United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

Submitted April 4, 2018
Decided April 17, 2018

Before

FRANK H. EASTERBROOK, *Circuit Judge*

DANIEL A. MANION, *Circuit Judge*

No. 17-2674

WILLIAM B. CROCKETT III,
Petitioner-Appellant,

v.

KEITH BUTTS,
Respondent-Appellee.

Appeal from the United States District Court for the Northern District of Indiana, South Bend Division.

No. 3:15-cv-00384-RLM

Robert L. Miller, Jr.,
Judge.

ORDER

William Crockett has filed a notice of appeal from the denial of his petition under 28 U.S.C. § 2254 and an application for a certificate of appealability. This court has reviewed the final order of the district court and the record on appeal. We find no substantial showing of the denial of a constitutional right. *See* 28 U.S.C. § 2253(c)(2).

Accordingly, the request for a certificate of appealability is DENIED. Crockett's motions to proceed in forma pauperis and for appointment of counsel under the Criminal Justice Act are DENIED.

APPENDIX A

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA
SOUTH BEND DIVISION

WILLIAM B. CROCKETT III, Petitioner,	)	
v.	)	Cause No. 3:15-cv-384-RLM
SUPERINTENDENT, Respondent.	)	

OPINION AND ORDER

William B. Crockett, III, filed a habeas corpus petition challenging his murder conviction and 65 year sentence in the St. Joseph Superior Court on January 25, 2005, under cause number 71D01-310-MR-27. ECF 2 at 1. Mr. Crockett raises one ground arguing that his direct appeal counsel "was ineffective in that he raised ineffective assistance of trial counsel on direct appeal and thereby failed to preserve for postconviction relief ineffective assistance claims based on evidence outside of the record on appeal." To succeed on an ineffective assistance of counsel claim on post-conviction review in the state courts, Mr. Crockett had to show that counsel's performance was deficient and that the deficient performance prejudiced him. Strickland v. Washington, 466 U.S. 668 (1984). This claim was adjudicated on the merits and the Indiana Court of Appeals decided that he had not met either prong of the Strickland test.

"Federal habeas review . . . exists as a guard against extreme malfunctions in the state criminal justice systems, not a substitute for ordinary error

APPENDIX B

correction through appeal." Woods v. Donald, 575 U.S. __, __; 135 S.Ct. 1372, 1376 (2015) (quotation marks and citation omitted).

> An application for a writ of habeas 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.

28 U.S.C. § 2254(d).

> [This] standard is intentionally difficult to meet. We have explained that clearly established Federal law for purposes of §2254(d)(1) includes only the holdings, as opposed to the dicta, of this Court's decisions. And an unreasonable application of those holdings must be objectively unreasonable, not merely wrong; even clear error will not suffice. To satisfy this high bar, a habeas petitioner is required to show that the state court's ruling on the claim being presented in federal court was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement.

Woods v. Donald, 575 U.S. __, __; 135 S.Ct. 1372, 1376 (2015) (quotation marks and citations omitted).

Mr. Crockett argues that neither the post-conviction trial court nor the Indiana Court of Appeals "officially reached the 'performance' prong [of the Strickland test], although the postconviction trial court essentially found that Petitioner's trial counsel was ineffective and the Indiana Court of Appeals essentially found that Petitioner's appellate counsel was ineffective." ECF 2-2 at 5. Mr. Crockett is incorrect. Both courts addressed the performance prong and

neither found that appellate counsel was deficient. In its amended findings of fact and conclusions of law, the post-conviction trial court found:

> Based on the testimony of appellate counsel, this court concludes that appellate counsel's performance was not deficient when he decided to raise a claim of ineffective assistance of trial counsel on direct appeal. Appellate counsel made a tactical decision based on his reading of the trial record and believed he had sufficient grounds on the face of that record to support the claim. The fact that the claim was not ultimately successful or that the decision to raise it in the direct appeal can be questioned did not render appellate counsel's performance deficient.

Appellant's [Post-Conviction] Appendix at 155; ECF 2-3 at 29. The Indiana Court of Appeals didn't disturb that finding when it addressed appellate counsel's performance.

> During the post-conviction hearing, Crockett's appellate counsel acknowledged that ineffective assistance of counsel claims should rarely be raised on direct appeal, but explained that he decided to present such issues on direct appeal because he "thought [they] were supported by facts that were in the record" and were "legitimate appellate issues." Transcript of Post–Conviction Hearing at 85. Crockett's appellate counsel further stated that, case law notwithstanding, in his "opinion," he did not believe that raising a claim of ineffective assistance of counsel on direct appeal would necessarily preclude the petitioner from raising the issue again on completely different grounds through a petition for postconviction relief. Id. at 87.
>
> Crockett's appellate counsel clearly misunderstood the state of the law insofar as it was his "opinion" that presenting claims of ineffective assistance of counsel on direct appeal would not foreclose Crockett from presenting additional claims of ineffective assistance of counsel during post-conviction proceedings. *Id.* Since our Supreme Court's decision in Woods v. State, [701 N.E.2d 1208 (Ind.1998)], it has been clear that such is in fact the effect of presenting a claim of ineffective assistance on direct appeal – any additional claims of ineffective assistance of counsel are foreclosed from collateral review. While appellate counsel's decision to present such issue on direct appeal was, in part, a tactical decision, it cannot be said that his misunderstanding or "opinion" of the law

> could serve as the basis for sound appellate strategy. That said, the post-conviction court properly concluded that Crockett's claim of ineffective assistance of appellate counsel nonetheless failed because Crockett did not establish prejudice resulting from appellate counsel's decision to raise an ineffective assistance of trial counsel claim on direct appeal.

