ATTORNEYS FOR APPELLANT

Amy E. Karozos
Public Defender of Indiana

C. Brent Martin
Deputy Public Defender
Indianapolis, Indiana

ATTORNEYS FOR APPELLEE

Theodore E. Rokita
Attorney General of Indiana

Ellen H. Meilaender
Supervising Deputy Attorney General
Indianapolis, Indiana

IN THE COURT OF APPEALS OF INDIANA

Michael T. Robinson,
Appellant-Petitioner,

v.

State of Indiana,
Appellee-Respondent.

September 14, 2021

Court of Appeals Case No. 21A-PC-417

Appeal from the Madison Circuit Court

The Honorable Angela G. Warner Sims, Judge

Trial Court Cause No. 48C01-1706-PC-25

Najam, Judge.

Statement of the Case

[1] Michael T. Robinson appeals from the post-conviction court's denial of his petition for post-conviction relief. Robinson raises two issues for our review, which we restate as follows:

1. Whether Robinson has shown reversible error on his freestanding claim that the prosecutor suborned perjury during Robinson's trial.

2. Whether the post-conviction court erred when it concluded that Robinson's counsel on direct appeal did not render ineffective assistance when he did not raise what at the time would have been a novel argument under Indiana double jeopardy law.

[2] We affirm.

Facts and Procedural History

[3] The facts underlying Robinson's convictions for murder, a felony, and robbery, as a Class A felony, were stated by our Supreme Court in his direct appeal:

> Robinson and Michael Hobbs were both drug dealers in Elwood, Indiana. Hobbs supplied marijuana to Robinson. Over a period of months, Robinson made plans to murder Hobbs so that he could move up in the local drug trade and make more money.
>
> On August 1, 1995, Robinson called his friend Donald Peters, told him to "come over," and said that Hobbs was coming over to sell them some marijuana. Robinson planned to kill Hobbs that night. Hobbs arrived at Robinson's house about 10:30 p.m. wearing a zippered pouch around his waist containing approximately $1,000 in cash. He also had a black duffel bag holding between six and seven pounds of marijuana in the back seat of his car. Robinson and Peters got into Hobbs' car, with Robinson in the backseat behind Hobbs, and Peters in the front passenger seat. Robinson carried a handgun and a pair of gloves with him. He tried to shoot Hobbs, but the gun jammed and misfired. Hobbs struggled to exit the car, but Robinson

> unjammed the gun and fired again, this time hitting Hobbs in the back of the neck. The single gunshot wound killed Hobbs.
>
> Peters and Robinson drove Hobbs' car three miles from the site of the shooting, then dragged the body into a soybean field. Peters removed the zippered pouch from around Hobbs' waist. The two then left the body and drove to Peters' house, where they picked up Peters' car. With Peters following, Robinson drove Hobbs' car back out to the country. After transferring the duffle bag to Peters' car, they abandoned Hobbs' car and returned to Robinson's house to divide the cash and marijuana.
>
> Police found Hobbs' car the next day, but his badly decomposed body was not found until three weeks later. Police were able to identify Hobbs' body through DNA testing.

Robinson v. State, 693 N.E.2d 548, 551 (Ind. 1998) (citations omitted) ("*Robinson I*").

[4] On September 5, 1995, the State charged Robinson with murder, a felony, and robbery, as a Class A felony. The State charged Peters as a co-defendant. About two weeks later, and well before Robinson's May 1996 trial, the State also filed a notice of probation violation against Peters. As the probation court commenced the fact-finding hearing on that notice, the following colloquy occurred:

> MR. OLIVER [for Peters]: Judge I really do not believe this is fair to my client.
>
> JUDGE: What is not fair?

