NO.: 20-6317

IN THE

SUPREME COURT OF THE UNITED STATES

Robert Petty - Petitioner;

v.

State of Indiana - Respondent;

PETITION FOR WRIT OF CERTIORARI

Attorney for Petitioner:

Robert Petty #106981
Petitioner -Appellant, *pro se*
Pendleton Correctional Facility
4490 W. Reformatory Road
Pendleton, IN 46064-9001

QUESTIONS PRESENTED

1. Whether the Indiana Courts erred denying Appellant was deprived effective assistance of trial counsel during closing arguments and sentencing violating the Fifth, Sixth and Fourteenth Amendments to the United States Constitution?

2. Whether the Indiana Courts erred denying Appellant was deprived of effective assistance of Appellate Counsel in violation of the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution when Appellate Counsel failed to raise issues that are significant and obvious from the face of the record that are clearly stronger than the issues raised.

LIST OF PARTIES

☒ All parties appear in the caption of the case on the cover page.

☐ All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

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IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

The Petitioner respectfully prays that this Honorable Court issue a writ of certiorari to review the judgment below.

OPINIONS BELOW

☐ For cases from **federal courts**:

The opinion of the United States court of appeals appears at Appendix ____ to the petition and is-

☐ reported at _____; or,

☐ has been designated for publication but is not yet reporter; or,

☐ is unpublished.

The opinion of the United States district court appears at Appendix ____ to the petition and is-

☐ reported at _____; or,

☐ has been designated for publication but is not yet reporter; or,

☐ is unpublished.

☒ **For cases from state courts**:

The opinion of the highest state court to review the merits appears at **Appendix** C to the petition and is-

☐ reported at _____; or,

☐ has been designated for publication but is not yet reporter; or,

☒ is unpublished.

The opinion of the Indiana Court of Appeals appears at **Appendix** B to the petition and is-

☐ reported at _____; or,

☐ has been designated for publication but is not yet reporter; or,

☒ is unpublished.

JURISDICTION

☐ For cases from **federal courts**:

The date on which the United States court of appeals decided my case was _____.
A copy of that decision appears at Appendix ____.

☐ No petition for rehearing was timely filed in my case.

☐ A timely petition for rehearing was denied by the United States court of appeals on the following date: _____ ____, 20__, and a copy of the order denying rehearing appears at Appendix ____.

☐ An extension of time to file the petition for a writ of certiorari was granted to and including _____ ____, 20__, on _____ ____, 20__, in Application No. __, and a copy of the order granting said extension appears at Appendix ____.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

☒ **For cases from state courts:**

The date on which the highest state court decided my case was October 1, 2020.
A copy of that decision appears at **Appendix C**.

☒ No petition for rehearing was timely filed in my case. Indiana prohibits rehearing in Petition to Transfer to the Indiana Supreme Court.

☐ A timely petition for rehearing was denied on the following date: _____ ____, 20__, and a copy of the order denying rehearing appears at Appendix ____.

☐ An extension of time to file the petition for a writ of certiorari was granted to and including _____ ____, 20__, on _____ ____, 20__, in Application No. __, and a copy of the order granting said extension appears at Appendix ____.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS AND STATUTES

Constitutional Provisions

Amendment 5

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Sixth Amendment

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

Amendment 14

Sec. 1. [Citizens of the United States.] All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

On April 7, 2007, Appellant Robert Petty married Nina Keown and their daughter, B.P. was born one month later. On October 9, 2009, Petty and Keown divorced, but got back together in July 2010. Keown was also in the process of moving back into Petty's house located on 7168 East Plymouth Road, Lexington, Indiana. On August 7, 2010, Petty, Keown and B.P. drove to Clarksville, Indiana for a day of shopping. Petty bought a video game at a game store, **two pints of Jim Beam at a liquor store**, and a ring for Keown at a pawn shop. They drove back to Lexington around 4:30 p.m., dropped off B.P. at Petty's father's house, and drove to Scottsburg, Indiana to attend the Hop Stock Music Festival (concert). Petty and Keown were together at the beginning of the concert but later separated. At some point, Petty wanted to go home. He walked back to his 4-Wheeler only to find Keown standing next to it, talking to somebody on her cell phone. Keown quickly hung up, and when Petty asked who she was talking to, Keown replied, "none of your fucking business." This made Petty angry and they started to argue. **They were both intoxicated from the alcohol they had consumed at the concert.** The pair set off on the 4-Wheeler but stopped at the intersection of Plymouth Road and Highway 3, where they got off and continued arguing for about two or three minutes before climbing back on the 4-Wheeler and driving the rest of the way home. Once they arrived at Petty's residence, petty snatched Keown's cell phone. Using her call history, Petty called the last number Keown had dialed. It turned out that Keown had called a wrong number, and spoken to a man by the name of Joe Barger. Barger told Petty that Keown had called him three times but Barger had refused to talk to him or disclose his identity. In one of these phone calls, Petty threatened Barger and told him that he would go over to his house to "whip" and "kill" him.

