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APPELLANT PRO SE:

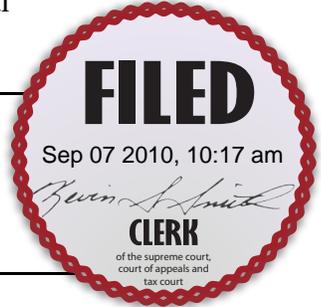
JOHN CHUPP
Pendleton, Indiana

ATTORNEYS FOR APPELLEE:

GREGORY F. ZOELLER
Attorney General of Indiana

MONIKA PREKOPA TALBOT
Deputy Attorney General
Indianapolis, Indiana

**IN THE
COURT OF APPEALS OF INDIANA**



JOHN CHUPP,)
)
 Appellant-Defendant,)
)
 vs.)
)
 STATE OF INDIANA,)
)
 Appellee-Plaintiff.)

No. 49A05-0912-PC-683

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Sheila A. Carlisle, Judge
Cause No. CR 82-81A

September 7, 2010

MEMORANDUM DECISION - NOT FOR PUBLICATION

FRIEDLANDER, Judge

John Chupp appeals from the post-conviction court's order denying his petition for post-conviction relief. Chupp raises the following consolidated and restated issue for our review: Did the post-conviction court err by denying Chupp's petition for post-conviction relief?

We affirm in part, vacate in part, and remand.

The facts supporting Chupp's conviction were previously recited in the opinion affirming his convictions on direct appeal and are as follows:

At trial the evidence showed that L.M., a 72-year-old widow, was awakened around 11:30 p.m. on July 10, 1982 by three men who crashed through her bedroom door. They demanded to know where her money was kept, and she told them it was downstairs. One of the men found her purse but it contained only thirty-one dollars. To force her to reveal the location of the rest of her money, one of the men burned her hand with [a] cigarette lighter. L.M. tried to explain that she had just returned from vacation and that thirty[-]one dollars was all she had. One of the men directed the other two to ransack the house. The remaining man raped L.M. and then one of the men sodomized her.

The men bound and gagged L.M. and finished searching the house. The victim was not found until noon the following day when her son-in-law discovered her. An ambulance transported her to a hospital where a medical examination revealed that L.M. had suffered bruises, lacerations, blisters, and swelling. She lost her purse with thirty-one dollars, her lock box containing personal papers and silver coins, and her maroon car.

Robert Graham testified that on the night of the crimes he was at Michael Arnold's house. He saw Arnold, David King and Chupp with two guns, gloves and jackets. The three men left in Chupp's car saying they were going out to do "something." When they returned later in the evening, Chupp was driving his own car and King was driving a maroon car. Graham saw Chupp, Arnold and King take a metal box into the house and pry it open. The three went through the envelopes in the box and found some silver coins.

The police received a tip about possible suspects in the case and sent Detective Joie Davis to investigate. He went to a residence looking for Chupp and Arnold. Robert Murray, who rented the house, answered the door. In

addition to Murray, Detective Davis met two young men who introduced themselves as Robert Wells and Joe Brown. Detective Davis asked Murray if he would go outside to talk with him. Once outside, Davis asked Murray if he knew where to find Chupp. Davis said he wanted to talk to Chupp about a robbery and rape. Chupp was passed out in the bedroom, Murray said. He also said that the two men inside the house had given aliases. The men's names, Murray said, were David King and Michael Arnold. Murray told the officer he overheard the three men planning to leave the state.

Davis consulted with headquarters and arrested the three men soon thereafter. After the arrest, Murray requested that the police remove a green duffle bag belonging to Arnold and two suitcases belonging to Chupp and King. Detective Davis seized the luggage, obtained a search warrant, and searched it. Inside the duffle bag the police found a pillowcase that matched the linen in L.M.'s house.

At trial Arnold testified against appellant. Four months later Arnold wrote a letter to the trial judge recanting his testimony. He lied, Arnold wrote, because he blamed Chupp for his arrest and because appellant misinformed him about the amount of money the victim would have in her home. Arnold would not identify the third person involved in the crime; he only said it was not Chupp.

