APPENDIX

APPENDIX

TABLE OF CONTENTS

APPENDIX A

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 21-2463

[Filed: March 30, 2022]

DONALD G. KARR, JR., *Petitioner-Appellant,*

v.

MARK R. SEVIER, Warden, *Respondent-Appellee.*

Appeal from the United States District Court for the Southern District of Indiana, Indianapolis Division. No. 1:19-cv-01973-JPH-TAB — **James P. Hanlon**, *Judge*.

ARGUED FEBRUARY 9, 2022 — DECIDED MARCH 30, 2022

Before FLAUM, BRENNAN, and ST. EVE, *Circuit Judges*.

BRENNAN, *Circuit Judge*. An Indiana jury convicted Donald Karr of rape and domestic battery for his assaults on A.P., his former girlfriend. Karr then fired his attorney, hired a new one, and pursued two claims of ineffective assistance of counsel in state court. Those

claims were rejected by the state trial court and on direct appeal. Karr then sought federal habeas relief under 28 U.S.C. § 2254, and the district court denied his petition.

His trial counsel was ineffective, Karr submits, because he failed to investigate A.P.'s history of medication use, and he introduced no evidence about whether Karr used his cellphone during his second assault of A.P. If the trial attorney had procured and introduced this evidence, Karr contends, A.P.'s trial testimony could have been impeached. But the jury had an ample basis on which to find A.P. credible, and there is no reasonable probability that any evidence Karr references would have affected the trial's outcome. Karr thus fails to show he was prejudiced by his trial counsel's purported errors.

Also before us are six additional claims for ineffective assistance of trial counsel, which Karr raised for the first time in federal habeas proceedings. Ordinarily, federal courts are barred from considering defaulted claims when reviewing habeas petitions. Because Karr did not raise those claims in Indiana state court, he procedurally defaulted them. Karr concedes the procedural defaults but asserts they are excusable under a narrow equitable exception delineated by the Supreme Court. That exception does not apply to insubstantial defaulted claims such as the ones Karr presents, though, and it does not apply in this procedural posture. We therefore affirm the denial of habeas relief.

I

A. Factual Background

We recount the facts primarily as they were found by the Indiana Court of Appeals. In § 2254 cases, a state court's determination of a factual issue is "presumed to be correct" unless the petitioner rebuts it by "clear and convincing evidence." 28 U.S.C. § 2254(e)(1); *Powell v. Fuchs*, 4 F.4th 541, 548 (7th Cir. 2021).

On the night of May 5, 2015, A.P., the victim, was living with Donald Karr and her three young children in Noblesville, Indiana. A.P. was putting her children to bed when Karr returned home and angrily accused her of sneaking a man into the house. Karr then hit A.P. in the face several times. Next, he grabbed her by her hair and ripped some of it out of her head. Karr then told A.P. that she had to perform oral sex on him every day and every night.

After confronting one of A.P.'s children and sending the child back to bed, Karr closed the blinds, approached A.P., and unbuckled his pants. A.P. tried to kick Karr away from her. At this point, A.P. began experiencing abdominal pains and feeling nauseous, which she believed was related to a previously diagnosed ovarian cyst. She convinced Karr to transport her to the hospital.

Upon arriving, A.P. told a nurse to contact a police officer because Karr had been hitting her. Officer Craig Denison was present in the ultrasound room, and A.P. told him that Karr had been hitting her and pulling her hair. The officer photographed A.P.'s hair, and her face

which showed swelling. A clump of hair from A.P.'s scalp came loose, and she gave it to Denison. After photographing the clump of hair, Denison disposed of it in a trash can at the hospital.

Denison informed A.P. that he believed there was insufficient probable cause to arrest Karr. Because she could not prevent Karr from occupying the home they shared, A.P. left with him. A.P. and Karr drove home together without conflict.

Once home, Karr again became upset with A.P., this time about an unrelated minor topic. He told her they were "going to pick up where [they] left off." He then hit her in the face. Karr took off his clothes and ordered A.P. to perform oral sex on him. She refused, but he forced her to comply. Karr eventually stopped and began to lecture A.P. about his "rules" for the house.

A.P. testified that before going to bed, Karr began to search for a pornographic video to watch. Karr again told A.P. to perform oral sex on him. At first she refused, but she eventually relented "[o]ut of fear of what would happen if [she] said no." During that time A.P. noticed a light shining from Karr's phone and she "assumed he was taking a video."

A.P. returned to the hospital the next day, where she met with another police officer, Matthew Boudreau. A.P. reported Karr's assaults to Boudreau. A forensic nurse, Nakia Bowens, examined A.P. and observed that A.P. had redness and tenderness in her scalp area, tenderness on her jawbone, and redness on her chin. According to Bowens, A.P. also had

petechiae—small, red dots that indicate blood has burst—on the roof of her mouth. Petechiae may be caused by blunt force trauma, Bowens opined, such as by a penis striking the roof of a mouth. Bowens took photographs of A.P.'s injuries, and some of those photographs were later introduced at trial.

B. Procedural History

Criminal charges and trial. The State of Indiana charged Karr with domestic battery (Count 1), two counts of rape (Counts 2 and 3), strangulation (Count 4), and intimidation (Count 5). Attorney Joshua Taylor represented Karr at trial. The State presented the evidence of the assaults, discussed above. Taylor cross-examined A.P. on Karr's behalf. By challenging their authentication, Taylor successfully excluded text messages that would have damaged Karr's defense.

At the close of evidence, Taylor moved for a directed verdict on all counts, which he later amended to include only Counts 3, 4, and 5—the second rape charge and the strangulation and intimidation charges. The trial court granted Taylor's motion in part and entered a directed verdict of not guilty on Count 5, the intimidation charge. The remaining counts were submitted to the jury. Karr was found guilty on the domestic battery and rape counts, but not guilty on the strangulation count.

Posttrial proceedings. Prior to sentencing, Karr discharged Taylor and hired Jane Ruemmele as his attorney. The defense moved for a new trial, alleging Taylor provided Karr ineffective assistance. The trial court held two evidentiary hearings on the motion, at

which Ruemmele raised several issues and Taylor testified about various decisions he had made before and during trial.

One issue concerned A.P.'s medication history. When questioned A.P. admitted she had been prescribed hydrocodone at the time of the assaults, but she did not recall whether she was taking it at that time. She testified that any drug consumption during that period did not affect her ability to recall the assaults. Another issue that arose concerned a forensic audit of Karr's cellphone. Ruemmele called Officer Matt McGovern, of the Noblesville Police Department, who had conducted a forensic analysis of Karr's phone. McGovern testified he found no evidence of a pornographic video that was accessed or recorded on Karr's cellphone on either May 5, 2015, or early the following morning when the second assault occurred. Per McGovern, though, he could not exclude the possibility that content which had been deleted from the phone did not appear in his report.

Arguing for a new trial, Ruemmele asserted that if A.P.'s "prescription drug medication … had been explored she could have been adequately impeached on her ability to observe and to report the events of the day." Ruemmele also contended the lack of evidence of a pornographic video on Karr's cellphone called into question A.P.'s credibility and the reliability of her testimony. The court was not persuaded and denied the motion for a new trial. According to the trial judge, Taylor had been "very successful" in excluding the inculpatory text messages that Karr sent to A.P. Karr

was sentenced to 17.5 years in prison, with five years of the sentence suspended.

Karr's direct appeal and postconviction proceedings. On Karr's behalf, Ruemmele pursued a direct appeal of the trial court's denial of her motion for a new trial. But then she received permission to stay the appeal and pursue postconviction relief in the trial court under Indiana's *Davis-Hatton* procedure (explained later in greater detail). In the petition for postconviction relief, Ruemmele alleged that Taylor had been ineffective as Karr's trial counsel for two main reasons. First, Taylor failed to impeach A.P. with evidence of her drug use. Second, Taylor failed to note the absence of pornographic or other evidence from Karr's cellphone. The State moved for summary denial of the petition, which the trial court granted. The trial court reasoned that claim preclusion barred the claims presented in the petition because they had been raised and denied on the merits in connection with the earlier motion for a new trial.

In a consolidated appeal, Ruemmele challenged Karr's convictions, his sentence, and the denial of postconviction relief. The Indiana Court of Appeals affirmed the the trial court in every respect. According to the appeals court, Karr was not prejudiced by Taylor's decision not to investigate and potentially present evidence of A.P.'s medication use. The appeals court also concluded that Karr did not suffer prejudice from Taylor's decision not to present the cellphone evidence to the jury. The Indiana Supreme Court denied Karr's petition to transfer. His petition to the

Supreme Court of the United States for a writ of certiorari likewise was denied.

Federal habeas proceedings. Karr filed a habeas petition under 28 U.S.C. § 2254(d) in the United States District Court for the Southern District of Indiana, which he later amended with the assistance of retained counsel. In the petition Karr again referenced the ineffectiveness claims related to A.P.'s medications and the forensic audit of his phone. Karr also raised several new bases for the alleged ineffectiveness of his trial counsel. The State opposed relief and argued Karr's claims were meritless or procedurally defaulted.

The district court denied habeas relief. Because each of the six defaulted claims for ineffective assistance of trial counsel was vague or otherwise facially deficient, the district court ruled that those claims lacked "some merit." Thus, the procedural defaults were not excused under *Martinez v. Ryan*, 566 U.S. 1 (2012), or *Trevino v. Thaler*, 569 U.S. 413 (2013), which in limited circumstances provide that a procedural default will not bar a federal habeas court from hearing a substantial claim of ineffective assistance of trial counsel if a prisoner is denied a meaningful opportunity to raise the claim. On the two non-defaulted claims for ineffective assistance of trial counsel, the district court concluded that the Indiana Court of Appeals' no-prejudice determination was a reasonable application of federal law.

The district court granted a certificate of appealability on the question of whether the Indiana Court of Appeals unreasonably applied established federal law in concluding that Karr was not prejudiced

by Taylor's failure to present evidence of A.P.'s medication history. Karr appealed, and he filed what was labeled a motion for issuance of a certificate of appealability. Our court construed the motion as a request to expand the certificate of appealability to include the previously adjudicated cellphone claim, and the six defaulted claims for ineffective assistance of trial counsel. We granted Karr's request and expanded the certificate of appealability.

II

First, we consider the two claims for ineffective assistance of trial counsel that Karr presented to the state court. We also briefly discuss Taylor's overall performance on Karr's claim for ineffective assistance of trial counsel. Then, we examine whether a lack of substantiality precludes Karr's defaulted claims from proceeding under the *Martinez-Trevino* exception to the rule prohibiting procedurally defaulted claims from being raised in federal habeas proceedings. We close by examining whether the *Martinez-Trevino* exception could apply in a case in this procedural posture.

The district court's legal conclusions are reviewed de novo and its factual determinations are examined for clear error. *Kimbrough v. Neal*, 941 F.3d 879, 881 (7th Cir. 2019) (citing *Morris v. Bartow*, 832 F.3d 705, 709 (7th Cir. 2016)). Federal courts may not grant habeas relief on any claim that was "adjudicated on the merits in State court proceedings" unless such adjudication "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1).

This standard is highly deferential, and we may not grant relief where "fairminded jurists could disagree on the correctness of the state court's decision." *Minnick v. Winkleski*, 15 F.4th 460, 468 (7th Cir. 2021), *cert. denied*, No. 21-1042 (U.S. Mar. 21, 2022).

Federal habeas review of a claim for ineffective assistance of counsel is "doubly deferential." *Id.* This is so because we must give "both the state court and the defense attorney the benefit of the doubt." *Burt v. Titlow*, 571 U.S. 12, 15 (2013). In reviewing ineffective-assistance claims, we apply a strong presumption that counsel "rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." *Minnick*, 15 F.4th at 468 *Strickland v. Washington*, 466 U.S. 668, 690 (1984)).

Although an isolated error can support a claim for ineffective assistance of counsel if the error is sufficiently egregious and prejudicial, "it is difficult to establish ineffective assistance when counsel's overall performance indicates active and capable advocacy." *Makiel v. Butler*, 782 F.3d 882, 902 (7th Cir. 2015) (quoting *Harrington v. Richter*, 562 U.S. 86, 111 (2011)). The performance of counsel (1) violates constitutional standards only "when it falls below an objective standard of reasonableness," and it (2) prejudices a petitioner only if "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Adeyanju v. Wiersma*, 12 F.4th 669, 673 (7th Cir. 2021) (quoting *Strickland*, 466 U.S. at 687–88, 694). "A petitioner is entitled to habeas relief only if he satisfies both of *Strickland*'s prongs." *Id.*

A. Medical Records Claim

First up is Karr's claim that Taylor was ineffictive for failing to investigate and potentially present evidence of A.P.'s medication history. Karr argues, as he did before the district court, that Taylor should have researched A.P.'s potential use of medications when the assaults took place. Karr asserts that, had Taylor done so, he could have presented the jury with evidence casting significant doubt on A.P.'s memory on the night of the assaults. This argument has two parts. Karr contends the jury should have heard that (1) A.P. was prescribed hydrocodone at the time of the assaults; and (2) A.P. told Karr that at the hospital she had been given an intravenous line with medication.

At the postconviction evidentiary hearing, A.P. testified she did not recall whether she had been taking hydrocodone at the time of the assaults as well as that any drug consumption did not affect her ability to recall the assaults. A.P. explained she might have told Karr that she had taken medication intravenously to account for the additional time she spent at the hospital. This would conceal from Karr that, at that time, she was speaking with a police officer about Karr's abuse. Considering how the trial proceeded—and given A.P.'s testimony—the Indiana Court of Appeals determined that Taylor had made a reasonable strategic decision not to obtain A.P.'s medical records. The Court of Appeals observed that it was not clear whether any such records would have been discoverable or admissible at trial. Thus, the court held that Taylor's failure to pursue the investigation of A.P.'s medical records did not prejudice Karr. In this

procedural posture, we must decide whether that holding was contrary to, or an unreasonable application of, *Strickland*. *See* 28 U.S.C. § 2254(d)(1); *Minnick*, 15 F.4th at 468.

The ruling of the Indiana Court of Appeals rested on the evidentiary decisions at trial and the potential defenses available to Taylor as Karr's attorney. Most prominently, the appeals court agreed with the State that the evidence showed A.P.'s thoughts and speech were clear on the night of the assaults and during her later conversations with police officers. Obtaining, and even introducing, A.P.'s medical records therefore would not have plausibly enabled Taylor to cast doubt on A.P.'s memory on the night of the assaults. To show that the state court unreasonably applied *Strickland* in making its no-prejudice determination, Karr would have to demonstrate why the state appeals court's logic was flawed. But he has not done so.

In these federal habeas proceedings, Karr has not challenged the state appeals court's determination that A.P.'s thought and speech were clear when she reported the assaults, which was shortly after they occurred. So, there is no factual foundation for Karr's assertion that the evidence he claims should have been investigated and introduced at trial would have affected the jurors' assessment of A.P.'s credibility. This is particularly true because, per A.P.'s testimony and the absence of any contradictory evidence, there is reason to doubt that she was taking medication at the time of the assaults. It follows that there is no "reasonable probability that, but for counsel's [alleged] unprofessional errors [regarding A.P.'s medications],

the result of the proceeding would have been different. *Adeyanju*, 12 F.4th at 673. We agree with the district court that the Indiana Court of Appeals' no-prejudice determination with respect to A.P.'s medication records was a reasonable application of *Strickland*.

