

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

Jason C. Johnson — PETITIONER
(Your Name)

People of the state vs.
of Illinois — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

Illinois Appellate Court

(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Jason C. Johnson
(Your Name)

P.O. Box 99
(Address)

Pontiac, Illinois 61764
(City, State, Zip Code)

NA
(Phone Number)

Question(s) Presented

1. Whether the Court erred in granting the People's Motion to allow hearsay statement, and erred in entering an insufficiently detailed order related thereto;

2. Whether the Court erred in admitting a videotaped interview as substantive evidence;

3. Whether Trial Counsel was ineffective for failing to raise or object to the trial court's entry of an insufficiently detailed order related to the People's motions, failing to object at trial to the admission of new, previously undisclosed evidence, the topic of which had been the subject of hearing on the People's Motion to allow hearsay;

4. Whether the evidence was insufficient to prove the defendant guilty beyond a reasonable doubt; and

5. The trial Court imposed an improperly excessive sentence without first making the required considerations as to imposing sentence.

LIST OF PARTIES

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

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IN THE
SUPREME COURT OF THE UNITED STATES
PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

☐ For cases from **federal courts**:

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

- ☐ reported at _____; or,
☐ has been designated for publication but is not yet reported; or,
☐ is unpublished.

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

- ☐ reported at _____; or,
☐ has been designated for publication but is not yet reported; or,
☐ is unpublished.

☒ For cases from **state courts**:

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

- ☐ reported at _____; or,
☒ has been designated for publication but is not yet reported; or,
☐ is unpublished.

The opinion of the Illinois Supreme Court court appears at Appendix B to the petition and is

- ☐ reported at _____; or,
☐ has been designated for publication but is not yet reported; or,
☒ is unpublished.

JURISDICTION

☐ For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was _____.

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

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

☐ An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. ____ A ____.

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

☒ For cases from **state courts**:

The date on which the highest state court decided my case was 1-16-18.
A copy of that decision appears at Appendix B.

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

☐ An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. ____ A ____.

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

Constitutional and Statutory Provisions Involved

No Constitutional provisions are involved. The Illinois statutory provision involved are set out below.

720 ILCS 5/11-1.40(a)(1) (West 2012).

A person commits predatory criminal sexual assault of a child if:

"that person commits an act of sexual penetration, is 17 years of age or older, and:

(1) the victim is under 13 years of age." Id

Sexual penetration is defined, in relevant, as follow:

"Any contact, however slight, between the sex organ or anus of another person, or any intrusion, however slight, of any part of the body of one person into the sex organ or anus of another person" 720 ILCS 5/11-0.1 (West 2012)

725 ILCS 115-10(b) (West 2014)

"(1) The court finds in a hearing conducted outside the presence of the jury that the time, content, and circumstances of the statement provides sufficient safeguards of reliability; (2) the child either (a) "testifies at the proceeding", or (b) "is unavailable as a witness and there is corroborative evidence of the act which is the subject

of the statement"; and (3) "the out of court statement was made before the victim attained 13 years of age or within 3 months after the commission of the offense, whichever occurs later." 725 ILCS 5/115-10(b) (West 2014)

Statement of the Case

In January 2014, defendant, Jason Johnson, was indicted on two counts of predatory criminal sexual assault of a child (720 ILCS 5/11-1.40(a)(1) (West 2012)), alleging that he committed acts of sexual penetration with M.B., who was less than 13 years of age. (See Appendix A, Opinion of the Illinois Appellate Court, People v. Jason C. Johnson, 2016 IL App (4th) 150004, at para. 1)

Prior to trial, the state filed a motion in limine, seeking to introduce evidence under the hearsay exception of section 115-10 of the Code of Criminal Procedure of 1963 (Code) (725 ILCS 5/115-10 (West 2012)). The trial court granted the motion in a written order. (Id. at para. 2)

At the May 2014 Jury trial, Shelly testified that she lived with her boyfriend, Larry, and her daughter, M.B., who was born in 2006. Defendant was M.B.'s father. M.B. visited him every other weekend.

