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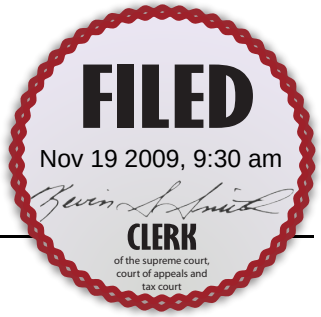

IN THE
COURT OF APPEALS OF INDIANA

STATE OF INDIANA,	)	
	)	
Appellant-Respondent,	)	
	)	
vs.	)	No. 49A02-0906-PC-505
	)	
NATALIE MEDLEY,	)	
	)	
Appellee-Petitioner.	)	

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Kurt Eisgruber, Judge
The Honorable John Boyce, Master Commissioner
Cause No. 49G01-0202-PC-57923

November 19, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

CRONE, Judge

Case Summary

The State of Indiana appeals the grant of Natalie Medley's petition for post-conviction relief. We reverse.

Issues

The State raises three issues, which we consolidate and restate as follows:

I. Whether the post-conviction court's conclusion that Medley's trial counsel rendered ineffective assistance is clearly erroneous; and

II. Whether the post-conviction court's alternative relief violates the Indiana Constitution's separation of powers.

Facts and Procedural History

In an unpublished decision, another panel of this Court recited the following facts on direct appeal:

> The record reveals that on December 16, 2001, Medley and Marshaun Buggs went to the home of Medley's ex-boyfriend, Reggie Moore. After Medley knocked on the door and Moore opened it, Buggs charged into the apartment and stabbed Moore. While Moore was lying on the floor, Buggs continued to stab him several times. During this time, Medley was searching through the apartment for money, guns, and anything else of value.
>
> Medley and Buggs fled the apartment after Moore had been killed. Buggs threw the knife away on the way back to Medley's apartment and they disposed of their bloody clothing. Moore's decomposing body was found on December 22, 2001, by his brother.
>
> Marion County Sheriff's detectives contacted Medley on December 23 to discuss Moore's murder. On February 25, 2002, the detectives obtained a search warrant for Medley's apartment and searched it on February 26. Medley was arrested after an automatic weapon and evidence of illegal drug use and dealing were found. Medley was advised of her rights and initially told police that she was not involved in Moore's murder. On February 27, 2002, Medley was again advised of her rights and then gave a statement in which she admitted that she and Buggs were involved in Moore's murder.

Medley v. State, No. 49A02-0210-CR-870, slip op. at 2-3 (Ind. Ct. App. July 8, 2003).

On February 28, 2002, the State charged Medley as follows: Count I, murder, a felony;[1] Count II, murder, a felony;[2] Count III, class A felony conspiracy to commit robbery;[3] Count IV, class C felony possession of cocaine and a firearm;[4] Count V, class D felony possession of cocaine;[5] Count VI, class A misdemeanor possession of marijuana;[6] and Count VII, class C felony assisting a criminal.[7]

> Medley was represented by Brian Salwowski at her jury trial. At the start of trial,
>
> > Medley made an oral motion to suppress the evidence of her February 27 statement to the police. She claimed that she was under duress and was extremely medicated on the drug Vicodin which she had received from another inmate. After conducting a hearing, the trial court denied the motion. During the trial, Medley renewed her objection to the evidence.

Id., slip op. at 3. The jury found Medley guilty on Counts I and III-VII and not guilty on Count II. The trial court reduced the conviction for conspiracy to commit robbery from a class A felony to a class C felony and merged Count IV into Count V based on double jeopardy considerations. "The trial court sentenced Medley to 60 years for the felony

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[1] Ind. Code § 35-42-1-1(2) ("A person who: … kills another human being while committing or attempting to commit … robbery… commits murder, a felony.").

[2] Ind. Code § 35-42-1-1(1) ("A person who: knowingly or intentionally kills another human being … commits murder, a felony.").

[3] Ind. Code §§ 35-41-5-2; 35-42-5-1.

[4] Ind. Code § 35-48-4-6(b)(1)(B).

[5] Ind. Code § 35-48-4-6(a).

[6] Ind. Code § 35-48-4-11.

