MEMORANDUM DECISION

APPELLANT PRO SE

Thomas D. Hunter
Westville, Indiana

ATTORNEYS FOR APPELLEE

Theodore E. Rokita
Attorney General of Indiana

Sierra A. Murray
Deputy Attorney General
Indianapolis, Indiana

IN THE COURT OF APPEALS OF INDIANA

Thomas D. Hunter,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff.

June 23, 2021

Court of Appeals Case No. 20A-PC-1293

Appeal from the Elkhart Superior Court

The Honorable Teresa L. Cataldo, Judge

Trial Court Cause No. 20D03-1705-PC-27

Mathias, Judge.

[1] Thomas D. Hunter pleaded guilty to felony murder in the Elkhart Superior Court. After an unsuccessful attempt to file a belated direct appeal, Hunter filed

the petition for post-conviction relief at issue in this appeal. The post-conviction court denied that petition following an evidentiary hearing. Hunter now appeals, arguing that the post-conviction court clearly erred in determining that: (1) he was not denied due process based on an alleged *Brady* violation; and (2) he was not denied the effective assistance of trial counsel.

[2] We affirm.

Facts and Procedural History

[3] In late 2000, Hunter and Clifton Miller, who "were drug dealers together," "fronted" crack cocaine to Terry Nelson with the expectation that he would sell some of the drugs and repay the debt. Appellant's App. pp. 51–52. Over the next few weeks, Hunter went to Terry's house "maybe two or three times" to collect the money owed, but was unsuccessful each time. *Id.* at 54.

[4] On January 12, 2001, Hunter again sought to collect the drug debt from Terry. So, he met up with Miller and Miller's half-brother, Quinton Clarkson, who drove the three men to Terry's house. After Clarkson backed the vehicle into the driveway, Miller and Clarkson exited the car and approached the home while Hunter stayed back. Though what happened next is not entirely clear, the following is undisputed: an altercation occurred on or near the front porch between Miller, Clarkson, Terry, and his brother, Larry Nelson; Clarkson struck Terry, knocking him to the ground; Larry was shot in the chest while attempting to assist his brother; Hunter, Miller, and Clarkson fled the scene after the shooting; and Larry died as a result of the gunshot wound.

[5] Sometime later, after the three men were apprehended, both Miller and Clarkson indicated that Hunter was the shooter. *See id.* at 34, 36, 93. Hunter, however, steadfastly denied shooting Larry, declaring that he "didn't see [a] gun the whole time we was together." *Id.* at 55. On January 31, the State charged Hunter with murder and felony murder; Miller and Clarkson were similarly charged. The underlying offense supporting the felony-murder charges was dealing in cocaine.

[6] Clarkson was the first of the three men to cooperate with police and, on May 17, the court accepted a guilty plea entered into between Clarkson and the State. On August 7, the court entered judgment of conviction on Clarkson's plea and set a sentencing date. About two weeks later, Hunter filed a motion to reveal agreements entered into between the State and potential witnesses. Ex. Vol. at 3–4. In that motion, Hunter requested the State disclose "[a]ny and all consideration or promise of consideration given or offered to prospective State witnesses, including but not limited to, Quinton Clarkson, by law enforcement officers, or the prosecuting attorney." *Id.* at 3. The court scheduled a September 6 hearing on Hunter's motion. Prior to that hearing, however, two key events occurred.

[7] The first was Miller's three-day jury trial. *See Miller v. State*, No 20A03-0111-CR-362, slip op. at 4 (Ind. Ct. App. Aug. 16, 2002). During trial, Clarkson testified for the State. *Id.*; *see also* Appellant's App. pp. 43, 71. He identified Hunter as the shooter, but also said that Miller "was aware that Hunter had a gun with him on the night Larry was shot." *Miller*, slip. op. at 4. Hunter took no

part in the trial. The jury ultimately found Miller guilty of both murder and felony murder. *Id.* And the State later remarked that it "got a whole lot more than we bargained for" from Clarkson's testimony. Appellant's App. p. 73.

