ORIGINAL

IN THE
COURT OF APPEALS OF INDIANA

CAUSE NO. 31A01-1703-PC-547

Lawrence Nunley, #198710

Appellant/Petitioner,

vs.

State of Indiana,

Appellee/Defendant.

Appeal from the Superior Court
Of Harrison County

Trial Cause: 31D01-1009-PC-011

The Honorable
Joseph Claypool
Presiding Judge

BRIEF OF APPELLANT

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

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JURISDICTIONAL STATEMENT

The Indiana Court of Appeals has jurisdiction over this Appeal, pursuant to **Ind. Appellate Rule 5(A)** and **Ind. Post-Conviction Rule 1(7).** This appeal arises from the trial court's denial of Nunley's Petition for Post-Conviction Relief.

STATEMENT OF THE ISSUES

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

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

STATEMENT OF THE CASE

Nature of the Case

This is an appeal from the denial of a post-conviction relief.

Course of Proceedings

On May 19, 2008, Mr. Nunley was charged with Counts I-III, Child Molesting as Class A felonies; Count IV, Child Molesting, a Class C felony; and Count V Disseminating Matter Harmful to a Minor, a Class D felony. (DA 9-13, App. Vol. III, p. 81).[1] Between November 18, 2008 and November 21, 2008, a jury trial was held. At the conclusion of the jury trial, Mr. Nunley was found guilty on all counts. (DA 71-75, App. Volume III, p. 81). On January 15,

[1] References to the original record will be to "R"; references to the Direct Appeal appendix will be to DA; References to the post-conviction hearing transcript will be to "PC" and References to the post-conviction Appendix will be to "App."

2009, Mr. Nunley was sentenced to 35 years incarceration on each Counts I-III; 4 years and 8 months on Count IV; and 21 months on Count V. The Court Ordered Count III to run concurrently with Counts I and II, but all other counts were ordered to be served consecutively, for an aggregate 76 years and 4 months. (R. 911, DA 83, App. Volume III, p. 81).

On September 24, 2010, Mr. Nunley filed a Petition for Post-Conviction Relief and requested the Assistance of the State Public Defender. Michael Sauer, a Deputy State Public Defender, filed an appearance but subsequently withdrew with this Court's approval. App. Vol. III, p. 82). The State filed its answer on October 14, 2010. (App. Vol. II, p. 24). Final Amendments to the petition were filed on January 14, 2016. (App. Vol. II, p. 70). The State filed its answer to the amended petition on January 22, 2016. (App. Vol. II, p. 70). The State generally denied the material allegations and did not plead any affirmative defenses. (App. Vol. II, p. 70).

Evidentiary hearings were held on July 14, 2016 and January 12, 2017. (App. Vol. II, pp. 5, 7). During the hearing, Nunley entered the original record on appeal. He also presented the live testimony of his trial and appellate attorneys. (PC Vol. II, pp. 22-46). The State did not pose any questions of trial counsel. (PC Vol. II, p. 35). The only questions posed to appellate counsel were related to the State Public Defender's withdrawal. (PC Vol. II, pp.43-44). The post-conviction court gave the parties 30 days to tender proposed findings of fact and conclusions of law. (PC Vol. II, p.46). Nunley timely tendered his proposed findings on February 3, 2017). (App. Vol. III, pp. 50-80). The State did not tender any legal arguments to the post-conviction court. (App. Vol. II, p. 7). On March 2, 2017, the post-conviction court denied the Petition for Post-Conviction Relief. (App. Vol. III, p. 83).

STATEMENT OF THE FACTS RELEVANT TO THE ISSUES

The post-conviction court did not make any findings regarding the substantive facts related to the issues. (App. Vol. III, pp. 81-83). The State did not tender any evidence at the post-conviction hearing and did not make any arguments related to the issues. Thus, the uncontroverted substantive facts, tendered by Nunley are as follows:

