And uh, I've got a couple of question from  
3 you. The first question, well, actually the second question I want to address first.  
4 This question reads, "On Count Four, it states that he used his penis, but in the  
5 Final Jury Instruction Number Six, it doesn't state a body part. Should penis be  
6 considered?" Okay, now I want you to first turn to your Preliminary, not the Final,  
7 but the Preliminary Jury Instructions. First I want you to turn to Preliminary Jury  
8 Instruction Number Four. Preliminary Jury Instruction Number Four describes  
9 each of the counts. That's the way the defendant was charged or accused of  
10 doing certain things, and that is what you would have to uh, find proof of, you  
11 know, and not some other way, but the way that he was charged. Does  
12 everybody agree with that?

13 MS. SCHULTZ: Yes, Judge.

14 THE COURT: Okay. So now if you refer..., if you refer to  
15 Preliminary Jury Instruction Number Four, Count "4", which is, on the third page  
16 of the preliminaries, you'll see, when you read that carefully, you'll notice that the  
17 way in which Count "4", the underlying facts in which that was alleged to have  
18 occurred is by uh, Lawrence Nunley touched the vagina of A.Y. with his penis.  
19 So should penis be considered? Well, yes, if you find that he did it. Uh, so you  
20 cannot find somebody guilty of something other than the way in which they are  
21 charged. Does everybody agree with that? The State and the defense?

22 MS. SCHULTZ: Yes, Judge.

23 THE STATE (MS. FLANIGAN): Yes, Judge.

24 THE COURT: All right. So I would ask you to compare Preliminary  
25

1 Jury Instruction Number Four, the description of Count "4" to uh, Final Jury  
2 Instruction Number Six. And it is true that the Final Jury Instruction Number Six  
3 doesn't use that language, but I'm telling you that is what you..., that is the way in  
4 which you have to determine, that's what you have to determine, whether or not  
5 Mr. Nunley knowingly or intentionally performed or submitted to any fondling or  
6 touching of A.Y. or him with the intent to arouse or satisfy sexual desires of A.Y.  
7 or him when the child was under fourteen years..., that is the way, the way he's  
8 charged is the way in which you must determine whether Count "4", whether  
9 there's a violation of law under Count "4". Does the State agree with that?

10 THE STATE (MS. FLANIGAN): Yes, Judge.

11 THE COURT: Does the defense agree with that?

12 MS. SCHULTZ: Yes, Judge.

13 THE COURT: Okay. I think that answers that question. So I would  
14 refer you back to Preliminary Instruction Number Four, Count "4", the description  
15 of Count "4", and read that. You'll remember that I talked to you about  
16 considering all the instructions together. So you have to sometimes have to refer  
17 back to others. Is there anything that the State or the defense would like to add  
18 to that issue?

19 THE STATE (MS. FLANIGAN): No, Judge.

20 MS. SCHULTZ: Nothing.

21 THE COURT: Okay. Any objections to anything that I've said about  
22 that?

23 THE STATE (MS. FLANIGAN): No, Judge.

24 MS. SCHULTZ: Not from us.

25

1 THE COURT: All right. Okay, then the other question reads as  
2 follows: Jurors have a disagreement regarding information on the Comfort House  
3 video. Is it possible to review the video with just the angle of Annie Young and  
4 Donna Lloyd Black? The answer is yes. You already knew that. I take it from  
5 this question that you want to see that again. Is that correct? Who is the  
6 foreperson? Is that correct?

7 FOREPERSON: Yes sir.

8 THE COURT: The entire jury. Okay, any objection by the State or  
9 the defense?

10 THE STATE (MS. FLANIGAN): No, Judge.

11 MS. SCHULTZ: No objection.

12 THE COURT: Okay. I would also offer, because it is at time  
13 sometimes difficult to hear. If any of you feel more comfortable in getting up out  
14 of your seat and coming closer to those speakers, feel free to do so. Okay? Uh,  
15 you can feel free to stand up if you like. Do as you wish. And it may or may not  
16 help you. And uh, let's go ahead and play that then.

17 MS. LAUREN WHEATLEY: If, Judge, if need be, if we need to get  
18 out of our chairs so others can get closer, we can do that.

19 THE STATE (MS. FLANIGAN): Judge, do you have, is this the view  
20 they wish to see?

21 FOREPERSON: Yes.

22 THE COURT: Yes, that's the view?

23 FOREPERSON: Yes.

24 THE COURT: Okay.

25

1 THE COURT: Drop the lighting some more?

2 JUROR (FEMALE): No. The volume, when you turn it way up, it  
3 picks up all the static worse.

4 THE COURT: Okay. Go ahead and...

5 JUROR (FEMALE): We could play with that one when they start  
6 talking.

7 THE COURT: Yeah, you're welcome to do so. The volume's right  
8 on that speaker, isn't it?

9 JUROR (FEMALE): Yeah.

10 THE COURT: You feel free to do that. The rest of you feel free to  
11 move around uh, closer if you think it's gonna help any.

12 (STATE'S EXHIBIT #9 REPLAYED TO THE JURY)

13

14 BENCH CONFERENCE:

15 THE COURT: I'd like to have Shawn or somebody to go back there  
16 and keep people from coming in and out of the door just to keep the noise down.  
17 Stop them from coming in and out.

18 (BENCH CONFERENCE ENDS)

19

20 (PLAYING OF DVD STOPS)

21 THE STATE (MS. FLANIGAN): Do you want to take the jury out?

22 THE COURT: What? Is there...

23 MS. LAUREN WHEATLEY: How long do you think it'll take,  
24 Shawn?

25

1 THE COURT: Can you get it back up?

2 (DVD RESUMES PLAYING)

3 THE COURT: What's going on with that?

4 SHAWN DONAHUE: It goes into a sleep mode after about ten  
5 minutes.

6 THE COURT: Oh.

7 MS. LAUREN WHEATLEY: Judge, I can sit here and I'll just...

8 THE COURT: Oh, okay, the laptop goes into sleep mode after it  
9 sits, and you have to touch the thing once in awhile. Okay, all right.

10 (DVD RESUMES PLAYING)

11

12 (DVD STOPS PLAYING)

13 BENCH CONFERENCE:

14 THE COURT: Uh, Shawn, come up here.

15 THE STATE (MS. FLANIGAN): I'm not familiar with this, but I'll  
16 need Shawn's help to go back. They won't go back each chapter and...

17 THE COURT: Uh, the issue is replaying certain things. If there's no  
18 objection...

19 (BENCH CONFERENCE ENDS)

20 THE COURT: We're on the record, Karen?

21 COURT REPORTER: Yes, you are.

22 THE COURT: No objection?

23 MS. SCHULTZ: No objection.

24 THE COURT: Okay...

25

1 MS. SCHULTZ: If they're having problems hearing and they want to  
2 replay a certain...

3 THE COURT: So the answer is yes, we can do that.

4 JUROR (FEMALE): Okay. We need to rewind and look at a few  
5 snippets.

6 THE COURT: Yeah. Yeah, you can go back just a little bit, can't  
7 you? Or..., okay, all right. Don't do it yet. No, don't do it yet.

8 JUROR (FEMALE): Can we just call out like stop and do it over, or  
9 do we have to keep writing it down?

10 THE COURT: No, don't keep writing it down.

11 JUROR (FEMALE): Okay.

12 THE COURT: Just tell us, if somebody wants to, to, to revisit  
13 something, say, "I want to hear that last thirty seconds", or whatever you think it  
14 is.

15 JUROR (MALE): We want to hear the pee-pee area. What she  
16 called it...

17 THE COURT: You..., just a minute or so earlier?

18 JUROR (FEMALE): Yeah.

19 THE COURT: All right, okay.

20 JUROR (MALE): Right there would be fine.

21 THE COURT: Okay.

22 JUROR (FEMALE): Right there should be perfect.

23 (DVD RESUMES PLAYING)

24 THE COURT: Do you all want to hear that again?

25

1 JUROR (FEMALE): Yeah.

2 JUROR (MALE): Yes, please.

3 THE COURT: Yeah, they want to hear that again.

4 JUROR (MALE): Does anybody want to come in closer to the  
5 mike? So everybody can listen to it.

6 (DVD STOPS PLAYING)

7 THE COURT: Just the pee, the description of the body part.

8 JUROR (FEMALE): The belly button and start it there would be  
9 fine.

10 (DVD RESUMES PLAYING)

11 JUROR (MALE): Just, just...

12 THE COURT: Stop it there.

13 JUROR (MALE): About a minute.

14 THE COURT: You want to go back about a minute?

15 JUROR (MALE): Yeah. A minute, a minute and a half.

16 THE COURT: A minute, minute and a half, all right.

17 JUROR (MALE): Or something like that.

18 THE STATE (MS. FLANIGAN): Okay. Let me see if I can move it a  
19 minute or a minute and a half. A minute or a minute and a half, maybe at  
20 eleven-o-seven?

21 JUROR (MALE): That's just..., yes. Thank you.

22 THE COURT: Let's try that right..., that's enough.

23 JUROR (FEMALE): Yes.

24 THE COURT: Is that all right?

25



1 JUROR (MALE): That, yeah, that's fine. Thank you.

2 (DVD RESUMES PLAYING)

3 THE COURT: Is that all you..., you're finished?

4 JUROR (FEMALE): Yeah.

5 THE COURT: Okay. Go ahead and stop it.

6 (DVD STOPS PLAYING)

7 THE COURT: Okay, all right. Then you can, if you don't have any  
8 more questions, then you can return to the jury room.

9 (JURY EXITS COURTROOM)

10 THE COURT: And uh, move the DVD and give it to Karen, and  
11 Karen will give it to the uh, to the Bailiff.

12 MS. LAUREN WHEATLEY: Shawn, just leave that set up.

13 THE STATE (MS. FLANIGAN): Judge, we'll just leave it set up in  
14 case there's another disagreement about...

15 THE COURT: Right. Well, okay, but go ahead and take the DVD  
16 out and then go ahead and give that Karen. Karen, you give it to Sharon to  
17 return to the jury room.

18 (OFF RECORD)

19

20 THE COURT: The record will reflect that the uh, defendant is  
21 present with his attorney; the prosecutors are present. And uh, a note that was  
22 received uhm, and I don't know exactly how many minutes ago, but it was a little  
23 while ago because I was out having supper. The note reads, and you've both  
24 seen this note, right? Prosecutor and...

25

1 THE STATE (MS. FLANIGAN): Yes, Judge.

2 MS. SCHULTZ: That's correct.

3 THE COURT: "When Officer Billy Wibbels was on the stand, we  
4 would like to know what he stated 'she', Annie Young said Ed Nunley did to her."  
5 And uh, of course, I think I'm correct in recalling that Officer Wibbels never  
6 interviewed Annie Young.

7 THE STATE (MS. FLANIGAN): Right.

8 THE COURT: But witnessed the interview and heard what was said  
9 at the Comfort House interview. Is that correct?

10 MS. SCHULTZ: That's correct.

11 THE COURT: Okay. So, we talked uh, in chambers in the uh,  
12 office about how to deal with this, and I think that uh, you tell me whether we're  
13 in agreement with the Court's proposed uh, resolution of this particular note.  
14 Number one, tell the jurors, number one, that Billy Wibbels never interviewed  
15 Annie Young. Number two, that the only time he heard her say anything about  
16 what Ed Nunley allegedly did to her was during the Comfort House interview.  
17 And that number three, that no witness' testimony could be reread or replayed  
18 unless uh, there was an appropriate request that complied with the details of  
19 Final Instruction Number "16".

20 MS. SCHULTZ: That's fine with me.

21 THE COURT: Is that all right with the State?

22 THE STATE (MS. FLANIGAN): That's fine, Judge.

23 THE COURT: Okay, all right. Bring them in. Tell them they won't  
24 be long, as in less than two minutes.

25

1 BAILIFF: Okay.

2 THE COURT: That they'll be in here less than two minutes.

3 (JURY ENTERS COURTROOM)

4 THE COURT: Ladies and gentlemen, please be seated. And...,  
5 okay, I'm in receipt of a note from the jury which reads as follows: When Officer  
6 Billy Wibbels was on the stand, we would like to know what he stated she, Annie  
7 Young, said Ed Nunley did to her. That's the note I received. Okay, there's a  
8 few things that I can about that. Number one, uh, the parties agree uhm, Billy  
9 Wibbels never interviewed Annie Young. Number two, the only time Billy  
10 Wibbels heard Annie Young say anything that Ed Nunley allegedly did to her was  
11 during the Comfort House interview. And number three, uh, to the extent that  
12 there may be some request concerning testimony, rereading or replaying  
13 testimony, the Court instructs the jury to review Final Instruction Number "16".  
14 As I mentioned to you before, there are requirements with respect to rereading or  
15 replaying testimony, and that can only be done under certain circumstances.  
16 And now, that's all I have to say to you. You can go back to the jury room.  
17 Thank you very much.

18 (JURY EXITS COURTROOM)

19 THE COURT: Okay, uh, we're back on the record?

20 COURT REPORTER: Uh huh.

21 THE COURT: Okay, the jury is out. Uh, and any problem with  
22 anything I said to the jury, Ms. Schultz?

23 MS. SCHULTZ: No.

24 THE COURT: Prosecutors?

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1 THE STATE (MS. FLANIGAN): No.

2 THE COURT: All right. Uhm, I really don't know what's coming  
3 next, but suspect another note. So don't go far.

4 MS. SCHULTZ: We'll give them five minutes before we send Ed  
5 downstairs again?

6 THE COURT: Yeah.

7 (OFF RECORD)

8 THE COURT: The record will reflect the uh, jury is not present, the  
9 prosecutors and the defendant, the defendant's attorney is present. Ms. Bailiff  
10 uh, what is the juror, jury foreperson told you?

11 BAILIFF: Uh, they've reached a verdict.

12 THE COURT: Okay. They've reached a verdict. All right, bring  
13 them in then.

14 (JURY RETURNS TO COURTROOM)

15 THE COURT: Ladies and gentlemen of the jury, please be seated.  
16 Ladies and gentlemen of the jury, have you reached a verdict?

