No. 14-

In the Supreme Court of the United States

JUAN MANZANO,

Petitioner,

v.

INDIANA,

Respondent.

On Petition for a Writ of Certiorari to the Court of Appeals of Indiana

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

When a criminal defendant seeks to vacate a guilty plea on the ground that defense counsel rendered ineffective assistance, in order to establish prejudice must the defendant show that but for counsel's errors he would not have pleaded guilty and would have insisted on going to trial (as this Court, all twelve federal circuits, and virtually all the states hold), or must the defendant also show that had he gone to trial he would have been acquitted (as the Indiana Supreme Court persists in holding)?

LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

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PETITION FOR A WRIT OF CERTIORARI

The petitioner, Juan Manzano, respectfully petitions for a writ of certiorari to review the judgment of the Court of Appeals of Indiana.

OPINIONS BELOW

The opinion of the Court of Appeals of Indiana is published at 12 N.E.3d 321 (Ind. Ct. App. 2014). App. 1a. The order of the Indiana Supreme Court denying review is unpublished. App. 18a. The opinion of the Circuit Court of Madison County, Indiana, denying the petition for post-conviction relief is unpublished but is available at 2013 WL 8481472 (Ind. Cir. Ct. 2013). App. 20a. The opinion of the Court of Appeals of Indiana affirming petitioner's sentence on direct appeal is unpublished but is noted in the table at 691 N.E.2d 517 (Ind. Ct. App. 1998). App. 36a.

JURISDICTION

The judgment of the Court of Appeals of Indiana was entered on July 15, 2014. The order of the Indiana Supreme Court denying review was entered on October 3, 2014. This Court has jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISION INVOLVED

The Sixth Amendment to the United States Constitution provides in relevant part: "In all criminal prosecutions, the accused shall … have the assistance of counsel for his defence."

STATEMENT

The Indiana Supreme Court is persisting in refusing to follow clear precedent from this Court. Where a defendant seeks to vacate a guilty plea on grounds of ineffective assistance of counsel, he must show two things—that counsel gave him unreasonably deficient advice, and that he was prejudiced by this bad advice. "[I]n order to satisfy the 'prejudice' requirement, the defendant must show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." *Hill v. Lockhart*, 474 U.S. 52, 59 (1985). The Court has repeated *Hill*'s definition of prejudice several times in recent years. This definition of prejudice is, unsurprisingly, employed in all twelve of the federal circuits that hear criminal cases and in virtually all the states.

But not in Indiana. The Indiana Supreme Court has its own definition of prejudice, one that is much more difficult for defendants to satisfy. In Indiana, it is not enough for a defendant to show that but for counsel's errors he would not have pleaded guilty and would have insisted on going to trial. A defendant in Indiana must also show that had he gone to trial he would have been acquitted. The Indiana Supreme Court has persisted for many years in employing this idiosyncratic definition of prejudice, even after being pointedly criticized by the Seventh Circuit for employing a rule so patently contrary to clearly established federal law. The Indiana Supreme Court has shown no signs of any willingness to reconsider its position.

This is one of the rare cases for which summary reversal is appropriate.

1. After drinking a very large amount of alcohol all through the night, petitioner Juan Manzano staggered home early in the morning and raped his six-year-old daughter. App. 1a-2a. He had no recollection of the incident, and indeed he had been so drunk that he could not even remember returning home. App. 2a. But his daughter had suffered the injuries a rape would cause, and under questioning from the police, Manzano acknowledged that if his daughter said that he raped her, he must have done so. App. 2a. "I guess I assaulted her," he told the police. "I must have used my penis." When he realized the enormity of what he had done, he told the police that he had come to believe that he had put his penis "inside her vagina." App. 2a. Manzano was charged with rape and three other offenses all based on the same incident: child molesting, incest, and battery. App. 2a. The court appointed a lawyer named Douglas Long to represent him. App. 21a.

At the time, intoxication was a defense in Indiana, whether the intoxication was voluntary or involuntary, if it was severe enough to negate the mens rea required to commit rape. App. 9a. Long filed a notice of intent to pursue an intoxication defense. App. 2a. Soon after, however, based on Long's advice, Manzano pled guilty to rape. App. 2a. Long did not attempt to negotiate a plea agreement. Rather, he advised Manzano to enter an "open" plea (a plea with no promises of any sentencing recommendation from the prosecutor). App. 21a. When Manzano pled

guilty to rape, the other three charges were dropped, not as part of a plea agreement, but because conviction on those charges would have constituted double jeopardy. App. 28a.

Manzano was sentenced to a fifty-year prison term, the maximum sentence he could have received if he had gone to trial. App. 2a. His sentence was affirmed on direct appeal. App. 36a.

2. Manzano filed a petition for post-conviction relief in Indiana Circuit Court. He alleged that Long had rendered ineffective assistance of counsel by conducting virtually no investigation, and by failing even to attempt to negotiate a plea agreement, before he advised Manzano to plead guilty. In the petition, Manzano provided a detailed catalogue of Long's deficiencies: (1) Long made no effort whatsoever to interview or even locate the people with whom Manzano had spent the night drinking, who could have corroborated an intoxication defense, even though two of these potential witnesses had given statements to the police; (2) Long did not think to request a translator, even though Manzano spoke little English at the time and was obviously indigent; (3) although a blood sample was taken from Manzano twelve to sixteen hours after the rape, Long never had the blood sample tested to see if it contained any drugs that might have supported an intoxication defense; (4) although blood, hair, and saliva samples were taken from Manzano for DNA matching purposes, well after he was arrested but before any lawyer had entered an appearance on his behalf, Long never moved to suppress the DNA results; (5) Long

did not even try to negotiate a plea agreement under which Manzano would have received a sentence shorter than the fifty-year maximum; (6) at sentencing, Long failed to present several available mitigating factors that might have reduced Manzano's sentence, including his near-lack of any criminal history, the fact that he was gainfully employed and supporting his family, his cooperation with the police to the best of his ability, and his remorse for what he realized he had done; and (7) although several family members were at the sentencing hearing and were willing to testify regarding Manzano's good qualities, Long failed to call any of them as witnesses. App. 23a.

After holding an evidentiary hearing, the Circuit Court denied the petition. App. 20a-35a.

The court observed that under Indiana Supreme Court precedent, Manzano was required to show that had he gone to trial, he would have been acquitted of rape:

> A petitioner, who claims that defense counsel incorrectly advised him on a legal defense, must show that, but for defense counsel's incorrect advice, the petitioner would not have pled guilty, the defense probably would have succeeded, and the defendant would have received a favorable outcome.

App. 25a (citing *Segura v. State*, 749 N.E.2d 496, 502-04 (Ind. 2001)). Because Manzano could not show that he would have been acquitted at trial, the Circuit Court concluded, he had failed to prove that

defense counsel provided ineffective assistance. App. 29a.

3. The Indiana Court of Appeals affirmed. App. 1a-17a. Like the Circuit Court, the Court of Appeals relied on *Segura v. State* to hold that Manzano could not show prejudice, because he could not show that if he had gone to trial he would have been acquitted. App. 6a-12a. The Court of Appeals quoted *Segura* at length:

> We conclude that *Hill* [*v. Lockhart*, 474 U.S. 52 (1985),] standing alone requires a showing of a reasonable probability of success at trial if the alleged error is one that would have affected the defense. This result seems preferable for several reasons. In [*State v.*] *Van Cleave*, [674 N.E.2d 1293 (Ind. 1996),] we identified sound reasons for requiring that a petitioner who pleads guilty show a reasonable probability of acquittal in order to prevail in a postconviction attack on the conviction based on a claim of ineffective assistance of counsel. As *Hill* emphasized, the State has an interest in the finality of guilty pleas. This is in part grounded in the cost of a new trial, and the demands on judicial resources that are imposed by revisiting the guilty plea, but also in concerns about the toll a retrial exacts from victims and witnesses who are required to revisit the crime years later.

App. 6a-7a (quoting *Segura*, 749 N.E.2d at 503).

The Court of Appeals acknowledged that "[i]n *Payne v. Brown*, 662 F.3d 825, 828 (7th Cir. 2011),

the Seventh Circuit rejected the *Segura* holding and concluded that our supreme court misinterpreted the United States Supreme Court's holding in *Hill v. Lockhart*, 474 U.S. 52 (1985)." App. 7a n.1. As the Court of Appeals explained, "[t]he Seventh Circuit concluded that *Hill* 'holds that a person who contends that ineffective assistance of counsel induced him to plead guilty establishes "prejudice" by demonstrating that, but for counsel's errors, he would have insisted on a trial.'" App. 7a n.1 (quoting *Payne*, 662 F.3d at 828). But the Court of Appeals recognized that it was bound by decisions of the Indiana Supreme Court, not by decisions of the Seventh Circuit. The Court of Appeals concluded that it had to "apply the standard established by our supreme court in *Segura*." App. 7a n.1.

Applying Indiana's standard of prejudice, the Court of Appeals determined that "[t]here is little to no probability that Manzano would have prevailed at trial." App. 9a. The court noted that Manzano did not deny having committed the rape, and that his daughter had suffered extensive injury. App. 9a. It concluded that Manzano could not show prejudice from counsel's failure to investigate the intoxication defense, because "[h]ad Manzano proceeded to trial and argued that the requisite mens rea for the crime of rape was negated by his voluntary intoxication, it is not reasonably probable that he would have succeeded in this defense." App. 10a.

The Court of Appeals rejected Manzano's other claims of ineffective assistance, because he could not show "that he would have succeeded at trial absent

these alleged errors had he not pleaded guilty." App. 12a. "Under the facts and circumstances of this case," the Court of Appeals concluded, "Manzano cannot prove that, absent counsel's alleged errors, there is a reasonable probability that he would have been acquitted if he had proceeded to trial." App. 13a. Because the Court of Appeals found that Manzano could not show prejudice under Indiana's standard, the court did not separately address whether counsel's performance was deficient.

Manzano sought review in the Indiana Supreme Court. In his petition for transfer, Manzano urged the Indiana Supreme Court to reconsider its standard of prejudice. He pointed out that Indiana's standard is contrary not just to the standard employed by the Seventh Circuit, but is also contrary to *Hill v. Lockhart*, 474 U.S. 52 (1985), *Lafler v. Cooper*, 132 S. Ct. 1376 (2012), and *Missouri v. Frye*, 132 S. Ct. 1399 (2012).

The Indiana Supreme Court denied review. App. 18a-19a.

REASONS FOR GRANTING THE WRIT

I. By requiring a defendant to make the additional showing that had he gone to trial he would have been acquitted, the Indiana Supreme Court is persisting in employing an idiosyncratic standard of prejudice contrary to the repeated decisions of this Court, of all twelve federal Courts of Appeals, and of the highest courts of nearly every state.

