

In the
United States Court of Appeals
For the Seventh Circuit

No. 15-2482

KUNTA GRAY,

Petitioner-Appellant,

v.

DUSHAN ZATECKY, Superintendent, Pendleton
Correctional Facility,

Respondent-Appellee.

Appeal from the United States District Court for the
Southern District of Indiana, Indianapolis Division.
No. 1:13-cv-812-SEB-DML — **Sarah Evans Barker**, Judge.

ARGUED JANUARY 10, 2017 — DECIDED AUGUST 2, 2017

Before WOOD, *Chief Judge*, and ROVNER and HAMILTON,
Circuit Judges.

WOOD, *Chief Judge*. During a drug deal that went bad, shots were fired and Gregory Jones was fatally wounded. The police arrested Kunta Gray for the crime, and a Marion County (Indiana) jury later convicted him, twice, for the murder and associated offenses. The Indiana courts ultimately upheld the convictions, and so Gray filed this action in federal

court, seeking a writ of habeas corpus on several grounds. See 28 U.S.C. § 2254. Before we can reach those arguments, however, we must assure ourselves that his petition was timely. It is only if Gray qualifies for equitable tolling, because he filed after the one-year time limit for such petitions. 28 U.S.C. § 2244(d). We agree with the district court that he failed to make the necessary showing, and so we affirm its judgment.

I

On the morning of November 16, 2000, Gray stopped by Jones's house in Indianapolis and made a deal to buy eight pounds of marijuana for \$6,500—Gray was to bring the money by later that day, and the men would make the exchange. Gray duly returned that afternoon, accompanied by another man. Jones's friend Tracy Avant was in the living room at the time and observed Jones, Gray, and the other man retire to the rear of the house. Shortly thereafter, the third man returned, hit Avant with a revolver, threw him to the ground, and robbed him. Avant heard Jones say "don't do this" in the back of the house, and then he heard five to ten gunshots. Gray ran back through the living room carrying a gun and a trash bag, firing into the rear of the house as he fled. Emergency responders took Jones to the hospital, but he died there 12 days later from multiple gunshot wounds to his abdomen.

A Marion County jury found Gray guilty in March 2002 of murder, robbery, and a number of related crimes, but he convinced the state courts to overturn those convictions on post-conviction review. The state held a second trial in August 2007. It ended on the same note: the jury convicted him of felony murder, murder, robbery, attempted murder, and carrying a handgun without a license, and the court sentenced him to 85 years' imprisonment.

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The retrial was a rocky affair. The prosecution used four of its eight peremptory challenges on black jurors. After trial, it emerged that a selected juror had been less than forthcoming on her juror questionnaire. These problems take on added significance since the prosecution's case was not especially strong. It hinged on testimony from Avant and Andrew White, both of whom maintained that Gray confessed while they shared a holding cell. Neither was a dream witness. Avant initially asserted that he was not present for the robbery. He struggled to identify the assailants, and he may have been high at the time of the crime. White's testimony was also problematic, partly because White was trying to get a lighter sentence. Worse, Jones had been White's friend, and Gray had robbed White in the past. Normally, Gray's earlier crime would have been inadmissible, but defense counsel introduced it to undermine White's credibility on the theory that White invented Gray's confession out of revenge. Unfortunately, the earlier robbery closely resembled the one against Jones, and so the jury learned that Gray had previously committed a crime nearly the same as the one of which he stood accused. Even so, the jury initially deadlocked. After receiving further instructions from the court, however, the jury notified the court that the hold-out juror had suddenly changed his or her vote. The foreperson commented to the court that "I have trouble submitting the change in good conscience," but the jury overcame those doubts and convicted Gray on all charges.

Gray's appeals proved unsuccessful, and his conviction became final on January 2, 2008. That started the one-year period for postconviction actions imposed by the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA). 28 U.S.C. § 2244(d)(1). Gray took no action until July 29, 2008 (208 days

later), when he filed a petition for postconviction relief in state court. This stopped the AEDPA clock until Indiana's denial of postconviction relief became final on August 8, 2012. See 28 U.S.C. § 2244(d)(2). On that date, Gray had 156 days left—until January 11, 2013—to file his federal habeas corpus petition. He did not submit it until April 29, 2013, 108 days after the calendar hit zero.

That left equitable tolling as his only hope, but the district court found him ineligible for that extraordinary measure and dismissed his petition without reaching the merits. We granted a certificate of appealability, requesting briefing on four issues: equitable tolling, ineffective assistance of counsel, whether striking the black jurors violated *Batson v. Kentucky*, 476 U.S. 79 (1986), and the possibility that Gray's due process rights were violated by the inaccurate questionnaire answers.

II

Because the rest of Gray's appeal depends on our conclusion with respect to equitable tolling, we begin (and end) there. AEDPA imposes a strict one-year time limit for requesting a writ of habeas corpus. That period runs from the latest of four dates, which can interact with one another, depending on the appeals and state collateral relief the applicant seeks. Here, we begin with the date on which Gray's judgment became final. See 28 U.S.C. § 2244(d)(1). That started the clock, but 208 days later he sought collateral relief from Indiana's court. Under the statute, the time spent while the collateral proceedings were pending did not count toward the one-year limitations period. 28 U.S.C. § 2244(d)(2). In other words, the clock was stopped (or the statute was "tolled," as courts like to say) during the time when those proceedings were pending. The countdown to one year resumed on August 8, 2012,

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when his state post-conviction proceedings came to an end and he still had 156 days—until January 11, 2013—during which he could have filed a timely federal petition. But he did not file anything until 108 days past that deadline. The Supreme Court has held that there is a narrow safety valve for people in Gray's position, in the form of equitable tolling—essentially, a brief extension of time during which a late filing will be accepted. *Holland v. Florida*, 560 U.S. 631 (2010). Unless Gray qualifies for that, he cannot pursue his federal petition for a writ of habeas corpus.

Equitable tolling is available when an applicant shows “(1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way and prevented timely filing.” *Id.* at 649 (internal quotation marks omitted). The statute requires “reasonable diligence,” not “maximum feasible diligence.” *Id.* at 653 (citations omitted). The district court must evaluate the circumstances holistically, considering “the entire hand that the petitioner was dealt” rather than taking each fact in isolation. *Socha v. Boughton*, 763 F.3d 674, 686 (7th Cir. 2014). Equitable tolling is “rare” but it does not “exist[] in name only.” *Id.* at 684. It is instead a “highly fact-dependent area in which courts are expected to employ flexible standards on a case-by-case basis.” *Id.* (internal quotation marks and citation omitted). Appellate review reflects this flexibility; we may reverse only if the district court abuses its discretion. See *id.* at 678.

This is a demanding standard, and we cannot say that the district court strayed out of bounds in its determination that Gray has not met it. His main argument (really his only one) is that this case is like *Socha*, which found that the challenges faced by the eponymous petitioner cleared the *Holland* bar.

There are certainly similarities between *Socha* and Gray's case—both defendants were indigent, both proceeded *pro se* for a long time, and neither had any particular legal experience. But that describes most habeas corpus petitioners and thus by definition is not “extraordinary.” A more relevant similarity, though regrettably also not an unusual one, is that both men had limited access to prison legal resources. Socha was held in administrative segregation, which limited his library access to 80 minutes a week—and the “library” consisted of “two computers with spotty internet access” that were “shared by 250 inmates.” *Id.* at 680. Gray, for his part, alleges that his access to the prison's law library was constrained “due to various institutional lockdowns ranging from (2) weeks up to (10) months, with (2) lockdowns in the past (3) months lasting a total of (3) weeks.” Most important, Gray and Socha both experienced long delays in obtaining the files they needed to prepare their petitions. Socha spent the better part of a year begging trial counsel for his file, while Gray waited 113 days for the Indiana Court of Appeals to give him his case record.

Indiana tries to trivialize the 113-day delay, but we do not make light of it. At oral argument the state suggested that so long as Gray received the documents before the one-year deadline, any delay in filing was entirely his responsibility. That cannot be right. This is a holistic inquiry, and the length of time remaining for the applicant to file is quite pertinent: several months will be one thing; two days quite another. Moreover, we reject the notion that a state's procrastination can torpedo an indigent prisoner's case. If this sort of delay becomes routine, prisoners may begin filing prophylactic habeas corpus petitions and immediately requesting a stay pending the state's provision of the required records. Indiana

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professed indifference to this outcome at oral argument; it may wish to reconsider. Such a system would clutter the courts, as well as state legal offices, with petitions that the full record would show should never have been filed. We trust that this was just something said in the heat of argument.

That said, there are important differences between Gray's case and Socha's that support a different outcome. Socha's public defender refused to hand over his records for almost a year despite a stream of requests; the defender's superior ultimately had to step in and send the files himself. *Id.* at 679–80. Here, it appears that Gray simply sent his request and waited 113 days for Indiana to follow through. Granted, a near-four month delay is a substantial obstacle. But it is less daunting in duration and degree than the delay Socha faced. At the time Gray's petition for state postconviction relief became final, he had another 156 days in which to file his federal petition. Subtracting the 113 days it took Indiana to give him the files he wanted, he still had 43 days to work with. Gray argues that this overstates the time that was really (not theoretically) available to him, noting that "institutional lockdowns" restricted his access to legal resources and hence his ability to prepare his petition. Here again, the district court reasonably could have found that he did not make as compelling a showing as Socha, who was almost totally deprived of meaningful library access because of his placement in administrative segregation.

By so holding, we do not mean to say that *Socha* establishes the floor for a finding of extraordinary circumstances. On the contrary, we stressed that equitable tolling is not "a chimera" and that this is a "highly fact-dependent area." *Id.* at 684 (internal citation omitted). There is no avoiding the careful look

at each applicant's situation that this type of equitable standard calls for. Again bearing in mind the deferential standard that applies to the district court's assessment of the case, we find nothing in Gray's case that compels us to excuse him from the one-year period of limitations.

We AFFIRM the judgment of the district court.

UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Everett McKinley Dirksen United States Courthouse
Room 2722 - 219 S. Dearborn Street
Chicago, Illinois 60604



Office of the Clerk
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FINAL JUDGMENT

August 2, 2017

DIANE P. WOOD, Chief Judge

Before:

ILANA DIAMOND ROVNER, Circuit Judge

DAVID F. HAMILTON, Circuit Judge

No. 15-2482	KUNTA GRAY, Petitioner - Appellant v. DUSHAN ZATECKY, Superintendent, Respondent - Appellee
Originating Case Information:	
District Court No: 1:13-cv-00812-SEB-DML Southern District of Indiana, Indianapolis Division District Judge Sarah Evans Barker	

The judgment of the District Court is **AFFIRMED**, with costs, in accordance with the decision of this court entered on this date.

