No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

TYRE BRADBURY – PETITIONER

VS.

STATE OF INDIANA – RESPONDENT

On Petition for a Writ of Certiorari to the Indiana Supreme Court

---

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

John A. Kindley
1626 Lincoln Way East
South Bend, IN 46613
(574) 400-5094
john@kindleylaw.com
Counsel of Record for Petitioner

TABLE OF APPENDICES

IN THE

Indiana Supreme Court

Supreme Court Case No. 21S-PC-441

Tyre Bradbury,
Appellant/Petitioner,

–v–

State of Indiana,
Appellee/Respondent.

Argued: June 10, 2021 | Originally Decided: October 1, 2021
Modified on Rehearing: February 7, 2022
Corrected

Appeal from the St. Joseph Superior Court
No. 71D08-1801-PC-2
The Honorable Elizabeth C. Hurley, Judge

On Petition to Transfer from the Indiana Court of Appeals
No. 20A-PC-620

Opinion by Justice David

Justices Massa and Slaughter concur.
Justice Massa concurs with separate opinion in which Justice Slaughter joins.
Justice Goff dissents with separate opinion in which Chief Justice Rush joins.

David, Justice.

In this murder case, defendant alleges counsel was ineffective in several ways. However, reviewing the facts and circumstances here, we find that counsel was not ineffective and affirm the post-conviction court.

Facts and Procedural History

Fifteen-year-old Tyre Bradbury was charged as an adult and convicted of murder as an accomplice with a gang enhancement after his nineteen-year-old friend, Robert Griffin, shot and killed a toddler while opening fire on a rival during a gang dispute. Bradbury had provided Griffin with the handgun he used.

After Bradbury was arrested, he spoke with police at length and changed his story a few times. At one point he even claimed that he was the shooter, but later reneged and said he was just protecting his friends. He also admitted his responsibility to other inmates.

At trial, Bradbury argued that he was innocent and tried to stop the shooting. Nevertheless, Bradbury was convicted and received an enhanced sentence of ninety years. This sentence was modified to sixty years following his direct appeal.

Bradbury then sought post-conviction relief alleging that his trial counsel was ineffective in various respects. The post-conviction court denied Bradbury's petition, and a split Court of Appeals appellate panel reversed. The majority focused on just two claims of ineffective assistance: 1) whether counsel was deficient for stipulating that Griffin was convicted of murder as the principal (thus conceding that Griffin had the requisite intent to kill); and 2) whether counsel was ineffective for failing to request that the jury be instructed on lesser-included offenses. The majority found that counsel should not have agreed to the stipulation and should have sought an instruction on lesser included offenses and that counsel's failures prejudiced Bradbury (but does not explain how).

Judge Vaidik dissented. She would affirm the trial court citing the standard of review and noting that while it is possible to read the record the way the majority did, she did not see it that way. She further noted that she agreed with the post-conviction court that counsel's decisions were strategic and noted evidence in the record not favorable to Bradbury that makes it less than clear that a new trial would produce a different result. For instance, there were multiple witnesses whose testimony supported Griffin's intent to kill and thus, not stipulating to it would not be helpful and further, given this evidence, a lesser included instruction would not be appropriate either.

The State petitioned for transfer which we now grant. Ind. Appellate Rule 58(A).

Standard of Review

In order to obtain relief on post-conviction, a petitioner must show "that the evidence, as a whole, unmistakably and unerringly points to a conclusion contrary to the post-conviction court's decision." *Wilson v. State*, 157 N.E.3d 1163, 1170 (Ind. 2020); *see also Ben-Yisrayl v. State*, 729 N.E.2d 102, 106 (Ind. 2000). This Court has also stated that an appellate court should not reverse a denial of post-conviction relief unless "there is no way within the law that the court below could have reached the decision it did." *Stevens v. State*, 770 N.E.2d 739, 745 (Ind. 2002). A reviewing court accepts the post-conviction court's findings of fact unless they are "clearly erroneous." *Davidson v. State*, 763 N.E.2d 441, 443-44 (Ind. 2001). In that analysis, the post-conviction court is the "sole judge of the evidence and the credibility of the witnesses." *Hall v. State*, 849 N.E.2d 466, 468-69 (Ind. 2006).

Discussion and Decision

To succeed on ineffective assistance of counsel claims, Bradbury must show: (1) counsel's performance fell below an objective standard of reasonableness based on prevailing professional norms; and (2) the deficiency was so prejudicial as to create a reasonable probability the outcome would have been different absent counsel's errors. *Hollowell v.*

State, 19 N.E.3d 263, 268-69 (Ind. 2014) (applying *Strickland* standard). Counsel is afforded considerable discretion in choosing strategy and tactics, and these decisions are entitled to deferential review. *Weisheit v. State*, 109 N.E.3d 978, 983 (Ind. 2018), *reh'g denied*. "The Sixth Amendment guarantees reasonable competence, not perfect advocacy judged with the benefit of hindsight." *Yarborough v. Gentry*, 540 U.S. 1, 8 (2003).

I. Stipulation to Griffin's conviction

In order to convict Bradbury of murder as an accomplice, the State was required to prove beyond a reasonable doubt that **Bradbury**, acting with the intent to kill his rival, knowingly aided, induced, or caused Griffin to commit the crime of murdering toddler J.S. [1] Bradbury's counsel stipulated to the fact that **Griffin** was convicted of murder. Bradbury and the Court of Appeals majority fault counsel for this decision, believing it undercut Bradbury's case and made it easier for the State to meet its burden of proof regarding Bradbury.

At an evidentiary post-conviction hearing, Bradbury's lead trial counsel testified that he agreed to stipulate to Griffin's conviction even though he believed the evidence could have been kept out because he did not want the jury to believe that if Bradbury were acquitted "this child died without anybody facing the music." PCR Tr. Vol. 4 at 20. He further stated: "[w]e were arguing that Mr. Griffin was acting on his own without any consultation or assistance from [Bradbury]. So [we] thought the fact that he had been convicted kind of supported that proposition." *Id*. at 21. Co-counsel articulated another reason for the stipulation as well. That is, Bradbury had initially confessed that he was the shooter and thus, the stipulation served to show that it was a false confession. *Id*. at 58-59.

[1] This was how the trial court instructed the jury on the charge. *See* Ind. Code §§ 35-42-1-1 (murder), 35-41-2-4 (accomplice liability). The State argues this instruction was erroneous and benefitted defendant.

More importantly though, this stipulation does not speak at all to **Bradbury's** intent, which the State still had to prove. While certainly counsel did not have to stipulate to Griffin's intent, this stipulation did not relieve the State of the burden to prove Bradbury's intent. Bradbury asserts he tried to stop the shooting, and lead counsel testified emphatically and repeatedly that this was what he wanted to get across to the jury any way he could. The stipulation in no way forecloses or contradicts that theory of the case. Thus, we find the Court of Appeals majority's conclusion that the stipulation "wholly undercut" the defense is inaccurate in light of Bradbury wanting not just to get a lesser conviction/sentence, but not wanting to be convicted at all. It seems counsel's strategy was to put some daylight between Bradbury and the shooter and only in retrospect, when the shooter and Bradbury were both convicted, does that seem to not have been the ideal plan.

Nevertheless, counsel was not ineffective here. He articulated his thought process for agreeing to stipulate, and doing so was not illogical or absurd. Further, the standard of review requires that we affirm unless "thereis no way within the law that the court below could have reached the decision it did." *Stevens*, 770 N.E.2d at 745.

Further, as for prejudice, Bradbury "must show a reasonable probability that, but for counsel's errors, the proceedings below would have resulted in a different outcome." *Wilson*, 157 N.E.3d at 1177. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland v. Washington*, 466 U.S. 668, 694 (1984). As Judge Vaidik noted in her dissent, there is a quite a bit of evidence here to support a finding that Griffin had the intent to kill given that several witnesses, including the intended victim, testified about how Griffin shot many times at the intended victim. So even if Bradbury's counsel had not agreed to the stipulation, Griffin's intent likely would have been proven. Thus, there would be no difference in the outcome.

II. Lesser included instruction

Bradbury also claims that his attorneys were ineffective for failing to seek lesser alternatives to a murder conviction. According to Bradbury, he

would have been entitled to a jury instruction on reckless homicide as an accomplice to Griffin if his counsel had sought it. Further, he testified that counsel did not discuss the matter with him and had counsel done so, he would have wanted the instruction.[2] Although lead trial counsel could not remember his exact thought process at the time of trial, he testified that he did not submit a lesser included instruction because he did not believe that it was supported by the evidence. He also testified that he typically would seek a lesser included instruction if it were warranted. But here, his theory of the case was that the State didn't sufficiently prove Bradbury's intent, and more importantly it was counsel's position that:

> it was rogue action by Griffin that [Bradbury] did not contribute to and did not join and did not have any knowledge; if Griffin did have specific intent that [Bradbury] never had that intent beforehand because for Christ's sake he tried to stop it and the victim said that he did.

