

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

**APPENDIX TO
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

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

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

Counsel for Petitioner/Appellant Jeffrey A. Weisheit

APPENDIX TABLE OF CONTENTS

Description	Page Number
<i>Weisheit v. Neal</i> , 151 F.4th 855 (7th Cir. 2025).....	App.001
Dist. Ct. Dkt. 119, Order Denying Petition for Writ of Habeas Corpus (S.D. Ind. Nov. 2, 2022)	App.034
Dist. Ct. Dkt. 120, Final Judgment (S.D. Ind. Nov. 2, 2022)	App.078
<i>Weisheit v. State</i> , 109 N.E.3d 978 (Ind. 2018)	App.079
Dist. Ct. Dkt. 126, Order Denying Motion to Alter or Amend Judgment and Granting Request to Expand Certificate of Appealability (S.D. Ind. Sept. 5, 2023)	App.123
Fifth Cir. Doc. 54, Order Denying Pet'n for Rehearing (Sept. 29, 2025)	App.124

trict court's cited cases held that specific parties to a contract were necessary or indispensable to litigation involving that contract, *see, e.g., Dollison v. Antero Res. Corp.*, 600 F. Supp. 3d 827, 835 (S.D. Ohio 2022), the district court still needed to conduct a pragmatic, case-specific Rule 19 analysis of the parties before it. It did not do so.

Without explicit reasoning or application of Rule 19 below, we are unable to determine the basis for the district court's Rule 19(a) determination. We cannot discern whether the district court found HHS necessary because the court could not afford complete relief among the existing parties. *See* Fed. R. Civ. P. 19(a)(1)(A). And we do not know whether it determined that HHS claims an interest in the litigation that will not be protected in HHS's absence. *See* Fed. R. Civ. P. 19(a)(1)(B)(i). Nor can we determine whether any of the four Rule 19(b) factors supported finding HHS indispensable. *See* Fed. R. Civ. P. 19(b).

On remand, the district court should consider the case-specific facts to determine whether HHS is necessary and indispensable. For example, Wilcac's counsel stated at oral argument that they would not interpret the contract in a way that would impact the special master's decision—Wilcac views the special master's decision as consistent with the annuity contract. And Wilcac conceded that it does not foresee making any argument adverse to HHS. These facts are crucial to determining whether HHS's interests are adequately represented by Wilcac and therefore whether HHS is a necessary party. *See* Fed. R. Civ. P. 19(a)(1)(B)(i).

Should the district court determine that HHS is necessary, the Rule 19(b) factors will clarify whether HHS is an indispensable party. If HHS is an indispensable party, for example, the estate will have no recourse against Wilcac. It can sue HHS in the Court of Federal Claims, but it cannot

sue Wilcac there. And the estate has disclaimed any claim against HHS. Thus, the estate claims it will not have an adequate remedy if this case cannot proceed in HHS's absence. *See* Fed. R. Civ. P. 19(b)(4).

Rule 19 requires courts to consider multiple factors to determine whether a party is necessary and indispensable. Because Rule 19 requires factfinding, we leave these issues for the district court to resolve in the first instance.

IV.

For these reasons, we reverse and remand for further proceedings consistent with this opinion.



Jeffrey Alan WEISHEIT,
Petitioner-Appellant,

v.

Ron NEAL, Respondent-Appellee.

No. 23-2906

United States Court of Appeals,
Seventh Circuit.

Argued September 25, 2024

Decided August 13, 2025

Background: After affirmance on direct appeal, 26 N.E.3d 3, of capital murder convictions and affirmance, 109 N.E.3d 978, of the denial of state postconviction relief, state prisoner petitioned for federal habeas relief, asserting numerous claims and alleging, among other things, ineffective assistance of trial and appellate counsel. The United States District Court for the Southern District of Indiana, Sarah

Evans Barker, J., denied prisoner's motion for additional funding, entered an order, 2022 WL 16635294, denying prisoner's motion to stay proceedings pending a return to state court to secure exhaustion of certain claims and denying prisoner's petition, and denied, 2023 WL 5722651, prisoner's motion to alter or amend judgment. Prisoner appealed.

Holdings: The Court of Appeals, St. Eve, Circuit Judge, held that:

- (1) defaulted claims premised on alleged trial-court failures and on prisoner's competency were not "unexhausted claims" for which habeas court had ability to stay proceedings;
- (2) prisoner failed to establish that avenue existed for state to correct alleged violations of right to effective assistance that postconviction counsel failed to raise in state postconviction proceedings;
- (3) denial of request for competency-based stay was not abuse of discretion;
- (4) brain-imaging tests for which prisoner sought funding were not reasonably necessary for his representation;
- (5) state court reasonably applied federal law in rejecting claims alleging violations of right to impartial jury;
- (6) state court acted reasonably in concluding that defendant's post-arrest statement to police was voluntary; and
- (7) state court acted reasonably in rejecting defendant's claims of ineffective assistance.

Affirmed.

1. Habeas Corpus ⇌380.1

A habeas petitioner exhausts state court remedies, as requirement for federal habeas relief under the Antiterrorism and Effective Death Penalty Act (AEDPA), when he fairly presents his claim in each appropriate state court. 28 U.S.C.A. § 2254(b)(1)(A).

2. Habeas Corpus ⇌319.1

If state court remedies remain available, a federal petitioner may have the opportunity to return to state court to present his claims in order to satisfy the Antiterrorism and Effective Death Penalty Act's (AEDPA) exhaustion requirement. 28 U.S.C.A. § 2254(b)(1)(A).

3. Habeas Corpus ⇌319.1, 401, 404

In determining whether a federal habeas petitioner has met the Antiterrorism and Effective Death Penalty Act's (AEDPA) exhaustion requirement, if the petitioner has not properly presented his claims in state court and no state court remedies remain available, those claims are procedurally defaulted; in such a circumstance, habeas courts may forgive the petitioner's default only upon a showing of cause and prejudice or a miscarriage of justice. 28 U.S.C.A. § 2254(b)(1)(A).

4. Habeas Corpus ⇌351

In proceedings under the Antiterrorism and Effective Death Penalty Act (AEDPA), a federal habeas court's ability to stay proceedings to allow the petitioner present claims to a state court applies only to unexhausted claims. 28 U.S.C.A. § 2254(b)(1)(A).

5. Habeas Corpus ⇌319.1

In determining whether a habeas petitioner has met the Antiterrorism and Effective Death Penalty Act's (AEDPA) exhaustion requirement, an "unexhausted claim" is one that has not been—but could be—pursued in state court. 28 U.S.C.A. § 2254(b)(1)(A).

See publication Words and Phrases for other judicial constructions and definitions.

6. Criminal Law ⇌1668(1)

In Indiana, only certain issues are available to a successive postconviction petitioner: a petitioner may not present

claims that could have been, but were not, raised in earlier proceedings, absent a sufficient reason; nor may a petitioner present an issue raised but adversely decided. Ind. Post-Conviction Rule 1(8, 12).

7. Criminal Law ⇔1668(1)

Assuming a petitioner’s claim is not barred, the Indiana Supreme Court will still only grant permission to file a successive petition for postconviction relief if the petitioner shows a reasonable possibility that he is entitled to relief. Ind. Post-Conviction Rule 1(12)(b).

8. Habeas Corpus ⇔431

Under Indiana law, habeas petitioner was barred from bringing certain claims, premised on alleged trial-court failures on his competency, through a successive state-court petition for postconviction relief, and thus such claims were not “unexhausted claims” for which federal habeas court had ability to stay proceedings to allow petitioner to present such claims in state court, in proceedings under Antiterrorism and Effective Death Penalty Act (AEDPA) challenging petitioner’s convictions of capital murder, where claims were not unknown to petitioner in earlier state postconviction proceedings. 28 U.S.C.A. § 2254(b)(1)(A); Ind. Post-Conviction Rule 1(8, 12).

See publication Words and Phrases for other judicial constructions and definitions.

9. Criminal Law ⇔1971

Indiana law judges the performance of postconviction counsel against an exceedingly low benchmark: counsel need only in fact appear and represent the petitioner in a procedurally fair setting which resulted in a judgment of the court.

10. Habeas Corpus ⇔431

Habeas petitioner failed to establish that avenue existed, consistent with Indiana’s own procedures for successive postconviction proceedings, for Indiana to

correct alleged violations of his right to effective assistance of trial counsel that postconviction counsel failed to raise in state postconviction proceedings, and thus failed to show that claims asserting such violations were “unexhausted claims” for which habeas court had ability to stay proceedings to allow for presentation in state court, in proceedings under Antiterrorism and Effective Death Penalty Act (AEDPA) challenging petitioner’s convictions of capital murder, where petitioner made no argument that his postconviction counsel fell below Indiana standard requiring appearance and representation in procedurally fair setting. U.S. Const. Amend. 6; 28 U.S.C.A. § 2254(b)(1)(A); Ind. Post-Conviction Rule 1(12).

See publication Words and Phrases for other judicial constructions and definitions.

11. Habeas Corpus ⇔431

Habeas court’s denial of petitioner’s request for a stay of proceedings, which request alleged that petitioner was not competent to assist habeas counsel, was not abuse of discretion, in proceedings under Antiterrorism and Effective Death Penalty Act (AEDPA) challenging petitioner’s convictions of capital murder, where petitioner’s claims were all either resolved on the merits by the state court or were not properly exhausted and barred. 28 U.S.C.A. § 2254.

12. Habeas Corpus ⇔661, 679

Federal habeas petitioners have no constitutional right to competence, but district courts may exercise their discretion to grant competency-based stays.

13. Habeas Corpus ⇔679

The outer limits of a federal habeas court’s discretion to grant competency-based stays counsel against a stay when the petitioner’s claims were adjudicated by the state courts on the merits, involve pure

questions of law, or are procedurally defaulted (and cannot be excused).

14. Habeas Corpus ⇌753

If the state court decided the merits of a habeas petitioner's claim, federal habeas courts must confine their review to the state court record.

15. Habeas Corpus ⇌883.1

Habeas petitioner failed to establish that he had forum in which to present results of brain imaging in support of claim alleging trial counsel's ineffectiveness for failing to present expert mitigation evidence, and thus such testing was not reasonably necessary for his representation, warranting denial of petitioner's request for funding to obtain imaging, in proceedings under Antiterrorism and Effective Death Penalty Act (AEDPA) challenging petitioner's convictions of capital murder; petitioner himself recognized that he was unable to present any evidence discovered through imaging in federal court, and petitioner did not identify Indiana procedure that would allow him to expand record in state court. U.S. Const. Amend. 6; 18 U.S.C.A. § 3599(f); 28 U.S.C.A. § 2254(e)(2).

16. Costs, Fees, and Sanctions ⇌1085

Application of the "reasonably necessary" standard, for a grant of funding in capital proceedings to pay for investigative, expert, or other services, requires courts to consider the potential merit of the claims that the applicant for funding wants to pursue, the likelihood that the services will generate useful and admissible evidence, and the prospect that the applicant will be able to clear any procedural hurdles standing in the way. 18 U.S.C.A. § 3599(f).

17. Costs, Fees, and Sanctions ⇌1085

If "reasonably necessary" standard, for a grant of funding to pay for investigative, expert, or other services, is met in capital proceedings, the district court has

broad discretion to decide whether to authorize funding. 18 U.S.C.A. § 3599(f).

18. Habeas Corpus ⇌883.1

In federal habeas proceedings, funding is not "reasonably necessary," as requirement for authorization of a grant of funding to pay for investigative, expert, or other services in capital proceedings, if a petitioner has no forum to introduce the uncovered evidence. 18 U.S.C.A. § 3599(f).

See publication Words and Phrases for other judicial constructions and definitions.

19. Habeas Corpus ⇌883.1

Consistent with Antiterrorism and Effective Death Penalty Act (AEDPA), federal courts evaluating a request for a grant of funding to pay for investigative, expert, or other services must determine at the outset whether new evidence sought could be lawfully considered. 18 U.S.C.A. § 3599(f); 28 U.S.C.A. § 2254.

20. Habeas Corpus ⇌765.1

Evaluating a claim for federal habeas relief on behalf of a person in state custody requires courts to focus on the particular reasons—both legal and factual—why state courts rejected a state prisoner's federal claims, and then to afford appropriate deference to that decision. 28 U.S.C.A. § 2254(d).

21. Habeas Corpus ⇌765.1

If the state court explains its decision on the merits in a reasoned opinion, the deference owed to such decision when evaluating a claim for federal habeas relief is substantial—habeas courts defer so long as the specific reasons given by the state court are reasonable. 28 U.S.C.A. § 2254(d).

22. Habeas Corpus ⇨452

If federal law clearly or inevitably applies to a set of facts, habeas courts must apply it. 28 U.S.C.A. § 2254(d)(1).

23. Habeas Corpus ⇨450.1

Whether a state court's application of clearly established law is unreasonable, as ground for grant of federal habeas relief, depends upon the nature of the rule itself—the more general the rule, the more leeway courts have in reaching outcomes in case-by-case determinations. 28 U.S.C.A. § 2254(d)(1).

24. Habeas Corpus ⇨450.1

Ultimately, for a writ of habeas corpus to issue based on a state court's unreasonable application of federal law, the state court's ruling must be so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement. 28 U.S.C.A. § 2254(d)(1).

25. Habeas Corpus ⇨205

The Antiterrorism and Effective Death Penalty Act (AEDPA) aims to reduce delays in the execution of state and federal criminal sentences, particularly in capital cases, and to advance the principles of comity, finality, and federalism. 28 U.S.C.A. § 2254.

26. Habeas Corpus ⇨450.1

When federal habeas courts evaluate challenges to state court determinations, whether grounded in law or fact, they do not decide if the state court's determination was incorrect, but whether that determination was unreasonable—a substantially higher threshold. 28 U.S.C.A. § 2254(d).

27. Jury ⇨33(2.15)

The seating of even one juror who will automatically vote for the death penalty violates a defendant's right to an impartial jury. U.S. Const. Amend. 6.

28. Jury ⇨33(2.10)

Requiring a defendant to use peremptory strikes to achieve an impartial jury does not, on its own, violate the Constitution, and so long as the jury that sits is impartial, the fact that the defendant had to use a peremptory challenge to achieve that result does not mean the Sixth Amendment was violated. U.S. Const. Amend. 6.

29. Habeas Corpus ⇨496

State supreme court reasonably applied federal law, as bar to habeas relief under Antiterrorism and Effective Death Penalty Act (AEDPA), in rejecting defendant's claim that trial court's denial of his for-cause objections to allegedly biased jurors violated his right to impartial jury, in prosecution for capital murder; although defendant reproduced handful of statements made by jurors who ultimately served, defendant did not articulate, let alone develop specific objections in support of his claim that objectionable or biased juror served on his jury. U.S. Const. Amend. 6; 28 U.S.C.A. § 2254(d)(1).

30. Habeas Corpus ⇨499

State court reasonably applied federal law regarding constitutional right to impartial jury, as bar to habeas relief under Antiterrorism and Effective Death Penalty Act (AEDPA), in concluding that state rebutted presumption of prejudice arising from jury's receipt of thank you note in box of cookies, in prosecution for capital murder; state supreme court grounded its conclusion on trial court's swift corrective actions, which included investigation of note's effect, individual questioning of each juror, finding that over half of jurors did not read note, determination that jurors credibly stated that note did not affect ability to impartially serve, and admonishment to jury that it must base its verdict

only on presented evidence. U.S. Const. Amend. 6; 28 U.S.C.A. § 2254(d)(1).

31. Criminal Law ⇌857(1)

As part of the Constitution's impartial jury requirement, jurors must reach their verdict relying solely upon evidence and argument in open court, and not upon any outside influence. U.S. Const. Amend. 6.

32. Criminal Law ⇌1163(6)

In a criminal case, any private communication with a juror during a trial about the matter pending before the jury is deemed presumptively prejudicial.

33. Criminal Law ⇌1163(6)

In criminal cases, the State can rebut the presumption of prejudice arising from private communications with jurors with a showing, after notice to and hearing of the defendant, that the juror contact was harmless.

34. Criminal Law ⇌1158.33

In resolving questions of jury impartiality, appellate courts rely upon a trial court's superior capacity to evaluate the credibility of jurors and afford great deference to that court's determinations.

35. Habeas Corpus ⇌499

State supreme court's interpretation of note that jurors received with box of cookies as "merely offer[ing] encouragement and gratitude for the jury's no doubt difficult job ahead," rather than as note thanking jurors for "service for the family of [victims]," did not render its affirmance of decision denying defendant's request for mistrial unreasonable in light of evidence presented, as bar to federal habeas relief under Antiterrorism and Effective Death Penalty Act (AEDPA) on defendant's claim that denial of mistrial violated defendant's right to impartial jury in prosecution for capital murder; jurors recalled that note just thanked them for service, and decision to affirm did not depend on note's interpretation, but instead was

based on trial court's investigation of note's impact. U.S. Const. Amend. 6; 28 U.S.C.A. § 2254(d)(2).

36. Habeas Corpus ⇌490(3)

State supreme court acted reasonably, as bar to habeas relief under Antiterrorism and Effective Death Penalty Act (AEDPA), in concluding that post-arrest statement defendant gave to police while hospitalized was voluntary, as supported conclusion that statement's admission at trial did not violate defendant's rights to due process or against self-incrimination, in prosecution for capital murder; defendant had only mild brain contusion, physicians testified at suppression hearing that defendant was alert, oriented, and capable of understanding and participating in conversation with police, defendant had ingested only anti-nausea medication, defendant was selectively responsive to police questions, interview lasted less than 20 minutes, and interview ceased when defendant asked for attorney. U.S. Const. Amends. 5, 14; 28 U.S.C.A. § 2254(d)(1, 2).

37. Constitutional Law ⇌4663

Both the Due Process Clause of the Fourteenth Amendment and the Fifth Amendment's protection against self-incrimination forbid the admission of an involuntary confession into evidence in a criminal case. U.S. Const. Amends. 5, 14.

38. Constitutional Law ⇌4664(1)

Criminal Law ⇌410.77

Whether a statement is voluntary, as required for the statement's admission into evidence in a criminal case to comport with the Due Process Clause of the Fourteenth Amendment and the Fifth Amendment's protection against self-incrimination, depends upon the totality of all the surrounding circumstances—both the characteristics of the accused and the details of the interrogation. U.S. Const. Amends. 5, 14.

39. Constitutional Law ⇔4664(1)

Criminal Law ⇔411.49

A statement that is coerced by means of, e.g., violence, threats, or prolonged interrogation tactics is not voluntary under the Due Process Clause of the Fourteenth Amendment and the Fifth Amendment's protection against self-incrimination. U.S. Const. Amends. 5, 14.

40. Constitutional Law ⇔4664(1)

Criminal Law ⇔410.77

At bottom, in assessing whether an involuntary confession was admitted into evidence in violation of the defendant's rights under the Due Process Clause of the Fourteenth Amendment and the Fifth Amendment's protection against self-incrimination, courts aim to determine whether the defendant's will was in fact overborne by police in their interrogation. U.S. Const. Amends. 5, 14.

41. Habeas Corpus ⇔450.1

If reasonable minds could differ, regardless of the "better" explanation, federal habeas courts cannot supersede a state court's factual determination. 28 U.S.C.A. § 2254(d)(2).

42. Constitutional Law ⇔4663

Criminal Law ⇔410.77

In assessing whether an involuntary confession was admitted into evidence in violation of the defendant's rights under the Due Process Clause of the Fourteenth Amendment and the Fifth Amendment, voluntariness is a general standard that demands a substantial element of judgment. U.S. Const. Amends. 5, 14.

43. Habeas Corpus ⇔508

State court's application of *Skipper* rule, regarding Eighth-Amendment and due-process requirements that capital defendants have opportunity to deny or explain evidence of future dangerousness, was reasonable, as bar to federal habeas relief, when it affirmed trial court's decision that former prison warden was un-

qualified to provide expert testimony, under Indiana evidentiary rules, regarding defendant's future dangerousness, in prosecution for capital murder; after applying *Skipper* to conclude that "error would ensue" if trial court prevented defendant from "introducing otherwise admissible evidence" on dangerousness, state supreme court observed that "[f]or all [warden's] knowledge and expertise in classifying inmates, [he] [was] not an expert in predicting future behavior." U.S. Const. Amends. 8, 14; 28 U.S.C.A. § 2254(d)(2); Ind. R. Evid. 702.

44. Sentencing and Punishment ⇔1757

Generally, the Eighth Amendment requires that the sentencer in capital cases be permitted to consider any relevant mitigating factor; this includes evidence that the defendant would not pose a danger if spared (but incarcerated). U.S. Const. Amend. 8.

45. Constitutional Law ⇔4744(2)

Sentencing and Punishment ⇔1720

When a prosecutor introduces evidence of a defendant's future dangerousness in pursuing the death penalty, it is not just the Eighth Amendment, but due process, that demands a defendant have the opportunity to deny or explain. U.S. Const. Amends. 8, 14.

46. Habeas Corpus ⇔453

Federal courts cannot grant habeas relief based on determinations of state law. 28 U.S.C.A. § 2254.

47. Criminal Law ⇔1881

To prevail on an ineffective assistance of trial counsel claim, a defendant must show that counsel (1) provided a deficient performance, that (2) caused him prejudice. U.S. Const. Amend. 6.

48. Criminal Law ⇌1882

Counsel's performance is deficient, as element of ineffective assistance, when it falls below an objective standard of reasonableness under prevailing professional norms. U.S. Const. Amend. 6.

49. Criminal Law ⇌1959

In the death penalty context, deficient performance causes prejudice, as element of ineffective assistance of counsel, where there exists a reasonable probability that but for the deficiency, at least one juror would have imposed a sentence other than death. U.S. Const. Amend. 6.

50. Criminal Law ⇌1961

In undertaking analysis of the prejudice element of ineffective assistance of counsel in a death-penalty case to determine whether at least one juror would have imposed a sentence other than death, courts consider the totality of the evidence, weighing all available mitigating evidence against aggravating evidence. U.S. Const. Amend. 6.

51. Habeas Corpus ⇌486(1)

Because the *Strickland* standard for claims of ineffective assistance of counsel is a general one, the range of reasonableness that entitles a state court determination to deference in federal habeas proceedings is substantial, and habeas courts ask only whether there is any reasonable argument that counsel satisfied *Strickland's* deferential standard. U.S. Const. Amend. 6; 28 U.S.C.A. § 2254(d).

52. Criminal Law ⇌1891

The Constitution imposes a duty on counsel to make reasonable investigations. U.S. Const. Amend. 6.

53. Criminal Law ⇌1891

The scope of counsel's Sixth-Amendment duty to make reasonable investigations encompasses not only the quantum of evidence already known to counsel, but also circumstances where the known evi-

dence would lead a reasonable attorney to investigate further. U.S. Const. Amend. 6.

54. Criminal Law ⇌1891

In order to comply with the Sixth-Amendment duty to make reasonable investigations, counsel must learn the law that is fundamental to their case, undertake at least some investigation into known and potentially powerful mitigating evidence, and pursue readily-available information that the prosecution will probably rely on; beyond that, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments. U.S. Const. Amend. 6.

55. Habeas Corpus ⇌486(5)

State court reasonably applied federal law, as bar to habeas relief under Antiterrorism and Effective Death Penalty Act (AEDPA), when it determined that trial counsel's failure to obtain defendant's records from facility where he had spend six months in juvenile detention did not amount to deficient performance, as element of ineffective assistance of counsel, in prosecution for capital murder; as far as counsel knew, Department of Corrections had destroyed defendant's records under ten-year records retention policy for facility, there was no indication that counsel learned they could access records another way or knew they should have followed up with archives, and Department's communication regarding status of records would not have led reasonable attorney to investigate further. U.S. Const. Amend. 6; 28 U.S.C.A. § 2254(d)(1).

56. Criminal Law ⇌1891

In order to comply with the Sixth-Amendment duty to make reasonable investigations, counsel does not need to obtain merely cumulative evidence that

would make little difference in the outcome of a proceeding. U.S. Const. Amend. 6.

57. Habeas Corpus ⇌486(5)

Even if trial counsel provided inadequate assistance in failing to obtain defendant's records from facility where he had spend six months in juvenile detention, state court reasonably applied federal law, as bar to habeas relief under Antiterrorism and Effective Death Penalty Act (AEDPA), in concluding that defendant was not prejudiced, as element of ineffective assistance, by counsel's failure to obtain records, in prosecution for capital murder; defendant's history of mental conditions, which records would have corroborated, came into evidence via testimony from multiple expert witnesses, including correctional counselor at facility, and counsel pointed to other admitted records "rife with suicide attempts, depression, medication," and inadequate treatment during defendant's childhood. U.S. Const. Amend. 6; 28 U.S.C.A. § 2254(d)(1).

58. Habeas Corpus ⇌486(5)

State supreme court reasonably applied federal law, as bar to habeas relief under Antiterrorism and Effective Death Penalty Act (AEDPA), when it determined that defendant was not prejudiced, as element of ineffective assistance, by trial counsel's allegedly deficient misunderstanding as to availability of neuropsychologist to provide expert testimony regarding defendant's bipolar disorder, in prosecution for capital murder; upon coming to conclusion that neuropsychologist was unavailable, counsel engaged psychologist to provide expert testimony, psychologist testified at trial that defendant had been diagnosed with bipolar disorder, just as neuropsychologist would have, and psychologist based testimony not only on his own observations and tests, but on review of neuropsychologist's report. U.S. Const. Amend. 6; 28 U.S.C.A. § 2254(d)(1).

59. Habeas Corpus ⇌486(5)

State supreme court made reasonable factual determination, as bar to federal habeas relief, when it concluded that neuropsychologist's postconviction testimony, that defendant likely experienced traumatic brain injuries exacerbating his mental conditions, was speculative, as supported conclusion that defendant was not prejudiced, as element of ineffective assistance, by trial counsel's allegedly deficient failure to develop and present evidence of brain injuries at penalty phase, in prosecution for capital murder; neuropsychologist based his opinion on review of defendants records, which corroborated only some injuries, defendant had never been tested for brain injury, and neuropsychologist acknowledged that just because someone hit his head, even multiple times, does not necessarily mean he had concussion or in turn that concussion caused permanent brain injury. U.S. Const. Amend. 6; 28 U.S.C.A. § 2254(d)(2).

60. Habeas Corpus ⇌486(5)

State court reasonably applied federal law, as bar to habeas relief, in determining that defendant was not prejudiced, as element of ineffective assistance, by trial counsel's failure to object to testimony by state's arson experts, that defendant intentionally set house fire that killed victims, at penalty phase of capital murder trial; court concluded that experts' testimony was not nearly as persuasive as defendant's own actions, which included telling coworker that if girlfriend was having affair he would "kill her, burn everything, and kill his self," canceling engagement-ring payments, quitting job, and withdrawing all his money shortly before fire, tying five-year-old victim up with rag in his mouth on night of fire, attempting to evade police, and imploring officers to shoot him. U.S. Const. Amend. 6; 28 U.S.C.A. § 2254(d)(1).

61. Habeas Corpus ⇔486(5)

State supreme court reasonably applied federal law, as bar to federal habeas relief, in declining to consider alleged prejudicial effect of trial counsel's performance at penalty phase of proceedings when it evaluated defendant's claim that counsel's failure to object to testimony by state's arson experts that defendant intentionally set house fire that killed victims amounted to ineffective assistance, in prosecution for capital murder; challenged testimony from experts presented during guilt phase did not impart any new prejudicial information at penalty phase, and jury was clearly satisfied that defendant intentionally set fire and imposed death sentence based on that understanding. U.S. Const. Amend. 6; 28 U.S.C.A. § 2254(d)(1).

62. Habeas Corpus ⇔486(5)

State court reasonably applied federal law, as bar to habeas relief, in concluding that defendant was not prejudiced, as element of ineffective assistance, by trial counsel's allegedly deficient failures to point trial court to correct evidentiary rule under which former prison warden would have qualified as expert and to make adequate offer of proof as to warden's dangerousness opinion, in prosecution for capital murder; state supreme court concluded that admissibility of warden's testimony was speculative under any of state's evidentiary rules, and reasoned that warden's testimony would have opened door to defendant's voluminous prison disciplinary records, which included reports depicting, among other incidents, threat to kill medical worker, threats to officers, and threats to inmates. U.S. Const. Amend. 6; 28 U.S.C.A. § 2254(d)(1).

63. Criminal Law ⇔1961

When evaluating the prejudice element of ineffective assistance in a death penalty case to determine whether at least one juror would have imposed a sentence other than death, courts analyzing a claim

founded on counsel's failure to introduce evidence in mitigation must consider not just the mitigation evidence, but any and all evidence that would have come in with it. U.S. Const. Amend. 6.

Appeal from the United States District Court for the Southern District of Indiana, New Albany Division. No. 4:19-cv-00036-SEB-KMB — **Sarah Evans Barker, Judge.**

Joseph J. Perkovich, Attorney, Phillips Black, Inc., New York, NY, David P. Voisin, Attorney, David P. Voisin PLLC, Hammond, LA, Joseph C. Welling, Attorney, Phillips Black, Inc., St. Louis, MO, for Petitioner-Appellant.

Tyler Banks, Kelly A. Loy, Attorneys, Office of the Attorney General, Indianapolis, IN, for Respondent-Appellee.

Before Easterbrook, St. Eve, and Pryor, Circuit Judges.

St. Eve, Circuit Judge.

An Indiana jury convicted Jeffrey Weisheit of murdering a five-year-old boy and eight-year-old girl left in his care. As recommended by the jury, his sentencing judge imposed the death penalty.

On direct appeal, the Indiana Supreme Court affirmed. After unsuccessfully pursuing postconviction relief in Indiana state court, Weisheit filed a habeas petition in federal court. He also sought stays of the federal proceeding—one to return to state court to present certain claims and another to restore competency—and moved for additional funding in support of his defense.

The district court denied his petition and related motions. It found most of his claims procedurally defaulted and the remaining claims without merit.

We agree that Weisheit has procedurally defaulted most of his claims, and we conclude that the district court did not abuse

its discretion in denying Weisheit's motions for stays and additional funding. As for decisions reached by the Indiana Supreme Court on the merits, the court neither unreasonably applied clearly established federal law nor made unreasonable determinations of facts. We thus affirm the district court's denial of Weisheit's petition and related motions.

I. Background

The details of Weisheit's brutal crime do not bear on the issues before us. We therefore recount them briefly, before chronicling the procedural history of this case.

A. Factual History

Jeffrey Weisheit and Lisa Lynch lived together with Lynch's two children—Alyssa and Caleb—in Evansville, Indiana. In early 2010, Lynch discovered she was pregnant with Weisheit's daughter. Suspicious that Lynch was having an affair, Weisheit told a coworker that if his suspicions proved true, "he would kill her, burn everything, and kill his self."

In late March, Weisheit stopped payment on an engagement ring he had purchased for Lynch, telling the jeweler that he and Lynch broke up and he was leaving the country. Around the same time, Weisheit quit his job and withdrew all the money in his bank account.

Approximately two weeks passed. On April 9, 2010, while caring for Lynch's children, Weisheit became enraged at Caleb. Weisheit duct taped Caleb's hands behind his back and pushed a rag into his mouth. He then packed up clothes and some of Lynch's jewelry and drove off toward Cincinnati.

Officers responded to flames engulfing the couple's home early the next morning. After extinguishing the fire, firefighters discovered the bodies of Caleb and Alyssa inside. Caleb had road flares under and around his body.

In the meantime, no one could reach Weisheit. Officers eventually tracked his location to a county in Kentucky more than 200 miles away. A high speed chase ensued before local law enforcement forced Weisheit from his vehicle. When Weisheit exited, he threw a knife over an officer's head and shouted for the officers to kill him. Two officers used tasers to stun Weisheit, who fell backward and hit his head.

From there, officers took Weisheit to a local hospital where doctors administered a sedative to treat his nausea and vomiting. Detectives Kerri Lynne Blessinger and Randy Chapman read Weisheit his *Miranda* warnings, which he stated he understood, and questioned him about the events from the night before. Weisheit answered most questions with three words or less, providing no detail about the fire or deaths of the children. When asked how he set the fire or what happened to the children, Weisheit generally responded that he did not know or remember. The interview lasted approximately 20 minutes and ended when Weisheit asked for a lawyer.

B. Procedural History

The State of Indiana charged Weisheit with two counts of murder and one count of felony arson resulting in serious bodily injury. *See Weisheit v. State*, 26 N.E.3d 3, 7 (Ind. 2015) ("*Weisheit I*"). The State sought the death penalty, asserting the multiple murders and the age of the victims as aggravating circumstances. *Id.*

1. The Trial

Weisheit proceeded to trial in June 2013. On the first day, juror 10 brought a box of cookies and a thank you note from his wife into the jury room. The note read:

Thank you for your service for the family of Alyssa [and] Caleb Lynch. I will pray for you all to have strength and wisdom to deal with the days ahead. God bless!

The trial court became aware of the cookies and note two days later and interviewed each juror to ascertain the effects of the note. Most of the jurors had not read it; the ones who had read it or otherwise learned of it generally recalled that it thanked them for serving on the jury. Juror 8 remembered the note included “words to the effect of . . . thank you and please do a fair job for Caleb and Alyssa.” He was “surprised” to see Caleb and Alyssa mentioned, but described the note as “very neutral” and told the court that it did not affect him “at all.” After the court questioned juror 10, who did not himself read the note, he was overheard saying “that’s ridiculous.” Other jurors responded to juror 10’s exclamation with “general chatter” and “nodd[ing] their heads.”

The court ultimately dismissed juror 10 for bringing in the note but denied Weisheit’s motion for a mistrial, reasoning that the note did not affect the other jurors. It admonished the jury to reach its verdict based only on the evidence presented and not to draw any negative inferences from the dismissal of juror 10.

Trial resumed. The State presented multiple witnesses who testified about the source of the fire: David Bretz, Assistant Chief of the German Township Fire Department; Clayton Kinder, Indiana State Fire Marshal; and Kerri Blessinger, a detective from the Vanderburgh County Sheriff’s Office. Assistant Chief Bretz and Fire Marshal Kinder testified that the house fire was intentionally set. Detective Blessinger went a step further, identifying Weisheit as the person who set it. Trial counsel did not object to any of this testimony.

After the State rested, Weisheit testified against the advice of counsel. He discussed, among other things, arguing with and duct taping Caleb, bringing flares into the house, gathering his belonging and

Lynch’s jewelry, driving to Cincinnati, attempting to flee from the police, and urging the police to shoot him.

On cross-examination, he denied setting the fire. When the State pressed him with undisputed facts—e.g., that the night Weisheit left with his belongings, he bound Caleb with duct tape and firefighters found Caleb with flares under his body—Weisheit responded, “[t]hings happen.”

The jury returned a guilty verdict on all charged offenses.

During the penalty phase of the trial, the State incorporated all evidence it presented in the guilt phase. Weisheit presented 17 witnesses in his defense, including family, friends, and neighbors; a former teacher; a counselor from the Indiana Boys School, where he spent six months in juvenile detention; his former therapist; a corrections officer; and two psychological experts. Both experts testified that he suffered from bipolar disorder. The State presented two expert witnesses in rebuttal.