17 FOREPERSON: Yes, your Honor.

18 THE COURT: If you'll deliver the verdict forms to the Bailiff. The  
19 defendant will please rise for the reading of the verdict. "We, the Jury, find the  
20 defendant, Lawrence E. Nunley, guilty of Count 1, the offense of Child Molesting,  
21 a Class A Felony. We, the Jury, find the defendant, Lawrence E. Nunley, guilty  
22 of Count 2, the offense of Child Molesting, a Class A Felony. We, the Jury, find  
23 the defendant, Lawrence Nunley, guilty of Count 3, the offense of Child  
24 Molesting, a Class A Felony. We, the Jury, find the defendant, Lawrence E.

25

1 Nunley, guilty of Count 4, the offense of Child Molesting, a Class C Felony. We,  
2 the Jury, find the defendant, Lawrence E. Nunley, guilty of Count 5, the offense  
3 of Dissemination of Matter Harmful to Minors, a Class D Felony." You may be  
4 seated.

5 Is there any reason why the verdicts should not be accepted and  
6 judgment entered? Ms. Schultz?

7 MS. SCHULTZ: Judge, we would ask that the Court poll the jury  
8 before that.

9 THE COURT: All right. Mr. Carl Vaughn, sir, are each of those  
10 verdicts your verdicts?

11 MR. VAUGHN: Yes.

12 THE COURT: Ms. Heather Spells, are each of those verdicts your  
13 verdicts?

14 MS. SPELLS: Yes.

15 THE COURT: Ms. Heather Davis or Snyder-Davis, are each of  
16 those verdicts your verdicts?

17 MS. DAVIS: Yes, your Honor.

18 THE COURT: Mr. Hildebrand, are each of those verdicts your  
19 verdicts?

20 MR. HILDEBRAND: Yes sir.

21 THE COURT: Ms. Roma Helms, are each of those verdicts your  
22 verdicts?

23 MS. HELMS: They are, your Honor.

24 THE COURT: Ms. Gunther, are each of those verdicts your

25

1 verdicts?

2 MS. GUNTHER: Yes sir.

3 THE COURT: Ms. Ferree, are each of these, each of those verdicts

4 your verdicts?

5 MS. FERREE: Yes sir.

6 THE COURT: And, Mr. Moore, are each of those verdicts your

7 verdicts?

8 MR. MOORE: Yes sir.

9 THE COURT: And, Ms. Collier, are each of those verdicts your

10 verdicts?

11 MS. COLLIER: Yes sir.

12 THE COURT: And, Mr. Engleman, are each of those verdicts your

13 verdicts?

14 MR. ENGLEMAN: Yes sir.

15 THE COURT: Mr. Hoback, are each of those verdicts your

16 verdicts?

17 MR. HOBACK: Yes sir.

18 THE COURT: And, Mr. Thomas, are each of those verdicts your

19 verdicts?

20 MR. THOMAS: Yes sir.

21 THE COURT: Any other requests by the State or the defense?

22 MS. SCHULTZ: No.

23 THE STATE (MS. FLANIGAN): None from the State, Judge.

24 THE COURT: All right. The Court accepts the verdicts of the jury.

25

1 Judgment of conviction is entered on the those verdicts. Presentence  
2 investigation is ordered. Sentencing hearing is scheduled..., waive thirty days or  
3 not, Ms. Schultz?

4 MS. SCHULTZ: We would waive thirty days.

5 THE COURT: Ms. Reporter?

6 COURT REPORTER: How about January 15<sup>th</sup> at nine?

7 THE COURT: January 15<sup>th</sup> at nine. Is that, how does that look with  
8 your schedule, Ms. Schultz?

9 MS. SCHULTZ: That looks fine. I'll be here anyway.

10 THE COURT: All right.

11 THE STATE (MS. FLANIGAN): I'll be here, Judge.

12 THE COURT: Okay, all right. And uh, okay, uh, now that  
13 concludes this case. And uh, you'll return to the jury room, folks, and uh, and I'll  
14 talk to you for just a moment before you leave. All right? Court is recessed.

15 (OFF RECORD)

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STATE OF INDIANA )  
 ) ss: IN THE HARRISON SUPERIOR COURT  
COUNTY OF WASHINGTON ) CAUSE NO. 31D01-0805-FA-389

STATE OF INDIANA )  
 )  
VS. )  
 )  
LAWRENCE E. NUNLEY )

**REPORTER'S CERTIFICATE**

I, Karen S. Hamilton, Reporter of the Harrison Superior Court, Harrison County, State of Indiana, do hereby certify that I am the Official Court Reporter of said Court, duly appointed and sworn to report the evidence of causes tried therein.

That upon the hearing of this cause, beginning on the 18<sup>TH</sup> day of November, 2008, I took down, by machine recording, all of the statements by counsel, the evidence given during the trial of this cause, the objections of counsel thereto, and the rulings of the Court upon such objections, the introduction of exhibits, the objections thereto, and the Court's rulings thereon.

I further certify that the foregoing transcript of the said jury trial, as prepared, is full, true, correct and complete.

IN WITNESS THEREOF, I have hereunto set my hand and affixed my Official Seal, this 7<sup>th</sup> day of May, 2009.

  
COURT REPORTER  
Harrison Superior Court  
Harrison County, Indiana.

(SEAL)



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IN THE HARRISON SUPERIOR COURT

STATE OF INDIANA

VS.

LAWRENCE E. NUNLEY

CAUSE NO. 31D01-0805-FA-389

TRANSCRIPT OF SENTENCING HEARING

JANUARY 15, 2009

BEFORE THE HONORABLE ROGER D. DAVIS

REGULAR JUDGE OF THE HARRISON SUPERIOR COURT

THE APPEARANCES:

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Mrs. Karen Hamilton  
Court Reporter

SENTENCING HEARING

1 THE COURT: Okay, this is State of Indiana versus Lawrence  
2 Nunley sentencing hearing. The defendant is present in person and with  
3 counsel. And the Prosecuting Attorneys are present. Uh, how about the  
4 Presentence Investigation. Are there any additions, corrections, notations,  
5 anything to uh, say about that as far as the State or the defense is concerned?

6 THE STATE (MS. FLANIGAN): Judge, I noticed upon review of the  
7 Presentence Investigation that Count "4" on Page one is listed as an "A" Felony.  
8 Uh, I brought that to the attention of the Probation Officer, and we had intended  
9 to amend that on the record today when I call her as a witness. It is actually...

10 THE COURT: Page one?

11 THE STATE (MS. FLANIGAN): Yes, page one, Count "4", Child  
12 Molesting is listed as an "A".

13 THE COURT: He must've modified that because mine says "C".

14 CHIEF PROBATION OFFICER: No. It's actually page one. Not  
15 the face sheet, your Honor.

16 THE COURT: Oh, oh, oh, oh, oh, oh, okay.

17 THE STATE (MS. FLANIGAN): Page one, in the bottom right-hand.

18 THE COURT: Oh, page one in the, after the two cover sheets.

19 Okay, all right, that needs to be changed to "C" Felony.

20 MS. SCHULTZ: And there's another reference to that later on.

21 CHIEF PROBATION OFFICER: Yeah. Your Honor, if you wanted  
22 to do all that right now, I can direct you to where I've...

23 THE COURT: Okay. Page one and then...

24 CHIEF PROBATION OFFICER: Page one, and then on page two.

25

1 THE COURT: Page...

2 CHIEF PROBATION OFFICER: In the first paragraph under  
3 "Summary of Legal History", the second line should be Child Molesting, comma,  
4 one count, a "C" Felony Child Molesting.

5 THE COURT: So, so instead, instead...

6 CHIEF PROBATION OFFICER: I'm sorry. The first line should be  
7 crossed out. The four should be crossed out and the three be put in there.

8 THE COURT: Okay, three...

9 CHIEF PROBATION OFFICER: And then, and one count of "C"  
10 Felony Child Molesting.

11 THE COURT: And then needs to be added, one count...

12 CHIEF PROBATION OFFICER: Yes, it does.

13 THE COURT: One count of, of uh, "C" Felony Child Molesting.

14 CHIEF PROBATION OFFICER: And then on page five. Page five,  
15 under, the third line down under "Recommendation".

16 THE COURT: Uh, the third line down, it says four, it should be  
17 three.

18 CHIEF PROBATION OFFICER: Three. And then after the semi  
19 colon, there should be added one count of Child Molesting, "C" Felony. And  
20 then finally on page six. It would be the uh, last line, before you get to  
21 "respectfully submitted", it should say three instead of four. And it should say...

22 THE COURT: Wait a minute. On page six...

23 CHIEF PROBATION OFFICER: Yes sir. It says, "This offer  
24 recommends he be sentenced to thirty years each on Counts 1 through 3"...

SENTENCING HEARING

1 THE COURT: Okay...

2 CHIEF PROBATION OFFICER: It should read.

3 THE COURT: All right.

4 CHIEF PROBATION OFFICER: Uh, comma, four years on Count  
5 4, and uhm, this isn't something different, but I'm changing the three years in  
6 Count 5 to one and a half years. And that's all.

7 THE COURT: Okay. Ms. Schultz, do you have anything?

8 MS. SCHULTZ: Yes, Judge, I do as a matter of fact. I have lots.  
9 Uhm, if you start with the numbered pages, on the top of page number two...

10 THE COURT: Okay.

11 MS. SCHULTZ: There are discussions in that about the incidents,  
12 the first paragraph uh, of events that occurred in the jail. I have spoken to my  
13 client and he has indicated to me that he, there was never any hearing on any of  
14 these matters, nor any proof that he was involved in any of the matters, with the  
15 exception of the sexual activity allegation, there was a hearing on that. There  
16 was a finding by the jail that he was guilty of that activity. He requested an  
17 appeal of that finding, and he was not provided with an appeal hearing, and he  
18 was advised by uh, jail personnel that the charge against him was dismissed as  
19 being without evidence, without further hearing. As best he knows, that that  
20 entire incident was dismissed. It is not, he was not granted his appeal right at  
21 any rate. Uh, and he was told that he would get an appeal, and it didn't happen.

22 THE COURT: So would it be fair to say that the defendant disputes  
23 that entire paragraph...

24 MS. SCHULTZ: That is correct.

25

SENTENCING HEARING

1 THE COURT: At the top of page two.

2 MS. SCHULTZ: Yes.

3 THE COURT: All right.

4 MS. SCHULTZ: And then when you go down to uh, sub...

5 THE COURT: Uh, let me make a note of that. Defendant  
6 disputes..., all allegations in this paragraph.

7 MS. SCHULTZ: Then going on down to the next section, the  
8 summary of legal history, the second paragraph in that uh, makes reference to  
9 the, to two additional molesting investigations that are ongoing. We would ask  
10 that the Court delete that from the report. And the reason for that being, the  
11 State in this case did not allege nor have the jury find that there were any other  
12 uh, improper actions of this uh...

13 THE COURT: Where's that at? Which..., summary of legal history?

14 MS. SCHULTZ: In..., right. Second paragraph. It says, "In addition  
15 to the above-file charges, the defendant has two additional child-molesting  
16 investigations that are ongoing." What we would like the Court to do is to delete  
17 from the Presentence Report any allegations of any other, or any reference to  
18 any other allegations of wrong doing on the part of the defendant. Those have  
19 not been proven. They are improper for the Court to consider in uh, sentencing  
20 Mr. Nunley. So we would ask that that be deleted. And there are a number of  
21 places where those allegations are brought forth in the Presentence Report.  
22 That's only the first of many.

23 THE COURT: Okay. What's the State's position on that?

24 THE STATE (MS. FLANIGAN): Judge, I've reviewed the case law

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SENTENCING HEARING

1 with respect to prior uncharged child-molesting uh, investigations being a uh,  
2 proper aggravator, and I've pulled case law. And uh, one of the cases of  
3 *Durham v. State*, and it specifically holds that prior uncharged uh, child-molesting  
4 allegations are proper aggravators.

5 THE COURT: Well...

6 THE STATE (MS. WHEATLEY): Your Honor, in addition to that,  
7 35-38-1-9 does provide that a Presentence Investigation may include any matter  
8 that the Probation Officer conducting the investigation believes is relevant to the  
9 question of sentence. And I believe after hearing Ms. Harrison testify uhm, she  
10 will tell you why she thinks it is relevant.

11 THE COURT: 35-38-1-9, which...

12 THE STATE (MS. WHEATLEY): "C".

13 MS. SCHULTZ: Well, Judge, the problem that I have with that is we  
14 can raise all kinds of allegations. We can have people who are enemies of any  
15 defendant and tell the Probation Department, doing an investigation, anything  
16 they want to evil about the person. And that is not an appropriate consideration  
17 by the Court unless there is some uh, finding by a fact finder that those things  
18 actually happened. And that's why when we're going to use something as an  
19 aggravator, there's a requirement that the State prove it, and if you're going to  
20 use it, then...

21 THE COURT: Well, there was actually sworn testimony with  
22 respect to the two previous all, or two other allegations. One uh, in one instance,  
23 the, the witness denied it, and the other instance, the witness uh, testified under  
24 oath that it occurred, if I remember correctly. Isn't that right?

25

SENTENCING HEARING <pageID>

1 MS. SCHULTZ: At the uh, hearing, the pretrial hearing.

2 THE COURT: That's right. Yeah, at the pretrial hearing. So there  
3 was sworn testimony uhm, both ways...

4 MS. SCHULTZ: But...

5 THE COURT: ...supporting and opposing.

6 MS. SCHULTZ: But my point is, is that I believe that if that is going  
7 to be used to enhance the sentence, then he has a right to have a jury make a  
8 determination of whether in fact that uh, that incident occurred. Uh, you know,  
9 he has a right to a jury trial on these issues.

10 THE COURT: Okay. What do you say about that?

11 THE STATE (MS. FLANIGAN): It's up to the Court to sentence and  
12 to weigh the aggravators and the mitigators, Judge. And the evidence in this  
13 specific case is before you in the form of that sworn testimony, and also in the  
14 form of a sworn deposition given by the one victim in the case.

15 THE COURT: Now, what about their argument that they, that a jury  
16 has to decide that uh, aggravator...

17 THE STATE (MS. FLANIGAN): That's the Court's job to determine  
18 the aggravators and the mitigators in the sentencing.

19 THE STATE (MS. WHEATLEY): Our position is that this is a post-  
20 Blakely case, Judge. And so you determine sentencing. It does not have to be  
21 tried in front of a jury. We would also note that the Presentence Investigation is  
22 a recommendation, and you are the ultimate trier of fact as to aggravators and  
23 mitigators.

