No. 21-3061

In the United States Court of Appeals for the Seventh Circuit

BIRT FORD,
Petitioner-Appellant,

v.

DENNIS REAGLE, Warden,
Respondent-Appellee.

ON APPEAL FROM THE U.S. DISTRICT COURT FOR THE SOUTHERN DISTRICT OF INDIANA

PETITIONER-APPELLANT'S OPENING BRIEF

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26 and Seventh Circuit Rule 26.1, counsel for Petitioner-Appellant Birt Ford certifies that the Corporate Disclosure Statement filed on August 30, 2022 is complete. Counsel asserts that there are no other reportable entities—i.e., parent companies, subsidiaries, partners, limited liability entity members and managers, trustees, affiliates, or similar reportable entities—that have an interest in the outcome of this case.

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INTRODUCTION

"[N]inety-four percent of state convictions are the result of guilty pleas," with "individuals who accept a plea bargain" often "receiving shorter sentences than" those willing to "take a chance and go to trial." *Missouri v. Frye*, 566 U.S. 134, 143–44 (2012). But Birt Ford never had that choice. Not because the State was not willing to negotiate (it was), and not because Mr. Ford was not interested in a deal (he was), but because—after telling counsel "to discuss a plea with the prosecutor because he was interested to hear what they had to offer"—"defense counsel did nothing concerning th[e] request." R. 1 at 13–14. It would be difficult, in our "system of pleas," to find a more glaring example of ineffective assistance. *Lafler v. Cooper*, 566 U.S. 156, 170 (2012).

But there is more. Bereft of a deal, Mr. Ford had little recourse but to go to trial. Having failed to investigate a possible deal, counsel began trial by promising that he would call Mr. Ford and Barbara Ford to the stand, with their testimony undermining the victim's credibility. App. 17, 22–23. Yet when trial ended the next day, counsel had done neither. When counsel did stand up, to cross-examine a key State witness, it was "difficult to find a strategic

reason for [his] asking" certain questions which opened the door for the prosecution to bring in harmful propensity evidence. App. 28.

After trial, Mr. Ford diligently sought to understand why counsel made the decisions he did. He wrote counsel letters. When he did not receive a response, he moved to compel testimony, depose counsel, and hold an evidentiary hearing. The state courts denied each request. App. 119, 123, 127. Worse yet, the Indiana Court of Appeals went on to fault Mr. Ford, stating he "did not provide any evidence" in postconviction proceedings. App. 170. The Court of Appeals, moreover, "presume[d] that" counsel "would not have corroborated Ford's account." *Id.*

That was—as the district court acknowledged—a "misstep": the Court of Appeals "ignore[d] the fact that [Mr.] Ford *tried* to obtain trial counsel's testimony," but was stonewalled at every turn. App. 12. It was, in other words, a decision based on an "unreasonable determination of the facts in light of the evidence presented." 28 U.S.C. § 2254(d)(2).

Having satisfied AEDPA, substantive review of Mr. Ford's ineffective-assistance claims yields fruit on both deficiency and prejudice. On their own, counsel's lapses—failing to negotiate a plea, breaking promises made in openings, eliciting unfavorable testimony—constitutes deficient performance.

Taken together, they form a clear pattern of ineffectiveness. And the resulting prejudice is clear. The average sentence for Mr. Ford's crime is between 72 and 86 months. He was sentenced to 840.

Mr. Ford has thus sufficiently demonstrated he merits habeas relief. In the alternative, he should at minimum be granted an evidentiary hearing. For almost twenty years, he has been denied a meaningful chance to test and develop his claims. This Court should grant him that opportunity.

STATEMENT OF JURISDICTION

Mr. Ford petitioned for a writ of habeas corpus under 28 U.S.C. § 2254 in the U.S. District Court for the Southern District of Indiana. The district court had jurisdiction under 28 U.S.C. § 2241 and 28 U.S.C. § 1331. The district court denied Mr. Ford's petition on September 28, 2021, and issued a final judgment the same day dismissing the petition with prejudice. App. 2, 32. The district court did, however, issue a certificate of appealability as to one of Mr. Ford's ineffective assistance of trial counsel claims. App. 2. Mr. Ford filed a notice of appeal on October 21, 2021. On October 3, 2022, undersigned counsel moved to expand the certificate of appealability. On October 26, 2022, this Court granted Mr. Ford's motion. This Court has jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

1. Whether Mr. Ford's counsel, who did nothing after the State was willing to negotiate and after his client requested he discuss a deal, provided constitutionally ineffective assistance.
2. Whether Mr. Ford's counsel's witness strategy at trial was constitutionally ineffective.
3. Whether the cumulative impact of Mr. Ford's counsel's mistakes was prejudicial.

RELEVANT STATUTORY PROVISIONS

The Sixth Amendment provides:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

28 U.S.C. § 2254(d) provides:

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

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

STATEMENT OF THE CASE

A. Factual and procedural background.

1. Mr. Ford's trial and direct appeal.

On June 16, 2005, Mr. Ford was charged with five felonies and two misdemeanors arising from an incident between him and his wife, Yolanda. App. 33–39. The felonies comprised two counts of felony rape, one count of criminal deviate conduct, one count of burglary, and one count of criminal confinement; the misdemeanors were for interference with the reporting of a crime and invasion of privacy. *Id.* The State's theory was that, over a single night, Mr. Ford broke into his wife's apartment, had nonconsensual sex with her twice, and forced her to give him oral sex. Laressa Ford, Mr. Ford and Yolanda's eldest child, was in the apartment at the time. App. 77–85.

On July 1, 2005, Mitchell Hicks was appointed Mr. Ford's trial counsel. App. 129. "[T]he majority of [Mr. Hicks'] July was dedicated to [a double homicide trial]" and, as he admitted, he "quite frankly, didn't have enough time" to prepare. App. 43–44. At most, he viewed a videotape the "morning [of trial from] his home" and provided a "witness list" to the court. *Id.* at 44.

On July 13, 2005, the prosecutor sent Mr. Hicks a letter "offer[ing] to discuss" a "plea." R. 1 at 13. Mr. Ford instructed Mr. Hicks to engage in

"guilty plea negotiations," "because he was interested to hear what they [the State] had to offer." *Id.* at 13–14. But "defense counsel did nothing concerning this request by his client," and so Mr. Ford's case went to trial. *Id.* at 14.

Three weeks later, in openings, Mr. Hicks vowed to the jury that Mr. Ford was "going to testify" and "tell you" about the incident. App. 62. Mr. Hicks also promised to call Barbara Ford. App. 55 ("[W]e'll be calling any and all State's witnesses as well as Barbara Ford."). As Mr. Hicks had underscored to the court at a pretrial hearing, Barbara was "my case in chief *obviously*," App. 50 (emphasis added), because she "would . . . provide[] evidence . . . [that] Yolanda . . . had a history of lying about" Mr. Ford "to her family and friends," R. 8-9 at 19. Both Mr. Ford and Barbara were in the courtroom and ready to testify. App. 130.

Mr. Hicks did not ultimately call either witness. He never explained to the jury why he abandoned his purported "case in chief." App. 50. He, indeed, presented no witnesses in Mr. Ford's defense, only recalling Yolanda for a brief examination. He appears to have, at one point, "informed" Mr. Ford "we had proven our case," obviating the need for additional testimony. App. 130.

On the other side of the ledger, the prosecution's "evidence included the testimony of Yolanda, Laressa, and the nurse who treated Yolanda, and a

taped police interview with [Mr.] Ford." App. 106. Laressa's direct examination discussed critical details to the criminal confinement and interference with the reporting of a crime charges. Rather than trying to rebut this testimony, though, Mr. Hicks' cross examination opened the door for Laressa to paint Mr. Ford in a negative light. He asked Laressa if she had seen her "dad mad before" and if "he gets pretty vocal when he gets upset." App. 71. In so doing, Mr. Hicks allowed the prosecution on re-direct to elicit additional harmful evidence of Mr. Ford's bad temper. App. 72–74. The prosecution later referred to Laressa's cross examination during closing arguments. App. 80–81.

The jury acquitted Mr. Ford of one count of felony rape and one count of misdemeanor interference with the reporting of a crime. App. 98–99. It convicted on the remaining counts. *Id.* The trial court sentenced Mr. Ford to thirty years for criminal deviate conduct, thirty years for rape, ten years for burglary, ten years for criminal confinement, and one year for invasion of privacy. App. 106. The court "ordered that the sentences for criminal deviate conduct, rape, and criminal confinement run consecutively, resulting in an aggregate sentence of seventy years." *Id.* The conviction and sentence were

affirmed on direct appeal. App. 108. The Indiana Supreme Court denied further review. App. 110.

2. Mr. Ford's petition for postconviction relief in Indiana Superior Court.

On August 28, 2007, Mr. Ford sought postconviction relief in Indiana Superior Court. R. 8-1 at 12. His petition alleged ineffective assistance by counsel, including a failure to "pursue plea negotiations, to call Petitioner to testify after telling the jury he would do so," to call impeachment witnesses, to properly elicit testimony from Laressa, and cumulative prejudice. *See* App. 137–39, 148; App. 28. Besides notices and withdrawals of appearances by counsel, no action was taken on this petition for several years.

On November 15, 2018, the State moved to require Mr. Ford submit his petition by affidavit. App. 111. Under Indiana law, when a "petitioner elects to proceed pro se," a court "at its discretion may order [the petition be] submitted upon affidavit." Ind. P.C.R. 1(9)(b). Parties in counseled petitions, on the other hand, may submit not just affidavits but also "pleadings, depositions, answers to interrogatories, admissions, [and] stipulations of fact" for the court's review. *Id.* (4)(g). One day later, the Indiana Superior Court granted the State's motion. App. 113.

Mr. Ford filed a motion objecting to the court's decision to proceed by affidavit. App. 114. The court overruled this objection. App. 118. Mr. Ford then moved to compel, App. 120, "seeking the court's assistance in acquiring affidavits from trial and appellate counsel after they twice failed to respond to his letters," App. 5. This motion "included receipts showing the second round of letters was sent via certified mail." *Id.*; *see also* App. 120, 122. The court denied this motion, asserting there was "nothing in the record of this cause indicating defendant [had] actually requested any such affidavits from counsel." App. 123.

Mr. Ford moved thereafter for leave to depose counsel. App. 124–25. The postconviction court deferred ruling on the motion, stating it would review Mr. Ford's petition and determine whether an evidentiary hearing was necessary. App. 127. On October 21, 2019, the Indiana Superior Court denied Mr. Ford's petition without an evidentiary hearing. App. 135.