> ***Substantive Facts***
>
> 4. Ms. Susan Schultz was appointed by the court to represent Mr. Nunley, in cause number 31D01-0805-FA-389, during the pretrial, trial, and sentencing phases of the proceedings.
>
> 5. Ms. Schultz testified at the evidentiary hearing that she met with Mr. Nunley multiple times, conducted depositions to ascertain the facts, and developed a general trial strategy to show that Mr. Nunley did not commit the crimes alleged.
>
> 6. In 8(a)(1) and 9(a)(1) of the petition, Mr. Nunley alleges that trial counsel was ineffective for failing to impeach A.Y.
>
> 7. Ms. Schultz was queried about A.Y.'s testimony. Ms. Schultz testified that there was no medical, forensic, or scientific evidence implicating Mr. Nunley in the alleged criminal activity. Ms. Schultz further testified that the only inculpatory evidence against Mr. Nunley was A.Y.'s testimony.
>
> 8. Therefore, Ms. Schultz testified that she viewed A.Y. as a critical witness and that she held that view going into trial.
>
> 9. Ms. Schultz conducted a deposition of A.Y. but she did not use the deposition to impeach A.Y. at trial. However, Ms. Schultz testified at the evidentiary hearing that she had an obligation to impeach A.Y. since she was a critical witness. Ms. Schultz also admitted that A.Y. did not testify consistently with her deposition testimony.
>
> 10. Although Ms. Schultz could not recall whether or not she impeached A.Y., the trial record unequivocally demonstrates that she did not impeach A.Y. (R. 417-500). For instance, A.Y. testified during her deposition that [], her mother told her what to remember and what to say to the police. (DA 215). Then she denied that her mother told her what to say. (DA 215). A.Y. testified during her deposition that she spent the night with Nunley lots of times, but that this was the first time she had done so without her mother. (DA 206-207). A.Y. also said that the only thing she could remember was Nunley licked her pee pee and she screamed. A.Y. did not remember seeing or touching Nunley's genitalia. (DA 218-21, 223, 231, 238, 239). A.Y. could not remember what she wrote down on a piece of paper. (DA 213, 239).She also

testified during her deposition that Nunley did not hurt her.(DA 240). The deposition testimony differs from A.Y.'s trial testimony. (R. 417-500). Other inconsistencies regarding the details of the events also arise between the deposition and trial testimonies.

11. Discrepancies exist about: (1) the time of day A. Y. arrived at Mr. Nunley's residence (DA 207-208, 210, 211, 229-230, 233, Pretrial Hearing 29, R. 459-461); (2) who was at Mr. Nunley's home when A.Y. arrived (DA 207, 208, 210, 229, 230, 231, 233; R. 427, 428, 459, 460, 461, 498); (3) the reason A.Y. ended up in Mr. Nunley's bedroom (Pretrial Hearing 23, 32; R. 430, 463-465); what was written on the note (DA 213, 231, 239; Pretrial Hearing, p. 36-39, 86; R. 435, 441-443, 448-451, 477, 479-480).

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

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

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

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

16. When the trial resumed, A.Y. was permitted to respond to questions in writing. (R. 441-443). Those writings were entered into evidence as "Joint Exhibits or Court's exhibits because they're in effect testimony." (R. 444). After the lunch recess, A.Y. wrote down an answer to a question and then read it out loud. (R. 450). That written statement was entered as State's Exhibit 5. (R. 454). A.Y. later drew a picture of Nunley's penis, which was entered as Joint Exhibit 3. (R. 493). A.Y. described Nunley's penis as soft and approximately ten inches in length. She claims to know because she counted the numbers on a ruler. (R. 493; Joint Exhibit 3).

17. A.Y. was permitted to provide written testimony without objection from counsel. (R. 441-443, 450, 454, 493). In fact, defense

counsel caused Joint Exhibit 3 to be introduced into evidence. A.Y.'s written testimony was sent to the jury room (R. 455).

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

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

20. In 8(a)(3) and 9(a)(3) of the petition, Mr. Nunley alleges that Ms. Schultz was ineffective for failing to object to violation of the separation of witnesses order. During A.Y.'s testimony, the trial was recessed for lunch. (R. 445). Immediately after the recess, the prosecutor advised the court that A.Y. was there with her parents, who were also witnesses. (R. 445-446). The judge instructed the prosecutor to go to lunch with A.Y. and her parents so that the prosecutor could inform the court that the separation of witnesses' violation was harmless. (R. 446). The State agreed. (R. 446). Defense counsel did not object to the violation of the separation of witnesses or the State's ex parte communication with witnesses during the trial. After the lunch break, A.Y. answered questions that she had previously refused to answer.(R. 449-450).

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

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

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

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

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

25. In 8(a)(5) and 9(a)(5) of the petition, Mr. Nunley alleges that Ms. Schultz should have objected to the vouching testimony of William Wibbels. Detective Wibbels vouched for the credibility of A.Y. when he testified that he did not feel that A.Y. had been coached and that he believed her. Such testimony unduly prejudiced Nunley because it validated the testimony of the State's key witness. Trial counsel did not object to this testimony, request an admonishment, or motion for a mistrial.