PCR Tr. Vol 4 at 28-29. Counsel expressed doubt that this theory was compatible with seeking a lesser included.

Defense counsel "enjoys 'considerable discretion' in developing legal strategies for a client, and this discretion demands deferential judicial review." *Gibson*, 133 N.E.3d at 682 (quoting *Stevens*, 770 N.E.2d at 746–47).Further, this Court has previously held that a tactical decision not to tender a lesser included offense does not constitute ineffective assistance of counsel, even where the lesser included offense is inherently included

[2] The dissent believes that this decision should have been discussed with Bradbury "[b]ut it wasn't", Dissent at 2, which suggests that counsel admitted he did not discuss the lesser included instruction strategy with his client. But counsel did not admit that he did not discuss such with Bradbury. Instead, counsel testified that he did not recall whether he had this conversation years ago, and under further questioning, he acknowledged that he should have, if he didn't. Defendants can and do occasionally make statements that may be self-serving and memories may fade over time. The record on this issue is not clear as to exactly what happened.

in the greater offense. *Autrey v. State*, 700 N.E.2d 1140, 1141 (Ind. 1998) (citing *Page v. State*, 615 N.E.2d 894, 895 (Ind. 1993)).

Here, counsel made a reasonable decision given the circumstances. As stated above, counsel sought to have the jury find that Bradbury was innocent. That is, Bradbury tried to stop the shooting and Griffin, the shooter, acted despite this. As this Court has previously held, "[i]t is not sound policy for this Court to second-guess an attorney through the distortions of hindsight." *Autrey*, 700 N.E.2d at 1141. Further, "[t]he all or nothing strategy employed by counsel was appropriate and reasonable based on the facts in this case." *Id.* Indeed, here a reasonable juror could have found that despite Griffin's action, Bradbury was not an accomplice because he tried to stop the shooting as counsel argued throughout trial. The fact that the jury decided otherwise does not mean that counsel was ineffective. To so hold would open the door to every unfavorable verdict being challenged and/or overturned on ineffective of assistance of counsel grounds. Accordingly, because we find that Bradbury's counsel's performance was not deficient, we decline to address the prejudice prong under *Strickland*. *See Williams v. State*, 706 N.E.2d 149, 154 (Ind. 1999) ("To prevail on an ineffective assistance of counsel claim, one must show **both** deficient performance and resulting prejudice") (emphasis added); *French v. State*, 778 N.E.2d 816, 824 (Ind. 2002) ("Failure to satisfy either prong will cause the claim to fail.").

III. Other claims of ineffective assistance of counsel not addressed by our Court of Appeals

Because our Court of Appeals found the above two issues dispositive, it did not address two other claims of ineffective assistance of counsel made by Bradbury on appeal. We briefly address them now.

Bradbury argues that counsel was ineffective by not using a defense witness' prior consistent statement to rehabilitate that witness during trial. However, as noted above, counsel is afforded considerable discretion in choosing a trial strategy and further, a post-conviction court can only be reversed if there is no way under the law such a result can be reached. Here, rather than using the witness' prior statement, which took the form of a recording that was hard to hear, counsel rehabilitated the witness

with his own trial testimony. This is a reasonable trial strategy and Bradbury has not demonstrated counsel was ineffective here, nor that there was no way within the law this outcome could be reached.

Additionally, Bradbury argues that counsel was deficient for not raising a constitutional challenge at trial. That is, that Indiana's criminal gang enhancement is vague. However, Bradbury has not demonstrated a reasonable probability that this argument would have succeeded.

When the validity of a statute is challenged, appellate courts begin with a "presumption of constitutionality." *State v. Lombardo*, 738 N.E.2d 653, 655 (Ind. 2000) (quoting *State v. Downey*, 476 N.E.2d 121, 122 (Ind. 1985)). To survive a challenge, the statute "need only inform the individual of the generally proscribed conduct, [and] need not list with itemized exactitude each item of conduct prohibited." *Id*. A statute will not be found unconstitutionally vague if individuals of ordinary intelligence can comprehend it adequately to inform them of the proscribed conduct. *Id*. Thus, Bradbury faces a high bar to have the statute here declared unconstitutional.

While Bradbury has argued it is hard to defend a criminal gang enhancement charge, posited some hypotheticals about what may or may not be included in the statutory definition and indicated that the State's inclusion of video evidence of him rapping was prejudicial, he has not demonstrated that a person of ordinary intelligence cannot comprehend the statute, nor has he pointed to any evidence that the statute is vague as applied to him. For these reasons, we cannot say that there is a reasonable probability that there would have been a different outcome for Bradbury had counsel raised this constitutional challenge. As such, we find no ineffective assistance of counsel here either.

Conclusion

We affirm the post-conviction court.

Massa and Slaughter, JJ., concur.
Massa, J., concurs with separate opinion in which Slaughter, J., joins.
Goff, J., dissents with separate opinion in which Rush, C.J., joins.

ATTORNEY FOR APPELLANT

John Kindley
South Bend, Indiana

ATTORNEY FOR AMICUS CURIAE

Victoria Bailey Casanova
Casanova Legal Services, LLC
Indianapolis, Indiana

ATTORNEYS FOR APPELLEE

Theodore E. Rokita
Attorney General of Indiana

Justin F. Roebel
Supervising Deputy Attorney General
Indianapolis, Indiana

Massa, J., concurring.

Not only was counsel here not constitutionally "ineffective," he was, in fact, extraordinarily effective, actually persuading the trial court to heighten the prosecution's burden, allowing him to pursue a reasonable and permissible all-or-nothing trial strategy.[1] That this clever and resourceful lawyering proved unsuccessful does not mean a violation of *Strickland* occurred.

Much ink has been spilled in Indiana appellate decisions over the past three decades on the elements of attempted murder. In *Spradlin v. State*, for better or worse, this Court for the first time required an extra element be added to jury instructions in attempted murder cases—that the defendant acted with the specific "intent to kill the victim." 569 N.E.2d 948, 950 (Ind. 1991). In practice, this has made attempted murder harder to prove than murder. If doctors fail to save the patient, the State need only prove a "knowing" killing by the shooter, i.e. he acted with awareness of the high probability that he would kill the victim—often a fair conclusion when someone shoots another person dead. If, however, the patient survives, the State must prove the shooter actually and specifically intended to kill. *Id.* Over time, this judicially imposed proof requirement was extended to accomplices in attempted murder cases, *Bethel v. State*, 730 N.E.2d 1242, 1246 (Ind. 2000), so the State must prove they shared the principal's specific intent.

Whatever one might think of the wisdom of our *Spradlin* jurisprudence, this much is clear: it is confined to cases of attempted murder. And Tyre Bradbury was not charged with **attempted** murder. He was charged with **murder** as an accomplice to a shooter accused and convicted on a theory of transferred intent. All the State should have had to prove (prior to the stipulation) was that Robert Griffin committed a **knowing** killing, and that Bradbury aided and abetted him. Yet, this allegedly ineffective defense counsel was somehow able to convince a superb trial judge to instruct the jury that Bradbury had to have formed *Spradlin*-level specific intent to kill. That's not ineffective, that's Darrow-like adversarial

[1] Defense counsel argued that recent precedent of the United States Supreme Court, *Rosemond v. United States*, 572 U.S. 65 (2014), suggested his client was entitled to a specific intent to kill instruction as an accomplice to murder. The trial court agreed and instructed the jury that the State must prove Bradbury was "acting with the intent to kill Larry Bobbitt."

advocacy that makes our system work. With this windfall in hand, counsel was able to argue to the jury that Griffin was the only truly responsible party, and that Bradbury lacked a mens rea that the State should not have had to prove in the first place. Such assistance was anything but constitutionally ineffective, even if it failed to gain an acquittal.

Stipulating to the principal's conviction and culpability was critical to counsel's trial strategy, especially once he was able to convince the court to commit instructional error to his client's significant benefit. It practically foreclosed—reasonably, if not successfully—asking for a lesser included instruction, an omission the dissent finds to be reversible error. One might second guess this strategic decision and assert that counsel would have been better off contesting the shooter's culpability and then asking for a lesser included instruction. Counsel could have employed a strategy that potentially led to his client being convicted of something less than murder. Or, armed with a jury instruction that overburdened the prosecution, he could argue that his client never meant for the shooter to kill anybody, and gain a full acquittal. There are "countless ways to provide effective assistance in any given case" and even the "best criminal defense attorneys would not defend a particular client in the same way." *Strickland v. Washington*, 466 U.S. 668, 689 (1984). That his defense strategy was unsuccessful does not mean it was unreasonable.

"It is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, that a particular act or omission of counsel was unreasonable." *Id.* A fair assessment of attorney performance requires that "every effort be made to eliminate the distorting effects of hindsight," and because of the difficulties inherent in making this evaluation, judicial scrutiny of counsel's performance must be "highly deferential." *Id.* Bradbury cannot overcome the "strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Id.* And even if he could, how can he show a reasonable probability of a different result? The jury convicted him of murder with a specific intent to kill, why would they have found him guilty of reckless homicide? Defense counsel's performance here was something to compliment, not second-guess.

