No. 25A-

IN THE

SUPREME COURT OF THE UNITED STATES

BIRT FORD,

Applicant,

v.

DENNIS REAGLE,

Respondent.

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

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APPLICATION FOR EXTENSION OF TIME TO FILE A PETITION FOR A WRIT OF CERTIORARI

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March 3, 2026

APPLICATION FOR EXTENSION OF TIME IN WHICH TO FILE A PETITION FOR A WRIT OF CERTIORARI

TO: The Honorable Amy C. Barrett, Associate Justice of the Supreme Court of the United States and Circuit Justice for the United States Court of Appeals for the Seventh Circuit:

Pursuant to 28 U.S.C. § 2101(c) and Rule 13.5 of the Rules of this Court, Applicant respectfully requests an extension of thirty (30) days in which to file a petition for a writ of certiorari in this case. The U.S. Court of Appeals for the Seventh Circuit denied rehearing on December 15, 2025. *See Ford v. Reagle*, 2025 WL 3637961 (7th Cir. Dec. 15, 2025); App. Exh. 1.

Absent extension, the deadline for filing a petition for a writ of certiorari is March 15, 2026. With the requested extension, the petition would be due on April 14, 2026. This application is being filed more than ten days before the petition is due. The jurisdiction of this Court will be invoked under 28 U.S.C. § 1254(1).

In support of this application, Applicant states:

1. Federal habeas law "provides that, if a prisoner 'has failed to develop the factual basis of a claim in State court proceedings,' a federal court may hold an evidentiary hearing on the claim' in only two limited scenarios," neither of which is relevant here. *Shinn v. Ramirez*, 596 U.S. 366, 381 (2022) (quoting 28 U.S.C. § 2254(e)(2)). In *Williams v. Taylor*, 529 U.S. 420, 432 (2000), this Court explained that "a failure to develop the factual basis of a claim is not established unless there is lack of diligence, or some greater fault, attributable to the prisoner or the

prisoner's counsel." *Shinn* added that "a federal habeas court may not conduct an evidentiary hearing or otherwise consider evidence beyond the state-court record based on ineffective assistance of state postconviction counsel." 596 U.S. at 382.

2. Petitioner Birt Ford was convicted of various state crimes in 2005. These convictions were affirmed on direct appeal by the Indiana Supreme Court in 2007. Exh. 2 at 7. Ford then sought postconviction relief in state court, alleging ineffective assistance of trial counsel. Specifically, Ford avers that, before trial, "the prosecution" told his trial counsel that they were "willing to negotiate," and Ford "instructed counsel to 'see what kind of deal they would offer' but his attorney did not follow up." *Id.* at 2. Ford contends that his trial attorney's failures violate the Sixth Amendment.

During postconviction proceedings, Ford was initially represented by a public defender. That attorney withdrew in October 2010. *Id.* at 7. Starting in 2011, Ford was represented by retained counsel Brent Welke. Over time, however, Welke became increasingly hard to reach and, for several years, Ford could not even reach him. Finally, in 2018, Ford reached Welke, and Ford fired him.

The next year, the Indiana Supreme Court suspended Welke's law license after reviewing numerous complaints against him from 2010 to 2019. *Matter of Welke*, 131 N.E.3d 161, 164–65 (Ind. 2019). As the court summarized, these complaints "collectively paint the picture of an attorney whose primary motivation appears to be the collection of legal fees rather than the provision of a valuable service." *Id.* at 165.

Shortly after firing Welke, Ford, proceeding pro se, tried to obtain relevant evidence to support his ineffective-assistance claim, including: (1) objecting to the State's efforts to proceed by affidavit (i.e., without an evidentiary hearing); (2) moving to compel testimony from his trial counsel; (3) moving to depose trial counsel; and (4) outlining in an affidavit what he would have shown had he been granted a hearing. Seventh Cir. Long App. at 5, 111–12, 113, 116, 120–21, 125–26. The postconviction court denied each of these requests and dismissed Ford's petition in October 2019. The Indiana Court of Appeals affirmed.

In federal habeas proceedings, the Seventh Circuit declined to grant Ford an evidentiary hearing on his claims. Exh. 2 at 20. It reasoned that Ford's postconviction counsel's "11-year failure to act" should be imputed to Ford, and that Ford's later actions while proceeding pro se were an "eleventh-hour request for court assistance" which did "not establish diligence under § 2254(e)(2). *Id.*

3. Petitioner's counsel intends to file a petition for certiorari in this case, and expects to present the following question: Whether a state prisoner has "failed to develop the factual basis of a claim in State court proceedings" when the prisoner raises the claim in state postconviction proceedings, discharges counsel who fails to act, and then personally and repeatedly seeks factual development that the state courts denied.

4. In answering that question in the negative, the panel below went beyond the rule in *Williams* and *Shinn*.

Williams recognizes that "[d]iligence for purposes of the opening clause depends upon whether the prisoner made a reasonable attempt, in light of the information available at the time, to investigate and pursue claims in state court." 529 U.S. at 435. It adds that "[d]iligence will require in the usual case that the prisoner, at a minimum, seek an evidentiary hearing in state court in the manner prescribed by state law." *Id.* at 437. And *Shinn* makes clear that "attorney error alone" does not "permit[] a federal court to expand the federal habeas record." 596 U.S. at 385.

Ford's claim fits within those bounds. There is no dispute that he sought "an evidentiary hearing in state court in the manner prescribed by state law." *Williams*, 529 U.S. at 437. That is because while represented, Ford could not file his own motion for an evidentiary hearing, because there is no right to "hybrid representation" under Indiana law. *Underwood v. State*, 722 N.E.2d 828, 832 (Ind. 2000). In the months after he fired his lawyer, Ford tried multiple times to expand the record, through motions to compel and motions to depose. This is not, in short, a case where the petitioner is relying on "attorney error alone." *Shinn*, 596 U.S. at 385. It is one where, "in light of the information available at the time," the petitioner discharged his attorney and then made every "reasonable attempt" "to investigate and pursue [his] claims in state court" pro se. *Williams*, 529 U.S. at 435.

The panel's decision to fault Ford and deprive him of an evidentiary hearing based solely on the time it took him to discharge his counsel—especially when counsel cannot even be reached—finds no support in *Williams* or *Shinn*.

5. The panel's decision also departs from the rule in other courts of appeals. As the Third Circuit has observed, a petitioner does not "fail[] to develop the factual basis of his claim" if he promptly seeks "an evidentiary hearing in the manner required by state law" and "[t]he state court just refuse[s]" to hold one. *Fooks v. Superintendent, Smithfield SCI*, 96 F.4th 595, 597 (3d Cir. 2024). That is because in this situation, the petitioner "is asking for his first bite at the apple, not a second," and § 2254(e)(2)'s "bar does not apply." *Id.* Likewise, in the Fifth Circuit, if a petitioner "request[s] an evidentiary hearing" in their "objection to the state's response to his habeas petition," and the court does not grant the "request for an evidentiary hearing," the petitioner has shown sufficient "diligence" under § 2254(e)(2)'s opening clause. *Harrison v. Quarterman*, 496 F.3d 419, 429 n.6 (5th Cir. 2007). Several other courts of appeals are in accord. *See Rodney v. Garrett*, 116 F.4th 947, 956 (9th Cir. 2024); *Conaway v. Polk*, 453 F.3d 567, 589 (4th Cir. 2006); *Greer v. Mitchell*, 264 F.3d 663, 681 (6th Cir. 2001); *Milton v. Miller*, 744 F.3d 660, 673 (10th Cir. 2014); *Valle v. Sec'y for Dep't of Corr.*, 459 F.3d 1206, 1216 (11th Cir. 2006); *Samper v. Greiner*, 74 F. App'x 79, 83 (2d Cir. 2003).

4. In short, this case presents a substantial, important, and recurring question left unanswered from *Williams* and *Shinn*. It is a question that more than half a dozen other courts of appeals have answered in a manner differently than

the panel below. There is thus a reasonable expectation that this Court will grant the petition, such that it warrants additional time for these questions to be fully addressed and briefed.

5. The University of Virginia Supreme Court Litigation Clinic is working expeditiously to prepare Ford's petition. In addition, Mr. Long recently became involved in this case as co-counsel, following the Seventh Circuit's denial of rehearing. This case is factually and legal complex, with numerous state and federal proceedings and several different, yet overlapping federal post-conviction rules. Additional time is necessary for the Clinic and co-counsel to research, complete, print, and file Applicant's petition.

6. Furthermore, the Clinic has several other pending matters, including being counsel of record for a cert. reply brief in *Aldridge v. Regions Bank*, No. 25-590 (due March 17, 2026), and a petition for writ of certiorari in *bin 'Attash v. United States* (due April 6, 2026). In light of these obligations, Applicant's counsel would face significant challenges completing the petition by the current due date.

For these reasons, Applicant requests that this Court grant an extension of thirty days, through April 14, 2026, within which to file a petition for a writ of certiorari in this case.

Respectfully submitted,

_____/s/ Xiao Wang _____

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March 3, 2026

APPLICATION EXHIBITS

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EXHIBIT 1

United States Court of Appeals

for the Seventh Circuit
Chicago, Illinois 60604

December 15, 2025

Before

MICHAEL B. BRENNAN, *Chief Judge*

DIANE S. SYKES, *Circuit Judge*

DAVID F. HAMILTON, *Circuit Judge*

No. 21-3061

BIRT FORD,
Petitioner-Appellant,

v.

DENNIS REAGLE,
Respondent-Appellee.

Appeal from the United States District Court for the Southern District of Indiana, Indianapolis Division.

No. 1:20-cv-01639

Richard L. Young,
Judge.

O R D E R

On consideration of the petition for rehearing and for rehearing en banc, no judge in active service requested a vote on the petition for rehearing en banc,[1] and the judges on the original panel voted to deny rehearing. It is therefore ordered that the petition for rehearing and for rehearing en banc is DENIED.

[1] Circuit Judges Michael Y. Scudder and Rebecca Taibleson did not participate in the consideration of this petition for rehearing.

EXHIBIT 2

In the

United States Court of Appeals

for the Seventh Circuit

No. 21-3061

BIRT FORD,

Petitioner-Appellant,

v.

DENNIS REAGLE,

Respondent-Appellee.

Appeal from the United States District Court for the
Southern District of Indiana, Indianapolis Division
No. 1:20-cv-01639 — **Richard L. Young**, *Judge*.

ARGUED APRIL 5, 2023 — DECIDED SEPTEMBER 22, 2025

Before SYKES, *Chief Judge*, and HAMILTON and BRENNAN, *Circuit Judges*.

SYKES, *Chief Judge*. In June 2005 Birt Ford forced his way into his estranged wife's home, threatened her with a knife, and repeatedly sexually assaulted her. A jury in Allen County, Indiana, found him guilty of rape, burglary, and other crimes, and he was sentenced to 70 years in prison. The Indiana Court of Appeals affirmed, and the Indiana Supreme Court denied further review.

Ford petitioned for state postconviction relief in August 2007. Through his appointed postconviction counsel, he raised claims of ineffective assistance of counsel under *Strickland v. Washington*, 466 U.S. 668 (1984). As relevant here, he alleged that his trial attorney failed to pursue plea negotiations and made poor decisions about witness strategy at trial. Three years after filing the petition, Ford retained private counsel, and his appointed counsel withdrew. Eight years later, the private attorney also withdrew. As far as the record shows, neither attorney took any action on the petition.