In the mean time, Keown had gone to the Master bedroom and had passed out on the bed, with her feet hanging over the foot of the bed. Since Petty did not get any information from Barger, he went into the master bedroom to ask Keown the same question. Keown was unconscious and did not therefore answer him. At this point Petty was **extremely intoxicated and angry** and he got on top of her putting his hands on her throat and choked her. When Petty saw she was not answering still, he left the house and drove back to Scottsburg, Indiana, stopping at Walmart and Burger King. Approximately one hour later, Petty drove back to his house and found Keown was still unconscious but had now turned blue. Petty tried to resuscitate Keown but she did not wake up. According to Petty, he then knew Keown had died because she had urinated on herself. Petty decided that he did not want to go to jail, so he tried "to make it all disappear." Petty placed Keown's body and her boots onto the back of his 4-Wheeler and drove out into the countryside stopping near Saluda, Indiana. He then placed two phone calls from Keown's cell phone in an attempt to divert suspicion from himself. After that, Petty removed Keown's cell phone battery and threw it in a field. Petty decided not to put Keown's body there, so he drove further stopping at Bethlehem Road in New Washington, Indiana. The road was on a hill and was overlooking a heavily wooded area. Petty picked up Keown's body, stepped over a guardrail, and began carrying her body down the hill and into the woods. The hill was steep and **Petty being intoxicated quickly fell**, dropping Keown's body. Petty left Keown's body where it came to rest and then drove for a while before realizing Keown's boots were still on the floorboard of his 4-Wheeler so he stopped and pitched them over the guardrail. At some point Petty realized that he still had Keown's ring in his pocket, so he pitched it somewhere along the route.

The next morning, he returned to the site where he had placed Keown's body to retrieve her clothes, because Petty feared, if found, it might assist the police in identifying him as Keown's killer. He then drove back home and burned Keown's clothes alongside his bed clothes in his backyard. On the same day, Petty called Keown's mother and grandmother and asked whether they had seen or heard from Keown. Petty told them that he and Keown had argued at the concern the night before, and the last time he had seen her was when she walked away at the intersection of Plymouth Road and Highway 3. Petty would continue to tell the same story to the police for about three weeks.

On August 26, 2010, while Petty was in custody for an unrelated case in Clark County Jail, Petty asked to speak to the Sheriff but he was unavailable. Petty spoke to Deputy Sheriff, Rachael Lee and confessed he killed Keown and then offered to aid the officers in Scott County with Keown's investigation. Thereafter, Deputy Lee called Scott County sheriff's Department and arranged to meet officers near the site where Petty had placed Keown's body. Keown's skeletal remains were found the next day.

On September 29, 2010, the State filed an Information charging Petty with Count 1, Murder, *I.C.* 35-42-1-1; Count 2, Removal of a Body from a Scene as a Class D felony, *I.C.* 36-2-14-7; and Count 3, Obstruction of Justice, as a Class D felony, *I.C.* 35-44-3-4. That same day, the State amended the Information adding a fourth charge, Count 4, Habitual Offender, *I.C.* 35-50-2-8.

Petty's jury trial was conducted on January 29, 2013. Following the return of a guilty verdict of Voluntary Manslaughter as a lesser included offense, Removal of a Body from a Scene, and Obstruction of Justice, Petty admitted to the Habitual Offender charge. On April 17, 2013, the trial court held Petty's sentencing hearing where Petty's ex-Sunday School teacher was

improperly permitted to make an impact statement even though she was not connected or involved with the case. The trial judge during sentencing made a statement of displeasure with the jury's verdict of involuntary manslaughter and then used elements of the crimes as aggravating factors.

Appellant was tried and convicted under cause number72C01-1009-MR-00001 for Ct. 1, Involuntary Manslaughter; Ct.2, Removal of a Body from Scene; Ct. 3, Obstruction of Justice and Ct. 4, Habitual Offender. Appellant was sentenced on April 17, 2013 to Ct. 1, 20 years enhanced by 30 years for Habitual Offender Count; Ct. 2, Removal of a Body 3 years consecutive to Ct. 1 and Ct 3, Obstruction of Justice 3 years consecutive to Ct's 1 & 2 for an executed sentence of 56 years.

On February 22, 2019 Appellant filed a Petition for Post-Conviction Relief alleging ineffective assistance of trial and appellate counsel. [PCR Appx. 18]. On February 26, 2019 the Judge recused himself. [PCR Appx. 2]. On March 6, 2019 the State filed an Answer to Appellant's Post-Conviction Relief. [PCR Appx. 3]. On March 20, 2019 Special Judge Maria Granger was appointed. [PCR Appx. 3. On May 1, 2019 Appellant filed Motion for Subpoenas of Brian Chastain, trial counsel, and Ryan Bower, appellate counsel which was granted on June 1, 2019. [PCR Appx. 39]. On May 1, 2019 Appellant filed a Motion to Withdraw Appellate record to trial Court for Use in Post-Conviction Proceedings and to Take Judicial Notice that was denied on June 1, 2019 [PCR Appx. 4, 47].; Appellant's Motion to Reconsider was denied on July 3, 2019 [PCR Appx. 53]. On October 10, 2019 Appellant filed a last Motion to Take Judicial Notice of any and all record denied in Court [PCR Appx. 61]. On December 5, 2019 an evidentiary hearing was held and trial counsel, Brian Chastain testified concerning the ineffective assistance of counsel claims against him, however, appellate counsel, Ryan Bower

did not appear so the hearing was continued until December 19, 2019. On December 19, 2019 appellate counsel, Ryan Bower, testified concerning the ineffective assistance of counsel claims against him. Upon completing the evidentiary hearing each party was ordered to provide a proposed finding of facts and conclusions of law within fifteen (15) days. During the December 5, 2019 evidentiary hearing the Appellant entered a copy of the trial transcripts into evidence to support his claims.

On February 5, 2020, Special Judge Maria Granger denied Appellant's Petition for Post-Conviction Relief and he filed his appeal in the Indiana Court of Appeals on February 20, 2020 that was affirmed on _____ __, 2020. The Indiana Supreme Court denied Transfer on _____ ___, 2020.