United States Court of Appeals
For the Seventh Circuit
Chicago, Illinois 60604

September 19, 2017

Before

DIANE P. WOOD, *Chief Judge*

ILANA DIAMOND ROVNER, *Circuit Judge*

DAVID F. HAMILTON, *Circuit Judge*

No. 15-2482

KUNTA GRAY,

Petitioner-Appellant,

v.

Appeal from the United States District
Court for the Southern District of
Indiana, Indianapolis Division.

DUSHAN ZATECKY, Superintendent,

Respondent-Appellee.

No. 1:13-cv-00812-SEB-DML

Sarah Evans Barker,
Judge.

ORDER

Petitioner-appellant filed a petition for rehearing and rehearing en banc on August 30, 2017. No judge in regular active service has requested a vote on the petition for rehearing en banc, and all members of the original panel have voted to deny rehearing. The petition for rehearing and rehearing en banc is therefore DENIED.

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION**

KUNTA K. GRAY,	)	
	)	
Petitioner,	)	
	)	
vs.	)	1:13-cv-812-SEB-DML
	)	
DUSHAN ZATECKY,	)	
	)	
Respondent.	)	

**Entry Discussing Petition for Writ of Habeas
Corpus and Denying Certificate of Appealability**

I.

Petitioner Kunta K. Gray seeks a writ of habeas corpus from this Court. Having considered the pleadings and the record in this action, the Court concludes that his petition for a writ of habeas corpus must be dismissed as untimely.

A.

Mr. Gray was convicted in an Indiana state court of murder and other serious felonies in 2006. He is currently serving a eighty-five year sentence for these crimes. He now challenges the convictions through his petition for writ of habeas corpus. The respondent seeks dismissal of his petition as untimely.

In an attempt to “curb delays, to prevent ‘retrials’ on federal habeas, and to give effect to state convictions to the extent possible under law,” Congress, as part of the Anti-terrorism and Effective Death Penalty Act of 1996 (“AEDPA”), revised several of the statutes governing federal habeas relief. *See Williams v. Taylor*, 529 U.S. 362, 404 (2000). One such revision amended 28 U.S.C. § 2244 to include a one-year statute of limitations for state prisoners seeking federal habeas relief, which begins to run from the latest of:

(A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;

(B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;

(C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

(D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

28 U.S.C. § 2244(d)(1). The AEDPA's limitations period is subject to statutory and equitable tolling. *See Wood v. Milyard*, 132 S. Ct. 1826, 1831 (2012) (statutory tolling); *Holland v. Florida*, 560 U.S. 631 (2010) (equitable tolling).

B.

Mr. Gray has not identified any facts that would trigger the application of § 2244(d)(1)(B), (C), or (D). He argues that § 2244(d)(1)(B) should apply because the state court delayed his request for record by 113 days, but this delay is not an impediment created by unconstitutional state action as is required to trigger § 2244(d)(1)(B). *See Lloyd v. Van Natta*, 296 F.3d 630, 634 (7th Cir. 2002) (holding that an “impediment” for the purposes of § 2244(d)(1)(B) “must *prevent* a prisoner from filing his petition,” and that the state’s failure to provide him a transcript does not do so). As such, the one-year period of limitations began to run when Mr. Gray’s conviction became final under § 2244(d)(1)(A). The facts pertinent to the computation of the statute of limitations under § 2244(d)(1)(A) are the following:

- Mr. Gray’s convictions were affirmed on direct appeal on August 10, 2007, and the Indiana Supreme Court denied his petition to transfer on October 4, 2007.
- On July 29, 2008, Mr. Gray filed a petition for post-conviction relief in state court.

- On June 19, 2012, the Indiana Court of Appeals affirmed the denial of post-conviction relief.
- On August 8, 2012, the Indiana Supreme Court denied Mr. Gray's petition to transfer.
- On April 29, 2013, Mr. Gray submitted the instant petition for habeas corpus to be filed with this Court.

The legal significance of the foregoing facts is the following:

- Mr. Gray's convictions became final on January 2, 2008, the date when the time to seek direct review from the judgment expired. *See Griffith v. Kentucky*, 479 U.S. 314, 321 & n.6 (1987) (a conviction is "final" when the time for seeking direct review from the judgment affirming the conviction has expired); *Powell v. Davis*, 415 F.3d 722, 726 (7th Cir. 2005).
- Accordingly, the statute of limitations established by 28 U.S.C. § 2244(d) began to run on January 2, 2008, and continued to run until Mr. Gray filed his petition for post-conviction relief on July 29, 2008. At that point, 209 days had run on the one-year statute of limitations for filing a habeas petition.
- The statute of limitations began to run again on August 8, 2012 (the day the denial of post-conviction relief became final), and continued to run for the remaining 156 days until it expired on January 11, 2013.
- Mr. Gray's petition for a writ of habeas corpus is considered to have been filed on April 29, 2013, the date he gave his petition to the proper prison authorities. *See Jones v. Bertrand*, 171 F.3d 499, 502 (7th Cir. 1999). This was 108 days after January 11, 2013.
- Mr. Gray's petition for a writ of habeas corpus was filed 108 days after the expiration of the statute of limitations.

C.

Mr. Gray acknowledges that he missed the one-year statute of limitations deadline by 108 days. However, he contends that he is entitled to equitable tolling because his delay in filing his petition was due to his transfers to several different prisons, which required him "to start and stop his petition each time he was moved" and made him "unable to recover his previous work product." According to Mr. Gray, he also had limited access to the law library at certain times. Despite these difficulties, Mr. Gray asserts that he "diligently" pursued his rights throughout this time period.

“Generally, a litigant seeking equitable tolling bears the burden of establishing two elements: (1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way” to prevent him from filing a timely petition. *Pace v. DiGuglielmo*, 544 U.S. 408, 418 (2005). The application of equitable tolling “is rare; it is ‘reserved for extraordinary circumstances far beyond the litigant’s control that prevented timely filing.’” *Socha v. Boughton*, 763 F.3d 674, 683-84 (7th Cir. 2014) (quoting *Nolan v. United States*, 358 F.3d 480, 484 (7th Cir. 2004)).

Mr. Gray has not carried his burden to establish that he is entitled to equitable tolling. A prisoner’s transfer from prison to prison is not an “extraordinary circumstance” that warrants equitable tolling. *See Montenegro v. United States*, 248 F.3d 585, 594 (7th Cir. 2001) (holding that the prisoner’s transfer between prisons did not constitute an “extraordinary circumstance” deserving of equitable tolling), *overruled on other grounds by Ashley v. United States*, 266 F.3d 671 (7th Cir. 2001). Nor is “limited access to the prison law library” a ground for equitable tolling. *Tucker v. Kingston*, 538 F.3d 732, 735 (7th Cir. 2008). In sum, even if Mr. Gray’s transfers and limited access to the law library made the filing of his habeas petition more difficult, the record shows that he still had sufficient time in which to file a timely petition. *See Taylor v. Michael*, 724 F.3d 806, 810, 811-12 (7th Cir. 2013) (“When an inmate, despite roadblocks thrown in his way, has reasonable time remaining to file a habeas petition in a timely manner, the circumstances cannot, as a definitional matter, be said to have prevented timely filing.”).

For these reasons, Mr. Gray is not entitled to equitable tolling. His petition for habeas corpus was filed 108 days after the one-year statute of limitation set forth in 28 U.S.C. § 2244(d)(1)(A), and therefore it must be dismissed as untimely.

D.

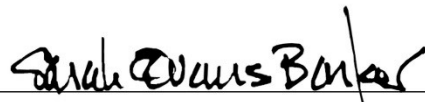
“[H]abeas corpus has its own peculiar set of hurdles a petitioner must clear before his claim is properly presented to the district court.” *Keeney v. Tamayo-Reyes*, 504 U.S. 1, 14 (1992) (O’Connor, J., dissenting) (internal citations omitted). In this case, Mr. Gray has encountered the hurdle produced by the one-year statute of limitations. He has not shown the existence of circumstances permitting him to overcome this hurdle, and hence is not entitled to the relief he seeks. His petition for a writ of habeas corpus is therefore **dismissed**. Judgment consistent with this Entry shall now issue.

II.

Pursuant to Federal Rule of Appellate Procedure 22(b), Rule 11(a) of the Rules Governing § 2254 Proceedings, and 28 U.S.C. § 2253(c), the court finds that Mr. Gray has failed to show that reasonable jurists would find it “debatable whether [this court] was correct in its procedural ruling.” *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). The court therefore **denies** a certificate of appealability.

IT IS SO ORDERED.

Date: 06/16/2015



SARAH EVANS BARKER, JUDGE
United States District Court
Southern District of Indiana

Distribution:

Electronically Registered Counsel

Kunta Gray
No. 973400
Pendleton Correctional Facility
Electronic Service Participant-Court Only

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION**

KUNTA K. GRAY,	)	
	)	
Petitioner,	)	
	)	
vs.	)	1:13-cv-812-SEB-DML
	)	
DUSHAN ZATECKY,	)	
	)	
Respondent.	)	

FINAL JUDGMENT PURSUANT TO FED. R. CIV. PRO. 58

The Court having this day directed the entry of final judgment, the Court now enters FINAL JUDGMENT in favor of the respondent and against the petitioner, Kunta K. Gray.

Mr. Gray's petition for writ of habeas corpus is denied and the action is dismissed with prejudice.

Date: 06/16/2015



SARAH EVANS BARKER, JUDGE
United States District Court
Southern District of Indiana

Distribution:

Electronically Registered Counsel

Kunta Gray
No. 973400
Pendleton Correctional Facility
Electronic Service Participant-Court Only

Original

ORIGINAL

IN THE

SUPREME COURT OF INDIANA

No. _____

[COURT OF APPEALS CAUSE

No. 49A04-1111-PC-623]



KUNTA K. GRAY,

Appellant (Petitioner Below),

v.

STATE OF INDIANA,

Appellee (Respondent Below).

Appeal from the Marion

Superior Court

Criminal Division One

Cause No. 49G01-0012-PC-220679

The Honorable Steven J. Rubick

Magistrate

The Honorable Kurt Eisgruber,

Judge

ORDER

Petition to Transfer is hereby DENIED,
this 8th day of August, 2012.

