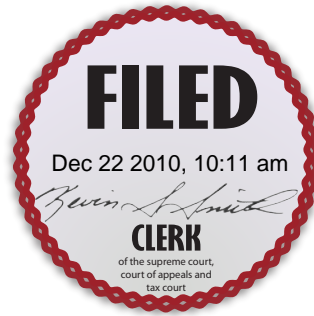


Pursuant to Ind. Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE  
COURT OF APPEALS OF INDIANA**

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ERIC GUESS, )  
 )  
Appellant/Petitioner, )  
 )  
vs. ) No. 49A05-1004-PC-281  
 )  
STATE OF INDIANA, )  
 )  
Appellee/Respondent. )

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APPEAL FROM THE MARION SUPERIOR COURT  
The Honorable Lisa F. Borges, Judge  
The Honorable Stanley E. Kroh, Master Commissioner  
Cause No. 49G04-0601-PC-238

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**December 22, 2010**

**MEMORANDUM DECISION - NOT FOR PUBLICATION**

**BRADFORD, Judge**

Appellant/Petitioner Eric Guess appeals the denial of his petition for post-conviction relief (“PCR”). Guess raises a number of issues, which we restate as (1) whether the post-conviction court erred with respect to its order that the State submit the transcripts from Guess’s trial as an exhibit to the post-conviction proceedings; and (2) whether the post-conviction court abused its discretion in denying Guess’s request that the post-conviction court issue a subpoena requiring his trial counsel to appear before the post-conviction court. Concluding that the post-conviction court acted properly in denying Guess’s PCR petition, we affirm.

## **FACTS AND PROCEDURAL HISTORY**

Our opinion in Guess’s direct appeal instructs us as to the underlying facts leading to this post-conviction appeal:

On December 31, 2005, Rachelle and Eric Guess rented a hotel suite at the Keystone at the Crossing Sheridan House to celebrate the New Year as well as their reconciliation following a four-month separation. The following night, the couple brought their one-year-old daughter and Rachelle’s thirteen-year-old daughter to the hotel to spend the night with them.

While Rachelle was sitting on the bed in a t-shirt and underwear holding her one-year-old daughter, Guess began yelling about her teenaged daughter’s cell phone use. Rachelle’s older daughter had been the source of problems for the Guesses in the past, and Rachelle told Guess that she was not going to leave her children for him, the reconciliation was not going to work, and she was going to divorce him.

Guess responded by hitting Rachelle in the face with his fist at least ten times. When Guess slipped while throwing a punch, Rachelle slid across the bed with her daughter and ran out the door. Both Rachelle and her daughter were covered in blood. A hotel worker saw them in the hallway and quickly put them in an elevator and took them to the hotel lobby.

When the police arrived at the scene, they apprehended Guess in the parking lot. Guess told the officers that he had “smacked the shit out of [Rachelle] and held her down against her will.” Transcript at 48. Rachelle was rushed to the hospital where she was diagnosed as suffering from a medial

orbital fracture, which is a fractured eye socket. Rachelle's eye was swollen shut and she was unable to see out of it until she had surgery to repair the socket. The surgery included the removal of soft tissue and insertion of an implant to guide the scar tissue in its regeneration of the area.

Guess was charged with Count I, battery as a class C felony; Count II, domestic battery as a class A misdemeanor; and Count IV, aggravated battery as a class B felony. At trial, Rachelle testified that she has continued to have problems with her eye after surgery. For example, normal drainage that is supposed to go behind her nasal cavity comes out her eye. She also has intermittent tearing and difficulty seeing to drive on both sunny and rainy days, and may require additional surgery to correct the tearing.

At trial, Guess testified that he hit Rachelle because she hit him. He admitted that he was not injured, and that Rachelle has continuing eye problems. The jury convicted him of all three counts.

Following a sentencing hearing, the trial court found Guess's remorse and the fact that he has a one-year-old daughter to be mitigating factors. The court found Guess's criminal history, including his history of violence, to be an aggravating factor. Thereafter, the trial court sentenced Guess as follows: eight years for the battery conviction, 365 days for the domestic battery conviction, and twenty years with four years suspended and sixteen years executed for the aggravated battery conviction. The court merged the sentences because the offenses arose out of the same circumstances for a total executed sentence of sixteen years.

*Guess v. State*, No. 49A02-0611-CR-1010 slip op. pp. 2-4 (Ind. Ct. App. August 3, 2007) (footnote omitted). In Guess's direct appeal, this court affirmed the judgment of the trial court. Guess filed a petition for transfer, which was unanimously denied by the Indiana Supreme Court.

On December 24, 2007, Guess filed a pro se PCR petition. On May 27, 2009, Guess filed an amended PCR petition. The post-conviction court conducted an evidentiary hearing on Guess's amended PCR petition on November 24, 2009. During this hearing, Guess presented evidence in support of his amended PCR petition. On March 12, 2010, the post-conviction court issued an order denying Guess's request for PCR. Guess now appeals.

