NO.

IN THE

SUPREME COURT OF THE UNITED STATES

DANNY W. HOWELL -- PETITIONER

V.S.

STATE OF INDIANA -- RESPONDENT

APPENDIX OF PETITIONER

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APPENDIX

In the
Indiana Supreme Court

State of Indiana ex rel. Danny W. Howell,
Relator,

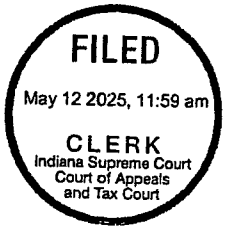
v.

Wells Circuit Court, et al.,
Respondents.

Supreme Court Case No.
25S-OR-112

Court of Appeals Case No.
25A-CR-316

Trial Court Case No.
90C01-0310-FA-5



Order

The relator, pro se, has filed a petition seeking relief under the Rules of Procedure for Original Actions. Relator seems to request a writ allowing him to seek transfer from the Court of Appeals' April 1, 2025 order in case number 25A-CR-316 denying his request to file a successive petition for post-conviction relief.

For this Court to issue a writ of mandamus, the relator must state facts showing clearly the respondent court has failed to act when it was under a duty to act. Relator has not made this showing. As the Court of Appeals explained in its order, transfer may not be sought from an order declining to authorize the filing of a successive petition for post-conviction relief. *See* Ind. App. R. 57(B) (providing that transfer may be sought from adverse Court of Appeals decisions "in the following form: (1) a published opinion; (2) a not-for-publication memorandum decision; (3) any amendment or modification of a published opinion or a not-for-publication memorandum decision; and (4) an order dismissing an appeal.").

Because the relator seeks a remedy that is not appropriate under the rules and law governing writs of mandamus and prohibition, this original action is DISMISSED. *See* Ind. Original Action Rule 2(D). Petitions for rehearing or motions to reconsider are not allowed. Orig. Act. R. 5(C).

Done at Indianapolis, Indiana, on 5/12/2025.

Loretta H. Rush
Chief Justice of Indiana

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IN THE
COURT OF APPEALS OF INDIANA

DANNY HOWELL,	)	
	)	
Appellant-Petitioner,	)	
	)	
vs.	)	No. 90A02-0809-PC-829
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Respondent.	)	

APPEAL FROM THE WELLS CIRCUIT COURT
The Honorable David L. Hanselman, Sr., Judge
Cause No. 90C01-0505-PC-2

February 17, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

BAKER, Chief Judge

Appellant-petitioner Danny Howell appeals the denial of his petition for post-conviction relief. Howell argues that the post-conviction court erroneously determined that he did not receive the ineffective assistance of trial counsel. Finding no error, we affirm.

FACTS

The underlying facts, as described by another panel of this court in Howell's direct appeal, are as follows:

> In the summer of 2002, Howell met his future wife Lorrinda Howell ("Lorrinda") through the internet. Lorrinda had a thirteen-year old daughter named B.S. Lorrinda married Howell in the fall of 2002, and she and B.S. moved into Howell's home in Bluffton, Indiana. After moving in with Howell, B.S.'s grades began to drop and she exhibited behavior problems. Lorrinda allowed Howell to discipline B.S. Howell usually disciplined B.S. by yelling at her or grounding her. B.S. was also made to do a significant amount of chores around the house.
>
> B.S. testified that in March of 2003, while B.S. was thirteen years old, Howell began coming into her room at night. Howell would take the covers off of B.S. and then touch B.S. between her legs near her crotch. Howell did not touch B.S. underneath her clothes. B.S. indicated that the touching would usually last for a minute or two, during which Howell did not speak. B.S. testified that this sort of touching occurred on approximately fifty different occasions between March and June of 2003. B.S. did tell Lorrinda about the touching, but Lorrinda took no action to prevent this from happening again.
>
> B.S. testified that in late June of 2003, while B.S. was still thirteen years old, Howell again came into her room at night. Howell proceeded to take the covers off of B.S. and then took off her pants and underwear. Howell then got in bed on top of B.S., and she noticed that he was completely naked. Howell placed his penis in B.S.'s vagina and had sex with her for about two minutes. Although she could not remember the exact date, B.S. testified that Howell had sex with her a second time while she was still thirteen years old.

On July 13, 2003, the day after B.S.'s fourteenth birthday, Howell again had sex with B.S.

Debra Evans, Lorrinda's friend, testified that she visited Howell's home five or six times and saw Howell touch B.S. in ways that she believed were inappropriate. Evans discussed this with Lorrinda, but Lorrinda refused to take any action. When she believed that she had collected sufficient information, Evans called the police in July of 2003, and reported that Howell was molesting B.S.

During July of 2003, Officer Greg Steele of the Bluffton Police Department and Wendy Garrett of the Wells County Office of Family and Children had three interviews with B.S. In the course of these interviews, B.S. revealed that Howell had molested her. Based on these interviews, on October 9, 2003, the State charged Howell with child molesting as a Class A felony and sexual misconduct with a minor as a Class B felony. The State also filed an habitual offender charge against Howell.

At the request of the Victim's Assistance Office, B.S. met with social worker Ted Ramsey five times. During these meetings B.S. discussed how Howell molested her. B.S. also alleged that Howell's son, B.H., [FN 1] had molested her.

> [FN 1.] B.H. was Howell's son from an earlier marriage. At the time, B.H. was sixteen years old. During the time that B.S. lived in Howell's home, B.H. would visit his father every other weekend. During these visits, B.H. would spend the night.

On April 14, 2004, a pretrial hearing was held. At this hearing, the State filed a motion in limine asking the trial court to exclude any evidence relating to B.S.'s past sexual conduct. The State argued that this evidence was inadmissible pursuant to Indiana's Rape Shield Statute, Indiana Code section 35-37-4-4. The trial court granted the State's motion in limine.

Howell v. State, Cause No. 90A02-0407-CR-571, slip op. p. 2-4 (Ind. Ct. App. Apr. 13, 2005). On April 30, 2004, a jury found Howell guilty of class A felony child molesting and class B felony sexual misconduct with a minor and Howell was also found to be a

habitual offender. On May 11, 2004, the trial court sentenced Howell to thirty years for child molesting, ten years for sexual misconduct with a minor, and enhanced the child molesting sentence by thirty years, for an aggregate executed term of seventy years imprisonment.

Howell appealed his convictions and sentence directly, arguing that the trial court had improperly permitted the State's expert witness to testify, improperly excluded evidence of an alleged sexual relationship between B.S. and B.H., and imposed an inappropriate sentence. On April 13, 2005, this court affirmed the trial court's judgment in an unpublished memorandum decision. Id.

On June 21, 2006, Howell filed an amended petition for post-conviction relief.[1] On April 15, 2008, the post-conviction court held a hearing on Howell's petition. The parties submitted proposed findings of fact and conclusions of law, and on August 29, 2008, the court denied Howell's petition. In relevant part, the post-conviction court found as follows:

> . . . [Howell] alleges that he was denied effective assistance of trial counsel because his trial counsel made no offer of proof at the trial regarding the admission of evidence concerning alleged sexual activity between the victim and the defendant's minor son. . . . Prior to the trial, the State filed a motion in limine to prohibit [Howell] from making reference to the alleged consensual sexual activity between the victim and the defendant's minor son. Citing Rule 412 of the Indiana Rules of Evidence, the Court granted said motion in limine. Subsequently, at the trial, [Howell's] attorney made no offer of proof regarding the allegation of consensual sexual activity between the victim and the defendant's minor son. . . .

[1] Howell had initially filed a pro se petition for writ of habeas corpus on May 15, 2005, which the post-conviction court deemed to be a petition for post-conviction relief.

. . . [Howell] believe[s] that answers to questions at the trial by a State expert witness, "opened the door" for admissions of evidence of the alleged consensual sexual activity between the victim and the defendant's minor son. . . .

***

1. Evidence of alleged consensual sexual activity between the victim and the defendant's minor son was not admissible . . . because it was prohibited by Rule 412 of the Indiana Rules of Evidence.

***

3. At the hearing . . . , [Howell] cited the case of Stewart v. State (1994) 636 N.E.2d 143 to support his position that testimony of the State's expert, Ted Ramsey, "opened the door" to admission of [the] evidence . . . ; however, this case (Howell v. State) is distinguished from Steward v. State for the following reasons:

   a) In Stewart . . . , the evidence sought to be admitted was that the victim was molested by four (4) other men, while in Howell . . . , the evidence sought to be admitted was that the victim had consensual sex with another minor child; and

   b) In Steward . . . , the State's expert testified that the victim displayed abnormal behavior that was indicative of the victim having been molested, while in Howell . . . , the State's expert never testified as to any such behavior by the victim.

4. The case of Steward . . . was the only case cited by [Howell] at his amended post-conviction relief hearing that was in effect at the time of the trial in this case.

***

6. Even if the evidence . . . would have somehow been admissible at the trial herein, failure of [Howell's] counsel to make an "offer of proof" as to said evidence would not have been so prejudicial as to deprive [Howell] of a fair trial for the following reasons:

   a) [Howell] presented no evidence at the hearing . . . that he had any trial witnesses available that would have testified

that alleged consensual sexual activity between the victim and another minor child would cause any behaviors of the victim consistent with molestation by [Howell]; and

b) The balance of the evidence presented by the State at [Howell's] trial was so overwhelming that [Howell] would have been convicted even if the State's expert . . . did not testify.

Appellant's App. p. 8-12. Howell now appeals.

DISCUSSION AND DECISION

I. Standard of Review

As we consider Howell's argument that the trial court erroneously denied his petition for post-conviction relief, we observe that the petitioner in a post-conviction proceeding bears the burden of establishing grounds for relief by a preponderance of the evidence. Ind. Post-Conviction Rule 1(5); McCarty v. State, 802 N.E.2d 959, 962 (Ind. Ct. App. 2004), trans. denied. When appealing from the denial of post-conviction relief, the petitioner stands in the position of one appealing from a negative judgment. Id. On review, we will not reverse the judgment unless the evidence as a whole unerringly and unmistakably leads to a conclusion opposite that reached by the post-conviction court. Id. Post-conviction procedures do not afford petitioners with a "super appeal." Richardson v. State, 800 N.E.2d 639, 643 (Ind. Ct. App. 2003). Rather, they create a narrow remedy for subsequent collateral challenges to convictions that must be based upon grounds enumerated in the post-conviction rules. Id.; see also P-C.R. 1(1).

Here, Howell argues that he received the ineffective assistance of trial counsel. When evaluating a claim of ineffective assistance of counsel, we apply the two-part test

articulated in Strickland v. Washington, 466 U.S. 668 (1984). Pinkins v. State, 799 N.E.2d 1079, 1093 (Ind. Ct. App. 2003). First, the defendant must show that counsel's performance was deficient. Strickland, 466 U.S. at 687. This requires a showing that counsel's representation fell below an objective standard of reasonableness and that the errors were so serious that they resulted in a denial of the right to counsel guaranteed to the defendant by the Sixth and Fourteenth Amendments. Id. at 687-88. Second, the defendant must show that the deficient performance resulted in prejudice. 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. A reasonable probability is a probability sufficient to undermine confidence in the outcome. Id.

II. Offer of Proof

Howell argues that his trial attorney was ineffective for failing to make an offer of proof regarding the alleged sexual relationship between B.S. and B.H. Although he concedes that this evidence would normally have been inadmissible pursuant to Indiana Evidence Rule 412,[2] Howell insists that Ramsey's testimony opened the door to the

[2] In relevant part, Rule 412 provides as follows:

> (a) In a prosecution for a sex crime, evidence of the past sexual conduct of a victim or witness may not be admitted, except:
>
> (1) evidence of the victim's or of a witness's past sexual conduct with the defendant;
>
> (2) evidence which shows that some person other than the defendant committed the act upon which the prosecution is founded;
>
> (3) evidence that the victim's pregnancy at the time of trial was not caused by the defendant; or

evidence, implicating Howell's right to cross-examine witnesses pursuant to the Sixth Amendment to the United States Constitution.

Ramsey was a social worker who interviewed B.S. on five separate occasions. During these sessions, B.S. discussed Howell's molestation and may have also mentioned her alleged sexual relationship with B.H. At Howell's trial, Ramsey testified about his counseling sessions with B.S.:

> Q. I'm going to ask you very specific questions and please try to stay within the perimeters of the questions I ask you. Do you believe that [B.S.] has the ability to know and understand acts that may have happened to her?
>
> A. Yes I do. . . . .
>
> Q. Do you perceive any indication that [B.S.] may have fabricated the story of her abuse because of some psychological or emotional need?
>
> A. No I do not.
>
> ***
>
> Q. Is it unusual for child molest victims as a whole not to resist when the act of sexual abuse is occurring?
>
> A. Not . . . it's more common than it is uncommon. It's very rare in fact for children to resist. Even children that are twelve, thirteen, fourteen, fifteen. It's very unusual for them to resist.
>
> Q. Is it unusual for child molesting victims as a whole not to scream out or yell for help when the act of abuse is occurring?
>
> A. Not unusual. . . . [V]ery common for them not to.

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(4) evidence of conviction for a crime to impeach under Rule 609.

Evid. R. 412(a).

Q. Is it unusual for child molesting victims as a whole not [to] confide in family members or anybody else about what's going on?

A. Again that's more the rule than it is the exception . . .

***

Q. Is it unusual for child molesting victims as a whole to be confused about details of the molesting?

A. Yes, many times they don't remember the details . . . .

Q. So if a child molesting victim as a whole doesn't remember specific details that other people remember, that's not unusual?

A. Not unusual.

***

Q. Do you believe [B.S.] is prone to exaggeration in sexual matters?

A. No I didn't find any evidence of that at all.

Q. Did you learn anything about [B.S.] that would be inconsistent with the victim being a victim of sexual abuse?

A. No not at all.

Q. Has [B.S.'s] version of the events since you began meeting with her . . . from the time you stopped remained consistent?

A. Very consistent . . . .

Trial Tr. p. 250-53. Howell argues that, notwithstanding Rule 412 and the order in limine, Ramsey's testimony opened the door to the admission of evidence of the relationship between B.S. and B.H.:

> Ramsey's testimony was offered to corroborate B.S.'s and the State's allegation B.S. had sexual contact, and Danny Howell was the perpetrator. The State by offering Ramsey's testimony opened the door to impeachment evidence that a specific perpetrator other than Danny Howell was responsible for B.S.'s psychological condition. Here, the State opened the door to impeachment evidence

> B.S. had been sexually active with her older stepbrother B.H. when she was thirteen years old. That evidence would have been admissible on whether she was prone to fabricate or exaggerate in sexual matters, whether her inability to recall details of being molested by Howell was because she was confusing such details with her sexual activities with B.H., and whether her version of events that she was a victim of sexual abuse meant she had been abused by her older stepbrother, Howell[,] or by both of them.

Appellant's Br. p. 11.

Howell directs our attention to Steward v. State as support for his contention that the evidence would have been admissible. 636 N.E.2d 143 (Ind. Ct. App. 1994), aff'd in relevant part, 652 N.E.2d 490, 499-500. In Steward, the defendant was charged with five counts of child molesting. At trial, the State offered expert testimony that the victim, S.M., had exhibited changed behaviors consistent with victims of child abuse, such as low self-esteem, guilt, depression, and a decline in school performance, and that S.M. exhibited improvement following disclosure of the molestation. Id. at 146-47.

This court found that the testimony was properly admitted into evidence but also held that it was fundamental error to have prevented the admission of exculpatory evidence that, at the same time S.M. disclosed Steward's molestation, she made accusations that four other individuals had molested her as well. In considering whether the trial court's decision to exclude that evidence denied Steward's Sixth Amendment right to cross-examination, this court engaged in the following analysis:

> . . . In partial corroboration, once there is evidence that sexual contact did occur, the witness's credibility is automatically "bolstered." Tague [v. Richards, 3 F.3d 1133, 1138 (7th Cir. 1993)]. . . .

> In other words, the risk of partial corroboration arises when the State introduces evidence of the victim's physical or psychological condition to prove that sexual contact occurred and, by implication, that the defendant was the perpetrator. Once admitted, such evidence may be impeached by the introduction through cross-examination of specific evidence which supports a reasonable inference and tends to prove that the conduct of a perpetrator other than the defendant is responsible for the victim's condition which the State has placed at issue. . . .
>
> Here, in order to prove that sexual contact occurred, the State introduced expert testimony that S.M.'s behavior was consistent with that of other victims of child sexual abuse syndrome. More importantly, the State produced evidence that S.M.'s manifestations of child sexual abuse syndrome improved once she reported that Steward had molested her and that a victim of child sexual abuse often improves after identifying the molester. This evidence does more than suggest inferentially that Steward caused S.M.'s condition; it is more than partial corroboration. It is evidence offered to prove that it was Steward who molested S.M. As a result of the State's evidence, the suggested inference is that the improvement in S.M.'s behavior was directly attributable to the defendant's absence from her presence. Thus, when the State presented evidence of S.M.'s behavior which actually linked the sexual contact to Steward and supported the inference that Steward was the perpetrator, the State opened the door to Steward's introduction of exculpatory evidence through cross-examination, limited to the scope of direct examination on that issue.

Id. at 149-50 (emphases in original). Finding that the exclusion of the evidence of prior molestations through cross-examination, which prohibited Steward from proving that there was another possible explanation for S.M.'s behavior, was a violation of his Sixth Amendment right of cross-examination, this court reversed Steward's conviction on the

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count of child molesting to which the evidence would have been relevant.

We find Steward easily distinguished from the case at hand. First, Howell offered no evidence at the post-conviction hearing that the relationship between B.S. and B.H.

was anything other than consensual. Moreover, he offered no evidence that a consensual sexual relationship would have caused B.S. to have behaved as though she had been molested. As put by the State, "there was no evidence that B.S. ever confused the acts of molestation committed by [Howell] with her sexual relationship with B.H." Appellee's Br. p. 8.

In any event, unlike in Steward, Ramsey did not testify that B.S. exhibited behaviors consistent with a victim of child molestation or that her behavior improved or changed after she disclosed the molestation. To the contrary, Ramsey merely testified that it is not unusual for victims of child molestation to refrain from resisting, to refrain from screaming for help, to refrain from confiding in family members about the molestation, and to be confused about the details of the molestation. As to B.S. specifically, he stated that he had no reason to conclude that she had fabricated her allegation, that she is not prone to exaggeration in sexual matters, that her version of events remained consistent, and that nothing about B.S. was inconsistent with being a victim of sexual abuse.

Unlike in Steward, this evidence was not "evidence of the victim's physical or psychological condition to prove that sexual contact occurred and, by implication, that the defendant was the perpetrator." 636 N.E.2d at 149. We cannot conclude that this evidence opened the door to testimony regarding a sexual relationship between B.S. and B.H. because Howell's Sixth Amendment right to cross-examination was simply not implicated. Cf. Tague, 3 F.3d at 1138-39 (holding that, where State introduced evidence that child molestation victim's hymen had been damaged to prove that sexual contact had

occurred, defendant was entitled to rebut the evidence by showing another possible source of the hymenal damage); Davis v. State, 749 N.E.2d 552, 555-56 (Ind. Ct. App. 2001) (holding that, where the State introduced physical evidence that the twelve-year-old victim had engaged in sexual intercourse, defendant was entitled to introduce evidence that she had had sexual partners other than him to rebut the inference that he had raped her). Under these circumstances, therefore, we cannot say that Howell's trial counsel was ineffective for failing to make an offer of proof regarding the sexual relationship between B.S. and B.H.

Furthermore, we note that even if we had concluded that an offer of proof should have been made, Howell would still fail in his ineffective assistance claim because he cannot establish prejudice given the substantial evidence in the record supporting his convictions. B.S. testified that Howell had engaged in sexual intercourse with her twice when she was thirteen and again when she was fourteen. Furthermore, four witnesses testified that they saw Howell pat B.S.'s legs inside her thigh, pat her bottom with his fingers between her legs, place his crotch area on her hand, and press the front of his body against B.S.'s bottom. Trial Tr. p. 196-98, 209, 312-14, 223, 234-37. We do not find the post-conviction court's conclusion that this evidence is "overwhelming" to be clearly erroneous. Appellant's App. p. 12. Therefore, we find that it was not clearly erroneous for the post-conviction court to have concluded that Howell established neither deficient performance nor prejudice, thereby denying his claim for post-conviction relief.

The judgment of the post-conviction court is affirmed.

NAJAM, J., and KIRSCH, J., concur.

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IN THE

COURT OF APPEALS OF INDIANA

No. 90A02-0407-CR-571

DARNY W. HOWELL,	)	Appeal from the Wells
	)	Circuit Court
Appellant (Defendant Below),	)	No. 90C01-0310-FA-0005
	)	
v.	)	
	)	
STATE OF INDIANA,	)	The Honorable
	)	David L. Hanselman, Sr.,
Appellee (Plaintiff Below).	)	Judge.

REPLY BRIEF OF DEFENDANT-APPELLANT

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Howell's Right To A Fair Trial Was Denied When The Court Overruled His Objection And Allowed The State To Corroborate The Alleged Victim's Claim Of Molestation Through Expert Accrediting Testimony Where The Jury Was Not Informed That The Alleged Victim Had Alleged She Had Also Been Molested By Another Person 2

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IN THE

COURT OF APPEALS OF INDIANA

No. 90A02-0407-CR-571

DANNY W. HOWELL,	)	Appeal from the Wells
	)	Circuit Court
Appellant (Defendant Below),	)	No. 90C01-0310-FA-0005
	)	
v.	)	
	)	
STATE OF INDIANA,	)	The Honorable
	)	David L. Hanselman, Sr.,
Appellee (Plaintiff Below).	)	Judge.

REPLY BRIEF OF DEFENDANT-APPELLANT

Summary of Reply Argument

Contrary to the State's argument, the fact that Social Worker Ramsey's testimony was within the boundaries of the type of "partially accrediting" expert testimony that may be admissible in a child molest prosecution in Indiana does not mean that it wasn't error to admit that testimony in Howell's case. It was error to admit Ramsey's "partially accrediting" testimony here because the jury wasn't informed that the alleged victim had alleged that she had also been

molested by Howell's son, which made the testimony in the form offered by the State, misleading and subjected Howell to grave danger of unfair prejudice.

Further, contrary to the State's argument, Howell's failure to seek admission at trial of evidence, which would have informed the jury of the alleged victim's allegations that Howell's son had also molested her, is of no consequence to whether or not it was error to admit Ramsey's testimony, which he did timely object to and preserve as an issue for appeal. Furthermore, as with the case with any evidence, it is the party seeking admission of the evidence that bears the burden of establishing a proper foundation for its admission for a proper purpose.

Argument I

Howell's Right To A Fair Trial Was Denied When The Court Overruled His Objection And Allowed The State To Corroborate The Alleged Victim's Claim Of Molestation Through Expert Accrediting Testimony Where The Jury Was Not Informed That The Alleged Victim Had Alleged She Had Also Been Molested By Another Person.

Over Howell's timely objections, the State was allowed to inform Howell's jury, through Social Worker Ramsey's expert testimony, that Schwob's behavior and psychological condition were entirely consistent with that of a child who had been molested. Thus, the State was able to bolster the credibility of Schwob's improbable story that Danny Howell had repeatedly entered her bedroom and molested her through Ramsey's "partially accrediting" expert testimony.

Howell's jury, however, was not informed that Schwob claimed that she also had been molested by Howell's sixteen year old son, Brandon. Thus, the admission of Ramsey's "partially accrediting" testimony allowed the jury to inaccurately conclude that Danny Howell was the only possible source responsible for Schwob's psychological condition being consistent with that of a child who had been molested. In turn, this inaccurate conclusion drawn from Ramsey's testimony allowed the jury to unreliably reason by implication that if Schwob had been molested, then it could only have been Danny Howell who had molested her.

The State maintained at trial, and continues to maintain on appeal, that it wasn't error for the trial court to allow the jury to wrongly and unreliably conclude from Ramsey's "partially accrediting" testimony that Danny Howell was the only "possible source" or sole possible perpetrator. In support of its argument, the State points out that Ramsey's testimony was of the type and in the form of "partially accrediting" expert testimony generally permitted in Indiana [*Appellee's Brief*, at 5-7].

Contrary to the State's arguments, the fact that expert "partially accrediting" testimony of the ilk of Ramsey's is generally admissible in child molest prosecutions doesn't make it always properly admissible in each and every case regardless of the particular facts or circumstances. In fact, neither *Laurence v. State*, 464 N.E.2d 923 (Ind. 1984), nor any of it's progeny stand for the proposition that it's proper and permissible for a trial court to admit an expert's "partially accrediting"

testimony in a child molest case when both the State and the court know that it would be misleading and would allow the jury to draw fallacious and unreliable inferences of the defendant's guilt because the alleged victim is claiming that she was also molested by others.

In Howell's case, both the State and the trial court knew full well that Schwob claimed that Howell's son had also molested her. The prosecutor told the court that Schwob "acknowledged she had sexual relationships with the son of the defendant . . . ." [MIL Tr. 7, Tr. 246-47]. Therefore, both the State and the trial court knew that the inference of Howell's guilt, which the State was inviting, indeed insisting, that the jury draw from Ramsey's "partially accrediting" testimony was unreliable at best and totally wrong at worst.

An inference of Howell's guilt drawn from Ramsey's testimony accrediting Schwob's claims that she had been molested is patently unreliable. If Schwob had been molested by someone other than Danny Howell, the fact Ramsey believed that her psychological condition and behavior were consistent with that of a child who has been molested can't accurately or reliably support an inference that Danny Howell had to be the one who molested her.

The court, nevertheless, allowed the State to present Ramsey's "partially accrediting" testimony over Howell's objection that Ramsey's testimony was misleading and would allow the jury to draw an unreliable inference because of Schwob's claims that she had also been molested by Brandon Howell [Tr. 246-47].

