

Appendix A

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

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ATTORNEYS FOR APPELLEE

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IN THE COURT OF APPEALS OF INDIANA

Charles E. Justise, Sr.,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff.

June 28, 2019
Court of Appeals Case No.
18A-PC-1420

Appeal from the Marion Superior
Court
The Honorable Mark D. Stoner,
Judge
Trial Court Cause No.
49G06-1601-PC-3703

Mathias, Judge.

[1] After his Class A felony child molesting and Class C felony child molesting convictions were affirmed on direct appeal,¹ Charles E. Justise, Sr. (“Justise”) filed a petition for post-conviction relief in Marion Superior Court. The post-conviction court denied Justise’s petition, and Justise appeals pro se.² Concluding that his claim of newly discovered evidence does not warrant a new trial and that his remaining claims are barred by the doctrines of res judicata and waiver, we affirm.

Facts and Procedural History

[2] In our memorandum decision on Justise’s direct appeal, we set forth the facts underlying his conviction as follows:

On June 21, 2006, twelve-year-old D.B. spent the night at the home of Justise, her father, and Shawna Winston [“Winston”], her father’s girlfriend. Justise and D.B. watched a movie, and D.B. fell asleep on a pallet on the floor in an upstairs bedroom. She awoke in the middle of the night when she felt Justise “feeling on her.” Tr. p. 63. Justise had pulled up D.B.’s shirt and bra and was touching her breasts with his lips. Justise told D.B. to go downstairs with him, and she did. Justise bent D.B. over one of the living room couches, removed her pants, and rubbed his penis against the cheeks of her buttocks for two to three minutes. Justise then moved D.B. to another couch where he got on top of her and tried to place his penis inside her vagina. There

¹ On June 22, 2009, Justise appealed his sentence and conviction, but this court later dismissed the appeal with prejudice for failure to comply with the appellate rules. On September 6, 2011, we allowed a belated appeal.

² Justise filed a motion not to publish, which we interpret as a motion to make the case confidential as opposed to the publication of this opinion. By separate order, we deny this motion.

was no penetration. Justise then placed D.B. on his lap, placed his finger inside her vagina, and moved it around in circles. Justise told D.B. that it was going to “tingle a little bit.” Tr. p. 71. Justise raised D.B. off of his lap and told her to “remember [that] this never happened.” Tr. p. 72. D.B. went upstairs and cried.

A few days later, D.B. told both her aunt, Ashley Jackson (“Jackson”), and Winston what had happened. Winston informed D.B.’s mother about the molestation. When D.B. confirmed to her mother what had occurred, D.B.’s mother contacted the Indianapolis Metropolitan Police Department. D.B. was interviewed at Child Protective Services and examined by Methodist Hospital Sexual Assault Nurse Linda Kelley (“Kelley”). Kelley noticed that D.B. showed notches or clefts on her hymen that could have been caused by something inserted into her vagina.

Detective Gregory Norris was assigned to the case. During his investigation, the detective downloaded recordings of telephone calls between Justise and Winston and Justise and D.B. while Justise was incarcerated in the Marion County Jail on other charges during June and July 2006. Many of the telephone calls made during that time period were not recorded. According to Buzz Michael, the keeper of inmate phone records at the Marion County Jail, the system failed to download approximately 90,000 phone calls due to a system wide failure. The logs indicated that the calls had been made, but the recordings did not exist. Michael explained that there was “no rhyme or reason behind which calls were lost and which calls were kept.” Tr. of Pre-trial Hearing p. 17.

In October 2006, the State charged Justise with two counts of child molesting as class A felonies, three counts of sexual misconduct with a minor as class B felonies, child molesting as a class C felony, and two counts of sexual misconduct with a minor as class C felonies. Justise represented himself at the October 2008 trial. The State introduced into evidence recordings of telephone calls between Justise and D.B., which were recorded

while Justise was incarcerated in the Marion County Jail. In one of the telephone calls, D.B. confronted Justise about touching her and placing his finger in her vagina. She told him that she was not lying and quoted his comment to her that his finger in her vagina would “tingle a little bit.” Ex. 18 p. 7.

