MEMORANDUM DECISION

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IN THE
COURT OF APPEALS OF INDIANA

Anthony Bedolla,
Appellant-Petitioner,

v.

State of Indiana,
Appellee-Respondent,

June 14, 2021

Court of Appeals Case No. 20A-PC-1912

Appeal from the Marion Superior Court

The Honorable Amy J. Barbar, Magistrate

Trial Court Cause No. 49G02-0903-PC-34210

Robb, Judge.

Case Summary and Issue

[1] In 2010, Anthony Bedolla was convicted of murder, a felony; and possession of cocaine, a Class D felony. He was sentenced to an aggregate of forty-five years. Bedolla appealed his murder conviction and a panel of this court affirmed. *Bedolla v. State*, No. 49A02-1003-CR-368 (Ind. Ct. App. Jan. 20, 2011), *trans. denied*. In 2011, Bedolla, pro se, filed a petition for post-conviction relief. In 2016 and 2017, Bedolla, by counsel, filed amended petitions. Following an evidentiary hearing, the post-conviction court denied Bedolla's petition. Bedolla now appeals and raises six issues, which we consolidate and restate as whether the post-conviction court erred in denying Bedolla's petition. Concluding the post-conviction court did not err, we affirm.

Facts and Procedural History

[2] We briefly summarized the underlying facts supporting Bedolla's conviction in his direct appeal:

> In the early morning hours of March 8, 2009, Jose Reyes and his girlfriend, Sarai Solano, were at the El Rey De Copas club in Indianapolis. Solano had worked as a paid confidential informant for the police in other cases. Solano saw Erick Espinoza arguing with Bedolla in the club and saw Bedolla push Espinoza. Solano had known Bedolla for about a month, and she knew what Espinoza looked like. Near the 3:00 a.m. closing time, Reyes and Solano were leaving the club and walking toward their vehicle when Solano saw Espinoza walking through the parking lot. She also saw Bedolla in the parking lot with a gun and heard Bedolla shouting at Espinoza that Espinoza owed

> money to him. Bedolla then shot Espinoza. With Espinoza lying on the ground, Bedolla threw money at Espinoza's feet and said that he did not need the money.
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> Reyes also knew Bedolla. Reyes saw Bedolla in the parking lot with a gun and saw him shoot the gun, but he could not see what Bedolla was shooting at. Reyes heard three shots and saw Bedolla get in his vehicle and leave after the shooting.
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> Espinoza died from his wounds, and police officers recovered money near Espinoza's body. When the police arrested Bedolla two weeks later at the El Rey De Copas club, he had cocaine in his possession. The State charged Bedolla with murder and possession of cocaine as a Class D felony. . . . Solano and Reyes both testified at Bedolla's bench trial in February 2010. Gerardo Baca[-]Ramirez testified that he followed Espinoza into the parking lot, saw Espinoza talking to a man, who was not Bedolla, saw the man pull out a gun, and heard shots. The trial court found Solano and Reyes more credible than Ramirez and found Bedolla guilty as charged. The trial court sentenced Bedolla to forty-five years in the Department of Correction.

Bedolla, No. 49A02-1003-CR-368 at *1.

[3] Bedolla appealed, arguing that the denial of his request to attend the depositions of two witnesses violated his confrontation rights or his right to assist in his own defense. He also claimed the evidence was insufficient to support his murder conviction. A panel of this court affirmed.

[4] On October 3, 2011, Bedolla filed a pro se petition for post-conviction relief alleging ineffective assistance of trial and appellate counsel and fundamental error. On September 21, 2016, January 10, 2017, and April 10, 2017, Bedolla,

now represented by counsel, filed amended petitions for post-conviction relief alleging fundamental error, i.e., prosecutorial misconduct preventing a fair trial; ineffective assistance of trial counsel; and newly discovered evidence. *See* Appendix of Appellant, Volume 2 at 80-97, 116-23, 148-51.

[5] With respect to prosecutorial misconduct, Bedolla alleged the State "failed to mention relevant and exculpatory information in the Probable Cause Affidavit and failed to discover exculpatory information to the defense." *Id.* at 81. He claimed that the State failed to disclose a witness' involvement in other criminal proceedings; allowed the production and broadcasting of a cable television show, Crime 360, about the pending investigation of this crime prior to trial; failed to disclose deals it made with witnesses; failed to provide a photo array from Baca-Ramirez's statement when he failed to identify Bedolla as the shooter; and used "unverified statements of an unnamed 'cooperating individual'" in the probable cause affidavit. *Id.* at 83.

