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 REPLY BRIEF

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TABLE OF CONTENTS

Page

Table of authorities ii

Introduction 1

Argument 5

I. The Indiana Court of Appeals' decision was unreasonable as to Mr. Ford's plea-bargaining claim. 5

A. The Indiana Court of Appeals' decision was the last reasoned opinion in this case. 5

B. The Indiana Court of Appeals' decision was based on an "unreasonable determination of the facts." 5

1. The Indiana Court of Appeals made factual findings without holding a hearing. 6

2. The Indiana Court of Appeals ignored evidence. 10

C. The Indiana Court of Appeals' decision was an "unreasonable application" of federal law. 11

II. Counsel provided constitutionally ineffective assistance to Mr. Ford during plea bargaining. 14

A. By doing "nothing," counsel's performance was deficient. 15

B. Counsel's inaction was prejudicial. 20

III. Counsel's witness strategy was unreasonable, and his many errors constituted cumulative prejudice. 22

A. Counsel's witness strategy was deficient. 22

B. Taken together, counsel's actions were prejudicial. 27

IV. This Court should grant Mr. Ford habeas relief or, in the alternative, order an evidentiary hearing 29

Conclusion 32

TABLE OF AUTHORITIES

Page(s)

CASES

Alkhalidi v. Neal,
963 F.3d 684 (7th Cir. 2020) 29

Alvarez v. Boyd,
225 F.3d 820 (7th Cir. 2000) 27

Bintz v. Bertrand,
403 F.3d 859 (7th Cir. 2005) 10

Blackmon v. Williams,
823 F.3d 1088 (7th Cir. 2016) 26

Brown v. Davenport,
142 S. Ct. 1510 (2022) 2

Brumfield v. Cain,
576 U.S. 305 (2015) 2, 11

Byrd v. Skipper,
940 F.3d 248 (6th Cir. 2019) 18, 21

Carlson v. Jess,
526 F.3d 1018 (7th Cir. 2008) ..... *passim*

Carmichael v. United States,
966 F.3d 1250 (11th Cir. 2020) 19

Cullen v. Pinholster,
563 U.S. 170 (2011) 29

Dalton v. Battaglia,
402 F.3d 729 (7th Cir. 2005) ..... *passim*

Davis v. Lambert,
388 F.3d 1052 (7th Cir. 2004) 30, 31

Doody v. Ryan,
649 F.3d 986 (9th Cir. 2011) 4

Dunn v. Reeves,
141 S. Ct. 2405 (2021) 13, 14

Fulton v. Graham,
802 F.3d 257 (2d Cir. 2015) 21

Gaylord v. United States,
829 F.3d 500 (7th Cir. 2016) 28

Goodman v. Bertrand,
467 F.3d 1022 (7th Cir. 2006) 3

Harris v. Reed,
894 F.2d 871 (7th Cir. 1990) 25

Hawkman v. Parratt,
661 F.2d 1161 (8th Cir. 1981) 19, 24

Hicks v. Hepp,
871 F.3d 513 (7th Cir. 2017) 27

Hill v. Lockhart,
474 U.S. 52 (1985) 15, 16

Interstate Circuit, Inc. v. United States,
306 U.S. 208 (1939) 12

Jones v. Basinger,
635 F.3d 1030 (7th Cir. 2011) 14

Kipp v. Davis,
971 F.3d 939 (9th Cir. 2020) 5, 6

Lafler v. Cooper,
566 U.S. 156 (2012) ..... *passim*

Lee v. Kink,
922 F.3d 772 (7th Cir. 2019) ..... *passim*

Local 167, International Brotherhood of Teamsters v. United States,
291 U.S. 293 (1934) 13

