

## **“APPENDIX - A”**

IN THE  
COURT OF APPEALS OF INDIANA

Elmer D. Baker,

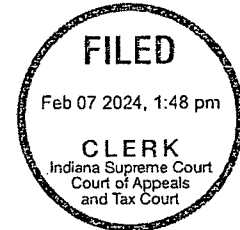
*Petitioner,*

v.

State of Indiana,

*Respondent.*

Court of Appeals Cause No.  
23A-SP-2792



Order

- [1] On January 5, 2024, the Court declined to authorize the filing of Petitioner's Successive Petition for Post-Conviction Relief. Petitioner has now filed a Petition for Rehearing.
- [2] Having reviewed the matter, the Court finds and orders as follows:
- [3] Petitioner's Petition for Rehearing is denied.

Ordered: 2/7/2024

Bailey, Brown, JJ., Najam, Sr.J., concur.

For the Court,

A handwritten signature in cursive script that reads "Elaine B. Brown".

Acting Chief Judge

## **"APPENDIX - B"**

IN THE  
COURT OF APPEALS OF INDIANA

Elmer D. Baker,

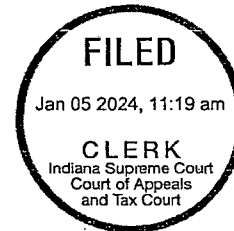
*Petitioner,*

v.

State of Indiana,

*Respondent.*

Court of Appeals Cause No.  
23A-SP-2792



Order

- [1] Petitioner has filed a Successive Petition for Post-Conviction Relief.
- [2] Having reviewed the matter, the Court finds and orders as follows:
1. The Petitioner has failed to establish a reasonable possibility that Petitioner is entitled to post-conviction relief, and accordingly, the Court declines to authorize the filing of the petition.
  2. The Clerk of this Court is directed to send this order to the Petitioner and the DeKalb Circuit and Superior Courts Clerk.
  3. The DeKalb Circuit and Superior Courts Clerk is directed to file this order under Cause Number 17D01-0607-FA-7, and, pursuant to Indiana Trial Rule 77(D), the Clerk shall place the contents of this order in the Record of Judgments and Orders.

Ordered: 1/5/2024

Bailey, Brown, JJ., Najam, Sr.J., concur.

For the Court,

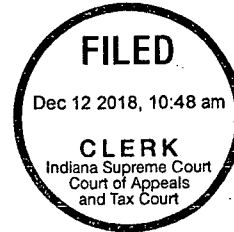
A handwritten signature in black ink, appearing to be "Robert E. Bailey", written over a horizontal line.

Chief Judge

## “APPENDIX - C”

## 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.



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APPELLANT *PRO SE*

Elmer Dean Baker  
Michigan City, Indiana

ATTORNEYS FOR APPELLEE

Curtis T. Hill, Jr.  
Attorney General of Indiana

Angela N. Sanchez  
Deputy Attorney General  
Indianapolis, Indiana

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## IN THE COURT OF APPEALS OF INDIANA

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Elmer Dean Baker,  
*Appellant-Petitioner,*

v.

State of Indiana,  
*Appellee-Respondent.*

December 12, 2018

Court of Appeals Case No.  
18A-PC-354

Appeal from the DeKalb Superior  
Court

The Honorable J. Scott  
VanDerbeck, Special Judge

Trial Court Cause No.  
17D01-1604-PC-3

**Bradford, Judge.**

## Case Summary

- [1] In August of 2008, Elmer Dean Baker was convicted of two counts of Class A felony child molestation and Class C felony child molestation and found to be a habitual offender, for which he was sentenced to 106 years of incarceration. We affirmed Baker's convictions on direct appeal, as did the Indiana Supreme Court on transfer.
- [2] In 2016, Baker filed his amended petition for post-conviction relief ("PCR"), contending, *inter alia*, that he was entitled to relief because he received ineffective assistance of appellate counsel ("IAAC"). The post-conviction court denied his petition in full. Baker contends that the post-conviction court erred by denying him PCR. Because we conclude that Baker has failed to establish that he received IAAC, we affirm.

## Facts and Procedural History

- [3] The underlying facts leading to Baker's appeal of the denial of his PCR petition are as follows:

On July 3, 2006 the State charged then fifty-nine-year-old Elmer Dean Baker with two counts of child molesting as Class A felonies. The victims of the alleged offenses were two of Baker's grandchildren, C.B. and J.A. And the offenses were alleged to have occurred in "June and July of 2003." After a jury trial in June of 2007 the trial court declared a mistrial when the jury could not reach a verdict. Thereafter the State sought leave to amend the charging information to reflect the time period "from October 2000 through August 2003." An additional count of

child molesting as a Class C felony was also added. The alleged victim was A.H., a cousin of C.B. who is unrelated to Baker. This offense was alleged to have occurred “in or about 2002.” Baker was also alleged to be a habitual offender.

Over Baker’s objection the trial court permitted the amendments. And a retrial began on August 13, 2008. Evidence presented by the State is summarized in part as follows: C.B., who was eighteen years of age at the time of trial, testified that she was born in September 1990, her cousin J.A. was born in December 1990, and that during the period between 2000 and 2003 she, J.A., and A.H. were close friends. C.B. also testified that during that period of time her family lived at various locations in DeKalb County including houses and apartments in Spencerville, Auburn, and Garrett, Indiana. According to C.B., Baker first began touching her inappropriately when she was about nine or ten years old. Specifically C.B. recounted an incident in which she and J.A. spent the night at Baker’s apartment in Auburn which was next door to her own home where she lived with her parents. J.A. and C.B. were first sleeping in the living room but became frightened for some reason and went into Baker’s room to lie down on his bed. C.B. testified that at that point “he started to touch us and he pulled me on top of him.... He [ ] pretended like he was having sex with me but we had, like I had my underwear on.... He like touched our vaginas.” She went on to say, “He like placed my hand on his penis and made like the motion of masturbating.”

When C.B. was ten or eleven years old Baker, who was a long distance truck driver, often took C.B. with him on overnight truck trips several weekends during the summer months of 2001 and 2002. According to C.B. most of the “sexual stuff” happened “in the semi” and it happened “a lot.” When asked by the prosecutor “what kind of stuff happened in the semi truck?” C.B. responded “my grandpa had sex, my grandpa had sex with me.” When asked “[w]hat other sex acts took place in the semi truck?”



