APPELLANT PRO SE:

HOWARD SMALLWOOD
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ATTORNEYS FOR APPELLEE:

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IN THE COURT OF APPEALS OF INDIANA

HOWARD SMALLWOOD,	)	
	)	
Appellant-Petitioner,	)	
	)	
vs.	)	No. 71A05-1001-PC-1
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Respondent.	)	

APPEAL FROM THE ST. JOSEPH SUPERIOR COURT
The Honorable John M. Marnocha, Judge
Cause No. 71D02-0304-PC-15

October 20, 2010

MEMORANDUM DECISION - NOT FOR PUBLICATION

VAIDIK, Judge

Case Summary

Howard Smallwood was sentenced to life without parole for the murder of a twelve-year-old child. Smallwood, *pro se*, now appeals the post-conviction court's denial of his petition for post-conviction relief. Smallwood claims that trial counsel was ineffective by failing to file a petition seeking a finding of mental retardation, failing to advise him that double jeopardy would have precluded convictions on all charges, and failing to object to the use of his accomplices' deposition testimony at sentencing. Smallwood further claims that appellate counsel was ineffective by failing to raise a violation of his Sixth Amendment right to self-representation and that his guilty plea was not voluntary, knowing, and intelligent. We conclude that the post-conviction court did not err by finding that trial and appellate counsel did not render ineffective assistance. We further conclude that Smallwood's guilty plea was voluntary, knowing, and intelligent. We therefore affirm.

Facts and Procedural History

The underlying facts of this case, taken from the Indiana Supreme Court's decision in Smallwood's direct appeal, are as follows:

> [Smallwood] and his accomplices broke into a residence seeking to kill a witness against [Smallwood]'s relative in an upcoming trial. Upon entering, [Smallwood] and a cohort fired five times into a person sleeping on the couch without confirming the identity of the victim. After firing two shots [Smallwood]'s gun jammed, the other man fired twice, and then [Smallwood] was able to fire another shot into the victim. In actuality, the sleeping person was not the intended victim but a twelve-year-old boy.

Smallwood v. State, 773 N.E.2d 259, 263 (Ind. 2002). Smallwood was charged with murder, Class A felony conspiracy to commit murder, felony murder, and Class A felony

burglary. Although the State initially sought the death penalty, it later amended its request to a sentence of life without parole. Regarding the LWOP aggravator, the State alleged that Smallwood "did intentionally kill [the victim], while committing or attempting to commit a burglary." App. p. 190.[1]

Two days before the case was set for jury trial, Smallwood and the State reached a plea agreement, which provides in pertinent part:

> I have, with the assistance of counsel, entered into a binding agreement with the State of Indiana as follows:
> a. Plead guilty to Ct. I, Murder, a felony.
> b. Stipulate to the Life Without Parole Aggravator set out in Ct. V.
> c. The sentence of Life Without Parole or to a Term of Years is to the Court[']s discretion pursuant to I.C. 35-50-2-9, with both sides free to argue at sentencing hearing.
> d. State to dismiss Cts II, III, & IV in this cause and all counts in causes 71D040106DF00560 and 71D020002CF89, and not file charges relating to events of March 6 or 7, 2000 at 1737 N. Brookfield, South Bend, Indiana.

Id. at 307. At the guilty plea hearing, the State presented a factual basis for murder and the stipulation to the LWOP aggravator. After Smallwood agreed to these, the trial court stated, "I find a factual basis with respect to Count I, Murder; and I suppose that based on the evidence I've heard today, that I can make a finding beyond a reasonable doubt that the aggravator[] in Count V, exist[s]." Tr. p. 141-42. The trial court accepted the plea agreement. Before sentencing, Smallwood, against the advice of his trial counsel, *see* App. p. 353, filed several motions to withdraw his guilty plea, one of which was *pro se*. The trial court denied the motions.