REASONS FOR GRANTING THE WRIT

ARGUMENTS

ARGUMENT I

Appellant was denied effective assistance of trial counsel violating the Fifth, Sixth and Fourteenth Amendments to the United States Constitution. Claims of ineffective assistance of counsel are analyzed under the two-part test in *Strickland v. Washington*, 466 U.S. 668, 80 L.Ed. 674, 104 S.Ct. 2054 (1984). To prevail on an ineffective assistance claim, one must show both deficient performance and resulting prejudice. A deficient performance is a performance that falls below an objective Standard of reasonableness. See: *Strickland*, 466 U.S. at 687; *Douglas v. State*, 663 N.E.2d 1153 (Ind.1996). Prejudice exist when a Appellant shows "there is reasonable possibility that, but for Counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome."*Strickland*, 466 U.S. at 694.

First, during Closing Arguments in this case trial counsel improperly told the jury alcohol/intoxication "is not a factor or a circumstance that you can consider ahm, in your, in this case." (Tr. Vol. 8, p. 1763, L. 6). Trial counsel misinformed the jury in instructing them they could not consider alcohol/intoxication at all as a factor or a circumstance in this case. It is the usage of the term "in this case" that caused prejudice to this Appellant, because alcohol/intoxication was limited by *I.C.* 35-41-2-5 only in determining the Appellant's mental state to form intent as follows:

> **35-41-2-5. Intoxication not a defense Applicability of IC 35-41-3-5.**
>
> Intoxication is not a defense in a prosecution for an offense and may not be taken into consideration in determining the existence of a mental state that is an element of the offense unless the defendant meets the requirements of IC 35-41-3-5.

HISTORY:
P.L.210-1997, 3.

Trial counsel should have pointed out to the jury that they could consider alcohol/intoxication to prove recklessness over sudden heat found to exist by the jury, because although voluntary intoxication is not a defense to a general intent-crime, it may be admitted to refute the existence of a particular state of mind for a specific-intent crime. *I.C.* 35-41-2-2 defining recklessness states as follows:

> **Culpability.**
>
> **(c)** A person engages in conduct recklessly if he engages in the conduct in plain, conscious, and unjustifiable disregard of harm that might result and the **disregard involves a substantial deviation from acceptable standards of conduct.**
> **(Emphasis Added)**

It is the factor of alcohol/intoxication in this case that led to a substantial deviation from acceptable standards of conduct and trial counsel failed to stress this to the jury. Appellant maintains that, "Intention cannot exist without foresight, but foresight can exist without intention. For a man may foresee the possible or even probable consequences of his conduct and yet not desire them to occur; none the less if he persists on his course he knowingly runs the risk of bringing about the unwished result. To describe this state of mind the word 'reckless' is the most appropriate." J.W. Cecil Turner, *Kenny's Outliners of Criminal Law* 28 (16th Edition, 1952). Alcohol/intoxication does have an effect on a person's forethought prior to acting in a certain manner. In *Duckworth v. Franzen,* 780 F.2d 645, 652 (7th Cir. 1985), the court used as an example of recklessness, the situation where a person deliberately chokes a person without intention of killing that person, yet the victim dies. This is exactly what happened in this case,

yet counsel failed to properly present to the jury why the facts in this case supported recklessness over sudden heat.

During the December 5, 2019 evidentiary hearing trial counsel testified concerning intoxication in this case that he first remembered it being an issue at trial but then later stated he could not remember it being an issue at trial. Trial counsel's testimony during post-conviction relief was contradictory and did not explain a reasonable strategy for his failure to bring intoxication to the jury's attention. Trial counsel's representation fell below the professional norms as guaranteed by the Sixth Amendment to the United States Constitution.

In denying this claim, the Post-Conviction Judge merely stated, "The Court finds the statement of trial counsel during closing argument to be consistent with the jury instruction given by the Court as Voluntary Manslaughter is a general intent crime." (Order Denying Verified Petition for Post-Conviction Relief, p. 5). The Post-Conviction Judge's statement totally ignores Appellant's argument concerning recklessness rather than sudden heat in the jury coming to a verdict.

Second, trial counsel was ineffective in representing Appellant during sentencing by failing to object to an improper witness making a prejudicial impact statement from a previous victim not involved in the current case later used by the judge as an aggravating factor. During sentencing the State placed Pamela Murray Campbell on the stand to testify her experience of being robbed at gunpoint by Appellant in a previous robbery not connect to the Voluntary Manslaughter, Removal of a Body and Obstruction of Justice he was being sentenced for [Sent. Vol. 1, Tr. 22-23]. Mrs. Campbell had been Appellant's Bible School Teacher and testified how violent he was and placed a gun to her head during her robbery. The State placed this witness under the premise that she was making a victim impact statement for the victim in the current

case, however, Mrs. Campbell not affiliated with this case volunteered to testify stating, "I just wanted to attest to his violent nature, this is not his first violent act" [Sent. Vol. 1, Tr. 41-42]. When the judge actually sentenced Appellant the judge stated as an aggravating factor, "Putting a gun to the head of Bible School Teacher whose trying to do extra work..." [Sent. Vol 1, Tr. 296, L. 16-17].

Indiana Code 35-40-13-2, set forth the appointment of representative by court as follows:

> If a victim is incompetent, deceased, or otherwise incapable of designating another person to act in the victims place, the court may appoint, upon request of the prosecuting attorney, a lawful representative who is not a witness.
>
> **HISTORY:**
> P.L.139-1999, 1.

