

**In the  
Indiana Supreme Court**

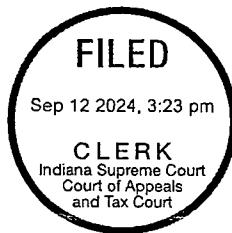
Christian Ricker,  
Appellant(s),

v.

State Of Indiana,  
Appellee(s).

Court of Appeals Case No.  
24A-PC-00184

Trial Court Case No.  
71D08-1905-PC-16

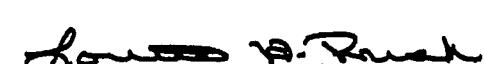


**Order**

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

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

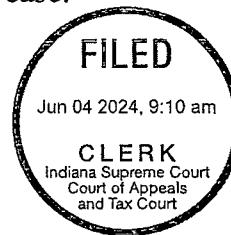
Done at Indianapolis, Indiana, on 9/12/2024.

  
Loretta H. Rush  
Chief Justice of Indiana

All Justices concur.

## MEMORANDUM DECISION

Pursuant to Ind. Appellate Rule 65(D), this Memorandum Decision is not binding precedent for any court and may be cited only for persuasive value or to establish res judicata, collateral estoppel, or law of the case.



## IN THE Court of Appeals of Indiana

Christian Ricker,  
*Appellant-Petitioner*

v.

State of Indiana,  
*Appellee-Respondent*

June 4, 2024

Court of Appeals Case No.  
24A-PC-184

Appeal from the St. Joseph Superior Court  
The Honorable Elizabeth C. Hurley, Judge

Trial Court Cause No.  
71D08-1905-PC-16

**Memorandum Decision by Judge Crone**  
Judges Bailey and Pyle concur.

**Crone, Judge.**

## **Case Summary**

[1] Christian Ricker appeals the post-conviction court's denial of his petition for post-conviction relief (PCR), alleging prosecutorial misconduct and ineffective assistance of trial counsel. We affirm.

## **Facts and Procedural History**

[1] In Ricker's direct appeal, the relevant facts were summarized as follows:

In May of 2009, Ricker began a romantic relationship with L.S.'s mother. L.S. was seven years old at the time. Starting in June of 2009, Ricker began spending a few nights a week at their house. On occasion, Ricker watched L.S. and her siblings while L.S.'s mother was at work.

The first inappropriate contact between Ricker and L.S occurred during the summer between L.S.'s third and fourth years in school. Ricker brought her downstairs, sat on the couch next to her, and touched L.S.'s chest over her clothes. The next inappropriate contact occurred later that year after school had started. Ricker rubbed L.S.'s leg and crotch over her clothes while she was sitting on the living room couch. A third incident occurred approximately one month later when Ricker entered L.S.'s bedroom, grabbed her arm, and brought her downstairs to the living room. Ricker removed L.S.'s shorts and underwear, took his own clothes off, placed a "balloon" on his "private part," and had intercourse with her. This lasted for about five minutes before L.S. kicked Ricker, grabbed her clothes, and went to her room. Before she left, Ricker told L.S. that he would hit her if she told anyone. The fourth instance of inappropriate contact occurred approximately one week later. L.S. was in the living room wearing shorts and a tank top. Ricker took his

clothes off and removed L.S.'s shorts, placed a "balloon thing" on his "private," and put it inside her. Ricker stopped because L.S.'s mother came home.

On December 23, 2011, L.S. disclosed the sexual abuse to her father's fiancée, Karagh Brennan. Brennan told L.S. it would be investigated. In May of 2012, L.S. opened up to Brennan again and disclosed additional abuse that had not been disclosed the first time.

The investigation involved interviews between L.S. and Carolyn Hahn, an employee with the Child Abuse Service Investigation Education Center. Hahn is a child forensic interviewer at the Center with an undergraduate degree and masters work in elementary education. She has been a forensic interviewer since 1996 and has conducted over 5,000 interviews with alleged child abuse victims. Hahn has been trained in the use of [Child Abuse Accommodation Syndrome], a system of clinical accommodations to help children struggling with child abuse. During Hahn's interview with L.S. on December 29, 2011, L.S. gave a partial disclosure to Hahn regarding her sexual abuse. On or about June 12, 2012, a second interview took place during which L.S. made additional disclosures about her sexual abuse.

On September 24, 2012, the State charged Ricker with three counts of Class A felony child molesting, one count of Class C felony child molesting, and one count of Class D felony intimidation.

*Ricker v. State*, No. 71A03-1407-CR-266, 2015 WL 2329121, at \*1-2 (Ind. Ct. App. May 15, 2015) (citations and footnote omitted).

