

IN THE
INDIANA COURT OF APPEALS

APPELLATE NO: 31A01-1703-PC-547

LAWRENCE NUNLEY,)	APPEAL FROM THE
)	HARRISON SUPERIOR COURT 1
Appellant / Petitioner,)	
)	TRIAL COURT CAUSE NO.
vs.)	31D01-1009-PC-11
)	
STATE OF INDIANA,)	THE HONORABLE
)	JOSEPH CLAYPOOL, JUDGE
Appellee / Respondent.)	
)	

TRANSCRIPT OF PROCEEDINGS

VOLUME 2 OF 2

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Court Reporter: Shannon Taylor

Proceedings recorded by electronic sound recording; Transcript
produced by Christy Gray

STATE OF INDIANA) HARRISON SUPERIOR COURT NO. 1
) SS:
COUNTY OF HARRISON) CAUSE NO. 31D01-1009-PC-11

LAWRENCE NUNLEY,)
)
 Petitioner,)
)
 vs.)
)
STATE OF INDIANA,)
)
 Respondent.)

POST-CONVICTION RELIEF PETITION
BEFORE THE HONORABLE JOSEPH CLAYPOOL
JUDGE OF THE HARRISON SUPERIOR COURT NO. 1
DATE: JULY 14, 2016

Court Reporter: Shannon Taylor

Proceedings recorded by electronic sound recording; Transcript produced by Christy Gray

APPEARANCES

ON BEHALF OF THE PETITIONER, LAWRENCE NUNLEY

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ON BEHALF OF THE RESPONDENT, STATE OF INDIANA

J. OTTO SCHALK
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1 **July 14, 2016**

2 THE COURT: Okay. Mr. Nunley?

3 THE DEFENDANT: Yes, sir.

4 THE COURT: You want to stand - sit over there? Okay,
5 Mr. Nunley, can you raise your right hand for me?

6 LAWRENCE NUNLEY, DEFENDANT'S WITNESS, SWORN

7 THE COURT: Okay, be seated. We're here on your Post-
8 Conviction Relief Petition. It's a hearing on that petition,
9 31D01-1009-PC-11, and this is your petition, sir. And I wanted
10 to make sure that you received everything you needed to receive
11 preliminarily here, and also proceed with the hearing. So, are
12 you ready to proceed, sir? You're representing yourself is my
13 understanding; is that correct?

14 THE DEFENDANT: Yes, Your Honor.

15 THE COURT: Okay.

16 THE DEFENDANT: Before we begin, there's some
17 preliminary matters I'd like to address.

18 THE COURT: Okay.

19 THE DEFENDANT: I bring to the court's attention, once
20 again, that I have not been receiving the court orders. I don't
21 know which way the Court has ruled on my motions and request. I
22 requested a status update on my motion and the court ordered the
23 clerk to send me a chronology, case chronology, unfortunately,
24 that doesn't tell me which way the court has ruled, and I filed
25 a motion to bring back the original record from the Court of

1 Appeals, and I don't know if it's, if you --

2 THE COURT: Okay. The last -

3 THE DEFENDANT: - granted that motion.

4 THE COURT: The last - let me interrupt you there for
5 a moment, sir, the last thing that I recall in your case was the
6 fact that you wanted - you had the information that you wanted
7 to receive from the Court, and you had a copy of it, but you
8 wanted to make sure that the defense or that the, uh, the
9 prosecution was willing to have that introduced into the record
10 with the markings that you had on it; is that correct? And they
11 agreed to do that, understand?

12 THE DEFENDANT: They agreed to do that. I didn't know
13 that until just a while ago. They didn't send me any kind of
14 information saying that they, they accepted it until - I'm not
15 getting anything, I don't get any kind of information from the
16 Court.

17 THE COURT: Okay. All right. So you're getting all
18 the information that we send to the clerk's office to put in the
19 CCS, so you should receive that. So I'll make sure that you
20 receive that in the future.

21 THE DEFENDANT: I do have the CCS, but it doesn't tell
22 me which way you ruled.

23 THE COURT: Okay. Usually it does.

24 THE DEFENDANT: I have a copy of it here.

25 THE COURT: Okay. Which way I ruled on which motion?

1 THE DEFENDANT: On all the motions, like the Motion to
2 Bring Back the Original Record from the Court of Appeals.

3 THE COURT: Okay. I think -

4 THE DEFENDANT: I don't know how you ruled on that.

5 THE COURT: I don't believe that they bring back the
6 original record from the Court of Appeals, okay. So, that's
7 something I talked to the clerk about earlier. I'll check on
8 that as well. Okay. Now, does the State - is there anything
9 else?

10 THE DEFENDANT: Um, yeah, uh, the subpoenas, they
11 denied the subpoenas?

12 THE COURT: They denied? Who denied?

13 THE DEFENDANT: Prosecution and um -

14 THE COURT: I think I denied the subpoenas.

15 THE DEFENDANT: Oh, you denied?

16 THE COURT: Mm-hmm.

17 THE DEFENDANT: Okay. Um, can I offer proof, because
18 I believe that I should, should be allowed to, um, due process?
19 Can I offer proof on that?

20 THE STATE: And Judge, uh, if - wants to save the
21 Court a little time, my opinion if Mr. Nunley, his allegations
22 do include ineffective assistance, counsel, against his trial
23 attorney and appellate attorney, the State has no objection.
24 It's the Court's decision obviously but, the State's position is
25 it has no issue if Mr. Nunley is allowed to subpoena either of

1 those two witnesses.

2 THE COURT: Okay. Well, those witnesses, sir - the
3 petition - one of your counsel is in Evansville, Indiana.

4 THE DEFENDANT: Yes, sir.

5 THE COURT: Okay. And you're claiming that he was
6 inadequate?

7 THE DEFENDANT: Yes, sir.

8 THE COURT: Okay. And the allegations you made in
9 there after reading your - reading your motion, um, well once,
10 what do you expect him to testify to?

11 THE DEFENDANT: I have the questions written here.

12 THE COURT: I think they were included in your - they
13 were included in your motion; were they not?

14 THE DEFENDANT: Yes.

15 THE COURT: Okay. And so they were - they were
16 allegations that I've, I believe in my, in my response to that -
17 did you not receive my response to that?