Ms. Campbell is not a lawful representative not being involved in the current case and testifying as a previous victim of a violent crime merely to prejudice Appellant during sentencing to be sentenced for a crime not connected to the one for sentencing. The Indiana Court of Appeals has made clear that victim impact statements are irrelevant if offered concerning a person who was not a victim of the crime at issue. *Lewis v. State*, 759 N.E.2d 1077, 2001 Ind. App. LEXIS 1987 (Ind. Ct. App. 2001). The *Lewis* Court further stated concerning an illegal witness as follows:

> The fact that Maxwell was murdered is an inappropriate aggravating circumstance for several reasons. First, Maxwell was not a "victim" of the crimes for which Lewis was being sentenced, and therefore, Ms. Maxwell's testimony was irrelevant to the appropriate sentence for his crimes against Williams. Indiana Code section 35-38-1-8.5 provides that as part of the presentence investigation, the probation officer "shall prepare a victim impact statement for inclusion in the convicted person's presentence report. The victim impact statement consists of information about each victim and the consequences suffered by a victim or a victim's family as a result of *the crime*." Ind. Code 35-38-1-8.5(c) (emphasis added). Indiana Code section 35-38-1-7.1 requires the

> court to consider "any oral or written statement made by a victim of *the crime*" in determining what sentence to impose. Ind. Code 35-38-1-7.1(a)(7) (emphasis added). The crimes under consideration herein are the battery and confinement of Williams. Therefore, the "victim" of "the crime" is Williams. Ms. Maxwell's testimony was irrelevant to these proceedings, and Lewis' objection to her testimony should have been sustained.
>
> Moreover, even if we could consider Ms. Maxwell's testimony as properly given, she did not testify to any particular impact beyond that which one would expect a family member of a murder victim to experience. Generally, the impact that a victim or a family experiences as a result of a particular offense is accounted for in the presumptive sentence. *Simmons v. State*, 746 N.E.2d 81, 91 (Ind. Ct. App. 2001), *trans. denied.* Therefore, under normal circumstances, the impact upon a victim or a victim's family is not an aggravating circumstance for purposes of sentencing. *Bacher v. State*, 686 N.E.2d 791, 801 (Ind. 1997). "In order to validly use victim impact evidence to enhance a presumptive sentence, the trial court must explain why the impact in the case at hand exceeds that which is normally associated with the crime." *Davenport v. State*, 689 N.E.2d 1226, 1233 (Ind. 1997), *clarified on reh'g on other grounds.*
> *Lewis id. at* 759 N.E.2d 1085, 1086

Mrs. Campbell's testimony was not related to the crime involved for sentencing, her testimony was not beyond what every robbery victim is exposed to, it did not concern the victim of this case and was designed merely to be an aggravating factor which should not have been considered, but was by the judge. During the December 5, 2019 evidentiary hearing trial counsel testified that he did not believe allowing Ms. Campbell to testify was prejudicial in any way during sentencing. Trial counsel's testimony did not counter the fact that her testimony violated *I.C.* 35-40-13-2 and case precedent. During cross-examination of Mr. Chastain, the State entered the Abstract of Judgment stating that her testimony was not listed as an aggravating circumstance in this case. The State's argument doesn't counter her testimony violated statute and precedent nor that it was improperly used as an impact statement while considering aggravators and was not an aggravator itself. If trial counsel had objected to her testimony as violating statute and

precedent she would not have been permitted to testify in this case. Trial counsel's representation fell below the professional norms as guaranteed by the Sixth Amendment to the United States Constitution.

In denying this claim, the Post-Conviction Judge merely stated, "The Court finds that trial counsel was not ineffective in not objecting to the statement made by Petty's bible school teacher as it was not a victim impact statement but rather pertained to the nature, character and dangerousness of Petty and is appropriate for sentencing." (Order Denying Verified Petition for Post-Conviction Relief, p. 5). The Post-Conviction Judge's reasoning is contrary to the Indiana Court of Appeals precedence established in *Lewis v. State*, 759 N.E.2d 1077, 1085-86, 2001 Ind. App. LEXIS 1987 (Ind. Ct. App. 2001), applying here because Pamela Murray Campbell was not a "victim" of the crimes for which Petty was being sentenced, and therefore, Ms. Campbell's testimony was irrelevant to the appropriate sentence for Appellant's crimes.

Third, trial counsel was ineffective by not objecting to the judge using elements of the crimes for sentencing as aggravating factors to enhance sentences and order them to be served consecutively.

During sentencing the judge in justifying the sentence he was giving for Count 2, Removal of a Body, stated:

> On Count II it will be a total of 3 years none of that is suspended, with 3 years to be executed and Count II of course was removal of a body of the scene a class D felony and that will be run consecutive and of course it was a separate act and not only was it a separate act but and it is a violation of the law because of the harm that can result by removing a body from the scene and that is the destruction of evidence and in this case clearly it did cause destruction of evidence.. [Sent. Vol. 2, Tr. 298, L. 3-14]

Appellant maintains that the judge in stating the above did not make proper aggravating factors for removal of a body, but did in fact use the elements for Obstruction of Justice as Indiana Code states:

> **35-44.1-2-2. Obstruction of justice.**
>
> **(3)** alters, damages, or removes any record, document, or thing, with intent to prevent it from being produced or used as evidence in any official proceeding or investigation;

Appellant pointed out that the Indiana Supreme Court has made clear to enhance his sentence violated the principle that a fact "which comprises a material element of a crime may not also constitute an aggravating circumstance to support an enhanced sentence." *Townsend v. State*, 498 N.E.2d 1198, 1201 (Ind. 1986); *Smith v. State*, 780 N.E.2d 1214, 1219 (Ind. Ct. App. 2003) (citing *Stone v. State*, 727 N.E.2d 33, 37 (Ind. Ct. App. 2000)), *trans. denied*, 792 N.E.2d 41 (Ind. 2003).