C.B. recounted an incident in which she and J.A. were together on one of the truck trips and both of them fellated Baker; on another occasion Baker digitally penetrated her and touched her breast.

By the summer of 2003 Baker owned a small house on Story Lake in DeKalb County. At that point C.B. was twelve years of age. On July 3rd of that year C.B. and J.A. were present for a family gathering and spent the night at Baker's house. At some time during the course of the night C.B. and J.A. went into Baker's room and according to C.B. "[u]m, he had sex with me.... Um, he inserted his penis into my vagina." C.B. further testified, "he like touched us and had us touch him ... on the private parts." The "us" referred to J.A. C.B. also testified that both she and J.A. "would take turns" fellating Baker.

C.B. recounted another incident occurring at a trailer that Baker owned at the North Pointe Crossing Mobile Home park just north of where she lived in Garrett. The precise date is unclear but the record suggests sometime between 2001 and 2003. C.B., J.A., and A.H. were present at Baker's trailer. The three girls went into Baker's bedroom where he pretended to be asleep. According to C.B. she and J.A. "took turns" fellating Baker, and all three of the girls "touch[ed] his penis."

J.A., who was seventeen years of age at the time of trial, testified that C.B. is her step first cousin and that she refers to Baker as "Grandpa Dean." She also testified that during 2000 to 2003 she, C.B., and A.H. were good friends. She offered testimony that tended to corroborate that of C.B. including an incident involving A.H. According to J.A. the three girls were present at Baker's house. Baker was present and pretending to be asleep. The three girls went into his bedroom where A.H. fellated Baker and J.A. played with his scrotum. "And then me and [A.H.] switched." She further recalled that C.B. was on top of Baker and he was "sucking on her [breast]."

A.H., who was also seventeen at the time of trial, was the third of the alleged victims to testify. Although no specific dates were given, A.H. largely corroborated the testimony of C.B. and J.A. concerning the alleged incident occurring at Baker's house at the mobile home park. Among other things she confirmed that C.B. fellated Baker, and "then [J.A.] did it and then after that I tried it." A.H. also recounted an occasion when she and J.A. were together on a trucking trip with Baker in his semi. The truck was equipped with a bed. While J.A. was in the passenger seat, A.H. went to sleep in the bed. A.H. testified that when she awoke Baker was lying next to her, and her clothing had been removed. Baker rubbed his fingers over her "private area," got on top of her, and "humped [her] stomach until he ejaculated."

Baker testified on his own behalf. He acknowledged occasionally taking all of his grandchildren on semi trucking trips at one time or another and acknowledged owning a house on Story Lake. However, Baker denied engaging in any sexual activity with C.B., J.A., or A.H. In response to his attorney's question "[a]nd you're saying to me that they are lying," Baker responded, "[t]hey absolutely are." Essentially he testified that he believed C.B. had organized the girls to offer false testimony as part of a conspiracy to get even with him after he caught C.B. in a car with a boy at three in the morning as a result of which "she got grounded." According to Baker, about two weeks later C.B. started a "rumor" about him engaging in inappropriate sexual activity.

Following a five-day jury trial Baker was convicted as charged, and he pleaded guilty to the habitual offender allegation. The trial court sentenced him to a consecutive term of imprisonment on each of the three child molest counts for a total of seventy-six years. One of the counts was enhanced by thirty years for the habitual offender adjudication. The total executed term was 106 years.

Baker appealed framing his contentions as follows: (1) the convictions are not sustained by evidence of jury unanimity, (2) the trial court's ruling allowing amendment of the information was in violation of proscriptions under the state and federal constitutions against ex post facto laws; if the amendment can be lawfully applied in this case, it was not applied properly, (3) the trial court committed fundamental error in giving its preliminary instruction 6 and final instruction 5, and (4) defendant's convictions should be set aside due to ineffective assistance of counsel. The Court of Appeals rejected Baker's arguments and affirmed the judgment of the trial court.

*Baker v. State*, 948 N.E.2d 1169, 1171–73 (Ind. 2011) (internal citations omitted).

- [4] The Indiana Supreme Court granted transfer to explore Baker's jury unanimity claim, ultimately holding that any instructional error regarding jury unanimity was not fundamental and summarily affirming the balance of the decision by the Court of Appeals. *Id.* at 1173. On April 19, 2016, Baker filed an amended PCR petition, alleging that he received IAAC. On December 12, 2017, the post-conviction court held a hearing on Baker's PCR petition, at which Baker's appellate counsel Latrielle Wheat testified, and it was ultimately denied on January 16, 2018.

## Discussion and Decision

- [5] The standard of review for appeals from the denial of PCR is well-settled. Petitioners who have exhausted the direct-appeal process may challenge the correctness of their convictions and sentences by filing a post-conviction

petition. *Stevens v. State*, 770 N.E.2d 739, 745 (Ind. 2002). Petitioner bears the burden of establishing grounds for PCR by a preponderance of the evidence. *Id.* By appealing from a negative judgment, Petitioner faces a rigorous standard of review. *Wesley v. State*, 788 N.E.2d 1247, 1250 (Ind. 2003). Denial of PCR will be affirmed unless, “the evidence as a whole leads unerringly and unmistakably to a decision opposite that reached by the post-conviction court.” *Id.* We do not defer to the post-conviction court’s legal conclusion but do accept its factual findings unless they are clearly erroneous. *Stevens*, 770 N.E.2d at 746. The post-conviction process does not provide petitioner with a “super-appeal” but, rather, a “narrow remedy for subsequent collateral challenges to convictions, challenges which must be based on grounds enumerated in the post-conviction rules.” *Rouster v. State*, 705 N.E.2d 999, 1003 (Ind. 1999). Issues that were known and available but not raised on direct appeal are waived, and issues raised but decided adversely are *res judicata*. *Id.*

## I. Sufficiency of Evidence

- [6] Baker contends that there was insufficient evidence to convict him of the two counts of Class A felony child molestation because there was no evidence of penetration. Although Baker has tried to frame this as a new issue, it is nothing more than a freestanding claim that is waived. *See Rouster*, 705 N.E.2d at 1003 (noting that an issue known and available but not raised on direct appeal is waived by petitioner).