Also during trial, Justise wanted to question Jackson about a phone conversation she had with D.B. According to Justise, D.B. told her aunt that she fabricated the molestation because she wanted to hide the fact that she had sexual intercourse with a boy name Jason. Justise wanted to introduce into evidence D.B.'s prior sexual history, but the trial court refused to allow him to do so because this evidence violated Indiana Evidence Rule 412 and was therefore inadmissible. Justise denied molesting his daughter.

A jury convicted Justise of the two counts of child molesting as class A felonies and one count of child molesting as a class C felony. At the sentencing hearing, the trial court merged the two class A felony convictions for double jeopardy purposes and sentenced Justise to forty-five years for the class A felony, and six years for the class C felony, with the sentences to be served consecutively, for an aggregate term of fifty-one years. Justise received permission to file a belated appeal in September 2011.

Justise v. State, No. 49A02-1105-CR-408, slip op. at 1–2 (Ind. Ct. App. May 22, 2012), *trans. denied*.

- [3] On direct appeal, Justise presented three issues: (1) whether his due process rights were violated when the State failed to disclose exculpatory evidence in violation of *Brady v. Maryland*, 373 U.S. 83 (1963); (2) whether the trial court erred in refusing to allow Justise to impeach the victim with evidence of her prior sexual history; and (3) whether there was sufficient evidence to support his conviction. A panel of this court rejected Justise's claims, holding: (1) there was

no evidence for the prosecution to suppress because the phone calls which Justise complains of were not recorded, and if there is no evidence to suppress, there is no *Brady* violation; (2) the victim's alleged sexual history does not fall into one of the enumerated exceptions of Rule 412, and therefore, the trial court did not err by excluding the challenged evidence under Rule 412; and (3) Justise's argument regarding the victim's testimony at trial was nothing more than an invitation for the court to reweigh the evidence, which the court cannot do. *Id.* at *2–3. Justise filed a petition to transfer his case to the Indiana Supreme Court, but that court denied the petition.

- [4] On January 22, 2016, Justise filed a pro se petition for post-conviction relief. In his petition, Justise claimed that (1) the State committed *Brady* violations; (2) he was denied the effective assistance of trial counsel; and (3) there was newly discovered evidence. On May 1, 2017, Justise amended his petition to add a claim of prosecutorial misconduct. The post-conviction court held an evidentiary hearing on September 21, 2017. Both parties then submitted proposed findings of fact and conclusions of law, and on May 18, 2018, the post-conviction court issued its findings of fact and conclusions of law denying Justise's petition for post-conviction relief. The post-conviction court concluded that D.B. acknowledged the allegations of inappropriate sexual contact she made against Justise, and D.B. indicated her testimony at trial was untruthful and that Justise had never touched her. The court, however, did not find D.B. credible and assigned no weight to her testimony. Further, the court held that

the issue of D.B.’s recantation was not a new issue, as it was addressed several times in Justise’s Court of Appeals decision. Justise now appeals.

Standard of Review

- [5] Our standard of review of claims that a post-conviction court erred in denying relief is well settled. That is, post-conviction proceedings are not “super appeals” through which convicted persons can raise issues they failed to raise at trial or on direct appeal. *Manzano v. State*, 12 N.E.3d 321, 325 (Ind. Ct. App. 2014), *trans. denied*. Instead, post-conviction proceedings afford petitioners a limited opportunity to raise issues that were unavailable or unknown at trial and on direct appeal. *Id.* A post-conviction petitioner bears the burden of establishing grounds for relief by a preponderance of the evidence. *Id.* Thus, on appeal from the denial of post-conviction relief, the petitioner stands in the position of one appealing from a negative judgment. *Id.* To prevail on appeal from the denial of post-conviction relief, the petitioner must show that the evidence as a whole leads unerringly and unmistakably to a conclusion opposite that reached by the post-conviction court. *Id.*
- [6] As required by Indiana Post-Conviction Rule 1(6), the post-conviction court entered findings of fact and conclusions of law. Therefore, we must determine if the court’s findings are sufficient to support its judgment. *Manzano*, 12 N.E.3d at 325. We review the post-conviction court’s factual findings under a clearly erroneous standard, i.e., we will not reweigh the evidence or judge the credibility of witnesses, and we will consider only the probative evidence and

reasonable inferences flowing therefrom that support the post-conviction court's decision. We do not defer to the post-conviction court's legal conclusions, which are reviewed *de novo*. *Stevens v. State*, 770 N.E.2d 739, 746 (Ind. 2002).