Slaughter, J., joins.

Goff, J., dissenting.

I respectfully dissent.

The Court holds that counsel was not ineffective (1) for stipulating, at Bradbury's trial for murder as an accomplice, to the principal actor's underlying conviction in the crime; and (2) for failing to request a lesser-included instruction. Because counsel sought to avoid suggesting to the jury that an acquittal would result in no accountability for the murder, I agree with the Court that counsel's stipulation was reasonable trial strategy. But because counsel failed to consult with Bradbury on whether to request a lesser-included instruction, and because *Strickland* imposes on counsel a specific duty to "consult with the defendant on important decisions" at trial, I would find counsel's performance deficient. And because this deficient performance resulted in prejudice to Bradbury, I would find ineffective assistance of counsel.

Discussion

When analyzing an ineffective-assistance-of-counsel claim, we apply the two-part test outlined in *Strickland v. Washington*, 466 U.S. 668 (1984). Under that test, Bradbury must show (1) that counsel's performance fell short of prevailing professional norms, and (2) that counsel's deficient performance prejudiced his defense. *Id.* at 687. A showing of deficient performance under the first prong requires proof that legal representation lacked "an objective standard of reasonableness," effectively depriving Bradbury of his Sixth Amendment right to counsel. *Overstreet v. State*, 877 N.E.2d 144, 152 (Ind. 2007) (citing *Strickland*). To establish prejudice, he must show a "reasonable probability" that, but for counsel's errors, the proceedings below would have resulted in a different outcome. *Wilkes v. State*, 984 N.E.2d 1236, 1241 (2013).

In my view, Bradbury has sufficiently met both requirements.

I. With no intended strategy and without consulting his client, counsel's failure to request a lesser-included instruction was deficient performance.

Bradbury contends that, had counsel requested it, he would have been entitled to an instruction on reckless homicide, whether as an accomplice or as a principal. Appellant's Br. at 16. In rejecting this claim, the post-conviction court found it "clear that counsels' strategy was an acquittal," as shown by "the intense advocacy [he] brought to bear at every stage of the proceedings." Appellant's App. Vol. II, p. 120. Affirming this decision, the Court relies on our precedent for the proposition "that a tactical decision not to tender a lesser included offense does not constitute ineffective assistance of counsel." *Ante*, at 6–7 (citing *Autrey v. State*, 700 N.E.2d 1140, 1141 (Ind. 1998)).

As a general rule, counsel may, "as part of an 'all or nothing' trial strategy," reasonably refrain from tendering instructions on a lesser-included offense. *Autrey*, 700 N.E.2d at 1141. And this rule holds true even when, like here, "the lesser included offense is inherently included in the greater offense." *Id.* (citing *Page v. State*, 615 N.E.2d 894, 895 (Ind. 1993)). *See Fisher v. State*, 810 N.E.2d 674, 679 (Ind. 2004) (holding that "reckless homicide is an inherently included lesser offense of murder"). Counsel, however, testified that his failure to request such an instruction "was **not** a strategic decision." P-C Tr. Vol. IV, p. 27 (emphasis added). And even if it were strategic, that decision should have been discussed with Bradbury. But it wasn't, and counsel admitted that it should have been.

Strickland imposes few requirements on attorneys. Indeed, counsel enjoys considerable discretion in developing strategies and tactics at trial, and "[j]udicial scrutiny of counsel's performance" is "highly deferential." *Strickland*, 466 U.S. at 689. Still, "[r]epresentation of a criminal defendant entails certain basic duties," among which include "a duty of loyalty" and "a duty to avoid conflicts of interest." *Id.* at 688. *Strickland* also imposes on counsel the "**particular** duties to **consult with the defendant** on important decisions and to keep the defendant informed of important developments in the course of the prosecution." *Id.* (emphases added).

Our Rules of Professional Conduct likewise require counsel to "abide by a client's decisions concerning the objectives of representation" and to "consult with the client as to the means by which they are to be pursued." Ind. Professional Conduct Rule 1.2(a). These Rules further require counsel to "explain a matter to the extent reasonably necessary to permit the client to make informed decisions." Prof. Cond. R. 1.4(b). Some of these decisions—including "whether to plead guilty, waive a jury, testify in his or her own behalf, or take an appeal"—implicate certain basic rights over which the defendant retains ultimate authority. *Jones v. Barnes*, 463 U.S. 745, 751 (1983). *See also Banks v. State*, 884 N.E.2d 362, 368 (Ind. Ct. App. 2008) (holding that counsel's concession that defendant was guilty of one of several charged offenses, "without any indication of the client's consent to the strategy," amounts to deficient performance under *Strickland*), *trans. denied*. Beyond these "fundamental decisions" lie strategic or tactical choices for which counsel assumes "professional responsibility" while conducting the case. *Jones*, 463 U.S. at 753 n.6. But even then, counsel should make these decisions only "after consulting with his client." *Id.*

Echoing these principles, the ABA's *Standards for Criminal Justice* specify that "[s]trategic and tactical decisions should be made by defense counsel, after consultation with the client where feasible and appropriate." American Bar Association Standards for Criminal Justice 4-5.2(b) (3rd ed. 1993).[1] And commentary to this standard considers it "important in a jury trial for defense counsel to consult fully with the accused about any lesser included offenses the trial court may be willing to submit to the jury." *Id.*

It's clear, then, that counsel's duty of consultation on **all** important decisions at trial—whether fundamental or strategic—is more than just a prevailing professional norm; it's "an ethical cornerstone of the legal profession." *United States v. Holman*, 314 F.3d 837, 841 (7th Cir. 2002). And

[1] The U.S. Supreme Court has long referred to the ABA standards "as guides to determining what is reasonable." *Wiggins v. Smith*, 539 U.S. 510, 522 (2003) (quoting *Strickland*, 466 U.S. at 688–89). And this Court will "often consult" them too, not as "rigid, detailed rules" but rather for "advisory" purposes. *Gibson v. State*, 133 N.E.3d 673, 682 (Ind. 2019) (quoting *Weisheit v. State*, 109 N.E.3d 978, 998 n.2 (Ind. 2018)).

there's no question in my mind that, under the circumstances here, the decision of whether to seek a lesser-included instruction, or to pin "all hope of a successful outcome on one roll of the dice" by seeking a full acquittal, was an important one. *See Hiner v. State*, 557 N.E.2d 1090, 1093 (Ind. Ct. App. 1990).[2] Indeed, with the charge of accessory to murder, along with a criminal-gang enhancement, Bradbury faced a maximum term of **130 years** in prison. *See* Ind. Code § 35-50-2-3 (2014) (specifying a 65-year maximum sentence for murder); I.C. § 35-50-2-15(d)(1) (criminal-gang enhancement for "an additional fixed term of imprisonment equal to the sentence imposed for the underlying felony"). A conviction for reckless homicide, by contrast, even with the criminal-gang enhancement, would have landed him in prison for a maximum of only **twelve years**. *See* I.C. § 35-42-1-5 (defining reckless homicide as a level-5 felony); I.C. § 35-50-2-6(b) (specifying a six-year maximum sentence for conviction of a level-5 felony); I.C. § 35-50-2-15(d)(1) (criminal-gang enhancement for "an additional fixed term of imprisonment equal to the sentence imposed for the underlying felony"). Given this **enormous** variation in potential sentencing outcomes, counsel's failure to request a lesser-included-offense instruction without consulting with his client, in my view, amounted to deficient performance.

This conclusion finds support in decisions from several jurisdictions. In *People v. Bell*, for example, the Illinois Appellate Court held that, with "no evidence that the decision was made by the defendant or that it was a component of any existing trial strategy," counsel's failure to request such an instruction reflected a "near total failure to act on behalf of his client." 505 N.E.2d 365, 371 (Ill. App. Ct. 1987). The Superior Court of New Jersey,

[2] In *Hiner*, the defendant-appellant raised an ineffective-assistance claim based in part on counsel's failure to request an instruction on a lesser-included offense. 557 N.E.2d 1090, 1093 (Ind. Ct. App. 1990). But, while ruling for the defendant, the Court of Appeals made no specific determination on the lesser-included-offense issue or whether counsel had discussed the decision with the defendant. Rather, the court's holding rested on the cumulative effect of counsel's errors, including—among other things—his refusal "to make opening arguments," "to object during the direct examination of any of the State's witnesses," "to cross-examine any of the State's witnesses," and "to make closing arguments." *Id.* at 1091.