Weisheit also intended to call James Aiken, a retired Indiana Department of Correction Commissioner, to provide expert testimony regarding the likelihood that Weisheit could be adequately managed and secured if he received a sentence of life in prison rather than the death penalty. The court excluded Aiken’s testimony as not grounded in scientific knowledge under Indiana Rule of Evidence 702.

The jury ultimately recommended a sentence of death, determining that the State proved aggravating circumstances beyond a reasonable doubt, and that those circumstances outweighed any mitigating factors. The trial court agreed and imposed the death penalty.

2. Direct Appeal and State Postconviction Proceedings

Weisheit appealed, raising numerous challenges: (1) the trial court erred by (a)

excluding Aiken’s testimony, (b) not dismissing several jurors for cause, and (c) admitting Weisheit’s statement to police while he was in the hospital; (2) insufficient evidence supported his convictions; (3) the cookie note sent to the jury room violated his Sixth Amendment right to an unbiased jury; (4) the jury did not meaningfully consider mitigating circumstances; and (5) the death sentence was an inappropriate penalty. The Indiana Supreme Court unanimously affirmed Weisheit’s convictions. *Weisheit I*, 26 N.E.3d at 21. The United States Supreme Court denied Weisheit’s petition for a writ of certiorari. *Weisheit v. Indiana*, 577 U.S. 1106, 136 S.Ct. 901, 193 L.Ed.2d 796 (2016).

Weisheit then pursued postconviction relief in state court, counseled by the Public Defender of Indiana. He argued that his trial and direct appellate counsel provided ineffective assistance. Following an evidentiary hearing, the trial court denied his petition. The Indiana Supreme Court affirmed in a fractured opinion: one justice concurred in part and in the judgment, concluding that trial counsel performed deficiently at the penalty phase but finding no prejudice, *Weisheit v. State*, 109 N.E.3d 978, 994 (Ind. 2018) (“*Weisheit II*”) (Slaughter, J., concurring in part and in judgment); and the Chief Justice concurred in part and dissented in part, con-

1. The State urges us not to consider whether Weisheit procedurally defaulted his claims because the certificate of appealability did not identify whether those claims presented “a substantial showing of the denial of a constitutional right.” 28 U.S.C. § 2253(c)(2); see also § 2253(c)(3). Even assuming the certificate was defective with respect to the question of procedural default, we exercise our discretion to consider it. *Gonzalez v. Thaler*, 565 U.S. 134, 137, 143, 132 S.Ct. 641, 181 L.Ed.2d 619 (2012) (holding that § 2253(c)(2) and (c)(3) are not jurisdictional); *Schmidt v. Foster*, 911 F.3d 469, 486 (7th Cir. 2018) (en banc) (“A defect in a certificate concerning one claim does not deprive us of jurisdiction

cluding that counsel’s performance was both deficient and caused Weisheit prejudice, *id.* at 996 (Rush, C.J., concurring in part and dissenting in part).

3. Federal Postconviction Proceedings

Unable to secure relief in state court, Weisheit filed a petition for a writ of habeas corpus in federal court under 28 U.S.C. § 2254. He advanced more than 30 claims for relief. The court denied 12 on the merits and determined that Weisheit had procedurally defaulted the rest. Still, acknowledging that reasonable jurists could disagree on the outcome of some of the claims, the court granted Weisheit a certificate of appealability. After two expansions, Weisheit secured a certificate on claims related to ineffective assistance of trial and appellate counsel; the cookie note sent to the jury; his statement to police while in the hospital; the exclusion of Aiken’s testimony; and the question of procedural default.¹

Weisheit also filed three related motions: two to stay the federal court proceedings (to exhaust certain claims in state court and to restore his competency), and one for transport and funding pursuant to 18 U.S.C. § 3599(f). The court denied each motion.

Weisheit appeals.

over that claim.” (citation modified)). The certificate properly issued on at least some claims and the parties have comprehensively briefed procedural default. Given the procedural complexities of this case, the high stakes of punishment, and consideration for judicial resources, we will decide whether Weisheit has procedurally defaulted these claims. See *Davis v. Borgen*, 349 F.3d 1027, 1028 (7th Cir. 2003) (“[T]he rules governing certificates of appealability are principally designed to save time for the litigants and judges, which implies that once briefs have been filed there is little point in revisiting the question whether a certificate should have been issued.”).

II. Discussion

All told, this appeal raises 11 issues for our consideration. We proceed in two steps. First, we review the district court’s resolution of Weisheit’s motions for stays and for additional funding. Second, we look at the decisions of the Indiana Supreme Court on the merits, evaluating whether the court unreasonably applied clearly established federal law or made unreasonable determinations of fact entitling Weisheit to habeas relief.

A. The District Court’s Decisions

We begin with the district court’s denial of Weisheit’s motions for stays and additional funding. The court rested its decisions in part on the doctrines of procedural default and exhaustion. We evaluate these questions of law de novo, *Booker v. Baker*, 74 F.4th 889, 892 (7th Cir. 2023), but otherwise review the court’s resolution of Weisheit’s motions for an abuse of discretion, *Ryan v. Gonzales*, 568 U.S. 57, 74, 133 S.Ct. 696, 184 L.Ed.2d 528 (2013) (stays); *Ayestas v. Davis*, 584 U.S. 28, 46, 138 S.Ct. 1080, 200 L.Ed.2d 376 (2018) (§ 3599(f) funding decisions).

1. Rhines Stay

[1] The Antiterrorism and Effective Death Penalty Act of 1996 (“AEDPA”) restricts federal courts’ review of state prisoner habeas petitions. 28 U.S.C. § 2254. One such restriction generally precludes federal courts from issuing a writ unless the petitioner has exhausted available state court remedies. § 2254(b)(1)(A).

2. The district court characterized as procedurally defaulted some claims that Weisheit did properly present in state court. But its characterization does not change our conclusion. Res judicata bars Weisheit from reasserting these claims in state court, *Matheney*

A petitioner exhausts state court remedies when he “fairly present[s] his claim in each appropriate state court.” *Baldwin v. Reese*, 541 U.S. 27, 29, 124 S.Ct. 1347, 158 L.Ed.2d 64 (2004) (citation modified); see also *O’Sullivan v. Boerckel*, 526 U.S. 838, 845, 119 S.Ct. 1728, 144 L.Ed.2d 1 (1999).

All agree that Weisheit has not properly presented many of his claims in state court. When a petitioner does not properly present his claims, the Supreme Court has recognized that in certain limited circumstances a federal court “is not required to automatically deny” them. *Shinn v. Ramirez*, 596 U.S. 366, 379, 142 S.Ct. 1718, 212 L.Ed.2d 713 (2022).

[2] First, if state court remedies remain available, the petitioner may have the opportunity to return to state court to present his claims. *Id.*; see also *Rhines v. Weber*, 544 U.S. 269, 277–78, 125 S.Ct. 1528, 161 L.Ed.2d 440 (2005) (permitting federal courts to stay habeas proceedings to allow petitioners to present their claims to state courts in the first instance, provided the petitioner meets certain requirements). We consider these claims “unexhausted.” *Shinn*, 596 U.S. at 379, 142 S.Ct. 1718.

[3] Second, if a petitioner has not properly presented his claims and no state court remedies remain available, those claims are procedurally defaulted. *Id.*; see also *Boerckel*, 526 U.S. at 847–48, 119 S.Ct. 1728. In such a circumstance, we may forgive the petitioner’s default in federal court only upon a showing of cause and prejudice or a miscarriage of justice. *Shinn*, 596 U.S. at 379, 142 S.Ct. 1718; *Coleman v. Thompson*, 501 U.S. 722, 750, 111 S.Ct. 2546, 115 L.Ed.2d 640 (1991).²

v. State, 834 N.E.2d 658, 662 (Ind. 2005), and he has not argued that the state court unreasonably applied clearly established federal law or made unreasonable determinations of fact entitling him to habeas relief.

Weisheit initially planned to pursue the second course of action. He would establish “cause” for his failure to present his ineffective assistance of trial counsel claims with a showing of ineffective assistance of state postconviction counsel. *See Martinez v. Ryan*, 566 U.S. 1, 9, 132 S.Ct. 1309, 182 L.Ed.2d 272 (2012) (recognizing a “narrow exception” to the general rule that “an attorney’s ignorance or inadvertence in a postconviction proceeding does not qualify as cause to excuse a procedural default” when the underlying claim alleges ineffective assistance of trial counsel); *see also Trevino v. Thaler*, 569 U.S. 413, 417, 133 S.Ct. 1911, 185 L.Ed.2d 1044 (2013). To make this showing, Weisheit conceded that he would need to expand the record in federal court.

After he filed his habeas petition, however, the Supreme Court clarified that a petitioner cannot expand the record in federal court—even to make out a claim of ineffective assistance of counsel—unless he meets the narrow exceptions set forth in § 2254(e)(2).³ *Shinn*, 596 U.S. at 382, 142 S.Ct. 1718. Weisheit conceded that he could not satisfy these stringent requirements.

He thus changed course.

With no way to develop his unrepresented claims in federal court, Weisheit sought a *Rhines* stay to present his claims to the Indiana state court in the first instance. *Rhines* empowers federal courts to issue a stay if the petitioner had good cause for his failure to exhaust, his unexhausted claims are potentially meritorious, and he did not engage in intentionally dilatory litigation tactics. 544 U.S. at 277–78, 125 S.Ct. 1528.

3. Section 2254(e)(2) precludes a petitioner from developing the factual basis for a claim in federal court unless the claim relies on (1) a new rule of constitutional law, or (2) a factual predicate undiscoverable by due diligence. 28 U.S.C. § 2254(e)(2)(A); *see also*

[4, 5] But *Rhines* applies only to unexhausted claims. *Id.*; *see also Day v. McDonough*, 547 U.S. 198, 210 n.10, 126 S.Ct. 1675, 164 L.Ed.2d 376 (2006) (explaining that *Rhines* permits “a habeas petitioner to present his unexhausted claims to the state court in the first instance”). As we have said, an unexhausted claim is one that has not been—but could be—pursued in state court. *Compare Doerr v. Shinn*, 127 F.4th 1162, 1175 (9th Cir. 2025) (affirming the grant of a *Rhines* stay where Arizona procedural rules did not clearly bar successive postconviction petitions in comparable circumstances), *with Haynes v. Quarterman*, 526 F.3d 189, 197 (5th Cir. 2008) (affirming the denial of a *Rhines* stay where the petitioner offered “no meritorious argument that the Texas [state court] would allow him to file a successive application for post-conviction relief”), *and Sanders v. Jordan*, No. 16-6152, 2023 WL 11978492, at *2, *4 (6th Cir. Feb. 8, 2023) (denying a *Rhines* stay where the petitioner had “no unexhausted claims” because a Kentucky law barring presentation of “issues that could reasonably have been presented” in an earlier postconviction proceeding precluded his claims). Weisheit must therefore establish an “available” state court procedure through which to pursue his claims. *Boerckel*, 526 U.S. at 848, 119 S.Ct. 1728.

Generously reading Weisheit’s appellate briefing, he offers two avenues for relief in Indiana: a successive postconviction petition under Indiana Rules of Post-Conviction Remedies 1(12) or a petition based on “new evidence” under Indiana Code § 35-50-2-9(k). He identifies no “new evidence”

Shinn, 596 U.S. at 382, 142 S.Ct. 1718. In either case, the new evidence must establish the petitioner’s innocence “by clear and convincing evidence.” § 2254(e)(2)(B); *Shinn*, 596 U.S. at 381, 142 S.Ct. 1718.

under subsection k, however, foreclosing that avenue of relief.

[6, 7] As for Weisheit's successive petition advocacy, Postconviction Rule 1(12) requires defendants in capital cases to seek permission from the Indiana Supreme Court before they may file a successive petition. *Isom v. State*, 235 N.E.3d 150, 151 (Ind. 2024). In Indiana, only certain issues are available to a successive petitioner. See *Matheney*, 834 N.E.2d at 662; see also *Timberlake v. State*, 753 N.E.2d 591, 597 (Ind. 2001) ("Postconviction procedures do not afford a petitioner with a super-appeal."). A petitioner may not present "[c]laims that could have been, but were not, raised in earlier proceedings," *Matheney*, 834 N.E.2d at 662, absent a "sufficient reason," Ind. P-C.R. 1(8). Nor may a petitioner present an issue raised but adversely decided. *Matheney*, 834 N.E.2d at 662. Assuming a petitioner's claim is not barred in one of these ways, the Indiana court will still only grant permission to file a successive petition if the petitioner shows "a 'reasonable possibility' that he is entitled to relief." *Isom*, 235 N.E.3d at 151 (quoting Ind. P-C.R. 1(12)(b)).

The claims that Weisheit seeks to "exhaust" in state court fall into two categories: those that allege ineffective assistance of trial counsel and those that do not.

[8] Weisheit has not argued that his non-ineffective assistance of trial counsel claims—claims premised on failures of the trial court and his competency, among others—were unknown to him in earlier proceedings. Nor does he attempt to justify his failure to raise these claims with any coherent argument. Weisheit therefore cannot bring these claims through a successive petition. See, e.g., *Timberlake*, 753 N.E.2d at 598 ("[T]he issue of . . . competency at trial was known and available on direct appeal and is therefore not available as a free-standing claim in post-conviction relief."); *Matheney*, 834 N.E.2d at 664

(holding that the petitioner's claim alleging trial court errors was procedurally defaulted where he made "no showing that the particular errors . . . were unknown in earlier review proceedings").

[9, 10] The same is true with respect to Weisheit's ineffective assistance of counsel claims. He attempts to excuse his failure to properly assert these claims by alleging ineffective assistance of his state postconviction counsel. But Indiana law judges the performance of postconviction counsel against an exceedingly low benchmark. Counsel need only "in fact appear[] and represent[] the petitioner in a procedurally fair setting which resulted in a judgment of the court." *Graves v. State*, 823 N.E.2d 1193, 1196 (Ind. 2005) (quoting *Baum v. State*, 533 N.E.2d 1200, 1201 (Ind. 1989)).

Weisheit does not argue that his postconviction counsel fell below this standard. Instead, he urges us to deem his claims unexhausted in light of a trio of relevant Supreme Court decisions: *Martinez*, *Trevino*, and *Shinn*. In *Martinez* and *Trevino*, the Court permitted habeas petitioners to rely on ineffective postconviction counsel to show cause for defaulted ineffective assistance of trial counsel claims. *Martinez*, 566 U.S. at 9, 132 S.Ct. 1309; *Trevino*, 569 U.S. at 417, 133 S.Ct. 1911. In *Shinn*, the Court clarified that even where petitioners invoke *Martinez* and *Trevino*, they cannot expand the record in federal court without meeting the § 2254(e) requirements. *Shinn*, 596 U.S. at 382, 142 S.Ct. 1718.

Weisheit's argument comes too late. After the district court issued its opinion denying relief, but before Weisheit filed his reply brief on appeal, the Indiana Supreme Court expressly considered its state court procedures in light of federal habeas jurisprudence: "While the rule from *Martinez* and *Trevino* preserves certain otherwise waived claims for federal habeas re-

view when state post-conviction counsel were ineffective, it does not preserve claims in state proceedings.” *Isom*, 235 N.E.3d at 155.

The Indiana Supreme Court recently reaffirmed its low standard for postconviction counsel. *See Ritchie v. State*, 254 N.E.3d 1064, 1065 (Ind. 2025) (declining the petitioner’s invitation, given “developments in the law,” to reconsider Indiana’s standard for postconviction counsel), *cert. denied*, No. 24-7157, — U.S. —, 145 S.Ct. 2729, 221 L.Ed.2d 982 (U.S. May 19, 2025). Although the *Ritchie* majority denied the petitioner’s request to file a successive petition without reasoning, the concurrence observed the petitioner could not overcome his unrepresented ineffective assistance claim “under [Indiana’s] prevailing standard” for assessing state postconviction counsel. *Id.* at 1066–67 (Slaughter, J., concurring). “All seem to agree,” Justice Slaughter recognized, the petitioner “loses . . . because his post-conviction counsel appeared and represented him during his first post-conviction proceeding.” *Id.* at 1067.

So too here. Respecting comity in our dual system of government, “it would be unseemly . . . for a federal district court to upset a state court conviction without giving an opportunity to the state courts to

correct a constitutional violation, and to do so consistent with their own procedures.” *Shinn*, 596 U.S. at 379, 142 S.Ct. 1718 (citation modified). Weisheit has established no avenue for Indiana to correct his alleged violations consistent with its own procedures.⁴ *Cf. Boerckel*, 526 U.S. at 847–48, 119 S.Ct. 1728 (explaining that the exhaustion doctrine does not “require[] federal courts to ignore a state law or rule providing that a given procedure is not available”). We thus affirm the district court’s denial of a *Rhines* stay because Weisheit has no unexhausted claims to present in state court.⁵

2. Competency Stay

[11] Weisheit also challenges the district court’s decision to deny his request for a stay on the basis that he was not competent to assist counsel in his habeas proceedings.

[12, 13] Federal habeas petitioners have no constitutional right to competence, and the Supreme Court has yet to recognize a right grounded in statute. *Gonzales*, 568 U.S. at 61, 133 S.Ct. 696 (holding that neither 18 U.S.C. § 3599 nor § 4241 provides such a right). But district courts may exercise their discretion to grant competency-based stays. *Id.* at 73–74, 133 S.Ct. 696. The outer limits of that discretion

4. Weisheit also advances an argument that, to the extent Indiana would not hear his unrepresented claims, the state’s postconviction system provides an unfair forum for petitioners to raise collateral claims. None of the law Weisheit cites compels this conclusion. *See, e.g., Murray v. Carrier*, 477 U.S. 478, 488, 106 S.Ct. 2639, 91 L.Ed.2d 397 (1986) (clarifying that “the existence of cause for a procedural default must ordinarily turn on whether the prisoner can show that some objective factor external to the defense impeded counsel’s efforts to comply with the State’s procedural rule”); *Marino v. Ragen*, 332 U.S. 561, 567, 68 S.Ct. 240, 92 L.Ed. 170 (1947) (Rutledge, J., concurring) (describing the Illinois collateral review process).

5. As of oral argument, Weisheit had not sought leave to file a successive petition in the Indiana Supreme Court. Given the admonishment in *Rhines* that a district court should not grant a stay where a petitioner “engages in abusive litigation tactics or intentional delay,” we doubt the propriety of a stay even if Weisheit’s claims were simply unexhausted. *See Rhines*, 544 U.S. at 277–78, 125 S.Ct. 1528 (expressing “particular” concern that “capital petitioners might deliberately engage in dilatory tactics to prolong their incarceration and avoid execution of the sentence of death”).

counsel against a stay when the petitioner's claims were adjudicated by the state courts on the merits, involve pure questions of law, or are procedurally defaulted (and cannot be excused). *Id.* at 74–76, 133 S.Ct. 696; *see also Holmes v. Neal*, 816 F.3d 949, 951 (7th Cir. 2016); *Lay v. Royal*, 860 F.3d 1307, 1314 (10th Cir. 2017).

[14] In these instances, the petitioner's assistance would not “substantially benefit” the development of his claim. *Gonzales*, 568 U.S. at 76, 133 S.Ct. 696. If the state court decided the merits, we must confine our review to the state court record. *Cullen v. Pinholster*, 563 U.S. 170, 181, 131 S.Ct. 1388, 179 L.Ed.2d 557 (2011). If the claim sounded in a question of law or was procedurally defaulted without excuse, its success would not depend on the petitioner's competence because “any evidence that [the] petitioner might have would be inadmissible” or irrelevant to the resolution of his claims. *Gonzales*, 568 U.S. at 75–76, 133 S.Ct. 696.

The district court denied Weisheit's motion for a competency-based stay because his claims were all either resolved on the merits by the state court or not properly exhausted and barred. We agree. Because Weisheit's assistance would provide no “substantial[] benefit” for the reasons discussed in this opinion, the district court did not abuse its discretion in denying Weisheit's motion for a competency-based stay.

3. Section 3599(f) Funding

[15] Weisheit also challenges the district court's denial of his request for funding and transport to obtain new brain imaging under 18 U.S.C. § 3599(f). He hoped to use the imaging, which would allegedly show brain abnormalities that correlate with impaired functioning, to establish trial counsel's ineffectiveness in failing to present expert mitigating evidence.

[16, 17] Section 3599(a) authorizes federal funding for a petitioner “who is facing the prospect of a death sentence and is ‘financially unable to obtain adequate representation or investigative, expert, or other reasonably necessary services.’” *Ayestas*, 584 U.S. at 43, 138 S.Ct. 1080 (quoting § 3599(a)). Subsection (f) specifically permits a district court to authorize funding for “investigative, expert, or other services” upon a determination that such services “are reasonably necessary for the representation of the defendant.” § 3599(f); *see also Ayestas*, 584 U.S. at 43, 138 S.Ct. 1080. “Proper application of the ‘reasonably necessary’ standard . . . requires courts to consider the potential merit of the claims that the applicant wants to pursue, the likelihood that the services will generate useful and admissible evidence, and the prospect that the applicant will be able to clear any procedural hurdles standing in the way.” *Ayestas*, 584 U.S. at 46–47, 138 S.Ct. 1080. If this standard is met, the district court has “broad discretion” to decide whether to authorize funding. *Id.* at 43–46, 138 S.Ct. 1080.

[18, 19] Funding is not reasonably necessary if a petitioner has no forum to introduce the uncovered evidence. *See Shoop v. Twyford*, 596 U.S. 811, 817–21, 142 S.Ct. 2037, 213 L.Ed.2d 318 (2022) (finding an order for transportation for medical testing not “necessary or appropriate” under the All Writs Act because § 2254(e)(2) barred the petitioner from introducing any uncovered evidence in his federal habeas proceeding); *Nelson v. Lumpkin*, 72 F.4th 649, 657 n.2 (5th Cir. 2023) (holding that investigative services were not reasonably necessary under § 3599(f) because the petitioner could not meet the § 2254(e)(2) requirements), *cert. denied*, — U.S. —, 144 S. Ct. 1344, 218 L.Ed.2d 422 (2024). “[C]onsistent with AEDPA,” federal courts must “determine

at the outset whether . . . new evidence sought could be lawfully considered.” *Twyford*, 596 U.S. at 820, 142 S.Ct. 2037.

Weisheit himself recognizes that he cannot present any evidence discovered from additional funding in federal court. And he has not persuaded us that Indiana would allow him to expand the record in state court.⁶ Whatever the results of the testing Weisheit seeks, then, testing is not reasonably necessary because he has no forum in which to present the results. The district court thus did not abuse its discretion in denying funding to develop new evidence.⁷

B. The State Court’s Decisions

We turn now to the claims Weisheit properly presented to the Indiana state courts.

When a state court has adjudicated the merits of a habeas petitioner’s claim, we may grant relief in two limited circumstances: where the state court (1) contradicted or unreasonably applied clearly established federal law, as determined by the United States Supreme Court; or (2) based its decision on an unreasonable determination of facts in light of the evidence presented in the state court proceeding. 28 U.S.C. § 2254(d)(1)–(2); *Wilson v. Sellers*, 584 U.S. 122, 125, 138 S.Ct. 1188, 200 L.Ed.2d 530 (2018). We look here to the decisions of the Indiana Supreme Court, as “the last state court to decide” Weisheit’s federal claims. *Sellers*, 584 U.S. at 125, 138 S.Ct. 1188.

[20, 21] Evaluating a claim for habeas relief under § 2254(d) requires us to focus

6. In any event, as the district court observed, Weisheit has identified no authority that requires federal courts to fund subsequent state court litigation. *Cf. Harbison v. Bell*, 556 U.S. 180, 189–90 & n.7, 129 S.Ct. 1481, 173 L.Ed.2d 347 (2009) (clarifying that § 3599(e) permits, but does not require, federal courts to provide representation in subsequent state postconviction proceedings).

on “the particular reasons—both legal and factual—why state courts rejected a state prisoner’s federal claims,” and then to afford “appropriate deference” to that decision. *Sellers*, 584 U.S. at 125, 138 S.Ct. 1188. If the state court “explains its decision on the merits in a reasoned opinion,” that deference is substantial—we defer so long as “the specific reasons given by the state court . . . are reasonable.” *Id.*

[22] Weisheit’s habeas petition implicates both avenues of relief under § 2254(d). For challenges asserting that the state court unreasonably applied clearly established federal law, only law as determined by Supreme Court holdings can justify relief. 28 U.S.C. § 2254(d)(1); *Williams v. Taylor*, 529 U.S. 362, 412, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000). If federal law clearly or inevitably applies to a set of facts, courts must apply it. *Schmidt*, 911 F.3d at 477; *see also Panetti v. Quarterman*, 551 U.S. 930, 953, 127 S.Ct. 2842, 168 L.Ed.2d 662 (2007) (emphasizing that “AEDPA does not require state and federal courts to wait for some nearly identical factual pattern before a legal rule must be applied” (citation modified)). But the Supreme Court has “cautioned against stretching its precedent to declare state-court decisions unreasonable.” *Schmidt*, 911 F.3d at 477; *see also, e.g., White v. Woodall*, 572 U.S. 415, 426, 134 S.Ct. 1697, 188 L.Ed.2d 698 (2014); *Nevada v. Jackson*, 569 U.S. 505, 512, 133 S.Ct. 1990, 186 L.Ed.2d 62 (2013).

[23, 24] Whether the application of clearly established law is “unreasonable,”

7. That the district court authorized some funding for brain imaging prior to the Court’s decision in *Shinn* does not alter the analysis. *Shinn* definitively closed the door on factual development in federal habeas proceedings absent narrow exceptions.

then, depends upon the nature of the rule itself—“[t]he more general the rule, the more leeway courts have in reaching outcomes in case-by-case determinations.” *Yarborough v. Alvarado*, 541 U.S. 652, 664, 124 S.Ct. 2140, 158 L.Ed.2d 938 (2004). Ultimately, for a writ to issue based on an unreasonable application of federal law, the state court’s ruling must be “so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement.” *Harrington v. Richter*, 562 U.S. 86, 103, 131 S.Ct. 770, 178 L.Ed.2d 624 (2011).

A petitioner faces an equally high hurdle when challenging a state court’s factual determinations under § 2254(d)(2). Although the Court has not defined precisely when a factual determination qualifies as “unreasonable,” it has made clear when a determination is *not* unreasonable: a state court’s factual determination is not unreasonable “merely because the federal habeas court would have reached a different conclusion,” nor if “reasonable minds” could disagree. *Wood v. Allen*, 558 U.S. 290, 301, 130 S.Ct. 841, 175 L.Ed.2d 738 (2010) (citation modified); *Brumfield v. Cain*, 576 U.S. 305, 314, 135 S.Ct. 2269, 192 L.Ed.2d 356 (2015). Unless a petitioner presents “clear and convincing evidence” to the contrary, we presume that a state court’s factual findings are correct. § 2254(e)(1); *Winfield v. Dorethy*, 956 F.3d 442, 452 (7th Cir. 2020); *Ward v. Sterne*, 334 F.3d 696, 703–04 (7th Cir. 2003).⁸

[25, 26] AEDPA presents an “intentionally difficult” standard for habeas petitioners to meet. *Woods v. Donald*, 575 U.S.

8. The Supreme Court has “left open the question” whether federal courts should review all § 2254(d)(2) challenges under the “clear and convincing evidence” standard set forth in § 2254(e)(1). *Wood*, 558 U.S. at 300, 130 S.Ct. 841; see also *Brumfield*, 576 U.S. at 322, 135 S.Ct. 2269 (“We have not yet defined the precise relationship between § 2254(d)(2) and

312, 316, 135 S.Ct. 1372, 191 L.Ed.2d 464 (2015) (citation modified). It aims “to reduce delays in the execution of state and federal criminal sentences, particularly in capital cases, and to advance the principles of comity, finality, and federalism.” *Twyford*, 596 U.S. at 818, 142 S.Ct. 2037 (citation modified). So when federal courts evaluate challenges to state court determinations, whether grounded in law or fact, we do not decide if “the state court’s determination was incorrect, but whether that determination was unreasonable—a substantially higher threshold.” *Id.* at 819, 142 S.Ct. 2037 (quoting *Schriro v. Landrigan*, 550 U.S. 465, 473, 127 S.Ct. 1933, 167 L.Ed.2d 836 (2007)).

With these well-established rules in mind, we turn to Weisheit’s claims.

1. Juror Challenges

We first address Weisheit’s challenges that implicate the constitutional guarantee of an impartial jury. *Morgan v. Illinois*, 504 U.S. 719, 728, 112 S.Ct. 2222, 119 L.Ed.2d 492 (1992). Weisheit argues that the trial court violated this right in two ways: by denying his for-cause motions to strike venirepersons and by not declaring a mistrial after discovering the thank you note juror 10 brought with a box of cookies for the jury.

[27, 28] The seating of even one juror “who will automatically vote for the death penalty” violates a defendant’s right to an impartial jury. *Morgan*, 504 U.S. at 729, 112 S.Ct. 2222. But requiring a defendant to use peremptory strikes to achieve an

§ 2254(e)(1)” (quoting *Burt v. Titlow*, 571 U.S. 12, 18, 134 S.Ct. 10, 187 L.Ed.2d 348 (2013)). Absent instruction to the contrary, however, we will continue to apply this standard. *Jansen v. Packaging Corp. of Am.*, 123 F.3d 490, 495 (7th Cir. 1997) (en banc). We note that our conclusion stands even relying on § 2254(d)(2) alone.

impartial jury does not, on its own, violate the Constitution. “So long as the jury that sits is impartial, the fact that the defendant had to use a peremptory challenge to achieve that result does not mean the Sixth Amendment was violated.” *Ross v. Oklahoma*, 487 U.S. 81, 88, 108 S.Ct. 2273, 101 L.Ed.2d 80 (1988); *see also Rivera v. Illinois*, 556 U.S. 148, 157–59, 129 S.Ct. 1446, 173 L.Ed.2d 320 (2009); *United States v. Martinez-Salazar*, 528 U.S. 304, 313–15, 120 S.Ct. 774, 145 L.Ed.2d 792 (2000). This means that to prevail on his claim challenging the court’s denial of his for-cause motions to strike, Weisheit must identify at least one biased juror on the jury.

[29] Before the Indiana Supreme Court, Weisheit argued that by improperly denying his for-cause objections, the trial court forced him to deplete his allotment of peremptory strikes and ultimately accept jurors “who, [while] not necessarily positioned to be challenged for cause, were biased against his evidence in either the guilty phase, penalty phase, or both.” Although he reproduced a handful of statements made by jurors who ultimately served, Weisheit did not articulate, let alone develop, specific objections. The Indiana Supreme Court’s conclusion that Weisheit failed to show an objectionable or biased juror served on his jury is consistent with *Ross* and other clearly established federal law. *See Weisheit I*, 26 N.E.3d at 13.

[30–33] Weisheit’s challenges regarding the cookie note fare no better. As part of the Constitution’s impartial jury requirement, jurors must reach their verdict relying solely upon “evidence and argument in open court, and not [upon] any outside influence.” *Skilling v. United States*, 561 U.S. 358, 378, 130 S.Ct. 2896, 177 L.Ed.2d 619 (2010) (quoting *Patterson v. Colorado*, 205 U.S. 454, 462, 27 S.Ct. 556, 51 L.Ed. 879 (1907)). “In a criminal

case, any private communication . . . with a juror during a trial about the matter pending before the jury is . . . deemed presumptively prejudicial.” *Remmer v. United States*, 347 U.S. 227, 229, 74 S.Ct. 450, 98 L.Ed. 654 (1954); *United States v. Coney*, 76 F.4th 602, 607 (7th Cir. 2023). The State can rebut this presumption with a showing, “after notice to and hearing of the defendant,” that the juror contact was harmless. *Remmer*, 347 U.S. at 229, 74 S.Ct. 450.

[34] Resolving questions of jury impartiality “involves credibility findings whose basis cannot be easily discerned from an appellate record.” *Thompson v. Keohane*, 516 U.S. 99, 111, 116 S.Ct. 457, 133 L.Ed.2d 383 (1995) (quoting *Wainwright v. Witt*, 469 U.S. 412, 429, 105 S.Ct. 844, 83 L.Ed.2d 841 (1985)). We thus rely upon a trial court’s “superior capacity” to evaluate the credibility of jurors and afford great deference to that court’s determinations. *Id.* at 113, 116 S.Ct. 457; *see also Rice v. Collins*, 546 U.S. 333, 341–42, 126 S.Ct. 969, 163 L.Ed.2d 824 (2006) (declaring that habeas courts may not “supersede the trial court’s credibility determination” simply because “[r]easonable minds reviewing the record might disagree”).

The Indiana Supreme Court properly applied this law. It first acknowledged that the cookie note created a presumption of prejudice. It then held that the State rebutted such presumption by demonstrating that the cookie note was harmless. The court grounded its conclusion on the trial court’s swift corrective actions, including the court’s investigation of the effect of the note and individual questioning of each juror (and finding that over half of the jurors did not even read it); determination that the jurors credibly stated that the note did not affect their ability to impartially serve; and admonishment to the jury that it must base its verdict only on pre-

sented evidence. *Weisheit I*, 26 N.E.3d at 16. It described the note as “merely offer[ing] encouragement and gratitude for the jury’s no doubt difficult job ahead,” and observed that it “made no mention of Weisheit at all.” *Id.*

Weisheit has not established that these findings were unreasonable. Weisheit’s disagreement with the court’s credibility determinations—for example, that the note left a deeper impression on one juror in particular—does not suffice for habeas relief. *See Collins*, 546 U.S. at 341–42, 126 S.Ct. 969 (concluding that the trial court could accept the prosecutor’s race-neutral justifications for excluding a juror despite having “reason to question the prosecutor’s credibility”).

[35] Nor does the court’s interpretation of the cookie note as “merely offer[ing] encouragement and gratitude for the jury’s no doubt difficult job ahead[,]” *Weisheit I*, 26 N.E.3d at 16, rather than, as Weisheit sees it, a note aimed at “service for the family of Alyssa [and] Caleb Lynch.” Differing interpretations can be reasonable. *See Collins*, 546 U.S. at 342, 126 S.Ct. 969 (habeas courts may not rely on “debatable inferences” to set aside a state court’s factual determinations). However reasonable Weisheit’s view, he must affirmatively establish that the court’s was “unreasonable . . . in light of the evidence presented.” 28 U.S.C. § 2254(d)(2); *Wood*, 558 U.S. at 301, 130 S.Ct. 841.

He has not met this stringent standard. Some record evidence supports the court’s interpretation, including the juror recollec-

tions that the note just thanked them for their service. In any event, the court’s decision to affirm denial of a mistrial did not depend on its interpretation of the note. The court instead appropriately based its affirmance on the trial court’s thorough investigation of the note’s lack of impact on jurors.

Which brings us to Weisheit’s next perceived deficiency: the Indiana Supreme Court’s reliance on the trial court’s admonishment. This was proper. Clearly established federal law plainly states that trial courts may presume jurors follow their instructions. *See Samia v. United States*, 599 U.S. 635, 646, 143 S.Ct. 2004, 216 L.Ed.2d 597 (2023); *Weeks v. Angelone*, 528 U.S. 225, 234, 120 S.Ct. 727, 145 L.Ed.2d 727 (2000).⁹

So too was the court’s treatment of the two-day gap between the jurors’ receipt of the note and the trial court’s investigation and juror 10’s commentary on the investigation. *See Weisheit I*, 26 N.E.3d at 14. Given the conclusion that the cookie note was harmless, the gap in its discovery is irrelevant. The same is true with respect to juror 10’s “ridiculous” comment, which the court expressly addressed, and the other jurors “nodding their heads” in response—an ambiguous action that Weisheit did not raise before the Indiana Supreme Court and does not amount to evidence of much of anything.