18 THE DEFENDANT: No, sir.

19 THE COURT: Okay. I tell you what we're going to do,
20 I'm going make sure that all those responses are brought down to
21 you in the jail. My - if I can get them from the file here,
22 that were filed, and make sure you can read those so you
23 understand where you're going with it right now, but - so you're
24 saying, sir, that you'd like to have your - what are you - you
25 want to know why I ruled on those things or if the State doesn't

1 have an objection to us subpoenaing these individuals, but the
2 individuals to come up over here in regard to what you were
3 asking them to testify to. To me, at that time, I did not feel
4 it was appropriate to do so, but I'll take a - I'll review that
5 as well. Okay, and I think that I - okay, let's go off the
6 record for a minute.

7 (Off the record at 10:10:10)

8 THE COURT: See that? Okay, now, I can't tell the
9 appellate court what to do; understand that? I ordered them to
10 do it, if they don't send it to you, it's up to you to go to the
11 Court of Appeals and ask them for that. Understand, sir? All
12 right. That's about as much as I can do on your behalf. Did
13 you understand what I was doing there? Okay. The Court
14 examined and considered that being duly applied the premise now
15 grants said motion, your motion.

16 THE DEFENDANT: Right.

17 THE COURT: Okay, therefore, it is Ordered and
18 Adjudged and Decreed by this Court that the Clerk of the Indiana
19 Supreme Court, Appeals Court, is ordered to transmit the
20 original record on file Cause Number 31A01-0902-CR-88 to the
21 trial courts for use in the post-conviction relief proceedings.
22 So, if that's not here, I've got to make sure that, you know,
23 the Court of Appeals, they're a higher court than I am. Now, if
24 they don't do it, you know, I can't say, okay, I'm going to put
25 you in jail for doing it, you know?

1 THE DEFENDANT: Okay.

2 THE COURT: Understand that? So I'll check with the
3 Clerk right now and see if it's here. If it's not here, then we
4 can call, you can, you can bring it up with the Supreme Court,
5 okay?

6 THE DEFENDANT: Okay. Can I have you take judicial
7 notice on all of the -

8 THE COURT: Take judicial notice? I mean, I already
9 signed this thing.

10 THE DEFENDANT: Right.

11 THE COURT: Okay, so I got that on there - that's
12 there. All right, so we're back on the record now. Okay. All
13 right, so, that's here. Okay. Motion for Discovery. Okay.
14 He's representing himself. We're going go off the record and
15 discuss this. We're not going have a -

16 (Off the record at 10:13 a.m.)

17 THE COURT: Taking a recess in this matter until 1:00.
18 1:00 o'clock. Okay. Thank you.

19 (Off the record at 10:19 a.m.)

20 THE COURT: Mr. Nunley, you can stand and come over
21 here. Okay, Mr. Nunley, I already swore you in this morning, so
22 I'll swear you in again. Raise your right hand.

23 LAWRENCE NUNLEY, DEFENDANT'S WITNESS, SWORN

24 THE COURT: Okay, be seated. I had a chance to review
25 your - usually when you come in, we're aware of all the motions

1 and everything else that came through, so in this case, I was a
2 little bit in the dark on this, so we're going go through this
3 again. Now, we're here for your hearing on Motion to Petition
4 your P.C., and it is Case Number 31D01-1009-PC-11, and a few
5 things concerned me this morning and one is that you were not
6 receiving the orders that came through.

7 THE DEFENDANT: Correct.

8 THE COURT: Okay. So, the first thing is that we did
9 receive - you received the CCS, but you could not see the orders
10 that were on that CCS; is that correct?

11 THE DEFENDANT: Yes.

12 THE COURT: And the orders that I have, have your
13 name, petitioner, and respondent, which is the State, on them as
14 well, so they should have been sent to you. So we've got to
15 figure out why that's not being done. I can give you copies of
16 all those today. Okay. Now, next thing was the order for the
17 Court of Appeals that I showed you this morning.

18 THE DEFENDANT: Yes.

19 THE COURT: Okay, and in your request, you stated that
20 you wanted to have it here and put in the record.

21 THE DEFENDANT: Yes, sir.

22 THE COURT: Okay. It's here. Okay?

23 THE DEFENDANT: Okay.

24 THE COURT: It is here, and we can put it in the
25 record. Is there anything in there that you wanted to review?

1 THE DEFENDANT: I just want to make sure that all the
2 appendages is in there, and the, uh, exhibits.

3 THE COURT: Okay.

4 THE DEFENDANT: And the, uh, attorney briefs.

5 THE COURT: This is everything we received, so this is
6 everything we got from the Court of Appeals. You can take a
7 look at that and you're not going be able to take it downstairs
8 or back to prison, but you can review it while it's here, and
9 it's going be part of the record.

10 THE DEFENDANT: Okay.

11 THE COURT: Okay, so that's in here. So that's here,
12 and it's all this stuff.

13 THE DEFENDANT: Okay.

14 THE COURT: You can, you can sit down.

15 THE DEFENDANT: Yeah.

16 THE COURT: That's the next thing. So that's here.
17 Okay, the next one was the motion for specific discovery and
18 that was in regard to the deposition that Mr. Schultz had taken,
19 correct?

20 THE DEFENDANT: Yes.

21 THE COURT: Okay, and you - that's been resolved as
22 well -

23 THE DEFENDANT: Yes.

24 THE COURT: - by order, and you didn't know that was
25 resolved, but now you know it's resolved, and you have - they've

1 | agreed to have that entered into evidence with the, with the
2 | notations you have on it, so there's no need to have her prepare
3 | another one or anything else. You have it, and you can use
4 | that. Okay?

5 | THE DEFENDANT: Okay. See, but, my petition exhibit
6 | like A and B - I mean -

7 | THE COURT: Well, whatever, whatever you have, is that
8 | you said you had it, you're willing to use that, and they're
9 | willing to accept that.

10 | THE DEFENDANT: Yeah.