In November of 2019, when M.B. was six years old, M.B. told Shelly that "Daddy likes to make sure my special spot is clean." When Shelly asked what M.B. meant by that statement, M.B. said that defendant took off her pajamas and underwear and stuck his fingers in her "special spot." Shelly asked if defendant ever made M.B. touch his "private area," and M.B. responded, "No" but said that "he would wet it and stick it on her private area." (Id. at para 12)

Shelly immediately called her friend, whose husband was a police officer. Based on the officer's advice, Shelly took M.B. to the Illinois Children Advocacy Center. That same night she took her to the emergency room. (Id. at para 13)

M.B., who was seven years old at the time of the trial, testified that defendant "licked his finger and put it in my private." while M.B. was visiting his house. M.B. was alone in her bedroom, asleep, when defendant entered and woke her up. He put his hand under the blanket that was covering M.B., and M.B. felt his finger move inside her "private." M.B. testified further that defendant touched her in a similar way on "a lot" of occasions, but he never touched "his private" against M.B.'s "privates." M.B. told her mom about the touching while they were in the car. (Id. at para 14)

Maureen Hofmann testified that she was employed as an advanced-practice nurse at the Pediatric Resource Center at the University of Illinois College of Medicine in Peoria. The trial court granted the state's request to have her tendered as an expert in the examination of children alleged to have been sexually abused. On December 4, 2013, Hofmann examined M.B. Hofmann testified that she conducted an external examination of M.B.'s genitals using a colposcope. The examination did not reveal any evidence of abuse reported by M.B. Hofmann clarified that the results of the examination did not rule out the abuse reported by M.B., because in 95% of cases in which children report sexual abuse, their examinations do not reveal physical evidence of abuse. (Id. at para. 15)

Tara Crady testified that she worked for the Tazewell County Children's Advocacy Center. On December 3, 2013, when M.B. was seven years old, Crady interviewed M.B. about her complaints that defendant committed sexual assault. A recording of that interview was played for the jury. (Id. at para. 16)

Kara E. testified that she was defendant's sister. Kara had a six-year-old child, H.E., with whom she had visitation every other weekend. When Kara had visitation

With H.E., she would arrange to meet up with defendant and M.B. Kara testified that M.B. had a normal interaction with defendant and seemed happy with him. On November 3, 2013, Kara, H.E., defendant, and M.B. were all visiting at Kara's and defendant's parents house. H.E. and M.B. were playing in H.E.'s bedroom. When Kara went to check on them, she found them both lying in bed together naked. Kara noticed that H.E. "little pee pee was hard." H.E. and M.B. told Kara that they were "just hugging and kissing." (Id. at para 19)

Ketra Eichelkraut testified that she was defendant's live in girlfriend for 2 1/2 years. She described defendant as a "loving father." On November 3, 2013, she and defendant visited defendant's parent's house, along with M.B., Kara, and H.E. Ketra left the house for a while and received a phone call from defendant telling her that "something had happened with H.E. and M.B." When Ketra returned to defendant's parents' house, defendant was talking to M.B. "about the incident what had happened, why we don't do things, and good touch, bad touch, things like that." Ketra testified further that she also had talked to M.B. previously about "good touching, bad touching." (Id. at para. 20)

Defendant testified that prior to the allegations in this case, he had visitation with his daughter every other weekend. In October or November 2013, defendant and Shelly got into an argument about visitation for M.B. Shelly was planning to move to an area that was further away from defendant and wanted defendant to meet her halfway when transporting M.B. from visitation. (Id. at para. 21)

Defendant also testified that he never touched his daughter in a sexual way, nor did he place his finger or penis in her genitals. He stated that he had very little alone time with M.B. because Kefra or defendant's son were usually around. The Jury found defendant guilty on both counts. After an August 2014 sentencing hearing the trial court sentence defendant to consecutive terms of 20 years in prison. (Id. at paras. 22-23)

ARGUMENT

I

The Court erred in granting the People's motions to allow hearsay statements, and erred in entering an insufficiently detailed order related thereto.

This Court has ruled that sufficient guarantees of trustworthiness are required prior to admission of statements under 725 ILCS 5/115-10, which is to be narrowly construed. *People v. Bridgewater*, 259 Ill.App.3d 344, 348-349, 631 N.E.2d 779, 197 Ill.Dec. 557 (1994). In examining the admissibility of hearsay statements under section 115-10, the standard of review to be applied is one of abuse of discretion. *People v. Land*, 241 Ill.App.3d 1066, 1079, 609 N.E.2d 1010, 182 Ill.Dec. 476 (4th Dist. 1993); *People v. Zwart*, 151 Ill.2d 37, 44, 600 N.E.2d 1169, 175 Ill.Dec. 711 (1992). Under this standard, a reviewing court looks to whether the decision of the trial court was "... arbitrary, fanciful or unreasonable, or where no reasonable person would take the view adopted by the trial court." *People v. Hammonds*, 354 Ill.Dec. 70, 84, 957 N.E.2d 386 (1st Dist. 2011); *People v. Dunmore*, 389 Ill.App.3d 1095, 1106, 329 Ill.Dec. 622, 906 N.E.2d 1233 (2nd Dist. 2009).