Mammoth Oil Co. v. United States,
275 U.S. 13 (1927) 12, 14

Martin v. United States,
789 F.3d 703 (7th Cir. 2015) 9, 10, 17

Mask v. McGinnis,
233 F.3d 132 (2d Cir. 2000) 21

Mayberry v. Dittmann,
904 F.3d 525 (7th Cir. 2018) 7

Miller-El v. Cockrell,
537 U.S. 322 (2003) 2, 32

Miller-El v. Dretke,
545 U.S. 231 (2005) 3

Missouri v. Frye,
566 U.S. 134 (2012) ..... *passim*

Myers v. Neal,
975 F.3d 611 (7th Cir. 2020) 25

Nunes v. Mueller,
350 F.3d 1045 (9th Cir. 2003) 8, 9

Olvera v. Gomez,
2 F.4th 659 (7th Cir. 2021) 24

Osagiede v. United States,
543 F.3d 399 (7th Cir. 2008) 6

Overstreet v. Wilson,
686 F.3d 404 (7th Cir. 2012) 29

Owens v. Frank,
394 F.3d 490 (7th Cir. 2005) 29, 30

Padilla v. Kentucky,
559 U.S. 356 (2010) 15, 16

Raysor v. United States,
647 F.3d 491 (2d Cir. 2011) 21

Sawyer v. United States,
874 F.3d 276 (7th Cir. 2017) 9, 17

Steele v. United States,
321 F. Supp. 3d 584 (D. Md. 2018) 17, 19

Strickland v. Washington,
466 U.S. 668 (1984) 17

Taylor v. Maddox,
366 F.3d 992 (9th Cir. 2004) 6

Townsend v. Sain,
372 U.S. 293 (1963) 31

U.S. ex rel. Hampton v. Leibach,
347 F.3d 219 (7th Cir. 2003) 25, 28, 32

United States v. Hall,
212 F.3d 1016 (7th Cir. 2000) 19, 20

United States v. Kane,
944 F.2d 1406 (7th Cir. 1991) 22

United States v. Knight,
981 F.3d 1095 (D.C. Cir. 2020) 16, 21

Ward v. Jenkins,
613 F.3d 692 (7th Cir. 2010) 9, 29

Williams v. Taylor,
529 U.S. 420 (2000) 29, 31

Woolley v. Rednour,
702 F.3d 411 (7th Cir. 2012) 5

STATUTES

28 U.S.C. § 2254 ..... *passim*

INTRODUCTION

In its opposition, the State trots out AEDPA's Four Horseman: the standard of review, Opp. Br. at 6; deference, *id.* at 8; prejudice, *id.* at 10; and (for good measure) double deference, *id.* at 12. But that is all it does. In section after section, it declines to meaningfully engage with any of Mr. Ford's arguments or with the binding precedent Mr. Ford cites.

Start with the standard of review. The State claims that "[t]he AEDPA standard is meant to be difficult to meet." *Id.* at 6. True. But is that standard met here? The State says it is not, because—it claims—"Ford does not point to any evidence that the state court ignored." *Id.* at 11. Yet the district court's opinion belies that assertion. As it noted, the state "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." App. 12 (first emphasis added).

The opening brief highlighted that "misstep" half a dozen times. *See id.*; Pet. Br. at 2, 13–14, 16, 20–21, 31, 36. And it explained, citing precedent, why such errors "result[] in a decision that was based on an unreasonable determination of the facts." 28 U.S.C. § 2254(d)(2); *see also* Pet. Br. at 35–38 (citing,

e.g., *Miller-El v. Cockrell*, 537 U.S. 322, 346 (2003), *Brumfield v. Cain*, 576 U.S. 305, 322 (2015), and *Carlson v. Jess*, 526 F.3d 1018 (7th Cir. 2008)).

These authorities make clear that Mr. Ford's ineffective-assistance claims should be examined de novo, not through the lens of AEDPA deference. *Brown v. Davenport*, 142 S. Ct. 1510, 1524 (2022). The State's opposition does not mention, much less rebut, this point. It instead sallies forth unencumbered, insisting that the Court apply AEDPA deference regardless. That is not how habeas review works.

In any event, the State's subsequent analysis misconstrues issues of both fact and law. It claims, for example, that a "prosecutor is under no duty to plea bargain." Opp. Br. at 9. But that is not the point. Here, the prosecution *did* want to plea bargain. And Mr. Ford likewise told his attorney to "negotiat[e]." R. 1 at 13. But "defense counsel did nothing concerning" that "request"—he did not follow-up, negotiate, nor provide further advice. App. 170. If, as the law makes clear, (1) negotiating a plea but providing improper advice and (2) negotiating a plea but failing to communicate it constitute ineffective assistance, then declining to negotiate altogether must also be ineffective. *See Lafler v. Cooper*, 566 U.S. 156, 162 (2012); *Missouri v. Frye*, 566 U.S. 134, 145 (2012).

As a backstop, the State invokes the specter of prejudice, Opp. Br. at 9–10, but here too it gets it wrong. It insists that Mr. Ford has "not alleged that he was willing to admit his guilt." *Id.* at 10. That is not the rule. Mr. Ford need not show with certainty he would have pleaded guilty. Rather, he must only show "there is a reasonable probability that" he "would have accepted the plea." *Lafler*, 566 U.S. at 164. Mr. Ford's interest in a plea, his instructions to counsel, and the disparity between his actual sentence and the average sentence satisfy that requirement.

The State's arguments as to counsel's conduct at trial fare no better. It gives no reason why counsel promised to call Mr. Ford but did not, why counsel promised to call Barbara Ford but did not, and why counsel examined Laressa Ford in the way he did. *See, e.g.*, Opp. Br. at 14, 16–17. Instead, shorn of any colorable explanation, the State retreats to its last redoubt: cloaking the Indiana Court of Appeals' decision under cover of double deference.

To be clear: A presumption of reasonableness is not an invitation to "engage in a post hoc rationalization for an attorney's actions by constructing strategic defenses that counsel does not offer." *Goodman v. Bertrand*, 467 F.3d 1022, 1029 (7th Cir. 2006). And "[d]eference does not by definition preclude relief." *Miller-El v. Dretke*, 545 U.S. 231, 240 (2005). Whatever

"deference AEDPA requires we give to factual findings and legal conclusions from state courts does not and cannot equate to abdication of . . . judicial responsibilit[y]." *Doody v. Ryan*, 649 F.3d 986, 1021 (9th Cir. 2011).

