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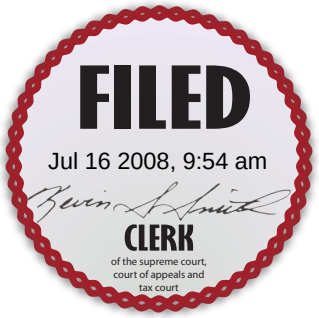

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IN THE COURT OF APPEALS OF INDIANA

MICHAEL SABO,	)	
	)	
Appellant-Petitioner,	)	
	)	
vs.	)	No. 49A05-0709-PC-507
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Respondent.	)	

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Robert R. Altice Jr., Judge
Cause No. 49G02-0103-PC-75127

July 16, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

BRADFORD, Judge

Petitioner Michael Sabo appeals the postconviction court's ruling denying his petition for relief on the grounds that his guilty pleas to and convictions of two counts of Child Molesting as Class B and Class C felonies were attributable to his allegedly involuntary plea and the ineffective assistance of his trial counsel. Sabo also alleges that certain requirements of the sex offender registry applicable to him violate Indiana and federal constitutional prohibitions against *ex post facto* laws. We affirm.

FACTS AND PROCEDURAL HISTORY

According to the factual basis for Cause Number 49G02-0103-CF-075127 ("Cause No. 75127"), on or between April 11, 1999 and July 29, 1999, in Marion County, Sabo performed an act of deviate sexual conduct on A.S. by putting his mouth on her sex organ. Sabo performed the act when A.S. was eleven years old. According to the factual basis for Cause Number 49G06-0201-FC-774[1] ("Cause No. 774"), on or about January 3, 1997 and June 5, 1998, also in Marion County, Sabo fondled the breast of A.S.[2] with the intent to arouse or satisfy his sexual desires. The fondling occurred when A.S. was ten or eleven years old.

On approximately April 5, 2001,[3] Sabo was charged with five counts of child molesting in Cause No. 75127, with two of those counts alleging Class A felonies, one count alleging a Class B felony, and two counts alleging Class C felonies. Sabo was also charged,

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[1] It appears that this cause number, which was apparently moved from Court 6 to Court 2, may have received new Cause Number 49G02-0201-FC-774.

[2] The A.S. named in Cause Number 49G02-0103-CF-075127 is not the same individual as the A.S. named in Cause Number 49G06-0201-FC-774.

under Cause No. 774, with an additional count of Class C felony child molesting.[4]

Sabo hired defense counsel Scott Montgomery to represent him. During the course of Montgomery's representation, the State offered Sabo a plea agreement which dismissed four of the charges in Cause No. 75127 in exchange for Sabo's guilty plea to one count of Class B felony child molesting in that cause and the single count of Class C felony child molesting in Cause No. 774, with the four-year executed sentence in Cause No. 774 to be served concurrent to the twelve-year sentence, with eight years executed, in Cause No. 75127. As an additional term of the plea agreement, Sabo was required to register as a convicted sex offender with respect to each cause.

In approximately March of 2002, the General Assembly enacted a law, effective January 1, 2003, updating the sex offender registry to include a web site publishing recent photographs of convicted sex offenders. *See* P.L. 116-2002, Sec. 27. Sabo asked Montgomery whether changes in the sex offender registry requirements would apply to him. According to Sabo, Montgomery responded that they would not, that the only requirements applicable to him would be those which were in effect at the time of his crime. Montgomery did not dispute that he had advised Sabo that it was his belief that any changes in the registry requirements would not apply to him. Montgomery further advised Sabo that this was a civil issue and to consult a civil lawyer.

Montgomery "pushed" Sabo "pretty hard" to accept the plea agreement. Tr. p. 208.

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[3] The charging information does not appear to be in the Appellant's appendix.

In Montgomery's estimation, it was the "best thing" for Sabo, given the facts of the case. Tr. p. 208. For his part, Sabo believed that his case involved a great deal of exculpatory evidence which Montgomery had failed to investigate thoroughly, including photographic evidence of his distinctive genitalia; testimony by a drug store employee regarding Sabo's stated concern for A.S.'s innocence; an "apology letter" written by A.S.; a *Boston Public* episode viewed by the victims apparently mirroring some of the facts at issue; an allegedly fabricated diary; and his wife's employment and financial records.