The state appeals court also described Taylor's decision not to pursue the discovery of A.P.'s medical records as a strategic decision. "[W]hen counsel's pretrial investigation is less than complete, counsel's strategic choices are 'reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation.'" *Olvera v. Gomez*, 2 F.4th 659, 669 (7th Cir. 2021) (quoting *Strickland*, 466 U.S. at 691). Here, Ruemmele introduced evidence at one of the posttrial evidentiary hearings that Taylor was aware a detective had met with A.P. a few days after the assaults occurred. During that meeting, the detective averred, "the vast majority of the time [A.P.] was collected and matter-of-fact."

This testimony supports the state appeals court's conclusion that Taylor's decision not to investigate A.P.'s medication records was a reasonable exercise of his professional judgment. Given that Taylor knew A.P. could speak in a calm and detailed manner about what happened to her on the night of the assaults, he reasonably could have concluded that any records of her medications would not have affected the jury's evaluation of her credibility. Notably, Ruemmele did not elicit any testimony contradicting this rationale during her examination of Taylor at the evidentiary hearing.

Moreover, as the State notes, any attempt Taylor could have made to impeach A.P. with evidence of her medication history would have been contrary to the theory of defense he presented to the jury—that A.P. had purposely fabricated the story of the assault for financial gain. Again, there was no evidence presented at the postconviction hearings to refute this rationale for Taylor's decision not to pursue the medication records. Without more, Karr has not shown that the Indiana Court of Appeals unreasonably applied *Strickland* in concluding that he suffered no prejudice from Taylor's strategic decisions regarding A.P.'s medication records.

B. Cellphone Claim

Next, we consider Karr's claim that Taylor provided ineffective assistance because he did not present the jury with evidence relating to McGovern's forensic audit of Karr's cellphone. According to Karr, this amounted to ineffective assistance because the audit did not reveal that Karr accessed a pornographic video or made a video recording during the second assault. The Indiana Court of Appeals ruled that Karr suffered no prejudice under *Strickland* from Taylor's decision in this respect. The state appeals court reasoned that even if this evidence had been presented, it would not necessarily have undermined A.P.'s account of the assaults. That court also concluded there was sufficient evidence adduced at trial for the jury to draw credibility determinations about A.P.'s testimony.

We agree with the district court that the Indiana Court of Appeals reasonably applied *Strickland* in reaching a no-prejudice determination on this issue as

well. Even if the forensic analysis of Karr's cellphone had been presented to the jury, it is extremely unlikely that evidence would have changed the trial's outcome. Recall that McGovern could not exclude the possibility that one or more videos had been deleted from Karr's cellphone and did not appear on the officer's forensic-analysis report. Had Taylor introduced the cellphone evidence at trial, then on cross-examination the State could have elicited the limits of that evidence. Karr has therefore not shown it is likely that the introduction of the cellphone evidence would have impeached A.P.'s testimony about Karr's cellphone use.

Further, as the district court noted, presumably the State would have also argued that A.P. was, at most, mistaken to assume Karr was viewing pornography or taking a video during the second assault. At no point has Karr explained why the jury would not have accepted such an explanation. Considering the cellphone evidence in the context of the entire trial, *Thompson v. Vanihel*, 998 F.3d 762, 767–68 (7th Cir. 2021), there is no reasonable probability that, but for Taylor's alleged unprofessional errors, the result of the trial would have been different.

Karr's arguments about the impact of the forensic audit of his cellphone on A.P.'s credibility are likewise unconvincing. The jury heard from several witnesses, including A.P., officers Denison and Boudreau, and nurse Bowens. The jury "had ample evidence on which to base a determination of [A.P.'s] credibility." *Hodkiewicz v. Buesgen*, 998 F.3d 321, 328 (7th Cir. 2021). It was therefore "reasonable for the court of appeals to conclude … there is not a reasonable

likelihood" that this one piece of evidence "would have so changed the jury's credibility determination that they would have acquitted [Karr.]" *Id*. (citations omitted).

Essentially, Karr contends "in a credibility contest, counsel must employ scorched-earth tactics in attacking the credibility of the primary witness." *Gilbreath v. Winkleski*, 21 F.4th 965, 991 (7th Cir. 2021). But Karr ignores that there are "significant downsides" to attacking a sympathetic accuser or "even being perceived as attacking her." *Id*. The Indiana Court of Appeals recognized those downsides when, in making its no-prejudice determination, it noted that the forensic analysis of Karr's cellphone "would not necessarily undermine [A.P.'s] account of the incidents.

In fact, an attempt to impeach A.P. with the forensic analysis of Karr's cellphone could have hurt rather than helped Karr's defense. *See id*. at 990–91. The jury might have perceived a potential attempt to cast A.P. as unreliable—by focusing on an extraneous part of her account—as reinforcing the strength of the State's case on the core details of the assaults. Thus, the Indiana Court of Appeals reasonably applied *Strickland* in ruling that Karr was not prejudiced by Taylor's failure to present evidence from the forensic analysis of the cellphone.

C. Taylor's Overall Performance

Because we conclude that Karr's prejudice arguments fall short, we need not reach the question of whether Taylor's overall performance was deficient. Indeed, this court's precedents discourage us from

undertaking a wholesale analysis of attorney performance in such circumstances. *See Adeyanju*, 12 F.4th at 676; *Thill v. Richardson*, 996 F.3d 469, 476–77 (7th Cir. 2021). Yet, without deciding the question, the State may be correct that Taylor's overall performance was at least adequate. According to the trial court, Taylor's "skillful objections" kept evidence damaging to Karr's defense from being presented to the jury. Taylor also argued for and procured a directed verdict of not guilty on Count 5, the charge of intimidation. And the jury acquitted Karr on Count 4, the charge of strangulation. This all supports the conclusion that Taylor's performance did not fall below an objective standard of reasonableness. *Strickland*, 466 U.S. at 688.

III

We turn to the six additional claims that were procedurally defaulted when they were not raised in Indiana state court. The Supreme Court has established the general rule that federal habeas petitioners may not use ineffective assistance of postconviction counsel as a rationale for excusing their procedural defaults of claims that trial counsel was ineffective under *Strickland*. *See Coleman v. Thompson*, 501 U.S. 722, 752–54 (1991).

Karr asserts the equitable exception delineated by the Supreme Court in *Martinez* and *Trevino* excuses these procedural defaults. In *Martinez*, the Supreme Court fashioned a "narrow exception" to the rule in *Coleman*: "Inadequate assistance of counsel at initial-review collateral proceedings may establish cause for a prisoner's procedural default of a claim of ineffective

assistance of counsel at trial." 566 U.S. at 9. That exception applies to excuse procedural defaults in federal habeas proceedings if state procedural law required a petitioner's claims to be raised in an initial-review collateral proceeding, but the petitioner failed to do so. *See id*. at 11–12. The Court in *Martinez* further wrote that "[t]o overcome the default, a prisoner must also demonstrate that the underlying ineffective-assistance-of-trial-counsel claim is a substantial one, which is to say that the prisoner must demonstrate that the claim has some merit." *Id*. at 14.

The next year in *Trevino* the Court extended the *Martinez* exception to include cases where a state's procedural rules meant that a prisoner was technically permitted to raise claims for ineffective assistance of trial counsel on direct appeal, yet the structure and design of the state procedural system made it "virtually impossible" to do so. 569 U.S. at 417. This court has added our take on this exception. In *Brown v. Brown*, we held that Indiana's procedural system makes it sufficiently difficult for claims of ineffective assistance of trial counsel to be brought on direct appeal such that "[t]he *Martinez-Trevino* form of cause to excuse procedural default is available to Indiana defendants who seek federal habeas relief." 847 F.3d 502, 512–13(7th Cir. 2017).

Under Indiana's *Davis-Hatton* procedure,[1] a prisoner may "suspend his direct appeal to pursue an immediate petition for postconviction relief for the

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[1] *Davis v. State*, 368 N.E.2d 1149 (Ind. 1977); *Hatton v. State*, 626 N.E.2d 442 (Ind. 1993).

purpose of developing a factual record to support the claim. The direct appeal and collateral-review appeal are then consolidated." *Crutchfield v. Dennison*, 910 F.3d 968, 975 (7th Cir. 2018). This procedure is limited and rarely used, however, and "the Indiana appellate courts have expressed a strong preference for reserving *Strickland* claims for collateral review." *Id.* Because the *Davis-Hatton* procedure, along with other aspects of the structure, design, and operation of Indiana's procedural system, does not offer most defendants a meaningful opportunity to present a claim for ineffective assistance of trial counsel on direct appeal, Indiana defendants who seek federal habeas relief may use the *Martinez-Trevino* exception. *See id.* at 976; *Brown*, 847 F.3d at 512–13.

The State counters that the *Martinez-Trevino* exception does not apply here for three reasons: (1) Ruemmele caused the procedural defaults, at least in part when she served as direct-appeal counsel (rather than solely as postconviction counsel); (2) Karr retained Ruemmele (instead of the State appointing her); and (3) the defaulted claims are without merit. We focus primarily on the third rationale—the lack of a substantial claim with "some merit." *Martinez*, 566 U.S. at 14. While "full consideration of the merits is not required," our inquiry into whether a petitioner's claims are substantial under *Martinez* and *Trevino* is deeper than our court's examination on whether to grant a certificate of appealability. *Brown*, 847 F.3d at 515. Beyond that clarification, *Brown* does not address the contours of the applicable standard for determining what qualifies as a substantial claim under *Martinez* and *Trevino*.

Here, regardless of the precise standard for a substantial claim, Karr cannot meet it. Now, we conclude that Karr's defaulted claims did not even warrant the issuance of a certificate of appealability, as they are insufficiently developed to show that "jurists of reason could disagree with the district court's resolution … or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further." *Id*. (quoting *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003)). Each of the six defaulted claims is vague, conclusory, or both. There is, therefore no basis on which to debate the district court's decision. *See id*. Next, we briefly review each of Karr's defaulted claims.

Claim One (Improper Jury Instruction). Karr asserts Taylor was ineffective for failing to object to a jury instruction, which did not state that witness credibility may be impeached by prior inconsistent statements. As the district court observed, "Karr does not identify which jury instruction he is talking about, nor does he elaborate on why the failure to object amounts to ineffective assistance." Karr does not address this deficiency on appeal.

Claim Two (Impeachment of Bowens). Karr alleges Taylor was ineffective for failing to impeach Bowens, the forensic nurse who examined A.P. Karr fails to specify how he believes Taylor should have impeached Bowens. And we cannot readily determine from the record what material Taylor allegedly should have used for impeachment or how this purported impeachment would have impacted Karr's overall defense.

Claim Three (DNA Testing). According to Karr, Taylor should have ordered DNA testing of hair specimens from A.P. But the hair sample obtained from A.P. at the hospital was discarded, and Karr does not contend that hair specimens originating with someone other than A.P. were introduced at trial, so it is difficult to discern what would have been accomplished if Taylor had A.P.'s hair tested. On appeal, Karr does not explain the import of any DNA testing that was not conducted.

Denison's disposal of the hair sample also underlies Karr's claim under *Brady v. Maryland*, 373 U.S. 83 (1963). That claim lacks merit as well, though. There can be no viable *Brady* claim where, as here, the defendant and his attorney knew at the time of trial that the evidence had been discarded. To succeed on a claim that evidence was unlawfully destroyed under the Supreme Court's decision in *Arizona v. Youngblood*, Karr would have to "show bad faith on the part of the police" in failing to preserve the evidence in question. 488 U.S. 51, 58 (1988). He also must demonstrate that "the exculpatory value of the evidence was apparent before it was destroyed." *McCarthy v. Pollard*, 656 F.3d 478, 485 (7th Cir. 2011). Karr can make neither showing—nor does he attempt to do so—because there is no reason to believe Denison acted in bad faith by discarding the hair sample or that any exculpatory value of the hair sample was apparent at the time it was discarded. Even accounting for Karr's incorrect framing of the issue, there is no *Youngblood* claim here that meets the threshold requirement of substantiality under *Martinez*. *See Brown*, 847 F.3d at 515.

Claim Four (Double Jeopardy). Karr contends Taylor was ineffective for not objecting to a violation of the double-jeopardy protections under the Indiana Constitution. His brief does not explain this alleged violation, and no violation is apparent from our review of the trial proceedings.

Claim Five (Vague Jury Charge). Karr also alleges Taylor failed to object to an unconstitutionally vague jury charge. As the district court noted, Karr did not identify the jury charge or explain why it is vague. Nor does he address the issue in his appellate briefs.

Claim Six (Hearsay in Jury Charge). Karr argues last that Taylor should have objected to improper hearsay included in a jury charge concerning witness testimony. Before the district court, Karr asserted the witness testimony was that of Amy Summerfield, but there was no record that anybody by that name testified at Karr's trial. On appeal, Karr does not identify the witness testimony or alleged hearsay at issue.

* * *

In sum, not one of these six claims is substantial under *Martinez*. Karr has not offered a plausible argument that any defaulted claim is substantial or has "some merit." *Martinez*, 566 U.S. at 14. So, the *Martinez-Trevino* exception does not excuse the procedural defaults.

IV

Given this case's procedural posture, a question arises as to whether defaulted claims, if substantial, would succeed here.

First, we agree with the State that Ruemmele's representation of Karr on both initial postconviction review and on direct appeal removes this case from the terrain occupied by the *Martinez-Trevino* exception. On Karr's behalf Ruemmele presented four claims to the Indiana Court of Appeals: two challenges to Karr's conviction and sentence, and two arguments regarding ineffective assistance of trial counsel. Ruemmele was acting—primarily, if not exclusively—in her capacity as Karr's direct-appeal counsel when she procedurally defaulted the six claims for ineffective assistance of trial counsel. Thus, the Indiana Court of Appeals did not hear those six claims because Ruemmele failed to raise them. Her role as Karr's counsel on direct appeal distinguishes this case from *Martinez*, where the Supreme Court found it crucial that the error committed by the prisoner's attorney occurred in initial-review collateral proceedings, precluding the Court from considering or adjudicating the prisoner's ineffective-assistance-of-trial-counsel claim on direct review of the state proceeding. *See* 566 U.S. at 10–11.

Here, as the State argues, Karr could have raised a claim before the Indiana Supreme Court that his direct-appeal counsel had been ineffective in procedurally defaulting the six claims for ineffective assistance of trial counsel. But he did not do so, perhaps because Ruemmele was still representing him on further appeal. "[A]n ineffective-assistance-of-counsel

claim asserted as cause for the procedural default of another claim can itself be procedurally defaulted." *Edwards v. Carpenter*, 529 U.S. 446, 453 (2000); *see also Smith v. Gaetz*, 565 F.3d 346, 352 (7th Cir. 2009) (ineffective assistance of counsel must be raised at each level of state-court review or else it is procedurally defaulted). By failing to raise ineffective assistance of appellate counsel before the Indiana Supreme Court, Karr procedurally defaulted that claim, which if successful could have excused the procedural defaults of his six claims for ineffective assistance of trial counsel.