Mr. Ford's counsel's performance was ineffective, and the Indiana Court of Appeals' finding otherwise was objectively unreasonable. His habeas petition should be granted. In the alternative, the Court should order an evidentiary hearing.

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.

The Indiana Court of Appeals' decision was the "last reasoned decision to discuss [Mr.] Ford's claims." App. 10. Although the State's opposition dances around this issue—referring repeatedly to some generic "state court"—it ultimately concedes the point. *See* Opp. Br. at 9 ("The Indiana appellate court rejected Ford's claim."). "AEDPA review," then, "appl[ies]" to that opinion, and that opinion only. *Woolley v. Rednour*, 702 F.3d 411, 422 n.1 (7th Cir. 2012). The Indiana Court of Appeals' decision fails both 28 U.S.C. § 2254(d)(1) and (d)(2).

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

Under (d)(2), a habeas petitioner may obtain relief where the state court opinion "resulted in a decision that was based on an unreasonable determination of the facts." 28 U.S.C. § 2254(d)(2).

As Mr. Ford has outlined—and which the State does not dispute—individuals satisfy (d)(2) when: (1) a state court makes "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 v. Kink*, 922 F.3d 772, 775 (7th Cir. 2019); and (3) a state court makes findings "under a misapprehension as to the correct legal standard," *Taylor*, 366 F.3d at 1001.

The State offers no response to (3): that the Indiana Court of Appeals mistakenly treated trial counsel's lack of cooperation as evidence of Mr. Ford failing to meet his burden. That misapprehension alone, as the opening brief explains, fulfills (d)(2). Pet. Br. at 38–39. But even if it did not, the State's counterarguments as to categories (1) and (2) are unavailing.

1. The Indiana Court of Appeals made factual findings without holding a hearing.

First, "[i]neffective 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. Mr. Ford was not once afforded such an opportunity to supplement the record during post-conviction review, and the state courts made factual findings without a hearing. *Kipp*, 971 F.3d at 953. The State's opposition disputes none of these points.

Instead, it focuses on a "lack of evidence" from Mr. Ford; i.e., that Mr. Ford offered only "barebones" allegations from his "affidavit." Opp. Br. at 4, 9. That assertion is neither factually sound nor legally supported.

For one, Mr. Ford's affidavit itself was not—as the State suggests—some string of conclusory, pro forma allegations. The affidavit instead provided specific details on when and how long he spoke to his trial counsel: "7 days before trial" and "for approximately 15–30 minutes." App. 129. He also noted, in the affidavit, that his counsel "told me that the State was willing to negotiate," that he "requested he go see what kind of deal they would offer," and that counsel "never did what I requested." *Id.* And he noted elsewhere in the record the specific date—July 13, 2005—that his trial counsel received a letter from the prosecutor "offer[ing] to discuss" a "plea." App. 11.

These are not barebones allegations. They are specific and particularized: They note when critical events happened, what happened, and what failed to happen. "[I]f proven," such allegations "would entitle [Mr. Ford] to relief." *Mayberry v. Dittmann*, 904 F.3d 525, 532 (7th Cir. 2018).

More importantly, by implying that Mr. Ford's affidavit cannot prompt an evidentiary hearing, the State makes the same error as the Indiana Court of Appeals. As this Court has "repeatedly stated," a post-conviction record

"may include a so-called 'self-serving' affidavit." *Dalton v. Battaglia*, 402 F.3d 729, 735 (7th Cir. 2005). Any holding to the contrary is based on an "old common-law rule" that "was discarded long ago." *Id.* at 735.

This case, indeed, mirrors the circumstances in *Dalton*. In *Dalton*, the district court "found that [the defendant] could not prevail based on [his] affidavit[]" because it "consist[ed] of his own self-serving statements." *Id.* at 734. In remanding for an evidentiary hearing, this Court held that an uncontroverted affidavit combined with the defendant's "exercise of due diligence" to obtain evidence warranted a hearing. *Id.* at 736.

Just as in *Dalton*, Mr. Ford diligently tried to supplement the record. He *tried* to compel his attorney to testify. App. 123. He *tried* to depose his counsel. App. 127. He *tried*, by filing motions in state and federal court, to obtain an evidentiary hearing. *See, e.g.*, App. 1, 127. He was, however, "thwarted at all turns," *Dalton*, 402 F.3d at 737: first by counsel who declined to cooperate and then by courts who rejected his manifold efforts.

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), is also instructive. There, the state court found an appellant "simply not credible" for alleging

"that he could not reach his attorney to clarify the plea offer," making "an evidentiary hearing [] unnecessary." *Id.* at 1053–54. It reasoned that appellant "had not made out a prima facie case . . . [that he] would have accepted [a] plea bargain." *Id.* at 1050.