[7] Ind. Code § 35-44-3-2.

murder, 8 years for the crime of conspiracy to commit robbery, 8 years for the possession of cocaine or a narcotic, and 1 year for possession of marijuana or hashish. The sentences were to be served concurrently." *Id.*

Medley appealed, raising two issues: "(1) whether the trial court erred in allowing into evidence her taped [February 27] confession, and (2) whether the trial court erred in sentencing." *Id.*, slip op. at 2. Medley argued that her February 27 confession was involuntarily and unintelligently given because she was impaired and under the influence of Vicodin and because the officers badgered her. After viewing Medley's videotaped confession, another panel of this Court concluded that Medley was not intoxicated when she made the statement, and that, based on the totality of the circumstances, her statement was given knowingly, intelligently, and voluntarily. *Id.*, slip op. at 5. As to sentencing, Medley contended that the trial court used improper aggravators and erred in balancing aggravating and mitigating factors, and that her sentence was inappropriate. In addressing her claims, we noted that

> the trial court chose to focus upon the planning of the crime and that it was done out of greed and to collect on a drug debt. … Medley took part in the organization of a crime in which her ex-boyfriend was to be stabbed so that he would provide the combination to a safe in order for Medley to get money which he owed her. … The crime was committed for the sole purpose of collecting on a drug debt.

Id., slip op. at 7, 10. We concluded that the trial court committed no error in sentencing and that her sentence was not inappropriate. *Id.*, slip op. at 10.

On May 6, 2004, Medley filed her pro se petition for post-conviction relief ("PCR"), which she amended, by counsel, on February 1, 2006. In her petition, Medley alleged that

her February 27 confession was obtained in violation of her rights under the Fifth and Sixth Amendments to the United States Constitution and Article 1, Sections 13 and 14 of the Indiana Constitution and should not have been admitted at trial; that her trial and appellate counsel were ineffective; and that the prosecutor acted inappropriately by leading her to believe that in exchange for her cooperation in testifying against Buggs, the prosecutor would request that her sentence be reduced. After a hearing, on May 5, 2009, the post-conviction court issued its findings of fact, conclusions of law, and judgment granting post-conviction relief. In relevant part, the judgment provides as follows:

> **II. Conclusions of Law**
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> ….
>
> *3. Ineffective Assistance of Trial Counsel*
>
> ….
>
> In the present case, the petitioner's claims of ineffective assistance of counsel stem from her claims that her attorney inadequately prepared for trial, [that] her attorney failed to raise alternate grounds to suppress her confession, and that she was prejudiced by her attorney's failure to sever the drug and gun charges from the trial of the murder and robbery counts.
>
> Ms. Medley's trial counsel admitted the following professional errors and omissions:
>
> A. Not only did Mr. Salwowski fail to file a motion to sever the homicide[-]related counts from the drug-related counts, he was totally unfamiliar with the Indiana joinder and severance statutes.
>
> B. Trial counsel visited Ms. Medley in jail on only two occasions, once shortly after her initial hearing and again, four days before trial. Neither he nor she recalled any telephone calls or written correspondence between them at any time.
>
> C. Mr. Salwowski did not visit the crime scenes.
>
> D. He did not interview or depose any State's witness.

E. At the suppression hearing Mr. Salwowski did not raise the issue of police re-initiation of interrogation following Ms. Medley's invocation of her right to counsel.

F. Mr. Salwowski did not show Ms. Medley her videotaped statement nor attempt to discuss it with her prior to trial.

G. Even though aware he was unprepared for trial Mr. Salwowski failed to request a continuance.

H. In preparation for a murder trial, Mr. Salwowski did nothing more to prepare than review the State's automatic discovery submissions and visit his client once immediately following her initial hearing and once more on the eve of trial.

Ms. Medley's expert [attorney David Hennessy] testified at the PCR hearing that each of the above errors or omissions fell below an objective standard of reasonableness in homicide cases. Mr. Hennessy's testimony was not effectively countered by the State.

At the time of Ms. Medley's prosecution, Indiana Code § 35-34-1-9 provided:

Two (2) or more offenses may be joined in the same indictment or information, with each offense stated in a separate count, when the offenses:

(1) are of the same or similar character, even if not part of a single scheme or plan; or

(2) are based on the same conduct or on a series of acts connected together or constituting parts of a single scheme or plan.