> MR. OLIVER: My client here had repeated discussions with myself and [Prosecutor Rodney] Cummings. . . . I think Mr. Cummings should be involved in this.
>
> JUDGE: Did you make a deal? . . . I don't know.
>
> MR. PUCKETT [for the State]: I don't know about it either.
>
> * * *
>
> JUDGE: Mr. Caldwell[, an investigative officer with the State,] do you know anything about a deal on his probation?
>
> MR. CALDWELL: I don't know anything about the probation part your Honor. I know there w[ere] discussions between Mr. Oliver and Mr. Cummings in regards to [the pending murder charge].
>
> * * *
>
> JUDGE: Well what is the unfair part?
>
> MR. OLIVER: My client . . . see Judge it is difficult for me to talk on the record.

Exs. Vol. I at 9-10 (last ellipsis in original). When Peters' counsel declined to be more specific, the probation court proceeded with the fact-finding hearing.

[5] During the hearing, the State called Caldwell, one of the investigating officers in the murder case. Caldwell testified that Peters had given officers a statement

after agreeing to waive his *Miranda* rights, at which point Peters' counsel again interjected:

> Judge we object at this particular time. We are taking the position again . . . , we have arrangements made in this case Judge.
>
> JUDGE: Well nobody said anything about arrangements to me Mr. Oliver and you refused to discuss it . . . and so we are going to press forward. . . .
>
> MR. OLIVER: Judge I have not refused to talk to the prosecutor. The prosecutor is not here for me to talk to. We had a deal.
>
> * * *
>
> JUDGE: But you do the deals and I approve them. Anything less than him going to jail [here] I am not going to approve anyhow. I don't care what your deal is.
>
> MR. OLIVER: Let me put it this way Judge, we do not have a deal. It is very sensitive. We do not have a deal but my client cooperated.
>
> JUDGE: Well fine.
>
> MR. OLIVER: Okay, but we don't have a deal, I want to make the record very clear on that.
>
> JUDGE: You got a deal but it is not a deal so when he takes the stand the defense lawyer for [Robinson] . . . of course I understand Mr. Oliver.

* * *

MR. OLIVER: So are you going to reset this[?]

JUDGE: No, we are doing it today.

Id. at 21-22 (last ellipsis in original). At the conclusion of the hearing, the court revoked Peters' probation and ordered him to serve the entirety of his previously suspended five-year sentence.

[6] Thereafter, in May of 1996 the court held Robinson's trial, at which Peters testified. As the post-conviction court would later summarize:

> Prosecutor Rodney Cummings examined Mr. Peters and asked, "You . . . You've been charged with[] the Murder and Robbery in the death of Michael Hobbs, is that correct, Mr. Peters?["] Mr. Peters responds[, "]Yes." Mr. Cummings followed with, "Have you been given any deal? Have I given you any deal in this to testify in this particular case?" Mr. Peters[:] "No sir." Mr. Cummings further questioned[:] "Made any offer to you at all?" Mr. Peters responded, ["]No, sir." Mr. Cummings further stated, "In exchange for your testimony, you've not been provided any leniency from the State[?]" Mr. Peters responded, "No, I haven't[."] Mr. Cummings stated, "Well, your trial date in this case is set for September . . . but you have absolutely no deal . . . you don't even have any hopes for a deal, do you[?]" Mr. Peters responded, "No, I don't know what's going to happen." Mr. Cummings then asked, "You just . . . Hasn't somebody said that maybe they'd go easier on you if you testified in this case?" Mr. Peters responded, "I was told that if . . . the very first day I got arrested that if I cooperated, they wouldn't push for the death penalty." Mr. Cummings[:] "And have they?" Mr. Peters[:] "No, not yet[."] Mr. Cummings[:] "Did

> they tell you they'd do anything else for you other than not push for the death penalty?["] Mr. Peters[:] "No." Mr. Cummings[:] "So you're just hoping for the best?["] Mr. Peters[] responds, "Yes."

Appellant's App. Vol. 2 at 125 (citations omitted; ellipses in original). The jury found Robinson guilty on both charges.

