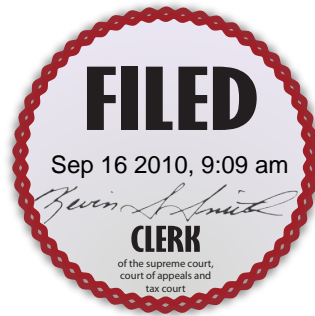


Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE  
COURT OF APPEALS OF INDIANA**

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WILLIAM C. DAVIS,	)	
	)	
Appellant-Petitioner,	)	
	)	
vs.	)	No. 82A01-0909-PC-460
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Respondent.	)	

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APPEAL FROM THE VANDERBURGH SUPERIOR COURT  
The Honorable Wayne S. Trockman, Judge  
Cause Nos. 82D02-0411-FA-911 and 82D03-0808-PC-14

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**September 16, 2010**

**MEMORANDUM DECISION – NOT FOR PUBLICATION**

**RILEY, Judge**

## STATEMENT OF THE CASE

Appellant-Petitioner, William C. Davis (Davis), appeals the post-conviction court's denial of his petition for post-conviction relief.

We affirm.

## ISSUES

Davis raises thirteen issues on appeal, which we consolidate and restate as the following two:

- (1) Whether the post-conviction court properly denied Davis' petition for post-conviction relief which raised numerous procedural errors which he perceived had been committed during the post-conviction proceedings; and
- (2) Whether Post-Conviction Rule 1(9)(b) violates the Equal Privileges and Immunities Clause of Article 1, Section 23 of the Indiana Constitution.

## FACTS AND PROCEDURAL HISTORY

The facts, as found by this court on direct appeal, are as follows:

[I]n February 2004, while working as a volunteer on a crisis line, Davis became acquainted with fellow volunteer [M.Y.]. [M.Y.] had four children, the oldest of which was twelve-year-old J.C. J.C. has Tourette's syndrome, learning disabilities, attention-deficit hyperactivity disorder, and attends special needs classes. Davis visited [M.Y.]'s house in Evansville frequently and spent the night there several times. Davis took J.C. fishing, swimming, and biking, and took J.C. to his home for several overnight visits.

Davis molested J.C. during at least one overnight stay at [M.Y.]'s house. After [M.Y.] and her family changed residences, Davis took J.C. to [M.Y.]'s largely vacant former residence and molested him further. Davis fondled J.C.'s penis on more than one occasion, performed oral sex on J.C., and performed anal sex on J.C. "plenty of times." Tr. at 84. Davis also had

J.C. fondle his penis and perform oral sex on him. In late July 2004, J.C. told [M.Y.] about the molestations. [M.Y.] called the police.

On July 29, 2004, Evansville Police Detective Jim Harpenau interviewed J.C. The next day, Detective Harpenau called Davis, told him that a young child had made an allegation against him, and said that he wanted to talk with Davis about the allegation. That same day, Davis called [M.Y.] and left a voicemail message stating, “[M.Y.] please please talk to me about this. Please call me. Please.” State’s Exh. 17. [M.Y.] played this message and two previous messages from Davis for Detective Harpenau, who recorded them from his phone.

Davis fled to Fargo, North Dakota, where he obtained a driver’s license using his brother’s name to avoid detention. Tests confirmed the presence of Davis’s sperm and genetic material consistent with J.C.’s DNA on a sweater found in a bedroom in [M.Y.]’s former residence. A warrant was issued for Davis’s arrest. On October 6, 2005, FBI Special Agent Matt Mohr received a tip that Davis was living in Fargo under his brother’s name. Agent Mohr obtained a copy of the photo from Davis’s North Dakota driver’s license and went with two other agents to the address provided by the tipster. The agents knocked on the door. Davis did not respond. Agent Mohr asked another tenant of the building to call Davis and tell him that there were three men downstairs who wanted to purchase the residence. Several minutes later, Davis came downstairs with a half-shaven head and was placed under arrest. Davis claimed to be his brother. The agents told Davis that they would fingerprint him to confirm his identity, but that it would be easier if he told them the truth. Davis states, “[A]lright, I’m Bill, my life is over.” *Id.* at 225.

*Davis v. State*, 2007 WL 2028095 (Ind. Ct. App. July 16, 2007).