## II. IAAC

- [7] Baker contends that he received ineffective assistance from Wheat when she represented him on direct appeal. The standard for determining whether appellate counsel's performance was ineffective is the same as that for trial counsel. *McKnight v. State*, 1 N.E.3d 193, 204 (Ind. Ct. App. 2013). We review a claim for IAAC based on the standard articulated in *Strickland v. Washington*, 466 U.S. 668 (1984):

Under *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), a claim of ineffective assistance of 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 so much that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different" *Id.* at 687, 694, 104 S.Ct. 2052; *Lowery v. State*, 640 N.E.2d 1031, 1041 (Ind. 1994). [...] Failure to satisfy either prong will cause the claim to fail. *Vermillion v. State*, 719 N.E.2d 1201, 1208 (Ind. 1999).

*French v. State*, 778 N.E.2d 816, 824 (Ind. 2002). Counsel's performance is presumed effective, and instances of isolated poor strategy, inexperience, or bad tactics are not necessarily ineffective assistance; thus a defendant must offer strong and convincing evidence to overcome the presumption of effective assistance. *McKnight*, 1 N.E.3d at 200.

- [8] "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.” *Reed v. State*, 856 N.E.2d 1189, 1195 (Ind. 2006).

“Judicial scrutiny is highly deferential regarding a claim that counsel was ineffective in failing to raise an issue on appeal thus resulting in waiver for collateral review, and the [petitioner] must overcome the strongest presumption of adequate assistance.” *McKnight*, 1 N.E.3d at 204. Rarely is ineffective assistance found where petitioner contends that appellate counsel failed to raise an issue on direct appeal, because the decision of which issue to raise is one of the most important strategic decisions made by appellate counsel. *Id.*

### **A. IAC Claim Brought on Direct Appeal**

[9] Baker contends that Wheat was ineffective for bringing an IAC claim on direct appeal rather than leaving the claim for a post-conviction proceeding. Baker contends that Wheat raised the claim ineffectively by failing to obtain testimony from Baker’s trial counsel regarding trial counsel’s decision not to obtain a medical expert to refute the State’s medical expert’s testimony at trial. Although post-conviction proceedings are usually the preferred avenue for bringing IAC claims, they are not prohibited from being brought on direct appeal. *Rogers v. State*, 897 N.E.2d 955, 965 (Ind. Ct. App. 2008), *trans. denied*. Post-conviction proceedings are preferred because presenting such a claim can require developing new facts that are not present in the trial record. *Id.*

[10] Baker has offered no proof of the testimony that needed to be elicited from his trial counsel to develop facts that were not already in the trial record. Arguing that his appellate counsel was ineffective by not eliciting testimony from trial

counsel, without more, is merely speculation. Further, it is Baker's burden to make a record, and because his trial counsel was never called to testify during his PCR hearing, the post-conviction court was not required to believe that trial counsel would have corroborated Baker's allegation. *See Culvahouse v. State*, 819 N.E.2d 857, 863 (Ind. Ct. App. 2004), *trans. denied* (finding that "[w]hen counsel is not called as a witness to testify in support of a petitioner's arguments, the post-conviction court may infer that counsel would not have corroborated the petitioner's allegations."). We cannot conclude that Wheat was ineffective by bringing an IAC claim on direct appeal.

### **B. Alleged Juror Prejudice**

[11] Baker contends that Wheat provided ineffective assistance by failing to claim that trial counsel was ineffective for not moving for a mistrial based on juror exposure to prejudicial newspaper articles. Baker relies on two newspaper articles which discuss his initial arrest and his first trial that resulted in a mistrial. Because at his PCR hearing Baker never admitted these newspaper articles nor any evidence that jurors were exposed to these articles, there was never any evidence of juror prejudice properly before the post-conviction court. Therefore, his claim is unsupported by evidence and therefore groundless.

### **C. Alleged Juror Taint**

[12] Baker also contends that Wheat provided ineffective assistance by failing to claim that trial counsel was ineffective for not moving for a mistrial based on a juror's conversation with the prosecutor's husband. "Defendants seeking

mistrial for suspected jury taint are entitled to the presumption of prejudice only after making two showings, by a preponderance of the evidence: (1) extra-judicial contact or communications between jurors and unauthorized persons occurred, and (2) the contact or communications pertained to the matter before the jury.” *Ramirez v. State*, 7 N.E.3d 933, 939 (Ind. 2014). Even assuming that the prosecutor’s husband was an unauthorized person, the communication was not related to Baker’s case. The conversation solely consisted of whether the prosecutor’s husband was going to play on the same soccer team as the juror that year. (Appellant’s App. Vol. VI p. 14). Baker failed to establish that Wheat’s performance was ineffective in this regard.

### **D. Statute of Limitations**

[13] Baker contends that Wheat was ineffective on direct appeal for failing to raise that the State’s amended charge of Count III, Class C felony child molestation, violated the applicable statute of limitations. Disregarding trial counsel’s failure to object, Baker’s claim has no merit. “A charging information must only state the date of the offense with sufficient particularity to show that the offense was committed within the period of limitations applicable to that offense.” *Blount v. State*, 22 N.E.3d 559, 569 (Ind. 2014) (internal citations admitted). We have noted that when it comes to child molesting cases, time is not of the essence because it is difficult for children to remember specific dates, especially when these incidents of molestation are not immediately reported. *Baber v. State*, 870 N.E.2d 486, 492 (Ind. Ct. App. 2007), *trans. denied*. The statute of limitations for amended Count III in this case was five years. *See* Ind. Code § 35-41-4-2(b)



(2002). On June 18, 2007, the State filed amended Count III, Class C felony child molestation, alleging that the molestation occurred “in or about 2002[.]” The State argues, and Baker does not contest, that trial testimony established that at least one instance of molestation involving all three victims occurred after the conclusion of one Buzz Wilkens’s trial, which concluded on October 30, 2002. Thus, that instance involving all three girls occurred after June 18, 2002, which is within the five-year statute of limitations. Baker has failed to establish that Wheat provided IAAC in this regard.

