No. 25-6947

In the Supreme Court of the United States

JEFFREY A. WEISHEIT, *PETITIONER*,

v.

RON NEAL, SUPERINTENDENT, INDIANA STATE PRISON, *RESPONDENT*.

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

BRIEF OF *AMICI CURIAE* MISSOURI PRACTITIONERS, LAW PROFESSORS, FORMER JUDGES, AND FORMER PROSECUTORS IN SUPPORT OF PETITIONER

ASHLEY CERRENTANO
Mo. Bar #77905
128 Olive Street
Kansas City, MO 64124

LILLIAN LUCAS
Mo. Bar #78078
1660 Genessee Street,
Unit 531
Kansas City, MO 64102

REBECCA E. WOODMAN
Counsel of Record
Attorney at Law, L.C.
1263 W. 72nd Ter.
Kansas City, MO 64114
(785) 979-3672
rewlaw@outlook.com

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Amici respectfully submit this brief of *amici curiae* in support of the Petitioner and urge that *certiorari* be granted in this case.[1]

INTERESTS OF *AMICI CURIAE*

Amici are former Missouri state judges and prosecutors, Missouri practitioners, and Missouri professors of law.[2] They are leaders in their communities and statewide, all of whom possess longstanding experience and familiarity with the criminal justice system and the administration of the death penalty. They include former trial and appellate judges, including former judges of the Missouri Supreme Court, and law professors from ABA accredited Missouri law schools. *Amici*, through their experiences in common, share a strong interest in the fair and proper administration of justice, the integrity and independence of the judicial system, and the protection and preservation of the rule of law.

Amici agree with Petitioner's argument in his Petition for a Writ of Certiorari and offer additional reasons why it is important for the Court to hear this case. *Amici* write to underscore the clearly established law, derived from longstanding decisions of this Court, that a showing of *Strickland* penalty phase prejudice on mitigation-focused ineffective assistance

---

[1] *Amici* certify that no party or party's counsel authored this brief in whole or in part and that no party or party's counsel made a monetary contribution intended to fund the preparation or submission of this brief. All counsel of record received timely notice of *Amici*'s intent to file this brief and all parties consented to the filing of this brief.

[2] A full list of *amici* appears as an appendix to this brief.

of counsel claims requires no more than a reasonable probability that at least one juror would have struck a different balance of aggravating and mitigating circumstances. *Amici* have an interest in this case to emphasize the contrast between Missouri's analysis of penalty phase prejudice under the state's "deadlock" capital sentencing scheme, and Indiana's analysis of penalty phase prejudice under its capital sentencing scheme, the only other scheme in the country that mirrors Missouri's law. Whereas Missouri courts consistently apply the clearly established "at least one juror" standard under which deadlock is itself a "different outcome" warranting relief under *Strickland* prejudice, Indiana courts apply an altogether different prejudice standard, requiring a defendant to show—as Petitioner was required to show in his case—a reasonable likelihood that all twelve jurors would have voted for a non-death sentence. *Amici* are unified in their support for Petitioner's argument that the clearly established "at least one juror" standard for *Strickland* prejudice should be the standard applied in Indiana, as it is in Missouri.

SUMMARY OF ARGUMENT

This Court should grant *certiorari* in this case because the decision of the Court of Appeals for the Seventh Circuit acquiesced to a penalty phase prejudice standard, applied to Petitioner's mitigation-focused ineffective assistance of counsel claims throughout Petitioner's post-conviction proceedings, that is contrary to clearly established law.

I. This Court's clearly established law for showing penalty phase prejudice on mitigation-focused

ineffective assistance of counsel claims, originating from *Strickland v. Washington*, 466 U.S. 668 (1984), requires a showing, after the reweighing of aggravating circumstances against the totality of mitigating evidence, of no more than "a reasonable probability that at least one juror would have struck a different balance." *Wiggins v. Smith*, 539 U.S. 510, 534 (2003). *See also Williams v. Taylor*, 529 U.S. 362, 397-398 (2000); *Porter v. McCollum*, 558 U.S. 30, 42 (2009); *Sears v. Upton*, 561 U.S. 945, 956 (2010) (*per curiam*); *Andrus v. Texas*, 590 U.S. 806, 822 (2020).