Appellate Division, recently found no ineffective assistance where the evidence showed that counsel "conferred with defendant" on the option of a lesser-included offense. *State v. Mells*, No. A-2575-18, 2021 WL 1749965, at *8 (N.J. Super. Ct. App. Div. May 4, 2021). And the Colorado Supreme Court has held that the decision to request such an instruction is a "tactical" one "that rests with defense counsel after consultation with the defendant." *Arko v. People*, 183 P.3d 555, 560 (Colo. 2008). *See also Cannon v. Mullin*, 383 F.3d 1152, 1167 (10th Cir. 2004) (emphasizing that the question of "[w]hether to argue a lesser-included offense is a matter to be decided by counsel after consultation with the defendant"), *abrogated in part on other grounds by Simpson v. Carpenter*, 912 F.3d 542, 576 n.18 (10th Cir. 2018); *Simeon v. State*, 90 P.3d 181, 184 (Alaska Ct. App. 2004) (holding that counsel "has the ultimate authority" to decide whether to submit a lesser-included instruction while acknowledging the importance of client consultation under the ABA standard).

Some courts, to be sure, impose no requirement of consultation before counsel pursues an all-or-nothing strategy. But even those decisions, with few exceptions, either cite evidence of a clear trial strategy or carefully scrutinize ineffective-assistance claims that raise the issue. In *Mathre v. State*, for example, the North Dakota Supreme Court held that counsel's failure to consult with the defendant about the decision not to submit a lesser-included instruction was "a reasoned decision based upon trial strategy." 619 N.W.2d 627, 631 (N.D. 2000). And, while declining to impose a blanket rule, the Georgia Supreme Court, in *Van Alstine v. State*, found it "critically important for defense lawyers in a jury trial to consult fully" with the defendant when pursuing "an 'all or nothing' defense," adding that the effect of counsel's failure to submit a lesser-included instruction "must be rigorously scrutinized when ineffective assistance of counsel is asserted." 426 S.E.2d 360, 363 (Ga. 1993).[3]

[3] An exception is *Reed v. State*, in which the Florida Supreme Court held that defense counsel may waive instructions on lesser-included offenses to non-capital crimes without showing that defendant knowingly or intelligently joined in the decision. 560 So.2d 203, 206–07 (Fla. 1990).

II. Counsel's deficient performance resulted in prejudice to Bradbury.

I would also hold that that counsel's deficient performance resulted in prejudice to Bradbury. The State prosecuted the principal for the toddler's death under a theory of transferred intent—*i.e.*, that the principal intended to murder the rival gang member but mistakenly killed the toddler instead. *Griffin v. State*, 40 N.E.3d 1282 (Ind. Ct. App. 2015) (mem. dec.). So, to convict Bradbury of murder as an accomplice, the State had to prove beyond a reasonable doubt that Bradbury, acting with the intent to kill the rival gang member, knowingly aided, induced, or caused the principal to commit the crime of murdering the toddler. *See* I.C. § 35-42-1-1 (murder), I.C. § 35-41-2-4 (accomplice liability). *See also Brown v. State*, 770 N.E.2d 275, 281 (Ind. 2002) (holding that "conviction of an accomplice requires sufficient proof of the underlying crime").

In arguing that Bradbury wasn't prejudiced by counsel's failure to request a lesser-included instruction, the State cites Bradbury's admissions of involvement in the shooting and points to evidence that "the shooting was not merely reckless" but intentional. Appellee's Br. at 19–20. But the evidence, from my reading of the record, isn't so clear cut.

To begin with, Bradbury, despite his initial statement of responsibility, later retracted his admissions (as the Court itself acknowledges), and testimony from the intended victim at trial suggested that Bradbury had in fact tried to stop the principal from shooting. What's more, while several witnesses testified that the principal shot "at" the rival gang member, other evidence suggested that he merely intended to frighten the rival by recklessly firing the gun in his general direction. The spray of gunfire, after all, killed the toddler, **not** the intended victim. In fact, counsel even argued to the jury—his stipulation to the underlying conviction notwithstanding—that the principal "obviously wasn't trying to kill" the victim, suggesting that "the state did not prove th[e requisite] mental intent" to establish murder. P-C Tr. Vol. IV, pp. 23–24.

This conflicting evidence, in my view, would likely have created a serious enough dispute over Bradbury's culpability as an accomplice for

the court to have given the lesser-included instruction, had counsel requested one. *See Brown*, 770 N.E.2d at 281 (holding that defendant charged with being an accomplice to murder was entitled to a jury instruction on reckless homicide where there was "a serious evidentiary dispute" about the culpability of the principal actor). And the probability that Bradbury could have received such an instruction, but for counsel's error, is reasonably sufficient, in my opinion, to "undermine confidence in the outcome" of the case. *See Weisheit v. State*, 109 N.E.3d 978, 983 (Ind. 2018).

Still, the State insists that, given Bradbury's "repeated admissions of responsibility, a jury would have had little difficulty finding him guilty of a lesser offense" and he "still may have received a significant sentence because he was also facing a criminal gang enhancement." Appellee's Br. at 16 (record citations omitted). But it's no answer to suggest "that a defendant may be better off without [a lesser-included] instruction." *Keeble v. United States*, 412 U.S. 205, 212 (1973). To be sure, when "the prosecution has not established beyond a reasonable doubt every element of the offense charged, and if no lesser offense instruction is offered, the jury must, as a theoretical matter, return a verdict of acquittal." *Id.* But a defendant is entitled to such an instruction "precisely because he should not be exposed to the substantial risk that the jury's practice will diverge from theory." *Id.* After all, when "one of the elements of the offense charged remains in doubt, but the defendant is plainly guilty of *some* offense, the jury is likely to resolve its doubts in favor of conviction." *Id.* at 212–13. But if given the option to convict on a lesser-included offense with a substantially reduced sentence (even with a criminal-gang enhancement), the jury may well have chosen that option.

The State's suggestion also conflicts with the "basic notion that juveniles are different from adults when it comes to sentencing and are generally less deserving of the harshest punishments." *State v. Stidham*, 157 N.E.3d 1185, 1188 (Ind. 2020). At fifteen years old at the time of his conviction, Bradbury had much "greater prospects for reform" than an adult offender, effectively "diminish[ing] the penological justifications for imposing" on him the harshest of sentences. *See id.* at 1194 (quoting *Miller v. Alabama*, 567 U.S. 460, 471 (2012)).

Conclusion

In sum, I agree that counsel's stipulation to the principal actor's conviction was reasonable trial strategy. I respectfully dissent, however, from the Court's holding that counsel's failure to request a lesser-included instruction amounted to effective assistance. Given the "particular" duties imposed by *Strickland*, codified in our Rules of Professional Conduct, and urged by the American Bar Association, I would hold that counsel's failure to consult with Bradbury on whether to request a lesser-included instruction amounted to deficient performance. And because conflicting evidence would likely have created a serious enough dispute over Bradbury's culpability as an accomplice for the court to have given the instruction, I would also hold that counsel's deficient performance resulted in prejudice.

Rush, C.J., joins.

In the Indiana Supreme Court

Tyre Bradbury,
Appellant,

v.

State of Indiana,
Appellee.

Supreme Court Case No.
21S-PC-441

Court of Appeals Case No.
20A-PC-620

Trial Court Case No.
71D08-1801-PC-2

Order on Rehearing

This matter comes before the Court on the petition for rehearing that Tyre Bradbury ("Bradbury") filed on November 1, 2021, and the parties' briefing on the petition.

Being duly advised, the Court grants Bradbury's petition in part and modifies its original majority opinion, issued October 1, 2021, as follows:

> To so hold would open the door to every unfavorable verdict being challenged and/or overturned on ineffective of assistance of counselgrounds. Accordingly, because we find that Bradbury's counsel's performance was not deficient, we decline to address the prejudice prong under *Strickland*. *See Williams v. State*, 706 N.E.2d 149, 154 (Ind. 1999) ("To prevail on an ineffective assistance of counsel claim, one must show **both** deficient performance and resulting prejudice") (emphasis added); *French v. State*, 778 N.E.2d 816, 824 (Ind. 2002) ("Failure to satisfy either prong will cause the claim to fail.").
>
> ~~We also find no prejudice here. Tendering the lesser included instruction would have given the jury another option to convict Bradbury.As the State correctly notes, Bradbury was unlikely to be acquitted of a lesser charge in light of the evidence that the shooting was not just reckless, but intentional, as well as Bradbury's own repeated admissions of responsibility. As such, he was not prejudiced by counsel not seeking a lesser included instruction.~~

Slip op. at 7.

Further, Justice Goff modifies his separate opinion as follows:

> In ~~concluding~~ arguing that Bradbury was~~n't not~~ prejudiced by counsel's failure to request a lesser-included instruction, the ~~Court~~ State cites ~~"~~Bradbury's ~~own repeated~~ admissions of involvement in the shooting ~~responsibility~~" and points to ~~"~~evidence that "the shooting was not ~~just~~ merely reckless"~~,~~ but intentional.~~"~~ Appellee's Br. at 19–20.~~*Ante*, at 7.~~

Dissent at 6.

