No. ____

IN THE
Supreme Court of the United States

JOHN MYERS,
Petitioner,

v.

RON NEAL,
Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Seventh Circuit erred by holding, in conflict with at least four other courts of appeals, that to establish prejudice under *Strickland v. Washington*, 466 U.S. 668 (1984), a criminal defendant must show that if the evidence tainted by the deficient performance of his defense counsel is ignored, then there would not be substantial evidence to support a conviction.

RELATED PROCEEDINGS

This case arises from and is related to the following proceedings in the State of Indiana, the United States District Court for the Southern District of Indiana, and the United States Court of Appeals for the Seventh Circuit:

- *Myers v. State*, 887 N.E.2d 170 (Ind. App. 2008) (affirming conviction).

- *In re Baker*, 955 N.E.2d 729 (Ind. 2011) (suspending petitioner's defense counsel from practice of law for mistakes made at petitioner's trial and in the course of representing petitioner).

- *Myers v. State*, 33 N.E.3d 1077 (Ind. App. 2015) (affirming denial of post-conviction petition, including claims under *Strickland v. Washington*, 466 U.S. 668 (1984)), which is reproduced in the appendix and attached hereto at Pet. App. 37a-117a.

- *Myers v. Superintendent, Indiana State Prison*, 410 F. Supp. 3d 958 (S.D. Ind. 2019) (granting federal habeas relief regarding *Strickland* claims), which is reproduced in the appendix and attached hereto at Pet. App. 118a-332a.

- *Myers v. Neal*, 970 F.3d 780 (7th Cir. 2020) (reversing grant of federal habeas relief).

- *Myers v. Neal*, 975 F.3d 611 (7th Cir. 2020) (reversing grant of federal habeas relief, as amended on denial of rehearing), which is reproduced in the appendix and attached hereto at Pet. App. 1a-36a, and Pet. App. 333a-334a.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner John Myers respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit.

OPINIONS BELOW

The Seventh Circuit's opinion as amended on denial of rehearing is reported at 975 F.3d 611 (7th Cir. 2020). Pet. App. 1a-36a. The district court's opinion granting habeas relief is reported at 410 F. Supp. 3d 958 (S.D. Ind. 2019). Pet. App. 118a-332a.

JURISDICTION

The Seventh Circuit issued its decision on August 4, 2020 and denied a timely petition for rehearing on September 16, 2020, while also amending its opinion. Pet. App. 1a-36a; *see also* Pet. App. 333a-334a. On March 19, 2020, the Court extended the deadline to file any petition for a writ of certiorari due on or after that date to 150 days. This Court has jurisdiction under 28 U.S.C. § 1254(1).

RELEVANT CONSTITUTIONAL PROVISION

The Sixth Amendment provides in relevant part: "In all criminal prosecutions, the accused shall enjoy the right … to have the Assistance of Counsel for his defence." U.S. Const. amend. VI.

INTRODUCTION

Although two pillars of the Court's criminal procedure jurisprudence—*Strickland v. Washington*, 466 U.S. 668 (1984) and *Brady v. Maryland*, 373 U.S. 83 (1963)—address different constitutional protections, they both ask courts ultimately to resolve whether a

defendant "received a fair trial, understood as a trial resulting in a verdict worthy of confidence." *Kyles v. Whitley*, 514 U.S. 419, 434 (1995). This inquiry typically is referred to as the "materiality" of the undisclosed evidence under *Brady* and "prejudice" from counsel's deficient performance under *Strickland*, but regardless of the label, the ultimate question courts must resolve under both doctrines is whether "there is a reasonable probability that, but for" the constitutional infirmity, "the result of the proceeding would have been different." *See Nix v. Whiteside*, 475 U.S. 157, 175 (1986) (*Strickland*); *Kyles*, 514 U.S. at 434-35 (*Brady*).

The fundamental question presented by this case is whether these tests truly are, as this Court has indicated, one and the same. *See Kyles*, 514 U.S. at 433-34. That is, it asks whether the *Strickland* "reasonable probability" test for prejudice is identical to the *Brady* "reasonable probability" test for materiality. The answer to that question is significant because in the *Brady* context the Court has resolved that the "reasonable probability" test "is not a sufficiency of [the] evidence test" akin to the one established by *Jackson v. Virginia*, 443 U.S. 307 (1979). *See Kyles*, 514 U.S. at 434-35. The Court has not yet made that clear with respect to *Strickland*. It should do so here.

Most courts to step into this void have held that the *Strickland* reasonable probability test is the same as its cognate under *Brady*—the reasonable probability test does not require a defendant to show that the remaining, untainted evidence is insufficient to support a conviction. Courts taking this position instead hold that a "reasonable probability" depends on whether defense

counsel's deficient performance made it more likely that the jury found guilt. *See, e.g.*, *Tice v. Johnson*, 647 F.3d 87, 110-11 (4th Cir. 2011) ("[h]ad the confession been suppressed," via an objection by counsel, "there was a reasonable probability that the jury would have returned a different verdict"). But that is not the unanimous view. For a minority of courts, including the Seventh Circuit here, prejudice under *Strickland* turns on whether the residual or untainted evidence can independently support the conviction once defense counsel's errors are ignored.

The distinction is subtle, but important. Under the minority approach, a criminal defendant may prevail under *Strickland* only if he can overcome all the damaging inferences a factfinder *could* draw (but need not draw) from the untainted portion of the evidentiary record. But under the majority approach, the defendant need only show that the errors of counsel materially increased the *probability* that the jurors hearing the case would vote to convict.

The Court should answer the question presented now and in this case. *Strickland* errors are among "the most commonly raised types of post-conviction error[s]," John H. Blume & Christopher Seeds, *Reliability Matters: Reassociating Bagley Materiality, Strickland Prejudice, and Cumulative Harmless Error*, 95 J. of Crim. L. & Criminology 1153, 1154 (2005), and courts often rule only on the prejudice component of a *Strickland* claim, *see* Wayne R. LaFave et al., 3 Crim. P. § 11.10(d) n.269 (4th ed.) (collecting cases). Furthermore, because the Seventh Circuit agreed with the district court that defense counsel's performance here was

indefensible, this case boils down to defining and applying the proper test for finding prejudice under *Strickland*. Pet. App. 20a-24a (affirming on performance); *id.* 24a-34a (reversing on prejudice given "substantial evidence" finding). And unlike in many similar cases, because the state court unreasonably applied *Strickland* by refusing to address prejudice cumulatively, the reasonable probability analysis is before the Court on a *de novo* standard of review. Pet. App. 24a-27a.

Most of all, however, this case warrants the Court's review because the difference between the two approaches was dispositive. Myers was convicted in a case that was "entirely circumstantial." *Myers v. State*, 887 N.E.2d 170, 196 (Ind. App. 2008) ('*Myers I*'). As the Seventh Circuit acknowledged, defense counsel's indefensible performance provided the prosecution its strongest evidence both of motive *and* of opportunity—motive, by failing to object to highly inflammatory, inadmissible speculation by a prosecution expert that the crime involved rape "until proven otherwise," *see* Pet. App. 305a-306a, and opportunity, by undermining Myers's otherwise strong alibi. So it was only by drawing every disputed inference for the prosecution—a hallmark of a sufficiency of the evidence analysis under *Jackson*, but not of reasonable probability under *Brady*—that the Seventh Circuit was able to determine that Myers was not prejudiced by his attorney's failings.

The facts of this case make it nearly impossible to look away from the glaring and prejudicial impact of defense counsel's egregious errors. Whether the

reasonable probability test instructs a court to do just that is the question this case presents.

STATEMENT OF THE CASE

Jill Behrman, a bicyclist and undergraduate student at Indiana University Bloomington, left her home in Bloomington on her bicycle shortly after 9:30 a.m. on May 31, 2000. Pet. App. 3a, 36a; *id.* 38a-39a. Behrman never reported to her on-campus job. It was not clear which direction Behrman had traveled on her bike ride that day—she may have ridden north, around town, or south, away from town. Pet. App. 39a; *see also* Pet. App. 36a (map). A witness who knew Behrman saw her riding south, and an FBI investigator thought there was a "strong possibility" she rode south; someone else, however, reported seeing "a female cyclist in her early twenties" that might have been Behrman riding north on either May 31 or June 1. Pet. App. 39a; *id.* 163a, 316a-317a.

A nationwide search ensued, making news in southern Indiana and beyond, and the investigation into Behrman's disappearance continued for years. *Id.* 39a; *see* Pet. App. 265a, 286a; *see also id.* 280a-281a ("'you couldn't go to the grocery store'" or "'pick up your laundry without talking about Jill Behrman'" and her whereabouts because it was "constantly discussed by nearly everyone in the area" (citations omitted)). Multiple suspects were considered, including a woman facing unrelated charges who gave a vivid confession regarding the circumstances of Behrman's murder. Pet. App. 46a, 104a-108a. That woman, Wendy Owings, confessed that she and two friends ran over Behrman with their van while high on drugs and driving south of

Bloomington, and that they then dumped Behrman's bike and other evidence after brutally killing her. Pet. App. 104a-109a; *id.* 153a, 281a. Acting on this information, investigators drained a creek and uncovered items consistent with Owings's confession, though investigators did not also find Behrman's remains there. *See id.* Because prosecutors ultimately came to doubt that they could obtain a conviction against Owings, they declined to file charges. *See id.* 65a.

Nearly three years after Behrman's disappearance, her remains were found on March 9, 2003 in a wooded area in a neighboring county. Pet. App. 47a. Still, the matter remained unsolved. During that time, investigators continued to receive tips, one of which came from John Myers's grandmother in 2004. Pet. App. 65a-66a; *id.* 3a-5a. Myers's grandmother informed police that her grandson had acted "strangely" years before, around the time of Behrman's disappearance. That tip prompted investigators to consider Myers a suspect. Pet. App. 66a. Myers cooperated with authorities and sat for hours of interviews, but repeatedly made clear he "didn't have anything to do with the Behrman case and" had "no knowledge other than what" he had "seen in the newspapers" and heard as "street rumor." Pet. App. 141a-143a (noting Myers's "'ten denials' of his involvement" including "'I didn't kill Jill Behrman and I have no involvement with Jill Behrman … I don't know how to convince you of that,'" and "'I hate being a broken record for you all … not only was I not involved but my knowledge is … at zero'") (citations omitted).

A. State Proceedings.

The authorities charged Myers with Behrman's murder. Shortly after Myers's arrest, an inexperienced and unprepared attorney named Patrick Baker approached Myers and persuaded Myers to retain him. *In re Baker*, 955 N.E.2d 729, 729 (Ind. 2011). Baker later admitted he was "motivated by selfishness, expecting that publicity from the case would lead to an increase in business." *Id.* at 729-30. Baker was suspended from the practice of law for misconduct that he committed in Myers's case. *Id.*

The prosecution's case was "entirely circumstantial." *Myers I*, 887 N.E.2d at 196. As is true of any criminal trial based solely on circumstantial evidence, the prosecution's case regarding "opportunity, means, and motive" thus were critical. *See Fry v. State*, 25 N.E.3d 237, 249 (Ind. App. 2015).

In Myers's case, the main obstacle to a conviction was uncertainty over which direction Behrman rode on the day of her disappearance—"if Ms. Behrman had ridden south on the day she disappeared, Mr. Myers had a solid alibi" since he was at home miles away, as demonstrated by phone records. Pet. App. 161a. But if Behrman rode north, towards Myers, then he would have had opportunity. Pet. App. 314a-316a. Testimony showed she "*could* have ridden north" but also that "there was a 'strong possibility'" she rode south. Pet. App. 258a-259a, 314a-319a. As the district court later explained, at least this aspect of the jury's inquiry thus was simple: "the jury would only need to believe there was some likelihood Ms. Behrman rode south to create reasonable doubt." Pet. App. 318a-319a. What is more, there was no

clear, specific evidence of motive, meaning the prosecution also needed to provide persuasive evidence explaining "why Mr. Myers would have randomly murdered a stranger riding a bicycle near his residence." Pet. App. 323a-324a.

Any competent defense lawyer would have seized on the uncertainty regarding Behrman's whereabouts and the absence of evidence regarding motive to sow reasonable doubt. But defense counsel was not competent. As the Seventh Circuit affirmed, defense counsel's performance was deficient under *Strickland* in three respects:

> (1) defense counsel did not object to a State expert's unsupported speculation that the victim's death was a "rape[-]murder," an opinion the State identified as Myers's motive during closing argument;
>
> (2) defense counsel did not object to (or perhaps even understand) the inadmissible bloodhound "tracking" evidence that placed the victim near Myers's home, which discredited Myers's "otherwise strong" alibi; and
>
> (3) defense counsel opened the case with grandiose false statements about how he would identify the real culprit, which compromised the defense's credibility with the jury when he ultimately was unable to live up to his promises.

See Pet. App. 118a-119a, 153a-156a, 168a-169a, 169a n.11, 284a-285a, 303a, 309a-315a, 320a; *id.* 20a-27a.

B. District Court Proceedings.

After the Indiana state courts affirmed Myers's conviction on direct review and rejected Myers's *Strickland* claim on collateral review, *see* Pet. App. 94a-97a (rape testimony not prejudicial); *id.* 75a-79a (assuming lack of objection to bloodhound tracking evidence was for strategic reasons); *id.* 58a-67a (false statements to jury not prejudicial), Myers petitioned for *habeas* relief in federal court, *id.* 118a.

The district court granted Myers's petition, finding that defense counsel's "serious errors all but destroyed the defense ... and tainted the entire trial." Pet. App. 119a. On motive, the court concluded that counsel's acquiescence to the "rape evidence" supplied "the only evidence that allowed the jury to make sense of why Mr. Myers would have randomly murdered a stranger" and "allowed the State to create motive ... when there otherwise was none." Pet. App. 310a, 323a-324a.

On opportunity, the district court observed that "it would be difficult to overstate how prejudicial the bloodhound evidence was to Mr. Myers's alibi" given that the question of whether Behrman rode north towards Myers (supplying Myers with opportunity) or south, which meant he could not have committed the crime, "was at best a close call, as there was not compelling or undisputed evidence either way." Pet. App. 317a-319a, 322a. The jury heard that an eyewitness who knew Behrman "told law enforcement that she saw Ms. Behrman riding south on May 31, 2000, the day she disappeared," and an FBI Agent testified "there was a 'strong possibility'" Behrman rode south that day, nowhere near Myers. Pet. App. 258a-260a, 315a-319a.

Yet other reports, possibilities, and timelines also were presented, leading to uncertainty about Behrman's whereabouts that day. *See* Pet. App. 316a-319a.

In other words, reasonable doubt existed about whether Behrman was even in the vicinity of Myers's home that day, until the prosecution's inadmissible bloodhound 'tracking' evidence was put before the jury. That evidence, which likely sounded scientific to the jury, indicated "that Ms. Behrman rode north to the field where her bicycle was found and stopped there," not far from Myers's home. *See* Pet. App. 180a, 316a. It thus greatly simplified an otherwise confusing evidentiary picture for the jury and "tipped the scale strongly" towards guilt. *See* Pet. App. 322a-323a. Including that plainly inadmissible bloodhound tracking evidence in the case submitted to the jury "left Mr. Myers without a meaningful defense theory through which any jury would find reasonable doubt." Pet. App. 323a.

Finding that these "three instances of deficient performance" were "more than sufficient for Mr. Myers to establish prejudice," the district court declined to resolve additional claims of ineffective assistance, presentation of false evidence, and withholding of exculpatory evidence. Pet. App. 170a, 251a, 331a.

C. Seventh Circuit Proceedings.

The Seventh Circuit affirmed that: (1) "[m]aking false promises about evidence in an opening statement is a surefire way for defense counsel to harm his credibility"; (2) acquiescing to the alibi-destroying inadmissible bloodhound evidence was not even an informed decision; and (3) "[p]erhaps the starkest" failure was permitting the State's expert to speculate

that Behrman—"a young college student [who] went missing and later turned up dead"—was raped as well as murdered. Pet. App. 20a-24a. The Seventh Circuit agreed with the district court that "[d]efense counsel should have sought to prevent Myers from being portrayed as a rapist" where the prosecution had only inadmissible speculation and no actual evidence to support its repeated claim "that this was a classic rape murder." Pet. App. 24a-28a.

But the Seventh Circuit nonetheless *reversed* the district court's finding that Myers had been prejudiced by these errors. The court held that because the prosecution "presented substantial evidence of Myers's guilt" that was not directly impacted by the errors themselves (*i.e.* because substantial "untainted" evidence existed), it was not possible for defense counsel's errors to have prejudiced Myers. Pet. App. 27a-28a, 34a.

The Seventh Circuit held there was no prejudice even though "counsel's deficient performance …. allowed the state to supply the jury with a theory of motive," which the prosecution made "as plain as day in its closing argument: 'You know the motive in this crime is clear ... when Doctor Radentz told you that this was a classic rape murder.'" Pet. App. 28a. This was so, the court held, because "even without the testimony about rape, the state painted that picture about Myers through other means," namely that he "lost his girlfriend" and "had no luck trying to restore the relationship" and that a jailhouse informant said that Myers used "degrading language," regarding "a woman," Pet. App. 10a, 28a-29a,

language that may—or may not—have referred to Jill Behrman, Pet. App. 270a-271a.[1]

The Seventh Circuit also held that no *Strickland* prejudice ensued from defense counsel's failure to object to the inadmissible bloodhound tracking testimony, even though that evidence put the victim near Myers's home and "all but guaranteed the jury would not credit Myers's alibi." Pet. App. 21a, 29a-31a. The court reached this conclusion because Behrman's "bike was found along North Maple Grove, less than a mile from Myers's home," *id.* 29a-30a, which was perhaps sufficient, independent evidence of Behrman's whereabouts, were the court to *also* assume that the jury disregarded the testimony of an FBI Agent—testimony indicating that "there was a 'strong possibility'" Behrman rode south *nowhere near Myers* and that her bicycle may have been later dumped by her killer or someone else along the northern route. Pet. App. 258a-260a, 315a-319a. To the Seventh Circuit, all that mattered was that the bike's recovery location created an "evidentiary obstacle for Myers" from which a jury *could* have inferred opportunity. Pet. App. 30a.

The Seventh Circuit thus summarized that because "the prosecution presented substantial evidence of [the defendant]'s guilt" Myers could not "show[] that he

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[1] This evidence was far from ironclad. *See* Pet. App. 270a ("Mr. Roell almost immediately acknowledged he was unsure whether Mr. Myers was talking about Ms. Behrman or not" and "acknowledged that his motivation in coming forward was to obtain release" from jail); *see also House v. Bell*, 547 U.S. 518, 552 (2006) (doubting "probative value" of "incriminating testimony from inmates").

suffered substantial prejudice from his trial counsel's errors." Pet. App. 27a-28a.

REASONS FOR GRANTING THE PETITION

I. THERE IS A SPLIT OF AUTHORITY ON THE QUESTION PRESENTED.

A. *Brady*'s Rule Is Clearly Established.

Where the prosecution fails to disclose exculpatory evidence, the rule of *Brady* "is clear." *Kyles*, 514 U.S. at 434-35, 435 n.8. The reasonable probability test used to assess materiality "is not a sufficiency of [the] evidence test. A defendant need not demonstrate that after discounting the inculpatory evidence in light of the undisclosed evidence, there would not have been enough left to convict." *Id.* at 434-35. That is because "[t]he possibility of an acquittal on a criminal charge does not imply an insufficient evidentiary basis to convict," and it is wrong for a court to assume that a defendant "must lose because there would still have been adequate evidence to convict" even if the exculpatory evidence had been disclosed. *Id.* at 435 & n.8.

Instead, the undisclosed evidence is considered "material 'if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.'" *Strickler v. Greene*, 527 U.S. 263, 280 (1999) (quoting *United States v. Bagley*, 473 U.S. 667, 682 (1985)). This does not mean that all failures to disclose evidence render "the outcome … unjust"; but it does mean that a conviction cannot stand if "the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." *Id.* at 281, 290

(quoting in part *Kyles*, 514 U.S. at 435). It thus is error to reject a *Brady* claim solely because "the record contained ample, independent evidence of guilt." *Id.* at 290. Whether "the remaining evidence is sufficient to support the jury's conclusions" does not determine whether the *Brady* error was what led to the guilty verdict. *See id.*

To be sure, there are times when a criminal defendant seeking to overturn a conviction must overcome a sufficiency of the evidence test. But that occurs when a *habeas* petitioner makes a sufficiency of the evidence *claim—i.e.* where he seeks to argue that his right to due process was denied because the evidence presented at trial did not establish his guilt beyond a reasonable doubt as to each element of the offense. *Jackson v. Virginia*, 443 U.S. 307, 318-19 (1979). That more demanding standard makes sense in that due process setting because the *Jackson* inquiry assumes the adversarial process functioned properly. *See id.* The *Jackson* analysis thus gives great weight to the fact of the conviction itself, which dictates how the evidence should be viewed on appeal. *Id.*

The situation under *Brady* is starkly different. At its core, the *Jackson* sufficiency of the evidence inquiry asks "whether a reasonable jury could have convicted an *adequately represented* defendant" given the evidence presented. *Tice v. Johnson*, 647 F.3d 87, 110 (4th Cir. 2011) (emphasis added); *see also Skakel v. Comm'r of Corr.*, 188 A.3d 1, 25 (Conn. 2018) (quoting *Tice*, 647 F.3d at 110). The reasonable probability test under *Brady*, however, asks "whether the absence of error," *i.e.* the record that *should* have been presented to the jury,

"would have given rise to a reasonable probability of acquittal," given that guilt must be proven beyond a reasonable doubt. *Tice*, 647 F.3d at 110-11; *Snow v. Sirmons*, 474 F.3d 693, 711 (10th Cir. 2007) (the point of the *Brady* materiality inquiry is whether "the omitted evidence creates a reasonable doubt that did not otherwise exist" (citation omitted)). Thus it is an "unreasonable application of clearly established" federal law to reduce the *Brady* materiality inquiry to a question of whether "the evidence was sufficient to support a conviction." *Carusone v. Warden, N. Cent. Corr. Inst.*, 966 F.3d 474, 479-80 (6th Cir. 2020).

B. Most Lower Courts Have Applied *Brady* And *Kyles* To *Strickland* Claims.

Most courts have held that the *Strickland* reasonable probability test, like its counterpart under *Brady*, is not a *Jackson*-like sufficiency of the evidence test. This means that most courts to address the question presented have held that *Strickland* prejudice is shown if the tainted evidence —the "evidence that the jury should not have considered"—had enough "inculpatory force" to meaningfully change the "prospects for conviction," even if the remaining "legitimate evidence" might have theoretically been enough to support a guilty verdict. *See Tice*, 647 F.3d at 111.

The Fourth and Fifth Circuits are among those courts. Both circuits have held that given the close link between *Strickland* prejudice and materiality under *Brady*, "the sufficiency of the 'untainted' evidence should not be the focus of the prejudice inquiry." *Johnson v. Scott*, 68 F.3d 106, 109-10 (5th Cir. 1995). Instead, *Strickland* asks whether the *tainted* evidence

"put the whole case in such a different light as to undermine confidence in the verdict." *Id.* at 110, 109 n.4 (disagreeing with district court, which had "concluded that because of the amount of other circumstantial evidence linking [the defendant] to the murders, [the defendant] was not prejudiced by trial counsels' errors"); *see also Johnson v. Tice*, 654 S.E.2d 917, 924 (Va. 2008) ("We resolve this issue by reviewing the remaining trial evidence, in the absence of [the defendant]'s confession, under the *Strickland* standard."), *habeas relief granted sub. nom. Tice v. Johnson*, 647 F.3d 87, 110-11 (4th Cir. 2011) (citing *Scott* and finding that Virginia Supreme Court unreasonably applied *Strickland*).[2]

The Third and Ninth Circuits take the same position. Both have explained that "convert[ing] *Strickland*'s prejudice inquiry into a sufficiency-of-the-evidence question" is improper because it assumes "there is *categorically* no *Strickland* error" where "the evidence is sufficient to support the verdict" otherwise. *Crace v. Herzog*, 798 F.3d 840, 849 (9th Cir. 2015) (finding Washington Supreme Court unreasonably applied *Strickland* "[b]y reducing the question to sufficiency of the evidence"); *Breakiron v. Horn*, 642 F.3d 126, 136, 140 (3d Cir. 2011) (finding Pennsylvania Supreme Court

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[2] *See also Strickler*, 527 U.S. at 290 ("As we made clear in *Kyles*, the materiality inquiry is not just a matter of determining whether … the remaining evidence is sufficient to support the jury's conclusions."); *Rompilla v. Beard*, 545 U.S. 374, 393 (2005) ("[A]lthough we suppose it is possible that a jury could have heard it all and still have decided on the death penalty, that is not the test.").

unreasonably applied *Strickland* by merely "noting that the evidence was sufficient to convict" on a robbery charge instead of completing the reasonable probability analysis regarding a lesser-included offense instruction).[3] Thus, the respective courts of appeals in *Crace* and in *Breakiron* both held that a state court had unreasonably applied *Strickland* by using the sufficiency of the evidence as a proxy or substitute for the reasonable probability test—both state courts had erroneously assumed that because sufficient evidence of guilt existed on the charged offense, that meant defense counsel's failure to insist on a lesser-included offense instruction could not have prejudiced the defendant. *Crace*, 798 F.3d at 849; *Breakiron*, 642 F.3d at 140. "Merely noting that the evidence was sufficient to convict does not accomplish" the probabilistic weighing exercise that *Strickland* requires—it does not shed light on whether the error meant that the defendant was exposed to a "substantial risk" of an improper conviction. *See Breakiron*, 642 F.3d at 140; *Crace*, 798 F.3d at 849.

At bottom, the principle underlying the Third, Fourth, Fifth, and Ninth Circuits' approach is that it is wrong to assume a jury *would* have returned a

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[3] *See also United States v. Kohring*, 637 F.3d 895, 902 (9th Cir. 2011) ("a 'reasonable probability' may be found 'even where the remaining evidence would have been sufficient to convict the defendant'") (internal citations omitted); *Ex parte Heidelberg*, No. AP-75,263, 2006 WL 3306880, at *6 & n.45 (Tex. Crim. App. Nov. 15, 2006) ("the question of prejudice under *Strickland* does not turn on whether, discounting trial counsel's errors of omission or commission, the evidence was otherwise sufficient to convict") (discussing *Kyles*, 514 U.S. at 434-35).

particular verdict just because it *could* reasonably have done so. As this Court has explained, "[t]he possibility of an acquittal" is not reduced to zero every time the prosecution presents "adequate evidence to convict" that is untainted by legal error. *Kyles*, 514 U.S. at 435 & n.8. And even when the tainted evidence "can be logically separated from the incriminating evidence," which frequently is not possible, it is not appropriate to do so if "[t]he jury would have been entitled to find" very different facts absent the legal error. *Id.* at 435 n.8, 453-54.

C. Other Lower Courts Have Denied That *Brady* And *Kyles* Apply To *Strickland* Claims.

In this case, the Seventh Circuit embraced a view previously taken by the Virginia, Washington, and Pennsylvania Supreme Courts. In *Tice*, for instance, the Virginia Supreme Court sought to "resolve th[e] issue by reviewing the remaining trial evidence" as though the jury's view of that evidence would not have been colored by the damaging evidence that should not have been presented. *See Johnson v. Tice*, 654 S.E.2d at 924-25. Similarly, the Washington Supreme Court in *Crace* identified not only what testimony said, but also what it may have been "suggesting" and what "a juror could conclude" from those suggestions. *See In re Crace*, 280 P.3d 1102, 1109 (Wash. 2012) (describing what "[e]vidence established"). And the Pennsylvania Supreme Court in *Breakiron* found that because "the evidence supported this verdict" the defendant "cannot show that the claimed error prejudiced him." *See Commonwealth v. Breakiron*, 729 A.2d 1088, 1095 (Pa. 1999).

Each of these decisions were vacated on federal *habeas* review by the Courts of Appeals. Yet the Seventh Circuit's decision in this case tracks their now discredited views. According to the Seventh Circuit, the reasonable probability test under *Strickland* allows for a conviction secured with "indefensible" and "clear … deficient performance" that "suppl[ied] the jury with a theory of motive" to be maintained by a federal court if the prosecution, on a cold appellate record, could otherwise point to "substantial evidence of [the defendant's] guilt." Pet. App. 20a-21a, 27a-28a. To the Seventh Circuit, so long as there is "enough left to convict," *see Kyles*, 514 U.S. at 434-35, then "substantial evidence" of guilt forecloses a finding of prejudice under *Strickland*. Pet. App. 27a-28a.

Had that *de novo* judgment been delivered by a state court in the Third, Fourth, Fifth, Sixth, or Ninth Circuits, it likely would have been identified by those Circuits not just as wrong, but as an unreasonable application of *Strickland*. The conflict between these approaches is plain and the "substantial disagreement" between the Circuits should be resolved by this Court. *See Wheat v. United States*, 486 U.S. 153, 158 & n.2 (1988) (granting certiorari in light of the divisions between the Circuits as to the right to counsel).

D. Courts Are Divided Even Within The Seventh Circuit Itself.

This Court also should grant the petition because the States of Wisconsin and Illinois now interpret *Strickland* differently from their regional Circuit. *See, e.g.*, *Johnson v. California*, 545 U.S. 162, 164 (2005) (noting conflict between California and the Ninth Circuit

on federal constitutional question impacting validity of state convictions); *Bates v. Dow Agrosciences LLC*, 544 U.S. 431, 436 & n.6 (2005) (noting conflict between Texas and the Fifth Circuit).

Prior to 2018, the Wisconsin Supreme Court had at times held, much as the Seventh Circuit did here, that the prejudice prong of *Strickland* turns on whether "sufficient evidence untainted by the error" can be found. *State v. Fishnick*, 378 N.W.2d 272, 282 (Wis. 1985) (emphasizing that "strength of the untainted evidence" meant "the erroneously admitted evidence" was insignificant). But in 2018, the Wisconsin Court resolved that "reviewing courts are improperly denying ineffective assistance claims by measuring prejudice under a sufficiency of the evidence test[.]" *State v. Sholar*, 912 N.W.2d 89, 104-05 (Wis. 2018) ("[T]he *Strickland* prejudice test is distinct from a sufficiency of the evidence test and … a defendant need not prove the outcome would 'more likely than not' be different in order to establish prejudice in ineffective assistance cases."). In doing so, the Wisconsin Supreme Court observed that while "[b]oth standards require a reviewing court to examine the evidence," they differ in their application: "To succeed on a sufficiency claim, a defendant must show a record devoid of evidence on which a reasonable jury could convict" even when viewed "'most favorably to the state and the conviction'"; meanwhile in "ineffective assistance challenges, a defendant must establish that but for his lawyer's error, there is a reasonable probability the jury would have had a reasonable doubt as to guilt." *Id.* at 104.

Wisconsin thus recognizes the critical difference between whether the jury "*could* have found guilt beyond a reasonable doubt" on all the evidence (sufficiency), and whether there was a "reasonable probability" it "*would* have had a reasonable doubt" absent the errors of counsel. *See id.* (emphasis added and citation omitted). The Seventh Circuit, however, does not. Only this Court can resolve the conflict.

Similarly, the Illinois Appellate Court in *People v. Moore* found that a defendant convicted of driving under the influence received constitutionally ineffective assistance when his defense counsel failed to prevent "highly incriminating evidence from being considered" that had been obtained in violation "of the right against self-incrimination." 663 N.E.2d 490, 495 (Ill. App. 1996). In doing so, that court rejected the prosecution's argument that the defendant had not been prejudiced because the untainted evidence provided "a sufficient evidentiary basis upon which to convict." *Id.* at 496. Though the court "agree[d] … that sufficient evidence existed," it found that "sufficiency of the evidence is not the touchstone for decision under *Strickland's* test of prejudice." *Id.* at 497. Citing this Court's decision in *Kyles*, the court explained:

> The *Strickland* standard … is subject to distortion if the evaluation focuses only on the evidence untouched by the professional errors of counsel. The standard falls prey to a seductive simplicity found in the mechanical search for untainted evidence to cleanse the prejudice by providing a sufficient independent evidentiary basis to convict. The prejudice referred to by the

> Supreme Court is less mechanical and calls for review of the fundamental fairness of the proceeding as a whole, to determine whether, in light of the professional errors of counsel, the result was worthy of confidence. In this regard, the possibility of acquittal does not imply an insufficient evidentiary basis to convict.

Id. at 498.

The states of Wisconsin and Illinois thus share an approach to the *Strickland* prejudice inquiry that is incompatible with the Seventh Circuit's "substantial evidence of [the defendant's] guilt" approach. Pet. App. 27a-28a. This Court should grant the petition and resolve the conflict.

II. THIS CASE PRESENTS A RECURRING AND IMPORTANT ISSUE THAT WARRANTS THIS COURT'S REVIEW.

This Court should grant review because "the question presented by this case is not only important, but [is] also one that frequently arises." *Perry v. Leeke*, 488 U.S. 272, 277 & n.2 (1989). Hundreds (if not thousands) of times every year, the federal Circuits and state appellate courts are asked to apply *Strickland*'s "reasonable probability" test to the "totality of the evidence before the judge or jury." *Strickland v. Washington*, 466 U.S. 668, 695 (1984); *see also* Blume & Seeds, *Reliability Matters*, 95 J. of Crim. L. & Criminology at 1153-54 (explaining that the *Brady* and *Strickland* doctrines "have developed into the principal safeguards of fair trials" and are frequently raised in post-conviction review). Whether that test is met by

mere "substantial evidence" of guilt, or something more, matters in many of those cases.

The Seventh Circuit's "substantial evidence" rule robs the *Strickland* prejudice analysis of the flexibility and nuance that is critical to the just implementation of the Sixth Amendment. The evidentiary consequences of deficient performance will be different in every case, and no "mechanical" rule could encapsulate the complex weighing process that juries are often asked to perform. *See Strickland*, 466 U.S. at 696. Yet the upshot of the Seventh Circuit's substantial evidence rule is that if "other means" exist through which a jury *could* have found guilt, then regardless of what defense counsel's error(s) were and what they added or subtracted to the evidence, as a matter of law, no prejudice occurred. Pet. App. 27a-29a.

Such a shortcut essentially means the weight and strength of the evidence introduced as a result of counsel's errors can be discounted if other evidence in the record can, with the benefit of inferences, be summoned to take its place. In murder trials, this turns *Strickland*'s fact-specific, probabilistic inquiry into a hunt for opportunity, means, and motive in the rest of the case. If, viewing the record in the light most favorable to the state and conviction, those elements can be found, no prejudice occurred. The nuances of the facts thus fall away; it then makes no difference, for example, whether or not "there was considerable forensic and other physical evidence" of guilt or not, as long as the court following the Seventh Circuit's approach can find "independent evidence of guilt" that can, with the benefit of inferences, be marshaled in support of the

verdict. *See Strickler*, 527 U.S. at 290, 293 (addressing Fourth Circuit's misreading of *Kyles*).

This approach to prejudice also misses the point. *Strickland* does not ask a reviewing court to decide whether a defendant may be guilty, for as this Court has emphasized the right to counsel is not "conditioned upon actual innocence." *Kimmelman v. Morrison*, 477 U.S. 365, 377, 379-80 (1986). Nor is the prejudice inquiry a meaningful substitute or proxy for assessing guilt or innocence. *See Sawyer v. Whitley*, 505 U.S. 333, 345 (1992) (explaining the difference between claims of "actual innocence" and claims of "prejudice"). So in assessing whether there is "a reasonable probability that, without [the error], at least one juror would have harbored a reasonable doubt," *Buck v. Davis*, 137 S. Ct. 759, 776 (2017), a court should not proceed from an assumption that the defendant is most likely guilty, as it would under a *Jackson* inquiry, *see Cone v. Bell*, 556 U.S. 449, 474 (2009) (suggesting that determining whether "suppressed evidence" was material "to the jury's finding of guilt" should be "viewed in the light most favorable to" *the defendant*). The court should instead proceed from the assumption that trial counsel's errors might have compromised the efficacy of the defense.[4]

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[4] *See State v. Best*, 852 S.E.2d 191, 202 (N.C. 2020) ("We have not decided today that [the defendant] is guilty or innocent, that the district attorney was right or wrong to charge him, or that [the defendant] should be convicted or acquitted on retrial. Instead, our review of the record in this case shows that the failure to disclose exculpatory evidence prejudiced [the defendant]'s ability to present a defense.").

If there is "*categorically* no *Strickland* error" where "the evidence is sufficient to support the verdict," *see Crace v. Herzog*, 798 F.3d at 849, then even the most inflammatory errors of counsel can be disregarded anytime the untainted evidence is sufficient to support conviction. This means it would no longer be important whether improper evidence was "'relied upon by the prosecution … during its closing argument,'" whether such evidence "was the centerpiece of" the prosecution's case, or even whether the remaining evidence consisted of "considerable forensic and other physical evidence" or something weaker. *See Banks v. Dretke*, 540 U.S. 668, 701 (2004) (contrasting *Strickler*, 527 U.S. at 289-96); *see also Wearry v. Cain*, 136 S. Ct. 1002, 1007 (2016) (criticizing state postconviction court for "emphasiz[ing] reasons a juror might disregard new evidence while ignoring reasons she might not"). If the theoretical possibility of guilt is all that matters in assessing prejudice under *Strickland*, then findings of prejudice would become rare and a court's application of that standard would be "mechanical," despite what the *Strickland* Court itself said. 466 U.S. at 696-97. This Court should grant the petition to clarify this important area of the law.

III. THIS CASE PRESENTS AN IDEAL VEHICLE FOR RESOLVING THE QUESTION PRESENTED.

Finally, this case presents an ideal vehicle for clarifying *Strickland*'s reasonable probability test, both because the answer to the question presented is outcome determinative, and because the reasonable probability

analysis here is before the Court on a *de novo* standard of review.

First, the dispositive issue in this case is whether the Seventh Circuit is right or is wrong that Myers's burden under the *Strickland* reasonable probability test was to show that the untainted evidence was not sufficient to support a conviction. A federal district judge and a unanimous panel of the Seventh Circuit both have "conclude[d] without hesitation" that defense counsel's performance was "clear[ly]" "deficient"—in the words of the Seventh Circuit, it was "indefensible," "passive[]" and "stark[]." Pet. App. 20a-24a (describing three instances of deficient performance and agreeing with district court's conclusion "that counsel performed deficiently"). So the only real dispute here is whether Myers was prejudiced by those deficiencies. The Seventh Circuit looked at the same evidence as the district court, yet found that the mere existence of "substantial evidence" "untainted" by error necessarily "prevents" a prejudice finding under *Strickland*. Pet. App. 27a-28a, 34a.

If the test of reasonable probability under *Strickland* is a sufficiency of the evidence test, then the Seventh Circuit's analysis likely is correct. "[T]he case against Myers was entirely circumstantial." *Myers I*, 887 N.E.2d at 196. That means the jury's role was to draw "reasonable inferences from basic facts to ultimate facts." *See Jackson*, 443 U.S. at 319. If every reasonable inference from the record is drawn in favor of the verdict, as would be the case under a *Jackson*-like sufficiency of the evidence test, then confidence in the jury's verdict probably is sustainable.

But if the test for reasonable probability under *Strickland* is the same as the test for reasonable probability under *Brady*, then the Seventh Circuit is almost certainly wrong. The question under a *Brady*-like reasonable probability test is whether the tainted evidence "put the whole case in such a different light as to undermine confidence in the verdict." *Johnson v. Scott*, 68 F.3d at 109-10 (citation omitted). That unquestionably is true here—the tainted rape evidence, for example, portrayed Myers in the worst possible light, a light this Court has acknowledged is close to *per se* prejudicial. *House v. Bell*, 547 U.S. 518, 540-41 (2006) ("a jury acting without the assumption" of a sex crime "would have found it necessary to establish some different motive, or, if the same motive, an intent far more speculative" and the defendant's otherwise "odd" behavior "might appear less suspicious").

At trial, the jury was not required to view all the evidence in the light most favorable to the prosecution; it was equally free—and indeed encouraged—to draw all reasonable inferences in favor of a finding of reasonable doubt. Again, it is not disputed that the most compelling evidence of both motive (the rape evidence) and opportunity (the bloodhound tracking evidence) entered the record because of defense counsel's errors. Without that evidence, guilt or innocence could only be determined from weighing complex and contradictory possibilities. *See* above at 9-10.[5] So while it is impossible

[5] In the specific context of this case, that weighing exercise was required to carefully consider "every reasonable theory of innocence" and only find guilt on the basis of circumstantial evidence "so conclusive ... as to exclude" all such theories of

to know on this particular record exactly which evidence convinced the jury that Myers had motive and opportunity,[6] there can be no doubt that the most compelling evidence of motive and opportunity played a significant role in deciding those questions.

Indeed, without defense counsel's egregious errors, the prosecution would have had little evidence of motive to point to at all, if any.[7] But because of defense counsel's errors, the prosecution could cite an expert's "rape testimony … to assign a motive to what otherwise appeared an implausible crime." Pet. App. 27a.

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innocence. Myers's jury was instructed: "Where proof of guilt is by circumstantial evidence only, it must be so conclusive in character and point so surely and unerringly to the guilt of the accused as to exclude every reasonable theory of innocence." Pet. App. 325a (quoting Trial Transcript at 2734, *State v. Myers*, No. 55D02-0604-MR-00087 (Morgan Cnty., Super. Ct. Oct. 30, 2006)). This "'reasonable theory of innocence'" instruction is "deeply imbedded in Indiana jurisprudence," *Hampton v. State*, 961 N.E.2d 480, 484, 486 (Ind. 2012), and is an "additional cautionary instruction in evaluating circumstantial evidence," *id.* at 486-87. It "admonishes the jury to tread lightly where the evidentiary gap between logical certainty and guilt is more tenuous" because the case against the defendant is entirely circumstantial. *Id.*

[6] *See* State Post-Conviction Trial Court Order at 5 (explaining that in this case "[w]hat convinced the jury to render their verdict is unknown" as the jury simply returned a guilty verdict without specifying the verdict's specific evidentiary basis), *Myers v. Superintendent*, No. 16-cv-02023, (S.D. Ind. filed on Apr. 14, 2017), ECF No. 20-14 at page 88.

[7] *See* Pet. App. 10a, 28a-29a (Seventh Circuit resorting to motive evidence that Myers "had no luck trying to restore the relationship" he had with his girlfriend, and ambiguous testimony from a jailhouse informant about "a woman," as evidence that Myers "committed a horrific crime").

Similarly, without defense counsel's errors, there would have been deeply conflicting evidence as to whether Myers physically even *could* have committed the crime, given the uncertainty as to Behrman's biking route.[8]

But defense counsel's errors allowed the prosecution to put the differing reports of Behrman's whereabouts to the side and to rely instead on inadmissible bloodhound tracking evidence that "put [the victim] close to Myers's home and doomed his alibi." *Id.* Defense counsel's errors also allowed the jurors to resolve any doubt they may have otherwise had about motive. *See* Pet. App. 323a-326a. And where there was conflicting evidence, defense counsel's "false promises about evidence in [his] opening statement" unquestionably "harm[ed] his credibility with the jury," hurting the rest of the defense's case. *See* Pet. App. 20a.

In sum, if the Seventh Circuit's articulation of the standard is correct—whether, when the 'tainted' evidence is ignored, there remains substantial "untainted" evidence of Myers's guilt, *see* Pet. App. 34a-35a—the Seventh Circuit's decision likely will stand. But if the Seventh Circuit's legal theory is wrong—as other courts have found—then its decision cannot withstand

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[8] *See* above at 9-10; *see also* Pet. App. 316a (explaining that "[b]y far the most compelling evidence" that Behrman rode north "was the bloodhound testimony of Deputy Douthett"); *id.* 317a (explaining that "the remaining evidence that Ms. Behrman rode north is just as tenuous as … [that] showing Ms. Behrman rode south" given that a high school classmate saw Behrman riding south, an FBI agent thought "based on various sources of information" that there was a "'strong possibility'" she rode south, and that Wendy Owings confessed to law enforcement that she hit Behrman while driving on the southern route (citations omitted)).

scrutiny as it simply strains credulity on the facts here to suggest that there is *no* reasonable possibility that the verdict *could* have been different when defense counsel's errors served up the best evidence of opportunity and motive, and destroyed the credibility of the defense. *See Kyles*, 514 U.S. at 453-54 (explaining that what matters under reasonable possibility standard is what "the jury would have been entitled to find" absent the legal error).

Second, this Court is not limited in this case by the strictures that apply in most cases involving habeas review. Because the state court failed to cumulatively analyze the prejudice from defense counsel's multiple errors, the prejudice prong in this case is reviewed *de novo*, as though the case arose on direct review. Pet. App. 23a, 26a-27a; *see also Panetti v. Quarterman*, 551 U.S. 930, 953 (2007) (an "unreasonable application of federal law" by a state court means that a federal habeas court "must then resolve the claim without the deference … otherwise require[d]"). The Court's review thus uniquely will owe no deference to the findings of any lower court.

In the end, this case presents a strong vehicle to review the question presented. The Court's decision will determine the fate of Myers's *habeas* petition and the Court will not be limited by a deferential standard of review. Given the importance of the question presented, and the divided views of lower courts on it, the petition should be granted.

CONCLUSION

For the foregoing reasons, this Court should grant the petition.

Respectfully submitted,

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February 12, 2021

APPENDIX

Appendix A

In the

United States Court of Appeals
For the Seventh Circuit

No. 19-3158

JOHN MYERS,

Petitioner-Appellee,

v.

RON NEAL,

Respondent-Appellant.

Appeal from the United States District Court for the Southern District of Indiana, Indianapolis Division.
No. 1:16-cv-2023 — **James R. Sweeney, II,** *Judge*.

ARGUED MAY 26, 2020 — DECIDED AUGUST 4, 2020
AMENDED SEPTEMBER 16, 2020

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

SCUDDER, *Circuit Judge*. Indiana University student Jill Behrman went for a bike ride one morning but never returned. The police later found her bicycle less than a mile from the home of John Myers II, on the north side of Bloomington. Two years later a woman named Wendy Owings came forward confessing to the murder, but the case was reopened when a hunter came upon Behrman's remains far from the location Owings described. A renewed investigation led the authorities to Myers, who was eventually charged with the murder. Six years after Behrman's disappearance, a jury convicted him. Multiple Indiana courts affirmed. Myers then sought relief in federal court, and the district court granted his application for a writ of habeas corpus, concluding that Myers's counsel performed so deficiently at trial as to undermine confidence in the jury's guilty verdict. We reverse.

The district court was right about the performance of Myers's trial counsel. It was deficient and plainly so in at least two ways. What leads us to reinstate Myers's conviction, though, is the strength of the state's case against him separate and apart from those errors. Among the most convincing evidence were the many self-incriminating statements that Myers made to many different people, like telling his grandmother that, if the police ever learned what he did, he would spend the rest of his life in jail. The weight of these statements, when combined with other evidence, leads us to conclude that his counsel's deficient performance did not prejudice him. The proper outcome is to respect the finality of Myers's conviction in the Indiana courts.

I.

A. The Murder and Investigation

Jill Behrman disappeared during a morning bicycle ride on May 31, 2000. Local authorities and the Bloomington community sprung to action with assistance from volunteer search groups, neighboring police forces, state authorities, and eventually the FBI. The police established the timeline of that morning: Behrman, a skilled cyclist, planned to go for a ride before starting work at noon at the University's Student Recreational Sports Center. She logged off her computer at 9:32 a.m. at her parents' house, which was close to the center of town. Two people reported seeing Behrman's bike lying by the road near farmland northwest of Bloomington at some point around noon that day. Nobody could locate her, though.

Initial leads pointed quite literally in different directions. Which way Behrman rode her bike that morning was one of the unsolved questions in the investigation and became a focus of the eventual trial. Everyone agreed that she started her ride from her parents' house in Bloomington. Whether she rode north or south was what mattered. Behrman's riding north was important to the theory the state would present at trial because it placed her near the home of John Myers. But some early leads suggested that Behrman rode south that morning. The Appendix contains a map with markings of the locations pertinent to the case.

Myers lived about a mile from where Behrman's bike was found on North Maple Grove. Given this

proximity, Bloomington Detective Rick Crussen interviewed him on June 28, 2000. Myers stated that he had been on vacation the week of Behrman's disappearance. He added that he had been "here and there" but mainly at home because his plans to take a trip with his girlfriend Carly Goodman had fallen through. While checking Myers's explanations, the authorities learned that his relationship with Goodman, a high school senior at the time, ended a few weeks earlier than he had described. Goodman also told the police that she had no plans to go anywhere with Myers.

In 2002, a woman named Wendy Owings came forward and confessed to Behrman's murder. Owings, a Bloomington resident, was facing unrelated felony charges when authorities interviewed her and asked her whether she knew about the Behrman disappearance—which by then was widely known around town. Owings faced up to 86 years' imprisonment and believed she could benefit by cooperating and confessing to the murder. Owings then decided to lie to the police, thinking that falsely admitting to the murder would mean less jail time. She did so by concocting the story that she and two friends were driving and using drugs when they accidentally hit Behrman on her bicycle. Owings said that the collision took place on Harrell Road on Bloomington's south side, roughly 20 miles from where Behrman's bike was found. To cover up the accident, Owings explained, they loaded Behrman's body into their car, wrapped her in a plastic sheet secured with bungee cords, stabbed her, and dumped her body in Salt Creek. Investigators were able to corroborate some of Owings's information: they drained

the creek and found a knife, plastic tarp, and bungee cords. Although Behrman's body was not recovered, the police closed the investigation into her disappearance.

Nearly three years after Behrman's disappearance, in March 2003, a father and son hunting in the woods north of Bloomington came across a human jawbone. The woods were about 20 miles north of where Behrman's bike was found. The authorities and a forensic expert surveyed the scene and collected other skeletal remains. They determined based on dental records that the remains belonged to Jill Behrman. Recognizing her story no longer added up, Owings recanted her confession and admitted to lying about the murder in hopes for leniency on other charges.

The authorities reopened the investigation after Owings's recantation, but no meaningful breakthrough occurred until 2004. It was then that Detective Rick Lang turned his focus to Myers based on unexpected information provided by Myers's own family. His grandmother Betty Swaffard came forward and told the authorities that Myers had made a series of suspicious and incriminating comments about Behrman's disappearance. Others also reported incriminating statements Myers made to them about the case. His former girlfriend, Carly Goodman, likewise informed the police about a time Myers took her to the approximate location in the woods where Behrman's remains were later found. These developments led the state to conclude it had enough evidence to bring charges. In April 2006 a grand jury indicted Myers for the murder of Jill Behrman.

B. The Trial

1. Opening Statements

Trial began on October 16, 2006. In its opening statements, the prosecution highlighted Myers's many incriminating statements, focusing especially on his grandmother who felt compelled to alert the authorities despite strong feelings of family loyalty. The state's theory hinged on Behrman riding her bike along a northern route on North Maple Grove near Myers's home, which the state said they would prove by presenting bloodhound scent evidence.

Defense counsel opened by suggesting Myers had an alibi: the morning that Behrman disappeared, Myers made phone calls from the landline in his northside home at 9:15, 9:17, 9:18, 10:35, and 10:47 a.m. That timing, defense counsel suggested, rendered Myers's involvement impossible if Behrman rode her bike not north (in the direction of Myers's home) but instead to the south along Harrell Road. The officers involved in the first investigation considered that route possible after speaking to one of Behrman's classmates and to Wendy Owings, both of whom said they saw Behrman on that road on the day she disappeared.

Myers's counsel also used his opening statement to offer the jury two alternative suspects for the murder. The first was Wendy Owings, the person who confessed to the murder but later recanted her story after the police recovered Behrman's remains in a different place than she had identified. Defense counsel alternatively sought to place blame on Brian Hollars, a Bloomington

resident who worked with Behrman at the Student Recreational Sports Center. But in contending that Hollars was responsible for Behrman's murder, defense counsel made certain misrepresentations. He promised the jury evidence that Hollars and Behrman were romantically involved and were seen fighting the day before she disappeared. Counsel also represented that a bloodhound followed Behrman's scent in the direction of Hollars's house but that an officer stopped the dog before it could reach the front door. All of those promises rang hollow, as defense counsel never presented any such evidence.

2. The State's Case Against Myers

The evidence presented during the first few days of trial focused on how Behrman's remains were uncovered, identified, and analyzed. Then the state presented evidence about her cycling habits and movements the day she disappeared. Brian Hollars testified for the prosecution, described Behrman's work at the recreational center, and offered an alibi by informing the jury that he was at work the day of the disappearance. His testimony was not meaningfully challenged.

As the state promised, it presented evidence supporting its theory that Behrman rode north on North Maple Grove, near Myers's home. Foremost, the state presented evidence showing the location at which Behrman's bike was found. Deputy Charles Douthett, who conducted a search with his bloodhound several days after the disappearance, likewise testified that the dog tracked Behrman's scent along parts of the northern

route. The dog alerted to Behrman's scent not only in the general direction of Brian Hollars's home but also near the location of her bike and indeed even a touch north in the direction of Myers's home. The jury heard no evidence that the bloodhound tracked Behrman to Hollars's doorstep as defense counsel told the jury in his opening statement.

The state's witnesses also included members of Myers's own family. His mother recounted for the jury a time in 2001 when Myers returned from fishing in the woods and reported finding a "bone" and "panties." Myers's aunt Debbie Bell testified that two months before Behrman's disappearance, Myers called asking for help watching his daughter because he needed time alone. Bell told the jury she remembered Myers pointing to problems with his girlfriend Carly Goodman and saying that he "felt like he was a balloon full of hot air ready to burst." She also described Myers's demeanor on the day Behrman disappeared, recalling that he showed up at his parents' home crying and saying he was leaving town.

Myers's grandmother Betty Swaffard testified despite what she described as conflicting feelings of family loyalty. She told the jury that early on Myers said he was a suspect in Behrman's disappearance and was afraid to drive past the police roadblocks near his home. She further recounted Myers's statements four years later in 2004, when he called and asked her to take care of his daughter. He explained that he needed time to himself because he had "a lot of things" to think about. When Swaffard asked what was wrong, Myers said that

"if the authorities knew" what he had done he would "be in prison for the rest of [his] life." As he dropped off his daughter, Myers was crying and told his grandmother that he wished he "wasn't a bad person" and that he hadn't "done these bad things." Defense counsel did not meaningfully cross-examine these family members.

The state also presented evidence about Myers's unusual behavior around the time of Behrman's disappearance. The jury heard, for example, a neighbor explain that Myers had covered the windows of his trailer and moved his car on the day Behrman went missing. Myers said he parked elsewhere so nobody could see he was home.

Nine additional witnesses testified that Myers brought up Behrman's disappearance—sometimes in highly inculpatory terms—between 2000 and 2006. One of those witnesses was the husband of Myers's cousin, who recalled him saying at a family gathering in late 2001 that he bet Behrman's body would be found in the woods.

Another witness, Myers's former coworker Dean Alexander, told the jury that while out on a furniture delivery, Myers asked him if he had heard about the Behrman case. Myers proceeded to point out where Behrman's bike was found and said that he had been questioned by police a couple of times because he lived close by. Alexander also told the jury that Myers then went further and, while driving north, gestured out the window and said, "if he was ever going to hide a body, he would hide it up this way in a wooded area." The state also called Kanya Bailey, a former girlfriend of Myers,

who said that in 2000 or 2001, he pointed to the spot where Behrman's bike was found and told her that he was the one who found it.

The state presented further testimony from John Roell, who was in jail for a petty offense and shared a cell with Myers for two days in May 2005. Roell recounted for the jury certain statements Myers made about Behrman. More specifically, Roell came forward to authorities to report that Myers brought up the Behrman case and mentioned her bicycle three or four times. Roell described how Myers paced nervously about the cell, appeared to be angry, once referred to a woman—who Roell believed was Behrman—as a "bitch," and said that "if she wouldn't have said anything, this probably . . . none of this would have happened."

Myers's former girlfriend Carly Goodman also testified for the prosecution and told the jury about the time in March 2000 when Myers drove her to a clearing in the woods north of Bloomington. Six years later, Detective Lang drove her back to the same general area and, without prompting, Goodman stated that she recognized the area as the location where Myers had taken her before. That area was less than one mile from where the Morgan County hunter found Behrman's remains. On cross-examination Goodman acknowledged that she had little explanation for how she recognized that clearing compared to any other.

Additional evidence supporting the prosecution's theory came from pathologist Stephen Radentz. He testified that Behrman had been killed by a shotgun

wound to the back of the head. He also opined that the physical evidence surrounding the scene, including the failure to locate any clothing, led him to conclude that Behrman was raped before she was murdered.

A firearms expert also testified and explained that the murder weapon, which was never recovered, likely was a 12-gauge shotgun. The state presented testimony from Myers's brother, who explained that he kept a 12-gauge shotgun at his parents' house but noticed the gun was missing when he moved home for a month in June 2000.

3. The Defense Case

The defense called only two witnesses. The first was Gary Dunn, the FBI investigator who led the initial inquiry into Behrman's death and considered seriously the possibility that she had biked along a southern route away from Myers's home. After Dunn stepped down, defense counsel admitted being unprepared to call their next witness because they "didn't anticipate having to put on [their] case this early" — the state had rested its case earlier than the trial schedule anticipated.

Jason Fajt, an officer responsible for processing physical evidence in the case, also testified. Fajt presented books about pregnancy and reproductive health found in Behrman's bedroom, presumably to bolster the defense's theory that Behrman had a relationship with Brian Hollars and became pregnant with his child. Fajt also showed the jury the tarp, knife, and bungee cords found in Salt Creek that were

consistent with the confession that Wendy Owings later recanted.

4. Closing Arguments

The state used its summation to argue that the trial evidence exposed two of Myers's obsessions: his ex-girlfriend Carly Goodman and Behrman's bicycle. The prosecutor reminded the jury of the many witnesses who described Myers's statements about Behrman's bike. The state likewise emphasized Myers's statements to his grandmother and aunt, urging the jury to see them as confessions to the murder.