CHIEF JUSTICE

All Justices concur.

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



ATTORNEYS FOR APPELLANT:

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ANNE MURRAY BURGESS
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ATTORNEYS FOR APPELLEE:

GREGORY F. ZOELLER
Attorney General of Indiana

ELLEN H. MEILAENDER
Deputy Attorney General
Indianapolis, Indiana

**IN THE
COURT OF APPEALS OF INDIANA**

KUNTA K. GRAY,

Appellant-Petitioner,

VS.

STATE OF INDIANA.

Appellee-Respondent.

No. 49A04-1111-PC-623

APPEAL FROM THE MARION SUPERIOR COURT

The Honorable Kurt M. Eisgruber, Judge
The Honorable Steven J. Rubick, Magistrate
Cause No. 49G01-0012-PC-220679

June 19, 2012

MEMORANDUM DECISION - NOT FOR PUBLICATION

NAJAM, Judge

STATEMENT OF THE CASE

Kunta K. Gray appeals the post-conviction court's denial of his petition for post-conviction relief. Gray raises two issues for our review, which we restate as follows:

1. Whether Gray preserved his claim of juror misconduct for post-conviction review; and
2. Whether he was denied the effective assistance of trial counsel.

We affirm.

FACTS AND PROCEDURAL HISTORY

This is the fourth time this court has heard the underlying facts of Gray's convictions. We have previously described those facts as follows:

The evidence most favorable to the judgment is that on November 16, 2000, Gray arranged to purchase a large quantity of marijuana from Greg Jones at an Indianapolis residence. Jones's friend, Avant, was at the house when Gray and an unidentified man arrived to buy the drugs. Jones retrieved a brown trash bag from his vehicle parked outside and then escorted Gray and the other man to the rear of the house, while Avant remained in the front living room area. A few minutes later, the unidentified man returned to the living room, hit Avant in the head with a handgun, and told him to get on the floor, stating, "[T]his is a robbery." Avant heard a number of gunshots from the back area of the home. Upon hearing the shots, the unidentified man stood and ran out of the house. Avant saw Gray stumble from the rear of the house and out the door. As Avant stood in or near the doorway, Gray pointed and fired his handgun at Avant, but missed. Gray and the other man sped away in a vehicle. Jones, who had suffered a number of gunshot wounds, staggered to the front door. Avant called 911 and waited with Jones until emergency personnel arrived. Jones underwent surgery, but died twelve days later from the injuries.

The State charged Gray with felony murder, murder, robbery, attempted murder, unlawful possession of a firearm by a serious violent felon ("possession by a SVF"), and carrying a handgun without a license as a C felony. The possession by a SVF count alleged as the prior violent felony a February 1997 B felony dealing in cocaine conviction. During trial, Gray stipulated that he had been convicted of a serious violent felony within the meaning of IC 35-47-4-5.

Gray v. State, 786 N.E.2d 804, 805 (Ind. Ct. App. 2003) (“Gray I”) (footnote and citation to the record omitted; alteration original), trans. denied.

We have further described the subsequent procedural history:

At the conclusion of trial, a jury found Gray guilty on all charges, and the trial court entered convictions for murder, attempted murder, and possession of a firearm by a serious violent felon. Gray was also determined to be an habitual offender. The court imposed an executed sentence of ninety years—sixty years for murder, to run concurrent[with] a forty-year sentence for attempted murder and a twenty-year sentence for possession of a firearm by a serious violent felon, which was enhanced by thirty years as a result of the habitual offender finding. We affirmed Gray’s conviction and sentence in the foregoing direct appeal [in Gray I].

On November 11, 2003, Gray filed a petition for post-conviction relief (PCR). The trial court denied the petition and Gray appealed. We reversed the denial of Gray’s PCR petition, overturned his convictions, and ordered a new trial. See Gray v. State, 841 N.E.2d 1210 (Ind. Ct. App. 2006) [(“Gray II”), trans. denied]. This decision was based upon our conclusion that Gray received ineffective assistance of appellate counsel for counsel’s failure to appeal the trial court’s denial of Gray’s request for a bifurcated trial (i.e., trying separately the charge that Gray was a serious violent felon).

In August 2006, a second jury trial was conducted and Gray was again found guilty on all counts. He was sentenced to thirty years for attempted murder, ten years for carrying a firearm by a serious violent felon, and four years for carrying a handgun without a license, with those sentences to run concurrently with one another and consecutive to the fifty-five-year sentence imposed for the murder conviction. Thus, Gray received an eighty-five-year executed sentence.

Gray v. State, 871 N.E.2d 408, 411-12 (Ind. Ct. App. 2007) (“Gray III”) (footnote omitted), trans. denied. In Gray III, we affirmed Gray’s convictions and sentence following his second trial.

On July 29, 2008, Gray filed his petition for post-conviction relief, which he amended in June of 2010. The post-conviction court held an evidentiary hearing on

March 29, 2011. On October 24, the court entered the following findings of fact and conclusions of law denying Gray's petition:

FINDINGS OF FACT

* * *

5. Defendant's lead attorney, Stephen Gray, testified that he and co-counsel Todd Ess collaborated on the handling of Defendant's case. Gray testified that he has been a lawyer since 1982, he primarily limits his practice to criminal defense, and he has defended other murder cases in the past.

Mr. Gray stated that he and Mr. Ess jointly reviewed the jury questionnaires before beginning voir dire. Gray stated that it is his personal policy to always peremptorily challenge potential jurors who respond on the juror questionnaires that they have been a victim of a crime because, "When somebody indicates on their questionnaire that they feel like they've been the victim of a crime and they are so passionate about it or so concerned about it that they indicated it on their questionnaire, that to me triggers a flag." Mr. Gray also opined that virtually everyone in our society has at some time in their lives been the victim of crime but less than 10% of people actually mark that they have been victims on juror questionnaires.

Gray also testified regarding his handling of the trial testimony of State's witness, Andrew White. Mr. Gray indicated that White essentially testified that[,] while he and Defendant were being held in a holding cell on completely unrelated matters, Defendant admitted to his involvement in the crimes in this case. Gray stated that it was "absolutely critical" to discredit White's testimony and the original strategy was to use the times noted on a printout of the Chronological Case Summary (CCS) in White's case to attempt to show that White could not have been present with Defendant when the admissions supposedly occurred. Gray noted that his attempts to introduce the CCS were rebuffed by the [S]tate's objection. Consequently, Gray's only recourse to establish witness bias was by cross-examining White regarding the fact that Defendant had allegedly previously attempted to rob him. Gray acknowledged that he was "tremendously troubled" by introducing this evidence, but he reiterated that "I just felt like impeaching Mr. White was absolutely critical to present a defense . . . and when the document was not admitted, I felt like I had to show some kind of bias or motive on his part for testifying the way that he did testify."

6. Attorney Todd Ess also testified. Ess stated that he remembers the voir dire as it relates to juror Erin Bower, and that he remembers that she had a prosthetic arm. Ess testified that Erin Bower did

not check the "victim[]" box on the juror questionnaire and that[,] after the trial, he learned that Erin Bower had previously been injured in a highly publicized bomb explosion. Ess stated that if he had known her history he would have moved to exclude her for cause. Although he could not identify what legal cause existed for a challenge, Ess also said that he would have peremptorily struck her from the jury.

7. Ms. Erin Bower was called to testify by the Defendant. Ms. Bower testified that she was a juror on Defendant's second trial. Ms. Bower indic[a]ted that she was injured when she was five years[]old, as the result of an incident where a pipe bomb detonated near her while she was shopping with her parents at a K-mart in Indianapolis. She stated that she has no real memories of the actual explosion, but that she lost an eye and part of an arm as a result of the explosion. Ms. Bower acknowledged that the incident attracted widespread media attention, but most of what she knows about it was told to her by somebody else. Despite her injuries, Ms. Bower testified she has had a fairly normal life. She graduated from school, ultimately attaining a doctora[l] degree in physical therapy.

Ms. Bower stated that she did not check the "victim" box on the juror questionnaire[] because "I don't consider myself a victim. It was an accident. I was in the wrong place at the wrong time. I wasn't sought out for it to be me. It just so happened I was there, and[,] unfortunately, it happened. I've moved on. I don't think about it. That's why I checked 'no' on that questionnaire, I would check no again, if this didn't happen." Ms. Bower also testified that prior to the incident neither she nor her family had met the suspected bomb-maker, but she has been told that the bomber committed suicide shortly after the incident. Ms. Bower also stated that there was an investigation of the incident, but to the best of her knowledge, no one was ever arrested and she never had to testify in court.

Ms. Bower specifically testified that, prior to the trial in this case, she had no idea what type of jury she might be called to serve on, and that she had never met Defendant or any of the witnesses in this case. She further testified that she did not know the murder victim or anyone who knew him. Finally, she indicated that her prior experiences related to the bombing did not play any part in her willingness to serve or in her deliberations as a juror.

CONCLUSIONS OF LAW

2. Juror Misconduct

Defendant's first argument in support of his petition for post conviction relief is that he should receive a new trial because of the alleged misconduct of one of the jurors at his second trial. . . .

Here, Defendant claims that Juror Erin Bower committed gross misconduct[] because he believes that she lied regarding her status as a crime victim. Defendant argues that this probably harmed him because he was denied the opportunity to challenge Ms. Bower for cause. Defendant's assessment of both his burden and his assessment of the evidence on point is wrong.

Contrary to Defendant's claims, there is no "specific substantial evidence" that shows that Ms. Bower was biased, nor any evidence that Defendant was possibly harmed. Ms. Bower was a highly intelligent, poised and credible witness. The Court accepts her testimony that she did not list herself as a victim on the questionnaire because she simply does not see herself as a victim[,] rather[,] she considers that her disabilities are the result of an accident. This is entirely consistent with her description of the events that resulted in her injury; the way that her life has moved beyond the tragedy; and consistent with the way that she answered questions during voir dire. Attempting to mischaracterize either her testimony or her subjective belief in the circumstances of her life is a gross mistreatment of this witness.

Although the fact that the events surrounding Ms. Bower's injuries were highly publicized [that] does not change the analysis. The point is not what Ms. Bower could have written on the questionnaire, but what she did and why. Ms. Bower's explanation for her actions, coupled with her testimony that she had no knowledge or connection with anyone associated with Defendant's case, leads to the inescapable conclusion that she was not motivated by any bias against Defendant. Ms. Bower's testimony regarding her prior lack of knowledge of any of the parties or witnesses, and her testimony that her disabilities played no part in her deliberations as a juror, clearly establish that Defendant suffered no cognizable legal harm by the way that Ms. Bower answered her jury questionnaire.

