STATE OF INDIANA)
) ss:
COUNTY OF ST JOSEPH)

ST JOSEPH SUPERIOR COURT
60th JUDICIAL CIRCUIT
CASE 71D01-0605-PC-000013

WILLIAM CROCKETT,
Petitioner,
v.
STATE OF INDIANA,
Respondent.

- FILED -
JUN 28 2013
Clerk
St. Joseph Superior Court

AMENDED FINDINGS OF FACT AND CONCLUSIONS OF LAW

On December 7, 2012, a hearing was held on the petitioner's petition for postconviction relief. Evidence and witnesses were presented and the parties were given an opportunity to brief the court. After both parties filed briefs, the petitioner favored the court at the court's request with a transcript of what the petitioner believes was said during an interview of the petitioner by law enforcement officers. By agreement of the parties on the record in open court on March 22, 2013, the deadline for ruling under the Indiana Rules of Trial Procedure, Trial Rule 53.2, was waived and the matter was taken under advisement for ruling. A ruling date of April 5, 2013, was tentatively set, but the actual ruling was delayed until April 12, 2013. After the court entered its findings of fact and conclusions of law, the petitioner filed a motion to correct error requesting, among other things, that the court correct its finding on Page 24 regarding the presence of a prosecuting attorney outside an interview room in which the petitioner was questioned by two police officers. A hearing on the motion to correct error was held on June 28, 2013. After hearing argument

on the motion to correct error, the court agreed that the original findings required amendment even though that amendment did not alter the conclusions of the court.

After considering the evidence and arguments presented on the petition for postconviction relief, and after considering the arguments on the petitioner's motion to correct error, the court finds and concludes as follows:

Statement of the Case

On October 27, 2003, the petitioner was charged with six criminal offenses, one of which included a charge for the murder of Donnell Langenderfer on or about October 27, 2002. The petitioner was initially arrested on October 23, 2003, in connection with alleged sexual assaults on two women. Although unrelated, five charges concerning those alleged assaults were filed in the same information as the murder charge. On November 17, 2003, the five sexual offense charges were severed from this case and dismissed. On August 2, 2004, the trial court permitted the state to file an amended information alleging a second charge against the petitioner for conspiracy to commit murder, a Class A felony, in connection with the death of Donnell Langenderfer. On December 3, 2004, a jury found the petitioner guilty of both murder and conspiracy to commit murder. At the sentencing hearing held on January 25, 2005, a judgment of conviction and sentence was entered only on the murder charge. The petitioner was sentenced to the maximum term of imprisonment of sixty-five years.

The petitioner was represented at trial and sentencing by Attorney James Korpal. An appeal was taken from the judgment of conviction and sentence by Attorney Charles

Lahey. Issues raised on appeal and addressed by the Court of Appeals of Indiana included contentions that: (1) evidence of the petitioner's drug dealing and other bad acts were improperly admitted at trial; (2) the prosecuting attorney committed misconduct; (3) the petitioner was denied the effective assistance of counsel in the trial court; and, (4) the petitioner was entitled to a reversal because of a conflict of interest in his legal representation. In an unpublished memorandum decision handed down on December 28, 2005, the Court of Appeals ruled that: (1) the trial court did not err in admitting evidence of the petitioner's drug dealing or other specific acts; (2) the petitioner failed to show that the prosecuting attorney committed misconduct; (3) the petitioner was not denied the effective assistance of counsel in the trial court; and, (4) there was no conflict of interest in the petitioner's legal representation.

On May 17, 2006, the petitioner filed a petition for postconviction relief which, as ultimately amended on December 3, 2012, alleges that the petitioner was denied the effective assistance of counsel on appeal. This claim is based on two separate grounds. First, that appellate counsel was ineffective when he raised a claim in the direct appeal that the petitioner was denied the effective assistance of counsel in the trial court. Second, that appellate counsel was ineffective for not timely filing a petition to transfer the direct appeal to the Supreme Court of Indiana after the Court of Appeals of Indiana handed down its decision.

The allegation that appellate counsel was ineffective for raising a claim in the direct appeal that petitioner was denied effective assistance of counsel in the trial court arises

from petitioner's contention that raising that claim in the direct appeal unnecessarily and ineffectively precluded the petitioner from later raising postconviction relief claims of ineffective assistance of trial counsel based on errors outside the trial record. In support of this allegation, the petitioner cites to four instances of the ineffective assistance of trial counsel which were not raised in the direct appeal and which purportedly could not have been raised in the direct appeal. The reason petitioner contends that the four instances could not have been known to appellate counsel is because they are based on the full audiovisual recording of a statement made by the petitioner to law enforcement authorities on October 23, 2003. Neither that recording nor a transcript of that recording was introduced as evidence at the petitioner's trial.

