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APPELLANT PRO SE:

**FARRELL HAYCRAFT**
Carlisle, Indiana

ATTORNEYS FOR APPELLEE:

**GREGORY F. ZOELLER**
Attorney General of Indiana

**MICHAEL GENE WORDEN**
Deputy Attorney General
Indianapolis, Indiana

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# IN THE
# COURT OF APPEALS OF INDIANA

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| FARRELL HAYCRAFT, | ) | |
| | ) | |
| Appellant, | ) | |
| | ) | |
| vs. | ) | No. 31A01-1009-PC-525 |
| | ) | |
| STATE OF INDIANA, | ) | |
| | ) | |
| Appellee. | ) | |

APPEAL FROM THE HARRISON SUPERIOR COURT
The Honorable Roger D. Davis, Judge
Cause No. 31D01-0303-PC-002

**October 28, 2011**

**MEMORANDUM DECISION – NOT FOR PUBLICATION**

**MATHIAS, Judge**

Farrell Haycraft ("Haycraft") was convicted in Harrison Superior Court of multiple offenses including four counts of Class A felony child molesting. Haycraft appealed his convictions and resulting sentence, and the Court of Appeals affirmed his convictions, but reduced his aggregate 190-year sentence to 150 years. Haycraft subsequently filed a pro se petition for post-conviction relief claiming fundamental error in the admission of evidence, sentencing errors, prosecutorial misconduct, and ineffective assistance of trial and appellate counsel. The post-conviction court denied Haycraft's petition and he appeals. Concluding that Haycraft has not established any reversible error, we affirm the denial of his petition for post-conviction relief.

**Facts and Procedural History**

In 2001, Haycraft was convicted of four counts of Class A felony child molesting, Class C felony child molesting, two counts of Class D felony obscenity before a minor, and Class A misdemeanor contributing to the delinquency of a minor. The facts pertinent to those convictions are recited in our resolution of Haycraft's direct appeal,

> [D]uring the summer of 2000, twelve-year-old A.M. and his eight-year-old brother, W.M., stayed with Haycraft, their forty-nine year-old grandfather, for extended periods of time. Haycraft lived with his life partner, Bob Sutton ("Sutton"), in Harrison County, Indiana. During the course of the summer, Haycraft inserted his penis and finger in A.M.'s anus, performed oral sex on A.M. and required A.M. to perform oral sex on him, furnished A.M. with alcoholic beverages and allowed A.M. to drive his truck, showed A.M. pornographic movies, and engaged in oral sex with Sutton in front of A.M. and W.M., who was often present during the abuse.
>
> A.M.'s grandmother, Haycraft's ex-wife, suspected that Haycraft was abusing A.M. and reported her suspicions to her daughter, A.M.'s mother. A.M.'s mother contacted Detective Charley Scarber ("Scarber") of the Indiana State Police, and the State filed charges against Haycraft on August 25, 2000. On August 28, 2000, Scarber interviewed Haycraft and

> obtained a taped confession from him. On January 19, 2001, a jury found Haycraft guilty as charged, and the trial court subsequently sentenced him to 190 years imprisonment.

Haycraft v. State, 760 N.E.2d 203, 207-08 (Ind. Ct. App. 2001), trans. denied. Haycraft raised several issues in his direct appeal including prosecutorial misconduct, admission of testimony of a child witness and of an investigating officer, and ineffective assistance of trial counsel. Our court concluded that Haycraft did not establish reversible error on any of those issues. However, our court did reduce Haycraft's aggregate sentence from 190 years to 150 years because we concluded that his sentence was manifestly unreasonable.[1] Id. at 214.

Haycraft subsequently filed a pro se petition for post-conviction relief. The State Public Defender was appointed to represent Haycraft, but withdrew from its representation of Haycraft in 2005. On March 22, 2010, Haycraft filed pro se an amended petition for post-conviction relief. A hearing was held on his petition on August 24, 2010. The next day, the post-conviction court issued an order denying Haycraft's petition. The order provides in pertinent part:

> 1. The petitioner presented no evidence.
> 2. The Petitioner claimed four different errors, namely: (a) being denied a fair trial; (b) ineffective assistance of trial and appellate counsel; (c) prosecutorial misconduct; and (d) abuse of discretion in sentencing defendant.
> 3. The fair trial arguments centered around an audio tape of petitioner being admitted at trial wherein petitioner made admissions and/or confessions and an argument that evidence at trial was insufficient to convict on the misdemeanor charge of contributing to the delinquency of a minor. The

[1] On July 19, 2002, our Supreme Court amended Appellate Rule 7(B) effective January 1, 2003, which altered our review of criminal sentences from "manifestly unreasonable" to "inappropriate sentence." See Kien v. State, 782 N.E.2d 398, 416 n.12 (Ind. Ct. App. 2003), trans. denied.