On August 9, 2002, Sabo entered into a plea agreement in Cause No. 75127 and pled guilty to Class B felony child molesting. At the plea hearing, Sabo indicated that he was satisfied with his attorney's services and that his plea was voluntary. Also on August 9, 2002, Sabo entered into a separate plea agreement in Cause No. 774 in which he agreed to plead guilty to Class C felony child molesting.

Following his entry of plea in Cause No. 75127 and his plea agreement in Cause No. 774, Sabo wished to withdraw from the plea and plea agreement. Sabo communicated this wish to Montgomery. According to Sabo and Montgomery's paralegal, Montgomery advised Sabo, through his paralegal, that he could not withdraw from the plea. According to Montgomery, Sabo was only advised that he would have to find another lawyer if he withdrew his plea.

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[4] The charging information for Cause No. 774 does not appear to be in the Appellant's Appendix, nor does the CCS for this cause.

During the October 16, 2002[5] plea colloquy prior to his entry of the plea in Cause No. 774, Sabo indicated his satisfaction with the services of his attorney, as well as the voluntariness of his plea. Following the State's recitation of the factual basis, Sabo indicated that he had committed the alleged act, and the trial court accepted the plea and entered judgment of conviction. Sabo made no mention of a wish to withdraw either plea.

At the October 16, 2002 hearing, the trial court sentenced Sabo, pursuant to the plea agreement, to twelve years in the Department of Correction, with four years suspended to probation, in Cause Number 75127. With respect to Cause Number 774, the trial court sentenced Sabo to four years in the Department of Correction, to be served concurrent to his sentence in Cause Number 75127.

Approximately two and one-half years later, on May 12, 2005, Sabo filed a petition for postconviction relief alleging, *inter alia*, that he had not entered into the plea knowingly and voluntarily, and that he had received ineffective assistance of counsel.[6]

The postconviction court held evidentiary hearings on June 30, 2006; August 18, 2006; December 22, 2006; March 9, 2007; and April 20, 2007. Following the hearings, the

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[5] State's Exh. A, which contains a transcript of the plea hearing in Cause No. 774, and the consolidated sentencing hearing, lists as its date both October 16, 2002, and curiously, January 14, 2004. It is difficult to ascertain the exact date of the plea hearing in Cause No. 774 because the CCS for Cause No. 774 was not included in the Appellant's Appendix. The postconviction court determined that the date of the plea in Cause No. 774 was October 16, 2002, and the October 16, 2002 date is listed on the cover page and in the Reporter's Certificate. We will therefore assume that the date of the plea in Cause No. 774 and the consolidated hearing occurred on October 16, 2002.

[6] It does not appear that Sabo raised his *ex post facto* claim in his petition. Indeed, it appears that he conceded that, pursuant to *Spencer v. O'Connor*, 707 N.E.2d 1039 (Ind. Ct. App. 1999), *trans. denied*, the application of new registry requirements does not violate prohibitions against *ex post facto* laws. Because the postconviction court addressed this claim, however, we too will address it.

postconviction court denied Sabo's petition on July 27, 2007. This appeal follows.

DISCUSSION AND DECISION

I. Standard of Review

In turning to Sabo's claims before us, we are mindful that the petitioner bears the burden to establish his grounds for postconviction relief by a preponderance of the evidence. *Godby v. State*, 809 N.E.2d 480, 481-82 (Ind. Ct. App. 2004) (citing Ind. Post-Conviction Rule 1(5)), *trans. denied*. Because the postconviction court denied relief in the case at hand, Sabo is appealing from a negative judgment and faces the rigorous burden of showing that the evidence as a whole "'leads unerringly and unmistakably to a conclusion opposite to that reached by the [] court.'" *Id*. at 482 (quoting *Williams v. State*, 706 N.E.2d 149, 154 (Ind. 1999) (quotation omitted)). We will disturb a postconviction court's decision as being contrary to law only where the evidence is without conflict and leads to but one conclusion, and the postconviction court has reached the opposite conclusion. *Id*. The postconviction 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 the postconviction court's findings of fact unless they are clearly erroneous, and no deference is given to its conclusions of law. *Id*.