On the ineffective assistance in plea bargaining claim, the court did not dispute Mr. Ford's version of events: i.e., that the State wanted to offer a plea deal, that Mr. Ford was interested in such a deal, and that Mr. Hicks had failed to pursue negotiations. App. 152. Instead, it held that "Indiana does not allow . . . pleas in which a defendant pleads guilty while still claiming to be

innocent," and Mr. Ford had not "assert[ed] that he would have admitted his guilt." *Id.*; *see also* App. 130 (postconviction affidavit stating that counsel's actions during voir dire made it "vital I testify to prove my innocence.").

On witness strategy, the court likewise acknowledged the fundamental premises underlying Mr. Ford's claim: counsel "told the jury that Petitioner would testify, but then Petitioner did not testify" and "[t]he record does not reveal why Petitioner did not testify." App. 145 (citations omitted). But "[t]he jury did hear Petitioner's account of events in [a] redacted interview video" with police, recorded without counsel shortly after Mr. Ford's arrest and while Mr. Ford was "shackled to the floor." App. 145, 147. The court did not separately address the failure to call Barbara, counsel's cross-examination of Laressa, or cumulative prejudice.

3. Mr. Ford's petition for postconviction relief in the Court of Appeals of Indiana.

The Indiana Court of Appeals affirmed. App. 179. At the outset, it noted "that neither Ford's trial nor appellate counsel testified, submitted affidavits, or were deposed in this proceeding." App. 164. It did not mention Mr. Ford's efforts to compel counsel to testify, submit affidavits, or sit for a deposition. It then rejected Mr. Ford's plea-bargaining arguments because Mr. Ford had

provided only "his own self-serving affidavit" and his "trial counsel did not provide any evidence" to the postconviction court. App. 170.

As to Barbara Ford, the Court of Appeals asserted she would have "testified about two specific lies that Yolanda told." App. 169. Under Indiana's Rules of Evidence, "a witness's credibility can be impeached by opinion or reputation evidence . . . but *not* by specific instances of untruthfulness." *Id.* Consequently, Mr. Ford had "failed to establish that [Barbara] would have provided any admissible impeachment evidence." *Id.*

The Court of Appeals echoed the Superior Court's reasons for the failure to call Mr. Ford at trial. App. 175 ("Ford's 'side of the story' was already going to be before the jury, in the form of his videotaped statement."). And it, like the Superior Court, did not address counsel's handling of Laressa. Finally, the court dismissed Mr. Ford's cumulative prejudice claim, asserting that "[b]ecause nothing plus nothing still equals nothing, Ford's claim of cumulative error fails." App. 177. The Indiana Supreme Court denied further review of Mr. Ford's petition. App. 180.

4. Mr. Ford's § 2254 petition and motion for evidentiary hearing.

On June 16, 2020, Mr. Ford filed a habeas petition in the U.S. District Court for the Southern District of Indiana. R. 1. He also moved for an

evidentiary hearing. R. 14. The district court denied both motion and petition. App. 1, 2.

Still, the district court granted a certificate of appealability ("COA") on Mr. Ford's "ineffective assistance during plea-bargaining claim." App. 31. As it explained, the Court of Appeals' decision rested on a flawed premise. Although the Court of Appeals "presume[d] that [counsel] would not have corroborated Ford's account" because he "did not provide any evidence in this proceeding," that "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." App. 12; *see also id.* at 15 n.2 ("Seventh Circuit precedent would suggest" Mr. Ford was "diligent in his pursuit of testimony from his trial counsel.").

Given this "misstep," the district court proceeded to examine the Indiana Superior Court's decision since, in its view, "the Indiana Court of Appeals essentially accepted the post-conviction court's rejection of Ford's plea bargain claim." App. 12. The district court thereby found that "[b]ecause 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." *Id.* at 13.

Yet it "harbor[ed] 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." *Id.* As it explained, "there is an evidentiary lacuna when it comes to Ford's claim about trial counsel's performance during the plea-bargaining process." *Id.* at 14; *see also id.* ("Without trial counsel's testimony, we don't know what counsel did or did not do."). "[I]t 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"—a patent case of ineffective assistance. *Id.*

Besides Mr. Ford's plea-bargaining claim, the district court also recognized that aspects of counsel's witness strategy were deficient. First, "[t]here [was] 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." App. 24. Second, counsel "was ineffective when he elicited testimony from Laressa about whether she had seen her dad angry because it opened the door to harmful evidence." App. 28. The court, though, declined to grant a COA on these assertions. It also

denied relief on Mr. Ford's allegation that his counsel was ineffective for not calling Barbara. App. 17–18. Finally, on cumulative prejudice, the district court repeated the reasoning of the Indiana Court of Appeals. App. 29 ("[N]othing plus nothing still equals nothing.").

Mr. Ford filed a notice of appeal and sought appointment of counsel. On July 6, 2022, this Court appointed the undersigned. Counsel afterward filed a Motion to Expand the Certificate of Appealability ("COA Motion"), to include additional ineffective assistance claims. On October 21, 2022, Mr. Ford's state court records were transferred to the Court and retrieved by counsel.[1] This Court granted the COA Motion on October 26, 2022.

B. Legal framework.

Because Mr. Ford filed his habeas petition in 2020, it is governed by the Antiterrorism and Effective Death Penalty Act ("AEDPA"). Under AEDPA, federal courts may grant habeas relief to claims that have been "adjudicated on the merits in State court proceedings" in two situations. 28 U.S.C. §

[1] The COA Motion inadvertently referred to counsel as conducting a direct examination of Laressa and promising to call Barbara in openings, whom he described to jurors as his case in chief. COA Motion at 8. Plenary review of the state court record indicates that the examination of Laressa was on cross, not direct. Additionally, counsel referred to Barbara's testimony to jurors prior to voir dire and had described her as his case in chief to the court in pretrial proceedings. Counsel apologizes for these oversights.

2254(d). First, when a state court decision is "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1). And second, if a state court's holding "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)(2).

SUMMARY OF ARGUMENT

I.A. In habeas, federal courts review "the last reasoned opinion on [a] claim." *Woolley v. Rednour*, 702 F.3d 411, 421 (7th Cir. 2012).

The district court contravened that principle when, in examining Mr. Ford's plea-bargaining claim, it "amalgamate[ed]" the decisions of the Indiana Court of Appeals and Indiana Superior Court. *Id.* at 422 n.1. A federal court may do that only when the last reasoned opinion "adopts or incorporates the reasoning of a prior opinion." *Id.* at 421. That is not what happened here.

Here, the Indiana Court of Appeals' decision included a separate section on plea negotiations. App. 169–70. To reach its holding, it cited different fact and law from the Indiana Superior Court. It did not mention, much less discuss, the Superior Court's decision. Even the State, in briefing below, agreed that the Indiana Court of Appeals was the last reasoned opinion on the claim. R. 8 at 17. The district court's erred in finding otherwise.

I.B. The Indiana Court of Appeals' decision was based on an "unreasonable determination of the facts" because it (1) made findings without holding a hearing, (2) ignored evidence, and (3) misapprehended the relevant rule. 28 U.S.C. § 2254(d)(2).

1. First, "ineffective assistance claims often require an evidentiary hearing." *Osagiede v. United States*, 543 F.3d 399, 408 (7th Cir. 2008). No such hearing was held here. Yet the Court of Appeals made findings anyway, holding that Mr. Ford could not rely on "his own self-serving" affidavit to instantiate his claims. App. 170.

As this Court has outlined, however, a "'self-serving' affidavit" may, in fact, serve as the impetus for meriting relief or—at the very least—holding an evidentiary hearing. *Dalton v. Battaglia*, 402 F.3d 729, 735 (7th Cir. 2005). That is particularly the case when, as here, a petitioner "trie[s] repeatedly" to supplement 'the record, only to be thwarted at all turns." *Id.* at 737. Consequently, a court may not "reject[] as 'simply not credible'" an appellant who says that "he could not reach his attorney." *Nunes v. Mueller*, 350 F.3d 1045, 1053–54 (9th Cir. 2003); *accord Owens v. United States*, 483 F.3d 48, 60 (1st Cir. 2007) ("[C]ourt may not deny a prisoner an evidentiary hearing simply because the court believes that the prisoner's allegations as stated in the habeas corpus petition are untrue.").

2. Second, a state court may not "insulate their decisions from federal review by refusing to entertain vital evidence," *Lee v. Kink*, 922 F.3d 772, 775 (7th Cir. 2019). But that is exactly what the Indiana Court of Appeals

did: to reach its conclusion, it "ignore[d] the fact that Ford *tried* to obtain trial counsel's testimony." App. 12. Courts have not hesitated to find a (d)(2) error in like circumstances. *See Carlson v. Jess*, 526 F.3d 1018, 1023 (7th Cir. 2008).

3. Third, the Indiana Court of Appeals' determination was based on "a misapprehension as to the correct legal standard." *Kipp v. Davis*, 971 F.3d 939, 953 (9th Cir. 2020). Although Mr. Ford carries the burden to establish relief, the Court of Appeals improperly used that burden to hold counsel's lack of cooperation against Mr. Ford.

I.C. The Indiana Court of Appeals' decision was also an "unreasonable application" of the missing evidence rule.

Should this Court examine the Indiana Court of Appeals' decision under 2254(d)(1), it would reach the same result. That is because the Court of Appeals applied the missing evidence rule in an "objectively unreasonable" manner. *Rompilla v. Beard*, 545 U.S. 374, 380 (2005). This rule permits courts to draw an adverse inference when a party "fails to offer" evidence which shows that "suspicious circumstances can be accounted for consistently with [] innocence." *Mammoth Oil Co. v. United States*, 275 U.S. 13, 52 (1927). Though the rule is "disfavored," *United States v. Tavarez*, 626 F.3d 902, 904

(7th Cir. 2010), it has, in limited circumstances, been applied in habeas cases, *Dunn v. Reaves*, 141 S. Ct. 2405 (2021).

But the rule includes an important—and, here, outcome-determinative—caveat: it applies "only in cases where it is manifest that proofs are in the power of the accused." *Mammoth Oil*, 275 U.S. at 52. The Indiana Court of Appeals flouted that condition. It drew an adverse inference against Mr. Ford's failure to produce favorable evidence from counsel, but never recognized that such "proofs" were *not* "in the power of the accused." *Id.* To the contrary, Mr. Ford was stonewalled in his efforts to obtain evidence, first by counsel, and then by the Indiana state courts.

