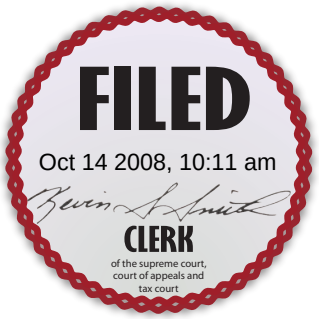

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IN THE
COURT OF APPEALS OF INDIANA

JEFF HOUSE,	)	
	)	
Appellant-Petitioner,	)	
	)	
vs.	)	No. 86A03-0803-PC-129
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Respondent.	)	

APPEAL FROM THE WARREN CIRCUIT COURT
The Honorable John A. Rader, Judge
Cause No. 86C01-0707-PC-123

October, 14, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

BARNES, Judge

Case Summary

Jeff House appeals the denial of his 1994 petition for post-conviction relief ("PCR"), following the grant of his second successive PCR petition. We affirm.

Issues

House raises numerous issues and the State cross appeals. We consolidate and restate the issues raised by House as:

> I. whether House's trial counsel was ineffective for failing to investigate and present evidence regarding Harold Hensley;
>
> II. whether House's appellate counsel for his direct appeal was ineffective;
>
> III. whether House presented newly discovered evidence to warrant post-conviction relief; and
>
> IV. whether House was denied due process of law by the post-conviction court's adoption of the State's proposed findings of fact and conclusions of law.

The State cross appeals contending that House's appeal should be dismissed. We restate the cross appeal issue as whether the successive post conviction court erred by finding that appellate counsel for the 1994 PCR petition was per se ineffective.

Facts

On October 1, 1985, a jury found House guilty of the murder of Donald Husley. He was sentenced to sixty years on October 21, 1985. Our supreme court summarized the facts most favorable to the verdict in House's 1989 direct appeal as follows:

> Donald Hulsey, the victim, was last seen alive at approximately 1:15 a.m. on June 3, 1979. Later that day at approximately 2:00 p.m., his brutally beaten corpse was

found in a field in Warren County, Indiana. The cause of death was multiple and massive skull fractures from blows with a blunt instrument. A homemade club fashioned out of a hollow metal table leg filled with gravel and secured with tape was found nearby. The club was bent; blood and hair found on the club matched Donald Hulsey's. The murder was unresolved for nearly six (6) years.

In those years, however, House made some apparently serious "confessions" to the murder, and would then state he was only joking. In April 1985, Jon Wood confessed to participating in the murder, and implicated House, Scott Talbott, and Jeff Wilson. At trial, Wood testified he attended a party at the Wilson residence in Warren County on the evening of June 2, 1979. He stated he left the party at around 12:30 a.m. with House, Talbott, and Wilson to buy more beer. House was driving his car and the others were passengers. The group smoked marijuana and drank beer. Some time during their trip they began discussing finding a "queer" to beat up. They drove around a park and spotted Donald Hulsey by a phone booth. The car stopped and the passengers had a conversation with Hulsey. For some reason, he did not get into the car at that point, but voluntarily got into the car after walking to a different spot in the park.

At this time, House was alone in the back seat. When Hulsey got in, House began speaking in an effeminate tone of voice to him. Wood testified that although he didn't actually see what happened next, he heard House punch Hulsey several times, saw House's fists raised, and heard a groan. The driver of the car then stopped near a mausoleum to decide what to do with Hulsey. There is no clear evidence as to whether Hulsey was dead at this point, but at trial Wood stated he doubted whether Hulsey was alive because he was not moving. He also stated at trial he, Wood, was dropped off at Layton's Star Market before the body was disposed of. Wood later learned from Talbott further details of the beating.

Wood was questioned several times about the murder between 1979 and 1985 while incarcerated on drug trafficking charges. Eventually he admitted he was involved in the murder. Also, evidence was admitted at trial which showed Wood's hand was crushed in a paste machine while he was substituting for House at C & D Battery in April, 1979. Wood admitted he had told friends "this is Jeff

> House's hand." Other evidence showed he stated at certain times he wanted to get House back for the injury.
>
> Bonnie Sherman was the State's other main witness. She dated House during the summer of 1979. She testified she and House attended the Wilson party together, but he brought her home at 11:30 that evening. Sherman stated she went to House's residence the next morning and found him searching through the newspaper for information about a murder. Later that afternoon he and Sherman went out driving around some back roads searching for something. Apparently when he spotted what he was looking for, he instructed her to drive quickly and not look. Sherman said House had "confessed" to killing Donald Hulsey on several occasions, and made it seem like a joke. One time however, he convinced her he was telling the truth.
>
> At the same time Jeff House was being investigated for the murder, the police were also investigating another possible suspect, Harold Hensley. Hensley's brother, Raymond, implicated him in the crime, but throughout the six year investigation gave conflicting versions of events.