At that point Ford proceeded pro se, and in November 2018 the state trial judge issued an order requiring that the postconviction petition be submitted on affidavits, as permitted by Indiana law. The judge gave Ford several months to submit affidavits and later denied his motion for court assistance when his effort to obtain an affidavit from his trial counsel failed. Ford submitted his own affidavit attesting that shortly before trial, his attorney told him that the prosecution was "willing to negotiate" and that he had instructed counsel to "see what kind of deal they would offer" but his attorney did not follow up. Ford did not say, however, that he would have pleaded guilty if the prosecution had offered a favorable plea deal. The trial court denied relief and the Indiana Court of Appeals affirmed. The Indiana Supreme Court again denied review.

Ford then sought federal habeas review under 28 U.S.C. § 2254. He requested an evidentiary hearing, but the district judge denied that request and ultimately denied the petition. The judge was concerned, however, about Ford's opportunity to fairly litigate the plea-negotiation claim given the state court's refusal to help him with evidence collection. So he

granted a certificate of appealability on that issue. We appointed pro bono counsel to assist Ford on appeal.[1] At counsel's request, we enlarged the certificate of appealability to include certain issues related to counsel's witness strategy at trial.

Having reviewed the record, we understand the district judge's concern about the lack of evidentiary development on the plea-negotiation claim. But the responsibility to develop the record rested with Ford's postconviction attorneys. They represented him for a combined period of 11 years without securing evidence from Ford's trial counsel, a necessary predicate for his *Strickland* claim. Under Supreme Court precedent, their failure to do so is attributed to Ford and does not permit us to override the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), which generally bars a federal evidentiary hearing on a state prisoner's habeas claim, with only narrow and inapplicable exceptions. *See* 28 U.S.C. § 2254(e)(2); *Shinn v. Ramirez*, 596 U.S. 366, 382 (2022); *Williams v. Taylor*, 529 U.S. 420, 432 (2000). The judge therefore properly denied Ford's request for an evidentiary hearing. And because the state appellate court's decision was not unreasonable under § 2254(d)(1) or (2), the district judge also properly denied habeas relief. We affirm.

I. Background

Our account of the facts comes from the trial evidence as described in the opinions of the Indiana Court of Appeals on

[1] Xiao Wang and the Bluhm Legal Clinic at Northwestern University's Pritzker School of Law accepted the appointment. Mr. Wang was assisted by law students Elaine Cleary and Samantha Reilly. They have ably discharged their duties. We thank them for their service.

direct appeal and postconviction review. *See Ford v. State* (*Ford I*), 856 N.E.2d 795 (Ind. Ct. App. 2006) (unpublished table decision); *Ford v. State* (*Ford II*), 145 N.E.3d 140 (Ind. Ct. App. 2020) (unpublished table decision). The key trial witnesses were Ford's estranged wife Yolanda, the victim of these offenses, and their teenaged daughter Laressa, who was present in the house where the offenses occurred.

At the time of the crimes, Birt and Yolanda had been together for about 20 years and married for ten. They have four children. Laressa is the oldest; she was 17 years old at the time of trial. Ford had a history of domestic abuse against his wife. In January 2005 he made a threat against Yolanda in the presence of a police officer who was helping her retrieve some personal items from the family home after she and the children moved out.

In the months that followed, Yolanda and her children lived in a women's shelter for periods of time; she eventually rented a home from the local housing authority. On May 27 Yolanda obtained a protective order prohibiting Ford from contacting her or visiting her residence. Undeterred, three days later Ford called her several times. When he learned that she was at her cousin's house, he went to that residence and forcibly tried to get her to leave with him; she sustained injuries to her arms and stomach in the scuffle.

On the evening of June 11, Yolanda put her younger children to bed and fell asleep while watching television with Laressa. She woke up to the sound of Ford kicking in her back door. She tried to call 911, but Ford snatched her phone and threw it to the floor, breaking it. Ford then grabbed a butcher's knife from the kitchen, barricaded the back door with the kitchen table, and led Yolanda to a back bedroom

and locked the door. While threatening to kill her, he ordered her to perform oral sex. At some point Ford heard sirens, so he stepped outside the bedroom to remind Laressa that "both her parents [would] be dead" if police entered the home. *Ford I*, 856 N.E.2d 795, at *1 (alteration in original). Ford then returned to the bedroom and had sex with Yolanda against her will.

The next morning Ford again had sex with Yolanda. Then, while he was showering, Yolanda and the children escaped from the home with her mother's help. Yolanda went to a sexual-assault treatment center, and an examining nurse noted that she had sustained injuries "consistent with forced penetration." *Id.*

Police interviewed Ford the same day. He admitted to many of these facts but characterized them differently. For example, although he acknowledged entering Yolanda's residence without consent, he denied kicking in the door. He admitted to grabbing the knife, but he claimed that he wanted Yolanda to stab *him* with it and said he had suggested that she do so. Finally, he admitted to twice having sex with Yolanda, but insisted that it was consensual. *Ford II*, 145 N.E.3d 140, at *2. More generally, Ford maintained that he had visited Yolanda with innocent intentions—to talk, make up, and reunite as a family.

Ford was charged with rape, burglary, criminal deviate conduct, and several other crimes. Public defender Mitchell Hicks was appointed to represent him. While most of the trial details are irrelevant for our purposes, a few deserve our attention. At the beginning of jury selection, the judge asked the lawyers to introduce themselves and their intended witnesses, thus giving the prospective jurors the opportunity

to identify potential conflicts. After Hicks introduced himself, he informed the jury that the defense intended to call Ford's sister Barbara (among other witnesses). During his opening statement, Hicks told the jury several times that Ford would testify in his own defense.

Yolanda Ford was the prosecution's first witness; she testified to the factual account we've just summarized. She was followed by her daughter Laressa, who largely corroborated her mother's account with minor variations. But Laressa lacked personal knowledge of the events in the back bedroom. Hicks's cross-examination of Laressa lasted only a few minutes. Focusing mostly on impeachment, Hicks reminded her of contradictory statements she had given to police and highlighted the differences between her testimony and her mother's. But his cross-examination also included a question about Ford's temper. Hicks asked Laressa, "You've seen your dad mad before, haven't you? He gets pretty vocal when he gets upset, doesn't he?" Laressa answered "yes."

In addition to Yolanda and Laressa, the prosecution called seven more witnesses and played a redacted portion of Ford's videotaped interview. The defense case was brief: Hicks recalled Yolanda, and his short direct examination primarily emphasized her lack of resistance against Ford's attack.

The jury found Ford guilty of five of the seven charged crimes: rape, criminal deviate conduct, burglary, criminal confinement, and invasion of privacy. The jury acquitted him of a second rape charge and a charge of interfering with a report of a crime. The judge imposed a total sentence of 70 years in prison. The Indiana Court of Appeals affirmed the

judgment on direct appeal, and the Indiana Supreme Court denied further review.

Ford then sought postconviction relief in state court, filing his petition through appointed postconviction counsel in August 2007. He raised claims under *Strickland* for ineffective assistance of counsel, alleging that his trial and appellate attorneys made numerous mistakes. As relevant here, he argued that Hicks failed to pursue plea negotiations and made several errors in witness strategy at trial.

From that point on, the record of what happened in the state trial court is almost totally silent. We know that Ford's appointed postconviction counsel withdrew in October 2010 and that retained counsel entered an appearance. The record picks up eight years later, in November 2018, when Ford's private counsel also moved to withdraw. The judge granted that motion. The State then moved to require Ford to submit his postconviction claims by affidavit, as permitted by Indiana law in this situation.[2] The judge granted that motion too. Ford moved for reconsideration. He also moved to compel the Allen County Clerk of Courts to mail him case documents and asked the court for assistance to compel Hicks to file an affidavit responding to his interrogatories. This last motion deserves some additional explanation. Ford explained that he had mailed interrogatories to Hicks but had not received a response; he attached a copy of a certified mail card as support. Several weeks later Ford also moved for a court order to depose Hicks.

The trial judge noted but took no action on Ford's reconsideration motion, took the deposition motion under advise-

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[2] *See* IND. R. POST-CONVICTION REMEDIES 1, § 9(b).

ment, and denied the other two. Apparently unpersuaded by Ford's representations and the certified mail card (or perhaps overlooking these submissions), the judge explained that "nothing in the record" indicated that Ford had "actually requested" an affidavit from counsel. Still, the judge reserved decision on whether to hold an evidentiary hearing until after the case was submitted by affidavit.

Ford submitted his own affidavit in support of his post-conviction claims. As relevant here, he stated that Hicks had informed him shortly before trial that the prosecution was "willing to negotiate" and that he had instructed counsel to "see what kind of deal they would offer" but Hicks "never did what I requested." Ford did not say, however, that he would have acknowledged his guilt and pleaded guilty if the prosecutor had offered a favorable plea deal. Ford also stated that Hicks had not called his sister Barbara to testify even though he had told the jury that she would be a witness. Ford asserted that Barbara would have testified about Yolanda's "habit of lying to me." Ford also claimed that Hicks was ineffective for not calling him as a witness in his own defense after telling the jury that he would testify. Finally, Ford complained that Hicks's cross-examination of Laressa had "opened the door" for the prosecution to "paint a negative picture of me."

The trial judge dismissed Ford's postconviction petition. On the plea-negotiation issue, the judge concluded that because Ford had not confirmed that he would have admitted his guilt—a prerequisite for a guilty plea in Indiana, *see Norris v. State*, 896 N.E.2d 1149, 1152 (Ind. 2008)—he had not shown that "plea negotiations would have affected the outcome" of the case, as required by *Lafler v. Cooper*, 566 U.S.

156 (2012). The judge also concluded that Hicks was not ineffective for failing to call Ford's sister as a witness because her proposed character testimony would have been inadmissible. Nor could Hicks be faulted for not putting his client on the stand in his own defense because Ford had not explained how his testimony at trial would have differed from what he said in the videotaped interview. The judge did not discuss Hicks's cross-examination of Laressa.

Ford appealed, raising the same issues. Applying the *Strickland* standard, the Indiana Court of Appeals affirmed. On the issue of Hicks's failure to pursue plea negotiations, the appellate court's analysis did not track the trial judge's. Rather than resting its decision on Ford's unwillingness to admit his guilt—making it unlikely that either he or the trial court would have accepted a plea deal—the appellate court focused instead on the lack of evidence to support this claim. The court noted that no evidence beyond Ford's own "self-serving affidavit" supported his version of events, and the trial court was "no[t] oblig[ed] to credit" that version. *Ford II*, 145 N.E.3d 140, at *5. In addition, because the record lacked any evidence from Hicks, the court presumed that he "would not have corroborated Ford's account." *Id.* (citing *Oberst v. State*, 935 N.E.2d 1250, 1254 (Ind. Ct. App. 2010)). In all other relevant respects, the appellate court's reasoning aligned with the trial judge's: the panel agreed that Barbara's testimony would have been inadmissible character evidence and that Ford's testimony would have been cumulative or contradictory—and in either case, unhelpful. *Id.* at *5, *7. Like the trial judge, the Indiana Court of Appeals did not address the issue of Hicks's cross-examination of Laressa.

Ford sought review in the Indiana Supreme Court, reiterating most of his arguments with one notable exception: he did not renew his claim that Hicks's cross-examination of Laressa was constitutionally ineffective. Once again, the state supreme court declined review.

Ford then turned to federal court with a pro se petition for habeas corpus under § 2254. He raised the same issues (and many others since abandoned). The district judge denied relief. Starting with the plea-negotiation issue, the judge was skeptical of the state appellate court's "failure of proof" rationale, noting that Ford had "*tried* to obtain trial counsel's testimony." So the judge looked through the appellate court's opinion to the trial judge's decision, reasoning that the appellate court had "essentially accepted" the trial court's analysis. The judge then held that the state trial judge had not unreasonably applied the Supreme Court's decisions in *Lafler* and the companion case of *Missouri v. Frye*, 566 U.S. 134 (2012). Not only was there "no evidence of an uncommunicated formal plea," but Ford's unwavering commitment to his innocence would have precluded an Indiana court from accepting a hypothetical guilty plea.