II.A. Counsel for Mr. Ford was deficient in failing to negotiate a plea.

Because Mr. Ford has satisfied 2254(d), his ineffective-assistance claims are analyzed de novo. *Ford v. Wilson*, 747 F.3d 944, 953 (7th Cir. 2014). And under that standard, his counsel's actions in plea bargaining fail *Strickland* prong one.

Lafler v. Cooper, 566 U.S. 156, 162 (2012), protects defendants who receive plea advice based on "an incorrect legal rule." *Missouri v. Frye*, 566 U.S. 134, 145 (2012), protects defendants whose counsel fails "to communicate

formal offers from the prosecution." Mr. Ford's counsel did even less. While counsel in *Lafler* at least gave advice, and while counsel in *Frye* at least negotiated an offer for his client, counsel here "did nothing." R. 1 at 14. The Sixth Amendment does not countenance such conduct.

To the contrary, as courts applying *Lafler* and *Frye* have outlined, a decision to override a client's wishes by being "unwilling[] to consider a plea" is deficient performance. *Byrd v. Skipper*, 940 F.3d 248, 251 (6th Cir. 2019). So too is a failure to "mention the plea offer," *United States v. Knight*, 981 F.3d 1095, 1100 (D.C. Cir. 2020), and a "refus[al] to respond" to follow-up, *Carmichael v. United States*, 659 F. App'x 1013, 1016 (11th Cir. 2016). Mr. Ford's case is of a piece with these decisions.

II.B. Absent Mr. Ford's counsel's deficiencies, "there is a reasonable probability that . . . the result of the proceeding would have been different." *Knowles v. Mirzayance*, 556 U.S. 111, 127 (2009).

1. The record reflects Mr. Ford's interest in a plea. He expressed that to counsel, and "requested [counsel] go see what kind of deal they would offer." App. 129. That is all he could and should have done: It would have made little sense to sacrifice his one bargaining chip by agreeing to something without seeing its terms.

Nor does Mr. Ford's single reference in his postconviction affidavit to his innocence preclude a prejudice finding. Defendants in Indiana may not "plead[] guilty and maintain [] innocence *at the same time*." *Carter v. State*, 739 N.E.2d 126, 129 (Ind. 2000). But nothing prevents them from "silently harbor[ing] a belief of innocence," pleading guilty, and then challenging their conviction afterward—just what Mr. Ford has done. *United States v. Kane*, 944 F.2d 1406, 1413 n.3 (7th Cir. 1991); *see id.* (a "plea then is not a lie, but a compromise settled upon voluntarily by the defendant").

2. Sentencing disparities confirm a finding of prejudice. Mr. Ford received consecutive sentences for rape (30 years), criminal deviate conduct (30 years), and criminal confinement (10 years). That totals 840 months imprisonment, many multiples higher than the national average—72 to 86 months—for a rape conviction.

Moreover, given Mr. Ford's acquittal on one count of rape, and the similar factual basis behind the charges at issue, it would have been reasonable (if not likely) a plea offer would, in exchange from a concession of guilt on one charge, have dropped other, related charges. *See Moore v. State*, 653 N.E.2d 1010, 1020 (Ind. Ct. App. 1995) (confinement is lesser included offense of attempted criminal deviate conduct); *Young v. State*, 57 N.E.3d 857, 859–60

(Ind. Ct. App. 2016) (rape and criminal deviate conduct cannot both be charged as Class A felonies).

III.A. Counsel's witness strategy at trial was deficient.

Counsel's ineffectiveness did not start and end at plea bargaining. It extended to trial. Before jurors, Mr. Hicks promised to call Barbara Ford. Later, in openings, he promised that Mr. Ford himself would testify—an undisputedly key witness in a rape prosecution. Yet at trial's end one day later, neither Barbara nor Mr. Ford had testified. During trial itself, Mr. Hicks' cross-examination of Laressa Ford, a critical State witness, was even worse than a recitation of her direct examination. It opened the door to even more harmful evidence against Mr. Ford.

"[F]alse promises" made in opening—especially over the defendant's own decision to testify—are "indefensible." *Myers v. Neal*, 975 F.3d 611, 621 (7th Cir. 2020). They are "clear instance[s] of deficient performance." *Id.* So too are cross examinations that have "no strategic or tactical justification." *Eze v. Senkowski*, 321 F.3d 110, 127 (2d Cir. 2003).

III.B. Taken together, counsel's errors pretrial and at trial constitute prejudice.

To "establish[] prejudice," Mr. Ford need only show his "chances of acquittal are better than negligible." *U.S. ex rel. Hampton v. Leibach*, 347 F.3d 219, 246 (7th Cir. 2003). Mr. Ford has done that. He was acquitted of one count of felony rape and misdemeanor interference with the reporting of a crime. As to the charges to which he *was* convicted, the parties agreed that credibility was key for criminal deviate conduct and criminal confinement, given the lack of other evidence. Yet counsel's broken promises gave away Mr. Ford's credibility for nothing, and his shortcomings related to Laressa further jeopardized his client's "chances of acquittal." *Id.*

IV. Mr. Ford merits habeas relief or, at minimum, an evidentiary hearing.

Counsel failed at several critical stages of this case: plea negotiations, opening statements, trial strategy. Such circumstances clear the bar for habeas relief. If this Court harbors uncertainty, however, it should order an evidentiary hearing. There may of course be circumstances when such a hearing is unwarranted. But a case in which counsel did not negotiate a plea, broke promises to the jury, and examined a key witness with no apparent strategy is not one of them.

STANDARD OF REVIEW

This Court "review[s] *de novo* the district court's denial of [a habeas] petition." *Peterson v. Douma*, 751 F.3d 524, 529 (7th Cir. 2014).

ARGUMENT

I. THE INDIANA COURT OF APPEALS' DECISION WAS UNREASONABLE AS TO MR. FORD'S PLEA-BARGAINING CLAIM.

A. The Indiana Court of Appeals' decision was the "last reasoned opinion" in this case.

When a "state collateral review system issues multiple decisions," federal courts "consider the last reasoned opinion on the claim." *Woolley v. Rednour*, 702 F.3d 411, 421 (7th Cir. 2012) (internal quotation marks omitted). That is because "AEDPA review . . . appl[ies] to a single state court decision, not to some amalgamation of multiple state court decisions." *Id.* at 422 n.1 (quoting *Barker v. Fleming*, 423 F.3d 1085, 1093 (9th Cir. 2005)).

Here, the district court held that the "Indiana Court of Appeals was the last reasoned decision to discuss Ford's claims."[2] App. 10. And in examining nine out of Mr. Ford's ten ineffective assistance of trial counsel claims, it looked only to the Court of Appeals' reasoning. But on Mr. Ford's plea-bargaining claim, it took an unwarranted detour.

It first summarized the reasoning of the Court of Appeals: i.e., that the "only support for Ford's claim" was "his own self-serving affidavit." App. 11–

[2] So too did the State. *See* R. 8 at 17 ("The Indiana Court of Appeals reasonably held that counsel fulfilled all of his obligations relative to plea negotiations.").

12. "[B]ecause Ford's trial counsel did not provide any evidence in this proceeding, we may presume that he would not have corroborated Ford's account." *Id.* at 12. Such reasoning was, as the district court conceded, a "misstep": the Court of Appeals "ignore[d] 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." *Id.*

Yet rather than examine whether this misstep produced "a decision that was based on an unreasonable determination of the facts," 28 U.S.C. § 2254(d)(2), the district court found that the Court of Appeals "essentially accepted the post-conviction court's rejection of Ford's plea bargain claim," App. 12. It then scrutinized the Indiana Superior Court's rationale.

That finding was error. To be sure, when "a state-court opinion adopts or incorporates the reasoning of a prior opinion," *Woolley*, 702 F.3d at 421, then a reviewing court may examine this prior opinion. For example, in *Jordan v. Hepp*, 831 F.3d 837 (7th Cir. 2016), this Court incorporated the trial court's order because the Wisconsin Court of Appeals noted that the "trial court" had "addressed" petitioner's "issues and "applied the proper legal standards to the relevant facts and reached the correct result"; as such, "*we*"—

the Wisconsin Court of Appeals—"*incorporate and attach the trial court's decision, and affirm*." *State v. Jordan*, 701 N.W.2d 653 (Table), at *1 (Wisc. Ct. App. June 28, 2005) (emphasis added). The Wisconsin Court of Appeals provided no further analysis or separate reasoning behind its decision.

Here though, the Court of Appeals issued a twenty-two-page opinion denying Mr. Ford relief. Its opinion included a separate section on plea negotiations, *see* App. 169–70, citing fact and law different from the Indiana Superior Court. It never once discussed the Superior Court's reasoning. And it ultimately gave a different rationale for its conclusion, pointing to Mr. Ford's lack of evidence rather than (per the Superior Court) whether Mr. Ford would have accepted a plea had one been offered.

These circumstances mirror *Williams v. Taylor*, 529 U.S. 362 (2000). There, "[t]he trial judge analyzed the ineffective-assistance claim under the correct standard; the Virginia Supreme Court did not." *Id.* at 395. Rather than look through the Virginia Supreme Court's errant decision, *Williams* applied AEDPA review only to the last reasoned decision. That is because even if "one state court adhered to federal law, [but] the last court to review the claim erred, the federal court should [still] review the last decision in isolation *and not in combination with decisions by other state courts*."

Barker, 423 F.3d at 1093 (discussing *Williams*) (emphasis added). By this same rubric, the Indiana Court of Appeals' decision—and that decision alone—is the last reasoned opinion for Mr. Ford's ineffective-assistance claims.

B. The Indiana Court of Appeals' decision was based on an "unreasonable determination of the facts."

The Court of Appeals faulted Mr. Ford for not providing additional evidence. App. 169–70. But in so doing, it failed to acknowledge his many attempts to procure such evidence. Its decision was therefore "based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d)(2).

As courts have outlined, such an unreasonable determination may arise when: (1) a state court makes "evidentiary findings without holding a hearing" and giving petitioner "an opportunity to present evidence," *Kipp v. Davis*, 971 F.3d 939, 953 (9th Cir. 2020) (quoting *Taylor v. Maddox*, 366 F.3d 992, 1001 (9th Cir. 2004), *abrogated on other grounds by Murray v. Schriro*, 745 F.3d 984, 999–1000 (9th Cir. 2014)); (2) a "state court[] refus[es] to consider evidence" that it has before it, *Lee*, 922 F.3d at 775; and (3) a state court makes findings "under a misapprehension as to the correct legal standard," *Taylor*,

366 F.3d at 1001. Mr. Ford's plea-bargaining claim fits within each such category.

1. The Indiana Court of Appeals made factual findings without holding a hearing and giving Mr. Ford an opportunity to present evidence.