[7] Robinson appealed his convictions and argued, among other things, that the prosecutor had committed misconduct by making various, allegedly prejudicial remarks in front of the jury. Robinson further argued that the prosecutor had committed misconduct by withholding purportedly favorable evidence. Our Supreme Court reviewed Robinson's arguments, rejected them, and affirmed his convictions. *Robinson I*, 693 N.E.2d at 551-52, 555.

[8] Following our Supreme Court's opinion, in January of 1999 Peters agreed to plead guilty to the State's charge of murder against him. At the beginning of that hearing, the parties discussed whether they had an agreement:

> MR. OLIVER: Judge I have not seen the plea agreement. . . .
>
> * * *
>
> MR. CUMMINGS: I have said all along, and it has always been our policy, we do not make plea agreements on murder cases. . . . What our position here is [is] that given the cooperation that Mr. Peters provided to the State of Indiana in the trial of Mr. Robinson, he can plead as charged, sentencing will be to the Court and the State will recommend to the Judge to impose the

> minimum possible sentence that the law allows. It is the Judge's call to make. . . .
>
> * * *
>
> MR. CUMMINGS: . . . [T]hirty (30) is the minimum. Which means he has got to do fifteen (15).
>
> * * *
>
> JUDGE: . . . I will tell you right now if you plead you will get the minimum sentence. He is saying to you he doesn't want to make an agreement, but he will recommend the minimum, but I am telling you I will give you the minimum.

Exs. Vol. I at 40-41. Peters then pleaded guilty to murder, a felony, which the court accepted. The court ordered him to serve thirty years, to be served consecutive to Peters' sentence on the probation revocation.

[9] In 2003, Robinson filed his petition for post-conviction relief, which he amended in 2017. In his amended petition, Robinson alleged in relevant part that he had been denied a fundamentally fair trial because Cummings had suborned perjury from Peters when he asked Peters to testify as to whether Peters had a deal with the State, and Peters testified he had no deal. Robinson also argued that he had received ineffective assistance of appellate counsel in his direct appeal when his counsel had not argued for what at the time would have been a novel application of Indiana double jeopardy law to have his robbery conviction vacated.

[10] The post-conviction court held a fact-finding hearing on Robinson's amended petition. Robinson submitted Peters' probation violation hearing transcript and Peters' guilty plea and sentencing hearing transcript as exhibits. Following the hearing, the post-conviction court found and concluded in relevant part as follows:

> 14. . . . [T]he court does not conclude that Mr. Peters was given a plea deal, either explicitly in writing or implicitly through a "wink and nod" arrangement, in exchange for his testimony . . . . At most, Mr. Peters and his attorney had an acknowledgement from the State that consideration would be given to his case if he were to cooperate in testifying truthfully at [Robinson's] trial. This is a logical expectation for any witness with a pending criminal case, and is often argued as a mitigating circumstance for sentencing purposes. [Robinson's] counsel certainly could have argued this very point at trial regardless of any possible plea agreement Mr. Peters may or may not have had. Further, even if the State indicated that consideration would be given, this does not equate to an agreement that leniency would be given or constitute plea negotiations. . . . Ultimately, Mr. Peters was left with nothing more than the hope that his case would possibly be resolved if he testified in [Robinson's] case. . . .
>
> 15. [Robinson] contends that the outcome of Mr. Peters' case substantiates his claim that an agreement was in place. However, this argument ignores the context in which the case was resolved. First, Mr. Peters plead[ed] guilty to one count of murder without the benefit of a plea agreement. Simply put, Mr. Peters plead[ed] open to one count of murder. The only consideration the State gave Mr. Peters was its recommendation that he receive the minimum sentence. However, complete discretion remained with the court. . . .

Appellant's App. Vol. 2 at 129-30. The court also found and concluded:

> 12. In regards to [Robinson's] double jeopardy claim, the case law as it existed at the time of [Robinson's] conviction and sentencing does not support a finding that a double jeopardy violation occurred. . . .
>
> 13. Given the state of Indiana law regarding double jeopardy at the time of [Robinson's] appeal, the court does not find that appellate counsel was ineffective for failing to raise an issue of double jeopardy on direct appeal.