II. Voluntariness of Guilty Plea / Ineffective Assistance of Counsel

A. Standard of Review

A postconviction petitioner must be allowed to withdraw his guilty plea whenever the withdrawal "is necessary to correct manifest injustice" that occurred because "the plea was

not knowingly and voluntarily made." *Lineberry v. State*, 747 N.E.2d 1151, 1155 (Ind. Ct. App. 2001) (citing Ind. Code § 35-35-1-4)). A trial court should not accept a plea of guilty unless it has determined that the plea was voluntary. *Id*. at 1155-56 (citing Ind. Code § 35-35-1-3(a)). Before accepting a guilty plea, a trial court judge is required to take steps to insure that a defendant's plea is voluntary. *Id*. (citing Ind. Code §§ 35-35-1-2, 35-35-1-3). A guilty plea entered after the trial court has reviewed the various rights that a defendant is waiving and has made the inquiries called for by statute is unlikely to be found wanting in a collateral attack. *State v. Moore*, 678 N.E.2d 1258, 1265 (Ind. 1997).

"However, defendants who can show that they were coerced or misled into pleading guilty by the judge, prosecutor or defense counsel will present colorable claims for relief." *Id*. at 1266. In assessing the voluntariness of a plea, we will review all of the evidence before the postconviction court, including testimony given at the postconviction hearing, the transcript of the petitioner's original sentencing, and any plea agreements or other exhibits that are a part of the record. *Id*. Despite references to a plea as involuntary because it was not based on informed or effective assistance of counsel, voluntariness is distinct from ineffective assistance of counsel. *Id*. Voluntariness is not part of the ineffective assistance of counsel analysis under the Sixth Amendment. *See id*. Voluntariness in Indiana practice instead "focuses on whether the defendant knowingly and freely entered the plea, in contrast to ineffective assistance, which turns on the performance of counsel and resulting prejudice." *Id*.

A claim of ineffective assistance of trial counsel is also properly presented in a

postconviction proceeding if such claim is not raised on direct appeal. *Timberlake v. State*, 753 N.E.2d 591, 597 (Ind. 2001). To prevail upon a claim of ineffective assistance of counsel, a petitioner must present strong and convincing evidence to overcome the presumption that counsel's representation was appropriate. *Wieland v. State*, 848 N.E.2d 679, 681 (Ind. Ct. App. 2006), *trans. denied*. In assessing such claims, we follow the two-pronged test enunciated in *Strickland v. Washington*, 466 U.S. 668, 687 (1984). *Id*. A petitioner must first show that his counsel's performance was deficient, which requires a showing that counsel's representation fell below an objective standard of reasonableness, thereby denying him the right to counsel guaranteed by the Sixth Amendment to the United States Constitution. *Timberlake*, 753 N.E.2d at 603. Second, the petitioner must demonstrate that he was prejudiced by his counsel's deficient performance. *Id*. To establish prejudice, a defendant 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 probability is reasonable if it undermines confidence in the outcome. *Id*. The two prongs of the *Strickland* test are separate and independent inquiries. *See Strickland*, 466 U.S. at 697. Thus we may dispose of the ineffective assistance claim on the ground of lack of sufficient prejudice. *See id*.

It is immaterial, however, whether Sabo's claim is of an involuntary plea or ineffective assistance of counsel. *Willoughby v. State*, 792 N.E.2d 560, 563 (Ind. Ct. App. 2003) (citing *Segura v. State*, 749 N.E.2d 496, 504-05 (Ind. 2001)), *trans. denied*.

> Whether viewed as ineffective assistance of counsel or an involuntary plea, the postconviction court must resolve the factual issue of the materiality of the bad

> advice in the decision to plead, and postconviction relief may be granted if the plea can be shown to have been influenced by counsel's error. However, if the postconviction court finds that the petitioner would have pleaded guilty even if competently advised as to the penal consequences, the error in advice is immaterial to the decision to plead and there is no prejudice.

