NO.:_____

IN THE

SUPREME COURT OF THE UNITED STATES

Samuel Jackson - Petitioner;

v.

State of Indiana - Respondent;

WRIT OF CERTIORARI APENDIX

Attorney for Appellant:
Samuel Lee Jackson,
Petitioner / *Pro se*
DOC # 913731
Pendleton Correctional Facility
4490 W. Reformatory Road
Pendleton, IN 46064-9001

In the
Indiana Supreme Court

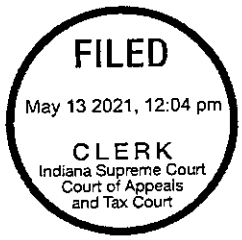
Samuel Lee Jackson,
Appellant(s),

v.

State Of Indiana,
Appellee(s).

Court of Appeals Case No.
20A-PC-01538

Trial Court Case No.
02D06-1204-PC-54



Order

This matter has come before the Indiana Supreme Court on a petition to transfer jurisdiction, filed pursuant to Indiana Appellate Rules 56(B) and 57, following the issuance of a decision by the Court of Appeals. The Court has reviewed the decision of the Court of Appeals, and the submitted record on appeal, all briefs filed in the Court of Appeals, and all materials filed in connection with the request to transfer jurisdiction have been made available to the Court for review. Each participating member has had the opportunity to voice that Justice's views on the case in conference with the other Justices, and each participating member of the Court has voted on the petition.

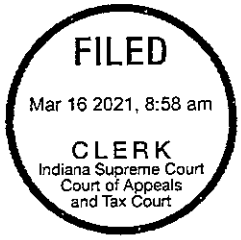
Being duly advised, the Court DENIES the petition to transfer.

Done at Indianapolis, Indiana, on 5/13/2021.

Loretta H. Rush
Chief Justice of Indiana

All Justices concur.

MEMORANDUM DECISION



APPELLANT PRO SE

Samuel Lee Jackson
Pendleton, Indiana

ATTORNEYS FOR APPELLEE

Theodore E. Rokita
Attorney General of Indiana

Tiffany A. McCoy
Deputy Attorney General
Indianapolis, Indiana

IN THE COURT OF APPEALS OF INDIANA

Samuel Lee Jackson,
Appellant,

v.

State of Indiana,
Appellee.

March 16, 2021

Court of Appeals Case No. 20A-PC-1538

Appeal from the Allen Superior Court

The Honorable David M. Zent, Judge

Trial Court Cause No. 02D06-1204-PC-54

Brown, Judge.

[1] Samuel Lee Jackson appeals the denial of his petition for post-conviction relief. Jackson raises several issues which we revise and restate as whether the post-conviction court abused its discretion in its ruling on his requests for judicial notice, and in denying his motions for discovery requests and to set an evidentiary hearing. We affirm.

Facts and Procedural History

[2] The relevant facts as discussed in Jackson's direct appeal follow:

> [O]n June 18, 2000, Glendora Shorts had an argument and physical altercation with Jackson, her boyfriend of ten years. As Jackson left Shorts' house, he threatened to kill her and her children. Shortly after midnight, Shorts' daughter, D.B., left Shorts' upstairs bedroom where she had been watching a movie with her mother and went to the bathroom, which was on the same floor as the bedroom. While in the bathroom, D.B. heard four "punching" sounds. She left the bathroom and found that her mother's bedroom door was closed and could not be opened all the way. D.B. was able to see someone wearing a red shirt through a crack in the door; Jackson had been wearing a red shirt earlier in the day. D.B. then heard a voice she clearly recognized as Jackson's say "I'm naked and you can't come in here, your mom know [sic] I'm here." She ran downstairs to the basement bedroom of her brother, R.S., who called 911. R.S. then heard someone that he was "positive" was Jackson yelling at D.B. After police arrived at the residence, D.B. noticed that the front door was open, and she went upstairs with an officer to Shorts' bedroom. Shorts was found lying in a pool of blood. A pathologist determined Shorts died from multiple blunt force injuries to the head consistent with being beaten with a baseball bat; a bat with red stains and hair stuck to it was found on the front porch. The State charged Jackson with murder and residential entry on June 22, 2000; the habitual offender allegation

> was added in July 2000. . . . The jury returned guilty verdicts for both charges and found Jackson to be an habitual offender. The trial court sentenced Jackson to an aggregate term of ninety-five years . . . .

Jackson v. State, 758 N.E.2d 1030, 1032-1033 (Ind. Ct. App. 2001) (citations omitted). This Court affirmed Jackson's convictions. *Id.* at 1037-1038. Jackson's trial counsel also represented him on appeal (Jackson's "defense counsel").

[3] Jackson filed a *pro se* petition for post-conviction relief on April 12, 2012. The court ordered him to submit his case via affidavit,[1] and on January 16, 2014, he filed an amended petition in which, according to the post-conviction court's Findings of Fact and Conclusions of Law, he requested representation by the public defender. The chronological case summary ("CCS") indicates that a notice was issued on the same day to "State PD Owens." Appellant's Appendix Volume II at 8. The public defender amended the petition on Jackson's behalf on March 16, 2017. In August 2017, the court held a hearing at which Jackson appeared in person and by post-conviction counsel and, upon request by Jackson's counsel, admitted a certified copy of the trial record.

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[1] Specifically, an August 23, 2012 order indicated that the court "now stay[ed] all further proceedings until such time as the Petition[er] informs the Court that he is prepared to proceed and further in fact receives Petitioner's Affidavit in Support of his Petition for Post[-]Conviction Relief." Appellant's Appendix Volume II at 78.