Further, if one or more aggravating circumstances cited by the trial court are invalid, the court must decide whether the remaining circumstance or circumstances are sufficient to support the sentence imposed. *Hollen v. State*, 761 N.E.2d 398, 402 (Ind. 2002). In this case the judge allowed an improper victim impact witness citing her testimony as aggravating and the judge then cited elements of Obstruction of Justice to sentence Appellant for Removal of a Body rending his sentence invalid and requiring correction. During the December 5, 2019 evidentiary hearing trial counsel testified he could not remember what the judge said during sentencing but would defer to the record as being accurate. The record in this case establishes that elements of a crime were used as an aggravator that should not have been used. Trial counsel's representation fell below the professional norms as guaranteed by the Sixth Amendment to the United States Constitution.

In denying this claim, the Post-Conviction Judge merely stated, "The Court finds that trial counsel was not ineffective during sentencing as the trial judge considered aggravating factors that were proper to be considered during Petty's sentencing. Also, the Court finds that the trial judge did not use elements of an offense as aggravating factors for sentencing. (Order Denying Verified Petition for Post-Conviction Relief, p. 5). Appellant maintains that the Post-Conviction Judge erred in ruling the trial judge in stating the above did not make proper aggravating factors for removal of a body, but did in fact use the elements for Obstruction of Justice.

Fourth, trial counsel was ineffective when he failed to object when the judge expressed displeasure with the jury's verdict considering sudden heat and then totally ignoring sudden heat as a mitigating factor during sentencing.

During sentencing the judge stated as follows:

> I have to agree with everyone that this is a tragedy we all have assumptions about this case and what happened because of the things that you have been convicted of doing and in fact when you talk with the police each time your story was somewhat different every time, sometimes much different and so I don't know if you in fact have fabricated all of the circumstances that might make it look as if this was all done in sudden heat. I don't know, I just am not sure about any of those things. The jury was left with a difficult decision and the way they resolved the decision is what determines what I'll sentence you on today and so my role in this of course is limited some what by what the statute say.
> [Sent. Vol. 2, Tr. 295, L. 6-21]

Appellant maintains his case is similar to *Hammons v. State*, 493 N.E.2d 1250 (Ind. 1986). Hammons was tried for murder, but found guilty by jury for the lesser included offense of voluntary manslaughter. During sentencing, the trial court repeatedly declared the error of the jury verdict, and that Hammons had in fact committed murder. The trial court imposed the

maximum penalty for manslaughter. The Indiana supreme Court reversed, holding the trial court's sentencing was not merely an act of skepticism with the jury verdict, but was more like an act of compensation to make up for the jury verdict, which was tantamount to sentencing the defendant for the crime for which he was acquitted. *Id.* at 1253. The judge in Appellant's case simply began sentencing with the declaration of 50 years for Count 1, Voluntary Manslaughter and Count 4, Habitual Offender; the maximum for each. In light of the judge's comments above it is painfully clear he was sentencing this Appellant as an "act of compensation to make up for the jury verdict, which was tantamount to sentencing the defendant for the crime for which he was acquitted." *Id.* During the judge's discussion of mitigating factors he never mentioned once sudden heat as a mitigating factor for sentencing.

Appellant points out that Indiana jurisprudence teaches that voluntary manslaughter is an inherently lesser included offense of murder. *See Watts v. State*, 885 N.E.2d 1228, 1232 (Ind. 2008). This is not a typical example of a lesser included offense in that what distinguishes voluntary manslaughter from murder is the existence of sudden heat, which is not an element of murder, but rather "**a mitigating factor in conduct that would otherwise be murder**." Emphasis Added, *Wilson v. State*, 697 N.E.2d 466, 474 (Ind. 1998) (quoting *Estes v. State*, 451 N.E.2d 313, 314 (Ind. 1983)). "Sudden heat occurs when a defendant is provoked by anger, rage, resentment, or terror, to a degree sufficient to obscure the reason of an ordinary person, prevent deliberation and premeditation, and render the defendant incapable of cool reflection." *Conner v. State*, 829 N.E.2d 21, 24 (Ind. 2005), like in this Appellant's case. Thus, an instruction on voluntary manslaughter as a lesser included offense to a murder charge is warranted only if the evidence reflects a serious evidentiary dispute regarding the presence of sudden heat. *Watts*, 885 N.E.2d at 1232. In Appellant case the evidence reflected a serious evidentiary dispute regarding

the presence of sudden heat found by the jury in finding him guilty of the lesser included offense of Voluntary Manslaughter. The judge questioned the validity of this verdict and sentenced Appellant without the benefit of sudden heat as a significant mitigating factor. During the December 5, 2019 evidentiary hearing trial counsel testified he did not believe the judge's comments were improper and he had no idea if the judge was intending to sentence this Appellant for the crime he was acquitted on. An effective trial counsel would be aware of these issues during sentencing however Mr. Chastain fell short.

Trial Counsel was ineffective by failing to object to the above errors that would have changed the outcome of this sentencing. Trial counsel must be found to be ineffective with his performance falling below the professional norm and the conviction and sentence in this case vacated and remanded for a new trial and/or re-sentencing and for all other relief deemed proper by law.