> Still, the ~~Court~~ State insists that, given Bradbury's "repeated admissions of responsibility, a jury would have had little difficulty finding him guilty of a lesser offense" and he "still may have received a significant sentence because he was also facing a criminal gang enhancement." Appellee's Br. at 16 (record citations omitted). ~~"[t]endering the lesser included instruction would have given the jury another option to convict Bradbury." Ante, at 7.~~ But it's no answer to ~~insist~~ suggest "that a defendant may be better off without ~~such an~~[a lesser-included] instruction." *Keeble v. United States*, 412 U.S. 205, 212 (1973). . . . But if given the option to convict on a lesser-included offense with a substantially reduced sentence (even with a criminal-gang enhancement), the jury may well have chosen that option.
>
> The ~~Court's~~ State's suggestion also conflicts with the "basic notion that juveniles are different from adults when it comes to sentencing and are generally less deserving of the harshest punishments." *State v. Stidham*, 157 N.E.3d 1185, 1188 (Ind. 2020).

Id. at 7.

Additionally, it has come to the Court's attention that the original majority opinion contains typographical errors on page 5 of the slip opinion. Specifically, the underlined words below were inadvertently omitted from the original opinion:

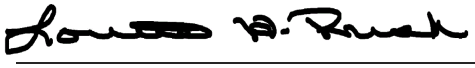
> . . . Further, the standard of review requires that we affirm unless "there is no way within the law that the court below could have reached the decision it did." *Stevens*, 770 N.E.2d at 745.
>
> Further, as for prejudice, Bradbury "must show a reasonable probability that, but for counsel's errors, the proceedings below would have resulted in a different outcome." *Wilson*, 157 N.E.3d at 1177. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland v. Washington*, 466 U.S. 668, 694 (1984).

Slip op. at 5.

Contemporaneous with the entry of this Order, the Court is filing its Opinion on Rehearing reflecting these changes.

Done at Indianapolis, Indiana, on 2/7/2022.

FOR THE COURT



Loretta H. Rush
Chief Justice of Indiana

All Justices concur, except Rush, C.J. and Goff, J., who vote to grant rehearing in full for the reasons expressed in the dissent to the opinion on rehearing.

ATTORNEY FOR APPELLANT

John Kindley
South Bend, Indiana

ATTORNEYS FOR APPELLEE

Curtis T. Hill, Jr.
Attorney General of Indiana

Justin F. Roebel
Deputy Attorney General
Indianapolis, Indiana

IN THE COURT OF APPEALS OF INDIANA

Tyre Bradbury,
Appellant-Petitioner,

v.

State of Indiana,
Appellee-Respondent

December 23, 2020

Court of Appeals Case No. 20A-PC-620

Appeal from the St. Joseph Superior Court

The Honorable Elizabeth C. Hurley, Judge

Trial Court Cause No. 71D08-1801-PC-2

Weissmann, Judge.

[1] Tyre Bradbury claims his defense attorneys eased the State's burden of convicting him of murder by stipulating to a disputed element of the crime. Moreover, Bradbury's counsel failed to seek instructions on alternative offenses with lesser sentences. Finding these shortcomings constituted ineffective assistance of counsel, we conclude the post-conviction court erroneously denied Bradbury's request to vacate his convictions. We reverse and remand for further proceedings.

Facts

[2] Bradbury was fifteen years old when his friend, 19-year-old Robert Griffin, shot and killed a toddler while firing at a rival, L.B.. The bullets missed L.B. but hit two-year-old J.S., who was playing in his yard. Bradbury unsuccessfully tried to stop Griffin from shooting, and a jury convicted Griffin of murder. The State charged Bradbury as an adult with murder as Griffin's accomplice.

[3] During Bradbury's trial, his attorneys stipulated to a major element of the State's case—the fact that the adult shooter had been convicted of murder. By doing so, counsel admitted one of the contested elements of Bradbury's crime. The attorneys also failed to request a jury instruction on the lesser-included offense of reckless homicide as an accomplice.

[4] Bradbury filed a petition for postconviction relief, claiming his counsels' performance on these two issues was deficient and that Bradbury was prejudiced as a result. The post-conviction court denied his petition, finding the

stipulation and the omission of lesser included offenses was strategic and, therefore, not the product of ineffective assistance of counsel.

Discussion and Decision

[5] Bradbury raises several claims on appeal, but we find two related issues dispositive: whether trial counsel was ineffective in stipulating as to Griffin's murder conviction and in failing to request a jury instruction on a lesser-included offense. To succeed on those claims, Bradbury was required to show: (1) counsel's performance fell below an objective standard of reasonableness based on prevailing professional norms; and (2) the deficiency was so prejudicial as to create a reasonable probability the outcome would have been different absent counsel's errors. *Hollowell v. State*, 19 N.E.3d 263, 268-69 (Ind. 2014).

[6] When appealing from the denial of post-conviction relief, the petitioner stands in the position of one appealing from a negative judgment. *Id.* To prevail, a petitioner must show the evidence as a whole leads unerringly and unmistakably to a conclusion opposite that reached by the postconviction court. *Weatherford v. State*, 619 N.E.2d 915, 917 (Ind. 1993). The postconviction court in this case made findings of fact and conclusions of law in accordance with Indiana Post-Conviction Rule 1(6). Although we do not defer to the postconviction court's legal conclusions, "[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." *Ben-Yisrayl v. State*, 729 N.E.2d 102, 106 (Ind. 2000) (quotation omitted).

Griffin's Murder Conviction

[7] To convict Bradbury of murder as an accomplice, the State was required to prove beyond a reasonable doubt that Bradbury, acting with the intent to kill his rival, L.B., knowingly aided, induced, or caused Griffin to commit the crime of murdering toddler J.S. Direct Appeal Appellant's App. Vol. II p. 159.[1] By stipulating to Griffin's murder conviction, trial counsel conceded a major element of the State's case: that Griffin was acting with the requisite intent for murder when the killing occurred. *Brown v. State*, 770 N.E.2d 275, 281 (Ind. 2002) (holding that "conviction of an accomplice requires sufficient proof of the underlying crime").

[8] Trial counsel specifically testified that, absent the stipulation, the State would have had difficulty proving Griffin's requisite intent and that Griffin's murder conviction likely would have been inadmissible. PCR Tr. Vol. IV p. 20. Counsel indicated that he entered into the stipulation because he believed the jury was less likely to convict Bradbury if it knew "justice had been done to the actual shooter." *Id.* The dissent finds counsel engaged in a proper strategy because acknowledging Griffin committed murder demonstrated that the

---

[1] Although there are other ways, per the relevant statutes, to convict someone of murder as an accomplice, this was how the trial court instructed the jury on the charge. *See* Ind. Code §§ 35-42-1-1 (murder), 35-41-2-4 (accomplice liability).

toddler victim's death would not go unpunished. This is problematic for two reasons. First, counsel admitted at the PCR hearing that acknowledging Griffin's intent was not a trial strategy. Moreover, counsel specifically raised the issue of Griffin's intent in a pretrial motion to dismiss, during pretrial hearings, in opening argument, during discussions of instructions, in his motion for a directed verdict, and during closing argument.

[9] We agree with Bradbury that Griffin's intent was as central to Bradbury's prosecution as it was to Griffin's. Griffin claimed both at trial and on appeal that the State did not prove his intent to kill. *Griffin v. State*, No. 71A03-1504-CR-144, *7 (Ind. Ct. App. Oct. 7, 2015). The primary issue in both the Griffin and Bradbury prosecutions was whether Griffin intended to kill his rival, L.B., or just frighten L.B. by recklessly firing in his general direction when the stray bullet from his gun struck toddler J.S. Bradbury's jury was not bound by the verdict of Griffin's jury. Yet, informing Bradbury's jury of that verdict sent the opposite message: another jury had found beyond a reasonable doubt Griffin fired with the intent to kill, so Bradbury's jury must follow suit.

[10] Trial counsel's stipulation to elements of the offense which he thought the State would have had difficulty proving cannot be deemed reasonable. Moreover, the stipulation wholly undercut trial counsel's litigation strategy of establishing Griffin did not act with specific intent to kill.

Lesser-Included Offenses

[11] Bradbury also claims his attorneys were ineffective for failing to seek lesser alternatives to a murder conviction. According to Bradbury, he would have been entitled to a jury instruction on reckless homicide as an accomplice to Griffin if his counsel had sought it. *See Brown*, 770 N.E.2d at 280-81 (holding that defendant charged with being an accomplice to murder was entitled to jury instruction on reckless homicide where there was "a serious evidentiary dispute" about the culpability of the principal actor).

[12] Counsel did not tender any lesser included offense instructions because he thought the evidence at trial did not support them. However, trial counsel indicated that if such evidence existed, he would have proposed such an instruction and that any failure to do so was error. He specifically testified the decision was not strategic.