Because Weisheit has not established that the court made unreasonable determinations of fact or applications of law, he is

9. *Smith v. Phillips*, 455 U.S. 209, 102 S.Ct. 940, 71 L.Ed.2d 78 (1982), the only Supreme Court case that Weisheit cites on this point, bolsters our conclusion. There, the Court remarked that due process requires “a jury capable and willing to decide the case solely on the evidence before it, and a trial judge ever watchful . . . to determine the effect of [prejudicial] occurrences when they happen.” *Id.* at

217, 102 S.Ct. 940. “Such determinations,” the Court continued, “may properly be made at a hearing”—just like the one the trial judge held here. *Id.* Even Justice O’Connor writing in concurrence (the only part of the opinion on which Weisheit relies) acknowledges that “in most instances a postconviction hearing will be adequate to determine” juror bias. *Id.* at 222, 102 S.Ct. 940.

not entitled to relief on his claims of juror bias.

2. Custodial Statement

[36] We turn next to the trial court’s decision to admit Weisheit’s post-arrest statement to police while hospitalized. Weisheit claims his statement was involuntary, and thus challenges its admission as a violation of his constitutional rights. The Indiana Supreme Court’s conclusion to the contrary, he argues, rested on an unreasonable determination of facts.

[37–40] Both the Due Process Clause of the Fourteenth Amendment and the Fifth Amendment forbid the admission of an involuntary confession into evidence in a criminal case. *Dickerson v. United States*, 530 U.S. 428, 433, 120 S.Ct. 2326, 147 L.Ed.2d 405 (2000). Whether a statement is voluntary depends upon “the totality of all the surrounding circumstances—both the characteristics of the accused and the details of the interrogation.” *Id.* at 434, 120 S.Ct. 2326 (quoting *Schneckloth v. Bustamonte*, 412 U.S. 218, 226, 93 S.Ct. 2041, 36 L.Ed.2d 854 (1973)). A statement that is coerced by means of, e.g., violence, threats, or prolonged interrogation tactics is not voluntary. *Berghuis v. Thompkins*, 560 U.S. 370, 387–88, 130 S.Ct. 2250, 176 L.Ed.2d 1098 (2010). At bottom, we aim to determine whether “the defendant’s will was in fact overborne” by police in their interrogation. *Miller v. Fenton*, 474 U.S. 104, 116, 106 S.Ct. 445, 88 L.Ed.2d 405 (1985); *Dassey v. Dittmann*, 877 F.3d 297, 303 (7th Cir. 2017) (en banc).

The trial court held a suppression hearing to resolve this question, where it considered testimony from officers and medical professionals and a recording of Weisheit’s statement. In admitting the statement as voluntary, the trial court found that Weisheit was alert and oriented and that the officers conducting his interview did not employ overbearing or coer-

cive conduct. The Indiana Supreme Court affirmed, highlighting the following pieces of evidence: Weisheit had only a mild brain contusion; the on-site examining physician testified that Weisheit was alert and oriented; another physician testified that Weisheit was capable of understanding and participating in his conversation with police; Weisheit ingested no drugs other than anti-nausea medication; the officers conducting the interview testified that Weisheit selectively feigned sleep based on the subject matter of their questions but was otherwise responsive; and the interview was relatively brief, lasting less than 20 minutes, and ceased when Weisheit asked for an attorney.

Weisheit disputes most of these factual determinations. But once again, he has not persuaded us that any were unreasonable.

He claims, for example, that the court erred in characterizing his injuries as minor. Yet he fails to account for the testimony from medical professionals that his concussion was indeed minor, and that he was oriented and capable of understanding his conversation with police.

His contention that the officers used “coercive” tactics by suggesting that he “needed” to speak with them is similarly belied by the record. The interview transcript contains no indicators of coercion. Moreover, Weisheit asked for a lawyer less than 20 minutes into the interview, revealing that he understood his rights. *See Duckworth v. Eagan*, 492 U.S. 195, 203, 109 S.Ct. 2875, 106 L.Ed.2d 166 (1989) (“The inquiry is simply whether the warnings reasonably convey to a suspect his rights as required by *Miranda*.” (citation modified)).

[41] Weisheit next asserts that, rather than feigning sleep, a “better explanation” for his bouts of nonresponsiveness is that he had just suffered a brain injury and was medicated. This argument misapprehends

our role. We assess only reasonableness. If reasonable minds could differ, regardless of the “better” explanation, we cannot supersede the state court’s determination. *Brumfield*, 576 U.S. at 313–14, 135 S.Ct. 2269; *Collins*, 546 U.S. at 341–42, 126 S.Ct. 969; *Pierce v. Vanihel*, 93 F.4th 1036, 1046–47 (7th Cir. 2024) (competing plausible interpretations precluded displacement of the state court’s factual determinations). In all, given the testimony of the officers and medical professionals and the interview recording itself, we have no trouble deeming the state court’s factual determinations reasonable.

[42] Recall that “[t]he more general the rule, the more leeway courts have in reaching outcomes in case-by-case determinations.” *Alvarado*, 541 U.S. at 664, 124 S.Ct. 2140. Voluntariness is a general standard that “demand[s] a substantial element of judgment.” *Dassey*, 877 F.3d at 303 (citation modified). The Indiana Supreme Court’s ultimate conclusion that Weisheit’s statement was voluntary fell well within the bounds of reasonableness, barring habeas relief on this issue.

3. Exclusion of Expert Testimony

[43] At the penalty phase of the trial, defense counsel attempted to call expert witness James Aiken, a former prison warden and consultant, to testify regarding Weisheit’s future dangerousness. Aiken would have testified that a prison could adequately manage and secure Weisheit without endangering prison staff, other inmates, or the public should he receive a life sentence. The trial court excluded his testimony on objection from the State under Indiana Rule of Evidence 702, which governs the admission of expert testimony.

The Indiana Supreme Court affirmed, reasoning that “counsel neither established Aiken’s qualifications to predict future behavior, nor did he make an offer of proof as to Aiken’s specific predictions of Weis-

heit’s potential future classification in prison.” *Weisheit II*, 109 N.E.3d at 987; *see also Weisheit I*, 26 N.E.3d at 10. Weisheit challenges this conclusion as an unreasonable application of a few clearly established federal rules and principles.

[44, 45] Generally, the Eighth Amendment requires that “the sentencer in capital cases . . . be permitted to consider any relevant mitigating factor.” *Eddings v. Oklahoma*, 455 U.S. 104, 112, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982); *see also Lockett v. Ohio*, 438 U.S. 586, 604–05, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978). This includes “evidence that the defendant would not pose a danger if spared (but incarcerated).” *Skipper v. South Carolina*, 476 U.S. 1, 5, 106 S.Ct. 1669, 90 L.Ed.2d 1 (1986). Prosecutors, too, may rely on a defendant’s future dangerousness in pursuing the death penalty. *Barefoot v. Estelle*, 463 U.S. 880, 896–97, 103 S.Ct. 3383, 77 L.Ed.2d 1090 (1983) (psychiatrists may predict future dangerousness); *see also Jurek v. Texas*, 428 U.S. 262, 275–76, 96 S.Ct. 2950, 49 L.Ed.2d 929 (1976). When a prosecutor introduces evidence of a defendant’s future dangerousness, it is not just the Eighth Amendment, but due process, that demands a defendant have the “opportunity to deny or explain.” *Skipper*, 476 U.S. at 5 n.1, 106 S.Ct. 1669 (quoting *Gardner v. Florida*, 430 U.S. 349, 362, 97 S.Ct. 1197, 51 L.Ed.2d 393 (1977)); *see also Simmons v. South Carolina*, 512 U.S. 154, 164, 114 S.Ct. 2187, 129 L.Ed.2d 133 (1994).

Weisheit contends that these cases clearly establish his entitlement to present Aiken’s proposed testimony on future dangerousness. Even assuming capital defendants have some right to introduce this kind of testimony, however, it would not extend so far as to prevent Indiana from setting reasonable limits on the evidence a defendant can submit and the manner in which it is submitted. *See Oregon v. Guzek*,

546 U.S. 517, 526, 126 S.Ct. 1226, 163 L.Ed.2d 1112 (2006); *see also United States v. Tsarnaev*, 595 U.S. 302, 319, 142 S.Ct. 1024, 212 L.Ed.2d 140 (2022) (“Because the States . . . retain the traditional authority to decide that certain types of evidence may have insufficient probative value to justify their admission, they may enact reasonable rules governing whether specific pieces of evidence are admissible.” (citation modified)); *Barefoot*, 463 U.S. at 904, 103 S.Ct. 3383 (“Although cases such as this involve the death penalty, we perceive no constitutional barrier to applying the ordinary rules of evidence governing the use of expert testimony.”).

The Indiana Supreme Court affirmed the trial court’s decision that Aiken was unqualified under Indiana rules of evidence. *Weisheit I*, 26 N.E.3d at 9–10. After applying *Skipper* to conclude “error would ensue” if the trial court prevented Weisheit from “introducing otherwise admissible evidence” regarding Weisheit’s future dangerousness, it observed that “[f]or all [Aiken’s] knowledge and expertise in classifying inmates, [he] is not an expert in predicting future behavior.” *Id.* at 10.

[46] We cannot grant habeas relief based on determinations of state law. *See Lewis v. Jeffers*, 497 U.S. 764, 780, 110 S.Ct. 3092, 111 L.Ed.2d 606 (1990). Absent an argument that Indiana’s evidentiary rule itself violates the Constitution—an argument Weisheit does not make—we do not review the Indiana Supreme Court’s application of state rules of evidence. *See Bradshaw v. Richey*, 546 U.S. 74, 76, 126

S.Ct. 602, 163 L.Ed.2d 407 (2005) (“We have repeatedly held that a state court’s interpretation of state law . . . binds a federal court sitting in habeas corpus.”); *Estelle v. McGuire*, 502 U.S. 62, 67–68, 112 S.Ct. 475, 116 L.Ed.2d 385 (1991).

Given the inadmissibility of Aiken’s testimony, the court did not unreasonably apply *Skipper*, *Simmons*, or any other clearly established law in excluding it. *See Skipper*, 476 U.S. at 7, 106 S.Ct. 1669 (rejecting a rule that would effectively “preclud[e] the defendant from introducing otherwise admissible evidence” of future dangerousness (emphasis added)).¹⁰

4. *Strickland* Challenges

[47] Weisheit’s final set of challenges concern his right to the effective assistance of counsel under the Sixth Amendment. *See Strickland v. Washington*, 466 U.S. 668, 686, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). To prevail on an ineffective assistance of trial counsel claim, a petitioner must show that counsel (1) provided a deficient performance, that (2) caused him prejudice. *Thornell v. Jones*, 602 U.S. 154, 163, 144 S.Ct. 1302, 218 L.Ed.2d 626 (2024); *Strickland*, 466 U.S. at 687, 104 S.Ct. 2052.

[48–50] Counsel’s performance is deficient when it falls “below an objective standard of reasonableness . . . under prevailing professional norms.” *Strickland*, 466 U.S. at 688, 104 S.Ct. 2052. In the death penalty context, deficient performance causes prejudice where there exists “a reasonable probability” that but for the

¹⁰ In fact, *Skipper* supports a contrary conclusion. The state in *Skipper* attempted to defend the trial court’s exclusion of nondangerousness testimony by arguing that the court simply prohibited “incompetent lay opinion testimony regarding petitioner’s ability to adjust to prison life in the future.” *Skipper*, 476 U.S. at 5, 106 S.Ct. 1669. The Supreme Court rejected this argument, emphasizing that the

witnesses intended to testify that the petitioner “has made a good adjustment to jail”—“nonopinion evidence” concerning *past behavior*. *Id.* at 5–6, 106 S.Ct. 1669. “Defense counsel,” the Court made clear, “was not offering opinion testimony regarding future events.” *Id.* at 6, 106 S.Ct. 1669. That is the precise testimony the state courts confronted here.

deficiency, at least one juror would have imposed a sentence other than death. *Wiggins v. Smith*, 539 U.S. 510, 537, 123 S.Ct. 2527, 156 L.Ed.2d 471 (2003); *Thornell*, 602 U.S. at 163, 144 S.Ct. 1302 (elaborating that a “reasonable probability is a probability sufficient to undermine confidence in the outcome,” which “requires a substantial, not just conceivable, likelihood of a different [sentencing] result” (citation modified)). In undertaking this analysis, courts consider the totality of the evidence, weighing all available mitigating evidence against aggravating evidence. *Strickland*, 466 U.S. at 695–96, 104 S.Ct. 2052; *Williams*, 529 U.S. at 397–98, 120 S.Ct. 1495.

[51] On its own, *Strickland* presents a high hurdle for defendants to overcome. *Richter*, 562 U.S. at 105, 131 S.Ct. 770. When a *Strickland* claim arises in a § 2254 petition, the hurdle heightens. The Supreme Court has described our review in these circumstances as “doubly” deferential: we no longer consider simply whether counsel’s actions were reasonable, but whether the state court’s decision was reasonable. *Id.* (quoting *Knowles v. Mirzayance*, 556 U.S. 111, 123, 129 S.Ct. 1411, 173 L.Ed.2d 251 (2009)). Because “[t]he *Strickland* standard is a general one,” that range of reasonableness is “substantial.” *Id.* We ask only “whether there is *any* reasonable argument that counsel satisfied *Strickland*’s deferential standard.” *Id.* (emphasis added).

With the clearly established law well settled, we turn to Weisheit’s four ineffective assistance of counsel claims: counsel provided ineffective assistance by (1) failing to investigate and obtain records from Weisheit’s time at the Indiana Boys School; (2) failing to present relevant expert mitigating evidence; (3) failing to object to the testimony of three witnesses who opined that the fire was intentionally set; and (4) failing to make an adequate

offer of proof on the admissibility of Aiken’s testimony. Weisheit contends that in affirming the trial court’s decision on these claims, the Indiana Supreme Court unreasonably applied *Strickland*. We disagree.

a. Indiana Boys School Records

We begin with defense counsel’s treatment of Weisheit’s records from the Indiana Boys School, a juvenile correctional institution. Weisheit spent roughly six months at the Boys School between 1992 and 1993. Records from his time there illustrate Weisheit’s mental health challenges.

Weisheit’s trial counsel sought to obtain these records, but the Department of Correction responded that a search revealed no match. The Department clarified that it maintained a policy to destroy records for any offender out of its facility for more than ten years. Weisheit had been out of the Boys School for far longer. Although his counsel stopped pursuing the Boys School records, they secured other mental health records from that time and provided them to Weisheit’s experts.

It turns out Weisheit’s Boys School records did exist. The Indiana State Archives had a copy, which Weisheit’s postconviction counsel managed to obtain. Weisheit claims that his trial counsel performed ineffectively in failing to secure those records.

[52, 53] To be sure, the Constitution imposes a duty on counsel “to make reasonable investigations.” *Strickland*, 466 U.S. at 691, 104 S.Ct. 2052. The scope of this duty encompasses “the quantum of evidence already known to counsel,” but also circumstances where “the known evidence would lead a reasonable attorney to investigate further.” *Wiggins*, 539 U.S. at 527, 123 S.Ct. 2527.

[54] Clearly established law arms us with some certainties: counsel must learn the law that is “fundamental” to their case, *Hinton v. Alabama*, 571 U.S. 263, 274, 134 S.Ct. 1081, 188 L.Ed.2d 1 (2014); undertake at least some investigation into known and potentially powerful mitigating evidence, *Wiggins*, 539 U.S. at 527, 123 S.Ct. 2527; and pursue “readily available” information that the prosecution will probably rely upon, *Rompilla v. Beard*, 545 U.S. 374, 385, 125 S.Ct. 2456, 162 L.Ed.2d 360 (2005). The Supreme Court has also instructed that “reasonably diligent counsel may draw a line when they have good reason to think further investigation would be a waste.” *Id.* at 383, 125 S.Ct. 2456 (counsel need not “scour the globe on the off chance something will turn up”). Beyond that, “a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel’s judgments.” *Strickland*, 466 U.S. at 691, 104 S.Ct. 2052.

[55] The Indiana Supreme Court reasonably applied *Strickland*, *Wiggins*, and other applicable law when it determined that trial counsel was not deficient for failing to obtain Weisheit’s Boys School records. No clearly established federal law requires counsel to inform themselves of an agency record-keeping policy that may lead to the discovery of beneficial mitigation evidence—particularly where, as here, counsel introduced much of the mitigation evidence by other means and the agency represented it did not have the records. See *Bobby v. Van Hook*, 558 U.S. 4, 11–12, 130 S.Ct. 13, 175 L.Ed.2d 255 (2009) (“[D]efense counsel’s decision not to seek more mitigating evidence from the defendant’s background than was already in hand fell well within the range of professionally reasonable judgments.” (citation modified)). As far as Weisheit’s counsel knew, the Department had destroyed Weisheit’s records. The record contains no

evidence that counsel learned they could access the records another way or knew they should have followed up with the archives. The communication from the Department was the only “known evidence” regarding the status of the records, and it would not have led a “reasonable attorney to investigate further.” *Wiggins*, 539 U.S. at 527, 123 S.Ct. 2527.

[56, 57] Even if counsel did provide inadequate assistance, Weisheit has not demonstrated that the Indiana Supreme Court misapplied clearly established law in finding no prejudice. Counsel does not need to obtain “merely cumulative” evidence that would make “little difference” in the outcome of a proceeding. *Wong v. Belmontes*, 558 U.S. 15, 22, 130 S.Ct. 383, 175 L.Ed.2d 328 (2009) (per curiam); see also *Westray v. Brookhart*, 36 F.4th 737, 753 (7th Cir. 2022) (finding no prejudice where witnesses testified about the defendant’s abuse but counsel did not introduce reports corroborating the abuse).

The Indiana Supreme Court observed that Weisheit’s history of mental illness, which the Boys School records would have corroborated, came into evidence via testimony from multiple expert witnesses—including a correctional counselor at the Boys School. At his state postconviction hearing, one of Weisheit’s experts even testified that although the records contained significant additional information, they did not alter or conflict with the opinion she gave about Weisheit’s mental illness during trial. See *Weisheit II*, 109 N.E.3d at 985.

Notwithstanding Weisheit’s contentions to the contrary, the Indiana Supreme Court also acknowledged Weisheit’s argument that the Boys School records could have “forcefully countered” the State’s attempt to downplay the impact of Weisheit’s mental illness. *Id.* Rather than ignore the argument, the court came to the rea-

sonable conclusion that Weisheit's counsel rebutted the State's attempt through its own presentation of the evidence. Counsel pointed to admitted records "rife with suicide attempts, depression, medication," and inadequate treatment during Weisheit's childhood. *Id.* (citation modified).

Given that Weisheit "*did* put on substantial mitigation evidence, much of it targeting the same" mental illness evidence he sought to introduce through the Boys School records, "[t]he sentencing jury was . . . 'well acquainted' with [Weisheit's] background." *Belmontes*, 558 U.S. at 23, 130 S.Ct. 383 (quoting *Landrigan*, 550 U.S. at 481, 127 S.Ct. 1933) (reversing a finding of prejudice for counsel's failure to introduce specific evidence of the petitioner's childhood and positive attributes because counsel introduced other evidence "targeting the same . . . theme"). "Additional evidence" on his history of mental illness "would have offered an insignificant benefit, if any at all." *Id.*

The Indiana Supreme Court recognized an additional bar to prejudice: presenting the Boys School records at trial could have had a counterproductive effect by exposing jurors to Weisheit's behavior as a teenager, including his lack of remorse, auto theft, fighting, threats, and cruelty to animals.

Weisheit claims that this conclusion runs contrary to *Sears v. Upton*, 561 U.S. 945, 130 S.Ct. 3259, 177 L.Ed.2d 1025 (2010), which clarified that the presence of adverse evidence accompanying mitigating evidence does not automatically trigger a finding of no prejudice. *Id.* at 951, 130 S.Ct. 3259. But *Sears* does not save Weisheit's claim. There, defense counsel "should have been able to turn some of the adverse evidence" regarding the defendant's "grandiose self-conception and . . . magical thinking" into a positive, namely, expert mitigation testimony of his "profound personality disorder." *Id.* (citation omitted).

Because counsel in *Sears* conducted an inadequate mitigation investigation, "*none* of this evidence was known to Sears' trial counsel." *Id.*

This case is not like *Sears*. The jury heard substantial evidence of Weisheit's mental illness and suicidal ideation. The Indiana Supreme Court properly applied U.S. Supreme Court precedent by considering "*all* the relevant evidence that the jury would have had before it" in undertaking its prejudice analysis. *Belmontes*, 558 U.S. at 20, 130 S.Ct. 383.

The Indiana Supreme Court did not unreasonably apply clearly established law when it found Weisheit did not prove the introduction of the Boys School records would have created a reasonable probability of a lesser sentence. *See Strickland*, 466 U.S. at 700, 104 S.Ct. 2052 (finding no prejudice where the proffered evidence "would barely have altered the sentencing profile presented to the sentencing judge").

b. Expert Mitigation Testimony

Weisheit next takes aim at his trial counsel for not presenting expert mitigation evidence from Dr. Philip Harvey and Dr. Ruben Gur during the penalty phase of his trial.

The defense retained Dr. Harvey, a qualified neuropsychologist, to testify regarding Weisheit's bipolar disorder. Based on a misunderstanding, counsel thought Dr. Harvey was unavailable to testify and engaged another qualified expert witness, Dr. David Price.

Dr. Price, a psychologist, received a memorandum prepared by Dr. Harvey that detailed his observations of Weisheit during a meeting the two had and more general impressions of Weisheit's mental health. In this memorandum, Dr. Harvey reported seeing Weisheit in a manic state.

Dr. Price separately conducted his own assessments of Weisheit. He ultimately testified in mitigation at the penalty phase of trial, explaining that based on his multiple assessments and a review of medical records dating back to Weisheit's childhood, Weisheit suffered from bipolar disorder, attention deficit hyperactivity disorder, predominate hyperactive impulse, and cognitive disorder. Dr. Price incorporated Dr. Harvey's observations, including Weisheit's manic episode, into his testimony.

[58] The Indiana Supreme Court found no deficiency in counsel's misunderstanding of Dr. Harvey's availability and no prejudice based on Dr. Price's ability to capably testify. We need not evaluate the court's deficiency determination because Weisheit has not shown that the court's no-prejudice finding was unreasonable. *See Strickland*, 466 U.S. at 697, 104 S.Ct. 2052 (explaining that courts need not "address both components of the [ineffective assistance of counsel] inquiry if the defendant makes an insufficient showing on one"). Dr. Price testified that Weisheit suffered from bipolar disorder, just as Dr. Harvey would have. He based this testimony not only on his own observations and tests, but on a review of Dr. Harvey's report.

Rather than identify evidence absent from Dr. Price's testimony that Dr. Harvey would have introduced, Weisheit argues that Dr. Harvey would have more effectively rebutted the State's argument that Weisheit was not manic. The Indiana Supreme Court rejected this argument, concluding that "even without Dr. Harvey's testimony about the instance of mania he observed, trial counsel did in fact present evidence of Weisheit's bipolar diagnosis and possible mania at the time of the murders." *Weisheit II*, 109 N.E.3d at 986.

Weisheit fails to persuade us that such a conclusion was unreasonable. *Wiggins*, the

only case that Weisheit cites, simply establishes that habeas courts reweigh the aggravating evidence against the totality of mitigating evidence. 539 U.S. at 534, 123 S.Ct. 2527. A fair reading of the Indiana Supreme Court's opinion shows that it did just that. *See Weisheit II*, 109 N.E.3d at 986.

[59] Dr. Gur, for his part, became involved in Weisheit's case at the postconviction stage. State postconviction counsel called him to testify about how the multiple brain injuries that Weisheit reported incurring in his childhood could have exacerbated his mental health conditions. Weisheit faults trial counsel for failing to develop and present evidence of his history of traumatic brain injury at the penalty phase of his trial.

The Indiana Supreme Court concluded that Weisheit failed to establish ineffective assistance, holding that Weisheit did not show prejudice. *Id.* at 987. The court reasoned that Dr. Gur's testimony was merely speculative and that speculative nature, together with testimony from the State's expert witness, would have minimized any mitigating effect of Dr. Gur's testimony.

Weisheit challenges the supreme court's "speculative" finding as an unreasonable determination of fact. But he has failed to show that such a conclusion was unreasonable given the evidence in the record.

Dr. Gur testified, based on his review of Weisheit's records (and never having met Weisheit), that Weisheit likely suffered instances of traumatic brain injury causing long-term effects. Medical records corroborated some of these injuries, others Weisheit self-reported. None of the incidents were corroborated by testing for brain injuries—without which, according to the State's expert, it was impossible to determine which instances caused permanent damage and which did not. Dr. Gur himself acknowledged that just because

someone hit his head, even multiple times, does not necessarily mean he suffered from concussions, or in turn that the concussions caused permanent brain injury.

Under AEDPA's deferential review standard, that some evidence in the record supported Dr. Gur's testimony is not enough. The fact that both the Indiana Supreme Court's and Weisheit's interpretations "are at least plausible precludes us from displacing the state court's factual determination at the habeas stage." *Pierce*, 93 F.4th at 1046; *see also Wood*, 558 U.S. at 301, 130 S.Ct. 841 ("[E]ven if reasonable minds reviewing the record might disagree about the finding in question, on habeas review that does not suffice to supersede the trial court's determination." (citation modified)).

As for the Indiana Supreme Court's reliance on conflicting testimony from the State's expert to conclude that Dr. Gur's testimony would have made no difference, clearly established Supreme Court law does require courts to reasonably account for mitigation evidence, even if the State identifies "perceived problems" with such evidence. *Porter v. McCollum*, 558 U.S. 30, 43, 130 S.Ct. 447, 175 L.Ed.2d 398 (2009) (per curiam). By the same token, though, controlling law mandates consideration of *all* evidence, which includes rebuttal evidence. *Belmontes*, 558 U.S. at 20, 130 S.Ct. 383.

Porter, the only clearly established federal law Weisheit identifies in support of his challenge, elucidates this point. In *Porter*, defense counsel presented only one witness during the penalty phase of trial and the sentencing judge heard "absolutely [no]" evidence about the defendant's abusive childhood, his heroic military service and resultant trauma, or his impaired mental capacity. 558 U.S. at 33, 41, 130 S.Ct. 447. Comparing this "significant mitigation evidence" to the less substantial evidence in aggravation, the Supreme

Court concluded that the state court unreasonably applied *Strickland's* prejudice prong, ignoring "too much mitigating evidence." *Id.* at 31, 44, 130 S.Ct. 447.

Weisheit's case starkly contrasts with *Porter's*. The jury and sentencing judge heard substantial evidence of Weisheit's background, including his history of mental health issues. Meanwhile, the aggravating evidence against Weisheit, including his gruesome murder of two children, was overwhelming. The Indiana Supreme Court reasonably considered the effect of the additional mitigation evidence—inconclusive and uncorroborated—against the significant aggravating evidence in finding no prejudice. *See Belmontes*, 558 U.S. at 27–28, 130 S.Ct. 383 ("It is hard to imagine expert testimony and *additional* facts about [the petitioner's background] outweighing the facts of . . . [the] murder[s].").

c. Fire Testimony

We turn next to trial testimony regarding the cause of the fire. Recall, Assistant Chief Bretz and Fire Marshal Kinder testified that the house fire was intentionally set. Detective Blessinger testified that Weisheit himself set it.

[60] The Indiana Supreme Court concluded that counsel did not perform deficiently in failing to object to the testimony of Bretz and Kinder because it was admissible under Indiana rules of evidence. *Weisheit II*, 109 N.E.3d at 991. We will not disturb this admissibility determination. *McGuire*, 502 U.S. at 67–68, 112 S.Ct. 475. As for Blessinger's testimony, the court explained that even if counsel provided deficient performance, Weisheit did not show prejudice. We evaluate the court's prejudice determination and discern no misapplication of clearly established federal law.

Citing the decision of the initial postconviction review court, which recounted evidence indicative of Weisheit's guilt, the Indiana Supreme Court concluded that the expert testimony "was not nearly as persuasive as Weisheit's actions before, during, and after the crime." *Weisheit II*, 109 N.E.3d at 991–92 (citation modified). The court detailed these actions on direct appeal, including:

- Months before the fire, Weisheit told a coworker that if Lynch was having an affair, as he suspected, he would "kill her, burn everything, and kill his self";
- Weeks or days before the fire, Weisheit canceled payments on the engagement ring for Lynch, told the jeweler he was leaving the country, quit his job, and withdrew all the money in his bank account;
- The night of the fire, Weisheit tied Caleb up and taped a rag into his mouth, left the children alone, fled Indiana, did not respond to numerous calls, attempted to evade police, and implored officers to shoot him;
- When officers finally secured him, they found cash, clothes, and Lynch's jewelry in his possession;
- At the hospital, Weisheit selectively answered questions from the police about the children and the fire; and

11. Weisheit separately faults the Indiana Supreme Court for not considering the prejudicial effect of counsel's performance at the penalty phase of proceedings. In Weisheit's case, this is a distinction without a difference; the challenged testimony, presented during the guilt phase, did not impart any new prejudicial information at the penalty phase. The jury was clearly satisfied that Weisheit intentionally set the fire and imposed his sentence based on that understanding. Because no prejudice resulted at the guilt phase, Weisheit has not established a reasonable probability that absent the fire witnesses' testimony, at

- Rescuers found Caleb with flares around his body—flares that Weisheit brought into the home.

Weisheit I, 26 N.E.3d at 11–12.

[61] The Indiana Supreme Court properly weighed the potential exclusion of the fire witnesses' testimony against the overwhelming evidence of Weisheit's guilt, as required by clearly established law. *See Belmontes*, 558 U.S. at 20, 130 S.Ct. 383; *Williams*, 529 U.S. at 397–98, 120 S.Ct. 1495. That it did so in only a few words does not undermine our conclusion. *See Johnson v. Williams*, 568 U.S. 289, 300, 133 S.Ct. 1088, 185 L.Ed.2d 105 (2013) ("federal courts have no authority to impose mandatory opinion-writing standards on state courts"); *Dassey*, 877 F.3d at 314 (dismissing the petitioner's criticism of the "terse" state court opinion where the court "endorsed detailed findings by the trial court that provide[d] substantial support" for its conclusion).¹¹

d. Failure to Make an Offer of Proof

[62] We end by returning to the testimony of James Aiken. Weisheit alleges ineffective assistance based on counsel's failure to point the trial court to the correct Indiana rule of evidence under which Aiken would have qualified as an expert (Rule 702(a)),¹² along with counsel's failure to make an adequate offer of proof. Ind. R. Evid. 103(a)(2) (requiring a party to inform

least one juror would have voted against death at the penalty phase. *See Wiggins*, 539 U.S. at 537, 123 S.Ct. 2527.

12. Indiana Rule of Evidence 702(a) permits the testimony of "[a] witness who is qualified as an expert by knowledge, skill, experience, training, or education . . . if the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue." Unlike Rule 702(b), it does not require testimony based "upon reliable scientific principles."

the court of the substance of excluded evidence by an offer of proof).

We do not decide whether Weisheit established deficient performance because the Indiana Supreme Court did not unreasonably apply *Strickland* in finding no prejudice. The court rested its holding on two grounds. First, under any rule of evidence, the admissibility of Aiken's testimony was "speculative." *Weisheit II*, 109 N.E.3d at 988. The Indiana Supreme Court outlined a handful of reasons, including Aiken's limited study of Weisheit's record, the inconsiderable amount of time he spent interviewing Weisheit, his difficulty addressing the trial court's questions about his experience and preparation, and his admission that he did not review any information regarding how an Indiana prison would house an inmate convicted of murdering children. *Id.* Once again, we do not second-guess a state court's application of its own rules of evidence. *McGuire*, 502 U.S. at 67–68, 112 S.Ct. 475.

The Indiana Supreme Court also reasoned that Aiken's testimony would have opened the door to Weisheit's voluminous disciplinary records. Weisheit accrued 35 incident reports during his pretrial incarceration between April 2010 and May 2011. The reports depicted, among other incidents, his threat to kill an EMT worker, threats to officers and other inmates, destruction of jail property, and concealment of "multiple, sharp chicken bones" in his mouth. *Weisheit II*, 109 N.E.3d at 988 (citation omitted).¹³

[63] As we have indicated, when evaluating prejudice, courts must consider "not just the mitigation evidence[,] but any and all evidence that "would have come in with it." *Belmontes*, 558 U.S. at 20–24, 130 S.Ct. 383. That is precisely how the

13. Weisheit attempts to challenge the significance of this evidence with conclusory statements that "some" evidence of his "erratic behavior" was already in the record through

Indiana Supreme Court proceeded. Weisheit does not dispute the court's interpretation of his disciplinary reports, nor its determination that the State would have introduced them to challenge Aiken's opinions. Given the speculative nature of Aiken's testimony and the likelihood that it would have triggered the introduction of powerful counterevidence, the Indiana Supreme Court reasonably determined that Weisheit did not suffer prejudice from the absence of Aiken's testimony. *See id.* (concluding that the petitioner did not establish prejudice where the sought "expert testimony discussing [the petitioner's] mental state, seeking to explain his behavior, or putting it in some favorable context would have exposed" the jury to powerful rebuttal evidence); *cf. Darden v. Wainwright*, 477 U.S. 168, 186, 106 S.Ct. 2464, 91 L.Ed.2d 144 (1986) (declining to find deficient performance where "[a]ny attempt to portray petitioner as a nonviolent man would have opened the door for the State to rebut with evidence of petitioner's prior convictions").

* * *

To summarize: the Indiana Supreme Court did not unreasonably apply *Strickland* when it concluded that Weisheit failed to establish ineffective assistance of counsel, so he is not entitled to habeas relief on these claims.

III. Conclusion

We observed at the outset that AEDPA intentionally presents a difficult standard for petitioners to meet. Weisheit has not carried his burden to meet it. For that reason, and because we agree with the district court's related de novo and discre-

Dr. Price's testimony. Having failed to articulate the character of this evidence from Dr. Price or the extent of any overlap, however, we are not persuaded.

tionary decisions, we AFFIRM the district court’s judgment.



Kiontae MACK, Plaintiff-Appellant,

v.

CITY OF CHICAGO, et al.,

Defendants-Appellees.

No. 23-2662

United States Court of Appeals,
Seventh Circuit.

Argued September 4, 2024

Decided August 13, 2025

Background: Former detainee, who was ultimately tried and acquitted of charges including first degree murder and armed robbery after nearly five years of pretrial detention, brought action under § 1983 against city and city police officers, alleging officers detained him without probable cause in violation of the Fourth Amendment, fabricated evidence to support his prosecution in violation of the Fourteenth Amendment, coerced an involuntary confession from him in violation of the Fifth and Fourteenth Amendments, and maliciously prosecuted him. On the parties’ cross-motions for summary judgment, the United States District Court for the Northern District of Illinois, Lindsay C. Jenkins, J., granted summary judgment for city and officers on all claims. Former detainee appealed.