Discussion and Decision

[7] First, Justise complains that the post-conviction court failed to address his *Brady* violation claim and his claim that the trial court should have admitted evidence that he contends would have impeached Jackson's testimony. The State asserts that these claims are barred by res judicata or waiver. The doctrine of res judicata "prevents the repetitious litigation of that which is essentially the same dispute." *State v. Holmes*, 728 N.E.2d 164, 168 (Ind. 2000). Issues that were raised and decided on direct appeal are res judicata and may not be litigated again on post-conviction review. *Ben-Yisrayl v. State*, 738 N.E.2d 253, 258 (Ind. 2000). "[W]here an issue, although differently designated, was previously considered and determined upon a criminal defendant's direct appeal, the State may defend against defendant's post-conviction relief petition on grounds of prior adjudication or res judicata." *Cambridge v. State*, 468 N.E.2d 1047, 1049 (Ind. 1984).

[8] On direct appeal, Justise unsuccessfully argued that the State committed a *Brady* violation with respect to the phone calls between himself and the victim. Here, Justise raises the same *Brady* violation claim, and it is therefore barred by res judicata. *See Ben-Yisrayl*, 738 N.E.2d at 259.

[9] Similarly, on direct appeal, Justise argued that the trial court should have allowed him to admit impeachment evidence concerning the victim's prior sexual history.³ Justise now argues that, "Jackson should have been allowed to testify as to D.B. telling her that Justise never touched her. Proper foundation was laid for impeachment." Appellant's Br. at 3. Issues that were known and available, but not raised, on direct appeal are waived, or procedurally defaulted, and may not be raised in the post-conviction process. *Bunch v. State*, 778 N.E.2d 1285, 1289 (Ind. 2002). Justise could have raised this issue on direct appeal but chose not to. Therefore, the claim is waived.

[10] Finally, Justise argues that the post-conviction court incorrectly rejected relief on his claim of newly discovered evidence. At the post-conviction hearing, D.B. testified under oath that she had never been inappropriately touched by Justise and that Justise never did "anything physical" with her. Tr. p. 14.

[11] In considering whether to set aside a conviction and grant a new trial on the basis of newly discovered evidence, Indiana courts apply a nine-part test:

New evidence will mandate a new trial only when the defendant demonstrates that: (1) the evidence has been discovered since the trial; (2) it is material and relevant; (3) it is not cumulative; (4) it is not merely impeaching; (5) it is not privileged or incompetent; (6) due diligence was used to discover it in time for trial; (7) the evidence is worthy of credit; (8) it can be produced upon a retrial

³ Justise does not appeal the denial of post-conviction relief on the grounds of ineffective assistance of counsel that he raised in his petition.

of the case; and (9) it will probably produce a different result at retrial.

Kubsch v. State, 934 N.E.2d 1138, 1145 (Ind. 2010) (quoting *Taylor v. State*, 840 N.E.2d 324, 329–30 (Ind. 2006)). These nine factors are analyzed with care, “as ‘the basis for newly discovered evidence should be received with great caution and the alleged new evidence carefully scrutinized.’” *Id.* (quoting *Taylor*, 840 N.E.2d at 330).

[12] Here, the post-conviction court concluded that the admission of the victim’s testimony at a new trial would be offered as merely impeaching evidence. We agree. D.B.’s testimony at the post-conviction hearing was not new substantive evidence but was merely impeaching of what she had previously testified under oath. This testimony at the evidentiary hearing only serves to undermine her own credibility, and thus, Justise has failed to establish the fourth prong of the test.

