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IN THE
COURT OF APPEALS OF INDIANA

Paul Dean Newcomb, Jr.,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff.

August 24, 2022

Court of Appeals Case No.
22A-PC-318

Appeal from the Elkhart Superior Court

The Honorable Teresa L. Cataldo, Judge

Trial Court Cause No.
20D03-1706-PC-31

Bailey, Judge.

Case Summary

[1] Paul Newcomb, Jr. ("Newcomb") was found in possession of a full array of methamphetamine precursors; his stated purpose was to give them to an unidentified friend. Despite an absence of evidence that either Newcomb or a phantom accomplice had begun to manufacture methamphetamine, Newcomb was convicted of Dealing in Methamphetamine, as a Class B felony,[1] as opposed to the lesser offense of Possession of Precursors with Intent to Manufacture, then a Class D felony.[2] A panel of this Court affirmed the conviction, upon adoption of the State's argument that Newcomb was liable for the greater offense, as an accomplice. Newcomb sought post-conviction relief and now appeals the partial denial of his petition.[3] He presents a claim of fundamental error, couched in allegations of ineffective assistance of trial and appellate counsel, because he stands convicted of a crime that did not occur.[4] The State does not challenge the underlying claim of insufficient evidence to

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[1] Ind. Code § 35-48-4-1.1(a)(1)(A). The sentence for a Class B felony committed before July 1, 2014 ranged from six years to twenty years, with an advisory sentence of ten years. I.C. § 35-50-2-5.

[2] I.C. § 35-48-4-14.5. The sentence for a Class D felony committed before July 1, 2014 ranged from six months to three years, with an advisory sentence of one and one-half years.

[3] Newcomb was granted partial post-conviction relief. The post-conviction court concluded that Newcomb had not been advised of his right to a jury trial upon the State's allegation that Newcomb is a habitual substance offender and ordered that the habitual substance offender adjudication "will be vacated if no appeal of this order is granted." Appealed Order at 14.

[4] "Sua sponte" is a Latin phrase having the meaning "without prompting or suggestion; on its own motion." BLACK'S LAW DICTIONARY 1650 (10th ed. 2014). The dissent opines that we have raised this issue sua sponte. On the contrary, the defendant, by counsel, has raised this at trial, in final argument, at sentencing, on appeal, and now in post-conviction proceedings. At every stage, Newcomb has argued that the State failed to prove his commission of the Class B felony of Dealing in Methamphetamine, by means of manufacturing, as alleged.

support the greater offense, but rather argues that counsel did not perform deficiently. Indeed, defense advocacy fell within professional norms. Thus, we are now squarely presented with whether a miscarriage of justice can be corrected within the confines of post-conviction relief, which generally addresses ineffectiveness of counsel or a claim demonstrably unavailable at trial and upon direct appeal. Here, the deprivation of due process has resulted in the loss of an additional thirteen years of liberty. We reverse and remand with instructions to vacate Newcomb's conviction of Manufacturing Methamphetamine, a Class B felony, enter a conviction for the possession offense, and conduct further proceedings upon the habitual substance offender allegation.

Facts and Procedural History

[2] The facts underlying this appeal were stated on direct appeal as follows:

> In early March 2014, Town and Country Auto Sales reported a Toyota RAV4 stolen from its lot in Elkhart, Indiana. A few weeks later, Town and Country repossession agents spotted the RAV4 at a gas station in Elkhart. The repossession agents parked their vehicles around the RAV4 to block it from leaving and exited their vehicles to confront the driver. Newcomb was the driver and sole occupant of the RAV4.
>
> While speaking with Newcomb, one of the repossession agents reached into the vehicle, which was running, to remove the key from the ignition. The key did not belong to a RAV4, and the engine did not shut off when it was removed. Newcomb grabbed a plastic bag from inside the vehicle and attempted to flee, but

one of the repossession agents tackled him to the ground. The plastic bag contained instant cold packs and several bottles of lighter fluid.

