No. _____

_____

IN THE

SUPREME COURT OF THE UNITED STATES

_____

LAMARR T. CRITTENDEN -PETITIONER

v.

KEITH BUTTS -RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI TO

THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

APPENDIX TO PETITION

LAMARR T. CRITTENDEN # 148648
NEW CASTLE CORRECTIONAL FACILITY
P.O. Box A

New Castle, IN 47362-1041

None

(Phone Number)

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United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

Submitted May 22, 2019
Decided May 30, 2019

Before

MICHAEL S. KANNE, *Circuit Judge*

MICHAEL B. BRENNAN, *Circuit Judge*

No. 18-3624

LAMARR T. CRITTENDEN,
Petitioner-Appellant,

v.

KEITH BUTTS,
Respondent-Appellee.

Appeal from the United States District Court for the Southern District of Indiana, Indianapolis Division.

No. 1:17-cv-02279-JMS-DLP

Jane Magnus-Stinson,
Chief Judge.

ORDER

Lamarr Crittenden has filed a notice of appeal from the denial of his petition under 28 U.S.C. § 2254 and an application for a certificate of appealability. We have reviewed the final order of the district court and the record on appeal. We find no substantial showing of the denial of a constitutional right. *See* 28 U.S.C. § 2253(c)(2).

Accordingly, the request for a certificate of appealability is DENIED.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

LAMARR T. CRITTENDEN,	)	
	)	
Petitioner,	)	
	)	
vs.	)	No. 1:17-cv-02279-JMS-DLP
	)	
KEITH BUTTS Warden,	)	
	)	
Respondent.	)	

Entry Discussing Petition for a Writ of Habeas Corpus

Petitioner Lamarr Crittenden was found guilty of child molesting following a bench trial in an Indiana state court. He is currently serving a 35-year sentence for this conviction. Crittenden now seeks a writ of habeas corpus. For the reasons explained in this Entry, Crittenden's petition for a writ of habeas corpus is **denied** and the action dismissed with prejudice. In addition, the Court finds that a certificate of appealability should not issue.

I. Background

District court review of a habeas petition presumes all factual findings of the state court to be correct, absent clear and convincing evidence to the contrary. *See Daniels v. Knight*, 476 F.3d 426, 434 (7th Cir. 2007). On direct appeal, the Indiana Court of Appeals summarized the relevant facts as follows:

> In 2006, Crittenden began cohabiting with Shontae Matlock and her daughter D.M., born February 8, 1999, on Denny Street in Indianapolis. On one occasion during 2007 or 2008, Crittenden entered D.M.'s bedroom while she was sleeping and ordered her to perform fellatio on him.
>
> When she refused, Crittenden placed his hand inside her vagina and moved it around. He then performed anal intercourse on her. Crittenden admonished D.M. not to tell anyone about the incident. Nevertheless, D.M. told her mother, who refused to believe her allegations. On May 11, 2008, D.M. reported the incident to her aunt, Lawanna Smith, who took her to the hospital for a medical examination.

> On October 7, 2008, the State charged Crittenden with two counts of class A felony child molesting and two counts of class C felony child molesting. On April 7, 2009, the State filed a notice of intent to introduce child hearsay statements at trial. On April 27, 2009, the trial court held a hearing on the matter and determined that such statements were admissible, subject to limitations set forth in *Tyler v. State,* 903 N.E.2d 463 (Ind. 2009). That same day, Crittenden waived his right to jury trial, and a bench trial ensued. The trial court found Crittenden guilty of one count of class A felony child molesting and one count of class C child molesting.

Crittenden v. State, 920 N.E.2d 277 (Ind. Ct. App. 2010) (*Crittenden I*).

In his direct appeal, Crittenden argued that the State presented insufficient evidence to prove that he molested D.M. in Indiana's territorial jurisdiction. The Indiana Court of Appeals found sufficient evidence and affirmed Crittenden's convictions. *Id.* Crittenden raised the same issue in a petition to transfer to the Indiana Supreme Court, which denied his petition on March 11, 2010.

On August 10, 2010, Crittenden filed a petition for post-conviction relief, which the trial court granted in part and denied in part, ordering a new sentencing hearing. Crittenden appealed to the Indiana Court of Appeals, raising procedural issues in the post-conviction court, challenging the admission of evidence at the post-conviction evidentiary hearing, and arguing that he received ineffective assistance of trial and appellate counsel. The Indiana Court of Appeals affirmed the trial court. *Crittenden v. State*, 2015 WL 3965812 (Ind. Ct. App. 2015) (*Crittenden II*). Crittenden then filed the instant petition for a writ of habeas corpus.

II. Applicable Law

A federal court may grant habeas relief only if the petitioner demonstrates that he is in custody "in violation of the Constitution or laws . . . of the United States." 28 U.S.C. § 2254(a) (1996). "Under the current regime governing federal habeas corpus for state prison inmates, the inmate must show, so far as bears on this case, that the state court which convicted him

unreasonably applied a federal doctrine declared by the United States Supreme Court." *Redmond v. Kingston,* 240 F.3d 590 (7th Cir. 2001) (citing 28 U.S.C. § 2254(d)(1); *Guys v. Taylor*, 529 U.S. 362 (2000); *Morgan v. Krenke*, 232 F.3d 562 (7th Cir. 2000)). Thus, "under AEDPA, federal courts do not independently analyze the petitioner's claims; federal courts are limited to reviewing the relevant state court ruling on the claims." *Rever v. Acevedo*, 590 F.3d 533, 536 (7th Cir. 2010). "A state-court decision involves an unreasonable application of this Court's clearly established precedents if the state court applies this Court's precedents to the facts in an objectively unreasonable manner." *Brown v. Payton*, 544 U.S. 131, 141 (2005) (internal citations omitted). "The habeas applicant has the burden of proof to show that the application of federal law was unreasonable." *Harding v. Sternes*, 380 F.3d 1034, 1043 (7th Cir. 2004) (citing *Woodford v. Visciotti*, 537 U.S. 19, 25 (2002)).

III. Discussion

In support of his petition for habeas relief, Crittenden argues that: (1) his counsel was ineffective for failing to investigate, failing to call witnesses, and failing to present any evidence on his behalf; (2) his counsel was ineffective for failing to correctly advise him about a plea offer; (3) his counsel was ineffective for failing to cross-examine D.M. during the pre-trial child hearsay hearing; (4) his counsel had a conflict of interest; (5) his classification as a sexually violent predator violated the *ex post facto* clause of the United States Constitution; (6) it was an *ex post facto* violation for the Indiana Court of Appeals to cite a case in its second direct-appeal opinion that was not available when Crittenden committed his crimes; (7) his counsel was ineffective for failing to request sentencing transcripts; and (8) the evidence against him is insufficient to sustain the conviction. The respondent argues that grounds Four and Seven are procedurally defaulted and that Crittenden is not entitled to relief on the merits of the remaining grounds.

A. *Grounds Four, Six, and Seven*

In grounds Four and Seven of his habeas petition, Crittenden argues that his counsel had a conflict of interest and that his counsel was ineffective for not requesting the sentencing transcripts because the sentencing transcripts would have shown the conflict of interest. The respondent argues that these claims are procedurally defaulted. In Ground Six, Crittenden argues that in reviewing his sentence, the Indiana Court of Appeals violated the *ex post facto* clause because it, when it reviewed his sentence as part of his second direct appeal, relied on caselaw that did not exist at the time the acts at issue took place. This claim, too, is procedurally defaulted.

"Inherent in the habeas petitioner's obligation to exhaust his state court remedies before seeking relief in habeas corpus, *see* 28 U.S.C. § 2254(b)(1)(A), is the duty to fairly present his federal claims to the state courts." *Lewis v. Sternes*, 390 F.3d 1019, 1025 (7th Cir. 2004). To meet this requirement, a petitioner "must raise the issue at each and every level in the state court system, including levels at which review is discretionary rather than mandatory." *Id.* at 1025-26. A federal claim is not fairly presented unless the petitioner "put[s] forward operative facts and controlling legal principles." *Simpson v. Battaglia*, 458 F.3d 585, 594 (7th Cir. 2006) (citation and quotation marks omitted). "A habeas petitioner who has exhausted his state court remedies without properly asserting his federal claim at each level of state court review has procedurally defaulted that claim." *Lewis*, 390 F.3d at 1026. "A prisoner can overcome procedural default by showing cause for the default and resulting prejudice, or by showing he is actually innocent of the offense." *Brown v. Brown*, 847 F.3d 502, 509 (7th Cir. 2017). This is at least in part because "[c]ause is defined as an objective factor, external to the defense, that impeded the defendant's efforts to raise the claim in an earlier proceeding." *Johnson v. Foster*, 786 F.3d 501, 505 (7th Cir. 2015).

Crittenden does not dispute that he has failed to present Grounds Four and Seven to the Indiana state courts, but he argues that the sentencing transcripts were not available at the time he sought relief in the state court. Crittenden bases his claims in Grounds Four and Seven on an alleged conflict of interest on the part of trial counsel. He states that his counsel requested that a "conflict attorney" be appointed at his sentencing hearing, but none was appointed and that the court did not make an inquiry into the conflict. He concludes that because the transcripts were unavailable, the facts supporting this claim were not reasonably available to him at the time of his post-conviction proceedings. The respondent contends that the transcripts have been available since Crittenden's direct appeal, and the record seems to support this assertion. Even if the transcripts were not available to Crittenden, he does not argue that he was somehow unaware of, or could not have discovered, the facts upon which his conflict of interest claim are based at the time of his post-conviction proceedings. As long as he was aware of those facts he could have presented them whether he had the transcript or not. He therefore has not shown good cause for his procedural default and he is not entitled to relief on grounds Four and Seven. Crittenden also did not present Ground Six to the state courts and he provides no reason for failing to do so. He is thus not entitled to relief on this ground either.

B. *Grounds One, Two, and Three*

In Grounds One, Two, and Three, Crittenden argues that his counsel was ineffective. A defendant has a right under the Sixth Amendment to effective assistance of counsel. *See Strickland v. Washington*, 466 U.S. 668, 687 (1984). For a petitioner to establish that "counsel's assistance was so defective as to require reversal," he must make two showings: (1) that counsel rendered deficient performance that (2) prejudiced the petitioner. *Id.* With respect to the performance requirement, "[t]he proper measure of attorney performance remains simply reasonableness under

prevailing professional norms." *Wiggins v. Smith*, 539 U.S. 510, 521 (2003) (quoting *Strickland*, 466 U.S. at 688). "[T]o establish prejudice, a 'defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'" *Id.* at 534 (quoting *Strickland*, 466 U.S. at 694).

When the deferential AEDPA standard is applied to a *Strickland* claim, the following calculus emerges:

> Establishing that a state court's application of *Strickland* was unreasonable under § 2254(d) is . . . difficult. The standards created by *Strickland* and § 2254(d) are both "highly deferential," [*Strickland*] at 689, 104 S. Ct. 2052; *Lindh v. Murphy*, 521 U.S. 320, 333, n.7 (1997), and when the two apply in tandem, review is "doubly" so, *Knowles*, 556 U.S. at 123. The *Strickland* standard is a general one, so the range of reasonable applications is substantial. 556 U.S., at 123. Federal habeas courts must guard against the danger of equating unreasonableness under *Strickland* with unreasonableness under § 2254(d). When § 2254(d) applies, the question is not whether counsel's actions were reasonable. The question is whether there is any reasonable argument that counsel satisfied *Strickland's* deferential standard.

Harrington v. Richter, 562 U.S. 86, 105 (2011).

Crittenden raises several ineffective assistance of trial counsel claims. The Indiana Court of Appeals addressed each of these claims after setting forth the *Strickland* standard governing ineffective assistance of counsel claims. The Court will address each in turn.

1. Failure to Call Witnesses and Present DCS Reports

Crittenden first argues that his counsel was ineffective for failing to present witnesses in support of his defense, including the victim's mother. He also argues that his counsel failed to investigate the DCS reports and present them at trial, which contained exculpatory evidence.

Addressing Crittenden's claim that his counsel should have called the victim's mother as a character witness, the Indiana Court of Appeals stated:

> In regard to witnesses, Crittenden argues that his counsel should have called the following as witnesses: (1) D.M.'s mother to testify that she did not believe that Crittenden had inappropriately touched D.M.; (2) D.M.'s teachers to see if D.M.

> had ever reported abuse to them; and (3) character witnesses to testify that Crittenden had never molested any other children.
>
> "A decision regarding what witnesses to call is a matter of trial strategy which an appellate court will not second-guess[.]" *Brown v. State*, 691 N.E.2d 438, 447 (Ind. 1998). "When ineffective assistance of counsel is alleged and premised on the attorney's failure to present witnesses, it is incumbent upon the petitioner to offer evidence as to who the witnesses were and what their testimony would have been." *Lowery v. State*, 640 N.E.2d 1031, 1047 (Ind. 1994), reh'g denied, cert. denied.
>
> We need not determine whether trial counsel's decision not to call witnesses was a reasonable trial strategy because Crittenden has failed to meet his post-conviction relief burden on this ineffective assistance claim. Crittenden did not offer any affidavits from these proposed witnesses or any other evidence to show what these witnesses' testimony would have been; thus, he has failed to meet his burden on this claim. *See Lowery*, 640 N.E.2d at 1047.

Crittenden II, 2015 WL at 3965812 *12.

