Cause No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

WILLIAM CLYDE GIBSON, III,

Petitioner,

v.

INDIANA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF INDIANA

PETITION FOR A WRIT OF CERTIORARI

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CAPITAL CASE

QUESTION PRESENTED

Whether the Indiana Supreme Court erred in determining Gibson's conflict of interest claim should be analyzed under *Strickland v. Washington* rather than *Culyer v. Sullivan*, where lead counsel's loyalties to Gibson were encumbered by his position as head of the county public defender agency.

LIST OF PARTIES

All parties appear in the caption on the cover page.

LIST OF PRIOR PROCEEDINGS

Jury Trial Guilty Verdict and Capital Sentence
Superior Court One of Floyd County, Indiana
State v. Gibson, No. 22D01-1204-MR-000919
entered October 25, 2013 and November 26, 2013, respectively

Direct Appeal affirming Conviction and Sentence
Supreme Court of Indiana
Gibson v. State, No. 22S00-1206-DP-00359
entered September 24, 2015
rehearing denied December 7, 2015

Petition for Writ of Certiorari to the Indiana Supreme Court
Supreme Court of the United States
Gibson v. Indiana, No. 15-9195
denied October 3, 2016

Denial of Post-Conviction Relief
Superior Court One of Floyd County, Indiana
Gibson v. State, No. 22D01-1606-PC-000004
entered October 6, 2017

Direct Appeal affirming the Denial of Post-Conviction Relief
Supreme Court of Indiana
Gibson v. State, No. 22S00-1601-PD-00009
entered October 24, 2019.
rehearing denied February 3, 2020

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PETITION FOR WRIT OF CERTIORARI TO THE
SUPREME COURT OF INDIANA

I. OPINIONS BELOW

The opinion of the Indiana Supreme Court, *Gibson v. State*, 133 N.E.3d 673 (Ind. 2019), entered October 24, 2019, is reprinted at Appendix A. The decision of the post-conviction court, *Gibson v. State*, entered October 6, 2017, is reprinted at Appendix B. The order of the Indiana Supreme Court denying rehearing, dated February 3, 2020, is reprinted at Appendix C.

II. JURISDICTION

Because Gibson asserted below and herein that he was deprived of rights guaranteed by the United State Constitution and timely files his petition for a writ of certiorari, this Court has jurisdiction to review the Indiana Supreme Court's judgment under 28 U.S.C. Section 1257(a).

III. CONSTITUTIONAL PROVISIONS INVOLVED

The following Amendments to the United States Constitution are vital to this case:

AMENDMENT VI

"In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense."

AMENDMENT XIV

"Section 1 . . . nor shall any State deprive any person of life, liberty, or property, without due process of law; . . . ."

IV. STATEMENT OF THE CASE

A. Trial, Penalty Phase and Direct Appeal Proceedings

On April 24, 2012, the State charged William Clyde Gibson, III, with two murders and alleged he was a habitual offender [A36-39].[1],[2] On May 23, 2012, the State dismissed one murder charge and filed its request for the death penalty alleging six aggravating factors [A77-78, 85-86]. On October 28, 2013, the State filed an amended information seeking death, alleging four aggravating factors: two counts of intentional murder while the defendant was committing criminal deviate conduct, that the defendant was on probation for theft at the time of the murder, and that the defendant dismembered the victim [A599-600].[3]

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[1] The direct appeal record in this case was admitted as Exhibit 10 during Gibson's post-conviction evidentiary proceedings. Citation to the appendix, transcript and exhibit volumes of that record are cited as "A", "T" and "E." Confidential post-conviction exhibits are cited as "EC." Citations to the post-conviction appendix, transcript and exhibit volumes are referred to as "PA," "PT," and "PE." The direct appeal record in Gibson's other capital case, Cause No. 22S00-1206-DP-360, was admitted as Exhibit 11 in the consolidated post-conviction hearing. Citations to that record are "PEX11 T" and "PEX11 A." Citations to other post-conviction exhibits are directly to the relevant pages in the post-conviction exhibit volumes.

[2]Gibson was initially charged with a second murder, the 2002 murder of Karen Hodella, in the same cause. On May 23, 2012, the State charged Gibson with the murder of Stephanie Kirk under a different cause number [PEX11 A31]. Ultimately the murder of Ms. Hodella was severed and charged under a separate cause number resulting in Gibson facing three murder charges in three different causes [A75-83]. The State sought the death penalty in two of the cases – for the murders of Ms. Whitis and Ms. Kirk.

[3] Ind. Code § 35-50-2-9(b) provides: The aggravating circumstances are as follows: (1) The defendant committed the murder by intentionally killing the victim while committing or attempting to commit any of the following: . . . (D) Criminal deviate conduct . . . (9) The defendant was: . . . (C) on probation after receiving a sentence for the commission of a felony. . . at the time the murder was committed. . . . (10) The defendant dismembered the victim.

On September 23, 2013, voir dire began. The guilt phase of trial took place from October 21 through 25, 2013 [A29-30]. On October 25, 2013, the jury convicted Gibson of murder [A30, T586]. The penalty phase presentation occurred on October 28 and 29, 2013 [A30-31]. Hours after the penalty phase concluded, the jury found the four aggravating factors were proven beyond a reasonable doubt and that the aggravating factors outweighed the mitigating circumstances and recommended a sentence of death [A613-618]. On October 30, 2013, the State presented evidence Gibson was a habitual offender, and the jury returned a verdict finding that he was [A32]. On November 26, 2013, the trial court sentenced Gibson to death for murder and withheld judgment on the habitual offender enhancement [A665-666].[4]

On September 24, 2015, the Indiana Supreme Court affirmed Gibson's conviction and death sentence. *Gibson v. State*, 43 N.E.3d 231 (Ind. 2015). On December 7, 2015, the Court denied rehearing in an unpublished order. On October 3, 2016, this Court denied Gibson's Petition for Certiorari. *Gibson v. Indiana*, 137 S.Ct. 54 (2016).

B. Post-Conviction Proceedings and Appeal

A Petition for Post-Conviction Relief was filed on June 16, 2016 [PAV2 11-17]. The petition was amended on January 19, 2017 and again on May 11, 2017 [PAV2 88-94, 104-112]. An evidentiary hearing was held from July 17 through 21, 2017.

[4]Indiana Code § 35-50-2-9(e) provides that, if the jury reaches a sentencing recommendation, the court shall sentence the defendant accordingly.

The trial court ruled Gibson was not denied the effective assistance of trial and appellate counsel and that Gibson did not establish his counsel was encumbered by a conflict of interest [PAV4 2-84]. Appendix B.

A Notice of Appeal was timely filed [PAV3 49]. The Indiana Supreme Court affirmed the denial of post-conviction relief. Appendix A. The Court applied the *Strickland v. Washington* prejudice standard to Gibson's conflict of interest claim rather than the adverse effect standard of *Culyer v. Sullivan*. The Court concluded there was no evidence of insufficient resources that prejudiced Gibson despite proof of an alternative strategy rejected due to lead counsel's conflicted interest as head of the county public defender agency.

V. REASONS TO GRANT THE PETITION

A. TRIAL PROCEEDINGS

On April 19, 2012, the body of 75-year-old Christine Whitis was found in the garage of Gibson's mother's house [T2697, 2931, 2935, 2972]. When found, she was naked and her breast had been severed from her body. When Gibson was located, Ms. Whitis' breast was found in his vehicle [T3141, 3202, 3206]. Gibson was arrested that night with a BAC of .23 [T2828]. He was interrogated over the following days without counsel, and he admitted to sexually assaulting and killing Ms. Whitis [E230-34, 253]. He also admitted to killing another woman, Karen Hodella [PEV3 6-24].

On April 24, 2012, the State charged Gibson with two counts of murder for the killings of Ms. Whitis and Ms. Hodella and with being a habitual offender [A36-39]. On the same day, the county public defender's office was appointed to represent Gibson [A2]. J. Patrick Biggs, the head of the county public defender agency, assigned

himself as lead counsel [PTV1 16]. Shortly thereafter, the State dismissed the murder charge regarding Ms. Hodella and filed its request for the death penalty alleging six aggravating factors in the killing of Ms. Whitis [A77-78, 85-86].

On September 23, 2013, voir dire began and a jury was empaneled [A24]. The guilt phase of trial took place from October 21 through 25, 2013 [A29-30]. Because there was little evidence to challenge the murder charge, the jury convicted Gibson of murder shortly after deliberations began [A30, T586].

On October 28, 2013, the penalty phase began, and the State filed an amended information seeking death, alleging four aggravating factors: two counts of intentional murder while the defendant was committing criminal deviate conduct, the defendant was on probation for theft at the time of the murder, and the defendant dismembered the victim [A30-31, 599-600]. The following day, the penalty phase concluded [A30-31].

In his penalty phase opening statement, Biggs told the jury they would hear about Gibson's mental health struggles as the result of a "miserable" childhood including instances of physical and verbal abuse at the hands of Gibson's father [T3495-96]. In support of its theory, the defense presented Brenda Ray, Gibson's half-sister, and Dr. Edmund Haskins, a clinical neuropsychologist [T3597, 3628]. Ray, the only family member presented at the penalty phase, testified about Gibson's family history of mental health and substance abuse problems, as well as Gibson's individual struggles with each [T3597-600; PEX11 T926-27]. She did not testify Gibson had a "miserable" childhood. In fact, she testified to the opposite – the Gibson

children's upbringing was "fairly normal" and her father was not physically or verbally abusive [T3596, 3606, 3608-09].

Haskins testified Gibson suffered from bipolar disorder, antisocial personality disorder, drug abuse, alcohol abuse, and borderline personality disorder [T3639]. Haskins explained how past evaluators might have missed the bipolar disorder diagnosis [T3648-49]. Haskins testified each contributed to Gibson's impulse control problems [T3646-51]. Haskins concluded Gibson's conditions progressed over time and led to a "gradual reduction in his ability to control himself." [T3646-50].

The defense called three other witnesses. An expert in prison classifications testified Gibson could likely be housed safely while incarcerated [T3578]. A correctional officer testified Gibson attempted suicide while in jail awaiting trial [T3528-30]. Finally, a neighbor of Gibson's mother testified Gibson mowed his lawn weekly until Gibson's mother died [T3518]. After that, Gibson was lax in mowing the yard and the neighbor noticed a "little" change in Gibson's behavior [T3520].

In closing, counsel argued,

> I want you to think about how a human being who is suffering multiple mental disorders, the emotional loss of his mother, being under extreme effects of alcohol intoxication, coming from an abusive family, and any other mitigators that you may personally consider on your own reflection of this matter, and choose that the Defendant, William Clyde Gibson, III, will spend the rest of his life behind bars, reflecting on what he did to his mother's best friend, realizing he will never be paroled and will die in prison.

[T3799].

Hours after the penalty phase concluded, the jury found the four aggravating factors proven beyond a reasonable doubt and that the aggravating factors

outweighed the mitigating circumstances and recommended a sentence of death [A613-618].

On October 30, 2013, the jury found Gibson was a habitual offender [A32]. On November 26, 2013, the trial court sentenced Gibson to death for murder and withheld judgment on the habitual offender enhancement [A665-666].

On September 24, 2015, the Indiana Supreme Court affirmed Gibson's conviction and death sentence. *Gibson v. State*, 43 N.E.3d 231 (Ind. 2015). On December 7, 2015, the Court denied rehearing in an unpublished order. On October 3, 2016, this Court denied Gibson's Petition for Certiorari. *Gibson v. Indiana*, 137 S.Ct. 54 (2016).

B. POST-CONVICTION PROCEEDINGS

The following evidence was presented at the hearing. In April 2012, the trial court appointed the Floyd County, Indiana public defender agency to represent Gibson. Biggs, the head of the Floyd County public defender agency, decided he would be lead counsel. Biggs approached George Streib to act as co-counsel on the case [PTV1 115]. Streib agreed and entered his appearance in June of 2012 [A95]. As the head of the agency, Biggs was responsible for, among other things, reporting at least annually the "operating costs, and projected needs" of the office. Ind. Code § 33-40-7-7. At the time Gibson's case was pending pre-trial, the county was experiencing budgetary issues, and funds were tight [PTV1 138, 170]. Streib had trouble getting paid for his work. Sometime he received only a fraction of what he was to be paid and other times received no paycheck [PTV1 138-39, PEV1 123].

Although Biggs enlisted the aid of co-counsel approximately a month after appointment, he waited many additional months before employing a mitigation specialist and a fact investigator. The mitigation specialist did not begin working on the case until late September, while the fact investigator did not begin working on the case until late October [PEV11 230; PTV3 109-10]. Biggs cited the attorneys' non-compliance with Indiana Criminal Rule 24 as the reason for his long delay in hiring team members [A348]. Indiana Criminal Rule 24 contains experiential and caseload requirements counsel must meet and comply with in order to be appointed to a capital case. If counsel complied with the requirements, the county would be reimbursed 50% of its all its expenses and fees incurred during its representation of Gibson.

By April of 2013, Streib recalled, "Mr. Biggs was worried about the public defender's office funding. That was a big question back then." [PTV1 144]. Streib testified Biggs indicated he "wanted to keep costs down" in the Gibson case [PTV1 148]. Around the same time, the executive director of the state's training agency for public defenders wrote a memo to the Indiana Supreme Court advocating for a rule prohibiting county chief public defenders from representing capital clients. In the memo, the director wrote,

> [I]n the past few years chief public defenders in three counties (Clark, Floyd, and Vanderburgh) have accepted the responsibility for representing a capitally charged defendant. All three chiefs have indicated that they felt obligated or pressured to represent the accused in these cases to reduce costs to the county.

[PEV12 8]. Biggs was chief public defender of Floyd County.

Throughout the time the case was pending, Streib expressed his concern about the lack of penalty phase preparation not only to Biggs, but also to others in the Indiana death penalty community. Months into the case, Streib wrote a memo explaining they must explore Gibson's possible mental health issues in order to formulate a defense [PEV1 221]. Approximately six months later, Streib wrote that Biggs wanted to "hurry the case along." [PEV1 222]. Streib detailed much of the penalty phase investigation still needed to be done, including investigation of Gibson's family history of any substance abuse or psychological issues, hiring an expert to review Gibson's medical records, and investigating whether there was an organic reason for Gibson's behavior [PEV1 222]. Around this time Streib also reached out to the state-wide agency providing support to public defenders. He relayed his belief that a continuance was needed, given the investigation that had not been done, and questioned whether he was able to fulfill his ethical duty to his client given this situation [PEV1 118, 123].

Voir dire was set to begin on September 23, 2013 [A24]. Although lead counsel hired a jury consultant, she was retained after the juror questionnaires were finalized [T3661; PEV1 101, 123]. The jury consultant testified her ability to help the team was constrained by counsel's failure to involve her earlier and provide her with necessary information such as a fact pattern and a mitigation report [PEV1 101].

Because the trial was moved out of the county, Biggs hired local counsel from the county where the case would be tried. Although Biggs invited local counsel to be part of the Gibson team months before the trial was to begin, Biggs did not reach out

to him again until two weeks before the trial [PTV3 73]. Local counsel testified he was not given any documents concerning the case or the facts of the case [PTV3 74]. The team's theory of defense was also not shared with him [PTV3 75].

Although Streib had repeatedly requested Biggs investigate Gibson's mental health, the sole mental health witness retained[5] by counsel was provided records to review just weeks before the start of trial [T3630, 3667-76, 3679, 3695]. Haskins was not given all of Gibson's records, including the report of Gibson's 2013 MRI and Gibson's complete Indiana Department of Corrections records [PEV12 22-23; T3672-3695]. Haskins evaluated Gibson two days before the start of jury selection [PEV11 245; T3630]. The only other testifying expert, a prison classifications expert, began working on the case after voir dire was complete and days before the guilt phase of trial began [PEV11 246].

Testimony from Kelly Fey, Gibson's ex-wife, was presented during the post-conviction proceedings. The couple married in 1980 [PEV2 50]. Although Gibson suffered from substance abuse problems most of his life, their life was fairly normal. He worked as a tree trimmer and was eventually promoted to supervisor [PEV 12, 47-49]. In their spare time, Gibson and Fey mainly worked around the house and socialized with family [PEV2 12].

Over time, Fey began to notice his drinking was increasing and she suspected he was using drugs [PEV2 15]. In 1991, after ten years of marriage, things began to

[5] Earlier in the case, two mental health professionals were court-appointed to assess competency to stand trial.

spiral out of control. In January of that year, Gibson had a serious car accident while driving drunk [PEV11 4-6]. Gibson had a cut on his head that required stitches [PEV2 19]. After that, Gibson's life changed drastically. Fey feared his drinking was increasing [PEV2 15]. He was unable to return to his job because his employer said Gibson "was not able to function the way he had before." [PEV2 39]. He made inappropriate comments about other women's bodies in front of his wife, something that had not happened before the accident [PEV2 32]. About seven months after the accident, Gibson and his wife separated and Gibson left their home [PEV 22].

After their separation, Gibson engaged in other behaviors that were out of character. Gibson came over to Fey's house and demanded the keys to a car. Fey refused to give Gibson the keys because he did not have a license and the car was uninsured [PEV2 25]. Gibson became very agitated, pulled the phone from the wall, and then "blacked out" and fell to the floor [PEV2 25]. Fey escaped. The following day, Gibson called Fey's father stating he could not remember what happened the night before and wanting to check on Fey's well-being [PEV2 26]. On other occasions, Gibson would tell Fey he had money and clothes but he could not remember how he obtained them [PEV2 28].

Approximately ten months after the accident, Gibson committed a sexual battery and robbery of a woman in "broad daylight" at a shopping center [PEV10 67-68; PTV2 173]. As a result, he was criminally charged [PEV10 67-68]. Defense attorney John Carroll, who represented Gibson on this offense, testified at the post-conviction hearing. Carroll noticed this offense was of a different character than

Gibson's past criminal history, which mainly consisted of alcohol related offenses [PTV2 175]. He noticed Gibson lived a relatively stable life – working and married – for over a decade until this incident [PTV2 180]. Gibson could not recall what happened during the incident because he was too intoxicated [PTV2 182, 194]. Carroll sought psychiatric evaluations and treatment for Gibson, not a usual practice for Carroll [PTV2 179]. It appeared to Carroll "in 1991, things had spiraled" for Gibson [PTV2 192]. Carroll was not contacted by Gibson's trial team [PTV2 188].

Dr. Andrew Chambers, an expert in addictions psychiatry, reviewed all Gibson's medical, psychological, military, and legal records, and he viewed hours of Gibson's video-recorded interrogations [PEV17 226]. During his review, he noticed a number of references to possible traumatic brain injury, specifically the 1991 accident [PEV17 230]. Chambers learned trial counsel had Gibson undergo an MRI in 2013 [PEV18 206]. Post-conviction counsel provided Chambers with the images and report [PEV17 238]. The trial team had not provided the images to any expert because the MRI report attributed significance of gliotic change to hypertension [PECV18 200-01]. Chambers knew, however, that linking Gibson's brain scarring to hypertension was incorrect because Gibson's hypertension was not longstanding based on the Indiana Department of Correction records provided to Chambers [PEV17 240, PEV18 150].

After a thorough review of all Gibson's records, including the MRI, Chambers evaluated Gibson, administered the Ohio State University TBI assessment tool, and confirmed what he believed to be true - Gibson has a brain injury [PEV17 231-32,

243; PEV18 11, 204-04]. He also diagnosed Gibson with bipolar disorder, mixed personality disorder, and substance use disorder [PEV18 16]. Chamber testified Gibson displays a level of brain dysfunction and impulsivity that "suggests someone who has... a very disturbed and dysfunctional brain" that is unlikely to result in "strategic premeditation." [PEV18 16]. Gibson's familial history resulted in a genetic predisposition to mental illness and substance abuse.

Chambers observed, in Gibson, "a person who had a mental illness and some addiction trouble," but experienced those as "relatively low-grade problems...." [PEV17 242-43]. Chambers' opined Gibson had a "bipolar underpinning" that was revealed when Gibson was young and unattached in the Army as opposed to later in life when he was married and stably employed [PEV18 51]. Gibson's bipolar disorder predisposed him to addiction. Chambers explained that Gibson's bipolar disorder has always existed for him in the background. Both his mental illness and addiction exacerbate each other [PEV17 222]. With those two co-morbidities in play, a person like Gibson is likely to engage in risky behaviors that increase his chances of accidental traumatic brain injury [PEV17 222-23]. In Gibson's case, Chambers stated, the 1991 motor vehicle accident "uncaged the monster of his bipolar and addiction." [PEV18 24]. After the accident, "...you have this unfolding of extreme neuropsychiatric and behavioral disturbances, much more severe addiction problems, bizarre behavior, extreme impulsivity, inability to maintain a relationship, inability to work occupationally, almost like a totally different person." [PEV17 242-43].

The post-conviction court ruled Gibson was not denied the effective assistance of trial and appellate counsel and that Gibson did not establish his counsel was encumbered by a conflict of interest [PAV4 2-84]. Appendix B. The Indiana Supreme Court affirmed the denial of post-conviction relief. Appendix A. The Court found Gibson's conflict of interest claim failed because he did not prove the deficient performance or prejudice required under *Strickland v. Washington*, 466 U.S. 668 (1984). Relying on Biggs' testimony, the Court found lead counsel did not feel pressure to save the county money during his representation of Gibson. The court found lead counsel did not delay in hiring the required participants to represent Gibson effectively and, if there was a delay, there was no prejudice from it.

The Indiana Supreme Court erred in analyzing Gibson's conflict of interest claim under *Strickland*. Gibson proved lead counsel "*actively represented* conflicting interests," *Mickens v. Taylor*, 535 U.S. 162, 175 (2002) (citing *Culyer v. Sullivan*, 446 U.S. 335, 360 (1980)), by putting the budget of the public defender agency ahead of the best strategy in Gibson's case. A better and reasonable strategy was to hire and consult experts well before trial including jury selection and to provide those experts with all the necessary information for them to meaningfully assist Gibson's defense.

The Indiana Supreme Court noted this Court in *Mickens* questioned whether *Sullivan* applied to cases other than multiple representation cases.[6] The Indiana

[6] The ruling of *Mickens* is in fact very narrow. This Court ruled that *Sullivan* does not entitle a habeas petitioner to automatic reversal when a trial court fails to inquire into a potential conflict of interest.

Supreme Court then analyzed Gibson's conflict of interest claim under the more difficult prejudice hurdle of *Strickland.*

When an attorney is hampered by an actual conflict of interest while representing a client, the attorney violates one of the most basic and fundamental duties owed to the client, the duty of loyalty. *Strickland*, 466 U.S. at 692. Because it is "difficult to measure the precise effect on the defense of representation corrupted by conflicting interests," courts employ a "fairly rigid rule of presumed prejudice." *Id.* Thus, when no objection is made at trial, the defendant must only establish "an actual conflict of interest adversely affected his lawyer's performance." *Sullivan*, 446 U.S. at 348.

After *Mickens*, circuit courts are divided on whether *Sullivan* applies to conflicts other than trial counsel's representation of more than one defendant in the same case. The Seventh Circuit has held this Court has not decided whether *Sullivan* applies outside multiple representation. *Reynolds v. Heppe*, 902 F.3d 699 (7th Cir. 2018). The Ninth Circuit also held this remains an "open question." *Foote v. Del Pappa*, 492 F.3d 1026, 1030 (9th Cir. 2007). Other circuits have held *Sullivan* applies to other types of conflicts. *U.S. v. Stitt*, 441 F.3d 297 (4th Cir. 2006) (counsel did not seek funds for a mitigation specialist to avoid disclosing his fee); *Koste v. Dormire*, 345 F.3d 974 (8th Cir. 2003) (analyzed whether conflict existed when counsel's coworker was being alleged ineffective by defendant in unrelated case). Still other circuits have affirmatively held *Sullivan* only applies to multiple representation. *Whiting v. Burt*, 395 F.3d 602 (6th Cir. 2004).

As lead counsel, Biggs was responsible for immediately assembling a team to investigate Gibson's offenses and social history. *See* American Bar Association Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases (2003 revision) [hereinafter "ABA Guidelines"], Guideline 10.4(C)(2)(a) and Guideline 10.4, commentary. Immediate investigation is important for many reasons, including revealing areas where expert consultation and evaluation are needed. *See* ABA Guideline 10.4, commentary and Guideline 10.7, commentary. Counsel did not engage the necessary team members immediately, instead waiting several months before securing the services of a fact investigator and a mitigation investigator, in order to comply with Indiana's county reimbursement standards. Counsel's delay in engaging the necessary team members and experts due to financial constraints had an adverse effect on Gibson's defense.

All evidence and testimony presented, except for lead counsel's self-serving post-conviction testimony, revealed counsel unreasonably delayed in hiring the necessary team members and experts in Gibson's case. The continuance motion counsel filed stated he waited to hire the necessary members of the trial team until he reached compliance with the rule that allowed the county to be reimbursed half of the costs of Gibson's defense [A348]. Although Biggs asked local counsel to help with jury selection months before the trial was to begin, Biggs did not provide him with enough information about the case to allow him to be an integral member of the team. The same was true for the jury consultant.

Most importantly, counsel performed deficiently by failing to engage the sole mental health professional in a timely manner and did not provide this vital witness with all Gibson's records, instead only giving him a fraction of Gibson's information [PEV12 22-23; T3672-3695]. Because of Haskins' late entry into the case, his evaluation of Gibson occurred only days before voir dire began. This left Haskins to evaluate Gibson with incomplete information upon which to reach a reliable diagnosis of Gibson. Additionally, the last minute evaluation left the team unable to meaningfully utilize the conclusions Haskins reached and without any time to follow-up. However, it was less expensive to have the expert spend limited time reviewing records and consulting with the team pre-trial in order to develop a mitigation theme going into jury selection. Lead counsel's divided loyalties had an adverse effect on the mitigation presentation at Gibson's capital trial.

Counsel's concern with costs resulted in him delaying in engaging an expert and providing him with the necessary documentation in a timely manner and had an adverse effect on Gibson. Had counsel engaged an expert such as Chambers in a timely manner and provided him with all readily-available documentation before an evaluation, an important mitigating factor would have been presented to the jury, that is, evidence of Gibson's brain damage. *Porter v. McCollum,* 558 U.S. 30, 41 (2009) (citing *Wiggins v. Smith*, 539 U.S. 510, 535 (2003)). Chambers confirmed Gibson has a traumatic brain injury, likely the result of the 1991 car accident [PEV17 231-32] That is, based on Chambers review of Gibson's records it is clear Gibson suffered from bipolar disorder and substance abuse problems as an adult. Even with these

struggles, Gibson was still able to lead a fairly normal life. Gibson was married and employed. He did not act out sexually. The legal problems he experienced were mainly as a result of his substance abuse struggles.

In 1991, Gibson's life changed dramatically [PEV17 243]. At the age of thirty-three, Gibson had a serious car accident. Afterwards Gibson's struggles with substance abuse were exacerbated. Gibson engaged in behaviors he never had prior to the accident. He was accused of a sexual assault. He made inappropriate comments to his wife about other women. He would blackout, not remembering what he had done. Chambers opined Gibson's traumatic brain injury likely occurred at this time given the dramatic change in Gibson's behavior. Chambers' opinion the brain injury likely occurred as a result of the 1991 accident is supported by the testimony of Gibson's ex-wife and Gibson's prior defense attorney.

Defense counsel's divided loyalties influenced his basic strategy decision to unreasonably delay consulting an expert, and counsel consequently failed to identify traumatic brain damage sustained by Gibson. Had counsel consulted with an expert and given the expert adequate time and information, an accurate picture of Gibson's brain functioning and mental health problems could have been presented to the jury. The expert would have explained the import of that brain damage, converging with his pre-existing mental illness and substance addiction, and allowed the jury to have a reliable and accurate explanation of Gibson's frailties. Rather than the jury hearing unsupported argument about Gibson's "miserable, abusive childhood," the jury would have had an accurate picture of a working, married man with some low-grade

substance abuse and mental health problems who sustained a traumatic brain injury which made him "a totally different person." [PEV17 243]. Evidence a defendant's brain is damaged in a way which may result in impulsive, violent behavior is an important factor in determining a defendant's moral culpability. *Porter,* 558 U.S. at 41 (citing *Wiggins*, 539 U.S. at 535). Had the jury been able to put Gibson's traumatic brain injury on the mitigating side of the scale, there is a reasonable probability the jury would have struck a different balance. *Wiggins*, 539 U.S. at 537. Had counsel's loyalties rested solely with Gibson, the needed investigation and evaluation would have been performed and Gibson's brain injury would have been uncovered.

Gibson established counsel had an actual conflict of interest which adversely affected counsel's performance. As such, pursuant to *Sullivan*, prejudice should have been presumed. *Sullivan*, 446 U.S. at 348.

CONCLUSION

For the foregoing reasons, Gibson respectfully requests that this Court issue a writ of certiorari to review the judgment of the Indiana Supreme Court.

Respectfully submitted,

/s/ Joanna Green
JOANNA GREEN*
Deputy Public Defender
Attorney No. 16724-53

Attorney for Petitioner

*Counsel of Record

Cause No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

WILLIAM CLYDE GIBSON, III,	)
	)
Petitioner-Appellant,	)
	)
v.	)
	)
STATE OF INDIANA,	)
	)
Respondent-Appellee.	)

PROOF OF SERVICE AND CERTIFICATE OF MAILING

I hereby certify that I have, this 30th day of June, 2020, mailed the attached and foregoing **PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF INDIANA**, to the Clerk of the United States Supreme Court, One First Street, North East, Washington, D.C. 20543-0001, pursuant to Supreme Court Rule 29, by certified mail, return receipt requested, designating said method of filing as of the time of mailing, in the United States Mail, first class postage affixed.

I hereby certify that I have, this 30th day of June, 2020, served upon Curtis Hill, Indiana Attorney General, and Aaron Negangard, Chief Deputy Attorney General a copy of the above and foregoing **PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF INDIANA**, by mailing it in the United States Mail, first class postage affixed, addressed to his office located at 402 West Washington Street, IGCS – 5th Floor, Indianapolis, Indiana 46204-2770.

