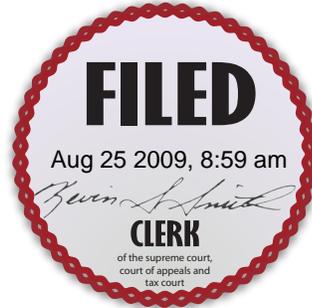


Pursuant to Ind. Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE  
COURT OF APPEALS OF INDIANA**

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WILLIAM ANDREWS,  
Appellant-Petitioner,

vs.

STATE OF INDIANA,  
Appellee-Respondent.

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No. 45A03-0812-PC-629

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APPEAL FROM THE LAKE SUPERIOR COURT  
The Honorable Thomas P. Stefaniak, Jr., Judge  
The Honorable Natalie Bokota, Magistrate  
Cause No. 45G04-0802-PC-03

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**August 25, 2009**

**MEMORANDUM DECISION - NOT FOR PUBLICATION**

**CRONE, Judge**

## **Case Summary**

William Andrews appeals the denial of his petition for post-conviction relief. We affirm.

### **Issues**

Andrews raises the following issues for review:

- I. Did he receive ineffective assistance of trial counsel?
- II. Did he receive ineffective assistance of appellate counsel?
- III. Did the post-conviction court abuse its discretion in refusing to subpoena certain witnesses for the post-conviction hearing?

### **Facts and Procedural History**

The facts as summarized by this Court in Andrews's direct appeal and adopted by the post-conviction court are as follows:

On May 22, 2001, Andrews and Kenneth Reeves ("Reeves"), who were drug dealers at the Ivanhoe Gardens Housing Development in Gary, Indiana ("Ivanhoe Development"), were investigating the source of a counterfeit \$100 bill used to purchase drugs. Around 11:00 p.m., Hosea Taylor ("Taylor") drove into the Development, parked his vehicle, and headed toward 3212 Brooks Place. Andrews and Reeves stopped Taylor and demanded to know what he wanted and whether he had passed counterfeit money. The pair forced Taylor to the ground, pistol-whipped him, kicked him in the face, pulled down his pants and rifled through his pockets, discovering only \$10.00. A bystander came forward and assured Andrews and Reeves that he knew Taylor personally, so the pair gave Taylor two bags of cocaine and apartment keys and allowed him to get up and go into 3212 Brooks Place to wash his face. As Taylor was leaving 3212 Brooks Place, Tracie Sanks entered.

Around midnight, Lorraine Scott ("Scott") approached 3212 Brooks Place to buy drugs. Andrews and Reeves were leaving the apartment and told her to "check with them later." (Tr. 264.) Scott did some errands and returned home shortly thereafter. She again headed toward 3212 Brooks Place, and heard Andrews call out to her to "go home." (Tr. 266.) Scott indicated that she wanted to purchase drugs, and Andrews promised to send someone to her

later. Scott walked back toward her apartment, and as she unlocked her door, she heard gunshots in the distance. Five or ten minutes after she heard gunshots, Scott heard a knock and opened her apartment door to Reeves. Reeves demanded Scott's apartment key, which she handed over to him.

Reeves' girlfriend, Rhonda Smith ("Smith"), refused to stay in the apartment she shared with Reeves after returning home to find a broken window. Reeves reassured Smith that Andrews had broken the window "for the guns," and told her that they would be staying at Scott's apartment. (Tr. 312.) Later that evening, Reeves awakened Curtis Armour ("Armour") and asked Armour to hold a gun for him. Armour refused.

Paul Veal ("Veal"), a visitor at the apartment of his daughter at 3220 Brooks Place, was outside working on his vehicle when Latonia Johnson ("Johnson") came up to him and asked to use his daughter's telephone. Veal allowed Johnson to use the telephone inside the apartment and they walked back outside together. Veal noticed smoke coming from the roof of the apartment next door and called out to neighbors to summon the fire department. Reeves appeared and began to converse with Johnson. Seconds later, Andrews appeared and demanded that Reeves "take care of business." (Tr. 889.)

Reeves struck Johnson in the face several times. Johnson tried to escape, screaming "what did I do wrong," but she was knocked to the ground. (Tr. 892.) Veal saw Andrews and Reeves standing over Johnson with handguns pointed toward Johnson's head and heard Andrews order Reeves to "kill her." (Tr. 893.) Veal heard four gunshots and ran. As Veal ran in search of a telephone, he heard more gunshots. When Veal circled back around the apartment building, he observed Johnson lying, apparently lifeless, on his daughter's porch. Veal saw Andrews and Reeves, still in the yard, holding guns. By that time, the apartment next door was "blazing." (Tr. 897.) Veal summoned an ambulance for Johnson.