Crittenden challenges this ruling arguing that he was unable to offer testimony from this proposed witness because the PCR court denied his request for a subpoena to this witness. But even if Crittenden had been able to present evidence regarding what D.M.'s mother's testimony would have been, he still has failed to show that his counsel's performance was deficient. Counsel testified at the post-conviction hearing that it was not a good strategy to try to present a character witness during the guilt phase of trial: "It's not an appropriate witness to call [at] trial and I know how the Court would react if I attempted to do it" (PCR Tr. 111).[1] "The Constitution does not oblige counsel to present each and every witness that is suggested to him." *Blackmon v. Williams*, 823 F.3d 1088, 1103 (7th Cir. 2016), quoting *United States v. Best*, 426 F.3d 937, 945 (7th Cir. 2005). Strategic decisions like these, so long as they are made after a thorough investigation of law and facts, are "virtually unchallengeable." *Strickland*, 466 U.S. at 690. The Supreme Court

[1] The Court uses the following citation format when citing to the state court records: "Trial Tr." for the trial record and "PCR Tr.," for the post-conviction hearing transcripts.

has made clear that "counsel should be 'strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment,' and that the burden to 'show that counsel's performance was deficient' rests squarely on the defendant." *Burt v. Titlow*, 134 S. Ct. 10, 17 (2013) (quoting *Strickland*, 466 U.S. at 687, 690)). Here, the Indiana Court of Appeals' rejection of this ineffective assistance of counsel claim on the basis that counsel explained it was not a good trial strategy to present character witnesses represents a reasonable application of *Strickland.*

Crittenden also argues that his counsel should have investigated DCS reports regarding the care of D.M. and introduced them at trial. One of these reports followed "a complaint filed on April 1, 2008, regarding a lack of food, shelter, and clothing in D.M.'s home" and "contained a statement that D.M. denied any abuse in the home at that time" *Crittenden II*, 3965812 *11. The other report follows "a complaint filed on May 11, 2008, regarding allegations of sexual abuse against Crittenden that then led to the current charges being filed against him" *Crittenden II*, 3965812 *3, n.2.

The Indiana Court of Appeals addressed Crittenden's claim that his counsel was ineffective for failing to investigate the DCS reports explaining:

> Crittenden asserts that his trial counsel should have investigated the DCS reports by deposing the family case managers who wrote the reports. Crittenden contends that if his trial counsel would have fully investigated the DCS report from April 2008 then he would have seen that the report – which was based on an investigation of the lack of food, shelter, and clothing in the home – contained a statement that D.M. denied any abuse in the home at that time. Critten also argues that his trial counsel was ineffective for failing to introduce the April 2008 and May 2008 DCS reports into evidence during the bench trial.
>
> During the post-conviction hearing, Crittenden's trial counsel testified that he had reviewed the DCS report before trial. He further testified that he did not specifically recall what his thinking or strategy was at the time of trial regarding the reports but that, when looking at them at the post-conviction hearing, he was able to speculate as to strategy regarding the reports. Trial counsel testified that he

> would not have offered evidence of the May 2008 report because it "would have likely convinced the Judge [during the bench trial that Crittenden was] guilty as opposed to anything that was exculpatory" and because it was a repetition of what the victim had told the detective and the forensic child interviewer. Crittenden's trial counsel testified that he would not have admitted the April 2008 report because it related to conduct not charged in Crittenden's case and that it would not have been relevant. Additionally, counsel testified that he would not have deposed [the] DCS case managers because "their testimony would have tended towards proving the State's case as opposed to anything exculpatory."
>
> Because trial counsel's decision to not further investigate the DCS reports by deposing the case manager and his decision to not introduce them into evidence was a reasonable strategic decision, Crittenden has failed to show that his trial counsel's performance was deficient. Moreover, Crittenden has failed to demonstrate that there is a reasonable probability that, but for his trial counsel's alleged errors, the result of the proceeding would have been different.

Id. at *12.

Crittenden argues that the Indiana Court of Appeals misapplied *Strickland* to this claim and that his counsel was ineffective for failing to use the April 2008 report as impeachment evidence because that report contained a statement that D.M. denied any abuse in the home. He also speculates that the complainant who initiated the April 2008 report is the victim's aunt who was biased against him. He infers from this that if his attorney had been able to show that the aunt was the complainant, he could have shown that she was biased and used this bias to impeach her testimony regarding the alleged abuse.

Here, the Court of Appeals concluded that counsel's decision not to further investigate the DCS reports or introduce them into evidence was based on his review of the reports and was a reasonable strategic decision. With regard to the April 2008 report, Crittenden's assumption that the complainant was the victim's aunt and that she was biased against him is insufficient to show that counsel failed to act reasonably in deciding not to pursue that line of inquiry. Crittenden has failed to show that this was an unreasonable application of *Strickland*.

Crittenden also argues in reply in support of his habeas petition that his counsel never

filed a motion for discovery of D.M.'s medical records. He contends that counsel's failure to investigate these records prejudiced his defense and that counsel could have uncovered facts that could have been used to help his defense. But Crittenden did not raise this argument at every stage of his state court proceedings and did not raise this argument before filing his reply in support of his habeas petition, so the Court deems it waived, and need not address it.

2. Plea Negotiations

Crittenden next argues that his counsel was ineffective for failing to correctly advise him about a plea offer, causing him to reject the offer. Crittenden states that, on the day before trial, he was offered a plea of eight years. At the same time, counsel advised him that he could waive his right to a jury trial and that he had five minutes to decide. He also states that his counsel failed to advise him of the consequences of being convicted of Class A felony child molesting, including lifetime parole, lifetime registration, and classification as a sexually violent predator. Further, Crittenden contends that his counsel failed to advise him that he could be convicted based solely on the testimony of the victim.

Addressing these arguments, the Indiana Court of Appeals stated:

> The record before us does not support Crittenden's assertions. During Crittenden's sentencing hearing, his trial counsel informed the trial court that he had discussed these issues with Crittenden. Specifically, his trial counsel stated:
>
> > And Judge, I feel compelled to make at least a very minimal record so that the Court's [sic] aware and Mr. Crittenden may not recall the entirety of our conversation but did have some other folks there with me as we were discussing it and I remember distinctly assuring him that the Court could convict just as easily acquit and we discussed in detail when plea negotiations were ongoing what he was facing if convicted and what was offered by the State and I know sitting here now [Crittenden] probably feels like more time could have been spent explaining it to him but I made sure before we signed that document that I was satisfied he was clear and I thought he was clear minded that day and I though he understood the nature of the circumstances, so, if that has changed I can only

> base my recollection on what I remember and what I told him and I remember distinctly warning him of all possible outcomes."
>
> *****
>
> Because a plea was offered that morning that I advised him to consider with a high level of consideration.
>
> Furthermore, during the post-conviction hearing, Crittenden's trial counsel testified that, prior to trial, he had consulted with Crittenden regarding the possibility of a plea agreement and testified that he would have conveyed any plea offer to him. Additionally, his trial counsel testified that he consulted with Crittenden and informed him of what kind of evidence could be used against him.
>
> Other than Crittenden's self-serving testimony during the post-conviction hearing, he did not present any evidence that his trial counsel engaged in the behavior that he alleged. Accordingly, he has failed to show that the post-conviction court erred by denying his ineffective assistance claim.

Crittenden II, 3965812 at *13. Counsel also testified at the post-conviction hearing that he consulted Crittenden about the State's plea offer. (PCR Tr. 71). According to counsel, he discussed with Crittenden the evidence that the State was going to use at his trial and the "kind of evidence [that] could be used by the State to obtain a conviction." (PCR Tr. 72). Specifically, he advised Crittenden "that a conviction could be obtained with no physical evidence such as no proof of penetration, no internal or external damage to the vaginal or ... anal cavities." (PCR Tr. 72). Moreover, counsel was sure that, "in a case like this," he would have told Crittenden that the victim's uncorroborated testimony was sufficient evidence. (PCR Tr. 72–73). And counsel would have told Crittenden his opinion about the plea offer and discussed Crittenden's potential penalties if he lost at trial. (PCR Tr. 113).

In short, the trial court considered the evidence presented regarding the plea offered to Crittenden and concluded that counsel had properly advised Crittenden regarding the plea and the possibility of being found guilty. This Court's review of the record does not reveal that the Court

of Appeals acted contrary to federal law or unreasonably applied the law to the facts before it. Crittenden is therefore not entitled to relief on this claim.

3. Child Hearsay Hearing

Crittenden also argues that his counsel was ineffective for not cross-examining D.M. during the child hearsay hearing.

To determine whether statements that D.M. made to her aunt and a nurse were admissible at trial, the court held a child hearsay hearing before trial. (Tr. 11–53). During the hearing, the Court heard testimony from D.M. and her aunt. The court also admitted as exhibits the taped interview of D.M. by a forensic child interviewer and a transcript of that interview. (Tr. 36). At the end of the hearing, the Court held that the hearsay statements were admissible but stated that if D.M. testified at trial, the interview with the forensic interviewer would not be admitted. Although counsel did not cross-examine D.M. at the child hearsay hearing, he cross-examined her at trial. (Tr. 77-84).

Crittenden argues that D.M. had provided inconsistent statements regarding where the molestation took place and that she told the forensic child interviewer that she had observed a friend's father tell her friend to "suck his stuff" and that other children had touched her private parts. Crittenden contends that his counsel was ineffective for failing to cross-examine her regarding these statements at the hearing. Reviewing this claim, the Indiana Court of Appeals stated:

> The post-conviction court noted that while Crittenden's trial counsel did not cross-examine D.M. during they child-hearsay hearing, he had cross-examined D.M. during the bench trial. The post-conviction court also noted that, at the end of Crittenden's bench trial, the trial court specifically clarified that its verdict was based solely on the victim's trial testimony and not on any other statement she had made to others. The post-conviction court determined that, as a result, Crittenden had failed to show any prejudice from his trial counsel's decision not to cross-examine D.M. during the child-hearsay hearing.

Crittenden II, 2015 WI 3965812, at *13.

Here, the Indiana Court of Appeals found that Crittenden's counsel was not ineffective for failing to cross-examine D.M. at the child hearsay hearing because counsel did cross-examine her at trial. That court also pointed out that cross-examination is a matter of trial strategy. *Id.*; *see also United States v. Jackson*, 546 F.3d 801, 814 (7th Cir. 2008) ("[D]eciding what questions to ask a prosecution witness on cross-examination is a matter of strategy."); *Johnson v. Thurmer*, 624 F.3d 786, 792 (7th Cir. 2010) (Courts "do not second guess the reasonable tactical decisions of counsel."). Crittenden has failed to show that this ruling was an unreasonable application of the law. First, because the trial court based its ruling on the testimony on trial, Crittenden has failed to show he was prejudiced because he failed to show how testimony at the child hearsay hearing impacted the trial. Moreover, the statements to the child interviewer were made available to the trial court during the child hearsay hearing and the trial court reviewed them during that hearing. Thus, even though counsel did not cross-examine D.M. regarding those statements, the trial court was aware of them at the child hearsay hearing. Crittenden therefore is not entitled to relief on this claim.

C. *Ground Five*

In Ground Five of his petition, Crittenden argues that the trial court failed to sentence him under the law that was in effect at the time he allegedly committed the offense and he was therefore deemed a sexually violent predator in violation of the Ex Post Facto Clause. Crittenden points out that the statue in place at the time the acts at issue in this case took place required that a determination that a person is a sexually violent predator be made by two board certified experts while the statute in effect at the time he was convicted and sentenced allows a person to be deemed a sexually violent predator by operation of law. He concludes that because there was no

determination by board certified experts regarding whether he is a sexually violent predator, he must have been found to be one by operation of law. Crittenden raised this argument in his second direct appeal the Indiana Court of Appeals and that court found that Crittenden is incorrect in his conclusion that he has been found to be a sexually violent predator. *Crittenden v. State*, 2017 WL 961891, *5 (Mar. 13, 2017) (*Crittenden III*). That court explained: "There has been no determination as to Crittenden's status upon his release from incarceration and Crittenden has not been notified that he is required to register as a sexually violent predator." *Id.* Thus, Crittenden's claim that the trial court improperly classified him as a sexually violent predator in violation of the *ex post facto* clause fails.

D. *Ground Eight*

In Ground Eight, Crittenden contends that the evidence was insufficient to convict him. Specifically, Crittenden argues that the state did not prove territorial jurisdiction over the crimes at issue.

The respondent argues that Crittenden's territorial jurisdiction claim is based on state law and not truly a challenge to the sufficiency of the evidence because territorial jurisdiction is not an element of the crime. But the Indiana Supreme Court has held:

> [t]he plain, ordinary, and usual meaning of [I.C. § 35–41–1–1] clearly establishes 'in Indiana' as a prerequisite for Indiana criminal prosecutions and thus restricts the power to exercise criminal jurisdiction to Indiana's actual territorial boundaries." *Benham v. State,* 637 N.E.2d 133, 137 (Ind.1994). Consequently, this Court treats territorial jurisdiction as though it were an element of an offense and has held that the State must prove this element "beyond a reasonable doubt."

An-Hung Yao v. State, 975 N.E.2d 1273, 1276–77 (Ind. 2012) (quoting *Ortiz v. State,* 766 N.E.2d 370, 375 (Ind. 2002)).