Turning to the cluster of issues concerning Hicks's trial performance, the judge noted some missteps in the appellate court's reasoning but nothing that provided grounds for habeas relief under § 2254(d). Relevant here, the judge held that the state appellate court had reasonably concluded that Hicks was not ineffective for failing to call Barbara Ford as a witness and likewise reasonably held that Ford was not prejudiced by his attorney's decision not to call him to testify. Finally, the judge noted that the state trial and appellate courts had overlooked the issue of Hicks's cross-examination

of Laressa. Analyzing it himself, the judge assumed without deciding that the challenged cross-examination amounted to deficient performance but concluded that it was not prejudicial based on the abundant corroborated evidence of Ford's guilt.

Still, the judge expressed concern about Ford's opportunity to "fairly litigate" the plea-negotiation issue based on the state court's "refusal to hold an evidentiary hearing or otherwise assist" him in collecting evidence. The judge concluded, however, that AEDPA barred him from holding an evidentiary hearing to develop a record for the first time on federal habeas review. But his lingering concern led him to issue a certificate of appealability limited to the plea-negotiation issue.

Ford appealed, and we appointed pro bono counsel to assist him. We later granted counsel's request to expand the certificate of appealability to include the claimed errors in witness strategy noted above.

II. Discussion

An order granting habeas relief from a state criminal judgment "is an 'extraordinary remedy,' reserved for only 'extreme malfunctions in the state criminal justice system.'" *Brown v. Davenport*, 596 U.S. 118, 133 (2022) (quoting *Brecht v. Abrahamson*, 507 U.S. 619, 633–34 (1993)). In deference to the federalism interests of the states, and to ensure that federal habeas review does not become a "substitute for ordinary error correction through appeal," *Harrington v. Richter*, 562 U.S. 86, 102–03 (2011), AEDPA imposes a steep standard of review when a state court has ruled on the merits of a state prisoner's federal claim, *Brown*, 596 U.S. at 125. A federal

court "shall not" grant a writ of habeas corpus unless the state court's decision was (1) "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court" or (2) "based on an unreasonable determination of the facts" as "presented in the State court proceeding." § 2254(d).

"Unreasonable" in this context means more than simply "wrong." The state court's decision must be "so lacking in justification that there was an error well understood and comprehended in existing law." *Harrington*, 562 U.S. at 103. Not just that—the error must be so obvious that it is "beyond any possibility for fairminded disagreement." *Id.* "By design, this is a difficult standard to meet." *Meyers v. Gomez*, 50 F.4th 628, 641 (7th Cir. 2022).

Moreover, where—as here—a state prisoner alleges a violation of his Sixth Amendment right to the effective assistance of counsel in his defense, our review is "doubly deferential" because the underlying substantive legal standard—established in the Supreme Court's decision in *Strickland*—is itself highly deferential. *Cullen v. Pinholster*, 563 U.S. 170, 190 (2011). "It is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable." *Strickland*, 466 U.S. at 689. To guard against "the distorting effects of hindsight," the Supreme Court has instructed courts to "indulge a strong presumption that counsel's conduct falls within the wide range of professional assistance"; the defendant bears the burden to overcome the presumption. *Id.*

Accordingly, on § 2254 habeas review, federal courts must indulge two presumptions: under AEDPA, we presume that the state courts "know and follow the law," *Dunn v. Reeves*, 594 U.S. 731, 739 (2021) (per curiam) (quotation marks omitted); and under *Strickland*, we presume that defense counsel "rendered adequate assistance" and "exercise[d] … reasonable professional judgment," *Burt v. Titlow*, 571 U.S. 12, 18 (2013) (quotation marks omitted). In simpler terms, we give "both the state court and the defense attorney the benefit of the doubt." *Id.* at 15.

To overcome the presumption of adequate representation, the defendant must prove that his attorney's performance was deficient—that is, that it "fell below an objective standard of reasonableness" under all the circumstances, *Strickland*, 466 U.S. at 687–88; and that counsel's deficient performance prejudiced his defense, *id.* at 692. To prove prejudice, the defendant must establish "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694.

One last point: a state prisoner's federal habeas claim "is considered against the last reasoned state court decision on the merits." *Minnick v. Winkleski*, 15 F.4th 460, 469 (7th Cir. 2021). We will return to this subject in a moment.

A. Plea-Negotiation Issue

The main issue on appeal concerns the failed plea negotiations—or more precisely, the *nonexistent* plea negotiations. Ford contends that Hicks was ineffective because he disregarded an explicit instruction from him to pursue the possibility of a plea deal.

The Sixth Amendment right to the effective assistance of counsel extends to plea negotiations, so under *Strickland* the defendant must shoulder the burden of proving that his counsel's performance with respect to plea bargaining was both objectively unreasonable and prejudicial. *Lafler*, 566 U.S. at 162–63; *see also Frye*, 566 U.S. at 140. To establish prejudice in this context, the defendant must show that but for counsel's ineffectiveness, there is a reasonable probability that (1) a favorable plea bargain would have been offered, accepted, and not later withdrawn based on intervening events; (2) the plea deal would have been accepted by the court; and (3) the resulting conviction or sentence (or both) "would have been less severe than under the judgment and sentence that in fact were imposed." *Lafler*, 566 U.S. at 164.

We pause here to address a threshold procedural point. Ford criticizes the district judge for "looking through" the Indiana appellate court's opinion to the trial court's decision. The Supreme Court has endorsed a "look-through" approach when the last state court decision "does not come accompanied with … reasons"—typically, when a reviewing court's decision simply says "affirmed" or "denied." *Wilson v. Sellers*, 584 U.S. 122, 125 (2018). The Indiana Supreme Court's summary denial of review certainly qualifies for this treatment, but the intermediate appellate court's decision contained a detailed, issue-by-issue analysis. So Ford's procedural point is well taken.

The district judge saw things differently. He found fault with the appellate court's rationale for rejecting Ford's claim about plea negotiations. But he determined that the appellate court had also (or perhaps alternatively) "essentially accepted" the trial judge's decision on this issue, so he shifted his

focus and considered the trial court's reasoning. Recall that the state trial judge's decision rested on the conspicuous absence of any statement from Ford that he would have pleaded guilty if a favorable plea deal had been offered. When considered against the backdrop of Ford's persistent claims of innocence—claims that under Indiana law would have foreclosed a guilty plea—this glaring omission meant that he had not shown a reasonable probability of a different result. And that, in turn, meant that Ford had failed to establish *Strickland* prejudice in the sense required by *Lafler*.

It's no surprise that the district judge found this analysis eminently reasonable. Indeed it was. Alas, nothing in the appellate court's decision suggests that the appellate panel adopted the trial judge's rationale; in fact, the court never mentioned it. Instead, the appellate court rested its decision on the lack of evidence corroborating Ford's factual narrative on the plea-negotiation claim—and most significantly, the absence of any testimony from Hicks. Because the record lacked evidence from Hicks, the appellate court presumed that the attorney would not have corroborated Ford's account. As the last reasoned state-court decision on the merits, we focus our review on the appellate court's reasons rather than the trial judge's.

Though Ford is right about this procedural point, he is wrong about its effect on the bottom line. We note for starters that the state appellate court correctly cited and applied the *Strickland* standard. Ford does not argue otherwise. Instead, he maintains that the appellate court unreasonably applied the "missing evidence" rule, a century-old common-law evidentiary presumption reflecting the common-sense inference that when a litigant fails "to bring to the support of his

defence the very best evidence … in his possession," the trier of fact may reasonably conclude that the evidence "would not be favorable to the defence." *Clifton v. United States*, 45 U.S. 242, 247 (1846). As applied to witnesses, the missing-evidence rule "permits an inference of unfavorable testimony from [a] missing witness." *Littlefield v. McGuffey*, 954 F.2d 1337, 1346 (7th Cir. 1992). But it applies only if the witness was "within the opposing party's power to produce." *Id.*

Ford contends that because the state trial court denied his pro se request for assistance in procuring Hicks's testimony, it was not just wrong for the appellate court to apply the "missing evidence" rule—it was objectively unreasonable. This argument overlooks the limits on federal habeas review of state criminal judgments. Under § 2254(d)(1), a federal court cannot set aside a state criminal judgment unless the state court's decision unreasonably applied clearly established *federal* law, as determined by the Supreme Court. In an effort to fit his case within subsection (d)(1), Ford cites the Supreme Court's decision in *Mammoth Oil Co. v. United States*, 275 U.S. 13 (1927). We're not sure why. The *Mammoth Oil* decision is simply an application of the "missing evidence" common-law presumption in a Supreme Court case; it did not establish a principle of federal law binding on the states under the Supremacy Clause.

To the contrary, the evidentiary rules used in state court are the province of *state* law; the state courts need not follow the same rules of evidence in use in the federal courts. Rather, the states have "broad latitude" to establish, interpret, and apply their own rules of evidence. *Caffey v. Butler*, 802 F.3d 884, 895 (7th Cir. 2015) (quoting *United States v. Scheffer*, 523 U.S. 303, 308 (1998)). And that's precisely what the Indiana

Court of Appeals did in Ford's case. The court relied on a state-law evidentiary inference in its failure-of-proof analysis, citing *Oberst v. State*, 935 N.E.2d 1250, 1254 (Ind. Ct. App. 2010) ("When counsel is not called as a witness to testify in support of a petitioner's arguments, the post-conviction court may infer that counsel would not have corroborated the petitioner's allegations."). If that was an error—an issue we do not decide—it was one of state law, not federal law. Errors of state law are not cognizable in federal habeas. *Pierce v. Vanihel*, 93 F.4th 1036, 1046 (7th Cir. 2024).

Ford's fallback position is that we should set aside the appellate court's failure-of-proof rationale as an unreasonable determination of the facts under § 2254(d)(2). This recharacterization of the claim rests on Ford's contention that the state trial judge wrongly denied his requests for assistance in procuring Hicks's testimony after his retained counsel withdrew, thus leaving a gap in the state-court record. Recast in this way, the argument overlaps with Ford's argument that the district judge should have granted his motion for an evidentiary hearing to address the gap in the state-court record. Whichever way it is characterized, the argument fails to grapple with the strict limits in § 2254(d) and (e).

On federal habeas review, a state court's factual findings are "presumed to be correct," and this presumption can be overcome only by "clear and convincing evidence." § 2254(e)(1); *see also Pierce*, 93 F.4th at 1045. "This is a stringent standard"; "even if reasonable minds … might disagree" about a factual finding, "that does not suffice to supersede the [state court's] determination." *Pierce*, 93 F.4th at 1045 (internal quotation marks omitted).

More fundamentally, however, the state appellate court's analysis of the plea-negotiation claim did not turn on factual findings. The appellate court rejected Ford's claim based on the lack of an evidentiary record—most notably, the absence of any evidence from Hicks. In other words, the appellate court's decision was rooted in factual *deficiencies*, not factual *determinations*. In the absence of any factual findings, Ford cannot establish what § 2254(d)(2) requires: that the state-court decision "was based on an unreasonable determination of the facts." So § 2254(d)(2) cannot serve as a gateway to de novo review of this claim.

Equally important, § 2254(e)(2) precludes an evidentiary hearing on a state prisoner's habeas claim to address the deficiencies in the state-court record. More specifically, the statute provides that "[i]f the applicant has failed to develop the factual basis of a claim in State court proceedings," the federal court "*shall not* hold an evidentiary hearing." § 2254(e)(2) (emphasis added.) There are exceptions, but they are quite limited. When a state prisoner fails to develop the state-court record, a federal court may hold an evidentiary hearing on his habeas claim in *only* two narrow circumstances: when the claim relies on either a new and retroactive rule of constitutional law from the Supreme Court, § 2254(e)(2)(i), or "a factual predicate that could not have been previously discovered through the exercise of due diligence," § 2254(e)(2)(ii). There is an additional requirement even if one of these exceptions applies: the facts underlying the new claim must be sufficient to establish by clear and convincing evidence that "no reasonable factfinder would have found the applicant guilty," § 2254(e)(2)(B).