By doing so, it erroneously enabled and invited the jury to draw the inference of Howell's guilt from testimony that the court knew or should have known was misleading and unreliable when used to draw an inference that if Schwob had been molested, then by implication it was Danny Howell who had to be the molester. Thus, it was plainly error for the trial court to overrule Howell's objections and allow Ramsey's "partially accrediting" testimony under the circumstances in Howell's case.

The State further argues that Howell failed to preserve any issue for appeal concerning whether evidence of Schwob's allegations that Howell's son, Brandon, had also molested her should have been admitted at trial. The State correctly points out that the trial court's pre-trial ruling in limine prohibiting Howell from mentioning Schwob's allegations against Brandon was merely a preliminary ruling, and as such, it preserves nothing for appeal. And also that to preserve the issue for appeal, Howell was required to request the court at trial to abrogate it's pre-trial in limine order prohibiting mentioning Schwob's allegations against Brandon, and if the court had refused to do so, to then make a proper offer to prove at trial that Schwob had made such allegations against Brandon [*Appellee's Brief*, at 7-8].

The State's observation about Howell's attorney's failure to preserve any issue for appeal concerning whether the trial court would have committed error by refusing to admit evidence at trial of Schwob's allegations that Brandon had

also molested her may be well-founded. But the State's observation is nothing more than a "red herring" intended to divert the Court's attention from the actual issue Howell has raised on appeal, which was preserved at trial.

The issue Howell has raised on appeal is the court's overruling of his objection that Social Worker Ramsey's "partially accrediting" testimony was improper and misleading because Schwob had claimed Howell's son had also molested her [*Appellant's Brief*, at 12]. The State's argument that Howell failed to preserve a separate and discrete issue for appeal has no application to the issue Howell did preserve at trial and is arguing on appeal.

The crux of the State's argument on appeal appears to be that it has a right to introduce evidence that it knows has a great potential to mislead a jury into drawing an unfounded and unreliable inference of a defendant's guilt because Howell could have sought permission from the trial court to introduce evidence, which could have attenuated the harm and prejudice engendered by the admission of the State's misleading evidence, but he made no effort to seek permission to do so from the trial court.

This Court should soundly reject the State's argument that it has a right to admit misleading and unfairly prejudicial evidence as long as there is other evidence available that a defendant might be allowed to use that could attenuate the unfair prejudice from the admission of the State's evidence. Even relevant evidence should be excluded if it's probative value is substantially outweighed by

its danger of unfair prejudice, confusion of issues or misleading the jury. Ind. Evidence Rule 403. Significantly, Evid. R. 403 doesn't say that in spite of the fact that evidence presents a danger of unfair prejudice or of misleading the jury, the trial court should admit it, if there's other evidence the opposing party might possibly be able to introduce to attenuate or alleviate the unfair prejudice from admitting the State's evidence in the first place.

The error here was in the trial court's original ruling, and Howell preserved that error for appeal by making a timely objection. It might well have been the more prudent course, once the trial court erroneously overruled his objections to Ramsey's accrediting testimony, for Howell's attorney to seek permission to introduce evidence concerning Schwob's allegations against Brandon in order to try to alleviate the harm and unfair prejudice that resulted from Ramsey's testimony. But if the trial court hadn't erroneously overruled his objections to Ramsey's testimony in the first place, then there wouldn't have been any need for Howell to try to get the court to let him inform the jury about Schwob's allegations against Brandon to try to cure the prejudice resulting from the court's erroneous ruling.

As in any other circumstance where evidence is potentially admissible for limited purposes, but would be inadmissible for other purposes, the burden is on the party seeking to admit the evidence for the proper purpose to establish the necessary foundation to make the evidence admissible, if the opposing party

makes a timely objection. Ind. Evidence Rule 104(b). Here for example, once Howell objected to Ramsey's testimony on the basis that it would be misleading given Schwob's allegations that Howell's son had also molested her, all the State would have had to do to meet Howell's objection and have Ramsey's testimony properly admitted would have been to offer to have Ramsey inform the jury that Schwob had also alleged that Howell's son had molested her. But the State failed to do so; and it, not Howell, failed to establish the necessary foundation to have Ramsey's accrediting testimony admitted under the circumstances in this case.

Conclusion

For all the foregoing reasons, Appellant Danny W. Howell respectfully continues to request the Court to vacate his convictions and remand this cause to the trial court with instructions to grant a new trial. In the alternative, Howell continues to request the Court to remand this cause to the trial court with instructions to re-sentence him to an aggregate term of no more than forty years.

Respectfully submitted,
SUSAN K. CARPENTER
Public Defender of Indiana
Att. No. 0003127-49

By: _____
DAVID P. FREUND
Deputy Public Defender
Att. No. 0006990-49

Attorneys for Appellant

IN THE

COURT OF APPEALS OF INDIANA

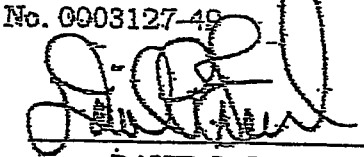
DANNY W. HOWELL,	)	
	)	
Appellant (Defendant Below),	)	
	)	
v.	)	No. 90A02-0407-CR-571
	)	
STATE OF INDIANA,	)	
	)	
Appellee (Plaintiff Below).	)	

CERTIFICATE OF SERVICE

I hereby certify that I have, this 25th day of January, 2005, served upon Steve Carter, Attorney General of Indiana, pursuant to Ind. Trial Rule 5(B)(1), by hand delivery, two (2) copies of the above and foregoing REPLY BRIEF OF DEFENDANT-APPELLANT filed in the Indiana Court of Appeals in the above-captioned cause of action.

Respectfully submitted,

SUSAN K. CARPENTER
Public Defender of Indiana
Att. No. 0003127-49

By: 

DAVID P. FREUND
Deputy Public Defender
Att. No. 0006990-49

Attorneys for Appellant

APPENDIX

B

NOTICE

Wells Circuit Court
102 W. Market Street West
Bluffton Indiana 46714

State Vs Howell #138701 90C01-0310-FA-000005

90C01-0310-FA-000005
To: Danny W Howell
DOC # 138701
6908 South Old Highway 41
Carlisle, IN 47838

To view any documents attached, type the hyperlink provided below in a web browser. Note this link is valid for 21 days. If you need a copy of this document, download it immediately.

If a document is confidential, the system will prompt you to enter your email address. However, because you received this paper notice, the court does not have a valid email address for you. Please file an Appearance with the clerk and include a valid email on the Appearance.

If you are unable to download the document attached and need a physical copy of the document, please contact the clerk or court.

EVENTS

Entry Date	File Stamped / Order Signed	Event and Comments
05/12/2025	05/12/2025	Order Received from the Court of Appeals

https://m.in.gov/CZFVVP8Y

OTHER PARTY - NOTICED	OTHER PARTY - ENOTICED
N/A	David Gregory Crell (Prosecutor)

STATE OF INDIANA	)	IN THE WELLS CIRCUIT COURT
	)	
COUNTY OF WELLS	)	CASE NUMBER: 90C01-0310-FA-000005

STATE VS HOWELL #138701

ENTRY AND ORDER RE: LETTER/SELF-REPRESENTED REQUEST OR NON-CONFORMING PLEADING

The Court having received on March 20, 2025, the document(s) not consisting of a proper pleading as otherwise required by the Indiana Trial Rules, now finds and orders as follows:

_____Deems it to be correspondence by a non-party (not seeking intervention), disregards the same, and takes no action and forwards to all parties. Filings are usually allowed only by counsel or self-represented parties.

_____Deems it to be a sufficiently pled motion and request for hearing, and sets this matter for hearing on the following issues: _____.

__X__Deems it to be incoherent, insufficient and/or misinformed and without legal basis, and the Court takes no further action.

_____Deems it to be a request for modification, that is repetitive or legally or factually without merit, and the same is denied.

_____Finds it to be submitted by a party currently represented by counsel, strikes it from the record as bifurcated representation is generally prohibited under Indiana law.

_____Finds it fails to comply with Indiana Trial Rule 5, in that it was not served on all parties of record. The Court is prohibited from engaging in ex parte communication.

_____Sets this matter for hearing on the _____. at _____. All parties are ordered to personally appear and be prepared to address the Court.

_____The Court now takes no action on the non-conforming pleading/letter, other than issuing this Order.

_____Should the sender desire further Court action in this matter, the sender is directed to contact counsel and/or observe proper Court procedures (such as filing petitions, motions, etc., with copies and notice to all parties) to bring the matter to the Court's attention.

_____The Court has previously ruled on the issues presented by the Defendant and the Court affirms its previous decision.

SO ORDERED: 3/20/2025

Kenton W Kiracofe, Judge
Wells Circuit Court

Distribution: Defendant
Wells County Prosecutor's Office

CRIMINAL NOTICE
WELLS CIRCUIT COURT
102 W. Market Street West
Bluffton Indiana 46714

State Vs Howell #138701

90C01-0310-FA-000005

To: Danny W Howell
DOC # 138701
6908 South Old Highway 41
PO Box 500
Carlisle IN 47838

ATTORNEYS	PARTIES
David Gregory Crell	PLAINTIFF State of Indiana
Danny W Howell	DEFENDANT Danny W Howell

EVENTS:

Entry Date	File Stamp/ Order Signed/ Hearing Date	Event and Comments
02/11/2025		Administrative Event (Form 10-1 Notice of Completion of Clerk's Record filed)

Distribution:

IN THE
INDIANA COURT OF APPEALS

Case No.: 25A-CR-00316

DANNY HOWELL, Appellant,	)	Appeal from the Wells Circuit Court
vs.	)	Trial Court Case No: 90C01-0310-FA-000005
STATE OF INDIANA, Appellee.	)	The Honorable Kenton W. Kiracofe, Judge

NOTICE

Cindra S. Bates, the Court Reporter of the Wells Circuit Court, represents to the Court and notifies the parties as follows:

1. On February 11, 2025, this Reporter received Appellant's Notice of Appeal wherein he seeks to request to transfer to the Supreme Court the Order of the Court of Appeals entered on January 24, 2025, that declined to authorize the filing of a successive petition for post-conviction relief, in Court of Appeal Cause No. 24A-SP-3142,
2. In said Notice, Appellant requests that "The official court reporter of this Court is requested to transcribe, certify, and file with the clerk of this Court a transcript of all proceedings recorded from the filing date of the original charging information up to and including all proceedings in the current matter, including exhibits."
3. On October 27, 2020, the Indiana Court of Appeals issued an order in Court of Appeals Case No. 90A02-0407-CR-571, which is the appellate case for Trial Court Case No. 90C01-0310-FA-000005; in relevant part, said order states that "1. On June 29, 2005, the Court ordered the Office of the Public Defender of Indiana to provide Appellant with a free copy of the record on appeal. 2. Because he has already been granted a free copy of the record on appeal, Appellant's Verified Petition for Copy of Record on Appeal is denied."
4. Review of the Chronological Case Summary (CCS) for 90C01-0310-FA-000005

reveals that no proceedings have been were conducted, thus not recorded, since the above-referenced order was issued on October 27, 2020, including for Appellant's Successive Petition for Post-Conviction Relief, which is the subject of the above-captioned appellate action.

5. As such, because no hearing was held on the Successive Petition for Post-Conviction Relief, there is no record to be transcribed.

/s/Cindra S. Bates
Court Reporter

CERTIFICATE OF SERVICE

I certify that on February 25, 2025, I served a copy of this document upon the following person(s) by United States Postal Service, postage pre-paid; electronic mail; or by placing a copy in the mailbox located in the Offices of the Wells Circuit Court that has been designated by the recipient for the receipt of such materials: Wells County Prosecuting Attorney; Danny Howell #138701, Wabash Valley Correctional Facility, P.O. Box 1111, Carlisle, Indiana 47838; and Theodore Edward Rokita, Office of the Attorney General, 302 West Washington Street, IGCS-Fifth Floor, Indianapolis, Indiana 46204.

/s/Cindra S. Bates
Court Reporter

STATE OF INDIANA) IN THE WELLS CIRCUIT COURT
)
COUNTY OF WELLS) CASE NUMBER: 90C01-0310-FA-000005

STATE VS HOWELL #138701

ENTRY AND ORDER RE: LETTER/SELF-REPRESENTED REQUEST OR NON-CONFORMING PLEADING

The Court having received on February 5, 2025, the document(s) not consisting of a proper pleading as otherwise required by the Indiana Trial Rules, now finds and orders as follows:

_____Deems it to be correspondence by a non-party (not seeking intervention), disregards the same, and takes no action and forwards to all parties. Filings are usually allowed only by counsel or self-represented parties.

_____Deems it to be a sufficiently pled motion and request for hearing, and sets this matter for hearing on the following issues: _____.

_____Deems it to be incoherent, insufficient and/or misinformed and without legal basis, and the Court takes no further action.

__X__Deems it to be a request , that is repetitive or legally or factually without merit, and the same is denied.

_____Finds it to be submitted by a party currently represented by counsel, strikes it from the record as bifurcated representation is generally prohibited under Indiana law.

_____Finds it fails to comply with Indiana Trial Rule 5, in that it was not served on all parties of record. The Court is prohibited from engaging in ex parte communication.

_____Sets this matter for hearing on the _____ at _____. All parties are ordered to personally appear and be prepared to address the Court.

__X__The Court now takes no action on the non-conforming pleading/letter, other than issuing this Order.

__X__Should the sender desire further Court action in this matter, the sender is directed to contact counsel and/or observe proper Court procedures (such as filing petitions, motions, etc., with copies and notice to all parties) to bring the matter to the Court's attention.

__X__The Court has previously ruled on the issues presented by the Defendant and the Court affirms its previous decision.

SO ORDERED: 2/6/2025

Honorable Kenton W Kiracofe
Judge, Wells Circuit Court

Distribution: All parties of record.

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29-37

NOTICE

Wells Circuit Court
102 W. Market Street West
Bluffton Indiana 46714

State Vs Howell #138701 90C01-0310-FA-000005

90C01-0310-FA-000005
To: Danny W Howell
Wabash Valley Correctional Fac
P.O. Box 1111 #138701
Carlisle, IN 47838

To view any documents attached, type the hyperlink provided below in a web browser. Note this link is valid for 21 days. If you need a copy of this document, download it immediately.

If a document is confidential, the system will prompt you to enter your email address. However, because you received this paper notice, the court does not have a valid email address for you. Please file an Appearance with the clerk and include a valid email on the Appearance.

If you are unable to download the document attached and need a physical copy of the document, please contact the clerk or court.

EVENTS

Entry Date	File Stamped / Order Signed	Event and Comments
02/05/2025	02/05/2025	Correspondence to/from Court Filed Notice of Appeal

https://m.in.gov/WZN8L32R

OTHER PARTY - NOTICED	OTHER PARTY - ENOTICED
N/A	David Gregory Crell (Prosecutor)

FILED

FEB 05 2025

WELLS COUNTY
CIRCUIT/SUPERIOR
COURT CLERK

STATE OF INDIANA)
) SS;
COUNTY OF SULLIVAN)

IN THE WELLS CIRCUIT COURT

OF WELLS COUNTY

DANNY W. HOWELL,
PETITIONER,

-V-

STATE OF INDIANA,
RESPONDENT.

LOWER
CASE NO. 90C01-0310-FA-5

NOTICE OF APPEAL

COMES NOW PETITIONER, DANNY W. HOWELL, PROSE, PURSUANT TO App. R. 9 (A), AND RESPECTFULLY GIVES NOTICE OF REQUEST TO TRANSFER TO THE SUPREME COURT FROM THE ORDER DECLINING TO AUTHORIZE TO AUTHORIZE THE FILING OF A SUCCESSIVE PETITION FOR POST-CONVICTION RELIEF, ON JANUARY 24, 2025. THIS APPEAL IS TAKEN TO THE SUPREME COURT OF INDIANA, CAUSE NO. 24A-SP-03142.

THE CLERK OF THIS COURT IS REQUESTED TO ASSEMBLE, IN CHRONOLOGICAL ORDER, ALL PAPERS FILED, OR OFFERED FOR FILING, IN THIS ACTION, ALONG WITH A CHRONOLOGICAL CASE SUMMARY.

THE OFFICIAL COURT REPORTER OF THIS COURT IS REQUESTED TO TRANSCRIBE, CERTIFY AND FILE WITH THE CLERK OF THIS COURT, A TRANSCRIPT OF ALL PROCEEDINGS RECORDED FROM THE FILING DATE OF THE ORIGINAL CHARGING INFORMATION UP TO AND INCLUDING ALL PROCEEDINGS IN THE CURRENT MATTER, INCLUDING ALL EXHIBITS.

RESPECTFULLY SUBMITTED THIS 3 DAY OF FEBRUARY, 2025.

Danny W. Howell
PETITIONER/PROSE

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CERTIFICATE OF SERVICE

I, DANNY W. HOWELL, do hereby certify that on this 9 day of FEBRUARY, 2025 a true and correct copy of the foregoing Motion was served upon the Prosecuting Attorney for WELLS County, BLUFFTON, Indiana; by ordinary, first class, postage prepaid, United States Mail.

Danny W. Howell, #138701
Petitioner

CHRONOLOGICAL CASE SUMMARY

CASE SUMMARY

CASE NO. 90C01-0501-PC-000001

Howell Vs State Of Indiana

§ Location: Wells Circuit Court
§ Judicial Officer: Kiracofe, Kenton W
§ Filed on: 01/20/2005
§ Legacy System Number: C105PC00001
§

CASE INFORMATION

Statistical Closures
03/07/2005 Dismissed

Case Type: PC - Post Conviction Relief Petition

Case Status: 03/07/2005 Decided

CASE ASSIGNMENT

DATE	Current Case Assignment	
	Case Number	90C01-0501-PC-000001
	Court	Wells Circuit Court
	Date Assigned	01/20/2005
	Judicial Officer	Kiracofe, Kenton W

PARTY INFORMATION

Petitioner — Howell, Danny
Wabash Valley Corr. Fac.
Po Box 1111
Carlisle, IN 47838

DATE	EVENTS & ORDERS OF THE COURT	INDEX
01/21/2005	Converted Event *Transcript Of Proceedings No. 77C01-0501-MI-00005 of the Sullivan Circuit Court filed. (RJO? N) | JTS Minute Entry Date: 01/21/2005*	
01/26/2005	Converted Event *Motion For Change Of Venue From The Judge filed. Affidavit In Support Of Motion For Change Of Venue From The Judge filed. Order filed. (RJO)(Notice) (RJO? N) | JTS Minute Entry Date: 01/26/2005*	
01/31/2005	Converted Event *State's Response To Petition For State Writ Of Habeas Corpus (Petition For Post Conviction Relief) filed. (RJO? N) | JTS Minute Entry Date: 01/31/2005*	
02/02/2005	Converted Event *Motion To Withdraw Appearance filed. Order Granting Withdraw filed. (RJO) (RJO? N) | JTS Minute Entry Date: 02/02/2005*	
02/10/2005	Converted Event *Letter filed. (RJO? N) | JTS Minute Entry Date: 02/10/2005*	
02/28/2005	Converted Event *Verified Petition Requesting Appointment Of Special Prosecutor filed nunc pro tunc as of February 22, 2005. Motion For Change Of Venue From The Judge & County After Prescribed Time Has Run, Pursuant To State Habeas/PCR-1 Sec. 4(b) filed. All matters scheduled for hearing Monday, March 7, 2005, at 1:00 p.m. (Notice) Affidavit In Support Of Motion For Change Of Venue From The Judge filed. Notice Of Non-Representation filed. Petitioner's Reply (Traverse) To State Response To Petition For State Writ Of Habeas Corpus (Post Conviction Relief) filed. Transport Order filed. (RJO) (Notice) (RJO? N) | JTS Minute Entry Date: 02/28/2005*	

CHRONOLOGICAL CASE SUMMARY

CASE SUMMARY

CASE NO. 90C01-0501-PC-000001

03/07/2005	Converted Event *Order filed. (RJO)(Notice) (DISPOSED: DI) (RJO? N) | JTS Minute Entry Date: 03/07/2005*
03/16/2005	Converted Event *Motion To Compel Court To Produce All Documents Pertaining To Petitioner's State Habeas Corpus w/ Exhibits filed. Order Requiring Court To Produce Petition Of State Habeas Corpus/ PCR 1 C and Exhibits To Petitioners Wife, Lorinda Howell, POA filed. (RJO)(Notice) (RJO? N) | JTS Minute Entry Date: 03/16/2005*
11/23/2010	Converted Event *IMAGED CONFIDENTIAL FILE PRIOR TO SCANNING INSTALLATION (RJO? N) | JTS Minute Entry Date: 11/23/2010*
11/23/2010	Converted Event *IMAGED CONFIDENTIAL FILE PRIOR TO SCANNING INSTALLATION (RJO? N) | JTS Minute Entry Date: 11/23/2010*
11/23/2010	Converted Event *IMAGED ALL DOCUMENTS IN FILE PRIOR TO SCANNING INSTALLATION. (RJO? N) | JTS Minute Entry Date: 11/23/2010*
06/08/2020	Correspondence to/from Court Filed File Stamp: 06/08/2020 Filed By: Petitioner Howell, Danny *Copy of CCS mailed to Mr. Howell*

	1. SEE CCS ENTRY FOR OFFENSE DESCRIPTION- Conversion Unknown
05/11/2004	**Judgment** *Conversion* 2. SEE CCS ENTRY FOR OFFENSE DESCRIPTION- Conversion Unknown
04/25/2005	Converted Event *For all CCS entries prior to this date see hard copy of CCS. Motion To Compel Counsel To Produce All Documents Pertaining To Petitioner filed. (RJO? N) | JTS Minute Entry Date: 04/25/2005*
05/04/2005	Converted Event *Petition For Payment For Cost Of Appeal filed. Order filed. (RJO) Copy of Brief Of Defendant-Appellant filed. Copy of Reply Brief Of Defendant-Appellant filed. (RJO? N) | JTS Minute Entry Date: 05/04/2005*
05/10/2005	Converted Event *Notice Of Termination Of State Public Defender's Representation filed. (RJO? N) | JTS Minute Entry Date: 05/10/2005*
05/26/2005	Converted Event *Opinion Of The Court Of Appeals Of Indiana filed. (RJO? N) | JTS Minute Entry Date: 05/26/2005*
07/17/2012	Converted Event *IMAGED ALL DOCUMENTS IN FILE PRIOR TO SCANNING INSTALLATION. (RJO? N) | JTS Minute Entry Date: 07/17/2012*
07/17/2012	Converted Event *IMAGED ALL DOCUMENTS IN FILE PRIOR TO SCANNING INSTALLATION. (RJO? N) | JTS Minute Entry Date: 07/17/2012*
07/17/2012	Converted Event *IMAGED ALL DOCUMENTS IN FILE PRIOR TO SCANNING INSTALLATION. (RJO? N) | JTS Minute Entry Date: 07/17/2012*
07/17/2012	Converted Event *IMAGED ALL DOCUMENTS IN FILE PRIOR TO SCANNING INSTALLATION. (RJO? N) | JTS Minute Entry Date: 07/17/2012*
07/17/2012	Converted Event *IMAGED ALL DOCUMENTS IN FILE PRIOR TO SCANNING INSTALLATION. (RJO? N) | JTS Minute Entry Date: 07/17/2012*
07/17/2012	Converted Event *IMAGED ALL DOCUMENTS IN FILE PRIOR TO SCANNING INSTALLATION. (RJO? N) | JTS Minute Entry Date: 07/17/2012*
07/17/2012	Converted Event *IMAGED CONFIDENTIAL FILE PRIOR TO SCANNING INSTALLATION (RJO? N) | JTS Minute Entry Date: 07/17/2012*
03/25/2014	Converted Event *Court Of Appeals Order filed. (RJO? Y) | JTS Minute Entry Date: 03/25/2014*
01/03/2017	Converted Event *Letter from Defendant filed. Petition for Modification of Sentence filed. Motion for Order for Evaluation filed. Proposed Order for Evaluation filed. Proposed order for Transport filed. sjs (RJO? N) | JTS Minute Entry Date: 01/03/2017*
01/03/2017	Converted Event *Defendant's Motion for Modification of Sentence is denied. Entry and Order re: Pro Se Motion for Sentence Modification filed. (RJO? Y) | JTS Minute Entry Date: 01/03/2017*

CASE SUMMARY

CASE NO. 90C01-0310-FA-000005

01/17/2017	Converted Event *Letter from Defendant filed. Motion for Relief From Judgment Or Order filed. sjs (RJO? N) | JTS Minute Entry Date: 01/17/2017*
01/19/2017	Converted Event *Entry And Order Re: Letter/Self-Represented Request Or Non-Conforming Pleading filed as of January 18, 2017. (RJO? Y) | JTS Minute Entry Date: 01/19/2017*
02/15/2017	Converted Event *Letter from Defendant filed. Motion for Relief from Judgment or Order filed. Memorandum in Support of Motion for Relief from Judgment or Order filed. sjs (RJO? N) | JTS Minute Entry Date: 02/15/2017*
02/16/2017	Converted Event *Entry and Order Re: Letter/Self-Represented Request or Non-Conforming Pleading filed. (RJO? Y) | JTS Minute Entry Date: 02/16/2017*
12/05/2019	Correspondence to/from Court Filed File Stamp: 12/05/2019 *Certification of Venue from Sullivan County, Petition for State Writ of Habeas Corpus, Exhibits, Motion for Leave to Proceed in Forma Pauperis and Order*
12/11/2019	Order Issued (Judicial Officer: Kiracofe, Kenton W) Order Signed: 12/11/2019 *in response to Defendant's Petition for State Writ of Habeas Corpus; State given 20 days to respond.*
12/12/2019	Automated Paper Notice Issued to Parties *Order Issued ---- 12/11/2019 : Danny W Howell*
12/12/2019	Automated ENotice Issued to Parties *Order Issued ---- 12/11/2019 : Andrew John Carnall*
01/03/2020	Appearance Filed File Stamp: 01/03/2020 For Party: State Plaintiff State of Indiana *Amended Appearance*
01/03/2020	Response Filed File Stamp: 01/03/2020 Filed By: State Plaintiff State of Indiana *Respone to Habeas PCR Relief .pdf*
01/03/2020	Administrative Event *Documents received and filed*
01/07/2020	Order Issued (Judicial Officer: Kiracofe, Kenton W) Order Signed: 01/07/2020 *to clarify proceedings.*
01/07/2020	Notice Filed File Stamp: 01/07/2020 Filed By: State Plaintiff State of Indiana; Defendant Howell , Danny W *Notice - No Record to Transcribe*
01/08/2020	Automated Paper Notice Issued to Parties *Order Issued ---- 1/7/2020 : Danny W Howell*
01/08/2020	Automated ENotice Issued to Parties *Order Issued ---- 1/7/2020 : David Gregory Crell;Andrew John Carnall*

CASE SUMMARY

CASE NO. 90C01-0310-FA-000005

01/09/2020	Order Denying (Judicial Officer: Kiracofe, Kenton W) Order Signed: 01/09/2020 Movant: Defendant Howell , Danny W *Defendant's Petition for State Writ of Habeas Corpus*
01/10/2020	Automated Paper Notice Issued to Parties *Order Denying ---- 1/9/2020 : Danny W Howell*
01/10/2020	Automated ENotice Issued to Parties *Order Denying ---- 1/9/2020 : David Gregory Crell;Andrew John Carnall*

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APPENDIX

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IN THE

SUPREME COURT OF INDIANA

NO. 25A-LR-00316

STATE OF INDIANA ON THE RELATION	)
OF DANNY W. HOWELL	)
RELATOR,	)
-V-	)
THE WELLS CIRCUIT COURT AND THE	)
HONORABLE KENTON W. KIRACOFE	)
AS JUDGE THEREOF	)
RESPONDENTS.	)

BRIEF IN SUPPORT OF WRIT OF MANDAMUS

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STATEMENT OF THE CASE

In re Howell, No. 24A-PC-03142, whose Brady and actual judicial bias claim could not be raised by means of a second or successive application for postconviction relief. App. Vol. 2 at p. 1-41, may file a request to transfer to the Supreme Court petition under Ind. R. App. P. 56. Although the petition to transfer was technically deficient for failing to raise a proper issue App. Vol. 2 at p. 5-15, under Rule 57 (H)(2)(citations omitted), the Supreme Court granted it in view of the issues of public importance involved because prisoner is ["actually innocent"] and the conflicting prior decisions were the basis of an incorrect understanding of Ind. Evid. R. § 412 and Indiana's Rape Shield Law, which postconviction relief is unavailable to him; if relief is obtained by state courts App. Vol. 2 at p. 1-41 ; when prisoner renews his contention in this Court that there is an "actual innocence" exception under Indiana Constitution, Article 7, Section 4; Appellate Rule 9 (B)(3). See In re Howell, No. 25A-CR-00316. App. Vol. 2 at p. 5-15.

