No. _____
(Capital Case)

In The
Supreme Court of the United States

JEFFREY A. WEISHEIT, Appellant/Petitioner

v.

RON NEAL, Warden, Indiana State Prison, Appellee/Respondent

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Joseph J. Perkovich
Counsel of Record
Phillips Black, Inc.
PO Box 3547
New York, NY 10008
(212) 400-1660
j.perkovich@phillipsBlack.org

Joseph C. Welling
Phillips Black, Inc.
100 N. Tucker Blvd., Ste. 750
St. Louis, MO 63101

David P. Voisin
P.O. Box 804
Hammond, LA 70404

Counsel for Petitioner/Appellant Jeffrey A. Weisheit

QUESTIONS PRESENTED (CAPITAL CASE)

At critical junctures, the state and federal courts have failed to assess the totality of the evidence establishing the fundamental unsoundness of Mr. Weisheit's capital sentencing.

The Indiana Supreme Court, "in a fractured opinion," *Weisheit v. Neal*, 151 F.4th 855, 867 (7th Cir. 2025), affirmed the denial of post-conviction relief on, in relevant part, multiple claims of trial counsel-ineffectiveness for the failure to investigate and present various mitigating evidence. At issue, inter alia, was Weisheit's profound mental illness and impairments arising from multiple etiologies, including repeated childhood brain trauma. The state court's majority opinion utterly overlooked four subclaims of trial counsel ineffectiveness. An opinion concurring in the judgment found Weisheit had proven deficient performance but could not prove prejudice, and the Chief Justice dissented finding cumulative ineffectiveness after properly considering the evidence of prejudice. In contravention of this Court's clearly established law, the majority failed to consider the cumulative effect of the penalty phase deficiencies, instead only contemplating, in isolation, the prejudice of each piece of mitigation not seen by the jury while excluding any consideration of the evidence that *was* presented to the jury.

In federal habeas corpus proceedings, Petitioner presented the exhausted penalty phase ineffective assistance claim. The district court denied on the merits after considering the cumulative effect of just three exhausted subclaims. On appeal, the Court of Appeals failed to consider cumulative prejudice, and instead analyzed prejudice in siloes, seriatim, cabined by various specific failures to present mitigating evidence.

This petition presents the following questions:

1. Must federal habeas courts reweigh the "totality of available mitigating evidence," *Wiggins v. Smith*, 539 U.S. 510, 534 (2003), when deciding penalty phase prejudice claims pursuant to enumerated grounds for deficient performance??
2. In such ineffectiveness claims, is "cumulative prejudice" a distinct claim for purposes of 28 U.S.C. § 2254 exhaustion purposes or *Wiggins* reweighing?
3. Under Indiana's juror deadlock provision, Ind. Code § 35–50–2–9(f), does a reasonable likelihood under evidentiary reweighing that at least one juror would strike a different balance and vote against a death sentence amount to a "different outcome" under *Wiggins*?

PARTIES TO THE PROCEEDINGS BELOW

Jeffrey A. Weisheit, Applicant and Petitioner/Appellant below.

Ron Neal, Warden, Indiana State Prison, Appellee/Respondent.

CORPORATE DISCLOSURE STATEMENT

For purposes of Rule 29.6, no party to the proceedings in the Fifth Circuit is a nongovernmental corporation.

STATEMENT OF RELATED PROCEEDINGS

State v. Weisheit, No. 10C01-1008-MR-000601 (Clark County, Ind. Circuit Court) (June 18, 2013, jury guilty verdict) (June 21, 2023, jury recommends death) (July 12, 2013, court enters guilty verdict and imposes death sentence).

Weisheit v. State, 26 N.E.3d 3 (Ind. 2015) (conviction and sentence affirmed on direct appeal).

Weisheit v. State, No. 10C01-1601-PC-1 Clark County, Ind. Circuit Court) (Nov. 18, 2016, denying post-conviction relief).

Weisheit v. State, 109 N.E.3d 978 (Ind. 2018); App.079–122. (affirming denial of post-conviction relief) [separate opinions by Slaughter, J., concurring in part and in the judgment, and Rush, C.J., concurring in part and dissenting in part).

Weisheit v. Neal, No. 4:19-CV-00036-SEB-DML, 2022 WL 16635294, (S.D. Ind. Nov. 2, 2022); App.034–078 (Dkt. 119) (denying the petition for writ of habeas corpus).

Weisheit v. Neal, 151 F.4th 855 (7th Cir. 2025); App.001–033 (affirming denial of writ of habeas corpus).

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

Constitutional Provisions

PETITION FOR WRIT OF CERTIORARI

Petitioner Jeffrey A. Weisheit respectfully petitions for a writ of certiorari to review the judgment of the Seventh Circuit Court of Appeals, which affirmed the Southern District Court of Indiana's denial of the writ of habeas corpus pursuant to 28 U.S.C. § 2254.

INTRODUCTION

Following a change of venue, Weisheit was convicted of two capital crimes and sentenced to death in the Clark County Circuit Court in Jeffersonville, Indiana on July 12, 2013. His trial representation was marked by extreme dysfunction and performance far below prevailing norms of professional practice in Indiana and national standards for capital representation. This resulted in multiple instances of deficient performance that prejudiced Weisheit at sentencing. His ineffective assistance of counsel claim, raised in state post-conviction proceedings, was never properly reviewed in state court owing to failures to reweigh the "totality of available mitigation" against the aggravation, as required by clearly established federal law from this Court in, for examples, *Porter v. McCollum*, 558 U.S. 30, 41 (2009); *Wiggins v. Smith*, 539 U.S. 510, 534 (2003); and *Williams v. Taylor*, 529 U.S. 362, 398 (2000). The state courts failed to meaningfully address the specific claim that the "cumulative prejudice" of multiple instances of deficient trial counsel performance prejudiced Weisheit. The scant prejudice analysis conducted in state post-conviction relied on siloed consideration of individual instances of counsel's failings, assessed seriatim and divorced from one another. The Indiana Supreme Court overlooked four

subclaims of ineffective assistance, including the claim that trial counsel were ineffective for failure to investigate and present available mitigation evidence.

Failing to reasonably apply this Court's clearly established precedent, the Indiana Supreme Court overlooked four subclaims of ineffective assistance, including the claim that trial counsel were ineffective for failing to investigate and present available mitigation evidence. Additionally, the Indiana Supreme Court majority relied on an incorrect "different outcome" standard, assuming Weisheit was required to prove that but for trial counsel's errors, it was reasonably likely that the entire jury would strike a different balance and vote unanimously for a non-death sentencing verdict.

In federal habeas corpus proceedings, both the Southern District of Indiana and the Seventh Circuit denied relief. In so doing, they failed to consider the prejudicial effect of the totality of available mitigation by contemplating only some of the exhausted subclaims and weighing the prejudicial effect of each subclaim in isolation. Although the District Court recited that it weighed the "cumulative prejudice," it facially did not. The Seventh Circuit erroneously considered the cumulative prejudice claim to have been defaulted and failed to address it at all, only conducting siloed prejudice analyses of a subset of the exhausted subclaims of the ineffective assistance of trial counsel claim. Neither the District Court nor the Seventh Circuit addressed the state court errant "different outcome" standard when finding the state supreme court's adjudication to be a reasonable application of this Court's clearly established federal law.

OPINION BELOW

The August 13, 2025, opinion of the Seventh Circuit Court of Appeals is published. *Weisheit v. Neal*, 151 F.4th 855 (7th Cir. 2025); App.001–033.

JURISDICTION

This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1) (providing for review upon grant of a writ of certiorari of cases in the federal courts of appeals).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Fourteenth Amendment to the United States Constitution provides, in relevant part: "No state shall . . . deprive any person of life, liberty, or property, without due process of law . . . ."

