IN THE INDIANA COURT OF APPEALS

APPELLATE CASE NO. 23A-PC-1081

JOHN B. LARKIN, Petitioner, (Appellant Below), v. STATE OF INDIANA, Respondent, (Appellee Below).	APPEAL FROM THE LAPORTE COUNTY SUPERIOR COURT, CRIMINAL DIVISION, Lower Court Cause No. NO. 46D01-2201-PC-000002 The Honorable Kim E. Hall, Special Judge

PETITION TO TRANSFER

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Question Presented on Petition to Transfer

1. Where the trial attorney abandoned the representation of JOHN B. LARKIN [Larkin] and prejudiced him with a procedurally unfair setting by failing to subject the prosecution's case to meaningful adversarial testing, did the Court of Appeals mistakenly and erringly affirmed the PCR court's denial of Larkin's ineffectiveness of counsel claim.

2. Did Larkin v. State, 173 N.E.3d 662 (Ind. 2021) modify Wadle v. State, 151 N.E.2d 227 (Ind. 2020), and Powell v. State, 151 N.E.3d 256 (Ind. 2020), so as to revive the Richardson v. State, 717 N.E.2d 32 (Ind. 1999), common law double jeopardy principles and to, thereby, compel the Court of Appeals to conclude that it was axiomatic that Larkin committed involuntary manslaughter and, therefore, suffered no prejudice by accumulation of errors of Larkin's trial, postconviction trial counsel, and postconviction appellate counsel in addressing the State of Indiana's request for the lesser included involuntary manslaughter jury instruction?

3. Did the Court of Appeals fail to reassess Larkin v. State, 173 N.E.3d 662 (Ind. 2021), in the light of A.W. v. State, 229 N.E.3d 1060 (Ind. 2024), and, thereby, issue an opinion unsupported by current case law?

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STATEMENT OF THE PROCEDURAL AND SUBSTANTIVE FACTS

"In 2012, John Larkin shot and killed his wife during an argument. For this, he was convicted of involuntary manslaughter and received a 2-year prison sentence. In his fifth appeal in just over a decade, Larkin alleged in a petition for post-conviction relief (PCR) that his trial counsel performed ineffectively in defending him. The PCR Court denied Larkin's petition…." Larkin v. State, No. 23A-PC-1081, 2024 WL 1155319, at *1 (Ind. Ct. App. Mar. 18, 2024). Larkin went to trial in 2019. Id.

After the close of evidence, the State of Indiana asked for an involuntary manslaughter jury instruction, arguing that involuntary manslaughter was a factually lesser included offense of voluntary manslaughter. Id. The trial court granted the State of Indiana's motion. Id. The jury convicted Larkin of involuntary manslaughter. Id. The Indiana Supreme Court affirmed the trial court's grant of the involuntary manslaughter jury instruction. Larkin v. State, 173 N.E.3d 662, 668 (Ind. 2021); Larkin v. State, No. 23A-PC-1081, 2024 WL 1155319, at *2 (Ind. Ct. App. Mar. 18, 2024).

The postconviction trial court denied Larkin relief. Larkin v. State, No. 23A-PC-1081, 2024 WL 1155319, at *1 (Ind. Ct. App. Mar. 18, 2024). During the postconviction proceedings, Larkin presented affidavits from his trial attorneys attesting that they did no research on or otherwise investigated the issue of possible lesser included offenses to voluntary manslaughter. Larkin v. State, No. 23A-PC-1081, 2024 WL 1155319, at *2 (Ind. Ct. App. Mar. 18, 2024).

The Court of Appeals affirmed the denial of postconviction relief for Larkin. Larkin v. State, No. 23A-PC-1081, 2024 WL 1155319, at *1 (Ind. Ct. App. Mar. 18, 2024).

ARGUMENT

I. WHERE THE TRIAL ATTORNEYS ABANDONED LARKIN'S REPRESENTATION AND PREJUDICED HIM WITH A PROCEDURALLY UNFAIR SETTING BY FAILING TO SUBJECT THE PROSECUTION'S

CASE TO MEANINGFUL ADVERSARIAL TESTING, THE COURT OF APPEALS MISTAKENLY AND ERRINGLY AFFIRMED THE PCR-COURT'S DENIAL OF LARKIN'S INEFFECTIVENESS OF COUNSEL CLAIM.