[4] At some point after Jackson and the State rested, the court allowed Jackson to make a statement and to speak with counsel, and his post-conviction counsel informed the court that Jackson shared he would like to "proceed pro se at this point, . . . and that he would like to amend his petition to include a claim of ineffective assistance of trial counsel." Transcript Volume II at 8. Jackson proceeded *pro se*, raised the issues of ineffective assistance of trial and of appellate counsel, and answered in the negative when the court asked him if the things about which he was speaking were in the petition that he sought to file. The court instructed Jackson's post-conviction counsel to withdraw and confirmed Jackson wished to proceed *pro se* while admonishing that "[w]e're not gonna flip flop back and forth" and that "if you're gonna represent yourself, your [sic] gonna represent yourself, right." *Id.* at 12.

[5] On February 16, 2018, Jackson *pro se* filed an amended petition, a motion to set an evidentiary hearing, a request for the court to subpoena his defense counsel, and a supporting affidavit for the subpoena request. On February 20, 2018, the State filed a motion to require Jackson to submit his case by affidavit, the post-conviction court denied Jackson's motion for a hearing "and other matters related to said request," granted the State's motion, ordered Jackson to submit his case by affidavit, and set a filing schedule which included a deadline for Jackson to submit his case by affidavit on or before July 2, 2018. Appellant's Appendix Volume II at 98. On April 23, 2018, Jackson filed a motion for leave to amend his petition, which the court granted. His amended petition included claims of effective assistance of counsel.

[6] On May 25, 2018, Jackson filed requests, as well as affidavits in support, for the court to issue subpoenas duces tecum for defense counsel and the County Jail in Allen County. The court denied the request on June 8, 2018, and found that Jackson failed to state any just cause or need for the requested information, and that his requests were unduly burdensome, had a lack of sufficient specificity, and "appeared to be nothing but fishing expeditions." *Id.* at 126. On June 8 and June 27, 2018, Jackson filed a request for interrogatories of his defense counsel.

[7] On July 16, 2018, the State filed a motion to dismiss Jackson's petition and asserted he had not submitted his case for post-conviction relief by affidavit on or before July 2, 2018. Jackson filed a motion to depose his defense counsel on August 10, 2018, alleging that he needed to complete discovery of counsel prior to filing his affidavits. The post-conviction court issued an order three days later which stated that Jackson's request to depose defense counsel was forwarded to the prosecuting attorney for a response within thirty days of the date of the order, and on the same day, Jackson filed an Objection to Dismiss concerning the State's July 16, 2018 motion. On August 17, 2018, the post-conviction court denied the State's July 16, 2018 motion and advised Jackson to inform the court when he was prepared to proceed in order that a hearing may be set. On August 30, 2018, the State filed a response to Jackson's motion to depose, pointed to the court's August 17, 2018 order and indicated that it was apparent the court had "decided to dispense with the submission of affidavits in this case, and instead simply to hold an evidentiary hearing" whenever Jackson was prepared to

proceed.[2] Appellant's Appendix Volume II at 152. The State further argued Jackson made no showing that the proposed deposition's purpose was anything other than exploratory, or how the cost of the deposition would be paid.

[8] On October 5, 2018, Jackson filed another motion to set an evidentiary hearing and "included his request for subpoenas" for his defense counsel. *Id.* at 155. Later that month, he filed a potential exhibit list which indicated that he intended to submit and refer to certain items, including the "Brief of the Appellee," his direct appeal in *Jackson*, 758 N.E.2d at 1030, and various lines from pages 88, 124, and 125 of "Vol. 1." *Id.* at 158. The court scheduled a hearing on Jackson's petition for March 1, 2019, and it issued a subpoena for Jackson's defense counsel which was served on December 6, 2018. *See* November 29, 2018 Subpoena, Cause No. 02D06-1204-PC-54.

[9] On January 22, 2019, the court issued an order cancelling the March 1, 2019 hearing and the subpoena for Jackson's defense counsel, indicating that because Jackson was not represented by counsel, the case should be submitted by affidavit. The court further ordered Jackson to submit his case by affidavit by April 1, 2019. On February 6, 2019, Jackson filed a motion to reconsider or to

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[2] Continuing, the State indicated that, even "if it had somehow been necessary for Mr. Jackson to depose [his defense counsel] to prepare an adequate submission of his case by affidavit, it would no longer be necessary for that purpose" given that Jackson had not stated a "reason why he cannot adequately question [his defense counsel] at the forthcoming evidentiary hearing, and therefore no reason why a deposition is needed in addition to the evidentiary hearing." Appellant's Appendix Volume II at 152-153.

certify order for interlocutory appeal, and the court denied the motion and later ordered Jackson to submit the case by affidavit by May 17, 2019.

[10] On March 25, 2019, Jackson filed motions to depose counsel and for the funds to do so at the public's expense, which the court denied. The court granted a request for a continuance and ordered Jackson to submit the case by affidavit by November 6, 2019. On May 8, 2019, Jackson filed a motion for leave to depose counsel by affidavit, and the court granted the motion two days later and ordered him to "send appropriate paperwork to counsel." *Id.* at 206. On July 25, 2019, Jackson filed a Motion to Reconsider Giving Petitioner An Evidentiary Hearing alleging that the "matter and claims before the [c]ourt at this time cannot be properly resolved by affidavit and will require an evidentiary hearing" to "develop the evidence required" for his ineffective assistance claims. *Id.* at 210, 212. The court denied the motion.

[11] On August 19, 2019, Jackson filed a Motion To Compel Attorney To Produce and requested discovery from his defense counsel, and the court ordered the Public Defender's Office to produce, within thirty days, the portions of Jackson's file that were discoverable. Following the denial of his request that the court certify the order for interlocutory appeal, Jackson filed a motion to continue, which the court granted, and a motion to reconsider the court's order granting his request to produce the portions of his file. In the motion to reconsider, Jackson indicated that the discoverable materials he was requesting were "not portions of the Defendant's File, but [his defense counsel]," and he was requesting his defense counsel to produce answers to the questions he previously submitted. *Id.*

at 236. On September 26, 2019, the court granted the motion to reconsider in part and ordered Jackson's defense counsel to answer the questions in the interrogatories filed in June 2018, within thirty days of the order, provide notice to the court of his answers, and serve a copy of the responses on Jackson. The post-conviction court also granted Jackson's request for continuance and ordered him to submit his case by affidavit by December 31, 2019, and that proposed findings of fact and conclusions of law were due on or before April 30, 2020.