House v. State, 535 N.E.2d 103, 105-06 (Ind. 1989).

Following House's conviction, his trial counsel, Michael Trueblood, conducted an investigation into the speculation about Harold Hensley's involvement in the Husley murder. After collecting information from Harold's family, Trueblood filed a motion to correct error, contending that the State intentionally withheld exculpatory evidence regarding the Hensley brothers.[1] The evidence in question consisted of statements made to police in 1982, 1983, and 1985 by Raymond Hensley that his brother Harold told him he killed Donald Hulsey and showed Raymond some bloody clothing. The evidence

[1] Trueblood alleged that the State violated Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194 (1963), by concealing exculpatory evidence and depriving House of a fair trial. Trueblood made additional charges of error in the motion, but it is only the information regarding the Hensley brothers that is contested today.

attached to the motion also included a 1985 interview with Robert Stoker, who claimed Raymond also told him Harold murdered Husley.

Trueblood and his investigator, Don Eberle, submitted sworn affidavits detailing the information they gathered post-trial. The trial court held a hearing on the motion to correct errors on January 20, 1986. Officer Gerald VanMeter testified that he took statements from Raymond and Randy Carr in 1981 that implicated Harold in the Hulsey murder. VanMeter noted in reports at that time, which were read into the record, that both subjects reported facts inaccurately and both statements were completely false. Detective Bill Nave testified that Raymond gave a recorded statement in October of 1983 again implicating his brother Harold. Raymond's October 31, 1983 taped statement to Detective Nave and Sheriff Moyars was played and transcribed into the record.

Detective Nave testified that Raymond was given a polygraph relative to the story of his brother Harold's involvement in the Husley murder and he failed. Deputy Sheriff Donald Moyars testified that while Raymond was incarcerated in the Warren County Jail he "was almost daily coming up with different information on different cases trying to bargain his way out of a case." Tr. p. 971. Harold and Raymond's sister Cheryl Higley testified that Harold told her he killed Husley in the summer of 1979. Higley recounted that Harold told her he picked Husley up on the side of the road, then the two fought, and Harold beat him with a table leg that was filled with gravel or mortar. Higley observed blood drops on Harold's tee shirt and a gash above his right ear. She also claims to have seen the murder weapon after the murder—a factual impossibility considering that the weapon was recovered at the scene. Higley's husband, Richard Gilkerson, testified that

Higley relayed this story to him and he spoke to Detective Nave about it. Raymond did not testify.

The trial court denied the motion to correct error on February 18, 1986. In its order, the trial court pointed out that during a bond hearing Trueblood asked Detective Nave if he had any contacts with someone with the last name of Hensley. Detective Nave responded that there was probably a statement by Raymond Hensley, and Trueblood indicated familiarity with Raymond, referred to him as "good ole Raymond." Id. at 1065. The trial court found that the information learned after the verdict:

> may be something that could be utilized by a defendant in the course of a trial but it is not this court's opinion that such information referred to by the defendant is so material as to determine the defendant has been denied a fundamental right of due process or a fair trial.

Id. at 233. In so finding, the trial court classified the Hensley information as a "dry lead" that was not required to be disclosed by the state. Id. Because the Hensley information was considered a dry lead by police and Trueblood had access to exploring the information, the trial court concluded that the State did not suppress exculpatory evidence and denied the motion to correct error.

House appealed directly to our supreme court with Kenneth Fishman serving as his appellate counsel. House's main contention was that he was denied due process of law because the State failed to disclose possibly exculpatory evidence, consisting of statements made by Raymond. The supreme court pointed out the conflicting portions of Raymond's story regarding the time of the murder and the victim's whereabouts prior to it. Ultimately, our supreme court determined that Raymond's statements were

"contradictory and confusing" and when considered "in light of Hensley's lack of credibility" the evidence did not rise to the level of reasonable probability of rendering it exculpatory. House, 535 N.E.2d at 108. Our supreme court pointed out that Trueblood only made general discovery request and not a specific request for information regarding either of the Hensleys. Id. at 107. They concluded "House was not denied a fair trial by the State's failure to turn over this evidence." Id. at 108.