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

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

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

29. Mr. McGovern testified that he read the trial transcript and confirmed that A.Y. was permitted to write down a portion of her testimony. Prior to Mr. Nunley's trial, Mr. McGovern had never seen a witness write down a portion of their testimony. He further testified

> that it was very unusual, and that it is improper for the court to cause the jury to place undue emphasis on the testimony or part of the testimony of a particular witness. Mr. McGovern characterized the written testimony as the most critical portion of A,Y,'s testimony. Mr. McGovern could not recall whether he considered the possibility that the written testimony added to A.Y.'s credibility.
>
> 30. Mr. McGovern had no specific recollection about whether or not he researched the issues that Mr. Nunley claims he should have raised.
>
> 31. Mr. McGovern testified that he was not familiar with *Bowling v, State* and did not recall whether or not he researched a potential double jeopardy issue.
>
> 32. The State presented no evidence in support of the affirmative defenses of *res judicata*, waiver, and laches.
>
> 33. Additional facts will be supplied as needed in the Conclusions of Law section below.

(App. Vol. III, pp. 52-58).

During the post-conviction hearing, Nunley presented the live testimony of his trial and appellate attorneys: Susan Schultz and Matthew McGovern, respectively. Ms. Schultz testified that she conducted depositions in preparation for trial, including a deposition of the alleged victim, A.Y. (PC Vol. II, p. 26, 28). She explained that depositions can be used for the purposes of impeachment or formulating questions for the witness. (PC Vol. II, p. 26). She also admitted that her trial strategy was to convince the jury that the A.Y., was lying about what happened. (PC Vol. II, p. 27). She recalled that there was no medical, forensic, or scientific evidence in this case. (PC Vol. II, p. 27). She unequivocally stated that the only way Nunley could be convicted was if the jury believed A.Y.'s testimony. (PC Vol. II, p. 27). She characterized A.Y. as a critical witness. (PC Vol. II, p. 28). She also testified that she believed she had an obligation to point out inconsistencies in A.Y.'s testimony. (PC Vol. II, p. 28).

Ms. Schultz further testified that A.Y. was permitted to write down a portion of her testimony and that portion of her testimony was entered into evidence. (PC Vol. II, p. 30). She

could not recall a similar instance, in her 35 years of experience, where a witness was permitted to write down a portion of her testimony. (PC Vol. II, p. 30). She further admitted that since the jury was permitted to take exhibits with them to the jury room, it placed undue emphasis on that portion of A.Y.'s testimony. (PC Vol. II, p. 31).

Mr. Nunley's appellate counsel, Matthew McGovern, also testified that he had never seen an instance in which a witness was permitted to write down a portion of their testimony. (PC Vol. II, p. 37). He thought it was unusual and believed it could have placed undue emphasis on that portion of her testimony. (PC Vol. II, p. 38). He did not think it was appropriate. (PC Vol. II, p. 38). He had no recollection of considering the issue for presentation on appeal. (PC Vol. II, p. 38, 39). He also could not recall considering a double jeopardy issue, and he was not familiar with *Bowling v. State*. (PC Vol. II, p. 42).

In the interest of brevity and in order to avoid needless repetition, additional facts will be supplied during the argument sections of this brief.

SUMMARY OF THE ARGUMENT

I. Initially, Mr. Nunley contends that the State waived any possible argument against him because the State failed to present any evidence or argument against Mr. Nunley during the post-conviction proceedings. The State did not even cross-examine Mr. Nunley's witnesses. The State only asked appellate counsel a few questions and all of the questions were related to the State Public Defender's Office. The State did not question appellate counsel about his performance or strategic choices. Trial counsel was ineffective for failing to impeach the State's key witness, A.Y. Trial counsel testified at the post-conviction hearing that her strategy was to demonstrate to a jury that A.Y. was lying about the allegations. Trial counsel admitted

that she had an obligation to impeach A.Y. and that her failure to impeach A.Y. was not strategic.

Trial counsel was also ineffective for failing to object to A.Y.'s being permitted to write down the most critical portion of her trial testimony. The trial court introduced this written testimony into evidence and it was available to the jurors during deliberations. Therefore, the written testimony placed undue emphasis on that portion of the testimony. Trial counsel testified that it placed undue emphasis on the testimony but did not offer any strategic reason for her failure to object.

Trial counsel was also ineffective for failing to object to the admissibility of State's Exhibit 2, a DVD of the movie *Sex Tutor*. The State failed to adhere to the rules of authentication. Therefore, if counsel had interposed an appropriate objection, the DVD would not have been admitted into evidence. Without this evidence, the jury might not have convicted Mr. Nunley.

Trial counsel was ineffective for failing to object to a violation of witnesses order. During her testimony, A.Y. was permitted to have lunch with her parents, who had not yet testified. When A.Y. retook the stand, she answered questions that she would not previously answer. The separation of witnesses of order should have been adhered to and an appropriate objection would have caused the court to enforce its order. Trial counsel did not have a strategic reason for not objecting.

