

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 21-3061

BIRT FORD,
Petitioner-Appellant,

v.

WARDEN,
Dennis Reagle, Pendleton Correctional Facility,
Respondent-Appellee.

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

BRIEF OF RESPONDENT-APPELLEE

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JURISDICTIONAL STATEMENT

Petitioner-Appellant's jurisdictional statement is complete and correct.

STATEMENT OF THE ISSUES

I. Whether the state court reasonably determined that Ford's counsel was not ineffective.

II. Whether Ford is entitled to an evidentiary hearing.

STATEMENT OF THE CASE

Nature of the Case

Ford petitioned the district court for a writ of habeas corpus seeking relief from custody due to his 2005 Allen County, Indiana, convictions for criminal deviate conduct, rape, burglary, criminal confinement, and invasion of privacy. The District Court denied the habeas corpus petition but granted a certificate of appealability on "Ford's ineffective assistance during plea-bargaining claim and his eligibility for an evidentiary hearing on that claim." SA 31. This court expanded the certificate of appealability to cover other ineffective assistance of trial counsel claims. Doc. 13.

Facts of the Crimes

The Indiana Court of Appeals recounted the facts of this case in Ford's direct appeal:

The facts most favorable to the verdict show that as of June 2005, Ford and Yolanda had been involved in a relationship for roughly twenty years and had been married for ten years. Ford and Yolanda have four children, the oldest being Laressa Ford, who was seventeen at the time of the trial. Ford and Yolanda's relationship was not always peaceful. In January 2005, a police officer was dispatched to the couple's residence to assist Yolanda with the removal of some of her items. At some point Ford told the officer, "I could do something to my wife while you are here in a nanosecond and there isn't anything

you could do.” Transcript at 238. On May 27, 2005, Yolanda obtained a protective order against Ford, prohibiting Ford from contacting Yolanda or from visiting Yolanda’s residence. Despite this order, Ford continued to contact Yolanda. On May 30, Ford called Yolanda several times, attempting to convince her to attend a barbeque with him. Yolanda instead went to her cousin’s residence. Ford arrived at the cousin’s house and used force in an attempt to get Yolanda to leave with him, in the process giving Yolanda visible injuries to her arms and stomach. Yolanda’s mother and a police officer, whom Yolanda’s cousin had called, photographed the injuries. After this incident, Yolanda and her four children returned to a women’s shelter where they had been residing.

On June 11, 2005, Yolanda and her children returned to the residence that she rented from the housing authority, which had imposed a no-trespassing order on Ford. That same day, Ford called Yolanda and asked her to go to church with him. That night, Yolanda put three of her children to bed and fell asleep watching television with Laressa. Yolanda awoke when Ford kicked in the back door. Yolanda attempted to call 911, but Ford grabbed the phone from her, removed the battery, and threw the phone to the floor. Ford then placed a kitchen table in front of the back door and retrieved a butcher’s knife from the kitchen. Ford told Yolanda to go into the back room with him, which she did after some hesitation. Upon entering the back room, Ford locked the door and told Yolanda that if the police arrived he would kill her and “have the police kill him.” Tr. at 163. Ford, while still holding the knife, told Yolanda to perform oral sex, which Yolanda did. Ford then took Yolanda into the bathroom, at which point they heard sirens and Ford repeated his threat to kill Yolanda if police entered the house. Ford called to Laressa, who told Ford that there was a fire across the street. After Ford entered the front room to check for himself, he told Laressa that if police entered the house, “both her parents [would] be dead.” Tr. at 168. Ford then returned to the bedroom with Yolanda, put the knife on the nightstand and told Yolanda to remove her clothes. Ford then had sex with Yolanda, during which Yolanda told Ford that she felt violated. Ford and Yolanda then went to bed. Yolanda testified that she did not get out of bed because she was afraid that if she did, she would awake Ford. In the morning, Ford again had sex with Yolanda. While Ford was in the shower, Yolanda’s mother came to the house, and Yolanda left with her and the four children. After they had driven away from the residence, Yolanda called the police and was then taken to a sexual assault treatment center. The nurse who examined Yolanda found injuries consistent with forced penetration.

R. 8-7 at 1-2.

Course of the State Court Proceedings

After a jury trial, Ford was convicted of criminal deviate conduct, rape, burglary, criminal confinement, and invasion of privacy. R. 8-7 at 2. Ford was sentenced to an aggregate term of 70 years' incarceration. R. 8-7 at 2.