Indiana's idiosyncratic definition of prejudice is contrary to thirty years of clear precedent from this Court. It is contrary to the law in all twelve circuits and in forty-seven of the other forty-eight states that have addressed the issue. Time and time again, courts in other jurisdictions have explicitly rejected Indiana's view. These courts include the Seventh Circuit, which hears habeas corpus cases from Indiana prisoners. Yet the Indiana Supreme Court refuses to budge. From all appearances, nothing will change until this Court intervenes.

A. This Court's decisions make clear that in order to show prejudice, the defendant must show a reasonable probability that but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial.

Under this Court's precedents, the law is clear. "[I]n order to satisfy the 'prejudice' requirement" where a defendant alleges that ineffective assistance of counsel caused him to plead guilty, "the defendant must show that there is reasonable probability that,

but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." *Hill v. Lockhart*, 474 U.S. 52, 59 (1985). As the Court explained, this is a straightforward application of the ordinary prejudice standard from *Strickland v. Washington*, 466 U.S. 668 (1984), in the context of guilty pleas. *Id.* at 58-59. The Court has repeated this standard of prejudice many times since. *See, e.g.*, *Missouri v. Frye*, 132 S. Ct. 1399, 1405-06 (2012) (discussing *Hill*); *Lafler v. Cooper*, 132 S. Ct. 1376, 1384-85 (2012) (quoting *Hill*); *Premo v. Moore*, 131 S. Ct. 733, 743 (2011) (quoting *Hill*).

Of course, any defendant can *claim* that he would have insisted on going to trial, so *Hill* emphasized that more than a bare allegation is necessary to establish a "reasonable probability" that the defendant actually would have gone to trial. The Court observed that one way to make such a claim credible would be to show that a rational and well-advised defendant under the circumstances would have chosen to go to trial. "For example, where the alleged error of counsel is a failure to investigate or discover potentially exculpatory evidence, the determination whether the error 'prejudiced' the defendant by causing him to plead guilty rather than go to trial will depend on the likelihood that discovery of the evidence would have led counsel to change his recommendation as to the plea." *Hill*, 474 U.S. at 59. The Court noted that whether counsel would in fact change his recommendation "will depend in large part on a prediction whether the evidence likely would have changed the outcome of the trial." *Id.* The Court then provided another example of circum-

stances that would add credibility to a claim that the defendant actually would have gone to trial. "Similarly, where the alleged error of counsel is a failure to advise the defendant of a potential affirmative defense to the crime charged, the resolution of the 'prejudice' inquiry will depend largely on whether the affirmative defense likely would have succeeded at trial." *Id.*

In suggesting these ways of credibly claiming that a defendant would have insisted on a trial, the Court did not say that to establish prejudice the defendant would have to show that he would have been acquitted. The Court made clear that prejudice consisted in showing that the defendant would have gone to trial, and that speculation as to the outcome of a trial was relevant only to the credibility of a defendant's claim that he actually *would* have gone to trial. Any doubt on this point was removed in the very next paragraph of *Hill*, where the Court applied this standard of prejudice. The Court held that the petitioner had not adequately pleaded prejudice, because he "did not allege in his habeas petition that, had counsel correctly informed him about his parole eligibility date, he would have pleaded not guilty and insisted on going to trial." *Id.* at 60. The Court said nothing about whether the petitioner in *Hill* alleged that he would have been acquitted, because that allegation was not necessary in order to plead prejudice.

In subsequent cases the Court has made the same point—that a defendant will have difficulty establishing a reasonable probability that he would actually have gone to trial, if a rational and well-advised

defendant under the circumstances would not have gone to trial. *See Padilla v. Kentucky*, 130 S. Ct. 1473, 1485 (2010); *Roe v. Flores-Ortega*, 528 U.S. 470, 486 (2000).

The *Hill* standard of prejudice—requiring a credible showing that the defendant would have insisted on going to trial, but *not* requiring a showing that the defendant would have been acquitted—is faithfully applied in all twelve of the federal circuits that hear criminal cases. *See Wilkins v. United States*, 754 F.3d 24, 28 (1st Cir. 2014) (quoting *Hill*); *Chhabra v. United States*, 720 F.3d 395, 408 (2d Cir. 2013) (quoting *Hill*); *United States v. Orocio*, 645 F.3d 630, 644 (3d Cir. 2011) (quoting *Hill*); *United States v. Fugit*, 703 F.3d 248, 260 (4th Cir. 2012) (quoting *Hill*), cert. denied, 134 S. Ct. 999 (2014); *United States v. Juarez*, 672 F.3d 381, 388 (5th Cir. 2012) (quoting *Hill*); *Dando v. Yukins*, 461 F.3d 791, 798 (6th Cir. 2006) (quoting *Hill*); *Payne v. Brown*, 662 F.3d 825, 828 (7th Cir. 2011) (quoting *Hill*); *Gingras v. Weber*, 543 F.3d 1001, 1004 (8th Cir. 2008) (quoting *Hill*); *Hibbler v. Benedetti*, 693 F.3d 1140, 1150 (9th Cir. 2012) (quoting *Hill*), cert. denied, 133 S. Ct. 1262 (2013); *Miller v. Champion*, 262 F.3d 1066, 1072-74 (10th Cir. 2001) (quoting *Hill*), cert. denied, 534 U.S. 1140 (2002); *Gordon v. United States*, 518 F.3d 1291, 1297 (11th Cir. 2008) (quoting *Hill*); *United States v. Berkeley*, 567 F.3d 703, 710 (D.C. Cir. 2009) (quoting *Hill*).

The *Hill* standard of prejudice is also faithfully applied in forty-seven of the other forty-eight states that have addressed the issue, as well as in the Dis-

trict of Columbia.[1] *See Ex parte Coleman*, 71 So. 3d 627, 632 (Ala. 2010) (quoting *Hill*); *Monroe v. State*, 752 P.2d 1017, 1020 (Alaska Ct. App. 1988) (citing *Hill*); *Gonder v. State*, 382 S.W.3d 674, 677-78 (Ark. 2011) (citing *Hill*); *State v. Ysea*, 956 P.2d 499, 504 (Ariz. 1998) (citing *Hill*); *In re Resendiz*, 19 P.3d 1171, 1186 (Cal. 2001) (citing *Hill*); *People v. Garcia*, 815 P.2d 937, 941-42 (Colo. 1991) (discussing *Hill*), cert. denied, 502 U.S. 1121 (1992); *Crawford v. Commissioner of Correction*, 982 A.2d 620, 635 (Conn. 2009) (citing *Hill*); *Grosvenor v. State*, 849 A.2d 33, 35 & n.3 (Del. 2004) (citing *Hill*); *Hilliard v. United States*, 879 A.2d 669, 671 (D.C. Ct. App. 2005) (quoting *Hill*); *Grosvenor v. State*, 874 So. 2d 1176, 1179-81 (Fla. 2004) (discussing *Hill*), cert. denied, 543 U.S. 1000 (2004); *Garrett v. State*, 663 S.E.2d 153, 154 (Ga. 2008) (using the *Hill* standard); *McKeeth v. State*, 103 P.3d 460, 465 (Idaho 2004) (quoting *Hill*); *People v. Rissley*, 795 N.E.2d 174, 204 (Ill. 2003) (quoting *Hill*); *State v. Tate*, 710 N.W.2d 237, 240 (Iowa 2006) (quoting *Hill*); *State v. Adams*,

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[1] The issue appears not to have arisen in Hawaii because the state constitutional standard of prejudice is easier for defendants to satisfy than the federal standard. *See State v. Smith*, 712 P.2d 496, 500 & n.7 (Haw. 1986); *State v. Antone*, 615 P.2d 101, 104 (Haw. 1980). Rhode Island is the only state that joins Indiana in requiring defendants to show that they would have been acquitted had they insisted on going to trial. *See Perkins v. State*, 78 A.3d 764, 768 (R.I. 2013) ("prejudice … in a plea context, means that the applicant would not have pleaded guilty and would have insisted on going to trial and, importantly, that the outcome of the trial would have been different") (citations and internal quotation marks omitted); *Neufville v. State*, 13 A.3d 607, 610-11 (R.I. 2011); *State v Figueroa*, 639 A.2d 495, 500 (R.I. 1994).

304 P.3d 311, 316 (Kan. 2013) (using the *Hill* standard); *Commonwealth v. Eliza*, 284 S.W.3d 118, 120-21 (Ky. 2009) (using the *Hill* standard); *State ex rel. Clement v. Whitley*, 678 So. 2d 538, 538-39 (La. 1996) (quoting *Hill*); *Aldus v. State*, 748 A.2d 463, 468 (Me. 2000) (quoting *Hill*); *Denisyuk v. State*, 30 A.3d 914, 919 (Md. 2011) (quoting *Hill*); *Commonwealth v. Rodriguez*, 5 N.E.3d 519, 521 (Mass. 2014) (using the *Hill* standard); *People v. Fonville*, 804 N.W.2d 878, 896 (Mich. Ct. App. 2011) (using the *Hill* standard); *Campos v. State*, 816 N.W.2d 480, 486 (Minn. 2012) (quoting *Hill*), cert. denied, 133 S. Ct. 938 (2013); *Burrough v. State*, 9 So. 3d 368, 375 (Miss. 2009) (citing *Hill*); *Roberts v. State*, 276 S.W.3d 833, 866 (Mo. 2009) (using the *Hill* standard); *State v. Cobell*, 86 P.3d 20, 23 (Mont. 2004) (using the *Hill* standard); *State v. Yos-Chiguil*, 798 N.W.2d 832, 841 (Neb. 2011) (quoting *Hill*); *Avery v. State*, 129 P.3d 664, 669 & n.13 (Nev. 2006) (citing *Hill*); *State v. Sharkey*, 927 A.2d 519, 522 (N.H. 2007) (using the *Hill* standard); *State v. Gaitan*, 37 A.3d 1089, 1095 (N.J. 2012) (citing *Hill*), cert. denied, 133 S. Ct. 1454 (2013); *State v. Hunter*, 143 P.3d 168, 176 (N.M. 2006) (quoting *Hill*); *People v. Hernandez*, 1 N.E.3d 785, 787-88 (N.Y. 2013) (quoting *Hill*), cert. denied, 134 S. Ct. 1900 (2014); *State v. Tinney*, 748 S.E.2d 730, 737 (N.C. Ct. App. 2013) (using the *Hill* standard); *Bahtiraj v. State*, 840 N.W.2d 605, 611 (N.D. 2013) (quoting *Hill*); *State v. Ketterer*, 855 N.E.2d 48, 64 (Ohio 2006) (quoting *Hill*); *Braun v. State*, 909 P.2d 783, 789-90 (Okla. Ct. Crim. App. 1995) (quoting *Hill*), cert. denied, 517 U.S. 1144 (1996); *Moen v. Peterson*, 824 P.2d 404, 409 (Or. 1991) (citing *Hill*);