That was error. As the Ninth Circuit explained, the state court "made "an impermissible—and a really speculative—conclusion." *Id.* at 1055. It "should not have required [the appellant] to prove his claim without affording him an evidentiary hearing." *Id.* at 1054. Had appellant received such a hearing, "we would not be second-guessing those procedures and [holding that their] results [were] objectively unreasonable." *Id.* at 1056.

This Court has, consistent with *Dalton* and *Nunes*, remanded other postconviction matters for evidentiary hearings based on statements from a petitioner's affidavit. *See, e.g.*, *Ward v. Jenkins*, 613 F.3d 692, 701 (7th Cir. 2010) (petitioner "requested" hearing "in his state proceedings in order to develop the factual basis for his assertions"); *Sawyer v. United States*, 874 F.3d 276, 279 (7th Cir. 2017) ("[D]istrict courts may not discount a petitioner's declarations simply because they may be self-serving.").

To be sure, when "assertions" are "conclusory," a hearing may not be necessary. *Martin v. United States*, 789 F.3d 703, 706 (7th Cir. 2015). But

that is not this case. Here, Mr. Ford repeatedly pointed to specific evidence of plea discussions. He described the letter that the prosecutor sent to counsel. *E.g.*, R. 1 at 13. He moved to compel counsel to testify or provide an affidavit. App. 119, 123. He offered specific detail behind his interactions with counsel. He, in short, more than satisfies a burden that, as this Court has made clear, "is not meant to be onerous." *Martin*, 789 F.3d at 707.

2. The Indiana Court of Appeals ignored evidence.

As to category (2), the State acknowledges that a failure to consider critical evidence would satisfy § 2254(d)(2). Opp. Br. at 11. But, it claims, Mr. "Ford does not point to any evidence that the state court ignored." *Id.* It contends, similarly, that "[h]ere, the facts were not disputed, just the legal effects flowing from those facts." *Id.* Wrong and wrong.

First, as the district court noted, the Indiana Court of Appeals "ignore[d] the fact that Ford *tried* to obtain counsel's testimony." App. 12. That observation, as a finding of fact, is reviewed for "clear error." *Bintz v. Bertrand*, 403 F.3d 859, 865 (7th Cir. 2005). Nothing in the State's opposition suggests that the district court's finding was error, let alone clear error.

What is more, the "legal effects flowing from" these disputed facts *are* highly consequential. Opp. Br. at 11. As *Lee v. Kink*, 922 F.3d at 775, explains,

a state court may not "insulate their decisions from federal review by refusing to entertain vital evidence." There, just as in this case, petitioner offered affidavits in support of his position. And petitioner, just like Mr. Ford, "wanted to introduce more" evidence, but "the state barred the door." *Id.* By "fail[ing] to afford him a hearing," "the state judiciary" had—just as it has here—"acted unreasonably." *Id.* at 774–75.

Both *Carlson v. Jess*, 526 F.3d 1018 (7th Cir. 2008), and *Brumfield v. Cain*, 576 U.S. 305 (2015), confirm this point. *Carlson* involved a court's factual determination which ignored statements from the parties on whether the relationship between client and counsel had "completely broken down." 526 F.3d at 1023. *Brumfield* concerned an overreliance on one specific piece of evidence, without considering other evidence or efforts to obtain other evidence. 576 U.S. at 322. Consistent with *Lee*, the gist of *Carlson* and *Brumfield* is that, when a state court glosses over essential or critical evidence, its resulting adjudication is "based on an unreasonable determination of the facts." 28 U.S.C. § 2254(d)(2). So too here.

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

The Indiana Court of Appeals' decision also "involved an unreasonable application of[] clearly established Federal law"—namely, an inappropriate

application of the missing evidence rule. 28 U.S.C. § 2254(d)(1). The State's advances, in its opposition, three arguments. One, that Mr. Ford "never clearly explains the rule." Opp. Br. at 12 n.2. Two, that Mr. Ford does not show "how it is clearly established federal law." *Id.* And three, that the rule does not "appl[y] to state collateral review." *Id.* All three assertions are unavailing.

First, as the opening brief makes clear, the missing evidence rule "applies when 'the accused is so situated that he could offer evidence' that 'suspicious circumstances can be accounted for consistently with his innocence.'" Pet. Br. at 40 (quoting *Mammoth Oil Co. v. United States*, 275 U.S. 13, 52 (1927)). If the accused "fails to offer such proof, the natural conclusion is that the proof, if produced, instead of rebutting, would tend to sustain the charge." 275 U.S. at 52. Likewise, "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).

Second, the rule constitutes "clearly established Federal law," as it has been recognized and applied "by the Supreme Court," 28 U.S.C. § 2254(d)(1), in numerous decisions: not just *Mammoth Oil* and *Interstate Circuit*, but also

Local 167, Int'l Brotherhood of Teamsters v. United States, 291 U.S. 293, 298 (1934), and, critically, *Dunn v. Reeves*, 141 S. Ct. 2405 (2021).