On direct appeal, Ford challenged the admission of prior conduct evidence under Indiana Evidence Rule 404(b) and the appropriateness of his sentence under Indiana Appellate Rule 7(B). R. 8-5; 8-7 at 1. The Indiana Court of Appeals affirmed his convictions and sentence. R. 8-7 at 2-5. Ford filed a petition to transfer to the Indiana Supreme Court, which was denied. R. 8-2 at 4; 8-8.

Ford then filed a petition for post-conviction relief, which was later amended. R. 8-3 at 1; 8-9. In this petition, Ford alleged 10 categories of ineffective assistance of trial counsel with subparts. R. 8-9. Relevant to this appeal, he argued that trial counsel should have pursued plea negotiations, had Ford testify, had Barbara Ford testify, and handled Laressa's cross-examination better. R. 8-9 at 8-9, 19, 23-24. He also argued that trial counsel's cumulative errors prejudiced him. R. 8-9 at 25. Regarding appellate counsel, he alleged that counsel was ineffective for "failing to raise every possible error" and for how he challenged Ford's sentence. R. 8-9 at 26-29. The post-conviction court denied relief on all these claims. R. 8-10. The Indiana Court of Appeals affirmed this denial. R. 8-14. The court found that Ford's sparse facts about potential plea negotiations did not show ineffective assistance of counsel; that counsel did not prevent Ford from testifying, but his testimony would

not have helped him in any event; that Barbara's evidence was inadmissible, so counsel was not ineffective for not proffering it; and that Ford failed to show cumulative errors that prejudiced him. R. 8-14. The Indiana Supreme Court denied Ford's petition to transfer. R. 8-14, 16.

Course of Federal Court Proceedings

On June 16, 2020, Ford filed a petition for habeas corpus relief in the Southern District of Indiana. R. 1. Ford requested an evidentiary hearing. R. 14. On September 28, 2021, the district court denied the petition and request for an evidentiary hearing but determined that a certificate of appealability should be granted on "Ford's ineffective assistance during plea-bargaining claim and his eligibility for an evidentiary hearing on that claim." SA 31. Ford filed a timely notice of appeal. R. 28. This Court expanded the certificate of appealability to cover other ineffective assistance of trial counsel claims. Doc. 13.

SUMMARY OF THE ARGUMENT

I. The state court reasonably applied *Strickland* to find that Ford failed to establish his claims of ineffective assistance of counsel. First, the state court reasonably determined that counsel was not ineffective regarding plea negotiations. There was no plea offer from the State. Without a plea offer from the State, a petitioner cannot show that he would have accepted the plea, that the prosecution would not have withdrawn it, or that the trial court would have accepted it. Ford said that he asked counsel to ask the State about a potential plea, and Ford said that counsel did not. The only evidence was Ford's barebones affidavit, and it failed to establish ineffective assistance of counsel. The Supreme Court has not found

ineffective assistance of counsel during plea negotiations in a case without an offer from the State. This is likely because the State has no obligation to make an offer to a defendant. The state court reasonably applied *Strickland* when it found that Ford failed to show he was denied the effective assistance of counsel.

Second, the state court also reasonably applied *Strickland* when it determined that trial counsel was not ineffective for failing to call him or Barbara Ford as witnesses. There is no evidence as to why trial counsel did not call Ford as a witness. It was Ford's decision whether to testify. Trial counsel could not prevent him from testifying. While trial counsel told the jury in opening statements that it would hear from Ford, there is no evidence why Ford chose not to testify. Ford has not overcome the presumption that counsel acted within the bounds of professional competence. And the evidence that Ford wanted his counsel to elicit from Barbara was inadmissible. The state court reasonably determined that trial counsel was not ineffective for failing to proffer inadmissible evidence.

Third, Ford's claim regarding trial counsel's cross-examination of Laressa was not presented in his petition to transfer, so it is barred from review by procedural default. And finally, the state court reasonably determined that cumulative errors by trial counsel did not aggregate to create a reasonable probability of a different result.

II. The district court properly denied Ford's request for an evidentiary hearing. The state court adjudicated his claims on the merits, which bars any hearing under 28 U.S.C. § 2254(e)(2). Ford's arguments against this conclusion rely

on Indiana cases discussing Indiana’s post-conviction procedures. Any claim that those procedures were not followed is not cognizable on federal review. Further, Ford did not raise this procedural claim to the Indiana Court of Appeals. Ford has not shown that he is entitled to an evidentiary hearing.