Begin with category one. "Ineffective assistance claims often require an evidentiary hearing because they frequently allege facts that the record does not fully disclose." *Osagiede v. United States*, 543 F.3d 399, 408 (7th Cir. 2008). Yet Mr. Ford has had no such a hearing though he has alleged "facts, which if proven, would entitle him to relief." *Mayberry v. Dittmann*, 904 F.3d 525, 532 (7th Cir. 2018).

There is, after all, no dispute that he was entitled to effective assistance in plea bargaining. *Padilla v. Kentucky*, 559 U.S. 356, 373 (2010). And it is undisputed that rather than provide such effective assistance, Mr. Hicks provided *no* assistance. He did not follow up on a plea offer, despite the State's willingness to discuss one and Mr. Ford's express instruction to pursue one. Even *if* such a dispute did exist—which the Court of Appeals appeared to manufacture, noting "Ford's trial counsel did not provide any evidence in this proceeding," App. 170—that dispute would all the more warrant a hearing.

Indeed, consistent with such an understanding, in *Nunes v. Mueller*, 350 F.3d 1045 (9th Cir. 2003), *overruled on other grounds by Ochoa v. Davis*, 50 F.4th 865 (9th Cir. 2022), appellant sought an evidentiary hearing for ineffective assistance in plea bargaining. The state court there "found that an evidentiary hearing was unnecessary" because appellant's contentions "were meritless 'on their face.'" *Id.* at 1053. It "rejected as 'simply not credible' [appellant's claim] that he could not reach his attorney to clarify the plea offer." *Id.* at 1053–54.

As *Nunes* observed, such a decision was "unreasonable under both Sections 2254(d)(1) and (2)." *Id.* at 1054. The state court "should not have required [appellant] to prove his claim without affording him an evidentiary hearing." *Id.* Although appellant relied on his own statements, these statements were "sufficient evidence to support his allegations that his attorney failed to convey the correct plea bargain and that he suffered prejudice as a result." *Id.* at 1056.

This Court adopted similar reasoning in *Dalton v. Battaglia*, 402 F.3d 729 (7th Cir. 2005), *Ward v. Jenkins*, 613 F.3d 692 (7th Cir. 2010), and *Campbell v. Reardon*, 780 F.3d 752 (7th Cir. 2015).

Dalton concerned whether the petitioner "was []aware of his eligibility for an extended term sentence when he pleaded guilty." 402 F.3d at 734. Just as in this case, petitioner relied on his own affidavits. *Id.* Just as in this case, petitioner "tried repeatedly" to supplement "the record, only to be thwarted at all turns"—either because the State refused to respond or because records had been lost. *Id.* at 737. And as here, the lower courts "found that [petitioner] could not prevail based on these affidavits" because "[p]etitioner's only 'evidence' consist[ed] of his own self-serving statements." *Id.* at 734; *compare* App. 170 ("The only support for Ford's claim . . . is provided by his own self-serving affidavit.").

This Court emphatically rejected such reasoning: "We have repeatedly stated that the record may include a so-called 'self-serving' affidavit." *Dalton*, 403 F.3d at 735 (citing cases). The "old common-law rule" holding otherwise "was discarded long ago." *Id.* *Dalton* consequently remanded for an evidentiary hearing. *Id.* at 739.

In the same vein, *Ward* ordered an evidentiary hearing on whether petitioner's "counsel was ineffective because" he "ignored . . . requests to file a motion to withdraw [a] guilty plea prior to sentencing." 613 F.3d at 694. Petitioner "diligently sought" a "hearing at every step in his state proceedings

in order to develop the factual basis for his assertions, *but those requests were denied." Id.* at 698 (emphasis added). These denials undermined the validity of the state court's decision denying relief, necessitating further proceedings. Finally, *Campbell* ordered an evidentiary hearing to "develop the record on [] the extent of counsel's actual pretrial investigation," which had not been sufficiently examined below. 780 F.3d at 772.

These decisions answer the instant question. As in those cases, there is here—at the very least—"a genuine dispute of fact on a critical matter." *Dalton*, 402 F.3d at 735. And when a habeas petitioner alleges facts that could entitle him to relief, then a sensible next step is to hold a hearing adjudicating this dispute. *Osagiede*, 543 F.3d at 412. To be sure, a court might in some cases order relief without a hearing. *See infra* § IV. But what a court may *not* do is make adverse factual findings, without a hearing and without giving petitioner a meaningful opportunity to present evidence. The Indiana Court of Appeals' decision otherwise constitutes "an unreasonable determination of the facts." 28 U.S.C. § 2254(d)(2).

2. The Indiana Court of Appeals ignored evidence.

The Indiana Court of Appeals' order also falls under a second § 2254 (d)(2) category—a refusal to consider critical evidence. *See Taylor*, 366 F.3d

at 1001 ("[T]he state-court fact-finding process is undermined where the state court has before it, yet apparently ignores, evidence that supports petitioner's claim."); *Miller-El v. Cockrell*, 537 U.S. 322, 346 (2003) ("[T]he state court also had before it, and apparently ignored, [relevant] testimony").

Here, the Court of Appeals' "analysis ignores the fact that Ford *tried* to obtain trial counsel's testimony." App. 12. Mr. Ford first tried to reach counsel by "writing" "letters." *Id.* When that proved fruitless, he "ask[ed] the trial court to compel [Mr. Hicks] to provide an affidavit." *Id.*; *see also* App. 116, 120. The trial court refused. App. 119, 123. So Mr. Ford moved to have his counsel "participate in a deposition"—yet another dead end. App 12; App. 124–25. He sought "an evidentiary hearing." App. 12. Rejected there too. The Indiana Court of Appeals had all this evidence before it. It took none of it into account when arriving at its decision.

These circumstances parallel *Carlson v. Jess*, 526 F.3d 1018 (7th Cir. 2008). At issue was whether the state court had improperly denied a motion to substitute counsel. *Id.* at 1020. Critically, in postconviction proceedings, the "state court of appeals" determined "that communication between" the petitioner and counsel "had not completely broken down." *Id.* at 1023. But as this Court noted, that determination ignored the many "statements by" both

petitioner and counsel at trial "telling the court that . . . there had been a 'total breakdown in communication.'" *Id.* at 1024. The state court's "factual finding" to the contrary, which appeared to skip past this evidence, "was clearly unreasonable." *Id.*

Other cases have similarly determined that a failure to consider relevant evidence satisfies § 2254(d)(2). In *Brumfield v. Cain*, 576 U.S. 305, 322 (2015), the Supreme Court held that a "state trial court should have taken into account that the evidence before it" of petitioner's "intellectual disability." A decision to rely on test scores but discount other evidence was therefore "unreasonable." *Id.* at 314–317. Similarly, in *Kipp v. Davis*, the court listed several instances in which factual findings were held unreasonable because lower courts "disregarded relevant evidence" or "failed to consider" adverse evidence. 971 F.3d at 954.

The thrust of these cases is that, while a "state court need not address 'every jot and tittle of proof suggested to them,'" *id.*, it also may not "insulate [its] decisions from federal review by refusing to entertain vital evidence," *Lee*, 922 F.3d at 775. Here, there is little evidence more vital than Mr. Ford's steadfast efforts to obtain corroborating evidence from his trial counsel about what, exactly, trial counsel did or did not do during the critical stage of plea

negotiations. Given his incarceration and his *pro se* status, Mr. Ford "did what he could." *Id.* at 774. "[T]he absence of evidence" is not—as the Indiana Court of Appeals would have it—Mr. Ford's fault, but that of "the state judiciary's failure to afford him a hearing." *Id.*[3]

3. The Indiana Court of Appeals' findings were based on a misapprehension of the legal standard.

Finally, an unreasonable determination results when the state court makes findings "under a misapprehension as to the correct legal standard." *Kipp*, 971 F.3d at 953. The misapprehension here is straightforward. A habeas "petitioner has the burden of establishing his grounds for relief." Ind. P.C.R. 1.5. But the Indiana Court of Appeals misguidedly took that burden as license to hold *counsel's* lack of cooperation against Mr. Ford.

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[3] The Indiana Superior Court, in reaching its decision, likewise ignored relevant evidence. It denied Mr. Ford's motion to compel because, in its view, "there is nothing in the record of this cause indicating defendant has actually requested any such affidavits from counsel." App. 123. But Mr. Ford "served on Trial Counsel Mitchell Hicks . . . via Certified Mail again requesting to answer questions fully and completely." App. 120. And he attached receipts of this mail delivery. *Id.* at 122. Consequently, even *if* this Court were to look past the "last reasoned opinion" of the Court of Appeals, *Thomas v. Clements*, 789 F.3d 760, 766 (7th Cir. 2015), it would reach the same result: The Superior Court's decision was also "based on an unreasonable determination of the facts." 28 U.S.C. § 2254(d)(2).

To be clear, such an error presents a "somewhat different set of considerations," *Taylor*, 366 F.3d at 1001, as it often comprises a "mixed question of law and fact," *Ward v. Sternes*, 334 F.3d 696, 704 (7th Cir. 2003). Thus, courts sometimes frame such errors under both (d)(1) and (d)(2). *Cf. Nunes*, 350 F.3d at 1054; *Taylor*, 366 F.3d at 999 (the "same standard of unreasonableness applies under subsections (d)(1) and (d)(2)"). For the sake of completeness, Mr. Ford does the same, showing below how the Indiana Court of Appeals' misapprehension of the relevant standard also presents "an unreasonable application of[] clearly established Federal law." 28 U.S.C. § 2254(d)(1).

C. The Indiana Court of Appeals' decision was an "unreasonable application" of federal law.

A decision unreasonably applies "clearly established Federal law," 28 U.S.C. § 2254(d)(1), "if the state court identifies the correct governing legal rule from [the Supreme Court's] cases but unreasonably applies it to the facts of the particular state prisoner's case," *Ouska v. Cahill-Masching*, 246 F.3d 1036, 1044 (7th Cir. 2001) (quoting *Anderson v. Cowan*, 227 F.3d 893, 896 (7th Cir. 2000)). "[E]ven a general standard may be applied in an unreasonable manner." *Panetti v. Quarterman*, 551 U.S. 930, 953 (2007).