### **E. Waiver of Jury**

[14] Baker contends that Wheat was ineffective for failing to claim that Baker did not knowingly, voluntarily, and intelligently waive his right to a jury trial. The waiver Baker is referring to occurred, through trial counsel, during the determination of his habitual offender status, at which the State presented evidence of his previous convictions and after which the trial court determined Baker to be a habitual offender. In support of his contention, Baker cites *Horton v. State*, 51 N.E.3d 1154, 1160 (Ind. 2016), in which the Indiana Supreme Court held that a defendant’s right to a jury trial in a felony prosecution may only be waived by the defendant personally. Assuming, *arguendo*, that the holding in *Horton* extends to the determination of habitual offender status, said precedent did not exist when Baker’s direct appeal was filed in 2009. When choosing the issues to raise on Baker’s direct appeal, Wheat could not have been ineffective for failing to foresee legal developments seven years down the road.

## F. Sentencing

[15] Baker contends that Wheat was ineffective for failing to make the following sentencing challenges on direct appeal: (1) his sentence violated the United States Supreme Court's holdings in *Blakely*<sup>1</sup> and *Apprendi*,<sup>2</sup> (2) the trial court abused its discretion by failing to explain why it imposed consecutive sentences, and (3) his sentence was manifestly unreasonable in light of the nature of his offense and his character.

[16] Although Baker contends that his sentence violated the United States Supreme Court's precedent in *Blakely* and *Apprendi* because the trial court considered aggravating circumstances not found by the jury, he fails to recognize that by the time he was sentenced, steps had been taken to conform Indiana's sentencing statutes with said precedent. In 2005, the Indiana General Assembly enacted new sentencing statutes to resolve the Sixth Amendment issues presented by *Blakely*. *Anglemyer v. State*, 868 N.E.2d 482, 489 (Ind. Ct. App. 2007), *clarified on reh'g* 875 N.E.2d 218. In doing so, the General Assembly eliminated fixed terms and enacted sentencing statutes that did not contain a maximum sentence a judge may impose without any additional findings. *Id.* (internal quotations admitted). "As a result, even with judicial findings of aggravating circumstances, it is now impossible to increase the penalty for a

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<sup>1</sup> *Blakely v. Washington*, 542 U.S. 296 (2004).

<sup>2</sup> *Apprendi v. New Jersey*, 530 U.S. 466 (2000).

crime beyond the prescribed statutory maximum.” *Id.* (internal quotations admitted). Therefore, even though the trial court found aggravating circumstances in Baker’s case, it did not impose—nor could it have imposed—a sentence that was beyond the prescribed statutory maximum in violation of *Blakely* and *Apprendi*.

[17] Baker also contends that Wheat was ineffective for failing to claim that the trial court abused its discretion by failing to explain why it was imposing consecutive sentences. However, the trial court found Baker to have been convicted of multiple offenses against multiple victims, which is sufficient reasoning for ordering consecutive sentences. *See O’Connell v. State*, 742 N.E.2d 943, 952 (Ind. 2001) (emphasizing that multiple crimes or victims constitute a valid aggravating circumstance for imposing consecutive sentences).

[18] Finally, Baker contends that Wheat was ineffective for failing to argue that his sentence was manifestly unreasonable in light of the nature of his offenses and his character. We note that at the time of Baker’s sentencing, the current Indiana Appellate Rule 7(B) was effective, which uses “inappropriate” as the standard rather than “manifestly unreasonable.” We may revise a sentence if, “after due consideration of the trial court’s decision, the Court finds that the sentence is inappropriate in light of the nature of the offense and the character of the offender.” Ind. Appellate Rule 7(B). “Sentencing is principally a discretionary function in which the trial court’s judgment should receive considerable deference.” *Cardwell v. State*, 895 N.E.2d 1219, 1222 (Ind. 2008) (internal citations omitted). The defendant bears the burden of proving that his

sentence is inappropriate in the light of both the nature of his offense and his character. *Gil v. State*, 988 N.E.2d 1231, 1237 (Ind. Ct. App. 2013).

- [19] The nature of Baker's offenses does not support a reduction in his sentence. Baker was convicted of two counts of Class A felony child molestation and one count of Class C felony child molestation. Baker committed these offenses against two of his granddaughters and C.B.'s step-cousin, requiring them to have intercourse with and fellate him while in his tractor trailer and home.
- [20] Baker's character also does not support a reduction in his sentence. Baker has been convicted of Class B felony criminal confinement, Class D felony theft, Class A misdemeanor resisting law enforcement, Class A misdemeanor battery, Class B misdemeanor disorderly conduct, and two counts of Class A misdemeanor criminal confinement. Despite Baker's many contacts with the criminal justice system, starting in 1969, he has been unwilling to conform his behavior to societal norms. Baker's sentence was not inappropriate, therefore he was not prejudiced by Wheat's failure to raise a 7(B) challenge on direct appeal. Baker has failed to establish that Wheat provided ineffective assistance in this regard.

### **G. Prosecutorial Misconduct**

- [21] Baker contends that Wheat provided ineffective assistance by failing to raise a claim of prosecutorial misconduct. Baker specifically contends that the prosecutor committed improper vouching and elicited sympathy for the State's witnesses. Of the prosecutor's numerous statements which Baker alleges as

misconduct, the one alleged as the most blatant example was in the State's closing argument when the prosecutor, regarding the three victims' testimony, stated "All three (3) of them agreed before you, when they were under oath to tell the truth as they remember it today." Appellant's App. Vol. VI p. 95. We have reviewed this statement and the others Baker has provided and find none of them to be improper vouching or elicitation of sympathy for victims but, rather, fair commenting on the evidence presented at trial. *See Thomas v. State*, 965 N.E.2d 70, 77 (Ind. Ct. App. 2012), *trans. denied* (noting that while a prosecutor may not state his or her personal opinion regarding a witness's credibility at trial, he or she may comment as to witness credibility if the assertions are based on reasons arising from the evidence presented at trial). Baker has failed to establish that Wheat provided IAAC in this regard.

## H. Stipulation of Evidence

[22] Baker contends that Wheat was ineffective by failing to claim that the trial court abused its discretion by allowing the evidentiary stipulation between Baker and the State, which involved testimony that would have allegedly otherwise been inadmissible. "An abuse of discretion occurs when the trial court's decision is clearly against the logic and effect of the facts and circumstances before the court or when the court misinterprets the law." *Johnson v. State*, 36 N.E.3d 1130, 1133 (Ind. Ct. App. 2015), *trans. denied*. We cannot conclude that the trial court abused its discretion by allowing an evidentiary stipulation that was a clear agreement by both parties.