Id. (quoting *Segura*, 749 N.E.2d at 505).

B. Analysis

In *Segura*, the Supreme Court created two categories of ineffective assistance of counsel claims relating to guilty pleas, applying different treatments to each respective category depending on whether the ineffective assistance allegation related to (1) a defense or failure to mitigate a penalty, or (2) an improper advisement of penal consequences. 749 N.E.2d at 507, *cited in Willoughby*, 792 N.E.2d at 563. *Segura* further divided this second "penal consequences" category into two sub-categories, specifically (1) claims of promised leniency, and (2) claims of incorrect advice as to the law. 749 N.E.2d at 504.

1. Misinformation as to Sex Offender Registry

Sabo first alleges that he would not have pled guilty but for Montgomery's advice that he would not be subject to changes in the sex offender registry law. His challenge therefore qualifies under subsection (2) of the second category, specifically an improper advisement of penal consequences relating to incorrect advice as to the law.

In *Segura*, the Indiana Supreme Court held that in order to state a claim for postconviction relief under this subcategory, a petitioner may not simply allege that a plea would not have been entered, nor is the petitioner's conclusory testimony to that effect sufficient to prove prejudice. 749 N.E.2d 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. *Segura*, 749 N.E.2d at 507. Specific 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*. Under this analysis, 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.

In *Segura*, the defendant, who had pled guilty, sought postconviction relief on the basis that trial counsel had failed to inform him about the possibility of deportation. 749 N.E.2d at 498. Defense counsel testified at the postconviction hearing that he had never discussed deportation as a possible consequence of the guilty plea. *Segura*, 749 N.E.2d at 499. After determining that the applicable standard in evaluating the defendant's claim was whether he had established by "objective facts" that the defendant's decision to plead was driven by erroneous advice, the Supreme Court denied his claim because the defendant had made only a "naked allegation that his decision to plead would have been affected by counsel's advice." *Id*. at 508.

In *Willoughby*, this court, citing *Segura*, similarly determined that the defendant had failed to meet his burden to show that his decision to plead was driven by defense counsel's

erroneous advice.[7] 792 N.E.2d at 565. The defendant in *Willoughby* was charged with four theft charges arising out of one incident. 792 N.E.2d at 562. During plea negotiations, defense counsel failed to inform the defendant that, due to Indiana's single larcency rule, he could not be convicted of three of his four pending charges. *Willoughby*, 792 N.E.2d at 562. The defendant entered his plea but subsequently petitioned for postconviction relief. During the postconviction hearing, the defendant claimed that his plea was involuntary on the grounds that, had defense counsel adequately informed him, he would have been able to negotiate a more favorable plea. *Id*. at 565. This court denied the defendant's petition, concluding in light of his potential exposure to a sentence of eleven years rather than the four years under the plea, that he had not satisfied his burden to show that a reasonable defendant in his situation would have rejected the plea, even with full information about the single larceny rule. *Id*.

Here, Sabo challenges his plea on the grounds that he was misinformed by defense counsel about the applicable requirements of the sex offender registry. In rejecting his claim, the postconviction court relied largely upon the plea colloquies, in both Cause Nos. 75127 and 774, in which Sabo stated that his plea was voluntary. The State similarly points to Sabo's representations during these plea colloquies as demonstrative of Sabo's voluntariness when entering the pleas.

As the postconviction court observed, during the August 9, 2002, and October 16,

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[7] In the absence of instruction in *Segura* to the contrary, the *Willoughby* court applied the *Segura* analysis for subcategory (2), improper advisement of penal consequences relating to incorrect advice as to the

2002, plea colloquies in the instant case, Sabo's stated representation was that his pleas were voluntary. Indeed, prior to each plea, the trial court asked Sabo whether he was entering a plea out of his free and voluntary will, and each time Sabo responded, "Yes." State's Exh. A, Aug. 9, 2002 Tr. p. 13; State's Exh. A, Oct. 16, 2002 Tr. p. 13. Of course, a defendant's affirmative answer during a plea colloquy that his plea is free and voluntary does not dispense with any subsequent challenge to the alleged involuntariness of the plea if the defendant was "misled into pleading guilty by the judge, prosecutor, or defense counsel." *Moore*, 678 N.E.2d at 1265.