The Indiana courts' application of a penalty phase prejudice standard contrary to this clearly established law was evident from the outset of Petitioner's post-conviction proceedings. The Indiana post-conviction trial court applied a "different outcome" prejudice standard that denied Petitioner relief because he had not demonstrated a reasonable likelihood the jury would have unanimously voted against death. The Indiana Supreme Court essentially parroted this finding on appeal, concluding only that Petitioner had not shown he would have received a different sentence even if counsel committed none of the alleged errors. On federal habeas review, both the district court and the Seventh Circuit stayed silent on the matter, summarily stating, respectively, that no showing a "different outcome" would result had been made, and that the Indiana Supreme Court reasonably applied *Strickland*. To the extent the Seventh Circuit's decision was merely a "rubber stamp" of the Indiana Supreme Court's decision, that decision, and all of the preceding lower court decisions in Petitioner's case, violated clearly established law.

II. Indiana's capital sentencing scheme, like Missouri's, allows a judge to impose death after a jury deadlock. *Cf.*, Ind. Code § 35-50-2-9(f); Mo. Rev. Stat. § 565.030.4(4). As articulated by the concurring judge in the Indiana Supreme Court, the penalty phase prejudice standard under Indiana's law requires a defendant to prove a reasonable probability (1) that the jury would have voted unanimously to impose a non-death sentence; or (2) that at least one juror would not have voted for the death penalty and the trial judge would not have imposed that sentence. *Weisheit v. State*, 109 N.E.3d 978, 994 (Ind. 2018) (Slaughter, J., concurring in part and in the judgment). The post-conviction court in Petitioner's case relied only on the first prong for its no-prejudice finding, and the Indiana Supreme Court merely adopted those findings.

Missouri, the only other state in the Nation with a scheme like Indiana's, consistently applies this Court's clearly established penalty phase standard of prejudice, requiring no more than a reasonable probability that at least one juror would have struck a different balance, which accurately treats jury deadlock as a "different outcome" under *Strickland*. *Taylor v. State*, 262 S.W.3d 231, 253 (Mo. 2008); *see also Simmons v. Luebbers*, 299 F.3d 929, 939 (8th Cir. 2002).

Indiana's heightened-prejudice rule, which insisted that Petitioner prove jury unanimity on a non-death sentence to establish penalty phase prejudice on his mitigation-focused ineffective assistance of counsel claims, is plainly irreconcilable with clearly established law under *Strickland* and its progeny.

Granting *certiorari* in this case will provide this Court with the opportunity to ensure that Indiana's penalty phase prejudice standard conforms with, and uniformly applies, this Court's clearly established law requiring no more than a reasonable probability that at least one juror would have struck a different balance.

ARGUMENT

I. Indiana's requirement that Petitioner must have demonstrated a reasonable likelihood of a unanimous jury verdict for a non-death sentence to prove penalty phase prejudice on his mitigation-focused ineffective assistance of counsel claims violates this Court's clearly established law requiring no more than the showing of a reasonable probability that at least one juror would have struck a different balance.

A. The penalty phase prejudice standard governing ineffective assistance of counsel claims is longstanding and well-established by this Court.

Beginning with *Strickland v. Washington*, 466 U.S. 668 (1984), this Court's standard for determining prejudice on a claim of ineffective assistance of counsel has focused on whether the petitioner has shown "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different," a "reasonable probability" meaning "a probability sufficient to undermine confidence in the outcome." *Id.*, at 694. *See also Williams*, 529 U.S. at 391 (quoting *Strickland*, 466 U.S. at 694); *Wiggins*, 539 U.S. at 534 (same).

In the context of a claim of penalty phase ineffective assistance for failure to investigate, develop, and present available mitigating evidence, the prejudice standard requires a court to reweigh the evidence in aggravation against the totality of available mitigating evidence to assess whether the petitioner has shown "a reasonable probability that at least one juror would have struck a different balance." *Wiggins*, 539 U.S. at 537. The Court has consistently applied this "different outcome" standard to such claims. *See*, *e.g.*, *Williams*, 529 U.S. at 397-398; *Porter*, 558 U.S. at 42; *Sears*, 561 U.S. at 956; *see also Andrus*, 590 U.S. at 822 ("[B]ecause Andrus' death sentence required a unanimous jury recommendation . . . prejudice here requires only 'a reasonable probability that at least one juror would have struck a different balance' regarding Andrus' 'moral culpability[.]'") (quoting *Wiggins*, 539 U.S. at 537-538) (other citations omitted).

B. The Indiana courts in Petitioner's case applied a "different outcome" standard contrary to this Court's clearly established law and the federal habeas courts were silent on the matter.