## **I. Plea Offer**

[23] Baker contends that Wheat was ineffective for failing to claim that Baker's trial counsel provided ineffective assistance by not communicating to him alleged plea offers from the State. Baker specifically contends that he declined a plea offer during trial because he was inadequately informed by counsel and that counsel never disclosed another plea offer. At Baker's PCR hearing, the post-conviction court asked Baker if he accepted the plea that was offered during trial, to which Baker responded, "On advice of my counsel I didn't, no." Appellant's App. Vol. II p. 191. Moreover, Baker presented another plea offer he alleged to have discovered in his file sent by the public defender's office, claiming it was never disclosed to him by trial counsel. However, the plea agreement was neither signed nor dated by the prosecuting attorney, and Baker presented no testimony from his trial counsel on the matter. "When counsel is not called as a witness to testify in support of a petitioner's arguments, the post-conviction court may infer that counsel would not have corroborated the petitioner's allegations." *Culvahouse*, 819 N.E.2d at 863. The post-conviction court denied Baker relief on these claims, and Baker's arguments on appeal are merely an invitation for us to reweigh the evidence, which we will not do. *Mahone v. State*, 742 N.E.2d 982, 984 (Ind. Ct. App. 2001), *trans. denied*. Baker has failed to establish that Wheat was ineffective in this regard.

## **J. Rehearing or Writ of Certiorari**

[24] Baker contends that Wheat was ineffective for failing to seek a rehearing from the Indiana Supreme Court or a writ of *certiorari* from the United States

Supreme Court on the Indiana Supreme Court's ruling on his jury unanimity claim. Baker does not explain why a request for rehearing or *certiorari* would have been granted, let alone establish that he would have achieved a ruling any more favorable than that handed down by the Indiana Supreme Court on transfer. Moreover, Baker has not established that failing to seek rehearing or *certiorari* falls below the objective standard of reasonableness based on prevailing professional norms, given that a majority of lawyers never even seek transfer. *See Yerden v. State*, 682 N.E.2d 1283, 1286 (Ind. Ct. App. 1997) (noting that "[a] healthy majority of lawyers who lose before the Indiana Court of Appeals, for example, elect not to seek transfer. On the face of it, without any explanation, a lawyer who does not petition for transfer has simply performed according to the statistical norm."). Baker has failed to establish that Wheat's representation constituted IAAC.

## Conclusion

[25] We conclude that Baker's sufficiency of the evidence claim is barred by waiver. We also find no merit in Baker's various IAAC claims. Baker has failed to establish that the post-conviction court erred by denying him PCR.

[26] The judgment of the post-conviction court is affirmed.

Bailey, J., and Brown, J., concur.

## **“APPENDIX - D”**



**Elmer D. Baker v. State of Indiana**  
**SUPREME COURT OF INDIANA**  
**127 N.E.3d 224; 2019 Ind. LEXIS 314**

**[NO NUMBER IN ORIGINAL]**  
**May 9, 2019, Decided**

**Notice:**

**DECISION WITHOUT PUBLISHED OPINION**

**Editorial Information: Prior History**

18A-PC-354.Baker v. State, 119 N.E.3d 230, 2018 Ind. App. Unpub. LEXIS 1480  
(Ind. Ct. App., Dec. 12, 2018)

**Opinion**

**Transfer Denied.**

## **"APPENDIX - E"**

7. The Petitioner appealed his conviction to the Indiana Court of Appeals which affirmed the Trial Court in Baker v. State, 922 N.E.2d 723 (Ind. App. 2010). The Indiana Court of Appeals, on rehearing, affirmed the decision in Baker v. State, 928 N.E.2d 890 (Ind. App. 2010).
8. The Indiana Supreme Court affirmed the judgment of the trial court in Baker v. State, 948 N.E.2d 1169 (Ind. 2011).
9. The facts and procedural history used in the appellate cases are found at:
  1. Baker v. State, 922 N.E.2d 723 (Ind. App. 2010) at 726-727
  2. Baker v. State, 928 N.E.2d 890 (Ind. App. 2010) at 891.
10. The facts supporting Elmer Dean Baker's conviction as found by the Indiana Supreme Court are found at:
  1. Baker v. State, 948 N.E.2d 1169 (Ind. 2011) at 1171-1173.
11. On December 12, 2017 the Court held an evidentiary hearing on the Petitioner's Amended Petition for Post-Conviction Relief. Elmer D. Baker elected to represent himself pro se. Petitioner's appellate trial counsel, Latrielle Wheat, testified. The Court has ordered a transcript of her testimony which has become part of the record.
12. The record for this case consists of: the transcript together with exhibits and arguments for the jury trial. The Court granted the State's request to take judicial notice of its file in case 17D01-0607-FA-00007. This trial judge does not have a copy of the trial transcript and will refer to the record found on a DVD sent with the transcript. All reference to location of testimony will be in the form of DVD 2008-filename-#.
13. This Court now finds Latrielle Wheat to be an expert in appellate law. She has worked 3 years in the Indiana Attorney General's Office in the appellate division. She has filed 30-40 appellate briefs. Her appellate training resulted in a strategy to present during direct appeal to the Court of Appeals, only the strongest issues.
14. Appellate Counsel, Latrielle Wheat, presented in direct appeal the following claims:
  - a. Trial Court Counsel was ineffective by entering into a stipulation.
  - b. Trial Court Counsel was ineffective by failing to hire an expert witness.
  - c. Trial Court Counsel was ineffective by not objecting to jury instructions at the time they were given.
  - d. Trial Court Counsel was ineffective by not objecting to jury instructions, verdict form or the verdicts.
15. This Court finds that trial counsel, David G. Pappas provided competent and effective representation. This is based on:

The extensive pre-trial arguments are located at DVD 2008 -Baker Pre-Trial 1-58. Trial Counsel presented a series of detailed motions, including: a Motion for Additional Security, Motion for Presentation of Exhibits used in the first Baker Trial, arguments to consider allowing a Deposition of State medical expert versus live testimony. Also discussed was the rights of the informant of the alleged molest to the Indiana Department of Child Services, contents of the State's six supplemental discovery

responses. Also was, defense motions for a Test Jury to determine prejudice from pre-trial publicity, Motion for Separation of Witnesses who were adults and parents of the minor child victims and the need to sequester a jury in a child molesting case with multiple victims. Also raised was a Motion for severance of counts, Defense Motion to utilize TR 412 evidence, Defense Notice of Intent to Use other Bad Acts of Evidence, State's Motion to Use Other Bad Acts, Defendant's Motion to Introduce Rape Shield Evidence, State's Motion in Limine, and a Stipulation regarding the admissibility of evidence. These discussions show defense counsel was competent and prepared for trial.