"Failure" in this context means a "lack of diligence, or some greater fault, attributable to the prisoner *or the prisoner's counsel*." *Williams*, 529 U.S. at 432 (emphasis added). So Ford cannot fault the state trial court for the lack of an evidentiary record on his claims. He was represented by counsel in 2007 when he filed his postconviction motion and for 11 years thereafter. His attorneys were responsible for developing a factual basis for his *Strickland* claim, but as far as the record shows, neither his appointed attorney nor retained attorney did so.[3] Their failures are imputed to Ford. *Williams*, 529 U.S. at 432.

The Supreme Court has been explicit and unequivocal on this point. "[U]nder AEDPA and [the Court's] precedents, state postconviction counsel's ineffective assistance in developing the state-court record is attributed to the prisoner." *Shinn*, 596 U.S. at 382. Accordingly, "under § 2254(e)(2), a prisoner is 'at fault' even when state postconviction counsel is negligent." *Id*. at 384. And in that situation, "a federal court may order an evidentiary hearing or otherwise expand the state-court record only if the prisoner can satisfy [one of] § 2254(e)(2)'s stringent" exceptions. *Id*.

That's what distinguishes Ford's case from *Lee v. Kink*, 922 F.3d 772 (7th Cir. 2019), which he cites as support for his argument that the district judge wrongly rejected his request

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[3] In postargument filings, Ford identified deficiencies in his postconviction counsel's performance that likely contributed to the stagnant state-court record. His description of his retained postconviction counsel's performance is especially concerning. He explained that the Indiana Supreme Court later suspended counsel's license for misconduct in an unrelated case. *In re Welke*, 131 N.E.3d 161, 165 (Ind. 2019).

for an evidentiary hearing. In *Lee* we remanded for an evidentiary hearing on a § 2254 habeas petition because the petitioner had made "more than a dozen express requests" for an evidentiary hearing in state court, all of them ignored. *Id.* at 774. The state prisoner's repeated efforts to obtain a hearing in state court were enough to demonstrate his diligence in trying to develop a factual basis for his claims. Under these circumstances, we held that the petitioner was not at fault for the failure to develop the state-court record; the fault, we said, "must be attributed to the state judiciary's failure to afford him a hearing." *Id.*

This case is different. Here the responsibility to develop the factual record rested with Ford's postconviction counsel. His attorneys are at fault for not doing so, not the state judiciary. Under *Shinn* and *Williams*, postconviction counsel's neglect is attributed to Ford. Because their 11-year failure to act is imputed to Ford, his eleventh-hour request for court assistance after the judge ordered the case submitted on affidavits does not establish diligence under § 2254(e)(2). The district court therefore was statutorily precluded from holding an evidentiary hearing unless Ford's case qualified under one of § 2254(e)(2)'s "stringent" exceptions. *Shinn*, 596 U.S. at 384. Because neither exception in § 2254(e)(2) applies, the district judge correctly declined to hold an evidentiary hearing and properly denied relief on this claim under § 2254(d).

B. Witness-Strategy Arguments

At Ford's request, we expanded the certificate of appealability to permit him to raise three additional *Strickland* arguments on appeal. All relate to Hicks's witness strategy at trial. We turn to those arguments now, but we can be brief.

We start with Hicks's cross-examination of Laressa, which elicited some negative information about Ford's temper. As an initial matter, the State argues that Ford procedurally defaulted this issue. State prisoners must exhaust state remedies as a prerequisite to a federal habeas petition. § 2254(b)(1)(A). To satisfy the exhaustion requirement, a habeas applicant must "fairly present his constitutional claims through at least one complete round of the state's established appellate review process." *Hicks v. Hepp*, 871 F.3d 513, 530 (7th Cir. 2017) (quotation marks omitted) (citing *O'Sullivan v. Boerckel*, 526 U.S. 838, 845 (1999)). "This includes presenting the claims to the state's highest court in a petition for discretionary review." *Id.* The failure to do so is a procedural default, which ordinarily precludes a federal court from considering the claim. *Id.* at 531.

As we've noted, Ford did not raise Hicks's cross-examination of Laressa in his petition to the state supreme court, so he indeed defaulted the issue. But procedural default is an affirmative defense that can be lost if not properly raised. *Williams v. United States*, 879 F.3d 244, 248 (7th Cir. 2018). Ford argues that the State waived the defense by not raising it in the district court. There is a potentially plausible reason for the State's failure to do so: Ford's lengthy habeas petition only briefly mentioned Laressa's cross-examination, and the issue was nested within a broader argument about Hicks's lack of preparation for trial. This framing arguably left the State without notice that the cross-examination was a discrete issue Ford intended to press.

But it's not necessary to decide the waiver question; the district judge properly rejected this claim on the merits, as the State argues in the alternative. The judge assumed for the

sake of argument that it was objectively unreasonable for Hicks to ask Laressa if Ford is "pretty vocal when he gets upset." Still, it's clear based on all the evidence that her "yes" answer was not so damaging that it affected the outcome. On this reasoning, the district judge held that this brief, if inadvisable, question on cross-examination was not prejudicial. We see no flaw in this analysis.

Ford next argues that Hicks was ineffective because he failed to put him on the stand to testify in his own defense after telling the jury that he would. The state appellate court rejected this claim, finding "no reason to believe that testifying would have helped Ford" because his side of the story was already before the jury in his videotaped police statement. The court also noted that putting Ford on the witness stand risked contradictory or impeaching testimony, as well as a potentially damaging cross-examination. The court did not specifically address the effect of Hicks's unmet promises that the jury would hear from Ford directly.

The district judge noted this oversight but nonetheless held that the state court reasonably rejected the claim based on lack of prejudice. Ford has never explained how his trial testimony would have added to, differed from, or contextualized his videotaped statement to police. Absent that explanation, and accounting for the obvious risks of subjecting himself to cross-examination, the state court's "no prejudice" ruling was not unreasonable.

Ford's final contention—that Hicks was ineffective for failing to call his sister Barbara to testify about Yolanda's character—is similarly meritless. First, Hicks never promised that Barbara would testify; he merely identified her to the jury as a potential witness. More importantly, the state appel-

late court determined that Barbara's proposed character testimony would have been inadmissible, so Hicks's decision not to call her as a defense witness was not objectively unreasonable. Accepting as we must the state court's interpretation of state evidence law, *see Miller v. Zatecky*, 820 F.3d 275, 277 (7th Cir. 2016), the court reasonably concluded that Hicks was not ineffective for failing to present inadmissible testimony. *See also Kavanagh v. Berge*, 73 F.3d 733, 736 (7th Cir. 1996) (explaining that counsel's "failure to offer inadmissible evidence is not ineffective assistance").

AFFIRMED

EXHIBIT 3

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

BIRT FORD,	)	
	)	
Petitioner,	)	
	)	
v.	)	No. 1:20-cv-01639-RLY-TAB
	)	
DUSHAN ZATECKY,	)	
	)	
Respondent.	)	

ORDER DENYING PETITION FOR A WRIT OF HABEAS CORPUS

Petitioner Birt Ford was convicted of criminal deviate conduct, rape, burglary, criminal confinement, and invasion of privacy in an Indiana state court. Ford now seeks a writ of habeas corpus pursuant to 28 U.S.C. § 2254. Ford alleges that the trial court erred in admitting certain evidence and that his trial and appellate counsel rendered ineffective assistance of counsel in several respects. The first issue is not cognizable, and the Indiana Court of Appeals reasonably applied federal law in Ford's post-conviction appeal with respect to his ineffective assistance of counsel claims. Therefore, Ford's petition for a writ of habeas corpus is **denied**, but a certificate of appealability will issue with respect to one of Ford's ineffective assistance of trial counsel claims.

I. BACKGROUND

A. The Crime and Trial

Federal habeas review requires the Court to "presume that the state court's factual determinations are correct unless the petitioner rebuts the presumption by clear and convincing evidence." *Perez-Gonzalez v. Lashbrook*, 904 F.3d 557, 562 (7th Cir. 2018); *see* 28 U.S.C. § 2254(e)(1). The following summary is adapted from the Indiana Court of Appeals' recitation of facts on postconviction, *Ford v. State*, 145 N.E. 3d 140, 2020 WL 1316389, *2 (Mar. 20, 2020)

(*Ford II*), *trans. denied* (citing *Ford v. State*, 856 N.E.2d 795, 2006 WL 319722, *1 (Ind. Ct. App. Nov. 6, 2006) (*Ford I*), *trans. denied*).

Ford's victim was his wife, Yolanda. Their teenage daughter Laressa witnessed some of the events and testified at trial.

In January 2005, police went to the couple's residence to help Yolanda remove some personal items. During the encounter, Ford told a police officer, "I could do something to my wife while you are here in a nanosecond and there isn't anything you could do." Tr. 238 (hereinafter "the January incident").

Yolanda obtained a protective order against Ford on May 27, 2005. On May 30, Ford called Yolanda several times and, upon hearing she was at a cousin's house, went to the house and used force to try to get Yolanda to leave with him, resulting in visible injuries to Yolanda's arms and stomach. After that incident, Yolanda and the children went to a women's shelter (hereinafter "the May incident").

On June 11, 2005, Yolanda and the children returned to the residence she rented from the housing authority which had in place a no-trespassing order against Ford. That night, Yolanda fell asleep on the couch while watching television with Laressa. She awoke to Ford kicking in the back door. Yolanda tried calling 911, but Ford grabbed her phone, removed the battery, and threw it to the floor. He then blocked the back door with a table and retrieved a butcher's knife from the kitchen.

Ford, armed with the knife, forced Yolanda to go into a bedroom. Once in the room, he locked the door and told her that if police arrived, he would kill her and force the police to kill him. Still holding the knife, Ford then compelled Yolanda to perform oral sex.

They then heard sirens, and Ford repeated his threat to kill Yolanda if police entered the

apartment. Ford called out to Laressa, who said there was a fire across the street. Ford left the bedroom, confirmed there was a fire, and then warned Laressa that if the police came to the house, "both her parents [would] be dead." Tr. 168.

Ford and Yolanda went back into the bedroom, and Ford put the knife on a nightstand. Ford then had sex with Yolanda, during which he asked her whether she felt violated and she said yes. Tr. 172. They went to bed. Yolanda never tried to leave the bedroom because she was afraid of waking Ford.

The next morning, Ford again had sex with Yolanda. While he was in the shower, Yolanda's mother came to the apartment, and Yolanda and the children left. Yolanda called the police and was taken to a sexual assault treatment center where the examining nurse found injuries consistent with forced penetration.

Later that day, Ford was interviewed by police while shackled. During the videotaped interview, he admitted to violating the protective order and entering the apartment without permission but denied kicking the door in. He admitted he stepped on Yolanda's phone but said she threw it at him first. He also admitted to having a knife but said he had brought it for Yolanda and told her to stab him with it if she felt threatened by him. He acknowledged having sex twice with Yolanda but said it was consensual.

At trial, evidence about the January and May incidents were admitted over his objection, and, after an unsuccessful motion to suppress, the videotaped interview was played for the jury. The jury found Ford guilty on all charges except one count of rape and interference with the reporting of a crime, and the trial court subsequently imposed a 70-year aggregate sentence.