A related inquiry is whether, notwithstanding Ruemmele's dual role as counsel on initial review and direct appeal, Karr's retention of her also prevents the procedural defaults from being excused.

The State asserts it is not responsible for a procedural default that results from the allegedly deficient performance of a retained, rather than appointed, postconviction counsel. *Martinez* specified two scenarios in which a prisoner may establish cause to excuse the default of an ineffective-assistance-of-trial-counsel claim: "The first is where the state courts did not appoint counsel in the initial-review collateral proceeding for a claim of ineffective assistance at trial. The second is where appointed counsel in the initial-review collateral proceeding, where the claim should have been raised, was ineffective under [*Strickland*]." 566 U.S. at 14. The State presents the question whether a third scenario—where the prisoner retains counsel—falls within the scope of *Martinez*. Karr disagrees with the

State's analysis, arguing that how counsel undertook his representation does not impact whether there is cause to excuse the defaults.

The parties touch upon this question in their submissions, but they do not fully and adequately present the arguments for our consideration, *Liu v. SEC*, 140 S. Ct. 1936, 1947 (2020), especially on a question with a likelihood of recurrence and significant consequences. *See Smith v. Pro. Transp., Inc.*, 5 F.4th 700, 703–04 (7th Cir. 2021). Accordingly, we choose not to reach it here.

* * *

For these reasons, we AFFIRM the judgment of the district court.

APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

No. 1:19-cv-01973-JPH-TAB

[Filed: July 28, 2021]

DONALD G. KARR, JR.,	)
Petitioner,	)
	)
v.	)
	)
KEITH BUTTS,	)
Respondent.	)
	)

ORDER DENYING PETITION FOR A WRIT OF HABEAS CORPUS AND DIRECTING ENTRY OF FINAL JUDGMENT

Donald Karr was convicted of rape and domestic battery after a trial in Indiana state court. His petition for a writ of habeas corpus asserts a claim for ineffective assistance of trial counsel and a *Brady* violation. While Mr. Karr concedes that his *Brady* claim and part of his ineffective assistance claim are procedurally defaulted, he contends that they should be allowed to proceed because the procedural default was caused by the ineffective assistance of his counsel at post-trial and post-conviction proceedings. But because

Mr. Karr has not demonstrated that post-trial counsel was ineffective, and because his non-defaulted claims do not entitle him to relief, the amended petition for a writ of habeas corpus must be **DENIED**.[1]

I.
BACKGROUND

Mr. Karr was convicted of two counts of rape, a Level 3 felony, and one count of domestic battery, a Level 6 felony, against his live-in girlfriend, A.P., in Indiana Criminal Case No. 29D03-1505-F6-4047. Dkt. 12-7, pp. 110-12.

Federal habeas review requires the Court to "presume that the state court's factual determinations are correct unless the petitioner rebuts the presumption by clear and convincing evidence." *Perez-Gonzalez v. Lashbrook*, 904 F.3d 557, 562 (7th Cir. 2018); *see* 28 U.S.C. § 2254(e)(1).

A. Trial Evidence

On May 5, 2015, Mr. Karr came home and accused A.P. of having another man in the house. Dkt. 12-2,

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[1] The respondent did not file a copy of Mr. Karr's Brief of Appellant, the State's Brief of Appellee, Mr. Karr's Reply, or the State's response in opposition to Mr. Karr's petition to transfer, which were filed on direct appeal of Mr. Karr's conviction and sentence in state court. *See* Rule 5(d) of the Rules Governing Section 2254 Cases in the United States District Courts (respondent must file all state court appellate briefs with the answer of the petition). In the interest of judicial economy, the Court takes judicial notice of these appellate briefs, which are publicly available on the Indiana Court of Appeals website. *See* https://public.courts.in.gov, Case Number 29A02-1707-CR-01502.

p. 37. He berated A.P., smacked her across the face and head, grabbed her by the hair, and threw her onto the floor. *Id.* at 37-39. When one of A.P.'s three children came out of her bedroom and asked to go to the bathroom, Mr. Karr told the child to go back to bed. *Id.* at 39-40. Mr. Karr told A.P. that she would have to perform oral sex on him, unbuckled his pants, and approached her. *Id.* at 40. A.P. kicked him away but then almost immediately began to experience abdominal pain from a preexisting ovarian cyst. *Id.* at 40-41.

Mr. Karr initially refused but later agreed to let A.P. call her doctor or go to the emergency room. *Id.* at 41. At A.P.'s request, they dropped her children off at her parents' house. *Id.* at 42. A.P. did not tell her parents that Mr. Karr had beaten her. *Id.* Later, when Mr. Karr was out of earshot, A.P. told an emergency room nurse, "I need you to get a police officer because he's hitting me." *Id.* at 43–44. A.P. spoke to a police officer in private and showed him a clump of hair that she claimed Mr. Karr had ripped from her scalp. *Id.*at 46-48. The officer told A.P. that he could not make an arrest that night because she did not have any visible bleeding or bruising. *Id.* at 48. He offered to drive her home and tell Mr. Karr to go elsewhere for the night, but she declined. *Id.* Instead, A.P. received treatment for her ovarian cyst and went home with Mr. Karr. *Id.* at 48-50. Her children spent the night at her parents' house. *Id.* at 49-50.

When they got home, Mr. Karr resumed his physical and verbal abuse. *Id.* at 50-51. He smacked A.P. across the face, ordered her to perform oral sex,

and forced himself into her mouth. *Id.* at 51-52. At one point he stopped and "lectured" her for several hours about the rules she needed to follow. *Id.* at 52-53. When they went to bed, Mr. Karr began looking for a pornographic video on his cell phone. *Id.* at 53-54. He told A.P. to put her hand on his penis, and she complied because "every time I told him no[,] I was either hit or forced to do something anyway[.]" *Id.* at 54. He later asked her to perform oral sex, which she did "[o]ut of fear of what would happen if [she] said no." *Id.* During this time, she saw a light behind her; she turned her head and saw it was his cell phone, and she "assumed he was taking a video." *Id.* at 55. Mr. Karr ejaculated on A.P., and they both fell asleep. *Id.* at 55.

The next morning, A.P. showered and went to her doctor's appointment. *Id.* at 56. Her doctor asked to know what had happened the night before with Mr. Karr. *Id.* at 57. A different police officer was called and drafted a probable cause affidavit for Mr. Karr's arrest. *Id.* at 57-59. A.P. underwent a forensic exam that revealed petechiae—small red dots indicative of burst blood—in the roof of her mouth. *Id.* at 60, 191. A forensic nurse later testified that these blood bursts could have resulted from oral sex. *Id.* at 192. A.P. also had tenderness and redness around her jaw, tenderness and redness on her scalp, and a cut on the inside of her lip. *Id.* at 191.

Mr. Karr was arrested later that day and charged with rape, domestic battery, strangulation, and intimidation. *Id.* at 132. Trial counsel's theory of defense was fabrication—that A.P. fabricated a story of domestic violence to get Mr. Karr out of her home and

out of her life. When her initial fabrication of domestic battery failed, she doubled down and fabricated an even more heinous story of sexual assault. *Id.* at 29-30. The trial court entered a directed verdict of not guilty as to intimidation. *Id.* at 243. The jury ultimately found Mr. Karr guilty on two counts of rape and one count of domestic battery. Dkt. 12-3 at 71.

B. Post-Trial Proceedings

Following the jury trial but before sentencing, trial counsel filed a motion to withdraw, and a new attorney, Jane Ruemmele, entered her appearance. *Id.* at 80; dkt. 12-7, p. 2.

On September 1, 2016, Ms. Ruemmele filed a motion for an appeal bond, which was denied. Dkt. 12-3, p. 84. She also filed a motion for a new trial, claiming that Mr. Karr had received ineffective assistance of trial counsel. Dkt. 12-7, pp. 3-6. The motion argued, among other things, that trial counsel was ineffective for (1) failing to investigate A.P.'s prescription medication use; (2) failing to investigate A.P.'s emergency room records; (3) failing to present evidence that A.P. sent Mr. Karr a text message about filling a hydrocodone prescription; (4) failing to present evidence that A.P. sent Mr. Karr a text message about receiving intravenous anesthesia in the emergency room; (5) failing to present evidence from the forensic analysis of Mr. Karr's cell phone that suggested he did not access a pornographic video during the second rape; and (6) failing to present evidence from the forensic analysis of Mr. Karr's cell phone that suggested he did

not record a video or take pictures of A.P. during the second rape.[2] *Id.*

At a hearing on the motion for a new trial, trial counsel testified that he did not fully investigate A.P.'s prescriptions because he did not know how to admit her prescriptions into evidence without calling Mr. Karr as a witness. *Id.* at 97. He also testified that he did not investigate A.P.'s records from the emergency room because he did not believe it would "show that [the sexual assaults] didn't happen." Dkt. 12-3 at 97. Ms. Ruemmele then asked the court to continue the hearing so she could have an opportunity to present additional evidence. *Id.* at 100. The court provided Ms. Ruemmele with an audio recording of the trial but did not provide a transcript. *Id.* at 105, 147.

A second hearing on the motion for a new trial was held on September 19, 2016. Ms. Ruemmele called four witnesses and entered eight exhibits into evidence. A.P. testified that she was being prescribed hydrocodone at the time of the assault. Dkt. 12-3, p. 120. A pharmacy receipt established that she had picked up hydrocodone from the pharmacy on May 5, 2015. Dkt. 12-4, p. 119. A.P. did not recall whether she had taken hydrocodone that night before the battery or the sexual assaults. *Id.* at 120. In a text message, A.P. indicated that she "got an IV for meds" at the hospital and was feeling much better. Dkt. 12-3, p. 124. Although A.P. could not recall at the post-trial hearing whether she received intravenous medication at the

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[2] Ms. Ruemmele raised additional grounds in her motion for a new trial which Mr. Karr has since abandoned.

emergency room, *see id.*, her medical records indicate that she received an intravenous injection of promethazine during her inpatient care on May 6, 2015.[3] Dkt. 12-4, p. 121-22.

Ms. Ruemmele also called Officer Matt McGovern of the Noblesville Police Department, who conducted a forensic examination of Mr. Karr's cell phone. Officer McGovern testified that the forensic analysis did not reveal that Mr. Karr accessed a pornographic video or recorded a video of A.P. before or during the second sexual assault. Dkt. 12-3, p. 139. He testified that in some cases a forensic exam may uncover cell phone data that has been deleted, but he could not exclude the possibility that the forensic analysis excluded relevant recordings that had been deleted. *Id.* at 141.

Following the presentation of evidence, Ms. Ruemmele argued that Mr. Karr had received ineffective assistance of trial counsel and was entitled to a new trial because the evidence that A.P. may have been under the influence of medication, and the evidence that Mr. Karr did not access pornographic videos on his cell phone or record a cell phone video of A.P., could have been used to impeach A.P.'s recollection of events. *Id.* at 151-59. The court denied the motion for a new trial. *Id.* at 160; dkt. 12-7, p. 7.

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[3] Promethazine is a central nervous system depressant. Side effects include sedation, confusion, disorientation, nightmares, delirium, and hallucinations. These side effects may be exacerbated when the medication is taken with other central nervous system depressants, such as hydrocodone. *See* https://www.accessdata.fda.gov/drugsatfda_docs/label/2004/07935s030lbl.pdf (last visited July 26, 2021).

The court sentenced Mr. Karr on November 4, 2016. On the two rape convictions, Mr. Karr received concurrent 10-year sentences at the Indiana Department of Correction (IDOC) followed by 5-year suspended sentences and probation. Dkt. 12-7, pp. 110-12. On the domestic battery conviction, Mr. Karr received a 2.5-year sentence at IDOC, consecutive to his sentences for rape. *Id.*

C. Direct Appeal and Post-Conviction Proceedings

Ms. Ruemmele continued to represent Mr. Karr on direct appeal. She filed a *Davis-Hatton* petition in the Indiana Court of Appeals seeking to stay the direct appeal and return to the trial court to file a petition for post-conviction relief.[4] Dkt. 12-8, p. 8. The Court of Appeals granted the petition. *Id.* Ms. Ruemmele raised the same ineffective assistance of counsel allegations in the petition for post-conviction relief as she raised in her motion for a new trial. Dkt. 12-8, pp. 24-27.

The trial court denied the petition for post-conviction relief, reasoning that the denial of the

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[4] In Indiana courts, ineffective assistance of trial counsel is ordinarily raised in collateral proceedings following direct appeal. An exception to this practice, the *Davis-Hatton* procedure, permits appellants to file a petition with the Indiana Court of Appeals to stay or dismiss the direct appeal without prejudice and allow the defendant to return to the trial court for post-conviction proceedings. If the trial court denies the petition for post-conviction relief, the defendant may raise direct appeal issues and collateral review issues in the same appellate proceeding. *See* dkt. 11-2, p. 2 n. 3 (citing *Talley v. State*, 51 N.E.3d 300, 302 (Ind. Ct. App. 2016); Ind. Appellate Rule 37(A)).

ineffective assistance of trial counsel claim in the motion for a new trial precluded Mr. Karr from relitigating the issue in a petition for post-conviction relief. *Id.* at 129-132.

Following the denial of post-conviction relief, Mr. Karr returned to the Indiana Court of Appeals. He appealed the denial of his motion for a new trial and the summary denial of his petition for post-conviction relief in the same appellate proceeding.

In his state appellate briefs, Mr. Karr repeatedly argued that A.P. may have received intravenous "anesthesia" at the emergency room. *See* Brief of Appellant, pp. 14, 19, 20, 28, 29, 33, 34, 37, 43; Reply Brief, pp. 10, 12; Petition to Transfer, pp. 7, 8. He did not refer to the injection of promethazine A.P. received and did not provide a citation to A.P.'s hospital records, even though these records had been admitted at the post-trial hearing. *See* dkt. 12-4, p. 121-22. The only evidence that Mr. Karr referred to in his appellate briefs to support the proposition that A.P. may have received intravenous medication at the emergency room was a text message she had sent stating that she received an "IV for meds so I'm feeling much better." *E.g.* Brief of Appellant, pp. 14, 19, 34 (citing Tr. Vol. III, p. 124).

The court affirmed the trial court in all respects. *See generally* dkt. 9-5.

Regarding the petition for post-conviction relief, the Indiana Court of Appeals reasoned that under Indiana law, a defendant who raises ineffective assistance of trial counsel in a post-trial motion is precluded from

raising ineffective assistance of trial counsel in a petition for post-conviction relief. *Id.* at 30-34.

Regarding the motion for a new trial, the Indiana Court of Appeals held that trial counsel was not deficient for failing to investigate A.P.'s prescription records or emergency room records because he made the "tactical" decision to devote his time elsewhere. Dkt. 9-5, p. 26, 28. The court also reasoned that Mr. Karr was not prejudiced by this failure because "A.P.'s testimony was clear and detailed, and there was no evidence that she did not remember the events in question," and because any inconsistencies in her testimony did not "undermine [A.P.'s] account of the incidents." *Id.* at 27, 29. Further, the court held there was no evidence that A.P. received "anesthesia" at the emergency room. *Id.* at 27. The only evidence that she received intravenous medication of any kind, the court reasoned, was her text message about receiving an "IV for meds," but the weight of that evidence was diminished by A.P.'s testimony at the post-trial hearing, where she also stated, "I'm not sure whether I actually received IV medications or if I just told him that." *Id.* at 28.