The state also described Myers's activities the morning of the murder, painting his calls to various parks and drive-in movies as a "last-ditch effort to get [his girlfriend] Carly back" and explaining that he was "trying to get control back" over her. The state connected the two apparent obsessions by establishing a motive: Myers wanted to control Goodman but could not, so instead he took Behrman, who was merely in the wrong place at the wrong time, to the same clearing in the woods where he had driven Goodman. Based on the evidence, the state argued, Myers's need to control women motivated what Dr. Radentz called a "classic rape homicide."

On the defense side, Myers's counsel followed up with a watered-down version of his original theory, since much of it had been discredited during trial. Defense counsel reemphasized Myers's alibi and that the evidence about which way Behrman rode was a wash.

He touched on the Wendy Owings theory and posited that the physical evidence did not rule out a stabbing.

When it came to Brian Hollars, counsel shied away from his original theory. He still suggested that Behrman might have been murdered because she was pregnant, a theory he gleaned from books about the topic and contraception found in her bedroom. But counsel said that the person responsible for the murder could have been Hollars "or maybe it was another man entirely." The defense also noted that Myers had no clear motive for the murder and stressed the lack of physical evidence connecting him to it.

The jury deliberated for less than two hours and returned a guilty verdict. The trial court later sentenced Myers to 65 years' imprisonment. The Indiana Court of Appeals affirmed Myers's conviction and sentence on direct review. See *Myers v. State*, 887 N.E.2d 170 (Ind. Ct. App. 2008). The Indiana Supreme Court then declined review. See *Myers v. State*, 898 N.E.2d 1228 (Ind. 2008) (unpublished table decision).

C. Requests for Postconviction Relief in State Court

Myers began his quest for postconviction relief by filing a petition in the trial court alleging that his counsel had performed so ineffectively at trial as to violate the Sixth Amendment. To support his petition, Myers pointed to an order of the Indiana Supreme Court finding that defense counsel, Patrick Baker, had engaged in professional misconduct during the trial, and suspending his license to practice for six months. See *In*

re Baker, 955 N.E.2d 729 (Ind. 2011). The Indiana Supreme Court found that Baker breached his ethical duties not only by making false promises to the jury during his opening statement, but also by improperly soliciting Myers as a client and then falsely promising to represent him free of charge.

While Myers alleged multiple instances of ineffective assistance in his state postconviction petition, three specific errors came to form the focus of his request for relief:

1. *False promises*: Counsel's broken promises to the jury in his opening statement destroyed his credibility and left jurors confused about his theory of defense.

2. *Bloodhound evidence*: Counsel's failure to object to unreliable bloodhound evidence allowed the jury to conclude that Behrman traveled near Myers's home, providing him the opportunity to commit the murder.

3. *Rape testimony*: Counsel failed to object to Dr. Radentz's testimony that the circumstances around Behrman's murder suggested she was raped. And that testimony allowed the jury to find a sexual assault motive, which was

> unfounded and resulted in severe prejudice.

The Indiana trial court denied relief. It noted that defense counsel did make misrepresentations during his opening statement but said that they did not affect the trial's outcome because the judge instructed the jurors not to base their decision on the statements and arguments of counsel. The trial court also rejected all of Myers's other contentions that his counsel performed deficiently at trial.

The Indiana Court of Appeals affirmed the denial of post-conviction relief. See *Myers v. State*, 33 N.E.3d 1077 (Ind. Ct. App. 2015). The court evaluated Myers's three primary contentions of ineffective assistance of counsel this way:

> 1. *False promises*: The court found deficient performance because defense counsel knew or should have known that no evidence supported his contentions that a bloodhound detected Behrman's scent at Hollars's home. (The court did not address counsel's false promise about evidence showing that Hollars and Behrman were seen fighting the day before her disappearance.) The false promise about the bloodhound evidence did not result in prejudice, however, as defense counsel was able to present some evidence suggesting the

possibility that Hollars had a romantic interest in Behrman. That evidence, the court reasoned, came from Behrman's cousin, who testified that some unidentified "older man" had asked Behrman out on a date.

2. *Bloodhound evidence*: Though defense counsel testified at the postconviction hearing that he did not remember ever researching the admissibility of bloodhound evidence, the court concluded that Myers failed to overcome the presumption that counsel's choice not to object to the evidence was strategic. Finding no deficient performance on this score, the court never reached the prejudice question.

3. *Rape testimony*: The court forwent a deficient performance analysis and concluded that Baker's failure to object to the testimony from Dr. Radentz did not prejudice Myers at trial. The court determined that counsel successfully cross-examined Dr. Radentz and elicited the acknowledgment that his conclusion about rape was not

> based on any physical evidence from Behrman's remains.

Before denying relief, the state appellate court paused to address Myers's contention that counsel's errors, when aggregated, affected the jury's decision and thereby amounted to ineffective assistance of counsel. The court underscored its finding that Myers had failed to show even one instance of his counsel performing deficiently in a way that resulted in prejudice. Without even one error to point to, the court reasoned, there was nothing to aggregate as part of any cumulative prejudice analysis.

The Indiana Supreme Court again declined review. See *Myers v. State*, 40 N.E.3d 858 (Ind. 2015) (unpublished table decision). It was then that Myers sought postconviction relief in federal court.

D. District Court's Award of Federal Habeas Relief

In a 146-page opinion, the district court focused much of its analysis on what it found were three serious errors committed by Myers's trial counsel: making false promises regarding the Brian Hollars evidence during opening statements, not objecting to the bloodhound evidence, and failing to preclude Dr. Radentz's testimony about Behrman likely being raped. *Myers v. Superintendent, Indiana State Prison*, 410 F. Supp. 3d 958, 981, 991, 1016 (S.D. Ind. 2019).

Turning to prejudice, the district court determined that the Indiana Court of Appeals, as the

last court to have considered the merits of Myers's ineffective assistance claim, considered each allegation of ineffective assistance in isolation, rather than focusing on their cumulative effect. See *id.* at 1021-23. The failure to consider the combined effect of the errors, the district court concluded, amounted to an unreasonable application of the clearly established direction the Supreme Court provided in *Strickland v. Washington*, 466 U.S. 668 (1984). See *id.*

From there the district court found that "no fairminded jurist could conclude that trial counsel's cumulative errors did not meet *Strickland's* prejudice standard." *Myers*, 410 F. Supp. 3d at 1054. The court underscored that, while the state's evidence was sufficient to convict Myers, "it is far from a strong case of guilt" and, as a result, "the prejudice caused by trial counsel's errors more likely impacted the verdict." *Id.* at 1034. Indeed, the district court found that the "cumulative impact of trial counsel's errors was devastating to Mr. Myers's defense." *Id.* at 1050. The court granted habeas relief on that basis.

II.

While this appeal owes some of its complexity to the federal habeas corpus framework, the proper starting point is familiar. To evaluate a claim of ineffective assistance of counsel, we apply the standard the Supreme Court announced in *Strickland v. Washington* and ask whether defense counsel's performance was deficient and resulted in prejudice. 466 U.S. at 687. The deficient performance prong requires that the defendant show that his counsel's errors were

so far below the level of competent representation that it was as though he had no counsel at all. See *id.* On the prejudice prong, the defendant must show "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694.

That hill is even steeper for issues that the state court decided on the merits. Through its enactment of the Antiterrorism and Effective Death Penalty Act of 1996, Congress has allowed a federal court to award habeas relief to those like John Myers convicted of crimes under state law only if the state court's ruling "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court," or "was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d)(1), (2). This is no easy task. See *Cullen v. Pinholster*, 563 U.S. 170, 181 (2011) (describing the federal habeas standard as "difficult to meet" and "highly deferential"). The deferential standard reflects Congress's decision to require federal courts to afford substantial respect to the interests of comity and finality embodied in state court judgments of conviction.

By its terms, however, so-called AEDPA deference does not apply to federal claims that the state court did not address on the merits. See 28 U.S.C. § 2254(d) (providing that the deferential standard of review applies to "any claim that was adjudicated on the merits in [s]tate court proceedings"). When a state court reaches only one part of *Strickland's* two-pronged

analysis, we review the unaddressed prong *de novo*. See *Wiggins v. Smith*, 539 U.S. 510, 534 (2003) (reviewing *de novo* whether the defendant was prejudiced for purposes of the Strickland analysis because the state court did not reach the issue).

A. Deficient Performance

We agree with the district court that defense counsel's performance fell short of "the legal profession's objective standards for reasonably effective representation." See *Anderson v. Sternes*, 243 F.3d 1049, 1057 (7th Cir. 2001) (citing *Strickland*, 466 U.S. at 687-88). We reach that conclusion whether we evaluate counsel's performance *de novo* or by affording the Indiana Court of Appeals's assessment the deference prescribed by § 2254(d)(1).

False promises. Defense lawyers often argue for acquittals on the basis that the authorities charged the wrong person. Myers's counsel sought to do just that but went too far. Counsel promised to present evidence that Brian Hollars killed Behrman, even though he had to know he could not follow through on that promise at trial. No evidence supported the promises to prove that a bloodhound tracked Behrman's scent to Hollars's home or that Hollars was seen arguing with Behrman a day or two before she disappeared. Without such evidence, counsel's promises went unfulfilled. Making false promises about evidence in an opening statement is a surefire way for defense counsel to harm his credibility with the jury. See *United States ex rel. Hampton v. Leibach*, 347 F.3d 219, 257 (7th Cir. 2003). The state wisely concedes that Myers's counsel's false promises

are indefensible—a clear instance of deficient performance.

Bloodhound evidence. The analysis is not as straightforward with Myers's contention that his counsel should have objected to the testimony that a bloodhound tracked Behrman's scent along a northern route and ultimately to the location of where her bike was found. The prosecution used this evidence to put Behrman—not just her bike—in north Bloomington, near Myers's home. Myers's counsel may have thought that it was more difficult to assign blame to Hollars without evidence putting Behrman in north Bloomington the morning of her disappearance.

But the district court was right in its observation that counsel so passively allowing the bloodhound evidence all but guaranteed the jury would not credit Myers's alibi that he was at home making telephone calls on a landline for a good part of the morning when Behrman disappeared. And the district court was equally correct that, at the very least, defense counsel should have investigated the admissibility of bloodhound evidence and made an informed decision about whether to seek its exclusion. We, too, are troubled by counsel's acknowledgment at the postconviction hearing that he did not recall doing anything to assess the admissibility of the bloodhound evidence. Plain and simple, counsel missed the issue.

In these circumstances, we are inclined to agree with the district court that counsel's failure to object amounted to deficient performance and that the Indiana Court of Appeals's conclusion to the contrary was

unreasonable, as it assumed without any evidentiary foundation in the record that counsel's failure to object reflected a considered and reasonable strategic decision. See *Strickland*, 466 U.S. at 690-91 ("[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."); *Wiggins*, 539 U.S. at 521 (emphasizing the same point).

Rape testimony. Perhaps the starkest example of deficient performance came from counsel's failure to object to testimony stating that the circumstances around the murder were consistent with Behrman being raped before she was killed. Dr. Radentz, a forensic pathologist, investigated Behrman's remains and the scene surrounding their recovery and concluded that the cause of death was a "shotgun wound to the back of the head." That conclusion alone presented an obstacle for Myers's theory that Wendy Owings's recanted confession (that she ran over Behrman with her car, stabbed her to death, and then dumped her body in Salt Creek) was in fact true. But Dr. Radentz also testified that Behrman's remains being found in a remote place without any clothing suggested that she was raped.

In state postconviction review, the Indiana Court of Appeals did not consider whether the failure to object to Dr. Radentz's testimony reflected deficient performance, preferring instead to take the permissible course of going straight to Strickland's prejudice prong.

See *Strickland*, 466 U.S. at 697 ("[A] court need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies."). That analytical route has a consequence for our review of Myers's request for federal habeas relief: we lack any state court determination on the deficient performance prong to which to review or defer under § 2254(d)(1). See *Quintana v. Chandler*, 723 F.3d 849, 853 (7th Cir. 2013) ("[W]hen a state court makes the basis for its decision clear, [§] 2254(d) deference applies only to those issues the state court explicitly addressed.") (citing *Wiggins*, 539 U.S. at 534). Our review therefore proceeds de novo.

Having taken our own fresh and thorough look at the trial record, we conclude without hesitation that defense counsel's failure to object to Dr. Radentz's testimony was "outside the wide range of professionally competent assistance." *Strickland*, 466 U.S. at 690. Counsel provided no explanation for this failure, and our role is not to search for one to excuse his deficient performance. See *Wiggins*, 539 U.S. at 526-27; *Brown v. Sternes*, 304 F.3d 677, 691 (7th Cir. 2002).

While the Indiana Court of Appeals was right to note that defense counsel did manage to elicit acknowledgment from Dr. Radentz that he could not prove Behrman was raped, the observation only goes so far. Defense counsel himself was responsible for provoking the testimony most harmful to Myers. On direct examination, Dr. Radentz raised only the possibility of a rape-homicide and even then only in passing. But it was defense counsel's imprecise and

prolonged questioning on cross-examination that allowed Dr. Radentz to underscore his certainty that a rape occurred. Indeed, in response to defense counsel's questions, Dr. Radentz testified that he considered the case "a rape homicide and dumping until proven otherwise."

Preventing the jury from hearing a word about a rape motive should have been a priority for counsel. Everyone should agree that the introduction of evidence of sexual violence, especially in a case where a young college student went missing and later turned up dead, can be prejudicial. See *House v. Bell*, 547 U.S. 518, 541 (2006). And in prosecuting Myers, the state did not use Dr. Radentz's testimony solely to explain where and how Behrman was murdered. It instead relied on the testimony to support its theory of motive: that Myers raped Behrman before shooting her as a display of his desire to control women. Defense counsel should have sought to prevent Myers from being portrayed as a rapist.

In the end, we agree with the district court that counsel performed deficiently. We turn now to whether any of counsel's errors resulted in substantial prejudice to Myers.

B. Prejudice

Errors are prejudicial when there is a "reasonable probability" that the trial would have come out differently without them. *Strickland*, 466 U.S. at 694; see also *Cook v. Foster*, 948 F.3d 896, 908 (7th Cir. 2020) (explaining and applying the same standard). "A

reasonable probability," the Supreme Court has explained, "is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694. While the Supreme Court has avoided assigning a numerical probability to the inquiry, it has explained that the likelihood of a different result need not be "more likely than not" but nonetheless "must be substantial." *Harrington v. Richter*, 562 U.S. 86, 111-12 (2011).

Where, as here, the record shows more than one instance of deficient performance, the Sixth Amendment requires that we approach the prejudice inquiry by focusing on the cumulative effect of trial counsel's shortcomings. This direction comes from *Strickland* itself, where the Supreme Court instructed courts to "consider the totality of the evidence before the judge or jury." 466 U.S. at 695. "Taking the unaffected findings as a given, and taking due account of the effect of the errors on the remaining findings, a court making the prejudice inquiry must ask if the defendant has met the burden of showing that the decision reached would reasonably likely have been different absent the errors." *Id.* at 696.

We have read *Strickland* just this way—as mandating a cumulative assessment of prejudice—on at least five prior occasions. See, *e.g.*, *Harris v. Thompson*, 698 F.3d 609, 648 (7th Cir. 2012) ("The question is whether counsel's entire performance at the hearing prejudiced Harris. By analyzing each deficiency in isolation, the [state] appellate court clearly misapplied the Strickland prejudice prong."); *Sussman v. Jenkins*, 636 F.3d 329, 360 (7th Cir. 2011) (assessing the "cumulative impact" of counsel's two errors); *Goodman*

v. Bertrand, 467 F.3d 1022, 1030 (7th Cir. 2006) (reversing the district court's denial of a § 2254 application because the state appellate court unreasonably applied federal law by "evaluating each error in isolation" and not in their totality); *Washington v. Smith*, 219 F.3d 620, 634-35 (7th Cir. 2000) (explaining that the *Strickland* prejudice inquiry required an assessment of "the totality of the omitted evidence" and the other evidence presented to the jury); *Alvarez v. Boyd*, 225 F.3d 820, 824 (7th Cir. 2000) (explaining that the need to analyze errors together because their "synergistic" effects can make the "whole . . . greater than the sum of its parts").

The Indiana Court of Appeals did not undertake a cumulative prejudice inquiry. It instead relied on its assessment of each individual error in isolation and then reasoned that because no one error met each of *Strickland's* two prongs, a cumulative analysis was unnecessary. The court defended its approach with sparse reasoning: "We have reviewed each of Myers' claims of error in detail and concluded that none of them amount to ineffective assistance of counsel." *Myers*, 33 N.E.3d at 1114. It then offered the view that "trial irregularities" cannot be combined to "gain the stature of reversible error." *Id.* (citing *Kubsch v. State*, 934 N.E.2d 1138, 1154 (Ind. 2010)). That legal observation is at odds with *Strickland* itself and our prior conclusions.

In these circumstances, where the state habeas court has not conducted a cumulative prejudice analysis, we must undertake the inquiry on our own in the first instance. See *Goodman*, 467 F.3d at 1030-31 (considering

the impact of counsel's errors in light of the strength of the other evidence presented to the jury *de novo* and therefore without deference to the state court's findings).

It is here that we part ways with the district court. In evaluating the state's evidence against Myers, assessing defense counsel's errors, and projecting how the trial may have proceeded differently absent those errors, the district court found itself lacking confidence in the jury's guilty verdict. The court emphasized the absence of physical evidence linking Myers to the murder and, even more generally, any proof of a prior connection between him and Behrman. And, as the district court saw it, the absence of such proof is what made Dr. Radentz's rape testimony so prejudicial to Myers, for it allowed the jury to assign a motive to what otherwise appeared an implausible crime. So, too, did the district court find that Myers suffered substantial prejudice when his counsel made no meaningful effort to show that Behrman rode her bike south (not north toward Myers's home) the morning she disappeared. That evidence would have been difficult for the prosecution to overcome, given the landline telephone records showing that Myers was home making calls that morning. And that point is why, in the district court's view, the bloodhound scent evidence mattered: it put Behrman close to Myers's home and doomed his alibi.

We see the evidence differently. Far from weak, the prosecution presented substantial evidence of Myers's guilt. The district court failed to appreciate that, when taken together, the evidence of Myers's guilt

overwhelmed any prejudicial effect of defense counsel's failings. The weight of the state's case against Myers prevents him from showing that he suffered substantial prejudice from his trial counsel's errors. See *Strickland*, 466 U.S. at 696 ("[A] verdict or conclusion only weakly supported by the record is more likely to have been affected by errors than one with overwhelming record support."); Cook, 948 F.3d at 909 (emphasizing the same point).

To be sure, counsel's deficient performance undoubtedly had some impact on the trial. The most troubling aspect of counsel's deficient performance—failing to object to Dr. Radentz's testimony that Behrman was raped before she was murdered—allowed the state to supply the jury with a theory of motive. The state made the point as plain as day in its closing argument: "You know the motive in this crime is clear . . . when Doctor Radentz told you that this was a classic rape murder. Rape is a crime of control. Rape is not a sex crime. It is pure and simple control over another human being and dominating them." The state used Dr. Radentz's opinion to underscore the narrative that Myers, while reeling from his breakup with Carly Goodman, had a need to control people, especially women.

But even without the testimony about rape, the state painted that picture about Myers through other means. The jury heard testimony showing that Myers lost his girlfriend, Carly Goodman, and had no luck trying to restore the relationship, including by unexpectedly showing up at her senior class trip and

trying to join her at an amusement park in Louisville before being turned away. The jury also heard from John Roell, who shared a cell with Myers in May 2005, that Myers spoke about Behrman using degrading language and saying that nothing had to happen to her if she would not have said anything—statements evincing Myers's attempt to exert control over her. With all of this evidence, the state portrayed a defendant who lost control of one relationship and committed a horrific crime as part of trying to exercise control over a young woman of a similar age.

As for counsel's false promises during his opening statement, we do not doubt that those damaged the theory of defense that Brian Hollars committed the murder. The jury never heard any testimony about a bloodhound alerting to Behrman's scent near Hollars's home or any argument between Hollars and Behrman in the days before her disappearance.

Counsel's errors also weakened Myers's alternate theory that Wendy Owings committed the murder. Recall that when she confessed, Owings said that she hit Behrman on Harrell Road on the south side of Bloomington. But by not objecting to the bloodhound evidence, counsel let the state provide support for its theory that Behrman rode her bike in the opposite direction the morning she went missing, making Owings's involvement seem implausible, especially given the recanted and admittedly false confession.

In evaluating the whole trial picture, however, it becomes clear that the viability of the Hollars and Owings theories was significantly undermined for

reasons other than counsel's mistakes. The Owings theory depended on Behrman riding south, but apart from the bloodhound scent testimony, the jury heard evidence that she rode in the opposite direction. Remember that Behrman's bike was found along North Maple Grove, less than a mile from Myers's home. Nothing about the bloodhound scent testimony changed that evidentiary obstacle for Myers. And from the outset, Hollars was not a serious suspect in the case. Indeed, the jury learned that the authorities initially considered Hollars due only to the admonitions from a psychic in Michigan.

Much more significant, the state called both Hollars and Owings to testify at trial. Owings explained in detail the pressure she felt from investigators and her own defense attorney to cooperate and confess to murdering Behrman since she was facing significant time on other charges. She also described how she formulated the fake story, in part by relying on her childhood experiences swimming and fishing in Salt Creek. For his part, Hollars denied any involvement in Behrman's disappearance, described the very limited interactions he had with Behrman during her work at the Indiana University recreation center, and explained that he was at work on the campus the morning she disappeared.

Simply put, Myers could not compete with the testimony the prosecution presented from Owings and Hollars—evidence presented almost certainly to prove to the jury that the state had charged the right person with Behrman's murder. The testimony from Owings

and Hollars diminished the strength of Myers's defense to a much greater extent than any prejudice that independently followed from counsel's failure to object to the bloodhound scent evidence or misleading opening statement.

So, while we are quick to acknowledge counsel's errors, we are confident that the defense theories that they impacted were sufficiently undermined, if not overwhelmed, by evidence presented at trial. Any impact from those errors on the jury's verdict pales in comparison to the strength of the evidence the state presented against Myers:

- Behrman's bike was found less than a mile from Myers's home;
- The very day Behrman went missing, Myers was seen crying and took steps to cover his windows with blankets and move his car to prevent anyone from knowing he was home;
- Myers took his girlfriend to the approximate location in the Morgan County woods where a hunter later came upon Behrman's remains;
- Myers had access to a 12-gauge shotgun like the one that the experts opined was used in Behrman's murder; and

- Myers made multiple self-incriminating statements to many different people, with at least one of those statements being tantamount to confessing to committing the murder.

The last point bears especially significant weight. The incriminating statements Myers made to so many different people following Behrman's disappearance make all the difference in determining whether defense counsel's errors substantially affected the outcome of the trial. During an interview with the investigators in 2005, he insisted that had not discussed the Behrman case with anyone except law enforcement—a position at extreme odds with much of the other testimony that the jury heard. See *United States v. Rajewski*, 526 F.2d 149, 158 (7th Cir. 1975) ("It is well settled that untrue exculpatory statements may be considered as circumstantial evidence of the defendant's consciousness of guilt."). Myers put himself front and center in the murder, conveying to many people an obsession with Behrman's disappearance and death and thereby thwarting a meaningful chance of a successful defense at trial.

The list is long, so we will recap just a few of the most revealing and inculpatory statements that Myers made. Just after Behrman went missing, Myers called his grandmother Betty Swaffard and asked for $200, telling her that he was a suspect in the case. Around the same time, he showed up at his parents' home crying and said he was leaving town and never coming back.

Swaffard's full testimony was devastating for Myers. She told the jury that in 2004 her grandson called her and said that he had "a lot of things [he] need[ed] to think about." He then went further and told her that if the authorities knew about the things on his mind he would "be in prison for the rest of [his] life." Later that night when he dropped his daughter off at Swaffard's house, he cried and told her that he wished he "hadn't done these bad things." Swaffard heard these statements as relating exclusively to Behrman, and, despite feelings of deep-seated family loyalty, felt compelled to come forward and share the information with the authorities.

Remember too that after Behrman's disappearance, Myers told his mother that he had been fishing in a creek in the woods and came upon a "bone" and "panties." He likewise told his cousin's husband (before the authorities recovered Behrman's remains) that he bet the police would find Behrman's body in the woods.

Aside from these statements to family members, the jury heard from an array of friends, acquaintances, and community members recalling similar comments. For example, Myers spoke frequently of the Behrman case and even aggrandized his role in it, like falsely telling his ex-girlfriend that he was the one who found Behrman's bike. Even more, he told his former coworker Dean Alexander during a discussion about Behrman that if he was going to hide a body, he would hide it up north in a wooded area. Myers's comment foreshadowed what happened over a year later—Behrman's remains were

found in the woods just north of Bloomington. And then there was John Roell, Myers's former cellmate who told the jurors that Myers brought up Behrman and her bicycle repeatedly, called her a "bitch," and said "if she wouldn't have said anything, this probably . . . none of this would have happened."

All of this testimony regarding the unsolicited statements that Myers made to those around him about Behrman's disappearance and murder went untainted by any of his trial counsel's errors and by any measure defeated his defense.

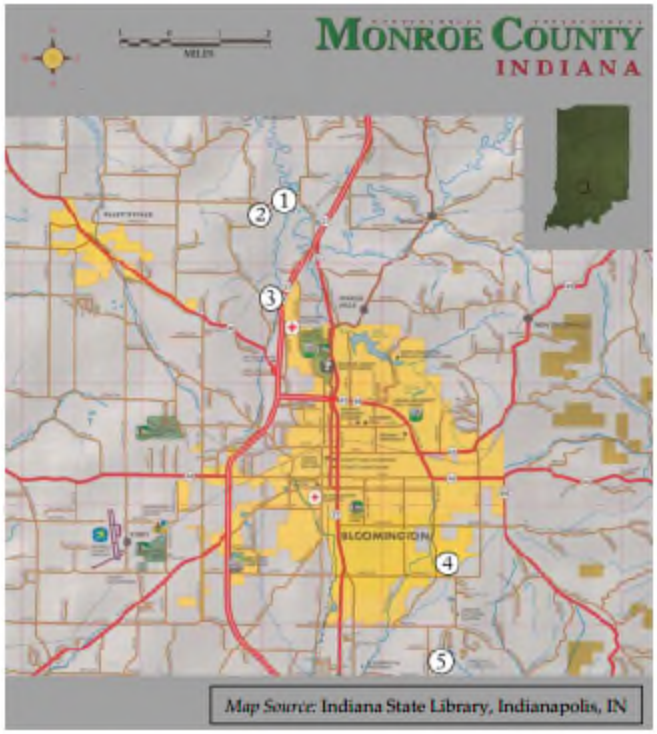
Our examination of the record leaves us of the firm conviction that even without counsel's errors, the jury would have reached the same conclusion and found John Myers guilty of murdering Jill Behrman. Because of the strength of the evidence presented at trial, our confidence in the jury's decision is not undermined. See *Lee v. Avila*, 871 F.3d 565, 571 (7th Cir. 2017) (finding no prejudice despite deficient performance when "the state's case was very strong" and made a different outcome "not reasonably probable"). Myers has fallen short of demonstrating what the Supreme Court has told us is essential to relief rooted in a claim of ineffective assistance of counsel—that the "likelihood of a different result must be substantial." *Richter*, 562 U.S. at 111-12.

We close by noting that the district court, while granting Myers relief based on the three instances of ineffective assistance of counsel analyzed in this opinion, acknowledged but did not definitively resolve other, lesser alleged instances of ineffective assistance. Our analysis of the strength of the state's evidence forecloses

relief based on these other allegations of ineffective assistance. But we do remand for the sole purpose of allowing the district court to address the two claims Myers advanced under *Brady v. Maryland*, 373 U.S. 83 (1963), in his § 2254 application. The district court reserved judgment on these claims. Our conclusions regarding the strength of the state's evidence may well foreclose relief on those claims too, but the district court should assess the question in the first instance as neither party briefed the claims in this appeal.

We REVERSE the order granting Myers's petition for a writ of habeas corpus and REMAND for the sole and limited purpose of allowing the district court to consider the unresolved *Brady* claims identified above.

Appendix



1. John Myers's home
2. Location where Jill Behrman's bike was found
3. Brian Hollars's home and location where one resident thought he saw Behrman cycling
4. Jill Behrman's home
5. Location where another resident thought she saw Behrman cycling and where Wendy Owings said she was driving

Not pictured: Jill Behrman's remains were found about 20 miles north of Point 2.

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IN THE
COURT OF APPEALS OF INDIANA

John R. Myers II, *Appellant-Petitioner*, v. State of Indiana, *Appellee-Respondent*	May 28, 2015 Court of Appeals Cause No. 55A05-1312-PC-608 Appeal from the Morgan Superior Court The Honorable G. Thomas Gray, Judge Cause No. 55D01-0902-PC-33

Friedlander, Judge.

[1] John R. Myers II appeals from the denial of his petition for post-conviction relief (PCR). He raises the following restated issues on appeal:

1. Did the post-conviction court err in concluding that Myers was not denied the effective assistance of trial counsel?

2. Did the post-conviction court err in concluding that Myers's due process rights were not violated by the State's alleged failure to disclose all exculpatory evidence to the defense?

3. Did the trial court err in concluding that Myers was not entitled to relief based on his claims of prosecutorial misconduct?

[2] We affirm.

[3] The facts underlying Myers's conviction were set forth as follows in this court's opinion arising out of his direct appeal:

> In the spring of 2000, John Myers II lived approximately seven tenths of a mile from the intersection of North Maple Grove Road and West Maple Grove Road, at 1465 West Maple Grove Road, north of Bloomington in Monroe County. Myers was on vacation from work the week of May 29 through June 2.
>
> On the morning of May 31, 2000', Jill Behrman, an accomplished bicyclist who had just completed her freshman year at Indiana University, left her Bloomington home to take a bicycle ride. She logged off of her home computer at 9:32 a.m.

Behrman did not report to the Student Recreational Sports Center, where she was scheduled to work from noon to 3:00 p.m. that day, nor did she appear at a postwork lunch scheduled with her father and grandparents. Following nationwide search efforts, Behrman's remains were ultimately discovered on March 9, 2003, in a wooded area near the intersection of Warthen and Duckworth Roads in Morgan County. The cause of her death was ruled to be a contact shotgun wound to the back of the head.

With respect to the events surrounding Behrman's disappearance, one report indicated that a young woman matching Behrman's description was seen riding her bicycle north of Bloomington on North Maple Grove Road at approximately 10:00 a.m. the morning of May 31. A tracking dog later corroborated this report. While another report placed Behrman south of Bloomington at 4700 Harrell Road at approximately 9:38 a.m., some authorities later discounted this report due to her log-off time of 9:32 a.m. and the minimum fourteen minutes it would take to bicycle to Harrell Road. The tracking dog did not detect Behrman's scent trail south of Bloomington.

At approximately 8:30 a.m. on the morning of May 31, 2000, in the North Maple Grove

Road area, a witness saw a white "commercial looking" Ford van without identification on its doors or sides drive slowly past his driveway on North Maple Grove Road, heading south. Two men were inside the van. This witness saw the van two additional times that morning by approximately 9:00 a.m. and later identified the van as "exactly like" a Bloomington Hospital van.

At some point before noon on May 31, 2000, another witness saw a bicycle later determined to be Behrman's lying off of the east side of North Maple Grove Road near the intersection of North Maple Grove Road and West Maple Grove Road. The location of the bicycle was approximately one mile from Myers's residence and ten and one-half miles from Behrman's house.

On May 31, the date of Behrman's disappearance, two witnesses separately noted that the windows in Myers's trailer were covered, which was unusual. One of these witnesses also observed that Myers's car was parked fifty yards from its normal location and remained out of sight from the road for approximately three days. Myers told this witness that he had parked his car in that secluded spot because he did not want anyone to know he was home.

Myers's account of his activities during his vacation week of May 29 through June 2 was reportedly that he was "here and there." Myers's employer at the time was the Bloomington Hospital warehouse, where he had access to two white panel Ford vans. Besides being "here and there," Myers indicated that he had been mostly at home, that he had gone to a gas station, and that he had gone to Kentucky Kingdom but found it was closed. Myers additionally stated that he and his girlfriend, Carly Goodman, had cancelled their plans to go to Myrtle Beach, South Carolina, and to Kings Island, Ohio, that week. Phone calls made from Myers's trailer on May 31 were at the following times: 9:15 a.m.; 9:17 a.m.; 9:18 a.m.; 10:37 a.m.; 10:45 a.m.; and 6:48 p.m. Myers's mother, Jodie Myers, testified that she had made those calls.[1] The calls were to drive-in theaters and various state parks.

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[1] Myers asserts that this is an inaccurate reflection of the record. After reviewing Jodie Myers's testimony, we agree. Although a portion of her testimony, when viewed in isolation, appears to support the assertion that she made the phone calls on May 31, 2000, her testimony when read in its entirety reveals otherwise. Instead, Jodie testified that after obtaining her son's telephone records for that date, she called the listed numbers to determine to whom they belonged. It is apparent to us that the jury was not misled into believing that Jodie had placed the phone calls, and the State made no such argument. It is also apparent that this court's

Myers was reportedly almost hysterical on May 31 and spoke of leaving town and never coming back. Myers's aunt, Debbie Bell, observed that Myers had been very depressed in the preceding month and believed that this was due to problems with his girlfriend. In late April 2000, Myers had called Bell because he had been having problems with his girlfriend and felt like "a balloon full of hot air about to burst."

Carly Goodman was Myers's girlfriend beginning in approximately late October 1999. In March of 2000, Myers took Goodman for a long drive through Gosport, "over a bridge where there was a creek and into some woods." Myers pulled his car into a clearing in the woods where the two of them argued, which scared Goodman. Although it was nighttime, Goodman observed the appearance of this clearing from the car's headlights. In late April or early May of 2000, Goodman broke off her relationship with Myers. Goodman denied that she and Myers had ever made plans to go to Myrtle Beach or to Kings Island the week of May 29.

On June 5, 2000, Bell again spoke with Myers. Myers mentioned that a girl had

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misunderstanding of the record had no impact on its resolution of Myers's direct appeal.

been abducted in the area, and he was afraid he would be blamed for it. Myers further stated that the girl's bicycle had been found about a mile from his house and that "they blame [him] for everything." Myers additionally asserted, "[T]hey haven't found her body yet" and guessed that the girl was dead. In that same conversation, Myers indicated that he had been stopped by a roadblock and was "scared" of roadblocks, but he later changed his mind, laughed, and said he was not really "scared."

Following a tip due to this conversation, on June 27, 2000, Detective Rick Crussen of the Bloomington Police Department interviewed Jodie and Myers's father, John Myers Sr., at their residence at 3909 West Delap Road. The following day, Detective Crussen interviewed Myers.

On June 27, 2000, immediately after Detective Crussen interviewed Myers's parents and the day before he interviewed Myers, Myers called his grandmother, Betty Swaffard, and asked to borrow $200. Myers told Swaffard he was unable to come to her house for the money because there were roadblocks on Maple Grove Road, and he did not want to leave his home. Myers-additionally stated that he was a suspect in the Jill Behrman

disappearance. Myers did not come to Swaffard's home for the money.

In July 2000, Bell noticed that John Myers Sr. was unusually nervous and agitated when in Myers's presence. Sometime in approximately August of 2000, Myers's brother, Samuel, who owned a twelve-gauge shotgun and had stored it at his parents' house on Delap Road since approximately 1997, noted that the gun was missing.

Myers raised the topic of Behrman's disappearance multiple times and in multiple contexts following her disappearance. Before Detective Crussen interviewed him, Myers falsely stated to his Bloomington Hospital supervisor that police had questioned him in connection with Behrman's disappearance because her bicycle was found close to his home. Also in June of 2000, Myers stated to a co-worker that he wondered whether authorities had investigated a barn in a field located on Bottom Road off of Maple Grove Road. Additionally, some weeks after Behrman disappeared, Myers told another co-worker during a delivery run that Behrman's bicycle was found in his neighborhood, and that Behrman was probably abducted near that site. Later in 2000 or 2001, while driving with his then-girlfriend, Kanya Bailey, Myers directed

Bailey's attention to a location a short distance from his mother's residence and stated he had found Behrman's bicycle there.

In the late spring to late summer of 2001, Myers again raised the topic of Behrman's disappearance with another co-worker. As the two were driving on Bottom and Maple Grove Roads, Myers pointed out where he lived and stated that Behrman's bicycle had been found close to where he used to live. A short time later, while on Maple Grove Road, Myers stated that if he was ever going to hide a body he would hide it in a wooded area up "this way," pointing north. On another occasion, Myers stated to this co-worker that he knew of someone in Florida who had Behrman's identification card or checkbook.

Sometime in November or December of 2001, Myers raised the topic of Behrman's disappearance with a family member, indicating his bet that Behrman would be found in the woods. During this conversation, Myers further indicated his familiarity with the Paragon area and with Horseshoe Bend, where he liked to hunt.

Also in 2001, Myers stated to his mother, Jodie, that he had been fishing in a creek and had found a pair of panties and a bone in a tree. Jodie suggested that this might

be helpful in the Behrman case, and Myers agreed to call the FBI. FBI Agent Gary Dunn later returned the call and left a message. Myers told Jodie that they should save the answering machine tape in case they were questioned.

Sometime in 2002, Wendy Owings confessed to Behrman's murder, claiming that she, Alicia Sowders-Evans, and Uriah Clouse struck Behrman with a car on Harrell Road, stabbed her with a knife in her chest and heart, wrapped her body in plastic tied with bungee cords, and disposed of her body in Salt Creek. In September 2002, authorities drained a portion of Salt Creek. They found, among other things, a knife, a bungee cord, and two sheets of plastic. Owings later recanted her confession.

On March 27, 2002, Myers, who at the time was in the Monroe County Jail on an unrelated charge, told Correctional Officer Johnny Kinser that he had found some letters in some food trays one morning that he believed Kinser should look at, apparently in connection with the Behrman disappearance. Myers said he felt bad about what had happened to that "young lady" and that he wished to help find her if he could. Myers additionally compiled a list of places potentially providing clues to Behrman's location.

Indiana State Police Trooper James Minton investigated the list, including gravel pits off of Texas Ridge Road between Stinesville and Gosport. A route from Gosport to the intersection of Warthen and Duckworth Roads in Morgan County passes by Horseshoe Bend.[2]

On March 9, 2003, Behrman's remains were discovered by a hunter in a wooded area near the intersection of Warthen and Duckworth Roads in Morgan County approximately thirty-five to forty yards from a clearing in the timber north of Warthen Road. Authorities recovered approximately half of the bones in Behrman's skeleton. No soft tissue remained. Six rib bones were among the bones missing from her skeleton. There was no evidence of stab or knife wounds, nor was there evidence of blunt force trauma. Investigators recovered a shotgun shell wadding from the scene, as well as 380 number eight shot lead pellets. The wadding found at the scene was

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[2] Myers asserts that this court's opinion in his direct appeal reflects a misunderstanding concerning the content of the list of locations Myers compiled. Myers apparently believes that the opinion stated that the note listed a route to the site at which Behrman's remains were eventually discovered. The opinion contains no such assertion. Instead, the court noted that a route between Gosport, near one of the places on the list, and the area where Behrman's remains were later found passes by Horseshoe Bend, an area where Myers liked to hunt.

typical of a twelve-gauge shotgun shell wadding. The cause of Behrman's death was ruled to be a contact shotgun wound to the back of the head. Scattered skull fragments and the presence of lead pellets in a variety of places, together with certain soil stains consistent with body decomposition, suggested that after being shot, Behrman's body had come to rest and had decomposed at the spot where it was found. No clothing was found at the scene. There is nothing in the record to clarify whether Behrman's clothing, if it had been left at the scene, would or would not have completely disintegrated prior to her body being found.

In March 2003, Myers told another co-worker, who had brought a newspaper to work announcing the discovery of Behrman's remains, that the woods pictured in the newspaper article looked familiar to him, and that he had hunted there before. According to this co-worker, the woods pictured in the newspaper article did not appear distinctive. Myers also stated that it was good that Behrman had been found and that he was surprised that he had not been contacted because he knew the people who police thought had committed the crime. Myers knew Wendy Owings, who had falsely confessed to the crime, as well as Uriah Clouse and Alicia

Sowders-Evans. Myers had a "cocky" tone of voice when he made these comments, according to the co-worker.

More than a year later, in November 2004, Myers called his grandmother, Swaffard. Myers, who was upset and stated that he needed time to himself, said to Swaffard, "Grandma, if you just knew the things that I've got on my mind. [I]f the authorities knew it; I'd be in prison for the rest of my life." Myers further stated that his father, John Myers Sr., "knew" and had "[taken] it to the grave with him." Subsequently, when Myers arrived at Swaffard's house, he said with tears in his eyes, "Grandma, I wish I wasn't a bad person. I wish I hadn't done these bad things."

Indiana State Police Detectives Tom Arvin and Rick Lang interviewed Myers again on May 2, 2005. During this taped interview, Myers denied having told anyone in his family that he was "scared" of the roadblocks or that he had talked to anyone besides the police about the case. Also in May of 2005, Myers, who was again in the Monroe County Jail on an unrelated charge, mentioned to his bunkmate that the state police were investigating him because Behrman's bicycle had been found in the vicinity of his house. Myers made approximately three or four references to Behrman's bicycle and was nervous and

> pacing at the time. During that conversation, Myers, who was also angry, made reference to the "bitch," and stated to this bunkmate, "[I]f she [referring to Behrman] wouldn't have said anything, . . . none of this would have happened."
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> On February 17, 2006, Detective Lang took Goodman on a thirty-six-mile drive north of Myers's home on Maple Grove Road and into rural Morgan County. Goodman recognized a clearing in the woods near the corner of Warthen and Duckworth Roads, approximately thirty-five to forty yards from where Behrman's remains were discovered, as the place that Myers had driven her in March 2000.
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> *Myers v. State*, 887 N.E.2d 170, 176-80 (Ind. Ct. App. 2008) (footnotes and citations to the record omitted), *trans. denied*. A grand jury indicted Myers for Behrman's murder in April 2006. A twelve-day jury trial commenced on October 16, 2006, at the conclusion of which Myers was found guilty as charged and sentenced to a term of sixty-five years. This court affirmed Myers's conviction on direct appeal and our Supreme Court denied transfer.

[4] Myers filed a pro se PCR petition on February 2, 2009. Counsel subsequently entered appearances on Myers's behalf and amended the petition. An

evidentiary hearing was held over several days in April and May 2013, at the conclusion of which the post-conviction court took the matter under advisement. The post-conviction court issued its written order denying Myers's PCR petition on November 18, 2013. Myers now appeals.

[5] In a post-conviction proceeding, the petitioner bears the burden of establishing grounds for relief by a preponderance of the evidence. *Bethea v. State*, 983 N.E.2d 1134 (Ind. 2013). "When appealing the denial of post-conviction relief, the petitioner stands in the position of one appealing from a negative judgment." *Id.* at 1138 (quoting *Fisher v. State*, 810 N.E.2d 674, 679 (Ind. 2004)). In order to prevail, the petitioner must demonstrate that the evidence as a whole leads unerringly and unmistakably to a conclusion opposite the post-conviction court's conclusion. *Bethea v. State*, 983 N.E.2d 1134. Although we do not defer to a post-conviction court's legal conclusions, we will reverse its findings and judgment only upon a showing of clear error, i.e., "that which leaves us with a definite and firm conviction that a mistake has been made." *Id.* at 1138 (quoting *Ben—Yisrayl v. State*, 729 N.E.2d 102, 106 (Ind. 2000)).

1.

[6] Myers first argues that his trial counsel were constitutionally ineffective.[3] A petitioner will prevail

[3] Myers was represented at trial by the father-son defense team of Hugh and Patrick Baker, with Patrick Baker acting as lead counsel.

on a claim of ineffective assistance of counsel only upon a showing that counsel's performance fell below an objective standard of reasonableness and that the deficient performance prejudiced the petitioner. *Bethea v. State*, 983 N.E.2d 1134. To satisfy the first element, the petitioner must demonstrate deficient performance, which is "representation that fell below an objective standard of reasonableness, committing errors so serious that the defendant did not have the 'counsel' guaranteed by the Sixth Amendment." *Id.* at 1138 (quoting *McCary v. State*, 761 N.E.2d 389, 392 (Ind. 2002)). To satisfy the second element, the petitioner must show prejudice, which is "a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different." *Id.* at 1139. "A reasonable probability is one that is sufficient to undermine confidence in the outcome." *Kubsch v. State*, 934 N.E.2d 1138, 1147 (Ind. 2010) (quoting *Strickland v. Washington*, 466 U.S. 668, 694 (1984)).

[7] There is a "strong presumption" that counsel rendered adequate service. *Bethea v. State*, 983 N.E.2d at 1139. "We afford counsel considerable discretion in choosing strategy and tactics, and [i]solated mistakes, poor strategy, inexperience, and instances of bad judgment do not necessarily render representation ineffective.'" *State v. Hollin*, 970 N.E.2d 147, 151 (Ind. 2012) (quoting *Timberlake v. State*, 753 N.E.2d 591, 603 (Ind. 2001)) (alteration in

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Except where we find it necessary to differentiate between the two, we will refer to both Bakers collectively as "trial counsel."

original). Indeed, "strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation." *Strickland v. Washington*, 466 U.S. at 690-91. Moreover, because a petitioner must prove both deficient performance and prejudice in order to succeed, the failure to prove either element defeats the claim. *See Young v. State*, 746 N.E.2d 920 (Ind. 2001) (holding that because the two elements of *Strickland* are separate and independent inquiries, the court may dispose of the claim on the ground of lack of sufficient prejudice if it is easier). Myers has raised numerous claims of ineffective assistance of trial counsel. We address them each in turn.

A.

[8] Myers raises a number of arguments with respect to the admission into evidence of a redacted version of his May 2, 2005 police interrogation. First, lie argues that trial counsel were ineffective for agreeing to the redactions because portions of the statement in which he denied any involvement in Behrman's disappearance and murder were excised, and those statements would have been helpful to the defense.

[9] The interrogation in question was conducted in two parts. In the first part of the interview, Myers was questioned by Indiana State Police Detectives Rick. Lang and Tom Arvin, and Myers repeatedly denied

any involvement in or knowledge of Behrman's disappearance and murder. Myers was then arrested on a separate charge of receiving stolen property, booked, fingerprinted, and swabbed for DNA. Thereafter, a second, post-arrest interview was conducted by Detective Jeff Heck, during which Myers again denied any involvement in Behrman's disappearance and murder. The State, defense, and trial court spent a substantial amount of time discussing redactions of the interrogation. Ultimately, the jury heard an audio recording of and was provided with a written transcript of the partially redacted pre-arrest interview; the post-arrest interview was omitted entirely. Myers does not appear to object to the manner in which the pre-arrest interview was redacted. Instead, he argues that the jury should also have heard the post-arrest interview.

[10] We have reviewed both the redacted and unredacted interrogation, and Myers has not established either deficient performance or prejudice stemming from the redaction of the post-arrest interview. The post-arrest interview contained several long monologues in which the interviewer attempted to appeal to Myers's moral sensibilities, followed by relatively short responses from Myers. Some of these monologues spanned several pages of transcript and made specific reference to Myers's past substance abuse and recovery process. The trial court described the post-arrest interview as largely filled with "a lot of irrelevant gibberish" that "add[ed] nothing to the factual determination in this case."

Trial Transcript at 26. We think this is a fair characterization. Although Myers continued to proclaim his innocence in the post-arrest interview, his denials of involvement were merely cumulative of his previous statements in the pre-arrest interview, which the jury heard. Myers also made statements in the post-arrest interview that the jury could have viewed as flippant under the circumstances. For example, at one point, Myers stated, "you know, as we're sitting there talking, I'm thinking cigarettes, I'm thinking coffee[.]" *PCR Exhibit* 305A at 154. It was not deficient performance for trial counsel to agree to redact the post-arrest interview in its entirety because it could have harmed Myers and, in any event, would have added little, if anything, to the pre-arrest interview. For the same reason, Myers was not prejudiced by the redaction.

[11] Myers also argues that counsel performed deficiently by failing to object to portions of Detective Arvin's and Detective Lang's testimony concerning the May 2, 2005 interrogation. Specifically, Myers notes that counsel did not object to Detective Arvin's testimony that Myers's demeanor during the interview was "nonchalant" and "cavalier" and that his answers appeared to be rehearsed. *Trial Transcript* at 2207. Additionally, on cross-examination by trial counsel, Detective Arvin asserted that Myers never "adamantly" or "expressly" denied guilt. *Id.* at 2211-12. In response to a jury question, Detective Arvin again testified that Myers's demeanor was nonchalant and cavalier.

Additionally, Detective Lang testified that he did not expect Myers to confess to the murder based on his "prior intelligence" and because "murder is one of the least things someone is going to confess to." *Id.* at 2380-81. According to Myers, these statements constituted inadmissible opinion testimony.

[12] The sum total of Myers's argument that this testimony was inadmissible is contained in the following conclusory statement in his appellant's brief: "The opinion evidence offered by [Detective] Arvin was objectionable, irrelevant and prejudicial. Ind. Evidence Rule 701; *Hensley v. State*, 448 N.E.2d 665, 667 (Ind. 1983) (lay witnesses may not give opinions where jury is well qualified to form an opinion)." *Appellant's Brief* at 28-29. Assuming *arguendo* that the testimony was objectionable, Myers has not established prejudice. With respect to Detective Arvin's testimony that Myers never adamantly or expressly denied guilt, trial counsel went on to elicit testimony clarifying that Myers had, in fact, denied involvement in Behrman's disappearance and murder "numerous" times. *Trial Transcript* at 2211. With respect to the characterizations of Myers's responses as rehearsed and his demeanor as nonchalant and cavalier, the jury heard the audio recording of the redacted interview and received a written transcript thereof, and was therefore able to draw its own conclusions as to whether Myers's responses and tone were inappropriately casual. Myers has made no attempt to explain how Detective Lang's testimony that he did not expect Myers to confess prejudiced him, and

we are unable to imagine how it might have done so. Myers has not established that the outcome of the trial would have been different had his trial counsel objected to this testimony.

[13] Finally, Myers takes issue with trial counsel's failure to challenge the State's characterization of the May 2, 2005 interrogation in its opening statement and closing argument. Specifically, Myers takes issue with the prosecutor's assertion in opening statements that Myers's demeanor was nonchalant—but, as we explained above, the jury heard Myers's interview and was able to draw its own conclusions in this regard. Myers also notes that the State used a Powerpoint slide presentation in its closing argument, and several of the slides included claims that Myers never denied guilt. The presentation consisted of over sixty slides, five of which bore the subheading "When pressed Defendant never denies guilt", followed by excerpts from the transcript of Myers's interrogation. *PCR Exhibit* 132. We note, however, that the slide presentation was not admitted as an exhibit at trial; instead, it was used by the State solely as a visual aid during closing arguments. Moreover, our review of the trial transcript reveals that the State did not verbally assert in its closing argument that Myers never denied guilt. The defense, on the other hand, emphasized in its closing argument that Myers repeatedly denied guilt during his police interrogation. Most importantly, the jury was provided a transcript and heard an audio tape of the interrogation, during which Myers repeatedly

denied any involvement in Behrman's disappearance and murder. Under these facts and circumstances, we cannot conclude that Myers has established that he suffered prejudice as a result of trial counsel's failure to object to the use of the slides.

B.

[14] Next, Myers argues that trial counsel Patrick Baker was ineffective for telling the jury in opening statements that the defense would present certain evidence, and then failing to do so. Specifically, during opening statements, Patrick Baker stated that during a search for Behrman shortly after her disappearance, a bloodhound alerted to the residence of Brian Hollars, who trial counsel had identified as an alternative suspect, but that the dog was called off. Counsel also told the jury that there was evidence that Hollars and Behrman were seen arguing days before she disappeared. Trial counsel did not present evidence to support these claims.

[15] The parties acknowledge that Patrick Baker was professionally disciplined for, among other things, stating that a dog had alerted at Hollars's home. *See In re Baker*, 955 N.E.2d 729 (Ind. 2011). Our Supreme Court found that "[t]hese statements were false and Respondent should have known that no evidence would be admitted at trial to support them." *Id.* at 729. The court noted, however, that there was no allegation in the disciplinary proceedings that counsel had provided substandard services to Myers or that Myers or the State were

prejudiced by the misrepresentation in his opening statement. We will presume, however, that an attorney who tells the jury that he will present evidence that he either knows or should know will not be presented has acted unreasonably for the purposes of the *Strickland* analysis. Thus, at least with respect to trial counsel's statement that a search dog alerted to Hollars's residence, we accept Myers's argument that trial counsel's performance, was deficient. We are left to consider whether the statements prejudiced Myers within the meaning of *Strickland*.

[16] In support of his argument that trial counsel's unfulfilled promise in this regard amounted to ineffective assistance of counsel, Myers directs our attention to two decisions of the United States Court of Appeals for the Seventh Circuit: *United States ex rel. Hampton v. Leibach*, 347 F.3d 219 (7th Cir. 2003) and *Barrow v. Uchtman*, 398 F.3d 597 (7th Cir. 2005). As this court has explained, "although decisions of the Seventh Circuit `are entitled to our respectful consideration,' its decisions on questions of federal law are not binding on state courts." *Jackson v. State*, 830 N.E.2d 920, 921 (Ind. Ct. App. 2005). Even so, we conclude that the cases cited do not mandate the conclusion that Myers's trial counsel was ineffective.

[17] In *United States ex rel. Hampton v. Leibach*, 347 F.3d 219, the Seventh Circuit found that Hampton's trial counsel was ineffective for failing to investigate exculpatory eyewitnesses to the crime. The court also considered Hampton's argument that his trial

counsel was ineffective for failing to fulfill two promises made during opening statement. First, Hampton's trial counsel stated that Hampton would testify that he was not involved in the gang-related attack for which he was on trial, and second, that the evidence would show that Hampton was not a member of or involved with any gang.

[18] The court explained that unforeseeable developments at trial may justify reversals of this nature, but that "when the failure to present the promised testimony cannot be chalked up to unforeseeable events, the attorney's broken promise may be unreasonable, for `little is more damaging than to fail to produce important evidence that had been promised in an opening.'" *Id.* at 257 (quoting *Anderson v. Butler*, 858 F.2d 16, 17 (1st Cir. 1988)). The court concluded that to the extent trial counsel had legitimate reasons to conclude that Hampton should not testify, those reasons should have been obvious from the outset of the case. In reaching its conclusion that counsel's performance was unreasonable, the court emphasized the fact that trial counsel had explicitly promised the jury that Hampton himself would testify, reasoning that "Hampton's unexplained failure to take the witness stand may well have conveyed to the jury the impression that in fact there was no alternate version of the events that took place, and that the inculpatory testimony of the prosecution's witnesses was essentially correct." *Id.* at 258.

[19] The court also found trial counsel's failure to present testimony that Hampton was not involved with a

gang unreasonable, noting that such evidence would bear on the likelihood that he had participated in a crime with "unmistakable gang overtones." *Id.* at 259. Testimony of this nature was readily available to counsel; he simply failed to pursue it. The court concluded that counsel's failure to present such evidence "could only have undercut the credibility of the defense with the jury." *Id.* With respect to the prejudice element of the *Strickland* standard, however, the court concluded that trial counsel's "breach of the promises he made in the opening statement was not so prejudicial that it would support relief in and of itself[.]" *Id.* at 260. Rather, the breach "serve[d] to underscore the more important failure to investigate exculpatory occurrence witnesses." *Id.*

[20] In *Barrow v. Uchtman*, 398 F.3d 597, the Seventh Circuit again encountered a claim that counsel was ineffective for failing to deliver on promises made during opening statements. In *Barrow*, trial counsel in opening statement informed the jury that "we will tell you about" the crime and the defendant's denial of involvement. *Id.* at 606 n.7. During the trial, however, Barrow's counsel presented no evidence whatsoever in defense. The court concluded that Barrow had not established that he was prejudiced by trial counsel's failure to deliver on his promise to present exculpatory evidence. In reaching this conclusion, the court carefully distinguished *Hampton*, noting that in that case, the court had "placed special importance on the fact that trial counsel had specifically promised the jury that the

defendant would testify *himself*." *Id.* at 606 (emphasis in original). Barrow's counsel, on the other hand, made no explicit promise that Barrow would testify; rather, he promised to present other exculpatory evidence. The court also noted that the nature of the evidence against Barrow was qualitatively different from that in *Hampton*. In *Hampton*, the sole evidence against the defendant was eyewitness testimony, but the primary evidence against Barrow was his own confession. Under these circumstances, Barrow's personal testimony was far less critical than Hampton's. Moreover, the content of Barrow's proposed testimony was unlikely to have altered the ultimate verdict given the abundant evidence against him. Thus, the court concluded, Barrow could not establish that he was prejudiced by his trial counsel's unfulfilled promises.

[21] Like the court in *Barrow*, we also conclude that Myers was not prejudiced by trial counsel's unfulfilled promises. First, we note that trial counsel made no promise that Myers himself would testify. Patrick Baker's representations that evidence would be presented that a dog had followed Behrman's scent to Hollars's residence and that Hollars and Behrman had been seen arguing shortly before her disappearance are more akin to the promises of trial counsel in *Barrow* to present exculpatory evidence.

[22] Moreover, although trial counsel failed to deliver on these specific promises, other evidence casting suspicion on Hollars was presented to the jury. Evidence was presented establishing that Hollars

had hired Behrman to work at Indiana University's Student Recreational Sports Center (SRSC) and that Hollars and Behrman shared an interest in cycling. In fact, Hollars had given Behrman his telephone number because he was trying to sell a bicycle and believed someone in Behrman's cycling club might be interested. Becky Shoemake, who was Behrman's cousin, roommate, and closest friend on campus, testified that Behrman had confided in her that an older man had asked her out and that Behrman was concerned because the man was old enough to drink, but Behrman was not. Shoemake did not know the man's identity or if Behrman accepted the date. Detective Lang testified that Behrman's mother had told him that Behrman was probably sexually active during her second semester. Trial counsel admitted into evidence condoms, a pregnancy test, a package of emergency contraceptive pills, and several books on pregnancy found in Behrman's room. Behrman's mother told Detective Crussen that Hollars had called the Behrman residence three or four times on June 1, 2000, which she found strange. Evidence was also presented that Hollars was married and that he owned a twelve-gauge shotgun and loaded his own shotgun shells using number eight shot, the same size used in Behrman's murder. Importantly, the jury was presented with evidence that a bloodhound tracked Behrman's scent near Hollars's residence. Hollars testified that he was questioned by police on the day of Behrman's disappearance and again by Detective Arvin in 2003, and he believed that he was under suspicion.