/s/ Joanna Green
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APPENDIX A

Gibson v. State, 133 N.E.3d 673 (Ind. 2019)

IN THE

Indiana Supreme Court

Supreme Court Case Nos. 22S00-1601-PD-00009,
22S00-1608-PD-00411

William Clyde Gibson, III
Appellant (Defendant)

–v–

State of Indiana
Appellee (Plaintiff)

Argued: January 10, 2019 | Decided: October 24, 2019

Appeal from the Floyd County Superior Court, No. 22D01-1606-PC-4
The Honorable Susan L. Orth

Appeal from the Floyd County Superior Court, 22D01-1703-PC-4
The Honorable Susan L. Orth

On Direct Appeal

Opinion by Justice Massa

Chief Justice Rush, Justice David, and Justice Goff concur.
Justice Slaughter not participating.

Massa, Justice.

William Clyde Gibson, III was convicted of and sentenced to death for the brutal murders of Christine Whitis and Stephanie Kirk. After this Court affirmed those convictions, Gibson, alleging ineffective assistance of counsel, unsuccessfully petitioned for post-conviction relief. Finding Gibson's arguments unpersuasive and largely unsupported by the record, we now affirm the post-conviction court's denial of relief. We also hold that Gibson's conflict-of-interest claim falls under our standard *Strickland* analysis for prejudice, not the presumption-of-prejudice standard under *Cuyler v. Sullivan*.

Facts and Procedural History

Victims, Murders, and Arrest

In March 2012, William Gibson invited Stephanie Kirk to his home, where, in an extended attack, he brutally strangled her to death and sexually assaulted her corpse. Gibson hid her naked and broken body in his garage overnight, burying her the next day in a shallow grave in his backyard. The following month, Gibson invited to his home his late mother's best friend, 75-year-old Christine Whitis. As with Kirk, Gibson violently strangled Whitis to death and sexually abused her corpse. He then dragged her nude and lifeless body to the garage, where he severed one of her breasts before leaving for a night out drinking at the bars. The following day, Gibson's sisters contacted police after discovering Whitis's body. That same evening, police arrested Gibson after a brief car chase, forcibly removing him from the vehicle when he refused to exit on his

own. A later search of the vehicle revealed Whitis's severed breast lying in the center console.[1]

Investigation, Confessions, Charges, and Appointment of Defense Counsel

While in custody, Gibson repeatedly asked to speak with police, expressly waiving his *Miranda* rights each time. On **April 20**, the day after his arrest, Gibson confessed to killing Whitis. He also confessed to killing Karen Hodella, a woman whose murder had gone unsolved since police had found her decomposed body in early 2003.

In subsequent interviews—on **April 23, 24, and 26**—Gibson confessed to murdering Kirk (who, at the time, police did not yet know was dead) and told police where to find her body in his back yard. Arriving there, investigators found Kirk's prescription drugs inside Gibson's home and, as with Whitis, found her corpse with a broken back.

The State charged Gibson with Whitis's and Hodella's murders on **April 24**. That same day, the court appointed J. Patrick Biggs, the Chief Public Defender of Floyd County, as Gibson's defense counsel. The public defender's office, however, wouldn't formally receive the order of appointment for another three days. But on **April 26**, after receiving direct notice from the New Albany Police Department, Biggs met with Gibson, advising him, "in the very strongest possible language," to remain silent and to stop talking with police. PCR Tr. Vol. I, p.15. Biggs also told Gibson that he could be facing the death penalty for his crimes. Gibson signed a special advisement and waiver form after the trial court advised him of the potential consequences for speaking with police.

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[1] Our citations to the briefings and to the record are as follows: "GI" refers to *State v. Gibson*, No. 22D01-1204-MR-919, the case in which Gibson was convicted for killing Christine Whitis. "GII" denotes *State v. Gibson*, No. 22D01-1205-MR-1145, the case in which Gibson was convicted for killing Stephanie Kirk. "DA" refers to the direct appeal materials for a particular case. And "PCR" indicates citations to the record in the present post-conviction proceedings.

Nearly a month later, on **May 23** the State charged Gibson with Kirk's murder, filed separate death-penalty requests for the murders of Whitis and Kirk, and refiled Hodella's murder under a separate cause number. In late June of that year, the trial court ordered a competency evaluation after Gibson attempted suicide in jail. In October, the court heard evidence and found Gibson competent to stand trial.

Trials, Pleas, Convictions, and Sentencing

Gibson first stood trial in October 2013 for Whitis's murder (***Gibson I***). Following his conviction, the jury deliberated on four aggravators during the penalty phase: two forms of criminal deviate conduct, dismemberment, and his probation status at the time of the crime. *See* I.C. § 35-50-2-9(b)(1)(D) (2007) (criminal deviate conduct); I.C. § 35-50-2-9(b)(10) (2007) (dismemberment); I.C. § 35-50-2-9(b)(9)(C) (2007) (probation status). The jury unanimously recommended a death sentence, and the trial court sentenced Gibson accordingly in November (withholding judgment on the jury's habitual-offender finding in view of the death sentence). On direct appeal, this Court affirmed Gibson's conviction and sentence for the Whitis murder. *Gibson v. State*, 43 N.E.3d 231, 242 (Ind. 2015).

Gibson's trial for the murder of Karen Hodella was originally set for October 2014. But in March of that year, he agreed to plead guilty in exchange for a 65-year sentence in lieu of the death penalty. The State also agreed not to use the Hodella murder or conviction as a death-penalty aggravator in the pending Kirk case. *See* I.C. § 35-50-2-9(b)(8) (enabling the State to seek the death penalty for murder by alleging at least one of several enumerated aggravators, including the defendant's commission of "another murder, at any time, regardless of whether the defendant has been convicted of that other murder"). The trial court accepted the plea agreement and, in April 2014, entered judgment of conviction and sentenced Gibson accordingly.

Finally, Gibson stood trial for Kirk's murder in early June 2014 (***Gibson II***). The day after jury selection began, the defense team discussed the State's proposal for a guilty plea and a penalty decision by the court

without a jury in exchange for dismissal of a habitual-offender allegation. Gibson accepted his counsel's advice to plead guilty and to "take his chances with the Judge." PCR Tr. Vol. I, p.74. At the penalty-phase hearing, the State presented four aggravators: conviction of the Whitis murder, the same two forms of criminal deviate conduct as with Whitis, and his probation status at the time of the murder. The trial court sentenced Gibson to death in August 2014, which this Court affirmed on direct appeal. *Gibson v. State*, 51 N.E.3d 204, 216 (Ind. 2016).

Post-Conviction Proceedings and Appeals

Gibson petitioned for post-conviction relief in all three cases, arguing ineffective assistance of counsel (**IAC**). At a consolidated hearing, three witnesses—a psychiatrist, Gibson's former attorney, and Gibson's ex-wife—testified in support of the defense's mitigation theory that Gibson had sustained a traumatic brain injury in a 1991 car crash, an injury which exacerbated his mental-health and substance-abuse problems. The post-conviction court denied relief and Gibson appealed.

The non-capital case for the murder of Hodella proceeded to the Court of Appeals after this Court denied Gibson's petition for emergency transfer. *See Gibson v. State*, No. 22A01-1711-PC-2528, 2018 WL 3421721 (Ind. Ct. App. July 16, 2018) (mem. dec.).[2] The two capital cases for the murders of Whitis and Kirk—*Gibson I* and *Gibson II*, respectively—come to this Court on direct appeal under Appellate Rule 4(A)(1)(a). After hearing oral arguments in all three cases, we now deny Gibson's petition to transfer in the Hodella case. Our opinion today, without formally consolidating the cases under Appellate Rule 38(B), addresses Gibson's post-conviction appeals in *Gibson I* and *Gibson II*.

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[2] In rejecting Gibson's argument that his guilty plea was not entered knowingly, intelligently, and voluntarily, the panel—though acknowledging the State may have improperly induced the plea agreement by using the Hodella case as a threatened death-penalty aggravator in the Kirk case—concluded in a memorandum decision that Gibson failed to show (1) that such threat was material to his decision to plead guilty or (2) that he would have proceeded to trial had counsel properly advised him of the illusory plea. *Gibson*, 2018 WL 3421721, at *6.

Standard of Review

Post-conviction proceedings are civil proceedings in which a defendant may present limited collateral challenges to a conviction and sentence. Ind. Post-Conviction Rule 1(1)(b); *Wilkes v. State*, 984 N.E.2d 1236, 1240 (Ind. 2013). The scope of potential relief is limited to issues unknown at trial or unavailable on direct appeal. *Ward v. State*, 969 N.E.2d 46, 51 (Ind. 2012). "Issues available on direct appeal but not raised are waived, while issues litigated adversely to the defendant are *res judicata*." *Id.* The defendant bears the burden of establishing his claims by a preponderance of the evidence. P.-C.R. 1(5). When, as here, the defendant appeals from a negative judgment denying post-conviction relief, he "must establish that the evidence, as a whole, unmistakably and unerringly points to a conclusion contrary to the post-conviction court's decision." *Ben-Yisrayl v. State*, 738 N.E.2d 253, 258 (Ind. 2000). When a defendant fails to meet this "rigorous standard of review," we will affirm the post-conviction court's denial of relief. *DeWitt v. State*, 755 N.E.2d 167, 169–70 (Ind. 2001).

Discussion and Decision

Gibson's IAC claim consists of several arguments, which we summarize and restate as follows: (I)(A) unreasonable delay in legal representation, which led to harmful self-incriminating statements; (I)(B) unreasonable delay in assembling a defense team and investigating evidence, which resulted in a deficient mitigation strategy throughout the proceedings; and (I)(C) failure to challenge certain evidence presented by the State as false, prejudicial, misleading, or unreliable. Gibson also argues (II) that trial counsel's uninformed advice prevented him from entering his guilty plea in *Gibson II* knowingly, intelligently, and voluntarily; as well as (III) that trial counsel—as Chief Public Defender of Floyd County—labored under a conflict of interest, placing the financial needs of his office above loyalty to his client.

We address each of these arguments in turn.

I. Trial counsel was not ineffective.

To prevail on his IAC claims, Gibson must show (1) that his counsel's performance fell short of prevailing professional norms, **and** (2) that counsel's deficient performance prejudiced his defense. *Strickland v. Washington*, 466 U.S. 668 (1984). A showing of **deficient performance** under the first of these two prongs requires proof that legal representation lacked "an objective standard of reasonableness," effectively depriving the defendant of his Sixth Amendment right to counsel. *Overstreet v. State*, 877 N.E.2d 144, 152 (Ind. 2007) (citing *Strickland*). To demonstrate **prejudice**, the defendant must show a reasonable probability that, but for counsel's errors, the proceedings below would have resulted in a different outcome. *Wilkes*, 984 N.E.2d at 1240–41 (citing *Strickland*).

When assessing counsel's performance under *Strickland*, we rely on several important guidelines. First, we strongly presume that, throughout the proceedings, counsel exercised "reasonable professional judgment" and rendered adequate legal assistance. *Stevens v. State*, 770 N.E.2d 739, 746 (Ind. 2002) (citing *Strickland*). Second, defense counsel enjoys "considerable discretion" in developing legal strategies for a client, and this discretion demands deferential judicial review. *Id.* at 746–47. Finally, counsel's "[i]solated mistakes, poor strategy, inexperience, and instances of bad judgment do not necessarily render representation ineffective." *Id.* at 747.

Beyond these broad directives, the American Bar Association's *Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases* (rev. ed. 2003) offer a digest of prevailing professional norms. This Court will often consult these **ABA Guidelines** in its analysis. *See, e.g., Ward*, 969 N.E.2d at 57 (applying the Guidelines in concluding "that the scope of counsel's investigation was reasonable"). At the same time, we view this source of authority as advisory in nature, "not as setting out rigid, detailed rules." *Weisheit v. State*, 109 N.E.3d 978, 998 n.2 (Ind. 2018) (Rush, C.J., dissenting in part). *See also Padilla v. Kentucky*, 559 U.S. 356, 366–67 (2010) (quoting *Bobby v. Van Hook*, 558 U.S. 4, 8 (2009)) (the Guidelines are not "'inexorable commands'").

A. There was no unreasonable delay in legal representation.

The trial court appointed defense counsel to represent Gibson on April 24, 2012—the same day the State charged Gibson with the Whitis murder and four days after he first confessed to killing her and Hodella. Biggs received notice of his appointment on April 26, at which time he went to visit Gibson in jail.

Gibson argues that this delay in representation led him to make several self-incriminating statements to police, effectively defeating any leverage he held in negotiating a "non-death resolution of both cases." Appellant's GII Br. at 23–24. Counsel should have been aware of the cases sooner, he contends, because of the extensive media coverage surrounding his arrest for the murders. He quotes the ABA Guidelines in arguing that, "'barring exceptional circumstances,'" Biggs should have contacted him immediately following his arrest. Appellant's GI Br. at 20 (quoting ABA Guideline § 10.5(B)(1)); Appellant's GII Br. at 21 (quoting the same).

For the reasons below, we find no merit in this IAC claim.

As for deficient performance, Gibson fails to show that Biggs, prior to April 26, actually knew of his arrest, let alone the charges leveled against him. Biggs testified that he had **not** heard of the case through media reports before receiving notice of appointment from the New Albany Police Department. And, even if Biggs had learned of these events through the media, Gibson—referred to in the papers only "as a possible person of interest"—had already confessed to murdering Whitis and Hodella by the time published news reports circulated.[3] PCR Ex. Vol. 12,

[3] On April 20, 2012, the *Floyd County News and Tribune*, in reporting on the investigation of Whitis's death, referred to Gibson "as a possible person of interest in the case," adding that he "was arrested on preliminary charges of operating while intoxicated and resisting law enforcement." PCR Ex. Vol. 12, pp. 13–15. Two days later, the weekend edition of the *News and Tribune* reported on the continuing investigation, again referring to Gibson as a "possible person of interest in the case." *Id.* at 16, 20. That same issue, in reporting on Kirk's disappearance, simply referred to an unnamed "man" who, although "not a suspect," police had "been unable to locate." *Id.* at 18.

pp. 13–15. On top of that, the timely appointment of defense counsel rests with the trial court. *See Powell v. Alabama*, 287 U.S. 45, 71 (1932). Here, Biggs met with Gibson **the day before** the public defender's office received official notice of that appointment, immediately advising his client, "in the very strongest possible language," to stop talking to police. PCR Tr. Vol. I, p.15. Biggs then arranged for a hearing at which the court also advised Gibson of the potential consequences of his confessions to the police. These actions fall far short of deficient performance of counsel. *See* ABA Guidelines § 10.5(B)(1), (2) (urging defense counsel to contact the client within 24 hours of "entry into case").[4]

Gibson also fails to show prejudice. Indeed, even if Biggs could have acted sooner, Gibson offers no evidence or persuasive argument to show that intervention by counsel would have prevented him from confessing or that the outcome of the proceedings would have been different. Despite repeated *Miranda* warnings from police during his initial custody, Gibson never asked to speak with an attorney. And after receiving warnings from both Biggs and the trial court, Gibson—having signed a special advisement and waiver form—persisted in speaking with police **and** the media about his crimes. The privilege against self-incrimination ultimately belonged to Gibson, not his defense counsel. *See Owens v. State*, 431 N.E.2d 108, 110 (Ind. 1982) ("The purpose of the *Miranda* advisement is to make the suspect aware of his privilege against self-incrimination, right to counsel, and right to discontinue interrogation."). And Gibson knowingly and intelligently chose to waive that privilege.

[4] Even the capital defense expert Gibson relies on, when asked how soon he meets with a new client facing the death penalty, stated that it "depends [on] when [he] get[s] notice" of appointment. PCR Tr. Vol. III, p.173.

B. We find no ineffectiveness, either at the pre-trial level or at sentencing, because of any delay by counsel in assembling the defense team.

Gibson faults trial counsel for unreasonable delay in assembling a defense team and in consulting with experts. This delay, he insists, (1) resulted in deficient pre-trial investigation, which, in turn, (2) thwarted the effectiveness of *voir dire*, (3) deprived him of leverage in negotiating a favorable plea, and (4) foreclosed any opportunity to pursue alternative mitigation theories at the sentencing phase.

1. Pre-Trial Investigation

Biggs started assembling his defense team almost immediately after his appointment. In late April (or early May) 2012, he contacted George Streib, a Floyd County public defender qualified to serve as co-counsel in capital cases. *See* Ind. Crim. R. 24(B)(2) (listing the qualifications for co-counsel in capital cases). Streib filed an appearance in June, serving as co-counsel in *Gibson I* until his replacement by Andrew Adams in November. Around the time he contacted Streib, Biggs also spoke with Mark Mabrey, an experienced investigator recommended by a leading capital defense attorney. Mabrey started work on the cases in late October 2012, a delay he attributed to his work in another capital case. Finally, in late September 2012, Biggs hired Michael Dennis, a mitigation specialist, who began work within a few days.

In addition to these key players, Biggs consulted with several mental-health experts. In late 2012, he hired an addictions expert and an expert on correctional systems. And several months later, in June 2013, Biggs—on the recommendation of the State Public Defender's Office—hired Dr. Edmund Haskins, a neuropsychologist, as a mental-health expert.

Despite these efforts, Gibson argues that, because trial counsel "failed to commence work on the case immediately" the resulting "delayed investigation fell below the prevailing professional norms." Appellant's GI Br. at 22, 26. As evidence of this alleged deficiency in representation,

Gibson cites the defense team's low number of billable hours following their retention.

We disagree and find no deficient performance.

First, our research reveals no caselaw (and Gibson cites none) finding IAC based on the **timing** of trial counsel's investigation. And we agree with one of our sister states that a "finding as to whether counsel was adequately prepared does not revolve solely around the amount of time counsel spends on the case." *State v. Lewis*, 838 So. 2d 1102, 1113 n.9 (Fla. 2002). We recognize the importance of counsel's prompt assembly of a defense team for a thorough and effective investigation. *See* ABA Guidelines § 10.4(C) (urging lead trial counsel, "as soon as possible" after appointment, to assemble a defense team); *id.* § 10.7(A) cmt. (noting that delayed investigation may affect "first phase defenses," decisions to consult with experts, and strategies in negotiating pleas). Here, however, we find no evidence of a deficient pre-trial investigation. Under the standard cited by Gibson, the "elements of an appropriate investigation" consist of (1) reviewing the charging documents; (2) searching for and interviewing potential witnesses; (3) acquiring information held by the prosecution or law enforcement, including any relevant physical evidence or expert reports; and (4) reviewing the crime scene. ABA Guidelines § 10.7(A) cmt.

A review of the record clearly shows that the defense team met this standard by the time Gibson first went to trial. During his time as co-counsel, Streib met with Gibson several times; he reviewed discovery, Gibson's statements to police, and his criminal record; and he prepared waivers, consulted with experts, and helped with jury selection. In the first two months of his investigation (even as the police investigation continued), Mabrey interviewed witnesses and reviewed discovery, photographs, autopsy evidence, charging information, and other documents. And during his first two months working the case, Dennis twice met with Gibson, conducted witness and record searches, reviewed documents and discovery, interviewed witnesses, prepared memoranda, and coordinated with Mabrey.

To be sure, the defense team encountered some setbacks in the investigation early on. Mabrey, for example, testified that his delay in the investigation made it difficult to locate some witnesses. And Streib added that, by the time they had arrived at Gibson's house, they "never really got to see the crime scene as it . . . originally was," leaving them only with photographs to reconstruct the scene. PCR Tr. Vol. I, p.122. But despite these setbacks, no one on the defense team testified that their belated involvement in the case precluded a meaningful investigation. To the contrary, as Biggs attested, the defense team "had everything that [they] should have had by the time [they] went to trial." PCR Tr. Vol. I, p.30.

Even if counsel's delays resulted in deficient pre-trial investigation, we find no prejudice. Gibson cites "lost" evidence from the crime scene and missing video footage from the jail "possibly" showing him talking to police. Appellant's GI Br. at 23; Appellant's GII Br. at 24–25. But he neglects to sufficiently explain what this evidence would have revealed, let alone how it would have changed the end result. *See Cross v. O'Leary*, 896 F.2d 1099, 1101 (7th Cir. 1990) (finding "no substantial likelihood that" alleged evidence, absent "sufficiently precise information," would have led to a different outcome). Pure speculation is simply not enough. *Id.*

2. Preparation for Jury Selection

Gibson next argues that trial counsel's delay thwarted the effectiveness of *voir dire*, leaving him with an unfavorable jury. As evidence of counsel's deficiency, Gibson cites (a) the undeveloped mitigation theme found in the juror questionnaires and (b) the delegation of questioning potential jurors to a single, inexperienced attorney.

We find neither deficient performance nor prejudice on either basis.

a. Juror Questionnaires

Gibson faults trial counsel for neither conferring with mental-health experts nor retaining a jury consultant before finalizing the juror questionnaires. As a result, Gibson contends, the questionnaires lacked a

cogent mitigation theme necessary to solicit vital information from the potential jurors.

A juror predisposed to voting automatically for the death penalty, without considering mitigating evidence, deprives the defendant of a fair and impartial trial. *Morgan v. Illinois*, 504 U.S. 719, 729 (1992). And a "capital defendant may challenge for cause any prospective juror who maintains such views." *Id.* To help uncover potential juror bias, the ABA Guidelines urge defense counsel, with the assistance of an expert consultant, to "devote substantial time to determining the makeup of the venire, preparing a case-specific set of voir dire questions, planning a strategy for voir dire, and choosing a jury most favorable to the theories of mitigation that will be presented." ABA Guidelines § 10.10.2 cmt.

We find no deficiency in performance under these standards.

First, Dennis, the mitigation specialist, spent several hours reviewing the questionnaires in the week leading up to jury selection in *Gibson I*. And considering the evidence he had collected up to that point in the case—through over forty hours of discovery and document review, witness interviews, and expert consulting—Dennis, rather than one of the jury consultants, was arguably the most appropriate person to review the questionnaire and recommend any changes if necessary.

Second, the questionnaire itself explicitly posed **several** mitigation-related questions. In addition to surveying the venire panel's religious beliefs, education levels, and general opinions of the criminal justice system, the twenty-page document asked, among other things, (1) whether the potential juror favored or opposed the death penalty, (2) whether the manner of execution made a difference in shaping that view, (3) whether any particular crime warranted capital punishment, (4) whether the potential juror considered the death penalty effective in deterring crime, (5) whether a dangerous criminal should ever be shown mercy, (6) whether a criminal's mental capacity should influence the level of punishment, (7) whether courts should rely on the expert testimony of mental-health professionals, and (8) whether the potential juror would ever consider life in prison.

Once the venire panel completed the questionnaires, trial counsel analyzed the data to further refine the jury pool during *voir dire*. To assist with this process in *Gibson I*, Biggs hired local counsel, Doug Garner. In the week leading up to *voir dire*, Garner scored the questionnaires, drawing on his personal knowledge of Dearborn County and the potential biases of the local jury pool. And in *Gibson II*, Jodie English, a jury consultant with experience in capital cases, helped process the questionnaires collected from the venire panel, distilling each response into a "cheat sheet" for further questioning during jury selection. PCR Tr. Vol. 2, pp. 140–42. This process, English testified, assisted trial counsel in determining whether the potential jurors were "mitigation impaired, whether they were life sentence impaired, whether they were automatic votes for death, or whether they were automatic votes for life." *Id.* at 140-41. In short, the questionnaire formed part of a larger strategy in the jury selection process.

To be sure, some of the jury consultants criticized trial counsel for failing to incorporate their recommended questions. Inese Nieders, for example, would have asked about the potential jurors' opinions of sexual assault and of crimes against the elderly. But the trial court concluded that similar questions impermissibly exposed the jury pool to case-specific aggravators. While courts may permit the questioning of potential "jurors' biases or tendencies to believe or disbelieve certain things about the nature of the crime itself or about the particular line of defense," *Wisehart v. State*, 693 N.E.2d 23, 45–46 (Ind. 1998) (internal quotation marks omitted), counsel may not, as we held on direct appeal in *Gibson I*, pose questions that "seek to shape the favorable jury by deliberate exposure to the substantive issues in the case." 43 N.E.3d at 238 (internal quotation marks omitted). Even if these questions were permitted, trial counsel may well have sought to avoid them, for fear of emphasizing the depravity of Gibson's crimes. *See Bannowsky v. State*, 677 N.E.2d 1032, 1035 (Ind. 1997) (concluding that defense counsel's "desire to avoid focusing [prospective]

jurors' attention upon [certain] questions" during *voir dire* was reasonable trial strategy).[5]

Because the questionnaires adequately covered the primary areas of mitigation and because Gibson fails to describe how they should have been changed, we find no deficiency in the performance of his counsel. *See United States v. Lathrop*, 634 F.3d 931, 938 (7th Cir. 2011) ("So long as counsel's reasons for not questioning [a potential juror] further were not so far off the wall that we can refuse the usual deference that we give tactical decisions by counsel, his performance will not qualify as deficient.") (internal quotation marks omitted).

Gibson also fails to show prejudice. While citing the purportedly pro-death views of several empaneled jury members, as reflected in their questionnaire answers, Gibson overlooks their "assurances of impartiality," as this Court expressly found on direct appeal in *Gibson I*. 43 N.E.3d at 240.

b. Delegation of Questioning to Co-Counsel

Gibson also faults trial counsel for delegating the questioning of jurors exclusively to co-counsel: Streib in *Gibson I* and Adams in *Gibson II*. As evidence of IAC, Gibson cites counsel's deviation from the "Colorado Method" of jury selection[6] and counsel's failure to strike for cause several prospective jurors with strong pro-death penalty views.

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[5] Gibson also argues that trial counsel proved ineffective for failing to amend the juror questionnaire in preparation for *Gibson II*. This argument is equally unavailing. Even if circumstances warranted revision, Gibson fails to explain what those circumstances were, and we find no significant difference between the two cases.

[6] The Colorado Method of capital jury selection applies several basic principles: (1) selection of jurors based on their life and death views only; (2) attempts to remove pro-death jurors using for-cause challenges while retaining jurors potentially favoring life; (3) questioning of pro-death jurors about their ability to respect the decisions of the other jurors; and (4) prioritization of peremptory challenges based on the prospective jurors' views on punishment. Matthew Rubenstein, *Overview of the Colorado Method of Capital Voir Dire*, Champion, Nov. 2010, at 18.

Again, we find no deficient performance.

First, both Streib and Adams received training in the Colorado Method of jury selection, making them the most qualified defense attorneys to handle this part of the case. *See* ABA Guideline § 10.10.2 (stating that counsel "should be familiar" with techniques to qualify a capital jury). To be sure, some members of the defense team spoke of their concerns over co-counsel's performance. For example, Garner (local counsel employed by Biggs) testified that Streib, while "reasonably effective" when jury selection began, ultimately "got worn down, and became less effective as the days went on and the days got later and later." PCR Tr. Vol. III, p.81. Streib was "clearly tired, fatigued, and stressed," Garner added, and "was less able to effectively resist the prosecutor's attempts to challenge persons for cause." *Id.*, p.82. English, the jury consultant, lodged similar criticisms against Adams, faulting him for not asking certain follow-up questions and other "radical deviations from the [Colorado] method." PCR Tr. Vol. II, p.145. But even if co-counsel deviated from their training, and even if they could have been "a little bit more aggressive" in their questioning, as Garner opined, PCR Tr. Vol. III, pp. 100–01, we find no evidence that they acted deficiently. As Garner himself acknowledged, "everybody does things differently" when applying the Colorado method. *Id.*, p.80.

Second, while they may have been the only ones interacting directly with the jury, both Streib and Adams testified to having the full support of the defense team. Gibson's claim to the contrary draws upon select portions of the record, painting a highly-subjective narrative that fails to accurately reflect trial counsel's strategy during jury selection. Indeed, even those critical of co-counsels' performance acknowledged the defense team's support. Garner, for example, testified to having sat with Streib at counsel table during jury selection, offering hypothetical questions to gauge the jury's response, and recommending which jurors to strike. "[W]hen the round of questioning was done," he stated, "everybody would put their heads together." PCR Tr. Vol. III, p.94.

Even if co-counsel fell short of prevailing professional norms in their questioning of jurors, Gibson fails to show prejudice. Indeed, other than faulting co-counsel for deviating from certain methods and for failing to

strike certain prospective jurors for cause, he points to no particular action that would have resulted in a different outcome. And "bald assertions of prejudice" don't satisfy the defendant's burden under *Strickland*. *Timmons v. State*, 500 N.E.2d 1212, 1217 (Ind. 1986).

3. Plea Negotiations

Soon after the State filed its death-penalty allegation in *Gibson I*, Biggs approached the prosecution in an effort to negotiate a plea sparing Gibson's life. But the prosecutor was "adamant" in seeking the death penalty, and Biggs made no further effort to negotiate a reduced plea in either case. PCR Tr. Vol. I, p.25.

Gibson argues that, regardless of the prosecutor's initial response, trial counsel had a continuing duty to negotiate a favorable plea "at all phases" of litigation. Appellant's GI Br. at 28; *See* ABA Guidelines § 10.9.1(E) ("[I]nitial refusals by the prosecutor to negotiate should not prevent counsel from making further efforts to negotiate."). "Had counsel conducted the necessary investigation and consulted with the appropriate experts," Gibson adds, "there is a reasonable probability that [the] parties would have reached an agreed-upon resolution sparing Gibson the death penalty." Appellant's GI Br. at 29.

While there is no constitutional right to a plea offer, criminal defendants are entitled to "effective counsel during plea negotiations." *Missouri v. Frye*, 566 U.S. 134, 144 (2012). Here, however, we find no deficient performance. The ABA Guidelines urge defense counsel to persevere in negotiations despite the prosecutor's initial refusals, but the persistence of counsel depends on changing circumstances over the course of the proceedings. *See* ABA Guidelines § 10.9.1 cmt. Gibson points to no change in circumstances that would have prompted trial counsel to renegotiate a plea deal. To the contrary, as the investigation unfolded, the overwhelming evidence revealed the horrific nature of Gibson's crimes, effectively depriving trial counsel of any leverage in seeking a reduced sentence.

Even if Biggs had attempted to negotiate a more favorable plea agreement, we find no prejudice, as Gibson fails to show that he would have accepted an offer had one been made—let alone that the prosecution would have kept that offer on the table. *See Lafler v. Cooper*, 566 U.S. 156, 164 (2012) (a finding of prejudice requires the defendant to show that he "would have accepted the plea and the prosecution would not have withdrawn it in light of intervening circumstances"). In fact, the record reveals Gibson's apparent preference for the death penalty—a preference that manifests itself in his statements to police and the media and in the "Death Row X 3" tattooed on the back of his head. *See* GII DA App. Vol. 4, p.749. As Biggs testified, "all along Mr. Gibson just kind of wanted to get things over with," that is, he "just wanted to go ahead, admit everything, and take the death penalty." PCR Tr. Vol. I, p.74.