[6] Bedolla claimed he received ineffective assistance of trial counsel when counsel failed to object to the prosecutorial misconduct; advised him to waive a jury trial;[1] failed to present certain evidence, including witnesses and documentary evidence; failed to request a *Franks*[2] hearing to challenge an allegedly deficient

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[1] Bedolla acknowledged that his waiver of jury trial was knowing and intelligent. Instead, he claimed that "it was ill-advised to waive the jury trial right given the facts and circumstances of this case." App. of Appellant, Vol. 2 at 118.

[2] In *Franks v. Delaware*, the United States Supreme Court held that an evidentiary hearing is required "where the defendant makes a substantial preliminary showing that a false statement knowingly and intentionally, or

probable cause affidavit; and failed to inform him of a significant conflict of interest. Bedolla made a *Cronic*[3] claim alleging that "the surrounding circumstances were such that even a fully competent lawyer had a very diminished chance of providing effective assistance." *Id.* at 119. And finally, Bedolla alleged newly discovered evidence revealed a different killer, entitling him to a new trial.

[7] Evidentiary hearings were held on January 11, April 26, July 28, 2017, and following an interlocutory appeal,[4] February 28, 2020. At the hearings, Bedolla's lead trial counsel, Richard Hagenmaier, and co-counsel, Albert

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with reckless disregard for the truth, was included by the affiant in the warrant affidavit, and if the allegedly false statement is necessary to the finding of probable cause[.]" 438 U.S. 154, 155-56 (1978).

[3] *United States v. Cronic*, 466 U.S. 648 (1984).

[4] The "newly discovered evidence" alleged in Bedolla's third amendment was information from Miguel Barragan-Lopez, who briefly shared a cell with Bedolla in the Marion County Jail. Barragan-Lopez told Bedolla he knew Solano and that she told him her boyfriend shot and killed Espinoza. In July 2017, the post-conviction court granted Bedolla's motion for leave to depose Barragan-Lopez. In September 2017, Bedolla's counsel began the deposition; however, the State objected to counsel's questions and Barragan-Lopez no longer wanted to participate without his attorney present. Although counsel contacted Barragan-Lopez's attorney, he was unavailable to participate in the deposition that day. A status hearing was held one week later during which Bedolla's counsel informed the post-conviction court that the parties were working on coordinating a new date for the deposition. The State objected to further depositions and the post-conviction court decided to close the evidence. Bedolla's counsel asked to respond to the State's argument, but the court refused and would also not allow counsel to make an offer of proof as to the content of Barragan-Lopez's testimony.

Bedolla subsequently filed a motion to correct error alleging, in part, that the post-conviction court erred by failing to allow counsel to make an offer of proof. The post-conviction court denied the motion and Bedolla moved to certify the order for interlocutory appeal, which the post-conviction court did, and this court accepted. A panel of this court affirmed, *see Bedolla v. State,* No. 49A02-1712-PC-3004 (Ind. Ct. App. Aug. 31, 2018), and Bedolla sought transfer. Our supreme court granted transfer, vacating this court's opinion, and ultimately held that the post-conviction court abused its discretion when it denied Bedolla's legitimate request to make an offer of proof. *Bedolla v. State*, 123 N.E.3d 661, 666-68 (Ind. 2019). Accordingly, our supreme court reversed the post-conviction court and remanded with instructions to proceed with the deposition. The deposition subsequently occurred on November 18, 2019.

Serrano, testified. In addition, Bedolla presented numerous witnesses who were not called to testify at his original trial, including Andrew Reyes, manager of El Rey De Copas nightclub; Indianapolis Metropolitan Police Department Lieutenant Donald Christ; Marco Antonio Damacio, owner of a taco truck outside the nightclub; Gary Herald, Bedolla's boss; and Veronica Cortez Perez, Ismael Santana Velasco, and Rodolfo Reyes, individuals who were at the club the night of the murder. Although Baca-Ramirez testified at trial for the State, he testified at the evidentiary hearing. Solano also testified. And finally, Bedolla presented the deposition transcript of Miguel Barragan-Lopez – what he claims to be newly discovered evidence.

[8] In his deposition, Barragan-Lopez testified that he and Solano were having an affair; Solano became intoxicated one night and disclosed to him that the father of her child was the one who shot Espinoza because Espinoza did not pay for a half kilogram of cocaine. *See* [PCR] Exhibits, Volume 1 at 4-27. He also stated that Solano told him the father of her child paid her to testify against Bedolla at trial. Barragan-Lopez was not at the club on the night of the murder.