Crockett v. State, 13 N.E.3d 556, *5 (Ind. Ct. App. 2014) (table); ECF 13-10 at 8-9. The court of appeals correctly noted that Mr. Crockett's appellate counsel understood that ineffective assistance of trial counsel claims should rarely be raised on direct appeal.[1] Though it found that appellate counsel's misunderstanding of the preclusive effect of that decision was not itself a basis for sound appellate strategy, it nevertheless found that his decision to raise an ineffective assistance of trial counsel claim on direct appeal was in part a tactical decision. The court's explanation was an implicit[2] determination that counsel's performance wasn't deficient. That determination was not unreasonable as long as counsel's reasons were not "so far off the wall that we can refuse the usual deference that we give tactical decisions by counsel, his performance will not qualify as deficient." United States v. Lathrop, 634 F.3d 931, 937 (7th Cir. 2011).

---

[1] During the post-conviction hearing, direct appeal counsel explained that "in most instances it's almost impossible to effectively raise ineffective assistance of counsel on direct appeal, because you are only dealing with the direct record, the trial record, and to demonstrate ineffective assistance of trial counsel ordinarily requires a going outside the record. Which is peculiarly within the ambit of post conviction relief rather than direct appeal"). PCR Transcript at 80-81.

[2] Mr. Crockett argues that the court of appeals didn't rule on the performance prong, but if that were true, then the post-conviction relief trial court's ruling remains undisturbed because it is "sensible to look past the silence to the decision of the next state court in the chain." Prihoda v. McCaughtry, 910 F.2d 1379, 1383 (7th Cir. 1990); *cf.* Ylst v. Nunnemaker, 501 U.S. 797, 803 (1991) ("Where there has been one reasoned state judgment rejecting a federal claim, later unexplained orders upholding that judgment or rejecting the same claim rest upon the same ground.").

Mr. Crockett argues that:

> Appellate counsel's decision in this case to raise ineffective assistance on direct appeal fell below objective standards of reasonableness based on prevailing professional norms. At least since the Indiana Supreme Court's decision in Woods v. State, 701 N.E.2d 1208 (Ind. 1998), it has been "crystal clear" that ineffective assistance of trial counsel should not be raised on direct appeal in Indiana, since "some grounds supporting an assertion of inadequate representation will not be reasonably knowable, much less fully factually developed, until after direct appeal," and "ineffective assistance of trial counsel is not available in postconviction if the direct appeal raises any claim of deprivation of Sixth Amendment right to counsel." Id. at 1220; Timberlake v. State, 753 N.E.2d 591, 604-05 (Ind. 2001).

ECF 2-2 at 1.

Mr. Crockett has overstated the holding of Woods v. State, 701 N.E.2d 1208 (Ind. 1998). Woods didn't hold that ineffective assistance of trial counsel claims cannot – or even should not – be brought on direct appeal. Woods said that "a postconviction hearing is normally the preferred forum to adjudicate an ineffectiveness claim. We nonetheless agree that potential for administrative inconvenience does not always outweigh the costs of putting off until tomorrow what can be done today . . .." Id. at 1219. The Woods court concluded "that the most satisfactory resolution of a variety of competing considerations is that ineffective assistance may be raised on direct appeal, but if it is not, it is available in postconviction proceedings irrespective of the nature of the issues claimed to support the competence or prejudice prongs." Id. at 1216. "The defendant must decide the forum for adjudication of the issue – direct appeal or collateral review. Id. at 1220.

Woods makes clear that it is normal to wait until post-conviction to raise an ineffective assistance of trial counsel claim. That it is the best practice and should be the most common custom. In deciding whether an attorney provided deficient performance, however, "[t]he question is whether an attorney's representation amounted to incompetence under prevailing professional norms, not whether it deviated from best practices or most common custom." Harrington v. Richter, 562 U.S. 86, 105 (2011) (quotation marks and citation omitted). A court's review of counsel's performance is deferential, and there is an added layer of deference when the claim is raised in a habeas proceeding. "[T]he question is not whether counsel's actions were reasonable. The question is whether there is any reasonable argument that counsel satisfied *Strickland's* deferential standard." Id. "[C]ounsel need not be perfect, indeed not even very good, to be constitutionally adequate." McAfee v. Thurmer, 589 F.3d 353, 355-56 (7th Cir. 2009) (citation omitted).

Mr. Crockett's appellate counsel mistakenly believed that an ineffective assistance of trial counsel claim could be brought both on direct appeal and again in post-conviction. Had appellate counsel acted on that belief alone, his performance would have amounted to incompetence under prevailing professional norms. But that wasn't why he raised the claim on direct appeal and it's not why the Indiana courts found that his performance wasn't deficient. He raised it as a tactical decision because he believed he had a valid claim based on the facts in the record. Though he lost on appeal, nothing in the appellate

opinion indicates the court believed it was a baseless issue that was improper to have raised. *See* Crockett v. State, 841 N.E.2d 669 (Table). The state courts applied a reasonable analysis that satisfies Strickland's deferential standard. Though it's possible the outcome might have differed in the state courts, it wasn't objectively unreasonable for the state courts to have found that Mr. Crockett hadn't demonstrated that his appellate counsel provided deficient performance.