[2] On December 9, 2013, Martin McCloskey (Trial Counsel) entered his appearance for Ricker. Ricker's jury trial was held on April 14 through 17,

2014. On the first day of the trial, the State moved to dismiss Count 3, the class A felony child molesting count that alleged Ricker had oral sex with L.S. The trial court granted the motion and dismissed the count with prejudice. At the conclusion of the trial, the jury found Ricker guilty of the remaining two counts of class A felony child molesting, class C felony child molesting, and class D felony intimidation.

- [3] On May 19, 2014, after Ricker was found guilty but before he was sentenced, Charles Lahey appeared as Ricker's new counsel (Sentencing Counsel). That same day, Sentencing Counsel filed an Indiana Trial Rule 60(B) motion for relief from judgment, alleging that L.S. "may have made false allegations of molestation against other men" that the State did not disclose to Trial Counsel even though the allegations were "known to the State, had been investigated by [the State, but had not been] prosecuted." PCR App. Vol. 2 at 85.
- [4] On July 25, in response to Ricker's Trial Rule 60(B) motion, the State filed an affidavit from Aimee Herring, the deputy prosecutor who had tried Ricker's case. In her affidavit, Deputy Prosecutor Herring stated that she had met with L.S. on multiple occasions and that L.S. did not disclose any allegations of molestation other than those alleged in the charging information for the instant case. She further stated that "no notice was given to [Trial Counsel] ... of any allegations of other molestations ... as the State was not aware of any information that would need to be disclosed[.]" *Id.* at 87.

- [5] At the sentencing hearing held that same day, the trial court noted receipt of Deputy Prosecutor Herring's affidavit and asked Sentencing Counsel if he was ready to proceed with sentencing. Sentencing Counsel answered in the affirmative. The court did not rule on Ricker's Trial Rule 60(B) motion. The court imposed an aggregate sixty-two-year sentence.
- [6] On direct appeal, Ricker challenged his convictions on grounds that L.S. presented incredibly dubious testimony that was insufficient to support his convictions and that the admission of testimony concerning Child Abuse Accommodation Syndrome amounted to fundamental error. Another panel of this Court affirmed Ricker's convictions.
- [7] On May 23, 2019, Ricker filed a PCR petition, raising freestanding claims that the State committed prosecutorial misconduct by (1) failing to disclose exculpatory evidence and (2) attempting to condition the jury during voir dire. Ricker also alleged that Trial Counsel was ineffective in the following ways: (1) eliciting testimony about L.S.'s sister's disclosure of abuse, (2) failing to cross-examine L.S. regarding her prior inconsistent statements, (3) failing to object to the "prejudicial drumbeat repetition" of L.S.'s out-of-court statements to witnesses, and (4) failing to object to vouching testimony. *Id.* at 42. He also argued that the cumulative effect of Trial Counsel's errors had denied him a fair trial.
- [8] At the hearing on the matter, held on April 23 and June 4, 2021, Ricker called Deputy Prosecutor Herring and Trial Counsel as witnesses. Following the

hearing, the State submitted proposed findings and conclusions.<sup>1</sup> On October 6, 2023, the post-conviction court issued its order denying relief. This appeal ensued. Additional facts will be provided as necessary.

## Discussion and Decision

[9] Ricker asserts that the post-conviction court erred in denying his PCR petition. “Post-conviction proceedings are civil proceedings in which a defendant may present limited collateral challenges to a conviction and sentence.” *Gibson v. State*, 133 N.E.3d 673, 681 (Ind. 2019) (citing Ind. Post-Conviction Rule 1(1)(b)), *cert. denied* (2020). “The scope of potential relief is limited to issues unknown at trial or unavailable on direct appeal.” *Id.* A defendant who files a petition for post-conviction relief “bears the burden of establishing grounds for relief by a preponderance of the evidence.” *Humphrey v. State*, 73 N.E.3d 677, 681 (Ind. 2017); Ind. Post-Conviction Rule 1(5). Because the defendant is appealing from the denial of post-conviction relief, he is appealing from a negative judgment:

Thus, the defendant must establish that the evidence, as a whole, unmistakably and unerringly points to a conclusion contrary to the post-conviction court’s decision. In other words, the defendant must convince this Court that there is no way within the law that the court below could have reached the decision it

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<sup>1</sup> Ricker’s proposed findings and conclusions are not included in his appendix and are not reflected in the chronological case summary. However, the State’s proposed findings and conclusions referenced Ricker having filed a brief that withdrew two of his ineffective assistance of trial counsel claims, namely, counsel’s failure to object to Child Abuse Accommodation Syndrome evidence and counsel’s failure to call medical witnesses and introduce certain medical records into evidence.

did. We review the post-conviction court's factual findings for clear error, but do not defer to its conclusions of law.