[8] The second event was when, on the day Miller's trial began, the State wrote in a letter to Clifford Williams, one of Hunter's two trial attorneys, "[i]t appears . . . Hunter could face the death penalty in this particular case." *Id.* at 40. The prosecutor requested Williams "contact me . . . so that we can discuss whether or not Mr. Hunter intends to enter a plea or whether the State should seriously consider filing a death penalty against Mr. Hunter." *Id.*

[9] After these events, the court held the hearing on Hunter's motion seeking information on agreements entered into between the State and potential witnesses. At the outset, the following exchange took place:

> Prosecutor: I have discussed this with [Kelly] Schweinzger [Hunter's other trial attorney]. My understanding is that she is only concerned about agreements that the State of Indiana would have entered into with witnesses in exchange for their testimony in this case. And I have advised her that I am aware of no agreements that the State of Indiana has entered into in exchange for testimony of any witnesses in this case. That includes Mr. Clarkson, who as the Court will recall, testified in [Miller's] trial. Pled to the charge straight up, 45 to 65 year penalty. No agreement.
>
> Court: I guess that answers the question, doesn't it?

Defense: Yes, your Honor.

Id. at 43–44.

[10] Hunter subsequently entered into a plea agreement with the State according to which he would plead guilty to felony murder, the State would dismiss the murder charge, and sentencing would be left to the court's discretion. *Id.* at 46–47. The agreement also informed Hunter, in relevant part, that by pleading guilty he would waive his right "to appeal the conviction." *Id.* at 47. That same day, the trial court held Hunter's guilty-plea hearing. The court advised Hunter of the rights he waived by pleading guilty, and Hunter answered questions about the events leading to Larry's death. *See* Ex. Vol. at 40–62. The court ultimately accepted Hunter's plea, entered judgment accordingly, and set the matter for sentencing.

[11] Four days before Hunter's sentencing hearing, Clarkson filed a motion to withdraw his guilty plea. At Hunter's sentencing hearing, his attorney, Williams, expressed concern with the recent development in Clarkson's case: "I believe that the integrity of the negotiating and the integrity of my word and Ms. Schweinzger's word to our client is impacted in the event Mr. Clarkson is allowed to withdraw his previously entered plea, because [Hunter] made his decision to plead based upon what equitable results were going to occur to the others." *Id.* at 67. The trial court acknowledged the concern but had "trouble understanding" how the status of Clarkson's plea impacted Hunter's case. *Id.* at 70. The State similarly remarked, "This has absolutely nothing to do with Mr.

Hunter. It may have something to do with Mr. Miller, it has nothing to do with Mr. Hunter." *Id.* at 72. The trial court proceeded to sentencing Hunter and identified four mitigating circumstances and ten aggravating circumstances. After concluding "the aggravating circumstances substantially outweigh the mitigating circumstances," the court imposed a sixty-three-year sentence. Appellant's App. pp. 65–66.

[12] A few years later, in February 2004, Hunter filed a petition for post-conviction relief, and the State Public Defender was subsequently appointed to represent him. About a year later, however, Hunter filed (1) a motion to dismiss the petition without prejudice and (2) a petition for appointment of counsel at county expense to pursue a belated direct appeal under Indiana Post-Conviction Rule 2. The court granted the former and denied the latter. Thereafter, in January 2006, Hunter filed a motion to reinstate the February 2004 post-conviction petition. The trial court granted the motion and scheduled a hearing. But before that hearing took place, Hunter filed a petition, under Post-Conviction Rule 2, for permission to file a belated notice of appeal. At the August 2008 hearing on that petition, both of Hunter's trial attorneys confirmed that they did not advise Hunter that he could appeal his sentence. *See* Appellant's App. pp. 113–14, 117. The trial court, however, denied Hunter's request to file a belated direct appeal, and he appealed that decision to this court. While the outcome of the appeal was pending, Hunter again successfully moved to dismiss his petition for post-conviction relief without prejudice.

[13] In summer 2009, a split panel of this court—in an unpublished decision—affirmed the trial court's denial of Hunter's request to file a belated appeal. *Hunter v. State*, No. 20A03-0812-CR-601, 2009 WL 1810992, at *1 (Ind. Ct. App. June 25, 2009), *trans. denied* (3-2). About two years later, Hunter, represented by different counsel, again filed a petition for post-conviction relief. But the trial court denied Hunter's petition "on the basis that it was a successive petition." Appellees App. p. 20. Then, in February 2017, this court issued an order permitting Hunter to proceed on a petition for post-conviction relief after recognizing that the trial docket indicated he had not yet had the opportunity.