Commonwealth v. Hickman, 799 A.2d 136, 141 (Pa. Super. 2002) (citing *Hill*); *Stalk v. State*, 681 S.E.2d 592, 594 (S.C. 2009) (quoting *Hill*); *Owens v. Russell*, 726 N.W.2d 610, 616 (S.D. 2007) (quoting *Hill*); *Calvert v. State*, 342 S.W.3d 477, 486 (Tenn. 2011) (quoting *Hill*); *Ex parte Imoudu*, 284 S.W.3d 866, 869 (Tex. Ct. Crim. App. 2009) (citing *Hill*); *Benvenuto v. State*, 165 P.3d 1195, 1202 & n.32 (Utah 2007) (citing *Hill*); *In re Fisher*, 594 A.2d 889, 896 (Vt. 1991) (quoting *Hill*); *Lewis v. Warden*, 645 S.E.2d 492, 506 (Va. 2007) (citing *Hill*); *State v. Sandoval*, 249 P.3d 1015, 1021 (Wash. 2011) (using the *Hill* standard); *State ex rel. Vernatter v. Warden*, 528 S.E.2d 207, 214 (W. Va. 1999) (quoting *Hill*); *State v. Burton*, 832 N.W.2d 611, 626 (Wis. 2013) (citing *Hill*); *Floyd v. State*, 144 P.3d 1233, 1237 (Wyo. 2006) (quoting *Hill*).

Several of the federal Courts of Appeals have explained, just as this Court did in *Hill*, that the defendant's likelihood of success at trial is relevant to the prejudice determination only as evidence of whether the defendant actually would have gone to trial if he had been properly advised. As Judge Ebel summarized these cases in a painstaking opinion for the Tenth Circuit, "while other circuits have considered the strength of the prosecution's case as circumstantial evidence of whether a petitioner would have changed his plea, and therefore whether he was prejudiced, none has held a petitioner must show that the case would likely have failed had it gone to trial." *Miller*, 262 F.3d at 1074. "Rather, these cases frequently state that the strength of the case that could have been mounted against one pleading guilty

to a crime is relevant only because it offers circumstantial evidence of what the petitioner would have done had his counsel not proved to be ineffective." *Id.* For this reason, the Tenth Circuit concluded: "Accordingly, in light of the Supreme Court's opinion in [*Hill v.*] *Lockhart*, our own precedent concerning prejudice in the context of a guilty plea, and the overwhelming weight of authority among the other federal circuits, we hold the district court erred by requiring Miller to prove a reasonable probability existed not only that he would have insisted on trial but for his counsel's mistakes, but also that there was a likelihood that he would have prevailed at trial." *Id.*

The same point has been made by some of the state supreme courts as well. *See, e.g.*, *Resendiz*, 19 P.3d at 1187 (California) ("In determining whether or not a defendant who has pled guilty would have insisted on proceeding to trial had he received competent advice, an appellate court may also consider the probable outcome of any trial"); *Rissley*, 795 N.E.2d at 205 (Illinois) (considering what might have happened at a trial as evidence of the credibility of the defendant's claim that he would have gone to trial because "[t]he bare allegation that, but for the mistaken advice, a defendant would have insisted on trial, without something more, is not enough").

Because this Court has spoken so clearly, there should not be any conflict among the lower courts. To establish prejudice, a defendant seeking to vacate a guilty plea on ineffective assistance grounds must show—credibly, with something beyond a bare alle-

gation—that had he been competently advised he would not have pled guilty but would have gone to trial instead. The defendant need not also show that had he gone to trial he would have been acquitted.

B. The Indiana Supreme Court persists in requiring defendants to show that had they gone to trial they would have been acquitted.

The Indiana Supreme Court first considered this issue in *State v. Van Cleave*, 674 N.E.2d 1293 (Ind. 1996), cert. denied, 522 U.S. 1119 (1998). "The question we decide today is one of first impression in Indiana," the court declared: "whether it is sufficient to set aside a conviction if the postconviction court concludes that there is a reasonable probability the defendant would not have pleaded guilty but for the deficient performance, or must the defendant establish a reasonable probability that the ultimate result—conviction—would have been different had counsel met the reasonableness standard." *Id.* at 1296. The court determined that the latter was the correct standard: "Van Cleave has not shown a reasonable probability that he would have been acquitted at trial, and therefore he has not shown any prejudice due to his lawyer's performance leading to his guilty plea." *Id.*

The Indiana Supreme Court acknowledged that *Hill v. Lockhart* held otherwise. "In *Hill*, the Court stated that 'in order to satisfy the "prejudice" requirement, the defendant must show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have

insisted on going to trial." *Id.* at 1297 (quoting *Hill*, 474 U.S. at 59). The Indiana Supreme Court conceded that the result it was reaching was contrary to a plain reading of *Hill*. "This language from *Hill*, standing alone, suggests that prejudice is a function of the outcome of the plea proceedings, i.e., if the defendant would not have pleaded guilty but for the attorney's shortcomings, the prejudice prong of *Strickland* is satisfied." *Van Cleave*, 674 N.E.2d at 1297.

But the Indiana Supreme Court thought that "*Hill* itself is not entirely clear on this point." *Id.* The Indiana Supreme Court quoted the portion of *Hill* that discusses how a likelihood of success at trial would support the credibility of a defendant's claim that he actually would have gone to trial if he had been properly advised. *Id.* And then came the court's first mistake. The Indiana Supreme Court misinterpreted this portion of *Hill* to mean that a defendant had to show, not just that he would have gone to trial, but that "the evidence or affirmative defenses the lawyer should have uncovered or presented would likely have led to an acquittal." *Id.* This misreading rendered *Hill* ambiguous. Misread in this way, *Hill* stated two inconsistent standards of prejudice, one right after the other: first, that a defendant had to show that he would have gone to trial, and second, that a defendant had to show that he would have been acquitted.

The Indiana Supreme Court then attempted to clear up the ambiguity it had manufactured by misinterpreting *Hill*. The court turned to *Lockhart v.*

Fretwell, 506 U.S. 364, 369 (1993), which held that no prejudice can flow from counsel's failure to make an incorrect legal argument, because in such a case the result of the proceeding was neither "fundamentally unfair [n]or unreliable." Then came the court's second mistake. The Indiana Supreme Court misread *Fretwell* to modify the standard of prejudice in *all* ineffective assistance cases, not just those in which counsel fails to make an incorrect legal argument. "[U]nder *Fretwell*," the Indiana Supreme Court concluded, "a different outcome at the plea stage but for counsel's errors is constitutionally insignificant if the ultimate result that was reached was neither unfair nor unreliable." *Van Cleave*, 674 N.E.2d at 1298.

The Indiana Supreme Court determined that *Fretwell* (which it misinterpreted) cleared up the ambiguity in *Hill* (which ambiguity would not have existed but for its own misinterpretation of *Hill*). "We conclude that to the extent *Hill* does not require a defendant to show a reasonable probability of acquittal to prove prejudice in the ineffective assistance context, *Fretwell* requires that showing. Otherwise stated, to show prejudice after a guilty plea—i.e., to establish that a conviction was unfair or unreliable—the defendant must establish a reasonable probability that the trial would not have resulted in that conviction." *Id.* at 1300.

Time did not treat this conclusion well. Within a few years, this Court clarified that *Fretwell* had not modified the prejudice standard of *Hill* and *Strickland*. *Williams v. Taylor*, 529 U.S. 362, 393-95

(2000); *Glover v. United States*, 531 U.S. 198, 202-03 (2001). This clarification should have caused the Indiana Supreme Court to bring its standard of prejudice in line with the standard used by this Court and by other lower courts.

Instead, the Indiana Supreme Court came up with a new justification for requiring defendants to show that they would have been acquitted at trial, a justification based on the court's view of sound policy rather than on precedent. The court could no longer rely on *Fretwell*, it acknowledged, "[n]ow that *Williams* has made clear that *Fretwell* did not alter *Strickland*." *Segura v. State*, 749 N.E. 496, 503 (Ind. 2001). But the Indiana Supreme Court reached the same result without *Fretwell*. "This result seems preferable for several reasons," the court declared:

> In *Van Cleave* we identified sound reasons for requiring that a petitioner who pleads guilty show a reasonable probability of acquittal in order to prevail in a postconviction attack on the conviction based on a claim of ineffective assistance of counsel. [674 N.E.2d] at 1300-02. As *Hill* emphasized, the State has an interest in the finality of guilty pleas. 474 U.S. at 58, 106 S. Ct. 366. This is in part grounded in the cost of a new trial, and the demands on judicial resources that are imposed by revisiting the guilty plea, *see United States v. Timmreck*, 441 U.S. 780, 784-85, 99 S. Ct. 2085, 60 L.Ed.2d 634 (1979), but also in concerns about the toll a retrial exacts from victims and wit-

> nesses who are required to revisit the crime years later.
>
> A new trial is of course necessary if an unreliable plea has been accepted. But its costs should not be imposed needlessly, and that would be the result if the petitioner cannot show a reasonable probability that the ultimate result—conviction—would not have occurred despite counsel's error as to a defense.

Segura, 749 N.E.2d at 503.

The law in Indiana has not changed since *Segura*. The Indiana Supreme Court still requires defendants to show that they would have been acquitted had they gone to trial. *See Helton v. State*, 907 N.E.2d 1020, 1023-24 (Ind. 2009); *Smith v. State*, 770 N.E.2d 290, 295 (Ind. 2002).

C. The Indiana Supreme Court's idiosyncratic prejudice standard has been repeatedly criticized by other lower courts.

Indiana's idiosyncratic standard of prejudice has been criticized, time and time again, by other lower courts.

