MEMORANDUM DECISION

Pursuant to Ind. Appellate Rule 65(D), this Memorandum Decision is not binding precedent for any court and may be cited only for persuasive value or to establish res judicata, collateral estoppel, or law of the case.

APPELLANT *PRO SE*

Larry Randolph
Michigan City, Indiana

ATTORNEYS FOR APPELLEE

Theodore E. Rokita
Attorney General of Indiana

Tyler Banks
Supervising Deputy Attorney General
Indianapolis, Indiana

IN THE

COURT OF APPEALS OF INDIANA

Larry Randolph,
Appellant-Petitioner,

v.

State of Indiana,
Appellee-Respondent.

March 3, 2023

Court of Appeals Case No. 21A-PC-2410

Appeal from the Lake Superior Court

The Honorable Diane Ross Boswell, Judge
The Honorable Natalie Bokota, Magistrate

Trial Court Cause No. 45G03-1708-PC-5

Memorandum Decision by Judge Bradford
Judges May and Mathias concur.

Bradford, Judge.

Case Summary

[1] Beginning in or around 2007, Larry Randolph engaged in numerous sexual encounters with J.E., who, at the time, was nine years old. On May 30, 2013, the State charged Randolph with two counts of Class A felony child molesting, Class A felony attempted child molesting, two counts of Class B felony sexual misconduct with a minor, Class C felony sexual misconduct with a minor, and Class C felony child molesting. Following trial, a jury found Randolph guilty as charged. He was subsequently sentenced to an aggregate sixty-eight-year term of incarceration. On direct appeal, Randolph argued that the evidence was insufficient to sustain one of his convictions for Class A felony child molesting and that his sixty-eight-year sentence was inappropriate. We affirmed the challenged conviction and Randolph's sentence, and the Indiana Supreme Court denied transfer.

[2] Randolph subsequently filed a *pro-se* petition for post-conviction relief ("PCR"), in which he claimed that both his trial and appellate counsels had provided him with ineffective assistance. He also claimed that he had been denied fundamental due process by alleged misconduct of various State officials and by an alleged abuse of discretion by the trial court. Following an evidentiary hearing, the post-conviction court denied Randolph's PCR petition. We affirm.

Facts and Procedural History

[3] Our decision in Randolph's direct appeal sets forth the underlying facts relating to his convictions:

> In 2003, Randolph began dating J.E.'s mother ("Mother")…. Mother struggled with drug addiction and left J.E. with Randolph on Labor Day in 2007…. Randolph became J.E.'s primary caregiver and raised her as his own daughter. Shortly after Mother left, Randolph made J.E. touch his penis when they were alone in his bedroom. J.E. told her cousin … about the incident.
>
> In 2009, … J.E. [and] Randolph … moved to another home on Pennsylvania Street in Gary, Indiana…. One year later, when no one else was home, Randolph came into J.E.'s bedroom…, put her on top of him, and made J.E. hump him. Both J.E. and Randolph were fully clothed during this incident. Another time, Randolph forced J.E. to perform oral sex on him in the basement of the home, which resulted in J.E. gagging and vomiting in Randolph's hand. On a different occasion while J.E. was watching television … in the living room, Randolph told J.E. that he needed to talk to her about something school related. J.E. followed Randolph into his bedroom, and he locked the door. Randolph took off J.E.'s clothes, pulled down his pants, and then rubbed his penis against her vagina. He instructed her to say, "I love you, daddy," which J.E. refused to do. Tr. p[p]. 74–75. J.E. cried and asked Randolph to stop, but he continued to rub his penis against her vagina. Tr. p. 75.
>
> Randolph began dating Pashiana Long ("Long") while he lived at the Pennsylvania Street home…. Long and Randolph's daughter was born in January 2012. In February 2012, Randolph married Long and bought a house on Maryland Street in Gary, Indiana. J.E. moved to the Maryland Street home with Randolph, Long, and Long's other children….
>
> Several more incidents took place at the Maryland Street address.