Holdings: The Court of Appeals, Lee, Circuit Judge, held that:

(1) officers all had at least arguable probable cause to detain arrestee former detainee, and thus, were entitled to qualified immunity on claim that they violated Fourth Amendment based on initial pretrial detention;

- (2) there was no evidence that officers caused victim to give statement they knew with certainty was false, as required for claim that officers violated former detainee’s Fourth Amendment rights by detaining him based on fabricated evidence;
- (3) detectives’ purported fabrication of victim’s tentative identification of former detainee did not taint prosecutor’s decision to prosecute, and thus, did not violate Fourth Amendment;
- (4) even if use of single photograph with victim was unduly suggestive, detectives had at least arguable probable cause to continue to detain former detainee, and thus, were entitled to qualified immunity on his claim alleging violation of his Fourth Amendment rights;
- (5) former detainee’s post-indictment detention was supported by probable cause, and not predicated on alleged false statements by officers, and thus, officers were not liable for that period of detention;
- (6) admission of allegedly fabricated evidence at trial did not violate former detainee’s due process right to a fair trial; and
- (7) allegedly coerced confession was not used as testimony against former detainee in suppression hearing, and thus, his Fifth Amendment right against self-incrimination was not violated.

Affirmed.

1. Federal Courts ⇌3604(4), 3675

Court of Appeals reviews grants of summary judgment de novo, examining the record in the light most favorable to the nonmovant and construing all reasonable inferences from the evidence in his favor. Fed. R. Civ. P. 56(a).

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
NEW ALBANY DIVISION

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

Order Denying Petition for Writ of Habeas Corpus

Jeffrey Alan Weisheit was found guilty of setting fire to his home in the middle of the night and killing his girlfriend's two children—eight-year-old Alyssa Lynch and five-year-old Caleb Lynch. An Indiana jury convicted him of two counts of murder and one count of arson, and the trial court sentenced him to death. He has brought this 28 U.S.C. § 2254 petition for writ of habeas corpus challenging his convictions and death sentence. For the reasons outlined below, the petition for writ of habeas corpus is **denied**, but a certificate of appealability is **granted** as to Mr. Weisheit's claims of ineffective assistance of trial and appellate counsel and a finding of procedural default.

I. Background

We begin with an overview of the crimes of which Mr. Weisheit was convicted and the procedural history leading up to those verdicts. Additional facts relevant to individual claims are included throughout the Order.

A. Mr. Weisheit's Crimes¹

In April 2010, Mr. Weisheit was living in Evansville, Indiana, with his girlfriend, Lisa Lynch, and her two children, Alyssa and Caleb. Lisa and Mr. Weisheit had discussed their possible marriage, prompting him to begin making payments on a wedding ring for Lisa. When Lisa became pregnant, Mr. Weisheit developed doubts about whether the child was his. He stopped making payments on the ring and attempted to get a refund from the jeweler. Dkt. 88-24 at 127–28 (David Krantz testimony); dkt. 88-26 at 83–84 (Jeffrey Weisheit testimony). Two weeks before the house fire, Mr. Weisheit abruptly quit his job. Dkt. 88-24 at 149 (Martha Cavanah testimony) ("He stormed out, peeled out in the parking lot, just left erratically."). That same day he withdrew all the funds in his bank account. Dkt. 88-26 at 66 (Jeffrey Weisheit testimony). He previously had told a friend that "if he found out that [Ms. Lynch] was having an affair he would kill her, burn everything, and kill his self." Dkt. 88-24 at 149 (Martha Cavanah testimony).

On the evening of April 9, Mr. Weisheit was home alone with Caleb and Alyssa while Ms. Lynch was at work during the night shift. Around 3:45 a.m. on April 10, a fire at his house was reported. By the time first responders arrived, the house was engulfed in flames and Mr. Weisheit along with his car were gone.

Mr. Weisheit did not answer phone calls placed to him by anyone, including by Ms. Lynch. Officers eventually succeeded via OnStar to track his location in Boone County, Kentucky, more than 200 miles away. After local law enforcement in Kentucky identified his car, Mr. Weisheit engaged them in a high-speed chase, which ended only after three of his four tires had been deflated by the officers. Dkt. 88-23 at 109 (Matthew Kremer testimony). Mr. Weisheit exited the car

¹ Except where noted by citation to the trial record, this summary of the trial evidence is drawn from the Indiana Supreme Court's decision on direct appeal. *Weisheit v. State*, 26 N.E.3d 3 (Ind. 2015). The state court's factual determinations are presumed correct, requiring Mr. Weisheit to rebut that presumption, if he can, by clear and convincing evidence. 28 U.S.C. § 2254(e)(1).

brandishing a knife and shouting to the officers, "Come on, fucking kill me, mother fuckers, I want to die." Dkt. 88-23 at 139 (Jeffrey Weisheit testimony). Mr. Weisheit then threw a knife at an officer, prompting two other officers to shoot him with their tasers. Mr. Weisheit collapsed onto the pavement and struck his head, causing a mild concussion. *See* dkt. 88-27 at 237 (David Price testimony). Officers found \$4800 in cash on Mr. Weisheit's person, plus another \$895 in cash in his wallet. Dkt. 88-23 at 141–42 (Jason Noel testimony); *id.* at 159–60 (Jeremy Rosing testimony).

Meanwhile, in Evansville, the fire department managed to extinguish the fire at Mr. Weisheit's home and, together with law enforcement, began a search for bodies. Tragically, their search lead them first to five-year-old Caleb, who was found lying face down on his bed with both his wrists and feet bound by duct tape. Dkt. 88-25 at 91 (Allen Griggs testimony). His mouth was also taped shut; when the tape was subsequently removed to examine Caleb's teeth, the dentist discovered a rag shoved into his mouth. Dkt. 88-25 at 64–65 (Barbara Wells testimony); dkt. 88-17 at 106 (photograph). The rag had traces of bile on it, indicating that Caleb had gagged and vomited while it was in his throat. Dkt. 88-25 at 64–65 at 66. There was also soot in Caleb's larynx, indicating that he had been alive and breathing—though only through his nose—during the fire. Dkt. 88-25 at 95–96 (Allen Griggs testimony). Two remnants of railroad flares were found on or near Caleb's body: one in his underwear, (Dkt. 88-17 at 131 (photograph)), having burned his left thigh while he was still alive; the other located under his body.

Eight-year-old Alyssa's body was not found at the scene of the fire until the afternoon of April 10th, located in a closet with burns covering approximately 90 percent of her body. Dkt. 88-25 at 84 (Allen Griggs testimony). She was determined to have died from smoke inhalation, though investigators were uncertain as to whether she was already dead or still alive when her body was burned. *Id.* at 85–89.

Following his arrest, while at the hospital, Mr. Weisheit provided an oral statement to officers, *see* dkt. 88-17 at 111–30 (transcript of recorded statement), preceded by his *Miranda* warnings, which he stated that he understood. *Id.* at 114. Though Mr. Weisheit answered a few questions, he provided little by way of detail about the fire or the death of the children. He admitted leaving Caleb and Alyssa alone in the home on the night of April 9, but denied any knowledge of the origins of the fire and the harm to the children. *Id.* at 115–30.

B. Pretrial and Trial Proceedings

The State of Indiana charged Mr. Weisheit with two counts of murder and one count of arson including a request for the death penalty. *Weisheit I*, 26 N.E.3d at 7. Defense counsel's motion to suppress Mr. Weisheit's post-arrest statement to officers was denied based on the Court's finding that the statement had been voluntary and was thus admissible. *Id.* at 17.

Following the prosecution's evidence, the defense called several witnesses, including Mr. Weisheit, who testified against his counsel's advice. Dkt. 88-26 at 51–52. He testified that he had quit his job in March 2010 because he was angry at his boss and explained that he had withdrawn all the money from his bank account before he fled because he had been worried that automatic withdrawals would deplete the funds in the account. Dkt. 88-26 at 65.

Regarding the night of the fire, Mr. Weisheit testified that Caleb had refused to go to bed and wanted to continue playing. *Id.* at 66. Mr. Weisheit said he "got real mad" at Caleb and in reaction to his anger taped the boy's hands behind his back. *Id.* According to Mr. Weisheit, Caleb "kept saying [he was sorry] over and over," prompting Mr. Weisheit to shove a rag into his mouth and cover it with duct tape. *Id.*

Mr. Weisheit's anger continued, leading him to pack up his clothes along with some of Ms. Lynch's jewelry and drive away from the house in an attempt to "cool down." *Id.* at 66–68.

He left the house around 1:00 a.m. and drove around Evansville until deciding to drive to Cincinnati. *Id.* at 68. When the police caught up with him and tried to stop him, his evasive efforts stemmed simply from his wanting to be left alone. *Id.* When police finally did succeed in stopping him, his shouts at the officers and his knife throwing were intended to provoke the officers into shooting him. *Id.* at 69.

For the most part Mr. Weisheit did not dispute the State's evidence at trial, though he did deny setting the fire. *Id.* at 72. On cross-examination, he admitted to having brought the railroad flares into the house when he first moved in, but could not explain how one flare ended up in Caleb's underwear. *Id.* at 74. He testified that he believed the fire had started from an electrical event due to the improper wiring of two ceiling fans. *Id.* at 77.

In response to the prosecutor's question on cross-examination of Mr. Weisheit, when asked: "So it just so happens that on the night you decided to pack up and leave, with all of your belongings, on the night you so happen to have hogtied Caleb with duct tape, and there so happened to be found three flares under his body, one in his underwear, there was a malfunction?", Mr. Weisheit responded, "Things happen." *Id.*

The jury returned verdicts of guilty as charged on all three offenses. Dkt. 88-26 at 173–74.

During the penalty phase of the post-trial proceedings, the State incorporated all the evidence that had been presented during the guilt phase. *Id.* at 196–97. In defense, Mr. Weisheit called 18 witnesses, which included members of his family, various friends, a former neighbor, a former teacher, a counselor from the Indiana Boys School where he had been in custody as a juvenile, his former therapist, a jail officer, and two psychological experts. *See generally* dkt. 88-26 at 198–250, dkt. 88-27 at 1–249, and dkt. 88-28 at 1–26. The thrust of the defense was primarily to demonstrate that Mr. Weisheit suffered from bipolar disorder and that he had

committed these crimes during an uncontrolled manic state.² The State called two expert witnesses in rebuttal. Dkt. 88-28 at 27–84.

Following deliberations, the jury concluded that four statutory aggravating circumstances had been established which outweighed the mitigating circumstances and recommended imposition of a sentence of death. *Id.* at 130–31. In concurrence with the jury, the trial court imposed the death penalty on each of the two murder convictions and imposed a twenty-year consecutive prison term for the arson. Dkt. 88-28 at 152; *Weisheit I*, 26 N.E.3d at 4.

C. Direct Appeal and Post-Conviction Review

Mr. Weisheit filed a direct appeal to the Indiana Supreme Court, raising seven claims:

- the trial court's exclusion of James Aiken's testimony, in violation of his Eighth Amendment rights;
- his arson conviction was based on insufficient evidence;
- the trial court's refusal to dismiss several jurors for cause, thereby requiring him to exhaust his peremptory challenges, which was an abuse of discretion;
- the "thank you" note sent by the wife of a juror to the jury as a whole constituted a prejudicial outside communication, in violation of his Sixth Amendment right to an unbiased jury;
- his murder convictions were based on insufficient evidence;
- his involuntary statement given to police at the hospital and introduced into evidence at trial, in violation of the Fifth and Sixth Amendments; and
- his sentence of death.

See generally dkt. 86-5. The Indiana Supreme Court, in a unanimous opinion, affirmed Mr. Weisheit's convictions on all grounds. *Weisheit I*, 26 N.E.3d at 21.

² Mr. Weisheit also called James Aiken, a retired Indiana Department of Correction Commissioner, to testify regarding the Indiana Department of Correction's ability to safely house Mr. Weisheit in prison, *see* dkt. 88-27 at 149, but this testimony was excluded. *Id.* at 171–72.

Mr. Weisheit next filed a petition seeking post-conviction relief. Following an evidentiary hearing, the relief sought was denied in a thorough and exhaustive (81-page) written order. Dkt. 22-34. Mr. Weisheit appealed that denial, arguing that his trial and direct appeal counsel were ineffective in the following ways:

- during voir dire, for failing to ensure that jurors would consider a term of years sentence if they found him guilty;
- during the suppression hearing, for failing to introduce evidence to establish that Mr. Weisheit had not wanted to sign the *Miranda* waiver at the hospital prior to making his statement to law enforcement;
- during the guilt phase of trial, for failing to object to the opinion testimony of three experts - a local fire department official, the state fire marshal, and a police detective - each of whom testified that the fire at Mr. Weisheit's house was intentionally set;
- during the penalty phase of trial, for counsel's failure to:
 - obtain records regarding Mr. Weisheit's stay at the Indiana Boys School for submission to and review by his expert witnesses;
 - call Dr. Philip Harvey as an expert witness;
 - call Dr. Ruben Gur as an expert witness (or another such witness) to testify about Mr. Weisheit's history of mild traumatic brain injury; and
 - submit a more convincing offer of proof regarding the excluded testimony of James Aiken;
- the prejudicial effect of these cumulative errors; and
- on appeal, counsel's failure to adequately brief a "biased jury" claim as part of his direct appeal.

See generally dkt. 86-15. In a split decision, the Indiana Supreme Court affirmed Mr. Weisheit's convictions. *Weisheit v. State*, 109 N.E.3d 978 (Ind. 2018) ("*Weisheit II*"). One justice concurred in part and concurred in the judgment, concluding that trial counsel performed deficiently at the penalty phase but agreeing with the majority that Mr. Weisheit was not prejudiced by counsel's ineffectiveness. *Id.* at 994–96 (Slaughter, J., concurring in part and in the judgment). Another

justice dissented in part and concurred in part, concluding that trial counsel's penalty phase performance was both deficient and prejudicial. *Id.* at 996–1021 (Rush, C.J., concurring in part and dissenting in part).

On January 17, 2020, Mr. Weisheit filed a petition for writ of habeas corpus in this Court one year to the day following the Indiana Supreme Court's denial of rehearing of his post-conviction appeal. Dkt. 21. On September 4, 2021, he filed an amended petition, which is the operative petition before us here. Dkt. 67. The amended petition advances 33 "claims," and though many are not actually separate claims, rather, they comprise specific allegations in support of Mr. Weisheit's ineffective assistance of counsel claims.³ *Id.* Mr. Weisheit has recently filed two motions to stay these proceedings: the first, based on his alleged incompetence, dkt. 95, and the second, to allow him to return to state court to litigate allegedly unexhausted claims, dkt. 112. We address the motions to stay below:

II. Defaulted Claims and Motion to Stay for Exhaustion

Well-established case law provides that if a petitioner in custody pursuant to a state court judgment raises a claim on federal habeas review without first presenting it through "one complete round of the State's established appellate review process," and there is no available avenue left to raise the claim in state court, the claim is procedurally defaulted. *O'Sullivan v. Boerckel*, 526 U.S. 838, 845 (1999); *Johnson v. Foster*, 786 F.3d 501, 504 (7th Cir. 2015). To excuse the default in an effort to obtain relief on a procedurally defaulted claim, a petitioner must show either "cause and prejudice" or "that the court's failure to consider the defaulted claim would result in a fundamental miscarriage of justice." *McDowell v. Lemke*, 737 F.3d 476, 483 (7th Cir. 2013).

³ For consistency, the Court adopts Mr. Weisheit's format in laying out his claims.

Mr. Weisheit concedes that he has failed to present Claims 1, 2, 3, 5, 6, 7, 8, 10, 13, 14, 17, 18, 19, 20, 21, 22, 25, 29, 30, 31, 32, and 33 through one complete round of Indiana's ordinary appellate review process. Dkt. 107 at 10. He contends that he could successfully muster a defense for these defaults, but only with evidence that exists outside the current state-court record. *Id.* at 10–11 ("[E]ach may require evidentiary development beyond the trial court record to establish cause to excuse the default and to establish the factual development of the underlying record."). He therefore seeks a stay of these proceedings to allow him to return to state court to develop a sufficient record. We decline to grant him his request for a stay.

A. Applicable Law

Until recently, many federal courts allowed petitioners to expand the record in federal habeas proceedings to excuse defaulted claims based on the alleged ineffective assistance of trial counsel. *See Brown v. Brown*, 847 F.3d 502, 517 (7th Cir. 2017) (remanding for evidentiary hearing on ineffective assistance of post-conviction counsel and noting that, if the default is excused, petitioner "will be entitled to an evidentiary hearing on the merits in the district court for the underlying claim of ineffective assistance of trial counsel").

However, under current statutes, if a petitioner "has failed to develop the factual basis of a claim in State court proceedings," a federal court can conduct an evidentiary hearing or consider evidence outside the state-court record for that claim only if —

(A) the claim relies on—

- (i) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or
- (ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and

(B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

28 U.S.C. § 2254(e)(2).

The Supreme Court recently ruled that, for purposes of § 2254(e)(2), "state postconviction counsel's ineffective assistance in developing the state-court record is attributed to the prisoner." *Shinn v. Ramirez*, 142 S. Ct. 1718, 1734 (2022). Thus, to be permitted to expand the record in this Court, Mr. Weisheit must be able to satisfy one of the § 2254(e)(2) exceptions. His inability to establish actual innocence under § 2254(e)(2)(B) forecloses any such expansion.

B. Discussion

Mr. Weisheit acknowledges that he cannot satisfy § 2254(e)(2) in light of *Shinn*, and, specifically, that he cannot succeed on his defaulted claims without expanding the record. Thus, Mr. Weisheit seeks a stay of his federal proceedings to allow him an opportunity to raise his defaulted claims in state court. Dkt. 112 at 11 ("Following *Shinn*, such evidentiary development . . . to overcome state procedural bars must take place in state court while the federal petition is stayed.>").

In his motion to stay proceedings, Mr. Weisheit repeatedly characterizes the relevant claims as "defaulted." *See, e.g.,* dkt. 112 at 32 ("Petitioner can demonstrate good cause to excuse procedural default of claims he seeks to exhaust."); *id.* at 37 (arguing that "the procedural default [of Claim 5] is attributable to post-conviction counsel's failure to raise this important issue"); *id.* at 38 ("Post-conviction counsel's deficiency amply supplies cause to overcome the default [of Claim 10]."); *id.* at 41 ("As per *Martinez*, equitable principles require excuse of the procedural default [of Claim 18] lest no court ever address this potentially meritorious claim."). However, in his reply in support of his motion, Mr. Weisheit changes tack, insisting that his claims are

unexhausted, rather than procedurally defaulted, because state procedures are available that would allow him to bring these claims. Dkt. 117 at 5–8; *cf. Perruquet v. Briley*, 390 F.3d 505, 514 (7th Cir. 2004) (explaining that a claim that has not been fully and fairly presented in state court is unexhausted if "state remedies remain available" and procedurally exhausted if "there is no longer any state corrective process available").

Mr. Weisheit identifies two state procedures as being available to him: a successive post-conviction petition and a petition to the Supreme Court based on "new evidence," pursuant to Indiana Code § 30-50-2-9(k). However, he has not been successful in establishing that either statutory route is actually available to him. Our review brings us to the conclusion that Mr. Weisheit's claims are, in fact, defaulted, not merely unexhausted, for the reasons explicated hereafter:

Under Indiana law, "[c]laims that could have been, but were not, raised in earlier proceedings and otherwise were not properly preserved are procedurally defaulted; we do not authorize the filing of successive petitions raising [such] forfeited claims." *Matheney v. State*, 834 N.E.2d 658, 662 (Ind. 2005). The ineffective assistance of post-conviction counsel ordinarily does not excuse a petitioner's failure to bring such a claim in his first post-conviction petition. *Baird v. State*, 831 N.E.2d 109, 117 (Ind. 2005). So long as post-conviction counsel "in fact appeared and represented the petitioner in a procedurally fair setting," a petitioner cannot seek to raise a claim in a successive petition that could have been brought in the original one. *Graves v. State*, 823 N.E.2d 1193, 1196 (Ind. 2005) (quoting *Baum v. State*, 533 N.E.2d 1200, 1201 (Ind. 1989)). In other words, a petitioner must establish that he was "abandoned" by post-conviction counsel. *Hill v. State*, 960 N.E.2d 141, 150 (2012) (denying relief on successive petition because original post-conviction counsel "far from abandoned" petitioner). Mr. Weisheit does not contend that his

post-conviction counsel abandoned him, and the record does not support such a finding. Thus, he has failed to show that he is entitled to file a successive state post-conviction petition on that claim.

Similarly, Mr. Weisheit has not identified any "new evidence" that would permit the filing of a successive petition to Indiana Supreme Court under Indiana Code § 35-50-2-9(k); *see Pruitt v. State*, 903 N.E.2d 899, 933 (Ind. 2009) ("[T]he evidence must be discovered since the trial, and the defendant must have used due diligence to discover it before trial." (cleaned up) (emphasis retained)). He has therefore failed to show that this avenue of redress is available to him.

Because no state court pathway remains available to him, Mr. Weisheit's claims are procedurally defaulted. *Perruquet*, 390 F.3d at 514. But even if Mr. Weisheit's claims were deemed unexhausted, rather than defaulted, entry of a stay would not be appropriate. The United States Supreme Court has directed that a stay of a mixed petition is appropriate only where (1) "there was good cause for the petitioner's failure to exhaust," (2) the claims are not "plainly meritless," and (3) the petitioner has not engaged in "abusive litigation tactics or intentional delay." *Rhines v. Weber*, 544 U.S. 269, 277–78 (2005). We find that Mr. Weisheit has failed to satisfy the first and third prongs of this test.

If, as Mr. Weisheit asserts, a state court process is available to him to exhaust his claims, that process was equally available to him in February 2019, when he initiated this action by moving for appointment of counsel. Dkt. 1. It was also available to him in January 2020, when he filed his first § 2254 petition—which included his acknowledgement that several claims were either unexhausted or procedurally defaulted for failure to complete one complete round of state court review. Dkt. 21. And it was available to him in September 2021, when he filed his amended § 2254 petition, dkt. 67. Yet, even now, no motion for leave to file a successive post-conviction petition nor a petition to the Indiana Supreme Court based on new evidence has been filed by Mr. Weisheit.

Over the past three-and-a-half years, Mr. Weisheit has advanced no good cause showing for his failure to exhaust or even attempt exhaustion. He maintains that prior to *Shinn* he had no reason to go to state court, because he "anticipated presenting newly developed evidence in the federal court." Dkt. 112 at 21. But a preference for litigating in federal court does not constitute "good cause" sufficient to overcome a failure to exhaust the process available in state court. If Mr. Weisheit had an available state-court avenue for relief, he was statutorily required to pursue it before litigating his claims (for years) in federal court. 28 U.S.C. § 2254(b); *See Yeoman v. Pollard*, 875 F.3d 832, 837 (7th Cir. 2017) ("[T]he court may grant a stay and abeyance only when the petitioner demonstrates good cause for failing to exhaust his or her claims *first* in state court." (emphasis added)). He is not entitled at this juncture to pursue as a fallback option an attempt to avail himself of state court procedures when the federal process is no longer available to him.

Accordingly, Mr. Weisheit's motion to stay proceedings pending a return to state court to secure exhaustion of his claims, dkt. [112], is **denied**. Claims 1, 2, 3, 5, 6, 7, 8, 10, 13, 14, 17, 18, 19, 20, 21, 22, 25, 29, 30, 31, 32, and 33 are thus procedurally defaulted, foreclosing relief to Mr. Weisheit unless and until he can establish cause and prejudice sufficient to excuse the defaults, *Davila v. Davis*, 137 S. Ct. 2058, 2064–65 (2017). However, because the record before us does not reflect any legally sufficient cause to excuse the defaults, these claims are **denied** as defaulted.

III. Non-Defaulted Claims

A. Applicable Law

1. Section 28: § 2254(d)

A successful state petitioner's petition for writ of habeas corpus must establish that the petitioner's custody violates "the Constitution or laws or treaties of the United States." 28 U.S.C. § 2254(a).

After a state court has adjudicated the merits of a petitioner's claim, federal habeas relief is unavailable, unless the state court's adjudication—

(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." *Dassey v. Dittmann*, 877 F.3d 297, 302 (7th Cir. 2017) (en banc).

Where no state court has adjudicated the merits of petitioner's claims, or where either prong of § 2254(d) is met, federal habeas review is *de novo*. *Thomas v. Clements*, 789 F.3d 760, 766–68 (7th Cir. 2015).

2. *Strickland v. Washington*

Many of Mr. Weisheit's claims before us focus on his allegations of ineffective assistance of counsel. To succeed on such a claim regarding trial counsel, a petitioner must show that counsel's performance was deficient and prejudicial. *Strickland v. Washington*, 466 U.S. 668, 689–92 (1984); *Dunn v. Neal*, 44 F.4th 696, 706–07 (7th Cir. 2022). Counsel's performance is "deficient" if it "fell below an objective standard of reasonableness" and "prejudicial" if there is "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 688, 694.

B. Sufficiency of the Evidence for Arson Conviction (Claim 15)

Mr. Weisheit's claim based on his arson conviction is that it lacked a legally sufficient evidentiary basis. Applicable Supreme Court decisions clearly establish that a criminal conviction may stand only if "the record evidence could reasonably support a finding of guilt beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 319 (1979). "[T]he relevant question is

whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Id.*

The Indiana Supreme Court addressed and resolved this claim on Mr. Weisheit's direct appeal. *Weisheit I*, 26 N.E.3d at 11–12. While the Court did not specifically rely on *Jackson*, it correctly set forth and applied the *Jackson* standard: "Appellate courts affirm the conviction unless no reasonable factfinder could find the elements of the crime proven beyond a reasonable doubt." *Id.* at 11. Applying that test, the Court reasonably concluded that the evidence adduced during Mr. Weisheit's trial easily satisfied this requirement.

Mr. Weisheit argues that "[t]he circumstantial evidence presented to the jury was too speculative to warrant conviction." Dkt. 67 at 142. That argument finds no support in the Indiana Supreme Court's opinion, which includes the following itemization of evidence from which the jury could have concluded that Mr. Weisheit intentionally set fire to his home:

- A few months before the fire, Weisheit told a co-worker that if he found out that Lisa was having an affair, he would kill her, then kill himself and burn everything";
- Weisheit told another co-worker that "if he had to get rid of [Lisa] he could. He could pull teeth, cut fingers off, put her in a place nobody would find her." He said if he were to leave, he would go out "[i]n a blaze of glory";
- Weisheit admitted to being very upset that Lisa was pregnant and questioned if the child was his;
- In late March 2010, Weisheit cancelled the layaway plan he was using to purchase an engagement ring for Lisa and told the jewelry store manager that Lisa and he had broken up and that he was going to leave the country;
- Weisheit admitted that he brought railroad flares into the house and was going to work at a railroad the next day;
- The day before the fire, Weisheit quit his job and withdrew all the money in his bank account;

- Weisheit admitted that on the night of the fire, because Caleb did not want to go to bed, he hog-tied the boy and stuffed a twelve-inch-by-twelve-inch washcloth into his mouth;
- Weisheit admitted that on the night of the fire he left the house alone with one child hog-tied and duct taped;
- Weisheit fled the State of Indiana the night of the fire;
- As he fled, Weisheit did not respond to numerous phone calls and refused to speak with Lisa when OnStar contacted him on her behalf;
- Weisheit fled police at speeds exceeding 140 miles per hour;
- When surrounded by police, Weisheit implored the officers to shoot him, threw a knife at officers, and had to be tased into submission;
- Weisheit had \$4,800 in cash, clothes, toiletries, and Lisa's jewelry in his possession when he was taken into custody;
- At the hospital, Weisheit selectively answered certain questions by the police but pretended to be asleep when asked about the fire or the children's whereabouts;
- One burnt flare was found stuffed in Caleb's underwear and another was recovered under his body; and
- Fire Marshall Kinder concluded that, based on the totality of the circumstances, the fire that killed Alyssa and Caleb Lynch was started intentionally.

Weisheit I, 26 N.E.3d at 11–12.

This evidence provides significantly more than a sufficient basis on which the jury could have concluded that Mr. Weisheit knowingly set fire to his home. Accordingly, we hold that the Indiana Supreme Court reasonably rejected Mr. Weisheit's sufficiency of the evidence claim as to the arson conviction. *Id.* at 12. Relief is therefore barred by 28 U.S.C. § 2254(d), and this claim is **denied**.

C. Investigation Testimony—Ineffective Assistance of Counsel (Claim 16)

Mr. Weisheit also alleges that trial counsel was ineffective for his failure to object to the testimony by a local fire department official, the state fire marshal, and the lead police detective, all of whom testified to their opinions that the fire in Mr. Weisheit's home was intentionally set.

The Indiana Supreme Court addressed and resolved these allegations of ineffectiveness in connection with the post-conviction appeal.

As for the testimony of the local fire department official and the state fire marshal, the Indiana Supreme Court found no deficiency or prejudice, ruling that the opinions were admissible under the Indiana rules of evidence. *Weisheit II*, 109 N.E.3d at 991 (citing Indiana Rule of Evidence 704(b)). It is not our role to dispute or contradict the Indiana Supreme Court's application of Indiana's evidentiary rules, even when such evidentiary ruling may be dispositive as to the federal ineffective assistance of counsel claim., *Sennholz v. Strahota*, 722 Fed. App'x 569, 571–72 (7th Cir. 2018); *cf. Miller v. Zatecky*, 820 F.3d 275, 276 (7th Cir. 2016) (relief unavailable on ineffective assistance of appellate counsel claim; in light of state court's ruling on underlying state-law issue, petitioner's "chance of success was zero"). Thus, the testimony of these fire protection officials stands, given the Indiana Supreme Court rulings.

The Indiana Supreme Court was less clear, however, as to whether the police detective's testimony was properly admitted. *Weisheit II*, 109 N.E.3d at 991 ("While defense counsel arguably could have objected, it is not clear such an objection would be sustained because defense counsel may have opened the door."). Regardless of any deficiency in counsel's performance, the Indiana Supreme Court held that Mr. Weisheit was not prejudiced by such testimony because "the expert testimony was not nearly as persuasive as Weisheit's actions before, during, and after the crime." *Id.* at 992.

This holding represents a reasonable application of *Strickland*. Given that the evidence of Mr. Weisheit's guilt was overwhelming, the lead police detective's opinion testimony likely had at most a minor impact on the jury's verdict in part because it was cumulative of the testimony of the fire officials and was of much less significance compared to all the other evidence of Mr. Weisheit's guilt. This ineffectiveness claim in this respect is therefore unavailing and barred by § 2254(d).

D. Biased Jury (Claims 9 and 11)

Mr. Weisheit next argues that his Sixth and Fourteenth Amendment rights to an unbiased jury were violated and also that appellate counsel was ineffective in failing to properly assert this a claim on direct appeal. We address each contention in turn below:

1. Due Process and Sixth Amendment Right to Unbiased Jury (Claim 9)

Mr. Weisheit contends that the trial court improperly denied his for-cause objections to several members of the venire, forcing him to use peremptory strikes and resulting in the empaneling of at least one biased juror and in refusing to voir dire to determine whether jurors could or would consider a sentence other than the death penalty. Dkt. 67 at 112–20. The Supreme Court has made clear that a defendant is entitled to an impartial jury under the Sixth Amendment, and even one juror "who will automatically vote for the death penalty in every case" violates that right. *Morgan v. Illinois*, 504 U.S. 719, 728 (1992).

Regarding the court's refusal to grant for cause strikes of certain jurors, "peremptory challenges are . . . a means to achieve the end of an impartial jury." *Ross v. Oklahoma*, 487 U.S. 81, 88 (1988). "So long as the jury that sits is impartial, the fact that the defendant had to use a peremptory challenge to achieve that result does not mean the Sixth Amendment was violated." *Id.*

The Supreme Court has also clearly ruled that state defendants have a Fourteenth Amendment due process right to exercise peremptory challenges to the extent they are afforded under state law. *Id.* at 88–89. But "there is no freestanding constitutional right to peremptory challenges." *Rivera v. Illinois*, 556 U.S. 148, 157 (2009). "If a defendant is tried before a qualified jury composed of individuals not challengeable for cause, the loss of a peremptory challenge due to a state court's good-faith error is not a matter of federal constitutional concern. Rather, it is a matter for the State to address under its own laws." *Id.*

The Indiana Supreme Court fully considered and adjudicated this claim on direct appeal. Its denial of the claim based on Mr. Weisheit's failure to identify any biased juror who was actually empaneled was a legally reasonable conclusion. *Weisheit I*, 26 N.E.3d at 13 ("[Mr. Weisheit's] conclusory assertion that he was forced to accept biased jurors is not nearly enough for us to find reversible error. At oral argument, Weisheit conceded as much."). Under *Ross*, and other applicable Supreme Court precedents, we thus hold that the decision of the Indiana Supreme Court on this issue in its entirety was reasonable.

Mr. Weisheit has recently supplemented his original jury bias claim to specify that at least one "biased or objectionable juror" was empaneled. Dkt. 67 at 119–20. Even so, we hold that the Indiana Supreme Court did not unreasonably reject this claim as it was presented in that forum. *See Felton v. Bartow*, 926 F.3d 451, 467 n. 5 (7th Cir. 2018) (state court reasonably found no prejudice based on arguments briefed in state court). To the extent Mr. Weisheit now seeks to raise a different claim in the case at bar, it has been procedurally defaulted. *Perruquet v. Briley*, 390 F.3d 505, 514 (7th Cir. 2004) ("[W]hen the habeas petitioner has failed to fairly present to the state courts the claim on which he seeks relief in federal court and the opportunity to raise that claim in state court has passed, the petitioner has procedurally defaulted that claim.").

2. Ineffective Assistance of Appellate Counsel (Claim 11)

Mr. Weisheit contends that his appellate counsel was ineffective in failing to argue (a) that Jurors 1, 2, 8, and 9 were "blatantly biased" against him, and (b) that a more favorable state-law standard governed his claim. Dkt. 67 at 123–26.

Mr. Weisheit concedes that the "more favorable state-law standard" issue in part (b), *supra*, has been procedurally defaulted. Though he does not concede that part (a) has, for the most part, also been procedurally defaulted, we hold that it has been. In the Indiana Supreme Court on post-conviction appeal, Mr. Weisheit raised this ineffective assistance of appellate counsel claim but only as to Juror 2.⁴ This claim thus has clearly been defaulted as to all the other jurors. *Pole v. Randolph*, 570 F.3d 922, 935 (7th Cir. 2009) ("[I]f a petitioner fails to assert in the state courts a particular factual basis for the claim of ineffective assistance, that particular factual basis may be considered defaulted.").

In adjudicating this claim relating to Juror 2 on post-conviction appeal, the Indiana Supreme Court concluded that appellate counsel's performance was neither deficient nor prejudicial. *Weisheit II*, 109 N.E.3d at 993. Our review leads us to hold that this prejudice determination by the Supreme Court was reasonable.⁵

⁴ We refer to the jurors by their numbers they were assigned at trial. The Indiana Supreme Court refers to this juror as "Juror 7," based on his designation before trial. *Weisheit II*, 109 N.E.3d at 992.

