IN THE
INDIANA COURT OF APPEALS

No. 15A04-1712-PC-2889

DANIEL BREWINGTON, *Appellant-Petitioner*, v. STATE OF INDIANA, *Appellee-Respondent*.	Appeal from the Dearborn Superior Court 2, No. 15D02-1702-PC-3, The Honorable W. Gregory Coy, Special Judge.

STATE'S BRIEF OF APPELLEE

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STATEMENT OF THE ISSUES

I. Post-Conviction Rule 1(4)(f) provides in part that a court may deny a petition for post-conviction relief without further proceedings "[i]f the pleadings conclusively show that petitioner is entitled to no relief." Brewington raises claims that are procedurally barred or conclusively lack merit given the Supreme Court's direct appeal opinion. Did the post-conviction court properly deny Brewington's petition on the pleadings?

II. A petitioner must first request a change of judge below in order to preserve a judicial bias claim for appeal, and a rational inference of bias or prejudice is not established because a judicial officer rules against a party. Brewington did not move for a change of judge, and he now alleges judicial bias because the judge denied the petition. Has Brewington waived his judicial bias argument for appeal?

III. Have the totality of Brewington's trial and post-conviction review proceedings violated his rights to due process and equal protection of the laws generally?

STATEMENT OF THE CASE

Brewington appeals the denial of his petition for post-conviction relief from his convictions for intimidation of a judge, attempted obstruction of justice toward a witness, and perjury to a grand jury.

On February 22, 2017, Brewington filed a petition for post-conviction relief from his 2011 convictions for intimidation, obstruction of justice, and perjury (App.

Vol. II 5, 15–86). He moved for a change of judge on March 3, 2017, which was granted on March 9, 2017 (App. Vol. II 5, 87–100, 101). Judge Coy accepted appointment as special judge on March 29, 2017 (App. Vol. II 6).

The State answered the petition on March 23, 2017 (App. Vol. II 6, 103–04). On April 3, 2017, Brewington moved for summary judgment, which he later requested be treated as a motion for summary disposition (App. Vol. II 6, 105–09, 110–28; Vol. IV 15–42). The State responded to this motion on June 8, 2017 (App. Vol. II 6; Vol III 2, 3–11). The post-conviction court denied Brewington's motion but granted judgment in favor of the State in a September 25, 2017, order that was entered onto the CCS on October 4, 2017 (App. Vol. II 7, 9, 10–12). The post-conviction court denied Brewington's motion to correct errors on November 6, 2017 (App. Vol. II 7, 14; Vol. IV 65–77). Brewington timely filed a notice of appeal on December 4, 2017.

STATEMENT OF THE FACTS

Brewington was a divorce litigant who was dissatisfied about how that case was unfolding, so he used a blog to threaten, harass, intimidate, and coerce the judge assigned to the case, the judge's wife, and an expert witness. When a grand jury investigated his conduct, he then gave false testimony in an attempt to mislead the panel. The Indiana Supreme Court summarized the specific facts of Brewington's crimes in its opinion on direct appeal. *Brewington v. State*, 7 N.E.3d 946, 955–57 (Ind. 2014) (*Brewington II*), *reh'g denied*, *cert. denied*. A jury found Brewington guilty of intimidation of the judge, judge's wife, and expert witness;

attempted obstruction of justice as to the expert witness; and perjury to the grand jury. *Id.* at 954. It also acquitted him of a charge of unlawful disclosure of grand jury proceedings. *Id.*

On appeal, Brewington challenged his convictions on a number of grounds:

- the empaneling of an anonymous jury,
- admission of certain evidence,
- double jeopardy violation as to the intimidation and obstruction of justice convictions related to the expert witness,
- sufficiency of the evidence as to the obstruction and all of the intimidation convictions given First Amendment free speech protections,
- sufficiency of the evidence as to the perjury conviction,
- erroneous jury instructions, and
- ineffective assistance of trial counsel.