Trial counsel was ineffective for failing to object to the vouching testimony of William Wibbels. Trial counsel did not have a strategic reason for not objecting to this testimony. This testimony bolstered the credibility of A.Y. Counsel testified at the post-conviction hearing and

told the jury during the trial that this case hinged on whether or not the jury believed A.Y.'s testimony. Thus, trial counsel was ineffective in this regard.

II. Appellate counsel was ineffective for failing to raise the issue regarding the denial of defense well. Specifically, Mr. McGovern should have advanced an argument that state procedural rules cannot be mechanistically applied to preclude a complete defense. Appellate counsel was also ineffective for failing to raise issues. First, appellate counsel should have raised the following sentencing issues: (1) double jeopardy violation, (2) use of improper aggravators, and (3) the appropriateness of the sentence. Under the then current precedent, all of the acts Mr. Nunley was alleged to have committed were part and parcel of a single confrontation with a single victim. Thus, the sentences violate double jeopardy principles. The trial court found two (2) aggravating circumstances: (1) Mr. Nunley was in a position of care, custody or control of the victim, and (2) Mr. Nunley's "criminal history," identified as prior allegations for which Mr. Nunley was never arrested or charged. The court found no mitigating circumstances. Mr. Nunley was sentenced to consecutive terms of incarceration. Appellate counsel's decision to omit these issues was not strategic. Rather, appellate counsel was unfamiliar with the precedent related to double jeopardy and simply did not present the improper aggravator/inappropriate sentence argument.

ARGUMENT I: INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL

The State's Waiver

Mr. Nunley anticipates that the State will attempt to argue against his issues on appeal. However, Mr. Nunley contends that all arguments tendered by the State should be considered waived. During the post-conviction proceedings, the State did not present any evidence or legal argument. Moreover, the State only cross examined a single witness – Matthew McGovern, Mr.

Nunley's direct appeal attorney. The State did not query Mr. McGovern about his performance on appeal or about facts in the record. Rather, the entire questioning was related to the withdrawal of post-conviction counsel.

As a general rule, issues not raised at the trial court level are waived on appeal. *Reemer v. State,* 835 N.E.2d 1005, 1007, n.4 (Ind. 2005); *Ealy v. State,* 685 N.E.2d 1047, 1050 (Ind. 1997). The State is not exempt from this rule. For instance, Our Supreme Court has found that the State was precluded from asserting a waiver defense because it had not made the argument at the post-conviction hearing. *Van Evey v. State*, 499 N.E.2d 245, 246 (Ind. 1986). Other instances of the State's waiving its arguments can be found in the opinions of this Court. *See, e.g., Merritt v. State*, 803 N.E.2d 257, 261 (Ind. Ct. App. 2004), *State v. Friedel*, 714 N.E.2d 1231 (Ind. Ct. App. 1989), and *Stewart v. State*, 548 N.E.2d 1171 (Ind. Ct. App. 1990).

In some instances, the State's general denial in response to the post-conviction might permit the State to argue against a petitioner on appeal. However, in this case, the State should not be permitted to advance any arguments. The State failed to contest Mr. Nunley's evidence. The State did not pose a single question related to Mr. Nunley's claims. The State failed to present any defenses. The State failed to advance a legal argument against Mr. Nunley. Thus, the State waived its right to present any legal argument to this Court by failing to present evidence or argument against Mr. Nunley at the trial court level.

Standards for Ineffective Counsel

The right to effective counsel is rooted in the Sixth Amendment of the United States Constitution. *Taylor v. State*, 840 N.E.2d 324, 331 (Ind. 2006). "The Sixth Amendment recognizes the right to the assistance of counsel because it envisions counsel's playing a role that is critical to the ability of the adversarial system to produce just results." *Strickland v.*

Washington, 466 U.S. 668, 685 (1984). "The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Id.* at 686.

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

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

> [T]he reviewing court should be particularly sensitive to the need for separating the wheat from the chaff in appellate advocacy and should not find deficient performance where counsel's choice of some issue over others was reasonable in light of the facts of the case and the precedent available to counsel when the choice was made.

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

Failure to Impeach A.Y.