[12] On October 21, 2019, Jackson filed an affidavit in support of his petition for post-conviction relief. In January 2020, he filed a Motion For Post-Conviction Court to Take Judicial Notice of Own Records that requested judicial notice of the "Record [o]f Proceedings and or Record on Appeal in relation to the jury/bench trial held in this case . . . from which is a record of this State and to make them part of the P-CR record as an exhibit." *Id.* at 229. He further stated that

> since the Petitioner (1) cannot present the Record on Appeal and or the Record of the Proceedings in that he will not be presented in person to the Court for the purpose of this action to present evidence on his own behalf, nor (2) is the Petitioner a licensed attorney from whom could obtain the record which is required even if he had access to the Court of Appeals.
>
> [] Petitioner also cannot afford to hire legal counsel for the purpose of obtaining the Record on Appeal and or the Record of the Proceedings and presenting it to the Court as an exhibit for evidence.

Id. at 228-229. In February 2020, the court granted the motion to take judicial notice in part, indicating that it took judicial notice of its own "[c]ourt [f]ile (CCS

and all motions, pleadings filed)," and did not know what exactly Jackson believes is necessary for his claims, or where exactly those records were currently located. *Id.* at 232. It further noted Jackson was represented by an attorney at trial and on appeal and at one time had state public defender representation in the post-conviction proceeding, and it advised that he should contact his attorney to obtain any records or copies of records he wished to make a part of the post-conviction record.

[13] On February 27, 2020, the State filed a response and supplemental response to Jackson's affidavit in support of his petition for post-conviction relief, and indicated that it would "also make the exhibit volume of the original trial record" available to the court for viewing if requested. Appellee's Appendix II at 32. The State indicated that in the exhibit volume of the original trial record, each document bore a certificate signed by the clerk of the county circuit and superior courts stating that it was a true and complete copy of "the record on file in 'this office.'" *Id.* at 33.

[14] In March 2020, Jackson filed a response to the court's judicial notice order indicating an understanding that the court "would take judicial notice of its own records rather than the Record of the Proceedings / Record on Appeal," and he requested that the court take notice of such documents and make them part of the record. Appellant's Appendix Volume II at 233. The court denied Jackson's request and indicated that it had "reviewed the Original Exhibit Volume," that it would take judicial notice of copies of several exhibits which had been attached, and that findings of fact and conclusions of law were still due April 30, 2020.

Appellee's Appendix Volume II at 35. Following timely filings of proposed findings by both the State and Jackson, the court denied his petition.

Discussion

[15] Before discussing Jackson's allegations of error, we observe that the purpose of a petition for post-conviction relief is to raise issues unknown or unavailable to a defendant at the time of the original trial and appeal. *Reed v. State*, 856 N.E.2d 1189, 1194 (Ind. 2006). A post-conviction petition is not a substitute for an appeal. *Id.* Further, post-conviction proceedings do not afford a petitioner a "super-appeal." *Id.* The post-conviction rules contemplate a narrow remedy for subsequent collateral challenges to convictions. *Id.* If an issue was known and available but not raised on appeal, it is waived. *Id.*

[16] We note the general standard under which we review a post-conviction court's denial of a petition for post-conviction relief. The petitioner in a post-conviction proceeding bears the burden of establishing grounds for relief by a preponderance of the evidence. *Fisher v. State*, 810 N.E.2d 674, 679 (Ind. 2004); Ind. Post-Conviction Rule 1(5). When appealing from the denial of post-conviction relief, the petitioner stands in the position of one appealing from a negative judgment. *Fisher*, 810 N.E.2d at 679. On review, we will not reverse the judgment unless the evidence as a whole unerringly and unmistakably leads to a conclusion opposite that reached by the post-conviction court. *Id.* "A post-conviction court's findings and judgment will be reversed only upon a showing of clear error – that which leaves us with a definite and firm conviction that a mistake has been made." *Id.* In this review, we accept findings of fact unless clearly erroneous,

but we accord no deference to conclusions of law. *Id.* The post-conviction court is the sole judge of the weight of the evidence and the credibility of witnesses. *Id.*

[17] We further note that Jackson is proceeding *pro se*. Such litigants are held to the same standard as trained counsel and are required to follow procedural rules. *Evans v. State*, 809 N.E.2d 338, 344 (Ind. Ct. App. 2004), *trans. denied*. *See also Zavodnik v. Harper*, 17 N.E.3d 259, 266 (Ind. 2014) ("Even if a court may take reasonable steps to prevent a good faith *pro se* litigant from being placed at an unfair disadvantage, an abusive litigant can expect no latitude."). To the extent Jackson fails to cite to the record or develop an argument with respect to the issues he attempts to raise on appeal, those arguments are waived. *See Cooper v. State*, 854 N.E.2d 831, 834 n.1 (Ind. 2006) (holding that the defendant's contention was waived because it was "supported neither by cogent argument nor citation to authority"); *Shane v. State*, 716 N.E.2d 391, 398 n.3 (Ind. 1999) (holding that the defendant waived argument on appeal by failing to develop a cogent argument), *trans. denied*.

[18] Jackson contends his post-conviction counsel left him "to fend for himself pro se," and he argues that the post-conviction court improperly denied his request to take judicial notice, and points to *Hubbell v. State*, 58 N.E.3d 268, 277 (Ind. Ct. App. 2016), *trans. denied*. Appellant's Brief at 7. He further argues the court abused its discretion in denying his motions for discovery requests and to set an evidentiary hearing.