House filed his first PCR petition on October 17, 1991. Robert Perry served as House's PCR counsel and a hearing was eventually held in 1994.[2] House alleged in the 1994 PCR that he was denied the right to confront witnesses against him, that his due process rights were violated because of prosecutorial misconduct, that his due process rights were violated because the State withheld exculpatory evidence, that he was denied his right to effective assistance of trial and appellate counsel, and that a statement by Doris Shonkweiler constituted newly discovered evidence.

Trueblood testified at the 1994 PCR hearing that he could not recall making a conscious decision about what to do regarding the Hensley information. He "would like to believe that I made a conscious decision about it" and admitted he was bothered that he "may have just got the information and blown it off and not followed up on it the way I should have." PCR Tr. p. 309. Trueblood testified that other leads in the case were prolific: "There may have been fifty leads reflected in these investigative reports and

[2] This PCR petition will be referred to in our opinion as the "1994 PCR." The transcript of this hearing will be labeled the "PCR Tr.". The first successive PCR petition, filed by Bookwalter in 1995, will be referred to as the "1995 PCR." The second successive PCR petition, filed by attorney Goebel on December 21, 2006, will be referred to as the "2006 PCR." The transcript of that hearing will be labeled as "Succ. PCR Tr.".

information we were getting daily we were checking out." Id. at 316. Trueblood could not remember the investigator's report and looking at it did not refresh his recollection; he only insisted that if it was a report from his investigator he must have read it. Even though Trueblood admitted seeing his investigator's report and talking with one of the Hensley's attorneys, he was unaware that Raymond provided a recorded statement to the state police. He did testify that, "Post trial, I think that there was certainly some very credible evidence that was important to [House]'s defense that I was unaware of prior to the trial." Id. at 320.

The 1994 PCR court denied House's petition on November 28, 1994. Following the denial of House's 1994 PCR, Perry attempted to enlarge the time to file a motion to correct error, and the 1994 PCR court granted this request. Following the denial of the motion to correct error, Perry filed a praecipe on March 23, 1995. This court dismissed the appeal as untimely on February 14, 1996, without an opinion and with a written order "that this appeal is dismissed pursuant to the decision in Howard." Docket 86A05-9506-PC-234, Entry Feb. 14, 1996.

House enlisted new counsel, Timothy Bookwalter, who filed a motion to file a successive PCR petition on November 26, 1996. House alleged in that motion that Perry was ineffective by failing to perfect an appeal from the denial of his 1994 PCR petition. This court "decline[d] to authorize the filing of the petition" and directed the clerk to return the petition and close the docket. Docket 86A03-9611-SP-423, Entry Dec. 3, 1996.

House hired his current attorneys, William Goebel and Thomas D. Sarver, and filed another successive PCR petition on December 21, 2006. The motions panel of this court granted House permission to pursue the 2006 PCR only on the question of whether House "received ineffective assistance from his appointed post-conviction counsel while preparing and pursuing an appeal of the trial court's denial of Petitioner's petition for post-conviction relief." Docket 86A04-612-SP-754, Entry July 6, 2007.

A hearing was held on the 2006 PCR in Warren County before special judge John Rader on January 24, 2007. The 2006 PCR court concluded that House received ineffective assistance from his appointed post-conviction counsel, Perry, in preparing and pursuing an appeal of the denial of his 1994 PCR petition. The 2006 PCR court found that House should be permitted to appeal the December 2, 1994 order denying his 1994 PCR. This appeal followed.

Analysis

I. Cross Appeal: Ineffectiveness of Post-Conviction Counsel

The State contends that the standard applied to evaluate a claim of ineffective post-conviction counsel is "whether counsel appeared and represented Petitioner in a procedurally fair setting that resulted in a judgment of the court." Appellee's Br. p. 7. The State concludes that Perry did perform in this manner for House and that the successive post-conviction trial court erred by finding Perry per se ineffective. House points out in his reply brief that the State conceded during the 2006 PCR hearing that he received ineffective assistance from his post-conviction counsel.

Our supreme court recently summarized the method by which we are to review claims of ineffective assistance of post-conviction counsel:

