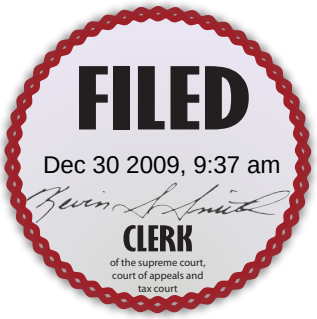

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IN THE
COURT OF APPEALS OF INDIANA

MORRIS W. SOWARD,	)	
	)	
Appellant/Petitioner,	)	
	)	
vs.	)	No. 45A05-0905-PC-268
	)	
STATE OF INDIANA,	)	
	)	
Appellee/Respondent.	)	

APPEAL FROM THE LAKE SUPERIOR COURT
The Honorable Kathleen A. Sullivan, Judge *Pro Tempore*
Cause No. 45G01-0206-PC-3

December 30, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

BRADFORD, Judge

In this successive petition for post-conviction relief ("PCR"), Appellant/Petitioner Morris Soward appeals the denial of his PCR petition, claiming ineffective assistance of trial counsel. Specifically, Soward argues that his counsel was ineffective because he failed to object to an erroneous jury instruction on voluntary manslaughter, and also because he failed to object to Soward's case being decided by an eleven-member jury. Concluding that Soward's ineffective assistance of counsel claims are barred by the doctrine of res judicata, we affirm.

FACTS AND PROCEDURAL HISTORY

The Indiana Supreme Court's opinion in Soward's direct appeal instructs us as to the underlying facts and procedural history leading to the instant appeal:

> In the early morning hours of September 28, 1997, [Jerry] Ragland and a friend went to the house Murdock Bowens shared with Lyle Holley in Gary. Soward was present when they arrived. Ragland argued with Soward over the price of cocaine he wanted to buy from Soward, was shot twice, and died as a result of gunshot wounds to the chest and abdomen.

Soward v. State, 716 N.E.2d 423, 424 (Ind. 1999) ("*Soward I*"). Both Bowens and Holley testified that Soward shot Ragland. *Id*. Soward was convicted of murder, and his conviction was subsequently affirmed by the Indiana Supreme Court. *Id*. at 425. Thereafter, Soward filed a PCR petition alleging, among other things, that his trial counsel was ineffective for failing to object to the trial court's jury instruction on voluntary manslaughter. Following a hearing, the post-conviction court denied Soward's petition. Soward appealed, and a panel of this court affirmed the post-conviction court. *Soward v. State*, No. 45A03-0306-PC-240 (Ind. Ct. App. Nov. 26, 2003) ("*Soward II*").

On July 25, 2006, this Court authorized the filing of a successive PCR petition. Soward's petition again alleged that he had received ineffective assistance of trial counsel. In support of this allegation, Soward claimed that his trial counsel had failed to object to the jury instruction on voluntary manslaughter and to his case being decided by an eleven-member jury. On April 22, 2009, the post-conviction court denied Soward's successive PCR petition. This appeal follows.

DISCUSSION AND DECISION

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

A party appealing from a negative judgment must establish that the evidence is without conflict and, when viewed as a whole, points unmistakably and unerringly to a decision opposite of that reached by the post-conviction court. *Williams*, 706 N.E.2d at 154. We accept the post-conviction court's findings of fact unless they are clearly erroneous, but do not defer to the post-conviction court's conclusions thereon. *Bigler v. State*, 732 N.E.2d 191, 194 (Ind. Ct. App. 2000), *trans. denied*. We examine only the probative evidence and reasonable inferences supporting the post-conviction court's determination and we do not

reweigh the evidence or judge witness credibility. *Id*. If an issue was known and available but not raised on appeal, it is waived. *Williams*, 706 N.E.2d at 153. If it was raised on appeal but decided adversely, it is res judicata. *Id*. at 153-54.

Initially, we note that Soward's previous appeal from the denial of his first PCR petition included, among other claims, the claim that Soward's trial counsel was ineffective because counsel failed to object to the voluntary manslaughter instruction given to the jury. *Soward II*, slip op. at 5-6. In reviewing this claim, this court concluded that the language of the voluntary manslaughter instruction did not improperly shift the burden of proof to Soward, and affirmed the post-conviction court's decision denying Soward's PCR petition. *Id*. at 6. In the present case, Soward again claims that his trial counsel was ineffective because counsel failed to object to the voluntary manslaughter instruction given to the jury. Soward also claims that his trial counsel was ineffective because counsel failed to object to his case being decided by only eleven jurors.

It is well-settled that a petitioner is entitled to only one post-conviction opportunity to raise the issue of ineffective assistance of trial counsel. *Daniels v. State*, 741 N.E.2d 1177, 1185 (Ind. 2001); *Resnover v. State*, 547 N.E.2d 814, 816 (Ind. 1989). Once a petitioner chooses "to raise his claim of ineffective assistance of trial counsel (either on direct appeal or post-conviction), he must raise all issues relating to that claim, whether record-based or otherwise." *Ben-Yisrayl v. State*, 738 N.E.2d 253, 259 (Ind. 2000); *see also Morris v. State*, 466 N.E.2d 13, 14 (Ind. 1984) (providing that "[n]othwithstanding the fact that petitioner gave several additional examples of his counsel's alleged ineffectiveness during the post-

conviction hearing, a consideration of the ineffectiveness issue would constitute review of an issue already decided on direct appeal"). Claims for ineffective assistance of counsel that have already been decided adversely to the petitioner are barred from re-litigation in successive post-conviction proceedings by the doctrine of res judicata, which prevents repetitious litigation which is essentially the same dispute. *Matheney v. State*, 834 N.E.2d 658, 662 (Ind. 2005); *see also Conner v. State*, 829 N.E.2d 21, 25 (Ind. 2005); *Smith v. State*, 825 N.E.2d 783, 789 (Ind. 2005); *Wallace v. State*, 820 N.E.2d 1261, 1263 (Ind. 2005).

The doctrine of res judicata may "sometimes not be enforced if the initial decision was clearly erroneous and would work manifest injustice" or in light of newly discovered evidence. *Wallace*, 820 N.E.2d at 1263 (quotation omitted); *Daniels*, 741 N.E.2d at 1185. However, Soward has not shown, and nothing in the record suggests, that the prior decisions were erroneous or unjust, much less clearly or manifestly so. Likewise, Soward has not shown that the evidence relating to either of his claims of ineffective assistance included in the instant appeal was not available at the time of Soward's previous PCR petition. Therefore, because Soward has previously alleged ineffective assistance of trial counsel on appeal and this court has rendered a decision on the merits, Soward's subsequent claim is barred by the doctrine of res judicata.[1] *See Daniels*, 741 N.E.2d at 1185; *Resnover*, 547 N.E.2d at 816.

[1] Furthermore, to the extent that Soward argues that his successive claim for ineffective assistance of trial counsel on this issue should be permissible because of a subsequent Seventh Circuit decision regarding voluntary manslaughter instructions, we note that "[a]n attorney is not required to anticipate changes in the law and object accordingly in order to be considered effective." *Wieland v. State*, 848 N.E.2d 679, 683 (Ind. Ct. App. 2006), *trans. denied* (quotations omitted).

The judgment of the post-conviction court is affirmed.

NAJAM, J., and FRIEDLANDER, J., concur.