Corporal Dustin Young of the Elkhart Police Department was dispatched to the gas station in reference to a fight. When Corporal Young arrived, he learned Newcomb's vehicle was possibly stolen. After confirming with dispatch the vehicle had been reported stolen, Corporal Young approached Newcomb and requested permission to perform a patdown search. Newcomb consented.

During the patdown, Corporal Young felt an object in Newcomb's coat pocket and asked Newcomb to identify the object. Newcomb stated the object was a scale and gave Corporal Young permission to remove it, but before Corporal Young could do so, Newcomb admitted he also had syringes and marijuana on his person. Corporal Young uncovered these items, as well as two baggies of white pills, a glass pipe with burnt residue, and a plastic baggie with white residue. The pills were identified by their markings as an over-the-counter drug containing pseudoephedrine, and subsequent forensic testing confirmed the white residue in the baggie was methamphetamine.

While Corporal Young searched Newcomb, Indiana State Police Trooper Gretchen Deal searched the RAV4. She uncovered the following items used in the manufacture of methamphetamine: additional instant cold packs, additional bottles of lighter fluid, a bottle of drain opener, a bag of salt, lithium batteries, coffee filters, pliers, and a plastic bottle. Trooper Deal did not find an active reaction vessel, but she noted the presence of loose cold pack beads on the floorboard in the back of the vehicle.

> Corporal Young confronted Newcomb about the items found in the RAV4. Newcomb "acknowledged that he knew what they were" and "said they were for a friend," but he refused to reveal the friend's identity. Transcript at 262.
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> When Corporal Young pressed Newcomb for the friend's name, Newcomb said he would not be answering any more questions. The friend's identity was never ascertained.
>
> The State charged Newcomb with dealing in methamphetamine by manufacturing as a Class B felony and also alleged he was an habitual substance offender, based on two prior convictions for possession of methamphetamine. A bench trial was held on January 14, 2015.

Newcomb v. State, No. 20A05-1503-CR-108, slip op. at 1-2 (Jan. 12, 2016). The trial court found Newcomb guilty as charged and Newcomb admitted his status as a habitual substance offender.

[3] On February 12, 2015, the trial court conducted a sentencing hearing. At that hearing, defense counsel maintained that there had been "no actual manufacture of methamphetamine that happened." (Tr. Vol. III, pg. 397.) At trial, the State admitted as much, stating that, "The State *will stipulate* that this was not an active methamphetamine laboratory, it was not rolling, it was not in the process of actually converting pseudoephedrine into methamphetamine. (Tr. Vol. II, pg. 137) (emphasis added.) At sentencing, the prosecutor described the offense for which Newcomb was to be sentenced as: "He was in the process of obtaining ingredients" and "had all the necessary ingredients." (Tr. Vol. III, pg. 403.) The trial court then acknowledged "the fact that you had

everything *ready to manufacture methamphetamine*," but nevertheless stated that a sentence would be imposed for the Class B felony, for dealing by manufacture. (*Id.* at 407.) (emphasis added.) The trial court sentenced Newcomb to sixteen years' imprisonment, enhanced by eight years due to Newcomb's status as a habitual substance offender.

[4] Newcomb appealed, challenging the sufficiency of the evidence to support his conviction. Specifically, Newcomb argued that the manufacturing process had not begun; he "point[ed] to the fact that many of the items recovered were unopened and did not appear to have ever been used to manufacture methamphetamine." *Id.* at 3. The *Newcomb* Court determined that, although Newcomb had "assembled necessary components" and removed pills from packaging, the manufacturing process had not begun. *Id.* However, the Court affirmed Newcomb's conviction, concluding that he had made admissions sufficient to show that he acted as an accomplice:

> Although Newcomb had assembled all of the necessary components, we conclude the manufacturing process had not yet begun when the police searched the RAV4. Nonetheless, we believe the evidence was sufficient to support Newcomb's conviction. "In Indiana there is no distinction between the responsibility of a principal and an accomplice." *Wise v. State*, 719 N.E.2d 1192, 1198 (Ind. 1999). As the State argues, Newcomb admitted he knew the purpose of precursors, "said they were for a friend," and possessed the finished product. Tr. at 262.