[1] Petitioner's Exhibit 1 consists of Smallwood's appendix on direct appeal, which we refer to as "App.," and a transcript of the pretrial proceedings, which we refer to as "Tr." We refer to the Smallwood's appendix in this appeal as "P-C App." and the transcript of the post-conviction hearing as "P-C Tr."

At the sentencing hearing, the State offered the depositions of Smallwood's four accomplices "for the additional proof of the [LWOP] aggravator." Tr. p. 157. Trial counsel attended all of these depositions and had the opportunity to cross-examine each witness. The factual accounts in the accomplices' depositions corroborated each other in all significant aspects. Trial counsel did not object to their admission.

Dr. Brian Hudson, a clinical neuropsychologist, testified at the sentencing hearing that he estimated Smallwood's IQ to be between 70 and 75, which placed him in the "borderline range," as opposed to the range of mental retardation. *Id.* at 197. Dr. Hudson noted that Smallwood has "a great deal of superficial intelligence," although "there is not much substance" to it. *Id.* He also testified that Smallwood was neuropsychologically sound and that he had no significant psychiatric disturbances that would warrant treatment.

After the sentencing hearing, Smallwood filed two *pro se* motions for self-representation. The trial court denied both motions.

The trial court subsequently sentenced Smallwood to life without parole.

Smallwood, by appellate counsel, filed a direct appeal. Smallwood argued that: (1) he is mentally retarded and thus cannot be sentenced to life without parole, and, in the alternative, his sentence is manifestly unreasonable in light of his mental retardation; (2) the trial court failed to give weight to his intoxication as a mitigating circumstance; and (3) the trial court erred in denying his request to withdraw his guilty plea. Our Supreme Court concluded that Smallwood failed to properly present his mental retardation claim at trial and his sentence was not manifestly unreasonable. *Smallwood*, 773 N.E.2d at 262,

263. The Court further found that the trial court did not abuse its discretion by failing to give weight to his intoxication as a mitigating circumstance or by denying his request to withdraw his guilty plea. *Id.* at 263, 264. The Court affirmed Smallwood's conviction and sentence. *Id.* at 264.

Smallwood, *pro se*, filed a petition for post-conviction relief. The petition was later amended by counsel. Among other issues, Smallwood argued that: (1) trial counsel was ineffective by failing to file a petition seeking a finding of mental retardation; (2) trial counsel was ineffective by failing to advise him that double jeopardy would have precluded convictions on all charges; (3) trial counsel was ineffective by failing to object to the use of his accomplices' deposition testimony at sentencing; (4) appellate counsel was ineffective by failing to raise a violation of his Sixth Amendment right to self-representation; and (5) his guilty plea was not voluntary, knowing, and intelligent. Along with the amended petition, Smallwood filed an affidavit which stated, among other things, "Had I known that the trial court would determine my sentence by reviewing depositions instead of forcing the State to produce live testimony, I would not have entered the plea agreement." P-C App. p. 46.

At the post-conviction hearing, trial counsel testified that the mitigation specialist, who was involved from the start of the case, would have looked at whether mental retardation was a viable issue. Trial counsel also noted that although Smallwood has a low IQ, adaptive skills are an important consideration when determining whether a person is mentally retarded, and "from [his] observations and observations of the specialists that were working on the case, those skills were present." P-C Tr. p. 17.

When asked whether he ever thought Smallwood had "below normal intelligence," he answered no. *Id.* at 14. Trial counsel testified that based on his own observations and those of the mitigation specialist, the investigator, and his co-counsel, he did not believe that it was appropriate to make a claim of mental retardation.

Trial counsel also testified that part of his advice to Smallwood was that, from his own experience and the experience of his defense team and others, he believed that if Smallwood went to trial, he would be more likely to get life without parole, but if he pled guilty, he would have a better chance of getting a term of years. *Id.* at 21, 42, 50.

Following a hearing, the post-conviction court entered findings of fact and conclusions of law denying relief.

Smallwood now appeals.

Discussion and Decision

Smallwood appeals the denial of his petition for post-conviction relief.