> State responded that both of these issues were known and available, but not raised on direct appeal and therefore waived. The court agrees with the [S]tate's position and so finds and concludes and relies on *Timberlake v. State of Indiana* 753 N.E.2d 591 (Ind. [] 2001).
> 4. Next the petitioner claims ineffective assistance of trial and appellate counsel for not continuing to object to "grooming testimony of Scarber" and "testimony of an uncharged molestation charge". The court finds that petitioner did in fact raise the issue of Scarber's testimony in the direct appeal. As a result the issue is foreclosed as a result of res judicata. *See Timberlake*. As to any issue of testimony of an uncharged molestation charge the court finds that issue was known and available, but not raised on direct appeal and is waived. The Court of Appeals also considered the issue of ineffective assistance of trial counsel in the direct appeal and found the claim "must fail", in part, because of petitioner's "confession". Petitioner must raise all issues related to the claim or they are foreclosed. *See Timberlake*.
> 5. Petitioner claims it was ineffective assistance of counsel on appeal for his appellate attorney to raise the claim of ineffective assistance of counsel at trial in the direct appeal because he should have held off on it for the inevitable post conviction relief proceeding. The court finds that it would have been waived since it was known and available and the court concludes that petitioner's claim in this regard must fail. Who knew a post conviction case was inevitable? Is a Writ of Habeas Corpus case inevitable? Is an appeal inevitable? Is it inevitable that no case ever ends?
> 6. Next the petitioner claims prosecutorial misconduct and abuse of discretion in sentencing. The court finds both of these claims were raised in the direct appeal and are therefore foreclosed because of res judicata. *See Timberlake*. In fact the petitioner's sentence was revised by the Court of Appeals and the Supreme Court denied transfer on the opinion of the Court of Appeals.

See August 25, 2010 Order reproduced in the Brief of the Appellant.[2] Haycraft now appeals the denial of his amended petition for post-conviction relief.

[2] The post-conviction court's order was not included in the Appellant's Appendix. Also, we observe that, contrary to Haycraft's argument, the post-conviction court's order is sufficient to meet the requirements of Post-Conviction Rule 1(6), which requires findings of fact and conclusions of law.

## Standard of Review

Post-conviction proceedings do not grant a petitioner a "super-appeal" but are limited to those issues available under the Indiana Post-Conviction Rules. Timberlake v. State, 753 N.E.2d 591, 597 (Ind. 2001) (citing Ind. Post-Conviction Rule 1(1)). Post-conviction proceedings are civil in nature, and petitioners bear the burden of proving their grounds for relief by a preponderance of the evidence. Ind. Post-Conviction Rule 1(5). A petitioner who appeals the denial of PCR faces a rigorous standard of review, as the reviewing court may consider only the evidence and the reasonable inferences supporting the judgment of the post-conviction court. Kien v. State, 866 N.E.2d 377, 381 (Ind. Ct. App. 2007), trans. denied. The appellate court must accept the post-conviction court's findings of fact and may reverse only if the findings are clearly erroneous. Stephenson v. State, 864 N.E.2d 1022, 1028 (Ind. 2007). If a post-conviction petitioner was denied relief, he or she must show that the evidence as a whole leads unerringly and unmistakably to an opposite conclusion than that reached by the post-conviction court. Ivy v. State, 861 N.E.2d 1242, 1244 (Ind. Ct. App. 2007), trans. denied.