Mr. Karr also claimed that his trial attorney was ineffective by failing to present to the jury evidence that Officer McGovern conducted a forensic analysis of Mr. Karr's phone, but did not find any evidence that Mr. Karr had accessed pornographic videos, as A.P. had stated in her testimony, or that Mr. Karr had photographed or videotaped A.P. as she suspected. Dkt. 9-5 at 28-29. Mr. Karr argued that this evidence "showed that A.P.'s story could not be corroborated."

Id. at 29. The Indiana Court of Appeals disagreed, explaining that the injuries noted by the nurse were consistent with the reports A.P. made to police. In addition, the court of appeals stated that Mr. Karr was not prejudiced by his trial counsel's failure to present the cell phone evidence because even if "the jury was persuaded that A.P. was incorrect when she said that Karr was viewing pornography and recording her acts with his cell phone, such evidence would not necessarily undermine her account of the incidents." *Id.*

D. Federal Proceedings

In this case, Mr. Karr raises the same grounds for ineffective assistance of trial counsel that were raised in Indiana state courts as well as additional grounds for ineffective assistance of trial counsel that have not been presented to any Indiana state court. Mr. Karr concedes that these additional grounds are procedurally defaulted, but he argues the default was caused by the ineffective assistance of his post-trial counsel, Ms. Ruemmele, and therefore fall under the *Martinez-Trevino* exception to the rule of procedural default. Mr. Karr specifically argues that Ms. Ruemmele was ineffective for raising ineffective assistance of trial counsel in a post-trial motion and in a *Davis-Hatton* petition rather than waiting to file a petition for post-conviction relief following direct appeal. Mr. Karr argues that he is entitled to explore these grounds for relief at an evidentiary hearing.

II.
LEGAL STANDARD

A federal court may grant habeas relief only if the petitioner demonstrates that he is in custody "in violation of the Constitution or laws . . . of the United States." 28 U.S.C. § 2254(a). The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") directs how the Court must consider petitions for habeas relief under § 2254. "In considering habeas corpus petitions challenging state court convictions, [the Court's] review is governed (and greatly limited) by AEDPA." *Dassey v. Dittmann*, 877 F.3d 297, 301 (7th Cir. 2017) (en banc) (citation and quotation marks omitted). "The standards in 28 U.S.C. § 2254(d) were designed to prevent federal habeas retrials and to ensure that state-court convictions are given effect to the extent possible under law." *Id.* (citation and quotation marks omitted).

A federal habeas court cannot grant relief unless the state court's adjudication of a federal claim on the merits:

> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d).

"The decision federal courts look to is the last reasoned state-court decision to decide the merits of the case, even if the state's supreme court then denied discretionary review." *Dassey*, 877 F.3d at 302. "Deciding whether a state court's decision 'involved' an unreasonable application of federal law or 'was based on' an unreasonable determination of fact requires the federal habeas court to train its attention on the particular reasons—both legal and factual—why state courts rejected a state prisoner's federal claims, and to give appropriate deference to that decision[.]" *Wilson v. Sellers*, 138 S. Ct. 1188, 1191-92 (2018) (citation and quotation marks omitted). "This is a straightforward inquiry when the last state court to decide a prisoner's federal claim explains its decision on the merits in a reasoned opinion." *Id.* "In that case, a federal habeas court simply reviews the specific reasons given by the state court and defers to those reasons if they are reasonable." *Id.*

"For purposes of § 2254(d)(1), an unreasonable application of federal law is different from an incorrect application of federal law." *Harrington v. Richter*, 562 U.S. 86, 101 (2011). "A state court's determination that a claim lacks merit precludes federal habeas relief so long as fairminded jurists could disagree on the correctness of the state court's decision." *Id.* "If this standard is difficult to meet, that is because it was meant to be." *Id.* at 102. "The issue is not whether federal judges agree with the state court decision or even whether the state court decision was correct. The issue is whether the decision was unreasonably wrong under an objective standard." *Dassey*, 877 F.3d at 302. "Put another way, [the Court] ask[s] whether the state

court decision 'was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement.'" *Id.* (quoting *Richter*, 562 U.S. at 103). "The bounds of a reasonable application depend on the nature of the relevant rule. The more general the rule, the more leeway courts have in reaching outcomes in case-by-case determinations." *Schmidt v. Foster*, 911 F.3d 469, 477 (7th Cir. 2018) (en banc) (citation and quotation marks omitted).

III.
DISCUSSION

Mr. Karr is represented in this action by retained habeas counsel. In the amended habeas petition and accompanying memorandum of law, Mr. Karr raises ineffective assistance of trial counsel allegations that were also raised by Ms. Ruemmele in the post-trial motion for a new trial. *Compare supra* at 4 *with* dkt. 9 (amended petition) *and* dkt. 9-1 (brief in support of amended petition). These allegations—which were presented through a complete round of state court review and are fully exhausted—include trial counsel's failure to use exculpatory cell phone evidence and failure to investigate A.P.'s pharmacy and emergency room records. *Id.*

Mr. Karr also raises issues that were never presented in state court. These ineffective assistance of counsel allegations are procedurally defaulted. He argues that the Court should consider the defaulted allegations under the *Martinez-Trevino* exception.

A. Procedurally Defaulted Claims

The Constitution does not guarantee the right to counsel in state post-conviction proceedings, and an error by post-conviction counsel ordinarily does not excuse procedural default. *Coleman v. Thompson*, 501 U.S. 722, 755 (1991). A narrow, "equitable . . . qualification" to this rule applies when state law requires prisoners to raise claims of ineffective assistance of trial counsel "in an initial-review collateral proceeding," rather than on direct appeal. *Martinez v. Ryan*, 566 U.S. 1, 16-17 (2012). But the defaulted claims must have "some merit." *Id.* Also, the exception only applies to claims for ineffective assistance of trial counsel, not other constitutional claims. *See id.*; *Davila v. Davis*, 137 S. Ct. 2058, 2065 (2017). Indiana prisoners may avail themselves of the *Martinez-Trevino* exception where these conditions are met. *Brown v. Brown*, 847 F.3d 502, 513 (2017).

But before digging into whether the procedurally defaulted claims can be considered, the Court notes that the underlying allegations are not supported by citations to relevant facts in the record or cogent legal argument. The Court will set forth the defaulted allegations and add some context from the record before turning to the arguments about default.

1. Purported *Brady* Violations

The first set of defaulted allegations is presented under the heading "**Brady violation: Destroyed Evidence.**" Dkt. 9-1, p. 17; *see Brady v. Maryland*, 373 U.S. 83, 87 (1963) (prosecution's suppression of material favorable evidence violates due process). This

section focuses on the clump of hair that Mr. Karr pulled out of A.P.'s head prior to the emergency room visit and subsequent sexual assaults. A.P. showed this clump of hair to the police officer in the emergency room when she reported Mr. Karr's domestic batteries. Mr. Karr states that the police destroyed the clump of hair. He does not explain how the clump of hair was exculpatory.

At trial, a picture of the clump of hair was admitted into evidence. *See* dkt. 12-4, p. 11. Regarding the admission of this photograph, Mr. Karr argues that "[trial] [c]ounsel was ineffective for failing to object to the introduction of the hair sample as there was no corpus deliciti [*sic*] of the crime." *Id.* But Mr. Karr does not explain how an objection to the picture based on a theory that there is no concrete evidence that a crime was committed would have had merit. The hair itself was some evidence that Mr. Karr committed domestic battery against A.P.

Next, under the same *Brady* heading, Mr. Karr raises a Fourteenth Amendment sufficiency of the evidence argument. He states that "[t]he hair sample photo alone is constitutionally insufficient to allow a reasonable trier of fact to establish every element of **capital murder** – mens rea, actus reus, and causation – beyond a reasonable doubt." *Id.* at 19 (emphasis added). Mr. Karr was not convicted of capital murder—he was convicted of rape and domestic battery. Further, there was plenty of additional evidence that he committed these crimes, such as A.P.'s testimony that Mr. Karr raped and battered her and the forensic nurse's testimony describing A.P.'s

physical injuries, which she opined were consistent with oral rape. Similarly, Mr. Karr argues that his convictions should be vacated based on insufficient evidence because "the Supreme Court requires a conviction to rest on more than the uncorroborated confession of the defendant." *Id.*(citing *Opper v. United States*, 348 U.S. 84 (1954)). But Mr. Karr did not confess to these crimes, so the rule in *Opper* is does not apply.

In short, Mr. Karr raises a defaulted *Brady* claim and defaulted sufficiency of the evidence claims. Dkt. 9-1, pp. 17-20. These claims may not proceed under the *Martinez-Trevino* exception because the exception only applies to procedurally defaulted claims for ineffective assistance of trial counsel. *Davila*, 137 S. Ct. at 2065.

2. Defaulted ineffective assistance of trial counsel allegations

Mr. Karr presents six defaulted ineffective assistance of trial counsel allegations.

First, he argues that "[t]rial counsel failed to object to the improper jury instruction, where the jury instruction failed to state that witness credibility may be impeached by prior inconsistent statements." Dkt. 9-1, p. 20. Mr. Karr does not identify which jury instruction he is talking about, nor does he elaborate on why the failure to object amounts to ineffective assistance.

Second, Mr. Karr argues that "[t]rial counsel failed to impeach a witness foundational to the prosecution's case, Nokia Bowens, who was a healthcare provider that treated A.P. after the alleged incident that gave

rise to Defendant-Petitioner's original conviction." *Id.* He does not state how trial counsel should have impeached this witness.

Third, Mr. Karr argues that "[t]rial counsel failed to order DNA testing of certain hair specimens used as proof the alleged victim A.P. had her hair pulled by the Defendant-Petitioner." *Id.* He does not explain how a DNA test of the hair would have aided Mr. Karr's defense—he never disputed that the hair was A.P.'s. Also, the petition alleges that the hair was destroyed by the police, so it is not clear how trial counsel could have ordered DNA testing of the hair. At trial, only a photo of the hair was admitted into evidence. *See* dkt. 12-4, p. 2.

Fourth, Mr. Karr argues that "[t]rial counsel failed to object to a violation of the Defendant-Petitioner's protection from double jeopardy under the Indiana Constitution." Dkt. 9-1, p. 20. He does not explain the basis for this alleged double jeopardy violation.

Fifth, Mr. Karr argues that "[t]rial counsel failed to object to the State of Indiana's unconstitutionally vague jury charge." *Id.* at 21. He does not identify this jury charge or explain how it was unconstitutionally vague.

Sixth, Mr. Karr argues that "[t]rial counsel failed to object to improper hearsay included in the jury charge concerning the testimony of Amy Summerfield." *Id.* He does not identify the allegedly improper hearsay. Amy Summerfield did not testify in these proceedings. Indeed, the name "Amy Summerfield" does not appear

anywhere in the transcript for the state court proceedings.

To determine whether any of these procedurally defaulted ineffective assistance of trial claims have "some merit," courts are guided by the two-prong approach set forth in *Strickland* and its progeny. *Brown*, 847 F.3d at 515. To avoid procedural default, the petitioner must make a "substantial showing" of trial counsel's deficient performance and the prejudice petitioner suffered because of this deficient performance. *Id.* "Substantiality is a threshold inquiry; full consideration of the merits is not required." *Id.*

The defaulted ineffective assistance of counsel allegations do not meet this threshold standard. The allegation that trial counsel was ineffective for failing to raise a corpus delicti objection to the admission of a photograph is plainly meritless, as the rule of corpus delicti concerns the admissibility of extrajudicial confessions and not photographs. *See Winfield v. Dorethy*, 956 F.3d 442, 457 (7th Cir. 2020); *see also Shinnock v. State*, 76 N.E.3d 841, 843 (Ind. 2017) ("The purpose of the corpus delicti rule is to prevent the admission of a confession to a crime which never occurred."). Further, A.P.'s testimony that Mr. Karr raped and battered her was evidence that the crimes occurred.

Mr. Karr devotes only a single sentence to each of the remaining defaulted ineffective assistance allegations. None of these allegations are supported by a citation to the record or controlling legal authority. Mr. Karr argues that trial counsel was ineffective for failing to object to a jury instruction, but he fails to

identify the instruction. He argues that trial counsel was ineffective for failing to impeach a witness, but he does not describe how the witness should have been impeached. He argues that trial counsel was ineffective for failing to order DNA testing of hair, but he fails to explain how the DNA test would have benefited his defense. He argues that trial counsel was ineffective for failing to raise a double jeopardy objection, but he does not explain the basis for this double jeopardy objection. He argues that trial counsel was ineffective for failing to object to an unconstitutionally vague jury charge, but he does not identify the jury charge or explain how it was unconstitutionally vague. Finally, he argues that trial counsel was ineffective for failing to object to improper hearsay from a person, Amy Summerfield, whose name does not appear in the transcript.

To be sure, a substantial showing does not require proof of success on the merits. But the defaulted ineffective assistance of trial counsel allegations that Mr. Karr seeks to advance are wholly undeveloped and, in some cases, divorced from any legal authority or support in the record. In the absence of allegations with "some merit," the *Martinez-Trevino* exception to procedural default does not apply. *Martinez*, 566 U.S. at 16-17. And under these circumstances, Mr. Karr cannot show that he received ineffective assistance of counsel from Ms. Ruemmele that deprived him of the opportunity to raise these meritless allegations.

Mr. Karr also argues that by alleging ineffective assistance of trial counsel in a post-judgment motion and in a *Davis-Hatton* petition, Ms. Ruemmele precluded him from further expanding the record or

raising additional ineffective assistance of counsel allegations in state court. Dkt. 9-1, pp. 9-15. Again, Ms. Ruemmele is not ineffective for failing to raise meritless allegations regardless of the procedural posture of the case. Thus, assuming *arguendo* that Ms. Ruemmele should have waited until after the direct appeal to raise ineffective assistance of trial counsel, Mr. Karr has not shown that he was prejudiced by this error.

Accordingly, the procedurally defaulted claims may not proceed under the *Martinez-Trevino* exception, and Mr. Karr's request for relief on these grounds is **DENIED**.

B. Remaining Claims

Mr. Karr's remaining claims are: (1) whether trial counsel was ineffective for failing to investigate A.P.'s pharmacy and emergency room records; and (2) whether trial counsel was ineffective for failing to present exculpatory cell phone evidence.

For a petitioner to establish that "counsel's assistance was so defective as to require reversal," he must show (1) that counsel rendered deficient performance that (2) prejudiced the petitioner. *Strickland*, 466 U.S. at 687. With respect to the performance requirement, "[t]he proper measure of attorney performance remains simply reasonableness under prevailing professional norms." *Wiggins v. Smith*, 539 U.S. 510, 521 (2003) (quoting *Strickland*, 466 U.S. at 688).

"[T]o establish prejudice, a 'defendant must show that there is a reasonable probability that, but for

counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.'" *Id.* at 534 (quoting *Strickland*, 466 U.S. at 694). A petitioner who raises ineffective assistance of counsel must overcome a "strong presumption that counsel was effective." *U.S. v. Pergler*, 233 F.3d 1005, 1008-09 (7th Cir. 2000).