In a post-conviction proceeding, the petitioner bears the burden of establishing grounds for relief by a preponderance of the evidence. Ind. Post-Conviction Rule 1(5); *Henley v. State*, 881 N.E.2d 639, 643 (Ind. 2008). When appealing the denial of post-conviction relief, the petitioner stands in the position of one appealing from a negative judgment. *Henley*, 881 N.E.2d at 643. The reviewing court will not reverse the judgment unless the petitioner shows that the evidence as a whole leads unerringly and unmistakably to a conclusion opposite that reached by the post-conviction court. *Id.* at 643-44. Further, the post-conviction court in this case made findings of fact and conclusions of law in accordance with Indiana Post-Conviction Rule 1(6). We will

reverse a post-conviction court's findings and judgment only upon a showing of clear error, which is that which leaves us with a definite and firm conviction that a mistake has been made. *Id.* at 644. The post-conviction court is the sole judge of the weight of the evidence and the credibility of the witnesses. *Fisher v. State*, 810 N.E.2d 674, 679 (Ind. 2004). We accept findings of fact unless clearly erroneous, but we accord no deference to conclusions of law. *Id.*

Smallwood claims that: (1) trial counsel was ineffective by failing to file a petition seeking a finding of mental retardation; (2) trial counsel was ineffective by failing to advise him that double jeopardy would have precluded convictions on all charges; (3) trial counsel was ineffective by failing to object to the use of his accomplices' deposition testimony at sentencing; (4) appellate counsel was ineffective by failing to raise a violation of his Sixth Amendment right to self-representation; and (5) his guilty plea was not voluntary, knowing, and intelligent.

I. Ineffective Assistance of Counsel

Smallwood contends that the post-conviction court erred by finding that trial and appellate counsel were not ineffective.

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. *Ben-Yisrayl v. State*, 729 N.E.2d 102, 106 (Ind. 2000) (citing *Strickland v. Washington*, 466 U.S. 668, 687 (1984)), *reh'g denied*. Counsel's performance is deficient if it falls below an objective standard of reasonableness based on prevailing professional norms. *Id.* Counsel is afforded

considerable discretion in choosing strategy and tactics, and we will accord those decisions deference. *Timberlake v. State*, 753 N.E.2d 591, 603 (Ind. 2001), *reh'g denied*. A strong presumption arises that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. *Id.* To meet the appropriate 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). If we can dismiss an ineffective assistance claim on the prejudice prong, we need not address whether counsel's performance was deficient. *Helton v. State*, 907 N.E.2d 1020, 1023 (Ind. 2009).

The standard of review for a claim of ineffective assistance of appellate counsel is the same as for trial counsel in that the petitioner must show appellate counsel was deficient in his performance and that the deficiency resulted in prejudice. *Reed v. State*, 856 N.E.2d 1189, 1195 (Ind. 2006). There are three basic ways in which appellate counsel may be considered ineffective: (1) when counsel's actions deny the defendant his right of appeal; (2) when counsel fails to raise issues that should have been raised on appeal; and (3) when counsel fails to present claims adequately and effectively such that the defendant is in essentially the same position after appeal as he would be had counsel waived the issue. *Grinstead v. State*, 845 N.E.2d 1027, 1037 (Ind. 2006).

The decision of what issue or issues to raise on appeal is one of the most important strategic decisions made by appellate counsel. *Bieghler v. State*, 690 N.E.2d 188, 193

(Ind. 1997), *reh'g denied*. Thus, we give considerable deference to appellate counsel's strategic decisions and will not find deficient performance in appellate counsel's choice of some issues over others when the choice was reasonable in light of the facts of the case and the precedent available to counsel at the time the decision was made. *Taylor v. State*, 717 N.E.2d 90, 94 (Ind. 1999). To establish deficient performance for failing to raise an issue, the petitioner must show that the unraised issue was clearly stronger than the issues that were raised. *Bieghler*, 690 N.E.2d at 194.

A. Trial Counsel

1. Mental Retardation Finding

Smallwood argues that trial counsel rendered ineffective assistance by failing to file a petition seeking a finding of mental retardation.