[23] From the jurors' questions, it is clear that the jury considered the possibility of Hollars's involvement in Behrman's murder. A juror asked Behrman's mother questions about when Behrman first met Hollars. Additionally, a juror asked Wes Burton, Behrman's supervisor at the SRSC, whether Hollars was romantically interested in Behrman. The jurors also wanted to know whether written records could corroborate Hollars's and Burton's recollections that they had been working together at the SRSC at the time Behrman went missing. A juror also asked if Hollars had left the SRSC at any time on May 31, 2000, and Hollars admitted that he had left the premises to check on athletic fields.

[24] The jurors also took note of the possibility that Behrman was pregnant. A juror asked Behrman's mother if Behrman had appeared to be sick, nauseated, fatigued, or lightheaded, and Behrman's mother recalled that Behrman had felt poorly one morning in May. A juror also asked Behrman's mother if she believed Behrman would have confided in her if she had been pregnant. The jurors did not, however, question the canine handler who testified concerning the bloodhound search conducted a few days after Behrman's disappearance about trial counsel's claim that a dog had alerted at Hollars's residence but been pulled off. We therefore conclude that counsel has not established prejudice stemming from trial counsel's failure to fulfill his promise to present evidence that the bloodhound alerted to Hollars's residence and

that Hollars was seen arguing with Behrman shortly before her disappearance.

[25] Myers also argues that Patrick Baker was ineffective for failing to deliver on his claim in opening statement that Carl Salzman, the Monroe County Prosecutor at the time of Behrman's disappearance, would testify that Myers was never a suspect and that Owings, Sowders-Evans, and Clouse were his primary suspects. In support of this argument, Myers directs our attention to Salzman's deposition testimony, taken just days before trial, in which Myers claims Salzman "said exactly the opposite[.]" *Appellant's Brief* at 31.

[26] Myers overstates Salzman's deposition testimony. Salzman testified in his deposition that his office investigated Behrman's disappearance until her remains were discovered in Morgan County, at which time the investigation was turned over to Morgan County officials. Salzman testified that during the Monroe County investigation, he never filed charges against anyone in Behrman's disappearance. Salzman was presented with a probable cause affidavit for Wendy Owings, and he testified that the plan was to use the charge to get to Sowders-Evans and Clouse. Salzman declined to file charges against Owings because he did not believe the evidence was sufficient. Salzman was never presented with a probable cause affidavit for Myers.

[27] Salzman testified further that after Morgan County took over the investigation, he continued to receive

tips from members of the community and jail inmates, which he would pass on to Detective Lang. One such tip came from Betty Swaffard, Myers's grandmother, who told Salzman that Myers had been behaving strangely at the time of Behrman's disappearance. Salzman found Swaffard to be credible and her story to be compelling, so he passed it on to Detective Lang and urged him to investigate further. Thus, from Salzman's testimony, it is apparent that Myers was not presented to Salzman as a suspect during Salzman's official investigation as the Monroe County Prosecutor. While it appears that Salzman eventually came to personally suspect Myers based on Swaffard's testimony, this occurred well after his official involvement in the case ended. During the Monroe County investigation, the only person Salzman considered charging was Wendy Owings. Thus, while Patrick Baker's assertion that Myers was not one of Salzman's suspects could have been clearer, it was not demonstrably false.

[28] Nevertheless, because Salzman did not testify at trial, Patrick Baker's promise concerning the substance of his testimony necessarily went unfulfilled. We note, however, that at the PCR hearing, Myers elicited no testimony from trial counsel concerning the failure to call Salzman as a witness. Because Myers has made no attempt to discount the possibility that trial counsel made a strategic decision not to call Salzman to testify, he has not satisfied his burden of establishing deficient performance on this issue. *See United States ex rel. Hampton v. Leibach*, 347 F.3d 219 (explaining that

unexpected developments at trial may justify an attorney's decision not to present evidence promised in opening statements); *Specht v. State*, 838 N.E.2d 1081, 1087 (Ind. Ct. App. 2005) (explaining that "an action or omission that is within the range of reasonable attorney behavior can only support a claim of ineffective assistance if that presumption is overcome by specific evidence as to the performance of the particular lawyer"), *trans. denied*. Nor has he established sufficient prejudice to justify relief on this basis. The jury was presented with ample evidence that the initial investigation focused on Owings, Sowders-Evans, and Clouse, and that Myers was not developed as the primary suspect until much later. Under these facts and circumstances, we cannot conclude that trial counsel's failure to elicit testimony from Salzman on this issue had an appreciable impact on the jury.

C.

[29] Next, Myers argues that trial counsel were ineffective for failing to adequately undermine the State's theory that Behrman had ridden her bicycle north on North Maple Grove Road, i.e., in the direction of Myers's residence, on the date she disappeared. According to Myers, it was crucial for the defense to establish that Behrman took a route south of Bloomington that morning because if she did so, phone records placing Myers at his residence that morning would have exonerated him.

[30] Myers's arguments on this issue presume that the only reasonable strategy trial counsel could have

pursued was one that depended heavily on establishing that Behrman rode south rather than north on the date of her disappearance. But trial counsel were not limited to presenting a single theory of defense. Indeed, in a case such as this, based solely on circumstantial evidence, the most advantageous approach may be to establish reasonable doubt by presenting multiple possible alternative theories of the crime that point away from the accused's guilt. As the U.S. Supreme Court has explained, "[t]o support a defense argument that the prosecution has not proved its case it sometimes is better to try to cast pervasive suspicion of doubt than to strive to prove a certainty that exonerates." *Harrington v. Richter*, 562 U.S. 86, 109 (2011).

[31] At the PCR hearing, when asked what he wanted the jury to believe concerning Behrman's bicycle route, Patrick Baker initially stated that he "didn't want her going north." *PCR Transcript* at 598. He went on to clarify, however, that he had "two theories, a southern route and a northern route". *Id.* Specifically, he testified as follows:

> We wanted the jury to believe that she couldn't have made it to [Myers's] house and back in time for work. So I don't know if we differentiated between the southern route and maybe partially of the northern route but we wanted the jury to believe that she couldn't have ridden to his house and back.

> *Id.* at 598-99. Thus, it was not trial counsel's strategy to eliminate the possibility that Behrman had ridden north—rather, trial counsel sought to establish that Behrman would not have followed the north route all the way to Myers's residence in light of her schedule that day.

[32] We cannot conclude that trial counsel's decision to pursue a defense theory that allowed for the possibility that Behrman had ridden north was unreasonable. As an initial matter, we note that trial counsel presented evidence supporting the theory that Behrman had ridden south. Trial counsel elicited testimony that Maral Papakhian, a high school classmate of Behrman's, had reported seeing Behrman riding her bike on Harrell Road, i.e., the southern route, on the morning of her disappearance. The jury was also presented with evidence of Owings's confession, in which she stated that she and Sowders-Evans had been passengers in Clouse's vehicle when he struck Behrman and abducted her on Harrell Road. Additionally, in both opening statements and closing arguments, trial counsel argued that the evidence presented supported a conclusion that Behrman had ridden south.

[33] We also note, however, that trial counsel's Hollars theory was premised in part on the fact that a bloodhound had scented Behrman on the northern route near Hollars's residence. Thus, presenting a theory of defense that depended on proving to a

certainty that Behrman had ridden south would have undermined this alternative theory. Moreover, there was other evidence that Behrman had ridden north. Robert England testified that he saw a cyclist matching Behrman's description riding north on Maple Grove Road either at 10:00 a.m. on the day Behrman disappeared or at 9:00 a.m. the next day. Moreover, Behrman's bike was discovered on the north route, less than one mile from Myers's residence. Although it has been suggested that Behrman could have taken the south route, been abducted and subdued there, and her bike dumped on the north route, the timeline for such a scenario is tight. Behrman logged off of her computer at 9:32 a.m. and her bike was spotted near Myers's residence "before noon." *Trial Transcript* at 1226. Additionally, evidence from the bloodhound tracking search was consistent with Behrman having ridden the bike to its final location as opposed to being driven there in a vehicle. Thus, although it is not impossible for the bike to have been dumped, we cannot conclude that it was unreasonable for trial counsel to decline to pursue a theory of defense that was wholly dependent on the jury reaching such a conclusion. While it might have been helpful to the defense to conclusively eliminate the possibility that Behrman had ridden north that morning, the evidence simply did not allow for such certainty.

[34] Moreover, none of the evidence Myers argues should have been used to impeach the theory that Behrman rode north was particularly strong. For example, Myers argues that trial counsel should have

established that shortly after Behrman's disappearance, police investigated routes south and east of Bloomington. Considering the breadth of the investigation in this case and the fact that investigators were simultaneously investigating possible routes north of Bloomington, such evidence was unlikely to impress the jury. Myers also suggests that evidence should have been presented to the effect that investigators and Behrman's family believed "[f]or years" that Behrman had ridden south. *Appellant's Brief* at 33. But the jury was well aware that investigators primarily pursued Owings's confession, which placed Behrman on the south route, until Behrman's remains were discovered.

[35] Myers also argues that trial counsel should have cross-examined Behrman's parents "on their prior belief their daughter would not have ridden north based on the limited time she had, her riding habits and her habits preparing for work and leaving the house." *Id.* at 33. The PCR court found that declining to pressure the Behrmans about the specifics of their daughter's bike route reflected a valid trial strategic decision to avoid alienating the jury by upsetting grieving parents.[4] In any, event,

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[4] Myers argues that trial counsel was not concerned about alienating the jury because Patrick Baker cross-examined Behrman's mother extensively about "whether her murdered daughter might have been pregnant with a married man's baby." *Appellant's Brief* at 34. We note, however, that Patrick Baker testified at the PCR hearing that he believed that evidence concerning a possible pregnancy was crucial. It was not unreasonable for trial counsel to forego intense

Behrman's parents clearly did not know which direction she had ridden that day, and we cannot conclude that cross-examining them as to their guesses on the matter would have had a significant impact on the jury. Finally, Myers argues that trial counsel should have impeached the testimony of Dr. Norman Houze, a cyclist who conducted a timed ride from the Behrman residence to the location where Behrman's bike was discovered, with evidence that the ride was accomplished with a police escort.[5] But Myers has not directed our attention to any evidence suggesting that the police escort had an appreciable impact on the speed at which the ride was conducted. For all of these reasons, we also conclude that Myers has not established the requisite prejudice.

[36] Myers also argues that trial counsel were ineffective for failing to object to hearsay testimony discrediting Papakhian's sighting of Behrman on Harrell Road on the morning of her disappearance. Hearsay is an out-of-court statement offered in court to prove the truth of the matter asserted. *Boatner v. State*, 934 N.E.2d 184 (Ind. Ct. App. 2010). As a general rule, hearsay is inadmissible unless the statement falls within one of the

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cross-examination on other, less important issues in order to avoid appearing antagonistic.

[5] The results of the timed ride suggested that Behrman might have been able to take the northern route and still make it to work at the SRSC in time for her shift. Trial counsel cross-examined Dr. Houze extensively.

established hearsay exceptions. *Yamobi v. State*, 672 N.E.2d 1344 (Ind. 1996).

[37] Detective Arvin testified that Papakhian told police she believed she saw Behrman on the 4700 block of Harrell Road on the morning of Wednesday, May 31, but that she could not be one hundred percent certain that she had not seen her on Tuesday. Detective Arvin testified further that when he interviewed Papakhian, she recalled having an argument with her boyfriend at a small party the night before the sighting, and she named several other people who had attended the party. Detective Arvin testified that he interviewed five people as a result of his interview with Papakhian, and that he ultimately reported to Detective Lang "that the timeline that [Papakhian] had presented did not fit." *Trial Transcript* at 2203. He testified further that based on his investigation, he believed that it was more likely that Papakhian had seen Behrman on Tuesday, the day before her disappearance. Detective Arvin explained that Papakhian told him that she regularly left her house forty-five minutes before her 10:20 a.m. class (i.e., at 9:35 a.m.) and Detective Arvin determined that it would take her only three minutes to drive to the 4700 block of Harrell Road. Because Behrman had logged off of her computer at 9:32 a.m., and it would take a minimum of fifteen minutes for her to bike from the Behrman residence to Harrell Road (not including additional time to change clothes, put on cycling shoes, fill a water bottle, etc.), Detective Arvin believed that Behrman could not have made it to the

4700 block of Harrell Road in time for Papakhian to have seen her there on the date of her disappearance.

[38] Myers argues that Detective Arvin testified to statements made to him by the other partygoers Papakhian identified, and that a hearsay objection to this testimony would have been sustained.[6] But Myers has not directed our attention to a single out-of-court statement made by these unnamed individuals and admitted into evidence through Detective Arvin's testimony. Instead, Detective Arvin testified that after interviewing Papakhian and five other witnesses, he came to the conclusion that Papakhian's timeline did not fit and she had probably seen Behrman on Tuesday. When giving a further explanation of why he reached the conclusion, Detective Arvin referred not to any statements or information gathered from the partygoers, but to the timeline he had worked out based on Papakhian's statements and Behrman's computer logoff time. Because Myers has not established that Detective Arvin testified to any out-of-court statements made by the unnamed witnesses he interviewed, Myers has not established

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[6] Myers makes no argument that counsel should have objected when Detective Arvin testified at length to out-of-court statements made by Papakhian, and for good reason. Because Papakhian did not testify at trial, the only way to get evidence of her sighting before the jury was through the testimony of others. Myers makes no argument that trial counsel were ineffective for failing to call Papakhian as a witness, and Papakhian did not testify at the PCR hearing.

that trial counsel were ineffective for failing to object based on hearsay.

D.

[39] Myers also argues that his trial counsel were ineffective for failing to object to the admission of evidence of a bloodhound tracking search, or alternatively for failing to impeach the reliability of such evidence. At trial, Porter County Sheriff's Deputy and canine handler Charles Douthett testified concerning a search he performed with his bloodhound, Sam. Deputy Douthett testified that he had been working with Sam for over ten years, and that he and Sam had attended numerous seminars and trainings and worked homicide investigations in six states. Deputy Douthett testified further that he and Sam had conducted numerous real-world tracking searches, including some cases involving tracking bicyclists. Deputy Douthett went on to describe the process used to present a bloodhound with a scent and to track that scent.

[40] Deputy Douthett testified further that the FBI contacted him and asked him to come to Bloomington to conduct a tracking search in the Behrman case. An exhaustive description of the tracking search is not necessary here. It suffices for our purposes to note that Deputy Douthett and Sam were taken to a spot on North Maple Grove Road roughly one-half mile southwest of where Behrman's bike had been discovered. Sam tracked Behrman's scent to the spot the bike had been found and continued tracking the scent northward briefly

before losing the scent and doubling back to the starting point of the search. At that point, Deputy Douthett and Sam got into a vehicle and were driven southward along the path Sam had been following. They stopped and got out of the vehicle at an intersection a few hundred yards away from Highway 37. Hollars's residence is very close to this intersection. Sam was able to pick the scent back up at that point and she followed it across Highway 37 before turning south on Kinser Pike.

[41] Myers argues that evidence of the bloodhound tracking search was inadmissible, or at the very least subject to impeachment on the basis of its unreliability. In support of this argument, he cites a line of Indiana Supreme Court cases supporting the proposition that bloodhound tracking evidence is too unreliable to be admissible. *See Hill v. State*, 531 N.E.2d 1382 (Ind. 1989); *Brafford v. State*, 516 N.E.2d 45 (Ind. 1987); *Ruse v. State*, 186 Ind. 237, 115 N.E. 778 (Ind. 1917). The State notes, however, that all of these cases were decided prior to the adoption of the Indiana Rules of Evidence. In his reply brief, Myers appears to concede that the line of cases he cited in his appellant's brief are no longer controlling. Instead, he argues that the admission of the bloodhound tracking evidence would now be evaluated under Indiana Evidence Rule 702(b), which provides that "[e]xpert scientific testimony is admissible only if the court is satisfied that the expert testimony rests upon reliable scientific principles." According to Myers, the application of Rule 702(b) would result in the exclusion of

bloodhound tracking evidence because "[a] dog's accuracy relies upon too many variant and subjective factors to be considered reliable". *Reply Brief* at 8. Myers also argues that even if bloodhound tracking evidence might be deemed admissible under the current rules of evidence, trial counsel were ineffective for failing to impeach the evidence by establishing its unreliability.

[42] We need not address whether the bloodhound tracking evidence in this case was admissible or subject to impeachment. "[A]n objection to inadmissible evidence may be waived as part of reasonable trial strategy, which will not be second-guessed by this court." *Nordstrom v. State*, 627 N.E.2d 1380, 1385 (Ind. Ct. App. 1994), *trans. denied*. Trial counsel may also choose to forego opportunities to impeach evidence when doing so serves a reasonable strategic purpose. *See Kubsch v. State*, 934 N.E.2d 1136 (concluding that counsel's decision not to impeach a witness was a matter of trial strategy and did not amount to ineffective assistance).

[43] At the PCR hearing, Patrick Baker testified that he could not recall whether he considered objecting to the bloodhound tracking evidence. Likewise, he could not recall whether he considered consulting with an expert on bloodhounds or researched the admissibility of such evidence, although he believed he or someone in his office had probably done some research on the issue. He noted on cross-examination that the bloodhound evidence put

Behrman within a reasonable proximity of Hollars's house around the time of her disappearance.

[44] It is Myers's burden to overcome the presumption that there were strategic reasons for the decisions trial counsel made. If Myers cannot satisfy that burden, he cannot establish deficient performance. Patrick Baker's inability to recall at the time of the PCR hearing whether he researched bloodhound evidence or considered objecting to its introduction at trial over six years earlier is insufficient to overcome the presumption in this case. This is so because we judge counsel's performance "by the standard of objective reasonableness, not his subjective state of mind." *Woodson v. State*, 961 N.E.2d 1035, 1041 (Ind. Ct. App. 2012) (citing *Harrington v. Richter*, 562 U.S. 86), *trans. denied*. "Although courts may not indulge '*post hoc* rationalization' for counsel's decisionmaking that contradicts the available evidence of counsel's actions, neither may they insist counsel confirm every aspect of the strategic basis for his or her actions." *Harrington v. Richter*, 562 U.S. at 109 (internal citation omitted).

[45] Judging trial counsel's performance by an objective standard of reasonableness, as we must, we conclude that there were valid strategic reasons for declining to object to or impeach the bloodhound tracking evidence irrespective of Patrick Baker's inability to recall his thoughts on the subject. One of trial counsel's tactics throughout trial was to cast suspicion on Hollars, and the bloodhound tracking evidence supported that strategy because it placed

Behrman near Hollars's residence. Indeed, trial counsel relied on the bloodhound tracking evidence and its link to Hollars in both opening statements and closing arguments. We will not speculate on the ultimate wisdom of trial counsel's strategic decisions on this issue. Because Myers has not overcome the presumption that trial counsel acted competently in declining to object to or impeach the bloodhound tracking evidence, he has not established ineffective assistance in this regard.

E.

[46] Next, Myers argues that his trial counsel were ineffective for failing to impeach Betty Swaffard's testimony. Swaffard, Myers's maternal grandmother, testified to certain statements Myers made to her following Behrrnan's disappearance. Specifically, Swaffard testified that on June 27, 2000, the date Detective Crussen interviewed Myers's parents, Myers called Swaffard and asked to borrow money. Swaffard told Myers that he would have to come to her house to pick up the money, and he said he could not come because there were road blocks up on Maple Grove Road, and he did not want to go out because he was a suspect in Behrman's disappearance. Swaffard testified further that in November 2004, Myers called her and asked her to look after his daughter because he needed some time alone to think. Swaffard asked what was on his mind, and Myers said, "Grandma, if you just knew the things that I've got on my mind. . . . [I]f the authorities knew it, I'd be in prison for the rest of my life." *Trial Transcript* at 1833. Myers stated

further that his father had known it and "took it to the grave with him." *Id.* Later that evening, when Myers dropped his daughter off at Swaffard's house, he had tears in his eyes and said, "Grandma, I wish I wasn't a bad person. I wish I hadn't done these bad things." *Id.* at 1833-34. On cross-examination, trial counsel asked Swaffard only two questions, both of which were apparently intended to establish that Swaffard had developed an unusually close relationship with Detective Lang. First, counsel asked Swaffard whether she knew Detective Lang's telephone number, and she responded affirmatively. Second, counsel asked what Detective Lang's phone number was, and Swaffard began to answer but was interrupted by an objection from the State. The trial court sustained the objection, and trial counsel declined to cross-examine Swaffard further.

[47] On appeal, Myers argues that trial counsel were ineffective for failing to use recordings of telephone conversations between Myers and Swaffard to impeach Swaffard's testimony at trial. We note that in May 2005, with Swaffard's permission, Detective Lang began recording Swaffard's phone calls with Myers. Some of these recordings were of telephone calls Myers made to Swaffard from jail, in which Myers told Swaffard that he had been interviewed concerning Behrman's death and denied any involvement or knowledge thereof At the PCR hearing, Patrick Baker testified that he had heard the recorded phone calls, but his strategy with respect to Swaffard was to get her off the witness stand as quickly as possible. He testified that

Swaffard gave very damaging evidence, that her demeanor and presentation were credible, and that it was extremely challenging to explain to the jury why a grandmother would falsely implicate her grandson in a murder.

[48] On appeal, Myers argues that this was not a reasonable trial strategy, and that trial counsel were required to make a greater effort to impeach Swaffard precisely because her testimony was damaging and appeared credible. This is the sort of second-guessing of trial strategy in which we will not engage on appeal. "It is well settled that the nature and extent of cross-examination is a matter of strategy delegated to trial counsel." *Waldon v. State*, 684 N.E.2d 206, 208 (Ind. Ct. App. 1997), *trans. denied*. Myers has not established that a strategy of limiting the jury's exposure to Swaffard's testimony and denying her the opportunity to elaborate further thereon fell outside the wide range of constitutionally competent assistance.

[49] In any event, Myers has not directed our attention to any particularly persuasive impeachment evidence contained within the telephone recordings. Although Myers denied any involvement in or knowledge of what happened to Berhman in the phone calls he made to Swaffard from the jail, he did so after being made aware that he was a suspect in the case. Additionally, he acknowledged during the conversations that he knew that telephone calls made from the jail are recorded. In light of these facts, Myers's denials of involvement were unlikely

to sway the jury, and they do nothing to explain why Swaffard would falsely implicate Myers. Moreover, in order to impeach Swaffard with the recordings, trial counsel would have had to make the jury aware that Myers's own grandmother had voluntarily agreed to allow Detective Lang to record her conversations with Myers. The damaging effect of such evidence would likely outweigh its minimal impeachment value.

[50] Myers also argues that counsel was ineffective for failing to object to what he calls "religious vouching" for Swaffard's credibility. *Appellant's Brief* at 43. Specifically, Swaffard was allowed to testify, albeit briefly and without great detail, concerning her religious involvement, including her affiliation with a specific church, her studies' at a Bible college, and religious writings she has authored. According, to Myers, this testimony "served no purpose other than to portray [Swaffard] as a God-fearing woman who wouldn't lie." *Id.* at 43. Myers argues that the error was compounded when the State made reference to Swaffard's faith in its closing argument, stating that she came forward after "great prayer and . . . thought" and that "by the grace of God she came forward and told you the truth[.]" *Trial Transcript* at 1247, 2827.

[51] At trial, Myers's counsel objected to the State's line of questioning regarding Swaffard's religious involvement on the basis of relevance. The trial court overruled the objection and explained that it would allow "some introductory questions just so the jury knows who the witness is." *Id.* at 1813. On

appeal, Myers argues that trial counsel's objection was insufficient because "he did not provide a specific rule." *Appellant's Brief* at 43. We note, however, that Myers has also failed to cite any specific rule of evidence in his appellant's brief in support of this assertion that Swaffard's testimony amounted to impermissible "religious vouching." Instead, he argues that "[v]ouching testimony invades the province of the jury", and he cites two cases, both of which address issues concerning adult witnesses vouching for the truthfulness of victims in child molesting cases. *Id.* The State, however, has directed our attention to Indiana Evidence Rule 610, which provides that "[e]vidence of a witness's religious beliefs or opinions is not admissible to attack or support the witness's credibility."

[52] The testimony Myers argues amounted to impermissible religious vouching was part of general background information Swaffard was asked to give about her life. She testified that she had lived in her home for forty-five years, that she was homemaker, that her husband was deceased, and that her hobbies included reading, writing, and gardening. She testified further that she had completed some studies at a Bible college and authored a children's Bible school curriculum. The State then asked Swaffard whether she attended a specific church, and trial counsel objected to the line of questioning based on relevance. The trial court overruled the objection, and Swaffard went on to testify that she had attended Maple Grove Christian Church for nine years, that she wrote poetry and

ladies' devotionals, and she gave more background about her children and family.

[53] We cannot conclude that Swaffard's testimony concerning her religious involvement constitutes vouching, religious or otherwise. Although the relevance of Swaffard's religious involvement is certainly questionable (hence trial counsel's objection on that basis), her testimony contained no express or implied assertion that she was more or less likely to tell the truth due to her religious beliefs. Thus, Myers has not established a reasonable probability that an objection on this basis would have been sustained. *See Passwater v. State*, 989 N.E.2d 766 (Ind. 2013) (explaining that to prevail on a claim of ineffectiveness based on failure to object, the defendant must establish a reasonable probability that the objection would have been sustained). Moreover, Myers has not established that he was prejudiced by Swaffard's testimony in this regard. Swaffard's testimony concerning her involvement in church and religious activities was short and not greatly detailed. More importantly, Swaffard testified that Myers was her grandson and that she loved him and had been close with him since he was a small child. In light of the evidence concerning Swaffard's relationship with Myers and the absence of any motive to lie, we are unconvinced that testimony concerning her religious involvement had a significant impact on the jury's assessment of her credibility.

[54] To the extent Myers argues that the prosecuting attorney's remarks in closing argument crossed the

line into impermissible religious vouching, we note that the State's references to Swaffard's religion were brief and vague at best. The State's use of the common phrase "by the grace of God" conveyed nothing about Swaffard's religious beliefs, nor did its statement that Swaffard was "the last of a dying breed. A generation of people where truth mattered more than anything else, where telling the truth was an oath that was taken seriously." *Trial Transcript* at 2827, 2754-55. If anything, these statements suggested that Swaffard was more likely to tell the truth because of her age, not because her religious convictions compelled her to do so.

[55] The State's remark that Swaffard came forward "with great prayer" is arguably a more direct reference to her religion, but when viewed in context, it is apparent that the statement did not imply that Swaffard was credible because of her religious beliefs. *Id.* at 2747. The statement was made as part of the following argument:

> And stop for a moment to think how much doubt . . . how much reasonable doubt [Swaffard] had overcome before she came forward with what she knew. She knew what it would do to the family. You saw what Jodie, Sam, and Luke did. They circled the wagons. But she told you one thing, [Swaffard] did, didn't she? That her conscience wouldn't let her sleep unless she came forward. Think how hard it would be for any grandmother to do. You know, as you get older you start thinking

> about your family legacy. You start thinking about what's important in life and with . . . with many tears and with great . . . with great prayer and . . . and thought, [Swaffard] did come forward. This is a case about relationships.

Id. Thus, it is apparent that the State was arguing that it was very difficult for Swaffard to come forward due to the impact her cooperation with the investigation would have on her familial relationships, but that her conscience nevertheless compelled her to do so. In other words, the State argued that Swaffard was credible because she came forward with reservations and at great personal expense. The brief reference to prayer did nothing to imply that Swaffard was more credible because of her religious beliefs.

[56] Moreover, Myers did not question trial counsel at the PCR hearing with respect to his failure to object to these statements. Our Supreme Court has held that, because counsel is presumed to be competent, "an action or omission that is within the range of reasonable attorney behavior can only support a claim of ineffective assistance if that presumption is overcome by specific evidence as to the performance of the particular lawyer." *Morgan v. State*, 755 N.E.2d 1070, 1074 (Ind. 2001). Under the circumstances presented here, trial counsel could have concluded that objecting to the State's vague, passing references to Swaffard's religious convictions would only draw more attention to them, and Myers has presented no evidence to the

contrary. *See Smith v. State*, 822 N.E.2d 193 (Ind. Ct. App. 2005) (noting that it is reasonable strategy for counsel not to object to certain evidence to avoid drawing unfavorable attention to it). In any event, we are unconvinced that the complained-of statements had an impact on the jury's verdict. For these reasons, Myers has established neither deficient performance nor prejudice stemming from counsel's failure to object to so-called religious vouching.

F.

[57] Myers next argues that trial counsel were ineffective for failing to adequately impeach Carly Goodman's testimony. Goodman testified that one night in March 2000, Myers, her then-boyfriend, took her for a long car ride through Gosport to a wooded area, where he parked in a "clearance" surrounded by a wooded area. *Trial Transcript* at 1899. Goodman testified that after Myers stopped the car, the couple argued and that she was afraid and wanted to go home. Goodman testified further that in February of 2006, she went for a drive with Detective Lang to identify places that Myers had taken her during their relationship. She recognized one place as the wooded area where she and Myers had argued in March 2000. This was the same area where Behrman's remains were discovered in 2003. Myers's trial counsel conducted a relatively short cross-examination, in which he asked a number of questions designed to create doubt as to the whether the site was sufficiently distinctive-looking for Goodman to reliably differentiate it from other

nearby wooded areas. On appeal, Myers argues that trial counsel should have impeached Goodman with her prior, allegedly inconsistent statements about the site.

[58] At the PCR hearing, Patrick Baker testified that his strategy with respect to Goodman's cross-examination was similar to his strategy with Swaffard—he sought to get Goodman off the witness stand as quickly as possible. He testified further that Goodman "had a lot of information, 404(b) evidence, that regarded domestic battery situations with [Myers]. Regarded her being held against her will in a trailer, I think, for three or four days without any clothes. I think protective orders that she had filed against [Myers.]" *PCR Transcript* at 581. He explained that this information had been ruled inadmissible, but he still had concerns about Goodman bringing it up. Moreover, when asked whether he had planned to impeach Goodman with prior inconsistent statements, counsel responded that he did not recall specifically, but that any strategies he had devised changed during Goodman's testimony because she displayed a palpable demeanor of fear toward Myers.

[59] Myers dismisses trial counsel's explanation of his strategy as unreasonable. He asserts that counsel could have cross-examined Goodman concerning her prior statements made to Detective Lang at the time she identified the site without eliciting or opening the door to prejudicial and inadmissible testimony. Further, Myers argues that fearful witnesses are "a reality of criminal defense for which

counsel should be prepared."[7] *Appellant's Brief* at 45. We will not engage in this sort of second-guessing of trial counsel's strategic decisions concerning the nature and scope of cross-examination. Myers has not established that his trial counsel's strategy was unreasonable; to the contrary, it was quite reasonable for trial counsel to minimize the jury's exposure to Goodman's fearful demeanor and avoid any inadvertent mention of highly prejudicial and inadmissible evidence by limiting the scope and duration of his cross-examination, while simultaneously eliciting testimony casting doubt on the reliability of her identification of the area.

[60] Moreover, Myers has again failed to establish the requisite prejudice. Much of the impeachment evidence Myers argues should have been used during Goodman's cross-examination was explored through Detective Lang's testimony. For example, Myers argues that trial counsel should have impeached Goodman with Detective Lang's testimony during the grand jury proceedings that Goodman recognized the area due to a humming sound the tires made as they drove across a metal bridge. The bridge, however, was not installed until

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[7] Myers does not, however, make any attempt to explain what such "preparation" would entail or propose an alternative strategy for dealing with such witnesses. It appears to us that one obvious strategy could be to limit cross-examination of such witnesses, as trial counsel did in this case.

2001, well after Goodman's March 2000 car ride with Myers.

[61] Contrary to Myers's assertion on appeal, Detective Lang's grand jury testimony did not establish that Goodman recognized the area due to the sound of the tires on the bridge. Although Detective Lang mentioned the humming sound the tires made, he did not state that the sound is what triggered Goodman's memory. Instead, Detective Lang described the bridge and the humming sound, and said it was at that point that Goodman stopped him midsentence and said that that the area looked more familiar to her than any of the other places they had been. Detective Lang later clarified that Goodman "did not indicate on the bridge. That's just where she interrupted my sentence and said, this place looks more familiar. She didn't say the bridge was more familiar, I remember that sound. She just said this place looks more familiar than any place we've been up to that point." *Grand Jury Transcript* at 6104. Indeed, in her own grand jury testimony, Goodman specifically stated that it was not the bridge that caused the area to be recognizable to her. Instead, she stated that she recognized a nearby creek, woods, steep hills with rocks on them, and an area she described as a "cutoff", which was not a road but provided enough clearance to allow a person to drive a short distance into the woods. *Id.* at 4080.

[62] Moreover, trial counsel did, in fact, raise the issue of Goodman's recognition of the bridge with Detective Lang. Specifically, trial counsel elicited testimony from Detective Lang concerning the date the bridge

was constructed, and he asked Detective Lang whether it was true that Goodman recognized the bridge. Detective Lang responded that Goodman did not recognize the bridge, and instead recognized the area. Detective Lang's trial testimony is supported by both his and Goodman's grand jury testimony. For these reasons, it is apparent that any further attempt to impeach Goodman or Lang using their grand jury testimony on this point would have been unsuccessful.[8]

[63] Myers also makes much of the fact that Goodman told Detective Lang that the wooded area where Behrman's remains were found was similar to, or looked like, the place Myers took her in March 2000 instead of positively identifying the area. At trial, however, when shown a picture of the area in which Behrman's remains were discovered, she responded "[t]hat's where he took me." *Trial Transcript* at

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[8] Myers also argues that trial should have used Detective Lang's report to impeach his testimony that Goodman recognized a clearing in the woods. According to Myers, "[Detective] Lang did not document Goodman's recognition of a cut-away in his report prepared contemporaneous with the trip." *Appellant's Brief* at 11. Myers has not, however, directed our attention to a copy of Detective Lang's report appearing in the record. We will not scour the extremely voluminous record in this case in search of support for Myers's contentions on appeal. Because Myers has not adequately supported this claim with citation to the record, it is waived. *See Smith v. State*, 822 N.E.2d 193 (Ind. Ct. App. 2005). Waiver notwithstanding, at trial, Detective Lang and Goodman both testified that Goodman recognized the clearing in the woods. It is unlikely that the possibility that Detective Lang omitted this fact in his report would have significantly undermined their testimonies in this regard.

1900. Our review of transcript reveals that trial counsel did a more than adequate job of calling into question the reliability of Goodman's identification of the area. On cross-examination, trial counsel elicited the following testimony:

> Q. . . . How do you differentiate that picture from any other picture that'd be taken in the woods?
> A. Because of the way the clearance is.
> Q. How do you rec . . . differentiate that clearance from any other clearance?
> A. It's . . . it's just what looks familiar to me.
> Q. But you don't know . . . that could be anywhere, correct?
> A. Yes.

Id. at 1906. Moreover, Detective Lang testified that Goodman told him that the area "look[ed] more familiar to [her] that anyplace we've been." *Id.* at 2413. Because the jury was presented with testimony that Goodman told Detective Lang that the area looked familiar instead of positively identifying the area, as well as with Goodman's own testimony that the area just "look[ed] familiar", *id.*, counsel did not perform deficiently by failing to use Detective Lang's grand jury testimony to establish those facts.

[64] Myers also argues that his trial counsel were ineffective for failing to object to Goodman's description of Myers's behavior during the March 2000 car trip, which he calls "prejudicial 404(b) testimony". *Appellant's Brief* at 46. Myers does not, however, cite the applicable language of Indiana

Evidence Rule 404(b) or make any attempt to apply it. Accordingly, this argument is waived for lack of cogency. *See Davis v. State*, 835 N.E.2d 1102, 1113 (Ind. Ct. App. 2005) (explaining that "[a] party waives an issue where the party fails to develop a cogent argument or provide adequate citation to authority and portions of the record"), *trans. denied*.

[65] To the extent Myers has made a coherent argument on this point, it essentially boils down to an assertion that, in light of other testimony suggesting that Behrman may have been raped, Goodman's testimony left the jury with the impression that Myers had raped her during the March 2000 car trip. In support of this argument, Myers directs our attention to Goodman's testimony that during the trip, she did not kiss Myers, she wanted to go home, and that she was afraid, as well as her testimony that Myers refused to take her home, and that they both got out of the car and stayed at the location for thirty to forty-five minutes before Myers finally took her home. Myers's argument on this point is unconvincing. Goodman told the jury what happened once they reached the clearing in the woods—she and Myers argued and Myers refused to take her home, which scared her. Nothing about Goodman's testimony implied that she had been raped.

[66] In any event, it is apparent that the testimony was admitted to show that Myers was familiar with the area in which Behrman's remains were discovered and to explain why Goodman was still able to remember the location so vividly several years later,

and not to establish that Myers had a propensity to commit murder or any other crime. Thus, the testimony did not violate Evidence Rule 404(b), and Myers points to no danger of unfair prejudice aside from his unpersuasive argument that the testimony left the jury with the impression that Goodman had been raped. *See Embry v. State*, 923 N.E.2d 1, 9 (Ind. Ct. App. 2010) (explaining that "[i]n assessing the admissibility of 404(b) evidence a trial court must (1) determine that the evidence of other crimes, wrongs, or acts is relevant to a matter at issue other than the defendant's propensity to commit the charged act and (2) balance the probative value of the evidence against its prejudicial effect pursuant to Indiana Evidence Rule 403"), *trans. denied*. Thus, Myers has not established a reasonable probability that an objection on the basis of Evidence Rule 404(b) would have been sustained, and he is consequently unable to show that counsel performed deficiently by failing to object on that basis.

G.

[67] Next, Myers argues that trial counsel were ineffective for failing to object to testimony suggesting that Behrman had been raped. Specifically, forensic pathologist Dr. Stephen Radentz testified that the condition in which Berhman's remains were discovered was consistent with a classic rape-homicide scenario. Additionally, Dr. Radentz responded affirmatively to a jury question asking whether he believed Berhman had been raped. During follow-up cross-examination by Myers's trial counsel, Dr. Radentz admitted that

there was no physical evidence that a rape had occurred. When questioned further by the State, Dr. Radentz testified that, based on his training and experience, he nevertheless believed that Berhman had been raped because the location and condition of the remains were consistent with a rape-homicide. The State referenced Dr. Radentz's rape testimony in closing arguments.

[68] On direct appeal, Myers argued that Dr. Radentz's references to rape amounted to fundamental error. Another panel of this court concluded that the admission of Dr. Radentz's rape testimony violated Evidence Rule 403 because Myers was not charged with rape and there was no physical evidence to support the rape determination. *Myers v. State*, 887 N.E.2d 170. The court went on, however, to conclude that the admission of the evidence did not amount to fundamental error. *Id.* The court reasoned as follows:

> We conclude that any error in the admission of Dr. Radentz's rape testimony did not substantially influence the outcome of the trial. The question of rape was peripheral to the murder charge and received relatively minimal attention at trial. To the extent the possibility of rape was at issue, defense counsel thoroughly cross-examined Dr. Radentz, eliciting his testimony that there was no physical evidence that Behrman had been raped and that the only basis upon which he opined that a rape had occurred was his

> training and experience with respect to circumstances surrounding the general disposal of human remains. Furthermore, the trial court excluded all evidence tending to link Myers to inappropriate sexual conduct. The references to rape, therefore, did nothing to implicate Myers as the perpetrator of this charged crime, which was the central issue at trial.

Id. at 187.

[69] Myers is correct that this court's conclusion on direct appeal that the admission of Dr. Radentz's rape testimony did not amount to fundamental error does not necessarily preclude a finding that counsel's failure to object thereto amounted to ineffective assistance. *See Benefield v. State*, 945 N.E.2d 791 (Ind. Ct. App. 2011). To establish fundamental error, a defendant must show that the alleged error was so prejudicial as to make a fair trial impossible. *Ryan v. State*, 9 N.E.3d 663 (Ind. 2014). To satisfy the prejudice element of an ineffective assistance of counsel claim, on the other hand, a defendant must establish that there is a reasonable probability that the result of the proceeding would have been different but for counsel's unprofessional errors. *Massey v. State*, 955 N.E.2d 247 (Ind. Ct. App. 2011). Thus, this court has noted "that there is a subtle distinction between the fundamental error and ineffective assistance prejudice standards." *Benefield v. State*, 945 N.E.2d at 803. Although the fundamental error standard

"presents a higher bar", "the two standards may frequently lead to the same result". *Id.* at 804, 803.

[70] This is one such case. For the same reasons this court on direct appeal concluded no fundamental error occurred, we also conclude that Myers has not established prejudice sufficient to warrant a finding of ineffective assistance of counsel. We agree with the panel's conclusion that Dr. Radentz's rape testimony did not substantially influence the outcome of the trial. Accordingly, Myers has not established a reasonable probability that the outcome of the trial would have been different but for counsel's failure to object.

H.

[71] Next, Myers argues that his trial counsel was ineffective for failing to object to what he calls irrelevant and highly prejudicial gun evidence. Specifically, Myers points to the testimony of Billy Dodd, Myers's neighbor at the time of Behrman's disappearance, that a number of rifles and shotguns were kept in a barn near Myers's trailer. Additionally, Debbie Bell, Myers's aunt, testified that Myers sold her husband a shotgun at Myers's father's funeral in December 2000, several months after Behrman's disappearance. Detective Lang testified that he retrieved that gun from Bell. Although the record reveals that this gun, as well as several others that Myers sold or distributed to relatives, had been stolen from the barn near Myers's trailer, the jury was not made aware of that

fact and evidence of Myers's resulting conviction for receiving stolen property was excluded.

[72] "Evidence that the defendant had access to a weapon of the type used in the crime is relevant to a matter at issue other than the defendant's propensity to commit the charged act." *Rogers v. State*, 897 N.E.2d 955, 960 (Ind. Ct. App. 2008), *trans. denied*. On the other hand, "[e]vidence of weapons possessed by a defendant but not used in the crime for which the defendant is charged should generally not be introduced because the evidence is irrelevant and highly prejudicial." *Oldham v. State*, 779 N.E.2d 1162, 1174 (Ind. Ct. App. 2002). On appeal, Myers argues that trial counsel should have objected to all evidence relating to the guns from the barn on the basis of relevance because Detective Lang's grand jury testimony established that they were not stolen until November 2000, well after Behrman's disappearance, and therefore could not have been the murder weapon.[9] But Detective Lang's testimony was hardly conclusive on this point. Detective Lang testified as follows before the grand jury:

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[9] Citing the same portion of the grand jury transcript, Myers also claims that the State acknowledged during the grand jury proceedings that the murder weapon was not among the guns taken from the barn. The transcript contains no such concession, and even if it did, Myers has not directed our attention to any authority or made any argument remotely supporting the proposition that the State would be somehow bound by a statement it made in the midst of an ongoing grand jury investigation.

> I talked to Mr. Maher, [the owner of the barn], the burglary he reported it November 2000, which would have been after the death obviously of [Behrman]. I asked him if it could be possible that he would not have known between May and November when he reported it that any of those weapons were missing? In his opinion, he said no. I don't know. You know I mean he . . . if they were all missing, I'm sure he's correct. If he took one, you know, it could have been out and he would not [have] noticed it in my opinion. But, he said that the air conditioner was removed and that was what tipped him off that something was wrong and then he found the guns were gone, so. He stated that he made trips to the barn on several occasions enough between May and November that he would have known somewhere in between that time that they would have been gone.

Grand Jury Transcript at 5483-84.

[73] The post-conviction court found testimony concerning the guns relevant because they (or at least one of them) could have been taken during a previous, undiscovered entry. We agree. Unlike in *Oldham v. State*, here there was no conclusive scientific proof that the weapons at issue were not used in the crime. The fact that the owner of the barn believed that he would have noticed if the guns were stolen prior to Behrman's death goes to the

weight to be attributed to the evidence, not its admissibility.[10] Thus, Myers has not established that the gun testimony was irrelevant.

[74] Myers has also failed to establish prejudice arising from the admission of the gun evidence in this case. There was other evidence presented at trial to establish that Myers had access to shotguns like the one used to kill Behrman. Samuel Myers, Myers's brother, testified that he owned a twelve-gauge shotgun, which he kept at his parents' house. Samuel testified further that he noticed that his shotgun was missing around August of 2000 and that he was never able to locate the weapon. Myers's other brother, Lucas Myers, also testified that Myers had access to shotguns at their parents' house, and Richard Swinney, Myers's cousin by marriage, testified that Myers told him that he hunted with a twelve-gauge shotgun. Accordingly, additional evidence to the effect that Myers had access to and possession of such weapons was unlikely to have had a significant impact on the outcome of the trial. Moreover, evidence was presented that many people in the community possessed similar weapons for hunting purposes and that Myers was himself a hunter. Thus, Myers's possession of such weapons, standing alone, was unlikely to be viewed by the jury as indicative of dangerousness or criminal activity. For all of these reasons, Myers has not established that his trial counsel were ineffective for failing to object to testimony that guns were stored

[10] The owner of the barn did not testify at the PCR hearing.

in a barn near Myers's trailer and that Myers sold a shotgun to his uncle.

I.

[75] Myers next argues that trial counsel were ineffective for failing to object to the testimony of jailhouse informant John Roell. As we have already noted, "in order to prevail on a claim of ineffective assistance due to the failure to object, the defendant must show a reasonable probability that the objection would have been sustained if made." *Passwater v. State*, 989 N.E.2d at 773. Myers has not satisfied-this burden.

[76] Roell testified at trial that he had been Myers's cellmate in the Monroe County Jail in May 2005. He testified further that Myers told him he was waiting to be questioned by the Indiana State Police concerning Behrman's bicycle. According to Roell, Myers appeared nervous and angry, and at one point stated "if she wouldn't have said anything, none of this probably would have happened." *Trial Transcript* at 2270-71. Roell understood Myers to be referring to Behrman when he made this statement, and Roell testified further that Myers referred to Behrman as a bitch.

[77] Myers contends that counsel should have objected to Roell's testimony pursuant to Indiana Evidence Rule 403. This rule provides, in pertinent part, that relevant evidence may be excluded "if its probative value is substantially outweighed by a danger of . . . unfair prejudice[.]" Ind. Evid. R. 403. "All evidence

that is relevant to a criminal prosecution is inherently prejudicial; thus proper inquiry under Evidence Rule 403 boils down to a balance of the probative value of the proffered evidence against the likely unfair prejudicial impact of that evidence." *Fuentes v. State*, 10 N.E.3d 68, 73 (Ind. Ct. App. 2014), *trans. denied*. "When determining the likely unfair prejudicial impact, courts will look for the dangers that the jury will (1) substantially overestimate the value of the evidence or (2) that the evidence will arouse or inflame the passions or sympathies of the jury." *Duvall v. State*, 978 N.E.2d 417, 428 (Ind. Ct. App. 2012) (quoting *Carter v. State*, 766 N.E.2d 377, 382 (Ind. 2002)), *trans. denied*.

[78] The crux of Myers's argument is that the probative value of Roell's testimony was low because he was not a credible witness due to inconsistencies among his initial statement to police, his deposition testimony, and his trial testimony. But it was for the trier of fact, not the trial court, to judge Roell's credibility. Ultimately, Myers's argument in this regard goes to the weight to be afforded to Roell's testimony, not its admissibility. *See Embrey v. State*, 989 N.E.2d 1260, 1268 (Ind. Ct. App. 2013) ("[i]nconsistencies in witness testimony go to the weight and credibility of the testimony, the resolution of which is within the province of the trier of fact" (internal quotation omitted)). Roell's testimony, if credited by the trier of fact, was highly probative of Myers's guilt.

[79] Myers also argues that the admission of Roell's testimony posed a significant danger of unfair

prejudice because, in order to fully impeach Roell, Myers would have had to use Roell's prior statement to police, which contained information more damaging to Myers's defense than Roell's trial testimony.[11] "Unfair prejudice addresses the way in which the jury is expected to respond to the evidence; it looks to the capacity of the evidence to persuade by illegitimate means, or the tendency of the evidence to suggest decision on an improper basis...." *Ingram v. State*, 715 N.E.2d 405, 407 (Ind. 1999) (internal quotation marks omitted).

[80] Nothing in Roell's testimony was likely to prompt the jury to convict Myers on an improper basis. Myers has cited no relevant authority supporting the proposition that evidence may be considered unfairly prejudicial because it forces counsel make difficult strategic decisions with respect to its impeachment. We decline to develop this argument on his behalf. Because Myers has not satisfied his burden of establishing that an objection to Roell's testimony on the basis of Evidence Rule 403 would have been sustained, he has consequently failed to establish deficient performance and resulting prejudice.

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[11] In support of this assertion, Myers cites only the deposition of Detective Cody Forston of the Bloomington Police Department. In the deposition, Detective Forston recounted Roell's statement to him, noting specifically that Roell told him that Myers had stated that Behrman had been sexually assaulted and that "if the dumb bitch would have done what [he] had told her, she wouldn't be dead now." *PCR Exhibit* 239, p. 14. Roell did not make these statements in his deposition or trial testimony.

[81] Next, Myers argues that his trial counsel were ineffective for failing to present all available evidence tending to establish the guilt of Owings, Sowders-Evans, and Clouse, and for failing to investigate and discover additional evidence to that effect. This argument is nothing more than a request to substitute Myers's PCR counsel's strategic judgment, informed by hindsight, for that of Myers's trial counsel, which we will not do.

[82] In 2002, Owings confessed to the police that she, Sowders-Evans, and Clouse had killed Behrman. In the story Owings gave police, she and Sowders-Evans were riding around with Clouse in his pickup truck and using drugs when Clouse struck a girl riding a bike on Harrell Road. Clouse stopped and loaded the injured and incapacitated girl into the back of the truck and wrapped her in plastic secured with bungee cords before placing the bicycle on top of her. Owings went on to state that Clouse then drove them all to Salt Creek, where the three of them took turns stabbing the girl in the chest before Clouse and Sowders-Evans pushed the body into the water. Neither Sowders-Evans nor Clouse ever confessed to the police, and Owings recanted her confession after Behrman's remains were discovered in Morgan County.

[83] The State called Owings as a witness at Myers's trial. Owings testified that when she was questioned by Detective Lang in April 2003, she denied any knowledge of Behrman's disappearance. She

testified further that she had previously lied about her involvement because she was facing a potential eighty-six-year sentence for various unrelated felonies, and her attorney had urged her to come forward with anything she knew about the case in an attempt to curry favor with the prosecution. Owings testified that she had named Clouse and Sowders-Evans because "[f]rom the very first time I was questioned, those were the two names that I was supposedly to be with [sic] or around at the time of the said incident. They thought that all three of us were together." *Trial Transcript* at 2094. She also testified that parts of her testimony were based on places she had been with Sowders-Evans in the past. Owings testified further that she had told police that the body was wrapped in plastic to explain why she was unable to identify the type of clothing Behrman had been wearing and that she said they had disposed of the body in Salt Creek "[b]ecause there's so much stuff in there . . . I figured . . .they couldn't even dive in it . . . . I knew they wouldn't find her[.]" *Id.* at 2098. Owings stated that she recanted her confession after Behrman's remains were discovered because she believed that scientific evidence would exclude her.

[84] Additionally, the State introduced into evidence a letter Owings received from her attorney prior to her confession. In the letter, Owings's attorney painted an exceptionally dire picture of Owings's prospects. Specifically, he wrote that "we might be talking about you being locked up until just about everyone you know has died of old age." *PCR*

Exhibit 301. Her attorney went on to write that he had heard that Owings might know something about the Behrman case, and told her "[f]or the sake of your children, your family, and your own life, if there is anything you can tell these people the time is NOW." *Id.* He added that he had gotten "the distinct impression you might not be punished for anything to do with the Behrman case, and might get considerably better treatment in these other matters, if you can help solve this." *Id.* He also wrote that Sowders-Evans, who was apparently also incarcerated, was trying to get out of jail, and that if Sowders-Evans talked first, Owings would be "sunk." *Id.*

[85] Myers argues that trial counsel were ineffective for failing to present certain testimony and witnesses supporting the theory that Owings, Sowders-Evans, and Clouse murdered Behrman. Trial counsel Hugh Baker, however, testified that the defense team made a strategic decision not to pursue Owings's confession as its primary theory of defense. Specifically, he testified as follows:

> . . . [W]e felt that trying to present to a jury and convince a jury what the Federal Bureau of Investigations, the Bloomington Police Department, and the Indiana State Police had concluded was false was not a good strategy, that is the Owings' confession. She'd recanted this confession. And they hadn't found Jill Behrman in the . . . in Salt Creek. Rather, she was found . . . her remains were found in

> Morgan County and she . . . hadn't died from drowning but she'd died from 99.9 percent certainty of being shot.

PCR Transcript at 840. For these reasons, a decision not to pursue the Owings theory would clearly reflect a reasonable strategic judgment. Myers, however, asserts that trial counsel did, in fact, pursue the Owings theory at trial, and it was therefore deficient performance not to present more evidence to support it.

[86] The record reveals that trial counsel pursued the Owings theory to some extent. Hugh Baker elicited testimony from Owings on cross-examination that she had discussed Behrman's disappearance with several acquaintances and made incriminating statements to at least one of them. He also elicited testimony from Owings concerning the substance of her confession to police, and the fact that she had first been interviewed in connection with the Behrman case in June of 2000. Trial counsel also touched on the Owings theory with other witnesses throughout trial. Trial counsel elicited testimony from Dr. Radentz that not all of Behrman's bones were recovered, and that it was possible (though unlikely) for her to have been stabbed without leaving marks on her skeletal' remains. Trial counsel also elicited testimony from Detective Lang and FBI Agent Gary Dunn that the FBI had drained part of Salt Creek looking for Behrman's remains, a task which took several weeks. A search of the drained creek yielded a retractable knife, a bungee cord, and two pieces of plastic sheeting, which were

consistent with items Owings mentioned in her confession. Trial counsel also elicited testimony from Agent Dunn that he had received a tip that the body had been moved and presented evidence that Papakhian had reported seeing Behrman on Harrell Road on the morning of her disappearance. In closing arguments, Patrick Baker told the jury that there were two theories leading away from Myers's guilt and toward that of others—the Owings theory and the Hollars theory.

[87] Essentially, Myers argues that trial counsel was obligated to take an all-or-nothing approach to the Owings theory—either forego it entirely or present all evidence supporting it. We are unpersuaded by this argument. It is noteworthy that it was the State who first informed the jury of Owings and her recanted confession in its opening statement. The State did so in an effort to explain the delay in Myers's development as the primary suspect, and presumably to get ahead of any attempt by the defense to cast suspicion on Owings and her alleged accomplices. Likewise, it was the State who called Owings to testify at trial. Under these circumstances, trial counsel did not act unreasonably by making a strategic decision to attempt to present just enough evidence to keep the possibility of Owings's involvement alive in the minds of the jurors, without making the Owings theory the crux of Myers's defense. Indeed, it appears to us that trial counsel's decision to pursue the Owings theory to only a limited extent was actually quite shrewd because it prevented the jury

from being exposed to all of the many conflicting versions of the story Owings, Sowders-Evans, and Clouse allegedly told.[12] This information might have resulted not only in the elimination in the jurors' minds of the possibility that Owings's confession was true, but also in trial counsel's loss of credibility with the jury. As the State argues in its brief, "the best counsel could hope for was to keep Owings on the delicate, razor-thin edge of jurors' credibility assessments. That strategy would have been ruined if counsel had pursued the over-zealous course of action advocated by Myers in this proceeding." *Appellee's Brief* at 50. Accordingly, Myers has not established that trial counsel performed deficiently in this regard.[13]

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[12] Versions of the story were told in which Behrman was struck by a pickup truck, a car, and an SUV. Clouse allegedly told a cellmate that Behrman's body was wrapped in black plastic, while Owings had told the police the plastic was off-white. Some versions of the story varied wildly from Owings's confession to police. For example, both Owings and Sowders-Evans allegedly told others that Behrman's body had been dismembered, and more than one version of the story was told in which Behrman was kept in the trunk of a car for days before being killed. Additionally, Sowders-Evans and Owings both allegedly told stories of killing Behrman that involved a completely different cast of characters than that featured in Owings's confession to the police. Owings allegedly gave one account of Behrman's abduction and murder that included a brutal rape.

[13] To the extent Myers argues that trial counsel failed to investigate and discover additional evidence supporting the Owings theory, we conclude that the limitations on the investigation were the result of trial counsel's reasonable strategic decision to limit reliance on the Owings theory. *See Strickland v. Washington*, 466 U.S. 668.

[88] We also conclude that Myers was not prejudiced by trial counsel's decision not to present additional evidence supporting the Owings theory. Myers makes no argument that counsel failed to present any physical evidence—rather, he claims that counsel should have presented testimony concerning incriminating statements Owings, Clouse, and Sowders-Evans made to others, as well as testimony corroborating parts of Owings's confession and evidence that Sowders-Evans fled the state during the investigation.[14] But the jury was aware of the most powerful evidence against Owings—her own confession to police. The jury was also aware that prior to the discovery of Behrman's remains, police put enough stock into Owings's confession to go to the extreme effort of draining part of Salt Creek, and that some corroborating physical evidence was discovered as a result. Additionally, trial counsel presented evidence that Papakhian had seen Behrman on Harrell Road on the date of her disappearance. Moreover, much of the testimony Myers argues trial counsel should have introduced might have been inadmissible,[15] and

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[14] Myers also argues that trial counsel should have presented evidence that Owings, Clouse, and Sowders-Evans gave false or shaky alibis. We note that Myers has not directed our attention to any evidence that Sowders-Evans ever provided an alibi. Moreover, Myers has not directed our attention to any portion of the record indicating that the jury was presented with evidence that any of the three had ever provided an alibi. Thus, there was no need for counsel to impeach those alleged alibis.