[14] So, in May 2017, Hunter filed the petition for post-conviction relief at issue in this appeal, raising the following two claims: (1) the State deprived him of due process when it committed a *Brady* violation by failing to disclose a deal with Clarkson; and (2) Hunter was denied effective assistance of trial counsel. Hunter later filed motions with the post-conviction court requesting transcripts of his guilty plea and sentencing hearings and that the court take judicial notice of both his and Clarkson's records. The court granted Hunter's transcript requests and took judicial notice of the transcripts for both Clarkson's and Miller's post-conviction relief hearings "subject to objection by the State for any relevant or other viable objections." Appellant's App. p. 11.

[15] The post-conviction court held an evidentiary hearing on Hunter's petition on October 28, 2019. At that hearing, Hunter questioned one of his trial attorneys,

Schweinzger,[1] as well as Clarkson. During Clarkson's testimony, Hunter sought to introduce into evidence the transcript from Clarkson's post-conviction relief hearing. The State objected on relevancy grounds and—after a lengthy dialogue—the court sustained the objection. *See* Tr. pp. 9–18. On May 20, 2020, the court entered an order denying Hunter's petition. He now appeals.

Standard of Review

[16] Hunter, in appealing from the denial of post-conviction relief, proceeds from a negative judgment. *See, e.g.*, *Walker v. State*, 903 N.E.2d 1022, 1024 (Ind. Ct. App. 2009), *trans. denied*. As such, he must convince us that the evidence unmistakably and unerringly leads to a conclusion opposite the one reached by the post-conviction court. *Id.* In making this determination, we consider only the evidence and reasonable inferences supporting the post-conviction court's judgment. *Shepherd v. State*, 924 N.E.2d 1274, 1280 (Ind. Ct. App. 2010), *trans. denied*. If we conclude Hunter has failed to meet this "rigorous standard of review," we will affirm the court's denial of relief. *Id.*

[17] The post-conviction court here entered findings of fact and conclusion of law in accordance with Post-Conviction Rule 1(6). Though we do not defer to the court's legal conclusions, we review the factual findings for clear error—that

[1] Hunter's other attorney, Williams, had unfortunately passed away.

which leaves us with a definite and firm conviction that a mistake has been made. *State v. Cozart*, 897 N.E.2d 478, 482 (Ind. 2008) (quotation omitted).

Discussion and Decision

[18] Hunter argues that the post-conviction court clearly erred in denying him relief on both of his claims: (1) the State deprived him of due process when it committed a *Brady* violation by failing to disclose a deal with Clarkson; and (2) he was denied effective assistance of trial counsel. We address each claim in turn and conclude that Hunter has failed to establish that the evidence unmistakably and unerringly leads to conclusions opposite those reached by the post-conviction court.

I. The court did not clearly err in concluding Hunter failed to establish a *Brady* violation.

[19] Hunter first maintains that the post-conviction court clearly erred in denying him relief based on his *Brady* claim: the State withheld evidence about a deal it had with Clarkson, which he asserts "was a key factor" in his decision to plead guilty. Appellant's Br. at 7. In Hunter's view, the State's denial of any such deal deprived him of due process. We conclude that Hunter has failed to establish a *Brady* violation.

[20] The Supreme Court of the United States held in *Brady v. Maryland*, 373 U.S. 83, 87 (1963), that "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." To prevail on a *Brady* claim, a defendant must make three showings: (1) the prosecution suppressed evidence; (2) the evidence was favorable to the defense; and (3) the evidence was material to an issue at trial. *Bunch v. State*, 964 N.E.2d 274, 297 (Ind. Ct. App. 2012) (citations omitted), *trans. denied*. For the third showing in particular, evidence is material "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." *Id.* (quoting *United States v. Bagley*, 473 U.S. 667, 682 (1985)).

[21] Here, Hunter's *Brady* claim centers on comments made by the same prosecutor at two different points in time. The first was at the September 2001 hearing on Hunter's motion to reveal agreements entered into between the State and potential witnesses where the prosecutor stated,

> My understanding is that [Hunter's trial counsel] is only concerned about agreements that the State of Indiana would have entered into with witnesses in exchange for their testimony in this case. And I have advised her that I am aware of no agreements that the State of Indiana has entered into in exchange for testimony of any witnesses in this case. That includes Mr. Clarkson, who as the Court will recall, testified in [Miller's] trial. Pled to the charge straight up, 45 to 65 year penalty. No agreement.

Appellant's App. p. 43. The second was at the December 2002 hearing on Clarkson's petition for post-conviction relief where the prosecutor remarked,

> Mr. Clarkson was offered the same deal that we offer to a number of defendants. If he assisted the state, he would be given

> some consideration so that he was always operating on the -- under the hope of gaining that consideration.