3. **Ineffective Assistance of Trial Counsel**

Defendant next claims that his trial counsel was ineffective because of the manner in which he cross-examined witness Andrew White. Specifically, Defendant claims that he was irreparably harmed by trial counsel's decision to use certain evidence of prior uncharged crimes. . . .

* * *

Here, Defendant focuses on Attorney Gray's decision to elicit testimony from witness Andrew White regarding an alleged prior uncharged robbery. The evidence presented at the evidentiary hearing clearly establish[es] that the admission of this evidence was not the result of negligence; rather, it was a carefully considered strategic decision that was made with full awareness of the risks involved. Mr. Gray testified that he was troubled by the prospect of using the evidence, but he considered it to be vital to the defense to establish that White had a long-standing personal animus against Defendant. Trial counsel is an experienced criminal defense attorney who was in the best position to evaluate the impact the evidence was having on the jury. Gray made a strategic decision to discuss this uncharged crime in the context of establishing the witness's personal bias, which was not an impermissible trial tactic in the face of Gray's assessment of its strategic importance. White's credibility was a central issue at trial and Gray's efforts to undermine that credibility were reasonable. Accordingly, Defendant has failed to meet his burden of proof to establish ineffective assistance of counsel.

Appellant's App. at 162-71 (footnotes and citations to the record omitted). This appeal ensued.

DISCUSSION AND DECISION

Standard of Review

Gray appeals the post-conviction court's denial of his petition for post-conviction relief. As we have explained:

[The petitioner] bore the burden of establishing the grounds for post-conviction relief by a preponderance of the evidence. See Ind. Post-Conviction Rule 1(5); Timberlake v. State, 753 N.E.2d 591, 597 (Ind. 2001). Post-conviction procedures do not afford a petitioner with a super-appeal, and not all issues are available. Timberlake, 753 N.E.2d at 597.

Rather, subsequent collateral challenges to convictions must be based on grounds enumerated in the post-conviction rules. Id. If an issue was known and available, but not raised on direct appeal, it is waived. Id. If it was raised on appeal, but decided adversely, it is res judicata. Id.

In reviewing the judgment of a post-conviction court, appellate courts consider only the evidence and reasonable inferences supporting the post-conviction court's judgment. Hall v. State, 849 N.E.2d 466, 468 (Ind. 2006). The post-conviction court is the sole judge of the evidence and the credibility of the witnesses. Id. at 468-69. Because he is now appealing from a negative judgment, to the extent his appeal turns on factual issues [the petitioner] must convince this court that the evidence as a whole leads unerringly and unmistakably to a decision opposite that reached by the post-conviction court. See Timberlake, 753 N.E.2d at 597. We will disturb the decision only if the evidence is without conflict and leads only to a conclusion contrary to the result of the post-conviction court. Id.

Lindsey v. State, 888 N.E.2d 319, 322 (Ind. Ct. App. 2008), trans. denied. Further: “[a] defendant in a post-conviction proceeding may allege a claim of fundamental error only when asserting either (1) deprivation of the Sixth Amendment right to effective assistance of counsel, or (2) an issue demonstrably unavailable to the petitioner at the time of his or her trial and direct appeal.” Id. at 325 (quotations and alterations omitted); see also State v. Hernandez, 910 N.E.2d 213, 216 (Ind. 2009) (same).

Gray argues that the post-conviction court erred for two reasons. First, Gray argues that Juror Bower's alleged misconduct denied him a fair and impartial jury. And, second, he asserts that he was denied the effective assistance of trial counsel. We address each argument in turn.

Issue One: Juror Misconduct

Gary first contends that he was denied his right to a fair and impartial jury when, as he characterizes it, Juror Bower “lied” on her voir dire questionnaire. See Appellant's App. at 168. The State responds that this issue—to the extent it has any merit—was

available to Gray on his direct appeal in Gray III and, therefore, it is not available as a free-standing claim of fundamental error in Gray's post-conviction petition. See Lindsey, 888 N.E.2d at 325. We agree with the State.

This issue was available to Gray at the time of his trial and direct appeal. Juror Bower's prosthetic device was readily apparent to Gray's trial counsel during voir dire and, when asked about her interest in physical therapy, Gray answered that she had been involved in an accident when she was younger. Gray's attorneys did not follow up with further questions, even though, at the post-conviction evidentiary hearing, Attorney Ess testified that Juror Bower's prosthetic device raised a "red flag." Post-Conviction Transcript at 23. If this were an issue worth exploring, Gray's attorneys had their opportunity.

Nonetheless, in his reply brief Gray asserts that this issue was "demonstrably unavailable" before the post-conviction proceedings because his counsel "did not learn the juror had actually been the victim of a pipe bombing until after the post-conviction proceedings had begun." Reply Br. at 2. But learning after a direct appeal that a juror did not consider herself a victim but only that she was "in the wrong place at the wrong time" is not on par with, say, newly discovered DNA evidence or new advancements in a relevant field of science.¹ See, e.g., Bunch v. State, 964 N.E.2d 274, 283-97 (Ind. Ct. App. 2012) (discussing post-conviction advancements in a field of science relevant to the defendant's convictions), not yet certified; Pinkins v. State, 799 N.E.2d 1079, 1092 (Ind.

¹ While we do not reach the merits of this issue, we note that Gray's attorney testified to the post-conviction court that he was not concerned with excluding actual victims of crimes but only with those who self-identified as victims. Based on his own testimony, Gray's attorney would not have challenged Juror Bower.

Ct. App. 2003) (holding that a post-conviction petitioner may be entitled to a new trial based on a subsequent, favorable DNA test), trans. denied. “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.” Taylor v. State, 840 N.E.2d 324, 330 (Ind. 2006). Issues that are based on “matters dealing with the original trial that were known and available” but not raised may not be raised for the first time in a petition for post-conviction relief. Id. at 331. Gray’s attorneys knew of and had available to them the opportunity to inquire into the supposed “red flag” raised by Juror Bower’s childhood injuries. Post-Conviction Transcript at 23. Thus, this issue is waived.

Gray further complains about the limited timeframe of voir dire and the need to cover several topics in that limited timeframe. We do not see how this entitles Gray to raise an otherwise available issue for the first time in his petition for post-conviction relief. And Gray’s dissatisfaction with the limited timeframe of voir dire is especially dubious when his own attorneys failed to investigate a self-proclaimed and readily apparent “red flag.” Id.

Finally, Gray argues that he is entitled to raise this issue as a free-standing claim because the Indiana Supreme Court has addressed free-standing claims of juror misconduct in prior post-conviction appeals. But the only case Gray cites in support of this assertion is State v. Dye, 784 N.E.2d 469 (Ind. 2003). In Dye, a death-penalty case, our supreme court addressed the petitioner’s claim of juror misconduct when the juror, among other things, stated during voir dire that she would vote to impose the death penalty automatically upon a finding of guilt. 784 N.E.2d at 476. But the court

concluded that the petitioner was entitled to relief because his counsel “failed to assert a challenge for cause, [which] omission constituted substandard performance with resulting prejudice.” *Id.* That is, the court’s holding was based on the petitioner’s claim of ineffective assistance of counsel, not on a free-standing claim of juror misconduct.

Gray makes no similar claim in his petition for post-conviction relief. While he does claim ineffective assistance of counsel, which we address below, that claim is unrelated to his free-standing claim of juror misconduct. Because his juror misconduct claim is independent of his claim of ineffective counsel and was otherwise available to him during his trial and direct appeal, Gray may not use the post-conviction process to raise this claim for the first time. *See Lindsey*, 888 N.E.2d at 325. For thoroughness, however, if we were to reach the merits of the juror misconduct claim we would agree entirely with the post-conviction court’s assessment of that claim.

Issue Two: Ineffective Assistance of Counsel

Gray also contends that he was denied the effective assistance of trial counsel based on his counsel’s decision to impeach a witness for the State by introducing evidence adverse to Gray. A claim of ineffective assistance of counsel must satisfy two components. *Strickland v. Washington*, 466 U.S. 668 (1984). First, the defendant must show deficient performance: representation that fell below an objective standard of reasonableness, committing errors so serious that the defendant did not have the “counsel” guaranteed by the Sixth Amendment. *Id.* at 687-88. Second, the defendant must show prejudice: a reasonable probability (i.e., a probability sufficient to undermine

confidence in the outcome) that, but for counsel's errors, the result of the proceeding would have been different. Id. at 694.

The post-conviction court found that Gray's trial counsel made a strategic decision to introduce adverse evidence in order to impeach the State's witness. "[T]he nature and extent of cross-examination is a matter of strategy delegated to trial counsel." Robles v. State, 612 N.E.2d 196, 198 (Ind. Ct. App. 1993). "Deliberate choices by some attorneys for some tactical or strategic reason do not establish ineffective assistance of counsel even though such choices may be subject to criticism or the choices ultimately prove to be detrimental to the defendant." Id. Indeed, "[w]e recognize that even the finest, most experienced criminal defense attorneys may not agree on the ideal strategy or most effective way to represent a client and therefore . . . we will assume that counsel performed adequately, and [we] will defer to counsel's strategic and tactical decisions." Mallory v. State, 954 N.E.2d 933, 936 (Ind. Ct. App. 2011) (citing Smith v. State, 765 N.E.2d 578, 585 (Ind. 2002)).

Here, Gray contends that his trial counsel's impeachment strategy was so unreasonable that it denied Gray his constitutional right to effective counsel. We cannot agree. As the post-conviction court found, Gray's trial counsel reluctantly chose that course of cross-examination only after he was denied his preferred course when the trial court excluded certain evidence. While not his preferred course of action, Gray's counsel "carefully considered [the] strategic decision that was made with full awareness of the risks involved." Appellant's App. at 171. Indeed, Gray's counsel "considered it to be vital to the defense to establish that White had a long-standing personal animus against"

Gray. Id. Such “[d]eliberate choices . . . for some tactical or strategic reason do not establish ineffective assistance of counsel” Robles, 612 N.E.2d at 198.