*Wilkes v. State*, 984 N.E.2d 1236, 1240 (Ind. 2013) (citations, emphasis, and quotation marks omitted). We will not reweigh the evidence or judge the credibility of witnesses and will consider only the probative evidence and reasonable inferences flowing therefrom that support the post-conviction court's decision. *Hinesley v. State*, 999 N.E.2d 975, 981 (Ind. Ct. App. 2013), *trans. denied* (2014).

**Section 1 – Ricker has waived his freestanding claims of prosecutorial misconduct because they were known and available on direct appeal but not raised.**

[10] Post-conviction relief is a “narrow remedy” that is limited to the grounds enumerated in Indiana Rules for Post-Conviction Relief. *Kirby v. State*, 95 N.E.3d 518, 520 (Ind. 2018). Those grounds may be generally characterized as “limited collateral challenges to a conviction and sentence” involving issues which were unknown at the time of trial or unavailable on direct appeal. *Wilson v. State*, 157 N.E.3d 1163, 1169 (Ind. 2020). Issues that were available for direct appeal but were not raised are waived, and issues that were raised on direct appeal that were decided adversely to the defendant are res judicata. *Id.* On review of the denial of post-conviction relief, this court does not review freestanding claims of error, even those presented as claims of fundamental error, if those errors were known and available to the defendant on direct appeal but were not raised. *Id.*

***Section 1.1 – Ricker has waived his freestanding claim that the State committed prosecutorial misconduct by failing to disclose exculpatory evidence that L.S. previously had made false accusations of molestation.***

[11] Ricker contends that the State failed to disclose that L.S. “had previously made a false accusation of molestation against another person[.]” Appellant’s Br. at 9. Ricker’s contention stems from actions that occurred during his trial. At the start of the trial, the parties argued over motions in limine. The State had asked to limit “[a]ny mention of other forensic interviews conducted by the [Child Abuse Service Investigation Education Center] with L.S.”—other than the “two [interviews] dealing with [the instant] case [that were] conducted on December 29, 2011, and June 12, 2012[.]” PCR App. Vol. 2 at 83. At trial, the State clarified that its motion sought to limit mention of “any other forensic interviews … dealing with cases other than this one[.]” Trial Tr. Vol. 1 at 10.

[12] During cross-examination of L.S., Trial Counsel asked L.S. whether she had “ever had anyone have their thing inside of [her]”—excluding the instances that she had already testified to regarding Ricker having intercourse with her. Trial Tr. Vol. 2 at 334. L.S. replied, “No.” *Id.* The State and Trial Counsel then approached the bench and, in a sidebar, discussed the question Trial Counsel had posed to L.S. The trial court ruled that the question violated the State’s motion in limine, and the court admonished the jury to disregard the question. At the subsequent PCR evidentiary hearing, Trial Counsel testified that the discussion during the sidebar had led him to believe that “there might have been other occasions” where L.S. had made “some sort of” previous allegations of sexual abuse. PCR Tr. Vol. 2 at 70.

[13] Ricker now raises the claim that the State committed prosecutorial misconduct by failing to disclose that L.S. might have made previous allegations of sexual abuse against another man. However, this issue was known and available to him at trial and on direct appeal. Issues available on direct appeal but not raised are waived. *See Wilson*, 157 N.E.3d at 1169 (potential post-conviction relief is limited in scope to issues unknown at trial or unavailable on direct appeal). Thus, Ricker has waived this issue for our review.

***Section 1.2 – Ricker has waived his freestanding claim that the State committed prosecutorial misconduct by failing to disclose evidence that L.S. had made prior inconsistent statements regarding the sexual abuse.***

[14] Ricker also contends that the State failed to disclose that L.S. had provided inconsistent statements regarding the sexual abuse Ricker perpetrated upon her. Ricker bases his contention on the reasoning Deputy Prosecutor Herring provided, at the start of the jury trial, for moving to dismiss Count 3, the class A felony child molesting count that alleged that Ricker had oral sex with L.S. The deputy prosecutor stated that the dismissal was “based upon a previous deposition [that had been] conducted with the victim in this case as well as numerous conversations with her” and that the “reason for moving to dismiss [the count] … [is because] I’m not sure exactly what [L.S.] is going to say about those type[s] of things.” Trial Tr. Vol. 1 at 11, 15. Ricker maintains that the deputy prosecutor’s failure to disclose the “inconsistencies between [L.S.’s] earlier statements and statements [L.S.] made to the [deputy prosecutor] during pretrial preparation” was “likely an effort to make these prior inconsistent statements to the Prosecutor irrelevant.” Appellant’s Br. at 14-15.