The State charged Davis with three Counts of Class A felony child molesting, two Counts of Class C felony child molesting, and with being a repeat sexual offender. On April 20, 2006, a jury found Davis guilty on all child molesting Counts and, thereafter, Davis admitted to being a repeat sexual offender. On June 14, 2006, the trial court sentenced Davis to eight-year terms on each of the Class C felony convictions, to be served consecutive to the concurrent fifty-year terms on each of the Class A felony convictions. The trial court

enhanced Davis' sentence by ten years for being a repeat sexual offender, resulting in an aggregate sentence of sixty-eight years. The trial court ordered the sentence to be served consecutive to a fifty-two year sentence that Davis was already serving for child molestation convictions in Posey County, Indiana. Davis appealed his conviction, challenging the admission of the voicemail messages and the imposition of his sentence. On July 16, 2007, we affirmed the trial court in all respect and the supreme court subsequently denied transfer.

On August 22, 2008, Davis filed a petition for post-conviction relief. In his petition, which is more than 180 pages long, he raised over 150 claims of error. The Public Defender Office filed an appearance and a notice of present inability to respond, indicating that the Office must assist petitioners on a first-come, first-serve basis on the date of filing and that the caseload did not allow for Davis' petition to be investigated at that time. On February 17, 2009, Davis filed a declaration that he was proceeding *pro se* together with a motion asking the post-conviction court to order the State to produce the original, certified copy of the direct appeal transcript. The following day, the post-conviction court granted Davis' declaration but denied his motion for the State to produce the original transcript. On March 10, 2009, the State filed a motion to proceed by affidavit pursuant to Ind. Post-Conviction Rule 1(9)(b). The State's motion was granted the same day and the post-conviction court gave Davis sixty days in which to submit his affidavits and certified documents. On April 27, 2009, Davis filed a motion for a change of judge, which was denied on May 22, 2009. That same day, Davis also filed a "Notice of Temporary Address – And More." (Appellant's App. p. 71). On May 19, 2009, Davis filed a request for a continuance of his deadline to

submit affidavits, which the post-conviction court also denied on May 22, 2009. On May 29, 2009, the post-conviction court issued written findings of fact and conclusions of law denying post-conviction relief because Davis “did not submit affidavits or documents to support the claims for relief.” (Appellant’s App. p. 44).

Davis now appeals. Additional facts will be provided as necessary.

## DISCUSSION AND DECISION

### *I. Standard of Review*

Under the rules of post-conviction relief, the petitioner must establish the grounds for relief by a preponderance of the evidence. Ind. Post-Conviction Rule 1(5); *Strowmatt v. State*, 779 N.E.2d 971, 974-75 (Ind. Ct. App. 2002). To succeed on appeal from the denial of relief, the post-conviction petitioner must show that the evidence is without conflict and leads unerringly and unmistakably to a conclusion opposite that reached by the post-conviction court. *Id.* at 975. The purpose of post-conviction relief is not to provide a substitute for direct appeal, but to provide a means for raising issues not known or available to the defendant at the time of the original appeal. *Id.* If an issue was available on direct appeal but not litigated, it is waived. *Id.*

### *II. Procedural Errors*

On appeal, Davis raises a number of procedural claims regarding the post-conviction proceedings and the denial of relief. Specifically—and we agree with the State’s understanding of Davis’ brief—Davis claims that the post-conviction court: 1) improperly denied his request to subpoena witnesses; 2) improperly denied Davis the opportunity to

present evidence; 3) failed to enter findings specifically addressing all of Davis' claims; 4) prevented Davis from obtaining and submitting the record of the direct appeal; 5) falsely claimed that Davis had presented no evidence; 6) denied Davis an evidentiary hearing; 7) improperly denied Davis' request for an extension of time in which to submit affidavits; and 8) wrongly denied his request for a change of judge. In addition, Davis claims that the State failed to file a "real" answer in response to his petition for post-conviction relief and that he was denied the assistance of post-conviction counsel. (Appellant's Br. pp. 33-37).

Besides these explicitly enumerated claims, Davis asserts that "[t]here are more than 130 instances of error and misconduct listed in the [p]etition for [post-conviction relief]" which are all "solid grounds for reversal" and requests this court to "read the [p]etition and reverse the conviction." (Appellant's Br. p. 34). Indiana Appellate Rule 46(A)(8) requires that an Appellant support each contention in his appellate brief with an argument, including citations to legal authorities, statutes, and the record for support. As such, merely incorporating an issue by reference does not satisfy the requirements of the Appellate Rule. *See Pinkston v. State*, 821 N.E.2d 830, 842 (Ind. Ct. App. 2004), *trans. denied*. Therefore, Davis waived review of these 130 claims; however, we will review Davis' claims enumerated above.