The post-conviction court’s findings of fact and conclusions of law are supported by the record, namely, the testimony of Gray’s trial counsel. Gray’s argument on appeal amounts to a request that we simply reweigh that testimony in a manner more favorable to Gray. We will not do so. See Lindsey, 888 N.E.2d at 322. And neither is his trial counsel’s deliberate strategy here on par with the multiple references made by the court and the State in Gray’s first trial to him being a “serious violent felon,” which we held in Gray II to be grounds for a new trial. 841 N.E.2d at 1219-20. The post-conviction court’s judgment on this issue is not clearly erroneous and Gray has not shown that the evidence leads “unerringly and unmistakably to a decision opposite that reached by the post-conviction court.” Lindsey, 888 N.E.2d at 322.

Conclusion

In sum, we hold that Gray procedurally defaulted on his juror misconduct claim.

We also hold that he has not met his burden of showing that his trial counsel’s strategy was unreasonable. Thus, we affirm the post-conviction court’s judgment.

Affirmed.

RILEY, J., and DARDEN, J., concur.

STATE OF INDIANA)
)
COUNTY OF MARION)

IN THE MARION COUNTY SUPERIOR
COURT, CRIMINAL DIVISION
CAUSE NO. 49G01-0012-PC-220679

STATE OF INDIANA,)

Plaintiff,)

v.)

KUNTA GRAY,)

Defendant.)

FILED

(38) OCT 24 2011

Elizabeth A. White
CLERK OF THE MARION CIRCUIT COURT

**FINDINGS OF FACT AND CONCLUSIONS
OF LAW DENYING POST-CONVICTION RELIEF**

The Court, having heard evidence and argument on the pending Petition for Post-Conviction Relief, and having reviewed the record herein and being duly advised in the premises, now FINDS:

FINDINGS OF FACT

1. This case began on December 6, 2000 when the State formally charged the Defendant with felony murder, murder, robbery, attempted murder, unlawful possession of a firearm by a serious violent felon, and carrying a handgun without a license. After a jury trial, Defendant was found guilty on all charges and the Court imposed an executed sentence of ninety years. *Gray v. State*, 786 N.E.2d 804 (Ind.Ct.App.2003).

Thereafter, on November 11, 2003, Defendant filed a petition for post-conviction relief which was denied. The Court of Appeals reversed the denial of the original post-conviction petition, overturned Defendant's convictions and ordered a new trial. *Gray v. State*, 841 N.E.2d 1210 (Ind.Ct.App.2006).

On August 10, 2006, after a second jury trial, Defendant was again found guilty on all counts and received an eighty-five-year executed sentence. Defendant appealed this judgment and sentence but the Court of Appeals affirmed both. *Gray v. State* 871 N.E.2d 408 (Ind.App.,2007)

2. The facts underlying the convictions, as found by the Indiana Court of Appeals are as follows:

The evidence most favorable to the judgment is that on November 16, 2000, Gray arranged to purchase a large quantity of marijuana from Greg Jones at an Indianapolis residence. Jones's friend, Avant, was at the house when Gray and an unidentified man arrived to buy the drugs. Jones retrieved a brown trash bag from his vehicle parked outside and then escorted Gray and the other man to the rear of the house, while Avant remained in the front living room area. A few minutes later, the unidentified man returned to the living room, hit Avant in the head with a handgun, and told him to get on the floor, stating, "[T]his is a robbery." Avant heard a number of gunshots from the back area of the home. Upon hearing the shots, the unidentified man stood and ran out of the house. Avant saw Gray stumble from the rear of the house and out the door. As Avant stood in or near the doorway, Gray pointed and fired his handgun at Avant, but missed. Gray and the other man sped away in a vehicle. Jones, who had suffered a number of gunshot wounds, staggered to the front door. Avant called 911 and waited with Jones until emergency personnel arrived. Jones underwent surgery, but died twelve days later from the injuries.

Gray v. State 871 N.E.2d 408, 411 (Ind.App.,2007) (Citing *Gray v. State*, 786 N.E.2d 804, 805 (Ind.Ct.App.2003))

3. On July 29, 2008, Defendant filed a pro se Petition for Post-Conviction Relief which was later amended by counsel on June 21, 2010 and June 22, 2010. In its final version, Defendant's petition alleges as grounds for relief: 1) juror misconduct; and 2) ineffective assistance of trial counsel.

4. An evidentiary hearing was held on March 29, 2011, where Defendant presented testimony from trial counsel Steven Gray and Todd Ess. Defendant also presented testimony from Erin Bower, who was a member of the venire at his second

trial, and the testimony of Courtney Benson-Kooy a law clerk with the Office of the State Public Defender. Defendant also admitted the trial record, the appellate briefs and the transcript of the voir dire portion of his trial.

5. Defendant's lead attorney, Stephen Gray, testified that he and co-counsel Todd Ess collaborated on the handling of Defendant's case. Gray testified that he has been a lawyer since 1982, he primarily limits his practice to criminal defense, and he has defended other murder cases in the past.

Mr. Gray stated that he and Mr. Ess jointly reviewed the jury questionnaires before beginning voir dire. Gray stated that it is his personal policy to always peremptorily challenge potential jurors who respond on the juror questionnaires that they have been a victim of a crime because, "When somebody indicates on their questionnaire that they feel like they've been the victim of a crime and they are so passionate about it or so concerned about it that they indicated it on their questionnaire, that to me triggers a flag." Transcript of March 29, 2011 Evidentiary Hearing p. 18. (Hereinafter cited as "3/29 Trans.") Mr. Gray also opined that virtually everyone in our society has at some time in their lives been the victim of crime but less than 10 % of people actually mark that they have been victims on juror questionnaires. *Id.*

Gray also testified regarding his handling of the trial testimony of State's witness, Andrew White. Mr. Gray indicated that White essentially testified that while he and Defendant were being held in a holding cell on completely unrelated matters, Defendant admitted to his involvement in the crimes in this case. Gray stated that it was "absolutely critical" to discredit White's testimony (3/14 Tr. p. 15) and the original strategy was to use the times noted on a printout of the Chronological Case Summary (CCS) in White's

case to attempt to show that White could not have been present with Defendant when the admissions supposedly occurred. Gray noted that his attempts to introduce the CCS were rebuffed by the state's objection. Consequently, Gray's only recourse to establish witness bias was by cross-examining White regarding the fact that Defendant had allegedly previously attempted to rob him. Gray acknowledged that he was "tremendously troubled" (3/14 Tr. p. 14) by introducing this evidence, but he reiterated that "I just felt like impeaching Mr. White was absolutely critical to present a defense for ... and when the document was not admitted, I felt like I had to show some kind of bias or motive on his part for testifying the way that he did testify." (3/14 Tr. pp. 15-16)

6. Attorney Todd Ess also testified. Ess stated that he remembers the voir dire as it relates to juror Erin Bower, and that he remembers that she had a prosthetic arm. Ess testified that Erin Bower did not check the "victim" box on the juror questionnaire and that after the trial, he learned that Erin Bower had previously been injured in a highly publicized bomb explosion. Ess stated that if he had known her history he would have moved to exclude her for cause. Although he could not identify what legal cause existed for a challenge, Ess also said that he would have peremptorily struck her from the jury.

7. Ms. Erin Bower¹ was called to testify by the Defendant. Ms. Bower testified that she was a juror on Defendant's second trial. Ms. Bower indicated that she was injured when she was five years-old, as the result of an incident where a pipe bomb detonated near her while she was shopping with her parents at a K-mart in Indianapolis. She stated that she has no real memories of the actual explosion, but that she lost an eye

¹ The Court notes that Ms. Bower subsequently married and changed her last name to Patterson, but for the sake of clarity and consistency, the Court will continue to use her original name. In this regard, the Court also notes that in the transcript, Ms. Bower is referred to as "Ms. Bowers" which is apparently an error and the Court will use "Bower."

and part of an arm as a result of the explosion. Ms. Bower acknowledged that the incident attracted widespread media attention, but most of what she knows about it was told to her by somebody else. Despite her injuries, Ms. Bower testified she has had a fairly normal life. She graduated from school, ultimately attaining a doctorate degree in physical therapy.

Ms. Bower stated that she did not check the "victim" box on the juror questionnaire, because "I don't consider myself a victim. It was an accident. I was in the wrong place at the wrong time. I wasn't sought out for it to be me. It just so happened I was there, and unfortunately, it happened. I've moved on. I don't think about it. That's why I checked "no" on that questionnaire, I would check no again, if this didn't happen." (3/29 Tr. p.43) Ms. Bower also testified that prior to the incident neither she nor her family had met the suspected bomb-maker, but she has been told that the bomber committed suicide shortly after the incident. Ms. Bower also stated that there was an investigation of the incident, but to the best of her knowledge, no one was ever arrested and she never had to testify in court.

Ms. Bower specifically testified that, prior to the trial in this case, she had no idea what type of jury she might be called to serve on, and that she had never met Defendant or any of the witnesses in this case. She further testified that she did not know the murder victim or anyone who knew him. Finally, she indicated that her prior experiences related to the bombing did not play any part in her willingness to serve or in her deliberations as a juror.

8. Defendant also called Courtney Benson-Kooy, who is a law clerk with the Office of the State Public Defender. Ms Benson-Kooy testified that she contacted Erin

Bower via the telephone, and spoke with her regarding her jury service and her answers to the juror questionnaire. Ms Benson-Kooy stated that Ms. Bower was forthright and cooperative, but when she answered a direct question about her answer as to whether she listed herself as a victim, Ms Benson-Kooy subjectively believed that Ms. Bower stumbled with her answer.

9. At the State's request, the Court took judicial notice of its file in this matter.

10. For the reasons discussed below, the Court finds that the facts are with the State and against Defendant.

CONCLUSIONS OF LAW

1. **Standard Of Review.**

Post-conviction relief is a collateral attack on the validity of a criminal conviction, and the petitioner carries the burden of proof. *Timberlake v. State*, 753 N.E.2d 591, 597 (Ind. 2001). This collateral challenge to the conviction is limited to the grounds enumerated in the post-conviction rules. In order to grant relief, the Court must find by a preponderance of the evidence that Defendant is entitled to relief under the specific provisions of the post-conviction rules.

2. **Juror Misconduct**

Defendant's first argument in support of his petition for post conviction relief is that he should receive a new trial because of the alleged misconduct of one of the jurors at his second trial. Generally, it is misconduct for a juror to make false statements in response to questions on *voir dire* examination, and such is held to constitute reversible error because it impairs the right to challenge the juror, either peremptorily or for cause.

