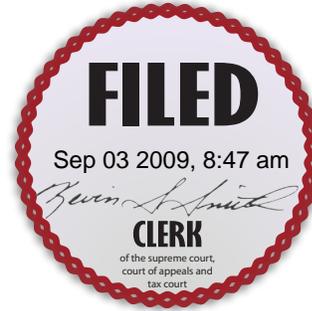


Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE  
COURT OF APPEALS OF INDIANA**

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CLIFTON K. MILLER, )  
 )  
Appellant-Petitioner, )  
 )  
vs. )  
 )  
STATE OF INDIANA, )  
 )  
Appellee-Respondent. )

No. 20A03-0901-PC-20

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APPEAL FROM THE ELKHART CIRCUIT COURT  
The Honorable Terry C. Shewmaker, Judge  
Cause No. 20C01-0101-CF-14

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**September 3, 2009**

**MEMORANDUM DECISION - NOT FOR PUBLICATION**

**BAILEY, Judge**

## Case Summary

Pro-se Appellant-Petitioner Clifton K. Miller (“Miller”) appeals the denial of his petition for post-conviction relief challenging his conviction for Murder.<sup>1</sup> We affirm.

### Issues

Miller raises nine issues for review. Declining to address issues that are waived, res judicata, or procedurally defaulted,<sup>2</sup> we consolidate and address the remaining two issues:

- I. Whether Miller was denied due process in the post-conviction proceedings; and
- II. Whether he was denied the effective assistance of trial counsel.

### Facts and Procedural History

On direct appeal, this court recited the pertinent facts as follows:

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<sup>1</sup> Ind. Code § 35-42-1-1.

<sup>2</sup>Post-conviction proceedings provide defendants the opportunity to raise issues not known or available at the time of the original trial or direct appeal. Stephenson v. State, 864 N.E.2d 1022, 1028 (Ind. 2007), cert. denied, 128 S. Ct. 1871 (2008). If an issue was known and available but not raised on direct appeal, the issue is procedurally foreclosed. Id. If an issue was raised and decided on direct appeal, it is res judicata. Id.

The allegation of prosecutorial misconduct was raised on direct appeal and decided adversely to Miller. To the extent that he claims there is newly discovered evidence of prosecutorial misconduct for failure to disclose that co-defendant Quinton Clarkson was an incentivized witness, the evidence presented at the post-conviction hearing does not support this contention. At that hearing, Clarkson testified that he had no promise of leniency for his testimony, merely a hope of leniency. Chief Deputy Prosecutor Michael Christofeno testified and confirmed that Clarkson testified at trial without a promise of leniency. A witness need not be disclosed as an incentivized witness if he or she testifies favorably in the hope of leniency and the State has neither confirmed nor denied that hope. Sigler v. State, 700 N.E.2d 809, 812 (Ind. Ct. App. 1998), trans. denied.

Likewise, the propriety of Miller’s sentence was addressed on direct appeal. This court declined to revise his sentence. To the extent that he attempts to raise a free-standing claim premised upon Blakely v. Washington, 542 U.S. 296 (2004), alleging that he possessed a Sixth Amendment right to a jury determination of facts used to enhance his sentence, the Indiana Supreme Court has determined that Blakely has no retroactive application to cases on collateral post-conviction review. See Smylie v. State, 823 N.E.2d 679, 689 n.16 (Ind. 2005).

The facts most favorable to the verdict reveal that Terry and Larry Nelson were dealing cocaine out of their residence at 817 Willard Street in Elkhart, Indiana. Robert Wagoner (“Wagoner”) also resided at that residence and dealt cocaine with the Nelsons until he moved out sometime after January 1, 2001. Wagoner introduced Terry Nelson (“Terry”) to Miller, who was also known by the nickname “T,” and Thomas Hunter (“Hunter”), who was known by the nickname “Food-Stamp.” Miller and Hunter were also cocaine dealers and they supplied cocaine to Wagoner and Terry, who resold it.

In November, 2000, Miller and Hunter “fronted”<sup>3</sup> \$160 of cocaine to Terry and Wagoner. Terry and Wagoner planned to smoke a portion of the cocaine and sell the remainder. However, they smoked the entire amount and were unable to pay Miller and Hunter for the cocaine.<sup>4</sup> Terry told Wagoner to make sure that Miller and Hunter were paid, and after Wagoner failed to pay them, Terry kicked Wagoner out of his house. Miller and Hunter made demands for payment on Wagoner on several occasions, but he was unable to pay them.

In December, 2000, Miller and Hunter went to the Nelson’s house and attempted to collect payment for the cocaine. Miller was angry when they were unable to pay him. Terry observed that Hunter had a gun and Hunter threatened to return and “shoot up” the house. Tr. P. 366. Approximately one week later, Miller returned to the Nelson’s house to attempt to collect payment. After arguing with Terry concerning whether Terry or Wagoner owed him the money, Miller punched Terry in the jaw. Tr. p. 368.