In its order denying relief, the post-conviction court noted, among other things:

> [E]vidence as to the defendant's mental state and level of functioning was presented at sentencing, by way of a defense expert, Dr. Brian Hudson. Although Dr. Hudson placed Smallwood's IQ at 70 to 75, which placed him in the "borderline range," no testimony at the sentencing hearing was adduced which would have caused the court to make a finding that Smallwood was a "mentally retarded individual."

P-C App. p. 91 (citations omitted). It then concluded:

> Based upon the review of the entire record and the testimony at the post-conviction hearing, the court cannot conclude that Smallwood was [a] "mentally retarded individual." Based upon this evidence the only conclusion the court can draw is that Smallwood is in fact *not* a "mentally retarded individual" and, as such, the court does not find trial counsel to be ineffective for failing to assert a defense[] for which there was no factual or legal basis.
>
> Smallwood has failed to meet his burden of proof as to [t]his issue and has failed to show that had the issue been raised by trial counsel that a different outcome would have resulted.

Id. at 92-93.

Indiana Code section 35-36-9-6 requires the dismissal of a request for the death penalty or for life without parole upon a determination that the defendant is mentally retarded. *Smallwood*, 773 N.E.2d at 261 & n.2. In Smallwood's direct appeal, our Supreme Court set forth the procedure to be followed when implementing this provision:

> [A] defendant must file a petition alleging mental retardation not later than twenty days before the omnibus date. I.C. § 35-36-9-3. Upon receipt of the petition, the trial court must order an evaluation of the defendant. *Id.* Further, an adversarial hearing on the petition must be held at which the defendant must prove by clear and convincing evidence that he meets the definition of a mentally retarded individual. I.C. § 35-36-9-4. The trial court must enter its determination and articulate findings supporting its determination of the issue not later than ten days before the initial trial date. I.C. [§] 35-36-9-5.

Id. at 261-62.

Trial counsel testified at the post-conviction hearing that he never thought Smallwood had "below normal intelligence." He also noted that adaptive skills are an important consideration when determining whether a person is mentally retarded, and he and specialists working on the case believed Smallwood's adaptive skills were sufficient. Trial counsel did not believe that it was appropriate to make a claim of mental retardation based on his own observations and those of the investigator, his co-counsel, and the mitigation specialist, who would have looked at whether mental retardation was a viable issue. The evidence shows that trial counsel decided not to pursue a claim of mental retardation only after careful consideration. Smallwood has failed to show that this decision was not made in the exercise of reasonable professional judgment.

Smallwood nonetheless argues that the post-conviction court should not have relied on Dr. Hudson's testimony at sentencing in its determination of trial counsel ineffectiveness as to this issue because the testimony was presented "for the purpose of mitigation, it was not intended to be a clinical or professional assessment as to whether Smallwood suffered from mental retardation." Appellant's Br. p. 10.

Because Smallwood was convicted pursuant to a guilty plea, we must analyze the prejudice prong under *Segura v. State*, 749 N.E.2d 496 (Ind. 2001). *Segura* categorizes two main types of ineffective assistance of counsel cases. *Smith v. State*, 770 N.E.2d 290, 295 (Ind. 2002). In the first type, the defendant alleges that his lawyer has impaired or overlooked a defense or failed to mitigate a penalty. *See Segura*, 749 N.E.2d at 499. When a post-conviction claim of ineffective assistance relates to the failure to mitigate a penalty, the prejudice from that failure must be measured by determining "whether the utilization of the opportunity to mitigate a penalty likely would produce a better result for the petitioner." *Willoughby v. State*, 792 N.E.2d 560, 563 (Ind. Ct. App. 2003) (citing *Segura*, 749 N.E.2d at 499), *trans. denied*.