4. Presentation of Mitigating Evidence at Sentencing

Gibson next argues that trial counsel's "dilatory representation from the case's inception" left him with a futile mitigation defense at sentencing. Appellant's GI Br. at 35; Appellant's GII Br. at 29.

The Sixth Amendment entitles capital defendants to the effective assistance of counsel at the penalty phase of trial. *See, e.g., Rompilla v. Beard*, 545 U.S. 374 (2005); *Smith v. State*, 547 N.E.2d 817 (Ind. 1989). This includes the investigation and presentation of mitigating factors that may reduce the defendant's sentence. *Porter v. McCollum*, 558 U.S. 30, 40 (2009); *Ward*, 969 N.E.2d at 56. While the failure to meet this duty may result in IAC, trial counsel need not investigate "every conceivable line of mitigating evidence." *Ritchie v. State*, 875 N.E.2d 706, 719 (Ind. 2007). Rather, "counsel has a duty to make a reasonable investigation or to make a reasonable decision that the particular investigation is unnecessary." *Id.* at 719–20. And the strategic decision to present or not to present the fruits of that investigation at trial enjoys broad judicial deference. *Id.* at 720. Ultimately, our concern is whether the investigation supporting that decision is reasonable, "not whether counsel should have presented more in mitigation." *Id.*

Here, trial counsel's mitigation theory in *Gibson I* focused largely on Gibson's history of drug and alcohol abuse, his dysfunctional childhood, his family's history of mental illness and the negative effect of his mother's recent death. Trial counsel also presented evidence of Gibson's hobbies and mechanical skills, the friendly relationships he forged with his neighbors, and his generally good behavior in prison. This narrative emerged from the defense team's extensive review of Gibson's medical history and the opinions of several experts.

With evidence that Gibson had sustained multiple concussions in the past, trial counsel ordered an MRI to assess Gibson for possible brain damage. Dr. Victor Matibag, a neurologist, reviewed the MRI, ultimately finding no evidence of brain damage. Dr. Haskins, a neuropsychologist and expert on traumatic brain injuries, likewise found no sign of major cognitive impairment, concluding that Gibson suffered from bipolar, anti-social personality, and borderline-personality disorders. At trial, he testified to the effect of these disorders on Gibson in relation to his history of drug and alcohol abuse.

In addition to these experts, the defense team presented several lay witnesses to support its mitigation theory at sentencing. Brenda Ray, Gibson's half-sister, testified to their childhood, their family history of mental illness and substance abuse, and their brother's suicide. George Johnson, a correctional officer, attested to Gibson's suicide attempt and emotional state during his incarceration. And Thomas Wesley, Gibson's neighbor, spoke of Gibson's help with home maintenance, the time they spent repairing motorcycles, and Gibson's dramatic change in personality following his mother's death.

With certain exceptions, trial counsel generally stuck with the same mitigation theory and witnesses in *Gibson II*. Dr. Barry Hargan, a psychologist, testified to Gibson's history of substance abuse. And Dr. Heather Henderson-Galligan, who replaced Dr. Haskins, testified to her diagnosis of Gibson's bipolar disorder.

Despite these efforts, Gibson argues that trial counsel ineffectively presented mitigating evidence at sentencing. He specifically faults counsel for failing to secure important lay witnesses and for failing to present his

complete medical history—including the 2013 MRI—to a qualified mental-health expert. As evidence of deficient performance, Gibson points to the allegedly stronger testimony of Dr. Andrew Chambers, an expert in addictions psychiatry who first testified at the post-conviction hearing. As with Drs. Haskins and Henderson-Galligan, Dr. Chambers diagnosed Gibson with bipolar disorder, anti-social personality disorder, and drug and alcohol abuse. But, in deviating from his expert counterparts at the trial level, Dr. Chambers—based on his review of the MRI and other medical records—concluded that Gibson suffered from a possible traumatic brain injury. This injury, traced to a 1991 car accident, allegedly went "grossly undertreated" over the years, exacerbating Gibson's mental illness and substance abuse problems. PCR Ex. Vol. 18, p.24. Two lay witnesses—Gibson's ex-wife, Kelly Fey, and John Carroll, a criminal defense attorney who represented Gibson on sexual battery charges in 1991—corroborated this theory, testifying to Gibson's deterioration in mental health after the accident. This deterioration, Dr. Chambers explained, left Gibson with a "very disturbed and dysfunctional brain," ultimately leading to impulsive criminal behavior devoid of "strategic premeditation." PCR Ex. Vol. 18, pp. 15, 16.

This post-conviction testimony, Gibson insists, "presented a much more accurate and compelling description of [his] addictive and psychiatric conditions" than that offered at sentencing. Appellant's GI Br. at 46. Had trial counsel uncovered and presented this readily-available evidence, he contends, there is a reasonable probability the court would have spared him the death penalty.[7]

We disagree and find no deficient performance of counsel.

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[7] In determining whether to impose a death sentence or a sentence of life imprisonment without parole, a court may consider several mitigating circumstances under Indiana Code section 35-50-2-9(c). Gibson argues that the post-conviction testimony supports two of these circumstances: (1) that he "was under the influence of extreme mental or emotional disturbance when the murder was committed" and (2) that his "capacity to appreciate the criminality of [his] conduct or to conform that conduct to the requirements of law was substantially impaired as a result of mental disease or defect or of intoxication." *See* I.C. § 35-50-2-9(c)(2), (6).

First, there is no evidence that the experts at trial received inadequate information to conduct their analyses or to form their opinions. Dr. Haskins reviewed volumes of Gibson's medical records—from Floyd Memorial Hospital, from Madison State Hospital, from Richmond State Hospital, from the Kentucky Department of Corrections, and from the Army. And while the record doesn't show whether he reviewed the 2013 MRI, Dr. Haskins conducted a "battery" of neuropsychological evaluations in forming his assessment. GI DA Tr. Vol. XV, pp. 3630, 3636, 3649.

Dr. Hargan, in turn, met with Gibson to assess his level of alcohol and drug dependence. In preparation for the interview, Dr. Hargan reviewed Dr. Haskins's evaluation, Gibson's medical records from the Madison State Hospital, and a discharge summary from another hospital visit. Because of the limited scope of his investigation, he testified, these documents—along with background information he collected on Gibson's family history, childhood, education, employment, and military experience—provided Dr. Hargan with "enough information" to conduct his assessments. GII DA Tr. Vol. IV, pp. 1024, 1027.

For her part, Dr. Henderson-Galligan reviewed Gibson's medical records from Richmond State Hospital and Madison State Hospital. She also interviewed Gibson, observing his behavior and collecting background information on his mental health and other aspects of his life. This information, she testified, likewise proved sufficient in forming the basis of her diagnosis.

Second, while evidence of brain damage resulting in impulsive, violent behavior is certainly relevant to a defendant's moral culpability, *see Porter*, 558 U.S. at 36, 41, there's nothing to **conclusively** establish the existence of a TBI. Indeed, neither of the trial experts—Dr. Haskins or Dr. Matibag—found evidence of brain damage. And Dr. Chambers himself acknowledged that "just because an individual sustains a head injury does not mean that they've sustained a brain injury." PCR Ex. 94D, Vol. 18, p.62. What's more, he added, even a brain injury can heal over time—the length of recovery depending on the level of severity. Absent evidence of impaired cognition, trial counsel may reasonably have decided that a head

injury sustained nearly three decades ago simply wasn't worth investigating further. And while Gibson's mental health and addiction issues may have escalated in the intervening years, he also lived a relatively normal life during this period—fixing motorcycles, creating artwork, and helping neighbors with home maintenance and repair. Trial counsel would have had a difficult time reconciling these facts with a theory attributing Gibson's violent criminal behavior to a concussion sustained thirty years ago, especially with evidence of Gibson's normal neurocognitive functioning. The recent death of Gibson's mother, on the other hand, presented trial counsel with a viable mitigation theory with supporting testimony from several lay witnesses. *See Stevens*, 770 N.E.2d at 746–47 (defense counsel enjoys considerable discretion in developing legal strategies for his client).

Finally, trial counsel had no reason to question the qualifications of the experts he employed; they came highly recommended by respected criminal defense attorneys and nothing suggests that they were wrong in their assessments. While Gibson suggests that Dr. Matibag was unqualified in evaluating the MRI for signs of brain damage, he fails to specify who counts as a "qualified expert" to conduct this analysis, let alone how Dr. Chambers—an addictions psychiatrist—was any more qualified than Dr. Matibag. To the extent the expert opinions conflict, such disagreement does not establish IAC in the investigation and presentation of mitigating evidence. *See Conner v. State*, 711 N.E.2d 1238, 1256 (Ind. 1999) (observing that mental-health professionals "disagree widely and frequently on what constitutes mental illness [and] on the appropriate diagnosis to be attached to a given behavior and symptoms").

In short, "[t]his is not a case in which the defendant's attorneys failed to act while potentially powerful mitigating evidence stared them in the face . . . or would have been apparent from documents any reasonable attorney would have obtained." *Bobby*, 558 U.S. at 11. Rather, trial counsel's "decision not to seek more mitigating evidence from the defendant's background than was already in hand fell well within the range of professionally reasonable judgments." *Id.* (internal quotation marks omitted). *Cf. Patrasso v. Nelson*, 121 F.3d 297, 303–05 (7th Cir. 1997) (counsel's performance at sentencing was "practically non-existent");

Brewer v. Aiken, 935 F.2d 850 (7th Cir. 1991) (holding that defense counsel's failure to investigate his client's psychiatric history before sentencing phase of trial amounted to IAC).

Even if trial counsel should have investigated further, Gibson fails to show prejudice. In assessing prejudice, we ask whether there is a reasonable probability that, but for counsel's errors, the sentencing court "would have concluded that the balance of aggravating and mitigating circumstances did not warrant death." *Strickland*, 466 U.S. at 695.

Here, the sentencing court faced four significant death-qualifying aggravators in each case. Gibson committed three murders in the span of about a decade, two he committed while on probation and which included extremely violent sexual assaults, and one which involved dismemberment. Given the severity of these aggravators, we are not persuaded that the jury in *Gibson I*, or the judge in *Gibson II*, would have imposed anything less than a sentence of death. Indeed, a "few more tidbits from the past or one more diagnosis of mental illness on the scale would not have tipped it in [Gibson's] favor." *Eddmonds v. Peters*, 93 F.3d 1307, 1322 (7th Cir. 1996); *see also Weisheit*, 109 N.E.3d at 995.

C. Trial counsel was not ineffective for failing to raise specific challenges at the guilt phase.

Gibson raises several IAC claims related to the guilt phase of his proceedings, namely counsel's failure to challenge (1) his allegedly coerced statements to police, (2) the allegedly false testimony from a State witness, (3) an allegedly prejudicial victim-impact statement, and (4) an alleged *Caldwell* error.

A decision to object or not to object is a matter of trial strategy, and counsel is presumed to have acted effectively in making the decisions. *Myers v. State*, 33 N.E.3d 1077, 1099 (Ind. Ct. App. 2015). To establish IAC in this context, "a defendant must prove that an objection would have been sustained if made and that he was prejudiced by the failure." *Wrinkles v. State*, 749 N.E.2d 1179, 1192 (Ind. 2001).

1. Statements to Police

Statements to police are admissible so long as they are voluntarily given. *Pruitt v. State*, 834 N.E.2d 90, 115 (Ind. 2005). In determining whether a confession was voluntary or coerced, we look to the circumstances surrounding the interrogation. *Id.*

Here, Gibson complains of the detectives' use of coercive techniques during his post-arrest interrogation, rendering his confessions false and unreliable. In support of this argument, he cites his vulnerability to manipulation and points to several statements he made about other putative victims that ultimately proved untrue. Gibson raises this claim not to contest his underlying guilt but to challenge the evidence used from his confessions at the sentencing phase.

We find no deficient performance, as Gibson fails to persuade us that the trial court would have sustained any objection to the admissibility or reliability of his statements.

First, the record shows that Gibson's statements were voluntary. Before each interrogation, the interviewing detective advised Gibson of his *Miranda* rights. And each time, Gibson waived those rights, persistently agreeing to speak with police about his crimes despite advice to the contrary from both trial counsel and the court. When asked whether Gibson seemed "capable of waiving his right to counsel and other *Miranda* rights," Biggs responded in the affirmative, testifying that Gibson "seemed very composed" and "very at ease" and that "he just wanted to get it all over with." PCR Tr. Vol. I, p.59. Co-counsel Adams likewise testified that Gibson's recorded statements to police appeared "knowingly . . . free [and] voluntary."[8] PCR Tr. Vol. I, p.168.

What's more, a challenge to Gibson's police confessions would have forced counsel to confront at trial the incriminating statements Gibson

[8] We likewise find the testimony of Gibson's expert on false confessions unpersuasive, as that testimony criticized only two tactics used by the police—minimization and leading questions—neither of which suggested coercion.

made to the media **without** evidence of coercion. We agree with the post-conviction court that the "defense's credibility would have been endangered by attempting to challenge these statements in light of corroborating evidence." Appellant App. Vol. III, pp. 24–25. *See Hardamon v. United States*, 319 F.3d 943 (7th Cir. 2003) (failure to object to damaging testimony by witness was reasonable trial strategy, since an objection would have called additional attention to the statements).

The evidence also contradicts the idea that Gibson was vulnerable to police coercion. To the contrary, it was Gibson—not the police—who consistently used "manipulative tactics" throughout the investigation. *Gibson II*, 51 N.E.3d at 208–09. As Detective Carrie East explained, because Gibson "had all the information" on his victims, he controlled the interviews, agreeing to reveal certain facts in exchange for a cigarette break, a coffee break, or other perks. PCR Tr. Vol. II, pp. 234–35.

Gibson's tactics also explain the false statements he made about other putative victims. As Biggs testified, Gibson consistently maintained "that the statements he gave about Ms. Hodella, Ms. Whitis, and Mrs. Kirk were true, that they were the **only** murders he had committed." PCR Tr. Vol. I, pp. 26–27, 50 (emphasis added). By confessing to the other alleged murders, Gibson deliberately misled police, sending "them on a number of wild goose chases . . . just to get out of his cell, just to drive around." *Id.*, pp. 26–27.

Even if trial counsel should have challenged Gibson's statements to police, we find no evidence of prejudice. Substantial independent evidence of Gibson's guilt confirms the truth of his admissions. Police found Whitis's corpse in Gibson's garage and, in the hours after her body was discovered, they apprehended Gibson, who was driving her van with the severed breast in the console.

In short, Gibson shows neither deficient performance nor a reasonable probability of a different outcome had he challenged the admissibility of his statements. As trial counsel testified, because they "had three bodies to corroborate the confessions," they "couldn't challenge them as being false confessions." PCR Tr. Vol. I, p.53.

2. Testimony from State Witness

At trial in *Gibson I*, one of the State's witnesses—a detective—testified to certain inconsistencies in Gibson's statements. These inconsistencies left a 24-hour gap during which Gibson may have held Whitis against her will before killing her. The detective also suggested that Gibson may have bound his victim using duct tape. Gibson attacks this testimony as false and argues that trial counsel acted deficiently by failing to object. As with his preceding IAC claim, Gibson concedes lack of prejudice at the guilt phase, arguing instead that counsel's deficient performance resulted in prejudice at sentencing.

A conviction based on the State's knowing use of false evidence violates a defendant's Fourteenth Amendment right to due process. *Giglio v. United States*, 405 U.S. 150, 153–55 (1972). Here, however, we find no proof of false testimony. The detective simply attested to the discrepancies between Gibson's statements and the physical evidence, suggesting Whitis may have endured an extended attack before dying. Indeed, the medical examiner found massive blunt force trauma to the victim's head, extensive bruising on her arms, and evidence that she had been sexually assaulted while still alive. This evidence tends to justify the detective's skepticism that Whitis died quickly. And Gibson himself acknowledges that the detective's "assertions were speculation." Appellant's GI Br. at 51. An objection by trial counsel on grounds of false testimony would not have been sustained. *See Wrinkles*, 749 N.E.2d at 1192 ("[T]o prove ineffective assistance of counsel due to the failure to object, a defendant must prove that an objection would have been sustained if made and that he was prejudiced by the failure.").

Gibson also fails to show deficient performance because trial counsel confronted the detective on cross-examination with evidence—namely, inconclusive DNA analysis of the duct tape—that contradicted the detective's tentative conclusions. Rather than lodging a preemptive objection to the detective's speculative testimony, trial counsel strategically challenged the witness on cross examination with conflicting evidence.

We likewise find no prejudice. Gibson contends that the prosecutor adopted the detective's false testimony in closing arguments "'in a manner calculated to inflame the passions or prejudice of the jury.'" Appellant's GI Br. at 53 (quoting *Neville v. State*, 976 N.E.2d 1252, 1264 (Ind. Ct. App. 2012), *trans. denied*). But those arguments—that Gibson sexually assaulted Whitis, "then killed her, and then . . . kept her in [his garage] for 24 hours or so"—simply reflect the facts of the case. GI DA Tr. Vol. XV, pp. 3416–17. *See Cooper v. State*, 854 N.E.2d 831, 837 (Ind. 2006) (the prosecutor may present a "fair commentary on the facts introduced at trial"). The prosecutor never stated that Gibson bound Whitis for an extended period of time. And even if there were such an implication, the severity of Gibson's crime—involving an extremely violent sexual assault and dismemberment—outweigh any prejudice.

3. Victim-Impact Statements

In both its opening and closing arguments during the guilt phase in *Gibson I*, the prosecution discussed how Whitis had enjoyed spending time with her children and grandchildren, that she was "active," "healthy," and "vibrant" and showed love "not just to her family, but to her friends" as well. GI DA Tr. Vol. XII, pp. 2697, 3447–48. These statements, Gibson contends, improperly influenced the jury by eliciting emotion and sympathy. Had trial counsel objected, he insists, the court would have sustained the objection.

Generally, courts allow the introduction of victim-impact statements to demonstrate the "consequences suffered by a victim or a victim's family as a result of a crime." *Laux v. State*, 985 N.E.2d 739, 749 (Ind. Ct. App. 2013), *trans. denied*. But this evidence is generally prohibited in a capital case, unless relevant to an aggravating or mitigating circumstance. *Bivins v. State*, 642 N.E.2d 928, 956–57 (Ind. 1994).

Here, the prosecutor appears to have offered these statements not as evidence but as an argument, likely to show that Gibson exploited the care and affection of a family friend for his own deviant ends. *See Piatek v. Beale*, 999 N.E.2d 68, 69 (Ind. Ct. App. 2013) (noting that the "arguments of counsel are not evidence"), *trans. denied*. And trial counsel could

reasonably have abstained from objecting to these statements to avoid the appearance of insensitivity or to avoid drawing more attention to the underlying facts. *See Pennycuff v. State*, 745 N.E.2d 804, 812 (Ind. 2001) (counsel's decision to waive "perfunctory objections having little chance of success or no direct or substantial relationship to the main thrust of the defense is within the realm of reasonable trial strategy") (internal quotation marks omitted); *Myers*, 33 N.E.3d at 1103 (finding no deficient performance when counsel failed to object "to avoid drawing unfavorable attention" to certain facts).

Even if we were to characterize the prosecutor's statements as evidence, Gibson fails to prove prejudice. The jury received instructions to disregard counsel's unsworn statements and "only consider testimony and evidence . . . [that] comes from the witness stand from a witness placed under oath." GI DA Tr. Vol. III, p.576. *See Weisheit v. State*, 26 N.E.3d 3, 20 (Ind. 2015) (juries are presumed to follow instructions). And to the extent the jury ignored these instructions, the prosecutor's statements likely had little, if any, effect on the jury, considering the overwhelming evidence of Gibson's guilt. *See Cooper v. State*, 687 N.E.2d 350, 353–54 (Ind. 1997) (relying on "overwhelming evidence of guilt" in finding no prejudice when defense counsel failed to object to victim-character evidence); *Lambert v. State*, 675 N.E.2d 1060, 1065 (Ind. 1996) (reciting the rule that an "evidentiary error is harmless" if its probable impact on the jury, "in light of all the evidence in the case, is sufficiently minor so as not to affect the substantial rights of the parties"). And the admission of facts about a victim that "does no more than state the victim's status in life" is no grounds for reversible error. *Burris v. State*, 642 N.E.2d 961, 966 (Ind. 1994).

4. *Caldwell* Error

In capital cases, Indiana law imposes on the jury a duty to "recommend to the court whether" the defendant should receive "the death penalty or life imprisonment without parole, or neither." I.C. § 35-50-2-9(e). And "[i]f the jury reaches a sentencing recommendation, the court **shall** sentence the defendant accordingly." *Id.* (emphasis added).

In its preliminary and final instructions during the penalty phase of *Gibson I*, the trial court informed the jury that, in weighing the aggravating and mitigating factors, it "**may** recommend the sentence of death or life imprisonment without parole." GI DA Tr. Vol. XV, p.3486; DA GI Tr. Vol. XVI, p.3808 (emphasis added). These instructions, Gibson argues, improperly suggested to the jurors that their recommendations were merely "advisory in nature" rather than binding, as the law requires. Appellant's GI Br. at 58–59 (internal quotation marks omitted). The prosecutor compounded this error, Gibson contends, by emphasizing to the jury in closing arguments that he "shar[ed the] responsibility" in deciding Gibson's fate, having "signed the charging document [and] death penalty papers." *See* GI DA Tr. Vol. XVI, p.3788. Had the jury understood the binding nature of its recommendation, Gibson argues, "there is a reasonable likelihood it would have voted against death." Appellant's GI Br. at 59.

Under *Caldwell v. Mississippi*, a statement to the jury that diminishes its sense of responsibility for imposing a death sentence is constitutionally impermissible. 472 U.S. 320, 328–29 (1985).[9] The purpose of this rule is to avoid "creating the mistaken impression" that a higher court, despite "the limited nature of appellate review," makes the final and "authoritative determination of whether death was appropriate." *Id.* at 343 (O'Connor, J., concurring in part and concurring in the judgment). *Caldwell* errors apply only to instructions, argument, or evidence that is inaccurate and misleading. To prove such an error, a defendant "must show that the remarks to the jury improperly described the role assigned to the jury by local law." *Dugger v. Adams*, 489 U.S. 401, 407 (1989).

Here, "the jury was not affirmatively misled regarding its role in the sentencing process." *Romano v. Oklahoma*, 512 U.S. 1, 9 (1994). Rather, the

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[9] In *Caldwell*, the prosecutor argued to the jurors that their decision was "not the final decision" because the case would be reviewed by a higher court on appeal. 472 U.S at 325. Caldwell appealed his death sentence, arguing that the prosecutor's comments diminished the constitutional responsibility placed on the jurors as the ultimate deciders of his fate. *Id.* at 325–26.

prosecutor simply made a factual assertion that he shared in the responsibility of determining the appropriate sentence since he was the one who sought the death penalty to begin with. In other words, had the prosecutor never filed the death-penalty allegation, the dilemma of whether to impose that sentence would never have presented itself to the jury. Nothing in the prosecutor's statements qualified the jury's role in sentencing Gibson. To the contrary, he recognized the heavy burden placed on each of the jurors, "in no way want[ing] to diminish" their "difficult" role in deciding Gibson's fate. GI DA Tr. Vol. XVI, p.3788. What's more, the prosecutor made no indication—either expressly or implicitly—that the ultimate determination of death lies with an appellate court. *See Caldwell*, 472 U.S. at 325.

Even if the prosecutor's comments were objectionable, the trial court informed the jury—in both its preliminary and final instructions—that the "law requires that your sentencing recommendation must be followed by the Judge" and that the "Judge must follow your sentencing recommendation." GI DA Tr. Vol. XVI, p.3814; GI DA Tr. Vol. XV, p.3486. And "[w]hen the jury is properly instructed, we will presume they followed such instructions." *Weisheit*, 26 N.E.3d at 20 (internal quotation marks omitted). To the extent these instructions proved insufficient, as Gibson suggests, defense counsel's arguments in closing—emphasizing the "the decision [the jury] will have to make" as to life or death—cured any confusion over the binding nature of the jury's sentencing recommendation. GI DA Tr. Vol. XVI, p.3792.

For these reasons, we find neither deficient performance nor prejudice from trial counsel's failure to object to the court's jury instructions or the prosecutor's closing arguments.[10]

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[10] Because Gibson fails to show deficient performance at the trial level, we decline to address his argument that appellate counsel was ineffective for failing to raise the unpreserved *Caldwell* claim on direct appeal. *See Woods v. State*, 701 N.E.2d 1208, 1221 (Ind. 1998) ("[I]neffective assistance of appellate counsel requires the petitioner to overcome the double presumption of attorney competence at both trial and appellate levels.").

II. Gibson's guilty plea with open sentencing was knowing, intelligent, and voluntary.

On the second day of voir dire in *Gibson II*, the prosecutor approached defense counsel to ask whether Gibson would consider, in lieu of a jury trial, pleading guilty to the Kirk murder while leaving sentencing to the court's discretion. The prosecutor also offered to dismiss the habitual-offender enhancement. After a "lengthy discussion," the defense team presented the offer to Gibson, outlining the "pros and cons" of the plea. PCR Tr. Vol. I, pp. 179–80. Biggs and Adams, while "ma[king] it clear [to Gibson] that it was his decision," urged him to accept the plea, opining "that it would be better to take his chances with the Judge" rather than with the jury. *Id.* at 73–74.

This advice, Gibson contends, amounted to IAC. "The prevailing professional norm," he insists, "is to avoid, if at all possible, pleading a capital client guilty with the death penalty as a sentencing option." Appellant's GII Br. at 67–68 (citing ABA Guidelines § 10.9.2). Further, he insists, trial counsel's uninformed advice—given the inadequate investigation of mitigating evidence—prevented Gibson from entering his plea intelligently and voluntarily, rendering it void as a violation of due process.

A valid guilty plea depends on "whether the plea represents a voluntary and intelligent choice among the alternative courses of action open to the defendant." *Hill v. Lockhart*, 474 U.S. 52, 56 (1985) (internal quotation marks omitted). IAC claims alleging invalid guilty pleas based on trial counsel's flawed advice turn on the same two-part test outlined in *Strickland*. *Id.* at 57.

Under the **performance** prong, "the voluntariness of the plea depends on whether counsel's advice was within the range of competence demanded of attorneys in criminal cases." *Lockhart*, 474 U.S. at 56 (internal quotation marks omitted). Here, the evidence supports the conclusion that trial counsel met this standard.

In weighing whether Gibson should plead guilty, Biggs recognized the detrimental effect that the gruesome photos of Ms. Whitis' corpse had

played in the outcome of *Gibson I*. Counsel clearly wanted to avoid the same effect in *Gibson II*. Biggs also considered that the judge had never sentenced someone to death without a binding jury recommendation. "We didn't know what the Judge would do," he testified, "but we felt virtually certain that that jury was going to impose the death penalty." PCR Tr. Vol. I, p.75 Co-counsel Mabrey expressed similar sentiments, concluding that, because of the death sentence already imposed in *Gibson I*, the judge "might consider" a life sentence instead. PCR Tr. Vol. III, p.134.

While "counsel should be extremely reluctant" to plead a capital client guilty with open sentencing, the choice ultimately is for the client to make and "counsel's role is to ensure that the choice is as well considered as possible." ABA Guidelines § 10.9.2 cmt. The deliberation here shows that trial counsel carefully considered their options. While "ma[king] it clear [to Gibson] that it was his decision," they believed Gibson stood a greater chance of avoiding a second death sentence by pleading before a detached and unbiased trial judge, rather than a highly-impressionable jury. PCR Tr. Vol. I, p.74.

Still, Gibson points to critical testimony from some members of the defense team as evidence of deficient performance. Co-counsel Adams, for example, "thought that the Judge would probably give [Gibson] death." PCR Tr. Vol. II, p.181. Likewise, Dennis was "adamantly opposed" to the plea and English thought it was "a terrible idea." PCR Tr. Vol. II, pp. 156, 159–60. But, as with other arguments posed by Gibson, this narrative paints only a partial picture of the defense team's deliberations. As Biggs testified, even English acknowledged the "lousy jury." PCR Tr. Vol. I, p.75. And while Adams believed it was likely that the trial court would impose a death sentence, he concurred with Biggs's assessment that the potential jurors were "very antithetical" to Gibson, and considerably more unfavorable than those picked in *Gibson I*. PCR Tr. Vol. I, pp. 69–70, 72, 179–80.

Even if trial counsel's advice were deficient, Gibson fails to show "a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." *Lockhart*, 474

U.S. at 59. He simply insists that, but for counsel's deficient advice, he would have proceeded to trial.[11] But a defendant's alleged propensity to heed his attorney's advice, without more, falls short of the prejudice standard. Gibson never testified—or even appeared—at his post-conviction hearing, and he never indicated the motivations for his guilty plea.

III. Trial counsel operated under no conflict of interest.

Finally, Gibson argues that his cases proceeded under a conflict of interest, the loyalties of trial counsel divided between Gibson himself and the Floyd County Public Defender's Office. Effective legal representation in a resource-consuming capital case, Gibson contends, stands irreconcilably at odds with trial counsel's duty, as Chief Public Defender, to ensure the efficient administration of public funds. As evidence of this conflict, Gibson cites several of the alleged deficiencies in representation discussed above. He also points to a proposed 2013 amendment to Criminal Rule 24. Drafted by the Indiana Public Defender Commission, that amendment would have prohibited the appointment of a chief public defender to a capital case. *See* PCR Ex. Vol. 12, pp. 8–10.

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[11] Gibson characterizes the prosecutor's proposal as a mere "suggestion" rather than a formal plea offer, the implication being that trial counsel should never have presented it to Gibson for consideration to begin with. Appellant's GII Br. at 63 (citing *Schmid v. State*, 972 N.E.2d 949, 953–54 (Ind. Ct. App. 2012) (counsel's failure to communicate a "possible compromise" with no firm written offer did not amount to IAC)). But this point is a non sequitur, as counsel's advice to plead guilty—whether prompted by the prosecutor's offer (or suggestion) or by the defense team's own strategic reasoning—fell within the realm of effective assistance of counsel. Furthermore, the ABA Guidelines on which Gibson relies specifically urge counsel to "inform the client of any **tentative** negotiated agreement reached with the prosecution, and explain to the client the full content of the agreement along with the advantages, disadvantages and potential consequences of the agreement." ABA Guidelines § 10.9.2(D) (emphasis added). That's precisely what counsel did here.