[19] The decision to take judicial notice of a matter, like other evidentiary decisions, is reviewed for an abuse of discretion. *Horton v. State*, 51 N.E.3d 1154, 1158 (Ind. 2016). Ind. Evidence Rule 201(a) governs the kinds of facts that may be judicially noticed and provides that "[t]he court may judicially notice . . . the existence of . . . records of a court of this state." Ind. Evidence Rule 201(c) provides that "[t]he court . . . (1) may take judicial notice on its own; or (2) must take judicial notice if a party requests it and the court is supplied with the necessary information." Ind. Post-Conviction Rule 1(9)(b), provides in part that, in the event a petitioner elects to proceed *pro se*, the court "at its discretion may order the cause submitted upon affidavit" and "need not order the personal presence of the petitioner unless his presence is required for a full and fair determination of the issues raised at an evidentiary hearing."

[20] In *Hubbell*, this Court reversed the denial of a post-conviction petition on the basis that the post-conviction court refused to obtain a certified copy of Hubbell's direct appeal record on his behalf upon request, reasoning that Hubbell's inability to produce a certified copy of the record precluded him from presenting evidence needed to assert claims he raised which "cannot be addressed on their merits without access to" the record. 58 N.E.3d at 277. Unlike in *Hubbell*, the post-conviction court here, upon request by Jackson through and by his post-conviction counsel, admitted a certified copy of the trial record at the August 2017 hearing, which Jackson cited in his October 21, 2019 affidavit.

[21] Following the admission of the record, Jackson indicated at the hearing he would like to proceed *pro se*, and the post-conviction court confirmed his wish to do so.

To the extent Jackson cites Ind. Evidence Rule 201(c), we note that, when Jackson requested a "Record [o]f Proceedings and or Record on Appeal" in January 2020, the court granted the motion, took judicial notice of its court file, CCS, all motions, and any filed pleadings, and indicated that it did not know what exact material Jackson believed was necessary for his claims. Appellant's Appendix Volume II at 229. The court further indicated in March 2020 it had reviewed the Original Exhibit Volume and ultimately took judicial notice of several exhibits. As to any of Jackson's claims that would require reference to the trial record, we additionally observe his case by affidavit referenced substance within the record and that Jackson never accompanied his requests for judicial notice with specificity as to the records needed, nor did he provide the court with the reasons for his requests. *See* Ind. Evidence Rule 201(c)(2) (noting the court must take judicial notice if a party requests it and "the court is supplied with the necessary information"). Under these circumstances, we cannot say that the court erred in its ruling on Jackson's motion for judicial notice.

[22] Regarding the motions for discovery requests, we note that, if "a PCR court does not believe a proposed witness's expected testimony would be relevant and probative, it must make a finding on the record to that effect before refusing to issue a subpoena." *Graham v. State*, 941 N.E.2d 1091, 1096 (Ind. Ct. App. 2011) (citing Ind. Post-Conviction Rule 1(9)(b)), *aff'd on reh'g*. When it denied Jackson's February 2018 motions for subpoenas duces tecum, the post-conviction court found Jackson had failed to state any just cause or need for the requested information, and that his requests were unduly burdensome and had a lack of

sufficient specificity. Previous to these findings, the court had ordered Jackson to submit his case by affidavit, and leading up to the court's January 2019 order Jackson did not clarify or otherwise explain, in his October 2018 motion or elsewhere, the relevance or probative nature of his discovery requests. Under these circumstances, we cannot say Jackson has shown reversal is necessary on this basis.

[23] To the extent Jackson argues that the post-conviction court abused its discretion by failing to hold an evidentiary hearing, Ind. Post-Conviction Rule 1(9)(b) provides that, in the event petitioner elects to proceed pro se, the court "at its discretion may order the cause submitted upon affidavit" and "need not order the personal presence of the petitioner unless his presence is required for a full and fair determination of the issues raised at an evidentiary hearing." Generally, "if the PCR court orders the cause submitted by affidavit under Rule 1(9)(b), it is the court's prerogative to determine whether an evidentiary hearing is required, along with the petitioner's personal presence, to achieve a 'full and fair determination of the issues raised[.]'" *Smith v. State*, 822 N.E.2d 193, 201 (Ind. Ct. App. 2005), *trans. denied.* We review the post-conviction court's decision to forego an evidentiary hearing when affidavits have been submitted under Rule 1(9)(b) under an abuse of discretion standard. *Id.* Jackson does not point to any specific claim in his petition for post-conviction relief or develop a cogent argument that any of his claims required a factual determination. Under these circumstances, we cannot say that reversal is warranted. *See id.* (holding that "other than claiming that the affidavits he and the State submitted raised issues of

fact, [the petitioner] has failed to show how an evidentiary hearing would have aided him").

[24] For the foregoing reasons, we affirm the post-conviction court's order.

[25] Affirmed.

Vaidik, J., and Pyle, J., concur.

STATE OF INDIANA	)	IN THE ALLEN SUPERIOR COURT
	) SS:	
COUNTY OF ALLEN	)	CAUSE NO. 02D06-1204-PC-54 (02D04-0006-CF-338)
SAMUEL LEE JACKSON, Petitioner,	)	
vs.	)	
STATE OF INDIANA, Respondent.	)	

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This matter having come before the Court on Petition for Post-Conviction Relief filed by Samuel Lee Jackson and the Petitioner having submitted his case for post-conviction relief by affidavit, the Court now being duly advised in the premises makes the following Findings of Fact and Conclusions of Law pursuant to Rule 1, Section 6 of the Indiana Rules of Procedure for Post-Conviction Remedies.

FINDINGS OF FACT

1. On January 18, 2001, Petitioner Samuel Lee Jackson was found guilty, after a jury trial, of Count 1, Murder, a felony, and Count 2, Residential Entry, a Class D felony. He was also found to be a habitual offender. The Court accordingly entered judgment of conviction. Mr. Jackson was sentenced to ninety-five (95) years on Count 1 (i.e., 65 years enhanced by an additional 30 years on the basis of the habitual offender finding) and three (3) years on Count 2. Count 1 and 2 were ordered to be served concurrent. Attorney Donald C. Swanson, Jr., represented Mr. Jackson at trial.