Further, the "verified motion to accept jurisdiction over appeals or decisions alleges the absence of jurisdiction of the respondent court or the failure of the respondent court to act when it was under a duty to act, id. at App. Vol. 2 at p. 1-41 because Howell's case was prosecuted as a pauper cause, the trial court clerk shall retain the clerk's record through the appeal, which includes a transcript of all proceedings recorded from the filing date of the original charging information up to and including all proceedings in the current matter, including exhibits." App. Vol. 2 at p. 39-40.

Furthermore, review of the chronological case summary (ccs) for 49C01-505-PC-2 reveals that recusal was mandatory due to impartiality concerns and there was no boundary changed circumstances or successive recusal. App. Vol. 6 at p. 14-15.

REASONS FOR GRANTING THE PETITION

IN RE ESTATE OF FANNING, 263 Ind. 414, 333 N.E. 2d 80, 1975 Ind. LEXIS 323 (Ind. 1975) ALTHOUGH THE PETITION FOR TRANSFER WAS TECHNICALLY DEFICIENT FOR FAILING TO RAISE A PROPER ISSUE PURSUANT TO FORMER AP. R. 11 (B) (2), THE COURT GRANTED IT IN VIEW OF THE ISSUES OF PUBLIC IMPORTANCE INVOLVED AND THE CONFLICTING PRIOR DECISIONS. SEE App.R. 56 (B). BY LIMITING THE GROUNDS FOR TRANSFER TO THE SUPREME COURT OF INDIANA, FORMER AP. R. 11 (B)(2) DISCOURAGED LITIGANTS FROM RAISING EVERY POSSIBLE CLAIM OF ERROR, WHICH IMPLIED THAT DECISION WAS NOT TO BE PUBLISHED. HOGAN V. MCBRIDE, 74 F3d 144, 1996 U.S. App. LEXIS 468 (7th Cir. Ind.), Modified, 79 F3d 578, 1996 U.S. App. LEXIS 4539 (7th Cir. Ind. 1996).

IN RE HOWELL, NO. 24A-SP-003K, Ind. R. App. P. 57 (B)'S EXCLUSION OF SUPREME COURT REVIEW OF A "DENIAL OF AN AUTHORIZATION BY A COURT OF APPEALS TO FILE A SECOND OR SUCCESSIVE APPLICATION" (id) APPLIES ONLY TO AN ACTUAL "DENIAL", NOT SOME OTHER TYPE OF RULING THAT MIGHT HAVE "THE EFFECT OF DENYING 'AUTHORIZATION'". SEE, E.G., ANNES V. STATE, 789 N.E.2d 955 (Ind. 2003) (REAL ISSUE IN DEFENDANT'S APPEAL FROM TRIAL COURT'S JUDGMENT DENYING HIS SECOND PETITION FOR POSTCONVICTION RELIEF WAS WHETHER JUSTICE DEMANDED THAT BAR OF RES JUDICATA BE WAIVED TO AVOID INJUSTICE. THUS FOR EXAMPLE, COURT OF APPEALS DENIAL OF HOWELL'S ARGUMENT THAT APPLICATION IS NOT IN FACT "SUCCESSIVE" IS REVIEWABLE IN THE SUPREME COURT, EVEN THOUGH APPELLATE COURT'S RULING HAD THE EFFECT OF DENYING AUTHORIZATION . . . TO FILE A SECOND . . . APPLICATION". Id. AS THE SUPREME COURT EXPLAINED IN ANNES V. STATE, SUPRA, "THE SUBJECT OF [REQUEST TO TRANSFER] PETITION [IN SUCH A CASE] IS NOT THE COURT OF APPEALS' DENIAL OF AUTHORIZATION" BUT

RATHER THAN VERY DIFFERENT QUESTION OF THE TRIAL COURT'S REFUSAL TO RECOGNIZE THAT . . . [THE CURRENT] PETITION FOR POSTCONVICTION RELIEF IS HOWELL'S FIRST, NOT SECOND." App. VOL. 2 at p. 5-15; 20-34.

HOWELL'S PETITION FOR THIS EXTRAORDINARY WRIT SHOULD BE GRANTED IN LIGHT OF SEABOLT V. STATE, 223 N.E.3d 221 (Ind. 2023), [SEABOLT] ARGUED:

> AN EPIDEMIC EXIST IN ELKHART, INDIANA WHERE WRONGFUL CONVICTIONS ARE PREDICTABLE PRODUCT OF POLICE MISCONDUCT AND WHITE-WASHED TRIALS. TRAGICALLY, THESE UNJUST CONVICTIONS OFTEN TAKE DECADES TO UNRAVEL, LEAVING INNOCENT MEN AND WOMEN TO LANGUISH IN PRISON FOR CRIMES THEY DID NOT COMMIT [.] GIVEN THE NEWLY DISCOVERED EVIDENCE DISCUSSED [*3] BELOW, [SEABOLT]'S CONVICTION MUST BE OVERTURNED AND A NEW TRIAL ORDERED. AFTER 18-YEARS OF WRONGFUL INCARCERATION, [SEABOLT] DESERVES TO BE ELKHART'S NEXT EXONEREE.

(App. VOL. 1 at 16-17).

P3 FURTHER, IN THIS PETITION, [SEABOLT] ARGUED THAT SHE WAS ENTITLED TO POSTCONVICTION RELIEF BECAUSE:

> (1) SHE WAS ACTUALLY INNOCENT, AS IS SHOWN BY NEWLY DISCOVERED EVIDENCE, THAT SHE COULD NOT WITH REASONABLE DILIGENCE HAVE DISCOVERED AND PRODUCED AT TRIAL; (2) SHE HAS DEMONSTRATED THAT THE STATE WITHHELD MATERIAL EXCULPATORY EVIDENCE AND IMPEACHMENT EVIDENCE AT TRIAL IN VIOLATION OF BRADY V. MARYLAND, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963) AND UNITED STATES V. GIGLIO, 405 U.S. 150, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972) MATERIALLY AFFECT-

ING HER SUBSTANTIAL RIGHTS [;] (3) SHE RELIED IN EFFECTING ASSISTANCE OF COUNSEL IN VIOLATION OF STRICKLAND V. WASHINGTON, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984) THAT FALLS BELOW AN OBJECTIVE STANDARD OF REASONABLENESS AND UNFAIRLY PREJUDICED [HER]; AND (4) PURSUANT TO Ind. Code Ann § 35-35-1-4(c)(3), HER PLEA WAS NOT KNOWINGLY AND VOLUNTARILY MADE AND THE RESULT OF INEFFECTIVE ASSISTANCE OF COUNSEL.

(App. Vol. 8 at 96) (FOOTNOTE OMITTED) ACCORDING TO [SEABOLT], "[E]ACH GROUND PROVIDE[D] AN INDEPENDENT BASIS FOR [THE POST-CONVICTION COURT] TO VACATE [SEABOLT'S CONVICTION AND GRANT A NEW TRIAL". (App. Vol. 8 at 96).

P4 ALSO, IN JUNE 2021, [SEABOLT] FILED A NINETEEN-PAGE MOTION FOR A CHANGE OF [P4] JUDGE PURSUANT TO INDIANA POST-CONVICTION RULE 1(4)(b). [SEABOLT] SPECIFICALLY ARGUED THAT THE POST-CONVICTION COURT SHOULD GRANT HER MOTION BECAUSE THE POST-CONVICTION COURT JUDGE HAD BEEN A DEPUTY PROSECUTOR IN THE ELKHART COUNTY PROSECUTOR'S OFFICE FROM 1998 UNTIL 2002. ACCORDING TO [SEABOLT], "[B]ASED UPON THIS COURT'S PRIOR EMPLOYMENT AT THAT TIME AT THE ELKHART COUNTY PROSECUTOR'S OFFICE — DURING THE PERIOD OF TIME THAT [SEABOLT] W[OULD] PRESENT EVID[ENCE] OF SYSTEMIC PROSECUTORIAL AND POLICE MISCONDUCT — THERE [WAS] AT LEAST A REASONABLE QUESTION AS TO WHETHER POLICE OR PROSECUTORIAL MISCONDUCT RESULTED IN [SEABOLT]'S WRONGFUL CONVICTION" (App. Vol. 8 at 176).

"Cf." In re HOWELL, NO. 25A-CR-00316, [HOWELL] ARGUED:

"THE LAW MUST SERVE THE CAUSE OF JUSTICE . . . . PERHAPS SOME WOULD SAY THAT

[HOWELL'S] INNOCENCE IS A MERE TECHNICALITY, BUT THAT WOULD MISS THE POINT. IN A SOCIETY DEVOTED TO THE RULE OF LAW, THE DIFFERENCE BETWEEN VIOLATING OR NOT VIOLATING A CRIMINAL STATUTE CANNOT BE SURREPTITIOUSLY BRUSHED ASIDE AS A MINOR DETAIL".

FURTHER, IN HIS PETITION, [HOWELL] ARGUED THAT HE WAS ENTITLED TO POST-CONVICTION RELIEF BECAUSE:

(1) HE IS ACTUALLY INNOCENT, AS IS SHOWN BY NEWLY DISCOVERED EVIDENCE THAT HE COULD NOT WITH REASONABLE DILIGENCE HAVE DISCOVERED AND PRODUCED AT TRIAL; (2) HE HAS DEMONSTRATED THAT THE STATE WITHHELD SIGNIFICANT EXCULPATORY AND MATERIAL IMPEACHING EVIDENCE AT TRIAL IN VIOLATION OF BRADY V. MARYLAND, 373 U.S. 83, 87, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963) AND STRICKLER V. GREENE, 527 U.S. 263, 281-82, 119 S.Ct. 1936, 144 L.Ed.2d 286 (1999) MATERIALLY AFFECTING HIS SUBSTANTIAL RIGHTS[;] (3) HIS SIXTH AMENDMENT CONFRONTATION RIGHT WAS VIOLATED WHEN THE STATE USED THE RAPE SHIELD LAW TO BAR EVIDENCE THAT ALLEGED VICTIM HAD BEEN MOLESTED PRIOR TO THE RELEVANT INSTANCE SAYLOR V. STATE, 859 N.E.2d 332 (Ind.Ct.App.1990); REDDING V. STATE, 849 N.E.2d 1061 (Ind.Ct.App.2006); AND TURNER V. STATE, 751 N.E.2d 671, 676 (Ind.Ct.App.2001); AND (4) PURSUANT TO I.C. 35-37-4-1, PROSECUTOR'S ACTION TO EXCLUDE EVIDENCE ESTABLISHING ANOTHER POSSIBLE SOURCE OF VICTIM'S BEHAVIORAL PROBLEMS AND IMPEDE HIS ABILITY TO REBUT INFERENCES THAT JURY IS ALLOWED TO DRAW FROM EXPERT TESTIMONY CONCERNING CHILD SEXUAL ABUSE ACCOMMODATION SYNDROME, VIOLATED HIS FOURTEENTH AMENDMENT DUE PROCESS RIGHT TO PRESENT A DEFENSE.

"WE HAVE SEVERAL TIMES UNDERSCORED THE 'SPECIAL ROLE PLAYED BY THE

AMERICAN PROSECUTOR IN THE SEARCH FOR TRUTH IN CRIMINAL TRIALS', COURTS, LITIGANTS, AND JURORS PROPERLY ANTICIPATE THAT 'OBLIGATIONS [TO REFRAIN FROM IMPROPER METHODS TO SECURE A CONVICTION] . . . FINALLY REST [UPON] UPON THE PROSECUTOR WILL BE FAITHFULLY OBSERVED.'

App. Vol. 2 at p. 20-34. In re Howell, No. 90601-0310-PA-5.

ALSO, IN JANUARY 2005, [HOWELL] FILED A MOTION FOR A CHANGE OF [JUDGE] PURSUANT TO P-CR 1 (4) (b) [HOWELL] SPECIFICALLY ARGUED THAT JUDGE HAS PERSONAL KNOWLEDGE THAT STEMMED FROM EXTRA-JUDICIAL SOURCES REQUIRING RECUSAL. In re Howell, No. 90601-0505-PC-2 REVEALS THE JUDGE WAS IN ATTENDANCE DISCUSSING A CHILD IN NEED OF SERVICES AND AFTER STATE RESPONSIVE TO PETITION FOR STATE WRIT OF HABEAS CORPUS — DURING SUCH TIME THAT [HOWELL] WILL HAVE] PRESENT EVIDENCE OF SYSTEMIC PROSECUTORIAL AND JUDICIAL MISCONDUCT — THERE [WAS] AT LEAST A REASONABLE QUESTION AS TO WHETHER PROSECUTORIAL AND JUDICIAL MISCONDUCT RESULTED IN [HOWELL'S] WRONGFUL CONVICTION" (App. Vol. 6 at p. 13-15).

FURTHERMORE, In re Howell, No. 90A02-0707-CR-571 (Ind. Ct. App. 2008) "COURT OF APPEALS ERRED IN FINDING TRIAL COURT'S APPLICATION OF STRICKLAND UNREASONABLE ON THE BASIS OF EVIDENCE NOT PROPERLY BEFORE THE COURT." "[T]HE STRICKLAND STANDARD OF REVIEW ASSESSES PREJUDICE UNDER A PREPONDERANCE-OF THE-EVIDENCE RATHER THAN A REASONABLE-PROBABILITY-STANDARD. Ind. Evid. R. 403. BOTH 403 AND 702(b)'S BALANCING TEST WERE NOT SATISFIED, WHERE TRIAL COURT ERRED IN ADMITTING EXPERT TESTIMONY OVER TRIAL COUNSEL'S OBJECTIONS REGARDING CHILD SEXUAL ABUSE SYNDROME EVIDENCE, WHERE THERE

WAS NO FOUNDATIONAL SHOW OF RELIABILITY UNDER 702(A) FLEENER V. STATE, 656 N.E.2d 1140 (Ind. 1995) AND "INDIANA SUPREME COURT WAS NO ALTERNATIVE BUT TO CONDUCT AN INDEPENDENT REVIEW OF THE CLAIM BECAUSE IN RE HOWELL, NO. 90A02-0809-PC-824 APPELLATE COURT'S "RULING ON [HOWELL]'S AMENDED PETITION FOR POST-CONVICTION RELIEF FOR AN EVIDENTIARY HEARING AND ON THE MERITS OF THE INEFFECTIVE ASSISTANCE CLAIM . . . RELIED UPON WHAT THE [COURT ON DIRECT APPEAL] PERCEIVED TO BE HOWELL'S FAILURE TO MAKE AN OFFER OF PROOF - Id. 1142 - App. Vol. 3 at p. 1-8, "APPELLANT'S REPLY BRIEF."

[HOWELL'S] CONVICTION AND SENTENCE SHOULD BE VACATED IN LIGHT OF BEARDEN V. STATE, 240 N.E.3d 1249, 2024 Ind. LEXIS 498, THE SUPREME COURT HELD THAT TRIAL COURT ERRED IN DENYING PETITIONER'S MOTIONS FOR RECUSAL UNDER Ind. P.R. POST-CONVICTION REMEDIES 1 (4) (h). BECAUSE THE JUDGE HAD PREVIOUSLY CONCLUDED IN A HIGHLY SIMILAR CASE THAT RECUSAL WAS MANDATORY DUE TO IMPARTIALITY CONCERNS AND NO ENUMERATED CIRCUMSTANCES OR MISTAKEN RECUSAL THAT WOULD JUSTIFY NOT RECUSING HERE.

THE RECORD CLEARLY INDICATES THAT [HOWELL] SOUGHT AN EVIDENTIARY HEARING ON HIS BRADY AND ACTUAL JUDICIAL BIAS CLAIMS, WHICH WERE REFUSED AND NOT CONSIDERED. SIMILARLY, STIVERS V. KNOX COUNTY Dep't. OF PUBLIC WELFARE, HELD THAT JUDGE WHO SERVED ON THE COMMUNITY CHILD PROTECTION TEAM THAT OVERSAW THE CASE DECIDING WHETHER A DAUGHTER WAS A CHILD IN NEED OF SERVICES AND NAMING HER A WARD OF THE DEPARTMENT OF PUBLIC WELFARE COULD NOT PRESIDE OVER THE CASE, 482 N.E.2d 746.

AT WORST, THIS IS A CLASSIC EXAMPLE OF AN EX PARTE COMMUNICATION CONTEMPLATED AND PROHIBITED BY CANNON 3 (A) (4); A PROSPECTIVE LITIGANT DISCUSSING POTENTIAL LITIGATION AS WELL AS THE EVIDENCE, ADMISSIBLE OR INADMISSIBLE, IN SUPPORT OF THAT LITIGATION

WITHOUT THE PRESENCE OF THE OTHER PARTY AND ALL DONE IN THE PRESENCE OF THE JUDGE WHO WILL PRESIDE OVER THAT PROCEEDING WHEN IT'S FILED CONSTITUTES AN INTOLERABLE SITUATION. Id. at 750. TRIAL JUDGE VIOLATED CONFRONTATION CLAUSE BY APPLYING RAPE SHIELD LAW TO BAR DEFENSE COUNSEL FROM CROSS-EXAMINING B.S. WITH DIARY PASSAGES SUPPORTING HER CONSENTUAL SEXUAL RELATIONSHIP WITH HOWELL'S SON, B.H.. THE STATE MAY NOT USE THE RAPE SHIELD STATUTE, I.C. 35-37-4-4, TO EXCLUDE EVIDENCE ESTABLISHING ANOTHER POSSIBLE SOURCE OF A VICTIMS BEHAVIORAL PROBLEMS AND IMPEDE A DEFENDANTS ABILITY TO REBUT INFERENCES THAT THE JURY IS ALLOWED TO DRAW FROM EXPERT TESTIMONY CONCERNING CHILD SEXUAL ABUSE ACCOMMODATION SYNDROME. TURNEY V. STATE, 759 N.E.2d at 676. Id. A LIE IS A LIE.

UNDER CANNON 3 (E)(1) A JUDGE SHOULD NOT SERVE IF IT IS LIKELY THAT THE ORGANIZATION WILL BE ENGAGED IN PROCEEDINGS THAT WOULD ORDINARILY COME BEFORE HIM OR WILL BE REGULARLY ENGAGED IN ADVERSARY PROCEEDINGS IN ANY COURT. Id. at 751. "FALSE AND MATERIAL EVIDENCE WAS ADMITTED AT HOWELL'S TRIAL IN VIOLATION OF HIS DUE PROCESS RIGHTS. WHERE THE STATE CANNOT USE THE RAPE SHIELD STATUTE, I.C. 35-37-4-4, BOTH AS A SHIELD AND AS A SWORD. WHERE THE STATE BOLSTERED ITS THEORY WITH EXPERT TESTIMONY ABOUT CHILD SEXUAL ABUSE ACCOMMODATION SYNDROME, BY OPENING THE DOOR TO SUCH EVIDENCE, DISCLOSURE OF THE MINORS PRIOR SEXUAL ACT BECAME MANDATORY, AND THE DEFENDANT WAS ENTITLED TO IMPEACH THE CHILD SEXUAL ACCOMMODATION SYNDROME EVIDENCE THROUGH CROSS-EXAMINATION WHICH COULD HAVE ESTABLISHED ANOTHER POSSIBLE SOURCE FOR THE MINORS EMOTIONAL UPSET. TURNEY V. STATE, 759 N.E.2d at 677-80

APPELLATE COURT'S DETERMINATION THAT "THERE WAS 'OVERWHELMING EVIDENCE OF [HOWELL'S] GUILT' INDEPENDENT OF '[IMPROPERLY ADMITTED EVIDENCE]' ALSO WAS CONTRARY TO

THAT FACTS PRESENTED AT HOWELL'S TRIAL". TESTIMONIAL EVIDENCE WAS EQUIPOISED. OBVIOUSLY, "WHERE THE TRIAL COURT HAS APPLIED THE WRONG LEGAL STANDARD, DEFERENCE DOES NOT APPLY." THE COURT IN PINCH V. STATE, 154 N.E.2d 856, 857, 1985 Ind. LEXIS 990, HELD THAT: IT IS ELEMENTARY IN THE AREA OF CRIMINAL LAW THAT THE CONSTITUTION PROHIBITS THE CRIMINAL CONVICTION OF ANY PERSON EXCEPT UPON PROOF OF GUILT BEYOND A REASONABLE DOUBT. IN RE WINSHIP, (1970), 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368; JACKSON V. VIRGINIA, (1979), 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560. PROOF OF GUILT IS SYNONYMOUS WITH PROOF OF EACH ESSENTIAL ELEMENT OF THE SUBSTANTIVE CRIME AS DEFINED BY STATUTE. Id.

MOREOVER, "COINCIDENT WITH THE THIRD BRADY COMPONENT (PREJUDICE), PREJUDICE WITHIN THE COMPASS OF THE 'CAUSE AND PREJUDICE' REQUIREMENT EXISTS WHEN THE SUPPRESSED EVIDENCE IS 'MATERIAL' FOR BRADY PURPOSES"; "AT LEAST AS TO THE PENALTY PHASE," STATE'S "SUPPRESSION OF [PROSECUTION WITNESS RAMSEY'S] INFORMANT STATUS" WAS "MATERIAL" FOR PURPOSES OF BRADY DOCTRINE AND "PREJUDICIAL" FOR PROCEDURAL DEFAULT DOCTRINE BECAUSE "ONE CAN HARDLY BE CONFIDENT THAT HOWELL RECEIVED A FAIR TRIAL, GIVEN JURY'S IGNORANCE OF [RAMSEY'S] TRUE ROLE IN THE INVESTIGATION AND TRIAL OF THE CASE" AND "ONE COULD NOT PLAUSIBLY DENY THE EXISTENCE OF THE REQUISITE 'REASONABLE PROBABILITY OF ACQUITTAL' HAD THE SUPPRESSED INFORMATION BEEN DISCLOSED TO THE DEFENSE." Id.

PRISONER MADE A SUFFICIENT FACTUAL SHOWING TO ESTABLISH "GOOD CAUSE" FOR DISCOVERY OF HIS CLAIM OF ACTUAL JUDICIAL BIAS BY SHOWING THAT TRIAL JUDGE WAS MAKING SPECIFIC ALLEGATIONS AS TO HOW HIS CASE WAS AFFECTED. . . THE RECORD MUST SHOW ACTUAL BIAS AND PREJUDICE OF THE JUDGE AGAINST THE DEFENDANT BEFORE A CONVICTION WILL BE REVERSED.

ON THE GROUND THAT THE TRIAL JUDGE SHOULD HAVE DISQUALIFIED HIMSELF. IN RE HOWELL, NO. 90C01-0505-PC-2, STATE CONCEALED EXISTENCE OF RECORD RELEVANT TO ISSUE, WHICH ESTABLISHED "CAUSE" FOR FAILURE TO RAISE CLAIM ON DIRECT APPEAL UNDER Ind. R. App. P. 5T (W). App. Vol. 6 at p. 14-15. [HOWELL]'S SHOWING THAT STATE CONCEALED EXISTENCE OF SIGNIFICANT EXCULPATORY OR IMPEACHING MATERIAL IN STATE'S POSSESSION REBUTTED FACTUAL FINDINGS BY STATE COURTS." A RETRIAL WOULD PLACE [HOWELL] IN DOUBLE JEOPARDY. "IT IS INCUMBENT ON THE STATE TO SET THE RECORD STRAIGHT."