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."

28 U.S.C. § 2254(d) provides:

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—
>
> > (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.

STATEMENT OF THE CASE

On July 12, 2013, Weisheit was sentenced to death upon conviction for two counts of Murder (Ind. Code § 35–42–1–1(1)) and Arson Resulting in Bodily Injury (Ind. Code § 35–43–1–1(a)) in the Clark County Circuit Court for the April 10, 2010 murder of Caleb and Alyssa Lynch, both under 12 years old at the same place and time by setting fire to the house and fleeing while the two children were inside. Dkt. 88-1 at 3; Dkt. 88-28 at 130–31.

On February 18, 2015, the Indiana Supreme Court affirmed the convictions and sentence on direct appeal. *Weisheit v. State*, 26 N.E.3d 3 (Ind. 2015)

On November 18, 2016, the post-conviction court denied relief, and on November 7, 2018, the Indiana Supreme Court majority affirmed denial of relief with an opinion concurring in the result finding deficient performance of trial counsel was not prejudicial, and a dissenting opinion finding deficient performance that cumulatively prejudiced Weisheit. *Weisheit v. State*, 109 N.E.3d 978, 978–94 (Ind. 2018); *id*. at 994–96 (Slaughter, J., concurring); *id*. at 996–1021 (Rush, C.J., dissenting).

On November 2, 2022, the federal district court denied Weisheit's petition for habeas corpus but granted a certificate of appealability (COA) as to all of the claims of ineffective assistance of counsel, "conclud[ing] that reasonable jurists could disagree about the merits of Weisheit's ineffective assistance of trial counsel and his ineffective assistance of appellate counsel claim," and as to claims it deemed procedurally defaulted in state court because "[r]easonable jurists could also disagree

about whether" the claims "have been procedurally defaulted or are instead unexhausted." Dkt. 11.

The Seventh Circuit granted Weisheit's motion to further expand the COA to encompass Claim 4 and invited the parties to discuss in their briefing "whether we have appellate jurisdiction given the potential presence of unexhausted claims." Doc. 6.[1] On August 13, 2025, a panel of the Seventh Circuit affirmed denial of relief but failed to address the explicit exhausted claim of cumulative prejudice. *See Weisheit*, 151 F.4th 855. On September 29, 2025, the Seventh Circuit declined to rehear the matter en banc. Doc. 54.

A. As a Child and Young Adult, Weisheit Exhibited Serious Mental Illness of Various Etiologies.

Weisheit exhibits a life-long history of congenital predispositions to cognitive and psychiatric disorders leading to various childhood diagnoses including Attention Deficit Hyperactive Disorder (ADHD), Bipolar Disorder at a young age as well as observed speech and lateralized motor developmental problems.[2] Dkt. 67 at 49–66 (First Amended Petition at 29–46). These conditions were exacerbated by "repeated traumatic stress, multiple head injuries, exposure to neurotoxins, and likely neurodevelopmental deficits." *Id*. at 50 (quoting Dkt. 67-56 at 1). As summarized in the Amended Petition filed in the district court:

> The traumatic stress includes "significant intrafamilial sexual abuse, paternal physical abuse, and childhood neglect." *Id*. Mr. Weisheit

[1] Citations to the District Court use "Dkt." and the District Court's pagination where pagination differs from that of the underlying document. Citations to Seventh Circuit filings other than the published opinion use "Doc." and the underlying document pagination.

[2] Weisheit has a family history of similar diagnosed mental disorders on both sides. Dkt. 67 at 56.

> suffered many head injuries resulting, as the neuropsychology evaluation chronicles, from "motor vehicle accidents, physical assaults, falls, and construction accidents," with many of them occurring during the developmental period when Mr. Weisheit was a child or very young adult. *Id*. at 2. Many of these incidents led to loss of consciousness, and "an observable left frontal scar." *Id*.

Dkt. 67 at 50 (footnote omitted).

In childhood, Weisheit exhibited extremely impulsive and irrational conduct followed by confabulations, *viz.*, attempts to create post hoc explanations for his conduct, when he himself had fleeting, at best, recollection of the events and lacked reasons for his actions. *Id*. at 67–69. These acts include multiple suicide attempts, property crimes often associated with suicidality and followed by extreme, very unusual runaway attempts illustrating his lack of forethought and planning. *Id*. at 67.

Weisheit's childhood records abundantly document his serious mental illness and efforts to treat them, including a tranche of records from his two separate commitments to the Indiana Boys School (IBS), which documented ongoing symptomology including further suicide attempts and prolonged psychiatric ward hospitalizations on suicide watch. Dkt. 67 at 163–66, 175–84.

Among Weisheit's bizarre childhood flights was a string of events in 1992, at the age of 16, commencing when he burglarized neighboring homes to steal weapons and a van, after which:

> He apparently loaded the van with firewood he took from a cabin to which his father had access and some hunting supplies, as if he planned to go on a hunting trip. *Id*. About a week after taking off, Mr. Weisheit apparently had some person call his parents and then hand him the phone, but he hung up after his father answered. *Id*. at 51. Mr. Weisheit

drove the van to Tennessee and abandoned it in Sumner County. *Id*. at 48. He made it to the home of his maternal aunt and her husband, and lived for several days in the crawlspace under their house. (Tr. 2305-09.) His aunt and uncle were unaware of his presence. One day when they were out, he cut a hole through the floor and entered the house to shower, eat, and wash clothes, before turning himself in to local law enforcement. (Tr. 2306.) Mr. Weisheit's attempts to explain this episode as something planned or rational are unsuccessful, and convey his need to manufacture an account to fill the void in his understanding of his own actions.

Id.

Weisheit exhibited the same impulsivity problems in early adulthood:

He was still living with his parents and working at a convenience store. One night [while working at the store], he stole money and cigarettes, and fled. Ex. 19. Later Mr. Weisheit would say that he wanted to go hunting or fishing and thought about going to Florida, or Canada, before settling on Missoula, Montana as his destination. Ex. 20. A thorough evaluation of his conduct does not support that he had any such clear goal. Rather, it is apparent that his attempts to recount the events are efforts to understand what happened after the fact.

He traveled through a number of states, including South Dakota and Iowa, before reaching Columbus, Montana, spending the money staying in hotels. *Id*. at 8. He said he meant to turn around and go back to Indiana, but the Mustang he was driving broke down at a rest stop in Montana (Tr. 2218), so he abandoned it with a note saying the car—which was in his father's name—was stolen and that he was on his way to Canada. Ex. 20 at 1. He then may have hitched a ride with a man driving a stolen, older Ford pickup truck in rough condition. *Id*. at 9. Or it is possible Mr. Weisheit stole the truck and picked up the man. Ex. 21. In any case, it appears that the two returned to Indiana, where Mr. Weisheit abandoned the man and drove the truck toward Kokomo, Indiana, before following an unknown route to arrive at Peoria, Illinois. Ex. 20 at 12. *Id*. In Peoria, he abandoned the old truck, and stole a newer Chevy pickup truck, which may have contained some radio equipment, though Mr. Weisheit may have stolen the radio equipment in Indiana.29 *Id*. at 13-14. At some point, Mr. Weisheit was in an accident, colliding with a parked car in Peoria, but it is unclear whether that was at this Peoria stop or a later one. *See* Ex. 13; Ex. 20 at 23. The sequence of events and the route he took is impossible to reconstruct from his

> statement. *See* Ex. 20. Mr. Weisheit ended up in Muscatine, Iowa, where he was finally picked up. (Tr. 2218.)

Id. at 67–68.