The Court will therefore treat Crittenden's challenge to the sufficiency of the evidence to support territorial jurisdiction as a challenge to the sufficiency of the evidence that is cognizable

in this 2254 petition. The Supreme Court provided the standard for sufficiency of the evidence claims in habeas petitions in *Jackson v. Virginia*, 443 U.S. 307 (1979). In that case, the Court explained that "evidence is sufficient to support a conviction if, "after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the *essential elements of the crime* beyond a reasonable doubt." 443 U.S. at 319 (emphasis added). "[H]abeas reviews of *Jackson* claims are subject to two levels of judicial deference creating a high bar: first, the state appellate court determines whether any rational trier of fact could have found the evidence sufficient; second, a federal court may only overturn the appellate court's finding of sufficient evidence if it was objectively unreasonable." *Saxon v. Lashbrook*, 873 F.3d 982, 987–88 (7th Cir. 2017). "Federal review of these claims . . . turns on whether the state court provided fair process and engaged in reasoned, good-faith decisionmaking when applying *Jackson*'s 'no rational trier of fact' test." *Gomez v. Acevedo*, 106 F.3d 192, 199 (7th Cir. 1999).

Crittenden bases his sufficiency of the evidence claim on his contention that the trial judge, in rendering a verdict, specifically explained that the verdict was based only on the testimony of the victim at trial and not on statements that she had made to others. Because the victim did not articulate at trial specifically that the events happened in Indiana, Crittenden concludes that there was insufficient evidence of territorial jurisdiction. In addressing this challenge to the sufficiency of the evidence, the Indiana Court of Appeals stated: "When reviewing a claim of insufficient evidence, we neither reweigh evidence nor judge witness credibility; rather, we consider only the evidence and reasonable inferences supporting the judgment." *Crittenden I*, 2010 WL 199311 at *1. Applying this standard to Crittenden's claim, the court held:

> In advancing his sufficiency claim, Crittenden relies on the trial court's statement during sentencing that its verdict "was based on the child's testimony [and] that [it] gave no weight in [its] decision to the *statements that the victim made to* [Aunt] Lawanna." D.M. testified that Crittenden molested her in her bedroom at their old

> house. Aunt Lawanna testified that Shontae, D.M., and Crittenden lived in various houses all within Indianapolis during 2006, 2007, and 2008. . . . Clearly, Aunt Lawanna's testimony regarding the location of D.M.'s home was based on personal knowledge and not on any hearsay statements D.M. made to her. Thus, the State presented sufficient evidence of territorial jurisdiction.

The foregoing analysis by the Indiana Court of Appeals comports with the *Jackson* standard. First, it set forth the state analog to the *Jackson* standard and what the State was required to show to prove territorial jurisdiction. It then set forth evidence from the record that in its view was sufficient to establish this—namely, that D.M. stated that the molestation occurred at her home and that Aunt Lawanna stated that she lived in various houses within Indianapolis during the time at issue. This analysis demonstrates that the Indiana Court of Appeals "engaged in reasoned, good-faith decisionmaking" when applying the *Jackson* standard. *Gomez*, 106 F.3d at 199. As the Indiana Court of Appeals explained, the trial court noted that statements D.M. made to others were not considered, but Aunt Lawanna's testimony regarding where D.M. lived was based on her personal knowledge. The trial court's statement that it considered only D.M.'s testimony was clearly directed only to the hearsay statements at issue and not other testimony. Regardless, there was evidence in the record to support the conclusion that the acts took place in Indiana. Accordingly, the Indiana Court of Appeals applied the *Jackson* standard in a reasoned, good-faith manner. Crittenden therefore cannot show that he is entitled to relief on this claim.

IV. Conclusion

This Court has carefully reviewed the state record in light of Crittenden's claims and has given such consideration to those claims as the limited scope of its review in a habeas corpus proceeding permits. Because Crittenden failed to carry his burden on his claims, he is not entitled to habeas relief, and his petition is therefore **denied**.

Judgment consistent with this Entry shall now issue.

V. Certificate of Appealability

Rule 11(a) of the *Rules Governing § 2254 Cases* requires the district courts to "issue or deny a certificate of appealability when it enters a final order adverse to the applicant," and "[i]f the court issues a certificate, the court must state the specific issue or issues that satisfy the showing required by 28 U.S.C. § 2253(c)(2)." Pursuant to § 2253(c)(2), a certificate of appealability may issue "only if the applicant has made a substantial showing of the denial of a constitutional right." Such a showing includes demonstrating "that reasonable jurists could debate whether . . . the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000) (citation and quotation marks omitted). Crittenden has failed to make this showing, and therefore a certificate of appealability is **denied**.

IT IS SO ORDERED.

Date: 11/16/2018

Hon. Jane Magnus-Stinson, Chief Judge
United States District Court
Southern District of Indiana

Distribution:

LAMARR T. CRITTENDEN
148648
NEW CASTLE - CF
NEW CASTLE CORRECTIONAL FACILITY - Inmate Mail/Parcels
1000 Van Nuys Road
NEW CASTLE, IN 47362

Jesse R. Drum
INDIANA ATTORNEY GENERAL
jesse.drum@atg.in.gov

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

LAMARR T. CRITTENDEN,	)	
	)	
Petitioner,	)	
	)	
vs.	)	No. 1:17-cv-02279-JMS-DLP
	)	
KEITH BUTTS Warden,	)	
	)	
Respondent.	)	

FINAL JUDGMENT

For the reasons set forth in the accompanying Entry, the Court now enters **FINAL JUDGMENT** in this action in favor of the respondent and against the petitioner. The petition for writ of habeas corpus relating to state court case number 49G-04-0810-FA-227401 is **denied** and this action is dismissed with prejudice.

Date: 11/16/2018

Jane Magnus-Stinson

Hon. Jane Magnus-Stinson, Chief Judge
United States District Court
Southern District of Indiana

Laura Briggs, Clerk
United States District Court

By: Deputy Clerk

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jesse.drum@atg.in.gov

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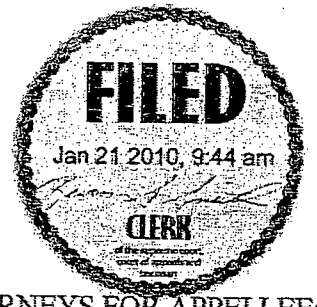

ATTORNEY FOR APPELLANT:

MICHAEL C. BORSCHEL
Indianapolis, Indiana

ATTORNEYS FOR APPELLEE:

GREGORY F. ZOELLER
Attorney General of Indiana

ANN L. GOODWIN
Special Deputy Attorney General
Indianapolis, Indiana

IN THE COURT OF APPEALS OF INDIANA

LAMAR CRITTENDEN,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 49A05-0906-CR-355
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Lisa Borges, Judge
Cause No. 49G04-0810-FA-227401

January 21, 2010

MEMORANDUM DECISION - NOT FOR PUBLICATION

CRONE, Judge

Lamar Crittenden appeals his convictions for class A and class C felony child molesting. He contends that the State failed to establish that he was within the territorial jurisdiction of Indiana when he molested his victim. We affirm.

In 2006, Crittenden began cohabiting with Shontae Matlock and her daughter D.M., born February 8, 1999, on Denny Street in Indianapolis. On one occasion during 2007 or 2008, Crittenden entered D.M.'s bedroom while she was sleeping and ordered her to perform fellatio on him. When she refused, Crittenden placed his hand inside her vagina and moved it around. He then performed anal intercourse on her. Crittenden admonished D.M. not to tell anyone about the incident. Nevertheless, D.M. told her mother, who refused to believe her allegations. On May 11, 2008, D.M. reported the incident to her aunt, Lawanna Smith, who took her to the hospital for a medical examination.

On October 7, 2008, the State charged Crittenden with two counts of class A felony child molesting and two counts of class C felony child molesting. On April 7, 2009, the State filed a notice of intent to introduce child hearsay statements at trial. On April 27, 2009, the trial court held a hearing on the matter and determined that such statements were admissible, subject to limitations set forth in *Tyler v. State*, 903 N.E.2d 463 (Ind. 2009).[1] That same day, Crittenden waived his right to jury trial, and a bench trial ensued. The trial court found Crittenden guilty of one count of class A felony child molesting and one count of class C

[1] In *Tyler*, our supreme court held that where the statements are consistent and otherwise admissible, testimony of a protected person may be presented in open court or by prerecorded statement through the protected person statute, found in Indiana Code Section 35-37-4-6, but not both except as authorized under the Indiana Rules of Evidence. 903 N.E.2d at 467.

child molesting. At the May 26, 2009 sentencing hearing, the trial court made the following statement:

> I want to state this specifically for the record, that my verdict was based on the child's testimony, that I gave no weight in my decision to the statements that the victim made to [Aunt] Lawanna Smith or any other individual but only upon her testimony here at trial, which I found to be compelling and credible.

Tr. at 153. This appeal ensued.

Crittenden contends that the State failed to present sufficient evidence to establish territorial jurisdiction over his case. Territorial jurisdiction refers to the state's authority to prosecute a person for an act committed within its territorial borders. *Ortiz v. State*, 766 N.E.2d 370, 374 (Ind. 2002). Although territorial jurisdiction is not considered an element of the offense, the State must prove it beyond a reasonable doubt. *Id.* When reviewing a claim of insufficient evidence, we neither reweigh evidence nor judge witness credibility; rather, we consider only the evidence and reasonable inferences supporting the judgment. *Id.* We affirm the conviction if there is substantial evidence of probative value from which a trier of fact could have found the defendant guilty beyond a reasonable doubt. *Id.*

In advancing his sufficiency claim, Crittenden relies on the trial court's statement during sentencing that its verdict "was based on the child's testimony [and] that [it] gave no weight in [its] decision to the *statements that the victim made to* [Aunt] Lawanna." *Id.* at 153 (emphasis added). D.M. testified in court that Crittenden molested her in her bedroom at their old house. Tr. at 62. Aunt Lawanna testified that Shontae, D.M., and Crittenden lived in various houses all within Indianapolis during 2006, 2007, and 2008. *Id.* at 89. Aunt Lawanna also testified that she frequently spent time with D.M. and essentially helped raise

her. *Id.* at 87-88. Clearly, Aunt Lawanna's testimony regarding the location of D.M.'s home was based on personal knowledge and not on any hearsay statements D.M. made to her. Thus, the State presented sufficient evidence of territorial jurisdiction. Accordingly, we affirm Crittenden's convictions.

Affirmed.

RILEY, J., and VAIDIK, J., concur.

MEMORANDUM DECISION

APPELLANT, PRO SE

Lamarr T. Crittenden
Miami Correctional Facility
Bunker Hill, Indiana

ATTORNEYS FOR APPELLEE

Gregory F. Zoeller
Attorney General of Indiana

George P. Sherman
Deputy Attorney General
Indianapolis, Indiana

IN THE COURT OF APPEALS OF INDIANA

Lamarr T. Crittenden,
Appellant-Petitioner,

v.

State of Indiana,
Appellee-Respondent.

June 30, 2015

Court of Appeals Case No. 49A05-1405-PC-227

Appeal from the Marion Superior Court

Lower Court Cause No. 49G04-0810-PC-227401

The Honorable Lisa F. Borges, Judge

The Honorable Anne Flannelly, Magistrate

Pyle, Judge.

D-1

Statement of the Case

[1] Lamarr T. Crittenden ("Crittenden") filed a pro se petition for post-conviction relief, alleging multiple claims of ineffective assistance of both trial and appellate counsel. Prior to the post-conviction hearing, the post-conviction court granted Crittenden's request for the issuance of subpoenas to his trial and appellate counsel, but it denied his request to issue subpoenas to four other proposed witnesses, finding that the testimony of these proposed witnesses was neither relevant nor probative. The post-conviction court also denied various discovery motions filed by Crittenden. During the post-conviction hearing, when Crittenden moved to admit into evidence two Department of Child Services ("DCS") reports, the State objected based on a lack of foundation, and the post-conviction court sustained the objection and ruled that the reports would not be admitted at that time.

[2] Following the hearing, the post-conviction court issued its findings and conclusions in which it denied post-conviction relief in part and granted it in part. Specifically, the post-conviction court concluded that Crittenden's trial counsel had rendered deficient performance at sentencing by failing to realize that the statutory minimum sentence for Class A felony child molesting was twenty years and by failing to bring the correct sentencing range to the trial court's attention, and the post-conviction court concluded that this "misimpression" was sufficient to show prejudice. As a result, the post-conviction court ordered that a new sentencing hearing be held. The post-conviction court also concluded that Crittenden's appellate counsel had

rendered ineffective assistance by failing to raise that sentencing issue on appeal. In regard to Crittenden's other allegations of ineffective assistance of trial and appellate counsel, the post-conviction court concluded that he had failed to meet his burden of proving these claims, and it denied post-conviction relief on these remaining claims.

[3] On appeal, Crittenden argues that the post-conviction court erred by: (1) denying his requests for subpoenas; (2) denying his motions for discovery; (3) excluding the DCS reports from evidence; and (4) denying post-conviction relief on his remaining ineffective assistance of trial and appellate counsel claims. Concluding that the post-conviction court committed no error as alleged by Crittenden, we affirm the post-conviction court's judgment.

[4] We affirm.

Issues

1. Whether the post-conviction court abused its discretion by denying Crittenden's request to issue four subpoenas.

2. Whether the post-conviction court abused its discretion by denying Crittenden's various discovery motions.

3. Whether the post-conviction court abused its discretion by excluding Crittenden's proposed evidence of DCS records from the post-conviction hearing.

4. Whether the post-conviction court erred by denying post-conviction relief on Crittenden's remaining claims of ineffective assistance of trial and appellate counsel.