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

The post-conviction court found that "[t]he decision of how, when or even if to impeach a distraught minor witness is related directly to the trial strategy of counsel and anticipating and

observing the jury's reactions of that moment in time." (App. Vol. III, p. 82). However, this was not a strategic consideration. In fact, Ms. Schultz believed that she had an obligation to point out inconsistencies in A.Y.'s testimony. (PC Vol. II, p. 28). Thus, the conclusion of the post-conviction court contravenes the evidence and precedent. As one federal court put it, "It is not the roles of a reviewing court to engage in post hoc rationalization for an attorney's actions "by constructing strategic defenses that counsel does not offer." Or engage in Monday morning quarterbacking. *Harris v. Reed*, 894 F.2d 871, 878 (7th Cir. 1990). Our Supreme Court has similarly found that "even if a decision is hypothetically a reasonable strategic choice, it may nevertheless constitute ineffective assistance if the purported choice is actually "made due to unacceptable ignorance of the law or some other egregious failure rising to the level of deficient attorney performance. *Brewington v. State*, 7 N.E.3d 946 (Ind. 2014), (Section III(C)).

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

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

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

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

This is exactly what occurred in this case. During her opening statements, Ms. Schultz informed the jury "This whole case, the whole issue revolves around whether she's a credible witness, whether you can believe her or not. And, as I said, if you believe her, then he should be found guilty. If you don't believe her, then he should be found not guilty." (R. 45). Ms. Schultz affirmed during her post-conviction testimony that A.Y. was a critical witness and that her strategy was to persuade the jury that her story was fabricated. (PC Vol. II, p. 26, 28) Thus, impeaching A.Y. was critical to successfully defending Mr. Nunley. PC Vol. II, p. 26, 28) If the jury had the opportunity to consider A.Y.'s inconsistent deposition testimony and pretrial statements, they likely would not have believed A.Y.'s testimony. This is particularly true of the testimony relating to Count 2.

"A failure to impeach constitutes ineffective assistance when there is a reasonable probability that, absent counsel's failure, the jury would have had a reasonable doubt of the petitioner's guilt." *United States v. Orr*, 636 F.3d 944, 952 (8th Cir. 2010), *quoting Whitfield v. Bowersox*, 324 F.3d 1009, 1017 (8th Cir. 2010).

"In cases which turn largely on questions of credibility… '[t]he jury's estimate of the truthfulness and reliability of a witness may well be determinative of guilt or innocence, and it is upon such subtle factors as the possible interest of the witness in testifying falsely that a defendant's life or liberty may depend.'" *State v. Bowens*, 722 N.E.2d 368, 370 (Ind. Ct. App. 2000), *quoting Lewis v. State*, 629 N.E.2d 934, 937-938 (Ind. Ct. App. 1994).

Under Ind. Evidence Rule 613, a witness's credibility may be attacked by showing that at some time before testifying, the witness made a statement inconsistent with her trial testimony. Ind. Evidence Rule 801(d)(1)(A) excludes from the definition of hearsay sworn

inconsistent statements made in a prior legal proceeding, including a deposition, if the declarant testifies at trial and is subject to cross-examination.

The Indiana Rules of Evidence do not define the term, "inconsistent," and Indiana case authority offers no clear test fro determining whether a prior statement is sufficiently inconsistent with trial testimony to justify its admission. Miller, *Indiana Evidence*, §§ 613.101 and 801.407 (3rd Ed. 2007). Cases decided under the federal rules suggest that a prior statement need not flatly contradict in-court testimony to be deemed inconsistent. Miller, § 801.407. The additional safeguards provided by Rule 801(d) (prior statement made under oath, right to cross-examine) appear to justify a generous definition of inconsistency. *United States v. Bingham*, 812 F.2d 943, 946 (5th Cir, 1987).

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

A.Y. made a number of statements that were inconsistent with her trial testimony, including "denying recollection" of events that she claimed happened to her. (DA 218-221, 231-232, 238-239).

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

A.Y.'s trial testimony was the crux of the case against Mr. Nunley, and trial counsel's strategy was to demonstrate to the jury that A.Y.'s account was fabricated. Ms. Schultz testified that she did not have a strategic reason for failing to impeach A.Y.; therefore, Ms. Schultz's

failure to impeach A.Y. was constitutionally deficient performance, resulting in prejudice to Mr. Nunley.

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

Mr. Nunley alleges that Ms. Schultz should have objected to A.Y.'s being permitted to write down a portion of her testimony, which was then entered into evidence and made available to the jury during deliberations. Ms. Schultz had no recollection of whether or not she objected, but she agreed with Mr. Nunley's proposition that the written testimony placed undue emphasis on A.Y.'s testimony. (PC Vol. II, p. 31). Ms. Schultz also admitted that A.Y.'s testimony was critical to the State's case. (PC Vol. II, p. 28). Ms. Schultz offered no strategic reason for failing to object.