At approximately 12:45 a.m. on May 23, Gary police officers were dispatched to respond to a report of gunshots at the Ivanhoe Development. At the sole entrance to the Ivanhoe Development, they encountered a vehicle with no headlights exiting at a high rate-of-speed. The officers blocked the path of the vehicle and the driver, later identified as Andrews, exited while yelling, "I got nothing" and "I didn't do anything." (Tr. 386, 387.) Andrews then jumped back in the vehicle and drove away, but crashed his vehicle at a church parking lot about a block from Ivanhoe Development. Andrews then exited the vehicle and fled on foot, but was apprehended shortly thereafter.

When Gary Police Corporal Timothy Somers arrived at 3220 Brooks Place, he discovered Johnson's lifeless body on the front porch. She had been shot in the head. The next-door apartment at 3212 Brooks Place was on fire. When firefighters entered the apartment, they discovered the bodies of Tracie

Sanks, Leonard Bryant and Freddie Morgan, who had each been shot in the head.

*Andrews v. State*, No. 45A03-0212-CR-435, slip op. at 2-5 (Ind. Ct. App. Oct. 22, 2003).

On May 29, 2001, the State charged Andrews and Reeves with four counts of murder, class B felony robbery, class B felony confinement, and class C felony battery. The first joint trial began on October 1, 2002, and ended in a mistrial that same day. The second joint trial began on October 2, 2002. On October 11, 2002, the jury found Andrews guilty on all counts. The trial court did not enter judgment on the confinement count based on double jeopardy concerns. The trial court sentenced Andrews to sixty-five years on each of the four murder counts, twenty years on the robbery count, and eight years on the battery count, all to be served consecutively, for an aggregate sentence of 288 years.

On July 11, 2003, Andrews filed a direct appeal. On October 22, 2003, this Court issued a memorandum decision affirming the trial court's judgment. On January 8, 2004, the Indiana Supreme Court denied Andrews's petition to transfer.

On July 14, 2004, Andrews filed a pro se petition for post-conviction relief, alleging prosecutorial misconduct, various abuses of trial court discretion, and ineffective assistance of trial and appellate counsel. On February 14, 2005, Andrews, by counsel, amended his petition, claiming ineffective assistance of trial and appellate counsel and newly discovered evidence requiring the vacation of his convictions. On September 15, 2005, Andrews filed a motion to dismiss his petition without prejudice, claiming that he had other, potentially stronger issues than those raised in the petition but which he could not adequately support at that time for lack of evidence. The post-conviction court granted his motion that same day.

On July 26, 2007, Andrews filed a pro se petition for post-conviction relief, alleging ineffective assistance of trial and appellate counsel, newly discovered evidence, and denial of due process. On May 8, 2008, the post-conviction court held a hearing, and on August 13, 2008, the court issued its findings of fact and conclusions of law, denying Andrews’s petition for post-conviction relief. This belated appeal ensued. Additional facts will be provided as necessary.

### **Discussion and Decision**

Andrews challenges the post-conviction court’s denial of his petition. The petitioner in a post-conviction proceeding “has the burden of establishing grounds for relief by a preponderance of the evidence.” Ind. Post-Conviction Rule 1(5); *Brown v. State*, 880 N.E.2d 1226, 1229 (Ind. Ct. App. 2008), *trans. denied*. When appealing the denial of a petition for post-conviction relief, the petitioner stands in the position of one appealing a negative judgment. *Brown*, 880 N.E.2d at 1229. Therefore, “[o]n review, we will not reverse the judgment unless the evidence as a whole unerringly and unmistakably leads to a conclusion opposite that reached by the post-conviction court.” *Id.* Here, the post-conviction court entered extensive findings of fact and conclusions of law in accordance with Indiana Post-Conviction Rule 1(6). “A post-conviction court’s findings and judgment will be reversed only upon a showing of clear error—that which leaves us with a definite and firm conviction that a mistake has been made.” *Id.* at 1230 (citation and quotation marks omitted).