B. Direct Appeal and Post-Conviction Proceedings

On direct appeal, Ford challenged the admission of evidence concerning the January and

May incidents and argued his sentence was inappropriate. The Indiana Court of Appeals affirmed his convictions, finding that any evidence about those incidents was harmless in light of the substantial evidence against him, and determined his sentence was appropriate. *Ford I*, 2006 WL 319722, at *4–5.

Ford filed a petition for post-conviction relief on August 28, 2007. Dkt. 8-3. After the State Public Defender and private counsel entered and withdrew appearances, the State moved to require Ford to submit the case by affidavit.[1] *Id.* at 2–3. Ford objected to proceeding by affidavit, but the post-conviction court overruled his objection. *Id.* at 5. Ford filed a motion to compel, seeking the court's assistance in acquiring affidavits from trial and appellate counsel after they twice failed to respond to his letters. *Id.* at 5; PCR App'x Vol. II at 126−28. He included receipts showing the second round of letters was sent via certified mail. PCR App'x Vol. II at 128. The post-conviction court denied the request, finding—without acknowledging the certified mail receipts—that there was "nothing in the record of this cause indicating defendant [had] actually requested any such affidavits from counsel." *Id.* at 129.

Ford then moved for leave to depose counsel. Dkt. 8-3 at 6. The post-conviction court took the motion under advisement pending submission of the case by affidavit, stating that once the affidavit was reviewed the court would "make a determination if the case requires an evidentiary hearing." *Id.*

Ford submitted an affidavit stating the various ways he believed trial and appellate counsel were ineffective. PCR App'x Vol. II at 142−45. The post-conviction court denied his petition, and he appealed. *Ford II*, 2020 WL 1316389. On appeal, Ford alleged trial counsel was ineffective for:

[1] Indiana Post-Conviction Rule 1(9)(b) provides that when a petitioner proceeds pro se, the post-conviction court may order the cause submitted upon affidavit rather than hold an evidentiary hearing.

(1) failing to investigate;

(2) failing to call impeachment witnesses;

(3) failing to consult experts;

(4) failing to object to biased jurors;

(5) failing to object to statements the prosecutor made during voir dire and closing argument;

(6) failing to pursue plea negotiations;

(7) failing to call Ford to testify after promising during opening that he would; and

(8) failing to raise a *Batson* challenge after the dismissal of the only African American juror.

Dkt. 8-11 at 9. He also alleged that appellate counsel was ineffective for failing to challenge evidence of the January and May incidents under Indiana Evidence Rule 403 and failing to challenge the imposition of consecutive sentences. The Indiana Court of Appeals denied relief on all claims, and the Indiana Supreme Court denied his petition to transfer. *Ford II*, 2020 WL 1316389; dkts. 8-14, 8-16.

C. Petition for a Writ of Habeas Corpus

Ford filed the instant petition for a writ of habeas corpus on June 16, 2020. Dkt. 1. Ford alleges that the trial court erred under Indiana Evidence Rule 404(b) by admitting evidence of the January and May incidents. He also alleges that his trial and appellate counsel were ineffective on the same grounds that he raised in the state courts.

On August 31, 2020, Ford filed a motion for evidentiary hearing, arguing that the state post-conviction court denied him a full and fair fact hearing. The Court denied the motion but noted it would determine whether a hearing is warranted once the materials were reviewed. On July 27, 2021, the Court ordered supplemental briefing on whether an evidentiary hearing could be heard on one of the claims of ineffective assistance of counsel. Both parties have

responded, and Mr. Ford's petition is now ripe.

II. LEGAL STANDARD

A federal court may grant habeas relief only if the petitioner demonstrates that he is in custody "in violation of the Constitution or laws . . . of the United States." 28 U.S.C. § 2254(a). The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") directs how the Court must consider petitions for habeas relief under § 2254. "In considering habeas corpus petitions challenging state court convictions, [the Court's] review is governed (and greatly limited) by AEDPA." *Dassey v. Dittmann*, 877 F.3d 297, 301 (7th Cir. 2017) (en banc) (citation and quotation marks omitted). "The standards in 28 U.S.C. § 2254(d) were designed to prevent federal habeas retrials and to ensure that state-court convictions are given effect to the extent possible under law." *Id.* (citation and quotation marks omitted).

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

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

28 U.S.C. § 2254(d).

"The decision federal courts look to is the last reasoned state-court decision to decide the merits of the case, even if the state's supreme court then denied discretionary review." *Dassey*, 877 F.3d at 302. "Deciding whether a state court's decision 'involved' an unreasonable application of federal law or 'was based on' an unreasonable determination of fact requires the federal habeas court to train its attention on the particular reasons—both legal and factual—why state courts rejected a state prisoner's federal claims, and to give appropriate deference to that decision[.]"

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

"For purposes of § 2254(d)(1), an unreasonable application of federal law is different from an incorrect application of federal law." *Harrington v. Richter*, 562 U.S. 86, 101 (2011). "A state court's determination that a claim lacks merit precludes federal habeas relief so long as fairminded jurists could disagree on the correctness of the state court's decision." *Id.* "If this standard is difficult to meet, that is because it was meant to be." *Id.* at 102. "The issue is not whether federal judges agree with the state court decision or even whether the state court decision was correct. The issue is whether the decision was unreasonably wrong under an objective standard." *Dassey*, 877 F.3d at 302. "Put another way, [the Court] ask[s] whether the state court decision 'was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement.'" *Id.* (quoting *Richter*, 562 U.S. at 103). "The bounds of a reasonable application depend on the nature of the relevant rule. The more general the rule, the more leeway courts have in reaching outcomes in case-by-case determinations." *Schmidt v. Foster*, 911 F.3d 469, 477 (7th Cir. 2018) (en banc) (citation and quotation marks omitted).

III. DISCUSSION

Ford's petition raises three issues: (1) whether the trial court erred by permitting evidence of bad prior conduct; (2) whether trial counsel was ineffective; and (3) whether appellate counsel was ineffective.

A. Evidentiary Claim

"Errors in state law in and of themselves are not cognizable on habeas review. The remedial power of a federal habeas court is limited to violations of the petitioner's federal rights, so only if a state court's errors have deprived the petitioner of a right under federal law can the federal court intervene." *Perruquet v. Briley*, 390 F.3d 505, 511 (7th Cir. 2004). "Because a state trial court's evidentiary rulings and jury instructions turn on state law, these are matters that are usually beyond the scope of federal habeas review." *Id.*

Ford argues that the trial court committed reversible error when it allowed the admission of evidence about the January 2005 incident, where Ford told a police officer he could harm his wife in a "nanosecond" if he wanted to, and the May 2005 incident, where Ford tried to forcibly remove Yolanda from her cousin's house, inflicting bruises on her arms and stomach in the process. But this claim arises under Indiana Evidence Rule 404(b) and as such is a non-cognizable state law claim that provides no basis for relief on habeas review.

B. Ineffective Assistance of Trial Counsel

A criminal defendant has a right under the Sixth Amendment to effective assistance of counsel. *See Strickland v. Washington*, 466 U.S. 668, 687 (1984). To succeed on a claim that counsel was ineffective, a petitioner must show (1) that counsel's performance "fell below an objective standard of reasonableness" and (2) "that the deficient performance prejudiced the defense." *Id.* at 687−88. Where the provisions of § 2254(d) apply, courts apply two layers of deference in assessing counsel's performance: "The question is whether there is any reasonable argument that counsel satisfied *Strickland*'s deferential standard." *Richter*, 562 U.S. at 105.

Further, counsel's strategic decisions "are entitled to a strong presumption of reasonableness," and "[t]he burden of rebutting this presumption rests squarely on the defendant." *Dunn v. Reeves*, 141 S. Ct. 2405, 2410 (2021) (internal quotation marks and citations omitted).

The Indiana Court of Appeals was the last reasoned decision to discuss Ford's claims. The court correctly cited the *Strickland* standard. *Ford II*, 2020 WL 1316389 at *3. Additionally, the court stated, "It is worth noting that neither Ford's trial nor appellate counsel testified, submitted affidavits, or were deposed in this proceeding. 'When counsel is not called as a witness to testify in support of a petitioner's arguments, the post-conviction court may infer that counsel would not have corroborated the petitioner's allegations.'" *Id.* (quoting *Oberst v. State*, 935 N.E.2d 1250, 1254 (Ind. Ct. App. 2010)).

Ford alleges that trial counsel was ineffective in many respects. First, he alleges that his trial counsel failed to prepare or conduct reasonable investigation. This was a speedy trial that began on August 9, 2005, yet counsel was not appointed until July 1, 2005, and admitted on the record that he had spent July focusing on a double homicide trial and did not obtain a copy of the interrogation tape until the day before Ford's trial. Tr. 4–5. Ford argues that the late appointment and attention to another case caused trial counsel to make a variety of missteps.

The Indiana Court of Appeals declined to assess counsel's alleged unpreparedness as a separate claim: "rather than make a distinct claim of unpreparedness, Ford cites it as a contributing factor to the alleged ineffective assistance in several more of his specific claims." *Ford II*, 2020 WL 1316389 at *3. The court then analyzed each of Ford's specific allegations. This was a reasonable way to organize its opinion, and this Court does the same.

i. Ineffective Assistance During Plea Negotiations

Though this is the third claim discussed by the Indiana Court of Appeals, the Court addresses it first because it is different in nature than the claims about counsel's performance during trial, and it presents concerns about whether an evidentiary hearing is needed.

1. Failure to Pursue a Plea

Ford alleges that trial counsel was ineffective for failing to explore a plea deal with the state. The right to effective assistance of counsel extends to the plea-bargaining process. *Lafler v. Cooper*, 566 U.S. 156, 162 (2012). If a formal offer is made by the prosecution, defense counsel has a duty to communicate the terms of the plea offer to the defendant. *Missouri v. Frye*, 566 U.S. 134, 145 (2012). To establish prejudice where a plea offer has lapsed due to counsel's deficient performance, the defendant must demonstrate a reasonable probability that he would have accepted the plea and that that the plea would have been entered without the prosecution canceling it or the trial court rejecting it. *Id.* at 147. Further, "it is necessary to show a reasonable probability that the end result of the criminal process would have been more favorable by reason of a plea to a lesser charge or a sentence of less prison time." *Id.*

According to Ford, the prosecutor sent Ford's attorney a letter on July 13, 2005, a few weeks before trial, offering to discuss a plea offer. Dkt. 1 at 13. Ford alleges that he told trial counsel to discuss a plea with the prosecutor, but counsel failed to follow up.

The Indiana Court of Appeals held that Ford failed to meet his burden of proof on this claim, stating:

> Ford contends that his trial counsel was ineffective for failing to explore a plea deal with the State. Ford concedes that his trial counsel did inform him of a letter from the State regarding a potential guilty plea. Ford contends, however, that he instructed his trial counsel to pursue the matter but that he did not. The only support for Ford's claim that "defense counsel did nothing concerning [Ford's] request" to discuss a plea agreement with the State, Appellant's Br. p. 15, is provided by his

> own self-serving affidavit, which the post-conviction court was under no obligation to credit. Moreover, because Ford's trial counsel did not provide any evidence in this proceeding, we may presume that he would not have corroborated Ford's account.

Ford II, 2020 WL 1316389 at *5. At first blush, there is nothing wrong with the court's analysis. As discussed, it was Ford's burden to prove his trial counsel was ineffective. *Dunn*, 141 S. Ct. at 2411 (finding absence of testimony or other evidence from trial counsel was "particularly significant given the range of possible reasons … counsel may have had for proceeding as they did." (internal quotation marks and citation omitted)); *see also Toro v. Fairman*, 940 F.2d 1065, 1068 (7th Cir. 1991) ("[Petitioner's] statement is self-serving and alone, insufficient to establish that, but for counsel's advice, there is a reasonable probability that he would have accepted the plea."). But the court's analysis ignores the fact that Ford *tried* to obtain trial counsel's testimony, both by writing him letters and by asking the trial court to compel him to provide an affidavit, participate in a deposition, or hold an evidentiary hearing.