Id. at 72.[2] Also during that hearing, the prosecutor noted when questioning Clarkson, "And out of the three of you, we have a common saying around here first to squeal gets the deal, and you were the one that cooperated with the police first. Isn't that right?" *Id.* at 94. Clarkson responded in the affirmative. *Id.* Hunter contends that the prosecutor's comments during the latter "completely contradicts" his testimony during the former, and thus the State suppressed evidence. Appellant's Br. at 19. Viewing the evidence most favorable to the post-conviction court's judgment, we cannot agree.

[22] At the September 2001 hearing, the prosecutor specified that the State was unaware of any agreement with Clarkson for his testimony in "**this** case," i.e., Hunter's case. And the prosecutor's later comments, during Clarkson's post-conviction hearing, were not about Hunter's case; those remarks referred to Clarkson's cooperation and testimony in **Miller's** case. *See* Appellant's App. pp. 70–73. Simply put, Hunter does not direct us to, and we cannot find, any reference to a deal that the State had with Clarkson for testifying against Hunter. *Cf. Wisehart v. State*, 693 N.E.2d 23, 57 (Ind. 1998) (recognizing that

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[2] We acknowledge that the court did not admit into evidence the transcript from Clarkson's post-conviction hearing. For purposes of resolving Hunter's claims on the merits and in their totality, we choose to take judicial notice of Clarkson's post-conviction hearing transcript and consider its relevant excerpts of factual information that are not subject to reasonable dispute. Ind. Evidence Rule 201; *see Fisher v. State*, 878 N.E.2d 457, 462 (Ind. Ct. App. 2007), *trans. denied*. We therefore decline to address Hunter's argument that the post-conviction court erred when it excluded the transcript from evidence.

"the duty to disclose arises only when a confirmed promise exists"). Thus, we cannot say that the State suppressed evidence, and Hunter has failed to establish a *Brady* violation for that reason alone.

[23] Yet even assuming that Hunter proved the State suppressed evidence of a deal with Clarkson, Hunter has also failed to satisfy *Brady*'s third prong. He has not demonstrated that the challenged evidence was "material," i.e., that there was a reasonable probability that, had Clarkson's deal been disclosed, the result of the proceeding—Hunter's decision to plead guilty—would have been different. We recognize Hunter's contention that if he knew of the "prearranged deal between the State and Clarkson he would not have pled guilty and elected to proceed to trial." Appellant's Br. at 20.[3] But we also observe that this self-serving, after-the-fact assertion wholly defies reason.

[24] Hunter pleaded guilty under the belief that the State had not entered into any deals with witnesses in exchange for testimony in his case. If Hunter had instead believed that Clarkson would testify against him, we do not see how these circumstances would have induced Hunter to proceed to trial. Clarkson has consistently identified Hunter as the man who shot and killed Larry. Appellant's App. pp. 36, 93; *Miller*, slip. op. at 4. Clarkson has also

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[3] In support of this claim, Hunter maintains he would have been able to "argue that Clarkson could lie to protect his brother [Miller]," Appellant's Br. at 21, and that "[w]here blood Brother[]s are co-defendant[]s in a case[,] there is always the possibility of one or both of them lying to protect one another," Reply Br. at 8. While these principles may generally be true, Hunter's assertions are undercut by the fact that Clarkson did in fact testify against "his brother" during Miller's trial. And from that testimony the State "got a whole lot more that [it] bargained for." Appellant's App. p. 73; *see also id.* at 103–04.

acknowledged that, on the day of the murder, he assisted Hunter in financing the delivery of cocaine. Appellant's App. p. 94. True, if Clarkson testified against Hunter in a hypothetical trial, Hunter could have challenged "whether or not Clarkson received consideration for his testimony from the State." Appellant's Br. at 21. But as the post-conviction court observed, that "would have been a trial matter to be considered by a jury in weighing the credibility of [] Clarkson's testimony at trial." Appellee's App. p. 23.

[25] In short, Hunter has not established that the State suppressed evidence of a deal between the State and Clarkson for testimony in Hunter's case. But even if the State did suppress such evidence, Hunter has not shown that it "could reasonably be taken to put the whole case in such a different light as to undermine confidence in the [outcome]." *Kyles v. Whitley*, 514 U.S. 419, 435 (1995). Thus, for two independent reasons, Hunter's *Brady* claim fails. The post-conviction court therefore did not clearly err in denying Hunter relief on that basis.