Here, whether trial counsel should have pursued a mental retardation claim goes to whether trial counsel failed to mitigate a penalty. That is, Smallwood essentially argues that had trial counsel filed the petition and had the trial court made a mental retardation finding, he would have been ineligible for life without parole. The prejudice from this alleged failure is measured by determining whether, but for trial counsel's alleged error, Smallwood would have likely been sentenced to a term of years instead of life without parole. In light of this standard, we find no error on the part of the post-conviction court

in noting that nothing in Dr. Hudson's testimony would lead one to believe that Smallwood is mentally retarded. Smallwood has failed to establish prejudice.

The post-conviction court did not err by finding that trial counsel's decision did not constitute ineffective assistance.

2. Double Jeopardy

Smallwood argues that trial counsel rendered ineffective assistance by failing to advise him that double jeopardy would have precluded convictions on murder, conspiracy to commit murder, felony murder, and burglary. Specifically, Smallwood asserts that double jeopardy would have precluded convictions for both murder and felony murder, and for both felony murder and burglary, and had trial counsel advised him of this, he would not have pled guilty to murder.

In its order denying relief, the post-conviction court noted that this issue was waived because Smallwood failed to provide the court with any specific facts or legal citation which would allow the court to determine whether double jeopardy would have precluded convictions on murder, conspiracy to commit murder, felony murder, and burglary. It then continued:

> Waiver notwithstanding, and assuming that there would have been a double jeopardy issue, Smallwood has failed to prove that had he been properly advised by trial counsel that he would have maintained his innocence and chosen to proceed to trial. Not only is this claim unsupported by any evidence, it is, at best, self-serving.
>
> The court does find, however, that [t]he plea agreement did afford Smallwood a benefit. In exchange for his plea of guilty to Count I and his stipulation to Count V, the defendant received the following benefit: "State to dismiss Cts. II, III, & IV in this cause and all counts in causes 71D040106DF00560 and 71D020002CF89, and not file charges relating to the events of March 6 or 7, 2000 at N. Brookfield, South Bend, Indiana.

> Accordingly, the court finds that Smallwood's trial counsel was not ineffective as to this issue and does not find that but for this alleged failure by trial counsel that he would have maintained his innocence and proceeded to trial.

P-C App. p. 93-94 (citation omitted).

In the second type of *Segura* ineffective assistance of counsel claim, the defendant alleges that his lawyer has incorrectly advised him as to penal consequences, either with promised leniency or incorrect advice as to the law. *Segura*, 749 N.E.2d at 504. To prove prejudice due to incorrect advice as to penal consequences, the petitioner may not simply allege that he would not have pled guilty. *Id.* at 507. The petitioner must instead "establish, by objective facts, circumstances that support the conclusion that counsel's errors in advice as to penal consequences were material to the decision to plead." *Id.* "[S]pecific facts, in addition to the petitioner's conclusory allegation, must establish an objective reasonable probability that competent representation would have caused the petitioner not to enter a plea." *Id.* In analyzing a claim of incorrect advice as to the law, the focus must be on whether the petitioner proffered specific facts indicating that a reasonable defendant would have rejected the petitioner's plea had the petitioner's trial counsel performed adequately. *See Willoughby*, 792 N.E.2d at 564.

Assuming without deciding that double jeopardy would have precluded convictions on all four charges and that trial counsel performed deficiently by failing to so advise Smallwood, Smallwood still fails to persuade us that he was prejudiced as a result. He has not proffered specific facts indicating that a reasonable defendant would have rejected the plea had trial counsel properly advised him. There is no showing other than Smallwood's own self-serving testimony that he would not have pled guilty had trial

counsel performed adequately. Accordingly, the post-conviction court did not err by finding that trial counsel was not ineffective by failing to advise Smallwood that double jeopardy would have precluded convictions on all charges.

3. Admission of Depositions

Smallwood argues that trial counsel rendered ineffective assistance by failing to object to the use of his accomplices' deposition testimony at sentencing, which the State had offered "for the additional proof of the [LWOP] aggravator." Specifically, Smallwood claims that trial counsel was ineffective by failing to object to the admission of the depositions because they constituted hearsay and violated his constitutional right to confront witnesses against him.