> This Court declared its approach to claims about performance by a post-conviction lawyer in Baum v. State, 533 N.E.2d 1200 (Ind. 1989). We observed that neither the Sixth Amendment of the U.S. Constitution nor article 1, section 13 of the Indiana Constitution guarantee the right to counsel in post-conviction proceedings, and explicitly declined to apply the well-known standard for trial and appellate counsel of Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Baum, 533 N.E.2d at 1201. The Baum Court noted that post-conviction pleadings are not regarded as criminal actions and need not be conducted under the standards followed in them. Id. We held unanimously that a claim of defective performance "poses no cognizable grounds for post-conviction relief" and that to recognize such a claim would sanction avoidance of legitimate defenses and constitute an abuse of the post-conviction remedy. Id. at 1200-01.
>
> We therefore adopted a standard based on principles inherent in protecting due course of law-one that inquires "if counsel in fact appeared and represented the petitioner in a procedurally fair setting which resulted in a judgment of the court." Id. at 1201. As Justice DeBruler explained later, speaking for a majority of us, it is "not a ground for post-conviction relief that petitioner's counsel in a prior post-conviction proceeding did not provide adequate legal assistance," but such a contention could provide a prisoner with a basis for replying to a state claim of prior adjudication or abuse of process. Hendrix v. State, 557 N.E.2d 1012, 1014 (Ind.1990) (DeBruler, J., concurring).

Graves v. State, 823 N.E.2d 1193, 1196-97 (Ind. 2005).[3]

[3] It should be noted that Graves's post-conviction attorney also missed the deadline for appeal and the appeal of his PCR denial was also dismissed. The crux of his appeal to the supreme court, however, involved counsel's performance at the PCR hearing and counsel's inability to present an adequate record there. Still, our supreme court found that his attorney "certainly did not abandon Graves" and affirmed the denial of PCR court. Graves, 823 N.E.2d at 1197. In this case, however, the State has conceded House's post-conviction attorney was ineffective in pursuing an appeal of the 1994 PCR denial and acquiesced to the filing of an appeal from that denial.

Perry served as House's post-conviction counsel for the 1994 PCR and when that petition was denied, Perry failed to perfect a timely appeal. Instead Perry attempted to enlarge the time to file a motion to correct error on January 3, 1995. The PCR court granted this request, which improperly extended the time for House to file the motion to correct error and praecipe for appeal, contrary to Indiana law. See Ind. Trial Rule 6(B)(2) (setting out that the court may not extend the time for taking an action to correct errors). A year before Perry's attempt to enlarge the time, effective on January 1, 1994, "amendments to [Post-Conviction] Rule 2 made it the vehicle for belated direct appeals alone." Howard v. State, 653 N.E.2d 1389, 1390 (Ind. 1995). Prior to the amendments, "this rule allowed requests from prisoners who were seeking to appeal something other than their direct appeal, such as petitions brought under Rule PC 1." Id. Essentially, the trial court was not authorized to grant House permission to file a belated praecipe. See id. Therefore, Perry was unsuccessful at the filing of his March 23, 1995 praecipe and the attempt to file an appeal. This court dismissed the appeal as untimely on February 14, 1996.

The State argues that Perry cannot be considered ineffective for not anticipating a change in the law, given that the Howard case was not handed down until after the filing of his praecipe. The Howard decision handed down on August 15, 1995, made clear that Rule 2 no longer allowed such requests. The amendment to Post-Conviction Rule 2, however, was in place on January 1, 1994, months before House's 1994 PCR hearing.

At the 2006 PCR hearing, the attorney for the State admitted that both Perry and Bookwalter "were deficient in the performance of their duties as it relates to having the

PCR determination heard by the Court of Appeals." Succ. PCR Tr. p. 4. The State went so far as to encourage an appellate review of the 1994 PCR:

> We believe that's what Mr. House is entitled to and nothing more. To have the original record as it existed in '94 heard by the Court of Appeals and a determination made with respect to Judge Johnson's findings. We do not object to the relief sought, and I think the only relief authorized by the Court of Appeals.

Id. The State's claim that this appeal should never have been granted and should be summarily dismissed flies in the face of its position at the hearing.

The 2006 PCR court concluded that Perry's failure to perfect an appeal from the denial of the 1994 PCR petition constituted ineffective assistance. The 2006 PCR court did not want to "speculate on the results of a such a review" and held that House's right to a fair hearing encompassed the "right to have the appeal actually heard before a learned panel of the Court of Appeals." Appellant's Br. p. 57. It ordered that "House should be permitted to appeal the December 2, 1994, Order denying the petition for post-conviction relief." Id.

Even despite its acquiescence and agreement to the claims of Perry's ineffective attempt at appealing the 1994 PCR, the State contends that the 2006 PCR court erred by relying on Evitts v. Lucey, 469 U.S. 387, 393, 105 S.Ct. 830, 834 (1985) in its findings and conclusions. The State argues Evitts in inapplicable here and deals with the loss of right to direct appeal, unlike the allegation here that House lost his PCR appeal. Regardless of the applicability of Evitts, the 2006 PCR court had evidence, and a concession by the State, to find that Perry was ineffective as House's 1994 PCR counsel

by failing to file a timely appeal. This finding was not in error and paved the way for the present appeal.