First, at the start of the proceedings, the post-conviction court ordered Davis to submit his cause by affidavit pursuant to P-C.R. 1§9(b). Davis now contends that the post-conviction court abused its discretion by proceeding by affidavit; instead, he maintains, he

should have been given the opportunity to present evidence at an evidentiary hearing where he could have subpoenaed witnesses.

Indiana Post-Conviction Rule 1§9(b) states, in pertinent part, that

In the event petitioner elects to proceed pro se, the court at its discretion may order the cause submitted upon affidavit. It need not order the personal presence of the petitioner unless his presence is required for a full and fair determination of the issues raised at an evidentiary hearing.

An abuse of discretion occurs when the post-conviction court's decision is clearly against the logic and effect of the facts and circumstances before it. *Fuquay v. State*, 689 N.E.2d 484, 486 (Ind. Ct. App. 1997), *trans. denied*.

Although we have not had many occasions to address P-C.R. 1§9(b), we previously analyzed this rule in light of its companion rules P-C.R. 1§4(f) and (g)<sup>1</sup> in *Smith v. State*, 822 N.E.2d 193 (Ind. Ct. App. 2005), *trans. denied*.

Rule 1(4) contains two subsections indicating that a court may deny a petition without a hearing, namely subsections (f) and (g). But it does not follow that an evidentiary hearing is necessarily required on every petition unless the parties meet the requirements of one of those two subsections. Rather, Rule 1(9)(b) clearly and plainly provides that when a petitioner proceeds pro se, the [post-conviction court] has the discretion to order the cause submitted upon affidavit. That rule also provides that the [post-conviction court] need not order the personal presence of the petitioner unless his presence is required for a full and fair determination of the issues raised at an evidentiary hearing. We read those sentences together to mean that if the [post-conviction court] orders the cause submitted by affidavit under Rule 1(9)(b), it is the court's prerogative to determine whether an evidentiary hearing is required, along with the petitioner's personal presence, to achieve a full and fair determination of

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<sup>1</sup> Post-Conviction Rule 1(4)(f) allows the post-conviction court to deny a petition without a hearing "if the pleadings conclusively show that petitioner is entitled to no relief." Post-Conviction Rule 1(4)(g) states that when "an issue of material fact is raised, then the court shall hold an evidentiary hearing as soon as reasonably possible."

the issue raised. Thus, Rule 1(9)(b) is a third and distinct way for a [post-conviction court] to rule on a petition without an evidentiary hearing. . . .

Affidavits are sworn testimony and competent evidence in post conviction proceedings. Factual statements in affidavits often raise issues of fact, and to require a full evidentiary hearing any time affidavits submitted under Rule 1(9)(b) create issues of fact would defeat the purpose of Rule 1(9)(b), which is to allow for more flexibility in both the presentation of evidence and the review of post conviction claims where the petitioner proceeds *pro se*. Accordingly, where the [post-conviction court] orders the parties to proceed by affidavit under Rule 1(9)(b), the court may also determine that the petitioner's personal presence at an evidentiary hearing is required. But we hold that the decision whether to hold an evidentiary hearing for a full and fair determination of the issues raised, like the decision to proceed by affidavit, is best left to the [post-conviction court's] discretion.

*Id.* at 201.

Here, Davis requested his public defender to withdraw from representation and notified the trial court that he pursue his claims *pro se*. In accordance with P-C.R. 1(9)(b), the post-conviction court ordered the cause to be submitted by affidavit. In the course of these proceedings, Davis filed three requests for issuance of subpoenas “for witnesses [to appear] at an evidentiary hearing.” (Appellant’s App. p. 92). Although Davis requested the post-conviction court to subpoena witnesses, he failed to submit affidavits to support his claims in the first place. As we stated in *Smith*, affidavits can raise issues of fact which *might* result in an evidentiary hearing even though the post-conviction court was initially determined to decide the cause based on the submitted affidavits. However, where, as here, Davis failed to present the post-conviction court with sworn affidavits, we cannot say that the post-conviction court abused its discretion in denying Davis’ motion to subpoena witnesses and to hold an evidentiary hearing.