[13] But for counsel's stipulation as to Griffin's murder conviction, a serious evidentiary dispute about Bradbury's culpability would have existed. The Record showed Griffin and Bradbury came to the park prepared to face their adversaries. When Bradbury saw Griffin fire in the rivals' general direction, Bradbury yelled for him to stop. As the dissent correctly notes, one witness testified Griffin aimed the gun at L.B. Based on this conflicting evidence from trial, a reasonable juror could have concluded Griffin did not intend to kill his rival, L.B.; instead, Griffin was trying to frighten L.B. by recklessly firing the gun in his general direction. The spray of gunfire killed the toddler, who, by all counts, was an unintended victim. Under such circumstances, Bradbury could

have been convicted as an accomplice to reckless homicide, a lesser offense than murder. Counsel's stipulation that Griffin was convicted of murder effectively foreclosed that defense.

[14] The postconviction court concluded Bradbury's attorneys were not ineffective in failing to request a jury instruction on lesser included offenses because the decision was strategic. We find the evidence does not support this conclusion. Bradbury's counsel specifically testified that he normally seeks as many lesser included offense instructions as the evidence will support, particularly in murder cases. Counsel also made clear that he would have tendered a lesser included offense instruction if the evidence against Bradbury supported it, and any failure to do so in the presence of such evidence was counsel's error. The evidence does not support the post-conviction court's finding that the decision to omit lesser-included offense instructions was strategic.

Conclusion

[15] Based on the record, we find the performance of Bradbury's attorneys was deficient with respect to the stipulation and omission of lesser included offense instructions and that but for this deficient performance, there was a reasonable probability that the result of the proceeding would have been different. *See Grinstead*, 845 N.E.2d at 1031. Therefore, the postconviction court erred by denying Bradbury's petition for post-conviction relief.[2] Even if these errors

[2] Because we find these two issues dispositive, we need not and will not reach Bradbury's other arguments.

were the product of strategic decisions, such egregious errors may be grounds for reversal in a post-conviction action. *See State v. Moore*, 678 N.E.2d 1258, 1261 (Ind. 1997), *cert. denied*, 523 U.S. 1079 (1998).

[16] The judgment of the postconviction court is reversed and this case is remanded for further proceedings.

Bailey, J., concurs.
Vaidik, J., dissents with a separate opinion.

IN THE
COURT OF APPEALS OF INDIANA

Tyre Bradbury,
Appellant-Petitioner,

v.

State of Indiana,
Appellee-Respondent

Court of Appeals Case No.
20A-PC-620

Vaidik, Judge, dissenting.

[17] I respectfully dissent from the majority's conclusion Bradbury received ineffective assistance of trial counsel. Because the post-conviction-court judge, who also presided over the jury trial, correctly concluded Bradbury's counsel were not ineffective, I would affirm.

[18] A defendant who files a petition for post-conviction relief must establish the grounds for relief by a preponderance of the evidence. *Hollowell v. State*, 19 N.E.3d 263, 268-69 (Ind. 2014). If the post-conviction court denies relief, and the petitioner appeals, the petitioner must show the evidence leads unerringly

and unmistakably to a conclusion opposite that reached by the post-conviction court. *Id.* at 269.

[19] When evaluating a defendant's ineffective-assistance-of-counsel claim, we apply the well-established, two-part test from *Strickland v. Washington*, 466 U.S. 668 (1984). *Bobadilla v. State*, 117 N.E.3d 1272, 1280 (Ind. 2019). The defendant must prove (1) counsel rendered deficient performance, meaning counsel's representation fell below an objective standard of reasonableness as gauged by prevailing professional norms, and (2) counsel's deficient performance prejudiced the defendant, i.e., but for counsel's errors, there is a reasonable probability the result of the proceeding would have been different. *Id.*

[20] Counsel is afforded considerable discretion in choosing strategy and tactics, and these decisions are entitled to deferential review. *Weisheit v. State*, 109 N.E.3d 978, 983 (Ind. 2018), *reh'g denied*. Charles and Brendan Lahey represented Bradbury in his trial for murder as an accomplice with a gang enhancement. Charles has devoted the majority of his practice to criminal-defense work, and his son Brendan has many years of experience.

[21] To be found guilty, the State had to prove the shooter, Griffin, intended to kill L.B. when he shot at him. But the State also had to prove Bradbury acted with the intent to kill L.B. Over the State's objection and at the request of counsel, and after repeated arguments before and even during trial, the trial court agreed to instruct the jury Bradbury's intent was an essential element of his murder

charge.[3] Ultimately, counsel stipulated Griffin had been convicted of murder. *See* March 28-30, 2016 Trial Tr. Vol. I p. 91. Doing so absolved the State from proving Griffin's intent. As Charles testified at the post-conviction hearing, "The advantage to that was that I did not want the jury sitting there thinking that they had to convict [Bradbury] or everybody might go free, and this child [the unintended victim] died without anybody facing the music." P-C Tr. Vol. IV p. 20. In my opinion, counsel strategically argued Bradbury's intent only. As Charles testified:

> [The shooting] was rogue action by Griffin that [Bradbury] did not contribute to and did not join and did not have any knowledge; if Griffin did have a specific intent that [Bradbury] never had that intent beforehand because for Christ's sake he tried to stop it and the victim said that he did.

Id. at 28.

[22] The majority finds counsel's decision to stipulate to Griffin's murder conviction was not reasonable because it "undercut [their] litigation strategy of establishing Griffin did not act with specific intent to kill." Slip op. at 5. My review of the

---

[3] The trial court instructed the jury that to find Bradbury guilty of murder, the State must have proven beyond a reasonable doubt that:

> 1) The Defendant, Tyre Bradbury
>
> 2) acting with the intent to kill [L.B.]
>
> 3) knowingly aided or induced or caused
>
> 4) Robert Griffin to commit the crime of Murder

Appellant's Direct Appeal App. Vol. II p. 159.

record does not lead me to the same conclusion, although I admit the record can be read as the majority reads it. Charles seemingly contradicted himself at the post-conviction hearing. He said, as the majority indicates, that absent the stipulation, it "would have been very hard for [the State]" to establish Griffin had been convicted of murder. P-C Tr. Vol. IV p. 20. Further, Charles testified he thought he had argued Griffin's intent at trial, and indeed he argued very limitedly Griffin's intent during closing.[4] However, Charles later said "it was not [his] belief that [he] was going to be successful in arguing the intent of [Griffin]." *Id.* at 22. And Brendan testified they were "hoping" to challenge Griffin's intent with evidence the child may have been killed with "an alternative [bullet] trajectory . . . that could have taken . . . a very high arch in the air," but that theory "didn't really come together after the testimony that the shooter leveled the gun at the . . . intended victim." *Id.* at 59-60. In my opinion, the strategy of counsel was to zero in on the State's failure to prove Bradbury's intent.

[23] Even assuming counsel's strategy was not reasonable, Bradbury's claim still fails. He must prove there is a reasonable probability the result of his trial would have been different. By the time of Bradbury's trial in March 2016, another jury had found Griffin guilty of murder, specifically finding he intended to kill L.B.

---

[4] Counsel argued during closing, "Well, we don't really know anything about the intent of Robert Griffin. That's not something that we know anything about." March 31, 2016 Trial Tr. p. 48

Moreover, the evidence is convincing Griffin fired the gun intending to kill L.B. Four people present at the shooting testified: L.B. and three others. None indicated, as the majority claims, that Griffin only wanted to "frighten L.B. by recklessly firing in his general direction." Slip op. at 5. L.B. testified that when he squared up with M.B., Griffin "pulled the gun out" and "shot." March 28-30, 2016 Trial Tr. Vol. I p. 124. According to L.B., the "bullet went pa[st]" him, and the bullet was so close he "felt" it. *Id.* at 125. L.B. then ran away in a zigzag fashion to avoid getting hit by the bullets. Another eyewitness testified everyone "surrounded" L.B. and then Griffin shot "at" him. *Id.* at 202, 203. Yet another witness said Griffin "open fired," shooting "a lot" of bullets. March 28-30, 2016 Trial Tr. Vol. II p. 254. The final eyewitness claimed to have heard but not seen the shooting. As Brandon testified at the post-conviction hearing, the evidence was not really there to believably contest Griffin's intent. After reviewing this record, that seems right to me. Bradbury has failed to prove there is a reasonable probability arguing Griffin's intent would have made a difference in the verdict.

[24] As to the issue of failing to request a jury instruction on the lesser-included offense of reckless homicide, Bradbury's claim fails as well. Bradbury has not shown the verdict would have been any different had Griffin's intent been at issue. Bradbury bears the burden, and he has failed to show there is a serious evidentiary dispute as to Griffin's intent. Charles acknowledged this reality in his post-conviction testimony when he said they "did not submit an instruction

on lesser included offense because we didn't think that there was any evidence of the lesser included offense." P-C Tr. Vol. IV p. 25.

[25] Requesting lesser-included-offense instructions demands a careful analysis by counsel—a decision we should be reticent to second guess. Here, regarding Griffin's intent, counsel needed to ask themselves: (1) was there enough evidence to credibly argue Griffin did not intend to kill L.B.?; (2) how would this jury respond to that argument?; and (3) would this alternative argument undermine the strength of Bradbury's intent argument that, if accepted by the jury, would have resulted in an acquittal? Decisions like this must be made on the ground, not after the fact.