11 | THE COURT: Okay, so that's good. The next thing is
12 | your subpoena request. The subpoena request, I ruled on that
13 | back in March, March 11th, okay. Did you see a copy of that
14 | order?

15 | THE DEFENDANT: Uh, you showed me a copy of it when I
16 | was here.

17 | THE COURT: Of the - no, I showed you a copy of the
18 | one for the Court of Appeals.

19 | THE DEFENDANT: I show, I have, I have a copy of it
20 | now.

21 | THE COURT: Okay.

22 | THE DEFENDANT: I didn't have it prior to today.

23 | THE COURT: Okay, and that was my ruling at that time.
24 | Okay, and my ruling at that time is going to stand, but I am
25 | going to give you the opportunity if you want to send

1 interrogatories or whatever you want to do to the other parties
2 and if there's anything - the affidavits that you sent, are your
3 affidavits, okay. They're not the, they're not an affidavit of
4 what anybody else is going to say, they're not - there's no
5 reason for me to believe that there would be anything other than
6 what, you know, that they're going state that this is their
7 trial strategy to get it done. Now, you stated on, on - I don't
8 know if we were on the record or not, that Ms. Schultz had said
9 something to you -

10 THE DEFENDANT: She said it to the Public Defender's
11 Office, I didn't ask.

12 THE COURT: Well that's, okay, well, whatever,
13 whatever it was, it wasn't in this court. So if you can send
14 her some type of interrogatory to that effect, under oath, and
15 it comes back, then I'll be more than happy to have her come in
16 and testify, but other than that, I'm not going have the
17 subpoenas issued for those people and you have that, you have my
18 reasoning and my order that was entered last May 11th. You have
19 that now; is that correct? Okay. I mean, you've got to say
20 something for the record here, too. Do you have that?

21 THE DEFENDANT: Yes, sir.

22 THE COURT: Okay. You have that. So that takes care
23 of that one. Now, the - I think that's all. Is there anything
24 else that you were requesting that you are claiming that you
25 have not received?

1 THE DEFENDANT: Um, I don't have any - any of the,
2 your decisions on any of them, but I think that covered most of
3 them. I would like to get a - have an opportunity to put in an
4 anti-legal argument into this, and I would like to put in a
5 memorandum, um, for the law, and citing the facts and
6 conclusions of the law.

7 THE COURT: Okay. You may. You want to proceed with
8 the hearing today with, you know, with the way we're standing
9 now, so we're going have a hearing today on your petition; is
10 that correct, sir? Are you ready to proceed on that matter?

11 THE DEFENDANT: No, I wanted to put in a memorandum.

12 THE COURT: Well, that's, that's what - pardon me?

13 THE DEFENDANT: I would like to have a continuance to
14 have the -

15 THE COURT: Continuance for what purpose? We
16 continued this thing for a year from July 17th, 2015, to today,
17 July 14th, 2016. Okay. And I've been trying to get all these
18 things ruled on. We had - the only thing I have to figure out
19 is how, why you didn't get those orders, okay, because those
20 orders were signed in March, okay. Everything that was done
21 came back here, this is already here, it's ready to go. So I
22 can give you a chance to review this, to review the documents we
23 received from the Appellate Court, and if you wish to file
24 interrogatories or something to the attorneys that you have, so
25 I have some reason to believe that their testimony is going to

1 be - where's my order? Okay, okay - that there's some reason
2 for me to believe that their testimony would be relevant and
3 probative, okay, so I need to have that. Other than that, I'm
4 not going have them subpoenaed over here from Evansville. You
5 need to get that done. Okay, so, as of now, so you want a
6 continuance? How long do you think it will take you to get that
7 done?

8 THE DEFENDANT: I don't know. We've got a very
9 limited time in the law library and I have to - I get two hours
10 a week to study, and I'm not sure how long it will take.

11 THE COURT: Okay. Well, you're your own counsel, so
12 I'm asking you to give me some type of timeframe that you'd like
13 to have a continuance.

14 THE DEFENDANT: Six months?

15 THE COURT: Does the State have any objection to that?

16 THE STATE: No.

17 THE COURT: Okay. So we'll give you that opportunity,
18 but then at that time, at the end of that six months, when we
19 give you that date to come back, I will make sure that you
20 receive all the orders that have been signed, or all the things
21 that you have here. I'll take it up with the clerk, and find
22 out why that has not been done, but I do think that, you know,
23 that you should have received those earlier on. I don't want to
24 put you in a predicament of having you see these things just
25 today, and not have anything else to, you know, to go on. So, I

1 will give you a continuance to six months, and that day will be-

2 THE BAILIFF: January 26th at 9:00 a.m.

3 THE COURT: January 26th at 9:00 a.m. back here, and
4 we'll go from there on this. Okay. So we're going to continue
5 this until this matter, State has no objection to that, so we'll
6 get that done. All right.

7 THE STATE: There's no objection.

8 THE COURT: Okay. Okay, does the State have anything
9 they want to bring up in this matter?

10 THE STATE: Um, trying to - Shannon, do you know when
11 that Shore [ph] trial is currently set for?

12 THE BAILIFF: January the 17th, I believe.

13 THE STATE: Can we maybe bump that up a couple weeks
14 so that way we're not in the middle of the Shore --

15 THE COURT: Bump this back a couple of weeks, you
16 mean?

17 THE STATE: Bump this one up a couple weeks to earlier
18 in January.

19 THE BAILIFF: Okay, so January 23rd.

20 THE STATE: Okay, yeah, can we bump it up maybe a week
21 or so? Because we got a trial that's scheduled up in Hamilton
22 County for that day, and I'll be up there for that, so that kind
23 of puts us in the middle of a bind [indiscernible 1:25:09]

24 THE BAILIFF: How about January 12th?

25 THE STATE: That would be fine.

1 THE COURT: January 12th, sounds good to me then. And
2 we'll give you the dates, sir, all on a card so you know what's
3 going on. You're your own counsel, so you don't have to worry
4 about that, you can talk to you - you talk to yourself anytime
5 you want, so, okay. So we have January 12th now is that date,
6 and that's at 9:00 a.m.?