Findings of Fact

The evidence presented trial regarding the petitioner's alleged involvement in the death of Donnell Langenderfer was summarized in the memorandum decision of the Court of Appeals of Indiana:

> [Petitioner William] 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, and 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 done 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 "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 the gun after killing Don. Finally, Crockett instructed Antrone an 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 with they noticed Don's van parked in the middle of Ardmore Trail. Manspeaker then noticed Don laying face-up in the cornfield. After discovering that Don was dead, Manspeaker called 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 *(sic)*.

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 skidmark 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 return 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.

William Crockett v. State of Indiana (December 28, 2005, not for publication memorandum decision).

The interview of the petitioner by Officer Corbett took place on October 23, 2003, while the petitioner was in custody. During testimony before the jury at trial, Timothy Corbett was questioned about statements made by the petitioner during the interview. He and summarized portions of that interview, but the audiovisual recording of that interview was not introduced into evidence at trial and was never seen by the jury. At the hearing on the petition for postconviction relief, the audiovisual recording was introduced into evidence. Although difficult to understand in many places, that interview began as police officers Randy Kaps and Timothy Corbett entered a small interview room in which the petitioner was alone:

KAPS: Alright, William. You know how to read and write?

CROCKETT: Yeah. [Points at other officer.]

KAPS: This is Commander Corbett. He's head of the homicide unit here.

CROCKETT: Corbett?

KAPS: Corbett.

CROCKETT: Corbett?

KAPS: Yeah, that's him. That is the Corbett.

CROCKETT: Tim?

CORBETT: Uh-huh.

KAPS: You know him?

CROCKETT: Yeah.

KAPS: Uh, all right, I'm going to read this to you. I want you to read along with me, okay?

CROCKETT: I know Tim.

KAPS: Huh?

CROCKETT: Old time.

KAPS: Huh?

CROCKETT: Old time. All right.

KAPS: Warning and waiver of rights. The warning part says before we ask you any questions, you must understand your rights. You have the right to remain silent. Anything you can, anything you say can and will be used against you in a court of law. You have the right to consult with an attorney before we ask you any questions and to have him present while you are questioned. If you cannot afford an attorney, one will be appointed to represent you before any questioning, if you wish. If you decide to answer questions now without an attorney present, you still have the right to stop answering at any time. You also have the right to stop answering at any time until you talk with an attorney. Do you understand that?

CROCKETT: Uh, yeah, but I wanted to ask one question. Where's the prosecutor at?

KAPS: He's watching the . . .we're audio-video taping . . . he's in the next office watching.

CROCKETT: Okay, cause I would like to speak to him.

KAPS: Okay.

CROCKETT: I would like to speak to him. So we can go through the Miranda or whatever, but I would like to speak to him because of the situation that I know about. A lot. But I'm, I'm not the one you all want.

KAPS: You are the one we want.

CROCKETT: No. . .

KAPS: We want some, we want some other people too.

CROCKETT: No, you all want the persons who actually did it.

KAPS: Yeah.

CROCKETT: You know, when you all asked me, I had no knowledge. At the time I found out . . .

CORBETT: Well let's go through this first before we start talking about it. We gotta get you your rights read.

CROCKETT: I'm not about to catch no conspiracy or nothing.

CORBETT: Well, uh.

CROCKETT: So get a lawyer. I'll get a lawyer.

KAPS: You want a lawyer?

CROCKETT: Well, I have to.

KAPS: Okay, we're done. [Stands up.]

CORBETT: [Standing up.] By the way, you are catching a conspiracy case.

CROCKETT: Huh?

CORBETT: At the very minimum you can catch a conspiracy case. Because we've got one person in custody and about three other people rolled over so . . .

CROCKETT: [Inaudible]. . . leave?

CORBETT: You asked for an attorney . . .

CROCKETT: Mr. Corbett . . .

KAPS: Listen. You know what. . .

CROCKETT: I'm just. . .

KAPS: . . . we're not talking to you anymore. You're done. You asked for an attorney. We're done. We're done. We're not, you know what the charge is, you'll get your paperwork in due time. That's it.

CROCKETT: All I asked you for was . . .

KAPS: You asked for an attorney. That ends this right now.

CROCKETT: I asked for a prosecutor. [As officers leave room.]

CORBETT: [Upon returning to the room.] Do you . . . Let me make something . . . Do you want an attorney? Are you asking for an attorney?

CROCKETT: I'm asking for you.

CORBETT: Now you, you said you, you wanted an, do you want an attorney, yes or no?

CROCKETT: I asked, I asked for. . .

CORBETT: Again listen, listen, listen to me. You're talking, now listen. That's why God gave you two ears and one mouth. You got to close one and listen to the other two. Do you want an attorney, yes or no?

CROCKETT: At this time? No.

CORBETT: No?

CROCKETT: I want to talk to you.

CORBETT: You want to just talk to me?

CROCKETT: Yeah.

CORBETT: Why just me?

CROCKETT: Cause.

CORBETT: Cause?

CROCKETT: Because. So, I mean, it's a long story and. . .

CORBETT: I know the story.