Id. at 129. The court then denied Robinson's petition, and this appeal ensued.

Discussion and Decision

Standard of Review

[11] Robinson appeals the denial of his petition for post-conviction relief. Our Supreme Court has made our standard of review in such appeals clear:

> Post-conviction proceedings are civil proceedings in which a defendant may present limited collateral challenges to a conviction and sentence. Ind. Post-Conviction Rule 1(1)(b); *Wilkes v. State*, 984 N.E.2d 1236, 1240 (Ind. 2013). The scope of potential relief is limited to issues unknown at trial or unavailable on direct appeal. *Ward v. State*, 969 N.E.2d 46, 51 (Ind. 2012). "Issues available on direct appeal but not raised are waived, while issues litigated adversely to the defendant are *res judicata*." *Id.* The defendant bears the burden of establishing his claims by a preponderance of the evidence. P.-C.R. 1(5). When, as here, the defendant appeals from a negative judgment denying post-conviction relief, he "must establish that the evidence, as a whole, unmistakably and unerringly points to a conclusion contrary to the post-conviction court's decision." *Ben-Yisrayl v.*

> *State*, 738 N.E.2d 253, 258 (Ind. 2000). When a defendant fails to meet this "rigorous standard of review," we will affirm the post-conviction court's denial of relief. *DeWitt v. State*, 755 N.E.2d 167, 169-70 (Ind. 2001).

Gibson v. State, 133 N.E.3d 673, 681 (Ind. 2019).

Issue One: Robinson's Freestanding Claim of Fundamental Error

[12] Robinson first argues on appeal that the post-conviction court erred when it denied his petition because the evidence shows that Cummings suborned perjury during Robinson's trial. Specifically, Robinson asserts that the transcript from Peters' probation revocation hearing and the transcript from Peters' guilty plea and sentencing hearing show that Cummings and Peters did in fact have an agreement whereby Peters would testify against Robinson and, in exchange, Cummings would recommend Peters receive the minimum sentence on the State's charge of murder against him. Therefore, Robinson continues, Cummings knowingly caused Peters to commit perjury during Robinson's trial when Cummings had Peters testify that he and the State had no deal.

[13] Before addressing Robinson's argument, we first note that his argument on this issue is a freestanding claim of fundamental error. Generally, freestanding claims of fundamental error are not available in the post-conviction process. "A defendant in a post-conviction proceeding may allege a claim of fundamental error only when asserting either (1) '[d]eprivation of the Sixth Amendment right to effective assistance of counsel,' or (2) 'an issue

demonstrably unavailable to the petitioner at the time of his . . . trial and direct appeal.'" *Lindsey v. State*, 888 N.E.2d 319, 325 (Ind. Ct. App. 2008) (quoting *Canaan v. State*, 683 N.E.2d 227, 235 n.6 (Ind. 1997)), *trans. denied*.

[14] But Robinson does not argue that his trial counsel was ineffective for not objecting to Peters' testimony or for not properly investigating Peters' dealings with the State. He also does not argue that this issue was demonstrably unavailable to him at the time of his trial and direct appeal. For example, he does not argue that either of the transcripts from Peters' proceedings are newly discovered evidence.[1] And he explicitly disclaims an argument that Cummings violated his rights under *Brady v. Maryland*, which would have been akin to an argument of newly discovered evidence.[2] *See* Appellant's Br. at 20 ("This is not a *Brady v. Maryland* claim."). Accordingly, Robinson has not shown that his argument is appropriate for post-conviction relief.

[15] In any event, the post-conviction court decided Robinson's petition on its merits, and the State does not assert on appeal that we should decide this issue on the ground that Robinson's argument is procedurally improper. We therefore briefly consider whether the evidence before the post-conviction court unmistakably shows that Cummings suborned perjury. And we conclude that it does not. The implication from Cummings' exchange with Peters was that

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[1] Peters' probation revocation hearing preceded Robinson's trial.