II. Review of the Denial of House's 1994 PCR

House stands in the limited position of directly appealing the 1994 PCR denial; therefore, we stand in the limited position of reviewing the 1994 PCR court's conclusions as our court would have at that time. House cannot raise new issues beyond those raised and subject to appeal from his 1994 PCR. Those additional issues, which we will not address, include ineffective assistance of post-conviction counsel (Perry), ineffective assistance of the first successive post-conviction counsel (Bookwalter), ineffective assistance of trial (Trueblood) and appellate (Fishburn) counsel regarding sentencing, and the alleged new evidence produced since the 1994 PCR.

A petitioner who appeals the denial of post-conviction relief faces a rigorous standard of review, as the reviewing court may consider only the evidence and the reasonable inferences supporting the judgment of the post-conviction court. Kien v. State, 866 N.E.2d 377, 381 (Ind. Ct. App. 2007), trans denied. If a PCR petitioner was denied PCR relief, he or she must show that the evidence as a whole leads unerringly and unmistakably to an opposite conclusion than was reached by the PCR court. Id. The petitioner has the burden of establishing grounds for relief by a preponderance of the evidence. Ind. P-C.R. 1(5); Kien, 866 N.E.2d at 381.

When ruling on a PCR petition, a court must render findings of fact and conclusions of law on all issues presented in the petition. P-C.R. 1(6). "Our review is limited to these findings and conclusions. We apply a deferential standard of review

when examining these findings and conclusions." Allen v. State, 749 N.E.2d 1158, 1164 (Ind. 2001), cert. denied. The findings must be supported by the evidence and the conclusions must be supported by law. Id. The appellate court must accept the PCR court's findings of fact and may only reverse if the findings are clearly erroneous. Kien, 866 N.E.2d at 381. We review the detailed findings and conclusions of the 1994 PCR court, totaling 48 pages with over 240 enumerated paragraphs, to determine whether the 1994 PCR court made clearly erroneous findings or incorrect conclusions.[4]

House's claims of prosecutorial misconduct that had been raised in the 1994 PCR are waived. Such claims could have been raised in House's direct appeal and were not, so these are waived for purposes of post-conviction relief. See Sanders v. State, 765 N.E.2d 591, 592 (Ind. 2002) ("[C]omplaints that something went awry at trial are generally congnizable only when they show deprivation of the right to effective counsel or issues demonstrably unavailable at the time of trial or direct appeal.").

A. Ineffective Assistance of Trial Counsel

A claim of ineffective assistance of counsel requires the defendant to show by a preponderance of the evidence that (1) counsel's performance was below the objective standard of reasonableness based on prevailing professional norms and (2) the defendant was prejudiced by counsel's substandard performance, i.e. there is a reasonable probability that, but for counsel's errors or omissions, the outcome of the trial would have been different. Stephenson v. State, 864 N.E.2d 1022, 1031 (Ind. 2007) (citing

[4] There appears to be a collating and/or photocopying error in the appellant's brief and appendix regarding the inclusion of the 1994 PCR court's order. Approximately 26 additional unrelated pages are inserted into the middle of each copy of the order without explanation. We disregard these pages.

Strickland v. Washington, 466 U.S. 668, 687, 694, 104 S. Ct. 2052, 2064, 2068 (1984)). Counsel's performance is presumed effective. Id. "The purpose of an ineffective assistance of counsel claim is not to critique counsel's performance, and isolated omissions or errors and bad tactics do not necessarily mean that representation was ineffective." Grinstead v. State, 845 N.E.2d 1027, 1036 (Ind. 2006).

The State initially argues that House has waived each of his ineffective assistance claims by not properly setting out the Strickland standard and failing to present cogent argument as to why Trueblood did not meet that standard. Although a clearer explanation of the standard of review would be appropriate, we do not find that House's argument lacks cogency and do not consider his argument waived.

House does not point to specific findings by the 1994 PCR court that are erroneous or even problematic. Instead, he generally claims, as he did in the 1994 PCR petition and hearing, that Trueblood was ineffective for not pursuing the Hensley theory during discovery and at trial. The evidence Trueblood had prior to trial included House's vague suggestion to him that Harold was involved, his own investigator's report regarding Raymond's claims, and Detective Nave's indication at House's bond hearing that Raymond probably made a statement to police. Trueblood could "not specifically" remember why he decided not to pursue the Harold lead but he does recall speaking to an attorney representing one of the Hensleys about Raymond's veracity. PCR Tr. p. 298 Trueblood could not recall "whether or not made a decision that it was not credible or whether I just frankly blew it off in light of what we were trying to focus on at the trial." Id. at 299.