[15] There are obvious hearsay problems with much of this evidence. Myers has made no attempt to establish that the statements at issue

much of the evidence Myers argues corroborated Owings's confession was shaky and could easily be explained away by Owings's testimony that she based parts of her confession on things that had actually happened.[16]

[89] In any event, even if trial counsel had presented a parade of credible witnesses to testify that Owings, Clouse, and/or Sowders-Evans had confessed to hitting Behrman with a car, wrapping her in plastic, stabbing her in the chest, and dumping her body in Salt Creek, the fact remains that the confession simply did not mesh with the physical evidence. Behrman's remains were found in a remote, wooded

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fall within an established exception to the hearsay rule, and we decline to develop this argument on his behalf

[16] In her confession, Owings stated that the night before Behrman's abduction, she and Sowders-Evans walked to a house at the corner of Rockport and That Road and asked to use the telephone. Alice O'Mullane lives at that corner, and she provided an affidavit stating that she remembered two girls coming to her home after midnight and asking to use the phone "[s]ome time in 2002". *PCR Exhibit* 134. Owings also testified that Clouse ran a Jeep off Lampkins Ridge Road while en route to Salt Creek after hitting Behrman with the truck. DL Poer testified at the PCR hearing that in 2000, she lived off of Lampkins Ridge Road and drove a Jeep. Poer recalled almost being run off the road by a red truck in May 2000, but she gave conflicting statements as to the precise date in May. Owings later told Detective Lang that she had made up this portion of the story because she was familiar with the road and knew that people are often run off the road there. Poer also testified that the stretch of road was very dangerous. Given these witnesses' uncertainty concerning the dates of these events, as well as Owings's testimony that she based parts of her story on things that actually happened, we cannot conclude that this evidence would have had a significant impact on the jury.

area, not in Salt Creek. There was no evidence that Behrman had been stabbed or struck by a car, but there was clear evidence that she had been shot in the head with a shotgun at the location where her remains were discovered. Although trial counsel elicited testimony from Agent Dunn that he had received a tip that the body had been moved, evidence was presented that the visibility in Salt Creek was extremely poor, and even the FBI was forced to go to the extreme measure of draining the creek in order to search it. Convincing the jury that Owings, her alleged accomplices, or their associates could have managed to remove the body from the creek would have been challenging, to say the least. Given the numerous, obvious weaknesses of the Owings theory, we cannot conclude that the decision not to pursue the theory to the extent Myers now advocates resulted in prejudice to Myers. Consequently, his claim of ineffective assistance of counsel on this basis fails.

K.

[90] Finally, Myers claims that the cumulative effect of trial counsel's errors amounted to ineffective assistance entitling him to a new trial. We have reviewed each of Myers's claims of error in detail and concluded that none of them amount to ineffective assistance of counsel. Indeed, most of Myers's claims of ineffective assistance are nothing more than quarrels with trial counsel's reasonable strategic decisions. "Alleged '[t]rial irregularities which standing alone do not amount to error do not gain the stature of reversible error when taken

together.'" *Kubsch v. State*, 934 N.E.2d at 1154 (quoting *Reaves v. State*, 586 N.E.2d 847, 858 (Ind. 1992)) (alteration in original). Accordingly, we are unpersuaded by Myers's cumulative error argument.

2.

[91] Next, Myers argues that the State violated his due process rights by failing to disclose all exculpatory evidence to the defense. In *Brady v. Maryland*, the United States Supreme Court held that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." 373 U.S. 83, 87 (1963). In order to prevail on a *Brady* claim, the defendant must establish: "(1) that the prosecution suppressed evidence; (2) that the evidence was favorable to the defense; and (3) that the evidence was material to an issue at trial." *Stephenson v. State*, 864 N.E.2d 1022, 1056-57 (Ind. 2007) (quoting *Conner v. State*, 711 N.E.2d 1238, 1245-46 (Ind. 2000)). Under *Brady*, evidence is considered material if the defendant establishes a reasonable probability that the result of the proceeding would have been different had the State disclosed the evidence. *Stephenson v. State*, 864 N.E.2d 1022. The State will not be found to have suppressed material information if such information was available to the defendant through the exercise of reasonable diligence. *Id.*

[92] Myers concedes that he cannot identify even one specific piece of evidence that the State suppressed. Instead, he asserts that in the course of investigating Myers's post-conviction claims, post-conviction counsel received over 8,000 pages of documents directly from the FBI and the Bloomington Police Department, and the State did not document transferring any of these materials to the defense prior to trial in its discovery notices. At the PCR hearing, however, evidence was presented that trial counsel received additional discovery that was not documented by the State. Patrick Baker testified that discovery was "fluid" and that the State was not always meticulous in documenting what materials it had provided. *PCR Transcript* at 525. Chief Deputy Prosecutor Robert Cline stated that prior to trial, he provided trial counsel with a CD containing 3,000 pages of FBI reports, and possibly other kinds of reports, without documenting the transfer. Additionally, Patrick Baker testified that he reviewed boxes of investigative reports from the FBI, the Indiana State Police, the Bloomington Police Department, and the Indiana University Police Department at the Putnamville State Police Post.[17]

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[17] Myers makes much of the fact that Patrick Baker testified that he read these reports in the post's property room. Sergeant Christopher Lewis, an ISP crime scene investigator, testified that police reports are not kept in the property room. He testified further, however, that reports are kept at the Putnamville Post. Thus, while trial counsel might have been mistaken in stating that he read the reports in the property room, this in no way establishes

[93] We agree with the post-conviction court's conclusion that based on the evidence presented at the PCR hearing, it is unclear whether trial counsel was provided with or had access to all of the relevant investigative reports. Consequently, Myers has not satisfied his burden of establishing that the State suppressed such evidence. Moreover, even if we assume the State failed to disclose some evidence, without knowing what that evidence was, we cannot begin to determine whether it was favorable to the defense and material to an issue at trial, or merely cumulative of what was disclosed to Myers. Additionally, Myers has made no attempt whatsoever to establish that the allegedly suppressed investigative reports were not available to him through the exercise of reasonable diligence. Essentially, Myers asks us to ignore his evidentiary burden and presume not only that investigative reports were suppressed, but also that somewhere among the allegedly suppressed reports, a nugget of evidence satisfying the requirements of *Brady* must exist. This we will not do.

3.

[94] Finally, Myers argues that he is entitled to reversal of his conviction because the State committed prosecutorial misconduct at trial. Specifically, he

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that he did not view the reports at the Putnamville Post. Sergeant Lewis testified further that the systems used to track who has viewed physical evidence held in the property room do not track who has viewed police reports. Thus, the fact that trial counsel's viewing of the police reports was not documented in evidence logs likewise does not establish that he did not view the reports.

asserts that the State committed prosecutorial misconduct by knowingly presenting false evidence and perjured testimony. *See Giglio v. United States*, 405 U.S. 150, 153 (1972) (explaining that "deliberate deception of a court and jurors by the presentation of known false evidence is incompatible with 'rudimentary demands of justice'" (quoting *Mooney v. Holohan*, 294 U.S. 103, 112 (1935)).

[95] Myers has fallen far short of establishing that the complained-of testimony and evidence were false or that the State knew as much. But Myers's claims of prosecutorial misconduct fail for a more fundamental reason. "Post-conviction procedures do not provide a petitioner with an opportunity to present freestanding claims that contend the original trial court committed error." *Wrinkles v. State*, 749 N.E.2d 1179, 1187 n.3 (Ind. 2001). Rather, "'[i]n post-conviction proceedings, complaints that something went awry at trial are generally cognizable only when they show deprivation of the right to effective counsel or issues demonstrably unavailable at the time of trial or direct appeal'" *Bunch v. State*, 778 N.E.2d 1285, 1289-90 (Ind. 2002) (quoting *Sanders v. State*, 765 N.E.2d 591, 592 (Ind. 2002)). "An available grounds for relief not raised at trial or on direct appeal is not available as a grounds for collateral attack." *Canaan v. State*, 683 N.E.2d 227, 235 (Ind. 1997). Myers has made no attempt to establish that his claims of prosecutorial misconduct were demonstrably unavailable at trial or on direct appeal. His claims of prosecutorial misconduct are

freestanding claims of trial error, and as such are not cognizable in this PCR proceeding.

[96]Judgment affirmed.

Vaidik, C.J., and Robb, J., concur.

Appendix C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

JOHN MYERS,	)	
	)	
Petitioner,	)	
	)	No. 1:16-cv-02023-JRS-DML
v.	)	
	)	
SUPERINTENDENT, Indiana State Prison,	)	
	)	
	)	
Respondent.	)	

ORDER GRANTING PETITION
FOR A WRIT OF HABEAS CORPUS

Petitioner John Myers filed a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 in this Court challenging his murder conviction. A jury convicted Mr. Myers of murder in Morgan County, Indiana in 2006. His conviction was affirmed by the Indiana Court of Appeals. He then challenged his conviction in state post-conviction proceedings but was unsuccessful. Mr. Myers now seeks a writ of habeas corpus, arguing that his counsel provided ineffective assistance during trial, the State presented false evidence, and the State withheld exculpatory evidence.

The record presented in this case is massive, involving several thousand pages of grand jury proceedings, trial transcripts, state post-conviction transcripts, and exhibits from those proceedings. The parties' briefing spans three hundred pages. The Court's lengthy ruling is the product of this record.

After reviewing the record and the parties' briefs in detail, the Court concludes that Mr. Myers received ineffective assistance of counsel at trial in violation of his Sixth Amendment rights. Most notably, Mr. Myers's counsel made false statements to the jury during opening arguments, which counsel admitted to the Indiana Supreme Court in a subsequent attorney disciplinary proceeding. He also failed to object to two significant categories of evidence that should not have been presented to the jury. In the end, these serious errors all but destroyed the defense that trial counsel presented to the jury and tainted the entire trial.

In denying Mr. Myers's ineffective-assistance-of-counsel claim, the Indiana Court of Appeals unreasonably applied clearly established Federal law as determined by the United States Supreme Court in *Strickland v. Washington*, 466 U.S. 668 (1984), and *Wiggins v. Smith*, 539 U.S. 510 (2003). When these standards are correctly applied, they reveal that Mr. Myers's counsel's errors "so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Strickland*, 466 U.S. at 686.

A federal habeas court "will not lightly conclude that a State's criminal justice system has experienced the

'extreme malfunctio[n]' for which federal habeas relief is the remedy." *Burt v. Titlow*, 571 U.S. 12, 20 (2013) (alteration in original) (citation omitted). But this case presents a rare instance where this has occurred. Accordingly, Mr. Myers's petition for a writ of habeas corpus is **GRANTED**. A writ of habeas corpus shall issue ordering Mr. Myers's release from custody unless the State elects to retry Mr. Myers within 120 days of the entry of Final Judgment in this action.

A new trial will likely come only at considerable cost—to the State, yes, but, more important, to the victim's family and community still wounded by their tragic loss. Such costs do not enter into the constitutional analysis; and yet, the Court cannot help but express its empathy for those who must bear them for the sake of our Constitution and its protections.

I. BACKGROUND

The factual background necessary to understand Mr. Myers's claims is extensive. The Indiana Court of Appeals summarized much of the factual and procedural background in its opinion denying Mr. Myers post-conviction relief. The Court will set out that background here in full and will discuss the factual background necessary to understand each of Mr. Myers's claims in Part II below.

On appeal from the denial of post-conviction relief, the Indiana Court of Appeals summarized the relevant factual and procedural history as follows:

The facts underlying Myers' conviction were set forth as follows in th[e] [Indiana Court of Appeals'] opinion arising out of his direct appeal:

> In the spring of 2000, John Myers II lived approximately seven tenths of a mile from the intersection of North Maple Grove Road and West Maple Grove Road, at 1465 West Maple Grove Road, north of Bloomington in Monroe County. Myers was on vacation from work the week of May 29 through June 2.
>
> On the morning of May 31, 2000, Jill Behrman, an accomplished bicyclist who had just completed her freshman year at Indiana University, left her Bloomington home to take a bicycle ride. She logged off of her home computer at 9:32 a.m. Behrman did not report to the Student Recreational Sports Center, where she was scheduled to work from noon to 3:00 p.m. that day, nor did she appear at a postwork lunch scheduled with her father and grandparents. Following nationwide search efforts, Behrman's remains were ultimately discovered on March 9, 2003, in a wooded area near the intersection of Warthen and Duckworth Roads in Morgan County. The cause of

her death was ruled to be a contact shotgun wound to the back of the head.

With respect to the events surrounding Behrman's disappearance, one report indicated that a young woman matching Behrman's description was seen riding her bicycle north of Bloomington on North Maple Grove Road at approximately 10:00 a.m. the morning of May 31. A tracking dog later corroborated this report. While another report placed Behrman south of Bloomington at 4700 Harrell Road at approximately 9:38 a.m., some authorities later discounted this report due to her log-off time of 9:32 a.m. and the minimum fourteen minutes it would take to bicycle to Harrell Road. The tracking dog did not detect Behrman's scent trail south of Bloomington.

At approximately 8:30 a.m. on the morning of May 31, 2000, in the North Maple Grove Road area, a witness saw a white "commercial looking" Ford van without identification on its doors or sides drive slowly past his driveway on North Maple Grove Road, heading south. Two men were inside the van. This witness saw the van two additional times that morning by approximately 9:00 a.m. and later identified the van as

"exactly like" a Bloomington Hospital van.

At some point before noon on May 31, 2000, another witness saw a bicycle later determined to be Behrman's lying off of the east side of North Maple Grove Road near the intersection of North Maple Grove Road and West Maple Grove Road. The location of the bicycle was approximately one mile from Myers' residence and ten and one-half miles from Behrman's house.

On May 31, the date of Behrman's disappearance, two witnesses separately noted that the windows in Myers' trailer were covered, which was unusual. One of these witnesses also observed that Myers' car was parked fifty yards from its normal location and remained out of sight from the road for approximately three days. Myers told this witness that he had parked his car in that secluded spot because he did not want anyone to know he was home.

Myers' account of his activities during his vacation week of May 29 through June 2 was reportedly that he was "here and there." Myers' employer at the time was the Bloomington Hospital warehouse, where he had access to two white panel Ford vans. Besides being

"here and there," Myers indicated that he had been mostly at home, that he had gone to a gas station, and that he had gone to Kentucky Kingdom but found it was closed. Myers additionally stated that he and his girlfriend, Carly Goodman, had cancelled their plans to go to Myrtle Beach, South Carolina, and to Kings Island, Ohio, that week. Phone calls made from Myers' trailer on May 31 were at the following times: 9:15 a.m.; 9:17 a.m.; 9:18 a.m.; 10:37 a.m.; 10:45 a.m.; and 6:48 p.m. [Mr. Myers made these calls.] The calls were to drive-in theaters and various state parks.

Myers was reportedly almost hysterical on May 31 and spoke of leaving town and never coming back. Myers' aunt, Debbie Bell, observed that Myers had been very depressed in the preceding month and believed that this was due to problems with his girlfriend. In late April 2000, Myers had called Bell because he had been having problems with his girlfriend and felt like "a balloon full of hot air about to burst."

Carly Goodman was Myers' girlfriend beginning in approximately late October 1999. In March of 2000, Myers took Goodman for a long drive through Gosport, "over a bridge where there

was a creek and into some woods." Myers pulled his car into a clearing in the woods where the two of them argued, which scared Goodman. Although it was nighttime, Goodman observed the appearance of this clearing from the car's headlights. In late April or early May of 2000, Goodman broke off her relationship with Myers. Goodman denied that she and Myers had ever made plans to go to Myrtle Beach or to Kings Island the week of May 29.

On June 5, 2000, Bell again spoke with Myers. Myers mentioned that a girl had been abducted in the area, and he was afraid he would be blamed for it. Myers further stated that the girl's bicycle had been found about a mile from his house and that "they blame [him] for everything." Myers additionally asserted, "[T]hey haven't found her body yet" and guessed that the girl was dead. In that same conversation, Myers indicated that he had been stopped by a roadblock and was "scared" of roadblocks, but he later changed his mind, laughed, and said he was not really "scared."

Following a tip due to this conversation, on June 27, 2000, Detective Rick

Crussen of the Bloomington Police Department interviewed Jodie [Myers] and Myers' father, John Myers Sr., at their residence at 3909 West Delap Road. The following day, Detective Crussen interviewed Myers.

On June 27, 2000, immediately after Detective Crussen interviewed Myers' parents and the day before he interviewed Myers, Myers called his grandmother, Betty Swaffard, and asked to borrow $200. Myers told Swaffard he was unable to come to her house for the money because there were roadblocks on Maple Grove Road, and he did not want to leave his home. Myers additionally stated that he was a suspect in the Jill Behrman disappearance. Myers did not come to Swaffard's home for the money.

In July 2000, Bell noticed that John Myers Sr. was unusually nervous and agitated when in Myers' presence. Sometime in approximately August of 2000, Myers' brother, Samuel, who owned a twelve-gauge shotgun and had stored it at his parents' house on Delap Road since approximately 1997, noted that the gun was missing.

Myers raised the topic of Behrman's disappearance multiple times and in

multiple contexts following her disappearance. Before Detective Crussen interviewed him, Myers falsely stated to his Bloomington Hospital supervisor that police had questioned him in connection with Behrman's disappearance because her bicycle was found close to his home. Also in June of 2000, Myers stated to a co-worker that he wondered whether authorities had investigated a barn in a field located on Bottom Road off of Maple Grove Road. Additionally, some weeks after Behrman disappeared, Myers told another co-worker during a delivery run that Behrman's bicycle was found in his neighborhood, and that Behrman was probably abducted near that site. Later in 2000 or 2001, while driving with his then-girlfriend, Kanya Bailey, Myers directed Bailey's attention to a location a short distance from his mother's residence and stated he had found Behrman's bicycle there.

In the late spring to late summer of 2001, Myers again raised the topic of Behrman's disappearance with another co-worker. As the two were driving on Bottom and Maple Grove Roads, Myers pointed out where he lived and stated that Behrman's bicycle had been found close to where he used to live. A short

time later, while on Maple Grove Road, Myers stated that if he was ever going to hide a body he would hide it in a wooded area up "this way," pointing north. On another occasion, Myers stated to this co-worker that he knew of someone in Florida who had Behrman's identification card or checkbook.

Sometime in November or December of 2001, Myers raised the topic of Behrman's disappearance with a family member, indicating his bet that Behrman would be found in the woods. During this conversation, Myers further indicated his familiarity with the Paragon area and with Horseshoe Bend, where he liked to hunt.

Also in 2001, Myers stated to his mother, Jodie, that he had been fishing in a creek and had found a pair of panties and a bone in a tree. Jodie suggested that this might be helpful in the Behrman case, and Myers agreed to call the FBI. FBI Agent Gary Dunn later returned the call and left a message. Myers told Jodie that they should save the answering machine tape in case they were questioned.

Sometime in 2002, Wendy Owings confessed to Behrman's murder, claiming that she, Alicia Sowders-

Evans, and Uriah Clouse struck Behrman with a car on Harrell Road, stabbed her with a knife in her chest and heart, wrapped her body in plastic tied with bungee cords, and disposed of her body in Salt Creek. In September 2002, authorities drained a portion of Salt Creek. They found, among other things, a knife, a bungee cord, and two sheets of plastic. Owings later recanted her confession.

On March 27, 2002, Myers, who at the time was in the Monroe County Jail on an unrelated charge, told Correctional Officer Johnny Kinser that he had found some letters in some food trays one morning that he believed Kinser should look at, apparently in connection with the Behrman disappearance. Myers said he felt bad about what had happened to that "young lady" and that he wished to help find her if he could. Myers additionally compiled a list of places potentially providing clues to Behrman's location. Indiana State Police Trooper James Minton investigated the list, including gravel pits off of Texas Ridge Road between Stinesville and Gosport. A route from Gosport to the intersection of Warthen and Duckworth Roads in Morgan County passes by Horseshoe Bend.

On March 9, 2003, Behrman's remains were discovered by a hunter in a wooded area near the intersection of Warthen and Duckworth Roads in Morgan County approximately thirty-five to forty yards from a clearing in the timber north of Warthen Road. Authorities recovered approximately half of the bones in Behrman's skeleton. No soft tissue remained. Six rib bones were among the bones missing from her skeleton. There was no evidence of stab or knife wounds, nor was there evidence of blunt force trauma. Investigators recovered a shotgun shell wadding from the scene, as well as 380 number eight shot lead pellets. The wadding found at the scene was typical of a twelve-gauge shotgun shell wadding. The cause of Behrman's death was ruled to be a contact shotgun wound to the back of the head. Scattered skull fragments and the presence of lead pellets in a variety of places, together with certain soil stains consistent with body decomposition, suggested that after being shot, Behrman's body had come to rest and had decomposed at the spot where it was found. No clothing was found at the scene. There is nothing in the record to clarify whether Behrman's clothing, if it had been left at the scene, would or would not have completely

disintegrated prior to her body being found.

In March 2003, Myers told another co-worker, who had brought a newspaper to work announcing the discovery of Behrman's remains, that the woods pictured in the newspaper article looked familiar to him, and that he had hunted there before. According to this co-worker, the woods pictured in the newspaper article did not appear distinctive. Myers also stated that it was good that Behrman had been found and that he was surprised that he had not been contacted because he knew the people who police thought had committed the crime. Myers knew Wendy Owings, who had falsely confessed to the crime, as well as Uriah Clouse and Alicia Sowders-Evans. Myers had a "cocky" tone of voice when he made these comments, according to the co-worker.

More than a year later, in November 2004, Myers called his grandmother, Swaffard. Myers, who was upset and stated that he needed time to himself, said to Swaffard, "Grandma, if you just knew the things that I've got on my mind. [I]f the authorities knew it, I'd be in prison for the rest of my life." Myers

further stated that his father, John Myers Sr., "knew" and had "[taken] it to the grave with him." Subsequently, when Myers arrived at Swaffard's house, he said with tears in his eyes, "Grandma, I wish I wasn't a bad person. I wish I hadn't done these bad things."

Indiana State Police Detectives Tom Arvin and Rick Lang interviewed Myers again on May 2, 2005. During this taped interview, Myers denied having told anyone in his family that he was "scared" of the roadblocks or that he had talked to anyone besides the police about the case. Also in May of 2005, Myers, who was again in the Monroe County Jail on an unrelated charge, mentioned to his bunkmate that the state police were investigating him because Behrman's bicycle had been found in the vicinity of his house. Myers made approximately three or four references to Behrman's bicycle and was nervous and pacing at the time. During that conversation, Myers, who was also angry, made reference to the "bitch," and stated to this bunkmate, "[I]f she [referring to Behrman] wouldn't have said anything, . . . none of this would have happened."

> On February 17, 2006, Detective Lang took Goodman on a thirty-six-mile drive north of Myers' home on Maple Grove Road and into rural Morgan County. Goodman recognized a clearing in the woods near the corner of Warthen and Duckworth Roads, approximately thirty-five to forty yards from where Behrman's remains were discovered, as the place that Myers had driven her in March 2000.
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> *Myers v. State*, 887 N.E.2d 170, 176-80 (Ind. Ct. App. 2008) [("*Myers I*")] (footnotes and citations to the record omitted), *trans. denied*.

Myers v. State, 33 N.E.3d 1077, 1083-88 (Ind. Ct. App. 2015) (footnote omitted) ("*Myers II*").[1]

Various law enforcement agencies began investigating Ms. Behrman's disappearance after she was reported missing, including the Bloomington Police Department and the Indiana State Police and agencies from surrounding counties. Agent Gary Dunn of the Federal Bureau of Investigation ("FBI") became involved in the search for Ms. Behrman on June 4, 2000, and was the lead investigator until his retirement in

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[1] The Indiana Court of Appeals in *Myers I* stated that Mr. Myers's mother, Jodie Myers, made the phone calls from Mr. Myers's trailer the day Ms. Behrman disappeared. But in *Myers II*, the Indiana Court of Appeals recognized that this was incorrect. 33 N.E.3d at 1085 n.1. It is undisputed that Mr. Myers made these calls, and thus the Court altered the above recitation of the facts to so reflect.

January 2003. Ms. Behrman's remains were discovered in March 2003. From this time through trial, Indiana State Police Detectives Rick Lang and Tom Arvin lead the investigation.

Mr. Myers was indicted by a grand jury for murder in April 2006. A twelve-day jury trial began on October 16, 2006. Mr. Myers was found guilty and sentenced to sixty-five years' imprisonment. Mr. Myers's conviction was affirmed on direct appeal. *See Myers I*, 887 N.E.2d at 197.

Mr. Myers petitioned for post-conviction relief in state court. The state post-conviction court denied relief. The Indiana Court of Appeals affirmed the denial of post-conviction relief. *See Myers II*, 33 N.E.3d at 1083. Mr. Myers filed a petition to transfer with the Indiana Supreme Court, and it denied transfer on November 10, 2015. *See Myers v. State*, 40 N.E.3d 858 (Ind. 2015). He then filed the instant petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. The parties have submitted five briefs, and Mr. Myers's habeas petition is now ripe for ruling.

II. LEGAL STANDARDS

A federal court may grant habeas relief only if the petitioner demonstrates that he is in custody "in violation of the Constitution or laws . . . of the United States." 28 U.S.C. § 2254(a). The Antiterrorism and Effective Death Penalty Act ("AEDPA") of 1996 directs how the Court must consider petitions for habeas relief under § 2254. "In considering habeas corpus petitions challenging state court convictions, [the Court's] review

is governed (and greatly limited) by AEDPA." *Dassey v. Dittmann*, 877 F.3d 297, 301 (7th Cir. 2017) (en banc) (citation and quotation marks omitted). "The standards in 28 U.S.C. § 2254(d) were designed to prevent federal habeas retrials and to ensure that state-court convictions are given effect to the extent possible under law." *Id.* (citation and quotation marks omitted).

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

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

28 U.S.C. § 2254(d).

"The decision federal courts look to is the 'last reasoned state-court decision' to decide the merits of the case, even if the state's supreme court then denied discretionary review." *Dassey*, 877 F.3d at 302 (quoting *Johnson v. Williams*, 568 U.S. 289, 297 n.1 (2013)). "Deciding whether a state court's decision 'involved' an unreasonable application of federal law or 'was based on' an unreasonable determination of fact requires the federal habeas court to train its attention on the particular reasons—both legal and factual—why state

courts rejected a state prisoner's federal claims, and to give appropriate deference to that decision[.]" *Wilson v. Sellers*, 138 S. Ct. 1188, 1191-92 (2018) (citation and quotation marks omitted). "This is a straightforward inquiry when the last state court to decide a prisoner's federal claim explains its decision on the merits in a reasoned opinion." *Id.* "In that case, a federal habeas court simply reviews the specific reasons given by the state court and defers to those reasons if they are reasonable." *Id.*

"For purposes of § 2254(d)(1), an unreasonable application of federal law is different from an incorrect application of federal law." *Harrington v. Richter*, 562 U.S. 86, 101 (2011). "A state court's determination that a claim lacks merit precludes federal habeas relief so long as fairminded jurists could disagree on the correctness of the state court's decision." *Id.* "If this standard is difficult to meet, that is because it was meant to be." *Id.* at 102. "The issue is not whether federal judges agree with the state court decision or even whether the state court decision was correct. The issue is whether the decision was unreasonably wrong under an objective standard." *Dassey*, 877 F.3d at 302. "Put another way, [the Court] ask[s] whether the state court decision 'was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement.'" *Id.* (quoting *Richter*, 562 U.S. at 103). "The bounds of a reasonable application depend on the nature of the relevant rule. The more general the rule, the more leeway courts have in reaching outcomes in case-by-case determinations." *Schmidt v. Foster*, 911 F.3d 469, 477

(7th Cir. 2018) (en banc) (citation and quotation marks omitted).

III. DISCUSSION

Mr. Myers raises three constitutional claims in his habeas petition: (1) trial counsel[2] provided ineffective assistance in violation of the Sixth Amendment; (2) the State violated his due process rights by presenting false evidence to the jury; and (3) the State violated his due process rights by failing to disclose all exculpatory evidence. The respondent maintains that Mr. Myers is not entitled to habeas relief on any of these claims. The Court concludes that Mr. Myers is entitled to relief on his ineffective-assistance-of-counsel claim, and thus the Court will not reach his other two claims.

A criminal defendant has a right under the Sixth Amendment to effective assistance of counsel. *See Strickland*, 466 U.S. at 687. For a petitioner to establish that "counsel's assistance was so defective as to require reversal," he must make two showings: (1) that counsel

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[2] Mr. Myers was represented by Patrick Baker, Hugh Baker, and Mike Keifer. The Court will use the term "trial counsel" and the pronoun "he" to refer to all three attorneys but will refer to the attorneys by name when appropriate or necessary. Patrick Baker and Hugh Baker represented Mr. Myers during trial, with Patrick Baker serving as lead counsel. Mike Keifer only entered an appearance to read the grand jury transcripts. He testified during the post-conviction hearing that he read no more than half of the grand jury transcripts and shared comments on them and that he may have assisted with the jury questionnaires, but he declined Patrick Baker's offer to assist with trial because he did not have time. *See* PCR Tr. 1071-73.

rendered deficient performance that (2) prejudiced the petitioner. *Id.* "This inquiry into a lawyer's performance and its effects turns on the facts of the particular case, which must be viewed as of the time of counsel's conduct." *Laux v. Zatecky*, 890 F.3d 666, 673-74 (7th Cir. 2018) (citation and quotation marks omitted). "As for the performance prong, because it is all too easy to conclude that a particular act or omission of counsel was unreasonable in the harsh light of hindsight, *Strickland* directs courts to adopt a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Id.* at 674 (citation and quotation marks omitted). "The prejudice prong requires the defendant or petitioner to 'show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'" *Id.* (quoting *Strickland*, 466 U.S. at 694).

The Indiana Court of Appeals in *Myers II* resolved several of the instances where Mr. Myers asserted his counsel provided ineffective assistance by addressing only one of the two *Strickland* prongs. In these instances, this Court reviews the unaddressed prong *de novo* rather than through AEDPA's deferential lens. *See Harris v. Thompson*, 698 F.3d 609, 625 (7th Cir. 2012) ("[When] the state courts address one prong of the two-prong *Strickland v. Washington* test for ineffective assistance of counsel[] but not the other[,] . . . federal courts apply AEDPA deference to the prong the state courts reached but review the unaddressed prong *de novo*."); *Sussman v. Jenkins*, 636 F.3d 329, 350 (7th Cir. 2011) ("[I]f a state court does not reach either the issue

of performance or prejudice on the merits, then "federal review of this issue 'is not circumscribed by a state court conclusion,' and our review is *de novo*." (citation and quotation marks omitted)); *see also Porter v. McCollum*, 558 U.S. 30, 38 (2009); *Rompilla v. Beard*, 545 U.S. 374, 390 (2005).

The Indiana Court of Appeals in *Myers II* assessed each allegation of ineffective assistance individually, denying it on either the performance prong, the prejudice prong, or both. But as discussed in further detail below, if counsel rendered deficient performance in multiple respects, the prejudice from each error cannot be adjudged in isolation. *See Hooks v. Workman*, 689 F.3d 1148, 1188 (10th Cir. 2012) (noting that resolving each allegation of ineffective assistance on prejudice grounds is "not . . . sufficient to dispose of [an ineffective assistance] claim because a further analysis of 'cumulative prejudice' [is] necessary"). The prejudice inquiry requires the Court to "evaluate the totality of the available . . . evidence—both that adduced at trial and the additional available evidence that adequate counsel would have procured." *Harris*, 698 F.3d at 648. "The 'predictive judgment' [required by *Strickland*'s prejudice analysis] does not depend 'on the notion that a single item of omitted evidence . . . would require a new hearing.'" *Id.* (quoting *Williams v. Taylor*, 529 U.S. 362, 397 (2000)). Instead, the Court " must assess 'the totality of the omitted evidence' under *Strickland* rather than the individual errors," *Washington v. Smith*, 219 F.3d 620, 634-35 (7th Cir. 2000) (quoting *Strickland*, 466 U.S. at 695), and determine whether trial counsel's

unprofessional errors prejudiced the defense, *id.* (citation and quotation marks omitted).

Accordingly, the Court will not assess each allegation of ineffective assistance in isolation. Instead, the Court will first determine whether trial counsel's performance was deficient in each of the ways alleged by Mr. Myers. The Court will then consider whether the cumulative impact of all trial counsel's errors prejudiced Mr. Myers.

A. Deficient Performance

Mr. Myers contends that trial counsel provided deficient performance in thirteen different ways. Ultimately, the Court concludes that trial counsel's performance was deficient in three respects: he made two false statements to the jury during opening, he failed to object to inadmissible bloodhound evidence, and he failed to object to evidence that Ms. Behrman was raped before she was murdered. In the end, the cumulative prejudice flowing from these errors is sufficient to entitle Mr. Myers to relief. Therefore, the Court need not definitively decide two of the allegations of deficient performance. Nevertheless, all thirteen allegations of deficient performance, including those not ultimately decided, are discussed in turn.

1. Presentation of Mr. Myers's Interview with Law Enforcement

Mr. Myers first argues that trial counsel's performance was deficient for failing to present a portion of his interview by law enforcement to the jury.

The Court begins with how and what portions of Mr. Myers's interview were presented to the jury.

Mr. Myers was twice interviewed by law enforcement regarding Ms. Behrman's murder on May 2, 2005, for a total of five hours. The first portion of this interview, conducted by Detective Lang and Detective Arvin, occurred before Mr. Myers was arrested for an unrelated offense (the "pre-arrest interview"). After he was arrested and booked into jail, the interview continued with those two detectives and Detective Heck (the "post-arrest interview"). The parties and trial judge discussed this interview and the redaction of it on several occasions throughout the trial. *See*, *e.g.*, Trial Tr. 407-09, 1391-96, 1861-69, 2314-18. [3] Ultimately, a redacted portion of the pre-arrest interview was played for the jury. *See id.* at 2390; Trial Ex. 96B. But the jury did not hear any portion of the post-arrest interview.

During both the pre- and post-arrest interviews, Mr. Myers consistently denied any involvement in Ms. Behrman's murder and disclaimed any knowledge of it. The jury heard many of these denials during the portions of the pre-arrest interview played during trial. For example, the jury heard Mr. Myers state he does not have "a clue" about the case, Trial Ex. 96B at 13; that he

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[3] The Court uses the following citation format throughout this Order: "Trial Tr." – Trial Transcripts; "Trial Ex." – State's Trial Exhibit; "D. Trial Ex." – Defendant's Trial Exhibit; "DA App." – Direct Appeal Appendix; "PCR Tr." – Post-Conviction Hearing Transcript; "PCR Ex." – Post-Conviction Exhibit; "GJ Tr." – Grand Jury Transcript (admitted as PCR Ex. 248); "GJ Ex." – Grand Jury Exhibit (admitted as PCR Ex. 244).

has "never . . . been around any of this," has "no knowledge of [it]," and that if he did he "would be more than happy" to tell them about it, *id.* at 89; when asked about his DNA, that they would "not find any of [his] DNA anywhere because [he has] got nothing to do with [it]," *id.* at 91; and, even though detectives pretended to have a letter from Mr. Myers's father stating that Mr. Myers confessed to him, Mr. Myers denied confessing to his father because he "didn't have anything to do with the Behrman case and [has] no knowledge other than what [he] ha[d] seen in the newspapers and what [he] ha[d] heard [as] street rumor," *id.* 91-92.

Because trial counsel agreed not to submit any of the post-arrest interview to the jury, they did not hear any of Mr. Myers's denials during that interview. Mr. Myers argues that trial counsel provided deficient performance by agreeing not to redact and present the post-arrest interview to the jury. He maintains that this was the "most exculpatory" portion of the interview because it contains "ten denials" of his involvement in Ms. Behrman's murder. Filing No. 9 at 24.

Mr. Myers indeed continued to assert his innocence throughout the post-arrest interview. For example, after the detectives told Mr. Myers they were going to test his DNA against evidence they had recovered, Mr. Myers asked if he would get to leave after the DNA "comes back and proves that I'm telling the truth here." PCR Ex. 305A at 139. Later during the post-arrest interview, Mr. Myers continued to assert his innocence, stating "I didn't kill Jill Behrman and I have no involvement with Jill Behrman . . . I don't know how to

convince you of that," *id.* at 204, and "I hate being a broken record for you all but I don't . . . not only was I not involved but my knowledge is . . . at zero," *id.* at 229.

The parties had multiple discussions about the May 2 interview and redacting it for the jury during the trial. These discussions provide necessary context for understanding the Indiana Court of Appeals' decision on this allegation of deficient performance and Mr. Myers's arguments as to why it was flawed. At the outset of trial, it appears trial counsel did not realize that certain statements the State attributed to Mr. Myers were from the May 2 interview. *See* Trial Tr. 407. This is supported by the State's representation that trial counsel was instructed by the trial judge to redact the statement but had not yet done so. *See id.* at 408. The trial judge asked Patrick Baker whether he had redacted the statement, and although he responded "[i]n part," he immediately clarified that he was referring to "what we addressed here today," which was very little, if any, of the statement. *Id.* at 409.

On the morning of the fifth day of trial, Friday, October 20, 2006, the parties again discussed the redaction of the May 2 interview because the State had filed a motion to impose a deadline on trial counsel to redact the interview. *See* Trial Tr. 1391. After some initial confusion by trial counsel as to whether he had "the entire" statement, trial counsel acknowledged that he did. *Id.* at 1394-95. Trial counsel informed the trial court that the redaction would be complete on the following Monday morning, October 23. *Id.* at 1396.

On the morning of October 23, Hugh Baker informed the trial court that he "spent all day yesterday reviewing the statement of . . . the defendant," and he would have the proposed redactions complete "by noon" or "certainly by the end of the day." *Id.* at 1861. Hugh Baker forewarned the trial court that he found much of the interview objectionable; for example, he pointed out that "there are numerous numerous pages where the interrogator is not asking questions but is simply engaging in . . . psycho babble, attempting to extricate a confession." *Id.* at 1862. After Hugh Baker said the interview was 246 pages, the State interjected that an agreement had been reached with Patrick Baker that they would stop at page 136 (i.e., the end of the pre-arrest interview). *Id.* at 1863. Patrick Baker stated that he made no such agreement. *Id.* The trial judge then questioned why they would spend time redacting the pages after page 136 if they were only presenting up through page 136, to which Hugh Baker responded, "we probably can live with that." *Id.* at 1864.

Hugh Baker elaborated on his decision to not present any of the post-arrest interview: "I've reviewed the [interview] carefully because I wanted to look at the number of times that the Defendant denied being involved in this and . . . the tactics used." *Id.* He then explained that as long as he could question Detective Lang how long the entire interview lasted, he did not need to present the specific contents of the post-arrest interview. *Id.* at 1865-68; *see also id.* at 2317 (trial counsel arguing to the trial court, "I don't think it's misleading that the exact questioning [during the post-arrest interview] is redacted. The time period is what is

crucial here."). The trial court suggested that if they only presented the pre-arrest interview, the length of the post-arrest interview was irrelevant. *Id.* at 1868-69. In the end, Hugh Baker agreed with the trial court that he would focus on the first 136 pages, and the trial court would "hear objections if you start drilling into other stuff." *Id.* at 1869.

Despite this conversation, trial counsel began its cross-examination of Detective Arvin by asking him the length of the full interview. Detective Arvin testified, "there were two interviews that I was present for. The first one was approximately an hour and a half maybe. And the other one was probably an hour, hour and fifteen minutes." *Id.* at 2211. Although Detective Arvin underestimated the total length of the two interviews (which was approximately five hours), he alerted the jury to the fact that there were two interviews that together lasted substantially longer than the interview the jury would hear.

Detective Arvin's testimony led the State to file a motion in limine on the morning of October 25. The State moved to prohibit, among other things, references to the length of the interview since the post-arrest interview would not be presented to the jury. *Id.* at 2314-15. After some discussion, the trial court granted the motion, and instructed trial counsel to "frame your questions focusing on not specific time periods but the interview took [a] long time," thus allowing trial counsel to say that it went on for a "very long time," but "without specifying five hours." *Id.* at 2318.

Again, Mr. Myers maintains that trial counsel provided deficient performance by agreeing to not present the post-arrest interview to the jury. The Indiana Court of Appeals addressed this claim on the merits in *Myers II*, concluding that trial counsel's performance was not deficient nor was Mr. Myers prejudiced by it. It found, in relevant part:

> We have reviewed both the redacted and unredacted interrogation, and Myers has not established either deficient performance or prejudice stemming from the redaction of the post-arrest interview. The post-arrest interview contained several long monologues in which the interviewer attempted to appeal to Myers' moral sensibilities, followed by relatively short responses from Myers. Some of these monologues spanned several pages of transcript and made specific reference to Myers' past substance abuse and recovery process. The trial court described the post-arrest interview as largely filled with "a lot of irrelevant gibberish" that "add[ed] nothing to the factual determination in this case." Trial Transcript at 26. We think this is a fair characterization. Although Myers continued to proclaim his innocence in the post-arrest interview, his denials of involvement were merely cumulative of his previous statements in the pre-arrest interview, which the jury heard. Myers also made statements in the post-arrest interview that the jury could have viewed as flippant under the circumstances. For example, at one

> point, Myers stated, "you know, as we're sitting there talking, I'm thinking cigarettes, I'm thinking coffee[.]" PCR Exhibit 305A at 154. It was not deficient performance for trial counsel to agree to redact the post-arrest interview in its entirety because it could have harmed Myers and, in any event, would have added little, if anything, to the pre-arrest interview. For the same reason, Myers was not prejudiced by the redaction.

Myers II, 33 N.E.3d at 1090.

Mr. Myers contends that the Indiana Court of Appeals' decision is an unreasonable application of *Strickland*. As an initial matter, Mr. Myers appears correct that trial counsel did not review the entire interview until five days into trial. *See* Filing No. 33 at 20-23. This is, at minimum, troubling. But while this failure perhaps informs trial counsel's approach to the post-arrest interview, it is not the core of Mr. Myers's claim. Rather, his claim is that trial counsel provided deficient performance by failing to present the post-arrest interview to the jury. *See* Filing No. 9 at 24.

As to this specific claim, the record reveals that trial counsel agreed to not present the post-arrest interview to the jury only after he had reviewed the entire interview. *Id.* at 1861. Trial counsel did so on the basis that he could still question law enforcement regarding the length of both interviews. Although the trial court ultimately ruled that such questions were inappropriate, *id.* at 2318, it did so only after trial counsel elicited from Detective Arvin that there were two interviews that

together were significantly longer than the audio clip the jury would hear, *id.* at 2211. Thus, trial counsel's objective was at least partially achieved.

In light of the foregoing, it is difficult to see how Mr. Myers has carried his burden to establish that the Indiana Court of Appeals' resolution of the performance prong was an unreasonable application of *Strickland*.[4] As correctly explained by the Indiana Court of Appeals, "the post-arrest interview contained several long monologues in which the interviewer attempted to appeal to Myers's moral sensibilities, followed by relatively short response from Myers." *Myers II*, 33 N.E.3d at 1090; *see, e.g.*, PCR Ex. 305A at 219-27. Mr. Myers is correct that the post-arrest interview also contained several additional denials of his involvement with Ms. Behrman's murder, but the Indiana Court of Appeals again correctly observed that "his denials of involvement were merely cumulative of his previous statements in the pre-arrest interview, which the jury heard." *Myers II*, 33 N.E.3d at 1090. Finally, the Indiana Court of Appeals was correct that Mr. Myers made statements during the post-arrest interview that the jury may have viewed as flippant, such as his statement, "'you know, as we're sitting there talking, I'm thinking

[4] To the extent that Mr. Myers argues that his counsel's failure permitted the State to present a false picture of the May 2 interview, that argument is addressed below.

cigarettes, I'm thinking coffee.'"[5] *Id.* (quoting PCR Ex. 305A at 154); *see also*, *e.g.*, PCR Ex. 305A at 186.

To summarize, Mr. Myers's trial counsel decided that he need not present the post-arrest interview—even though he knew it contained additional denials of involvement that were generally helpful, *see* PCR Tr. 593—so long as he could put before the jury the length of the interrogation and the tactics used, which he at least did in part. This allowed him to attack the methods used to interrogate Mr. Myers, while not presenting the jury with cumulative denials that were mixed in amongst certain unfavorable statements by Mr. Myers and "several long monologues," *id.*, or in trial counsel's

[5] Mr. Myers argues that, had trial counsel's performance not been deficient, much of the unfavorable portions of the post-arrest interview would have been redacted, as was true for the pre-arrest interview. This is undoubtedly true for certain portions of the post-arrest interview. For example, the trial court excluded all reference to polygraphs, Trial Tr. 331, so such references in the post-arrest interview would not have been presented to the jury. But Mr. Myers does not explain on what basis other unfavorable portions of the post-arrest interview would have been redacted. This is true not only for the "I'm thinking cigarettes" comment on which the Indiana Court of Appeals relied, but also similarly unfavorable comments. For example, Mr. Myers responded to a lengthy monologue by Detective Heck— during which he stated that Mr. Myers's body language showed he wanted to "get rid" of his burden caused by his involvement in Ms. Behrman's murder—by stating, "My body language wants a cigarette." PCR Ex. 305A at 186. Thus, Mr. Myers has failed to show that the Indiana Court of Appeals was mistaken in concluding that portions of the post-arrest interview would not be favorable to Mr. Myers.

words, "numerous pages . . . [of] psycho babble."[6] Trial Tr. 1862. The Indiana Court of Appeals relied on these factors to conclude that trial counsel's performance was not deficient because his approach to the post-arrest interview was a reasonable trial strategy.

The Supreme Court made clear in *Strickland* that "strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable[.]" *Strickland*, 466 U.S. at 690-91; *see United States v. Jansen*, 884 F.3d 649, 656 (7th Cir. 2018) ("Generally when an attorney articulates a strategic reason for a decision, the court defers to that choice." (citation and quotation marks omitted)). Because the record is not inconsistent with its assessment that trial counsel made a strategic decision not to present the post-arrest interview to the jury, the Indiana Court of Appeals did not unreasonably apply *Strickland*.

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[6] Mr. Myers argues that the Indiana Court of Appeals engaged in post-hoc rationalization of trial counsel's strategy, which is forbidden when assessing counsel's performance. *See Wiggins v. Smith*, 539 U.S. 510, 526-27 (2003). Unlike in *Wiggins*, the Indiana Court of Appeals' recitation is a fair approximation of what the record reveals trial counsel's strategy appeared to be at the time. Of course, counsel's strategy is not always apparent from the trial records (or their post-conviction testimony). But it appears from the trial records that, after reviewing the entire statement, trial counsel did not believe that the additional cumulative denials were helpful enough to outweigh exposing the jury to "numerous pages . . . of psycho babble." Trial Tr. 1862. As explained above, trial counsel's expressed strategy at the time was to tell the jury that there were two interviews lasting five hours and was at least partially successful in pursuing this strategy.

2. Failure to Object to Testimony and Arguments Regarding the May 2, 2005 Interview That Inaccurately Describe the Interview

Mr. Myers's second allegation of deficient performance also relates to the May 2, 2005 interview. He argues that trial counsel failed to object to certain testimony and arguments by the State that were "inaccurate and inadmissible." Filing No. 9 at 26. Specifically, Mr. Myers contends that trial counsel should have objected to the following: (1) the State argued during opening that Mr. Myers was "nonchalant" during the interview, Trial Tr. 460, and Detective Arvin testified that Mr. Myers was "cavalier," "nonchalant," and "rehearsed," during the interview, *id.* at 2207, 2244; (2) Detective Arvin testified that Mr. Myers "never adamantly denied" the crime and "never expressly denied it," *id.* at 2211-12; and (3) Detective Lang testified that he did not expect Mr. Myers to confess during the interview based on his "prior intelligence" and because "murder . . . is one of the least [sic] things somebody's going to confess to," *id.* at 2380-81.

The Indiana Court of Appeals addressed these arguments on the merits in *Myers II*. It "[a]ssum[ed] *arguendo* that the testimony was objectionable," but concluded that Mr. Myers could not establish prejudice from any of trial counsel's alleged failures. *Myers II*, 33 N.E.3d at 1090. Because the Indiana Court of Appeals did not address trial counsel's performance, this Court must review it *de novo*. *See Porter*, 558 U.S. at 38; *Rompilla*, 545 U.S. at 390.

Mr. Myers fails to develop his arguments with respect to these allegations of deficient performance. To the extent he points to these statements as part of the prejudice flowing from trial counsel's failure to admit the post-arrest interview, *see* Filing No. 9 at 26; Filing No. 33 at 25-26, trial counsel's performance was not deficient for the reasons outlined above and thus prejudice need not be assessed. If Mr. Myers meant them to be standalone allegations of deficient performance, he has not attempted to explain why an objection to any of the above challenged statements would have been sustained. This is perhaps why the Indiana Court of Appeals thought it easier to resolve these allegations of ineffective assistance on the prejudice prong. Before doing so, it noted that the "sum total of [Mr.] Myers' argument that this testimony was inadmissible is contained in . . . [one] conclusory statement in his appellant's brief" that the "opinion evidence offered by [Detective] Arvin was objectionable, irrelevant and prejudicial." *Myers II*, 33 N.E.3d at 1090 (quotation marks omitted).

Without further development of these claims, Mr. Myers has failed to demonstrate that the challenged statements were objectionable even under *de novo* review. He does not explain on what legal basis trial counsel should have objected to these statements, nor explained why the objections would have been sustained under Indiana law. *Hough v. Anderson*, 272 F.3d 878, 898 (7th Cir. 2000) ("An ineffective assistance claim based on a failure to object is tied to the admissibility of the underlying evidence. If evidence admitted without objection was admissible, then the complained of action

fails both prongs of the *Strickland* test[.]"). Without such development, Mr. Myers has failed to carry his burden to establish that trial counsel's performance was deficient for failing to object to these statements.

3. Trial Counsel's False Statements during Opening Arguments

Mr. Myers argues that trial counsel provided ineffective assistance by making two false statements to the jury during opening arguments. Trial counsel made the following statements that Mr. Myers contends were false: (1) shortly after Ms. Behrman disappeared a tracking dog went to the home of Ms. Behrman's co-worker Mr. Hollars, but the police pulled the dog away; and (2) Mr. Hollars and Ms. Behrman were seen arguing days before she disappeared.

Understanding this claim requires an understanding of trial counsel's defense strategy. During opening, trial counsel offered two theories for who else may have murdered Ms. Behrman and an alibi defense. He referenced these theories throughout trial and during closing argument. The first theory (the "Owings theory") was that Ms. Owings, Ms. Sowders, and Mr. Clouse hit Ms. Behrman with a vehicle when they were driving south of Ms. Behrman's residence while high on drugs, then killed her to cover up their crime, placed her body in Salt Creek, and eventually moved it to where it was ultimately found three years later. Trial Tr. 471-72. This theory, trial counsel argued, was supported by several things, including Ms. Owings's confession to law enforcement, portions of which were corroborated. *Id.* at 473. Trial counsel maintained that the corroborating

evidence included that Ms. Behrman was last seen by a high school classmate riding on 4700 Harrell Road, which was several miles south of her residence, and a significant distance from Mr. Myers's residence, which was several miles north of her residence. *Id.* at 471-73. This, trial counsel said, was "[t]heory number one." *Id.* at 474.

"Theory number two," trial counsel explained, was that Ms. Behrman's supervisor at the Student Recreational Sports Center ("SRSC"), Mr. Hollars, killed Ms. Behrman. *Id.* at 474. This theory (the "Hollars theory") was problematic for reasons that are explored in some detail below, as trial counsel's pursuit of this theory pervades several of Mr. Myers's claims and the Indiana Court of Appeals' resolution of them. At this juncture, it is sufficient to explain that this theory was predicated on allegations that Mr. Hollars (who was married to someone else) and Ms. Behrman were in a romantic relationship, Ms. Behrman became pregnant, and Mr. Hollars killed her to cover it up.

Lastly, trial counsel offered an alibi defense. The alibi defense was based on phone records showing that Mr. Myers was at his residence several miles north of Ms. Behrman's residence during the timeframe Ms. Behrman disappeared. *See* D. Trial Ex. A. Trial counsel argued that if Ms. Behrman rode south, the phone records established that it was "absolutely impossible for [Mr. Myers] to be involved." Trial Tr. 475. Establishing that Ms. Behrman rode south also aligned with the Owings theory, which alleged that Ms. Owings, Ms. Sowders, and Mr. Clouse hit Ms. Behrman with a

vehicle when she was riding south of her residence on Harrell Road.

Trial counsel's false statements related to the Hollars theory. During opening, Patrick Baker introduced the Hollars theory as follows:

> They sent dogs out. They sent dogs out right after the disappearance on May 31st. You'll hear from [Detective] Tom Arvin that a dog followed a scent, went to a home of a coworker. Did he go inside? No. He pulled the dog off. Why did he pull the dog off? He goes up to the house where the coworker lives, and he calls the dog off. Did he question him? Yes. Questioned him about a gun, a 12-gauge shotgun. The man was a skeet shooter. Name's Brian Hollars. Brian Hollars was seen arguing with Jill Behrman a day or two days before she disappeared. . . . Theory number two. Coworker who was possibly involved with her with a dog going up to his house was involved.

Id. at 474. Simply put, Patrick Baker introduced the jury to the Hollars theory by stating that evidence will show that Mr. Hollars and Ms. Behrman were in some sort of dispute immediately before she disappeared, and despite the fact that a bloodhound tracked Ms. Behrman's scent to Mr. Hollars's residence on the day she disappeared, law enforcement covered it up.

Hugh Baker further explained the Hollars theory later during opening, arguing that Mr. Hollars may have been the older man rumored to have asked Ms. Behrman

on a date, that his alibi was not solid, and that law enforcement failed to test Mr. Hollars's shotgun. *See id.* 481-82. He also repeated Patrick Baker's false statements regarding the bloodhound. *Id.* at 481-82 ("[T]he police ruled [Mr. Hollars] out, *ignored the fact that the dog went up to his house*, ignored the fact that he worked with her . . . that they knew that there was a rumor that she had a crush on him. (emphasis added)). Finally, throughout trial, trial counsel attempted to show that Ms. Behrman may have been pregnant, that Mr. Hollars may have been in a relationship with her, and because Mr. Hollars was married, the pregnancy gave Mr. Hollars motive to murder Ms. Behrman.

However, the two critical facts on which Patrick Baker relied to cast suspicion on Mr. Hollars were false: a bloodhound did not follow Ms. Behrman's scent to Mr. Hollars's residence, let alone was one purposefully pulled away by Detective Arvin, nor were Mr. Hollars and Ms. Behrman seen arguing a day or two before she disappeared. The parties both acknowledge that no evidence supported either of these contentions.[7]

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[7] Mr. Myers argued to the Indiana Court of Appeals that trial counsel additionally misled the jury by stating that he would call Monroe County Prosecutor Carl Salzman who would testify that Mr. Myers was never a suspect and that Owings, Sowders, and Clouse were his primary suspects. Trial counsel never called Mr. Salzman as a witness. Mr. Myers briefly references this argument in his habeas petition, Filing No. 9 and 28, but does not elaborate on it in his reply brief. The Indiana Court of Appeals concluded that Mr. Myers had failed to carry his burden to show that this was deficient performance because he failed during the post-conviction hearing to elicit any "testimony from trial counsel concerning the

Several years after the trial had concluded, Patrick Baker was disciplined by the Indiana Supreme Court for, among other things, making the false statement regarding the bloodhound during opening. *See In re Baker*, 955 N.E.2d 729 (Ind. 2011).[8] Patrick Baker

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failure to call Salzman as a witness" and thus "made no attempt to discount the possibility that trial counsel made a strategic decision not to call Salzman to testify." *Myers II*, 33 N.E.3d at 1095. This analysis is potentially problematic. *See Reeves v. Alabama*, 138 S. Ct. 22, 26 (2017) (Sotomayor, J., dissenting from the denial of cert.) ("This Court has never . . . required that a defendant present evidence of his counsel's actions or reasoning in the form of testimony from counsel, nor has it ever rejected an ineffective-assistance claim solely because the record did not include such testimony."). Nevertheless, Mr. Myers's failure to attempt to explain to this Court why the analysis is an unreasonable application of *Strickland*'s performance prong precludes success on this claim.

[8] Patrick Baker was also disciplined for improperly soliciting Mr. Myers as a client and unreasonably collecting expenses from Mr. Myers's mother that need not have been collected. *In re Baker*, 955 N.E.2d at 729-30. The Court has grave concerns about Patrick Baker's testimony during the post-conviction hearing, which occurred in 2013, that directly contradicts facts he stipulated were true to the Indiana Supreme Court in 2011. Although these contradictions do not impact the Court's resolution of any of the claims discussed herein, they are nevertheless troubling because they cast doubt on Patrick Baker's honesty while testifying under oath during the post-conviction proceedings. For example, he stipulated to the Indiana Supreme Court that "[w]ithout invitation from [Mr. Myers] *or anyone else*, [Patrick Baker] visited [Mr. Myers] in jail and agreed to represent him without charge." *In re Baker*, 955 N.E.2d 729, 729 (Ind. 2011) (emphasis added). Yet during the post-conviction hearing, Patrick Baker testified that he received a voicemail from an unknown individual who asked him if he would help Mr. Myers, which prompted him to visit Mr. Myers in jail. PCR Tr. 493-94. Even the State's proposed conclusions of law for the post-conviction court recognized that Patrick Baker's testimony at

stipulated to the following facts during his attorney disciplinary proceeding: "During his opening statement, [Patrick Baker] stated that search dogs were sent out shortly after the victim's disappearance and one dog 'alerted' at the home of [Mr. Hollars], but the dog was called off. These statements were false and [Patrick Baker] should have known that no evidence would be admitted at trial to support them." *Id.* at 729.