The application of a penalty phase prejudice standard contrary to clearly established law was evident from the outset of Petitioner's post-conviction proceedings. The post-conviction trial court in Indiana found that prejudice from the effect of Petitioner's penalty phase ineffective assistance of counsel claims could not be established because he had not demonstrated "a reasonable likelihood the jury would have unanimously voted against death." *See Weisheit v. State*, 109 N.E.3d at 1020 (Rush, C.J., concurring in part and dissenting in part) (quoting the post-

conviction trial court's ruling). The Indiana Supreme Court appears to have applied this same erroneous standard in affirming the post-conviction trial court's decision on appeal, finding without elaboration that Petitioner had not demonstrated prejudice "even assuming counsel was deficient," because "he has not shown that he would be given a different *sentence* even if counsel had committed none of the alleged errors." *Id.*, 109 N.E.3d at 992 (emphasis added).

On federal habeas review, neither the federal district court nor the Court of Appeals for the Seventh Circuit, in affirming the Indiana Supreme Court's decision, specifically analyzed Indiana's application of a penalty phase prejudice standard that required a showing that all twelve jurors would have agreed on a non-death sentence. The federal district court concluded only that no showing that a "different outcome" would result had been made. *See* Pet.App. 74 (district court opinion). The Seventh Circuit, addressing Petitioner's penalty phase ineffective assistance claims individually rather than cumulatively, merely concluded with regard to prejudice that the Indiana Supreme Court reasonably applied *Strickland*. *See Weisheit v. Neal*, 151 F.4th 855, 881-882, 883, 886 (7th Cir. 2025).[3] To the extent the Seventh Circuit's decision finding no penalty phase prejudice on Petitioner's ineffective assistance of counsel claims appears to be little more than a

[3] While the Seventh Circuit cited the clearly established prejudice standard in its opinion, 151 F.4th at 879-880; *id.* (quoting *Wiggins*, 539 U.S. at 537), the opinion never confronts the issue of prejudice vis-à-vis the Indiana Supreme Court majority's "different outcome" requirement of showing jury unanimity on a non-death sentence.

"rubber stamp" of the lower courts' application of an erroneous penalty phase prejudice standard to those claims, that decision, and all of the decisions that came before it, violated clearly established law.

II. Indiana's "deadlock" capital sentencing scheme cannot be permitted to alter the clearly established "at least one juror" penalty phase prejudice standard governing mitigation-focused ineffective assistance of counsel claims.

Under *Strickland* and its progeny, defendant need only show a "reasonable probability" that the result would have been different. *Strickland*, 466 U.S. at 694. With respect to mititgation-focused penalty phase ineffective assistance of counsel claims, the proper inquiry is whether the totality of all the available mitigating evidence establishes a reasonable probability that at least one juror would have struck a different balance of aggravating and mitigating circumstances. *Wiggins*, 539 U.S. at 537 ("Had the jury been able to place petitioner's . . . life story on the mitigating side of the scale, there is a reasonable probability that at least one juror would have struck a different balance.").

Indiana's capital sentencing scheme allows a judge to impose death after a jury deadlock. *See* Ind. Code § 35-50-2-9(f). As articulated by the concurring justice of the Indiana Supreme Court in Petitioner's case, in order to show penalty phase prejudice on his ineffective assistance of counsel claims in Indiana, Petitioner had to prove a reasonable probability: (1) "that the jury would have voted unanimously **not** to impose the death penalty"; or (2) "that at least one juror would not have voted for the death penalty, and

the trial judge would not have imposed that sentence. *Weisheit v. State*, 109 N.E.3d at 994 (Slaughter, J., concurring in part and in the judgment) (emphasis in original). In Petitioners's case, the post-conviction trial court relied only on the first prong for its no-cumulative prejudice finding, and the Indiana Supreme Court merely adopted the trial court's findings. *See* 109 N.E.3d at 1014 (Rush, C.J., concurring in part and dissenting in part) (criticizing the majority's truncated cumulative prejudice inquiry).