[15] However, this issue too was known and available but not raised in Ricker's direct appeal. Therefore, it is waived and unavailable for post-conviction review. *See Wilson*, 157 N.E.3d at 1169.

***Section 1.3 – Ricker has waived his freestanding claim that the State attempted to condition the jury pool during jury selection.***

[16] Next, Ricker contends that the State's questioning during jury selection amounted to an attempt to condition the potential jurors. Ricker argues that during voir dire, Deputy Prosecutor Herring “[tried] the case ... by planting in the jurors' minds a fact pattern [that the impaneled jurors would] instantly recognize when [the] evidence [was presented] at trial[.]” Appellant's Br. at 16. In support of his argument, Ricker focuses our attention on several examples of statements the deputy prosecutor made during voir dire that purport to show the State's attempt to condition the jurors.

[17] Potential jurors may be asked questions during voir dire to eliminate bias but may not be asked questions meant “to condition them to be receptive to the questioner's position.” *Von Almen v. State*, 496 N.E.2d 55, 59 (Ind. 1986). “Questions which seek to shape a favorable jury by deliberate exposure to the substantive issues in the case are improper.” *Id.*

[18] Here, the post-conviction court determined that Ricker's jury conditioning claim was barred by procedural default, and we must agree. Ricker's claim was known and available but not raised on direct appeal, so it is waived. *See Wilson*, 157 N.E.3d at 1169.

**Section 2 – Ricker has failed to establish that Trial Counsel was ineffective.**

[19] Ricker maintains that he is entitled to post-conviction relief because he was denied the right to effective assistance of trial counsel guaranteed by the Sixth Amendment to the United States Constitution. *See Strickland v. Washington*, 466 U.S. 668, 686 (1984) (“[T]he right to counsel is the right to effective assistance of counsel.”) (quoting *McMann v. Richardson*, 397 U.S. 759, 771 n.14 (1970)). To succeed on an ineffective assistance of counsel claim, the defendant must satisfy the two-part test articulated in *Strickland*. *Humphrey*, 73 N.E.3d at 682. “To satisfy the first prong, ‘the defendant must show deficient performance: representation that fell below an objective standard of reasonableness, committing errors so serious that the defendant did not have the ‘counsel’ guaranteed by the Sixth Amendment.’” *Id.* (quoting *McCary v. State*, 761 N.E.2d 389, 392 (Ind. 2002)). When considering a claim of ineffective assistance of counsel, we strongly presume “that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment.” *Hinesley*, 999 N.E.2d at 982 (citation omitted). We presume that counsel performed effectively, and a defendant must offer strong and convincing evidence to overcome this presumption. *Id.* Isolated poor strategy, inexperience, or bad tactics does not necessarily constitute ineffective assistance. *Id.*

[20] To satisfy the second prong of the *Strickland* test, the defendant must show prejudice. *Humphrey*, 73 N.E.3d at 682. To demonstrate prejudice from

counsel's deficient performance, a petitioner need only show "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Middleton v. State*, 72 N.E.3d 891, 891 (Ind. 2017) (emphasis and citation omitted). "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 891-92.

[21] "Although the performance prong and the prejudice prong are separate inquiries, failure to satisfy either prong will cause the claim to fail." *Baer v. State*, 942 N.E.2d 80, 91 (Ind. 2011). "If we can easily dismiss an ineffective assistance claim based upon the prejudice prong, we may do so without addressing whether counsel's performance was deficient." *Henley v. State*, 881 N.E.2d 639, 645 (Ind. 2008). "Most ineffective assistance of counsel claims can be resolved by a prejudice inquiry alone." *Id.*

***Section 2.1 – Ricker has failed to show that Trial Counsel performed deficiently by introducing evidence that L.S.'s sister made an allegation of sexual abuse that indicated Ricker was the perpetrator.***

[22] Ricker contends that Trial Counsel was ineffective "for eliciting testimony alleging additional, uncharged criminal sexual conduct by Ricker upon" L.S.'s sister, M.S. Appellant's Br. at 20. During cross-examination of Carolyn Hahn, the child forensic interviewer, Trial Counsel asked whether M.S. had disclosed during an interview that she, too, had been sexually abused. Hahn replied, "Yes." Trial Tr. Vol. 2 at 427. A juror sent a follow-up question to the trial court, and the court asked Hahn, "[W]ithout getting into the details of ...