A. Admissibility of hearsay evidence.

Concerning the statements made to M.B.'s mother, Shelly Barker, the Plaintiff maintains that "Barker was taken aback by this statement and took the necessary steps to handle this troubling statement." (Pl. Br. 8) Pursuant to Shelly Barker's testimony at the hearing on the People's motions, those steps were to ask leading questions of M.B. during a conversation that lasted twenty minutes. (R. Vol. III, 28-30) At that hearing, Ms. Barker admitted that she recently moved a great distance away, which made

visitation between the Defendant and M.B. both costly and inconvenient. (R. Vol. III, 33-35) The trial court's finding at the hearing on the Defendant's post-trial motion that there existed "...no agenda by mom that's been identified..." (Supp. R. Vol. VII, 17) completely ignored Shelly Barker's previous testimony. Also ignored in the trial court's ruling was the false statement made by Shelly Barker at the hearing on the People's motion. Namely, Shelly Barker, after having testified that there had been no other incidents of a sexual nature involving M.B., then on cross examination admitted to M.B. being involved in a solicitation made by M.B.'s cousin as well as a separate incident of genital exposure committed at M.B.'s school. (R. Vol. III, 35-36) When a witness testifies to false information, admitting later the falsity of her testimony, that witness' credibility is certainly questionable, at best. Furthermore, false testimony, when coupled with an agenda on the part of that witness, would make anyone hard pressed to find sufficient guarantees of trustworthiness so as to allow an exception to a rule of evidence, which is to be narrowly construed.

Concerning the statements made to Tara Crady, forensic interviewer for the Children's Advocacy Center, Plaintiff argues that sufficient guarantees of trustworthiness existed due to "...C.A.C.'s training, procedures, and implementation of policies, which include the use of non-leading questions." (Pl. Br. 9) However, having received training to interview children at an institution with procedures and policies in place is not the same as using that training or following those procedures and policies. It was at the hearing held on the People's motions to allow hearsay statements that Ms. Crady was confronted by the fact that at no time during her interview did she identify or have M.B. explain in any way the frequency of alleged sexual abuse, much less the

number of times it happened, or even when the alleged abuse occurred. (R. Vol. III, 16-17) Perhaps this is the reason why the People alleged in their charging documents for both counts that the offense occurred, "...between December 1, 2011, and November 17, 2013..." (C. 9-10), and, even after the trial, the time frame, number of instances, frequency, and dates still remain unclear.

Furthermore, Tara Crady never discussed with M.B. false information the minor gave during the interview when Tara Crady knew it to be false. Specifically, M.B. told Tara Crady that the date of last incident was the same date of M.B.'s interview. (R. Vol. III, 13-14) Tara Crady knew this to be false, and Tara Crady admitted she did not address or clarify the falsity of this statement. (*Id.*) Furthermore, Tara Crady also testified that M.B. made inconsistent statements as to the names of family pets. (R. Vol. III, 16) Plaintiff argues that this court should consider, among other issues, M.B.'s age at the time of her interview. Certainly age could affect a very small child's recollection of dates, but to say that a tender age would affect a minor's recollection of something as simple as the name or names of family pets stretches the imagination. In addition, Tara Crady learned from M.B. during the interview that she had previously told her younger brother about the alleged abuse, which also proved to be false when Tara Crady interviewed that same individual. (R. Vol. III, 18)

Plaintiff argues that *People v. Boling* made clear that section 115-10 was passed "...out of a concern that 'child witnesses, especially the very young, often lack the cognitive or language skills to effectively communicate instances of abuse at trial [citation], or may be impeded psychologically in their efforts to do so.'" 2014 IL App (4th) 120634 at ¶ 83, 8 N.E.3d 65, 380 Ill.Dec. 134 (4th Dist. 2014); citing *People v.*

Bowen, 183 Ill.2d 103, 699 N.E.2d 577, 232 Ill.Dec. 800 (1998); (Pl. Brief. 8).

Certainly, as envisioned by the legislature, getting the evidence of a criminal offense from another source via hearsay testimony is an important thing when a minor witness may lack the skills necessary to testify at trial. That said, the allowance of knowingly false hearsay testimony at trial, whether in the form of a recorded video or details of it as testified to by someone like Tara Crady, simply because at one time someone like Tara Crady received training in interviewing cannot be what the legislature had in mind or what this court had in mind when requiring sufficient guarantees of trustworthiness. Furthermore, Tara Crady's failure to address even the most basic details in relation to the allegations, such as time and place, unquestionably casts doubt on any safeguards of reliability presented by Ms. Crady's training and experience. Consequently, the ruling of the trial court was arbitrary, fanciful, or unreasonable, and this Court should vacate the conviction, ordering a new trial in this cause.