Id. In June of 2016, the Indiana Supreme Court permitted Newcomb to file a belated pro-se petition for transfer. On August 11, 2016, the Supreme Court denied the petition.

[5] In June of 2017, Newcomb filed a pro-se petition for post-conviction relief. His petition was amended, with assistance of counsel, in December of 2020 and February of 2021. The Indiana Public Defender represented Newcomb at an evidentiary hearing conducted on June 29, 2021. On January 10, 2022, the post-conviction court entered an order granting relief in part and denying relief in part. Newcomb now appeals.

Discussion and Decision

[6] Indiana Post-Conviction Rule 1(a)(1) provides:

> Any person who has been convicted of, or sentenced for, a crime by a court of this state and who claims: that the conviction or the sentence was in violation of the Constitution of the United States or the constitution or laws of this state; may institute at any time a proceeding under this Rule to secure relief.

The United States Supreme Court has held that the Fourteenth Amendment "protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." *In re Winship*, 397 U.S. 358, 364, 90 S. Ct. 1068 (1970). "While we seldom reverse for insufficient evidence, we have an affirmative duty to make certain that the proof at trial is sufficient to support the [judgment] beyond a reasonable

doubt." *Webb v. State*, 147 N.E.3d 378, 386 (Ind. Ct. App. 2020), *trans. denied,* (citing *Bean v. State*, 818 N.E.2d 148, 150 (Ind. Ct. App. 2004)).

[7] The petitioner for post-conviction relief must establish that he is entitled to relief by a preponderance of the evidence. *Timberlake v. State*, 753 N.E.2d 591, 597 (Ind. 2001). "Because he is now appealing a negative judgment, to the extent his appeal turns on factual issues, [the petitioner] must convince this Court that the evidence as a whole leads unerringly and unmistakably to a decision opposite that reached by the post-conviction court." *Id.* We accept the post-conviction court's findings of fact unless clearly erroneous but accord no deference to conclusions of law. *Turner v. State*, 974 N.E.2d 575, 581 (Ind. Ct. App. 2012), *trans. denied*. We will reverse the post-conviction court's decision only if the evidence is without conflict and leads to a conclusion opposite that reached by the post-conviction court. *Id.* at 581-82.

[8] Newcomb argues that his trial counsel was ineffective for "conced[ing] that Newcomb was guilty of manufacturing methamphetamine as a principal" and "fail[ing] to respond to the State's [rebuttal] argument that Newcomb could be found guilty of manufacturing as an accomplice" although the manufacturing process had not begun. Appellant's Brief at 13. He also contends that trial counsel was deficient for failing to correct a misstatement of evidence made by the Prosecutor in rebuttal argument; that is, that an officer had testified Newcomb acknowledged that the items in his vehicle "had a purpose." (Tr. Vol. II, pg. 388.) This factual contention was later incorporated into the State's appellee's brief, without correction or challenge from appellate counsel –

however, Newcomb had actually admitted only knowing "what they were." Appellate counsel did not file a reply brief or seek transfer to challenge any misstatement of the breadth of Newcomb's admissions or to argue a mistake of law as to accomplice liability.[5]

[9] Newcomb's trial and appellate counsel each argued that the dealing by manufacturing offense was not supported by sufficient evidence. Such arguments were unavailing, and, at some point, counsel gave up. Newcomb's argument of ineffectiveness distills to a claim of abandonment of advocacy.

Trial Counsel

[10] The Sixth Amendment's "right to counsel is the right to the effective assistance of counsel." *Strickland v. Washington*, 466 U.S. 668, 686 (1984) (quoting *McMann v. Richardson*, 397 U.S. 759, 771 n.14 (1970)). To establish a claim of ineffective assistance of counsel, a convicted defendant must show (1) counsel's performance was deficient such that it fell below an objective standard of reasonableness based on prevailing professional norms and (2) the defendant was prejudiced by counsel's deficient performance. *Id.* at 687. When considering whether counsel's performance was deficient, there exists a "strong presumption" that counsel's performance was reasonable. *Id.* at 689. A defendant is prejudiced if "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been