CONCLUSION

HOWELL'S PETITION FOR WRIT OF MANDAMUS AND WRIT OF PROHIBITION SHOULD BE GRANTED.

RESPECTFULLY SUBMITTED,

Danny W. Howell, #138701

RELATOR PRO SE

WORD COUNT CERTIFICATE

I, DANNY W. HOWELL, HEREBY CERTIFY THAT THIS BRIEF IN SUPPORT OF PETITION FOR WRIT OF MANDAMUS AND WRIT OF PROHIBITION CONTAINS LESS 4,200 WORDS.

Danny W. Howell, #138701

RELATOR PRO SE

IN THE

SUPREME COURT OF INDIANA

CASE NO. 25A-CR-00514

DANNY W. HOWELL,

APPELLANT,

v.

STATE OF INDIANA,

APPELLEE.

FILED

MAR 20 2025

WELLS COUNTY
CIRCUIT/SUPERIOR
COURT CLERK

APPEAL FROM THE COURT OF APPEALS

LOWER CASE NO. 90C01-0316-PA-00025
(TRIAL COURT)

HON. KENTON KIRKHOFF, JUDGE

VERIFIED MOTION TO ACCEPT JURISDICTION OVER APPEAL DECISION

COMES NOW APPELLANT, DANNY W. HOWELL, PRO SE, PURSUANT TO Ind. CONSTITUTION ARTICLE VII, § 4, MOVES THIS COURT TO ACCEPT JURISDICTION OVER AN APPEAL THAT INVOLVES A SUBSTANTIAL QUESTION OF LAW OF GREAT PUBLIC IMPORTANCE. IN SUPPORT OF THE SAME, APPELLANT STATES:

1. STATEMENT OF GROUNDS

INDIANA RULE OF APPELLATE PROCEDURE 4.5 (D)(2). THE PRECLUSION OF CERTIORARI REVIEW OF A "DENIAL OF AN AUTHORIZATION BY A COURT OF APPEALS TO FILE A SECOND OR SUCCESSIVE APPLICATION" (Id) APPLIES ONLY TO AN ACTUAL "DENIAL", NOT SOME OTHER TYPE OF RULING THAT MIGHT HAVE "THE EFFECT OF DENYING 'AUTHORIZATION . . . TO FILE A SECOND OR SUCCESSIVE APPLICATION'" Cf. ANNIS V. STATE, 789 N.E.2d 553 (Ind. 2003). THUS FOR EXAMPLE, APPELLATE COURT'S DENIAL OF A PETITIONER'S OR MOVANT'S ARGUMENT THAT AN APPLICATION IS NOT IN FACT "SUCCESSIVE" IS REVIEWABLE ON CERTIORARI, EVEN THOUGH APPELLATE COURT'S RULING "HAD THE EFFECT OF DENYING AUTHORIZATION . . . TO FILE A SECOND

. . . APPLICATION." Id. AS THE SUPREME COURT EXPLAINED IN ANNES V. STATE, SUPRA, "[THE] 'SUBJECT OF . . . [A CERTIORARI] IN SUCH A CASE IS NOT THE COURT OF APPEALS' 'DENIAL OF AUTHORIZATION' BUT RATHER, THE VERY DIFFERENT QUESTION" OF "THE LOWER COURT'S REFUSAL TO RECOGNIZE THAT . . . [THE CURRENT] POST-CONVICTION RELIEF RULE 1, § 1 (a)(4) PETITION IS [MOVANT'S] FIRST, NOT HIS SECOND." Id. (APP. D; DENIAL OF SUPREME COURT REVIEW)

2. STATEMENT OF SUPPORTING FACTS:

ON MARCH 5, 2025, APPELLANT WAS ISSUED A NOTIFICATION THAT PETITIONS TO TRANSFER ARE NOT PERMITTED IN SP CASES. CASE NO. 25A-LA-00316. ALTHOUGH, REQUEST TO TRANSFER INVOLVED A SUBSTANTIAL QUESTION OF LAW OF GREAT PUBLIC IMPORTANCE IN HIS APPLICATION WHICH THE INDIANA COURT OF APPEALS ISSUED AN ORDER BEGINNING TO AUTHORIZE THE FILING OF A SUCCESSIVE PETITION FOR POST-CONVICTION RELIEF. NO. 24A-SP-3142 (1-24-2025). THE NOTICE OF APPEAL WAS FILED ON FEBRUARY 5, 2025 AND THE TRANSCRIPTS WERE DUE TO BE FILED ON MARCH 24, 2025. HOWELL V. STATE, NO. 49G01-0310-PA-5. BECAUSE OF "GAPS IN THE [STATE TRIAL COURT] RECORD PERTAINING TO CRITICAL PIECES OF MISSING INFORMATION", AN EVIDENTIARY HEARING WAS NECESSARY. THERE WAS AN ABSENCE OF STATE FACTFINDINGS.

ALTHOUGH THE PETITION FOR TRANSFER WAS TECHNICALLY DEFICIENT, . . . THE MISCARRIAGE OF JUSTICE IS MANIFEST. SINCE THE "IMPERATIVE HERE IS TO CORRECT A FUNDAMENTALLY UNJUST INCARCERATION THE COURT SHOULD GRANT IT IN VIEW OF THE ISSUES OF PUBLIC IMPORTANCE INVOLVED AND THE CONFLICTING PRIOR DECISIONS." AP 57 (A),(B)(2); (H); TRIAL R. 61

THE UNDERLYING FACTS OF THE COMPLETE RECORD IS FOLLOWS:

SHORTLY AFTER HOWELL MARRIED LORINDA IN OCTOBER OF 2002, HER THEN THIRTEEN -

- YEAR OLD DAUGHTER, B.S., EXHIBITED INCORRIGIBLE BEHAVIOR AT HOME AND SCHOOL (TR. 130-31, 139, 176-78). B.S. ALLEGED THAT HOWELL'S SON, B.H., HAD MOLESTED HER. SUP Op. p.3. AFTER DISCOVERING HER DIARY PASSAGES, NOTES, LETTERS AND SCHOOL RECORDS, SHE HAD ADMITTED SHE LIED. App. B; p.1-12.

FEBRUARY OF 2003, HOWELL AND HIS WIFE REQUESTED COUNSELING FOR B.S. WITH SCHOOL WORKER, TED RAMSEY. DURING THESE FIVE MEETINGS THEY DISCUSSED B.S.'S SEXUAL MISCONDUCT WITH STEP-BROTHER, B.H. AND B.S.'S INCORRIGIBLE BEHAVIOR. COUNSELING ENDED MID MARCH OF 2003 (TR. 137, 245-49, 294-95). RAMSEY DID NOT REPORT SEXUAL ABUSE. COMPARE SUP Op. at p. 2-3.

DEBRA EVANS, MARY BOURNONVILLE, KIMBERLY ROBERTS AND TONY RUDDELL ON BEHALF OF THEIR SEPARATE VISITS TESTIFIED THEY SAW HOWELL PAT B.S.'S LEGS INSIDE HER THIGH, PAT HER BOTTOM WITH HIS FINGERS BETWEEN HER LEGS, PLACE HIS CROTCH AREA ON HER HAND AND PRESS THE FRONT OF HIS BODY AGAINST B.S.'S BOTTOM (TR. 192-95, 209, 213-14, 223, 234-37) ON MAY 19, 2003, B.S. DID NOT PROVIDE ANY INFORMATION TO OFFICER GREG STEELE OF THE BLUFFTON POLICE DEPARTMENT WHEN SHE WAS INTERVIEWED THE FIRST TIME (TR. 118-19, 124, 170).

DIANNE MCMILLEN, TAMMY AND JOE VAN HOOSIER, AND LORINDA HOWELL EQUALLY TESTIFIED THAT THEY DID NOT SEE HOWELL TOUCHING B.S. INAPPROPRIATELY (TR. 261, 273, 284, 307). B.S. TESTIFIED THAT SHE TOLD HER MOTHER THAT HOWELL WAS TOUCHING HER AND SHE DID NOTHING (TR. 156-57, 182-83). B.S. DID NOT TELL HER MOTHER ABOUT THE SEXUAL INTERCOURSE WITH HOWELL (TR. 169). B.S. TESTIFIED THE SEXUAL ACTIVITY ONLY OCCURRED WHEN HOWELL CAME INTO

HER BEDROOM AT NIGHT (TR.132-34,148,152-54). B.S.'S MOTHER TESTIFIED THAT B.S. DID NOT TELL HER ABOUT ANY SEXUAL CONTACT WITH HOWELL. (TR. 247-48, 302-03, 306).

B.S. PROVIDED INFORMATION TO OFFICER STEELE AND WENDY GARRETT, WHEN IT WAS RECORDED IN HER SECOND AND THIRD INTERVIEWS (TR.106-07, 109-10, 117-19, 120-24, 160). EXTRA-JUDICIAL CHILD PROCEEDINGS WERE HELD. TRIAL JUDGE DAVID L. HANSELMAN, SR. PRESIDED AND STATE'S ACCREDITED EXPERT, RAMSEY TESTIFIED UNDER PROSECUTOR MICHAEL LUTZENHEISER'S NARROWLY TAYLORED QUESTIONS ABOUT HIS OBSERVATIONS OF B.S.'S PSYCHOLOGICAL CONDITION AND THE CHARACTERISTICS MANIFESTED BY CHILD MOLEST VICTIMS IN GENERAL. B.S. WAS NOT EXAMINED BY A DOCTOR (TR. 171).

ON APRIL 14, 2004, A HEARING IN LIMINE WAS HELD. TRIAL COUNSEL WANTED MAKE AN OFFER OF PROOF TO ESTABLISH THE NEED FOR ANY FOUNDATION ESTABLISHING ANOTHER POSSIBLE SOURCE OF B.S.'S BEHAVIORAL PROBLEMS, App. E; p. 142. PROSECUTOR ARGUED THAT THIS WAS INADMISSIBLE UNDER THE RAPE SHIELD STATUTE, I.C. § 35-37-4-4. TRIAL JUDGE OVERRULED HOWELL'S OBJECTION TO RAMSEY'S PARTIALLY ACCREDITING TESTIMONY THAT IT WAS MISLEADING AND IT WOULD ALLOW THE JURY TO DRAW AN UNRELIABLE INFERENCE OF HOWELL'S GUILT BECAUSE B.S. ALSO CLAIMED SHE WAS MOLESTED BY HOWELL'S SON, B.H. (TR. 246-47).

ON APRIL 30, 2004, A JURY FOUND HOWELL GUILTY ALLEGED IN THE INFORMATION:

COUNT I: CHILD MOLESTATION, A CLASS A FELONY UNDER I.C. § 35-42-4-3, THAT HOWELL PERFORMED OR SUBMITTED TO SEXUAL INTERCOURSE WITH B.S., A CHILD UNDER FOURTEEN-YEARS OLD, WHEN HE WAS AT LEAST TWENTY ONE-YEARS OLD;

COUNT 2: SEXUAL MISCONDUCT WITH A MINOR, A CLASS B FELONY UNDER I.C. 35-42-4-9, THAT HOWELL PERFORMED OR SUBMITTED TO SEXUAL INTERCOURSE WITH B.S., A CHILD WHO IS AT LEAST FOURTEEN, BUT NOT YET SIXTEEN-YEARS OLD, WHEN HE WAS AT LEAST TWENTY ONE-YEARS OLD; AND HOWELL WAS ALSO FOUND TO BE A HABITUAL OFFENDER ON AN UNRELATED CHARGE. (TR. 352, 354-56). SEE NOTICE OF COMPLETION OF CLERK'S RECORD 2-11-2005

IN A NOT FOR PUBLICATION MEMORANDUM DECISION, HOWELL V. STATE, NO. 49A02-0407-CR-571 (Ind. Ct. App. 2005) THE APPELLATE COURT, ON DIRECT APPEAL RULED RAMSEY DID NOT DIRECTLY VOUCH FOR B.S.'S CREDIBILITY. SLIP. OP. AT P. 6. IF FOUND THAT HOWELL WAIVED ANY ERROR IN HIS PRETRIAL EXCLUSION OF EVIDENCE THAT B.S. TOLD RAMSEY THAT B.H. HAD MOLESTED HER BECAUSE HE DID NOT OFFER THE EVIDENCE AT TRIAL OR, MAKE AN OFFER OF PROOF. SLIP OP. AT P. 11. SEE NOTICE OF COMPLETION 2-11-2005. Id.

IN HOWELL V. STATE, 2009 Ind. App. Unpub. LEXIS 597 (Ind. Ct. App. 2009), trans. denied (2009). APPELLATE COURT RULED RAMSEY'S TESTIMONY DID NOT OPEN THE DOOR TO TESTIMONY REGARDING A SEXUAL RELATIONSHIP BETWEEN B.S. AND B.H.; TRIAL COUNSEL THEREFORE WAS NOT INEFFECTIVE FOR NOT MAKING AN OFFER OF PROOF; THE POST-CONVICTION COURT'S RULING THE SUBSTANTIAL EVIDENCE AGAINST HOWELL WAS OVERWHELMING WAS NOT CLEARLY ERRONEOUS, AND HOWELL COULD NOT ESTABLISH PREJUDICE ON HIS INEFFECTIVENESS CLAIM. SLIP. OP. AT P. 12-13. - App. 2. ~~CLERK'S RECORD AT P.~~

3. STATEMENT OF GOVERNING LAW:

Cf. DRESKE V. HALEY, 124 S. Ct. 1847, 1855 (2004) (STEVENS, J., DISSENTING) "THE STATE HAS . . . [AN] OVERRIDING 'OBLIGATION TO SERVE THE CAUSE OF JUSTICE'" (QUOTING UNITED STATES V. AGURS, 427 U.S. 97, 111 (1976)); Id. AT 1856 (KENNEDY, J., DISSENTING) "THE AGURS

OF THE PENAL SYSTEM ARE THOUGHT TO BE MITIGATED TO SOME DEGREE BY THE DISCRETION OF THOSE WHO ENFORCE THE LAW. SEE, E.G., JACKSON, THE FEDERAL PROSECUTOR, 31 J. AM. INST. CRIM. L. & CRIMINOLOGY 3, 6 (1940-1941), . . . THE LAW MUST SERVE THE CAUSE OF JUSTICE. . . . EXECUTIVE DISCRETION CAN INSPIRE LITTLE CONFIDENCE IF OFFICIALS SWORN TO FIGHT INJUSTICE CHOOSE TO CONCEAL."); BANKS V. DRETKE, 124 S.CT. 1256, 1275 (2004) ("WE HAVE SEVERAL TIMES UNDERSCORED THE 'SPECIAL ROLE PLAYED BY THE AMERICAN PROSECUTOR IN SEARCH FOR TRUTH IN CRIMINAL TRIALS.' COURTS, LITIGANTS, AND JURIES PROPERLY ANTICIPATE THAT 'OBLIGATIONS [TO REFRAIN FROM IMPROPER METHODS TO SECURE A CONVICTION] . . . PLAINLY REST[S] UPON THE PROSECUTING ATTORNEY, WILL BE FAITHFULLY OBSERVED.'") (QUOTING STRICKLER V. GREENE, INFRA, AND BERGER V. UNITED STATES, INFRA)). GRANT VACATE REMAND IN LIGHT OF THE FOLLOWING:

THE SUPREME COURT HAS A DUTY TO MAKE ITS OWN INDEPENDENT EXAMINATION OF THE RECORD WHEN FEDERAL CONSTITUTIONAL DEPRIVATIONS ARE ALLEGED. E.G., SEABOLT V. STATE, 240 N.E.3d 1244 (Ind. 2024) (TRIAL COURT ERRED IN DENYING PETITIONER'S MOTIONS FOR RECUSAL UNDER Ind. R. P. POSTCONVICTION REMEDIES 1(4)(h) BECAUSE THE JUDGE HAD PREVIOUSLY CONCLUDED IN A HIGHLY SIMILAR CASE THAT RECUSAL WAS MANDATORY DUE TO IMPARTIALITY CONCERNS AND THERE WAS NO EVIDENCE OF CHANGED CIRCUMSTANCES OR MISTAKEN RECUSAL THAT WOULD JUSTIFY NOT RECUSING HERE. HOWELL ARGUES A JUDGE'S PERSONAL KNOWLEDGE ACQUIRED THROUGH EXTRAJUDICIAL SOURCES REQUIRES RECUSAL. STIVERS V. KNOX COUNTY Dep't. OF PUBLIC WELFARE, 482 N.E.2d 748, 751 (Ind. Ct. App. 1985); JONES V. STATE, 412 N.E. 2d 880, 881 (Ind. Ct. App. 1981). HOWEVER, THE LAW ALSO PRESUMES THAT A JUDGE IS UNBIAS AND UNPREJUDICIAL IN MATTERS BEFORE HIM. Id. (App. Br. p. 13-15)

INDIANA COURT OF APPEALS ACTED CONTRARY TO, OR UNREASONABLY APPLIED, CLEARLY ESTABLISHED FEDERAL LAW, SEE, e.g., FINCH V. STATE, 454 N.E.2d 856, 857, 1985 Ind. LEXIS 990. THE COURT HELD THAT: "IT IS ELEMENTARY IN THE AREA OF CRIMINAL LAW THAT THE CONSTITUTION PROHIBITS THE CRIMINAL CONVICTION OF ANY PERSON EXCEPT UPON PROOF OF GUILT BEYOND A REASONABLE DOUBT. IN RE WINSHIP, (1970) 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368; JACKSON V. VIRGINIA, (1979) 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed. 2d 560. PROOF OF GUILT IS SYNONYMOUS WITH PROOF OF EACH ESSENTIAL ELEMENT OF THE SUBSTANTIVE CRIME AS DEFINED BY STATUTE.

THE RECORD CLEARLY INDICATES REQUIREMENTS OF BOTH IND. EVIDENCE RULES 403 AND 702 (b)'S BALANCING TEST WERE NOT SATISFIED. TRIAL COURT ERRED IN ADMITTING EXPERT TESTIMONY OVER TRIAL COUNSEL'S OBJECTIONS REGARDING CHILD SEXUAL ABUSE SYNDROME EVIDENCE, WHERE THERE WAS NO FOUNDATIONAL SHOWING OF RELIABILITY, UNDER RULE 702 (b). CONTRARY TO STATE'S ARGUMENT, THE ONLY EVIDENCE IN TRIAL PER CHILD SEXUAL ABUSE ACCOMMODATION SYNDROME WAS INSUFFICIENT TO "ESTABLISH BEYOND A REASONABLE DOUBT, THAT HOWELL WAS THE PERPETRATOR - FLEENER V. STATE, 656 N.E.2d 1140 (Ind. 1995). APPELLATE COURT'S DETERMINATION THAT "THERE WAS OVERWHELMING EVIDENCE OF HOWELL'S GUILT" INDEPENDENT OF [IMPROPERLY ADMITTED EVIDENCE] "WAS CLEARLY ERRONEOUS IN LIGHT OF THE RECORD PRESENTED AT HOWELL'S TRIAL", . . . IT WAS EQUIPOISED. Id. 442; ORANGE V. VALLEY, SUPRA, 124 S.Ct. at 1836. "THE LAW MUST SERVE THE CAUSE OF JUSTICE . . . PERHAPS SOME WOULD SAY THAT HOWELL'S MISCONDUCT IS A MERE TECHNICALITY, BUT THAT WOULD MISS THE POINT. IN A SOCIETY DEVOTED TO THE RULE OF LAW, THE DIFFERENCE BETWEEN VIOLATING A CRIMINAL STATUTE CANNOT BE BRUSHED ASIDE AS A MINOR DETAIL." SEE ALSO Ind. CONST. ART. VII, § 4.

SIMILARLY, BRADLEY, 223 N.E.3d 221 (Ind. 2023) ARGUED: 1) EVIDENCE HE COULD NOT WITH REASONABLE DILIGENCE HAVE DISCOVERED AND PRODUCED AT TRIAL; 2) HE HAS DEMONSTRATED THAT THE STATE WITHHELD MATERIAL EXCULPATORY EVIDENCE AND IMPEACHMENT EVIDENCE AT TRIAL IN VIOLATION OF BRADY V. MARYLAND, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963) AND UNITED STATES V. GIGLIO, 405 U.S. 150, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972) MATERIALLY AFFECTING HER SUBSTANTIAL RIGHTS; AND (3) SHE RECEIVED INEFFECTIVE ASSISTANCE. THE RECORD MUST SHOW ACTUAL BIAS AND PREJUDICE OF THE JUDGE AGAINST THE DEFENDANT BEFORE A CONVICTION WILL BE REVERSED ON THE GROUND THAT THE TRIAL JUDGE SHOULD HAVE DISQUALIFIED HIMSELF. E.g., BANKS V. DRETKE, 540 U.S. 668, 124 S.Ct. 1256 (2004) "STATE ASSISTED IN HIDING [PROSECUTION WITNESS'S] INFORMANT STATUS AND MISLEADINGLY REPRESENTED THAT IT HAD COMPLIED IN FULL WITH ITS BRADY DISCLOSURE OBLIGATIONS" AND PROSECUTORS FAILED TO CORRECT WITNESS'S "MISREPRESENT[ATIONS] [OF] HIS DEALINGS WITH POLICE" IN TESTIMONY AT GUILT AND PENALTY PHASES OF TRIAL: "WHEN POLICE OR PROSECUTORS CONCEAL SIGNIFICANT EXCULPATORY OR IMPEACHING MATERIAL IN THE STATE'S POSSESSION, IT IS ORDINARILY INCUMBENT ON THE STATE TO SET THE RECORD STRAIGHT." App. B.

CONTRARY TO STATE'S ARGUMENT, THE FACT THAT INDIANA'S RAPE SHIELD ACT CANNOT BE USED TO BAR EVIDENCE THAT THE VICTIM HAD BEEN MOLESTED PRIOR TO THE RELEVANT INSTANCE, WHICH VIOLATES THE DEFENDANT'S SIXTH AMENDMENT CONFRONTATION RIGHT. SEYLER V. STATE, 559 N.E.2d 332 (Ind. Ct. App. 1990); REDDING V. STATE, 844 N.E.2d 1067 (Ind. Ct. App. 2006); AND TURNEY V. STATE, 759 N.E.2d 671, 676 (Ind. Ct. App. 2001). TRIAL JUDGE RELIED I.C. § 35-37-4-4 TO EXCLUDE EVIDENCE ESTABLISHING ANOTHER POSSIBLE SOURCE OF A VICTIM'S BEHAVIORAL PROBLEMS AND IMPAIRED DEFENDANT'S ABILITY TO REBUT INFERENCES THAT THE JURY IS ALLOWED TO DRAW FROM EXPERT TESTIMONY CONCERNING CHILD SEXUAL ABUSE.

SYNDROME." Id.

FURTHER, CONTRARY TO STATE'S ARGUMENT WHERE THE STATE BOLSTERED ITS THEORY WITH EXPERT TESTIMONY ABOUT CHILD SEXUAL ABUSE ACCOMMODATION SYNDROME, BY OPENING THE DOOR TO SUCH EVIDENCE, DISCLOSURE OF MINOR'S PRIOR SEXUAL ACT BECAME MANDATORY, AND THE DEFENDANT WAS ENTITLED TO IMPEACH THE CHILD SEXUAL ABUSE ACCOMMODATION SYNDROME EVIDENCE THROUGH CROSS-EXAMINATION WHICH COULD HAVE ESTABLISHED ANOTHER POSSIBLE SOURCE FOR MINOR'S EMOTIONAL UPSET. TURNER V. STATE, 719 N.E. 2d 671, at 677-80. FURTHERMORE, IN BANKS V. DRETKE, SUPRA, 124 S.Ct. 1256, 1272, 1279 (2004) "CONSISTENT WITH THE THIRD ARMY COMPONENT (PREJUDICE - I.C.), PREJUDICE WITHIN THE COMPASS OF THE 'CAUSE AND PREJUDICE' REQUIREMENT EXIST WHEN THE SUPPRESSED EVIDENCE IS 'MATERIAL' FOR BRADY PURPOSES"; "AT LEAST AS TO THE PENALTY PHASE," STATE'S "SUPPRESSION OF [PROSECUTION WITNESS'S] INFORMANT STATUS" WAS "MATERIAL" FOR PURPOSES OF BRADY DOCTRINE AND "PREJUDICIAL" FOR PURPOSES OF PROCEDURAL DEFAULT DOCTRINE BECAUSE "ONE CAN HARDLY BE CONFIDENT THAT HOWELL ABCDNED A FAIR TRIAL, GIVEN THE JURY'S IGNORANCE OF [WITNESS'S] TRUE ROLE IN THE INVESTIGATION AND TRIAL OF THE CASE' AND "ONE COULD NOT PLAUSIBLY DENY THE EXISTENCE OF THE REQUISITE 'REASONABLE PROBABILITY OF A DIFFERENT RESULT' HAD THE SUPPRESSED INFORMATION BEEN DISCLOSED TO THE DEFENSE." Id. TRIAL RULE 61, ERROR WAS NOT HARMLESS.

STATE COURT FACTFINDING MAY BE OVERTURNED BASE ON NEW EVIDENCE PRESENTED FOR THE FIRST TIME IN STATE COURT ONLY IF SUCH NEW EVIDENCE AMOUNTS TO CLEAR AND CONVINCING PROOF THAT THE STATE-COURT FINDING IS CLEARLY ERRONEOUS. IN THE STRICKLAND STANDARD OF REVIEW ASSESSED PREJUDICE UNDER A PREPONDERANCE-OF-THE EVIDENCE RATHER THAN A REASONABLE-PROBABILITY-STANDARD. SURGEON V. STATE, 719 N.E.2d 1173, 1182 (Ind. 1999)

TRIAL COURT'S FAILURE TO SUBMIT ISSUE OF MATERIALITY TO THE JURY, VIOLATES DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT AND DEFENDANT'S SIXTH AMENDMENT RIGHT TO A JURY TRIAL. THE STATE DENIED MEANINGFUL ACCESS TO BE HEARD IN ITS COURTS. THE CONSTITUTIONALITY OF AN ACT OF CONGRESS WAS DRAWN INTO QUESTION UNDER Ind. Const. Art. VII, § 4. HOWELL IS DISABLED AND HAS PROSECUTED ALL APPEALS IN FORMA PAUPERIS SINCE 2004. HOWELL RELIES ENTIRELY ON THE STATE-COURT RECORD IN QUESTION.