A. The standard *Strickland* analysis applies to Gibson's conflict-of-interest claim.

The constitutional right to effective assistance of counsel includes representation free from conflicts of interests. *Wood v. Georgia*, 450 U.S. 261, 271 (1981) (citations omitted). A conflict-of-interest claim is a category of an IAC claim. *Strickland*, 466 U.S. at 692. But, unlike in traditional IAC challenges, a defendant generally need not show prejudice to prevail in a conflict-of-interest claim. *Cuyler v. Sullivan*, 446 U.S. 335, 349–50 (1980). Rather, a limited presumption of prejudice applies when the defendant shows "that an actual conflict of interest adversely affected his lawyer's performance."[12] *Id.* at 348. The reason for this presumption stems in part from the difficulty of measuring the precise effect the conflict has on counsel's representation. *Strickland*, 466 U.S. at 692.

Conflict-of-interest claims typically arise when counsel represents multiple defendants in the same case. *See* Wayne R. LaFave et al., 3 Crim. Proc. § 11.9(a) (4th ed. 2018). Indeed, the concurrent representation of co-defendants is "fraught with the potential for chaos" and "should be avoided as the plague." *Ross v. State*, 268 Ind. 608, 611, 377 N.E.2d 634, 636 (1978). For example, codefendants may raise conflicting defenses, with one implicating the other. Or, in the plea bargaining process, one defendant may offer testimony against the other in exchange for a lesser charge or reduced sentence. LaFave, 3 Crim. Proc. § 11.9(a).

But conflicts of interest may threaten the effective assistance of counsel in other contexts as well. For example, a conflict may arise because of counsel's representation of a hostile witness, because of counsel's personal legal problems, or because of counsel's previous role as judge *pro tempore* in the same case. *See, respectively, Cowell v. State*, 275 Ind. 252, 254, 416

[12] The Court in *Strickland* referred to the *Cuyler* standard as a "limited" presumption of prejudice—not quite a *per se* rule of prejudice but a lesser standard than ordinary IAC claims. 466 U.S. at 692.

N.E.2d 839, 841 (1981); *Thompkins v. State*, 482 N.E.2d 710 (Ind. 1985); *Hennings v. State*, 638 N.E.2d 811 (Ind. Ct. App. 1994), *trans. denied.*

Not all conflicts of interest, however, present the same concerns. Unlike the high risk of harm imposed on at least one client in multiple-representation cases, a conflict implicating counsel's personal interests only (e.g., media rights or future referrals) need not compromise the duty of loyalty—that is, counsel may still act in the client's best interest even if detrimental to counsel's best interest. So, the question is whether a particular conflict-of-interest claim warrants application of the lower burden under *Cuyler* or the traditional prejudice standard under *Strickland.*

With the few exceptions noted above, Indiana Courts have long been reluctant to depart from traditional IAC analysis beyond multiple-representation conflicts. *See, e.g., Johnson v. State*, 948 N.E.2d 331, 334 (Ind. 2011) (rejecting the conflict-of-interest exception to *Strickland* where there was no "other client or interest to which counsel owed a [conflicting] duty of loyalty"); *McGillem v. State*, 516 N.E.2d 1112, 1113 (Ind. Ct. App. 1987) (applying *Strickland* prejudice standard despite defendant's conflict-of-interest claim against trial counsel who also served as city attorney). This approach reflects the general view taken by the U.S. Supreme Court. *See Mickens v. Taylor*, 535 U.S. 162, 175–76 (2002) (questioning the propriety of extending the *Cuyler* standard beyond multiple-representation conflicts); *Holleman v. Cotton*, 301 F.3d 737, 742–43 (7th Cir. 2002) (stating that *Mickens* "has cast doubt" on whether *Cuyler* should even apply to successive-representation cases).

Without deciding whether *Cuyler* applies exclusively to multiple-representation conflicts, we hold that Gibson's conflict-of-interest claim

falls under our standard *Strickland* analysis for prejudice.[13] We reach this conclusion for several reasons.

First, Gibson's claim is essentially a repackaging of his IAC arguments above. Indeed, as evidence of counsel's alleged conflict, Gibson cites (1) the delay in assembling the investigative defense team, (2) the lack of preparation for jury selection, (3) the failure to consult with and adequately prepare qualified mental-health experts for mitigation at sentencing, and (4) the failure to consult with an expert to properly assess the reliability of Gibson's statements to police. If we were to apply the *Cuyler* standard to every case involving similar claims, the exception would effectively swallow the *Strickland* rule. *See Beets v. Scott*, 65 F.3d 1258, 1297 (5th Cir. 1995) (coming to the same conclusion).

Second, our conclusion follows precedent implicating similar claims. *See Brown v. State*, 698 N.E.2d 1132, 1145, 1145 n.17 (Ind. 1998) (applying *Strickland* standard rather than *Cuyler* standard in rejecting defendant's argument that insufficient resources from "the Lake County public defender system created a conflict of interest for her trial counsel"); *Johnson v. State*, 693 N.E.2d 941, 953 (Ind. 1998) ("Irrespective of whether there were problems with the public defender system, in order to claim ineffective assistance of counsel, [defendant] must show that his trial counsel provided deficient performance and that it was prejudicial.")

And, finally, regardless of the financial burden imposed on the county, trial counsel's undivided loyalty remained with Gibson. *See Henson v. State*, 798 N.E.2d 540, 543 n.3 (Ind. Ct. App. 2003) (noting that public defenders' "allegiance lies with the clients they represent," not with "the State or any employee of the State") (internal quotations omitted), *trans.*

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[13] To be sure, our Rules of Professional Conduct prohibit a lawyer from representing a client if there's "a significant risk that the representation . . . will be materially limited by the lawyer's responsibilities to . . . a former client or a third person or by a personal interest of the lawyer." Ind. Professional Conduct Rule 1.7(a)(2). But while these rules offer general guidelines to avoid a potentially-broad range of conflicts, the "[b]reach of an ethical standard does not necessarily make out a denial of the Sixth Amendment guarantee of assistance of counsel." *Mickens v. Taylor*, 535 U.S. 162, 176 (2002) (internal quotation marks omitted).

denied; *Wright v. State*, 436 N.E.2d 335, 338–40 (Ind. Ct. App. 1982) (noting the Sixth Amendment requires the state to "respect the independence of the public defender" and the code of professional responsibility requires attorneys to resist outside pressure, even from third parties who pay for the defendant's representation). *See also Wisehart*, 693 N.E.2d at 56–57 (holding that the alleged "lack of independence" attendant to "the political nature of appointments of public defenders" does not create a presumption of ineffective assistance based on a conflict of interest).

B. There is no evidence that insufficient resources rendered trial counsel ineffective or resulted in prejudice to Gibson.

Applying the standard *Strickland* analysis to Gibson's claim, we find neither deficient performance nor prejudice.

The thrust of Gibson's argument is that trial counsel delayed the hiring of his defense team to qualify for reimbursement of expenses under Criminal Rule 24. That delay, he insists, resulted in a deficient mitigation strategy throughout the proceedings—from the pre-trial level to sentencing. But, as previously discussed, *see supra* section I.B., this contention contradicts the record, which shows that trial counsel and his defense team began work on the cases soon after their appointments. Additionally, we have consistently concluded throughout this opinion that counsel's performance met the prevailing professional norms.

And to the extent there was a delay, we find no prejudice to Gibson. Biggs testified that working toward compliance with Criminal Rule 24's caseload requirements had no effect on his ability to represent Gibson. Indeed, had the trial court concluded otherwise, it would have revoked Gibson's appointment as lead defense counsel. *See* Ind. Crim. Rule

24(B)(3)(d).[14] As for expenses, Biggs testified that "no one [had] ever questioned the cost" of defending Gibson and he never felt "pressure from anyone to save the county money when determining the needs of Mr. Gibson's defense." PCR Tr. Vol. I, p.45. Biggs repeated this chorus several times in his testimony, adding that no claim for reimbursement of expenses—totaling over $686,000—was ever denied or paid untimely.[15] While obligated not to squander public funds, Biggs considered himself "morally bound, ethically bound to spend whatever . . . is reasonable to spend in a capital case." PCR Tr. Vol. I, p.47. And in defending Gibson, he added, "[a]ll the money was spent because there was a need." *Id.*

To be sure, other members of the defense team offered conflicting testimony. Adams indicated that funding in Floyd County was generally "tight." PCR Tr. Vol. I, p.170. And Streib stated that "Biggs was worried about the public defender's office funding" and that he had a hard time getting paid on a "timely basis." PCR Tr. Vol. II, pp. 144, 148. But this conflict in testimony does not lead "unmistakably and unerringly" to a conclusion reached opposite that of the post-conviction court. *Ben-Yisrayl*, 738 N.E.2d at 258.

Based on the actual expenditures in representing Gibson and the employment of co-counsel, an investigator, a mitigation specialist, experts, and other consultants, we have little doubt that Gibson received quality

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[14] In 2013, this Court amended Rule 24, not by prohibiting the appointment of a chief public defender to a capital case (as the Indiana Public Defender Commission had proposed) but rather by placing certain limits on these appointments. *See* Order Amending Indiana Rules of Criminal Procedure, No. 94S00-1301-MS-30 (Ind. May 29, 2013), *available at* https://www.in.gov/judiciary/files/order-rules-2013-94s00-1301-ms-30b.pdf. Under the revised rule, a court, before appointing a chief or managing public defender to represent a capital defendant, must assess the impact of the appointment on the workload of the attorney, including their administrative duties. *See id.* (codified at Ind. Crim. Rule 24(B)(3)(b)).

[15] For Gibson's capital case, Floyd County received reimbursement for 50% of expenditures from the Indiana Public Defender Commission. For Gibson's non-capital case, the county received 40%.

representation, not ineffective assistance of counsel prejudicial to his defense.

Conclusion

For the reasons specified above, we affirm the post-conviction court's denial of relief in both *Gibson I* and *Gibson II*.[16]

Rush, C.J., and David and Goff, JJ., concur.
Slaughter, J., not participating.

[16] We decline to review Gibson's argument that trial counsel's deficiencies resulted in cumulative prejudice. An appellate court may assess whether the "prejudice accruing to the accused" from counsel's individual errors "has rendered the result unreliable, necessitating reversal under *Strickland*'s second prong." *Weisheit v. State*, 109 N.E.3d 978, 992 (Ind. 2018) (internal quotations omitted). But here, Gibson's arguments overlap to such an extent that a separate analysis on cumulative error would be superfluous. Indeed, the common thread running through most of his claims is that trial counsel's delay resulted in the inadequate development and presentation of mitigating evidence. And to the extent his remaining arguments break from this pervasive theory, we agree with the State that Gibson fails to "explain how one particular deficiency worked with another to create unique prejudice." State's GII Br. at 65.

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APPENDIX B

Decision of State Post-Conviction Court

IN THE FLOYD SUPERIOR COURT NO.1
STATE OF INDIANA

WILLIAM CLYDE GIBSON, III
Petitioner-Defendant

CASE NO. 22D01-1606-PC-4

vs.

STATE OF INDIANA,
Respondent-Plaintiff

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND JUDGMENT

This matter comes before the Court upon Petitioner William Clyde Gibson, III's petitions for post-conviction relief as amended in Cause Numbers 22D01-1606-PC-4, 22D01-1701-PC-1, and 22D01-1703-PC-4. By agreement of the parties, the Court held a consolidated evidentiary hearing under all three causes commencing on July 17, 2017, and concluding on July 21, 2017. Petitioner Gibson appeared by counsel, Deputy Public Defenders Joanna Green, Laura Volk, Lindsay Van Gorkom, and Deidre Eltzroth. The State of Indiana appeared by Deputy Attorneys General Kelly A. Loy and Tyler G. Banks. Petitioner Gibson waived his right to be present at the evidentiary hearing. At the conclusion of the evidentiary hearing, the Court took the petitions under advisement.

The parties have submitted proposed findings of fact and conclusions of law on Petitioner Gibson's claims for post-conviction relief. The Court, having reviewed the evidence and the pleadings, enters the following findings of fact and conclusions of law and judgment on those claims asserted in the petitions as amended. This Court recognizes a ruling on the Post Conviction Relief

is not the occasion to rely, inadvertently or otherwise, upon testimony and facts which, while may have occurred at trial or pre-trial, are not included in the Post Conviction Relief record. To the extent that any part of these findings of fact and conclusions of law appear to have been adopted from a party's proposed findings of fact and conclusions of law, the Court represents that such has been closely reviewed by the Court and constitutes the Court's own finding and conclusion. Moreover, all conclusions of law that are more appropriately findings of fact are deemed findings of fact, and all findings of fact that are more appropriately conclusions of law are deemed conclusions of law.

The Court concludes that William Clyde Gibson is not entitled to post-conviction relief from his conviction or sentence.

I.

WAIVER OF APPEARANCE

1. The Court finds that Petitioner Gibson's waiver of appearance at the post-conviction evidentiary hearing was done knowingly, voluntarily, and intelligently.

2. On June 6, 2017, counsel for Petitioner Gibson filed a document entitled Waiver of Presence at Post-Conviction Hearing. In this document, counsel averred that Petitioner Gibson did not want to personally attend the hearing in this case.

3. Attached to this waiver was a signed affidavit from Petitioner Gibson. In this affidavit, Petitioner Gibson acknowledged:

a. the date of the hearing, its anticipated length, what would occur at the hearing;

b. that evidence would be presented by both parties concerning Petitioner Gibson's post-conviction claims on all three causes,

c. that he had the right to confront and cross-examine witnesses,

d. that his attorneys would be required to make decisions on his behalf in his absence and without ready opportunity to consult, and,

e. that the Court would be making rulings in his absence.

Petitioner Gibson also stated that he was "thoroughly informed of the nature and purpose of this hearing, and the potential harm to [him] if [he] [is] absent." Petitioner Gibson told the Court that his waiver is "voluntary and intelligent" and that he understands the "waiver of [his] presence means that [he] cannot complain later about [his] absence."

4. The rules governing post-conviction procedures do not contemplate a mandatory appearance on behalf of the petitioner. See Ind. Post-Conviction Rule 1(5). The rules grant the Court discretion to order the petitioner to personally appear but do not require the appearance of the petitioner if not so ordered by the Court. On June 9, 2017, the Court signed an order granting Petitioner Gibson's waiver of appearance.

5. Petitioner Gibson did not appear at the post-conviction hearing. The Court again addressed Petitioner Gibson's waiver of appearance at the beginning of the evidentiary hearing, and Petitioner Gibson's counsel confirmed that he maintained that he did not want to appear at the post-conviction evidentiary hearing. Counsel further stated that Petitioner Gibson was fully advised by his current post-conviction counsel of his right to appear and the potential harms that could be incurred upon his failure to be present.

6. Counsel for the State of Indiana did not object to Petitioner Gibson waiving his appearance at the hearing and informed the Court that they were satisfied that Petitioner Gibson was waiving his appearance voluntarily, knowingly, and intelligently.

7. Based on Petitioner Gibson's affidavit and the statements of counsel, the Court finds that Petitioner Gibson knowingly, voluntarily, and intelligently waived his right to be present at the evidentiary hearing held on his three petitions for post-conviction relief.

II.

FACTS OF THE CRIME AND PROCEDURAL HISTORY

1. In the morning on Wednesday, April 19, 2012, William Clyde Gibson called Christine Whitis and asked her to come to his house (GI DA Ex. 6, pp. 230-31, Ex. 11, p. 286).[1] Ms. Whitis was a long-time friend of Petitioner Gibson's recently deceased mother in whose house Petitioner Gibson was living (GI DA Tr. 2924-25). Even after Petitioner Gibson's mother passed, Ms. Whitis maintained a relationship with and would check on him and his two sisters (GI DA Tr. 2932).

2. For about a month before making the call on April 19, 2012, Petitioner Gibson had been thinking about having sex with and killing Ms. Whitis (GI DA Ex. 6, pp. 264, Ex. 11, pp. 284, Ex. 14). During this time, Ms. Whitis had been visiting Petitioner Gibson because, according to him,

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[1] Citations within this document are as follows:

GI DA Tr.	Direct-appeal transcript in Gibson I
GI DA App.	Direct-appeal appendix in Gibson I
GI DA Ex.	Direct-appeal exhibits in Gibson I (page numbers, when used, are to the exhibit volume page number)
GI PCR Ex.	Post-conviction exhibit (if the number is not available, a brief description of the exhibit appears)

Testimony from the post-conviction proceeding is indicated by the witness's name and a number corresponding approximately to how many pages into the testimony that the proposition being supported appears.

"she just always helped [him]" (GI DA Ex. 6, p. 231). Ms. Whitis agreed to visit Petitioner Gibson and arrived at his house in the late morning or early afternoon of April 19, 2012 (GI DA Ex. 14).

3. When she arrived, she sat on the couch next to Petitioner Gibson (GI DA Ex. 14). At some point, he put his arm around Ms. Whitis, pulled her close to him, and put his hand under her shirt, touching her breast underneath of her bra (GI DA Ex. 14). She pulled away from him and said, "Clyde[,] what would your mother say[?]" (GI DA Ex. 14).

4. In response to her reproach, Petitioner Gibson ripped Ms. Whitis' shirt and bra from her body while she begged him to stop (GI DA Tr. 2988-89, 3034-3, 3088; GI DA Ex. 6, p. 269). Petitioner Gibson put his hands around her neck and strangled Ms. Whitis to death (GI DA Ex. 14).

5. A medical examiner, Dr. Amy Burrows-Beckham, would later testify that it "[was] not a quick strangulation" and lasted "at least four minutes" (GI DA Tr. 3235). While Petitioner Gibson would later tell police that this sequence of events led to Ms. Whitis' death shortly after she arrived at the house, Dr. Burrows-Beckham observed evidence of multiple blunt force traumas to Ms. Whitis' head that were inflicted while she was alive and consistent with having her head slammed onto a hard surface (GI DA Tr. 3230, 3232-36). Ms. Whitis also suffered an injury to her eye consistent with being punched, and at her autopsy, both of her arms showed extensive bruising consistent with "violent grabbing" (GI DA Tr. 3226-27). Petitioner Gibson never admitted to the violent conduct leading to these particular injuries inflicted while Ms. Whitis was alive.

6. Petitioner Gibson then, as he later wrote to police, "put [his] whole hand" inside of Ms. Whitis' vagina "as far in as [he] could get it" (GI DA Ex. 13). According to him, he "played around inside of [her] with [his] hand until [he] got tired of that" (GI DA Ex. 13).

7. He then fully undressed Ms. Whitis (GI DA Ex. 13). After undressing her, he sat on the floor with his back against the couch and pulled Ms. Whitis' legs toward him and, according to him, "bent [her] double" (GI DA Ex. 13). He then "bit[ ] and chew[ed]" on Ms. Whitis' labia (GI DA Ex. 13). Dr. Burrows-Beckham would later find multiple abrasions to Ms. Whitis' right labia majora (GI DA Tr. 3218).

8. While Ms. Whitis' body was in this position, he also "violently plung[ed] his fist into her vagina[,]" which Petitioner Gibson thought caused her back to break (GI DA Exs. 13, 52; GI DA Tr. 3225-26).

9. Petitioner Gibson dragged Ms. Whitis' body to his garage where he completely severed her left breast from her body with a knife (GI DA Ex. 6, p. 233, Exs. 26, 58, 59). With her severed breast in his hand, Petitioner Gibson left the house to go drinking at various bars (GI DA Ex. 14).

10. At approximately 7:30 p.m. on Wednesday night, he ran into Robert Getrost-one of his neighbors-at a bar called Shooter's (GI DA Tr. 3273; GI DA Ex. 6, p. 242). After less than an hour of talking, Petitioner Gibson invited Mr. Getrost back to his house, where Ms. Whitis' body was still in the garage (GI DA Tr. 3274). Mr. Getrost agreed to come over to the house later; Petitioner Gibson left the bar, and Mr. Getrost came over to his house approximately an hour after Petitioner Gibson left the bar (GI DA Tr. 3273-74).

11. By the time Mr. Getrost arrived, Petitioner Gibson had moved Ms. Whitis' van from in front of his house to a nearby apartment complex's parking lot, placed Ms. Whitis' glasses on the fireplace mantle, and hid her purse in a closet (GI DA Ex. 6, p. 236, Ex. 11, p. 315; GI DA Tr. 2740, 3275-76). Mr. Getrost and Petitioner Gibson sat and drank together for approximately 90 minutes

before Mr. Getrost left at approximately 10:30 p.m. (GI DA Tr. 3277). Petitioner Gibson would later again run into Mr. Getrost that night at another neighbor's apartment that Petitioner Gibson visited after Mr. Getrost had left his house (GI DA Tr. 3280-81). Mr. Getrost thought that Petitioner Gibson was behaving normally all night (GI DA Tr. 3277-78, 3280-81).

12. At some point in the night, Petitioner Gibson returned home and left again the next day to go drinking at bars, ending up at a Hooters restaurant in Clarksville (GI DA Tr. 3301-04, 3313; Gibson DA Ex. 11, pp. 320-21).

13. Servers Hannah Finchum and Elaina Craig saw Petitioner Gibson drinking beer on the Hooters porch around noon on Thursday, watching them wash cars in their bikinis as a promotional event for Hooters (GI DA Tr. 3297-99, 3307-08). Petitioner Gibson stayed at Hooters for approximately four hours (GI DA Tr. 3309).

14. During this time, his two sisters, Theresa Adam and Brenda Ray, were visiting Petitioner Gibson's house to retrieve information from their deceased mother's vehicle that was parked in the garage (GI DA Tr. 2923, 2926, 2935). The two arrived and entered the house, and as Ms. Adam was looking for a pen in the kitchen, Ms. Ray entered the garage and saw Ms. Whitis' body (GI DA Tr. 2926). Ms. Ray said, "[O]h, God, is this real[,]" as Ms. Adam later recalled (GI DA Tr. 2926). The two left the house and called the police (GI DA Tr. 2927).

15. After officers arrived and spoke to Petitioner Gibson's sisters and other neighbors, police were on the lookout for Petitioner Gibson, who was driving Ms. Whitis' blue minivan (GI DA Tr. 2714-15, 2744, 2746-47).

16. At approximately 6:30 p.m. on Thursday afternoon, Officer Matt Kidd with New Albany Police Department heard the call to be on the lookout for Petitioner Gibson and the blue

minivan (GI DA Tr. 2943, 2946). Officer Kidd saw the blue minivan and was able to see that Petitioner Gibson was driving it (GI DA Tr. 2948). Officer Kidd turned his vehicle around, activated his lights and sirens, and attempted to stop Petitioner Gibson (GI DA Tr. 2948-49).

17. Petitioner Gibson did not immediately pull over (GI DA Tr. 2949). Petitioner Gibson eventually stopped the vehicle in the parking lot of a Wal-Mart store (GI DA Tr. 2949). Officers removed Petitioner Gibson from the van after he refused to exit on his own (GI DA Tr. 2950-51).

18. A later search of the vehicle recovered Ms. Whitis' severed breast from the minivan's center console (GI DA Tr. 2984; GI DA Ex. 24).

19. Petitioner Gibson was taken into custody and, because of his intoxication and injuries from being removed from the vehicle, later taken to Floyd Memorial Hospital (GI DA Tr. 2955-56). Detective Carrie East, after viewing the crime scene at Petitioner's house, went to the hospital (GI DA Tr. 2790-92, 2798). She spoke to Petitioner Gibson briefly but did not engage in any extended discussion, despite Petitioner asking multiple times to talk (GI DA Tr. 2798). Detective East instead waited until the next day, April 20, 2012, to interview Petitioner Gibson (GI DA Tr. 2798-2800).

20. On April 20, 2012, Detective East interviewed Petitioner Gibson (GI DA Exs. 5, 6). After being read his *Miranda* rights, Petitioner Gibson signed a waiver-of-rights form and agreed to speak to Detective East (GI DA Ex. 6, pp. 228-29; GI PCR Ex. with waiver for April 20).

21. On this day, not only did Petitioner Gibson admit to killing Ms. Whitis after thinking about having sex with her for a month, but he also admitted to Ms. Hodella's murder (PCR Ex. Gibson Statement on April 20, pp. 5-7, 27-28, 47-53, 57, 68).

22. Police continued to speak to Petitioner Gibson at his request about Ms. Whitis' murder, and he also confessed to Ms. Kirk's murder and Ms. Hodella's murder in his statements on

April 21, April 23, and April 24, 2012 (GI PCR Exs. Statements on April 21, 23, and 24). These statements were always given after Petitioner Gibson had orally waived his *Miranda* rights and signed a written waiver form (GI PCR Exs. Waivers on April 21, 23, and 24). At no point in these or any of his interviews did Petitioner Gibson refuse to speak to officers or ask for an attorney.

23. On April 24, 2012, the State charged Petitioner Gibson with murdering Ms. Whitis. The case was not charges as Capital Murder until May 23, 2012. (GI DA App. 2, 85).

24. On that date, an initial hearing was held, the Court found probable cause that Petitioner Gibson murdered Ms. Whitis and appointed counsel (GI DA App. 2; GI DA Tr. 18).

25. Lead counsel, J. Patrick Biggs, was not informed of Petitioner Gibson's arrest and his appointment until April 26, 2012-after Petitioner had admitted to killing Ms. Whitis, Ms. Kirk, and Ms. Hodella (Biggs Tr. 6).

26. Mr. Biggs was the Chief Public Defender for Floyd County and had been for approximately 20 years (Biggs. Tr. 1). Mr. Biggs, as Chief Public Defender, had previously represented defendants in three other capital cases and met all of the requirements of Criminal Rule 24 to be lead counsel in a capital case (Biggs. Tr. 4, 5).

27. The State did not file for the death penalty until May 23, 2012 (GI DA App. 85). The State originally alleged six aggravating circumstances, but, ultimately, the jury was only asked to deliberate on four: 1) committing criminal deviate conduct against Ms. Whitis using his mouth and her sex organ, 2) committing criminal deviate conduct against Ms. Whitis using "his fingers or fist" and her sex organ, 3) the dismemberment of Ms. Whitis' corpse by severing her breast, and 4) that Gibson was on probation at the time of the murder (GI DA App. 599-600).

28. While Mr. Biggs's office did not receive his appointment until April 27, 2012, Detective East contacted Mr. Biggs on April 26, 2012, to inform him that Petitioner Gibson was confessing to a murder (Biggs Tr. 6-7). At the time, Mr. Biggs was representing Petitioner Gibson on an unrelated operating-while-intoxicated charge (Biggs Tr. 7).

29. Mr. Biggs went to the New Albany Police Department to meet Petitioner Gibson (Biggs Tr. 7). When he arrived, Mr. Biggs spoke to Petitioner and told him not to speak to the police (Biggs Tr. 7). Mr. Biggs also could not convince the chief of detectives, Mike Lawrence, to stop the interviews (Biggs Tr. 8).

30. Because of this disagreement, Mr. Biggs and Petitioner Gibson went on the record in this Court (Biggs Tr. 8-9). The Court ensured that it was truly Petitioner Gibson's desire to continue speaking to police and advised him that speaking to the police could have adverse consequences (Biggs. Tr. 8-9; PCR Ex. with Advisements tailored for Gibson). The Court advised Petitioner Gibson to listen to his attorney's advice. Even after these advisements, Petitioner Gibson still wanted to speak to police (Biggs Tr. 8-9). Petitioner Gibson spoke to the police several more times over the next month until this Court issued a protective order to stop communication while Petitioner Gibson's competency was being determined (GI DA App. 106; PCR Exs. for recordings of Gibson's statements).

31. Mr. Biggs's co-counsel in this case was George Streib, a contract public defender in Floyd County (Streib Tr. 1-2). Mr. Streib was first contacted by Mr. Biggs at the end of April 2012 to gauge Mr. Streib's interest in being co-counsel (Streib Tr. 3-4). At the time, Mr. Streib was qualified to be co-counsel in a capital case under Criminal Rule 24 (Streib Tr. 3-4). Although he did

not enter his appearance until June 5, 2012, Mr. Streib had met with Petitioner Gibson in May 2012 (Streib Tr. 6).

32. Jury selection began in Dearborn County on September 23, 2013, and concluded on September 26, 2013 (GI DA App. 25-26).

33. The guilt phase of the jury trial began on October 21, 2013, and the jury returned a guilty verdict on the murder count on October 25, 2013 (GI DA App. 29, 586).

34. The penalty phase began on October 28, 2013 (GI DA App. 30). On October 29, 2013, the jury found that the State proved all four aggravating circumstances beyond a reasonable doubt and that the aggravators outweighed the mitigators (GI DA App. 613-17). The jury unanimously recommended a sentence of death (GI DA App. 618).

35. On November 26, 2013, the Court, pursuant to the binding recommendation of the jury, sentenced Petitioner Gibson to death (GI DA App. 665-66).[2]

36. Petitioner Gibson was represented by Laura Paul and Steven Ripstra on direct appeal from the conviction and sentence (GI App. 666). On September 24, 2015, the Indiana Supreme Court affirmed Gibson's conviction and sentence. *Gibson v. State*, 43 N.E.3d 231 (Ind. 2015).

37. Gibson filed his petition for post-conviction relief on June 16, 2016, which was later amended on January 29, 2017, and May 11, 2017. The parties conducted an evidentiary hearing on the second amended petition from July 17, 2017, to July 21, 2017.

[2] The jury also found that Gibson was a habitual offender (GI DA App. 664). The Court withheld sentence on this finding due to the imposition of the death sentence (GI DA App. 666).

III.

STANDARDS GOVERNING POST-CONVICTION RELIEF

1. Indiana law has long viewed post-conviction proceedings as collateral, quasi-civil proceedings that are separate and distinct from the underlying criminal trial. *Hall v. State*, 849 N.E.2d 466, 472 (Ind. 2006). The Indiana Supreme Court has delineated the purpose and scope of post-conviction review as follows:

> Post-conviction proceedings are civil proceedings that provide defendants the opportunity to raise issues not known or available at the time of the original trial or direct appeal. *Conner v. State*, 711 N.E.2d 1238, 1244 (Ind. 1999). Thus, if an issue was known and available but not raised on direct appeal, the issue is procedurally foreclosed. *Timberlake v. State*, 753 N.E.2d 591, 597 (Ind. 2001). If an issue was raised and decided on direct appeal, it is res judicata. *Id.* If a claim of ineffective assistance of trial counsel was not raised on direct appeal, that claim is properly raised at a post-conviction proceeding. Id. In post-conviction proceedings, the defendant bears the burden of proof by a preponderance of the evidence. *Wallace v. State*, 553 N.E.2d 456, 458 (Ind.1990).