As time passed, these episodes dissipated. In his twenties, Weisheit benefited from the highly structured routine of his work, as a laborer at Industrial Contractors, one of the largest construction contractors in Evansville at that time, where he came to thrive as a dependable and industrious worker. In these years during his twenties and early thirties, Weisheit further benefited from the expectations and routines of living under his parents' roof, in their basement, which also enabled him to save, over the course of many years, to purchase his own home in his Evansville community at age 32 or 33. Dkt. 67 at 139. Soon thereafter, he began dating a woman he'd met at work, Lisa Lynch. After a very brief courtship, Ms. Lynch and her two young children, Caleb and Alyssa, moved into Weisheit's home. Dkt. 67 at 174. With stressors around his new relationship and vastly greater personal responsibilities for his household, Weisheit's underlying impairments began to reemerge. He was unable to cope with this sort of relationship and heavy responsibilities for which he was ill-equipped to handle. He grew irrationally jealous especially when he learned Ms. Lynch was likely having an affair.

Weisheit abruptly quit his job, which he had held for many years and from which he derived his identity from his personal work ethic. He withdrew his money from the bank and cancelled a layaway plan for an engagement ring for Ms. Lynch.

Weisheit fled the burning house and, after a high-speed chase, was subdued in Kentucky. During his arrest, he was tased and fell striking his head on the pavement,

which caused him to suffer another major head injury. In jail for this case, his psychiatric symptoms and neurological impairments led to manic episodes and profoundly affected his capacity for meaningful communication with his legal team, which his counsel did not gather was a product of his recent brain trauma, coupled with lifelong impairments brought to the fore under these extreme circumstances. His trial team's failure to establish basic communication with Weisheit afflicted his case from its outset, contributed to counsel's grossly substandard representation, especially with respect to sentencing preparation, and culminated in his self-defeating decision to testify at his trial.

B. Dysfunction of Trial Counsel.

Weisheit's legal team faced a succession of extraordinary challenges effectively eliminating any chance that he could receive competent representation. At bottom, crucial matters repeatedly fell through the cracks, or counsel failed to follow through, leading to a disorganized presentation of scant and fragmentary, at best, evidence despite the abundance of highly material information for understanding Weisheit's liability and culpability that would come to light after his trial.

The case opened in Vanderburgh County Circuit Court on April 12, 2010. The court deemed Weisheit indigent and assigned his representation to the public defender's office. On April 27, 2010, the court appointed Timothy Dodd as lead counsel and Steve Owens[3] as second chair.

3 Mr. Owens had no prior capital trial experience. Doc. 67-24 at 4 ¶36.

In June 2010, Mr. Owens suffered a serious heart attack requiring hospitalization for a week. Doc. 67-24 at 1 ¶ 5. "For some time thereafter [Mr. Owens] was not actively involved in the case." *Id*.

Mr. Owens described a fraught relationship with Mr. Dodd, feeling Mr. Dodd was "uncomfortable with [him] acting as second chair" because Mr. Owens was then the Chief Public Defender, and Mr. Dodd feared Mr. Owens was accustomed to being in charge. *Id*. at 1 ¶4. The friction also concerned a disagreement about the basic approach to the case: Mr. Owens wanted to focus on Weisheit's liability and attacking the arson case, while Mr. Dodd wanted to focus primarily on preparing the penalty phase. *Id*. at 1 ¶6.[4] Mr. Owens perceived that orientation as wanting to concede guilt, which he opposed. *Id*. In any event, privileging the preparation of one phase over the other is, on its face, a faulty approach.

On August 4, 2010, the court granted the defense's motion for a change of venue and transferred the case to the Clark County Circuit Court, where a jury trial was soon set for April 27, 2011. Doc. 67-28 at 2–3. That date would be reset twice, first to August 16, 2011, then to September 9, 2011. *Id*. at 7–8, 14–15. Meanwhile, on May 25, 2011, the trial court heard a series of motions including motions to withdraw by both Mr. Dodd and Mr. Owens. Dkt. 135-1 at 32–57.

---

[4] According to Mr. Owens, Mr. Dodd had recently attended a training conference on Colorado Method, which Mr. Owens patently misunderstood, believing it was an overall strategy for capital defense which "concentrates on fighting the penalty phase more than the guilt phase." Dkt. 67-24 at 1 ¶7. In fact, the Colorado Method is a longstanding, systematic approach to conducting jury selection in a capital case, with appropriate focus on death qualifying or disqualifying attitudes which encompasses—but is not limited to—whether the juror is willing to consider mitigation evidence. *E.g.,* Sophie E. Honeyman, *Escaping Death: The Colorado Method of Capital Jury Selection*, 54 UIC J. Marshall L. Rev. 247, 250 (2021) ("[T]he Colorado method [is] a highly sophisticated and particularly effective instrument of [capital] jury selection.") (quotations omitted).

Mr. Dodd had recently been diagnosed with an advanced case of esophageal cancer, and he was receiving continuous chemotherapy by a device he "carried around with him" on a "one week on, two weeks off" protocol coupled with daily radiation treatment in Evansville for a total of twenty-eight sessions of which he had about two or three weeks remaining. *Id.* at 32–35. The cancer had spread to his lymph nodes, and the prognosis was "uncertain." The doctor told him he had a "fifty, fifty chance," and more would be known after the initial series of treatments. *Id.* at 34.

Mr. Owens, for his part, sought to withdraw for two reasons. First, he was not first-chair qualified for a capital case, and in the event of Mr. Dodd's death, he thought it wise to have someone who was so qualified who could "move seamlessly into the first chair, should that become necessary." *Id.* at 37, 57. Additionally, as Chief of the Public Defender, he had substantial administrative duties, including time-consuming work getting his own compensation for the capital case from a recalcitrant Vanderburgh County Council. *Id.* at 39–40, 56. In addition to these administrative duties, he had other non-capital cases, but the issue with compensation in Weisheit's case took most of his time, "essentially since April 21st"—the date of the County Council meeting resulting in an unfavorable decision regarding compensation. *Id.* at 51, 56. He was spending an inordinate amount of time at "serial meetings, serial phone calls" with the Council regarding compensation. *Id.* at 56. There were no other capital qualified attorneys in the Public Defender's office. *Id.* at 57. Primarily because the court was unable to identify any qualified substitutes in the PD's office, he denied both motions to withdraw. *Id.* at 57. He especially wanted Mr. Owens to stay on,

because in the event of losing Mr. Dodd, "you provide some threa[d] of continuity." *Id.* at 63. "But in order to move forward, you know, I'm not going to grant your motion to withdraw. I'm not going to allow that just now. . . ." *Id.*

On June 11, 2011, Mr. Dodd died. Dkt. 67-22 at 4.

Mr. McDaniel became Weisheit's attorney following Mr. Dodd's death. Dkt. 67-24 at 2 ¶12. Friction immediately formed between Mr. McDaniel and Mr. Owens. Mr. Owens described Mr. McDaniel as taking charge in every way. *Id.* at 2 ¶15. He made all the decisions, led all the meetings, and mitigation investigator Mike Dennis reported only to Mr. McDaniel, unless McDaniel was unavailable. *Id.* Mr. McDaniel had also attended a training dedicated to jury selection, and, according to Mr. Owens, that meant he would "handle the penalty phase" while Mr. Owens focused on guilt phase investigations and strategy. *Id.* at 2–3 ¶¶17–23. Mr. Owens also thought Weisheit became "dependent" on Mr. McDaniel's figurative "hand-holding" in that when he was absent, Weisheit was more difficult to manage. *See id.* at 3 ¶24.