2. On December 4, 2001, Mr. Jackson's convictions were upheld on appeal. *Jackson v. State,* 758 N.E.2d 1030 (Ind. Ct. App. 2001). Attorney Swanson also represented Mr. Jackson on appeal. The Court of Appeals of Indiana summarized the facts supporting Mr. Jackson's convictions as follows.

The evidence most favorable to the convictions reveals that on June 18, 2000,

> Glendora Shorts had an argument and physical altercation with Jackson, her boyfriend of ten years. As Jackson left Shorts' house, he threatened to kill her and her children. Shortly after midnight, Shorts' daughter, D.B., left Shorts' upstairs bedroom where she had been watching a movie with her mother and went to the bathroom, which was on the same floor as the bedroom. While in the bathroom, D.B. heard four "punching" sounds. Transcript p. 123. She left the bathroom and found that her mother's bedroom door was closed and could not be opened all the way. D.B. was able to see someone wearing a red shirt through a crack in the door; Jackson had been wearing a red shirt earlier in the day. D.B. then heard a voice she clearly recognized as Jackson's say "I'm naked and you can't come in here, your mom know [*sic*] I'm here." Transcript p. 124. She ran downstairs to the basement bedroom of her brother, R.S., who called 911. R.S. then heard someone that he was "positive" was Jackson yelling at D.B. Transcript p. 159. After police arrived at the residence, D.B. noticed that the front door was open, and she went upstairs with an officer to Short's bedroom. Shorts was found lying in a pool of blood. A pathologist determined Shorts died from multiple blunt force injuries to the head consistent with being beaten with a baseball bat; a bat with red stains and hair stuck to it was found on the front porch.

Id. at 1032.

3. On April 12, 2012, Mr. Jackson filed a pro se Petition for Post-Conviction Relief. He initially declined to accept representation by the Public Defender of Indiana. On January 16, 2014, he filed an Amended Petition for Post-Conviction Relief in which he requested representation by the Public Defender. On March 16, 2017, the Public Defender amended the Petition on Mr. Jackson's behalf, and an evidentiary hearing was set for August 4, 2017. At the hearing, however, Mr. Jackson objected to representation by the Public Defender and elected to proceed pro se; the Public Defender accordingly withdrew. Mr. Jackson, pro se, later amended the Petition on February 16, 2018, and finally on April 23, 2018.

4. The Petition, as ultimately amended, alleges that attorney Swanson rendered ineffective assistance on appeal by failing to properly argue (i) the "failure of a jury instruction for Direct Evidence compared to Circumstantial Evidence"; (ii) that the jury should have been instructed on a lesser included offense of murder; (iii) that the trial court committed fundamental error in denying a continuance to "properly prepare, consult, recruit and present defense experts at trial"; (iv) that the State used an ineligible felony to

support the habitual offender enhancement; (v) that the State failed to prove each required element of the habitual offender enhancement; and (vi) that the Court failed to attach the habitual offender enhancement to a specific count. The Petition also alleges that Swanson rendered ineffective assistance on appeal by failing to raise more meritorious issues than those that were raised, and to preserve issues raised. The Petition alleges that Swanson rendered ineffective assistance at trial by failing to (i) properly communicate with Mr. Jackson; (ii) properly tender an instruction on direct evidence compared to circumstantial evidence; (iii) properly tender an instruction on a lesser included offense of murder; (iv) investigate whether Mr. Jackson was eligible for the habitual offender enhancement; (v) object to the filing of the habitual offender enhancement; (vi) present an adequate defense including expert witnesses; (vii) argue that State's Exhibits 82 and 83 were not self-authenticating; (viii) preserve the issue of "the State speaking on what the decedent would say from the grave"; and (ix) file a motion to correct error with regard to the habitual offender enhancement. The Petition further purports to raise free-standing claims that the trial court erred in refusing a jury instruction on circumstantial evidence and denying a continuance to the defense.

5. Pursuant to Indiana Post-Conviction Rule PC 1, Section 9(b), Mr. Jackson was ordered to submit his case for post-conviction relief by affidavit. After obtaining extensions of time, he timely did so on October 21, 2019.

6. During the habitual offender phase of Mr. Jackson's trial, the prosecutor stated the date of Mr. Jackson's first prior felony conviction (in cause number 02D04-9101-CF-9), without objection, as the 11th day of December, 1991. Tr. 541. The handwritten date on the judgment of conviction for cause number 02D04-9101-CF-9 (admitted into evidence at trial as State's Exhibit 82) is December 11, 1991. The date of commission of the second prior felony (in cause number 02D04-9608-DF-455) was August 1, 1996, as shown in State's Exhibit 83. In the exhibit volume of the original trial record, it may be seen that each document in State's Exhibits 82 and 83 bears a certificate signed by the Clerk of the Allen

Circuit and Superior Courts, stating that it is a true and complete copy of the record on file in "this office."