7 THE STATE: Yes.

8 THE COURT: At 9:00 a.m. Okay. Thank you, sir.
9 We'll be - I'm going to give you the opportunity to look at
10 these things in the courtroom this afternoon with the
11 corrections officer. You can sit up here and look at those
12 things. Okay. And then we'll have you - after you have an
13 opportunity to look at this - now, if you look at all these
14 things, you know, it's going to be, it's voluminous, all right?
15 So you're not going - we're not going to make copies of
16 everything here, but you want to make sure that everything is
17 there. This is their record, so everything they've sent us.
18 You have a lot of stuff in there. What's in your - well -

19 THE DEFENDANT: Trial transcripts and certain things.

20 THE COURT: Okay, so that's what you have. A lot of
21 what's up here, probably.

22 THE DEFENDANT: Probably.

23 THE COURT: Okay. All right. If there's anything
24 missing, you can make a note to that effect. It's in the --

25 THE DEFENDANT: Over here?

1 THE COURT: That'll be fine. Okay. And make sure we
2 get everything back that's in there. I'm going to hold you
3 accountable for each and every page. Okay. Thank you. Okay.
4 And, sir, if you can put your stuff - I don't want anything
5 mixed in there as well. Okay. Okay, okay, so we'll see you
6 back here on January 12th. Thank you, sir. Okay. All right,
7 now, we have another matter here.

8 (Proceedings concluded at 1:26 p.m.)
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STATE OF INDIANA)	HARRISON SUPERIOR COURT 1
) SS:	
COUNTY OF HARRISON)	CAUSE NO. 31D01-1009-PC-11

LAWRENCE NUNLEY,)
)
Petitioner,)
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vs.)
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STATE OF INDIANA,)
)
Respondent.)
)

MOTION FOR POST-CONVICTION RELIEF
BEFORE THE HONORABLE JOSEPH CLAYPOOL
JUDGE OF THE HARRISON SUPERIOR COURT 1
DATE: JANUARY 12, 2017

Court Reporter: Shannon Taylor

Proceedings recorded by electronic sound recording; Transcript produced by Christy Gray

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January 12, 2017

THE COURT: This morning for Petition and Post-conviction Relief hearing for Mr. Lawrence Nunley; 31D01-1009-PC-11. And Mr. Nunley you've requested individuals be brought here today for your questioning and they are here. Okay, so, this is your - your hearing that you requested sir, so, raise your right hand for me.

PETITIONER'S EVIDENCE

LAWRENCE NUNLEY

LAWRENCE NUNLEY, PETITIONER'S WITNESS, SWORN

THE COURT: Okay, so, you can start your - start your case as we have it this morning.

MR. NUNLEY: Okay. First of all, I would like to let the Court know that I'm still not getting any kind of notification as to how you rule. I didn't know if their subpoenas were going to be issued or not. I'm prepared to ask questions but -

THE COURT: Well, they're here; you were notified you were going to be transferred, so I don't, you know, I don't quite -

MR. NUNLEY: But I'm not getting any kind of notification from the Court on any of the other things that - and know if there's -

THE COURT: Any other - other what, sir?

MR. NUNLEY: I filed offers of proof and things of

DIRECT EXAMINATION SUSAN SCHULTZ

1 that nature because I didn't get a response on whether or not
2 those subpoenas were going to be issued. I didn't get a
3 response on those, so I kind -

4 THE COURT: So you're saying you're not prepared today
5 to go forward?

6 MR. NUNLEY: Yes, I am prepared.

7 THE COURT: You are prepared to go forward? Okay.
8 Then let's go forward.

9 MR. NUNLEY: Okay, I'd like to call Ms. Susie Schultz,
10 please.

11 THE COURT: Okay, Ms. Schultz. Ms. Schultz, you are
12 an officer of the Court but I'm still going to swear you in on
13 this matter.

14 SUSAN SCHULTZ

15 SUSAN SCHULTZ, PETITIONER'S WITNESS, SWORN

16 THE COURT: Be seated. Okay, go ahead Mr. Nunley.

17 DIRECT EXAMINATION

18 BY MR. NUNLEY:

19 Q Ms. Schultz, please state your name for the record and
20 spell your last name, please.

21 A Susan Schultz S-C-H-U-L-T-Z.

22 Q And what is your profession?

23 A I'm an attorney.

24 Q How long have you been an attorney?

25 A Since 1981. Actually, I was licensed in Michigan initially

1 in 1981, and then when I moved to Indiana I was licensed in
2 Indiana in 1991 and I let my Michigan license lapse after I
3 moved to Indiana so, I'm not sure what year that was.

4 Q Do you have your own practice or are you part of a firm?

5 A I have my own practice.

6 Q Do you practice law here in Harrison County?

7 A Yes. My office is in downtown Corydon at 127 East Chestnut
8 Street.

9 Q Are there any educational requirements to obtain a license
10 to practice law and what is your background?

11 A Yes, I have a Juris Doctorate Degree from well - I'm trying
12 to think of the name of the law school. My brain went a little
13 blank there for a second. Lansing, Michigan is where I went to
14 law school. Cooley Law School and so I have a J.D. from there
15 and then I wrote the bar exam and got my license and after that
16 we have continuing ed requirements that we have to do every year
17 so I have been current on all of those.

18 Q Do you specialize in any particular area of law?

19 A I don't - I wouldn't actually say specialize. I do mostly
20 criminal stuff and for a while I did a lot of divorce work, but
21 I'm kind of semi-retired now so about the only thing I've got is
22 a few criminal things that are hanging on at this point.

23 Q Have you ever represented me?

24 A Yes, I have.

25 Q Do you recall the nature of that representation?

1 A Yes, I represented you on a couple of different cases. And
2 when I went back through my file I couldn't remember exactly
3 what it was but I recall representing you on the sexual
4 allegations in the A felony case and then, I believe, there was
5 also an invasion of privacy perhaps, or a battery case of some
6 kind and I don't even recall what happened to those. I think
7 they were dismissed, but I'm not sure of that.