KAPS: You want me to get the attorney form?

CROCKETT: You don't know, I mean, you know, I know you, you just don't know me.

CORBETT: Oh, I know, I know who you are, just sit tight for a minute.

CROCKETT: I mean, shit. I'm not scared. . . [Door shuts as officers leave room.] . . . [To self:] Why go through all this shit, I been there, done that. [Pause, then again to self:] I have [inaudible].

[After about a minute more, Corbett returns alone.]

CORBETT: Do you understand everything he read to you?

CROCKETT: Yeah.

CORBETT: All right, read, read this part to me here. "I have read the above. . ." Read that part.

CROCKETT: "I have read the above statement of my rights, and it has been read to me. I understand what my rights are and do not want

an attorney at this time. I understand and know what I am doing. No force, threats or promises of any kind or nature have been used by anyone in any way to influence me to waive my rights." All right.

CORBETT: You understand that?

CROCKETT: Yeah.

CORBETT: [Marks paper and gives pen to petitioner:] Right where that "X" is, when you sign that all you stating is that you understand what your rights are. . . Right there [pointing.] [Petitioner signs waiver form.] All right, now I'll sign it. [Corbett signs waiver form.] You know why you're down here, right?

CROCKETT: Yeah.

Following this exchange, the petitioner and Officer Corbett began a discussion that lasted nearly two hours. During the discussion, the petitioner asked a number of times about "cutting a deal" with the prosecuting attorney, about what sort of bargain he could make to get out of custody, and when he was going to be able to leave based on information he was willing to provide. Officer Corbett stated on several occasions that he could not make promises and that he first needed to know what evidence the petitioner was willing to provide so it could be investigated for verification before the petitioner's value as a witness could be determined. It was also made clear to the petitioner that he wasn't getting out of jail that night because he was, at the very least, being held on unrelated sexual offense charges by the Mishawaka Police Department. During the initial discussion, the petitioner acknowledged his acquaintance with Donnell Langenderfer and

to knowing that "Mike" killed him. The petitioner otherwise remained adamant that he was not in any way responsible for, involved in, or present at the killing.

About forty minutes into the discussion with Officer Corbett, the petitioner again inquired about being released immediately in return for any information he was willing to provide. When Officer Corbett informed the petitioner that he was not getting out and that, "Right now, there's a warrant for you for conspiracy to commit murder," the petitioner stated, "Might as well go with a lawyer, then." As the petitioner continued to talk to Officer Corbett, Officer Corbett began leaving the room, and told the petitioner, "Once you say you want an attorney, I can't talk to you." The petitioner then asked Officer Corbett to, "Talk to your prosecutor, whatever." Officer Corbett returned to the interview room four minutes later and the following took place:

> CORBETT: When I walked out, I didn't understand completely. Do you want an attorney, or are you willing to talk now since I talked to the prosecutor, or what do you want to do?
>
> CROCKETT: I want to go into it and try to get something cleared up.
>
> CORBETT: All right. The prosecutor's been in the other room. He's watching everything. He has given verbal authorization to arrest you for conspiracy to commit murder. Now, he can do anything he wants with that charge. He can upgrade it to murder. He can do anything he wants with it. But the only thing that you need to do, that you can do, to convince the prosecutor, he's listening right now, watching right up in this tape right now, is let him, let us, know what you know. Tell the story from beginning to end. That's what I was trying to tell you earlier. That's what's gonna be necessary so we can prove or disprove what you're telling is factual.

For the next hour and twenty minutes, a more detailed discussion was held between the petitioner and Officer Corbett. During this second part, the petitioner provided even greater details about what he purported to know regarding the killing, who committed the killing, and how he had come to know the details of the killing. The petitioner remained adamant, however, that he was not in any way responsible for, involved in, or present at the killing, and only learned about it after the fact.

Both Timothy Corbett and Randy Kaps testified at trial in front of the jury. During Officer Corbett's testimony, the petitioner's signed waiver of rights was admitted without objection. As previously noted, the audiovisual recording of the petitioner's interview was not introduced into evidence, but portions of it were summarized by Officer Corbett. The officer started out by telling the jury that the petitioner had "asked on several occasions if I could make a deal with him," but that, "I was very specific that I could not cut any deals, that I needed to know what his information was. And he continued to press for me to give him some kind of deal and I did not do that." "*Tr. p. 359.* Officer Corbett then related that the petitioner had given details during the interview about what he claimed to know regarding the killing but had initially denied even knowing the alleged victim. *Tr. p. 360.* On direct examination, the jury was informed that the petitioner said he learned about the alleged victim's death two days after it occurred. *Tr. p. 364.* In closing his direct examination, the officer stressed again that the petitioner wanted a deal. *Tr. pp. 367-368.* No objection was made by petitioner's trial counsel to the officer's testimony about the petitioner wanting a deal.