In denying this claim, the Post-Conviction Judge merely stated, "The Court does not find ineffective assistance of counsel for not raising an objection to the trial court's explanation of the jury's verdict in which Petty characterized as an expression of displeasure." (Order Denying Verified Petition for Post-Conviction Relief, p. 6). The judge questioned the validity of this verdict and sentenced Appellant without the benefit of sudden heat as a significant mitigating factor. During the December 5, 2019 evidentiary hearing trial counsel testified he did not believe the judge's comments were improper and he had no idea if the judge was intending to sentence this Appellant for the crime he was acquitted on. An effective trial counsel would be aware of these issues during sentencing however Mr. Chastain fell short. The Post-Conviction Judge erred in not finding trial counsel ineffective for this claim.

The Post-Conviction Judge erred in denying Trial counsel was not ineffective with his performance falling below the standards expected in his profession and under the Sixth Amendment right to effective counsel in the United States Constitution and therefore this case must be reversed and remanded for a new trial.

ARGUMENT II

Appellant was deprived of effective assistance of Appellate Counsel in violation of the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution and Article One, Sections Twelve and Thirteen of the Indiana Constitution when Appellate Counsel failed to raise issues that are significant and obvious from the face of the record that are clearly stronger than the issues raised.

The standard by which claims of ineffective assistance of appellate counsel are reviewed is the same standard applicable to claims of trial counsel ineffectiveness under *Strickland, Id. Wright v. State*, 881 N.E.2d 1018, 1022 (Ind. Ct. App. 2008), *reh'g denied, trans. denied.* In *Bieghler*, our supreme court identified three categories of appellate counsel ineffectiveness claims, including: (1) denial of access to an appeal; (2) waiver of issues; and (3) failure to present issues well. *Bieghler v. State*, 690 N.E.2d 188, 193-95, *reh'g denied, cert. denied*, 525 U.S. 1021, 119 S. Ct. 550, 142 L. Ed. 2d 457 (1998). In evaluating these claims, the courts use the following two part 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. *Bieghler*, 690 N.E.2d at 194. Otherwise stated, to prevail on a claim of ineffective assistance of appellate counsel, a defendant must show from the information available in the trial record or otherwise known to appellate counsel that appellate counsel failed to present a significant and obvious issue and that this failure cannot be explained by any reasonable strategy. *Ben-Yisrayl v.*

State, 738 N.E.2d 253, 260-61 (Ind. 2000), *reh'g denied, cert. denied*, 534 U.S. 1164, 122 S. Ct. 1178, 152 L. Ed. 2d 120 (2002).

First, appellant counsel merely raised sentencing under Appellate Rule 7(B) for the court to determine if the sentence was inappropriate in light of the nature of the offense and the character of the offender. Appellant counsel was ineffective not raising issues significant and clearly on the record and stronger than the issue raised.

Appellate counsel failed to raise an improper witness made a prejudicial impact statement from a previous victim not involved in the current case later used by the judge as an aggravating factor. During sentencing the State placed Pamela Murray Campbell on the stand to testify her experience of being robbed at gunpoint by Appellant in a previous robbery not connect to the voluntary manslaughter, Removal of a Body and Obstruction of Justice he was being sentenced for [Sent. Vol. 1, Tr. 22-23]. Mrs. Campbell had been Appellant's Bible School Teacher and testified how violent he was and placed a gun to her head during her robbery. The State placed this witness under the premise that she was making a victim impact statement for the victim in the current case, however, Mrs. Campbell not affiliated with this case volunteered to testify stating, "I just wanted to attest to his violent nature, this is not his first violent act" [Sent. Vol. 1, Tr. 41-42]. When the judge actually sentenced Appellant the judge stated as an aggravating factor, "Putting a gun to the head of Bible School Teacher whose trying to do extra work..." [Sent. Vol 1, Tr. 296, L. 16-17].

Indiana Code 35-40-13-2, set forth the appointment of representative by court as follows:

> If a victim is incompetent, deceased, or otherwise incapable of designating another person to act in the victims place, the court may appoint, upon request of the prosecuting attorney, a lawful representative who is not a witness.

HISTORY:
P.L.139-1999, 1.

Ms. Campbell is not a lawful representative not being involved in the current case and testifying as a previous victim of a violent crime merely to prejudice Appellant during sentencing to be sentenced for a crime not connected to the one for sentencing. The Indiana Court of Appeals has made clear that victim impact statements are irrelevant if offered concerning a person who was not a victim of the crime at issue. *Lewis v. State*, 759 N.E.2d 1077, 2001 Ind. App. LEXIS 1987 (Ind. Ct. App. 2001). The *Lewis* Court further stated concerning an illegal witnes as follows:

> The fact that Maxwell was murdered is an inappropriate aggravating circumstance for several reasons. First, Maxwell was not a "victim" of the crimes for which Lewis was being sentenced, and therefore, Ms. Maxwell's testimony was irrelevant to the appropriate sentence for his crimes against Williams. Indiana Code section 35-38-1-8.5 provides that as part of the presentence investigation, the probation officer "shall prepare a victim impact statement for inclusion in the convicted person's presentence report. The victim impact statement consists of information about each victim and the consequences suffered by a victim or a victim's family as a result of *the crime*." Ind. Code 35-38-1-8.5(c) (emphasis added). Indiana Code section 35-38-1-7.1 requires the court to consider "any oral or written statement made by a victim of *the crime*" in determining what sentence to impose. Ind. Code 35-38-1-7.1(a)(7) (emphasis added). The crimes under consideration herein are the battery and confinement of Williams. Therefore, the "victim" of "the crime" is Williams. Ms. Maxwell's testimony was irrelevant to these proceedings, and Lewis' objection to her testimony should have been sustained.
>
> Moreover, even if we could consider Ms. Maxwell's testimony as properly given, she did not testify to any particular impact beyond that which one would expect a family member of a murder victim to experience. Generally, the impact that a victim or a family experiences as a result of a particular offense is accounted for in the presumptive sentence. *Simmons v. State*, 746 N.E.2d 81, 91 (Ind. Ct. App. 2001), *trans. denied*. Therefore, under normal circumstances, the impact upon a victim or a victim's family is not an aggravating circumstance for purposes of sentencing. *Bacher v.*