ARGUMENT

Standard of Review

Under the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Ford is not entitled to a writ of habeas corpus unless “he is in custody in violation of the Constitution or laws or treaties of the United States.” 28 U.S.C. § 2254(a). For claims that were adjudicated on the merits in state court, Ford must show that the adjudication “resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court,” or that the adjudication 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 AEDPA standard is meant to be difficult to meet. *Harrington v. Richter*, 562 U.S. 86, 102 (2011). When the petitioner seeks review under the “unreasonable application” provision of § 2254(d)(1), this Court defers to a reasonable state court decision. *Id.* An “unreasonable application” of federal law means more than merely an incorrect application. *Knowles v. Mirzayance*, 556 U.S. 111, 123 (2009). A federal habeas court must first determine what arguments or theories supported or could have supported the state court’s decision; then it must ask whether it is possible that fairminded jurists could disagree that those arguments or theories are

inconsistent with a prior holding of the Supreme Court. *Richter*, 562 U.S. at 102. In its practical application, this standard means that federal courts will uphold a state court judgment that is “at least minimally consistent with the facts and circumstances of the case ... even if it is not well reasoned or fully reasoned, or even if it is one of several equally plausible outcomes.” *Searcy v. Jaimet*, 332 F.3d 1081, 1089 (7th Cir. 2003) (quotation omitted). “[F]ederal judges are required to afford state courts due respect by overturning their decisions only when there could be no reasonable dispute that they were wrong,” *Woods v. Donald*, 575 U.S. 312, 316 (2015) (per curiam), and under AEDPA, a state court’s determination that a claim lacks merit precludes federal habeas relief if “fairminded jurists could disagree” on the correctness of the state court’s decision, *Richter*, 562 U.S. at 101 (quotation omitted).

I.

None of Ford’s ineffective assistance of counsel claims entitle him to relief.

The Indiana court cited *Strickland* and reasonably applied that standard to Ford’s claims of ineffective assistance of counsel. This Court should affirm the denial of his request for habeas relief.

A. Standard of Review for Ineffective Assistance of Counsel Claims

To succeed on an ineffective assistance of counsel claim, a petitioner must show that counsel’s performance was unconstitutionally deficient and that the deficient performance prejudiced him. *Williams v. Taylor*, 529 U.S. 362, 390-91 (2000) (citing *Strickland v. Washington*, 466 U.S. 668, 692 (1984)). Counsel’s performance should be measured by an objective standard of reasonableness “under

prevailing professional norms.” *Strickland*, 466 U.S. at 692. To prove prejudice, a petitioner “must show that there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” *Id.* at 694. Moreover, a petitioner’s failure to satisfy either the performance or the prejudice prong of the *Strickland* test is fatal to his ineffectiveness claim. *Id.* at 687.

Under AEDPA, the “pivotal question is whether the state court’s application of the *Strickland* standard was unreasonable.” *Harrington v. Richter*, 562 U.S. 86, 101 (2011). “A state court must be granted a deference and latitude that are not in operation when the case involves review under the *Strickland* standard itself.” *Id.* Thus, a federal habeas court does not apply the principles of *Strickland* directly, but rather analyzes whether the state courts reasonably applied federal law in concluding that counsel was not ineffective. *Id.*; see also *Conner v. McBride*, 375 F.3d 643, 657 (7th Cir. 2004).

B. The state court reasonably determined that trial counsel was not ineffective in plea negotiations.

The Indiana state court reasonably concluded that the evidence did not show that trial counsel was ineffective in plea negotiations. If a defendant can show that counsel performed deficiently, to satisfy prejudice under *Strickland* in the guilty plea context, he must show a reasonable probability he would have accepted the offer at the time the prosecutor had the offer open, and that the trial court would have accepted the plea. *Missouri v. Frye*, 566 U.S. 134, 147 (2012). Here, there is no evidence that the State ever made an offer, and the state court determined that

Ford failed to put forward sufficient evidence to make out a claim. This was a reasonable application of *Strickland*.