Nor was Mr. Dodd's death the end of the attorney health issues afflicting the case. Just as the trial began, Mr. McDaniel became "very ill." *Id.* at 4 ¶29. One morning during the penalty phase, the team found Mr. McDaniel unconscious on a small couch in a little room in the courthouse. *Id.* at 4 ¶30. According to Mr. Owens, "I had to check to make sure he was alive. [Fact investigator] Mr. Mabrey called Mike's wife to ask her if we should do anything. We asked her if he needed to go to the hospital. Ultimately, he continued on." *Id.* However, Mr. McDaniel was too ill to conduct the penalty phase witness examinations he had prepared, including

examination of James Aiken, a widely recognized expert in prison classifications, was to testify that he would take over. *Id.* at 4 ¶31. Mr. Owens had to take over though he had not prepared for Mr. Aiken: "I was flying by the seat of my pants." *Id.* at 4 ¶¶31, 34. He lost the motion to exclude crucial opinion testimony Mr. Aiken was prepared to provide, so Mr. Owens withdrew him as a witness. *Id.* at 4 ¶32; *see also* Doc. 67 at 197–211 (Claims 26 and 27).

1. Trial counsel were unable to adequately supervise a thorough and reliable mitigation investigation.

In a capital case, counsel has an "obligation to conduct a thorough investigation of the defendant's background." *Williams,* 529 U.S. at 396 (citing ABA Standards for Criminal Justice 4–4.1, commentary, p. 4–55 (2nd ed. 1980)); *Porter,* 558 U.S. at 39; *Wiggins*, 539 U.S at 524 (citing ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases 11.4.1(C), p. 93 (1989)). "Lead counsel bears overall responsibility for the performance of the defense team, and should allocate, direct, and supervise its work in accordance with these Guidelines and professional standards." *American Bar Association Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases*, 31 HOFSTRA L. REV. 913, Guideline 10.4(B) (2003). The duty to supervise the team is ongoing. *Supplementary Guidelines for the Mitigation Function of Defense Teams in Death Penalty Cases*, 36 HOFSTRA L. REV. 677, 4.1(B (2008)). *See, e.g.*, *State v. Henry,* 28 N.E.3d 1217, 1238 (Ohio 2014) (discussing counsel's responsibility to ensure adequate investigation); *see also Chatman v. Walker,* 773 S.E.2d 192, 202 (Ga. 2015).

Given their impairments, trial counsel leaned heavily on investigator Mike Dennis, who utterly misapprehended Weisheit's impairments. Mr. Dennis's initial sustained impression of Weisheit was that he "was a very difficult client. The Vanderburgh County Jail treated him favorably, and still he complained." Doc. 67-23 at 1 ¶9. In his initial meetings with Weisheit in the Vanderburgh County Jail, Mr. Dennis found him sometimes cooperative and sometimes not. *Id.* at 2 ¶10.

Contrary to the Indiana Public Defender's emphatic published instructions reflecting national capital defense standards,[5] Mr. Dennis simplistically conceived of mitigation investigation as a pursuit of people who had something "good to say about" the client. *Id.* at 4 ¶33. He found that "Mr. Weisheit did not have many friends at all," and "[n]o one really liked him." *Id.* at 3 As he began interviewing potential mitigation witnesses, he instead discovered "they had more bad things to say." *Id.* at 4 ¶33. When

---

[5] Indiana capital defense training materials stress that mental illness and other impairments are commonplace among capital clients and all members must be on the lookout for these conditions:

> To make matters worse, your client may very likely suffer from mental and emotional problems as the result of childhood abuse or neglect, biological damage or disorder, and/or substance abuse.

Paula Sites, *Defending a Capital Case*, IND. PUB. DEF. COUNCIL, (Nov. 2010) ["IPDC Guidelines, 2010"] at16; Paula Sites, *Defending a Capital Case*, IND. PUB. DEF. COUNCIL, (Mar. 2013, ["IPDC Guidelines, 2013"] at 24. The manual significantly gives counsel reason to be careful not to misinterpret illness as something to be taken personally to the detriment of the client:

> Mental disabilities pervade our client's lives, causing suffering we often fail to comprehend in our focused efforts to resolve their capital murder charges. Most suffer from a constellation of recognized mental disorders, brain damage from a variety of causes, and experiences that have left them with what can only be described as tormented psyches. These disabilities and disorders can prevent us from working effectively with our clients, and can lead them to behave in ways that are not only maddening but self-destructive.

IPDC Guidelines, 2010 at 25; IPDC Guidelines, 2013 at 33. The IPDC relies on national standards. *E.g.,* IPDC Guidelines 2010 at 3 (citing various national publications as well as this Court's opinions in *Wiggins*, *Strickland*, and *Williams*).

he tried to discuss these "bad things" with Weisheit, "he became less cooperative . . . and sometimes he would become verbally confrontational." *Id.* at 2 ¶13.

Although the defense believed Weisheit was not "serious about helping in his defense," *id.* at 2 ¶19, they never contemplated that he possessed serious mental impairments that rendered him unable to communicate rationally to prepare in his defense. Mr. Dennis's only reflections on the engagement of mental health evaluators were that the neuropsychologist he recommended, Dr. Harvey, "had to get off the case," which threw "things into a tizzy," and the subsequent engagement of Dr. David Price was a "big change," with too little left to prepare, especially given Dr. Price's reputation for being "a thorough examiner." *Id.* at 4–5 ¶¶36–39. Mr. Dennis believed Dr. Price was not very good on cross-examination because he did not have a very good rapport with juries: "He came across as someone saying this is the way it is. You could see jurors squirm when he was testifying . . . ." *Id.* at 5 ¶40.

Mr. Dennis had no understanding of Weisheit's conduct as stemming from impairments resulting from lifelong cumulative brain traumas and other likely etiologies, evidencing a severe professional blind spot that, given counsel's utter lack of supervision, rendered his investigation far short of the prevailing norms.

2. Counsel misunderstood and mishandled Weisheit's incompetence.

While trial counsel pointedly experienced Weisheit's inability to communicate rationally with them to assist in his own defense, they interpreted his incapacity as the willful acts of a "difficult client" (Dkt. 67-23 at 1–2) and thus failed to subject his competency to any meaningful testing. They also failed to protect their incompetent

client's right not to stand trial, in large part because they presumed his competence and deemed him simply a problem client that made their tasking difficult. *Id.*; Dkt. 67-24 at 1–5. As Weisheit insisted on testifying at trial and proceeded to testify contrary to his own interest and in display of his inability even to tell a rational story, his incompetence manifested in patterns mirroring incidents throughout his life. *Id.* at 6. Yet neither his counsel nor the court made any effort to reconsider the earlier competence determination. Nor were counsel prepared to explain to the jurors how Weisheit's rambling testimony was a manifestation of his impairments.

3. Against his interest and with neither adequate advice nor assistance of counsel, Weisheit testified at trial.

Communication between trial counsel and Weisheit was very difficult from the beginning. Dkt. 67 at 71. Quickly, the attorney-client relationship went from strained to hostile. *Id.* at 72. Weisheit's lack of trust toward his defense team and the team's animus toward their client were such that when Weisheit decided to testify, his attorneys failed to meaningfully attempt to dissuade him from that catastrophic step. *Id.* at 73. After Weisheit's damaging testimony,[6] trial counsel resorted to expressing their anger at Weisheit for being "difficult," thereby failing to provide any evidence to clarify for the jury the context of Weisheit's testimony. Dkt. 107 at 49–50.

Weisheit's destructive testimony as well as other significant problems with the case are the foreseeable result of their lack of orientation to his disabilities which established a hostile, adversarial relationship with Weisheit. Mr. Dennis regarded

[6] His narrative testimony was dissembling, inculpating, often disjointed and likely alienating. *See Weisheit*, 26 N.E.3d at 7–8.

Weisheit as "the most frustrating and least likeable" client he had ever met. Doc. 67-23 at ¶25. Second chair, Steve Owens, rated Weisheit "the worst client I ever had." Doc. 67-24 at 4 ¶36.