Missouri is the only other state in the Nation with a deadlock sentencing scheme like Indiana's. As in Indiana, a hung jury in Missouri results in judicial sentencing. *See* Mo. Rev. Stat. § 565.030.4(4). Unlike Indiana, however, on review of mitigation-focused penalty phase ineffective assistance of counsel claims, Missouri applies this Court's clearly established standard governing penalty phase prejudice. *See Taylor*, 262 S.W.3d at 253 ("Had the jury been able to place petitioner's excruciating life history on the mitigating side of the scale, there is a reasonable probability that at least one juror would have struck a different balance.") (citing *Wiggins*, 539 U.S. at 537). *See also Simmons*, 299 F.3d at 939 (stating, in a Missouri case, that the penalty phase prejudice standard is whether "there is a reasonable probability that at least one of the jurors would have voted against the imposition of the death penalty"). In other words, Missouri recognizes that jury deadlock is a "different outcome" under *Strickland*'s prejudice standard, requiring a showing of no more than a reasonable probability that at least one juror would

have struck a different balance.[4] That is as it should be. Indiana should not be permitted to impose—as it did in Petitioner's case—a different, unreasonably heightened standard of penalty phase prejudice that is directly contrary to clearly established law.

CONCLUSION

This Court should grant *certiorari* to ensure that Indiana's penalty phase prejudice standard conforms with clearly established law holding that the penalty phase prejudice inquiry requires only a reasonable probability that at least one juror would have struck a different balance.

---

[4] States with other types of capital sentencing schemes also recognize that jury deadlock under *Strickland*'s "at least one juror" penalty phase prejudice standard leads to a new sentencing hearing (mostly with a new jury). *E.g.*, *In re Lucas*, 94 P.3d 477, 510–11 (Cal. 2004); *Rippo v. State*, 423 P.3d 1084, 1110, *amended on denial of reh'g*, 432 P.3d 167 (Nev. 2018); *Largin v. State*, 392 So. 3d 997, 1022–23 (Ala. Crim. App. 2022).

Respectfully submitted,

ASHLEY CERRENTANO
Mo. Bar #77905
128 Olive Street
Kansas City, MO 64124

LILLIAN LUCAS
Mo. Bar #78078
1660 Genessee Street
Unit 531
Kansas City, MO 64102

REBECCA E. WOODMAN
Counsel of Record
Attorney at Law, L.C.
1263 W. 72nd Ter.
Kansas City, MO 64114
(785) 979-3672
rewlaw@outlook.com

April 2, 2026

APPENDIX

TABLE OF CONTENTS

FULL LIST OF AMICI *CURIAE*[5]

Michael Wolff, Chief Justice, Missouri Supreme Court (2005-2007); Judge, Missouri Supreme Court (1998-2011); St. Louis University School of Law Dean (2013-2016); Law Professor (1975-1993, 2011-2013); Senior Advisor to St. Louis County Prosecuting Attorney Wesley Bell (2018-2021).

Laura Denvir Stith, Chief Justice, Missouri Supreme Court (2007-2009); Judge, Missouri Supreme Court (2001-2021); Judge, Missouri Court of Appeals-Western District (1994-2000).

Gary Oxenhandler, Circuit Court Judge for the 13th Judicial Circuit (Boone and Callaway Counties) (2002-2016).

Charles Atwell, Assistant Prosecuting Attorney in Jackson County, Missouri (1977-1981); Assistant United States Attorney in the Western District of Missouri (1983-1984); Circuit Court Judge for the 16th Judicial Circuit (Jackson County, Missouri) (1996-2012) (including special judge service on the Missouri Court of Appeals and the Missouri Supreme Court); Member, Missouri State Public Defender Commission (2019-present); Chairman, Missouri State Public Defender Commission (2020-present).

Jean Peters-Baker, Jackson County, Missouri, Prosecuting Attorney (2011-2025).

Sean O'Brien, Executive Director Missouri Capital Punishment Resource Center (1985-1989); Law Professor and Director of multiple criminal defense

---

[5] Institutional affiliations for identification purposes only.

clinics—including Public Defender Appeals Clinic, Public Defender Trial Clinic, and the Death Penalty Representation Clinic at the University of Missouri-Kansas City School of Law (1993-present).

Peter A. Joy, Washington University in St. Louis Professor and Director of Criminal Justice Clinic (1998-present).

Sue McGraugh, St. Louis University School of Law Professor (2002-present), Director Criminal Defense Clinic (2003-present); Missouri Public Defender in St. Louis including in the office's Capital Defense Unit (1990-1998).

Chad Flanders, Ph.D., J.D., St. Louis University School of Law Professor (2009-present).

Brendan Roediger, St. Louis University School of Law Professor (2009-present), Director Civil Advocacy Clinic.

Steve Leben, University of Missouri-Kansas City School of Law Professor (2020-present), Associate Dean for Faculty and Academics (2024-present); former Kansas state trial and appellate judge (27 years total).

Kathryn B. Parish, Partner, Carlyle Parish, LLC.

Elizabeth Unger Carlyle, Partner, Carlyle Parish, LLC.