Brewington v. State, 981 N.E.2d 585, 590 (Ind. Ct. App. 2013) (*Brewington I*), *aff'd in part by Brewington II*, 7 N.E.3d at 955.

This Court affirmed in part and reversed in part; it affirmed the perjury, intimidation of the judge, and attempted obstruction convictions, but reversed the for intimidation of the judge's wife conviction on First Amendment grounds and the intimidation of the expert witness conviction on double jeopardy grounds. *Brewington I*, 981 N.E.2d at 610. After granting transfer, the Supreme Court affirmed the convictions for intimidation of a judge and attempted obstruction of justice for different reasons than did this Court, but summarily affirmed this

Court's decision as to the perjury, intimidation of the judge's wife and intimidation of the expert witness convictions. *Brewington II*, 7 N.E.3d at 954–55, *aff'g in part Brewington I*, 981 N.E.2d at 599, 602–03.

SUMMARY OF THE ARGUMENT

This Court should affirm the post-conviction court's entry of judgment against Brewington without an evidentiary hearing because all of the claims that Brewington raises in this appeal are conclusively barred by res judicata and procedural default. Post-Conviction Rule 1(4)(f) permits judgment on the pleadings when the pleadings conclusively establish there is no possibility that the petitioner is entitled to relief. As to the claims that Brewington raises in his Brief of Appellant, all of them were either raised on direct appeal (in the case of his ineffective assistance of trial counsel arguments) or available on direct appeal but not raised (in the case of his grand jury, prosecutorial misconduct, and judicial bias arguments). There is no possibility that Brewington can obtain relief on his claims, and so post-conviction relief was properly denied on the pleadings.

Brewington fails to make a cogent argument as to his judicial bias arguments and his vague invocation of equal protection and due process generally. He also waived his judicial bias arguments by not moving for a change of judge. But in any event, the bias claims lack merit because, in explaining how he thinks the judges have conspired against him, Brewington only points to select rulings against him made by these judges. Such rulings are insufficient as a matter of law to state a claim of judicial bias.

ARGUMENT

I.
The post-conviction court properly denied Brewington's petition on the pleadings because his claims are procedurally barred or conclusively lack merit.

Brewington mistakenly argues that four of his post-conviction claims should have at least survived through to an evidentiary hearing,[1] if not formed the basis for summary disposition in his favor:

1) he received ineffective assistance of trial counsel because counsel allegedly did not communicate well enough with him about the charges and evidence;

2) trial court staff allegedly manipulated the record of the grand jury proceeding as part of a conspiracy against him;

3) the grand jury indictments were unconstitutional because they were allegedly not sufficiently detailed to notify Brewington of what criminal acts he committed; and

4) prosecutors allegedly committed misconduct at trial, particularly in argument before the jury.

[1] Any potential arguments that the post-conviction court should not have denied his myriad other claims that were asserted in his post-conviction relief petition have been waived by Brewington's decision to abandon them on appeal and his failure to argue why those claims should not have been denied. *Bunch v. State*, 778 N.E.2d 1285, 1290 (Ind. 2002) (to be available on appeal, a petitioner must include all of his claims in his principal brief; if he does not, then they are waived). Should he attempt to revive them in a reply brief, he cannot do so. *Id.*

Brewington's ineffective assistance of trial counsel claim was raised and adjudicated on direct appeal, but the other claims were not despite being available.

"In post-conviction proceedings, complaints that something went awry at trial are generally cognizable only when they show deprivation of the right to effective counsel or issues demonstrably unavailable at the time of trial or direct appeal." *Sanders v. State,* 765 N.E.2d 591, 592 (Ind. 2002). But because Brewington raised ineffective assistance of trial counsel on direct appeal, he cannot raise it again on post-conviction review. *Brewington II*, 7 N.E.3d at 978. Brewington's claims are therefore conclusively barred by res judicata and procedural default, so the post-conviction court properly denied relief without further evidentiary development. Given the conclusive barriers to post-conviction relief that exist in his case, Brewington does not—because he cannot—meet the appropriate standard. This Court should affirm.