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

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

"However, recognizing the potential trauma facing a child in court, Indiana trial courts have permitted children to testify under special conditions despite the possibility that it would emphasize their testimony." *Id.* at 5. The *Schaffer* Court went on to note that the appellate courts have upheld decisions to allow children to testify with a support person sitting behind

them[3], a guardian sitting next to them[4], or via two-way, closed-circuit television[5]. *Id.* "As a result, the manner in which a party is entitled to question a witness of tender years especially in embarrassing situations is left largely to the discretion of the trial court. We will reverse the trial court's if there is a clear abuse of such discretion." *Id.*

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

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

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

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

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

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

interposed an objection to the jurors' being allowed to rewatch the Comfort House video outside of the courtroom on the grounds that it placed undue emphasis on the importance of the testimony over other evidence. (R. 615). The then presiding judge sustained the objection with a lengthy explanation, stating that the law prohibits the jury from rehearing testimony without a specific request and then only when there is a dispute about the testimony. (R. 616-618).

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

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

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

Separation of Witnesses Violation

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

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

Mr. Nunley is mindful of the Supreme Court of Indiana's view on a separation of witnesses order. In *Jiosa v. State*, 755 N.E.2d 605 (Ind. 2001), our Supreme Court stated: "Where a party is without fault and a witness disobeys an order directing a separation of witnesses, the party shall not be denied the right of having the witness to testify, but the conduct of the witness may go to the jury upon the question of his credibility." *Id.* at 607.

But, the *Jiosa* court went on to note that the exclusion of testimony for a violation of a separation order when there is "consent, connivance, procurement, or knowledge of the party seeking the witness' testimony." *Id.* at 607-608 (internal federal citations omitted).

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

In this case, the prosecuting attorney went to lunch with A.Y. and her parents. A.Y. was in the middle of her testimony and had refused to answer multiple questions. When she returned to the stand after the recess, she answered questions that she previously would not answer.

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

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

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

Failure to Object to State's Exhibit 2

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

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

The State attempted to use A.Y., a witness with purported knowledge of the DVD, to authenticate the DVD in accordance with the rules of evidence. Ind. Evid. R. 901(b)(1). A.Y. testified that State's Exhibit 2 was the DVD that Nunley showed her (R. 432). However, A.Y. did not view the DVD, had not marked the DVD, and did not identify the name of the DVD that Nunley was alleged to have shown her. When asked how she knew it was the same DVD, A.Y. testified, in part, "I had it memorized, but I don't remember it now." (R. 469).

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

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

Failure to Object to Vouching Testimony

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

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

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

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

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

Cumulative impact

Strickland demands that courts assess the cumulative impact of errors, rather than simply considering the errors individually. This court finds that nature of the errors are significant and that the errors operate in tandem to deny Mr. Nunley a due process of law and a fair trial as

guaranteed by the Sixth and Fourteenth Amendments of the Untied States Constitution. Therefore, even if the prejudice to Mr. Nunley was not significant enough to mandate reversal on an individual error, the totality of error certainly does.

ARGUMENT II: INEFFECTIVE ASSISTANCE OF APPELLATE COUNSEL

Appellate Counsel's Failure to Raise Issues Well

Mr. Nunley asserts that Mr. McGovern did not raise the issue regarding the denial of defense well. Specifically, Mr. Nunley contends that Mr. McGovern should have advanced an argument that state procedural rules cannot be mechanistically applied to preclude a complete defense.

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

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

The defendant's constitutional right to present a defense must not be abridged by evidence rules that are arbitrary or disproportionate to the purposes they are designed to serve. *Holmes v. South Carolina*, 547 U.S. 319, 3.26 (2006).

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

> The excluded testimony was highly relevant to a critical issue in the punishment phase of the trial .... [S]ubstantial reasons existed to assume its reliability. ... The statement was against interest ... .

> Perhaps most important, the State considered the testimony sufficiently reliable to use it against [the co-defendant], and to base a sentence of death upon it.

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

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

The United States Supreme Court has also state the following:

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

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

Limiting criminal defendants' ability to present evidence to the *State's* theory – without being allowed to develop an alternative and independent theory of the case – violates the due process principles established by the United States Supreme Court. Regardless, *Chambers* and *Holmes* have made it clear that Mr. Nunley had the right to present evidence to the jury that another person committed the crime.

The state relied heavily on testimony from A.Y. to make its case. A.Y. and Mr. Nunley were the only two people in the room when the incident was alleged to have occurred. (PC Vol. II, p. 26). Since there is no medical or forensic evidence linking Mr. Nunley to any criminal activity (PC Vol. II, p. 26)., denying Mr. Nunley the ability to present crucial evidence that would have impacted the credibility of a critical State's witness rises to the level of the denial of a defense.

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

Thus, Mr. McGovern was ineffective in this regard.