The post-conviction court noted that the depositions, although hearsay, were admissible at sentencing and found no Confrontation Clause violation in their admission. The post-conviction court stated that it

> places no weight on Smallwood's affidavit that had he known the depositions would have been admitted that he would not have pled guilty. . . . As the State correctly points out in its Proposed Findings of Fact and Conclusions of Law it co[u]ld have called [any of the accomplices] to give live testimony at the sentencing hearing.

P-C App. p. 97-98. It then concluded

> that the depositions would have been admissible even over trial counsel's objection, had such been made. Accordingly, the court do[e]s not find Smallwood's trial counsel to have been ineffective concerning this issue. Further, Smallwood has not shown the outcome, that is his sentence to life without parole, would have been any different.

Id. at 98.

To establish ineffective assistance for counsel's failure to object, a petitioner must show that the trial court would have sustained the objection had it been made and that the petitioner was prejudiced by the failure to object. *Jones v. State*, 847 N.E.2d 190, 197-98 (Ind. Ct. App. 2006) (citing *Wrinkles v. State*, 749 N.E.2d 1179, 1192 (Ind. 2001)), *reh'g denied, trans. denied*.

Even if the trial court would have sustained an objection had it been made, there is no prejudice here. As part of the plea agreement, Smallwood stipulated to the LWOP aggravator. At the guilty plea hearing, the State made a record that Smallwood was stipulating to the fact that he intentionally killed the victim while committing or attempting to commit burglary. The trial court then found that the LWOP aggravator existed beyond a reasonable doubt. Smallwood has suffered no prejudice in the admission of his accomplices' depositions at sentencing because the trial court had already found the existence of the LWOP aggravator beyond a reasonable doubt.

Smallwood has not shown that there is a reasonable probability that, but for trial counsel's alleged error, the trial court would have sentenced him to a term of years instead of life without parole. Smallwood has failed to show that trial counsel provided ineffective assistance.

B. Appellate Counsel

Smallwood contends that the post-conviction court erred by finding that appellate counsel was not ineffective by failing to raise a violation of his Sixth Amendment right to self-representation.

The post-conviction court concluded "that Smallwood has failed in his burden of proof as to this issue." P-C App. p. 101.

The Sixth and Fourteenth Amendments include a constitutional right to proceed without counsel when a criminal defendant voluntarily and intelligently elects to do so. *Indiana v. Edwards*, 128 S. Ct. 2379, 2383 (2008). Here, Smallwood filed his *pro se* motions for self-representation only after the sentencing hearing. It is thus unclear in what manner Smallwood wished to represent himself. To the extent Smallwood argues that he wanted to represent himself in his motions to withdraw the guilty plea, one of which was a *pro se* motion, the trial court denied these motions, effectively accepting Smallwood's self-representation in the *pro se* motion.

In Smallwood's direct appeal, appellate counsel raised three issues: (1) Smallwood is mentally retarded and thus cannot be sentenced to life without parole, and, in the alternative, his sentence is manifestly unreasonable in light of his mental retardation; (2) the trial court failed to give weight to his intoxication as a mitigating circumstance; and (3) the trial court erred in denying his request to withdraw his guilty plea. Smallwood has not shown that the issue of self-representation after the sentencing hearing was clearly stronger than the issues raised. Moreover, Smallwood makes no argument as to how he has been prejudiced by appellate counsel's failure to raise the issue.

The post-conviction court did not err by finding that appellate counsel was not ineffective as to this issue.

II. Voluntary, Knowing, and Intelligent Guilty Plea

Smallwood finally contends that his guilty plea was not voluntary, knowing, and intelligent because he relied on the trial court's advisement that he would be allowed to confront the witnesses against him at sentencing.