The 1994 PCR court's finding regarding Trueblood's effectiveness as related to the Hensley theory are enumerated in paragraphs 115-152 and the conclusions in paragraphs 80-87. The findings included that fact that Raymond made several inconsistent statements and had a reputation for being unreliable and trying to get out of pending charges by offering information. The 1994 PCR court also pointed out that the record lacked any evidence that Harold Hensley admitted, or was prepared to admit, any involvement in the murder. The 1994 PCR court found that Teresa Turner, Cheryl Higley, Richard Gilkerson, Linda Thorpe and Raymond possessed no personal knowledge of Harold's involvement and their only knowledge consisted of out of court statements that would not be admissible under hearsay rules. The 1994 PCR court is the sole judge of the evidence and witness credibility. Smith v. State, 792 N.E.2d 940, 943 (Ind. App. 2003), trans. denied. The 1994 PCR court noted that Trueblood's strategy was to advance a theory that individuals involved in an auto accident near the site where Husley's body was found may have been involved.

The State points out that House failed to demonstrate any evidence from Harold's family would have been admissible at trial. See Kien, 866 N.E.2d at 384 (holding trial counsel was not ineffective for failing to investigate and present inadmissible evidence). The 1994 PCR court's finding and conclusions addressed such concerns and explicitly stated:

> Assuming, for the sake of argument, that the evidence might have been admissible for some purpose, an additional important factor to consider in evaluating trial counsel's conduct is the nature of the evidence to be presented, and by whom. Trial counsel would have been placed in the position

> of offering evidence from an individual with a reputation for being a liar, who almost daily attempted to bargain his way out of jail by giving "information", and who had six prior felony convictions and was awaiting sentencing on a Theft conviction and habitual criminal determination. The evidence sought to be introduced by these witnesses was conflicting and there was no independent verification of this testimony. The evidence was also not consistent with the defense theory that the persons involved in the accident may have had involvement in the murder of Donald Hulsey. Using the "Hensley evidence" could well have appeared to be a desperate "shotgun" approach in the eyes of the jury. Jon Wood may well have looked like the pillar of credibility against that backdrop. Trial counsel's criticisms of the State's chief witnesses, Bonnie Sherman and Jon Wood, might well have fallen upon deaf ears when compared to the "Hensley witnesses."

Appellant's App. p. 249. House relies on Patterson v. State, 263 Ind. 55, 324 N.E.2d 482 (1975), for the proposition that Harold's out-of-court statements could be admitted at the time of House's trial. Patterson, however, specifies that the declarant must be at trial to acknowledge the statement and offer live testimony consistent with it. See Travers v. State, 568 N.E.2d 1009, 1011-12 (Ind. 1991) (explaining the holding of Patterson and its foundational requirements). As the 1994 PCR court pointed out, Harold Hensley never appeared at any hearings in this matter, nor was there any evidence introduced that he intended to make a statement or to appear.

No matter what the implication or admissibility of the evidence could have been, the record indicated that Trueblood did not pursue the Hensley theory and that his choice was not prejudicial to House. Trueblood testified at the 1994 PCR hearing that he faced approximately fifty leads from his investigation into the Hulsey murder. Nothing uncovered in the post verdict investigation amounted to or was deemed by the trial court

or our supreme court on direct appeal to be exculpatory evidence. Moreover, there were concerns about the credibility of Raymond and the other witnesses and their testimony amounted to inadmissible hearsay. Despite thorough cross-examination, the jury chose to believe Jon Wood, who testified that he witnessed House beating Husley. The jury also believed House's ex-girlfriend Bonnie Sherman, who testified that House confessed the murder to her.

House has failed to convince us that Trueblood did not reasonably try his case and defend him. House has not convinced us that even if Trueblood's pretrial investigation and discovery was inadequate, that it prejudiced him. The Hensley theory was not entirely credible and conflicted with the adopted trial strategy. The 1994 PCR court's finding and conclusions supporting the denial of House's petition are sound.