Appellate Counsel's Failure to Raise Issues

a. Sentencing Issues

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

There is no question that Mr. McGovern could have raised sentencing arguments, regardless of whether or not the issues were properly preserved. On direct review, the Court of Appeals has the constitutional authority to review and revise sentences. This authority is bestowed upon the appellate courts, pursuant to Article VII, Section 6 of the Indiana Constitution. Ind. Const. Art. VII, § 6; *Love v. State*, 741 N.E.2d 789, 795 (Ind. Ct. App. 2001). This Constitutional responsibility is independent from the court of Appeals' general appellate jurisdiction. *Id; Perry v. State*, 751 N.E.2d 306, 309 (Ind. Ct. App. 2001). Prior to January 2003,

the vehicle for the Court of Appeals' authority under Article VII, Section 6 was Appellate Rule 17(B), which allowed the Court of Appeals to revise a sentence only if it was manifestly unreasonable. Recognizing that Rule 17(B) was "an almost impossible standard to meet," our Supreme Court modified it in 1997 to allow more meaningful review. *Bluck v. State*, 716 N.E.2d 507, 515-516 (Ind. Ct. App. 1999).

In a further effort to realize the broad powers under Article VII, Section 6, our Supreme Court abrogated Rule 17(B) in favor of the current rule under Appellate Rule 7(B). Under this new rule, the Court of Appeals has the authority to revise an accused's sentence if it is inappropriate in light of the nature of the offense and the character of the offender. Ind. App. Rule 7(B). Our Supreme Court noted that the shift to the broader language of Rule 7(B) "changed its thrust from a prohibition on revising sentences unless certain narrow conditions were met to an authorization to revise sentences when certain broad conditions are satisfied. *Neale v. State*, 826 N.E.2d 635, 639 (Ind. 2005). Thus, the Court of Appeals' authority under Article VII, Section 6 and Rule 7(B) is considerably broad. *See, e.g., Childress v. State*, 848 N.E.2d 1073, 1079-1080 (Ind. 2006). Indeed, the Indiana Supreme Court has revised sentences even when it found that all of the trial court's aggravating factors were proper. *See Buchanan v. State*, 767 N.E.2d 967, 973-974 (Ind. 2002); *Gregory v. State*, 644 N.E.2d 543, 545 (Ind. 1994).

1. Double Jeopardy

Mr. Nunley was alleged to have shown A.Y. a pornographic movie. (R. 432, 469-470). During the movie, Mr. Nunley is alleged to have "licked [A.Y.'s] pee pee" and made her "suck on his weenie bob." (R. 450, 472, 497). Thus, all acts were part and parcel of a single confrontation with a single victim. Thus, the sentences violate double jeopardy principles.

Common law support for this proposition is found in *Bowling v. State*, 560 N.E.2d 658 (Ind. 1990). In *Bowling*, our Supreme Court stated:

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

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

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

> *Bowling* nonetheless espoused a sentencing rule that has not been explicitly rejected, i.e., a sentence must reflect the episodic nature of the crimes committed. 560 N.E.2d at 660. Indeed, this "single incident analysis" for sentencing purposes has been embraced in

> other contexts. *See Beno v. State*, 581 N.E.2d 922 (Ind. 1991) (holding it improper to impose consecutive sentences for multiple drug dealing convictions based on nearly identical state sponsored sales as part of an ongoing operation); Ind. Code § 35-50-1-2 (imposing a limitation upon the aggregate sentence to be imposed for an "episode of [nonviolent] criminal conduct"). Cf. *Serino v. State*, 799 N.E.2d 852, 857 (Ind. 2003) (observing that "consecutive sentences seem necessary to vindicate the fact that there were separate harms and separate acts against more than one person."). Clearly, the *Bowling* court gave consideration to the episodic nature of a single victim in a single confrontation. ***Therefore, unless instructed to the contrary, we should do the same.***

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

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

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

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

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

2. Mr. Nunley's Sentence is Inappropriate

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

Mr. McGovern could have presented the issue that Mr. Nunley's sentence was inappropriate. Again, he did not recall researching possible sentencing issues. (PC Vol. II, p. 42-44)

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

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

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

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

(R. 911)

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

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

In this case, like in *Carmona*, Mr. Nunley was left to try to prove a negative. The PSI indicated that he had no criminal history. Yet, the judge used an allegation that was not even

charged as criminal history. This is improper. *See also Green v. State*, 850 N.E.2d 977, 988-989 (Ind. Ct. App. 2016). Therefore, Mr. Nunley should be remanded for resentencing. *Comer v. State*, 839 N.E.2d 721, 730 (Ind. Ct. App. 2005).

