Cause No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

JEFFREY A. WEISHEIT

Petitioner-Appellant,

v.

STATE OF INDIANA,

Respondent-Appellee.

MOTION FOR LEAVE TO PROCEED IN *FORMA PAUPERIS*

The petitioner asks leave to file the attached petition for writ of certiorari without prepayment of costs and to proceed *in forma pauperis*.

Please check the appropriate boxes:

■ Petitioner has previously been granted leave to proceed *in forma pauperis* in the following court(s):

Clarke Circuit Court, Cause No. 10C01-1601-PC-1; Indiana Supreme Court on post-conviction appeal, Cause No. 10S00-1507-PD-413; U.S. District Court on notice of intent to file habeas corpus, Cause No. 4:19-CV-00036-SEB-DML.

□ Petitioner has **not** previously been granted leave to proceed *in forma pauperis* in any other court.

□ Petitioner's affidavit or declaration in support of this motion is attached hereto.

■ Petitioner's affidavit or declaration is **not** attached because the court below appointed counsel in the current proceeding, and;

■ The appointment was made the under the following provisions of law:

Indiana Post-Conviction Rule 1, Sections 2 and 9(a), or

■ a copy of the order of appointment is appended. (Federal Court Order)

Respectfully submitted,

JOHN PINNOW*
Deputy Public Defender
Attorney No. 6619-02

KATHLEEN CLEARY
Deputy Public Defender
Attorney No. 14292-53

*Counsel of Record

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
NEW ALBANY DIVISION

JEFFREY ALAN WEISHEIT,	)	
	)	
Petitioner,	)	
	)	
v.	)	No. 4:19-cv-00036-SEB-DML
	)	
RON NEAL,	)	
	)	
Respondent.	)	

Entry on Pending Motions and Directing Further Proceedings

I.

This action was opened upon the filing of a "Notice of Intent to File First Federal Habeas Petition under 28 U.S.C. § 2254 in a Death Penalty Case and Motion for Appointment of Counsel." The motion for the appointment of counsel, dkt. [1], is **granted**. Marie F. Donnelly and David Voisin are appointed to represent the petitioner in this action. They have **through March 8, 2019**, to enter their appearance in this action.

II.

The petitioner's motion for leave to proceed *in forma pauperis*, dkt. [2], is **granted**.

III.

The pre-petition filing does not suggest when the petitioner intends to file his habeas petition. The statute of limitations for actions under 28 U.S.C. § 2254 is governed by 28 U.S.C. § 2244(d)(1). The petitioner is **notified** that it is his responsibility to timely file his habeas petition in accordance with 28 U.S.C. § 2244(d)(1).

IT IS SO ORDERED.

Date: 3/4/2019

Sarah Evans Barker

SARAH EVANS BARKER, JUDGE
United States District Court
Southern District of Indiana

Cause No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

JEFFREY A. WEISHEIT

Petitioner-Appellant,

v.

STATE OF INDIANA,

Respondent-Appellee.

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

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Counsel For Petitioner

QUESTIONS PRESENTED FOR REVIEW

1. Whether the Indiana Supreme Court contravened ***Strickland*** by acknowledging counsel made mistakes, but not finding them to be deficient performance even though they were clustered in counsel's penalty phase representation.

2. Whether the Indiana Supreme Court contravened ***Strickland*** and ***Williams*** on the prejudice prong by considering the aggravating circumstances in a death penalty case dispositive without balancing them against the aggregate mitigating circumstances.

LIST OF PARTIES

All parties appear in the caption on the cover page.

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I. OPINION BELOW

The Indiana Supreme Court's opinion is cited at ***Weisheit v. State***, 109 N.E.3d 978 (Ind. 2018), and is reprinted in Appendix A, infra.

II. JURISDICTION

The Indiana Supreme Court's opinion affirming the trial court's denial of post-conviction relief was issued on November 7, 2018. The Indiana Supreme Court denied Weisheit's timely Petition for Rehearing on January 17, 2019. The Order denying rehearing is reproduced in Appendix C, infra.

The jurisdiction of this Court to review the judgment of the Supreme Court of Indiana is invoked under 28 U.S.C. Section 1257(a), Weisheit having asserted below and asserting herein deprivation of rights secured by the United States Constitution.

III. CONSTITUTIONAL PROVISIONS INVOLVED

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

AMENDMENT VI

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

AMENDMENT XIV

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

IV. STATEMENT OF THE CASE

A. Jury Trial, Sentencing and Direct Appeal Proceedings

On April 12, 2010, Jeffrey Weisheit was charged with Counts 1 and 2 murder[1] and arson,[2] a Class A felony [A. 64-65]. On April 26, 2010, the State filed death penalty counts alleging the aggravating circumstances the victims were under age twelve (12) and multiple murder [A. 68-69].[3]

On June 10-18, 2013, the guilt phase was tried by jury trial [Tr. 1123-2141]. The jury found Weisheit guilty as charged on all three counts [A. 1271-1273]. On June 19-21, 2013, the penalty phase was tried by jury trial [Tr. 2142-2594]. The jury found the aggravating circumstances had been proved beyond a reasonable doubt, found the aggravating circumstances outweighed the mitigating circumstances and recommended a sentence of death [A. 1306-1316]. On July 11, 2013, the trial court sentenced Weisheit to a sentence of death on Counts 1 and 2[4]

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[1] Ind. Code 35-42-1-1(1) provides: A person who knowingly or intentionally kills another human being; . . . commits murder, a felony.

[2] Ind. Code 35-43-1-1(a) provides: A person who, by means of fire, explosive or destructive device, knowingly or intentionally damages: . . .(3) property of another person without the other person's consent if the pecuniary loss is at least five thousand dollars ($5,000); . . .commits arson, a Class B felony. However, the offense is a Class A felony if it results in either bodily injury or serious bodily injury to any person other than a defendant.

[3] Ind. Code 35-50-2-9(b) provided: The aggravating circumstances are as follows: . . . (8) The defendant has committed another murder, at any time, regardless of whether the defendant has been convicted of that other murder. . . (12) The victim of the murder was less than twelve (12) years of age.

[4] Ind. Code 35-50-2-9(e) provides: . . . If the jury reaches a sentencing recommendation, the court shall sentence the defendant accordingly. . . .

and a twenty (20) year sentence for arson as a Class B felony[5] [A. 74-82, 1377-1387; Tr. 2609-2626].

On February 18, 2015, the Indiana Supreme Court affirmed Weisheit's convictions and death sentence. ***Weisheit v. State***, 26 N.E.3d 3 (Ind. 2015). On June 9, 2015, the Court denied rehearing in an unpublished Order. On January 19, 2016, this Court denied the petition for certiorari following the direct appeal opinion. ***Weisheit v. Indiana***, 136 S.Ct. 901 (2016).

B. Post-Conviction Proceedings and Appeal

On December 29, 2015, Weisheit filed a Petition for Post-Conviction Relief [PCR App. Vol. 2, 42-58]. On July 13, 2016, he filed an Amendment to Petition for Post-Conviction Relief [PCR App. Vol. 2, 82-94]. On September 26-28, 2016, the trial court held an evidentiary hearing on the Amended Petition [PCR Volumes 1 and 2].

The trial court ruled Weisheit was not denied the effective assistance of trial and appellate counsel [PCR App. Vol. 4, 13-93]. Appendix B, infra.

The Indiana Supreme Court affirmed the denial of post- conviction relief. Appendix A. The Court stated: "We affirm the post-conviction court, finding that although counsel made some mistakes, most of them do not rise to the level of deficient performance pursuant to ***Strickland***, and in any case, Weisheit fails to demonstrate that he was prejudiced." ***Weisheit***, 109 N.E.3d at 982. The Court

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[5] Ind. Code 35-50-2-5 then provided: A person who commits a Class B felony shall be imprisoned for a fixed term of ten (10) years, with not more than ten (10) years added for aggravating circumstances or not more than four (4) years subtracted for mitigating circumstances.

concluded: "We agree that counsel made errors and could have done things differently or better. Nevertheless, as discussed above, these errors do not rise to the level of deficient under ***Strickland***." ***Id.*** at 992.

Chief Justice Rush dissented on counsel's penalty phase representation. She reviewed the post-conviction court's findings and found trial counsel's penalty phase performance was deficient for not calling Dr. Philip Harvey to testify about his observations of Weisheit in a manic state, not obtaining Weisheit's Indiana Boys School records which contained important information about his mental health and family background, and in not identifying the foundation requirements and making a proper offer of proof on James Aiken's testimony about Weisheit's adjustment to imprisonment. ***Weisheit***, 109 N.E.3d 1004, 1008, 1012. Justice Slaughter agreed that counsel's performance was deficient in those respects. ***Id.*** at 994. He concluded Weisheit did not show he was prejudiced. ***Id.*** at 994-96. Chief Justice Rush concluded the cumulative effect of counsel's deficient performance at the penalty phase prejudiced Weisheit. ***Id.*** at 1013-21. She noted "[t]he majority did not recognize any deficiencies in counsel's performance, so it does not engage in 'the type of probing and fact-specific analysis' required to evaluate cumulative prejudice." ***Id.*** at 1014 (other citations omitted).

V. REASONS THE WRIT SHOULD BE GRANTED

1. THE INDIANA SUPREME COURT ERRONEOUSLY DID NOT RECOGNIZE COUNSEL'S ERRORS AT THE PENALTY PHASE AMOUNTED TO DEFICIENT PERFORMANCE.

2. THE COURT ERRONEOUSLY APPLIED THE PREJUDICE PRONG BY CONSIDERING THE AGGRAVATING CIRCUMSTANCES IN A DEATH PENALTY CASE DISPOSITIVE WITHOUT BALANCING THEM AGAINST THE AGGREGATE MITIGATING CIRCUMSTANCES

In ***Strickland v. Washington***, 466 U.S. 668, 690 (1984), this Court held a defendant claiming deficient performance by counsel "must identify the acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment. The court must then determine whether, in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance." A defendant showing prejudice "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 694. A court reviewing findings on the prejudice prong must consider "the totality of the available mitigation evidence – both that adduced at trial, and the evidence adduced in the [collateral] proceeding in reweighing it against the evidence in aggravation." ***Williams v. Taylor***, 529 U.S. 362, 397-98 (2000).

The Indiana Supreme Court's majority acknowledged counsel made errors, but concluded they did not rise to the level of deficient performance. ***Weisheit***, 109 N.E.3d at 992. Trial counsel's mistakes and errors were clustered in penalty phase representation and amounted to deficient performance. Counsel's failure to call Dr.

Harvey as a witness was based on the mistaken belief he was unavailable to testify at trial [PCR Vol. 1, 150, PCR Vol. 2, 183, 186]. Counsel's failure to call him as a witness was not based on strategy, but inattention. ***Wiggins v. Smith***, 539 U.S. 510, 526 (2003). The failure to make more than one attempt in a capital case to obtain Weisheit's Boys School records did not meet with the duty to obtain records and follow up on leads recognized in ***Porter v. McCollum***, 558 U.S. 30, 39-40 (2009); ***Rompilla v. Beard***, 545 U.S. 374, 381-90 (2005); and ***Wiggins***, 539 U.S. at 533-34. Counsel's failure to lay a proper foundation for Aiken to testify and to make a proper offer of proof was deficient performance where Aiken's testimony was admissible under ***Skipper v. South Carolina***, 476 U.S. 1, 4-5 (1986).

The Indiana Supreme Court's analysis of the prejudice prong is flawed by its error in not finding that counsel's errors amounted to deficient performance. The Court then stated: "Weisheit has not demonstrated prejudice. Indeed, he has not shown that he would be given a different sentence even if counsel had committed none of the alleged errors in light of the nature of this particular crime – the murder of two small children – and the overwhelming evidence of his guilt." ***Weisheit***, 109 N.E.3d at 992. Indiana requires the jury to first find the alleged aggravating circumstances beyond a reasonable doubt and second that any mitigating circumstances that exist are outweighed by the aggravating circumstance(s).[6] The

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[6] Ind. Code 35-50-2-9(l) provides: Before a sentence may be imposed under this section, the jury, in a proceeding under subsection (e), or the court, in a proceeding under subsection (g), must find that : (1) the state has proved beyond a reasonable doubt that at least one (1) of the aggravating circumstances listed in subsection (b) exists; and (2) any mitigating circumstances that exist are outweighed by the aggravating circumstance or circumstances.

Court's sole focus on the strength of the aggravating circumstances means it contravened ***Strickland*** and ***Williams*** by erroneously not weighing them against the mitigating circumstances.

Since Weisheit was tried by jury trial, his burden "was to show a **reasonable probability** that without counsel's penalty-phase performance deficiencies, at least one juror would not have voted for the death penalty, and the trial judge would not have imposed that sentence." Rush, C.J. dissenting, 109 N.E.3d at 1013 (emphasis in original). Counsel's deficient performance impacted three mitigating circumstances: Weisheit was under the influence of extreme mental or emotional disturbance when the murder was committed,[7] Weisheit's capacity to appreciate the criminality of his conduct or to conform that conduct to the requirements of law was substantially impaired as a result of mental disease,[8] and Weisheit had adjusted to imprisonment and could be managed by the Department of Correction [PCR Vol. 2, 38-39, 43, 66-67, 97-99, 102, 105, 178, 192-193].[9]

Weisheit was denied the effective assistance of trial counsel at the penalty phase by the cluster of counsel's errors and mistakes. There is a reasonable probability the result of the penalty phase would have been different than a death

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[7] Ind. Code 35-50-2-9(c)(2) provides: The mitigating circumstances that may be considered under this section are as follows: The defendant was under the influence of extreme mental or emotional disturbance when the murder was committed

[8] Ind. Code 35-50-2-9(c)(6) provides: The defendant's capacity to appreciate the criminality of the defendant's conduct or to conform that conduct to the requirements of law was substantially impaired as a result of mental disease or defect or of intoxication.

[9] Ind. Code 35-50-2-9(c)(8) provides: Any other circumstances appropriate for consideration.

sentence. If counsel's performance had not been deficient, the jury would have been balancing the aggravating circumstances of the murder of two children against mitigating circumstances that Weisheit's capacity to appreciate the criminality of his conduct were substantially impaired by his mental illness, Bipolar Disorder, and that he had adjusted to imprisonment and could be safely managed by the Department of Correction. By contrast the jury at trial had conflicting evidence on whether Weisheit even met the criteria for Bipolar Disorder, no evidence from Aiken on Weisheit's adjustment to imprisonment and the State was able to argue there was no evidence of statutory mitigating circumstances [Tr. 2568-2569].

CONCLUSION

For the reasons set forth, Jeffrey Weisheit urges this Court to grant Certiorari.

Respectfully submitted,

JOHN PINNOW*
Deputy Public Defender
Attorney No. 6619-02

KATHLEEN CLEARY
Deputy Public Defender
Attorney No. 14292-53

Attorneys for Petitioner

*Counsel of Record

Cause No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

JEFFREY A. WEISHEIT,	)
	)
Petitioner-Appellant,	)
	)
v.	)
	)
STATE OF INDIANA,	)
	)
Respondent-Appellee.	)

PROOF OF SERVICE AND CERTIFICATE OF MAILING

I hereby certify that I have, this 10th day of April, 2019, mailed the attached and foregoing **PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF INDIANA**, to the Clerk of the United States Supreme Court, One First Street, North East, Washington, D.C. 20543-0001, pursuant to Supreme Court Rule 29, by certified mail, return receipt requested, designating said method of filing as of the time of mailing, in the United States Mail, first class postage affixed.

I hereby certify that I have, this 19th day of April, 2019, served upon Curtis Hill, Indiana Attorney General, a copy of the above and foregoing **PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF INDIANA**, by mailing it in the United States Mail, first class postage affixed, addressed to his office located at 402 West Washington Street, IGCS – 5th Floor, Indianapolis, Indiana 46204-2770.

John Pinnow
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APPENDIX A

Weisheit v. State, No. 10S00-1507-PD-43
(Ind. November 7, 2018)

STATE OF INDIANA
IN THE SUPREME COURT

JEFFREY WEISHEIT,

Appellant(s),

v.

STATE OF INDIANA

Appellee(s).

Cause No. 10S00-1507-PD-00413

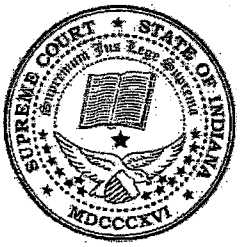
CERTIFICATION

STATE OF INDIANA)
) SS:
Court of Appeals)

I, Gregory R. Pachmayr, Clerk of the Supreme Court, Court of Appeals and Tax Court of the State of Indiana, certify the above and foregoing to be a true and complete copy of the Opinion of said Court in the above entitled case.

IN WITNESS WHEREOF, I hereto set my hand and affix the seal of THE CLERK of said Court, at the City of Indianapolis, this on this the 23rd day of January, 2019.

Gregory R. Pachmayr,
Clerk of the Supreme Court



IN THE

Indiana Supreme Court

Supreme Court Cause No. 10S00-1507-PD-413

Jeffrey A. Weisheit,
Appellant (Petitioner Below)

–v–

State of Indiana
Appellee (Respondent Below)

Argued: September 7, 2017 | Decided: November 7, 2018

Appeal from the Clark Circuit Court
Cause No. 10C01-1601-PC-1

The Honorable Andrew Adams, Judge

On Direct Appeal

Opinion by Justice David

Justice Massa and Justice Goff concur.
Justice Slaughter concurs in part and in the judgment with separate opinion.
Chief Justice Rush concurs in part and dissents in part with separate opinion.

David, Justice

Jeffrey Weisheit was convicted of the murders of two children as well as arson. His convictions were affirmed on direct appeal. He subsequently sought and was denied post-conviction relief, alleging that both his trial and appellate counsel were ineffective. We affirm the post-conviction court, finding that although counsel made some mistakes, most of them do not rise to the level of deficient performance pursuant to *Strickland*, and in any case, Weisheit fails to demonstrate that he was prejudiced.

Facts and Procedural History

In April 2010, Jeffrey Weisheit was living with his pregnant girlfriend, Lisa Lynch, and her two children: eight-year-old Alyssa and five-year-old Caleb. Weisheit was caring for the children one night while his girlfriend worked. He bound and gagged Caleb, set fire to the home, and fled the state. Both children died in the fire.

Police located Weisheit in Kentucky. Weisheit resisted and officers had to tase him to effect his arrest. Weisheit fell and hit his head. He was taken to the hospital and diagnosed with a concussion.

In 2013, a jury convicted Weisheit of two counts of murder and one count of Class A felony arson resulting in serious bodily injury. The jury found the State had proven the alleged aggravating circumstances—multiple murders and that each child was under the age of twelve—beyond a reasonable doubt, found the aggravators outweighed any mitigators, and recommended the death penalty. The trial court sentenced Weisheit accordingly, and this Court affirmed the convictions and sentence on direct appeal. *Weisheit v. State*, 26 N.E.3d 3 (Ind. 2015) (unanimous opinion by David, J.).

Weisheit sought post-conviction relief, alleging multiple instances of ineffective assistance by trial and appellate counsel. The trial court denied Weisheit's petition in November 2016. Weisheit now appeals. Additional facts will be provided as necessary.

Standard of Review

Post-conviction proceedings are civil proceedings in which a defendant may present limited collateral challenges to a conviction and sentence. *Wilkes v. State*, 984 N.E.2d 1236, 1240 (Ind. 2013). The defendant bears the burden of establishing his claims by a preponderance of the evidence. *Id.* The defendant must convince this Court that there is "no way within the law that the court below could have reached the decision it did." *Stevens v. State*, 770 N.E.2d 739, 745 (Ind. 2002).

Discussion

Weisheit argues that he received ineffective assistance of both trial and appellate counsel. He faults trial counsel in six areas: 1) errors during the penalty phase of trial; 2) failures regarding the admissibility of expert testimony; 3) failure to appropriately question jurors; 4) failure to adequately present evidence in support of suppressing pretrial statement; 5) failure to object to opinion testimony about the nature and origin of the fire; and 6) cumulative errors. Weisheit faults appellate counsel for failing to sufficiently identify objectionable jurors on direct appeal.

Ineffective assistance of counsel claims are evaluated under the two-part test articulated in *Strickland v. Washington*, 466 U.S. 668 (1984). To prevail, Weisheit must show: 1) that counsel's performance was deficient based on prevailing professional norms; and 2) that the deficient performance prejudiced the defense. *Ward v. State*, 969 N.E.2d 46, 51 (Ind. 2012) (citing *Strickland, 466* U.S. at *687*).

In analyzing whether counsel's performance was deficient, the Court first asks whether, "'considering all the circumstances,' counsel's actions were 'reasonable [ ] under prevailing professional norms.'" *Wilkes*, 984 N.E.2d at 1240 (quoting *Strickland,* 466 U.S. at 668). Counsel is afforded considerable discretion in choosing strategy and tactics, and judicial scrutiny of counsel's performance is highly deferential. *Id.*

To demonstrate prejudice, "the 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." *Strickland*, 466 U.S. at 694.

There is a strong presumption that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. *Stevens*, 770 N.E.2d at 746. Counsel is afforded considerable discretion in choosing strategy and tactics and these decisions are entitled to deferential review. *Id.* at 746-47 (citing *Strickland*, 466 U.S. at 689). Furthermore, isolated mistakes, poor strategy, inexperience and instances of bad judgment do not necessarily render representation ineffective. *Id.* at 747 (citations omitted).

A. Trial Counsel

1. Errors during the penalty phase of trial

a. Failure to obtain Boys School Records and to prepare certain experts

This Court and the United States Supreme Court have found that capital defendants are entitled to adequate representation at the penalty phase of trial. *See Rompilla v. Beard*, 545 U.S. 374, 382-93 (2005); *Williams v. Taylor*, 529 U.S. 362, 395-98 (2000); *Smith v. State*, 547 N.E.2d 817, 821-22 (Ind. 1989). "A decision by defense counsel not to present evidence can be deemed reasonable only if it is 'predicated on a proper investigation of the alleged defense.'" *Smith*, 547 N.E.2d at 821 (quoting *Thomas v. State*, 242 N.E.2d 919, 924 (Ind. 1969)).

Weisheit first argues that he was denied effective assistance during the penalty phase of trial because trial counsel did not fully investigate and obtain pertinent mental health records. Specifically, he faults counsel for

not obtaining his records from the Indiana Boys School. He points to the post-conviction court's conclusion that these records (which were obtained for the post-conviction hearing from the Indiana Archives) contained valuable mitigation evidence that was not provided to the jury. Weisheit also argues that had these records been provided to experts, their testimony would have been more compelling.

Here, trial counsel requested the records, but received a response from the Boys School that they were not available and that pursuant to its document retention policy, documents from that time period would have been destroyed. Nevertheless, defense counsel found other documents and mental health records and provided them to mental health experts.

While Weisheit faults trial counsel for only making one attempt to obtain the Boys School records, it does not seem that counsel was deficient for not making multiple attempts given that counsel was told by the Boys School that there was no match for the records and that records over 10 years old were destroyed, and counsel did obtain other mental health records from other sources. Had counsel been told the records were moved to the archives or even told they could not be located, it would have made sense to fault counsel for not pursuing them further. However, this is not the case. The dissent believes that counsel should have followed up by calling the Department of Correction because the Department noted in response to the records request to "feel free to contact" them with "[a]ny further questions." However, in response to being told there was no match for the requested records and further that records over 10 years old would be destroyed, it's not clear what "further questions" there are to ask at that point. Nor can we say that if counsel called that they would have been told that the records were, in fact, available elsewhere or been given any other new information. All the information pointed to the records not being available from the Boys School.

Weisheit also faults counsel for not providing these records to some of the testifying witnesses (Dr. Henderson-Galligan- licensed psychologist and Deborah Eccles-Skidmore- Weisheit's Boys School counselor) because if they had the records and were prepared using them, they would have

been more compelling mitigation witnesses. While perhaps this is the case, it is not clear that counsel's performance was deficient by not preparing witnesses in a more ideal or preferred way. Weisheit's best claim in this regard is that counsel failed to appropriately prepare Eccles-Skidmore by failing to inform her that she would be subject to cross-examination. Counsel should have done at least that much.

However, even assuming counsel was deficient in failing to appropriately prepare Eccles-Skidmore, Weisheit has not demonstrated prejudice. During trial, counsel did present evidence of Weisheit's mental health struggles throughout his life and his various mental health diagnoses. For instance, Boys School counselor Eccles-Skidmore, testified that Weisheit was in the Boys School for a time, attempted suicide while there, and was admitted to Methodist Hospital as a result. Defense witness, Dr. Price, reviewed records from throughout Weisheit's life, including academic records, hospital and other medical records, police records, prior psychotherapy records, prior evaluation records, etc. He also personally evaluated Weisheit on four different occasions. Dr. Price testified regarding the history of mental illness in Weisheit's family, Weisheit's history of brain/head injuries, and his diagnoses that Weisheit had bipolar disorder not otherwise specified (NOS), attention deficient hyperactivity disorder (ADHD), predominant hyperactive impulse and cognitive disorder NOS. He also testified that he disagreed with Dr. Allen (the State's expert) that Weisheit did not meet the diagnostic criteria for bipolar disorder and explained why he disagreed.

Dr. Henderson-Galligan, who was initially appointed by the trial court to do a competency evaluation, met with Weisheit on two occasions and reviewed his background and mental health records including both Dr. Price and Dr. Allen's reports. She testified that Weisheit was competent to stand trial and further, she diagnosed him with bipolar disorder NOS, cognitive disorder NOS and personality disorder NOS with Cluster B characteristics. During the post-conviction hearing, Dr. Henderson-Galligan testified that while the missing records contained significant information, nothing in those documents conflicted with her opinion at trial.

Weisheit points to arguments the State made during its closing wherein it downplayed the impact of his mental illness and argued that he was a manipulator. He argues that with the additional information contained in the Boys School records, he could have forcefully countered those arguments. He also argues that counsel could have used information from the records to argue that Weisheit was suffering from a psychotic break at the time of the murders.

However, looking at the record, Weisheit's trial counsel did, in fact, make arguments about Weisheit's significant history of psychological problems since childhood and possible mania at the time of the murders. Counsel pointed to Weisheit's records that are "rife with suicide attempts, depression, medication. . ." and the fact that during childhood he was never "totally adequately treated." (Tr. 2560.) When discussing Weisheit's mental health, counsel stated that "at some point a major disruption occurs which pushes one over the edge. . . to what we call acute mania." (Tr. 2562.) "In this case, it happened with tragic results." (Tr. 2562-63.) Accordingly, despite not having the aid of the Boys School records, counsel was able to present a rather complete picture of Weisheit's mental health at trial.

Finally, as the State notes, Weisheit's Boys Schools records contained information that was potentially prejudicial to Weisheit, including multiple references to Weisheit's lack of remorse and records containing descriptions of Weisheit's poor behavior that led to several juvenile adjudications. For instance, Weisheit had adjudications for burglaries, auto theft, running away, fighting, making threats, stealing weapons and other misbehavior at school. The records also make reference to Weisheit's lack of remorse for his behavior and his cruelty to animals. It is not clear that introduction of these additional records would have helped Weisheit. Accordingly, Weisheit has not demonstrated that counsel was ineffective by not obtaining the records or using them to prepare witnesses.

b. Failure to call witnesses

Weisheit also faults trial counsel for not calling certain witness,

including Dr. Harvey, an expert retained by the defense, and Dr. Gur, an expert regarding Weisheit's traumatic brain injuries.

Dr. Harvey

Dr. Harvey performed a mental health assessment of Weisheit in 2010. After that assessment, Dr. Harvey's terms of employment changed, and he no longer had direct contact with individuals in forensic cases. Dr. Harvey stated he could testify only as to his prior assessment and offered to find someone else who could do a future assessment. Dr. Harvey sent counsel a memorandum reporting his observations during his 2010 meeting with Weisheit and detailing his impressions of Weisheit's mental health. The defense team did not pursue further services from Dr. Harvey, but instead, engaged another psychologist (Dr. Price), who received Dr. Harvey's memorandum, incorporated it into his own assessment, and testified at trial.

Weisheit argues that ". . . Dr. Harvey would have tipped the balance for the jury or sentencing court from finding no mitigating circumstances to finding they existed." (Appellant's Brief at 42.) He believes Dr. Harvey's testimony regarding his first-hand observation of Weisheit in a manic state was crucial to rebut the State's evidence and secure a different sentence. However, as discussed above, even without Dr. Harvey's testimony about the instance of mania he observed, trial counsel did in fact present evidence of Weisheit's bipolar diagnosis and possible mania at the time of the murders. Further, Dr. Price reviewed Dr. Harvey's report prior to serving as a testifying witness. 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. Further, even though counsel mistakenly believed Dr. Harvey could not testify about his prior assessment, Weisheit was not prejudiced because another expert capably testified about Weisheit's mental health conditions.

Dr. Gur

Dr. Gur, a neuropsychologist with expertise in brain injury and behavior, testified at Weisheit's PCR hearing regarding how the multiple brain injuries Weisheit incurred would have exacerbated his mental health conditions. Weisheit argues that counsel was ineffective for not presenting this evidence at trial. However, because Dr. Gur could not point to medical evidence of Weisheit's alleged brain injuries and another expert disagreed with his conclusion, Weisheit is asking this Court to reweigh the evidence on this issue which we will not do.

The post-conviction court determined that evidence of Weisheit's injuries was available to trial counsel, and counsel's failure to further investigate the injuries and their effects was unreasonable. However, the court found that even at the post-conviction hearing, Weisheit presented no conclusive medical evidence that he actually suffered from traumatic brain injuries or the other effects Dr. Gur suggested could result from such injuries.

We agree that the evidence of Weisheit's brain injuries is speculative. Dr. Gur admitted that just because someone has hit their head, even multiple times, this does not necessarily mean they suffer a concussion and further, that even sustaining a concussion does not guarantee permanent brain injury. He further admitted that he did not interview Weisheit; his opinion that Weisheit suffered from concussions was largely based on Weisheit's self-reports and he could not point to medical records that documented each of the alleged concussions or other traumatic brain injury. His testimony was significantly undermined when he stated that it "seems like" Weisheit suffered from concussions. (PCR Tr. Vol. I. at 95.) Thus, it is not clear how reliable or helpful Dr. Gur's testimony would have been during trial.

Further, another expert, Dr. Westcott, disagreed with Dr. Gur that Weisheit sustained traumatic brain injuries. She testified that while there were instances where Weisheit suffered injury to his head, there was no medical evidence to show he had concussions or traumatic brain injuries, except for the instance where he hit his head when he was tased during his arrest for the present crimes.

In sum, Weisheit has failed to show a reasonable likelihood of a different outcome had either Dr. Harvey or Dr. Gur testified. Dr. Price testified in Dr. Harvey's place and the utility of Dr. Gur's testimony is questionable at best.

2. Failures regarding the admissibility of expert testimony

At trial, counsel intended to call James Aiken, a former prison warden and consultant, to testify that Weisheit could be adequately managed and secured under a life sentence without presenting danger to prison staff, other inmates, or the public. Aiken's testimony was not presented, however, because the trial court found he was not qualified as an expert under Indiana Evidence Rule 702(b) and counsel withdrew him. On direct appeal, this Court affirmed the exclusion of Aiken's testimony because Aiken's proposed opinion concerned Weisheit's future adjustment to prison, and counsel neither established Aiken's qualifications to predict future behavior, nor did he make an offer of proof as to Aiken's specific predictions of Weisheit's potential future classification in prison. *See Weisheit*, 26 N.E.3d at 10.

Weisheit now argues that counsel was ineffective for failing to point the trial court to the correct rule of evidence—702(a)—under which Aiken would have qualified as an expert.[1] The post-conviction court agreed that the trial court erred in excluding Aiken's testimony under 702(b), and found Aiken was qualified under 702(a). It further found that "[h]ad the jury heard this mitigating evidence, there is a reasonable likelihood the jury would have given Weisheit's case for mitigation greater weight and returned a verdict for something less than death." (PCR Order at 14.) Nevertheless, despite making such a strong statement, the court found

1 A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue. Ind. R. Evid. 702(a).

that Weisheit did not demonstrate prejudice and denied his ineffective assistance claim.

Despite contradictory statements in its order, the post-conviction court came to the correct conclusion. As the State points out, even assuming Aiken could qualify under 702(a), it is not clear that he actually would have been allowed to testify. The trial court is not required to accept the opinion of experts. *Wilkes v. State*, 917 N.E.2d 675, 690 (Ind. 2009) (citing *Thompson v. State*, 804 N.E.2d 1146, 1149 (Ind. 2004)).