Facts

[5] The facts of Crittenden's crimes were set forth in the memorandum decision from his direct appeal as follows:

> In 2006, Crittenden began cohabiting with Shontae Matlock and her daughter D.M., born February 8, 1999, on Denny Street in Indianapolis. On one occasion during 2007 or 2008, Crittenden entered D.M.'s bedroom while she was sleeping and ordered her to perform fellatio on him. When she refused, Crittenden placed his hand inside her vagina and moved it around. He then performed anal intercourse on her. Crittenden admonished D.M. not to tell anyone about the incident.
>
> Nevertheless, D.M. told her mother, who refused to believe her allegations. On May 11, 2008, D.M. reported the incident to her aunt, Lawanna Smith, who took her to the hospital for a medical examination.
>
> On October 7, 2008, the State charged Crittenden with two counts of class A felony child molesting and two counts of class C felony child molesting. On April 7, 2009, the State filed a notice of intent to introduce child hearsay statements at trial. On April 27, 2009, the trial court held a hearing on the matter and determined that such statements were admissible, subject to limitations set forth in *Tyler v. State,* 903 N.E.2d 463 (Ind. 2009). That same day, Crittenden waived his right to jury trial, and a bench trial ensued. The trial court found Crittenden guilty of one count of class A felony child molesting [for putting his penis in D.M.'s anus] and one count of class C child molesting [for fondling D.M.]. At the May 26, 2009 sentencing hearing, the trial court made the following statement:
>
> > I want to state this specifically for the record, that my verdict was based on the child's testimony, that I gave no weight in my decision to the statements that the victim made to [Aunt] Lawanna Smith or any other individual but only upon her testimony

here at trial, which I found to be compelling and credible.

Tr. at 153 . . . .

Crittenden v. State, No. 49A05-0906-CR-355, *1 (Ind. Ct. App. Jan. 21, 2010) (footnote omitted), *trans. denied.*

[6] During Crittenden's May 26, 2009 sentencing hearing, the trial court stated that the "minimum amount of time" that Crittenden could receive for his Class A felony conviction was "thirty years executed." (Tr. 148).[1] Crittenden's trial counsel agreed, asked the court to sentence Crittenden to "the absolutely minimum executed sentence that the Court c[ould,]" and requested that the trial court sentence him to "thirty years, thirty-five years, suspend five, two of that [to] probation . . . and the minimum sentence executed in the Department of Correction[]." (Tr. 152). The trial court sentenced Crittenden to thirty-five (35) years, with thirty (30) years executed and five (5) years suspended, for his Class A felony conviction and six (6) years for his Class C felony conviction, and the trial court ordered that these sentences be served concurrently.

[7] Thereafter, Crittenden appealed his convictions and argued that the State "failed to present sufficient evidence to establish territorial jurisdiction over his

[1] We will refer to the direct appeal transcript as "(Tr.)," the direct appeal appendix as "(App.)," the post-conviction transcript as "(P-CR Tr.)," and the post-conviction appendix as "(P-CR App.)."

case." *Crittenden v. State*, No. 49A05-0906-CR-355 at *1. Our Court held that there was sufficient evidence and affirmed his convictions.

[8] On July 29, 2010, Crittenden filed a pro se petition for post-conviction relief. Thereafter, the State Public Defender entered an appearance, investigated Crittenden's claims, and then, in February 2012, withdrew its appearance pursuant to Post-Conviction Rule 1(9)(c). Crittenden later filed amended pro se post-conviction petitions.

[9] Crittenden raised post-conviction claims of ineffective assistance of trial and appellate counsel, as well as, freestanding claims of error relating his sentence. Specifically, Crittenden alleged that his trial counsel had rendered ineffective assistance by: (1) failing to file a motion to dismiss, which he alleged should have been based on: (a) the probable cause affidavit and charging information lacking a file stamp; (b) a challenge to the constitutionality of the child molesting statute; and (c) a challenge to the lack of criminal intent element; (2) failing to sufficiently investigate his case and to present witnesses (including character witnesses in favor of Crittenden and witnesses to discredit D.M.'s testimony); (3) failing to advise him regarding his chances at trial and the benefits of accepting a plea offer; (4) failing to cross-examine the child victim and the forensic child interviewer at the pretrial child-hearsay hearing; (5) failing to admit evidence of two DCS reports;[2] (6) failing to object to the

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[2] One of these DCS reports was written, following a complaint filed on April 1, 2008, regarding a lack of food, shelter, and clothing in D.M.'s home, while the other report was written, following a complaint filed on

admissibility of the victim's medical exam and entering into a stipulation regarding the examining nurse's testimony; (7) being unaware that the statutory minimum sentence for Class A child molesting was twenty years; and (8) failing to object—based on *Blakely*[3]—to the trial court's aggravation of his sentence.

[10] In regard to Crittenden's ineffective assistance of appellate counsel claim, he alleged that his counsel rendered ineffective assistance by: (1) failing to sufficiently argue the territorial jurisdictional sufficiency issue raised on direct appeal; (2) failing to present a separate sufficiency issue on appeal; and (3) failing to raise sentencing issues, including a challenge that the trial court and his trial counsel misapplied the law regarding the statutory minimum sentence for his Class A felony child molesting conviction and a challenge to the enhancement of his sentence based on *Blakely*.

[11] During the course of this post-conviction proceeding, Crittenden filed various discovery motions, which were ultimately denied by the post-conviction court. These motions included: (1) Requests for Access to Relevant Portions of the Record (filed August 22, 2012 and March 8, 2013); (2) a Motion to Compel Release of Documents (filed on November 13, 2012); (3) Request for Access to Relevant Portions of the Record (filed March 8, 2013); (4) a Request for Documents, Calculated to Lead to Discovery of Admissible Evidence, Pursuant

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May 11, 2008, regarding allegations of sexual abuse against Crittenden that then led to the current charges being filed against him.

[3] *Blakely v. Washington*, 542 U.S. 296 (2004), *reh'g denied.*

to Trial Rule 34(B) (filed on March 11, 2013); and (5) a Motion for Offer to Prove (filed on March 21, 2013). When denying some of these motions, the post-conviction determined that Crittenden had "failed to show how the requested discovery [wa]s necessary to support his pending post-conviction relief claims, and he ha[d] not shown that he ha[d] made any effort to obtain such evidence from his trial counsel's file or his previously-appointed State Public Defender." (P-CR App. 134, 144).

[12] Prior to the post-conviction hearing, Crittenden filed a request for the post-conviction court to issue subpoenas. He sought to have subpoenas issued to: (1) his trial counsel; (2) his appellate counsel; (3) the deputy prosecutor from his bench trial; (4) the nurse who performed a medical exam on the victim and who did not testify at trial because the parties stipulated that she had examined D.M. and stipulated that the exam did not reveal any signs of injury to D.M.'s genitalia;[4] (5) a DCS family case manager who did not testify at trial and who wrote the April 2008 DCS report after she conducted an interview with D.M. and her mother following a complaint regarding a lack of food, shelter, and clothing in the home; and (6) a DCS family case manager who did not testify at trial and who wrote the May 2008 DCS report that contained allegations of sexual abuse against Crittenden and that led to the current charges being filed

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[4] Specifically, the parties stipulated that the nurse "examined" D.M. and that D.M. "did not have any injuries to her genitalia which neither confirm[ed] nor negate[d] the allegations of sexual abuse." (Tr. 118).

against him. Thereafter, the post-conviction court entered an order granting Crittenden's request for subpoenas for his trial and appellate counsel and denying his request for subpoenas for the remaining four witnesses. The post-conviction court explained that it denied Crittenden's request for the remaining witnesses "for the reason that the Court finds that each of these proposed witness' testimony is not relevant and probative." (P-CR App. 209).

[13] On June 18, 2013, the post-conviction court held a hearing on Crittenden's petition. During the hearing, at which Crittenden represented himself pro se, he called his trial counsel and appellate counsel as witnesses. He also testified on his own behalf. The post-conviction court took judicial notice of its file, the trial and sentencing transcripts, the appellate briefs, and this Court's memorandum decision from Crittenden's direct appeal.

[14] Crittenden's trial attorney did not have a specific recollection of the details of the underlying case. When questioning his trial counsel, Crittenden moved to admit the two DCS reports that Crittenden stated "were discovered to [his trial counsel] by [the] Deputy Prosecuting Attorney[.]" (P-CR Tr. 58). The State noted that the DCS reports appeared to be photocopies, and it objected to the admission of these reports based on a lack of foundation and lack of self-authentication. The post-conviction court sustained the objection and stated

that the reports would "not [be] admitted at this time." (P-CR Tr. 59). Crittenden did not try later to have the reports admitted into evidence.[5]

[15] Crittenden questioned his appellate counsel about his decision-making process when deciding what issue to raise on appeal. When Crittenden asked appellate counsel if a sufficiency of the evidence issue would have been a more meritorious issue to raise than the territorial jurisdiction issue, appellate counsel disagreed. Appellate counsel stated that "there was sufficient evidence to support the finding of guilty" and that he thought the jurisdictional issue was a better one to raise. (P-CR Tr. 13).

[16] On May 15, 2014, the post-conviction court issued its findings and conclusions in which it denied post-conviction relief in part and granted it in part. Specifically, the post-conviction court concluded that Crittenden's trial counsel had rendered deficient performance at sentencing by stating that the statutory minimum sentence for a Class A felony child molesting conviction was thirty years instead of twenty years and by failing to bring the correct sentencing range to the trial court's attention. The post-conviction court also concluded that this "misimpression" was sufficient to show prejudice. (P-CR App. 362). As a result, the post-conviction court ordered that a new sentencing hearing be held. The post-conviction court also concluded that Crittenden's appellate counsel

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[5] These reports, however, appear to be part of the court's file because the prosecutor submitted them to the trial court for review prior to the bench trial and then filed a copy of the reports that were sent to Crittenden's trial counsel as part of the pre-trial discovery.

had rendered ineffective assistance by failing to raise the issue on appeal. In regard to Crittenden's other allegations of ineffective assistance of trial and appellate counsel, the post-conviction court concluded that Crittenden had failed to prove that he had received ineffective assistance of counsel. Lastly, the post-conviction court concluded that Crittenden had waived his freestanding claims of error relating to sentencing.

[17] Crittenden now appeals the post-conviction court's ruling on his ineffective assistance of counsel claims, as well as, the court's rulings on some procedural issues. Additional facts will be provided when discussing Crittenden's appellate arguments.

Decision

[18] Crittenden appeals from the post-conviction court's order denying post-conviction relief on his remaining claims of ineffective assistance of trial and appellate counsel. Our standard of review in post-conviction proceedings is well settled.

> We observe that post-conviction proceedings do not grant a petitioner a "super-appeal" but are limited to those issues available under the Indiana Post-Conviction Rules. Post-conviction proceedings are civil in nature, and petitioners bear the burden of proving their grounds for relief by a preponderance of the evidence. Ind. Post-Conviction Rule 1(5). A petitioner who appeals the denial of PCR faces a rigorous standard of review, as the reviewing court may consider only the evidence and the reasonable inferences supporting the judgment of the post-conviction court. The appellate court must accept the post-conviction court's findings of fact and may reverse only if the

> findings are clearly erroneous. If a PCR petitioner was denied relief, he or she must show that the evidence as a whole leads unerringly and unmistakably to an opposite conclusion than that reached by the post-conviction court.

Shepherd v. State, 924 N.E.2d 1274, 1280 (Ind. Ct. App. 2010) (internal case citations omitted), *trans. denied.*

[19] Before addressing Crittenden's post-conviction claims, we will first address his challenges to the post-conviction court's procedural rulings that occurred during the course of this post-conviction proceeding. He argues that the post-conviction court erred in its following rulings: (1) denying his request for the issuance of four subpoenas; (2) denying his various discovery motions; and (3) excluding his proposed evidence of DCS records.

1. Subpoenas

[20] We first address Crittenden's contention that the post-conviction court erred by denying his request to issue subpoenas to four witnesses.

[21] Post-Conviction Rule 1(9)(b)—which addresses the issuance of subpoenas in a post-conviction proceeding—provides, in relevant part that:

> If the pro se petitioner requests issuance of subpoenas for witnesses at an evidentiary hearing, the petitioner shall specifically state by affidavit the reason the witness' testimony is required and the substance of the witness' expected testimony. If the court finds the witness' testimony would be relevant and probative, the court shall order that the subpoena be issued. If the court finds the proposed witness' testimony is not relevant

and probative, it shall enter a finding on the record and refuse to issue the subpoena.

[22] A post-conviction court's decision to grant or deny a request for issuance of a subpoena is within its discretion. *Collins v. State*, 14 N.E.3d 80, 84 (Ind. Ct. App. 2014). An abuse of discretion occurs where the decision is against the logic and effect of the facts and circumstances. *Id.*

[23] Here, the post-conviction court granted Crittenden's request for the issuance of subpoenas to his trial and appellate attorneys but denied his request for subpoenas to four other requested witnesses, which included the deputy prosecutor, a nurse who examined D.M., and two DCS family case managers.[6] In Crittenden's request for subpoenas for these four witnesses, he generally alleged that they would help him prove his claims of ineffective assistance of trial counsel. When denying Crittenden's request for subpoenas, the post-conviction court explained that it did so "for the reason that the Court finds that each of these proposed witness' testimony is not relevant and probative." (P-CR App. 209).