The trial team's ongoing serious health issues including the death of the original first chair, and the incapacitation of first chair at a key moment during the penalty phase, coupled with inadequate training, experience, and qualifications largely explain numerous deeply prejudicial deficiencies in counsel's performance. It explains their failure to pursue vital records from the Indiana Boys School, the mix-up resulting in the failure to arrange for the trial testimony of the expert who witnessed Weisheit have a manic episode and thereby could powerfully convey the mental health significance of that observation in light of his history, their failure to lay a foundation for an expert on adaptability to incarceration, their failure to arrange for adequate assessment of Weisheit's brain damage, or their inexplicable failure to challenge the lack of foundation for the State's testimony about the cause of the fire.

C. Direct Appeal and Post-Conviction Proceedings.

On direct appeal, the state supreme court affirmed the conviction and sentence rejecting eight claims of trial error. *Weisheit*, 26 N.E.3d at 8.

At post-conviction, Weisheit raised, in relevant part, claims of ineffective assistance of trial counsel based on ten subclaims alleging prejudicial deficient performance at both guilt and penalty phases. Dkt. 86-13 at 1–8. Post-conviction counsel specifically argued, as a distinct eleventh subclaim that the several "instances of deficient performance stated in subsections 1 through 10 individually and cumulatively showed counsel's performance fell below prevailing professional

norms," and that "Weisheit was prejudiced" thereby "so there is a reasonable probability the result of the guilt and/or penalty phases would have been different but for counsel's deficient performance." *Id.* at 8 ¶11. The post-conviction court addressed each of the ten subclaims in order, found multiple instances of deficient performance, but found no prejudice treating the effect of any error in the subclaims in isolation from one another. Dkt. 88-31 at 18–80. It tersely disposed of petition Subclaim 11 without conducting any reweighing of the totality of mitigation, apparently referring to its previous siloed analyses of the subclaims: "As discussed herein, the Court finds no errors, cumulatively or otherwise, that resulted in deficient performance of trial counsel or that were prejudicial to Weisheit. Weisheit is not entitled to relief on this claim." Dkt. 88-31 at 81.

On appeal, the majority affirmed denial of relief, repackaging the trial counsel ineffectiveness subclaims into six issues, headed:

1. Errors during the penalty phase of trial
2. Failures regarding the admissibility of expert testimony
3. Failure to appropriately question jurors
4. Failure to adequately present evidence in support of pretrial statement
5. Failure to object to opinion testimony about the nature and origin of the fire
6. Cumulative errors

Weisheit, 109 N.E.3d at 984–92.

This repackaging resulted in the court entirely discarding without consideration four of the enumerated subclaims, including two related to jury

selection, Subclaims 2 and 3, and two explicitly tied to penalty phase: Subclaims 7 (failure to "attempt at the penalty phase to mitigate the damage from Weisheit's trial testimony") (Dkt. 89-13 at 6–7 ¶ 7) and 9 (failure to "properly investigate and present mitigating evidence and witnesses at the penalty phase") (Dkt. 89-13 at 8 ¶9). *See Weisheit*, 109 N.E.3d at 984–992.

Additionally, this repackaging combined petition Subclaims 8 (failure to obtain the IBS records available in the state archives), and 10 (failure to present testimony of expert witnesses like Dr. Harvey, who could have testified to first-hand observation of Weisheit in a manic state) and Dr. Gur (who could have testified about brain imaging analysis and the effect of multiple traumatic brain injuries in exacerbating Weisheit's mental health conditions), into heading number 1 "penalty phase." The court did so while inexplicably omitting from its "penalty phase" category petition Subclaim 1, which concerned the failure to make an offer of proof following the exclusion of penalty phase opinion testimony of prison classifications expert and former director of the Indiana Department of Corrections James Aiken (which was relabeled as heading 2 above). *Weisheit*, 109 N.E.3d at 987; Dkt. 86-13 at 1–3 ¶1. This subclaim concerning failings around Mr. Aiken's prospective evidence is especially weighty, given that on direct appeal, the Indiana Supreme Court opined that if counsel had laid a proper foundation for Aiken's opinion testimony, it "could have possibly resulted in reversal of his death sentence." *Weisheit*, 26 N.E.3d at 10.

The state supreme court affirmed the post-conviction court's finding that Weisheit had failed to prove ineffective assistance of counsel, in some instances

without making any finding on performance, in at least one instance finding deficient performance, but relying on failure to show prejudice. *Weisheit*, 109 N.E.3d at 984–92. Additionally, the guilt phase claims, including especially but not limited to petition Subclaim 5 (the failure to object to unqualified opinion testimony about the origin of the fire) have relevance to sentencing phase prejudice. Ind. Code § 35–50–2–9(d) (providing that the sentencer "may consider all the evidence introduced at the trial stage of the proceedings, together with new evidence presented at the sentencing hearing"). The majority underscored that the post-conviction court "was critical of trial counsel in several ways," further suggesting the finding that "there was no ineffective assistance of counsel" relied heavily on the lack of prejudice from any deficient performance. *Weisheit*, 109 N.E.3d at 992.

But not only did the majority fail to consider two subclaims of ineffective assistance of trial counsel explicitly tied to penalty phase performance, its prejudice analysis considered only the prejudicial effect of each alleged instance of deficient performance in isolation rather than taking into account "the totality of available mitigation." *Wiggins*, 539 U.S. at 534. Nor was this problem resolved by addressing "Cumulative errors." In handling this distinct subclaim, the majority recites that it is legally possible to find cumulative prejudice arising from distinct claims of ineffective assistance of trial counsel even where the individual claims are not prejudicial, and observes that trial counsel "made errors," but simply asserts that "Weisheit has not demonstrated prejudice" citing only the aggravated nature of the crime and failing to mention anything about the overall mitigation picture that the

jury was not shown owing to trial counsel's errors. *See Weisheit*, 109 N.E.3d at 992. To be clear, there is no mention whatsoever of the mitigation the jury might have seen but for these errors or any change in the weight of aggravation.

As to the claims the majority overlooks, this Court has held that a federal habeas court "should 'look through' the unexplained decision to the last related state-court decision that does provide a relevant rationale. It should then presume that the unexplained decision adopted the same reasoning." *Wilson v. Sellers*, 584 U.S. 122, 125 (2018). Here, the majority does not address the omitted claims at all—does not provide even a summary disposition of them. But assuming "look through" doctrine applies, the post-conviction court disposition of these four subclaims underscores the dearth of proper reweighing. The court found deficient performance in Subclaim 2 and part of Subclaim 9 (as to failing to present testimony of an expert like Dr. Gur) (Dkt. 88-31 at 29, 80), again highlighting that the finding that counsel were not ineffective relied heavily on prejudice analysis.

Returning to discussion of the Indiana Supreme Court's analysis: further underscoring the work done by the flawed prejudice analysis, the concurring opinion of Justice Slaughter concluded "that trial counsel's performance during the penalty phase was deficient, but that Weisheit failed to show prejudice." *Weisheit*, 109 N.E.3d at 994 (Slaughter, J., concurring in part and in the judgment). Justice Slaughter concluded that the post-conviction court "botched the governing legal standard" which is "a reasonable probability that, were it not for counsel's deficient performance during the penalty phase, at least one juror would not have voted for the death

penalty, and the trial judge would not have imposed that sentence; or alternatively, that the jury would have voted unanimously **not** to impose the death penalty." *Id.*

Writing in dissent, Chief Justice Rush finds that "Weisheit's many claims of ineffective assistance at the penalty phase of trial fail individually. But in my view, Weisheit has met his burden on his cumulative-effect claim." *Id.* at 996 (Rush, C.J., dissenting). In assessing the totality of the evidence, the Chief Justice concludes that "[t]he post-conviction court's findings and the evidence as a whole lead only to the conclusion that counsel's deficiencies collectively prejudice Weisheit at the penalty stage." *Id.* at 1004. The dissent observes the majority's and the post-conviction court's failure to consider the totality of available mitigation and its mishandling of "cumulative prejudice." *Id.* at 1013–14.