During cross-examination, petitioner's trial counsel asked the officer if, at the time the officer was speaking to the petitioner and the petitioner was asking for a deal, that "this case was not the only problem with the law he had." The officer confirmed the truth of that fact. *Tr. pp. 383-384.* During redirect examination, the prosecuting attorney brought out that the petitioner's other problems concerned sexual offenses, but the court prohibited inquiry into this subject over trial counsel's objection. The jury was instructed to disregard the question and answer as to the precise nature of the petitioner's other legal problems. *Tr. pp. 387-391.*

When it came time for questions from the jurors, there were inquiries about the audiovisual recording of the interview, but the court told the jury that "for legal reasons I have determined that those tapes would not be used in this trial." *Tr. pp. 394-395.* Officer Kaps testified later in the trial that he was present at a portion of the petitioner's interview. He testified that during the interview there was a discussion concerning a deal in regards to the petitioner giving the police information "on the murder of Donnell Langenderfer." *Tr. pp. 548-549.* Again, there was no objection to this testimony by petitioner's trial counsel.

In closing arguments at trial, both the prosecuting attorney and defense counsel referred to the petitioner's interview and the petitioner's request to make a deal. The prosecuting attorney posed the question to the jury as to why "an individual who did not partake or participate in the planning of this crime, or aid in the planning of this crime, wanted a deal? There would be no reason for a deal, if all he had was information about what others did. " *Tr. p. 639.* Trial counsel's response to this argument in his closing

remarks was that the questioning of Officer Corbett had brought out that petitioner had other legal matters and therefore had "something else he needed to make a deal about." *Tr. p. 654.* The prosecuting attorney pointed out in response to this argument that Officer Kaps had specifically told the jury that the petitioner wanted deal because of information petitioner had concerning the homicide. "It had absolutely nothing else to do with any other criminal legal matters." she said. *Tr. p. 667.*

Standards of Review

To prevail on a claim of ineffective assistance of counsel, a petitioner must show not only that counsel's performance was deficient, but also that counsel's performance caused prejudice to the petitioner. *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). To establish the first element of this test, a petitioner must show that counsel made errors so serious that counsel was not functioning as counsel guaranteed by the Constitution of the United States and the Constitution of the State of Indiana. *See Lowery v. State*, 640 N.E.2d 1031 (Ind. 1994). Stated another way, counsel's actions must have fallen below an objective standard of reasonableness under prevailing professional norms. *Strickland, supra,* at 687. A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Because of the difficulties inherent in making this assessment, a court must indulge in a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance. *Id.* at 689. Isolated poor strategy, poor tactics,

a mistake, carelessness or inexperience do not necessarily amount to ineffective assistance of counsel unless, taken as a whole, the representation was inadequate. *Davis v. State*, 675 N.E.2d 1097 (Ind. 1996). Tactical choices strategically made, even though subject to legitimate criticism, which ultimately turn out to be detrimental to the client's case, are not sufficient by themselves to establish that counsel was ineffective. *Garrett v. State*, 602 N.E.2d 139 (Ind. 1992).

Even if a petitioner meets the first test of ineffective assistance of counsel by proving deficient performance, it must still be shown that the petitioner was prejudiced by that performance. *Strickland, supra*, at 694. To meet this second test, the petitioner must establish a reasonable probability that, but for counsel's unprofessional errors, the results of the proceedings would have been different. In this context, a reasonable probability is a probability sufficient to undermine confidence in the outcome of the proceedings. Stated another way, a petitioner must show that counsel's alleged errors so undermined the functioning of the adversarial process that the proceedings cannot be relied on as having produced a just and reliable result. *Id.* at 686. The standards for judging the effectiveness of trial and appellate counsel are the same for both. *Mato v. State*, 478 N.E.2d 57 (Ind. 1985).

A postconviction relief petition is not a substitute for an appeal. *Davidson v. State*, 763 N.E.2d 441 (Ind. 2002). It is instead intended to provide a petitioner with an opportunity to raise issues which were not known or available at the time of trial or appeal. *Williams v. State*, 706 N.E.2d 149 (Ind. 1999). If an issue was known and available but not raised on appeal, it is waived. *Rouster v. State*, 705 N.E.2d 999 (Ind. 1999). If the issue was

raised on direct appeal, but was decided adversely to the petitioner, it is *res judicata. Trueblood v. State*, 715 N.E.2d 1242 (Ind. 1999).The doctrine of *res judicata* bars a later suit when an earlier suit resulted in a final judgment on the merits, was based on proper jurisdiction, and involved the same cause of action and the same parties as the later suit. *Annes v. State*, 789 N.E.2d 953, 954 (Ind. 2003). As a general rule, when a reviewing court decides an issue on direct appeal, the doctrine of *res judicata* applies and precludes review of that issue again in postconviction proceedings. *Ben-Yisrayl v. State*, 738 N.E.2d 253 (Ind. 2000). The purpose of the doctrine of *res judicata* is to prevent repetitious litigation of that which is essentially the same dispute. *Sweeney v. State*, 704 N.E.2d 86 (Ind. 1998). A petitioner for post-conviction relief cannot escape the effect of claim preclusion merely by using different language to phrase an issue and define an alleged error. *State v. Holmes*, 728 N.E.2d 164 (Ind. 2000). Where an issue, although differently designated, was previously considered and determined in a petitioner's direct appeal, it is *res judicata*. *Cambridge v. State*, 468 N.E.2d 1047, 1049 (Ind. 1984).