The Indiana Court of Appeals addressed Mr. Myers's claim regarding trial counsel's false statements on the merits in *Myers II*. Beginning with the performance prong, it agreed with Mr. Myers that "[t]rial counsel did not present evidence to support the[] claims" made during opening. *Myers II*, 33 N.E.3d at 1091. The Indiana Court of Appeals also acknowledged that Patrick Baker was disciplined by the Indiana Supreme Court, but noted that the disciplinary proceeding did not address whether his performance was deficient or whether Mr. Myers was prejudiced by it.[9] *Id.* Nevertheless, it "presume[d] . . . that an attorney who tells the jury that he will present evidence that he

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the post-conviction hearing was contradicted by the facts to which he stipulated before the Indiana Supreme Court, and thus urged the post-conviction court to reject this aspect of Mr. Baker's testimony. *See* DA App. at 542. Nevertheless, it appears that Patrick Baker's testimony as it relates to his representation of Mr. Myers was otherwise taken as true.

[9] The Indiana Supreme Court specifically noted "that there is no allegation in th[e] [attorney discipline] proceeding that [Patrick Baker] provided substandard services to [Mr. Myers] or that [Patrick Baker's] improper representations during his opening statement prejudiced [Mr. Myers] or the State." *In re Baker*, 955 N.E.2d at 729.

either knows or should know will not be presented has acted unreasonably for the purposes of the *Strickland* analysis." *Id.* "Thus," the Indiana Court of Appeals concluded, "at least with respect to trial counsel's statement that a search dog alerted to Hollars's residence, we accept Myers's argument that trial counsel's performance was deficient. We are left to consider whether the statements prejudiced Myers within the meaning of *Strickland*." *Id.*

Arguably, the Indiana Court of Appeals "accepted" only that trial counsel's false statement that a dog alerted at Mr. Hollars's residence was false and thus constituted deficient performance, which leaves this Court to analyze *de novo* whether trial counsel's false statements regarding Mr. Hollars and Ms. Behrman arguing the day before she disappeared also amount to deficient performance. *See Harris*, 698 F.3d at 625; *Sussman*, 636 F.3d at 350. The respondent, understandably, does not advance an argument that it was not deficient performance for trial counsel to make this false statement during opening. No strategic or other reason has been suggested at any stage of this case as to why trial counsel made these false statements.

Of course, failing to follow through on statements during opening does not always amount to deficient performance, such as when "unforeseeable events" or "unexpected developments . . . warrant . . . changes in previously announced trial strategies." *United States ex rel. Hampton v. Leibach*, 347 F.3d 219, 257 (7th Cir. 2003) (citations and quotation marks omitted). But this is not such a case, since the statements at issue were nothing

more than false representations about what the evidence would show, and trial counsel should have known these statements were false when he made them. These false statements served no purpose but to undermine the defense offered and diminish trial counsel's credibility with the jury. *See id.* ("[L]ittle is more damaging than to fail to produce important evidence that had been promised in an opening." (citation and quotation marks omitted)); *id.* at 259 ("Promising a particular type of testimony creates an expectation in the minds of jurors, and when defense counsel without explanation fails to keep that promise, the jury may well infer that the testimony would have been adverse to his client and may also question the attorney's credibility."). Such harmful conduct constitutes deficient performance. *See id.*; *see also English v. Romanowski*, 602 F.3d 714, 728 (6th Cir. 2010) ("[I]t was objectively unreasonable for [the defendant's] trial attorney to decide before trial to call . . . a [certain] witness, make that promise to the jury, and then later abandon that strategy, all without having fully investigated [that witness] and her story prior to opening statements."); *McAleese v. Mazurkiewicz*, 1 F.3d 159, 166 (3d Cir. 1993) ("The failure of counsel to produce evidence which he promised the jury during his opening statement that he would produce is indeed a damaging failure sufficient of itself to support a claim of ineffectiveness of counsel."); *Harris v. Reed*, 894 F.2d 871, 879 (7th Cir. 1990) (holding counsel's performance deficient and prejudicial where counsel promised the jury evidence that another suspect committed the crime and then failed to call any defense witnesses without explaining why to the jury).

Accordingly, the Court concludes that it was deficient performance for trial counsel to make the above false statements during opening. The Court will consider the prejudice flowing from this deficient performance, along with the other aspects of trial counsel's performance that were deficient, in the prejudice analysis below.

4. Failure to Sufficiently Challenge the State's Theory that Ms. Behrman Rode North and to Object to Improper Testimony that She Rode South

Mr. Myers next contends that trial counsel provided deficient performance by failing to adequately challenge the State's evidence that Ms. Behrman rode north on the day she disappeared. Whether Ms. Behrman rode her bicycle north or south of her house on the day she disappeared was important for investigators when they were attempting to solve Ms. Behrman's murder. It was also critical at trial. Ms. Behrman logged off her home computer at 9:32 a.m. the morning she disappeared. She was scheduled to work at the SRSC at noon. Mr. Myers's phone records show that he was at home—several miles northwest of Ms. Behrman's residence—during the timeframe when Ms. Behrman disappeared. Specifically, Mr. Myers called several Indiana State Parks at 9:15, 9:17, and 9:18 a.m., and he called nearby movie theaters at 10:37 and 10:45 a.m. *See* D. Trial Ex. A. Given this, if Ms. Behrman had ridden south on the day she disappeared, Mr. Myers had a solid alibi. Establishing that Ms. Behrman rode south would have also corroborated the Owings theory—that Ms. Owings, Ms.

Sowders, and Mr. Clouse hit Ms. Behrman with a vehicle when she was riding south of her residence, killed her, dumped her bike, and hid her body.

Trial counsel recognized how beneficial establishing that Ms. Behrman rode south would be for Mr. Myers's alibi defense. Indeed, trial counsel highlighted on several occasions during both opening and closing that the evidence showed Ms. Behrman rode south. During opening, trial counsel pointed out that Ms. Behrman was last seen south on Harrell Road by her former high school classmate, Maral Papakhian.[10] Trial Tr. 472. Trial counsel then argued that Mr. Myers's phone records make it impossible for him to have murdered Ms. Behrman: "This man's at home making telephone calls at the exact time when she's last seen [south on Harrell Road]." *Id.* at 475. During closing, trial counsel again argued that the phone records establish Mr. Myers's innocence given that Ms. Behrman was last seen south on Harrell Road. *Id.* at 2781. Trial counsel argued further that Agent Dunn "worked this case for three years" and "believed that theory because it matches as to where Jill Behrman was last seen, 4700 South [Harrell] Road." *Id.* at 2781-82. This southern route theory, trial counsel continued, was "corroborated by the Wendy Owings statement." *Id.* at 2782.

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[10] Various spellings of Ms. Papakhian's name appear in the records. The State reports that her name is misspelled in the trial transcripts, and the proper spelling is "Papakhian." Filing No. 20-16 at 14 n.8. The Court will use this spelling, but different spellings are used if quoting from another source.

The State presented evidence that Ms. Behrman rode north—in the direction of Mr. Myers's residence—and attempted to undermine the evidence that she rode south. As discussed further below, the State presented evidence that six days after Ms. Behrman disappeared, Deputy Charles Douthett handled a bloodhound that tracked Ms. Behrman's scent along the northern route. *See id.* at 957-91. The State called Robert England, who testified that he saw a female cyclist in her early twenties on North Maple Grove Road who matched Ms. Behrman's description either on Wednesday (the day Ms. Behrman disappeared) or Thursday. *See id.* at 1019-26. Dr. Norman Houze—the leader of a bicycle group Ms. Behrman was in—testified that Ms. Behrman could have ridden the northern route to where her bicycle was found and back in time to make her noon shift at the SRSC. *See id.* at 1265-71.

Detective Arvin offered testimony attempting to undermine Ms. Papakhian's sighting of Ms. Behrman. Detective Arvin testified that he interviewed Ms. Papakhian and disagreed with Agent Dunn's original conclusion that Ms. Papakhian saw Ms. Behrman on the Wednesday morning she went missing. *Id.* at 2228. Instead, after interviewing her and five other individuals who were at the same party as Ms. Papakhian the night before she saw Ms. Behrman, *id.* at 2203, Detective Arvin concluded that it was "more likely Tuesday that she saw Jill Behrman," *id.* at 2228; *see also id.* at 2230-32.

During the post-conviction hearing, Patrick Baker was asked about his strategy with respect to whether he

wanted to establish that Ms. Behrman rode north or south the morning she went missing. Patrick Baker answered as follows:

> Q. What did you want the jury to believe about where Jill rode her bike the morning of May 31st?
>
> A. I didn't want her going north. I think . . . our strategy was to show that she was going on a southern route from her home. There were two theories, a southern route and a northern route, Judge.
>
> Q. But you wanted the jury to believe that she had ridden south.
>
> A. Yes.
>
> Q. Do you recall that part of the evidence . .
>
> A. Well, I . . no. I . . can I explain, Judge? We wanted the jury to believe that she couldn't have made it to [Mr. Myers'] house and back in time for work. So I don't know if we differentiated between the southern route and maybe partially of the northern route but we wanted the jury to believe that she couldn't have ridden to his house and back.

PCR Tr. 598-99.

Mr. Myers sets forth two allegations of deficient performance with respect to how trial counsel handled the issue of whether Ms. Behrman rode north or south

the morning she disappeared. The Court will address each in turn.

a. Failure to Challenge the State's Northern Route Theory

Mr. Myers argues that trial counsel provided deficient performance by failing to use readily available evidence to show that Ms. Behrman rode south on the day she disappeared. *See* Trial Tr. 2746. He points to three specific ways in which trial counsel should have undermined the State's northern theory: (1) cross-examining Ms. Behrman's parents regarding their prior belief that she would not have ridden north; (2) impeaching Dr. Houze's timed reconstruction of the northern route; and (3) presenting evidence that Ms. Behrman hated riding through traffic, including crossing Highway 37, which she was required to do on the northern route. *See* Filing No. 33 at 48.

> The Indiana Court of Appeals addressed these contentions on the merits in *Myers II*:
>
> Myers' arguments on this issue presume that the only reasonable strategy trial counsel could have pursued was one that depended heavily on establishing that Behrman rode south rather than north on the date of her disappearance. But trial counsel were not limited to presenting a single theory of defense. Indeed, in a case such as this, based solely on circumstantial evidence, the most advantageous approach may be to establish reasonable doubt by presenting multiple possible alternative theories of the

crime that point away from the accused's guilt. As the U.S. Supreme Court has explained, "[t]o support a defense argument that the prosecution has not proved its case it sometimes is better to try to cast pervasive suspicion of doubt than to strive to prove a certainty that exonerates." *Harrington v. Richter*, 562 U.S. 86, 109 (2011).

At the PCR hearing, when asked what he wanted the jury to believe concerning Behrman's bicycle route, Patrick Baker initially stated that he "didn't want her going north." PCR Transcript at 598. He went on to clarify, however, that he had "two theories, a southern route and a northern route". *Id.* Specifically, he testified as follows:

> We wanted the jury to believe that she couldn't have made it to [Myers'] house and back in time for work. So I don't know if we differentiated between the southern route and maybe partially of the northern route but we wanted the jury to believe that she couldn't have ridden to his house and back.

Id. at 598–99. Thus, it was not trial counsel's strategy to eliminate the possibility that Behrman had ridden north—rather, trial counsel sought to establish that Behrman would not have followed the north route all the way to Myers' residence in light of her schedule that day.

We cannot conclude that trial counsel's decision to pursue a defense theory that allowed for the possibility that Behrman had ridden north was unreasonable. As an initial matter, we note that trial counsel presented evidence supporting the theory that Behrman had ridden south. Trial counsel elicited testimony that Maral Papakhian, a high school classmate of Behrman's, had reported seeing Behrman riding her bike on Harrell Road, *i.e.*, the southern route, on the morning of her disappearance. The jury was also presented with evidence of Owings' confession, in which she stated that she and Sowders[] had been passengers in Clouse's vehicle when he struck Behrman and abducted her on Harrell Road. Additionally, in both opening statements and closing arguments, trial counsel argued that the evidence presented supported a conclusion that Behrman had ridden south.

We also note, however, that trial counsel's Hollars theory was premised in part on the fact that a bloodhound had scented Behrman on the northern route near Hollars' residence. Thus, presenting a theory of defense that depended on proving to a certainty that Behrman had ridden south would have undermined this alternative theory. Moreover, there was other evidence that Behrman had ridden north. Robert England testified that he saw a cyclist matching Behrman's description riding north on Maple Grove Road either at 10:00 a.m. on the day

> Behrman disappeared or at 9:00 a.m. the next day. Moreover, Behrman's bike was discovered on the north route, less than one mile from Myers' residence. Although it has been suggested that Behrman could have taken the south route, been abducted and subdued there, and her bike dumped on the north route, the timeline for such a scenario is tight. Behrman logged off of her computer at 9:32 a.m. and her bike was spotted near Myers' residence "before noon." Trial Transcript at 1226. Additionally, evidence from the bloodhound tracking search was consistent with Behrman having ridden the bike to its final location as opposed to being driven there in a vehicle. Thus, although it is not impossible for the bike to have been dumped, we cannot conclude that it was unreasonable for trial counsel to decline to pursue a theory of defense that was wholly dependent on the jury reaching such a conclusion. While it might have been helpful to the defense to conclusively eliminate the possibility that Behrman had ridden north that morning, the evidence simply did not allow for such certainty.

Myers II, 33 N.E.3d at 1095-96.

Mr. Myers contends that the Indiana Court of Appeals' decision was an unreasonable determination of the facts as well as an unreasonable application of *Strickland*. For example, Mr. Myers argues that the "two theories" to which Patrick Baker referred were actually two arguments supporting the same theory. *See*

Filing No. 33 at 50. As Patrick Baker testified during the post-conviction hearing, he did not differentiate between two theories at trial, he was simply trying to prove that Ms. Behrman could not have ridden near Mr. Myers's residence and back in time to show up to work at the SRSC. If trial counsel could show this—either by showing that she rode south or by showing she only "partially" rode north, *see* PCR Tr. 598—then Mr. Myers's alibi that he was home making phone calls would be very persuasive. To posit that such a strategy would lead trial counsel to withhold evidence that Ms. Behrman rode south—even if it undermined trial counsel's Hollars theory[11]—is perplexing at best. More important, the notion that trial counsel strategically withheld evidence that Ms. Behrman rode south is contrary to trial counsel's actual conduct at trial. During both opening and closing, and throughout trial more generally, trial counsel repeatedly argued and attempted to prove that Ms. Behrman rode south. *See*, *e.g.*, Trial Tr. 472, 475-76, 2780-81.

For these reasons, and reasons similar to those set forth below regarding the Indiana Court of Appeals' resolution of Mr. Myers's claim regarding the

[11] As discussed further below, evidence that Ms. Behrman rode south would have hardly, if at all, undermined the Hollars theory. Even if Ms. Behrman rode north past Mr. Hollars' residence, there was no evidence that Mr. Hollars was home. Instead, the nearly undisputed evidence was that Mr. Hollars was at work at the SRSC. Moreover, as concluded below, trial counsel's investigation of the bloodhound evidence was deficient such that he did not understand the bloodhound evidence well enough to determine whether its potential detriment to the alibi defense was worth whatever minimal support it provided to the Hollars theory.

bloodhound tracking evidence, the Indiana Court of Appeals' resolution of this claim may well be an unreasonable application of *Strickland* and *Wiggins*. Despite the Court's concern, it need not ultimately decide this question. As discussed below, the three instances of deficient performance identified by the Court are more than sufficient for Mr. Myers to establish prejudice and be entitled to habeas relief. Accordingly, the Court need not resolve whether trial counsel's performance was deficient for not presenting the additional evidence that Ms. Behrman rode south.

b. Failure to Object to Alleged Hearsay Regarding Ms. Papakhian

Mr. Myers next argues that trial counsel failed to object to Detective Arvin's testimony undermining Ms. Papakhian's sighting of Ms. Behrman riding south the Wednesday morning she disappeared. Specifically, Mr. Myers argues that Detective Arvin concluded the timeline did not fit for Ms. Papakhian to have seen Ms. Behrman on Wednesday morning based at least in part on statements of other individuals he interviewed and that, without objection, Detective Arvin placed the hearsay statements of those individuals before the jury. The Indiana Court of Appeals addressed this claim on the merits in *Myers II* as follows:

> Myers also argues that trial counsel were ineffective for failing to object to hearsay testimony discrediting Papakhian's sighting of Behrman on Harrell Road on the morning of her disappearance. Hearsay is an out-of-court statement offered in court to prove the truth of

the matter asserted. *Boatner v. State*, 934 N.E.2d 184 (Ind. Ct. App. 2010). As a general rule, hearsay is inadmissible unless the statement falls within one of the established hearsay exceptions. *Yamobi v. State*, 672 N.E.2d 1344 (Ind. 1996).

Detective Arvin testified that Papakhian told police she believed she saw Behrman on the 4700 block of Harrell Road on the morning of Wednesday, May 31, but that she could not be one hundred percent certain that she had not seen her on Tuesday. Detective Arvin testified further that when he interviewed Papakhian, she recalled having an argument with her boyfriend at a small party the night before the sighting, and she named several other people who had attended the party. Detective Arvin testified that he interviewed five people as a result of his interview with Papakhian, and that he ultimately reported to Detective Lang "that the timeline that [Papakhian] had presented did not fit." Trial Transcript at 2203. He testified further that based on his investigation, he believed that it was more likely that Papakhian had seen Behrman on Tuesday, the day before her disappearance. Detective Arvin explained that Papakhian told him that she regularly left her house forty-five minutes before her 10:20 a.m. class (i.e., at 9:35 a.m.) and Detective Arvin determined that it would take her only three minutes to drive to the 4700 block of Harrell Road. Because Behrman had logged off of her

computer at 9:32 a.m., and it would take a minimum of fifteen minutes for her to bike from the Behrman residence to Harrell Road (not including additional time to change clothes, put on cycling shoes, fill a water bottle, etc.), Detective Arvin believed that Behrman could not have made it to the 4700 block of Harrell Road in time for Papakhian to have seen her there on the date of her disappearance.

Myers argues that Detective Arvin testified to statements made to him by the other partygoers Papakhian identified, and that a hearsay objection to this testimony would have been sustained. But Myers has not directed our attention to a single out-of-court statement made by these unnamed individuals and admitted into evidence through Detective Arvin's testimony. Instead, Detective Arvin testified that after interviewing Papakhian and five other witnesses, he came to the conclusion that Papakhian's timeline did not fit and she had probably seen Behrman on Tuesday. When giving a further explanation of why he reached the conclusion, Detective Arvin referred not to any statements or information gathered from the partygoers, but to the timeline he had worked out based on Papakhian's statements and Behrman's computer logoff time. Because Myers has not established that Detective Arvin testified to any out-of-court statements made by the unnamed witnesses he interviewed, Myers

> has not established that trial counsel were ineffective for failing to object based on hearsay.

Myers II, 33 N.E.3d at 1097-98. The Indiana Court of Appeals also noted that Mr. Myers did not argue that trial counsel should have objected to the out-of-court statements of Ms. Papakhian "and for good reason. Because Papakhian did not testify at trial, the only way to get evidence of her sighting before the jury was through the testimony of others." *Id.* at 1098 n.6.

Mr. Myers argues that this was an unreasonable application of *Strickland* in two respects. First, he argues that Detective Arvin's testimony "clearly suggests that his conclusions were based on his interview with partygoers." Filing No. 33 at 45 (citing Trial Tr. 2203, 2226-28). Second, he argues that even though Detective Arvin "*also* testified at trial, on redirect, that the timeline did not fit based on his estimates of the time it would have taken Jill to ride from her home to the approximate location Papakhian saw Behrman (4700 South Harrell Road), and the driving time from Papakhian's residence to that location, there are problems with this testimony as well." *Id.* at 46 (citation omitted).

As to Mr. Myers's first argument, the Court agrees that Detective Arvin's testimony suggests his conclusion that the timeline "did not fit" was reached at least in part due to what the partygoers told him. During direct examination, Detective Arvin testified that he interviewed five other people while investigating Ms. Papakhian's sighting and ultimately concluded that the "timeline that she had presented did not fit." Trial Tr.

2203. Trial counsel pressed Detective Arvin about this during cross-examination:

> Q. . . . [The FBI] had focused on Wednesday, the day . . . she disappeared as the day that . . . Papa[khian] . . . saw her. Correct?
>
> . . . .
>
> A. She had stated that she believed that she'd seen Jill on that date, but then . . . when I re-interviewed her, she told me that she recalled that the night before she had seen Jill she had attended a party and that she had forgotten to mention that to the . . . FBI. So I set out to find out . . . when the party was . . . . When I asked her about the party, she named several people that were present at the party.
>
> Q. . . . [B]ut the FBI believed that she had seen her on Wednesday and conducted a three-year investigation based upon that belief, didn't they?
>
> A. I'm thinking the FBI may have thought that she saw her on Wednesday, but based on my investigation, I believe that it was more likely Tuesday that she saw Jill Behrman.

Id. at 2227-28.

Although Detective Arvin's testimony shows he relied in part on what the other partygoers told him

about the date of the party in reaching his conclusion, he never shared what any of the five partygoers he interviewed told him. Simply put, Detective Arvin's testimony included no out-of-court statements of the partygoers. This is the basis on which the Indiana Court of Appeals rejected Mr. Myers's assertion that his counsel should have raised a hearsay objection. It began by defining hearsay as "an out-of-court statement offered in court to prove the truth of the matter asserted." *Myers II*, 33 N.E.3d at 1097 (citing *Boatner*, 934 N.E.2d 184). Then it ultimately concluded that "[b]ecause Myers has not established that Detective Arvin testified to any out-of-court statements made by the unnamed witnesses he interviewed, Myers has not established that trial counsel were ineffective for failing to object based on hearsay." *Id.* at 1098.

This is a reasonable application of *Strickland*. Notably, Mr. Myers has again not identified a specific out-of-court statement offered through Detective Arvin. Without a specific hearsay statement about which an objection would have been sustained, it cannot have been deficient performance for trial counsel to fail to raise such an objection. *See Hough*, 272 F.3d at 898. This failure dooms Mr. Myers's claim.[12]

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[12] Even though Mr. Myers's specific allegation of deficient performance lacks merit, it is worth noting that much about trial counsel's performance with respect to Ms. Papakhian's sighting of Ms. Behrman was, at best, underwhelming. For example, Mr. Myers points out that Detective Arvin's interviews with the partygoers fell well short of casting doubt on Ms. Papakhian's initial memory—which she first reported two days after Ms. Behrman disappeared—

5. Failure to Challenge Bloodhound Evidence

Mr. Myers maintains that trial counsel provided deficient performance by failing to exclude or otherwise impeach the bloodhound evidence offered by Deputy

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that she saw Ms. Behrman on the Wednesday morning Ms. Behrman disappeared. Filing No. 33 at 44-45. Detective Arvin testified during the post-conviction hearing that his trial testimony that the timeline did not fit was "based on the interview[s] with all of the parties involved." PCR Tr. 1190. But he clarified that none of the partygoers undermined Ms. Papakhian's original report—which Agent Dunn believed—that she saw Ms. Behrman on Wednesday. Instead, all the partygoers told Detective Arvin that "nobody could remember what night the party was." *Id.* This is not only unsurprising given that Detective Arvin conducted these interviews three years later, but it also shows that his interviews with the partygoers did not, as he implied during trial, provide him information undermining Ms. Papakhian's report. The partygoers simply did not remember.

Nevertheless, this failure was not presented as a ground for relief in state court. Mr. Myers's claim was simply that trial counsel was deficient for failing to object to the alleged hearsay statements offered through Detective Arvin. *See* Filing No. 20-14 at 45-46. Although in this Court Mr. Myers toes the line between focusing on the unraised hearsay objection and expanding his claim to include failing to "otherwise correct" Detective Arvin's misleading testimony, see, *e.g.*, Filing No. 33 at 44, the Court cannot conclude that the Indiana Court of Appeals' resolution of a claim was unreasonable when the claim presented to this Court has been meaningfully altered. If Mr. Myers truly intended to also argue to this Court that trial counsel's performance was additionally deficient for conducting a deficient cross-examination of Detective Arvin, such a claim was not raised in state court and thus is procedurally defaulted. *See Snow v. Pfister*, 880 F.3d 857, 864 (7th Cir. 2018) (explaining that one type of procedural default occurs when a petitioner failed to exhaust claims through one complete round of state court review).

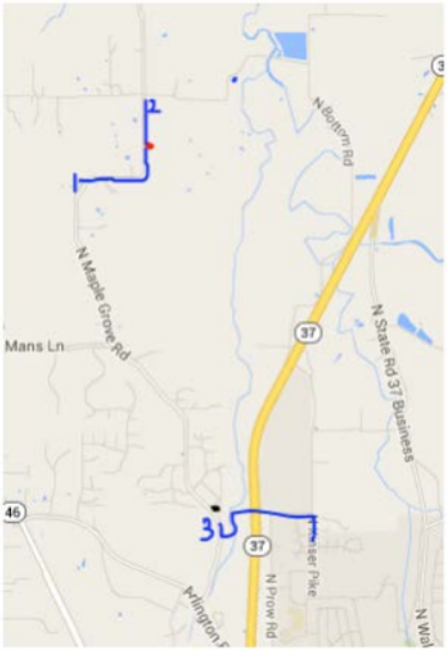
Douthett. The Indiana Court of Appeals summarized the factual background of this claim in *Myers II* as follows:

> At trial, Porter County Sheriff's Deputy and canine handler Charles Douthett testified concerning a search he performed with his bloodhound, Sam. Deputy Douthett testified that he had been working with Sam for over ten years, and that he and Sam had attended numerous seminars and trainings and worked homicide investigations in six states. Deputy Douthett testified further that he and Sam had conducted numerous real-world tracking searches, including some cases involving tracking bicyclists. Deputy Douthett went on to describe the process used to present a bloodhound with a scent and to track that scent.
>
> Deputy Douthett testified further that the FBI contacted him and asked him to come to Bloomington to conduct a tracking search in the Behrman case. An exhaustive description of the tracking search is not necessary here. It suffices for our purposes to note that Deputy Douthett and Sam were taken to a spot on North Maple Grove Road roughly one-half mile southwest of where Behrman's bike had been discovered. Sam tracked Behrman's scent to the spot the bike had been found and continued tracking the scent northward briefly before losing the scent and doubling back to the starting point of the search. At that point, Deputy Douthett and Sam got into a vehicle and were driven southward

> along the path Sam had been following. They stopped and got out of the vehicle at an intersection a few hundred yards away from Highway 37. Hollars' residence is very close to this intersection. Sam was able to pick the scent back up at that point and she followed it across Highway 37 before turning south on Kinser Pike.

Myers II, 33 N.E.3d at 1098.

The following map is a representation of a larger map that was admitted during trial. The blue lines represent the relevant locations where the bloodhound tracked according to Deputy Douthett's testimony, the red dot (just south of the "2") is where Ms. Behrman's bike was found, the black dot (just north of the "3") is Mr. Hollars's residence, and the blue dot (east/northeast of the "2") is Mr. Myers's residence. The bloodhound tracked from the "1" to the "2," before being dropped at the "3" and tracking along the blue line.



See Trial Ex. 74; Trial Tr. 1094.

Toward the end of Deputy Douthett's testimony, he was explicitly asked by the State, "at any time during your track did Samantha [the bloodhound] take you . . . to any houses," and Deputy Douthett responded, "[n]o." Trial Tr. 986. In summation, Deputy Douthett testified that what the bloodhound

> show[ed] us was possibly the bicycle route that the person had taken from Bloomington up to the point where the field entrance was because there was no scent. The dog did not show signs of a scent trail from that position anywhere farther north. The fact that we were running a nose down trail on the sidewalk which was 15

> feet from the roadway was a strong indicator to me that we were following either a walking or bicycle trail.

Id. at 988-89.

As discussed above, whether Ms. Behrman rode north or south of her residence on the day she disappeared featured prominently at trial. To undermine Mr. Myers's alibi and the Owings theory, the State attempted to prove that Ms. Behrman rode north to where her bicycle was found. The State did so primarily via the testimony of Deputy Douthett. His testimony, if credited, showed that Ms. Behrman rode north to the field where her bicycle was found and stopped there. This not only undermined Mr. Myers's alibi, given that the field was very close to his residence, but it also undermined the Owings theory, which depended on Ms. Behrman being hit while riding south of her residence and her bike being dumped in the field where it was found.

Mr. Myers argued during state post-conviction proceedings that trial counsel's performance was deficient for failing to object to or otherwise impeach Deputy Douthett's bloodhound evidence. Mr. Myers pointed out that Indiana common law deems bloodhound tracking evidence too unreliable to be admissible, and thus trial counsel should have objected to Deputy Douthett's testimony regarding his bloodhound track.

The Indiana Court of Appeals in *Myers II* briefly mentioned the common-law authorities on which Mr. Myers relied to argue the evidence was inadmissible,

and it also noted that the question may now be governed by Indiana Evidence Rule 702(b). *See Myers II*, 33 N.E.3d at 1099. But it ultimately concluded that it "need not address whether the bloodhound tracking evidence in this case was admissible or subject to impeachment" because "[a]n objection to inadmissible evidence may be waived as part of reasonable trial strategy, which will not be second-guessed by this court," and "[t]rial counsel may also choose to forego opportunities to impeach evidence when doing so serves a reasonable strategic purpose." *Id.* (citations and quotation marks omitted). It then explained its conclusion that trial counsel's failure to object or impeach Deputy Douthett's bloodhound tracking evidence was a strategic decision:

> At the PCR hearing, Patrick Baker testified that he could not recall whether he considered objecting to the bloodhound tracking evidence. Likewise, he could not recall whether he considered consulting with an expert on bloodhounds or researched the admissibility of such evidence, although he believed he or someone in his office had probably done some research on the issue. He noted on cross-examination that the bloodhound evidence put Behrman within a reasonable proximity of Hollars' house around the time of her disappearance.
>
> It is Myers' burden to overcome the presumption that there were strategic reasons for the decisions trial counsel made. If Myers cannot satisfy that burden, he cannot establish

deficient performance. Patrick Baker's inability to recall at the time of the PCR hearing whether he researched bloodhound evidence or considered objecting to its introduction at trial over six years earlier is insufficient to overcome the presumption in this case. This is so because we judge counsel's performance "by the standard of objective reasonableness, not his subjective state of mind." *Woodson v. State*, 961 N.E.2d 1035, 1041 (Ind. Ct. App. 2012) (citing *Harrington v. Richter*, 562 U.S. 86), *trans. denied*. "Although courts may not indulge 'post hoc rationalization' for counsel's decisionmaking that contradicts the available evidence of counsel's actions, neither may they insist counsel confirm every aspect of the strategic basis for his or her actions." *Harrington v. Richter*, 562 U.S. at 109 (internal citation omitted).

Judging trial counsel's performance by an objective standard of reasonableness, as we must, we conclude that there were valid strategic reasons for declining to object to or impeach the bloodhound tracking evidence irrespective of Patrick Baker's inability to recall his thoughts on the subject. One of trial counsel's tactics throughout trial was to cast suspicion on Hollars, and the bloodhound tracking evidence supported that strategy because it placed Behrman near Hollars' residence. Indeed, trial counsel relied on the bloodhound tracking evidence and its link to

> Hollars in both opening statements and closing arguments. We will not speculate on the ultimate wisdom of trial counsel's strategic decisions on this issue. Because Myers has not overcome the presumption that trial counsel acted competently in declining to object to or impeach the bloodhound tracking evidence, he has not established ineffective assistance in this regard.

Id. at 1099-1100.

The Court first explains why the foregoing is an unreasonable application of *Strickland* and *Wiggins*. While doing so, the Court also explains why, had the Indiana Court of Appeals reasonably applied *Strickland* and *Wiggins*, it would have concluded that trial counsel's investigation of the bloodhound evidence was deficient. The Court also explains why an adequate investigation of the bloodhound evidence would have led trial counsel to object to it. Given that the Indiana Court of Appeals' decision was based on an unreasonable application of *Strickland* and *Wiggins*, the Court must turn next to whether the Court's own *de novo* review governs or whether the Court must consider what other grounds could have supported the Indiana Court of Appeals' decision. Although the Supreme Court's decision in *Wilson* suggests this Court should simply review this allegation of deficient performance *de novo*, the Court applies currently controlling Seventh Circuit precedent requiring an analysis of what other grounds could have supported the Indiana Court of Appeals' decision. Ultimately, neither the state post-conviction court's

alternative basis nor the respondent's proposed resolution could have supported the Indiana Court of Appeals' decision. This leaves the Court's *de novo* conclusion that trial counsel's performance was deficient for failing to object to the bloodhound evidence.

a. Indiana Court of Appeals' Analysis of *Strickland*'s Performance Prong

Mr. Myers contends that the Indiana Court of Appeals' decision constitutes an unreasonable application of clearly established federal law as set forth by the Supreme Court in *Strickland* and *Wiggins* for two related reasons. First, he argues that the Indiana Court of Appeals engaged in the post-hoc rationalization it foreswore. Trial counsel's actual conduct and statements at trial, contends Mr. Myers, clearly show both that he wanted to prove that Ms. Behrman rode south, and that trial counsel did not make a strategic decision to let in the bloodhound evidence to support the Hollars theory.

Second, Mr. Myers argues that, even assuming trial counsel made a strategic decision not to object to the bloodhound evidence "because it placed Behrman near Hollars' residence," *Myers II*, 33 N.E.3d at 1100, trial counsel failed to reasonably investigate the evidence before deciding to pursue this strategy. Mr. Myers maintains that it was contrary to *Strickland* and *Wiggins* for the Indiana Court of Appeals to defer to trial counsel's purported strategy without assessing the reasonableness of trial counsel's investigation before deciding on that strategy.

The Indiana Court of Appeals' decision was unreasonable on both bases for reasons that significantly overlap. This Court will focus primarily on Mr. Myers's second argument because the Indiana Court of Appeals completely failed to consider whether trial counsel conducted a reasonable investigation before deciding on the purported strategy. While explaining this conclusion, this Court will also discuss how trial counsel's actual conduct both undermines the notion that he made a strategic decision regarding the bloodhound evidence, as well as bolsters the conclusion that trial counsel's investigation was deficient. In the end, this analysis shows not only that the Indiana Court of Appeals unreasonably applied *Strickland* and *Wiggins*, but also that trial counsel's performance was deficient.

The Indiana Court of Appeals reasoned that trial counsel made a strategic decision not to object to Deputy Douthett's bloodhound testimony "because it placed Behrman near Hollars' residence," *Myers II*, 33 N.E.3d at 1099, and thus that evidence supported trial counsel's Hollars theory. Identifying a strategy counsel may have been pursuing and then deferring to it should not have been the entirety of the Indiana Court of Appeals' analysis. To apply *Strickland* and *Wiggins*, it had to examine whether trial counsel's strategic decision was made after a reasonably competent investigation of the facts and law underlying that strategic choice. *See Wiggins*, 539 U.S. at 527 ("[A] reviewing court must consider the reasonableness of the investigation said to support [the asserted] strategy."). The Indiana Court of Appeals did not do this analysis at all, and, as explained further below, such a failure constitutes an unreasonable

application of *Strickland* and *Wiggins*.[13] *See id.* at 528 ("The Court of Appeals' assumption that the investigation was adequate . . . reflected an unreasonable application of *Strickland*.).

"The Supreme Court held in *Wiggins* . . . that 'the deference owed to . . . strategic judgments' depends on 'the adequacy of the investigations supporting those judgments.'" *Jordan v. Hepp*, 831 F.3d 837, 848 (7th Cir. 2016) (quoting *Wiggins*, 539 U.S. at 521). "[S]trategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation." *Strickland*, 466 U.S. at 690-91. Thus, labelling a decision as strategic, as the Indiana Court of Appeals did here, does not automatically insulate it from review. *See Jansen*, 884 F.3d at 656 ("[A]n attorney's decisions are not immune from examination simply because they are deemed tactical." (citation and quotation marks omitted)). Instead, the Indiana Court of Appeals had to examine whether the strategic decision was made after a reasonable investigation into the law and facts was performed. *See id.* ("A strategic choice based on a misunderstanding of law or fact . . . can amount to ineffective assistance." (citation and quotation

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[13] The Indiana Court of Appeals acknowledged that *Strickland* requires a consideration of counsel's investigation, *see Myers II*, 33 N.E.3d at 1089, and even held that trial counsel reasonably truncated his investigation into the Owings theory, *id.* at 1112 n.13. But it did not address trial counsel's investigation or lack thereof regarding the bloodhound evidence, even though Mr. Myers argued that trial counsel "did not understand the bloodhound evidence." Filing No. 20-16 at 13.

marks omitted)). "In assessing counsel's investigation," a court must engage in a "context-dependent consideration of the challenged conduct as seen 'from counsel's perspective at the time.'" *Wiggins*, 539 U.S. at 523 (quoting *Strickland*, 466 U.S. at 689).

Had the Indiana Court of Appeals considered trial counsel's investigation, it would have recognized that trial counsel did not adequately investigate the bloodhound evidence in the case, including Deputy Douthett's bloodhound search, before deciding to not object to or meaningfully impeach Deputy Douthett's testimony. Several related factors lead to this conclusion.

First, and most important, trial counsel failed to take basic steps to investigate the bloodhound evidence even though he knew of the bloodhound searches in May 2005, long before trial. *See* PCR Tr. 600. Although trial counsel reviewed the grand jury transcripts, Deputy Douthett did not testify during grand jury proceedings, nor did trial counsel depose him, even though he was on the State's witness list. *See, e.g.*, Trial Tr. 990. Patrick Baker could not recall what, if any, steps he took to investigate the bloodhound evidence as a factual or legal matter. *See Myers II*, 33 N.E.3d at 1099 (noting that Patrick Baker could not recall "whether he considered objecting to the bloodhound tracking evidence[,] . . . [or] whether he considered consulting with an expert on bloodhounds or researched the admissibility of such evidence."); *see also* PCR Tr. 599-600. Critically, Patrick Baker admitted to the Indiana Supreme Court that his investigation regarding the bloodhound evidence was

inadequate. Patrick Baker stipulated to the Indiana Supreme Court that he "should have known" that no evidence would be admitted at trial to support his statements during opening regarding what the bloodhound evidence would show. *See In re Baker*, 955 N.E.2d at 729.

It is clear trial counsel's investigation was wholly deficient because he did not know even basic information about what occurred during the bloodhound searches in this case. Had trial counsel conducted a reasonable investigation—for example, by deposing Deputy Douthett—he would have known that neither Deputy Douthett nor Detective Arvin[14] would testify that a bloodhound tracked to any residence, let alone to Mr. Hollars's. Trial counsel also would have learned, more generally, that Deputy Douthett's testimony would completely undermine Mr. Myers's alibi.

Only with this information could trial counsel have made an appropriate strategic judgment regarding whether he should challenge the admissibility of the bloodhound evidence. Trial counsel would have had adequate information to make the strategic decision whether (1) he should move to exclude the bloodhound

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[14] Detective Arvin, who trial counsel said would testify about the bloodhound tracking to Mr. Hollars' residence, testified near the end of the State's case. He testified that he had never been a canine officer, never owned a tracking dog, and never even "been with a tracking dog on this case." Trial Tr. 2199. Even more damaging for trial counsel's promise, Detective Arvin testified that he was not involved in investigating Ms. Behrman's case until Ms. Behrman's remains were found in 2003—years after any bloodhound tracking occurred. *Id.* at 2199, 2223.

evidence in order to keep out by far the best evidence undermining his alibi defense (and evidence that also undermined his Owings theory); or (2) even though it harmed these defenses, the bloodhound evidence was worth admitting because it supported the Hollars theory by showing that Ms. Behrman rode near, but long past, Mr. Hollars residence. When one considers that the latter evidence hardly cast suspicion on Mr. Hollars since the nearly undisputed evidence shows Mr. Hollars was working at the SRSC and no evidence was presented showing Mr. Hollars was home, trial counsel's choice would have been objectively clear. But because trial counsel failed to investigate, he, at minimum, thought the bloodhound evidence cast significantly more suspicion on Mr. Hollars than it did—namely, he thought the bloodhound tracked directly to Mr. Hollars's door and was pulled away by law enforcement.

Second, trial counsel's handling of Deputy Douthett's testimony shows that his "failure to investigate thoroughly resulted from inattention, not reasoned strategic judgment." *Wiggins*, 529 U.S. at 526. Deputy Douthett testified early during trial regarding the bloodhound tracking. As noted above, Deputy Douthett concluded his testimony by explaining that his bloodhound showed that Ms. Behrman rode to the field where her bike was found and stopped there—that is, Ms. Behrman rode to the field near Mr. Myers's residence where she was abducted. Trial Tr. 988-89.

Despite this detailed testimony that Ms. Behrman's ride ended very near Mr. Myers's residence, Patrick Baker did not ask Deputy Douthett *any* questions about

it during cross-examination. Nor did he ask any questions about the proximity of the bike route to Mr. Hollars's residence. Instead, Patrick Baker asked Deputy Douthett five questions during cross-examination, all of which related to a bloodhound track *south* of Bloomington that Deputy Douthett performed more than two weeks later, on June 23, 2000. Deputy Douthett testified that he was called back to perform a bloodhound track on that date because "they had a possible witness that observed . . . Ms. Behrman riding her bicycle south of Bloomington." *Id.* at 989. Neither party asked Deputy Douthett more questions.

Patrick Baker, however, asked the trial judge for an opportunity to compare Deputy Douthett's trail log, which he had just received, to Deputy Douthett's testimony because his testimony was "very confusing." *Id.* at 990. After the trial judge asked if he wanted to compare it to Deputy Douthett's grand jury testimony, the State explained that Deputy Douthett did not testify during grand jury proceedings, but that he was listed as a witness and Patrick Baker "could have deposed" him. *Id.* Patrick Baker then asked that Deputy Douthett remain under subpoena so Deputy Douthett could be recalled if necessary, but he was not recalled during trial. *Id.* at 990-91.

In the end, trial counsel's conduct during and immediately after Deputy Douthett's testimony supports the conclusion that his conduct was the result of a lack of investigation and preparation rather than a strategic choice. *See Wiggins*, 539 U.S. at 526 ("The record of the . . . proceedings underscores the

unreasonableness of counsel's conduct by suggesting that [the] failure to investigate thoroughly resulted from inattention, not reasoned strategic judgment."). He failed to ask any questions regarding the northern route even though, according to the Indiana Court of Appeals, he made the strategic decision to let this testimony in to show the northern route's proximity to Mr. Hollars's residence. The lack of questions by trial counsel regarding the northern route, combined with his admitted confusion and desire to consider recalling Deputy Douthett, point to counsel's unawareness of what Deputy Douthett would testify to, not to his exercise of strategic judgment.

Third, trial counsel's pivot from his arguments during opening to those made at closing shows his fundamental misunderstanding of the bloodhound evidence—a misunderstanding that would not have occurred had he properly investigated the evidence before trial. Again, trial counsel promised during opening that Detective Arvin would testify that a bloodhound tracked to Mr. Hollars's residence on the day Ms. Behrman disappeared, May 31, 2000, but was pulled away. *See* Trial Tr. 474. By the end of trial, no evidence had been produced of a bloodhound tracking to Mr. Hollars's residence or evidence that Detective Arvin at all participated in bloodhound searches.

As trial counsel must have anticipated, during closing the State pointed out trial counsel's unfulfilled promise made during opening. *See id.* at 2817 ("[The bloodhound] never tracked at Brian Hollars' front door as you heard the Defense [during] opening."). It is

therefore unsurprising that trial counsel no longer argued that Detective Arvin pulled a bloodhound away that had tracked Ms. Behrman's scent to Mr. Hollars's residence. Instead, trial counsel argued the most the evidence showed—that "Samantha [tracked] . . . *near* the house of Mr. Hollars, but the trail was stopped." *Id.* at 2792 (emphasis added).

Thus the bloodhound evidence that trial counsel maintained supported the Hollars theory at closing was completely different from the evidence promised during opening: it was Deputy Douthett's bloodhound tracking (not Detective Arvin's) on June 6 (not May 31) that tracked "near" Mr. Hollars's residence (not to his door then pulled away) that supported the Hollars theory. This change can only be explained by trial counsel's unawareness of what the bloodhound evidence would show before trial, discovering that whatever he thought it would show before trial was incorrect, and then significantly changing his argument in closing to tailor it to what the evidence revealed.

These three related factors show that trial counsel's handling of the bloodhound evidence was caused by a lack of investigation and preparation rather than a strategy. The Court thus agrees with Mr. Myers that the purported strategic decision on which the Indiana Court of Appeals relied appears to be more a "*post hoc* rationalization of counsel's conduct [rather] than an accurate description" of what occurred. *Wiggins*, 539 U.S. at 526-27.

But, more important, even if it was trial counsel's strategy to not object to Deputy Douthett's bloodhound

evidence because it would show Ms. Behrman rode near Mr. Hollars's residence, he chose this strategy without having first reasonably investigated the evidence.[15] The Indiana Court of Appeals did not at all discuss trial counsel's investigation of the bloodhound evidence before deferring to trial counsel's purported strategy regarding this evidence. Contrary to *Wiggins*, the Indiana Court of Appeals "merely assumed that the investigation was adequate." 539 U.S. at 528. A court cannot defer to trial counsel's strategic judgment without assessing "'the adequacy of the investigations supporting th[at] [strategy].'" *Jordan*, 831 F.3d at 848 (quoting *Wiggins*, 539 U.S. at 521). The Indiana Court of Appeals—despite recognizing earlier in its opinion that trial counsel should have known its representations about the bloodhound evidence were false—ignored this fact and its implications when analyzing this claim. It concluded that there was an objectively reasonable strategy supporting trial counsel's failure to object without assessing whether trial counsel could have settled on such a strategy given trial counsel's lack of investigation and misunderstanding of the evidence—an analysis that *Strickland* and *Wiggins* mandate before

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[15] Alternatively, trial counsel did not object to or impeach the bloodhound evidence because his failure to investigate its admissibility left him without the knowledge that there were valid bases on which to object. Such a lack of legal knowledge regarding an important piece of evidence that undermined Mr. Myers's alibi would amount to deficient performance. *See Hinton v. Alabama*, 571 U.S. 263, 274 (2014) ("An attorney's ignorance of a point of law that is fundamental to his case combined with his failure to perform basic research on that point is a quintessential example of unreasonable performance under *Strickland*.").

deferring to a proposed strategic justification. *Wiggins*, 539 U.S. at 527 ("[A] reviewing court must consider the reasonableness of the investigation said to support th[e] strategy."); *see Strickland*, 466 U.S. at 690-91.

For these reasons, the Indiana Court of Appeals' decision with respect to this allegation of deficient performance "involved an unreasonable application of[] clearly established Federal law." 28 U.S.C. § 2254(d)(1). It did so by failing to analyze whether a reasonable investigation supported the purported strategy, as clearly required by *Strickland* and *Wiggins*. *See Wiggins*, 539 U.S. at 528 ("The Court of Appeals' assumption that the investigation was adequate . . . reflected an unreasonable application of *Strickland*."). Indeed, the Indiana Court of Appeals noted that this analysis was necessary when evaluating ineffective-assistance-of-counsel claims earlier in its opinion, but simply failed to consider it when analyzing this allegation of deficient performance. Failing to properly apply these aspects of *Strickland* and *Wiggins* constitutes an "'error well understood and comprehended in existing law beyond any possibility for fairminded disagreement.'" *Ward*, 835 F.3d at 703 (quoting *Richter*, 562 U.S. at 103).

b. Appropriate Standard of Review

The Court has concluded that the Indiana Court of Appeals unreasonably applied *Strickland* and *Wiggins* to this allegation of deficient performance, but the Court's inquiry cannot end there. Federal courts have debated whether, even after concluding that a state court unreasonably applied clearly established federal

law as determined by the Supreme Court, the federal habeas court then reviews the issue *de novo* or if deferential review under § 2254(d) is still required. This debate centers on the "could have supported" framework set forth by the Supreme Court in *Richter*:

> Under § 2254(d), a habeas court must determine what arguments or theories supported or, as here, could have supported, the state court's decision; and then it must ask whether it is possible fairminded jurists could disagree that those arguments or theories are inconsistent with the holding in a prior decision of this Court.

Richter, 562 U.S. at 102. "Prior to *Richter*, if a state court offered a rationale to support its decision denying *habeas* relief, [the federal habeas court] assessed the *actual* reason offered by the state court to determine whether the decision was the result of an unreasonable application of federal law." *Whatley v. Zatecky*, 833 F.3d 762, 774 (7th Cir. 2016). But after *Richter*, the Seventh Circuit questioned:

> first, whether *Richter* (a) applies only to cases in which the state court offers no reasoning, or instead (b) holds in effect that federal courts should always entirely disregard the state court's rationale and decide independently if the bottom line is justifiable; and second, if *Richter* applies only to summary dispositions, how a federal court should evaluate a case in which the state court offers a reason, but that reason is either wrong as a matter of law or patently irrational.

Id. (quoting *Brady v. Pfister*, 711 F.3d 818, 824-25 (7th Cir. 2013)).

In other words, unlike in *Richter* but like this case, "[t]he problem is . . . not silence; it is what to do if the last state court to render a decision offers a bad reason for its decision." *Brady*, 711 F.3d at 826. "At that point," the Seventh Circuit held, "we concluded that although we would no longer attach significance to the state court's expressed *reasons*, we would still apply AEDPA deference to the *judgment*." *Whatley*, 833 F.3d at 775 (citing *Brady*, 711 F.3d at 827). Thus, even "[i]f a state court's rationale does not pass muster under . . . Section 2254(d)(1) . . . , the only consequence is that further inquiry is necessary." *Brady*, 711 F.3d at 827. To conduct this inquiry, "the federal court should turn to the remainder of the state record, including explanations offered by lower courts." *Id.*; *see Whatley*, 833 F.3d at 775. In other words, the federal court should apply *Richter*'s "could have supported" framework. *See Whatley*, 833 F.3d at 775 (noting that a petitioner is not "entitle[d] . . . to *de novo* review simply because the state court's rationale is unsound").

Whether these holdings remain the law—that is, whether *Richter*'s "could have supported" framework applies when the last state court provides a reasoned decision—was cast into doubt by the Supreme Court's decision in *Wilson v. Sellers*, 138 S. Ct. 1188 (2018); *see Thomas v. Vannoy*, 898 F.3d 561, 568 (5th Cir. 2018) (noting without deciding that *Wilson* may have undermined the "continued viability" of the Fifth Circuit's application of *Richter*'s "could have supported"

framework even when the state court provided a reason for its decision). In *Wilson*, the Supreme Court stated that application of AEDPA deference is "a straightforward inquiry when the last state court to decide a prisoner's federal claim explains its decision on the merits in a reasoned opinion. In that case, a federal habeas court simply reviews the specific reasons given by the state court and defers to those reasons if they are reasonable." 138 S. Ct. at 1192. In so stating, it cited to three pre-*Richter* cases where the Supreme Court did not apply the "could have supported" framework even after finding specific reasons provided by the state court involved an unreasonable application of Supreme Court precedents. *Id.* (citing *Porter*, 558 U.S. at 39-44; *Rompilla*, 545 U.S. at 388¬392; *Wiggins*, 539 U.S. at 523-538).

The Supreme Court in *Wilson* further explained that *Richter* does not control in all § 2254 cases, noting that if it "[h]ad . . . intended *Richter*'s 'could have supported' framework to apply even where there is a reasoned decision by a lower state court," its decision issued the same day in *Premo v. Moore*, 562 U.S. 115 (2011), "would have looked very different." *Wilson*, 138 S. Ct. at 1195. Instead, in *Premo*, the Supreme Court "focused exclusively on the actual reasons given by the lower state court, and we deferred to those reasons under AEDPA." *Id.* at 1195-96. Indeed, throughout *Wilson* the Supreme Court juxtaposes the "look through" presumption it adopts with the "could have supported" framework, which is difficult to square if the latter approach applied in all cases, even when reasons

are provided for a state court's decision. *See id.* at 1193-95.

Wilson casts serious doubt on the continued application of the *Richter* framework when the last state court decision provides reasons for the decision. Ultimately, the Court need not decide whether *Wilson* calls into doubt the Seventh Circuit's decisions in *Brady* and *Whatley*. Even applying the "could have supported" framework, as the Court does below, failing to object to or otherwise attempt to impeach the bloodhound evidence amounted to an "'error well understood and comprehended in existing law beyond any possibility for fairminded disagreement.'" *Ward*, 835 F.3d at 703 (quoting *Richter*, 562 U.S. at 103).

Justice Gorsuch, dissenting on other grounds in *Wilson*, aptly explained what the "could have supported" framework from *Richter* requires. It does not require "a federal court to imagine its own arguments for denying habeas relief and engage in decision-making-by-hypothetical." *Wilson*, 138 S. Ct. at 1199 (Gorsuch, J., dissenting). Instead,

> [i]n our adversarial system a federal court generally isn't required to imagine or hypothesize arguments that neither the parties before it nor any lower court has presented. To determine if a reasonable basis "could have supported" a summary denial of habeas relief under *Richter*, a federal court must look to the state lower court opinion (if there is one), any argument presented by the parties in the state proceedings, and any argument presented in the

> federal habeas proceeding. Of course, a federal court sometimes may consider on its own motion alternative bases for denying habeas relief apparent in the law and the record, but it does not generally bear an *obligation* to do so.

Id. (Gorsuch, J., dissenting). This is consistent with the approach set out by the Seventh Circuit in *Brady*, 711 F.3d at 827, and *Whatley*, 833 F.3d at 775, and the mode of analysis the Court will apply here.

The state post-conviction court and the respondent both offer an alternative basis to conclude that trial counsel's performance regarding the bloodhound evidence was not deficient. The state post-conviction court agreed that the bloodhound evidence could have been excluded had trial counsel objected but reasoned that a different strategy than that offered by the Indiana Court of Appeals led trial counsel not object to it. The respondent argues that, even if trial counsel would have objected to the bloodhound evidence, the objection would not have been sustained. Filing No. 20 at 39-40. The Court discusses and ultimately rejects each argument in turn.

c. State Post-Conviction Court's Alternative Basis

The state post-conviction court had a different basis for ruling against Mr. Myers on this claim than the Indiana Court of Appeals. Notably, the state post-conviction court agreed with Mr. Myers that trial counsel's handling of the bloodhound evidence was suboptimal, and it also agreed that had trial counsel

objected to the bloodhound evidence, it would have been excluded. But it held that trial counsel did not object to the bloodhound evidence in support of a different strategy. The state post-conviction court's factual findings in full were as follows:

> The issues brought up by [Mr. Myers] . . . ha[ve] merit. The promised bloodhound evidence was not fleshed out well by [trial counsel]. His opening statement was not supported fully by the evidence. The court does take issue with [Mr. Myers'] position that [trial counsel] should have objected to the bloodhound evidence. The trail the dog laid down kept going a long way past [Mr. Myers'] home and would insinuate to the jury that [Ms. Behrman] did not go to [Mr. Myers'] home. The court agrees . . . that better use could have been made of this. To say that trial counsel should have attempted to exclude this evidence is an overreach that the court will not take. Using the submitted evidence had value to [Mr. Myers'] case. Allowing bloodhound evidence in is error if counsel so chooses to object in any given case. Here it was not error such that *Strickland*, *id* can be used to reverse the verdict.

DA App. at 752; *see also id.* at 758 ("Allowing bloodhound evidence was a valid trial tactic.").

The state post-conviction court, like the Indiana Court of Appeals in *Myers II*, held that it was a strategic choice to not object to the bloodhound evidence. But the purported strategy underlying trial counsel's choice was

different. Unlike the Indiana Court of Appeals' conclusion that trial counsel admitted the bloodhound evidence to support the Hollars theory, the state post-conviction court reasoned that the bloodhound evidence more generally aided Mr. Myers's defense because it established that Ms. Behrman rode "a long way past [Mr. Myers' home]." *Id.* at 752.

The state post-conviction court's resolution of this claim is both factually and legally flawed. This Court focuses on the factual flaw, however, because the state post-conviction court's decision is clearly "based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d)(2). Factual determinations are not unreasonable under § 2254(d)(2) "merely because the federal habeas court would have reached a different conclusion in the first instance," nor are they unreasonable if "[r]easonable minds reviewing the record might disagree about the finding in question." *Wood v. Allen*, 558 U.S. 290, 301 (2010) (citation and quotation marks omitted). But here, the state post-conviction court's factual premise is indisputably incorrect.

The state post-conviction court concluded that "[a]llowing bloodhound evidence was a valid trial tactic," DA App. at 758, based entirely on the factual premise that "[t]he trail the dog laid down kept going a long way past [Mr. Myers'] home and would insinuate to the jury that [Ms. Behrman] did not go to [Mr. Myers'] home," *id.* at 752. But the bloodhound evidence did not show this. As the above map shows, the bloodhound tracked a long

way past *Mr. Hollars*'s residence, not Mr. Myers's.[16] *See* Trial Ex. 74. Mr. Myers's residence was north and east of the field where Ms. Behrman's bicycle was recovered, and Deputy Douthett explicitly testified that the bloodhound's scent trail ended at the field. Trial Tr. 988 ("The dog did not show signs of a scent trail from that position anywhere farther north.").

In short, the bloodhound did not track "a long way past" Mr. Myers's residence, but tracked directly to the field where Ms. Behrman's bike was located, which is less than a mile from Mr. Myers's residence. Unlike evidence that Ms. Behrman rode long past Mr. Myers's residence, which may have helped Mr. Myers's defense, evidence that her ride ended in a field shortly before Mr. Myers's residence hinders it, especially considering it undermines Mr. Myers's alibi that he was home making phone calls. For this reason, the state post-conviction court's decision was "based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d)(2).[17] It is thus not entitled to AEDPA deference.

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[16] Oddly enough, the state post-conviction court suggested that the bloodhound tracking near but past Mr. Myers residence makes it *less* likely Mr. Myers was involved. But the Indiana Court of Appeals in *Myers II* held that evidence that Ms. Behrman rode near but past Mr. Hollars' residence cast suspicion on him.