Stephenson v. State, 864 N.E.2d 1022, 1028 (Ind. 2007). "A post-conviction petition is not a substitute for an appeal. Further, post-conviction proceedings do not afford a petitioner a 'super-appeal.' Our post-conviction rules contemplate a *narrow remedy* for subsequent collateral challenges to convictions." *Reed v. State*, 856 N.E.2d 1189, 1194 (Ind. 2006) (citations omitted) (emphasis in original). Additionally, the petitioner bears the burden of proving his grounds for relief by a preponderance of the evidence because a presumption of regularity attaches to final judgments that were affirmed on direct appeal. *Hall*, 849 N.E.2d at 472.

2. Gibson raises several instances of trial counsel ineffectiveness. To succeed on a claim of trial counsel ineffectiveness, Petitioner Gibson must prove by a preponderance of the evidence not only that trial counsel's performance was deficient, but also that his counsel's errors were so

serious as to deprive him of a fair trial because of a reasonable probability that, but for counsel's unprofessional errors, the result would have been different. *Stevens v. State*, 770 N.E.2d 739, 746 (Ind. 2002) (citing *Bell v. Cone*, 535 U.S. 685 (2002); *Williams v. Taylor*, 529 U.S. 362, 390 (2000); *Strickland v. Washington*, 466 U.S. 668, 687 (1984); *Woods v. State*, 701 N.E.2d 1208, 1224 (Ind. 1998)). Showing deficient performance requires proof that "counsel's representation fell below an objective standard of reasonableness and that counsel made errors so serious that counsel was not functioning as 'counsel' guaranteed to the defendant by the Sixth Amendment." *Overstreet v. State*, 877 N.E.2d 144, 151-52 (Ind. 2007). To prove prejudice, Petitioner must prove that there is a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* This reasonable probability must be sufficient to undermine confidence in the reliability of the verdict. *Id.*

3. In determining whether a petitioner proves his claim of ineffective assistance of counsel, the Court is guided by various important guidelines. *Stevens*, 770 N.E.2d at 746. There is a strong presumption that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. *Id.* (citing *Strickland*, 466 U.S. at 690). Counsel is afforded considerable discretion in choosing strategy and tactics, and these decisions are entitled to deferential review. *Id.* at 746-47 (citing *Strickland*, 466 U.S. at 689). Isolated mistakes, poor strategy, inexperience, and instances of bad judgment do not necessarily render representation ineffective. *Id.* at 747 (citing *Perez v. State*, 748 N.E.2d 853, 854 (Ind. 2001); *Timberlake v. State*, 753 N.E.2d 591, 603 (Ind. 2001)).

IV.

FINDINGS OF FACTS AND CONCLUSIONS OF LAW[3]

Trial Counsel Unreasonably Delayed Active Representation of Gibson as well as the Hiring of Guilt and Mitigation Investigators
(Amended Petition Paras. 9(a)(1)(i), 9(a)(1)(ii))

1. On April 19, 2012, Petitioner Gibson was arrested for operating while intoxicated and resisting law enforcement (GI DA Tr. 2955-56).

2. On April 20, 2012, Detective East interviewed Petitioner Gibson after being read his *Miranda* rights, Petitioner Gibson signed a waiver-of-rights form and agreed to speak to Detective East (GI DA Ex. 5, 6, pp. 228-29; GI PCR Ex. with waiver for April 20). Petitioner Gibson admitted to killing Ms. Whitis and Ms. Hodella (PCR Ex. Gibson Statement on April 20, pp. 5-7, 27-28, 47-53, 57, 68).

3. Police continued to speak to Petitioner Gibson at his request about Ms. Whitis' murder, Ms. Hodella's murder, and also to Ms. Kirk's murder on April 21, April 23, and April 24, 2012 (GI PCR Exs. Statements on April 21, 23, and 24). These statements were always given after Petitioner Gibson had orally waived his Miranda rights and signed a written waiver form (GI PCR Exs. Waivers on April 21, 23, and 24). At no point in these or any of his interviews did Petitioner Gibson refuse to speak to officers or ask for an attorney, and many of the interviews were initiated by Petitioner Gibson.

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[3] The Court will identify each claim as presented by Petitioner Gibson in his proposed findings of fact and conclusions of law filed with this Court, will identify the corresponding claim or claims filed in his petition for post-conviction relief, and discuss its findings of fact and conclusions of law together in its discussion of each claim. To the extent there are claims included in Petitioner Gibson's petition, but not addressed in his proposed findings of fact and conclusions of law, the Court will address those claims at the end.

4. On April 24, 2012, the State charged Petitioner Gibson with murdering Ms. Whitis and appointed counsel, some four days after Petitioner Gibson made his admission to the police (GI DA App. 2; GI DA Tr. 18).

5. Lead counsel, J. Patrick Biggs, was not informed of Petitioner Gibson's arrest and his appointment until April 26, 2012-after Petitioner had admitted to killing Ms. Whitis and performing sex acts on her and killing Ms. Hodella and Ms. Kirk, some six days prior (Biggs Tr. 6). Mr. Biggs did not hear about the case from the media before that time (Biggs Tr. 7). Petitioner Gibson's admissions to the police were made prior to the State's request for an oral probable cause hearing; before the Court could appoint a Public Defender, and before J. Patrick Biggs had even been notified of Petitioner Gibson's admissions.

6. While Mr. Biggs's office did not receive his appointment until April 27, 2012, Detective East contacted Mr. Biggs on April 26, 2012, to inform him that Petitioner Gibson was confessing to a murder (Biggs Tr. 6-7). At the time, Mr. Biggs was representing Petitioner Gibson on an unrelated operating-while-intoxicated charge (Biggs Tr. 7).

7. Mr. Biggs went to the New Albany Police Department to meet Petitioner Gibson (Biggs Tr. 7). When he arrived, Mr. Biggs spoke to Petitioner and told Petitioner "in the very strongest possible language ... told him not to say another word, don't say anything else" (Biggs Tr. 7). Mr. Biggs also told Petitioner Gibson that he could be facing the death penalty (Biggs Tr. 8). Despite Mr. Biggs's advice, Petitioner Gibson still wanted to speak to officers (Biggs Tr. 8).

8. Mr. Biggs also could not convince the chief of detectives, Mike Lawrence, to stop the interviews (Biggs Tr. 8).

9. Because of this disagreement, Mr. Biggs and Petitioner Gibson went on the record in this Court (Biggs Tr. 8-9). The Court ensured that it was truly Petitioner Gibson's desire to continue speaking to police and told him that speaking to the police could have adverse consequences (Biggs. Tr. 8-9; PCR Ex. with Advisements tailored for Gibson). The Court advised Petitioner Gibson to listen to his attorney's advice. Even after these advisements, Petitioner Gibson still wanted to speak to police (Biggs Tr. 8-9). Petitioner Gibson spoke to the police several more times over the next month until this Court issued a protective order to stop communication due to a motion filed by Mr. Biggs while Petitioner Gibson's competency was being determined (GI DA App. 106; PCR Exs. for recordings of Gibson's statements).

10. Mr. Biggs's co-counsel in this case was George Streib, a contract public defender in Floyd County (Streib Tr. 1-2). Mr. Streib was first contacted by Mr. Biggs at the end of April 2012 to gauge Mr. Streib's interest in being co-counsel (Streib Tr. 3-4). At the time, Mr. Streib was qualified to be co-counsel in a capital case under Criminal Rule 24 (Streib Tr. 3-4). Although he did not enter his appearance until June 5, 2012, Mr. Streib had met with Petitioner Gibson in May 2012 (Streib Tr. 6).

11. The State filed for the death penalty on May 23, 2012, and charged him with the murder of Stephanie Kirk (GI DA App. 85). While Biggs and George Streib were initially appointed by the Court in the case involving Ms. Kirk, Andrew Adams eventually replaced Streib as co-counsel in Ms. Kirk's case in November of 2012 (Gibson II DA 80, 141).

12. Mr. Biggs was given the name of Michael Dennis as a mitigation specialist and Mark Mabrey as an investigator in May of 2012, by a trusted defense attorney in the community who had

worked on capital cases with both gentleman (Biggs Tr. 10). Mr. Dennis began working on Petitioner Gibson's cases in September of 2012 (PCR Ex. 77).

13. The defense team hired Mark Mabrey in October of 2012, there was meeting held that included Michael Dennis, Mr. Biggs, Mr. Streib, and Mr. Adams, and he was provided discovery at that time (Mabrey Tr. 3-4). Mabrey did the typical things to investigate Petitioner Gibson's case like review discovery, read documents, statements of witnesses, photographs, autopsy evidence, charging information, and listened to Petitioner Gibson's statements (Mabrey Tr. 2-4). During Mr. Mabrey's investigation he identified overlap in the investigation of the three murders, especially since 2 were so close in time (Mabrey Tr. 10, 11). Indeed, the majority of investigation for Ms. Whitis and Ms. Kirk's murders was done simultaneously (Mabrey Tr. 25).

14. On June 26, 2012, the trial court ordered a competency evaluation (docket). On September 6, 2012, Dr. Shelton filed a competency evaluation following an interview with Petitioner Gibson (docket). On September 20, 2012, Dr. Henderson-Galligan filed a competency evaluation following an interview with Petitioner Gibson (docket). On October 12, 2012, the trial court held a competency hearing, heard evidence, and found Petitioner Gibson to be competent to go to trial (docket).

15. Following Dr. Henderson-Galligan's evaluation, Mr. Biggs consulted with her regarding her assessment of Petitioner Gibson's mental health (Biggs Tr. 13). Due to the report of several head injuries, the defense team decided to have Petitioner Gibson evaluated by a neurologist and a neuropsychologist (Biggs Tr. 13-14, 58-59).

16. Mr. Biggs contacted Tom Hinesly from the State Public Defender's Office who recommended he hire a neuropsychologist, Dr. Haskins, to evaluate Petitioner Gibson (Biggs Tr. 14,

55).[4] Mr. Biggs hired Dr. Nichols who was the former chief medical examiner for the State of Kentucky to review the autopsy reports and also a neurologist, Dr. Matibag, to determine whether Petitioner Gibson suffered brain damage from having hit his head during his lifetime (Biggs. Tr. 13, 47, 54). Dr. Nichols was used on all three of Petitioner Gibson's cases (Biggs. Tr. 15). Additionally, Mr. Biggs hired Dr. Barry Hargan who specialized in alcohol use and abuse and James Aiken, an expert on correctional systems (Biggs. Tr. 15). There was some delay in trying to obtain Petitioner Gibson's medical records (Biggs Tr. 14).

17. The neurologist reported to trial counsel that Petitioner Gibson did not have any brain damage (Biggs Tr. 14-15).

18. Mr. Biggs contacted Dr. Haskins in June of 2013 (Biggs Tr. 13; GI Tr. 3667). On September 21, 2013, Dr. Haskins met with Petitioner Gibson (GI Ex. 32). Prior to the meeting Dr. Haskins had reviewed numerous documents, and records, in addition to interviews with Petitioner Gibson's sisters (GI Ex. 32; GI Tr. 3671-3695). Dr. Haskins conducted a full battery of neuropsychological testing and determined that Petitioner Gibson was in the near normal range and had no evidence of any major cognitive impairment, an average IQ, suffered from Bi-polar disorder and self-medicated with significant alcohol use (GI Ex. 32).

19. The defense team made the decision to use Dr. Haskins testimony in Ms. Whitis' trial and presented Dr. Henderson-Galligan's testimony in Ms. Kirk's case (Biggs Tr. 14).

20. Jury selection began in Dearborn County on September 23, 2013, and concluded on September 26, 2013 (GI DA App. 25-26). The guilt phase of the jury trial began on October 21,

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[4] The Court notes that the State Public Defender's Office represents Petitioner Gibson in his post-conviction challenges.

2013, and the jury returned a guilty verdict on the murder count on October 25, 2013 (GI DA App. 29, 586). The penalty phase began on October 28, 2013 (GI DA App. 30).

21. The Court finds that Petitioner Gibson has failed to show that trial counsel unreasonably delayed their representation or their investigation into guilt or penalty phase evidence. Before Mr. Biggs was appointed or even learned about Mr. Gibson, Mr. Gibson had already confessed to the police his involvement in Ms. Whitis' murder, in Ms. Hodella's murder, and in Ms. Kirk's murder and acted promptly and diligently in advising Gibson to stop speaking with the police. The Court finds that Petitioner Gibson has failed to show that trial counsel was deficient. Petitioner Gibson has also failed to show a reasonable probability of a different result of both the guilty phase and the penalty phase of Ms. Whitis' case. At most, Petitioner Gibson only points this Court to matters that with the aid of hindsight could have been handled differently and speculation as to how that may have affected Petitioner Gibson. Petitioner Gibson has failed to present any case law finding ineffective assistance of counsel based on the timing of investigation and obtaining experts for trial. And, as will be later addressed by this Court, Petitioner Gibson has failed to show that his presentation of mitigation was inadequate or deficient. This is insufficient to establish a reasonable probability of a different result. Petitioner Gibson's claim is DENIED.

Counsel Failed to Secure the Assistance of a Necessary Expert to Aid Them in Challenging the Admissibility, Credibility, or Reliability of Gibson's Statements, Either in a Pretrial Hearing or at the Trial Itself.
(Amended Petition Paras. 9(a)(1)(iv), 9(a)(1)(v))

1. Petitioner Gibson claims trial counsel was ineffective for failing to challenge the admissibility and reliability of his numerous statements to the police. The Court finds that counsel was not ineffective for failing to challenge Petitioner Gibson's statements.

2. "[T]o prove ineffective assistance of counsel due to the failure to object, a defendant must prove that an objection would have been sustained if made and that he was prejudiced by the failure." *Wrinkles v. State*, 749 N.E.2d 1179, 1192 (Ind. 2001) (citing *Timberlake v. State*, 690 N.E.2d 243, 259 (Ind. 1997)). Statements made to police are admissible provided they are voluntarily given. An essential prerequisite to suppressing a confession is the existence of coercive police conduct. *State v. Banks*, 2 N.E.3d 71, 79 (Ind. Ct. App. 2014), *trans. denied.* Provided there is coercion, voluntariness is determined by looking at all of the circumstances surrounding a particular interrogation. *Pruitt v. State*, 834 N.E.2d 90, 115 (Ind. 2005) (citing *Schmitt v. State*, 790 N.E.2d 147, 148 (Ind. 2002)). Ultimately, "[t]he question whether a confession was coerced depends upon whether the defendant's will was overborne at the time he confessed, for if such was the case, this confession cannot be deemed the product of a rational intellect and a free will." *Sparks v. State*, 248 Ind. 429, 433, 229 N.E.2d 642, 645 (1967).

Deficient Performance

3. Before every one of Petitioner Gibson's statements, Petitioner was read an advisement of rights by the officer conducting the interview (GI PCR Ex. Advisements). Petitioner Gibson verbally agreed to speak to officers and signed forms waiving his rights before speaking (GI PCR Ex. Advisements). In fact, Petitioner Gibson initiated the vast majority of the interviews by asking detectives to come and talk to him (GI PCR Ex. Beginnings of Statements Admitted). And, he did so after he was advised by his counsel not to speak to the police and told on the record by this Court and by his counsel that he should not talk to police (Biggs Tr. 8-9). A special advisement was created for Petitioner Gibson to remind him of this hearing and of this Court's and his counsel's warnings (GI PCR Ex. Advisements). These advisements not only concerned Petitioner Gibson's *Miranda*

right to remain silent but also specifically reminded Petitioner that this Court and his counsel, Patrick Biggs, had advised him about negative consequences that were likely to result if he continued to speak to police (PCR Ex. Advisements). Despite these warnings and advisements of the negative consequences for talking to the police, Petitioner Gibson continued to speak. Petitioner Gibson not only spoke to detectives voluntarily, but enthusiastically, and sought opportunities to do so. Additionally, Petitioner Gibson not only spoke to police and confessed his guilt, but he also wrote to the media who later published his admissions of guilt (Biggs Tr. 45; PCR Exs. Newspaper Articles, Handwritten Statements).

4. Petitioner Gibson's expert on false confessions, Alan Hirsch, only criticized two of Detective East's tactics: minimization and leading questions (Hirsch Tr. 44-45). Minimization is a method that attempts to reassure a suspect that confessing will make things better for them (Hirsch Tr. 39). Further, Mr. Hirsch did not testify that he saw any significant confrontation of Petitioner Gibson-a tactic used to convince a suspect that denying guilt is futile and a tactic that, if used here, would make a far more convincing case for coercion (Hirsch Tr. 39).

5. The Court finds that Gibson has failed to show that if his counsel had challenged the admissibility of his statements, the challenge would have been successful. See *Premo v. Moore*, 562 U.S. 115, 124 (2011) (upholding state-court decision that counsel was not ineffective for failing to file a motion to suppress the defendant's confession because the motion would not have been successful). The Court finds that Gibson would not have been able to show the essential element of police coercion. Any reassurances or use of leading questions by police in Petitioner Gibson's interviews did not rise to the level of establishing that Petitioner Gibson was coerced into making a statement. On the contrary, the record establishes that Petitioner Gibson's statements were made

voluntarily, knowingly, and intelligently. Counsel could not have been deficient for foregoing a losing objection.

6. To the extent Petitioner Gibson also claims deficiency because, even if the statements were admitted, trial counsel could still challenge their reliability in front of the jury, this claim is also denied.

7. The Indiana Supreme Court has recognized that even if a confession is admissible, its reliability can be attacked before the jury. *Miller v. State*, 770 N.E.2d 763, 772 (2002). In the context of using an expert in false confessions, the expert may testify "'on the general subjects of coercive police interrogation and false or coerced confessions. Experts may also testify regarding the techniques the police used in a particular interrogation.'" *Jimerson v. State*, 56 N.E.3d 117, 121 (Ind. Ct. App. 2016) (quoting *Shelby v. State*, 986 N.E.2d 345, 369-70 (Ind. Ct. App. 2013), *trans. denied*) (internal citations omitted), *trans. denied*. "'Experts may not, however, comment about the specific interrogation in controversy in a way that may be interpreted by a jury as the expert's opinion that the confession in that particular case was coerced or false, as this would invade the province of the jury and violate Evidence Rule 704(b).'" *Id.* (quoting *Shelby*, 986 N.E.2d at 369-70); see also *United States v. Jacques*, 784 F.Supp.2d 59, 63 (D. Mass. 2011) (citing *United States v. Bennally*, 541 F.3d 990, 995 (10th Cir. 2008) ("An opinion that a defendant's statement 'I am guilty' is unreliable cannot be logically disconnected from the implicit opinion that the defendant is, in fact, not guilty.") (emphasis in original).

8. Presenting Mr. Hirsch's testimony in order to challenge the reliability of Petitioner Gibson's confession was not a reasonable trial strategy. Pursuant to Indiana Rule of Evidence 704 and the precedent of Indiana courts, if counsel had proffered Mr. Hirsch, the extent of his testimony

would have been limited to informing the jury that false confessions exist and that they are correlated with certain coercive police techniques. He would not have been able to come to an opinion about the falseness or the reliability of Petitioner Gibson's statements or apply his hypotheses to the facts of the case: "Where a jury is able to apply concepts without further assistance, highlighting individual exchanges or vouching for the truth or falsity of particular evidence is invasive." *Jimerson*, 56 N.E.3d at 123. With this limitation, counsel reasonably did not offer a witness who could not testify to the conclusion that he was hired to make.

9. The State would have been able to challenge Mr. Hirsch's testimony with actual instances where Petitioner Gibson's statements were reliable thereby neutralizing any doubt Mr. Hirsch's testimony may have cast on the reliability of Petitioner Gibson's statements. For example, the State could have demonstrated that the majority of the salient facts establishing Petitioner Gibson's murder of Ms. Whitis were corroborated by the evidence found at the scene of the crime and after an autopsy examination. Further, the State could have demonstrated actual instances where Petitioner Gibson's statements were reliable and generative of new evidence such as leading the police to the body of another of his victims that police did not even know was dead before Petitioner told them that he killed her and buried her body in his back yard (*See* Findings in Gibson II). This information would have significantly boosted reliability of the confession. Counsel reasonably did not enter this minefield of potential pitfalls in an attempt to diminish the force of Petitioner Gibson's voluntary statements.

10. Perhaps most importantly, trial counsel was not deficient for failing to challenge the reliability of the statements because any strategy attempting to show the confession was unreliable could have reasonably led to the exposure of the jury to some, if not all, of the prejudicial statements

Petitioner Gibson made about other crimes and wrongdoings. In support of this claim in post-conviction, Petitioner Gibson presented the testimony of Mr. Hirsch, who is well-read in the phenomena of false confessions generally. In his testimony, Mr. Hirsch stated that he reviewed what he called "a pretty voluminous file" that contained all of Petitioner Gibson's statements, police reports, summaries of forensic reports, hearing transcripts, and deposition transcripts (Hirsch Tr. 15). Thus, for trial counsel to have challenged the reliability of the confession to Ms. Whitis' murder, counsel would likely not have been able to prevent other prejudicial information from reaching the jury in order to sufficiently develop Mr. Hirsch's testimony regarding why he believed the police were using coercive techniques. Likewise, it would have been difficult for trial counsel to keep the door closed on such highly prejudicial information when the State tested Mr. Hirsch's opinion.

11. To raise a challenge to the unreliability of Petitioner Gibson's statements would have been diametrically opposed to the reasonable strategy that trial counsel employed. It is clear that trial counsel spent their efforts trying to minimize prejudice to Petitioner Gibson by meticulously redacting each statement to prevent the jury from learning that Petitioner Gibson had confessed to many other crimes, wrongdoings, and bad acts. Trial counsel's plan to prevent the jury from learning this highly prejudicial information was a sound reasonable strategy that this Court will not second guess.

12. Moreover, Petitioner Gibson confessed his guilt to killing Ms. Whitis to the local newspapers (PCR Exs. Newspaper Articles, Handwritten Statement to Media). Therefore, counsel would have been in the irreconcilable position of both attacking the statements to the police, accusing them of being false, while also attacking these same corroborating statements Petitioner Gibson independently made to the media without any evidence of coercion. The defense's credibility

would have been endangered by attempting to challenge these statements in light of the corroborating evidence. As Mr. Biggs testified at the post-conviction hearing, the defense team "couldn't challenge [the statements] as false" because there were "three bodies to corroborate the confessions" (Biggs Tr. 46). "'[W]hen a defendant has given counsel reason to believe that pursuing certain investigations would be fruitless or even harmful, counsel's failure to pursue those investigations may not later be challenged as unreasonable.'" *Rompilla v. Beard*, 545 U.S. 374, 398 (2005) (quoting *Strickland*, 466 U.S. at 691) (alteration in original). To challenge the falseness or the reliability of corroborated confessions would have been a losing and potentially damaging strategy considering the evidence supporting Petitioner Gibson's admissions of guilt. Counsel was not unreasonable for forgoing an attack against voluntary statements made to the police that were corroborated by statements made to the media and also corroborated by the evidence.

13. Further, counsel, in good faith, could not challenge the falsity of these statements because counsel knew that they were true. At post-conviction, counsel Mr. Biggs testified:

> And as far as reliability, he said all along that the statements he gave about Ms. Hodella, Ms. Whitis, and Mrs. Kirk were true, that they were the only murders he had committed. Whereas, he had kept talking to the police and sent them on a number of wild goose chases about other offenses that he said he committed. But he told us, he said it was just, just to get out of his cell, just to drive around, just to go out to the sally port to have some cigarettes, drink some coffee.

(Biggs Tr. 19-20). Counsel was not deficient for not presenting testimony from an expert on false confessions when his client, under no coercion whatsoever, admitted to the truth of the three murder accusations he was facing. The Court finds that counsel was not deficient for failing to challenge the reliability of Petitioner Gibson's statements before the jury. *Strickland* "permits counsel to 'make a

reasonable decision that makes particular investigations unnecessary.'" *Harrington v. Richter*, 562 U.S. 86, 106 (2011) (quoting *Strickland*, 466 U.S. at 691).

14. Further, Petitioner Gibson claims that a medical doctor like Dr. Chambers should have testified as to Petitioner's poor memory. The failure to do so was not unreasonable for two reasons. First, Petitioner Gibson's statements express his problems with memory extensively; therefore, the jury was aware of his memory issues. Second, Dr. Haskins testified about Petitioner Gibson's memory, concluding that neuropsychological testing indicated that his memory was "fine" (GII DA Tr. 3634). Counsel was not unreasonable for relying on Dr. Haskins to communicate about Petitioner Gibson's memory rather than hire another expert to talk about memory.

Prejudice

15. Even if it were unreasonable for counsel to have failed to challenge the truthfulness or the reliability of Petitioner Gibson's statements, he has not proved prejudice resulted from this decision. To prove the second prong of the *Strickland* analysis, Petitioner Gibson must show "'a reasonable probability (i.e. a probability sufficient to undermine confidence in the outcome) that, but for counsel's errors, the result of the proceeding would have been different.'" *Humphrey v. State*, 73 N.E.3d 677, 682 (Ind. 2017) (quoting *McCary v. State*, 761 N.E.2d 389, 392 (Ind. 2002)). Concerning Ms. Whitis' case, as to a pre-trial challenge to admissibility, even if made (as explained above), it would not have been successful. Likewise, the reasons explained above as to why trial counsel was not deficient in challenging the reliability of the statements demonstrate why Petitioner Gibson was not prejudiced.

16. Moreover, substantial independent evidence of Petitioner Gibson's guilt confirms the truth of his admissions, and Petitioner Gibson fails to show a reasonable probability of a different

result. Ms. Whitis' dead body was found in Petitioner Gibson's garage (GI DA Exs. 50, 52, 56). In the hours after her body was discovered, police had apprehended Petitioner, who was driving Ms. Whitis' vehicle, and he was in possession of the breast that he had severed from Ms. Whitis' body (GA DA Tr. 2721, 2735, 2746-47, 2984; GI DA Ex. 79). This evidence by itself demonstrated Petitioner Gibson's guilt and also supports the evidence for the dismemberment aggravator found by the jury (GI DA App. 832). *See* Ind. Code § 35-50-2-9(b)(10) (2012). With this strong and substantial evidence proving both Petitioner Gibson's guilt and an aggravating circumstance, Petitioner Gibson has failed to show a reasonable probability of a different outcome had he challenged the admissibility of his statements, and had that challenge been successful.

17. Petitioner Gibson has failed to show either deficiency or prejudice on this claim. His claim relating to challenging the admissibility or reliability of his statements is DENIED.

Trial Counsel Violated Their Duty to Seek a Plea Agreement to a Sentence Less Than Death Under the ABA Guidelines
(Amended Petition Para. 9(a)(1)(vii))

1. Petitioner Gibson's claim that counsel was ineffective for failing to seek a plea agreement to a non-death sentence is denied.

Deficient Performance

2. Defendants are entitled to effective counsel during the negotiations of a plea agreement. *Missouri v. Frye*, 566 U.S. 134, 144 (2012). Yet, defendants have no right to be offered a plea agreement or a right for a trial court to accept a proffered plea agreement. *Lafler v. Cooper*, 566 U.S. 156, 168 (2012) (citing *Frye*, 566 U.S. at 148-49). Some insight into the requirements of counsel as to plea negotiations can be found in the ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases. Guideline 10.9.1 states that counsel have

an obligation to seek a plea agreement at all stages of the proceeding and should not be deterred by a prosecutor's initial refusals to negotiate. ABA Guidelines for the Appointment and Performance of Defense Counsel 10.9.1(A), (E) (rev. ed. 2003) [ABA Guidelines]. The commentary to this Guideline notes that pleas to sentences less than the death penalty must be "'pursued and won[,]'" by persistent requests for an agreed resolution. ABA Guidelines 10.9.1 comm. The commentary emphasizes that "circumstances change over time" and as these circumstances change, defense counsel should attempt to seize upon them. *Id.* While the Guidelines do provide some information about the prevailing professional norms of capital defense counsel, the Indiana Supreme Court and the United States Supreme Court have held that they are not mandatory requirements of counsel and failing to live up to all of the stated aspirations found in the Guidelines is not necessarily ineffective assistance. *Ward v. State*, 969 N.E.2d 46, 57 (Ind. 2012) (citing *Bobby v. Van Hook*, 558 U.S. 4, 8-9 (2009) (per curiam)); *Padilla v. Kentucky*, 559 U.S. 356, 366-67 (2010) (ABA Guidelines are not "'inexorable commands'") (quoting *Bobby*, 558 U.S. at 8). The Court is also guided by the fact that plea negotiations depend on many factors that cannot appear in the record, such as the prior negotiating history of the parties and their individual negotiation strategies. A claim that counsel should have secured a particular plea agreement is a particularly situation-specific inquiry.

3. Counsel Biggs testified at post-conviction that, at the outset of the filing of the death-penalty allegation, he approached the prosecutor about a plea agreement (Biggs Tr. 17). Mr. Biggs also testified about the prosecutor's response: He was "adamant that he was seeking the death penalty and was not going to do anything else" (Biggs Tr. 17). No further negotiations were held, and Petitioner Gibson does not allege that Mr. Biggs received an offer that was not communicated to him.

4. Counsel was not ineffective for failing to persist in negotiations with the prosecutor. While the ABA Guidelines and Mr. Koselke insist that negotiations must be persistent, they also claim that this persistence is motivated by the fact that circumstances change over the course of a prosecution and mitigation investigation. ABA Guidelines 10.9.1 comm. The idea is that counsel should re-engage in plea negotiations when they uncover favorable evidence or are able to make a new and significant concession in exchange for a less-than-death sentence. That was not the situation facing trial counsel in this case. To the extent that circumstances may have changed over the course of this case, it was never in such a way as to provide leverage for defense counsel to negotiate a plea to life without parole or a term of years. In their discussions of persistence, neither the ABA Guidelines nor Mr. Koselke consider the familiarity of a Chief Public Defender and Prosecutor who have a long working history with each other. And, to the extent that the ABA Guidelines contemplate that Mr. Biggs should have asked again about a plea, the ABA Guidelines are not commands or inexorable requirements. *Bobby*, 558 U.S. at 8-9.