On January 12, 2001, Miller returned to the Nelsons’s house with Hunter and his half-brother, Quentin Clarkson (“Clarkson”). While Miller and Clarkson went up to the front porch of the house, Hunter, who had a gun, waited on the driveway. Miller told Terry that he had come to collect payment for the cocaine. Terry explained that he was not working, but as soon as he got a job he would get Miller his money. Tr. p. 370. Miller stated that “somebody better come up with his money because he was tired of waiting.” *Id.* Terry’s brother, Larry, then attempted to come out onto the porch, and Miller told him

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<sup>3</sup> At trial, Terry explained that when someone “fronts” you cocaine, that means that “they give the cocaine now and then you pay for it later.” Tr. p. 363.

<sup>4</sup> At trial, Terry testified that Wagoner smoked the entire amount of cocaine, but Wagoner testified that Terry did so. Regardless, neither paid Miller and Hunter for the cocaine.

to get back into the house before he put a cap in his ass.<sup>5</sup> Tr. pp. 371-72. Miller then hit Terry, who was knocked down onto the porch. Larry began to push open the screen door to come out onto the porch. Terry heard a shot and saw Larry grab his chest. Tr. p. 378. Larry died from the gunshot wound to his chest.

On January 24, 2001, Miller was charged with murder, and the charging information was amended on August 23, 2001. A three-day jury trial began on August 27, 2001. At trial, Clarkson testified that Miller was aware that Hunter had a gun with him on the night Larry was shot. Clarkson stated that before they went to the Nelsons's house, he saw Hunter grab a gun. Tr. p. 591. Clarkson asked Hunter why he was taking the gun and Hunter said he needed it. Tr. p. 592. Clarkson testified that this conversation occurred in Miller's presence. Tr. P. 619.

The jury found Miller guilty of both murder and felony murder. The trial court then merged the convictions and sentenced Miller to sixty-five years in the Department of Correction[.]

Miller v. State, No. 20A03-0111-CR-362, slip op. at 2-4 (August 16, 2002). Miller filed a direct appeal, alleging prosecutorial misconduct and insufficiency of the evidence, and arguing that his sentence was manifestly unreasonable. See id. at 2. This court affirmed Miller's conviction and sentence. See id.

On April 29, 2003, Miller filed a petition for post-conviction relief, which was subsequently amended. He alleged ineffectiveness of trial counsel, prosecutorial misconduct, and a deprivation of his Sixth Amendment right to have a jury determine the facts used to enhance his sentence. See Blakely v. Washington, 542 U.S. 296 (2004). The post-conviction court conducted a hearing on September 25, 2008. On November 24, 2008, the post-conviction court issued its findings of fact, conclusions of law, and order denying Miller

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<sup>5</sup> Terry understood this to mean that Miller was threatening to shoot Larry.

post-conviction relief. He now appeals.

## **Discussion and Decision**

### Standard of Review

“For the most part, completion of Indiana’s direct appellate process closes the door to a criminal defendant’s claims of error in conviction or sentencing.” Pruitt v. State, 903 N.E.2d 899, 905 (Ind. 2009), reh’g denied. However, our law allows defendants who have exhausted the direct appeal process to raise a narrow set of claims through a petition for post-conviction relief. Id.

Post-conviction proceedings are civil in nature and a defendant must establish his claims by a preponderance of the evidence. Stephenson v. State, 864 N.E.2d 1022, 1028 (Ind. 2007), cert. denied, 128 S. Ct. 1871 (2008). We review the post-conviction court’s factual findings under a “clearly erroneous” standard but do not defer to the post-conviction court’s legal conclusions. Id. We will not reweigh the evidence or judge the credibility of the witnesses; we examine only the probative evidence and the reasonable inferences that support the decision of the post-conviction court. Id.

#### I. Due Process in Post-Conviction Proceedings

Miller contends that he was denied due process because the post-conviction court failed to enter adequate findings of fact and conclusions of law, and failed to compel the appearance of Miller’s trial counsel, Dan Hill (“Hill”) at the post-conviction hearing.

Post-Conviction Rule 1(6) provides in relevant part: “The court shall make specific findings of fact, and conclusions of law on all issues presented, whether or not a hearing is

held.” Miller contends that the post-conviction court failed to address his third and fourth allegations as to trial counsel’s ineffectiveness and therefore, the findings of fact and conclusions of law were inadequate. We disagree. Although the post-conviction court did not articulate findings and conclusions mirroring each of the alleged instances of trial counsel’s deficient performance, the post-conviction court fully addressed the claim of trial counsel’s ineffectiveness, focusing upon counsel’s aggregate performance and lack of prejudice.