Chupp v. State, 509 N.E.2d 835, 836-37 (Ind. 1987).

The State charged Chupp with class A felony burglary, class A felony rape, two counts of class A felony criminal deviate conduct, class A felony robbery, and class B felony criminal confinement. At the conclusion of Chupp's jury trial he was found guilty of class A felony burglary,¹ class A felony robbery,² and class B felony criminal confinement.³ The trial court imposed concurrent sentences of fifty years on the burglary and robbery convictions and a consecutive sentence of twenty years on the criminal confinement conviction, for an aggregate sentence of seventy years. Chupp pursued a direct appeal of his

¹ Ind. Code Ann. § 35-43-2-1(2) (West, Westlaw through 2010 2nd Regular Sess.).

² Ind. Code Ann. § 35-42-5-1 (West, Westlaw through 2010 2nd Regular Sess.).

convictions and sentence, which were affirmed. *See Chupp v. State*, 509 N.E.2d 835. In that appeal, Chupp raised the following issues: 1) The denial of his motion for a new trial; 2) the sufficiency of identification testimony; 3) error in the admission of evidence; 4) whether he received effective assistance of counsel; 5) the reasonableness of his sentence; and 6) whether he was required to be present when the trial court granted a continuance.

Chupp filed a *pro se* petition for post-conviction relief that, after counsel's subsequent amendments, alleged Chupp received ineffective assistance of appellate counsel and fundamental error occurred because the same injury was used to enhance both the robbery and burglary convictions. That petition was voluntarily withdrawn. Chupp filed another *pro se* petition for post-conviction relief in which he claimed his sentence was erroneous because the robbery and burglary convictions were enhanced by the same injuries. The Public Defender of Indiana appeared in Chupp's case, investigated it, and eventually withdrew. Chupp was allowed to withdraw this petition without prejudice.

On April 24, 2007, Chupp, *pro se*, filed another petition for post-conviction relief claiming that there was newly discovered evidence, *i.e.*, he had been kidnapped from his original family, placed with another family, and a form of hypnosis was used on him to commit the crimes. Chupp also amended this petition to include a claim that his sentence was erroneous because the robbery and burglary convictions were enhanced based on the same injuries. Chupp also filed several motions including a motion for DNA testing and a motion to compel evidence from the Marion County Sheriff's Department. The motions were denied by the post-conviction court.

³ I. C. § 35-42-3-3(b)(2) (West, Westlaw through 2010 2nd Regular Sess.).

Chupp further amended his petition adding claims regarding the charging information, jury instructions, and ineffective assistance of appellate counsel. On February 26, 2008, Chupp again amended his petition to add issues regarding DNA testing, denial of investigation by the trial court, and newly discovered evidence. The post-conviction court held an evidentiary hearing and later issued findings of fact and conclusions thereon denying Chupp post-conviction relief. Chupp now appeals.

Post-conviction proceedings do not afford the petitioner an opportunity for a super appeal, but rather, provide the opportunity to raise issues that were unknown or unavailable at the time of the original trial or the direct appeal. *Ben-Yisrayl v. State*, 738 N.E.2d 253 (Ind. 2000), *cert. denied* (2002); *Wieland v. State*, 848 N.E.2d 679 (Ind. Ct App. 2006), *trans. denied, cert. denied*. The proceedings do not substitute for a direct appeal and provide only a narrow remedy for subsequent collateral challenges to convictions. *Ben-Yisrayl v. State*, 738 N.E.2d 253. The petitioner for post-conviction relief bears the burden of proving the grounds by a preponderance of the evidence. Ind. Post-Conviction Rule 1(5).

When a petitioner appeals a denial of post-conviction relief, he appeals from a negative judgment. *Fisher v. State*, 878 N.E.2d 457 (Ind. Ct. App. 2007), *trans. denied*. The petitioner must establish that the evidence as a whole unmistakably and unerringly leads to a conclusion contrary to that of the post-conviction court. *Id.* We will disturb a post-conviction court's decision as being contrary to law only where the evidence is without conflict and leads to but one conclusion, and the post-conviction court has reached the opposite conclusion. *Wright v. State*, 881 N.E.2d 1018 (Ind. Ct. App. 2008), *trans. denied*. The post-conviction court is the sole judge of the weight of the evidence and the credibility

of witnesses. *Lindsey v. State*, 888 N.E.2d 319 (Ind. Ct. App. 2008), *trans. denied*. We accept the post-conviction court's findings of fact unless they are clearly erroneous, and no deference is given to its conclusions of law. *Fisher v. State*, 878 N.E.2d 457.