When deciding a petition for postconviction relief, it is also necessary to keep in mind that an error made in a trial court which might entitle a person to relief in a direct appeal will not necessarily entitle a person to relief when that issue is raised in postconviction proceedings. Different standards of review apply to different types of error depending on whether the issue is raised in a direct appeal or is raised in a collateral attack such as a petition for postconviction relief. This can best be understood by separating errors into the three recognized categories of error which can arise from trial court

proceedings: nonconstitutional error, constitutional trial error and constitutional structural error.

Generally, admission of inadmissible evidence, discovery issues or violations, and trial procedure errors are examples of nonconstitutional error. *Kotteakos v. United States*, 328 U.S. 750, 66 S.Ct. 1239, 90 L.Ed.2d 1557 (1946). These are errors that usually need to be preserved in the trial court and cannot be raised for the first time on appeal. They are also the most likely candidates for a harmless error analysis on appeal. A nonconstitutional error is harmless if the error did not influence the jury or had but a very slight effect. A nonconstitutional error is not harmless if it had substantial and injurious effect or influence in determining a jury's verdict. An error will be viewed as harmless if the probable impact of the evidence on the jury is sufficiently minor so as not to affect the party's substantial rights. *Appleton v. State*, 740 N.E.2d 122 (Ind. 2001).

One example of a constitutional error would be when the trial court admits evidence which was unconstitutionally obtained, like a statement to the police. Other examples would include denying a defendant the right to consult with counsel, admitting testimony about an improper identification procedure, or preventing a defendant from full exercise of his or her right to confrontation. *Arizona v. Fulminante*, 499 U.S. 279, 111 S.Ct. 1246, 113 L.Ed.2d 302 (1991). Constitutional errors are subject to a higher standard when determining on appeal if they are harmless. When dealing with a constitutional error, the state must show that the error was harmless beyond a reasonable doubt. A constitutional error is not harmless if the appellate court has a reasonable doubt as to whether the trier

of fact would have convicted the defendant if the error had not occurred. *Chapman v. California*, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967); *Underwood v. State*, 722 N.E.2d 828 (Ind. 2000).

Constitutional structural error is error that deprives an accused of the basic safeguards without which a criminal trial cannot be said to have reliably served its function as a vehicle for determination of innocence or guilt. Examples include the denial of effective assistance of counsel at trial, denial of the right to self-representation, failure to instruct a jury on the burden of proof beyond a reasonable doubt, *Batson*-type challenges and denial of the right to a public trial. A harmless error analysis does not apply on direct appeal to constitutional structural errors. *See, e.g., Waller v. Georgia*, 467 U.S. 39, 104 S.Ct. 2210, 81 L.Ed.2d 31 (1984).

Error review standards are different in postconviction proceedings. In a collateral proceeding such as a petition for postconviction relief, a harmless error analysis has wider application. Essentially, the standards are shifted a level. Constitutional structural errors which are reversible *per se* in a direct appeal are subject to a harmless beyond a reasonable doubt standard in postconviction proceedings. Constitutional trial errors must be shown by a petitioner to have had a substantial and injurious effect. Nonconstitutional trial errors are not remedial in postconviction proceedings because they are considered to have been waived when they were not raised in the trial court or on appeal. *See Brecht v. Abrahamson*, 507 U.S. 619, 113 S.Ct. 1710, 123 L.Ed.2d 353 (1993) (The *Kotteakos* harmless error standard, rather than the *Chapman* standard, applies when determining whether habeas relief must

be granted because of constitutional trial error.) When nonconstitutional trial errors are addressed in psotconviction proceedings, it is usually through an evaluation of a claim of ineffective of assistance of trial counsel, which is a constitutional structural error.

It is for these reasons that it can be said that what constitutes fundamental error for postconviction relief purposes is different than what constitutes fundamental error in a direct appeal. "Fundamental error" in a direct appeal refers to the two categories of constitutional trial error and constitutional structural error. Essentially, an error must be fundamental in the direct appeal sense to be raised at all in a petition for postconviction relief. In postconviction proceedings, unlike direct appeals, a fundamental error will be found only when "the record clearly reveals blatant violations of basic and elementary principles of due process and the harm or the potential for harm cannot be denied." *Canaan v. State*, 683 N.E.2d 227 (Ind. 1997). In other words, constitutional structural error which is found not to have been harmless.