Miller further contends that he was denied the right to cross-examine Hill because Hill was not served with a subpoena commanding him to appear at the post-conviction hearing. Miller attempted to subpoena Hill but was unable to obtain a valid address for his former attorney, who had not worked as a public defender for several years. Although Miller implicitly argues that the post-conviction court was required to locate Hill, Miller cites no authority for this proposition.

Moreover, Hill was not an anticipated State’s witness to be cross-examined by Miller; instead, Miller sought to call Hill as his own post-conviction witness and to elicit Hill’s direct testimony. Miller has not explained what testimony he hoped to elicit from Hill or how this would have supported Miller’s allegation of ineffectiveness. In the absence of any showing of deprivation of due process or prejudice, Miller is not entitled to post-conviction relief on this basis.

## II. Effectiveness of Trial Counsel

Effectiveness of counsel is a mixed question of law and fact. Strickland v.

Washington, 466 U.S. 668, 698 (1984). We evaluate Sixth Amendment claims of ineffective assistance under the two-part test announced in Strickland. Id. To prevail on an ineffective assistance of counsel claim, a defendant must demonstrate both deficient performance and resulting prejudice. Dobbins v. State, 721 N.E.2d 867, 873 (Ind. 1999) (citing Strickland, 466 U.S. at 687). Deficient performance is that which falls below an objective standard of reasonableness. Strickland, 466 U.S. at 687; see also Douglas v. State, 663 N.E.2d 1153, 1154 (Ind. 1996). Prejudice exists when a claimant demonstrates “a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.” Strickland, 466 U.S. at 694; see also Cook v. State, 675 N.E.2d 687, 692 (Ind. 1996). The two prongs of the Strickland test are separate and independent inquiries. Strickland, 466 U.S. at 697. Thus, “[i]f it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice . . . that course should be followed.” Id.

Moreover, under the Strickland test, counsel’s performance is presumed effective. Douglas, 663 N.E.2d at 1154. A petitioner must present convincing evidence to overcome the strong presumption that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Strickland, 466 U.S. at 690; Broome v. State, 694 N.E.2d 280, 281 (Ind. 1998).

Miller presents several allegations of error by trial counsel. According to Miller, trial counsel should have challenged the amendment of the charging information, proffered an instruction on double jeopardy, and objected to Final Instruction 3 (a felony murder

instruction) and Final Instruction 31 (which he characterizes as an “Allen charge”<sup>6</sup>). Appellant’s Brief at 2.

Amendment of Charging Information. On August 6, 2001, several months after Miller’s omnibus date of March 22, 2001, the State successfully moved to amend the information charging Miller with felony murder to add a count of knowing or intentional murder. At the time of Miller’s crime, Indiana Code Section 35-34-1-5 permitted amendments of charges against a defendant under certain circumstances, providing in relevant part:

(b) The indictment or information may be amended in matters of substance or form, and the names of material witnesses may be added, by the prosecuting attorney, upon giving written notice to the defendant, at any time up to:

(1) thirty (30) days if the defendant is charged with a felony; or

(2) fifteen (15) days if the defendant is charged only with one (1) or more misdemeanors;

(c) Upon motion of the prosecuting attorney, the court may, at any time before, during, or after the trial, permit an amendment to the indictment or information in respect to any defect, imperfection, or omission in form which does not prejudice the substantial rights of the defendant.

Ind. Code § 35-34-1-5 (1988).

Miller relies upon Fajardo v. State, 859 N.E.2d 1201 (Ind. 2007) to support his contention that his trial attorney should have objected to the amendment of the charging information in his case. Fajardo clarified that Indiana Code Section 35-34-1-5(b) required

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<sup>6</sup> An “Allen charge” is a designation for a supplemental charge given by a trial judge to an apparently deadlocked jury. Broadus v. State, 487 N.E.2d 1298, 1303 (Ind. 1986). It is named after the first major case considering such a charge, Allen v. United States, 164 U.S. 492 (1896).

that substantive amendments to charges must be filed within the statutory time frame and that the question of prejudice was irrelevant to this inquiry.<sup>7</sup> Id. at 1207. However, the Fajardo opinion recognized that there had been confusion about the application of Indiana Code Section 35-34-1-5(b), and listed numerous cases from this Court and our supreme court that looked not just to the timeliness requirement but focused upon whether an amendment prejudiced a defendant. Fajardo, 859 N.E.2d at 1206-07. Thus, at the time of Miller's trial, the relevant statute had not been interpreted in a manner that would have invalidated the amendment at issue.