[9] On September 17, the post-conviction court entered an order denying Bedolla's petition and concluding, in pertinent part:

> **Free Standing Claim [of Fundamental Error]**
>
> [Bedolla] claims that he was subjected to "fundamental error" when the State committed prosecutorial misconduct by failing to mention exculpatory information in the [probable cause] affidavit, and based the charges on what he describes as an

unreliable witness[;] that the [S]tate failed to discover certain exculpatory information[;] used a commercial television broadcast to publish false information about him[; and] that the State failed to discover deals and incentives that it gave to State's witnesses.

* * *

[T]he facts of a possible due process violation were fully available for direct appeal. . . . Consequently, the court must find that Bedolla's fundamental error claims are waived for post-conviction review.

Ineffective Assistance of Trial Counsel

To avoid waiver, in his second amended Petition, Bedolla re[f]rames his fundamental error claims as ineffective assistance of counsel. . . .

Bedolla claims . . . that his counsels advised him to waive jury [trial], counsels failed to present crucial evidence, including his witnesses, and documentary evidence[,] failed to request a *Franks* hearing[,] . . . failed to informed him of a significant conflict of interest[,] fail[ed] to object to the prosecutorial misconduct in the form of undisclosed *Brady*[5] material, and failed to object to the broadcast of the Crime 360 television show.

Jury Waiver

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[5] *Brady v. Maryland*, 373 U.S. 83 (1963).

* * *

The Court finds that trial counsels' decision to recommend a jury waiver was clearly a considered professional strategic decision [and] was professionally reasonable in the circumstances of this case, and as such does not support a claim of ineffective assistance.

Failure to present witnesses and documents

. . . Attorney Hagenmaier testified that the decision as to what witnesses to call is complicated and based on his assessment of the evidence and how the trial was progressing. He said that in this case he made the decision to rely on the testimony of Gerrardo Baca-Ramirez, because he was a witness to the shooting event, and that his testimony exonerated Bedolla. . . . [T]he Court finds that Bedolla's trial counsels' choice of witnesses was clearly considered and was clearly strategic. [T]he witnesses who did testify at the evidentiary hearing presented a confused and contradictory portrayal of events on the night of the murder, and there is no basis to conclude that Bedolla's trial counsels' choice of witness[es] was outside the wide range of professional competent assistance. Accordingly, Bedolla has failed to meet his burden of proof.

Bedolla also faulted his trial counsel[s] for failing to submit certain documentary exhibits [on] his behalf. These documents consisted of (1) all the State's discovered exhibits; (2) a videotape of the Crime 360 show; (3) CHIN[S] records regarding Sarai Solano's child; (4) Document regarding a 2007 case a Jose Nunez had in Court 23; and (5) records of payments made by Drug Task Force to . . . Solano.

. . . The Court is unclear exactly what Bedolla means by claiming his counsel was ineffective for failing to introduce "all of the . . .

State's discovered exhibits." Without any more specificity the court cannot even begin to analyze the extremely general claim.

Regarding the videotape of the Crime 360 show, . . . [Bedolla] acknowledged that there is no evidence that the [trial court judge] saw the program before the trial. The only testimony at the trial regarding the show came during cross of Det. Brickley, where he testified the program is a reenactment and not an accurate depiction. . . . [T]rial counsel was not ineffective for failing to introduce the tape.

Regarding the CHINS documents and the payments made to Sarai Solano, the court finds that the issues raised by these documents were thoroughly explored by the State and the defense at the original trial. Also, the defense did introduce a redacted documentary version of the payments she received. Clearly, some years before she witnessed the murder in this case, Ms. Solano was involved as a witness in a federal drug conspiracy case. Ms. Solano may also have had some involvement in the conspiracy itself. As part of that involvement and her agreement to testify in that federal case, Ms. Solano received approximately $9,000, most of which was in the form of paying her rent and paying for her to move to Ohio for a time. [She] likely also . . . received some assistance in terms of her immigration status, and in terms of regaining custody of her daughter, although that is not specifically clear[.] On this evidence, the court finds little to no evidentiary value in these documents beyond the issues thoroughly explored by defense counsel at trial. It is clear . . . that [the trial court judge] was well aware of and understood Solano's role as a [confidential informant] and the benefits accrued. Counsel was not ineffective.