8 Q Yes, Ma'am, they were. Approximately how many clients did
9 you have at the time you represented me?

10 A I have no idea.

11 Q Okay.

12 A I don't keep a tally and so I know I had a bunch, but I
13 think at that time I was doing quite a bit of domestic stuff
14 too. So, I would have had clients that I represented in
15 divorces and custody cases and that type of thing also, but I
16 don't know, for a number, I couldn't tell you.

17 Q Do you recall when the trial occurred?

18 A I believe it was in November of 2008.

19 Q Okay and how long had you been admitted to the bar at that
20 time?

21 A So since 1981 to 2008 that would be 23 years. I don't
22 know. My math might not be right. No, it wouldn't be 23.
23 What's 19 and 8? Twenty-seven years.

24 Q And do you know how many criminal cases you had tried prior
25 to that?

1 A No. I know I've tried quite a few cases. When I first
2 moved to Indiana, I worked a lot in Crawford County and I tried
3 quite a few cases over there and I've tried quite a few here in
4 Harrison County too.

5 Q Had you gotten a client an acquittal after trying the case?

6 A Oh, yes.

7 Q And had you ever gotten a client a reduction in charges
8 after trying the case?

9 A Yes.

10 Q Were you retained by me or you were appointed -

11 A I was -

12 Q - by this Court?

13 A - court appointed to represent you.

14 Q Okay. Do you remember when they appointed you?

15 A I'm not sure of the exact date but, I think, it was
16 probably in May or June of 2008.

17 Q And after you were appointed, do you remember having any
18 interviews with me prior to trial?

19 A Yes, I do. I recall going to the jail and visiting with
20 you and in anticipation of this case. I looked at the billing
21 that I had sent to the county and when I looked at my billing,
22 it appeared to me that I had been to the jail to see you
23 probably six times, at least, before trial. I'm not always good
24 at remembering to write those down so I may have been there more
25 than that but, I would say at least six times.

1 Q During the interview did you seek to ascertain my version
2 of the facts?

3 A Oh, yes, I did.

4 Q Do you recall what they were?

5 A That you didn't do it. That the child was there to visit
6 you overnight and that the events that she described did not
7 happen, and, as I recall, the explanation that was provided to
8 me was that the child's mother was angry with you about
9 something and you believed that she - she had encouraged the kid
10 to manufacture the facts because of her anger with you, is what
11 I recall.

12 Q And did I ever waiver from that position at any time?

13 A No, I don't believe so.

14 Q Did you conduct any depositions in preparation for the
15 trial?

16 A Yes, I did. I did several. I don't recall exactly who it
17 was, but I know I did some.

18 Q What is the purpose of a deposition?

19 A To determine ahead of time what the witnesses are going to
20 say and what their version of the facts are and then you can use
21 that deposition evidence later in trial for purposes of
22 impeachment or formulating your questions you're going to ask
23 the witness when they testify.

24 Q So it can benefit?

25 A Yes, it is to benefit the person that you're representing.

1 Q Did you develop a strategy in the case prior to trial?

2 A Well, it's really hard to say. I guess going into it my
3 strategy was to try to convince the jury that this child was
4 lying about what happened, but, you know, I don't know of any
5 other specific way to describe it.

6 Q Did you discuss your trial strategy with me prior to trial?

7 A I believe I would have. You know one of my problems in
8 this particular case is that since the trial took place in 2008,
9 and a lot of these things are not things that you have written
10 memorandum of, it's really difficult for me to remember the
11 specifics of some of the questions that come up and the things
12 that happened, so.

13 Q Did your - do you remember any medical, forensic, or
14 scientific evidence linking me to the crimes?

15 A Absolutely not. The only way that you could be convicted
16 was if the jury believed what the child said happened. There
17 was nothing else there that would convict you.

18 Q And what would you consider the crux of the State's case
19 was probably just what you said?

20 A Yes, whether the child was telling the truth or not.

21 Q And would you think that it's fair to say that without
22 ██████ testimony - ██████ ██████, that the State would not have
23 had - been able to convict?

24 THE STATE: Your Honor, I'll object. That's grounds
25 for speculation.

1 THE COURT: Do you have a response sir, to his
2 objection?

3 MR. NUNLEY: No.

4 THE COURT: Okay. Sustained.

5 Q Would it be fair to characterize [REDACTED] as a critical
6 witness?

7 A Absolutely.

8 Q And that's the way you viewed her going into trial?

9 A Absolutely.

10 Q And did you conduct a deposition of her?

11 A Yes, I did.

12 Q Did you use that deposition to impeach her?

13 A I don't know if I did or not. And the reason I say that is
14 because, as I mentioned earlier, I have not seen a transcript of
15 the trial and it's been such a long period of time that I don't
16 know whether I did or not.

17 Q At the trial, were you aware that she was not always
18 testifying consistently with the deposition?

19 A I don't really have an independent recollection of that. I
20 mean, I have looked at some of the, like, the appellate decision
21 and what not and it appears that her testimony was inconsistent
22 from various times during the police investigation.

23 Q Do you think you had an obligation to point out
24 inconsistencies in her statement?

25 A Oh, I think that - that would be absolutely correct.

1 Q And do you think that you had an obligation to point out
2 evidence of coaching if it existed?

3 A Certainly.

4 Q And does highlighting discrepancy and coaching cast doubt
5 on her credibility?

6 MR. SCHALK: Can you repeat the question? I'm sorry,
7 I didn't hear it.

8 Q Does highlighting discrepancies and coaching cast doubt on
9 her credibility?

10 A I would think so.

11 Q Was it part of your trial strategy to cast doubt on her
12 credibility?

13 A Yes.

14 Q Okay. Do you recall [REDACTED] being allowed to write down part
15 of her testimony?

16 A Well, I didn't recall it before I just recently reviewed
17 the decision from the Court of Appeals but, you know, it's one
18 of those things that's kind of foggy in my memory. I believe
19 that it happened, but not because I specifically remember it
20 happening but because of reading the decision of the Court of
21 Appeals.

22 MR. NUNLEY: I would like permission to deliver these
23 two papers as page 441 and 444 of the trial to refresh your
24 memory with please.

25 THE STATE: Could I have a copy of those or at least

1 see it real quickly?