## Discussion and Decision

On appeal of the denial of his petition for post-conviction relief, Haycraft raises several issues that are not properly before our court. First, Haycraft's arguments concerning the exclusion of evidence under the Rape Shield Law, denial of right to confrontation, and prosecutorial misconduct were available, but not raised on direct appeal. In "post-conviction proceedings, complaints that something went awry at trial

are generally cognizable only when they show deprivation of the right to effective counsel or issues demonstrably unavailable at the time of trial or direct appeal." Sanders v. State, 765 N.E.2d 591, 592 (Ind. 2002). Haycraft's arguments were available at the time of direct appeal, and we will not address the arguments as freestanding claims. See Conner v. State, 829 N.E.2d 21, 26 (Ind. 2005) (holding that the petitioner's post-conviction claim "of trial court bias was not raised at trial or in [the petitioner's] earlier appeal, and [was] therefore procedurally defaulted").

Next, in his petition for post-conviction relief, Haycraft claimed that his trial counsel was ineffective. But Haycraft previously raised this argument in his direct appeal. See Haycraft, 760 N.E.2d at 212-13. "A criminal defendant claiming ineffective assistance of trial counsel is at liberty to elect whether to raise this claim on direct appeal or in post-conviction proceedings. But if raised on direct appeal, the appellate resolution of the issue acts as res judicata and precludes its relitigation in subsequent post-conviction relief proceedings." Jewell v. State, 887 N.E.2d 939, 941 (Ind. 2008) (citations omitted); see also Allen v. State, 749 N.E.2d 1158, 1166 (Ind. 2001) ("It is well-established that if a defendant claims on direct appeal that his trial counsel was ineffective, he may not raise further issues of trial counsel error during post-conviction review.").

Finally, we address the only claim properly before us: Haycraft's argument that his appellate counsel was ineffective. When we review claims of ineffective assistance of appellate counsel, we use the same standard applied to claims of ineffective assistance of trial counsel. Harris v. State, 861 N.E.2d 1182 (Ind. 2007). That is, the party seeking

post-conviction relief must show that appellate counsel's performance fell below an objective standard of reasonableness and that there is a reasonable probability that but for the deficient performance of counsel the result of the proceeding would have been different. Id. 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).

Haycraft appears to argue that appellate counsel was ineffective for failing to raise three additional arguments on direct appeal: 1) the State's admission of evidence concerning prior bad acts and an uncharged crime; 2) that he was denied a fair trial; and, 3) that trial counsel was also ineffective for failing to object to a child's testimony on the grounds of competency.

> When a petitioner claims the denial of effective assistance of appellate counsel because counsel did not raise issues the petitioner argues should have been raised, reviewing courts should be particularly deferential to counsel's strategic decision to exclude certain issues in favor of others, unless such a decision was unquestionably unreasonable. But this does not end our analysis. Even if we determine that counsel's choice of issues was not reasonable, a petitioner must demonstrate a reasonable probability that the outcome of the direct appeal would have been different in order to prevail.

Taylor v. State, 840 N.E.2d 324, 328 (Ind. 2006). We must determine "(1) whether the unraised issues are significant and obvious from the face of the record; and (2) whether the unraised issues are 'clearly stronger' than the raised issues." Gray v. State, 841 N.E.2d 1210, 1214 (Ind. Ct. App. 2006), trans. denied.

Haycraft did not seek to admit any of the trial record or the brief from his direct appeal into evidence during the post-conviction hearing and did not call either his trial or appellate counsel as witnesses. To establish that appellate counsel's performance fell below an objective standard of reasonableness, Haycraft was required to present some evidence that appellate counsel failed to present a significant and obvious issue, and that such failure cannot be explained by any reasonable strategy. And because neither counsel testified at the hearing, the post-conviction court may properly infer that trial and appellate counsel would not have corroborated Haycraft's claims. See Graham v. State, 941 N.E.2d 1091, 1096 (Ind. Ct. App. 2011) (citing Dickson v. State, 533 N.E.2d 586, 589 (Ind. 1989), aff'd on reh'g). Haycraft's argument is also less than cogent, and although he provides citation to authority, he does not explain the relevance of that authority to his argument.

Finally, Haycraft inexplicably argues that his appellate counsel was ineffective for failing to challenge certain aggravating circumstances on direct appeal. Appellate counsel successfully argued that Haycraft's sentence was manifestly unreasonable. It is probable that appellate counsel chose to make only this argument as a matter of appellate strategy. For all of these reasons, we conclude that Haycraft failed to establish that his appellate counsel was ineffective.

Haycraft has not established that he was entitled to post-conviction relief, and we therefore affirm the trial court's denial of his petition for post-conviction relief.

Affirmed.

BAILEY, J., and CRONE, J., concur.