No. 18-8857

IN THE
Supreme Court of the United States

JEFFREY A. WEISHEIT,

Petitioner,

v.

INDIANA,

Respondent.

On Petition for Writ of Certiorari to the Indiana Supreme Court

RESPONDENT'S BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

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CAPITAL CASE

QUESTION PRESENTED

Whether the Indiana Supreme Court properly determined that Weisheit failed to demonstrate ineffective assistance of trial counsel at the penalty phase of his capital murder trial.

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STATEMENT

Jeffrey Weisheit stands convicted and sentenced to death for the 2010 murders of two children, eight-year-old Alyssa Lynch and two-year-old Caleb Lynch, in Vanderburgh County, Indiana. The Indiana Supreme Court denied his petition for post-conviction relief, and he seeks review of that decision.

In April 2010, Weisheit was living with his girlfriend and her two children. One night while Weisheit was caring for the children, he bound and gagged Caleb and then set fire to the house. Both children died in the fire. A jury found the aggravating circumstances—multiple murders and that each victim was under the age of twelve—beyond a reasonable doubt, concluded the aggravating circumstances outweighed any mitigating circumstances, and determined that Weisheit should be sentenced to death. The Indiana Supreme Court affirmed Weisheit's convictions and sentence on direct appeal. *Weisheit v. State*, 26 N.E.3d 3 (Ind. 2015) (*Weisheit I*).

Weisheit filed a petition for post-conviction relief in the trial court raising multiple instances where he alleges his trial and appellate counsel were constitutionally ineffective. The trial court denied the petition and the Indiana Supreme Court affirmed. *Weisheit v. State*, 109 N.E.3d 978 (Ind. 2018) (*Weisheit II*).

REASONS TO DENY THE PETITION

I. Weisheit Presents No Grounds Justifying Review

Weisheit does not offer any argument as to how this case satisfies the criteria for issuing a writ of certiorari as described in Rule 10. *See* U.S. Sup. Ct. R. 10. He presents no split of authority or issue of national importance that requires the Court's

intervention. He does not even allege that the state courts applied the wrong law. He asks only that the Court correct what he sees as errors in the lower-court's reasoning, which is an insufficient basis for certiorari review.

Moreover, "'this Court rarely grants review'" of state-court decisions in post-conviction review, "'*even when the application for state collateral relief is supported by arguably meritorious federal constitutional claims*.'" *Lawrence v. Florida*, 549 U.S. 327, 335 (2007) (quoting *Kyles v. Whitley*, 498 U.S. 931, 932 (1990) (Stevens, J., opinion concurring in denial of stay of execution) (emphasis added). The Court generally "choos[es] instead to wait for 'federal habeas proceedings.'" *Id.* (quoting *Kyles*, 498 U.S. at 932). There is nothing prevent Weisheit from seek review of the Indiana Supreme Court's resolution of his federal constitutional claims by timely filing a habeas corpus petition that complies with 28 U.S.C. § 2254. There is no special need for this Court to devote its resources to matters the lower federal courts are well-suited to address.

II. The Indiana Supreme Court Properly Determined That Weisheit Received Effective Assistance of Trial Counsel

Beyond his failure to present a compelling reason for this Court's review, Weisheit is wrong on the merits: The Indiana Supreme Court correctly applied *Strickland v. Washington*, 466 U.S. 668, 690 (1984), and its progeny to reject Weisheit's claims.

A. Trial counsel were not ineffective in declining to call Dr. Harvey as a witness

The Indiana Supreme Court correctly found that trial counsel were not ineffective for not calling Dr. Harvey as a witnesses at the penalty phase. In 2010,

the defense team retained Dr. Harvey to examine Weisheit's mental health (PCR Tr. Vol. I, 139). On July 22, 2010, one of Weisheit's attorneys wrote a letter to Dr. Harvey with an attached binder containing information the defense believed would assist him (PCR Ex. D). In September of 2010, Dr. Harvey met with Weisheit in the Vanderburgh County Jail for approximately 2 ½ hours (PCR Tr. Vol. I, 139). Shortly after that assessment, Dr. Harvey's employment changed and Dr. Harvey informed counsel that he no longer had direct contact with individuals in forensic cases. (PCR Ex. F.) Dr. Harvey sent trial counsel a memorandum recounting his meeting with Weisheit, his observations of Weisheit during the meeting, and his impressions of Weisheit's mental health (PCR Ex. O). After the defense team received Dr. Harvey's memorandum, it chose not to engage him further but instead hired another psychologist who Dr. Harvey's memorandum, incorporated it into his own assessment, and testified at trial. *See Weisheit II*, 109 N.E.3d at 986.