Putting aside this misstep, the Indiana Court of Appeals essentially accepted the post-conviction court's rejection of Ford's plea bargain claim. Thus, it is helpful to examine the post-conviction court's more thorough rationale for finding Ford failed to meet his burden. *See Jordan v. Hepp*, 831 F.3d 837, 843 (7th Cir. 2016) (noting where court of appeals adopted trial court's order, the trial court's order can be considered as part of the "last reasoned opinion" of the state court). The post-conviction court stated,

> Petitioner complains that Attorney Hicks failed to pursue plea negotiations [Amended Petition, at 8−9; Petitioner's Affidavit, at 2]. He does not assert that he would have admitted his guilt at any time. Indiana does not allow so-called "best interest" or "*Alford*" guilty pleas in which a defendant pleads guilty while still claiming to be innocent. *Ross v. State*, 456 N.E.2d 420, 423 (Ind. 1983). Petitioner does not identify any circumstances under which he would have tried to enter a plea of guilty while maintaining a discreet silence about his belief that he was not guilty—nor has he shown that this Court would have accepted a guilty plea from him without hearing his own account of facts that made him guilty. As he has not

> shown that plea negotiations would have affected the outcome of the proceeding, he has not shown that Attorney Hicks was ineffective in failing to pursue plea negotiations.

Dkt. 8-10 at 18−19, ¶ 13.

This was not an unreasonable application of Supreme Court jurisprudence. Ford had to show that but for counsel's deficient performance, there would have been a beneficial plea offer that would have been accepted by Ford, the state, and the trial court. *Lafler*, 566 U.S. at 171; *Frye*, 566 U.S. at 147. First, there is no evidence of an uncommunicated formal plea. *Frye*, 566 U.S. at 145. But even assuming that the prosecutor had a plea offer in mind—given her prior communications with counsel—there is evidence that Ford maintained his innocence. *See, e.g.* PCR App'x Vol. II at 144 (Ford's affidavit stating, "Mr. Hicks further failed to object when the State during voir dire shifted the burden to me making it vital I testify to prove my innocence (which Mr. Hicks did not allow to happen.)"). Because Indiana does not permit pleas if a defendant refuses to admit his guilt, the post-conviction court reasonably concluded that Ford failed to meet his burden on this claim. *See Alkhalidi v. Neal*, 963 F.3d 684, 687 (7th Cir. 2020) (holding where defendant was committed to maintaining his innocence, he failed to show a reasonable probability that the trial court would have accepted his plea since "Indiana requires the defendant to admit the factual basis of the plea.").

2. Necessity of an Evidentiary Hearing

Although the state court's resolution was reasonable, the Court harbors concerns about Ford's ability to fairly litigate this claim given the post-conviction court's refusal to hold an evidentiary hearing or otherwise assist Ford in procuring testimony from his attorneys. This refusal did not affect the Court's review of the ineffective assistance claims for alleged errors that occurred during trial; the Court reviewed the record and could assess trial counsel's performance as a whole

when assessing the reasonableness of the Indiana Court of Appeals' decision. But there is an evidentiary lacuna when it comes to Ford's claim about trial counsel's performance during the plea-bargaining process. Without trial counsel's testimony, we don't know what counsel did or did not do. For example, it is possible that counsel did communicate with the prosecutor, who may have had a plea agreement drafted, and then he forgot to communicate the plea to Ford. And the Indiana Court of Appeals faulted the lack of testimony when it determined that Ford failed to meet his burden on this claim. *See Ford II*, 2020 WL 1316389 at *5. Thus, the Court requested additional briefing on whether an evidentiary hearing could be held to develop the factual basis of the claim. Dkt. 16.

Generally, a federal court's "review under §2254(d)(1) is limited to the record that was before the state court that adjudicated the claim on the merits." *Cullen v. Pinholster*, 563 U.S. 170, 181 (2011). However, if the federal court finds factual aspects of a state court's decision unreasonable under §2254(d)(2), *Pinholster* does not prohibit the court from holding a hearing. *Lee v. Kink*, 922 F.3d 772, 775 (7th Cir. 2019) ("Illinois wants us to treat [*Pinholster*] as equivalent to a rule that state courts may insulate their decisions from federal review by refusing to entertain vital evidence. Yet a state court's refusal to consider evidence can render its decision unreasonable under §2254(d)(2) even when its legal analysis satisfies §2254(d)(1)".)

Further, to qualify for an evidentiary hearing, a petitioner must show that, through no fault of his own, the state-court record lacks essential facts. *Id.* at 773. "Section 2254(e)(2)(A)(ii) permits the district court to conduct an evidentiary hearing in limited circumstances: namely, when the state court record does not contain sufficient factual information to adjudicate a claim, and 'the factual predicate could not have been previously discovered through the exercise of due diligence.'" *Jordan*, 831 F.3d at 849.

As discussed, the state court's resolution of this claim did not rest on trial counsel's acts or omissions but rather on its factual finding that no plea would have been accepted because Ford maintained his innocence. *See Lafler*, 566 U.S. at 171; *Frye*, 566 U.S. at 147. And there was evidentiary support for this factual finding. Thus, because the state court did not make an unreasonable factual determination under §2254(d)(2), Ford does not qualify for an evidentiary hearing.[2]

However, because jurists of reason could disagree with the Court's resolution of this claim, a certificate of appealability is **granted** as to this claim.

ii. Ineffective Assistance During Trial

The Court now addresses Ford's claims about alleged errors that occurred during trial.

1. Failure to Adequately Challenge Statement to Police

Ford argues that trial counsel failed to adequately challenge the admission of his videotaped statement on Fourth and Fifth Amendment grounds. The Indiana Court of Appeals rejected this claim because Ford failed to show that "trial counsel could have altered his approach in any way that would have resulted in suppression of the statement." *Id.*

As to the Fourth Amendment, there was no dispute that Ford was seized at the time of his interview because he was shackled. Absent an arrest warrant, "Ford's seizure was constitutional only if authorities suspected him of wrongdoing." *Id.* (citing *United States v. Mendenhall*, 446 U.S. 544, 551–52 (1980)). Ford does not argue that law enforcement lacked reasonable suspicion. The state court found that Ford's Fourth Amendment claim was rooted in concern about the shackling

[2] The Court need not decide whether Ford was diligent in his pursuit of testimony from his trial counsel, though Seventh Circuit precedent would suggest he was. *See Lee*, 922 F.3d at 774 ("[B]y asking for a hearing to explore an ineffective-assistance theory, …Lee strongly implied what topics would be covered at a hearing. … He did what he could, and the absence of evidence … must be attributed to the state judiciary's failure to afford him a hearing.").

itself. The court rejected the argument because Ford provided no legal authority that shackling a suspect during an interview is *per se* illegal or unreasonable in these circumstances. This conclusion was reasonable. While being handcuffed or shackled is probative evidence that a person has been seized, *see, e.g. United States v. Borostowski*, 775 F.3d 851, 862 (7th Cir. 2014), there is no Supreme Court precedent stating that handcuffing or shackling a suspect during an interview runs afoul of the Fourth Amendment.

The court then proceeded to evaluate whether Ford's statement was voluntary. To determine whether a confession is voluntary, the court must assess the totality of surrounding circumstances, "including: (1) the defendant's age, intelligence, experience, education, mental capacity, and physical condition at the time of questioning; (2) the legality and duration of the detention; (3) whether the suspect was given *Miranda* warnings; (4) the duration of the questioning; and (5) the existence of any physical or mental abuse." *Lentz v. Kennedy*, 967 F.3d 675, 685 (7th Cir. 2020) (internal quotation marks and citation omitted).

The Indiana Court of Appeals examined the totality of the circumstances and found that the confession was voluntary. In doing so, the court adopted the prosecutor's summary of the events made during the suppression hearing (which was consistent with the court's own review of the video). *Ford II*, 2020 WL 1316389 at *4–5. As the prosecutor explained, Ford had a high school diploma and two years of college. Ford initially expressed interest in pleading the Fifth Amendment but then proceeded to question the detective and repeatedly told him that he wanted to talk to him. The detective tried to leave the room four times, but Ford continued to speak to the detective. The detective left the room for about fifteen minutes, and when he returned Ford confirmed that he wanted to speak with him and signed the advisement of rights. The court concluded, "Far from being coerced, the totality of the circumstances indicates that Ford practically

insisted on telling the detectives his side of the story." *Id.* at *5. Having reviewed the videotape, the Court agrees that, based on the totality of the circumstances, Ford's inculpatory statements were voluntarily provided to law enforcement.

Based on its conclusion that the statement was properly admitted, the court concluded that "trial counsel was not ineffective for failing to more vigorously challenge the admission of his statement to police." *Id.* This was a reasonable application of *Strickland*. Counsel cannot be ineffective for failing to win a losing argument.

2. Failure to Call Impeachment Witnesses

Ford alleges that trial counsel was ineffective for not calling Barbara and Jimmy Ford as witnesses. Ford says the witnesses would have testified that Yolanda had a propensity to lie. Barbara would have testified about two specific lies that Yolanda told, and Jimmy would have testified about Yolanda's propensity to lie. Under Indiana Evidence Rules 608 and 609, "a witness's credibility can be impeached by opinion or reputation evidence as to the witness's character for truthfulness but *not* by specific instances of untruthfulness unless they have resulted in convictions for dishonesty-related offenses." *Id.*

Ford did not offer an affidavit from either witness during post-conviction proceedings. Ford did not argue that the specific lies Barbara would have testified about resulted in convictions for dishonesty-related offenses. The Indiana Court of Appeals held that because Ford failed to establish that either Jimmy or Barbara's testimony would have been admissible, he could not establish that trial counsel was ineffective. This is a reasonable application of *Strickland*. Attorneys' strategic decisions, including which witnesses to call, "are entitled to a 'strong presumption' of reasonableness." *Reeves*, 141 S. Ct. at 2410 (quoting *Richter*, 562 U.S. 104). Counsel could not be ineffective for failing to call two witnesses whose purported testimony would

have been inadmissible. *See Kavanaugh v.* Berge, 73 F.3d 733, 736 (7th Cir. 1996) ("[F]ailure to offer inadmissible evidence is not ineffective assistance.").

3. Failure to Present Expert Testimony

Ford alleges that trial counsel was ineffective for failing to hire or call experts in sexual assault and mental health. With respect to a sexual assault expert, he believes the expert could have rebutted a nurse's testimony that Yolanda sustained "shearing" injuries on her cervix consistent with blunt force trauma. Tr. 260−65. He also alleges that if trial counsel had consulted with an expert, he would not have asked the nurse whether vaginal dryness could also have caused the shearing. Tr. 265−66. The nurse answered that only blunt force trauma or impact caused shearing, *id.* at 266, bolstering the State's evidence that Ford raped Yolanda.

The Indiana Court of Appeals concluded that because Ford failed to "explain what such an expert would have said or how the testimony could have helped him at trial," or how an expert would have assisted his trial counsel in addressing the nurse's testimony, his claim was too vague to establish ineffective assistance of counsel. *Ford II*, 2020 WL 1316389 at *5. This was a reasonable application of *Strickland*. *See Burt v. Titlow*, 571 U.S. 12, 23 (2013) ("It should go without saying that the absence of evidence cannot overcome the 'strong presumption that counsel's conduct [fell] within the wide range of reasonable professional assistance.'" (quoting *Strickland*, 466 U.S. at 689)). Further, although not explicitly addressed by the Indiana Court of Appeals, Ford cannot show he was prejudiced by trial counsel's question about alternative causes of shearing. After receiving an undesirable answer, counsel asked the nurse whether shearing was necessarily the result of rape, and she testified, "I cannot say that." Tr. 266.