CONCLUSION

MOTION SHOULD BE GRANTED, CONVICTION AND SENTENCE VACATED AND ANY OTHER RELIEF THIS COURT DEEMS JUST AND PROPER WITHIN ITS PREMISES.

RESPECTFULLY SUBMITTED,

Danny W. Howell, 138701

APPELLANT, PRO SE

WORD COUNT CERTIFICATE

I, DANNY W. HOWELL, VERIFY THAT THIS VERIFIED MOTION TO ACCEPT JURISDICTION OVER APPEAL DECISIONS CONTAINS NO MORE THAN 4,200 WORDS.

Danny W. Howell, 138701

APPELLANT PRO SE

CERTIFICATE OF SERVICE

I, DANNY W. HOWELL, HEREBY CERTIFY THAT I HAVE, THIS 13 DAY OF MARCH, 2025, SERVED A TRUE AND CORRECT COPY OF THE FOREGOING MOTION UPON THE WELLS CIRCUIT COURT AND THE WELLS COUNTY PROSECUTOR, 102 MARKET STREET WEST, 4TH FLOOR, BLUFFTON, IN. 46714, PURSUANT TO App. R. 24, BY ORDINARY, FIRST CLASS, POSTAGE PREPAID UNITED STATES MAIL.

I, FURTHER CERTIFY THAT I HAVE THIS 13 DAY OF MARCH 2025, MAILED FOR FILING THE ORIGINAL AND ONE (1) COPY OF THE ABOVE FOREGOING VERIFIED MOTION TO ACCEPT JURISDICTION OVER APPEAL DECISIONS TO THE CLERK OF THE INDIANA SUPREME COURT, 216 STATE-HOUSE, 200 W. WASHINGTON STREET, INDPLS., IN. 46204, PURSUANT TO App. R. 24, BY ORDINARY, FIRST CLASS, POSTAGE PREPAID UNITED STATES MAIL.

I, FURTHERMORE, CERTIFY THAT I HAVE ON THIS 13 DAY OF MARCH, 2025, SERVED A TRUE AND CORRECT COPY OF THE FOREGOING MOTION UPON THE ATTORNEY GENERAL OF INDIANA, INDIANA GOVERNMENT CENTER SOUTH, FIFTH FLOOR, 402 N. WASHINGTON STREET, INDPLS., IN. 46204, PURSUANT TO App. R. 24, BY ORDINARY FIRST CLASS, POSTAGE PREPAID UNITED STATES MAIL.

Danny W. Howell, 138701

APPELLANT PRO SE

IN THE SUPREME COURT OF INDIANA

CASE NO. 49A-3P-03142

DANNY W. HOWELL,
APPELLANT,

v.

STATE OF INDIANA,
APPELLEE.

PETITION FOR REVIEW OF AN ORDER DECLINING TO AUTHORIZE FILING OF A SUCCESSIVE POST-CONVICTION RELIEF

CAUSE NO. 49C01-0310-PD-5

HONORABLE KENTON W. KIRACOFE, JUDGE

REQUEST TO TRANSFER TO THE SUPREME COURT

DANNY W. HOWELL
DOC# 138701
WABASH VALLEY CORRECTIONAL FACILITY
6908 S. OLD U.S. HWY 41
CARLISLE, IN. 47838

APPELLANT PRO SE

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QUESTION PRESENTED ON TRANSFER

"WHETHER THE COURT OF APPEALS HAS SO SIGNIFICANTLY DEPARTED FROM ACCEPTED LAW OR PRACTICE OR HAS SANCTIONED SUCH A DEPARTURE BY A TRIAL COURT AS TO WARRANT THE EXERCISE OF SUPREME COURT JURISDICTION ?"

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BACKGROUND AND PRIOR TREATMENT OF ISSUES

THE FACTS MOST FAVORABLE TO THE VERDICT REVEAL THAT SHORTLY AFTER HOWELL'S MARRIAGE TO LORINDA, OCTOBER OF 2002, HER THEN THIRTEEN YEAR OLD DAUGHTER, B.S. EXHIBITED BEHAVIORAL PROBLEMS AT HOME AND HER NEW SCHOOL. B.S. ALLEGED THAT HOWELL'S SON, B.H. HAD MOLESTED HER. FEBRUARY 2003, AFTER DISCOVERING EVIDENCE THAT SHE HAD LIED, HOWELL AND LORINDA EMPLOYED COUNSELING WITH SOCIAL WORKER, TED RAMSEY. DURING THESE FIVE MEETINGS THEY DISCUSSED HER INCORRIGIBLE BEHAVIOR. COUNSELING ENDED MARCH OF 2003. § 826 N.E.2d 1169. ABSENCE OF STATE RECORD, SEE PCR PETITION, 59.

DEBRA EVANS, MARY SOUTHWORTH, KIMBERLY ROBERTS, AND TONY RHODES TESTIFIED THEY SAW HOWELL TOUCHING B.S. INAPPROPRIATELY ON EACH THEIR SEPARATE VISITS TO SEE FRIENDS FROM MARION, LORINDA. ON JULY OF 2003, B.S. DID NOT PROVIDE ANY INFORMATION TO POLICE WHEN FIRST INTERVIEWED BY BLUFFTON POLICE OFFICER GREG STEELE AND WELLS COUNTY OFFICE OF FAMILY AND CHILDREN. DURING THE COURSE OF THE INVESTIGATION, JUDGE HUNT OVERSAW CHILD IN NEED OF SERVICES (CHINS) ALSO PROVIDED IN HOWELL'S CASE. B.S. GAVE INFORMATION ON HER SECOND AND THIRD INTERVIEWS, WHEN IT WAS RECORDED.

TAMMY AND JOE VAN HOOSIER, DIANNE HIGHLEN, AND LORINDA EQUALLY TESTIFIED THAT THEY DID NOT SEE HOWELL TOUCHING B.S. INAPPROPRIATELY. B.S. TESTIFIED THAT DID NOT TELL HER MOTHER ABOUT SEXUAL INTERCOURSE WITH HOWELL. B.S. B.S. TESTIFIED THAT SHE TOLD HER MOTHER HOWELL WAS TOUCHING HER INAPPROPRIATELY AND SHE DID NOTHING. B.S.'S MOTHER TESTIFIED THAT B.S. DID NOT TELL HER ABOUT ANY SEXUAL CONTACT WITH HOWELL. B.S. WAS NOT EXAMINED BY A DOCTOR.

BASED ON THE THREE INTERVIEWS HOWELL WAS CHARGED WITH CLASS A FELONY CHILD MOLESTING AND CLASS B FELONY SEXUAL MISCONDUCT WITH A MINOR AND WAS ALSO FOUND TO BE A HABITUAL OFFENDER. ON APRIL 14, 2004, AT MOTION IN LIMINE HEARING, DEFENSE COUNSEL WANTED TO MAKE AN OFFER OF PROOF WITH EVIDENCE ESTABLISHING ANOTHER POSSIBLE SOURCE OF VICTIM'S BEHAVIOR PROBLEMS. PROSECUTOR ARGUED THAT THIS EVIDENCE WAS INADMISSIBLE. JUDGE OVERRULED HOWELL'S OBJECTIONS. THE TRIAL COURT GRANTED STATE'S MOTION. HOWELL ARGUED ON DIRECT APPEAL THAT IT WAS ERROR TO PERMIT FURTHER TESTIMONY OF COMMON EBUNKLER CHARACTER OF SEXUALLY ABUSED CHILDREN AFTER DEFENDANTS OBJECTION BECAUSE THE JURY WASN'T INFORMED THAT THE ALLEGED VICTIM HAD ALSO BEEN MOLESTED BY HOWELL'S SON, BM. TRANSCRIPT at 246-47.

PETITIONER FILED A PRO SE, VERIFIED PETITION FOR STATE WRIT OF HABEAS CORPUS ON JANUARY 5, 2005, PRIOR TO DIRECT APPEAL DECISION, REQUESTING IMMEDIATE RELEASE AND BASED ON EXHIBITS A-F AND TWO AUDIO TAPES. POST CONVICTION COURT DEEMED IT TO BE A PETITION FOR POST CONVICTION RELIEF. App. E; p. 13. PETITIONER FILED A VERIFIED PETITION REQUESTING APPOINTMENT OF SPECIAL PROSECUTOR AND MOTION FOR CHANGE OF JUDGE. AFFIDAVIT OF HISTORICAL FACTS ALLEGING BIAS OR PREJUDICE STEMMED FROM EXTRA-JUDICIAL PROCEEDINGS, THAT THE JUDGE PERSONAL KNOWLEDGE OF THE DISPUTED EVIDENTIARY FACTS. A HEARING AND AN ORDER TO DISMISS WAS ISSUED. App. E; p. 14-15.

THERE IS NO FOUNDATION IN THE STATE COURT PROCEEDINGS BECAUSE STATE COURT'S RULING

ON PETITIONER'S MOTION TO AMEND FOR EVIDENTIARY HEARING AND ON THE MERITS OF THE INEFFECTIVE ASSISTANCE CLAIM. . . RELIED UPON WHAT [STATE COURTS] PERCEIVED TO BE A FAILURE ON THE PART OF HOWELL TO MAKE AN OFFER OF PROOF. SUP Op. at 11. POSTCONVICTION COURT "NEVER DIRECTLY ADDRESSED THE SPECIFIC ISSUE OF WHETHER THE EVIDENCE WAS SUFFICIENT TO SUPPORT HOWELL'S CONVICTION" BECAUSE COURT ERRONEOUSLY BELIEVED THAT CLAIM HAD BEEN RESOLVED ON DIRECT APPEAL.

ON COLLATERAL REVIEW APPELLATE COURT DID NOT REACH THE ISSUE OF HARMLESS ERROR BECAUSE THEY RULED RAMSEY'S TESTIMONY DID NOT OPEN THE DOOR TO TESTIMONY REGARDING A SEXUAL RELATIONSHIP BETWEEN B.S. AND B.H.; TRIAL COUNSEL THEREFORE WAS NOT INEFFECTIVE FOR NOT MAKING AN OFFER OF PROOF; THE POSTCONVICTION COURT'S RULING THE SUBSTANTIAL EVIDENCE AGAINST HOWELL WAS OVERWHELMING WAS NOT CLEARLY ERRONEOUS, AND HOWELL COULD NOT ESTABLISH PREJUDICE ON HIS INEFFECTIVENESS CLAIM. SUP Op. 12-13.

APPELLATE COURT'S OPINION DID NOT . . . MENTION THAT THE EXCLUSION OF [EVIDENCE] ESTABLISHING ANOTHER POSSIBLE SOURCE OF A VICTIM'S BEHAVIORAL PROBLEMS AND IMPEDED HIS ABILITY TO REBUT INFERENCES THAT THE JURY IS ALLOWED TO DRAW FROM EXPERT, RAMSEY AND VICTIM, B.S.'S TESTIMONY THAT SHE WAS MOLESTED ON AN OCCASION OTHER THAN THE ONE FOR WHICH HOWELL WAS ON TRIAL, BY ANOTHER PERSON, B.H. . . . DEPRIVED HOWELL OF HIS CONSTITUTIONAL RIGHT TO PRESENT A DEFENSE, . . . A MATTER RAISED IN AN 8-PAGE REPLY BRIEF ON HIS DIRECT APPEAL. THE COURT OBVIOUSLY OVERLOOK THIS PARTICULAR CLAIM IN ITS DENIAL OF RELIEF. App. B; p. 1-8.

HABEAS RELIEF WAS DENIED FOLLOWING UNSUCCESSFUL APPEALS FROM CONVICTION.

ARGUMENT :

I. STANDARD OF REVIEW

HOWELL ARGUES THAT BECAUSE STATE COURTS ANALYZED CLAIM SOLELY UNDER STATE LAW AND DID NOT ADDRESS UNDERLYING DUE PROCESS ISSUE, "[T]HE STRICKLAND STANDARD OF REVIEW ASSESSED PREJUDICE UNDER A PREPONDERANCE-OF-THE-EVIDENCE RATHER THAN A REASONABLE-PROBABILITY-STANDARD, THE SUPREME COURT HAS A DUTY TO MAKE ITS OWN INDEPENDENT EXAMINATION OF THE RECORD WHEN FEDERAL CONSTITUTIONAL DEPRIVATIONS ARE ALLEGED." SEE Ind. CONST. Art. 7, §4; BRESKE V. HALEY, 124 S.Ct. 1847, 1855 (2004) (STEVENS, J., DISSENTING) "THE STATE HAS . . . [AN] OVERRIDING 'OBLIGATION TO SERVE THE CAUSE OF JUSTICE'" (QUOTING UNITED STATES V. AGURS, 427 U.S. 97, 111 (1976)); *id.* at 1856 (KENNEDY, J., DISSENTING) "THE RIGORS OF THE PENAL SYSTEM ARE THOUGHT TO BE MITIGATED TO SOME DEGREE BY THE DISCRETION OF THOSE WHO ENFORCE THE LAW. SEE, E.G., JACKSON, THE FEDERAL PROSECUTOR, 31 J. AM. INST. CRIM. L. & CRIMINOLOGY 3, 6 (1940-1941). . . . THE LAW MUST SERVE THE CAUSE OF JUSTICE . . . . EXECUTIVE DISCRETION CAN INSPIRE LITTLE CONFIDENCE IF OFFICIALS SWORN TO RIGHT INJUSTICE CHOOSE TO IGNORE IT." "WHEN CHALLENGING A CLEARLY ERRONEOUS STANDARD' . . . THE RIGHT TO DIRECT APPEAL IS NOT "SECOND OR SUCCESSIVE" APPLICATION, SEE Ind. TRIAL RULE 61.

HERE, COURT OF APPEALS ERRED IN FINDING THE STATE COURTS APPLICATION OF STRICKLAND UNREASONABLE ON THE BASIS OF EVIDENCE NOT PROPERLY BEFORE THE STATE COURT; "WHETHER A STATE COURT'S DECISION WAS UNREASONABLE MUST BE ASSESSED IN LIGHT OF THE RECORD THE COURT HAD BEFORE IT." THE COURT ACTED CONTRARY TO, FINCH V. STATE, 454 NE.2d 856, 857, 1983 Ind. LEXIS 990 THE COURT HELD THAT: IT IS ELEMENT-

ARY IN THE AREA OF CRIMINAL LAW THAT THE CONSTITUTION PROHIBITS THE CRIMINAL CONVICTION OF ANY PERSON EXCEPT UPON PROOF OF GUILT BEYOND A REASONABLE DOUBT. In re WINSHIP, (1970) 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368; JACKSON V. VIRGINIA, (1979) 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560. PROOF OF GUILT IS SYNONYMOUS WITH PROOF OF EACH ESSENTIAL ELEMENT OF THE SUBSTANTIVE CRIME AS DEFINED BY STATUTE. THE STATE'S OBSERVATION IS NOTHING MORE THAN A "RED HERRING" INTENDED TO DIVERT THE COURT'S ATTENTION FROM THE ACTUAL ISSUE HOWELL WAS RAISED ON APPEAL, WHICH WAS PREJUDICED ATTRIAL. THE RECORD CLEARLY INDICATES REQUIREMENTS OF BOTH Ind. EVIDENCE RULE 403 AND 702 (b)'s BALANCING TEST WERE NOT SATISFIED. E.g., FLEENER V. STATE, 436 N.E.2d 1140, 1142 (Ind. 1995); TRIAL COURT ERRED IN ADMITTING EXPERT TESTIMONY OVER PRIOR COUNSEL'S OBJECTIONS REGARDING CHILD SEXUAL ABUSE SYNDROME EVIDENCE, WHERE THERE WAS NO FOUNDATIONAL SHOWING OF RELIABILITY UNDER RULE 702 (b). EVIDENCE WAS INSUFFICIENT TO "ESTABLISH, BEYOND A REASONABLE DOUBT, THAT HOWELL WAS THE PERPETRATOR". EVIDENCE WAS NOT OVERWHELMING OF HOWELL'S GUILT, IT WAS EQUIPOISED Id. - BRETKE V. HALEX, SUPRA, 124 S.Ct. at 1856, "THE LAW MUST SERVE THE CAUSE OF JUSTICE. . . . PERHAPS SOME WOULD SAY THAT HALEX'S INNOCENCE IS A MERE TECHNICALITY, BUT THAT WOULD MISS THE POINT. IN A SOCIETY DEDICATED TO THE RULE OF LAW, THE DIFFERENCE BETWEEN VIOLATING OR NOT VIOLATING A CRIMINAL STATUTE CANNOT BE SWEPT ASIDE AS A MINOR DETAIL". App. B; p. 1-8.

SEE ALSO, BANKS V. DRETKE, 124 S.Ct. 1256, 1275, "WE HAVE SEVERAL TIMES UNDERSCORED THE SPECIAL ROLE PLAYED BY THE AMERICAN PROSECUTOR IN SEARCH FOR TRUTH IN CRIMINAL TRIALS, COURTS, LITIGANTS AND JURIES PROPERLY ANTICIPATE THAT OBLIGATIONS (TO REFRAIN

FROM IMPROPER METHODS TO SECURE A CONVICTION] . . . PLAINLY RESTING] UPON THE PROSECUTING ATTORNEY, WILL BE FAITHFULLY OBSERVED" (QUOTING STRICKLER V. GREENE, INFRA, AND BERGER V. UNITED STATES, INFRA)).

HERE, "STATE PERSISTED IN HIDING [PROSECUTION WITNESS'S] INFORMANT STATUS AND MISLEADINGLY REPRESENTED THAT IT HAD COMPLIED IN FULL WITH ITS BRADY DISCLOSURE OBLIGATIONS" AND PROSECUTORS FAILED TO CORRECT WITNESS'S "MISREPRESENT[ATIONS] [OF] HIS DEALINGS WITH POLICE" IN TESTIMONY AT GUILT AND PENALTY PHASES OF TRIAL; "WHEN POLICE OR PROSECUTORS CONCEAL SIGNIFICANT EXCULPATORY OR IMPEACHING MATERIAL IN STATE'S POSSESSION, IT IS ORDINARILY INCUMBENT ON THE STATE TO SET THE RECORD STRAIGHT." Id. at 1256. HOWELL ARGUES THAT TRIAL COURT ERRED IN DENYING PETITIONER'S MOTION FOR RECUSAL UNDER Ind.R. POST-CONVICTION RELIEF REMEDIES 1 (9) (b) BECAUSE IN A SIMILAR CASE RECUSAL WAS MANDATORY, E.g., ANDREWS V. STATE, 505 N.E. 2d 815, 826 (Ind. Ct. App. 1987), A JUDGE'S PERSONAL KNOWLEDGE ACQUIRED THROUGH EXTRA JUDICIAL SOURCES REQUIRES RECUSAL. STINERS V. KNOX COUNTY DEPT. OF PUBLIC WELFARE, 482 N.E. 2d 748, 751 (Ind. Ct. App. 1985); JONES V. STATE, 416 N.E. 2d 880, 881 (Ind. Ct. App. 1981).

HOWEVER, THE LAW ALSO PRESUMES THAT A JUDGE IS UNBIAS AND UNPREJUDICIAL IN MATTERS BEFORE HIM. JONES, at 881; LEISTIKOW V. HOOSIER STATE BANK OF INDIANA, (1979), 182 Ind. App. 150, 152, 394 N.E. 2d 225, 227. THE ONLY TYPE OF PREJUDICE WHICH WILL DISQUALIFY A JUDGE IS A PERSONAL PREJUDICE FOR OR AGAINST A PARTY. JONES, at 881; LEISTIKOW, at 227. THE RECORD MUST SHOW ACTUAL BIAS AND PREJUDICE OF THE JUDGE AGAINST THE DEFENDANT BEFORE A CONVICTION WILL BE REVERSED ON THE GROUND THAT THE TRIAL JUDGE SHOULD HAVE DISQUALIFIED HIMSELF. ROSE V. STATE, 488 N.E. 2d 1141, 1144. App. B; p. 14

TRIAL COURT'S FAILURE TO SUBMIT THE QUESTION OF "MATERIALITY" TO THE JURY VIOLATES

THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT AND DEFENDANT'S SIXTH AMENDMENT RIGHT TO A JURY TRIAL. SEE BANKS, 124 S.Ct. 1256, 1273-76 (2004) APPLYING STRICKLER, SUPRA, TO FIND THAT PETITIONER HAD "CAUSE FOR FAILING TO INVESTIGATE, IN POSTCONVICTION PROCEEDINGS, [PROSECUTION WITNESS'S] CONNECTIONS TO DEPUTY SHERIFF FOR PURPOSES OF BRADY CLAIM" BECAUSE THE STATE PERSISTED IN HIDING [WITNESS'S] INFORMANT STATUS AND MISLEADINGLY REPRESENTED THAT IT HAD COMPLIED IN FULL WITH ITS BRADY DISCLOSURE OBLIGATIONS"; CONTRARY TO, TAYLOR V. STATE, 559 N.E.2d 332 (Ind. Ct. App. 1990); REDDING V. STATE, 844 N.E.2d 1067 (Ind. Ct. App. 2006); AND TURNEY V. STATE, 759 N.E.2d 674, at 676 (Ind. Ct. App. 2001). THE STATE MAY NOT USE THE RAPE SHIELD STATUTE, I.C. §35-37-4-4, TO EXCLUDE EVIDENCE ESTABLISHING ANOTHER POSSIBLE SOURCE OF A VICTIM'S BEHAVIORAL PROBLEMS AND IMPEDE A DEFENDANT'S ABILITY TO REBUT INFERENCES THAT JURY IS ALLOWED TO DRAW FROM EXPERT TESTIMONY CONCERNING CHILD SEXUAL ABUSE ACCOMMODATION SYNDROME. App. B; p. 3-6; C; p. 3.

SEE ALSO BANKS, SUPRA, 124 S.Ct. 1256, at 1277, STATE'S BRADY VIOLATION IN SUPPRESSING INFORMATION ABOUT PROSECUTION WITNESS'S STATUS AS PAID INFORMANT IS FOUND "PREJUDICIAL" FOR PURPOSES OF PROCEDURAL DEFAULT DOCTRINE AND "MATERIAL" FOR PURPOSES OF BRADY DOCTRINE BECAUSE, INTER ALIA, THE STATE CANNOT USE THE RAPE SHIELD STATUTE, I.C. § 35-37-4-4, BOTH AS A SHIELD AND AS A SWORD. IT IS ERROR TO APPLY A RULE MECHANISTICALLY TO PROHIBIT THE DEFENSE FROM EITHER OFFERING ITS VERSION OF THE FACTS OR ASSURING THROUGH CROSS-EXAMINATION THAT THE TRIER OF FACT HAS A SATISFACTORY BASIS FOR EVALUATING THE TRUTH OF A WITNESS'S TESTIMONY. RULE 412 DOES NOT RENDER INADMISSIBLE EVIDENCE OF SPECIFIC INSTANCES OF OTHER SEXUAL BEHAVIOR, IF EXCLUSION WOULD VIOLATE DEFENDANT'S CONSTITUTIONAL RIGHT TO CONFRONTATION OR DUE PROCESS RIGHTS.

PRESENT A DEFENSE. Id. ANALOGIES WERE POSSIBLE WHERE STATE BOLSTERED ITS CASE WITH EXPERT TESTIMONY ABOUT CHILD SEXUAL ABUSE ACCOMMODATION SYNDROME THAT MADE THE DISCLOSURE MANDATORY BY OPENING THE DOOR TO EVIDENCE OF THE VICTIM'S PRIOR SEXUAL MISCONDUCT. App. E; p. 2,3, TURNEY, 759 N.E.2d at 677-80. Ind. TRIAL RULE 61.

PETITIONER MADE A SUFFICIENT FACTUAL SHOWING TO ESTABLISH "GOOD CAUSE" FOR DISCOVERY OF HIS CLAIM OF ACTUAL JUDICIAL BIAS BY SHOWING THAT TRIAL JUDGE MADE SPECIFIC ALLEGATIONS AS TO HOW HIS CASE WAS AFFECTED.

APPELLATE RULE 65(D)'S PRECLUSION OF THE COURT OF APPEALS DECLINING TO AUTHORIZE THE FILING OF A SUCCESSIVE PETITION" (Id.) APPLIES ONLY TO AN ACTUAL "DENIAL", NOT SOME OTHER TYPE OF RULING THAT MIGHT HAVE "THE EFFECT OF DENYING 'AUTHORIZATION . . . TO FILE A SECOND . . . APPLICATION." ANNIS V. STATE, 789 N.E.2d 953 (Ind. 2003). THE SUBJECT OF " . . . [A REQUEST TO TRANSFER] PETITION [IN SUCH A CASE] IS NOT THE COURT OF APPEALS' DENIAL OF AN AUTHORIZATION" BUT RATHER THE "VERY DIFFERENT QUESTION OF" THE LOWER COURTS' REFUSAL TO RECOGNIZE THAT . . . [THE CURRENT] Ind. P.C.R. POSTCONVICTION REMEDIES RULE 1, 3(a)(4) PETITION IS [THE PETITIONER'S] FIRST, NOT HIS SECOND".