In deciding that trial counsel was not deficient for not calling Dr. Harvey as a witness, the Indiana Supreme Court concluded that Weisheit's counsel "was not ineffective for not pursuing further services from Dr. Harvey after he contacted counsel, told counsel he could not do future evaluations and indicated he would recommend his replacement." *Id*. Other than a naked assertion that the Indiana Supreme Court was wrong, Weisheit provides no reason to question the Court's recounting of the facts or its ultimate determination.

The Indiana Supreme Court also determined that Weisheit was not prejudiced by the omission of Dr. Harvey's testimony, concluding that "Weisheit was not

prejudiced because another expert capably testified about Weisheit's mental health conditions." *Id*. Weisheit similarly fails to challenge this determination. The Indiana Supreme Court correctly determined that trial counsel was not ineffective for failing to call Dr. Harvey as a witness.

B. Trial counsel were not ineffective in their attempt to procure the Boy School records

Trial counsel attempted to obtain the records of Weisheit's time at the Indiana Boys School. Counsel were told by the Indiana Department of Correction that Weisheit's Boys School records were not available and documents from that time period would have been destroyed pursuant to the school's document retention schedule. It turned out, however, that the records had not yet been destroyed and were found in the state archives during Weisheit's post-conviction relief proceedings. The Indiana Supreme Court determined that trial counsel's decision to forgo further attempts to find the record did not constitute deficient performance. Because "[a]ll the information pointed to the records not being available from the Boys School," trial counsel was not deficient for not expending additional resources searching for the records. *Id*. at 984.

Weisheit asserts that this holding is inconsistent with *Porter v. McCollum*, 558 U.S. 30, 39-40 (2009); *Rompilla v. Beard*, 545 U.S. 374, 381-90 (2005); and *Wiggins v. Smith*, 539 U.S. 510, 526 (2003). Yet these cases involved failures of counsel to investigate large swaths of a defendant's life. None of these cases involved counsel requesting documents and being told that they do not exist; nor did any of these cases involve, as here, a single source of information. *See, e.g., Wiggins,* 539 U.S. at 525

(acknowledging that an investigation is reasonable if "further investigation would have been fruitless"); *Porter*, 558 U.S. at 33 (explaining that the new evidence presented in the post-conviction proceedings that had *not* been presented in the original trial included the defendant's "abusive childhood, his heroic military service and the trauma he suffered from it, his long-term substance abuse, and his impaired mental health and mental capacity"). The Indiana Supreme Court correctly found that counsel did not perform deficiently by accepting the record keeper's answer that the records did not exist.

The Indiana Supreme Court also properly determined that Weisheit was not prejudiced by the fact that the Boys School records were not discovered. The court noted that even without the records Weisheit was able to present a complete picture of his mental health. *Id*. at 985. Further, the Boys School records likely would have harmed Weisheit at trial rather than helped him given their multiple references to criminal activity, lack of remorse, and cruelty to animals. *Id*. at 986. The Indiana Supreme Court correctly found that Weisheit was not prejudiced by the omission of the Boys School records at trial.

C. Trial counsel was not ineffective with regard to James Aiken's testimony

Trial counsel attempted to present the testimony of James Aiken, a proposed expert on whether Weisheit could be safely housed under a life sentence. The trial court found that Aiken did not qualify as an expert, and counsel withdrew him as a witness. On post-conviction, Weisheit claimed that Aiken could have testified if trial counsel had laid a proper foundation. The Indiana Supreme Court disagreed, "It is

speculative to say Aiken's testimony would have been admissible." *Id*. at 988. Weisheit fails to identify any error in this determination.

The Indiana Supreme Court also found no prejudice from the fact that Aiken did not testify. The court held that "even if Aiken had testified, the prior prison records of Weisheit undercut Aiken's claims and demonstrate Weisheit's propensity for violence and odd behavior. Thus, Aiken would not have aided his mitigation case." *Id*. at 988. Again, Weisheit does not specifically challenge this determination. The Indiana Supreme Court correctly determined that Weisheit was not denied the effective assistance of counsel regarding the testimony of James Aiken.

D. Even if trial counsel performed deficiently, Weisheit was not prejudiced at the penalty phase

The Indiana Supreme Court concluded that "Weisheit has not demonstrated that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Weisheit II*, 109 N.E.3d at 993. Weisheit's simply disagrees with this conclusion and fails to provide any reason to doubt it. The Indiana Supreme Court correctly found that even if counsel had performed as Weisheit now urges, the mitigating circumstances would not have been stronger. The Indiana Supreme Court properly applied this Court's precedent, and there is no reason for this Court to grant Weisheit's petition.

CONCLUSION

Weisheit's petition for a writ of certiorari should be denied.

Respectfully submitted,

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