Further, the Chief Justice argued that the majority's "different outcome" standard is incorrect: under the Indiana deadlock provision, deficient performance is prejudice when the petitioner can demonstrate a reasonable likelihood of either 1) a unanimous jury verdict for a non-death sentence, or 2) a reasonable likelihood that "at least one juror would not have voted for the death penalty, *and* the trial judge would not have imposed that sentence." *Id.* at 1013 (emphasis added).

D. Federal Habeas Corpus Proceedings.

From the outset, the parties in federal habeas corpus proceedings contemplated the need to expand the record[7] in light of the Seventh Circuit's

[7] Inter alia, federal counsel sought to maintain the standard of care for mitigation investigation under pandemic conditions and to obtain, upon consultation with Dr. Gur, new brain imaging necessary for

recognition that the *Martinez v. Ryan*, 566 U.S. 1 (2012), equitable rule is applicable in Indiana. Doc. 17 at 9 (citing *Brown v. Brown*, 847 F.3d 502 (7th Cir. 2017)). However, investigation efforts were stifled by the Covid-19 pandemic and complicated by Weisheit's ongoing serious mental impairments, including a protracted hunger strike and a suicide attempt stemming from pervasive paranoid delusions suffered during this period. *Id.* at 10, 26–27; Dkt. 67 at 27–32.

After *Shinn v. Ramirez*, 596 U.S. 366 (2022) (holding that 28 U.S.C. § 2254(e)(2)'s restriction on considering evidence not presented in state court applies even to claims falling under the *Martinez* exception), that pathway forward was effectively foreclosed, and undersigned counsel unsuccessfully sought a stay of federal proceedings to permit necessary development of the record and presentation of new evidence and unexhausted claims in the state court, pursuant to *Rhines v. Weber*, 544 U.S. 269 (2005).[8] Doc. 17 at 27–36; Dkt. 119 at 12 (denying the *Rhines* stay motion).

Ultimately, the District Court compelled filing the amended petition without new evidentiary development. Dkt. 64. It denied the writ, in relevant part by assessing the four ineffective assistance of trial counsel subclaims it deemed exhausted. Dkt. 119 at 17–18, 29–40. Like the Indiana Supreme Court majority, the District Court assessed prejudice of these subclaims independently. *Id.* The District

his proper quantitative analysis discussed but never conducted in state proceedings. Dkt. 67 at 29–31, 192.

[8] Counsel also sought a stay pending restoration of Weisheit to competency as his input was necessary to develop the record to support specific habeas claims. Dkt. 95 (Motion to Restore Competency); Dkt. 119 at 42 (denying the competency motion).

Court also addressed the distinctly asserted cumulative prejudice claim, noting that it would only assess "taken together" three of the subclaims:

> (1) counsel's failure to object to the police detective's opinion testimony regarding the cause of the fire; (2) counsel's failure to call Dr. Gur or another similarly qualified expert to testify about Mr. Weisheit's possible traumatic brain injuries; and (3) counsel's failure to make an adequate offer of proof as to Mr. Aiken's testimony about the Indiana Department of Correction's ability to safely house Mr. Weisheit.

Id. at 41. In its one paragraph weighing of the prejudicial effect of these three subclaims, the District Court failed to consider the effect of all ten exhausted subclaims raised in state post-conviction proceedings.

After obtaining a certificate of appealability, Weisheit presented five claims related to trial counsel's performance: the failure to obtain the IBS records, failure to present expert testimony like Dr. Harvey and Dr. Gur, failure to contest unqualified opinion testimony about the nature and origin of the fire, failure to make an offer of proof with regard to Aiken's excluded testimony, and a cumulative error claim. *Weisheit*, 151 F.4th at 880–86. The Seventh Circuit's prejudice assessment for each subclaim did not consider the effect of the others. Notably, the Seventh Circuit failed to address the distinct cumulative prejudice claim at all, perhaps confusing the District Court's discussion that some of the subclaims in the federal petition were defaulted. *See id.*; Dkt. 119 at 40.

In finding the state court adjudication to be a reasonable application of clearly established federal law, neither the District Court nor the Seventh Circuit addressed the flawed "different outcome" standard applied by the state court.

REASONS FOR GRANTING THE WRIT OF CERTIORARI

A. Clearly Established Federal Law Requires Reweighing the Totality of Available Mitigation.

This Court has long recognized that professional norms of capital representation include "an obligation to conduct a thorough investigation of the defendant's background." *Andrus v. Texas*, 590 U.S. 806, 814 (2020) (quotation omitted).

This Court has long held that to prevail on a claim of ineffective assistance of counsel, the petitioner " '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.' " *Wiggins*, 539 U.S. at 534 (quoting *Strickland v. Washington*, 466 U.S. 668, 694 (1984)).[9] In claims of ineffective assistance for failure to investigate, develop, and present available mitigation, "In assessing prejudice, we reweigh the evidence in aggravation against the totality of available mitigating evidence." *Id.* Available mitigation includes any presented at trial as well as that adduced in collateral proceedings. *Williams*, 529 U.S. at 398.

This Court has illustrated proper reweighing multiple times. In *Wiggins* itself, this Court took into account evidence adduced at post-conviction proceedings about

[9] In *Wiggins*, this Court also reversed the court of appeals' finding that failure to present this material was "reasonable strategic decision" of trial counsel to "focus on petitioner's direct responsibility." *Id.* at 518. Although this decision might have been reasonable strategy had it been predicated on "a reasonably thorough investigation" it cannot have otherwise been reasonable. *Id.* at 535. Accordingly, performance analysis also hinges on consideration of the totality of evidence—including everything an adequate investigation turned up as part of the assessment of reasonableness of purported trial strategy.

the petitioner's "dysfunctional background" in addition to argument at trial that the defendant "had a difficult life." *Wiggins*, 539 U.S. at 516, 526.

In Terry Williams's case, this Court found the state court erred by failing to reweigh the totality of mitigating evidence, emphasizing that consideration of mitigation goes beyond evidence tending to rebut the prosecution's case for death eligibility under the state statute.[10]

In *Porter v. McCollum*, this Court reweighed evidence presented at the trial along with evidence of "(1) Porter's heroic military service in two of the most critical—and horrific—battles of the Korean War, (2) his struggles to regain normality upon his return from war, (3) his childhood history of physical abuse, and (4) his brain abnormality, difficulty reading and writing, and limited schooling." 558 U.S. at 41. This Court concluded that "[h]ad the judge and jury been able to place Porter's life history on the mitigating side of the scale, and appropriately reduced the ballast on the aggravating side of the scale, there is clearly a reasonable probability that the

---

[10]

> But the state court failed even to mention the sole argument in mitigation that trial counsel did advance—Williams turned himself in, alerting police to a crime they otherwise would never have discovered, expressing remorse for his actions, and cooperating with the police after that. While this, coupled with the prison records and guard testimony, may not have overcome a finding of future dangerousness, the graphic description of Williams' childhood, filled with abuse and privation, or the reality that he was "borderline mentally retarded," might well have influenced the jury's appraisal of his moral culpability. The circumstances recited in his several confessions are consistent with the view that in each case his violent behavior was a compulsive reaction rather than the product of cold-blooded premeditation. Mitigating evidence unrelated to dangerousness may alter the jury's selection of penalty, even if it does not undermine or rebut the prosecution's death-eligibility case. The Virginia Supreme Court did not entertain that possibility. It thus failed to accord appropriate weight to the body of mitigation evidence available to trial counsel.