24 THE COURT: What about the uh, fact that it's a post-Blakely case,

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SENTENCING HEARING <pageID>

1 Ms. Schultz?

2 MS. SCHULTZ: Well, I, I still think if, if the Court is going to use that  
3 fact as an aggravator, then it has to be a finding by a jury that it actually occurred  
4 and can be used as an aggravator. Now the way our state has revamped our  
5 sentencing laws uh, the Court doesn't have to find aggravators in order to  
6 sentence. The Court has to give a reason for why the Court is imposing the  
7 sentence it is, but it doesn't have to find aggravators. I mean there's some pretty  
8 current uh, case law on that, but I think if the Court uses it as an aggravator, then  
9 it has to be a fact found by a jury before you could do that. That's my  
10 interpretation of it.

11 THE COURT: Yeah. I think they decided to have it both ways.

12 MS. SCHULTZ: Well, I think so. They, I mean the Federal  
13 Constitution of law was set forth, and the State kind of cut the legs out from  
14 everybody and made everything confusing, because now we don't know what...

15 THE COURT: So, what do you all, what do you prosecutors say  
16 about that? It seems like there's been some cases that say that uh, you can't  
17 just decide what the sentence is uh, but rather you've got to uh, you've got to,  
18 the Court has got to uh, give the reasons, as Ms. Schultz said uh, an explanation  
19 for why you've chosen a particular sentence. And is, isn't that right?

20 THE STATE (MS. FLANIGAN): Yes. After Blakely, Judge, I think  
21 the cases are pretty clear that you would have to state a reason for imposing  
22 your sentence, but the sentencing statute where it says criteria for sentencing at  
23 35-38-1-7-1 says "one of the things that the Court", not the jury, but "the Court  
24 may consider uh, as an aggravator is a person has a history of criminal or

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SENTENCING HEARING

1 delinquent behavior.” And I would say that this evidence uhm, which in this case  
2 is not in the form of, of someone angry at Mr. Nunley, telling Ms. Harrison  
3 something out of the blue. This is sworn, actual testimony before this Court, and  
4 you can use that to determine uh, that it’s an aggravator. And as long as you set  
5 that in the record is why you...

6 THE COURT: Okay...

7 THE STATE (MS. FLANIGAN): ...sentence him the way you do.

8 THE COURT: With respect to the statement in the Presentence  
9 investigation uh, do you expect to have evidence that that’s true, that there are  
10 ongoing investigations?

11 THE STATE (MS. FLANIGAN): That, that Ms. Harrison has  
12 determined that, and I would expect to call her as a witness and to put that  
13 evidence in, into the record.

14 THE COURT: Okay, I’ll take under the advisement your request to  
15 mark that out. Okay. We’ll see what the evidence shows with respect to that.  
16 Okay. What else, Ms. Schultz?

17 MS. SCHULTZ: Well, I don’t like all the references to other uh,  
18 misconduct deleted. And including, that would include on page three under  
19 subparagraph “B”. The first, the first paragraph of section “B”. Uh, the sentence  
20 that starts, “Kristen Nunley told Detective Wibbels on May 30<sup>th</sup>”, and from there  
21 on through the rest of the paragraph. And then the following paragraph uh, there  
22 is a reference to the women that Mr. Nunley has lived with. And the last line of  
23 that paragraph says, “All of these women have children who have alleged the  
24 defendant molested them.” Uh, I would ask that that be stricken.

SENTENCING HEARING

1 THE COURT: What about that?

2 THE STATE (MS. FLANIGAN): Judge, this is all information that  
3 Ms. Harrison had to search out because Mr. Nunley refused to speak to her.  
4 This is all information that has been previously provided to defense counsel in  
5 the form of discovery. Uh, this is the information...

6 THE COURT: So you expect to be able to present testimony on  
7 that?

8 THE STATE (MS. FLANIGAN): Yes.

9 THE COURT: Okay. What else?

10 MS. SCHULTZ: Uh, one of the questions that I have about the  
11 report is when I looked at the uh, portion where it talks about uh, criminal  
12 orientation, paragraph "C" on, on page one. It says, "The instant offense is Child  
13 Molesting, the defendant's first known conviction." And then when I go back to  
14 page five, under the aggravating circumstances uh, the probation officer has  
15 indicated, number one aggravated, the person has a history of criminal or  
16 delinquent behavior. Perhaps the way to handle that would be to ask the  
17 probation officer doing the report about that, but it seems to me to be directly  
18 contradictory to say in one place that he has, this is his first known conviction,  
19 and to say in another place that he has a history of criminal or delinquent  
20 behavior.

21 THE COURT: Okay. Uh, uh, I'm guessing that uh, you'll have to  
22 take the uh, Presentence Investigation Report has a whole.

23 MS. SCHULTZ: And, and, Judge, we would also ask that the  
24 portions of the uh, attachments be deleted uh, that have to do with the uh,

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SENTENCING HEARING

1 allegations of other uh, criminal misconduct by Mr. Nunley. And...

2 THE COURT: Where's that at? Uh...

3 MS. SCHULTZ: Uh, when you look back through the attachments  
4 on page six of eight of Officer Wibbels' report, and probably about halfway  
5 through the packet.

6 THE COURT: Okay. Six of eight?

7 MS. SCHULTZ: Yeah. There are some references there uh...

8 THE COURT: About Kristen Nunley?

9 MS. SCHULTZ: The Kristen Nunley references. Starts about a  
10 third of the way down the page and goes almost to the bottom of the page.

11 THE COURT: Okay. Well, all right, I think I'll take that under  
12 advisement uh, with respect to the uh, all the references to Kristen Nunley and  
13 that...

14 MS. SCHULTZ: Okay.

15 THE COURT: ...whole affair there.

16 MS. SCHULTZ: And, and we would also ask that the entire last two  
17 pages, which is the State's Amended Notice of Intent to Introduce Extrinsic Act  
18 Evidence at Trial, that that, the entire thing be deleted from the report.

19 THE COURT: Where, where's that at?

20 MS. SCHULTZ: The last two pages of the packet.

21 THE COURT: Oh, the very last two pages of the packet.

22 MS. SCHULTZ: Right.

23 THE COURT: Oh, State's Amended Notice of Intent to Introduce  
24 Extrinsic Act Evidence. Uhm, okay. And the State's response to that?

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SENTENCING HEARING

1 THE STATE (MS. FLANIGAN): It's a part of the Court's record,  
2 Judge.

3 THE COURT: I'll give the uh, the State, I'll take that request under  
4 advisement and give the State the opportunity to present evidence with respect  
5 to that as well, and whether that fits in the scope of 35-38-1-9. Okay, anything  
6 else, Ms....

7 MS. SCHULTZ: I think those are the only uh, corrections or  
8 deletions that we would ask to make to the report.

9 THE COURT: Okay. All right, and uh, does the State want to begin  
10 with their evidence on sentencing?

11 THE STATE (MS. FLANIGAN): Yes, Judge.

12 THE COURT: You can call your first witness.

13 THE STATE (MS. FLANIGAN): The State will call Diane Harrison to  
14 the stand.

15 DIANE HARRISON: Would you like me on the stand, your Honor?

16 THE COURT: Please. Do you solemnly swear or affirm the  
17 testimony you're about to give shall be the truth and nothing but the truth, so help  
18 you God?

19 WITNESS: Yes sir.

20  
21 **DIRECT EXAMINATION OF DIANE HARRISON BY STATE (MS. FLANIGAN):**

22 Q Ms. Harrison, can you state your entire name for the record?

23 A Yes. My name is Diane Harrison West. And I'm the Chief Probation  
24 Officer in this Court.

25

SENTENCING HEARING

1 Q How long have you been a Probation Officer in this Court?

2 A Uhm, thirteen years.

3 Q Okay, and how long have you served as the Chief Probation Officer?

4 A Thirteen years.

5 Q In connection with your employment, were you assigned to uhm, complete  
6 a Presentence Investigation Report on Lawrence Edward Nunley?

7 A Yes ma'am.

8 Q And did you do that?

9 A I did.

10 Q What date did you file that with the Court?

11 A Uhm, I filed that on December 17<sup>th</sup> of 2008.

12 Q And can you state, in connection with the filing of that report, what steps  
13 you took in order to offer that report?

14 A Yes. Uhm, we have a questionnaire that we require uhm, the defendants  
15 to fill out. Uhm, the questionnaire was provided to Mr. Nunley. Uh, it  
16 includes uh, questions uhm, to find out information about uh, somebody's  
17 social history, their past, where they grew up, their family. And it also  
18 includes a section about prior criminal activity uhm, their immediate family.

19 Q Did Mr. Nunley fill out that form?

20 A Uhm, no. I went down then..., he had the questionnaire forms and I went  
21 down to visit him in our jail here on December 2<sup>nd</sup>. And he told me at that  
22 time uh, he talked to me for a few minutes uhm, and said that uhm, that  
23 he was not going to uhm, be interviewed by me, nor did he fill out the  
24 questionnaire because uhm, he knew that it didn't, would not benefit him.

25

SENTENCING HEARING

1 Q Given that fact that the uh, defendant would not cooperate with your  
2 investigation, what were you left with to come up with information about  
3 Mr. Nunley's social history?

4 A Well, I uhm, I looked very carefully through uhm, Detective Wibbels' police  
5 reports, his investigation, police reports. Uhm, I read the uh, depositions  
6 of uh, the victim on this case and on another case. Uhm, I did not try to  
7 contact his family members. Uhm, so I took all the information I could get.  
8 I, basically from paperwork. And then, of course, I contacted the uh,  
9 family of the victim on this matter.

10 Q Ms. Harrison, I would like to call your attention to some of the attachments  
11 to your report that you filed.

12 A Yes ma'am.

13 Q And the first set of, the first attachment would just be simply a uh, CCS or  
14 a criminal case summary of this case.

15 A Yes ma'am.

16 Q And just so we're talking about the right case, this was a jury trial at which  
17 Mr. Nunley was found guilty. Is that correct?

18 A Yes ma'am.

19 Q Then you have the affirmations that you filed as well. Is that correct?

20 A Yes ma'am.

21 Q And Detective Wibbels' Affidavit of Probable Cause.

22 A Yes ma'am.

23 Q All right. And then you have also filed uh, starting with page one, two,  
24 three, four and five, a uh, it looks like a police report of a Kevin Bowling.

25

SENTENCING HEARING <pageID>

1 Is that your...

2 A Yes ma'am.

3 Q Is that correct?

4 A Uh huh.

5 Q And you filed, so we have a correct record on this, a two-page  
6 supplemental report of Detective Wibbels.

7 A Yes ma'am.

8 Q And a one-page report of Detective Wibbels.

9 A Yes ma'am.

10 Q And an eight-page report of Detective Wibbels.

11 A Yes ma'am.

12 Q Another one-page report.

13 A Yes ma'am.

14 Q Another one-page supplemental report of Detective Wibbels.

15 A Yes ma'am.

16 Q And then a three-page report.

17 A Yes ma'am.

18 Q Okay. And you filed those as a part of your report. Uh, why is it that you  
19 file those as part of your report?

20 A Uhm, I filed whatever police reports have been filed on this case. And if  
21 you notice uhm, at the top of each of those pages uh, would be the case  
22 number reference of 45-46877. So uhm, I filed those with the report intact  
23 as they are. I'll wait a moment. If I could have just a moment, your  
24 Honor. Excuse me. Uhm, I was saying that I filed all of the uhm,

25

SENTENCING HEARING

1 detective who filed this case, I filed all of the State Police reports that had  
2 to do with his case. And I filed them intact. I would never take out the  
3 page or two from the report and have it go page one, two, three, seven,  
4 eight or something.

5 Q So based upon your training and experience, it would be important for the  
6 Court to have all of the relevant police reports attached to the  
7 Presentence Investigation?

8 A Yes ma'am, sure.

9 Q And could you turn uhm, Ms. Harrison, to page three of your report, that's  
10 uh, roman numeral five, entitled "Family Personal Background."

11 A Three roman numeral, yes ma'am.

12 Q And this is the section you indicated you could not fill out uh, based on  
13 what Mr. Nunley told you because he didn't tell you anything.

14 A That's, that's correct.

15 Q Okay, you have reviewed uhm, all of Detective Wibbels' reports that are  
16 attached to this Presentence Investigation.

17 A Yes ma'am.

18 Q And upon review of those, you've formulated some of this information. Is  
19 that correct?

20 A That's true. I would also offer that I looked through uhm, the Gavel  
21 system here that has all the criminal and uh, small claims filings in this  
22 county to see if Mr. Nunley had any other uh, cases pending. Uhm, and I  
23 included a small claims matter uhm, indicating that the defendant's father  
24 and uhm, I think it, he filed this case in March, the small claims case with



SENTENCING HEARING

1 Spencer Nunley, filed in March to evict the defendant from the home that  
2 he was renting. And I thought that was uhm, important to include, if his  
3 father was having difficulties with him.

4 Q Okay.

5 A And given I don't have a whole lot of other social history, you know, I, I  
6 chose to include that.

7 Q Okay. Thank you. And then on to Marital and Dependent Status. If we  
8 could go through that. Uh, you have here that he was divorced from  
9 Patricia Nunley about five years ago.

10 A Yes ma'am.

11 Q And he has the three children listed there.

12 A Yes ma'am.

13 Q And did you glean that from Detective Wibbels' reports?

14 A Yes ma'am. As I said, yes ma'am.

15 Q Okay. And then you also added that Kristen Nunley told Detective  
16 Wibbels on May 30<sup>th</sup>, 2008 that her father, Lawrence Nunley, had sexually  
17 molested her when she was between four to six years of age. However,  
18 she has since denied she was molested by her father.

19 A Yes ma'am.

20 Q Uhm, you got the first part of that from Detective Wibbels' report. Is that  
21 correct?

22 A Yes.

23 Q About the molestation.

24 A Yes.

25

SENTENCING HEARING

1 Q And then uh, the part about since denying it, Ms. Harrison, where is that  
2 from?

3 A Uhm, I think it's also in his report. Uh, later on in one of the supps.

4 Q Okay. Uhm, why is that, would you tell the Court why you thought it was  
5 important to include that part under the Marital/Dependent Status?

6 A Yes ma'am. I just uhm, as I saw that uhm, Ms. Nunley had uhm, stated  
7 that she had been molested by her father uhm, I just thought that was  
8 once again really important. Uhm, I cannot imagine any reason a young  
9 adult woman would say that unless it was true. Uhm, and it's also, I  
10 understand she recanted and she said no, it didn't happen. It's hard to  
11 bring the charges against, you know, your own father, and obviously she  
12 didn't want to follow through with that.