B. The court entered an insufficiently detailed order.

A trial court need not issue a written order following a hearing pursuant to 725 ILCS 5/115-10. *People v. Carter*, 244 Ill.App.3d 792, 800, 614 N.E.2d 452, 185 Ill.Dec. 318 (1st Dist. 1993). Plaintiff maintains that the *Coleman* case is misconstrued by the Defendant. (Pl. Br. 12) In *People v. Coleman*, this court, citing to the recently decided U.S. Supreme Court case of *Idaho v. Wright*, 497 U.S. 805, 110 S. Ct. 3139, 111 L.Ed. 638 (1990), explained "*Wright* has now given greater definition to the required hearing and the finding necessary to allow admission of the evidence." 205 Ill.App.3d 567, 584, 563 N.E.2d 1010, 150 Ill.Dec. 883 (1990). This court then set forth factors to use when determining whether sufficient guarantees of trustworthiness exist, including

"...spontaneity and consistent repetition, mental state of declarant, use of terminology unexpected of a child of similar age, and lack of motive to fabricate." *Coleman*, 205 Ill.App.3d at 581; citing *Wright*, 497 U.S. at 821-822. This court then remanded the case, in part because the order did not reflect the reasoning of the trial court. *Coleman*, 205 Ill.App.3d at 584. Likewise, the First District remanded a similar case, ruling, "Relying on the aforementioned United States and Illinois authorities, we find that the hearing in the case at bar did not provided adequate guarantees of trustworthiness as it did not reflect the reasoning of the trial judge as to the reliability of the corroborative testimony." *Carter*, 244 Ill.A..3d at 801.

In explaining why Defendant misconstrued *Coleman*, Plaintiff maintained "The *Coleman* court did not take issue with the trial court's written order, but rather the sufficiency of the evidence before it at the pre-trial hearing on the admissibility of the hearsay evidence." (Pl. Br. 12-13) This is precisely the point Defendant wishes to make on appeal, and precisely the problem with the order entered in the present cause. The order entered only recites the statute, and the only out-of-statute reference contained in it is one to the interviewing techniques used at the C.A.C. (C. 39) This Order is the only order related to the hearing held on the People's motion pursuant to section 115-10, and there is no further reasoning to which this court can refer. Although Plaintiff cites to further explanations of why that order was entered by a judge who did not enter it (Pl. Br. 11), these explanations do not help to now supplement the reasoning of the trial court, which the court is required to make when hearsay statements are allowed pursuant to section 115-10. Consequently, the trial court's order was insufficiently detailed, and,

consequently, the conviction should be vacated and this cause remanded for further hearing.

II

The Court erred in admitting a videotaped interview as substantive evidence at trial.

The admission of a video is reviewed using an abuse of discretion standard, and "... an abuse occurs when the trial court's ruling is fanciful, unreasonable or when no reasonable person would adopt the trial court's view." *People v. Baez*, 241 Ill.2d 44, 106, 349 Ill.Dec. 165, 946 N.E.2d 359 (2011); *People v. Illgen*, 145 Ill.2d 353, 364, 164 Ill.Dec. 599, 583 N.E.2d 515 (1991). Recorded evidence, like the recorded interview of M.B. at the C.A.C., can be admitted as substantive evidence and considered by a jury as such only if the foundation for it is laid, and that foundation is the same as for real evidence, which must include evidence that it has been substantially unaltered. *People v. Flores*, 406 Ill.App.3d 566, 572, 941 N.E.2d 375, 346 Ill.Dec. 817 (2nd Dist. 2010). When a foundation is laid for a video as a demonstrative exhibit, that foundation "... is inadequate to ensure ...[its]... reliability as substantive evidence" *Flores*, 406 Ill.App.3d at 573.

The foundation for a demonstrative exhibit only requires that a witness with personal knowledge of the exhibit at the relevant time need testify only that it is a fair and accurate representation of that which was purportedly recorded. *Id.* at 572. In the present cause, the People laid inadequate foundation to admit the video as substantive evidence. The foundation laid by the People at trial through Tara Crady (R. Vol. V, 12-13), is the foundation required to admit the video as demonstrative evidence only.