[17] It is an open question whether meeting the § 2254(d)(2) standard necessarily requires meeting the § 2254(e)(1) standard. *See Wood v. Allen*, 558 U.S. 290, 300 (2010); *Price v. Thurmer*, 637 F.3d 831, 837 (7th Cir. 2011). Although the Court analyzes the factual determination under § 2254(d)(2), the arguably more demanding

d. Respondent's Alternative Basis

The Court turns next to the respondent's contention that trial counsel's performance was not deficient because an objection to the bloodhound evidence would have been overruled. *See Hough*, 272 F.3d at 898 ("An ineffective assistance claim based on a failure to object is tied to the admissibility of the underlying evidence."). The parties dispute whether bloodhound evidence is admissible under Indiana law. The Court's analysis is significantly hindered by the respondent's failure to meaningfully engage with the critical issues governing the admissibility of bloodhound evidence. Mr. Myers primarily relies on Indiana Supreme Court cases discussed below, which hold that bloodhound tracking evidence is inadmissible. These cases, however, were decided prior to Indiana's adoption of the Indiana Rules of Evidence in 1994. Nevertheless, Mr. Myers argues that the prior common law cases retain persuasive value.

Given that the respondent does not meaningfully confront these complicated questions and Mr. Myers's arguments regarding them, this Court is not obligated to construct such arguments for the respondent. *Wilson*, 138 S. Ct. at 1199 (Gorsuch, J., dissenting). Thus, after showing why the authorities on which the State relies are irrelevant to the admissibility of bloodhound evidence, the Court concludes that the respondent has

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standard of § 2254(e)(1) is also met because there is no evidence in the record even suggesting that the bloodhound tracked long past Mr. Myers's residence, as the state post-conviction court concludes. Instead, Deputy Douthett's testimony shows the bloodhound did not track as far north or east as Mr. Myers's residence.

failed to show another basis that "could have supported" the Indiana Court of Appeals' decision. *See id.* In the alternative, the Court goes on to address the admissibility question directly, concluding that all indications point to the continued inadmissibility of bloodhound evidence in Indiana. During this analysis, the Court addresses the authorities on which the State relies to contend otherwise, concluding they are irrelevant.

The most compelling basis for this Court to conclude that the bloodhound evidence would have been excluded had trial counsel objected to it is that the state post-conviction court reached this exact conclusion. In analyzing Mr. Myers' claim regarding the bloodhound evidence, it noted that "[a]llowing bloodhound evidence in is error if counsel so chooses to object in any given case." DA App. at 752. The state post-conviction court reached this conclusion even though the State argued that bloodhound evidence was admissible following the adoption of the Indiana Rules of Evidence. *See id.* at 545. Given the respect owed by a federal habeas court to state-court decisions on questions of state law, this Court should adhere to that decision, even though the state post-conviction court is not the last reasoned decision being reviewed in this action. *See Wilson v. Corcoran*, 562 U.S. 1, 5 (2010) (per curiam) ("[I]t is not the province of a federal habeas court to reexamine state-court determinations on state-law questions." (citation and quotation marks omitted)); *Miller v. Zatecky*, 820 F.3d 275, 277 (7th Cir. 2016) ("A federal court cannot disagree with a state court's resolution of

an issue of state law."). This basis alone is sufficient to reject the respondent's position.

Even if the state post-conviction court's decision was not determinative, all other Indiana authorities suggest that the state post-conviction court's determination was correct. Bloodhound tracking evidence has been inadmissible in Indiana for over a century. It was first held inadmissible by the Indiana Supreme Court in *Ruse v. State*, 115 N.E. 778 (1917). In *Ruse*, the Indiana Supreme Court analyzed decisions from other state courts on both sides of the issue, but ultimately agreed with courts that had held "that the conclusions of the bloodhound are generally too unreliable to be accepted as evidence," reasoning as follows:

> When it is considered that the use of bloodhounds, even under the most favorable conditions, is attended with some degree of uncertainty, which may readily lead to the conviction or accusation of innocent persons, and that, at best, evidence as to their conduct in following a supposed trail is properly not of great probative value, it follows, as is suggested in *Brott v. State*, 70 Neb. 395, 398, that both reason and instinct condemn such evidence, and courts should be too jealous of the life and liberty of human beings to permit its reception in a criminal case as proof of guilt.

Id. at 781. Since *Ruse*, the Indiana Supreme Court has twice reaffirmed that bloodhound tracking evidence is inadmissible. *See Brafford v. State*, 516 N.E.2d 45, 49

(Ind. 1987) ("It has long been held in Indiana that tracking dog or 'bloodhound evidence' is not sufficiently reliable to be admitted into evidence." (citing *Ruse*, 115 N.E. 778)); *Hill v. State*, 531 N.E.2d 1382, 1384 (Ind. 1989) ("[E]vidence of the result of the use of a tracking dog is not admissible." (citing *Brafford*, 516 N.E.2d 45)); *see also Hill*, 531 N.E.2d at 1385 ("It flows a *fortiori* from th[e] rule [in *Ruse*] that no satisfactory foundation for the admission of bloodhound evidence can be made. The rule is based on upon the unobtainability of scientific and other information which can furnish a satisfactory basis or reason for admitting such evidence.") (DeBruler, J., dissenting). These cases, however, were decided prior to Indiana's adoption of the Indiana Rules of Evidence in 1994.

The respondent does not argue that the Indiana Rules of Evidence—particularly Rule 702 governing expert testimony—undermine the reasoning or holdings of *Ruse* and its progeny. Instead, the respondent argues that these cases are simply distinguishable from the instant case. The States contends that, unlike in *Ruse*, *Brafford*, and *Hill*, the bloodhound here "was not used to prove the identity of [Ms. Behrman's] killer, but to prove confirm [sic] portions of the route [Ms. Behrman] took on the day she died." Filing No. 20 at 39. As an initial matter, the bloodhound evidence was certainly used to prove that Mr. Myers was the perpetrator, at the very least because it was used to show that Ms. Behrman rode north toward his house; had Ms. Behrman ridden south, Mr. Myers had an alibi. But the Court understands the State to argue that *Ruse* and its progeny only prevent bloodhound tracking evidence if

the bloodhound is tracking the alleged perpetrator, not, as here, the victim. This interpretation of these cases is too narrow.

The Indiana Supreme Court in *Ruse* made clear that bloodhound evidence generally was inadmissible because it is unreliable. *See* 115 N.E. at 781 ("We agree fully with the statement in *Brott v. State* [70 Neb. 395, 97 N. W. 593, 63 L. R. A. 789], that the 'conclusions of the bloodhound are generally too unreliable to be accepted as evidence in either civil or criminal cases.'").

The subsequent Indiana Supreme Court decisions similarly stated *Ruse*'s holding in categorical terms. *See Hill*, 531 N.E.2d at 1384 ("[E]vidence of the result of the use of a tracking dog is not admissible."); *Brafford*, 516 N.E.2d at 49 ("It has long been held in Indiana that tracking dog or 'bloodhound evidence' is not sufficiently reliable to be admitted into evidence."). The holdings of these cases are not that bloodhound evidence is inadmissible when the bloodhound is tracking a perpetrator, but that bloodhound evidence is inadmissible altogether because it is unreliable. *Cf. Hubbard v. State*, 742 N.E.2d 919, 923 n.9 (Ind. 2001) (noting that the reason why polygraph test results are being offered is irrelevant because they are "unreliable" regardless of why they are offered).

The State next argues that even under the common law "the behavior of animals has been held to be relevant and admissible evidence." Filing No. 20 at 39 (collecting cases). But the three cases on which the State relies are wholly inapplicable to the question of whether bloodhound tracking evidence is admissible. First, in

Price v. State, 911 N.E.2d 716, 720-21 (Ind. Ct. App. 2009), the court held that a dog's loud screaming when hit with a belt was sufficient evidence to convict the defendant of cruelty to animals. Second, *Ross v. Lowe*, 619 N.E.2d 911, 914 (Ind. 1993), was a negligence action in which the Indiana Supreme Court discussed the standard of care owed to invitees for preventing injury from a dog kept on the property. Third, in *Neufhoff v. State*, 708 N.E.2d 889, 891 (Ind. Ct. App. 1999), the Indiana Court of Appeals held that a probable cause affidavit that relied on the alerting of a drug sniffing dog was sufficiently reliable to establish probable cause. Not only do these cases not relate specifically to bloodhound tracking evidence, but none of them even deal with the admissibility of evidence at all. The respondent's reliance on these cases is illustrative of the little assistance provided to the Court in analyzing this question of Indiana law.[18]

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[18] The State relied on nearly the same arguments before the state post-conviction court. For example, the State argued that Indiana "[d]ecisions since the adoption of the rules have allowed such evidence to prove a route taken without comment." DA App. at 545 (citing *Hill v. State*, 773 N.E.2d 336, 339 (Ind. Ct. App. 2002)). But the Indiana Court of Appeals decision in *Hill*, much like the cases on which the respondent relies here, has no bearing on the admissibility of bloodhound evidence. The admissibility of bloodhound evidence was not discussed at all in *Hill*; the Indiana Court of Appeals merely mentioned that a bloodhound was utilized to track the perpetrator and did not mention, let alone rely, on that fact again. *See Hill*, 773 N.E.2d at 339. This is far from legal authority that Indiana courts "have allowed" bloodhound evidence to be admissible, as the issue was not even presented or addressed in the case. Most important, the state post-conviction court was

This leaves the Court to determine what role *Ruse* and its progeny play in determining the admissibility of bloodhound evidence following the adoption of the Indiana Rules of Evidence. As noted by the Indiana Court of Appeals in *Myers II*, these cases were decided prior to the adoption of the Indiana Rules of Evidence in 1994 and thus are no longer strictly binding precedent. 33 N.E.3d at 1099; *see Albores v. State*, 63 N.E.3d 34, *6 (Ind. Ct. App. 2016) (noting that *Brafford* "was decided prior to the adoption of the Indiana Rules of Evidence and is no longer controlling"). But no Indiana court has decided whether or to what degree they remain persuasive.

Mr. Myers contends that *Ruse* and its progeny continue to provide guidance even after the adoption of the Rules of Evidence. *See* Filing No. 33 at 59, 61. Specifically, he suggests that previous common law decisions provide a baseline for deciding whether bloodhound evidence is reliable enough to pass through Rule 702(b). Filing No. 33 at 61. Although the *Myers II* court did not reach any ultimate conclusions regarding admissibility, it suggested that Rule 702 governs. Rule 702 provides:

> (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

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unconvinced, as it concluded that bloodhound evidence is inadmissible should counsel object to it. *See* DA App. at 752.

> trier of fact to understand the evidence or to determine a fact in issue.
>
> (b) Expert scientific testimony is admissible only if the court is satisfied that the expert testimony rests upon reliable scientific principles.

What role *Ruse* and its progeny have in determining whether Deputy Douthett's testimony rests on "reliable scientific principles" under Rule 702(b) is the critical question presented by Mr. Myers. Indiana courts have not definitively decided the weight that should be given to common law precedents following the enactment of the Indiana Rules of Evidence. But significant guidance is available. On one hand, the Indiana Supreme Court has noted that "the Rules of Evidence generally superseded previously existing common law." *Specht v. State*, 734 N.E.2d 239, 240 (Ind. 2000); *see McIntyre v. State*, 717 N.E.2d 114, 121 (Ind. 1999) (suggesting that it is an open question whether "common law decisions . . . survive the Indiana Rules of Evidence"). Nevertheless, Indiana courts have continued to apply the common law when it is consistent with the Rules of Evidence and there is "no reason to depart from the well established common law rule." *Jackson v. State*, 728 N.E.2d 147, 153 (Ind. 2000). Indeed, Indiana courts regularly look to the common law for guidance even when the Rules of Evidence now govern the analysis. *See Lafayette v. State*, 917 N.E.2d 660, 662-64 (Ind. 2009) (examining common law precedents regarding Rule 404(b) and noting that the Indiana Supreme Court's first examination of the rule "largely tracked the common law

of evidence . . . that had developed prior to our adoption of the Rules of Evidence"); *Jiosa v. State*, 755 N.E.2d 605, 607 (Ind. 2001) (noting that when the Rule of Evidence at issue does not specifically address the legal question, "pre-1994 cases are instructive," and concluding that "[t]he common law presumption was not changed by the adoption of the Rules of Evidence"); *Ealy v. State*, 685 N.E.2d 1047, 1055 (Ind. 1997) ("Prior to the enactment of the [Indiana Rules of Evidence], we long held it proper for an expert to give an opinion based upon an autopsy report prepared by another. We see no reason to change that now."); *id.* (finding support for an interpretation of a Rule of Evidence by noting that the interpretation is "consistent with our own" common law); *Grinstead v. State*, 684 N.E.2d 482, 487 (Ind. 1997) (considering pre-1994 cases to determine whether expert testimony regarding blood spatter was admissible under Rule 702). Notably, the respondent does not cite, nor could the Court locate, a single instance where an Indiana court has held that long-standing common law precedents were irrelevant merely because an Indiana Rule of Evidence now governs the legal question when the Rule at issue did not explicitly undermine those precedents.

Given this, the Court follows the same course here. The above precedents show that Indiana courts regularly look to common law precedents when applying the Rules of Evidence. Thus, in determining whether bloodhound evidence "rests on reliable scientific principles" under Rule 702(b), Indiana courts would likely continue to follow the determination in *Ruse* and its progeny that it does not.

Finally, the one source to have addressed this question other than the state post-conviction court in this case concluded that Indiana Rule of Evidence 702 did not change the inadmissibility of bloodhound evidence established in *Ruse*. The preeminent Indiana evidence treatise written by Judge Robert Miller explicitly addresses the issue of the admissibility of bloodhound evidence following the enactment of the Rules of Evidence.[19] Judge Miller concludes that bloodhound tracking testimony is not "expert scientific testimony" under Rule 702(b), but that *Ruse* and its progeny nevertheless remain controlling law: "Earlier Indiana cases applied a 'reliability' test even as to plainly non-scientific evidence. For example, tracking dog, or 'bloodhound,' evidence was deemed insufficiently reliable for admission. Nothing in Rule 702 appears to require a different result." 13 R. Miller, Ind. Prac., Indiana Evidence § 702.208 (4th ed.) (citing *Hill*, 531 N.E.2d at 1384; *Brafford*, 516 N.E.2d at 49).

The Court finds Judge Miller's position persuasive, not least because it is consistent with how Indiana courts have treated the admissibility of polygraph evidence both before and after the enactment of the Indiana Rules of Evidence. Long before the Indiana Rules of Evidence were adopted, Indiana courts consistently deemed polygraph evidence inadmissible because "the test is not sufficiently accurate to permit its admission and the fear the jury will give undue weight to the validity of a

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[19] The Indiana Supreme Court regularly relies on Judge Miller's evidence treatise. *See*, *e.g.*, *Malenchik v. State*, 928 N.E.2d 564, 574 (Ind. 2010); *Schultz v. Ford Motor Co.*, 857 N.E.2d 977, 984 (Ind. 2006); *Ealy*, 685 N.E.2d at 1051.

polygraph test." *Hall v. State*, 514 N.E.2d 1265 (Ind. 1987). After the Indiana Rules of Evidence were adopted, Indiana courts continued to exclude polygraph evidence, often without discussing the Indiana Rules of Evidence generally or Rule 702 specifically. *See Majors v. State*, 773 N.E.2d 231, 238 (Ind. 2002); *Gray v. State*, 758 N.E.2d 519, 522 (Ind. 2001). Indiana courts follow this pattern even though a "polygraph examiner is an expert witness" subject to the requirements of Rules 403 and 702. *Hubbard v. State*, 742 N.E.2d 919, 924 (Ind. 2001).

For all the foregoing reasons, had trial counsel objected to the bloodhound evidence that objection would have been sustained.[20] Not only is this the

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[20] Mr. Myers argues in the alternative that even if the bloodhound evidence would not have been excluded altogether, trial counsel's performance was deficient for failing to impeach Deputy Douthett's testimony. *See* Filing No. 33 at 62-64. For example, there was evidence that prior to Deputy Douthett's use of the bloodhound on June 6, 2000 (six days after Ms. Behrman disappeared), law enforcement attempted to use other scent tracking dogs to help locate Ms. Behrman, but they did not pick up her scent near where her bicycle was found. *See* PCR Ex. 232 at 28. This significantly undermines evidence that during a later bloodhound search—after the scent has further dissipated—the bloodhound was able to pick up Ms. Behrman's scent at that location.

Moreover, although Deputy Douthett testified that he attempted to track Ms. Behrman's scent along the southern route but there were no "strong" scent trails, Trial Tr. 986, Agent Dunn testified to the grand jury that Deputy Douthett told him Samantha picked up Ms. Behrman's scent on the southern route. *See* GJ Tr. 1337. The jury did not hear this evidence, or any of the other bases on which Deputy Douthett's testimony could have been undermined. *See*

conclusion of the only state court in this case to have addressed the issue, but all other legal sources addressing the question point in the same direction, albeit for different reasons. The respondent's contention that trial counsel was not deficient for failing to object to the bloodhound evidence because an objection would have been overruled does not provide a basis that could have supported the Indiana Court of Appeals' conclusion.

In sum, trial counsel failed to conduct an unreasonable investigation into the bloodhound evidence before deciding not to object to it. Had a reasonable investigation been conducted, trial counsel would have realized that the bloodhound evidence did not support the Hollars theory in the manner he thought (and barely, if at all, supported it), which made it obviously worth excluding given that it completely undermined Mr. Myers' alibi defense. The Indiana Court of Appeals unreasonably applied *Strickland* and *Wiggins* in concluding otherwise, and neither the state post-conviction court nor the respondent offers a justification that otherwise could have supported the Indiana Court of Appeals' decision. The Court will

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Filing No. 33 at 62-64. Although the Court need not reach this issue, there is significant evidence trial counsel could have used to undermine the trustworthiness of the bloodhound tracking presented by Deputy Douthett, see, *e.g.*, Filing No. 33 at 62-64, but trial counsel entirely failed to do so. Had the Court not concluded that an objection to the bloodhound evidence would have been sustained, this would have been an alternative basis to conclude that trial counsel's performance regarding the bloodhound evidence was deficient.

therefore consider this instance of deficient performance in the prejudice analysis below.

6. Failure to Impeach Ms. Swaffard

Mr. Myers argues trial counsel provided deficient performance by failing to impeach Betty Swaffard's testimony. The Indiana Court of Appeals summarized Ms. Swaffard's testimony during direct- and cross-examination as follows:

> Swaffard, Myers' maternal grandmother, testified to certain statements Myers made to her following Behrman's disappearance. Specifically, Swaffard testified that on June 27, 2000, the date Detective Crussen interviewed Myers' parents, Myers called Swaffard and asked to borrow money. Swaffard told Myers that he would have to come to her house to pick up the money, and he said he could not come because there were road blocks up on Maple Grove Road, and he did not want to go out because he was a suspect in Behrman's disappearance. Swaffard testified further that in November 2004, Myers called her and asked her to look after his daughter because he needed some time alone to think. Swaffard asked what was on his mind, and Myers said, "Grandma, if you just knew the things that I've got on my mind . . . . [I]f the authorities knew it, I'd be in prison for the rest of my life." *Trial Transcript* at 1833. Myers stated further that his father had known it and "took it to the grave with him." *Id.* Later that evening, when Myers dropped his

> daughter off at Swaffard's house, he had tears in his eyes and said, "Grandma, I wish I wasn't a bad person. I wish I hadn't done these bad things." *Id.* at 1833–34. On cross-examination, trial counsel asked Swaffard only two questions, both of which were apparently intended to establish that Swaffard had developed an unusually close relationship with Detective Lang. First, counsel asked Swaffard whether she knew Detective Lang's telephone number, and she responded affirmatively. Second, counsel asked what Detective Lang's phone number was, and Swaffard began to answer but was interrupted by an objection from the State. The trial court sustained the objection, and trial counsel declined to cross-examine Swaffard further.

Myers II, 33 N.E.3d at 1100.

Mr. Myers argues that trial counsel had ample grounds on which to impeach Ms. Swaffard and it was deficient performance not to do so. Specifically, Mr. Myers points to the fact that Detective Lang began recording Ms. Swaffard's phone calls with her consent in late April and May 2005. PCR Tr. 1196-97, 1259. During these calls—which trial counsel listened to before trial, *id.* at 582—Mr. Myers repeatedly and adamantly denied involvement in Ms. Behrman's murder, PCR Ex. 101A at 21-27. These denials, Mr. Myers contends, would have impeached Ms. Swafford's testimony regarding Mr. Myers. Filing No. 9 at 35-36; Filing No. 33 at 64-67.

Patrick Baker was questioned regarding his strategy with respect to Ms. Swaffard's testimony during the post-conviction hearing. He testified that Ms. Swaffard had "very damaging evidence and it was probably the most challenging explanation of the entire trial and I think probably remains the most challenging explanation as to how a grandma could start a murder case against her grandson." PCR Tr. 584. "[B]ased upon that," Patrick Baker explained, "and based upon the questioning . . . of . . . Mr. Sonnega . . . we wanted to ask her very few questions, if any at all." *Id.* Patrick Baker explained further that Ms. Swaffard's "presentation was very credible so it wasn't just her testimony. It was her presentation and . . . her demeanor." *Id.* at 585. In sum, his strategy was "to get her off the stand . . . because the longer she was before the jury, we felt, the more damaging it could be." *Id.* at 584.

The Indiana Court of Appeals rejected Mr. Myers' allegation of deficient performance in *Myers II*, reasoning that "[t]his is the sort of second-guessing of trial strategy in which we will not engage on appeal. 'It is well settled that the nature and extent of cross-examination is a matter of strategy delegated to trial counsel.' Myers has not established that a strategy of limiting the jury's exposure to Swaffard's testimony and denying her the opportunity to elaborate further thereon fell outside the wide range of constitutionally competent assistance." *Myers II*, 33 N.E.3d at 1101 (citation omitted).

Mr. Myers contends that this was an unreasonable application of *Strickland*'s performance prong.

Specifically, he argues that "[t]he state court's assumption that counsel's presentation was adequate, without any assessment of whether counsel's conduct[] 'actually demonstrated reasonable professional judgment'" was unreasonable. Filing No. 33 at 66-67 (quoting *Wiggins*, 539 U.S. at 528). Mr. Myers further argues that "'if no reason is or can be given for a tactic, the label "tactic" will not prevent it from being used as evidence of ineffective assistance of counsel.'" *Id.* at 66 (quoting *Miller v. Anderson*, 255 F.3d 455, 458 (7th Cir. 2001)).

As an initial matter, there *was* a strategic reason given by trial counsel for essentially declining to cross examine Ms. Swaffard—namely, that her evidence, presentation, and demeanor were extremely damaging to Mr. Myers and thus trial counsel wanted her off the stand as quickly as possible. *See* PCR Tr. 584-85. The Indiana Court of Appeals recognized trial counsel's testimony and credited trial counsel's strategy regarding cross-examination. *See Myers II*, 33 N.E.3d at 1100-01.

Furthermore, Mr. Myers is incorrect that the Indiana Court of Appeals failed to assess "whether counsel's conduct[] 'actually demonstrated reasonable professional judgment.'" Filing No. 33 at 66-67 (quoting *Wiggins*, 539 U.S. at 528). Again, trial counsel explained his strategy behind failing to cross-examine Ms. Swaffard. And one premise of this strategy—that Ms. Swaffard's testimony was extremely damaging evidence for Mr. Myers—is undoubtedly true.

The Supreme Court made clear in *Strickland* that "strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable[.]" *Strickland*, 466 U.S. at 690-91; see *Jansen*, 884 F.3d at 656 ("Generally when an attorney articulates a strategic reason for a decision, the court defers to that choice." (citation and quotation marks omitted)). And "deciding what questions to ask a prosecution witness on cross-examination is a matter of strategy." *Peterson v. Douma*, 751 F.3d 524, 531 (7th Cir. 2014) (citation and quotation marks omitted). These principles are precisely what the Indiana Court of Appeals recognized and applied when concluding that trial counsel's performance was not deficient.

Moreover, unlike with other allegations of deficient performance, Mr. Myers raises no issue over whether trial counsel sufficiently investigated potential impeachment evidence for Ms. Swaffard before choosing this strategy. This is likely because Patrick Baker testified that he reviewed the recorded conversations between Mr. Myers and Ms. Swaffard. He simply decided that it was better to end Ms. Swaffard's testimony as quickly as possible—after two brief questions—rather than delve into this or any other evidence. Given that there is no allegation that trial counsel's investigation into Ms. Swaffard was deficient—trial counsel's testimony that he reviewed those calls went undisputed—trial counsel's strategic decision is "virtually unchallengable," *Strickland*, 466 U.S. at 691. This is the conclusion reached by the Indiana Court of Appeals, and it was not an unreasonable application of *Strickland*.

Accordingly, Mr. Myers has not shown that trial counsel's performance was deficient for failing to sufficiently cross-examine Ms. Swaffard.

7. Failure to Object to Improper Religious Vouching for Ms. Swaffard

Mr. Myers argues that trial counsel provided deficient performance by failing to object to alleged improper religious vouching for Ms. Swaffard's credibility by the State. Specifically, Mr. Myers contends that, without objection, the State began Ms. Swaffard's testimony with the fact that she engages in Bible study and is a lay counselor at her church and then, during closing, the State referenced Ms. Swaffard's religious convictions to bolster the credibility of her testimony. For example, the State argued during closing that "with great prayer . . . [Ms. Swaffard] did come forward," Trial Tr. 2747, and at the conclusion of closing, "[t]hanks to Betty Swaffard and her courage and her strength and the grace of God she came forward and told you the truth," *id.* at 2827.

The Indiana Court of Appeals addressed this issue on the merits in *Myers II*, concluding that trial counsel's failure to object was not deficient performance and, even if it was, Mr. Myers was not prejudiced by it. *See Myers II*, 33 N.E.3d at 1101-03. The Court need not consider the Indiana Court of Appeals' discussion of prejudice, however, because its performance analysis forecloses this claim.

The Indiana Court of Appeals recognized that Indiana Rule of Evidence 610 provides that "[e]vidence

of a witness's religious beliefs or opinions is not admissible to attack or support the witness's credibility." After analyzing the alleged improper religious bolstering by the State, *id.* at 1101-02, the Indiana Court of Appeals held that it "cannot conclude that Swaffard's testimony concerning her religious involvement constitutes vouching, religious or otherwise," *id.* at 1102. It continued: "Although the relevance of Swaffard's religious involvement is certainly questionable . . . , her testimony contained no express or implied assertion that she was more or less likely to tell the truth due to her religious beliefs. Thus, Myers has not established a reasonable probability that an objection on this basis would have been sustained." *Id.*

Whether an objection under Rule 610—or any other Indiana Rule of Evidence—would be sustained is purely a question of state law. This Court cannot second-guess that determination, as "it is not the province of a federal habeas court to reexamine state-court determinations on state-law questions." *Wilson*, 131 S. Ct. at 16 (citation and quotation marks omitted); *see Miller*, 820 F.3d at 277 ("A federal court cannot disagree with a state court's resolution of an issue of state law."). Thus, "although claims of ineffective assistance of counsel can be premised on an attorney's failure to raise state-law issues, federal courts reviewing such claims must defer to state-court precedent concerning the questions of state law underlying the defendant's ineffectiveness claim." *Shaw v. Wilson*, 721 F.3d 908, 914 (7th Cir. 2013) (citations omitted); *see Harper v. Brown*, 865 F.3d 857, 859 (7th Cir. 2017) (holding that a habeas petitioner's

argument was really an attack on a state court's resolution of a question of state law embedded within its analysis of a *Strickland* claim, and that federal courts are not empowered to review such questions of state law under § 2254).

Since this Court must accept the Indiana Court of Appeals' determination that any objection to the alleged improper vouching would not have been sustained, Mr. Myers cannot establish that his trial counsel's performance was deficient in this respect. This is because "[i]f evidence admitted without objection is, in fact, admissible, then failing to object to [that] evidence cannot be a professionally unreasonable action." *Jones v. Brown*, 756 F.3d 1000, 1009 (7th Cir. 2014) (citation and quotation marks omitted); *Hough*, 272 F.3d at 898 ("An ineffective assistance claim based on a failure to object is tied to the admissibility of the underlying evidence. If evidence admitted without objection was admissible, then the complained of action fails both prongs of the *Strickland* test[.]").

In sum, this Court must accept the Indiana Court of Appeals' conclusion that any objection to the alleged improper vouching would not have been sustained, and it cannot be deficient performance to not raise an objection that would have been overruled. Accordingly, Mr. Myers has failed to show that trial counsel rendered deficient performance by failing to object to alleged improper religious vouching for Ms. Swaffard's credibility.

8. Failure to Impeach Carly Goodman

Carly Goodman was a senior in high school and Mr. Myers' girlfriend from late 1999 to through early 2000. She testified during trial that, among other things, while they were dating, Mr. Myers took her to the very location in the woods where Ms. Behrman's remains were found in 2003. Mr. Myers argues that trial counsel provided deficient performance by failing to impeach Ms. Goodman's testimony regarding her identification of the location in which Ms. Behrman's remains were found as a location Mr. Myers had previously taken her. He contends that Ms. Goodman previously made inconsistent statements about her identification of the site, and trial counsel should have used these inconsistent statements to impeach her testimony.

The Indiana Court of Appeals in *Myers II* summarized the factual background of this claim as follows:

> Goodman testified that one night in March 2000, Myers, her then-boyfriend, took her for a long car ride through Gosport to a wooded area, where he parked in a "clearance" surrounded by a wooded area. *Trial Transcript* at 1899. Goodman testified that after Myers stopped the car, the couple argued and that she was afraid and wanted to go home. Goodman testified further that in February of 2006, she went for a drive with Detective Lang to identify places that Myers had taken her during their relationship. She recognized one place as the wooded area where she and Myers had argued

> in March 2000. This was the same area where Behrman's remains were discovered in 2003.

Myers II, 33 N.E.3d at 1103.

Mr. Myers' claim focuses on the failure to impeach Ms. Goodman's identification of the site. Ms. Goodman testified at trial that during a drive with Mr. Myers he parked in a clearance that was completely surrounded by woods. Trial Tr. 1899-1900. She was then shown Exhibit 12, which was a picture of where Ms. Behrman's remains were found. *Id.* She stated she recognized the place, and when asked by the State what she recognized about it, she replied, "[t]hat's where [Mr. Myers] took me." *Id.* at 1900.

Patrick Baker conducted a brief cross-examination of Ms. Goodman, focusing on her ability to identify the clearance in Exhibit 12 as the specific clearing to which Mr. Myers took her. He asked her how she could "differentiate that clearance from any other clearance?" *Id.* at 1906. She responded that "it's just what looks familiar to me." *Id.* When Patrick Baker next asked, "[b]ut . . . that could be anywhere, correct," she responded, "yes." *Id.* Cross-examination concluded shortly thereafter following a few questions regarding how well Ms. Goodman knows Detective Lang and how familiar she is with the wooded areas near Bloomington. *See id.* at 1906-07.

Mr. Myers argues that trial counsel should have impeached Ms. Goodman's testimony that she recognized the exact place Ms. Behrman's remains were found via allegedly inconsistent statements she made to

Detective Lang. Specifically, Mr. Myers contends that Detective Lang's grand jury testimony was that Ms. Goodman "did *not* say that cut-away was *the one* to which Myers took her, but could only say it was *similar to* it." Filing No. 33 at 70.

Patrick Baker testified during the post-conviction hearing regarding his strategy with respect to Ms. Goodman's testimony. He stated that his strategy from the outset was to "minimize" her testimony because she "had a lot of information, 404(b) evidence, that regarded domestic battery situations" with Mr. Myers, "regarded her being held against her will in a trailer, I think, for three or four days without any clothes," and "protective orders that she had filed against [Mr. Myers], all of which . . . [the trial judge] had . . . ruled in our favor but we did not want her bringing any of those issues up." PCR Tr. 581. Patrick Baker was then asked whether he had any plans to undermine her testimony with any prior inconsistent statements. He responded that he did not "know specifically," but that he also had to "judge the witnesses as they c[a]me up and . . . the demeanor and the fear . . . on her face was so evident, I think that whatever strategies we may have had or contemplated were changed at that moment based upon her apparent fear." *Id.* at 582.

The Indiana Court of Appeals addressed the performance prong on the merits in *Myers II*. It first acknowledged Patrick Baker's testimony at the post-conviction hearing discussed above, then reasoned that trial counsel's performance was not deficient:

> Myers dismisses trial counsel's explanation of his strategy as unreasonable. He asserts that counsel could have cross-examined Goodman concerning her prior statements made to Detective Lang at the time she identified the site without eliciting or opening the door to prejudicial and inadmissible testimony . . . . We will not engage in this sort of second-guessing of trial counsel's strategic decisions concerning the nature and scope of cross-examination. Myers has not established that his trial counsel's strategy was unreasonable; to the contrary, it was quite reasonable for trial counsel to minimize the jury's exposure to Goodman's fearful demeanor and avoid any inadvertent mention of highly prejudicial and inadmissible evidence by limiting the scope and duration of his cross-examination, while simultaneously eliciting testimony casting doubt on the reliability of her identification of the area.

Myers II, 33 N.E.3d at 1103-04.

Mr. Myers contends the Indiana Court of Appeals' resolution of the performance prong constitutes an unreasonable application of *Strickland*. His primary argument is that there "was no reason to believe that impeaching Goodman with her prior inconsistent statements to Lang would have elicited prohibited 404(b) evidence," as the trial court was vigilantly prohibiting such evidence from being admitted. Filing No. 33 at 71. Moreover, Mr. Myers contends that trial counsel "*did* cross examine Goodman, in an attempt to

show her identification was implausible in light of the lack of distinguishing features of this particular area of the woods." *Id.* (citing Trial Tr. 1905-07). This shows, says Mr. Myers, that "the state court's theory is based on a 'post-hoc rationalization of counsel's conduct [rather] than an accurate description of [counsel's] deliberations.'" *Id.* (first alteration in original) (quoting *Wiggins*, 539 U.S. at 526-27).

As an initial matter, while Mr. Myers addresses the concern about risking Rule 404(b) testimony from Ms. Goodman, he fails to explain how trial counsel's concern about Ms. Goodman's fearful demeanor did not provide a reasonable strategic justification to limit her cross-examination. After all, Patrick Baker explained during the post-conviction hearing "that whatever strategies we may have had or contemplated were changed [during Ms. Goodman's testimony] based upon her apparent fear." PCR Tr. 582. The state courts accepted this testimony and Mr. Myers does not dispute it. As noted above, "[g]enerally when an attorney articulates a strategic reason for a decision, the court defers to that choice." *Jansen*, 884 F.3d at 656 (quoting *United States v. Cieslowski*, 410 F.3d 353, 360 (7th Cir. 2005)).

Given this strategy, Mr. Myers' position fails for essentially the same reasons his claim regarding his trial counsel's alleged failure to sufficiently cross-examine Ms. Swaffard did— namely, that "strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable[.]" *Strickland*, 466 U.S. at 690-91; *see Bryant v. Brown*, 873 F.3d 988, 996 (7th Cir. 2017) (quoting *Jones v. Butler*, 778

F.3d 575, 584 (7th Cir. 2015) ("A 'decision not to impeach a particular witness is normally considered a strategic choice within the discretion of counsel.'"). This is precisely the path the Indiana Court of Appeals followed when it concluded that it would not "second-guess[] . . . trial counsel's strategic decisions concerning the nature and scope of cross-examination," especially given that it is a reasonable strategy to "minimize the jury's exposure to Goodman's fearful demeanor." *Myers II*, 33 N.E.3d at 1104.

Mr. Myers resists this conclusion by arguing that the proffered strategy is merely a post-hoc rationalization for trial counsel's decisions. But Patrick Baker testified that his strategy developed at the very time Ms. Goodman was on the stand because that was when he could observe her demeanor and consider its impact on the jury. Moreover, the objective evidence at least partially corroborates that this was Patrick Baker's asserted strategy at the time. During cross-examination, he briefly attempted to undermine the reliability of Ms. Goodman's identification of the clearance and was rather successful in doing so. *See* Trial Tr. 1906 (Ms. Goodman responding "yes" when Patrick Baker asked if the State's picture of the clearance "could be anywhere"). He then asked only a few more questions—the entirety of cross-examination spans less than two full transcript pages—before concluding his cross-examination. Such a brief cross-examination—after at least partially undermining her identification of the clearance—of a witness that both parties agree was important is consistent with Patrick Baker's testimony that, given Ms. Goodman's fearful demeanor, he changed

what strategy he previously had in the moment and instead chose to expose the jury to her fearful demeanor as little as possible.

In sum, even though Mr. Myers now argues trial counsel should have done more to impeach Ms. Goodman's testimony, the Indiana Court of Appeals reasonably applied *Strickland* in concluding that trial counsel's strategy is "virtually unchallengeable," *Strickland*, 466 U.S. at 690-91, under these circumstances.

9. Failure to Object to Carly Goodman's Testimony under Rule 404(b)

Mr. Myers argues that trial counsel provided deficient performance by failing to object under Indiana Rule of Evidence 404(b) to certain testimony by Ms. Goodman. Generally, Rule 404(b) prohibits admission of "a crime, wrong, or other act . . . to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character."

Prior to trial, the parties and the trial judge discussed at some length Mr. Myers' motion *in limine* to exclude Rule 404(b) evidence that may have been admitted through Ms. Goodman's testimony. *See* Trial Tr. 352-75. The trial court granted motions *in limine* with respect to several categories of evidence Ms. Goodman might offer. For example, the trial court prohibited any reference to two protective orders Ms. Goodman had sought against Mr. Myers and the reasons she had sought those protective orders. *Id.* at 363-64. The trial court also excluded any evidence from the

State that Mr. Myers would make Ms. Goodman strip naked in his trailer and take her clothing as a means to control her. *Id.* at 375.

Early during Ms. Goodman's testimony, trial counsel raised several objections because the State's open-ended questions risked Ms. Goodman straying into forbidden testimony. *See id.* at 1883-86. The trial court warned the State during a bench conference that the State's questions were "leaving it wide open for her to start talking about . . . protective order stuff," and reminded the State to "not go there." *Id.* at 1886. Trial counsel continued to raise numerous objections, some of which were sustained. *See*, *e.g.*, *id.* at 1887-91.

Mr. Myers argues that, even though trial counsel objected to many of the State's questions, trial counsel failed to object to damaging Rule 404(b) testimony. Specifically, Mr. Myers points to the following sequences during the State's questioning of Ms. Goodman:

> Q. What did you do [during the ride with Mr. Myers]?
>
> A. I asked for him to take me home.
>
> Q. Did he take you home?
>
> A. No.
>
> Q. How'd you feel?
>
> A. Scared.
>
> . . . .

Q. And when you parked the car in the clearance, was this a romantic . . . romantic type of . . .

PATRICK BAKER: Objection to leading.

THE COURT: Sustained.

MR. SONNEGA: Okay. Rephrase.

Q. What did you and the Defendant do when he parked his car . . .

PATRICK BAKER: Objection, Judge, to relevance.

THE COURT: Overruled.

A. We argued.

Q. Did you kiss him?

A. No.

Q. Did you want to go home?

A. Yes.

Q. Were you scared?

A. Yes.

. . . .

Q. How long did you spend at that location?

A. It's hard to say. Maybe a half an hour, 45 minutes.

Trial Tr. 1893, 1899-1900, 1901.[21]

Mr. Myers argues that trial counsel should have objected to the foregoing questions under Rule 404(b) because they were unrelated to the purpose of Ms. Goodman's testimony—that is, to show Mr. Myers had knowledge of the location where Ms. Behrman's remains were found, see *id.* at 367—and were prejudicial. They were especially prejudicial, says Mr. Myers, considering that evidence that Ms. Behrman was raped (which is discussed further below) was improperly presented to the jury. "After hearing reference to a rape at the same location," Mr. Myers contends, "the jury was left to wonder if Goodman had also been raped." Filing No. 9 at 39.

The Indiana Court of Appeals addressed this claim on the merits in *Myers II*. As an initial matter, it concluded that the argument was waived because it was not fully developed:

> Myers also argues that his trial counsel were ineffective for failing to object to Goodman's description of Myers' behavior during the March

[21] Ostensibly to show that objections to the latter questions would have been sustained, Mr. Myers asserts that "[a] relevance objection about whether the trip to the woods was romantic was sustained." Filing No. 9 at 39. But the objection in question was not for relevance, but for leading. *See* Trial Tr. 1899. In fact, when the State rephrased the question, trial counsel's relevance objection was overruled. *See id.*

> 2000 car trip, which he calls 'prejudicial 404(b) testimony.' *Appellant's Brief at* 46. Myers does not, however, cite the applicable language of Indiana Evidence Rule 404(b) or make any attempt to apply it. Accordingly, this argument is waived for lack of cogency. *See Davis v. State*, 835 N.E.2d 1102, 1113 (Ind. Ct. App. 2005) (explaining that "[a] party waives an issue where the party fails to develop a cogent argument or provide adequate citation to authority and portions of the record"), *trans. denied*.

Myers II, 33 N.E.3d at 1105-06.

The respondent first argues that the Indiana Court of Appeals' finding of waiver constitutes an independent and adequate state law basis for denying this claim, making this claim procedurally defaulted. *See* Filing No. 20 at 46-47. The respondent is correct that one type of procedural default occurs when the state court decides a federal claim on an independent and adequate state law basis. *See Walker v. Martin*, 562 U.S. 307, 315 (2011) (quoting *Beard v. Kindler*, 558 U.S. 53, 55 (2009)) ("A federal habeas court will not review a claim rejected by a state court if the decision of [the state] court rests on a state law ground that is independent of the federal question and adequate to support the judgment.").

Mr. Myers resists this conclusion, arguing that the Indiana Court of Appeals' invocation of waiver is not an "adequate" procedural ruling. He points out that Mr. Myers' appellate brief clearly invoked Rule 404(b), pointed to the allegedly inappropriate questions and

testimony in the record, cited another state case that analyzes Rule 404(b) evidence, and discussed why this evidence was prejudicial. *See* Filing No. 33 at 76.

Although Mr. Myers did not quote the language of Rule 404(b) in his post-conviction appellate brief, he clearly invoked the rule as the basis for this claim of ineffective assistance. *See* Filing No. 20-14 at 56 ("Counsel's failure to object to prejudicial 404(b) testimony was ineffective assistance."). He also attempted to apply it; in his brief, he explicitly argued that Ms. Goodman's testimony was admitted over trial counsel's pre-trial objection under the latter portion of Rule 404(b) "to show knowledge of the crime scene," *id.* (citing Trial Tr. 367), and whether she "wanted to go home, or was scared was not relevant for that purpose," *id.*

Given this, it is a close question as to whether the Indiana Court of Appeals relied upon an independent and adequate state law ground. *See Crockett v. Butler*, 807 F.3d 160, 167 (7th Cir. 2015) (holding that a state rule may be inadequate if it is applied "'infrequently, unexpectedly, or freakishly'" (quoting *Prihoda v. McCaughtry*, 910 F.2d 1379, 1383 (7th Cir. 1990)). But it is not one the Court must ultimately answer, as the Indiana Court of Appeals went on to address the merits of Mr. Myers' claim. The Court will therefore bypass this more difficult question of procedural default, as Mr. Myers' claim must be denied on the merits. *See Washington v. Boughton*, 884 F.3d 692, 698 (7th Cir. 2018) ("Rather than work our way through the maze of these procedural arguments, however, we think it best

to cut to the chase and deny [the petitioner's] due process claim on the merits."); *see also Brown v. Watters*, 599 F.3d 602, 610 (7th Cir. 2010).

The Indiana Court of Appeals also addressed Mr. Myers' claim on the merits. After detailing the evidence set forth above, the Indiana Court of Appeals first rejected Mr. Myers' contention that Ms. Goodman's testimony, considered in conjunction with Dr. Radentz's testimony that Ms. Behrman had been raped, left an impression that Ms. Goodman had also been raped. *See Myers II*, 33 N.E.3d at 1106 ("Nothing about Goodman's testimony implied that she had been raped."). It then went on to explain why any objection under Rule 404(b) would not have been sustained anyway:

> In any event, it is apparent that the testimony was admitted to show that Myers was familiar with the area in which Behrman's remains were discovered and to explain why Goodman was still able to remember the location so vividly several years later, and not to establish that Myers had a propensity to commit murder or any other crime. Thus, the testimony did not violate Evidence Rule 404(b), and Myers points to no danger of unfair prejudice aside from his unpersuasive argument that the testimony left the jury with the impression that Goodman had been raped. *See Embry v. State*, 923 N.E.2d 1, 9 (Ind. Ct. App. 2010) (explaining that "[i]n assessing the admissibility of 404(b) evidence a trial court must (1) determine that the evidence of other crimes, wrongs, or acts is relevant to a

> matter at issue other than the defendant's propensity to commit the charged act and (2) balance the probative value of the evidence against its prejudicial effect pursuant to Indiana Evidence Rule 403"), *trans. denied*. Thus, Myers has not established a reasonable probability that an objection on the basis of Evidence Rule 404(b) would have been sustained, and he is consequently unable to show that counsel performed deficiently by failing to object on that basis.

Myers II, 33 N.E.3d at 1106.

In short, the Indiana Court of Appeals held that the proposed Rule 404(b) objection would not have been sustained. As discussed above, whether an unmade evidentiary objection would have been sustained under the Indiana Rules of Evidence is purely a question of state law. This Court cannot second-guess that determination, as "it is not the province of a federal habeas court to reexamine state-court determinations on state-law questions." *Wilson*, 131 S. Ct. at 16 (quoting *Estelle v. McGuire*, 502 U.S. 62, 67 (1991)); *see also Miller*, 820 F.3d at 277; *Shaw*, 721 F.3d at 914.

Since this Court must accept the Indiana Court of Appeals' determination that the proposed Rule 404(b) objections would not have been sustained, Mr. Myers cannot establish that his trial counsel's performance was deficient in this respect. This is because "[i]f evidence admitted without objection is, in fact, admissible, then failing to object to [that] evidence cannot be a professionally unreasonable action." *Jones*, 756 F.3d at

1008-09 (quoting *Hough v. Anderson*, 272 F.3d 878, 898 (7th Cir. 2001)).

Accordingly, Mr. Myers has failed to show that trial counsel rendered deficient performance by failing to object to certain of Ms. Goodman's testimony under Rule 404(b).

10. Failure to Object to Testimony that Ms. Behrman was Raped

Mr. Myers argues trial counsel provided deficient performance by failing to object under Indiana Rule of Evidence 403 to Dr. Radentz's testimony that Ms. Behrman was raped before she was murdered. Dr. Radentz is a forensic pathologist who testified as an expert witness for the State during trial. *See* Trial Tr. 1413-61. Among other things, he testified that the cause of Ms. Behrman's death was a "contact shotgun wound to the back of the head," *id.* at 1420, that Ms. Behrman was killed at the site where her remains were located, *id.* at 1423, that she was raped prior to being killed, *id.* at 1423, and that, of the bones that were remaining (no soft tissue remained), there was no evidence of stabbing, being struck by a vehicle, or other trauma, *id.* at 1425, 1450.

At issue here is Dr. Radentz's testimony that Ms. Behrman was raped prior to being killed, describing this as a "classic scenario . . . of a rape homicide." *Id.* at 1423. Trial counsel did not object to this or any of Dr. Radentz's other rape testimony, which is discussed in more detail in the prejudice analysis below.

Whether Rule 403 should have precluded the admission of the evidence that Ms. Behrman was raped was first addressed by the Indiana Court of Appeals on direct appeal in *Myers I*:

> Myers was not charged with rape. At trial, forensic pathologist Dr. Stephen Radentz nevertheless testified that the circumstances surrounding the disposal of Behrman's remains suggested the classic scenario for a rape-homicide. The court subsequently submitted Jury Question 84 without objection to Dr. Radentz, which asked in part, "Do you believe the body was raped before being shot?", to which Dr. Radentz answered, "Yes." Tr. p. 1454. During follow-up cross-examination, Dr. Radentz admitted there was no physical evidence to support such an assertion. During additional re-direct examination, however, he testified based upon his training and experience that due to the facts that Behrman's remains were found in a remote area, without clothing, and with a "depersonalizing" shotgun wound to the back of the head, Behrman's case was a "rape homicide . . . until proven otherwise." Tr. p. 1460. Although Myers specifically challenges on appeal the court's submission of Question 84 to Dr. Radentz, defense counsel did not object to Jury Question 84, which, but for a claim of fundamental error, waives the issue. Myers also claims, however, that [all of] Dr. Radentz's references to rape constituted fundamental error.

Myers I, 887 N.E.2d at 186.

Although the Indiana Court of Appeals in *Myers I* concluded that Dr. Radentz's testimony did not violate Rule 702, it determined that it did violate Rule 403, which states that "[t]he court may exclude relevant evidence if its probative value is substantially outweighed by a danger of . . . unfair prejudice." The Indiana Court of Appeals reasoned: "With respect to the probative value of Dr. Radentz's testimony, an essential element of rape is penetration, no matter how slight. Because none of Behrman's soft tissue remained, there was no physical evidence to support the rape determination. In addition, Myers was not charged with rape. We agree that the rape testimony was more prejudicial than probative." *Myers I*, 887 N.E.2d at 186-87.

Having determined that the rape testimony should have been excluded under Rule 403, the Indiana Court of Appeals turned to whether it "constituted fundamental error," which requires a showing that the error is "so prejudicial to the rights of the defendant as to make a fair trial impossible." *See id.* at 187 (quoting *Myers v. State*, 718 N.E.2d 783, 790 (Ind. Ct. App. 1999)) ("In determining whether an alleged error rendered a judicial proceeding unfair, we must consider whether the resulting harm or potential for harm is substantial. We look to the totality of the circumstances and decide whether the error had a substantial influence upon the outcome."). The Indiana Court of Appeals concluded the error did not amount to fundamental error and therefore denied relief. *See id.*

During post-conviction proceedings, Mr. Myers argued that his counsel was ineffective for failing to object to testimony regarding rape. The Indiana Court of Appeals in *Myers II* denied this claim on the prejudice prong of *Strickland*, without addressing trial counsel's performance. *See Myers II*, 33 N.E.3d at 1106-07. This Court must therefore review trial counsel's performance *de novo*. *See Porter*, 558 U.S. at 38; *Rompilla*, 545 U.S. at 390.

As an initial matter, the respondent's argument regarding this claim is at best confusing. The respondent first asserts that the Indiana Court of Appeals in *Myers II* "held that the [rape] testimony should have been objected to." Filing No. 20 at 49. But the *Myers II* court did not assess trial counsel's performance, deciding only that Mr. Myers was not prejudiced. 33 N.E.2d at 1106-07. Although this at first appears to be a concession that trial counsel's performance was deficient, the respondent then goes on to argue that the lack of objection was part of trial counsel's strategy. Specifically, the respondent argues that trial counsel purposefully did not object to Dr. Radentz's opinion because, given that there was "no physical evidence indicating that Myers had killed Jill [Behrman]," it allowed Mr. Myers "to argue that someone had moved the body from Salt Creek," which "suited Myers' Owings theory very well." Filing No. 20 at 49.

There are multiple problems with this line of reasoning, to the extent the Court can correctly discern the respondent's position. First, the notion that Dr. Radentz's testimony generally was helpful to Mr. Myers'

theory that Ms. Owings, or perhaps others, may have moved Ms. Behrman's body from Salt Creek to where it was eventually found is incorrect. Dr. Radentz testified repeatedly that he did not believe that Ms. Behrman was killed elsewhere and her body moved. *See*, *e.g.*, Trial Tr. 1417 (stating that he had never seen a deceased person's body moved and then shot); *id.* at 1423-24 (explaining at length why in his expert opinion Ms. Behrman was killed at the location her remains were found).

Second, and more important, it appears that the respondent's argument that Dr. Radentz's testimony could have been helpful to Mr. Myers—and thus it may have been strategic not to object to it—is based on the entirety of Dr. Radentz's opinion testimony, not the specific rape testimony at issue here. Whatever assistance Dr. Radentz's testimony generally provided for Mr. Myers' theory that Ms. Behrman's body was moved—which, as noted, is likely none—his testimony that Ms. Behrman was raped could have been objected to without impacting the purportedly helpful testimony regarding whether the body was moved. In other words, Dr. Radentz's testimony that there was no physical evidence connecting Mr. Myers to the crime scene could have been admitted even if his rape testimony was excluded.

These two reasons show that the respondent's attempt to provide a strategic justification for trial counsel's failure is simply an impermissible "*post-hoc* rationalization," *Wiggins*, 539 U.S. at 526-27, of trial counsel's failure to object—a rationalization that the

state courts did not consider let alone accept—and an implausible rationalization at that.

In the end, the Court concludes that it was objectively deficient performance for trial counsel not to object to Dr. Radentz's testimony regarding rape. The Indiana Court of Appeals in *Myers I* concluded that the evidence should have been excluded under Rule 403. *See Myers I*, 887 N.E.2d at 186-87. And there is no possible strategic reason for failing to object to this testimony. Indeed, Hugh Baker's own contemporaneous conduct shows that he too believed the rape testimony to be damaging to Mr. Myers' case. He attempted—with some, albeit limited, success— during cross-examination to undermine Dr. Radentz's conclusion that Ms. Behrman was raped. *See* Trial Tr. 1458-61. But, had he raised a Rule 403 objection, all of the rape testimony would have been excluded, and the State, among other things, would not have been able to argue during its closing argument that Mr. Myers had motive to murder Ms. Behrman. *See House v. Bell*, 547 U.S. 518, 540 (2006) ("When identity is in question, motive is key."). Given the foregoing, trial counsel's inexplicable failure to object to Dr. Radentz's rape testimony constitutes deficient performance.

As noted above, the prejudice analysis must consider the cumulative prejudice flowing from all of trial counsel's errors. Accordingly, the Court will consider the prejudice from trial counsel's failure to object to Dr. Radentz's rape testimony in the prejudice analysis below.

11. Failure to Object to Evidence Regarding Mr. Myers' Access to Shotguns

Mr. Myers maintains that trial counsel performed deficiently by failing to object to allegedly irrelevant evidence regarding shotguns. During trial, the State introduced evidence that shotguns were missing from a barn near Mr. Myers' home, as well as evidence that Mr. Myers sold shotguns to his uncle at Mr. Myers' father's funeral. Trial Tr. 1798-1802. This evidence was irrelevant and prejudicial, says Mr. Myers, because the shotguns went missing after Ms. Behrman was murdered and thus none of them could have been the murder weapon. Mr. Myers suggests trial counsel knew this because Detective Lang testified to as much during grand jury proceedings. Filing No. 9 at 41. Therefore, had his trial counsel objected as to relevancy, Mr. Myers contends that the objection would have been sustained.

The Indiana Court of Appeals addressed this allegation on the merits, concluding that trial counsel's performance was not deficient, nor was Mr. Myers prejudiced. *See Myers II*, 33 N.E.3d at 1107-09. It agreed with Mr. Myers that "'[e]vidence of weapons possessed by a defendant but not used in the crime for which the defendant is charged should generally not be introduced because the evidence is irrelevant and highly prejudicial.'" *Id.* at 1108 (quoting *Oldham v. State*, 779 N.E.2d 1162, 1174 (Ind. Ct. App. 2002)). But it disagreed that Detective Lang's grand jury testimony completely foreclosed the possibility that one of the stolen shotguns was the murder weapon. It began by quoting the following portion of Detective Lang's testimony:

> I talked to Mr. Maher, [the owner of the barn], the burglary he reported in November 2000, which would have been after the death obviously of [Behrman]. I asked him if it could be possible that he would not have known between May and November when he reported it that any of those weapons were missing? In his opinion, he said no. I don't know. You know I mean he . . . if they were all missing, I'm sure he's correct. If he took one, you know, it could have been out and he would not [have] noticed it in my opinion. But, he said that the air conditioner was removed and that was what tipped him off that something was wrong and then he found the guns were gone, so. He stated that he made trips to the barn on several occasions enough between May and November that he would have known somewhere in between that time that they would have been gone.

Id. (quoting Grand Jury Tr. 5483-84). Based on this testimony, the Indiana Court of Appeals agreed with the post-conviction court's conclusion that the "testimony concerning the guns [was] relevant because they (or at least one of them) could have been taken during a previous, undiscovered entry." *Id.* And if the evidence was relevant, the Indiana Court of Appeals reasoned, any objection would not have been sustained. *Id.*

Mr. Myers cannot assail this decision by the Indiana Court of Appeals for the same reasons discussed above regarding his claim that trial counsel should have

objected to allegedly improper vouching for Ms. Swaffard's credibility—namely, whether an objection would have been sustained is purely a question of state law that this Court cannot reexamine. *See Wilson*, 131 S. Ct. at 16 (quoting *Estelle*, 502 U.S. at 67); *Miller*, 820 F.3d at 277. In analyzing Mr. Myers' allegation of deficient performance, the Indiana Court of Appeals determined as a matter of state evidentiary law that the shotgun evidence was relevant. This Court must defer to determinations of state law embedded in ineffective assistance of counsel claims. *See Harper*, 865 F.3d at 859; *Shaw*, 721 F.3d at 914. Doing so precludes this Court from concluding that trial counsel rendered deficient performance for not objecting to the gun evidence, given that any such objection would have been overruled. *See Jones*, 756 F.3d at 1009; *Hough*, 272 F.3d at 898.

Accordingly, Mr. Myers has failed to show that trial counsel's performance was deficient in this respect.

12. Failure to Object to John Roell's Testimony

Mr. Myers argues that trial counsel provided deficient performance by failing to object to the testimony of Mr. Myers' former cellmate at the Monroe County Jail, John Roell. Mr. Roell testified at trial that, among other things, Mr. Myers made comments appearing to implicate himself in Ms. Behrman's murder. Mr. Myers argues that trial counsel should have moved to exclude Mr. Roell's testimony under Rule 403, which provides in relevant part that relevant evidence may be excluded "if its probative value is substantially outweighed by a danger of . . . unfair prejudice." In support of this argument, Mr. Myers primarily relies on

the numerous inconsistencies between Mr. Roell's deposition and trial testimony to argue that the probative value of his testimony was minimal given his lack of credibility.