CONCLUSIONS OF LAW

1. The law is with the State of Indiana and against the Petitioner.

2. To prevail on a claim of ineffective assistance of counsel, a convicted defendant must show both (1) that counsel's performance was deficient and (2) that the deficient performance prejudiced the defense. *Bouye v. State,* 699 N.E.2d 620, 623 (Ind. 1998). Because "[t]he object of an ineffectiveness claim is not to grade counsel's performance," a court need not determine whether counsel's performance was deficient before determining whether the defendant suffered prejudice; rather, "[i]f it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, . . . that course should be followed." *Bouye,* 699 N.E.2d at 623, quoting *Strickland v. Washington,* 466 U.S. 668, 697 (1984). To prove prejudice, the defendant must show a reasonable probability—that is, a probability "sufficient to undermine confidence in the outcome"—that, but for the claimed errors, the result of the proceeding would have been different. *Taylor v. State,* 840 N.E.2d 324, 331 (Ind. 2006). On the other hand, some ineffectiveness claims are more appropriately resolved by a straightforward assessment of counsel's performance. *Grinstead v. State,* 845 N.E.2d 1027, 1031 (Ind. 2006). The standard for determining the effectiveness of assistance of counsel is the same for both trial and appellate counsel. *Mato v. State,* 478 N.E.2d 57, 62 (Ind. 1985). Appellate counsel will not be found ineffective for failing to raise an issue that would not have been successful. *Mauricio v. State,* 659 N.E.2d 869, 872-873 (Ind. Ct. App. 1995), *trans. denied.*

3. On Mr. Jackson's direct appeal, the Court of Appeals held that "voice identification evidence that places the defendant at the crime scene at the precise time and place of the crime's commission is direct evidence." *Jackson,* 758 N.E.2d at 1036. As the voice identification testimony of D.B. and R.S., placing Mr. Jackson at the crime scene at the precise time and place of the crime's commission [*id.* at 1032], was direct evidence, Mr.

Jackson was not entitled to a jury instruction stating that "[w]*here proof of guilt is by circumstantial evidence only, it must be so conclusive in character and point so surely and unerringly to the guilt of the accused as to exclude every reasonable theory of innocence.*" Id. at 1036-37 (emphasis in original). Mr. Jackson asserts that, if only attorney Swanson had presented better argument on appeal, the outcome in his case would have been the same as in *Hampton v. State,* 961 N.E.2d 480 (Ind. 2012). Amended Petition, § 8(a)(i), 9(a)(i); Petitioner's Affidavit, at 3-4. Petitioner Hampton's conviction was not overturned in that case. *Hampton,* 961 N.E.2d at 482, 495. Furthermore, *Hampton* was about DNA evidence, and the only reference to voice identification evidence in *Hampton* indicates that such evidence is direct, not circumstantial: "if the proposed conclusion is that defendant and others robbed the victim, the victim's voice identification of the defendant as one of the robbers is consistent only with the proposed conclusion and is, therefore, direct evidence." *Id.* at 490 n.8. As the outcome of Mr. Jackson's case would have been the same even if *Hampton* had already been decided, attorney Swanson cannot be found ineffective for failing to present argument like the reasoning later set forth in *Hampton. Taylor,* 840 N.E.2d at 331.

4. An instruction on a lesser included offense should be given if, and only if, "there is a serious evidentiary dispute about the element or elements distinguishing the greater from the lesser offense and if, in view of this dispute, a jury could conclude that the lesser offense was committed but not the greater." *Wright v. State,* 658 N.E.2d 563, 567 (Ind. 1995). Mr. Jackson complains that attorney Swanson was ineffective in failing to argue for a jury instruction on a lesser included offense of murder [Amended Petition, § 8(a)(ii), 9(a)(ii); Petitioner's Affidavit, at 4], but identifies no serious evidentiary dispute in view of which the jury could have concluded that Mr. Jackson was guilty of a lesser included offense rather than murder. The facts noted by the Court of Appeals—specifically, that Mr. Jackson threatened to kill the victim, and later returned to beat her to death with a baseball bat [*Jackson,* 758 N.E.2d at 1032]—would indeed appear to rule out any serious evidentiary

dispute as to whether Mr. Jackson acted in sudden heat, or intended only to batter the victim but not to kill her, or was merely reckless in killing her. Mr. Jackson therefore would not have been entitled to a jury instruction on voluntary manslaughter [IC 35-42-1-3 (1997)], involuntary manslaughter [IC 35-42-1-4 (1997)], or reckless homicide [IC 35-42-1-5 (1980)]—and he does not suggest that attempted murder would have been a possibility, in view of the undisputed fact of the victim's death. Swanson therefore cannot be found ineffective for failing to argue for a jury instruction on a lesser included offense. *See Williams v. State*, 706 N.E.2d 149, 161 (Ind. 1999), *cert. denied*, 529 U.S. 1113 (2000) (failure to submit a jury instruction is not deficient performance "if the court would have refused the instruction anyway").

5. Mr. Jackson asserts that attorney Swanson was ineffective in failing to argue that a continuance should have been granted to "properly prepare, consult, recruit and present defense experts at trial." Amended Petition, § 8(a)(iii), 9(a)(iii); Petitioner's Affidavit, at 4. Swanson did argue that a continuance should have been granted, but without reference to the possibility of calling defense experts. *Jackson*, 758 N.E.2d at 1033. A defendant cannot show that failure to call a witness amounted to ineffective assistance without producing evidence—not merely the defendant's own bare assertions—as to what that witness would have said and how that witness's testimony would likely have affected the outcome of the trial. *Hunter v. State*, 578 N.E.2d 353, 355 (Ind. 1991); *McBride v. State*, 515 N.E.2d 865, 867 (Ind 1987). Mr. Jackson conjectures that defense experts, if called, could have cast doubt upon the identification of him as the perpetrator by voice identification and DNA evidence. Amended Petition, § 9(a)(iii)(e). He presents no evidence having any tendency to establish the existence and identity of any experts who could actually have done so. Swanson cannot be found ineffective for failing to argue for a continuance for the purpose of coming up with experts not shown to have existed, much less to have been able to provide beneficial testimony for Mr. Jackson. *Hunter*, 578 N.E.2d at 355; *McBride*, 515 N.E.2d at 867.