[5] Newcomb later filed a pro-se petition for transfer, which also did not cogently present such challenges.

different." *Id.* at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.*

[11] The two prongs of the *Strickland* test—performance and prejudice—are independent inquiries, and both prongs need not be addressed if the defendant makes an insufficient showing as to one of them. *Id.* at 697. For instance, "[i]f it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice ... that course should be followed" without consideration of whether counsel's performance was deficient. *Id.*

[12] Newcomb was charged with Dealing in Methamphetamine, as a Class B felony, pursuant to Indiana Code Section 35-48-4-1.1(a)(1), which at that time provided:

> [a] person who ... knowingly or intentionally:
>
> (A) manufactures;
>
> (B) finances the manufacture of;
>
> (C) delivers; or
>
> (D) finances the delivery of;
>
> methamphetamine, pure or adulterated[,] commits dealing in methamphetamine, a Class B felony.

[13] Indiana Code Section 35-48-1-18 defines "manufacture" as:

> the production, preparation, propagation, compounding, conversion, or processing of a controlled substance, either directly or indirectly by extraction from substances of natural origin, independently by means of chemical synthesis, or by a combination of extraction and chemical synthesis, and includes any packaging or repackaging of the substance or labeling or relabeling of its container.

The manufacturing statute does not require that manufacture be completed or that a final product must be present. *Bush v. State*, 772 N.E.2d 1020, 1023 (Ind. Ct. App. 2002), *trans. denied*. However, there must be direct or circumstantial evidence of methamphetamine production. *Id.* "The manufacturing process must, at the very least, have been started by a defendant in order to be found guilty of manufacturing methamphetamine." *Id.* at 1024.

[14] In *Bush*, the police executed a search warrant at the defendant's residence and found many items used in the manufacture of methamphetamine, including a can of denatured alcohol, a coffee grinder with white residue in it, empty iodine and hydrogen peroxide containers, bottles of mini-thins that contained pseudoephedrine, and a turkey baster. Additionally, the police found two jars of liquid, both of which contained ephedrine and pseudoephedrine. An expert for the State testified that the lab was an "in process lab," meaning the process of making methamphetamine had begun, but it had not yet been completed. The police did not find any methamphetamine in its final form. *Id.* at 1022. The discovery of an active or in-process lab is not required. In *Dawson v. State*, 786 N.E.2d 742, 748 (Ind. Ct. App. 2003), *trans. denied*, this Court held that, "once an individual crushes up pills in order to separate the ephedrine from the

pill binders, the manufacturing process has begun," as the defendant has begun extracting the ephedrine from the pill.

[15] On the same day that *Bush* was decided, this Court handed down *Iddings v. State*, 772 N.E.2d 1006, (Ind. Ct. App. 2002), *trans. denied*. There, we determined that the difference between the evidence required to support a conviction of dealing in a controlled substance, and possession of two or more precursors with the intent to manufacture methamphetamine, is "one may be guilty of possessing chemical precursors with intent to manufacture without actually beginning the manufacturing process, whereas the manufacturing process must, at the very least, have been started by a defendant in order to be found guilty of manufacturing methamphetamine." *Id.* at 1016-17. Here, although Newcomb admittedly possessed precursors, there was no evidence that he had begun manufacture.

[16] Notwithstanding the lack of evidence of Newcomb's use of the precursors to engage in a manufacturing process – which this Court would later acknowledge – the Prosecutor argued in the rebuttal phase of closing arguments that Newcomb was guilty of Dealing in Methamphetamine, by manufacture, as an accomplice. The prosecutor pointed to alleged admissions by Newcomb to the investigating officer:

> What is particularly telling about what the defendant's intentions were was that he acknowledged that he was aware of these items in the vehicle and that they had a purpose. He was going to give them to a friend. Even if you take those words as true, as self-serving as he has admitted they are, it is the State's contention

> that still violates the statute because he is knowingly taking these products, acquiring them for a purpose – to cook methamphetamine, ostensibly to get a finished product at the end. That's aiding, abetting, inducing the manufacture of methamphetamine.

(Tr. Vol. III, pg. 388.)