Davis now claims that he did not submit affidavits because the post-conviction court refused to grant him an extension. A post-conviction court's grant or denial of a continuance is reviewed for an abuse of discretion. *Tapia v. State*, 753 N.E.2d 581, 586 (Ind. 2001). On March 10, 2009, the post-conviction court had ordered Davis to submit his affidavits and supporting certified documents within sixty days, *i.e.*, by May 11, 2009.<sup>2</sup> On April 27, 2009, Davis filed a Notice of Temporary Address – And More. In this notice, Davis informed the post-conviction court that he had been transferred to the Posey County Jail and that he did not have access to his research materials and had thus not been able to proceed by affidavit. Davis noted that he expected to be moved back to the Wabash County Jail soon. Nonetheless, in the final sentence of his notice, Davis states “[i]f the deadline [to file affidavits] is less than 2 week from now then I will need an extension of the deadline.” (Appellant's App. p. 71). The post-conviction court did not respond to this notice of temporary address.

Then on May 19, 2009, after the deadline for filing affidavits had expired, Davis filed a petition requesting a continuance of his deadline to file. Again, Davis' request only stated that he had been temporarily transferred and did not have all of his legal documents with him. However, he did not explain why he was unable to prepare an affidavit or seek affidavits from witnesses without these documents. Also, Davis did not propose a timeline or give the court an assurance that a slight extension of time would be sufficient for him to comply. As

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<sup>2</sup> The sixtieth day was May 9, 2009, which was a Saturday and as such, Davis' actual deadline became May 11, 2009.

such, we find that the post-conviction court acted within its discretion when it denied Davis' request for an extension of time.

Next, Davis maintains that the post-conviction court abused its discretion when it prevented him from submitting the record on direct appeal into evidence. Davis first filed a motion with the court of appeals to have the original trial transcript submitted to the post-conviction court as an exhibit. On January 16, 2009, we denied Davis' motion, noting that Davis had not filed a motion for copy of record requesting his public defender to copy and transmit the record to him. Nevertheless, we added that we "will consider a motion to transfer the appellate record if it is filed by the trial court judge, or counsel assigned by the trial court to represent the defendant, or the State of Indiana." (Appellant's App. p. 121). Next, instead of following this court's advice, Davis filed a motion with the post-conviction court asking the court to order the State to produce the original, certified direct appeal record for use as evidence at the hearing. The post-conviction court denied this motion, noting that certified copies of the record were admissible but that it was not going to order the opposing party to produce the original. We find that the post-conviction court acted within its discretion as it clearly did not prevent Davis from filing the record, rather, the court advised Davis the proper way to proceed, which Davis did not heed. Moreover, there is no evidence in the record that Davis ever contacted his direct appeal attorney and requested a copy of the record.

Davis also complains that the post-conviction court wrongly denied his request for a change of judge. Post-Conviction Rule 1(4)(b) provides that "[w]ithin ten [10] days of filing

a petition for post conviction relief under this rule, the petitioner may request a change of judge by filing an affidavit that the judge has a personal bias or prejudice against the petitioner.” “[T]he rule requires the judge to examine the affidavit, treat the historical facts recited in the affidavit as true, and determine whether these facts support a rational inference of bias or prejudice.” *State ex rel. Whitehead v. Madison County Circuit Court*, 626 N.E.2d 802, 803 (Ind. 1993). This motion should be granted only if the evidence reveals such a high degree of favoritism or antagonism as to make fair judgment impossible. *State v. Shackelford*, 922 N.E.2d 702, 707 (Ind. Ct. App. 2010), *reh’g denied*. Disqualification is not required under the rule unless the judge holds a personal bias or prejudice. *Id.* In the cause before us, Davis filed his petition for post-conviction relief on August 22, 2008, but he did not file his motion for a change of judge until April 27, 2009, over eight months after the petition was filed. Therefore, the post-conviction court properly denied Davis’ motion of change of judge.

In addition, Davis claims that the State failed to file a “real” answer to his post-conviction relief petition. (Appellant’s Br. pp. 33-37). Our review of the State’s answer establishes that the State filed a standard answer to Davis’ petition, claiming that it was without sufficient information to admit or deny the allegations in Davis’ rhetorical paragraphs 1-7 and 10-18, that it denied the allegations contained in rhetorical paragraphs 8 and 9, and that it asserted the defenses of waiver, prior adjudication, laches, res judicata, collateral estoppel and law of the case. As such, we conclude that the State’s answer comported with the requirements of a responsive pleading set forth in Indiana Trial Rule 8.