[13] The post-conviction court also concluded that D.B.’s testimony at the post-conviction relief evidentiary hearing was not worthy of credit. The court had the opportunity to hear D.B. testify multiple times regarding the molestation. During her trial testimony which resulted in Justise’s convictions, D.B. did not waver in her accusations. Additionally, the court concluded that D.B. related the same facts she testified to at trial to a forensic interviewer, Linnett Garcia, who described D.B. as “very forthcoming.” Appellant’s App. Vol. 2, p. 238. D.B. remained consistent in her accusation against Justise during a pretrial deposition. During a recorded pretrial jail conversation between D.B. and Justise, D.B. asked Justise specifically about the molestation. *Id.* In sum, the

court found D.B.'s testimony at the evidentiary hearing not worthy of credit as D.B.'s prior testimony was too clear, precise, and forthcoming to ignore now. Thus, Justise had failed to meet his burden of proving the seventh prong of the newly discovered evidence test. We agree with the trial court that D.B.'s testimony is not worthy of credit.

[14] Therefore, the alleged newly discovered evidence is not supportive of a different result at retrial, and there is no merit to Justise's claims. Justise's argument to the contrary is nothing more than a request for us to reweigh the evidence on appeal, which we will not do.

Conclusion

[15] The issues Justise raised in his petition for post-conviction relief were either addressed on direct appeal, and therefore res judicata, or known and available to him at the time of his direct appeal, and therefore waived. Furthermore, Justise is not entitled to a new trial based on his claim of newly discovered evidence because D.B.'s recantation of her trial testimony was merely impeaching and because the post-conviction court determined that her testimony at the post-conviction evidentiary hearing was not credible. Accordingly, we affirm the court's denial of Justise's petition for post-conviction relief.

[16] **Affirmed.**

May, J., and Brown, J., concur.

Appendix B

STATE OF INDIANA) IN MARION SUPERIOR COURT
COUNTY OF MARION) CRIMINAL DIVISION, ROOM SIX

CHARLES JUSTISE)
)
v.) CAUSE NO. 49G061601PC003703
)
STATE OF INDIANA)

FILED
May 18, 2018
Myra L. Oldridge
CLERK OF THE COURT
MARION COUNTY
JO

FINDINGS OF FACT AND CONCLUSIONS OF LAW
DENYING PETITION FOR POST-CONVICTION RELIEF

COMES NOW, the Court and pursuant to Indiana Post-Conviction Rule 1(6), issues its Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

1. On August 24, 2006, the Petitioner, Charles E. Justise, Sr. ("Justise") was charged with two counts of Child Molest, as class A felonies, three counts of Sexual Misconduct with a Minor, as class B felonies, one count of Child Molest, as a class C felony, and two counts of Sexual Misconduct with a Minor, as class C felonies.

2. With Attorney T.R Fox ("Fox") providing representation, the case proceeded through extensive pretrial discovery and motions. A trial was held on September 4 and 5, 2007 on the two A felony and one C felony counts of Child Molest. The other five counts were severed for purposes of trial. This trial resulted in a hung jury.

3. The case was reset for jury trial, and on January 15, 2008 the Court granted Justise's motion to represent himself. Fox was appointed as standby counsel.

4. Substantial additional discovery and pretrial motions were litigated, until the case proceeded to a second jury trial on October 20 and 21, 2008. Justise represented himself during this trial, with Fox on standby, and ultimately the jury found him guilty of two A felony counts and one C felony count of Child Molest.

5. On November 6, 2008 a sentencing hearing was held. Due to double jeopardy concerns, the trial court only entered convictions for one count of Child Molest, as an A felony, and one count of Child Molest, as a C felony. After hearing arguments of the parties, the Court sentenced Justise to an aggregate sentence of 51 years in the Department of Correction.

6. Justise, *pro se*, appealed his conviction and sentence. On June 22, 2009, the Indiana Court of Appeals dismissed the appeal with prejudice for failure to comply with the appellate rules.

7. On October 19, 2010 Justise filed his first *pro se* Petition for Post-Conviction Relief. This petition was withdrawn, without prejudice, on January 13, 2011.

8. On September 6, 2011, the Indiana Court of Appeals granted Justise's Motion to file a belated appeal. On appeal he raised as issues: 1) whether the State committed a *Brady* violation; 2) whether the trial court erred by refusing to allow him to impeach the victim with evidence of her prior sexual history; and 3) whether there was sufficient evidence to support his convictions. On May 22, 2012, the Court of Appeals affirmed in all respects. *Justise v. State*, No. 49A02-1105-CR-408, *slip op.* (In. Ct. App. May 22, 2012).