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

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

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

Mr. Nunley did not harm A.Y. in a manner more than is inherent in the criminal offenses. The underlying criminal acts are as follows: (1) that Mr. Nunley licked A.Y.'s vagina, and (2) that Mr. Nunley made A.Y. suck his penis. (R. 450, 472, 497). There is nothing inherent in the commission of these crimes that is more severe or harmful than what is inherent in the commission of the offenses themselves. In *Fointno v. State*, 487 N.E.2d 140 (Ind. 1986) the Supreme Court of Indiana held that a sentence was manifestly unreasonable given the

defendant's lack of criminal history and that the defendant did not brutalize the victim, "except as is inherent in the commission of the crimes." *Id.* at 148. In so holding, the Indiana Supreme Court declared that *"a rational sentencing scheme should punish more severely those who brutalize the victims of their crimes." Id.* (emphasis added).

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

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

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

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

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

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

Mr. Nunley contends that appellate counsel should have raised the issue regarding the violation of the separation of witnesses order. Inasmuch as this issue was not properly preserved for appeal, it could have been raised as fundamental error. *Gyamfi v. State*, 15 N.E.3d 1131 (Ind. Ct. App. 2014).

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

Mr. Nunley contends that appellate counsel should have raised the issue that State's Exhibit 2 should not have been admitted into evidence. If this issue had been raised, it likely would have prevailed. Without the DVD, there is a reasonable probability of a different result. Mr. McGovern was, therefore, ineffective in this regard. Inasmuch as this issue was not properly preserved for appeal, it could have been raised as fundamental error. *Gyamfi v. State*, 15 N.E.3d 1131 (Ind. Ct. App. 2014).

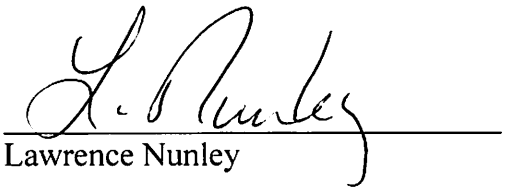
e. Failure to Include the underlying issue of Vouching Testimony

Mr. Nunley claims Mr. McGovern should have raised the issue regarding Detective Wibbels vouching for A.Y.'s truthfulness. Inasmuch as this issue was not properly preserved for appeal, it could have been raised as fundamental error. *Bradford v. State*, 960 N.E.2d 871 (Ind. Ct. App. 2012).

CONCLUSION

For all of the foregoing reasons, the judgment of the post-conviction court should be reversed and this matter should be remanded for a new trial. In the alternative, this matter should be remanded with instructions to resentence Mr. Nunley to concurrent terms

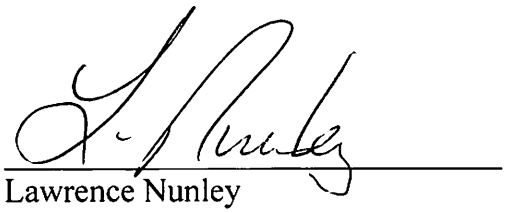
Respectfully submitted,



Lawrence Nunley

WORD COUNT

I, Lawrence Nunley, hereby verify that the foregoing Brief of Appellant is less than 14,000 words; to wit: 11,510 words, according to the electronic word count feature in *Microsoft Word*.



Lawrence Nunley

CERTIFICATE OF SERVICE

I verify that on the 16th day of October, 2017, I filed the foregoing Brief of Appellant with the Indiana Court of Appeals by depositing the same in the **United States Mail,** first-class postage prepaid and affixed properly addressed as follows: Indiana Court of Appeals, 217 State House, Indianapolis, Indiana 46204

I also certify that on the 16th day of October, 2017, I served a true and accurate copy of the foregoing Brief of Appellant upon the Appellee by depositing the same in the **United States Mail**, first-class postage prepaid and affixed, properly addressed as follows:

Curtis Hill
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Indiana Government Center South
Fifth Floor
302 W. Washington Street
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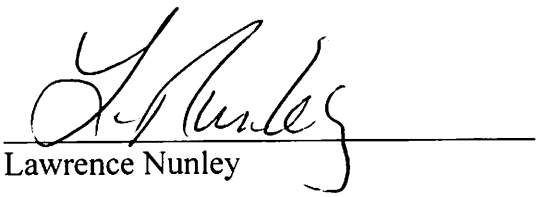

Lawrence Nunley

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

FINDINGS OF FACT AND CONCLUSIONS OF LAW

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

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

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

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

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

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

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

CONCLUSIONS OF LAW

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

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

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

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

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

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

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

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

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

CONCLUSION

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

So ORDERED this 2nd day of March, 2017.

Honorable Joseph Claypool
Judge, Harrison Superior Court

CC: Prosecutor
Defendant