[2] In *Brady*, the Supreme Court of the United States held that criminal defendants have a due process right to receive potentially exculpatory evidence in the possession of the State. 373 U.S. 83 (1963).

there was no promise that Peters' testimony at Robinson's trial would benefit him. Peters entered an open plea, which left sentencing to the trial court's discretion, and the trial court was not obliged to accept the State's recommendation of a minimum sentence. Accordingly, Robinson has not shown that there was a plea "deal" between the State and Peters, and he has not shown that the post-conviction court's judgment on this issue is erroneous.

Issue Two: Effective Assistance of Appellate Counsel

[16] Robinson also asserts that his counsel on direct appeal rendered ineffective assistance. To prevail on this claim, Robinson must show:

> (1) that his counsel's performance fell short of prevailing professional norms, and (2) that counsel's deficient performance prejudiced his defense. *Strickland v. Washington*, 466 U.S. 668 (1984). "A showing of deficient performance under the first of these two prongs requires proof that legal representation lacked 'an objective standard of reasonableness,' effectively depriving the defendant of his Sixth Amendment right to counsel." *Gibson [v. State]*, 133 N.E.3d [673,] 682 [(Ind. 2019)] (quoting *Overstreet v. State*, 877 N.E.2d 144, 152 (Ind. 2007)). "To demonstrate prejudice, the defendant must show a reasonable probability that, but for counsel's errors, the proceedings below would have resulted in a different outcome." *Id.* (citing *Wilkes v. State*, 984 N.E.2d 1236, 1240-41 (Ind. 2013)). "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694.

Wilson v. State, 157 N.E.3d 1163, 1177 (Ind. 2020) (emphases removed). Further, as Robinson's claim is specific to his appellate counsel:

> "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." *Reed v. State*, 856 N.E.2d 1189, 1195 (Ind. 2006) (citation omitted) (emphasis added). . . .
>
> "To show that counsel was ineffective for failing to raise an issue on appeal thus resulting in waiver for collateral review, the defendant must overcome the strongest presumption of adequate assistance, and judicial scrutiny is highly deferential." *Gallien v. State*, 19 N.E.3d 303, 307 (Ind. Ct. App. 2014) (citing *Reed*, 856 N.E.2d at 1195). "To evaluate the performance prong when counsel waived issues upon appeal, we apply the following test: (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." *Reed*, 856 N.E.2d at 1195 (quotation omitted) (emphasis added). [Ineffective assistance of counsel] is very rarely found in cases where a defendant asserts that appellate counsel failed to raise an issue on direct appeal, in part, because the decision of what issues to raise is one of the most important strategic decisions to be made by appellate counsel. *Bieghler v. State*, 690 N.E.2d 188, 193-94 (Ind. 1997). Though instances of successful claims are "very rare," one ground for past successful [ineffective assistance of counsel] claims is appellate counsel's failure "to locate[ ] and rel[y] upon" recent precedent from this Court that is "not out-of-date or obscure" and would have directly supported a meritorious argument for relief. *Hopkins v. State*, 841 N.E.2d 608, 614 (Ind. Ct. App. 2006).

Id. at 1178-79. While showing that appellate counsel failed to rely on "recent precedent" that is not "obscure" and "would have directly supported a meritorious argument" may support a showing of post-conviction relief, that standard implies another clear rule in our review of such claims for relief: the

reasonableness of appellate counsel's decisions is based on the precedent available to counsel at the time of the direct appeal. *Johnson v. State*, 103 N.E.3d 704, 707 (Ind. Ct. App. 2018), *trans. denied*. The Sixth Amendment does not require counsel "to anticipate changes in the law." *Smylie v. State*, 823 N.E.2d 679, 690 (Ind. 2005).