A. The Post-Conviction Rules permitted disposing of Brewington's petition without a hearing.

The post-conviction court properly denied Brewington's petition without a hearing notwithstanding the fact that it was Brewington, and not the State, who moved for summary disposition of the petition. The post-conviction court did not specify whether it was denying relief under Post-Conviction Rule 1(4)(f), which allows for judgment on the pleadings, or Post-Conviction Rule 1(4)(g), which permits summary disposition without an evidentiary hearing and allows for the court to consider other materials than just the pleadings and the law (App. Vol. II 11–12). *See Binkley v. State*, 993 N.E.2d 645, 649–50 (Ind. Ct. App. 2013) (discussing *Allen*

v. State, 791 N.E.2d 748, 752–53 (Ind. Ct. App. 2003) (explaining the different applications of subsections (f) and (g) to Post-Conviction Rule 1(4))). Although the court denied Brewington's motion for summary judgment/disposition under Rule 1(4)(g), the court's order also suggests that in denying the petition for post-conviction relief itself, the Court acted pursuant to Rule 1(4)(f):

> Even though the State did not move for summary judgment, based on the undersigned judge's reading of the pleadings and the appellate cases mentioned above, judgment should be entered without a hearing.

(App. Vol. II 12).

In this case, it does not matter which subsection the court below acted under because the claims that Brewington presses on appeal are conclusively procedurally barred under the doctrines of res judicata and procedural default. On appeal, Brewington cannot prevail under either of the standards of review that apply to the appellate review of those judgments, so there is no need for this Court to decide whether the post-conviction court could have granted summary disposition against Brewington in the absence of a motion from the State.

1. Judgment on the pleadings under Rule 1(4)(f) was proper.

Post-conviction courts may deny petitions for post-conviction relief whenever "the pleadings conclusively show that [the] petitioner is entitled to no relief." Post-Conviction R. 1(4)(f); *Osmanov v. State*, 40 N.E.3d 904, 908 (Ind. Ct. App. 2015). The post-conviction court is limited to considering the pleadings when proceeding under Rule 1(4)(f), *id.* at 909, which the post-conviction court did (App. Vol. II 12). The court below properly compared the pleadings to the applicable law—including the

Supreme Court's direct appeal decision—to determine the viability of Brewington's claims. These sources established the procedural barriers to Brewington's claims and "conclusively show[ed] that petitioner is entitled to no relief."

The post-conviction court's order does not reflect consideration of any information outside of the pleadings and law. Based solely on the stated claims and information provided in the petition and answer, the post-conviction court properly applied the law and determined that Brewington's ineffective assistance of trial counsel claim was raised on direct appeal and is now barred by res judicata (App. Vol. II at 20–70, 73, 79–84), as well as confirming that all other freestanding claims of error were barred by either procedural default or res judicata because they were required to have been raised on direct appeal and are unavailable for post-conviction review. *See Allen*, 791 N.E.2d at 754–55 (partially affirming judgment on the pleadings in a post-conviction action as to two freestanding claims of trial error that were procedurally barred, but remanding for further factual development an ineffective assistance of counsel claim that was not procedurally barred). Unlike in *Allen*, where that petitioner did not raise an ineffectiveness claim on direct appeal, *id.* at 755, this petitioner did, *Brewington*, 7 N.E.3d at 977–78. The Supreme Court specifically found on direct appeal that his future trial counsel arguments will be barred. *Id.* at 978. Given that instruction, the post-conviction court was required to deny relief and judgment under Post-Conviction Rule 1(4)(f) was appropriate.