Larkin appeals a denial of post-conviction relief and, as such, proceeds from a negative judgment and on appeal must prove that the evidence presented in the post-conviction proceedings points to an unmistakable and unerring conclusion opposite the post-conviction court's conclusion. Games v. State, 684 N.E.2d 466, 469 (Ind. 1997); Harrison v. State, 707 N.E.2d 767, 773-774 (Ind. 1999); Bobadilla v. State, 117 N.E.3d 1272, 1279 (Ind. 2019).

"The special value of the right to the assistance of counsel explains why '[i]t has long been recognized that the right to counsel is the right to the effective assistance of counsel.' *McMann* v. *Richardson,* 397 U. S. 759, 771, n. 14 (1970)." United States *v.* Cronic, 466 U.S. 648, 654, 80 L. Ed. 2d 657, 104 S. Ct. 2039, 1984 U.S. LEXIS 78 (1984).

The standard of review for ineffective assistance of counsel claims is the same for trial counsel and appellate counsel: The defendant must demonstrate that trial counsel or appellate counsel was deficient in his or her performance and that the deficiency resulted in prejudice. Strickland v. Washington, 466 U.S. 668, 686, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); Bieghler v. State, 690 N.E.2d 188, 192–93 (Ind. 1997); Henley v. State, 881 N.E.2d 639, 644 (Ind. 2008).

An accumulation of errors by counsel may justify a finding of ineffective assistance of counsel. Smith v. Indiana, 511 N.E.2d 1042, 1046 (Ind. 1987); Siglar v. State, 541 N.E.2d 944, 948 (Ind. 1989); Potter v. State, 684 N.E.2d 1127, 1135 (Ind. 1997); Grinstead v. State, 845 N.E.2d 1027, 1037 (Ind. Ct. App. 2006); McCullough v. State, 973 N.E.2d 62, Dissent, 87 (Ind. Ct. App. 2012).

"[S]ituations where counsel entirely fails to subject the prosecution's case to meaningful adversarial testing" justifies the presumption of the ineffectiveness of counsel. Cronic, 466 U.S.

at 659. Where the claimed ineffectiveness of counsel, whether trial, appellate, or post-conviction, is, in effect, an egregious abandonment of counsel claim, a Cronic presumption of ineffectiveness of counsel may apply. See Bobadilla, 117 N.E.3d at 1280, fn. 4.

The failure of trial counsel to correctly understand the governing law may satisfy the deficient performance prong of Strickland. See Helton v. State, 907 N.E.2d 1020, 1023 (Ind. 2009).

Larkin's trial attorneys did no work on possible lesser included offenses to voluntary manslaughter. Larkin v. State, No. 23A-PC-1081, 2024 WL 1155319, at *2 (Ind. Ct. App. Mar. 18, 2024). They were taken by surprise by the State of Indiana's request for an involuntary manslaughter offense jury instruction. Id. Larkin's trial attorneys' failure to investigate the law of lesser included offenses to voluntary manslaughter were not strategic decisions. Strategic decisions require knowledge. Larkin's trial attorneys failed "to subject the State of Indiana's case against him to meaningful adversarial testing." Cronic, 466 U.S. at 659.

The Court of Appeals erred in concluding that Larkin was not prejudiced by his trial attorneys' abandonment at a crucial stage of his trial, to-wit: failing to be prepared to explain why the State of Indiana's proposed jury instruction for involuntary manslaughter should not be given.

Larkin's trial attorneys presented affidavits attesting to their lack of knowledge and lack of preparation on the issue of lesser included offenses to voluntary manslaughter. Larkin v. State, No. 23A-PC-1081, 2024 WL 1155319, at *2 (Ind. Ct. App. Mar. 18, 2024). The Court of Appeals refused to deem this lack of knowledge and lack of preparation as ineffective assistance of counsel. Id. at 1. The Court of Appeals erred.