[26] We turn now to Hunter's other basis for post-conviction relief—his contention that he was denied effective assistance of trial counsel.

II. The court did not clearly err in concluding that Hunter failed to establish he received ineffective assistance of trial counsel.

[27] To succeed on an ineffective-assistance-of-trial-counsel claim, Hunter must make two showings: (1) trial counsels' performance was deficient by falling below an objective standard of reasonableness; and (2) he was prejudiced by the

deficient performance such that, but for counsels' unprofessional errors, there is a reasonable probability the outcome of the proceeding would have been different. *Strickland v. Washington*, 466 U.S. 668, 687, 694 (1984); *Hill v. Lockhart*, 474 U.S. 52, 57 (1985); *Bobadilla v. State*, 117 N.E.3d 1272, 1280 (Ind. 2019). Failure to satisfy either prong causes the entire claim to fail. *See, e.g., Hanks v. State*, 71 N.E.3d 1178, 1183 (Ind. Ct. App. 2017), *trans. denied.*

[28] Though Hunter did not proceed to trial, the *Strickland* two-part analysis also governs "claims arising out of the plea process." *Hill*, 474 U.S. at 370. With respect to the deficient-performance component, there is a strong presumption that counsel rendered adequate assistance and used reasonable professional judgment. *See, e.g.*, *Gibson v. State*, 133 N.E.3d 673, 682 (Ind. 2019). Hunter "must rebut this presumption by proving that his attorney's representation was unreasonable under prevailing professional norms and that the challenged action was not sound strategy." *Kimmelman v. Morrison*, 477 U.S. 365, 384 (1986). We evaluate reasonableness from counsels' perspective at the time of the alleged error and in light of all the relevant circumstances. *Pennycuff v. State*, 745 N.E.2d 804, 811–12 (Ind. 2001). For the prejudice component, Hunter must demonstrate a "reasonable probability that he would have rejected the guilty plea and insisted on going to trial instead." *Bobadilla*, 117 N.E.2d at 1284. In making this showing, Hunter "cannot simply say that [he] would have gone to trial," he instead "must establish rational reasons supporting why [he] would have made that decision." *Id.*

[29] Here, Hunter maintains that trial counsel rendered ineffective assistance in four distinct ways. Hunter's first two allegations of error relate to counsel advising him to plead guilty; we address those together. We then consider Hunter's third allegation of error, which relates to counsels' failure to object to aggravators at sentencing. In closing, we address Hunter's contention that counsel provided ineffective assistance by failing to advise him that he could appeal his sentence.

A. Hunter has failed to establish that trial counsel performed deficiently by advising him to plead guilty.

[30] Hunter argues that trial counsel was ineffective for (1) advising him to plead guilty to felony murder, and (2) advising him to plead guilty to avoid the death penalty. Appellant's Br. at 24. Though he presents each claim separately, both rely on his contention that the evidence was insufficient to support a conviction for dealing in cocaine—the predicate offense that both supported his felony-murder conviction and made him death-penalty eligible. *See* Appellant's Br. at 14, 31–32; Ind. Code §§ 35-42-1-1(3)(A), -50-2-9(b)(1)(J) (1998).[4] Because we conclude Hunter has failed to establish that the evidence is insufficient to support a conviction for dealing in cocaine, Hunter has not shown that counsel provided deficient performance in advising him to plead guilty.

[31] A person can commit the offense of dealing in cocaine in several different ways. *See* I.C. § 35-48-4-1. For example, as is relevant here, a person commits the

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[4] All citations to criminal statutes throughout this opinion are to the controlling law at the time of Hunter's offenses. *See Smith v. State*, 675 N.E.2d 693, 695 (Ind. 1996) (citation omitted).

offense by knowingly or intentionally either delivering cocaine or financing the delivery of cocaine. *Id.* -1(a)(1). The word "delivery," as used in the statute, includes "the organizing or supervising" of "an actual or constructive transfer from one (1) person to another of a controlled substance." I.C. § 35-48-1-11.

[32] Hunter maintains that "no elements of dealing in cocaine were present on the day Larry Nelson [was] killed." Appellant's Br. at 27. In support of this argument, Hunter points to the following circumstances: the original delivery of cocaine to the Nelson home "occurred in November or December 2000"; there is no evidence that Hunter, Miller, or Clarkson delivered or attempted to deliver cocaine on the day Larry was killed; and there was no cocaine entered into evidence. *See* Appellant's Br. at 26–32, Reply Br. at 10–12. Hunter therefore asserts that there are "breaks in the chain of events which makes the prior drug deals in November or December of 2000 a separate event as the homicide." Reply Br. at 12. While we generally agree with Hunter's characterization of the evidence and his ultimate assertion, he is incorrect that the same evidence is insufficient to support a conviction for dealing in cocaine.