2 A Okay, I've reviewed the transcript pages.

3 Q Does it refresh your memory?

4 A Yes.

5 Q Can I get those back. Now, do you - do you remember [REDACTED]
6 being allowed to write down part of her testimony now that we've

7 -

8 A From reviewing the transcript, yes.

9 Q Okay. And was [REDACTED]'s written testimony entered into
10 evidence?

11 A It's my understanding that it was, my recollection it was.

12 Q Okay, I also have pages for that, if you would like to read
13 those.

14 A No, I have no reason to believe that it wasn't.

15 Q Okay. Prior to this trial, had you ever seen a witness be
16 permitted to write down a portion of their testimony?

17 A I don't - I don't recall ever having been - having seen
18 that happen. I know that in some occasions people will draw
19 diagrams or pictures of what they're testifying about, but as
20 far as actually writing down their testimony instead of stating
21 it to the jury, I have never seen that happen before. Before or
22 since.

23 Q Did you find that odd?

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

25 Q Do you think that it placed undue emphasis on a portion of

1 her testimony?

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

13 Q Okay, and would it be fair to say that the written
14 testimony was the most critical portion of her testimony?

15 THE STATE: I'm going to object again. That's the -
16 that would be the determination of the jury to determine what
17 was more critical than others. They were the ones that made the
18 decision.

19 THE COURT: Mr. Nunley, any response?

20 MR. NUNLEY: I was just asking her - getting her
21 opinion because she's an attorney and she's been in trial - been
22 licensed to practice law. Just wanted her opinion on it, it's
23 not -

24 THE STATE: But she's a fact witness in this
25 particular case. I believe that's -

1 THE COURT: I'll sustain the objection. Go ahead.

2 MR. NUNLEY: Okay.

3 Q Do you think by doing this, did it put undue emphasis on
4 the testimony?

5 THE STATE: Again, I'm going to renew the same
6 objection.

7 THE COURT: Sustained.

8 Q Was there a particular reason you didn't object to her
9 being permitted to write down her testimony, parts of her
10 testimony?

11 A I'm not sure I didn't object. I don't - I don't really
12 recall whether I did or not.

13 Q Okay, and, as an attorney, are you familiar with the rules
14 of evidence?

15 A Yes, I try to be. Although, I admit that we all make
16 mistakes sometimes.

17 Q Are you familiar with the rules requiring authentication of
18 evidence?

19 A Yes.

20 Q If the State were to fail to authenticate a piece of
21 evidence, is that grounds for objecting?

22 A Yes.

23 Q Would such an objection generally be sustained?

24 A Well, I guess, it would depend on, on what the evidence is
25 and - I think, that it's not a black and white area, it's kind

1 of gray sometimes. What I think isn't authenticated, the Judge
2 may disagree with me, so.

3 Q Was it part of your trial strategy to allow evidence to be
4 admitted without requiring it be authenticated?

5 A No.

6 Q Why didn't you object to the admission of the DVD Sex Ed
7 Tutor?

8 A I don't know whether I did or not.

9 Q Okay, and do you recall a violation of the separation of
10 witness order that was in effect?

11 A No, I don't and, you know, when I'm thinking about it,
12 there's some question in my mind as to what your definition of
13 separation of witnesses is. It's my understanding separation of
14 witnesses is typically accompanied by the Court's instruction
15 that the witnesses are not to speak with one another about their
16 testimony, or the facts of the case throughout the trial. But
17 I've never understood that to mean that separation of witnesses
18 means that they can't discuss something else like the weather,
19 you know, so, when the Court enters the separation of witnesses
20 order, it is not my understanding it means that they cannot have
21 any contact with each other whatsoever during the trial.

22 Q I'd like you to read page 445 from the trial transcripts,
23 please.

24 THE COURT: Let the record show the Prosecutor's
25 reviewing that before it's read.

1 THE STATE: Just 445 or 446 as well?

2 MR. NUNLEY: It's 445 and 446, yeah.

3 THE COURT: Any objection?

4 THE STATE: No.

5 (WITNESS reviews document)

6 Q Did that refresh your memory?

7 A It refreshed my memory as to the conversation that went on,
8 but it was my understanding, at that time and the way that I
9 read it now, is that the Court had instructed the witness not to
10 talk to the parents or anybody about her testimony and to ensure
11 that, that did not happen he ordered that one of the prosecutors
12 accompany them to lunch when they went to make sure that they
13 did not talk about the case.

14 Q Did you have any reason for not objecting to that?

15 A No, I think that was appropriate. I mean, I could be wrong
16 but, it was my interpretation, at the time and that's how I
17 interpret it now, was that what the Judge's instruction, it
18 wouldn't be a violation of the separation of witnesses order.

19 Q Okay, was it part of your strategy to allow the detective
20 to vouch for or bolster ██████'s testimony?

21 A Absolutely not.

22 Q And why didn't you object to the Detective when he was
23 vouching for ██████ testimony?

24 A I don't know whether I did or not. I don't recall that
25 specific part of the - the testimony as to what happened.

DIRECT EXAMINATION MATTHEW MCGOVERN

1 Q Okay.

2 MR. NUNLEY: At this time, I'd like to pass the
3 witness.

4 THE STATE: I don't have any other questions.

5 THE COURT: Ms. Schultz, you may step down. Thank
6 you.

7 (Witness excused)

8 THE COURT: Mr. Nunley.

9 MR. NUNLEY: At this time, I'd like to call Mr. Matt
10 McGovern.

11 THE COURT: Mr. McGovern. Mr. McGovern, even though
12 you are an officer of the Court, I am going to swear you in, in
13 this matter.