#### ***I. Ineffective Assistance of Trial Counsel***

Andrews contends that the post-conviction court erred in concluding that he did not

receive ineffective assistance of trial counsel. At the outset, we note that Andrews has waived this issue for failure to make a cogent argument. A party waives an issue raised on appeal if he fails to develop a cogent argument or provide adequate citation to authority and the record. *Smith v. State*, 822 N.E.2d 193, 202-03 (Ind. Ct. App. 2005), *trans. denied*; *see also* Ind. Appellate Rule 46(A)(8) (stating that appellant’s brief must contain contentions on issues presented and that each contention must be supported by cogent reasoning and citations to authorities and statutes relied on). Andrews’s ineffective assistance claim merely recites the post-conviction court’s findings and conclusions, references motions and exhibits, cites to case law, and concludes that the post-conviction court erred. He fails to explain or develop his claim. Thus, it is waived.

Waiver notwithstanding, we address Andrews’s claim that he was denied his constitutional right to effective assistance of trial counsel. A petitioner must satisfy two components to prevail on his ineffective assistance claim. *Id.* He must demonstrate both deficient performance and prejudice resulting from it. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). Deficient performance is “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.” *Brown*, 880 N.E.2d at 1230. We assess counsel’s performance based on facts that are known at the time and not through hindsight. *Shanabarger v. State*, 846 N.E.2d 702, 709 (Ind. Ct. App. 2006), *trans. denied*. “[C]ounsel’s performance is presumed effective, and a defendant must offer strong and convincing evidence to overcome this presumption.” *Ritchie v. State*, 875 N.E.2d 706, 714 (Ind. 2007).

Prejudice occurs when a reasonable probability exists that, “but for counsel’s errors the result of the proceeding would have been different.” *Brown*, 880 N.E.2d at 1230. We can dispose of claims upon failure of either component. *Id.*

As best we can discern, Andrews’s claim concerns his trial counsel’s alleged failure to conduct pretrial discovery and to object to the admission of Paul Veal’s unsigned deposition at trial. Regarding the latter, Indiana Trial Rule 30(E) provides that a deposed witness shall be permitted to read and sign his deposition. However, if the witness either fails to sign it or waives signature, “any party may use a copy of the deposition with the same force and effect as though the original had been signed by the witness.” Ind. Trial Rule 30(E)(4); *see also Gallagher v. State*, 466 N.E.2d 1382, 1388 (Ind. Ct. App. 1984) (stating that absence of both signature and formal waiver of signature does not necessarily preclude admission of deposition). As the post-conviction court correctly observed, “This procedural anomaly was fully and rather exhaustively addressed at trial and is clearly presented on the face of the record. ROP at 841-931.” Appellant’s App. at 338.

Andrews also alleges that his trial counsel failed to conduct pretrial discovery and failed to adequately prepare to cross-examine deponent Veal. However, at the post-conviction hearing, Andrews questioned his trial counsel only about his receipt of the notice letter regarding Veal’s unsigned deposition. Tr. at 13-18, 21. He failed to question his trial counsel about whether he had in fact performed pretrial discovery tasks or to what extent he had prepared for his cross-examination of Veal. We agree with the post-conviction court’s conclusion that “[t]here is no evidence therefore that counsel’s investigation and pre-trial

discovery fell below an objective standard of reasonableness from which [Andrews] suffered prejudice.” Appellant’s App. at 337. In other words, Andrews’s trial counsel was not ineffective.

## *II. Ineffective Assistance of Appellate Counsel*

Andrews also claims that the post-conviction court erred in concluding that he did not receive ineffective assistance of appellate counsel. Andrews has also waived this issue for failure to make a cogent argument. Ind. Appellate Rule 46(A)(8). Waiver notwithstanding, the standard of review for a claim of ineffective assistance of appellate counsel is identical to the standard for trial counsel. *Lowery v. State*, 640 N.E.2d 1031, 1048 (Ind. 1994). The petitioner must establish deficient performance by appellate counsel resulting in prejudice. *Id.* “Ineffective assistance of appellate counsel claims generally fall into three basic categories: (1) denial of access to an appeal, (2) waiver of issues, and (3) failure to present issues well.” *Henley v. State*, 881 N.E.2d 639, 644 (Ind. 2008). “[T]he decision of what issues to raise is one of the most important strategic decisions to be made by appellate counsel.” *Reed v. State*, 856 N.E.2d 1189, 1196 (Ind. 2006). For countless years, experienced advocates have “emphasized the importance of winnowing out weaker arguments on appeal and focusing on one central issue if possible, or at most a few key issues.” *Bieghler v. State*, 690 N.E.2d 188, 194 (Ind. 1997) (citation and quotation marks omitted). Thus, when reviewing these types of claims, we should be particularly deferential to appellate counsel’s strategic decision to exclude certain issues in favor of other issues more likely to result in a reversal. *Id.* As a result, “[i]neffective assistance is very rarely

found in cases where a defendant asserts that appellate counsel failed to raise an issue on direct appeal.” *Reed*, 856 N.E.2d at 1196.