While J.E. was in Randolph's bedroom, Randolph tried to insert his penis into her vagina. His penis went in "a little bit." Tr. p. 79. Another time, J.E. had just exited the bathtub, and Randolph came in the bathroom, rubbed his penis against her buttocks, pulled down her pants, and attempted to insert his penis into her anus….

Throughout the time that J.E. lived at the Maryland Street home, again when no one was home, Randolph called J.E.'s breasts "jibblies" and told her that they were "juicy" and were getting big and "perky." Tr. 81. On numerous occasions, Randolph would reach under J.E.'s shirt and grab her breasts with his hands and suck on her nipples. *Id.* On another occasion while J.E. and Randolph were in the basement sitting on the futon, Randolph performed oral sex on J.E.

On July 20, 2012, … J.E. went to her room after Randolph scolded her [for allowing her cousin to come over without permission]. Randolph then came into J.E.'s room, pushed her down on the bed, held her arms down so she could not move, removed her clothes, and then removed his own clothes. Randolph rubbed his penis against her vagina and ejaculated on her bedspread. He then instructed J.E. to take her bedspread downstairs so he could wash it.

J.E. told her cousin … each time an incident with Randolph occurred, but she did not tell anyone else because Randolph threatened that if she told anyone what happened that Randolph would go to jail and J.E. would be put in foster care. After the July 20, 2012 incident, [J.E.'s cousin] finally told [J.E.'s aunt] about what had happened to J.E. On July 22, 2012, J.E. moved out of the Maryland Street home and into [another aunt's] residence.

On May 30, 2013, the State charged Randolph with two counts of Class A felony child molesting, Class A felony attempted child molesting, two counts of Class B felony sexual misconduct with a

> minor, Class C felony sexual misconduct with a minor, and Class C felony child molesting. A jury trial was held on August 4, 6, and 7, 2014. The jury found Randolph guilty on all charges.
>
> A sentencing hearing was held on March 20, 2015. The trial court found that Randolph was in a position of care and custody of J.E. and the events occurred over a prolonged period of time as aggravating circumstances. Randolph's lack of significant prior criminal history was found to be a mitigating circumstance. The court entered judgment on all counts except the Class A felony attempted child molesting charge. The court ordered Randolph to serve consecutive terms of twenty years for each Class A felony conviction, ten years for each Class B felony conviction, and four years for each Class C felony conviction, for an aggregate sixty-eight-year sentence in the Department of Correction.

Randolph v. State, 45A03-1504-CR-141, 2016 WL 682967 * 1–2 (Ind. Ct. App. Feb. 18, 2016), *trans. denied*.

[4] On direct appeal, Randolph challenged the sufficiency of the evidence to sustain one of his convictions for Class A felony child molesting. He also argued that his aggregate sixty-eight-year sentence was inappropriate. Concluding that the evidence was sufficient to sustain the challenged conviction and that Randolph's sentence was not inappropriate, we affirmed. *Id.* at *5. The Indiana Supreme Court denied transfer.

[5] Randolph subsequently filed a PCR petition, arguing that both his trial and appellate counsels had provided ineffective assistance and that he had been denied fundamental due process by alleged misconduct of various State officials

and by an alleged abuse of discretion by the trial court. After conducting an evidentiary hearing, the post-conviction court denied Randolph's PCR petition.

Discussion and Decision

[6] "Post-conviction procedures do not afford the petitioner with a super-appeal." *Williams v. State*, 706 N.E.2d 149, 153 (Ind. 1999). "Instead, they create a narrow remedy for subsequent collateral challenges to convictions, challenges which must be based on grounds enumerated in the post-conviction rules." *Id.* A petitioner who has been denied post-conviction relief appeals from a negative judgment and as a result, faces a rigorous standard of review on appeal. *Dewitt v. State*, 755 N.E.2d 167, 169 (Ind. 2001); *Collier v. State*, 715 N.E.2d 940, 942 (Ind. Ct. App. 1999), *trans. denied*.