In this case, with regard to his preparation to serve as an expert witness, Aiken testified that he spent just 30 to 45 minutes with Weisheit the night prior to appearing in court and that he reviewed Weisheit's prison records provided by counsel and some annual reports online. He did not use any structure or assessment tool when evaluating Weisheit. He struggled to answer the trial court's questions about his training and experience. He admitted he had not reviewed anything regarding how an Indiana prison would house an inmate convicted of murdering children. It is speculative to say Aiken's testimony would have been admissible.

Further, 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 cause. For instance, 35 incident reports were filed regarding Weisheit from April 2010 to May 2011. Incidents include Weisheit threatening to kill an EMT who was dispensing medication, threatening officers and challenging them to fight him, threatening other inmates, destroying several pieces of jail property, urinating in the hallway and concealing "multiple, sharp chicken bones" in his mouth during a search. (PCR Exhibit L.) Accordingly, it is not clear that Aiken's testimony would have been given great weight and that there's a reasonable probability that the outcome would have been different had Aiken testified.

3. Failure to appropriately question jurors

Indiana Code Section 35-50-2-9(e) states that the jury in a capital case "shall recommend to the court whether the death penalty or life imprisonment without parole, or neither, should be imposed." *See Wrinkles v. State*, 749 N.E.2d 1179, 1198 (Ind. 2001) (statute requires that the jury be instructed as to all three possible penalties). Qualified jurors must be willing to consider all of the possible penalties. *Burris v. State*, 465 N.E.2d 171, 177 (Ind. 1984). This principle flows from United States Supreme Court jurisprudence, which requires that jurors in capital cases must be willing to follow the law (including instructions indicating all of the possible penalties) and must be excused if their personal views of the death penalty (whether pro or con) "would prevent or substantially impair" their ability to follow their oath and the law. *Ritchie v. State*, 875 N.E.2d 706, 726-27 (Ind. 2007) (quoting *Wainwright v. Witt*, 469 U.S. 412, 420 (1985)); see also *Greene v. Georgia*, 519 U.S. 145, 146 (1996) ("*Witt* is the controlling authority as to the death-penalty qualification of prospective jurors.") (internal quotation and citation omitted); *Adams v. Texas*, 448 U.S. 38, 45 (1980) (Jurors must be excused if their views on the death penalty "would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath."); *Witherspoon v. Illinois*, 391 U.S. 510, 522 (1968).

It is presumed that jurors follow their instructions. *Richardson v. Marsh*, 481 U.S. 200, 206-07 (1987). Here, the jury was instructed on death, life imprisonment without parole, and a term of years as the three sentencing options. Nevertheless, Weisheit alleges that counsel's performance was deficient when, during voir dire, counsel did not ask five jurors if they would be willing to consider a term of years as a sentencing option if they found Weisheit guilty.

Jurors or potential jurors were asked in their questionnaires about their thoughts about a sentence of a term of years for a person convicted of intentionally murdering children. The responses for the five jurors at issue were as follows:

> Juror 7: "I would feel justice was not truly served and a dangerous person could be set free."
>
> Juror 15: "He should never get out."
>
> Juror 75: "Should include 'without the possibility of parole.'"
>
> Juror 160: "Is not appropriate for crime."
>
> Juror 167: "I don't think this is a fair sentence especially if they are guilty of murder."

(PCR Ex. 9- Exhibit Supp. 1 & 2.)

Weisheit alleges that trial counsel did not follow up and ask the jurors if they would follow the law and consider one of the three possible sentencing options and that he was prejudiced by this because jurors went into the trial rejecting a term of years as a possible sentence.

Relying on this Court's decision in *Wilkes v. State*, 984 N.E.2d 1236, 1240 (Ind. 2013), the post-conviction court determined it was reasonable for counsel's strategy to focus on identifying and screening those jurors that would automatically vote for the death penalty. The court found answers on the preliminary jury questionnaire did not establish prejudice by showing a reasonable likelihood of a different outcome in the penalty phase, and Weisheit presented no evidence that any juror indicated he or she would not fully consider a term of years sentence.

We agree. First, Weisheit has not identified any duty or requirement that trial counsel had to ask specific questions of jurors for them to be qualified. Additionally, despite their responses on the questionnaires, several of these jurors said that they would look at all the evidence and mitigators when determining punishment, that they would have an open mind, etc. Juror 7 agreed that the death penalty is not always the right thing to do and that such a sentence depends on the facts and circumstances of an individual case. Juror 15 stated she would consider mitigation evidence including mental health status when deciding an appropriate sentence. Juror 75 was instructed about the different

sentencing options and was told "death is different." (Tr. 646.) He was told about the State's burden to prove aggravating circumstances to support a death sentence. He did not say much about his view of the death penalty; however, he said nothing that would indicate he would not consider a term of years. Juror 160 stated she would weigh the evidence and that she couldn't say she had any particular feelings about the death penalty one way or the other. She would weigh the evidence presented. She also stated she would not take the decision lightly. Finally, Juror 167 stated twice that she would keep an open mind.

Counsel was not deficient for not further questioning the five jurors at issue because they are presumed to follow the law, counsel was not required to ask certain questions, the jurors were in fact instructed and asked about the three sentencing options, and none of them said anything during voir dire to indicate they would not consider a term of years. The term of years option was repeatedly mentioned throughout trial.

Further, the jury's verdict was unanimous and of course, a child murderer would not engender much sympathy from a jury, despite defense counsel asking about sentencing options. Accordingly, Weisheit cannot demonstrate prejudice. His ineffective assistance of counsel claims related to the questioning of the jurors fail.

4. Failure to adequately present evidence in support of suppressing pretrial statement

Weisheit suffered injuries, including a concussion, during his arrest and was hospitalized. During that time, he was interviewed by police and gave a statement indicating that he was the last person to see the children alive. That is, he stated that he left the children in the home because he did not want them with him, and just started driving. He did not know if he set the fire or how the fire started. Before giving the statement, the officer read Weisheit his *Miranda* rights and he indicated he understood them. The officer did not ask if Weisheit was waiving his rights, and though she had a waiver of rights form, Weisheit "[d]idn't seem to

acknowledge it as far as [ ] wanting to sign it." (PCR Ex. Vol. III at 52.) The police then questioned Weisheit until he asked for a lawyer.

Trial counsel moved to suppress the statement on the basis that Weisheit did not knowingly, intelligently, and voluntarily waive his *Miranda* rights. At the hearing on the motion to suppress, trial counsel focused on Weisheit's medical condition at the time of the interview. The trial court denied the motion to suppress, and this Court affirmed on direct appeal. *See Weisheit*, 26 N.E.3d at 18. Weisheit now argues that failure to introduce the officer's testimony about his response (or lack of response) to the waiver form was deficient performance.

The post-conviction court agreed that the officer's testimony would have supported an argument that Weisheit's *Miranda* waiver was invalid, which trial counsel (and appellate counsel) did not make. But the court credited trial counsel's testimony at the post-conviction hearing that this omission was strategic, because counsel knew that a waiver could not be invalid solely based on lack of a written waiver. (PCR Order at 32-34 (citing, e.g., *Berghuis v. Thompkins*, 560 U.S. 370, 384-86 (2010)). The court also found Weisheit had not shown a reasonable likelihood of a different outcome had counsel made the argument below.

Weisheit argues the post-conviction court's conclusions were erroneous. Citing to *Mendoza-Vargas v. State*, 974 N.E.2d 590, 595 (Ind. Ct. App. 2012), he argues that his not wanting to sign the acknowledgement form was akin to his refusal to waive his rights. However, the validity of a waiver is judged by the totality of the circumstances. *Berghuis*, 560 U.S. at 384. In *Mendoza-Vargas*, a defendant who spoke Spanish shook his head no when he was asked if he wanted to answer questions after being given his Miranda rights. *Mendoza-Vargas*, 974 N.E.2d at 593. Nevertheless, police continued to question him. *Id.* In contrast, here, while Weisheit did not seem to want to sign the form, his conduct indicated that he wanted to answer police questions. As we noted on direct appeal, he selectively feigned sleep based on the subject matter of the questions but was otherwise responsive and the interview, which was brief in duration, ceased when Weisheit asked for an attorney. *Weisheit* 26 N.E.3d at 18. Thus, counsel was not deficient for not raising the issue of Weisheit

seeming to not want to sign the waiver form because it is not clear that such a challenge would have been successful in light of the totality of the circumstances which showed Weisheit's willingness to speak with police initially.

Further, as the State notes, at the time police spoke to Weisheit, they did not know where at least one of the child victims was. Thus, police were authorized to speak to Weisheit and his statements would have been admitted into evidence pursuant to the public safety exception.

Finally, in light of the overwhelming evidence of Weisheit's guilt, Weisheit has failed to show a reasonable likelihood that the outcome of trial would have been different had the statement not been admitted.

5. Failure to object to opinion testimony about the nature and origin of the fire

At trial, the State offered three witnesses who testified about the nature and origin of the fire. The assistant chief of the local fire department, who was at the scene, opined the fire was intentionally set. The state fire marshal who investigated the fire opined the fire was intentionally set. The lead detective on the case testified it was her opinion the fire was intentionally set by Weisheit.

The post-conviction court found these opinions were inadmissible and would have been excluded had an objection been made. (PCR Order at 36.) (citing Ind. Evid. R. 704(b), "Witnesses may not testify to opinions concerning intent, guilt or innocence in a criminal case . . . or legal conclusions.")) The court found counsel's failure to object was deficient performance because no strategy supported it, counsel did not object because he was not the questioning attorney, and he thought co-counsel should have objected. But the post-conviction court ultimately found no prejudice, because substantial other evidence—like Weisheit's flight after the fire and one child's condition of being bound and gagged—supported the conclusion Weisheit intentionally started the fire.

The State argues that the post-conviction court erred because the assistant fire chief's and the fire marshal's opinions were properly admitted. The State is correct that expert testimony regarding the cause of a fire (that does not tie the defendant to the fire) does not run afoul of Evidence Rule 704(b). *See Julian v. State*, 811 N.E.2d 392, 399-400 (Ind. Ct. App. 2004), *trans. denied.* (state fire marshal's opinion that fire was intentionally set was admissible where testimony did not reference defendant). Accordingly, counsel was not deficient for not objecting to the admission of the fire chief and fire marshal's statements.

As for the lead detective's testimony, as the State notes, this testimony was elicited on cross by the State in response to the defense's direct wherein the defense questioned the thoroughness of the detective's investigation. While defense counsel arguably could have objected, it is not clear such an objection would be sustained because defense counsel may have opened the door. Weisheit does not challenge the appropriateness of his trial counsel's strategy to challenge the detective's thoroughness.

In any case, even if counsel was deficient for not objecting to and/or opening the door to the detective's testimony, Weisheit has not demonstrated prejudice. As the post-conviction court aptly noted, this expert testimony was "not nearly as persuasive as Weisheit's actions before, during, and after the crime." (PCR Order at 37.)

6. Cumulative errors

Generally, trial errors that do not justify reversal when taken separately also do not justify reversal when taken together. *Smith*, 547 N.E.2d at 819. However, in the context of ineffective assistance of counsel, a reviewing court also assesses whether "the cumulative prejudice accruing to the accused" as a result of counsel's errors has "rendered the result unreliable, necessitating reversal under *Strickland*'s second prong." *Id.* at 819-20 (internal citations omitted).

Weisheit faults trial counsel on many grounds as discussed above. Also, this Court notes that in the post-conviction court's findings of fact, it was critical of trial counsel in several ways. For instance, it was critical of counsel's failure to: adequately prepare witnesses, undertake better efforts to get Aiken's testimony admitted, investigate Weisheit's alleged traumatic brain injuries and their effects, and object to testimony about the ultimate cause of the fire, among other things. However, despite these findings, the post-conviction court's conclusions of law were that there was no ineffective assistance of counsel.

We agree that counsel made errors and could have done things differently or better. Nevertheless, as discussed above, these errors do not rise to the level of deficient under *Strickland*. Further, even assuming counsel was deficient, Weisheit has not demonstrated prejudice. Indeed, he has not shown that he would be given a different sentence even if counsel had committed none of the alleged errors in light of the nature of this particular crime— the murder of two small children—and the overwhelming evidence of his guilt.

B. Appellate Counsel

Counsel's failure to identify objectionable jurors on appeal

The standard for gauging appellate counsel's performance is the same as that for trial counsel. *Ward*, 969 N.E.2d at 75. "Claims of inadequate presentation of certain issues . . . are the most difficult for convicts to advance and reviewing tribunals to support." *Biegler v. State*, 690 N.E.2d 188, 195 (Ind. 1997). Here, Weisheit contends his appellate counsel performed deficiently "when he did not cite in the Brief of Appellant the clearest expression that Juror 7 would automatically vote for the death penalty." (Appellant's Br. at 71.) That is, during voir dire, Juror 7 was presented with the following scenario:

> Murder of two children, eight and five, and an arson. No defenses, no mental illness that would excuse it, no retardation

> that would excuse it, no drugs, no alcohol defenses that you would consider, just kind of stone cold-blooded killer of two innocent children. Is the death penalty the only appropriate penalty for that kind of guilty murder?

(Tr. 141.) And Juror 7 responded: "In that hypothetical situation, yes, I believe so." (Id.) Appellate counsel did not cite this portion of the transcript. Instead he quoted the following interaction between trial counsel and Juror 7:

> MR. McDANIEL: And I think in your – again, going back to the magic questionnaires here. You indicated you thought the death penalty was appropriate if it was premeditated, multiple murderer, particularly gruesome, and the victims suffered or were tortured. That would be, I think, what you wrote down.
>
> JUROR NO. 7: Yes, sir.
>
> MR. McDANIEL: And that would still be your opinion today; is that right?
>
> JUROR NO. 7: Yes, sir.
>
> MR. McDANIEL: And does that sound like the hypothetical facts that we were talking about here?
>
> JUROR NO. 7: Very similar, yes.
>
> MR. McDANIEL: All right. And I think that you indicated that you somewhat agree with eye for an eye. And even though that's a very common saying, let me ask what's that mean to you, the eye for the eye?
>
> JUROR NO. 7: Well, it means that if you take someone else's life, you shouldn't be allowed the privileges of continuing your own.

(Tr. 141-42.)

While Weisheit now prefers a different quotation than the one cited in his appellate brief, it is not clear that there is a significant difference between the two. In each passage, Juror 7 states a strong preference for the death penalty under facts like the one of this case. But the hypotheticals discussed by counsel during voir dire, are just that, hypotheticals. As discussed above, Juror 7 also stated during voir dire that the death penalty is not always the right thing to do and that such a sentence depends on the facts and circumstances of an individual case. Juror 7 was not presented with all the facts at the time the quoted statements were made.

Had appellate counsel not cited either quotation, perhaps we would be in a different situation. But as it stands, counsel provided significant relevant information about Juror 7's views that appears on the same page as the quote Weisheit prefers. In any case, this Court in reaching its decision is not limited to only what the parties discuss and cite in their briefs. Instead, we "review relevant portions of the record" thoroughly and "often decide cases based on legal arguments and reasoning not advanced by either party." *See Bieghler v. State*, 690 N.E.2d 188, 195 (Ind. 1997.) The language quoted by the parties is only the starting place for our review and decision-making. Thus, we cannot say that counsel was deficient for not choosing a particular quotation that appears on the same page of the transcript as language that was in fact quoted, nor can Weisheit claim prejudice as a result of counsel's decision to include different language in the brief. Accordingly, Weisheit's ineffective assistance of counsel claim as to his appellate counsel fails.

Conclusion

While Weisheit's trial counsel made mistakes and could have done things better, counsel's performance was not deficient. In any case, 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. Accordingly, Weisheit's ineffective assistance of trial counsel claims fail.

Weisheit's ineffective assistance of appellate counsel claim also fails because appellate counsel's performance was not deficient. Counsel made a reasonable decision to quote certain language from the transcript although it is not Weisheit's preferred quotation. Further, given the similarities between the language chosen and the language not chosen and this Court's thorough review of relevant portions of the record, Weisheit has not demonstrated prejudice.

Finally, we note that in the post-conviction court's 81-page order, some of its findings seem to contradict its ultimate conclusions. However, after an exhaustive review of the record and in light of our standard of review that requires us to affirm the post-conviction court unless there's no way within the law it could have come to the result it did (*Stevens*, 770 N.E.2d at 745), we believe the post-conviction court came to the right conclusion on all issues. Thus, we affirm the post-conviction court.

Massa and Goff, JJ., concur.
Slaughter, J. concurs in part and in the judgment with separate opinion.
Rush, C.J. concurs in part and dissents in part with separate opinion.

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Slaughter, J., concurring in part and in the judgment.

I agree with the Court that Weisheit is not entitled to post-conviction relief, and that the trial court's judgment upholding his convictions and death sentence should be affirmed. But I reach that result for different reasons. Unlike the Court, I conclude that trial counsel's performance during the penalty phase was deficient, but that Weisheit failed to show prejudice.

On the performance issue, I share the dissent's view that Weisheit's trial counsel were deficient during sentencing for all the reasons the Chief Justice outlines in her thoughtful and thorough opinion. Counsel's performance was indeed substandard and not the product of reasonable professional judgment or strategic choice in three respects: failure to pursue the Boys School records, failure to call Dr. Harvey about testifying for Weisheit, and failure to lay a proper foundation and make a clear offer of proof for Aiken's testimony.

On the issue of prejudice, the dissent concludes—and I agree—that none of counsel's "omissions, in isolation, is prejudicial enough to warrant relief". But where the dissent and I part company is the Chief Justice's view that Weisheit was prejudiced by counsel's **cumulative** deficiencies. She believes these deficiencies collectively undermine confidence in the legality of Weisheit's death sentence. I respectfully disagree. In my view, Weisheit did not sustain his burden under *Strickland*. He failed to show a "reasonable probability" that, had counsel performed competently, "the result of the proceeding would have been different." *Strickland v. Washington*, 466 U.S. 668, 694 (1984).

The dissent correctly observes that the post-conviction court botched the governing legal standard under *Strickland*. Under the correct standard, Indiana's death-penalty statute required Weisheit to show a reasonable probability that, were it not for counsel's deficient performance during the penalty phase, at least one juror would not have voted for the death penalty, and the trial judge would not have imposed that sentence; or, alternatively, that the jury would have voted unanimously **not** to impose

the death penalty. This standard follows from our statute's mandate that a unanimous jury recommendation for or against death requires the trial judge to impose that sentence. Ind. Code § 35-50-2-9(e). And if even one juror disagrees, then the court alone decides the sentence. *Id.* § 35-50-2-9(f).

Based on this standard, the Chief Justice concludes that Weisheit is entitled to a new penalty phase. She finds that because *Strickland*'s prejudice inquiry depends on the balance of aggravators and mitigators, "adding enough weight to the mitigating side of the scale—or lifting enough weight from the aggravating side—makes all the difference." Although this proposition is true in the abstract, trial counsel's deficiencies here do not diminish Weisheit's aggravating circumstances; they affect only the mitigation side of the scale. While the omitted mitigating evidence in theory could have made a difference, Weisheit failed to show a reasonable probability on this record that the evidence would have made a difference—for two reasons. First, the aggravating evidence associated with Weisheit's multiple crimes was overwhelming. Second, the mitigating evidence trial counsel overlooked paled in comparison.

I'll begin with the overwhelming aggravating evidence supporting the death penalty. For two years Weisheit's girlfriend and her two young children had been living with him at his home in Evansville. After the girlfriend became pregnant, Weisheit reportedly doubted the unborn child was his. While the girlfriend was at work, Weisheit torched the house and left the two children in the house to die—eight-year-old Alyssa and five-year-old Caleb. Alyssa was found in a closet with over ninety percent of her body charred black. She either had been trapped inside the closet or had sought refuge there from the fire. The pathologist said she experienced a drowning-like sensation in her final moments. Caleb also was charred beyond recognition. He was found on a mattress in the bedroom, hog-tied with duct tape, with a washcloth stuffed in his mouth and secured by duct tape. A railroad flare had been placed in his underwear and another under his body. The flare in his underwear burned his left thigh while he was still alive and conscious. He died in

agony suffocating from soot and smoke inhalation. *See Weisheit v. State*, 26 N.E.3d 3, 6-8 (Ind.), *cert. denied*, 136 S. Ct. 901 (2015).

It is worth recounting some of these grisly aspects of Weisheit's crimes because they show how heavily the balance tipped in favor of the jury's unanimous recommendation to impose the death penalty and the high burden Weisheit faced on post-conviction review of proving that the omitted evidence stood a reasonable probability of changing that result. To be clear, someone who commits these or other monstrous acts does not forfeit his Sixth Amendment right to effective counsel. But the problem with Weisheit's ineffectiveness claim is that the circumstances surrounding the proven statutory aggravators were heinous. In a less-horrific case, perhaps the same omitted evidence would have tipped the scales and led to a sentence other than death. But here Weisheit failed to establish that the omitted evidence probably would have made a difference.

That is especially true because the omitted evidence was partially cumulative of other evidence the jury already heard and was only partially mitigating. As the Court points out, the jury heard a "rather complete picture of Weisheit's mental health at trial", including his significant history of mental-health problems, his suicide attempts, and his possible manic episode while carrying out the two murders. The Boys School records would have provided some additional detail of the extent of Weisheit's mental-health problems and his troubled childhood. And had Dr. Harvey testified, the jury would have heard his firsthand account of Weisheit's bipolar disorder during a manic phase. But Weisheit did not establish that this limited additional mitigating evidence, on top of what the jury already heard, probably would have persuaded at least one juror and the trial judge (or, alternatively, **all** the jurors) to spare his life.

In addition, the overlooked evidence was not uniformly mitigating. The school records, for example, included multiple references to Weisheit's lack of remorse after his prior crimes and his cruelty to animals over the years. Also of dubious mitigating value was Aiken's proposed testimony that Weisheit could have adjusted to prison life and would not pose a danger to others if he were incarcerated and not executed. There was

ample countervailing evidence that Weisheit was a troublemaker who would pose a danger to others within the prison setting. As the Court emphasizes, Weisheit's prison records revealed a propensity for violence and antisocial behavior, including threats to kill an EMT who was dispensing medication; threatening correctional officials and other inmates; hiding sharp chicken bones in his mouth during a search; and urinating in a hallway.

Weisheit's guilt is clear, and so is the horrific nature of his crimes. He didn't just kill these young children; he left them to die in a house fire he started, and he ensured they would suffer unimaginable pain before succumbing. As we held on direct appeal, the State proved the existence of aggravating circumstances beyond a reasonable doubt, and the jury was entitled to conclude the aggravating circumstances outweighed the mitigating circumstances. 26 N.E.3d at 20. The fact that trial counsel should have presented some additional mitigating evidence at Weisheit's penalty phase does not establish a reasonable probability on this record that the outcome would have been different if they had. For these reasons, I agree that trial counsel were not constitutionally ineffective during the penalty phase. The post-conviction court was right to deny Weisheit relief. I join the Court's opinion affirming his convictions, and I concur in its judgment affirming his sentence.

Rush, C.J., concurring in part and dissenting in part.

There is no question that the murders of Alyssa and Caleb were unequivocally horrific. And Weisheit's guilt for those disturbingly reprehensible crimes is clear. I thus agree with my colleagues that Weisheit has no right to a new trial on his guilt. His convictions should stand.

I also agree that Weisheit's many claims of ineffective assistance at the penalty phase of trial fail individually. But in my view, Weisheit has met his burden on his cumulative-effect claim.

"[D]eath is different," *Ring v. Arizona*, 536 U.S. 584, 606 (2002), and the "qualitative difference between death and other penalties calls for a greater degree of reliability when the death sentence is imposed," *Lowenfield v. Phelps*, 484 U.S. 231, 238–39 (1988) (quoting *Lockett v. Ohio*, 438 U.S. 586, 604 (1978) (plurality opinion)). *See Monge v. California*, 524 U.S. 721, 732 (1998). Here, the evidence and the post-conviction court's findings compel the conclusion that counsel's penalty-phase performance suffered multiple deficiencies. While none of those deficiencies, in isolation, is prejudicial enough to warrant relief, in the aggregate, they deprived the jury of enough essential information about Weisheit's background and mental health that his death sentence is not as reliable as the constitution requires.

"[T]here are certain immutable principles of justice which inhere in the very idea of free government which no member of the Union may disregard." *Powell v. Alabama*, 287 U.S. 45, 71–72 (1932) (quoting *Holden v. Hardy*, 169 U.S. 366, 389 (1898)). Among them is the constitutional right to due process, which secures another constitutional right: to effective assistance of counsel. *Id.*; *see Strickland v. Washington*, 466 U.S. 668, 684–85 (1984).

To uphold these constitutional pillars of justice, when a defendant's life is at stake—no matter how reprehensible the defendant—there is "an acute need for reliability," *Monge*, 524 U.S. at 732, which calls courts to be

"particularly sensitive to insure that every safeguard is observed," *Gregg v. Georgia*, 428 U.S. 153, 187 (1976) (plurality opinion). This includes verifying that the jury was properly presented with mitigating evidence to consider at the sentencing phase. *See Williams v. Taylor*, 529 U.S. 362, 395–98 (2000); *Eddings v. Oklahoma*, 455 U.S. 104, 116–17 (1982).

We conduct this review with "painstaking care," *Burger v. Kemp*, 483 U.S. 776, 785 (1987), in part because the death penalty is "profoundly different from all other penalties," *Eddings*, 455 U.S. at 110 (quoting *Lockett*, 438 U.S. at 605 (plurality opinion)), and "unique 'in both its severity and its finality,'" *Monge*, 524 U.S. at 732 (quoting *Gardner v. Florida*, 430 U.S. 349, 357 (1977) (plurality opinion)). Our careful review is to confirm that the state's imposition of the death penalty stands soundly on the fundamental principles of justice that our federal constitution guarantees. An execution tainted by constitutional error corrodes the integrity of the justice system and of the state that imposed it. I believe Weisheit's death sentence suffers that taint of constitutional error.

It is entirely possible that without counsel's performance deficiencies Weisheit would still have received a death sentence—again, these murders were brutal. But there is also a reasonable probability that he wouldn't have. So the outcome of his penalty phase does not meet the required level of reliability. *See Strickland*, 466 U.S. at 694. Weisheit was thus denied his Sixth Amendment right to effective assistance at the penalty phase—though not at the guilt phase—of trial.

The post-conviction court reached the opposite conclusion and relied on improper legal standards. For these reasons, I would remand for a new penalty phase untainted by constitutional error before this case undergoes further review. *Cf. Baer v. Neal*, 879 F.3d 769, 773 (7th Cir. 2018) (finding that this Court unreasonably applied *Strickland* in denying the defendant relief on claims of ineffective assistance at the penalty phase of trial), *petition for cert. filed*, (U.S. Aug. 31, 2018) (No. 18-287).

I therefore respectfully dissent in part.

I. The evidence and the post-conviction court's findings contradict its cumulative-effect conclusion.

It is true that Weisheit must convince this Court that there is no way within the law that the post-conviction court could have arrived at the conclusion it did. *See Stevens v. State*, 770 N.E.2d 739, 745 (Ind. 2002). And "[s]urmounting *Strickland*'s high bar is never an easy task." *Padilla v. Kentucky*, 559 U.S. 356, 371 (2010).

But the bar is not unreachable. The post-conviction court here was required to "make specific findings of fact, and conclusions of law on all issues presented." Ind. Post–Conviction Rule 1(6). Under this requirement, the evidence must support the findings, and the findings must support the conclusions. *Bivins v. State*, 735 N.E.2d 1116, 1121 (Ind. 2000). We do not defer to the court's legal conclusions, but we do defer to its factual determinations, reviewing them only for clear error. *See, e.g., Wilkes v. State*, 984 N.E.2d 1236, 1240 (Ind. 2013).

The post-conviction court's findings[1] and the evidence as a whole lead only to the conclusion that counsel's deficiencies collectively prejudiced

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[1] I agree with my colleagues that these findings are, in fact, the court's findings. The State at oral argument asserted that the order's numbered paragraphs are merely paraphrased restatements of Weisheit's arguments, but the post-conviction court explicitly foreclosed that interpretation in its order's introduction:

> To the extent that any part of these findings of fact and conclusions of law appear to have been adopted from a party's proposed findings of fact and conclusions of law, the Court represents that such has been reviewed by the Court and constitutes the Court's own finding[s] or conclusions.

Although some of the court's findings do observe Weisheit's arguments—with sentences starting "Weisheit alleges . . ." or "Weisheit claims . . ."—nothing indicates that those qualifiers extend beyond the sentences they begin. Nor is this a case in which the court essentially adopted wholesale and verbatim Weisheit's allegations as the court's findings of fact and conclusions of law. Even if the court had done so, we would take the findings and conclusions as the court's own while approaching them with cautious appellate scrutiny. *See Stevens*, 770 N.E.2d at 762.

Weisheit at the penalty stage. The post-conviction court erred in concluding otherwise.

I'll begin with counsel's performance deficiencies and then turn to their cumulative effect.

A. Multiple deficiencies marred counsel's penalty-phase performance.

The Sixth Amendment guarantees Weisheit "the Assistance of Counsel," U.S. Const. amend. VI, which carries a performance standard of "reasonableness under prevailing professional norms," *Strickland*, 466 U.S. at 688.

In measuring attorney performance, courts are mindful that counsel's function is to make the adversarial testing process work in each case. *Id.* at 688–90. In death penalty cases, counsel should make "extraordinary efforts on behalf of the accused," whose life is at stake. *Woolley v. Rednour*, 702 F.3d 411, 425 (7th Cir. 2012) (quoting *ABA Standards for Criminal Justice Prosecution Function and Def. Function* 120 (3d ed. 1993) [hereinafter *ABA Standards*]); *ABA Guidelines for the Appointment and Performance of Def. Counsel in Death Penalty Cases*, Introduction (2003) [hereinafter *ABA Guidelines*].[2] At the sentencing phase, "defense counsel's job is to counter the State's evidence of aggravated culpability with evidence in mitigation." *Rompilla v. Beard*, 545 U.S. 374, 380–81 (2005).

Since during the penalty phase Weisheit's counsel acknowledged Weisheit's guilt and presented a case in mitigation, counsel had "every reason to develop the most powerful mitigation case possible." *Wiggins v. Smith*, 539 U.S. 510, 526 (2003). Counsel's obligation to find mitigating evidence included conducting "a thorough investigation" of Weisheit's

[2] The Supreme Court of the United States has "long referred" to American Bar Association standards and guidelines "as guides to determining what is reasonable." *Wiggins v. Smith*, 539 U.S. 510, 524 (2003) (quoting *Strickland*, 466 U.S. at 688). I likewise refer to them not as setting out rigid, detailed rules but as guideposts for determining reasonableness under professional norms at the time counsel represented Weisheit.

background. *Porter v. McCollum*, 558 U.S. 30, 39 (2009) (per curiam) (quoting *Williams*, 529 U.S. at 396). Interviewing witnesses and requesting records were the first steps. *Id.* Then counsel should have left "no stone unturned," *ABA Standards* at 4-1.2 Commentary, "to discover **all reasonably available** mitigating evidence," *Wiggins*, 539 U.S. at 524 (quoting *ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases*, 11.4.1(C) (1989)). *See also ABA Standards* at 4-4.1(a) ("Defense counsel should . . . explore all avenues leading to facts relevant to the merits of the case and the penalty . . . .").

Limitations on the investigation must be supported by "reasonable professional judgments" under the circumstances; they must not result from inattention. *Wiggins*, 539 U.S. at 533 (quoting *Strickland*, 466 U.S. at 691). *Compare Bobby v. Van Hook*, 558 U.S. 4, 11–13 (2009) (per curiam), *with Williams*, 529 U.S. at 395–96. Presenting some mitigating evidence is not enough if counsel failed to pursue sources that counsel should have been aware of, that were reasonably available, and that promised more powerful evidence than counsel actually obtained. *See Wiggins*, 539 U.S. at 533; *Porter*, 558 U.S. at 39–40; *Rompilla*, 545 U.S. at 381–90. Finally, greater effort is required when the absent evidence is "particularly pressing" for the defendant's case. *Rompilla*, 545 U.S. at 386. In other words, the amount of effort that is reasonable rises with the evidence's importance.