Courts have acknowledged the ease with which video recordings can be altered and manipulated, and, as a result, the admission of a video recording as substantive evidence is the same as for real evidence, not demonstrative evidence. *Flores*, 406 Ill.App.3d at 573.

Typically, to admit an original piece of real evidence, a witness need only establish that the exhibit is the actual item, is unaltered, and is the same as the one recovered. *Id.* at 576; citing *People v. Whirl*, 351 Ill.App.3d 464, 470-471, 814 N.E.2d 872, 286 Ill.Dec. 646 (2nd Dist. 2004). However, as referenced above, this foundation would be insufficient for admission of a video recording as substantive evidence, given the ease with which video recordings can be manipulated and altered. *Id.* at 573. In addition, in the present cause, the video recording exhibit was a copy, as acknowledged by the People's own witness. (R. Vol. V. 12-13) Consequently, for the prosecution to admit a video recording as substantive evidence, as was done in the case at bar, the foundation must demonstrate "...a chain of custody with sufficient completeness to render it improbable that the original item has been exchanged, contaminated, or subjected to tampering." *Flores*, 406 Ill.App.3d at 576. To admit a duplicated video as the People did here, then, "... there must be a cogent explanation of any copying such that the court is satisfied that during the copying process there were no changes, additions, or deletions." [sic.] *Id.* at 577. In the present cause, no such explanation was provided. (R. Vol. V, 12-13)

Plaintiff highlights trial counsel's failure to object. (Pl. Br. 17) However, trial courts admit or refuse admission of evidence depending on the foundation laid, not solely based on any objection, and when a court improperly admits evidence without

also providing a limiting instruction to a jury, error occurs. *People v. Taylor*, 956 N.E.2d 431, 353 Ill.Dec. 569 (2011); *People v. Dennis*, 956 N.E.2d 998, 343 Ill.Dec. 870 (5th Dist. 2011). Plaintiff highlights that Tara Crady testified to the recording being a fair and accurate recording of the interview (Pl. Br. 17), but this is the foundation required for demonstrative, not real, substantive, evidence. *Flores*, 406 Ill.App.3d at 572. Plaintiff references this court's decision in *People v. Lara*, 2011 IL App (4th) 080983-B, 958 N.E.2d 719, 354 Ill.dec. 787 (4th Dist. 2011), which is distinguishable from the present cause, because, in *Lara*, this court addressed section 115-10 as well as the Confrontation Clause, and was not asked to consider the improper admission of a video following an inadequate foundation, and the admission of a video at a pre-trial hearing pursuant to section 115-10 has no bearing on the later foundation laid at trial. Given the lacking foundation for admission of the video as substantive evidence, the trial court abused its discretion, and, having heard foundation for admission only as a demonstrative exhibit, the trial court then failed to issue the jurors a limiting instruction related to that video. Consequently, this court should vacate the conviction, and order a new trial in this cause.

III

Trial counsel was ineffective for failing to raise or object to the trial court's entry of an insufficiently detailed order related to the People's motions, failing to object at trial to the admission of new, previously undisclosed evidence, the topic of which had been the subject of hearing on the People's motions to allow hearsay statements, or in failing to either object to the admission and publication of a

videotaped interview at trial and, further, failing to seek a limiting instruction related to same.

Claims of ineffective assistance are reviewed using a two-prong test. *People v. Albanese*, 104 Ill.2d 504, 473 N.E.2d 1246, 85 Ill.Dec. 441 (1984); *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). In order to be successful, a claim of ineffective assistance must show that, "... counsel's performance fell below an objective standard of reasonableness, and a reasonable probability exists that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *People v. Henderson*, 2013 IL 114040, ¶ 11, 989 N.E.2d 192, 370 Ill.Dec. 804 (2013).

A. Trial counsel was ineffective for failing to raise or object to the trial court's entry of an insufficiently detailed order related to the People's motions.

As was discussed above, the trial court is not required to enter an order, but did rule on the People's pre-trial motions in the form of the written order at issue. (C. 39) That order was insufficient. It did not reflect the reasoning of the trial court that heard those motions, as is required. *Coleman*, 205 Ill.App.3d at 584. Likewise, the order is void of reference to the reasoning of the court in assessing the reliability of testimony. *Carter*, 244 Ill.A.3d at 801. Consequently, anything a party can point to in assessing the court's reasons are tenuous at best.