Interestingly, the Court of Appeals did not refer to this lack of knowledge and lack of preparation as strategic choices by Larkin's trial attorneys. The Court of Appeals, instead, found no prejudice because it was convinced that Larkin had committed involuntary manslaughter. Larkin's trial attorneys' "actions were not a product of trial strategy or tactics but rather were deficient performance." Dowdell v. State, 720 N.E.2d 1146, 1151 (Ind. 1999). Larkin's trial attorneys' deficient performance prejudiced Larkin by not "subject[ing] the State of Indiana's case against [Larkin] to meaningful adversarial testing." Cronic, supra. Larkin's trial attorneys, with prejudicial effect, stopped representing Larkin when faced with the proposed lesser included involuntary manslaughter offense jury instruction and abandoned him during this critical phase of Larkin's trial just as Dowdell's trial counsel stopped representing him and abandoned him. Dowdell v. State, 720 N.E.2d at 1151("The motion for continuance filed on May 9, 1996 stated that Cable had been given the names of ten potential witnesses and addresses for four of them. Cable could have filed a witness list at that time, but did not. Moreover, it appears that Cable did nothing to find additional information about these witnesses. In the face of an order to compel that explicitly mentioned exclusion as a potential sanction, Cable filed no witness list and apparently did no independent investigation. Rather, he sought a continuance and then, on the morning of trial, filed a belated witness list. In addition, after the first trial ended in a hung jury, Cable did not file a written request for reconsideration of the trial court's ruling on exclusion but rather raised the issue orally on the morning of the second trial. Finally, Cable made no offer of proof to preserve any error in the trial court's exclusion of the witnesses. Under these circumstances, we conclude that the evidence leads to the conclusion that Cable's actions were not a product of trial strategy or tactics but rather were deficient performance."). Larkin's trial attorneys' trial conduct in not being prepared to challenge

proposed lesser included offenses jury instructions deprived Larkin of his constitutional right to effective representation. Cronic, supra.

II. THE COURT OF APPEALS MISTAKENLY AND ERRINGLY AFFIRMED THE PCR-COURT'S DENIAL OF LARKIN'S INEFFECTIVENESS OF LARKIN'S TRIAL ATTORNEYS DESPITE THE ACCUMULATION OF ERRORS COMMITTED BY LARKIN'S TRIAL ATTORNEYS.

Substantive double jeopardy refers to criminal situations from which multiple convictions arise in a single prosecution. Gaunt v. State, 296 N.E.2d (Ind. Ct. App. 2024). Procedural double jeopardy concerns successive prosecutions for the same offense. Id. Wadle and Powell changed Indiana's substantive double jeopardy jurisprudence. Wadle v. State, 151 N.E.3d 227 (Ind. 2020); Powell v. State, 151 N.E.3d 256 (Ind. 2020). The Indiana Supreme Court issued Wadle and Powell in 2020. Id. Following the issuance of those two opinions, a recurrent question was "what is left of Indiana's common law double jeopardy jurisprudence." See Gaunt v. State, supra; cf. A.W. v. State, 229 N.E.3d 1060 (Ind. 2024).

An offense is inherently included in another if it may be established by proof of the same material elements or less than all the material elements defining the crime charged or if the only feature distinguishing the two offenses is that a lesser culpability is required to establish the commission of the lesser offense. Id. An offense is factually included in another offense when the charging instrument alleges that the means used to commit the crime charged include all the elements of the alleged the lesser included offense. Id.

Larkin v. State, 173 N.E.3d 662 (Ind. 2021) [Larkin-2021], is a case in which the Indiana Supreme Court discusses involuntary manslaughter being a factually included lesser offense of voluntary manslaughter, with the commonality being a battery with a firearm. The Indiana Supreme Court recognized that there was a problem with the criminal information in Larkin's case and whether or not the criminal information alleged a battery. 173 N.E.3d at 668. The

Indiana Supreme Court explained that "[a] knowing or intentional killing with a handgun can be classified as a battery." Id. The Indiana Supreme Court went on to state, "understandably, the allegation in the information – killing with a handgun – invokes a shooting, not a pushing." Id. at 669. Justice David, in his dissent in Larkin-2021, stated, "I note a few things about the case relied upon by the State and the majority, *Lynch v. State,* 571 N.E.2d 537, 538–39 (Ind. 1991), for the proposition that killing by handgun necessarily involves a battery. The decision in *Lynch* was very fact specific as evidenced by the Court including limiting language such as 'here' and 'this is not such a case.' *Id.* at 539. The Court did not craft a broad rule providing that any and all killing by handguns is necessarily battery in every case and acknowledged that the language of the charging information could limit lesser included instructions. Here, the charging information is terse and only alleged that a handgun was used without more. That it is, it provides the 'killing' was accomplished by the handgun with zero mention of a battery or facts that would even indicate one. We don't read words into statutes when interpreting them and I do not believe we should read them into charging information either." Id. at 672.