Third, *Dunn* answers the State's final concern, by applying the missing evidence rule in collateral review proceedings. During an evidentiary hearing in state court, petitioner in *Dunn* alleged ineffective assistance. *Id.* at 2408. But "[d]espite [petitioner's] focus on his attorney's performance, he did not give them the opportunity to explain their actions. Although all three of his lawyers apparently were alive and available, [petitioner] did not call them to testify." *Id.* at 2409.

That lack of testimony meant that the Supreme Court "simply [did] not know what information and considerations [might have] emerged as counsel reviewed the case and refined [] strategy." *Id.* at 2411. As it explained, "if the attorneys *had been given the chance to testify*, they might have pointed to information justifying the strategic decision to devote their time and efforts elsewhere." *Id.* at 2412 (emphasis added). Because petitioner did not give his attorneys that chance, despite opportunity to do so, an adverse inference was warranted.

The Indiana Court of Appeals sought to apply the same inference here: "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. But that inference is warranted only if an individual *can* produce the desired evidence. *See Mammoth Oil*, 275 U.S. at 52 (rule may be "applied . . . only in cases where it is manifest that proofs are in the power of the accused.").

Petitioner in *Dunn* was in such a position. The state courts afforded him a hearing, but he "offered no testimony or other evidence from [his counsel]" to supplement his argument. 141 S. Ct. at 2411. Mr. Ford was not. He never received an evidentiary hearing, but the Indiana Court of Appeals faulted him anyway for not producing evidence he tried to but could not obtain. The Indiana Court of Appeals, in other words, "unreasonably extend[ed] a principle to a situation in which it should *not* have controlled." *Jones v. Basinger*, 635 F.3d 1030, 1044 (7th Cir. 2011). That is "[a]n unreasonable application of Supreme Court precedent," failing 2254(d)(1). *Id.*

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

Because the Indiana Court of Appeals' decision fails both § 2254(d)(1) and § 2254(d)(2), Mr. Ford's ineffective assistance claims are reviewed de novo. *Carlson*, 526 F.3d at 1024. And under such review, Mr. Ford's trial counsel's actions were both deficient and prejudicial.

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

Consider plea bargaining's normal course. At **step one**, the prosecutor reaches out to counsel to discuss a plea. *See Frye*, 566 U.S. at 138 ("[T]he prosecutor sent a letter to Frye's counsel."); R. 1 at 13 (prosecutor "sent" Mr. Ford's counsel "a letter" "offer[ing] to discuss" a "plea"). In **step two**, counsel informs the client and the client, if interested, instructs counsel to pursue negotiations. *Lafler*, 566 U.S. at 161 ("[R]espondent . . . expressed a willingness to accept" an offer); *Hill v. Lockhart*, 474 U.S. 52, 54 (1985); R. 1 at 13–14 (instructing counsel to "seek guilty plea negotiations" because Mr. Ford "was interested to hear what they had to offer."). During **step three**, counsel negotiates and obtains an offer for the client. *Frye*, 566 U.S. at 141 (quoting *Padilla v. Kentucky*, 559 U.S. 356, 373 (2010) ("[T]he negotiation of a plea bargain is a critical phase of litigation for purposes of the Sixth Amendment right to effective assistance of counsel")). At **step four,** counsel communicates the offer. *Frye*, 566 U.S. at 139. At **step five**, counsel informs the client of the consequences of the plea and advises whether to accept, reject, or continue to negotiate. *Lafler*, 566 U.S. at 161 ("[H]is attorney convinced him that the prosecution would be unable to establish his intent to murder"). Finally, once an offer is accepted by the parties, the court oversees a change of plea hearing.

Frye, 566 U.S. at 142–143. Both *Frye* and *Lafler*, as well as other cases, follow this basic sequence. *See Hill*, 474 U.S. at 54; *Padilla*, 559 U.S. at 359–60.

Case law makes clear that a failure to provide proper advice at **step five** constitutes deficient performance. Counsel in *Padilla*, for instance, "failed to advise [petitioner] of" certain immigration "consequence[s] prior to his entering the plea," and counsel in *Lafler* gave advice based on "an incorrect legal rule." *See* 559 U.S. at 359; 566 U.S. at 162.

Moreover, *Frye* and its progeny make clear that a failure at **step four**—to obtain but then fail to communicate an offer—is also constitutionally deficient. 566 U.S. at 145; *United States v. Knight*, 981 F.3d 1095, 1100 (D.C. Cir. 2020) (failure to "mention the plea offer").

At heart, then, the State's contention is that counsel who does even less—i.e., fails **step three**—is somehow deserving of even more constitutional protection. Under its reading, an attorney who does not negotiate fares better than one who negotiates, obtains an offer, and provides (incorrect) legal advice or fails to communicate the offer to the client. That understanding makes no sense.

"Quite simply, when a criminal defendant asks his or her attorney to obtain a plea offer, and the attorney fails to do so when acquiring one was

reasonably practicable, then that attorney has made an error so serious that counsel was not functioning as the counsel guaranteed the defendant by the Sixth Amendment." *Steele v. United States*, 321 F. Supp. 3d 584, 592 (D. Md. 2018) (citing *Strickland v. Washington*, 466 U.S. 668, 689 (1984), and *Lafler*, 566 U.S. at 165–66) (internal quotation marks omitted).