Upon receiving the written order at issue in this cause, trial counsel did not raise or object to the sufficiency of that order, and, had trial counsel done so, the trial court would then be required to confront the inadequacies of the testimony presented, as were discussed above, following which the trial court, in turn, might very well have denied

the pre-trial motions to allow hearsay statements. As a result, the jury would not have, in turn, heard from two witnesses or watched the video recorded interview of M.B., and, consequently, might very well have found the Defendant not guilty. Although this proposition may seem tenuous, because there is no predicting what the trial court might have done had trial counsel objected to the insufficiency of the court's order, the entire reasoning of the trial court in entering the order is equally tenuous due to the insufficient findings contained therein. As a result, trial counsel's assistance was ineffective.

B. Trial counsel was ineffective for failing to object at trial to the admission of new, previously undisclosed evidence, the topic of which had been the subject of hearing on the People's motions to allow hearsay statements.

As was discussed in Defendant's brief, previously undisclosed evidence was testified to by Shelly Barker at trial for the first time, even though the events about which she testified were also the subject of the pre-trial hearing on the People's motions. (Def. Br. 25-26) At the pre-trial hearing on the People's motions to allow hearsay testimony, Shelly Barker testified that after M.B.'s initial statement to her, she then spoke with M.B. for twenty minutes, following which she took M.B. to the hospital. (R. Vol. III, 30) At trial, Shelly Barker testified that she then called her friend, whose husband was a police officer, and, upon this individual's advice, she took M.B. to the hospital. (R. Vol. IV, 21)

In addressing this issue, Plaintiff argues consistent with the People's position to and the position of the trial court that the new testimonial evidence was inconsequential. (Pl. Br. 22-23) Essentially, the position of the Plaintiff is that the evidence was inconsequential, because it was not offered for the truth of the matter asserted, and was

simply to explain the sequencing of events. (Pl. Br. 23) The trial court's ruling was that Shelly Barker's new testimony "...show[s] why mom went to the hospital instead of just driving home." (Supp. R. Vol. VII, 20) However, these arguments do not address the ultimate issue.

No one would argue that this new testimony was in any way the crux of the People's case, but this alone, or its inconsequential nature alone, misses the underlying issue. An exception to the hearsay rule was made pursuant to section 115-10, which should be narrowly construed and only after particularized guarantees of trustworthiness have been shown, and any determination of these guarantees of trustworthiness can inevitably be reduced to issues related to witness credibility. *Bridgewater*, 259

Ill.App.3d at 349. In addressing this issue during the hearing on Defendant's post-trial motion, neither the People nor the trial court addressed how this new evidence affected Shelly Barker's credibility for purposes of the court's ruling on the pre-trial motions. Had trial counsel objected at trial to the testimony of Shelly Barker as it related to the 115-10 hearing, then certainly Shelly Barker's credibility would be called into doubt, and, therein, the granting of the People's pre-trial motions, which rested in part on the credibility of Shelly Barker might also have changed. Consequently, trial counsel's performance fell below an objective standard, such that the outcome might very well have been different, and, consequently, this court should find the Defendant received ineffective assistance of trial counsel.

C. Trial counsel was ineffective for failing to either object to the admission and publication of a videotaped interview at trial, and, further, for failing to seek a limiting instruction related to same.

As was discussed above, the admissibility of M.B.'s recorded interview at the C.A.C. as substantive evidence was improper, foundation only having been laid for it to be admitted as demonstrative evidence. Trial counsel did not object at trial to the admission and publication of the video as substantive evidence. (R. Vol. V, 13) This failure to object to the admission and publication of the video exposed the jury to its contents. Those contents were of a video in a relaxed atmosphere, in which M.B. spoke at great length with Tara Crady. This was in addition to Tara Crady's testimony, as well as that of the other witnesses, including M.B., essentially affording the jury yet another opportunity to hear from M.B. at a time when the Defendant cannot cross examine M.B. Plaintiff references trial counsel's failure to object as a strategic choice. (Pl. Br. 25) However, one would be hard pressed to find an instance in which a party would strategically allow the jury to hear as substantive evidence that which was only demonstrative evidence.

The trial court, in ruling on Defendant's post-trial motion, found that no harm occurred, because had there been an objection, "...the State could have put on a foundation that is different than what they put on." (Supp. R. Vol. VII, 18) Nothing whatsoever in the record indicates this is true, and the foundational rules for admission of evidence were violated in no small part due to trial counsel's failure to object at trial. Had trial counsel objected and Tara Crady been unable to lay further foundation, the jury would have received the exhibit as a demonstrative one, instead of substantive one, which is an assumption equal to that made by the trial court in assuming the People could have laid further foundation.