B. Ineffective Appellate Counsel on Direct Appeal

House contends that Fishman should have advised him to pursue a claim of ineffective trial counsel in his direct appeal. As with claims of ineffectiveness of trial counsel, a defendant claiming ineffective assistance of appellate counsel must show that counsel was deficient in his or her performance and that the deficiency resulted in prejudice. Hopkins v. State, 841 N.E.2d 608, 611 (Ind. Ct. App. 2006) (quoting Fisher v. State, 810 N.E.2d 674, 676-77 (Ind. 2004)), trans. denied. A petitioner arguing ineffective assistance of appellate counsel based upon appellate counsel's failure to properly raise and support a claim of ineffective assistance of trial counsel faces a compound burden. Dawson v. State, 810 N.E.2d 1165, 1177 (Ind. Ct. App. 2004), trans. denied. A petitioner making such a claim must demonstrate that appellate counsel's

performance was deficient and that, but for the deficiency of appellate counsel, trial counsel's performance would have been found deficient and prejudicial. Id. The petitioner must establish the two elements of ineffective assistance of counsel separately as to both trial and appellate counsel. Id.

When challenging an appellate counsel's strategic decision to include or exclude issues, the petitioner must overcome the strongest presumption of adequate assistance because judicial scrutiny is highly deferential. Ben-Yisrayl v. State, 738 N.E.2d 253, 260-61 (Ind. 2000). To prevail on a claim of ineffective assistance of appellate counsel, a petitioner must show "from the information available in the trial record or otherwise known to appellate counsel that appellate counsel failed to present a significant and obvious issue and that this failure cannot be explained by any reasonable strategy." Id. at 261. The record of the 1994 PCR hearing indicated that Fishman considered a claim of ineffective assistance of trial counsel, but strategically left it for post-conviction review due to the scarcity of evidence on the issue in the direct appeal record. "[W]e didn't believe there was sufficient evidence to establish it on direct appeal." PCR Tr. p. 375, Deposition of Fishman p. 6. Fishman explained that an ineffective trial counsel claim would need to be developed in the future and "might be more appropriately raised on a collateral basis and a petition for post-conviction relief." Id., Deposition of Fishman p. 6.

Fishman's strategy to postpone any ineffective assistance of trial counsel claim until post-conviction proceedings because sufficient information had not been available in the direct appeal record to present such a claim is sound. He had logical reasons for omitting such a claim and we will not second guess his strategy. Moreover, as we have

found that trial counsel was not ineffective, House cannot meet the compound burden for this claim. We conclude that House's appellate counsel was not ineffective for deciding to omit the ineffective assistance of trial claim from the direct appeal. House had not convinced us that the PCR court should have reached the opposite conclusion and we find the PCR court's findings and conclusions on the issue to be sound.

C. New Evidence

House argues he is entitled to a new trial based on "newly discovered evidence" within the testimony of Hershel Benskin, James Barnett, Teresa Turner, and Donald Moyars. Our supreme court has explained that new evidence will mandate a new trial only when the defendant demonstrates the following:

> (1) the evidence has been discovered since the trial; (2) it is material and relevant; (3) it is not cumulative; (4) it is not merely impeaching; (5) it is not privileged or incompetent; (6) due diligence was used to discover it in time for trial; (7) the evidence is worthy of credit; (8) it can be produced upon a retrial of the case; and (9) it will probably produce a different result at retrial. See Fox v. State, 568 N.E.2d 1006, 1007 (Ind. 1991). This Court analyzes these nine factors with care, as "[t]he basis for newly discovered evidence should be received with great caution and the alleged new evidence carefully scrutinized." Reed v. State, 508 N.E.2d 4, 6 (Ind. 1987).

Carter v. State, 738 N.E.2d 665, 671 (Ind. 2000).

In his 1994 PCR petition, House argues that the newly discovered evidence consisted of a statement of Doris Shonkwieler and a wooden club and tire iron found at the scene. During the 1994 PCR proceeding, House apparently withdrew the argument about the club and tire iron. See PCR Tr. pp. 345, 362. House cannot attack the denial of

the 1994 PCR with evidence presented after that petition and hearing. Therefore, he cannot now present the affidavits of Benskin and Barnett to serve as newly discovered evidence. If House contends that additional new evidence has been discovered since his trial and after the 1994 PCR, that evidence is not a subject for this appeal. As set out above, we are considering an appeal solely from the denial of the 1994 PCR.

House does not clearly list or classify what he deems "newly discovered evidence" for the purposes of this appeal. In the section heading for this argument he specifically lists testimony of Benskin, Barnett, Turner, and Moyars, but then goes on to claim that testimony of other witnesses—Raymond, Harold, Linda Thorpe, James Gilkerson, John James, Doris Shonkwiler, and Higley—also served as corroborating and/or exonerating evidence.[5] Nor does House present cogent argument about what specific evidence each of these individuals presents and how that evidence meets each of the nine Fox factors. House bears the burden of showing that each piece of the newly discovered evidence meets each of the nine prerequisites and fails to do so here.