Mr. Crockett also argues that "[t]he state court's finding that Crockett was not prejudiced by the deficient performances of his trial and direct appeal counsel was unreasonable." ECF 16 at 2. He argues:

> Had appellate counsel not raised ineffective assistance of trial counsel on direct appeal, it would have been available in postconviction proceedings. If ineffective assistance of trial counsel had been available in postconviction proceedings, Petitioner would have been granted postconviction relief based on ineffective assistance of trial counsel [and] should have been granted postconviction relief based on ineffective assistance of appellate counsel.

ECF 2-2 at 4.

> Evidence established on postconviction relief showed that Petitioner's trial counsel was ineffective for four reasons, aside from the reasons raised on direct appeal: first, counsel failed to object to evidence that Petitioner asked for a "deal"; second, counsel in attempting to respond to this evidence opened the door to the admission of evidence that Petitioner had been arrested for sexual offenses involving two women; third, counsel failed to elicit admissions from the State's witnesses that Petitioner had repeatedly and firmly asserted his innocence; and fourth, counsel failed to object to any and all testimony by Corbett and Kaps concerning any and all of the Petitioner's statements during their interview with him on October 23, 2003, on the grounds that they were made (a) prior to Miranda warnings being given, (b) as a result of being falsely told by Corbett and Kaps that a prosecutor was watching the interview from the next room, and/or (c) after Petitioner had invoked his right

> to counsel and in response to further police-initiated custodial interrogation in violation of Miranda.

ECF 2-2 at 2.

The Indiana court of appeals found, "that Crockett failed to show prejudice from appellate counsel's decision to raise ineffective assistance of trial counsel on direct appeal. More specifically, Crockett failed to show that had his claim of ineffective assistance of trial counsel been preserved for post-conviction review, he would have been entitled to relief." Crockett v. State, 13 N.E.3d 556, *8 (Ind. Ct. App. 2014) (table).

The test for prejudice is whether there was a reasonable probability that "but for counsel's unprofessional errors, the result of the proceeding would have been different." Strickland v. Washington, 466 U.S. 668, 694 (1984). A reasonable probability is one "sufficient to undermine confidence in the outcome." Id. at 693. In assessing prejudice under Strickland "[t]he likelihood of a different result must be substantial, not just conceivable." Harrington v. Richter, 562 U.S. 86, 112 (2011). "On habeas review, [the] inquiry is now whether the state court unreasonably applied Strickland . . .." McNary v. Lemke, 708 F.3d 905, 914 (7th Cir. 2013). "Given this high standard, even 'egregious' failures of counsel do not always warrant relief." Id. As previously explained, appellate counsel didn't provide deficient performance. Nevertheless, here is how the court of appeals explained its decision that these four events were harmless.

> Officer Corbett's testimony during trial that Crockett requested a "deal" in exchange for information concerning Langenderfer's murder likely had minimal, if any, impact on the

jury's verdict. Crockett maintains that the inference to be drawn from the fact that he requested a deal was that he was in fact guilty of or somehow implicated in Langenderfer's murder. This inference, however, was dispelled by testimony that Crockett had another motive for requesting a deal. Although Crockett's trial counsel arguably opened the door to evidence that Crockett was involved in other criminal matters, the trial court closed that door when it sustained trial counsel's objection regarding the nature of the other criminal matter and instructed the jury to disregard any testimony related thereto. Further, we note that there was also testimony that Crockett only learned of Langenderfer's murder two days after it occurred and that Crockett was out of town at the time of Langenderfer's murder. Considered together, any testimonial reference to the fact that Crockett wanted to make a deal in exchange for information about Langenderfer's murder was not, as characterized by Crockett, "tantamount" to a confession. Reply Brief at 2.

With regard to his protestations of his innocence during the videotaped interview with police, as noted above, Crockett's defense was that he had an alibi at the time of the murder. Evidence was introduced that Crockett was out of town at the time of the murder and that he only learned of the murder two days after it occurred. The jury was made aware that Crockett denied any involvement in Langenderfer's murder.

Finally, Crockett claims that his videotaped statement was in violation of Miranda, made in connection with plea negotiations, and/or illegally obtained after he had invoked his right to counsel and therefore any reference thereto violated his rights. Crockett does not support any of these claims with citations to authority. In any event, as noted above, the trial testimony that referenced portions of his statement to police was not the evidence that sealed his fate. To be sure, there was evidence from eye witnesses, consistent in relevant aspects, that Crockett was the mastermind behind Langenderfer's murder. Wright's testimony revealed that Crockett had become frustrated with Langenderfer and had decided that it was time for Langenderfer "to disappear" and that he directed Antrone Crockett and Michael Wright to "take[ ] care of" Langenderfer by meeting him "out in the country." Trial Transcript at 441, 444, 446, respectively. Wright further testified that Crockett gave them instructions on where to obtain a gun in Crockett's apartment and that they were to dispose of the gun after the murder was carried out. Crockett made arrangements to be out of town when the murder was carried out. The following morning, Crockett contacted Antrone and Wright to make sure they had followed

> through with the plan. This evidence clearly implicates Crockett in Langenderfer's murder.

Crockett v. State, 13 N.E.3d at *7; ECF 13-10 at 11-13 (footnote omitted, brackets in original).