[7] Post-conviction proceedings are civil in nature. *Stevens v. State*, 770 N.E.2d 739, 745 (Ind. 2002). Therefore, in order to prevail, a petitioner must establish his claims by a preponderance of the evidence. Ind. Post-Conviction Rule 1(5); *Stevens*, 770 N.E.2d at 745. When appealing from the denial of a PCR petition, a petitioner must convince this court that the evidence, taken as a whole, "leads unerringly and unmistakably to a decision opposite that reached by the post-conviction court." *Stevens*, 770 N.E.2d at 745. "In other words, the defendant must convince this Court that there is *no* way within the law that the court below could have reached the decision it did." *Id.* (emphasis in original). "It is only where the evidence is without conflict and leads to but one conclusion, and the post-conviction court has reached the opposite conclusion, that its

decision will be disturbed as contrary to law." *Godby v. State*, 809 N.E.2d 480, 482 (Ind. Ct. App. 2004), *trans. denied*. "The post-conviction court is the sole judge of the weight of the evidence and the credibility of the witnesses." *Fisher v. State*, 810 N.E.2d 674, 679 (Ind. 2004).

[8] In arguing that the post-conviction court erred in denying his PCR petition, Randolph contends that his trial counsel provided ineffective assistance during trial and his appellate counsel provided ineffective assistance on direct appeal. Randolph also contends that he had been denied fundamental due process by alleged misconduct of various State officials and by an alleged abuse of discretion by the trial court. For its part, the State argues that the post-conviction court did not err in denying Randolph's PCR petition.

I. Ineffective Assistance of Counsel

[9] "The right to effective counsel is rooted in the Sixth Amendment to the United States Constitution." *Taylor v. State*, 840 N.E.2d 324, 331 (Ind. 2006). "'The Sixth Amendment recognizes the right to the assistance of counsel because it envisions counsel's playing a role that is critical to the ability of the adversarial system to produce just results.'" *Id.* (quoting *Strickland v. Washington*, 466 U.S. 668, 685 (1984)). "'The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result.'" *Id.* (quoting *Strickland*, 466 U.S. at 686).

[10] A successful claim for ineffective assistance of counsel must satisfy two components. *Reed v. State*, 866 N.E.2d 767, 769 (Ind. 2007). Under the first prong, the petitioner must establish that counsel's performance was deficient by demonstrating that counsel's representation "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.* (internal quotation omitted). "We 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, under this prong, we will assume that counsel performed adequately and defer to counsel's strategic and tactical decisions. *Smith v. State*, 765 N.E.2d 578, 585 (Ind. 2002). "Isolated mistakes, poor strategy, inexperience, and instances of bad judgment do not necessarily render representation ineffective." *Id.*

[11] Under the second prong, the petitioner must show that the deficient performance resulted in prejudice. *Reed*, 866 N.E.2d at 769. A petitioner may show prejudice by demonstrating that there is "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.* (internal quotation omitted). A petitioner's failure to satisfy either prong will cause the ineffective assistance of counsel claim to fail. *See Williams*, 706 N.E.2d at 154. Stated differently, "[a]lthough the two parts of the *Strickland* test are separate inquires, a claim may be disposed of on either prong." *Grinstead v. State*, 845 N.E.2d 1027, 1031 (Ind. 2006) (citing *Williams*, 706 N.E.2d at 154).

A. Trial Counsel

[12] Randolph alleges that his trial counsel provided him with ineffective assistance by failing to object to alleged instances of perjury provided by two of the State's witnesses at trial. Specifically, Randolph asserts that his trial counsel provided him with ineffective assistance of counsel by "failing to address" the State's alleged act of "knowingly us[ing] perjured testimony to obtain a tainted and wrongful conviction." Appellant's Br. p. 7. Randolph claims that while his trial counsel did initially address the question of whether two of the State's witnesses had committed perjury, his counsel provided ineffective assistance by later abandoning the issue.