. . . Bedolla does not explain how the[ ] documents [regarding Nunez] were admissible or even relevant to the murder charges in this case. . . . There is no evidence in this case that Bedolla's trial counsels had an actual conflict of interest, and consequently

the Court finds that they were not ineffective for failing to introduce document[s] regarding the Court 23 case, nor does the Court find that any conflict of interest[ ] existed, and so there is no valid ineffective assistance claim regarding any actual conflict.

Franks Hearing

[Bedolla] has not made any specific claim that the probable cause affidavit contained any intentionally uttered false statement, instead, liberally interpreted, he may be claiming that the probable cause affidavit contained omissions of material facts. . . . [A]t worst, Bedolla presents no admissible evidence supporting his claims on this issue, and at most, he is attempting [to] ask the Court to reweigh the credibility of the State's witnesses, which this Court will not do. In any event, the Court finds that Bedolla's trial counsels were not ineffective for failing to request a Franks hearing.

Brady violation

Next Bedolla claims that his trial counsels were ineffective for failing to object to the prosecutorial misconduct in the form of undisclosed Brady material. . . . [It is] unclear exactly what information Bedolla is claiming that the State failed to disclose. [He] introduced a partial transcript of the federal criminal case in which . . . Solano testified [and] refer[s] to documents which listed payments made to Solano regarding her testimony in that case. . .

Bedolla has presented no evidence that the State or anyone associated with the prosecution ever possessed the transcript. [Trial counsels] were fully aware of Ms. Solano's involvement in the federal case. They deposed her and extensively cross examined her on her history as a paid government witness. The State did resist discovering the evidence of payments made to

[her]; however, . . . the information was discovered. Additionally, at evidentiary hearing trial counsel specifically testified that he believed there was no evidence that Ms. Solano received any incentives for testifying in the Bedolla case, and that the State did discover all relevant material on this issue. . . . Bedolla has failed to establish that any *Brady* violation occurred, and consequently his counsels were not ineffective in this regard.

Crime 360

. . . Bedolla has repeatedly attempted to pursue this claim, however ultimately, all his arguments ignore the facts that the television show was not presented as evidence in the case, or even referenced by any party during the proceedings. There is no evidence, or even a suggestion that the trier of fact had viewed or was influenced in any way by the show. . . . Bedolla has failed to identify how or when his trial counsels should have or even could have objected to the television show, and he has failed to establish that such a putative objection would have or even could have been sustained. . . .

Cronic

. . . While the Court accepts that this case presented challenges from a defense perspective, there have been many other cases fairly tried in this country with much more pre-trial publicity and shady and dangerous defendants and witnesses than this case ever presented (Manson comes to mind, terrorists, mob figures, etc.). The Court finds that, based upon review of the evidence [in the] original case and based on Bedolla's trial counsels' overall performance and their skill and experience, Bedolla has failed to prove that the circumstances surrounding the case completely deprived him of a meaningful opportunity to subject the State's evidence to adversarial testing.

Newly discovered evidence

> [T]he court finds that Bedolla has failed to meet his burden of proof [and] that Barragan-Lopez's testimony is merely impeaching[,] not worthy of credit[,] wholly inconsistent with the factual testimony of others who witnessed the shooting[, and] it is unlikely . . . to produce a different result at a putative retrial[.]

Appealed Order at 5-26 (citations omitted). Bedolla now appeals. Additional facts will be provided as necessary.

Discussion and Decision

I. Post-Conviction Standard of Review

[10] Bedolla appeals from the denial of his petition for post-conviction relief. Post-conviction proceedings are civil in nature and the petitioner must therefore establish his claims by a preponderance of the evidence. Ind. Post-Conviction Rule 1(5). "Post-conviction proceedings do not afford the petitioner an opportunity for a super appeal, but rather, provide the opportunity to raise issues that were unknown or unavailable at the time of the original trial or the direct appeal." *Turner v. State*, 974 N.E.2d 575, 581 (Ind. Ct. App. 2012), *trans. denied*. On appeal, a petitioner who has been denied post-conviction relief faces a "rigorous standard of review." *Dewitt v. State*, 755 N.E.2d 167, 169 (Ind. 2001). To prevail, the petitioner must show that the evidence as a whole leads unerringly and unmistakably to a conclusion opposite that reached by the post-conviction court. *Hall v. State*, 849 N.E.2d 466, 469 (Ind. 2006). When

reviewing the post-conviction court's order denying relief, we will "not defer to the post-conviction court's legal conclusions," and the "findings and judgment will be reversed only upon a showing of clear error—that which leaves us with a definite and firm conviction that a mistake has been made." *Humphrey v. State*, 73 N.E.3d 677, 682 (Ind. 2017) (quoting *Ben-Yisrayl v. State*, 729 N.E.2d 102, 106 (Ind. 2000), *cert. denied*, 534 U.S. 830 (2001)). The post-conviction court is the sole judge of the weight of the evidence and the credibility of witnesses. *Fisher v. State*, 810 N.E.2d 674, 679 (Ind. 2004).