Criminal defendants are entitled to a fair trial but not a "perfect" one. Rose v. Clark, 478 U.S. 570, 579 (1986). To warrant relief, a state court's decision must be more than incorrect or erroneous; it must be "objectively" unreasonable. Wiggins v. Smith, 539 U.S. 510, 520 (2003). "A state court' s determination that a claim lacks merit precludes federal habeas relief so long as fairminded jurists could disagree on the correctness of the state court' s decision." Harrington v. Richter, 562 U.S. 86, 101 (2011) (quotation marks omitted). Mr. Crockett hasn't met this burden.[3]

His arguments are essentially that there is a reasonable probability he would have been acquitted of murder if the jury had heard that he protested his innocence rather than asking for a deal when police interviewed him and/or the jury was unaware that he had been arrested on unrelated sexual assault

[3] Attached to Mr. Crockett's amended petition is an affidavit prepared by his post-conviction and habeas corpus lawyer on May 5, 2015, after the conclusion of the post-conviction proceedings and before this case was filed. This affidavit details conversations counsel had online with the post-conviction trial judge about the prejudice standard established by Strickland. Mr. Crockett wants this court to accept this as proof that the post-conviction trial judge applied the wrong standard of law. Whether the post-conviction trial judge misunderstood the Strickland prejudice standard is irrelevant because the Indiana Court of Appeals articulated and properly applied the correct legal standard. It did so *de novo* with no deference to the conclusions of law made by the post-conviction trial court. *See* Crockett v. State, 13 N.E.3d at *3; ECF 13-10 at 6. Moreover, the affidavit is not properly part of the record in this case. *See* Boyko v. Parke, 259 F.3d 781, 790 (7th Cir. 2001) ("Because § 2254(e)(2) restricts a petitioner's attempts to supplement the factual record, [the petitioner] must satisfy that provision's requirements before he may place new factual information before the federal court."). The affidavit wasn't considered as a part of the decision to deny habeas corpus relief.

charges. Alternatively, he aregues there is a reasonable probability he would have been acquitted if the jury had not heard anything about his October 23, 2003, police interview. The crux of these arguments is that the evidence against Mr. Crockett was otherwise so weak that without testimony that he wanted a deal or had been separately charged with a sexual assault, there is a reasonable probability that he would have been acquitted of murder. The state court determination that the police testimony about his interview and his unrelated sexual assault charges were harmless wasn't objectively unreasonable. The state court determination that the admission of that police testimony didn't undermine confidence in the outcome wasn't objectively unreasonable. The state court determination that there was not a reasonable probability that the result would have been different wasn't unreasonable. Reasonable jurists could disagree as to whether (or to what extent) this police testimony impacted the decision making process of the jury. But fairminded disagreement isn't a basis for habeas corpus relief; indeed, fairminded disagreement precludes habeas corpus relief. *Id.* The habeas corpus petition must be denied.

Under Section 2254 Habeas Corpus Rule 11, the court must grant or deny a certificate of appealability. To obtain a certificate of appealability under 28 U.S.C. § 2253(c), the petitioner must make a substantial showing of the denial of a constitutional right by establishing "that reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were adequate to deserve

encouragement to proceed further." Slack v. McDaniel, 529 U.S. 473, 484 (2000). For the reasons explained in this opinion for denying habeas corpus relief, there is no basis for encouraging Mr. Crockett to proceed further, so a certificate of appealability must be denied. For the same reasons, he cannot appeal in forma pauperis because an appeal could not be taken in good faith.

For the these reasons the court DENIES habeas corpus relief; DENIES a certificate of appealability pursuant to Section 2254 Habeas Corpus Rule 11; DENIES leave to appeal in forma pauperis pursuant to 28 U.S.C. § 1915(a)(3); and DIRECTS the clerk to enter judgment in favor of the Respondent and against the Petitioner.

SO ORDERED.

ENTERED: July 31, 2017.

/s/ Robert L. Miller, Jr.
Judge
United States District Court

United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

May 18, 2018

Before

FRANK H. EASTERBROOK, *Circuit Judge*

DANIEL A. MANION, *Circuit Judge*

No. 17-2674

WILLIAM B. CROCKETT III,
Petitioner-Appellant,

v.

KEITH BUTTS,
Respondent-Appellee.

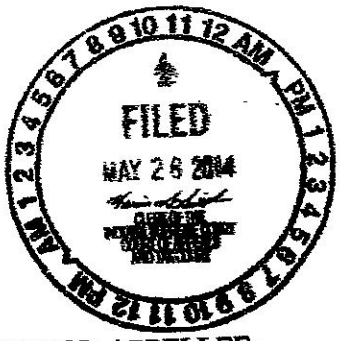
Appeal from the United States District Court for the Northern District of Indiana, South Bend Division.

No. 3:15-cv-384-RLM
Robert L. Miller, Jr.,
Judge.

Order

Petitioner-appellant filed a petition for rehearing and rehearing en banc on May 1, 2018. No judge in regular active service has requested a vote on the petition for rehearing en banc, and both of the judges on the panel have voted to deny rehearing. The petition for rehearing is therefore DENIED.