In further rejecting Sabo's claim, the postconviction court determined that, in light of the fact that Sabo received eight years under the plea rather than the eighty-plus years he was facing, Sabo had failed to demonstrate that a reasonable defendant in his situation would have rejected the plea.

As a preliminary matter, we recognize that this court has in the past rejected the reasoning that, when a defendant enters into a plea based upon misinformation, the favorable nature of that plea demonstrates its voluntariness in spite of the misinformation. In *Cornelious v. State*, 846 N.E.2d 354, 357 (Ind. Ct. App. 2006), *trans. denied*, a defendant pled guilty based upon the misrepresentation by defense counsel and the trial court that he could pursue a Criminal Rule 4 appeal following his plea. In awarding postconviction relief, this court concluded that the unfulfilled promise to appeal was demonstrably material to the

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law, to subcategory (1), improper advisement of penal consequences relating to claims of promised leniency. *Willoughby*, 792 N.E.2d at 564.

defendant's decision to plead and therefore rendered the plea involuntary.[8] *Id*. at 359-60. In reaching this conclusion, this court found it fairly insignificant, in light of the unfulfilled promise driving the decision to plead, that the defendant had received a favorable plea and that the Criminal Rule 4 claim he wished to appeal was probably meritless. *Id*. at 359.

In *Lineberry v. State*, 747 N.E.2d 1151, 1157-58 (Ind. Ct. App. 2001), this court similarly rejected the State's contention that, given a defendant's significant benefit from the plea, including dismissal of other charges against him, his plea based upon misinformation was nevertheless voluntary. Notably in *Lineberry*, the defendant's misinformation was determined to be the primary inducement for the plea. *Id*.

Unlike in *Cornelious* and *Lineberry*, where the defendants pled guilty based on a false hope of full exoneration from a potentially successful appeal, here the extent of the misinformation was relatively minimal. Sabo was fully aware that as a term of each plea he would have to register as a sex offender, even if he was not fully apprised of all of the relevant requirements which might apply to that registry. To the extent those requirements involved the internet, Sabo knew that the registry requirements included posting his name and charges on the internet, even if he was unaware that his picture would appear there as well. (Tr. 85-86) Because of the minimal impact of Sabo's misinformation, we conclude

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[8] We recognize that the *Cornelious* decision specifically distinguishes itself from *Segura* and *Willoughby* on the grounds that the defendant's claim for postconviction relief, which the defendant framed as a claim of ineffective assistance of counsel, was not based solely upon advice from counsel but was instead based upon an exchange between defense counsel and the court, as well as the fact that the misinformation at issue had to do with the defendant's Criminal Rule 4(B) rights rather than with penal consequences. *Cornelious*, 846 N.E.2d at 358 n.4. The *Cornelious* decision, however, deals directly with the question at issue here, as well as in *Segura* and *Willoughby*, namely, whether misinformation is material to a defendant's

Cornelious and *Lineberry* are distinguishable.

Indeed, in denying Sabo relief, the postconviction court specifically discounted the impact of Sabo's misinformation on his decision to plead, finding instead that Sabo had pled guilty because his plea was highly beneficial. As the postconviction court found, Sabo, who faced two additional Class A felony and two additional Class C felony charges, faced a sentence in excess of eighty years. Under the plea, he received twelve years, with only eight of them executed. Given the minimal nature of the misinformation and the highly favorable nature of the plea, we conclude that Sabo has failed to satisfy his high burden to show that the postconviction court erred in determining, based upon these facts, that counsel's misinformation was material to his decision to plead and that a reasonable defendant in his situation would have rejected the plea. *See Segura*, 749 N.E.2d at 507; *Willoughby*, 792 N.E.2d at 565.

2. Alleged Misinformation as to Petition to Withdraw from Plea

Sabo additionally challenges his plea as involuntary based upon defense counsel's alleged misinformation that he could not withdraw from his plea. Neither Sabo nor the State suggests which *Segura* subcategory this claim falls into, specifically whether Sabo must establish that this alleged misinformation was material to his decision to plead or whether Sabo must establish that he would have obtained a more favorable result in a competently run trial. *See Segura*, 749 N.E.2d at 507.