[11] Bedolla specifically claims that the post-conviction court erred in concluding his trial counsel was not ineffective, the evidence he presented was not "newly discovered evidence" warranting a new trial, and that he failed to establish a *Cronic* claim. We address each in turn.[6]

II. Ineffective Assistance of Trial Counsel

[12] In seeking post-conviction relief, Bedolla claimed, in relevant part, that his trial counsel was ineffective for failing to object to the State's alleged prosecutorial misconduct in the form of *Brady* violations; failing to cross-examine and impeach a key witness; and failing to investigate and present several witnesses who would allegedly exonerate him.

[6] Bedolla does not challenge the other bases upon which the post-conviction relied in denying his petition for relief, namely that his trial counsel was ineffective for failing to request a *Franks* hearing, failing to present certain documents, and recommending that he waive jury.

A. Standard of Review

[13] The Sixth Amendment to the United States Constitution guarantees a criminal defendant the right to counsel and mandates "that the right to counsel is the right to the effective assistance of counsel." *Strickland v. Washington*, 466 U.S. 668, 686 (1984). Generally, to prevail on a claim of ineffective assistance of counsel a petitioner must demonstrate both that his counsel's performance was deficient, and that the petitioner was prejudiced by the deficient performance. *French v. State*, 778 N.E.2d 816, 824 (Ind. 2002) (citing *Strickland*, 466 U.S. at 687, 694). A counsel's performance is deficient if it falls below an objective standard of reasonableness based on prevailing professional norms. *Id*. To meet the test for prejudice, the petitioner must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Id*. A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Perez v. State*, 748 N.E.2d 853, 854 (Ind. 2001). Failure to satisfy either prong will cause the claim to fail. *French*, 778 N.E.2d at 824.

[14] When we consider a claim of ineffective assistance of counsel, we apply a "strong presumption . . . that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." *Morgan v. State*, 755 N.E.2d 1070, 1073 (Ind. 2001). And "a defendant must offer strong and convincing evidence to overcome this presumption." *Williams v. State*, 771 N.E.2d 70, 73 (Ind. 2002). Counsel has wide latitude in selecting trial strategy and tactics, which we afford great deference. *Ward v. State*, 969

N.E.2d 46, 51 (Ind. 2012). "*Strickland* does not guarantee perfect representation, only a 'reasonably competent attorney.'" *Woodson v. State*, 961 N.E.2d 1035, 1041-42 (Ind. Ct. App. 2012) (quoting *Harrington v. Richter*, 562 U.S. 86, 110 (2011)), *trans. denied*. "[E]ven the finest, most experienced criminal defense attorneys may not agree on the ideal strategy or the most effective way to represent a client. Isolated mistakes, poor strategy, inexperience, and instances of bad judgment do not necessarily render representation ineffective." *Smith v. State*, 765 N.E.2d 578, 585 (Ind. 2002).

B. Failure to Object: *Brady* Violations

[15] Bedolla contends his counsel was ineffective for failing to object to alleged prosecutorial misconduct in the form of *Brady* violations. Specifically, Bedolla claims that the State violated *Brady* by failing to provide a photo array shown to Baca-Ramirez, in which he did not identify any individual in the array, and by failing to provide impeaching evidence on Solano.

[16] When a petitioner claims ineffective assistance of counsel based on counsel's failure to object, the petitioner must show that a proper objection would have been sustained. *Smith*, 765 N.E.2d at 585.

[17] In *Brady*, the United States Supreme Court held that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." 373 U.S. at 87. To show a *Brady* violation, the defendant must establish (1) that the prosecutor

suppressed evidence; (2) that such evidence was favorable to the defense; and (3) that the suppressed evidence was material. *Turner v. State,* 684 N.E.2d 564, 568 (Ind. Ct. App. 1997), *trans. denied*. "Evidence is material under *Brady* only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *Bunch v. State*, 964 N.E.2d 274, 297 (Ind. Ct. App. 2012) (internal quotation omitted), *trans. denied.* The State will not be found to have suppressed material evidence if it was available to a defendant through the exercise of reasonable diligence. *Id*. And the State does not have a duty to disclose evidence that the defendant knew or should have known existed. *Denney v. State*, 695 N.E.2d 90, 95 (Ind. 1998). Favorable evidence includes exculpatory and impeachment evidence. *Bunch*, 964 N.E.2d at 297-98. Suppression of *Brady* evidence is constitutional error warranting a new trial. *Id.* at 298.