Such principles govern here. The Indiana Court of Appeals held that "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." App. 170. That presumption reflects the missing evidence rule, which applies when "the accused is so situated that he could offer evidence" that "suspicious circumstances can be accounted for consistently with his innocence." *Mammoth Oil Co. v. United States*, 275 U.S. 13, 52 (1927). If the accused, though, "fails to offer such proof, the natural conclusion is that the proof, if produced, instead of rebutting, would tend to sustain the charge." *Id.*

Cases applying the rule are legion. *See, e.g.*, *Local 167, Int'l Brotherhood of Teamsters v. United States*, 291 U.S. 293, 298 (1934) ("They were present in court but failed to testify in their own defense. It justly may be inferred that they were unable to show that they had abandoned the conspiracy and did not intend further to participate in it."); *Littlefield v. McGuffey*, 954 F.2d 1337, 1346 (7th Cir. 1992) ("[T]he missing-witness rule . . . permits an inference of unfavorable testimony from the missing witness."). And a variation of the rule holds that "the production of weak evidence when strong is available can lead only to the conclusion that the strong would have been adverse." *Interstate Cir., Inc. v. United States*, 306 U.S. 208, 226 (1939).

Both the rule and its variation have been applied in the habeas context. In *Dunn v. Reeves*, 141 S. Ct. 2405, 2407 (2021), for instance, petitioner sought relief because "his trial counsel should have hired an expert to develop" evidence of "intellectual disability." At an evidentiary hearing, petitioner called two experts. *Id.* at 2408. But he did not call trial counsel. As *Dunn* noted, though petitioner had "filed a 100-plus-page brief alleging" "fault with his lawyers, he offered no testimony or other evidence from them." *Id.* at 2411. Petitioner, in short, "produc[ed] weak evidence" (his brief and his experts) "when strong [was] available." *Interstate Cir.*, 306 U.S. at 226.

But employing the missing evidence rule here was inappropriate, lying "outside the boundaries of permissible differences of opinion." *Raygoza v. Hulick*, 474 F.3d 958, 963 (7th Cir. 2007). As the Supreme Court has made clear, the rule "is to be cautiously applied, and *only in cases where it is manifest that proofs are in the power of the accused.*" *Mammoth Oil*, 275 U.S. at 52 (emphasis added); *accord Foust v. Munson S.S. Lines*, 299 U.S. 77, 86 (1936) ("They had, and readily could submit to the court, definite evidence."). "[I]n this circuit," too, a "missing witness instruction is disfavored," and appropriate only if "the witness was peculiarly in the other party's power to produce." *United States v. Tavarez*, 626 F.3d 902, 904–05 (7th Cir. 2010).

Indiana courts hold as well that the rule may only be invoked "where no effort was made to produce either the testimony of the trial counsel *or counsel's affidavit*." *Lenoir v. State*, 368 N.E.2d 1356, 1358 (Ind. 1977) (emphasis added). In *Dunn*, the Supreme Court appropriately drew an adverse inference because petitioner *could* have, but did not, call counsel at an evidentiary hearing.

The circumstances in this case could not be more different. For one, Mr. Ford was never granted a hearing or even an opportunity to develop evidence. Worse yet, he *tried* to do so, but was turned away every time. App. 116, 120, 124. Despite informal outreach (letters) and legal means (motions to compel and motions to depose), he was unable, through no fault of his own, to obtain evidence or testimony from Mr. Hicks. "Perhaps," in some last-ditch effort, he "could have dispatched a pigeon from his prison cell." *Washington v. Smith*, 219 F.3d 620, 631 (7th Cir. 2000). But such a move, as this Court has emphasized, "is wholly unreasonable." *Id.* Applying a missing evidence inference here—when it was "manifest[ly]" clear that proof was *not* "in the power of the accused," *Mammoth Oil*, 275 U.S. at 52—was thus "not only incorrect or erroneous but objectively unreasonable," *Rompilla v. Beard*, 545 U.S. 374, 380 (2005) (alterations omitted).

II. COUNSEL PROVIDED CONSTITUTIONALLY INEFFECTIVE ASSISTANCE TO MR. FORD DURING PLEA BARGAINING.

"[A] petitioner who prevails under AEDPA must still [] persuade a federal habeas court that 'law and justice require' relief." *Brown v. Davenport*, 142 S. Ct. 1510, 1524 (2022). But when "the trial court base[s] its decision on an unreasonable factual determination, the substantive merits of [a] claim are analyzed under the pre-AEDPA standard—that is, *de novo*." *Carlson*, 526 F.3d at 1024; *accord Panetti*, 551 U.S. at 953 (applying same standard for (d)(1)).

The substantive standard governing Mr. Ford's claim is well-established. The Supreme Court has "long recognized that the negotiation of a plea bargain is a critical phase of litigation for purposes of the Sixth Amendment." *Padilla*, 559 U.S. at 373. And like other ineffective-assistance claims, an attorney fails to fulfill his duties in plea bargaining if (1) his performance was deficient, and (2) his "deficient performance prejudiced the defense." *Strickland v. Washington*, 466 U.S. 668, 687 (1984). Mr. Ford satisfies both requirements.

A. By doing "nothing," counsel's performance was deficient.

Lafler v. Cooper, 566 U.S. 156 (2012), and *Missouri v. Frye*, 566 U.S. 134 (2012), provide the framework for examining ineffective assistance in the plea-bargaining context. In *Lafler*, a "favorable plea offer was reported to the client but, on the advice of counsel, was rejected." 566 U.S. at 160. The case went to trial which, "[a]fter a guilty verdict," resulted in "a sentence harsher than that offered in the rejected plea bargain." *Id.* In *Frye*, the "attorney did not advise [his client] that [plea] offers had been made" before they "expired." 566 U.S. at 139.

Counsel's actions were constitutionally deficient in both cases. Advising a client to reject an offer based on "an incorrect legal rule" fails *Strickland*. *Lafler*, 566 U.S. at 162. That the client ultimately received a "reliable trial does not foreclose relief," because "[t]he constitutional rights of criminal defendants . . . are granted to the innocent and the guilty alike." *Id.* at 169 (internal quotation marks omitted). Likewise, "defense counsel has the duty to communicate formal offers from the prosecution." *Frye*, 566 U.S. at 145. If counsel "allow[s] the offer to expire without advising the defendant or allowing him to consider it, defense counsel [does] not render the effective assistance the Constitution requires." *Id.*

Compared to *Lafler* and *Frye*, Mr. Hicks' deficiency began earlier and persisted longer. At most, Mr. Hicks told Mr. Ford there was a potential plea on the table. R. 1 at 13; App. 129. His "assistance" ended there. Mr. Ford asked him to investigate and learn more. App. 129. But there is no sign that Mr. Hicks ever discussed a plea with the prosecution again. *Id.*; *see also* R. 1 at 13–14. On the contrary, there *is evidence* Mr. Hicks was simply too busy, with the overlapping double-murder matter, to adequately consider Ford's case. App. 129; *see also* App. 44 ("So with that going on in my calendar, . . . I quite frankly didn't have enough time."). And Mr. Hicks could have also been far too overconfident about trial prospects, thinking the case was won, to Mr. Ford's detriment. App. 130. If the Sixth Amendment bars bad advice based on a misunderstanding of the law, *Lafler*, 566 U.S. at 162, or preventing a defendant from "consider[ing]" an offer, *Frye*, 566 U.S. at 145, it necessarily also bars counsel from skirting (despite a client's instruction to the contrary) the negotiation process altogether.

A contrary rule would be unworkable. Consider three situations. One: An attorney competently negotiates a plea deal but gives incompetent advice. Ineffective, per *Lafler*. 566 U.S. at 162. Two: An attorney competently negotiates a deal but fails to communicate it. Again, ineffective, per *Frye*. 566

U.S. at 145. Three: The client wants and the government is willing to negotiate a plea. But the attorney does not enter negotiations for a formal written offer—because *they* overestimate their chances at trial, or because *they* were too busy, or because *they* forgot to follow up. It would make little sense to shield counsel from scrutiny in scenario three.

Case law post-*Lafler* and *Frye* confirms this point. In *Byrd v. Skipper*, 940 F.3d 248, 253 (6th Cir. 2019), defendant "specifically asked" his counsel "about the possibility of pleading guilty." There was also evidence suggesting "the prosecutor . . . was interested in . . . negotiating an agreement" with the defendant. *Id.* at 251. An evidentiary hearing confirmed that the State was "willing[] to extend a plea offer." *Id.* at 258. Yet defendant "was denied the opportunity to accept a lesser charge." *Id.* at 252. Instead, despite "case law" pointing to the contrary, counsel "vastly overestimate[d] the strength of" a particular line of defense, and "went so far as to say that he believed" his client would be "found not guilty." *Id.* at 252. Counsel consequently declined to engage in plea negotiations.

By "never initiat[ing] plea negotiations with the prosecutor's office," counsel had failed *Strickland*'s first prong. *Id.* Counsel's errors "were apparent and abundant, and without doubt, his representation fell far outside

prevailing professional norms." *Id.* at 257 (internal quotation marks omitted). As *Byrd* summarized, counsel's "unwillingness to consider a plea" and "determin[ation] to go to trial" overrode his client's wishes, "effectively halting plea negotiations before they could begin." *Id.* at 251, 252.

Carmichael v. United States, 659 F. App'x 1013 (11th Cir. 2016), is in accord. There, defendant specifically "asked the lead attorney on his case" to "pursu[e] plea negotiations." *Id.* at 1015. That attorney "left the case before conducting plea negotiations." *Id.* Defendant renewed his requests to new counsel, but counsel "never mentioned any plea offers" and "refused to respond" to follow-up inquiries. *Id.* at 1015–16. Only after the jury's guilty verdict did defendant overhear the prosecutor "refer[] to a" prior "plea offer." *Id.* Defendant had, in these circumstances, "sufficiently pled deficient performance to warrant an evidentiary hearing." *Id.* at 1021. "[P]lea negotiations [were] not being communicated," and "[a]lthough the Government's plea offers were informal, [defendant's] counsel had a continuing obligation to consult . . . regarding important developments, including plea negotiations, in his case." *Id.* at 1021–22; *see also Carmichael v. United States*, 966 F.3d 1250, 1254 (11th Cir. 2020) ("[T]he parties do not

dispute . . . that counsels' performance was deficient due to their failure to . . . seek a negotiated plea.").