5. Trial counsel did not fall below prevailing professional norms, and the Court is not inclined to hold that counsel is required by the Sixth Amendment to badger the prosecutor for an offer or continue to persist in asking the prosecutor for a plea agreement. Here, the evidence is clear that the prosecutor would not entertain a guilty plea to a sentence less than death. There is no evidence that the prosecutor would have entertained any other agreement, and it is clear that trial counsel never foreclosed the possibility that they would engage in plea negotiations should the prosecutor change his mind. See *Ward*, 969 N.E.2d at 57 (quoting *Nix v. Whiteside*, 475 U.S. 157, 165 (1986)) (courts should take caution "not to 'constitutionalize particular standards of professional conduct'"). Petitioner Gibson has failed to prove deficient performance.

Prejudice

6. Petitioner Gibson has failed to show any resulting prejudice. A showing of prejudice requires a finding that "the defendant would have accepted the plea and the prosecution would not have withdrawn it in light of intervening circumstances." *Lafler*, 565 U.S. at 164. As stated above, Petitioner Gibson has failed to show that continuing efforts of counsel would have caused the prosecutor to offer a plea to a lesser sentence than death. In fact, the only evidence in the record of the prosecutor's inclinations was his unequivocal refusal to negotiate (Biggs Tr. 17). Moreover, Petitioner Gibson failed to show that he would have accepted an offer had one been made. Petitioner Gibson did not testify at the post-conviction hearing, and nowhere in the direct appeal record does Petitioner Gibson indicate his willingness to plead guilty at all. His claim of ineffectiveness is DENIED.

Trial Counsel Failed to Effectively Question and Challenge Jurors During Voir Dire
(Amended Petition Para. 9(a)(2)(I))

1. Petitioner Gibson challenges his counsel's performance during jury selection and whether that led to unqualified jurors not being struck for cause. He claims that there was a lack of a developed mitigation theme and also complains of the use of only one attorney in voir-dire questioning. The Court finds that Petitioner Gibson has failed to show either deficient performance or prejudice.

Deficient Performance

2. The evidence does not support Petitioner Gibson's claim that trial counsel did not have a mitigation plan developed. Trial counsel testified that they did have a mitigation theme developed by the time of trial that centered on Petitioner Gibson's mental health (Streib Tr. 20). Further, to the extent that Petitioner Gibson's claim is that counsel should have somehow primed the

jury or injected anticipated mitigation evidence into voir dire, our Supreme Court held this would be improper in Petitioner Gibson's direct appeal: "Those questions that 'seek to shape the favorable jury by deliberate exposure to the substantive issues in the case' are not permitted." *Gibson v. State*, 43 N.E.3d 231, 238 (Ind. 2015) (quoting *Davis v. State*, 598 N.E.2d 1041, 1047 (Ind. 1992)).

3. Petitioner Gibson has also failed to show deficient performance because the decision to have Mr. Streib be the only questioner of potential jurors was a reasonable one. Mr. Biggs testified about the division of labor for the trial. Having Mr. Streib be the individual that questioned the jury was because Mr. Streib was sent to Colorado for training on the Colorado method of jury selection in a capital case (Biggs. Tr. 88-89). Having the most fully trained attorney perform a task is not an unreasonable decision of counsel.

4. And, while Mr. Streib may have been the only attorney personally interacting with the jurors, he was supported by his defense team that included Mr. Biggs, Doug Garner (an attorney specifically retained for any local knowledge about the potential jurors (Biggs Tr. 56)), Inese Neiders (jury consultant) (Biggs Tr. 57-58), Andrew Adams (co-counsel in Gibson II, who was involved in the first three days of jury selection in Gibson I (Andrews Tr. 13)), and Petitioner Gibson himself. Counsel's strategy was to have one person questioning, supported by a team. Petitioner Gibson has not proved that this was so unreasonable that counsel was not acting as counsel guaranteed by the Sixth Amendment. Therefore, he has not proved deficient performance, and his voir-dire claim is denied.

Prejudice

5. Petitioner Gibson has also failed to prove prejudice. His only allegation regarding how the decision to have Mr. Streib solely question jurors may have affected his conviction and

sentence is found in his proposed findings: "Delegating the questioning in voir dire to one attorney negatively impacted the defense's ability to effectively question jurors. As a result, Mr. Streib was unable to ask the questions needed to establish a cause challenge for biased jurors" (Gibson Proposed Findings 30).

6. This conclusory speculation is not supported by any evidence. Petitioner Gibson gives no examples of what questions should have been asked, what answers would have been received, and how those answers would have influenced counsel's ability to make or succeed upon a challenge for cause. While Gibson attempts to show this Court that disqualified jurors sat on Gibson's jury, that contention is unsupported by our Supreme Court's holding on direct appeal. *Gibson v. State*, 43 N.E.3d 231, 239-40 (Ind. 2015).

7. To the extent that Petitioner Gibson is claiming that unqualified jurors sat on the jury, the claim is unavailable to him. He raised an identical claim on direct appeal and has not presented any additional evidence that was not available on direct appeal to show that the jurors were unqualified (GI DA Def. Br. 38-45). Our Supreme Court rejected that claim. *Id.* at 238-41. Therefore, the issue has already been decided, and Gibson may not relitigate it on post-conviction. *Reed v. State*, 856 N.E.2d 1189, 1194 (Ind. 2006) (citing *Trueblood v. State*, 715 N.E.2d 1242, 1248 (Ind. 1999)) ("If an issue was raised on direct appeal, but decided adversely to the petitioner, it is res judicata."). This Court is in no position to re-evaluate that holding through the lens of ineffective questioning of these or other jurors. Petitioner Gibson has failed to prove prejudice.

8. Because Gibson has failed to prove either deficient performance or prejudice from the use of only one attorney in voir dire, his claim of ineffectiveness is DENIED.

Counsel Failed to Object to the State's Questioning of its Witnesses Which Led to Inadmissible

Answers Because the Witnesses Speculated Beyond their Expertise or the Testimony Was Not Based on the Facts of the Case
(Amended Petition Para. 9(a)(2)(ii))

1. Petitioner Gibson claims his trial counsel was ineffective for failing to object to questions that produced inadmissible answers. Petitioner Gibson's claim of ineffectiveness relating to the failure to object to allegedly speculative testimony is denied.

2. Petitioner Gibson identifies three areas of testimony regarding the discovery of Ms. Whitis' body from three witnesses that he claims were inadmissible and not objected to by trial counsel: Detective East, Sergeant Wibbles, and Sergeant McDaniel. Detective East testified that she believed Ms. Whitis' body was found in such a manner that she "consider[ed] positioning, a display if you will, of the human body, like someone had taken the time to put her in that position" (GI DA Tr. 2793). Sergeant Wibbles testified that the crime scene was "[u]nbelievable" and "unnatural[,]" and also added: "Man, that was basically like seeing your grandmother laying there" (GI DA Tr. 3027). Sergeant McDaniel testified that Ms. Whitis' body was in a "displayed position" (GI DA Tr. 3181). McDaniel also testified that he saw a chainsaw in the middle of the floor of the garage and found no reason for it to be in that location (GI DA Tr. 3182). Gibson claims that these statements were either inadmissible under Evidence Rule 702 or "not based on the facts of the case"[5] (GI Pet'n ¶9(a)(2)(ii)).

[5] The Court is not entirely clear what Petitioner Gibson's use of the phrase "not based on the facts of the case" means in the context of being a basis for objection. In the trial court, the evidence being admitted constitutes the facts of the case, so it is unclear to the Court how any evidence admitted can be outside of or in contradiction with the facts of the case. Further, the Court is not aware of this being the basis of a legal objection, and Petitioner Gibson has pointed the Court to no such authority.

Deficient Performance

3. Gibson has failed to prove deficient performance because any objection would not have been sustained. This testimony would have been admissible as lay witness opinion. All of these witnesses testified as to their perceptions of having viewed Ms. Whitis' body, and their testimony was rationally based on that perception. Any person, regardless of their experience with crime scenes and whether they were an expert, would have noticed that Ms. Whitis' body had been unnaturally manipulated and that her genitals were exposed and had been injured. Any testimony describing the state in which her body was discovered did not rise to the level requiring specialized knowledge. It was proper and admissible for these witnesses to testify as to the state in which the body was found. And, to the extent that Sergeant Wibbels offered some colloquial testimony about his feelings upon seeing the body, that testimony is not inadmissible under Rule 702 as Petitioner alleges; therefore, an objection on that basis would not have succeeded. Petitioner Gibson cites to no other basis for objection, and it is his burden to prove deficiency.

4. An objection under Indiana Evidence Rule 702 or 701 would not have been sustained. Petitioner Gibson alleges that an objection should have been lodged under Indiana Evidence Rule 702(a) governing the testimony of expert witnesses. Yet, the testimony he has identified is not governed under Rule 702: "'[Q]ualification under Rule 702 (and hence designation as an expert) is only required if the witness's opinion is based on information received from others pursuant to [Indiana Evidence] Rule 703 or on a hypothetical question.'" *Jones v. State*, 957 N.E.2d 1033, 1040 (Ind. Ct. App. 2011) (quoting *Farrell v. Littell*, 790 N.E.2d 612, 617 (Ind. Ct. App. 2003)). The testimony of the officers here is not of this nature and could not reasonably be called 'scientific' or 'expert' testimony. An objection under Rule 702 would not have been successful.

5. Nor would any other objection have succeeded because this testimony was admissible even under the Rule 701 analysis for admitting testimony of skilled witnesses. Although not qualified under Rule 702, "a skilled witness is a person with 'a degree of knowledge short of that sufficient to be declared an expert under [Indiana Evidence] Rule 702, but somewhat beyond that possessed by the ordinary jurors.'" *Kubsch v. State*, 784 N.E.2d 905, 922 (Ind. 2003) (quoting 13 Robert Lowell Miller, Jr., *Indiana Evidence* § 701.105, at 318 (2d ed. 1995)). Skilled witnesses may testify not only to their observations, but also "'to opinions or inferences that are based solely on facts within their own personal knowledge.'" *Jones*, 957 N.E.2d at 1041 (citing *Farrell*, 790 N.E.2d at 617)). Under Rule 701, a skilled witness may give opinions provided that they are "rationally based on the witness's perception" and "helpful to a clear understanding of the witness's testimony or to a determination of a fact in issue." Ind. Evid. R. 701.

6. These witnesses were qualified to give these opinions; therefore, counsel was not deficient in failing to object to the conclusion that Ms. Whitis' body was displayed. Sergeant McDaniel had 26 years of experience with the Indiana State Police, was the regional supervisor of ISP's crime scene investigators, had served as a patrolman and detective, and testified that he had investigated nearly 800 crime scenes, of which 300 were death investigations (GI DA Tr. 3175-76). Sergeant Wibbles had been with ISP for 16 years, had accumulated 145 hours of crime-scene-investigation training, attended numerous other trainings, and testified that he had investigated the wide range of crimes "from thefts to murders" (GI DA Tr. 3013-16). Detective East had 10 years of patrol work before becoming a detective and had attended "hours and hours of training and specialty classes" (GI DA Tr. 2786, 2788). The extensive training and experience in law

enforcement of these witnesses qualified them to provide the jury with a clear understanding of the significance of the positioning of Ms. Whitis' body.

Prejudice

7. Even if inadmissible, Petitioner Gibson has not proved a reasonable probability of a different outcome if it had been excluded upon a successful objection. First, as concluded above, any objection would not have been successful. Second, the jury saw the pictures of Ms. Whitis' body and its positioning, and the jurors were able to independently evaluate the accuracy of the officers' opinions (GI DA Exs. 50, 52, 56). Third, the jury was repeatedly instructed that they were "the exclusive judges of the evidence," that it was their "duty to decide the value [given] to the exhibits [received] and the testimony [heard]," and that they could "believe all of what a witness said, some of it, or none of it" (GI DA App. 567, 568, 582, 594). Fourth, the challenged testimony again is insignificant in light of Petitioner Gibson's fatal admissions to killing and performing sexual deviate conduct on Ms. Whitis after putting her in this position displaying her genitals. Petitioner Gibson claims prejudice because this testimony was "inaccurate and prejudicial" (GI Proposed Findings 33). Petitioner Gibson's own statements prove that any conclusion that he put the body in a particular position was true (GI DA Exs. 13, 14). And any prejudice here comes not from the officers' testimony, but from the gruesome treatment of Ms. Whitis' body by Petitioner Gibson. He has failed to prove prejudice.

8. Because Gibson proved neither deficiency nor prejudice, his claim of ineffectiveness is DENIED.

Trial Counsel Failed to Object When the State's Evidence Alerted the Jury to the Fact Gibson's Statements Included Comments About Crimes that Were Not at Issue in This Trial
(Amended Petition Para. 9(a)(2)(v))

1. Petitioner Gibson alleges that trial counsel failed to object when the jury was alerted that his statements included comments about other crimes. Specifically, Petitioner Gibson complains that trial counsel should have objected to the recordings of his statements as being 'partial' and also objected to references to other statements given to police that were not admitted at trial. Counsel was not ineffective in failing to object to these accurate descriptions of evidence.

Deficient Performance

2. Counsel did not perform unreasonably in not objecting to the description of the admitted statements as being partial. Before trial, the parties agreed that the statements were to be redacted to avoid the many mentions of other bad acts committed by Petitioner Gibson (GI DA Tr. 433-34, 435, 438-46, 2680). They were redacted to the parties' satisfaction (GI DA Tr. 438-46, 2680). At trial, recordings and transcripts of some of Petitioner Gibson's statements were described as being 'partial' (*E.g.*, 2808-09, 2862). But, it is clear from these recordings that they were edited. The jury would automatically be alerted that it was not viewing all of the events that occurred in the interviews. It then follows that, no matter what, the jury was going to know that they were not seeing the full recordings of everything that happened during the recorded interviews. No objection was going to cure the clearly-edited nature of the recordings. Therefore, counsel could not have been deficient for not objecting to an accurate description of the evidence that was clear from the evidence itself.

3. Counsel was also not deficient for not objecting to references to other interviews with Petitioner Gibson that were not played for the jury. Detectives East and Bush testified to having other interviews with Petitioner Gibson, recordings of which were not admitted at trial (GI DA Tr. 2884-85, 2913-14). Nothing about these interviews (outside of their relation to the murder of Ms.

Whitis) was told to the jury. The fact that Gibson spoke to police multiple times is simply not objectionable and creates no false or misleading impression in the jurors minds. Further, objecting to these mentions would draw more attention to them and indicate to the jury that they contain objectionable information that they were not allowed to hear. Counsel was not ineffective for not drawing more attention to the number of interviews. Therefore, like the mentions to the interviews being 'partial', Petitioner Gibson has failed to prove deficient performance on this claim.

Prejudice

4. Petitioner Gibson has failed to prove prejudice. Petitioner Gibson claims he was prejudiced because "[t]he jury was fully aware there [were] large portions of the statements and videos they were not permitted to see. They were able to speculate that these portions were prejudicial to Gibson, otherwise they would have been able to view them" (GI Proposed Findings 35).

5. There is no reason to believe that the jury speculated that the redacted portions of his statements were not shown to the jury because they were prejudicial to Petitioner in the sense that the statements would have painted Petitioner Gibson in a bad light. There are other reasonable inferences to be drawn from the redaction of the videos. The jury just as easily could have concluded that these periods of time were breaks or irrelevant information that was neither prejudicial nor beneficial to either party. Petitioner Gibson's speculation falls far short of showing a reasonable probability of a different result.

6. Moreover, the jury instructions eliminated or at least tempered any prejudice. The jurors were repeatedly instructed that they were to resolve all doubts in favor of Petitioner Gibson where possible (GI DA App. 580, 582), that they were not to deliver a verdict based on speculation

(GI DA App. 567, 581), and that their verdict was to be based solely on the evidence presented at trial (GI DA App. 564, 568, 576, 580). Jurors are presumed to follow their instructions, *Pruitt v. State*, 622 N.E.2d 469, 473 (Ind. 1993) (citing references omitted), and Petitioner Gibson has presented no evidence to rebut that presumption. Petitioner Gibson has failed to prove prejudice.

7. Because Petitioner Gibson has failed to prove deficiency and prejudice relating to unobjected-to references to other interviews or that the portions played to the jury were partial statements, his claims of ineffectiveness are DENIED.

Trial Counsel Failed to Object to the State's Leading Question That Suggested Inappropriate and Misleading Answers
(Amended Petition Para. 9(a)(2)(vi))

1. Petitioner Gibson claims that trial counsel was ineffective for failing to object to the form of the prosecutor's questions during the examination of three witnesses. Petitioner Gibson claims that trial counsel should have objected to questions posed to Detective East, Detective Bush, and Hannah Finchum (who was working at Hooters when Petitioner Gibson was there before his arrest on Thursday, April 20, 2012 (GI DA Tr. 3297-99)). Petitioner Gibson's counsel was not ineffective for failing to object to the form of the State's questions. Petitioner Gibson has failed to prove ineffectiveness, and his claim is denied.

Deficient Performance

2. Decisions about whether to object to questions or their answers is a matter of trial strategy, and counsel is presumed to have acted effectively in its decision concerning objections. *Myers v. State*, 33 N.E.3d 1077, 1099 (Ind. Ct. App. 2015) (citing *Woodson v. State*, 961 N.E.2d 1035, 1041 (Ind. Ct. App. 2012), *trans. denied*; *Nordstrom v. State*, 627 N.E.2d 1380, 1385 (Ind. Ct. App. 1994), *trans. denied*), *trans. denied*. Even a failure to object to inadmissible evidence does not

lead to an automatic conclusion of deficiency. *Id.* ("'[A]n objection to inadmissible evidence may be waived as part of reasonable trial strategy, which will not be second-guessed by this court.'") (quoting *Nordstrom*, 627 N.E.2d at 1385) (alteration in original); *Hinesley v. State*, 999 N.E.2d 975, 983-84 (Ind. Ct. App. 2013) (holding that trial counsel was not ineffective for failing to object to inadmissible hearsay), *trans. denied*. This is especially true of whether to object to leading questions, where the objection is not to the potential evidence to be elicited, but to the form of the question asked to elicit that evidence. See *Burnett v. Collins*, 982 F.2d 922, 930 (5th Cir. 1993) ("[F]ailure to object to leading questions and the like is generally a matter of trial strategy as to which we will not second-guess counsel."). Counsel may have many reasons not to object, even to inadmissible evidence, including not drawing attention to a particular answer, not being seen as avoiding unfavorable evidence, economy of proceedings, and maintaining credibility before the jury.

3. Initially, the Court notes that Petitioner Gibson has only alleged that the testimony elicited was inappropriate and misleading, but he has not alleged that the actual substance of the testimony was itself inadmissible. Therefore, he has implicitly conceded that the only proper basis of an objection was to the form of the question as a leading question. Because he has not claimed the evidence elicited was inadmissible, the only basis of objection would be to the questions' form, and Petitioner Gibson has failed to prove that the State would not have been able to elicit the exact same information upon rephrasing the allegedly leading questions. See *United States v. Meza-Urtado*, 351 F.3d 301, 303 (7th Cir. 2003) ("If [a leading question] objection is offered and sustained, the examiner simply rephrases the question and draws the desired information from the witness. Any reasonably good lawyer worth his salt can accomplish this little trick.") The Court finds that trial counsel exercised reasonable strategic decisions in determining which questions to object

to and that Petitioner Gibson has failed to show that the testimony elicited could not have been admitted had the State rephrased the question. On this basis alone, the Court concludes that Petitioner Gibson has failed to prove ineffective assistance of counsel, even had a leading-question objection been technically sustainable. However, the Court will further address the questioning to which Petitioner Gibson complains.

4. Petitioner Gibson first points this Court to the following interaction during Detective East's direct examination by the State discussing Detective East's strategy after the first interview with Petitioner:

> Q Did you think that there was [sic] still more facts that he hadn't told you?
> A Yes.
> Q So what was the game plan then?
> A At that point the game plan would have been to gather more details and information about the autopsy and from other people to try to put the puzzle pieces together, basically, questions that we didn't have answered or I did not have answered in the interview.
> Q I think probably the jury could see that real clearly. Can you think of a time when a fact helped you open up an avenue where he did tell you something in this interview?
> A He told me that - initially he said that it was a very spur of the moment thing he did. And then later in the interview he told me that he had been thinking about it for some time.
> Q So he gave you some sort of like a premeditation, that he had been planning this?
> A Yes.

(GI DA Tr. 2821 (challenged questions emphasized)). This line of questioning occurred shortly after the jury had watched and read the statement Petitioner Gibson gave on April 20, 2012 (GI Ex. 5A, Ex. 6). During this video, Petitioner Gibson admitted to contemplating and considering killing Ms. Whitis before she arrived at his house (Ex. 5A, Ex. 6, pp. 33, 41).

5. Petitioner Gibson has failed to show that a leading-question objection to either of these questions would have been sustained. A leading question "is one that suggests to the witness the answer desired." *Williams*, 733 N.E.2d at 922 (citing *Goodman v. State*, 479 N.E.2d 513, 515 (Ind. 1985)). While the use of leading questions is generally prohibited, their use is also a matter of the trial court's discretion. *Jones v. State*, 982 N.E.2d 417, 430 (Ind. Ct. App. 2013) (citing *Williams v. State*, 733 N.E.2d 919, 922 (Ind. 2000)), *trans. denied*. The questions complained of by Petitioner Gibson are not leading and do not desire a specific answer. The first question is merely establishing whether the witness has the ability to recollect. As for the second challenged question in this interaction, the jury had already heard Petitioner Gibson himself provide the evidence of premeditation, and Detective East's recounting that Petitioner Gibson told her he had been thinking about the crime "for some time." The State's question asked for confirmation of this fact in the context of East's investigation-an answer that was neither inappropriate nor misleading, but was based on the evidence. *Thompson v. State*, 674 N.E.2d 1307 (Ind. 1996) (citing *Webster v. State*, 206 Ind. 431, 436, 190 N.E. 52, 54 (1934)) (finding harmless error when the substance of an answer to a leading question had already been admitted without objection). Because Petitioner Gibson has failed to show that a leading-question objection would have been sustained, he has failed to show any deficient performance.

6. Next, Gibson points the Court to various questions asked of Detective Bush regarding his interviews with Petitioner Gibson and whether certain facts discussed in the interviews about the crime would be 'good' or 'bad' facts for Petitioner Gibson (GI DA Tr. 2867-68, 2870, 2883-84). The State also elicited testimony that suspects could "shade" or "minimize" their involvement in an offense (GI DA Tr. 2859). In these exchanges, the State was showing the course of the police

investigation and reasons why the police conducted a second interview (GI DA Tr. 2858-60). The Court finds that these questions were not leading, and an objection would not have been sustained on that basis. Again, Petitioner Gibson has not alleged that any of the answers to these questions were inadmissible. Even if the questions were leading in character, the testimony elicited could have been admitted upon re-phrased questioning. Counsel was not deficient in failing to lodge an objection that would not ultimately lead to the exclusion of evidence. Further, Petitioner Gibson alleges that these comments were inappropriate or misleading but develops no further argument on the point. The Court finds nothing inappropriate or misleading about these statements, and even if those adjectives were apposite, those types of defects are cured on cross-examination, not through objection and exclusion of evidence.

7. Finally, Petitioner Gibson claims counsel was deficient for failing to object during the following interaction between Ms. Finchum and the State during direct examination:

> Q Okay. Did [Gibson] appear intoxicated to you?
> A No, I didn't really get to look at him. He was just behind me and I was just kind of answering questions that he was asking.
> Q In the meantime, between 12 and 3:45, he was just sitting out there at this patio?
> A Yeah, just sitting there.
> Q How did you feel?
> A Kind of uncomfortable. He just sat there quiet, didn't really say anything, just kind of stared at us.
>
> ***
>
> Q When you and I had talked earlier, you sort of had a term how he made you feel, what was that term, do you remember?
> A (Witness shakes head).
> Q Creepy?
> A Yeah, creepy, yeah, he was like kind of creepy.
> Q Sort of made you feel uneasy?
> A Yeah, uncomfortable.
> Q The way he was looking at you?
> A Yeah. Just because he didn't say anything or have any - like he just

would look, would stare.

Q Just staring at you --

A Yeah.

Q -- because you're in your bikini washing cars?

A Yeah.

***

Q Okay. So he just sort of sat back there?

A Yeah, just in the van right behind us.

Q Still sort of looking at you guys?

A Yeah. I mean, it was probably like, I mean, this far away from the back of me (witness indicating). Like here's the truck, and he literally pulled right behind us. So there was probably only this much of a gap between the truck, and his van, and us right here (witness indicating).

(GI DA Tr. 3302-03).

8. While Petitioner Gibson quoted portions of Detective Bush's questioning in his proposed findings, he did not identify which of these statements were leading questions to which objections would have been sustained. It is his burden to prove deficiency, and his broad allegation that objections would have been sustained does not carry that burden. He has also not alleged that any of this testimony was inadmissible. The Court will also note that Ms. Finchum was a lay witness and may have needed more guidance in her testimony than that of a police officer or other experienced witness. The Court, had counsel objected, had the discretion to allow the State to ask leading questions. *Jones*, 982 N.E.2d at 430 (citing *Williams*, 733 N.E.2d at 922). The State was attempting to establish Petitioner Gibson's actions and demeanor during the time that he was at Hooters after having murdered Ms. Whitis and while her body remained in his garage, which is relevant evidence. And, to the extent Ms. Finchum needed her recollection refreshed, the State would have been given leeway to do so. Gibson has failed to prove deficiency relating to counsel's failure to object to the form of the State's questions.

Prejudice

9. Petitioner Gibson has also failed to show a reasonable probability of a different result at trial had trial counsel objected. The reasoning here is similar to that above: Petitioner Gibson has neither alleged, nor proved, that the evidence elicited by the leading questions would not have been admitted through different questioning. The Seventh Circuit has recognized why prejudice would be so difficult to prove when the answer to a leading question is ultimately admissible: "If [a leading question] objection is offered and sustained, the examiner simply rephrases the question and draws the desired information from the witness. Any reasonably good lawyer worth his salt can accomplish this little trick." *Meza-Urtado*, 351 F.3d at 303. Petitioner Gibson has not proved that the State's attorneys could not accomplish this task; therefore, his claim of prejudice fails.

10. Further, the evidence elicited through potentially improper questioning leading to admissible answers is insignificant in light of the strength of the State's case proving with little to no doubt that Petitioner Gibson strangled Ms. Whitis to death, performed sexual acts on her, violently battered her head and arms, and removed her breast before taking it with him to bars. Considering the weight and strength of this ghastly evidence proving Petitioner Gibson's guilt and the appropriateness of his sentence, the fact that some admissible evidence may have been elicited through technically improper questioning is simply not significant. Therefore, Petitioner Gibson cannot prove a reasonable probability of a different outcome had counsel objected to leading questions.

11. Because Petitioner Gibson has failed to prove both deficiency and prejudice, his claim of ineffectiveness as to counsel's failure to object to leading questions is DENIED.

Counsel Failed to Object to Testimony Offered by the State Witnesses on Direct Examination Which the State Knew, or Should Have Known, Was False and Police Statements Which Presented Information Not Supported by the Evidence
(Amended Petition Para. 9(a)(2)(vii))

1. Petitioner Gibson next claims trial counsel was required to object to four factual assertions that he claims were supported by knowingly false evidence introduced by the State. He points to evidence relating to Ms. Whitis being bound with duct tape, a "missing 24 hour period" during which Ms. Whitis' whereabouts were unknown, and two questions of Dr. Haskins about his involvement in other cases. Petitioner Gibson's claim is denied primarily because he has failed to prove either that this evidence supported false factual assertions, that the State knew these factual assertions were false, or that counsel did not make a reasonable strategic decision to address the matter during examination. And, even if an objection would have been sustained, Petitioner Gibson cannot show a reasonable probability of a different result. Therefore, counsel was not ineffective for failing to object. The Court will analyze these factual assertions in turn.

Duct Tape and the "Missing" 24-Hour Period

Deficient Performance

2. After the jury heard the partial interview with Petitioner Gibson on April 21, 2012, Detective Steve Bush testified about inconsistencies he perceived between Petitioner Gibson's statements to Detective East on April 20, 2012, and the evidence being uncovered by the investigation:

> Q Were there some things about what he had said on the 20th that just didn't fit with you?
> A Yes.
> Q What were those things?
> A The main thing was the time frame. Initially he's saying that it's Thursday when he killed her. But actually, you know, we have the alarm code being set in the morning when she left, the phone record, or at least the phone conversation, we couldn't account for 24 hours.

Q Does that make a difference to you as an investigator?
A Absolutely.

***

Q Is there a difference between a murder that occurs within 30 minutes and a murder that maybe occurs over 24 hours?
A Yes.

(GI DA Tr. 2865-67). Shortly later in his testimony, Bush told the jury: "As, you know, we confronted [Gibson] with the fact that there was 24 hours difference than what he's telling us as to what our evidence is showing us, and he's basically blaming it on the alcohol, saying it's possible it could have happened that way" (GI DA Tr. 2875).

3. Then, after the playing of the partial interview with Gibson on April 24, 2012, the State continued to ask questions about the interview and Detective Bush's investigation of the timeline of events (GI DA Tr. 2882):

Q So, Officer [Bush], let's talk a little bit about April 24th. There were certainly some things that you and Detective East were trying to clarify?
A That is correct.
Q What would that have been?
A The timeframe again. Again, we were still just bothered, if you will, with that 24 hours of missing time.
Q Why?
A It just didn't make sense with the evidence that we had before us. From the alarm being set, the cell phone coverage of the cell phone being at the house or in that general area, to the void on the wrist, to the tape with the hair on it, just, you know, the evidence was saying something different to us than what Mr. Gibson was.
Q And what was -- in your mind, what was the evidence telling you?
A The evidence was telling us that she was over there probably the afternoon of Wednesday into the evening. It tells us that she possibly could have been bound and been still alive at that time.
Q And what about into Thursday? When was she discovered?
A Thursday afternoon.
Q So there was this 24 hour -- longer than 24-hour period that you had to account for?
A That is correct.

(GI DA Tr. 2882-83).