[18] First, Bedolla claims that the State's "failure to disclose the photo array shown to the first interviewed witness, Gerardo Baca-Ramierz, and the fact that he could not identify anyone in the photo array, violated *Brady*[.]" Brief of Appellant at 31. He contends that the evidence would have had exculpatory value "because the witness who defense believed was more credible did not identify Bedolla as the shooter, but it also simultaneously undermine[d] Solano, the State[']s key witness." *Id.*

[19] Even if we assume the State suppressed this evidence, Bedolla has not shown that it is material. At trial, Baca-Ramirez testified that he was at the nightclub on the night of the murder, observed two men, neither of whom he identified as

Bedolla, waiting in the parking lot, and witnessed one of the men shoot the victim. Later, a detective showed Baca-Ramirez several photos of individuals and he did not recognize anyone in the photos. *See* [Trial] Transcript, Volume I at 163.[7] Therefore, even if this evidence was withheld from the defense, it was presented at trial and Bedolla cannot show that the result of the proceeding would have been different as it is merely cumulative of evidence already presented.

[20] Bedolla also claims the State failed to disclose impeaching evidence about Solano; specifically, "the information concerning consideration of charges she received in the federal [drug] case" and out-of-state police reports documenting allegations of domestic violence between Solano and Reyes. Br. of Appellant at 33.

[21] With respect to information regarding Solano's involvement as a confidential informant and the benefits she received, Hagenmaier testified at the evidentiary hearing that he "had a lot of trouble finding out any information on the confidential informant" and eventually filed a motion to compel. [PCR] Transcript, Volume II at 22. He further stated, "the State was always reluctant to give me anything . . . because a lot of it was [the U.S. Drug Enforcement Agency ("DEA") but] they did finally give me" the list of amounts paid by the Metro Drug Task Force or DEA. *Id.* at 23-24. In fact, our review of the record

[7] Citations for the trial transcript are based on the .pdf pagination.

indicates that during Bedolla's trial, defense counsel cross-examined Solano about the benefits she received. [Trial Tr.] Vol. I at 189-97. And counsel subsequently introduced the document, which was admitted into evidence. *See* [Prior Case] Exhibits, Volume I at 105[8] (Defendant's Exhibit C). The State did not suppress this evidence.[9]

[22] Regarding the domestic violence reports, Bedolla claims the State failed to disclose this information but fails to provide any explanation as to how the State suppressed such evidence. Nor has he provided any argument as to how the reports are favorable to him or material. *See* Br. of Appellant at 33-34. Therefore, his claim fails. *Turner,* 684 N.E.2d at 568 (to show a *Brady* violation, the defendant must show that the prosecutor suppressed evidence; that such evidence was favorable to the defense; and that the suppressed evidence was material); *see also* Ind. Appellate Rule 46(A)(8)(a) (an appellant's argument section "must contain the contentions of the appellant on the issues presented, supported by cogent reasoning").

[23] In sum, Bedolla has failed to establish that any *Brady* violation occurred and therefore, his trial counsel cannot be ineffective for failing to object.

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[8] Citations for the trial exhibits are based on the .pdf pagination.

[9] It is unclear what other alleged exculpatory information Bedolla claims the State had pertaining to Solano that he did not have or was not aware of.

C. Failure to Cross-Examine and Impeach

[24] Bedolla contends his trial counsel performed deficiently by failing to meaningfully cross-examine and impeach Solano "by drawing on the irreconcilable inconsistencies between her statement to police, her deposition, and her trial testimony." Br. of Appellant at 39. However, even assuming arguendo this constituted deficient performance, Bedolla fails to offer any argument as to *how* he was prejudiced by such alleged deficiency. *French*, 778 N.E.2d at 824. Therefore, he has failed to show his counsel was ineffective in this respect.

D. Failure to Investigate and Present Certain Evidence

[25] Bedolla also claims his counsel was ineffective for failing to investigate and present witnesses "who would have testified that [he] could not have been the shooter[which] was not a matter of trial strategy, as trial counsel flatly did not even contact several of the witnesses." Br. of Appellant at 41. Specifically, he contends his trial counsel should have called Rodolfo Reyes, Marco Antonio Damacio, Andres Reyes, and Gary Herald at trial.