Likewise, in *United States v. Pender*, 514 F. App'x 359, 360 (4th Cir. 2013), defendant "averred that his attorney failed to seek a plea bargain even though the evidence against him was quite strong." Although the government insisted that defendant "was in fact offered a beneficial plea agreement," defendant "had no knowledge of this plea offer" and "there [was] no affidavit from counsel in the record" on the point. *Id.* at 360–61 & n.1; *see also Merzbacher v. Shearin*, 706 F.3d 356, 369–70 (4th Cir. 2013) ("[A] petitioner can show *Strickland* prejudice despite the incipience of the plea offer he did not accept due to his counsel's lack of communication or inadequate advice.").

Finally, and most recently, in *United States v. Knight*, 981 F.3d 1095, 1100 (D.C. Cir. 2020), the D.C. Circuit concluded that counsel was deficient for not "mention[ing] [a] plea offer" during a jail visit. After the offer was subsequently made in open court, counsel provided "misinformation" about sentencing consequences and did not, despite promising to do so, "discuss the plea offer further" with defendant. *Id.*

Consistent with these cases, this Court has in dicta suggested that the nascency of plea negotiations does not preclude a finding of deficiency. *See*

Overstreet v. Wilson, 686 F.3d 404, 407 (7th Cir. 2012) ("[W]e assume, again without deciding, that counsel's duty to communicate potential bargains to their clients covers oral offers before they are term-complete."). More generally, it has affirmed the duty to investigate available evidence to determine "whether to plead guilty," *Anderson v. United States*, 981 F.3d 565, 576 (7th Cir. 2020), and the "duty to inform" about "plea agreements," *Johnson v. Duckworth*, 793 F.2d 898, 902 (7th Cir. 1986)—both duties Mr. Hicks failed.

In short, as in *Byrd*, *Carmichael*, *Pender*, and *Knight*, Mr. Ford requested his counsel enter plea negotiations. App. 129; R. 1 at 13. As in those cases, the prosecution was willing to discuss a plea, though a written offer was not yet on the table. App. 129. It was *counsel's* unexplained failures to follow up and "inability to secure a plea agreement" which deprived Mr. Ford of effective assistance. *Delatorre v. United States*, 847 F.3d 837, 846 (7th Cir. 2017).

B. Counsel's inaction was prejudicial.

On prejudice, Mr. Ford must show that "there is a reasonable probability that" he "would have accepted the plea," that "the prosecution

would not have withdrawn it," and that "the court would have accepted its terms." *Lafler*, 566 U.S. at 164.

Disposing of the latter two elements is straightforward. Defendants must, on element two, demonstrate that "the prosecution would not have withdrawn [the plea] in light of intervening circumstances." *Id.* Here, the State sent a letter offering to discuss a plea on July 13, 2005. R. 1 at 13. Trial began and ended less than a month later. R. 8-1 at 4. The record reflects no intervening circumstances between these dates which suggest the State would have withdrawn its plea. That is unlike *Frye*, where, in the time between offer and trial, defendant committed a "new offense." 566 U.S. at 151.

As to element three, in Indiana, a "trial court [is] likely to accept the plea agreement given how common plea agreements are in resolving criminal charges." *Woods v. State*, 48 N.E.3d 374, 382 (Ind. Ct. App. 2015). Doing so "save[]s the State the time and resources required for a trial." *Id.*; *see also id.* at 381 (holding that counsel's performance was prejudicial because of the "failure to communicate [a] plea offer," absent intervening circumstances).

That leaves whether there was "a reasonable probability" Mr. Ford "would have accepted" a plea. *Frye*, 566 U.S. at 150. Two aspects are central to this inquiry: (1) whether defendant was "amenable to accepting the plea

offer," *Knight*, 981 F.3d at 1103, and (2) the "disparity" between a potential plea and the actual sentence, *United States v. Gordon*, 156 F.3d 376, 381 (2d Cir. 1998).

1. Mr. Ford's interest in a plea reflects a "reasonable probability" he would have accepted an offer.

Immediately after learning of the State's "willing[ness] to negotiate," Mr. Ford "requested [counsel] go see what kind of deal they would offer." App. 129. That was because he was "interested to hear what they had to offer." R. 1 at 13–14.

These statements check the "reasonable probability" box. *Frye*, 566 U.S. at 150. In *Byrd*, for instance, where plea negotiations were similarly "halt[ed]" before "they could begin," the court remarked that if defendant "were unwilling to accept a plea, he would not have inquired about the potential of pleading guilty—but he did make such an inquiry." 940 F.3d at 251, 259. Similarly, in *Knight*, when an individual asks "how much time does the government want," 981 F.3d at 1104 (alterations omitted)—a request much like Mr. Ford asking counsel to "see what kind of deal they would offer," App. 129—that reflects being "amenable to accepting [a] plea offer," 981 F.3d at 1103. In other cases, being "willing to consider pleading guilty," *Mask v.*

McGinnis, 233 F.3d 132, 141 (2d Cir. 2000), or stating that one is "interested in the plea," *Fulton v. Graham*, 802 F.3d 257, 266 (2d Cir. 2015), is enough to show prejudice.

The gravamen of these opinions is that, when plea negotiations are at an early stage, a continued interest in their development—as Mr. Ford showed—is enough to clear "reasonable probability." *Frye*, 566 U.S. at 150. He need not have agreed to whatever deal was offered, nor forfeited his innocence. To the contrary, for plea bargaining to work, "[d]efendants must claim innocence right up to the point of accepting a guilty plea, or they would lose their ability to make any deal with the government." *Griffin v. United States*, 330 F.3d 733, 738 (6th Cir. 2003).

That Mr. Ford later referred to his innocence in his postconviction affidavit does not change this calculus. First, when a defendant has received ineffective assistance in plea bargaining, there is usually no choice *but* to go to trial—making it "entirely logical that a defendant would have hope for acquittal." *Byrd*, 940 F.3d at 259. And here the context behind Mr. Ford's singular assertion of innocence from his affidavit makes clear this was the exact predicament he was in: Mr. Hicks' failures in "voir dire" made it "vital I

testify to prove my innocence (which Mr. Hicks did not allow to happen)." App. 130.

Consistent with this understanding, "[t]he Supreme Court . . . has held that a defendant's repeated declarations of innocence do not prove that he would not have accepted a guilty plea," and "[o]ther courts have also held that [such declarations] do not prevent a defendant from proving *Strickland* prejudice." *Banks v. Vannoy*, 708 F. App'x 795, 799 n.2 (5th Cir. 2017) (citing cases).

The rule in Indiana is no different. *Carter v. State*, 739 N.E.2d 126, 129 (Ind. 2000), holds that guilty pleas are valid even when a defendant later claims innocence. To be sure, *Carter* acknowledged that "in Indiana as a matter of law a judge may not accept a plea of guilty when the defendant both pleads guilty and maintains his innocence *at the same time*." *Id.* (internal quotation marks and ellipses omitted) (quoting *Ross v. State*, 456 N.E.2d 420, 423 (Ind. 1983)). This "rule is explicitly contingent, however, upon the protestation of innocence occurring at the same time the defendant attempts to enter the plea." *Id.*

"There is a substantive difference between a defendant who maintains innocence but asks the court to impose punishment without trial, and one who

concedes guilt in one proceeding but contradicts that admission by claiming innocence in a later proceeding." *Id.* at 130. Indiana forbids the former. It permits the latter. Indiana's courts have thus upheld guilty pleas notwithstanding "proclaim[ations of] innocence" at sentencing, *Carter*, 739 N.E.2d at 128, in postconviction proceedings, *McWhorter v. State*, 945 N.E.2d 1271, 1272 (Ind. Ct. App. 2011), and in other situations, *Johnson v. State*, 734 N.E.2d 242, 245 (Ind. 2000) ("A trial court may, however, accept a guilty plea from a defendant who pleads guilty in open court, but later protests his innocence.").

The Seventh Circuit, too, has long recognized this point. In *United States v. Kane*, 944 F.2d 1406, 1412 (7th Cir. 1991), the prosecution introduced evidence on cross of defendant's prior Indiana conviction for check deception. After defendant "testified on redirect examination that he was innocent" of this charge, but "pled guilty to avoid having to go to court," *id.*, the prosecutor asserted that defendant had "lied . . . if he had entered a guilty plea while innocent," because "the state of Indiana prohibits *Alford* pleas," *id.* at 1413 n.3.

This Court, on plain-error review, rejected this assertion. *Id.* at 1411. Citing *Ross v. State*, the same decision underpinning *Carter*, it explained that in Indiana "[a] court is free to accept a guilty plea so long as no simultaneous

declaration of innocence is made." *Id.* at 1413 n.3. "A defendant thus might . . . silently harbor a belief of innocence and the court can still validly accept the plea. The plea then is not a lie, but a compromise settled upon voluntarily by the defendant." *Id.* *Ross*, *Carter*, and *Kane* govern. They make clear that neither Indiana law nor Mr. Ford's affidavit bar relief.[4]

Neither *Overstreet v. Wilson* nor *Alkhalidi v. Neal*, 963 F.3d 684 (7th Cir. 2020), compel a holding to the contrary. To start, the state court held an evidentiary hearing in both cases. *Overstreet*, 686 F.3d at 409 ("His trial lawyers testified at the post-conviction hearing."); *Alkhalidi*, 963 F.3d at 686. No such hearing was held here.

More importantly, the last reasoned opinion in both cases squarely addressed whether the plea at issue would have been accepted under Indiana's treatment of *Alford*. For *Overstreet*, that was the postconviction court, *Overstreet v. Superintendent*, 2011 WL 836800, at *5 (N.D. Ind. Mar. 4, 2011),

[4] New Jersey is one of the only other states that purportedly bars *Alford* pleas. But it too holds that a post-hoc "assertion of innocence will not upset an otherwise validly entered into plea." *State v. Luckey*, 840 A.2d 862, 867 (N.J. App. Div. 2004). And when such questions arise in habeas, "[a]n inquiry solely involving whether or not [the defendant] proclaimed innocence . . . is not the correct means by which to address prejudice when assessing a claim of ineffective assistance of counsel in the plea negotiation process." *Hines v. Ricci*, 2013 WL 1285290, at *21 (D.N.J. Mar. 26, 2013).

and for *Alkhalidi*, it was the Indiana Court of Appeals, *Alkhalidi v. State*, 2016 WL 6342629 (Table) (Ind. Ct. App. Sept. 22, 2016). Either way, this last-reasoned opinion *did* address the *Alford* issue, making federal review subject to AEDPA deference. *Overstreet v. Superintendent*, 2011 WL 836800, at *6 ("Because the state post-conviction court reached the merits of this claim, my review of the matter is not *de novo.*"); *Alkhalidi*, 963 F.3d at 686.