2. Summary disposition under Rule 1(4)(g) was also appropriate.

The post-conviction court was also authorized to dispose of the petition under Post-Conviction Rule 1(4)(g). Brewington's motion for summary disposition was intentionally limited to his allegations related to the grand jury (App. Vol. II 122, ¶7; App. Vol. III 2–11), but both parties submitted additional materials in support of their briefing (*see* App. Vol. II at 129–42, Vol. III at 12–60). The post-conviction court was permitted to consider those materials in addition to the pleadings when determining whether summary disposition was appropriate. *Binkley*, 993 N.E.2d at 649–50. In *Binkley*, neither party formally moved for summary disposition under Rule 1(4)(g), but they still asked the court to consider other materials in addition to the pleadings when deciding whether judgment should issue before an evidentiary hearing. *Id.* at 650. This Court found that Rule 1(4)(g) permitted review beyond just the pleadings, and it would govern review of the post-conviction court's order. *Id.* Indeed, there is every reason to read the post-conviction rules as giving judges this authority in order to efficiently dispose of petitions that have been fully factually developed according to the petitioner, yet still have zero chance of success given those unquestioned facts.

Brewington asked the post-conviction court to consider his materials and determine if summary disposition was appropriate. Those materials showed, and the petition conceded, what was litigated on direct appeal and what was not. He does not even challenge those facts in this appeal. And so the post-conviction court did the review Brewington asked for, just not with the result Brewington expected.

Under *Binkley*, he cannot be heard to complain of that procedure now. Nor does it matter because the State was entitled to judgment as a matter of law under both subsections given the insurmountable procedural bars to Brewington's claims.

3. Regardless of which subsection applies in this case, both of the respective standards of review require affirmance.

On appeal, Brewington has the burden of proving that the post-conviction court erred. *Allen*, 791 N.E.2d at 753 (under P-C. R. 1(4)(f)); *Hough v. State*, 690 N.E.2d 267, 270 (Ind. 1997) (under P-C.R. 1(4)(g)). A judgment on the pleadings should be reversed if the pleadings do not conclusively show that petitioner is entitled to no relief. *Osmanov*, 40 N.E.3d at 909. In that review, courts "should accept the well-pled facts as true and determine whether the post-conviction petition raises an issue of possible merit." *Id.* (quoting *Allen*, 791 N.E.2d at 756). So while petitions should not be denied on the pleadings "even though the petitioner has only a remote chance of establishing his claim[s]," *id.*, the claims that Brewington now argues should not have been dismissed have no possible merit because they are conclusively foreclosed by his direct appeal.

In cases with conclusive procedural bars such as this one, the same result follows under the standard for reviewing summary dispositions. A judgment under Post-Conviction Rule 1(4)(g) is reviewed the same as a motion for summary judgment, that is it "should only be granted when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law." *Hough*, 690 N.E.2d at 269. "Any doubts about the existence of a fact or the inferences to be drawn therefrom are to be resolved in favor of the nonmoving

party." *Id.* at 270. In Brewington's case, he ignored the fact that he was required to have raised on direct appeal all of his freestanding claims of trial error and also that the fact that he litigated a claim of ineffective assistance of counsel on direct appeal foreclosed future trial counsel claims for post-conviction review.

B. The ineffective assistance argument is barred by res judicata.

On direct appeal, Brewington argued that his trial counsel rendered ineffective assistance of counsel, and the Supreme Court addressed and rejected it on the merits. *Brewington*, 7 N.E.3d at 974–78. Having raised ineffective assistance at that time, he is barred under the doctrine of res judicata from raising the claim again through a petition for post-conviction relief. *Sims v. State*, 771 N.E.2d 734, 742 (Ind. Ct. App. 2002) (*citing Woods v. State*, 701 N.E.2d 1208 (Ind. 1998)). This is true whether he wants to reargue his direct appeal allegations or assert other ways in which he thinks that counsel was ineffective at trial. *Id*. So as to leave no room for doubt, the Supreme Court specifically said so in Brewington's direct appeal. *Brewington II*, 7 N.E.3d at 978.