The most pointed criticism has come from the Seventh Circuit, which hears the habeas cases filed by Indiana prisoners. In Judge Easterbrook's opinion for the Seventh Circuit in *Payne*, he lambasted the Indiana Supreme Court for making the "mistake" of concluding "that the Supreme Court of the United States couldn't have meant what it said in *Hill*." *Payne*, 662 F.3d at 828. Judge Easterbrook explained

that "[t]he understanding of *Fretwell* reflected in *Segura* and *Van Cleave* [the relevant Indiana Supreme Court decisions] did not survive the decisions in *Williams v. Taylor*, 529 U.S. 362, 120 S. Ct. 1495, 146 L.Ed.2d 389 (2000), and *Glover v. United States*, 531 U.S. 198, 121 S. Ct. 696, 148 L.Ed.2d 604 (2001), which establish that *Fretwell* must not be understood to change the prejudice inquiry otherwise appropriate under *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L.Ed.2d 674 (1984), and *Hill*." *Payne*, 662 F.3d at 828. The Seventh Circuit accordingly found that Indiana's prejudice standard is contrary to clearly established federal law under 28 U.S.C. § 2254(d)(1). *Payne*, 662 F.3d at 828.

Prosecutors in several states have urged their state supreme courts to adopt Indiana's standard, but the state supreme courts have uniformly rejected these suggestions. *See Ysea*, 956 P.2d at 504-05 (Arizona); *Grosvenor*, 874 So. 2d at 1179-81 (Florida); *McKeeth*, 103 P.3d at 465 (Idaho); *Yos-Chiguil*, 798 N.W.2d at 841-44 (Nebraska); *Floyd*, 144 P.3d at 1236-38 (Wyoming). As the Arizona Supreme Court concluded, "[t]he issue is not whether counsel's errors prejudiced the outcome of a trial that was never held but whether counsel's error prejudiced Ysea by inducing him to make an involuntary plea agreement and consequently give up his right to trial." *Ysea*, 956 P.2d at 505. In the words of the Florida Supreme Court, "the proper interpretation of *Hill* is to follow its express language. The merits of any defense, as the Court explained in *Hill*, is relevant to the *credibility* of the defendant's assertion that he would have insisted on going to trial." *Grosvenor*,

874 So. 2d at 1181. Or as the Idaho Supreme Court put it, "the likelihood that without counsel's errors a defendant may or may not have been able to prevail at trial is relevant only to the extent it sheds light on the defendant's state of mind when he pleaded guilty." *McKeeth*, 103 P.3d at 465.

The Nebraska Supreme Court may have said it best, while rebuffing the attempt of the state's Attorney General to persuade the court to adopt the Indiana standard of prejudice:

> The State seizes on language in [*Hill*] and argues that Yos-Chiguil must show that his defense will ultimately be successful at trial. The State argues that to merely claim that he would have insisted on a trial is not enough.
>
> We, however, do not read *Hill* as the State does. Under our reading, a defendant must only allege facts showing a reasonable probability that he would have insisted on going to trial had counsel informed him of the defense. The viability of the defense is relevant as to how it would have reasonably affected the defendant's decision whether to plead guilty or go to trial. But it is not the sole factor to consider.
>
> … Other relevant factors could include the benefit of an offered plea bargain or the potential penalties the defendant faces. We do not believe that the ultimate merits of the defense are the only consideration. But they are relevant to whether the defendant would, in the light of all the circumstances known to him at

> the time, roll the dice on that defense and insist on going to trial.

Yos-Chiguil, 798 N.W.2d at 842-43.

The Third Circuit and the supreme courts of two states, Connecticut and Mississippi, initially made the same mistake as the Indiana Supreme Court, but all three courts then recognized the mistake and corrected it.

The Third Circuit initially required a defendant to show that he would have been acquitted had he gone to trial. *United States v. Nino*, 878 F.2d 101, 105 (3d Cir. 1989). But the court later acknowledged that *Nino* was wrong in this respect. Judge Pollak, sitting by designation, explained in his opinion for the Third Circuit: "The Supreme Court, however, requires only that a defendant could rationally have gone to trial in the first place, and it has never required an affirmative demonstration of likely acquittal at such a trial as the *sine qua non* of prejudice." *Orocio*, 645 F.3d at 643 (citing *Hill*, 474 U.S. at 59). The Third Circuit accordingly determined that *Nino* had been superseded by intervening precedent from this Court. "Therefore, *Nino*'s requirement that a defendant affirmatively show that he would have been acquitted in order to establish prejudice in this context is no longer good law." *Orocio*, 645 F.3d at 644.

The Connecticut Supreme Court at first required a defendant to show "the likelihood that the introduction of the evidence or defense that was not identified because of ineffective assistance of counsel would have been successful at trial." *Copas v. Commissioner of Correction*, 662 A.2d 718, 726 (Conn.

1995). Later, however, the Connecticut Supreme Court construed *Copas* as simply a restatement of the *Hill* standard, "that there is a reasonable probability that, but for counsel's errors, [the defendant] would not have pleaded guilty and would have insisted on going to trial." *Johnson v. Commissioner of Correction*, 941 A.2d 248, 261 (Conn. 2008) (quoting *Hill* and citing both *Hill* and *Copas*). In subsequent cases, the Connecticut Supreme Court has applied the *Hill* standard without even mentioning *Copas*. *See Crawford*, 982 A.2d at 635; *Washington v. Commissioner of Correction*, 950 A.2d 1220, 1245 (Conn. 2008).

The Mississippi Supreme Court also initially required defendants "to delineate facts which, if proven, would show the likelihood of success at trial." *Mowdy v. State*, 638 So. 2d 738, 742 (Miss. 1994). In more recent cases, however, the court has applied the *Hill* standard correctly, without any mention of *Mowdy*. *See Burrough*, 9 So. 3d at 375; *Reeder v. State*, 783 So. 2d 711, 718-19 (Miss. 2001); *State v. Pittman*, 744 So. 2d 781, 786 (Miss. 1999).

Whenever a lower court has given thoughtful consideration to adopting Indiana's standard, the court has always rejected Indiana's standard as inconsistent with *Hill*.

D. This issue arises frequently in Indiana, but the Indiana Supreme Court has repeatedly declined to reconsider its unique prejudice standard.

The Indiana courts apply the state's unique prejudice standard many times each year, because the

issue arises whenever a defendant seeks to vacate a guilty plea on grounds of ineffective assistance of counsel. *See, e.g.*, *Craig v. State*, 2014 WL 4177257, *7 (Ind. Ct. App. 2014) (unpublished opinion); *Romero v. State*, 2014 WL 3906199, *3 (Ind. Ct. App. 2014) (unpublished opinion); *Honaker v. State*, 2014 WL 2202760, *7 (Ind. Ct. App. 2014) (unpublished opinion); *Fields v. State*, 2013 WL 5968810, *3 (Ind. Ct. App. 2013) (unpublished opinion); *O'Neal v. State*, 2013 WL 5676280, *2 (Ind. Ct. App. 2013) (unpublished opinion); *Vazquez v. State*, 2013 WL 5303731, *5 (Ind. Ct. App. 2013) (unpublished opinion); *Ivester v. State*, 2013 WL 4727536, *2 (Ind. Ct. App. 2013) (unpublished opinion); *Jorman v. State*, 2013 WL 4010999, *4 (Ind. Ct. App. 2013) (unpublished opinion); *Long v. State*, 2013 WL 3376946, *3 (Ind. Ct. App. 2013); *Williams v. State*, 2013 WL 2368310, *4 (Ind. Ct. App. 2013) (unpublished opinion); *McCullough v. State*, 987 N.E.2d 1173, 1178 (Ind. Ct. App. 2013); *Pounds v. State*, 2013 WL 264712, *3 (Ind. Ct. App. 2013) (unpublished opinion).

The instant case is just the most recent in which defendants have asked the Indiana Supreme Court to correct its erroneous prejudice standard. The court has declined to review any of these cases. In opposing review, the Indiana Attorney General defends the state's standard as the proper interpretation of *Hill v. Lockhart*, and criticizes the Seventh Circuit's *Payne* decision as a misreading of *Hill*. *See* (in addition to the instant case) Brief in Opposition to Transfer, 6-7, *Fleenor v. State*, available at 2014 WL 4116702; Brief in Response to Transfer, 4-6

Eisele v. State, available at 2013 WL 7087967. The Indiana Supreme Court presumably agrees that this Court, every federal circuit court, and nearly every state court is wrong. At any rate, it has repeatedly refused to grant review on this issue, despite many opportunities to do so.

Because the Indiana Supreme Court persists in flouting this Court's clear precedent, while virtually every other court in the country applies the correct standard of prejudice, summary reversal is appropriate.

II. This is an appropriate case in which to correct the Indiana Supreme Court's persistent error, because while petitioner cannot show that he would have been acquitted at trial, he *can* show that he would have gone to trial if he had been competently represented.

The standard of prejudice will make a big difference in this case. Juan Manzano cannot show that he would have been acquitted had he gone to trial. The outcome of a trial would have turned on whether his intoxication could have negated the mens rea required to commit rape. Intoxication defenses do succeed sometimes, but the likelihood of the defense succeeding in this case would probably have been less than fifty percent.

Nevertheless, if Manzano were given the opportunity on remand to show that he would have gone to trial if he had been competently represented, he can make that showing. Whether it makes sense to

go to trial depends on what the alternatives are. Manzano would have had no good alternatives. Without any plea agreement, the only alternative was an open plea to a crime that was frankly horrific. An open plea was almost certain to result in the maximum fifty-year sentence (as indeed it did). With these choices, going to trial would have been practically riskless for Manzano, because the worst-case scenario would have been the same fifty-year sentence he was sure to get by pleading guilty. Going to trial offered at least the possibility of an acquittal or a conviction on one of the lesser charges. In this situation, a rational and well-advised defendant would go to trial, even if success at trial was a longshot, because the alternatives were worse.

This is the kind of prejudice calculation the Indiana courts should have undertaken. They never did, because of the Indiana Supreme Court's adherence to its mistaken prejudice standard.

CONCLUSION

The petition for a writ of certiorari should be granted, the judgment below vacated, and the case remanded for the Indiana courts to apply the correct standard of prejudice. In the alternative, the petition for a writ of certiorari should be granted and the case set for argument.

Respectfully submitted,

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APPENDIX A

12 N.E.3d 321
Court of Appeals of Indiana.
Juan MANZANO, Appellant–Petitioner,
v.
STATE of Indiana, Appellee–Respondent.
No. 48A02–1310–PC–905
July 15, 2014.

MATHIAS, Judge.

In 1997, in Madison Circuit Court, Juan Manzano ("Manzano") pleaded guilty to and was convicted of Class A felony rape and ordered to serve fifty years executed in the Department of Correction. Manzano has now filed a petition for post-conviction relief arguing that his trial counsel and appellate counsel were ineffective. The post-conviction court denied his petition, and Manzano appeals.

Concluding that Manzano did not receive ineffective assistance of trial or appellate counsel, we affirm.