4. On cross examination, trial counsel confronted Detective Bush with evidence that did not support his conclusion that Ms. Whitis may have been bound and held alive for a period of time. Specifically, Counsel Biggs confronted him about his lack of knowledge of DNA analysis of the duct tape; that it was Detective Bush's personal opinion that he saw a "void" on Ms. Whitis' wrist; Detective Bush's lack of knowledge about any duct tape residue being found on the rocking chair near Ms. Whitis' body; and Detective Bush's lack of knowledge about the autopsy results (GI DA Tr. 2890-96).

5. The Court finds that Petitioner Gibson has failed to prove the falsity of this testimony. The physical and documentary evidence facing Detective Bush at that time definitively showed where Ms. Whitis was on Wednesday morning and that she had talked to Petitioner Gibson that morning (GI DA Exs. 1, 2, 3, 4; GI DA Tr. 2866-67). Then, her body was discovered on Thursday afternoon (GI DA Tr. 2882-83). Therefore, as Detective Bush properly testified to, he was trying to determine precisely what happened to Ms. Whitis between Wednesday morning and early Thursday afternoon-approximately 24 hours. Detective Bush testified as to his attempts to solidify the timeline. This was not false testimony.

6. There were other discrepancies between Petitioner Gibson's statements and the physical evidence discovered during the course of the investigation that gave Detective Bush reason to challenge or test what Petitioner Gibson was telling him. In fact, the testimony of the medical examiner indicates that much more violence was perpetrated on Ms. Whitis than Petitioner Gibson would ever admit: Dr. Burrows-Beckham found extensive bruising on both of Ms. Whitis' arms that she described as being caused by "violent grabbing" (GI DA Tr. 3226-27). Dr. Burrows-Beckham also found multiple blunt force traumas to Ms. Whitis' head, injuries to Ms. Whitis' eye that may

have been the result of being punched, and multiple other abrasions to her face (GI DA Tr. 3230). The examiner also testified that Ms. Whitis' head was beaten and that she was sexually assaulted while alive (GI DA Tr. 3242). This evidence tends to show that Detective Bush's skepticism of Petitioner Gibson's account that he quickly strangled Ms. Whitis was justified, and his testimony on the matter was not false.

7. Petitioner Gibson attempts to prove falsity by pointing the Court to testimony of Dr. Burrows-Beckham that she did not observe any glue residue or anything else to indicate that Ms. Whitis was bound with duct tape and also to the fact that DNA analysis of the hair found on the duct tape "failed to demonstrate a sufficient quantity of DNA for further analysis" (GI DA Tr. 3242-44; GI DA Exs. 71, 72). This testimony only proves the absence of evidence to confirm the State's theory. Yet, the absence of evidence in confirmation does not constitute disproving evidence. On post-conviction review, Petitioner Gibson was required to demonstrate that the evidence collected could not have supported Detective Bush's questions about whether Ms. Whitis was bound, and he failed to do so. To the extent that the State argued that Ms. Whitis may have been alive longer than Petitioner Gibson admitted to, it was properly based on the evidence (*See* GI DA Tr. 3400-01, 3416-17). And, even if it was speculative, the arguments of counsel are not evidence, and this type of speculation does not equal falsity.

8. Petitioner Gibson fairs no better on the issue of timing. While he points to Dr. Burrows-Becham's testimony that it was likely that Ms. Whitis died on Wednesday afternoon, the testimony is clear that it was possible she died Wednesday night and less likely she died on Thursday, but not improbable. The fact that she was uncertain does not prove that the State presented false evidence, and it was within the bounds of proper advocacy for the State to formulate a theory

that seized on this uncertainty. Both Detective Bush and Dr. Burrows-Beckham were subject to cross-examination on this point (GI DA Tr. 2890, 2892-93, 3242-44), and it was within the discretion of counsel to ask questions of the witnesses themselves, rather than lodging a 'falsity' objection. And the substance of Counsel Biggs's cross-examination shows that was his strategy.

9. Petitioner Gibson has failed to prove falsity relating to statements about timing and duct tape. And, to the extent this testimony could be challenged, Counsel Biggs made a reasonable strategic decision not to object but rather to challenge the witness with conflicting evidence during his cross-examination. The cure for testimony with factual inaccuracies may very well be, as it was in this case, vigorous cross-examination, not a preemptive evidentiary objection. Therefore, because trial counsel made a reasonable strategic decision to challenge this testimony during cross-examination and because Petitioner Gibson cannot show that this evidence was false, let alone knowingly false, he cannot prove deficiency for counsel's failure to object to these statements as false.

Cross-Examination of Dr. Haskins

Deficient Performance

10. During the cross-examination of Dr. Haskins, the State questioned him about his prior testimony in two other capital cases (GI DA Tr. 3731-32). Relative to a case involving Joseph Corcoran, Dr. Haskins answered affirmatively to the following question by the State: "And you told the court, the jury that he had schizophrenia" (GI DA Tr. 3732). In Corcoran's case, he refused to sign his post-conviction petition, and the trial court ordered competency evaluations, one of which was performed by Dr. Haskins. *Corcoran v. State*, 820 N.E.2d 655, 660, 660 n.6 (Ind. 2005). Dr. Haskins was specifically named in the Supreme Court's opinion as testifying that "Corcoran

suffer[ed] from paranoid schizophrenia." *Id.* Therefore, there was nothing even inaccurate in the State's questioning, other than the mention of a jury, which is a mere misstatement-not an intentional falsehood-and a misstatement with no significance. Petitioner Gibson has failed to prove that counsel should have objected to this objectively true testimony.

11. Dr. Haskins also previously testified on behalf of Paul McManus in his capital post-conviction proceedings and was questioned by the State about his testimony:

> Q I'm going to show you another individual who was on death row, Paul McManus. Do you remember testifying for him or preparing an evaluation of him?
> A I remember the name.
> Q I wouldn't ask you this if I didn't have it on my computer.
> A Okay.
> Q Where you did an evaluation of him to determine that he was mentally retarded.
> A Oh, okay.
> Q Do you remember that now?
> A Vaguely.
> Q Well, you should, you were very successful. He is now off of death row because of your findings that he was mentally retarded at the time when he killed his wife and two daughters. So that was somewhat of a success[.]

(GI DA Tr. 3732).

12. In McManus's post-conviction case, he alleged that he could not be put to death because he was mentally retarded-a claim on which he prevailed in the trial court, but was reversed by the Indiana Supreme Court. *State v. McManus*, 868 N.E.2d 778, 781 (Ind. 2007). McManus had also challenged his competency to go to trial. Dr. Haskins testified as an expert in McManus's post-conviction hearing about McManus's low IQ scores in support of McManus's claim of mental retardation. *Id.* at 786. Therefore, the testimony in this case was true. The inaccuracy was the prosecutor's comment that McManus was "off of death row" because of this finding; McManus's

conviction was reversed by the Seventh Circuit because he was not competent at the time of trial. *McManus v. Neal*, 779 F.3d 634, 639 (7th Cir. 2015). Any misstatement by the prosecutor was one between McManus's conviction being overturned on appeal due to mental retardation or due to his competency. This slight difference does not prove that the statement by the prosecutor was anything but a mistake rather than false, let alone knowingly false. Additionally, trial counsel made a reasonable strategic decision to question Dr. Haskins about his credibility on re-direct:

> Q Dr. Haskins, the prosecutor asked you if you had testified on behalf of certain people here. Do you testify on behalf of anyone or do you just testify to your findings?
> A I always testify to my findings.
> Q Okay.
> A What I try to do, essentially, is not think about whatever the penalty is. I don't really enjoy death penalty cases to tell you the truth. I worry about making a mistake or missing something. And I frankly prefer not to even think about it, and just do my work and try to do the best job I can, and, you know, leave the outcome in God's hands, where it belongs.

(GI DA Tr. 3735-36). The record shows that counsel was aware of the attack on Dr. Haskins's credibility and presented testimony to rebut that notion. Finally, Dr. Haskins himself could have clarified the prosecutor's statement if it was false, and he did not do so. Therefore, Petitioner Gibson has failed in his burden to prove that counsel should have objected to false testimony.

Prejudice

13. Petitioner Gibson has also failed to prove prejudice resulting from any of this allegedly false testimony. As concluded above, none of the factual assertions here were false, were based on false evidence, or were knowingly made or elicited. Statements about the timing and duct tape were not unmoored from physical evidence, and most of the statements about Dr. Haskins were

objectively true and verifiable through published case law. Further, not only can he not prove falsity, he cannot prove the State's knowledge of falsity.

14. In his proposed findings, Petitioner Gibson writes: "Although the false testimony in Gibson's case did not rise to the required level in the guilt phase, the testimony did meet the level required in the penalty phase" (Gibson Proposed Findings 44). The Court is aware of no case where false testimony was introduced and a court held that it was insufficiently 'false' to overturn a conviction, but sufficiently false to overturn a sentence.

15. Regardless, Petitioner Gibson cannot prove prejudice. Concerning the timing and duct-tape testimony, Detective Bush and Dr. Burrows-Beckham were thoroughly cross-examined by counsel to reify any contradictions or holes in the State's theory (GI DA Tr. 2890, 2892-93, 3242-44). Petitioner Gibson does not contend ineffectiveness in counsel's questioning of these witnesses and does not contend that it was insufficient to disprove or discredit the State's theory of the case. Concerning Dr. Haskins, Petitioner Gibson is likely correct that the State was attempting to portray Dr. Haskins as biased and as a witness who testifies favorably for capital defendants. The State's goal though was accomplished by questioning Dr. Haskins on all of the capital cases where he has testified on behalf of the defendant and not simply in pointing out that a court relied on his testimony in overturning McManus's conviction. Moreover, a juror may have believed that Dr. Haskins' testimony must be credible because another court had relied on it. The Court believes Petitioner Gibson's speculation as to how this testimony prejudiced him is unfounded and falls far short of establishing the requisite level of prejudice. Moreover, counsel's questioning of Dr. Haskins on this topic eliminated, or at least tempered, any prejudice that could have resulted from the slight inaccuracy about the reason McManus's conviction was reversed.

16. Further, Gibson cannot show a reasonable probability of a different sentence if this testimony had not been elicited. As held above, none of this testimony was false, but instead fair comments and argument on the evidence and cross-examination of a hired expert witness. As to the cross-examination of Dr. Haskins, the portion discussing other cases was substantially smaller than the questioning of his conclusions related to Petitioner Gibson and served as a small portion of the total import of the State's questioning. These isolated dialogues about McManus and Corcoran were not significant. Petitioner Gibson has failed to prove prejudice.

17. Because Petitioner Gibson has failed to prove either deficiency or prejudice, his claim of ineffectiveness relating to allegedly false testimony is DENIED.

Counsel Failed to Object to the State's Guilt Phase Argument Regarding Photographs Presented and Victim Impact Evidence Which Resulted in Prejudice to Gibson
(Amended Petition Para. 9(a)(2)(viii), 9(a)(2(ix))

1. Petitioner Gibson points the Court to comments made by the prosecutor in portions of his arguments in the guilt and penalty phases to which counsel should have objected. These comments are of two types: comments about photographs shown to the jury and alleged victim-impact evidence (Gibson Proposed Findings 45-46). The Court will address both in turn. The Court concludes that Petitioner Gibson has not proved deficiency or prejudice and cannot succeed on this claim.

Comments About Photographs

Deficient Performance

2. In the State's rebuttal argument in the guilt phase, the prosecutor made the following argument:

> You know, you saw a lot of medical evidence. And I also want to say to you that in all of this that we did and these photos, that it wasn't without a lot of thought. It truly pained us to present that to you, even up until the time we were doing it. Not only had we thought about this for a long time before we presented it to you, but I sat at this table and as I stood before you hesitated before I even put certain photographs up. But we had to do it to prove the case. And I want you to know we did the best we could to minimize that impact for you, as well as the family and the onlookers here today.

(GI DA Tr. 3442-43).

3. During opening statements in the penalty phase, the State commented:

> Now, let's talk about criminal deviate conduct for a moment, while committing or attempting to commit the crime. So criminal deviate conduct, and we allege that he intentionally performed an act involving his mouth and the sex organ of the victim, let's stop there for a moment. And, again, the State's -- we're not going to put on evidence again of what you have already heard, there's no need to. I'm not going to show you photographs again, you've got those emblazoned in your mind as to what we did.
>
> You know, you may have even asked yourself during the underlying case, why is the State spending so much time on this to prove that this Defendant killed Christine Whitis. Well, because of the aggravators. And so I'm not going to put that back on for you today. We went over that quite thorough[ly] when we were presenting our case.

(GI DA Tr. 3489-90).

4. Petitioner Gibson has failed to prove deficient performance because these statements were unobjectionable. Petitioner Gibson fails to present any basis in law for objecting to the arguments of the State. The statements merely reflected that the photographs in this case were graphic and clearly would have had an impact on the average juror who is not accustomed to seeing horrific crime scenes such as that in this case. And the State's comments address the real danger that the jury may view the State in a negative light for having displayed the pictures of Ms. Whitis' body. The Court cannot find a basis for objection to these comments, and Petitioner Gibson has provided

none to this Court. Therefore, his claim of deficient performance for failing to object to these two comments about the State's hesitation to display disturbing photographs is rejected, and his claim of ineffectiveness denied.

Victim-Impact Evidence

5. As to improper victim-impact evidence, first, Petitioner Gibson points this Court to a portion of the prosecutor's opening statement in the guilt phase:

> This case is about the *State of Indiana vs. Clyde Gibson*. But I want to introduce you to someone. This is Mrs. Christine Whitis. Christine is a vibrant, 75-year-old woman. She lives alone because her husband of many years passed away about a year prior. She has a son, Mike, Mike has a family. He has grown children, her grandchildren. She very much enjoys spending time with them. She recently went on vacation with them. She enjoyed when they would come over to her house. She enjoyed when they came to visit her. She was active, she was healthy, she was vibrant.
>
> > She lives alone now, but she's in this phase of her life that she meets a lot of people, she's known a lot of people, and there isn't anyone that doesn't speak highly of Christine. She's loved and she loves. Not just to her family, but to her friends.

(GI DA Tr. 2697).

6. Second, he directs the Court to the following comment occurring at the end of the State's argument in rebuttal in the guilt phase:

> I said for what you're about to hear, and I laid out to the best of my knowledge what the evidence was as I believed you were going to hear it, and I said at the end of this, I said, yes, it's going to be a difficult case, because of the type of case it is, but I said at the very end don't forget who Christine Whitis is.
>
> Because we're not just talking about pictures and we're just not talking about a corpse. And you heard that from this stand, you heard from a son, you heard from friends. And those two friends, if you recall, that you heard from, two of the friends were the Defendant's own sisters, who described her as a loving person who still checked on them even after their mother died. And why, we can't answer that. Why did this happen, we can't answer that. Only one person knows that and that's this Defendant.

> And as the evidence has shown, as that beautiful woman had her life taken from her in such a brutal way, he is correct, and he's got this part right, he's evil. I ask you after listening to the instructions to retire and return a verdict of guilty, murder, William Clyde Gibson, III.

(GI DA Tr. 3447-48).

7. Counsel was not deficient in failing to object to these statements because they were not objectionable. Victim-impact evidence "is evidence that demonstrates the consequences suffered by a victim or a victim's family as a result of a crime." *Laux v. State*, 985 N.E.2d 739, 749 (Ind. Ct. App. 2013) (citing *Holmes v. State*, 671 N.E.2d 841, 848 (Ind. 1996), *abrogated on other grounds*, *Wilkes v. State*, 917 N.E.2d 675 (Ind. 2009)). While the Eighth Amendment to the U.S. Constitution does not prohibit the introduction of victim-impact evidence, Indiana law holds that it is only admissible when it relates to an "'an issue properly before the judge or court.'" *Payne v. Tennessee*, 501 U.S. 808, 827 (1991); *Lambert v. State*, 675 N.E.2d 1060, 1064 (Ind. 1996) (citing *Bivins v. State*, 642 N.E.2d 928, 956 (Ind. 1994)). It is not reversible error for the State to make comments about the victim that merely "state[s] the victim's status in life." *Burris v. State*, 642 N.E.2d 961, 966 (Ind. 1994), abrogated on other grounds, *Wilkes*, 971 N.E.2d 675.

8. These statements were not victim-impact evidence; therefore, counsel was not deficient for failing to object to them. Initially, the Court observes that the statements of the prosecutor were not evidence at all, but merely argument. The jury was instructed that the arguments of counsel were not evidence (GI DA App. 576). These statements do not qualify as victim-impact evidence as the prosecutor was not attempting to inflame the passions of the jury by demonstrating the consequences of the crime upon the victim and the victim's family. See *Laux*, 985 N.E.2d at 749. In the State's guilt-phase opening, the State was merely reciting facts about Ms. Whitis' life and her

status in life at the time of the crime. Comments like this do not create reversible error and counsel was not unreasonable in deciding not to object during the State's introduction of the victim to the jury. See *Burris*, 642 N.E.2d at 966. Further, an objection could call more attention to this evidence, and counsel would not be unreasonable in wanting to avoid emphasis on the State's comments. *Myers v. State*, 33 N.E.3d 1077, 1103 (Ind. Ct. App. 2015) (citing *Smith v. State*, 822 N.E.2d 193, 205 (Ind. Ct. App. 2005), *trans. denied*) (holding it was not deficient performance to fail to object to evidence so as to avoid drawing more attention to it), trans. denied.

9. As to the second alleged victim-impact comment, it also is not victim-impact evidence as it did not ask the jury to find Petitioner Gibson guilty because of the impact of the crime on Ms. Whitis or her family. Instead, the argument was directed at the motive in this case and based on the evidence. The evidence showed that Ms. Whitis, being his mother's best friend, had taken on a role of helping and supporting Petitioner Gibson's family. Through Petitioner's statements he explained that he was able to get Ms. Whitis to visit him in his home under the guise that he was upset and grieving over the death of his mother. Motive is always relevant in a criminal case, and the State's comments appear to try to simply explain that it did not know the motive for this crime. *Camm v. State*, 908 N.E.2d 215, 223 (Ind. 2009) (quoting *Wilson v. State*, 765 N.E.2d 1265, 1270 (Ind. 2002)) ("'Evidence of motive is always relevant in the proof of a crime[.]'"). Any mention of her family was a passing comment and not a plea to come to a particular decision because of their grief and devastation. Victim-impact evidence (even if this fell within the definition of the term) is admissible when it relates to a matter relevant at trial. *Lambert*, 675 N.E.2d at 1064. Therefore, any objection to the two comments of the State during arguments would not have succeeded, and counsel

cannot be ineffective for failing to object. Petitioner Gibson has failed to prove deficient performance.

Prejudice

10. Petitioner Gibson likewise has failed to prove prejudice from any of these comments. Regarding the comments about the photographs, the Court finds both that the comments were not objectionable and that they had no impact on the jury's decision.

11. As to the alleged victim-impact evidence, the flaws in Petitioner Gibson's challenge are multifaceted. First, our Supreme Court has repeatedly held that, even if inadmissible, victim-impact evidence presented was harmless. See, *e.g.*, *Lambert*, 675 N.E.2d at 1064-65 (harmless beyond a reasonable doubt); *Bivins*, 642 N.E.2d at 957 (harmless beyond a reasonable doubt); *Burris*, 642 N.E.2d at 966; *Harrison v. State*, 644 N.E.2d 1243, 1261 (Ind. 1995) (harmless beyond a reasonable doubt). The Court comes to the same conclusion about these statements, even if they were inadmissible.

12. Second, the jury was instructed that the arguments of counsel are not evidence, and juries are presumed to follow their instructions (GI DA App. 576). *Weisheit v. State*, 26 N.E.3d 3, 20 (Ind. 2015) (quoting *Duncanson v. State*, 509 N.E.2d 182, 186 (Ind. 1987)) ("'When the jury is properly instructed, we will presume they followed such instructions.'").

13. Third, these statements are not significant in light of the overwhelming proof of Petitioner Gibson's guilt that included a dead body being found in his garage and his subsequent admissions to killing Ms. Whitis and performing deviate sexual conduct on her before he mutilated her body. Petitioner Gibson has failed to prove prejudice.

Because Petitioner Gibson has not met his burden to prove ineffectiveness, his claim is DENIED.

Counsel Failed to Adequately Investigate, Prepare, and Present Mitigating Evidence
(Amended Petition Para. 9(a)(3)(I))

1. The State originally alleged six aggravating circumstances, but ultimately, the jury was only asked to deliberate on four: 1) committing criminal deviate conduct against Ms. Whitis using his mouth and her sex organ, 2) committing criminal deviate conduct against Ms. Whitis using "his fingers or fist" and her sex organ, 3) the dismemberment of Ms. Whitis' corpse by severing her breast, and, 4) that Petitioner Gibson was on probation at the time of the murder (GI DA App. 599-600).

2. Trial counsel presented a mitigation theory that Petitioner Gibson had a horrible childhood, abusive family, mental illness, and alcohol abuse, and presented evidence of what life in the prison system is like (GI Tr. 3496).

3. The State presented the testimony of Claire Banet, Petitioner Gibson's probation officer, who testified that Petitioner Gibson had been on probation at the time of the offense for a class D felony theft conviction since September of 2009 (GI Tr. 3500, 3506).

4. The defense presented the testimony of Thomas Wesley who was a neighbor of Petitioner Gibson (GI Tr. 3518-19). Petitioner Gibson would cut Mr. Wesley's yard, and Mr. Wesley and Petitioner Gibson shared an interest in and would spend time together working on motorcycles (GI Tr. 3521). Mr. Wesley testified about the change in personality in Petitioner Gibson after his mother's death (GI Tr. 3520). Mr. Wesley testified regarding Petitioner Gibson's mechanical skills with small motors and engines and his talent as an artist (GI Tr. 3522-25).

5. The defense presented testimony from George Johnson, a correctional officer, that described an incident on June 23rd of 2012, where Petitioner Gibson attempted to commit suicide by trying to hang himself with a noose in the shower (GI Tr. 3529-30). The officer detailed Petitioner Gibson's emotional state while incarcerated and that he had made statements about being sick and not wanting to go through "this" anymore (GI Tr. 3530).

6. The defense presented the testimony of James Aiken, who testified as an expert in correctional prisons, jail, and criminal justice (GI Tr. 3541). Mr. Aiken testified about security measures in prison and prison life generally, that based on Petitioner Gibson's age of 55 years old that he will become more compliant as he ages, and that he will be more vulnerable to violence because he will be considered by other prisoners as a sex offender (GI Tr. 3551-52).

7. The defense presented the testimony of Brenda Ray, Petitioner Gibson's sister, regarding their childhood, and information about family members including drug and alcohol problems and mental illness, as well as the suicide of a brother (GI Tr. 3593-3599). Ms. Ray also testified about Petitioner Gibson's problems throughout his life with alcohol and drugs, about their mother's illness and subsequent death, and that Petitioner Gibson changed following their mother's death (GI Tr. 3605-3625).

8. The defense also presented the testimony and report of Dr. Haskins, a neuropsychologist (GI Tr. 3627). Dr. Haskins testified that "[p]rimarily what I do is testing and treatment for individuals who've had known or suspected brain damage" (GI Tr. 3628). Dr. Haskins was recommended by Tom Hinesley from the Indiana State Public Defender's office and had been on the faculty as a presenter for the Indiana Public Defender Council at the bi-annual seminar on defending capital cases in September of 2013 (Paula Sites Affidavit). Dr. Haskin's presentation was

titled, "Recognizing Effects of Head Trauma & Brain Damage" (Paula Sites Affidavit). Dr. Haskins has testified in several Indiana capital cases.

9. Dr. Haskins gave Petitioner Gibson an array of neuropsychological tests and personally interviewed him (GI Tr. 3630-3635, 3647; Ex. 32). Dr. Haskins thoroughly explained his diagnosis of Bipolar disorder and the symptomology and circumstances that one experiences in both manic and depressive phases and how that affects Petitioner Gibson's ability to function, make decisions, and cope with life (GI Tr. 3635-3643, 3646-49). Dr. Haskins also discussed Petitioner Gibson's drug and alcohol abuse and its relationship with Bipolar disorder (GI Tr. 3641-3644, 3649-50). Mr. Biggs also addressed Petitioner Gibson's statements with Dr. Haskins and the effect of substance abuse on his memory that, in Dr. Haskins' opinion, was reflected in his statements to police (GI Tr. 3651-59). Dr. Haskins gave descriptive testimony regarding the significant effect alcohol abuse has had on Petitioner Gibson's memory and also opined that Petitioner Gibson expressed remorse in his statements (GI Tr. 3651-59). Dr. Haskins' report details several circumstances in which Petitioner Gibson may have hit his head (GI Ex. 32).

10. On post-conviction, Petitioner Gibson presented the testimony of Dr. Chambers, a psychiatrist (PCR Ex. 94). Dr. Chambers also diagnosed Petitioner Gibson with Bipolar disorder, found that Petitioner Gibson may have suffered traumatic brain injuries due to the reported incidents where Petitioner Gibson hit his head, and diagnosed him with Mild Neurocognitive Disorder (PCR Ex. 94). Dr. Chambers also opined that Petitioner Gibson had been "grossly undertreated" for his addictions and mental illness and that his memory was impaired (PCR Ex. 94).

11. On post-conviction, Petitioner Gibson also presented the testimony of former defense attorneys who had represented Petitioner Gibson on various criminal charges.

12. Petitioner Gibson has failed to show that trial counsel was ineffective in their selection and presentation of mitigation witnesses. Trial counsel consulted multiple doctors and mental health professionals, none of whom Petitioner Gibson challenges as not having the appropriate experience, education or background. Specifically, Dr. Haskins had extensive credentials and expertise in brain trauma and identifying functional deficits. It was reasonable for trial counsel to rely on the expert opinion from Dr. Haskins regarding whether Petitioner Gibson suffered any cognitive deficits or lasting effects from a brain injury. The Court finds Petitioner Gibson's challenge to Dr. Haskins' opinion to be troublesome given that the State Public Defender recommended Dr. Haskins' services and the State Public Defender Commission uses Dr. Haskins as a presenter at their death penalty seminars specifically in the area of brain trauma. Regardless, to the extent Dr. Chambers disagrees with Dr. Haskins, such disagreement does not establish ineffective assistance of counsel. That two doctors disagree does not show that trial counsel conducted an unconstitutionally myopic investigation or deficient mitigation presentation. See *Conner v. State*, 711 N.E.2d 1238, 1256 (Ind. 1999) ("psychiatrists disagree widely and frequently on what constitutes mental illness [and] on the appropriate diagnosis to be attached to a given behavior and symptoms").

13. The Court finds that the testimony at trial covered the majority of the same areas of Petitioner Gibson's life that were presented by Petitioner Gibson in post-conviction, and to extent there was more or different evidence, the Court reasonably believes that his sentence would not have been different had the witnesses who testified at the post-conviction hearing been presented. *Id.* See *Woods v. McBride*, 430 F.3d 813 (7th Cir. 2005) (citing *Conner v. McBride*, 375 F.3d 643, 666 (7th Cir. 2004); *Stewart v. Gramley*, 74 F.3d 132, 135 (7th Cir. 1996); *Eddmonds v. Peters*, 93 F.3d 1307, 1322 (7th Cir. 1996) ("[A] few more tidbits from the past or one more diagnosis of mental illness

on the scale would not have tipped it in [the petitioner's] favor."). Petitioner Gibson has failed to show deficient performance from trial counsel and that any mitigation presented at post-conviction would have led to a reasonable probability of a different result, especially in light of the significant aggravating circumstances. Petitioner Gibson's claim is DENIED.

Trial Counsel were Ineffective for Failure to Ensure the Jury Understood it Could Consider Intoxication a Mitigating Circumstance
(Amended Petition Para. 9(a)(3)(iii))

1. Generally, "[a] trial court may not accept a tendered instruction unless it correctly states the law, is supported by evidence in the record, and is not covered by other instructions." *Lambert v. State*, 743 N.E.2d 719, 739 (Ind. 2001). A reviewing court will not find ineffective assistance of counsel for failing to submit an instruction if the trial court could have properly refused the instruction. *Id.* Moreover, an appellate court will not reverse a post-conviction court unless "the trial court would have been compelled by law to give the instruction." *Baer v. State*, 942 N.E.2d 80 (Ind. 2011).

2. In *Lockett v. Ohio*, 438 U.S. 586 (1978), the Supreme Court held that Ohio's death penalty statute was unconstitutional under the Eighth and Fourteenth amendments because the statute impermissibly precluded the jury from considering relevant mitigating factors mandating a capital sentence if one of three statutory mitigating circumstances was not found. *Lockett*, 438 U.S. at 608. Similarly in *Eddings v. Oklahoma*, 455 U.S. 104 (1982), the Supreme Court reaffirmed that a sentencer may not be precluded from considering, and may not refuse to consider, as a matter of law relevant mitigating circumstances. See also *Hitchcock v. Dugger*, 481 U.S. 393 (1987) (holding that a jury cannot be instructed nor can a judge refuse to consider non-statutory mitigating circumstances).

3. As Petitioner Gibson conceded in his proposed findings, the jury was properly instructed in the penalty phase (1) that it could consider whether the "defendant's capacity to appreciate the criminality of the defendant's conduct or to conform that conduct to the requirements of law was substantially impaired as a result of mental disease or defect or intoxication" (GI DA App. 589) and (2) that it could consider "any other circumstance appropriate for consideration" (GI DA App. 589).

4. The trial court could have properly refused a tendered instruction attempting to explain to the jury that it could consider intoxication as a mitigating circumstance even though it is not a defense to the charge of murder and was not a statutorily recognized freestanding mitigator. The jury was properly and correctly instructed, and the instructions that were given sufficiently covered the instruction Petitioner Gibson now complains was not tendered. The instructions as tendered were clear that the jury could consider intoxication as a mitigating circumstance; these are ordinary words that can easily be understood by the average person. See *Stevens v. State*, 770 N.E.2d 739, 756 (Ind. 2002). And, there was no instruction informing the jury that it could not consider a non-statutory mitigator.

5. The fact that the jury had previously been instructed during the guilt phase of the trial that voluntary intoxication is not a defense to murder but may be considered in determining intent did not confuse the jury as to the manner it could consider Petitioner Gibson's claim of intoxication in the penalty phase. Because the instructions as given sufficiently and correctly instructed the jury that intoxication could be considered as a mitigating circumstance without limitation, the trial court would have properly refused a redundant instruction that intoxication could be considered as a mitigating circumstance. Trial counsel was not deficient, and Petitioner Gibson has failed to show

any prejudice. See *Baer*, 942 N.E.2d at 97 (trial counsel was not ineffective where jury was instructed in guilt phase that voluntary intoxication was not a defense and was not instructed that intoxication could be considered a mitigating circumstance). Petitioner Gibson's claim that trial counsel was ineffective for failing to tender an instruction informing the jury that it could consider intoxication despite the previous guilt phase instruction is DENIED.