Fuquay v. State, 583 N.E.2d 154, 157 (Ind.Ct.App.1991). Proof that a juror was biased against the defendant or lied on *voir dire* entitles the defendant to a new trial. *Lopez v. State*, 527 N.E.2d 1119, 1130 (Ind.1988). In order to warrant a new trial, there must be a showing that the misconduct was gross and that the conduct probably harmed the defendant. *Id.* In order to meet the burden of probable harm, a post conviction petitioner must make a "specific, substantial evidence showing" that a juror "was possibly biased," and that this bias "... probably harmed the defendant." *Dickenson v. State*, 732 N.E.2d 238 (Ind App.2000), *trans. denied*; *Roberts v. State*, 894 N.E.2d 1018, 1022 (Ind.App.2008). The issue of juror misconduct is a matter within the trial court's discretion. *Id.* See also, *Warner v. State* 773 N.E.2d 239, 246 (Ind.,2002).

Here, Defendant claims that Juror Erin Bower committed gross misconduct, because he believes that she lied regarding her status as a crime victim. Defendant argues that this probably harmed him because he was denied the opportunity to challenge Ms. Bower for cause. Defendant's assessment of both his burden and his assessment of the evidence on point is wrong.

Contrary to Defendant's claims, there is no "specific substantial evidence" that shows that Ms. Bower was biased, nor any evidence that Defendant was possibly harmed. Ms. Bower was a highly intelligent, poised and credible witness. The Court accepts her testimony that she did not list herself as a victim on the questionnaire because she simply does not see herself as a victim, rather she considers that her disabilities are the result of an accident. This is entirely consistent with her description of the events that resulted in her injury; the way that her life has moved beyond the tragedy; and consistent with the

way that she answered questions during *voir dire*.² Attempting to mischaracterize either her testimony or her subjective belief in the circumstances of her life is a gross mistreatment of this witness.

Although the fact that the events surrounding Ms. Bower's injuries were highly publicized does not change the analysis. The point is not what Ms. Bower could have written on the questionnaire, but what she did and why. Ms. Bower's explanation for her actions, coupled with her testimony that she had no knowledge or connection with anyone associated with Defendant's case, leads to the inescapable conclusion that she was not motivated by any bias against Defendant. Ms. Bower's testimony regarding her prior lack of knowledge of any of the parties or witnesses, and her testimony that her disabilities played no part in her deliberations as a juror, clearly establish that Defendant suffered no cognizable legal harm by the way that Ms. Bower answered her jury questionnaire. *See e.g. Dickenson supra; Roberts, supra.*

3. *Ineffective Assistance of Trial Counsel*

Defendant next claims that his trial counsel was ineffective because of the manner in which he cross-examined witness Andrew White. Specifically, Defendant claims that he was irreparably harmed by trial counsel's decision to use certain evidence of prior uncharged crimes. In order to prevail on his post-conviction claim that his Sixth Amendment right to effective assistance of counsel was violated, Defendant must establish the two components from *Strickland v. Washington*, 466 U.S. 668 (1984).

² During *voir dire*, the following exchange occurred:

Mr. T. Ess: Okay. Ms. Bowers, you're a graduate student?

Ms. E. Bowers: Uh-huh.

Mr. T. Ess: What are you studying?

Ms. E. Bowers: Physical Therapy.

Mr. T. Ess: Okay. Why does that interest you?

Ms. E. Bowers: Because I was in an accident when I was younger and then went through physical therapy as well.

Wesley v. State, 788 N.E.2d 1247, 1252 (Ind. 2003) (citing *Williams v. Taylor*, 529 U.S. 362, 390 (2000) (parallel citations omitted)); *Wentz v. State*, 766 N.E.2d 351, 360 (Ind. 2002).

First, Defendant must show defense counsel's performance was deficient, which "requires 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.* (citing *Strickland*, 466 U.S. at 687-88); *Mays v. State*, 719 N.E.2d 1263, 1265 (Ind. Ct. App. 1999); *Smith v. State*, 765 N.E.2d 578, 585 (Ind. 2002). This objective standard of reasonableness is based on "prevailing professional norms." *Id.*

Second, Defendant must show the deficient performance prejudiced the defense. *Strickland*, 466 U.S. at 687; *Wentz*, 766 N.E.2d at 360; *Douglas v. State*, 800 N.E.2d 599, 607 (Ind. Ct. App. 2003), *trans. den.* Prejudice is proven by showing counsel's errors were so serious as to deprive the defendant of a fair trial, a failing so severe as to render the result unreliable. *Wentz*, 766 N.E.2d at 360. In other words, Defendant must show there is a reasonable probability that, but for counsel's unprofessional errors, the result of his trial would be different. *Id.*; *Bahm v. State*, 789 N.E.2d 50, 58 (Ind. App. 2003), *trans. den.*; *Steele v. State*, 536 N.E.2d 292, 293 (Ind. 1989). A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Strickland*, 466 U.S. at 694; *Bahm*, 789 N.E.2d at 58. Furthermore, the two prongs are separate and independent inquiries, and if a court can "dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice . . . that course should be followed." *Timberlake*, 753 N.E.2d at 603

(citing *Williams v. State*, 706 N.E.2d 149, 154 (Ind. 1999) (quoting *Strickland*, 466 U.S. at 697)).

It is well settled that the nature and extent of cross-examination is a matter of strategy delegated to trial counsel. *Osborne v. State*, 481 N.E.2d 376, 380 (Ind.1985); *Robles v. State*, 612 N.E.2d 196, 198 (Ind.Ct.App.1993). Deliberate choices made by an attorney for some tactical or strategic reason do not establish ineffective assistance of counsel, even though such choices may be subject to criticism or the choices ultimately prove to be detrimental to the defendant. *Berry v. State* 483 N.E.2d 1369 (Ind. 985); *Robles v. State*, 612 N.E.2d 196, 198 (Ind.App.,1993).

Here, Defendant focuses on Attorney Gray's decision to elicit testimony from witness Andrew White regarding an alleged prior uncharged robbery. The evidence presented at the evidentiary hearing clearly establish that the admission of this evidence was not the result of negligence; rather, it was a carefully considered strategic decision that was made with full awareness of the risks involved. Mr. Gray testified that he was troubled by the prospect of using the evidence, but he considered it to be vital to the defense to establish that White had a long-standing personal animus against Defendant. Trial counsel is an experienced criminal defense attorney who was in the best position to evaluate the impact the evidence was having on the jury. Gray made a strategic decision to discuss this uncharged crime in the context of establishing the witness's personal bias, which was not an impermissible trial tactic in the face of Gray's assessment of its strategic importance. White's credibility was a central issue at trial and Gray's efforts to undermine that credibility were reasonable. Accordingly, Defendant has failed to meet his burden of proof to establish ineffective assistance of counsel.

4. Conclusion

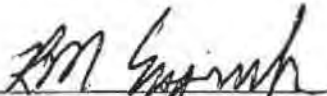
Post-conviction relief is a collateral attack on the validity of a criminal conviction, and the petitioner carries the burden of proof. *Timberlake v. State*, 753 N.E.2d 591, 597 (Ind. 2001). Defendant has failed to carry his burden. The law is with the State and against Defendant and there is no basis upon which to grant relief. As such, the pending Petition for Post-Conviction Relief is DENIED in its entirety.

RECOMMENDED FOR APPROVAL THIS 21 DAY OF OCTOBER, 2011.



STEVEN J. RUBICK
MAGISTRATE
MARION COUNTY SUPERIOR COURT
CRIMINAL DIVISION

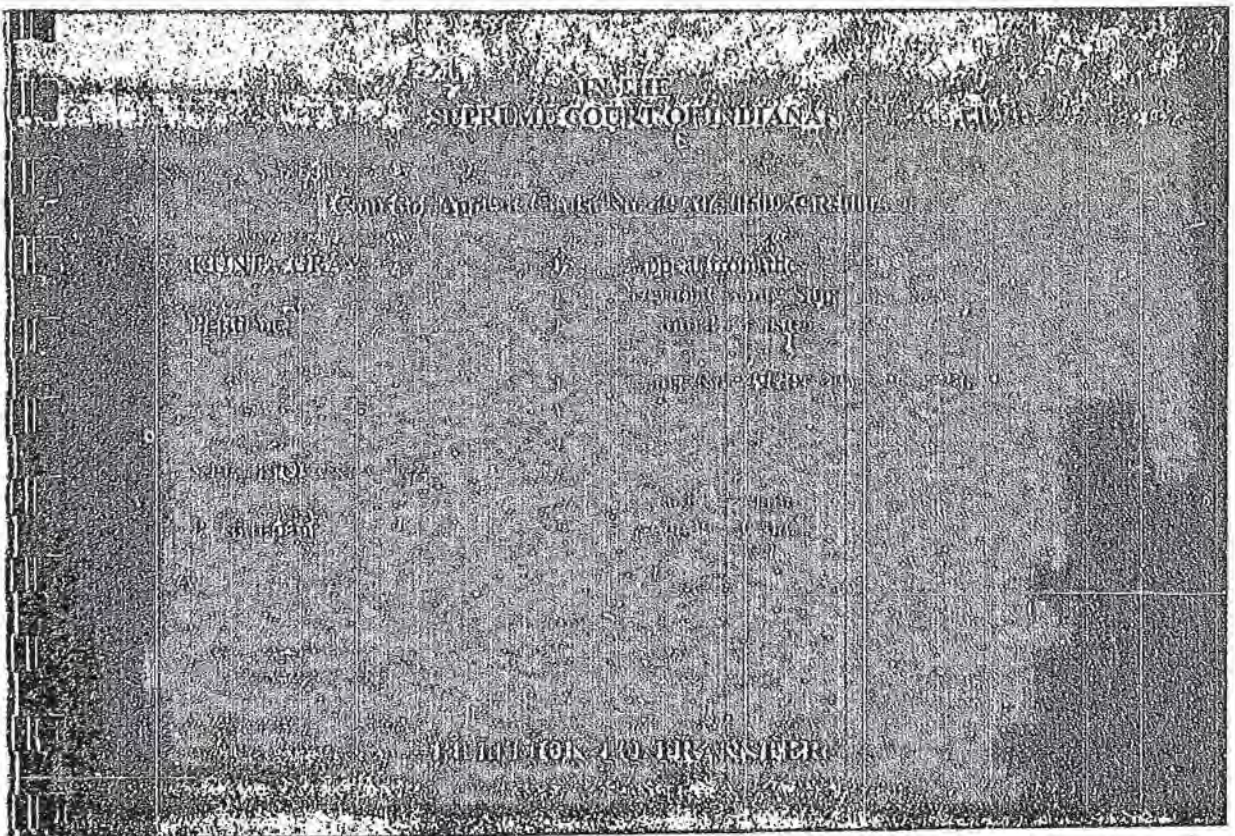
APPROVED AND ORDERED THIS 24 DAY OF OCTOBER, 2011.