[24] On appeal, Crittenden again makes a general assertion, without further explanation, that these witnesses would support his claims of ineffective assistance of counsel. Accordingly, Crittenden has failed to show that the post-conviction court abused its discretion by denying his request for subpoenas.

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[6] Again, neither of the DCS workers nor the nurse testified at trial.

See, e.g., *Collins*, 14 N.E.3d at 84 (finding no abuse of discretion by the post-conviction court's refusal to issue subpoenas where the petitioner failed to provide any information on appeal to show how a proposed witness would have offered any relevant testimony to his post-conviction claims); *see also Johnson v. State*, 832 N.E.2d 985, 994-95 (Ind. Ct. App. 2005) (holding that a petitioner who had failed to explain how a proposed witnesses' testimony would support his ineffective assistance of counsel claim waived his claim that the post-conviction court erred by denying his request for a subpoena).

2. Discovery

[25] Crittenden argues that the post-conviction court abused its discretion when it denied his various discovery motions. We have consolidated his specific arguments on these motions and will discuss them in further detail below.

[26] "Post-conviction proceedings are governed by the same rules 'applicable in civil proceedings including pre-trial and discovery procedures.'" *Wilkes v. State*, 984 N.E.2d 1236, 1251 (Ind. 2013) (quoting P-C.R. 1(5)). "[P]ost-conviction courts are accorded broad discretion in ruling on discovery matters[,] and we will affirm their determinations absent a showing of clear error and resulting prejudice." *Id.* (citing *State v. McManus*, 868 N.E.2d 778, 790 (Ind. 2007), *cert. denied*).

A. Requests for Access to Relevant Portions of the Record

[27] Crittenden first argues that the post-conviction court erred by denying his Requests for Access to Relevant Portions of the Record, one of which he filed

August 22, 2012 and the other on March 8, 2013. In his appellate brief, Crittenden specifically challenges the post-conviction court's denial of his request for the following portions of the record: (1) a photograph taken by a DCS caseworker that was included in trial discovery from the prosecutor to Crittenden's trial attorney; and (2) a DVD copy of the VHS tape that contained the statement that D.M. made to the forensic child interviewer and that was admitted, along with the transcript of the statement, during the child-hearsay hearing.

[28] When denying one of these motions, the post-conviction court determined that Crittenden had "failed to show how the requested discovery [wa]s necessary to support his pending post-conviction relief claims, and he ha[d] not shown that he ha[d] made any effort to obtain such evidence from his trial counsel's file or his previously-appointed State Public Defender." (P-CR App. 134).

[29] On appeal, Crittenden generally alleges that his requested documents were needed to prove his post-conviction claims, but he fails to explain how these various discovery motions would have helped to support those claims. He also fails to dispute the post-conviction court's conclusion that he could have obtained these records from his trial counsel's file or previously-appointed State Public Defender. Accordingly, we conclude that the post-conviction court did not abuse its discretion by denying his Requests for Access to Relevant Portions of the Record.

B. Motion to Compel Release of Documents

[30] Crittenden next argues that the post-conviction court erred by denying his Motion to Compel Release of Documents, in which he asked the post-conviction court to issue an order requiring the State to serve three sets of interrogatories that he had previously tendered to the State. These interrogatories did not contain questions posed to the State; instead, they were interrogatories addressed to three non-party individuals, all of whom did not testify at his bench trial. These individuals included the nurse for whom the parties entered a stipulation regarding her testimony and the two DCS case workers who wrote DCS reports that were not introduced into evidence during his bench trial.

[31] Indiana Trial Rule 33 provides, in relevant part, that "[a]ny *party* may serve upon *any other party* written interrogatories to be answered by the party served[.]" (Emphasis added). Here, Crittenden tendered interrogatories to the State to serve upon three non-party individuals who did not testify at trial. On appeal, he has not shown how the post-conviction court's denial of his request to compel the State to serve these interrogatories on these non-parties was clear error or that it resulted in prejudice. Accordingly, we affirm the post-conviction court's denial of his Motion to Compel Release of Documents. *See Wilkes*, 984 N.E.2d at 1251 (explaining that we will affirm a post-conviction court's discovery ruling absent a showing of clear error and resulting prejudice).

C. Request for Documents Pursuant to Trial Rule 34(B)

[32] Crittenden also contends that the post-conviction court erred by denying his Request for Documents, Calculated to Lead to Discovery of Admissible Evidence, Pursuant to Trial Rule 34(B). In this motion, Crittenden requested items that he had requested in previously-denied pretrial discovery motions, such as the photograph taken by a DCS worker, an in-camera review of the two DCS reports, and a DVD recording of D.M.'s statement to the forensic child interviewer. The post-conviction court denied this request, determining that Crittenden had "failed to show how the requested discovery [wa]s necessary to support his pending post-conviction relief claims, and he ha[d] not shown that he ha[d] made any effort to obtain such evidence from his trial counsel's file or his previously-appointed State Public Defender." (P-CR App. 134).

[33] Crittenden has not shown that he could not have obtained these records from his trial counsel's file or previously-appointed State Public Defender. Also, he has not shown that the post-conviction court's determination was clearly erroneous or that it resulted in prejudice. Accordingly, we conclude that the post-conviction court did not abuse its discretion by denying his Request for Documents.

D. Motion for Offer to Prove

[34] Lastly, Crittenden argues that the post-conviction court erred by denying his Motion for Offer to Prove. As Crittenden acknowledges, in this motion, he "once again requested the same discovery that he ha[d] requested multiple times before[,]"which included a DVD recording of D.M.'s statement to the

forensic child interviewer, a "hard copy of the audio version of the trial and sentencing transcripts[,]" an in-camera review of the April 2008 and May 2008 DCS reports, and the name of the complainant from the April 2008 DCS report.[7] (Crittenden's Br. 12).

[35] Crittenden has failed to show that the post-conviction court's ruling was erroneous or that he was prejudiced by the denial of these items. Indeed, the record from his direct appeal contained a VHS copy and a transcript of D.M.'s statement to the forensic child interviewer, as well as, the transcripts from his trial and sentencing hearings. In regard to Crittenden's request for an in-camera review of the two DCS reports, the record shows that he had these two documents; indeed, he tried to introduce them into evidence during the post-conviction hearing. As to his request for the name of the complainant from the April 2008 DCS report, we note that this report was not admitted during his bench trial and that it pertained to an allegation of a lack of food, shelter, and clothing, which is an allegation unrelated to Crittenden's crimes. Because Crittenden has failed to show how the post-conviction court's denial of his Motion for Offer to Prove was clearly erroneous or prejudiced him, he has failed to show that the post-conviction court abused its discretion by denying his motion.

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[7] In his Motion for Offer to Prove, Crittenden asserted that he wanted the name of the complainant so that he could show that it was D.M.'s aunt. This April 2008 DCS report—which was offered as Petitioner's Exhibit I but not admitted into evidence during the post-conviction hearing—was based upon an allegation, made by a relative, of a lack of food, shelter, and clothing in D.M.'s home.

3. Evidentiary Ruling

[36] Turning to Crittenden's challenge to the post-conviction court's exclusion of the DCS reports from evidence, we note that in a post-conviction hearing, "[t]he admission or exclusion of evidence is within the sound discretion of the [post-conviction] court and will not be disturbed on review unless there was an abuse of discretion on the part of the [post-conviction] court." *Roche v. State*, 690 N.E.2d 1115, 1134 (Ind. 1997), *reh'g denied.*

[37] When questioning his trial counsel during the post-conviction hearing, Crittenden attempted to admit two DCS reports into evidence. The State noted that the DCS reports appeared to be photocopies, and it objected to the admission of these reports based on a lack of foundation and lack of self-authentication. The post-conviction court sustained the objection and stated that the reports would "not [be] admitted at this time." (P-CR Tr. 59). Crittenden did not try later to have the reports admitted into evidence.

[38] On appeal, Crittenden neither argues that the exclusion of this evidence violated an evidentiary rule nor offers any argument as to why it should have been admitted. Accordingly, he has not shown that the post-conviction court abused its discretion by excluding the DCS reports from evidence. *See, e.g., id.* (holding that the post-conviction court did not abuse its discretion by excluding evidence where the petitioner made "no argument that the exclusion of th[e]

evidence violated any evidentiary rule nor even any argument as to why [the evidence] should have been admitted").[8]

4. Post-Conviction Claims – Ineffective Assistance of Counsel

[39] Lastly, we review Crittenden's challenge to the post-conviction court's rulings on his ineffective assistance of counsel claims. Although the post-conviction court granted relief based on Crittenden's ineffective assistance of counsel claims regarding his sentencing, the post-conviction court concluded that Crittenden had failed to meet his burden of proving the remainder of his ineffective assistance of counsel claims. Now, on appeal, Crittenden argues that the post-conviction court erred by denying post-conviction relief on these remaining ineffective assistance of trial and appellate counsel claims.

[40] We apply the same standard of review to claims of ineffective assistance of appellate counsel as we apply to claims of ineffective assistance of trial counsel. *Williams v. State*, 724 N.E.2d 1070, 1078 (Ind. 2000), *reh'g denied*, *cert. denied*. A claim of ineffective assistance of trial counsel requires a showing that: (1) counsel's performance was deficient by falling below an objective standard of reasonableness based on prevailing professional norms; and (2) counsel's performance prejudiced the defendant such that "'there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'" *Davidson v. State*, 763 N.E.2d 441, 444

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[8] Again, we note that these reports appear to be part of the court's file over which the post-conviction court took judicial notice.

(Ind. 2002) (quoting *Strickland v. Washington*, 466 U.S. 668, 687 (1984), *reh'g denied*), *reh'g denied*, *cert. denied*. "A reasonable probability arises when there is a 'probability sufficient to undermine confidence in the outcome.'" *Grinstead v. State*, 845 N.E.2d 1027, 1031 (Ind. 2006) (quoting *Strickland*, 466 U.S. at 694). "Failure to satisfy either of the two prongs will cause the claim to fail." *Gulzar v. State*, 971 N.E.2d 1258, 1261 (Ind. Ct. App. 2012) (citing *French v. State*, 778 N.E.2d 816, 824 (Ind. 2002)), *trans. denied*. However, "[i]f we can easily dismiss an ineffective assistance claim based upon the prejudice prong, we may do so without addressing whether counsel's performance was deficient." *Baer v. State*, 942 N.E.2d 80, 91 (Ind. 2011), *reh'g denied*. "Indeed, most ineffective assistance of counsel claims can be resolved by a prejudice inquiry alone." *French*, 778 N.E.2d at 824.

A. Ineffective Assistance of Trial Counsel

[41] Crittenden argues that his trial counsel was ineffective for the following: (1) failing to file a motion to dismiss the charging information because it lacked a file stamp; (2) failing to sufficiently investigate his case and to present witnesses and evidence at trial, including evidence of prior DCS reports; (3) failing to advise him regarding his chances at trial and the benefits of accepting a plea offer; (4) failing to properly cross-examine the child victim and the forensic child interviewer at the pretrial child-hearsay hearing; and (5) failing to object to

the admissibility of the victim's medical exam and entering into a stipulation regarding the examining nurse's testimony.[9]

[42] Before addressing Crittenden's claims, we note that:

> There is a strong presumption that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Counsel is afforded considerable discretion in choosing strategy and tactics, and these decisions are entitled to deferential review. Isolated mistakes, poor strategy, inexperience, and instances of bad judgment do not necessarily render representation ineffective.

Stevens v. State, 770 N.E.2d 739, 746-47 (Ind. 2002) (internal citations omitted), *reh'g denied*, *cert. denied*. "Few points of law are as clearly established as the principle that '[t]actical or strategic decisions will not support a claim of ineffective assistance.'" *McCary v. State*, 761 N.E.2d 389, 392 (Ind. 2002) (quoting *Sparks v. State*, 499 N.E.2d 738, 739 (Ind. 1986)), *reh'g denied*.

1. Motion to Dismiss

[43] Crittenden asserts that his trial counsel was ineffective for failing to file a motion to dismiss the charging information based on it not containing a file stamp.

[44] To prevail on a claim of ineffective assistance due to the failure to file a motion to dismiss, "the defendant must show a reasonable probability that the motion

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[9] We have consolidated some of Crittenden's ineffective assistance claims but will address each claim.

to dismiss would have been granted if made." *Garrett v. State*, 992 N.E.2d 710, 723 (Ind. 2013).

[45] In its findings and conclusions, the post-conviction court pointed out that the charging information is "reflected on the clerk's chronological case summary in the list of case pleadings filed" and "also reflected in the court's minutes." (P-CR App. 381-82). The post-conviction court also determined that, even if Crittenden's trial counsel would have directed the trial court's attention to the lack of a file stamp, the court could "have properly ordered a nunc pro tunc entry to correct the clerical error," and, as a result, the post-conviction court concluded that Crittenden had failed to prove any prejudice. (P-CR App. 382).

[46] We agree with the post-conviction court and conclude that Crittenden has failed to prove that he was prejudiced by his counsel's failure to file a motion to dismiss the charging information. *See Owens v. State*, 333 N.E.2d 745 (Ind. 1975) ("A trial court has the power and a duty to order a nunc pro tunc entry to correct . . . a clerical error" such as an indictment without a file stamp); *Emmons v. State*, 847 N.E.2d 1035, 1037-39 (Ind. Ct. App. 2006) (relying on *Owens* and noting that—in a case where a charging information does not contain a file stamp—the "better course of action" would be to have "a nunc pro tunc entry to show the filing of the information"). Accordingly, Crittenden has failed to persuade us that the evidence as a whole leads unerringly and unmistakably to a decision opposite that reached by the post-conviction court.