The State raised the affirmative defense of laches. The equitable doctrine of laches operates to bar consideration of the merits of a claim or right of one who has neglected for an unreasonable time, under circumstances permitting due diligence, to do what in law should have been done. *Mansfield v. State*, 850 N.E.2d 921 (Ind. Ct. App. 2006). Laches is an affirmative defense which the State must plead in its responsive pleading. *Id.* To prevail on a claim of laches the State has the burden of proving by a preponderance of the evidence that the petitioner unreasonably delayed seeking post-conviction relief and that the State has been prejudiced by the delay. *Id.*

Laches indicates a conscious indifference or procrastination. *Perry v. State*, 512 N.E.2d 841 (Ind. 1987). Circumstantial evidence is sufficient to show state of mind. *Id.* Facts from which a reasonable finder of fact could infer petitioner's knowledge may support a finding of laches. *Id.* Repeated contacts with the criminal justice system, consultation with attorneys, and incarceration in a penal institution with legal facilities are all facts from which the fact finder may infer knowledge. *Id.* Here, the post-conviction court found that Chupp had been continuously incarcerated in the Indiana Department of Correction since his sentencing in 1982. Chupp had filed two petitions for post-conviction relief, one in 1989, and another in 1995, both of which were withdrawn, and the latter was withdrawn after the public defender had investigated the allegations of Chupp's petition. Chupp filed the instant petition for post-conviction relief in 2007 and that petition was amended numerous times

prior to the evidentiary hearing and the post-conviction court's decision. We conclude that the trial court correctly found the State met its burden of establishing Chupp unreasonably delayed the prosecution of his petition for post-conviction relief.

The State was also required to establish by a preponderance of the evidence that it was prejudiced by the delay. The post-conviction court found that a paralegal for the State had attempted to locate the listed witnesses in the case and was able to locate only the lead detective. The victim, who was seventy-two years old at the time of the offense, and an eyewitness to the crimes, as well as other witnesses were not located. As a consequence, the State is in a position where a successful re-prosecution of the case is virtually impossible. Prejudice, for the purpose of post-conviction relief proceedings, is not merely the impossibility of presenting any case at all, or difficulty in locating and obtaining physical evidence or witnesses. *Mahone v. State*, 742 N.E.2d 982 (Ind. Ct. App. 2001). If the reasonable likelihood of successful prosecution is materially diminished by the passage of time attributable to a defendant's neglect, such evidence may be sufficient to demonstrate prejudice. *Id.* We agree with the post-conviction court that the State has met its burden of proving prejudice and the affirmative defense of laches. On that ground alone, Chupp is not entitled to post-conviction relief on many of his claims.

Laches notwithstanding, we turn next to Chupp's claim of ineffective assistance of appellate counsel. Our standard of review of claims of ineffective assistance of appellate counsel follows:

We apply the same standard of review to claims of ineffective assistance of appellate counsel as we apply to claims of ineffective assistance of trial counsel. To prevail on a claim of ineffective assistance of counsel, a petitioner

must demonstrate both that his counsel's performance was deficient and that the petitioner was prejudiced by the deficient performance. A counsel's performance is deficient if it falls below an objective standard of reasonableness based on prevailing professional norms. To meet the appropriate test for prejudice, the petitioner must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. Failure to satisfy either prong will cause the claim to fail.

Walker v. State, 843 N.E.2d 50, 57 (Ind. Ct. App. 2006) (citing *Strickland v. Washington*, 466 U.S. 668 (1984)) (internal citations omitted), *trans. denied*. Claims of ineffective assistance of appellate counsel generally fall into one of three categories: (1) denying access to appeal; (2) failing to raise issues; and (3) failing to present issues competently. *Bieghler v. State*, 690 N.E.2d 188 (Ind. 1997), *cert. denied*, 525 U.S. 1021 (1998).