KURT M. EISGRUBER
JUDGE
MARION COUNTY SUPERIOR COURT
CRIMINAL DIVISION, ROOM 1

DISTRIBUTION:

File
State
State Public Defender
Defendant



ORDER

Petition to Transfer is hereby DENIED,
this 4th day of October, 2007.

CHIEF JUSTICE

All Justices concur.



FOR PUBLICATION

ATTORNEY FOR APPELLANT:

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ATTORNEYS FOR APPELLEE:

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Deputy Attorney General
Indianapolis, Indiana

IN THE COURT OF APPEALS OF INDIANA

KUNTA GRAY,

Appellant-Defendant,

vs.

STATE OF INDIANA,

Appellee-Plaintiff.

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No. 49A04-0609-CR-518

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Priscilla Fossum, Judge Pro Tempore
Cause No. 49G01-0012-PC-220679

August 10, 2007

OPINION - FOR PUBLICATION

FRIEDLANDER, Judge

Appendix H - 43a

APP 141

Kunta Gray appeals his conviction of Murder,¹ a felony, Attempted Murder,² a class A felony, Possession of a Firearm by a Serious Violent Felon,³ a class B felony, and Carrying a Handgun Without a License,⁴ a class C felony. Gray presents the following restated issues for review:

1. Did the trial court err in refusing to admit into evidence the certified case chronology involving another case in which a witness who testified on the State's behalf was the defendant?
2. Did the trial court err in imposing consecutive sentences?
3. Did the failure to provide a plausible, race-neutral challenge to the striking of a juror violate equal protection principles?
4. Was the evidence sufficient to support Gray's convictions?

We affirm.

The underlying facts were set out in a previous opinion of this court, as follows:

The evidence most favorable to the judgment is that on November 16, 2000, Gray arranged to purchase a large quantity of marijuana from Greg Jones at an Indianapolis residence. Jones's friend, Avant, was at the house when Gray and an unidentified man arrived to buy the drugs. Jones retrieved a brown trash bag from his vehicle parked outside and then escorted Gray and the other man to the rear of the house, while Avant remained in the front living room area. A few minutes later, the

¹ Ind. Code Ann. § 35-42-1-1 (West, PREMISE through 2007 Public Laws, approved and effective through April 8, 2007).

² I.C. § 35-42-1-1; Ind. Code Ann. § 35-41-5-1 (West, PREMISE through 2007 Public Laws, approved and effective through April 8, 2007).

³ Ind. Code Ann. § 35-47-4-5 (West, PREMISE through 2007 Public Laws, approved and effective through April 8, 2007).

⁴ I.C. § 35-47-2-1 (West, PREMISE through 2007 Public Laws, approved and effective through April 8, 2007).

unidentified man returned to the living room, hit Avant in the head with a handgun, and told him to get on the floor, stating, “[T]his is a robbery.” Avant heard a number of gunshots from the back area of the home. Upon hearing the shots, the unidentified man stood and ran out of the house. Avant saw Gray stumble from the rear of the house and out the door. As Avant stood in or near the doorway, Gray pointed and fired his handgun at Avant, but missed. Gray and the other man sped away in a vehicle. Jones, who had suffered a number of gunshot wounds, staggered to the front door. Avant called 911 and waited with Jones until emergency personnel arrived. Jones underwent surgery, but died twelve days later from the injuries.

The State charged Gray with felony murder, murder, robbery, attempted murder, unlawful possession of a firearm by a serious violent felon (“possession by a SVF”), and carrying a handgun without a license as a C felony. The possession by a SVF count alleged as the prior violent felony a February 1997 B felony dealing in cocaine conviction. During trial, Gray stipulated that he had been convicted of a serious violent felony within the meaning of IC 35-47-4-5.

Gray v. State, 786 N.E.2d 804, 805 (Ind. Ct. App. 2003) (footnote and internal citation to the transcript omitted), *trans. denied*. At the conclusion of trial, a jury found Gray guilty on all charges, and the trial court entered convictions for murder, attempted murder, and possession of a firearm by a serious violent felon. Gray was also determined to be an habitual offender. The court imposed an executed sentence of ninety years – sixty years for murder, to run concurrently to a forty-year sentence for attempted murder and a twenty-year sentence for possession of a firearm by a serious violent felon, which was enhanced by thirty years as a result of the habitual offender finding. We affirmed Gray’s conviction and sentence in the foregoing direct appeal.

On November 11, 2003, Gray filed a petition for post-conviction relief (PCR). The trial court denied the petition and Gray appealed. We reversed the denial of Gray’s

PCR petition, overturned his convictions, and ordered a new trial. *See Gray v. State*, 841 N.E.2d 1210 (Ind. Ct. App. 2006). This decision was based upon our conclusion that Gray received ineffective assistance of appellate counsel for counsel's failure to appeal the trial court's denial of Gray's request for a bifurcated trial (i.e., trying separately the charge that Gray was a serious violent felon).

In August 2006, a second jury trial was conducted and Gray was again found guilty on all counts.⁵ He was sentenced to thirty years for attempted murder, ten years for carrying a firearm by a serious violent felon, and four years for carrying a handgun without a license, with those sentences to run concurrently with one another and consecutive to the fifty-five-year sentence imposed for the murder conviction. Thus, Gray received an eighty-five-year executed sentence.

1.

Gray contends the trial court erred in refusing to admit into evidence a certified copy of the Chronological Case Summary (CCS) for a different criminal case involving a person who testified on the State's behalf.

Gray frames this issue in terms of the exclusion of evidence. This mischaracterizes the decision in question. The background facts are that Andrew White claimed Gray had confessed to him (White) that he (Gray) robbed and killed Jones. According to White, this occurred in the City-County Building, while White was there

⁵ The habitual offender count was dismissed after trial at the State's request.

awaiting a jury verdict in a case in which he was the defendant, and Gray was there for a pretrial conference. In anticipation of White's testimony, and before he was called to the witness stand, defense counsel advised the court that she would be asking it to take judicial notice of the court's record in White's criminal case. According to counsel,

The facts are that – that he [i.e., White] was not taken back until 11:00 – until 23:42, Your Honor, which is about 18 minutes of midnight. ... That's when he was remanded back to the custody of the – of the Sheriff – in other words that's when his proceedings concluded, not 9:00 [as White had claimed]. So, therefore, if the jury was out four hours [as White had claimed] the argument would be that the jury went out and began deliberating no earlier than 7:00 p.m. which makes it even more incredible or less likely that Mr. Gray would have been back there sitting in the holding tank with him while Mr. White's jury is out. That – he is certain – we nailed him down on several times it happened during – during jury deliberations.

Transcript at 443-44.

In a nutshell, defense counsel sought, via judicial notice, the introduction of the CCS in White's case to show that White had no opportunity to speak with Gray on the day when he claims Gray confessed to him that he had killed Jones. The State objected to the appropriateness of judicial notice in this instance because it would not establish what defense counsel hoped to establish and, further, would be confusing to the jury. Ultimately, the court agreed that it was questionable "whether or not the times punched into the case chronology actually reflect when the event took place or when somebody had the opportunity to sit down and enter it into the computer." *Id.* at 446. In explaining its decision, the court stated, "But you're not asking to put the record into evidence, you're asking me to take judicial notice of a fact, and I cannot instruct the jury in good

conscious [sic] that the record shows that Mr. White was taken back at X time based on that case chronology.” *Id.* at 447. Gray claims he “should have been allowed to introduce the document.” *Appellant’s Brief* at 12.

Ind. Rules of Evidence 201(a)(2) states, in relevant part, “A court may take judicial notice of a fact. A judicially-noticed fact must be one not subject to reasonable dispute in that it is ... capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.” This provision has been interpreted to permit judicial notice of court records, which presumably would include a chronological case summary. *See Brown v. Jones*, 804 N.E.2d 1197 (Ind. Ct. App. 2004), *trans. denied*. “Nevertheless, notice of court records is not without limitation.” *Id.* at 1202. Except for situations involving claim preclusion, “judicial notice should be limited to the fact of the record’s existence, rather than to any facts found or alleged within the record of another case.” *Id.*

In this case, Gray did not seek, via the CCS, judicial notice to establish the fact of White’s case. Rather he sought judicial notice of certain facts found in the record of that case, i.e., what time jurors began deliberating, what time they returned with a verdict, and ultimately, what time Gray was in the holding cell. As the State’s and trial court’s comments indicated, the times listed on the CCS do not necessarily reflect what times those events occurred; neither do they reflect the times that White was confined in the holding cell. Therefore, they were properly excluded upon several bases. First, although it is undisputed that the CCS reflects certain times for certain events, the accuracy of the

times provided is not indisputable; therefore, the facts Gray sought to prove thereby were in dispute as well. Second, it appears that Gray's request went beyond judicial notice merely of the fact of White's CCS, but extended impermissibly to facts found or alleged within the record of White's case. *See Brown v. Jones*, 804 N.E.2d 1197. Finally, the ruling that Gray sought here is, at best, inconsistent with the general rule that a trial court may not take judicial notice *even of its own records* in another case previously before the court on a related subject with related parties. *See id.* (citing *Henderson v. State*, 544 N.E.2d 507 (Ind. 1989)).

The trial court did not err in refusing Gray's request for judicial notice.

2.

Gray contends the trial court erred in imposing consecutive sentences for the murder and attempted murder convictions. Following the first trial, Gray's sentences for murder and attempted murder were ordered to run concurrently. When those convictions were overturned and Gray was again convicted and sentenced for those two offenses at a second trial, the sentences were imposed consecutively. Gray contends the trial court violated his due process rights by imposing those sentences consecutive to one another after they were first imposed concurrently.