Williams, 529 U.S. at 398 (citation omitted).

advisory jury—and the sentencing judge—would have struck a different balance, and it is unreasonable to conclude otherwise. *Id*. at 42 (quotations and citation omitted). It is noteworthy that the four distinct categories of evidence were considered holistically.

In *Rompilla v. Beard*, deficient performance was made clear by trial counsel's failure to review court files from the defendant's prior conviction (a professional norm to rebut the prosecution's noticed statutory aggravator rendering the case death eligible). 545 U.S. 374, 383 (2005). Because the defendant, the few family members trial counsel spoke with, and mental health experts consulted for purposes of determining competency to be tried all suggested there was not likely to be any mitigating evidence, trial counsel pursued a strategy focused on challenging guilt and proffering residual doubt in mitigation. *Id*. at 378. As it turns out, the court file also contained evidence which "pictured Rompilla's childhood and mental health very differently from anything defense counsel had seen or heard." *Id*. at 390. This Court found the failure to review that file and then follow up on these red flags was deficient performance. *Id*. at 383. Like in *Wiggins*, it was impossible to make a reasonable strategic decision not to present this without knowing the effect of available mitigation. *Id*. at 386. In assessing prejudice, this Court took into account various types of available mitigation trial counsel would have turned up had it examined the court file and followed up on these leads, including childhood poverty, childhood abuse and neglect, juvenile incarceration, alcoholism, schizophrenia and other disorders, and "test scores showing a third grade level of cognition after nine years of

schooling." *Id*. at 390–91. This Court noted that "[t]his evidence adds up to a mitigation case" that was not presented to the jury. *Id*. at 393.

B. The Seventh Circuit's Conclusion that the State Court Reasonably Applied this Court's Clearly Established Federal Law Relied on Siloed Analyis of Prejudice.

The Seventh Circuit affirmed the District Court's conclusion under § 2254(d)(1). The lower federal courts ruled that the state court had reasonably applied the clearly established law. In so doing, these federal courts did not recognize that on the state court prejudice analysis failed to consider the totality of available mitigation.

As detailed above, the Indiana Supreme Court's analysis treated the effect of six of the ten subclaims in isolation and ignored four other subclaims (two of which were explicitly penalty phase) altogether. Even in its terse recitation of "cumulative errors," the majority failed to reweigh the totality of available mitigation. These shortcomings are highlighted in the Chief Justice's dissenting opinion which conducts totality of available mitigation analysis under the heading of cumulative prejudice.

The dissent also highlights the majority's failure to apply the correct "different outcome" standard from *Strickland*. The majority incorrectly requires showing a reasonable likelihood that, but for trial counsel's errors, all twelve jurors would agree to a non-death sentence. The Chief Justice identified two pathways for proving prejudice under Indiana's capital sentencing deadlock provision. Clearly established law requires showing it is reasonably likely that at least one juror would have struck a different balance. *Wiggins*, 539 U.S. at 537 ("a reasonable probability that at least one juror would have struck a different balance"), *quoted in Andrus*, 590 U.S. at 822.

The Missouri Supreme Court has relied on the same standard, in a state with a deadlock provision functionally equivalent to Indiana's explicitly recognizing that a deadlock is a "different outcome" just as it is in states requiring a life sentence when the jury fails to agree on death:

> "Had the jury been able to place petitioner's excruciating life history on the mitigating side of the scale, there is a reasonable probability that at least one juror would have struck a different balance." *Wiggins,* 539 U.S. at 537[]. If competent counsel had presented and explained the significance of all the available mitigation evidence, there is a "reasonable probability that the result of the sentencing proceeding would have been different." *Williams,* 529 U.S. at 399[] (resulting in a life sentence in Maryland; in Missouri it would result in a new penalty phase proceeding). The motion court clearly erred in concluding otherwise.

Taylor v. State, 262 S.W.3d 231, 253 (Mo. 2008); *see also* Mo. Rev. Stat. § 565.030.4(4) (authorizing the trial judge to impose life without parole or death if the jury cannot agree on the sentence). Under Indiana law, if the jury cannot agree, the result is a "different outcome" from the jury agreeing on death: the statute requires the judge to "discharge the jury and proceed" as if the sentencing phase were a bench trial. Ind. Code § 35–50–2–9(f).[11]

The District Court assessed only four subclaims of the ineffective assistance of counsel claims it deemed exhausted. Dkt. 119 at 17–18, 29–40. It assessed the prejudice of each of these subclaims independently of the effect of the others. See id. It also separately treated "cumulative prejudice." *Id.* at 40–42. Here the District

[11] Chief Justice Rush's approach is reconcilable with Missouri's approach and this Court's precedent as long as it is presumed that the evidence necessary to show at least one juror would have struck a different balance and voted against death is necessarily sufficient to show that it reasonably likely that the judge too would strike a different balance and not impose death.

Court noted it was only considering the effect "taken together" of three sets of deficient performance (that is the combined prejudicial effect of three of the subclaims of ineffective assistance of trial counsel) acknowledging that its prior prejudice analysis treated these effects independently. *Id*. at 41. It devoted one paragraph to reweighing these three. *Id*. It failed to consider the totality of all ten subclaims presented in state court, or even the totality of available mitigation arising from the subclaims directly addressing penalty phase. Based on this truncated analysis, it found the state court was a reasonable application of clearly established federal law.

As noted, in affirming the District Court, the Seventh Circuit similarly treated each subclaim of trial counsel's deficient performance in isolation, assessing the prejudice in independent silos. The Seventh Circuit failed to address the "cumulative prejudice" claim (presumably on the errant belief that it had not been presented in state court) or otherwise addressed the totality of available evidence in assessing the prejudice.

C. Circuits Are Split on the Nature or Feasibility of "Cumulative Prejudice" Claims.

The majority of jurisdictions to have explicitly addressed "cumulative prejudice"—including the Seventh Circuit—recognize the necessity of examining the effect of multiple instances of deficient performance even when the effect of each one individually is not prejudicial. *E.g.*, *Myers v. Neal*, 975 F.3d 611, 623 (7th Cir. 2020) ("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."); *Bejarano v. Reubart*, 136 F.4th

873, 890–91 (9th Cir. 2025) ("Under our doctrine, "the cumulative effect of multiple errors may prejudice a defendant even if no single error in isolation is sufficient to establish prejudice," meaning that prejudice resulting from ineffective assistance of counsel must be 'considered collectively, not item by item.' " *Williams v. Filson*, 908 F.3d 546, 570 (9th Cir. 2018) (quoting *Doe v. Ayers, 782* F.3d 425, 460 n.62 (9th Cir. 2015); *accord Silva v. Woodford*, 279 F.3d 825, 834 (9th Cir. 2002)."); *Littlejohn v. Trammell*, 704 F.3d 817, 868 (10th Cir. 2013); *United States v. McGill*, 815 F.3d 846, 947 (D.C. Cir. 2016) ("It is true that even where individual errors are insufficiently prejudicial to warrant reversal, 'the total effect of numerous small missteps may deprive a defendant of a fair trial,' provided that appellants can demonstrate prejudice resulting from the various errors taken together. [*United States v.*] *Celis,* 608 F.3d [818,] 847 [(D.C. Cir. 2010)] (citing *Egan v. United States,* 287 F. 958, 971 (D.C. Cir.1923))").[12]

The Fourth Circuit departs radically from this Court's approach of considering the "totality of available mitigation" in assessing prejudice:

> Specifically, we have stated that "ineffective assistance of counsel claims ... must be reviewed individually, rather than collectively." *Fisher v. Angelone*, 163 F.3d 835, 852 (4th Cir. 1998). As such, even if Frizzell had demonstrated prejudice under *Strickland*, no cumulative analysis would have been possible under this binding precedent.