“Counsel is afforded ‘considerable discretion’ in choosing strategy and tactics.” *State v. Miller*, 771 N.E.2d 1284, 1288 (Ind. Ct. App. 2002) (quoting *Martin v. State*, 760 N.E.2d 597, 600 (Ind. 2002)), *trans. denied*. When evaluating claims of defective strategy rising to the level of ineffective assistance, we “strongly presume” counsel provided adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. *Id.* Moreover, we have indicated that, generally, “deliberate choices made by attorneys for tactical or strategic reasons do not establish ineffective assistance of counsel, even where such choices are subject to criticism or ultimately proved to be detrimental to the defendant.” *Id.* We have adopted this view upon our recognition that the best and most experienced criminal defense attorneys may disagree on matters of strategy. *See Timberlake v. State*, 753 N.E.2d 591 (Ind. 2001), *cert. denied*, 537 U.S. 839 (2003). The decision of

what issue or issues to raise on appeal is one of the most important strategic decisions made by appellate counsel. *Bieghler v. State*, 690 N.E.2d 188.

Chupp argues that appellate counsel was ineffective for failing to pursue the argument that there was insufficient evidence of the use of a weapon during the commission of the crimes. The record reveals that as a matter of strategy, Chupp's counsel argued, instead that there was insufficient evidence to establish Chupp's presence at the scene of the crimes beyond a reasonable doubt. Chupp's argument, if successful, would have served to reduce the class of two of the crimes charged. Chupp's appellate counsel's argument, if successful, could have resulted in a reversal of each of Chupp's convictions. We cannot say that Chupp's appellate counsel was ineffective on this basis.

Next, Chupp argues that his appellate counsel should have raised a double jeopardy argument regarding the elevation of both the burglary and robbery counts to class A felonies based on the same injuries. Prior to Chupp's direct appeal, the Supreme Court held that a defendant's class A felony convictions for burglary, attempted rape, and attempted robbery should be vacated and entered as class B felony convictions because the same injury to the victim had been used to support the attempted murder conviction, as was used to elevate those offenses to class A felonies. *See Flowers v. State*, 481 N.E.2d 100 (Ind. 1985). Had Chupp's counsel raised the double jeopardy issue on direct appeal, Chupp's robbery conviction likely would have been reduced to a class C felony.

Although we have previously concluded that the post-conviction court properly found Chupp's claims barred by the doctrine of laches, the doctrine does not preclude our resolution of this issue. The rationale behind the doctrine of laches is that a person, who for an

unreasonable length of time, has neglected to assert a claim against another waives the right to assert his claim when this delay prejudices the person against whom he would assert it. *Mansfield v. State*, 850 N.E.2d 921. As the double jeopardy claim here can be determined on the record before us, there is no prejudice to the State from the delay in asserting the claim. Chupp's appellate counsel's failure to raise this argument on direct appeal does constitute deficient performance. We now turn to the issue of whether that deficient performance prejudiced Chupp.

The State correctly notes that Chupp's sentences for his robbery and burglary convictions are to be served concurrently. Thus, it appears that Chupp has not been prejudiced by the failure to reduce his robbery conviction to a class C felony with respect to the executed time he is required to serve. The prejudice, however, potentially comes from the effect the class A felony conviction, as opposed to a class C felony conviction, might have on Chupp's overall criminal history. We therefore vacate Chupp's conviction for robbery as a class A felony and direct the post-conviction court to enter judgment on the robbery conviction as a class C felony, and sentence Chupp accordingly.

Chupp claims that his appellate counsel was ineffective was failing to pursue a double jeopardy claim on direct appeal with respect to the commission of both the robbery and confinement offenses while in possession of a gun. The State concedes that had Chupp's appellate counsel made this double jeopardy argument on direct appeal, Chupp's robbery conviction would have been reduced to a class C felony. Because we have already granted Chupp the relief warranted here with regard to the previous argument we do not find that additional relief is necessary as to this claim.