Indiana Code § 35-34-1-11 provided:

Whenever two (2) or more offenses have been joined for trial in the same indictment or information solely on the ground that they are of the same or similar character, the defendant shall have a right to a severance of the offenses. In all other cases the court, upon motion of the defendant or the prosecutor, shall grant a severance of offenses whenever the court determines that severance is appropriate to promote a fair determination of the defendant's guilt or innocence of each offense considering:

(1) the number of offenses charged;

(2) the complexity of the evidence to be offered; and

(3) whether the trier of fact will be able to distinguish the evidence and apply the law intelligently as to each offense.

In this case, any acts of Ms. Medley in connection with Reginald Moore's robbery and death by stabbing are of little, if any, relationship to those acts connected to her possession of drugs and a firearm in her home two months later. There is no evidence or conduct common to the charges. They were neither of the same or similar character nor part of a common scheme or plan. As a result, the charges would have been subject to mandatory severance had counsel filed a motion to sever.

Despite the fact the drug and gun evidence may have been elicited late in the trial, well after the evidence of the robbery and murder, it is highly likely the jury could have been influenced to believe Ms. Medley willingly participated in a robbery/homicide because she possessed drugs and a firearm. The clear but impermissible inference is that she was a drug dealer.

Had the counts been severed, evidence of the count not being tried would be inadmissible in the case of the count then being tried, protecting against any impermissible inference from one count to the other. Because Mr. Salwowski failed to seek severance where it would have been mandatory if requested, his performance was deficient and caused Ms. Medley prejudice. Further, the acts and omissions identified in sub-paragraphs B through H, above, further establish that counsel's representation fell below an objective standard of reasonableness causing prejudice to her. As a result, this Court finds Ms. Medley's conviction must be vacated and she must be granted a new trial.

4. The State's Failure to Recommend a Sentence Reduction

Ms. Medley's final claim alleges [Deputy Prosecutor Karen] Jensen engaged in prosecutorial misconduct in securing Ms. Medley's testimony against her codefendant, Mr. Buggs. Having determined the petitioner [is] entitled to a new trial this issue is now moot for the reason the relief sought on this issue, a sentence reduction, is obviated by the granting of a new trial. Nonetheless, for the purposes of appellate review, the Court now finds on this issue as follows:

Ms. Medley's testimony was obtained by Ms. Jensen's perceived promise to assist her in obtaining a sentence reduction. Ms. Jensen testified she told the petitioner her situation was unfair and that she would help her. Ms. Jensen testified she understood how Ms. Medley would believe she was promising a sentence reduction in return for testimony. Ms. Jensen was aware

> of, but deliberately indifferent to the impression she induced within Ms. Medley. Accordingly, had this Court not found that Ms. Medley should receive a new trial, the Court could have found and Ordered the Marion County Prosecutor to seek to reduce Ms. Medley's sentence and to produce evidence at the re-sentencing hearing of Ms. Medley's cooperation with the State and testimony against Marshaun Buggs, resulting in his conviction for the murder of Reginald Moore.

Appellant's Br. at 30-34.[8]

Discussion and Decision

Standard of Review

The State appeals the grant of Medley's petition for post-conviction relief. We observe that post-conviction proceedings do not grant a petitioner a "super-appeal" but are limited to those issues available under the Indiana Post-Conviction Rules. *Timberlake v. State*, 753 N.E.2d 591, 597-98 (Ind. 2001) (citing Ind. Post-Conviction Rule 1(1)). Post-conviction proceedings are civil in nature, and petitioners bear the burden of proving their grounds for relief by a preponderance of the evidence. Ind. Post-Conviction Rule 1(5).

Whether the State or the defendant appeals a post-conviction decision, our standard of review is governed by Indiana Trial Rule 52(A):

> On appeal of claims tried by the court without a jury or with an advisory jury, at law or in equity, the court on appeal shall not set aside the findings or judgment unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses.

In reviewing the State's appeal, we use the "clearly erroneous" standard.

[8] The State failed to include the appealed judgment in its appellant's appendix as required by Indiana Appellate Rule 50(A)(2)(b). Although the State provided the appealed judgment in its brief in compliance with Indiana Appellate Rule 46(A)(10), the pages are unnumbered. Accordingly, our citations to the appellant's brief correspond to the number of the page had it actually been numbered.