14 MATTHEW MCGOVERN

15 MATTHEW MCGOVERN, PETITIONER'S WITNESS, SWORN

16 THE COURT: Be seated.

17 DIRECT EXAMINATION

18 BY MR. NUNLEY:

19 Q Mr. McGovern, would you state your name and spell your last
20 name please.

21 A Matthew McGovern M-C-G-O-V-E-R-N.

22 Q And what is your profession?

23 A I'm an attorney.

24 Q How long have you been an attorney?

25 A I've been an attorney since 1998 so, coming up on 20 years.

1 Q Are there licensing requirements to practice law in the
2 State of Indiana?

3 A Yes.

4 Q Are you currently licensed to practice law?

5 A Yes.

6 Q What year were you first licensed to practice law - you
7 said 1998?

8 A 1998, yes.

9 Q Do you own your own practice or are you part of a firm?

10 A I'm a solo practitioner.

11 Q And do you practice in Harrison County?

12 A I - I do practice - I do appeals for Harrison County, yes.

13 I do not have an office in Harrison County.

14 Q What is your educational background?

15 A I have a juris doctorate in law.

16 Q Have you ever been censored, disciplined by the State
17 Disciplinary Commission?

18 A No.

19 Q Have you ever represented me?

20 A Yes.

21 Q Do you recall the nature of that representation?

22 A Yes.

23 Q And what was that?

24 A I represented you in a child molesting case. I took that
25 up on appeal to the Court of Appeals and then attempted to take

1 it to the Indiana Supreme Court.

2 MR. NUNLEY: I'd like permission to give him a copy of
3 the appellate brief.

4 THE COURT: Any objection?

5 THE STATE: It's just a brief that he had already
6 filed?

7 MR. NUNLEY: Yes, it's his appellate brief.

8 THE STATE: I have no objection to that.

9 Q Do you recognize this document?

10 A I do.

11 Q Does it appear to be the same or substantially similar to
12 the condition when you authored it?

13 A Yes.

14 Q In preparing for my appeal did you read the trial record?

15 A I did.

16 Q In reviewing my record, do you recall [REDACTED] [REDACTED] being
17 allowed to write down part of her testimony?

18 A I don't have an independent recollection of that, but after
19 reviewing the Court of Appeals opinion, I - I understand that,
20 that did happen.

21 Q Would you like to see this?

22 A I - I don't dispute that.

23 Q Prior to this trial, had you ever seen a witness be
24 permitted to write down a portion of her testimony?

25 A No.

1 Q Did you find that odd?

2 A I found that unusual, yes.

3 Q Do you think that it placed undue emphasis on her
4 testimony?

5 A I think it could have.

6 Q Did one of the parties move to enter those writings into
7 evidence?

8 A I don't have an independent recollection of that, but, and
9 I don't know where I saw it, but I did see that, that did
10 happen.

11 Q Do you think it's proper for the Court to cause the jury to
12 place undue emphasis on the testimony or parts of a testimony of
13 a particular witness?

14 A No.

15 Q Did you consider the possibility of these - this action
16 added to the credibility of [REDACTED] pretrial actions?

17 A I'm sorry, could you repeat the question?

18 Q Do you consider the possibility that - that these actions
19 added to the credibility of [REDACTED] testimony and actions?

20 A I - I don't have a recollection on whether I considered
21 that as an appellate issue.

22 Q Do you do legal research on issues?

23 A Yes.

24 Q Did you do any legal research on that issue?

25 A I don't recall.

1 Q So you didn't consider raising that issue?

2 A I don't recall.

3 Q And as an attorney, are you familiar with rules of
4 evidence?

5 A Yes.

6 Q If evidence is admitted in violation of the rules of
7 evidence, is that a potential issue for appeal?

8 A Yes, it is.

9 Q If an item of evidence was admitted without proper auth -
10 authentication is that a - oh that's the same question. Sorry.
11 Is it feasible to bring this up, this type of issue if it was
12 not properly preserved for appellate review with the appropriate
13 objection?

14 A Are you asking is it possible to raise an issue even if
15 there was not an objection at trial?

16 Q Is it feasible?

17 A It's possible. Whether it's feasible depends on how strong
18 the issue is. In other words, if the chances for getting
19 reversal on that issue are relatively slim, so it would have to
20 be a pretty strong issue.

21 Q Did you - do you recall a DVD being submitted without
22 proper identification?

23 A I do not recall that.

24 Q Okay, let me see - I'd like to read - read you some pages
25 of the transcript. Page 44 - 444 and 454. I think so. Let me

1 find it.

2 THE COURT: Mr. Schalk, you want to read -

3 THE STATE: Are you just going to read these or are
4 you going to give those to him to read them?

5 MR. NUNLEY: Give them to him to read.

6 THE STATE: Okay so it's 444-

7 MR. NUNLEY: And 454.

8 (Prosecutor reviews document)

9 THE STATE: I don't have an objection to this.

10 (Witness reviews document)

11 A And - and you're referencing obviously the admission into
12 evidence of her written - written testimony?

13 Q No the DVD titled - I may have given you the wrong papers.

14 A Yeah, I think you gave us the wrong - the wrong papers.

15 THE STATE: I think that had to do with drawings.

16 MR. NUNLEY: I've got 444 and 454. That's the written
17 testimony you mean.

18 A Yes, that's the written testimony.

19 MR. NUNLEY: I'm sorry, it was page 432. My fault,
20 I'm sorry.

21 THE STATE: Page 432? That's fine.

22 (Witness reviews document)

23 A I've - I've reviewed the transcript.

24 MR. NUNLEY: Can I have that paper back -

25 THE WITNESS: Sure.

1 MR. NUNLEY: - before I ask you again.

2 Q Okay, did you consider raising that as an issue?

3 A I did not.

4 Q Did you do any kind of legal research on that issue?

5 A I don't recall.

6 Q And do you know why you didn't?

7 A I would just be guessing, my guess would be that there was
8 not an objection and that the witness did identify the DVD, so
9 as a fundamental error issue, that seems to me to be relatively
10 a weak issue.

11 Q Okay. Do you recall any vouching testimony in the record?

12 A I don't recall any vouching testimony, no.

13 Q If the record does have vouching testimony, do you have any
14 reason to doubt the record?

15 A I do not.

16 Q Okay, if vouching testimony exists in the record, is that
17 potential issue for appeal?

18 A It is.

19 Q Do you recall if you researched any vouching testimony, or
20 issues?

21 A I would have searched - I certainly researched vouching
22 issues. The vouching that I was concerned about was the
23 Prosecutor's closing argument.