The Indiana Court of Appeals addressed this claim on the merits in *Myers II*. *See Myers II*, 33 N.E.3d at 1109-10. It set forth the relevant state law governing objections under Indiana Evidence Rule 403, before reasoning as follows:

> The crux of Myers' argument is that the probative value of Roell's testimony was low because he was not a credible witness due to inconsistencies among his initial statement to police, his deposition testimony, and his trial testimony. But it was for the trier of fact, not the trial court, to judge Roell's credibility. Ultimately, Myers' argument in this regard goes to the weight to be afforded to Roell's testimony, not its admissibility. *See Embrey v. State*, 989 N.E.2d 1260, 1268 (Ind. Ct. App. 2013) ("[i]nconsistencies in witness testimony go to the weight and credibility of the testimony, the resolution of which is within the province of the trier of fact" (internal quotation omitted)). Roell's testimony, if credited by the trier of fact, was highly probative of Myers' guilt.

Myers II, 33 N.E.3d at 1109. It then went on to note that Mr. Myers' argument regarding prejudice was underdeveloped and would not be made for him. *Id.* at 1110. Given these determinations, the Indiana Court of Appeals concluded that Mr. Myers had "not satisfied his

burden of establishing that an objection to Roell's testimony on the basis of Evidence Rule 403 would have been sustained, he has consequently failed to establish deficient performance and resulting prejudice." *Id.*

As with other alleged errors on trial counsel's part, the Indiana Court of Appeals determined that, as a matter of state evidentiary law, the suggested objection would not have been sustained. Again, this state-law determination is unreviewable by this federal habeas court. *See Wilson*, 131 S. Ct. at 16; *Miller*, 820 F.3d at 277. Such is true even when, as here, it is embedded in an ineffective assistance of counsel claim. *See Harper*, 865 F.3d at 859; *Shaw*, 721 F.3d at 914. Accordingly, accepting that the objection to Mr. Roell's testimony would have been overruled, Mr. Myers cannot establish that his counsel rendered deficient performance by failing to object. *See Jones*, 756 F.3d at 1009; *Hough*, 272 F.3d at 898.

13. Failure to Present Evidence Supporting the Theory that Ms. Owings, Ms. Sowders, and Mr. Clouse May have Murdered Ms. Behrman

Mr. Myers' final allegation of deficient performance is that trial counsel failed to impeach Ms. Owings's testimony with inculpatory evidence that she and others murdered Ms. Behrman. Filing No. 9 at 44. Specifically, Mr. Myers contends that trial counsel failed to "impeach Owings; produce evidence corroborating Owings's confession; produce witnesses to whom Owings, Clouse, and Sowders made incriminating statements; produce evidence of Owings, Clouse, and Sowders false or shaky

alibis; [and] produce evidence of Sowders's flight to Texas." Filing No. 9 at 44-45; Filing No. 33 at 87-100.

The Indiana Court of Appeals addressed this claim on the merits in *Myers II*. It relied on Hugh Baker's testimony during the post-conviction hearing that the failure to present much of the above evidence was a strategic decision:

> Trial counsel Hugh Baker . . . testified that the defense team made a strategic decision not to pursue Owings' confession as its primary theory of defense. Specifically, he testified as follows:
>
> > . . . [W]e felt that trying to present to a jury and convince a jury what the Federal Bureau of Investigations, the Bloomington Police Department, and the Indiana State Police had concluded was false was not a good strategy, that is the Owings' confession. She'd recanted this confession. And they hadn't found Jill Behrman in the . . . in Salt Creek. Rather, she was found . . . her remains were found in Morgan County and she . . . hadn't died from drowning but she'd died from 99.9 percent certainty of being shot.
>
> *PCR Transcript* at 840. For these reasons, a decision not to pursue the Owings theory would clearly reflect a reasonable strategic judgment.

Myers II, 33 N.E.3d at 1111. Mr. Myers, however, argued to the Indiana Court of Appeals and argues here that trial counsel pursued the Owings theory during trial, thus it was deficient performance not to present significant evidence in support of it. After noting that trial counsel "pursued the Owings theory to some extent," the Indiana Court of Appeals concluded that, contrary to Mr. Myers' argument, trial counsel was not "obligated to take an all-or-nothing approach to the Owings theory—either forego it entirely or present all evidence supporting it." *Id.* at 1112. The Indiana Court of Appeals, because the State called Owings to testify as to why she recanted, reasoned:

> trial counsel did not act unreasonably by making a strategic decision to attempt to present just enough evidence to keep the possibility of Owings' involvement alive in the minds of the jurors, without making the Owings theory the crux of Myers' defense. Indeed, it appears to us that trial counsel's decision to pursue the Owings theory to only a limited extent was actually quite shrewd because it prevented the jury from being exposed to all of the many conflicting versions of the story Owings, Sowders–Evans, and Clouse allegedly told. This information might have resulted not only in the elimination in the jurors' minds of the possibility that Owings' confession was true, but also in trial counsel's loss of credibility with the jury. As the State argues in its brief, "the best counsel could hope for was to keep Owings on the delicate, razor-thin edge of jurors' credibility

> assessments. That strategy would have been ruined if counsel had pursued the over-zealous course of action advocated by Myers in this proceeding." Appellee's Brief at 50. Accordingly, Myers has not established that trial counsel performed deficiently in this regard.

Id.

Mr. Myers details at length the evidence regarding the Owings theory that was not put before the jury. *See* Filing No. 33 at 89-93. This includes evidence that Ms. Owings gave a false alibi and that she confessed to non-law enforcement individuals that she killed Ms. Behrman long before she confessed to law enforcement. The latter undermines the State's theory at trial that Ms. Owings only confessed to receive beneficial treatment with respect to pending drug charges against her (which itself is a somewhat dubious justification for confessing to murder). Mr. Myers also points to evidence that Mr. Clouse and Ms. Sowders also confessed to non-law enforcement individuals, which could have undermined the State's argument at trial that there was no such evidence.

With this evidence in mind, Mr. Myers argues that the Indiana Court of Appeals unreasonably applied *Strickland* and *Wiggins* in concluding that trial counsel's performance was not deficient in this respect. *See* Filing No. 33 at 96-98. Specifically, he argues that (1) its reasoning represents an impermissible post-hoc rationalization of trial counsel's conduct because trial counsel actually wanted to and attempted to prove the

Owings theory at trial, rather than presenting "just enough" evidence to keep the jury interested; and (2) trial counsel could not have adequately made the posited strategic decision because trial counsel unreasonably failed to sufficiently investigate much of the above evidence supporting the Owings theory. *Id.*

The Court has serious concerns regarding trial counsel's performance related to the Owings theory, as well as the Indiana Court of Appeals resolution of this claim.[22] Whether the Indiana Court of Appeals' analysis was an objectively unreasonable application of *Strickland*, however, presents a difficult question. Therefore, as the Court did with Mr. Myers' claim regarding trial counsel's alleged failure to challenge the State's theory that Ms. Behrman rode north, the Court will not ultimately resolve this instance of deficient performance. As discussed below, the three instances of deficient performance identified are more than sufficient for Mr. Myers to establish prejudice and thus be entitled to habeas relief, making resolution of this claim unnecessary.

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[22] It is striking to the Court that Hugh Baker testified during the post-conviction hearing that it was not sound trial strategy to attempt to "convince a jury what the Federal Bureau of Investigations, the Bloomington Police Department, and the Indiana State Police had concluded was false," PCR Tr. 840, yet this is precisely what trial counsel did in focusing much of their defense on the Hollars theory. As noted below, even Mr. Myers's own witness, Agent Dunn, testified that Mr. Hollars was "absolutely" excluded as a suspect. Trial Tr. 2599-61. The evidence implicating Ms. Owings available to trial counsel was by far more inculpatory than that implicating Mr. Hollars.

B. Prejudice

Trial counsel's performance was deficient in at least the three ways identified above, so the Court must consider the prejudice flowing from those errors. To do so, the Court will turn first to the Indiana Court of Appeals' analysis of prejudice in *Myers II*. After concluding that the Indiana Court of Appeals unreasonably applied *Strickland* in concluding that Mr. Myers was not prejudiced by trial counsel's deficient performance, the Court then turns to its own prejudice analysis.

1. Indiana Court of Appeals' Analysis of Prejudice

The Indiana Court of Appeals in *Myers II* addressed each allegation of ineffective assistance in isolation. *See Myers II*, 33 N.E.3d at 1089-1114. Certain claims were decided on only the performance prong, others were decided on only the prejudice prong, and others were decided on both. For example, regarding whether trial counsel was ineffective for making false statements during opening, the Indiana Court of Appeals held that it was deficient performance for trial counsel to make these unfulfilled promises, but concluded Mr. Myers was not prejudiced by this error. *See Myers II*, 33 N.E.3d at 1091-95. The Indiana Court of Appeals bypassed whether trial counsel's handling of Dr. Radentz's improper rape testimony constituted deficient performance and instead decided only that Mr. Myers was not prejudiced by that evidence. *See id.* at 1106-07.

After reviewing each allegation of ineffective assistance in this manner, the Indiana Court of Appeals turned to Mr. Myers's contention "that the cumulative effect of trial counsel's errors amounted to ineffective assistance entitling him to a new trial." *Id.* at 1114. Its resolution of this claim, in full, is as follows:

> We have reviewed each of Myers' claims of error in detail and concluded that none of them amount to ineffective assistance of counsel. Indeed, most of Myers' claims of ineffective assistance are nothing more than quarrels with trial counsel's reasonable strategic decisions. "Alleged '[t]rial irregularities which standing alone do not amount to error do not gain the stature of reversible error when taken together.'" *Kubsch v. State*, 934 N.E.2d at 1154 (quoting *Reaves v. State*, 586 N.E.2d 847, 858 (Ind. 1992)) (alteration in original). Accordingly, we are unpersuaded by Myers' cumulative error argument.

Id.

Although the Indiana Court of Appeals correctly set out *Strickland*'s prejudice standard at the outset of its opinion, Mr. Myers is correct that it unreasonably applied that standard in its analysis. The prejudice analysis requires the reviewing court to "assess 'the totality of the omitted evidence' under *Strickland* rather than the individual errors," *Washington*, 219 F.3d at 634-35 (quoting *Strickland*, 466 U.S. at 695), and determine whether trial counsel's unprofessional errors prejudiced the defense, *id.*; *see also Williams v. Taylor*, 529 U.S.

362, 397-98 (2000) (holding that the state court's prejudice analysis was an unreasonable application of *Strickland* "insofar as it failed to evaluate the totality of the available . . . evidence—both that adduced at trial, and the evidence adduced in the habeas proceeding"); *Sussman*, 636 F.3d at 360-61 (explaining that when faced with multiple errors by counsel, the Court "must consider the[ir] cumulative impact" to determine prejudice). Thus "even if [counsel's] errors, in isolation, were not sufficiently prejudicial, their cumulative effect" can amount to prejudice under *Strickland*. *Martin*, 424 F.3d at 592; *see Hooks*, 689 F.3d at 1188 (noting that resolving each allegation of ineffective assistance on prejudice grounds is "not . . . sufficient to dispose of [an ineffective assistance] claim because a further analysis of 'cumulative prejudice' [is] necessary").

The Indiana Court of Appeals in *Myers II* failed to consider the cumulative prejudice of trial counsel's instances of deficient performance, even though it decided multiple of Mr. Myers's claims based on a lack of prejudice. Instead, it referred to its assessment of trial counsel's errors in isolation, noting that "none of them amount to ineffective assistance of counsel." *Myers II*, 33 N.E.3d at 1114. Relying on the principle that "[a]lleged trial irregularities which standing alone do not amount to error do not gain the stature of reversible error when taken together," *id.* (quoting *Kubsch*, 934 N.E.2d at 1154) (quotation marks omitted), the Indiana Court of Appeals thus concluded that Mr. Myers's "cumulative error argument" lacked merit, *id.*

The principle from *Kubsch* on which the Indiana Court of Appeals relied is inconsistent with the prejudice analysis mandated by *Strickland*—that the prejudice flowing from all instances of deficient performance must be considered cumulatively, not considered in isolation. Put differently, the Indiana Court of Appeals was wrong to treat each allegation of deficient performance as a stand-alone ineffective-assistance-of-counsel claim; such a claim encompasses all instances of deficient performance and asks whether all of those instances, taken together, were prejudicial. Had the Indiana Court of Appeals correctly applied *Strickland*, it would have had to consider how the cumulative prejudice flowing from every instance where it concluded that trial counsel's performance was deficient or where it bypassed that question and focused solely on prejudice. But, by improperly relying on *Kubsch*, it failed to do so.

Notably, the Seventh Circuit has concluded that the exact mode of analysis employed by the *Myers II* court constitutes an unreasonable application of *Strickland*. *See Harris*, 698 F.3d at 648 ("The question is whether counsel's entire performance . . . prejudiced [the petitioner]. By analyzing each deficiency in isolation, the [state] appellate court clearly misapplied the *Strickland* prejudice prong . . . the state appellate court's prejudice determination was unreasonable insofar as it failed to apply the correct framework."); *Goodman v. Bertrand*, 467 F.3d 1022, 1030 (7th Cir. 2006) ("Rather than evaluating each error in isolation, as did the Wisconsin Court of Appeals, the pattern of counsel's deficiencies must be considered in their totality. In weighing each

error individually, the Wisconsin Court of Appeals overlooked a pattern of ineffective assistance and unreasonably applied *Strickland*." (citing *Washington*, 219 F.3d at 634-35); *see also Raether v. Meisner*, 608 Fed. Appx. 409, 415 (7th Cir. 2015) ("The state court examined the prejudice flowing from each alleged error individually, but the correct question is whether [the defendant] was prejudiced by counsel's errors in the aggregate.").

Having concluded that the Indiana Court of Appeals unreasonably applied *Strickland*'s prejudice analysis, the Court must determine under what standard to evaluate prejudice. As discussed above when analyzing the Indiana Court of Appeals' resolution of Mr. Myers's claim regarding the bloodhound evidence, the continuing applicability of *Richter*'s "could have supported" framework when a state court gives reasons for its decision was cast into doubt by the Supreme Court in *Wilson*. *See* 138 S. Ct. at 1192-95. The Supreme Court's analysis in *Wilson* suggests that the Court should review prejudice *de novo* rather than using *Richter*'s "could have supported" framework. *Id.* But the Court need not resolve this question. In the end, even if the "could have supported" framework continues to apply, the Court concludes that no "fairminded jurist[]" could conclude that trial counsel's cumulative errors did not meet *Strickland*'s prejudice standard. *Richter*, 562 U.S. at 101.

2. This Court's Prejudice Analysis

The Court turns now to the cumulative prejudice analysis mandated by *Strickland*. To properly evaluate

prejudice, the Court will first set forth the evidence supporting the verdict and evaluate its strength. *See Strickland*, 466 U.S. at 696 ("[A] verdict or conclusion only weakly supported by the record is more likely to have been affected by errors than one with overwhelming record support."). The Court will then discuss each of trial counsel's errors and assess whether there is a reasonable probability those errors, taken together, impacted the jury's verdict.[23]

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[23] The Court ordered the parties to submit supplemental briefing solely on two specific questions regarding cumulative prejudice. *See* Filing No. 36 at 3. In the supplemental brief, the respondent for the first time argues that certain errors are procedurally defaulted. *See* Filing No. 41 at 6. Specifically, the respondent argues that certain of trial counsel's errors cannot be considered in the cumulative prejudice analysis because Mr. Myers failed to repeat them in the cumulative prejudice portion of his petition to transfer to the Indiana Supreme Court, even though they were individually included.

The respondent's procedural default argument is waived and lacks merit. Rule 5(b) of the *Rules Governing Habeas Corpus Cases under Section 2254* provides that the respondent's answer "must state whether any claim in the petition is barred . . . by a procedural bar." The respondent's answer did not include this argument, and the Court's supplemental-briefing order did not provide an additional opportunity to raise it. Procedural default is an affirmative defense that can be waived. *See Blackmon v. Williams*, 823 F.3d 1088, 1100 (7th Cir. 2016). The respondent waived it by not raising it in the initial answer. Moreover, for the reasons in Mr. Myers's supplemental brief, the newly raised procedural default argument lacks merit. *See* Filing No. 46 at 9-15.

a. Evidence Supporting Verdict

Much of the evidence supporting the verdict was referenced in the Indiana Court of Appeals' recitation of the facts in *Myers II* quoted at the beginning of this Order. *See Myers II*, 33 N.E.3d at 1083-88. This evidence can be broken down into five general categories: (1) evidence that Mr. Myers had the opportunity to commit the crime because Ms. Behrman rode north near his residence on the day she disappeared, which also undermined Mr. Myers's alibi that he was home making phone calls; (2) evidence that Mr. Myers had the means to commit the crime in that he had access to a shotgun; (3) evidence suggesting Mr. Myers had a consciousness of guilt; (4) evidence of a connection to the crime or crime scene; and (5) evidence that Mr. Myers exhibited suspicious or strange behavior. The Court will summarize each category of evidence and briefly analyze its potential impact on the verdict.

i. Evidence Ms. Behrman Rode North

It was critical for the State to prove that Ms. Behrman rode north from her residence (toward Mr. Myers's residence) rather than south on the day she disappeared. This is because Mr. Myers had an uncontested alibi if she rode south—namely, phone records establish he was home making phone calls when Ms. Behrman disappeared.

The State presented four types of evidence to prove Ms. Behrman rode north that day. First was the mere fact that her bicycle was found in a field along a route north of Ms. Behrman's residence. This does not,

however, conclusively establish whether Ms. Behrman rode to that location or whether her bicycle was dumped there by the perpetrator. *See*, *e.g.*, Trial Tr. 2561-62 (Agent Dunn testifying that although he did not have a "firm conclusion" about whether Ms. Behrman rode to the field or the bicycle was dumped there, there was some likelihood that Ms. Behrman's bike was dumped in the field because there was a "strong possibility" that Ms. Papakhian's sighting on Harrell Road was accurate).

The State's primary evidence that Ms. Behrman actually rode north was the testimony of the bloodhound handler, Deputy Douthett. He testified at length regarding the bloodhound tracking he conducted six days after Ms. Behrman disappeared. *See* Trial Tr. 957-88. He concluded that the bloodhound trail showed it was likely Ms. Behrman rode north from her house to the field where the bike was found, which was close to Mr. Myers's residence, and her ride ended there. *Id.* at 988-89. As discussed above, trial counsel should have objected to this bloodhound evidence and, had trial counsel done so, it would not have been admitted at trial.

The remaining evidence that Ms. Behrman rode north consists of the testimony of Robert England and Dr. Houze. Mr. England briefly testified that he saw a female cyclist in her twenties with a bike shirt and helmet that matched Ms. Behrman's description. *Id.* at 1021-22. He was not sure, however, whether he saw this bicyclist on Wednesday morning (the day Ms. Behrman disappeared) or Thursday morning. *Id.* at 1026-28.

Dr. Houze was an experienced bicyclist who testified regarding a timed simulation he conducted of

Ms. Behrman's proposed route north. He testified that it would have taken Ms. Behrman between forty and forty-one minutes to ride from her house to the field where her bike was found. *Id.* at 1271. This evidence was presented to show that it was possible for Ms. Behrman to have ridden north to where her bicycle was found and made it back on time for her shift at the SRSC that began at noon.

Had the bloodhound evidence not been admitted, the evidence that Ms. Behrman rode north rather than south was quite weak. Dr. Houze merely demonstrated that Ms. Behrman *could* have ridden north and returned in time for her work shift. This leaves only Mr. England's testimony that Ms. Behrman actually rode north. While he testified that he saw a bicyclist matching Ms. Behrman's description, he was uncertain whether he saw this biker on the relevant day or not. One witness testifying that he saw a cyclist matching Ms. Behrman's description perhaps on the day in question is far from compelling evidence that Ms. Behrman rode north. As discussed further below, such evidence is, at best, no more convincing than the evidence that Ms. Behrman road south.

ii. Access to Shotguns

Dan Downing, the Morgan County Coroner, and Dr. Radentz, a forensic pathologist, both testified that the cause of Ms. Behrman's death was a shotgun wound on the back of the head. *Id.* at 517, 1420; *see also id.* at 621, 664 (Dr. Nawrocki, the forensic anthropologist, providing further details regarding the shotgun wound and related evidence). Mark Keisler, a firearms expert

with the Indiana State Police, further explained that a twelve-gauge shotgun was used with number eight shot and "very unique" wadding manufactured by the Federal Cartridge Company. *Id.* at 740-41. Due to this evidence regarding the cause of death, it was important for the State to prove that Mr. Myers had access to shotguns during the time Ms. Behrman was murdered, as no murder weapon was produced at trial.

The State adduced such evidence by way of several witnesses. Although no witness testified that Mr. Myers owned or otherwise possessed a shotgun on the date Ms. Behrman disappeared, multiple witnesses testified that he had access to shotguns around this time. For example, Mr. Myers's brother, Samuel Myers, testified that the shotgun he kept at his parents' house went missing around the relevant timeframe. *Id.* at 1667-70, 1675. Richard Swinney, the husband of Mr. Myers's cousin, testified that he spoke with Mr. Myers about hunting with shotguns. *Id.* at 1921. Debbie Bell, Mr. Myers's aunt, testified that Mr. Myers sold a shotgun to her husband at Mr. Myers's father's funeral. *Id.* at 1798-1802.

In sum, the State produced essentially uncontested evidence that—even though the specific murder weapon was not found, Mr. Myers did not own a shotgun, and there was no evidence that Mr. Myers had a shotgun on the day Ms. Behrman disappeared—Mr. Myers had access to twelve-gauge shotguns around the relevant period.

iii. Consciousness-of-Guilt Evidence

The State's strongest evidence of guilt consisted of consciousness-of-guilt evidence—evidence that Mr. Myers made statements or exhibited behavior that a guilty person would. This evidence falls into two main categories. First, evidence was presented regarding Mr. Myers's mental and emotional state on and around the day Ms. Behrman disappeared, May 31, 2000, and in the months and years that followed. The evidence came primarily from Mr. Myers's aunt, Ms. Bell, and Mr. Myers's grandmother, Ms. Swaffard. Second, the State presented evidence—with varying degrees of success—that Mr. Myers implicitly or explicitly acknowledged his involvement in Ms. Behrman's murder. This evidence consisted of Mr. Myers's May 2, 2005 interview with law enforcement and the testimony of Mr. Myers's former cellmate at the Monroe County Jail, Mr. Roell. The Court summarizes these two categories of evidence in detail below.

Ms. Bell testified that Mr. Myers was distraught around the time Ms. Behrman disappeared. Although she lived in Tennessee, she occasionally spoke with Mr. Myers. She testified that in April 2000, Mr. Myers asked her for help with his daughter because he was having trouble with his girlfriend (Ms. Goodman) and "felt like he was a balloon full of hot air ready to burst." *Id.* at 1779. Ms. Bell testified that Mr. Myers's mother, Jodie, told her that on May 31 (the day Ms. Behrman disappeared), Mr. Myers was at his parents' house "crying," "distraught," and "almost hysterical," stating that "he was leaving town and never coming back." *Id.*

at 1786. Ms. Bell did not testify why Mr. Myers was upset. Jodie Myers testified that it was because Mr. Myers's father had surgery regarding his cancer the day before, which made "all of [her] boys distraught," *id.* at 1705, but Ms. Bell could not corroborate this, *id.* at 1786.

Five days later, on June 5, Ms. Bell spoke with Mr. Myers and asked him how he was doing and if everything was okay. He told her he was "scared" because "there was a girl who was abducted up here, and [he was] afraid they're going to blame" him since "they found her bicycle about a mile from [his] house, and they blame [him] for everything." *Id.* at 1788. Ms. Bell asked if the girl was dead, and Mr. Myers responded, "uh, well, yeah, I guess." *Id.* at 1789. Mr. Myers told Ms. Bell during that same conversation that he was stopped by a roadblock, which scared him. When Ms. Bell asked him why he was scared, he switched from being scared to "laughing," saying he was "not really scared." *Id.*

Ms. Swaffard, who lived near Mr. Myers and would regularly help take care of his daughter, similarly testified about Mr. Myers's mental and emotional state during this period. She testified that Mr. Myers told her he loved his girlfriend, Ms. Goodman, and hoped to marry her, but that their relationship started to deteriorate in the Spring of 2000, which made Mr. Myers "real upset" and would cause him to "get teary-eyed." *Id.* at 1820-22.

Ms. Swaffard also testified regarding a conversation she had with Mr. Myers on the phone on June 27, 2000, nearly four weeks after Ms. Behrman disappeared. Earlier that day, law enforcement spoke with Mr.

Myers's parents about whether Mr. Myers was involved in Ms. Behrman's disappearance. Mr. Myers called Ms. Swaffard and asked to borrow two hundred dollars. She responded that she only had ten dollars, and he said he would "take that." *Id.* at 1828. When Ms. Swaffard told Mr. Myers that he would have to come get it from her house, he responded that he could not "because they have road blocks up on Maple Grove Road" and he is "a suspect in the Jill Behrman disappearance." *Id.* She testified that Mr. Myers had previously borrowed money from her, but he did not state on this occasion the reason he needed the money. *Id.* at 1828-29.

Ms. Swaffard then called her daughter, Jodie Myers, and told her what Mr. Myers had said. Ms. Swaffard testified that Jodie Myers was upset, stating that she knew Mr. Myers was a suspect because she had spent "three hours of hell talking to the police about it." *Id.* at 1831.

Lastly, Ms. Swaffard testified regarding a conversation she had with Mr. Myers more than three years later, in November 2004. Mr. Myers called her, asking if she could watch his daughter. Although she initially declined, she called him back and said she could. Ms. Swaffard testified regarding that conversation as follows:

> [H]e said, I appreciate it, Grandma. And his voice kind of broke. And I said, are you and your girlfriend going out for the evening or something? And he said, no, I just need the time to myself. He said, I've got a lot of things I need to think about. . . . [H]e said, Grandma, if you

> just knew the things that I've got on my mind. He said, if the authorities knew it, I'd be in prison for the rest of my life. . . . [H]e said, my dad knew it. He took it to the grave with him.

Id. at 1833. Mr. Myers then took his daughter to Ms. Swaffard's house. He sat in her living room and said, "I wish I hadn't done these bad things." *Id.* at 1835.

Ms. Swaffard testified that she reported this to Carl Salzman, the Monroe County Prosecutor, who attended her church. *Id.* at 1838. She did so because her "conscience demanded it," explaining that she "couldn't live with the fact that he had said something like this to me, and I didn't know what it might mean." *Id.* at 1835. She said she "thought about" her conversation with Mr. Myers in June 2000 when she chose to come forward in 2004. *Id.* at 1836.

Although Mr. Myers never acknowledged any involvement in Ms. Behrman's murder to his relatives Ms. Bell and Ms. Swaffard, their testimony undoubtedly weighed heavily in the jury's assessment of Mr. Myers's guilt. Indeed, Detective Lang testified that it was "significant" when Ms. Bell and Ms. Swaffard contacted law enforcement in December 2004 because they were acting "against their own best interest by providing information about a family member." *Id.* at 2362. If Mr. Myers's own relatives, especially his Grandmother, believed his comments described above and his emotional state could be related to his involvement in Ms. Behrman's murder, the jury would undoubtedly give his own relatives' assessment great weight.

Next, the State presented two types of evidence that it portrayed as Mr. Myers's acknowledgment of guilt. First, as discussed in some detail above, Mr. Myers was interviewed by law enforcement regarding his potential involvement in Ms. Behrman's murder on May 2, 2005, nearly five years after she disappeared. The jury listened to the audio of a redacted version of the pre-arrest interview. *See* Trial Ex. 96B, Trial Tr. 2390. It is not obvious what impact this interview had on the juror's assessment of Mr. Myers's guilt, as different aspects of the interview cut for and against Mr. Myers's guilt.

Casting suspicion on Mr. Myers were statements he made during the interview that directly contradicted other witnesses' testimony.[24] For example, he denied talking to people other than law enforcement about the case, Trial Ex. 96B at 29-30, and he denied telling anyone in his family that he was afraid of the roadblocks police had set up, *id.* at 65. Mr. Myers also readily acknowledged other behaviors that would seems suspicious, such as traveling to Kentucky Kingdom (where Ms. Goodman's senior trip was) by himself, *id.* at 50-51, being "[e]xtremely upset" at the time Ms.

[24] Mr. Myers also made such statements when he was interviewed regarding Ms. Behrman by Detective Crussen on June 27, 2000. Mr. Myers told Detective Crussen that he planned on going to Myrtle Beach with Ms. Goodman during the week he was on vacation, but that those plans were cancelled. Trial Tr. 1499-1500. Ms. Goodman denied having such plans. *Id.* at 1892. However, Mr. Myers's phone records show that he made calls to Myrtle Beach around that time, as well as Kentucky Kingdom, King's Island, and other locations where one would vacation. *Id.* at 2439-40.

Behrman disappeared, *id.* at 62, and hanging up blankets over the windows of his trailer (offering that he does this still to block the light since he sleeps in the living room), *id.* at 63-65.

The State portrayed Mr. Myers's conduct during the interview as that of a guilty person. Detective Arvin testified that during the interview Mr. Myers "never adamantly denied" and "never expressly denied" murdering Ms. Behrman.[25] Trial Tr. 2211-12. Yet Detective Arvin's testimony, at least with respect to the lack of denials, was completely undermined by the audio of the interview. Mr. Myers consistently and categorically denied involvement during the portion of the interview played to the jury. *See*, *e.g.*, Trial Ex. 96B at 13, 83, 89-96, 103-04. Indeed, even when law enforcement falsely claimed they had a letter from Mr. Myers's father stating that Mr. Myers confessed to him, Mr. Myers denied confessing to his father because he "didn't have anything to do with the Behrman case and [has] no knowledge other than what [he] ha[d] seen in the newspapers and what [he] ha[d] heard [as] street rumor." *Id.* at 91-92.

Finally, the State introduced the testimony of Mr. Myers's former cellmate, Mr. Roell, and portrayed Mr. Myers's statements to Mr. Roell as akin to a confession. Mr. Roell testified that he shared a cell with Mr. Myers in Monroe County Jail for two days in May 2005. During

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[25] The State presented a slideshow during closing argument, and the slides were admitted during the post-conviction proceedings. *See* PCR Ex. 132. Five slides dedicated to the May 2 Interview were each entitled, "When pressed Defendant never denies guilt." *Id.*

those two days, Mr. Myers brought up Ms. Behrman, saying that the State Police were investigating her bike being found near his residence, and Mr. Myers was "scared and nervous." Trial Tr. 2269. Mr. Roell thought Mr. Myers brought up the bike "[t]hree or four times." *Id.* at 2270. According to Mr. Roell, Mr. Myers was angry when he stated, "if she . . . if nothing would have been said, if she wouldn't have said anything, this probably . . . none of this would have happened," and Mr. Roell testified that the pronoun "she" referred to Ms. Behrman. *Id.* When asked whether Mr. Myers used any derogatory terms regarding Ms. Behrman, Mr. Roell testified, "There was one comment made in reference to a bitch." *Id.*

Later during his testimony, Mr. Roell was somewhat equivocal on whether the pronoun "she" referred to Ms. Behrman. He initially testified that "she" referred to Ms. Behrman, *id.*, and explained later during re-direct that it did not refer to anyone else because "Jill Behrman was basically the only person that was [sic] talked about," *id.* at 2279. But when pressed about who Mr. Myers meant by "she," his testimony was less certain:

> Q. Someone else could have been the person that said something that caused things to happen. Isn't that possible?
>
> A. I . . anything's . . that's not for me to . . I don't . . I don't know. That's just what was said.
>
> Q. He never said to you, did he, that if Jill Behrman would have said . . wouldn't have

said anything that nothing would have happened to her?

A. No, he did not use her name.

Q. Could have been anyone, couldn't it?

A. I don't know.

Id. at 2276.

Mr. Roell also testified regarding how he ended up sharing this information with law enforcement. He was arrested in May 2006 for attempting to bring narcotics to his wife, who was incarcerated at the Monroe County Jail. *Id.* at 2266. After he was arrested—which was a year after he shared a cell with Mr. Myers—Mr. Roell brought up "the Behrman case" to law enforcement because he was afraid and "thought that perhaps it could help me." *Id.* at 2267. He met with Detective Lang in the months following May 2006 and told him what he knew. *Id.* at 2272-73.

Although Mr. Roell testified during direct examination that law enforcement did not promise him any benefit for his testimony, he acknowledged during cross-examination that when he stated he thought "it could help" him to tell law enforcement, he was "hoping" it would get him "out of a jam." *Id.* at 2274. He even acknowledged that he stated this hope "several times" when he gave his statement to law enforcement, *id.*, and that his "motivation" in coming forward was to obtain release from jail, *id.* at 2275. On re-direct examination, Mr. Roell elaborated that selfish reasons were not his

sole motivation, as he had a daughter and coming forward seemed like the right thing to do. *Id.* at 2278.

How Mr. Roell's testimony weighed in the juror's minds, like much of the evidence in this case, depends on whether it was trustworthy. It either amounted to an implicit acknowledgement by Mr. Myers of his involvement with Ms. Behrman's murder or was the fabrication of a man who was afraid and trying to "get out of a jam." *Id.* at 2274. When pressed during cross-examination, Mr. Roell almost immediately acknowledged he was unsure whether Mr. Myers was talking about Ms. Behrman or not, although he was rehabilitated on this point during re-direct examination. Moreover, the fact that Mr. Roell acknowledged that his motivation in coming forward was to obtain release, and that he repeatedly asked law enforcement if this would benefit him, makes his testimony much less probative than the testimony of Ms. Swaffard or Ms. Bell who lacked any motivation to lie. *Cf. House*, 547 U.S. at 552 (noting that evidence from witnesses with no motive to lie "has more probative value than, for example, incriminating testimony from inmates"). Notably, Detective Lang acknowledged that law enforcement had concerns about jailhouse informants, testifying this was such a "high profile media case" that he was concerned about certain information coming out because "people that were currently in jail would use it as their possible get-out-of-jail-free card." Trial Tr. 2347; *see also id.* at 2399 (Detective Lang, testifying that they did not publicly name Mr. Myers as a suspect because he "didn't want to gain a bunch of false leads like they did within the confines of most jails. I didn't want any false

implications of Mr. Myers for somebody to gain something out of that")

iv. Connection to the Crime or Crime Scene

Little evidence was presented during trial that directly connected Mr. Myers to the crime. Other than certain of the consciousness-of-guilt evidence discussed above, the primary evidence directly connecting Mr. Myers to the crime was the State's attempt to show that Mr. Myers previously took his former girlfriend, Ms. Goodman, to the wooded area where Ms. Behrman's remains were found.[26] This evidence was primarily

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[26] Other than Ms. Goodman's testimony regarding Mr. Myers's possible connection to the crime scene, the other primary way the State attempted to connect Mr. Myers to the crime was by creating suspicion that two men driving a white delivery van may have abducted Ms. Behrman near where her bike was found and by establishing that Mr. Myers drove similar white delivery vans as part of his employment at Bloomington Hospital. Joe Penden, a farmer who owned the land adjacent to where Ms. Behrman's bicycle was found, testified that he saw a white van with two men in it driving back and forth three times on Maple Grove Road at approximately 9:00 a.m. the morning Ms. Behrman disappeared. *Id.* at 1245-49. They were driving slowly, and he thought "the people were looking for an address or something." *Id.* at 1249. Indeed, during Mr. Myers's May 2, 2005 Interview with law enforcement, Mr. Myers offered that he knew there were rumors about a white van being involved and that he worked at Bloomington Hospital where he drove their white vans. Trial Ex. 96B. at 14.

In the end, however, there was no evidence presented that Mr. Myers was in the white van in question, nor evidence that the individuals driving the van were connected to Ms. Behrman's murder. Not only did Mr. Myers's supervisor at Bloomington

introduced through the testimony of Detective Lang and Ms. Goodman.

Detective Lang testified the he drove Ms. Goodman around the roads near where Ms. Behrman's remains were found to see if she would recognize any of them. He explained that, while driving across an "iron grated bridge," Ms. Goodman recognized the area, which was approximately seven-tenths of a mile from where Ms. Behrman's remains were found. *Id.* at 2409-13. He then turned around and "stopped directly south" of where Ms. Behrman's remains were found and exited the vehicle. *Id.* at 2414. Ms. Goodman told him she recognized the "cut that was in the wooded area" and the "positioning of the woods." *Id.* On cross-examination, Detective Lang acknowledged that the "iron grated bridge" on which he was driving when Ms. Goodman stated she recognized the area was not installed until 2001, that is, a year after she and Mr. Myers relationship ended and Ms. Behrman was killed. *Id.* at 2473. Detective Lang testified, however, that it was the area, not the bridge, that Ms. Goodman recognized. *Id.*

As detailed above, Ms. Goodman testified regarding her recognition of this clearance. She testified that "it was just a wooded area. There was a clearance where you could actually drive into the woods. It wasn't a road.

Hospital testify that Mr. Myers did not have access to the white vans while he was on vacation the week Ms. Behrman disappeared, *id.* at 2005, but Detective Lang testified that he attempted but was unable "to positively tie the white van from the hospital to this case," *id.* at 2397, and that hospital employees told him they would have noticed if a white van was missing when Mr. Myers was on vacation, *id.* at 2498.

It was just kind of a clearance. And it was completely surrounded by woods." *Id.* at 1900. She was then shown a picture of the clearance where Ms. Behrman's remains were found in 2003, *see* Trial Ex. 12, and testified that she recognized it as where Mr. Myers took her in March 2000, Trial Tr. 1900.

Ms. Goodman also testified regarding how she came to provide law enforcement with this information. Detective Lang contacted her about the case in 2005. In February 2006, he drove Ms. Goodman around the rural area north of Bloomington for at least an hour to different places Mr. Myers had taken her when they were dating several years prior. Ms. Goodman testified that she recognized Gosport, "the creek that we had to go over, and . . . the wooded area and the clearance in the woods." *Id.* at 1905. She testified that those places were familiar to her "[b]ecause that's where [Mr. Myers] took me." *Id.*

During cross-examination, Ms. Goodman struggled to explain what about the clearing in Exhibit 12 where Ms. Behrman's remains were found allowed her to identify it as the clearing Mr. Myers drove her to six years earlier. She testified as follows:

> Q. How do you differentiate [Exhibit 12] from any other picture that'd be taken in the woods?
>
> A. Because of the way the clearance is.
>
> Q. How do you . . . differentiate that clearance from any other clearance?

A. It's . . . just what looks familiar to me.

Q. But you don't know . . . that could be anywhere, correct?

A. Yes.

Id. at 1905-06.

Ms. Goodman's testimony, if credited by the jury, would have weighed significantly in favor of Mr. Myers's guilt. If Mr. Myers had previously taken Ms. Goodman to the exact clearance in the woods where Ms. Behrman's remains laid undiscovered for three years, the State established some likelihood that Mr. Myers knew the area where Ms. Behrman was killed. Corroborating Ms. Goodman's testimony is Detective Lang's testimony that Ms. Goodman offered on her own accord that she recognized the area seven-tenths of a mile from where Ms. Behrman's remains were found.

However, it is far from certain whether the jury would credit Ms. Goodman's recollection of the clearance. The picture shown to Ms. Goodman depicts a rather nondescript clearance in the woods. *See* Trial Ex. 12. This aligns with Ms. Goodman's inability during cross-examination to describe any feature of the clearance that stood out to her, as well as her explicit acknowledgment that the picture shown to her "could be anywhere." Trial Tr. 1906. Moreover, Mr. Myers had taken her to the wooded clearance at night, while Detective Lang drove her there during the day (and Exhibit 12 is a picture of the clearance during the day),

which casts further doubt on her ability to identify the specific clearance in question. *Id.* at 2471, 2474.

Like Mr. Roell's testimony, the jury could view Ms. Goodman's testimony in at least two ways. It either cast significant suspicion on Mr. Myers in that it shows he had previously been to the exact location in the woods where Ms. Behrman's remains were found, or it could be viewed as the unreliable testimony of an ex-girlfriend who, six years later, essentially acknowledged that she could not distinguish the clearance at issue from any other clearance in the woods.

v. Strange or Suspicious Behavior

The State called several witnesses to testify about strange or suspicious behavior that Mr. Myers exhibited either near the time Ms. Behrman disappeared or in the years that followed. Certain of the evidence is indeed suspicious, while other evidence is simply strange. The Court will summarize these witnesses' testimony below.

First, the State presented testimony that Mr. Myers covered the windows of his trailer and hid his car in the days following Ms. Behrman's disappearance. Mr. Myers's neighbor, Billy Dodd, testified that on the day Ms. Behrman disappeared, Mr. Myers covered the windows of his trailer and parked his car where it could not be seen from the main road, neither of which Mr. Dodd had seen Mr. Myers do before. *Id.* at 1559-63; *see also id.* at 1581 (testimony of Marlin Dodge, a State of Indiana Conservation Officer, that he observed Mr. Myers's windows covered in the week following Ms. Behrman's disappearance). Mr. Myers left the car there

for three days and never parked it there again. *Id.* at 1563. When Mr. Dodd inquired why his car was parked there, Mr. Myers told him "he just didn't want nobody to know he was at home." *Id.* Detective Crussen testified that the windows of Mr. Myers's trailer were also covered by blankets or sheets when he interviewed him a few weeks later. *Id.* at 1529. Mr. Myers's mother, Jodie Myers, testified that Mr. Myers had blankets on the windows of his trailer between May 31 and June 4, 2000, and Mr. Myers told her they were there because he was growing marijuana plants (she testified that she did not see any plants but would not have expected to). *Id.* at 1714-15.

Second, the State presented evidence that Mr. Myers was so interested in Ms. Behrman's disappearance that he tried to assist law enforcement in solving it. Jodie Myers testified that sometime in 2001, Mr. Myers told her he was fishing and found a "bone" and "panties." *Id.* at 1736. She told him they should report it to law enforcement in case it could help with "the Jill Behrman case." *Id.* at 1738. They both agreed that was the best course, so Mr. Myers called the FBI to report what he found. *Id.* at 1738-39. Agent Dunn returned their call and left a message on Jodie Myers's answering machine two weeks later. *Id.* at 1739. Mr. Myers suggested that "they should save the tape in case they question that this conversation took place." *Id.* at 1740.

The State also presented the testimony of Johnny Kinser, a correctional officer at Monroe County Jail while Mr. Myers was incarcerated there in March 2002,

who testified that Mr. Myers again attempted to assist law enforcement. He explained that there were a couple of inmates on Mr. Myers's cellblock being held in relation to Ms. Behrman's disappearance. *Id.* at 2160. Mr. Myers told Officer Kinser that "he'd found some letters" from other inmates in his cellblock that law enforcement should see, and he also gave Officer Kinser a list of places Mr. Myers created where law enforcement should look for Ms. Behrman's remains. *Id.*; *see also* Trial Ex. 93 (the handwritten list Mr. Myers provided Officer Kinser listing seven locations). Officer Kinser testified that Mr. Myers provided this list shortly after law enforcement had drained Salt Creek, that Mr. Myers said he felt bad "that this had happened to that young lady," and that he thought Mr. Myers "seemed like he generally wanted to help." Trial Tr. 2163. James Minton, an Indiana State Police Officer, searched the locations provided by Mr. Myers, but he did not find relevant evidence at any of the locations. *Id.* at 2197.

Third, the State presented several witnesses who testified that Mr. Myers raised Ms. Behrman's disappearance, raised the proximity of his residence to where her bike was found, or raised what may have happened to her in the years that followed her disappearance. The witnesses provided the following testimony:

- James Cantwell, the warehouse supervisor at Bloomington Hospital where Mr. Myers worked, testified that the week following Ms. Behrman's disappearance, Mr. Myers claimed that police had questioned him about Ms.

Behrman "because the bike was found fairly close to his home," *id.* at 1998, which was false since Mr. Myers was not questioned by law enforcement until four weeks later.

- Matthew Colbert, who performed deliveries for Bloomington Hospital with Mr. Myers for four months beginning in March 2000, testified that, after Ms. Behrman disappeared, Mr. Myers wondered why law enforcement had searched a particular barn in a field. *Id.* at 1983.

- James Swanay, who worked with Mr. Myers at Bloomington Hospital in 2000, testified that a few weeks after posters about Ms. Behrman's disappearance were hung in the hospital, Mr. Myers mentioned to him that Ms. Behrman was "probably [abducted] around . . . where they found the bicycle." *Id.* at 2145; *see also id.* at 2140-47.

- Kanya Bailey, who dated Mr. Myers' sometime in 2000 or 2001, testified that Mr. Myers pointed to a field while they were driving near his home and told her that is where he found Ms. Behrman's bicycle, even though Mr. Myers was not the one who found her bicycle. She did not know why Mr. Myers brought this up, and they did not discuss it any further. *Id.* at 1600-03.

- Doug Alexander, who worked with Mr. Myers delivering furniture in mid-2001, testified that Mr. Myers raised Ms. Behrman's disappearance once during a delivery, stating that her bike was

found near his residence, that he was questioned a couple times about the case, and that "if he was ever going to hide a body, he would hide it up [north] in a wooded area." *Id.* at 1944. On a different occasion, Mr. Myers told him that he knew someone in Florida who had Ms. Behrman's ID or checkbook. *Id.* at 1951.

- Richard Swinney, the husband of Mr. Myers' cousin, testified that Ms. Behrman's disappearance came up at a family get-together in late 2001. He was outside with Mr. Myers when Mr. Myers mentioned his familiarity with the Paragon and Horseshoe Bend areas, where he liked to hunt, and commented, "I bet she's found in the woods." *Id.* at 1921-23.

- Mike Franey, who worked with Mr. Myers at a Kroger grocery store in 2003, testified that on the day the newspaper ran an article about Ms. Behrman's remains being discovered, Mr. Myers saw the newspaper in the break room and said the picture of the woods "looked familiar to him" because "he had hunted there before," even though the woods did not look distinctive. *Id.* at 2009. Mr. Myers further stated that "it was good they finally found the remains" and, in a tone Mr. Franey described as "probably cocky," Mr. Myers stated he was surprised law enforcement had not contacted him "because he knew the people that they thought . . . did the crime." *Id.* at 2010.

- Michelle Lang, a neighbor of Mr. Myers' who babysat for his daughter, testified that Mr. Myers stated in May 2005 that "the police w[ould] not find [Ms. Behrman's] killer because there's no evidence" and that the police should "look into the low-lifes that live on Delap Road." *Id.* at 2304.

The foregoing evidence clearly established that Mr. Myers discussed Ms. Behrman's disappearance with several people over the five-year period between her disappearance and his arrest. Not only did he theorize about where or how the crime was committed and where her remains would be found, but he lied to increase his perceived knowledge about the case. Perhaps most notably, he was correct that her remains were found in the woods. These comments certainly cast suspicion on Mr. Myers, even though they are far from even an implicit acknowledgment of involvement in Ms. Behrman's murder. They undoubtedly raised the question as to why Mr. Myers appeared so interested in the case and whether his comments that she would be found in the woods were based on actual knowledge.

The probative value of these comments, however, must be evaluated in context. They are the comments of an individual who lived very close to where Ms. Behrman's bicycle was found and was interviewed by law enforcement within a month of her disappearance—that is, an individual who has likely spent significant time thinking about Ms. Behrman's disappearance.

His comments must also be considered in light of the fact that nearly everyone in the area was constantly

talking about Ms. Behrman's disappearance at the time. Multiple witnesses testified to this effect. *See*, *e.g.*, *id.* at 1522 (Detective Crussen testifying that in the early stages of the investigation, "in Monroe County during this period of time you couldn't go to the grocery store without talking about Jill Behrman. You couldn't pick up your laundry without talking about Jill Behrman"); *id.* at 1925-26 (Richard Sweeney testifying that he had heard people other than Mr. Myers discuss Ms. Behrman's case on "several" occasions); *id.* at 1966 (Bill Mueller, Mr. Myers's employer in 2001, testifying that around this time others discussed Ms. Behrman's case "quite often").

Indeed, when Ms. Owings testified regarding her confession and subsequent recantation, she acknowledged that she had told an individual she "partied with" that she killed Ms. Behrman and told a group of friends that Ms. Behrman was "turtle bait." *Id.* at 2103-04. She downplayed these comments implicating herself and others that were much more suspicious than those made by Mr. Myers by testifying that Ms. Behrman was constantly discussed by nearly everyone in the area. *See id.* at 2105-06 (Ms. Owings testifying, "I have several different kinds of groups of friends, and [Ms. Behrman] was a subject of conversation in all of them. . . . Some people were saying that it was an accident. Some people were saying they thought it was a serial killer. Some people were saying that they thought that it was me and [Alisha Sowders and Uriah Clouse]."); *id.* at 2106 (Ms. Owings testifying that people discussing Ms. Behrman regularly speculated about how she died and where she would be found).

Thus, like much of the evidence of Mr. Myers's guilt, the weight given to these comments significantly depends on the jury's credibility assessment and the assessment of the other evidence against Mr. Myers. This is especially true given that the jury discounted Ms. Owings's much more inculpatory comments presumably because the jury believed other evidence did not support her guilt. Thus, depending on the jury's evaluation of the other evidence and Mr. Myers's defense, his comments were either those of an individual who knew something about Ms. Behrman's disappearance and was potentially involved, or they were the strange and embellished comments of one who, like much of the community, was interested in the case and what happened to Ms. Behrman.

vi. Totality of Evidence Supporting Verdict

The foregoing summary of the evidence supporting the jury's verdict shows it was far from overwhelming. Other than Mr. Roell's testimony, there was no direct evidence linking Mr. Myers to the crime; there were no witnesses that ever saw Mr. Myers with Ms. Behrman; there was no physical evidence linking Mr. Myers to the crime; and, had the rape evidence been properly excluded, there was no evidence that Mr. Myers had any motive to kill Ms. Behrman.

The affirmative evidence supporting Mr. Myers's guilt consisted primarily of consciousness of guilt evidence from two family members, the testimony of a former girlfriend that Mr. Myers had taken to the wooded location Ms. Behrman was ultimately found, and

the testimony of a former cellmate that Mr. Myers essentially acknowledged guilt. The testimony of Mr. Myers's grandmother and aunt undoubtedly had a strong impact on the jury, although neither testified that Mr. Myers ever acknowledged involvement. The testimony of Ms. Goodman and Mr. Roell was likely even more damaging for Mr. Myers, but only if credited by the jury; both witnesses' testimony, unlike Mr. Myers's relatives' testimony, directly connected Mr. Myers to Ms. Behrman's murder, but the accuracy of both witnesses' testimony was called into question during cross-examination. Thus, much of the jury's assessment of this evidence depended on a credibility judgment.

Together, this evidence is easily more than sufficient for the jury to find Mr. Myers guilty beyond a reasonable doubt, but it is far from a strong case of guilt. Given this, the prejudice caused by trial counsel's errors more likely impacted the verdict. *See Strickland*, 466 U.S. at 696 ("[A] verdict or conclusion only weakly supported by the record is more likely to have been affected by errors than one with overwhelming record support.").

b. The Prejudice Caused by Trial Counsel's Errors

Having discussed the strength of the evidence supporting the verdict, the Court turns to how trial counsel's deficient performance prejudiced Mr. Myers's defense. The Court will first discuss each of the three instances of deficient performance and the prejudice

flowing therefrom. The Court will then assess the cumulative prejudice of these errors.[27]

i. Trial Counsel's False Statements During Opening

As detailed above, trial counsel made two critical false statements to the jury during opening regarding the Hollars theory—namely, that a bloodhound tracked Ms. Behrman's scent to Mr. Hollars's residence but was pulled away by law enforcement and that Mr. Hollars and Ms. Behrman were seen arguing a day or two before she disappeared. No evidence was admitted supporting either of these assertions. As to the former, Patrick Baker admitted to the Indiana Supreme Court that he should have known that no evidence supported this assertion. *See In re Baker*, 955 N.E.2d at 729.

These false statements prejudiced Mr. Myers in two ways. First, they eliminated whatever remaining possibility that the Hollars theory created reasonable

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[27] As discussed above, the Indiana Court of Appeals did not assess cumulative prejudice as *Strickland* requires. This leaves the Court to analyze cumulative prejudice in the first instance. The Court notes, however, that for two of the identified errors—trial counsel's errors regarding the false statements and the rape evidence—the Indiana Court of Appeals determined that Mr. Myers was not sufficiently prejudiced by the individual error such that relief was warranted. Thus, even though this Court's cumulative prejudice analysis is necessarily different than the individual prejudice analysis conducted by the Indiana Court of Appeals, the Court will, when appropriate, discuss in several footnotes below how the Indiana Court of Appeals assessed the prejudice from the individual errors.

doubt. Second, and more prejudicial, they destroyed trial counsel's credibility with the jury as a general matter. Trial counsel's false statements left the jury with the impression that Mr. Myers's best defense involved trial counsel concocting a sensational theory of an unwanted pregnancy leading to murder and a police cover-up.

To evaluate these two types of prejudice, it is important to examine how the Hollars theory was otherwise supported during trial. As explained below, trial counsel presented scant evidence supporting the Hollars theory, and the State presented compelling evidence undermining it. This would leave the jury with the unmistakable impression that the two false statements by trial counsel during opening were not mere oversights of peripheral matters regarding an otherwise strong theory. Instead, the false statements would more likely be perceived as deliberate fabrications meant to focus the jury's attention on a theory of the crime that, in truth, was supported by very little compelling evidence. The jury would ultimately be left to believe that a false sensational story was part of Mr. Myers's best defense.

As an initial matter, Mr. Hollars had a solid alibi. Both he and Ms. Behrman's supervisor at the SRSC, Wes Burton, testified that Mr. Hollars was working at the SRSC during the timeframe in which Ms. Behrman disappeared. Trial Tr. 1044-50. Trial counsel did not meaningfully undermine this evidence during cross-examination. At most, it was acknowledged that Mr.

Hollars's whereabouts could not be confirmed minute-by-minute.

Moreover, law enforcement witnesses, who investigated Ms. Behrman's murder both before and after her remains were found, testified without meaningful opposition that Mr. Hollars was categorically excluded as a suspect. Detective Arvin explained that he interviewed Mr. Hollars and five or six other individuals regarding Mr. Hollars and concluded he had "no involvement." *See* Trial Tr. 2204-06. He further explained that Mr. Hollars became a "person of interest due to a psychic from Michigan that had labeled him," and that he followed up with the psychic and determined she was not credible. *Id.* at 2203-04; *see also id.* at 942 (Marilyn Behrman testifying that Mr. Hollars's possible involvement was first raised by "a psychic"); *id.* at 2241 (Detective Arvin testifying, in response to a juror's question regarding why Mr. Hollars became a person of interest, that "a psychic from Michigan . . . stated that she was a specialist in remote viewing and [Ms. Behrman] had shown her that . . . possibly [Mr. Hollars] was involved."); *id.* at 2493 (Detective Lang testifying, in response to a juror's question of whether Mr. Hollars was ever implicated, that his understanding is that Mr. Hollars's "implication comes from a conversation that Eric Behrman had with a psychic early-on in the investigation."). Agent Dunn, who was Mr. Myers's witness, testified that Mr. Hollars was "absolutely" excluded as a suspect and that the "sole connecti[on]" between Mr. Hollars and Ms. Behrman was that they worked together. *Id.* at 2584, 2599-61. The State highlighted this during closing, noting that it showed

how thorough law enforcement's investigation had been. *See id.* at 2817 (noting that Mr. Hollars "was a suspect because of a psychic"); *id.* at 2823 (arguing that Detectives Dunn and Arvin investigated Mr. Hollars "and eliminated him," and noting that it was even surprising that they looked at him at all "based on the word of a psychic," but this "shows you the detail" with which law enforcement investigated).

Against this, trial counsel provided little evidence connecting Mr. Hollars to Ms. Behrman, let alone implicating him in her murder.[28] Indeed, the evidence meant to cast suspicion on Mr. Hollars was the following:

- Mr. Hollars interviewed Ms. Behrman when she applied to work at the SRSC, *id.* at 1100;

- Mr. Hollars gave Ms. Behrman his name and telephone number because he heard she was a member of a cycling club, Discycles, and he had

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[28] When setting forth the evidence implicating Mr. Hollars, the Indiana Court of Appeals stated, "[i]mportantly, the jury was presented with evidence that a bloodhound tracked Behrman's scent near Hollars' residence." *Myers II*, 33 N.E.3d at 1093. First, this evidence would have been excluded from trial but for trial counsel's deficient performance. Second, even if it was not excluded, this fact did little, if anything, to implicate Mr. Hollars. Not only did Mr. Hollars have a solid alibi that he was at work and no evidence was presented that he was at home, but the bloodhound evidence itself suggested that Ms. Behrman rode several miles past Mr. Hollars's residence and ultimately to the field in which her bike was found. Without more, such evidence hardly implicates Mr. Hollars. Most important, as discussed herein, trial counsel should have objected to the bloodhound evidence and that objection would likely have been sustained.

a nice road bike he wanted to sell, *id.* at 921; Ms. Behrman told her mother about this and her mother did not see anything "unusual" about it because Mr. Hollars was "just a guy she met at work," *id.* at 924, 942;

- Mr. Hollars called Ms. Behrman's residence multiple times the day after she disappeared, which Ms. Behrman's mother thought was odd, *see id.* at 1529, but Detective Lang testified that Mr. Hollars first called because Ms. Behrman's tennis shoes were left at the SRSC, and after he heard she was missing, he thought this might help provide a reference time for her whereabouts; Marilyn Behrman could not remember the contents of the second call, *id.* at 2453-54, 2483;

- Mr. Hollars owned a twelve-gauge shotgun, which was the type of gun used to kill Ms. Behrman; but despite trial counsel making much of law enforcement's failure to test this gun, the State presented evidence that the shotgun wadding found with Ms. Behrman's remains did not match the wadding used by Mr. Hollars, *id.* at 740-41, 747, 1118, 2815-16; and

- Ms. Behrman missed church because she (incorrectly) thought she was subbing for someone's work shift at the SRSC on a Sunday morning in mid-May, so instead of returning to church, Ms. Behrman exercised but at a different recreational center than normal, which

her mother testified was "unusual," *id.* at 913-18.[29]

Trial counsel also repeatedly suggested and attempted to prove that Ms. Behrman was pregnant, arguing this could have been Mr. Hollars's motive for murdering her. Evidence was presented that condoms, a pregnancy test, emergency contraceptive medication, and several books regarding pregnancy were found in Ms. Behrman's bedroom. *See*, *e.g.*, *id.* at 925-31. But there was also significant evidence presented that Ms. Behrman was not pregnant, including testimony from Marilyn Behrman (that her daughter would have told her had she been pregnant and that she did not see any signs of morning sickness) and Detective Lang (that his investigation uncovered no evidence that she was pregnant). *See*, *e.g.*, *id.* at 926-27, 952-54, 2484.