Trial Counsel Failed to Object to the Use of the Word "Recommendation" in the Preliminary and Final Penalty Phase Instructions and Failed to Object to the State Diminishing the Jury's Sense of Responsibility
(Amended Petition Para. 9(a)(3)(v), 9(a)(2)(iii))

1. Petitioner Gibson claims that trial counsel was ineffective for failing to object to statements of the prosecutor in closing argument of the penalty phase. Petitioner's claim relates to the following portion of closing argument of the prosecuting attorney in the penalty phase:

> I don't stand before you in any way, shape or form and suggest to you that the job you have undertook [sic] and are undertaking is easy. It's a serious, serious matter. But you haven't come here alone, because, see, I share your responsibility. I signed the charging document as the prosecutor of this county. I signed the death penalty papers to be put before this Court and eventually before you. And I know, I've watched you, I watched you since last Monday, and I know the agony you have gone through with this case, the anguish and the concern. I know that hasn't been easy. And I in no way want to diminish that with anything I say, that somehow what you have to do in your capacity as jurors is easy, I know it's difficult.[6]

(Whitis DA Tr. 3788).

Deficient Performance

2. In *Caldwell v. Mississippi*, the prosecutor-with whom the trial court agreed-argued to the jury that their "decision [was] not the final decision" because the case would be reviewed by

[6] This excerpt of argument also forms the basis of Petitioner Gibson's claim that appellate counsel was ineffective for failing to challenge the prosecutor's argument pursuant to *Caldwell v. Mississippi*, as adjudicated in Part VI.N.

a higher court. 472 U.S. 320, 325 (1985). Caldwell was sentenced to death. *Id.* He appealed, claiming that these comments diminished the heavy responsibility constitutionally placed on the jury to be the ultimate decider of a death sentence. *Id.* at 325-26. A plurality of the United States Supreme Court held: "[I]t is constitutionally impermissible to rest a death sentence on a determination made by a sentencer who has been led to believe that the responsibility for determining the appropriateness of the defendant's death rests elsewhere." *Id.* at 328-29. Justice O'Connor concurred on the narrower ground that she would not have joined in overturning the sentence had the prosecutor's comments not been inaccurate and misleading; her focus was on the inaccurate legal statement that led to the jury's diminished sense of responsibility. *Id.* at 341-44 (O'Connor, J., concurring).

3. The Court later recognized Justice O'Connor's narrower ground was controlling and wrote: "[W]e have since read *Caldwell* as 'relevant only to certain types of comment-those that mislead the jury as to its role in the sentencing process in a way that allows the jury to feel less responsible than it should for the sentencing decision.'" *Romano v. Oklahoma*, 512 U.S. 1, 9 (1994) (quoting *Darden v. Wainwright*, 477 U.S. 168, 184 n.15 (1986)). "Thus, 'to establish a *Caldwell* violation, a defendant necessarily must show that the remarks to the jury improperly described the role assigned to the jury by local law.'" *Id.* (quoting *Dugger v. Adams*, 489 U.S. 401, 407 (1989)) (citing *Sawyer v. Smith*, 497 U.S. 227, 233 (1990)). In determining whether trial counsel was ineffective for not objecting to a prosecutor's argument, the question is not simply whether the comments were improper, "but whether they were so improper that counsel's only defensible choice was to interrupt those comments with an objection." *Bussard v. Lockhart*, 32 F.3d 322, 324 (8th Cir. 1994).

4. The comments of the prosecutor did not cross this line of impropriety. The prosecutor was making a simple factual statement: He shared responsibility for the challenge that jurors were facing in determining the appropriate sentence for Petitioner Gibson because he was the one that made the decision to seek the death penalty. If not for his filing of the charging information and the death-penalty allegation, then the jury would not have to make the decision whether the death penalty was an appropriate sentence; it was a statement of but-for causation. The prosecutor's statement did the opposite of diminish the role of the jury as the sentence-rather, the statements recognized the difficult burden and heavy responsibility that was being placed on the jury members ("And I in no way want to diminish that with anything I say, that somehow what you have to do in your capacity as jurors is easy, I know it's difficult."). Successful *Caldwell* claims arise where the jury is misled by inaccurate statements that shift their sense of responsibility for sentencing to another entity. Nothing in the prosecutor's statement was inaccurate or misleading: He filed the charges and penalty request and was responsible for putting this dilemma in their hands. Nothing about it is objectionable; therefore, counsel did not perform deficiently by failing to object.

5. The decision not to object was a reasonable strategic choice of counsel because trial counsel had the opportunity to address any arguments made by the State in their own closing argument. Counsel, in fact, did just that at the beginning of his closing argument: "Now, you were called upon to decide how William Clyde Gibson dies. Clyde Gibson will die in jail or prison. Does he die by being strapped to a gurney and injected with poison, or does he die behind razor wire and steel bars, that is the decision you will have to make" (Whitis DA Tr. 3792). Petitioner Gibson has failed to prove deficiency.

Prejudice

6. Petitioner Gibson also cannot prove prejudice. Even if these statements were objectionable, both the prosecutor and trial counsel emphasized the seriousness of the jury's decision and the jury's responsibility for the sentence. The State told the jury that the decision was "in [their] hands"; that the jury's decision was "a serious, serious matter"; and that he "in no way want[ed] to diminish [the difficulty of the decision and proceedings] with anything [he] [said]" (Whitis DA Tr. 3778, 3788). Further, the State reminded the jury that what he argued was not evidence (Whitis DA Tr. 3782). Defense counsel, as quoted above, also affirmed that the jury was making the decision as to "how William Clyde Gibson dies" (Whitis DA Tr. 3792). Not only did the arguments of counsel emphasize the jury's responsibility, a penalty-phase preliminary instruction stated: "Your recommendation is an important part of the sentencing process. The Judge must follow your sentencing recommendation" (Gl DA App. 597). Therefore, even if the State's comments were objectionable, Petitioner Gibson was not prejudiced by their introduction considering the statements of counsel and the jury instructions. Petitioner Gibson's claim of ineffectiveness is DENIED.

The Prosecuting Attorneys Violated the State and Federal Constitutions when they Presented Evidence They Knew to be False
(Amended Petition Para. 9(b))

1. Gibson raises a freestanding claim under *Napue v. Illinois*, 360 U.S. 264, 269 (1959), claiming that the State presented evidence knowing that it was false. The Court has already found that testimony relating to duct tape, the "missing" 24-hour period, and the cross-examination of Dr. Haskins did not constitute false testimony or false evidence. *See supra*. The Court notes that Petitioner Gibson presented no new evidence about the truth or falsity of information elicited at trial

concerning these subject matters. He relies entirely on record evidence in his proposed findings in an attempt to prove his claim (Gibson Proposed Findings 63-71).

2. Gibson's freestanding claim is barred because it was available to him on direct appeal and not raised. "In post-conviction proceedings, claims that are known and available at the time of direct appeal, but are not argued, are waived. ... They cannot be subsequently raised in the post-conviction setting." *Taylor v. State*, 882 N.E.2d 777, 781 (Ind. Ct. App. 2008) (citing *Reed v. State*, 856 N.E.2d 1189, 1193-94 (Ind. 2006); *Timberlake v. State*, 753 N.E.2d 591, 597 (Ind. 2001)).

3. Had Petitioner Gibson presented new evidence proving that the State knowingly introduced false testimony, then his claim may be available on post-conviction. But, although he had Detective Bush (one of the allegedly offending witnesses) on his witness list, Petitioner Gibson did not present any new evidence (physical or testimonial) at the post-conviction hearing relating to false testimony. Therefore, his claim is entirely based on the direct appeal record; thus, the claim was available to him on direct appeal. Gibson's freestanding Napue claim is DENIED.

Counsel's Performance was Affected by an Actual Conflict of Interest
(Amended Petition Para. 9(c))

1. The Sixth Amendment right to effective assistance of counsel necessarily includes representation that is free from conflicts of interest. *Wood v. Georgia*, 450 U.S. 261, 271 (1981). In the context of representing multiple clients in a particular case, "[T]he possibility of conflict is insufficient to impugn a criminal conviction... [A] defendant must establish that an actual conflict of interest adversely affected his lawyer's performance." *Cuyler v. Sullivan*, 446 U.S. 335, 350 (1980). Once a defendant shows an actual conflict of interest and an adverse impact, prejudice is presumed under *Strickland. Burger v. Kemp*, 483 U.S. 776, 783 (1987). In order to show an adverse

effect on performance caused by trial counsel's failure to act, a defendant must show (1) "a plausible strategy or tactic that was not followed but might have been pursued; and (2) an inconsistency between that strategy or tactic and counsel's other loyalties, or that the alternate strategy or tactic was not undertaken due to the conflict." *Woods v. State*, 701 N.E.2d 1208, 1223 (Ind. 1998) (citing *Winkler v. Keane*, 7 F.3d 304, 309 (2d Cir.1993)); *Cates v. Superintendent*, Indiana Youth Center, 981 F.2d 949, 955 (7th Cir.1992) ("The premise of a defendant's claim that he was denied conflict-free assistance ... must be that his lawyer would have done something differently if there was no conflict.").

2. Patrick Biggs is the Chief Public Defender of the Floyd County Public Defender Office and has been in that position since its inception, approximately twenty years ago (Biggs Tr. 1). Part of his responsibilities include overseeing the administration of the office; the office has three staff members that assist with administration and seven part-time public defenders (Biggs. Tr. 1-2). Mr. Biggs also maintains a full caseload representing indigent clients (Biggs Tr. 3, 7, 39-40). When the trial court appointed the Floyd County Public Defender's Office to represent Petitioner Gibson, Mr. Biggs did not consider any other attorney to be lead attorney because "that was [his] job" (Biggs Tr. 34, 39-40). Mr. Biggs did not have any concerns about being appointed to Petitioner Gibson's three murder cases and maintaining his role as the Chief Public Defender primarily because he has confidence in his staff to assist with the administrative duties (Biggs Tr. 7, 34). Shortly after his appointment, Mr. Biggs hired an additional part-time public defender to take on new cases during the course of Petitioner Gibson's representation (Biggs Tr. 35). During the time Mr. Biggs was reducing his caseload in order to comply with Criminal Rule 24, Mr. Biggs did not believe that it

delayed his ability to represent Petitioner Gibson (Biggs Tr. 37). Mr. Biggs was never told by anyone to keep the costs of Petitioner Gibson's defense down (Biggs Tr. 38).

3. Generally, the Floyd County Public Defender's Office is funded from the general county fund and the public defender's supplemental fund (Biggs. Tr. 30). Mr. Biggs explained the funding process for the defense of large cases, including a capital case: the county council would set up a separate fund for the case, and he would submit claims directly to the council for expenses (Biggs Tr. 16). The council was notified in the beginning by this Court and the Chief Public Defender about Petitioner Gibson's cases, that they needed to set up a fund for expenditures, and that the defense of the cases would be expensive (Biggs Tr. 17). The county would be reimbursed for 50% of its expenditures in a capital case and 40% of its expenditures in a non-capital case by the Indiana Public Defender Commission, which was done in Petitioner's cases (Biggs Tr. 37). Mr. Biggs made decisions about expenditures for Petitioner Gibson's defense based on the assessment of whether there was a need and did not decide not to do anything that was necessary in order to keep the defense costs down (Biggs Tr. 40). And no claim for expenses or reimbursement for Petitioner Gibson's defense was ever denied (Biggs Tr. 38). There is no evidence that any expenses or claims were questioned or refused by the County Council at any time. There is no evidence that any claims were not timely paid before, during, or after the trial, including the Appeal. Ultimately, the Floyd County Public Defender's Office incurred expenses totaling approximately $686,164.00, which did not include hours worked by Mr. Biggs on all three cases or for Amber Shaw, as she was already a part-time public defender, for Ms. Hodella's case (Biggs Tr. 75, 79).

4. Mr. Biggs hired an investigator, Mark Mabrey, and a separate mitigation specialist, Michael Dennis (Biggs Tr. 10). Mr. Biggs hired Dr. Haskins as a mental health expert to evaluate

Petitioner Gibson, and Dr. Henderson-Galligan, a psychologist, who had first come into contact with Petitioner Gibson when appointed by the trial court to conduct a competency evaluation (Biggs. Tr. 13, 58-59). Mr. Biggs contacted Tom Hinesly from the State Public Defender's Office who recommended he hire a neuropsychologist, Dr. Haskins, to evaluate Petitioner Gibson (Biggs Tr. 14, 55).[7] Mr. Biggs hired Dr. Nichols who was the former chief medical examiner for the State of Kentucky to review the autopsy reports and also a neurologist, Dr. Matibag, to determine whether Petitioner Gibson suffered brain damage from having hit his head during his lifetime (Biggs. Tr. 13, 47, 54). Dr. Nichols was used on all three of Petitioner Gibson's cases (Biggs. Tr. 15). Additionally, Mr. Biggs hired Dr. Barry Hargan, who specialized in alcohol use and abuse, and James Aiken, an expert on correctional systems (Biggs. Tr. 15).

5. There were some steps that his defense team opted not to take. Mr. Biggs believed that Petitioner Gibson's cases did not need separate experts because the mitigation presentation was the same on all three cases (Biggs Tr. 16). Mr. Biggs did not hire a crime scene reconstructionist for Ms. Whitis' case because he did not believe a reconstruction of the crime would assist Petitioner Gibson's defense or affect the outcome (Biggs Tr. 73).

6. In addition to Mr. Streib (co-counsel on Ms. Whitis' case), and Mr. Adams (co-counsel on Ms. Kirk's case), and Ms. Shaw (co-counsel on Ms. Hodella's case), Mr. Mabrey and Mr. Dennis, Mr. Biggs hired additional members for the defense team (Biggs Tr. 62, 78-79). Mr. Biggs hired Doug Garner to serve as local counsel during jury selection for Ms. Whitis' case for the purpose of providing local knowledge about Dearborn County, Indiana and the jurors (Biggs. Tr. 56).

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[7] The Court notes that the State Public Defender's Office represents Petitioner Gibson in his post-conviction challenges.

Mr. Biggs also hired Inese Neiders as a jury consultant in Ms. Whitis' case to review questionnaires and assist in the jury selection process (Biggs Tr. 57). In Ms. Kirk's case, Mr. Biggs hired Jodie English to fulfill the role of jury consultant, who was also an attorney and had experience in capital cases, and Dennis Vowels as local counsel from Vanderburgh County (Biggs Tr. 56-57). Mr. Streib submitted payment for 1,128 billable hours, and Mr. Adams submitted payment for 1,693 billable hours; both Mr. Streib and Mr. Adams were also sent to Colorado to attend a conference for training in the Colorado Method of picking a capital jury that was paid for by the Floyd County Public Defender's office.

7. After Mr. Biggs' filed his appearance in all three of Petitioner Gibson's cases, the State Public Defender Commission held several meetings where the topic of whether a Chief Public Defender should be lead counsel in a capital case was discussed. On April 9, 2013, Larry Landis, the Executive Director of the Indiana Public Defender Council, sent a written memorandum to the Indiana Supreme Court advocating for a change in Indiana Criminal Rule 24 to prohibit the appointment of a chief public defender in a capital case due to concerns about a Chief Public Defender's responsibility to "save the county money" and a compromised ability to adequately represent a capital defendant and attend to administrative duties and overseeing the representation of indigent persons within their county (See Larry Landis Testimony and Exhibit). David Powell, Executive Director of the Indiana Prosecuting Attorneys Council, also sent a written memorandum to the Indiana Supreme Court advocating for Chief Public Defenders to remain available for appointment in capital cases in their county (See Powell Affidavit). As a result, effective in May of 2013, the Indiana Supreme Court amended Rule 24 to include provisions that before a chief or managing public defender may be appointed to represent a capital defendant, a court must assess the

impact of the appointment on the workload of the attorney, including their administrative duties. *See* Indiana Criminal Rule 24(B)(3)(b). Although not required, the trial court considered, and reviewed, Mr. Biggs's administrative duties and time that he needed to address those responsibilities along with his general caseload and determined that he was in compliance with Indiana Criminal Rule 24.

8. In 2015, following Mr. Biggs's representation of Petitioner Gibson, the county council set up a committee, of which Mr. Biggs was a member, to review the makeup of the Public Defender Office and make recommendations on fiscal matters (Biggs Tr. 31). The Court recognizes the fact that the Committee's discussions depend upon many factors that cannot appear in the record. Based on the review of the administration of the office, the county council submitted an amended comprehensive plan to the Indiana Public Defender Commission; an amended plan which Mr. Biggs contributed to (Biggs Tr. 40-41). The main difference between the current plan and the amended plan was essentially a title change for Mr. Biggs's position, however Mr. Biggs had no reason to believe that he would no longer be the head of the Floyd County Public Defender's Office (Biggs Tr. 40-41).[8] The plan was rejected by the Commission in September of 2016 (Biggs Tr. 41). Any further consideration would be speculative.

9. During the representation of Petitioner Gibson, both Mr. Biggs and Mr. Streib acknowledged that they had differences of opinion about the best way to represent the best interests of Petitioner Gibson (Biggs Tr. 69). The two would discuss the matters and generally come to the same conclusion and resolve the matter; Mr. Biggs considered Mr. Streib his co-counsel, not a subordinate (Biggs Tr. 69, 71-72). Mr. Biggs reported that Mr. Streib "convinced [him] on quite a

[8] Even if Mr. Biggs's position was going to be eliminated with a new plan, Mr. Biggs was prepared to retire as it would have been a good time for him to leave (Biggs Tr. 42). Mr. Biggs continues to serve as Chief Public Defender.

few things where [they] originally differed...a lot of time it was a matter of developing circumstances" (Biggs Tr. 69-71). Mr. Biggs never prevented Mr. Streib from doing anything he believed was necessary to properly represent Petitioner Gibson nor imply or tell Mr. Streib that his employment with the public defender's office was in jeopardy if he challenged Mr. Biggs on any matter regarding Petitioner Gibson's defense (Biggs Tr. 70-71). This Court would hope a robust discussion between co-counsel would occur in a matter of such importance.

10. As found above, trial counsel did not unreasonably delay in starting to work on Petitioner Gibson's three cases. The evidence shows that Mr. Biggs and Mr. Streib began working on Petitioner Gibson's cases immediately upon notification of their appointments. Any time that passed before experts were hired was not related to counsel's efforts to reduce their caseloads to comply with Rule 24. Petitioner Gibson has failed to show that hiring an expert sooner would have changed his defense or the quality of his representation in any way. During the course of his representation, the trial court assessed whether Mr. Biggs's had the ability to properly represent Petitioner Gibson and assessed his time constraints not only with his representation of other clients but also with his administrative duties and found Mr. Biggs to be in compliance with Rule 24. Mr. Biggs did not feel pressure to minimize costs expended in defense of Petitioner Gibson and instead made decisions based on the needs of each of his cases. Nor did Mr. Biggs fail to do anything that was necessary for Petitioner Gibson's defense because of pressure to keep costs low. Indeed, the actual expenditures and the number of counsel, investigators, consultants, and other experts demonstrates that Petitioner Gibson received high quality representation. Petitioner Gibson's unsupported accusation that trial counsel felt pressure to keep the cost of expenses for his defense down is not supported at any point in the record and is wholly insufficient to demonstrate an actual

conflict of interest. At most, Petitioner Gibson has identified a potential conflict of interest. However, a potential conflict of interest is insufficient to show an actual conflict of interest and establish an adverse impact. Petitioner Gibson's claim is DENIED.

Appellate Counsel were Ineffective
(Amended Petition Para. 9(d))

1. Petitioner Gibson claims ineffectiveness of appellate counsel only concerning his conviction and sentence in the case of Ms. Whitis' murder. Defendants are entitled to effective assistance of counsel on appeal. *Ben-Yisrayl v. State*, 738 N.E.2d 253, 260 (Ind. 2000) (citing *Evitts v. Lucey*, 469 U.S. 387, 396 (1985). Claims of ineffective assistance of appellate counsel are subjected to the same *Strickland* standard governing claims of ineffective assistance of trial counsel. *Id.*

2. Ineffective assistance of appellate counsel claims fall into three general categories: "(1) denial of access to an appeal; (2) waiver of issues; and, (3) failure to present issues well." *Hollowell v. State*, 19 N.E.3d 263, 270 (Ind. 2014) (citing *Reed v. State*, 856 N.E.2d 1189, 1195 (Ind. 2006); *Fisher v. State*, 810 N.E.2d 674, 677 (Ind. 2004)). Petitioner Gibson's claim falls into the second of these categories. Our Supreme Court has recognized that "'[i]neffectiveness is very rarely found in these cases.'" *Bieghler v. State*, 690 N.E.2d 188, 193 (Ind. 1997) (quoting Lissa Griffin, *The Right to Effective Assistance of Appellate Counsel*, 9 W.Va. L. Rev. 1, 25 (1994)).

3. To prevail on a waiver-of-issues claim of ineffectiveness, "'the defendant must overcome the strongest presumption of adequate assistance and judicial scrutiny is highly deferential.'" *Garrett v. State*, 992 N.E.2d 710, 724 (Ind. 2013) (quoting *Ben-Yisrayl*, 738 N.E.2d at 260-61). This is because the decision of which issues to raise "is one of the most important

strategic decisions to be made by appellate counsel." *Bieghler*, 690 N.E. 2d at 193. "Accordingly, when assessing these types of ineffectiveness claims, reviewing courts should be particularly deferential to counsel's strategic decision to exclude certain issues in favor of others, unless such a decision was unquestionably unreasonable." *Id.* at 194.

4. First, this Court must determine "whether the unraised issues are significant and obvious from the face of the record and ... whether the unraised issues are 'clearly stronger' than the raised issues." *Garrett*, 992 N.E.2d at 724 (citing *Timberlake v. State*, 753 N.E.2d 591, 605-06 (Ind. 2001)). If deficiency is proved, then the prejudice analysis "requires an examination of 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.* (quoting *Bieghler*, 690 N.E.2d at 194). Again, the Court grants significant deference to the decisions of appellate counsel regarding which claims to raise as the United States Supreme Court has expressly required: "[T]he 'process of winnowing out weaker claims on appeal and focusing on those more likely to prevail, far from being evidence of incompetence, is the hallmark of effective appellate advocacy.'" *Burger v. Kemp*, 483 U.S. 776, 784 (1987) (quoting *Smith v. Murray*, 477 U.S. 527, 536 (1986)) (internal quotation marks omitted).

5. Petitioner Gibson claims that the following statements of the prosecutor in closing arguments of the penalty phase should have been the basis of an appellate claim under *Caldwell*:

> I don't stand before you in any way, shape or form and suggest to you that the job you have undertook [sic] and are undertaking is easy. It's a serious, serious matter. But you haven't come here alone, because, see, I share your responsibility. I signed the charging document as the prosecutor of this county. I signed the death penalty papers to be put before this Court and eventually before you. And I know, I've watched you, I watched you since last Monday, and I know the agony you have gone through with this case, the anguish and the concern. I know that hasn't been easy. And I in no way want to diminish that with anything I say, that somehow what you have to do in your capacity as jurors is easy, I know it's difficult.

(Whitis DA Tr. 3788).

Deficient Performance

6. Petitioner Gibson's claim of ineffectiveness on appeal is denied because he cannot show that counsel was unreasonable in choosing not to raise a weak and losing *Caldwell* claim. The deficient performance analysis requires the Court to first examine whether the claim was significant and obvious from the record and whether it was clearly stronger than those issues raised. *Garrett*, 992 N.E.2d at 724. A *Caldwell* claim will only succeed where the challenged comments "'mislead the jury as to its role in the sentencing process in a way that allows the jury to feel less responsible than it should for the sentencing decision.'" *Romano*, 512 U.S. at 9 (quoting *Darden*, 477 U.S. at 184 n. 15). Therefore, a successful claim must show that the comments to the jury "'improperly described the role assigned to the jury by local law.'" *Id.* (quoting *Dugger*, 489 U.S. at 407).

7. The *Caldwell* claim here is not significant or obvious on the record as the prosecutor's comments contained nothing inaccurate that misled the jury as to their responsibility for imposing sentence. He basically made a statement of but-for causation: But for him "sign[ing] the charging document" and "sign[ing] the death penalty papers[,]" the "serious, serious matter" would never have been placed in front of the jurors (GI DA Tr. 3788). This was neither inaccurate nor misleading.

8. And these comments in no way implied that the jury should see their role as being anything but the final word. In fact, shortly after mentioning that he had filed the case, the prosecutor stated: "And I in no way want to diminish [the 'anguish and concern' of the jurors during trial] with anything I say, that somehow what you have to do in your capacity as jurors is easy, I know it's difficult" (GI DA Tr. 3788). Further, just before the allegedly unconstitutional comments, the prosecutor said: "I don't stand before you in any way, shape or form and suggest to you that the job you have undertook [sic] and are undertaking is easy. It's a serious, serious matter" (GI DA Tr.

3788). Because these comments were not misleading, inaccurate, or serving to diminish the jury's role as the body that imposes a final sentence, a fair reading of the record would not have presented a significant and obvious *Caldwell* claim that appellate counsel was deficient to have missed.

9. Further, even if Petitioner Gibson could prove that the prosecutor made unconstitutional comments diminishing the jury's responsibility for sentencing, those comments would have been mitigated by the trial court's instructions. In the preliminary instructions, the jury was told: "Your recommendation is an important part of the sentencing process. The Judge must follow your sentencing recommendation" (GI DA App. 597). It is well-established that juries are presumed to follow their instructions. *Weisheit*, 26 N.E.3d at 20. Therefore, even had appellate counsel recognized the prosecutor's comments as violating *Caldwell*, the *Caldwell* argument is diluted because of the jury instruction. Further, in the presence of this jury instruction, counsel would wisely not raise the *Caldwell* claim because the existence of such an instruction is part of the United States Supreme Court's analysis when denying these types of claims. *Romano*, 512 U.S. at 9. Petitioner Gibson cannot prove deficient performance of appellate counsel because the *Caldwell* claim is neither significant nor obvious in the record.

10. Petitioner Gibson also cannot show that the *Caldwell* claim was clearly stronger than other issues presented. Appellate counsel raised six claims: denial of his fourth motion to continue, denial of his motion to dismiss the entire venire for pre-trial publicity exposure, limitation of voir-dire questioning disallowing case-specific questions, denial of motions to strike certain jurors for cause, rejection of a voluntary manslaughter instruction, and the appropriateness of the death sentence under Indiana Appellate Rule 7(B) (GI DA Def. Br. 1-2). Of these six claims, five were attacks on his conviction, which, if upset, would have entitled him to an entirely new trial. By dint

of the fact that Petitioner Gibson would be able to erase both his murder conviction and his death sentence, at least the outcomes if successful on these claims would be more favorable to Petitioner Gibson. A reasonable strategy of counsel could be to strongly pursue those claims that would result in removal of both the conviction and sentence, rather than those only affecting the sentence. Further, the Rule-7(B) claim is stronger than any *Caldwell* argument: Petitioner Gibson only needed to convince three justices of our Supreme Court that the death sentence was inappropriate for him under Rule 7(B). While that bar is high and the nature of Petitioner Gibson's crimes atrocious, his criminal history (at least before killing three women) is not littered with hugely violent offenses, but instead a sexual battery conviction and a handful of thefts and alcohol-related offenses. This relatively minor criminal history would leave the analysis of Petitioner's character open for debate-and certainly stronger than the *Caldwell* claim that has no true support in the record. Petitioner Gibson has failed to prove deficient performance from counsel's failure to raise an unsupportable *Caldwell* claim.

Prejudice

11. Prejudice in the ineffective assistance of appellate counsel context is proved by showing that the unraised issue "would have been clearly more likely to result in reversal or an order for a new trial." *Garrett*, 992 N.E.2d at 724. For the reasons articulated above in the deficient performance analysis of this claim, a *Caldwell* claim had no chance of success; therefore, it could not have been clearly more likely to result in a new trial. The prosecutor's statement in no way placed the responsibility of making the decision to impose a death sentence on any entity but the jury. Petitioner Gibson cannot prove the ineffectiveness of his appellate counsel. His claim is DENIED.

V.

UNPRESENTED CLAIMS

1. In his second amended petition for post-conviction relief, Petitioner Gibson raised four claims that he does not present to this Court in his proposed findings of fact and conclusions of law: a failure to support the last defense motion to continue (paragraph 9(a)(1)(iii) in his second amended petition); a failure to challenge the method of execution (paragraph 9(a)(1)(vi)); a failure to investigate a potential juror who may have had mitigating evidence (paragraph 9(a)(2)(iv)); and, a failure to move for a directed verdict when the State did not formally incorporate the guilt-phase evidence into the penalty phase (paragraph 9(a)(3)(ii)).

2. Petitioner Gibson presented no evidence on these claims at the post-conviction hearing.

3. Petitioner Gibson has presented no proposed findings or legal conclusions on these claims to this Court.

4. Because Petitioner Gibson has presented no evidence or argument concerning these four claims, the Court holds that Petitioner Gibson failed to meet his burden of proof relative to these claims. Therefore, they are all DENIED.

JUDGMENT

IT IS ORDERED, ADJUDGED, AND DECREED BY THIS COURT that for the reasons set forth above, the Petitioner, William Clyde Gibson, III, has failed to prove his claims by a

preponderance of the evidence. As a result, his petition for post-conviction relief is DENIED.

SO ORDERED on October 6, 2017.

Honorable Susan L. Orth
Judge, Floyd Superior Court 1

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APPENDIX C

Order Denying Petition for Rehearing
February 3, 2020

In the
Indiana Supreme Court

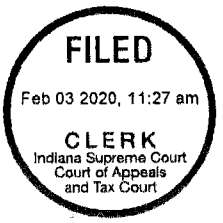
William Clyde Gibson, III,
Appellant(s),

v.

State Of Indiana,
Appellee(s).

Supreme Court Case No.
22S00-1601-PD-00009

Trial Court Case Nos.
22D01-1204-MR-919;
22D01-1606-PC-4



Order

Appellant's Petition for Rehearing is hereby DENIED.
Done at Indianapolis, Indiana, on 2/3/2020.

Steve David
Acting Chief Justice of Indiana

All Justices concur.
Justice Slaughter not participating.