Facts and Procedural History

On September 14, 1996, Manzano's now ex-wife left their two children in his care while she worked an overnight shift for her employer. While his six-year-old daughter and four-year-old son were sleeping, Manzano went to several bars with two co-workers and consumed alcohol. When Manzano returned home sometime in the early morning hours on September 14, he removed B.M., his six-year-old daughter, from her bed, removed her clothing and placed the child in his bed. Manzano then raped his

daughter. As a result, six-year-old B.M. suffered a tear from the opening of her vagina to the opening of her rectum.

The following morning, after his wife returned home, Manzano went to work at the Red Gold Factory. Shortly thereafter, B.M. appeared in the kitchen with blood on her legs. B.M.'s mother called the police and took B.M. to the emergency room. B.M. had emergency surgery to repair her injury and was hospitalized for several days.

B.M. identified Manzano as her attacker, and Manzano was arrested later that morning. He gave a statement to the police and initially claimed that he did not remember anything that had happened. However, he stated that if B.M. claimed that he raped her, he must have done so. Manzano later admitted that he attempted to put his penis "inside her vagina" and remembered B.M. saying "no ... over and over." Appellant's App. pp. 243–45.

On September 16, 1996, Manzano was charged with Class A felony child molesting, Class A felony rape, Class B felony incest, and Class C felony battery. Prior to pleading guilty, Manzano filed a notice of intent to pursue an intoxication defense and a motion to suppress his statement to the police. A suppression hearing was scheduled for April 7, 1997, but on that date, Manzano agreed to plead guilty to Class A felony rape. At the sentencing hearing held on May 5, 1997, the trial court ordered Manzano to serve fifty years executed in the Department of Correction. Our court affirmed his fifty-year sentence on direct appeal. *Manzano v. State*, No. 48A02–9708–

CR–529, 691 N.E.2d 517 (Ind. Ct. App. Jan. 28, 1998).

On February 28, 2006, Manzano filed a pro se petition for post-conviction relief. The State denied the allegations in the petition. Manzano's petition languished until June 8, 2012, when he filed an amended petition. Shortly thereafter, counsel entered an appearance on Manzano's behalf. The post-conviction court held evidentiary hearings on February 25 and April 15, 2013. The court found that Manzano did not receive ineffective assistance of trial and appellate counsel and denied his petition for post-conviction relief. Manzano now appeals. Additional facts will be provided as necessary.

I. Post–Conviction Standard of Review

Post-conviction proceedings are not "super appeals" through which convicted persons can raise issues they failed to raise at trial or on direct appeal. *McCary v. State*, 761 N.E.2d 389, 391 (Ind. 2002). Rather, post-conviction proceedings afford petitioners a limited opportunity to raise issues that were unavailable or unknown at trial and on direct appeal. *Davidson v. State*, 763 N.E.2d 441, 443 (Ind. 2002). A post-conviction petitioner bears the burden of establishing grounds for relief by a preponderance of the evidence. *Henley v. State*, 881 N.E.2d 639, 643 (Ind. 2008). On appeal from the denial of post-conviction relief, the petitioner stands in the position of one appealing from a negative judgment. *Id.* To prevail on appeal from the denial of post-conviction relief, the petitioner must show that the evidence as a whole leads unerringly and unmistakably to a con-

clusion opposite that reached by the post-conviction court. *Id.* at 643–44.

Where, as here, the post-conviction court makes findings of fact and conclusions of law in accordance with Indiana Post–Conviction Rule 1(6), we cannot affirm the judgment on any legal basis, but rather, must determine if the court's findings are sufficient to support its judgment. *Graham v. State*, 941 N.E.2d 1091, 1096 (Ind. Ct. App.2011), *aff'd on reh'g*, 947 N.E.2d 962. Although we do not defer to the post-conviction court's legal conclusions, we review the post-conviction court's factual findings under a clearly erroneous standard. *Id.* Accordingly, we will not reweigh the evidence or judge the credibility of witnesses, and we will consider only the probative evidence and reasonable inferences flowing therefrom that support the post-conviction court's decision. *Id.*

II. Ineffective Assistance of Trial Counsel

Manzano contends that the post-conviction court clearly erred in denying his claim of ineffective assistance of trial counsel. Our supreme court summarized the law regarding claims of ineffective assistance of trial counsel in *Timberlake v. State* as follows:

> A defendant claiming a violation of the right to effective assistance of counsel must establish the two components set forth in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). First, the defendant must show that counsel's performance was deficient. This requires a showing

that counsel's representation fell below an objective standard of reasonableness, and that the errors were so serious that they resulted in a denial of the right to counsel guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. 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. A reasonable probability is a probability sufficient to undermine confidence in the outcome.

Counsel is afforded considerable discretion in choosing strategy and tactics, and we will accord those decisions deference. A strong presumption arises that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. The *Strickland* Court recognized that even the finest, most experienced criminal defense attorneys may not agree on the ideal strategy or the most effective way to represent a client. Isolated mistakes, poor strategy, inexperience, and instances of bad judgment do not necessarily render representation ineffective. The two prongs of the *Strickland* test are separate and independent inquiries. Thus, [i]f it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice ... that course should be followed.

753 N.E.2d 591, 603 (Ind. 2001) (citations and quotations omitted).

A. The Ineffective Assistance of Trial Counsel Standard as it Relates to Guilty Plea Proceedings

Before we address Manzano's specific arguments, it is important to observe that "[t]here are two different types of ineffective assistance of counsel claims that can be made in regards to guilty pleas: (1) failure to advise the defendant on an issue that impairs or overlooks a defense and (2) an incorrect advisement of penal consequences." *McCullough v. State*, 987 N.E.2d 1173, 1176 (Ind. Ct. App.2013) (citing *Segura v. State*, 749 N.E.2d 496, 500 (Ind. 2001)); *see also Smith v. State*, 770 N.E.2d 290, 295 (Ind. 2002). Our supreme court has observed:

> We conclude that *Hill [v. Lockhart*, 474 U.S. 52, 106 S.Ct. 366, 88 L.Ed.2d 203 (1985)] standing alone requires a showing of a reasonable probability of success at trial if the alleged error is one that would have affected a defense. This result seems preferable for several reasons. In *[State v.] Van Cleave*, [674 N.E.2d 1293 (Ind. 1996),] we identified sound reasons for requiring that a petitioner who pleads guilty show a reasonable probability of acquittal in order to prevail in a postconviction attack on the conviction based on a claim of ineffective assistance of counsel. As *Hill* emphasized, the State has an interest in the finality of guilty pleas. This is in part grounded in the cost of a new trial, and the demands

> on judicial resources that are imposed by revisiting the guilty plea, but also in concerns about the toll a retrial exacts from victims and witnesses who are required to revisit the crime years later.

Segura, 749 N.E.2d at 503 (citations omitted).[1] Therefore, our supreme court concluded that "[a] new trial is of course necessary if an unreliable plea has been accepted. But its costs should not be imposed needlessly, and that would be the result if the petitioner cannot show a reasonable probability that the ultimate result—conviction—would not have occurred despite counsel's error as to a defense." *Id.*

Importantly, the decision to enter a guilty plea is largely the defendant's decision, and is therefore different from the tactical or investigatory steps that are the bases of most claims of ineffective assistance of counsel. *Id.* at 503–04. In *State v. Van Cleave*, our supreme court reasoned:

> Demonstrating prejudice seems particularly appropriate in the context of a claim of inef-

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[1] In *Payne v. Brown*, 662 F.3d 825, 828 (7th Cir. 2011), the Seventh Circuit rejected the *Segura* holding and concluded that our supreme court misinterpreted the United States Supreme Court's holding in *Hill v. Lockhart*, 474 U.S. 52, 106 S.Ct. 366, 88 L.Ed.2d 203 (1985). The Seventh Circuit concluded that *Hill* "holds that a person who contends that ineffective assistance of counsel induced him to plead guilty establishes 'prejudice' by demonstrating that, but for counsel's errors, he would have insisted on a trial." *Id.* Because the Seventh Circuit's "decisions on questions of federal law are not binding on state courts," *see Jackson v. State*, 830 N.E.2d 920, 921 (Ind. Ct. App.2005), we apply the standard established by our supreme court in *Segura*.

> fective assistance by a defendant who has pleaded guilty. The guilty plea, virtually uniquely among all procedural steps, involves the judgment of the defendant as well as his attorney.... [T]he decision to plead is often strongly if not overwhelmingly influenced by the attorney's advice. But it is equally true that the defendant appreciates the significance of the plea and is uniquely able to evaluate its factual accuracy. The requirement that the court satisfy itself as to the factual basis for the plea is designed to ensure that only guilty defendants plead guilty, and also that the defendant's decision to waive a jury trial is an informed and reflective one. Many decisions at trial—calling a given witness, asserting a defense, or the extent of cross-examination—are difficult if not impossible for the defendant to make, and reliance on counsel is unavoidable. In contrast, the decision whether to plead guilty is ultimately the prerogative of the defendant, and the defendant alone. More than conjecture or hope for a lucky break at trial should be required to upset that action years later.

674 N.E.2d at 1301. Likewise, "if the error or omission has the result of overlooking evidence or circumstances that affect the sentence imposed, prejudice is evaluated by the reasonable probability that it had that effect." *Segura*, 749 N.E.2d at 504. Accordingly, we focus our inquiry on whether there is a reasonable probability that Manzano would have succeeded at trial.

There is little to no probability that Manzano would have prevailed at trial. He did not deny raping his daughter, and B.M. identified him as the perpetrator of the offense. Moreover, given the extensive injury to six-year-old B.M.'s vagina and rectum, Manzano does not dispute the evidence that he penetrated his daughter's vagina with his penis.

B. Intoxication Defense

Manzano and his counsel discussed and planned to raise the defense of intoxication at trial. On the date Manzano committed the offense, evidence of voluntary intoxication could be used to negate the requisite mens rea of rape.[2] *See Sanchez v. State*, 749 N.E.2d 509, 512 (Ind.2001).

Evidence of Manzano's level of intoxication on the night he raped his daughter is conflicting. Daniel Garza was with Manzano before he raped his daughter and told the police that Manzano consumed numerous alcoholic beverages and that he was drunk. But Garza also stated that Manzano was able to walk without assistance. Trial Record of Proceedings p. 46. When the police officers arrested Manzano on the morning of September 14, 1996, he did not appear to be under the influence of alcohol. The officers administered a breathalyzer test to Manzano, and the results registered a blood alcohol content of zero.

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[2] In 1997, the General Assembly eliminated voluntary intoxication as a defense in prosecution for a criminal offense. *See Sanchez*, 749 N.E.2d at 513; *see also* Ind.Code § 35–41–3–5.