Gray challenges consecutive sentences only on the above basis. In support of this claim, he cites Ind. Post-Conviction Rule 1(10)(b), *Ogburn v. State*, 549 N.E.2d 389 (Ind. Ct. App. 1990) and *Hull v. State*, 839 N.E.2d 1250 (Ind. Ct. App. 2005). P.-C.R. 1(10)(b) states:

If a sentence has been set aside pursuant to this rule and the successful petitioner is to be resentenced, *then the sentencing court shall not impose a more severe penalty than that originally imposed* unless the court includes in the record of the sentencing hearing a statement of the court's reasons for selecting the sentence that it imposes which includes reliance upon identifiable conduct on the part of the petitioner that occurred after the imposition of the original sentence, and the court shall give credit for time served.

(Emphasis supplied.) *Hull* and *Ogburn* provide examples of the application of the forgoing provision. Citing this authority, Gray contends the trial court erred in the instant case because, in imposing consecutive rather than concurrent sentences, it did not set forth identifiable conduct on his part that occurred *after* the imposition of the original sentence. We conclude the sentence here imposed does not implicate P.-C.R. 1(10)(b).

The provisions of P.-C.R. 1(10)(b): (A) apply when a defendant's conviction has been reversed in a previous appeal and a retrial resulted in conviction of the same charges; (B) forbid a greater sentence for the subsequent conviction unless the court explains why it imposed a greater sentence following the second trial; and (C) require that said explanation cite behavior on the defendant's part that post-dated the time of the first sentencing. Clearly, condition (A) is met, as Gray appeals a conviction following a second trial after convictions following a first trial were reversed. Condition (B), however, is not met because the trial court did not impose a greater sentence here than in the first trial.

Gray contends the instant sentence is greater because the two terms in question were imposed consecutively, not concurrently. Although we find no case directly on

point, cases discussing related issues have not defined “increase” in this manner. In *Williams v. State*, 494 N.E.2d 1001 (Ind. Ct. App. 1986), *trans. denied, cert. denied*, 481 U.S. 1054 (1987), the defendant was sentenced to ten years for the underlying conviction, which was enhanced by thirty years based upon a habitual offender finding. The defendant successfully challenged the validity of the habitual offender finding and sentence enhancement. The trial court vacated the habitual offender finding and the entire forty-year sentence. Upon resentencing, the court imposed the presumptive term of ten years enhanced by two (2) years for aggravating circumstances. The defendant argued that the new sentence violated due process – essentially one of the main arguments Gray makes in the instant case. The court rejected that argument in *Williams*, indicating among other things that the measure of “increase” in such cases focuses on a comparison of the aggregate sentences, not the individual components of the aggregate sentences (“[t]he result was, in fact, a lesser sentence than Williams had before (twelve years versus forty years’’)). *Id.* at 1004. *Cf. also Kelly v. Neubert*, 898 F.2d 15, 16 (3rd Cir. 1990) (“a restructuring of a sentence does not trigger the *Pearce* rule when the aggregate sentence is less than that originally imposed and there is no evidence of vindictiveness on the part of the sentencing court’’). We also note in *Kelly* a persuasive rationale for adopting this view, viz.:

When a defendant is convicted of more than one count of a multicount indictment, the district court is likely to fashion a sentencing package in which sentences on individual counts are interdependent. When, on appeal, one or more counts of a multicount conviction are reversed and one or more counts are affirmed, the result is an “unbundled” sentencing package.

Because the sentences are interdependent, the reversal of convictions underlying some, but not all, of the sentences renders the sentencing package ineffective in carrying out the district court's sentencing intent as to any one of the sentences on the affirmed convictions.

Id. at 17 (quoting *United States v. Shue*, 825 F.2d 1111, 1114 (7th Cir. 1987), *cert. denied*, 484 U.S. 956).

Consistent with the foregoing authorities, we conclude that for purposes of P.-C.R. 1(10)(b), “more severe penalty” as used in that statute refers to the aggregate sentence, not its component parts. In the instant case, the trial court imposed an eighty-five-year sentence following the second trial, which was five years less than the sentence imposed following the first trial. Even considering the fact that the second sentence did not include an habitual offender enhancement and assuming for the sake of argument that P.-C.R. 1(10)(b) applied, there is no evidence that the trial court was motivated by vindictiveness. Rather, the similarity of the two sentences reflects what the *Shue* court referred to as a general sentencing intent.

3.

Gray contends the trial court's failure to provide a plausible, race-neutral challenge to the striking of a juror violated his equal protection rights.

When a *Batson* claim is made, the defendant must first make a *prima facie* showing that the prosecutor exercised peremptory strikes based on race. *Hardister v. State*, 849 N.E.2d 563 (Ind. 2006). “A *prima facie* showing requires the defendant to show that peremptory challenges were used to remove members of a cognizable racial

group from the jury pool and that the facts and circumstances raise an inference that the removal was because of race.” *Id.* at 576. After such a prima facie showing is made, the burden shifts to the prosecution to provide a race-neutral explanation. *Hardister v. State*, 849 N.E.2d 563. In *McCormick v. State*, 803 N.E.2d 1108 (Ind. 2004), our Supreme Court adopted the “tainted” approach to reviewing *Batson* challenges. The Court explained that approach as follows: “In simple terms, ‘[r]egardless of how many other nondiscriminatory factors are considered, any consideration of a discriminatory factor directly conflicts with the purpose of *Batson* and taints the entire jury selection process.’” *Id.* at 1113 (quoting *Arizona v. Lucas*, 18 P.3d 160, 163 (Ariz. Ct. App. 2001), *cert. denied*, 534 U.S. 1014).

In the instant case, defense counsel challenged the State’s dismissal of four African-American prospective jurors as racially motivated. The State responded as follows:

First of all, Judge, I’d like to say that I don’t believe that there’s been a prima facia [sic] case (of improper striking) shown. We did leave three⁶ African-Americans on. I’d also like the record to reflect that the Defense struck African-Americans that the State did not. Mr. Simmons [the first disputed, dismissed African-American juror] is a convicted felon and served time in the Department of Corrections. That’s the reason that the State struck him. Miss Hunt [the second disputed African-American juror dismissed by the State], it was definitely not because she’s African-American. I loved every answer that she gave. The reason [she] was struck, however, is because of her employment with FSSA, and as this court is aware, our office has charged and has investigated a lot of people

⁶ The record reflects a discrepancy as to whether there were two or three African-American members on the jury.

who work for the FSSA, and we were very worried that she would hold that against the State of Indiana. As for Mr. – Mr. Beckam [the third disputed African-American juror dismissed by the State] – Mr. Beckam would not directly answer why he could not be a fair and impartial juror, Miss McCoy asked him more than one time – I believe three or four times, and he wouldn't give her a straight answer. He also then went on to discuss why some people might not be able to judge other people based on religion. And although, he said that he – that wasn't him, it was just we felt it was very odd that he would bring that up, if it didn't apply to him, which is why we struck him. And Mr. Gilbert [the fourth disputed African-American juror dismissed by the State], when I was discussing the possibility that he might hear some witnesses who may or may not be doing things that he liked, he indicated – I asked him if he would discount completely, and it took me four or five times before he finally said no, he (indiscernible), and I was under the impression that yes, actually he would discount them completely. He also did not answer on this questionnaire yes or nowhere [sic] he could be fair and impartial and those are the reasons we struck them.

Transcript at 51-53 (footnote supplied).

In reviewing the above comments, we discern no racial motivation on the State's part in striking the jurors in question. To the contrary, the State provided plausible, race-neutral reasons for striking each of the jurors in question, and nothing more. Moreover, we note that at least two African-Americans were seated on the jury. *See Hardister v. State*, 849 N.E.2d 563 (standing alone the removal of some, but not all, African-American jurors by peremptory challenge does not raise an inference of discrimination). The trial court did not err in denying Gray's *Batson* challenge.

4.

Gray contends the evidence was not sufficient to support Gray's convictions. Specifically, Gray contends his convictions are primarily based upon Avant's testimony,

which Gray claims was incredibly dubious. Gray summarizes the nature of his argument as follows:

Avant's testimony is inherently improbable and is the only direct evidence which placed Gray at the Tallman house at the time of Jones' death. It is the only evidence of the attempted murder charge. Avant's lies with respect to his use of marijuana on the date of the shooting, his changing versions of events, his unreliable identification and his cagey responses with respect to his location at the time of Jones' shooting leaves his testimony incredibly dubious and the evidence insufficient to support Gray's convictions on each count.

Appellant's Appendix at 23-24.

When reviewing a challenge to the sufficiency of the evidence, we neither reweigh the evidence nor judge witness credibility. *Clay v. State*, 755 N.E.2d 187 (Ind. 2001). We consider the evidence and the reasonable inferences to be drawn therefrom supporting the verdict and will affirm if evidence of probative value exists from which a jury could find the defendant guilty beyond a reasonable doubt. *Id.*

Gray seeks to invoke the incredible dubiousity rule. "Within the narrow limits of the 'incredible dubiousity' rule, a court may impinge upon a jury's function to judge the credibility of a witness." *Love v. State*, 761 N.E.2d 806, 810 (Ind. 2002). For testimony to be disregarded based on a finding of "incredible dubiousity," it must be inherently contradictory, wholly equivocal, or the result of coercion. *Love v. State*, 761 N.E.2d 806. Moreover, there must also be a complete lack of circumstantial evidence of the defendant's guilt. *Id.* This rule is rarely applicable. *Id.*

We find that the incredible dubiousity rule does not apply here. We note first there was not a complete lack of circumstantial evidence. Among other things, earlier on the day of the incident, Gray first approached Jeffrey Taylor and asked about purchasing a large quantity of marijuana. Taylor went down the street to the house of Jones, who was a known drug dealer, and informed Jones of Gray's request. Jones told Taylor to bring the men to his (Jones's) house. Taylor did so. At the second trial, Taylor testified that he had driven Gray to Jones's house earlier on the day of the murder, that Jones and Gray had reached an agreement concerning a drug deal, and the Gray was to return to Jones's house later to complete the deal. Taylor's description of the car Gray was driving earlier in the day was consistent with Avant's description of the car in which the shooter and his accomplice drove from the scene after the shooting. Also, Jones's fiancée was arriving at Jones's house as the assailants were leaving just after the shooting, and she testified that she saw a car matching that same description speeding away from the scene. Moreover, Gray overstates the extent and scope of the internal inconsistencies inherent in Avant's testimony. To the extent such inconsistencies existed, they were brought to the jury's attention during closing argument by Gray's counsel. Those inconsistencies were matters to be considered by the jury in assessing Avant's credibility and we will not invade its province in that regard. The evidence was sufficient to support the convictions.

Judgment affirmed.

BAKER, C.J., and CRONE, J., concur.