[13] "It is well established that 'a conviction obtained through use of false evidence, known to be such by representatives of the State, must fall under the Fourteenth Amendment. The same result obtains when the State, although not soliciting false evidence, allows it to go uncorrected when it appears.'" *Smith v. State*, 34 N.E.3d at 1211, 1219 (Ind. 2015) (quoting *Napue v. Illinois*, 360 U.S. 264, 269 (1959)). The Indiana Supreme Court has held that "[w]hile the knowing use of perjured testimony may constitute prosecutorial misconduct, contradictory or inconsistent testimony by a witness does not constitute perjury." *Timberlake v. State*, 690 N.E.2d 243, 253 (Ind. 1997). "The main thrust of the case law in this area focuses on whether the jury's ability to assess all of the facts and the credibility of the witnesses supplying those facts has been impeded to the unfair disadvantage of the defendant." *Smith*, 34 N.E.3d at 1220.

[14] Randolph's trial took place nearly eight years ago. Sadly, Randolph's trial counsel passed away at some point between Randolph's jury trial and the post-conviction evidentiary hearing and was therefore unavailable to testify during the post-conviction evidentiary hearing. Thus, like the post-conviction court, our review of trial counsel's representation is limited to the trial court record, which was admitted into the underlying post-conviction proceedings.

[15] At all times relevant to this case, Indiana law has provided that

> A person who:
>
> > (1) makes a false, material statement under oath or affirmation, knowing the statement to be false or not believing it to be true; or
> >
> > (2) has knowingly made two (2) or more material statements, in a proceeding before a court or grand jury, which are inconsistent to the degree that one (1) of them is necessarily false;

commits the criminal act of perjury. Ind. Code § 35-44.1-2-1(a).[1] With regard to Randolph's claim that his trial counsel provided ineffective assistance by failing to object to the alleged perjurious statements provided by the State's witnesses at trial, the post-conviction court found as follows:

> 11. Randolph's claim seems to be that trial counsel should have objected whenever he thought a witness was testifying

[1] Prior to July 1, 2014, the quoted language was found at Indiana Code section 35-44-2-1(a) and the commission of perjury was a Class D felony, rather than a Level 6 felony as it has been since the criminal code was revised in 2014.

untruthfully. He cites no legal authority to show this is a cognizable objection under the Indiana Rules of Evidence. Therefore, he fails to show that an objection on the basis of lying under oath would be sustained. Logically, the same conclusion applies to a motion for a mistrial or dismissal on this basis. In addition, a review of the individual allegations of perjury and trial counsel's response indicates that counsel's performance was neither deficient nor prejudicial despite the fact that the jury found Randolph guilty.

12. The first alleged instance of perjury occurred when J.E. testified that Randolph forced her to perform oral sex on him when she lived on Pennsylvania Street (Tr. 69–71) but later testified that Randolph never penetrated her body when she lived on Pennsylvania Street[.] (Tr. 76). Randolph fails to prove that J.E. knowingly made two inconsistent statements. When the Deputy Prosecuting Attorney asked J.E. what penetration meant she explained, "pushing your penis all the way into the vagina." Tr. 137. Since the evidence before this court is that J.E. did not consider oral sex to be penetration, she did not knowingly make "two (2) or more material statements, in a proceeding before a court … which are inconsistent." Therefore, as previously discussed, an objection to perjury would have been overruled as meritless. Second, there is no evidence that the trial counsel's decision to forego objecting or moving for a mistrial or dismissal was other than strategic. On cross-examination, trial counsel confronted J.E. with her prior inconsistent statements. Tr. 98; 123, 128–29, 130–33. The logical inference is that counsel made a tactical decision to challenge the testimony through cross-examination not through objections or motions. Finally, Randolph fails to prove that counsel's handling of this testimony prejudiced Randolph. The jurors heard both statements and were therefore able to judge J.E.'s credibility. In addition, counsel challenged the sufficiency of the evidence by moving for a directed verdict when the State rested its case and focused on these inconsistencies in closing argument. Tr. 329, 331–33. Randolph fails to prove that J.E. committed perjury or that

counsel's handling of the inconsistent statements was ineffective.