The State's cherry-picking of language from *Martin* and *Lafler* does not counsel otherwise. Opp. Br. at 10. *Martin*, to be sure, says that ineffective assistance claims generally presuppose "the existence of a plea agreement." *Martin*, 789 F.3d at 707. But *Martin* followed up by clarifying that this language was limited to the facts of the case at hand—i.e., because defendant there "ha[d] failed to present *any evidence*, apart from his vague and conclusory allegations." *Id.* Nor did defendant there even try to supplement the record. More to the point, in *Sawyer v. United States*, this Court subsequently explained that the allegations in *Martin* were "problematic because of their *conclusory* nature, rather than the fact that they came from the petitioners as interested parties." 874 F.3d at 279. In other words, so long as an individual's allegations are *not* conclusory and so long as an individual *tries* to supplement the record—two bars Mr. Ford plainly clears—*Martin* does not apply.

Lafler is even further afield. The opinion does, to be sure, note that "[i]f no plea offer is made . . . the issue raised here simply does not arise." 566 U.S. at 168. But this plucks a single sentence out of context. The immediately preceding sentences make clear that the Court was responding to a common point, made in *Lafler* and in *Frye*, that defendants "no right to be offered a plea." *Id.*; *see also Frye*, 566 U.S. at 143 ("[T]he State insists there is no right to receive a plea offer."); Opp. Br. at 9.

The Supreme Court, though, rejected that argument. *Id.* at 143–44. Instead, as it recognized, "the negotiation of a plea bargain, rather than the unfolding of a trial, is almost always the critical point for a defendant." *Id.* at 144. Because "criminal justice" is "a system of pleas," "defense counsel have responsibilities in the plea bargain process . . . that must be met to render the adequate assistance of counsel that the Sixth Amendment requires." *Id.* at 143.

Case law post *Frye* and *Lafler* affirms this point. As noted in *Byrd v. Skipper*, 940 F.3d 248, 253 (6th Cir. 2019), defendant "specifically asked" his counsel "about the possibility of pleading guilty." The government likewise expressed "interest[] in . . . negotiating an agreement." *Id.* at 251. But counsel

declined to negotiate, instead "rel[ying] on" his own decision to pursue trial. *Id.* at 253.

Similarly, in *Steele*, counsel "not only neglected her obligations to communicate with her client regularly, but also failed to proactively engage in the plea bargaining process with the Government." 321 F. Supp. 3d at 592. Although the client asked "his attorney to obtain a plea offer," counsel "failed to do so." *Id.* And likewise, in *Carmichael v. United States*, 966 F.3d 1250, 1258 (11th Cir. 2020), there was no dispute that an attorney's "performance [is] deficient due to their failure to . . . seek a negotiated plea." *See also Hawkman v. Parratt*, 661 F.2d 1161, 1171 (8th Cir. 1981) ("[C]ounsel's failure to initiate plea negotiations . . . constituted ineffective assistance of counsel which prejudiced" petitioner.").

Nor, finally, does *United States v. Hall*, 212 F.3d 1016 (7th Cir. 2000), hold otherwise. Defendant there had "remained steadfast in refusing to ever consider any plea agreement involving time in" prison. *Id.* at 1021. There was thus little indication that counsel would receive "cooperation of his client." *Id.* at 1022. There was also nothing to suggest the government wanted to "cooperat[e]" or offer "an agreement." *Id.*

Hall thus stands for an unremarkable proposition. When a case does not get past **step one** (because the prosecutor has no interest in negotiating) or **step two** (because the client is only willing to entertain the implausible), then a "fail[ure] to procure a plea agreement" may not be ineffective. *Id.* at 1020. But in this case, the State *did* want to negotiate—satisfying (unlike *Hall*) **step one**. Mr. Ford did too—meeting (again, unlike *Hall*) **step two**. It was counsel who disregarded Mr. Ford's request to engage, by simply doing "nothing" at **step three**. App. 170. That is deficient performance.

B. Counsel's inaction was prejudicial.

The State's claims about prejudice are similarly unavailing. It contends that Mr. 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." Opp. Br. at 10. In so doing, it disregards the appropriate legal standard and invents its own.

The law does not require Mr. Ford to say with certainty "he would accept" a plea and "admit guilt." *Id.* The standard, instead, is whether there was "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.

Here it plainly would have. That is because, to satisfy "reasonable probability," two data points are critical. *Id.* First, "a significant sentencing disparity" between a potential plea and actual sentence. *Raysor v. United States*, 647 F.3d 491, 495 (2d Cir. 2011). And second, whether Mr. Ford was "amenable to accepting" an offer. *Knight*, 981 F.3d at 1103.

The government does not dispute that the disparity here would have made a plea offer attractive to Mr. Ford. By failing to pursue plea negotiations, counsel "denied [Mr. Ford] the opportunity to accept a lesser charge and more lenient sentence." *Byrd*, 940 F.3d at 252.