No such deference is warranted here. Instead, because the Indiana Court of Appeals was the last reasoned opinion, and because its opinion fails (d)(1) and (d)(2), the substantive merits must be analyzed de novo. *See Corcoran v. Neal*, 783 F.3d 676, 683 (7th Cir. 2015) ("[I]f the prisoner . . . shows that the state court's decision was legally or factually unreasonable, the federal court reviews the prisoner's claim of constitutional error de novo."). And given that, on *plain-error* review, *Kane* held that Indiana "only forbids [an Indiana] court from accepting a guilty plea if the defendant both pleads guilty and maintains his innocence at the same time," examining Mr. Ford's claim de novo yields a clear answer. 944 F.2d at 1411, 1413 n.3. Mr. Ford has demonstrated a "reasonable probability" he would have accepted the plea. *Frye*, 566 U.S. at 150.

2. The sentencing disparity favors a finding of prejudice.

To the extent there is any doubt on this point, a significant disparity between a plea and sentence provides additional "objective evidence" to "support[] an inference that the petitioner would have accepted the proposed plea offer if properly advised." *Raysor v. United States*, 647 F.3d 491, 495 (2d Cir. 2011); *see also Knight*, 981 F.3d at 1103 ("Other circuits have recognized that a disparity in sentencing exposure may suffice to show prejudice.") (citing decisions from Third, Fourth, Fifth, and Sixth Circuits); *accord United States v. Kearn*, 578 F. Supp. 3d 1221, 1240–41 (D. Kan. 2022). The Seventh Circuit has implied as much, holding counsel ineffective where counsel misinformed his client on a sentencing range. *Julian v. Bartley*, 495 F.3d 487, 499–500 (7th Cir. 2007).

The gap here would likely have been significant. Recall that the State's theory was that Mr. Ford forced his wife to have sex with him (rape) and to perform oral sex on him (criminal deviate conduct). To do so, Mr. Ford broke into his wife's residence, committing burglary and criminal confinement. App. 77–84. For such conduct, Mr. Ford received a seventy-year sentence of imprisonment: consecutive thirty-year terms for rape and criminal deviate conduct, Class A felonies, and a consecutive ten-year term for criminal

confinement, a Class B felony. App. 104. The remaining counts ran concurrently.

As a benchmark, had Mr. Hicks sought a plea, he likely would have received *some* offer. In 2010, prosecutors resolved almost 150,000 cases through pleas; only around 5000 went to trial. *See* Indiana Trial Court Statistics, https://publicaccess.courts.in.gov/ICOR/.

And national statistics confirm the disparity between Mr. Ford's actual sentence and what he might have received through a plea bargain. In 2005, the average state sentence for rape was between 72 and 86 months.[5] Mr. Ford received an 840-month sentence. He has already been imprisoned for more than 200 months.

To bring the point home, the line in Indiana between rape, criminal deviate conduct, and criminal confinement is not altogether clear. "[C]onfinement," for instance, sometimes "merges to become a lesser included offense" of "attempted criminal deviate conduct." *Moore v. State*, 653 N.E.2d 1010, 1020 (Ind. Ct. App. 1995). In cases involving the "same bodily injury"—

[5] Thomas P. Bonczar, et al., *National Corrections Reporting Program: Time Served in State Prison, By Offense, Release Type, Sex, and Race*, Bureau of Justice Statistics, https://bjs.ojp.gov/library/publications/national-corrections-reporting-program-time-served-state-prison-offense (2011).

i.e., this case—rape and criminal deviate conduct merge or, to avoid double jeopardy, courts "reduce" a "conviction for Class A felony criminal deviate conduct" to "Class B felony criminal deviate conduct." *Young v. State*, 57 N.E.3d 857, 859–60 (Ind. Ct. App. 2016); *Ramon v. State*, 888 N.E.2d 244, 253 (Ind. Ct. App. 2008). Confusion surrounding the line between criminal deviate conduct and rape in fact prompted Indiana to recently "eliminate[]" the "separate offense of criminal deviate conduct" and "roll[]" it "into the offense of rape." Joel M. Schumm, *Recent Developments in Indiana Criminal Law and Procedure*, 47 Ind. L. Rev. 1043, 1043 (2014).

To be clear, Mr. Ford is not trying to relitigate his convictions. But such precedent, coupled with the State's theory and Mr. Ford's acquittal on several counts, imply that the State could have dropped certain charges in exchange for a plea. *See, e.g.*, *Abrajan v. State*, 917 N.E.2d 709, 711 (Ind. Ct. App. 2009) (pleading guilty to Class A felony rape in exchange for dismissal of remaining eight felony charges); *Yakym v. State*, 939 N.E.2d 127, *1 (Ind. Ct. App. 2010) (pleading guilty to Class A felony rape in exchange for dismissal of criminal deviate conduct, criminal confinement, and felony battery). Doing so would have, of course, affected the final sentence.

Put another way, given his interest in a plea, the likelihood the State would have offered one, and the significant disparity between the average sentence and sentence received, there is "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Lafler*, 566 U.S. at 163.

III. COUNSEL'S WITNESS STRATEGY WAS UNREASONABLE, AND HIS MANY ERRORS CONSTITUTED CUMULATIVE PREJUDICE.[6]

Counsel's performance at trial, just like his performance before trial, was constitutionally ineffective. His missteps fall under two categories: (1) what he promised to do but did not, and (2) what he in fact did.

On the former category, counsel promised, on day one, that Mr. Ford and Barbara Ford would testify. In a rape prosecution between Mr. Ford and his wife, Mr. Ford's decision to testify would no doubt be critical— and here even more so because counsel promised Mr. Ford would "tell [the jury] that"

[6] It is unclear what standard of review applies to these issues; this Court does not seem to have decided this precise question. However, because "[i]neffective assistance of counsel is a single ground for relief," *Peoples v. United States*, 403 F.3d 844, 848 (7th Cir. 2005), and since a decision's "partial reliance on an erroneous factual finding" can underscore its "unreasonableness," *Wiggins v. Smith*, 539 U.S. 510, 528 (2009), it would appear such issues should also be reviewed de novo.

certain allegations "didn't happen" and would help put into context other details of the State's case. App. 63. Counsel also described Barbara, in a pretrial hearing to the court, as his "case in chief." App. 50. Trial concluded the next day. Neither Mr. Ford nor Barbara had been called. In closings, counsel did not address, much less explain, these omissions.

On the latter category, one of the State's key witnesses was Laressa Ford, Mr. Ford's daughter and one of the few individuals on the scene. Mr. Hicks' cross-examination of Laressa was an exercise in futility. Spanning just six transcript pages, Mr. Hicks elicited from Laressa that she and her mother were "scared" of her father, App. 67; that she heard him say "fuck that bullshit, I came over to fuck" and "to get some pussy," App. 69; that she heard "yelling" and "screaming" "from [her] bedroom," App. 68; and that her father had been "mad before" and "gets pretty vocal when he gets upset," App. 71. Not even the State, in direct examination, elicited testimony so unfavorable to Mr. Ford.

A. Counsel's witness strategy was deficient.

"Making false promises about evidence"—exactly what Mr. Hicks did here—"is a surefire way for defense counsel to harm his credibility with the jury." *Myers v. Neal*, 975 F.3d 611, 621 (7th Cir. 2020). Such "false promises are indefensible" and "a clear instance of deficient performance." *Id.*; *accord*

Humbles v. Buss, 268 F. App'x 459, 464 (7th Cir. 2008) ("It is clear that counsel did err when he said in his very short opening statement . . . that defendant will testify.").

That counsel "had not spoken with Barbara Ford" in advance and was "unprepared to put her on the stand" does not excuse his conduct. R. 8-9 at 19. To the contrary, "if counsel never bothers to find out what a potential witness may say on the stand, counsel's decision not to call that witness to testify cannot be passed off as a matter of strategy." *Olvera v. Gomez*, 2 F.4th 659, 669 (7th Cir. 2021); *accord Meyers v. Gomez*, 50 F.4th 628, 643 (7th Cir. 2022) ("An outright failure to investigate a potential witness is 'more likely to be a sign of deficient performance.'").

There is also ample evidence supporting counsel's deficiency in the handling of Laressa. As the district court observed, "[w]ithout testimony from trial counsel, it's difficult to find a strategic reason for" counsel's examination of Laressa. App. 28. That is the very standard courts use when evaluating such claims. *See Eze v. Senkowski*, 321 F.3d 110, 127 (2d Cir. 2003) (counsel is deficient when "there is no strategic or tactical justification for the course taken" in "conduct of examination and cross-examination"); *cf. Higgins v. Renico*, 470 F.3d 624, 633 (6th Cir. 2006) ("A number of courts, including this

one, have found deficient performance where, as here, counsel failed to challenge the credibility of the prosecution's key witness.").

The Indiana Court of Appeals nonetheless denied relief because, as to Mr. Ford, his testimony would have been cumulative and, as to Barbara, her testimony would have been inadmissible. App. 25 ("Ford presented his version of events in the videotaped statement to police."); *id.* at 18 ("Failure to offer inadmissible evidence is not ineffective assistance.") (alteration omitted).

Such reasoning lacks merit. For one, Mr. Ford gave his videotaped statement shackled, without counsel, immediately after his arrest. App. 4. That is dramatically different from being called to the stand, without restraints, after discussing strategy with counsel. By testifying, Mr. Ford might well have placed into context statements from his videotaped interview. True, the State could have "impeached him[]" with the videotape. App. 175. But by declining to put Mr. Ford on the stand, there was nothing even to impeach. The State could lean on the potentially incriminating interview statements alone, without worrying about jurors hearing a clarified or more nuanced version of events.

Similarly, though Indiana's Rules of Evidence might have prevented Barbara from testifying about specific lies Yolanda told, Barbara could have

offered "impeachment of" Yolanda "by evidence of reputation or character." *Pierce v. State*, 640 N.E.2d 730, 732 (Ind. Ct. App. 1994). Mr. Ford's affidavit confirms this is precisely what Barbara would have said. App. 130 ("Barbara wanted to testify about Yolanda's habit of lying.").