CONCLUSION

"TAKING THE EVIDENCE AS A WHOLE, PETITIONER'S SUCCESSIVE APPLICATION MAKES A PRIMA FACIE SHOWING OF A CONSTITUTIONAL GRAVE ERROR THAT IF PROVEN IN THE TRIAL COURT MAY BE SUFFICIENT TO CAUSE THE FACT FINDER TO REACH THE CONCLUSION BEYOND A REASONABLE DOUBT THAT HOWELL WAS NOT GUILTY OF CHILD MOLESTATION, SEXUAL MISCONDUCT WITH A MINOR AND AS A HABITUAL OFFENDER. PETITIONER HOWELL HAS MADE A PRIMA FACIE SHOWING THROUGH DOCUMENTS

THAT FALSE AND MATERIAL EVIDENCE WAS ADMITTED AT HOWELL'S TRIAL IN VIOLATION OF HIS DUE PROCESS RIGHTS AND TRIAL JUDGE VIOLATED CONFRONTATION CLAUSE BY APPLYING RAPE SHIELD LAW TO BAR DEFENSE COUNSEL FROM CROSS-EXAMINING THE SOCIAL WORKER AND VICTIM REGARDING THEIR TESTIMONY THAT THE VICTIM WAS MOLESTED ON AN OCCASION OTHER THAN THE ONE FOR WHICH DEFENDANT WAS ON TRIAL, BY ANOTHER PERSON.

RESPECTFULLY SUBMITTED,

Danny Wayne Howell, 136701

PRO SE APPELLANT

WORD COUNT CERTIFICATE

I, DANNY W. HOWELL, VERIFY THAT THIS PETITION FOR REQUEST TO TRANSFER TO THE SUPREME COURT CONTAINS NO MORE THAN 4,200 WORDS.

Danny W. Howell
APPELLANT - PRO SE

CERTIFICATE OF SERVICE

I, DANNY W. HOWELL, HEREBY CERTIFIES THAT ON THIS 11 DAY OF FEBRUARY, 2025, I SERVED A TRUE AND CORRECT COPY OF THE FOREGOING PETITION TO REQUEST FOR TRANSFER TO THE SUPREME COURT UPON THE ATTORNEY GENERAL OF INDIANA, INDIANA GOVERNMENT CENTER SOUTH, FIFTH FLOOR, 402 W. WASHINGTON STREET, INDIANAPOLIS, IN. 46204, PURSUANT TO App. R. 24, BY ORDINARY, FIRST CLASS, POSTAGE PREPAID UNITED STATES MAIL.

Danny W. Howell, 139701
APPELLANT

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ORIGINAL

IN THE

SUPREME COURT OF INDIANA

[COURT OF APPEALS CAUSE
NO. 90A02-0809-PC-829]

DANNY HOWELL,	)	Appeal from the Wells
Appellant (Petitioner Below),	)	Circuit Court
v.	)	
	)	Cause No. 90C01-0505-PC-2
STATE OF INDIANA,	)	
	)	The Honorable
Appellee (Respondent Below).	)	David L. Hanselman, Sr., Judge.

PETITION TO TRANSFER
OF PETITIONER-APPELLANT

ORDER

Petition to Transfer is hereby DENIED,
this 2 day of April, 2009

Randall T. Shepard
CHIEF JUSTICE

All Justices concur.

Volume's
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Appx. 8.

BEFORE THE

SUPREME COURT OF INDIANA

CAUSE NO. 90A02-0809-PC-829

DANNY HOWELL, *Appellant (Petitioner below),* *v.* STATE OF INDIANA, *Appellee (Respondent below).*	Appeal from the Circuit Court of Wells County Cause No. 90C01-0505-PC-2 Hon. David L. Hanselman, Sr., Judge

NOTICE IN OPPOSITION TO TRANSFER

Appellee, the State of Indiana, intends to file no separate opposition to Appellant's *Petition to Transfer*. Rather, in opposition to transfer, the State will rely on its Brief of Appellee filed in the Court of Appeals and the Court of Appeals' decision, which are adequate to show that the petition should be denied. The State will prepare and file a response should this Court so request.

Respectfully submitted,

GREGORY F. ZOELLER
INDIANA ATTORNEY GENERAL
Atty. No. 1958-98

Joby D. Jerrells
DEPUTY ATTORNEY GENERAL
Atty. No. 24248-53

Attorneys for Respondent/Appellee

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APPENDIX

D

IN THE

COURT OF APPEALS OF INDIANA

Danny W. Howell,

Appellant,

v.

State of Indiana,

Appellee.

Court of Appeals Cause No.
25A-CR-316

Order

[1] This appeal was dismissed with prejudice on April 1, 2025. Appellant, pro se, has now tendered a Motion to Correct or Modify Clerk's Record.

[2] Having reviewed the matter, the Court finds and orders as follows:

1. The Clerk of the Court is directed to file Appellant's Motion to Correct or Modify Clerk's Record as of the date of this order.
2. Appellant's Motion to Correct or Modify Clerk's Record is denied.

[3] Ordered: 6/23/2025

Chief Judge

IN THE

COURT OF APPEALS OF INDIANA

Danny W. Howell,

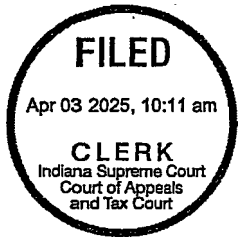
Appellant,

v.

State of Indiana,

Appellee.

Court of Appeals Cause No.
25A-CR-316



Order

[1] This appeal was dismissed on April 1, 2025. Appellant, pro se, has now filed a Verified Motion to Accept Jurisdiction over Appeal Decisions.

[2] Having reviewed the matter, the Court finds and orders as follows:

[3] Appellant's Verified Motion to Accept Jurisdiction over Appeal Decisions is denied.

Ordered: 4/3/2025

Chief Judge

A
2

IN THE

COURT OF APPEALS OF INDIANA

Danny W. Howell,

Appellant,

v.

State of Indiana,

Appellee.

Court of Appeals Cause No. 25A-CR-316

Order

[1] On January 24, 2025, in Cause Number 24A-SP-3142, the Court denied Petitioner's request to file a successive petition for post-conviction relief.

[2] On February 6, 2025, Appellant filed a Notice of Appeal, requesting transfer of this Court's January 24, 2025 order to the Indiana Supreme Court. Transfer may not be sought from an order declining to authorize the filing of a successive petition for post-conviction relief. *See* Ind. Appellate Rule 57.

[3] Additionally, Appellant's Notice of Appeal does not identify any final judgment issued by a trial court of this State that Appellant seeks to appeal. Consequently, the Court lacks jurisdiction. *See* App. Rule 5.

[4] Having reviewed the matter, the Court finds and orders as follows:

1. Transfer may not be sought from an order declining to authorize the filing of a successive petition for post-conviction relief. Additionally, Appellant does not identify any final judgment issued by a trial court in this State that he seeks to

Volume 2
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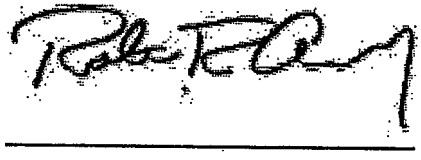
appeal. Consequently, the Court lacks jurisdiction, and this appeal is dismissed with prejudice.

2. The Clerk of the Court is directed to send this order to the parties and the Wells Circuit and Superior Courts Clerk.
3. The Wells Circuit and Superior Courts Clerk is directed to file this order under Cause Number 90C01-0310-FA-5, 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: 4/1/2025



Chief Judge

IN THE

COURT OF APPEALS OF INDIANA

Danny W. Howell,

Petitioner,

v.

State of Indiana,

Respondent.

Court of Appeals Cause No.
24A-SP-3142

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. 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 the Court is directed to send this order to Petitioner and the Wells Circuit and Superior Courts Clerk.
3. The Wells Circuit and Superior Courts Clerk is directed to file this order under Cause Number 90C01-0310-FA-5, 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: 1/24/2025

Kenworthy, Felix, JJ., Baker, Sr. J., concur.

For the Court,

Chief Judge

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to
APPX 'A' 41
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Clerk of the Appellate Courts

Greg Pachmayr, Clerk • 317-232-1930 • courts.in.gov

February 21, 2025

Danny Howell

Re: Petition to Transfer; 24A-SP-3142

Dear Danny Howell:

Our office received your Petition to Transfer referencing the above-mentioned case. Petitions to Transfer are not permitted in SP cases. Please see the following Appellate Rule:

Rule 57. Petitions To Transfer And Briefs
Effective January 1, 2022

A. Applicability.
This Rule applies to Petitions to Transfer an appeal from the Court of Appeals to Supreme Court after an adverse decision by the Court of Appeals.

B. Decisions From Which Transfer May be Sought.
Transfer may be sought from adverse decisions issued by the Court of Appeals in the following form:

(1) a published opinion;

(2) a not-for-publication memorandum decision;

(3) any amendment or modification of a published opinion or a not-for-publication memorandum decision; and

(4) an order dismissing an appeal.

Any other order by the Court of Appeals, including an order denying a motion for interlocutory appeal under Rule 14(B) or 14(C) and an order declining to authorize the filing of a successive petition for post conviction relief, shall not be considered an adverse decision for the purpose of petitioning to transfer, regardless of whether rehearing by the Court of Appeals was sought.

For more information, please refer to the Indiana Rules of Appellate Procedure.

Sincerely,

Gregory Pachmayr
Clerk of the Appellate Courts
wo

APPENDIX

E

200 LED2D 966, _ US _ Howell v. Brown

No. 17-6500.

Danny Howell, Petitioner

vs.

Richard Brown, Superintendent, Wabash Valley Correctional Facility.

[200 L Ed 2d 966] 2018 US LEXIS 2701.

April 30, 2018.

Petition for rehearing denied.<*pg. 967>

Former decision, 138 S. Ct. 667, 199 L. Ed. 2d 555, 2018 U.S. LEXIS 153.

Danny Howell, Petitioner v. Richard Brown, Superintendent, Wabash Valley Correctional Facility.
SUPREME COURT OF THE UNITED STATES
138 S. Ct. 667; 199 L. Ed. 2d 555; 2018 U.S. LEXIS 153; 86 U.S.L.W. 3331
No. 17-6500.
January 8, 2018, Decided

Editorial Information: Subsequent History

US Supreme Court rehearing denied by Howell v. Brown, 2018 U.S. LEXIS 2701 (U.S., Apr. 30, 2018)

Judges: {2018 U.S. LEXIS 1}Roberts, Kennedy, Thomas, Ginsburg, Breyer, Alito, Sotomayor, Kagan, Gorsuch.

Opinion

Petition for writ of certiorari to the United States Court of Appeals for the Seventh Circuit denied.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF INDIANA
FORT WAYNE DIVISION

DANNY HOWELL,	)	
	)	
Petitioner,	)	
	)	
vs.	)	CAUSE NO. 1:09-CV-168
	)	
SUPERINTENDENT,	)	
	)	
Respondent.	)	

ORDER

This matter is before the Court on another Federal Rule of Civil Procedure 60 motion filed by Danny Howell, a pro se prisoner, on March 8, 2017. For the reasons set forth below, the court: (1) **DENIES** the Rule 60 motion (DE 47) for want of jurisdiction; (2) **FINES** Danny Howell $5,000; (3) **DIRECTS** the clerk of court to return, unfiled, any papers filed in any case by or on behalf of Danny Howell (except for a notice of appeal or unless filed in a criminal case or a habeas corpus proceeding challenging a new conviction) until he has paid in full all outstanding fees and sanctions in all civil actions in any federal court; and (4) **DIRECTS** the clerk to note on the docket of this case any attempted filings in violation of this order.

BACKGROUND

On June 19, 2009, Howell filed a habeas corpus petition raising one ground to challenge his child molestation and sexual

misconduct with a minor convictions in the Wells Circuit Court under cause number 90C01-0310-FA-5. DE 1. This court addressed the merits of his claim "that his trial counsel rendered ineffective assistance because he failed to offer proof that alleged child molest victim told other people her stepbrother previously molested her." DE 23 at 4. Habeas corpus was denied on April 26, 2010. DE 23. Howell appealed, but was denied a certificate of appealability. DE 41 at 2. He petitioned for rehearing and was denied. DE 41 at 4.

Howell petitioned the Seventh Circuit for leave to file a successive habeas corpus petition and was denied. DE 42. His second request was also denied and he was cautioned that if he continued to submit frivolous filings, he could be fined and restricted. *Id.* Undeterred, he filed a third request. It too was denied and he was fined $500 and restricted from filing in this circuit. DE 43. He paid the fine and the restriction was lifted.

Howell next filed a motion in this case pursuant to Federal Rule of Civil Procedure 60(b) arguing that the "[e]arlier habeas court's decision was the product of a fraud upon the court." DE 44 at 1. In denying that motion, the court explained that "[t]he fraud

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Howell alleges the State committed to obtain his 2004 conviction is the basis on which he seeks habeas relief. His arguments that this court wrongly decided the merits of his habeas claim are themselves the assertion of a claim." DE 45 at 3. A Rule 60(b)

motion which argues the merits of a claim is a successive petition, *Gonzalez v. Crosby*, 545 U.S. 524, 532 (2005), and "[a] district court must dismiss a second or successive petition, without awaiting any response from the government, unless the court of appeals has given approval for its filing." *Nunez v. United States*, 96 F.3d 990, 991 (7th Cir. 1996) (emphasis in original). Therefore the Rule 60(b) motion was denied because Howell had not obtained permission to file a successive petition and this court lacked jurisdiction.

Rather than appeal that ruling, Howell filed with the Seventh Circuit a fourth request to file a successive petition. It was denied. He was fined $1,000 and again restricted. *Howell v. Brown*, 13-2060 (7th Cir. June 7, 2013). He paid the fine and the restriction was lifted. Still undeterred, he filed a second Rule 60 motion in this court again arguing that his habeas corpus petition was improperly denied because of a fraud on the court. *Howell v. Brown*, 1:15-CV-200 (N.D. Ind. filed July 30, 2015). It was denied for lack of jurisdiction the next day.

DISCUSSION

Now he is back again with a third Rule 60 motion making the same argument as the first two. For the reasons explained in this court's prior orders, this filing is a successive petition and this court lacks jurisdiction to consider it because Howell has

not been authorized by the Seventh Circuit to file a successive habeas corpus petition. He has asked the Circuit four times. He has been denied four times. He has been fined and restricted twice. He paid the fines and the restrictions were lifted. However, he has not heeded the Circuit's warning that that "payment of that fine is not a license to resume filing frivolous papers." *Howell v. Brown*, 13-2060 (7th Cir. June 7, 2013). Instead, since the second restriction was lifted, he has filed two frivolous Rule 60 motions.

This must stop. These filings are a waste of judicial resources. "Abusers of the judicial process are . . . to be sanctioned." *Free* v. *United States*, 879 F.2d 1535, 1536 (7th Cir. 1989). "Federal courts have both the inherent power and constitutional obligation to protect their jurisdiction from conduct which impairs their ability to carry out Article III functions." *In re McDonald*, 489 U.S. 180, 185 n.8 (1989) (*quoting In re Martin-Trigona*, 737 F. 2d 1254, 1261 (2nd Cir. 1984)).

Therefore Howell will be fined $5,000 and again restricted. Until he pays in full all outstanding fees and sanctions in all civil actions in any federal court, the clerk of this court will return unfiled any papers he submits in a civil case including attempts to attack his current criminal judgment. The restriction imposed by this order does not restrict him from filing a notice of appeal nor "impede him from making any filings necessary to protect him from imprisonment or other confinement [based on a new

conviction], but . . . [it does] not let him file any paper in any other [civil] suit . . . until he pays the money he owes." *Support Sys. Int'l v. Mack*, 45 F.3d 185, 186 (7th Cir. 1995).

CONCLUSION

For the reasons set forth above, the court: (1) **DENIES** the Rule 60 motion (DE 47) for want of jurisdiction; (2) **FINES** Danny Howell $5,000; (3) **DIRECTS** the clerk of court to return, unfiled, any papers filed in any case by or on behalf of Danny Howell (except for a notice of appeal or unless filed in a criminal case or a habeas corpus proceeding challenging a new conviction) until he has paid in full all outstanding fees and sanctions in all civil actions in any federal court; and (4) **DIRECTS** the clerk to note on the docket of this case any attempted filings in violation of this order.

DATED: March 8, 2017

/s/Rudy Lozano, Judge
United States District Court

IN THE

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF INDIANA

FORT WAYNE DIVISION

DANNY W. HOWELL,

PLAINTIFF,

V.

SUPERINTENDENT,

DEFENDANT.

CASE NO. 1:09-CV-168

MEMORANDUM IN SUPPORT OF MOTION

FOR RELIEF FROM JUDGMENT OR ORDER

PLAINTIFF, DANNY W. HOWELL, PRO SE, SUBMITS THIS MEMORANDUM IN SUPPORT OF HIS MOTION FOR RELIEF FROM JUDGMENT AND RESPECTFULLY REQUEST COURT TO GRANT HIS MOTION TO SET ASIDE JUDGMENT WHERE THERE WAS FRAUD UPON THE FEDERAL COURT WHICH LED TO THE DENIAL OF THE HABEAS PETITION; FED. R. CIV. P. 60 (d)(3).

STATEMENT OF THE FACTS

"UNDER THE AEDPA STANDARD OF REVIEW, IT IS ENTIRELY APPROPRIATE — EVEN NECESSARY — THAT FEDERAL COURTS ASK WHETHER THE STATE COURT APPLIED CORRECT LEGAL PRINCIPLES IN AN OBJECTIVELY UNREASONABLE WAY (WILLIAMS V. TAYLOR, 529 U.S. at 404-06), AN INQUIRY THAT REQUIRES ANALYSIS OF THE STATE COURT'S METHOD AS WELL AS ITS RESULT."

ON APRIL 30, 2010, DISTRICT COURT CONCLUDED THAT THE INDIANA COURTS HAD CORRECTLY APPLIED ESTABLISHED FEDERAL LAW IN ADJUDICATING HIS INEFFECTIVE ASSISTANCE OF COUNSEL CLAIMS, AND DID NOT MAKE AND UNREASONABLE DETERMINATION OF THE FACTS IN LIGHT OF THE FACTS CONTAINED IN THE RECORD. HOWELL V. [SUPERINTENDENT], NO. 1:09-CV-168-RL.

"IN THIS CASE, THE STATE APPELLATE COURT'S DECISION IS THE LAST REASONED DECISION, AND IS THUS THE DECISION WE MUST REVIEW." WE MUST REVIEW RECORD AS A WHOLE TO DETERMINE WHETHER

PROSECUTOR'S MISCONDUCT DENIED DEFENDANT A FAIR TRIAL. U.S. V. CLARKE, 227 F3d 874, 884 (9th Cir. 2000). "IN MOST CASES, FOR AN ERROR TO "AFFECT SUBSTANTIAL RIGHTS" IT MUST BE "PREJUDICIAL" AND MUST HAVE "AFFECTED THE OUTCOME OF THE DISTRICT COURT'S PROCEEDINGS." INYO V. MADDOX, 366 F3d 992, 1008-09 (9th Cir. 2004).

UNDER §§ 2254 (d)(2) AND (e)(1), A FEDERAL COURT CAN DISAGREE WITH A STATE COURT'S CREDIBILITY DETERMINATION AND, WHEN GUIDED BY AEDPA, CONCLUDE THE DECISION WAS UNREASONABLE OR THAT THE FACTUAL PREMISE WAS INCORRECT BY CLEAR AND CONVINCING EVIDENCE." MILLER-EL V. COCKRELL, 537 U.S. 322, 340 (2003).

IN HOWELL V. STATE, NO. 90C01-0310-PA-0005, SHORTLY AFTER HOWELL'S MARRIAGE TO LORINDA, OCTOBER, 2002, HER THEN THIRTEEN YEAR-OLD DAUGHTER, BRITNEY SCUDDS (B.S.) BECAME INCORRIGIBLE AND PROMISCUOUS (TR. 130-31, 139, 176-78). AFTER DISCOVERING B.S.'S SEXUAL RELATIONSHIP WITH HER STEP BROTHER, BRANDON HOWELL (B.H.) IN THE EARLY PART OF 2003 (B.S.'S PRE-TRIAL DEPOSITION, PP. 31-32), HOWELL AND HIS WIFE INITIATED COUNSELLING FOR B.S. WITH SOCIAL WORKER, TED RAMSEY, FEBRUARY 2003. THEY DISCUSSED B.S.'S SEXUAL MISCONDUCT WITH B.H. AND HER INCORRIGIBLE BEHAVIOR AT HOME AND AT SCHOOL. COUNSELLING ENDED, MID MARCH 2003. (137, 245-49, 299-95; APPELLANT'S PCR BRIEF).

DEBRA EVANS, MARY SOUTHWORTH, KIMBERLY ROBERTS, AND TONY RHODES TESTIFIED THEY SAW HOWELL INAPPROPRIATELY TOUCHING B.S. ON EACH OF THEIR SEPARATE VISITS TO HOWELL'S HOME (TR. 194-98, 209, 213-14, 223, 234-37). B.S. DID NOT PROVIDE ANY INFORMATION TO BLUFFTON POLICE WHEN SHE WAS FIRST INTERVIEWED ON JULY 19, 2003, (TR. 116-19, 124, 170). AFTER SAID WITNESSES RETURNED, B.S. GAVE INFORMATION, A SECOND AND THIRD TIME, WHEN IT WAS RECORDED (TR. 106-07, 109-10, 117-19, 120-24, 160). BASED ON THESE INTERVIEWS, HOWELL WAS CHARGED ON OCTOBER 9, 2003.

B.S. TESTIFIED THE SEXUAL ACTIVITY ONLY OCCURRED WHEN HOWELL CAME INTO HER ROOM AT NIGHT (TR. 132-34, 148, 152-54). SHE TOLD HER MOTHER HOWELL WAS TOUCHING HER INAPPROPRIATELY AND SHE DID NOT DO ANYTHING (TR. 136-37, 182-83). SHE DID NOT TELL HER MOTHER ABOUT THE SEXUAL INTERCOURSE (TR. 169). B.S.'S MOTHER TESTIFIED B.S. DID NOT TELL HER ABOUT ANY SEXUAL CONTACT WITH HOWELL (TR. 297-98, 302-03, 304). TAMMY AND JOE VAN HOOSIER, DIANNE MCMILLEN, AND LORINDA HOWELL TESTIFIED THEY DID NOT SEE HOWELL TOUCHING B.S. INAPPROPRIATELY. (TR. 267, 273, 286, 307).

THE STATE HIRED THE SAME SOCIAL WORKER, RAMSEY FOR A SUBSEQUENT EVALUATION OF B.S.'S

PSYCHOLOGICAL CONDITION. DURING THESE FIVE MEETINGS B.S. CLAIMED SHE WAS ALSO MOLESTED BY HOWELL'S SON, B.H. (TR. 245, 250, 253). THE STATE AND RAMSEY KNEW FULL WELL THAT B.S. WAS INITIALLY EVALUATED FOR HER PROMISCUITY WITH B.H. AND HER INCORRIGIBLE BEHAVIOR. B.S. WAS NOT SEEN BY A DOCTOR (TR. 171), NOR WAS B.H. CHARGED.

TRIAL COUNSEL WANTED TO ESTABLISH A FOUNDATION IN EVIDENCE OF B.S.'S CLAIM THAT B.H. MOLESTED HER IN ORDER TO OFFER EVIDENCE WHICH SHOWS THAT SOMEONE OTHER THAN ACCUSED COMMITTED THE ACT UPON WHICH THE PROSECUTION WAS FOUNDED, EVIDENCE RULE 412 (c)(2), BUT B.S. CLAIMED TO HAVE A CONSENSUAL SEXUAL RELATIONSHIP WITH B.H. IN HER PRE-TRIAL DEPOSITION. Id. at PP. 31-32. THE PROSECUTOR TOLD THE COURT THAT B.S. "ACKNOWLEDGED SHE HAD SEXUAL RELATIONSHIPS WITH THE SON OF THE DEFENDANT. . . ." (STATE'S MOTION IN LIMINE [MIL TR. 7, TR. 246-47]). THERE IS NO FOUNDATION IN EVIDENCE OF B.S.'S INITIAL EVALUATION WITH RAMSEY. JUDGE, DAVID HARSELMAN, SR. REPEATEDLY OVERRULED TRIAL COUNSEL'S OBJECTIONS TO RAMSEY TESTIFYING ON THE GROUNDS THAT IT WAS INAPPROPRIATE BECAUSE B.S. ALSO CLAIMED B.H. MOLESTED HER (TR. 246-48, 250, 252).

AS STATE'S ACCREDITED EXPERT, RAMSEY TESTIFIED UNDER THE PROSECUTOR'S NARROWLY TAILORED QUESTIONS ABOUT HIS OBSERVATIONS OF B.S.'S PSYCHOLOGICAL CONDITION AND THE CHARACTERISTICS MANIFESTED BY CHILD MOLEST VICTIMS IN GENERAL. HE TESTIFIED THAT B.S. WAS NOT PRONE TO EXAGGERATE IN SEXUAL MATTERS, HE HAD NOT LEARNED ANYTHING INCONSISTENT WITH HER BEING A VICTIM OF SEXUAL ABUSE AND SHE REMAINED CONSISTENT IN HER VERSION OF EVENTS. (TR. 250, 252-53).

ON APRIL 30, 2004, A JURY FOUND HOWELL GUILTY ON BOTH COUNTS ALLEGED IN THE INFORMATION.

COUNT I: CHILD MOLESTING, A CLASS A FELONY UNDER I.C. § 35-42-4-3, THAT ON APRIL 6, 2003, HOWELL PERFORMED OR SUBMITTED TO [SEXUAL INTERCOURSE] WITH B.S., A CHILD UNDER FOURTEEN YEARS OLD, WHEN HE WAS AT LEAST TWENTY-ONE YEARS OLD, AND

COUNT II: SEXUAL MISCONDUCT WITH A MINOR, A CLASS B FELONY UNDER I.C. § 35-42-4-9, THAT ON JULY 13, 2003, HOWELL PERFORMED OR SUBMITTED TO [SEXUAL INTERCOURSE] WITH B.S., A CHILD WHO IS AT LEAST FOURTEEN, BUT NOT NET SIXTEEN YEARS OLD, WHEN HE WAS AT LEAST TWENTY-ONE YEARS OLD. (TR. 352, 354-56).