> It is a review for sufficiency of the evidence, and we neither reweigh the evidence nor determine the credibility of witnesses but consider only the probative evidence and reasonable inferences supporting the judgment. We reverse only on a showing of clear error–that which leaves us with a definite and firm conviction that a mistake has been made. In reviewing the State's claim that the post-conviction court erroneously granted relief to the defendant, the inquiry is essentially whether there is any way the trial court could have reached its decision.

State v. Dye, 784 N.E.2d 469, 471 (Ind. 2003) (citations, quotation marks, and emphasis omitted).

I. Ineffective Assistance of Trial Counsel

The State contends that the post-conviction court's conclusion that Medley's trial counsel provided ineffective assistance is clearly erroneous. Claims of ineffective assistance of trial counsel are generally reviewed under the two-part test announced in *Strickland v. Washington*, 466 U.S. 668 (1984). To establish ineffective assistance of counsel, a petitioner must show that "(1) counsel's performance fell below an objective standard of reasonableness based on prevailing professional norms; and (2) 'there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine the confidence in the outcome.'" *Lambert v. State*, 743 N.E.2d 719, 730 (Ind. 2001) (quoting *Strickland*, 466 U.S. at 694). "'Unless a defendant makes both showings, it cannot be said that the convictions … resulted from a breakdown in the adversary process that renders the result unreliable.'" *Smith v. State*, 511 N.E.2d 1042, 1043 (Ind. 1987) (quoting *Strickland*, 466 U.S. at 687).

Regarding counsel's performance, our supreme court has noted that "'[c]ounsel is afforded considerable discretion in choosing strategy and tactics, and we will accord that decision deference. A strong presumption arises that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment.'" *Lambert*, 743 N.E.2d at 730 (quoting *State v. Holmes*, 728 N.E.2d 164, 172 (Ind. 2000) (footnote omitted)). Although the two parts of the *Strickland* test are separate inquires, a claim may be disposed of on either prong. "'If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, ... that course should be followed.'" *Grinstead v. State*, 845 N.E.2d 1027, 1031 (Ind. 2006) (quoting *Strickland*, 466 U.S. at 697).

The State first argues that trial counsel was not ineffective by failing to file a motion to sever because the motion would not have been granted. It is true that "[t]o prevail on an ineffective assistance of counsel claim based upon counsel's failure to file motions on a defendant's behalf, the defendant must demonstrate that such motions would have been successful." *Wales v. State*, 768 N.E.2d 513, 523 (Ind. Ct. App. 2002), *clarified on reh'g*, 774 N.E.2d 116 (Ind. Ct. App. 2002), *trans. denied*. The State contends that the murder charges were properly joined with the drug charges because they are based on "a series of acts connected together or constituting parts of a single scheme or plan[,]" and, as such, severance was not mandatory but was subject to the trial court's discretion. *See* Ind. Code §§ 35-34-1-9(a)(2), 35-34-1-11(a). The State asserts that Medley cannot show that a motion to sever would have been granted.

Medley contends that the post-conviction court's conclusion that severance of the charges was mandatory is supported by *Maymon v. State*, 870 N.E.2d 523 (Ind. Ct. App. 2007), *aff'd in relevant part*, 882 N.E.2d 210 (Ind. 2008). *Maymon* involved four burglary and theft charges. Maymon argued that he was entitled to severance of these charges as a matter of right because they were joined for trial solely on the ground that they were of the same or similar character. Here, the State is not arguing that the charges were joined because they were of the same or similar character. As such, Medley's reliance on *Maymon* is misplaced.

The State relies on *Barajas v. State*, 627 N.E.2d 437 (Ind. 1994). Barajas was convicted of murder, corrupt business influence, and dealing in cocaine. Barajas contended that the trial court erred by denying his motion to sever. Our supreme court disagreed, stating,

> In the case at bar, the murder and the drug charges were intricately connected. The State's theory of the case was that the victim was murdered by appellant because he had not paid for drugs supplied by appellant. The corrupt business influence count was based upon appellant's drug dealing and his commerce with those who sold drugs on the street for him. Under the circumstances, we see no abuse of the trial court's discretion in determining that the charges should not be severed.