9. On January 22, 2016, Justise filed his second *pro se* petition for post-conviction relief. In his petition, Justise claimed that the State committed *Brady* violations, he was denied the effective assistance of trial counsel, and there is newly discovered evidence. On May 1, 2017, Justise amended his petition to add a claim of prosecutorial misconduct.

10. On September 21, 2017, the Court held an evidentiary hearing on the Amended Petition for Post-Conviction Relief. At the hearing, the Appellate Record of Proceedings was admitted as Petitioner's exhibit A. Justise presented the testimony of the victim, Diamon Brownie ("Brownie"), and at the State's request, the Court took judicial notice of its file in the underlying criminal case.

11. In relevant part, the facts and procedure supporting Justise's convictions, as found by the Indiana Court of Appeals are:

On June 21, 2006, twelve-year-old D.B. spent the night at the home of Justise, her father, and Shawna Winston, her father's girlfriend. Justise and D.B. watched a movie, and D.B. fell asleep on a pallet on the floor in an upstairs bedroom. She awoke in the middle of the night when she felt Justise "feeling on her." Tr. p. 63. Justise had pulled up D.B.'s shirt and bra and was touching her breasts with his lips. Justise told D.B. to go downstairs with him, and she did. Justise bent D.B. over one of the living room couches, removed her pants, and rubbed his penis against the cheeks of her buttocks for two to three minutes. Justise then moved D.B. to another couch where he got on top of her and tried to place his penis inside her vagina. There was no penetration. Justise then placed D.B. on his lap, placed his finger inside her vagina, and moved it around in circles. Justise told D.B. that it was going to "tingle a little bit." Tr. p. 71. Justise raised D.B. off of his lap and told her to "remember [that] this never happened." Tr. p. 72. D.B. went upstairs and cried.

A few days later, D.B. told both her aunt, Ashley Jackson, and Winston what had happened. Winston informed D.B.'s mother about the molestation. When D.B. confirmed to her mother what had occurred, D.B.'s mother contacted the Indianapolis Metropolitan Police

Department. D.B. was interviewed at Child Protective Services and examined by Methodist Hospital Sexual Assault Nurse Linda Kelley. Kelley noticed that D.B. showed notches or clefts on her hymen that could have been caused by something inserted into her vagina.

In October 2006, the State charged Justise with two counts of child molesting as class A felonies, three counts of sexual misconduct with a minor as class B felonies, child molesting as a class C felony, and two counts of sexual misconduct with a minor as class C felonies. Justise represented himself at the October 2008 trial. The State introduced into evidence recordings of telephone calls between Justise and D.B., which were recorded while Justise was incarcerated in the Marion County Jail. In one of the telephone calls, D.B. confronted Justise about touching her and placing his finger in her vagina. She told him that she was not lying and quoted his comment to her that his finger in her vagina would "tingle a little bit." Ex. 18 p. 7.

A jury convicted Justise of the two counts of child molesting as class A felonies and one count of child molesting as a class C felony.

Justise at 2-4

12. At the September 21, 2017 PCR Evidentiary hearing, Brownie's testimony was relatively brief. Brownie acknowledged that she made allegations against Justise of inappropriate sexual contact. Brownie indicated her testimony at trial was untruthful and Justice had not touched her.

13. As such, Brownie's testimony at the PCR hearing was directly contrary to her sworn testimony under oath at trial on October 20, 2008. The Court recognized Brownie had given two completely contradictory statements under oath and advised her of her Fifth Amendment right against self-incrimination entered Sixth Amendment right to counsel. Brownie indicated she understood those rights, did not wish to consult with counsel, and repeated her testimony, under oath and penalty of perjury, that Justise did not touch her

inappropriately. Brownie gave no explanation for the change in her testimony or any indication of remorse, sorrow, or understanding of the importance of what she was saying. The Court did not find her credible and assigns no weight to her testimony.

14. The issue of Brownie's recantation is not a new issue. In fact, it was addressed several times in the Petitioner's Court of Appeals decision:

Also during the trial, Justise wanted to question Jackson about a phone conversation she had with D.B. According to Justise, DB told her aunt that *she fabricated the molestation* because she wanted to hide the fact that she had sexual intercourse with a boy named Jason. Justise wanted to introduce into evidence D.B.'s prior sexual history, but the trial court refused to allow him to do so because this evidence violated Indiana Evidence Rule 412 and was therefore inadmissible. Justise denied molesting his daughter.