[M.S.'s] disclosure of sexual abuse[,] was it a disclosure about herself or about [L.S.]?" *Id.* at 430. Hahn replied, "About herself, I believe." *Id.*

- [23] Later in the trial, when a juror sent a follow-up question to the trial court during a different witness's testimony about whether M.S.'s disclosure concerned Ricker, the court determined that the question was irrelevant and did not pose it to the witness. In a subsequent discussion bench conference outside the presence of the jury, Trial Counsel expressed a desire to call M.S. to testify about allegations of Ricker sexually abusing her. The trial court determined that M.S.'s testimony was "not relevant to the case involving [L.S.]" *Id.* at 435.
- [24] Ricker maintains that the outcome of the trial would have been different had Trial Counsel "avoided introducing this purely prejudicial evidence" that, according to Ricker, could not be construed as "the exercise of any conceivable trial tactic[.]" Appellant's Br. at 20. We disagree. During the four-day jury trial, evidence that M.S. had also been sexually abused was limited to the question that Trial Counsel posed to Hahn on cross-examination and the follow-up question posed by the juror. No evidence was presented at trial to indicate that Ricker had sexually abused M.S. And Trial Counsel testified at the PCR evidentiary hearing that "[t]here was a strategic reason" behind asking whether M.S. had made an allegation of sexual abuse. PCR Tr. Vol. 2 at 69.
- [25] The post-conviction court concluded that Trial Counsel did not render ineffective assistance of counsel. As the court observed, "[w]hile reasonable minds may disagree about this trial strategy and its potential prejudice to

[Ricker], the strategy was cut short at trial[,]” and “[n]o evidence was elicited that anyone other than [L.S.] made any allegations of sexual abuse about [Ricker].”Appealed Order at 6.

[26] Under our standard of review, we presume that counsel performed effectively. *See Hinesley*, 999 N.E.2d at 982. Ricker has not shown either deficient performance or prejudice on this issue. Therefore, his ineffectiveness claim on this basis fails.

***Section 2.2 – Ricker has failed to show that Trial Counsel performed deficiently by failing to cross-examine L.S. regarding her prior inconsistent statements.***

[27] Next, Ricker contends that Trial Counsel rendered ineffective assistance by failing to adequately cross-examine L.S. regarding her prior inconsistent statements to “State authorities.” Appellant’s Br. at 22. “It is well settled that the nature and extent of cross-examination is a matter of strategy delegated to trial counsel.” *Waldon v. State*, 684 N.E.2d 206, 208 (Ind. Ct. App. 1997), *trans. denied*. And “the method of impeaching witnesses is a tactical decision and a matter of trial strategy that does not amount to ineffective assistance.” *Kubsch v. State*, 934 N.E.2d 1138, 1151 (Ind. 2010). Here, however, even assuming arguendo that Trial Counsel’s cross-examination of L.S. constituted deficient performance, Ricker fails to offer any argument as to *how* he was prejudiced by such alleged deficiency. Therefore, he has failed to show that Trial Counsel was ineffective in this respect. *See French v. State*, 778 N.E.2d 816, 824 (Ind. 2002)

(“Indeed, most ineffective assistance of counsel claims can be resolved by a prejudice inquiry alone.”).

***Section – 2.3 Ricker has failed to show that Trial Counsel performed deficiently by failing to object to repetitious hearsay testimony.***

[28] Next, Ricker contends that Trial Counsel was ineffective for failing to object to “multiple hearsay violations by [S]tate witnesses in which they were permitted to testify to statements made to them by L.S.[,]” which “allowed for a prejudicial drumbeat repetition of L.S.’s [out-of-court] statements to witnesses.” Appellant’s Br. at 23. However, Ricker has not provided any specific objectionable instances of hearsay. Instead, he baldly states that Trial Counsel failed to object to “most of [the] testimony” concerning L.S.’s out-of-court statements to her “step-mother, mother, case workers[,] and police[,]” and introduced “all” of L.S.’s statements to Hahn, including “full testimony” concerning Child Abuse Accommodation Syndrome. *Id.* at 22.

[29] We emphasize that a brief must be prepared so that each judge, considering the brief alone, and independent of the transcript and record, can intelligently consider the question presented. *Ramsey v. Rev. Bd. of Ind. Dep’t of Workforce Dev.*, 789 N.E.2d 486, 488 (Ind. Ct. App. 2003) (citing *Terpstra v. Farmers & Merch. Bank*, 483 N.E.2d 749, 753 (Ind. Ct. App. 1985)). Ricker’s briefing on this issue offers us no ability to intelligently consider the alleged repetitious hearsay statements and evaluate their prejudicial effect. Thus, we agree with the State that Ricker has waived this argument by not developing it as required by Indiana Appellate Rule 46(A)(8). *See Isom v. State*, 170 N.E.3d 623, 648 (Ind.