With respect to a mental health expert, Ford alleges that trial counsel should have called an expert who could "testify about being bi-polar and the cause and effect of …not taking the

medication to treat this disorder." Dkt. 1 at 16. He elaborated that "an expert would have at least explained this bi-polar disorder to the jury so they understood how the victim (Petitioner's wife) would have been acting before and during this alleged crime while being bi-polar and not taking medication to treat it." *Id*. Ford presented this argument verbatim to the Indiana Court of Appeals. *Compare* dkt. 1 at 16 *with* dkt. 8-11 at 18−19.

Also embedded in this argument is Ford's claim that trial counsel should have objected to Yolanda's testimony that her mental health counselor was aware that Yolanda was not taking medication. He alleges this testimony prejudiced him because (1) there was no way to confirm that the mental health counselor knew Yolanda was not taking medication, and (2) the prosecutor referred to this testimony in closing argument to discredit his argument that Yolanda acted irrationally when not on medication. Dkt. 1 at 16−18; *see also* dkt. 8-11 at 19−21.

The Indiana Court of Appeals stated:

> Ford contends that his trial counsel was ineffective for failing to call a witness who would testify that *Yolanda was taking medication to treat bi-polar disorder around the time of Ford's crimes*, which would have contradicted Yolanda's testimony that she was not taking her medication. Even if such a witness had so testified, we fail to see how such an impeachment would have helped Ford. We think it is a stretch, to say the least, to maintain that a jury would be likely to conclude that Yolanda was lying about Ford's crimes against her based on the fact she lied about not taking her medication, even if true. Corroborating evidence of Ford's crimes makes this even less likely. The jury saw and heard ample evidence beyond Yolanda's testimony that Ford committed the crimes for which he was convicted, including Nurse Richards's testimony, photographic evidence of the crime scene, Laressa's testimony, and—last but not least—Ford's own incriminating statements. Ford has failed to establish how he was prejudiced in this regard.
>
> Ford also contends that an expert should have been found who could have testified regarding the effect on a person's behavior when they do not take medication for bi-polar disorder. For one thing, this claim is inconsistent with Ford's apparent claim that he had evidence that Yolanda was, in fact, taking her medications. In any event, Ford does not explain what such an expert would have said that would have had any bearing on his trial whatsoever, only that he wanted such an expert to "testify about being bi-polar and the cause and effect of and not taking the

> medication to treat this disorder[.]" Appellant's Br. p. 21. Ford has failed to establish ineffective assistance of trial counsel in this regard.

Ford II, 2020 WL 1316389 at *6 (emphasis added).

The first part of the court's analysis reflects a misunderstanding of Ford's argument. Ford's position was consistent in that he believed Yolanda was not taking medication to treat her bipolar disorder, which he alleged caused her to act irrationally or erratically.

But the court did address Ford's position in the next paragraph, concluding that Ford failed to explain how an expert on bipolar disorder would have changed the outcome of his trial. In doing so, the Indiana Court of Appeals reasonably concluded that Ford failed to prove he was prejudiced by the absence of a mental health expert in light of the "ample evidence" of Ford's guilt. *Id.* The Court agrees. In addition to Yolanda's testimony, Laressa saw Ford with a knife and was on the receiving end of his threat to kill Yolanda if Laressa tried to call the police. Tr. 197, 202. Ford's interview with police corroborated much of Yolanda's version of events, insofar as he admitted that he entered the house without her permission, they engaged in sexual acts, he advised her that if the police came she would have to kill him, and there was a knife in the bedroom. Dkt. 8-10 at 6−7. Pictures of the broken door and knife on the nightstand were admitted into evidence. Exs. 7, 14. Yolanda immediately reported the assault and underwent a sexual assault exam which revealed physical trauma. Thus, in light of the corroborating evidence, Ford has not shown a reasonable likelihood that a mental health expert's testimony would have changed the outcome of the trial. And for the same reason, he has failed to demonstrate prejudice resulting from Yolanda testifying that her counselor was aware that she was not on medication.

4. Failure to Object to Biased Jurors

Ford next argues that trial counsel was ineffective for failing to challenge several jurors who had been victims or knew victims of sexual or violent crime: Juror 14 had been robbed at

knifepoint; Juror 12 was a robbery victim; Juror 53 knew a sexual assault victim; and Juror 62 had been in a violent domestic relationship for five years.

The Indiana Court of Appeals rejected this claim because all four jurors affirmed that their personal experiences would not affect their abilities to serve as jurors, and Ford produced no evidence that would have provoked counsel to challenge the veracity of their testimony. *Ford II*, 2020 WL 1316389 at *6. Merely being a victim of a crime is not a basis for a strike for cause. *See* Indiana Jury Rule 17. And jurors are not required to forget past experiences but rather must "'set aside any opinion [they] might hold, relinquish [their] prior beliefs, or put aside [their] biases or [their] prejudicial personal experiences." *Wesley v. Pfister*, 659 F. App'x 360, 363 (7th Cir. 2016) (quoting *United States v. Allen*, 605 F.3d 461, 465−66 (7th Cir. 2010)).

Ford's claim of implied bias is without merit. A claim of implied bias "requires 'exceptional' or 'extreme circumstances' giving rise to an implication of bias." *United States v. Kuljko*, 1 F.4th 87, 93 (1st Cir. 2021) (quoting *Smith v. Phillips*, 455 U.S. 209, 222 (1982) (O'Connor, J., concurring)). Examples include the juror being an employee of the prosecutor's office, a juror who is closely related to one of the participants in the trial, or a juror who was a witness or otherwise involved in the crime. *Smith*, 455 U.S. at 222; *see also United States v. Brazelton*, 557 F.3d 750, 754 (7th Cir. 2009) (noting that "the question comes down to whether the relationship is close enough to assume bias"). None of the jurors had such a relationship that would trigger a finding of implied bias.

Because Ford produced no proof of bias, the Indiana Court of Appeals reasonably applied *Strickland* when rejecting this claim.

5. Failure to Object to Prosecutor's Statements

Ford alleges that trial counsel should have objected when, during voir dire, the prosecutor asked the venire, "When something happens, you like to hear both sides of the story. Who likes to hear both sides of the story?" Tr. 60. Ford alleges this was an impermissible comment on his right not to testify. The Indiana Court of Appeals rightfully rejected this argument because Ford took the comment out of context. *Ford II*, 2020 WL 1316389 at *7. Immediately after posing the question, the prosecutor said,

> Do you understand in a criminal case sometimes you don't hear both sides? . . . And even though you might want to hear from him, he has the right not to, for whatever reason. Do you understand that? …Can you not hold that against him? . . . 'Cause the law is going to say you can't hold that against him. So do you think you can base the decision on the evidence and not hold anything against Mr. Ford if he chooses not to talk. Is that okay?

Tr. 61−62. The court concluded, "Far from committing misconduct, the prosecutor was *clarifying* that a defendant's refusal to testify could not be held against him." *Ford II*, 2020 WL 1316389 at *7 (emphasis original). This was a reasonable application of *Strickland*. Because the prosecutor did not improperly comment on Ford's right to not testify, counsel was not ineffective for failing to object to the statement.

6. Failure to Call Ford to Testify

Ford alleges that trial counsel was ineffective for failing to call Ford to testify after promising several times in opening statement that he would. And promise he did. During opening, counsel made the following statements:

- "And Birt's going to testify too. [Regarding the criminal deviate conduct charge] Birt will tell you that is—that is not true." Tr. 133.
- Birt's going to tell you that during the course—he went over there. He was trying to save his marriage." Tr. 134.

- "Matter of fact, Birt will tell you that while he and Yolanda were in the bedroom, they called the daughter back into the bedroom and said everything was okay." Tr. 135.

- "They lived in a tough part of town and they always—Birt will tell you, he'll testify to this. They always either had a knife or some kind of crowbar is what Birt will tell you. Some sort of weapon in that house in case of a break in." Tr. 135.

- "Birt's going to tell you that when they were having this conversation about these other men, that he told Yolanda, listen, if you're afraid that I'll react badly, if you're having an affair, I want you to be honest, handcuff me." Tr. 136.

- "Birt going to testify that this period of time—well, let me back up. He will testify that he's been with this woman 20 years and that he knows her personality for the lack of a better word. . . . He knows her on her medication and he knows her when she's not on the medication. Birt's going to tell you that on this evening she was not on her medication." Tr. 136.

After the State rested, Ford recalled Yolanda briefly and then rested. Tr. 292−300. There was no exchange with the trial court about whether Ford would testify or whether he knowingly waived the right to testify. *Id.* And trial counsel did not explain during closing argument why Ford had not testified. *Id.* at 315−21.

The Indiana Court of Appeals rejected the argument as follows:

> First, this argument is partially premised on the false claim, made in the last section, that the prosecutor improperly told the jury that it could hold Ford's failure to testify against him. Second, Ford does not explain how his trial counsel could have prevented him from taking the stand if he had insisted on testifying. Finally, there is no reason to believe that testifying would have helped Ford. Ford's "side of the story" was already going to be before the jury, in the form of his videotaped statement. If Ford had testified in [a] way consistent with his statement, his testimony would have been merely cumulative. If he had contradicted his statement, he would have impeached himself. Moreover, in either circumstance he would have been subject to cross-examination, which we cannot imagine would have helped him. Under the circumstances, we conclude that Ford has failed to establish that his trial counsel was ineffective in this regard.

Ford II, 2020 WL 1316389 at *7.

The court's reasoning addressed half of Ford's claim—that counsel should have called him to testify in his defense. But it did not address the other half—that trial counsel was ineffective

when he promised the jury that Ford would testify and then failed to explain why that promise was not met. In doing so, the court failed to recognize the damage trial counsel may have caused by vehemently promising that Ford would testify only to change course with no explanation. "Promising a particular type of testimony creates an expectation in the minds of jurors, and when defense counsel without explanation fails to keep that promise, the jury may well infer that the testimony would have been adverse to his client and may also question the attorney's credibility." *U.S. ex rel. Hampton v. Leibach*, 347 F.3d 219, 259 (7th Cir. 2003); *see also Myers v. Neal*, 975 F.3d 611, 621 (7th Cir. 2020) ("Making false promises about evidence in an opening statement is a surefire way for defense counsel to harm his credibility with the jury."). The harm is particularly significant when the broken promise is that the defendant will testify in his own defense. *Barrow v. Uchtman*, 398 F.3d 597, 606 (7th Cir. 2005) (citing *Hampton*, 347 F.3d at 257−60).

Of course, failing to follow through on statements during opening does not always amount to deficient performance. Sometimes "unforeseeable events" or "unexpected developments ... warrant ... changes in previously announced trial strategies." *Hampton*, 347 F.3d at 257. But that's not the case here. Trial counsel moved to suppress the videotaped statement before trial began, which the trial court denied, stating there was no "Fifth Amendment problem here whatsoever." Tr. 12. Thus, the subsequent admission of the videotape could not be viewed as unforeseeable or unexpected. The Indiana Court of Appeals' conclusion that trial counsel was not deficient was an unreasonable application of *Strickland*. There is no evidence suggesting that counsel made a strategic decision by promising six times during opening that Ford would testify, only to not call him and not explain why during closing argument.