In Weisheit's case, counsel countered the aggravating circumstances—two murders of children under the age of twelve, *see* Ind. Code § 35-50-2-9(b)(8), (12) (2008)—with four statutory mitigating factors. First, Weisheit had no significant history of prior criminal conduct. *See* I.C. § 35-50-2-9(c)(1). Second, Weisheit was under the influence of extreme mental or emotional disturbance when he committed the murders. *See* I.C. § 35-50-2-9(c)(2). Third, Weisheit's capacity to appreciate the criminality of his conduct or to conform that conduct to the law was substantially impaired

because of mental disease or defect.[3] *See* I.C. § 35-50-2-9(c)(6). And finally—in a catchall for any other circumstances appropriate for consideration—Weisheit could be securely housed in the Department of Correction for the remainder of his life, and his troubled childhood and mental health issues reduce his culpability. *See* I.C. § 35-50-2-9(c)(8); *Porter*, 558 U.S. at 43–44; *Rompilla*, 545 U.S. at 390–91; *Williams*, 529 U.S. at 395–96; *Skipper v. South Carolina*, 476 U.S. 1, 4–5 (1985).

Within this framework, counsel's penalty-phase performance suffered multiple deficiencies: failure to ask Dr. Philip Harvey if he would testify; failure to pursue the Boys School records; and—for Aiken's testimony—failure to point the trial court to the proper foundational requirements and to make an adequate offer of proof.

1. Failure to ask Dr. Harvey if he would testify, after receiving an email from him indicating he could testify about his past evaluation of Weisheit.

Defense counsel did not attempt to secure Dr. Harvey as a witness for the penalty phase of trial. As the post-conviction court found, Dr. Harvey was an expert on bipolar disorder who personally observed Weisheit exhibit signs of a manic episode during an in-person evaluation. He emailed the defense team that, while he was unable to perform a future assessment of Weisheit, he was able and willing to testify about his past observations of Weisheit. After receiving this email and despite Dr. Harvey's willingness, Weisheit's counsel never contacted the doctor to see

[3] This statutory mitigating factor differs from the insanity defense. Whereas insanity is a defense when the defendant, "as a result of mental disease or defect . . . was **unable** to appreciate the wrongfulness of the conduct at the time of the offense," I.C. § 35-41-3-6(a) (emphasis added), the statutory mitigating factor applies when the defendant's "**capacity to appreciate** the criminality of the defendant's conduct **or to conform** that conduct to the requirements of law was **substantially impaired** as a result of mental disease or defect or of intoxication," I.C. § 35-50-2-9(c)(6) (emphases added). Because of these differences, a person may be legally sane but nevertheless qualify for the mitigating factor, depending on the degree of the defendant's mental illness. *See, e.g., Matheney v. State*, 688 N.E.2d 883, 898 (Ind. 1997); *Lowery v. State*, 547 N.E.2d 1046, 1059 (Ind. 1989).

if he would testify. The post-conviction court—after taking evidence—properly found that this failure was a "mistake" and "not a strategic decision," yet concluded that trial counsel's performance was not deficient. As I explain below, the post-conviction court's findings and the evidence as a whole do not support this conclusion.

a. The evidence supports the post-conviction court's findings that counsel's communication failure was a "mistake" and "not a strategic decision," so we are bound by them.

At the post-conviction hearing, Dr. Harvey testified about his extensive background studying bipolar disorder since 1979, including a clinical research study involving more than 4,500 people with bipolar disorder. Dr. Harvey then explained his involvement with Weisheit's case, beginning with lead counsel Tim Dodd contacting him:

> . . . [Dodd] had me go to Evansville and perform an evaluation. Our plan was to perform an initial mental health evaluation . . . [t]o be followed up by other assessments as needed. . . .
>
> . . . What was clear when I was talking to Mr. Weisheit was that he was showing the signs of having a manic episode. . . .
>
> . . . This interview was performed on the 19th of September, 2010.
>
> . . . [T]hen Mr. Dodd showed me a video that had been taken at the time of Mr. Weisheit's arrest . . . .
>
> . . . Mr. Weisheit was very agitated when he got out of the car. He was yelling at the officers that were there. He threw – he actually threw a knife at the officers immediately prior to being struck by the taser.

Following this meeting, in May 2011, Dodd sent Dr. Harvey a letter, forecasting Dr. Harvey's further involvement with the case and telling him to expect some health records on Weisheit's family members. But Dodd died the following month. Dr. Harvey wanted to do at least one repeat examination, and Weisheit's "second chair" counsel, Stephen Owens, testified that he was aware of that fact. Nevertheless, after receiving the records Dodd had mentioned in his letter, Dr. Harvey "never received a repeat invite to come back and see Mr. Weisheit after that for a considerable period of time."

Then, in January of 2012, Dr. Harvey sent an email to the mitigation specialist, Mike Dennis. Dr. Harvey testified that he had sent the email "based on my being informed by my medical group that effective the 1st of January, 2012 we could no longer be paid for doing personal assessments on individuals." He also testified that in the email, "I told him . . . I'd be happy to help you find someone else to perform an assessment on Mr. Weisheit, but I also made it very clear in [the email that] this does not preclude testimony on previously seen cases. . . . I will have to restrict my testimony to the data that I have previously collected prior to this rule."

Dr. Harvey's email matches his testimony. It was dated January 17, 2012, and provided,

> We have just been informed that as of the first of this year, we can no longer be paid as individuals for the assessment of any forensic cases that involve direct contact with clients. . . . This does not preclude testimony on previously seen cases. Let me try to find you someone else who could do an assessment for you, but I can't. I will have to restrict my testimony to the data that I previously collected prior to this rule.

Dr. Harvey testified about what happened next:

> . . . Then I discovered in 2012 that Mr. Weisheit's initial counsel had died. And I wrote a summary of my assessment and provided it at that point in 2012 to the mitigation specialist.

. . . .

> . . . It was a very abbreviated report just summarizing the results of my three hour – two and half, three hour visit with Mr. Weisheit and some of the minimal medical records that I've been sent since then . . . .

Dr. Harvey explained that he could have testified at Weisheit's trial in 2013, but that he was not asked by counsel to do so and in fact "heard nothing else about this proceeding." He also testified that "[b]ipolar disorder would meet the criteria for extreme emotional disturbance," a mitigating factor under Indiana Code section 35-50-2-9(c)(2), and that "[c]learly if someone was experiencing a major depressive or manic episode at the time of committing the crime it would meet th[e] criteria" for the mitigating factor under Section 35-50-2-9(c)(6) (substantial impairment from mental disease or defect).

Counsel Owens testified at the post-conviction hearing that "[i]nitially the lead counsel was Tim Dodd. Tim came in in April of 2010 and then he passed in June of 2011," and Mike McDaniel, who replaced Dodd, died before the post-conviction hearing. Owens explained the attorneys' involvement in the mitigation aspect of the case:

> I think initially when Tim was in the case, Tim was having more contact with Mike [Dennis, the mitigation investigator] than I was. Sort of gave Mike the job of going out and locating as much mitigation evidence and witnesses as we could. So, I don't think either one of us, either Tim or I, had much input into the mitigation at that point. When Mike McDaniel came into the case, we pretty much left it up to Mike and Dennis.

When asked if Owens considered contacting Dr. Harvey at the time of trial to see if he was available as a potential mitigation witness, Owens responded,

> I had received information from Mike Dennis and Mike McDaniel that Dr. Harvey was no longer able to participate. . . .

> My understanding was, basically, he was not going to be able to be a witness and he was not going to be able to continue to evaluate.
>
> . . . .
>
> . . . [O]ur understanding was th[at] Dr. Harvey was not going to be able to continue as an expert, because his employment had changed and he was not going to be able to return to Indiana. . . . We moved to continue th[e] trial date as a result of Dr. Harvey sort of bailing out on us and that we needed some[]time to obtain an expert witness.

Owens confirmed that neither he nor Mike McDaniel contacted Dr. Harvey when the trial came in 2013, to see if he was available to testify.

After weighing this evidence, the post-conviction court's findings for counsel's failure to contact Dr. Harvey included the following:

3. Dr. Harvey is a licensed psychologist. . . . Dr. Harvey has been studying Bipolar Disorder since 1979.

4. Dr. Harvey was involved in a very large and significant study of veterans diagnosed with Bipolar Disorder as the Clinical Chair. . . . Dr. Harvey personally reviewed [thousands of] individual results in the study.

   . . . .

6. Dr. Harvey testified to the importance of a clinical interview. . . . Dr. Harvey finds a structured interview like the SCID is the most informative aspect of a clinical evaluation. . . .

7. Dr. Harvey was originally contacted by prior counsel, Timothy Dodd. Dr. Harvey performed an evaluation of Weisheit on September 19, 2010. . . . During the evaluation, Dr. Harvey administered the SCID. Dr. Harvey felt Weisheit was showing signs of a manic episode when he performed Weisheit's evaluation. Following the evaluation, Dr. Harvey met with trial counsel and . . . [c]ounsel showed Dr. Harvey the video of Weisheit being stopped [by police] and his behavior prior to being hit with a taser. Dr. Harvey informed trial counsel Weisheit's behavior was consistent with the behavior he observed when he performed the evaluation of Weisheit. At the time, Dr. Harvey expected he would perform another psychological

evaluation [of Weisheit]. He was provided the family mental health records in 2011, but had no other contact with the trial team regarding the additional evaluation until January of 2012. In an e-mail to the defense team, Dr. Harvey notified them of his recent change of conditions of employment. . . . [H]e [could] no longer have direct contact with individuals in forensic cases. . . . He would have to restrict his testimony to the evaluation he had performed. . . . He could have testified at the 2013 trial, but was not asked to do so.

. . . .

11. The failure to call Dr. Harvey was not a strategic decision. Counsel mistakenly believed Dr. Harvey was not able to continue on the case. The e-mail contradicts this belief . . . . Dr. Harvey clearly conveyed he was available to testify to the results obtained during his evaluation of Weisheit. Counsel did not contact Dr. Harvey to learn whether he could or could not testify. Dr. Harvey was willing to do so. Due to counsel's mistake, Dr. Harvey was not provided the necessary documentation of evidence supporting the episodic nature of Bipolar Disorder and the Boys School records reflecting the long term treatment for Major Depression. A Major Depressive Episode is the first observed symptom for the majority of those identified later in life with Bipolar Disorder. Weisheit's presentation, a late onset single manic episode, is consistent with 40% of those diagnosed with Bipolar Disorder.

12. Dr. Price's testimony reflected some of Dr. Harvey's observations. However, he could not testify to Dr. Harvey's opinion and therefore had to dilute the information collected by Dr. Harvey . . . .

13. Dr. Harvey's testimony could have been used to rebut the State's expert, Dr. Allen. . . .

14. . . . Dr. Harvey's opinion would have supported two statutory mitigators and would have effectively rebutted Dr. Allen's testimony. The State exploited counsel's failure and argued there was no evidence of these two statutory mitigators (Tr. 2568-2569). By failing to contact Dr. Harvey, the defense was left with one expert to testify to the cognitive disorder and Bipolar Disorder. Trial counsel's own assessment of the credibility of Dr. Price's testimony reflects the magnitude of this error.

Ultimately, the evidence supports the post-conviction court's findings. Dr. Harvey made clear in his email that he was able to testify to his previously collected data. That data was critical to Weisheit's mitigation case, which largely relied on the effect of Weisheit's mental health on his behavior and culpability.

Although the email clearly informed counsel that Dr. Harvey could testify to his past evaluation, if the email had created any doubt about his ability to testify, diligence would have required a phone call or some other contact for clarification. *See generally* Ind. Professional Conduct Rule 1.3 (requiring "reasonable diligence"). Instead, counsel did nothing.

Failing to contact Dr. Harvey after he emailed the defense team "resulted from inattention, not reasoned strategic judgment." *Wiggins*, 539 U.S. at 526; *see Strickland*, 466 U.S. at 689. So the post-conviction court properly found that "not contact[ing] Dr. Harvey to learn whether he could or could not testify" was a "mistake" and "not a strategic decision." It was also not a minor, innocuous mistake, *see Strickland*, 466 U.S. at 695–96; *Timberlake v. State*, 753 N.E.2d 591, 603 (Ind. 2001), because Dr. Harvey's hours-long, in-person encounter with Weisheit was vitally important to the defense's case. As the post-conviction court found, "[t]he State exploited counsel's failure" by arguing that no evidence showed the two statutory mitigators that "Dr. Harvey's opinion would have supported," revealing a breakdown in the adversarial process, *see Strickland*, 466 U.S. at 688–90. Given the evidence in support, these and other related findings were not clearly erroneous.

b. The evidence and the post-conviction court's findings, however, do not support its conclusion that trial counsel was not deficient.

Although the post-conviction court's findings are supported by the evidence, neither those findings nor the evidence as a whole support its conclusion that "Weisheit has failed to show that trial counsel['s] performance fell below prevailing professional norms where counsel failed to call Dr. Philip Harvey at the penalty phase of Weisheit's trial."

The court reasoned that "Weisheit never established when the [new employment rule] . . . went into effect" and "[i]t was reasonable for trial counsel to decide to hire another qualified expert." This reasoning—and the conclusion that stands on it—is faulty, for multiple reasons.

First, as the post-conviction court found, Dr. Harvey's email—dated January 17, 2012—specified that the rule went into effect "as of the first of this year." So Weisheit did establish when the rule went into effect. Even more importantly, though, Weisheit did not need to establish the rule's effectuation date. This is because the rule did not bar Dr. Harvey from testifying to his past evaluation of Weisheit. As the post-conviction court found, "Dr. Harvey clearly conveyed he was available to testify to the results obtained during his evaluation of Weisheit."

Second, the post-conviction court—and similarly the majority today—excuses counsel for dropping Dr. Harvey's involvement because counsel later hired Dr. Price, who incorporated Dr. Harvey's two-page summary memorandum into his own assessment and testimony. But hiring Dr. Price does not erase the deficiency from counsel's performance. This is because the choice to employ Dr. Price was based entirely on counsel's false impression that Dr. Harvey could not testify—a false impression formed by inattention rather than by "reasoned strategic judgment." *Wiggins*, 539 U.S. at 526. Thus, although calling Dr. Price to testify may have been a reasonable decision by itself, it proceeded from inattention that did not reflect reasonable professional judgment. *Cf. id.* at 533 ("'[S]trategic choices made after less than complete investigation are reasonable' only to the extent that 'reasonable professional judgments support the limitations on investigation.'" (quoting *Strickland*, 466 U.S. at 690–91)).

And although hiring Dr. Price might have shielded Weisheit from prejudice caused by counsel's deficient performance, that goes to *Strickland*'s second prong. *See Timberlake*, 753 N.E.2d at 603 ("The two prongs of the *Strickland* test are separate and independent inquiries."). Regardless of prejudice, the post-conviction court's findings and the evidence as a whole lead only to the conclusion that failing to contact Dr. Harvey after he emailed the defense team was an inexcusable,

unprofessional error—one that amounted to deficient performance under *Strickland*'s first prong. *See Williams*, 529 U.S. at 396 (chiding counsel for failing to return a phone call of someone who had visited the defendant in prison and had offered to testify); *Hall v. Washington*, 106 F.3d 742, 749–50 (7th Cir. 1997). The post-conviction court's opposite conclusion—that counsel was not deficient—is thus contrary to law.

2. Failure to pursue the Boys School records.

Early in their investigation, defense counsel learned that records of Weisheit's time at the Boys School likely contained valuable mitigating evidence. Counsel were aware that while Weisheit was at the Boys School, he attempted suicide and received treatment at Methodist Hospital. Tim Dodd accordingly sent initial records requests to the Department of Correction and to the hospital, but neither entity could fill the request.

Despite both the importance of the records to Weisheit's case and the Department's invitation to contact its Director of Operational Support, defense counsel made no other efforts to find the Boys School records. Post-conviction counsel obtained the records from the state archives, which had received the records from the Boys School "in accordance with the records retention schedule for the Indiana Department of Correction."

After reviewing the evidence, the post-conviction court rightly found that the mitigation case would have been stronger "but for counsel's deficiencies," and even likened counsel's limited investigation to the deficient performance found in *Wiggins*, 539 U.S. at 525. Yet the post-conviction court concluded that counsel's aborted efforts were not deficient performance. The court's findings and the evidence as a whole do not support this conclusion.

a. The evidence supports, so we are bound by, the post-conviction court's findings that counsel's limited investigation amounted to "deficiencies" that weakened the defense's case in mitigation.

Counsel had limited records indicating that Weisheit attempted suicide while at the Boys School and received treatment at Methodist Hospital. Those records did not provide specific details about the suicide attempt or Weisheit's behavior and health at that time. With this important documentation missing, Dodd sent initial records requests to the hospital and to the Department of Correction. His letter to the Department said,

> It is our understanding that [Weisheit] was a[n] inmate at the Indiana Boys School. The enclosed Subpoena is issued in order to obtain such records you may have concerning his incarceration, in 1992-1993. We believe he attempted suicide while at Boy's School and was taken to Methodist Hospital where he spent 5-6 weeks. We hope your file contains records from that Methodist Hospital stay and if so the subpoena is intended to include those records. Our subpoena to Methodist Hospital was returned by them indicating their files had been purged.

The Department responded that "we have no match" for the requested records and that "[a]fter 10 years if an offender doesn't return to our facility we destroy the file." The Department's letter also gave the name and phone number of the Director of Operational Support and invited, "please feel free to contact" that person with "[a]ny further questions."

At the post-conviction hearing, Mike Dennis testified about the defense team's efforts to obtain the records:

> After we knew that [Weisheit] had been in the Boy[s] School Tim and I talked about it and I said – I don't think I initially called them. I said we ought to just write a letter, send a release and he did that. At some point several weeks later, I'm not sure

how long, he received a letter back saying that the records were unavailable.

When asked about follow-up efforts, Dennis revealed that there were none:

Q And to your knowledge, were any other efforts made to seek those records?

A Not to my knowledge.

. . . .

Q Mr. Dodd never asked you to do anything else to get those records?

A No.

Q And Mr. McDaniel, he did not ask you to do anything to get those records?

A No.

Q And Mr. Owens, did he ask you to do anything to get those records?

A No.

Dennis also testified that he knew of the Indiana State Archives. But, as Owens testified, no one from the defense team went to the state archives to attempt to obtain the Boys School records.

Weisheit's post-conviction counsel retrieved the Boys School records from the state archives. The custodian of those records confirmed that "[t]he records, consisting of 403 pages, were received from the Indiana Boys School in accordance with the records retention schedule for the Indiana Department of Correction (Record Series 86-368)," and supplied the records retention policy. The policy provides that before the Department of Correction destroys an offender packet "ten (10) years after discharge, expiration of the sentence[,] or closing of the Department's interest in the case," the records are first transferred "to the designated

departmental collection center" and must undergo "SAMPLING by the STATE ARCHIVES DIVISION, ARCHIVES AND RECORDS ADMINISTRATION."

After being presented with this evidence, the post-conviction court made findings on counsel's limited investigation, including the following:

2. Mike Dennis was the defense team's mitigation investigator. Owens testified the mitigation aspect of the case was "pretty much left to Mike Dennis."

3. The defense team was aware Weisheit had spent some time in the Boys School. Tim Dodd sent a letter to the Department of Correction requesting copies of the Boys School records. Dodd received a response that they no longer had the records (PCR Ex. C). Dennis was never asked by any other counsel to do anything else to look for the Boys School records. They received a few records from Weisheit's parents, but did not get everything they wanted.

4. The defense team was aware that while Weisheit was at the Boys School, he was sent to Methodist Hospital. A report from the Boys School . . . indicated that while Weisheit was in the psychiatric unit of Methodist Hospital after attempting suicide at the Boys School, he suffered a psychotic break (PCR Ex. 5). Owens testified if there was evidence Weisheit had a psychotic break while at Methodist Hospital, that would have been important to provide to the defense team's experts.

. . . .

13. . . . [H]ad counsel been armed with the Boys School records, he would have been able to present to the jury information about the school's resources and the rarity of Weisheit's placement at Methodist. [Deborah Eccles-]Skidmore could have been a much more compelling witness for the defense but for counsel's deficiencies.

Under a "conclusion" heading, the post-conviction court's order included additional findings on counsel's limited investigation and likened those findings to the deficient performance in *Wiggins*:

> The investigation the defense team conducted unearthed leads to persuasive mitigating evidence. They knew that Weisheit was in the Boys School yet failed to find the records. . . . The records that were provided to

> the jury reflected very little of the compelling evidence of Weisheit's mental illness or the role his family played in failing to follow through with treatment. . . . The Boys School records document lengthy treatment for a major mental illness, one which included that Weisheit suffered a psychotic break. . . . In *Wiggins*, the Supreme Court found counsel's performance deficient where they failed to continue investigating once this type of lead had been found. "The scope of the[ir] investigation was also unreasonable in light of what counsel actually discovered [in the . . . records]." *Wiggins*, 539 U.S. at 525. The Court explained counsel uncovered no evidence to suggest "further investigation would have been fruitless." *Id.*

Ultimately, the evidence supports the post-conviction court's findings. Indeed, counsel was aware that the Boys School records promised persuasive mitigating evidence of Weisheit's troubled youth and mental health issues. Counsel also had no reasonable substitute for the Boys School records, making those records of Weisheit's time at the Boys School—when he attempted suicide—particularly pressing for the strength of the defense's case. *See Rompilla*, 545 U.S. at 385–86.

With Weisheit's life on the line, and considering the records' importance to the mitigation case, reasonable efforts certainly required at least **some** follow-up action. This is especially true since the Department of Correction invited counsel to contact the Director of Operational Support for more information, and counsel did not even take that small step. In light of the evidence, the post-conviction court's findings about the defense team discontinuing their investigation of the Boys School records after "unearth[ing] leads to persuasive mitigating evidence" are not clearly erroneous.

b. The evidence and the post-conviction court's findings do not support its conclusion that counsel's limited investigation was not deficient performance.

Although the evidence supports the findings above, those findings and the evidence do not support the court's conclusion that "[t]rial counsel's

efforts to gain information regarding Weisheit's Indiana Boys' School records was more than sufficient under the dictates of *Strickland*."

For this conclusion, the post-conviction court reasoned that counsel "was informed that the records did not exist and that the documents were older than their retention policy." It further reasoned that "[h]ad IDOC referred trial counsel to the State Archives and trial counsel failed to exhaust this lead, Weisheit would have had a much closer case for deficiency." This reasoning is inaccurate and ignores counsel's failure to take the step that the Department **did** set out for counsel.

The Department's letter did not make the broad statement that the records did not exist. Rather, it informed counsel that the Department did not have the file, and it recited part of their record-retention practices. Specifically, it explained that they had "no match" for the requested records and possessed only an offender card on Weisheit, and that "[a]fter 10 years if an offender doesn't return to our facility we destroy the file."

The Department invited counsel's further questions, and counsel failed to act on that invitation. It was not the Department's responsibility to provide counsel with other next steps for their investigation, such as referring counsel to the state archives. It was counsel's responsibility to follow the leads that they had and to be thorough in uncovering the defendant's background. *See Porter*, 558 U.S. at 39–40; *ABA Supplementary Guidelines for the Mitigation Function of Def. Teams in Death Penalty Cases*, Introduction, 10.4 (2008) (recognizing that the "ultimate responsibility for the investigation . . . rests irrevocably with counsel").

As the post-conviction court observed in comparing this case to *Wiggins*, the evidence does not suggest that it would have been fruitless to contact the Department's Director of Operational Support for more information about what happened to the records. Quite the opposite: counsel might have learned that destruction-after-ten-years was not the entirety of the Department's record-retention policy. The policy included in the post-conviction evidence called for destruction of offender files ten years after "discharge, expiration of the sentence[,] or closing of the Department's interest in the case," but only after the records are

transferred and undergo "SAMPLING by the STATE ARCHIVES DIVISION, ARCHIVES AND RECORDS ADMINISTRATION."

Similar to the post-conviction court, the majority asserts that "it does not seem that counsel was deficient"[4] for discontinuing pursuit of the Boys School records because "counsel was told by the Boys School that there was no match for the records and that records over 10 years old were destroyed, and counsel did obtain other mental health records from other sources."

True, this is not a case where counsel completely ignored their obligation to find mitigating evidence. *See Rompilla*, 545 U.S. at 381. Counsel did obtain some records. But those records made counsel aware that the Boys School records promised more powerful mitigating evidence, and counsel had an obligation to follow that lead. *See Porter*, 558 U.S. at 39–40; *Rompilla*, 545 U.S. at 381–89; *Wiggins*, 539 U.S. at 533–34. Counsel didn't need to "scour the globe" for the Boys School records. *Rompilla*, 545 U.S. at 383. But counsel's aborted pursuit of critical mitigating evidence is a far cry from both counsel's "overriding mission of vigorous advocacy," *Strickland*, 466 U.S. at 689 and the "extraordinary efforts" demanded when a client's life is at stake, *ABA Guidelines*, Introduction. Particularly because counsel knew the importance of Weisheit's mental-health history to his mitigation case, doing nothing to follow up on the records was unreasonable.

Augmenting the unreasonableness of counsel's inaction are that the sentencing phase was "the main event" of Weisheit's trial since acquittal was unlikely, *Brewer v. Aiken*, 935 F.2d 850, 860 (7th Cir. 1991) (Easterbrook, J., concurring), and that reasonable efforts would have been enough to locate and obtain the records at the state archives, *see Rompilla*, 545 U.S. at 389–90. Counsel's inaction and lack of effort in pursuing

[4] Whether the majority has imposed a heightened burden on Weisheit—to show **clearly** ineffective assistance—is another issue. Weisheit bears the burden of establishing grounds for relief by a preponderance of the evidence. *See* P–C.R. 1(5); *Wilkes*, 984 N.E.2d at 1240. In my view, Weisheit has carried his burden to establish deficient performance and cumulative prejudice.

valuable mitigating evidence was unreasonable and put their client's life at greater risk. *Cf. Baer*, 879 F.3d at 783–84. These failures amounted to deficient performance.

3. Failure to identify proper foundational requirements and to make a clear offer of proof for Aiken's testimony.

Laying a proper foundation for testimony is an "evidentiary requirement that every trial attorney should understand." *Hernandez v. State*, 638 N.E.2d 460, 462 (Ind. Ct. App. 1994), *trans. denied*. It includes pointing the trial court to the governing foundational rule when necessary to prevent a "breakdown in the adversarial process," *Strickland*, 466 U.S. at 696.

An equally basic skill is preserving a claim of error in the exclusion of evidence—counsel must inform the court of the evidence's substance by an offer of proof, allowing for meaningful review on appeal. Ind. Evidence Rule 103(a)(2); *see State v. Richardson*, 927 N.E.2d 379, 385 (Ind. 2010); *Von Almen v. State*, 496 N.E.2d 55, 57 (Ind. 1986) ("The importance of establishing a record as a prerequisite to appellate review cannot be understated.").

Here, the evidence reveals that Weisheit's trial counsel neither laid a proper foundation for Aiken's testimony nor provided an adequate offer of proof. The evidence thus supports the post-conviction court's findings that counsel's failure to point the trial court to the proper foundational requirements was "error" and "not the result of poor strategy or bad tactics," and that counsel had not "made the proper offer of proof."

Despite these findings, the post-conviction court failed to draw the only conclusion that flows from them: that counsel's performance was deficient.

a. The evidence supports the post-conviction court's findings that counsel's failure to point the trial court to the proper foundational requirements was "error" and "not the result of poor strategy or bad tactics," and that counsel did not make a "proper offer of proof."

At the penalty phase, counsel appropriately recognized that "mitigation includes . . . whether or not this particular individual poses a threat to the community, or to corrections officers, or to other inmates." For mitigation evidence on this front, counsel called and relied on James Aiken for expert testimony about Weisheit's ability to be incarcerated in the Department of Correction, including on a long-term basis, without undue risk of harm to others.

Aiken is a former Commissioner of the Indiana Department of Correction and has approximately forty-five years of experience with corrections, including developing and implementing inmate classification systems across the United States.

At the penalty phase, Aiken began to describe his background to the jury, but before his testimony filled two transcript pages, the State objected. The trial court then dismissed the jury and prompted Owens, "Tell me what [Aiken's] likely testimony's going to be, or maybe we want to get that from him . . . ." Owens tried to summarize Aiken's testimony, but the court remained uncertain about the evidence's substance. Rather than Owens providing clarity by questioning Aiken, Owens suggested the trial court do so:

> THE COURT: . . . Are you asking -- are you proposing that his testimony is going to be in the nature of projecting or offering an opinion as to whether or not the Defendant will be, and I'm -- these are my words, a disruptive influence in the prison system?
>
> MR. OWENS: Why don't you just ask Mr. Aiken.

> THE COURT: No, I want to know what you're proposing to offer here, because I'm still not satisfied that he's got the qualifications to do that in a futuristic sort of way.

The trial court did eventually ask Aiken questions, gearing them toward the foundational requirements for expert **scientific** testimony under Indiana Evidence Rule 702(b). Counsel did not point the court to Rule 702(a), which spells out the less-stringent requirements for non-scientific expert testimony. The court ultimately excluded Aiken's testimony on Weisheit's future inmate classification because it did not meet Rule 702(b)'s requirements, but the court said that Aiken could testify on classification generally.

Counsel then asked if the court would also permit Aiken to "testify as to his review of Mr. Weisheit's records," which included jail records following Weisheit's arrest. The court responded, "Yes"—yet counsel withdrew Aiken as a witness without having Aiken testify about his review of those records concerning Weisheit's past adjustment to imprisonment.

Apart from Aiken's description of his own background, which he supplied before the State's objection, the jury heard nothing from Aiken. In the offer of proof, counsel did not clearly set out Aiken's review of Weisheit's past adjustment to imprisonment and other characteristics relevant to sentencing. So that information was not part of the foundation for Aiken's testimony on Weisheit's future inmate classification.

When Aiken testified at the post-conviction hearing, he provided his qualifications and extensive experience with prison classification. He listed some of the factors he considers in classifying inmates, including a diagnostic evaluation, age, medical and mental health, gang involvement, escape history, institutional violence or potential for violence within the facility, relationship with law enforcement, the nature of the offense, and the length of the sentence. He also confirmed that he applied these factors to Weisheit to form his opinion of Weisheit's ability to be secured, supervised, and managed in the Department of Correction. Then Aiken

provided his opinion on Weisheit's past adjustment to imprisonment and his individualized prediction for Weisheit's inmate classification.

For Weisheit's past adjustment, Aiken concluded:

> . . . I did not find anything that would give me an indication that his criminal history would cause an[y] issues . . . the Department of Correction[] could not anticipate or manage.
>
> . . . .
>
> . . . [F]rom the stand point of managing him for a long term basis, he did not present an unusual risk . . . . There were incident reports, disciplinary hearings and so forth in relationship to his behavior and I made assessments of each one . . . . And those type of misconduct reports were at the lower end of the spectrum as it relates to managing inmate population.

Aiken also explained that Weisheit had "stabilized very well" after moving from the Vanderburgh County Jail to the Clark County Jail, and that his opinion about Weisheit's adjustment to imprisonment was "further validated" by Weisheit's institutional history since the time of the penalty phase.

For his particularized prediction of Weisheit's inmate classification, Aiken concluded:

> [t]hat [Weisheit] could be adequately managed for the remainder of his life in a high security setting and that he could be . . . [a]dequately secured, supervised and managed within the Indiana Department of Correction without causing an undue risk of harm to staff, himself, other inmates, as well as the general community.

Also at the post-conviction hearing, Owens testified that he had not met with or spoken to Aiken until the morning of his testimony and that he was surprised by the State's objection.

After reviewing this evidence, the post-conviction court made the following findings on counsel's performance:

7. The jury learned Aiken's occupation was in corrections and prisons (Tr. 2357). He outlined his experience with various jurisdictions' prison systems. Aiken was cut off by a State's objection before the jury heard of his experience in Indiana. The jury heard nothing else from this witness.

. . . .

9[a]. . . . The court ruled it would allow Aiken to testify generally about classification, but not render any opinions as to how the State of Indiana would classify Weisheit if he received life without parole or a term of years. . . . Owens never corrected the court about its use of 702(b) foundational requirements.

9[b]. Owens withdrew Aiken without any further offer of proof. . . .

10. Owens testified at the post-conviction hearing he did not know until the morning of Aiken's testimony that he would be questioning Aiken. Aiken met briefly with counsel before he testified. . . .