[26] At the evidentiary hearing, each of these witnesses, except Herald, testified that Bedolla was either inside the nightclub or the taco truck located in the parking lot at the time of the shooting. Herald testified that Bedolla was working the week after the shooting.

[27] Hagenmaier testified at the hearing that he believed they had a good case because Baca-Ramirez was at the scene, which was undisputed, witnessed the

shooting, and stated that Bedolla was not the shooter. Hagenmaier made the strategic decision to rely on Baca-Ramirez's testimony and testified that "the decision to put on evidence is complicated sometimes." [PCR] Tr., Vol. II at 65. The post-conviction court found that Hagenmaier's choice of witnesses was "clearly considered and was clearly strategic. [T]he witnesses who did testify at the evidentiary hearing presented a confused and contradictory portrayal of events on the night of the murder, and there is no basis to conclude that Bedolla's trial counsels' choice of witness was outside the wide range of professionally competent assistance." Appealed Order at 15. And therefore, the post-conviction court found that Bedolla failed to meet his burden of proof.

[28] As this court has explained,

> Counsel is given significant deference in choosing a strategy which, at the time and under the circumstances, he or she deems best. A reviewing court will not second-guess the propriety of trial counsel's tactics. Trial strategy is not subject to attack through an ineffective assistance of counsel claim, unless the strategy is so deficient or unreasonable as to fall outside of the objective standard of reasonableness. This is so even when such choices may be subject to criticism or the choice ultimately proves detrimental to the defendant.

Benefield v. State, 945 N.E.2d 791, 799 (Ind. Ct. App. 2011) (quotations, alterations, and citations omitted). Here, Hagenmaier's decision as to the theory of the case – that Bedolla was not the shooter – and corresponding choice of witnesses was clearly a strategic one (i.e., relying on Baca-Ramirez),

which we will not second guess. In sum, the evidence does not compel the opposite conclusion and we will not disturb the post-conviction court's finding.

III. *Cronic* Claim

[29] Bedolla claims that law enforcement "fixate[d] on [him] to the exclusion of all other explanations, and when combined with the State's suppression of material exculpatory evidence and gross mischaracterization of key witness Solano . . ., [he] was deprived of any meaningful opportunity to subject the State's evidence to adversarial testing." Br. of Appellant at 29 (internal quotation omitted). He also claims that the surrounding circumstances, including the airing of the Crime 360 show, and "cumulative effect of the State's actions denied [him] Due Process and prevented a fair trial." *Id.* at 47.[10]

[30] *Cronic* provides a narrow exception to the traditional *Strickland* analysis. *Conner v. State*, 711 N.E.2d 1238, 1254 (Ind. 1999) (quoting *Cronic*, 466 U.S. at 662), *cert. denied*, 531 U.S. 829 (2000). In *Cronic*, the United States Supreme Court

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[10] Bedolla claims the State violated his "due process rights when it knowingly used false evidence" in violation of *Napue v. People of State of Ill.*, 360 U.S. 264 (1959). Br. of Appellant at 43. However, based upon our review of the record, Bedolla never asserted this particular claim in his petition or subsequent amendments. *See* App. of the Appellant, Vol. 2 at 80-97, 116-23, 148-51. It is therefore waived. *Canaan v. State*, 683 N.E.2d 227, 235 (Ind. 1997) ("[C]laims not advanced until appellant's brief in an appeal from the denial of post-conviction relief are waived"), *cert. denied*, 524 U.S. 906 (1998). He did, however, allege that the State portrayed Solano as a confidential informant when she was not, which was incorporated into his *Cronic* claim in his Second Amendment to Oct. 3, 2011 Pro Se Petition for Post-Conviction Relief. *See* App. of Appellant, Vol. 2 at 120-22. On appeal, he appears to make a free-standing due process claim in this regard. But because an allegation of the denial of a petitioner's due process rights may not be raised in the "free standing" form of an allegation of fundamental error, *Bailey v. State*, 472 N.E.2d 1260, 1263 (Ind. 1985), we evaluate Bedolla's claim that the State violated his due process rights as a *Cronic* claim.

rejected a claim of ineffective assistance of counsel but suggested that, in limited circumstances of extreme magnitude, "a presumption of ineffectiveness" may be justified and that such circumstances are, in and of themselves, "sufficient [to establish a claim of ineffective assistance] without inquiry into counsel's actual performance at trial." *Id.*

> *Cronic* delineated three circumstances justifying this presumption: (1) the complete denial of counsel; (2) situations when counsel entirely fails to subject the State's case to meaningful adversarial testing; and (3) situations where surrounding circumstances are such that, although counsel is available to assist the accused during trial, the likelihood that any lawyer, even a fully competent one, could provide effective assistance is so small that a presumption of prejudice is appropriate without inquiry into the actual conduct of the trial.