1. Failure to investigate or present evidence about A.P.'s medications

Mr. Karr argues that trial counsel's failure to investigate A.P.'s medical records and prescription history, and his failure to present A.P.'s text message stating she received an "IV for meds" at the emergency room, deprived him of the effective assistance of counsel.

In *Strickland*, the Supreme Court provided the following guidance for claims that trial counsel was ineffective for failing to conduct a thorough pretrial investigation:

> "[S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation. In other words, counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary. In any ineffectiveness

> case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments."

Wiggins, 539 U.S. at 521-22 (quoting *Strickland*, 466 U.S. at 690-91). In assessing counsel's investigation, courts must conduct an "objective review of [counsel's] performance, measured for reasonableness under prevailing professional norms, which includes a context-dependent consideration of the challenged conduct as seen from counsel's perspective at the time." *Wiggins*, 539 U.S. at 523 (internal quotations and citations omitted).

Here, even if Mr. Karr showed that the Indiana Court of Appeals unreasonably applied *Strickland* and *Wiggins* in finding there was no deficient performance, he would still have to show that the Indiana Court of Appeals' no-prejudice finding was "contrary to, or involved an unreasonable interpretation of, clearly established Supreme Court precedent"; or that the decision "was based on an unreasonable determination of fact in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d). *See Wetzel v. Lambert*, 565 U.S. 520, 525 (2012) ("*each* ground supporting the state court decision [must be] examined and found to be unreasonable.")

To establish prejudice under the *Strickland* test, Mr. Karr must demonstrate a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different, such that the proceedings were fundamentally unfair or unreliable. *United States v. Jones*, 635 F.3d 909, 915

(7th Cir. 2011); *Fountain v. United States*, 211 F.3d 429, 434 (7th Cir. 2000); *Adams v. Bertrand*, 453 F.3d 428, 435 (7th Cir. 2006). "A reasonable probability is defined as one that is sufficient to undermine confidence in an outcome." *Adams*, 453 F.3d at 435 (citing *Strickland*, 466 U.S. at 694); *see also Stickler v. Greene*, 527 U.S. 263, 289-90 (1999) (in assessing prejudice on a *Brady* claim, "[t]he question is not whether [the petitioner] would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence.").

The Indiana Court of Appeals correctly identified this legal standard. Dkt 11-2, pp. 24-25. The court then determined "there is no evidence in this record that A.P. was given 'anesthesia' at any point." *Id.* at 27 (citing Brief of Appellant at 33, 43). This was a reasonable factual determination. There is no evidence that A.P. received "anesthesia" at the emergency room.

To be sure, A.P. did receive an injection of promethazine on the day she went to the emergency room, *see* dkt. 12-4, pp. 121-22, but promethazine is not an anesthetic. In his appellate briefs, Mr. Karr referred only to "anesthesia" that A.P. may have received at the emergency room. *See* Brief of Appellant, pp. 14, 19, 20, 28, 29, 33, 34, 37, 43; Reply Brief, pp. 10, 12; Petition to Transfer, pp. 7, 8. He did not argue that she received promethazine or another intravenous medication. He did not even direct the court of appeals, or this Court for that matter, to A.P.'s hospital records, which showed her list of in-patient medications. The Indiana

Court of Appeals was not required to sniff out facts buried in the record that may have benefited Mr. Karr's ineffective assistance of trial counsel claim, and its failure to do so does not make its factual determinations about A.P.'s medication history unreasonable. *See Felton v. Bartow*, 926 F.3d 451, 467 n. 5 (7th Cir. 2019) ("[j]udges are not like pigs, hunting for truffles buried in the record").

The court of appeals then reasonably applied the prejudice standard from *Strickland* to its reasonable factual determinations about A.P.'s medication history. The court rightly observed that A.P.'s testimony "was clear and detailed, and there was no evidence suggesting she did not remember the events in question. She was consistent with what she told [police] at the E.R. that night, and there was no evidence that she exhibited signs of impairment." Dkt. 9-5 at 27. Given these facts, the court held that Mr. Karr was not prejudiced by trial counsel's failure to investigate A.P.'s medication history or introduce into evidence her text message about receiving an "IV for meds" at the emergency room.

Mr. Karr has failed to show that the Indiana Court of Appeals' no-prejudice determination was based on an unreasonable application of existing Supreme Court precedent or an unreasonable factual determination. Accordingly, his request for relief on these grounds is **DENIED**.

2. Failure to Present Forensic Cell Phone Analysis

Mr. Karr has not established that the Indiana Court of Appeals unreasonably found that he was not prejudiced when trial counsel did not admit the forensic analysis of his cell phone.

At trial, A.P. testified that before the second sexual assault, Mr. Karr "started looking up, looking, searching for a pornographic video to watch." Dkt. 12-2, p. 54. She did not testify that Mr. Karr accessed a pornographic video on his cell phone at that time. Similarly, although A.P. testified at trial that she "assumed [Mr. Karr] was taking a video" of the second sexual assault, *see id.* at 55, this was only an assumption based on the fact that Mr. Karr was shining his cell phone light on her at that time. Finally, while the forensic analysis did not confirm that Mr. Karr had accessed a pornographic video on his cell phone or taken a video around the time of the second sexual assault, the officer testified at the post-trial hearing that he could not exclude the possibility that this data had been deleted before the phone was seized by law enforcement. Dkt. 12-3, p. 141.

Once again, the Indiana Court of Appeals reasonably applied the prejudice standard from *Strickland* to its reasonable factual determinations about the forensic evidence. The court rightly observed that Mr. Karr was not prejudiced by his trial counsel's failure to present the cell phone evidence because even if "the jury was persuaded that A.P. was incorrect when she said that Karr was viewing pornography and recording her acts with his cell phone, such evidence

would not necessarily undermine her account of the incidents." Dkt. 9-5 at 29. The forensic analysis of Mr. Karr's cell phone does not cast meaningful doubt on A.P.'s trial testimony. At most, the forensic analysis shows that her assumption that Mr. Karr shined his cell phone light on her to record a video was mistaken. Even then, the forensic analysis was not conclusive because it could not rule out the possibility that Mr. Karr deleted a video recording before the cell phone was seized by law enforcement.

Mr. Karr has failed to show that the Indiana Court of Appeals' no-prejudice determination was based on an unreasonable application of existing Supreme Court precedent or an unreasonable factual determination.

Accordingly, his request for relief on this ground is **DENIED**.

IV.
CERTIFICATE OF APPEALABILITY

"A state prisoner whose petition for a writ of habeas corpus is denied by a federal district court does not enjoy an absolute right to appeal." *Buck v. Davis*, 137 S. Ct. 759, 773 (2017). Instead, a state prisoner must first obtain a certificate of appealability. *See* 28 U.S.C. § 2253(c)(1). "A certificate of appealability may issue . . . only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). In deciding whether a certificate of appealability should issue, "the only question is whether the applicant has shown that jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the

issues presented are adequate to deserve encouragement to proceed further." *Buck*, 137 S. Ct. at 773 (citation and quotation marks omitted).

Rule 11(a) of the Rules Governing Section 2254 Proceedings in the United States District Courts requires the district court to "issue or deny a certificate of appealability when it enters a final order adverse to the applicant." Because jurists of reason could disagree with the Court's conclusion that the Indiana Court of Appeals did not unreasonably apply the law in concluding that Mr. Karr was not prejudiced by trial counsel's failure to present evidence of A.P.'s medications, a certificate of appealability is **granted** as to Mr. Karr's claim that trial counsel was ineffective.

V.
CONCLUSION

Mr. Karr's petition for a writ of habeas corpus is **denied**. A certificate of appealability on his claim for ineffective assistance of counsel, as it relates to his counsel's failure to present evidence of the victim's medications, is **granted**.

Final Judgment in accordance with this decision shall issue.

SO ORDERED.

Date: 7/28/2021

/s/ James Patrick Hanlon
James Patrick Hanlon
United States District Judge
Southern District of Indiana

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APPENDIX C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

No. 1:19-cv-01973-JPH-TAB

[Filed: July 28, 2021]

DONALD G. KARR, JR.,

Petitioner,

v.

KEITH BUTTS,

Respondent.

FINAL JUDGEMENT

The Court now enters final judgment. The petition for a writ of habeas corpus is **denied**.

Date: 7/28/2021

Roger A.G. Sharpe, Clerk of Court

By: /s/ Pam Pope
Deputy Clerk

/s/ James Patrick Hanlon
James Patrick Hanlon
United States District Judge
Southern District of Indiana

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APPENDIX D

IN THE
COURT OF APPEALS OF INDIANA

Court of Appeals
Case No. 29A02-1707-CR-1502

[Filed: January 31, 2018]

Donald G. Karr, Jr.,	)
	)
Appellant-Defendant/Petitioner,	)
	)
v.	)
	)
State of Indiana,	)
	)
Appellee-Plaintiff/Respondent.	)

MEMORANDUM DECISION

ATTORNEY FOR APPELLANT

Jane H. Ruemmele,
Hayes Ruemmele, LLC
Indianapolis, Indiana

ATTORNEYS FOR APPELLEE

Curtis T. Hill, Jr.
Attorney General of Indiana

James B. Martin
Deputy Attorney General
Indianapolis, Indiana

Appeal from the
Hamilton Superior Court

The Honorable
William J. Hughes, Judge
The Honorable
Wayne A. Sturtevant, Judge

Trial Court Cause Nos.
29D03-1505-F6-4047
29D05-1703-PC-1576

Kirsch, Judge

[1] Following a jury trial, Donald G. Karr, Jr. ("Karr") was convicted of Level 6 felony domestic battery committed in the presence of a child less than sixteen years of age[1] and two counts of

[1] *See* Ind. Code § 35-42-2-1.3.

> Level 3 felony rape.[2] The trial court sentenced Karr to two and one-half years for the battery conviction. For the two rape convictions, the trial court imposed concurrent fifteen-year sentences, with five years suspended on each, and ordered the rape sentences to be served consecutive to the battery sentence, for an aggregate executed sentence of twelve and one-half years. Karr filed a motion for a new trial, alleging ineffective assistance of trial counsel, and the trial court denied his motion. Karr appealed, but then sought a remand to the trial court in order to pursue post-conviction relief. We granted his request and dismissed his appeal without prejudice pursuant to *Davis v. State*, 267 Ind. 152, 368 N.E.2d 1149 (1977) and *Hatton v. State*, 626 N.E.2d 442 (Ind. 1993), allowing Karr to later file a new notice of appeal and raise both the issues that he would have raised in the original appeal along with new issues created by the post-conviction court's ruling on the petition for post-conviction relief.[3] *Appellant's App. Vol. II* at 33.

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[2] *See* Ind. Code § 35-42-4-1(a)(1).

[3] This procedure is referred to by Indiana courts as a *Davis/Hatton* procedure and involves a termination or suspension of a direct appeal already initiated, upon appellate counsel's motion for remand or stay, to allow a post-conviction relief petition to be pursued in the trial court. *Talley v. State*, 51 N.E.3d 300, 302 (Ind. Ct. App. 2016), *trans. denied*; *see also* Ind. Appellate Rule 37(A) ("At any time after the Court on Appeal obtains jurisdiction, any party may file a motion requesting that the appeal be dismissed without prejudice or temporarily stayed and the case remanded to

[2] Karr filed a petition for post-conviction relief, alleging claims of ineffective assistance of trial counsel, and the trial court denied Karr's petition, finding that it was barred by *res judicata*. Karr initiated this consolidated appeal and presents the following reordered and restated issues:

> I. Whether sufficient evidence supports Karr's domestic battery conviction and two rape convictions;
>
> II. Whether the trial court abused its discretion in sentencing Karr;
>
> III. Whether the trial court erred when it found that Karr received effective assistance from trial counsel and, therefore, denied Karr's request for a new trial; and
>
> IV. Whether the post-conviction court erred when, by summary denial, it denied Karr's petition for post-conviction relief on the basis that his claims of ineffective assistance of counsel were barred by *res judicata*.

[3] We affirm.

---

the trial court . . . for further proceedings. The motion must be verified and demonstrate that remand will promote judicial economy or is otherwise necessary for the administration of justice."). The procedure is useful where a defendant needs to develop an evidentiary record to support a claim of ineffective assistance of trial counsel. *Talley*, 51 N.E.3d at 303.

Facts and Procedural History

[4] In May 2015, Karr and his then-girlfriend, A.P., along with her three children ("Children"), ages six, five, and three years old, were living in a residence that Karr and A.P. leased. Karr and A.P. shared a bedroom that was located off the same hallway as a bedroom that the three Children shared. On the evening of May 5, 2015, A.P. was home with the Children, and she put them to bed around 8:00 p.m. As A.P. left the Children's room and closed the door behind her, Karr came home from work. He was "agitated" and asked her what she was doing. *Tr. Vol. II* at 35. He walked from the front door to the back door and looked outside, and he accused her of having someone in the house before he got home. She told him that was not the case, and he became angry and took her phone from her as she sat on the living room couch, which according to A.P. was positioned right next to the opening to the hallway, leading to the Children's bedroom. Karr believed that A.P. was lying, and his voice got louder as he accused her. He asked her "to deny it again[,]" and when she did, he hit her across the cheek with an open hand. *Id.* at 38. He pulled her off the couch by her hair, and she fell to the floor. Karr then told A.P. to get up, saying that she was going to "suck his dick" every day and every night. *Id.* at 39.

[5] At some point, A.P.'s oldest child ("Child") came out of her bedroom, and as she opened the door,

Karr went into the hallway and confronted her. Child said she needed to go to the bathroom, and Karr told her "no" and to go back to bed. A.P. heard Child begin to cry as she went back into the bedroom, and Karr closed the door. He returned to A.P., who had gotten herself up from the floor and was on the couch. He unbuckled his pants, and A.P. put her feet up "and tried to kick him away" from her. *Id.* at 40. At that point, A.P. began to have abdominal pains from a preexisting ovarian cyst condition, so A.P. told Karr that she needed to call her doctor.

[6] He initially refused, but he eventually agreed to let her call her doctor or go to the emergency room. After A.P. vomited in the bathroom, Karr woke the Children and told them they were all leaving and taking A.P. to the hospital. At A.P.'s request, they dropped the Children off at A.P.'s parents' home on the way. When A.P. was asked at trial if, when they dropped off the Children at her parents' house, she had told her parents that Karr had beaten her and pulled her hair, A.P. explained that she did not, because at that time her "main focus was getting the kids away from [Karr] and . . . getting them someplace safe." *Id.* at 42. She feared that saying anything would put herself and the Children in "more danger." *Id.* Once at the hospital, she and Karr walked to the registration area, and A.P. suggested to him that he go and park the car, and when she "felt he was out of earshot," she told the nurse, "I need you to get a police officer because he's hitting me." *Id.* at 43- 44. Karr returned, and

they sat together in an examination room, but then the nurse told Karr that A.P. needed an ultrasound and he could not go, so she left and went to an ultrasound room, where Officer Craig Denison ("Officer Denison") of the Noblesville Police Department ("NPD") was waiting for her.