11. Aiken has an undergraduate and graduate degree in criminal justice. He has worked for 45 years in the corrections industry. He has experience implementing techniques and protocols related to classification. He has participated in training programs related to classification. Aiken has been employed by various correctional facilities throughout the country and the Virgin Islands (PCR Ex. 23). He was the commissioner of the Indiana Department of Correction. . . . Aiken has helped design and implement classification systems throughout the country. . . . He has testified in several Indiana death penalty cases as to the ability of the Indiana Department of Correction to safely house an inmate without undue risk of harm to others.

. . . .

13. Prior to his testimony in 2013, Aiken reviewed Weisheit's criminal history, all institutional records from the Vanderburgh County Jail and the facts surrounding this crime (Tr. 2366). He also interviewed Weisheit (Tr. 2367). At post-conviction, Aiken testified he found the following information from those records relevant to his conclusion Weisheit posed a lower risk of violence in the Department of Correction: Weisheit's age of being in his late-30's because inmates' behavior tends to calm down in this age range; Weisheit had no previous history with gang activity which contributes to systemic violence in a prison; Weisheit had displayed very little

institutional violence; Weisheit maintained a relationship with his family which generally reduces the incentive for violence; and the nature of his crime being a crime against children would require a higher level of security for his safety. With regard to the behavior issues Weisheit had during the months after being arrested, Aiken testified that was not unusual given the stress of being incarcerated for the first time in a jail. Once moved to the Clark County Jail, Weisheit adjusted quite well. During his interview of Weisheit, Aiken observed his demeanor and how he appeared to be handling the stress of incarceration and the trial. Aiken did not find Weisheit to be cool, detached or aggressive.

14. Aiken testified that given all the circumstances, Weisheit would be incarcerated in a maximum security facility . . . . Aiken offered the opinion if Weisheit received a term of years or life without parole, he could be securely housed in a high security setting by the Department of Correction without undue risk of harm to prison staff or the other inmates.

15. Before the post-conviction hearing, Aiken reviewed Weisheit's Department of Correction history since his convictions. Aiken testified the records demonstrated Weisheit had made adequate adjustment to being incarcerated. Aiken noted two minor violations in three years. He did not see any evidence of random or systemic violence. These records validated his original opinion.

. . . .

17. . . . The [Indiana Supreme] Court opined [on direct appeal] that if counsel had made a more precise offer of proof detailing Weisheit's adjustment to imprisonment leading up to trial, it "could have possibly resulted in reversal of his death sentence." [*Weisheit*, 26 N.E.3d at 10.]

18. When deciding whether to impose a death sentence, the trier of fact may consider any appropriate mitigating circumstances. Ind. Code 35-50-2-9(c). It is a violation of the U.S. Constitution to fail to consider evidence of a defendant's adjustment to incarceration leading up to trial as mitigating evidence to weigh against the aggravating circumstances. *Skipper*, 476 U.S. at 3–5; *Wilkes v. State*, 917 N.E.2d 675, 690 (Ind. 2009).

. . . .

20. The trial court's use of foundational requirement[s] of Ind. Evid. R. 702(b) was error. Aiken's testimony was admissible under Ind. Evid. R. 702(a) . . . .

> 21. The subject matter here, whether the Department of Correction can adequately house Weisheit given his particular circumstances, is not a subject known to the average person. Aiken was qualified as an expert in classification and had specialized knowledge to assist the jury in determining a mitigating factor, the ability of Weisheit to be safely incarcerated without undue risk of harm to others, in weighing the decision between the death penalty, life without parole or a term of years. . . .
>
> 22. . . . Counsel's error was not the result of poor strategy or bad tactics. . . .
>
> 23. . . . Counsel was not prepared to handle any objections from the State. . . .
>
> . . . .
>
> 26. . . . The jury did not hear . . . about any of the factors that weighed in favor of his imprisonment without undue risk to others. . . . The defendant must show there is a reasonable probability the result of the proceeding would have been different absent the deficient performance. [*Strickland*,] 466 U.S. at 693. The [Indiana] Supreme Court's own words demonstrate there is a reasonable probability of a different outcome had counsel made the proper offer of proof. . . .

The evidence supports the post-conviction court's findings. Counsel did not steer the trial court to Rule 702(a) when laying the foundation for Aiken's testimony. This failure ultimately led to the exclusion of mitigating expert testimony during Weisheit's penalty phase. Thus, the post-conviction court's finding that the failure was "error" and "not the result of poor strategy or bad tactics" is not clearly erroneous.

Similarly, counsel did not set out how Aiken's review of Weisheit's past jail records and other characteristics helped qualify Aiken to testify to Weisheit's future inmate classification. And counsel withdrew Aiken as a witness before Aiken was able to testify about Weisheit's past adjustment to imprisonment. This supports the post-conviction court's finding that counsel did not make a "proper offer of proof."

Long before Weisheit's penalty phase, the Supreme Court of the United States established the mitigating potential of testimony about a defendant's promising adjustment to prison. *See Skipper*, 476 U.S. at 4–5. Counsel was thus deficient in failing to present the jury with that

testimony when Aiken was prepared—and permitted by the court—to provide it at Weisheit's penalty phase.

b. In evaluating whether counsel was deficient, the post-conviction court failed to measure counsel's performance using prevailing professional norms.

In rejecting Weisheit's Aiken-testimony claim, the post-conviction court concluded that "Weisheit has failed to show trial counsel's performance was to a level of deficiency that he was prejudiced . . . ."

Below, I address prejudice and elaborate on how this statement in the post-conviction court's order conflates *Strickland*'s performance and prejudice demands. But as far as the deficiency inquiry is concerned, counsel's performance should be measured by reasonableness under prevailing professional norms, *see Strickland*, 466 U.S. at 687–88, not by whether the performance "was to a level of deficiency that he was prejudiced."

Also undercutting the post-conviction court's no-deficiency assertion is this Court's suggestion on direct appeal that counsel's performance surrounding Aiken's testimony was deficient. As the post-conviction court recognized in its findings, we had already observed on direct appeal that:

> To be sure, had Aiken (or another expert) been prepared to testify as to Weisheit's adjustment to imprisonment throughout the time **leading up to** the penalty phase, then the trial court's exclusion of such testimony . . . would have been problematic and could have possibly resulted in reversal of his death sentence. . . .
>
> Further, we note that Weisheit did not help his case by failing to make a more precise offer of proof regarding Aiken's prediction of his specific future classification . . . . At no time during th[e] discussion [with the court] did Weisheit's counsel make a clear offer of proof by requesting permission from the

> trial court to ask Aiken a series of questions that counsel intended to ask at trial.

Weisheit v. State, 26 N.E.3d 3, 10 (Ind. 2015).

In other words, defense counsel's performance surrounding Aiken's testimony both prevented the jury from hearing valuable and admissible mitigating evidence and precluded the record from reflecting a clear offer of proof. Under the correct standard to evaluate deficiency—reasonableness under prevailing professional norms—the evidence and findings lead to only one conclusion: counsel's performance concerning Aiken's testimony was deficient.

In sum, the post-conviction court's own findings and the evidence as a whole compel the conclusion that three deficiencies marred counsel's penalty-phase performance.

I turn now to those deficiencies' cumulative impact on Weisheit's penalty-phase outcome.

B. Counsel's performance deficiencies collectively prejudiced Weisheit.

A defendant overcomes the burden for *Strickland*'s prejudice prong by showing "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694. The defendant is **not** required to "show that counsel's deficient conduct more likely than not altered the outcome in the case." *Id.* at 693. Rather, "[a] reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 694.

Weisheit's burden, then, was to show a **reasonable probability** that without counsel's penalty-phase performance deficiencies, at least one juror would not have voted for the death penalty, and the trial judge would not have imposed that sentence. *See* I.C. § 35-50-2-9(e); *Wilkes v. State*, 917 N.E.2d 675, 693 (Ind. 2009).

In determining prejudice, reviewing courts consider "the totality of the available mitigation evidence"—presented both at trial and at the post-

conviction hearing—and "reweig[h] it against the evidence in aggravation." *Porter*, 558 U.S. at 41 (alteration in original) (quoting *Williams*, 529 U.S. at 397–98).

The majority does not recognize any deficiencies in counsel's performance, so it does not engage in "the type of probing and fact-specific analysis" required to evaluate cumulative prejudice. *Sears v. Upton*, 561 U.S. 945, 955 (2010) (per curiam) (disapproving "the type of truncated prejudice inquiry undertaken by the state court"); *Baer*, 879 F.3d at 788 (finding that this Court's "pithy analysis on prejudice" for the defendant's cumulative-effect claim did not support our conclusion).

The post-conviction court likewise conducted no analysis of cumulative prejudice. Its explanation was a single sentence: "As discussed herein, the Court finds no errors, cumulatively or otherwise, that resulted in deficient performance of trial counsel or that were prejudicial to Weisheit."

Yet the post-conviction court's perfunctory conclusion does not square with its detailed findings on Weisheit's individualized claims—evidence-supported findings that point only to prejudice for Weisheit's cumulative-effect claim.

To start, the post-conviction evidence showed that the mitigation case would have been stronger had counsel contacted Dr. Harvey to testify. Dr. Harvey would have told the jury about his first-hand encounter with Weisheit while Weisheit was "in the middle of" a manic phase. His testimony would have countered the State's rebuttal witness, and his opinion would not have been diluted or abbreviated by Dr. Price.

Similarly, had counsel obtained the Boys School records and provided them to witnesses, the defense would have presented stronger mitigating testimony from Dr. Henderson-Galligan, Dr. Harvey, and Eccles-Skidmore. The Boys School records gave a more accurate picture of the extent of Weisheit's mental health issues, enmeshed family, and childhood troubles, and would have made Dr. Harvey's bipolar diagnosis "definitive."

Finally, had counsel more clearly offered Aiken's testimony about Weisheit's past adjustment to imprisonment and future inmate

classification, the jury would have heard evidence that Weisheit would not pose a danger if spared but incarcerated. *Skipper*, 476 U.S. at 5. Even if Aiken weren't permitted to testify to Weisheit's future classification, he could have testified to Weisheit's past adjustment to imprisonment. This is important because "the sentencer may not refuse to consider or be precluded from considering 'any relevant mitigating evidence.'" *Id.* at 4 (quoting *Eddings*, 455 U.S. at 114). And "there is no question," *id.*, that favorable inferences jurors might have drawn from Aiken's testimony about Weisheit's past adjustment to imprisonment "would be 'mitigating' in the sense that they might serve 'as a basis for a sentence less than death,'" *id.* at 4–5 (quoting *Lockett*, 438 U.S. at 604 (plurality opinion)).

The evidence thus supports the post-conviction court's corresponding findings in Weisheit's individualized claims, which include the following:

7. The jury learned Aiken's occupation was in corrections and prisons (Tr. 2357). He outlined his experience with various jurisdictions' prison systems. . . . The jury heard nothing else from this witness.

. . . .

9[a]. . . . The court ruled it would allow Aiken to testify generally about classification, but not render any opinions as to how the State of Indiana would classify Weisheit if he received life without parole or a term of years (Tr. 2381-2383). . . . The court did not change his ruling. Owens never corrected the court about its use of 702(b) foundational requirements.

9[b]. Owens withdrew Aiken without any further offer of proof. . . .

. . . .

13. Prior to his testimony in 2013, Aiken reviewed Weisheit's criminal history, all institutional records from the Vanderburgh County Jail and the facts surrounding this crime (Tr. 2366). He also interviewed Weisheit (Tr. 2367). . . .

14. Aiken testified that given all the circumstances, Weisheit would be incarcerated in a maximum security facility . . . . Aiken offered the opinion if Weisheit received a term o[f] years or life without parole, he could be securely housed in a high security setting by the Department of Correction without undue risk of harm to prison staff or the other inmates.

. . . .

17. . . . The [Indiana Supreme] Court opined [on direct appeal] that if counsel had made a more precise offer of proof detailing Weisheit's adjustment to imprisonment leading up to trial, it "could have possibly resulted in reversal of his death sentence." [*Weisheit*, 26 N.E.3d at 10.]

18. . . . It is a violation of the U.S. Constitution to fail to consider evidence of a defendant's adjustment to incarceration leading up to trial as mitigating evidence to weigh against the aggravating circumstances. . . .

. . . .

20. . . . Aiken's testimony was admissible under Ind. Evid. R. 702(a) . . . .

21. . . . Aiken was qualified as an expert in classification and had specialized knowledge to assist the jury in determining a mitigating factor, the ability of Weisheit to be safely incarcerated without undue risk of harm to others, in weighing the decision between the death penalty, life without parole or a term of years. . . .

. . . .

26. . . . The jury did not hear how Weisheit adjusted to incarceration nor did they hear about any of the factors that weighed in favor of his imprisonment without undue risk to others. Further, the Indiana Supreme Court said on direct appeal that if Aiken had been prepared to testify to Weisheit's adjustment leading up to [the] penalty phase, exclusion of his testimony "would have been problematic and could have possibly resulted in reversal of his death sentence." . . . The Supreme Court's own words demonstrate there is a reasonable probability of a different outcome had counsel made the proper offer of proof. Had the jury heard this mitigating evidence, there is a reasonable likelihood the jury would have given Weisheit's case for mitigation greater weight and returned a verdict for something less than death.

. . . .

4. . . . A report from the Boys School records . . . indicated that while Weisheit was in the psychiatric unit of Methodist Hospital after attempting suicide at the Boys School, he suffered a psychotic break (PCR Ex. 5). Owens testified if there was evidence Weisheit had a psychotic break while at Methodist Hospital, that would have been important to provide to the defense team's experts.

5. Dr. Henderson-Galligan and Dr. Harvey both relied on information found in the Boys School records in forming their opinions about Weisheit's

Bipolar diagnosis. Dr. Henderson-Galligan testified the Boys School records showed Weisheit was prone to downplay his struggles during his teen years. She noted Weisheit's extent of suicidal ideation was important in demonstrating the severity of Weisheit's mental health issues. Psychiatric records found in the Boys School records described Weisheit's family as "deeply chaotically enmeshed." This information was important in understanding Weisheit's mental health issues. . . . The records showed Weisheit had been prescribed three different anti-depressants over the course of a year. This showed a significant, ongoing issue with treating Weisheit's depression.

6. Dr. Harvey testified . . . [that the Boys School] records established an extended period of depression and mania. With those records, Dr. Harvey testified he could have made a definitive diagnosis.

7. . . . In contrast to her brief testimony at the penalty phase, Skidmore provided significantly more detailed information about the Boys School and Weisheit's access to care. This was in part because she was able to review documents from the Boys School records which were prepared by her.

. . . .

13. . . . [H]ad counsel been armed with the Boys School records, he would have been able to present to the jury information about the school's resources and the rarity of Weisheit's placement at Methodist. Skidmore could have been a much more compelling witness for the defense but for counsel's deficiencies.

. . . .

22. A comprehensive evaluation [in the Boys School records showed that Weisheit's parents] . . . allowed [his] prescription to run out and did not refill it. Dr. Henderson-Galligan noted the importance of this information because it supports the conclusion that this is an enmeshed family. The failure to monitor and continue the medication reflects a poor choice within the family unit. The evaluation revealed that because Weisheit spent an extensive period of time in Methodist, it was likely the symptoms were genuine and not malingered and the primary cause of Weisheit's difficulties was a mental illness. The documents also reflect Weisheit suffered a psychotic break while being treated at Methodist. It was noted this may reoccur under stress. Dr. Henderson-Galligan testified that once one suffers a psychotic break it is more likely to happen again.

. . . .

[under the heading of CONCLUSION] . . . Valuable information was not presented because [counsel] had not located the [Boys School] records and counsel did not interview Skidmore. The records that were provided to the jury reflected very little of the compelling evidence of Weisheit's mental illness or the role his family played in failing to follow through with treatment. Dr. Harvey and Dr. Henderson-Galligan testified at the Post-Conviction hearing to the importance of these records in reaching an accurate and complete diagnosis. The Boys School records document lengthy treatment for a major mental illness, one which included that Weisheit suffered a psychotic break. . . . The evidence presented at trial, taken together with the post-conviction evidence, is the type of "evidence about the defendant's background and character (that) is relevant because of the belief, long held by [this] society, that defendants who commit criminal acts that are attributable to a disadvantaged background[,] or to emotional and mental problems, may be less culpable than defendants who have no such excuse." *Abdul-Kabir v. Quarterman*, 550 U.S. 233, 251–52 (2007) (internal citations omitted).

. . . .

10. Dr. Harvey reviewed Ind. Code 35-50-2-9 and determined Bipolar Disorder is considered an extreme mental or emotional disturbance under Ind. Code 35-50-2-9(c)(2) and also could be a mental disease or defect under Ind. Code 35-50-2-9(c)(6).

11. . . . Due to counsel's mistake, Dr. Harvey was not provided the necessary documentation of evidence supporting the episodic nature of Bipolar Disorder and the Boys School records reflecting the long term treatment for Major Depression. . . .

12. Dr. Price's testimony reflected some of Dr. Harvey's observations. However, he could not testify to Dr. Harvey's opinion and therefore had to dilute the information collected by Dr. Harvey and incorporate it in his opinion finding that Dr. Harvey's observations were "consistent with Bipolar Disorder." (Tr. 2430).

13. Dr. Harvey's testimony could have been used to rebut the State's expert, Dr. Allen. Dr. Allen testified Weisheit had been incarcerated for three years and never had a manic episode during that time (Tr. 2504). Dr. Harvey observed a manic phase during this time. Dr. Allen also testified Bipolar was not likely in Weisheit's case because Bipolar is progressive and the

episodes become more frequent (Tr. 2504, 2516). Dr. Harvey testified that Weisheit's symptomology was consistent with 40% of the cases.

14. . . . Dr. Harvey's opinion would have supported two statutory mitigators and would have effectively rebutted Dr. Allen's testimony. The State exploited counsel's failure and argued there was no evidence of these two statutory mitigators (Tr. 2568-2569). By failing to contact Dr. Harvey, the defense was left with one expert to testify to the cognitive disorder and Bipolar Disorder. Trial counsel's own assessment of the credibility of Dr. Price's testimony reflects the magnitude of this error.

The conclusion that flows from these findings and the evidence as a whole is to me inescapable: Weisheit suffered prejudice from the cumulative effect of counsel's performance deficiencies. Even if no single deficiency, standing alone, renders Weisheit's death sentence unreliable, together they certainly "undermine confidence in the outcome." *Strickland*, 466 U.S. at 694.

The majority discounts the effect of Dr. Harvey's absence, reasoning that Dr. Price incorporated Dr. Harvey's two-page summary report into his testimony. But Dr. Price's presence did not make up for Dr. Harvey's absence. Dr. Harvey saw Weisheit for two to three hours "in the middle of" a manic episode; he could have described to the jury his in-person observations, which directly opposed the testimony of the State's rebuttal witness. Dr. Price, on the other hand, did not see Weisheit in the middle of a manic episode, had trouble remembering who Dr. Harvey was, and abridged Dr. Harvey's written observations into 175 words for the jury.

As the post-conviction court determined, Dr. Price "dilute[d]" Dr. Harvey's opinion. Especially since the jury's questions to Dr. Price and to Dr. Allen demonstrated particular interest in how bipolar disorder might have affected Weisheit, I believe that Dr. Harvey's testimony would have materially strengthened the mitigation case.

The majority similarly understates the effect of the Boys School records, citing the records' references to Weisheit's lack of remorse and poor behavior. Even those references, however, show the extent of Weisheit's troubled youth and mental illness. The records are therefore relevant and mitigating "because of the belief, long held by this society, that defendants

who commit criminal acts that are attributable to a disadvantaged background, or to emotional and mental problems, may be less culpable than defendants who have no such excuse." *Abdul-Kabir v. Quarterman*, 550 U.S. 233, 251–52 (2007) (quoting *Franklin v. Lynaugh*, 487 U.S. 164, 184 (1988) (O'Connor, J., concurring in judgment)). And as the post-conviction court found, the Boys School records revealed that "the primary cause of Weisheit's difficulties was a mental illness."

The majority also discounts (as the post-conviction court did) the importance of the Boys School records because they did not **conflict** with Dr. Henderson-Galligan's opinion at trial. True, they did not conflict with her opinion or those of Dr. Harvey and Eccles-Skidmore; they made those mitigating opinions **stronger**. Because the prejudice inquiry depends on the balance of aggravators and mitigators, adding enough weight to the mitigating side of the scale—or lifting enough weight from the aggravating side—makes all the difference. *See Porter*, 558 U.S. at 41–42; *Rompilla*, 545 U.S. at 386 n.5, 390–93; *Wiggins*, 539 U.S. at 537–38.

As for Aiken's testimony, I disagree with the majority that the admissibility of Aiken's testimony is speculative. The post-conviction testimony shows Aiken's qualifications to make an individualized prediction for Weisheit's inmate classification, and the post-conviction court determined that "Aiken's testimony was admissible."

Even if Aiken could not have opined on Weisheit's future classification, he could have testified about Weisheit's past adjustment to imprisonment. The trial court specifically told defense counsel that Aiken could testify to his review of Weisheit's records, which included those from the Vanderburgh County Jail where Weisheit was housed after his arrest. And—as the post-conviction court found—Aiken had interviewed Weisheit; reviewed his criminal history, all institutional records from the Vanderburgh County Jail, and the facts surrounding the crimes; and "had specialized knowledge to assist the jury in determining a mitigating factor, the ability of Weisheit to be safely incarcerated without undue risk of harm to others."

In short, Aiken was prepared at Weisheit's penalty phase to testify to Weisheit's past adjustment to imprisonment. Yet counsel withdrew Aiken,

keeping the jury from learning not only that Aiken "did not find anything that would . . . indicat[e] that his criminal history would cause an[y] issues . . . the Department of Correction[] could not anticipate or manage," but also that Aiken believed Weisheit's misconduct in jail was "at the lower end of the spectrum."

This Court recognized on direct appeal that Weisheit's case suffered from counsel's failure to provide a precise offer of proof, particularly because the offer of proof that counsel supplied omitted Aiken's evaluation of Weisheit's past adjustment to prison:

> To be sure, had Aiken (or another expert) been prepared to testify as to Weisheit's adjustment to imprisonment throughout the time **leading up to** the penalty phase, then the trial court's exclusion of such testimony—assuming the proper foundation had been laid and it was otherwise admissible—would have been problematic and could have possibly resulted in reversal of his death sentence. . . .
>
> Further, we note that Weisheit did not help his case by failing to make a more precise offer of proof regarding Aiken's prediction of his specific future classification . . . . Perhaps if Aiken had made a detailed prediction as to Weisheit's potential classification, and if Weisheit had established that Aiken had adequate qualifications and experience in predicting inmates' future behavior (beyond the prediction inherent in classifying inmates), then we may not have agreed with the trial court that Aiken's potential testimony was speculative and thus inadmissible.

Weisheit, 26 N.E.3d at 10.

In light of the post-conviction evidence and the post-conviction court's findings, I believe that Weisheit has met his burden to show a reasonable probability that at least one juror and the sentencing judge "would have struck a different balance" without counsel's collective deficiencies. *Wiggins*, 539 U.S. at 537. This is not a case where the new evidence

presented at the post-conviction proceeding "would barely have altered the sentencing profile presented" at Weisheit's penalty phase. *Porter*, 558 U.S. at 41 (quoting *Strickland*, 466 U.S. at 700). Rather, the jurors were denied an accurate picture of Weisheit's mental health issues and troubled youth. Nor did they encounter any expert testimony about Weisheit's past adjustment to imprisonment, which might have served as a basis for a sentence less than death. Perhaps that information would have swayed the jurors' judgment, or perhaps not—but it is significant enough to "undermine confidence in the outcome," which is all that *Strickland* requires. 466 U.S. at 694.

Weisheit's crimes are undeniably horrific—at the far end of the spectrum. The defendant's culpability for crimes, though, is not the only factor that jurors may—and must, if presented with mitigating evidence—consider in deciding whether to sentence someone to death. *See* I.C. § 35-50-2-9(c), (l); *Skipper*, 476 U.S. at 4–5; *Eddings*, 455 U.S. at 116–17. If it were, counsel's obligation to thoroughly investigate the defendant's background would not attach in every death penalty case. *See Porter*, 558 U.S. at 39–40; *Stevens v. McBride*, 489 F.3d 883, 887, 896–98 (7th Cir. 2007). This requirement exists in part because evidence may be mitigating even if inferences from it "would not relate specifically to [the defendant's] culpability for the crime he committed," *Skipper*, 476 U.S. at 4.

The post-conviction court's conclusion for Weisheit's cumulative-effect claim opposes the court's own findings and the evidence as a whole. That is reason enough to reverse the post-conviction court's cumulative-effect holding and allow a new penalty phase.

But there is another problem with the post-conviction court's cumulative-effect conclusion: it is built on improper legal standards.

II. The post-conviction court's conclusion rests on improper legal standards.

Even if we could ignore the conflict between the post-conviction court's evidence-backed findings and its cumulative-effect conclusion, that conclusion rests on improper legal standards.

As explained above, the post-conviction court did not conduct a separate analysis for the cumulative-effect claim. Rather, it relied entirely on its decisions for Weisheit's more individualized claims of ineffective assistance. The court's decisions on those individualized claims harbor two legal errors that ultimately corrode the court's derivative cumulative-effect conclusion.

First, the post-conviction court conflated *Strickland*'s deficiency and prejudice prongs, reasoning that "Weisheit has failed to show trial counsel's performance was to a level of deficiency that he was prejudiced and that but for trial counsel['s] performance the results of the proceedings would have been different."

Whether counsel's performance was deficient does not depend on prejudice—rather, deficiency is measured against prevailing professional norms. *See Strickland*, 466 U.S. at 687–90. And although the severity of a deficiency may affect whether the defendant suffered prejudice, under *Strickland*, deficiency and prejudice are distinct inquiries, *id.* at 687–96; *Timberlake*, 753 N.E.2d at 603. Because the post-conviction court commingled the two, its cumulative-effect conclusion rests on a misdirected analysis.

Second, the court applied a heightened prejudice standard, concluding that "there is no reasonable likelihood the jury would have unanimously voted against death." Weisheit did not need to show a reasonable likelihood that the jury would have unanimously voted against death. Unanimity in the jury's sentencing recommendation binds the trial court to impose the recommended sentence. *See* I.C. § 35-50-2-9(e). And, here, following Weisheit's penalty phase, the jury unanimously recommended death, so the judge was required to impose that sentence.

But if even **one** juror had voted against death, the trial court's responsibilities would have been different. *See* I.C. § 35-50-2-9(f). The court would have had discretion in sentencing Weisheit, *id.*, and thus would have borne the "truly awesome responsibility" to decide whether to impose the death penalty, *Caldwell v. Mississippi*, 472 U.S. 320, 341 (1985). In making that decision, the lack of unanimity among the jurors would have been a relevant consideration, since a conflicted jury "demonstrate[s]

a level of uncertainty among the citizens" as to the appropriate penalty. *Wilkes*, 917 N.E.2d at 693. And in imposing the death penalty—which "calls for a greater degree of reliability," *Lowenfield*, 484 U.S. at 239 (quoting *Lockett*, 438 U.S. at 604 (plurality opinion))—courts should be "particularly sensitive to insure that every safeguard is observed," *Gregg*, 428 U.S. at 187 (plurality opinion).

So, Weisheit's burden under *Strickland*'s prejudice prong was to show a reasonable probability that without counsel's errors, at least one juror would not have voted for the death penalty and the trial court would not have imposed that sentence. Given the mitigation evidence that would have been presented but for counsel's deficient performance, I believe there is a reasonable probability that the jury would have been conflicted and that the judge would not have sentenced Weisheit to death.

In concluding otherwise, the post-conviction court relied on improper legal analysis.

Conclusion

The post-conviction court's cumulative-effect conclusion contravenes both the evidence and the court's own findings, and it stands on improper legal standards. The majority affirms the post-conviction court's cumulative-effect decision by dismissing contradictions between the post-conviction court's findings and its conclusion and by asserting that Weisheit has failed to carry his burden under *Strickland*.

I believe that the majority's cumulative-effect holding misapplies *Strickland* and deviates from our standard of review. In my view, Weisheit was denied his Sixth Amendment right to effective assistance of counsel at the penalty phase of trial. And he has carried his burden to show that there is no way within the law that the post-conviction court could have arrived at its cumulative-effect conclusion. Though Weisheit's offenses were horrific and his guilt is clear, he should be afforded a penalty phase untainted by constitutional error.

I therefore respectfully dissent in part.

APPENDIX B

Decision of State Post-Conviction Court

IN THE CLARK CIRCUIT COURT NO. 1
STATE OF INDIANA

JEFFREY A. WEISHEIT,
Petitioner-Defendant,

v. CAUSE NO. 10C01-1601-PC-1

STATE OF INDIANA,
Respondent-Plaintiff.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

INTRODUCTION

This matter comes before the Court upon Petitioner Jeffrey A. Weisheit's Petition for Post-Conviction Relief and Amendment to Petition for Post-Conviction Relief. The Court conducted an evidentiary hearing on September 26-28, 2016. Weisheit appeared by counsel, Deputy Public Defenders John Pinnow, Kathleen Cleary, and Anne Burgess. Weisheit was present at the evidentiary hearing. The State appeared by Deputy Attorneys General Kelly A. Loy and Tyler G. Banks. Evidence was submitted on the above dates and a ruling on the petition was taken under advisement.

The parties have submitted proposed findings of fact and conclusions of law on Weisheit's claims for post-conviction relief. The Court, having reviewed the evidence and the pleadings, enters the following findings of fact and conclusions of law and judgment on those claims asserted in the petition as amended. To the extent that any part of these findings of fact and conclusions of law appear to have been adopted from a party's proposed findings of fact and conclusions of law, the Court represents that such has been reviewed by the Court and constitutes the Court's own finding or conclusions.

PROCEDURAL FACTS

1. On April 12, 2010, Weisheit was charged in Vanderburgh County with Count 1 murder of A.L.; Count 2 murder of C.L.; and Count 3 arson, a Class A felony [A. 66-67][1].

2. On April 26, 2010, the State filed a death penalty count alleging the aggravating circumstances Weisheit committed another murder, A.L. was less than 12 years old and C.L. was less than 12 years old [A. 68-69].

3. Tim Dodd and Stephen Owens were appointed to represent Weisheit.

4. On August 4, 2010, Weisheit filed a Motion for Change of Venue from the county, which was granted. The case was venued to Clark County.

5. On March 1, 2011, Weisheit filed a Motion to Suppress his April 10, 2010 custodial statement [A. 190-191].

6. Tim Dodd died in June, 2011, and was replaced effective June 23, 2011, by Mike McDaniel as lead counsel [S.Tr. 5-7]. McDaniel and Owens represented Weisheit through the remainder of the pretrial proceedings, the trial and sentencing proceedings.

7. On September 2, 2011, the Court held an evidentiary hearing on the Motion to Suppress Evidence [S.Tr. 52-212].

8. On September 13, 2011, the State filed its Brief in Opposition to the Motion to Suppress [A. 202-209].

9. On October 4, 2011, the Court denied the Motion to Suppress Statement [A. 210-219].

10. On June 3-7, 2013, the jury was selected and sworn in [Tr. 4-1091].

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[1]A. is for Trial Appendix; Tr. is for Trial Transcript; T.Ex. is for Trial Exhibit; PCR Ex. is for Post-Conviction Exhibit; S.Tr. is for Supplemental.

11. On June 10-18, 2013, the guilt phase of the trial was conducted [Tr. 1123-2141].

12. The jury found Weisheit guilty of both murder counts and arson as a Class A felony [A. 1271-1273].

13. On June 19-21, 2013, the penalty phase of the trial was conducted [Tr. 2142-2594].

14. The jury found the aggravating circumstances had been proved beyond a reasonable doubt, found the aggravating circumstances outweighed the mitigating circumstances, and recommended a sentence of death [A. 1306-1316].

15. On July 11, 2013, Judge Daniel Moore held a sentencing hearing [Tr. 2595-2631]. The Court ordered a sentence of death on Counts 1 and 2 and twenty (20) year sentence for arson [A. 74-82, 1377-1387; TR. 2609-2616]. The conviction for arson was modified to a Class B felony [Tr. 2610].

16. On August 8, 2013, Weisheit filed a Motion to Correct Errors [A. 1422-1424]. The State filed a Motion in Opposition [A. 1425-1429]. On August 23, 2013, the Court denied the Motion to Correct Errors [A. 1430-1432].

17. Steven Ripstra and Thomas Dysert were appointed to represent Weisheit on appeal. Laura Paul was later substituted for Dysert. Ripstra was lead counsel on the appeal.