APPENDIX C



ATTORNEY FOR APPELLANT:

JOHN A. KINDLEY
Lakeville, Indiana

ATTORNEYS FOR APPELLEE:

GREGORY F. ZOELLER
Attorney General of Indiana

JODI KATHRYN STEIN
Deputy Attorney General
Indianapolis, Indiana

IN THE COURT OF APPEALS OF INDIANA

WILLIAM CROCKETT,	)	
	)	
Appellant-Defendant,	)	
	)	No. 71A04-1307-PC-374
vs.	)	
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE ST. JOSEPH SUPERIOR COURT
The Honorable T. Edward Page, Senior Judge
Cause No. 71D01-0605-PC-13

May 28, 2014

MEMORANDUM DECISION - NOT FOR PUBLICATION

FRIEDLANDER, Judge

APPENDIX D

William Crockett appeals from the denial of post-conviction relief of his 2005 murder conviction. On appeal, Crockett contends that the post-conviction court erroneously determined that his appellate counsel was not ineffective for presenting a claim of ineffective assistance of trial counsel on direct appeal, thereby foreclosing that issue for post-conviction review.

We affirm.

The facts underlying Crockett's murder conviction as found by this court on direct appeal are as follows:

> Crockett and his cousin, Antrone, were drug dealers in South Bend. During the spring of 2002, Don and Doris Langenderfer (collectively, the Langenderfers) began delivering drugs and collecting money for Crockett. The Langenderfers were paid in either cash or in crack cocaine for their efforts.
>
> Sometime in October 2002, Michael Wright, a friend of the Langenderfers, also began running drugs for Crockett. Later that month, Crockett informed Wright that Don owed him money, and that Crockett might have to kill Don. Crockett also told Brian Kyle, his drug supplier, that he thought Don might be working with an undercover police officer. Crockett stated that he would not go to prison and that he would "handle it." Tr. p. 562.
>
> On October 24, Crockett, Antrone, and Wright delivered some cocaine to an individual known as "Domino." Tr. p. 434, 440. Crockett purportedly told Domino that he thought Don had contacted the police about Crockett's drug activities, and that Don would have to disappear. Crockett stated that he might have to take Don for a "ride in the country." Tr. p. 435-36. The next day, Antrone, Wright, and Crockett went to a hotel and Crockett stated that he was tired of Don "messing up his money" and that it was time for Don "to disappear." Tr. p. 441. Crockett telephoned Kyle and informed him that he was going to be out of town for a couple of days.
>
> On October 26, Crockett told Wright and Antrone that he wanted Don "taken care of" that night, and that he was leaving for Fort Wayne. Tr. p. 440, 444. Crockett then instructed Antrone and Wright to call Don and direct him to meet them at some location "out in the country." Tr. p. 446. In particular, Crockett told Wright to call Don. Wright was to inform Don that the police had followed him and that he and Antrone had to throw some drugs out of their car window. Wright was to ask Don to assist him in searching for the drugs.

Crockett also told the others to go to their apartment and retrieve a .44 caliber revolver so that they could shoot Don with it. He also told Wright to dispose of the gun after killing Don. Finally, Crockett instructed Antrone and Wright to sell whatever drugs they had and to collect the money.

Later on that same day, Crockett and two friends—Dawn Buwa and Lindsay Rider—left for Fort Wayne in Crockett's Cadillac, while Antrone and Wright departed in Crockett's gray Grand Marquis automobile. Antrone and Wright sold some drugs that afternoon, retrieved the gun from the apartment, and located an area in the country to kill Don. Around 2:00 a.m., Wright called the Langenderfers' home from a pay phone at a Park-N-Shop Supermarket. Doris handed the telephone to Don, whereupon Wright related the "story" to Don about the police chase and the discarded drugs. Don got dressed and left the house, informing Doris that he would return later.

Antrone and Wright then drove back to the rural area and waited for Don to arrive. Approximately ten minutes later, Don arrived, and Antrone was waiting for him in a cornfield. Antrone shot Don once in the face with the .44 caliber revolver. Antrone then ran back to the Grand Marquis where Wright had been waiting. As the two left the scene, Antrone informed Wright that he "blew Don's face off" and that he "got him good." Tr. p. 463. At some point, Antrone tossed the gun from the vehicle.

The next morning, David Manspeaker and a friend were driving to a golf course when they noticed Don's van parked in the middle of Ardmore Trail. Manspeaker then noticed Don lying face-up in the cornfield. After discovering that Don was dead, Manspeaker contacted the police.

At approximately 6:40 a.m. on that same morning, Crockett telephoned Antrone and directed Antrone and Wright to meet him at a house on Chicago Street. In the meantime, Doris woke up and discovered that Don was not at home. As a result, she contacted the hospital and the police. Sometime later, South Bend Police Officer David Newton arrived at the Langenderfers' home and informed Doris that Don was dead. It was determined that Don had died of a single gunshot wound that entered his chin, passed through his mouth, and severed his spinal chord.

When Crockett returned from his trip, he informed Kyle that he and "old boy" had to "take a guy on a drive," "four-four to the head, four-five, all to the head, to the face, ain't comin' back." Tr. p. 564. Crockett was shaking and panicking, stating that the body probably had not been found because it was located in a field. Crockett, Antrone, and Wright then had a conversation about what had occurred earlier that morning. Specifically, Crockett asked if everything went all right, whether they made sure that Don was dead, and whether they had disposed of the gun. After asking for the drug proceeds from the previous afternoon, Crockett handed Wright $100 and some crack cocaine. Crockett then told Wright to take the Grand Marquis and leave town. Kyle

arrived at the scene and noticed that Wright was attempting to remove the left rear tire from the vehicle. Crockett told Kyle that a skid mark was left at the scene of the murder and that he would have to "torch" the vehicle if the tire could not be removed. Tr. p. 569, 579.