⁵ The Indiana Supreme Court's deficiency analysis on post-conviction appeal is difficult to square with its direct appeal decision. On post-conviction appeal, the Court explained,

[C]ounsel provided significant relevant information about Juror [2]'s views that appears on the same page as the quote Weisheit prefers. In any case, this Court in reaching its decision is not limited to only what the parties discuss and cite in their briefs. Instead, we "review relevant portions of the record" thoroughly and "often decide cases based on legal arguments and reasoning not advanced by either party." The language quoted by the parties is only the starting place for our review and decision-making.

Weisheit II, 109 N.E.3d at 993. On direct appeal, the Indiana Supreme Court had rejected Mr. Weisheit's claim of a biased jury due to his failure to identify any objectionable juror who was actually empaneled. *Weisheit I*, 26 N.E.3d at 13. Regardless, our analysis and determination may permissibly turn only on the

During voir dire, defense counsel presented Juror 2 with the following hypothetical:

Murder of two children, eight and five, and an arson. No defenses, no mental illness that would excuse it, no retardation that would excuse it, no drugs, no alcohol defenses that you would consider, just kind of stone cold-blooded killer of two innocent children. Is death the only appropriate penalty for that kind of a guilty murder?

Dkt. 88-18 at 141. Juror 2 answered in the affirmative. *Id.* Juror 2 also chose "somewhat agree" as the appropriate response on the questionnaire to "an eye for an eye." *Id.* at 142.

The Indiana Supreme Court acknowledged that Juror 2 "states a strong preference for the death penalty under facts like the ones of this case." *Weisheit II*, 109 N.E.3d at 993. But it also noted that the facts included in the hypothetical were not "all the facts" in the case tried to the jury. *Id.* Mr. Weisheit included mitigating circumstances evidence during the penalty phase of trial, including his bipolar disorder. He also argued that the murders were not "cold blooded," rather, simply impulsive acts driven in part by an episode of mania reflective of his history of mental illness and his reckless behavior during the aftermath of the crime. The Indiana Supreme Court also accurately noted that Juror 2 explained at another point during voir dire that he did not believe the death penalty was "always the right thing to do," stating that "it depends on the facts and circumstances of an individual case as applied." Dkt. 88-18 at 121; *Weisheit II*, 109 N.E.3d at 993. Given these facts in the properly expanded record, we find that the Indiana Supreme Court's determination that Mr. Weisheit was not prejudiced by the failure of his direct appeal counsel to assert Juror 2's alleged bias was reasonable. Thus, relief on this claim is barred by § 2254(d).

E. Use of Hospital Statement (Claim 4)

Mr. Weisheit contends that the introduction of his statement at trial, which he had provided to law enforcement during his hospital stay, violated his Fifth and Sixth Amendment rights because

lack of prejudice factor, without addressing whether the Indiana Supreme Court's deficiency determination on post-conviction appeal was reasonable.

the statement was not voluntarily given. Supreme Court precedent clearly establishes that the introduction of an involuntary custodial statement violates the Fifth and Sixth Amendments. *Dickerson v. United States*, 530 U.S. 428, 433 (2000). The test for voluntariness "takes into consideration the totality of all the surrounding circumstances—both the characteristics of the accused and the details of the interrogation." *Id.* (cleaned up). In analyzing voluntariness of statements by a defendant, the ultimate question for the court to determine is "whether a defendant's will was overborne." *Schneckloth v. Bustamonte*, 412 U.S. 218, 226 (1973).

The trial court denied Mr. Weisheit's motion to suppress his statement, finding "no proof of Mr. Weisheit losing consciousness and not being aware of his rights during the interview. To the contrary, the medical proof is that he was alert and oriented." Dkt. 88-2 at 245–46. In its ruling on appeal, the Indiana Supreme Court also credited the state court's finding that "the officers conducting the interview did not demonstrate any coercive or overbearing conduct." *Weisheit I*, 26 N.E.3d at 17 (cleaned up).

The Indiana Supreme Court, in adjudicating Mr. Weisheit's direct appeal, concurred in the trial court's assessment that Mr. Weisheit's statement had been voluntarily provided. *Weisheit I*, 26 N.E.3d at 18. The Indiana Supreme Court also relied upon and applied the correct legal standards, including its reasonable deference towards the trial court's factual findings, including that "the officers conducting the interview did not demonstrate any coercive or overbearing conduct." *Id.* at 17 (cleaned up).

Our court applies § 2254(d)(1) in analyzing the legal conclusion that Mr. Weisheit's hospital-derived statement was voluntary, while § 2254(d)(2) and § 2254(e)(1) provide the statutory guidance for reviewing the state courts' underlying factual determinations. *See Dassey v.*

Dittman, 877 F.3d 297, 316 (7th Cir. 2017) ("Because the Wisconsin appellate court accepted the trial court's findings of fact, we review the trial court's factual determinations directly.").

We have no difficulty reaching the decision that Mr. Weisheit has not successfully established the unreasonableness of the state trial court's factual findings. He challenges the officers' testimony that he pretended to drift into sleep when they asked more pointed questions about what he had done to Caleb and Alyssa. Dkt. 67 at 98–102. However, importantly, the state trial court's ruling was based on the audio recording of Mr. Weisheit's statement,⁶ plus the testimony of the detectives, medical providers, and a neurological expert witness. We do not reweigh that evidence *de novo*. On the record before us, we conclude that Mr. Weisheit's attempt to demonstrate that the trial court's assessment of the evidence was unreasonable is unavailing.

Finally, Mr. Weisheit contends that the officers interviewing him at the hospital made conflicting comments that effectively nullified his *Miranda* warnings, when they said: "You need to sit up here and talk to us" and "So you need to tell me what happened to those babies and you need to tell me what happened in that house last night." Dkt. 67 at 97. In reviewing this claim and these statements, both the trial court and Indiana Supreme Court determined that the officers' conduct was neither "coercive or overbearing." *Weisheit I*, 26 N.E.3d at 17 (cleaned up). Their

⁶ Our own review of the audio recording reveals misstatements by counsel representing Mr. Weisheit in the petition before us in at least one material respect concerning his interrogation by law enforcement officers. In his amended petition, Mr. Weisheit states that he invoked his right to counsel, as follows: "I wanna talk to a lawyer, should of [sic] had the right to remain silent." Dkt. 67 at 97 (alteration in amended petition). Counsel argues that this statement "made no reference to the [*Miranda*] warnings, and it was as if he had been denied his right to remain silent." *Id.* However, the transcript of the audio recording proves otherwise: near the 19-minute mark in the audio recording, Mr. Weisheit is heard to say, "I'll talk to the lawyer. You said I had the right to remain silent." Dkt. 67-33 at 18:57–19:02. This statement refers to the *Miranda* rights that had been read to Mr. Weisheit some 15 minutes prior. *Id.* at 2:53–3:34. As such, this statement provides further support for the state trial court's finding that Mr. Weisheit was alert, oriented, and aware of his rights.

findings, we hold, were not unreasonable, either as factual determinations or as applications of clearly established law. Relief on this claim is therefore barred by § 2254(d).

F. Extrajudicial Communication (Claim 12)

1. Claim-specific background

On the first day of Mr. Weisheit's trial, after witnesses began to testify, Juror 10 brought in cookies baked by his wife for his fellow jurors to enjoy. *See* dkt. 88-24 at 237–39 (questioning of Juror 10). Attached to the box of cookies was a note on which was written, "Thank you for your service for the family of Alyssa [and] Caleb Lynch. I will pray for you all to have strength and wisdom to deal with the days ahead. God bless!" Dkt. 67-37 (thank you note).

Each juror and alternate juror was questioned individually about the impact, if any, of this note on their ability to hear and decide the case impartially. Dkt. 88-24 at 223–251; dkt. 88-25 at 4. Jurors 1, 2, 3, and 6 testified that they did not recall seeing the note. Alternate Jurors 1 and 2 observed the note but did not read it. Dkt. 88-24 at 247–50. Juror 9 saw the note, but ignored it and "went straight for the cookies." *Id.* at 236. Jurors 4, 5, 7, 11, and 12, and Alternate Juror 3 said that they had read the note and recalled it, but characterized it as a generic "thank you" note. Each juror stated that the note would not affect his/her objectivity. Juror 7 specifically stated that in his/her view, the note did not seem to be an attempt to sway the jury in either direction. Dkt. 88-24 at 233.

Juror 8 was the only member of the venire who reported that he recalled that the note mentioned Caleb and Alyssa. *Id.* at 234. Juror 8 said that the reference to the children's names came as a surprise, but, after re-reading the note, like the others he concluded it was not an attempt to influence the jury in either direction. *Id.* Juror 8 disputed that the note had struck "a sentimental chord," stating that "it hasn't affected me at all." *Id.* at 235.

Juror 10, who himself had not read the note from his wife, was nonetheless removed from the jury by the judge for having brought in and shared the outside communication. *Id.* at 237–41; dkt. 88-25 at 17–19. As the judge explained to the full jury regarding the removal of Juror 10: "There's nothing negative to be taken about the gentleman I've excused. I just think the process is served better when we don't have circumstances like that that upset our jury process." *Id.* at 20.

2. Constitutional violation based on extrajudicial communication

Mr. Weisheit maintains that the cookie and thank-you note incident entitled him to a mistrial based on the Fourteenth and Sixth Amendments which guarantee him the right to be tried before an impartial jury. *Morgan v. Illinois*, 504 U.S. 719, 726 (1992). This guarantee encompasses the requirement that "the conclusions to be reached in a case will be induced only by evidence and argument in open court, and not by any outside influence, whether of private talk or public print." *Skilling v. United States*, 561 U.S. 358, 378 (2010) (quoting *Patterson v. Colorado ex rel. Atty Gen. of Colo.*, 205 U.S. 454, 462 (1907)). Indeed, "any private communication, contact, or tampering directly or indirectly, with a juror during a trial about the matter pending before the jury is . . . deemed presumptively prejudicial." *Remmer v. United States*, 347 U.S. 227, 229 (1954). "The presumption is not conclusive, but the burden rests heavily upon the Government to establish, after notice to and hearing of the defendant, that such contact with the juror was harmless to the defendant." *Id.*; *Smith v. Phillips*, 455 U.S. 209, 217 (1982) ("Due process means a jury capable and willing to decide the case solely on the evidence before it, and a trial judge ever watchful to prevent prejudicial occurrences and to determine the effect of such occurrences when they happen. Such determinations may properly be made at a hearing like that ordered in *Remmer* and held in this case.").

The Indiana Supreme Court fully and carefully adjudicated this claim on direct appeal. Though it did not directly cite any controlling Supreme Court precedent, it applied the correct legal standard. *Weisheit I*, 26 N.E.3d at 15–16 (explaining that the State bore the burden "to show that the note's message was harmless"). The Court concluded, that "the State successfully rebutted the presumption of prejudice to Weisheit from the note by showing that its contents were harmless and that the note had no influence on the jury." *Id.* at 16. We hold that this determination was reasonable based on the record before us.

Given that the trial judge's finding of no prejudice reflected his assessments of the jurors' responses and demeanor in response to his questioning, (*See* dkt. 88-25 at 207–08), such a determination is "notoriously difficult to overturn under § 2254(d)(2)." *Coleman v. Hardy*, 690 F.3d 811, 817 (7th Cir. 2012).

Mr. Weisheit challenges the Indiana Supreme Court's conclusion as unreasonable.⁷ His challenges focus on the words of the note accompanying the cookies, to wit, the jurors' "service for the family of Alyssa [and] Caleb." Dkt. 107 at 33–34. However, as previously detailed, only one juror, Juror 8, recalled that the note mentioned Alyssa and Caleb, and, when asked about the note's effect on him or her, Juror 8 replied, "Oh, I can serve just fine, it hasn't affected me at all." Dkt. 88-24 at 235. Mr. Weisheit has been unable to establish the unreasonableness of the trial judge's as well as Indiana Supreme Court's acceptance of this response.

Mr. Weisheit also contends that his rights were violated when "the state court failed to consider the likely effect on the jurors when they heard Juror 10 repeatedly voice his displeasure at being dismissed, and the other jurors shook their heads in agreement." Dkt. 107 at 34. The trial

⁷ Mr. Weisheit also asserts without elaboration that the Indiana Supreme Court's adjudication of this claim involved an unreasonable application of clearly established law. However, he does not identify what clearly established law he believes was unreasonably applied, and we likewise do not find any.

judge in analyzing and reacting to Juror 10's statements, found that they "reinforced the decision of the court to remove [Juror] 10." Dkt. 88-25 at 207–08. The trial judge 's admonition to the jury after Juror 10 had been removed did not escape notice by the Supreme Court. *Id.* at 208 ("Then I gave another admonishment to the group as a whole.").

Notably, Mr. Weisheit does not claim that Juror 10's statements created a risk of bias on the part of the remaining venire, apparently conceding that any such claim has been procedurally defaulted. In any event, the record is devoid of any reactions by the other jurors, to Juror 10's statements. Dkt. 88-25 at 78 (Mr. Dennis testified that the other jurors "all just kind of looked and nodded their heads. And then there was general chatter, I guess"). Taking the circumstances as a whole, we find no basis on which to conclude that the Indiana Supreme Court's determination as to the risk of bias was not legally or factually unreasonable.

Mr. Weisheit's final claim regarding the note is that the Indiana Supreme Court's reliance on the jurors' own statements about their ability to keep an open mind was unreasonable. Dkt. 107 at 34–35 ("[T]hough the jurors may have intended to remain uninfluenced by the note, they may not be aware of their own bias."). As support for this contention, Mr. Weisheit cites Justice O'Connor's concurrence in *Smith*, in which she expressed concern that jurors may sometimes not be aware of their own biases. *Id.* at 34 (citing *Smith*, 455 U.S. at 222 (O'Connor, J., concurring)). In her concurring opinion, however, Justice O'Connor specifically endorsed the judicial inquiry procedure similar to that undertaken in Mr. Weisheit's trial as a proper tool for rooting out potential bias, a process she characterized as effective in all but a handful of "extreme situations." *Smith*, 455 U.S. at 222 ("I believe that in most instances a postconviction hearing will be adequate to determine whether a juror is biased. A hearing permits counsel to probe the juror's memory, his reasons for acting as he did, and his understanding of the consequences of his actions. A hearing

also permits the trial judge to observe the juror's demeanor under cross-examination and to evaluate his answers in light of the particular circumstances of the case."). The situation under review here involving a thank-you note written by a fellow juror's wife and conveyed to the jury along with a gift of cookies is a far cry from the "extreme situation" referenced by Justice O'Connor that gives rise to an irrebuttable presumption of juror bias. The possibility that a juror was subconsciously impacted undermining the Indiana Supreme Court's factual determination is neither sufficient nor unreasonable.

Having found that the Indiana Supreme Court's adjudication of this claim was not unreasonable, we hold that the relief Mr. Weisheit seeks is barred by § 2254(d).

G. Failure to Consider Mitigating Evidence (Claim 28)

Mr. Weisheit next asserts that neither the jury nor the trial judge "meaningfully considered" any mitigating circumstances in deciding whether to impose the death sentence, as evidenced by the absence of any such list of mitigating circumstances on the verdict forms. Dkt. 67 at 211–12. The Indiana Supreme Court addressed and resolved this claim on direct appeal, stating: "[S]imply because the jury and the trial court did not list any mitigating circumstances does not mean that they failed to consider his offered mitigators and weigh them against the four aggravators proven beyond a reasonable doubt by the State." *Weisheit I*, 26 N.E.3d at 20 (emphasis omitted).

Mr. Weisheit cites no clearly established law requiring a verdict form to include or a jury to specifically determine any mitigating factors in determining whether to impose a death sentence. Nor does he provide any other basis on which to find that the jury failed to consider the mitigating evidence he had introduced. Relief on this claim is therefore barred by § 2254(d). *Berkman v. Vanihel*, 33 F.4th 937, 946 (7th Cir. 2022) ("Having failed to come forward with any clearly

established Supreme Court precedent that has imposed such a duty on the trial court, we must conclude that Mr. Berkman has not met his burden under [§ 2254(d)(1)].").

H. Indiana Boys School Records—Ineffective Assistance of Counsel (Claim 23)

Mr. Weisheit next contends that his trial counsel was ineffective in failing to obtain and use records from his time when he was incarcerated at the Indiana Boys School. Supreme Court case law clearly directs that "counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." *Strickland*, 466 U.S. at 690. "In assessing the reasonableness of an attorney's investigation, . . . a court must consider not only the quantum of evidence already known to counsel, but also whether the known evidence would lead a reasonable attorney to investigate further." *Wiggins v. Smith*, 539 U.S. 510, 527 (2003).

Once again, the Indiana Supreme Court adjudicated this claim on post-conviction appeal, citing relevant Supreme Court cases and applying the proper legal standard. *Weisheit II*, 109 N.E.3d at 984 ("A decision by defense counsel not to present evidence can be deemed reasonable only if it is predicated on a proper investigation of the alleged defense." (cleaned up)). So advised, the Supreme Court ruled that counsel's performance was neither deficient nor prejudicial.

In assessing trial counsel's performance, the Indiana Supreme Court ruled that counsel had made a reasonable attempt to obtain Mr. Weisheit's Indiana Boys School records when he sent a letter of explanation to the Indiana Department of Correction Records Division along with a subpoena for any records concerning Mr. Weisheit's incarceration at Indiana Boys School. Dkt. 89-6 at 239–40. The Director of Operational Support for the Department of Correction replied to counsel's request as follows:

Enclose you will find your original paperwork on, Jeffrey A. Weisheit, DOC #926126: We search[ed] our records with the information you provided to our office and unsuccessfully we have no match. **After 10 years if an offender doesn't return to our facility we destroy the file.** The only document we have on this

offender is a card from our Powerway System which is attached. Any further questions please feel free to contact Lina Presley, Director of Operational Support at [telephone number].

Id. at 241 (emphasis added). The letter referenced no other information or existing records, nor were directions provided or suggestions made which counsel failed to pursue. Indeed, the reasonable conclusion based on this letter is that any such records, if they ever existed, no longer do. *See Weisheit II*, 109 N.E.3d at 984.

Mr. Weisheit maintains that post-conviction counsel "had no trouble obtaining" the Indiana Boys School records from the Indiana State Archives. Dkt. 67 at 178. However, it is not enough in terms of establishing counsel's ineffectiveness simply to show that records existed and could have been obtained, had counsel known from whom and where to request them. Before the State courts on appeal, Mr. Weisheit was required to show that his counsel's failure to continue searching for such documentation after the Indiana Department of Correction had reported that the records were destroyed was "outside the wide range of professionally competent assistance." *Pole v. Randolph*, 570 F.3d 922, 945 (7th Cir. 2009). The burden is even higher in our court: Mr. Weisheit must show that there is no "reasonable argument that counsel satisfied" the deferential "professionally competent" standard. *Harrington v. Richter*, 562 U.S. 86, 105 (2011).

Mr. Weisheit's arguments fail to comport with this high standard. Citing the post-conviction testimony of his trial mitigation specialist he stated that he has "had the occasion where [he] requested documents and [was] told that they don't exist, but then other efforts produce[d] the documents," (Dkt. 88-34 at 161–62 (Michael Dennis testimony)). Mr. Weisheit ignores the specialist's additional testimony that, despite his 25-year employment history as a mitigation specialist, he has never previously succeeded in obtaining records from the Indiana State Archives. *Id.* at 162–63. Mr. Weisheit has also referenced a certification by a custodian at the Indiana State

Archives attesting that his records had been turned over to the state archives by the Indiana Boys School in accordance with Indiana Department of Correction policy. Dkt. 89-5 at 220 ("DESTROY ten (10) years after discharge, expiration of the sentence or closing of the Department's interest in the case and after SAMPLING by the STATE ARCHIVES DIVISION, ARCHIVES AND RECORD ADMINISTRATION."). However, the record before us does not disclose whether this Indiana Department of Correction policy was known by or publicly available to trial counsel when Mr. Weisheit's records were being sought. Thus, the only information received by counsel clearly reflects that any Indiana Boys School records relating to Mr. Weisheit had been destroyed.

Considered as a whole, this evidence supports the Indiana Supreme Court's reasonable conclusion that Mr. Weisheit's counsel was not deficient in failing to request the records from the Indiana State Archives. Thus, § 2254(d) bars relief for this alleged instance of ineffective assistance of counsel.

2. Prejudice

We hold as well that the Indiana Supreme Court reasonably concluded that Mr. Weisheit was not prejudiced by the counsel's failure to obtain the Indiana Boys School records, a finding that creates an independent bar to the relief sought here by Mr. Weisheit.

We assume that certain subsets of the Indiana Boys School records would have supported Mr. Weisheit's case during the penalty phase of the litigation, had such records existed and been available to him, *i.e.*, evidence of profound family dysfunction, ongoing depression, suicide attempts, hospital admissions for suicide attempts, and a psychotic break. Dkt. 22-34 at 42. However, lacking the corroborating documentary evidence, counsel adduced at least some of this information at trial through the oral testimony of Deborah Eccles-Skidmore, a correctional

counselor at Indiana Boys School. *See* dkt. 88-27 (testifying that Mr. Weisheit was "not a behavior problem" and that he was hospitalized for multiple weeks following a suicide attempt). The Indiana Boys School records might well have allowed counsel to paint a fuller picture for the jury of Mr. Weisheit's overall situation.

However, as the Indiana Supreme Court noted, the records might just as easily have provided evidentiary ammunition for the prosecution. The available records included a psychological assessment recounting that Mr. Weisheit "shows no remorse for his victims." Dkt. 89-4 at 154. The same assessment reported that Mr. Weisheit was "found to be manipulative with his suicidal ideation." *Id.*; *see also id.* at 155 ("When caught, Jeff almost always fabricated a suicide story. . . . Jeff later admits that he was just being manipulative in his suicidal ideations."). The reports further note that Mr. Weisheit admitted to shooting a dog during one of his several runaway attempts. *Id.* at 155 ("He shot their dog when he allegedly tried to bite Jeff."). Perhaps most troubling was the psychological assessment which noted Mr. Weisheit's "stated infatuation with movies and books about 'psycho killers and people that go crazy.'" Jeff states that he thinks it would be fun to go crazy and be involved in these sort of crimes." *Id.* at 156–57. These details, if presented to a jury, would obviously have bolstered the prosecution's argument that Mr. Weisheit was a depraved and remorseless murderer. The Indiana Supreme Court therefore in our view reasonably ruled that counsel's failure to obtain Mr. Weisheit's Indiana Boys School records did not necessarily prejudice him during the penalty phase of trial.

I. Mitigation Experts—Ineffective Assistance of Counsel (Claim 24)

Mr. Weisheit includes in his litany of claims advanced here that his trial counsel was ineffective during the penalty phase of trial for the reasons of his (1) failing to call Dr. Philip Harvey as a witness and (2) failure to investigate his history of brain damage and to call an expert

witness comparable to Dr. Ruben Gur to testify about that condition. We address each of these issues below.

1. Dr. Harvey

The Indiana Supreme Court ruled that trial counsel's failure to call Dr. Harvey was neither a deficient representation nor prejudicial to his defense. Our review allows us to conclude as well that both of these decisions were reasonable.

The post-conviction record shows that Dr. Harvey conducted one assessment of Mr. Weisheit in preparation for trial. Dkt. 88-35 at 177–80 (Phillip Harvey testimony). He had apparently planned to conduct another assessment prior to trial, but his medical practice group informed him that he was not eligible for compensation for assessments of non-patients. *Id.* at 181–83. In response to that notification, Dr. Harvey sent Mr. Weisheit's defense team the following email:

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

Dkt. 89-7 at 55.

Trial counsel concluded, based on this information, that Dr. Harvey was "bailing out" of the case. Dkt. 88-34 at 150. Dr. Harvey did provide a summary report for use by the defense team's subsequent expert. *Weisheit II*, 109 N.E.3d at 986. Consequently, believing that Dr. Harvey's services were no longer available, counsel engaged a replacement expert, Dr. David Price.

Dr. Price reviewed Dr. Harvey's report and also performed his own independent psychological assessments of Mr. Weisheit, which included evaluations conducted over four

sessions in April 2012 and December 2012. Dkt. 88-27 at 188–89 (David Price testimony). Dr. Price testified during the penalty phase as to his conclusions, including Dr. Harvey's observations as well. *Id.* at 218–19. Dr. Price diagnosed Mr. Weisheit as experiencing attention deficit hyperactivity disorder (ADHD), predominant hyperactive impulse; cognitive disorder, not otherwise specified; and bipolar disorder, not otherwise specified. *Id.* at 201. These diagnoses were based on a review of medical records dating back Mr. Weisheit's childhood and through his young adulthood as well as Dr. Price's personal observations and assessments and an MRI scan. *Id.* at 187–201. Dr. Price incorporated Dr. Harvey's report describing an apparent manic episode that occurred during Dr. Harvey's evaluation. *Id.* at 218–19.

Based on these facts, the Indiana Supreme Court concluded that counsel's performance was not deficient in adjusting to the unavailability of Dr. Harvey, given that Dr. Harvey had "contacted counsel, told counsel he could not do future evaluations and indicated he would recommend his replacement." *Weisheit II*, 109 N.E.3d at 986. Mr. Weisheit characterizes the Supreme Court's conclusion as unreasonable, since Dr. Harvey also testified during the post-conviction hearing that he would have been willing to testify at trial, even though he was unavailable to perform any further in-person assessments. Dkt. 67 at 185.

Mr. Weisheit's attempt to portray his trial counsel's misunderstanding of Dr. Harvey's letter falls short of establishing ineffective assistance. He must show that trial counsel's misunderstanding was unreasonable under the circumstances (*Strickland*, 466 U.S. at 690–91), and he must show that the Indiana Supreme Court's failure to find as much was likewise unreasonable. *Richter*, 562 U.S. at 105. We hold that Dr. Harvey's after-the-fact testimony as to his willingness and availability to testify at trial does not overcome the "doubly deferential" standard of review applicable here in our court. *Knowles v. Mirzayance*, 556 U.S. 111, 123 (2009).

Likewise, Mr. Weisheit has failed to demonstrate that the Indiana Supreme Court's prejudice determination was unreasonable. He faults the Indiana Supreme Court for failing to recognize that "experts are not fungible," dkt. 107 at 55, and he maintains that Dr. Harvey had "special expertise" and that only Dr. Harvey had "directly observed Weisheit in a manic state." *Id.* at 107. However, the Indiana Supreme Court's conclusion that Dr. Price "capably testified about Weisheit's mental health conditions," was, in our view, altogether reasonable as was its conclusion that anything extra Dr. Harvey may have contributed to the trial proceedings was not likely to have swayed the jury (*Weisheit II*, 109 N.E.3d at 986).

Accordingly, having concluded that the Indiana Supreme Court's deficiency and prejudice determinations were reasonable, § 2254(d) bars further relief based on trial counsel's alleged ineffectiveness.

2. Dr. Gur

Mr. Weisheit next argues that his trial counsel should have called Dr. Ruben Gur, or some other similarly well qualified neuropsychologist, to testify about his history of head injuries and the manner in which they contributed to his impulse to set fire to his house, after leaving Caleb and Alyssa inside.

Dr. Gur testified at Mr. Weisheit's post-conviction hearing as to his review of Mr. Weisheit's self-reported injuries to other experts, identifying several possible traumatic brain injuries.⁸ Dkt. 88-34 at 86–90 (fell on sidewalk at age eight, requiring stitches to back of head); *id.* at 94 (fell off roof at age 14); *id.* at 46–47 (punched in the nose at age sixteen); *id.* at 47–48 (car accident at age sixteen, requiring stitches to head); *id.* at 95 (car accident at age seventeen,

⁸ Dr. Gur's assessment seems to have been based on a baseline expectation that active young males will experience some number of traumatic brain injuries. "Active, especially boys, will get into situations where they will get [traumatic brain injuries] and it's almost unavoidable." Dkt. 88-34 at 45–46.

resulting in lost consciousness); *id.* at 96 (car accidents at age twenty-one and twenty-two, one of which required stitches).

Dr. Gur explained that such traumatic brain injuries might produce symptoms that mimic or exacerbate bipolar disorder. *Id.* at 50–51 ("They can be very happy one moment and then go from that to an outburst of rage or uncontrollable crying in another moment."). According to Dr. Gur, Mr. Weisheit's behavior in certain respects is consistent with multiple traumatic brain injuries. *Id.* at 54–55 ("He had difficulty in school. Throughout his childhood he is behaving like someone who had t.b.i. He is impulsive. He gets into fights. He gets into mischief of all sorts.").

The Indiana Supreme Court did not resolve the issue of any deficiency by trial counsel in failing to call Dr. Gur as a witness, but it did conclude that the failure to call Dr. Gur to testify was not prejudicial, in view of the fact that "the evidence of Weisheit's brain injuries (was) speculative." *Weisheit II*, 109 N.E.3d at 987. We hold that that determination by the Indiana Supreme Court was also reasonable.

Mr. Weisheit presented evidence at the penalty phase of trial of traumatic brain injury. *See* dkt. 87-27 at 212 (Dr. Price testified that Mr. Weisheit "had a cognitive disorder related to having prior cumulative traumatic brain injury"); *id.* at 236 ("[H]e's had repeated concussions. That's what you're reading about when you hear all this stuff with NFL players about chronic traumatic encephalopathy. It's the cumulative process of repeated concussions on the brain and on that person's emotional functioning and mental functioning. So, yes, that would have an impact on him every day he wakes up."). As the Supreme Court noted, Dr. Gur's testimony did not include more contemporaneous medical evidence with regard to the purported traumatic brain injuries. *Id.* ("[Dr. Gur's] opinion that Weisheit suffered from concussions was largely based on Weisheit's self-reports and he could not point to medical records that documented each of the alleged

concussions or other traumatic brain injury."). Dr. Gur acknowledged that he could make probabilistic determinations as to whether Mr. Weisheit experienced traumatic brain injury based only on the reports he reviewed. *See, e.g.*, dkt. 88-34 at 89–90 ("Fifty-five percent" likelihood that the fall onto a sidewalk at age eight resulted in a concussion). Because we view the Indiana Supreme Court's prejudice determination as reasonable, § 2254(d) bars relief on this claim.

J. James Aiken Testimony (Claims 26 and 27)

1. Trial court's evidentiary ruling (Claim 26)

During the penalty phase of the trial, the trial court excluded testimony by James Aiken regarding the Indiana Department of Correction's ability to provide safe housing to Mr. Weisheit, if he were to receive an executed sentence other than death. Mr. Weisheit challenges this ruling as violative of his Eighth and Fourteenth Amendment rights. Well-established Supreme Court precedent does clearly direct that "evidence that the defendant would not pose a danger if spared (but incarcerated) must be considered potentially mitigating. . . . [S]uch evidence may not be excluded from the sentencer's consideration." *Skipper v. South Carolina*, 476 U.S. 1, 5 (1986). "But the Eighth Amendment does not deprive the State of its authority to set reasonable limits upon the evidence a defendant can submit." *Oregon v. Guzek*, 546 U.S. 517, 526 (2006).

The Indiana Supreme Court adjudicated this claim on direct appeal, setting forth the correct legal rule based on *Skipper* and agreeing with Mr. Weisheit that "error would ensue if the trial court precluded the defendant from introducing otherwise admissible evidence for the explicit purpose of convincing the jury that he should be spared the death penalty because he would pose no undue danger to his jailers or fellow prisoners and could lead a useful life behind bars if sentenced to life imprisonment." *Weisheit I*, 26 N.E.3d at 10 (cleaned up). Even so, the trial court

did not abuse its discretion in excluding Mr. Aiken's testimony under Indiana evidentiary rules, according to the Indiana Supreme Court. *Id.*

The trial court's ruling did not prevent *all* opinion testimony about Mr. Weisheit's future dangerousness. This case is therefore distinguishable from the out-of-circuit cases Mr. Weisheit cites in which the state trial court categorically rejected certain kinds of evidence about a defendant's future behavior. *See Lawlor v. Zook*, 909 F.3d 614, 629–33 (4th Cir. 2018) (holding that exclusion of opinion testimony about defendant's future dangerousness in prison, rather than "in society," was unreasonable application of clearly established Supreme Court law); *Davis v. Coyle*, 475 F.3d 761, 770 (6th Cir. 2007) (same where state court excluded "testimony concerning [petitioner's] exemplary behavior on death row" before resentencing).

Here, the trial court's decision to exclude Mr. Aiken's testimony was based on his lack of qualification to offer such opinion testimony. Dkt. 88-27 at 181 ("[I]n terms of projecting in the future, I just, I don't believe there's a foundation as an expert or skilled witness."). The trial court based its ruling on Indiana Rules of Evidence 701 ("Opinion Testimony by Lay Witnesses") and 702 ("Testimony by Expert Witnesses"). *Id.* Our review of this issue is limited because "it is not the province of a federal habeas court to reexamine state-court determinations on state-law questions." *Estelle v. McGuire*, 502 U.S. 62, 67–68 (1991); *see Sennholz v. Strahota*, 722 Fed. App'x 569, 571 (7th Cir. 2018) (state court's ruling on admissibility of opinion testimony "is a determination of state law by the state court and therefore is not subject to our review").

We find no basis for concluding that the Indiana Supreme Court unreasonably applied *Skipper* or any other clearly established Supreme Court precedent, thus this claim is **denied**.

2. Ineffective assistance of counsel

Mr. Weisheit raises a related claim arguing that trial counsel was ineffective for his failure to make an adequate offer of proof as to Mr. Aiken's testimony.

The Supreme Court fully considered and adjudicated this claim as well on appeal, holding that even if defense counsel were deficient for failing to make a better offer of proof, Mr. Weisheit was not prejudiced by that failure. *Weisheit II*, 109 N.E.3d at 988. This holding was based on two rationales.

First, as the Supreme Court stated: "It is speculative to say Aiken's testimony would have been admissible" under Indiana law.⁹ *Id.* This conclusion reflects Mr. Aiken's limited study of Mr. Weisheit's record and his limited current knowledge about Indiana's classification procedures. *Id.* ("Aiken testified that he spent just 30 to 45 minutes with Weisheit the night prior to appearing in court. . . . He admitted he had not reviewed anything regarding how an Indiana prison would house an inmate convicted of murdering children."). On evidentiary questions, our court is not authorized to second-guess the Indiana Supreme Court's application of Indiana evidentiary law. *McGuire*, 502 U.S. at 67–68; *Sennholz*, 722 Fed. App'x at 571.