Trial counsel did not believe that Manzano was likely to prevail on an voluntary intoxication defense. We agree. Had Manzano proceeded to trial and argued that the requisite mens rea for the crime of rape was negated by his voluntary intoxication, it is not reasonably probable that he would have succeeded in this defense.

But Manzano also argues that his defense counsel should have also pursued a defense of involuntary intoxication in light of his self-serving claim that he cannot remember committing the offense. Aside from Manzano's claimed lack of recall, there is no evidence in the record that would support a defense of involuntary intoxication. And Manzano admitted to the investigating detective that he attempted to put his penis "inside her vagina" and remembered B.M. saying "no ... over and over." Appellant's App. pp. 243–45.

C. Motions to Suppress

Trial counsel filed a motion to suppress Manzano's statement because the video and transcribed statement did not include a waiver of rights. But after the prosecutor provided trial counsel with a signed copy of Manzano's advisement of rights waiver, trial counsel opined that the motion to suppress would be denied. Trial Record of Proceedings at 113.

Manzano also expresses concern that trial counsel failed to file a motion to suppress evidence obtained during the search of his home and from DNA samples taken from Manzano. And trial counsel allowed Manzano to plead guilty on the date they received the DNA test results from the State. But this evi-

dence is merely cumulative of other evidence that Manzano was the assailant who raped B.M., including B.M.'s identification of her father as the man who raped her. And Manzano has not established lack of consent to search his home or to collect DNA samples, but simply speculates that there may not have been consent.[3] Moreover, Manzano does not argue the likelihood of success of said motions, just that trial counsel was ineffective for failing to file them.

Manzano also raises other claims concerning alleged "discovery problems" but does not argue how these discovery violations prejudiced him.[4] Manzano argues "[t]rial by surprise is not fair and undermines the way in which the criminal justice system should work." Appellant's Br. at 12. Manzano's claims of surprise concerning DNA results are disingenuous in light of his daughter's accusation and his own admission to the police that he raped his daughter. Again, we observe that Manzano's appellate and re-

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[3] Manzano was arrested at his home and does not remember whether he gave police consent to search it. Tr. p. 84.

[4] Manzano emphasizes the State's inability to produce an audible and/or transcribed copy of Casimiro Loera's statement, the other co-worker who was drinking with Manzano on the night he raped his daughter. Loera is now deceased. The State also failed to discover and/or disclose to Manzano that Loera had a lengthy criminal history. However, Manzano fails to establish prejudice or that access to Loera's statement would have resulted in acquittal if he had taken the case to trial. Manzano merely speculates that Loera's statement could have supported an involuntary intoxication defense. We again observe that Manzano's claim that he could have possibly raised an involuntary intoxication defense is supported only by his self-serving statement that he cannot remember raping his daughter.

ply briefs focus on what trial counsel could have done as a result of the State's alleged discovery violations, but he fails to argue how he was prejudiced as a result. Manzano has not argued that he would have succeeded at trial absent these alleged errors had he not pleaded guilty, and given the circumstances of this case, and as acknowledged by trial counsel, Manzano's likelihood of acquittal was slim to none.

D. The Sentencing Proceedings

Finally, Manzano claims that his trial counsel was ineffective for failing "to object to improper aggravating circumstances and his omission in not arguing valid mitigating circumstances." *Id.* at 12. Manzano argues that "[p]rejudice occurred because Manzano received the maximum sentence; despite the fact he pled open he received the harshest sentence possible." *Id.*

However, Manzano does not argue which aggravating circumstances the trial court relied on were allegedly improper. During the sentencing hearing, Manzano's trial counsel argued that the serious bodily injury to B.M. was an element of the offense, so it should not be considered in imposing sentence. Counsel also argued that Manzano's prior criminal record was "mild." Trial Record of Proceedings p. 185. Counsel claimed that Manzano's remorse and cooperation with the police should be considered as mitigating, and counsel appropriately focused much of his argument on the weight to be given to Manzano's guilty plea. Finally, counsel noted Manzano's

good behavior while incarcerated during the trial proceedings.

The only mitigating circumstance Manzano specifically argues that counsel failed to raise was that his prolonged incarceration would result in hardship on his family. It is not likely the trial court would have valued this mitigator even if it had been raised because Manzano's family, and most particularly his daughter, were the victims of the offense. And the Class A felony conviction subjected Manzano to, at a minimum, a lengthy twenty-year term of incarceration. *See* Ind.Code § 35–50–2–4.

Finally, after the guilty plea hearing concluded, the trial court allowed Manzano's ex-wife to give victim impact testimony for the purposes of sentencing because she desired to return to Texas and did not want to make a return trip to Indiana. This was unorthodox and Manzano's counsel failed to object, but again, Manzano has failed to establish prejudice as a result.

E. Conclusion

We cannot conclude that Manzano established that he was subjected to ineffective assistance of trial counsel. Under the facts and circumstances of this case, Manzano cannot prove that, absent counsel's alleged errors, there is a reasonable probability that he would have been acquitted if he had proceeded to trial. Finally, although it is generally true that a trial court should not impose a maximum sentence when a defendant pleads guilty, it is evident from the trial record that Manzano's decision to plead guilty was a pragmatic one. Accordingly, Manzano

was not subjected to ineffective assistance of trial counsel during the sentencing proceedings because his heinous offense and the horrific injury to his six-year-old daughter supports the maximum sentence imposed.

III. Ineffective Assistance of Appellate Counsel

Manzano also claims that his appellate counsel was constitutionally ineffective for failing to raise certain issues concerning his sentence. When we review claims of ineffective assistance of appellate counsel, we use the same standard applied to claims of ineffective assistance of trial counsel: the post-conviction petitioner must show that appellate counsel's performance fell below an objective standard of reasonableness and that there is a reasonable probability that, but for the deficient performance of counsel, the result of the proceeding would have been different. *Harris v. State*, 861 N.E.2d 1182, 1186 (Ind. 2007).

To show that counsel was ineffective for failing to raise an issue on appeal, the defendant must overcome the strongest presumption of adequate assistance, and judicial scrutiny is highly deferential. *Reed v. State*, 856 N.E.2d 1189, 1195 (Ind. 2006). To evaluate the performance prong when counsel failed to raise issues upon appeal, we apply the following test: (1) whether the unraised issues are significant and obvious from the face of the record and (2) whether the unraised issues are "clearly stronger" than the raised issues. *Id.* If the analysis under this test demonstrates deficient performance, then we examine whether "the issues which ... appellate

counsel failed to raise, would have been clearly more likely to result in reversal or an order for a new trial." *Id*. Ineffective assistance is very rarely found in cases where a defendant asserts that appellate counsel failed to raise an issue on direct appeal because the decision of what issues to raise is one of the most important strategic decisions to be made by appellate counsel. *Id*.

Manzano claims appellate counsel was ineffective for failing to argue that the trial court should have, but failed to consider the following alleged mitigating circumstances: 1) that his incarceration would place undue hardship on his dependents, 2) that he cooperated with the authorities, and 3) that he was remorseful for his crime. We cannot conclude that our court would have concluded that Manzano's sentence was manifestly unreasonable[5] if appellate counsel had argued these mitigating circumstances on appeal.

First, we observe that the trial court did acknowledge and consider Manzano's remorse when it imposed his sentence. Trial Record of Proceedings at 190. Also, the finding of mitigating circumstances

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[5] Before January 1, 2003, Indiana Appellate Rule 7(B) provided: "The Court shall not revise a sentence authorized by statute unless the sentence is manifestly unreasonable in light of the nature of the offense and the character of the offender." Ind. Appellate Rule 7(B). The same rule now provides: "The Court may revise a sentence authorized by statute if, after due consideration of the trial court's decision, the Court finds that the sentence is *inappropriate* in light of the nature of the offense and the character of the offender." (Emphasis added).

is within the trial court's considerable discretion. *See Sims v. State*, 585 N.E.2d 271, 272 (Ind. 1992). Therefore, had appellate counsel argued the trial court's refusal to find that Manzano's incarceration would place undue hardship on his dependents, it is unlikely that our court would have concluded that the trial court erred under the circumstances of this case where the victim of the rape was his dependent daughter and the Class A felony conviction subjected him to a lengthy twenty to fifty year term of incarceration. *See* I.C. § 35–50–2–4. Likewise, we cannot conclude that appellate counsel's failure to argue cooperation with the authorities would have been successful on appeal given the heinous nature of Manzano's crime.

Appellate counsel raised the strongest issue available to Manzano on appeal of his sentence: whether Manzano's maximum fifty-year sentence was manifestly unreasonable because he pleaded guilty. Appellate counsel cited to and thoroughly discussed cases wherein our courts have held that a defendant's guilty plea is entitled to substantial mitigating weight. *See* Ex. Vol., Petitioner's Ex. B, pp. 10–11. Our court considered Manzano's argument and rejected it. *Manzano v. State*, No. 48A02–9708–CR–529, 691 N.E.2d 517 (Ind. Ct. App. Jan. 28, 1998). After reviewing the trial proceedings and the appellate brief, we conclude that our court would not have reduced Manzano's sentence had appellate counsel raised the arguments discussed above, and therefore, Manzano's appellate counsel was not ineffective.

Conclusion

Manzano has not established that he was subjected to ineffective assistance of trial and appellate counsel. We therefore affirm the denial of his petition for post-conviction relief.

Affirmed.

FRIEDLANDER, J., and KIRSCH, J., concur.

APPENDIX B

CAUSE NO.: 48A02-1310-PC-00905
LOWER COURT CAUSE NO.: 48D019609CF208

MANZANO, JUAN V. STATE OF INDIANA

YOU ARE HEREBY NOTIFIED THAT THE SUPREME COURT HAS ON THIS DAY, 10/02/2014, ORDERED AS FOLLOWS:

THE MATTER HAS COME BEFORE THE INDIANA SUPREME COURT ON A PETITION TO TRANSFER JURISDICTION FOLLOWING THE ISSUANCE OF A DECISION BY THE COURT OF APPEALS. THE PETITION WAS FILED PURSUANT TO APPELLATE RULE 57. THE COURT HAS REVIEWED THE DECISION OF THE COURT OF APPEALS. ANY RECORD ON APPEAL THAT WAS SUBMITTED HAS BEEN MADE AVAILABLE TO THE COURT FOR REVIEW, ALONG WITH ANY AND ALL BRIEFS THAT MAY HAVE BEEN FILED IN THE COURT OF APPEALS AND ALL THE MATERIALS FILED IN CONNECTION WITH THE REQUEST TO TRANSFER JURISDICTION. EACH PARTICIPATING MEMBER HAS HAD THE OPPORTUNITY TO VOICE THAT JUSTICE'S VIEWS ON THE CASE IN CONFERENCE WITH THE OTHER JUSTICES.