[17] The testimony to which the prosecutor directed attention was that of Corporal Dustin Young. Corporal Young testified that he had "discussed the items in the vehicle" with Newcomb before Newcomb invoked his right to remain silent. (*Id.* at 261-262.) The extent to which Corporal Young's testimony concerned Newcomb's "admissions" is as follows:

> Prosecutor: So this was the lighter fluid, the ammonium nitrate or cold packs, the batteries. What was [Newcomb's] response when you asked him about those items?
>
> Corporal Young: He said they were for a friend.
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> Prosecutor: So he acknowledged that he knew what they were?
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> Corporal Young: Yes.
>
> Prosecutor: And that he had actually – he was going [to] give them to somebody else?
>
> Corporal Young: Correct.

(Tr. Vol. III, pg. 262.) As such, Newcomb had indicated that he knew "what they were," i.e., the identity of the items. *Id.* He did not admit to knowing

their express purpose or that he and the "friend" had ever engaged in manufacture.[6] Defense counsel attempted no correction of the record. Nor did defense counsel refer to the law of accomplice liability.

[18] Indiana Code Section 35-41-2-4 provides:

> A person who knowingly or intentionally aids, induces, or causes another person to commit an offense commits that offense, even if the other person: (1) has not been prosecuted for the offense; (2) has not been convicted of the offense; or (3) has been acquitted of the offense.

The foregoing contemplates that an offense has been committed. The distinction between principal and accomplice has been eliminated and "[a]n accomplice may be tried and convicted *when the proof of the underlying crime is sufficient* despite the fact that the *other actor* is not prosecuted, not convicted, or even acquitted." *Johnson v. State*, 687 N.E.2d 345, 350 (Ind. 1997) (emphasis added). Here, the manufacturing process had not been commenced by Newcomb and there is no evidence that another person, with whom he acted in concert, began the manufacturing process. There simply is no "proof of the underlying crime" or "other actor" to whom Newcomb could have been an accomplice. *See id.* Indeed, at the sentencing hearing, the trial court,

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[6] Assuming that the officer's testimony could support a reasonable inference that Newcomb knew the purpose of the precursors, providing evidentiary support for the characterization of Newcomb's "admissions" in rebuttal argument, nonetheless such an inference does not support an offense greater than Possession of Precursors with Intent to Manufacture, because the manufacturing process had not begun, by Newcomb or the phantom accomplice.

prosecutor, and defense counsel seemed to be aligned with the position that manufacturing had not begun.

[19] In hindsight, it certainly would have been appropriate for trial counsel to present sur-rebuttal argument to counter the introduction of accomplice liability theory or place the alleged "admissions" in their proper context – which was that the officer assented to a prosecutor's description and there was no reference to "purpose." Counsel did not take that particular route but had already engaged in vigorous advocacy. In relevant part, defense counsel argued:

> Obviously, we have a different – while the facts in this case were not controverted, the application of the facts to the law is. Our belief is that, is that he had not prepared the, he had not prepared a meth lab; that he did have precursors to make it. Speaking of Corporal Young's testimony, in his speaking with Mr. Newcomb, he said that he was going to give the precursors to a friend. That is in – that while it is somewhat self-serving in this case, it at least goes to show his intent. The State has not proven a manufacture of methamphetamine happened.
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> Here what the State's argument is, is that Mr. Newcomb committed manufacturing by possessing precursors. We have a law for that. It is Possession of Precursors With Intent. It's a D felony. That's not what he is charged with. He is charged with Manufacturing Methamphetamine as a B, although he, although the State has not proven that he ever manufactured methamphetamine.
>
> Your Honor, I believe that, that this – that whether or not he manufactured is discretionary to the fact-finder here. I think that it's – while the law is settled that you could find him guilty, you don't have to. You can, what you can do is show that he, is

> show, is find him guilty, though, of what he actually did which was possessed precursors as a D felony. We would ask you to find judgment in the same, and if not find him – just find him not guilty of the B felony, to find him instead guilty of the lesser D felony.