Id. at 438. Further, our supreme court observed that Barajas suffered no prejudice because, based on Federal Rule of Evidence 404(b), his drug dealing activities would have been

admissible in the State's case to establish his guilt on the murder charge.[9]

Barajas is dispositive of the issue before us. Here, "[t]he crime was committed for the sole purpose of collecting on a drug debt." *Medley*, slip op. at 10. We agree with the State that Medley's murder and drug charges are connected together or constitute part of a single scheme or plan. Therefore, severance of the charges was discretionary not mandatory. *See* Ind. Code § 35-34-1-11(a). Medley has failed to demonstrate that a motion for severance would have been granted. Accordingly, we conclude that the post-conviction court's conclusion that trial counsel provided ineffective assistance by failing to file a motion to sever is clearly erroneous.[10]

We now turn to the remainder of the post-conviction court's grounds for finding that trial counsel was ineffective. The post conviction court summarily concluded that "the acts

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[9] Federal Rule of Evidence 404(b) was adopted by the Indiana supreme court on January 1, 1994, and provides in relevant part:

> Evidence of other crimes, wrongs or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as, proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident[.]

[10] The State argues that any error in failing to grant a motion to sever would have been harmless. In support, the State asserts that Medley testified that the purpose for going to Moore's apartment was to rob Moore, citing Exhibit Volume II of IV, Trial Transcript at 255. However, this is an inaccurate description of Medley's testimony:

> Q: What–What was your sole purpose in going to [Moore's] apartment?
> A. To get the money that he owed me.
> Q. Okay. There was no–was there any kind of other idea why you were going there? Was there any other reason?
> A. No.

Id. We remind the State of their duty of candor toward the tribunal pursuant to Indiana Professional Conduct Rule 3.3.

and omissions identified in sub-paragraphs B through H, above, further establish that counsel's representation fell below an objective standard of reasonableness causing prejudice to [Medley]." Appellant's Br. at 32. These acts and omissions include counsel's conduct in meeting with Medley only twice before trial, not visiting the crime scenes, not interviewing or deposing any State's witnesses, not requesting a continuance, and not raising at the suppression hearing the issue of police re-initiation of interrogation on February 27, 2002, following Medley's request for counsel.[11] The post-conviction court also found that trial counsel was ineffective for not showing or discussing with Medley her February 27 videotaped confession before trial, but our review of the record reveals otherwise. Medley testified that trial counsel showed her a transcript of the statement, and Medley told him that she did not recall making the statements. April 15, 2008, PCR Tr. at 270. Thus, the trial court committed clear error in finding that trial counsel did not discuss the February 27 videotaped confession with Medley. It follows that trial counsel was not ineffective in this regard.

[11] Medley also argues that trial counsel was ineffective in failing to object to hearsay testimony from Moore's brother during trial. In her petitioner's tender of proposed findings of fact, conclusions of law, and judgment, Medley proposed that counsel's failure to object to the hearsay was a professional error constituting ineffective assistance of counsel. Appellant's App. at 220. However, we presume that the post-conviction court rejected this particular proposed conclusion because it is absent from its findings of facts, conclusions of law and judgment. Appellant's Br. at 30-31. As to this particular conclusion then, Medley appeals from a negative judgment. *See Fisher v. State*, 810 N.E.2d 674, 679 (Ind. 2004). On review, we will not reverse the judgment unless the evidence unerringly and unmistakably leads to the opposite conclusion. *Patton v. State*, 810 N.E.2d 690, 697 (Ind. 2004). In this regard, Medley has failed to present a cogent argument and has therefore waived the issue. *See Diaz v. State*, 753 N.E.2d 724, 728 (Ind. Ct. App. 2001) (holding that failure to present cogent argument adequately supported by authority will result in waiver of appellant's claims).

Waiver notwithstanding, Medley's claim must fail. At trial, the State asked Moore's brother, Michael Moore, "[W]as there a particular reason that Reggie was talking to you about [Medley]?" Ex. Vol. I, Trial Tr. at 93. Trial counsel objected based on hearsay. *Id*. at 94. Accordingly, trial counsel did not fail to object to hearsay.

As to the rest of the acts and omissions, Medley argues that "trial counsel's performance consisted of just showing up for trial[,]" and that she "barely received any type of legal representation at all." Appellee's Br. at 6, 10. However, the State claims that deficient performance does not equate to *Strickland* prejudice and that Medley failed to demonstrate prejudice.