The video, having been improperly admitted as substantive evidence, the court and parties had a cure available to them. Namely, a limiting instruction to the jury either at the time of publication or prior to deliberations. *Taylor*, 956 N.E.2d 431; *Dennis*, 956 N.E.2d 998. Having failed to object to the admission of the video as substantive evidence, trial counsel then failed to seek a limiting instruction to the jury either at the time of publication or during the instruction phase. If trial counsel had objected to the video as substantive evidence or sought a limiting instruction, the jury would have not been allowed to view the video as substantive evidence, and their verdict might very well have been different. Therefore, the Defendant received ineffective assistance of counsel in failing to object to the admission and publication of the video or, alternatively in failing to seek a limiting instruction, and his conviction should be vacated.

IV

The evidence was insufficient to prove the Defendant guilty beyond a reasonable doubt.

The Defendant was not proven guilty beyond a reasonable doubt. Proof beyond a reasonable doubt required a showing that the Defendant placed his penis in the vagina of M.B., as alleged in Count 1, and that the Defendant placed his finger in the vagina of M.B., as alleged in Count 2. Every element was not proven beyond a reasonable doubt, which is required. *People v. Tye*, 141 Ill.2d 1, 12, 565 N.E.2d 931, 152 Ill.Dec. 249 (1990). This is true regardless of whether the evidence is direct or circumstantial. *People v. Pintos*, 133 Ill.2d 286, 291, 549 N.E.2d 344, 139 Ill.Dec. 832 (1989). In reviewing issues related to proof at trial, a reviewing court must consider whether "after viewing the evidence in the light most favorable to the prosecution, any rational trier of

fact could have found the essential elements of the crime beyond a reasonable doubt."

Jackson v. Virginia, 443 U.S. 307, 319, 99 S. Ct. 2781, 61 L.Ed.2d 560 (1979) ; adopted in *People v. Cunningham*, 212 Ill.2d 274, 278-279, 818 N.E.2d 304, 288 Ill.Dec. 616 (2004); *People v. Collins*, 106 Ill.2d 237, 261, 478 N.E.2d 267, 87 Ill.Dec. 910 (1985).

In the present cause, the evidence was inconsistent. M.B.'s recorded interview contained statements confirmed to be false. Tara Crady's interview of M.B. included her failure to confront M.B. with the false statements made during it. Shelly Barker's testimony contained information affecting her credibility, including her bias, interest, or motive to lie, such as the time and expense of visitations between M.B. and the Defendant. M.B. herself testified to feeling the Defendant's member and finger in her, but M.B. could not expand on this further beyond stating she felt she had to urinate. (R. Vol. IV, 22) Maureen Hofman, of the University of Illinois College of Medicine, could only offer the explanation that children perceive penetration differently, essentially allowing a guess that a child who was penetrated might feel as though she needed to urinate. (R. Vol. IV, 84-85) Furthermore, no physical evidence of penetration existed. (R. Vol. IV, 83)

The only evidence of actual penetration, an essential element to be proven, was provided by M.B., someone who had already given inconsistent statements. Specifically as M.B.'s testimony related to penetration, she stated that the Defendant put his member or finger in her, which was refuted by both her inability to perceive, having testified that a blanket blocked her view (R. Vol. IV, 55), as well as by another witness for the People, Maureen Hofman. (R. Vol. IV, 83)

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The Defendant then called Kara Erwin, who testified about a previous sexual encounter involving M.B. and another minor (R. Vol. V, 29-30), as well as her appreciation that someone was always present during any visitation M.B. had with the Defendant during the rough time period in question (R. Vol. V, 30-33). The defense next called Ketra Eichelkraut, who in sum and size testified to the impossibility of the offense having been committed, because she was present during visitations between the Defendant and M.B. due to his work schedule. (R. Vol. V, 58, 62-63, 65-66) The Defendant next testified in his own defense, and testified that all visitations with M.B. were effectively supervised by Ketra Eichelkraut, making the commission of the offense impossible (R. Vol. V, 76-77). The Defendant provided clarity as to Shelly Barker's interest, bias, or prejudice, including a motive to lie, concerning the inconveniences and expenses incurred as a result of Barker's relocation to a town further away. (R. Vol. V, 82-86) The Defendant also emphatically denied ever engaging the conduct of which he was accused. (R. Vol. V, 86-87)

In sum, the jury heard inconsistent testimony from the People's witnesses. The jury heard from a child who could not identify that she was penetrated or positively ascertain what penetration was, and the jury heard from another witness, Hofman, who could not identify that any penetration occurred. This evidence does not exclude every reasonable hypothesis consistent with the Defendant's presumed innocence, and is insufficient evidence upon which to find the Defendant guilty. The People's evidence fell woefully short of guilty beyond a reasonable doubt, especially in light of the testimony of the defense witnesses, for whom no motive to lie was shown. As a result, no rational trier of fact could conclude that the essential elements of the crime had been

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proved beyond a reasonable doubt. When a verdict is not supported by the evidence, grounds for a new trial exist, and the standard in determining whether to grant a new trial is whether the jury's verdict was against the manifest weight of the evidence.