13 Q Okay. Ms. Harrison, you have some specialized training in, in connection  
14 with being a probation officer for sex crimes.

15 A Yes ma'am.

16 Q Okay, can you, before we move on, can you put that on the record what  
17 type of special training you have?

18 A Okay. Uhm, since about uh, well, I guess it was the year I came here,  
19 during the years 1995 and '96 uhm, I started a uh, I investigated what  
20 locally was available in the way of uh, a sexual perpetrators group uhm, to  
21 get uhm, defendants who have uh, perpetrated against children uh, and  
22 some adult per..., who have perped against adults also. But mainly  
23 children perpetrators. Uhm, to find uh, some help for them, if you will,  
24 some therapy that would be appropriate and would help be able to keep

25

SENTENCING HEARING

1           them from re-offending. And uhm, I then, and I found somebody, a  
2           professional that provides that, and I spent uhm, oh approximately three  
3           years uhm, assisting him group, in the perpetrators group on a weekly  
4           basis. And so I've been uh, and I don't have a certificate or anything from  
5           that. But I've been uh, worked with David Breeding in that regard for three  
6           years on an on-going basis. And then since then, every so often. I also  
7           received specialized training on uhm, two different occasions by the  
8           Association for the Treatment of Sexual Abusers, which is an international  
9           organization. And I probably have about fifty hours of training from them.  
10          And I also participate..., they called it Li-Serve, which I think that's a  
11          computer Internet uh, terminology for..., it's an exchange of information  
12          uh, once again internationally for people who work with uh, and, and try to  
13          help uh, sex offenders.

14 Q       So based uh, and given that training and what you've placed on the  
15       record uh, does that training assist you when you review police reports  
16       and this kind of family history in uh, pointing out certain things to the Court  
17       that would be important in sentencing a sex, a sex offender?

18 A       Yes, I think so.

19 Q       Okay. And, and was part of that training that led you to point out these  
20       two specific items that we've talked about, about the father having evicted  
21       him, and the daughter accusing him and then recanting?

22 A       Yes ma'am.

23 Q       Okay. Uh, then, Ms. Harrison, the next part about uh, the recent history of  
24       pursuing relationships with women who are drug abusers and with small

25

SENTENCING HEARING

1 children. Can you indicate for the Court where you gleaned that  
2 information?

3 A Uhm, yes. And, and that information that I gleaned was another reason I  
4 chose to uh, reference his criminality. And if we'd rather use the word  
5 "criminality" in my aggravating circumstance, a person has a history of  
6 criminal or delinquent behavior uh, I certainly believe he has a history of  
7 criminality. Uhm, and from reading the reports that was in the uh, instant  
8 offense report, some of the information, and then I saw other reports uh,  
9 that have been started, but there, but they're the uh, child-molesting  
10 reports, cases that have not yet been filed, but are under investigation.  
11 Uhm, in looking at some of those cases, it was so blatantly obvious that  
12 uh, the defendant would hook up with women, number one, who had  
13 small children. Uhm, I think all the kids uh, prepubescent, between the  
14 ages of six to eight. And uhm, and then the fact that they were uh, drug  
15 abusers. And I had further information on uh, for instance uh, Miss  
16 Michelle Cayton uh, they, she had lived with the defendant, or per  
17 Detective Wibbels' report, had lived with the defendant for about a year.  
18 And Miss Cayton has a Possession of Controlled Substance cases  
19 pending in this county.

20 Q Let me stop you there, Ms. Harrison.

21 A Uh huh.

22 Q You did some independent research into these cases?

23 A Into the, yeah, looking up the local uh, case files. And then uh, he also  
24 had a relationship with Jenny Simler, who has a pending Possession of

SENTENCING HEARING

1 Methamphetamine charges. And then the mother of the victim in the  
2 instant offense, Tonya Caves, was uh, obviously friends with the  
3 defendant, and a known drug abuser. And I would have to say that I know  
4 that from uh, speaking to her relatives, and also hearing things in Court.

5 Q Okay. So you again uhm, conducted some independent research and  
6 found out these things...

7 A Yeah.

8 Q Independently.

9 A And that, that's pretty classic that we see is uh, first of all we see uh, I've  
10 see over and over again offenders hook up with children that are their  
11 target. You know, it's funny how they, anyway..., and then of course the  
12 uh, it helps if the mothers aren't really, really present all the time, if you  
13 will.

14 Q Okay, thank you. And uh, Ms. Harrison, with respect to educational  
15 history and all the others, except for employment history, which you said  
16 he was laid off from Specialty Products in '08, you were unable to come  
17 up with answers to that because Mr. uh, Nunley would not provide that  
18 information to you.

19 A Right. And I didn't see any reference to them in the police reports.

20 Q Just a moment. Okay, and uh, Ms. Harrison, then I'd like to go back to the  
21 attachments again...

22 A Yes ma'am.

23 Q And go through those a little bit more, and indicate for the record why  
24 those are included with your presentence report. We had stopped with

25

SENTENCING HEARING

1 uh, actually we had ended up Detective Wibbels' reports, and then we  
2 had gone on with the Harrison County Correction Department uh, Incident  
3 and Accident Reports.

4 A Yes ma'am.

5 Q Could you indicate for the record why you would include something like  
6 that in a P.S.I.?

7 A Yes ma'am. Uhm, under the uhm, in the Presentence Investigation on  
8 page one, under "C. Criminal Orientation", we actually have in the, when  
9 we interview uhm, a defendant for a P.S.I., it doesn't appear here in the  
10 form, the questions that we are to ask. But uhm, we're to ask questions  
11 like the age of their first criminal conviction uhm, some other matters. And  
12 included in that what we're supposed to ask them is uh, "Did you, have  
13 you had any write-ups since you've been incarcerated?" And I will ask a  
14 defendant that. And, of course, I wasn't able to ask Mr. uh, Nunley that.  
15 But then I will also check with jail staff and get a copy of any reports. And  
16 these are the reports that were provided to me.

17 Q And they revealed two specific incidents of misconduct by..., or two  
18 specific incidences for which Mr. Nunley was written up. Is that correct?

19 A Uhm, I was thinking there was three. There was the sexual activity, there  
20 was making hooch uhm, that there was a...., do I have the one in here  
21 about flooding the cell?

22 Q Yes. There was, there were three.

23 A Okay. Yeah. And some of like, like uhm, flooding the cell and making  
24 hooch uhm, I think that was a general accusation to the whole, to his cell.

25

SENTENCING HEARING

1 I don't think him specifically, but you know, that he was in on it. And the  
2 sexual activity, of course, was between him and another man and it was  
3 specifically about him.

4 Q Okay. And based on your training and experience, does that specific  
5 activity or being written up for sexual activity in the jail, does that uhm, is  
6 that of some importance in this P.S.I.?

7 A Oh yes, I think so. Uhm, any time that uhm, it tells me that it's a highly  
8 sexualized uh, defendant. Uhm, I don't think that it, it..., it doesn't speak  
9 to any kind of like homosexuality or anything like that, but more so..., and  
10 from the reports in his past relationships, I don't have any reason to think  
11 that it's homosexual activity, rather, and more importantly, it's just, it's  
12 sexual, you know.

13 Q And again, you were just checking with the jail for write-ups. Is that what  
14 you asked?

15 A That's right. That's what I determined. And I don't know about their  
16 procedures for having hearings or not having hearings. And uh, they  
17 didn't provide me that information.

18 Q So if you had asked Mr. Nunley this question, if he had cooperated with  
19 you directly, you would've said, "Have you ever been written up in the jail  
20 and how many times"?

21 A Sure. That's the exact words that I use, yes.

22 Q And had Mr. Nunley decided to cooperate with you and answer, he  
23 could've explained to you, "That I asked for an appeal", and given you all  
24 that information. Is that correct?

25

SENTENCING HEARING

1 A Sure, he could.

2 Q Okay. But instead, you were left with going to the jail and asking for their  
3 documents?

4 A Yes, that's all I had to go on.

5 Q And when you went, this is what you were given?

6 A Yes ma'am.

7 Q Okay. And you did uh, his driving history. Is that part of the attachments?

8 A Yes, yes.

9 Q There was nothing of note in that. Is that correct?

10 A No ma'am.

11 Q And there was also a criminal history. Is that correct?

12 A Yes ma'am.

13 Q And there was nothing uhm, listed in his criminal history?

14 A No. There was a few uhm, a protective order uh, explanations given. But  
15 nothing in his criminal history.

16 Q Okay.

17 A Could I have a break?

18 Q Yes.

19 THE STATE (MS. FLANIGAN): I, I can't give a break. Judge can.

20 THE COURT: Yes.

21 WITNESS: A short break? Thank you.

22 (OFF RECORD)

23 STATE RESUMES DIRECT EXAMINATION OF DIANE HARRISON:

24 Q Ms. Harrison, in the next two attachments, which simply be some uh,

25



SENTENCING HEARING

1 C.C.S.'s from criminal cases that came after this criminal case. Am I  
2 correct, those cases are involving Michelle Cayton?

3 A Yes ma'am.

4 Q Okay. Then there's a police report from Chris Walden which is uh, a  
5 Criminal Mischief report that Mr. Nunely had made after the victim's  
6 mother in this case had....

7 A Yes.

8 Q .... destroyed some of his property.

9 A And once again, I felt that was important to include the uh, time when he  
10 was victimized.

11 Q Okay. And, finally, there's an amended notice to introduce extrinsic act  
12 evidence at trial. That was a filing that you got from the court file. Is that  
13 correct?

14 A Yes ma'am.

15 Q And why was this included?

16 A I included that because of it uhm, talking about the uhm, it was from, I  
17 don't, it was from this..., uh, I used information, not specific information,  
18 but as far as uh, coming up in my opinions, from reading the deposition  
19 uhm, of uh, K.S., I believe it was, uh, the Simler girl, is that K.S.?

20 Q Uh huh, yes.

21 A And uhm, so I saw this first, and that's where I referenced to go to read  
22 the deposition.

23 Q Okay. So this filing actually uh, is a filing by the State. Is that correct?

24 A That's right.

25

SENTENCING HEARING

1 Q And this uh, clued you into some additional acts by Mr. Nunley that you  
2 wanted to research in connection...

3 A Right.

4 Q ...with the P.S.I.

5 A And I try to include anything in the report that I used to go further, so you  
6 guys will know, you know, from where I got the information.

7 Q Okay. So this wasn't being shown to the Judge really to, to show the truth  
8 of any of this in here.

9 A No, huh uh.

10 Q It's just shown to the Judge to show why you took the next step to read  
11 some depositions and to investigate further?

12 A Right. Showing where I got my information.

13 Q And now, if we could uh, move on, Ms. Harrison. Uhm, to make a  
14 recommendation, you did all of this research. Is that correct? That you've  
15 described for the Court?

16 A Yes ma'am.

17 Q And then uhm, you made a recommendation based upon, one, your  
18 training and experience with sex offenders. Is that correct?

19 A Yes ma'am.

20 Q And upon aggravators and mitigators that you would've found in this  
21 case?

22 A Yes ma'am.

23 Q Okay. And let's discuss, for the record, the aggravators that you put in  
24 your presentence report.

25

SENTENCING HEARING

1 A Okay.

2 Q First is that uh, the person has a history of criminal or delinquent behavior.

3 A Yes. I felt that uhm, that the information that I read from uh, both from  
4 Detective Wibbels' uh, police report and the supplements to it, and from  
5 the uh, deposition I wrote where uhm, a child victim was interviewed by  
6 uhm, probably yourself and, and Ms. Schultz. I found that information to  
7 uhm, credible and uhm, I decided to include it as uh, a history of  
8 criminality on the defendant's part.

9 Q And specifically, if we went back, Ms. Harrison, to page two where you,  
10 you put forth uh, a history of, some what of his legal history. Is that  
11 correct?

12 A Yes ma'am.

13 Q And you indicated for court, for the Court that he has two additional child-  
14 molesting investigations that are ongoing?

15 A Yes ma'am.

16 Q One of those would be the Simler matter. Is that correct?

17 A Yes, Simler.

18 Q Okay. And you have uh, reviewed her deposition.

19 A Yes ma'am.

20 Q And uh, are you aware that if that is uh, been turned in or given to any uh,  
21 prosecutor's office?

22 A Yes. I understand from Detective Wibbels that it's been uhm, given to the  
23 uh, Floyd County..., pardon me, Prosecutor, Keith Henderson.

24 Q Okay. But you are not aware if they've actually filed the charges or...

25

SENTENCING HEARING

1 A No.

2 Q ...what the status...

3 A No. The last I knew they had not filed the charges.

4 Q Okay. So that's one of those two that are currently under investigation.

5 A Yes ma'am.

6 Q And did that involved uh, allegations that Mr. Nunley, who at the time was  
7 over twenty-one years of age uh, had criminal deviate conduct with a child  
8 under the age of twelve?

9 A Yes. As I remember, it was just real, real similar. Real similar, almost  
10 identical to the..., what he was found guilty of in this courtroom.

11 Q Okay. And the other child-molesting investigation. Uh, which one were  
12 you referencing?

13 A I believe that one was the one with uhm, Michelle Cayton's children.  
14 Uhm, and once again, the similarities were striking, involving pornographic  
15 movies and molesting the uh, the children in their prepubescent,  
16 molesting girls in the prepubescent age category.

17 Q Okay. And let me correct, let me correct you uh, Ms. Harrison. Michelle  
18 Cayton, that would've been uh, an allegation actually, and that's a C.P.S.  
19 investigation, not a criminal investigation. Is that right?

20 A I don't know.

21 Q Okay. And that actually involved, Ms. Cayton actually had young boys.

22 A Boys, that's right, yes.

23 Q Okay, but that would've been the one of the two that you're referencing  
24 here?

25

SENTENCING HEARING

1 A Let me look to see if I can..., yes, that was.

2 Q Okay, all right. And when you talk about a history of criminal or delinquent  
3 behavior, you're speaking about the case involving uhm, K.S. or Kimberly  
4 Simler?