BEING DULY ADVISED, THE COURT NOW DENIES THE APPELLANT'S PETITION TO TRANSFER OF JURISDICTION.

LORETTA R. RUSH, CHIEF JUSTICE
ALL JUSTICES CONCUR.
(ORDER REC'D 10/3/14 @ 9:41 AM) ENTERED ON 10/3/14 KF

TRANSMITTED PURSUANT TO MY AUTHORITY UNDER APPELLATE RULE 26.

SIGNED,
KEVIN S. SMITH
CLERK OF THE SUPREME COURT, COURT OF APPEALS AND TAX COURT
216 STATE HOUSE
200 W. WASHINGTON ST.
INDIANAPOLIS, IN 46204

APPENDIX C

Circuit Court of Indiana
Division VI
Madison County
Juan J. MANZANO, Petitioner,
v.
STATE of Indiana, Respondent.
No. 48D01-9609-CF-00208.
October 3, 2013

FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT

Dennis Carroll, Judge.

COMES NOW the Court and, pursuant to Indiana Post-Conviction Rule 1(6), issues its Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

1. On September 14, 1996, during the early hours, Juan J. Manzano sexually assaulted his 6 year old daughter B.M. at their home in Orestes, Indiana. Manzano had sexual intercourse with B.M.. During the intercourse, B.M. cried "no", and cried out for her brother for help. B.M. suffered a tear from the opening of her vagina to the opening of her rectum as a result of Manzano penetrating her. B.M. had to have emergency surgery and was hospitalized.

2. On September 16, 1996, the State charged Manzano in the above captioned cause with four counts: Count I, Child Molest, a Class A Felony; Count II, Rape, a Class A Felony; Count 111, Incest,

a Class B Felony; and Count IV; Battery, a Class C Felony. This Court appointed Rick Walker as public defender, and later to be assisted by Attorney Tom Reynolds.

3. On September 27, 1996, an informal pretrial conference was conducted between the assigned deputy prosecutor and the defendant's attorney.

4. On October 25, 1996, a status conference or pretrial was conducted and the Court imposed a plea deadline for March 10, 1997 and set a jury trial for April 9, 1997.

5. On December 30, 1996, Rick Walker and Tom Reynolds withdrew from the case and this Court appointed Attorney Douglas Long as successor public defender. Walker and Reynolds where requested to forward their file to Mr. Long.

6. On February 24, 1997, the parties appeared for a final pretrial conference.

7. On March 26, 1997, Mr. Long filed a motion to suppress Manzano's statement and filed a Motion in *Limine*. Hearing and argument on the motions were set for April 7, 1997.

8. On April 7, 1997, the parties appeared and Mr. Long informed the Court that Manzano would be withdrawing his previous not guilty plea and he would plead guilty to Count II, Rape, a class A Felony, with an open sentence, with an understanding from the State that the remaining counts would be dismissed. This Court informed Manzano of his constitutional and legal rights and Manzano indicated he understood them. This Court explained the possi-

ble penalties on a Class A felony of which Manzano indicated he understood. Manzano indicated that he was freely and voluntarily entering his plea of guilt without any promises, threats or being forced into pleading. Manzano testified he was satisfied with Mr. Long's representation.

9. Manzano affirmed that he and Mr. Long had spent time talking about the facts of the case, the evidence, and his defense, all in preparation for the upcoming trial. Deputy Prosecutor Sauer laid the factual basis into the record and entered a supporting photograph. Mr. Long informed the Court that he previously filed a notice of intent to use intoxication as a defense; however he and Manzano now agreed that the evidence would show that Manzano was not intoxicated to the extent that intoxication would be a viable defense. At the conclusion of the hearing, Manzano pleaded guilty to Count II, Rape, a Class A Felony.

10. On May 5, 1997, this Court conducted Manzano's sentencing hearing. At the conclusion of the hearing, this Court entered judgment of conviction and sentenced Manzano to fifty (50) years executed to the Indiana Department of Correction.

11. On May 9, 1997, this Court appointed Sali K. Falling-Newman as appellate counsel.

12. On January 28, 1998, The Indiana Court of Appeals affirmed the conviction and sentence.

13. On February 28, 2006, Manzano filed a *pros se* petition for post-conviction relief.

14. On March 15, 2006, the State responded to Manzano's petition, denying the allegations presented in the petition and notifying Manzano of its affirmative defenses.

15. On June 8, 2012, Manzano filed an amended petition for post-conviction relief, alleging the following errors:

> Ineffective Assistance of Trial Counsel (Long)
>
> A. Failure to interview State's witness, or depose police officer.
>
> B. Failure to obtain defense translator to assist with client communication.
>
> C. Failure to conduct an investigation.
>
> D. Failure to proceed on the suppression motion.
>
> E. Failure to negotiate a fair plea bargain.
>
> F. Failure to object at sentencing hearing and failure to articulate mitigators.

16. On July 2, 2012, Attorney Cynthia Carter filed an appearance on behalf of Manzano.

17. This Court issues Discovery Orders in support of Post Conviction Counsel's efforts to thoroughly investigate possible shortcomings in the State or Trial Counsel's original investigation. The passage of time, the death of a witness, and the absence of compelling evidence undermined these efforts. It is fair to conclude, that despite Post Conviction Counsel's thorough and tenacious efforts, no additional compelling evidence was developed. What "might have been" is mere speculation.

18. On February 25th, and April 15th, 2013, this Court conducted evidentiary hearings on the petition for post-conviction relief. Ms. Carter called Mr. Long and her client and entered multiple documents into evidence including affidavits from Mr. Long and Ms. Falling-Newman. This Court allowed Manzano to orally amend his petition to conform to the evidence to add a claim of ineffective assistance of appellate counsel. This Court took judicial notice of the underlying criminal cause, its pleadings and motions and appellate record. Due to the number of issues that Manzano has alleged in his petition and the length of the evidentiary hearing, this Court will present the relevant facts from the evidentiary hearing only where appropriate in this Court's conclusions of law.

CONCLUSIONS OF LAW

1. A petitioner has the burden of establishing his grounds for post-conviction relief by a preponderance of the evidence. Ind. Post-Conviction Rule 1(5).

2. Ineffective-assistance-of-counsel claims are evaluated according to the two-part test announced in *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L.Ed.2d 674 (1984). To prevail on a claim of ineffective assistance of counsel, a petitioner must prove both deficient performance and resulting prejudice. *Danks v. State*, 733 N.E.2d 474, 485 (Ind. Ct. App. 2000). If counsel's performance falls below an objective standard of reasonableness, then it is deficient. *Id.* And if there is a reasonable probability that, but for counsel's deficient performance, the result of the proceeding would have been different, then there is prejudice. *Id.* Lastly, to prevail on an

ineffective-assistance-of-counsel claim, which alleges that counsel performed deficiently by failing to file a motion on his client's behalf, a petitioner must prove that the motion would have been granted. Id. at 489.

3. Following a guilty plea, a post-conviction petitioner may allege ineffective assistance of counsel for only two reasons: (1) incorrect advisement on a probably meritorious defense; and (2) incorrect advisement of the penal consequences of the guilty plea. *Segura v. State*, 749 N.E.2d 496, 499-507 (Ind. 2001). A petitioner, who claims that defense counsel incorrectly advised him on a legal defense, must show that, but for defense counsel's incorrect advice, the petitioner would not have pled guilty, the defense probably would have succeeded, and the defendant would have received a favorable outcome. *Id.* at 502-504. Moreover, if the alleged ineffectiveness pertains to incorrect advice on the penal consequences of the guilty plea, then it is not sufficient for the petitioner to simply assert that he would not have pleaded guilty. *Id.* The petitioner's conclusory testimony is insufficient to prove resulting prejudice. *Id.* at 505-507. The petitioner must present "special circumstances" or objective facts to show that his decision to plead guilty was driven by defense counsel's erroneous advice. *Id.* at 507.

4. Manzano has failed to prove that Mr. Long provided ineffective assistance. Manzano has not alleged that Mr. Long incorrectly advised him of a probably meritorious defense or incorrectly advised him of the penal consequences of his guilty plea, which are principal reasons that a postconviction petitioner, who has pleaded guilty, may allege as a ba-

sis for an ineffective-assistance-of-counsel claim. *Segura*, 749 N.E.2d at 499-507. On the contrary, Manzano alleges only:

> A. Failure to interview State's witness, or depose police officer;
>
> B. Failure to obtain defense translator to assist with client communication.
>
> C. Failure to conduct an investigation.
>
> D. Failure to proceed on the suppression motion.
>
> E. Failure to negotiate a fair plea bargain.
>
> F. Failure to object and articulate mitagators at sentencing hearing.

Because Manzano has not alleged any grounds that would entitle him to relief, this Court concludes that his ineffective-assistance-of-counsel claim is meritless. Notwithstanding, the Court addresses the merits of asserted claims, as follows.

5. The long-standing test for the validity of a guilty plea is whether the plea represents a voluntary and intelligent choice among the alternative courses of action available to the defendant. *Diaz v. State*, 934 N.E.2d 1089, 1094 (Ind. 2010). In furtherance of this objective, Indiana Code section 35-35-1-2 provides that the court accepting the guilty plea determine that the defendant: (1) understands the nature of the charges; (2) has been informed that a guilty plea effectively waives several constitutional rights, including trial by jury, confrontation and cross-examining of witnesses, compulsory process,

and proof of guilt beyond a reasonable doubt without self-incrimination; and (3) has been informed of the maximum and minimum sentences for the crime charged. *Id.* A guilty plea entered after the trial court has reviewed the various rights that the 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).

6. Manzano has also failed to prove that he did not knowingly, intelligently, and voluntarily pleaded guilty. Manzano testified that he was satisfied with Mr. Long's representation. Manzano understood what he was doing when he pleaded guilty. The record of the dispositional and sentencing hearings clearly indicates Manzano understood his constitutional and legal rights and understood that by pleading guilty he would be waiving those rights. Manzano's dialogue in English with the Court shows comprehension and communication skills in English more than adequate for the tasks at hand. Mr. Long informed the Court that he and Manzano discussed the law and evidence and discussed their contemplated strategies.