From the Indiana Supreme Court's ruling in Larkin-2021 that a knowing or intentional killing with a handgun can be classified as a battery, the Indiana Court of Appeals stated "the court pointed out that, **for decades**, a knowing or intentional killing with a handgun has been classified as a battery." Larkin v. State, No. 23A-PC-1081, 2024 WL 1155319, *2 (Ind. Ct. App. Mar. 18, 2024)(emphasis added.) [Larkin-2024].

Larkin 2021, given the Court of Appeals conclusion in Larkin 2024 that "a knowing or intentional killing with a handgun has been classified as a battery" "for decades," is problematic for all of the cases contending that Wadle and Powell destroyed the common law double jeopardy jurisprudence. Larkin v. State, No. 23A-PC-1081, 2024 WL 1155319, *2. Larkin

2021, from the perspective of the Larkin 2024 court, tells us that Wadle and Powell did not extinguish common law substantive double jeopardy on the "factually included" prong.

Given the Indiana Supreme Court's analysis that Larkin had committed a battery that caused the handgun to fire, the Indiana Court of Appeals maintained that analysis on the appeal of the denial of the postconviction relief sought by Larkin despite Justice David's admonition in his dissent in Larkin 2021 that the pushing occurred at different times. Id.

Given the majority's description of the shooting of Larkin's wife in Larkin-2021, stippling would have been expected. The absence of stippling supports Justice David's view that the shooting and touching occurred at different times. Despite the evidence presented in the postconviction relief hearing, the Larkin 2024 court felt compelled to follow the conclusion reached by the Larkin 2021 court. Larkin's trial attorneys' failure to research or to otherwise investigate the case law on possible lesser included offenses to voluntary manslaughter compounded the problems for Larkin at his trial and arising from the expansive view on the factually included offenses to involuntary manslaughter of Larkin 2021 to the "factually included" prong of substantive double jeopardy in Indiana, to-wit: Although Wadle and Powell eliminated common law double jeopardy jurisprudence, Larkin-2021 seems to resuscitate Richardson v. State, 717 N.E.2d 32 (Ind. 1999) which was overruled by Wadle v. State, 151 N.E.3d 227 (Ind. 2020).

Since Larkin-2021, the Indiana Supreme Court seems to have appreciated Justice David's dissent in Larkin-2021, albeit without discussing Larkin-2021. See A.W. v. State, 229 N.E.3d 1060 (Ind. 2024). A.W. v. State was issued on March 12, 2024. Larkin-2024 was issued March 18, 2024. In A.W. v. State, the majority issued an opinion in which the Court stated:

> "We conclude that when assessing whether an offense is factually included, a

> court may examine only the **facts as presented on the face of the charging instrument**. This includes examining the 'means used to commit the crime charged,' which must 'include all of the elements of the alleged lesser included offense.' *Id*. Step 2 has core constraints: it does not authorize courts to probe other facts, such as evidence adduced from trial. *Cf. Phillips*, 174 N.E.3d at 647. The factually included inquiry at this step is thus limited to facts on the face of the charging instrument. Otherwise, Step 2 would be another formulation of the now-retired *Richardson* approach. *Richardson*'s 'either/or' regime was rejected because it gave courts **options**, which thus led to a selective application of 'one test over another.' *Wadle*, 151 N.E.3d at 241. Using their discretion, courts typically focused on actual evidence rather than the statutory elements, which led to a mélange of inconsistency. *Compare Hines v. State*, 30 N.E.3d 1216, 1222 (Ind. 2015) (double jeopardy violation existed 'because the facts establishing criminal confinement would also establish battery[,]' though the facts establishing the latter offense would not have established the former), *with Carrico v. State*, 775 N.E.2d 312, 314 (Ind. 2002) (no double jeopardy violation where evidence establishing murder established only one element of B felony robbery, even though evidence establishing the latter crime may have established the former). Inconsistency breeds confusion, and confusion imperils the rule of law."

A.W. v. State, 229 N.E.3d 1060, 1067–68 (Ind. 2024)(emphasis in the original). Justice Goff issued a concurrence in A.W. v. State in which he suggests that the Indiana Supreme Court's A.W. v. State ruling did, in fact, breed confusion. A.W. v. State, 229 N.E.3d 1060, concurring opinion, 1076 (Ind. 2024).