We observe that the post-conviction court did not articulate how trial counsel's acts and omissions resulted in prejudice to Medley. Neither does Medley. Although we are sensitive to the seriousness of Medley's charges and the possibility of the grave consequences that necessarily attach to a murder trial, a simple accumulation of errors does not, without more, rise to *Strickland* prejudice as a matter of law. The defendant must show that the individual errors resulted in some prejudice, even if each error alone is not sufficiently prejudicial so as to constitute ineffective assistance of counsel.

Smith, *supra*, is instructive. There, the defendant, who had been convicted of murder, appealed the denial of his petition for post-conviction relief, arguing that his trial counsel provided ineffective assistance based on a multitude of acts and omissions including: counsel's failure to investigate and/or utilize police and hospital reports; counsel's failure to investigate and/or present alibi evidence; and counsel's failure to object to hearsay testimony. 511 N.E.2d at 1043.

To evaluate Smith's claim, our supreme court reviewed each alleged error or omission in turn to determine the specific prejudice that resulted. Regarding counsel's failure to investigate and/or utilize police and hospital reports, the *Smith* court noted that there was a

police report and a hospital report that showed that approximately six weeks prior to the victim's death, the victim and Kalvyn Collins were arrested for public intoxication and the victim was transported to the hospital for knife wounds inflicted by Collins. Collins's testimony was the only direct evidence connecting Smith with the victim's death. At trial, defense counsel questioned Collins about injuries the victim had sustained in the several months prior to his death. She testified that she would have known if the victim had been injured and that he had not been injured or treated at a hospital for an injury shortly before his death. The *Smith* court concluded that the "police and hospital reports put Collins's credibility in serious doubt and counsel's failure to present evidence of this incident prejudiced the defense." *Id*. at 1044.

As to counsel's failure to investigate and/or present alibi evidence, the *Smith* court observed that although Smith stated that individuals in Chicago would have testified that he was in Chicago the night of the murder, he did not present these witnesses at the post-conviction hearing. Our supreme court concluded that Smith's "testimony that these witnesses were available is not sufficient to overcome his burden of persuasion that counsel was ineffective for failure to present the witnesses." *Id*. at 1045.

Finally, as to counsel's failure to object to hearsay evidence, Collins's mother testified that on the night of the murder, she was at her home, where the victim was killed. She testified that she was talking to Bob, a tenant in the house, when they heard someone outside calling to Bob. She testified that Bob said the person outside was Smith. Counsel did not object to this hearsay testimony. Further, Bob was not present in court or available for cross-

examination, and the hearsay was the only direct evidence besides Collins's testimony placing Smith at the scene of the crime. The *Smith* court observed that the prejudice was apparent. *Id*. at 1046. Ultimately, the *Smith* court concluded that trial counsel's errors and omissions amounted to ineffective assistance.

Unlike the defendant in *Smith*, Medley has not shown how her case was prejudiced by trial counsel's errors and omissions. Medley has not argued, let alone demonstrated, how counsel's failure to visit the crime scenes or request a continuance prejudiced her. *See Lawrence v. State*, 464 N.E.2d 1291, 1295-96 (Ind. 1984) (concluding defendant failed to show sufficient prejudice to establish that counsel was ineffective for failing to request a continuance). Likewise, she has not shown what additional information would have been gained by interviewing the State's witnesses and how the absence of the information prejudiced her case. *See Williams v. State*, 771 N.E.2d 70, 74 (Ind. 2002) ("Counsel's failure to interview or depose State's witnesses does not, standing alone, show deficient performance. The question is what additional information may have been gained from further investigation and how the absence of that information prejudiced his case.") (citations omitted); *see also Rondon v. State*, 711 N.E.2d 506, 518 (Ind. 1999) ("At first blush, it would seem that a trial strategy consisting of nothing more than putting the State to its burden is an improbable approach to a defense, especially in a capital case. However, this is precisely the type of decision that falls within the broad definition of trial strategy.") (footnote omitted).

As to whether trial counsel was ineffective for failing to argue that Medley's February 27 videotaped confession was inadmissible because the police re-initiated interrogation after

Medley requested an attorney, the State argues that "counsel was not ineffective by failing to file a motion to suppress founded upon a re-interrogation theory that would have been fruitless and unsupported by the evidence." Appellant's Br. at 16. We agree.