2021). Accordingly, Ricker has wholly failed to establish that Trial Counsel performed deficiently by failing to object to repetitious hearsay testimony.

***Section 2.4 – Ricker has failed to show that Trial Counsel performed deficiently by failing to object to improper vouching statements and testimony.***

[30] Ricker also contends that Trial Counsel was ineffective for failing to object to improper vouching statements and testimony, basing his claim on the repetition of L.S.’s out-of-court statements. However, we need not reach the issue because Ricker did not argue this ground below. Rather, his vouching argument to the post-conviction court in his PCR petition was based on Hahn’s testimony “in the context of Child Abuse Accommodation Syndrome.” PCR App. Vol. 2 at 43. Ricker’s vouching claim is therefore waived. *See Allen v. State*, 749 N.E.2d 1158, 1171 (Ind. 2001) (“Issues not raised in the petition for post-conviction relief may not be raised for the first time on post-conviction appeal.”), *cert. denied* (2002).

***Section 3 – Ricker has failed to show that the cumulative effect of Trial Counsel’s errors deprived him of effective assistance of counsel.***

[31] Ricker also contends that Trial Counsel’s deficient performance resulted in cumulative error that prejudiced him. However, because we have concluded that there was no error, we also conclude that there was no cumulative error. Thus, we affirm the post-conviction court’s denial of post-conviction relief on Ricker’s claims of prosecutorial misconduct and ineffective assistance of trial counsel.

[32] Affirmed.

Bailey, J., and Pyle, J., concur.

ATTORNEY FOR APPELLANT

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STATE OF INDIANA      )      IN THE ST. JOSEPH SUPERIOR COURT  
                            ) SS:  
ST. JOSEPH COUNTY      )      CAUSE NO. 71D08-1905-PC-000016

CHRISTIAN RICKER      )  
Petitioner,              )  
                            )  
VS.                      )  
                            )  
STATE OF INDIANA      )  
Respondent.              )

**FILED**  
October 6, 2023  
ST. JOSEPH CIRCUIT & SUPERIOR COURT  
EH

**ORDER**

The Petitioner having filed a Petition for Post-Conviction Relief and the Court, having held evidentiary hearing<sup>1</sup>, now finds and orders as follows:

**Facts/Procedural History**

The facts as detailed in *Ricker v. State*, 32 N.E.3d 846 (Ind.Ct.App. 2015) are as follows:

In May of 2009, Ricker began a romantic relationship with L.S.'s mother. L.S. was seven years old at the time. Starting in June of 2009, Ricker began spending a few nights a week at their house. On occasion, Ricker watched L.S. and her siblings while L.S.'s mother was at work.

The first inappropriate contact between Ricker and L.S. occurred during the summer between L.S.'s third and fourth years in school. Ricker brought her downstairs, sat on the couch next to her, and touched L.S.'s chest over her clothes. The next inappropriate contact occurred later that year after school had started. Ricker rubbed L.S.'s leg and crotch over her clothes while she was sitting on the living room couch. A third incident occurred approximately one month later when Ricker entered L.S.'s bedroom, grabbed her arm, and brought her downstairs to the living room. Ricker removed L.S.'s shorts and underwear, took his own

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<sup>1</sup> The Court gave the Petitioner time to file a written final argument and an opportunity to reply to the State's written argument. The Court received no filings from Petitioner following the evidentiary hearing. The Court relies on the Petitioner's memorandum filed contemporaneously with the Petition for Post-Conviction Relief

clothes off, placed a “balloon” on his “private part,” and had intercourse with her. Transcript at 278. This lasted for about five minutes before L.S. kicked Ricker, grabbed her clothes, and went to her room. Before she left, Ricker told L.S. that he would hit her if she told anyone. The fourth instance of inappropriate contact occurred approximately one week later. L.S. was in the living room wearing shorts and a tank top. Ricker took his clothes off and removed L.S.’s shorts, placed a “balloon thing” on his “private,” and put it inside her. Tr. at 286. Ricker stopped because L.S.’s mother came home.

On December 23, 2011, L.S. disclosed the sexual abuse to her father’s fiancée, Karagh Brennan. Brennan told L.S. it would be investigated. In May of 2012, L.S. opened up to Brennan again and disclosed additional abuse that had not been disclosed the first time.

The investigation involved interviews between L.S. and Carolyn Hahn, an employee with the Child Abuse Service Investigation Education Center. Hahn is a child forensic interviewer at the Center with an undergraduate degree and masters work in elementary education. She has been a forensic interviewer since 1996 and has conducted over 5,000 interviews with alleged child abuse victims. Hahn has been trained in the use of CAAS, a system of clinical accommodations to help children struggling with child abuse. During Hahn’s interview with L.S. on December 29, 2011, L.S. gave a partial disclosure to Hahn regarding her sexual abuse. On or about June 12, 2012, a second interview took place during which L.S. made additional disclosures about her sexual abuse.