Wright then drove to Lafayette in the Grand Marquis and briefly stayed with family members before his mother informed him that the police wanted to speak with him. Wright then contacted the police and told them where he had left the vehicle. Wright then returned to South Bend and spoke with Officers Keith Hadary and David Newton on October 29. While Wright initially denied any involvement in the shooting, he subsequently told the officers that Antrone had shot Don and that the gun could be found "off Pine Road." Tr. p. 259-61, 471-74. Acting on this information, the police located the gun, which was later identified to have fired the bullet that killed Don. They also discovered a Seagram's gin bottle that was subsequently tested and linked to Antrone through DNA testing. The South Bend Police Department then bought a bus ticket for Wright to move to Las Vegas where he stayed for approximately six months with family members.

In October 2003, Wright returned from Las Vegas to South Bend and gave another statement, wherein he admitted his involvement in the shooting. South Bend police officers then interviewed Crockett, who admitted to Officer Timothy Corbett that he knew that Wright and Antrone were involved in the murder. Tr. p. 359-60. Crockett repeatedly indicated that the State should offer him a "deal" with regard to the incident. Tr. p. 359. Crockett stated that he was in Fort Wayne when Don was killed, and he identified Wright as the shooter.

Thereafter, in October 2003, Crockett, Antrone, and Wright were charged with murder. The State later amended the information to include a charge of conspiracy to commit murder. Wright pleaded guilty to the conspiracy charge in exchange for his testimony at Crockett's trial.

Crockett v. State, No. 71A03-0506-CR-263, slip op. at 2-6 (Ind. Ct. App. December 28, 2005). Additional facts will be provided where necessary.

In 2004, a jury found Crockett guilty of murder and conspiracy to commit murder. In January 2005, the trial court entered a judgment of conviction for murder and sentenced Crockett to sixty-five years imprisonment.[1] Crockett filed a direct appeal, and this court

[1] The trial court merged the conspiracy to commit murder conviction into the murder conviction.

affirmed his conviction in a memorandum decision. Crockett filed a petition for post-conviction relief in May 2006. After several amended petitions, Crockett filed his last amended petition on December 3, 2012. The post-conviction court held a hearing on December 7, 2012, and issued its findings of fact and conclusions of law denying Crockett post-conviction relief on April 12, 2013. In response to a motion to correct error, the post-conviction court entered amended findings of fact and conclusions of law on June 28, 2013, affirming the denial of post-conviction relief. Crockett appeals this denial.

Post-conviction proceedings are civil proceedings in which the defendant must establish his claims by a preponderance of the evidence. Ind. Post-Conviction Rule 1(5); *Ben-Yisrayl v. State,* 738 N.E.2d 253 (Ind. 2000), *cert. denied* (2002). Post-conviction proceedings do not afford the petitioner an opportunity for a super appeal, but rather, provide the opportunity to raise issues that were unknown or unavailable at the time of the original trial or the direct appeal. *Ben-Yisrayl v. State,* 738 N.E.2d 253; *Wieland v. State,* 848 N.E.2d 679 (Ind. Ct. App. 2006), *trans. denied.* The proceedings do not substitute for a direct appeal and provide only a narrow remedy for subsequent collateral challenges to convictions. *Ben-Yisrayl v. State,* 738 N.E.2d 253.

When a petitioner appeals a denial of post-conviction relief, he appeals from a negative judgment. *Fisher v. State,* 878 N.E.2d 457 (Ind. Ct. App. 2007), *trans. denied.* The petitioner must establish that the evidence as a whole unmistakably and unerringly leads to a conclusion contrary to that of the post-conviction court. *Id.* We will disturb a post-conviction court's decision as being contrary to law only where the evidence is without

conflict and leads to but one conclusion, and the post-conviction court has reached the opposite conclusion. *Wright v. State,* 881 N.E.2d 1018 (Ind. Ct. App. 2008), *trans. denied.* The post-conviction court is the sole judge of the weight of the evidence and the credibility of witnesses. *Lindsey v. State,* 888 N.E.2d 319 (Ind. Ct. App. 2008), *trans. denied.* We accept the post-conviction court's findings of fact unless they are clearly erroneous, and no deference is given to its conclusions of law. *Fisher v. State,* 878 N.E.2d 457.

On direct appeal, Crockett's appellate counsel presented four substantive issues: (1) the admission of evidence under Ind. Evidence Rule 404(b); (2) prosecutorial misconduct; (3) ineffective assistance of counsel (three separate claims); and (4) conflict of interest. This court rejected Crockett's claims and affirmed his murder conviction. As part of his request for post-conviction relief, Crockett argues that his appellate counsel was ineffective because he presented the issue of ineffective assistance of trial counsel on direct appeal, thereby precluding him from presenting such issue during post-conviction proceedings. *See Woods v. State*, 701 N.E.2d 1208 (Ind. 1998).

In order to prevail on a claim of ineffective assistance of appellate counsel, a petitioner must demonstrate both that counsel's performance was deficient and that the petitioner was prejudiced thereby. *Kubsch v. State,* 934 N.E.2d 1138 (Ind. 2010) (citing *Strickland v. Washington,* 466 U.S. 668 (1984)). This is the so-called *Strickland* test. Counsel's performance is deficient if it falls below an objective standard of reasonableness and "counsel made errors so serious that counsel was not functioning as 'counsel' guaranteed

to the defendant by the Sixth Amendment." *Id.* at 1147 (quoting *Strickland v. Washington,* 466 U.S. at 687)).