First, there is conflicting evidence as to whether Montgomery informed Sabo that he

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decision to plead guilty. To the extent that *Cornelious* involves the analysis at issue here, we find it necessary

could not withdraw from the plea, or, as Montgomery contended, he merely told Sabo that he would have to seek a different lawyer if he withdrew. In denying Sabo relief, the postconviction court found Montgomery's testimony to be more reliable, and it afforded little credibility to Sabo's claimed lack of understanding for the plea process given his sophisticated understanding of the postconviction process. Pursuant to our standard of review, we will not disturb the postconviction court's credibility findings. *See Fisher*, 810 N.E.2d at 679. In addition, even if Sabo had been under the false impression that he could not withdraw from his plea, this misinformation was procedural rather than substantive in nature and, like the sex offender registry misinformation, of minimal impact in light of Sabo's favorable plea. Sabo fails to satisfy even the lesser *Segura* burden to show that his failure to understand that he could petition to withdraw his plea was material to his decision to enter either of his guilty pleas and that a reasonable defendant in his situation, aware that he could petition to withdraw his pleas, would have rejected either or both pleas on these rather trivial grounds.

3. Alleged Inadequacy of Defense Strategy

Sabo additionally challenges the postconviction court's denial of his claim for relief based upon Montgomery's allegedly inadequate defense strategy. Sabo claims that he was forced to plead guilty because Montgomery failed to investigate certain evidence which Sabo believed to be crucial to his case including photographic evidence of his distinctive genitalia; testimony by a drug store employee regarding Sabo's stated concern for A.S.'s innocence; a

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to distinguish it.

Boston Public episode viewed by the victims apparently mirroring some of the facts at issue; Sabo's ex-wife's employment and financial records; an allegedly fabricated diary; and an "apology letter."

Under *Segura*, Sabo must demonstrate, with respect to these challenges to Montgomery's defense strategy, that there is a reasonable probability that a more favorable result would have obtained in a competently run trial. 749 N.E.2d at 499, 507. Sabo has failed to satisfy his burden.

As the postconviction court found, certain evidence which Sabo wished to pursue, including the pictures of his genitals, his concern for A.S.'s innocence, and the *Boston Public* episode, even if presented at trial, do not establish a reasonable likelihood of a more favorable result. As Montgomery testified, the mere presence of pictures of Sabo's genitals would likely be prejudicial to Sabo's child molesting case, especially considering that Sabo was not alleged to have committed the charges at issue using his genitals. Further, Sabo's stated concern for a young girl's "innocence" while buying her feminine products at the drug store is just as likely, if not more likely, to demonstrate his prurient interest in the topic than the truth of the matter asserted. In addition, Sabo fails to establish that a television episode allegedly mirroring the victims' stories impeaches the victims' stories more than it reinforces them such that its introduction into evidence would cause him a likelihood of success at trial.

With respect to Sabo's ex-wife's employment and financial records as evidence that he was "set up," Montgomery interviewed Sabo's wife and determined that Sabo's theory on this ground was "ridiculous." Tr. p. 186. The trial court found Montgomery's testimony on

this point to be credible. In addition, Sabo fails to satisfy his burden on appeal to demonstrate that any allegation of sex abuse by his ex-wife at her workplace, regardless of its merits, demonstrated that she caused the victims to make false allegations against Sabo. We find no error.

With respect to the allegedly fabricated diary and the "apology" letter, although Sabo complains that Montgomery failed to respond to the handwriting expert's request for a handwriting exemplar, Sabo makes no showing that had Montgomery done so, the diary would have been demonstrably unreliable and further, that without the diary, the State could not have successfully prosecuted its case against him. Regarding the letter, Sabo fails to demonstrate that any one statement by a victim is sufficiently weighty to contradict any other statements by that victim with the probable effect of exonerating him at trial.