The Trial Judge Kirk Carpenter found that Mr. Pappas "was a competent defense counsel and he has a business practice and is a popular attorney". DVD 2008 Baker Pre-Trial 54.

This Court also finds Defense Counsel had adequate time to prepare for trial, develop a thorough trial strategy and was an effective advocate.

### CONCLUSIONS OF LAW

16. The Petitioner raised eight (8) issues in his Amended Petition for Post Conviction Relief. Petitioner's Verified Memorandum of Law presents his claimed error in 18 arguments. This Court will address his issues as they are developed in the Memorandum of Law.

#### 1. 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. It has long been the rule that the post-conviction procedure is not a "super-appeal," and not all issues are available. *Timberlake, supra*. "If an issue was known and available, but not raised on direct appeal, it is waived. It is also black letter law that, "A petitioner for post-conviction relief cannot escape the effect of claim preclusion merely by using different language to phrase an issue and define an alleged error." *Ben-Yisrayl v. State*, 738 N.E.2d 253, 258 (Ind. 2000). *Also see e.g. Morris v. State*, 466 N.E.2d 13 (Ind., 1984). Moreover, courts cannot address an issue where it is merely raised as a convenient vehicle to present arguments that have been waived. See *Holt v. State*, 656 N.E.2d 495, 497 (Ind. Ct. App. 1995), *trans. denied*.

#### 2. Ineffective Assistance of Appellate Counsel

##### **Petitioner's Argument I**

Claim: Appellate Counsel was ineffective by raising ineffective assistance of Trial Counsel on direct Appeal.

The Appellate Court resolved the issue of presenting alleged Trial Court Counsel error in *Baker v. State*, 922 N.E.2d 723 (Ind. App. 2010), at 729-732.

Considering the additional testimony and affidavits presented by Baker at the Post Conviction hearing, this Court finds no error. If an issue of attorney incompetency was raised on appeal, and decided adversely, it is res judicata to consider the issue again. If an issue is known and available, but not raised on direct appeal, it is waived. *Timberlake v. State*, 753 N.E.2d 591 (Ind. 2001).

An experienced appellate counsel was obtained by Petitioner after she was employed for three years in the Appellate division of the Indiana Attorney General's Office. After a complete review

of the issues and facts she chose to present to the Court of Appeals, this Court finds no error. Appellate Counsel was not ineffective. *Garrett v. State*, 922 N.E.2 710 (Ind. 2013).

## Argument II

Claim: Appellate Counsel Error regarding the issue of improper juror voir dire.

Petitioner, claims that his appellate counsel was ineffective by not raising this issue, to his detriment.

The two prong standard for evaluating the effective assistance of Trial Counsel, was first announced in *Strickland v. Washington*, 466 U.S. 668, 80 L.E.2d 674, 104 S. Ct. 2052 (1984). This standard has been applied to claims of ineffective assistance of appellate counsel. *Lowery v. State*, 640 N.E.2d 1031, 1048 (Ind. 1994), *Henley v. State*, 881 N.E.2d 639. There are three categories of counsel ineffectiveness of claims. Lissa Griffin, *The Right to Effective Assistance Appellate Counsel*, 97 W. Va. L. Rev. 1, 21-22 (1994). The first and the most serious type category would be denying Defendant access to appeal entirely. The second category of ineffective assistance of appellate claim, involves Appellate Counsel who did not raise issue which the convict later argues should have been raised. "Ineffectiveness is very rarely found in these cases." Lissa Griffin, *The Right to Effective Assistance Appellate Counsel*, 97 W. Va. L. Rev. 1, 21-22 (1994) – this in essence involves a waiver of issues. Lissa Griffin, *The Right to Effective Assistance Appellate Counsel*, 97 W. Va. L. Rev. 1, 25 (1994). The third category of appellate ineffectiveness claims allege that counsel's presentation of particular issues were inadequately presented in some way. Lissa Griffin, *The Right to Effective Assistance Appellate Counsel*, 97 W. Va. L. Rev. 1, 23 (1994). Cited in *Bigler v. State*, 690 N.E.2d 188, 1997 Ind. LEXIS 231 and *Henley v. State*, 881 N.E.2d 639, 2008 Ind. LEXIS 170.

Petitioner alleges the Trial Counsel errored during the jury trial held August 18-22, 2008. Before trial one day, the DeKalb Prosecuting Attorney volunteered to the Trial Judge and opposing Counsel that her husband inadvertently spoke to a juror after the previous day of trial. The Trial Judge conducted a hearing on the record.

Transcript 903-906, DVD 2008 Baker 2d 214-219

Present for the hearing before the Judge Carpenter was Prosecutor Winebrenner, the Defendant and Petitioner's Trial Counsel, Daniel G. Pappas (Pappas). Pappas is now Magistrate for Allen County Superior Court. Pappas was familiar with the reputation of the Prosecuting Attorney and family. Counsel made a trial strategy and waived the right to pursue an in camera interview with the Juror.

Trial Counsel Pappas' strategy ultimately lead to a conviction. This does not mean that he was ineffective.

Trial Counsel was presenting the Petitioner in the best possible light when he waived the in camera interview with the juror, and not make the timely objection. Thus he waived the objection. Trial Counsel error is not ineffective. *Lewis v. State*, 511 N.E.2 1054 (Ind. 1987). *VanMartin v. State*, 535 N.E.2 493 (Ind. 1989).

In preparation for the post conviction hearing, Petitioner had requested to send interrogatories to the juror in question. Petitioner requested that this juror be subpoenaed to testify at the Post

Conviction hearing. The PCR Judge denied both requests finding this issue was waived by trial court counsel. Also, due to the long delays, laches has occurred.