The post-conviction court's findings and conclusions on this issue state:

> Smallwood claims that his plea of guilty was not made knowingly, voluntarily, or intelligently, because he was not advised that he would not be able to confront the witnesses testifying against him at the sentencing hearing.
>
> The court incorporates its reasoning, legal conclusions, and factual findings as to [the issue regarding trial counsel's ineffectiveness by failing to object to the admission of Smallwood's accomplices' depositions at sentencing], above, and finds, for the same reasons, that Smallwood's trial counsel was not ineffective as to this issue.

P-C App. p. 98. The post-conviction court thus construed Smallwood's argument as a claim of ineffective assistance of counsel. We disagree. Smallwood's amended petition for post-conviction relief clearly parses his arguments into three categories: (1) ineffective assistance of trial counsel, (2) his plea was not voluntary, knowing, and intelligent, and (3) ineffective assistance of appellate counsel. *See id.* at 31-44. Regarding the validity of his plea, Smallwood points to the following advisement by the trial court:

> THE COURT: So you're giving up your trial, and at the trial you would have the right to see the evidence, face the witnesses, confront and cross-examine those witnesses; but under this plea you're not giving up your right to the sentencing hearing.
>
> And at that sentencing hearing you will have the right to do the same thing with respect to those witnesses; do you understand that?
>
> THE DEFENDANT: Yes.

Tr. p. 129-30. Smallwood argued in his amended petition for post-conviction relief and in this appeal that he relied on the trial court's promise when he entered the plea that he

would be allowed to confront witnesses at his sentencing hearing, but that the admission of his accomplices' depositions effectively deprived him of the right of confrontation. We thus understand and address Smallwood's argument as independent from his claims of ineffective assistance of counsel.

We also note that the State's responds by arguing that Smallwood raised the same issue on direct appeal, and because the issue was decided adversely, it is barred by res judicata. *See* Appellee's Br. p. 6. Contrary to the State's assertion, whether Smallwood's guilty plea was voluntary, knowing, and intelligent was not an issue raised on direct appeal. Instead, the issue raised was whether the trial court erred by denying Smallwood's motion to withdraw his guilty plea in light of his alleged mental retardation. Moreover, the validity of his guilty plea could not have been raised on direct appeal. *See Jones v. State*, 675 N.E.2d 1084, 1089 (Ind. 1996) ("[T]he validity of a guilty plea may not be challenged by a motion to correct errors or direct appeal but instead must be brought by filing a petition for post-conviction relief.").

A guilty plea constitutes a waiver of constitutional rights, and this waiver requires the trial court to evaluate the validity of every plea before accepting it. *Davis v. State*, 675 N.E.2d 1097, 1102 (Ind. 1996). For a plea to be valid, it must represent a voluntary and intelligent choice among the alternative courses of action open to the defendant. *Diaz v. State*, --- N.E.2d ---, No. 20S05-0911-PC-521, slip op. at 6 (Ind. Sept. 29, 2010). A court accepting a guilty plea must determine that the defendant: (1) understands the nature of the charges; (2) has been informed that a guilty plea effectively waives several constitutional rights, including trial by jury, confrontation and cross-examining of

witnesses, compulsory process, and proof of guilt beyond a reasonable doubt without self-incrimination; and (3) has been informed of the maximum and minimum sentences for the crime charged. Ind. Code § 35-35-1-2; *Diaz*, slip op. at 7. In assessing the voluntariness of the plea, we review all the evidence before the post-conviction court, including testimony given at the post-conviction trial, the transcript of the petitioner's original sentencing, and any plea agreements or other exhibits which are part of the record. *Diaz*, slip op. at 7.

Notwithstanding the trial court's advisement that Smallwood would be allowed to confront witnesses at his sentencing hearing, the post-conviction court stated in its order denying relief that it placed no weight on Smallwood's affidavit stating that he would not have pled guilty had he known the depositions would be admitted in lieu of live testimony. Thus, the post-conviction court, the sole judge of the weight of the evidence and the credibility of the witnesses, did not find that Smallwood relied on the trial court's advisement when entering the plea agreement.

Smallwood has thus failed to show that his guilty plea was not voluntary, knowing, and intelligent.

Affirmed.

MAY, J., and ROBB, J., concur.