On the second prong, a defendant satisfies "reasonable probability" when they (1) "inquire[] about the potential of pleading guilty," *Id.* at 259; (2) ask "how much time does the government want," *Knight*, 981 F.3d at 1104 (alteration omitted); (3) are "willing to consider pleading guilty," *Mask v. McGinnis*, 233 F.3d 132, 141 (2d Cir. 2000); or (4) state that they are "interested in [a] plea," *Fulton v. Graham*, 802 F.3d 257, 266 (2d Cir. 2015). By telling his counsel "to discuss a plea with the prosecutor because he was interested to hear what they had to offer," Mr. Ford's fits well within this line of cases. R. 1 at 13–14; *accord* App. 129 ("I requested he go see what kind of deal they would offer.").

As a final matter, the State points to Indiana law, saying that "[a] defendant may not plead guilty and *simultaneously* assert innocence." Opp. Br. at 9–10 (citing *Ellis v. State*, 67 N.E.3d 643, 646–50 (Ind. 2017)) (emphasis added). That is true, but it does not get the State far. After all, as this Court has made clear, nothing prevents an Indiana defendant from "silently harbor[ing] a belief of innocence," pleading guilty, and then challenging their conviction afterward—just what Mr. Ford could have done. *United States v. Kane*, 944 F.2d 1406, 1413 n.3 (7th Cir. 1991). A "plea then is not a lie, but a compromise settled upon voluntarily by the defendant," *id.*, reflecting the "horse trading" of "what plea bargaining is" today, *Frye*, 566 U.S. at 144.

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

A. Counsel's witness strategy was deficient.

Counsel's actions at trial—namely, his approach to witness strategy—suffers from similar constitutional deficiencies. Those deficiencies take several forms: promising the jury that he would call Mr. Ford, but not doing so, App. 64; promising the jury that he would call Barbara Ford, but not doing so,

App. 50; and questioning Laressa Ford with no coherent strategy, App. 67–71. The State offers no serious rebuttal on any of these fronts.

As to Mr. Ford, for instance, the State takes a wholly unsupported detour. It speculates that "Ford could have told trial counsel that he was willing to testify and change[d] his mind during the trial," and—alarmingly—that there was no "contradictory evidence . . . from Ford himself" on this point. Opp. Br. at 14–15. But Mr. Ford *did* offer contradictory evidence. His affidavit says it was "vital I testify," which "Mr. Hicks did not allow to happen." App. 130. It notes that counsel "never clarified to the jury why he had told them we would testify but didn't." *Id.* Such references make clear that trial counsel, and not Mr. Ford, broke his promise. R. 8-11 at 23–24; R. 8-15 at 11.

The State likewise misconstrues the record as to Barbara Ford, asserting that Mr. Ford "may not change his claim after he lost in the state court." Opp. Br. at 17. It asserts Mr. Ford told the state courts that Barbara would "testify about a specific situation," rather than "testify more generally about a habit of lying," rendering Barbara's testimony inadmissible under Indiana law. *Id.* at 16–17. That too is incorrect.

Again, Mr. Ford's affidavit plainly says that "Barbara wanted to testify about Yolanda's habit of lying." App. 130. His brief to the Indiana Court of

Appeals and Supreme Court said the same. R. 8-11 at 26 ("If defense counsel had put Barbara Ford on the stand, she would have provided evidence . . . [that] Yolanda Ford had a history of lying."); *accord* R. 8-15 at 8 ("Barbara Ford . . . would testify Yolanda had a history of lying.").

Further, from the outset, Mr. Ford has asserted that Mr. Hicks was "unprepared" for trial and "had not spoken with Barbara Ford" in advance. R. 8-9 at 19. As this Court and others have explained, any "decision not to call" a critical "witness to testify cannot be passed off as a matter of strategy" if "counsel never bothers to find out what [she] may say on the stand." *Olvera v. Gomez*, 2 F.4th 659, 669 (7th Cir. 2021); *accord Hawkman*, 661 F.2d at 1169 (the investigation of "a reasonably competent attorney" generally "includes an independent interviewing of witnesses"). The State's halfhearted nod toward Indiana evidence law does not transform counsel's deficient conduct into effective assistance.

Finally, as to Laressa, the State all but admits that her cross-examination was a "mistake of counsel." Opp. Br. at 17. It concedes that "[t]here is no evidence from counsel as to why he asked" Laressa certain questions. *Id.* at 18. But it then inexplicably concludes that "there is no evidence to rebut the

strong presumption that counsel's conduct" was ineffective. *Id.* (internal quotation marks omitted). It invokes this same sleight-of-hand—no evidence, presumption of reasonableness, no relief—for Mr. Ford and Barbara as well. Opp. Br. at 14, 16.

It would be hard to find a more glaring example of circular reasoning. The State may not, with one side of its mouth, deny Mr. Ford an opportunity to supplement the record, and with the other side, fault him for not supplementing the record.