13. The second allegation of perjury is that J.E. testified on cross-examination that she told Detectives (during her initial Family Assistance Bureau (FAB) interview) that nothing happened between the ages of nine and thirteen. Tr. 123. As is obvious from the claim itself, trial counsel impeached J.E.'s trial assertions of molestation with this prior inconsistent statement. As with the first allegation of perjury, Randolph fails to prove that trial counsel's decisions were not strategic. Since [trial counsel] impeached J.E. with the prior inconsistent statement, Randolph also fails to prove prejudice.

14. Randolph's third assertion of perjury concerns several parts of J.E.'s testimony. J.E. testified that when she lived on Maryland Street, there was a time when Randolph's penis went in half way or a little bit. Tr. 75, 78–79. She later testified his penis did not go in her vagina. Tr. 87. In addition, she admitted on cross-examination that she told the police Randolph never penetrated her. Tr. 131. Randolph's claim lacks merit. J.E.'s testimony at page 87 of the trial transcript describes a different episode from that described at pages 75 and 78–79. Therefore, these statements were not inconsistent; they describe different events. Furthermore, although J.E. did tell the police that Randolph never penetrated her, she did not know the legal definition of penetration as previously discussed. Therefore, any statements she made prior to trial expressing her opinion of whether penetration occurred are not inconsistent with her testimony at trial wherein she described the *acts* that constitute the *legal definition* of penetration. Randolph fails to prove that J.E. committed perjury or that counsel's handling of her statements was ineffective.

15. The final allegation of perjury concerns the testimony of Misti Perez. Ms. Perez testified that J.E. said Randolph only partially penetrated her when J.E. lived on Maryland Street. Tr. 176–77. However, on cross-examination Ms. Perez was

confronted with the [Department of Child Services ("DCS")] report wherein she wrote that J.E. denied penetration. Tr. 192, 194. Randolph fails to show that the witness committed perjury. Ms. Perez clarified that she didn't know whether J.E. used the word "penetration" to describe what Randolph did. Tr. 176–77. In addition, she explained that J.E. told her Randolph "tried to put his stuff in her hole" which Perez interpreted to be partial penetration. Tr. 178. Like J.E., Ms. Perez did not know the legal definition of penetration at the time she interviewed J.E. or even at the time she testified at trial. When asked to define penetration, Perez responded that it means "to enter into."[2] Tr. 197–98. As with the prior claims of perjury and ineffectiveness, Randolph fails to prove that perjury occurred. He fails to prove that counsel's performance was not deliberate, tactical or strategic. He fails to prove that Randolph was prejudiced by counsel's performance given the fact that the jury heard the prior statements and could compare them with the trial testimony to judge the credibility of the witness.

16. Concerning all of Randolph's claims of perjury, he argues that his attorney should also have objected based on prosecutorial misconduct. If a claim of prosecutorial misconduct is preserved on appeal, the appellate court makes two inquiries. First, whether under prevailing case law and rules of conduct the prosecutor engaged in misconduct. *McBride v. State*, 785 N.E.2d 312, 319 (Ind. Ct. App. 2003), *trans. denied*. Second, the court determines whether the misconduct, if such occurred, placed the defendant in a position of grave peril to which he should not have been subjected or evidenced a deliberate attempt to improperly prejudice the defendant. *Id.* "Grave peril" is determined by analyzing the probable persuasive effect of the misconduct on the jury's decision …" [*Id.*] (citing *Stevens v. State*, 691 N.E.2d 412, 420 (Ind. 1997)[)]. If the defendant does not

[2] Like J.E., Perez testified that she understood the term penetration to relate to "penetration into the vagina." Trial Tr. p. 197.

> object to the alleged misconduct, he waives any claim of error. *Etienne v. State*, 716 N.E.2d 457, 461 (Ind. 1999). Because Randolph has failed to prove that the witnesses committed perjury, he has failed to prove that the State engaged in misconduct by presenting perjured testimony. His attorney did not perform deficiently when he declined to make a meritless objection.