[p. 4. emphasis added]

Justise first argues that he was denied his due process rights when the State failed to disclose exculpatory evidence in violation of Brady v. Maryland, 373 U. S. 83 (1963). Specifically, Justise explains that when he was incarcerated, he received a telephone call from D.B. where *she admitted that she made up the molestation allegation* because she was jealous of his girlfriend.

Justise at 4-5 [emphasis added]

15. The issue of Brownie's recantation thus was available to the Petitioner not only at trial but also on appeal.

16. The Court finds that the evidence is with the State and against the Petitioner.

CONCLUSIONS OF LAW

17. *Standard of Review.* Post-conviction relief is a collateral attack on the validity of a criminal conviction, and the petitioner carries the burden of proof. *Timberlake v. State*, 753 N.E.2d 591, 597 (Ind. 2001). This collateral challenge to the conviction is limited to the grounds enumerated in the post-conviction rules. *Id.*, citing Ind. Post-Conviction Rule 1(1). PC Rule 1 reads, in pertinent part:

- (a) Any person who has been convicted of, or sentenced for, a crime by a court of this state, and who claims:
 - (1) That the conviction or the sentence was in violation of the Constitution of the United States or the constitution or laws of this state;
 - (2) That the court was without jurisdiction to impose sentence;
 - (3) That the sentence exceeds the maximum authorized by law, or is otherwise erroneous;
 - (4) That there exists evidence of material facts, not previously presented and heard, that requires vacation of the conviction or sentence in the interest of justice;
 - (5) That his sentence has expired, his probation, parole or conditional release unlawfully revoked, or he is otherwise unlawfully held in custody or other restraint;
 - (6) That the conviction or sentence is otherwise subject to collateral attack upon any ground of alleged error heretofore available under any common law, statutory or other writ, motion petition, proceeding, or remedy;

may institute at any time a proceeding under this rule to secure relief.

Thus, in order to grant relief, the Court must find the preponderance of the evidence proved Petitioner is entitled to relief under one of the provisions enumerated above.

18. Before turning to Justise's claims, the Court reiterates the often repeated rule that, "Pro se litigants without legal training [are held to the same standard as trained counsel and] are required to follow procedural rules." *Wright v. State*, 772 N.E.2d 449, 463 (Ind.Ct.App.2002). "This has consistently been the standard applied to pro se litigants, and the courts of this State have never held that a trial court is required to guide pro se litigants through the judicial system." *Evans v. State* 809 N.E.2d 338 (Ind.Ct.App.2004). Consequently, in reviewing Justise's claims, this Court will not "indulge in any benevolent presumptions on [his] behalf, or waive any rule for the orderly and proper conduct of [his claim]."
Ankeny v. Governor of State of Indiana, 916 N.E.2d 678, 689 (Ind.Ct.App.2009), *reh'g denied, trans. denied* (citation omitted). The Court, prior to trial, and on a number of occasions post-trial, repeatedly warned the Petitioner of the dangers of proceeding *pro se* based upon the seriousness of the charges and Petitioner's lack of legal training.

19. The Court initially notes that in his post-conviction relief petitions, Justise has raised a broad array of collateral attacks. However, the Court finds that based on his evidentiary presentation, and his arguments to the Court in support of his petition, Justise has elected to only pursue his claim of newly discovered evidence.