5 A Yes ma'am.

6 Q Okay. Uhm, you spoke earlier about a criminality or criminal behavior.

7 A Uh huh.

8 Q Can you explain that a little bit more for the record? Does that go into  
9 this?

10 A Yes. Uhm, I look at that..., that's in the uh, it's in the statute, an Indiana  
11 Code as being what probation officers are supposed to look for and  
12 report. And uh, criminality to me means criminal-like behavior, not  
13 necessarily charged uhm, and I would include both uh, like I said, the  
14 depositions that I read uh, especially the one in the Simler case, and also  
15 uh, I include, in my thinking, where I got my opinion was from his daughter  
16 saying that he had molested her.

17 Q Okay. And that, knowing that she had recanted that?

18 A Yes. And also that was uh, and she was a small child, was twelve or  
19 fourteen years ago. Uh, so I'm looking at the history, you know, the length  
20 of time that's been going on.

21 Q So it's possible in your mind to reconcile the fact that he has no criminal  
22 convictions, but yet you said an aggravator is his history of criminal or  
23 delinquent behavior?

24 A Yes. Obviously I felt comfortable and felt uh, more than comfortable; I felt

25

SENTENCING HEARING

1 like it was uhm, ethical for me to say that, yes.

2 Q Okay. And with respect to number two, Ms. Harrison, uhm, you indicate  
3 that Mr. uh, Nunley showed no remorse?

4 A That's correct.

5 Q And can you indicate for the record uhm, what you, what factors of your  
6 investigation you used to come up with that?

7 A Uhm, he uhm, he would uhm, I guess the few things that I heard from him  
8 were very self-serving.

9 Q Okay...

10 A And he showed no empathy toward uhm, small children having gone  
11 through a trial. But uhm, of course, he didn't talk to me a lot. Although  
12 when I went down to talk with him, to interview him for this, he didn't just  
13 say, "I have nothing to say." Uhm, he seemed to have a difficult time just  
14 saying nothing. He uh, said that uh, kind of uh, railed about..., I shouldn't  
15 use that word. He kind of went on about and was excited about that, you  
16 know, "I didn't do this. I'm being railroaded." That type of thing. I also  
17 should say that in his uh, comments when I saw him down in the jail to  
18 interview him uhm, that he wanted me to know that he wasn't being, he  
19 didn't mean to be rude to me, and which I told him that was, you know, not  
20 a problem. I, but he uh, he didn't just say nothing. He went on for a little  
21 while. But uhm, and certainly didn't, you know, show any remorse.

22 Q Okay. And number three, Ms. Harrison, is that he was in a position having  
23 care, custody and control of the victim in the offense. Can you indicate for  
24 the record why, what in your investigation led you to come up with that

25

SENTENCING HEARING

1           aggravator?

2 A           Uhm, the offense that he was, the offenses that he was found guilty of  
3           happened when he was uh, babysitting uh, this child.

4 Q           Okay. And in fact uh, did your investigation show that she had been left  
5           there and left there overnight?

6 A           Left there overnight, yes. He was the adult there.

7 Q           Ms. Harrison, you also were required to look at any mitigating factors in  
8           your investigation. Is that correct?

9 A           Yes ma'am.

10 Q          And did you come up with any mitigating factors?

11 A          No.

12 Q          So your job was one to uh, provide the Court with all of the relevant  
13          information that you thought would be pertinent to sentencing?

14 A          Yes ma'am.

15 Q          And then to come up with the aggravators and the mitigators?

16 A          Yes ma'am.

17 Q          And do you believe you've done that in this case?

18 A          Yes.

19 Q          Okay. And based upon all of that, did you come up with a sentencing  
20          recommendation for Mr. Nunley?

21 A          I did.

22 Q          And can you indicate what that is for the Court?

23 A          Yes. Uh, it was based on uhm, the aggravators and mitigators, but also  
24          on uhm, I offered several uhm, in the recommendation area on page five,

25

SENTENCING HEARING <pageID>

1 under "Recommendation" uhm, I offered, offered several uhm, cites. And  
2 I thought my recommendation has a lot to do with uh, incorporating those  
3 uhm, legal uhm, requirements for sentencing of uh, of Mr. Nunley. Uh, but  
4 with that uhm, and also give that uhm, another reason I came up with my  
5 recommendation was that he uh, certainly uhm, appears to be a predatory  
6 offender. Uhm, and there's uh, no chance, virtually no chance of  
7 rehabilitation at this point, of course, because he doesn't acknowledge  
8 that he did anything wrong. Uhm, I don't think uh, probation would be of  
9 any use to uh, I don't think probation would give him any chance of being  
10 rehabilitated uhm, or that we would make an impact on him. He would go  
11 on doing whatever he wanted to do, I believe, if he was placed on  
12 probation. So my recommendation was that he be uh, sentenced to uh,  
13 thirty years each on counts, on the "A" felonies, Counts 1 through 3. And  
14 then four years on Count 4, which I believe is the presumptive. And then  
15 one and a half years on Count uh, 5. And also uh, I believe per statute,  
16 that would uhm, have to be con uh, have to be served consecutively.

17 Q Okay. Just so I have it right, because we, on that, you changed it a bit  
18 from what was written when we discussed this earlier, before you were  
19 placed under oath.

20 A Yes ma'am.

21 Q Uh, it was thirty years on Count 1 to 3.

22 A Yes ma'am.

23 Q Four years on Count 4, and one and a half years on Count 5?

24 A Yes ma'am.

25



SENTENCING HEARING

1 Q All to be served consecutively?

2 A Yes ma'am.

3 Q And is that based partially on 35-50-2-2(b), that he should serve a  
4 minimum of twenty years on the "A" felonies? You'd cited that on page  
5 five.

6 A Yes. And uhm, I am not, I cited both those uh, the statute from 2008 and  
7 2006 because I don't know which statute has to be followed. I was  
8 leaving that up to you lawyers.

9 Q Okay...

10 A And uhm, but my understanding is certainly that uh, that statute, that he  
11 falls under that statute.

12 Q Okay. And does 35-50-1-2, which you cited on page five, since they are  
13 crimes of violence, the sentencing should be consecutive?

14 A Yes ma'am.

15 Q Okay. And you referenced some guidelines, or some guide, some  
16 guidelines about how you write a P.S.I.

17 A Uh...

18 Q Are they specific statutory guidelines or...

19 A Yes.

20 Q What, what is the cite for that?

21 A We have, the cite for that would uhm, 35-38-1-9. And then the  
22 questionnaire that I referred to is something that is a uhm, standardized  
23 format uh, that the Indiana Judicial Center uhm, has all their probation  
24 departments use on adult offenders.

25

SENTENCING HEARING

1 Q Okay. Ms. Harrison, the advisory sentence on a Count "A", or on a Class  
2 "A" Felony uh, would be thirty years. Is that correct?

3 A The advise..., yes ma'am.

4 Q Okay. And the advisory sentence on a Class "C" Felony would be four  
5 years.

6 A Yes ma'am.

7 Q And the advisory sentence on a "D" Felony would be one year.

8 A One and a half years, I believe.

9 Q One and a half years. And I would like to ask you, while you're on the  
10 stand and I have you there uhm, you've indicated that uhm, he's a  
11 predatory offender, no chance for rehabilitation. You've enumerated three  
12 specific aggravators, but you still recommended the presumptive sentence  
13 for Mr. Nunley.

14 A Uh huh.

15 Q Can you indicate why you didn't go above the advisory sentence?

16 A Uhm, I think that I was feeling that..., that the "A" felonies were the  
17 biggies. And that those have to be, by statute, the way I understand it,  
18 that they, that's what he has to be sentenced to, was either the twenty- or  
19 the thirty-year minimum. The others, I was uh, went a little bit less  
20 because uhm, he's not uhm, the worst or the worst at this point. And so I  
21 guess uh, I was kind of giving him a break on those, if you will. And that's  
22 why I did that.

23 Q So your assumption was that he could only be sentenced to thirty years  
24 on the "A" felonies?

25

SENTENCING HEARING

1 A Yes. Either, either the thirty or twenty, depending upon which the 2006  
2 statute or the 2008, yes.

3 Q Okay. So your, your...

4 A I think by law that's what he'd have to get.

5 Q Okay. But just so we're clear, when I make my argument, Ms. Harrison....

6 A Uh huh.

7 Q You went with thirty years on the uh, on the "A" Felonies, because you  
8 thought that was as high as you could go by law?

9 A I think that I thought that thirty years, as long as it was consecutive, if the  
10 counts were consecutive, that that was also appropriate.

11 Q Okay. I just wanted, if you thought you couldn't go higher or...

12 A No.

13 Q That was the appropriate sentence.

14 A Yes.

15 Q As long as they were consecutive.

16 A Yes ma'am.

17 Q Okay.

18 THE STATE (MS. FLANIGAN): That's all I have of this witness,  
19 Judge.

20 THE COURT: Okay. Cross examination?

21

22 **CROSS EXAMINATION OF DIANE HARRISON BY DEFENSE:**

23 Q Ms. Harrison, do you believe that the statute requires that the Court  
24 sentence these two consecutive sentences?

25

SENTENCING HEARING <pageID>

1 A Yes, because of the uhm, uhm, it gets into the, different episodes and  
2 everything of the charges.

3 Q Okay. Well, I disagree with you legally.

4 A Yeah.

5 Q But I just wanted to see where you were coming from. And you do not  
6 believe that Mr. Nunley is the worst or the worst, as you put it? There are  
7 people who commit sex crimes against children, "A" felonies, who do a  
8 whole lot worse things to the children than what Mr. Nunley did to this  
9 child?

10 A I was not looking at it that way. I was looking at it uhm, more a given this  
11 isn't his fifth conviction.

12 Q Okay. Gotcha.

13 A Yeah.

14 Q Are you aware that his daughter, Kristen, was in court and denied, on the  
15 record in this court, that Mr. Nunley had done anything inappropriate to  
16 her sexually?

17 A No. I wasn't aware of that. I knew that she had denied it, but I thought I  
18 got that from uh, Detective Wibbels' report.

19 Q Were you also aware that she, well, I guess not also. Were you aware  
20 that uhm, she not only denied that her father had molested her, she also  
21 denied that she told Officer Wibbels that he had? Were you aware of that  
22 fact?

23 A That, to say that she had denied in court...

24 Q Yes.

25

SENTENCING HEARING

1 A That she told Officer Wibbels that? That was in court uhm, in a hearing?

2 Q When we, when we had the uh, hearing to, for extrinsic act evidence, she  
3 was subpoenaed to court...

4 A Okay, yeah.

5 Q And she sat on the witness stand...

6 A Yeah.

7 Q Denied that her father had molested her.

8 A Right.

9 Q And in addition to that, denied that she had told Officer Wibbels that he  
10 had molested her.

11 A Was that with the defendant present? I assume?

12 Q Yes.

13 A Uhm, I guess, I just knew that she had denied it.

14 Q Okay.

15 A I didn't know under what circumstances.

16 Q But you were not aware that she had denied that she told Officer Wibbels  
17 that?

18 A No.

19 Q Okay. Now with respect to the uh, other investigations you were talking  
20 about, you indicated that there was one involving the Simler child and that  
21 was under investigation. Are...

22 A Yes ma'am. I believe, and I don't know as far as the terms, I think the  
23 case has been..., no, it wouldn't have been filed until it gets the  
24 prosecutor's..., and files it. So yes, it would be under investigation in

25

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1 Floyd County.

2 Q And do you know how long that investigation has been going on?

3 A Uhm, since 2007?

4 Q So it's been a couple of years at least.

5 A I'm not..., I'd have to look. I could look for you when uh, it was recorded.

6 But uhm, I don't really know.

7 Q Okay. And the other case, this second investigation that you were talking  
8 about. Do you, do you have any familiar, familiarity with how long that's  
9 been going on?

10 A No, I don't. I might've at one time, but I don't remember.

11 Q Do you know what county it was in?

12 A I'm thinking it was in Clark, but I'm not sure, Susan.

13 Q Okay. Then I believe that you said that was the Cayton child?

14 A Yes ma'am, children, yes.

15 Q And they were boys?

16 A Yes. I do remember that now, after being corrected, yes.

17 Q Okay. Well, that's a new one to me. I'd heard about that one. So...

18 Michelle Cayton lived in Harrison County. That's why I'm a little confused  
19 about that.

20 A But, as I said, I think it's in Clark. I could be mistaken.

21 Q Is it possible you have the wrong name on the case? That it's not the  
22 Cayton kids, it's other children?

23 A I'm not sure. I could, I could look, if you'd like me to pursue that.

24 Q No, that's fine.

25

SENTENCING HEARING

1 A Okay.

2 Q You were talking about the statute that uh, references P.S.I.'s uh, being  
3 35-38-1-9.

4 A Yes ma'am.

5 Q Does that statute mandate what you put in your Presentence Report?

6 A Does it mandate? Uhm, I'm gonna look at it. Okay. I don't, I don't, I don't  
7 think it really mandates. I think it's more of a guideline because, for  
8 instance, when it uses the word "may", it says, "the presentence may  
9 include any matter that the probation officer thinks is relevant".

10 Q Okay. So there is nothing in that statute that says, for example, when you  
11 prepare your Presentence Report, you must attach copies of the relevant  
12 case reports to the P.S.I.?

13 A No. That comes from the guidelines from the Judicial Center. That's like  
14 the questionnaire format comes from them.

15 Q Okay. And you indicated that uh, in your limited conversations with Mr.  
16 Nunley uh, he denied that he had done this act?

17 A Yes ma'am.

18 Q And would you expect a person who uh, indicates that they're not guilty of  
19 any criminal offense to show remorse?

20 A I guess I would expect them to want to talk to me and to explain it.

21

22 MS. SCHULTZ: That's all the questions I have.

23 THE STATE (MS. FLANIGAN): I don't have anything on redirect,  
24 Judge.

25

SENTENCING HEARING

1 QUESTION BY THE COURT:

2 Q Okay. So that I'm clear about this, Ms. Harrison. Your recommendation,  
3 if I heard you correctly, you believe the sentences are required by law to  
4 be consecutive?

5 A Uh, yes.

6 Q Okay. And, and that that figured into your recommendation on the  
7 sentence?

8 A Yes. Very much so.

9 Q Okay.

10

11 THE COURT: Any questions on the Court's questions?

12 THE STATE (MS. FLANIGAN): No, Judge.

13 THE COURT: All right. Thank you. Next witness?

14 THE STATE (MS. FLANIGAN): I will call Melissa Albertson to the  
15 stand.

16 THE COURT: Okay. Do you solemnly swear or affirm the  
17 testimony you're about to give shall be the truth and nothing but the truth, so help  
18 you God?