## DISCUSSION AND DECISION

Post-conviction procedures do not afford the petitioner with a super-appeal. *Williams v. State*, 706 N.E.2d 149, 153 (Ind. 1999). Instead, they create a narrow remedy for subsequent collateral challenges to convictions, challenges which must be based on grounds enumerated in the post-conviction rules. *Id.* A petitioner who has been denied post-conviction relief appeals from a negative judgment and as a result, faces a rigorous standard of review on appeal. *Dewitt v. State*, 755 N.E.2d 167, 169 (Ind. 2001); *Collier v. State*, 715 N.E.2d 940, 942 (Ind. Ct. App. 1999), *trans. denied*.

Post-conviction proceedings are civil in nature. *Stevens v. State*, 770 N.E.2d 739, 745 (Ind. 2002). Therefore, in order to prevail, a petitioner must establish his claims by a preponderance of the evidence. Ind. Post-Conviction Rule 1(5); *Stevens*, 770 N.E.2d at 745. When appealing from a denial of a PCR petition, a petitioner must convince this court that the evidence, taken as a whole, “leads unmistakably to a conclusion opposite that reached by the post-conviction court.” *Stevens*, 770 N.E.2d at 745. “It is only where the evidence is without conflict and leads to but one conclusion, and the post-conviction court has reached the opposite conclusion, that its decision will be disturbed as contrary to law.” *Godby v. State*, 809 N.E.2d 480, 482 (Ind. Ct. App. 2004), *trans. denied*. 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 therefore accept the post-conviction court’s findings of fact unless they are clearly erroneous but give no deference to its conclusions of law. *Id.*

Guess argues that the post-conviction court erred with respect to its order that the State submit the trial transcript as an exhibit to the post-conviction proceedings because the post-conviction court allegedly failed to enforce that order. However, the record reflects that the post-conviction court did enforce its order that the State submit the trial transcript. During the November 24, 2009 evidentiary hearing, the State notified the post-conviction court that it had requested the trial transcript from the Clerk of this court and would submit the trial transcript as an exhibit as soon as it was available. The post-conviction court then reiterated its prior order that the State submit the trial transcript as an exhibit as soon as the Clerk of this court made it available. The record further reflects that the State did in fact submit the trial transcript as an exhibit before the post-conviction court at some point prior to the issuance of the post-conviction court's order denying Guess's PCR petition. In light of the evidence in the record demonstrating that the post-conviction court enforced, and the State complied with, its order that the State submit the trial transcript as an exhibit to the post-conviction proceedings, we conclude that Guess has failed to convince us that the trial court erred in this regard. Therefore, we further conclude that Guess has failed to establish that he is entitled to post-conviction relief in this regard.

Guess also argues that the post-conviction court abused its discretion in denying his request that it issue a subpoena requiring his trial counsel to appear before the post-conviction court. In raising this argument, Guess claims that the post-conviction court acted improperly because it had previously indicated that it would grant any request by Guess to issue subpoenas relating to Guess's ineffective assistance of counsel claims. It is undisputed

that it is within the post-conviction court's discretion to determine whether to grant or deny a petitioner's request for a subpoena. *Allen v. State*, 791 N.E.2d 748, 756 (Ind. Ct. App. 2003), *trans. denied*. "An abuse of discretion has occurred if the court's decision is against the logic and effect of the facts and circumstances before the court." *Id.*

Here, the record indicates that during the November 24, 2009 evidentiary hearing, the post-conviction court stated that, to the extent it had previously indicated it would entertain a request to issue a subpoena to Guess's trial counsel, such indication was made in error because at the time, the court erroneously believed that either Guess's original or amended PCR petition included a claim of ineffective assistance of trial counsel. However, upon closer review, the post-conviction court determined that neither the original nor the amended PCR petition included a claim of ineffective assistance of trial counsel, but rather only a claim of ineffective assistance of appellate counsel.<sup>1</sup>

On appeal, the State correctly asserts that in order for a claim of ineffective assistance of counsel to be available in post-conviction proceedings, the petitioner must have raised such a claim in his PCR petition. *Bahm v. State*, 794 N.E.2d 444, 445 (Ind. Ct. App. 2003) (citing *Allen v. State*, 749 N.E.2d 1158, 1171 (Ind. 2001)). Therefore, in light of Guess's failure to include a claim of ineffective assistance of trial counsel in either the original or amended PCR petition, we conclude that Guess could not successfully raise a claim of ineffective assistance of trial counsel during the November 24, 2009 evidentiary hearing.

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<sup>1</sup> We note that Guess failed to include a copy of his amended PCR petition in the record on appeal, and therefore we must rely upon the post-conviction court's description of the amended PCR petition contained in the November 24, 2009 evidentiary hearing transcript.

Accordingly, we further conclude that the post-conviction court did not abuse its discretion in denying Guess's request that the court issue a subpoena to Guess's trial counsel.

The judgment of the post-conviction court is affirmed.

KIRSCH, J., and CRONE, J., concur.