[7] A.P. told Officer Denison what had happened, and he took some pictures. She also removed from her pocket and showed Officer Denison hairs that had come loose and fallen out of her head when she was on the couch and Karr was telling the Child to go back to bed. Officer Denison advised A.P. that he did not believe he could make an arrest of Karr at that time because there was no immediate bleeding or bruising, but he offered to speak to Karr and to drive A.P. home or wherever she needed to go. Believing that Karr had calmed, and deciding "it would be better to just go home and . . . deal with everything the next morning[,]" A.P. went back home with Karr. *Id.* at 48-49. A.P. called her parents to let them know "what was going on" with her trip to the emergency room,[4] and because it was so late, after midnight, the Children stayed with A.P.'s parents. *Id.* at 49.

[8] When A.P. and Karr arrived home, she went into the bathroom to get ready for bed and put on pajamas, and he went to the kitchen. He became angry that she had purchased "the

[4] We note that, after talking to Officer Denison, but before leaving the hospital, A.P. received an ultrasound associated with the cysts.

wrong orange juice" and told her that she "needed to be doing what he told [her] to do." *Id.* at 51. He hit her across her face, and she fell on the hallway floor. Karr took off his pants and underwear and told her she was going to "suck his dick." *Id.* at 52. He forced himself into her mouth, but at some point stopped and "lectured" her about the rules he was setting for her. *Id.* at 53. Eventually, Karr said he wanted to go to bed, so A.P. got into bed. When he came into bed, he said he needed to masturbate. According to A.P., he searched his phone for a pornographic video and told her to put her hand on his penis. She complied because "every time I told him no[,] I was either hit or forced to do something anyway[.]" *Id.* at 54. He later asked her to perform oral sex, which she did "[o]ut of fear of what would happen if I said no." *Id.* During this time, she saw a light behind her; she turned her head and saw it was his cell phone "so I assumed he was taking a video." *Id.* at 55. Karr ejaculated on A.P., and both of them fell asleep.

[9] Karr went to work the next day, and, after she showered, A.P. went to a doctor's appointment. At her appointment, the doctor had already received record of A.P.'s emergency room visit. The doctor asked A.P. to tell her "what had happened," referring to the situation with Karr. Officer Michael Boudreau ("Officer Boudreau") of NPD came and met A.P. at the doctor's office, and at A.P.'s request, an advocate from Prevail, a victim's assistance agency, also met with A.P.

to help her prepare a request for a protective order. A.P did not go home after the appointment because she was admitted to the hospital for pain associated with the ovarian cysts. A.P. called her parents and asked her mother to take the Children "someplace away from the house" and asked her father to pick up her car from the hospital. *Id.* at 58. Meanwhile, Karr and A.P. exchanged some casual text messages throughout the day. However, Karr became angry when A.P. stopped responding to him. Officer Boudreau prepared a probable cause affidavit, and Karr was arrested during a traffic stop.

[10] Before being released from the hospital, A.P. met with a forensic nurse, who examined her, and took pictures of areas where Karr had hit A.P. and pulled her hair. After being discharged, A.P. met with Detective Michael Haskett ("Detective Haskett") of NPD. Within the next week or two, A.P. and her Children were interviewed by Indiana Department of Child Services ("DCS").

[11] On May 28, 2015, the State filed an amended information charging Karr with Counts 1 through 5, as follows: Count 1, Level 6 felony domestic battery; Count 2, Level 3 felony rape; Count 3, Level 3 felony rape; Count 4, Level 6 felony strangulation; and Count 5, Level 6 felony intimidation. A jury trial was conducted on the charges in August 2016.

[12] A.P. was the first witness. She described the layout of the home where she, Karr, and the Children resided. She said that the bedroom she shared with Karr and the Children's bedroom were both located off "a very small hallway," were "maybe six feet apart" in the hall, and, generally, she would be able to hear the Children talking in their room after she put them to bed in the evenings. *Tr. Vol. II* at 34. As to the night in question, she described that Karr believed she had secretly had someone else in the house right before he got home and sent the person out the front door as he came in the back. He became very angry at her, and, after he first hit her, he "continued to hit [her] several times again, both with an open hand and with a closed fist" on both sides of her face and on her head. *Id.* at 39. She said that when he pulled her off the couch by her hair, "It hurt a lot. I could feel and hear hair ripping out of my head." *Id.* A.P. said that she was on the floor, kneeling in front of the couch, when her oldest Child came out of her room, and Karr went and told Child to go back to bed. A.P. described that Child's voice sounded "timid and a little scared." *Id.* at 40. A.P. explained that she went home from the hospital later that night with Karr because "I was looking for some kind of protection and if he wasn't going to be arrested at that point then I felt that my only other course of action would be to file for a protective order and I wasn't going to be able to do that until the next morning[.]" *Id.* at 49.

[13] A.P. stated that the trip home from the hospital was uneventful, but that, when they got home, Karr became angry that she got the wrong juice and demanded that she perform oral sex on him. When she tried to avoid it, he threatened to carve "C-U-N-T" into her forehead. *Id.* at 52. She described that she was crying and choking and gagging when he forced his penis in her mouth. *Id.*

[14] On cross examination, defense counsel asked A.P. why she went home with Karr that night from the hospital after he had beaten her and why she did not leave once he fell asleep. She explained that she went home with him so that he would not know she had told her story at the hospital or to a police officer and that she planned to seek a protective order the next day. She said she did not leave after he fell asleep because she was afraid of waking him or of him following her. She did not go to a neighbor's house because she did not know her neighbors. She was asked, and denied, that at any time she removed her hair from either the shower drain or her hair brush.

[15] Among other witnesses, Officers Denison and Boudreau also testified for the State. Officer Denison testified to meeting with A.P. at the hospital when she was in the E.R. He did not observe any injuries to her at that time, but noted that "sometimes bruises, scratches, abrasions, swelling doesn't show up until a later date." *Id.* at 154. Officer Denison characterized

her demeanor as serious, but she was "not frantic or crying." *Id.* at 147. According to Officer Denison, A.P. did not want him to speak with Karr or her Children, telling him that she "didn't believe that her kids had witnessed any of the actual assault that occurred," and "it was just the verbal part that they had witnessed or heard." *Id.* at 150. He stated that A.P. seemed fearful or had concerns about possessing the Prevail documents that he had given her, which he found was not unusual in cases of domestic abuse. A.P. told Officer Denison she planned to obtain a protective order the next day.

[16] Officer Boudreau testified that he was dispatched to the hospital on May 6, 2015, to take a report of a sexual assault. A Prevail representative was also present during his interview with A.P. He did not observe any injuries to A.P. and did not collect evidence from her. He was aware of a sexual assault examination being conducted later in the day, and the following day, Officer Boudreau wrote a probable cause affidavit for Karr's arrest.

[17] Forensic nurse examiner Nakia Bowens ("Bowens") testified that she examined A.P. on May 7, 2015. She described A.P. as calm at times, but "tearful" at other times. *Id.* at 182. She observed "redness and tenderness" in A.P.'s scalp area and tenderness on her jawbone and redness to her chin, and an injury to the inside of her lip. *Id.* at 185-86, 190-91, 203. She also had petechiae, or "small red dots that indicate

blood has burst," on the roof of her mouth. *Id.* at 191. One of the causes of petechiae is blunt force trauma. *Id.* at 191-92. Bowens testified that a penis striking the roof of the mouth could cause petechiae. Pictures taken of A.P. by Bowens were admitted into evidence.

[18] Detective Haskett met with A.P. on May 8 at the police station to get a formal statement from her. He described her demeanor as "collected and matter-of-fact," but tearful at times. *Id.* at 215. He did not observe any injuries to her at that time. *Id.* at 221. Sergeant Matt McGovern ("Officer McGovern") of NPD testified that, pursuant to a search warrant, he conducted a forensic analysis of Karr's cell phone. Officer McGovern testified that "sometimes" law enforcement is able to retrieve deleted content, but it depends on the make and model of the cell phone. *Id.* at 226.

[19] At the conclusion of the presentation of the State's evidence, Karr moved for and was granted a directed verdict on Count 5, Level 6 felony intimidation. *Id.* at 242. Thereafter, the defense presented the testimony of DCS employee Marshall Despain ("Despain"). In May 2015, Despain was an assessment worker, who was assigned to investigate allegations of domestic violence between A.P. and Karr and determine "how it affected the [C]hildren." *Tr. Vol. III* at 3. Despain testified to interviewing A.P. in May 2015, then consulting with law enforcement, reviewing reports, and

interviewing the Children. He also tried to contact Karr for an interview. DCS ultimately determined that the report "was unsubstantiated against both [A.P.] and [] Karr[,]]" meaning that there was no evidence that the Children were affected or had "any knowledge of anything every happening between them[.]" *Id.* at 2-3. He explained that his purpose was not to determine if something happened between the parents; he was to assess if the Children were affected and to make sure they were safe.

[20] At the conclusion of the trial, the jury returned verdicts of guilty on Count 1, Level 6 felony domestic battery, Count 2, Level 3 felony rape, and Count 3, Level 3 felony rape; it returned a verdict of not guilty on Count 4, strangulation.

[21] The parties appeared on September 2, 2016, for a sentencing hearing, but by that point, Karr's trial counsel, Joshua Taylor ("Taylor"), had filed a motion to withdraw. Karr appeared in person at the September 2 hearing, along with Taylor and replacement defense attorney Jane Ruemmele ("Ruemmele"), who sought leave to file an appearance for Karr and a continuance of the sentencing hearing. *Id.* at 78. The trial court granted both Taylor's request to withdraw and Karr's request to continue the sentencing hearing.

[22] The day before the scheduled September 2 sentencing hearing, Karr also had filed a motion for a new trial based upon ineffective assistance of trial counsel. Ruemmele noted to the court at

the September 2 hearing that Karr's ineffective assistance claims were still preliminary and would later be supplemented because Karr did not yet have a copy of the trial transcript or A.P.'s medical records, including any medications A.P. was taking or had received at the E.R., which information Ruemmele argued would have been relevant to A.P.'s memory of the alleged incidents, and thus, the ineffective assistance claims would be supplemented upon review of those materials. On September 2, Karr proceeded to present Taylor's testimony relative to Karr's ineffective assistance of counsel claims as alleged in his motion for a new trial. Among other things, Taylor testified as to what medical records he requested or did not request, what witnesses he called or did not call, and why he did not explore alleged drug use by A.P., explaining that his actions were based upon strategic decisions and assessments. He also discussed having made a motion in limine, making certain objections, and his decision not to request a mistrial at one point because he believed "things were going about as well as they could have at that point," and Taylor believed "there was a decent chance the jury would find Mr. Karr not guilty[.]" *Id.* at 97. Taylor testified that, both before and during trial, Karr and Taylor had discussed whether to have Karr testify and the risks associated with him doing so, noting his concern that having Karr testify would provide a chance for "fairly harmful" evidence to come into evidence. *Id.* at 99. In closing the hearing, the trial court

directed that a trial transcript be prepared for Karr's use and review in preparing for the hearing on a motion for a new trial, and took the motion for a new trial under advisement.

[23] On September 19, 2016, the trial court conducted an additional evidentiary hearing on Karr's ineffective assistance of trial counsel claims, as alleged in his motion for a new trial, presenting testimony of: A.P.; a male neighbor; Officer McGovern; and Taylor. A.P. was questioned about what prescriptions she had filled on or before May 5, the night in question, and if she received intravenous medications while at the E.R. During her testimony, A.P. stated that she was not impaired before or during the incident and any medications taken did not affect her ability to recall the events. *Id.* at 135. When on cross-examination Karr's counsel asked A.P. why she showered before being examined by the forensic nurse, A.P. explained, "I was trying to carry on with the day as if it was normal. Also had no expectation of being examined by anyone for anything. At that time my understanding was that nothing was going to be done and my only plan for the day was to file for a protective order." *Id.* at 132. Officer McGovern, who had conducted a forensic analysis of Karr's cell phone and recovered videos, searches, texts and other information from it, testified that he did not find any evidence of searches or viewing of pornographic videos, as A.P. had testified to at trial, and he found no videos of A.P. performing sex acts,

contrary to A.P.'s testimony that she thought Karr was videotaping her when she saw his cell phone light behind her. Upon cross-examination by the State, Officer McGovern testified that he is not always able to recover deleted content from a phone. *Id.* at 141.

[24] At the conclusion of the hearing, the trial court denied Karr's motion for a new trial, and it also issued a written order, stating, "The Court being duly advised finds that the Defendant, has failed to establish that trial counsel Joshua Taylor was ineffective at trial by either error or omission or commission and has further failed to establish that any conduct by Mr. Taylor prejudiced the case of the Defendant." *Appellant's App. Vol. III* at 7.

[25] In November 2016, the trial court held a sentencing hearing, sentenced Karr to two and one-half years on the battery conviction and to fifteen years with five years suspended for each rape conviction, and ordered the sentences for the rape convictions to run concurrent with one another and consecutive to the term imposed on the battery conviction. Karr timely filed a notice of appeal.

[26] On January 6, 2017, Karr filed a *Davis/Hatton* petition with this court, seeking to suspend his initial appeal and pursue post-conviction remedies. We granted his request, and, on March 3, 2017, Karr filed a petition for post-conviction relief, alleging that Taylor, his trial counsel, was ineffective by: (1) failing to use

phone records that showed that Karr's phone did not contain photos or videos of A.P. performing oral sex, although A.P. testified that Karr may have been photographing or videotaping her; (2) failing to use phone records that showed that Karr's phone did not contain evidence that he accessed pornographic sites, although A.P. had testified that he searched for pornography when she told him she did not want to engage in oral sex; (3) failing to obtain medical records of A.P. to discover whether she had been administered anesthesia at the E.R. in the hours prior to the alleged acts that formed the basis of the rape charges; (4) failing to obtain A.P.'s prescription records to determine if she had filled a prescription for narcotics the same day as the alleged battery; (5) failing to offer during trial text messages showing conversations between Karr and A.P. that indicated A.P had filled a prescription for Narco on May 5, 2015; (6) failing to offer at trial a text message sent by A.P. to someone, in which she stated that she had received an IV and felt better, which Karr asserted "establish[es] that she was under the influence of narcotics." *Appellant's App. Vol. IV* at 3-4.

[27] After filing his motion for post-conviction relief, Karr filed a motion for change of judge, which was granted on March 20, 2017. In May 2017, the State filed a Motion for Summary Denial of Karr's petition for post-conviction relief, asserting that the claims raised in Karr's petition had already been litigated and

adjudicated by the trial court pursuant to Karr's motion for new trial. *Id.* at 18-22. Following briefing, the post-conviction court granted the State's request and issued an order on June 13, 2017. The order stated that evidence was heard during two hearings on Karr's motion for a new trial that alleged ineffective assistance of counsel, and the post-conviction court's order further stated, in part:

> 13. Although the Petitioner has abandoned two grounds of alleged ineffectiveness of counsel originally raised in the trial court, the allegations now raised in the Petitioner's Petition for Post-Conviction Relief are otherwise the same. All of the grounds alleged in the pending Petition were directly argued, were available to be argued from the evidence and/or were available to be raised at the time of the hearing on Petitioner's Motion for a New Trial.
>
> 14. In his Motion for a New Trial, the Petitioner sought to have his convictions for Domestic Battery and Rape vacated based upon the alleged ineffective assistance of counsel. This is the exact same relief requested in the Petitioner's Petition for Post-Conviction Relief, and that relief is sought based upon the exact same grounds that were raised or could have been raised and determined under Petitioner's Motion for a New Trial.