Chupp asserts that his appellate counsel was ineffective for failing to present three separate prosecutorial misconduct arguments. First, Chupp argues that the prosecutor committed a *Brady* violation by withholding evidence that the victim did not see a weapon. Second, Chupp argues that the prosecutor violated a separation of witnesses order. Last, Chupp argues that the prosecutor threatened Robert Murray, the man who rented the house where Chupp and the others were found.

In reviewing a claim of prosecutorial misconduct, we determine whether the prosecutor engaged in misconduct, and if so, whether the misconduct, under all of the circumstances, placed the defendant in a position of grave peril to which he would not have been subjected. *Cooper v. State*, 854 N.E.2d 831 (Ind. 2006). The gravity of peril is measured by the probable persuasive effect of the misconduct on the jury's decision rather than the degree of impropriety of the conduct. *Id.*

To establish the alleged *Brady* violation, Chupp needs to show that the State suppressed material evidence that was favorable to his defense. *See Brady v. Maryland*, 373 U.S. 83 (1963); *Stephenson v. State*, 864 N.E.2d 1022 (Ind. 2007). The suppression by the prosecution of evidence favorable to an accused upon request violates due process principles where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution. *Stephenson v. State*, 864 N.E.2d 1022. Evidence is material only if there is a reasonable probability that had the evidence been disclosed to the defense, the result of the proceeding would have been different. *Id.*

The record reveals that the victim testified at trial and was cross-examined on the very issue of her inability to see the gun. She testified that while she could not see the gun

because her eyes were taped, she felt the gun on her knee and could determine that it was a rifle or shotgun. Chupp has failed to establish a *Brady* violation, prosecutorial misconduct, or ineffective assistance of appellate counsel in this regard.

Likewise, Chupp's argument concerning an alleged violation of a separation of witnesses order fails. Chupp alleges that it was error for Detective Joie Davis to be permitted to remain in the courtroom during testimony of other witnesses and to testify. Ind. Evid. Rule 615 requires a trial court to grant a party's request for a witness separation order except for certain witnesses identified by the rule as not being subject to exclusion. *Fourthman v. State*, 658 N.E.2d 88 (Ind. Ct. App. 1995). "This rule does not authorize the exclusion of (1) a party who is a natural person, or (2) an officer or employee of a party that is not a natural person designated as its representative by its attorney, or (3) a person whose presence is shown by a party to be essential to the presentation of the party's cause." Evid. R. 615. The purpose of a separation of witnesses order is to prevent witnesses from gaining knowledge from testimony of other witnesses and adjusting their testimony accordingly. *Childs v. State*, 761 N.E.2d 892, 895 (Ind. Ct. App. 2002). Here, the record reflects that Detective Davis, the State's designated representative, was allowed to remain in the courtroom during the proceedings and was allowed to testify. This was permissible under Evid. R. 615(2) and does not constitute prosecutorial misconduct. Chupp's appellate counsel was not ineffective in this regard.

Chupp also argues that the prosecutor threatened witness Robert Murray. In support of his allegation, Chupp, in an affidavit, spelled out the circumstances of Murray's guilty plea and immunity in exchange for testifying against Chupp. There is no evidence of threats

against Murray in Chupp's affidavit. Further, the State disclosed its agreement with Murray at trial during Murray's testimony. Chupp has failed to support his claim of prosecutorial misconduct, and his appellate counsel was not ineffective for failing to raise this issue.

Chupp claims that his appellate counsel was ineffective for failing to argue that Chupp's arrest was illegal because false statements were contained in the probable cause affidavit. Chupp does not cite to any evidence or authority. Chupp's claim, which is already defeated by the affirmative defense of laches, fails for the additional reason that he has waived the issue by failing to develop this claim with an argument supported by cogent reasoning and citation to authorities. *See* Ind. Appellate Rule 46(A)(8)(a)(argument should be supported by cogent reasoning and citation to authority and parts of record); *Davis v. State*, 835 N.E.2d 1102 (Ind. Ct. App. 2005) (failure to make cogent argument results in waiver).