Conclusions of Law

The heart of the petitioner's argument in his petition for postconviction relief is that the interview with Officer Corbett violated the petitioner's constitutional rights. The petitioner claims that the substance of that interview should not have been relayed to the jury and that trial counsel was ineffective in this regard. The state counters that trial counsel's handling of the interview issue has been waived because a claim of ineffective assistance of counsel was raised on different grounds in the petitioner's direct appeal and it cannot be relitigated through the petition for postconviction relief on new grounds. The

petitioner seeks to rebut this argument by alleging that the petitioner was denied the effective assistance of appellate counsel when appellate counsel prematurely raised ineffective assistance of trial counsel in the direct appeal. Petitioner argues that because he was denied the effective assistance of appellate counsel, he is entitled to raise the new grounds for ineffective assistance of trial counsel in these proceedings.

The way the interview of the petitioner proceeded on October 23, 2003, is troubling in several respects. Prior to any police questioning of a person in custody, that person must be warned that he has a right to remain silent, that any statement he makes may be used as evidence against him, and that he has the right to the presence of an attorney. *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966). That warning was given in this this case. If the person requests counsel, however, any questioning must cease until an attorney is present. *Edwards v. Arizona*, 451 U.S. 477, 101 S.Ct. 1880, 68 L.Ed.2d 378 (1981). The cessation of questioning is not required if the person being questioned makes a reference to an attorney that is ambiguous or equivocal such that a reasonable officer would not have understood that the person might be invoking the right to counsel. *Davis v. United States*, 512 U.S. 452, 114 S.Ct. 2350, 129 L.Ed.2d 362 (1994). The person being questioned may waive the right to counsel, if done voluntarily, knowingly, and intelligently. *Miranda*, 384 U.S. at 444, 86 S. Ct. at 1612, 16 L. Ed. 2d at 707. When a person being questioned has invoked the right to have counsel present during custodial interrogation, a valid waiver of that right cannot be established by showing only that the person responded to further police-initiated custodial interrogation. This is true even if the

person has been properly advised of his rights. A renewed waiver under these circumstances cannot be said to be a purely voluntary choice. *Maryland v. Shatzer*, 559 U.S. 98, 130 S. Ct. 1213, 175 L. Ed. 2d 1045 (2010). Once a person invokes the right to counsel, the person is not subject to further interrogation by the authorities until counsel has been made available, unless the person himself initiates further communication, exchanges, or conversations with the police. *Edwards, supra*, at 484-485. Even if the person elects to waive his rights, that waiver may be rescinded at any time during the questioning. If the right to counsel or the right to remain silent is invoked at any point during questioning, further interrogation must cease. *Berghuis v. Thompkins*, 560 U.S. —, 130 S. Ct. 2250, 176 L. Ed. 2d 1098. The Indiana Supreme Court held in *Carr v. State*, 934 N.E.2d 1096 (Ind. 2010), that a detective's failure to immediately cease further communications following a defendant's unambiguous and unequivocal invocation of his right to counsel rendered a videotape and transcript of the police interview of the defendant inadmissible at trial.

In this case, the petitioner made a clear and unequivocal request for counsel at the start of the interview after his rights were read but after Officer Kaps told the petitioner that, "You are the one we want." Both Officer Corbett and Officer Kaps were present at that point, and appeared to honor the petitioner's request for a lawyer by starting to leave. As they were leaving, Officer Corbett told the petitioner, "By the way, you are catching a conspiracy case. . .At the very minimum you can catch a conspiracy case. Because we've got one person in custody and about three other people rolled over so . . ." In response to this, the petitioner started to ask them not to leave. Officer Kaps stated ". . . we're not

talking to you anymore. You're done. You asked for an attorney. We're done. We're done. We're not, you know what the charge is, you'll get your paperwork in due time. That's it." At this point, the petitioner said that he wanted was to talk to Officer Corbett alone. Again, Officer Corbett asked the petitioner if he wanted an attorney, and this time he said no. The waiver was then signed and the petitioner and Officer Corbett talked for the next forty minutes. As noted above, the petitioner admitted to having knowledge of the killing but did not otherwise incriminate himself.

Just past forty minutes into the interview, when Officer Corbett made it clear that the petitioner was not getting out of jail and that there was a warrant against him for conspiracy to commit murder, the petitioner again invoked his right to counsel. Officer Corbett terminated the conversation and but, as he was leaving the room, the petitioner asked the officer to talk to the prosecuting attorney. Several minutes later, Officer Corbett returned to the room and asked the petitioner, "When I walked out, I didn't understand completely. Do you want an attorney, or are you willing to talk now since I talked to the prosecutor, or what do you want to do?" The petitioner responded "I want to go into it and try to get something cleared up." The second and much longer part of the interview then proceeded. During this second part, the petitioner gave much more information but still denied involvement in the killing.