But "the Supreme Court has never hinted at a *per se* rule that defense lawyers must keep all promises made in opening statement," and accordingly Ford must show he was prejudiced by

the change in strategy. *Fayemi v. Ruskin*, 966 F.3d 591, 594 (7th Cir. 2020). Despite failing to acknowledge the harm caused by trial counsel's undelivered promise, the Indiana Court of Appeals reasonably applied *Strickland* when it determined Ford was not prejudiced by counsel's decision not to call him to testify. *See Hartsfield v. Dorethy*, 949 F.3d 307, 317 (7th Cir. 2020) (finding petitioner failed to show omitted testimony would have affected the jury's verdict where the circumstantial evidence was strong and the proposed testimony was "little more than a generic denial of guilt."). As the state court observed, Ford presented his version of events in the videotaped statement to police, and he would have been impeached if his testimony deviated from his statement. Further, his concern about the prosecutor's statement during opening was misplaced since, as discussed above, she explained at length that the jury could not hold his decision not to testify against him. Finally, as previously discussed, the evidence against Ford was strong.

In short, although the Indiana Court of Appeals' unreasonably concluded that trial counsel was not deficient when he promised to call Ford to testify and then failed to explain why he did not, Ford has not shown he was prejudiced by this error.

7. Failure to Raise *Batson* Challenge

Ford next alleges that trial counsel was ineffective for failing to challenge the alleged removal of the only Black juror from the jury pool without justification. The Indiana Court of Appeals properly identified *Batson v. Kentucky*, 476 U.S. 79 (1986), as the relevant legal framework. *Ford II*, 2020 WL 1316389 at *8. "Purposeful racial discrimination in selection of the venire violates a defendant's right to equal protection because it denies him the protection that a trial by jury is intended to secure." *Batson*, 476 U.S. at 86. "Under *Batson*, once a prima facie case of discrimination has been shown by a defendant, the State must provide race-neutral reasons for its preemptory strikes. The trial judge must determine whether the prosecutor's stated reasons were

the actual reasons or instead were a pretext for discrimination." *Flowers v. Mississippi*, 139 S. Ct. 2228, 2241 (2019).

In his affidavit in support of his petition, Ford stated that trial counsel "allowed the only black [juror] to be struck while I was using the restroom claiming the State had proven this person had won a lawsuit against the city." PCR App'x Vol. II at 144. The post-conviction court rejected this claim, finding that Ford offered no information about the identity of the juror, and his claim was unsupported by the trial record. Dkt. 8-10 at 20, ¶ 16. The trial record showed that Ford took a restroom break during voir dire, but no proceedings occurred in his absence. Tr. 80. The Indiana Court of Appeals agreed with the post-conviction court, finding Ford had failed to provide any evidence beyond his self-serving affidavit in support of this "somewhat implausible claim." *Ford II*, 2020 WL 1316389 at *8. This was a reasonable application of *Strickland*.

8. Miscellaneous Arguments

There were two additional instances of attorney error raised in Ford's appellate brief that were not explicitly addressed by the Court of Appeals.

Harrington v. Richter, 562 U.S. 86, 98 (2011), holds that "[w]hen a state court rejects a prisoner's federal claim without discussion, a federal habeas court must presume that the court adjudicated it on the merits unless some state-law procedural principle indicates otherwise." *Lee v. Avila*, 871 F.3d 565, 567-68 (7th Cir. 2017). "The *Richter* presumption applies when the state court's decision expressly addresses some but not all of a prisoner's claims." *Id.* (citing *Johnson v. Williams*, 568 U.S. 289 (2013). "We've explained that under *Richter* and *Williams*, the 'state courts must be given the benefit of the doubt when their opinions do not cover every topic raised by the habeas corpus petitioner.'" *Id.* at 571 (quoting *Brady v. Pfister*, 711 F.3d 818, 826 (7th Cir. 2013)). In sum, "[w]hen applying § 2254(d) to an argument not explicitly addressed in the state

court's opinion, "a habeas court must determine what arguments or theories . . . could have supported[ ] the state court's decision; and then it must ask whether it is possible fairminded jurists could disagree that those arguments or theories are inconsistent with the holding in a prior decision of [the Supreme] Court." *Id.*

First, Ford alleged that trial counsel failed to object to the following statement the prosecutor made in closing argument:

> He wants you to believe that Yolanda is so off her meds and acts differently and Yolanda told you she—the meds makes [sic] her feel horrible. She doesn't like the way she feels. She also told you that she's still not taking her meds, she's still in counseling, she's still seeing a doctor and her counselor knows. So does he know better than all the medical professionals who are working with Yolanda?'

Dkt. 8-11 at 20 (quoting trial transcript at 324). Ford alleges this statement was prosecutorial misconduct and an objection would have been sustained. *Id.* at 20−21. The post-conviction court found that "[a]n objection to the Deputy Prosecutor's rhetorical question in closing argument about whether Petitioner knew better than the medical professionals would have been sustained as referring to facts not in evidence." Dkt. 8-10 at 18, ¶ 12. However, Ford failed to show prejudice because he did not explain how "this apparently tangential point in relation to the victim's credibility or any other issue" would have affected the outcome of trial. *Id.* The Court can "presume that by affirming the judgment, the appellate court agreed" with this reasoning. *Lee*, 871 F.3d at 572.

Because the post-conviction court did not explicitly address the deficient performance prong (that is, the court found an objection would have been sustained but not whether it fell below prevailing professional norms not to object), this Court reviews this prong *de novo*. *Campbell v. Reardon*, 780 F.3d 752, 769 (7th Cir. 2015). Even assuming an objection would have been sustained, trial counsel did not perform deficiently by failing to object. "[I]t's not uncommon for

lawyers to refrain from objecting during closing argument and to depart from that practice only when confronted with a serious misstep by opposing counsel." *Id.* The prosecutor's closing argument was lengthy and focused on facts in evidence. Tr. 301−14, 322−27. Her offhanded comment about Ford's medical knowledge was not such a serious misstep as to compel an objection. Ford's claim fails to satisfy either *Strickland* prong.

Second, Ford alleged that counsel was ineffective when he elicited testimony from Laressa about whether she has seen her dad angry because it opened the door to harmful evidence. Dkt. 1 at 25. Trial counsel asked, "You've seen your dad mad before haven't you? … He—he gets pretty vocal when he gets upset, doesn't he?" Tr. 209−10. Laressa answered yes. *Id.* On re-direct, Laressa testified that when Ford became angry with Laressa, he said, "Fuck that bitch." *Id.* at 211. Ford raised this claim in his petition for post-conviction relief, PCR App'x Vol. II, his affidavit in support, *id.* at 144, and his appellate brief, dkt. 8-11 at 31, but it was not addressed by the post-conviction court or the Indiana Court of Appeals. Without testimony from trial counsel, it's difficult to find a strategic reason for asking Laressa this question. Maybe trial counsel wanted to highlight that Ford had a bad temper but would not physically harm his family members. *See* tr. 205 (Counsel: "Your dad has never harmed you, would he?" Laressa: "No."). But even assuming trial counsel performed deficiently for eliciting testimony that opened the door to harmful testimony, Ford has not shown prejudice in light of the corroborating evidence of his guilt.

9. Cumulative Prejudice

Where counsel's performance was deficient in more than one instant, the court must consider the cumulative effect of the errors to determine prejudice. *Cook v. Foster*, 948 F.3d 896, 908 (7th Cir. 2020) ("[W]e set aside any alleged error for which [counsel's] performance did not

fall below the constitutional minimum; we look only at the question whether areas in which his performance was deficient, taken as a whole, led to a reasonable probability of a different result.").

Ford alleges that the cumulative impact of trial counsel's errors prejudiced him. The Indiana Court of Appeals made short shrift of this claim, stating, "Ford, however, has failed to establish that any of his claims have merit. Because nothing plus nothing still equals nothing, Ford's claim of cumulative error fails." *Ford II*, 2020 WL 1316389 at *8.

The Court finds or assumes that counsel was deficient at trial for (1) promising the jury that Ford would testify in his defense, only to not call Ford and not address his lack of testimony and (2) eliciting testimony from Laressa about Ford's temper. But in light of the substantial evidence against Ford and the relatively minor consequences of counsel's trial errors, Ford has not shown that he suffered substantial prejudice. *See Myers*, 975 F.3d at 624.

C. Ineffective Assistance of Appellate Counsel

Ford alleges appellate counsel was ineffective for failing to raise two arguments. "The general *Strickland* standard governs claims of ineffective assistance of appellate counsel as well as trial counsel." *Makiel v. Butler*, 782 F.3d 882, 897 (7th Cir. 2015) (noting that when the claim is poor issue selection, "appellate counsel's performance is deficient under *Strickland* only if she fails to argue an issue that is both 'obvious' and 'clearly stronger' than the issues actually raised").

First, Ford alleges that appellate counsel was ineffective for not challenging the admission of the January and May incidents under Indiana Rule of Evidence 403, which provides that "[t]he court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, or needlessly presenting cumulative evidence." Recall, appellate counsel had challenged the admission of the evidence under Rule 404(b) only. *Ford I*, 2006 WL 3196722, *2−4. On direct

appeal, the Indiana Court of Appeals mentioned Rule 403 but determined a separate analysis was not necessary because it concluded "that any error in the admission of the evidence did not affect Ford's substantial rights and therefore constitutes harmless error." *Id.* at *4. And because the court determined that admission of the evidence was harmless on direct appeal, the Indiana Court of Appeals held on post-conviction review that appellate counsel was not ineffective for failing to raise the issue. *Ford II*, 2020 WL 1316389 at *9. This was a reasonable application of *Strickland*. The Court essentially determined that Ford suffered no prejudice because the introduction of the evidence was harmless in light of the other evidence of Ford's guilt.

Ford's second claim was that appellate counsel was ineffective for failing to challenge the imposition of consecutive sentences. The Indiana Court of Appeals swiftly rejected this argument because appellate counsel did argue that consecutive sentences were unreasonable, and "Ford's appellate counsel could not have been ineffective for not making an argument that he did, in fact, make." *Id.* This was a reasonable application of *Strickland*.

IV. 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). Instead, the petitioner must first obtain a certificate of appealability, which will issue only if the petitioner has made "a substantial showing of the denial of a constitutional right." *See* 28 U.S.C. § 2253(c)(1), (c)(2).

Rule 11(a) of the Rules Governing Section 2254 Proceedings in the United States District Courts requires the district court to "issue or deny a certificate of appealability when it enters a final order adverse to the applicant." Rule 11(a) of the Rules Governing Section 2254 Proceedings in the United States District Courts requires the district court to "issue or deny a certificate of

appealability when it enters a final order adverse to the applicant." Ford's first claim is not cognizable. The Indiana Court of Appeals reasonably applied federal law when it analyzed each of Ford's ineffective assistance of trial counsel claims with respect to trial performance and his two appellate counsel claims. However, because jurists of reason could disagree with the Court's resolution of Ford's ineffective assistance during plea-bargaining claim and his eligibility for an evidentiary hearing on that claim, and because the issue deserves encouragement to proceed, a certificate of appealability is **granted** as to that claim.

V. CONCLUSION

Ford's habeas petition is **DENIED**, and the action is **DISMISSED**. A certificate of appealability shall issue as to his ineffective assistance of trial counsel at the plea-bargaining stage claim.

Final judgment in accordance with this Order shall now issue.

IT IS SO ORDERED.

Date: 9/28/2021

RICHARD L. YOUNG, JUDGE
United States District Court
Southern District of Indiana

Distribution:

BIRT FORD
157207
PENDLETON - CF
PENDLETON CORRECTIONAL FACILITY
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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

BIRT FORD,	)	
	)	
Petitioner,	)	
	)	
v.	)	No. 1:20-cv-01639-RLY-TAB
	)	
DUSHAN ZATECKY,	)	
	)	
Respondent.	)	

FINAL JUDGMENT

The Court now enters final judgment. The petitioner's petition for a writ of habeas corpus is denied, and the action is dismissed with prejudice.

Date: 9/28/2021

Roger A.G. Sharpe, Clerk of Court

By: Dina M. Dafle
Deputy Clerk

RICHARD L. YOUNG, JUDGE
United States District Court
Southern District of Indiana

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