19 WITNESS: I do.

20

21 DIRECT EXAMINATION OF MELISSA ALBERTSON BY STATE (MS.

22 FLANIGAN):

23 Q Please uh, state and spell your name for the record, please.

24 A Melissa Albertson, —e-l-i-s-s-a, A-l-b-e-r-t-s-o-n.

25



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1 Q And how uh, are you familiar with Annie Young?

2 A Yes, she is my niece.

3 Q Okay. And she's not a niece by blood, but she's your brother's step-  
4 daughter?

5 A Yes, that's correct.

6 Q And Annie has lived with you up in Salem since uh, August of 2007. Is  
7 that correct?

8 A That is correct.

9 Q You've had a chance to observe Annie every day?

10 A Yes, I have.

11 Q Okay, and would you consider yourself her primary caregiver at the  
12 current time?

13 A Yes, I am.

14 Q Uh, can you indicate for the Court, you're familiar with the trial and the  
15 case against Mr. Nunley. Is that right?

16 A That's correct.

17 Q And you know we're here today because he was found guilty?

18 A That is correct.

19 Q Okay. Can you indicate for the Court uh, how this event uhm, has  
20 effected Annie?

21 A It has effected her with her sleeping. She uh, wakes up..., she has trouble  
22 going to sleep, and she says the reason why is because she has bad  
23 dreams. And then once she does get to sleep, a lot of nights she wakes  
24 up numerous times in the night crying, and it's because she says that

25

SENTENCING HEARING

1 she's having bad dreams.

2 Q Okay.

3 A But other than that, I can't, you know, we don't, you know, really discuss  
4 that much about it.

5 Q Okay. Were you here when Annie had to come to the trial?

6 A Yes, I was.

7 Q Okay, and was that easy for Annie or was that hard for her?

8 A That was very hard for her.

9 Q And would you say that that had a profound impact on her life?

10

11 MS. SCHULTZ: Objection. I don't know how this uh, witness can  
12 answer that question without some kind of expertise as a therapist, counselor or  
13 some other professional.

14 THE STATE (MS. FLANIGAN): I'll rephrase it.

15 THE COURT: Okay.

16

17 STATE RESUMES DIRECT EXAMINATION OF MELISSA ALBERTSON:

18 Q Ms. Albertson, uhm, you were able to observe Annie each day she came  
19 here to court.

20 A That's correct.

21 Q And can you indicate to the Court how she would act on those days?

22 A She, she did not want to come at all. Uh, she just would, just fuss about  
23 getting ready. She just did not want to be here at all.

24 Q Okay. And after she would testify, can you describe for the Court how she

25

SENTENCING HEARING

1 would be?

2 A She would just really be, be really upset and just would like stay to herself.

3 And she, just really very quiet.

4 Q And, Ms. Albertson, as, as Annie's primary caregiver, do you have a  
5 recommendation to the Court of what you think would be an appropriate  
6 for Mr. Nunley in this case?

7  
8 MS. SCHULTZ: Objection, your Honor. I don't believe that her  
9 recommendation to the Court is appropriate in this case. She has not been  
10 appointed the representative of the child. She certainly isn't a victim. What she  
11 wants is totally irrelevant to what should be imposed.

12 THE STATE (MS. FLANIGAN): Judge, this is a minor child. Uhm,  
13 you have observed her. You know how young she is. Uhm, Ms. Albertson has  
14 put sworn testimony before the Court that she is her primary caregiver. Uhm,  
15 she would uh, be the uh, person who would be her representative, to make a  
16 victim impact statement before this court, and it's uhm, it's something...

17 THE COURT: I am supposed to appoint a relative of the minor  
18 victim. And I don't think that's been done. Uh...

19 MS. SCHULTZ: But, Judge, she isn't a relative even.

20 THE COURT: Is there a relative to be appointed? Is there  
21 anybody? I mean the mother doesn't have custody of the child.

22 THE STATE (MS. FLANIGAN): No.

23 THE COURT: The father of the child is uh...

24 THE STATE (MS. FLANIGAN): He..., the father that was here is

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1 the step-father, so he's of no, and he was never...

2 THE COURT: The natural father or the real father in a biological  
3 sense is uh...

4 THE STATE (MS. FLANIGAN): Missing.

5 THE COURT: Unknown or missing in action. Do we even know  
6 who the real father is?

7 THE STATE (MS. FLANIGAN): We are under the impression it's  
8 Richard uh, Richard Young. But Ms. Caves has given us various different  
9 stories, even fairly recently. So, I'm not sure, Judge.

10 THE COURT: Okay. So her step-father..., is there anyone uh, do  
11 you know, Ms. Harrison, anyone else? Do you...

12 DIANE HARRISON: No. I...

13 THE COURT: ...a recommendation?

14 DIANE HARRISON: I do. I spoke to both Ms. Tonya Caves, the  
15 mother of the victim, and to Melissa. And uh, I absolutely recommend Melissa.  
16 And there's no other family members uh, close to this daughter that are reliable.

17 THE COURT: Anything you want to argue about that before I do  
18 something on that, Ms. Schultz?

19 MS. SCHULTZ: Well, I, I don't, I haven't looked at the statute  
20 recently, but I'm not sure if it requires that the Court appoint a relative or not.  
21 And I, and I guess I would have a preliminary question for the witness. Uhm,  
22 as...

23 THE COURT: Go ahead.

24

25

SENTENCING HEARING

1 **PRELIMINARY QUESTIONS BY DEFENSE:**

2 Q Have you ever petitioned to be appointed the guardian of uh, the child?

3 A No.

4 Q Okay...

5 A No ma'am, I have not.

6 Q So do you have any uh, documentation from the mother which gives you  
7 the authority to act on her behalf? A power of attorney or anything of that  
8 nature?

9 A No. Because I never can get up with her, and that's the only reason why I  
10 have not done that.

11 Q Okay. So she is just staying with you, with the consent of her mother, but  
12 there is no legal authority that you could hold the child if Mom wanted to  
13 come back and get her?

14 A That is correct.

15

16 MS. SCHULTZ: Okay. I don't have any other questions.

17 THE STATE (MS. FLANIGAN): Judge, I've got a question that  
18 might be helpful to the Court.

19 THE COURT: Yeah.

20

21 **EXAMINATION OF MELISSA ALBERTSON BY STATE OF INDIANA (MS.**

22 **FLANIGAN):**

23 Q C.P.S., Child Protective Services...

24 A Yes.

25

SENTENCING HEARING

1 Q Ms. Albertson, they're aware that Annie is in your home and in your  
2 custody. Is that correct?

3 A To my knowledge, yes.

4 Q Yes? And uh, they have made no effort to remove her, they're fine with  
5 that situation?

6 A That is correct. I do know that they have spoken with Annie at the school.

7 Q Okay.

8

9 THE COURT: Okay. Uh, the statute basically starts off saying the  
10 uh, the victim is a minor, the victim's parents or legal guardian may exercise all  
11 the victim's rights. Section three does not apply. Is there a legal guardian  
12 appointed? Do you know?

13 THE STATE (MS. FLANIGAN): There's...

14 WITNESS: Not that I know of.

15 THE STATE (MS. FLANIGAN): Judge, if I may, we attempted to,  
16 during the course of this trial uh, Melissa brought paperwork to have either her or  
17 Richard appointed the legal guardian, and we could not pin Tonya down to get it  
18 executed. So, it is not from lack of trying. I mean currently this child is totally  
19 without any legal guardian. Uh, she is, C.P.S. is aware of where she is...

20 THE COURT: C.P.S.? Is there a current C.P.S. case?

21 THE STATE (MS. FLANIGAN): There is.

22 THE COURT: And is uh, Richard Caves, he's, that's the step-  
23 father, isn't it?

24 THE STATE (MS. FLANIGAN): Yes.

25

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1 THE COURT: Richard Caves and Melissa Albertson, do you two  
2 live together?

3 WITNESS: Yes. He is my brother.

4 THE COURT: Okay, he's your brother?

5 WITNESS: Yes.

6 THE COURT: Okay. Okay, so is he placed, is the child placed with  
7 uh, Richard and Melissa pursuant to the CHINS case?

8 THE STATE (MS. FLANIGAN): It's, I don't know that he, I don't  
9 believe that she's legally placed there. It's an informal adjustment, and I think  
10 that they're uh, know where she is, and that they are okay with that. I don't  
11 believe that Ms. Albertson or Richard have been to court in a CHINS to be  
12 appointed a relative placement.

13 WITNESS: That is correct. We have not.

14 THE COURT: Okay, Ms. Schultz, any other suggestion or  
15 argument or...

16 MS. SCHULTZ: I have no doubt that Ms. Albertson is probably the  
17 best place to be..., this child. I just don't know whether the statute, whether the  
18 Court can appoint her since she isn't a relative.

19 THE COURT: Well, the, I was just looking at that, and uh, it doesn't  
20 look like the parents or legal guardian are capable or willing to exercise the  
21 victim's right on behalf of the victim. So, in the event that, if section three of this  
22 chapter does not apply, which is what I was just talking about, the court shall  
23 consider appointing a relative, shall consider appointing a relative as a lawful  
24 representative. So I think what I'm going to do is appoint Melissa Albertson as

25

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1 the victim's representative. Uh, since it appears there's no other appropriate  
2 person to uhm, to do that. Okay, now uh, I don't, I don't know that, I don't know  
3 that uh, that the uh, first of all, the victim representative or the victim's  
4 recommendation is certainly not binding on the court, if one is made. The, now,  
5 do you have a further objection, Ms. Schultz, if any?

6 MS. SCHULTZ: No.

7 THE COURT: You don't have any objection at this point?

8 MS. SCHULTZ: No, not that I'm...

9 THE COURT: To the question?

10 MS. SCHULTZ: Right.

11 THE COURT: Okay, why don't you restate the question for the  
12 witness?

13

14 STATE RESUMES DIRECT EXAMINATION OF MELISSA ALBERTSON:

15 Q Ms. Albertson, what is uh, do you believe will be the appropriate sentence  
16 or the appropriate punishment for Mr. Nunley?

17 A I feel that the maximum sentence possible would be appropriate.

18 Q And you sat through every day of the trial, right?

19 A Yes, I did.

20 Q Okay, and you dealt with Annie before and after the trial every day?

21 A Yes, I did.

22 Q And you continue to deal with her and care for her?

23 A That is correct.

24

25



SENTENCING HEARING

1 THE STATE (MS. FLANIGAN): That's all I have, Judge.

2 THE COURT: Questions, Ms. Schultz?

3

4 **CROSS EXAMINATION OF MELISSA ALBERTSON BY DEFENSE:**

5 Q Ms. Albertson uh, was Annie living with you at the time that this incident  
6 happened to her?

7 A No.

8 Q Okay. Do you know whether she suffered any physical injuries as a result  
9 of the incident?

10 A Not that I'm aware of, no.

11 Q She hasn't had any on-going physical problems relating to this at all?

12 A Not that I'm aware of, no ma'am.

13 Q So the, the injuries to her would be limited to uh, mental health type  
14 things?

15 A That would be my opinion, yes. And like you said, I'm not a counselor or  
16 anything, you know.

17 Q Okay. So there's been nothing physical; it's only been mental?

18 A Yes.

19 Q And prior to the time that she came into court, what, how was she acting  
20 in your home? Was she a normal uh, kid?

21 A Just a normal uh, eight-year-old little girl. Very happy and very pleased to  
22 uh, be in a stable home, to where she had her own room and her own  
23 personal belongings, yes.

24 Q And before she came into court to testify, was she having nightmares and

25

SENTENCING HEARING

1 difficulty going to sleep?

2 A Yes. All that started, that was going on when she came into my home.

3 Q Okay. So that was not something that was effected by having to uhm,

4 appear and testify in court?

5 A No, because like I say, that was going on prior to coming to the court also.

6 Q Okay. Now we had this trial, I believe it was back in November.

7 A I think so.

8 Q I think we were in, I think it was in November.

9 A I think that, yeah.

10 Q Since that the trial is over and she doesn't have to testify any more, and

11 she's away from the court system, has her behavior improved, or has her,

12 have, have the uh, symptoms, the sleep problems and the nightmares,

13 have they eased up?

14 A No ma'am.

15 Q So that's continuing?

16 A Yes.

17 Q Is she in counseling or therapy now?

18 A No ma'am, she is not.

19 Q Okay. Has she been at all since she's lived with you?

20 A No ma'am.

21 Q And how long has she been living with you?

22 A I think Mrs. uh, Julie, what's her..., stated August of 2007. That's, it's

23 been since August of 2008.

24 Q So she has been living with you for approximately six months?

25

SENTENCING HEARING

1 A Yeah, yes.

2

3 MS. SCHULTZ: All right. I don't have any other questions.

4 THE STATE (MS. FLANIGAN): I have nothing further, Judge.

5 THE COURT: Okay, thank you.

6 WITNESS: Thank you.

7 THE COURT: Next witness?

8 THE STATE (MS. FLANIGAN): I have no further witnesses. I

9 would ask you to take judicial notice of the testimony of the hearing that took  
10 place here on Friday uh, November 13<sup>th</sup>, 2008, specifically the sworn testimony  
11 of Kimberly Simler. And with that I would rest the State's portion of the  
12 sentencing.

13 THE COURT: Any objection to that request?

14 MS. SCHULTZ: I guess the objection that I would have is that I do  
15 not believe that under the state of our law that the court can use that testimony  
16 to establish an aggravator in this case. And I would ask that the court not do so.  
17 Uhm, I understand though that the court has heard that testimony in person, and  
18 you can't remove something from your mind that's already there. So uh...

19 THE COURT: Well, the defendant was present in person,  
20 represented by counsel, and an opportunity to cross exam..., that's...

21 MS. SCHULTZ: That is correct.

22 THE COURT: Okay, all right. Mr. Ingle has something. Uh, we can  
23 stop on this for just a minute.

24 (OFF RECORD)

25

SENTENCING HEARING

1 THE COURT: Okay. Uh, okay, the State has no more witnesses.  
2 Uh, now with respect to that last request uh, the date of the hearing was  
3 November the 13<sup>th</sup>, you said?

4 THE STATE (MS. FLANIGAN): Judge, I, I think that was it. I  
5 remember it being Friday the 13<sup>th</sup>.

6 MS. SCHULTZ: It had to be November 13<sup>th</sup> then.

7 THE COURT: And uh, but in any event, that was a pretrial hearing,  
8 and the uh, and uh, there were two people that ended up testifying that day.  
9 One was Kristen Nunley and one was Kimberly Simler. Is that right?