More important, even if the jury believed Ms. Behrman was pregnant, there was no specific evidence

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[29] The Indiana Court of Appeals cited to this evidence, reasoning that "although trial counsel failed to deliver on these specific promises, other evidence casting suspicion on Hollars was presented to the jury." *Myers II*, 33 N.E.3d at 1093. But, as noted, the "other evidence" potentially implicating Mr. Hollars was at best weak. Given this, it is unclear to the Court how this makes trial counsel's false promises that he would present much more damaging evidence regarding Mr. Hollars *less* prejudicial. The opposite is more likely. Presented with very little evidence that Mr. Hollars was involved, trial counsel's false statements regarding the two most potentially damaging pieces of evidence makes the already weak case against Mr. Hollars have the appearance of being a deliberate fabrication to bolster an unsupportable theory with dramatic claims.

presented that Mr. Hollars and Ms. Behrman had any sort of relationship, let alone a sexual relationship to cause a pregnancy and thus a motive for murder. The closest such evidence was the testimony of Becky Shoemake, who was Ms. Behrman's cousin and roommate at Indiana University. She testified that an older man "wanted to go out to lunch or something, and [Ms. Behrman] was concerned because he was over 21, and she wasn't old enough to drink, so she wasn't sure, you know, do I go . . . ." *Id.* at 1013. Ms. Shoemake made clear that she had no idea who this person was or anything other information about him. *See id.* at 1013-14.

Against this evidence—evidence that at most invites the jury to engage in complete speculation that the older man was Mr. Hollars[30]—several witnesses consistently testified that there was no evidence substantiating a relationship between Mr. Hollars and Ms. Behrman. Mr. Hollars denied it. *See id.* at 1100-01. But more persuasive are the litany of other witnesses who testified that there was no such relationship. *See*, *e.g.*, *id.* at 942 (Marilyn Behrman testifying that Mr. Hollars was "just a guy she met at work"); *id.* at 1055

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[30] Mr. Myers aptly explains why this theory is simply implausible: "Behrman's mother testified that Jill had only met Hollars in mid-May, one or two weeks before her disappearance. Trial Tr. 945, 921-24. That is, even if Behrman (who had recently expressed doubts about the propriety of having *lunch* with someone over 21 years old because she wasn't old enough to drink (Trial Tr. 1014)) had decided to have unprotected sex with Hollars the day she met him . . . , it is unlikely she would have been *aware* of any resulting pregnancy before she was abducted, let alone been able to share this information with Hollars." Filing No. 33 at 36-37 (citation format altered).

(Mr. Burton denying knowledge of any relationship); *id.* at 2456 (Detective Lang testifying "that there was . . . no basis . . . of any kind of rumor that [Mr. Hollars] and Jill were ever romantically linked"); *id.* at 2601 (Agent Dunn testifying that the "sole connecti[on]" between Mr. Hollars and Ms. Behrman was that they worked together).

Perhaps no incident at trial highlighted both how poorly the Hollars theory came off and how blatantly false trial counsel's promises were than trial counsel's lone attempt to present any evidence supporting his second false statement—that Ms. Behrman and Mr. Hollars were seen arguing a day or two before she disappeared. During Detective Lang's testimony, Patrick Baker directed him to a case report Detective Lang had written to refresh his memory about what Ms. Behrman's father told him. *See* Trial Tr. 2454. The report stated: "Mr. Behrman recalled that on May 30th, 2000, BRIAN had a softball game at the Cascades in Bloomington. BRIAN and his girlfriend were present at the game. Mr. BEHRMAN recalled JILL was also present at the game and seeing her and BRIAN talk. He learned that they actually made plans to have lunch together before JILL went to camp." D. Trial Ex. B at 5. After Detective Lang reviewed this paragraph, trial counsel asked the following questions:

Q. Does that refresh your recollection?

A. I'm still looking for Hollars in the first paragraph.

Q. First complete paragraph on that page, sir. He talked about Brian Hollars being at the softball game.

A. In the middle of the page?

MR. SONNEGA: Judge, objection. That's not Brian. .

THE COURT: He's just trying to get him focused on what he's asking about. You want to point to it or tell him?

A. I . . . found it.

. . . .

Q. Mr. Behrman told you that Jill had been talking to Brian at the softball game. Is that correct?

A. That's her brother.

Q. She'd been talking to Brian. Correct?

A. Brian, her brother.

Q. And they actually made plans to go have lunch. Is that correct?

MR. SONNEGA: Judge, I'm going to object.

A. It's her brother.

Trial Tr. 2454-55. In short, trial counsel believed (or at least tried to deceive the jury into believing) that Mr. Hollars had been with Ms. Behrman at a softball game and made plans to have lunch together shortly before she disappeared (presumably, attempting to prove that Mr. Hollars and Ms. Behrman were together the evening before she disappeared and/or that Mr. Hollars was the older man Ms. Shoemake testified asked Ms. Behrman on a date). But the "Brian" in the report was not Brian Hollars; it was Ms. Behrman's brother, Brian Behrman.

This incident is a microcosm of how poorly the Hollars theory went during trial. Not only did trial counsel have little to no evidence supporting the Hollars theory, but this incident undoubtedly created the same impression trial counsel's false statements did—that trial counsel was trying to mislead them. After all, the jury had by this time already heard Ms. Behrman's mother testify that their family went to watch Jill's brother Brian's softball game the evening before Jill disappeared. *See id.* at 901.

Finally, the parties' closing arguments highlighted how damaging trial counsel's false statements were. Patrick Baker returned to the Hollars theory in closing. At that point he knew that he had failed to present evidence supporting his two false promises during opening argument, but he did not address this failure head on. Instead, he attempted to press forward with the Hollars theory, albeit in a significantly watered-down fashion. The below portion of Patrick Baker's closing argument, especially the emphasized portions, show how

tenuous the Hollars theory had become by the end of trial, even in trial counsel's own telling of it:

> Motive, there is actual motive here. Not motive by John Myers. There's evidence that the victim may have been involved with an older man. There's your evidence right there. . . . There is evidence that the victim was concerned about being pregnant. Brian Hollars, an older man who . . . worked with her[] is considered a suspect. Ladies and Gentlemen, these books [found in Ms. Behrman's bedroom] are not for sexuality class, okay. Let's talk about the new medicine books, "Pills That Don't Work Over-the Counter" ones, "Pregnant Too Soon", "Poor Baby, Poor Body", a pregnancy kit from IU. This is the physical evidence as to motive. The police dropped Brian Hollars as a suspect without following all of the very important evidence. *He interacted with Jill Behrman.* Yes he gave her his number regarding a bicycle and maybe he says, I want to sell a bicycle, but he calls three or four times the next day after her disappearance. Is that about a bicycle? The bloodhound, Samantha, followed his scent, *which was near the house of Mr. Hollars, but the trail was stopped. She was taken to the other side of 37, which by the way is pretty hard to get across on a bicycle.* Mr. Hollars was an enthusiastic hunter owning a twelve-gauge shotgun matching the description of the gun that the doctors said that was used. Matching the description of the same gun the doctors said

> was used. They questioned Mr. Hollars but they did not examine his shotgun. Why? Why didn't the police take that extra step to look at his shotgun? Twelve gauge. Mr. Hollars had a twelve gauge. That's why this is important. That's why these books are important, ladies and gentlemen. This lady should not have lost her life but ladies and gentlemen it's called motive. It's called the motive of Brian Hollars *or someone else. (Inaudible) associated with Brian Hollars or maybe it was another man completely. An unwanted pregnancy who it had motivated someone to commit this crime. There it is.*

Trial Tr. 2791-92 (emphases added).[31] Trial counsel had produced so little evidence supporting the Hollars

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[31] Patrick Baker's description of the bloodhound evidence during closing—that the bloodhound tracked near Mr. Hollars' "but the trail was stopped"—appears to be an attempt to continue pressing the false narrative he began during opening that law enforcement somehow directed the bloodhound away from Mr. Hollars's residence. At best, this is a misleading gloss on the evidence, if not simply false. Deputy Douthett testified about the need to use drop trails— where a bloodhound is driven along the direction it is scenting and then periodically dropped off to see if it can pick up the scent—so the bloodhound does not become too tired. *See* Trial Tr. 975-96, 983. After the bloodhound scented near the field where Ms. Behrman's bicycle was found, drop trails were used to allow the bloodhound to scent south along Maple Grove Road. *Id.* at 974-75. Deputy Douthett requested that law enforcement driving the vehicle "stop prior to any major roadway." *Id.* at 978. Thus the bloodhound was loaded into the vehicle significantly north of Mr. Hollars's residence near Maple Grove Road and dropped off shortly before Highway 37, where it picked up the scent and continued

theory—and no evidence supporting his two most important promises during opening related to that theory—that he nearly abandons it in closing, vaguely suggesting that it could have been another man altogether who murdered Ms. Behrman because she was (perhaps) pregnant.

During closing, the State capitalized on trial counsel's false statement regarding Detective Arvin leading a bloodhound to Mr. Hollars's residence. Specifically, the State noted that the bloodhound Samantha "never tracked at Brian Hollars' front door as you heard the Defense [claim during] opening." *Id.* at 2817. The State then juxtaposed trial counsel's failure to follow through with their promises to the State's truthfulness during opening argument:

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tracking south and east along the proposed northern route. *Id.* at 974-85. The drop trail near Highway 37 was *past* Mr. Hollars's residence when heading south, and the bloodhound continued tracking south. *See* Trial Ex. 74. Nothing about this testimony suggests that the bloodhound scented "near" Mr. Hollars's residence but was then "stopped," as Patrick Baker argued. If anything, it showed that the drop trail began long before Mr. Hollars's residence and the bloodhound was not dropped off until immediately after Mr. Hollars's residence. It is true that this prevented the bloodhound from having the opportunity to divert toward Mr. Hollars's residence. But this is not what Patrick Baker argued. The bloodhound did not, as he stated, track near Mr. Hollars's residence but was then stopped. Notably, during Deputy Douthett's testimony Patrick Baker did not attempt to elicit any testimony regarding Mr. Hollars's residence, nor did he ever suggest that the drop trail locations were selected for any reason but that testified to by Deputy Douthett—namely, to stop before any major intersection.

> In the State's opening the State showed you everything we were going to show you and then think we delivered that and more. We didn't tell you about the dog. We played poker too but we showed you everything and we told you and we proved everything (inaudible). In the Defense's opening the dog (inaudible) Tom Arvin's dog (inaudible) right up to the front door. I don't know if it's in evidence whether it's a toy poodle or not but he certainly doesn't have a police dog.

Id. at 2822-23.

In sum, the evidence presented at trial regarding the Hollars theory revealed that Mr. Hollars had a strong alibi; there was no evidence that Mr. Hollars was romantically involved with Ms. Behrman; law enforcement absolutely excluded him as a suspect, including Mr. Myers's own witness; despite trial counsel's protestations that law enforcement refused to check Mr. Hollars's shotgun, Mr. Hollars used shotgun wadding different than that found at the crime scene; and Mr. Hollars was only even considered a suspect due to a psychic from Michigan. The only evidence connecting Mr. Hollars to Ms. Behrman is that they worked together, Mr. Hollars gave Ms. Behrman his phone number because he was trying to sell a bicycle (perhaps to someone in Ms. Behrman's cycling club), and he called her house multiple times the day she disappeared after she did not show up for work.

Against this backdrop, trial counsel's two false statements during opening were prejudicial. Had they been true, they would have been by far the strongest

evidence supporting the Hollars theory showing (1) Ms. Behrman was at Mr. Hollars's residence the morning she disappeared, (2) law enforcement covered it up, and (3) the possibility of a relationship between Mr. Hollars and Ms. Behrman shortly before her disappearance.

Simply put, trial counsel promised to produce specific, dramatic evidence to implicate Mr. Hollars, but, without explanation, failed to follow through. This caused significant prejudice. *See Anderson v. Butler*, 858 F.2d 16, 17 (1st Cir. 1988) ("[L]ittle is more damaging than to fail to produce important evidence that had been promised in an opening. . . . The promise was dramatic, and the indicated testimony strikingly significant."); *United States v. Crawford*, 680 F. Supp. 2d 1177, 1194-95 (E.D. Cal. 2009) ("Failure to produce a witness promised in opening statement may constitute ineffective assistance of counsel, if the promise was sufficiently specific and dramatic and the evidence omitted would have been significant."). When, as here, counsel's unfulfilled promises relate directly to a critical aspect of the defense, it is even more prejudicial. *See Saesee v. McDonald*, 725 F.3d 1045, 1049-50 (9th Cir. 2013) (noting that prejudice exists "particularly [in] cases where the promised witness was key to the defense theory of the case and where the witness's absence goes unexplained"). Whatever viability the Hollars theory had—which, to be sure, was not much—trial counsel's false statements undoubtedly led the jury to reject it.

More importantly, trial counsel's false statements undermined Mr. Myers's defense in a second, more fundamental way: They destroyed trial counsel's

credibility with the jury. It is true that the evidence supporting the Hollars theory was so weak that even without considering trial counsel's false statements, the jury likely would have rejected it. But given how weak the Hollars theory was, trial counsel's false statements likely created the impression that Mr. Myers's best defense involved trial counsel concocting a sensational theory that was utterly unsupported by the evidence such that trial counsel needed to falsely promise that strong evidence would be presented to support it.

Counsel's credibility with the jury is of immense importance during a trial. Even small misstatements about what the evidence will show could damage counsel's credibility and thereby prejudice the jury against the defendant. But as detailed above, trial counsel's false statements here were not peripheral. Trial counsel promised a sensational story of a young woman in a relationship with an older coworker who then murders her because she becomes pregnant. The most direct way trial counsel promised to show this was also rather sensational: law enforcement used a bloodhound to track to Mr. Hollars residence but pulled the dog away, implying that law enforcement were covering for the true murderer.[32] Trial counsel also

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[32] In its prejudice analysis of trial counsel's false statements during opening, the Indiana Court of Appeals stated that the jurors' questions showed they were interested in the Hollars theory generally—including questions regarding Mr. Hollars's alibi and whether he was romantically involved Ms. Behrman—but they did not ask the "canine handler," Deputy Douthett, regarding trial counsel's claim that a bloodhound had alerted at Mr. Hollars's residence. *Myers II*, 33 N.E.3d at 1093-94. This, reasoned the

promised evidence of a fraying relationship shortly before Ms. Behrman was murdered: Mr. Hollars and Ms. Behrman were seen arguing shortly before she disappeared.

As the jury found out during trial, however, neither of these critical promises was true. Since trial counsel was untruthful regarding two key pieces of evidence that were supposed to support his defense theory, the jury was left with the unmistakable impression that Mr. Myers's best defense involved misleading the jury and attempting to distract them with sensational claims. Any reasonable jury would conclude not merely that the Hollars theory was meritless, but that any defendant whose best defense includes a sensational theory predicated on lies has no viable defense at all. This would

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Indiana Court of Appeals, shows that the jury was not focused on trial counsel's misstatements and thus the false statements were not prejudicial.

This analysis ignores the fact that the State asked Deputy Douthett on direct whether the bloodhound tracked to "any houses," to which he responded, "[n]o." Trial Tr. 986. It is thus entirely unsurprising that the jurors did not repeat this question. They were already categorically told that the bloodhound did not track to any houses. Moreover, jurors *did* ask questions regarding the bloodhound tracking to Mr. Hollars's residence to other witness, thus showing that they remembered trial counsel's false promises during opening and were searching for supporting evidence. For example, a juror asked Mr. Hollars if he was "ever questioned about a bloodhound coming up to your door?" Trial Tr. 1162. Mr. Hollars responded that "the first time [he] ever heard that was in the paper, and so I don't know anything about a bloodhound coming to my door, no." *Id.* Jurors also asked Mr. Hollars and Mr. Burton whether Ms. Behrman had been to Mr. Hollars's house, both of whom responded in the negative. *See id.* at 1057, 1159.

lead the jury to discount trial counsel's other defense theories, not to mention trial counsel's credibility regarding anything else disputed during trial.

Federal courts have recognized the negative effects caused when defense counsel is untruthful with the jury: the jury imputes defense counsel's lack of credibility to the defendant himself, which can cause substantial prejudice. The Seventh Circuit explained this in *Hampton*: "Promising a particular type of testimony creates an expectation in the minds of jurors, and when defense counsel without explanation fails to keep that promise, the jury may well infer that the testimony would have been adverse to his client and *may also question the attorney's credibility*." 347 F.3d at 260 (emphasis added).[33] Similarly, the Ninth Circuit aptly

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[33] The Indiana Court of Appeals concluded that Mr. Myers was not prejudiced, in part, because *Hampton* is distinguishable in that the false promise made by the defendant's counsel in *Hampton* was that the defendant himself would testify, but never did. The Indiana Court of Appeals is correct that *Hampton* is distinguishable on that basis. *See Barrow v. Uchtman*, 398 F.3d 597, 606-07 (7th Cir. 2005) (distinguishing *Hampton* on multiple bases, one of which that in *Hampton* the Seventh Circuit "placed special importance on the fact that trial counsel had specifically promised the jury that the defendant would testify *himself*"). But that is not the end of the analysis. Merely because this case does not fall directly within *Hampton*'s specific holding, does not mean either that different false promises during opening cannot be prejudicial nor that *Hampton*'s reasoning is not persuasive in a different, albeit related, context. Indeed, the Seventh Circuit and others have recognized that the failure to follow through on promises about what evidence will be presented can amount to ineffective assistance of counsel even when the promised evidence is not the defendant's own testimony. *See English*, 602 F.3d at 728; *Harris*, 894 F.2d at 879.

described how damaging counsel's promise that a witness will testify can be when it goes unfulfilled. *Saesee*, 725 F.3d at 1049-50. This dynamic plays out in a similar manner when, as here, critically important promised evidence goes unpresented:

> A juror's impression is fragile. It is shaped by his confidence in counsel's integrity. . . . Having waited vigilantly for the promised testimony, counting on it to verify the defense theory, the juror may resolve his confusion through negative inferences. In addition to doubting the defense theory, the juror may also doubt the credibility of counsel. By failing to present promised testimony, counsel has broken a pact between counsel and jury, in which the juror promises to keep an open mind in return for the counsel's submission of proof. When counsel breaks that pact, he breaks also the jury's trust in the client. Thus, in some cases—particularly cases where the promised witness was key to the defense theory of the case and where the witness's absence goes unexplained—a counsel's broken promise to produce the witness may result in prejudice to the defendant.

Id. (citing *Williams v. Woodford*, 859 F. Supp. 2d 1154, 1167 (E.D. Cal. 2012)); *see English*, 602 F.3d at 729 ("The jury in this case must have wondered what happened to [the witness] after she was promised [during opening] as a corroborating witness for [the defendant's] story, and the jury may well have counted this unfulfilled promise against [the defendant] and his attorney."); *McAleese*, 1

F.3d at 166 ("The failure of counsel to produce evidence which he promised the jury during his opening statement that he would produce is indeed a damaging failure sufficient of itself to support a claim of ineffectiveness of counsel.").

The Court will consider below how the two types of prejudice flowing from trial counsel's false statements, along with the prejudice from trial counsel's other errors, impacted the jury's verdict.

ii. Improper Rape Evidence

The Court turns next to the prejudice flowing from trial counsel's failure to object to the improper evidence that Ms. Behrman was raped before she was murdered. To assess the impact this evidence had at trial, the Court will first set forth the improper rape evidence that was presented and how the State used it during closing argument.

As detailed above, Dr. Radentz, a forensic pathologist called by the State, testified regarding the "dumping" of a body:

> [A] homicide in which the individual is taken to a remote spot and dumped. Sometimes they are killed at the spot or killed elsewhere. The classic scenario is that of a rape homicide in which you have the remains of a young female, and the clothes, if they're present, are in disarray, and in this case though there is very little, if no, clothing found at the scene. So this is a fairly

> classic for a rape homicide and then subsequent dumping of the body.

Trial Tr. 1423. This testimony undoubtedly prompted a juror to ask Dr. Radentz, "Do you believe the body was raped before being shot," to which Dr. Radentz replied, "yes." *Id.* at 1454.

During follow-up questioning, trial counsel attempted to undermine this testimony instead of simply objecting to it. On one hand, trial counsel brought out testimony that there was no physical evidence proving that Ms. Behrman was raped. But on the other, the exchanges—which, again, would not have been necessary had counsel simply objected to the testimony—belabored Dr. Radentz's testimony regarding rape and, worse still, allowed Dr. Radentz to further explain why he strongly believed Ms. Behrman was raped.

Trial counsel asked and Dr. Radentz answered as follows:

> Q. . . . [Y]ou don't have any evidence that she was raped, do you?
>
> A. No. That's based on my training and experience.
>
> Q. It's based on speculation, isn't it?
>
> A. No. As an expert witness, it's based on my training and experience.

Q. Yeah, but you're looking at that from a way that a scientist looks at statistics. You don't have any evidence that . . . here because you don't have any soft tissues. Isn't that correct?

A. In terms of physical evidence.

Q. . . . Right.

A. No.

Id. at 1458. Trial counsel ended his questioning, and the State immediately followed-up on this

subject:

Q. . . . Based on your training and experience, what did you observe that led you to that conclusion?

A. The . . . scene is classic . . . with a dumping or a scene of a homicide, more specifically a rape homicide. When you find the remains of a female in a remote area with, again, clothing either in disarray or being absent, as I believe it was in this case, that is considered a rape homicide and dumping until proven otherwise. The other characteristic of this case which is found in the rape homicides is the depersonalization effect of the shotgun wound to the back of the head. It is fairly common for an individual after a rape to occur to

> depersonalize the individual to make the crime seem less severe to them, so they'll frequently disfigure the face with multiple blunt force injuries or a massive wound to the head such as a shotgun would which would completely fragment and disrupt the head and face.

Id. at 1459-60. Thus, not only was Dr. Radentz permitted to testify that the jury should believe Ms. Behrman was raped unless Mr. Myers "prove[s] otherwise," he was permitted to elaborate on his theory of why this case was a rape-homicide in a manner that, as set forth below, the State utilized during closing argument.

Finally, trial counsel followed-up with further questioning, again attempting to undermine Dr. Radentz's testimony:

> Q. And you have no evidence of [rape] in this case other than your own opinion . . . correct?
>
> A. Well, I mean, other than the evidence of the fact that the body was found in a remote scene, the fact that the body was that of a young female, the fact . . . that there were very few if no clothing items present. Other than that, no.
>
> Q. Okay. And . . . you certainly . . . even if your conclusion is correct, you don't know who performed that duty because you don't have any scientific evidence to determine that.

A. That's correct.

Id. at 1460-61. Dr. Radentz was so insistent that Ms. Behrman was raped that Hugh Baker essentially ceded the point by pointing out that, even if she was raped, there's no scientific evidence establishing who raped her.

Dr. Radentz's testimony regarding rape featured in the State's closing in three respects. First, the State detailed the factors Dr. Radentz discussed that make this the "classic" rape-homicide. *Id.* at 2750, 2753. Specifically, the State argued that "Dr. Radentz also talked about a classic rape versus homicide case," and compared the two types of body "dumping." *Id.* at 2750, 2753. The State downplayed the first type where an individual overdoses and friends or acquaintances who panic leave the body somewhere it will easily be found, then turned to this case:

> And compare that that with what Dr. Radentz said was the classic rape homicide. Look at those factors and see how they apply to this case. Yo[u]ng female. That's Jill. Remote area. That's that area up there, isn't it? Remote? Yeah. There's barely a house around, very little traffic, it's way off the beaten path. No clothing found. Dr. Nawrocki searched. Detective Lang had the recruit school out. No clothing was found. And then depersonalization. Can you think of anything more . . . dehumanizing or more impersonal than putting somebody down, stripped naked, shooting them in the back of the head?

Id. at 2753.[34]

Second, the State returned to Dr. Radentz's testimony regarding depersonalization of a rape victim to argue that Mr. Roell's testimony was credible. In the midst of discussing Mr. Roell's testimony, the State noted that Mr. Roell, given that he was facing criminal charges, had a reason to lie, but his testimony should be believed because he "said things that were corroborated." *Id.* at 2764. First, Mr. Myers "talked three or four times about the bike. Remember the Defendant's pacing, he's nervous, the Defendant was worried about the bike." *Id.* Second, the State explained:

> He also said something pretty important and I'm not going to use the language but he used the B word. The Defendant was angry and referred to Jill using the B word. Now remember what Doctor Radentz said about depersonalizing the victims. Stop and think what more way, better way or worse way rather, to depersonalize a human than refer to her as a female dog. It's starting to make sense.

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[34] The State's slideshow used during closing contained two slides regarding Dr. Radentz's testimony, one of which highlighted Dr. Radentz's testimony regarding rape. Specifically, it noted that Dr. Radentz, "Explained 'Body Dump vs Rape/Homicide'" and highlighted that this was a "Classic Rape/Homicide case" because it involved a "Young female," "Remote Area," "No clothing found," and "'Depersonalization of the Victim.'" *Id.*

Id.[35]

Third, the State turned to the evidence of rape to show that Mr. Myers was the perpetrator of the crime, as rape was his motive:

> You know the motive in this crime is clear. It's (inaudible) when Doctor Radentz told you that this was a classic rape murder. Rape is a crime of control. Rape is not a sex crime. It is pure and simple control over another human being and dominating them. The Defendant did not have control over [Ms. Goodman]. He was a balloon of hot air about ready to burst, April 28th, 2000. She broke up with him May 5th, that first week he didn't have to (inaudible). He was still obsessing about her when she went on her high school trip to Kentucky Kingdom. He wanted control over her pure and simple and unfortunately Jill happened to be between Carly's house and Lost Man's Lane near the Defendant's trailer at the wrong place at the wrong time.

Id. at 2816-17.

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[35] The State folded back to Dr. Radentz's depersonalization theory later during closing: "[R]ecall what Doctor Radentz said about depersonalizing the victim. At a time when everybody is hoping that Jill comes home safe . . . here's what [Mr. Myers] calls this, a piece of human excrement, waste, it's depersonalizing and when you see what Doctor Radentz said you start adding the pieces up." *Id.* at 2772.

The foregoing shows that trial counsel's failure to object to Dr. Radentz's testimony regarding rape caused three distinct types of prejudice. First is the general prejudice flowing from society's desire to ensure that those who commit sex crimes are held accountable. Second, the State used the rape evidence to bolster Mr. Roell's credibility—a witness whose credibility was otherwise questionable but was important to the State's case. Third, and perhaps most prejudicial, the rape evidence allowed the State to create motive for Mr. Myers to murder a complete stranger when there otherwise was none.

The Supreme Court has discussed the first two types of prejudice in an analogous, albeit different, context. In *House*, the Supreme Court held that the petitioner had demonstrated his actual innocence—a difficult standard requiring a showing that "it is more likely than not that no reasonable juror would have found petitioner guilty beyond a reasonable doubt"—such that his procedural default of certain claims could be overlooked. 547 U.S. at 537. The Supreme Court discussed several factors that led to this conclusion. One such factor was that, in direct contradiction of evidence presented at trial, DNA evidence showed that semen on the victim's nightgown came from her husband, not the petitioner. The State argued that this evidence was immaterial because "neither sexual contact nor motive were elements of the offense" of murder. *Id.* at 540. But, by way of reasoning directly applicable to this case, the Supreme Court held that the new evidence was of "central importance." *Id.*

First, the Supreme Court noted as a general matter that "[l]aw and society, as they ought to do, demand accountability when a sexual offense has been committed." *Id.* at 541. Thus, the fact that a sexual offense occurred, even though the petitioner was not charged with one, "likely was a factor in persuading the jury not to let him go free." *Id.* Much the same can be said for Mr. Myers. Although Mr. Myers was not charged with rape, the fact that the jury believed Ms. Behrman was raped before she was murdered was likely a factor in their decision to find him guilty. *Cf. Daniel v. Commissioner*, 822 F.3d 1248, 1277 (11th Cir. 2016) ("Rape is, of course, highly inflammatory, so unrebutted evidence that [the defendant] tried to rape someone is highly prejudicial.").

Second, the Supreme Court rejected the State's argument in *House* that the new evidence was irrelevant by noting how important evidence of motive is in criminal cases, especially cases like the instant case where the primary issue at trial is the identity of the perpetrator. The Supreme Court observed that the trial in *House* "[f]rom beginning to end . . . [was] about who committed the crime," and "[w]hen identity is in question, motive is key." *House*, 547 U.S. at 540; *see also Ford v. Wilson*, 747 F.3d 944, 952 (7th Cir. 2014) ("[W]hile motive was not an element of the offense, it was certainly relevant."); *Turner v. State*, 953 N.E.2d 1039, 1057 (Ind. 2011) ("Evidence of a defendant's motive is always relevant in the proof of a crime."). The Supreme Court highlighted that the importance of motive "was not lost on the prosecution, for it introduced the evidence and relied on it in the final guilt-phase

closing argument," *House*, 547 U.S. at 540, just as the State did during closing here.

In both this case and *House*, the jury was told rape was the motive, but the evidence supporting that should not have been presented. The Supreme Court explained how this can impact the jury:

> A jury informed that fluids on [the victim's] garments could have come from House might have found that House trekked the nearly two miles to the victim's home and lured her away in order to commit a sexual offense. By contrast a jury acting without the assumption that the semen could have come from House would have found it necessary to establish some different motive, or, if the same motive, an intent far more speculative.

Id. at 541. Moreover, the Supreme Court noted how evidence of sexual assault as motive can color the jury's perception of other evidence: without the evidence of sexual assault as motive, "House's odd evening walk and his false statements to authorities, while still potentially incriminating, might appear less suspicious." *Id.*

In sum, the rape evidence prejudiced Mr. Myers in the three foregoing ways. How this prejudice weighs in cumulation with the prejudice flowing from trial counsel's other errors is considered below.[36]

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[36] The Indiana Court of Appeals in *Myers II* addressed the improperly admitted rape evidence only on the prejudice prong. *See*

Myers II, 33 N.E.3d at 1106-07. It first set forth the reasons the *Myers I* court determined that the admission of the rape evidence, although an error, did not amount to fundamental error such that Mr. Myers was entitled to a new trial. Those reasons were: (1) "the question of rape was peripheral to the murder charge and received relatively minimal attention at trial"; (2) "defense counsel thoroughly cross-examined Dr. Radentz, eliciting his testimony that there was no physical evidence that Behrman had been raped and that the only basis upon which he opined that a rape had occurred was his training and experience with respect to circumstances surrounding the general disposal of human remains"; and (3) because all other evidence that Mr. Myers engaged in inappropriate sexual conduct was excluded, "[t]he references to rape . . . did nothing to implicate Myers as the perpetrator of this charged crime, which was the central issue at trial." *Id.* at 1107 (quoting *Myers I*, 887 N.E.2d at 187) (internal quotation marks omitted). The *Myers II* court recognized that establishing prejudice under *Strickland* requires a lesser showing than that to establish fundamental error, but stated that "[f]or the same reasons this court [in *Myers I*] concluded no fundamental error occurred, we also conclude that Myers has not established prejudice." *Id.* at 1107.

The preceding analysis of the rape evidence undermines all three bases on which the Indiana Court of Appeals discounted its prejudicial effect. First, the rape evidence was only "peripheral" in the sense that only Dr. Radentz, who was one of many witnesses at trial, testified about it. But he was also the only witness who *could have*, given that the rape testimony was based solely on his expertise. More important, it was not at all peripheral in the sense that it was the *only* evidence of motive and was discussed several times by the State during closing, both to argue that Mr. Myers had motive and to bolster Mr. Roell's credibility. Second, Dr. Radentz forcefully and rather persuasively defended his opinion that Ms. Behrman was raped during cross-examination. He even testified that all relevant factors suggesting Ms. Behrman was raped were met such that the jury should conclude as much unless Mr. Myers "prove[s] otherwise." Trial Tr. 1459-60. Finally, the Supreme Court's analysis in *House*—of how evidence of sexual assault and motive are critical for determining who committed a crime—is

iii. Improper Bloodhound Evidence

The Court turns finally to the bloodhound evidence.[37] The Court concluded above that trial counsel should have objected to Deputy Douthett's testimony regarding his bloodhound search and, had trial counsel done so, that objection likely would have been sustained. To assess the potential prejudice flowing from this error, the Court will set forth the role the bloodhound evidence played during trial and, had it not been introduced, what the remaining evidentiary picture would have led the jury likely to conclude. In the end, the bloodhound evidence was the State's strongest evidence undermining Mr. Myers's alibi, and it also undermined the Owings theory.

Trial counsel's defense of Mr. Myers consisted of offering two different theories of who else may have committed the crime, the Hollars and Owings theories, and offering an alibi for Mr. Myers. *See* Trial Tr. 472-75. The alibi, as previously discussed, was based on phone records showing that Mr. Myers was home several miles northwest of Ms. Behrman's residence during the timeframe when she disappeared. *See* D. Trial Ex. A. Given this, if Ms. Behrman had ridden south from her home on the day she disappeared, Mr. Myers had a solid

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directly contrary to the Indiana Court of Appeals' conclusion that the rape evidence "did nothing to implicate Myers as the perpetrator of this charged crime." *Myers II*, 33 N.E.3d at 1107.

[37] The Indiana Court of Appeals did not address prejudice as to Mr. Myers's claim regarding the bloodhound evidence, as it decided this claim only on the deficient performance prong. *See Myers II*, 33 N.E.3d at 1099-1100.

alibi. Establishing that Ms. Behrman rode south also aligned with the Owings theory—that Ms. Owings, Ms. Sowders, and Mr. Clouse hit Ms. Behrman with a vehicle when she was riding south of her residence, killed her, dumped her bike, and hid her body.

Mr. Myers's alibi was a central part of his defense. Trial counsel noted several times during opening that Ms. Behrman was last seen south of her residence by Ms. Papakhian. *See* Trial Tr. 472-74, 480. He not only argued that if Ms. Behrman rode south, the phone records establish that it was "absolutely impossible for [Mr. Myers] to be involved," *id.* at 475, but he pointed out that, after several years of investigations and grand jury proceedings, law enforcement never even obtained or considered Mr. Myers's phone records, *id.* at 475-76. Trial counsel returned to this argument during closing, arguing that Agent Dunn "worked this case for three years" and "believed [the southern] theory because it matches as to where Jill Behrman was last seen, 4700 South [Harrell] Road." *Id.* at 2781-82. This southern route theory, trial counsel continued, was "corroborated by the Wendy Owings statement." *Id.* at 2782.

Indeed, the alibi was likely his best defense, as it was undisputed during trial that Mr. Myers made phone calls from his residence. Thus, trial counsel only had to show some reasonable likelihood Ms. Behrman rode south for Mr. Myers's alibi to create reasonable doubt. This stands in stark contrast to the difficulty of creating reasonable doubt by convincing the jury of the Hollars or Owings theories, both of which had significant problems.

To undermine Mr. Myers's alibi and the Owings theory, the State attempted to prove that Ms. Behrman rode north on the day she disappeared. As described above, the State attempted to prove this by pointing out that the bike was found on the northern route and offering three additional witnesses. By far the most compelling evidence was the bloodhound testimony of Deputy Douthett. His testimony, if credited by the jury, showed that Ms. Behrman rode north to the field where her bicycle was found and stopped there. *Id.* at 988-89. Such evidence almost entirely undermined Mr. Myers's alibi that he was home, given that the field was less than a mile from Mr. Myers's residence.

Had trial counsel moved to exclude this evidence, as he should have sought to do, the remaining evidence that Ms. Behrman rode north rather than south was quite weak. As noted above, Dr. Houze merely demonstrated that Ms. Behrman *could* have ridden north and returned in time for her work shift, which leaves only Mr. England's testimony that Ms. Behrman actually rode north. Mr. England testified that he saw a bicyclist matching Ms. Behrman's description, but he was uncertain whether he saw this biker on the relevant day or not. Trial Tr. 1019-26. One witness testifying that he saw a cyclist matching Ms. Behrman's description perhaps on the day in question is far from compelling evidence that Ms. Behrman rode north. Notably, the State argued during closing that other than Ms. Papakhian's sighting of Ms. Behrman, "all the other evidence points north," but to support this argument, pointed only to the bloodhound evidence that should have been excluded. *Id.* at 2746.

Critically, the remaining evidence that Ms. Behrman rode north is just as tenuous as the evidence presented showing Ms. Behrman rode south. The jury heard that Ms. Behrman's high school classmate, Ms. Papakhian, originally told law enforcement that she saw Ms. Behrman riding south on May 31, 2000, the day she disappeared.[38] *Id.* at 2203. Agent Dunn confirmed this, testifying that, based on various sources of information, he thought there was a "strong possibility that [Ms. Behrman] was on South Harrell Road" where Ms. Papakhian saw her. *Id.* at 2563; *see also id.* at 1080 (Brian Behrman testifying that he was aware of reports that his sister was last seen south on Harrell Road); *id.* at 2463 (Detective Lang testifying that there were "several" reported sightings of Ms. Behrman, but Agent Dunn focused solely on Ms. Papakhian's sighting of Ms. Behrman south on Harrell Road). This was also consistent with the story Ms. Owings originally told law enforcement (although she testified during trial that it was false)—namely, that while driving on Harrell Road, she hit Ms. Behrman. *Id.* at 2095.

Detective Arvin, however, testified that he interviewed Ms. Papakhian several years later and

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[38] The Court did not ultimately decide whether trial counsel's performance was deficient for failing to present additional evidence that Ms. Behrman rode south on the day in question because the three errors identified were together sufficient to establish prejudice. If trial counsel was also deficient for this reason, the additional evidence supporting that Ms. Behrman rode south that trial counsel should have presented would, of course, make it even more likely that the jury would have concluded Ms. Behrman rode south on the day in question. This, in turn, would have made Mr. Myers's alibi defense even stronger.

disagreed with Agent Dunn's and the FBI's original conclusion that Ms. Papakhian saw Ms. Behrman on the Wednesday morning she went missing. *Id.* at 2227-28. Instead, after interviewing five other individuals who were at the same party as Ms. Papakhian the night before she saw Ms. Behrman, *id.* at 2203, Detective Arvin concluded that it was "more likely" Ms. Papakhian saw Ms. Behrman the day before she disappeared, *id.* at 2228. Detective Arvin also concluded that the timeline for Ms. Papakhian to have seen Ms. Behrman, based on when Ms. Behrman logged off her computer and when Ms. Papakhian almost always left for class, suggested that it was unlikely Ms. Papakhian saw her on the day she disappeared. *See id.* at 2230-32.

Without the bloodhound evidence, the jury would have been left with evidence that an individual who personally knew Ms. Behrman reported to law enforcement that she saw her riding south on the day in question. The FBI's investigation led it to believe there was a "strong possibility" that this report was correct. Trial Tr. 2561-62. But, based on interviews and a recreation of the timing of that sighting conducted several years later, different law enforcement officials concluded the sighting was the day before Ms. Behrman disappeared. *Id.* at 2228. The jury would have had to weigh this evidence that Ms. Behrman rode south—that may have been undermined—against the testimony of Mr. England, an individual who did not know Ms. Behrman but saw a rider matching her description on the northern route either the day she disappeared or the day after. Because Mr. Myers had a solid alibi if Ms. Behrman rode south, the jury would only need to believe

there was some likelihood Ms. Behrman rode south to create reasonable doubt that Mr. Myers murdered her. Given this, it would be difficult to overstate how prejudicial the bloodhound evidence was to Mr. Myers's alibi defense.

The bloodhound evidence also damaged trial counsel's Owings theory. During opening, trial counsel offered the Owings theory and Hollars theory as alternative bases on which to find reasonable doubt that Mr. Myers murdered Ms. Behrman. Trial counsel told the jury that Ms. Owings, Ms. Sowders, and Mr. Clouse hit Ms. Behrman with a vehicle when they were driving south of Ms. Behrman's residence, then killed her to cover up their crime, placed her body in Salt Creek, and eventually moved it to where it was ultimately found three years later. Trial Tr. 471-72. This theory, trial counsel argued, was supported by several things, one of which was that Ms. Behrman was last seen by Ms. Papakhian riding on 4700 Harrell Road. *Id.* at 471-73. As discussed above, Ms. Owings confessed (but later recanted) that while driving on Harrell Road, she hit Ms. Behrman. *Id.* at 2095. The bloodhound evidence bolstered the State's position that Ms. Owings's confession was false because it showed Ms. Behrman rode north, not south on Harrell Road.

Much like the Hollars theory, there were significant problems with the Owings theory even without trial counsel's errors. The most glaring were that (1) Ms. Owings told law enforcement Ms. Behrman was stabbed to death, yet once Ms. Behrman's remains were found, the forensic evidence strongly suggested that her cause

of death was a shotgun wound, and (2) Ms. Behrman's remains were not found in Salt Creek. *Id.* at 517, 621, 664, 1420. For these reasons, and because all law enforcement agencies believed Ms. Owings's confession was false, the Indiana Court of Appeals determined that trial counsel decided not to "pursue Owings's confession as its primary theory of defense" and thus only pursued it "to some extent." *Myers II*, 33 N.E.3d at 1111.

Despite these difficulties and trial counsel's own reservations about the strength of the theory, trial counsel repeatedly presented the Owings theory to the jury as a basis for reasonable doubt. Yet trial counsel's failure the exclude the bloodhound evidence undermined a key part of Ms. Owings's confession—that she hit Ms. Behrman on Harrell Road, the very road where Ms. Papakhian saw Ms. Behrman. Thus, to the extent the jury thought the Owings theory could have been true, the bloodhound evidence undermined its foundation—that the incident started by Ms. Owings hitting Ms. Behrman on Harrell Road.

In sum, trial counsel's failure to move to exclude the unreliable bloodhound evidence destroyed Mr. Myers's otherwise strong alibi defense and weakened the already weak Owings theory. The Court will consider this prejudice along with the prejudice flowing from trial counsel's other errors below.

c. Cumulative Prejudice Analysis

The Court turns finally to the cumulative prejudice analysis required by *Strickland*. To demonstrate prejudice, Mr. Myers "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. This requires a "substantial, not just conceivable" likelihood of a different result. *Richter*, 562 U.S. at 112. But prejudice can be shown "[e]ven if the odds that the defendant would have been acquitted had he received effective representation appear to be less than fifty percent, . . . so long as the chances of acquittal are better than negligible." *Harris*, 698 F.3d at 644. As noted above and applicable here, "a verdict or conclusion only weakly supported by the record is more likely to have been affected by errors than one with overwhelming record support." 466 U.S. at 696.

The prejudice analysis requires the Court to "assess the totality of the omitted evidence under *Strickland* rather than the individual errors." *Washington*, 219 F.3d at 634-35 (citing *Williams*, 529 U.S. at 397-98); *Sussman*, 636 F.3d at 360-61. "[E]ven if [counsel's] errors, in isolation, were not sufficiently prejudicial, their cumulative effect" can amount to prejudice under *Strickland*. *Martin*, 424 F.3d at 592 (citing *Alvarez v. Boyd*, 225 F.3d 820, 824 (7th Cir. 2000)).

The cumulative impact of trial counsel's errors was devastating to Mr. Myers's defense. Trial counsel's errors impacted the jury's verdict in at least four specific ways that, taken together, undermine the Court's confidence in its accuracy. Because the Court discussed the prejudice flowing from each of trial counsel's errors

in detail above, the Court will more succinctly summarize how those types of prejudice, together, show that there is a "reasonable probability" they impacted the outcome of trial. *Strickland*, 466 U.S. at 694.

i. Trial Counsel Undermined All Three of Mr. Myers's Defenses

Trial counsel's false statements during opening and failure to object to the bloodhound evidence, together, significantly undermined all three of Mr. Myers's defenses. Trial counsel's false statements regarding the Hollars theory—that a bloodhound tracked Ms. Behrman's scent to Mr. Hollars's residence and that he was seen arguing with Ms. Behrman shortly before she disappeared—were, if true, the best evidence supporting the theory. But they were simply false. Thus, to whatever extent the jury was considering the Hollars theory by the end of trial, it came to realize not only that the best evidence promised to support it was not presented, but that the theory was predicated on rather sensational lies. After this, no reasonable jury would consider the Hollars theory a basis for reasonable doubt.

Then, trial counsel's failure to exclude the bloodhound evidence undermined Mr. Myers's remaining two defenses. As explained above, Mr. Myers's alibi defense was likely his strongest defense. But for the bloodhound evidence, the evidence of whether Ms. Behrman rode north toward Mr. Myers's residence or south (in which case Mr. Myers had an alibi) was at best a close call, as there was not compelling or undisputed evidence either way. Given this, the bloodhound evidence tipped the scale strongly in favor

of Ms. Behrman riding north and, in doing so, destroyed Mr. Myers's alibi.

Because the Owings theory relied on Ms. Behrman riding south, the bloodhound evidence undermined it as well. Even though trial counsel only pursued the Owings theory "to some extent," *Myers II*, 33 N.E.3d at 1111, trial counsel repeatedly offered it to the jury as a basis to find reasonable doubt. But trial counsel's failure the exclude the bloodhound evidence undermined a key part of Ms. Owings's confession—that she hit Ms. Behrman on Harrell Road, the very road where Ms. Papakhian saw Ms. Behrman. This failure showed yet another aspect of Ms. Owings's confession that was false.

In the end, trial counsel's errors undermined all three of Mr. Myers defenses. The errors destroyed two of his defenses, including his best defense, and further undermined a defense that trial counsel only attempted to pursue in a limited fashion. Together, this left Mr. Myers without a meaningful defense theory through which any jury would find reasonable doubt.

ii. Trial Counsel Allowed the State to Present Evidence of Motive when There was Otherwise None

Trial counsel's failure to object to the rape evidence allowed the State to argue that Mr. Myers had motive when, but for that error, the State had no evidence explaining why Mr. Myers would have murdered Ms. Behrman. The State was able to use the rape evidence to argue in closing that Mr. Myers's motive was "clear"—rape is a "crime of control," and since he could

not control his ex-girlfriend, Ms. Goodman, he used rape to control Ms. Behrman, who was "at the wrong place at the wrong time." Trial Tr. 2816-17. Whether Mr. Myers or someone else killed Ms. Behrman was essentially the only question at trial, and the Supreme Court has made clear that "[w]hen identity is in question, motive is key." *House*, 547 U.S. at 540. Without the rape evidence, the jury "would have found it necessary to establish some different motive, or, if the same motive, an intent far more speculative." *Id.* at 541. Simply put, the rape evidence was the only evidence that allowed the jury to make sense of why Mr. Myers would have randomly murdered a stranger riding a bicycle near his residence. Trial counsel's failure to keep out the evidence that allowed the State to explain why Mr. Myers did so, when no other reason was apparent, was extremely prejudicial. *See id.* at 540-41 ("Particularly in a case like this where the proof was . . . circumstantial, we think a jury would have given th[e] evidence [of sexual assault] great weight.").

iii. Trial Counsel Allowed the State to Bolster the Credibility of its Most Important Witness, Who had Significant Credibility Problems

Trial counsel's failure to object to the rape evidence also permitted the State to bolster the otherwise weak credibility of Mr. Roell, who, if credited, was one of the most, if not the most, damaging witness against Mr. Myers. When asked if Mr. Myers used any derogatory terms regarding Ms. Behrman, Mr. Roell testified, "There was one comment made in reference to a bitch."

Trial Tr. 2271. The State, recognizing both the importance of Mr. Roell's testimony and his credibility issues, twice during closing argument connected this testimony to the rape evidence to bolster Mr. Roell's credibility.

After acknowledging that Mr. Roell had a motive to lie, *id.* at 2763, the State argued, "Mr. Roell though said things that were corroborated," *id.* at 2764. One of those things—that the State described as "pretty important"—was that Mr. Myers "referred to [Ms. Behrman] using the 'B' word." *Id.* The State then tied that "depersonalizing" language to Dr. Radentz's rape testimony, arguing what "better way . . . to depersonalize a human than refer to her as a female dog." *Id.* Connecting Mr. Roell's testimony to the rape evidence, the State argued, made the whole picture "start[] to make sense." *Id.* at 2764.

How much this line of argument bolstered Mr. Roell's credibility is debatable. But, given the strong reasons to doubt Mr. Roell's credibility, even minimal corroboration meaningfully prejudiced Mr. Myers because Mr. Roell's testimony was the only direct evidence of Mr. Myers's guilt introduced during the entire trial. If the jury did not credit it, the following jury instruction would come into play: "Where proof of guilt is by circumstantial evidence only, it must be so conclusive in character and point so surely and unerringly to the guilt of the accused as to exclude every reasonable theory of innocence." *Id.* at 2734. At the very least, Mr. Myers's alibi was a reasonable theory of innocence, if not a strong one. Thus Mr. Roell's

credibility was paramount for the State. Had trial counsel excluded the rape testimony, the State would not have been able to bolster the credibility of arguably the most important witness, whose credibility was certainly in question.

iv. Trial Counsel's Errors Cast a Prejudicial Cloud Over the Entire Trial, Leading the Jury to Believe He was Untrustworthy and that Mr. Myers Committed a Sex Crime

Trial counsel's false statements and failure to object to the rape evidence cast two clouds over Mr. Myers and the entire trial. The former created the impression that trial counsel was untrustworthy, and the inflammatory rape evidence caused the jury to feel that Mr. Myers could not be set free, since "society . . . demand[s] accountability when a sexual offense has been committed." *House*, 547 U.S. at 541. It is difficult to know precisely how these more amorphous forms of prejudice impacted the verdict, yet they likely caused significant prejudice.

Trial counsel falsely promised evidence supporting a sensational story of a pregnant college student in a relationship with an older, married coworker who murdered her because she was pregnant, and whose guilt was covered up by law enforcement who pulled a tracking dog away from the coworker's residence. Given the dramatic opening by trial counsel, the false promises did not simply destroy whatever was left of the Hollars theory as a viable defense, but they undoubtedly turned the jury against both trial counsel and Mr. Myers

generally. *See Saesee*, 725 F.3d at 1049-50 ("A juror's impression is fragile. It is shaped by his confidence in counsel's integrity. . . . In addition to doubting the defense theory, the juror may also doubt the credibility of counsel. By failing to present promised testimony, counsel has broken a pact between counsel and jury, in which the juror promises to keep an open mind in return for the counsel's submission of proof. When counsel breaks that pact, he breaks also the jury's trust in the client.").

In a case highly dependent on how the jury would evaluate the credibility of witnesses, the prejudice to Mr. Myers was significant. When one defense theory is presented as equal to the others, but it turns out to be in large part a sensational theory predicated on lies, it undermines the jury's confidence in the others.[39] For

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[39] Notably, the Indiana Court of Appeals in *Myers II* recognized that trial counsel's credibility with the jury is an important consideration and that presenting a weak theory can damage that credibility. In concluding that trial counsel's performance was not deficient for failing to more aggressively present evidence supporting the Owings theory (an allegation this Court did not ultimately decided), the Indiana Court of Appeals concluded that trial counsel's decision to only "pursue the Owings theory to a limited extent was actually quite shrewd" because it prevented the jury from being exposed to "many conflicting versions of the story." *Myers II*, 33 N.E.3d at 1112. "This information," the Indiana Court of Appeals continued, "might have resulted not only in the elimination in the jurors' minds of the possibility that Owings's confession was true, *but also in trial counsel's loss of credibility with the jury*." *Id.* (emphasis added). But if it was shrewd to not expose the jury to significant weaknesses in the Owings theory in part because that would damage trial counsel's credibility, it was catastrophic for trial counsel's credibility to make sensational false claims in support of the Hollars theory. This is

example, why would the jury have any faith in trial counsel's alibi defense or Owings theory when he lied about sensational evidence supporting the Hollars theory? Why would the jury give any credence to the fact that law enforcement failed to obtain Mr. Myers's phone records that may have given him an alibi during six years of investigating when trial counsel lied about an alleged cover-up of evidence implicating Mr. Hollars? Why would the jury credit trial counsel's attempt to undermine Mr. Roell's or Ms. Goodman's credibility, when trial counsel himself lacked credibility?

The improper rape evidence similarly prejudiced Mr. Myers as a general matter. Rape is "highly inflammatory" and undoubtedly gives any jury second thoughts about finding a defendant not guilty. *Cf. Daniel*, 822 F.3d at 1277 ("Rape is, of course, highly inflammatory, so unrebutted evidence that [the defendant] tried to rape someone is highly prejudicial."). When a jury believes a victim was raped before being murdered, the jury's desire to hold someone accountable increases. *House*, 547 U.S. at 541 ("Law and society, as they ought to do, demand accountability when a sexual offense has been committed, so not only did th[e] evidence [of sexual assault] link [the defendant] to the crime; it likely was a factor in persuading the jury not to let him go free."). Thus, like trial counsel's sensational false promises, the inflammatory rape evidence prejudiced Mr. Myers in that it made it less likely the

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especially true given that, unlike the Owings theory, all of the weaknesses in the Hollars theory were presented to the jury in detail.

jury would resolve close or difficult credibility decision in his favor.

v. Cumulative Prejudice Conclusion

In the end, the cumulative prejudice caused by trial counsel's errors create 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. Together, trial counsel's errors all but destroyed Mr. Myers's best defense (his alibi); eviscerated the Hollars theory, which although weak, was the defense theory on which trial counsel focused; and undermined the Owings theory, which was his only remaining defense, one that trial counsel declined to push too hard given its perceived weaknesses. This left Mr. Myers without even a tenable defense. This is likely prejudice sufficient to warrant relief, but it is undoubtedly so when considered with trial counsel's other errors.

Trial counsel's cumulative errors not only left him without a defense, but they also allowed the State to create evidence of a motive when there otherwise was none and bolster the credibility of arguably the State's most important witness who had significant credibility issues. Finally, trial counsel's false statements and the inflammatory rape evidence both cast a shadow over the entire trial, making it even more unlikely that the jury would trust anything trial counsel presented or be capable of neutrally weighing the evidence.

The foregoing analysis reveals why it is critical to evaluate the cumulative prejudice from trial counsel's

errors, rather than the prejudice from each error in isolation. The Indiana Court of Appeals in *Myers II* considered only the latter. When doing so, it is much easier to view the prejudice from a single error as insufficient to meet the *Strickland* standard. But when considered together, trial counsel's errors "so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Strickland*, 466 U.S. at 686. This is especially true given that the case against Mr. Myers was based almost entirely on circumstantial evidence that was far from overwhelming. *See Strickland*, 466 U.S. at 696 ("[A] verdict or conclusion only weakly supported by the record is more likely to have been affected by errors than one with overwhelming record support."). In short, the Court concludes that trial counsel's errors were "so serious" that Mr. Myers was deprived of a trial "whose result is reliable." *Id.* at 687.

Trial counsel's errors so fundamentally undermined his own strategy, that even if *Richter*'s "could have supported" framework remains applicable after *Wilson*, "no fairminded jurist" could conclude that Mr. Myers has not met *Strickland*'s prejudice standard. *See Richter*, 562 U.S. at 102. And this is so even though "[t]he *Strickland* standard is a general one, so the range of reasonable applications is substantial." *Id.* at 105. Simply put, when trial counsel lies to the jury during opening regarding what the evidence will show; undermines all three of his own defense theories, including a strong alibi defense; allows the State to improperly introduce evidence of motive when there otherwise was none; and improperly permits inflammatory rape evidence to be

introduced, there is "no reasonable argument" that *Strickland*'s prejudice standard was not met. *Id.*

For these reasons, § 2254(d) does not pose a barrier to relief, and Mr. Myers has established that he failed to receive the effective assistance of counsel to which he was entitled under the Sixth Amendment.

IV. CONCLUSION

For the reasons explained above, Mr. Myers's petition for a writ of habeas corpus is **granted** because he failed to receive effective assistance of counsel during trial in violation of his Sixth Amendment rights. Since Mr. Myers is entitled to relief on this claim, the Court need not reach his claims that the State presented false evidence in violation of *Giglio v. United States*, 405 U.S. 150, 153 (1972), and withheld exculpatory evidence in violation of *Brady v. Maryland*, 373 U.S. 83, 87 (1963).

A writ of habeas corpus shall issue ordering Mr. Myers's release from custody unless the State elects to retry Mr. Myers within 120 days of entry of Final Judgment in this action.

Again, a new trial will likely come only at considerable cost—to the State and to the victim's family and community—but the Constitution and its protections demand a new trial in this case.

IT IS SO ORDERED.

Date: 9/30/2019

JAMES R. SWEENEY II, JUDGE
United States District Court
Southern District of Indiana

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Appendix D

United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

September 16, 2020

Before

JOEL M. FLAUM, *Circuit Judge*

MICHAEL Y. SCUDDER, *Circuit Judge*

AMY J. ST. EVE, *Circuit Judge*

No. 19-3158

JOHN MYERS,

Petitioner-Appellee,

v.

RON NEAL,

Respondent-Appellant.

Appeal from the United States District Court for the Southern District of Indiana, Indianapolis Division.
No. 1:16-cv-2023 — **James R. Sweeney, II,** *Judge*.

ORDER

Petitioner-appellee filed a petition for rehearing and rehearing *en banc* on September 1, 2020. No judge in regular active service has requested a vote on the petition for rehearing *en banc* and all members of the original panel have voted to deny rehearing and to issue an amended opinion. The court's opinion dated August 4, 2020 is amended by the attached opinion, which includes changes on pages 30 and 31.

Accordingly, IT IS ORDERED that the petition for rehearing and rehearing *en banc* is therefore DENIED.