This issue was not presented by Appellate Court Counsel for direct appeal. The issue was waived by Appellate Court Counsel.

Petitioner claims incompetence even though he sites and briefs the point that appellate counsel should select for argument the strongest issues, and omit the rest. *Jones v. Barnes*, 463 U.S. 745, 751 – 52 103 S. Ct. 3308, 77 L. Ed. 2d 987 (1983).

#### Issue III:

Claim: Petitioner maintains Appellate Counsel performed ineffective assistance, and the State failed to prove that Count III, took place within the statute of limitation period.

Petitioner alleges ineffective counsel by Tracy Nelson, (appointed counsel from Indiana Public Defender's Office for the original PCR Petition). (page 33 of his Verified Memorandum of Law). She declared in a letter this issue had no merit. This issue was denied by the Indiana Court of Appeals in *Baker v. State*, 922 N.E.2d 723 (Ind. App. 2010). Motion denied.

#### Argument IV:

Claim: Petitioner claims that Appellate Counsel was ineffective for not presenting a possible variance between the charging information and proof presented at trial.

Petitioner's argument is discredited by the facts, procedural history, findings and logic found by the Indiana Court of Appeals in *Baker v. State*, 922 N.E.2d 723 (Ind. App. 2010), pages 729-730.

Secondly, Petitioner alleges trial and appellate counsel provided ineffective assistance by failing to argue the Court's instructions were inadequate. A review of all of the jury instructions occurred in *Baker v. State*, 922 N.E.2d 723 (Ind. App. 2010) at 729-730. Trial Counsel for the Petitioner did not object to the jury instructions at the time they were given, the Court of Appeals found this resulted in waiver of the issue. *Baker v. State*, 729 N.E.2d 723 at 729-730, and *Blanchard v. State*, 802 N.E.2d 14, 32 (Ind. Ct. App. 2004).

#### Argument V:

Claim: Petitioner alleges Appellate Counsel was ineffective by not raising his "plea of guilty to being a habitual offender" was not done in a knowing, informed, intelligent or voluntary manner.

The record of proceedings for the Habitual Offender charge begin on DVD 2008 Baker 2e 94-134. Present was the Court, Mrs. Weinbrenner, Prosecuting Attorney, Defense Counsel, Mr. Pappas and the Petitioner. The Jury had just pronounced the Defendant guilty of Count 1, Count 2 and Count 3 and each juror had been polled and affirmed the judgment of guilt. DVD 2008 Baker 2e 91-94. The official Court record does not state that the Defendant was present but this Court finds so as he does not claim he was not. Defense Counsel, Pappas, moved to dismiss the Phase II of the Habitual Criminal allegations for being unconstitutionally vague. Discussions on page 62-71. The Trial Court denied the Defendant's Motion to Dismiss DVD 2008 Baker 2e 95-107.

Mr. Pappas waived a jury as to phase two of the proceedings DVD 2008 Baker 2e 107-108. The State presented its case. The Court adjudged the Defendant to be a Habitual Offender. Judgement was entered on Count III. Defendant was taken into custody, a Pre-Sentence Report was Ordered

and a Sentencing date was set. DVD 2008 Baker 2e 109-131. The Indiana Court of Appeals found that Petitioner waived his right to trial by jury on the habitual offender count in *Baker v. State*, 922 N.E.2d 723 (Ind. App. 2010) at p. 727.

This Court finds the trial tactics of defense counsel were a major reason for the waiver of Defendant's rights to trial by jury on the habitual offender account. The tactics chosen were in an attempt to lessen the severity of the actions the Petitioner was found to have committed against his granddaughter and other victims at trial. Motion denied.

**Argument VI:**

Claim: Petitioner alleges Appellate Court committed ineffective assistance by failing to challenge the sentence in the motion to correct errors portion of the Post trial proceedings.

Petitioner alleges that trial Court was too harsh in sentencing. The Court is unconvinced that the trial court improperly waived the aggravators and mitigators and came to an improper decision.

This argument is denied outright as the decision was in the discretion of the Trial Court.

**Argument VII:**

Claim: Petitioner alleges that appellate and trial counsel were ineffective by not objecting to nor arguing against alleged improper vouching opinion testimony by the Prosecutor during the course of the trial.

This Court finds that there was corroborated trial testimony regarding the Defendant's behavior. The testimony provided overwhelming proof of his guilt.

There was considerable testimony from each of the three victims, all minors. Also, there was also cooperating evidence by adult witnesses.

1. Wendy Baker (mother of victim) DVD 2008 Baker Comp Part I 701-743.
2. Brandy Klemczak (neighbor of victim) DVD 2008 Baker Comp Part I, 964-984.
3. Lisa Huff (mother of victim) DVD 2008 Baker Comp Part I, 985-1013.

Any claimed error was harmless. *Williams v. State*, 43 N.E.3d 578 (Ind. 2015). Motion is Denied.

**Argument VIII:**

Claims: Respondent alleges appellate counsel committed ineffective representation by failing to properly handle alleged prejudicial pre-trial publicity.

The Indiana standard to determine if a trial court erred by denying a motion for change of venue due to pre-trial publicity is outlined in *Specht v. State*, 734 NE2d 239 (Ind. 2000). In this case the trial court and trial counsel had extensive conversations about pre trial motions DVD 2008 Baker Pretrial 1-85. Defense moved for a test jury which was denied by the Trial Court. DVD 2008 Baker Pretrial 24-37.

During voir dire, all jurors were questioned on this point. The voir dire was extensive and lasted two (2) days. DVD 2008 Baker Comp Part I 3-356. The trial judge was satisfied the necessary protections in this case were received by the Petitioner.

The claim of error in argument VIII is denied.

**Argument IX:**

Claim: Petitioner alleges the Prosecuting attorney gave personal analogies of the beyond a reasonable doubt standard, causing him alleged harm. He claims the appellate counsel was ineffective when she failed to raise on appeal an alleged error on direct appeal.

Petitioner alleged Trial Counsel, Pappas erred by not objecting to Prosecutor's definition of beyond a reasonable doubt DVD 2008 Baker 2e 18. By choosing not to object, trial counsel reasonably chose a strategy which cast Defendant in the most favorable light.