Chupp asserts that his appellate counsel was ineffective for failing to challenge the adequacy of the charging information. In particular, Chupp argues that he was not notified via the charging information of the specific subsections of the criminal statutes applicable to his crimes. The purpose of the charging information is to ensure that the accused is afforded certain protections, and to apprise him of the nature of the accusation made, so that preparations for mounting a defense can be made. *Wine v. State*, 637 N.E.2d 1369 (Ind. Ct. App. 1994). Our review of the record reveals that although the charging information does not expressly provide the subsections of the criminal statutes applicable to Chupp's crimes, the charging information itself describes with sufficient particularity the acts constituting

burglary, robbery, and confinement such that Chupp could adequately prepare his defense. Appellate counsel was not ineffective here.

Chupp argues that instruction number 44 was unconstitutional and that his appellate counsel was ineffective for failing to present the issue. Instruction number 44 was an instruction on accomplice liability. Chupp's trial counsel's objection to the instruction was based on the lack of evidence to support giving the instruction, not that it was unconstitutional. As a consequence, his challenge to the constitutionality of the instruction has been waived. Failure to make a contemporaneous objection to a jury instruction results in waiver. *Baker v. State*, 922 N.E.2d 723 (Ind. Ct. App. 2010). Furthermore, a defendant may not raise one ground for objection at trial and argue a different ground on appeal. *Morgan v. State*, 755 N.E.2d 1070 (Ind. 2001). The argument on the constitutionality of the instruction could only be made in the context of fundamental error. The fundamental error exception to waiver of a procedurally defaulted claim is extremely narrow and available only when the record reveals a clearly blatant violation of basic and elementary principles, where the harm or potential for harm cannot be denied, and which violation is so prejudicial to the rights of the defendant as to make a fair trial impossible. *Jewell v. State*, 887 N.E.2d 939 (Ind. 2008).

Chupp relies on *Sandstrom v. Montana*, 442 U.S. 510 (1979) and *Walker v. State*, 779 N.E.2d 1158 (Ind. Ct. App. 2002) to support his argument that the instruction given at his trial was unconstitutional. The State, however, correctly notes that neither case is applicable to Chupp's situation. In *Sandstrom*, a case not involving accomplice liability, the instruction at issue violated the defendant's due process rights because it created a mandatory

presumption, that the law presumes a person intends the ordinary consequences of his voluntary acts, which had the effect of shifting the burden of proof on the element of intent to the defendant. 442 U.S. 510. In *Walker*, a challenge was made to an accomplice liability instruction. A panel of this court held that the accomplice liability instruction given in that case created a mandatory presumption violating the defendant's due process rights by shifting the burden of proof and was unconstitutional. 779 N.E.2d 1158. The holding in *Walker*, however, was disapproved in *McCorker v. State*, 797 N.E.2d 257 (Ind. 2003). Our Supreme Court held that to the extent there was a presumption created in the instruction, it was permissive and not unconstitutional. *Id.* That said, the instruction language at issue in those cases, is not present in Chupp's case. *Sandstrom* did not involve an accomplice liability instruction, and *Walker* and *McCorker* were decided well after Chupp's direct appeal. Chupp has not established ineffective assistance of appellate counsel for failure to raise a fundamental error claim or ineffective assistance of trial counsel claim in connection with this instruction.

Chupp claims that his appellate counsel was ineffective for failing to raise various ineffective assistance of trial counsel claims. We have addressed nearly each of the separate components of Chupp's argument above and have found no error. Consequently, his appellate counsel was not ineffective for failing to raise an ineffective assistance of trial counsel claim. Chupp makes the additional argument that appellate counsel was ineffective for failing to present an ineffective assistance of trial counsel claim based upon his trial counsel's alleged failure to advise Chupp that he would receive a lesser sentence if he spoke at his sentencing hearing. We note that portion of the appendix cited by Chupp does not

support his contention. The record does not reflect that the trial court stated it would have imposed a lesser sentence had Chupp spoken at his sentencing hearing. This argument fails.