Appellant's App. Vol. II pp. 113–17 (emphases in original).

[16] Upon review, we agree with the post-conviction court that the record reveals that trial counsel had seemingly made the tactical decision to cross-examine both J.E. and Perez about their prior inconsistent statements and questioned whether J.E.'s testimony could be believed during closing argument. Again, we defer to counsel's strategic and tactical decisions. *Smith*, 765 N.E.2d at 585. Furthermore, we cannot say that "the jury's ability to assess all of the facts and the credibility of the witnesses" was "impeded to the unfair disadvantage of the defendant" by trial counsel's tactical decision to point out the witnesses' prior inconsistent statements rather than objecting to the allegedly false testimony at trial. *Smith*, 34 N.E.3d at 1220. This is especially true given the lack of any authority, either known to the court or cited to by Randolph, indicating that an objection on the basis of lying under oath would have been sustained if raised by counsel. Randolph has failed to establish that trial counsel performed deficiently, much less that he was prejudiced by trial counsel's representation.

B. Appellate Counsel

[17] "The standard of review for appellate counsel is the same as for trial counsel in that the defendant must show appellate counsel was deficient in his or her performance and that the deficiency resulted in prejudice." *Garrett v. State*, 992 N.E.2d 710, 719 (Ind. 2013). "[I]neffective assistance of appellate counsel claims generally fall into three categories: (1) denial of access to an appeal; (2) waiver of issues; and (3) failure to present issues well." *Hollowell v. State*, 19 N.E.3d 263, 270 (Ind. 2014). Randolph's claim regarding appellate counsel falls under the second category.

[18] With respect to a claim relating to waiver of issues for appeal, "[i]neffectiveness is very rarely found in these cases because the decision of what issues to raise is one of the most important strategic decisions to be made by appellate counsel." *Ritchie v. State*, 875 N.E.2d 706, 723–24 (Ind. 2007) (internal quotation omitted).

> Accordingly, our review is particularly deferential to counsel's strategic decision to exclude certain issues in favor of others. We first look to see whether the unraised issues were significant and obvious upon the face of the record. If so, then we compare these unraised obvious issues to those raised by appellate counsel, finding deficient performance only when ignored issues are clearly stronger than those presented. If deficient performance by counsel is found, then we turn to the prejudice prong to determine whether the issues appellate counsel failed to raise would have been clearly more likely to result in reversal or an order for a new trial.

Id. at 724 (internal citations omitted).

[19] In arguing that his appellate counsel provided ineffective assistance, Randolph asserts that his appellate counsel should have challenged his conviction on the basis that two witnesses committed perjury during trial. Specifically, Randolph claims that the issue of perjury was "stronger" and "more obvious" than the issues his appellate counsel raised on direct appeal. Appellant's Br. p. 32. We disagree.

[20] Appellate counsel testified during the post-conviction evidentiary hearing that he had been a practicing attorney for thirty-six years. When asked about his "strategy" or "tactics" on appeal, appellate counsel indicated

> [w]ell, I have to determine what, if any, issues exist and what issues to raise. In this particular case, in my opinion, there was one issue regarding evidence and one issue regarding your sentencing. The only viable issue, in my opinion, that you had regarding the evidence was the challenge to proof of intercourse or penetration in one of the counts. And then the second viable issue was to challenge the sentence that you received.

Tr. Vol. II p. 14. Pointing to a portion of J.E.'s trial testimony, Randolph asked appellate counsel whether he would "consider in [his] expertise as an attorney … that to be perjury." Tr. Vol. II p. 21. Appellate counsel responded that he "can't give an opinion as to whether it was perjury" but could "say that for trial purposes, it was impeachment based on inconsistent statements." Tr. Vol. II p. 22. When Randolph continued to question appellate counsel about the veracity of J.E.'s testimony at trial, appellate counsel responded