> 15. Finally, and most obviously, the parties to the controversy in the current matter are the same as those who were the parties to the original criminal case.
>
> 16. A court may grant a motion by either party for summary disposition of a petition for post-conviction relief when it appears that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law.
>
> 17. In this case, there is no genuine issue of material fact because the evidentiary issues now raised by the Petitioner have already been heard and decided against Petitioner in the original trial court.

Id. at 129-132. Karr filed a motion to reconsider, which the post-conviction court denied. Karr now appeals.

Discussion and Decision

I. Sufficiency of the Evidence

[28] Karr contends that the State presented insufficient evidence for the jury to conclude that he was guilty of domestic battery and two counts of rape.[5] Our standard of review is

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[5] We note that in both his issue statement and his argument section, Karr claims that his "conviction" (singular) is not supported by sufficient evidence, which suggests to us that he is appealing only one conviction. *Appellant's Br.* at 2, 41. However, Karr later urges in his brief that, for the reasons argued, we vacate

deferential to the factfinder, and we consider only the evidence and reasonable inferences most favorable to the convictions, neither reweighing evidence nor reassessing witness credibility. *Taylor v. State*, 86 N.E.3d 157, 163 (Ind. 2017). We will reverse only if no reasonable factfinder could find the defendant guilty. *Id.* at 164. The evidence is not required to overcome every reasonable hypothesis of innocence and is sufficient if an inference may reasonably be drawn from it to support the verdict. *Drane v. State*, 867 N.E.2d 144, 147 (Ind. 2007).

[29] To prove Karr committed Level 3 felony rape, the State was required to present sufficient evidence that he caused A.P. to "perform or submit to other sexual conduct" when she was "compelled by force or imminent threat of force[.]" Ind. Code § 35-42-4-1(a)(1). Indiana Code section 35-31.5-2-221.5 defines "other sexual conduct" as "an act involving ... a sex organ of one person and the mouth or anus of another person." Karr argues, "There was no forensic evidence establishing that a sex act occurred[,]" noting that officers did not observe physical injuries, Officer McGovern did not find pornographic videos on Karr's phone, nor any videos or pictures of A.P. performing oral sex. *Appellant's Br.* at 20.

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his "convictions" (plural). *Id.* at 44. We thus infer that he is challenging the sufficiency of the evidence as to all three of his convictions.

[30] We reject Karr's argument. First, it ignores that nurse Bowens found evidence of physical injuries to A.P., including an injury to the inside of her lip and petechiae on the roof of A.P.'s mouth, and Bowens testified that a penis striking the roof of the mouth could cause petechiae. Second, there does not need to be "forensic evidence establishing that a sex act occurred" to support the convictions. "A rape conviction may rest solely on the uncorroborated testimony of the victim." *Carter v. State*, 44 N.E.3d 47, 54 (Ind. Ct. App. 2015) (citing *Potter v. State*, 684 N.E.2d 1127, 1136 (Ind. 1997)).

[31] Karr also contends that, as to the Level 6 felony domestic battery conviction, there was no evidence that any battery occurred within the presence of a child.[6] Indiana courts have recognized, "[T]he critical question in determining whether a child is 'present' for purposes of the statute is whether a reasonable person would conclude that the child might see or hear the offense; not whether the child is in the same room as where the offense is taking place." *Manuel v. State*, 971 N.E.2d 1262, 1270 (Ind. Ct. App. 2012); *see also True v. State*, 954 N.E.2d 1105, 1111 (Ind. Ct. App. 2011)

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[6] Pursuant to the version of Indiana Code section 35-42-2-1.3, under which Karr was charged and convicted, the offense of domestic battery is a Class A misdemeanor, but becomes a Level 6 felony, "if the person who committed the offense . . . committed [it] in the physical presence of a child less than sixteen years of age, knowing that the child was present and might be able to see or hear the offense."

("presence" for purposes of Indiana Code section 35-42-2-1.3(b)(2) is "defined as knowingly being within either the possible sight or hearing of a child").

[32] In support of his position, Karr points to the fact that A.P. had already put the Children to bed in their own bedroom by the time he came home on the night in question. Karr also notes that A.P. told Officer Denison that she did not think that the Children had witnessed the battery. *Tr. Vol. II* at 150. However, the inquiry is not whether any of the Children *witnessed* the battery; it is whether it was committed in their presence, including within their possible hearing. Here, Officer Denison's testimony was that A.P. told him that she "didn't believe that her kids had witnessed any of the actual assault that occurred," and "it was just the verbal part that they had witnessed or heard." *Id.* Further, the State presented evidence that (1) the couch was positioned next to the "very small hallway" off of which the Children's bedroom was located, and (2) A.P. generally could hear the Children talking after she put them to bed in the evenings, allowing the inference that they, too, could hear what was happening outside of their room. *Id.* at 34. Evidence was also presented that, during the time that Karr was yelling at A.P. and telling her to "suck his dick," the oldest Child opened her bedroom door. Karr confronted Child at her door and told her to go back to bed, at which point A.P. heard Child begin to cry and go back into her own bedroom. *Id.* at 39. Based

on the record before us, we find that the State presented sufficient evidence from which the jury could reasonably infer that the battery was committed within the presence of a child.

[33] Karr also argues that A.P.'s testimony as to the battery and the rape allegations is not to be believed because she was questioned about, but could not recall, certain details before, during, and after, the incidents, including whether she was taking pain medication(s), if she had filled a certain prescription, or for what period of time the incidents lasted. *Appellant's Br.* at 41-42. Karr asserts, "Her lack of memory could have been that she consumed drugs that day, was administered drugs that day, or both, or was simply fabricating the events." *Id.* at 43. He argues that her testimony showed that "she had significant deficiencies in her ability to recall the details of her allegations," and her testimony was incredibly dubious and should not be believed. *Id.*

[34] The incredible dubiosity rule allows an appellate court to impinge upon the fact-finder's assessment of witness credibility when the testimony at trial was so "unbelievable, incredible, or improbable that no reasonable person could ever reach a guilty verdict based upon that evidence alone." *Moore v. State*, 27 N.E.3d 749, 751 (Ind. 2015). Incredible dubiosity is a difficult standard to meet, requiring ambiguous, inconsistent testimony that "runs counter to human experience." *Carter*, 44 N.E.3d

at 52. Our Supreme Court has reiterated the limited scope of the rule and set out three requirements for its application: (1) a sole testifying witness; (2) testimony that is inherently contradictory, equivocal, or the result of coercion; and (3) a complete absence of circumstantial evidence. *Moore*, 27 N.E.3d at 756.

[35] Here, A.P. related her version of events to at least the following: Officer Denison at the E.R., her doctor the next day, Officer Boudreau, a victim's advocate from Prevail, Detective Haskett, and nurse Bowens. Her testimony was not inherently contradictory or equivocal, and there is no evidence or assertion that it was the result of coercion. Thus, the incredible dubiosity rule is inapplicable. Further, the rule requires a complete absence of circumstantial evidence. In this case, Bowens testified to the injuries that she observed to A.P.'s scalp, lip, and mouth, which were consistent with A.P.'s description of what happened with Karr. Karr's claim that A.P.'s testimony was not credible is a request for us to reweigh the evidence, which we cannot do on appeal. *Carter*, 44 N.E.3d at 54. The State presented sufficient evidence to sustain Karr's three convictions.

II. Sentencing

[36] Karr challenges his sentence of an executed twelve and one-half years, claiming it is excessive, and he asks us to remand for a new sentencing hearing or, alternatively, reduce it.

Initially, we note that Karr makes the assertion that his sentence "is inappropriate in light of the nature of the offense and [his] character[,]" *Appellant's Br.* at 46, but he does not specifically make any argument or analysis as to either the nature of the offense or the character of the offender. Thus, he has waived any inappropriateness argument under Indiana Appellate Rule 7(B). *Perry v. State*, 921 N.E.2d 525, 528 (Ind. Ct. App. 2010) (failure to make cogent argument regarding the nature of defendant's offense and defendant's character results in waiver of appropriateness claim).

[37] Sentencing decisions rest within the sound discretion of the trial court and are reviewed on appeal for an abuse of discretion. *Kubina v. State*, 997 N.E.2d 1134, 1137 (Ind. Ct. App. 2013). A trial court abuses its discretion if its decision is clearly against the logic and effect of the facts and circumstances before the court, or the reasonable, probable, and actual deductions to be drawn therefrom. *Anglemyer v. State*, 868 N.E.2d 482, 490, *clarified on reh'g*, 875 N.E.2d 218 (Ind. 2007). A trial court may be found to have abused its discretion by failing to enter a sentencing statement at all; entering a sentencing statement that explains its reasons for imposing a sentence where such reasons are not supported by the record or are improper as a matter of law; or entering a sentencing statement that omits reasons which are clearly supported by the record and advanced for consideration. *Id.* at 490-91. "[R]egardless of the

presence or absence of aggravating or mitigating circumstances, a trial court may impose any sentence authorized by statute and permissible under the Indiana Constitution." *Kubina*, 997 N.E.2d at 1137 (citing Indiana Code section 35-38-1-7.1, providing non-exhaustive list of aggravating and mitigating circumstances court may consider).

[38] The range of penalties for a Level 6 felony is a fixed term of between six months and two and one-half years, with the advisory sentence being one year. Ind. Code § 35-50-2-7. The range of penalties for a Level 3 felony is a fixed term of between three and sixteen years, with the advisory sentence being nine years. Ind. Code § 35-50-2-5. Here, Karr received two and one-half years on the domestic battery conviction and fifteen years, with five years suspended, on each of the rape convictions. In sentencing Karr, the trial court found as aggravating factors that Karr had a history of criminal behavior and that his record reflected that he engaged in what the trial court termed a "pattern" of similar behavior, committing a battery after a breakup or as a relationship was ending. *Tr. Vol. III* at 232-33. The trial court recognized as mitigating that his incarceration would result in unusual circumstances and hardship for his parents, who relied on him for financial support.

[39] On appeal, Karr argues that the trial court should also have recognized as a mitigating

circumstance that he suffered multiple concussions in his life. The record reflects that, at the sentencing hearing, Karr's parents testified that Karr suffered a concussion on four occasions, and they described that he had resulting dizziness, memory issues, and increased agitation or frustration. No medical evidence was presented, nor any suggested connection as to how those concussions affected his actions on the day in question. It is well recognized that a trial court is not obligated to find a circumstance mitigating because it is advanced as such by the defendant. *Weedman v. State*, 21 N.E.3d 873, 893 (Ind. Ct. App. 2014), *trans. denied*. Karr also takes issue with the fact that the trial court stated, "[Y]ou are guilty of having raped . . . [A.P.] . . . and having battered her rather severely in the presence, physical presence of her daughter. These are serious crimes." *Tr. Vol. II* at 233. He urges that there was no evidence of "severely" beating A.P., and the trial court erred when it used that circumstance as an aggravator. Upon review of the record, we find that, contrary to Karr's claim, the trial court did not use this as an aggravator, and, rather, as the State suggests, it was a comment that was part of the court's discussion of the jury's verdict. The trial court did not rely on the severity of the battery as an aggravating circumstance. Karr has failed to establish that the trial court abused its discretion when it sentenced him.

III. Ineffective Assistance of Trial Counsel

[40] Karr claims that the trial court erred when it determined that he did not receive ineffective assistance of trial counsel and, so finding, denied his motion for a new trial, which sought relief on that basis. To succeed on a claim of ineffective assistance of counsel, a petitioner must show not only that his trial counsel's representation fell below an objective standard of reasonableness, but also that the deficient performance resulted in prejudice. *Manzano v. State*, 12 N.E.3d 321, 325 (Ind. Ct. App. 2014) (quoting *Timberlake v. State*, 753 N.E.2d 591, 603 (Ind. 2001)) (quotations omitted), *trans. denied, cert. denied* 135 S. Ct. 2376 (2015). To establish prejudice, a petitioner must show that 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. *Id.* A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Id.*

[41] There is a strong presumption that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. *Id.* Counsel is afforded considerable discretion in choosing strategy and tactics, and these decisions are entitled to deferential review. *Id.* Isolated mistakes, poor strategy, inexperience, and instances of bad judgment do not necessarily

render representation ineffective. *Id.* at 325-26. We do not second guess counsel's strategic decisions requiring reasonable professional judgment even if the strategy or tactic, in hindsight, did not best serve the defendant's interests. *Elisea v. State*, 777 N.E.2d 46, 50 (Ind. Ct. App. 2002). If it is easier to dispose of an ineffectiveness claim by analyzing the prejudice prong alone, that course should be followed. *Manzano*, 12 N.E.3d at 326.

[42] Karr asserts that, at trial, "defense counsel's theory was that the allegations were fabricated[,]" and "Thus, it was incumbent on trial counsel to present all readily available sources of evidence to prove that these event[s] did not occur." *Appellant's Br.* at 31. Karr maintains that Taylor should have but failed to present evidence of drug consumption by A.P. at or near the time of the incidents, through investigation and discovery of medical information such as A.P.'s prescriptions that she was taking or had been prescribed or the E.R. records on the night in question. He suggests that if the jury knew of A.P.'s prescribed pain and anxiety medication, trial counsel could have effectively impeached her regarding her ability to remember and recount the events in question.

[43] At the hearing on Karr's motion for a new trial, Taylor was asked about why he "did not explore [A.P.'s] drug use prior to or during the first offense[,]" and he replied that Karr would be the only person who would have been able to testify

to that, and Karr did not testify. *Tr. Vol. II* at 97. Karr argues that Taylor could have requested her prescription medication or "asked A.P. when she testified." *Appellant's Br.* at 33. A pharmacy bag was admitted during the hearing on Karr's motion for a new trial indicating that A.P. filled a prescription for Narco on May 5, 2015. Also admitted at the hearing were medical records from A.P.'s doctor's visit on May 7, 2015, which reflected that A.P. reported taking hydrocodone. *Tr. Vol. III* at 122; *Ex. Vol. IV* at 122. Karr urges that "[t]he jury never heard this evidence because trial counsel did not present it." *Appellant's Br.* at 34.

[44] Effective representation requires adequate pretrial investigation and preparation, but we resist judging an attorney's performance with the benefit of hindsight. *McKnight v. State*, 1 N.E.3d 193, 200 (Ind. Ct. App. 2013). Accordingly, when deciding a claim of ineffective assistance for failure to investigate, we give a great deal of deference to counsel's judgments. *Id.* at 201. Strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable, and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitation on investigation. *Id.* In other words, counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary. *Id.*

[45] Here, A.P. testified at the hearing that she may have filled a prescription earlier in the day, but did not recall for certain if or where she did so, and she testified that she was not impaired due to drug consumption and her memory was not affected by any medication. A.P.'s testimony was clear and detailed, and there was no evidence suggesting she did not remember the events in question. She was consistent with what she told Officer Denison at the E.R. that night, and there was no evidence that she exhibited signs of impairment. Karr has failed to show that he was prejudiced by Taylor's decision not to obtain and present medical records evidence concerning any drugs A.P. may have consumed prior to the domestic battery.