[17] Robinson's argument that his appellate counsel rendered ineffective assistance is contrary to that precedent. Robinson asserts that his appellate counsel should have relied on the following footnote from a 1997 opinion of the Indiana Supreme Court, which was available to his counsel on direct appeal:

> In presenting the general claim that his sentences violate the double jeopardy provisions of the Indiana and United States Constitutions, the defendant cites both constitutions. However, the defendant does not provide Indiana authority, *and we find none from this Court, establishing an independent state double jeopardy protection based upon an analysis of the Indiana Constitution*. Of the cases cited by the defendant in support of his double jeopardy argument, only *Bevill v. State*, 472 N.E.2d 1247 (Ind. 1985) mentions the Indiana Constitution. However, the mention in *Bevill* is only a recitation of the defendant's claim that it violated the Indiana Constitution. *Bevill* resolves the claim utilizing an analysis based upon the federal provision. The defendant presents no argument urging that the Indiana Constitution provides double jeopardy protections different from those under the federal constitution. *Cf. Peterson v. State*, 674 N.E.2d 528, 533 (Ind. 1996) ("Separate and apart from the federal Fourth Amendment analysis, Article I, Section 11 of the Indiana Constitution provides an independent prohibition against unreasonable searches."); *Price v. State*, 622 N.E.2d 954, 958 (Ind. 1993) ("[Federal] First Amendment jurisprudence differs from the Indiana approach [under Indiana's free speech clause]");

> *Collins v. Day*, 644 N.E.2d 72, 75 (Ind. 1994) (Article 1, Section 23 of the Indiana Constitution "should be given independent interpretation and application."); *Moran v. State*, 644 N.E.2d 536, 540 (Ind. 1994) (Article 1, Section 11's application of an independent reasonableness standard rather than the federal Fourth Amendment jurisprudence); *Brady v. State*, 575 N.E.2d 981, 987 (Ind. 1991) (Article 1, Section 13 is treated differently than the federal Sixth Amendment because "it has a special concreteness and is more detailed."). Because the defendant fails to present an argument based upon a separate analysis of the Indiana Constitution, "we will only analyze this under federal double jeopardy standards." *Gregory-Bey v. State*, 669 N.E.2d 154, 157 n.8 (Ind. 1996). *See also Bivins v. State*, 642 N.E.2d 928, 949 n.7 (Ind. 1994), *cert. denied*, 516 U.S. 1077, 116 S. Ct. 783, 133 L. Ed. 2d 734 (1996); *St. John v. State*, 523 N.E.2d 1353, 1355 (Ind.1988).

Games v. State, 684 N.E.2d 466, 473 n.7 (Ind. 1997) (emphasis added; alterations original to *Games*). According to Robinson, that footnote was an invitation by the Indiana Supreme Court for appellate attorneys to raise double jeopardy arguments under the Indiana Constitution. Robinson then notes that, shortly after his direct appeal had been resolved by the Indiana Supreme Court in *Robinson I*, the Court decided *Richardson v. State*, which established new rules for analyzing double jeopardy claims under the Indiana Constitution. *See* 717 N.E.2d 32 (Ind. 1999).[3] And Robinson asserts that, had his appellate counsel accepted the *Games* invitation to raise a double jeopardy issue under the Indiana

[3] *Richardson*, in turn, has since been overruled. *Wadle v. State*, 151 N.E.3d 227 (Ind. 2020).

Constitution, and the Court announced in *Robinson I* the holding it announced in *Richardson*, he may have had his conviction for robbery vacated.

[18] Be that as it may, the Sixth Amendment does not require counsel to speculate, and, thus, it did not require Robinson's appellate counsel to anticipate our Supreme Court's holding in *Richardson*. Indeed, the *Games* footnote on which Robinson's argument is premised itself says that, at the time of Robinson's direct appeal, there was no "independent state double jeopardy protection." 684 N.E.2d at 473 n.7. Thus, based on the precedent available to Robinson's appellate counsel at the time of his direct appeal, there was no state double jeopardy issue to raise. We therefore affirm the post-conviction court's rejection of this issue and denial of Robinson's petition for relief.

[19] Affirmed.

Riley, J., and Brown, J., concur.