To establish the requisite prejudice, a petitioner "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.* "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Smith v. State,* 765 N.E.2d 578, 585 (Ind. 2002). The two elements of *Strickland* are separate and independent inquiries. The failure to satisfy either component will cause an ineffective assistance of counsel claim to fail. *Taylor v. State,* 840 N.E.2d 324 (Ind. 2006). Thus, if it is easier to dispose of such a claim on the ground of lack of sufficient prejudice, that course should be followed. *Landis v. State,* 749 N.E.2d 1130 (Ind. 2001).

Although a criminal defendant claiming ineffective assistance of trial counsel is at liberty to elect whether to present this claim on direct appeal or in post-conviction proceedings, it is well-settled that a post-conviction proceeding is generally the preferred forum for adjudicating claims of ineffective assistance of trial counsel because the presentation of such claims often requires the development of new evidence not present in the trial record. *See Jewell v.* State, 887 N.E.2d 939 (Ind. 2008); *Woods v. State,* 701 N.E.2d at 1220 (noting "some grounds supporting an assertion of inadequate representation will not be reasonably knowable, much less fully factually developed, until after direct appeal"). If, however, a defendant chooses to raise a claim of ineffective assistance of counsel on direct appeal, "the issue will be foreclosed from collateral review." *Woods v. State,* 701 N.E.2d at

1220. This rule should "likely deter all but the most confident appellants from asserting any claim of ineffectiveness on direct appeal." *Id.*

To prevail upon a claim that appellate counsel was ineffective for raising an ineffective assistance of trial counsel claim on direct appeal, the defendant must show that appellate counsel performed deficiently by raising this claim on direct appeal and that the evidence presented during post-conviction proceedings proved trial counsel's ineffectiveness. *See Timberlake v. State*, 753 N.E.2d 591 (Ind. 2001). *See also Allen v. State*, 749 N.E.2d 1158 (Ind. 2001); *Ben-Yisrayl v. State*, 738 N.E.2d 253 (Ind. 2000) (stating that when a claim of ineffective assistance is directed at appellate counsel for failing to fully and properly raise a claim of ineffective assistance of trial counsel on direct appeal, a defendant faces a compound burden on post-conviction of showing ineffective assistance of both trial and appellate counsel).

On direct appeal, Crockett's appellate counsel presented three claims of ineffective assistance of trial counsel for this court's review—(1) trial counsel's failure to object to the admission of character evidence of other bad acts; (2) trial counsel's failure to object to two alleged instances of prosecutorial misconduct; and (3) trial counsel's failure to identify a conflict of interest. This court rejected each claim of ineffective assistance of counsel. During the post-conviction hearing, Crockett's appellate counsel acknowledged that ineffective assistance of counsel claims should rarely be raised on direct appeal, but explained that he decided to present such issues on direct appeal because he "thought [they] were supported by facts that were in the record" and were "legitimate appellate issues."

Transcript of Post-Conviction Hearing at 85. Crockett's appellate counsel further stated that, case law notwithstanding, in his "opinion," he did not believe that raising a claim of ineffective assistance of counsel on direct appeal would necessarily preclude the petitioner from raising the issue again on completely different grounds through a petition for post-conviction relief. *Id.* at 87.

Crockett's appellate counsel clearly misunderstood the state of the law insofar as it was his "opinion" that presenting claims of ineffective assistance of counsel on direct appeal would not foreclose Crockett from presenting additional claims of ineffective assistance of counsel during post-conviction proceedings. *Id.* Since our Supreme Court's decision in *Woods v. State*, *supra*, it has been clear that such is in fact the effect of presenting a claim of ineffective assistance on direct appeal – any additional claims of ineffective assistance of counsel are foreclosed from collateral review. While appellate counsel's decision to present such issue on direct appeal was, in part, a tactical decision, it cannot be said that his misunderstanding or "opinion" of the law could serve as the basis for sound appellate strategy. That said, the post-conviction court properly concluded that Crockett's claim of ineffective assistance of appellate counsel nonetheless failed because Crockett did not establish prejudice resulting from appellate counsel's decision to raise an ineffective assistance of trial counsel claim on direct appeal.

To fully understand Crockett's claims, it is important to know that Crockett made two statements to police. Crockett makes no claim regarding the admission of his first statement to police on November 1, 2002. Crockett made a second videotaped statement to police on

October 23, 2003. During the jury trial, Officers Timothy Corbett and Randy Kaps testified regarding statements Crockett made during the October 23 videotaped interview. Neither the recording nor a transcript of this second statement was introduced at trial.

Crockett's claim that he received ineffective assistance of appellate counsel is based on his contention that raising the claim of ineffective assistance of trial counsel on direct appeal unnecessarily precluded him from raising claims of ineffective assistance of trial counsel based on errors that were not apparent in the record. Specifically, Crockett maintains that his videotaped statement establishes additional claims of ineffective assistance of trial counsel that were not raised on direct appeal. In support of his petition for post-conviction relief, the videotaped statement was introduced into evidence.