As noted above, in A.W. v. State, supra, the Indiana Supreme Court held that, "when

assessing whether an offense is factually included, a court may examine only the **facts as presented on the face of the charging instrument**. This includes examining the 'means used to commit the crime charged,' which must 'include all of the elements of the alleged lesser included offense.'" A.W. v. State, 229 N.E.3d at 1067(citation omitted.). This is Justice David's position in Larkin-2021.

The Indiana Supreme Court issued A.W. v. State on March 12, 2024, before the Court of Appeals issued its decision on March 18, 2024, in Larkin-2024. The implicit retraction of the expansiveness of Larkin-2021 on the factually included prong of substantive double jeopardy jurisprudence was available for consideration by the Larkin-2024 Court of Appeals. The analyses in both the majority opinion and in the concurrence opinion demonstrate that the Larkin-2024 Court of Appeals was not bound by the analyses or factual conclusions of Larkin-2021.

Given that the Indiana Supreme Court in Larkin 2021 ultimately concluded that Larkin admitted to touching his wife with the handgun during a pre-charging statement and used that admission to conclude that Larkin shot his wife while touching her with a firearm, perhaps the Indiana Supreme Court's "factually included" discussion in Larkin 2021 can be viewed as dicta. Dicta or not dicta, the Court of Appeals felt compelled to agree with the legal and factual analysis of the Indiana Supreme Court in Larkin 2021 and did not give adequate consideration to the post-conviction court's treatment of the timing of the touching of Larkin's wife and the first shot of Larkin's wife and Larkin's postconviction relief counsel and appellate postconviction relief counsel attempts to support Justice David's conclusion in his dissent in Larkin 2021 that the pushing occurred at different times. The Larkin-2024 court felt compelled to follow the legal and factual analyses in Larkin-2021, because it determined that Larkin-2021 stands for the

proposition that common law "factually included offenses" double jeopardy jurisprudence survived the substantive double jeopardy jurisprudence set forth in Wadle and Powell. If Larkin's trial attorneys had researched the issue of possible lesser included offenses, they would have been able to address the State of Indiana's proposed factually lesser included offense instruction of involuntary manslaughter being included in the offense of voluntary manslaughter under Indiana's common law double jeopardy jurisprudence and the problems associated with the stretch of that law. See Dissent of Justice David, Larkin v. State, 173 N.E.3d at 672. Larkin's trial attorneys abandoned Larkin by not developing the issue that Larkin-2021 does not fit well with Wadle and Powell and that the true facts of the case support the analysis of Justice David. Id. Larkin's trial attorneys failed "to subject the State of Indiana's case against him to meaningful adversarial testing." Cronic, 466 U.S. at 659; see Bobadilla, 117 N.E.3d at 1280, fn. 4. Further, the analyses in both the majority opinion and in the concurrence opinion demonstrate that the Larkin-2024 Court of Appeals was not bound by the analysis or factual conclusions of Larkin-2021. The Larkin-2024 Court of Appeals mistakenly and erringly affirmed the postconviction court's denial of Larkin's ineffectiveness of trial counsel despite the accumulation of errors and the consequences of their errors.

CONCLUSION

The evidence presented in the post-conviction proceedings points to an unmistakable and unerring conclusion opposite the post-conviction court's conclusion and the Court of Appeals affirmation of that decision. Based upon the preceding, Larkin requests that the Indiana Supreme Court grant transfer of this case, vacating the opinion of the Court of Appeals, and conclude that Mr. Larkin was denied a fair trial, that his trial attorneys provided ineffective assistance of counsel, that the involuntary manslaughter jury instruction should not have been

given, and remand the case to the trial court to vacate the involuntary manslaughter conviction, and issue a judgment of acquittal based upon the jury acquitting Mr. Larkin at trial.

WORD COUNT CERTIFICATE

I verify that this petition to transfer fulfills the requirements of App. R. 44D and App. R. 44F. This petition to transfer contains a total of 14 pages and not more than four thousand words. Counsel herein relies on the word processing system used to prepare this petition to transfer when verifying the word count.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true copy of this PETITION TO TRANSFER has been delivered through E-service using the Indiana E-filing System to the following listed herein below on this date, May 2, 2024, to:

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