(Tr. Vol. III, pgs. 386-87.) We are not persuaded that trial counsel's unfortunate reference to "discretion," taken in context, amounts to an admission that Newcomb could properly be found guilty as charged. Inasmuch as defense counsel strenuously argued that the State had not proven the commission of a B felony, we are hard-pressed to say that his performance was deficient.

Appellate Counsel

[20] According to Newcomb, appellate counsel "failed to respond to the State's argument that Newcomb was guilty as an accomplice to manufacturing, [and] then failed to challenge the Court of Appeals' adoption of that argument, despite the lack of evidence that any manufacturing had begun." Appellant's Brief at 17. Although he does not claim that appellate counsel is routinely required to file a reply brief and a petition for transfer, he argues that failure to do so here amounted to deficient performance.

[21] The standard of review for a claim of ineffective assistance of appellate counsel is the same as for trial counsel in that the defendant must show appellate counsel performed deficiently and that the deficiency resulted in prejudice. *Strickland*, 466 U.S. at 686, 104 S. Ct. 2052; *Bieghler v. State*, 690 N.E.2d 188,

192-93 (Ind. 1997). To satisfy the first prong, the petitioner must show that counsel's performance was deficient in that counsel's representation fell below an objective standard of reasonableness and that counsel committed errors so serious that petitioner did not have the "counsel" guaranteed by the Sixth Amendment. *McCary v. State*, 761 N.E.2d 389, 392 (Ind. 2002). To show prejudice, the petitioner must show a reasonable probability that but for counsel's errors the result of the proceeding would have been different. *Id.*

[22] Ineffective assistance of appellate counsel claims generally fall into three basic categories: (1) denial of access to an appeal; (2) waiver of issues; and (3) failure to present issues well. *Fisher v. State*, 810 N.E.2d 674, 677 (Ind. 2004). Here, the third category is implicated. Appellate counsel addressed insufficiency of the evidence generally[7] and pointed to the absence of a reactionary vessel in Newcomb's vehicle. Counsel pointed out that the coffee filter did not test positive for methamphetamine and that the pills were not crushed. However, when the State argued that there was sufficient evidence of accomplice liability, citing *Lothamer v. State*, 44 N.E.3d 819 (Ind. Ct. App. 2015), for the proposition that an accomplice need not participate in each element of the crime, and erroneously reiterating that "Defendant acknowledged he knew the purpose for

[7] When reviewing the sufficiency of the evidence to support a conviction, we consider only the probative evidence and reasonable inferences supporting the [judgment]. *Drane v. State*, 867 N.E.2d 144, 146 (Ind. 2007). We neither reweigh the evidence nor assess the credibility of witnesses. *Id.* Unless no reasonable fact-finder could conclude the elements of the crime were proven beyond a reasonable doubt, we will affirm the conviction. *Id.*

which [precursors] were purchased," Appellee's [Direct Appeal] Brief at 12, Newcomb's counsel did not draft a reply brief in response.

[23] Thus, counsel did not address the discrepancy between the evidentiary record and the State's representation of the breadth of Newcomb's "admissions." Corporal Young did not testify regarding a "purpose" for precursors; rather, he testified to Newcomb's admission that he knew what they were. Ultimately, this Court relied upon alleged admissions by Newcomb and the authority of *Lothamer* in concluding that accomplice liability had been established. Appellate counsel made no attempt to distinguish *Lothamer*. Again, in hindsight, distinguishing *Lothamer* would have been a highly appropriate advocacy decision.

[24] In *Lothamer*, the participation of the accomplice was described as follows:

> Here, Lothamer and Farber permitted Jensen to use their home to manufacture methamphetamine [on three occasions]. Lothamer was present in the home on each occasion and even admitted supervising Jensen on one occasion. Lothamer never expressed any opposition to having the drug produced at his home. In fact, Lothamer provided pseudoephedrine to Jensen to use in the manufacture of methamphetamine and went to the store to purchase items to be used in the manufacturing process. Lothamer also installed hooks so blankets could be hung to keep the odors contained to the bathroom while Jensen cooked the methamphetamine. Lothamer was therefore not merely present at the scene, but acted in concert with Jensen to manufacture methamphetamine.