The Supreme Court also ruled that, even if Mr. Aiken had testified, he "would not have aided [Mr. Weisheit's] mitigation cause", because Mr. Aiken would have been confronted on cross-examination with Mr. Weisheit's less-than-stellar disciplinary records while in custody, to wit: "35 incident reports were filed regarding Weisheit from April 2010 to May 2011. Incidents include Weisheit threatening to kill an EMT who was dispensing medication, threatening officers

⁹ The post-conviction trial court held that counsel's performance was deficient and that Mr. Aiken's testimony would have been admissible under Indiana Rule of Evidence 702(a) had counsel laid the proper foundation. Dkt. 22-34 at 7–16. However, we are obligated to examine the "last reasoned state-court decision" in adjudicating the claim. *Johnson v. Williams*, 568 U.S. 289, 297 n.1 (2013); *Thurston v. Vanihel*, 39 F.4th 921, 928 (7th Cir. 2022).

and challenging them to fight him, threatening other inmates, destroying several pieces of jail property, urinating in the hallway and concealing 'multiple, sharp chicken bones' in his mouth during a search." *Weisheit II*, 109 N.E.3d at 988. These incident reports were not introduced during the guilt or penalty phases of Mr. Weisheit's trial, and Mr. Weisheit does not dispute the Supreme Court's factual determination that they would likely have been introduced to challenge the basis of Mr. Aiken's opinions, had he testified. Thus, we hold that the Supreme Court reasonably concluded that Mr. Aiken's testimony, on balance, would not have redounded to the benefit of Mr. Weisheit's mitigation arguments. The Supreme Court also reasonably applied *Strickland* in concluding that Mr. Weisheit had failed to show a reasonable probability that the sentencing outcome would have been different, even if counsel had made the offer of proof.

K. Cumulative Prejudice (Claim 30)

Finally, Mr. Weisheit contends that the cumulative effect of counsel's penalty phase deficiencies have caused him a significant and independent prejudice. In advancing his claim, he concedes that some of the specific, individual deficiencies underlying it have been defaulted (dkt. 107 at 10), but argues nonetheless that "even the cumulative effect of trial counsel's deficient penalty phase performance presented in state habeas proceedings merits relief." *Id.* at 67. We therefore address whether the cumulative effect of Mr. Weisheit's non-defaulted claims regarding counsel's alleged deficiencies compel a separate finding of prejudice.

The Indiana Supreme Court adjudicated this claim in the post-conviction appeal, stating as follows: "[E]ven assuming counsel was deficient, Weisheit has not demonstrated prejudice. Indeed, he has not shown that he would be given a different sentence even if counsel had committed none of the alleged errors in light of the nature of this particular crime—the murder of

two small children—and the overwhelming evidence of his guilt." *Weisheit II*, 109 N.E.3d at 992. This conclusion in our judgment constitutes a reasonable application of *Strickland*.

Mr. Weisheit's three, specific instances of deficiency by counsel have each been previously addressed as to their individual prejudicial impact: (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.

Taken together, we find no reasonable probability that, had they all not occurred, a different outcome would have resulted from Mr. Weisheit's penalty phase. With or without the police detective's testimony, the evidence of Mr. Weisheit's guilt was overwhelming. Similarly, regarding Mr. Aiken's testimony, it is at best unclear whether it would have had a net positive effect as mitigation evidence in his favor. Assuming Mr. Aiken would have testified that in his opinion the Indiana Department of Correction was capable of safely housing a prisoner such as Mr. Weisheit, that opinion likely would have been impeached by Mr. Weisheit's record of bad conduct during his pretrial custody, to wit, his "threatening to kill an EMT who was dispensing medication, threatening officers and challenging them to fight him, threatening other inmates, destroying several pieces of property, urinating in the hallway and concealing 'multiple, sharp chicken bones' in his mouth during a search." *Weisheit II*, 109 N.E.3d at 988. Thus, only the omission of Dr. Gur's testimony remains for review, which in our judgment, if included, would have likely had no more than a minimal impact on the outcome of proceedings because his opinion was based primarily on Mr. Weisheit's own, self-reported head injuries.

Thus, we hold that the Indiana Supreme Court's resolution of this cumulative impact claim as part of the post-conviction appeal was reasonable and, as such, pursuant to § 2254(d), relief is barred.

IV. Motion to Stay to Restore Competence

Separate from the motion to stay to exhaust state court remedies, Mr. Weisheit's counsel has sought a stay of this litigation based on Mr. Weisheit's alleged temporary incompetence. Dkt. 95.

A state inmate, including one who has been sentenced to death, has no right to competence in § 2254 habeas corpus proceedings. *Ryan v. Gonzales*, 568 U.S. 57, 64–73 (2013). Nevertheless, a district court is permitted to stay § 2254 proceedings when a "petitioner's claim could substantially benefit from the petitioner's assistance" and there is "reasonable hope of competence" in the foreseeable future. *Id.* at 76–77.

Here, we do not believe that Mr. Weisheit's claims would substantially benefit from his participation and assistance, assuming he is impaired or experiencing diminished capacity. His claims are for the most part either all defaulted or otherwise barred by 28 U.S.C. § 2254(d). A stay is therefore both unnecessary and inappropriate. We need not further address Mr. Weisheit's factual claim of incompetence. *See id.* at 74 ("[A] stay is not generally warranted when a petitioner raises only record-based claims subject to 28 U.S.C. § 2254(d).").

V. Certificate of Appealability

"A state prisoner whose petition for a writ of habeas corpus is denied by a federal district court does not enjoy an absolute right to appeal." *Buck v. Davis*, 137 S. Ct. 759, 773 (2017). A state prisoner must first obtain a certificate of appealability. *See* 28 U.S.C. § 2253(c)(1). A district court

must "issue or deny a certificate of appealability when it enters a final order adverse to the applicant." Habeas Corpus Rule 11(a).

"A certificate of appealability may issue . . . only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). Where a claim is resolved on procedural grounds, a certificate of appealability should issue only if reasonable jurists could disagree about the merits of the underlying constitutional claim and about whether the procedural ruling was correct. *Flores-Ramirez v. Foster*, 811 F.3d 861, 865 (7th Cir. 2016).

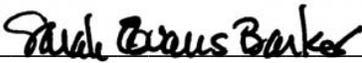
Here, though we have confidence in the correctness of our rulings, we concede that reasonable jurists could disagree about the merits of Mr. Weisheit's ineffective assistance of trial counsel claim and his ineffective assistance of appellate counsel claim. *See Stevens v. McBride*, 489 F.3d 883, 894 (7th Cir. 2007) ("[A] certificate [of appealability] identifying ineffective assistance of counsel brings up all of counsel's actions."). Reasonable jurists could also disagree about whether Claims 1, 2, 3, 5, 6, 7, 8, 10, 13, 14, 17, 18, 19, 20, 21, 22, 25, 29, 30, 31, 32, and 33 have been procedurally defaulted or are instead unexhausted. A certificate of appealability is therefore **granted** as to these issues.

VI. Conclusion

The petition for writ of habeas corpus is **denied**. A certificate of appealability is **granted**. Final judgment shall now enter.

IT IS SO ORDERED.

Date: 11/2/2022


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

Distribution:

All ECF-registered counsel of record via email

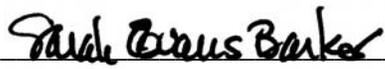
UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
NEW ALBANY DIVISION

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

FINAL JUDGMENT

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

Date: 11/2/2022


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

Distribution:

All ECF-registered counsel of record via email

proper, William is not entitled to court approval of them.

We therefore affirm in part, reverse in part, and remand to the trial court for proceedings consistent with this opinion.

David, Massa, Slaughter, and Goff, JJ., concur.



Jeffrey A. WEISHEIT, Appellant
(Petitioner Below)

v.

STATE of Indiana, Appellee
(Respondent Below)

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

Supreme Court of Indiana.

Argued: September 7, 2017

Filed November 7, 2018

Rehearing Denied January 17, 2019

Background: Defendant was convicted in the Circuit Court, Clark County, Daniel E. Moore, J., of two counts of murder and one count of arson resulting in serious bodily injury, for which he was sentenced to death. The Supreme Court, 26 N.E.3d 3, affirmed defendant's convictions and sentence. Defendant sought post-conviction relief, asserting ineffective assistance of counsel. The Circuit Court, Clark County, Andrew Adams, J., denied defendant's petition. Defendant appealed.

Holdings: The Supreme Court, David, J., held that:

(1) counsel was not deficient in failing to obtain school mental health records;

(2) defendant was not prejudiced by counsel's failure to provide testifying witnesses with mental health records;

(3) defendant was not prejudiced by counsel's failure to call retained medical expert;

(4) defendant was not prejudiced by counsel's failure to direct trial court to correct rule of evidence on expert qualifications;

(5) counsel was not deficient in failing to ask jurors follow-up questions about willingness to consider a term of years sentence;

(6) counsel was not deficient in failing to introduce police officer testimony about defendant's lack of response to *Miranda* waiver; and

(7) defendant was not denied effective assistance of counsel based on counsel's failure to use a particular juror quote in appellate brief.

Affirmed.

Slaughter, J., concurred in part and in the judgment with separate opinion.

Rush, C.J., concurred in part and dissented in part with separate opinion.

1. Criminal Law ¶1407, 1409

Post-conviction proceedings are civil proceedings in which a defendant may present limited collateral challenges to a conviction and sentence.

2. Criminal Law ¶1615

A criminal defendant petitioning for post-conviction relief bears the burden of establishing his claims by a preponderance of the evidence.

3. Criminal Law ¶1450

A criminal defendant seeking post-conviction relief must convince the court that there is no way within the law that

the court below could have reached the decision it did.

4. Criminal Law ⇌1881

To prevail on a claim of ineffective assistance of counsel pursuant to *Strickland*, a defendant must show: 1) that counsel's performance was deficient based on prevailing professional norms; and 2) that the deficient performance prejudiced the defense. U.S. Const. Amend. 6.

5. Criminal Law ⇌1882

In analyzing whether counsel's performance was deficient under *Strickland*, the Supreme Court first asks whether, considering all the circumstances, counsel's actions were reasonable under prevailing professional norms. U.S. Const. Amend. 6.

6. Criminal Law ⇌1870, 1884

Counsel is afforded considerable discretion in choosing strategy and tactics, and judicial scrutiny of counsel's performance is highly deferential for purposes of a claim of ineffective assistance. U.S. Const. Amend. 6.

7. Criminal Law ⇌1883

To demonstrate prejudice, as element of claim of ineffective assistance under *Strickland*, the defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. U.S. Const. Amend. 6.

8. Criminal Law ⇌1883

A reasonable probability, for purposes of *Strickland* ineffective assistance analysis, is a probability sufficient to undermine confidence in the outcome of the proceeding. U.S. Const. Amend. 6.

9. Criminal Law ⇌1871

There is a strong presumption, in reviewing a claim of ineffective assistance, that counsel rendered adequate assistance

and made all significant decisions in the exercise of reasonable professional judgment. U.S. Const. Amend. 6.

10. Criminal Law ⇌1884

Counsel is afforded considerable discretion in choosing strategy and tactics and these decisions are entitled to deferential review for purposes of claim of ineffective assistance; isolated mistakes, poor strategy, inexperience and instances of bad judgment do not necessarily render representation ineffective. U.S. Const. Amend. 6.

11. Criminal Law ⇌1891

A decision by defense counsel not to present evidence can be deemed reasonable, for purposes of claim of ineffective assistance, only if it is predicated on a proper investigation of the alleged defense. U.S. Const. Amend. 6.

12. Criminal Law ⇌1905

Defense counsel's failure to obtain mental health records from school attended by defendant did not constitute deficient performance, as element of claim of ineffective assistance, despite fact that counsel made only one attempt to obtain the records; the school responded to counsel's request by explaining that the requested records had been destroyed pursuant to document retention policy, such that further attempts by counsel to obtain the records would have been fruitless, and, regardless, counsel was able to obtain other mental health records from other sources. U.S. Const. Amend. 6.

13. Criminal Law ⇌1905

Defense counsel's failure to provide mental health records to testifying psychologist and school counselor in defendant's trial for murder did not constitute deficient performance, as element of claim

of ineffective assistance. U.S. Const. Amend. 6.

14. Criminal Law ⇌1905

Even if defense counsel was deficient in failing to appropriately prepare testifying witnesses in defendant's trial for murder, by not providing them with defendant's mental health records, defendant was not prejudiced, as element of claim of ineffective assistance; counsel presented evidence and arguments at trial regarding defendant's mental health struggles and diagnoses, a court appointed physician who evaluated defendant's competency testified that nothing in the records conflicted with her opinion, and the records contained information that was potentially prejudicial to defendant, such as references to his cruelty, criminal history, and lack of remorse. U.S. Const. Amend. 6.

15. Criminal Law ⇌1931

Defense counsel's failure to call retained expert during defendant's trial for murder did not prejudice defendant, and thus could not amount to ineffective assistance under *Strickland*; counsel was able to present evidence of defendant's bipolar diagnosis and possible mania at the time of murders even without the expert testimony regarding an observed instance of defendant's mania, and another expert capable testified about defendant's mental health conditions, such that defendant failed to show a reasonable likelihood of a different outcome had his expert testified. U.S. Const. Amend. 6.

16. Criminal Law ⇌1931

Defense counsel's failure to call retained neuropsychologist during defendant's trial for murder did not prejudice defendant, and thus could not amount to ineffective assistance; during post-conviction hearing, the neuropsychologist could not point to medical evidence of defendant's alleged brain injuries, and their ex-

acerbation of his mental health problems, which purportedly occurred when defendant was tased by police, neuropsychologist based his opinion on defendant's self-reports, and another expert disagreed that defendant had suffered traumatic brain injuries at all, such that defendant failed to show a reasonable likelihood of a different outcome had the testimony been offered. U.S. Const. 6. Amend.

17. Criminal Law ⇌494

A trial court is not required to accept the opinion of experts.

18. Criminal Law ⇌1931

Defense counsel's failure to direct trial court to the correct rule of evidence, under which former prison warden would have qualified as an expert witness, did not prejudice defendant, and thus was not ineffective assistance; although post-conviction court agreed that trial court erred in excluding the warden's testimony, it was not clear whether he actually would have been allowed to testify even if he had qualified as an expert, and, even if he been allowed to testify, prior prison records demonstrating defendant's propensity for violence undercut warden's claim that defendant could be adequately managed under a life sentence, such that there was not a reasonable probability of a life sentence, instead of death, had the warden testified. U.S. Const. Amend. 6; Ind. R. Evid. 702.

19. Jury ⇌108

Qualified jurors must be willing to consider all of the possible penalties for a crime.

20. Jury ⇌105(4), 108

Jurors in capital cases must be willing to follow the law (including instructions indicating all of the possible penalties) and must be excused if their personal views of the death penalty (whether pro or con)

would prevent or substantially impair their ability to follow their oath and the law.

21. Criminal Law ⇌1144.15

It is presumed that jurors follow their instructions.

22. Criminal Law ⇌1901

Defense counsel's failure, during defendant's murder trial, to ask jurors follow-up questions regarding their willingness to follow the law and consider a term of years as one of the three possible sentencing options did not constitute deficient performance, as element of claim of ineffective assistance; counsel was not legally required to ask such questions, the jurors were instructed and asked about the three sentencing options, none of them indicated during voir dire that they would not consider a term of years, and this sentencing option was repeatedly mentioned throughout trial. U.S. Const. Amend. 6; Ind. Code Ann. § 35-50-2-9(e).

23. Criminal Law ⇌1901

Defense counsel's failure to ask jurors follow-up questions regarding their willingness to follow the law and consider a term of years as one of the three possible sentencing options, instead of death, did not prejudice defendant, as element of claim of ineffective assistance, where the jury's guilty verdict was unanimous and defendant, as an alleged child murderer, was unlikely to engender much juror sympathy even with additional questions by counsel. U.S. Const. Amend. 6.

24. Criminal Law ⇌1932

Defense counsel's failure to introduce police officer testimony about defendant's lack of response to a *Miranda* rights waiver form did not constitute deficient performance, as element of claim of ineffective assistance; although defendant did not seem to want to sign the waiver, his conduct, such as selectively feigning sleep but

otherwise being responsive, indicated that he was willing to answer police questions, and the brief interview ceased when defendant asked for an attorney. U.S. Const. Amend. 6.

25. Criminal Law ⇌411.92

The validity of a waiver of *Miranda* rights is judged by the totality of the circumstances.

26. Criminal Law ⇌1932

Defense counsel's failure, during defendant's murder trial, to introduce police officer testimony about defendant's lack of response to a *Miranda* rights waiver form did not prejudice defendant, as element of ineffective assistance of counsel, where the record contained other overwhelming evidence of defendant's guilt. U.S. Const. Amend. 6.

27. Criminal Law ⇌1931

Defense counsel's failure to object to opinion testimony of assistant fire department chief, fire marshal, and lead detective, that the house fire in which the children of defendant's girlfriend perished was set intentionally, did not constitute deficient performance, as element of claim of ineffective assistance; testimony regarding the cause of the fire did not violate evidentiary rule on opinions on an ultimate issue, in that defendant was not referenced personally, and any objection to State's cross-examination of the detective might not have been sustained because counsel opened the door on direct. U.S. Const. Amend. 6; Ind. R. Evid. 702(b).

28. Criminal Law ⇌1931

Defense counsel's failure to object to opinion testimony of assistant fire department chief, fire marshal, and lead detective, that the house fire in which the children of defendant's girlfriend perished was set intentionally, did not prejudice defendant in his murder trial, as element of

claim of ineffective assistance, where post-conviction court noted that the testimony was not nearly as persuasive as defendant's actions before, during, and after the murder-arson. U.S. Const. Amend. 6.

29. Criminal Law ⇌1186.1

Generally, trial errors that do not justify reversal when taken separately also do not justify reversal when taken together.

30. Criminal Law ⇌1883

In the context of claim of ineffective assistance of counsel, a reviewing court assesses whether the cumulative prejudice accruing to the accused as a result of counsel's errors has rendered the result unreliable, necessitating reversal under *Strickland's* prejudice prong. U.S. Const. Amend. 6.

31. Criminal Law ⇌1967

The standard for gauging appellate counsel's performance under *Strickland* is the same as that for trial counsel. U.S. Const. Amend. 6.

32. Criminal Law ⇌1969

Defense counsel's failure to cite in his appellate brief a specific juror quote, that purportedly showed the juror would automatically vote for the death penalty in defendant's murder trial, did not constitute deficient performance, as element of claim of ineffective assistance; counsel used another quotation from voir dire, in which juror spoke favorably about imposition of the death penalty, instead of the quotation that appeared on the same page of the transcript and was favored by defendant, but there was no significant difference between the two quotes and the juror in question was responding to hypothetical questions rather than the facts of the case. U.S. Const. Amend. 6.

Appeal from the Clark Circuit Court, Cause No. 10C01-1601-PC-1, The Honorable Andrew Adams, Judge

ATTORNEYS FOR APPELLANT: Stephen T. Owens, Public Defender of Indiana, Kathleen Cleary, John Pinnow, Anne Murray Burgess, Deputy Public Defenders, Indianapolis, Indiana

ATTORNEYS FOR APPELLEE: Curtis T. Hill, Jr., Attorney General of Indiana, Kelly A. Loy, Tyler G. Banks, Deputy Attorneys General, Indianapolis, Indiana

David, Justice

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

Facts and Procedural History

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

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

In 2013, a jury convicted Weisheit of two counts of murder and one count of Class A

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

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

Standard of Review

[1–3] Post-conviction proceedings are civil proceedings in which a defendant may present limited collateral challenges to a conviction and sentence. *Wilkes v. State*, 984 N.E.2d 1236, 1240 (Ind. 2013). The defendant bears the burden of establishing his claims by a preponderance of the evidence. *Id.* The defendant must convince this Court that there is “no way within the law that the court below could have reached the decision it did.” *Stevens v. State*, 770 N.E.2d 739, 745 (Ind. 2002).

Discussion

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

lative errors. Weisheit faults appellate counsel for failing to sufficiently identify objectionable jurors on direct appeal.

[4] Ineffective assistance of counsel claims are evaluated under the two-part test articulated in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). To prevail, Weisheit must show: 1) that counsel’s performance was deficient based on prevailing professional norms; and 2) that the deficient performance prejudiced the defense. *Ward v. State*, 969 N.E.2d 46, 51 (Ind. 2012) (citing *Strickland*, 466 U.S. at 687, 104 S.Ct. 2052).

[5, 6] In analyzing whether counsel’s performance was deficient, the Court first asks whether, “‘considering all the circumstances,’ counsel’s actions were ‘reasonable [] under prevailing professional norms.’” *Wilkes*, 984 N.E.2d at 1240 (quoting *Strickland*, 466 U.S. at 668, 104 S.Ct. 2052). Counsel is afforded considerable discretion in choosing strategy and tactics, and judicial scrutiny of counsel’s performance is highly deferential. *Id.*

[7, 8] To demonstrate prejudice, “the defendant must show that there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.” *Strickland*, 466 U.S. at 694, 104 S.Ct. 2052.

[9, 10] There is a strong presumption that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. *Stevens*, 770 N.E.2d at 746. Counsel is afforded considerable discretion in choosing strategy and tactics and these decisions are entitled to deferential review. *Id.* at 746–47 (citing *Strickland*, 466 U.S. at

689, 104 S.Ct. 2052). Furthermore, isolated mistakes, poor strategy, inexperience and instances of bad judgment do not necessarily render representation ineffective. *Id.* at 747 (citations omitted).

A. Trial Counsel

1. Errors during the penalty phase of trial

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

[11] This Court and the United States Supreme Court have found that capital defendants are entitled to adequate representation at the penalty phase of trial. *See Rompilla v. Beard*, 545 U.S. 374, 382-93, 125 S.Ct. 2456, 162 L.Ed.2d 360 (2005); *Williams v. Taylor*, 529 U.S. 362, 395-98, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000); *Smith v. State*, 547 N.E.2d 817, 821-22 (Ind. 1989). “A decision by defense counsel not to present evidence can be deemed reasonable only if it is ‘predicated on a proper investigation of the alleged defense.’” *Smith*, 547 N.E.2d at 821 (quoting *Thomas v. State*, 251 Ind. 546, 242 N.E.2d 919, 924 (Ind. 1969)).

Weisheit first argues that he was denied effective assistance during the penalty phase of trial because trial counsel did not fully investigate and obtain pertinent mental health records. Specifically, he faults counsel for not obtaining his records from the Indiana Boys School. He points to the post-conviction court’s conclusion that these records (which were obtained for the post-conviction hearing from the Indiana Archives) contained valuable mitigation evidence that was not provided to the jury. Weisheit also argues that had these records been provided to experts, their testimony would have been more compelling.

[12] Here, trial counsel requested the records, but received a response from the Boys School that they were not avail-

able and that pursuant to its document retention policy, documents from that time period would have been destroyed. Nevertheless, defense counsel found other documents and mental health records and provided them to mental health experts.

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

[13] Weisheit also faults counsel for not providing these records to some of the testifying witnesses (Dr. Henderson-Galligan-licensed psychologist and Deborah Eccles-Skidmore-Weisheit’s Boys School counselor) because if they had the records

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

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

Dr. Henderson-Galligan, who was initially appointed by the trial court to do a competency evaluation, met with Weisheit

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

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

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

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

b. Failure to call witnesses

Weisheit also faults trial counsel for not calling certain witness, including Dr. Harvey, an expert retained by the defense, and Dr. Gur, an expert regarding Weisheit's traumatic brain injuries.

Dr. Harvey

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

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

Dr. Gur

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

The post-conviction court determined that evidence of Weisheit's injuries was available to trial counsel, and counsel's fail-

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

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

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

In sum, Weisheit has failed to show a reasonable likelihood of a different outcome had either Dr. Harvey or Dr. Gur testified. Dr. Price testified in Dr. Har-

vey's place and the utility of Dr. Gur's testimony is questionable at best.

2. Failures regarding the admissibility of expert testimony

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

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

1. A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if the expert's scientific, technical,

or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue. Ind. R. Evid. 702(a).

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

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

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

Further, even if Aiken had testified, the prior prison records of Weisheit undercut Aiken's claims and demonstrate Weisheit's propensity for violence and odd behavior. Thus, Aiken would not have aided his mitigation cause. For instance, 35 incident reports were filed regarding Weisheit from April 2010 to May 2011. Incidents include Weisheit threatening to kill an EMT who was dispensing medication, threatening officers and challenging them to fight him, threatening other inmates, destroying several pieces of jail property, urinating in the hallway and concealing "multiple, sharp chicken bones" in his mouth during a search. (PCR Exhibit L.) Accordingly, it is not clear that Aiken's testimony would

have been given great weight and that there's a reasonable probability that the outcome would have been different had Aiken testified.

3. Failure to appropriately question jurors

[19, 20] Indiana Code Section 35-50-2-9(e) states that the jury in a capital case "shall recommend to the court whether the death penalty or life imprisonment without parole, or neither, should be imposed." See *Wrinkles v. State*, 749 N.E.2d 1179, 1198 (Ind. 2001) (statute requires that the jury be instructed as to all three possible penalties). Qualified jurors must be willing to consider all of the possible penalties. *Burris v. State*, 465 N.E.2d 171, 177 (Ind. 1984). This principle flows from United States Supreme Court jurisprudence, which requires that jurors in capital cases must be willing to follow the law (including instructions indicating all of the possible penalties) and must be excused if their personal views of the death penalty (whether pro or con) "would prevent or substantially impair" their ability to follow their oath and the law. *Ritchie v. State*, 875 N.E.2d 706, 726-27 (Ind. 2007) (quoting *Wainwright v. Witt*, 469 U.S. 412, 420, 105 S.Ct. 844, 83 L.Ed.2d 841 (1985)); see also *Greene v. Georgia*, 519 U.S. 145, 146, 117 S.Ct. 578, 136 L.Ed.2d 507 (1996) ("Witt is the controlling authority as to the death-penalty qualification of prospective jurors.") (internal quotation and citation omitted); *Adams v. Texas*, 448 U.S. 38, 45, 100 S.Ct. 2521, 65 L.Ed.2d 581 (1980) (Jurors must be excused if their views on the death penalty "would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath."); *Witherspoon v. Illinois*, 391 U.S. 510, 522, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968).

[21] It is presumed that jurors follow their instructions. *Richardson v. Marsh*, 481 U.S. 200, 206-07, 107 S.Ct. 1702, 95 L.Ed.2d 176 (1987). Here, the jury was instructed on death, life imprisonment without parole, and a term of years as the three sentencing options. Nevertheless, Weisheit alleges that counsel's performance was deficient when, during voir dire, counsel did not ask five jurors if they would be willing to consider a term of years as a sentencing option if they found Weisheit guilty.

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

Juror 7: "I would feel justice was not truly served and a dangerous person could be set free."

Juror 15: "He should never get out."

Juror 75: "Should include 'without the possibility of parole.'"

Juror 160: "Is not appropriate for crime."

Juror 167: "I don't think this is a fair sentence especially if they are guilty of murder."

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

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

Relying on this Court's decision in *Wilkes v. State*, 984 N.E.2d 1236, 1240 (Ind. 2013), the post-conviction court determined it was reasonable for counsel's strategy to focus on identifying and screening those jurors that would automatically vote for the death penalty. The court

found answers on the preliminary jury questionnaire did not establish prejudice by showing a reasonable likelihood of a different outcome in the penalty phase, and Weisheit presented no evidence that any juror indicated he or she would not fully consider a term of years sentence.

[22] We agree. First, Weisheit has not identified any duty or requirement that trial counsel had to ask specific questions of jurors for them to be qualified. Additionally, despite their responses on the questionnaires, several of these jurors said that they would look at all the evidence and mitigators when determining punishment, that they would have an open mind, etc. Juror 7 agreed that the death penalty is not always the right thing to do and that such a sentence depends on the facts and circumstances of an individual case. Juror 15 stated she would consider mitigation evidence including mental health status when deciding an appropriate sentence. Juror 75 was instructed about the different sentencing options and was told "death is different." (Tr. 646.) He was told about the State's burden to prove aggravating circumstances to support a death sentence. He did not say much about his view of the death penalty; however, he said nothing that would indicate he would not consider a term of years. Juror 160 stated she would weigh the evidence and that she couldn't say she had any particular feelings about the death penalty one way or the other. She would weigh the evidence presented. She also stated she would not take the decision lightly. Finally, Juror 167 stated twice that she would keep an open mind.

Counsel was not deficient for not further questioning the five jurors at issue because they are presumed to follow the law, counsel was not required to ask certain questions, the jurors were in fact instructed and asked about the three sentencing op-

tions, and none of them said anything during voir dire to indicate they would not consider a term of years. The term of years option was repeatedly mentioned throughout trial.

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

4. Failure to adequately present evidence in support of suppressing pre-trial statement

Weisheit suffered injuries, including a concussion, during his arrest and was hospitalized. During that time, he was interviewed by police and gave a statement indicating that he was the last person to see the children alive. That is, he stated that he left the children in the home because he did not want them with him, and just started driving. He did not know if he set the fire or how the fire started. Before giving the statement, the officer read Weisheit his *Miranda* rights and he indicated he understood them. The officer did not ask if Weisheit was waiving his rights, and though she had a waiver of rights form, Weisheit "[d]idn't seem to acknowledge it as far as [] wanting to sign it." (PCR Ex. Vol. III at 52.) The police then questioned Weisheit until he asked for a lawyer.

Trial counsel moved to suppress the statement on the basis that Weisheit did not knowingly, intelligently, and voluntarily waive his *Miranda* rights. At the hearing on the motion to suppress, trial counsel focused on Weisheit's medical condition at the time of the interview. The trial court denied the motion to suppress, and this

Court affirmed on direct appeal. *See Weisheit*, 26 N.E.3d at 18. Weisheit now argues that failure to introduce the officer's testimony about his response (or lack of response) to the waiver form was deficient performance.

The post-conviction court agreed that the officer's testimony would have supported an argument that Weisheit's *Miranda* waiver was invalid, which trial counsel (and appellate counsel) did not make. But the court credited trial counsel's testimony at the post-conviction hearing that this omission was strategic, because counsel knew that a waiver could not be invalid solely based on lack of a written waiver. (PCR Order at 32-34 (citing, e.g., *Berghuis v. Thompkins*, 560 U.S. 370, 384-86, 130 S.Ct. 2250, 176 L.Ed.2d 1098 (2010)). The court also found Weisheit had not shown a reasonable likelihood of a different outcome had counsel made the argument below.

[24, 25] Weisheit argues the post-conviction court's conclusions were erroneous. Citing to *Mendoza-Vargas v. State*, 974 N.E.2d 590, 595 (Ind. Ct. App. 2012), he argues that his not wanting to sign the acknowledgement form was akin to his refusal to waive his rights. However, the validity of a waiver is judged by the totality of the circumstances. *Berghuis*, 560 U.S. at 384, 130 S.Ct. 2250. In *Mendoza-Vargas*, a defendant who spoke Spanish shook his head no when he was asked if he wanted to answer questions after being given his *Miranda* rights. *Mendoza-Vargas*, 974 N.E.2d at 593. Nevertheless, police continued to question him. *Id.* In contrast, here, while Weisheit did not seem to want to sign the form, his conduct indicated that he wanted to answer police questions. As we noted on direct appeal, he selectively feigned sleep based on the subject matter of the questions but was otherwise responsive and the interview, which

was brief in duration, ceased when Weisheit asked for an attorney. *Weisheit* 26 N.E.3d at 18. Thus, counsel was not deficient for not raising the issue of Weisheit seeming to not want to sign the waiver form because it is not clear that such a challenge would have been successful in light of the totality of the circumstances which showed Weisheit's willingness to speak with police initially.

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

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

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

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

The post-conviction court found these opinions were inadmissible and would have been excluded had an objection been made. (PCR Order at 36.) (citing Ind. Evid. R. 704(b), "Witnesses may not testify to opinions concerning intent, guilt or innocence in a criminal case . . . or legal conclusions.") The court found counsel's failure to object was deficient performance be-

cause no strategy supported it, counsel did not object because he was not the questioning attorney, and he thought co-counsel should have objected. But the post-conviction court ultimately found no prejudice, because substantial other evidence—like Weisheit's flight after the fire and one child's condition of being bound and gagged—supported the conclusion Weisheit intentionally started the fire.

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

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

[28] In any case, even if counsel was deficient for not objecting to and/or opening the door to the detective's testimony, Weisheit has not demonstrated prejudice. As the post-conviction court aptly noted, this expert testimony was "not nearly as

persuasive as Weisheit's actions before, during, and after the crime." (PCR Order at 37.)

6. Cumulative errors

[29, 30] Generally, trial errors that do not justify reversal when taken separately also do not justify reversal when taken together. *Smith*, 547 N.E.2d at 819. However, in the context of ineffective assistance of counsel, a reviewing court also assesses whether "the cumulative prejudice accruing to the accused" as a result of counsel's errors has "rendered the result unreliable, necessitating reversal under *Strickland's* second prong." *Id.* at 819-20 (internal citations omitted).

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

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

B. Appellate Counsel

Counsel's failure to identify objectionable jurors on appeal

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

Murder of two children, eight and five, and an arson. No defenses, no mental illness that would excuse it, no retardation that would excuse it, no drugs, no alcohol defenses that you would consider, just kind of stone cold-blooded killer of two innocent children. Is the death penalty the only appropriate penalty for that kind of guilty murder?

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

MR. McDANIEL: And I think in your – again, going back to the magic questionnaires here. You indicated you thought the death penalty was appropriate if it was premeditated, multiple murderer, particularly gruesome, and the victims suffered or were tortured. That would be, I think, what you wrote down.

JUROR NO. 7: Yes, sir.

MR. McDANIEL: And that would still be your opinion today; is that right?

JUROR NO. 7: Yes, sir.

MR. McDANIEL: And does that sound like the hypothetical facts that we were talking about here?

JUROR NO. 7: Very similar, yes.

MR. McDANIEL: All right. And I think that you indicated that you somewhat agree with eye for an eye. And even though that's a very common saying, let me ask what's that mean to you, the eye for the eye?

JUROR NO. 7: Well, it means that if you take someone else's life, you shouldn't be allowed the privileges of continuing your own.

(Tr. 141-42.)

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

[32] Had appellate counsel not cited either quotation, perhaps we would be in a different situation. But as it stands, counsel provided significant relevant information about Juror 7's views that appears on the same page as the quote Weisheit prefers. In any case, this Court in reaching its decision is not limited to only what the parties discuss and cite in their briefs. Instead, we "review relevant portions of the record" thoroughly and "often decide cases based on legal arguments and reasoning not advanced by either party." *See*

Bieghler v. State, 690 N.E.2d 188, 195 (Ind. 1997.) The language quoted by the parties is only the starting place for our review and decision-making. Thus, we cannot say that counsel was deficient for not choosing a particular quotation that appears on the same page of the transcript as language that was in fact quoted, nor can Weisheit claim prejudice as a result of counsel's decision to include different language in the brief. Accordingly, Weisheit's ineffective assistance of counsel claim as to his appellate counsel fails.

Conclusion

While Weisheit's trial counsel made mistakes and could have done things better, counsel's performance was not deficient. In any case, Weisheit has not demonstrated that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. Accordingly, Weisheit's ineffective assistance of trial counsel claims fail.

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

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

tion court came to the right conclusion on all issues. Thus, we affirm the post-conviction court.

Massa and Goff, JJ., concur.

Slaughter, J., concurs in part and in the judgment with separate opinion.

Rush, C.J., concurs in part and dissents in part with separate opinion.