The total sum of evidence that Ford presented to the state post-conviction court consisted of this one sentence: “It was during this conversation that [trial counsel] told me the State was willing to negotiate and I requested he go see what kind of deal they would offer, but he never did what I requested concerning this potential plea agreement.” App. 129. The state appellate court found this evidence did not establish that trial counsel was ineffective.

The Indiana appellate court rejected Ford’s claim for lack of evidence. The appellate court pointed out that the only evidence regarding counsel’s performance was Ford’s affidavit, which asserted that counsel did not ask the State about an offer. But Ford cites to no case that requires trial counsel to ask about an offer. There are many things outside a trial counsel’s control in plea negotiations. For example, “[a] prosecutor is under no duty to plea bargain at all, or to keep an offer open, as the offer remains in the discretion of the prosecutor.” *Alkhalidi*, 963 F.3d at 687. Counsel similarly cannot control the cooperation of the defendant or the court.

Further, Ford never asserted that he would have admitted his guilt. If Ford was not willing to plead guilty it would be a fool’s errand for trial counsel to spend time negotiating a plea.¹ Indiana law is clear: A defendant may not plead guilty and

¹ Ford asked for an early trial, which means the trial had to occur within 70 days. *See* Ind. Crim. R. 4. Ford wanted a quick trial (not a quick plea), and trial counsel reasonably pursued preparing for trial rather than pursuing plea negotiations that Ford would not accept. The trial occurred less than two months after Ford’s initial hearing, which did not provide much time to negotiate. R. 8-1 at 2, 4.

simultaneously assert innocence. *See Ellis v. State*, 67 N.E.3d 643, 646-50 (Ind. 2017). So even had trial counsel done what Ford thinks he should have done, it would not have affected the proceedings because Ford has not alleged that he was willing to admit his guilt. This is a reasonable application of *Strickland*. *See Alkhalidi v. Neal*, 963 F.3d 684, 687 (7th Cir. 2020) (“Even if we were convinced Alkhalidi would accept the plea deal, a reasonable probability the prosecutor and trial court would have accepted the plea deal is unpersuasive for the simple reason that Indiana requires the defendant to admit the factual basis of the plea.”). The state court reasonably determined that Ford failed to show counsel performed deficiently.

Ford also has not shown that the state court unreasonably determined that counsel’s performance did not prejudice him. Ford has not cited a clearly established case that requires a state court to find ineffective assistance of counsel when the allegation is simply that counsel did not test the waters to see the type of plea the State may be willing to offer. To the contrary, as this Court has highlighted, “[a] claim of ineffective assistance of counsel with respect to the plea negotiation process presupposes the existence of a plea agreement.” *Martin v. United States*, 789 F.3d 703, 707 (7th Cir. 2015); *see also Lafler v. Cooper*, 566 U.S. 156, 168 (2012) (“If no plea offer is made, ... the issue raised here simply does not arise”). Ford cannot show prejudice unless he shows the state made an offer that he would accept, that he would admit guilt, and that the court would accept the parties’ agreement. There is no evidence of these necessary elements. The state appellate court relied on these

shortcomings to find that Ford did not show ineffective assistance of counsel, and Ford fails to so show that the decision was an unreasonable application of *Strickland*.

In finding that Ford's ineffective assistance of counsel claim was without merit, the state court did not rely on a unreasonable determination of facts. A petitioner can avoid AEDPA deference if the state court decision 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). Under section 2254(d)(2), "a state-court factual determination is not unreasonable merely because the federal habeas court would have reached a different conclusion in the first instance." *Wood*, 558 U.S. at 301 (citing *Williams*, 529 U.S. at 411). The state court's factual determinations are reasonable if they are supported by the record. *See Burt v. Titlow*, 571 U.S. 12, 20 (2013). Ford must show that all reasonable minds would disagree with the state court's factual findings. *See Rice v. Collins*, 546 U.S. 333, 341–42 (2006). That is to say, the facts must be beyond debate. *See id.* at 342; *Burt*, 571 U.S. at 22; *Wood v. Allen*, 558 U.S. 290, 303 (2010). Any arguments about the weight of evidence, rather than its existence, must be made under section 2254(d)(1). *See Lopez v. Smith*, 574 U.S. 1, 8 (2014).