18. On February 18, 2015, the Indiana Supreme Court affirmed Weisheit's convictions and death sentence. ***Weisheit v. State***, 26 N.E.3d 3 (Ind. 2015). On June 9, 2015, the Court denied rehearing in an unpublished order.

19. On July 6, 2015, Weisheit filed a Motion for Stay of the death sentence which the Supreme Court granted on July 9, 2015.

20. On December 29, 2015, Weisheit filed a Petition for Post-Conviction Relief.

21. On January 15, 2016, the State filed its Answer.

22. On January 19, 2016, the United States Supreme Court denied the petition for certiorari following the direct appeal decision. ***Weisheit v. Indiana***, 136 S.Ct. 901 (2016).

23. On July 13, 2016, Weisheit filed an Amendment to Petition for Post-Conviction Relief. He alleged he was denied the effective assistance of trial and appellate counsel.

24. On September 26-28, 2016, the Court held an evidentiary hearing on the Amended Petition.

STANDARDS GOVERNING POST-CONVICTION RELIEF

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

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

Stephenson v. State, 864 N.E.2d 1022, 1028 (Ind. 2007). "A post-conviction petition is not a substitute for an appeal. Further, post-conviction proceedings do not afford a petitioner a 'super-appeal.' Our post-conviction rules contemplate a *narrow remedy* for subsequent collateral challenges to convictions." *Reed v. State*, 856 N.E.2d 1189, 1194 (Ind. 2006) (citations omitted)

(emphasis in original). Additionally, the petitioner bears the burden of proving his grounds for relief by a preponderance of the evidence because a presumption of regularity attaches to final judgments, such as criminal convictions, that were affirmed on direct appeal. *Hall*, 849 N.E.2d at 472. Petitioner has the burden of proving his claims of ineffective assistance of trial and appellate counsel by a preponderance of the evidence. ***State v. Hollin***, 970 N.E.2d 147, 150 (Ind. 2012). A petitioner claiming ineffective assistance of trial counsel must show counsel's performance fell below prevailing professional norms and he was prejudiced so there is a reasonable probability of a different result. ***Strickland v. Washington***, 466 U.S. 668, 687-94 (1984).

In Weisheit's Amended Petition for Post Conviction Relief, Weisheit concisely set out in order facts and arguments in support of each of his claims for relief and the grounds that he set forth in support of each claim. The Court will address each of these in order that each appeared in Weisheit's Petition. The Court will discuss its findings of fact for each claim and set out the Courts conclusions of law on each claim.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

8(A) Weisheit was denied the effective assistance of trial counsel in violation of the Sixth and Fourteenth Amendments to the United States Constitution

For Weisheit to succeed on a claim of trial counsel ineffectiveness, Weisheit must prove by a preponderance of the evidence not only that trial counsel's performance was deficient, but also that his counsel's errors were so serious as to deprive him of a fair trial because of a reasonable probability that, but for counsel's unprofessional errors, the result would have been different. *Stevens v. State,* 770 N.E.2d 739, 746 (Ind. 2002) (citing *Bell v. Cone*, 535 U.S. 685 (2002); *Williams v. Taylor*, 529 U.S. 362, 390 (2000); *Strickland v. Washington*, 466 U.S. 668, 687 (1984); *Woods v. State*, 701 N.E.2d 1208, 1224 (Ind. 1998)). Showing deficient

performance requires proof that "counsel's representation fell below an objective standard of reasonableness and that counsel made errors so serious that counsel was not functioning as 'counsel' guaranteed to the defendant by the Sixth Amendment." *Overstreet v. State*, 877 N.E.2d 144, 151–52 (Ind. 2007). To prove prejudice, Petitioner must prove that there is a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* This reasonable probability must be sufficient to undermine confidence in the reliability of the verdict. *Id.*

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

9(A) Weisheit was denied the effective assistance of trial counsel for the following reasons:

(1) Counsel's performance fell below prevailing professional norms when he did not make a clear offer of proof on the admissibility of testimony from James Aiken on Weisheit's future ability to adjust to prison life.

1. Weisheit alleged in 9(a)(1) that trial counsel was ineffective for failing to make a proper offer of proof on the testimony of James Aiken; for failing to argue Aiken's testimony was admissible under Ind. Evidence Rule 702(a); and for withdrawing Aiken as a witness after the Court's ruling that his testimony would not be admitted.

2. During the penalty phase, trial counsel offered the testimony of James Aiken, a former warden who owns a consulting firm (DA Tr. 2357–59). Aiken testified briefly before the State objected to his testimony and the jury was removed from the courtroom (DA Tr. 2357-2359).

4. The State argued that Aiken was not qualified to testify as an expert witness as to Weisheit's danger of future violence (DA Tr. 2359–61).

5. Defense counsel argued that Aiken's experience in the correctional field qualified him to speak on the ability of the Indiana Department of Correction to safely house Weisheit without a threat to other inmates, staff, or the general public (DA Tr. 2359–63, 2372–73, 2379–80).

6. Trial counsel further explained that they wanted to present Aiken's testimony because, "One of the things that mitigation includes is whether or not this particular individual poses a threat to the community, or to corrections officers, or to other inmates" (DA Tr. 2360).

7. The jury learned Aiken's occupation was in corrections and prisons [Tr. 2357]. He outlined his experience with various jurisdictions' prison systems. Aiken was cut off by a State's objection before the jury heard of his experience in Indiana. The jury heard nothing else from this witness.

8. Weisheit proposes that if permitted to testify, the jury would have learned that based on Aiken's experience in classification and his review of Weisheit's records, it was his opinion the Indiana Department of Correction could adequately house, manage, supervise, and secure Weisheit for the remainder of his life without causing undue risk of harm to staff and inmates [Tr. 2373].

9. There was a lengthy colloquy over the admissibility of Aiken's testimony [Tr. 2357-2392]. The State's objections were varied and fluid. They included what seemed to be a relevance objection [Tr. 2359]; that Aiken did not have a report [Tr. 2362]; a lack of foundation [Tr. 2365]; and that the evidence was not scientifically reliable to meet the foundational requirements of ***Daubert*** [Tr. 2370]. The court then questioned Aiken using ***Daubert*** foundational requirements [Tr. 2373]. The State again argued there was no scientific basis for his testimony [Tr. 2379]. Much of the colloquy centered around predicting Weisheit's future behavior or future dangerousness [Tr. 2360, 2365, 2383, 2386, 2390, 2392]. The court ruled: "I am not finding that the requirements of evidence Rule 702 are met. I'm not satisfied that there's an objective scientific foundation for his testimony" [Tr. 2380]. The court ruled it would allow Aiken to testify generally about classification, but not render any opinions as to how the State of Indiana would classify Weisheit if he received life without parole or a term of years [Tr. 2381-2383]. After a recess, the court announced it reviewed the case of ***Sears Roebuck & Co. v. Manuilov***, 715 N.E.2d 968 (Ind. T. App. 1999) (later reviewed and reversed on other grounds at 742 N.E.2d 453 (Ind. 2001)). ***Sears*** discussed the foundational requirements of Ind. Evidence Rule 702(b). ***Id.*** The court returned from recess and asked the witness for a scientific technique or theory supporting his opinion about Weisheit's classification and whether his methods were peer reviewed [Tr. 2384, 2387]. The court did not change his ruling. Owens never corrected the court about its use of 702(b) foundational requirements.

9. Owens withdrew Aiken without any further offer of proof. At the post-conviction hearing, Ripstra testified he was concerned about Owens having withdrawn Aiken as a witness, fearing he waived the issue. Ripstra testified his preference would have been to have Aiken

testify in an offer of proof and he believed it was unusual to have the judge make the offer of proof.

10. Owens testified at the post-conviction hearing he did not know until the morning of Aiken's testimony that he would be questioning Aiken. Aiken met briefly with counsel before he testified. Owens also believed ***Daubert*** was not the required foundational requirement. Owens believed the offer of proof was adequate and that the issue of Aiken's exclusion had not been waived.

11. Aiken has an undergraduate and graduate degree in criminal justice. He has worked for 45 years in the corrections industry. He has experience implementing techniques and protocols related to classification. He has participated in training programs related to classification. Aiken has been employed by various correctional facilities throughout the country and the Virgin Islands [PCR Ex. 23]. He was the commissioner of the Indiana Department of Correction. He was appointed and served on the National Prison Rape Elimination Commission by the U.S. Congress. Aiken has helped design and implement classification systems throughout the country. He has testified as an expert witness in both criminal and civil cases. He has testified in several Indiana death penalty cases as to the ability of the Indiana Department of Correction to safely house an inmate without undue risk of harm to others.

12. Aiken testified at the post-conviction hearing about the classification process and its purpose; to place an inmate in the proper level of security to protect the inmate, staff and other inmates. Aiken testified that in making a classification assessment, it is typical to consider an inmate's criminal history, institutional history and the facts of the instant conviction. Further, Aiken conducts a personal interview to validate the information from his document interview.

He notices nonverbal communication and how the inmate seems to handle the stress of incarceration.

13. Prior to his testimony in 2013, Aiken reviewed Weisheit's criminal history, all institutional records from the Vanderburgh County Jail and the facts surrounding this crime [Tr. 2366]. He also interviewed Weisheit [Tr. 2367]. At post-conviction, Aiken testified he found the following information from those records relevant to his conclusion Weisheit posed a lower risk of violence in the Department of Correction: Weisheit's age of being in his late-30's because inmates' behavior tends to calm down in this age range; Weisheit had no previous history with gang activity which contributes to systemic violence in a prison; Weisheit had displayed very little institutional violence; Weisheit maintained a relationship with his family which generally reduces the incentive for violence; and the nature of his crime being a crime against children would require a higher level of security for his safety. With regard to the behavior issues Weisheit had during the months after being arrested, Aiken testified that was not unusual given the stress of being incarcerated for the first time in a jail. Once moved to the Clark County Jail, Weisheit adjusted quite well. During his interview of Weisheit, Aiken observed his demeanor and how he appeared to be handling the stress of incarceration and the trial. Aiken did not find Weisheit to be cool, detached or aggressive.

14. Aiken testified that given all the circumstances, Weisheit would be incarcerated in a maximum security facility, either Wabash Valley or the Indiana State Prison in Michigan City. Aiken offered the opinion if Weisheit received a term or years or life without parole, he could be securely housed in a high security setting by the Department of Correction without undue risk of harm to prison staff or the other inmates.

15. Before the post-conviction hearing, Aiken reviewed Weisheit's Department of Correction history since his convictions. Aiken testified the records demonstrated Weisheit had made adequate adjustment to being incarcerated. Aiken noted two minor violations in three years. He did not see any evidence of random or systemic violence. These records validated his original opinion.

16. Appellate counsel Ripstra raised as the first issue, whether classification expert James Aiken's testimony should have been excluded at penalty phase. [Brief of Appellant, pp. 16-32]. Ripstra believed the exclusion of Aiken's testimony was the strongest issue for appeal.

17. Citing ***Skipper v. South Carolina***, 476 U.S. 1, 4-5 (1986), the Indiana Supreme Court held Aiken's testimony was not admissible because it related to predicting future behavior rather than past adjustment to incarceration. ***Weisheit***, 26 N.E.3d at 10. The Court opined that if counsel had made a more precise offer of proof detailing Weisheit's adjustment to imprisonment leading up to trial, it "could have possibly resulted in reversal of his death sentence." ***Id.***

18. When deciding whether to impose a death sentence, the trier of fact may consider any appropriate mitigating circumstances. Ind. Code 35-50-2-9(c). It is a violation of the U.S. Constitution to fail to consider evidence of a defendant's adjustment to incarceration leading up to trial as mitigating evidence to weigh against the aggravating circumstances. ***Skipper***, 476 U.S. at 3-5; ***Wilkes v. State***, 917 N.E.2d 675, 690 (Ind. 2009).

19. Weisheit argued that the evidence at the post-conviction hearing demonstrates Aiken's testimony was proffered as mitigating evidence for the purpose of showing Weisheit adjusted well to incarceration and considering other factors such as age, lack of violent institutional behavior, family relationship and the required security given the nature of the crime,

Weisheit could be safely and securely housed in the Department of Correction with low risk of harm to others.

20. The trial court's use of foundational requirement of Ind. Evid. R. 702(b) was error. Aiken's testimony was admissible under Ind. Evid. R. 702(a): "A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue." Ind. Evid. R. 702(a); ***Vaughn v. Daniels Co. (W. Virginia),*** 841 N.E.2d 1133, 1138 (Ind. 2006) ("Hands-on experience, formal education, specialized training, study of textbooks, performing experiments and observation can provide the foundation for an expert's opinion.") Two requirements must be met. The subject matter must be related to a distinct field, business, or profession beyond the knowledge of the average person. Second, the witness must have the knowledge or experience in that subject matter to render an opinion that will aid the trier of fact. ***Turner v. State***, 720 N.E.2d 440, 444 (Ind. Ct. App. 1999).

21. The subject matter here, whether the Department of Correction can adequately house Weisheit given his particular circumstances, is not a subject known to the average person. Aiken was qualified as an expert in classification and had specialized knowledge to assist the jury in determining a mitigating factor, the ability of Weisheit to be safely incarcerated without undue risk of harm to others, in weighing the decision between the death penalty, life without parole or a term of years. Aiken had over 40 years of experience employed or consulting with various corrections facilities. He has an educational background in criminal justice. He has been involved extensively in training correction facilities on classification methods. Aiken is familiar with publications from American Correctional Association, National Institute of Correction and

the Federal Prison Authority. He has provided consulting services to the National Institute of Correction. He has experience in observing and working directly with thousands of inmates.

22. Weisheit claims that counsel failed to direct the Court to the proper foundational requirements. ***Ellyson v. State***, 603 N.E.2d 1369, 1374 (Ind. Ct. App. 1992); ***United States ex rel. Barnard v. Lane***, 819 F.2d 798, 803 n. 4 (7th Cir. 1987). Counsel's error was not the result of poor strategy or bad tactics. ***Ellyson***, 603 N.E.2d at 1374.

23. Counsel briefly met with Aiken prior to his testimony. He did not know he would be questioning Aiken until the morning he testified. Counsel was not prepared to handle any objections from the State. Appellate counsel agreed the foundational requirements used by the Court were not the proper requirements.

24. A party must make an offer of proof by informing the court of the substance of the evidence. Ind. Evid. R. 103(a)(2). As noted by the Indiana Supreme Court in Weisheit's direct appeal, the offer regarding future adaptability to incarceration must be individualized according to the defendant's specific past behavior and record. ***Weisheit***, 26 N.E.3d at 10, n. 4; citing ***Lawler v. Commonwealth***, 285 Va.187, 738 S.E.2d 847, 883-84 (Va. 2013).

25. Weisheit claims that counsel failed to inform the court, through an offer of proof, the individualized circumstances that supported Aiken's opinion. At the post-conviction hearing, Aiken testified Weisheit's age, his lack of previous history with gang activity and institutional violence, his relationship with his family, and the nature of his crime being against children would require a higher level of security for his safety all contributed to his conclusion the Department of Correction would be able to adequately incarcerate Weisheit without undue risk of harm to staff, himself or other inmates.

26. Weisheit claims that counsel failed to direct the court to the proper foundational requirements which may have lead the Court to admit significant mitigating evidence. The jury did not hear how Weisheit adjusted to incarceration nor did they hear about any of the factors that weighed in favor of his imprisonment without undue risk to others. Further, the Indiana Supreme Court said on direct appeal that if Aiken had been prepared to testify to Weisheit's adjustment leading up to penalty phase, exclusion of his testimony "would have been problematic and could have possibly resulted in reversal of his death sentence." ***Weisheit***, 26 N.E.3d at 10. Pursuant to ***Strickland***, "a defendant need not show that counsel's deficient conduct more likely than not altered the outcome in the case." 466 U.S. at 693. The defendant must show there is a reasonable probability the result of the proceeding would have been different absent the deficient performance. ***Id.*** The Supreme Court's own words demonstrate there is a reasonable probability of a different outcome had counsel made the proper offer of proof. Had the jury heard this mitigating evidence, there is a reasonable likelihood the jury would have given Weisheit's case for mitigation greater weight and returned a verdict for something less than death.

27. Weisheit's claim of ineffective assistance of counsel for failing to argue Aiken's admission upon the proper foundational requirements and for failing to make an adequate offer of proof are not barred by *res judicata*. ***Trueblood v. State***, 715 N.E.2d 1242, 1248 (Ind. 1999) (some contentions, even if related to issues addressed on direct appeal may be, to varying degrees, properly presented in support of a claim of ineffective assistance of trial or appellate counsel.) The issue on appeal was whether the court erred in excluding Aiken's testimony. ***Weisheit***, 26 N.E.3d at 9. The Indiana Supreme Court suggested counsel failed to make a proper offer of proof which may have lead to admission of the evidence. "At no time . . . did Weisheit's

counsel make a clear offer of proof ...." *Id.* At 10. If counsel had established Aiken had adequate qualifications and experience, "we may not have agreed Aiken's potential testimony was speculative and thus inadmissible." *Id.* The instant claim is whether counsel rendered ineffective assistance of counsel for failing to establish an adequate foundation and offer of proof demonstrating Aiken's qualifications and his opinion that Weisheit, based on his individual circumstances, could be adequately incarcerated without undue harm to himself of others.

CONCLUSION

Weisheit's claim regarding the testimony of James Aiken is denied. Weisheit has failed to show that he would have had a reasonable likelihood of a different outcome. The defendant must show there is a reasonable probability the result of the proceeding would have been different absent the deficient performance. Weisheit has failed to show trial counsel's performance was to a level of deficiency that he was prejudiced and that but for trial counsels performance the results of the proceedings would have been different. Trial counsel were not ineffective in their offer of testimony from James Aiken and their decision not to have Aiken testify following the trial court's ruling. Weisheit's claims in 9(A)(1) that trial counsel ineffectiveness for failing to present a better offer of proof and failure to otherwise present Aiken's testimony fails. Weisheit is not entitled to relief on this basis. Weisheit's claims in 9(A)(1) that trial counsel was ineffective regarding the presentation of a better offer to proof for Aiken's testimony is DENIED.

(2) Counsel's performance fell below prevailing professional norms where he agreed to submit a jury questionnaire to prospective jurors that was incomplete.

1. Weisheit alleged in 9(a)(2) that trial counsel's performance was deficient because counsel agreed to submit a jury questionnaire to prospective jurors that was incomplete.

2. Jury consultant Heather Pruss prepared multiple versions of a proposed jury questionnaire. Her final draft was due to defense counsel on May 1, 2013, which was about one month before jury selection started.

3. On April 29, 2013, the Court held a hearing on the jury questionnaire [S.Tr. 654-663]. The defense version included a question 61 with a chart/table where the prospective jurors could state their views on multiple possible mitigating circumstances [S.Tr. 659; Pruss Testimony; PCR Ex. 8, p. 18]. The State objected to question 61/the table being included because it thought it would confuse the potential jurors and did not comport with the law on mitigation [S.Tr. 659]. The Court sustained the State's objection and ruled question 61 would not be included on the jury questionnaire [A. 932-933].

4. Trial counsel Owens did not see the jury questionnaire sent to the prospective jurors until they started receiving completed jury questionnaires. Pruss received an email from trial counsel McDaniel on May 21 or 22, 2013 that there were boxes of completed questionnaires for her to review. She found out at that point that question 61, p. 14 of her proposed questionnaire [PCR Ex. 8] was not included in the jury questionnaire [Owens, Pruss Testimony].

5. Among the questions asked was whether the defendant's brain damage, his history of mental illness, and whether he would be a well behaved inmate and could be rehabilitated in prison, would be important to the prospective juror's sentencing decision [PCR Ex. 8, p. 14].

6. Question 98 from the jury questionnaire asked if it was important to consider the person's background - his home life/mental or emotional problems - in sentencing. Question 106 asked if the prospective juror would consider a defendant's mental status or abilities in deciding whether to impose a death sentence [PCR Ex. 9, pp. 23-24]. Pruss found some key component questions related to mitigation were not included in the jury questionnaire [Pruss testimony].

The questionnaire did not explicitly ask whether the defendant's brain damage would affect the consideration of a potential sentence. Nor did it ask whether the defendant's likely behavior and ability to be rehabilitated in prison would affect the consideration of a potential sentence.

7. The mitigation evidence presented at the penalty phase included evidence Weisheit made two suicide attempts as a teenager and had been diagnosed as ADHD [Tr. 2167-2168, 2175, 2195-96, 2207, 2217, 2252, 2402-2403, 2412, 2423, 2468]. A counselor noted there was serious dysfunction within the family when Weisheit was 16 or 17 years old [Tr. 2335]. Dr. David Price and Dr. Heather Henderson-Galligan diagnosed Weisheit as having Bipolar Disorder [Tr. 2412, 2423, 2431, 2443, 2467]. Dr. Price opined Weisheit had a cognitive disorder related to prior traumatic brain injuries that predated being tased [Tr. 2402-2404, 2418, 2423]. Defense counsel planned to call James Aiken, but much of his proposed testimony was excluded and he did not testify before the jury.

8. It was important to ask the prospective jurors about potential mitigation evidence to determine if they would consider it when they were deciding what sentence to impose. It was essential to selecting a fair and impartial jury for defense counsel to inquire of the prospective jurors regarding their beliefs and feelings on Weisheit's defense. ***Black v. State***, 829 N.E.2d 607, 611 (Ind. Ct. App. 2005). Trial counsel's performance was deficient when they did not object during voir dire to the jury questionnaires being incomplete.

9. The assembly of the questionnaire submitted to prospective jurors was a collaborative effort between the State, Weisheit's counsel, and the trial court (VH 3 at 653–63). At a hearing, the parties discussed the questionnaire (VH 3 at 653–63). Specifically relating to Questions 61–65 that Weisheit mentions in his petition for post-conviction relief, the State objected, the trial court ruled that one particular question had to be removed (Question 61), but that the others

could be included and were in fact included in the final questionnaire (VH 3 at 659–61; DA App. 939, Qs 62–65; PCR Ex. 9, p. 25, Qs 108–111).

10. At the post-conviction hearing, Owens confirmed that neither party saw a final version of the jury questionnaire the trial court sent to the jury pool; Owens did not see the final version until the jurors returned the questionnaires after having filled them out (PCR Tr. Vol. I, p. 133).

CONCLUSION

Weisheit claims that he was prejudiced because his counsel's deficiency in submitting an incomplete questionnaire hampered the ability to accurately evaluate prospective jurors' attitudes about mitigation evidence (Pet'n ¶ 9(a)(2)). The final version of the questionnaire submitted to the prospective jurors included multiple questions about mitigation including what facts would tend to make them more or less likely to impose the death penalty as opposed to a lesser penalty (PCR Ex. 9, pp. 20–22),[2] the circumstances where the death penalty would be per se inappropriate (PCR Ex. 9, p. 24), what facts would be relevant in the penalty determination (PCR Ex. 9, p. 24), the effect of mental illness on the penalty decision (PCR Ex. 9, p. 25), and potential jurors' opinions on mental health experts and specifically testifying mental health experts (PCR Ex. 9, pp. 26–28). Not only did the questionnaire submitted to the jury pool include questions about these particular areas of mitigation, but counsel had the opportunity to ask any relevant mitigation questions of the potential jurors during the five-day voir dire held in this case. While our Supreme Court has held that "[j]ury questionnaires are a useful tool employed by courts to facilitate and expedite sound jury selection[,]" *Stevens v. State*, 770 N.E.2d 739, 751 (Ind. 2002), the use of this tool does not limit counsel to asking questions outside of the questionnaires. Weisheit cannot prove prejudice from an allegation of incomplete jury questionnaires when

counsel was given every opportunity to ask any omitted questions. Weisheit has the burden to show that counsel performed below prevailing standards of professional practice in their jury questionnaire submission. Heather Pruss, a jury consultant, advised counsel as to the content and format of the jury questionnaires (PCR Tr. Vol. I, p. 179–82; PCR Ex. 7). She prepared a proposed questionnaire for trial counsel to consider submitting to the trial court (PCR Tr. Vol. I, p. 182, 197; PCR Ex. 8). Weisheit has not shown any evidence that the questionnaire trial counsel submitted was incomplete or inadequate. Weisheit has failed to show trial counsel's performance was deficient and that he was prejudiced. Weisheit has failed to show any prejudice, and he is not entitled to relief on this ground. Weisheit's claims in 9(A)(2) that trial counsel was ineffective regarding the submission of the jury questionnaire is DENIED.

(3) Counsel's performance fell below prevailing professional norms when he conceded to allowing the State to make paper strikes for cause on potential *Witherpoon-Witt* excludable prospective jurors based on their jury questionnaires. The State did not concede to paper strikes for cause on potential automatic death penalty jurors based on their jury questionnaires.

1. Weisheit alleged in 9(a)(3) that trial counsel's performance fell below prevailing professional norms when he conceded to allowing the State to make paper strikes for potential ***Witherspoon- Witt*** excludable prospective jurors based on their filled out questionnaires, while the State did not concede to making paper strikes on potential automatic death penalty prospective jurors.

2. Prospective jurors who indicate they will automatically vote against the death penalty or whose views prevent them from following the court's instructions at the penalty phase are excludable in death penalty cases. ***Witherspoon v. Illinois***, 391 U.S. 510, 522 (1968); ***Wainwright v. Witt***, 469 U.S. 412, 424 (1985). Prospective jurors who indicate they will always

vote for the death penalty are also excludable and should not serve in death penalty cases. ***Morgan.***

3. Trial counsel Owens testified the parties agreed to some paper strikes on both ***Witherspoon-Witt*** excludable prospective jurors as well as automatic death penalty excludable prospective jurors [Owens Testimony]. Jury consultant Pruss suggested making more paper strikes on automatic death penalty prospective jurors than actually occurred. She was not present for the conference where the attorneys agreed on paper strikes [Pruss Testimony].

4. There is a presumption trial counsel's performance was effective. ***Strickland,*** 466 U.S. at 689. Petitioner did not prove his allegation that paper strikes were not made on automatic death penalty prospective jurors. That fewer of such jurors were excused by agreement than Pruss expected does not establish trial counsel's performance was deficient.

5. The record shows that the parties came to mutual agreements on which prospective jurors could be removed (VH 4 at 763-764, 777, 794-99). At a pre-trial hearing, the State listed a series of jurors that the parties agreed could be excused on paper (VH 4 at 795–96). After this listing, trial counsel agreed that there was no objection to excusing these jurors (VH 4 at 797).

6. The trial court clarified the basis for these agreed exclusions: "I haven't looked at them, but they're the always, always or never, never kind of people?" (VH 4 at 799).

CONCLUSION

Weisheit has failed to present any evidence that trial counsel was deficient or that Weisheit was prejudiced by trial counsel's selection of the jury. Weisheit has failed to identify any evidence to support this claim in his proposed findings to this Court and concedes that he is not entitled to relief on this claim. The Court has finds that Weisheit failed to present evidence to establish that any concessions, let alone prejudicial concessions, were made by either party.

Trial counsel made reasonable strategic decisions in entering into agreements with the State to remove unwanted jurors from the pool. In addition, Weisheit has failed to present any evidence demonstrating how he was prejudiced based on these agreements. Weisheit does not present any evidence to claim that his counsel was unduly limited in their questioning of jurors at voir dire. Weisheit has failed to show any prejudice, and he is not entitled to relief on this ground. Weisheit's claims in 9(A)(3) that trial counsel was ineffective when he conceded to allowing the State to make paper strikes for cause on potential *Witherpoon-Witt* excludable prospective jurors based on their jury questionnaires regarding is DENIED.

(4) Counsel's performance fell below prevailing professional norms when counsel did not ensure during voir dire that the prospective jurors would be willing to consider a term of years as a sentencing option if they found Weisheit guilty.

1. Weisheit alleged in 9(a)(4) that counsel's performance was deficient when counsel did not ensure on voir dire that the prospective jurors would be willing to consider a term of years as a sentencing option if they found Weisheit guilty.

2. There were three possible sentencing options for the jury if they found Weisheit guilty of murder and found one or both alleged aggravating circumstances: the death penalty, life imprisonment without parole or a term of years. It was important to ask the prospective jurors about a term of years because it was one of three punishments they said they were willing to consider [Pruss Testimony].

3. Several jurors who served on the jury or served as an alternate were not asked by defense counsel or anyone else if they could consider a term of years as a sentencing option [Juror 15 Tr. 98-118; Juror 7 Tr. 129-154; Juror 80 Tr. 665-67; Juror 160 Tr. 1032-35; Juror 167 Tr. 1055-56; Juror 168 Tr. 1060-63].

4. All of the prospective jurors were asked in question 96 on p. 22 of the jury questionnaire their thoughts on a sentence of a term of years for a person convicted of intentionally murdering multiple children.

> Juror 7: "I would feel justice was not truly served and a dangerous person could be set free."
>
> Juror 15: "He should never get out."
>
> Juror 75: "Should include 'without the possibility of parole.'"
>
> Juror 160: "Is not appropriate for crime."
>
> Juror 167: "I dont think this is a fair sentence especially if they are guilty of murder."
>
> Juror 168: "I don't think this is a suitable sentence. Anyone who has intentionally murdered children should have no possibility of parole. They should be locked up for life."

[PCR Ex. 9].

5. Four jurors and two alternate jurors in their questionnaires rejected the possibility of a term of years as a sentencing option. None of them were asked during voir dire if they would consider a term of years as a sentencing option.

6. Trial counsel did not ask these jurors and alternate jurors if they would be willing to follow the law and consider one of the three sentencing options.

7. Once Weisheit reached the penalty phase of the trial, a significant portion of the jury was only going to consider the death penalty or life imprisonment without parole as sentencing options.

CONCLUSION

Weisheit claims trial counsel failed to question certain jurors about their openness to considering a term-of-years sentence, as opposed to a sentence of life without parole or the death penalty (Pet'n ¶ 9(a)(4)). Indiana Code Section 30-50-2-9(e) states that the jury in a capital case "shall recommend to the court whether the death penalty or life imprisonment without parole, or neither, should be imposed." *See Wrinkles v. State*, 749 N.E.2d 1179, 1198 (Ind. 2001) (statute requires trial court to instruct on all three possible penalties). Qualified jurors must be willing to consider all of the possible penalties. *Burris v. State*, 465 N.E.2d 171, 177 (Ind. 1984). This principle flows from United States Supreme Court jurisprudence which requires that jurors in capital cases must be willing to follow the law (including instructions indicating all of the possible penalties) and must be excused if their personal views of the death penalty (whether pro or con) "'would prevent or substantially impair'" their ability to follow their oath and the law. *Ritchie v. State*, 875 N.E.2d 706, 726–27 (Ind. 2007) (quoting *Wainwright v. Witt*, 469 U.S. 412, 418–24 (1985)); *see also Greene v. Georgia*, 519 U.S. 145, 146 (1996) ("*Witt* is the controlling authority as to the death-penalty qualification of prospective jurors.") (internal quotation and citation omitted); *Adams v. Texas*, 448 U.S. 38, 45 (1980) (jurors must be excused if their views on the death penalty "would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath."); *Witherspoon v. Illinois*, 391 U.S. 510, 522 (1968).

The Court notes that Weisheit has identified seven jurors or alternate jurors that were not asked about a term of years during voir dire. Out of those seven jurors or alternate jurors Weisheit has identified, three of them that were either asked about a term of years or never served on Weisheit's jury. Juror 168 was an alternate juror that never sat on the actual 12-

member jury panel. Thus, trial counsel was not deficient for not asking a question in voir dire about his views on a term-of-years sentence, nor does such an omission show a reasonable likelihood of a different outcome. As for Juror 160, the direct appeal record shows that Juror 160 was asked multiple questions by the State about her views on all three sentencing alternatives (DA Tr. 1029–31). Further, Juror 160 never indicated that she could not consider a term of years at all. Thus, trial counsel was given a full picture of this juror's views without having to ask additional questions. Juror 75 was directly asked about the three sentencing options and never indicated he could not consider them (DA Tr. 645–47). Therefore, trial counsel could not be ineffective.

As for the four remaining jurors identified by Weisheit, Weisheit's claim of deficiency is in counsel's failure to ask these jurors during voir dire about their view of a term-of-years sentence (Pet'n ¶ 9(a)(4)). This deficiency, Weisheit alleges, prejudiced Weisheit because "[n]ot questioning the jurors about this possibility decreased the likelihood they would consider it as a viable option" (Pet'n ¶ 9(a)(4)). The Court finds that trial counsel was not deficient in their performance in selecting qualified jurors nor was Weisheit prejudiced because he cannot show a reasonable likelihood of a different result.