We find that none of these statements properly constitute newly discovered evidence for the purposes of an appeal from the 1994 PCR denial. The statement by Raymond cannot meet all nine factors because law enforcement officers investigating the Husley murder found inconsistencies in Raymond's statements and his credibility

[5] Shonkwiler was Jon Wood's ex-wife who asserted the marital privilege when Trueblood attempted a deposition and called her at trial, a matter that was appealed on direct appeal and affirmed. House does not point to any new evidence regarding her. John James was a used car salesmen who purchased Harold's car in 1980 and testified at the motion to correct error hearing that the Sheriff contacted him at some point wanting to look under the seats of Harold's car, but that they never did. This evidence is hardly relevant. Linda Thorpe was Raymond's girlfriend and supposedly was present when Harold confessed to the murder and has not testified in this matter at any stage. James Gilkerson was Higley's husband. He testified at the motion to correct error hearing as to what Higley told him about Harold.

remains in question. Moreover, this statement was discoverable prior to trial. The remainder of the statements are merely cumulative of what Raymond told investigators about Harold. The evidence hardly presents anything "new" and consists primarily of hearsay statements. Higley's testimony also cannot be considered very credible, because she claimed to see the murder weapon in Harold's possession following the murder—but the weapon was recovered by police at the scene. House has not convinced us that the 1994 PCR court erred when in found there was no newly discovered evidence and denied his petition.

D. Adoption of the State's Proposed Findings and Conclusions

House contends that he was denied due process of law because the 1994 PCR court adopted the State's proposed findings of fact and conclusions of law verbatim. Both parties submitted proposed findings and conclusions on at the start of the second day of the hearing and it appears House filed another set the next day.[6] The first proposals were submitted before Trueblood, Theresa Turner, and Donald Moyars had testified and before Fishman's deposition was read into the record. House contends "by not considering Theresa Turner'[s] and Donald Moyars' testimony in its final findings of facts and conclusions of law, the court has erroneously filed findings of fact and essential[sic] a 'rubber stamp' judgment without considering Defendant's evidence." Appellant's Br. p. 53.

[6] The record reflects that both parties made submissions of their respective proposed findings and conclusions at the start of the hearing on November 21, 1994. See PCR Tr. p. 374. In his brief, House argues that his proposed findings were not filed until the next day, and the attached copy is file stamped November 22, 1994. See Appellant's App. p. 177. The record is not clear on whether House submitted two copies or merely withdrew his first set.

First, we must note that there is no evidence that the court ignored Turner's and Moyars's testimony. Second, our supreme court has noted that "it is not uncommon for a trial court to enter findings that are verbatim reproductions of submissions by the prevailing party" considering that the trial courts face an enormous volume and keeping the docket moving is a "high priority." Prowell v. State, 741 N.E.2d 704, 708-09 (Ind. 2001). For these reasons, our supreme court has expressly stated that it "does not prohibit the practice of adopting a party's proposed findings." Id. at 709. The supreme court cautions, however, that "there is an inevitable erosion of the confidence of an appellate court that the findings reflect the considered judgment of the trial court." Id.

We cannot say the court's exclusion of specific references to Moyars's testimony and brief reference to Turner indicates it ignored that evidence or that the findings are clearly erroneous, especially considering that House's own proposed findings and conclusions only reference Turner twice and do not mention Moyars. As we have reviewed the record alongside the lengthy order and found no clear error, we cannot conclude that the 1994 PCR court's adoption of the State's proposed findings and conclusions was problematic.

We should also note that the 1994 PCR court was actively engaged in the proceeding, even interjecting questions and comments during both parties' final arguments. Moreover, this does not appear to be a situation where the 1994 PCR court presided over two days of hearings and issued a perfunctory statement many months later. The 1994 PCR court issued its order on December 2, 1994, merely eleven days after the second day of the hearing. Though the first day of the hearing had been held

much earlier in June, the record on the final day indicated the 1994 PCR court was already in possession of the transcript of the earlier proceeding. See PCR Tr. p. 462.

Conclusion

Several of House's claims are waived or not appropriate for this appeal, which is limited to an appeal of the denial of the 1994 PCR. For the remaining claims, House has not convinced us that his trial or appellate counsels' performance fell below an objective standard of reasonableness, or that he was prejudiced by the performance. House has not presented new evidence or convinced us that the 1994 PCR court's finding and conclusions are in error. We affirm the 1994 denial of PCR relief.

Affirmed.

FRIEDLANDER, J., and DARDEN, J., concur.