[46] Karr also asserts that trial counsel should have obtained medical records from the E.R. as to what medications she received at the hospital, as that would have affected her memory of what happened thereafter, including the forced oral sex supporting the rape charges. He argues, "Whether she was under the influence of anesthesia and dreaming or imagining the events was important to explore" and "had trial counsel properly impeached her with her drug consumption of opiates and anesthesia administered at the ER . . . the outcome would have been different." *Appellant's Br* at 33, 43. Initially, we note that there is no evidence in this record that A.P. was given "anesthesia" at any point. Upon Karr's questioning at the hearing on his motion for a new trial, A.P.

acknowledged that she sent a text while at, or before leaving, the hospital to someone, stating "I got an IV for meds so I'm feeling a lot better." *Tr. Vol. III* at 124. However, she also stated, "I'm not sure whether I actually received the IV medications or if I just told him that." *Id.* Furthermore, A.P. testified that at no time was she impaired, and she had no issues with remembering what Karr did to her. As the State observes, "[T]he totality of the evidence . . . supports only that A.P. was clear of thought and speech at all relevant times[,]" including in her interviews with nurse Bowens, who characterized A.P. as calm but tearful at times, with Officer Denison, who described her as calm and composed but concerned, and Detective Hackett, who said she was "matter of fact" but sometimes would "tear up" while describing what happened. *Appellee's Br.* at 30; *Tr. Vol. II* at 146-47, 160, 182, 214-15. Furthermore, Taylor testified at the hearing that it was his strategic decision not to obtain the records. *Tr. Vol. III* at 124. Karr has failed to show that Taylor's tactical decision to not try to obtain A.P.'s prescription and medical records, which may or may not have been discoverable or admissible,[7]

[7] "To make a sufficient showing that [rape victim's] prescription drug records were discoverable, [the defendant] must demonstrate that his request was particular and material." *Williams v. State*, 819 N.E.2d 381, 386 (Ind. Ct. App. 2004), *trans. denied*. "[W]hile generally evidence of drug use may be excluded at trial, evidence of drug use affecting a witness's ability to recall underlying events is admissible." *Id.*

was unreasonable or that Karr was prejudiced by trial counsel's choice.

[47] On appeal, Karr also contends that Taylor was ineffective for failing to present to the jury that Officer McGovern conducted a forensic analysis of Karr's phone, but did not find any evidence that Karr (1) had accessed pornographic videos, as A.P. had stated in her testimony, and (2) had photographed or videotaped A.P., as she suspected when she saw the light of his phone behind her. He argues, "Trial counsel never presented this affirmative evidence to the jury[,]" which "was in the possession of the State and readily available," and it "showed that A.P.'s story could not be corroborated." *Appellant's Br.* at 38.

[48] As an initial matter, we disagree that A.P.'s story "could not be corroborated"; as discussed above, the injuries and redness observed by nurse Bowens were consistent with the reports that A.P. made to police. Regardless, even if the trial counsel had presented the evidence, and the jury was persuaded that A.P. was incorrect when she said that Karr was viewing pornography and recording her acts with his cell phone, such evidence would not necessarily undermine her account of the incidents, *i.e.*, Karr has not established that he was prejudiced by the failure to present the cell phone evidence.

[49] We further note that Karr was charged with five counts. Taylor successfully argued for and received a directed verdict on one count and

successfully received an acquittal on one of the remaining counts. Several pieces of evidence were excluded from evidence based upon Taylor's objections, and he thoroughly cross-examined witnesses, including A.P. We conclude that Karr has not established either deficient performance or prejudice stemming from trial counsel's representation. The trial court correctly determined that Taylor had not provided ineffective assistance and, therefore, appropriately denied Karr's motion for a new trial.

IV. Denial of Post-Conviction Relief

[50] After the trial court denied his motion for a new trial, Karr filed a notice of appeal with this court, which pursuant to his request, we dismissed without prejudice, allowing him to file a petition for post-conviction relief, which he did, also requesting and receiving a change of judge. The State filed a motion for summary denial of Karr's petition for post-conviction relief, which motion the trial court granted on the basis that Karr was raising the same ineffective assistance of counsel claims that that he had asserted in his motion for a new trial – which had already been heard and decided – such that his post-conviction claims were barred by *res judicata.* Karr asserts that the post-conviction court's denial of his petition was erroneous and asks us to vacate the decision and remand to the post-conviction court for a hearing.

[51] A petitioner seeking post-conviction relief bears the burden of establishing grounds for relief by a preponderance of the evidence. Post-Conviction Rule 1(5). A post-conviction court is permitted to summarily deny a petition for post-conviction relief if the pleadings conclusively show the petitioner is entitled to no relief. P-C.R. 1(4)(f). "'An evidentiary hearing is not necessary when the pleadings show only issues of law; [t]he need for a hearing is not avoided, however, when a determination of the issues hinges, in whole or in part, upon facts not resolved.'" *Kuhn v. State*, 901 N.E.2d 10, 13 (Ind. Ct. App. 2009) (quoting *Godby v. State*, 809 N.E.2d 480, 482 (Ind. Ct. App. 2004), *trans. denied*). On appeal, "A petitioner who is denied post-conviction relief appeals from a negative judgment, which may be reversed only if the evidence as a whole leads unerringly and unmistakably to a decision opposite that reached by the post-conviction court." *Collins v. State*, 14 N.E.3d 80, 83 (Ind. Ct. App. 2014).

[52] Karr's petition for post-conviction relief asserted that Taylor provided ineffective assistance in the following summarized ways: (1) he failed to offer at trial phone records showing that Karr's phone (a) did not contain photos or videos of A.P. during the oral sex and (b) did not contain evidence that he accessed pornographic sites; (2) he failed to obtain medical records of A.P. to discover whether she had been administered anesthesia at the E.R. and failed to obtain A.P.'s prescription records to determine if she had

filled a prescription for narcotics the same day as the alleged battery; and (3) he failed to offer at trial a text message written by A.P. showing that (a) she filled a prescription for Narco on May 5, 2015, and (b) she sent a text message to someone from the hospital before leaving the E.R. stating that she had received an IV and felt better. *Appellant's App. Vol. IV* at 3-4.

[53] The post-conviction court determined that these issues were litigated at the two hearings on Karr's motion for a new trial and were barred by claim preclusion. *Id.* at 130. We agree. "'*Res judicata*, whether in the form of claim preclusion or issue preclusion (also called collateral estoppel), aims to prevent repetitious litigation of disputes that are essentially the same, by holding a prior final judgment binding against both the original parties and their privies.'" *M.G. v. V.P.*, 74 N.E.3d 259, 264 (Ind. Ct. App. 2017) (quoting *Becker v. State*, 992 N.E.2d 697, 700 (Ind. 2013)). "'Claim preclusion applies when the following four factors are present: (1) the former judgment was rendered by a court of competent jurisdiction; (2) the former judgment was rendered on the merits; (3) the matter now at issue was, or could have been, determined in the prior action; and (4) the controversy adjudicated in the former action was between parties to the present suit or their privies.'" *Id.* (quoting *Dawson v. Estate of Ott*, 796 N.E.2d 1190, 1195 (Ind. Ct. App. 2003)). When claim preclusion applies, all matters that were or might have been litigated are deemed

conclusively decided by the judgment in the prior action. *Id.*

[54] Here, the record reflects that, at the first hearing on Karr's motion for a new trial, held on September 2, 2016, Karr presented testimony from trial counsel, Taylor, and, among other things, Taylor testified as to what medical records he requested or did not request, what witnesses he called or did not call, and why he did not explore alleged drug use by A.P., explaining that his actions were based upon strategic decisions and assessments. Understanding that Karr's counsel, Ruemmele, needed a trial transcript to further explore ineffectiveness issues, the trial court scheduled a second hearing, and it directed that a trial transcript be prepared promptly for Ruemmele's use. The second hearing was held September 19, at which Karr presented the testimony of four witnesses, including A.P., who testified that she was not impaired and her memory was not affected by any medications. Officer McGovern testified that, while his forensic analysis of Karr's cell phone did not show that Karr accessed pornographic sites or had taken pictures or video of A.P., he also testified that it is not always possible to recover deleted material from a phone. Karr also presented seven exhibits, including a prescription bag from CVS pharmacy for a hydrocodone-acetaminophen prescription for A.P. and medical records from Community North from her E.R. visit. *Ex. Vol. IV* at 119, 121-22 (*Def. Exs.* D, E).

[55] Karr refers us to the recognized principle that "[a]n issue previously considered and determined in a defendant's direct appeal is barred for post-conviction review on grounds of prior adjudication - *res judicata*[,]" and urges that, here, "Because Karr has not challenged the adequacy of his trial representation on direct appeal, his ineffective assistance claims are not waived." *Appellant's Br.* at 26-27 (citing *Conner v. State*, 711 N.E.2d 1238, 1244 (Ind. 1999), *cert. denied*, 531 U.S. 829 (2000), and *Overstreet v. State*, 877 N.E.2d 144, 178 (Ind. 2007), *cert. denied*, 555 U.S. 972 (2008)). We do not find that Karr's claims are waived; we find that his claims of ineffective assistance of counsel have already been raised, heard, and decided. To the extent that Karr is arguing that only those claims of ineffective assistance of counsel that were raised on direct appeal may be barred by *res judicata*, we disagree with his suggestion that direct appeal is the exclusive basis for rendering the ineffectiveness assistance claims barred. We find that, in the unique posture and context of this case,[8] it was not error for the post-conviction

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[8] The State suggests that Karr's petition for post-conviction relief was the functional equivalent to a successive petition "because it raised only the same claims previously presented to the trial court for adjudication[,]" and our Supreme Court has explained that, "[A] defendant is entitled to one post-conviction hearing and one post-conviction opportunity to raise the issue of ineffective assistance of trial counsel in the absence of newly discovered evidence or a *Brady* violation." *Appellee's Br.* at 27 (citing *Daniels v. State*, 741 N.E.2d 1177, 1184-85 (Ind. 2001)). Our holding today is consistent with the Supreme Court's reasoning.

court to find that Karr was not entitled to relitigate the claims, and we find no error with its decision to grant the State's request for summary denial of Karr's petition for post-conviction relief.[9]

[56] Affirmed.

[57] Bailey, J., and Pyle, J., concur.

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[9] We also reject Karr's claim that – due to trial counsel's alleged ineffectiveness, combined with the trial court's comment during the hearing on the motion for a new trial, where the trial court stated that it was "pretty certain" that it would not have granted any request by trial counsel for A.P.'s prescription records, *Tr. Vol. III* at 102 – he was denied his right to explore bias and motive, was thereby denied his right to confrontation and a fair trial, and was entitled to post-conviction relief. *Reply Br.* at 14.

APPENDIX E

STATE OF INDIANA
COUNTY OF HAMILTON

IN THE SUPERIOR COURT NO. 5
OF HAMILTON COUNTY

CAUSE NO. 29D05-1703-PC-001576

[Filed: June 13, 2017]

DONALD G. KARR, JR.,	)
	)
Petitioner	)
	)
v.	)
	)
STATE OF INDIANA and	)
HAMILTON COUNTY PROSECUTOR'S	)
OFFICE,	)
	)
Respondents	)
	)

ORDER ON STATE'S MOTION FOR SUMMARY DENIAL OF THE PETITION FOR POST-CONVICTION RELIEF

The State having filed its Motion for Summary Denial of the Petition for Post-Conviction Relief filed in this cause, Petitioner having filed his Response thereto, and the State having then filed its Reply in Support of Summary Denial, and the Court being duly

advised in the premises, does now enter the following findings and ruling.

1. The Defendant was found guilty under cause number 29D03-1505-F6-004047 for the offense of Domestic Battery, a Level 6 felony, and two counts of Rape as Level 3 felonies.

2. On September 1, 2016, the Petitioner, by counsel, filed a Motion for a New Trial specifying five separate allegations.

3. On September 2, 2016, the original trial court heard testimony and argument on the Motion for a New Trial.

4. On September 19, 2016, a hearing was specifically held on the Petitioner's Motion for a New Trial. Additional evidence and argument was received by the original trial court at that time.

5. Thereafter, the original trial court denied the Petitioner's Motion for a New Trial.

6. The Petitioner herein flied his Petition for Post-Conviction Relief under a PC cause number in the original trial court. After a motion for change of judge was granted, the cause was transferred to the above court under the above-captioned cause number.

7. Summary denial of the Petitioner's Petition for Post-Conviction Relief should be granted because the Petitioner is barred from raising his post-conviction relief claims by the doctrine of *res judicata.*

8. *Res judicata* has two branches: claim preclusion and issue preclusion, and the Petitioner's

Petition is barred by the law regarding claim preclusion.

9. The claim of preclusion applies when a final judgment on the merits has been rendered which acts as a complete bar to a subsequent action on the same issue or claim between the parties.

10. For claim preclusion to apply, four factors must be present: (1) the former judgment must have been rendered by a court of competent jurisdiction; (2) the former judgment must have been rendered on the merits; (3) the matter now in issue was, or could have been, determined at a prior action; and (4) the controversy adjudicated in the former action must have been between the parties to the present suit.

11. Judgment on the Petitioner's Motion for a New Trial was rendered by a court of competent Jurisdiction, that being Hamilton County Superior Court 3.

12. Judgment on the Petitioner's Motion for a New Trial was rendered on the merits. Evidence was heard during two hearings. Evidence and argument was received by the original trial court, and upon considering that evidence and argument, Petitioner's Motion for a New Trial was denied.

13. Although the Petitioner has abandoned two grounds of alleged ineffectiveness of counsel originally raised in the trial court, the allegations now raised in the Petitioner's Petition for Post-Conviction Relief are otherwise the same. All of the grounds alleged in the pending Petition were directly argued, were available to be argued from the evidence and/or were available to

be raised at the time of the hearing on Petitioner's Motion for a New Trial.

14. In his Motion for a New Trial, the Petitioner sought to have his convictions for Domestic Battery and Rape vacated based upon the alleged ineffective assistance of counsel. This is the exact same relief requested in the Petitioner's Petition for Post-Conviction Relief, and that relief is sought based upon the exact same grounds that were raised or could have been raised and determined under Petitioner's Motion for a New Trial.

15. Finally, and most obviously, the parties to the controversy in the current matter are the same as those who were the parties to the original criminal case.

16. A court may grant a motion by either party for summary disposition of a petition for post-conviction relief when it appears that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law.

17. In this case, there is no genuine issue of material fact because the evidentiary issues now raised by the Petitioner have already been heard and decided against Petitioner in the original trial court. While that decision may be an issue for direct appeal, the Petitioner is foreclosed from raising the same issues that have already been decided through a request for post-conviction relief. Therefore, the State is entitled to judgment as a matter of law.

For all of the above reasons, the Petitioner's for Post-Conviction Relief is now hereby denied. The

hearing currently set for July 3, 2017, is vacated, and the State's Motion to Continue that hearing is denied as moot.

SO ORDERED June 13, 2017

/s/ Wayne A. Sturtevant
Wayne A. Sturtevant, Judge
Hamilton Superior Court No. 5

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