IN A MEMORANDUM DECISION IN HOWELL V. STATE, 49A02-0407-CR-571, ON APRIL 13, 2005, DIRECT APPEAL COURT RULED RAMSEY DID NOT DIRECTLY VOUCH FOR B.S. CREDIBILITY. SLIP Op. at 8. IT FOUND THAT HOWELL WAIVED ANY ERROR IN ITS PRE-TRIAL EXCLUSION OF EVIDENCE THAT B.S. TOLD RAMSEY THAT B.H. HAD MOLESTED HER BECAUSE HE DID NOT OFFER THE EVIDENCE AT TRIAL OR MAKE AN OFFER OF PROOF. SLIP Op. at 11.

IN HOWELL V. STATE, NO. 49A02-0809-PC-829, ON FEBRUARY 17, 2009, IN ITS MEMORANDUM DECISION, APPELLATE COURT RULED RAMSEY'S TESTIMONY DID NOT OPEN THE DOOR TO TESTIMONY REGARDING A SEXUAL RELATIONSHIP BETWEEN B.S. AND B.H.; TRIAL COUNSEL THEREFORE WAS NOT INEFFECTIVE FOR NOT MAKING AN OFFER OF PROOF; THE POST-CONVICTION COURT'S RULING THE SUBSTANTIAL EVIDENCE AGAINST HOWELL WAS OVERWHELMING WAS NOT CLEARLY ERRONEOUS, AND HOWELL COULD NOT ESTABLISH PREJUDICE ON HIS INEFFECTIVENESS CLAIM. SLIP Op. 12-13.

ARGUMENT I.

UNDER RULE 60(d)(3), HOWELL IS IMPUGNING THE INTEGRITY OF DISTRICT COURT'S JUDGMENT REJECTING HIS PETITION ON THE GROUND THAT THE STATE OBTAINED THE JUDGMENT BY FRAUD. HOWELL CHALLENGES THE STATE COURT'S FINDINGS BASED ENTIRELY ON THE STATE RECORD. CHALLENGE IS BASED ON THE CLAIM THAT THE FINDING IS UNSUPPORTED BY SUFFICIENT EVIDENCE, . . . THAT THE PROCESS EMPLOYED BY THE STATE COURT IS DEFECTIVE, . . . OR THAT NO FINDING WAS MADE BY THE STATE COURT AT ALL. TAYLOR V. MADDOX, 366 F3d 992, 999 (9th Cir. 2004); § 2254 (d)(2) AND (e)(1).

STATE COURT'S SUMMARY REJECTION OF VARIOUS CLAIMS AS "EITHER UNPRESERVED FOR APPELLATE REVIEW OR WITHOUT MERIT" CONSTITUTED "ADJUDICATION ON THE MERITS" AND ACCORDINGLY FEDERAL COURT "MUST DETERMINE WHETHER [STATE COURT] UNREASONABLY APPLIED CLEARLY ESTABLISHED FEDERAL LAW IN REJECTING CLAIM." SEE RYAN V. MILLER, 303 F3d 231, 245-46 (2d Cir. 2002).

INDIANA APPELLATE COURT'S RECONSTRUCTION OF LOWER COURT DECISIONS WAS AN OBJECTIVELY UNREASONABLE DETERMINATION OF THE FACTS IN LIGHT OF THE FACTS CONTAINED IN THE STATE RECORD "CAUSE" AND "PREJUDICE" EXIST FOR PROCEDURAL DEFAULTS AS A RESULT OF INTERFERENCE BY OFFICIALS, THE OTHERWISE DEFAULTED CLAIM WAS REASONABLY UNKNOWN TO HOWELL'S LAWYERS AND HOWELL'S LAWYERS MADE NO INTENTIONAL DECISION TO FORGO CLAIM. MURRAY V. CARRIER, 477 U.S. 478, 488 (1986).

IN HOWELL V. STATE, NO. 90A02-0407-CR-571, THERE IS CLEAR AND CONVINCING PROOF THAT THE APPELLATE COURT FINDING IS IN ERROR. THE VERDICT WAS AGAINST WEIGHT OF EVIDENCE BECAUSE LOWER COURT BASED VERDICT ON TESTIMONIES OF WITNESSES WHOSE CREDIBILITY COURT HAD QUESTIONED. CONTRARY TO, U.S. V. WASHINGTON, 184 F3d 653, 658-59 (7th Cir. 1999); IN RE WINSHIP, 397 U.S. 358, 363-64 (1970). "WITNESSES TESTIMONIES OF INAPPROPRIATE TOUCHING IS NEITHER ALLEGED IN THE CHARGING INFORMATION NOR FOUND BY THE JURY BEYOND A REASONABLE DOUBT AS THE REQUIRED BASIS TO JUSTIFY PROSECUTION'S BURDEN OF PROOF ON THE ELEMENT OF [SEXUAL INTERCOURSE] IN BOTH COUNTS. STATE RECORD IS DEVOID OF PROSECUTOR'S FAILURE TO CORRECT WITNESSES MISREPRESENTATIONS OF FACT. Id.

AEDPA'S PRESUMPTION OF CORRECTNESS DID NOT APPLY TO STATE COURT FINDINGS ARRIVED AT THROUGH THE USE OF ERRONEOUS LEGAL STANDARDS. APPELLATE COURT'S FINDING OF WAIVER WAS THE PRODUCT OF DECEPTION BECAUSE IT WAS NOT FULLY INFORMED OF THE FACTS. RECORD WAS SILENT REGARDING B.S.'S INITIAL PSYCHOLOGICAL EVALUATION WITH SOCIAL WORKER RAMSEY. TRIAL COUNSEL HAD NO FOUNDATION IN EVIDENCE OF EITHER OF B.S.'S CONFLICTING STATEMENTS TO RAMSEY. [STATE COURT'S FACTUAL CONCLUSION ABOUT INFORMATION AVAILABLE TO TRIAL COUNSEL IS REJECTED UNDER §2254 (d)(2) BECAUSE STATE COURT'S FACTFINDING PROCESS WAS MARRED BY COURT'S ERRONEOUS ASSUMPTION ABOUT CONTENTS OF SOCIAL WORKERS RECORDS IN COUNSEL'S POSSESSION. STATE AND TRIAL JUDGE KNOWING USED THE RAPE SHIELD STATUTE TO PREVENT TRIAL COUNSEL FROM PRESENTING ANY EVIDENCE PROSECUTOR'S SUBORNATION OF RAMSEY'S AND B.S.'S PERJURED TESTIMONIES. CONTRARY TO, CALLENDO V. WARDEN, 565 F3d 691, 698 (9th Cir. 2004); U.S. V. ROTH, 777 F2d 1204 (7th Cir. 1985); (MIL TR. 7, TR 246-47); TAYLOR V. MADDOX, SUPRA, 366 F3d at 1000-01.

SIMILARLY, IN DALOSA V. CAIN, 279 F3d (5th Cir. 2002) ("PROSECUTOR AROSE AT TRIAL DEFENSE'S ATTRIBUTION OF CRIME TO OTHER PERPETRATOR WAS REFUTED BY ABSENCE OF PHYSICAL EVIDENCE, EVEN THOUGH PROSECUTION HAD WITHHELD DISCLOSURE OF PHYSICAL EVIDENCE THAT DIRECTLY SUPPORTED ACCUSED'S ACCOUNT OF EVENTS"; "STATE THUS BASED ITS CASE ON THE NON-EXISTENCE OF EVIDENCE IT KNEW EXISTED". STATE CREATED THE IMPRESSION FOR THE JURY THAT WITNESSES STATEMENTS LED POLICE TO FOCUS ON HOWELL AS A SUSPECT. THEREBY, PLAINLY IMPLYING THAT HOWELL MOLESTED B.S. (SEE APPELLANT'S REPLY BRIEF, P.R. 3-8).

IN HOWELL V. STATE, NO. 90A02-0809-PC-829, OBVIOUSLY, WHERE THE STATE COURT'S LEGAL ERROR INFECTED THE FACTFINDING PROCESS, THE RESULTING FACTUAL DETERMINATION WILL BE OBJECTIVELY UNREASONABLE. FINDING PROSECUTION'S CASE IN-CHIEF, LAWRENCE V. STATE, 464 N.E.2d 923 (IND. 1984) TO BE APPLICABLE TO THE FACTS WHEN IT ACTUALLY IS NOT IS CONTRARY TO, HELLUMS V. WILLIAMS, 116 Fed. Appx. 905, 2001 U.S. App. LEXIS 17697 (10th Cir. AUG. 8, 2001) (PROSECUTION'S EXPERT WITNESSES, WHO EXAMINED CHILD COMPLAINANT IN SEXUAL ABUSE CASE, "IMPERMISSIBLY VOUCHED FOR THE VICTIM'S CREDIBILITY BY INDICATING THAT THEY BELIEVED HER TESTIMONY"). HARMLESS ERROR

APPELLATE COURT'S FINDING THAT THE LOWER COURT'S RULING THAT THERE WAS "OVERWHELMING EVIDENCE OF HOWELL'S GUILT" INDEPENDENT OF [IMPROPERLY ADMITTED EVIDENCE] WAS OBJECTIVELY UNREASONABLE IN LIGHT OF THE EVIDENCE PRESENTED IN HOWELL'S TRIAL RECORD, UNDER § 2254 (d)(2) BECAUSE STATE COURTS' FAILURE TO DISCUSS OR EVEN MENTION KEY TESTIMONIES SHOWS THAT STATE COURTS "FAILED TO CONSIDER KEY ASPECTS OF THE RECORD": "THE STATE COURTS MIGHT HAVE DISBELIEVED [WITNESSES], OR PERHAPS DISCOUNTED THEIR TESTIMONIES, BUT THEY WERE NOT ENTITLED TO ACT AS IF IT DID NOT EXIST." SIMILARLY, TAYLOR V. MADDOX, SUPRA, 366 F3d AT 1008.

HOWELL HAD "CAUSE" FOR FAILING TO INVESTIGATE IN STATE POST-CONVICTION PROCEEDINGS," DEFENSE COUNSEL HAS NO 'PROCEDURAL OBLIGATION TO ASSERT CONSTITUTIONAL ERROR ON THE BASIS OF MERE SUSPICION THAT SOME PROSECUTORIAL MISSTEP MAY HAVE OCCURRED.'"

PETITIONER'S CLAIMS WERE REJECTED BECAUSE DISTRICT COURT'S DENIAL OF RELIEF BY MERELY "ADOPTING THE REASONS GIVEN BY THE STATE APPELLATE COURT IN AFFIRMING HOWELL'S CONVICTION AND REASONS GIVEN BY THE STATE IN OPPOSING THE PETITION" RESULTED IN RECORD "MERELY ASSUMING" THAT CERTAIN FACTUAL CONCLUSIONS IS CORRECT RATHER THAN SYSTEMATICALLY SCRUTINIZING THE RELEVANT FACTS, IS CONTRARY TO, MILLER-EL, SUPRA, 537 U.S. AT 340; AND FINDING A DOCTRINAL EXCEPTION TO BE APPLICABLE TO THE FACTS, IS CONTRARY TO, TAYLOR V. MADDOX, SUPRA, 366 F3d AT 1000-01; § 2254 (d)(2) AND (e)(1).

"SUPPRESSION OF [PROSECUTION'S WITNESSES] TRUE ROLES IN SUPPLYING INFORMATION WAS "MATERIAL" FOR PROSECUTORIAL FRAUD CLAIM AND "PREJUDICIAL" FOR PURPOSES OF PROCEDURAL DEFAULT DOCTRINE BECAUSE "ONE CAN HARDLY BE CONFIDENT THAT HOWELL RECEIVED A FAIR TRIAL, GIVEN THE JURY'S LENGTHENED OF [WITNESSES] TRUE ROLES IN THE INVESTIGATION AND TRIAL OF THE CASE" AND "ONE

COULD NOT PLAUSIBLY DENY A DIFFERENT RESULT HAD THE SUPPRESSED EXCULPATORY OR IMPEACHING INFORMATION BEEN DISCLOSED TO THE DEFENSE". U.S. V. ALANIS, 88 Fed. Appx. 15, 22-23, 2004 U.S. App. LEXIS 2149, at *22 (5th Cir. Feb. 10, 2004).

ARGUMENT II.

THE COA DETERMINATION UNDER SECTION 2253 (c) REQUIRED AN OVERVIEW OF THE CLAIMS IN THE HABEAS PETITION AND A GENERAL ASSESSMENT OF THEIR MERITS. THE SEVENTH CIRCUIT ERRED IN HOLDING THAT EVERY §2254 MOTION CONSTITUTES A PROHIBITED 'SECOND OR SUCCESSIVE' HABEAS PETITION AS A MATTER OF LAW AND REFUSED TO PERMIT CONSIDERATION OF A NOTAL INTERVENING LEGAL DEVELOPMENT WHEN FAILURE TO DO SO PRECLUDED HOWELL FROM EVER RECEIVING ANY ADJUDICATION OF HIS CLAIMS ON THE MERITS." FED. R. CIV. P. 15'S PROVISIONS, INCLUDING "RELATION BACK" PRINCIPLE OF RULE 15 (c), APPLY TO POST-AEDPA §2254 PROCEEDINGS". LITTLE JOHN V. ARTUZ, 271 F3d 360, 363-64 (2d Cir. 2001).

THE SUPREME COURT IN CASTRO V. U.S., 124 S.Ct. 786, 793 (2003), RULED IN FAVOR OF MOVANT OVER GOVERNMENTAL ARGUMENT BASED ON "LAW OF THE CASE" DOCTRINE, EXPLAINING THAT THE DOCTRINE "CANNOT POSE AN INSURMOUNTABLE OBSTACLE" TO GRANTING RELIEF IN "AN APPROPRIATE CASE" BECAUSE DOCTRINE 'SIMPLY EXPRESSES' COMMON JUDICIAL PRACTICE" AND "DOES NOT LIMIT" THE COURTS' POWER (CITING MESSENGER V. ANDERSON, 225 U.S. 436, 444 (1912) (HOLMES, J.)).

"AEDPA DEFERENCE DID NOT APPLY UNDER §2254 (e)(1) AND NOT ENTITLED TO A PRESUMPTION OF CORRECTNESS. STATE COURT FINDINGS OF FACT WERE MADE IN THE COURSE OF RESOLVING CLAIMS OF INEFFECTIVE ASSISTANCE, ISSUES OF COUNSEL'S PERFORMANCE AND DEFENDANT'S PREJUDICE ARE MIXED QUESTIONS OF FACT AND LAW. PROSECUTORIAL FRAUD IMPOSED UNREASONABLE PROCEDURAL DEFAULTS UPON THE FEDERAL COURTS AND BECAUSE THE STATE COURTS COULD NOT HAVE MADE A PROPER DETERMINATION ON THE MERITS, A COURT OF EQUITY SHOULD GRANT RELIEF. §2244 (b)(2); RULE 60 (d)(3).

IN CONCLUSION, DISTRICT COURT SHOULD SET ASIDE JUDGMENT FOR FRAUD AND VACATE JUDGMENT.

RESPECTFULLY SUBMITTED,

Danny W. Howell, 138701

PLAINTIFF, PRO SE

IN THE

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF INDIANA

FORT WAYNE DIVISION

DANNY W. HOWELL,	)	
PLAINTIFF,	)	
V.	)	CASE NO. _____
SUPERINTENDENT,	)	
DEFENDANT.	)	

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181 LED2D 80, 565 U.S. 847 Howell v. Brown

No. 10-10750.

Danny Howell, Petitioner

vs.

Richard Brown, Superintendent, Wabash Valley Correctional Facility.

565 US 847, 132 S Ct 167, 181 L Ed 2d 80, 2011 US LEXIS 6472

October 3, 2011.

Petition for writ of certiorari to the United States Court of Appeals for the Seventh Circuit denied.

DANNY HOWELL, Petitioner, vs. SUPERINTENDENT, WABASH VALLEY CORRECTIONAL Facility, Respondent.
UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF INDIANA, FORT WAYNE DIVISION
2010 U.S. Dist. LEXIS 61441
CAUSE NO. 1:09-CV-168
June 21, 2010, Decided
June 21, 2010, Filed

Editorial Information: Subsequent History

Motion denied by Howell v. Superintendent, Wabash Valley Corr. Facility, 2010 U.S. Dist. LEXIS 61774 (N.D. Ind., June 22, 2010)

Editorial Information: Prior History

Howell v. Superintendent, 2010 U.S. Dist. LEXIS 40581 (N.D. Ind., Apr. 26, 2010)

Counsel Danny Howell, Petitioner, Pro se, Carlisle, IN.

For Superintendent, Wabash Valley Correctional Facility, Respondent: Kelly A Miklos, LEAD ATTORNEY, Indiana Attorney General's Office - IAG/302, Indianapolis, IN.

Judges: RUDY LOZANO, Judge.

Opinion

Opinion by: RUDY LOZANO

Opinion

ORDER

This matter is before the Court on Petitioner Danny Howell's request for a Certificate of Appealability. To obtain a Certificate of Appealability, a petitioner must make "a 'substantial showing of the denial of a federal right.'" *Barefoot v. Estelle*, 463 U.S. 880, 893, 103 S. Ct. 3383, 77 L. Ed. 2d 1090 (1983) (quoting *Stewart v. Beto*, 454 F.2d 268, 270 n.2 (5th Cir. 1971), *cert. denied*, 406 U.S. 925, 92 S. Ct. 1796, 32 L. Ed. 2d 126 (1972)). *See also Stuart v. Gagnon*, 837 F.2d 289 (7th Cir. 1987). The court's discretion on whether to grant or deny a Certificate of Appealability is the best vehicle of separating meritorious from frivolous appeals. *Barefoot v. Estelle*, 463 U.S. at 893. A petitioner is not required to show that he would prevail on the merits, but he must show that the issues presented in his habeas petition are "debatable among jurists of reason; that a court *could* resolve the issues [in a different manner]; or that the questions are 'adequate to deserve encouragement to proceed further.'" *Id.* at 893 n.4 **{2010 U.S. Dist. LEXIS 2}**(quoting *Gordon v. Willis*, 516 F.Supp. 911, 913 (N.D.Ga. 1980)). *See also United States ex rel. Calhoun v. Pate*, 341 F.2d 885 (7th Cir.), *cert. denied*, 382 U.S. 945, 86 S. Ct. 402, 15 L. Ed. 2d 354 (1965).

This court denied Mr. Howell's petition for writ of habeas corpus because it concluded that the Indiana courts had correctly applied established federal law in adjudicating his ineffective assistance of counsel claims, and did not make an unreasonable determination of the facts in light of the facts contained in the state court record. Nothing in Mr. Howell's petition for certification of appealability casts doubt on that conclusion, and the issue does not present a question that is debatable among jurists of reason. Further, he has not presented an argument adequate to deserve encouragement to proceed further.

For the foregoing reasons, the petitioner's motion for a Certificate of Appealability (DE 28) is **DENIED** pursuant to Rule 22(b), Federal Rules of Appellate Procedure. The court advises the petitioner that pursuant to Fed. R. App. P. 22(b), where the district judge denies a certificate of appealability, the applicant for the writ may then request issuance of the certificate by a circuit judge.

DATED: June 21, {2010 U.S. Dist. LEXIS 3}2010

/s/ RUDY LOZANO, Judge

United State District Court

DANNY HOWELL, Petitioner, vs. SUPERINTENDENT, WABASH VALLEY CORRECTIONAL FACILITY, Respondent.
UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF INDIANA, FORT WAYNE DIVISION
2010 U.S. Dist. LEXIS 61774
NO. 1:09-CV-168
June 22, 2010, Decided
June 22, 2010, Filed

Editorial Information: Prior History

Howell v. Superintendent, Wabash Valley Corr. Facility, 2010 U.S. Dist. LEXIS 61441 (N.D. Ind., June 21, 2010)

Counsel Danny Howell, Petitioner, Pro se, Wabash Valley Correctional, Carlisle, IN.

For Superintendent, Wabash Valley Correctional Facility, Respondent: Kelly A Miklos, LEAD ATTORNEY, Indiana Attorney General's Office - IAG/302, Indianapolis, IN.

Judges: RUDY LOZANO, United State District Judge.

Opinion

Opinion by: RUDY LOZANO

Opinion

OPINION AND ORDER

This matter is before the Court on the motion to alter or amend judgment pursuant to Fed. R. Civ. P. 59(e) filed by Petitioner Danny Howell, asking the Court to grant his petition for writ of habeas corpus. For the reasons set forth below, the Court **DENIES** the Petitioner's motion to alter or amend judgment.

Howell, a prisoner confined at the Wabash Valley Correctional Facility, filed this petition for writ of habeas corpus pursuant to 28 U.S.C. section 2254, challenging his convictions in the Wells Circuit Court for felony child molestation and sexual misconduct for a minor for which he received sentences totaling seventy years. On April 26, 2010, the court denied Howell's petition for writ of habeas corpus. On April 30, 2010, he filed his motion to alter or amend judgment, and on May 20, 2010, he filed his notice of appeal.

Where a party has filed a notice of appeal, a district court **{2010 U.S. Dist. LEXIS 2}**may deny, but not grant his motion for relief from judgment. *United States v. Cronic*, 466 U.S. 648, 667 n. 42, 104 S. Ct. 2039, 80 L. Ed. 2d 657 (1984)."*Cronic* involved a motion for a new trial under Fed. R. Crim. P. 33, but the principle is general. A district court disposed to alter the judgment from which an appeal has been taken must alert the court of appeals, which may elect to remand the case for that purpose. The

18
12
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district court may not alter the judgment unless the court of appeals grants leave." *Kusay v. United States*, 62 F.3d 192, 195 (7th Cir. 1995)(citations omitted).

For the reasons set forth above, the petitioner's motion to alter or amend judgment (DE 25) is **DENIED**.

DATED: June 22, 2010

/s/ RUDY LOZANO, Judge

United State District Court

DANNY HOWELL, Petitioner, vs. SUPERINTENDENT, WABASH VALLEY CORRECTIONAL Facility, Respondent.
UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF INDIANA, FORT WAYNE DIVISION
2010 U.S. Dist. LEXIS 40581
CAUSE NO. 1:09-CV-168
April 26, 2010, Decided
April 26, 2010, Filed

Editorial Information: Subsequent History

Certificate of appealability denied Howell v. Superintendent, Wabash Valley Corr. Facility, 2010 U.S. Dist. LEXIS 61441 (N.D. Ind., June 21, 2010)

Counsel Danny Howell, Petitioner, Pro se, Carlisle, IN.

For Superintendent, Wabash Valley Correctional Facility, Respondent: Kelly A Miklos, LEAD ATTORNEY, Indiana Attorney General's Office - IAG/302, Indianapolis, IN.

Judges: RUDY LOZANO, United State District Judge.

Opinion

Opinion by: RUDY LOZANO

Opinion

OPINION AND ORDER

This matter is before the Court on the Petition for Writ of Habeas Corpus by a person in State custody under 28 U.S.C. § 2254, seeking review of his conviction, submitted by Petitioner Danny Howell, the Response to the order to show cause filed by the Respondent, and the Petitioner's Traverse. For the reasons set forth below, the court **DENIES** this petition and the Clerk is **ORDERED** to **DISMISS** the petition.

BACKGROUND

Petitioner Danny Howell, a prisoner confined at the Wabash Valley Correctional Facility, filed this petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254, challenging his convictions in the Wells Circuit Court for felony child molestation and sexual misconduct with a minor for which he received sentences totaling seventy years. The Indiana Court of Appeals affirmed his convictions on direct appeal. (DE 17-5) and he did not seek transfer to the Indiana Supreme Court. (DE 1 at 2). Howell subsequently **{2010 U.S. Dist. LEXIS 2}** petitioned for post-conviction relief asserting ineffectiveness of his trial counsel. The trial court denied relief, the Indiana Court of Appeals affirmed the trial court's resolution of the petition for post-conviction relief (DE 17-9), and the Indiana Supreme Court denied transfer. (DE 17-7 at 5). In his petition for writ of habeas corpus, Howell asserts that he

"was denied his right to the effective assistance of counsel under the Sixth and Fourteenth Amendments for failure to offer proof that alleged child molest victim told other people her stepbrother previously molested her." (DE 1 at 5).

LEGAL STANDARDS

This petition is governed by the provisions of the Anti-Terrorism and Death Penalty Act of 1996 ("AEDPA"). *See Lindh v. Murphy*, 521 U.S. 320, 336, 117 S. Ct. 2059, 138 L. Ed. 2d 481 (1997). AEDPA allows a district court to issue a writ of habeas corpus on behalf of a person in custody pursuant to a state court judgment "only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2254(a). The court can only grant an application for habeas relief if it meets the requirements of 28 U.S.C. § 2254(d), which provides:

> An application for a writ of habeas **{2010 U.S. Dist. LEXIS 3}**corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim--
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

Under this deferential standard, a federal habeas court must "attend closely" to the decisions of state courts and "give them full effect when their findings and judgments are consistent with federal law." *Williams v. Taylor*, 529 U.S. 362, 383, 120 S. Ct. 1495, 146 L. Ed. 2d 389 (2000). A state court decision is "contrary to" federal law if the state court arrives at a conclusion opposite to that reached by the Supreme Court or if the state court reaches an opposite result in a case involving facts materially indistinguishable from relevant Supreme Court precedent. *Bell v. Cone*, 535 U.S. 685, 694, 122 S. Ct. 1843, 152 L. Ed. 2d 914 (2002). A federal court may grant habeas relief under the "unreasonable **{2010 U.S. Dist. LEXIS 4}**application" clause if the state court identifies the correct legal principle from Supreme Court precedent but unreasonably applies that principle to the facts of the petitioner's case. *Wiggins v. Smith*, 539 U.S. 510, 520, 123 S. Ct. 2527, 156 L. Ed. 2d 471 (2003). To warrant relief, a state court's decision must be more than incorrect or erroneous; it must be "objectively unreasonable." *Id.*

DISCUSSION

In his petition for writ of habeas corpus, Howell asserts that his trial counsel rendered ineffective assistance because he failed "to offer proof that alleged child molest victim told other people her stepbrother previously molested her." (DE 1 at 5)

"The Sixth Amendment entitles criminal defendants to the 'effective assistance of counsel'-- that is, representation that does not fall below an objective standard of reasonableness in light of prevailing professional norms." *Bobby v. Van Hook*, 130 S. Ct. 13, 175 L. Ed. 2d 255, 2009 WL 3712013, at *2 (2009). The governing Supreme Court case is *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). To establish ineffective assistance of counsel under *Strickland*, the Petitioner must show that counsel's performance was deficient and that the deficient performance prejudiced him. The court's review of **{2010 U.S. Dist. LEXIS 5}**counsel's performance is "highly deferential," and the Petitioner "must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy." *Davis v. Lambert*, 388 F.3d 1052, 1059 (7th Cir. 2004). The prejudice prong requires the Petitioner to show that "but for counsel's

unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694. Where it is expedient to do so, a court may resolve an ineffective assistance claim based solely on the prejudice prong; in other words, where a petitioner cannot establish prejudice, there is no need to consider in detail whether counsel's performance was constitutionally deficient. *See Strickland*, 466 U.S. at 697; *Watson v. Anglin*, 560 F.3d 687, 689-90 (7th Cir. 2009).