Id. at 822. Newcomb possessed some methamphetamine residue and a panoply of precursors. But, in contrast to the facts of *Lothamer*, there is no evidence that Newcomb was ever present at the scene of methamphetamine manufacturing or that he had provided items used in that process. Newcomb had not used the precursors in his vehicle to begin manufacture; there is no evidence that his unidentified friend, if indeed the friend existed, had begun manufacturing. Although an accomplice need not participate in each element of an offense, there must be an offense.

[25] During the post-conviction hearing, appellate counsel testified that she did not believe a reply brief was warranted because her argument of insufficient evidence remained the same. Appellate counsel testified:

> [T]he issue raised was sufficiency. And my argument was there insufficient evidence to show that the manufacturing process had begun. And in my view of Mr. Newcomb's case, that was the strong argument on his behalf was that the manufacturing process had not begun. So whether Mr. Newcomb was convicted as an accomplice or as a principal, my argument [was] that the manufacturing process had not begun.
>
> So in a reply brief which is governed under appellate rule 46(C) I think, it is again "a may" discretion. And you cannot raise any new issues in a reply brief. So given the fact that my sole argument was that the manufacturing process had not begun, I cannot reraise that in a reply brief because it is the same argument I made initially.

(P.C.R. Tr. pg. 19.)

[26] Grounds for error are to be framed in an appellant's initial brief; if those grounds are addressed for the first time in the reply brief, they are waived. *Snow v. State*, 137 N.E.3d 965, 969 (Ind. Ct. App. 2019), *trans. denied*. Although appellate counsel could not raise and have this Court address a new issue in a reply brief, she could have distinguished *Lothamer* within the context of the insufficiency of evidence issue already raised. Again, however, given the substantial and appropriate advocacy in appellate counsel's identifying a failure of proof, we cannot say that the performance was deficient.

[27] At bottom, counsel performed adequately, but Newcomb stands convicted of an offense that he did not commit. We have often repeated the general limitation upon post-conviction claims enunciated by our Indiana Supreme Court:

> It was wrong to review the fundamental error claim in a post-conviction proceeding. As we explained in *Canaan v. State*, N.E.2d 227, 235 n. 6 (Ind. 1997), the fundamental error exception to the contemporaneous objection rule applies to direct appeals. 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) (emphasis added.) Now we are confronted with circumstances not encompassed by generalities. Importantly, while *Sanders* disapproves of free-standing fundamental error claims as a general proposition, the decision did not categorically prohibit recognition of fundamental error where, as here, the crime alleged did not occur and there has been a miscarriage of justice.

[28] In *Woodson v. State*, 778 N.E.2d 475, 477 (Ind. Ct. App. 2002), we observed that the *Canaan* language relied upon in *Sanders* originated in *Bailey v. State*, 472 N.E.2d 1260, 1263 (Ind. 1985). We further observed "*Bailey* remains good law" and explained: *Bailey* and *Canaan* limit appellate review of freestanding claims of fundamental error, but they do not place a blanket restriction on the review of claims of fundamental error that arise within the rules of post-conviction procedure. *Id.* at 478. That is, we continue to "have the power to discuss a claim of fundamental error that arises in the context of ineffective assistance of counsel or as an issue that was not available to the defendant at the time of trial and on direct appeal." *Id.* at 479.

[29] In *Martin v. State*, 480 N.E.2d 548, 549 (Ind. 1985), our Supreme Court adopted upon transfer a portion of the underlying opinion of this Court.

> No one has ever challenged the fact that Martin was convicted of a crime with which he was not charged. The fact that his issue was not raised at the trial level, the post-conviction hearing or in this appeal does not permit us to ignore such fundamental error at the appellate level.

Id. (quoting *Martin v. State*, 470 N.E.2d 733, 735 (Ind. Ct. App. 1984)).