7. Mr. Long explained they explored the possible defense of intoxication, however, abandoned that theory when it became evident that there was no evidence to support intoxication as a viable defense. DNA evidence further tying Manzano to the crime scene was also taken into consideration in their discussions of whether to plead guilty. Mr. Long assessed that the likelihood of prevailing on the motion to suppress was not very strong as there was a

signed advisement of rights waiver. Mr. Long opined that even if they were to prevail, the State still had sufficient circumstantial and direct evidence to convict. Moreover, Mr. Long explained that it would be difficult for them to argue remorse as a mitigating factor as a sentencing strategy, if, in fact, they made the child go through with trial. Last, Mr. Long informed the Court that his client did not want to put his child through any more agony than he already had. In conclusion, Mr. Long stated:

> Based upon a ...[sic] all the unattractive choices that we had in this case, and after what I feel like as is thorough analysis as I could get to the fact situation, I certainly think that this is in his best interest and there is no advantage for Juan to go to trial.

(Petitioner Ex. p. 114-115, Transcript of Guilty Plea and Sentencing p. 29-30.)

At the conclusion of the dialogue, Manzano pleaded guilty to Count II, Rape, with an open sentence, with the understanding that the remaining counts would be dismissed based on double jeopardy. In light of the foregoing, this Court concludes that Manzano knowingly, intelligently, and voluntarily pleaded guilty.

8. Manzano has failed to prove that Mr. Long provided ineffective assistance of counsel for not interviewing a State's witness, or depose a police officer. Mr. Long was appointed to Manzano's case after Public Defenders Mr. Walker and Mr. Reynolds withdrew. This Court instructed Mr. Walker and Mr. Reynolds to forward their files to Mr. Long. There is

no evidence that the files were not forwarded. Further, Mr. Long filed his own motion for discovery. The trial record is devoid of any discovery problems, although this Court had denied one motion for depositions at public expense due to the absence of necessity. (Discovery Motions filed by post-conviction counsel and the court's rulings thereon assisted postconviction counsel in exploring the possibility of significant faults in trial preparation. There is no evidence, or reasonable inference to be drawn, that evidence developed at the post-conviction stage was significant or outcome dispositive. Manzano has not shown that Mr. Long was aware of any additional witness testimony and has not shown prejudice. Moreover, since Manzano has not alleged that Mr. Long incorrectly advised him on a probable meritorious defense; or an incorrect advisement of his penal consequences of the guilty plea, Manzano is foreclosed from raising this allegation of, ineffective assistance. *Segura* at 499-507. *Segura* notwithstanding, the court does not view Mr. Long's observation at the PCR hearing that he might not continue to say to clients, "People who go to trial get more time," as a penal advisement. A reasonable person would understand that to be a statement of "experience." Clearly, Mr. Long was surprised by the court's sentencing decision. That flows from Mr. Long's 25 years of experience as a criminal defense lawyer in the particular trial court. That the Manzano sentence was inconsistence with Mr. Long's general experience does not rise to the level of erroneous penal advisement.

9. Manzano's second claim that counsel failed to obtain a translator to assist with client communication was withdrawn at the post-conviction hearing. Mr. Long testified that he and Manzano had no difficulty communicating and in fact Manzano wrote letters to Mr. Long from jail.

10. Manzano has failed to prove that Mr. Long provided ineffective assistance of counsel for not conducting an investigation. The record is absent of any evidence that Mr. Long was not fully informed, prepared or that his investigation was incomplete. Moreover, since this allegation does not fall within the parameters of *Segura*, it cannot be asserted.

11. Manzano has failed to prove that Mr. Long provided ineffective assistance of counsel for not failing to proceed on his suppression motion. The record is clear that on the date of Manzano's suppression hearing, Manzano choose to withdraw his previous denial and plead to Rape, a Class A Felony. By pleading guilty, Manzano abandoned his motion to suppress and waived his right to a suppression hearing. This ineffective assistance claim further does not fall within the parameters of *Segura*. Even if the merits of the claim is considered, the outcome of the suppression hearing is speculation and pursuing the matter may have cost Mr. Manzano the opportunity to lock the state and the court into a single count. That too is speculative and illustrates the folly of attempting to second-guess the decision made by Manzano and his counsel to abandon the Motion and request a change of plea hearing. Manzano's claim is meritless.

12. Manzano has failed to prove that Mr. Long provided ineffective assistance of counsel for failing to request a continuance when he received the DNA results shortly before the guilty plea hearing. A continuance for what purpose? The balance of the state's evidence was already known, including the firm identification of Manzano as the perpetrator by the young victim and damaging physical evidence on her small body. There was either a DNA "match" or no match. A "match" requires little explanation or analysis. It was simply the final piece of evidence that Manzano and Mr. Long were waiting for. Upon receipt, Mr. Manzano decided to plead guilty. He may have done so reluctantly and with sorrow. But he also did so intelligently, knowingly and voluntarily.

13. Manzano has failed to prove that Mr. Long provided ineffective assistance of counsel for not negotiating a fair plea bargain. Since the State bears the burden of guilt, it is their prerogative whether to enter into plea negotiations. Further, the Court has the right to place a deadline on plea negotiations. A defendant may accept or reject a plea agreement. It is unclear as to whether there was a plea offer made by the State. (Pet. Ex, J). However, in as much as there was an oral plea proposal, it is clear that Manzano rejected it. *Id.* Further since this allegation does not fall within *Segura*, it cannot be asserted. Manzano pleaded guilty without the benefit of a plea agreement, except apparently for the State's acknowledgment that the remaining counts would be dismissed. That a better bargain might have been struck is mere speculation. This claim is meritless.

14. Manzano has failed to prove that Mr. Long provided ineffective assistance of counsel for failing to object and articulate mitigators at sentencing hearing. Manzano has not shown how he was prejudiced by Mr. Long not objecting during the sentencing hearing. Furthermore, the record clearly shows Mr. Long argued mitigating factors at the sentencing hearing. Mr. Long filed a sentencing memorandum and clearly argued the mitigating factors that Manzano pleaded guilty conferring a benefit to the State and that Manzano was remorseful. Mr. Long further offered testimony that Manzano behaved well in jail becoming a trustee, achieved his AA certificate and became baptized. Mr. Long testified at the post-conviction hearing that he would have called anyone to testify on behalf of Manzano but didn't recall anyone at the hearing available to testify. Because Manzano has failed to prove that Mr. Long performed deficiently, resulting in prejudice, he has failed to prove that Mr. Long provided ineffective assistance of counsel.

15. The standard for reviewing claims of ineffective assistance of appellate counsel is the same as the standard for reviewing assistance of trial counsel. *Collier v. State*, 572 N.E.2d 1299, 1301 (Ind. Ct. App. 1991), trans. denied.

16. Ineffective assistance is very rarely found in cases involving appellate counsel's failure to raise issues on appeal. *Beighler v. State*, 690 N.E. 2d 188, 193 (Ind. 1997) cert, denied, 525 U.S. 1021(1998). When assessing this type of ineffectiveness claim, we should be particularly deferential to counsel's strategic decision to exclude certain issues in favor of

others, unless such a decision was unquestionable unreasonable. Id. At 194.

17. Appellate lawyers must make difficult judgment calls in narrowing a broad range of possible claims to select a few that are thought to have the best chance of success. *Woods v. State*, 701 N.E.2d 1208, 1221 (Ind. 1998), cert denied, 528 U.S. 861 (1999). In this winnowing process, possibly valid claims may be eliminated due to page limits or strategic judgment that the perceived strongest contentions not be diluted. Id.

18. The Indiana Supreme Court has addressed the issue of ineffectiveness of appellate counsel on many occasions and clearly stated the standard of review:

> This Court has noted several times the need for a reviewing Court to be deferential to appellate counsel on this issue .... and should not find deficient performance when counsel's choice of some issues over others was reasonable in light of the facts of the case and the precedent available to counsel when that choice was made. *Beighler v. State*, 690 N. E.2d 188, 194 (Ind 1997). This Court has approved the two-part test used by the Seventh Circuit to evaluate these claims: (1) whether the unraised issues are significant and obvious from the face of the record and (2) whether the unraised issues are "clearly stronger" than the raised issue. Id. (quoting *Gray v. Greer*, 800 F.2d 644, 646 (7th Cir. 1986)). Otherwise stated, to prevail on a claim of ineffective assistance of appellate counsel, "a defend-

> ant 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**." *Ben-Yisrayl v. State*, 738 N.E.2d 253, 260-61 (Ind. 2000).

Timberlake v. State, 753 N.E.2d 591, 605-06 (Ind. 2001) (full citations added in text for cases cited in the above block quote) (emphasis added).

19. Manzano has failed to prove that Ms. Falling-Newman provided ineffective assistance of appellate counsel by only arguing the reasonableness of the sentence on appeal and not arguing mitigating factors. Post Conviction counsel seems to argue in her supplemental Memorandum filed October 1, 2013 that appellate counsel overlooked important mitigators like cooperation, remorse and the desire to save defendant's daughter from further trauma. In fact, the court's sentencing order specifically found Manzano's "remorse" and "guilty plea" to be mitigators. "Guilty plea" is shorthand for concepts like cooperation, saving the State time and expense and it would clearly avoid the trauma of a trial for the victim. Likewise, Manzano's remorse speaks to similar issues. It would have been fruitless for appellate counsel to argue mitigators that were already acknowledged by the trial court.

20. Manzano choose not to call Ms. Falling-Newman, but only submitted her affidavit, which stated that, "due to the passage of many years since representing Manzano, I have no recollection of the

case nor anything to add that would help the Court make its determination. (Pet. Ex. C). Ms. Falling-Newman further stated that, she could provide nothing more than rest on what is in her appellate brief. *Id.* Ms. Falling-Newman's strategic decisions were not "unquestionably unreasonable", and therefore, should be given particular deference. Because Manzano has not proved Ms. Falling-Newman performed deficiently, resulting in prejudice, he has failed to prove that Ms. Falling-Newman provided ineffective assistance.

21. The facts and the law are with the State and against Manzano.

JUDGMENT

The Petition for Post-Conviction Relief is DENIED.

SO ORDERED, ADJUDGED, AND DECREED this 3th day of October, 2013.

<<signature>>
DENNIS CARROLL, JUDGE

MADISON CIRCUIT COURT

APPENDIX D

Court of Appeals of Indiana

JUAN J. MANZANO, Appellant-Defendant,
vs.
STATE OF INDIANA, Appellee Plaintiff.
No. 48A02-9708-CR-529

January 28, 1998
Memorandum Decision—Not for Publication

Per Curiam

Juan J. Manzano contends his fifty-year sentence for raping his six-year-old daughter is unreasonable and argues that although the trial court listed his guilty plea as a mitigating factor, it failed to give it the proper weight. Our review discloses that Manzano's sentence is not unreasonable in light of the offense and the offender and, therefore, is not an abuse of discretion. *See Smith v. State*, 658 N.E.2d 910, 918 (Ind. Ct. App. 1995), *trans. denied*.

SULLIVAN, FRIEDLANDER, and KIRSCH, J.J., participating.