[26] Reasonable minds differ. And they certainly have here on the issues of whether counsel's decisions were strategic and whether there is a reasonable probability the result of the trial would have been different. Because I believe this to be a reasonable difference of opinion, I cannot say the evidence as a whole leads unerringly and unmistakably to a conclusion opposite that reached by the post-conviction court. I would defer to the judgment of the post-conviction-court judge, who also presided over Bradbury's jury trial, and affirm on these and the other issues raised by Bradbury.

STATE OF INDIANA	)	IN THE ST. JOSEPH SUPERIOR COURT
	) SS:	
ST. JOSEPH COUNTY	)	CAUSE NO. 71D08-1801-PC-000002
TYRE MARK BRADBURY	)	
Petitioner,	)	
	)	
vs.	)	
	)	
STATE OF INDIANA	)	

ORDER

The Petitioner, Tyre Bradbury (hereafter "Petitioner") appeared in person, in custody, and with counsel, John A. Kindley. The State appeared by Deputy Prosecuting Attorney Kenneth Biggins, for evidentiary hearing on the Petitioner's Petition for Post-Conviction Relief. The Court, having reviewed the evidence, and heard testimony of witnesses and argument of the parties, now finds and orders as follows:

Facts/Procedural History

The facts of this case, as detailed in *Bradbury v. State,* 86 N.E.3d 231 (Ind.Ct.App. 2017), *transfer denied,* 89 N.E.3d 406 (Ind. 2017), are as follows:

> On April 8, 2014, a fistfight broke out among several young men at a public park in South Bend. Fifteen-year-old Tyre Bradbury and another juvenile, L.B., participated in the fight on opposing sides. The next day, Bradbury and numerous companions, including Robert Griffin and juvenile T.B., returned to the park. Bradbury had obtained a handgun and a shotgun; he gave the handgun to Griffin and the shotgun to another companion. The group again encountered L.B., and, during a confrontation, Griffin and T.B. pulled out handguns and shot at L.B. multiple times. No one fired the shotgun. None of the shots hit L.B., but one of Griffin's bullets traveled 390 yards and struck two-year-old J.S. in the chest as he was playing with his sister in the front yard of his house. J.S. died from the gunshot.
>
> These dreadful events rightly led to multiple prosecutions. Griffin, who fired the shot that killed J.S. and was an adult at the time of the shooting, received a flat sixty years for murder. T.B., the other shooter, received a forty-year sentence with

> five years suspended for attempted murder. Bradbury's other companions, including Josh Hodge, Xavier Primm, M.B., D.W., and C.W., received sentences of ten years or less. The State argued that most of Bradbury's companions were also members of the gang, but only C.W. was convicted of the criminal organizations enhancement. M.B. and D.W. were also charged with the enhancement, but the enhancement was later dismissed as to them.
>
> As for Bradbury, the police arrested him on April 10, and an officer interrogated him with his mother present. The State charged Bradbury with murder as an accessory and sought a sentencing enhancement for participation in a criminal organization. The juvenile court waived jurisdiction and transferred the case to the St. Joseph Superior Court. In a bifurcated proceeding, the jury determined that Bradbury was guilty of murder and that he was subject to the criminal organizations enhancement. The court sentenced Bradbury to an aggregate of ninety years. (footnotes omitted)

The Court of Appeals affirmed the Petitioner's conviction for Murder as well as the gang enhancement. However, while the Court upheld the Petitioner's sentence of 45 years for the murder charge, it modified the enhancement from 45 years to 15 years, for an aggregate sentence of 60 years. The Indiana Supreme Court denied transfer. Following certification of the Court of Appeals' decision, this Court modified the Petitioner's sentence in accordance with the ruling.

On January 11, 2018, the Petitioner filed a Petition for Post-Conviction Relief, and two amendments to the petition thereafter. In the Petition, the Petitioner alleges eight (8) bases for his claim of ineffective assistance of trial counsel, Charles Lahey and Brendan Lahey. On September 13, 2018, the Court held an evidentiary hearing. After competition of the transcripts from the evidentiary hearing, the Petitioner filed a Brief in Support of Petition for Post-Conviction Relief. The State then filed Proposed Findings of Fact and Conclusions of Law, and the Petitioner filed a Reply Brief in Support of Petition for Post-Conviction Relief. In the following section, the Court addresses each of the Petitioner's claims of ineffective assistance of trial counsel.

Legal Analysis

Post-conviction proceedings are civil in nature. *Reid v. State*, 984 N.E.2d 1264, 1266-67 (Ind. Ct. App. 2013) *transfer denied,* 989 N.E.2d 782 (Ind. 2013) *(citations omitted)*. Therefore, in order to prevail on his Petition, Petitioner must establish his claim for relief by a preponderance of the evidence. (*See*, *Ind. Post–Conviction Rule 1(5)*).

The Court, in *Wilkes v. State,* 984 N.E.2d 1286, 1240 (Ind. 2013) stated:

> Post-conviction proceedings are civil proceedings in which the defendant must establish his claims by a preponderance of the evidence. Post-conviction proceedings do not offer a super-appeal, rather, subsequent collateral challenges to convictions must be based on grounds enumerated in the post-conviction rules. Those grounds are limited to issues that were not known at the time of the original trial or that were not available on direct appeal. Issues available but not raised on direct appeal are waived, while issues litigated adversely to the defendant are *res judicata.* Claims of ineffective assistance of counsel and juror misconduct may be proper grounds for post-conviction proceedings.
>
> Because the defendant is appealing from the denial of post-conviction relief, he is appealing from a negative judgment and bears the burden of proof. Thus, the defendant must establish that the evidence, as a whole, unmistakably and unerringly points to a conclusion contrary to the post-conviction court's decision. In other words, the defendant must convince this Court that there is *no* way within the law that the court below could have reached the decision it did. (internal quotations and citations omitted)

In *Garrett v. State,* 992 N.E.2d 710, 718-719 (Ind. 2013), the Supreme Court reiterated its long-held standard required for a petitioner to prevail on a claim of ineffective assistance of counsel in a post-conviction relief proceeding.

> To establish a post-conviction claim alleging violation of the Sixth Amendment right to effective assistance of counsel, a defendant must establish the two components set forth in *Strickland v. Washington,* 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). "First, a defendant must show that counsel's performance was deficient." *Strickland,* 466 U.S. at 687, 104 S.Ct. 2052. This requires a showing that counsel's representation fell below an objective standard of reasonableness and that counsel made errors so serious that counsel was not functioning as "counsel" guaranteed to the defendant by the Sixth Amendment. *Id.* "Second, a defendant must show that the deficient performance prejudiced the defense." *Id.* This requires a showing that counsel's errors were so

> serious as to deprive the defendant of a fair trial, meaning a trial whose result is reliable. *Id.* To establish prejudice, a defendant must show that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694, 104 S.Ct. 2052. A reasonable probability is one that is sufficient to undermine confidence in the outcome. *Id.*

A Petitioner has the burden to demonstrate to the post-conviction court that his counsel's trial strategy was unreasonable under prevailing professional norms. That the defense strategy was ultimately unsuccessful does not mean that counsel was constitutionally ineffective. *Hinesley v. State,* 999 N.E.2d 975, 983 (Ind.Ct.App. 2013) (quotations and internal citations omitted).

Petitioner's Claims of Ineffective Assistance of Trial Counsel
Charles Lahey and Brendan Lahey

Claim 1: Counsel failed to request a jury instruction on a lesser-included offense

On this issue, the Court is guided by the Supreme Court decision in *Autrey v. State*, 700 N.E.2d 1140 (Ind. 1998), a case involving a claim of ineffective assistance of counsel for failure to request a jury instruction on a lesser-included charge. The case involved a multiple person fight with various weapons that ended in a death and a conviction for murder. The Court noted the "widely disparate accounts" of the fight. At trial, the forensic pathologist testified that any one of the head wounds could have led to the death, and any number of weapons wielded by any number of the people involved could have caused the head wounds. *Id.* at 1140-1141.

The Supreme Court held:

> After careful consideration of the record, we find that counsel acted effectively. The record contains numerous indications that trial counsel made the decision not to tender lesser included offenses as part of an "all or nothing" trial strategy. It is

> well-established that trial strategy is not subject to attack through an ineffective assistance of counsel claim, unless the strategy is so deficient or unreasonable as to fall outside of the objective standard of reasonableness. *Garrett v. State,* 602 N.E.2d 139, 142 (Ind.1992). This is so even when "such choices may be subject to criticism or the choice ultimately prove detrimental to the defendant." *Id.*
>
> Further, this Court has previously held that a tactical decision not to tender a lesser included offense does not constitute ineffective assistance of counsel, even where the lesser included offense is inherently included in the greater offense. *Page v. State,* 615 N.E.2d 894, 895 (Ind.1993). *Autrey v. State,* 700 N.E.2d at 1141.