On September 24, 2012, the State charged Ricker with three counts of Class A felony child molesting,<sup>1</sup> one count of Class C felony child molesting, and one count of Class D felony intimidation. A jury found him guilty of two counts of Class A felony child molesting, Class C felony child molesting, and Class D felony intimidation. On July 25, 2014, the trial court imposed an aggregate sixty-two year sentence.

### Legal Analysis

Post-conviction proceedings are civil in nature. *Reid v. State*, 984 N.E.2d 1264, 1266-67 (Ind. Ct. App. 2013) *transfer denied*, 989 N.E.2d 782 (Ind. 2013) (*citations omitted*). Therefore, in order to prevail on his Petition, Petitioner must establish his claim for relief by a preponderance of the evidence. (*See, Ind. Post-Conviction Rule 1(5)*).

The Court, in *Stevens v. State*, 770 N.E.2d 739, 746 (Ind. 2002) held,

Post-conviction procedures do not afford a petitioner with a super-appeal, and not all issues are available. Rather, subsequent collateral challenges to convictions must be based on grounds enumerated in the post-conviction rules. If an issue was known and available but not raised on direct appeal, it is waived. If it was raised on appeal, but decided adversely, it is res judicata. If not raised on direct appeal, a claim of ineffective assistance of trial counsel is properly presented in a post-conviction proceeding. A claim of ineffective assistance of appellate counsel is also an appropriate issue for post-conviction review. As a general rule, however, most freestanding claims of error are not available in a post-conviction proceeding because of the doctrines of waiver and res judicata. (citing *Timberlake v. State*, 753 N.E.2d 591, 597 (Ind. 2001)) (internal citations omitted).

#### Claims of Prosecutorial Misconduct

The Petitioner alleges prosecutorial misconduct for “failing to disclose that the victim in the underlying case made a false accusation of molestation against another man”, for failing to disclose statements made by victim that were inconsistent with prior statements, and for conditioning the jury during voir dire.

The Court first notes that the petitioner did not raise the issue of prosecutorial misconduct on appeal. In *Pruitt v. State*, 902 N.E.2d 899 (Ind. 2009), the Supreme Court affirmed a post-conviction court’s ruling barring claims of prosecutorial misconduct since those claims were not raised on direct appeal. The Court restated long-held law that “because a post-conviction relief proceeding is not a substituted for direct appeal but rather a process for raising issues unknown or not available at trial, an issue known and available but not raised on direct appeal may not be raise in post-conviction proceedings.” *Id.* at 926.

Additionally, the testimony at the evidentiary hearing made clear that the State had no evidence in its possession to indicate that the victim had ever been abused by another individual. By counsel’s own admission, the evidence he had came from “scuttlebutt” and from the State’s reaction at trial to defense counsel’s question about the victim’s prior sexual activity which was clearly impermissible under Rule of Evidence 412 as well as a violation of the trial court’s order in limine. The Petitioner addressed this issue following trial in a Motion for Relief from Judgment, to which the State responded by way of an affidavit prepared by Deputy Prosecutor Aimee Herring who had been

assigned to the case. In the affidavit, DPA Herring affirmed that at no time had the victim ever disclosed that anyone other than Petitioner had molested her, and that notice was never given to any prior defense counsel of any other acts of molestation as the State was unaware of any such information, and that no other investigations into other acts of child molestation involving the same victim has ever occurred.

The Petitioner alleges prosecutorial misconduct during voir dire, citing a number of examples in his Proposed Findings of Fact and Conclusions of Law. While the paraphrased examples are somewhat accurate, many are taken out of context. For example, DPA Herring said, “This is a type of the crime I expect you to be outraged about hearing about. You shouldn't want to hear this happening in your community. We acknowledged it does happen. But you will have to decide did it happen this time that we're talking about. So other than the people who have indicated personal relationships and connections to victims is there anyone who would not be able to follow the instructions to put those feelings aside and focus only on the evidence presented in the courtroom to determine whether this did or did not happen?” (Trial Trans. p. 63). Like many of the other examples cited by Petitioner, the broader context in which the statements were made focused on the jurors' feelings about the type of case at issue, to discover any juror bias, and to determine the jurors' ability to be fair and impartial.

The Court, in *Glover v. State*, 179 N.E.3d 526, 533 (Ind.Ct.App. 2021) stated, “While questions that seek to shape a favorable jury by deliberate exposure to the substantive issues in the case are not permitted, we have routinely deferred to the trial court's exercise of discretion in distinguishing between impermissible exposure to the substantive issues and permissible examination of the prospective jurors to disclose their attitudes toward the offense charge and to uncover preconceived ideas about defenses the defendant intends to use.” (internal citations and quotations omitted).