Here, the facts were not disputed, just the legal effects flowing from those facts. The state court found the evidence did not support Ford's claim of ineffective assistance of counsel. R. 8-14 at 12-13. Ford does not point to any evidence that the state court ignored. There is no evidence showing the State ever made an offer, that

Ford would have accepted that offer, or that the trial court would have accepted any such hypothetical agreement. Ford does not identify any facts that the state court relied on whose determination is unreasonable “in light of the evidence presented in the State court proceeding.” 28 U.S.C. § 2254(d)(2).

At most, Ford is arguing that the state court should not have presumed that evidence from trial counsel would not have been helpful. Even if it were unfair for the state court to apply the presumption that an affidavit from Ford’s trial counsel would not have helped him,² that finding was unnecessary to the state court decision.³ Even if trial counsel corroborated Ford’s affidavit, Ford still did not show that the State extended an offer, that he was willing to accept and admit guilt. This claim entirely depends on the State extending a plea offer and Ford accepting it, but this is missing from Ford’s evidence. Even if it was unfair for the state court to employ the presumption that counsel’s evidence would not help him, Ford still loses without that presumption. The state court’s conclusion that Ford’s claim lacked the necessary evidence was a reasonable determination under *Strickland*.

² Ford spends several pages in his Brief discussing whether the state court decision was an unreasonable application of a rule that failure to provide proof results in a contrary presumption. Br. of Appellant at 39-42. However, Ford never clearly explains the rule or how it is clearly established federal law that applies to state collateral review cases. The main case cited by Ford is a civil case over the propriety of oil and gas leases. *See Mammoth Oil Co. v. United States*, 275 U.S. 13 (1927). Without explanation from Ford about how application of this rule results in him being held unconstitutionally, Respondent does not see how this case is clearly established federal law for any purpose under 28 U.S.C. § 2254(d).

³ In this case, it is not clear what difference there is between the presumption that counsel performed within the bounds of professional conduct and a presumption that the lack of evidence from counsel indicates that he would not corroborate a defendant’s claim of ineffective assistance of counsel.

Even under de novo review, Ford has not shown that he is entitled to relief. First, as the State did not extend an offer, the issue of ineffective assistance regarding plea negotiations does not arise. *See Lafler*, 566 U.S. at 168. But even analyzing this case under *Strickland*, Ford has not shown deficient performance or prejudice because he did not show that the State would have made an offer that he would have accepted, that he would have admitted committing the crime, or that the court would accept the plea agreement worked out by the State. Successful negotiation of a plea agreement involves factors beyond the control of counsel, including cooperation of the client and of the prosecutor. *See United States v. Hall*, 212 F.3d 1016, 1022 (7th Cir. 2000). But even if this Court determines that counsel performed deficiently by not asking the State for an offer, there is no prejudice to Ford unless the State actually extends an offer. Ford has not shown that he was denied the effective assistance of counsel at the plea bargaining stage.

Even were this Court to find ineffective assistance of counsel in plea bargaining here, Ford has not explained how this Court could provide effective relief. Because the prosecutor is not required to extend any offer (and there is no offer to re-extend) and Ford has been convicted at a fair trial, there is no reason for the prosecutor to extend an offer now.

C. The state court reasonably determined that trial counsel was not ineffective at trial.

The state court reasonably applied *Strickland* to find that Ford had not established that counsel was ineffective for not calling him or Barbara as a witness. Ford's claim regarding trial counsel's handling of Laressa during cross-examination is barred from review by procedural default. Finally, the State court reasonably found that Ford's ineffective assistance of counsel claims did not cumulatively prejudice him.

1. Failing to call Ford as a witness

The state court determined that Ford failed to show ineffective assistance of counsel because he could not be prevented from testifying and there is "no reason to believe that testifying would have helped Ford." R. 8-14 at 8. This was a reasonable application of *Strickland*. On the performance prong, Ford focuses on counsel's promise to the jury during opening statement that Ford would testify. Br. of Appellant at 61-62. Ford calls this promise false. But the fact that Ford ultimately did not testify did not mean the promise was false when counsel made it. The decision to testify is the defendant's choice, and no one, including his lawyer, can make a defendant testify if he does not want to. *See McCoy v. Louisiana*, 138 S. Ct. 1500, 1508 (2018). Courts presume that trial counsel acts according to reasonable strategy. *See Winfield v. Dorethy*, 956 F.3d 442, 451 (7th Cir. 2020). Ford could have told trial counsel that he was willing to testify and changed his mind during the trial. Counsel could not explain Ford's change of heart to the jury without further prejudicing Ford. Ford does not point to any evidence in this case that he wanted to

testify but was prevented from doing so. Without contradictory evidence from his trial counsel or evidence from Ford himself, he has not shown that trial counsel performed deficiently. For an unexplained event, courts rely on the presumption that counsel was acting according to professional competence; Ford asks the Court to flip this presumption on its head. The state court reasonably determined that Ford failed to show his counsel performed deficiently.