[33] The evidence here supports a conclusion that Hunter was knowingly or intentionally financing the delivery of cocaine on the day of the murder. Hunter acknowledges that, in late 2000, he "fronted" Terry cocaine with the understanding that he would "sell the crack cocaine for money" to repay the debt. Appellant's App. p. 51; *see also id.* at 52, 54. When Hunter "fronted" the drugs to Terry, Hunter both delivered cocaine and financed the delivery of cocaine. While the actual "delivery" was complete that day, the financing of

that delivery was not complete until Nelson paid his debt. *See Financing*, Black's Law Dictionary (11th ed. 2019) ("The act or process of raising or providing funds."). And there is no dispute that Hunter went to Terry's home to collect that debt the day of the murder. *See* Appellant's Br. at 27–28, Appellant's App. pp. 50–54. Thus, the evidence supports a conclusion that Larry was killed while Hunter was financing the delivery of crack cocaine.[5] Under these unique circumstances, it is inconsequential that the actual delivery of drugs was months earlier or that no drugs were entered into evidence.

[34] In sum, the evidence is sufficient to sustain Hunter's conviction for dealing in cocaine, the predicate offense underlying his felony-murder conviction. And committing murder—for which Hunter was also charged—while committing dealing in cocaine made Hunter eligible for the death penalty. I.C. § 35-50-2-9(b)(1)(J). Hunter has therefore failed to establish that trial counsel provided deficient performance by advising him to plead guilty. And the post-conviction court did not clearly err in reaching the same conclusion.[6]

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[5] Hunter admitted as much during his guilty-plea hearing. *See* Appellant's App. p. 53.

[6] Hunter also asserts, as a separate argument, that the post-conviction court "applied [the] wrong standard," Appellant's Br. at 35, when it cited to *Segura v. State*, 749 N.E.2d 496, 507 (Ind. 2001), in rejecting his claim "that he would not have pled guilty but for counsel's alleged improper advice," Appellee's App. p. 25. This argument is misplaced for two reasons. First, our supreme court, in *Bobadilla*, 117 N.E.3d at 1287, disapproved of *Segura* for its analysis on an ineffective-assistance claim "based on [] counsel's failure to advise [the defendant] that pleading guilty could result in deportation." Deportation is not at issue here. Second, the *Bobadilla* Court disapproved of dicta in *Segura* concerning consideration of the strength of the State's case when evaluating prejudice, clarifying that "the ultimate result at trial (conviction versus acquittal) is not the determinative factor in these prejudice inquiries[.]" *Bobadilla*, 117 N.E.3d at 1287. The prejudice inquiry here is irrelevant because Hunter has failed to establish that counsels' advice constituted deficient performance. Thus, to the extent the post-conviction court erred by applying *Segura*, such error was harmless.

B. Hunter has failed to establish that trial counsel performed deficiently by failing to object at sentencing to the court's identified aggravating circumstances.

[35] Hunter next argues that trial counsel was ineffective for failing to object to the court's reliance on "several" allegedly "improper aggravators" in enhancing his sentence. Appellant's Br. at 41. Because Hunter's claim is premised on a failure to object, he "must show that a proper objection would have been sustained by the trial court." *Lambert v. State*, 743 N.E.2d 719, 732 (Ind. 2001). Hunter's arguments here are inapt for several reasons. To explain why, we first provide an overview of the relevant sentencing law at the time.

[36] Hunter pleaded guilty to felony murder, an offense that carried a "fixed term" of imprisonment of "fifty-five (55) years, with not more than ten (10) years added for aggravating circumstances[.]" I.C. § 35-50-2-3(a). Under his plea agreement, Hunter agreed that the "sentence shall be determined by the Court." Appellant's App. p. 46. Though that determination ultimately fell within the trial court's discretion, the court was guided by Indiana Code section 35-38-1-7.1 (Supp. 2000). *See Harris v. State*, 659 N.E.2d 522, 527 (Ind. 1995). That statute provides a non-exclusive list of several factors that "the court may consider . . . as aggravating circumstances" in imposing a sentence above the presumptive fifty-five-year term. I.C. § 35-38-1-7.1(b), (d). If a trial court relies on aggravating circumstances to enhance the presumptive sentence—as it did here—the court must: (1) identify all significant mitigating and aggravating circumstances; (2) state the specific reason why each circumstance is determined to be mitigating or aggravating; and (3) articulate the evaluation

and balancing of the identified circumstances. *McCann v. State*, 749 N.E.2d 1116, 1119 (Ind. 2001).