> The right to have counsel present during an interrogation is indispensable to the protection of the Fifth Amendment privilege against self-incrimination. *Miranda v. Arizona*, 384 U.S. 436, 469, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966). When a suspect asserts his right to counsel during custodial questioning, the police must stop until counsel is present or the suspect reinitiates communication with the police and waives his right to counsel. *Edwards v. Arizona*, 451 U.S. 477, 484-85, 101 S. Ct. 1880, 68 L. Ed. 2d 378 (1981). Although a suspect need not invoke any magic words to assert his right to counsel, his request must be clear enough for a reasonable police officer to understand the statement as a request for an attorney.

Powell v. State, 898 N.E.2d 328, 336 (Ind. Ct. App. 2008) (citation omitted), *trans. denied* (2009).

The record shows that Medley signed two advisements of rights:[12] one on February 26, 2002, after her apartment was searched and she was arrested on the drug charges; and again on February 27, 2002, when she provided the videotaped confession at issue here. Ex. Vol. III, State's Ex. 56, 57;[13] *see also Medley*, slip op. at 3. Medley consistently asserted both at trial and at the post-conviction hearing that she had asked for an attorney before Detective Mark Gullion removed her from detention to talk to her on the morning of February 27. Ex. Vol. I, Trial Tr. at 41, 47; Ex. Vol. II, Trial Tr. at 214; April 15, 2008, PCR Tr. at 276. At

[12] At the PCR hearing, Detective Mark Gullion testified that Medley also signed an advisement of rights when she was interviewed on December 23, 2001. August 19, 2008, PCR Tr. at 385. This does not comport with his trial testimony, wherein he stated that he advised Medley that she was free to leave the interview. Ex. Vol. I, Trial Tr. at 132.

the PCR hearing, the State asked Detective Gullion whether Medley had asserted her right to an attorney during the February 26 interview, and he answered, "She never advised me that she didn't want to talk." August 19, 2008, PCR Tr. at 387. We observe that his answer is not directly responsive to the question. Nevertheless, it was Medley's burden at the PCR hearing to show that a motion to suppress based on this alternative theory would have been granted. *See Wales*, 768 N.E.2d at 523. Medley's testimony that she asked for an attorney on February 26 does not, standing alone, demonstrate that a motion to suppress her February 27 confession based on a re-initiation of interrogation theory would have been granted, and therefore the post-conviction court's determination that counsel's omission constitutes deficient performance is clearly erroneous. We therefore reverse the post-conviction court's conclusion that Medley received ineffective assistance of trial counsel.

II. Alternative Relief

The post-conviction court also concluded that

> had this Court not found that Ms. Medley should receive a new trial, the Court could have found and Ordered the Marion County Prosecutor to seek to reduce Ms. Medley's sentence and to produce evidence at the re-sentencing hearing of Ms. Medley's cooperation with the State and testimony against Marshaun Buggs, resulting in his conviction for the murder of Reginald Moore.

Appellant's Br. at 34. The State asserts that the post-conviction court is barred from issuing such an order by Article 3, Section 1 of the Indiana Constitution, which prohibits the three branches of government–the legislative, executive, and judicial–from exercising the

[13] In the record before us, there are two volumes labeled "Exhibit Volume 3 of 4, February 5, 2008." Clearly, one of them is mislabeled. In this opinion, when we cite to "Exhibit Volume III," we are referring to the volume with the blue tab.

functions of the others. We agree. *See Williams v. State*, 669 N.E.2d 1372, 1378 (Ind. 1996) ("[T]he trial judge may not assume an adversarial role in the proceedings. In fact, to the extent that intervention by the trial court in the proceedings would constitute exercising the prosecutorial function, it would violate the separation of powers or functions article of the Indiana constitution.") (citations omitted); *Beanblossom v. State*, 637 N.E.2d 1345, 1348-49 (Ind. Ct. App. 1994) (observing that case law indicates that trial court does not hold inherent judicial power to modify sentence); *see also* Ind. Code § 35-38-1-17 ("If more than three hundred sixty-five (365) days have elapsed since the convicted person began serving the sentence and after a hearing at which the convicted person is present, the court may reduce or suspend the sentence, subject to the approval of the prosecuting attorney...."). We therefore reverse the post-conviction court's alternative relief.

Reversed.

MAY, J., and BROWN, J., concur.