Next, Davis asserts that he was denied the assistance of post-conviction counsel. Here, after Davis indicated a desire to be represented by post-conviction counsel, the court properly forwarded his request to the Public Defender's Office, who, in turn appointed a public defender. The public defender filed an appearance together with a notice of present inability to respond. At Davis' instruction, the public defender subsequently withdrew from representation because Davis elected to proceed *pro se* as he did not want his case to be delayed until the public defender had time to investigate. Thus, Davis was not denied the assistance of a public defender simply because his assigned counsel could not investigate his case as quickly as he would have liked. Therefore, we conclude that Davis' right was not violated.

Lastly, Davis contends that the post-conviction court falsely claimed that Davis had not presented any evidence. It is well established that it is petitioner's burden to prove his assertions by a preponderance of the evidence. *See* P-C.R. 1(5). Although Davis was required to submit affidavits as evidence to support his claims, he failed to present any affidavits. Therefore, the post-conviction court was correct in concluding that because Davis had submitted no affidavits, he had presented no evidence and thus, by definition could not have met his burden of proof regarding his claims. We affirm the post-conviction court.

### III. *Indiana's Equal Privileges and Immunities Clause*

As a final issue, Davis contends that Post-Conviction Rule 1(9)(b) violates Article 1, Section 23 of the Indiana Constitution, *i.e.*, the Equal Privileges and Immunities Clause, which provides that "the general assembly shall not grant to any citizen or class of citizens,

privileges or immunities, which, upon the same terms, shall not equally belong to all citizens.” Specifically, he claims that “[i]t cannot be legal or fair for petitioners represented by counsel to have an automatic right to an evidentiary hearing (when questions of fact are raised in the petition) but a [p]ro-se petitioner with the exact same issues and circumstances has no right to that evidentiary hearing.” (Appellant’s Br. p. 25).

A two-part test governs Section 23 claims. First, “the disparate treatment accorded by the legislation must be reasonably related to inherent characteristics which distinguish the unequally treated classes.” *Collins v. Day*, 644 N.E.2d 72, 80 (Ind. 1994). Second, “the preferential treatment must be uniformly applicable and equally available to all persons similarly situated.” *Id.* In determining whether a statute complies with the Equal Privileges and Immunities Clause of Section 23, courts must exercise “substantial deference to legislative discretion.” *Id.*

We agree with the State that by its own terms, the Equal Privileges and Immunities Clause does not apply to rules of court, which are adopted by our supreme court, not by the general assembly. While Section 23 prohibits the general assembly from legislating in certain ways, it does not purport to apply to measures adopted by courts in the governance of the judicial system. Thus, a Section 23 analysis, which evaluates legislative classifications and legislative discretion, would not be useful in this context as there is no action by the legislature to be examined.

Regardless, assuming *arguendo*, that Section 23 is applicable to judicial rules, Post-Conviction Rule 1(9) complies with the Privileges and Immunities Clause. Davis asserts that

there is preferential treatment accorded to petitioners represented by counsel with respect to the presentation of evidence. We cannot agree with this. All petitioners, whether represented by counsel or proceeding *pro se*, are given an opportunity to present evidence. Post-Conviction Rule 1(9)(b) does not mandate that all *pro se* petitioners can only submit their cases through affidavit. When the case involves a *pro se* petitioner, the post-conviction court has the discretion to receive evidence through submission of affidavits, all the while retaining the possibility to request an evidentiary hearing if the post-conviction court deems it necessary for a full and fair determination of the issues. *See Smith*, 822 N.E.2d at 201. Thus, submission of evidence by affidavits is not a lesser or second-class way of presenting evidence. We agree with the State that in some circumstances it may even be advantageous as witnesses will not be subject to cross-examination at a hearing. Therefore, we conclude that Post-Conviction Rule 1(9)(b) does not violate the Equal Privileges and Immunities Clause of the Indiana Constitution.

### CONCLUSION

Based on the foregoing, we conclude that the post-conviction court properly denied Davis' petition for post-conviction relief which raised numerous perceived procedural errors committed during the trial; and the Equal Privileges and Immunities Clause of Article 1, Section 23 of the Indiana Constitution is not applicable to Post-Conviction Rule 1(9)(b).

Affirmed.

KIRSCH, J., and BAILEY, J., concur.