The petitioner's argument that this was something less than the police officers scrupulously honoring the petitioner's request for counsel has some merit. Two separate times the petitioner unmistakably requested counsel. Those requests were acknowledged

by the officers but the officers ended up renewing their interview of the petitioner. The first time the petitioner invoked the right to counsel, the petitioner called the officers back. But this was only after Officer Corbett had responded to the petitioner's request for counsel by telling the petitioner that he was catching a conspiracy case. The second time the petitioner invoked his right to counsel, the petitioner requested the officer to talk to the prosecuting attorney as the officer was leaving the room. When the officer returned, he again asked the petitioner if he wanted to talk "since I talked to the prosecutor." The petitioner began talking again with Officer Corbett after being told the prosecuting attorney was watching the interview.

This situation does not rest on all fours with the facts in *Carr* but it does bear a resemblance. In *Carr*, the detective was considerate and polite, but continued talking in a way that invited a response from the defendant after a clear invocation of the defendant's right to counsel. Unlike *Carr*, however, the police advised the petitioner of his rights before any questioning began. Although Officer Corbett did not immediately continue the questioning of the petitioner after the first invocation of the petitioner's right to counsel, he did make a statement about the petitioner "catching a conspiracy charge" in a way that appears to have been intended to get the petitioner to keep talking. That is exactly what happened. The petitioner asked to talk to Officer Corbett. He did sign a waiver form before doing so.

The second renewal of questioning after the invocation of the right to counsel appears to have been set in motion by the petitioner asking the officer to speak to the

prosecuting attorney. The officer returned with a message that he had talked with the prosecuting attorney and the prosecuting attorney was watching. The petitioner then continued to talk with Officer Corbett. ~~The evidence presented at the hearing on the petition for postconviction relief by the officers established that a prosecuting attorney was in fact present outside the interview room, but the identity of that prosecuting attorney is no longer known.~~ Based on the state's answer to the petitioner's interrogatory introduced at the hearing on the petition for postconviction relief, the testimony of Officers Kaps and Corbett at the hearing on the petition, and the subsequent affidavits submitted by the petitioner in support of his motion to correct error, the court finds that it is difficult to determine whether a prosecuting attorney was in fact present outside the interview room, but the weight of the evidence is that a prosecuting attorney was not present. On the other hand, the court is not persuaded by the petitioner's testimony at the hearing on the petition that he would not have spoken with the police officers at all if they had told him that a prosecuting attorney was not actually present and watching from outside the interview room. As demonstrated by the content of petitioner's statements to the police officers after agreeing to continue talking to them after twice invoking his right to counsel, the petitioner's primary motive in talking to the officers was to deny any personal involvement in the killing and to obtain his immediate release from custody in return for providing evidence against others in this case and in unrelated matters. In any event, at no time were any promises made to the petitioner by the officer and no "deals" were arranged in return for the petitioner talking to the police officers.

Although the questioning of the petitioner after his invocation of the right counsel is troubling, it is not necessary for this court to decide whether the interview violated the petitioner's constitutional rights in order to resolve the petition for postconviction relief. The petitioner argues that the contents of this interview as relayed to the jury was "devastating" because it was emphasized and reemphasized to the jury that the petitioner wanted a deal in return for talking to the police officers when no emphasis was put on the petitioner's protestation of his innocence. The petitioner believes the balance of the evidence against him was weak and that it was the testimony regarding the interview that sealed his fate.

This court cannot agree that the balance of the evidence against the petitioner was weak. The evidence presented to the jury was not circumstantial but came from witnesses who testified before the jury about numerous incriminating things the petitioner did and said in relation to the killing. The fact that the petitioner was known by the jury to have wanted to make a deal in return for talking to the officers about what he knew did not particularly hurt him in this court's opinion. At the same time, the emphasis on the petitioner giving the officers contradictory information or information that conflicted with the testimony of other witnesses definitely did not help him. Nonetheless, it was clear from the questioning of the officers before the jury that the petitioner did not admit any responsibility for the death of Donnell Langenderfer because the petitioner only acknowledged learning of the killing two days after it happened. Even if the admission of the testimony regarding the police interview of the petitioner was found to be a

constitutional trial error, this court finds and concludes that this testimony did not have a substantial and injurious effect. In the context of the petition for postconviction relief, this error, if there is one, was harmless.

The petitioner claims that he was denied the effective assistance of counsel on appeal because appellate counsel should not have raised the issue of ineffective assistance of counsel in the trial court in the direct appeal. When a claim of ineffective assistance is directed at appellate counsel for failing to fully and properly raise and support a claim of ineffective assistance of trial counsel, a petitioner faces a compound burden in postconviction proceedings. The postconviction court must conclude that appellate counsel's performance was deficient and that, but for the deficiency of appellate counsel, trial counsel's performance would have been found deficient and prejudicial. *Ben-Yisrayl v. State, supra,; Timberlake v. State*, 753 N.E.2d 591 (Ind. 2001).