> *State*, 686 N.E.2d 791, 801 (Ind. 1997). "In order to validly use victim impact evidence to enhance a presumptive sentence, the trial court must explain why the impact in the case at hand exceeds that which is normally associated with the crime." *Davenport v. State*, 689 N.E.2d 1226, 1233 (Ind. 1997), *clarified on reh'g on other grounds*.
> *Lewis id. at* 759 N.E.2d 1085, 1086

Mrs. Campbell's testimony was not related to the crime involved for sentencing, her testimony was not beyond what every robbery victim is exposed to, it did not concern the victim of this case and was designed merely to be an aggravating factor which should not have been considered, but was by the judge. During the December 5, 2019 evidentiary hearing appellate counsel testified he was aware that her testimony was improper and prejudicial. He further stated he was aware of *Lewis v. State*, 759 N.E.2d 1077, 2001 Ind. App. LEXIS 1987 (Ind. Ct. App. 2001) that clearly prohibited her testimony, yet could not explain why he failed to raise this issue on direct appeal. Appellate counsel's representation fell below the professional norms as guaranteed by the Sixth Amendment to the United States Constitution.

In denying this claim, the Post-Conviction Judge merely stated, "The Court finds that appellate counsel was not ineffective in raising issues on appeal." (Order Denying Verified Petition for Post-Conviction Relief, p. 6). The Post-Conviction Judge's reasoning is contrary to the Indiana Court of Appeals precedence established in *Lewis v. State*, 759 N.E.2d 1077, 1085-86, 2001 Ind. App. LEXIS 1987 (Ind. Ct. App. 2001), applying here because Pamela Murray Campbell was not a "victim" of the crimes for which Petty was being sentenced, and therefore, Ms. Campbell's testimony was irrelevant to the appropriate sentence for Appellant's crimes.

Secondly, appellate counsel was ineffective by not raising the judge using elements of the crimes for sentencing as aggravating factors to enhance sentences and order them to be served consecutively.

During sentencing the judge in justifying the sentence he was giving for Count 2, Removal of a Body, stated:

> On Count II it will be a total of 3 years none of that is suspended, with 3 years to be executed and Count II of course was removal of a body of the scene a class D felony and that will be run consecutive and of course it was a separate act and not only was it a separate act but and it is a violation of the law because of the harm that can result by removing a body from the scene and that is the destruction of evidence and in this case clearly it did cause destruction of evidence.. [Sent. Vol. 2, Tr. 298, L. 3-14]

Appellant maintains that the judge in stating the above did not make proper aggravating factors for removal of a body, but did in fact use the elements for Obstruction of Justice as Indiana Code states:

> **35-44.1-2-2. Obstruction of justice.**
>
> **(3)** alters, damages, or removes any record, document, or thing, with intent to prevent it from being produced or used as evidence in any official proceeding or investigation;

Appellant points out appellate counsel had available that the Indiana Supreme Court has made clear to enhance his sentence violated the principle that a fact "which comprises a material element of a crime may not also constitute an aggravating circumstance to support an enhanced sentence." *Townsend v. State*, 498 N.E.2d 1198, 1201 (Ind. 1986); *Smith v. State*, 780 N.E.2d 1214, 1219 (Ind. Ct. App. 2003) (citing *Stone v. State*, 727 N.E.2d 33, 37 (Ind. Ct. App. 2000)), *trans. denied*, 792 N.E.2d 41 (Ind. 2003).

Further, if one or more aggravating circumstances cited by the trial court are invalid, the court must decide whether the remaining circumstance or circumstances are sufficient to support the sentence imposed. *Hollen v. State*, 761 N.E.2d 398, 402 (Ind. 2002). In this case the judge allowed an improper victim impact witness citing her testimony as aggravating and the judge then cited elements of Obstruction of Justice to sentence Appellant for Removal of a Body

rending his sentence invalid and requiring correction. During the December 5, 2019 evidentiary hearing appellate counsel testified he agreed using elements of the crime as an aggravator is improper but did not believe an objection was entered by trial counsel. His testimony ended with this could have been a possible issue but could not explain why he did not raise it.

Appellate Counsel was ineffective by failing to raise the above errors that would have changed the outcome of the appeal. Appellate counsel's representation fell below the professional norms as guaranteed by the Sixth Amendment to the United States Constitution.

In denying this claim, the Post-Conviction Judge merely stated, "The Court finds that appelate counsel was not ineffective by not raising an issue regarding the judge using elements of the instant offense as aggravating factors to enhance sentences and order they to be served consecutively. (Order Denying Verified Petition for Post-Conviction Relief, p. 6). Appellant maintains that the Post-Conviction Judge erred in ruling appellant counsel was not ineffective by failing to raise this issue because the trial judge in stating the above did not make proper aggravating factors for removal of a body, but did in fact use the elements for Obstruction of Justice.

Third, appellate counsel was ineffective when he failed to raise on appeal that the judge expressed displeasure with the jury's verdict considering sudden heat and then totally ignoring sudden heat as a mitigating factor during sentencing.