[30] We understand our Supreme Court's guidance in *Sanders* as to the two categories which are "generally" exclusive, as opposed to definitely exclusive, together with the background of *Martin*, to mean that we are not compelled to ignore the very rare case in which a petitioner is convicted of a crime that the State has not shown was committed. The evidence showed, and the State

conceded, that there had been no actual manufacturing of methamphetamine. The trial court agreed, in effect, that Newcomb had committed the offense of Possession of Precursors with Intent to Manufacture, a Class D felony, but nevertheless sentenced Newcomb for a Class B felony.

[31] Newcomb has steadfastly admitted that he committed a lesser offense. "A lesser included offense is necessarily included within the greater offense if it is impossible to commit the greater offense without first having committed the lesser." *Bush*, 772 N.E.2d at 1023–24. At the time of Newcomb's offense, Indiana Code Section 35-48-4-14.5(b) provided that a person who possessed two or more chemical reagents or precursors with the intent to manufacture methamphetamine committed a Class D felony. "[I]t is impossible to knowingly or intentionally manufacture methamphetamine without first possessing the chemical precursors of methamphetamine with the intent to make the drug. Methamphetamine cannot be conjured up out of thin air." *Bush*, 772 N.E.2d at 1024. Accordingly, we have found that possession of precursors with intent to manufacture methamphetamine is a lesser included offense of manufacturing methamphetamine. *Scott v. State*, 803 N.E.2d 1231, 1238 (Ind. Ct. App. 2004). Here, Newcomb possessed multiple precursors. There is testimony to support a reasonable inference that Newcomb had the requisite intent to manufacture in the future. There exists sufficient evidence to support Newcomb's conviction of Possession of Precursors with Intent to Manufacture.

Conclusion

[32] We are constrained to follow the rules of post-conviction procedure. That said, the appellant has attempted at every stage of the trial and appellate proceedings to comply with the relevant rules and draw attention to a wrongful conviction. The courts have not afforded him the relief due. In these rare circumstances of fundamental error raised in the context of ineffective assistance of counsel but demonstrated as a matter of law, we reverse the partial denial of Newcomb's petition for post-conviction relief. We remand with instructions to vacate the conviction for Dealing in Methamphetamine, enter a conviction for Possession of Precursors with Intent to Manufacture, conduct proceedings upon the habitual substance offender allegation, and sentence Newcomb accordingly.

[33] Reversed and remanded with instructions.

Najam, Sr. J., concurs.
Bradford, C.J., dissents in part and concurs in part with opinion.

IN THE
COURT OF APPEALS OF INDIANA

Paul Dean Newcomb, Jr.,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff.

[Add Hand-down date]

Court of Appeals Case No. 22A-PC-318

Appeal from the Elkhart Superior Court

The Honorable Teresa L. Cataldo, Judge

Trial Court Cause No. 20D03-1706-PC-31

Bradford, C.J., dissents in part and concurs in part with opinion.

[34] I agree with the majority's conclusion that Newcomb has failed to establish that either trial or appellate counsel provided him with ineffective assistance.

[35] However, I must disagree with the majority's suggestion that Newcomb "presents a claim of fundamental error, couched in allegations of ineffective assistance of trial and appellate counsel[.]" Slip op. p. 2. Rather, in correcting what it refers to as a "miscarriage of justice," slip op. p. 2, I believe that the majority raises the issue of fundamental error *sua sponte* and effectively reverses a prior decision of this court, in which transfer was denied. *See Newcomb v.*

State, 20A05-1503-CR-108 (Ind. Ct. App. Jan. 12, 2016), *trans. denied*. By raising and deciding the issue *sua sponte*, this court has decided the issue of fundamental error without granting the parties' lawyers with the opportunity to weigh in on the issue.

[36] In presenting his arguments on appeal, Newcomb asserts only that he received ineffective assistance from both his trial and appellate counsel. Newcomb did not present a claim of fundamental error. The Indiana Supreme Court recently reiterated that it disfavors *sua sponte* rulings. *See Conley v. State*, 183 N.E.3d 276, 283 (Ind. 2022) (citing *Thomas v. State*, 965 N.E.2d 70, 77 n.2 (Ind. Ct. App. 2012)). I therefore must dissent with the majority's conclusion that vacation of Newcomb's underlying conviction was appropriate.