By the time of petitioner's direct appeal, the Supreme Court of Indiana had resolved an ongoing debate among practitioner's and courts about when it is necessary to directly appeal claims of ineffective assistance trial counsel to avoid that issue being waived. *Woods v. State*, 701 N.E.2d 1208 (Ind. 1998). The court held in *Woods* that a claim of ineffective assistance of trial counsel, if not raised on direct appeal, could be raised for the first time in postconviction proceedings. Prior to *Woods*, the failure to raise ineffective assistance of counsel in the trial court as part of the direct appeal generally waived the issue for postconviction proceedings. One caveat was included with this change to appellate practice: if ineffective assistance of trial counsel is raised on direct appeal, the issue may not

be raised again in postconviction proceedings. This limitation was expected to have the effect of deterring "all but the most confident appellants from asserting any claim of ineffectiveness on appeal." *Id.*

Appellate counsel testified at the hearing on the petition for postconviction relief. In his testimony, appellate counsel acknowledged that ineffective assistance of counsel should rarely, if ever, be raised on direct appeal based on *Woods*. Appellate counsel stated that he decided to raise the issue of ineffective assistance of trial counsel in the direct appeal because he believed he had one or more issues of ineffective assistance of trial counsel that he felt was supported by the trial record. Appellate counsel also stated that he did not believe raising this claim in the direct appeal would necessarily preclude the petitioner from raising the claim again on completely different grounds through a petition for postconviction relief. He was aware, however, that waiver was a potential problem.

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.

The petitioner alleges in his petition that trial counsel was ineffective for four reasons other than those raised on direct appeal: (1) failure to object that the petitioner

asked for a deal in the police interview; (2) opening the door to testimony that the petitioner was under arrest for two sexual offenses at the time of his police interview; (3) failure to elicit testimony from the police officers that the petitioner repeatedly asserted his innocence during the police interview; and, (4) failure to object to the testimony of the police officers about statements made by the petitioner during the interview because they were made prior to the petitioner being advised of his rights, were made in connection with plea negotiations and were made in violation of the petitioner's right to counsel.

The court does not find that the statements made by the petitioner during the police interview were made in connection with plea negotiations. Generally, statements made by a person as part of plea negotiations are not admissible at trial. *Chase v. State*, 528 N.E.2d 784 (Ind. 1988). However, statements made by a person prior to the existence of any charge against him to a police officer who lacks authority to enter into a binding agreement are not part of the plea bargaining process. The plea bargaining process does not commence until persons having the authority to make a binding agreement have agreed to negotiate. *Id.* At the time the petitioner made his statements to the police officers, he was not yet charged with any offenses and no negotiations were authorized or entered into for obtaining a plea to any charges. On the contrary, the petitioner was repeatedly told that no promises could be made to him but that any information he provided would be investigated. From a thorough review of the two hour audiovisual recording of the interview, it is clear that the petitioner was not negotiating a plea to any charges. He was instead trying to talk his way out of jail and out of any charges being filed against him.

None of the four claims raised by the petitioner to support his claim that he was denied the effective assistance of counsel in the trial court are sufficient to establish that he was prejudiced by those alleged errors. The statements to the police were made by the petitioner after appropriate warnings were given and acknowledged by him. As set forth in detail above, the testimony about the police interview at trial, even if error, was harmless as it relates to the petitioner's claim that his invocation of the right to counsel was violated. The jury was aware that the petitioner did not admit guilt to the police officers. And finally, the question and answer about the fact the petitioner was facing sexual offense allegations at the time of the interview was objected to by trial counsel and was struck from the record by the trial court judge with an admonishment to the jury. Under these circumstances, the petitioner has failed to establish the second prong of ineffective assistance of appellate counsel because he has not shown that trial counsel's performance would have been found deficient and prejudicial if appellate counsel had raised the additional four grounds in the direct appeal.

The petitioner's remaining claim that appellate counsel was ineffective because he failed to petition for the direct appeal to be transferred to the Supreme Court of Indiana does not rise to the level of ineffective assistance of counsel. Even if it is assumed for the sake of argument that the failure to file a timely petition to transfer was deficient performance, the findings and conclusions above show that the fact a petition to transfer was not filed did not prejudice the petitioner. Aside from the fact that there is nothing in the memorandum decision to suggest that the appeal was likely to result in a successful

petition to transfer, there is also nothing in case law to suggest that a transfer, even if accepted by the Supreme Court, would have resulted in a reversal of the decision of the Court of Appeals.

Judgment

In conclusion, the petition for postconviction relief is denied for the reasons that the petitioner has not established ineffective assistance of appellate counsel. The claim of ineffective assistance of trial counsel is *res judicata* because it was raised and decided in the direct appeal. The additional grounds raised in the petition in support of the claim of ineffective assistance of trial counsel were waived when they were not raised in the direct appeal.

The clerk is directed to notify the petitioner, Attorney John A. Kindley and Prosecuting Attorney Michael A. Dvorak. The clerk is further directed to show this case as disposed.

T Edward Page

T. EDWARD PAGE, Senior Judge