20. Thus, to the extent that other issues, such as various alleged *Brady* violations, claims of ineffective assistance of counsel or prosecutorial misconduct might be considered active, or viable, the Court, nonetheless finds that

consideration and review of these issues are waived. More specifically, the Court finds that Justise has wholly failed to even attempt to present facts or arguments on these alternate issues. By not presenting any evidence or argument, whatsoever, Justise has wholly failed to sustain his burden of proof on these claims. As previously observed, a post-conviction petitioner bears the burden in the post-conviction court to prove his claims by a preponderance of the evidence. Ind. Post-Conviction Rule 1(5); *Kubsch*, 934 N.E.2d at 1144. Where a petitioner fails to present any evidence to the post-conviction court in support of his claims, he cannot obtain post-conviction relief. *See Tapia v. State*, 753 N.E.2d 581, 588 (Ind. 2001) (the total absence of any evidence of petitioner's post-conviction claim supports post-conviction court's conclusion that petitioner did not meet his burden of proof); Additionally, *See Wingate v. State*, 900 N.E.2d 468, 475 (Ind. Ct. App. 2009) (quoting *Davis v. State*, 835 N.E.2d 1102, 1113 (Ind. Ct. App. 2005), *trans. denied*) ("A party waives an issue where the party fails to develop a cogent argument or provide adequate citation to authority and portions of the record.").

21. In his single remaining issue, Justise claims he should receive a new trial due to newly discovered evidence. "Newly discovered evidence" in its legal sense has been narrowly defined by our Supreme Court. In order to satisfy his burden of showing that he is entitled to relief on the basis of newly-discovered evidence, Petitioner must meet a nine-part test, and show that: 1) the evidence has been discovered since the trial; 2) it is material and relevant; 3) it is not cumulative; 4) it is not merely impeaching; 5) it is not privileged or incompetent; 6) due diligence was

used to discover it in time for trial; 7) the evidence is worthy of credit; 8) it can be produced on a retrial of the case; and 9) it will probably produce a different result.

Webster v. State, 699 N.E.2d 266 (Ind. 1998); *Bradford v. State*, 675 N.E.2d 296, 302 (Ind. 1996)

22. The Court is required to analyze these nine factors with care, as '[t]he basis for newly discovered evidence should be received with great caution and the alleged new evidence carefully scrutinized.'" *Carter v. State*, 738 N.E.2d 665, 671 (Ind. 2000) (quoting *Reed v. State*, 508 N.E.2d 4, 6 (Ind. 1987)). The burden of showing that all nine requirements are met rests with Justice. *Taylor v. State*, 840 N.E.2d 324, 330 (Ind. 2006).

23. In his petition, Justice presents Brownie's PCR evidentiary hearing testimony as the newly discovered evidence that merits his receiving a new trial. As argued by the State, Justice's petition must rely on proving it's the fourth and seventh prongs of the newly discovered evidence test. However, this Court, which heard the evidence at both of the Petitioner's trials, was well aware of the Petitioner's claims that Brownie had fabricated her story and recanted it to others. The Petitioner failed to present these issues to the jury through proper use of the rules of evidence or as a matter of trial strategy. It is not "newly discovered" within the nine-pronged test and is waived as a matter of post-conviction relief.

24. Even if the Court determined this testimony was "newly discovered," the petition would fail for other reasons. Under the fourth prong from Wright and Bradford, Brownie's recantation testimony is merely impeaching of her own trial

testimony. At the post-conviction hearing, the entire premise of Brownie's brief testimony served to support the idea that she lied when she testified at trial. The Court and jury heard questions at trial where the Petitioner challenged Brownie's truthfulness and desire to fabricate information. The jury heard Brownie deny Petitioner's challenges and insist that Petitioner did touch Brownie inappropriately, both in direct testimony and recorded jail calls with Petitioner and a third person. Her testimony at the PCR hearing was not new substantive evidence, but was merely impeaching of what she had previously testified under oath. This testimony at the evidentiary hearing only serves to undermine her own credibility. See *Taylor v. State*, 840 N.E.2d 324, 330 (Ind. 2006) (concluding a witness's affidavit stating he lied during trial did not constitute newly discovered evidence because the affidavit would show the witness was merely lying at trial thereby undermining his own credibility). Thus Justice has failed to establish the fourth prong of the test.

25. The Court also concludes that D.B.'s testimony at the PCR evidentiary hearing is not worthy of credit. It is beyond dispute that evaluation of evidence and witness credibility is firmly within the province of the trial court. See *Webster v. State*, 699 N.E.2d 266, 269 (Ind. 1988) (holding that "when ruling on a motion for a new trial based on newly discovered evidence the trial court must assess the credibility of any proffered new evidence"); see also *McVey v. State*, 863 N.E.2d 434, 446 (Ind. Ct. App. 2007), *trans. denied* (holding that determining whether the new evidence is credible is "a factual determination to be made by the trial judge who has the opportunity to see and hear the witness testify").