Nevertheless, Brewington tries both approaches in his invitation for this Court to revisit the Supreme Court's resolution of his claims: he argues both that the Supreme Court was wrong and that his counsel's performance qualifies for relief under *United States v. Cronic*, 466 U.S. 648 (1984) (explaining that certain types of deficient performance are so inherently prejudicial that the Sixth Amendment does not require a separate showing of prejudice as is ordinarily required under *Strickland v. Washington*, 466 U.S. 668 (1984)). But neither the post-conviction

court nor this Court can entertain his arguments under the doctrine of res judicata, *Brewington II*, 7 N.E.3d at 978, so the Court should affirm the judgment below.[2]

C. Procedural default bars the remaining arguments because Brewington did not raise them on direct appeal.

It is well-established that claims that are available at the time of direct appeal must be raised then or they are forfeited. The doctrine of procedural default bars Brewington's claims about the completeness of grand jury transcripts, legal sufficiency of the indictments, and any instances of alleged prosecutorial misconduct because these claims were available on direct appeal, but not presented. *Morales v. State*, 19 N.E.3d 292, 295 n.3 (Ind. Ct. App. 2014) (citing *Bunch*, 778 N.E.2d at 1289). To the extent that Brewington now claims that these are fundamental errors, that doctrine is unavailable on post-conviction review to excuse these types of procedural defaults.[3] *Bunch*, 778 N.E.2d at 1289. These are applications of the basic principle that post-conviction proceedings do not afford the opportunity for a super-appeal, *id.*, which is precisely how Brewington treats this

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[2] In this appeal, Brewington does not claim ineffective assistance of appellate counsel, so he has waived for further review any later assertion of it. *French v. State*, 778 N.E.2d 816, 825–26 (Ind. 2002) (in post-conviction appeals, ineffective assistance arguments are waived when not raised in principal brief). *See also Bunch*, 778 N.E.2d at 1290 (same); *Curtis v. State*, 948 N.E.2d 1143, 1148 (Ind. 2011) (cannot assert fundamental error if not raised in the principal brief); *Jones v. State*, 22 N.E.3d 877, 881 n.4 (Ind. Ct. App. 2014) (alternative arguments are waived on appeal if raised for the first time in a reply brief).

[3] Throughout his brief, Brewington sprinkles references to the fundamental error doctrine, although it is not clear whether he uses it as a legal term of art to suggest that a waiver should be excused or in a more colloquial manner to illustrate how he views the claims as particularly serious. Neither way excuses his procedural default at this time.

proceeding. Finally, Brewington has never claimed that his appellate counsel was ineffective for having not presented these arguments, so he cannot now try to revive them under that standard. The post-conviction court properly understood that these claims were conclusively barred and denied relief. This Court should affirm.

D. If summary disposition was inappropriate, then remand for further evidentiary development is the appropriate remedy.

The procedural bars to Brewington's claims are heavy, and the post-conviction court properly found that Brewington is conclusively not entitled to relief. But if the judgment below was in error, then the proper remedy is not summary disposition in Brewington's favor, as he argues. First, Brewington specifically did not include his ineffective assistance and prosecutorial misconduct claims in his motion for summary judgment (App. Vol. II 122 ¶7), so he cannot now insist that he is entitled to summary disposition on those claims. Second, if there are no procedural bars that permit judgment on the pleadings, then Brewington needs to support his allegations with actual evidence. His assertions of fact will remain mere assertions unless and until he can prove them with evidence that the post-conviction court finds persuasive. So if this Court determines that the procedural deficiencies in Brewington's claims are not bars to relief, then the proper remedy if to remand with instructions to allow Brewington the opportunity to prove his claims with evidence submitted by affidavit under Post-Conviction Rule 1(9)(b), or an evidentiary hearing under Post-Conviction Rule 1(5). The choice between these options should remain within the post-conviction court's sound discretion.