Trial counsel was not deficient in its selection of qualified jurors. Although Weisheit raises a claim of ineffective assistance of trial counsel for failure to ask particular jurors about whether they could consider a term-of-years sentence for Weisheit, the Court notes that Weisheit already challenged the qualifications of the jury on direct appeal and the Indiana Supreme Court denied Weisheit's claim. *Weisheit*, 26 N.E.3d at 12-13. In short, Weisheit's allegation at bottom touches upon whether the jurors were qualified to sit in judgment of Weisheit. The Court finds that the Supreme Court's holding that Weisheit failed to demonstrate that any jurors were not

qualified to sit on his jury under *Oswalt v. State*, 19 N.E.3d 241 (Ind. 2014), is a finding that the jury was qualified. And, specific to his claim here, Weisheit directly challenged the qualifications of Jurors 7 and 80 on direct appeal—a claim on which he received no relief (Def. Br. 50). The Supreme Court's opinion and holding alone show that trial counsel was not deficient.

In its opinion affirming the denial of relief on this claim, the Supreme Court recounted the experience and training of Wilkes's trial counsel, the use of a jury consultant (Heather Pruss, also used by Weisheit here), and trial counsel's strategy. *Id.* In *Wilkes*, the defense team, in their review of the questionnaires, sought to identify those people who were always going to vote death and those who would consider mitigation. The Court held that counsel made "a tactical decision to focus on other prospective jurors during the selection process. Such a decision is well within the discretion of trial counsel." *Id.* at 1248 (citing *Pruitt v. State*, 903 N.E.2d 899, 906 (Ind. 2009)).

The Supreme Court's decision in *Wilkes* controls the outcome of this claim. In both *Wilkes* and here, the defendants on post-conviction alleged ineffectiveness in counsel's failure to ask specific questions to particular jurors about topics relevant to capital cases—mitigation in *Wilkes* and penalty options here. *Wilkes*, 984 N.E.2d at 1246. The Supreme Court rejected the claim in *Wilkes*, finding no deficient performance of counsel. *Id.* at 1248. In both *Wilkes* and here, trial counsel's primary strategy was to identify and screen those jurors that would automatically vote for the death penalty (Tr. 134–35; PCR Tr. 134–35). *Id.* at 1247–48. The Court concludes that counsel was not ineffective for making a reasonable trial decision not to ask every juror about their views of the term-of-years option.

Weisheit claims he was prejudiced because counsel's failure to question about a term of years in voir dire "decreased the likelihood [jurors] would consider it a viable option" (Pet'n ¶ 9(a)(4)). However, a decreased likelihood that jurors would consider a term of years as a viable option does not establish the prejudice required under a *Strickland* analysis. A decreased likelihood in considering a sentencing option is not a reasonable likelihood of a different outcome. Moreover, Weisheit has presented no persuasive evidence to support his claim. None of the jurors testified at the post-conviction hearing to prove, one, that they did not fully consider the term-of-years option, and, two, that if they had been asked, their verdict might have been different. The only evidence on which he can rely is the completed juror questionnaires, completed before voir dire began, and consequently, long before the penalty decision was given to the jury. The juror questionnaires are not sufficient evidence to meet Weisheit's burden of showing a reasonable likelihood of a different result. Weisheit has failed to show that any failure to ask jurors about this option in voir dire had any effect on his ultimate sentence. Weisheit has failed to prove uncurable bias in the penalty phase after voir dire, the guilt phase, penalty phase instructions, deliberation, and the presumption that jurors follow their instructions. *See Fox v. State*, 997 N.E.2d 384, 397 (Ind. Ct. App. 2013), *trans. denied.* Weisheit alleged in 9(a)(4) that counsel's performance was deficient when counsel did not ensure on voir dire that the prospective jurors would be willing to consider a term of years as a sentencing option if they found Weisheit guilty. Weisheit has failed to show any prejudice, and he is not entitled to relief on this ground and he request is DENIED.

(5) Counsel's performance fell below prevailing professional norms when counsel did not present evidence at the hearing on the motion to suppress Weisheit's custodial statement and at trial that Detective Kerri Blessinger had a *Miranda* form in her hands, showed it to Weisheit and he did not seem to acknowledge it as far as wanting to sign it.

1. Weisheit alleged in 9(a)(5) that trial counsel's performance fell below prevailing professional norms when counsel did not present evidence at the suppression hearing that Detective Blessinger had a ***Miranda*** waiver form in her hands, showed it to Weisheit and he did not seem to want to acknowledge it as far as wanting to sign it. Weisheit alleged that evidence indicating he did not want to sign the ***Miranda*** waiver form supported an argument he did not knowingly, intelligently and voluntarily waive his ***Miranda*** rights prior to being questioned and giving a statement.

2. Weisheit was in custody at St. Elizabeth's Hospital in Florence, Kentucky when Detectives Kerri Blessinger and Randy Chapman questioned him on April 10, 2010.

3. Detective Blessinger read the Miranda rights to Weisheit [T.Ex. 61, Exhibit Volume - E. 93]. She asked Weisheit if he understood and his rights and he said yes [E. 93]. She did not ask if he was waiving his rights [T.Ex. 61]. Blessinger and Chapman questioned Weisheit for nineteen minutes before he requested an attorney and questioning ceased.

4. Weisheit admitted leaving the children alone in the house when he left and just started driving [E. 95-96, 107]. He did not take the kids with him because he did not want them [E. 99, 102]. He just wanted to end his life [E. 109]. He did not know if he set the fire or how the fire started [E. 97-98, 101-103, 107-108]. Detective Chapman considered the statement to be incriminating [Chapman Testimony]. Excerpts from the statement were included in the affidavit for probable cause [A. 72].

6. Trial counsel Tim Dodd and Steve Owens deposed multiple witnesses prior to filing a motion to suppress. They deposed the police officers and medical personnel who had treated Weisheit [Owens Testimony]. Detective Blessinger testified at her deposition as follows:

"Q. Did you have him sign the Miranda form?

A. He wouldn't as far - - I mean, he didn't - - he didn't sign it.

Q. Why not?

A. I don't think at that point we even - - I mean, I had it in my hands. I showed it to him and he . . .

Q. He what?

A. Didn't seem to acknowledge it as far as like wanting to sign it. So we just read it to him and figured that since we had it on tape we were good on that where we wouldn't have to get a signed form.

Q. Did you ask him to sign it? Not that I recall." [PCR Ex. 18].

7. Trial counsel filed a motion to suppress evidence which alleged the statement was involuntary and was not knowingly and intelligently given for the following reasons:

"a. The statements sought to be suppressed were obtained while the Defendant was isolated from family, friends and legal counsel in a hospital treatment room;
b. That the Defendant was weakened from pain and shock from the traumatic brain injury that he had sustained during the court (sic) of his arrest;
c. That the combination of the Defendant's traumatic brain injury and physical response to medications administered at the hospital made it impossible for the Defendant to knowingly, intelligently and voluntarily waive his Miranda rights and voluntarily give a statement;
d. That the Defendant made no express statement that he was willing to waive his Miranda rights and give a statement." [A. 190-191].

8. Trial counsel Dodd died after the motion to suppress was filed. He was replaced by trial counsel Mike McDaniel prior to the September 2, 2011 evidentiary hearing on the motion to suppress.

9. Trial counsel focused on Weisheit's medical condition when he was questioned at the suppression hearing and the failure of the police officers to ask the medical personnel if Weisheit was capable of giving a statement. No evidence was presented about Detective Blessinger's deposition testimony on Weisheit not seeming to want to acknowledge the Miranda form "as far as like wanting to sign it."

10. Judge Daniel Moore denied the motion to suppress in a written order [A. 210-219]. The Court summarized the medical testimony [A. 212-216] and applicable law [A. 216-218]. The Court found the medical proof is Weisheit was alert and oriented [A. 218]. The Court found:

> "Defendant demonstrated, inter alia, the ability, at the time of the taped interview, to (a) know the position of the persons with whom he was speaking, (b) to acknowledge his legal rights when read to him, (c) to recognize the changing topics contained in questions posed to him, (d) to recognize those questions that focused on the children and make responses thereto, (e) to identify and describe his purposes during the police chase, (f) to state his Vanderburgh County home address, (g) to acknowledge he had been with Caleb and Alyssa in the prior evening, (h) to know he put them to bed inside the home, (i) to know he left them to start driving, (j) to know their mother was at work, (k) to state he was leaving for good; and (l) to ask for a lawyer, after which all questioning ceased.
>
> The State has established, by the required standard of proof, that Defendant's statement was knowingly and voluntarily given to police officers. The state has proven beyond a reasonable doubt that Defendant's April 10, 2010 statement was voluntarily given and is admissible as evidence at trial.
>
> Defendant's Motion to Suppress the Statement is DENIED. " [A. 219].

11. Trial counsel objected at trial when Weisheit's pretrial statement was offered into evidence [Tr. 1665-1668, 1672-1673]. The Court denied the motion to suppress and admitted the statement [Tr. 1672-1673, 1756]. The tape, Exhibit 61, was played to the jury [Tr. 1757].

12. Appellate counsel Ripstra argued on appeal the pretrial statement should not have been admitted into evidence [PCR Ex. 1, Brief of Appellant, pp. 59-63; Reply Brief, p. 7]. The

primary federal case he cited was ***Mincey v. Arizona***, 437 U.S. 385 (1978) [Brief of Appellant, p. 61]. The focus of his argument was the police did not make even a cursory attempt to find out if Weisheit was capable of giving a statement and the police did not talk to a doctor about Weisheit's medical condition [Ripstra Testimony]. Blessinger's pretrial deposition was not part of the record on appeal and appellate counsel could not rely on it in the appeal [PCR Ex. 1; Ripstra Testimony].

13. The Indiana Supreme Court noted Weisheit was relying on ***Mincey*** and found it distinguishable. ***Weisheit***, 26 N.E.3d at 17. The Court stated: "Here, we find that the following evidence, among others, supports the trial court's rulings: (1) Weisheit had only a mild brain contusion; (2) the on-site examining physician testified that Weisheit was alert and oriented at the relevant time; (3) another physician testified that Weisheit was capable of understanding and participating in his conversation with the police; (4) no drugs other than anti-nausea medication had been administered to Weisheit; (5) the officers conducting the interview testified that Weisheit selectively feigned sleep based on the subject matter of their questions but was otherwise responsive; and (6) the interview was relatively brief in duration and ceased when Weisheit asked for an attorney - in itself evidence that he understood his ***Miranda*** rights and was thus aware of his surroundings." ***Id.*** at 18. The Court affirmed the trial court's ruling the State proved the voluntariness of Weisheit's statements beyond a reasonable doubt. ***Id.***

14. Blessinger's deposition testimony, which she admitted was correct at the post-conviction hearing, supported a challenge to the validity of the waiver of ***Miranda*** rights. A challenge to the validity of the waiver of rights is a separate challenge than a challenge to the voluntariness of a statement. See ***State v. Keller***, 845 N.E.2d 154, 161-66 (Ind. Ct. App. 2006).

15. "Once warnings have been given, the subsequent procedure is clear. If the individual indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease." ***Miranda v. Arizona***, 384 U.S. 436, 473-74 (1966).

16. Detectives Blessinger and Chapman did not ask Weisheit if he waived his rights, and there is no verbal waiver of rights. They did not ask him to sign the written waiver of rights, and there is no written waiver of rights. The fact Weisheit did not seem to want to acknowledge the ***Miranda*** form when it was right next to him while Detective Blessinger was reading the ***Miranda*** rights may have demonstrated he was indicating in a non-verbal manner that he wished to remain silent. See ***Mendoza-Vargas v. State***, 974 N.E.2d 590, 595 (Ind. Ct. App. 2012) (Defendant shook his head no when asked if he wanted to answer questions. It was an obvious invocation of his right to remain silent).

17. Detectives Blessinger and Chapman continued to question Weisheit and he answered additional questions until they ceased questioning when Weisheit verbally requested counsel.

18. The State has the burden of demonstrating Weisheit's statements did not contribute to his convictions. ***Arizona v. Fulminante***, 499 U.S. 279, 296 (1991). Weisheit has the burden of showing that but for trial counsel's deficient performance, there is a reasonable probability of a different result at trial. Weisheit was prejudiced by the admissibility of his pretrial statement. The State in closing argument maintained his admission he was the last one in the house with the kids and not once did he deny setting the fire showed he was guilty [Tr. 2088-2089, 2091]. Whether Weisheit set the fire (committed arson) was the primary disputed issue at the guilt phase. The State did not have evidence on how the fire started and presented no evidence that Weisheit admitted setting the fire.

CONCLUSION

The Fifth Amendment guarantees that "[n]o person ... shall be compelled in any criminal case to be a witness against himself." In *Miranda v. Arizona*, 384 U.S. 436, 460-61 (1966), the United States Supreme Court extended the Fifth Amendment privilege against compulsory self-incrimination to individuals subjected to custodial interrogation by police. "The *Miranda* court formulated a warning that must be given to all suspects before they can be subjected to custodial interrogation." *Berghuis v. Thompkins*, 560 U.S. 370, 380 (2010). "[T]he accused's statement during a custodial interrogation is inadmissible at trial unless the prosecution can establish that the accused 'in fact knowingly and voluntarily waived his [*Miranda*] rights' when making the statement." *Id.* at 382 (quoting *North Carolina v. Butler*, 441 U.S. 369 (1979)) (alterations in original).

> The waiver inquiry "has two distinct dimensions": waiver must be "voluntary in the sense that it was the product of a free and deliberate choice rather than intimidation, coercion, or deception," and "made with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it."

Thompkins, 560 U.S. at 382-83 (quoting, *Moran v. Burbine*, 475 U.S. 412, 421 (1986)).

A waiver of *Miranda* rights does not have to be express. *Thompkins*, 560 U.S. at 384. "As a general proposition, the law can presume that an individual who, with full understanding of his or her rights, acts in a manner inconsistent with their exercise has made a deliberate choice to relinquish the protection those right afford." *Id.* at 385. Therefore, "a waiver of *Miranda* rights may be implied through 'the defendant's silence, coupled with an understanding of his rights and a course of conduct indicating waiver.'" *Id.* at 384 (quoting *Butler*, 441 U.S. at 373). "Where the prosecution shows that a *Miranda* warning was given and that it was understood by the accused, an accused's uncoerced statement establishes an implied waiver of the right to

remain silent." *Id.*; *United State v. Brown*, 664 F.3d 1115, 1118 (7th Cir. 2011) (stating that courts must look at the totality of the circumstances and that it is "immaterial [to a valid waiver] that defendant did not sign a waiver form or even utter a clear yes in response to the first recitation of *Miranda*"); *United States v. Murdock*, 491 F.3d 694, 700 (7th Cir. 2007).

Counsel established that she read Weisheit his *Miranda* rights from the form, that Weisheit said he understood his *Miranda* rights, but that she did not have Weisheit sign the waiver of rights form (VH 1 at 197-200; DA Ex. 61 at 02:49-3:34).

At the post-conviction hearing, trial counsel stated that he did not challenge the validity of Weisheit's waiver on the basis that he did not sign the *Miranda* form because he knew through legal research that a waiver could not be invalid solely on this basis (PCR Tr. Vol. I, p. 131). Instead, counsel presented that information as one fact for the trial court to consider under the totality of the circumstances (PCR Tr. Vol. I, p. 128-31).

Trial counsel's strategy was reasonable and in accordance with the law regarding the validity of a waiver of *Miranda* rights. Cases from trial counsel's file clearly show that counsel knew what was required for a valid waiver and knew that the validity of the waiver is based upon the totality of the circumstances and not just on one factor, such as if Weisheit signed a waiver form (PCR Tr. Vol. II, p. 121; PCR Ex. A). *See Thompkins*, 560 U.S. at 384-85.

Trial counsel had both favorable and unfavorable evidence to support his motion and made reasonable strategic decisions to highlight the favorable evidence. Trial counsel focused on evidence of Weisheit's head injury *and* the fact that he did not sign the form (PCR Tr. Vol. I, p. 129-30; DA App. 190-91; VH 1 at 197-200; DA Ex. 61 at 02:49-3:34; DA Ex. 61A). Trial counsel knew that Weisheit had continued to answer Detective Blessinger's questions after being read a *Miranda* form and stating that he understood (VH 1 at 59, 197-200; DA Ex. 61 at 02:49-

03:34; DA Ex. 61A). Trial counsel was aware that challenging the admission of the statement solely on whether Weisheit signed the form would not be successful (PCR Tr. Vol. I, p. 121, 128; PCR Ex. A). *Butler*, 441 U.S. at 373. Trial counsel's performance was not deficient. *United States v. Steward*, 388 F.3d 1079, 1085 (7th Cir. 2004) (trial counsel cannot be ineffective for failing to lodge a meritless objection).

Weisheit has failed to demonstrate that trial counsel was deficient and that there is a reasonable likelihood that he would have been acquitted.

Weisheit has failed to show that the outcome of his trial would have been different had the statement been suppressed. Weisheit has failed to show a reasonable likelihood that the outcome of his trial would have been different if his statement had not been admitted; he has not suffered prejudice. Weisheit's claim that trial counsel were ineffective in challenging Weisheit's April 10, 2010, statement is denied.

(6) Counsel's performance fell below prevailing professional norms when they failed to object to inadmissible opinion testimony. Witnesses David Bretz, Clayton Kinder, and Kerri Blessinger all testified it was their opinion the fire was intentionally set and/or was arson.

1. Weisheit alleged in 9(a)(6) that trial counsel's performance fell below prevailing professional norms when they failed to object to inadmissible opinion testimony. Witnesses David Bretz, Clayton Kinder, and Kerri Blessinger all testified it was their opinion the fire was intentionally set and/or was arson.

2. Owens testified the defense's primary strategy during the guilt phase of the trial was to call into question whether the State had proven an arson.

3. The State was unable to present evidence of the cause and origin of the fire.

4. David Bretz, Assistant Chief of the German Township Fire Department, was one of the fire fighters at the scene. The State offered his testimony as a witness to the fire, stating he was not an expert [Tr. 1308]. He testified at trial it was his opinion the fire was intentionally set [Tr. 1311-1312]. Counsel testified he believed Bretz's opinion was admissible.

5. Clayton Kinder was the Indiana State Fire Marshal who investigated the fire [Tr. 1490]. Kinder explained the difference between an incendiary fire and an arson [Tr. 1505]. He explained that an incendiary fire is intentionally set and arson was the crime of intentionally setting a fire. He explained not all intentionally set fires are arsons [Tr. 1505-1506]. Kinder testified it was not possible to determine the origin or ignition source of the fire [Tr. 1501]. His opinion was "the cause of the fire was an incendiary fire, an intentionally set fire" [Tr. 1501]. Counsel Owen testified he believed his opinion was admissible.

6. Kerri Blessinger was the lead detective on this case. She testified at trial it was her opinion the fire was an arson intentionally set by Weisheit [Tr. 1897-1898]. Counsel testified at the post-conviction hearing he did not object because Blessinger was not his witness. He believes his co-counsel could have objected on the basis she was not qualified to express that opinion.

7. In this case, the State was unable to prove an arson through the circumstances of the fire itself. Rather, the State relied upon the actions taken by Weisheit after the fire. Therefore, Bretz and Kinder's opinions were prejudicial. They were not witnesses to Weisheit's actions after the fire – only to the fire itself. Therefore any opinions the fire was intentionally set or was arson invaded the province of the jury to determine whether an arson had been committed.

8. Indiana Evidence Rule 702(a) provides: A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or

otherwise if the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue. Ind. Evid. R. 702(a). Expert opinion is appropriate when it addresses issues not within the common knowledge and experience of ordinary persons and would aid the jury. Ind. Evid. Rule 702(a). ***Miller v. State***, 770 N.E.2d 763, 773 (Ind. 2002). "When [jurors] are faced with evidence that falls outside common experience, we allow specialists to supplement the jurors' insight." ***Carter v. State,*** 754 N.E.2d 877, 882 (Ind. 2001) (finding experts may not testify, however, "to opinions concerning intent, guilt, or innocence in a criminal case; the truth or falsity of allegations; whether a witness has testified truthfully; or legal conclusions." Evid. R. 704(b)). "We expect jurors to draw upon their own personal knowledge and experience in assessing credibility and deciding guilt or innocence." ***Carter,*** 754 N.E.2d at 882.

Indiana Evidence Rule 704 provides:

> (a) Testimony in the form of an opinion or inferences otherwise admissible is not objectionable just because it embraces an ultimate issue.
> (b) Witnesses may not testify to opinions concerning intent, guilt or innocence in a criminal case; the truth or falsity of allegations; whether a witness has testified truthfully ; or legal conclusions.

Ind. Evid. R. 704.

9. The opinions of Bretz and Kinder were based on the circumstances before and after the fire and not the fire itself. The jury did not need their opinions to evaluate that evidence and decide upon Weisheit's intent. Those opinions were inadmissible and an objection would have been sustained.

10. Blessinger's testimony should have also been excluded. ***Williams v. State***, 43 N.E.3d 578, 582-583 (Ind. 2015); ***Smith v. State***, 721 N.E.2d 213, 217 (Ind. 1999).

CONCLUSION

Even assuming that trial counsel's objection would have been sustained and testimony that this was an intentionally set fire was not admitted, Weisheit has failed to show a reasonable probability that the outcome of trial would have been different. Testimony that this was an intentionally set fire was not the most incriminating evidence that the State presented. Chief Bretz testified that the surrounding circumstances—the fact that the owner of the house fled to Kentucky and the condition of Caleb hog-tied on the mattress—were compelling indicators that this was an intentionally set fire (DA Tr. 1311-12). Fire Marshal Kinder indicated:

> My decision to make the determination it was an incendiary fire was based on the evidence gathered at the scene, which was the flares, as well as the other evidence noted at the scene, which would be Caleb duct-taped, the rag in the throat, tape over his mouth, and the totality of all the other circumstances.

(DA Tr. 1541-42). This same information that Chief Bretz and Fire Marshal Kinder used to determine that the fire was intentionally set was information that the jury was presented with through other witnesses and the jury was free to draw the same inference therefrom. *See Harrison v. State*, 707 N.E.2d 767, 780 (Ind. 1999) ("[G]iven that one of the bodies found in the fire had died from stab wounds, it seems improbable that an accidental fire would be the conclusion of the jury.").

Testimony that this was an intentionally set fire was not nearly as persuasive as Weisheit's actions before, during, and after the crime. The exclusion of the opinion testimony would not have had a reasonable likelihood of a different outcome. Weisheit has failed to show that he was prejudiced. Weisheit has failed to demonstrate that trial counsel were deficient in not objecting to testimony regarding how the fire started and he has failed to show that there is a reasonable likelihood that he would have been acquitted had trial counsel objected. Weisheit's claim that trial counsel were ineffective in challenging opinion testimony is denied.

(7) Counsel's performance fell below prevailing professional norms when counsel did not attempt at the penalty phase to mitigate the damage from Weisheit's trial testimony.

1. Weisheit alleged in 9(a)(7) that trial counsel's performance fell below prevailing professional norms when counsel did not attempt at the penalty phase to mitigate the damage from Weisheit's trial testimony.

2. Weisheit testified in a narrative form during the guilt phase of trial against counsel's advice (DA Tr. 2014; PCR Tr. Vol. I, p.146). Prior to the day Weisheit testified, trial counsel did not know Weisheit was going to decide to testify (PCR Tr. Vol. I, p. 165).

3. Before trial, counsel had conversations with Weisheit about whether he should testify or not (Id.). Before Weisheit testified, both trial counsel, Michael Dennis, and Mark Maybury (investigator) sat with Weisheit in one of the sheriff's offices and spoke to Weisheit for two hours about not testifying and tried to convince him it was not in his best interest (PCR Tr. Vol. I, p. 166, 167).

4. Weisheit used notes when he testified that he made beforehand and refused to show to Counsel Owens (PCR Tr. Vol. I, p. 167).

5. Leading up to April 9-10, 2010, Weisheit told the jury that he quit his job because he was angry at his boss (DA Tr. 2026). He had a job lined up at Elite Environmental (DA Tr. 2026). On April 10, 2010, Weisheit watched the kids while Lisa went to work (DA Tr. 2027). He claimed the kids fell asleep while watching a movie in Alyssa's bedroom; he had fallen asleep on the couch (DA Tr. 2027).

6. Weisheit testified that when he woke up, he woke up Caleb and put Caleb in Caleb's bed (DA Tr. 2027). Later, Weisheit heard something, and, when he looked down the hallway, he saw that Caleb's bedroom light was on (DA Tr. 2027). Caleb was playing with his toys (DA Tr.

2027). Weisheit told Caleb to put the toys away because it was time for bed (DA Tr. 2027). Weisheit described how he fought with Caleb (DA Tr. 2027). Weisheit testified:

> And I just, I got real mad. I put duct tape on him, on his hands behind his back. I pushed the rag into his mouth, because he said I was sorry. He said I'm sorry, he kept saying it over and over. Put the duct tape in his mouth – or the rag in his mouth. I put the duct tape over it. I laid him back on his back in the bed.

(DA Tr. 2027-28, 2034-35, 2043, 2046-47). Weisheit stated he decided to leave and drive to Cincinnati (DA Tr. 2028-29).

7. As Weisheit drove to Cincinnati, a police officer pulled up behind him (DA Tr. 2029). He threw a knife at the officers to get them to shoot him (DA Tr. 2030). After Weisheit was tased, he fell and hit his head, and Weisheit claimed he didn't remember anything after that (DA Tr. 2030).

8. Weisheit testified that he emptied his bank account because he was off of work and "the bills actually would be taken out monthly or whatever," and he needed money for the house payment (DA Tr. 2026). He took some of Lisa's clothes and jewelry with him because he was afraid that Lisa would take everything and move out, like she did before (DA Tr. 2028, 2040).

9. Weisheit denied setting the fire (DA Tr. 2033, 2039).

10. The jury returned guilty verdicts on June 18, 2013, and the penalty phase began the next day (DA Tr. 2142).

CONCLUSION

Weisheit has failed to show that trial counsel was deficient for failing to obtain an expert to explain Weisheit's testimony to the jurors during the penalty phase. Initially, the Court finds that this claim fails because trial counsel had no fair warning that Weisheit was going to testify before the day he testified. Certainly, trial counsel could not be found to be ineffective for not obtaining an expert with no notice that one would be needed or obtain an expert with no time

between the guilt and penalty phases. Weisheit has not presented to this Court any case law finding trial counsel to be deficient under these circumstances. This claim is one judging trial counsel's performance solely on the basis of hindsight, which *Strickland* does not allow. . Weisheit has failed to show that he was prejudiced. Weisheit has failed to demonstrate that trial counsel were counsel did not attempt at the penalty phase to mitigate the damage from Weisheit's trial testimony and he has failed to show that there is a reasonable likelihood that he would have been acquitted Weisheit's claim that trial counsel were ineffective in when counsel did not attempt at the penalty phase to mitigate the damage from Weisheit's trial testimony is denied.

(8) Counsel's performance fell below prevailing professional norms when counsel did not properly investigate and obtain Weisheit's Boy's (sic) School records that were available in the state archives.

1. Weisheit alleged in 9(a)(8) that trial counsel's performance fell below prevailing professional norms when counsel did not properly investigate and obtain Weisheit's Boy's School records that were available in the state archives.

2. Mike Dennis was the defense team's mitigation investigator. Owens testified the mitigation aspect of the case was "pretty much left to Mike Dennis."

3. The defense team was aware Weisheit had spent some time in the Boys School. Tim Dodd sent a letter to the Department of Correction requesting copies of the Boys School records. Dodd received a response that they no longer had the records [PCR Ex. C]. Dennis was never asked by any other counsel to do anything else to look for the Boys School records. They received a few records from Weisheit's parents, but did not get everything they wanted.

4. The defense team was aware that while Weisheit was at the Boys School, he was sent to Methodist Hospital. A report from the Boys School records dated October 21, 1993, authored by clinician Karen Hampton and Dr. Dixon-Reed indicated that while Weisheit was in the psychiatric unit of Methodist Hospital after attempting suicide at the Boys School, he suffered a psychotic break [PCR Ex. 5]. Owens testified if there was evidence Weisheit had a psychotic break while at Methodist Hospital, that would have been important to provide to the defense team's experts.

5. Dr. Henderson-Galligan and Dr. Harvey both relied on information found in the Boys School records in forming their opinions about Weisheit's Bipolar diagnosis. Dr. Henderson-Galligan testified the Boys School records showed Weisheit was prone to downplay his struggles during his teen years. She noted Weisheit's extent of suicidal ideation was important in demonstrating the severity of Weisheit's mental health issues. Psychiatric records found in the Boys School records described Weisheit's family as "deeply chaotically enmeshed." This information was important in understanding Weisheit's mental health issues. Records from January, February and March of 1993, demonstrated Weisheit's severe mood swings that were noted by clinicians who were seeing him on a near daily basis and who would have been in the best position to make those assessments. The records showed Weisheit had been prescribed three different anti-depressants over the course of a year. This showed a significant, ongoing issue with treating Weisheit's depression.

6. Dr. Harvey testified his diagnosis of Bipolar Disorder was supported by information in the Boys School records including the timeframe of 1993. Those records established an extended period of depression and mania. With those records, Dr. Harvey testified he could have made a definitive diagnosis.

7. At the penalty phase of the trial, counsel called as a witness, Deborah Eccles Skidmore [Tr. 2250-2257]. Her testimony included that while at the Boys School, Weisheit suffered from depression and attempted suicide [Tr. 2252]. As a result of the suicide attempt, he was removed and placed in Methodist Hospital [Tr. 2253]. Weisheit's placement was from two to three or four weeks approximately which was longer than an average juvenile was placed in outside care [Tr. 2253]. Prior to her testimony at the penalty phase, she was not provided any documents to review [Tr. 2255]. Skidmore spoke with Mike Dennis prior to her testimony but did not meet the attorneys until the day she testified. She did not know that she would be cross-examined by the State or asked questions by the jury. In contrast to her brief testimony at the penalty phase, Skidmore provided significantly more detailed information about the Boys School and Weisheit's access to care. This was in part because she was able to review documents from the Boys School records which were prepared by her.

8. Skidmore was the correctional counselor for Cottage 4. There were a total of 13 cottages at the Boys School. Intake evaluations were performed in Cottage 5. The boys underwent educational and psychological testing. Based on the results, the boys were placed in their respective cottages. Placement was based on personality type. Cottage 4 was for the boys that were needy and less predatory. Cottage 13 was a segregation unit. There was more structure and 5 minute checks on the boys. As the counselor, Skidmore would have had daily contact with Weisheit while in her cottage.

9. PCR Ex. 4 was prepared by Skidmore. It was a Progress and Pre-Parole Summary. It reflects that Weisheit arrived at Cottage 4 on December 15, 1992. Weisheit was interviewed by the consulting psychiatrist and placed on an anti-depressant. However, Weisheit was not taking the medication and instead used it to attempt suicide. As a result, he was placed in the

Adolescent Unit of Methodist Hospital for approximately 30 days. It had to be a serious suicide attempt before an individual was sent from the Boys School to a private care unit like Methodist. [PCR Ex. 25, Affidavit of David Moore].

10. There were approximately 35-45 children in Cottage 4. Over her time at the institution, Skidmore interacted with hundreds if not thousands of boys. Skidmore recalled only one other boy being sent from the Boys School to Methodist. Of the two, Skidmore testified that Weisheit was there the longest.

11. There were psychologists at the Boys School. Skidmore recalled that Dr. Robert Craig was one of those individuals. She would have met with him as part of the team evaluating Weisheit's care. Skidmore was familiar with boys with situational depression from being placed at the Boys School. Weisheit presented as chronically depressed. Weisheit would not make eye contact when being spoken to, had very little to say and would be slumped over. She did not believe that Weisheit was faking his level of depression. Boys at the Boys School did not want to seem weak. If an inmate was viewed as weak, that inmate could be viewed as prey. Suicide was seen as a sign of weakness.

12. Skidmore was a long time employee of the Department of Correction. She was also involved with hundreds if not thousands of boys sent to the Boys School. Through her experience, her observations that Weisheit was not faking his depression carries much weight with the Court. Likewise, her knowledge of the practices of the institution at the time of Weisheit's admission are credited by the Court. Weisheit's admission to Methodist Hospital's Adolescent Care Unit and lengthy stay are evidence supporting the records assessment that he suffered from Major Depression.