[12] This question is complicated and confused by the fact that the Indiana Supreme Court in this case relabeled Weisheit's claim of cumulative prejudice as "cumulative errors." *Weisheit*, 109 N.E.3d at 992. Properly speaking, "cumulative error" is the aggregation of various types of constitutional error, not limited to ineffective assistance of counsel, and the prejudice cannot properly be assessed in aggregate because "various errors carry different prejudice standards." *United States v. Certified Env't Servs., Inc.*, 753 F.3d 72, 95 (2d Cir. 2014).

Frizzell v. Dotson, No. 21-7491, 2024 WL 5135606, at *10 (4th Cir. Dec. 17, 2024). The Third and Fifth Circuits have effectively established the same rule by insisting that "cumulative prejudice" is a distinct claim of error that must separately be exhausted for purposed of 28 U.S.C. § 2254(b)(1)(A). *Collins v. Sec'y of Pa. Dep't of Corr.*, 742 F.3d 528, 541 (3d Cir. 2014) ("We have not had occasion before to hold that a cumulative error argument constitutes a standalone constitutional claim subject to exhaustion and procedural default, but, with the issue squarely presented now, we so rule. Collins's cumulative error claim was not raised before the Pennsylvania Supreme Court and is therefore not properly before us."); *Jimenez v. Guerrero*, 133 F.4th 483, 495 n.5 (5th Cir. 2025) ("We also decline to address Jimenez's 'cumulative prejudice' claim. He never asserted this claim in state court, and he raised it for the first time in his reply brief in the district court. This argument is procedurally barred for the failure to exhaust state remedies.") (citations omitted).

However, in claims of ineffective assistance for failure to investigate, develop, and present available mitigation evidence, this Court has never strayed from always assessing prejudice using the "totality of available mitigation." *Wiggins*, 539 U.S. at 534. The fact that deficient performance can include failure to obtain or review available records, failure to interview and present testimony of relevant lay witnesses, failure to engage or present expert opinion testimony, does not mean the prejudice of these individual instances of deficient performance should be cabined off from one another for prejudice analysis. In short, there is just one claim of ineffective

assistance of trial counsel, and penalty phase prejudice is assessed by reweighing the totality of available mitigation.

Most circuit courts have correctly applied the clearly established federal law. For example, in *Sowell v. Anderson*, 663 F.3d 783, 795 (6th Cir. 2011), the court of appeals reasoned that the new mitigation evidence was significantly more powerful than evidence already presented at trial in that it was far more detailed while, in contrast, what the jury saw only "spoke in generalities that lacked any details" of the defendant's childhood history. Further, lay witnesses provided "first-hand, eyewitness accounts of specific examples." *Id*. The Sixth Circuit simultaneously considered the effect of the difference in reporting and testimony by expert witnesses properly armed with the lay witness input. *Id*. at 795–96. The Sixth Circuit did not conduct separate prejudice analyses on the effect of the lay witnesses or expert reporting, nor did it silo the prejudice analysis based on subject matter, demonstrating the interplay between evidence of the good deeds the defendant performed as an adult and the "longitudinal perspective that his developmental history provides." *Id*. at 796. The ultimate question is whether the entire presentation of mitigation was reasonably likely to move at least one juror to vote for life rather than death. *Id*. at 796.

The Eleventh Circuit has recognized that even when "the aggravating circumstances in this case are especially powerful," prejudice analysis requires examination of the totality of available mitigation. *Boyd v. Allen*, 592 F.3d 1274, 1295 (11th Cir. 2010). Thus, "[b]y any standard acceptable to a civilized society, these

crimes were extremely wicked and shockingly evil."[13] *Id*. at 1296. Despite the extreme degree of aggravation, the Eleventh Circuit's reweighing nonetheless included all available mitigation, considering in the aggregate evidence stemming from multiple instances of deficient performance. *Id*. at 1297 ("Against these heinous crimes, we are obliged to consider the circumstances of Boyd's childhood, as developed at his trial *and* the post-conviction Rule 32 hearing." (emphasis in original)). This included omitted evidence presented by both lay and expert witnesses and touching on a variety of subject matters, before concluding it was not reasonably likely that but for the deficient performance at least one juror would have struck a different balance. *Id*. at 1297–1302.

But some circuit courts have strayed from the clearly established federal law. In *Tucker v. Ozmint*, for example, the Fourth Circuit separately assessed prejudice of the failure to provide expert witness records related to defendant's childhood sexual abuse and the failure to investigate and challenge one of the state's expert witnesses.

---

[13]

> (a) Th[e] Defendant invaded the privacy of the victims, threatened to kill their daughter (and step-daughter), robbed them, kidnaped them at gun point from their home, bound and gagged them, took them to a remote area and abused both of them while they were fighting and begging for their lives.
>
> (b) The Defendant inflicted severe pain and suffering upon both victims by hitting them on the head and in the face with a large limb while they were tied up and blindfolded.
>
> (c) The Defendant shot each victim two or three times after physically abusing them.
>
> (d) The Defendant used an ax to cut Evelyn Blackmon so that her body would go into a 55 gallon drum.
>
> (e) The Defendant bragged about the killings and about how cold blooded he was.

Id.

350 F.3d 433, 440–44 (4th Cir. 2003). There was no contemplation of the overall prejudice from the deficient performance.

The Fifth Circuit "truncated" the analysis in a similar way (over a strong dissenting opinion). In *Canales v. Davis*, a Fifth Circuit panel first sorted the new mitigation evidence into three categories "(1) childhood trauma, (2) mental illness, and (3) coercion (*i.e.*, evidence that Canales would likely have been killed by the Texas Mafia if he had refused to kill Dickerson and to write exaggerated notes about his role in the murder)," and then compared those category labels to similarly applied labels to the new mitigation in this Court's precedent, observing that none of the precedent cases involved these exact same three sets. 96 F.3d 409, 414–415 (5th Cir. 2020). This Court had previously "warned against exactly this approach. this Court warned against exactly that approach, noting 'that we have never before equated what was sufficient in *Wiggins* with what is necessary to establish prejudice.' " *Canales v. Lumpkin*, 142 S. Ct. 2563, 2568 (2022) (mem.) (Sotomayor, J., dissenting from denial of writ of certiorari) (quoting *Andrus*, 590 U.S. at 823 n.6).

CONCLUSION

For the foregoing reasons, this Court should grant the petition for writ of certiorari and either call for briefing and oral argument or summarily reverse the opinion below and remand for further proceedings. Alternatively, since the Seventh Circuit mistakenly treated the entirety of the "cumulative prejudice" claim as

unexhausted, this Court could grant the writ, vacate the Seventh Circuit's opinion, and remand for further proceedings there.

Respectfully submitted,
/s/ Joseph J. Perkovich

JOSEPH J. PERKOVICH
Counsel of Record
Phillips Black, Inc.
PO Box 3547
New York, NY 10008
212.400.1660 (tel)
888.532.0897 (fax)
j.perkovich@phillipsblack.org

/s Joseph C. Welling
JOSEPH C. WELLING
Phillips Black, Inc.
100 N. Tucker Blvd., Ste. 750
St. Louis, MO 63101
314.629.2492 (tel)
314.582.1266 (fax)
j.welling@phillipsblack.org

/s David P. Voisin
DAVID P. VOISIN
P.O. Box 804
Hammond, LA 70404
(601) 949-9486
david@dvoisinlaw.com

Counsel for Jeffrey A. Weisheit

February 26, 2026