[37] Also relevant at the time of Hunter's sentencing was the U.S. Supreme Court's then-recent decision in *Apprendi v. New Jersey*, 530 U.S. 466 (2000). There, the Court held that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Id.* at 490. But the *Apprendi* Court explained that it is not "impermissible for judges to exercise discretion—taking into consideration various factors relating both to offense and offender—in imposing a judgment within the range prescribed by statute." *Id.* at 481. As to murder specifically, once guilt is established beyond a reasonable doubt, "the judge is authorized by that [conviction] to sentence the defendant to the maximum sentence provided by the murder statute." *Id.* at 490 n.16.[7]

[7] We are well aware that the U.S. Supreme Court, approximately three years after *Apprendi*, "chose to define [statutory maximum] as 'the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant.'" *Smylie v. State*, 823 N.E.2d 679, 682–83 (Ind. 2005) (quoting *Blakely v. Washington*, 542 U.S. 296, 303 (2004)). Notably, it was not until *Blakely* defined "maximum sentence" that constitutional doubt was cast over Indiana's sentencing scheme. *See id.* at 682–84. In any event, *Blakely* was decided well after Hunter's sentencing hearing and the time to file a direct appeal had expired. So, while *Apprendi* is relevant to Hunter's claims, *Blakely* and its progeny are not. *See Gutermuth v. State*, 868 N.E.2d 427, 434–35 (Ind. 2007). Hunter's and the State's citations to the latter are misplaced.

[38] With the controlling law in hand, we now turn to the trial court's sentencing decision and show why Hunter's ineffective-assistance arguments on counsels' failure to object to the court's identified aggravators are unavailing.

[39] In sentencing Hunter, the trial court identified four mitigating factors and the following ten aggravating factors:

1. Hunter's criminal history (one infraction, one juvenile offense, and six misdemeanor convictions);

2. Hunter possibly committed the offense while "on probation";

3. Hunter's criminal history indicated a "lack of respect and unwillingness to abide by" court orders or state laws;

4. Hunter had previously been "placed on probation multiple times without success";

5. the offense "was a crime of violence committed with a weapon and involved multiple instances of dealing drugs for profit";

6. Hunter committed the offense "while under the influence of alcohol and marijuana";

7. the victim "was known to be a drug abuser" and "was killed because he owed money for drugs";

8. both Mitchell and Clarkson identified Hunter as the shooter;

9. Hunter left the victim "languishing and . . . sought no medical help"; and

10. Hunter "involved others in his criminal endeavor" and fled the area after the crime.

Appellant's App. pp. 61–65. The court then concluded "that the aggravating circumstances substantially outweigh the mitigating circumstances," and imposed an enhanced sentence of sixty-three years—eight years above the presumptive sentence. *Id.* at 65. Hunter argues that the aggravators were either "improper" or "inappropriate" and resulted in a sentence that was eight years "above the statutory maximum." Appellant's Br. at 41. He is incorrect.

[40] We first note that Hunter's sentence was not "above the statutory maximum" as that term was understood in 2001. *See Smylie v. State*, 823 N.E.2d 679, 682–84 (Ind. 2005). Turning to the aggravators, the first four arguably fall within the confines of section 35-38-1-7.1(b). Under subsections (b)(1) and (b)(2) respectively, the court may consider as aggravating that "[t]he person has a history of criminal or delinquent activity" and "[t]he person has recently violated the conditions of any probation." Turning to the other identified aggravators, while it is true that a trial court "may not use a factor constituting a material element of an offense as an aggravating circumstance," it is also true that "the particular manner in which a crime is committed may constitute an aggravating factor." *Henderson v. State*, 769 N.E.2d 172 (Ind. 2002). The latter six aggravators arguably fall within these confines as none of them constitute a "material element" of felony murder; rather, each relates to the particular

manner in which the crime was committed. In short, Hunter has not shown that any objection to the court's aggravators would have been successful.[8]

[41] Yet, even if an objection would have been sustained, it is well settled that a single aggravating circumstance can be enough to support an enhanced sentence. *See e.g.*, *Hawkins v. State*, 748 N.E.2d 362, 363–64 (Ind. 2001) (collecting cases). And here, in rejecting Hunter's ineffective-assistance claim on this issue, the court concluded, "The record shows that numerous proper aggravators were considered by the Court in imposing the sentence." Appellee's App. p. 25. Hunter has not demonstrated that conclusion is clearly erroneous.