On the prejudice prong, the state court reasonably determined that Ford was not prejudiced by counsel's performance. Ford's version of events was already presented in the form of his videotaped statement. As the state court found:

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.

R. 8-14 at 18. This decision was a reasonable application of *Strickland*.

Ford's attempts to show this conclusion was unreasonable fall flat. First, Ford suggests that by testifying he could have placed his videotaped statements into "context." However, Ford does not explain what statements he would have put in context or even what his testimony would have been had he testified. This assertion that Ford could have minimized the damage of his statement is mere speculation. Second, without him taking the stand, the State could not impeach his testimony. It is difficult to see how this is a reason for him to testify. Finally, because he did not testify, the State could rely on his videotaped statement without jurors hearing "a clarified or more nuanced version of events." Br. of Appellant at

63. This is still not an explanation of what his testimony would have been or how it would have been helpful. The bare statement that the testimony would have been helpful does not show that the state court's conclusion was unreasonable. Ford ignores that testifying would have opened him to harmful cross-examination. The state court reasonably determined that Ford failed to show that he was prejudiced by his failure to testify at trial.

2. Failing to call Barbara Ford as a witness

The state court reasonably applied *Strickland* to determine that trial counsel was not ineffective for failing to call Barbara as an impeachment witness. Ford argued that trial counsel should have called Barbara as an impeachment witness to testify about specific lies that the victim told. The state court found that under Indiana state law, this evidence was inadmissible,⁴ so counsel was not ineffective for failing to proffer it. This is a reasonable application of *Strickland* because, as this Court has pointed out, counsel's "failure to offer inadmissible evidence is not ineffective assistance." *Kavanagh v. Berge*, 73 F.3d 733, 736 (7th Cir. 1996).

Ford attempts to avoid this result by suggesting that Barbara may have been able to present a different type of impeachment evidence, namely, the victim's habit of lying. However, the evidence does not show that Barbara had the necessary foundation to testify more generally about a habit of lying. There is no evidence from Barbara. Ford told the state court that trial counsel should have called

⁴ The evidentiary question is one of state law that cannot be second-guessed by a federal habeas court. *Bradshaw v. Richey*, 546 U.S. 74, 76 (2005); *Estelle v. McGuire*, 502 U.S. 62, 67-68 (1991).

Barbara to testify about a specific situation where the victim lied about collecting money for Ford and sending it to him in the jail. R. 8-11 at 14. He may not change his claim after he lost in the state court. *See Perruquet v. Briley*, 390 F.3d 505, 513-14 7th Cir. 2004) (to overcome the exhaustion doctrine petitioner must present the same claim to state courts that he urges in the federal courts). Changing the parameters of his claim does not show that the state court unreasonably decided the claim that he actually made before the state court. The state court reasonably determined that trial counsel was not ineffective for failing to proffer inadmissible evidence.

3. Cross-examination of Laressa

This claim is not available for review because Ford did not present this issue to the Indiana Supreme Court. To preserve a claim for federal collateral review, the petitioner must have presented the claim to the state's highest court. *O'Sullivan v. Boerckel*, 526 U.S. 838, 845 (1999). Where the petitioner has exhausted his state court remedies, but has failed to fairly present his federal claim in the state court proceedings, that claim is procedurally defaulted for federal habeas review. *Farrell v. Lane*, 939 F.2d 409, 410 (7th Cir. 1991); *see also Riggins v. McGinnis*, 50 F.3d 492, 493 (7th Cir. 1995). Ford did not present this claim in his petition to the Indiana Supreme Court. R. 8-15. Because Ford failed to present this claim to the Indiana Supreme Court, it is barred from review by procedural default.

Even if available for review, this is at most an isolated mistake of counsel. Ford does not explain his claim on appeal, but he relies on the district court's

discussion of this issue. Br. of Appellant at 62. The district court points to one cross-examination question from trial counsel: “You’ve seen your dad mad before haven’t you? ... He—he gets pretty vocal when he gets upset, doesn’t he,” and Laressa answered, “yes.” SA 28. There is no evidence from counsel as to why he asked this question. So there is no evidence to rebut the “strong presumption that counsel’s conduct falls within the wide range of reasonable professional assistance.”