During sentencing the judge stated as follows:

> I have to agree with everyone that this is a tragedy we all have assumptions about this case and what happened because of the things that you have been convicted of doing and in fact when you talk with the police each time your story was somewhat different every time, sometimes much different and so I don't know if you in fact have fabricated all of the circumstances that might make it look as if this was all done in sudden heat. I don't know, I just am not sure about any of those things. The jury was left with a

> difficult decision and the way they resolved the decision is what determines what I'll sentence you on today and so my role in this of course is limited some what by what the statute say.
> [Sent. Vol. 2, Tr. 295, L. 6-21]

Appellant maintains his case is similar to *Hammons v. State*, 493 N.E.2d 1250 (Ind. 1986). Hammons was tried for murder, but found guilty by jury for the lesser included offense of voluntary manslaughter. During sentencing, the trial court repeatedly declared the error of the jury verdict, and that Hammons had in fact committed murder. The trial court imposed the maximum penalty for manslaughter. The Indiana supreme Court reversed, holding the trial court's sentencing was not merely an act of skepticism with the jury verdict, but was more like an act of compensation to make up for the jury verdict, which was tantamount to sentencing the defendant for the crime for which he was acquitted. Id. at 1253. The judge in Appellant's case simply began sentencing with the declaration of 50 years for Count 1, Voluntary Manslaughter and Count 4, Habitual Offender; the maximum for each. In light of the judge's comments above it is painfully clear he was sentencing this Appellant as an "act of compensation to make up for the jury verdict, which was tantamount to sentencing the defendant for the crime for which he was acquitted." *Id.* During the judge's discussion of mitigating factors he never mentioned once sudden heat as a mitigating factor for sentencing.

Appellant points out that Indiana jurisprudence teaches that voluntary manslaughter is an inherently lesser included offense of murder. *See Watts v. State*, 885 N.E.2d 1228, 1232 (Ind. 2008). This is not a typical example of a lesser included offense in that what distinguishes voluntary manslaughter from murder is the existence of sudden heat, which is not an element of murder, but rather "**a mitigating factor in conduct that would otherwise be murder**." Emphasis Added, *Wilson v. State*, 697 N.E.2d 466, 474 (Ind. 1998) (quoting *Estes v. State*, 451 N.E.2d 313, 314 (Ind. 1983)). "Sudden heat occurs when a defendant is provoked by anger, rage,

resentment, or terror, to a degree sufficient to obscure the reason of an ordinary person, prevent deliberation and premeditation, and render the defendant incapable of cool reflection." *Conner v. State*, 829 N.E.2d 21, 24 (Ind. 2005), like in this Appellant's case. Thus, an instruction on voluntary manslaughter as a lesser included offense to a murder charge is warranted only if the evidence reflects a serious evidentiary dispute regarding the presence of sudden heat. *Watts*, 885 N.E.2d at 1232. In Appellant case the evidence reflected a serious evidentiary dispute regarding the presence of sudden heat found by the jury in finding him guilty of the lesser included offense of Voluntary Manslaughter. The judge questioned the validity of this verdict and sentenced Appellant without the benefit of sudden heat as a significant mitigating factor. During the December 5, 2019 evidentiary hearing appellate counsel testified he did not believe the judge's comments were improper even though he testified he was aware that *Hammons v. State*, 493 N.E.2d 1250 (Ind. 1986) prohibited the judge's comments. Appellate counsel's testimony does not explain his failure to raise this issue since he admittedly knew precedent prohibited it.

In denying this claim, the Post-Conviction Judge merely stated, "The Court does not find ineffective assistance of appellant counsel for not raising an objection to the trial court's explanation of the jury's verdict in which Petty characterized as an expression of displeasure." (Order Denying Verified Petition for Post-Conviction Relief, p. 6). This statement is obviously a cut & paste from trial counsel ineffectiveness above because it otherwise makes no sense concerning appellant counsel herein. The trial judge questioned the validity of this verdict and sentenced Appellant without the benefit of sudden heat as a significant mitigating factor. During the December 5, 2019 evidentiary hearing trial counsel testified he did not believe the judge's comments were improper and he had no idea if the judge was intending to sentence this Appellant for the crime he was acquitted on. An effective trial counsel would be aware of these

issues during sentencing however Mr. Chastain fell short. The Post-Conviction Judge erred in not finding appellant counsel ineffective for not raising this issue on direct appeal.

Appellate Counsel was ineffective by failing to raise to the above errors that would have changed the outcome of sentencing on appeal. Appellate counsel must be found to be ineffective with his performance falling below the professional norm and the sentence in this case vacated and remanded for re-sentencing and for all other relief deemed proper by law.

CONCLUSION

WHEREFORE, Appellant has proven his trial and appellant counsels were ineffective and collectively, counsel's errors "have had a pervasive effect on the inferences to be drawn from the evidence, altering the entire evidentiary picture" *Strickland*, 466 U.S. at 698-699, changing the outcome of his trial and sentencing and he prays this Court will find the Indiana Courts erred herein and grant certiorari then remanding for a new trial and for any and all other just relief this Court deems necessary.

Executed on: October 30, 2020,

Respectfully submitted,

Robert Petty
Petitioner / *pro se*

NO.:_____

IN THE

SUPREME COURT OF THE UNITED STATES

Robert Petty - Petitioner;

v.

State of Indiana - Respondent;

ON PETITION FOR WRIT OF CERTIORARI TO UNITED STATES SUPREME COURT

APPENDIX OF PETITIONER

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