That Mr. Hicks may have at some point told Mr. Ford he had "proven our case," *id.*, does not excuse his conduct. Setting aside that said evaluation was off the mark, "the foundation" for Mr. Ford's claim "is the broken promise as opposed to the decision not to pursue a particular line of testimony." *U.S. ex rel. Hampton v. Leibach*, 347 F.3d 219, 257 (7th Cir. 2003). When counsel "promise[s] the jury that it [will] hear from" a witness, and "renege[s] on his promises without explaining to the jury why he did so," such conduct is "unreasonable." *Id.* As this Court has underscored, "[t]he damage can be particularly acute when"—as here—"it is the defendant himself whose testimony fails to materialize." *Id.*; *see also id.* at 258 ("Nothing was to be gained from making that promise, only to renege upon it later without explanation."). The same calculus applies to a witness that counsel describes as his case in chief. *See Toliver v. Pollard*, 688 F.3d 853, 862 (7th Cir. 2012) ("Counsel's failure to call [key witnesses], despite the family relationship, constitutes deficient performance.").

To be sure, "[t]urnabouts" may "be justified when unexpected developments warrant changes." *Hampton*, 347 F.3d at 257 (cleaned up). But the record reflects no such developments. And neither the State nor any court has suggested otherwise. Instead, what the record shows is Mr. Hicks promising one thing on day one, abandoning that plan by day two, and never telling the court, his client, or the jury why. Under *Myers*, *Hampton*, and *Toliver*, that is deficient performance.

B. Taken together, counsel's actions were prejudicial.

The State's final redoubt, prejudice, fares no better. Courts have at times held that "promis[ing]" in openings to show "powerful evidence, and then not to produce it," is "prejudicial as [a] matter of law." *Anderson v. Butler*, 858 F.2d 16, 19 (1st Cir. 1988); *see also Harris v. Reed*, 894 F.2d 871, 879 (7th Cir. 1990) (citing *Anderson* with approval); *Williams v. Woodford*, 859 F. Supp. 2d 1154, 1170–71 (E.D. Cal. 2012). Even if this Court were disinclined to adopt such a broad reading, Mr. Ford would need only show, to "establish[] prejudice," that his "chances of acquittal are better than negligible." *Hampton*, 347 F.3d at 246.

He has done that. This was not necessarily some open and shut case. The jury acquitted Mr. Ford on one count of felony rape, App. 98–99; in other

words, it could not find, beyond a reasonable doubt, that there were multiple instances of nonconsensual intercourse.

Moreover, counsel's witness strategy affected multiple charges to which Mr. Ford was convicted. As to criminal deviate conduct, for instance, both sides agreed that Mr. Ford's guilt hinged on his and Yolanda's credibility. As the State noted, there was scant medical evidence, because Mr. Ford ultimately "refused the oral sex": "[S]he didn't want to and I didn't force her." App. 85. That made this an issue of dueling narratives—making credibility critical. *Compare id.* ("Consent versus force. That's what this is about."), *with* App. 91 ("I don't know why people lie. People lie. You know they do."). But by the time Mr. Hicks stood up in closing, his credibility had been shot.

Similarly, for interference with reporting of a crime and criminal confinement, the State's case turned on Laressa's testimony. App. 79–81. But the jury did not accept the State's account wholesale. It acquitted on interference with reporting of a crime. App. 98–99. And had Mr. Hicks properly impeached Laressa, he might well have cast doubt on confinement, too. Instead, his examination was so poor the State referenced it in closing, App. 80, plainly jeopardizing Mr. Ford's "chances of acquittal," *Hampton*, 347 F.3d at 246.

One final point. Mr. Ford asserted not just specific claims of assistance, but also cumulative prejudice. Given counsel's pattern of deficient conduct, that path makes sense. Yet the Indiana Court of Appeals disposed of the claim in cursory fashion: "Because nothing plus nothing still equals nothing, Ford's claim of cumulative error fails." App. 177.

That conclusion is legally and factually incorrect. As a legal matter, it misstates the relevant rule. That is because by "weighing each error individually," a reviewing court will (as happened here) "overlook[] a pattern of ineffective assistance and unreasonably appl[y] *Strickland*." *Goodman v. Bertrand*, 467 F.3d 1022, 1030 (7th Cir. 2006). Courts therefore examine whether "the cumulative effect of two or more individual harmless errors has the potential to prejudice a defendant to the same extent as a single reversible error." *Alvarez v. Boyd*, 225 F.3d 820, 824 (7th Cir. 2000).

And as a factual matter, had the state courts applied the correct standard, it would have arrived at a different conclusion. There is plainly *something* to each of Mr. Ford's claims. The failure to negotiate a plea falls short of *Lafler* and *Frye*. Promising to call a witness and failing to do so is a "clear instance of deficient performance." *Myers*, 975 F.3d at 621; *accord Harris*, 894 F.2d at 879. And using cross to not only reinforce but supplement

the State's case is unquestionably harmful. These claims on their own make a compelling case for relief. Taken together, they plainly "undermine confidence in the outcome." *Strickland*, 466 U.S. at 694.

IV. THIS COURT SHOULD GRANT MR. FORD HABEAS RELIEF OR, IN THE ALTERNATIVE, ORDER AN EVIDENTIARY HEARING.

Mr. Hicks' conduct fell clearly outside constitutional norms. What is less clear is what remedy follows. *Compare Lafler*, 566 U.S. at 174 ("order[ing] the State to reoffer the plea agreement"), *with Frye*, 566 U.S. at 151 (remanding for further proceedings).

On one hand, this Court could grant Mr. Ford habeas and require the State to either retry him or engage in plea negotiations. There are compelling reasons to do so. The fingerprints of counsel's ineffectiveness are all over this case. He did not negotiate a plea, though "pleas account for nearly 95% of all criminal convictions." *Frye*, 566 U.S. at 143. "There is no evidence that defense counsel visited the scene of the crime, deposed necessary witnesses, consulted any experts, nor did the bare minimum to present an adequate defense at trial." R. 8-9 at 7. He filed no motions raising merger concerns, though the law may well have supported such an argument.

And his lack of preparation did not disguise some grand trial strategy. On day one, he promised to call Mr. Ford and Barbara Ford. On day two, trial ended, and neither Mr. Ford nor Barbara Ford had testified. In the years since, counsel has elided scrutiny at every turn. He refused to respond to letters, dodged a motion to compel, and was never required to appear for an evidentiary hearing. The egregiousness of these facts provide a sufficient basis for granting habeas relief. *See Taylor*, 366 F.3d at 1008–9 (making "findings ourselves serves the interest of judicial economy," in part because "petitioner has already served over ten years of his sentence"); *Kipp*, 971 F.3d at 960.

That said, at minimum, an evidentiary hearing is warranted. As this Court has noted, state courts may not "insulate their decisions from federal review by refusing to entertain vital evidence." *Lee*, 922 F.3d at 775. Even when this Court has ultimately denied relief on plea bargaining claims, it did so only *after* a hearing. *Overstreet*, 686 F.3d at 409; *Alkhalidi*, 963 F.3d at 686.

That the Indiana courts should have ordered a hearing only buttresses Mr. Ford's claim. Under *Hamner v. State*, 739 N.E.2d 157, 160 (Ind. Ct. App. 2000), a hearing is required where the "determination hinges, in whole or in part, upon facts not resolved." That is the case even when "it appears unlikely

that the petitioner will be able to produce evidence sufficient to establish his claim." *Id.*; *see also id.* (hearing must be held "even though the petitioner has only a remote chance of establishing his claim"). When a state court decides a petition by affidavit, it must still order a hearing when necessary for a "full and fair determination of the issues." Ind. P.C.R. 1(9)(b). That requirement is met when a petitioner provides specific assertions, submits affidavits, or "request[s] that [] witnesses be subpoenaed" to resolve factual questions. *Smith v. State*, 822 N.E.2d 193, 202 (Ind. Ct. App. 2005).

The Indiana Superior Court took no such steps; it ignored Mr. Ford's efforts at a hearing, despite clear factual questions. The Indiana Court of Appeals fared no better, denying Mr. Ford's claims based on an unreasonable determination of the facts and unreasonable application of the law. This Court should reverse.

CONCLUSION

For the foregoing reasons, Mr. Ford's petition for a writ of habeas corpus should be granted. In the alternative, this Court should order an evidentiary hearing on Mr. Ford's ineffective assistance claims.

Respectfully submitted,

By: /s/ Xiao Wang

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DECEMBER 19, 2022

CERTIFICATE OF COMPLIANCE
WITH TYPEFACE AND WORD-COUNT LIMITATIONS

I hereby certify:

A. This brief complies with the type-volume limitations of Seventh Circuit Rule 32(c) because it contains 13,998 words, excluding the sections listed under Fed. R. App. P. 32(f).

B. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5)(A) and Seventh Circuit Rule 32(b) and type style requirements of Fed. R. App. P. 32(a)(6) and Seventh Circuit Rule 32(b) because it has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point font.

/s/ Xiao Wang
XIAO WANG

DATED: DECEMBER 19, 2022

CERTIFICATE OF SERVICE

I, Xiao Wang, counsel for Petitioner-Appellant, certify that, on December 19, 2022, a copy of the attached opening brief and addendum was filed electronically through the appellate CM/ECF system with the Clerk of the Court. I further certify that all parties required to be served have been served.

/s/ Xiao Wang
XIAO WANG

DATED: DECEMBER 19, 2022

No. 21-3061

In the United States Court of Appeals for the Seventh Circuit

BIRT FORD,
Petitioner-Appellant,

v.

DENNIS REAGLE, Warden,
Respondent-Appellee.

ON APPEAL FROM THE U.S. DISTRICT COURT FOR THE SOUTHERN DISTRICT OF INDIANA

PETITIONER-APPELLANT'S SHORT APPENDIX

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CERTIFICATE OF COMPLIANCE WITH CIRCUIT RULE 30

Pursuant to Circuit Rule 30(d), I certify that the short appendix and accompanying appendix submitted with this brief contain all of the materials required by Circuit Rule 30(a) and (b).

/s/ Xiao Wang
XIAO WANG

DATED: DECEMBER 19, 2022

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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.	)	

Entry Denying Motion for Hearing

The petitioner's motion requesting a hearing in this habeas action brought pursuant to 28 U.S.C. § 2254, dkt. [14], is **denied**. The petitioner's habeas petition is fully briefed. Once the Court has reviewed the materials set forth in Rule 8(a) of the Rules Governing Section 2254 Cases in the United States District Courts, the Court will determine whether a hearing in this action is warranted.

IT IS SO ORDERED.

Date: 9/01/2020

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

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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.	)	

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:

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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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