Throughout trial in this matter, it is clear that counsels' strategy was an acquittal. While Attorney Charles Lahey may have stated at the evidentiary hearing that not asking for the lesser-included instruction was not a strategic decision, that is belied by his arguments throughout the trial. This is also apparent from the pretrial motions filed and the intense advocacy Mr. Lahey brought to bear at every stage of the proceedings. Although his arguments were unsuccessful, Mr. Lahey was not ineffective for pursuing an all or nothing strategy.

Claim 2: Counsel stipulated to publishing to the jury unduly prejudicial parts of a video of a police interview of Bradbury

Petitioner alleges that counsel was ineffective for failing to redact, or agreeing to not redact, portions of the videotaped statement made by Petitioner at the County Metro Homicide Unit. Specifically, Petitioner argues that portions of the interview when Petitioner was alone in the interview room and he was rapping or yelling and striking the wall were "profoundly prejudicial". Petitioner fails to explain why he believes these portions of the interview were unduly prejudicial, nor does he provide legal support for their exclusion. Furthermore, Attorney Charles Lahey testified about why he wanted the

jury to see the Petitioner acting this way when he was alone in the interview room. While Petitioner may now believe that this was not an appropriate strategy, the Court does not find that Mr. Lahey was ineffective for employing this strategy. As he explained, he was hoping that at least one juror would see Petitioner as a young, inexperienced kid being played by his friends. Attorney Lahey testified that it was "real important" for [the jury] to see that."

The Court does not find credible the testimony by Attorney Brendan Lahey that he had never seen the redacted videotaped interview. Before the Court conducted voir dire, Charles and Brendan Lahey moved to suppress the Petitioner's statements made at the Metro Homicide Unit. The argument was that Officer Cook had engaged in interview tactics so egregious that everything the Petitioner said following that should be suppressed. All parties stated at that time that they had agreed on the redactions to the statement, and if the Court denied the motion to suppress, they had an agreement as to the appropriate redactions.

The Court took a recess to watch the relevant portion of the recorded statement, after which, the Court denied the Motion to Suppress. The Court again asked if the parties had an agreed redacted statement, at which time Charles Lahey stated, "I believe so, yes. I haven't actually seen the tape." (Tr. p. 21) The Court tells the parties that she expects counsel to review the redacted recording to ensure that there is agreement. Later, when Officer Cook testified and the State moved to admit the redacted recording, Attorney Brendan Lahey was allowed to voir dire Officer Cook regarding the video compression and the time irregularities that resulted. The Court then admitted the recording. At no time during or after the recording was played for the jury did either

Charles or Brendan Lahey object on the grounds that the recording contained portions that were supposed to have been redacted. Taken together with Charles Lahey's explanation at the evidentiary hearing as to why he wanted those portions of the statements shown to the jury, the Court finds that it was a strategic decision on counsels' part to show the agreed redacted recording. The Court does not find counsel ineffective for doing so.

Claim 3: Counsel stipulated to the admission into evidence of Robert Griffin's conviction for murder

At the evidentiary hearing, Attorney Charles Lahey provided an explanation for why he entered into the stipulation that advised the jury of Robert Griffin's conviction for murder. "The advantage to that was that I did not want to jury sitting here thinking that they had to convict Tyre or everybody might go free, and this child died without anyone facing the music." (PCR Tr. 20). The Court finds that this decision supported counsel's strategy of defense, that being to portray the Petitioner as a kid being taken advantage of by friends. Counsels' goal from the start, as early as opening statement, was to paint a picture for the jury of the Petitioner as a boy caught up in the events of the couple days at issue, but not someone with any intent to kill anyone. By stipulating to Robert Griffin's murder conviction, counsel could argue that Robert Griffin was the only person with the requisite intent.

Petitioner's argument also fails to recognize that the jury instruction required the jurors to find that Petitioner had the specific intent to kill Larry Bobbitt when he aided Robert Griffin. Counsels' argument throughout the trial was that Petitioner did not have

that requisite intent. While the strategy ultimately proved unsuccessful, the Court does not find counsel ineffective for choosing that strategy.

Claim 4: Counsel failed to hire an expert on gangs to testify at trial

Petitioner argues that an expert could have highlighted the obvious vagueness of the statute defining a criminal gang, using as an example the "rugby team who gets in an ad hoc bar fight" versus the Aryan Brotherhood. Petitioner further argues that the expert could have explained how law enforcement needs to make common sense practical decisions in a way that is not racially discriminatory.

Petitioner fails to explain how law enforcement in this case acted in a way that was racially discriminatory, or how Petitioner's affiliation with East Side/Evil Side was more similar to affiliation with a sports team than with a criminal gang. In this case, the jury was instructed regarding the "criminal gang enhancement" statute, specifically that the State had to prove that when the Petitioner committed the murder, he was a member of a criminal gang and that he committed the murder at the direction of or in affiliation with the criminal gang. The jury was instructed that a criminal gang is a group with at least three members that promotes, sponsors, assists in, participates in, or requires as a condition of membership or continued membership, the commission of a felony. The Petitioner fails to provide evidence of how an expert's testimony on the issue of proper application of the criminal gang enhancement statute would have resulted in a different outcome.

Claim 5: Counsel failed to research and be aware of case law supporting the intended defense of abandonment

Petitioner argues that counsel was ineffective for failing to cite to the Court *Whitener v. State,* 696 N.E.2d 40 (Ind. 1998), after the State provided the Court the case of *Brownlee v. State,* 400 N.E.2d 1374 (Ind. 1980). Petitioner argues that Footnote 3 in *Whitener* supports the giving of the abandonment instruction, which the Court reversed its ruling on after reviewing *Brownlee*. The Court does not find that *Whitener* supports Petitioner's claim. Footnote 3 states that some cases have interpreted the abandonment statute differently, but states that *Brownlee* correctly tracked the language of the statute on abandonment.

Further, Attorney Lahey testified at the evidentiary hearing that he knew there were some legal issues with the abandonment instruction, and that he knew it was not a guarantee that they would get that instructions. It appears from this testimony that Attorney Lahey was aware of the case law regarding abandonment and was hoping to get the instruction despite *Brownlee*. The Court does not find counsel ineffective as to this issue.

Claim 6: Counsel failed to present Larry Bobbitt's prior consistent statement that Bradbury tried to stop the shooting immediately before it happened

Petitioner argues that counsel should have introduced the videotaped statement made by Larry Bobbitt during the investigation of this matter as a prior consistent statement. Petitioner argues that Larry Bobbitt told his mother, outside the presence of investigators, that Petitioner tried to stop the shooting. Having watched the recorded statement, the Court finds it difficult to discern what Larry Bobbitt said about Petitioner, other than Petitioner wouldn't come to his house later to retaliate. Counsel did elicit at

trial, on more than one occasion and through more than one witness, that Petitioner attempted to stop the shooting, or said "don't shoot". The Court does not find that counsel was ineffective for failing to rehabilitate Larry Bobbitt with a recorded prior consistent statement, as opposed to rehabilitating him through his own testimony at trial that the jurors could see and understand.

Claim 7: Counsel failed to file a Motion to Correct Error under Trial Rule 59(J), moving the court as the "13th juror" to grant a new trial or to set aside the murder conviction and criminal gang enhancement and modify the judgment to reflect a conviction on a lesser included offense.

The Petitioner argues that the Court would likely have granted this motion if the Court knew about Larry Bobbitt's statement to his mother that Petitioner had tried to prevent the shooting. The Court heard evidence throughout the trial that Petitioner said, "don't shoot". Counsel moved for a directed verdict, which the Court denied. The Court does not find that the result would have been different if counsel had filed a TR 59(J) motion, and further finds that counsel was not ineffective for failing to do so.

Claim 8: Counsel failed to file a motion to dismiss the gang enhancement charge on the ground that the statutory definition of "criminal gang" was unconstitutionally vague.

Petitioner argues that counsel was ineffective for failing to raise a constitutional challenge to the gang enhancement statute. The Court of Appeals decided that issue in *Armstrong v. State,* 22 N.E.3d 629 (Ind.Ct.App. 2014). In that case, it was argued that the phrase "in affiliation with" was unconstitutionally vague. The Court found that it was not. This Court finds that the other application phrase of the statute "at the direction of" appears far less vague than the phrase found constitutional in *Armstrong*. In light of the

holding in *Armstrong,* the Court does not find that counsel was ineffective for failing to raise this issue.

Conclusion

The Court finds that Petitioner has not proven his claims of ineffective assistance of trial counsel by a preponderance of the evidence. The Court, therefore, finds that the Petition for Post-Conviction Relief should be denied.

IT IS THEREFORE ORDERED that the Petition for Post-Conviction Relief is denied.

So Ordered the date of the filemark hereon.

Elizabeth C. Hurley

ELIZABETH C. HURLEY, JUDGE
ST. JOSEPH SUPERIOR COURT

ST. JOSEPH COUNTY
SEAL
INDIANA

EH