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

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

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

On the issue of prejudice, the dissent concludes—and I agree—that none of counsel's "omissions, in isolation, is prejudicial enough to warrant relief". But where the dissent and I part company is the Chief Justice's view that Weisheit was prejudiced by counsel's **cumulative** deficiencies. She believes these deficiencies collectively undermine confidence in the legality of Weisheit's death sentence. I respectfully disagree. In my view, Weisheit

did not sustain his burden under *Strickland*. He failed to show a "reasonable probability" that, had counsel performed competently, "the result of the proceeding would have been different." *Strickland v. Washington*, 466 U.S. 668, 694, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

The dissent correctly observes that the post-conviction court botched the governing legal standard under *Strickland*. Under the correct standard, Indiana's death-penalty statute required Weisheit to show a reasonable probability that, were it not for counsel's deficient performance during the penalty phase, at least one juror would not have voted for the death penalty, and the trial judge would not have imposed that sentence; or, alternatively, that the jury would have voted unanimously **not** to impose the death penalty. This standard follows from our statute's mandate that a unanimous jury recommendation for or against death requires the trial judge to impose that sentence. Ind. Code § 35-50-2-9(e). And if even one juror disagrees, then the court alone decides the sentence. *Id.* § 35-50-2-9(f).

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

Weisheit's multiple crimes was overwhelming. Second, the mitigating evidence trial counsel overlooked paled in comparison.

I'll begin with the overwhelming aggravating evidence supporting the death penalty. For two years Weisheit's girlfriend and her two young children had been living with him at his home in Evansville. After the girlfriend became pregnant, Weisheit reportedly doubted the unborn child was his. While the girlfriend was at work, Weisheit torched the house and left the two children in the house to die—eight-year-old Alyssa and five-year-old Caleb. Alyssa was found in a closet with over ninety percent of her body charred black. She either had been trapped inside the closet or had sought refuge there from the fire. The pathologist said she experienced a drowning-like sensation in her final moments. Caleb also was charred beyond recognition. He was found on a mattress in the bedroom, hog-tied with duct tape, with a washcloth stuffed in his mouth and secured by duct tape. A railroad flare had been placed in his underwear and another under his body. The flare in his underwear burned his left thigh while he was still alive and conscious. He died in agony suffocating from soot and smoke inhalation. See *Weisheit v. State*, 26 N.E.3d 3, 6-8 (Ind.), cert. denied, — U.S. —, 136 S.Ct. 901, 193 L.Ed.2d 796 (2015).

It is worth recounting some of these grisly aspects of Weisheit's crimes because they show how heavily the balance tipped in favor of the jury's unanimous recommendation to impose the death penalty and the high burden Weisheit faced on post-conviction review of proving that the omitted evidence stood a reasonable probability of changing that result. To be clear, someone who commits these or other monstrous acts does not forfeit his Sixth Amendment right to effective counsel. But the problem with Weisheit's ineffectiveness claim is

that the circumstances surrounding the proven statutory aggravators were heinous. In a less-horrific case, perhaps the same omitted evidence would have tipped the scales and led to a sentence other than death. But here Weisheit failed to establish that the omitted evidence probably would have made a difference.

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

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

pensity for violence and antisocial behavior, including threats to kill an EMT who was dispensing medication; threatening correctional officials and other inmates; hiding sharp chicken bones in his mouth during a search; and urinating in a hallway.

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

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

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

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

"[D]eath is different," *Ring v. Arizona*, 536 U.S. 584, 606, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002), and the "qualitative difference between death and other penalties calls for a greater degree of reliability when the death sentence is imposed," *Lowenfield v. Phelps*, 484 U.S. 231, 238-39, 108 S.Ct. 546, 98 L.Ed.2d 568 (1988) (quoting *Lockett v. Ohio*, 438 U.S. 586, 604, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978) (plurality opinion)). See *Monge v. California*, 524 U.S. 721, 732, 118 S.Ct. 2246, 141 L.Ed.2d 615 (1998). Here, the evidence and the post-conviction court's findings compel the conclusion that counsel's penalty-phase performance suffered multiple deficiencies. While none of those deficiencies, in isolation, is prejudicial enough to warrant relief, in the aggregate, they deprived the jury of enough essential information about Weisheit's background and mental health that his death sentence is not as reliable as the constitution requires.

"[T]here are certain immutable principles of justice which inhere in the very idea of free government which no member of the Union may disregard." *Powell v. Alabama*, 287 U.S. 45, 71-72, 53 S.Ct. 55, 77 L.Ed. 158 (1932) (quoting *Holden v. Hardy*, 169 U.S. 366, 389, 18 S.Ct. 383, 42 L.Ed. 780 (1898)). Among them is the constitutional right to due process, which secures another constitutional right: to effective assistance of counsel. *Id.*; see *Strickland v. Washington*, 466 U.S. 668, 684-85, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

To uphold these constitutional pillars of justice, when a defendant's life is at stake—no matter how reprehensible the defendant—there is "an acute need for reliability," *Monge*, 524 U.S. at 732, 118 S.Ct. 2246, which calls courts to be "particularly sensitive to insure that every safeguard is observed," *Gregg v. Georgia*, 428 U.S. 153, 187, 96 S.Ct. 2909, 49 L.Ed.2d

859 (1976) (plurality opinion). This includes verifying that the jury was properly presented with mitigating evidence to consider at the sentencing phase. *See Williams v. Taylor*, 529 U.S. 362, 395–98, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000); *Eddings v. Oklahoma*, 455 U.S. 104, 116–17, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982).

We conduct this review with “painstaking care,” *Burger v. Kemp*, 483 U.S. 776, 785, 107 S.Ct. 3114, 97 L.Ed.2d 638 (1987), in part because the death penalty is “profoundly different from all other penalties,” *Eddings*, 455 U.S. at 110, 102 S.Ct. 869 (quoting *Lockett*, 438 U.S. at 605, 98 S.Ct. 2954 (plurality opinion)), and “unique ‘in both its severity and its finality,’” *Monge*, 524 U.S. at 732, 118 S.Ct. 2246 (quoting *Gardner v. Florida*, 430 U.S. 349, 357, 97 S.Ct. 1197, 51 L.Ed.2d 393 (1977) (plurality opinion)). Our careful review is to confirm that the state’s imposition of the death penalty stands soundly on the fundamental principles of justice that our federal constitution guarantees. An execution tainted by constitutional error corrodes the integrity of the justice system and of the state that imposed it. I believe Weisheit’s death sentence suffers that taint of constitutional error.

It is entirely possible that without counsel’s performance deficiencies Weisheit would still have received a death sentence—again, these murders were brutal. But there is also a reasonable probability that he wouldn’t have. So the outcome of his penalty phase does not meet the required level of reliability. *See Strickland*, 466 U.S. at 694, 104 S.Ct. 2052. Weisheit was thus denied his Sixth Amendment right to effective assistance at the penalty phase—though not at the guilt phase—of trial.

1. I agree with my colleagues that these findings are, in fact, the court’s findings. The

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

I therefore respectfully dissent in part.

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

It is true that Weisheit must convince this Court that there is no way within the law that the post-conviction court could have arrived at the conclusion it did. *See Stevens v. State*, 770 N.E.2d 739, 745 (Ind. 2002). And “[s]urmounting *Strickland*’s high bar is never an easy task.” *Padilla v. Kentucky*, 559 U.S. 356, 371, 130 S.Ct. 1473, 176 L.Ed.2d 284 (2010).

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

The post-conviction court’s findings¹ and the evidence as a whole lead only to

State at oral argument asserted that the order’s numbered paragraphs are merely para-

the conclusion that counsel's deficiencies collectively prejudiced Weisheit at the penalty stage. The post-conviction court erred in concluding otherwise.

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

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

The Sixth Amendment guarantees Weisheit "the Assistance of Counsel," U.S. Const. amend. VI, which carries a performance standard of "reasonableness under prevailing professional norms," *Strickland*, 466 U.S. at 688, 104 S.Ct. 2052.

In measuring attorney performance, courts are mindful that counsel's function is to make the adversarial testing process work in each case. *Id.* at 688–90, 104 S.Ct. 2052. In death penalty cases, counsel should make "extraordinary efforts on behalf of the accused," whose life is at stake. *Woolley v. Rednour*, 702 F.3d 411, 425 (7th Cir. 2012) (quoting *ABA Standards for Criminal Justice Prosecution Function and Def. Function* 120 (3d ed. 1993) [hereinafter *ABA Standards*]); *ABA Guidelines for the Appointment and Perform-*

phrased restatements of Weisheit's arguments, but the post-conviction court explicitly foreclosed that interpretation in its order's introduction:

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

Although some of the court's findings do observe Weisheit's arguments—with sentences starting "Weisheit alleges . . ." or "Weisheit claims . . ."—nothing indicates that those qualifiers extend beyond the sentences they begin. Nor is this a case in which the court essentially adopted wholesale and verbatim

ance of Def. Counsel in Death Penalty Cases, Introduction (2003) [hereinafter *ABA Guidelines*].² At the sentencing phase, "defense counsel's job is to counter the State's evidence of aggravated culpability with evidence in mitigation." *Rompilla v. Beard*, 545 U.S. 374, 380–81, 125 S.Ct. 2456, 162 L.Ed.2d 360 (2005).

Since during the penalty phase Weisheit's counsel acknowledged Weisheit's guilt and presented a case in mitigation, counsel had "every reason to develop the most powerful mitigation case possible." *Wiggins v. Smith*, 539 U.S. 510, 526, 123 S.Ct. 2527, 156 L.Ed.2d 471 (2003). Counsel's obligation to find mitigating evidence included conducting "a thorough investigation" of Weisheit's background. *Porter v. McCollum*, 558 U.S. 30, 39, 130 S.Ct. 447, 175 L.Ed.2d 398 (2009) (per curiam) (quoting *Williams*, 529 U.S. at 396, 120 S.Ct. 1495). Interviewing witnesses and requesting records were the first steps. *Id.* Then counsel should have left "no stone unturned," *ABA Standards* at 4-1.2 Commentary, "to discover **all reasonably available** mitigating evidence," *Wiggins*, 539 U.S. at 524, 123 S.Ct. 2527 (quoting *ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases*, 11.4.1(C) (1989)). *See also ABA*

Weisheit's allegations as the court's findings of fact and conclusions of law. Even if the court had done so, we would take the findings and conclusions as the court's own while approaching them with cautious appellate scrutiny. *See Stevens*, 770 N.E.2d at 762.

2. The Supreme Court of the United States has "long referred" to American Bar Association standards and guidelines "as guides to determining what is reasonable." *Wiggins v. Smith*, 539 U.S. 510, 524, 123 S.Ct. 2527, 156 L.Ed.2d 471 (2003) (quoting *Strickland*, 466 U.S. at 688, 104 S.Ct. 2052). I likewise refer to them not as setting out rigid, detailed rules but as guideposts for determining reasonableness under professional norms at the time counsel represented Weisheit.

Standards at 4-4.1(a) (“Defense counsel should . . . explore all avenues leading to facts relevant to the merits of the case and the penalty . . .”).

Limitations on the investigation must be supported by “reasonable professional judgments” under the circumstances; they must not result from inattention. *Wiggins*, 539 U.S. at 533, 123 S.Ct. 2527 (quoting *Strickland*, 466 U.S. at 691, 104 S.Ct. 2052). Compare *Bobby v. Van Hook*, 558 U.S. 4, 11–13, 130 S.Ct. 13, 175 L.Ed.2d 255 (2009) (per curiam), with *Williams*, 529 U.S. at 395–96, 120 S.Ct. 1495. Presenting some mitigating evidence is not enough if counsel failed to pursue sources that counsel should have been aware of, that were reasonably available, and that promised more powerful evidence than counsel actually obtained. See *Wiggins*, 539 U.S. at 533, 123 S.Ct. 2527; *Porter*, 558 U.S. at 39–40, 130 S.Ct. 447; *Rompilla*, 545 U.S. at 381–90, 125 S.Ct. 2456. Finally, greater effort is required when the absent evidence is “particularly pressing” for the defendant’s case. *Rompilla*, 545 U.S. at 386, 125 S.Ct. 2456. In other words, the amount of effort that is reasonable rises with the evidence’s importance.

In Weisheit’s case, counsel countered the aggravating circumstances—two murders of children under the age of twelve, see Ind. Code § 35-50-2-9(b)(8), (12) (2008)—with four statutory mitigating factors. First, Weisheit had no significant history of prior criminal conduct. See I.C. § 35-50-2-9(c)(1). Second, Weisheit was un-

3. This statutory mitigating factor differs from the insanity defense. Whereas insanity is a defense when the defendant, “as a result of mental disease or defect . . . was **unable** to appreciate the wrongfulness of the conduct at the time of the offense,” I.C. § 35-41-3-6(a) (emphasis added), the statutory mitigating factor applies when the defendant’s “**capacity to appreciate** the criminality of the defendant’s conduct **or to conform** that conduct to

der the influence of extreme mental or emotional disturbance when he committed the murders. See I.C. § 35-50-2-9(c)(2). Third, Weisheit’s capacity to appreciate the criminality of his conduct or to conform that conduct to the law was substantially impaired because of mental disease or defect.³ See I.C. § 35-50-2-9(c)(6). And finally—in a catchall for any other circumstances appropriate for consideration—Weisheit could be securely housed in the Department of Correction for the remainder of his life, and his troubled childhood and mental health issues reduce his culpability. See I.C. § 35-50-2-9(c)(8); *Porter*, 558 U.S. at 43–44, 130 S.Ct. 447; *Rompilla*, 545 U.S. at 390–91, 125 S.Ct. 2456; *Williams*, 529 U.S. at 395–96, 120 S.Ct. 1495; *Skipper v. South Carolina*, 476 U.S. 1, 4–5, 106 S.Ct. 1669, 90 L.Ed.2d 1 (1986).

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

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

Defense counsel did not attempt to secure Dr. Harvey as a witness for the penalty phase of trial. As the post-conviction court found, Dr. Harvey was an expert on

the requirements of law was **substantially impaired** as a result of mental disease or defect or of intoxication,” I.C. § 35-50-2-9(c)(6) (emphases added). Because of these differences, a person may be legally sane but nevertheless qualify for the mitigating factor, depending on the degree of the defendant’s mental illness. See, e.g., *Matheney v. State*, 688 N.E.2d 883, 898 (Ind. 1997); *Lowery v. State*, 547 N.E.2d 1046, 1059 (Ind. 1989).

bipolar disorder who personally observed Weisheit exhibit signs of a manic episode during an in-person evaluation. He emailed the defense team that, while he was unable to perform a future assessment of Weisheit, he was able and willing to testify about his past observations of Weisheit. After receiving this email and despite Dr. Harvey's willingness, Weisheit's counsel never contacted the doctor to see if he would testify. The post-conviction court—after taking evidence—properly found that this failure was a “mistake” and “not a strategic decision,” yet concluded that trial counsel's performance was not deficient. As I explain below, the post-conviction court's findings and the evidence as a whole do not support this conclusion.

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

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

... [Dodd] had me go to Evansville and perform an evaluation. Our plan was to perform an initial mental health evaluation ... [t]o be followed up by other assessments as needed. ...

... What was clear when I was talking to Mr. Weisheit was that he was showing the signs of having a manic episode. ...

... This interview was performed on the 19th of September, 2010.

... [T]hen Mr. Dodd showed me a video that had been taken at the time of Mr. Weisheit's arrest. ...

... Mr. Weisheit was very agitated when he got out of the car. He was yelling at the officers that were there. He threw – he actually threw a knife at the officers immediately prior to being struck by the taser.

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

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

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

We have just been informed that as of the first of this year, we can no longer be paid as individuals for the assessment of any forensic cases that involve direct

contact with clients. . . . This does not preclude testimony on previously seen cases. Let me try to find you someone else who could do an assessment for you, but I can't. I will have to restrict my testimony to the data that I previously collected prior to this rule.

Dr. Harvey testified about what happened next:

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

. . . .

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

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

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

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

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

I had received information from Mike Dennis and Mike McDaniel that Dr. Harvey was no longer able to participate. . . . My understanding was, basically, he was not going to be able to be a witness and he was not going to be able to continue to evaluate.

. . . .

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

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

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

3. Dr. Harvey is a licensed psychologist. . . . Dr. Harvey has been studying Bipolar Disorder since 1979.
4. Dr. Harvey was involved in a very large and significant study of veter-

ans diagnosed with Bipolar Disorder as the Clinical Chair. . . . Dr. Harvey personally reviewed [thousands of] individual results in the study.

-
6. Dr. Harvey testified to the importance of a clinical interview. . . . Dr. Harvey finds a structured interview like the SCID is the most informative aspect of a clinical evaluation. . . .
 7. Dr. Harvey was originally contacted by prior counsel, Timothy Dodd. Dr. Harvey performed an evaluation of Weisheit on September 19, 2010. . . . During the evaluation, Dr. Harvey administered the SCID. Dr. Harvey felt Weisheit was showing signs of a manic episode when he performed Weisheit's evaluation. Following the evaluation, Dr. Harvey met with trial counsel and . . . [c]ounsel showed Dr. Harvey the video of Weisheit being stopped [by police] and his behavior prior to being hit with a taser. Dr. Harvey informed trial counsel Weisheit's behavior was consistent with the behavior he observed when he performed the evaluation of Weisheit. At the time, Dr. Harvey expected he would perform another psychological evaluation [of Weisheit]. He was provided the family mental health records in 2011, but had no other contact with the trial team regarding the additional evaluation until January of 2012. In an e-mail to the defense team, Dr. Harvey notified them of his recent change of conditions of employment. . . . [H]e [could] no longer have direct contact with individuals in forensic cases. . . . He would have to restrict his testimony to the evaluation he had performed. . . . He could have testified at the 2013 trial, but was not asked to do so.
-
11. The failure to call Dr. Harvey was not a strategic decision. Counsel mistakenly believed Dr. Harvey was not able to continue on the case. The email contradicts this belief Dr. Harvey clearly conveyed he was available to testify to the results obtained during his evaluation of Weisheit. Counsel did not contact Dr. Harvey to learn whether he could or could not testify. Dr. Harvey was willing to do so. Due to counsel's mistake, Dr. Harvey was not provided the necessary documentation of evidence supporting the episodic nature of Bipolar Disorder and the Boys School records reflecting the long term treatment for Major Depression. A Major Depressive Episode is the first observed symptom for the majority of those identified later in life with Bipolar Disorder. Weisheit's presentation, a late onset single manic episode, is consistent with 40% of those diagnosed with Bipolar Disorder.
 12. Dr. Price's testimony reflected some of Dr. Harvey's observations. However, he could not testify to Dr. Harvey's opinion and therefore had to dilute the information collected by Dr. Harvey
 13. Dr. Harvey's testimony could have been used to rebut the State's expert, Dr. Allen. . . .
 14. . . . Dr. Harvey's opinion would have supported two statutory mitigators and would have effectively rebutted Dr. Allen's testimony. The State exploited counsel's failure and argued there was no evidence of these two statutory mitigators (Tr. 2568-2569). By failing to con-

tact Dr. Harvey, the defense was left with one expert to testify to the cognitive disorder and Bipolar Disorder. Trial counsel's own assessment of the credibility of Dr. Price's testimony reflects the magnitude of this error.

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

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

Failing to contact Dr. Harvey after he emailed the defense team "resulted from inattention, not reasoned strategic judgment." *Wiggins*, 539 U.S. at 526, 123 S.Ct. 2527; *see Strickland*, 466 U.S. at 689, 104 S.Ct. 2052. So the post-conviction court properly found that "not contact[ing] Dr. Harvey to learn whether he could or could not testify" was a "mistake" and "not a strategic decision." It was also not a minor, innocuous mistake, *see Strickland*, 466 U.S. at 695–96, 104 S.Ct. 2052; *Timberlake v. State*, 753 N.E.2d 591, 603 (Ind. 2001), because Dr. Harvey's hours-long, in-person encounter with Weisheit was vitally important to the defense's case. As the post-conviction court found, "[t]he State exploited counsel's failure" by arguing that no evidence showed the two statutory mitigators that "Dr. Harvey's opinion would have supported," revealing a breakdown in the adversarial process, *see Strickland*,

466 U.S. at 688–90, 104 S.Ct. 2052. Given the evidence in support, these and other related findings were not clearly erroneous.

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

Although the post-conviction court's findings are supported by the evidence, neither those findings nor the evidence as a whole support its conclusion that "Weisheit has failed to show that trial counsel[s] performance fell below prevailing professional norms where counsel failed to call Dr. Philip Harvey at the penalty phase of Weisheit's trial." The court reasoned that "Weisheit never established when the [new employment rule] . . . went into effect" and "[i]t was reasonable for trial counsel to decide to hire another qualified expert." This reasoning—and the conclusion that stands on it—is faulty, for multiple reasons.

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

Second, the post-conviction court—and similarly the majority today—excuses counsel for dropping Dr. Harvey's involvement because counsel later hired Dr. Price, who incorporated Dr. Harvey's two-page summary memorandum into his own assessment and testimony. But hiring Dr. Price does not erase the deficiency from

counsel's performance. This is because the choice to employ Dr. Price was based entirely on counsel's false impression that Dr. Harvey could not testify—a false impression formed by inattention rather than by “reasoned strategic judgment.” *Wiggins*, 539 U.S. at 526, 123 S.Ct. 2527. Thus, although calling Dr. Price to testify may have been a reasonable decision by itself, it proceeded from inattention that did not reflect reasonable professional judgment. *Cf. id.* at 533, 123 S.Ct. 2527 (“[S]trategic choices made after less than complete investigation are reasonable’ only to the extent that ‘reasonable professional judgments support the limitations on investigation.’” (quoting *Strickland*, 466 U.S. at 690–91, 104 S.Ct. 2052)).

And although hiring Dr. Price might have shielded Weisheit from prejudice caused by counsel's deficient performance, that goes to *Strickland's* second prong. *See Timberlake*, 753 N.E.2d at 603 (“The two prongs of the *Strickland* test are separate and independent inquiries.”). Regardless of prejudice, the post-conviction court's findings and the evidence as a whole lead only to the conclusion that failing to contact Dr. Harvey after he emailed the defense team was an inexcusable, unprofessional error—one that amounted to deficient performance under *Strickland's* first prong. *See Williams*, 529 U.S. at 396, 120 S.Ct. 1495 (chiding counsel for failing to return a phone call of someone who had visited the defendant in prison and had offered to testify); *Hall v. Washington*, 106 F.3d 742, 749–50 (7th Cir. 1997). The post-conviction court's opposite conclusion—that counsel was not deficient—is thus contrary to law.

2. Failure to pursue the Boys School records.

Early in their investigation, defense counsel learned that records of Weisheit's time at the Boys School likely contained valuable mitigating evidence. Counsel were

aware that while Weisheit was at the Boys School, he attempted suicide and received treatment at Methodist Hospital. Tim Dodd accordingly sent initial records requests to the Department of Correction and to the hospital, but neither entity could fill the request.

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

After reviewing the evidence, the post-conviction court rightly found that the mitigation case would have been stronger “but for counsel's deficiencies,” and even likened counsel's limited investigation to the deficient performance found in *Wiggins*, 539 U.S. at 525, 123 S.Ct. 2527. Yet the post-conviction court concluded that counsel's aborted efforts were not deficient performance. The court's findings and the evidence as a whole do not support this conclusion.

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

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

ment of Correction. His letter to the Department said,

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

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

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

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

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

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

A Not to my knowledge.

....

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

A No.

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

A No.

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

A No.

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

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

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

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

3. The defense team was aware Weisheit had spent some time in the Boys School. Tim Dodd sent a letter to the Department of Correction requesting copies of the Boys School records. Dodd received a response that they no longer had the records (PCR Ex. C). Dennis was never asked by any other counsel to do anything else to look for the Boys School records. They received a few records from Weisheit's parents, but did not get everything they wanted.
 4. The defense team was aware that while Weisheit was at the Boys School, he was sent to Methodist Hospital. A report from the Boys School . . . indicated that while Weisheit was in the psychiatric unit of Methodist Hospital after attempting suicide at the Boys School, he suffered a psychotic break (PCR Ex. 5). Owens testified if there was evidence Weisheit had a psychotic break while at Methodist Hospital, that would have been important to provide to the defense team's experts.
-
13. . . . [H]ad counsel been armed with the Boys School records, he would have been able to present to the jury information about the school's resources and the rarity of Weisheit's placement at Methodist. [Deborah Eccles-]Skidmore could have been a much more compelling witness for the defense but for counsel's deficiencies.

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

The investigation the defense team conducted unearthed leads to persuasive

mitigating evidence. They knew that Weisheit was in the Boys School yet failed to find the records. . . . The records that were provided to the jury reflected very little of the compelling evidence of Weisheit's mental illness or the role his family played in failing to follow through with treatment. . . . The Boys School records document lengthy treatment for a major mental illness, one which included that Weisheit suffered a psychotic break. . . . In *Wiggins*, the Supreme Court found counsel's performance deficient where they failed to continue investigating once this type of lead had been found. "The scope of the[ir] investigation was also unreasonable in light of what counsel actually discovered [in the . . . records]." *Wiggins*, 539 U.S. at 525, 123 S.Ct. 2527. The Court explained counsel uncovered no evidence to suggest "further investigation would have been fruitless." *Id.*

Ultimately, the evidence supports the post-conviction court's findings. Indeed, counsel was aware that the Boys School records promised persuasive mitigating evidence of Weisheit's troubled youth and mental health issues. Counsel also had no reasonable substitute for the Boys School records, making those records of Weisheit's time at the Boys School—when he attempted suicide—particularly pressing for the strength of the defense's case. *See Rompilla*, 545 U.S. at 385–86, 125 S.Ct. 2456.

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

their investigation of the Boys School records after “unearth[ing] leads to persuasive mitigating evidence” are not clearly erroneous.

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

Although the evidence supports the findings above, those findings and the evidence do not support the court’s conclusion that “[t]rial counsel’s efforts to gain information regarding Weisheit’s Indiana Boys’ School records was more than sufficient under the dictates of *Strickland*.”

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

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

The Department invited counsel’s further questions, and counsel failed to act on that invitation. It was not the Depart-

ment’s responsibility to provide counsel with other next steps for their investigation, such as referring counsel to the state archives. It was counsel’s responsibility to follow the leads that they had and to be thorough in uncovering the defendant’s background. *See Porter*, 558 U.S. at 39–40, 130 S.Ct. 447; *ABA Supplementary Guidelines for the Mitigation Function of Def. Teams in Death Penalty Cases*, Introduction, 10.4 (2008) (recognizing that the “ultimate responsibility for the investigation . . . rests irrevocably with counsel”).

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

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

4. Whether the majority has imposed a heightened burden on Weisheit—to show **clearly** ineffective assistance—is another issue. Weisheit bears the burden of establishing grounds for relief by a preponderance of the

evidence. *See* P–C.R. 1(5); *Wilkes*, 984 N.E.2d at 1240. In my view, Weisheit has carried his burden to establish deficient performance and cumulative prejudice.

True, this is not a case where counsel completely ignored their obligation to find mitigating evidence. *See Rompilla*, 545 U.S. at 381, 125 S.Ct. 2456. Counsel did obtain some records. But those records made counsel aware that the Boys School records promised more powerful mitigating evidence, and counsel had an obligation to follow that lead. *See Porter*, 558 U.S. at 39–40, 130 S.Ct. 447; *Rompilla*, 545 U.S. at 381–89, 125 S.Ct. 2456; *Wiggins*, 539 U.S. at 533–34, 123 S.Ct. 2527. Counsel didn’t need to “scour the globe” for the Boys School records. *Rompilla*, 545 U.S. at 383, 125 S.Ct. 2456. But counsel’s aborted pursuit of critical mitigating evidence is a far cry from both counsel’s “overriding mission of vigorous advocacy,” *Strickland*, 466 U.S. at 689, 104 S.Ct. 2052 and the “extraordinary efforts” demanded when a client’s life is at stake, *ABA Guidelines*, Introduction. Particularly because counsel knew the importance of Weisheit’s mental-health history to his mitigation case, doing nothing to follow up on the records was unreasonable.

Augmenting the unreasonableness of counsel’s inaction are that the sentencing phase was “the main event” of Weisheit’s trial since acquittal was unlikely, *Brewer v. Aiken*, 935 F.2d 850, 860 (7th Cir. 1991) (Easterbrook, J., concurring), and that reasonable efforts would have been enough to locate and obtain the records at the state archives, *see Rompilla*, 545 U.S. at 389–90, 125 S.Ct. 2456. Counsel’s inaction and lack of effort in pursuing valuable mitigating evidence was unreasonable and put their client’s life at greater risk. *Cf. Baer*, 879 F.3d at 783–84. These failures amounted to deficient performance.

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

Laying a proper foundation for testimony is an “evidentiary requirement that ev-

ery trial attorney should understand.” *Hernandez v. State*, 638 N.E.2d 460, 462 (Ind. Ct. App. 1994), *trans. denied*. It includes pointing the trial court to the governing foundational rule when necessary to prevent a “breakdown in the adversarial process,” *Strickland*, 466 U.S. at 696, 104 S.Ct. 2052.

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

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

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

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

At the penalty phase, counsel appropriately recognized that “mitigation includes

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

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

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

THE COURT: . . . Are you asking -- are you proposing that his testimony is going to be in the nature of projecting or offering an opinion as to whether or not the Defendant will be, and I’m -- these are my words, a disruptive influence in the prison system?

MR. OWENS: Why don’t you just ask Mr. Aiken.

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

The trial court did eventually ask Aiken questions, gearing them toward the foundational requirements for expert **scientific** testimony under Indiana Evidence Rule

702(b). Counsel did not point the court to Rule 702(a), which spells out the less-stringent requirements for non-scientific expert testimony. The court ultimately excluded Aiken’s testimony on Weisheit’s future inmate classification because it did not meet Rule 702(b)’s requirements, but the court said that Aiken could testify on classification generally.

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

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

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

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

For Weisheit's past adjustment, Aiken concluded:

... I did not find anything that would give me an indication that his criminal history would cause an[y] issues ... the Department of Correction[] could not anticipate or manage.

....

... [F]rom the stand point of managing him for a long term basis, he did not present an unusual risk There were incident reports, disciplinary hearings and so forth in relationship to his behavior and I made assessments of each one And those type of misconduct reports were at the lower end of the spectrum as it relates to managing inmate population.

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

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

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

Also at the post-conviction hearing, Owens testified that he had not met with or spoken to Aiken until the morning of his

testimony and that he was surprised by the State's objection.

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

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

....

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

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

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

11. Aiken has an undergraduate and graduate degree in criminal justice. He has worked for 45 years in the corrections industry. He has experience implementing techniques and protocols related to classification. He has participated in training programs related to classification. Aiken has been employed by various correctional facilities throughout the country and the Virgin Islands (PCR Ex. 23). He was the commissioner of the

Indiana Department of Correction . . . Aiken has helped design and implement classification systems throughout the country . . . He has testified in several Indiana death penalty cases as to the ability of the Indiana Department of Correction to safely house an inmate without undue risk of harm to others.

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

Weisheit, Aiken observed his demeanor and how he appeared to be handling the stress of incarceration and the trial. Aiken did not find Weisheit to be cool, detached or aggressive.

14. Aiken testified that given all the circumstances, Weisheit would be incarcerated in a maximum security facility . . . Aiken offered the opinion if Weisheit received a term of years or life without parole, he could be securely housed in a high security setting by the Department of Correction without undue risk of harm to prison staff or the other inmates.
 15. Before the post-conviction hearing, Aiken reviewed Weisheit's Department of Correction history since his convictions. Aiken testified the records demonstrated Weisheit had made adequate adjustment to being incarcerated. Aiken noted two minor violations in three years. He did not see any evidence of random or systemic violence. These records validated his original opinion.
-
17. . . . The [Indiana Supreme] Court opined [on direct appeal] that if counsel had made a more precise offer of proof detailing Weisheit's adjustment to imprisonment leading up to trial, it "could have possibly resulted in reversal of his death sentence." [*Weisheit*, 26 N.E.3d at 10.]
 18. When deciding whether to impose a death sentence, the trier of fact may consider any appropriate mitigating circumstances. Ind. Code 35-50-2-9(c). It is a violation of the U.S. Constitution to fail to consider evidence of a defendant's adjust-

ment to incarceration leading up to trial as mitigating evidence to weigh against the aggravating circumstances. *Skipper*, 476 U.S. at 3–5, 106 S.Ct. 1669; *Wilkes v. State*, 917 N.E.2d 675, 690 (Ind. 2009).

-
20. The trial court’s use of foundational requirement[s] of Ind. Evid. R. 702(b) was error. Aiken’s testimony was admissible under Ind. Evid. R. 702(a)
 21. The subject matter here, whether the Department of Correction can adequately house Weisheit given his particular circumstances, is not a subject known to the average person. Aiken was qualified as an expert in classification and had specialized knowledge to assist the jury in determining a mitigating factor, the ability of Weisheit to be safely incarcerated without undue risk of harm to others, in weighing the decision between the death penalty, life without parole or a term of years....
 22. ... Counsel’s error was not the result of poor strategy or bad tactics....
 23. ... Counsel was not prepared to handle any objections from the State....
 -
 26. ... The jury did not hear ... about any of the factors that weighed in favor of his imprisonment without undue risk to others.... The defendant must show there is a reasonable probability the result of the proceeding would have been different absent the deficient performance. [*Strickland*,] 466 U.S. at 693, 104 S.Ct. 2052. The [Indiana] Supreme Court’s own words demonstrate there is a rea-

sonable probability of a different outcome had counsel made the proper offer of proof. . . .

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

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

Long before Weisheit’s penalty phase, the Supreme Court of the United States established the mitigating potential of testimony about a defendant’s promising adjustment to prison. *See Skipper*, 476 U.S. at 4–5, 106 S.Ct. 1669. Counsel was thus deficient in failing to present the jury with that testimony when Aiken was prepared—and permitted by the court—to provide it at Weisheit’s penalty phase.

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

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

Below, I address prejudice and elaborate on how this statement in the post-conviction court's order conflates *Strickland's* performance and prejudice demands. But as far as the deficiency inquiry is concerned, counsel's performance should be measured by reasonableness under prevailing professional norms, *see Strickland*, 466 U.S. at 687–88, 104 S.Ct. 2052, not by whether the performance “was to a level of deficiency that he was prejudiced.”

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

To be sure, had Aiken (or another expert) been prepared to testify as to Weisheit's adjustment to imprisonment throughout the time **leading up to the** penalty phase, then the trial court's exclusion of such testimony . . . would have been problematic and could have possibly resulted in reversal of his death sentence. . . .

Further, we note that Weisheit did not help his case by failing to make a more precise offer of proof regarding Aiken's prediction of his specific future classification At no time during th[e] discussion [with the court] did Weisheit's counsel make a clear offer of proof by requesting permission from the trial court to ask Aiken a series of questions that counsel intended to ask at trial. *Weisheit v. State*, 26 N.E.3d 3, 10 (Ind. 2015).

In other words, defense counsel's performance surrounding Aiken's testimony both prevented the jury from hearing valuable and admissible mitigating evidence and precluded the record from reflecting a clear offer of proof. Under the correct

standard to evaluate deficiency—reasonableness under prevailing professional norms—the evidence and findings lead to only one conclusion: counsel's performance concerning Aiken's testimony was deficient.