Petitioner failed to prove that trial counsel was ineffective, as defined by *Saylor v. State*, 765 N.E.2d 525 (Ind. 2002) at 549.

Petitioner alleges defense counsel erred during his closing arguments by defining reasonable doubt. His discussion of the evidence was long. DVD 2008 Baker 2e 26-58. Trial counsel used an analogy that reasonable doubt was like "sending your kids out on the lake on ice, the first ice of the fall." DVD 2008 Baker 2e 57.

In Northeast Indiana frozen lakes in the winter is a reality. Many people live on or near a lake or a pond. Trial Counsel's strategy was an attempt to befriend the jurors and draw similarities between their lives and the Defendant's.

Appellate Counsel made no error by failing to point this issue to the Court of Appeals in direct appeal.

Also, Judge Carpenter read the standard final instructions regarding the definition of beyond a reasonable doubt. DVD 2008 Baker 2e 78-79. The Trial Court's instructions cured any possible error committed during the trial.

Petitioner claims he was denied affective assistance of appellate counsel on direct appeal. As the Indiana Supreme Court has noted, experienced appellate advocates must winnow out arguments on appeal and focus on one central issue, or at most a few conditions." *Bieghler v. State*, 690 N.E.2d 188, at 193-194 (*Jones v. Barnes*, 463 U.S. 745, 751-752, 77 L. Ed. 2d 987, 103 S. Ct. 3300 (1983)).

Motion denied.

**Argument X:**

Claim: Petitioner alleges that appellate counsel erred when she did not raise on Appeal that the Trial Counsel signed an evidence stipulation

This claim was addressed by the Indiana Court of Appeals in *Baker v. State*, 922 N.E.2d 723 (Ind. App. 2010). The Court of Appeals found that the record indicates that Baker's trial counsel used the stipulations as part of a strategy to challenge the victims during cross examination. Trial Counsel was reasonable. The trial strategy of appellate counsel was reasonable. She "winnowed out the weaker arguments" on appeal. This was recommended in *Bieghler*.

Motion is denied.



**Argument XI:**

Claim: Petitioner claims that Appellate Counsel was ineffective regarding the admission in trial of two evidentiary stipulation. The Indiana Court of Appeals found against this Argument in *Baker v. State*, 922 N.E.2d 723 (Ind. App. 2010).

Trial Counsel's opening statements evidenced a strategy to use the testimony of the three minor victims as a tactic to attack their credibility. DVD Baker Comp Part I, 393-401.

Appellate Counsel and Trial Counsel committed no error.

Petitioner's argument XI is denied.

**Argument XII:**

Claim: Petitioner claims appellate counsel was ineffective by failing to raise trial counsel did not move to sever the Counts for separate trials.

Using the logic expressed, in argument XI above, this Court finds that trial court's behavior was part of a trial strategy. Trial Counsel's strategy was reasonable. Appellate counsel committed no error.

Motion denied.

**Argument XIII:**

Claim: Petitioner alleges that Appellate Counsel was ineffective regarding the expert witness testimony of the trial.

This Court finds that trial court counsel developed a strategy that included presentations of evidence rebutting the state's trial witnesses. Trial Counsel's opening statement referenced the expected testimony of the State's expert witness. Counsel clearly intended to discredit during cross examination three minor victim's testimony. DVD 2008 Baker Comp Part I, 400-401 Appellate Counsel committed no error.

Further, the Indiana Court of Appeals resolved this issue unfavorably to the Petitioner in *Baker v. State*, 922 N.E.2d 723 (Ind. App. 2010) 733-734.

Petitioner's claimed error is denied.

**Argument XIV:**

Claim: Petitioner alleges Appellate Counsel was ineffective by not raising the allegation that trial counsel did not strongly and clearly advise the Defendant to accept a plea agreement.

Petitioner chose not to accept a plea agreement and suffered the consequences. Trial Counsel's strategy of going forward with a jury trial proved wrong.

Petitioner's motion is denied.

**Argument XV:**

Claim: Petitioner alleges Appellate Counsel was ineffective by not pointing out alleged Prosecutor misconduct.

The Court finds that trial court instructed the jury in preliminary and final instructions as to the sources of evidence to consider. Baker disk 2e, screens 52 to 56. The trial court's efforts cured any alleged error in this area. DVD Baker Comp Part I, 369, DVD 2008 Baker 2e, 72-90.

Petitioner's claim in argument XV is denied.

**Argument XVI:**

Claim: Petitioner alleges appellate counsel was ineffective by not petitioning for a rehearing by the Indiana Supreme Court and creatively arguing that he was denied rights under Federal and State equal protection laws.

There is overwhelming testimony to convict the Petitioner of multiple offenses. He may have been fortunate the Prosecuting Attorney did not file additional counts.

The Appellate Counsel's selective arguments regarding jury instructions in child molest cases with multiple counts and multiple victims resulted in new law being created in Indiana. *Baker v. State*, 948 N.E.2d 1169 (Ind. 2011). She was not prescient of all possible issues, lacking seven years of reflective thought, however, she is not ineffective.

This Court finds that appellate counsel is competent.

Petitioner's Argument XVI is denied.

**Argument XVII:**

Claim: Petitioner alleges Appellate Counsel was ineffective by not arguing the Indiana Supreme Court decision was an "unreasonable application of clearly established law".

The Petitioner's trial attorney was thoroughly familiar with the facts of the case and was highly competent.

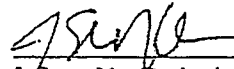
Petitioner's trial attorney tactically allowed certain evidence to be introduced by reason of the calculated evidence stipulation. Together they took the calculated risk of trial. Petitioner now raises issue with the State of the record and how it contains uncertainty in the evidence. There was overwhelming testimony of guilt on each of the counts for each of the victims. There is a solid basis for a finding of guilt.

The complained of issue is waived.

Petitioner's Argument is denied.

Petitioner's Petition for Post Conviction Relief is denied.

SO FOUND AND ORDERED THIS 16 DAY OF JANUARY, 2018.

  
J. Scott VanDerbeck, Special Judge  
DeKalb Superior Court

**Additional material  
from this filing is  
available in the  
Clerk's Office.**