Howell presented his ineffective assistance of counsel claims to the Indiana courts in his post-conviction proceedings. The Indiana Appellate Court properly identified the *Strickland* standard as governing the resolution of this claim. (DE 17-9 at 7-8). Accordingly, the court must determine whether the state court's application of *Strickland* was unreasonable.

Howell argued in his state appeal **{2010 U.S. Dist. LEXIS 6}**that he "was denied the effective assistance of counsel when counsel did not make an offer of proof that B.S. told other people her stepbrother molested her." (DE 17-8 at 3). A social worker named Ramsey interviewed the victim on five occasions. "During these sessions, B.S. discussed Howell's molestation and may have also mentioned her alleged sexual relationship with B.H." (DE 17-9 at 9). Howell argued that Ramsey's testimony opened the door to the admission of evidence of the relationship between B.S. (the victim) and B.H. (Howell's minor son), and that "his trial attorney was ineffective for failing to make an offer of proof regarding the alleged sexual relationship between B.S. and B.H." (DE 17-9 at 8)

The Indiana courts rejected this theory. The Indiana Court of Appeals noted in its opinion that Howell conceded in his appellate brief "that this evidence would normally have been inadmissible . . . Howell insists that Ramsey's testimony opened the door to the evidence implicating Howell's right to cross-examine witnesses pursuant to the Sixth Amendment to the United States Constitution." (DE 17-9 at 8-9).

In regard to the deficient performance prong of the *Strickland* test, the Indiana **{2010 U.S. Dist. LEXIS 7}**Appellate Court concluded that, unlike the case Howell cited in his appeal, there was no evidence that the relationship between B.S. and B.H. was non-consensual, and there was "no evidence that a consensual sexual relationship would have caused B.S. to have behaved as though she had been molested." (DE 17-9 at 13). After analyzing the facts of Howell's appeal the court of appeals stated "[w]e cannot conclude that this evidence opened the door to testimony regarding a sexual relationship between B.S. and B.H. because Howell's Sixth Amendment right to cross-examine was simply not implicated." (*Id.*).

In regard to the prejudice prong of the *Strickland* test, the Indiana court of Appeals noted that:

> . . . even if we had concluded that an offer of proof should have been made, Howell would still fail in his ineffective assistance claim because he cannot establish prejudice given the substantial evidence in the record supporting his convictions. B.S. testified that Howell had engaged in sexual intercourse with her twice when she was thirteen and again when she was fourteen. Furthermore, four witnesses testified that they saw Howell pat B.S.'s legs inside her thigh, pat her bottom with is fingers **{2010 U.S. Dist. LEXIS 8}**between her legs, place his crotch area on her hand, and press the front of his body against B.S.'s body. We do not find the post-conviction court's conclusion that this evidence is "overwhelming" to be clearly erroneous. Appellant's App. P. 12. Therefore, we find that it was not clearly erroneous for the post-conviction court to have concluded that Howell established neither deficient performance nor prejudice . . . .DE 17-9 at 14.

A federal court may grant habeas relief if the state court identifies the correct legal principle from Supreme Court precedent but unreasonably applies that principle to the facts of the petitioner's case. *Wiggins*, 539 U.S. at 520. The Indiana Court of Appeals reviewed Howell's claims under the *Strickland* standard, reasonably applied *Strickland* to the Petitioner's allegations, and rejected them. Howell

failed to establish ineffective assistance of trial counsel because he did not establish either cause or prejudice. Nothing in the record suggests that had Howell's counsel attempted to delve into the relationship between the victim and Howell's minor son the result of the proceeding would have been different. Because the Indiana Court of Appeals reasonably **{2010 U.S. Dist. LEXIS 9}**applied *Strickland* to Howell's claims and found them to be unsubstantiated his claims are without merit on habeas review pursuant to 28 U.S.C. § 2254(d).

CONCLUSION

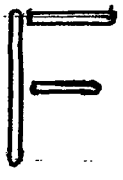
For the reasons set forth above, the petition (DE 1) is **DENIED** and the Clerk is **ORDERED** to **DISMISS** the petition.

DATED: April 26, 2010

/s/ RUDY LOZANO, Judge

United State District Court

APPENDIX



Thursday Jan. 23, 2003

Diary,

This week has been horrible. But, at the moment, for some apparent reason, I feel normal for the first time ever! I'm listening to "Just a Friend" by Mario at 9:57 p.m. while I'm writing this. I'm having major problems at school with Matt and him hurting, threatening, and sexually harassing us while the school sits around and sends him to I.S.D. for a day and a half! Then, the problems I'm having here at home. Me & Brandon got caught. Dan is going to talk to Brandon tomorrow when they get here. I'm worried about this weekend because I'm afraid of how Brandon's going to

-Raiders Jump Boy-

-Super Bowl Sun.- Sun. Jan. 26, 2003

Diary,

Well, now I know how Brandon is going to act around me. He'll stare at me, he'll watch me when I walk, but he won't talk to me. I'm afraid he'll never talk to me again. Dan told me that is the least of any of my problems. I know it is. But I don't have him hate me and never talk to me again. I'm not in love with Brandon, but I do love him because he's my brother. I'm going to try to talk to him and see if we can start over as friends. To see if we can forget any of this ever happened. We just have to convince our parents to just back to leave us alone together. This will never happen again. But I'm actually glad we got caught

YAHOO! Mail

Print - Close

Date: Mon, 14 Apr 2003 08:18:44 -0700 (PDT)
From: "Michael Broderick" <dx125dirtrider2004@yahoo.com>
Subject: Re: Story of Matt
To: "Brit Schwab" <cherrybb2@yahoo.com>

He should have listened. No offense to him but what a bastard.

Brit Schwab <cherrybb2@yahoo.com> wrote:

> *Michael Broderick <dx125dirtrider2004@yahoo.com>* wrote:
>
> > Matt was turned in by the bus driver with 3 preps backing the bus driver's story. At least that's what I heard. He got I.S.S today and O.S.S. tomorrow and Wed. Josh was also turned in. Luckily, Matt and Josh were low the office at the same time. They had the same story; the ciggs didn't belong to them. That's what they told DARNELL (—|—)-> fat ass!😊
> > Well he got away with it and so did Josh, but they still had a minor punishment. He could've got expelled.
> >
> > I told him not to do it! This isn't fair! The only day I have to spend with him now is Thursday cause I won't be here Friday. I'll be in Kentucky for Easter. I don't want to go. This makes me so mad. I wish he would have listened to me. He told me he was trying to stop. If he's going to stop, He needs to leave them alone. Not the friends, the ciggs! I was trying to keep him out of trouble as good as I could. You can see how well that worked.
>
> Do you Yahoo!?
> Yahoo! Tax Center - File online, calculators, forms, and more

Do you Yahoo!?
Yahoo! Tax Center - File online, calculators, forms, and more

Do you Yahoo!?
Yahoo! Tax Center – File online, calculators, forms, and more

88000953 - Schwob, Brittney

EXPLANATION OF MARKS

Norwell Middle School
1100 US ...
Ossian, IN 46777
260-543-2213
Home of the Crusaders

EXPLANATION OF TEACHER COMMENTS

03 Lessons not prepared

April 7 School Dismisses at 11:30 - Teacher Inservice
April 18th - School will be in session - Make up day

Lorinda Howell
RE: Brittney Schwob
901 W LANCASTER ST
BLUFFTON, IN 46714

REPORT CARD SASI/SASIxp #213199

Schwob, Brittney
ID: 88000953 Grade: 07

Norwell Middle School
FROM 01/06/03 TO 03/13/03 3rd Quarter Report Card

Course Title	Teacher	1st Qtr	2nd Qtr	1st Exam	1st Sem	3rd Qtr	4th Qtr	2nd Exam	2nd Sem		Tot Abs	Tot Tdy	Conduct	Credits Earned	Teacher Comments (See List Above)
Language Arts 7	Gallmeyer	C+	C		C+						3				03
Mathematics 7	McClure, D.					C+									
Science 7	Roby	F	D		D										
Science 7	Roby					D					3				
Art 7	Curry	C													
Aquatics 7	Gates	A-													
Aerobic Health 7	Ault														
Aerobic Health 7	Ault		A												
Soc/Map Skills 7	Klimczak					B					7				
Health 7	McClure, T.					A					7				
Physical Edu 7	Ault		B												
Physical Edu 7	Ault														
Social Studies 7	Hanni	D-	C+		C+										
Social Studies 7	Hanni					C-					3	1			
PAGE 1 OF 2															

EXPLANATION OF MARKS

[illegible]
Home of the Crusaders

April 17 School dismisses at 11:30 Teacher Inservice
April 18th School will be in session- Make up day

Lorinda Howell
RE: Brittney Schwob
301 W LANCASTER ST
BLUFFTON, IN 46714

EXPLANATION OF TEACHER COMMENTS

[illegible]

REPORT CARD

SASI/SASIxp #213199

Norwell Middle School

Schwob, Brittney [illegible] FROM 01/26/03 TO 03/12/03 3rd Quarter Report Card

ID: 6300093 Grade: 07

COURSE TITLE	TEACHER	ACADEMIC MARKS										ATTENDANCE		CONDUCT	CREDITS EARNED	TEACHER COMMENTS (SEE LIST ABOVE)
Crusader Time	McClure D	[illegible]														
Crusader [illegible]	McClure D	[illegible]														
Mathematics [illegible]	McClure D	[illegible]														
Computer [illegible]	Smith [illegible]	[illegible]														
Study Hall [illegible]	McClure D	[illegible]														
Language Arts [illegible]	Gallmeyer [illegible]	[illegible]														

PAGE 2 OF 2

[illegible]

Angela Smith
Composition 7 (07 - S2)
Crs:1090 Sec:1090-071 Per:07

Student Progress Report

4/22/2003

Schwob, Brittney

Norwell Middle HS

Student's Grade: 18.81% (F)

4th Nine Weeks (Numeric Total Points)

#	Task Type (no weight)	Task Name	Score	Out Of	Percent
1	Homework	Graphic organizer	0	15	0.00
2	Homework	Rough Draft Critical Review	0	20	0.00
3	Homework	Group Conference	0	20	0.00
4	Homework	Second Draft Critical Review	0	20	0.00
5	Homework	Self Edit	0	20	0.00
6	Homework	Peer Edit	0	15	0.00
7	Homework	Final Critical Review	0	5	0.00
8	Homework	Rough Draft Gold Medal POW	0	75	0.00
9	Homework	Final Gold Medal POW	20	20	100.00
10	Homework	Mug Shots 3-10	21	35	60.00
11	Homework	Mug Shots 3-17	0	18	0.00
12	Homework	Mug Shots 3-31	4	24	16.67
13	Homework	Prewriting	0	20	0.00
14	Homework	Mug Shots 4-7	12	16	75.00

Student's Summary Grade: 18.81

Missing Tasks:

#	Task Type (no weight)	Task	Reason	Missing Percent
1	Homework	Graphic organizer	0	4.72
2	Homework	Rough Draft Critical Review	0	6.29
3	Homework	Group Conference	0	6.29
4	Homework	Second Draft Critical Review	0	6.29
5	Homework	Self Edit	0	6.29
6	Homework	Peer Edit	0	4.72
7	Homework	Final Critical Review	0	1.57
10	Homework	Mug Shots 3-10	0	23.58
12	Homework	Mug Shots 3-31	0	5.66
13	Homework	Prewriting	0	6.29
			<empty>	4.72

Total Percentage Missing: 70.13

YAHOO! Mail

Print - Close Windo

Date: Mon, 14 Apr 2003 08:18:44 -0700 (PDT)
From: "Michael Broderick" <lcx125dirtrider2004@yahoo.com>
Subject: Re: Story of Matt
To: "Brit Schwob" <cherrybb2@yahoo.com>

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> > Well he got away with it and so did Josh, but they still had a minor punishment. He could've got expelled.
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> > I told him not to do it! This isn't fair! The only day I have to spend with him now is Thursday cause I won't be here Friday. I'll be in Kentucky for Easter. I don't want to go.This makes me so mad. I wish he would have listened to me. He told me he was trying to stop. If he's going to stop, He needs to leave them alone. Not the friends, the ciggs! I was trying to keep him out of trouble as good as I could. You can see how well that worked.
>
>

I'm freaked I don't think we should wait and let something really bad happin to you but I also don't want to tell cause you will be taken away from your parents and then I'll never see you again!

so Ameee I hope you won't be mad ok

Don't tell anyone

Brandy

CHRONOLOGICAL CASE SUMMARY

CASE SUMMARY

CASE NO. 77C01-0501-MI-000005

Howell V Hanks

Location: Sullivan Circuit Court
Filed on: 01/04/2005
Legacy System Number: C105MI00005

CASE INFORMATION

Statistical Closures
01/11/2005 Other

Case Type: MI - Miscellaneous Civil
Case Status: 01/11/2005 Decided

CASE ASSIGNMENT

DATE	
	Current Case Assignment
	Case Number: 77C01-0501-MI-000005
	Court: Sullivan Circuit Court
	Date Assigned: 01/04/2005

PARTY INFORMATION

Plaintiff	Howell, Danny *IN*
Defendant	Hanks, Craig *IN*

DATE	EVENTS & ORDERS OF THE COURT	INDEX
01/04/2005	Converted Event *docket level comment: T/O TO WELLS COUNTY*	
01/04/2005	Converted Event *Docket Level Entry: Entry/Fee - Book: 2 Page: 519*	
01/04/2005	Converted Event *Petition filed pending approval of fee waiver. kkt (RJO? N) | JTS Minute Entry Date: 01/04/2005*	
01/05/2005	Converted Event *Petitioner files VERIFIED PETITION FOR STATE WRIT OF HABEAS CORPUS, AFFIDAVIT OF POVERTY, MOTION FOR APPOINTMENT OF COUNSEL, EXHIBITS A,B,C,D, E, F and 2 TAPES. tt (RJO? N) | JTS Minute Entry Date: 01/04/2005*	
01/12/2005	Converted Event *The Court having reviewed Petitioner's Verified Petition For State Writ Of Habeas Corpus, now Orders this cause transferred without accessing costs to the Wells Circuit Court, pursuant to Post Conviction Rule 1, Subsection 1(c). OFF tt (DISPOSED: TO) (RJO? Y) (Alt Judge R) | JTS Minute Entry Date: 01/11/2005*	Vol/Book 137

9-9-19 You will need to contact an Attorney for answers to your questions. We are not [illegible] advice

PETITIONER'S EXHIBIT: 4

CHRONOLOGICAL CASE SUMMARY

CASE SUMMARY

CASE NO. 90C01-0501-PC-000001

Howell Vs State Of Indiana

§ Location: **Wells Circuit Court**
§ Judicial Officer: **Kiracofe, Kenton W**
§ Filed on: **01/20/2005**
§ Legacy System Number: **C105PC00001**
§

CASE INFORMATION

Statistical Closures
03/07/2005 Dismissed

Case Type: **PC - Post Conviction Relief Petition**

Case Status: **03/07/2005 Decided**

CASE ASSIGNMENT

Current Case Assignment

Case Number	90C01-0501-PC-000001
Court	Wells Circuit Court
Date Assigned	01/20/2005
Judicial Officer	Kiracofe, Kenton W

PARTY INFORMATION

Petitioner **Howell, Danny**
Wabash Valley Corr. Fac.
Po Box 1111
Carlisle, IN 47838

DATE	EVENTS & ORDERS OF THE COURT	INDEX
01/21/2005	Converted Event *Transcript Of Proceedings No. 77C01-0501-MI-00005 of the Sullivan Circuit Court filed. (RJO? N) | JTS Minute Entry Date: 01/21/2005*	
01/26/2005	Converted Event *Motion For Change Of Venue From The Judge filed. Affidavit In Support Of Motion For Change Of Venue From The Judge filed. Order filed. (RJO) (Notice) (RJO? N) | JTS Minute Entry Date: 01/26/2005*	
01/31/2005	Converted Event *State's Response To Petition For State Writ Of Habeas Corpus (Petition For Post Conviction Relief) filed. (RJO? N) | JTS Minute Entry Date: 01/31/2005*	
02/02/2005	Converted Event *Motion To Withdraw Appearance filed. Order Granting Withdraw filed. (RJO) (RJO? N) | JTS Minute Entry Date: 02/02/2005*	
02/10/2005	Converted Event *Letter filed. (RJO? N) | JTS Minute Entry Date: 02/10/2005*	
02/28/2005	Converted Event *Verified Petition Requesting Appointment Of Special Prosecutor filed nunc pro tunc as of February 22, 2005. Motion For Change Of Venue From The Judge & County After Prescribed Time Has Run, Pursuant To State Habeas/PCR-1 Sec. 4(b) filed. All matters scheduled for hearing Monday, March 7, 2005, at 1:00 p.m. (Notice) Affidavit In Support Of Motion For Change Of Venue From The Judge filed. Notice Of Non-Representation filed. Petitioner's Reply (Traverse) To State Response To Petition For State Writ Of Habeas Corpus (Post Conviction Relief) filed. Transport Order filed. (RJO) (Notice) (RJO? N) | JTS Minute Entry Date: 02/28/2005*	

CHRONOLOGICAL CASE SUMMARY

CASE SUMMARY

CASE NO. 90C01-0501-PC-000001

03/07/2005	Converted Event *Order filed. (RJO)(Notice) (DISPOSED: DI) (RJO? N) | JTS Minute Entry Date: 03/07/2005*
03/16/2005	Converted Event *Motion To Compel Court To Produce All Documents Pertaining To Petitioner's State Habeas Corpus w/ Exhibits filed. Order Requiring Court To Produce Petition Of State Habeas Corpus/ PCR 1 C and Exhibits To Petitioners Wife, Lorinda Howell, POA filed. (RJO)(Notice) (RJO? N) | JTS Minute Entry Date: 03/16/2005*
11/23/2010	Converted Event *IMAGED CONFIDENTIAL FILE PRIOR TO SCANNING INSTALLATION (RJO? N) | JTS Minute Entry Date: 11/23/2010*
11/23/2010	Converted Event *IMAGED CONFIDENTIAL FILE PRIOR TO SCANNING INSTALLATION (RJO? N) | JTS Minute Entry Date: 11/23/2010*
11/23/2010	Converted Event *IMAGED ALL DOCUMENTS IN FILE PRIOR TO SCANNING INSTALLATION. (RJO? N) | JTS Minute Entry Date: 11/23/2010*
06/08/2020	Correspondence to/from Court Filed File Stamp: 06/08/2020 Filed By: Petitioner Howell, Danny *Copy of CCS mailed to Mr. Howell*

IN THE

COURT OF APPEALS OF INDIANA

NO. 90A02-0809-PC-829

DANNY HOWELL,	)	Appeal from the Wells Circuit Court
Appellant (Petitioner Below,)	)	
V.	)	Cause No. 90C01-0505-PC-2
STATE OF INDIANA,	)	The Honorable David L. Hanselman, Sr., Judge.
Appellee (Plaintiff Below),	)	

REPLY BRIEF OF PETITIONER-APPELLANT

SUMMARY OF THE REPLY ARGUMENT

I. Howell was denied the effective assistance of trial counsel. Once the State opened the door through Ramsey's testimony, trial counsel could have presented evidence through the testimony of his wife or himself that B.S. previously said B.H. engaged in sexual activity with her. Trial counsel alternatively could have called B.S. as a witness and asked her about her allegation.

REPLY ARGUMENT I

HOWELL WAS DENIED THE EFFECTIVE ASSISTANCE OF TRIAL COUNSEL.

The State argues Howell did not present any evidence on how the lack of an offer of proof prejudiced him because Ramsey had no recollection B.S. alleged B.H. molested her [Brief of Appellee, pp. 6-7].

Ramsey was not the only source that could have testified B.S. alleged B.H. molested her. B.S.'s mother and Howell testified at the PCR hearing that B.S. told them about the allegation prior to speaking to Ramsey and before she accused Howell of molesting her [PCR. 17-91, 21-22].[1] Another possible way to bring up B.S.'s allegation about B.H. after the State opened the door through Ramsey's testimony would have been to recall B.S. as a defense witness and ask her about the allegation. If she denied making the statement, she could have been impeached with her deposition [PCR. Exhibit E, pp. 31-32]. If she admitted making the statement, trial counsel would have used it to question her credibility on her allegations against Howell [PCR. 13].

The State cites *McVey v. State*, 863 N.E.2d 434, 445 (Ind. Ct. App. 2007), in support of its argument that allowing "testimony regarding the sexual relationship with B.H. would have handed Petitioner the fishing rod, using his own son as the bait, and B.S.'s mother as the hook" [Brief of Appellee, p. 8]. *McVey* is factually distinguishable. In *McVey*, J.H. in 2001 reported her brother (McVey) had touched her inappropriately. McVey was charged in June, 2002. *Id.* at 439. The trial court excluded evidence another man had sexual contact with J.H. in July, 2002.

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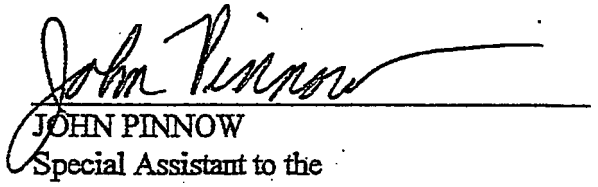
[1]What B.S. told them would have been limited to impeaching her credibility and was not admissible for the truth [PCR. 17].

Id. at 445. The Court of Appeals found no abuse of discretion in refusing to let McVey cross-examine J.H. about her prior sexual history, *Id.*, and distinguished *Davis v. State*, 749 N.E.2d 552 (Ind. Ct. App. 2001).. In *McVey*, the other man could not have been the source of J.H.'s accusation against McVey because his alleged sexual contact with J.H. did not occur until after she had accused McVey and her physical examination had been conducted. *Id.* at 445. In *Davis*, the trial court excluded evidence L.P. had been sexually active with others in the same time period the defendant had allegedly molested her and prior to a hospital examination which determined she had been sexually active. Here, the trial court excluded evidence B.S. had been sexually active with B.H. in early 2003 [PCR. Exhibit E, pp. 31-32], which was before she alleged Howell started molesting her [TR. 132; PCR. 19, 22]. B.S.'s accusation against B.H. was unlike *McVey* because it predated her accusation against Howell. Ramsey's testimony B.S. was not prone to exaggerate in sexual matters, he had not learned anything inconsistent with her being a victim of sexual abuse and she remained consistent in her version of events [TR. 250, 252-253] suggests B.S. was a child molest victim. The jury did not hear that she was a victim of sexual abuse by B.H. before her allegations against Howell, and before she spoke with Ramsey.

CONCLUSION

Howell renews his request that this Honorable Court grant him the relief requested in the Brief of Appellant filed on November 26, 2008.

Respectfully,



JOHN PINNOW
Special Assistant to the
State Public Defender
Attorney No. 6619-02

Attorney for Appellant

IN THE

COURT OF APPEALS OF INDIANA

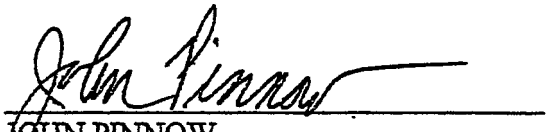
NO. 90A02-0809-PC-829

DANNY HOWELL,	)	Appeal from the Wells
	)	Circuit Court
Appellant (Petitioner Below,)	)	
	)	
V.	)	Cause No. 90C01-0505-PC-2
	)	
STATE OF INDIANA,	)	The Honorable
	)	David L. Hanselman, Sr.,
Appellee (Plaintiff Below),	)	Judge.

CERTIFICATE OF SERVICE

I hereby certify that I have, this 21 day of January, 2009, served upon Mr. Greg Zoeller, Attorney General of Indiana, a copy of the above and foregoing **REPLY BRIEF OF PETITIONER-APPELLANT** pursuant to Appellate Rule 24(C)(1), by personal service, to his office located at 217 State House, Indianapolis, IN 46204.

Respectfully submitted,



JOHN PINNOW
Attorney at Law
Attorney No. 6619-02

AFFIRMATION

I, DANNY W. HOWELL, being duly sworn upon my oath, depose and say that I have subscribed to the foregoing petition; that I know the contents thereof; that it includes every ground known to me for vacating, setting aside or correcting the conviction and sentence attacked in this motion; and that the matters and allegations therein set forth are true.

Danny W. Howell
Signature of Affiant

State of Indiana)
) SS:
County of Sullivan)

Subscribed and sworn to before me, a Notary Public for the State of Indiana, this 4 day of October, 2023.

My Commission Expires:

4 / 14 / 27
Month Day Year

Sullivan
County of Residence

J Gilbert
Notary Public

J Gilbert
Name Printed

SULLIVAN COUNTY, STATE OF INDIANA
J GILBERT NOTARY PUBLIC SEAL
MY COMMISSION EXPIRES 04/14/2027
COMMISSION NO NP0719755