2. Investigation/Witnesses/Evidence

[47] Crittenden next contends that his trial counsel rendered ineffective assistance because he failed to sufficiently investigate his case; failed to call any witnesses on his behalf; and failed to present any evidence, including evidence of the DCS reports, at trial.

[48] Turning to Crittenden's argument regarding the failure to investigate, we note that "[w]hen deciding a claim of ineffective assistance for failure to investigate, we apply a great deal of deference to counsel's judgments." *Boesch v. State*, 778 N.E.2d 1276, 1283 (Ind. 2002) (citing *Strickland*, 466 U.S. at 691), *reh'g denied.* "[E]stablishing failure to investigate as a ground for ineffective assistance of counsel requires going beyond the trial record to show what investigation, if undertaken, would have produced." *McKnight v. State*, 1 N.E.3d 193, 201 (Ind. Ct. App. 2013) (citing *Woods v. State*, 701 N.E.2d 1208, 1214 (Ind. 1998), *cert. denied*). The petitioner must also show "how that additional information would have aided in the preparation of the case." *Turner v. State*, 974 N.E.2d 575, 585 (Ind. Ct. App. 2012) (citing *Coleman v. State*, 694 N.E.2d 269, 274 (Ind. 1998)), *trans. denied.* "This is necessary because success on the prejudice prong of an ineffectiveness claim requires a showing of a reasonable probability of affecting the result." *McKnight*, 1 N.E.3d at 201.

[49] Crittenden asserts that his trial counsel should have investigated the DCS reports by deposing the family case managers who wrote the reports. Crittenden contends that if his trial counsel would have fully investigated the DCS report from April 2008 then he would have seen that the report—which

was based on an investigation of the lack of food, shelter, and clothing in the home—contained a statement that D.M. denied any abuse in the home at that time. Crittenden also argues that his trial counsel was ineffective for failing to introduce the April 2008 and May 2008 DCS reports into evidence during the bench trial.

[50] During the post-conviction hearing, Crittenden's trial counsel testified that he had reviewed the DCS reports before trial. He further testified that he did not specifically recall what his thinking or strategy was at the time of trial regarding the reports but that, when looking at them at the post-conviction hearing, he was able to speculate as to his strategy regarding the reports. Trial counsel testified that he would not have offered evidence of the May 2008 report because it "would have likely convinced the Judge [during the bench trial that Crittenden was] guilty as opposed to anything that was exculpatory" and because it was a repetition of what the victim had told the detective and the forensic child interviewer. (P-CR Tr. 84). Crittenden's trial counsel testified that he would not have admitted the April 2008 report because it related to conduct not charged in Crittenden's case and that it would not have been relevant. Additionally, counsel testified that he would not have deposed a DCS case managers because they would have just repeated what was in the reports and because "their testimony would have tended towards proving the State's case as opposed to anything exculpatory." (P-CR Tr. 62-63).

[51] Because trial counsel's decision to not further investigate the DCS reports by deposing the case manager and his decision to not introduce them into evidence

was a reasonable strategic decision, Crittenden has failed to show that his trial counsel's performance was deficient. *See Rondon v. State*, 711 N.E.2d 506, 518 (Ind. 1999) (holding that "trial counsel's decision to put the State to its burden without conducting an investigation to discover information beyond what the State had supplied through discovery was reasonable under the circumstances"). Moreover, Crittenden has failed to demonstrate that there is a reasonable probability that, but for his trial counsel's alleged errors, the result of the proceeding would have been different. Thus, the post-conviction court did not err by denying post-conviction relief on Crittenden's claims relating to the DCS reports.

[52] Crittenden also argues that his counsel should have investigated other occupants of the houses where D.M. lived to see if they could have possibly disclaimed D.M.'s allegation of abuse by Crittenden. During the post-conviction hearing, Crittenden's trial counsel testified that he "would have investigated every avenue to attempt to defend" Crittenden and that he "investigated all the various leads that were open to pursue." (P-CR Tr. 64, 70). Additionally, Crittenden offered no evidence during the post-conviction hearing to show what an investigation of these occupants, if undertaken, would have produced or how that additional information would have aided in the preparation of the case. Because he has made no showing that there was a reasonable probability that the outcome of his case would likely have been different had counsel further investigated the occupants, the post-conviction court did not err by denying post-conviction relief on these claims.

[53] In regard to witnesses, Crittenden argues that his counsel should have called the following as witnesses: (1) D.M.'s mother to testify that she did not believe that Crittenden had inappropriately touched D.M.; (2) D.M.'s teachers to see if D.M. had ever reported abuse to them; and (3) character witnesses to testify that Crittenden had never molested any other children.

[54] "A decision regarding what witnesses to call is a matter of trial strategy which an appellate court will not second-guess[.]" *Brown v. State*, 691 N.E.2d 438, 447 (Ind. 1998). "When ineffective assistance of counsel is alleged and premised on the attorney's failure to present witnesses, it is incumbent upon the petitioner to offer evidence as to who the witnesses were and what their testimony would have been." *Lowery v. State*, 640 N.E.2d 1031, 1047 (Ind. 1994), *reh'g denied*, *cert. denied.*

[55] We need not determine whether trial counsel's decision not to call witnesses was a reasonable trial strategy because Crittenden has failed to meet his post-conviction relief burden on this ineffective assistance claim. Crittenden did not offer any affidavits from these proposed witnesses or any other evidence to show what these witnesses' testimony would have been; thus, he has failed to meet his burden on this claim. *See Lowery*, 640 N.E.2d at 1047. As a result, he has failed to show that the post-conviction court erred by denying relief on this claim.

3. Advice

[56] Next, Crittenden argues that the post-conviction court erred by denying him relief on his claim that his trial counsel was ineffective for failing to advise him regarding his chances at trial and the benefits of accepting a plea offer. Crittenden asserts that his trial counsel erroneously allowed him to reject a plea offer and failed to advise him that he could be convicted based on the testimony of the child victim.

[57] The record before us does not support Crittenden's assertions. During Crittenden's sentencing hearing, his trial counsel informed the trial court that he had discussed these issues with Crittenden.[10] Specifically, his trial counsel stated:

> And Judge, I feel compelled to make at least a very minimal record so that the Court's [sic] aware and Mr. Crittenden may not recall the entirety of our conversation but I did have some other folks there with me as we were discussing it and I remember distinctly assuring him that the Court could convict just as easily acquit and we discussed in detail when plea negotiations were ongoing what he was facing if convicted and what was offered by the State and I know sitting here now [Crittenden] probably feels like more time could have been spent explaining it to him but I made sure before we signed that document that I was satisfied he was clear and I thought he was clear minded that day and I thought he understood the nature of the circumstances, so, if that has changed I can only base my

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[10] Crittenden's trial counsel made a record during sentencing because Crittenden had complained about the lack of time to make a decision about a plea, his jury trial waiver, and counsel's alleged promise of a positive trial outcome.

recollection on what I remember and what I told him and I remember distinctly warning him of all the possible outcomes.

* * * * *

Because a plea was offered that morning that I advised him to consider with a high level of consideration.

(Tr. 146-47).

[58] Furthermore, during the post-conviction hearing, Crittenden's trial counsel testified that, prior to trial, he had consulted with Crittenden regarding the possibility of a plea agreement and testified that he would have conveyed any plea offer to him. Additionally, his trial counsel testified that he consulted with Crittenden and informed him of what kind of evidence could be used against him.

[59] Other than Crittenden's self-serving testimony during the post-conviction hearing, he did not present any evidence that his trial counsel engaged in the behavior that he alleged. Accordingly, he has failed to show that the post-conviction court erred by denying his ineffective assistance claim.

4. Cross-Examination

[60] Crittenden also argues that his trial counsel was ineffective for failing to cross-examine D.M. and failing to sufficiently cross-examine the forensic child interviewer during the child-hearsay hearing.

[61] "'It is well settled that the nature and extent of cross-examination is a matter of strategy delegated to trial counsel.'" *Waldon v. State,* 684 N.E.2d 206, 208 (Ind.

Ct. App. 1997) (citing *Osborne v. State*, 481 N.E.2d 376, 380 (Ind. 1985)), *trans. denied.*

[62] In regard to Crittenden's first ineffective assistance claim regarding cross-examination, he contends that his trial counsel was ineffective because his counsel failed to cross-examine D.M. during the pretrial child-hearsay hearing and challenge her credibility. The post-conviction court noted that while Crittenden's trial counsel did not cross-examine D.M. during the child-hearsay hearing, he had cross-examined D.M. during the bench trial. The post-conviction court also noted that, at the end of Crittenden's bench trial, the trial court specifically clarified that its verdict was based solely on the victim's trial testimony and not on any other statements she had made to others. The post-conviction court determined that, as a result, Crittenden had failed to show any prejudice from his trial counsel's decision not to cross-examine D.M. during the child-hearsay hearing.

[63] Our review of the record supports the post-conviction court's determination. Furthermore, Crittenden did not present evidence during the post-conviction hearing to show what favorable testimony, if any, would have been elicited from such a cross-examination and how it would have affected the outcome of his trial. Thus, the post-conviction's court conclusion that Crittenden had failed to meet his burden of showing prejudice is further supported. *See Fine v. State*, 490 N.E.2d 305, 309 (Ind. 1986) (holding that there was no showing of prejudice by counsel's failure to cross-examine "key state's witnesses" when the defendant failed to establish that counsel could have elicited favorable

testimony); *Waldon*, 684 N.E.2d at 208-09 (holding that the defendant had failed to show that he was prejudiced by trial counsel's failure to cross-examine a witness).

[64] In regard to Crittenden's claim that his counsel was ineffective for not properly cross-examining the forensic child interviewer, Crittenden merely asserts in his appellate brief that his counsel's cross-examination was ineffective and that he was prejudiced, and he then refers us to his post-conviction memorandum filed with the post-conviction court in an attempt to have us incorporate his previously-made argument. Our Court, however, has explained that "a party may not present an argument entirely by incorporating by reference from a source outside the appellate briefs." *Bigler v. State*, 732 N.E.2d 191, 197 (Ind. Ct. App. 2000), *trans. denied.* "We [have] explained that briefs should be prepared 'so that each judge, considering the brief alone and independent of the transcript, can intelligently consider each question presented.'" *Id.* (quoting *Pluard v. Patients Compensation Fund*, 705 N.E.2d 1035, 1038 (Ind. Ct. App. 1999), *trans. denied*). Because Crittenden has failed to make an independent argument in his appellate brief, he has waived this argument. *See id.*

5. Medical Exam/Nurse's Statement

[65] Crittenden asserts that he received ineffective assistance of trial counsel because his counsel did not object to the admissibility of the victim's medical exam and because he entered into a stipulation regarding the examining nurse's testimony.

[66] To demonstrate ineffective assistance of counsel for failure to object, a defendant must prove that an objection would have been sustained if made and that he was prejudiced by counsel's failure to make an objection. *Wrinkles v. State,* 749 N.E.2d 1179, 1192 (Ind. 2001), *cert. denied.*

[67] During Crittenden's bench trial, his trial counsel and the State entered into a stipulation regarding the testimony of the nurse who examined D.M. and regarding the admissibility of the corresponding medical records.[11] They stipulated that the nurse "examined" D.M. and that D.M. "did not have any injuries to her genitalia which neither confirm[ed] nor negate[d] the allegations of sexual abuse." (Tr. 118). Because his counsel stipulated to the admission of the medical records, Crittenden cannot show that an objection to those records would have been sustained. Thus, he cannot show that his counsel rendered ineffective assistance by failing to object to the medical records.

[68] In regard to his argument regarding counsel's stipulation to the nurse's testimony, Crittenden contends that his counsel was ineffective because he did not present live testimony from her and cross-examine her. This argument also fails. Crittenden's trial counsel testified during the post-conviction hearing that a stipulation of the nurse's testimony was the equivalent of a "very positive outcome of any cross-examination." (P-CR Tr. 96). Crittenden, however, did not present any evidence during the post-conviction hearing to show how

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[11] The record reveals that the nurse had a scheduling issue and was not available to testify on the morning of the bench trial.

counsel's decision to stipulate to the nurse's testimony constituted deficient performance. Nor did Crittenden present any evidence of specific testimony that would have resulted from calling the nurse as a witness and how it would have affected the outcome of his trial. Therefore, he has failed to meet his burden of showing that the post-conviction court erred by denying post-conviction relief on this ineffective counsel claim.

B. Ineffective Assistance of Appellate Counsel

[69] Lastly, Crittenden contends that the post-conviction court erred by denying him post-conviction relief on his ineffective assistance of appellate counsel claims. Ineffective assistance of appellate counsel claims "'generally fall into three basic categories: (1) denial of access to an appeal, (2) waiver of issues, and (3) failure to present issues well.'" *Garrett v. State*, 992 N.E.2d 710, 724 (Ind. 2013) (quoting *Reed v. State*, 856 N.E.2d 1189, 1195 (Ind. 2006)). Crittenden argues that his appellate counsel rendered ineffective assistance because he failed to raise a challenge to the sufficiency of the evidence and because he failed to "sufficiently argue" the "meritorious issue" of territorial jurisdiction on appeal. (Crittenden's Br. 43). Thus, his ineffective assistance of appellate counsel claims are based upon categories (2) and (3).