Andrews’s appellate counsel raised three issues on direct appeal: improper admission of Veal’s deposition where the State failed to notify the court and the defense that Veal was unavailable to testify at trial,<sup>1</sup> insufficiency of evidence, and inappropriateness of sentence. As best we can discern, Andrews argues that his appellate counsel should have raised the issue of improper admission of Veal’s unsigned deposition. However, as discussed, Indiana Trial Rule 30(E)(4) provides that a party may use a copy of an unsigned deposition “with the same force and effect as though the original had been signed by the witness.” Thus, admissibility of Veal’s unsigned deposition is not so compelling an issue that a competent attorney would have raised it instead of, or in addition to, the issues actually raised on direct appeal. Thus, Andrews has failed to overcome the presumption that his appellate counsel provided effective assistance.

### ***III. Refusal to Issue Subpoenas***

Finally, Andrews asserts that the post-conviction court abused its discretion in refusing to subpoena certain witnesses. A post-conviction court has discretion to determine whether to grant or deny the petitioner’s request for a subpoena. *Johnson v. State*, 832 N.E.2d 985, 994 (Ind. Ct. App. 2005), *trans. denied*. An abuse of discretion occurs only where the post-conviction court’s decision is against the logic and effect of the facts and

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<sup>1</sup> To the extent Andrews raises a constitutional challenge regarding an alleged violation of his Sixth Amendment right to cross examine Veal, the issue was litigated and decided adversely on direct appeal and is therefore res judicata. *Timberlake v. State*, 753 N.E.2d 591, 597 (Ind. 2001).

circumstances before it. *Id.* Upon a pro se petitioner’s request for the issuance of subpoenas, the post-conviction court shall determine whether the proposed witness’s testimony would be relevant and probative. Ind. Post-Conviction Rule 1(9)(b).

Essentially, Andrews claims that, by refusing to issue subpoenas to three witnesses, the post-conviction court improperly excluded newly discovered evidence.<sup>2</sup> An allegation of newly discovered evidence should be received with great caution and careful scrutiny. *Taylor v. State*, 840 N.E.2d 324, 330 (Ind. 2006). Our supreme court has enunciated the following criteria for the admission of newly discovered evidence:

(1) the evidence has been discovered since the trial; (2) it is material and relevant; (3) it is not cumulative; (4) it is not merely impeaching; (5) it is not privileged or incompetent; (6) due diligence was used to discover it in time for trial; (7) the evidence is worthy of credit; (8) it can be produced upon a retrial of the case; and (9) it will probably produce a different result at retrial.

*Id.* at 329-30. The petitioner bears the burden of establishing that all nine requirements have been met. *Id.* at 330.

Here, the post-conviction court concluded that Andrews pled “no specific facts to explain or support this claim [of newly discovered evidence]. Neither did [he] present any evidence to prove its merit. We deem the claim waived.” Appellant’s App. at 339. We agree that Andrews has waived this claim. Waiver notwithstanding, we note that the witnesses either testified at Andrews’s trial or were known and discoverable by due diligence

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<sup>2</sup> The record indicates that the post-conviction court granted Andrews’s subpoena request with regard to two witnesses: trial counsel Corinth Bishop and Kenneth Miller. Andrews challenges the trial court’s refusal to subpoena Shalanda Johnson, Cassandra Montgomery, and Keith Richardson.

at the time of trial.<sup>3</sup> Thus, Andrews has failed to demonstrate that any evidence qualifying as “newly discovered” would have been elicited even if his request for subpoenas had been properly pled. As such, we conclude that the post-conviction court acted within its discretion in refusing to issue the requested subpoenas. Accordingly, we affirm.

Affirmed.

MAY, J., and BROWN, J., concur.

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<sup>3</sup> Montgomery and Richardson both testified at trial, and Johnson, the daughter of one of the murder victims, was known and discoverable at the time of trial.