> I think that part of what your problem is in your question, Mr. Randolph, and the way you're viewing this is, may be a lack of understanding of a fundamental tenet, which is this, and that is on direct appeal, I cannot raise arguments that challenges the credibility of the witness, or of the victim. What you're attempting to do is say she said something on this date, and now she's saying she didn't, or she changed her statement. And you're equating that with perjury. From our standpoint, from a legal standpoint, what this really is is a question for the jury, and the jury was there to determine is she telling the truth today. [Trial counsel's] job was to attempt to impeach her if she made inconsistent statements. Once the jury has reached a verdict, on appeal I can't now challenge the truth of what she said, because it's taken as truth, it's part of the jury's verdict, the jury had the choice of believing her, was she credible or not. And I can't -- as I said, the basic tenet is the court of appeals will not reweigh, or rejudge, the credibility of a witness.

Tr. Vol. II p. 24.

[21] Appellate counsel went on to explain that "[t]here is a rare legal argument on direct appeal that can be made, and it's called incredible dubiosity," but stated that "[i]n this particular case that didn't apply, because incredible dubiosity requires no corroborating evidence of any other sort to support the statements.… I would have considered it in this case, but it didn't apply." Tr. Vol. II p. 25. Appellate counsel further indicated that he did not believe that Randolph had potentially successful arguments relating to either the alleged perjury or supposed ineffective assistance of trial counsel that could have been raised on direct appeal, stating that in his opinion, Randolph "simply did not

have other meritorious issues" beyond those raised on direct appeal. Tr. Vol. II p. 41.

[22] Again, the "decision of what issues to raise is one of the most important strategic decisions to be made by appellate counsel" and "[a]ccordingly, our review is particularly deferential to counsel's strategic decision to exclude certain issues in favor of others." *Ritchie*, 875 N.E.2d at 724. The post-conviction record clearly establishes that appellate counsel had considered the record and raised what he believed to be the only potentially meritorious claims available. We defer to appellate counsel's decision in this regard and agree with the post-conviction court that "[t]here is no evidence that [appellate counsel] performed below prevailing professional norms." Appellant's App. Vol. II p. 118. As such, we further agree with the post-conviction court that Randolph has failed "to prove he was denied effective assistance of appellate counsel." Appellant's App. Vol. II p. 118.

II. Freestanding Claims

[23] In challenging the denial of his PCR petition, Randolph also raises a number of freestanding claims, arguing that "he was denied fundamental due process by the [alleged] official misconduct of the State and abuse of discretion of by the trial court." Appellant's Br. p. 7. The Indiana Supreme Court has held that, as a general rule, "most free-standing claims of error are not available in a postconviction proceeding because of the doctrines of waiver and res judicata." *Timberlake v. State*, 753 N.E.2d 591, 597–98 (Ind. 2001). "If an issue was known

and available but not raised on appeal, it is waived. If an issue was raised on direct appeal, but decided adversely to the petitioner, it is res judicata." *Reed v. State*, 856 N.E.2d 1189, 1194 (Ind. 2006) (emphasis and internal citations omitted). Post-conviction proceedings only "provide defendants the opportunity to raise issues that were not known at the time of the original trial or that were not available to the defendant on direct appeal." *Conner v. State*, 711 N.E.2d 1238, 1244 (Ind. 1999).

[24] Randolph's freestanding claims relate to the alleged perjury, specifically to the way the alleged perjury was handled by various State officials and the trial court. As has been demonstrated above, these claims were known and available, but not raised, on direct appeal. As such, these claims are waived on appeal. *See Reed*, 856 N.E.2d at 1194.

[25] The judgment of the post-conviction court is affirmed.[3]

May, J., and Mathias, J., concur.

---

[3] We note that the Confidential Appendix and Addendum to Appellant's Brief include two documents: a report generated by DCS and a report generated by the Gary Police Department. The DCS report was excluded from the appellate record in its entirety and the police report was admitted for the limited purpose of showing that J.E. spoke to police. In Footnote 1 on page 6 of its brief, the State argues that the Confidential Appendix should be struck in its entirety and the two documents should be struck from the Addendum to Randolph's appellate brief. We deny the State's request as moot given our above-stated conclusions.