1. Waiver of Issue

[70] Turning to Crittenden's argument regarding appellate counsel's waiver of an issue challenging the sufficiency of the evidence, we note that "[t]o show that counsel was ineffective for failing to raise an issue on appeal thus resulting in

waiver for collateral review, 'the defendant must overcome the strongest presumption of adequate assistance, and judicial scrutiny is highly deferential.'" *Garrett*, 992 N.E.2d at 724 (quoting *Ben–Yisrayl v. State*, 738 N.E.2d 253, 260-61 (Ind. 2000), *reh'g denied*, *cert. denied*). Our Indiana Supreme Court has explained the "need" for a reviewing court to be deferential to appellate counsel when considering whether counsel was ineffective for failing to raise an issue on direct appeal:

> [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 when counsel's choice of some issues over others was reasonable in light of the facts of the case and the precedent available to counsel when that choice was made.

Timberlake v. State, 753 N.E.2d 591, 605-06 (Ind. 2001) (quoting *Bieghler v. State,* 690 N.E.2d 188, 194 (Ind. 1997), *reh'g denied*, *cert. denied*), *reh'g denied*, *cert. denied*. "Ineffective assistance is very rarely found in cases where a defendant asserts that appellate counsel failed to raise an issue on direct appeal." *Reed*, 856 N.E.2d at 1196. This is because "'the decision of what issues to raise is one of the most strategic decisions to be made by appellate counsel.'" *Wrinkles*, 749 N.E.2d at 1203 (quoting *Bieghler,* 690 N.E.2d at 193).

[71] "To evaluate the performance prong when counsel waived issues upon appeal, we apply the following test: (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 issues." *Garrett*, 992 N.E.2d at 724 (quoting

Timberlake, 753 N.E.2d at 605-06). "If the analysis under this test demonstrates deficient performance, then we evaluate the prejudice prong which requires an examination of whether 'the issues which . . . appellate counsel failed to raise would have been clearly more likely to result in reversal or an order for a new trial.'" *Garrett*, 992 N.E.2d at 724 (quoting *Bieghler,* 690 N.E.2d at 194).

[72] Crittenden contends that appellate counsel was ineffective for failing to challenge the sufficiency of the evidence to support his convictions for Class A and Class C felony child molesting because the evidence against him was based on D.M's testimony and not any physical evidence. Crittenden contends that the sufficiency issue was a stronger issue because "it is apparent from the face of the record[] that the evidence was insufficient to sustain the judge[']s verdict of guilt" on his two child molesting convictions.

[73] During the post-conviction hearing, however, Crittenden's appellate counsel's testimony showed otherwise. Appellate counsel testified that he reviewed the transcripts of the hearings, trial, and sentencing and that he tried to raise the strongest issue. He testified that he did not raise a sufficiency issue because it would not have been stronger than the territorial jurisdiction issue. Counsel also testified that there was "direct testimony from the victim" and that he thought it was "sufficient evidence to support the finding of guilt." (P-CR Tr. 12, 13).

[74] In regard to this claim, the post-conviction court concluded that:

> Crittenden had little chance of success in arguing on appeal that the evidence was insufficient to establish his child molesting convictions. D.M.'s testimony supported the convictions for A-Felony and C-felony child molesting. See T.R. 64, 66-68 (Crittenden pulled her pajama bottoms and panties off and touched her inside of her bottom with his "stuff" [previously identified as his "private" or the body part boys use to go to the bathroom], that he was moving and shaking, that it hurt, and that D.M. "told him it hurted"); T.R. 65 (Crittenden touched her on the inside of her private or "pee pot" and his hand was moving, not still).
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> * * * * *
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> Petitioner has failed to prove that it was unquestionably unreasonable for appellate counsel not to raise this as a claim on appeal. Nor does Petitioner provide any legal authority to show a reasonable probability that such a claim would have been successful if raised or would have been stronger than the claim raised. With no proof of deficient performance or prejudice, this claim fails.

(P-CR App. 394, 395) (brackets in original).

[75] In support of Crittenden's argument, he again attempts to incorporate the argument he made below to the post-conviction court. (*See* Crittenden's Br. 44) (directing us to "See entire argument in support of the fact that the evidence was not sufficient to support the guilty verdict of the judge. (App. at 265-271)") (boldface removed). As explained above, "a party may not present an argument entirely by incorporating by reference from a source outside the appellate briefs." *Bigler*, 732 N.E.2d at 197. Thus, he has waived review of this claim. *See id.* Waiver notwithstanding, our review of the record supports the post-conviction court's ruling denying post-conviction relief on this claim as

Crittenden failed to "overcome the strongest presumption of adequate assistance." *Garrett*, 992 N.E.2d at 724.

2. Failure to Present Issue Well

[76] Lastly, we turn to Crittenden's claim that his counsel was ineffective for failing to sufficiently argue the territorial jurisdiction issue on appeal.

[77] "[C]laims of inadequate presentation of certain issues, as contrasted with the denial of access to an appeal or waiver of issues, are the most difficult for defendants to advance and for reviewing tribunals to support." *Hollowell v. State*, 19 N.E.3d 263, 270 (Ind. 2014) (citing *Bieghler*, 690 N.E.2d at 195). "[T]his is so because such claims essentially require the reviewing court to reexamine and take another look at specific issues it has already adjudicated to determine 'whether the new record citations, case references, or *arguments* would have had any marginal effect on their previous decision.'" *Id.* (quoting *Bieghler*, 690 N.E.2d at 195)) (emphasis added by *Hollowell* Court).

[78] In regard to this claim, the post-conviction court stated that Crittenden did "little to explain this less than cogent claim." (P-CR App. 393). The post-conviction court found that "[w]hen considered in light of the requisite highest deference to appellate counsel's performance, Crittenden's claim here [was] unsupported and ma[d]e[] no sense." (P-CR App. 393). As a result, it concluded that Crittenden has failed to establish that appellate counsel was ineffective.

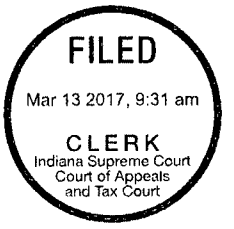
[79] On appeal, as below, Crittenden fails to present a cogent argument. Thus, he has waived this argument. *See Johnson*, 832 N.E.2d at 1006 (holding that petitioner had waived claims of ineffective assistance of appellate counsel by failing to make a cogent argument). He has also waived review of the argument because he, once again, tries to incorporate his argument made below during the post-conviction proceedings. *See Bigler*, 732 N.E.2d at 197. Waivers notwithstanding, Crittenden has failed to show either deficient performance or prejudice in regard to this claim. Accordingly, he has failed to meet his burden of showing that the post-conviction court erred by denying relief on this claim.

[80] Affirmed.

Barnes, J., and May, J., concur.

MEMORANDUM DECISION

Pursuant to Ind. Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



APPELLANT PRO SE

Lamarr T. Crittenden
New Castle, Indiana

ATTORNEYS FOR APPELLEE

Curtis T. Hill, Jr.
Attorney General of Indiana

George P. Sherman
Deputy Attorney General
Indianapolis, Indiana

IN THE COURT OF APPEALS OF INDIANA

Lamar T. Crittenden,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff

March 13, 2017

Court of Appeals Case No. 49A04-1512-CR-2183

Appeal from the Marion Superior Court

The Honorable Lisa F Borges, Judge

Trial Court Cause No. 49G04-0810-FA-227401

Altice, Judge.

Case Summary

E1

[1] Following a bench trial, Lamar T. Crittenden was convicted of one count of child molesting as a Class A felony and one count of child molesting as a Class C felony. Crittenden was originally sentenced to an aggregate term of thirty-five years, with five years suspended. Crittenden's convictions and sentence were affirmed on direct appeal. *See Crittenden v. State*, No. 49A05-0906-CR-355 (Ind. Ct. App. Jan. 21, 2010), *trans. denied* (*Crittenden I*). Crittenden, pro se, filed a petition for post-conviction relief arguing, in part, that his trial and appellate counsel rendered ineffective assistance with regard to sentencing. The post-conviction court agreed and remanded for a new sentencing hearing. Crittenden appealed, challenging several of the post-conviction court's procedural rulings as well as its denial of his remaining claims of ineffective assistance of trial and appellate counsel. In a memorandum decision, this court affirmed the post-conviction court's rulings and decision. *Crittenden v. State*, 49A05-1405-PC-227 (Ind. Ct. App. June 30, 2015) (*Crittenden II*).

[2] At the resentencing hearing, the trial court again sentenced Crittenden to an aggregate term of thirty-five years, with five years suspended. Crittenden, pro se, appeals, challenging the sentence imposed on several grounds:

1. Did the trial court have subject matter jurisdiction?

2. Did the trial court properly sentence Crittenden?

3. Did the trial court properly classify Crittenden as a sexually violent predator?

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4. Did Crittenden receive ineffective assistance of counsel at his resentencing hearing?

5. Did the trial court properly amend the sentence imposed?

[3] We affirm.

Facts & Procedural History

[4] The facts underlying Crittenden's convictions were set forth by this court on direct appeal as follows:

> In 2006, Crittenden began cohabiting with Shontae Matlock and her daughter D.M., born February 8, 1999, on Denny Street in Indianapolis. On one occasion during 2007 or 2008, Crittenden entered D.M.'s bedroom while she was sleeping and ordered her to perform fellatio on him. When she refused, Crittenden placed his hand inside her vagina and moved it around. He then performed anal intercourse on her. Crittenden admonished D.M. not to tell anyone about the incident.
>
> Nevertheless, D.M. told her mother, who refused to believe her allegations. On May 11, 2008, D.M. reported the incident to her aunt, Lawanna Smith, who took her to the hospital for a medical examination.

Crittenden I, slip op. at 1 (footnote omitted). Crittenden was charged with two counts of Class A felony child molesting and two counts of Class C felony child molesting. Following a bench trial, the trial court found him guilty of one count of each. The trial court subsequently sentenced Crittenden to thirty-five years with five years suspended for the Class A felony conviction and to a

concurrent, six-year term for the Class C felony conviction. This sentence was set aside upon post-conviction review and the matter was remanded for a new sentencing hearing.

[5] A resentencing hearing was held on November 18, 2015, during which the trial court incorporated evidence presented during the first sentencing hearing. After the trial court received additional evidence and testimony from Crittenden, the trial court sentenced him to the same sentence previously imposed. Crittenden now appeals. Additional facts will be provided as necessary.

Discussion & Decision

1. Jurisdiction

[6] Crittenden first argues that the trial court did not have subject matter jurisdiction because the charging information was not properly filed as it was not file-stamped by the clerk of the court. Relying on *Emmons v. State*, 847 N.E.2d 1035 (Ind. Ct. App. 2006), he asserts that his convictions are therefore void for lack of jurisdiction.

[7] In *Emmons*, the defendant moved to dismiss the charges against him because the charging information was not properly file-stamped. The trial court granted the defendant's motion to dismiss at the bench trial prior to the presentation of evidence. Upon retrial, Emmons moved to dismiss the charges on double jeopardy grounds, which the trial court denied. We affirmed the trial court's denial of the motion, explaining in an alternative analysis:

> A defendant may also be retried if the prior proceeding was terminated because a legal defect in the proceedings would make any resulting judgment reversible as a matter of law. . . . We have explained:
>
> > [A] criminal action can be commenced only in the manner provided by law, and that it is the filing of the accusation in lawful form that invokes the jurisdiction of the court in the particular case. It is a universal principle as old as the law that the proceedings of a court without jurisdiction are a nullity and its judgment void. There can be no conviction or punishment for crime, except on accusation made in the manner prescribed by law . . . .
>
> *Pease v. State*, 74 Ind.App. 572, 576, 129 N.E. 337, 339 (1921) (internal citations omitted) . . . .
>
> The original information against Emmons had not been file-stamped and therefore was not properly filed under Ind. Code § 35-34-1-1. As a result, the trial court did not have jurisdiction over Emmons and any judgment rendered would have been void for lack of jurisdiction . . . .

Emmons, 847 N.E.2d at 1038-39. The court noted, however, that failure to properly file-stamp the charging information constituted a clerical error that could have been corrected by a nunc pro tunc entry. *Id.* at 1038 (citing *Owens v. State*, 263 Ind. 487, 495, 333 N.E.2d 745, 749 (1975)). Indeed, the court indicated that "[t]he better course of action . . . would be a nunc pro tunc entry to show the filing of the information." *Id.* at 1037 n.6

[8] Unlike the defendant in Emmons, Crittenden did not raise the jurisdictional defect before the trial court. If he had, the clerical error could have easily been corrected by a nunc pro tunc entry. Moreover, even assuming that the clerical error constituted a jurisdictional defect, it was at most a defect in personal jurisdiction, not subject matter jurisdiction.