Strickland, 466 U.S. at 689; *see also*. *Winfield v. Dorethy*, 956 F.3d 442, 451 (7th Cir. 2020). But even if there were no strategic reason for asking this question, this isolated mistake is not deficient performance. One mistake does not entitle a defendant to collateral relief unless it is a “whopper of an error that nullifies all of the good things that counsel did.” *Coleman v. Neal*, 990 F.3d 1054, 1056 (7th Cir. 2021). Ford was also not prejudiced by this question and response. There was significant and corroborating evidence of his guilt. He has not shown prejudice.

4. Cumulative Error

The state court reasonably concluded that Ford was not prejudiced by the alleged deficiencies of counsel. The court determined that Ford failed to establish that any of his claims have merit: “Because nothing plus nothing still equals nothing, Ford’s claim of cumulative error fails.” R. 8-14 at 19-20. This is a reasonable application of *Strickland*.⁵ Ford argues that the plea negotiation claim should be added to his trial claims to show cumulative prejudice. Br. of Appellant at

⁵ The court did not find more than one instance of deficient performance, so there was no need to focus on the “cumulative effect of trial counsel’s shortcomings.” *Myers v. Neal*, 975 F.3d 611, 623 (7th Cir. 2020).

67. But it is unclear how plea negotiations could impact what happened at trial. The state court reasonably applied *Strickland* to find there were no errors to aggregate to reach a reasonable probability of a different result.

II.

Ford has failed to show that he is entitled to an evidentiary hearing.

The district court properly denied Ford's request for an evidentiary hearing. The state court adjudicated Ford's claims on the merits, so he is not entitled to an evidentiary hearing. Generally, in federal habeas proceedings, "[r]eview proceeds on the evidentiary record in state court." *Bland v. Hardy*, 672 F.3d 445, 450 (7th Cir. 2012) (citing *Cullen v. Pinholster*, 563 U.S. 170 (2011)). "Although state prisoners may sometimes submit new evidence in federal court, AEDPA's statutory scheme is designed to strongly discourage them from doing so." *Pinholster*, 563 U.S. at 185. AEDPA prohibits an evidentiary hearing in a federal habeas attack on a state-court conviction unless certain requirements are met. 28 U.S.C. § 2254(e)(2). But section 2252(e)(2) does not apply when a state court adjudicates a claim on the merits. "[R]eview under Section 2254(d)(1) is limited to the record that was before the state court that adjudicated the claim on the merits." *Pinholster*, 563 U.S. at 181. This is because the "backward-looking language" in section 2254(d)(1) "requires an examination of the state-court decision at the time it was made." *Id.* at 182. "In other words, no federal evidentiary hearing is permitted when the state court has already addressed the issue[.]" *Stechnauer v. Smith*, 852 F.3d 708, 721 (7th Cir. 2017) (citing *Pinholster*, 563 U.S. at 182). Ford's claims of ineffectiveness of counsel were adjudicated on the merits, thus barring any hearing under section 2254(e)(2).

Ford fails to discuss the standard for an evidentiary hearing in a federal habeas action reviewing a state court conviction. Instead, citing Indiana appellate cases, he argues that he should have had a hearing in state court. Even if Ford is right that the State failed to follow its procedure, that claim is not cognizable in federal habeas. *See Resendez v. Smith*, 692 F.3d 623, 628 (7th Cir. 2012) (stating “that the State may have failed to comply with its post-conviction procedures would not raise a cognizable federal habeas claim”); *Jackson v. Duckworth*, 112 F.3d 878, 880 (7th Cir. 1997). But even if cognizable, Ford did not raise the claim on appeal,⁶ so it is barred from review by procedural default. *See O’Sullivan*, 526 U.S. at 845. Ford fails to show that he is entitled to an evidentiary hearing.

CONCLUSION

This Court should affirm the district court’s judgment.

Respectfully submitted,

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⁶ Ford could have raised the evidentiary hearing claim in his appeal from the denial of post-conviction relief, but he did not. R. 8-11.

CERTIFICATE OF SERVICE

I hereby certify that on January 27, 2023, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Seventh Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

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