26. In this case, the Court not only had the opportunity to hear Brownie testify at the evidentiary hearing, but the Court heard her testify at the first trial, which ended in a hung jury, and the second trial which resulted in the Petitioner's convictions. During her trial testimony, Brownie did not waiver in her accusations. She was poised, clear, consistent and detailed. She maintained this poise, and consistency even in the face of graphic cross-examination from the Defendant, her father. (App. Rec. p. 70)

27. The record also reveals that Brownie related the same, consistent facts to the forensic interviewer, Linnett Garcia. (App. Rec p. 43-50). Garcia, who testified she had many such interviews, described Brownie as "very forthcoming." (App. Rec p. 49). Brownie remained consistent in her accusation against Justise during a pretrial deposition (App. Rec p 87), and also during a recorded pretrial jail conversation between her and Justise that was admitted during the trial. (State's Exh. 19, App record 158-59)

28. In sum, the Court does not speculate as to Brownie's motives for her evidentiary hearing testimony. However, the Court cannot ignore the quality and quantity of her testimony before and during the trials conducted in this cause, particularly as compared to her short, perfunctory statements a decade later. The Court finds that, in the legal sense, her testimony at the evidentiary hearing is not worthy of credit. Her prior testimony was too clear, precise and forthcoming to simply ignore now. Accordingly, the Court finds that Justise has also failed to meet

his burden of proving the seventh prong of the newly discovered evidence test.

29. Therefore, after reviewing the facts and the law, the Court finds that the law is with the State and against the Petitioner.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED by the Court that the Petition for Post-Conviction Relief is hereby DENIED.

All so ordered this 11th day of May, 2018.

Mark D. Stoner

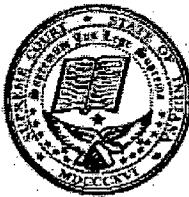
Judge
Marion Superior Court
Criminal Division Room Six

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Charles Justice, # 921730
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Michigan City, IN 46360

Appendix C



CLERK

SUPREME COURT, COURT OF APPEALS, AND TAX COURT STATE OF INDIANA

216 STATE HOUSE, INDIANAPOLIS, IN 46204
317-232-1930 FAX: 317-232-8365

Charles E Justise
#921730
Miami Correctional Facility
3038 West 850 South
Bunker Hill, IN 46914

CAUSE NO.: 18A-PC-01420
LOWER COURT CAUSE NO.: 49G061601PC3703

IN RE: Charles E Justise, Sr. v. State of Indiana

You are hereby notified that the Indiana Supreme Court has on this day, Thursday, January 23, 2020, issued the attached order, opinion, or notice.

Transmitted pursuant to the requirements of Indiana Appellate Rule 26.

Clerk of the Indiana Supreme Court, Court of Appeals, and Tax Court
Statehouse Rm. 216
200 W. Washington St.
Indianapolis, IN 46204

In the
Indiana Supreme Court

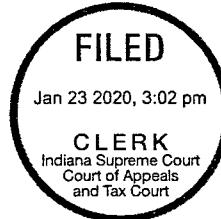
Charles E. Justise, Sr.,
Appellant(s),

v.

State Of Indiana,
Appellee(s).

Court of Appeals Case No.
18A-PC-01420

Trial Court Case No.
49G06-1601-PC-3703



Order

This matter has come before the Indiana Supreme Court on a petition to transfer jurisdiction, filed pursuant to Indiana Appellate Rules 56(B) and 57, following the issuance of a decision by the Court of Appeals. The Court has reviewed the decision of the Court of Appeals, and the submitted record on appeal, all briefs filed in the Court of Appeals, and all materials filed in connection with the request to transfer jurisdiction have been made available to the Court for review. Each participating member has had the opportunity to voice that Justice's views on the case in conference with the other Justices, and each participating member of the Court has voted on the petition.

Being duly advised, the Court DENIES the petition to transfer.

Done at Indianapolis, Indiana, on 1/23/2020.

Loretta H. Rush
Loretta H. Rush
Chief Justice of Indiana

All Justices concur.