Minnick v. State, 698 N.E.2d 745, 752 (Ind. 1998) (internal quotation omitted), *cert. denied*, 528 U.S. 1006 (1999). If the narrow *Cronic* exception is inapplicable, the defendant must fulfill the individualized requirements of *Strickland*. *Conner*, 711 N.E.2d at 1254.

[31] In this case, Bedolla claims the third *Cronic* situation applies. The "surrounding circumstances" claimed by Bedolla include the State's alleged bolstering of Solano's credibility and the airing of the Crime 360 show. With respect to Solano, Bedolla claims the State "bolstered their star witness's credibility by repeatedly referring to her as a 'confidential informant' [when i]n fact, she was not, and the State knew she was not[.]" Br. of Appellant at 43. The evidence in the record shows otherwise. At trial, Solano testified that she had been a

confidential informant since February 2007. [Trial] Tr., Vol. I at 190. And further, Bedolla's argument that the State erroneously bolstered Solano's credibility is undermined by the fact that Bedolla's trial counsel acknowledged she was a confidential informant, introduced a redacted copy of amounts paid to her by Metro Drug Task Force or DEA, and cross-examined Solano about her involvement as an informant.

[32] Bedolla also claims that the airing of the Crime 360 show prior to trial, which impacted his decision to waive a jury trial, deprived him of a fair trial. But Bedolla fails to demonstrate how he was denied a fair trial. His case was tried to the bench and he puts forth no evidence that the trial court judge was influenced by or ever viewed the show. At trial, defense counsel tested the State's theory by presenting testimony that another individual was the real shooter and exposing Solano's biases and credibility issues. Ultimately, the post-conviction court found "that, based upon a review of the evidence [in the] original case and based on Bedolla's trial counsels' overall performance and their skill and experience, Bedolla has failed to prove that the circumstances surrounding the case completely deprived him of a meaningful opportunity to subject the State's evidence to adversarial testing." Appealed Order at 24. And based on our review, we conclude that the evidence is not without conflict and, as a whole, does not lead unerringly and unmistakably to a decision opposite the post-conviction court's finding that Bedolla failed to establish a *Cronic* claim.

IV. Newly Discovered Evidence

[33] And finally, we address Bedolla's challenge to the post-conviction court's denial of his petition on the basis of newly discovered evidence. He claims that Barragan-Lopez's testimony that Solano became intoxicated and disclosed to him that her boyfriend was the killer is newly discovered evidence that "directly undermines" Solano's testimony that Bedolla was the killer. Br. of Appellant at 34.

> In order to obtain relief because of newly discovered evidence, a defendant must show that (1) the evidence has been discovered since the trial; (2) it is material and relevant; (3) it is not cumulative; (4) it is not merely impeaching; (5) it is not privileged or incompetent; (6) due diligence was used to discover it in time for trial; (7) the evidence is worthy of credit; (8) it can be produced on a retrial of the case; and (9) it will probably produce a different result.

Powell v. State, 714 N.E.2d 624, 627 (Ind. 1999) (quoting *Webster v. State,* 699 N.E.2d 266, 269 (Ind. 1998)). We review these nine factors "with care, as the basis for newly discovered evidence should be received with great caution and the alleged new evidence carefully scrutinized." *Taylor v. State*, 840 N.E.2d 324, 330 (Ind. 2006) (internal quotation omitted). The petitioner for post-conviction relief bears the burden of showing that all nine requirements are met. *Id.*

[34] Here, Bedolla has not shown that Barragan-Lopez's testimony meets all the criteria. Most notably, this evidence is merely impeaching because it is not freestanding evidence of Bedolla's innocence but rather calls into question

Solano's testimony. *Cf. State v. McCraney*, 719 N.E.2d 1187, 1190 (Ind. 1999). Because Bedolla has failed to show that Barragan's testimony is not merely impeaching, it is not newly discovered evidence. Therefore, the post-conviction court did not err in so concluding.

Conclusion

[35] For the foregoing reasons, we conclude the post-conviction court did not err in denying Bedolla's petition for relief. Accordingly, we affirm.

[36] Affirmed.

Bailey, J., and May, J., concur.