6. Mr. Jackson asserts that attorney Swanson was ineffective in failing to argue that the State failed to prove each required element of the habitual offender enhancement. Amended Petition, § 8(a)(v), (vii), 9(a)(v), (vii); Petitioner's Affidavit, at 5-8. Specifically, he asserts that the State failed to prove the date of conviction for his first prior felony (in cause number 02D04-9101-CF-9) because the date on the judgment of conviction (State's Exhibit 82) was unreadable. The date was readable, and was correctly stated by the prosecutor as December 11, 1991, a date that is prior to the second felony, which was August 1, 1996 [Findings of Fact, ¶ 6]. Swanson therefore could not have successfully argued that the State failed to prove that Mr. Jackson was sentenced for the first prior felony before committing the second. *See Caldwell v. State,* 527 N.E.2d 711, 712 (Ind. 1988) (proof of habitual offender status requires, *inter alia,* proof that defendant committed the second prior felony after sentencing on the first). Accordingly, he cannot be found ineffective for failing to do so. *Mauricio,* 659 N.E.2d at 872-873.

7. Mr. Jackson also asserts that the authenticity of State's Exhibits 82 and 83 was questionable because the documents were not file-stamped. Amended Petition, § 8(a)(v), (vii), 9(a)(v), (vii); Petitioner's Affidavit, at 5-8. Indiana Evidence Rule 902(4) provides that a copy of an official record is self-authenticating if it is certified as correct by the custodian or another person authorized to make the certification. The certificates signed by the Clerk of the Allen Circuit and Superior Courts [Findings of Fact, ¶ 6] sufficed to render the documents self-authenticating under Rule 902(4). As a challenge to the authenticity of the documents would not have succeeded, Swanson cannot be found ineffective for failing to raise such a challenge on appeal. *Mauricio,* 659 N.E.2d at 872-873. Likewise, Swanson cannot be found to have rendered ineffective assistance by failing to object to State's Exhibits 82 and 83 at trial on the ground that they were not self-authenticating. *Sanchez v. State,* 675 N.E.2d 306, 310 (Ind. 1996) (a defendant cannot prove that counsel's failure to move to suppress, or to object to the admission of evidence, constituted inadequate representation without showing that, had the objection been made, "the

court would have had no choice but to sustain it").

8. Mr. Jackson asserts that attorney Swanson failed to argue that the Court did not attach the habitual offender enhancement to a specific count. Amended Petition, § 8(a)(vi), 9(a)(vi). The remedy for failure to attach a habitual offender enhancement to a specific count is, not surprisingly, to attach the habitual offender enhancement to a specific count. *Miller v. State,* 563 N.E.2d 578, 584 (Ind. 1990), *cited in McIntire v. State,* 717 N.E.2d 96, 102 (Ind. 1999). Counsel's failure to raise issues on appeal will lead to a finding of deficient performance only when the omitted issues were "significant, obvious, and clearly stronger than those presented." *Wrinkles v. State,* 749 N.E.2d 1179, 1203 (Ind. 2001), *cert. denied,* 525 U.S. 861. No authority suggests that an issue may be "significant" if it would be ascertainably worthless in terms of any direct or indirect benefit to the defendant. Mr. Jackson has not shown that his sentence would have been shortened, nor that Swanson had any reason to think it might be shortened, upon the attachment of the habitual offender attachment to a specific count. As the issue of attachment of the habitual offender attachment to a specific count was not significant, Swanson cannot be found ineffective for failing to raise it. *Id.*

9. The Court of Appeals held that attorney Swanson waived two issues on appeal: prosecutorial misconduct and sufficiency of the evidence. *Jackson,* 758 N.E.2d at 1037. For the following reasons, the outcome on appeal would have been the same even if Swanson had not waived those issues. Swanson therefore cannot be found ineffective for waiving them. *Mauricio,* 659 N.E.2d at 872-873.

10. The Court of Appeals gave the following account of the alleged prosecutorial misconduct:

> During closing arguments, the prosecutor stated "[i]f [Shorts] could say anything to you she would say to you, listen-" Transcript p. 537. At this point, Jackson objected to the prosecutor's attempt to invoke Shorts' voice "from beyond the grave." The trial court overruled the objection and allowed the prosecutor to proceed:
>
> > She would tell you if you're beating someone to death with a baseball bat,

> whose hair . . . you heard Officer Meihls, where is that hair found, on the end of the bat where you would beat somebody with it. Who's [sic] hair is going to be on that. The person that's getting their head beat in or the person who is holding the bat. She's [sic] say use your common sense. She'd also say listen to what Officer Meihls said. When you're swinging a bat, you know how, the force of the bat is throwing the blood away from you . . . .
>
> Transcript p. 538. Jackson claims this commentary constituted prosecutorial misconduct.

Jackson, 758 N.E.2d at 1037. The Court of Appeals found this claim waived because there was no request at trial for an admonishment or motion for a mistrial based on these comments. *Id.* A claim of prosecutorial misconduct requires a determination (1) that there was misconduct by the prosecutor, and (2) that it had a probable persuasive effect on the jury's decision. *Cox v. State*, 696 N.E.2d 853, 859 (Ind. 1998). Mr. Jackson presents no argument, and none can be imagined, to establish that the prosecutor's ill-advised and unconvincing effort to recruit the deceased victim as an advocate in closing argument had any tendency to lead the jury to find Mr. Jackson guilty. As there was no probable persuasive effect on the jury's decision, Swanson would not have prevailed on appeal in raising this claim of prosecutorial misconduct even if he had requested an admonishment or moved for a mistrial. *Cox*, 696 N.E.2d at 859. Swanson therefore cannot be found ineffective for waiving this claim. *Mauricio*, 659 N.E.2d at 872-873.

11. As to the sufficiency of the evidence, the Court of Appeals made it clear that the outcome of the appeal would have been the same even if Swanson had not waived the issue by failing to acknowledge the applicable standard of review: "Waiver notwithstanding, we are convinced that the evidence in this case is more than sufficient to support Jackson's convictions." *Jackson*, 758 N.E.2d at 1037. Swanson therefore cannot be found ineffective in regard to that issue. *Mauricio*, 659 N.E.2d at 872-873.