The Court does not find that DPA Herring committed prosecutorial misconduct. Furthermore, “in post-conviction proceedings, complaints that something went awry at trial are generally cognizable only when they show deprivation of the right to effective counsel or issues demonstrably unavailable at the time of trial or direct appeal. An available grounds for relief not raised at trial or on direct appeal is not available as a ground for collateral attack.” *Myers v. State*, 33 N.E.3d 1077, 1115 (Ind.Ct.App. 2015)

(internal citations and quotations omitted). Claims of prosecutorial misconduct are freestanding claims of trial error, and as such are not cognizable in a PCR hearing. *Id.* For these reasons, the Court does not find merit to the Petitioner's request for post-conviction relief on the claim of prosecutorial misconduct.

### *Ineffective Assistance of Counsel*

In *Garrett v. State*, 992 N.E.2d 710, 718-719 (Ind. 2013), the Supreme Court reiterated its long-held standard required for a petitioner to prevail on a claim of ineffective assistance of counsel in a post-conviction relief proceeding.

To establish a post-conviction claim alleging violation of the Sixth Amendment right to effective assistance of counsel, a defendant must establish the two components set forth in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). "First, a defendant must show that counsel's performance was deficient." *Strickland*, 466 U.S. at 687, 104 S.Ct. 2052. This requires a showing that counsel's representation fell below an objective standard of reasonableness and that counsel made errors so serious that counsel was not functioning as "counsel" guaranteed to the defendant by the Sixth Amendment. *Id.* "Second, a defendant must show that the deficient performance prejudiced the defense." *Id.* This requires a showing that counsel's errors were so serious as to deprive the defendant of a fair trial, meaning a trial whose result is reliable. *Id.* To establish prejudice, a defendant must show that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694, 104 S.Ct. 2052. A reasonable probability is one that is sufficient to undermine confidence in the outcome. *Id.*

Petitioner argues that his trial counsel, Martin McClosky ("Attorney McClosky") was ineffective because he asked Carolyn Hahn, the child forensic interviewer, on cross examination whether the victim's sibling had also made a disclosure of abuse when Ms. Hahn interviewed the sibling. A juror followed up with a question about the identity of the alleged abuser, but the trial court sustained an objection to that question. No evidence was presented to indicate that the Petitioner abused the victim's sibling. From a review of the trial transcript, the Court notes that Attorney McCloskey may have intended to bring in information about the sibling's disclosure regarding the Petitioner, but the trial court sustained an objection on relevance grounds to that. Attorney

McCloskey stated at the evidentiary hearing that he believed he had a strategic reason for doing this. Since the objection at trial was sustained, the strategic reason was not fully fleshed out, but it appeared that he may have wanted to argue that the children were coached to make allegations against the Petitioner since they were brought in for interviews on the same day. (Trial Trans. Pp. 434-435).

While reasonable minds may disagree about this trial strategy and its potential prejudice to the Petitioner, the strategy was cut short at trial. No evidence was elicited that anyone other than the listed victim made any allegations of sexual abuse about the Petitioner. The one question to Carolyn Hahn about whether the victim's sibling disclosed abuse was not an error so serious as to deprive the Petitioner of a fair trial.

The Petitioner also alleges that Attorney McCloskey was ineffective for failing to object to various questions, thereby allowing the "drumbeat of repetition" of the victim's allegations through multiple witnesses; for failing to cross-examine effectively regarding inconsistent statements; and for failing to object to vouching testimony. The Petitioner argues that Attorney McCloskey should have objected to the introduction of the victim's statements to other witnesses. At one at least one occasion, Attorney McCloskey did object, and the trial court required that an answer be given in such a way that is specifically avoided the "drumbeat of repetition". On other occasions, witnesses were cautioned during questioning not to reveal specifics of what the victim said to them. The Petitioner gives no examples of vouching testimony or ineffective cross-examination on inconsistent statements. The Court does not find that Attorney McCloskey was ineffective on these bases.

The Petitioner further argues that the cumulative effect of Attorney McCloskey's errors resulted in ineffective assistance of counsel and thus deprived Petitioner of a fair trial. For the reasons stated above, the Court does not find that the Petitioner met its burden of proof on the issue of ineffective assistance of trial counsel.

### Conclusion

The Court finds that Petitioner has not proven his claims set out in his Petition for Post-Conviction Relief by a preponderance of the evidence, and that the Petition for Post-Conviction Relief should be denied.