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

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

B. Counsel's performance deficiencies collectively prejudiced Weisheit.

A defendant overcomes the burden for *Strickland's* prejudice prong by showing “a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.” *Strickland*, 466 U.S. at 694, 104 S.Ct. 2052. The defendant is **not** required to “show that counsel's deficient conduct more likely than not altered the outcome in the case.” *Id.* at 693, 104 S.Ct. 2052. Rather, “[a] reasonable probability is a probability sufficient to undermine confidence in the outcome.” *Id.* at 694, 104 S.Ct. 2052.

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

In determining prejudice, reviewing courts consider “the totality of the available mitigation evidence”—presented both at trial and at the post-conviction hearing—and “reweig[h] it against the evidence

in aggravation.” *Porter*, 558 U.S. at 41, 130 S.Ct. 447 (alteration in original) (quoting *Williams*, 529 U.S. at 397–98, 120 S.Ct. 1495).

The majority does not recognize any deficiencies in counsel’s performance, so it does not engage in “the type of probing and fact-specific analysis” required to evaluate cumulative prejudice. *Sears v. Upton*, 561 U.S. 945, 955, 130 S.Ct. 3259, 177 L.Ed.2d 1025 (2010) (per curiam) (disapproving “the type of truncated prejudice inquiry undertaken by the state court”); *Baer*, 879 F.3d at 788 (finding that this Court’s “pithy analysis on prejudice” for the defendant’s cumulative-effect claim did not support our conclusion).

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

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

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

Similarly, had counsel obtained the Boys School records and provided them to witnesses, the defense would have presented

stronger mitigating testimony from Dr. Henderson-Galligan, Dr. Harvey, and Eccles-Skidmore. The Boys School records gave a more accurate picture of the extent of Weisheit’s mental health issues, enmeshed family, and childhood troubles, and would have made Dr. Harvey’s bipolar diagnosis “definitive.”

Finally, had counsel more clearly offered Aiken’s testimony about Weisheit’s past adjustment to imprisonment and future inmate classification, the jury would have heard evidence that Weisheit would not pose a danger if spared but incarcerated. *Skipper*, 476 U.S. at 5, 106 S.Ct. 1669. Even if Aiken weren’t permitted to testify to Weisheit’s future classification, he could have testified to Weisheit’s past adjustment to imprisonment. This is important because “the sentencer may not refuse to consider or be precluded from considering ‘any relevant mitigating evidence.’” *Id.* at 4, 106 S.Ct. 1669 (quoting *Eddings*, 455 U.S. at 114, 102 S.Ct. 869). And “there is no question,” *id.*, that favorable inferences jurors might have drawn from Aiken’s testimony about Weisheit’s past adjustment to imprisonment “would be ‘mitigating’ in the sense that they might serve ‘as a basis for a sentence less than death,’” *id.* at 4–5, 106 S.Ct. 1669 (quoting *Lockett*, 438 U.S. at 604, 98 S.Ct. 2954 (plurality opinion)).

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

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

. . . .

- 9[a]. . . . The court ruled it would allow Aiken to testify generally about classification, but not render any

- opinions as to how the State of Indiana would classify Weisheit if he received life without parole or a term of years (Tr. 2381-2383).... The court did not change his ruling. Owens never corrected the court about its use of 702(b) foundational requirements.
- 9[b]. Owens withdrew Aiken without any further offer of proof....
-
13. Prior to his testimony in 2013, Aiken reviewed Weisheit's criminal history, all institutional records from the Vanderburgh County Jail and the facts surrounding this crime (Tr. 2366). He also interviewed Weisheit (Tr. 2367)....
14. Aiken testified that given all the circumstances, Weisheit would be incarcerated in a maximum security facility.... Aiken offered the opinion if Weisheit received a term of [f] years or life without parole, he could be securely housed in a high security setting by the Department of Correction without undue risk of harm to prison staff or the other inmates.
-
17. ... The [Indiana Supreme] Court opined [on direct appeal] that if counsel had made a more precise offer of proof detailing Weisheit's adjustment to imprisonment leading up to trial, it "could have possibly resulted in reversal of his death sentence." [*Weisheit*, 26 N.E.3d at 10.]
18. ... It is a violation of the U.S. Constitution to fail to consider evidence of a defendant's adjustment to incarceration leading up to trial as mitigating evidence to weigh against the aggravating circumstances....
-
20. ... Aiken's testimony was admissible under Ind. Evid. R. 702(a)....
21. ... Aiken was qualified as an expert in classification and had specialized knowledge to assist the jury in determining a mitigating factor, the ability of Weisheit to be safely incarcerated without undue risk of harm to others, in weighing the decision between the death penalty, life without parole or a term of years....
-
26. ... The jury did not hear how Weisheit adjusted to incarceration nor did they hear about any of the factors that weighed in favor of his imprisonment without undue risk to others. Further, the Indiana Supreme Court said on direct appeal that if Aiken had been prepared to testify to Weisheit's adjustment leading up to [the] penalty phase, exclusion of his testimony "would have been problematic and could have possibly resulted in reversal of his death sentence." ... The Supreme Court's own words demonstrate there is a reasonable probability of a different outcome had counsel made the proper offer of proof. Had the jury heard this mitigating evidence, there is a reasonable likelihood the jury would have given Weisheit's case for mitigation greater weight and returned a verdict for something less than death.
-
4. ... A report from the Boys School records ... indicated that while Weisheit was in the psychiatric unit of Methodist Hospital after attempting suicide at the Boys School, he

suffered a psychotic break (PCR Ex. 5). Owens testified if there was evidence Weisheit had a psychotic break while at Methodist Hospital, that would have been important to provide to the defense team's experts.

5. Dr. Henderson-Galligan and Dr. Harvey both relied on information found in the Boys School records in forming their opinions about Weisheit's Bipolar diagnosis. Dr. Henderson-Galligan testified the Boys School records showed Weisheit was prone to downplay his struggles during his teen years. She noted Weisheit's extent of suicidal ideation was important in demonstrating the severity of Weisheit's mental health issues. Psychiatric records found in the Boys School records described Weisheit's family as "deeply chaotically enmeshed." This information was important in understanding Weisheit's mental health issues.... The records showed Weisheit had been prescribed three different anti-depressants over the course of a year. This showed a significant, ongoing issue with treating Weisheit's depression.
6. Dr. Harvey testified ... [that the Boys School] records established an extended period of depression and mania. With those records, Dr. Harvey testified he could have made a definitive diagnosis.
7. ... In contrast to her brief testimony at the penalty phase, Skidmore provided significantly more detailed information about the Boys School and Weisheit's access to care. This was in part because she was able to review documents from the Boys School records which were prepared by her.

....

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

....

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

....

[under the heading of CONCLUSION] ... Valuable information was not presented because [counsel] had not located the [Boys School] records and counsel did not interview Skidmore. The records that were provided to the jury reflected very little of the compelling evidence of Weisheit's

mental illness or the role his family played in failing to follow through with treatment. Dr. Harvey and Dr. Henderson-Galligan testified at the Post-Conviction hearing to the importance of these records in reaching an accurate and complete diagnosis. The Boys School records document lengthy treatment for a major mental illness, one which included that Weisheit suffered a psychotic break. . . . The evidence presented at trial, taken together with the post-conviction evidence, is the type of “evidence about the defendant’s background and character (that) is relevant because of the belief, long held by [this] society, that defendants who commit criminal acts that are attributable to a disadvantaged background[,] or to emotional and mental problems, may be less culpable than defendants who have no such excuse.” *Abdul-Kabir v. Quarterman*, 550 U.S. 233, 251–52, 127 S.Ct. 1654, 167 L.Ed.2d 585 (2007) (internal citations omitted).

. . . .

10. Dr. Harvey reviewed Ind. Code 35-50-2-9 and determined Bipolar Disorder is considered an extreme mental or emotional disturbance under Ind. Code 35-50-2-9(c)(2) and also could be a mental disease or defect under Ind. Code 35-50-2-9(c)(6).
11. . . . Due to counsel’s mistake, Dr. Harvey was not provided the necessary documentation of evidence supporting the episodic nature of Bipolar Disorder and the Boys School records reflecting the long term treatment for Major Depression. . . .
12. Dr. Price’s testimony reflected some of Dr. Harvey’s observations. However, he could not testify to

Dr. Harvey’s opinion and therefore had to dilute the information collected by Dr. Harvey and incorporate it in his opinion finding that Dr. Harvey’s observations were “consistent with Bipolar Disorder.” (Tr. 2430).

13. Dr. Harvey’s testimony could have been used to rebut the State’s expert, Dr. Allen. Dr. Allen testified Weisheit had been incarcerated for three years and never had a manic episode during that time (Tr. 2504). Dr. Harvey observed a manic phase during this time. Dr. Allen also testified Bipolar was not likely in Weisheit’s case because Bipolar is progressive and the episodes become more frequent (Tr. 2504, 2516). Dr. Harvey testified that Weisheit’s symptomology was consistent with 40% of the cases.
14. . . . Dr. Harvey’s opinion would have supported two statutory mitigators and would have effectively rebutted Dr. Allen’s testimony. The State exploited counsel’s failure and argued there was no evidence of these two statutory mitigators (Tr. 2568-2569). By failing to contact Dr. Harvey, the defense was left with one expert to testify to the cognitive disorder and Bipolar Disorder. Trial counsel’s own assessment of the credibility of Dr. Price’s testimony reflects the magnitude of this error.

The conclusion that flows from these findings and the evidence as a whole is to me inescapable: Weisheit suffered prejudice from the cumulative effect of counsel’s performance deficiencies. Even if no single deficiency, standing alone, renders Weisheit’s death sentence unreliable, together they certainly “undermine confidence in

the outcome.” *Strickland*, 466 U.S. at 694, 104 S.Ct. 2052.

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

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

The majority similarly understates the effect of the Boys School records, citing the records’ references to Weisheit’s lack of remorse and poor behavior. Even those references, however, show the extent of Weisheit’s troubled youth and mental illness. The records are therefore relevant and mitigating “because of the belief, long held by this society, that defendants who commit criminal acts that are attributable to a disadvantaged background, or to emotional and mental problems, may be less culpable than defendants who have no such excuse.” *Abdul-Kabir v. Quarterman*, 550 U.S. 233, 251–52, 127 S.Ct. 1654, 167 L.Ed.2d 585 (2007) (quoting *Franklin v. Lynaugh*, 487 U.S. 164, 184, 108 S.Ct. 2320, 101 L.Ed.2d 155 (1988) (O’Connor, J., concurring in judgment)). And as the post-

conviction court found, the Boys School records revealed that “the primary cause of Weisheit’s difficulties was a mental illness.”

The majority also discounts (as the post-conviction court did) the importance of the Boys School records because they did not **conflict** with Dr. Henderson-Galligan’s opinion at trial. True, they did not conflict with her opinion or those of Dr. Harvey and Eccles-Skidmore; they made those mitigating opinions **stronger**. Because the prejudice inquiry depends on the balance of aggravators and mitigators, adding enough weight to the mitigating side of the scale—or lifting enough weight from the aggravating side—makes all the difference. *See Porter*, 558 U.S. at 41–42, 130 S.Ct. 447; *Rompilla*, 545 U.S. at 386 n.5, 390–93, 125 S.Ct. 2456; *Wiggins*, 539 U.S. at 537–38, 123 S.Ct. 2527.

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

Even if Aiken could not have opined on Weisheit’s future classification, he could have testified about Weisheit’s past adjustment to imprisonment. The trial court specifically told defense counsel that Aiken could testify to his review of Weisheit’s records, which included those from the Vanderburgh County Jail where Weisheit was housed after his arrest. And—as the post-conviction court found—Aiken had interviewed Weisheit; reviewed his criminal history, all institutional records from the Vanderburgh County Jail, and the facts surrounding the crimes; and “had specialized knowledge to assist the jury in determining a mitigating factor, the ability of

Weisheit to be safely incarcerated without undue risk of harm to others.”

In short, Aiken was prepared at Weisheit’s penalty phase to testify to Weisheit’s past adjustment to imprisonment. Yet counsel withdrew Aiken, keeping the jury from learning not only that Aiken “did not find anything that would . . . indicat[e] that his criminal history would cause an[y] issues . . . the Department of Correction[] could not anticipate or manage,” but also that Aiken believed Weisheit’s misconduct in jail was “at the lower end of the spectrum.”

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

To be sure, had Aiken (or another expert) been prepared to testify as to Weisheit’s adjustment to imprisonment throughout the time **leading up to** the penalty phase, then the trial court’s exclusion of such testimony—assuming the proper foundation had been laid and it was otherwise admissible—would have been problematic and could have possibly resulted in reversal of his death sentence. . . .

Further, we note that Weisheit did not help his case by failing to make a more precise offer of proof regarding Aiken’s prediction of his specific future classification Perhaps if Aiken had made a detailed prediction as to Weisheit’s potential classification, and if Weisheit had established that Aiken had adequate qualifications and experience in predicting inmates’ future behavior (beyond the prediction inherent in classifying inmates), then we may not have agreed with the trial court that Aiken’s poten-

tial testimony was speculative and thus inadmissible.

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

In light of the post-conviction evidence and the post-conviction court’s findings, I believe that Weisheit has met his burden to show a reasonable probability that at least one juror and the sentencing judge “would have struck a different balance” without counsel’s collective deficiencies. *Wiggins*, 539 U.S. at 537, 123 S.Ct. 2527. This is not a case where the new evidence presented at the post-conviction proceeding “would barely have altered the sentencing profile presented” at Weisheit’s penalty phase. *Porter*, 558 U.S. at 41, 130 S.Ct. 447 (quoting *Strickland*, 466 U.S. at 700, 104 S.Ct. 2052). Rather, the jurors were denied an accurate picture of Weisheit’s mental health issues and troubled youth. Nor did they encounter any expert testimony about Weisheit’s past adjustment to imprisonment, which might have served as a basis for a sentence less than death. Perhaps that information would have swayed the jurors’ judgment, or perhaps not—but it is significant enough to “undermine confidence in the outcome,” which is all that *Strickland* requires. 466 U.S. at 694, 104 S.Ct. 2052.

Weisheit’s crimes are undeniably horrific—at the far end of the spectrum. The defendant’s culpability for crimes, though, is not the only factor that jurors may—and must, if presented with mitigating evidence—consider in deciding whether to sentence someone to death. *See* I.C. § 35-50-2-9(c), (*l*); *Skipper*, 476 U.S. at 4–5, 106 S.Ct. 1669; *Eddings*, 455 U.S. at 116–17, 102 S.Ct. 869. If it were, counsel’s obligation to thoroughly investigate the defendant’s background would not attach in every death penalty case. *See Porter*, 558 U.S. at 39–40, 130 S.Ct. 447; *Stevens v. McBride*, 489 F.3d 883, 887, 896–98 (7th Cir. 2007). This requirement exists in part

because evidence may be mitigating even if inferences from it “would not relate specifically to [the defendant’s] culpability for the crime he committed,” *Skipper*, 476 U.S. at 4, 106 S.Ct. 1669.

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

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

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

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

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

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

Whether counsel’s performance was deficient does not depend on prejudice—

rather, deficiency is measured against prevailing professional norms. *See Strickland*, 466 U.S. at 687–90, 104 S.Ct. 2052. And although the severity of a deficiency may affect whether the defendant suffered prejudice, under *Strickland*, deficiency and prejudice are distinct inquiries, *id.* at 687–96, 104 S.Ct. 2052; *Timberlake*, 753 N.E.2d at 603. Because the post-conviction court commingled the two, its cumulative-effect conclusion rests on a misdirected analysis.

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

But if even **one** juror had voted against death, the trial court’s responsibilities would have been different. *See* I.C. § 35-50-2-9(f). The court would have had discretion in sentencing Weisheit, *id.*, and thus would have borne the “truly awesome responsibility” to decide whether to impose the death penalty, *Caldwell v. Mississippi*, 472 U.S. 320, 341, 105 S.Ct. 2633, 86 L.Ed.2d 231 (1985). In making that decision, the lack of unanimity among the jurors would have been a relevant consideration, since a conflicted jury “demonstrate[s] a level of uncertainty among the citizens” as to the appropriate penalty. *Wilkes*, 917 N.E.2d at 693. And in imposing the death penalty—which “calls for a greater degree of reliability,” *Lowenfield*, 484 U.S. at 239, 108 S.Ct. 546 (quoting *Lockett*, 438 U.S. at 604, 98 S.Ct. 2954 (plurality opinion))—courts should

be “particularly sensitive to insure that every safeguard is observed,” *Gregg*, 428 U.S. at 187, 96 S.Ct. 2909 (plurality opinion).

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

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

Conclusion

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

I believe that the majority’s cumulative-effect holding misapplies *Strickland* and deviates from our standard of review. In my view, Weisheit was denied his Sixth Amendment right to effective assistance of counsel at the penalty phase of trial. And he has carried his burden to show that there is no way within the law that the post-conviction court could have arrived at

its cumulative-effect conclusion. Though Weisheit’s offenses were horrific and his guilt is clear, he should be afforded a penalty phase untainted by constitutional error.

I therefore respectfully dissent in part.



**PICKET FENCE PROPERTY COMPANY, and Andrew Patrick,¹
Appellant-Plaintiff,**

v.

**Chris DAVIS,² Appellee-Defendant,
and**

**Madison County Auditor and Madison
County Treasurer, Appellees-
Intervenors.**

**Court of Appeals Case No.
48A02-1710-MI-2493**

Court of Appeals of Indiana.

Filed July 31, 2018

Rehearing denied October 5, 2018

Background: Purchaser, which successfully bid upon a certain property at a county commissioners’ certificate sale, filed a petition for issuance of a tax deed. The Circuit Court, Madison County, No. 48C03-1608-MI-660, Carl Van Dorn, Senior Judge, issued an order that, in addition to granting the request for a tax deed, also stated that certain specified property taxes were waived. County auditor and treasurer

1. Andrew Patrick claims to be the successor-in-interest to original plaintiff Picket Fence Property Company, and this appears to not be in dispute.

2. Defendant Chris Davis does not participate in this appeal, but we include him in the caption pursuant to Indiana Appellate Rule 17(A), which provides that a party in the trial court shall be a party on appeal.

United States Court of Appeals
For the Seventh Circuit
Chicago, Illinois 60604

September 29, 2025

Before

FRANK H. EASTERBROOK, *Circuit Judge*

AMY J. ST. EVE, *Circuit Judge*

DORIS L. PRYOR, *Circuit Judge*

No. 23-2906

JEFFERY A. WEISHEIT,
Petitioner-Appellant,

Appeal from the United States District
Court for the Southern District of Indiana,
New Albany Division.

v.

No. 4:19-cv-00036-SEB-KMB

RON NEAL,

Respondent-Appellee.

Sarah Evans Barker,
Judge.

ORDER

On consideration of appellant's petition for rehearing, no judge in regular active service has requested a vote on the petition for rehearing en banc and the judges on the original panel have voted to deny rehearing. It is, therefore, **ORDERED** that the petition for rehearing is **DENIED**.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
NEW ALBANY DIVISION

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

**Order Denying Motion to Alter or Amend Judgment and
Granting Request to Expand Certificate of Appealability**

Jeffrey Allen Weisheit, an inmate in Indiana, brought this 28 U.S.C. § 2254 petition for a writ of habeas corpus challenging his convictions for two counts of murder and one count of arson, as well as his death sentence. The Court denied the petition, granted a certificate of appealability on certain claims, and entered final judgment. Now before the Court is Mr. Weisheit's timely and fully briefed motion to alter or amend judgment, which includes a request to expand the certificate of appealability. For the reasons outlined below, the motion to alter or amend judgment is **denied**, but the request to expand the certificate of appealability is **granted**.

I. Procedural Background

Mr. Weisheit was found guilty of setting fire to his home in the middle of the night and killing his girlfriend's two children.¹ An Indiana jury convicted him of two counts of murder and one count of arson, and the trial court sentenced him to death. Mr. Weisheit completed his direct appeal and state post-conviction review proceedings before filing a 28 U.S.C. § 2254 petition in

¹ Details of Mr. Weisheit's crimes and the factual underpinnings of his claims are provided in this Court's order denying habeas corpus relief, dkt. 119, and the Indiana Supreme Court's decision on direct appeal, *Weisheit v. State*, 26 N.E.3d 3 (Ind. 2015).

this Court in January 2020. After multiple extensions of time, Mr. Weisheit filed an amended § 2254 petition in September 2021. Dkt. 67. Respondent filed a return in March 2022.

In June 2022, Mr. Weisheit filed a motion to stay proceedings pending a return to competency, dkt. 95, and a motion to stay the briefing schedule pending resolution of that motion, dkt. 96. The Court denied the latter motion to stay, but granted Mr. Weisheit an extension of time to file a reply in support of his petition. Dkt. 97. Mr. Weisheit filed a reply in support of his petition on July 22, 2022. Dkt. 107.

On July 29, 2022, thirty months after filing his original petition, and after the amended petition was fully briefed, Mr. Weisheit moved for a stay of proceedings so he could attempt to exhaust state court remedies as to several grounds of ineffective assistance of counsel. Dkt. 112.

The Court denied Mr. Weisheit's motions to stay, denied his petition for a writ of habeas corpus, and entered final judgment on November 2, 2022. Dkt. 119; dkt. 120.

Mr. Weisheit filed a timely motion to alter or amend judgment on November 30, 2022. Dkt. 121. That motion is now fully briefed.

II. Rule 59(e) Standard

The purpose of a motion to alter or amend judgment under Rule 59(e) is to have the Court reconsider matters "properly encompassed in a decision on the merits." *Osterneck v. Ernst and Whinney*, 489 U.S. 169, 174 (1988). To receive relief under Rule 59(e), the moving party "must clearly establish (1) that the court committed manifest error of law or fact, or (2) that newly discovered evidence precluded entry of judgment." *Edgewood v. Manor Apartment Homes, LLC v. RSUI Indem. Co.*, 733 F.3d 761, 770 (7th Cir. 2013). A "manifest error" means "wholesale disregard, misapplication, or failure to recognize controlling precedent." *Oto v. Metro. Life Ins. Co.*, 224 F.3d 601, 606 (7th Cir. 2000). Relief through a Rule 59(e) motion to alter or amend is an

"extraordinary remed[y] reserved for the exceptional case." *Runnion ex rel. Runnion v. Girl Scouts of Greater Chi.*, 786 F.3d 510, 521 (7th Cir. 2015) (internal quotation omitted).

III. Discussion

Mr. Weisheit raises three arguments in his motion to alter or amend judgment: (1) the Court erred in denying his motion to stay proceedings; (2) the Court erred in denying him funding and other requests to create new evidence to expand the record; and (3) the Court should expand the certificate of appealability to include certain additional claims. The Court addresses each argument below. Additionally, the Court concludes that its implicit denial of Mr. Weisheit's motion to restore proceedings pending the restoration of competency was not erroneous.

A. Motion to Stay

Mr. Weisheit contends that the Court erred in denying him a stay under *Rhines v. Weber*, 544 U.S. 269 (2005). Dkt. 121 at 16–21. The Court's ruling rested on two independent bases. First, *Rhines* does not apply because the ineffective assistance of counsel grounds at issue are procedurally defaulted, not unexhausted. Dkt. 119 at 10–12. And second, even under *Rhines*, a stay would not be warranted because Mr. Weisheit has not shown good cause for his failure to exhaust and has engaged in intentional delay. *Id.* at 12–13.

1. Defaulted Claims

Mr. Weisheit sought a stay to present a number of ineffective assistance of counsel grounds in state court. Dkt. 112. The Court found that these claims were procedurally defaulted, not merely unexhausted. Dkt. 119 at 10–13.

Mr. Weisheit first contends that his claims were simultaneously procedurally defaulted and unexhausted, and that the Court erred in rejecting this argument. Dkt. 121 ("The Court fundamentally errs in rejecting Mr. Weisheit's argument that claims that were procedurally

defaulted due to the ineffective assistance of state collateral review counsel can remain unexhausted for purposes of *Rhines* . . ."); *id.* at 17 ("[T]he notion that 'procedurally defaulted' necessarily means 'exhausted' is untenable, especially after *Shinn* [*v. Ramirez*, 142 S. Ct. 1718 (2022)]."). But the Seventh Circuit has made clear that when a claim has not been presented through one complete round of a state's ordinary appeal process, it is either procedurally defaulted or unexhausted—but not both—depending on whether any state-court remedy remains available. *Bolton v. Akpore*, 730 F.3d 685, 696 (7th Cir. 2013) ("Where the petitioner has already pursued his state court remedies and there is no longer any state corrective process available to him, it is not the exhaustion doctrine that stands in the path to habeas relief, but rather the separate but related doctrine of procedural default." (cleaned up)). *Guest v. McCann*, 474 F.3d 926, 930 (7th Cir. 2007) ("If a habeas petitioner has not exhausted a claim, and complete exhaustion is no longer available, the claim is procedurally defaulted."). Mr. Weisheit has not demonstrated that the Court erred in rejecting his argument that his claims were simultaneously procedurally defaulted and unexhausted.

Mr. Weisheit also contends that the Court erred in concluding that no state-court procedure remains available for him to present his ineffective assistance of counsel grounds. Dkt. 121 at 17–19. Specifically, he argues that he could present these grounds in a successive post-conviction petition. *Id.* But Indiana courts "do not authorize the filing of successive petitions raising" "[c]laims that could have been, but were not, raised in earlier proceedings." *Matheny v. State*, 834 N.E.2d 658, 662 (Ind. 2005). This specifically applies to claims of ineffective assistance of trial counsel. *Baum v. State*, 533 N.E.2d 1200, 1201 (Ind. 1989) ("If a convicted person wishes to challenge the performance of his defense counsel at a trial upon criminal charges, he may do so.

If such challenge is included in the second petition for post-conviction relief, the claim then is properly subject to waiver or *res judicata*.").

Mr. Weisheit does not dispute that he could have, but did not, raise his ineffective assistance of trial counsel grounds in his original post-conviction proceedings. He argues instead that post-conviction counsel's ineffectiveness will allow him to litigate his ineffective assistance of trial counsel claims in a successive state post-conviction petition. Dkt. 121 at 17–19. But "a claim of defective performance [of prior post-conviction counsel] 'poses no cognizable grounds for post-conviction relief.'" *Graves v. State*, 823 N.E.2d 1193, 1196 (Ind. 2005) (quoting *Baum*, 533 N.E.2d at 1200). So long as "counsel in fact appeared and represented the petitioner in a procedurally fair setting which resulted in a judgment of the court," there is no relief available in a successive post-conviction petition. *Id.* (quoting *Baum*, 533 N.E.2d at 1201). And to obtain leave to file a successive post-conviction petition, a petitioner must "establish[] a reasonable probability that he is entitled to post-conviction relief." *Baird v. State*, 831 N.E.2d 109, 118 (Ind. 2005).

Mr. Weisheit does not contend that he can make even a threshold showing that post-conviction counsel abandoned him. He nevertheless insists that post-conviction counsel's errors deprived him of the opportunity to litigate his post-conviction petition in a procedurally fair setting. But he cites no Indiana case endorsing this attempt to sneak the general ineffective assistance of counsel standard through the back door of "procedural fairness," and the Court is aware of none. On the contrary, if ordinary counsel ineffectiveness were enough to render a post-conviction proceeding procedurally unfair, then the counsel-abandonment standard applied in *Baum*, *Graves*, and *Baird* would be meaningless.

Unable to make the required showing under Indiana law, Mr. Weisheit points to a number of district court orders from other states where courts have granted stays to allow § 2254 petitioners

to return to state court to exhaust available state-court remedies. Dkt. 121 at 20; dkt. 112 at 10–11 and n.6. He does not acknowledge any contrary cases. *See, e.g., Bearup v. Shinn*, CV-16-3357-PHX-SPL, 2023 WL 1069686, at *2–6 (D. Ariz. Jan. 27, 2023) (denying stay on procedurally defaulted claims because Arizona law does allow successive post-conviction petition based on allegations of prior post-conviction counsel's ineffectiveness); *Shanklin v. Raybon*, 6:20-cv-2020-LSC, 2023 WL 2356037, at *3 (N.D. Ala. Mar. 3, 2023) (denying stay on procedurally defaulted claims because petitioner failed to make showing of counsel abandonment, as required under Alabama law to overcome bar on successive petitions). But more importantly, he fails to demonstrate how district court orders applying other states' post-conviction rules and case law supports his claim that this Court erred in its analysis of Indiana law.

Mr. Weisheit has not shown that he has "the right under the law of [Indiana] to raise, by any available procedure," the ineffective assistance of counsel grounds at issue. 28 U.S.C. § 2254(c). These grounds are therefore exhausted and procedurally defaulted. The Court did not err in holding that *Rhines* does not apply where a petitioner seeks a stay based on procedurally defaulted grounds.

2. Good Cause and Intentional Delay

Alternatively, even if Mr. Weisheit's grounds are unexhausted such that *Rhines* does apply, the Court did not err in finding that Mr. Weisheit lacked good cause for failing to exhaust and that he has engaged in intentional delay.

Mr. Weisheit's original post-conviction proceedings concluded on January 17, 2019, when the Indiana Supreme Court denied his petition for rehearing after affirming the trial court's denial of post-conviction relief. Dkt. 86-4 at 14. Now, more than four years later—and despite knowing for more than three years that many of his grounds had never been presented to the Indiana courts,

see generally dkt. 21—he *still* has not sought leave from the Indiana Supreme Court to file a successive post-conviction petition.²

Mr. Weisheit contends that he did not have to exhaust his claims in state court because he planned to argue that his claims were procedurally defaulted and that he could excuse the procedural default based on ineffective assistance of post-conviction counsel. Dkt. 121 at 19–20. But 28 U.S.C. § 2254 is not a choose-your-own adventure novel. If Mr. Weisheit's claims were unexhausted, as he now argues, then he was required to diligently exhaust them, not try to circumvent the exhaustion requirement by presenting them as procedurally defaulted. 28 U.S.C. § 2254(b); *see Yeoman v. Pollard*, 875 F.3d 832, 837 (7th Cir. 2017) ("[T]he court may grant a stay and abeyance only when the petitioner demonstrates good cause for failing to exhaust his or her claims *first* in state court." (emphasis added)).

Mr. Weisheit also cites Covid-19 and the lack of available funding for experts as reasons that he has failed to seek leave to file a successive post-conviction petition. *Id.* at 20–21. But he fails to explain why the statement of claims he provided in his 28 U.S.C. § 2254 petitions would be insufficient for presenting his request for leave to file a successive state post-conviction petition on the same issues.

² Mr. Weisheit contends that federalism and comity principles weigh in favor of allowing the state court to determine in the first instance whether a successive post-conviction petition is available. Dkt. 121 at 18–19. This argument rings hollow, given Mr. Weisheit's apparently strategic decision not to apply in the Indiana Supreme Court for leave to file a successive post-conviction petition. If Mr. Weisheit had filed such an application even as late as July 2022, when he filed his motion to stay these proceedings, *see* dkt. 112, there likely would be no need for this Court (or ultimately the Seventh Circuit) to now decide whether any state procedures are "available" to him. His decision not to engage in the state court process, now more than a year after *Shinn*, further supports the Court's findings that he has created intentional delay and has not shown good cause for his failure to diligently exhaust in state court.

Mr. Weisheit therefore has not shown that the Court erred by denying him a stay under *Rhines*, even if his ineffective assistance of counsel grounds are unexhausted.

B. Motion to Transport and for Expert Funding

Mr. Weisheit contends that the Court erred in denying him funding and time to create additional evidence during the § 2254 proceedings. Dkt. 121 at 9–16. But Mr. Weisheit has not shown any basis for expanding the record under 28 U.S.C. § 2254(e)(2). Indeed, he acknowledged as much in his pre-judgment briefing. Dkt. 112 at 2 (conceding that any development of new evidence must be done in state court). And to the extent Mr. Weisheit argues that the Court should have allowed him the opportunity and funding to create evidence in support of a successive state post-conviction petition, he has not demonstrated that the Court committed manifest error. Mr. Weisheit has not requested or received permission to pursue a successive state post-conviction petition. Nor has he pointed to any authority for the proposition that this Court must fund his state-court litigation. *Cf. Harbison v. Bell*, 556 U.S. 180, 189–90 and n.7 (2009) (explaining that 18 U.S.C. § 3599 authorizes, but does not require, federal courts to provide counsel to inmates facing death sentences for state-court post-conviction challenges).

C. Certificate of Appealability

Mr. Weisheit argues that the Court manifestly erred in not granting relief—or at least granting a certificate of appealability—on two claims: (1) an impartial-jury claim based on a juror bringing in cookies with a "thank you" note that referenced the victims and their family (Claim 12); and (2) an Eighth Amendment claim based on the exclusion of expert testimony regarding Mr. Weisheit's ability to be safely housed in prison if he received a sentence other than death (Claim 26). Dkt. 121 at 21–26. Mr. Weisheit has not demonstrated manifest error in the Court's resolution of these claims. However, the Court agrees with Mr. Weisheit that reasonable jurists

could disagree on these issues and therefore **GRANTS** Mr. Weisheit's request to expand the certificate of appealability.

D. Motion to Stay Pending Restoration of Competency

In denying Mr. Weisheit's petition for a writ of habeas corpus and motion to stay proceedings pending exhaustion, the Court implicitly denied Mr. Weisheit's motion to stay pending restoration of competency. *See* dkt. 95. The Court now makes the implicit explicit. Mr. Weisheit's motion to stay proceedings pending the restoration of competency was properly denied.

A 28 U.S.C. § 2254 petitioner, even one who challenges his death sentence, has no statutory or constitutional right to competence during habeas corpus proceedings. *Ryan v. Gonzales*, 568 U.S. 57, 65 (2013). However, a district court retains discretion to stay § 2254 proceedings to order a short-term stay to allow a petitioner to return to competence if the "district court concludes that the petitioner's claim could substantially benefit from the petitioner's assistance." *Id.* at 76.

Here, Mr. Weisheit's claims would not have substantially benefited from his assistance. He had already filed a petition and amended petition before moving to stay proceedings. Moreover, the Court resolved his claims—including his procedurally defaulted grounds for ineffective assistance of counsel—based on the state-court record, as it was required to do. Mr. Weisheit's participation was not required, nor would it have substantially benefited his claims.

IV. Conclusion

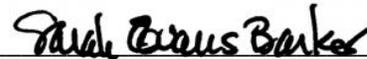
Mr. Weisheit's request to expand the certificate of appealability is **GRANTED**. The certificate of appealability now includes the following claims and procedural issues:

- ineffective assistance of trial counsel;
- ineffective assistance of appellate counsel;
- an impartial-jury claim based on a juror bringing in cookies with a "thank you" note that referenced the victims and their family;
- an Eighth Amendment claim based on the exclusion of expert testimony regarding Mr. Weisheit's ability to be safely housed in prison if he received a sentence other than death; and
- whether Claims 1, 2, 3, 5, 6, 7, 8, 10, 13, 14, 17, 18, 19, 20, 21, 22, 25, 29, 30, 31, 32, and 33 were procedurally defaulted or are instead unexhausted.

Aside from this expansion of the certificate of appealability, Mr. Weisheit's motion to alter or amend judgment, dkt. [121], is **DENIED**.

IT IS SO ORDERED.

Date: 9/5/2023



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

Distribution:

All ECF-registered counsel of record via email