12. Mr. Jackson asserts that Swanson was ineffective in failing to properly communicate with him before trial. Amended Petition, § 8(b)(i), 9(b)(i); Petitioner's Affidavit,

at 8. A showing of inadequacies in investigation, consultation, or other preparation does not alone suffice to prove ineffective assistance; the defendant must show that better preparation would have resulted in better performance at trial, which in turn would have created a reasonable probability of acquittal. *See Ford v. State*, 523 N.E.2d 742, 747 (Ind. 1988). Mr. Jackson has made no showing as to how Swanson could or would have done anything different at trial, much less created a reasonable probability of acquittal, as a result of more extensive consultation or communication. Swanson therefore cannot be found ineffective on this basis. *Id.*

13. Mr. Jackson asserts that Swanson rendered ineffective assistance at trial in failing to properly tender an instruction on "Direct Evidence compared to Circumstantial Evidence." Amended Petition, § 8(b)(ii), 9(b)(ix); Petitioner's Affidavit, at 8. An instruction applicable when the evidence is entirely circumstantial would not have been given [Conclusions of Law, ¶ 3], and Mr. Jackson does not assert that any other instruction should have been given. Swanson cannot be found ineffective for failing to tender an instruction that would not have been given. *See Williams*, 706 N.E.2d at 161.

14. Mr. Jackson asserts that Swanson rendered ineffective assistance at trial in failing to tender instructions on lesser included offenses. Amended Petition, § 8(b)(iii), 9(b)(ii); Petitioner's Affidavit, at 9. As such instructions would not have been given [Conclusions of Law, ¶ 4], Swanson cannot be found ineffective for failing to tender them. *See Williams*, 706 N.E.2d at 161.

15. Mr. Jackson asserts that Swanson rendered ineffective assistance at trial in failing to ascertain that Mr. Jackson was not eligible for the habitual offender enhancement. Amended Petition, § 8(b)(iv), (v), 9(b)(iii), (iv); Petitioner's Affidavit, at 9-11. As Mr. Jackson has not shown that he was ineligible for the enhancement [Conclusions of Law, ¶ 6], he has not shown that Swanson was ineffective in failing to allege that he was ineligible. *Taylor*, 840 N.E.2d at 331.

16. Mr. Jackson asserts that Swanson rendered ineffective assistance at trial in

failing to present testimony from defense experts. Amended Petition, § 8(b)(vi), 9(b)(v); Petitioner's Affidavit, at 11. As Mr. Jackson has not shown that any available expert testimony would have been beneficial to his defense [Conclusions of Law, ¶ 5], he has not shown that Swanson was ineffective in failing to present such testimony. *Hunter,* 578 N.E.2d at 355; *McBride,* 515 N.E.2d at 867.

17. Mr. Jackson asserts that Swanson was ineffective in failing to discover that unspecified "lead witnesses" for the State had unspecified prior convictions and pending charges. Amended Petition, § 9(b)(v). He states no specific facts having any tendency to establish that any identifiable witness had any identifiable prior convictions or pending charges, much less that these could have been used for impeachment of the State's witnesses. Swanson cannot be found ineffective for failing to discover unspecified information. *See Steele v. State,* 536 N.E.2d 292, 293 (Ind. 1989) (a claim of ineffective assistance must identify counsel's claimed errors).

18. Mr. Jackson asserts that Swanson was ineffective at trial in failing to request an admonishment or to move for a mistrial in regard to the prosecutor's argument about what the victim would say if she could speak. Amended Petition, §§ 8(b)(viii), 9(b)(vii); Petitioner's Affidavit, at 12. As that argument had no probable persuasive effect on the jury's decision [Conclusions of Law, ¶ 10], the outcome at trial would have been the same even if Swanson had requested an admonishment, and a mistrial would not have been granted because the prosecutor's unpersuasive argument about what the victim would say did not place Mr. Jackson in a position of grave peril to which he should not have been subjected. *See Francis v. State,* 758 N.E.2d 528, 532 (Ind. 2001). Swanson therefore cannot be found ineffective for failing to request an admonishment or to move for a mistrial. *Taylor,* 840 N.E.2d at 331.

19. Mr. Jackson asserts that Swanson was ineffective in failing to file a motion to correct error after Mr. Jackson was found to be a habitual offender. Amended Petition, § 8(b)(ix), 9(b)(viii); Petitioner's Affidavit, at 12. Except under circumstances not present

here, a motion to correct error is not a prerequisite for appeal. Ind. Trial Rule 59(A). As Mr. Jackson's ability to appeal the habitual offender adjudication was not affected by the absence of a motion to correct error, Swanson cannot be found ineffective for failing to file such a motion. *See Taylor,* 840 N.E.2d at 331.

20. Mr. Jackson purports to raise free-standing claims that the trial court erred in refusing a jury instruction on circumstantial evidence and denying a continuance to the defense. Amended Petition, §§ 8(c), 9(c). Those claims were raised and decided adversely to Mr. Jackson on direct appeal. *Jackson,* 758 N.E.2d at 1033, 1036-37. They therefore cannot be relitigated in this post-conviction proceeding according to the doctrine of res judicata. *Washington v. State,* 570 N.E.2d 21, 23 (Ind. 1991). Even if those claims had not been raised, they would have been available on direct appeal, and therefore could not be raised in free-standing form in this post-conviction proceeding. *Woods v. State,* 701 N.E.2d 1208, 1224 (Ind. 1998), *cert. denied,* 528 U.S. 861.

21. The Petitioner has failed to prove his claim on the merits by a preponderance of the evidence.

22. The Petition for Post-Conviction Relief is hereby denied.

DATE 7/20/20

David M. Zent

PROOF OF NOTICE UNDER TRIAL RULE 72 (D)

A copy of the entry was served either by mail to the address of record, deposited in the attorney's distribution box, or personally distributed to the following persons:

David H. McClamrock, DPA
Petitioner Samuel Lee Jackson, # 913731, Pendleton Correctional Facility,
4490 West Reformatory Road, Pendleton, IN 46064

Additional material from this filing is available in the Clerk's Office.