10 THE STATE (MS. FLANIGAN): That's correct.

11 THE COURT: Okay. That's the way you remember...

12 MS. SCHULTZ: And I believe also the victim in this case testified  
13 that same day too.

14 THE COURT: And the victim in this case, yes. But other than the  
15 victim in this case, it was Kimberly Simler and Kristen Nunley. Kristen Nunley  
16 denied that her father had ever molested her basically, denied that she told Mr.  
17 Wibbels any such a thing. Uhm, uhm, all right. I'm going to take judicial notice  
18 of the testimony of Kimberly Simler. And if you want me to take judicial notice of  
19 Kristen Nunley as well, I will, Ms. Schultz.

20 MS. SCHULTZ: I don't think it really matters.

21 THE COURT: It doesn't matter about that. Okay, all right. Okay,  
22 all right, the State have anything else?

23 THE STATE (MS. FLANIGAN): No, Judge.

24 THE COURT: Okay, okay. Uh, Ms. Schultz, evidence for the

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1 defendant?

2 MS. SCHULTZ: Judge, we would not have any evidence to uh,  
3 present at this time. But we would like to make it clear that my client maintains  
4 today, as he has all along, that he is not guilty of these offenses, even though a  
5 jury has convicted him. And I would have some legal arguments uh, to give to  
6 the court relative to what the sentence should be.

7 THE COURT: All right. So no evidence by the defendant?

8 MS. SCHULTZ: No.

9 THE COURT: Okay. Now, with respect to uh, now with..., now let's  
10 go back, now I've heard all the evidence. Now let's go back to the Presentence  
11 investigation. You made some requests with respect to uhm, uh, allegations  
12 about the uh, or information put in the Presentence Investigation regarding,  
13 regarding uh, the things that Ms. Harrison included in the Presentence  
14 investigation. Uh, and uh, now let's talk about that just a little bit more. Uhm, do  
15 you, does this, does the State have any additional argument about uh..., one  
16 thing was the last two pages. The State's Amended Notice of Intent to Introduce  
17 Extrinsic Evidence at Trial. Uhm, and that had to do with uh, that had to do with  
18 Kimberly Simler and Kristen Nunley. And then also a K.B. Uhm, that's pretty  
19 much it, isn't it?

20 MS. SCHULTZ: Yeah.

21 THE COURT: Okay. All right, does the State have anything else  
22 about that particular one?

23 THE STATE (MS. FLANIGAN): Meaning the last, the very last  
24 exhibit, Judge?

25

SENTENCING HEARING <pageID>

1 THE COURT: Two pages, yeah.

2 THE STATE (MS. FLANIGAN): Just I think that uh, Ms. Harrison  
3 clarified on the record, under oath, why she had included that, that it led her in  
4 the direction to, as part of the research into Mr. uh, Nunley's criminal history or  
5 history of delinquency, which under 35-38-1-9(b)2, she's required to uh, look into  
6 and gather information with respect to that.

7 THE COURT: All right. Ms. Schultz, anything on that?

8 MS. SCHULTZ: Well, when I look at, at this, I still think it all should  
9 be excluded. I don't think the Court should consider that in determining whether  
10 it's an aggra..., whether there's an aggravator or not. But uh, I would note that  
11 paragraph five, which talks about a child named K.B. was not referenced at all by  
12 Ms. Harrison in her testimony. And I believe that is in fact the child that was in  
13 Clark County. Uh, but I don't think there's any evidence of that. Uh, furthermore,  
14 that case looks to be like something that's been investigated for approximately  
15 four years. And I would suggest to the Court that if the State has been  
16 investigating something for three or four years, and hasn't been able to decide  
17 whether to charge or not at this point, then it's probably not a very strong case.  
18 And, and it certainly shouldn't be considered as evidence of aggravator with  
19 respect to that one. I think the same thing goes with re, with respect to the, the  
20 Simler case. Again, it's been investigated for a significant period of time. And if  
21 there isn't enough evidence or hasn't been enough evidence up to this point in  
22 time to charge Mr. Nunley with it, and it's a pretty iffy case, and it should not be  
23 considered as an aggravator. I mean I don't think it should be considered as an  
24 aggravator either, but I think it makes it even more suspect because there's

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1 never been a charge, and the investigation has been ongoing for a significant  
2 period of time.

3 THE COURT: Okay. Anything else?

4 THE STATE (MS. FLANIGAN): Not on that..., those two pages,  
5 Judge.

6 THE COURT: Okay. Uh, okay, I'm going to order paragraph four  
7 has to do with his allegations regarding his daughter. That will be struck. Uhm,  
8 and then the allegations regarding K.B. will be struck. That's paragraph five, at  
9 the request of the defendant. Uhm, paragraph six has to do with the allegations  
10 with uh, are concerning this case. And then uh, K.S., the Court heard evidence,  
11 sworn testimony on that. So, okay, now what else was it that uh, you wanted to  
12 talk about striking that I took under advisement?

13 MS. SCHULTZ: Uhm, the, page six or eight of the Wibbels report.

14 THE COURT: Six of eight of the Wibbels report. Uhm...

15 MS. SCHULTZ: I would ask that all of the references to Kristen  
16 Nunley and allegations of her being abused is stricken. And that's about the  
17 middle half of the report.

18 THE COURT: Okay. Uhm, well, let me just do this, let me just say  
19 that the Court will uh, uhm, not consider the allegations uh, regarding Kristen  
20 Nunley in determining the sentence in any way. Uh, is that good enough?

21 MS. SCHULTZ: Sure.

22 THE COURT: Okay.

23 MS. SCHULTZ: With respect to that person, yeah.

24 THE COURT: Okay. Okay, anything else about the Presentence

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1 that...

2 MS. SCHULTZ: Are you talking about the other ones that we asked  
3 to have deleted?

4 THE COURT: Yes.

5 MS. SCHULTZ: In the uh...

6 THE COURT: Is it good enough to say on the record that I'm not  
7 considering Kristen Nunley's allegations? She came in here and swore under  
8 oath that it never happened. So I'm, as far as I'm concerned, it's not something  
9 for me to consider.

10 MS. SCHULTZ: Well, we had asked that the other uhm, any other  
11 allegations regarding any other child not be considered. Is it the Court's uh,  
12 intention to limit the exclusion to Kristen or is the Court going to exclude other  
13 uh, allegations relative to other non-charged conduct?

14 THE COURT: Well, let me stop for a minute, take a break. Let you  
15 all think about that. I'll come right back and you tell me what's...

16 (OFF RECORD)

17 THE COURT: Okay. So, we've got K.B., which uh, was uh, was  
18 uh, under-aged boys supposedly. Is that...

19 MS. SCHULTZ: They were girls.

20 THE COURT: Girls?

21 THE STATE (MS. FLANIGAN): K.B. was one girl, Judge.

22 THE COURT: I'm sorry?

23 THE STATE (MS. FLANIGAN): K.B. was one girl.

24 THE COURT: Okay. So we've got Kristen Nunley, who denied it.

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1 We've got Ms. Simler, Kimberly Simler who came and testified under oath, was  
2 subject to cross examination. And then we've got the victim in this case. And  
3 then we've got what else? What other children are included in some way in  
4 some of these pages?

5 THE STATE (MS. FLANIGAN): Uh, the only other child that's not  
6 been addressed is uhm, Michelle Cayton's children, who are uhm, Ms...

7 THE COURT: Michelle Cayton's children, boys or girls?

8 THE STATE (MS. FLANIGAN): The boys who were uh...

9 THE COURT: Boys?

10 THE STATE (MS. FLANIGAN): Yeah. And I think what specifically  
11 is referred to here is, "In addition to the above filed charges, the defendant has  
12 two additional child-molesting investigations that are ongoing." One is the Simler  
13 case out of Floyd County, and she testified that the other one is the Cayton case.  
14 But that's a C.P.S. case here in Harrison County.

15 THE COURT: Okay, all right. Okay. Anything else you want...

16 MS. SCHULTZ: We certainly didn't know anything about that, and  
17 there certainly has been no proof in this court that he ever molested those kids.

18 THE COURT: Okay. So with respect to it staying in the  
19 Presentence Investigation, I'm gonna allow it to stay in the Presentence  
20 investigation because it's part of the uh, it's part of the information the Probation  
21 Officer uh, believed was important. Uhm, whether or not the Court will ultimately  
22 determines that it is, is another matter. And that's perhaps arguably part of the  
23 uh, family/social history, or what the Probation Officer believed was the  
24 defendant's uh, alleged criminal behavior. So I'm gonna deny your request to

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1 strike anything further in regard to the Cayton children. Uh, all right, anything  
2 else? Ms. Schultz?

3 MS. SCHULTZ: Not with respect to the earlier deletions we  
4 requested.

5 THE COURT: Okay. So does that take care of everything  
6 regarding the Presentence Investigation?

7 MS. SCHULTZ: I guess so.

8 THE COURT: Okay.

9 MS. SCHULTZ: I mean I, I do not agree with the uh, Probation  
10 Officer's uh...

11 THE COURT: I understand you don't agree...

12 MS. SCHULTZ: ...belief of the consec...

13 THE COURT: ...with her recommendation.

14 MS. SCHULTZ: Oh, I don't...

15 THE COURT: Or their...

16 MS. SCHULTZ: The consecutive versus concurrent sentences.

17 THE COURT: All right. Okay.

18 MS. SCHULTZ: I think she has come to an improper conclusion  
19 there.

20 THE COURT: Okay, I understand, yeah. Okay, now uh, all right,  
21 uhm, no other evidence from the State or the defense? No other discussion  
22 regarding the Presentence Investigation? Argument by the State regarding the  
23 sentence?

24 THE STATE (MS. FLANIGAN): Judge, respectfully, the State would

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1 request that you uh, sentence Mr. Nunley as follows, and I will submit argument  
2 after. With respect to Count 1, the State would ask that you impose a sentence  
3 of forty years executed upon Mr. Nunley. With respect to Count 2, I would ask  
4 for a sentence of forty years executed upon Mr. Nunley. Count 3, forty years  
5 executed upon Mr. Nunley. Count 4, six years executed upon Mr. Nunley. And  
6 Count 5, two years executed upon Mr. Nunley, for a total of a hundred and  
7 twenty-eight years executed. I would ask that those be served consecutively. I  
8 believe that that is proper and lawful under 35-50-1-2, that these...

9 THE COURT: Your request is forty, forty, forty, six and two?

10 THE STATE (MS. FLANIGAN): Yes.

11 THE COURT: Okay.

12 THE STATE (MS. FLANIGAN): And that I believe that that is  
13 proper, these served consecutive under the terms of 35-50-1-2.

14 THE COURT: You're not arguing that it's mandatory?

15 THE STATE (MS. FLANIGAN): I don't think it's mandatory. I think  
16 that if it were the reverse, that if they were not crimes of violence, it would have  
17 to be concurrent.

18 THE COURT: Okay...

19 THE STATE (MS. FLANIGAN): But we are, since they are crimes  
20 of violence, they can be set uh, sentenced consecutively based upon the  
21 aggravators and mitigators.

22 THE COURT: Now just so that we're clear about this and we don't  
23 spend a lot of time on this, because of the timing of the offense, do you agree  
24 that the mandatory minimum non-suspendable is twenty years instead of thirty?

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1 THE STATE (MS. FLANIGAN): Yes, Judge.

2 THE COURT: Okay.

3 MS. SCHULTZ: Yes.

4 THE COURT: Okay. Okay, that, and, and everybody agrees that  
5 the consecutive sentencing is discretionary with the Court?

6 MS. SCHULTZ: Yes.

7 THE COURT: Okay. I'm sorry. Go ahead.

8 THE STATE (MS. FLANIGAN): But, Judge, with respect to the  
9 consecutive and concurrent under 35-50-1-2 uhm, subsection "c" uh, the Court  
10 shall determine whether terms of imprisonment shall be served concurrently  
11 consecutively, may consider the aggravating circumstances and the mitigating  
12 circumstances. I would submit to the Court that there is evidence before the  
13 Court, specifically the ones enumerated by the Probation Officer. One being  
14 prior criminal conduct; two, lack of remorse; and three, position of trust. No  
15 mitigators, that the aggravators would outweigh the mitigators, and that a  
16 consecutive sentence would be uh, appropriate in this case, in that they're  
17 crimes of violence uh, under "A-10", Child Molesting.

18 THE COURT: Okay. Uh, okay, so you're aggravators are history of  
19 criminal behavior uhm, care, care and control of the victim in the offense, and uh,  
20 no remorse?

21 THE STATE (MS. FLANIGAN): Right.

22 THE COURT: Okay. And, all right, anything else?

23 THE STATE (MS. FLANIGAN): No, Judge.

24 THE COURT: Ms. Schultz?

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1 MS. SCHULTZ: Judge, we would ask that the Court uh, sentence  
2 Mr. Nunley to the minimum sentence on each of these. Uhm, and I think it's  
3 probably pretty obvious to the Court at this point that he will be seeking an  
4 appeal on this conviction. And I would ask that you sentence him to the  
5 minimum sentence on each count, and that the sentences be served  
6 concurrently. I believe that one of the significant aggravators, or uh, mitigators in  
7 this case, as revealed by the report of the Probation Department, is that there  
8 has been not reported history of criminal convictions in the past. And I think this  
9 is fairly significant given the age of the defendant. Now I understand that the  
10 Probation Department and the State would argue that there's all this other  
11 conduct going on, and that the Court should consider that as an aggravator  
12 because of the other allegations. The problem that I have with that is that Mr.  
13 Nunley has not been in a position previous to today where he has been able to  
14 contest those allegations. And I understand that he was given the right to cross  
15 examine some of the other witnesses that appeared in Court. But cross  
16 examination in a full contest of the allegations against him are two uh, totally  
17 separate things. I believe in this particular case that if the Court were going to  
18 consider the other allegations of criminal misconduct against Mr. Nunley as an  
19 uh, aggravator, then it would be something that either Mr. Nunley would have  
20 had to have admitted or the jury would have had find that that actually happened,  
21 and that that was an aggravator. I don't think that the Court can, based on what  
22 we've seen here uh, so far in this courtroom with respect to this case, determine  
23 that to be an aggravator. Uh, so I think that the lack of a criminal history uh,  
24 would be a mitigator in this particular case.