The salient inquiry when determining whether an attorney rendered deficient performance is whether his or her performance fell below an objective level of reasonableness based upon prevailing professional norms. Strickland, 466 U.S. at 687-88. The case law available to Miller's attorney at the time of trial would have indicated to a reasonable attorney that the untimeliness of an amendment would not necessarily render the amendment impermissible. See Singleton v. State, 889 N.E.2d 35, 41 (Ind. Ct. App. 2008) (rejecting a claim of ineffectiveness of trial counsel premised upon counsel's failure to object to the amendment of an information based on the reasoning later adopted in Fajardo), trans. denied. See also Leatherwood v. State, 880 N.E.2d 315, 318 (Ind. Ct. App. 2008) (holding that Fajardo did not apply retroactively to cases on post-conviction review), trans. denied. Counsel is not ineffective for failing to anticipate a change in the law. J.A. v. State, 904

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<sup>7</sup> Since the Fajardo decision, Indiana Code Section 35-34-1-5 has been amended to provide that an indictment or information may be amended in matters of substance before the commencement of trial if the amendment does not prejudice the substantial rights of the defendant.

N.E.2d 250, 258 (Ind. Ct. App. 2009), trans. denied.

Double Jeopardy. Miller contends that his trial counsel should have tendered an instruction advising the jury that it could not find him guilty of both murder and felony murder because of double jeopardy concerns. However, the submission of both charges to the jury is not improper, as explained by our supreme court in Carter v. State:

It is highly ordinary that a jury ... may hear evidence about multiple counts during a single trial and determine guilt on each of them. These findings of guilt do not mean that a defendant has faced multiple sentences or multiple judgments of conviction. Asking the jury to deliberate on all potential charges that are supported by the evidence is a sensible and efficient practice. A verdict of guilty can certainly be a significant legal event, but only if a court later enters a judgment on it.

750 N.E.2d 778, 779 (Ind. 2001). Here, the trial court merged the felony murder conviction into the murder conviction and pronounced a single sentence. Miller, slip op. at 6, n.6. It was not incumbent upon trial counsel to proffer a jury instruction to avoid double jeopardy concerns.

Final Instruction 3 (felony murder). In Final Instruction 3, the jury was informed that Miller could be convicted of felony murder if the State proved that he killed Lawrence Nelson while committing or attempting to commit Dealing in Cocaine, and further informed the jury that a person who “knowingly or intentionally delivers or finances the delivery of cocaine commits dealing in cocaine.” (App. 98). Miller argues that his attorney should have objected to this instruction because it omitted some of the language of Indiana Code Section 35-48-4-1, defining the crime of Dealing in Cocaine.

However, Indiana Code Section 35-48-4-1 is written in the disjunctive. A person may

commit Dealing in Cocaine by knowingly or intentionally manufacturing cocaine, financing the manufacture of cocaine, delivering, or financing the delivery of cocaine, or possessing cocaine with intent to manufacture, finance the manufacture of, deliver, or finance the delivery of cocaine. Here, the State did not allege that Miller had committed Dealing in Cocaine by all possible means. Miller has not shown that a timely objection by his counsel would have been sustained. See Walker v. State, 843 N.E.2d 50, 59 (Ind. Ct. App. 2006) (observing that when an ineffectiveness claim is based on failure to make an objection, the petitioner must show that a proper objection would have been sustained), trans. denied.

Final Instruction 31. Finally, Miller claims that his counsel was ineffective for failing to challenge an “Allen-like”<sup>8</sup> instruction. In pertinent part, the instruction advised:

If you should fail to reach a decision, this case will be left open and undecided. Like all cases it must be disposed of at some time. Another trial would be a heavy burden on both sides.

There is no reason to believe that the case can be tried again any better or more exhaustively than it has been. There is no reason to believe that more evidence or clearer evidence would be produced on behalf of either side.

There is no reason to believe that the case would ever be submitted to twelve people more intelligent, more impartial or more reasonable than you. Any future jury must be selected in the same manner that you were.

(App. 127). The Indiana Supreme Court considered this language in Broadus v. State, 487 N.E.2d 1298 (Ind. 1986) and, while “not condoning” language approaching or paralleling the language of an “Allen charge,” the giving of the instruction was held to be harmless error as

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<sup>8</sup> He concedes that the instruction was not given to a deadlocked jury, but rather was given to the jury before they began to deliberate.

it was given with the initial set of instructions. Here, the instruction was included as part of the final instructions, and counsel could have properly lodged an objection. Nevertheless, although counsel's efforts and strategies did not ultimately achieve acquittal, they were not so unreasonable as to constitute ineffective assistance of counsel.

### **Conclusion**

Miller has failed to demonstrate that trial counsel's performance was deficient and that he suffered resulting prejudice. Accordingly, the post-conviction court did not err in rejecting Miller's ineffective assistance claim and denying post-conviction relief.

Affirmed.

VAIDIK, J., and BRADFORD, J., concur.