In this appeal from the denial of his petition for post-conviction relief, Crockett alleges four instances of ineffective assistance of trial counsel that were not and could not have been presented on direct appeal without the additional evidence of Crockett's videotaped statement to police. Specifically, Crockett contends that trial counsel failed to object to testimony from Officer Timothy Corbett that Crocket asked for a "deal" during his videotaped statement to police, which Crockett claims was a gross mischaracterization and created an impression in the jury's mind that he was admitting his guilt. *Trial Transcript* at 359. Further, Crockett asserts that trial counsel was ineffective because in attempting to respond to trial testimony that he requested a "deal", trial counsel opened the door to the admission of evidence that Crockett had been arrested for sexual offenses. Third, Crockett maintains that his trial counsel failed to elicit testimony from Officers Corbett and Kaps that

Crockett had repeatedly asserted his innocence during his videotaped statement. Fourth, Crockett contends that his trial counsel was ineffective for failing to object to any and all testimony by Officers Corbett and Kaps concerning any and all of Crockett's statements made during the October 23, 2003 videotaped interview on grounds that (1) the statement was made prior to *Miranda* warnings, (2) the statement was made in connection with plea negotiations, and/or (3) Crockett's statement was made after he had invoked his right to counsel, yet Officers Corbett and Kaps continued with police-initiated custodial interrogation.

Although the post-conviction court found that the manner in which Crockett's statement (as seen on the videotape) was obtained was "troubling in several respects," the post-conviction court ultimately concluded that any error in the admission of evidence related to the police interview was "harmless."[2] *Appellant's Appendix* at 148, 154, respectively. We agree with the post-conviction court's assessment.

Officer Corbett's testimony during trial that Crockett requested a "deal" in exchange for information concerning Langenderfer's murder likely had minimal, if any, impact on the jury's verdict. Crockett maintains that the inference to be drawn from the fact that he requested a deal was that he was in fact guilty of or somehow implicated in Langenderfer's murder. This inference, however, was dispelled by testimony that Crockett had another motive for requesting a deal. Although Crockett's trial counsel arguably opened the door to evidence that Crockett was involved in other criminal matters, the trial court closed that door

when it sustained trial counsel's objection regarding the nature of the other criminal matter and instructed the jury to disregard any testimony related thereto. Further, we note that there was also testimony that Crockett only learned of Langenderfer's murder two days after it occurred and that Crockett was out of town at the time of Langenderfer's murder. Considered together, any testimonial reference to the fact that Crockett wanted to make a deal in exchange for information about Langenderfer's murder was not, as characterized by Crockett, "tantamount" to a confession. *Reply Brief* at 2.

With regard to his protestations of his innocence during the videotaped interview with police, as noted above, Crockett's defense was that he had an alibi at the time of the murder. Evidence was introduced that Crockett was out of town at the time of the murder and that he only learned of the murder two days after it occurred. The jury was made aware that Crockett denied any involvement in Langenderfer's murder.

Finally, Crockett claims that his videotaped statement was in violation of *Miranda*, made in connection with plea negotiations, and/or illegally obtained after he had invoked his right to counsel and therefore any reference thereto violated his rights. Crockett does not support any of these claims with citations to authority. In any event, as noted above, the trial testimony that referenced portions of his statement to police was not the evidence that sealed his fate. To be sure, there was evidence from eye witnesses, consistent in relevant aspects, that Crockett was the mastermind behind Langenderfer's murder. Wright's testimony revealed that Crockett had become frustrated with Langenderfer and had decided that it was

---

[2] The post-conviction court also stated that the testimony referencing Crockett's statement to police did not

time for Langenderfer "to disappear" and that he directed Antrone Crockett and Michael Wright to "take[] care of" Langenderfer by meeting him "out in the country." *Trial Transcript* at 441, 444, 446, respectively. Wright further testified that Crockett gave them instructions on where to obtain a gun in Crockett's apartment and that they were to dispose of the gun after the murder was carried out. Crockett made arrangements to be out of town when the murder was carried out. The following morning, Crockett contacted Antrone and Wright to make sure they had followed through with the plan. This evidence clearly implicates Crockett in Langenderfer's murder.

To the extent Crockett claims Wright's testimony was inconsistent or could not be believed because he had a strong motive to lie, such matters were brought to the jury's attention. It was the jury's prerogative to assess the credibility of the witnesses and such will not be second-guessed by this court. The State's theory for the murder as related to the jury through several witnesses was not "implausible" as Crockett claims, but rather was a matter for the jury's consideration. *Appellant's Brief* at 18.

In one sentence, Crockett also argues that his "appellate counsel was ineffective because he failed to timely file a petition to transfer to the Indiana Supreme Court despite his communication to the Defendant that he would do so." *Appellant's Brief* at 11. Crockett has failed to support this argument with any authority or establish why such should serve as the basis for post-conviction relief.

---

have a "substantial and injurious effect."

In summary, the post-conviction court properly concluded that Crockett failed to show prejudice from appellate counsel's decision to raise ineffective assistance of trial counsel on direct appeal. More specifically, Crockett failed to show that had his claim of ineffective assistance of trial counsel been preserved for post-conviction review, he would have been entitled to relief. In light of the substantial evidence in the record, we are unconvinced that the testimony referencing Crockett's request for a "deal" during his videotaped statement or the indication that Crockett was involved in a separate criminal matter had any impact on the outcome. Because Crockett has failed to establish that trial counsel was ineffective, he cannot establish that he received ineffective assistance of appellate counsel. The post-conviction court properly denied Crockett's petition for post-conviction relief.

Judgment affirmed.

MATHIAS, J., and PYLE, J., concur.