13. Counsel testified he met Skidmore prior to her testimony. He had been provided a summary by Mike Dennis, the mitigation investigator. He was not aware she would be able to offer more details. Counsel relied on the investigator to perform a task that was his responsibility. Counsel did not meet with the witness prior to her testimony to talk about her experiences and background that would have been beneficial to the defense case. She was also unprepared to testify as she was unaware that anyone other than trial counsel would be asking her questions. Likewise, had counsel been armed with the Boys School records, he would have been able to present to the jury information about the school's resources and the rarity of Weisheit's placement at Methodist. Skidmore could have been a much more compelling witness for the defense but for counsel's deficiencies.

14. Dr. Craig was a member of the psychological unit at Boys School. He was treating Weisheit while at the school. The Boys School records reflect this relationship and Dr. Craig's concerns about Weisheit's level of depression. Dr. Craig was alive at the time of the penalty phase of Weisheit's trial. However, he was deceased at the time of the post-conviction hearing [PCR Ex. 10].

15. Dr. Heather Henderson-Galligan testified at the penalty phase of the trial [Tr. 2453-2484]. Dr. Henderson-Galligan is a licensed psychologist who was appointed by the trial court to evaluate Weisheit's competency [Tr. 2457]. Her report was admitted at the penalty phase [T.Ex. K-2]. The report reflected her review of documents provided to her which were the Order and Motion to Determine Competency, Dr. Matibag's note, the MRI report from Clark Memorial Hospital, Dr. Allen's deposition and Dr. Price's report [Tr. 2460, 2471; T.Ex. K-2]. Dr. Henderson-Galligan found that Weisheit suffered from Bipolar Disorder, NOS, a Cognitive Disorder, NOS, Attention Deficit Hyperactivity Disorder by history and a Personality Disorder

NOS Cluster B [Tr. 2467-2469]. She found Bipolar Disorder based on the historical information that was given to her [Tr. 2473-2474].

16. Dr. Henderson-Galligan testified at the post-conviction hearing as well. Dr. Henderson-Galligan has testified several hundreds of times. In addition, she teaches psychopharmacology, diagnosis of mental disorders and disease as well as ethics. When Dr. Henderson-Galligan is appointed by a Court to determine competence to proceed, she normally performs one clinical assessment. In this case, she met with Weisheit on two occasions.

17. Dr. Henderson-Galligan reviewed the Boys School records. She found a great deal of significant information in the Boys School records [PCR Ex. 5, 22]. Weisheit downplayed his prior struggles as a juvenile. The Social History prepared by Bernie Faraone in November of 1992 includes information about his upbringing and family history. The report also details the significant mental health history including suicide attempts and threats. Once placed at the Boys School, Weisheit was kept on suicide watch. The handwritten notes on the IBS Document Review Checklist reflect Weisheit had a recent suicide attempt on November 5, 1992 and he was in need of a psychiatric referral. He was assigned a bed up front because he was a suicide risk.

18. The Classification Summary Sheet reflected Weisheit was admitted at age 16 on December 2, 1992. Under Security and Custody Concerns, he was observed to be suicidal and a run risk. He was also referred for both group and individual Psychological Counseling. A Psychiatric Evaluation was performed on December 4, 1992 by Dr. Dennis Rhyne. Dr. Rhyne diagnosed Weisheit with Conduct Disorder and Depression not otherwise specified. Weisheit said that he was the "oddball" of the family. The Intake Evaluation Unit prepared its Juvenile Diagnostic and Classification Summary on December 14, 1992. Under Family Dynamics, the preparers found "the Weisheit family is deeply chaotically enmeshed." The Weisheit family

structure contributed to Weisheit's problems during his teen years. There was no admission of the family dysfunction by Weisheit or his parents but the professionals treating and observing the family noted its presence. Rebellion was twisted into a drive to defy Weisheit's father. Weisheit had identity confusion when he could not identify or fit into a family role he was expected to play.

19. On January 8, 1993, Weisheit was seen by Dr. Rhyne again. This time he presented with a "much brighter affect" and a "more positive outlook." Dr. Rhyne noted that he was in therapy with Dr. Craig and it appeared to help him. On January 15, 1993, there was another evaluation by Dr. Rhyne. Dr. Rhyne spoke with Dr. Craig and learned that Dr. Craig was concerned about Weisheit being really depressed. When Dr. Rhyne met with Weisheit, Weisheit admitted when asked about his brighter mood on January 8 that it was a superficial display. Weisheit admitted to mood swings and significant depression. Dr. Rhyne prescribed Prozac, which treats depression, not Conduct Disorder or Attention Deficit Hyperactivity Disorder (ADHD). Dr. Henderson-Galligan found significant the wide swing in mood and affect in one week's time.

20. Within the Boys School records there is a Registration Record dated January 23, 1993, from the Hendricks County Hospital. This document reflects the date of Weisheit's admission for his suicide attempt at the Boys School. He failed to take his medication as directed and instead tried to overdose on it. Weisheit then was placed in Methodist. He was returned to the Boys School on February 18, 1993, and placed on 15 minute visual checks as ordered by Dr. Craig. Dr. Craig spoke with Weisheit on February 19. On the same date, Dr. Rhyne performed another psychiatric evaluation. Dr. Rhyne noted that Weisheit again presented with a brighter affect and confronted him about appearing non-depressed in the past. Dr. Rhyne

continued the medication Weisheit was on, Wellbutrin, an anti-depressant. When Weisheit was seen on March 8, 1993, his dosage was increased. Weisheit was released from the Boys School in the spring 1993. In the Pre-Parole Summary prepared by Skidmore, a condition of parole was continued mental health contact. As noted by Dr. Henderson-Galligan, the family did not monitor or refill medications following Weisheit's release.

21. Weisheit was readmitted to the Boys School on September 27, 1993. He was listed as a suicide risk and again they monitored him. The staff took all psychological precautions including 5 minute visual checks, a stripped room with no sheets and a wool blanket provided after 9 p.m. The checks, noting that they were due to Weisheit being upset, continued through October 21, 1993. On September 28, 1993, Dr. Sajal Bose performed a Psychiatric Evaluation of Weisheit. Dr. Bose diagnosed Weisheit with Major Depression. Dr. Bose prescribed Zoloft, another anti-depressant.

22. A comprehensive evaluation was prepared by Karen Hampton, who treated Weisheit, and Dr. Andrew Dixon-Reed. The evaluation included information from the missing Methodist Hospital records. It also outlined Weisheit's psychiatric history and family environment. Dr. Henderson-Galligan noted the significance of the psychiatric history which went back to his treatment in the 5th and 6th grades. The parents, while noting that Weisheit's behavior improved when he was discharged in May, 1993, while taking the Wellbutrin, allowed the prescription to run out and did not refill it. Dr. Henderson-Galligan noted the importance of this information because it supports the conclusion that this is an enmeshed family. The failure to monitor and continue the medication reflects a poor choice within the family unit. The evaluation revealed that because Weisheit spent an extensive period of time in Methodist, it was likely the symptoms were genuine and not malingered and the primary cause of Weisheit's

difficulties was a mental illness. The documents also reflect Weisheit suffered a psychotic break while being treated at Methodist. It was noted this may reoccur under stress. Dr. Henderson-Galligan testified that once one suffers a psychotic break it is more likely to happen again.

23. Dr. Henderson-Galligan testified that there is overlap between the diagnosis of ADHD, conduct disorder and Bipolar Disorder. ADHD is characterized by impulsivity. This is true of both Conduct Disorder and mania in Bipolar Disorder. Grandiosity is another symptom that overlaps among the various disorders. Early in her education, Dr. Henderson-Galligan learned that the preference was to diagnose Conduct Disorder rather than Bipolar Disorder. A diagnosis of Conduct Disorder falls off at the age of 18, while Bipolar Disorder is a lifelong diagnosis. Clinicians are concerned about labeling juveniles with a lifelong disorder. Conduct Disorder under the DSM III-R is a disorder only recognized in childhood or adolescence. *Diagnostic and Statistical Manual of Mental Disorders* (Third Edition – Revised) (1987) pp. 53-56 (Edition in effect at time of juvenile placement).

24. Other documents reviewed by Dr. Henderson-Galligan were Weisheit's family's records which reflected a maternal cousin and uncle were treated for Bipolar Disorder and a maternal aunt was treated for a Mood Disorder. This is significant because there is a genetic component to both Bipolar Disorder and Schizophrenia. It is an industry standard to ask for the family history of mental illness.

25. Dr. Henderson-Galligan noted there was evidence of mania in Dr. Allen's report.

26. Dr. Henderson-Galligan could also have been called as rebuttal to the State's expert, Dr. Allen. Dr. Henderson-Galligan had been appointed by the Court to evaluate Weisheit. As such, she was hired by neither party and was a neutral expert. Her forensic experience would

have been an asset for the defense in convincing the jury to reject Dr. Allen's opinion Weisheit did not suffer from Bipolar Disorder.

CONCLUSION

The investigation the defense team conducted unearthed leads to persuasive mitigating evidence. They knew that Weisheit was in the Boys School yet failed to find the records. They located Skidmore and called her as a witness. Valuable information was not presented because they had not located the records and counsel did not interview Skidmore. The records that were provided to the jury reflected very little of the compelling evidence of Weisheit's mental illness or the role his family played in failing to follow through with treatment. Dr. Harvey and Dr. Henderson-Galligan testified at the Post-Conviction hearing to the importance of these records in reaching an accurate and complete diagnosis. The Boys School records document lengthy treatment for a major mental illness, one which included that Weisheit suffered a psychotic break. The penalty phase records provided to the jury suggest Conduct Disorder and ADHD. In ***Wiggins***, the Supreme Court found counsel's performance deficient where they failed to continue investigating once this type of lead had been found. "The scope of the investigation was also unreasonable in light of what counsel actually discovered (in the records)." ***Wiggins***, 539 U.S. at 525. The Court explained counsel uncovered no evidence to suggest "further investigation would have been fruitless." ***Id.***

Weisheit claims there was no strategic reason not to present the evidence at trial that was presented at post-conviction. See ***Williams v. Taylor***, *supra*, (counsel was ineffective where he had no strategic reason not to present mitigating evidence and unpresented evidence was not inconsistent with penalty theory). Prejudice is assessed by the "totality of the available mitigation evidence – both that adduced at trial, and the evidence adduced in (collateral review)."

Williams, 529 U.S. at 397-98. The evidence presented at trial, taken together with the post-conviction evidence, is the type of "evidence about the defendant's background and character (that) is relevant because of the belief, long held by our society, that defendants who commit criminal acts that are attributable to a disadvantaged background or to emotional and mental problems, may be less culpable than defendants who have no such excuse." ***Abdul-Kabir v. Quarterman***, 550 U.S. 233, 251-52 (2007) (internal citations omitted).

Even if the Indiana Boys' School records had been discovered, Weisheit has failed to show a reasonable likelihood of a different outcome. Had the jury and judge been presented with the evidence which was presented at post-conviction hearing in addition to the evidence presented at the trial, there is no reasonable likelihood the jury would have unanimously voted against death. As further discussed, the information in the records would not have changed either Dr. Henderson-Galligan's diagnosis or Dr. Harvey's assessment. Both doctors testified at the post-conviction hearing that their diagnosis would not have changed had they been privy to the information and only served to validate them. Weisheit has failed to show that trial counsel was deficient in their investigation of Weisheit's juvenile mental health records and has failed to show prejudice. Specifically, Weisheit faults trial counsel for failure to find and present additional mitigating evidence in the penalty phase in the form of Weisheit's records from the Indiana Boys' School. *Strickland* requires trial counsel to have conducted a reasonable 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.

Strickland, 466 U.S. at 690–91.

Weisheit has failed to show a reasonable likelihood of a different result. First, even though trial counsel could not find records from the Indiana Boys' School, trial counsel was able to learn that Weisheit was in the school in his youth, that he attempted suicide while there, and that he was admitted to Methodist Hospital because of this attempt. This information, including more information from this time period was communicated and relied upon by both Dr. Price and Dr. Henderson-Galligan and presented to the jury. Therefore, trial counsel was able to gather meaningful information from Weisheit's stay at the Indiana Boys' School and his mental health at the time. This evidence was presented in the penalty phase.

The Court finds that trial counsel conducted a reasonable investigation to obtain records created by IDOC regarding Weisheit's stays at Indiana Boys' School. Trial counsel went directly to the source of the information and was informed that the records did not exist and that the documents were older than their retention policy. However, trial counsel was not deterred and continued to pursue other avenues to obtain the records or other mental health records during the relevant time periods. Trial counsel was likewise unsuccessful obtaining records from Methodist Hospital, but was able to find some records from Southwestern Indiana mental health providers. Trial counsel's efforts to gain information regarding Weisheit's Indiana Boys' School records was more than sufficient under the dictates of *Strickland.*

Trial counsel's investigation was reasonable and Weisheit has failed to show that the limitations on the investigation were unreasonable, especially in light of the responses from the IDOC and Methodist Hospital to his record requests. Weisheit has not demonstrated that trial counsel should have known that Weisheit's records may have been moved to the State archives.

In fact, it was reasonable for trial counsel to believe that the records had been destroyed because IDOC only had a one-page document remaining, did not have any other documents, and the dates of the records were well outside the time period for destruction. Had IDOC referred trial counsel to the State Archives and trial counsel failed to exhaust this lead, Weisheit would have had a much closer case for deficiency. Moreover, the fact that post-conviction counsel submitted records from Indiana Boys' School gathered from the State of Indiana Archives does not show that the records were available at the time of Weisheit's trial. And, especially given IDOC's response regarding their destruction schedule of records, trial counsel's failure to investigate whether the State Archives had copies of the records was not deficient performance.

Finally, Weisheit has failed to show that he would have had a reasonable likelihood of a different outcome, based on the strength of the evidence of Weisheit's guilt and the significant weight of the charged aggravating factors that Weisheit detained two small children and burned the house down with them alive inside (*See* prejudice analysis Claim 9(A)(1)). Weisheit has failed to show that his trial counsel was ineffective in when counsel failed to procure the entire Indiana Boys' School records. Weisheit's claim that trial counsel's performance fell below prevailing professional norms when counsel did not properly investigate and obtain Weisheit's Boy's School records that were available in the state archives is denied.

(9) Counsel's performance fell below prevailing professional norms when counsel did not properly investigate and present mitigating evidence and witnesses at the penalty phase.

1. Weisheit alleged in 9(a)(9) that trial counsel's performance fell below prevailing professional norms when counsel did properly investigate and present mitigating evidence and witnesses at the penalty phase.

2. Weisheit was entitled to effective representation at the penalty phase of his death penalty trial. ***Williams v. Taylor***, 529 U.S. 362, 395-98 (2000); ***Rompilla v. Beard***, 545 U.S. 374, 382-93 (2005); ***Smith v. State***, 547 N.E.2d 817, 821-22 (Ind. 1989). A significant source for determining whether counsel performed within prevailing professional norms is the *ABA Standards for the Appointment and Performance of Counsel in Death Penalty Cases*. ***Bobby v. Van Hook***, 558 U.S. 4, 16 (2009).

3. Trial counsel have an "obligation to conduct a thorough investigation of the defendant's background." ***Williams***, 529 U.S. at 396. "The ABA Guidelines provide that investigations into mitigating evidence 'should comprise efforts to discover **all reasonably available** mitigating evidence and evidence'" ***Wiggins v. Smith***, 539 U.S. 510, 524 (2003), *citing ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases*, 11.4.1(C) (1989) (emphasis added).[3]

4. While mitigating evidence was presented to the jury at penalty phase, the inquiry does not end there. "We have never limited the prejudice inquiry under ***Strickland*** to cases in which there was only 'little or no mitigation evidence' presented." ***Sears v. Upton***, 561 U.S. 945, 954 (2010).

5. Prejudice is assessed by the "totality of the available mitigation evidence – both that adduced at trial, and the evidence adduced in (collateral review)." ***Williams***, 529 U.S. at 397-98. The evidence presented at trial, taken together with the post-conviction evidence, is the type of "evidence about the defendant's background and character (that) is relevant because of the belief, long held by our society, that defendants who commit criminal acts that are attributable to a disadvantaged background or to emotional and mental problems, may be less culpable than

[3] A portion of Guideline 11.4.1 was the basis for Guideline 10.7 in the ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases, revision in 2003.

defendants who have no such excuse." ***Abdul-Kabir v. Quarterman,*** 550 U.S. 233, 251-52 (2007) (internal citations omitted).

6. The Post-Conviction team called Dr. Ruben Gur, a neuropsychologist, and he testified for Petitioner at the post-conviction hearing. Dr. Gur is from the University of Pennsylvania and has particular expertise in brain injury and behavior. He has extensive expertise in analyzing imaging of the brain. Dr. Gur co-founded the Brain Behavior Laboratory at the University of Pennsylvania School of Medicine. Dr. Gur has published over 500 peer-reviewed articles relating to brain disorder and behavior. He has participated in grant-funded studies for the National Institutes of Health, NASA and the Army including traumatic brain injury and behavior. He is knowledgeable in research having to do with multiple mild traumatic brain injuries in sports and veterans and brain behavior related to those injuries.

7. Dr. Gur was sent the documents detailed in Petitioner's Exhibit 3. From those records, he identified several traumatic brain injuries from the reports of Dr. Price and Dr. Henderson-Galligan. Some of those TBI's were self-reported by Weisheit. Others were substantiated by other documentation in the records. Dr. Gur testified regarding a nasal fracture Weisheit received from being punched when he was a teen and another car accident that happened around the same time. He identified a car accident in which Weisheit required stitches. He also identified an injury when he was quite young which required stitches.

8. There is corroborative evidence of these 4 injuries in Weisheit's medical and Boys School records. In 2012, Weisheit informed Dr. Price of several head injuries when he was a juvenile. Based on the number of head injuries Weisheit reported, Dr. Price was concerned about the existence of brain damage that might explain some of his behavior. An early head injury at about age 7 was documented in an affidavit of Dr. Price in support of requesting a

contrast MRI [A. 1655]. Weisheit's family physician, Dr. Kinkaid showed an entry in his progress notes dated June 16, 1983, when Weisheit was 7, in which a suture was removed from the back of his head. [T.Ex. C-2]. Weisheit gave consistent information about this early injury to several other providers. [T.Ex. D-2, p. 5; K-2, p. 3]. Medical records admitted as Defendant's Exhibit A-2 document a nasal fracture in October of 1992 that required surgery and an auto accident that required stitches in 1999. Another auto accident around October of 1992 in which he totaled a vehicle, was documented in several places in Weisheit's mental health records. [T.Ex. B-2]. Brain injury can occur without an impact to the head. It can be caused by a sudden movement which caused the brain to impact within the cranium. The brain can also sustain injury in a side-to-side movement which may cause the brain to twist around its axis.

Beyond that, Weisheit self-reported a number of head injuries to Dr. Henderson-Galligan during her competency exam. [T.Ex. K-2, p. 3]. Considering only the TBI's supported by other documentation, Dr. Gur testified there was a concern Weisheit suffered at least some long term effects. Any injury that caused stitches or nasal surgery, more likely than not, resulted in concussion and TBI. The State's expert, Dr. Polly Westcott, found it compelling Weisheit's medical records did not mention symptoms normally associated with concussion in concluding the medical records did not support a diagnosis of TBI. However, Dr. Gur testified, during the 1990's at the time Weisheit suffered most of these TBI's, hospitals were not necessarily reporting symptoms of concussion unless it resulted in a loss of consciousness. At that time, medicine did not diagnose concussion without a loss of consciousness. Further, brain injury can occur without impact to the head. It can be caused by sudden movement.

9. According to Dr. Gur, brain research has revealed multiple mild traumatic brain injuries can have long term effects. Mild traumatic brain injury is not necessarily visible on an

MRI without the use of quantitative analysis which would identify diffuse brain damage. In Weisheit's case, quantitative analysis would result in speculative results because there is no pre-April, 2010, MRI to compare it to. It is possible Weisheit has diffuse brain damage that is not visible on the MRI. Research has shown it is not known how long it takes for the brain to heal from a brain injury. Therefore, the time between the brain injuries is not determinative of the possible long term effects of the injury.

10. People with successive mild traumatic brain injury suffer from impaired executive function, impaired ability to regulate behavior and judgment, risk taking and impulsivity. There is a lot of overlap between the symptoms associated with TBI and Bipolar Disorder. A brain injury may exacerbate the symptoms of Bipolar Disorder. However it is very difficult to determine what extent of the symptoms are associated with Bipolar Disorder as opposed to TBI.

11. Dr. Gur was asked if Weisheit likely suffered the long term effects of multiple TBI's during the events of April, 2010. Dr. Gur's opinion was that Weisheit's behavioral history was compatible to kids who suffer from successive TBI's. Dr. Gur also testified that because Weisheit had a history of Bipolar Disorder, his brain would have been more vulnerable to the effects of mild TBI, exacerbating his symptoms.

12. The defense team's mitigation investigation revealed multiple mild traumatic brain injuries to Weisheit. Due to these injuries, the defense's expert, Dr. Price, recommended a contrast MRI. During the penalty phase, the evidence showed there was likely no brain injury pre-dating the April 10, 2010 tasing and that resulting permanent injury [T.Ex. 1-2, p. 7]. This evidentiary picture is not accurate and left out valuable information. Had counsel developed the brain injury evidence, the jury would have also heard the likelihood Weisheit suffered the effects of multiple mild traumatic brain injury growing up which exacerbated his behavior issues and

Bipolar Disorder. The common symptoms of successive mild traumatic brain injury include impaired executive function and ability to self-regulate behavior and judgment, risk-taking and impulsivity. Injury resulting from multiple TBI's exacerbate any existing mental health issues such as Bipolar Disorder. The jury would have heard the effects of mild traumatic brain injury likely contributed to the events of April 10, 2010. The limited scope of counsel's investigation in this area of mitigation was unreasonable. ***Wiggins***, 539 U.S. at 525. Further investigation would not have been fruitless. ***Id.***

13. During closing, the State discounted the mitigation evidence and argued Weisheit's juvenile history was due to problems he brought on himself [Tr. 2548]. Evidence regarding Weisheit's Bipolar Disorder and successive mild traumatic brain injuries prior to April, 2010, present a significantly more compelling case of mitigation.

14. Weisheit claims that this evidence would have more strongly refuted the State's claim that Weisheit's behavior problems growing up and during the events leading up to the fire were of his choosing. *See* ***Williams***, 529 U.S. at 397-98.

15. Dr. Heather Henderson-Galligan was initially appointed by the trial court to do a competency evaluation of Weisheit (PCR Tr. Vol. II, 9; DA App. 928–29). She met with Weisheit on two occasions to do this evaluation and then generated a "Competency Evaluation" (DA Ex. K-2).

16. In determining competency, she Dr. Heather Henderson-Galligan also reviewed records including Dr. Price's neuropsychological report (DA Ex. K-2, p. 1). She concluded that Weisheit was "clearly competent" to stand trial (DA. Ex. K-2, p. 6).

17. Dr. Henderson-Galligan also testified in the penalty phase and her competency report was admitted as an exhibit (DA Tr. 2453–84; DA Ex. K-2). Both in her report and in her

testimony, she told the jury she believed that Weisheit had bipolar disorder not-otherwise-specified (NOS), cognitive disorder NOS, ADHD, and personality disorder NOS with Cluster B characteristics (DA Ex. K-2; DA Tr. 2467–70).

18. Dr. Henderson-Galligan testified at the Post-Conviction hearing. She recounted her previous diagnoses of Weisheit that she had previously told the jury in the penalty phase (PCR Tr. Vol. II, pp. 11–14, DA Tr. 2467–70).

19. Prior to her testimony at the Post-Conviction hearing, Dr. Henderson-Galligan was sent more materials relating to Weisheit's past behaviors and mental health, including the previously unavailable Indiana Boys' School records (PCR Tr. Vol. II, pp. 15–16). She reviewed these records before her post-conviction testimony (PCR Tr. Vol. II, p. 16–17). Specifically relating to the Indiana Boys' School records, while she found "significant information in those documents", the information in the records did not conflict with her prior opinions and diagnoses (PCR Tr. Vol. II, p. 18).

20. At the post-conviction hearing, Henderson-Galligan expansively explained the significance of various information found in the records provided for her post-conviction testimony (PCR Tr. Vol. II, pp. 19–42). The Indiana Boys' School records confirmed her previous diagnosis of bipolar disorder (PCR Tr. Vol. II, pp. 70–71), and she affirmed that having the records did not change her original diagnoses presented to the jury and contained within her report admitted in the penalty phase (PCR Tr. Vol. II, p. 45).

CONCLUSION

Post-conviction counsel presented the testimony of Dr. Gur, a neuropsychologist from Pennsylvania, as the testimony that trial counsel was deficient for not presenting in the penalty phase (PCR Tr. Vol. I, p. 23). Dr. Gur testified that he believes Weisheit's self-reports of a

history of hitting his head and equates that with Weisheit having suffered multiple concussions and mild traumatic brain injuries (PCR Tr. Vol. I, p. 48-49, 59, 69, 93, 102-03, 108). Further, Dr. Gur opined that, even though Weisheit was competent to go to trial, trial counsel should not have allowed Weisheit to testify given his deficits caused by brain injuries (PCR Tr. Vol. I, p. 112-113). However, no evidence was presented that that Weisheit suffered multiple mild traumatic brain injuries or suffers from chronic traumatic encephalopathy like Dr. Gur suggests (PCR Tr. Vol. II, p. 150). Weisheit has failed to show a reasonable likelihood of a different outcome had Dr. Gur testified.

Post-conviction counsel presented the testimony of Dr. Heather Henderson-Galligan was initially appointed by the trial court to do a competency evaluation of Weisheit (PCR Tr. Vol. II, 9; DA App. 928–29). She met with Weisheit on two occasions to do this evaluation and then generated a "Competency Evaluation" (DA Ex. K-2). In determining competency, she also reviewed records including Dr. Price's neuropsychological report (DA Ex. K-2, p. 1). She concluded that Weisheit was "clearly competent" to stand trial (DA. Ex. K-2, p. 6). Dr. Henderson-Galligan also testified in the penalty phase and her competency report was admitted as an exhibit (DA Tr. 2453–84; DA Ex. K-2). Both in her report and in her testimony, she told the jury she believed that Weisheit had bipolar disorder not-otherwise-specified (NOS), cognitive disorder NOS, ADHD, and personality disorder NOS with Cluster B characteristics (DA Ex. K-2; DA Tr. 2467–70).

Dr. Henderson-Galligan testified at the post-conviction hearing. She recounted her previous diagnoses of Weisheit that she had previously told the jury in the penalty phase (PCR Tr. Vol. II, pp. 11–14, DA Tr. 2467–70). Prior to her testimony, Dr. Henderson-Galligan was sent more materials relating to Weisheit's past behaviors and mental health, including the

previously unavailable Indiana Boys' School records (PCR Tr. Vol. II, pp. 15–16). She reviewed these records before her post-conviction testimony (PCR Tr. Vol. II, p. 16–17). Specifically relating to the Indiana Boys' School records, while she found "significant information in those documents", the information in the records did not conflict with her prior opinions and diagnoses (PCR Tr. Vol. II, p. 18). At the post-conviction hearing, Henderson-Galligan expansively explained the significance of various information found in the records provided for her post-conviction testimony (PCR Tr. Vol. II, pp. 19–42). The Indiana Boys' School records confirmed her previous diagnosis of bipolar disorder (PCR Tr. Vol. II, pp. 70–71), and she affirmed that having the records did not change her original diagnoses presented to the jury and contained within her report admitted in the penalty phase (PCR Tr. Vol. II, p. 45).

Counsel was not deficient in preparing or utilizing Dr. Henderson-Galligan's testimony at the penalty phase. To the extent that this claim is a continuation of Weisheit's claim of ineffectiveness for failing to obtain the Indiana Boys' School records, the Court incorporates its analysis and ruling finding that trial counsel was not deficient for failing to obtain those records. Consequently, counsel could not be ineffective for failing to provide these records to Dr. Henderson-Galligan in preparation for her penalty phase testimony.

Counsel was also not deficient in failing to more effectively or fully utilize Dr. Henderson-Galligan. Weisheit has presented no evidence showing different or better testimony that she could have provided. The majority of her testimony on post-conviction was recounting information found in the Indiana Boys' School records (PCR Tr. Vol. II, pp. 19–42). While she may have found information that more clearly supported her diagnosis (PCR Tr. Vol. II, pp. 18), on post-conviction, Weisheit has not presented any argument or evidence to support that she may have had additional mitigating information to present to the jury that counsel failed to so present.

To the extent that Weisheit additionally claims Dr. Henderson-Galligan should have been called to rebut Dr. Allen's testimony after Dr. Allen testified, she had already done so. At the penalty phase, she confirmed that she read Dr. Allen's deposition and that she disagreed with his failure to diagnose bipolar disorder, listing the evidence to support her side of the disagreement (DA Tr. 2471–77). Weisheit presents no evidence to show that this did not sufficiently rebut Dr. Allen's findings and conclusions presented at the penalty phase. The Court finds no deficient performance on this claim.

Finally, as this Court has previously discussed under 9(A)(1), Weisheit has failed to show what different testimony Dr. Henderson-Galligan could have provided that would have outweighed the overwhelming supported and significant aggravating factors. Furthermore, Weisheit has failed to show a reasonable likelihood that the result of his trial would be different had Dr. Gur testified. Weisheit has failed to show that trial counsel was deficient for not obtaining an expert to testify during the penalty phase to explain Brain-Injury. Weisheit's claim that trial counsel's performance fell below prevailing professional norms when counsel did not properly investigate and present mitigating witnesses at the penalty phase is denied.

(10) Counsel's performance fell below prevailing professional norms where counsel failed to call Dr. Philip Harvey at the penalty phase of Weisheit's trial.

1. Weisheit alleged in 9(a)(10) that trial counsel's performance fell below prevailing professional norms where counsel failed to call Dr. Philip Harvey at the penalty phase of Weisheit's trial.

2. The penalty phase of the trial included evidence Weisheit was mentally ill. Dr. David Price and Dr. Heather Henderson-Galligan testified he had a cognitive disorder related to a prior brain injury, had Bipolar Disorder and a personality disorder [Tr. 2404-2407, 2412, 2416-2418,

2423, 2431, 2433, 2437, 2467, 2469]. However the defense failed to call Dr. Philip Harvey. During Dr. Price's testimony, he referred to Dr. Harvey and Dr. Harvey's report [Tr. 2424-2426; 2429-2230]. The State's expert, Dr. Timothy Allen, had not reviewed the report referenced by Dr. Price [Tr. 2510-2511]. Counsel did not remember why Dr. Harvey was not asked to participate. His memory was Dr. Harvey was no longer available to testify.

3. Dr. Harvey is a licensed psychologist. He has testified as an expert witness in civil and criminal cases in several jurisdictions. His Curriculum Vitae was admitted as Petitioner's Exhibit 24. Dr. Harvey is currently on the Editorial Board of Bipolar Disorders. [PCR Ex. 24, p. 88]. He has published extensively in peer reviewed journals. He has published on the area of diagnostic accuracy of manic episodes including a 2001 article on this topic. [PCR Ex. 24, p. 15]. He was awarded the John B. Barnwell Award in 2014. [PCR Ex. 24, p. 95]. The Veteran's Administration awards this highest honor for clinical research and treatment. Dr. Harvey was the first psychologist or mental health professional to receive the award. Dr. Harvey has been studying Bipolar Disorder since 1979.

4. Dr. Harvey was involved in a very large and significant study of veterans diagnosed with Bipolar Disorder as the Clinical Chair. [PCR Ex. 24, p. 84]. The study was funded for over $34,000,000 and involved more than 9,500 veterans. As the Clinical Chair, Dr. Harvey was involved in oversight of the project. All individuals were diagnosed through the use of the Structured Clinical Interview for the Diagnostic and Statistical Manual [SCID]. Dr. Harvey personally reviewed over 4,500 individual results in the study.

5. Dr. Harvey has been evaluating individuals through the use of the SCID and its precursors since 1980. In Dr. Harvey's practice, the SCID is the gold standard method of evaluation. It measures current and past symptomology and covers the major Axis 1 disorders.

6. Dr. Harvey testified to the importance of a clinical interview. A clinical interview is required to substantiate a diagnosis. Dr. Harvey finds a structured interview like the SCID is the most informative aspect of a clinical evaluation. Personality inventories are less useful.