[9] "The question of subject matter jurisdiction entails a determination of whether a court has jurisdiction over the general class of actions to which a particular case belongs." *K.S. v. State*, 849 N.E.2d 538, 542 (Ind. 2006) (citing *Troxel v. Troxel*, 737 N.E.2d 745, 749 (Ind. 2000)). As our Supreme Court noted, "[*r*]*eal* jurisdictional problems would be, say, a juvenile delinquency adjudication entered in a small claims court, or a judgment rendered without any service of process." *Id.* (emphasis in original). Our Supreme Court clarified that "characterizing other sorts of procedural defects as 'jursidictional' misapprehends the concepts [of personal and subject matter jurisdiction]." *Id.* In *K.S.*, the Court thus held that even if the juvenile court had not explicitly approved the filing of a delinquency petition, as was required by statute, the juvenile court was not divested of subject matter jurisdiction in the matter because juvenile courts have jurisdiction over delinquency proceedings. *Id.*

[10] Similarly, here, even if the trial court clerk neglected to place a file stamp on the charging information as required by I.C. § 35-34-1-1, such clerical error would not change the fact that the trial court had subject matter jurisdiction over the criminal case filed against Crittenden. Indeed, the Marion Superior Court has "original and concurrent jurisdiction in all criminal cases allegedly committed

in Marion County." *Taylor-Bey v. State*, 53 N.E.3d 1230, 1231 (Ind. Ct. App. 2016). Crittenden's argument that the trial court was without subject matter jurisdiction fails.

2. Sentencing

[11] Crittenden argues that the trial court abused its discretion when it sentenced him to an aggravated sentence using improper aggravating factors. Sentencing decisions are within the sound discretion of the trial court and are reviewed on appeal for an abuse of discretion. *Anglemyer v. State*, 868 N.E.2d 482, 490 (Ind. 2007), *clarified on reh'g*, 875 N.E.2d 218 (Ind. 2007). An abuse of discretion occurs if the decision is "clearly against the logic and effect of the facts and circumstances before the court, or the reasonable, probable, and actual deductions to be drawn therefrom." *Id.* A trial court abuses its discretion by

> (1) failing to enter a sentencing statement, (2) entering a sentencing statement that explains reasons for imposing the sentence but the record does not support the reasons, (3) the sentencing statement omits reasons that are clearly supported by the record and advanced for consideration, or (4) the reasons given in the sentencing statement are improper as a matter of law.

Kimbrough v. State, 979 N.E.2d 625, 628 (Ind. 2012).

Age of Victim

[12] Crittenden first argues that the trial court inappropriately relied upon the age of the victim as an aggravating factor because age is a material element of the

crime of child molesting. Crittenden's crimes required that the victim be under fourteen years of age. *See* Ind. Code § 35-42-4-3. D.M. was between the ages of seven and nine when the molestations occurred. During the sentencing hearing, the trial court found as an aggravating circumstance that "[t]his was a very young child that [Crittenden] had been in a position of care, custody and control over." *Transcript* at 211.

[13] This court has held that, "[w]hile the victim's age may not constitute an aggravating circumstance to support an enhanced sentence when it also comprises a material element of the crime for which conviction was obtained, the trial court may properly consider particularized circumstances of the factual elements as aggravating factors." *Mallory v. State*, 563 N.E.2d 640, 647 (Ind. Ct. App. 1990). To the extent the trial court considered the age of the victim as an aggravating circumstance, it properly did so in light of the particular circumstances, i.e., the very young age of the victim. *See Kien v. State*, 782 N.E.2d 398, 414 (holding that trial court properly considered age of the victim in a child molesting case as an aggravating circumstance where court noted that "child is extremely vulnerable to sexual predation because of her 'tender years'").

Victim Impact

[14] Crittenden argues that the trial court improperly considered the impact of the crime on the victim as an aggravating circumstance because such had already been factored into the advisory sentence for the level of the crime committed.

A trial court may consider as an aggravator whether "[t]he harm, injury, loss, or damage suffered by the victim . . . was . . . significant[] and . . . greater than the elements necessary to prove the commission of the offense. Ind. Code § 35-38-1-7.1(a)(1).

[15] Here, there was evidence that D.M. suffered significant behavioral issues as a result of the molestation and began acting out sexually with other children and with herself. D.M.'s aunt testified that D.M. began playing with dolls in a sexual manner and also "tried to hump the neighbor's kids." *Transcript* at 94. Because of D.M.'s behavioral issues, her aunt turned her over to foster care because she was not able to care for her. Eventually, D.M. was placed in a mental hospital. D.M. continues to face issues relating to the molestation by Crittenden. At the first sentencing hearing, the trial court found that the harm to D.M. was "significant and certainly greater than the elements that are necessary to prove the offense." *Transcript* at 156.[1] At the second sentencing hearing, the court again noted that "[t]he impact on the victim was just incredibly lasting. She's lost her mother, she's lost so much. Spent time in a mental hospital trying to cope with the memories" of what Crittenden did to her. *Id.* at 210. The court further observed that D.M. was devastated and scared by having to testify and be in Crittenden's presence. Based on the

[1] The original transcript of the trial and sentencing hearing were included in the record on appeal. These same transcripts were included in the "Transcript of the Record" in this appeal, which also includes the transcript of the second sentencing hearing. For simplicity, our citations to the Transcript will refer to the "Transcript of Record."

foregoing, we cannot say that the trial court erred in finding the serious and lasting nature of the impact on the victim as an aggravating factor.

Position of Trust

[16] Crittenden argues that the trial court erred in finding as an aggravating factor that he violated a position of trust because such "is already inherently included in the presumptive [sic] sentence as an element of the offense." *Appellant's Brief* at 18. Contrary to Crittenden's argument, "Indiana courts have long held that the violation of a position of trust is a valid aggravating factor." *Stout v. State*, 834 N.E.2d 707, 711 (Ind. Ct. App. 2005), *trans. denied*. The sad fact that adults in positions of trust are often the perpetrators of these crimes does not change this result. *Id.* (disagreeing with defendant's argument that the violation of a position of trust with one's victim should not be an aggravator in a case of child molesting because acts of molestation are commonly committed by stepfathers). Crittenden does not challenge that he was in a position of trust with D.M. Indeed, Crittenden was D.M.'s mother's boyfriend and he lived in the home with D.M. and her mother. The trial court did not improperly consider as an aggravating circumstance that Crittenden was in a position of trust with his victim.

Criminal History

[17] Crittenden argues that the trial court should not have cited his criminal history as an aggravating circumstance because his one prior conviction for theft "bears no relation to the crime for which the sentence enhancement was applied."

Appellant's Brief at 20. A defendant's criminal history is a proper aggravating factor; the significance of which "varies based on the gravity, nature and number of prior offenses as they relate to the current offense." *Wooley v. State*, 716 N.E.2d 919, 929 n.4 (Ind. 1999).

[18] With regard to Crittenden's criminal history, the trial court acknowledged that he had a prior conviction for Class D felony theft in 2004 and that he violated his probation. The trial court described such as "very minimal" and indicated that it gave it "very little weight." *Transcript* at 212. The trial court's consideration of such was not error. To the extent Crittenden's claim is that the trial court afforded too much weight to his criminal history, such claims are no longer subject to appellate review. *Anglemyer*, 868 N.E.2d at 491.

Rehabilitation

[19] Crittenden argues that the trial court abused its discretion by failing to explain how an enhanced sentence furthered his rehabilitation. The trial court, however, is not required to provide such an explanation where its sentencing statement sufficiently demonstrates that it evaluated the mitigating and aggravating circumstances. *See Kile v. State*, 729 N.E.2d 211, 215 (Ind. Ct. App. 2000) (citing *Crawley v. State*, 677 N.E.2d 520, 523 (Ind. 1997)). Here, the trial court explained its evaluation of the circumstances impacting the sentence.

Maintaining Innocence

[20] Crittenden argues that the trial court "abused its discretion when it based the outcome of [his] sentence on [him] admitting or denying guilt." *Appellant's Brief* at 22. In support of his argument, Crittenden directs us to a portion of the trial court's sentencing statement wherein the court stated in response to Crittenden's request that the court consider placing him in community corrections or an additional five years of probation:

> One of the things that would matter a great deal to me would be your participation in counseling while you are at the DOC. Now, that may require admission, I don't know. If that – I don't know if you can get into the sex offender counseling at the DOC without admitting the offense. I don't know that. Perhaps you can. But that's one of the things that would move me a long ways down the road when you get closer to the end of your sentence. I might, might reconsider letting you come out for the last couple of years or so onto home detention.

Transcript at 216. Crittenden maintains that the trial court's statement shows that the trial court is "trying to compel [him] to accept responsibility for a crime that he maintains his innocence to . . ., so he could possibly receive the benefit of a lighter sentence." *Appellant's Brief* at 22.

[21] Contrary to Crittenden's claim,[2] the trial court did not consider Crittenden's possible participation in counseling as weighing on the sentence imposed. The trial court's statement came after the trial court pronounced the sentence and

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[2] Crittenden cites to *Ashby v. State*, 904 N.E.2d at 361 (Ind. Ct. App. 2009) in support of his argument. Upon review, we find *Ashby* to be inapposite.

was in response to Crittenden's request that the court consider placing him in community corrections or an additional five years of probation. The trial court's sentencing decision was not based on him admitting or denying guilt. The trial court did not abuse its discretion.

3. Sexually Violent Predator

[22] Crittenden argues that although the trial court never specifically found that he was a sexually violent predator, a notation in the abstract of judgment was to that effect. Crittenden is referring to the trial court's statement in the comment section of the abstract of judgment in which the court noted "NO CONTACT ORDER ISSUED: SEE STATE'S REGISTRY." *Appellant's Second Appendix Volume 2* at 13. Crittenden maintains that with this notation, the court was informing him to follow the State's sex offender laws. Crittenden asserts that if required to register as a sexually violent predator under the law as it exists today, such would constitute an ex post facto violation.

[23] We do not agree with Crittenden's interpretation of the trial court's notation in the abstract of judgment. Rather, as the State asserts, we find that the reference to "SEE STATE'S REGISTRY" is a reference to the registry for no-contact orders. *See* http://www.in.gov/judiciary/admin/2654.htm (Indiana's Protection Order Registry). There has been no determination as to Crittenden's status upon his release from incarceration and Crittenden has not been notified that he is required to register as a sexually violent predator. Thus, Crittenden's

claim that the trial court improperly classified him as a sexually violent predator in violation of the ex post facto clause fails.

4. Ineffective Assistance

[24] Crittenden argues that he received ineffective assistance of counsel during his resentencing hearing. A petitioner will prevail on a claim of ineffective assistance of counsel only upon a showing that counsel's performance fell below an objective standard of reasonableness and that the deficient performance prejudiced the petitioner. *Bethea v. State*, 983 N.E.2d 1134, 1138 (Ind. 2013). To satisfy the first element, the petitioner must demonstrate deficient performance, which is "representation that fell below an objective standard of reasonableness, committing errors so serious that the defendant did not have the 'counsel' guaranteed by the Sixth Amendment." *Id.* (quoting *McCary v. State*, 761 N.E.2d 389, 392 (Ind. 2002)). To satisfy the second element, the petitioner must show prejudice, which is "a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different." *Id.* at 1139. "A reasonable probability is one that is sufficient to undermine confidence in the outcome." *Kubsch v. State*, 934 N.E.2d 1138, 1147 (Ind. 2010) (quoting *Strickland v. Washington*, 466 U.S. 668, 694 (1984)). Failure to satisfy either element will cause an ineffectiveness claim to fail. *Carrillo v. State*, 982 N.E.2d 461, 464 (Ind. Ct. App. 2013).

[25] Crittenden argues that his counsel at the resentencing hearing was ineffective because she failed to object on grounds that the trial court did not have

jurisdiction. This claim is bared by *res judicata* as Crittenden presented essentially this same argument in his post-conviction appeal. *See Holmes v. State*, 728 N.E.2d 164, 168 (Ind. 2000) ("The doctrine of *res judicata* prevents the repetitious litigation of that which is essentially the same dispute."). In *Crittenden II*, this court affirmed the post-conviction court's determination that Crittenden had failed to prove prejudice resulting from counsel's failure to file a motion to dismiss the charging information because it lacked a file stamp. *Slip op.* at 10.

[26] Furthermore, as we discussed *supra*, the trial court had subject-matter jurisdiction regardless of any mistake made by the trial court clerk in file-stamping the charges. Thus, counsel could not have been ineffective for failing to argue lack of jurisdiction. Crittenden likewise cannot prove prejudice because had his trial counsel objected to the lack of a file-stamp, the court could have properly made a nunc pro tunc entry to correct the clerical error. *See Owens*; *Emmons*, 847 N.E.2d at 1037-39. Crittenden's claim of ineffective assistance of counsel fails.

5. Sentencing Amendment

[27] Crittenden argues that the trial court abused its discretion when it amended his sentence without him or his counsel being present. Crittenden was resentenced on November 18, 2015. The basis of Crittenden's argument appears to stem from a notation in the chronological case summary to an amended sentence. Crittenden, however, does not identify how his sentence was amended.

[28] We note that in the record before us, there are two sentencing orders, one dated November 18, 2015, and the other dated November 24, 2015. The sentencing orders are essentially identical with one exception being an additional notation on the November 24, 2015 order that the original date of sentencing was May 26, 2009. Likewise, the record contains two virtually identical abstracts of judgments bearing the same dates as the sentencing orders. On the November 18 abstract of judgment, there is a handwritten notation regarding the original sentencing date. This notation is typed on the November 24 abstract. There is nothing that indicates that the trial court amended Crittenden's sentence. Thus, Crittenden's claim of an improper amendment to his sentence fails.

[29] Judgment affirmed.

[30] Riley, J. and Crone, J., concur.

CERTIFICATE OF AUTHENTICITY

I declare under penalty of perjury under the laws of the United States of America that the documents contained within the foregoing Appendices are true, authentic and accurate copies of the Original documents.

Executed on: August 28th, 2019

Petitioner, *pro se*