24 Q Could criminal defendants have a right to review their
25 sentence? Have a right for review of their sentence?

1 A I don't know that they know - I don't know that they have a
2 - it is an available issue, yes. It is an available issue, yes.

3 Q Do you recall whether or not you researched any sentencing
4 issues in my case?

5 A I - I - I'm sure I did, but I don't have a specific
6 recollection.

7 Q Okay. Did you explore the possibility of a double jeopardy
8 violation in my case?

9 A I - I don't recall, no.

10 Q And are you familiar with Bowling versus State?

11 A Not off hand, no.

12 Q When you do legal research, do you confine your research to
13 Indiana cases?

14 A No.

15 Q Why didn't you cite any U.S. Supreme Court precedence to
16 support your positions on appeal?

17 A I've examined my brief on the issue related to your right
18 to present a defense. I cited Indiana cases that discuss the
19 federal right to present a defense. That's usually how I do it
20 if I can and cite Indiana cases that discuss the relevant
21 federal - federal rules.

22 Q Okay, when you present an argument on appeal, is it - is
23 logic and reasoning important?

24 A Certainly.

25 Q Could errors in logic and reasoning cause a valid issue to

CROSS EXAMINATION MATTHEW MCGOVERN

1 be denied?

2 A It's possible.

3 MR. NUNLEY: Okay. I have no more questions. I pass
4 the witness.

5 THE STATE: I just have a couple.

6 CROSS-EXAMINATION

7 BY MR. SCHALK:

8 Q Mr. McGovern, are you - have you had an opportunity to
9 review the chronological case summary or CCS in this matter on
10 the - with respect to the PCR?

11 A Yes.

12 Q And, I note in here on October 12, 20 - or first on
13 September 28, 2010, there was an order appointing a State Public
14 Defender's office and I believe that was James Michael Sauer.
15 Are you familiar with Mr. Sauer?

16 A I - I believe I've spoken with him.

17 Q Okay and what - what -

18 A Yes, but I don't know for certain.

19 Q Do you know in what capacity he represented the Petitioner?

20 A Based on the chronological case summary, my understanding
21 is he entered an appearance for the Defendant in the post-
22 conviction relief matter.

23 Q And then it appears to be on October 12, 2010, Mr. Sauer
24 filed a present inability to investigate. Through your
25 background and what you do, what does that typically infer?

1 A I - I can't be certain what that infers. I know that Mr.
2 Sauer a few years later withdrew his appearance, so I - I would
3 be guessing, but I assume that they didn't want to pursue the
4 post-conviction relief petition.

5 Q Okay, and is that a common practice if they do not want to
6 pursue the post-conviction relief practice whether that's
7 because there are no - no issues that they see that they
8 withdraw?

9 A That's my understanding.

10 Q Okay.

11 A But I have not worked for that office so, I want to be
12 clear -

13 Q No, I understand.

14 A - that, that's just my general understanding.

15 THE STATE: I don't have any other questions.

16 THE COURT: Any further, Mr. Nunley, in regard to Mr.
17 Schalk's questions?

18 MR. NUNLEY: No.

19 THE COURT: You may step down.

20 (Witness excused)

21 THE COURT: Okay, Mr. Nunley, proceed.

22 MR. NUNLEY: Yeah, Your Honor, my initial pleading
23 does not have any legal argument in it. I would like an
24 opportunity to file a memorandum of law or proposed finding of
25 facts and conclusions of law.

1 THE COURT: Any objection?

2 THE STATE: Your Honor, I - based on what we've heard
3 today - the State would renew its motion for summary disposition
4 that it had filed back in 2010. I think the evidence is clear
5 that the Petitioner's not entitled to any relief. There are no
6 genuine issues of material fact or facts and, as a matter of
7 law, we are entitled to judgment. I don't feel going to the
8 next step is necessary based on what was presented today.

9 THE COURT: Mr. Nunley, argument?

10 MR. NUNLEY: I feel I should have an opportunity to,
11 to present my argument. I'm still working on it. I don't have
12 it completed.

13 THE COURT: You're still working on it? Okay, Mr.
14 Nunley, I've given you a lot of leeway since we've gone - since
15 I've been judge here, I believe, in calling individuals. This
16 is, I believe, the second or third time you've been in the
17 courtroom with me, is that correct?

18 MR. NUNLEY: (no audible response)

19 THE COURT: Okay. I am going to allow you to file
20 your - what you want to file after this. You want to file your
21 -

22 MR. NUNLEY: Memorandum of law.

23 THE COURT: - memorandum of law and what else?
24 Proposed findings and -

25 MR. NUNLEY: Yeah proposed findings of facts and

1 conclusions of law.

2 THE COURT: Okay. I'll let you - I'll allow you to do
3 that.

4 MR. NUNLEY: And how long do I have to do that with?

5 THE COURT: How long do you need?

6 MR. NUNLEY: Thirty days.

7 THE COURT: Okay. Thirty days.

8 MR. NUNLEY: Thank you.

9 THE COURT: Okay, do you have anything else, Mr.
10 Nunley?

11 MR. NUNLEY: No, Sir.

12 THE COURT: Mr. Schalk?

13 THE STATE: Nothing from the State at this time.

14 THE COURT: Okay. Thank you. We'll recess the Court
15 at this point. Go off the record.

16 (Proceedings concluded at 10:37 a.m.)

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STATE OF INDIANA)	HARRISON COUNTY SUPERIOR
)	
COUNTY OF HARRISON)	CAUSE NO.: 31D01-1009-PC-011
LAWRENCE NUNLEY,)	
)	
Petitioner,)	
)	
vs.)	
)	
STATE OF INDIANA,)	
)	
Respondent.)	

REPORTER'S CERTIFICATION

I, Christy Gray, Court approved transcriber for the Harrison County Superior Court, certify that the foregoing transcript was transcribed from the digital recording of said evidence given in the above, entitled matter. I further certify the foregoing transcript, as prepared to the best of my professional skills and abilities, is a full, accurate, correct, and complete transcription of all matters contained in the recorded proceedings.

WITNESS MY HAND AND SEAL THIS 29th DAY OF June, 2017

/s/Christy L. Gray

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