7. Dr. Harvey was originally contacted by prior counsel, Timothy Dodd. Dr. Harvey performed an evaluation of Weisheit on September 19, 2010. Dr. Harvey was provided little information about the case. During the evaluation, Dr. Harvey administered the SCID. Dr. Harvey felt Weisheit was showing signs of a manic episode when he performed Weisheit's evaluation. Following the evaluation, Dr. Harvey met with trial counsel and the mitigation investigator. Counsel showed Dr. Harvey the video of Weisheit being stopped and his behavior prior to being hit with a taser. Dr. Harvey informed trial counsel Weisheit's behavior was consistent with the behavior he observed when he performed the evaluation of Weisheit. At the time, Dr. Harvey expected he would perform another psychological evaluation. He was provided the family mental health records in 2011, but had no other contact with the trial team regarding the additional evaluation until January of 2012. In an e-mail to the defense team, Dr. Harvey notified them of his recent change of conditions of employment. He outlined the new limitations which included that he no longer have direct contact with individuals in forensic cases [A. 1623]. He could no longer do an assessment himself. He would have to restrict his testimony to the evaluation he had performed. At post-conviction he testified he could have reviewed any documents made available by the trial team. He could have testified at the 2013 trial, but was not asked to do so

8. In preparation for his testimony at the post-conviction hearing, Dr. Harvey reviewed the same materials as Dr. Gur. [PCR Ex. 3]. Dr. Harvey found the Boys School records to have significant information to inform his diagnosis of Weisheit. In January of 1993, Weisheit was

prescribed Prozac. Following this, he was admitted to Methodist Hospital for a suicide attempt. Ultimately, Weisheit was released from the Boys School only to be readmitted in the fall of 1993. He was treated several times for major depression over the course of a year. This was significant to the diagnosis of Bipolar Disorder.

9. The jail records from Vanderburgh County and some of the telephone calls between Weisheit and his parents provided information relevant to the duration of the impairment. The Vanderburgh County Jail records reflect that in September of 2010, around the time of Dr. Harvey's evaluation, Weisheit started acting out in the jail. Prior to that time period, he had no significant problems in terms of dealing with the staff. Throughout September of 2010, his behavior deteriorated. Then, it suddenly stopped. There were no significant behavioral disturbances at the jail again until January of 2011. During this phase, one of the jail commanders noted that Weisheit could lose contact with reality in an instant. Recorded jail calls and visits with family reflect some evidence of behaviors consistent with a manic episode in September of 2010. In one late September call, Weisheit informs his family that he sang "99 Bottles of Beer on the Wall" for 8 hours. This behavior is consistent with a manic phase. It also highlights the behavior is episodic rather than consistent over time because it reflected that Weisheit was stable from the time of his arrest to September, 2010. Then, he began to act out with the jail staff around the time of Dr. Harvey's evaluation. Weisheit again settled down and did not act out again until January of 2011. This information confirms the duration of the manic phase around the time of Dr. Harvey's evaluation and highlights the episodic nature of Weisheit's illness.

10. Dr. Harvey reviewed Ind. Code 35-50-2-9 and determined Bipolar Disorder is considered an extreme mental or emotional disturbance under Ind. Code 35-50-2-9(c)(2) and also could be a mental disease or defect under Ind. Code 35-50-2-9(c)(6).

11. The failure to call Dr. Harvey was not a strategic decision. Counsel mistakenly believed Dr. Harvey was not able to continue on the case. The e-mail contradicts this belief [A. 1623]. Dr. Harvey clearly conveyed he was available to testify to the results obtained during his evaluation of Weisheit. Counsel did not contact Dr. Harvey to learn whether he could or could not testify. Dr. Harvey was willing to do so. Due to counsel's mistake, Dr. Harvey was not provided the necessary documentation of evidence supporting the episodic nature of Bipolar Disorder and the Boys School records reflecting the long term treatment for Major Depression. A Major Depressive Episode is the first observed symptom for the majority of those identified later in life with Bipolar Disorder. Weisheit's presentation, a late onset single manic episode, is consistent with 40% of those diagnosed with Bipolar Disorder.

12. Dr. Price's testimony reflected some of Dr. Harvey's observations. However, he could not testify to Dr. Harvey's opinion and therefore had to dilute the information collected by Dr. Harvey and incorporate it in his opinion finding that Dr. Harvey's observations were "consistent with Bipolar Disorder." [Tr. 2430].

13. Dr. Harvey's testimony could have been used to rebut the State's expert, Dr. Allen. Dr. Allen testified Weisheit had been incarcerated for three years and never had a manic episode during that time [Tr. 2504]. Dr. Harvey observed a manic phase during this time. Dr. Allen also testified Bipolar was not likely in Weisheit's case because Bipolar is progressive and the episodes become more frequent [Tr. 2504, 2516]. Dr. Harvey testified that Weisheit's symptomology was consistent with 40% of the cases.

14. Weisheit claims he was prejudiced where trial counsel failed to call Dr. Harvey as a witness. Dr. Harvey's opinion would have supported two statutory mitigators and would have effectively rebutted Dr. Allen's testimony. The State exploited counsel's failure and argued there was no evidence of these two statutory mitigators [Tr. 2568-2569]. By failing to contact Dr. Harvey, the defense was left with one expert to testify to the cognitive disorder and Bipolar Disorder. Trial counsel's own assessment of the credibility of Dr. Price's testimony reflects the magnitude of this error.

15. On Tuesday, January 17, 2012, Dr. Harvey sent the following email to Michael Dennis:

> We have just been informed that as of the first of this year, we can no longer be paid as individuals for the assessment of any forensic cases that involve direct contact with clients. This income is now seen to be directly payable to our Medical Practice. As my salary is already way more than covered, I can't spend two days seeing a forensic case for no money. This does not preclude testimony on previously seen cases. Let me try to find you someone else who could do an assessment for you, but I can't. I will have to restrict my testimony to the data that I previously collected prior to this rule.

(PCR Ex. F).

16. Dr. Harvey then sent trial counsel, on February 12, 2012, a memorandum recounting his meeting with Weisheit, his observations of Weisheit, and his impressions of Weisheit's mental health (PCR Ex. O). Specifically, Dr. Harvey reported that Weisheit manifested a number of signs of a current manic episode during his interview, "does appear to have any [sic] episodic history of antisocial behavior in the past, mostly involving thefts and va[n]dalism," and that Weisheit has had a lifetime history of bipolar illness (PCR Ex. O).

17. The defense team interpreted Dr. Harvey's communication to mean that he would not be able to evaluate Weisheit and provide testimony (PCR Tr. Vol. I, p. 149). In fact, Owens understood that Dr. Harvey had "bailed" on testifying (PCR Tr. Vol. I, p. 159-60).

18. Thereafter, the defense team sought the services of another qualified psychologist, Dr. Price; a psychologist which Weisheit does not contend was insufficient or unqualified in any way. The defense team passed Dr. Harvey's observations and impressions memorialized in his February 12, 2012, memorandum to Dr. Price for consideration (DA Tr. 2398; DA Ex. E-2).

CONCLUSION

Weisheit claims that trial counsel was deficient because they did not present Dr. Harvey's testimony. According to Dr. Harvey's January 17, 2012, email, any testimony would have to be limited to data collected "prior to this rule." Weisheit never established when the rule restricting Dr. Harvey's ability to conduct assessments, testify as to his opinions, and to be paid directly for his efforts went into effect, or what data he had collected up and to that point.

It was reasonable for trial counsel to believe that Dr. Harvey was not interested in testifying as he indicated in his letter any testimony he would be able to give would be limited to data collected thus far, that he would not testify for free, that he could no longer be compensated directly, and that he would refer trial counsel to someone else who could assess Weisheit. Dr. Harvey wrote in a separate memorandum to trial counsel the salient information he had gathered and passed that on to trial counsel. It was reasonable for trial counsel to decide to hire another qualified expert; one that could fully evaluate Weisheit and testify as to his findings at the trial. Weisheit has not alleged that Dr. Price was unqualified or inadequate in any way. Trial counsel reasonably passed Dr. Harvey's memorandum on to Dr. Price and they could rely on whatever significance Dr. Price chose to place on the information. It was not unreasonable for trial counsel to rely on Dr. Price's assessment of the importance or relevance of the information in Dr. Harvey's February 2012 memorandum.

Weisheit has failed to show that any error was prejudicial and had a reasonable likelihood of a different sentence. First, the information Dr. Harvey found significant after his interview with Weisheit was communicated to trial counsel and their testifying expert. Therefore, the information was presented and incorporated into Weisheit's penalty phase presentation. Even if Dr. Harvey would have testified to this information, it would have been merely cumulative as Dr. Price's diagnosis relied upon it. Moreover, Dr. Harvey's testimony was cumulative of both that of Dr. Price and Dr. Henderson-Galligan as they both diagnosed and testified on Weisheit's behalf that Weisheit suffered from bi-polar disorder. The failure to present cumulative evidence is not prejudicial. Weisheit has failed to show a reasonable likelihood that the result of his proceeding would be different had Dr. Harvey testified. *See Ritchie*, 875 N.E.2d at 706 (Ind. 2007) (finding no ineffective assistance of counsel for failing to present additional psychological experts, specifically an expert that would have shown Ritchie suffered from bipolar disorder).

Weisheit has failed to show that trial counsel performance fell below prevailing professional norms where counsel failed to call Dr. Phillip Harvey at the penalty phase of Weisheit's trial. Weisheit's claim that trial counsel's performance fell below prevailing professional norms where counsel failed to call Dr. Phillip Harvey at the penalty phase of Weisheit's trial is denied.

(11) The foregoing instances of deficient performance stated in subsections 1 through 10 individually and cumulatively showed counsel's performance fell below prevailing professional norms.

1. Weisheit alleged in 9(a)(11) that the cumulative instances of deficient performance of trial counsel denied him the effective assistance of counsel.

CONCLUSION

As discussed herein, the Court finds no errors, cumulatively or otherwise, that resulted in deficient performance of trial counsel or that were prejudicial to Weisheit. Weisheit is not entitled to relief on this claim.

8(b) Weisheit was denied the effective assistance of appellate counsel in violation of the Sixth and Fourteenth Amendments to the United States Constitution.

Defendants are entitled to effective assistance of counsel on appeal. *Ben-Yisrayl v. State*, 738 N.E.2d 253, 260 (Ind. 2000) (citing *Evitts v. Lucey*, 469 U.S. 387, 396 (1985). Claims of ineffective assistance of appellate counsel are subjected to the same *Strickland* standard governing claims of ineffective assistance of trial counsel. *Id.* Ineffective assistance of appellate counsel claims fall into three general categories: "(1) denial of access to an appeal; (2) waiver of issues; and (3) failure to present issues well." *Hollowell v. State*, 19 N.E.3d 263, 270 (Ind. 2014) (citing *Reed v. State*, 856 N.E.2d 1189, 1195 (Ind. 2006); *Fisher v. State*, 810 N.E.2d 674, 677 (Ind. 2004)). Weisheit's claims fall within the third of these categories, namely, inadequate presentation of issues. To prevail on a claim of ineffective appellate counsel "regarding the selection and presentation of issues, the defendant must overcome the strongest presumption of adequate assistance, and judicial scrutiny is highly deferential." *Id.* at 260–61 (citing *Conner v. State*, 711 N.E.2d 1238, 1252 (Ind. 1999); *Bieghler v. State*, 690 N.E.2d 188, 195–96 (Ind. 1997)). To this claim, our Supreme Court has stated that "claims of inadequate presentation of certain issues, as contrasted with the denial of access to an appeal or waiver of issues, are the most difficult to advance[.]" *Id.* (citing *Bieghler*, 690 N.E.2d at 195).

Weisheit was represented by Steven Ripstra on his direct appeal who has been an attorney for almost 38 years (PCR Tr. 238). Ripstra was certified to work on capital cases under

Rule 24 (PCR Tr. 240–41). Half of his legal practice involves criminal cases: he has done criminal trial work in the past and worked on major felony cases on appeal (PCR Tr. 238-39). Ripstra has worked on the direct appeals in multiple capital cases including, Weisheit's, William Clyde Gibson, Roy Lee Ward (which involved two direct appeals), and Richard Dillon, which resulted in the grant of habeas relief (PCR Tr. 239-240).

Weisheit's amended petition raises two allegations that appellate counsel rendered ineffective assistance. The court will address each allegation individually below.

9(B) Weisheit was denied the effective assistance of appellate counsel for the following reasons:

(1) Counsel's performance fell below prevailing professional norms when counsel in Argument 3 of the Brief of Appellant did not sufficiently identify which particular seated jurors were objectionable in arguing the court erroneously denied cause challenges and forced the defense to exercise peremptory challenges.

1. Weisheit alleged in 9(b)(1) that appellate counsel's performance was deficient when counsel in Argument 3 of the Brief of Appellant pp. 38-51; Reply Brief of Appellant, pp. 4-6, did not sufficiently identify which particular jurors were objectionable in arguing the court erroneously denied cause challenges and forced the defense to exercise peremptory challenges.

2. This allegation falls into the category of the failure to present issues well. "[E]ven when counsel's performance is found constitutionally deficient under this analysis, appellant must still show a reasonable probability that, because of counsel's deficiencies, the convictions are fundamentally unfair or unreliable." ***Bieghler***, 690 N.E.2d at 195. "[A]n ineffectiveness challenge resting on counsel's presentation of a claim must overcome the strongest presumption of adequate assistance. . . Relief is appropriate only when the appellate court is confident it would have ruled differently." ***Id.*** at 196.

3. The right to an impartial jury issue raised on appeal was preserved for appeal because defense counsel exhausted all of his peremptory challenges. ***Weisheit***, 26 N.E.3d at 11; ***Oswalt v. State***, 19 N.E.3d 241, 246 (Ind. 2014).

4. The Supreme Court stated Weisheit "neither identifies which particular juror(s) were objectionable nor explains why he wished to strike the juror(s); he simply states that in expending all of his peremptory challenges, he 'was forced to accept other jurors who, although not necessarily positioned to be challenged for cause, were biased against his evidence in either the guilt phase, the penalty phase, or both.' (Appellant's br. at 49.) Under ***Oswalt***, his conclusory assertion that he was forced to accept biased jurors is not nearly enough for us to find reversible error. At oral argument, Weisheit conceded as much. Accordingly, Weisheit cannot demonstrate, and no longer argues, that the trial court abused its discretion, in refusing to excuse twelve jurors for cause." ***Weisheit***, 26 N.E.3d at 13.

5. Appellate counsel quoted extensively in the Brief of Appellant on what prospective jurors, who defense counsel had unsuccessfully challenged for cause, had said during voir dire. Counsel quoted from defense counsel's questioning of Juror 7, a juror who served on the jury, the following:

> Q.: "You indicated you thought the death penalty was appropriate if it was a premeditated, multiple murder, particularly gruesome, and the victims suffered or were tortured. That would be, I think, what you wrote down.
>
> Juror No. 7: Yes, sir.
>
> Q. And that would still be your opinion today; is that right?
>
> Juror No. 7: Yes, sir."

[Brief of Appellant, p. 50; Tr. 141; PCR Ex. 19]

4. Appellate counsel did not quote from an earlier question and response on Juror 7:

> Q. Murder of two children, eight and five, and an arson. No defenses, no mental illness that would excuse it, no retardation that would excuse it, no drugs, no alcohol defenses that you would consider, just kind of stone cold-blooded killer of two innocent children. Is death the only appropriate penalty for that kind of guilty murder?
>
> Juror No. 7: In that hypothetical situation, yes, I believe so."

[Tr. 141; PCR Ex. 19].

5. Appellate counsel did not have a strategic reason for not citing this portion of the record in the Brief of Appellant [Ripstra Testimony]. The portion of the record not cited in the Brief of Appellant showed Juror 7 should have been stricken for cause because he indicated he was likely to automatically vote for death given the factual circumstances in Weisheit's case. ***Morgan v. Illinois***, 504 U.S. 719, 729 (1992).

6. Appellate counsel's performance was deficient when he did not cite in the Brief of Appellant the clearest expression that Juror 7 would automatically vote for the death penalty. The portion of the record that counsel cited in the Brief of Appellant, p. 50 only stated whether Juror 7 thought the death penalty was appropriate in some circumstances. Believing the death penalty was appropriate in some circumstances does not equate with believing the death penalty is the only appropriate penalty.

7. There is a reasonable probability the result of the appeal would have been different if appellate counsel had brought to the Supreme Court's attention that one of the jurors who served on the jury, Juror 7, had stated he would automatically vote to impose the death penalty. ***Morgan***.

CONCLUSION

Relevant to Weisheit's claim on post-conviction, Ripstra raised the argument that "the trial court erred in refusing [Weisheit's] challenges for cause during jury selection, thereby

requiring the Defendant to use peremptory strikes, resulting in a final jury panel that contains persons th[at] [Weisheit] would have otherwise removed peremptorily" (Def. Br. 1). While Ripstra pursued the claim that multiple objectionable jurors sat on the jury, on post-conviction, Weisheit has only found fault in the sufficiency of appellate counsel's argument concerning one juror—Juror 7 (Def. Br. 49–51; Pet'n ¶ 9(b)(1)). Weisheit's claim is that Ripstra failed to "cite the clearest expression that Juror 7 would automatically vote for the death penalty" (Pet'n ¶ 9(b)(1)).

The Indiana Supreme Court denied relief on Weisheit's claim that several jurors should have been stricken for cause and were not qualified to sit on Weisheit's jury. *Weisheit*, 26 N.E.3d at 12–13. The Court held that Weisheit did not establish that an objectionable juror actually sat on his jury. *Weisheit*, 26 N.E.3d at 13. The Court held that he did not particularly "identif[y] which particular juror(s) were objectionable nor explains why he wished to strike the juror(s)[.]" *Id.* Ultimately, the Court rejected Weisheit's claim because "Weisheit cannot demonstrate ... that the trial court abused its discretion in refusing to excuse twelve jurors for cause." *Id.*

Ripstra testified on post-conviction that he selected the issues he thought had the highest chance for relief (PCR Tr. 265–66). Specifically relating to the voir dire claim, he focused on whether jurors could meaningfully consider a sentence other than death (PCR Tr. 253–54). Within his argument challenging the qualification of certain jurors in the brief of appellant, Ripstra quoted Juror 7's responses in voir dire and cited those pages containing Juror 7's responses that appellate counsel believed supported his claim that Juror 7 should have been excused for cause (Def. Br. 50 (citing DA Tr. 141–42)). In his post-conviction testimony relating to the presentation of this issue, Weisheit's PCR counsel inquired of Ripstra whether he quoted the following testimony from voir dire (PCR Tr. 256–57):

> MR. MCDANIEL: ... Murder of two children, eight and five, and an arson. No defenses, no mental illness that would excuse it, no retardation that would excuse it, no drugs, no alcohol defenses that you would consider, just kind of stone cold-blooded killer of two innocent children. Is death the only appropriate penalty for that kind of a guilty murder?
> JUROR NO. 7: In that hypothetical situation, yes, I believe so.

(DA Tr. 141). Ripstra did not quote this portion of Juror 7's responses in his brief (PCR Tr. 256–57). Instead, Ripstra quoted the following interaction between trial counsel and Juror 7:

> MR. MCDANIEL: And I think in your-- again, going back to the magic questionnaires here. You indicated you thought the death penalty was appropriate if it was a premeditated, multiple murder, particularly gruesome, and the victims suffered or were tortured. That would be, I think, what you wrote down.
> JUROR NO. 7: Yes, sir.
> MR. MCDANIEL: And that would still be your opinion today; is that right?
> JUROR NO. 7: Yes, sir.
> MR. MCDANIEL: And does that sound like the hypothetical facts that we were talking about here?
> JUROR NO. 7: Very similar, yes.
> MR. MCDANIEL: All right. And I think that you indicated that you somewhat agree with an eye for an eye. And even though that's a very common saying, let me ask what's that mean to you, the eye for the eye.
> JUROR NO. 7: Well, it means that if you take someone's life, you shouldn't be allowed the privilege of continuing your own.

(Def. Br. 50; DA Tr. 141–42). At the post-conviction hearing, Ripstra could not think of a reason why he did not quote the first passage above, but he recognized that he included citations to the page containing the first passage (PCR Tr. 257).

This claim fails for two reasons. First, while Ripstra may not have quoted the testimony Weisheit claims was essential, he cited to the page on which his 'essential' testimony existed and quoted other significant testimony from Juror 7 (Def. Br. 50 (citing DA Tr. 141–42)). Ripstra directed the Supreme Court to the exact page containing the testimony Weisheit now insists should have been quoted (Def. Br. 50 (citing DA Tr. 141–42)). Second, while Weisheit claims that the portion Ripstra quoted was not the most persuasive portion he could have quoted, in the

view of the Court, the views of Juror 7 exhibited in the quoted portion are, under Weisheit's theory, as problematic as those actually quoted (DA Tr. 141–42).

Even if the court were to believe Ripstra quoted the less persuasive portion of Juror 7's testimony at voir dire, he still cited to the same page on which that alleged more persuasive testimony could be found (Def. Br. 50 (citing DA Tr. 141–42)). Thus, Ripstra directed the appellate court to the proper juror he was challenging, quoted some related passages from voir dire with Juror 7, and also directed the court to the entirety of Juror 7's responses, including the exact page on which the passage which Weisheit now says was deficient performance not to quote could be found in the transcript. Weisheit's burden is to show that counsel's alleged deficiency created a reasonable probability he would have received relief from the Indiana Supreme Court. *Hollowell*, 19 N.E.3d at 269–70. This burden—on a claim that requires a significant showing of ineffectiveness, *id.* at 269—has not been carried.

Weisheit has failed to show that the Indiana Supreme Court was either not sufficiently alerted to the passage or other facts that presented a similar factual basis to support his claim. Moreover, Weisheit has failed to show how the Indiana Supreme Court's analysis denying this claim would have changed had this passage had been quoted instead of presented with a page citation. Therefore, Weisheit's claim for relief is denied.

(2) Counsel's performance fell below prevailing professional norms when he did not argue on appeal that the trial court failed to properly consider the mitigating circumstance that "[t]he defendant's capacity to appreciate the criminality of the defendant's conduct or to conform that conduct to the requirements of law was substantially impaired as a result of mental disease or defect ...." The court's order shows it erroneously applied the standard for the defense of insanity under Ind. Code 35-41-3-5 rather than the standard for the existence of a mitigating circumstance under Ind. Code 35-50-2-9(c)(6).

1. Weisheit alleged in 9(b)(2) that appellate counsel's performance was deficient when he did not argue on appeal the trial court failed to properly consider Weisheit's mental health as a mitigating circumstance when its sentencing order stated: "5. There is no competent substantial evidence in this record to sustain any assertion by defendant, or his counsel, that Defendant was impaired or affected by a mental disease or condition at the time he committed the murders herein. Expert testimony at the trial established that the Defendant had the ability to know right from wrong at the time of the murders;" [A. 77].

2. When a Petitioner alleges appellate counsel ineffective for not raising an issue on appeal the reviewing court: "first looks to see whether the unraised issues were significant and obvious upon the face of the record. If so, that court then compares these unraised obvious issues to those raised by appellate counsel, finding deficient performance 'only when ignored issues are clearly stronger than those presented." ***Bieghler***, 690 N.E.2d at 194.

3. The standard the trial court cited in its sentencing order is the standard for the defense of insanity under Ind. Code 35-41-3-6 [Ripstra Testimony]. The standard for mental health as a mitigating circumstance is that "[t]he defendant's capacity to appreciate the criminality of the defendant's conduct or to conform that conduct to the requirements of law was substantially impaired as a result of mental disease or defect . . . " Ind. Code 35-50-2-9(c)(6). Evidence that Weisheit was mentally ill, even if it did not rise to the level of a defense at the guilt phase, was a mitigating circumstance. ***Prowell v. State***, 741 N.E.2d 704, 717-18 (Ind. 2001). The trial court applied the wrong standard in evaluating the mental health evidence.

4. It was a significant and obvious issue. A sentencer may not refuse to consider any relevant mitigating evidence offered by a defendant as a basis for a sentence less than death. ***Eddings v. Oklahoma***, 455 U.S. 104, 110 (1982). Indiana trial courts prior to the 2002

amendment of Ind. Code 35-50-2-9(e) that made a jury's sentencing determination binding on a trial court were required to issue a detailed sentencing order that identified each mitigating and aggravating circumstance it found. ***Harrison v. State***, 644 N.E.2d 1243, 1262-64 (Ind. 1995).

5. Ind. Code 35-50-2-9(e) provided at the time of Weisheit's sentencing and still provides: "If the jury reaches a sentencing recommendation, the court shall sentence the defendant accordingly." The detailed capital sentencing order required by ***Harrison*** is no longer required when the jury makes the final sentencing determination. ***Pittman v. State***, 885 N.E.2d 1246, 1254 (Ind. 2008).

6. Appellate counsel argued on appeal that the death sentence should be vacated because neither the jury nor the trial court gave any consideration to the mitigating circumstances [PCR Ex. 1, Brief of Appellant, pp. 70-71]. The Supreme Court ruled juries are not required to list their findings or consideration of mitigating circumstances. ***Weisheit***, 26 N.E.3d at 20.

7. Appellate counsel also argued on appeal the Supreme Court should revise his death sentence because the trial court abused its discretion in sentencing him to death [PCR Ex. 1, Brief of Appellant, pp. 64-74]. Counsel's failure to point out that the trial court applied the wrong standard in its consideration of mental health as a mitigating circumstance was deficient performance that prejudiced Weisheit. The defense presented penalty phase evidence at trial that he was mentally ill. Dr. David Price and Dr. Heather Henderson-Galligan testified he had a cognitive disorder related to a prior brain injury, had Bipolar Disorder and a personality disorder [Tr. 2404-2407, 2412, 2416-2418, 2423, 2431, 2433, 2437, 2467, 2469]. State's expert witness Dr. Allen agreed there was a relatively strong possibility of a cognitive disorder and acknowledged the presence of atrophy in the frontal lobes of Weisheit's brain [Tr. 2501, 2532]. Weisheit could have these conditions even though he knew the difference between right and

wrong [Tr. 2446, 2482, 2538]. The trial court's consideration of the wrong standard taints any ruling he did not present mitigating evidence under Ind. Code 35-50-2-9(e)(6).

CONCLUSION

Weisheit alleges that Ripstra was ineffective for failing to include a specific challenge to the following language found in the trial court's sentencing order:

> There is no competent substantial evidence in this record to sustain any assertion by defendant, or his counsel, that Defendant was impaired or affected by a mental disease or condition at the time he committed the murders herein. Expert testimony at the trial established that the Defendant had the ability to know right from wrong.

(DA App. 77).

Upon a unanimous jury recommendation of death as a penalty, the trial court is required to "sentence the defendant accordingly." I.C. § 35-50-2-9(e). This is a binding recommendation that requires the trial court's judgment upon it. *Pittman v. State*, 885 N.E.2d 1246, 1253 (Ind. 2008). As the Supreme Court held on Weisheit's direct appeal, no authority requires either the jury or the trial court upon imposing their sentencing recommendation "to list mitigating circumstances or even provide information about its consideration of alleged mitigators." *Weisheit*, 26 N.E.3d at 20. A trial court must only comply with *Harrison's* requirements when the trial court imposes the death penalty or life imprisonment without parole without a jury's findings and recommendation. *Pittman v. State*, 885 N.E.2d 1246, 1253 (Ind. 2008) (citing *Harrison v. State*, 644 N.E.2d 1243, 1262 (Ind. 1995)). "[B]y entering the sentence recommended by the jury, the trial court has made an independent determination according to the trial rules that there is sufficient evidence to support the jury's decision." *Id.* at 1254. Weisheit has failed to show that appellate counsel was deficient in challenging the trial court's findings and sentencing statement and has failed to show any prejudice.

On direct appeal, Ripstra specifically challenged the consideration of mitigating circumstances (Def. Br. 70–74). He argued that the trial court failed to meaningfully consider the mitigating circumstances, including Weisheit's alleged "mental problems" (Def. Br. 72–73). At the post-conviction hearing, Ripstra testified that he appealed the sentencing order (PCR Tr. Vol. I, p. 262). He testified that "[p]art of [Weisheit's] mitigation was mental, but not strong" (PCR Tr. Vol. I, p. 264). Ripstra also interpreted the relevant paragraph:

> I think what I really thought on this one was that [the trial court] was saying was no matter what mental conditions they were bringing forward, it doesn't come close to being – it doesn't come close to being impaired, as if he had posed an insanity defense. So, to me, he was just discounting all of the mental as no mitigation, or very little.

(PCR Tr. Vol. I, p. 265).

Weisheit claims deficiency for not specifically challenging the mental-health language within his mitigation argument on appeal. In his proposed findings and conclusions to this Court, he provides no reasoning or findings on the prejudice prong of the *Strickland* standard.

Although Weisheit seems to argue that his claim falls into the second category of ineffective assistance, i.e., that the trial court's alleged error concerning mental health mitigation evidence was a "significant and obvious issue" that Ripstra did not raise (Pet'n ¶ 9(b)(2)). However, the Court disagrees that his claim falls into the 'failure to brief an issue at all' category. Ripstra clearly challenged the trial court's sentencing order specifically as it related to mitigation evidence and consideration of it (Def. Br. 71–74). Ripstra argued that Weisheit's mental health problems were not given meaningful consideration by the jury (Def. Br. 72–73). Ripstra did not fail to challenge the trial court's sentencing statement entirely. Rather, Ripstra did not raise the specific challenge within that argument that Weisheit now contends should have been made.

Weisheit has failed to show deficiency on Ripstra's part for failing to present his mitigation and sentencing statement issue well. Ripstra specifically challenged the sentencing statement and the jury's consideration of mitigation evidence, even though he believed that the mental health mitigation evidence was "not strong" (Def. Br. 71–74; PCR Tr. Vol. I, p. 264). His argument pointed the Supreme Court to the sentencing statement and alerted them that it contained errors that Weisheit was contending were sufficiently prejudicial to justify reversal or remand. The fact that Ripstra did not challenge a factual finding that the trial court was not even required to make under the law does not prove that he failed to present this issue well enough to warrant relief on this claim.

The Court finds that the trial court was not saying that the standard for mitigation evidence is equivalent to that of insanity. Instead, the trial court wrote a paragraph relating to Weisheit's mental health, making two findings: (1) No competent evidence supports the assertion that he was impaired by a mental defect at the time of the murders; and (2) Testimony about Weisheit's mental health shows that he knew right from wrong. Both of these facts relate to Weisheit's mental health, and the Court rejects Weisheit's characterization that some implied causal connection exists between the two statements.

Weisheit was not prejudiced by any alleged deficiency of appellate counsel. Assuming that Ripstra had made the exact argument that Weisheit claims he should have, Weisheit could never receive relief in the form of a new trial or new sentencing hearing, because, regardless of the trial court's opinion about the mental health evidence, the jury's unanimous sentencing recommendation was binding. *Pittman*, 885 N.E.2d at 1253. Therefore, Weisheit cannot show a reasonable probability that the outcome of his sentence would be different. The trial court could not have overturned the jury's finding that the proven aggravators outweighed any mitigators.

Further, and as noted above, in his proposed findings of fact and conclusions of law, Weisheit provides the court no evidence or argument that he was actually prejudiced by Ripstra's alleged deficiency. Weisheit has not proved any deficiency or prejudice, and his claim of ineffective assistance of appellate counsel on this point is denied.

CONCLUSION OF LAW

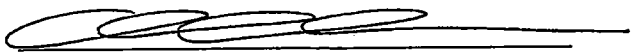
1. Weisheit was not denied the effective assistance of trial and appellate counsel in violation of the Sixth and Fourteenth Amendments to the United States Constitution.

2. Petitioner has not carried his burden of proof and the law is with the Respondent.

JUDGMENT

For the above reasons, the Amended Petition for Post-Conviction Relief is denied in all respects.

SO ORDERED this 18th day of November, 2016.



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APPENDIX C

Order Denying Petition for Rehearing, January 17, 2019

In the
Indiana Supreme Court

Jeffrey Weisheit,
Appellant,

v.

State of Indiana,
Appellee.

Supreme Court Case No.
10S00-1507-PD-00413

Trial Court Case No.
10C01-1601-PC-000001

Order

Appellant's Petition for Rehearing is hereby DENIED. Done at Indianapolis, Indiana, on 1/17/2019.

Loretta H. Rush
Chief Justice of Indiana

All Justices concur, except Rush, C.J., who votes to grant rehearing.