Nonetheless, this Court should affirm the post-conviction court's judgment because Brewington's claims are barred from post-conviction review.[4]

II.
The judicial bias claims are waived and lack merit.

It is not clear which judges Brewington intends to allege bias against, or even what the nature of that bias is other than how he perceives the Indiana judiciary engaged in a conspiracy against him. Given the vague nature of his claim, Brewington has waived it for appellate review by not providing cogent argument. *Howard v. State*, 32 N.E.3d 1187, 1195 n.12 (Ind. Ct. App. 2015). If Brewington intends to claim that Judge Coy was biased against him during the post-conviction relief proceeding, Brewington has also waived review by not having moved for a change of judge from Judge Coy under Post-Conviction Rule 1(4)(b),[5] or by otherwise challenging the impartiality of the post-conviction court prior to appeal. *Flowers v. State*, 738 N.E.2d 1051, 1059–60 (Ind. 2000); *Sisson v. State*, 985 N.E.2d 1, 18 (Ind. Ct. App. 2012). And finally, to the extent that Brewington claims that Judge Hill was biased against him during the trial proceedings, that claim is barred

[4] Although not strictly relevant to the resolution of this appeal, the State notes that federal habeas corpus review will not be available to Brewington. Federal courts lack habeas corpus jurisdiction over petitioners who are not "in custody" pursuant to a state court judgment, and Brewington's sentence has been fully served. *See, e.g., Kelley v. Zoeller*, 800 F.3d 318, 324 (7th Cir. 2015), *reh'g en banc denied*. Moreover, Brewington's claims would be time-barred because he waited well over one year from the end of his direct appeal to file the instant petition. *See, e.g., Powell v. Davis*, 415 F.3d 722, 726 (7th Cir. 2005).

[5] Brewington did seek, and receive, a change of judge from Judge Hill at the outset of his post-conviction relief action (App. Vol. II 87-101)

by procedural default because it was available to him on direct appeal, but he did not raise it. *Morales*, 19 N.E.3d at 295 n.3.

Procedural bars notwithstanding, his claim lacks merit. Brewington complains of bias by pointing only to actions by these judges taken during the pendency of his case. An adverse ruling alone is insufficient to show bias or prejudice, rather the record must show *actual* bias or prejudice, such as an undisputed claim or where a judge expressed an opinion of the controversy. *Massey v. State*, 803 N.E.2d 1133, 1138–39 (Ind. Ct. App. 2004). At most, Brewington points to ways in which judges sometimes ruled against him—to which he adds mere speculation and conspiratorial reasoning—and that is insufficient as a matter of law to warrant a change of judge. *Voss v. State*, 856 N.E.2d 1211, 1217 (Ind. 2006). This Court should affirm the post-conviction court's judgment.

III.
Freestanding equal protection and due process claims are barred.

Brewington appears to attempt to constitutionalize all of his claims by vaguely invoking principles of equal protection and due process, but these statements, to the extent they are claims, are waived for a lack of cogent argument. Brewington does not cite or discuss relevant caselaw to explain how his claims state a violation of the Fourteenth Amendment or similar Indiana constitutional protections beyond what is necessarily part of the original claim (e.g., prosecutorial misconduct or judicial bias). *Howard*, 32 N.E.3d at 1195 n.12. Moreover, to the extent that these are independent claims for relief, they were not raised in his petition below and are waived now. *Id.* at 1195. Should the Court remand for

further proceedings for another reason, then Brewington may pursue whatever claim he attempts to state here.

CONCLUSION

This Court should affirm the post-conviction court's judgment.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on May 10, 2018, the foregoing document was electronically filed using the Indiana E-filing System ("IEFS"). I also certify that the foregoing was served upon Daniel Brewington via IEFS at the time of electronic filing.

/s/ Stephen R. Creason
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