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1 Also, with respect to the length of the sentence in the uh, consecutive  
2 versus the concurrent sentencing uh, it is our uh, belief that the Court has  
3 absolute discretion determining whether it should be consecutive or concurrent.  
4 And the only thing that I would want to point out to the Court that there is a  
5 recent case of uh, I want to be sure and get the right name on it..., Mishler uh,  
6 *Mishler versus the State*, which was decided uhm, October 23<sup>rd</sup> of last year,  
7 2008. It is found at 894 N.E. 2<sup>nd</sup>, page 1095. And in that particular case, we had  
8 uh, we see a defendant who engaged in much of the same kind of conduct that  
9 Mr. Nunley has been uh, charged with. Including uh, oral sex on a minor child  
10 and various other sexual-type incidents. However, in the Mishler case, the  
11 defendant was the step-father of the child and not a relative. Mr. Mishler had  
12 allegedly and was convicted of engaging in sexual misconduct on at least two  
13 separate occasions with the child, and he was convicted by a jury. When the  
14 uhm, Court sentence him, he was sentenced to uh, fifty years on each of two "A"  
15 felony molestations, and those sentences were ordered to be served  
16 concurrently. When the Court of Appeals looked at that case and they looked at  
17 it through the eyes of the rule that gives them the right to modify sentences,  
18 uhm, they looked at some of the facts that were involved. They looked at the  
19 fact that the victim claimed that she was molested almost every night. They  
20 looked at the fact that there were multiple incidents with multiple sex acts  
21 involved in each, and they said, "Yeah, this is a bad thing. We don't mean to  
22 make light of what happened, but we believe that a fifty-year concurrent  
23 sentence for two 'A' felonies is inappropriate", and they modified the sentence in  
24 that particular case to include a total sentence for Mr. Mishler of thirty-eight

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1 years, and they modified uh, let me check and make sure. I think it was thirty-  
2 eight years. Yes. And they found Mr. Mishler's sentence to be inappropriate,  
3 remanded the cause to the trial court to revi..., to revise his sentence to thirty-  
4 eight years on each count of Class "A" Felony Child Molesting, to be con, served  
5 concurrently.

6 And, Judge, I, I think that in light of that decision in the uh, way the Court  
7 went through its argument and looked at the facts in the case, I think that this is  
8 the type of uh, a similar case to the one we have today. Although I think that Mr.  
9 Nunley's case should be even a lighter sentence. We have here a situation  
10 where Mr. Nunley was convicted of five separate offenses. And the thing that  
11 sticks out in my mind about all five of these offenses is that each and every one  
12 of them occurred simultaneously, if you will. We don't have a situation where Mr.  
13 Nunley was charged on day one with doing "X" to the child and day two with  
14 doing "B", and day three was doing "C". We have all five offenses that he has  
15 been accused of happening at the same time, at the same incident. We don't  
16 have separate incidences involving these.

17 In, in my experience, in most courts that I've worked in, this person would  
18 have been charged with one sex crime. And not with five separate incidents.  
19 Maybe possibly two separate ones for showing the movies, and then having the  
20 sexual contact. But generally, what I have always seen in the past is a, is one  
21 charge, not heaping it on uh, and charging the one person in one incident with  
22 doing all of these separate things. But that's what we have here and that's what  
23 we have to deal with. I believe that the appropriate sentence for Mr. Nunley  
24 would be concurrent sentences on all of these cases. I believe that he is far

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1 from being the worst of the worst, as they say. I believe that his uh, lack of a  
2 prior criminal history is certainly a mitigator in this case. And for all those  
3 reasons, we would ask that the Court sentence him to the minimum non-  
4 suspendable sentence on each count. And I believe that to be twenty years on  
5 the "A" felonies.

6 THE COURT: Okay.

7 THE STATE (MS. FLANIGAN): Judge, my only response is that  
8 both with respect to going outside of the advisory sentence, again I would argue,  
9 and with respect to the consecutive sentences uhm, I believe that the  
10 aggravators are enough here. And I specifically point to the evidence of  
11 Kimberly Simler, that this is not the first time that Mr. Nunley has done that. Ms.  
12 Schultz makes much of the fact he has no criminal history, but the evidence  
13 before this Court is that there's uncharged criminal conduct. The case law in  
14 Indiana uh, and this specifically, the Indiana Supreme Court has explicitly held  
15 that it's proper for a trial court to use such evidence in determining a sentence,  
16 and that's a prior uncharged uhm, act of child molesting. And that case uhm, is  
17 the *Kelly case*, 452 N.E. 2<sup>nd</sup>, 907, cited in the *Durham* case uhm, and in a case  
18 called *Davies v. State* uhm, which is 730 N.E. 2<sup>nd</sup>, 726. That reiterates also that  
19 uncharged misconduct with other kids is an appropriate thing for a trial court to  
20 decide miti..., or an aggravator. And in that case, there was also a position-of-  
21 trust argument. And those were both seen as aggravators.

22 Uhm, I would also submit that in the *Mishler* case, the Court found some  
23 mitigators. I don't think there's any mitigators in this case. And that uhm, was a  
24 case involving one victim, not what we have here, where the aggravator would be



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1 a separate case involving a completely unrelated victim. So I think Mishler would  
2 not apply in this case.

3 So I would submit, Judge, that with respect to going outside the advisory  
4 sentences uhm, there's a, the aggravators are there for that, and there's also  
5 aggravators to make these consecutive sentences.

6 THE COURT: Okay. Now, Ms. Schultz, tell me again, what do you  
7 believe are the mitigators, if any?

8 MS. SCHULTZ: I believe that the fact that as we look at the  
9 Presentence Report, it indicates there's no prior criminal convictions. And I  
10 believe that no prior criminal convictions in this case, in light of the fact that my  
11 client is in his forties, is a mitigator. I know that there's allegations that have  
12 been made by the State, that he has committed some other acts. I don't believe  
13 that they have shown these. And I think under Blakely, they have to prove this  
14 before they can use it as an aggravator. And I think that the cases that the State  
15 has cited otherwise are all pre-Blakely cases. I don't think there's anything  
16 current. I, she didn't give us the dates, but I believe that they're probably pre-  
17 Blakely.

18 THE COURT: No criminal history, no criminal convictions.

19 MS. SCHULTZ: Right.

20 THE COURT: No criminal convictions. Okay, what, what, what  
21 else? Is that it?

22 MS. SCHULTZ: That's the only one that I'm aware of. I mean he  
23 has minor kids. And, so theoretically, his being incarcerated would uh, cause a  
24 hardship for his children. I don't think that's anything that's got a great deal of

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1 weight in this case. I think it's a uh, mitigator, but not anything that would...

2 THE COURT: You're not arguing that?

3 MS. SCHULTZ: No.

4 THE COURT: All right, okay. Anything else from the State on  
5 argument?

6 THE STATE (MS. FLANIGAN): No. No, Judge.

7 THE COURT: By the defense on argument? Does the defendant  
8 wish to make any statement prior to sentencing?

9 MS. SCHULTZ: No, Judge, he does not.

10 THE COURT: The defendant does not wish to make any statement  
11 prior to sentencing. Uhm, okay, and the Court finds the defendant is a sexually  
12 violent predator pursuant to 35-38-1-7.5, by operation of law. The defendant is  
13 ordered to undergo H.I.V. testing, 35-38-1-10.5. It's required by law. The  
14 defendant is ordered to register as a sex offender for life, 11-8-8-19(b), 11-8-8-7,  
15 35-38-2-2.2. The defendant is ordered not to reside within one thousand feet of  
16 school property, 35-38-2-2.2, subsection 2. The defendant is ordered not, is  
17 ordered to not reside within one mile of the uh, victim in this case, initials A.Y.,  
18 while on parole, if he ever is on parole uhm, or probation. Court costs are  
19 imposed. Sexual Assault Victim's Fee of two hundred and fifty dollars is  
20 imposed. As I previously indicated uh, Melissa Albertson is appointed as the  
21 victim's representative. The Court finds uh, no mitigating circumstances. The  
22 Court finds that the defendant, under "A-8", it's an aggravator, that the person  
23 was in a position of having care, custody or control of the victim of the offense,  
24 and the Court finds that the defendant was in a position of having care and

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1 control of the victim of this offense uh, at the time the offenses were committed.  
2 The uh, Court finds that the defendant does have a history of criminal behavior  
3 and specifically I'm talking about Kimberly Simler. The Court heard sworn  
4 testimony with respect to uh, the offenses that uh, the defendant allegedly  
5 committed Kimberly Simler. That the defendant was present, the defendant's  
6 attorney was present, and the witness was subject to cross examination.

7 Uh, now uh, with respect to the uh, defendant's sentences uh, the  
8 sentence with respect to Count 1, the Court is ordering the defendant to serve a  
9 sentence of thirty-five years. With respect to Count 2, the Court is ordering the  
10 defendant to serve a sentence of thirty-five years. With respect to Count 3, the  
11 defendant is ordered to serve a sentence of thirty-five years. With respect to  
12 Count 4, the sentence will be four years and eight months. And with respect to  
13 uh, Count uhm, 5, the Court is ordering the defendant to serve a sentence of  
14 twenty-one months. With respect to the consecutive or concurrent uh, on the  
15 sentences, the Court finds it's appropriate, based upon the circumstances of this  
16 case, and the aggravating circumstances in particular, that the defendant, Count  
17 1, the sentence will be, Count 1 and Count 2, Count 1, Count 2, Count 4 and  
18 Count 5 will be consecutive. Count 3 will be concurrent to Counts 1 and 2. The  
19 only sentence that's concurrent is Count 3. The defendant is entitled to credit for  
20 time served since, Mr. Jailer..., that's right there. Let's see, the defendant has  
21 been incarcerated since May the 29<sup>th</sup>, 2008, is what I've got. Do you have  
22 anything different on that? Uhm, Ms. Schultz or Mr. Nunley, May 29<sup>th</sup>, 2008 is  
23 what I've got that he's been in jail since then on this case.

24 MS. SCHULTZ: Yes, he has been.

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1 THE COURT: Okay. Now uh, okay, now the uh, the Court is  
2 required to inquire and advise the defendant that he's entitled to take an appeal  
3 or file a Motion to Correct Errors. If he wishes to file a Motion to Correct Errors  
4 or an appeal, it must be done within thirty days of the sentencing, or thirty days  
5 after the ruling on the Motion to Correct Errors. You must file a Notice of Appeal  
6 and uh, designate what is to be included in the record on appeal within thirty  
7 days of sentencing. That's today. As I've already said, if uh, Notice of Appeal is  
8 not timely filed, the right of appeal will be forfeited. If you're financially unable to  
9 employ an attorney, the Court will appoint an attorney to represent you at public  
10 expense for the purpose of uh, perfecting your appeal, filing a Motion to Correct  
11 Errors and taking whatever actions are necessary in that regard. What is the  
12 defendant's intention regarding an appeal?

13 MS. SCHULTZ: Mr. Nunley has indicated to me that he would to  
14 appeal. And since he is incarcerated, he has no funds with which to hire an  
15 attorney, and would ask that the Court appoint an attorney for him.

16 THE COURT: All right. Uh, Mr. Nunley uh, do you solemnly swear  
17 or affirm the testimony you're about to give shall be the truth and nothing but the  
18 truth, so help you God?

19 DEFENDANT: Yes sir.

20 THE COURT: Do you own a house?

21 DEFENDANT: No sir.

22 THE COURT: Do you own a vehicle?

23 DEFENDANT: No sir.

24 THE COURT: Do you have any money with which to hire an

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1 attorney?

2 DEFENDANT: No sir, I sure don't.

3 THE COURT: Any way to hire an attorney?

4 DEFENDANT: No sir.

5 THE COURT: All right. Mr. McGovern is appointed to represent the  
6 defendant on appeal. The Court Reporter is directed to notify Mr. McGovern of  
7 his appointment. And uh, okay, now there were, I think, some other cases. Uh,  
8 there were some other cases that I think are pending. There's CM-24 and CM-  
9 886. One was an Invasion of Privacy, and one was a Domestic Battery. And I  
10 think both are uh, were continued pending the outcome of this case. There was  
11 a Bench Trial, I guess, at one time scheduled.

12 MS. SCHULTZ: Did we continue them until after the...

13 THE COURT: Resolution...

14 MS. SCHULTZ: Resolution of this case.

15 THE COURT: All right. So uh, what about uh, what about the uh,  
16 what's the defendant's..., shall we schedule a trial date?

17 THE STATE (MS. FLANIGAN): Judge, I'm going to dismiss this  
18 counts in interest of justice.

19 THE COURT: All right. The State's moving to dismiss both 24 and  
20 886?

21 THE STATE (MS. FLANIGAN): Yes.

22 THE COURT: All right. Okay, those cases are dismissed on the  
23 State's motion. Uhm, all right. Let's see uh, now uh, I know, there were some  
24 bonds posted. It looks one was posted by Jason Nunley. And the other one was

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1 uh, an insurance, a surety bond. Okay. Is there anything further on any of these  
2 cases by the State? Or the defendant?

3 THE STATE (MS. FLANIGAN): No, Judge.

4 MS. SCHULTZ: No, Judge.

5 THE COURT: Okay. And I think that means we're finished with  
6 that.

7 (END OF SENTENCING HEARING)

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COUNTY OF HARRISON  
IN THE HARRISON SUPERIOR COURT

STATE OF INDIANA

VS.

LAWRENCE E. NUNLEY

CAUSE NO. 31D01-0805-FA-389

REPORTER'S CERTIFICATE

I, Karen Hamilton, Court Reporter of the Harrison Superior Court, Harrison County, State of Indiana, do hereby certify that I am the Court Reporter of said court, duly appointed and sworn to report the evidence of causes tried therein.

That upon the Sentencing Hearing of this cause, beginning on the 15<sup>th</sup> day of January, 2009, I recorded and transcribed all statements of counsel, the evidence given during said hearing, the objections of counsel and the rulings of the Court upon such objections.

I further certify that the foregoing transcript, as prepared, is full, true correct and complete of the Sentencing Hearing.

IN WITNESS THEREOF, I have hereunto set my hand and affixed my Official Seal this 11<sup>th</sup> day of May, 2009.

*Karen Hamilton*

KAREN HAMILTON,  
COURT REPORTER  
HARRISON SUPERIOR COURT  
HARRISON COUNTY, INDIANA

SEAL