Maple vs. Gustafson, 151 Ill.2d 445, 453-454, 603 N.E.2d 508, 177 Ill.Dec. 438 (1992).

The evidence in this cause was upon which a reasonable trier of fact could find the Defendant guilty beyond a reasonable doubt. Therefore, this court should vacate the verdict of guilt, finding the Defendant not guilty, or, alternatively, grant the Defendant a new trial.

V

The trial court imposed an improperly excessive sentence without first making the required considerations as to imposing sentence.

The trial court's sentence was excessive. The standard of review in such matters is an abuse of discretion by the trial court. *People v. Streit*, 142 Ill.2d 13, 19, 566 N.E.2d 1351, 153 Ill.Dec. 245 (1991). An abuse of discretion occurs, even when the sentence imposed is within the statutory limits, if the sentence "... is greatly at variance with the spirit and purpose of the law, or manifestly disproportionate to the nature of the offense." *People v. Fern*, 189 Ill.2d 48, 54, 723 N.E.2d 207, 243 Ill.Dec. 175 (1999); *People v. Cabrera*, 116 Ill.2d 474, 493-4, 508 N.E.2d 708, 108 Ill.Dec. 397 (1987).

When imposing sentence, our Illinois Constitution provides guidance: "All penalties shall be determined both according to the seriousness of the offense and with the objective of restoring the offender to useful citizenship." Ill. Const. Art. I, § 11. Consequently, a trial court imposing sentence must balance protecting society and rehabilitating an offender. *People v. Cox*, 82 Ill.2d 268, 280, 412 N.E.2d 541, 45

Ill.Dec. 190 (1980). Striking that balance requires considering, "...the defendant's age, demeanor, habits, mentality, credibility, criminal history, general moral character, social environment, and education, as well as the nature and circumstances of the crime and of defendant's conduct in the commission of it." *People v. Raymond*, 404 Ill.App.3d 1028, 1069, 938 N.E.2d 131, 344 Ill.Dec. 862 (1st Dist. 2010); *People v. Center*, 198 Ill.App.3d 1025, 1033, 556 N.E.2d 724, 145 Ill.Dec. 106 (1st Dist. 1990).

The Defendant in this cause, who was then forty-eight, had never before been convicted of a felony offense, and the Defendant's prior criminal history was devoid of anything similar to that of which he had been convicted. (C. 54) Furthermore, the trial court was required to consider statutory factors in mitigation, but, despite saying that it did so, failed to address that "[t]he character and attitudes of the defendant indicate that he is unlikely to commit another crime," pursuant to 730 ILCS 5/5-5-3.1(9). Consideration of the above helps yield a reasoned judgment that favors minimizing a sentence of imprisonment.

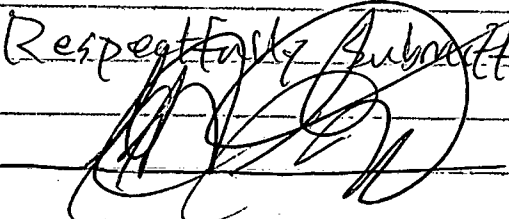
In addition, although a court should consider punishment in performing the above-referenced balancing test, the trial court in this cause did not consider that such punishment had already been accounted for and built into the legislative scheme for the offenses of which the Defendant was convicted by way of imposing the mandatory minimum punishment for same. Perhaps this is due to the trial court's passionate reference to the offenses as being "despicable" (R. Vol. VII, 10), or perhaps this is due to the fact that the Defendant asserted his constitutional right to a trial, as the People argued (Supp. R. Vol. VII, 26-27). Nonetheless, there was an inadequate showing, barring passion, that would require the imposition of more than the minimum sentence

For this defendant, someone who had never before been sentenced to prison, much less been sentenced on a felony offense. The sentence imposed exceeds the retributive nature of it, violating the spirit and purpose of the law and ignores this defendant's rehabilitative potential. Therefore, this court should find the sentence to be excessive, and reduce same or remand this matter for further hearing.

Conclusion

Wherefore, Petitioner humbly request that he be granted a writ of certiorari.

Respectfully Submitted,


Date 3-29-18