To the extent Sabo relies upon other alleged errors and theories in challenging his guilty plea, we conclude that he has failed to demonstrate a reasonable probability of a more favorable result at trial. In sum, we find no error in the postconviction court's denial of relief on the ground that defense counsel failed to adequately investigate Sabo's case.

III. Ex Post Facto Violation

Sabo's final challenge to the postconviction court's ruling is on the grounds that the updated sex offender registry constitutes an *ex post facto* law in violation of the United States and Indiana Constitutions and thereby voids his guilty plea. Sabo's challenge focuses largely upon what he claims are the increasing requirements of the sex offender registry, including that he must carry identification, register every three months, incur a yearly fifty-dollar

charge, and have his photograph posted on a web site.[9] Sabo does not specifically challenge the registry based upon its lifetime requirement.[10]

The United States and the Indiana Constitutions prohibit *ex post facto* laws. *See* U.S. Const. Art. I, § 10; Ind. Const. Art. I, § 24. The *ex post facto* analysis is the same under the Indiana Constitution as under the federal Constitution. *See Spencer v. O'Connor*, 707 N.E.2d 1039, 1042 (Ind. Ct. App. 1999), *trans. denied*. A law is *ex post facto* if it substantially disadvantages a defendant because it increases his punishment, changes the elements of or ultimate facts necessary to prove the offense, or deprives a defendant of some defense or lesser punishment that was available at the time of the crime. *Stroud v. State*, 809 N.E.2d 274, 288 (Ind. 2004) (quotation omitted). In evaluating what constitutes prohibited *ex post facto* punishment, we must determine whether the proceedings at issue are intended by the General Assembly to be civil or criminal. *Spencer*, 707 N.E.2d at 1042. Next we must determine whether the statutory scheme is so punitive in purpose or effect as to negate the State's intention to deem it civil. *Id.* (quotation omitted).

With respect to whether the sex offender registry is civil in nature, we observe that it is codified at Indiana Code sections 11-8-8-8 (formerly 5-2-12-6) and 36-2-13-5.5. It does not fall within the criminal code but rather under Title 11, which governs corrections

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[9] Sabo does not cite specific code sections for these alleged requirements.

[10] Currently, that issue is before the Indiana Supreme Court. *See Jensen v. State*, 878 N.E.2d 400, 404 (Ind. Ct. App. 2007), *trans. granted*. The Supreme Court has also granted transfer in *Wallace v. State*, 878 N.E.2d 1269 (Ind. Ct. App. 2008), *trans. granted*, wherein this court concluded that a defendant's conviction for failure to register as a sex offender, even though the registry was not in effect at the time of the defendant's predicate offense, did not constitute an *ex post facto* law.

(formerly Title 5, which governs state and local administration), and Title 36, which governs local government. *See Spencer*, 707 N.E.2d at 1043.

In addition, Sabo fails to demonstrate that the registry is overly punitive in purpose and effect. With respect to the registry's purpose, we cannot conclude that it is overly punitive. As the *Spencer* court observed, the public dissemination of information regarding crime has always been a priority in our society. 707 N.E.2d at 1044. In addition, a significant amount of the required information is already in the public domain. *See id*. With respect to the alleged punitive effect, public dissemination of information regarding criminal activity has always carried the risk of negative consequences. *Id.* at 1045. Yet it has never been regarded as punishment when done in furtherance of a legitimate governmental interest. *Id*. at 1045-46. In promoting the public's right to protect itself, there is a legitimate interest in specific and widely-available information identifying the appearance and location of sex offenders. In light of this public interest, requiring a convicted sex offender to inconvenience himself by maintaining an updated photograph, addresses, and other necessary information in a registry, even an internet registry, does not rise to the level of being so punitive as to overcome the non-punitive legislative intent to keep the public apprised of his whereabouts. *See id*. Accordingly, we conclude Sabo's challenge based upon *ex post facto* grounds is without merit.

Having concluded that Sabo has failed to demonstrate that his plea was involuntary or that he was prejudiced by defense counsel's alleged ineffectiveness, and having rejected Sabo's challenge to the sex offender registry on *ex post facto* grounds, we affirm.

The judgment of the postconviction court is affirmed.

BARNES, J., and CRONE, J., concur.