C. Hunter has failed to establish that he was prejudiced by trial counsels' failure to inform him that he could appeal his sentence.

[42] Finally, Hunter claims that he received ineffective assistance when trial counsel did not advise him that, even though he pleaded guilty, he could still appeal his sentence. Hunter maintains that once he "was denied the right to challenge his sentence, he was denied an entire judicial proceeding [that] he wanted if he'd been advised in a timely manner." Appellant's Br. at 45. Based on the unique circumstances here, we disagree that actions by Hunter's trial counsel deprived him of "an entire judicial proceeding."

[8] We also note that Hunter—during his guilty-plea hearing, his sentencing hearing, and in the presentence investigation report—admitted to several of the aggravators he now argues trial counsel should have objected to. *See* Ex. Vol. at 55–56, 58, 82–83, 85–86, 94.

[43] We first observe that, contrary to the State's position, the record definitively reveals that neither of Hunter's two trial attorneys informed him of his right to appeal his sentence. *See* Appellant's App. pp. 113–14, 117. But even if we assume counsels' failure amounts to deficient performance, Hunter has not established prejudice.

[44] Hunter had the opportunity to appeal his sentence notwithstanding counsels' omission. Though trial counsel did not explicitly tell Hunter that he could appeal his sentence, Indiana Appellate Rule 7(A) explicitly states that "a defendant in a Criminal Appeal may appeal the defendant's sentence." Even still, Hunter's failure to timely bring a direct appeal did not foreclose him from appealing his sentence. He had the opportunity, under Post-Conviction Rule 2, to petition for permission to file a belated notice of appeal and thereby challenge his sentence. *See Collins v. State*, 817 N.E.2d 230, 233 (Ind. 2004). Though he eventually took that opportunity, the trial court denied Hunter's request after finding that he "was aware of his right to appeal his sentence for nearly four years and failed to act." *Hunter*, 2009 WL 1810992 at *1 (quotation omitted); *see Roe v. Flores-Ortega*, 528 U.S. 470, 484 (2000) ("[T]o show prejudice in these circumstances, a defendant must demonstrate that there is a reasonable probability that, but for counsel's deficient failure to consult with him about an appeal, he would have timely appealed."). A panel of this court then affirmed the trial court, observing that Hunter's first petition for post-conviction relief, filed in 2004, "did not include any sentencing claim." *Id.* at *3. Echoing the trial court's observation, the majority observed that Hunter did not raise a

sentencing claim until 2008, "nearly three and one-half years after he knew that he could raise that issue." *Id.*[9] In short, despite counsels' failure to advise Hunter of his right to appeal his sentence, he had ample opportunity to challenge it on appeal.[10] It was his own inaction, not trial counsels' omission, that ultimately deprived him of those opportunities.

[45] In sum, Hunter has failed to demonstrate that any of trial counsels' alleged errors satisfies the two-part *Strickland* test. Thus, Hunter has not established that the post-conviction court clearly erred in concluding that he was not denied the effective assistance of counsel.

Conclusion

[46] The post-conviction court concluded that Hunter failed to prove either that he was denied due process based on an alleged *Brady* violation or that he received ineffective assistance of trial counsel. Hunter has failed to establish that the evidence unmistakably and unerringly leads to opposite conclusions. We thus affirm the court's denial of Hunter's petition for post-conviction relief.

Riley, J., and Crone, J., concur.

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[9] Hunter does not ask us to revisit this earlier decision. *See State v. Huffman*, 643 N.E.2d 899, 901 (Ind. 1994).

[10] We thus reject Hunter's request that we revise his sentence under Appellate Rule 7(B), *see* Appellant's Br. at 42, Reply Br. at 17, 19, as it is well settled that "[w]e do not review a freestanding claim of error, either 'fundamental' or otherwise, on post-conviction review when it was not raised on direct appeal if the claim was known and available to him," *Wilson v. State*, 157 N.E.3d 1163, 1169 (Ind. 2020) (quotation omitted).