Chupp asserts that his trial counsel was ineffective by failing to call witnesses in Chupp's defense at trial. Chupp fails to identify witnesses who would have been helpful to his defense. Because he has not established ineffective assistance of trial counsel in this regard, his appellate counsel cannot be ineffective for failing to raise this claim.

Chupp argues that he is entitled to a new trial based upon newly discovered evidence. The Supreme Court has held that in order to obtain a new trial based on newly discovered evidence, the defendant must show that: (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 on a retrial of the case; and (9) it will probably produce a different result. *Kahlenbeck v. State*, 719 N.E.2d 1213 (Ind. 1999). Chupp alleged his newly discovered evidence was that he was kidnapped from his original family and placed with another family who brainwashed him into committing the crimes. Chupp's biological father testified at the hearing on Chupp's petition for post-conviction relief that he raised Chupp from infancy in his home. The post-conviction court correctly found that Chupp is not entitled to post-conviction relief on these grounds.

Chupp also claimed that he had newly discovered evidence of prosecutorial misconduct. He alleged that he was present during a conversation between the prosecutor and Murray concerning Murray's guilty plea during the trial. On the face of Chupp's affidavit, however, it is apparent that this evidence is not newly discovered as it occurred

during the trial and Chupp was present. The post-conviction court did not err by denying Chupp relief.

As a final matter, Chupp argues that the post-conviction court erred in making various pre-hearing rulings. Chupp's motion for DNA testing was properly denied because it was not material to identifying Chupp as the perpetrator of the crimes. Chupp sought the testing in order to establish his claim that he had been kidnapped from his original family. That claim was disproven by the testimony of his biological father. Chupp's motion to compel discovery from the F.B.I. also was properly denied by the post-conviction court. He claimed that he needed a civil rights complaint to help prove an issue in his petition, yet he did not explain the contents of the complaint or how it would have helped him. This issue is waived.

Chupp sought to compel the interrogatory responses of two witnesses without explaining to the post-conviction court or this court why their testimony would be helpful to his case. Chupp also sought to depose Murray, a witness who testified at trial. Chupp had the opportunity to question Murray at trial, and his deposition would have been cumulative of his testimony at trial. The post-conviction court did not err by denying these requests.

The post-conviction court also denied Chupp's request for a transcript of the sentencing hearing. Chupp's challenge to his sentence was appropriately denied because he raised a sentencing issue in his direct appeal making the resolution of that issue *res judicata*. Further, a post-conviction relief proceeding is not the appropriate proceeding to pursue a sentencing claim known or available on direct appeal. *See Timberlake v. State*, 753 N.E.2d at

597 (issue known and available but not raised on direct appeal is waived; issue raised and decided adversely is res judicata).

Chupp requested public funds to hire a private investigator, but cited no authority to support his request. Neither does he cite to authority to bolster his claim that the post-conviction erred by denying his request. We find no error in the court's ruling.

Chupp argues that the post-conviction court erred by denying his request to issue a subpoena to one of his co-defendants who did not testify against Chupp. Chupp claims that David Wayne King would testify to prosecutorial misconduct and ineffective assistance of counsel by offering plea agreements to Chupp and King in which they would be compelled to testify at trial against the other. In the event Chupp was able to show unethical conduct on the part of the prosecutor or defense counsel, this conduct did not prejudice Chupp because King did not testify against him. The post-conviction court did not err.

The post-conviction court denied Chupp's request to compel Attorney Andrew Wirick to file an affidavit. Chupp stated in his motion to compel discovery that he requested the attorney's assistance in filing a lawsuit against the person he alleged kidnapped him. Since the validity of Chupp's kidnapping claim was defeated by his biological father's testimony, we do not find that the post-conviction court erred by denying Chupp's request.

In sum, the State established its affirmative defense of laches barring many of Chupp's claims. Chupp's claims regarding double jeopardy, however, survive the affirmative defense of laches and require us to remand to the post-conviction court the issue of Chupp's robbery conviction, and direct the court to enter judgment of conviction as a class

C felony and enter a sentence accordingly. The remainder of Chupp's claims fail, laches notwithstanding.

Judgment affirmed in part, vacated in part, and remanded.

BARNES, J., and CRONE, J., concur.