More generally, the presumption of reasonableness is not some cure-all for otherwise deficient conduct. That is because "a reviewing court should not . . . construct strategic defenses which counsel does not offer." *Harris v. Reed*, 894 F.2d 871, 878 (7th Cir. 1990). And more specifically, when counsel "ma[kes] representations" in an opening statement, only not to deliver on them, "the foundation for an [ineffective assistance] 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); *accord 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.").

One final note. The State's opposition, for the first time, asserts Mr. Ford has procedurally defaulted his allegations as to Laressa. Opp. Br. at 17. And to be sure, Mr. Ford did not specifically mention Laressa in his brief to the Indiana Supreme Court. But that is not the end of the inquiry.

First, procedural default is "an affirmative defense that the State is obligated to raise and preserve." *Blackmon v. Williams*, 823 F.3d 1088, 1100 (7th Cir. 2016). Mr. Ford pointed to Laressa's cross-examination as an instance of trial counsel's ineffectiveness in his federal habeas petition. R. 1 at 25. Nowhere in its opposition did the State assert—on this question or any other—procedural default. *See* R. 8. It did not seek reconsideration on this point when the district court raised it in its opinion. And it did not oppose Mr. Ford's motion to expand the certificate of appealability on this ground.

Second, it is undisputed that "Ford raised this claim in his petition for post-conviction relief, his affidavit in support, and his appellate brief." App. 28 (citations omitted). Yet, despite these repeated assertions, "it was not addressed by the post-conviction court or the Indiana Court of Appeals." *Id.*

Third, Mr. Ford's brief to the Indiana Supreme Court did generally assert ineffective assistance. R. 8-15 at 6. It referred to counsel's "fail[ure] to adequate investigate the case," *id.* at 7; his "lack of preparedness," *id.* at 8;

and his overall handling of witness strategy, *id.* at 10–12. As this Court has underscored, "ineffective assistance of counsel is a single ground for relief no matter how many failings the lawyer may have displayed." *Hicks v. Hepp*, 871 F.3d 513, 525 n.6 (7th Cir. 2017).

Given these circumstances, the State's assertions about procedural default are not well taken.

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

Each of counsel's missteps here—failing to negotiate a plea, breaking promises made in opening, examining a witness with no cogent strategy—is grounds for relief. Taken together, as a cumulative prejudice analysis requires, they establish a convincing case for granting habeas. *See Alvarez v. Boyd*, 225 F.3d 820, 824 (7th Cir. 2000) ("The cumulative effect of two or more individually harmless errors has the potential to prejudice a defendant to the same extent as a single reversible error.").

The State's primary counterargument—that it is "unclear how plea negotiations could impact what happened at trial," Opp. Br. at 19—lacks merit. Rather, counsel's actions pretrial and during trial form a common thread. Counsel did not negotiate a plea, despite instructions from Mr. Ford and interest by the prosecution. Nor was counsel apparently busy preparing for

trial. "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; *see also Anderson v. United States*, 981 F.3d 565, 573 (7th Cir. 2020) ("In the plea bargaining context, reasonably competent counsel will attempt to learn all of the facts of the case, make an estimate of a likely sentence, and communicate the results of that analysis before allowing his client to plead guilty.") (quoting *Gaylord v. United States*, 829 F.3d 500, 506 (7th Cir. 2016)).

That pattern only continued at trial itself, where counsel filed virtually no evidentiary motions (even though he could have). He then broke several promises made at opening. He failed to effectively question Laressa. His cross-examination was so ineffective that the prosecution referred to it in closings. App. 80–81. And the prosecution referred, as well, to the credibility of the sides, App. 85, rendering Mr. Ford and Barbara's absence all the more glaring.

In the end, this is not a matter involving an "isolated mistake of counsel." Opp. Br. at 17. It is a case in which counsel's mistakes were plain, repeated, and manifest. Together, they render the "chances of acquittal [] better than negligible," satisfying "prejudice." *Hampton*, 347 F.3d at 246.

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

The record sufficiently demonstrates that Mr. Ford merits habeas relief. But if the Court harbors uncertainty on the appropriate remedy, it should at minimum grant Mr. Ford an evidentiary hearing—as virtually every other court has done in like cases, even when relief was ultimately denied. *See, e.g.*, *Dalton*, 402 F.3d at 739; *Ward*, 613 F.3d at 698; *Alkhalidi v. Neal*, 963 F.3d 684, 686 (7th Cir. 2020); *Overstreet v. Wilson*, 686 F.3d 404, 409 (7th Cir. 2012). The State's three contentions to the contrary reflect a misreading of AEDPA.

First, it discusses at length *Cullen v. Pinholster*, 563 U.S. 170 (2011), and 28 U.S.C. § 2254(e)(2). But neither applies here. Instead, as AEDPA's text makes clear, § 2254(e)(2) applies only "[i]f the applicant has failed to develop the factual basis of a claim in State court proceedings." "[T]he phrase 'failed to develop' means lack of diligence in developing the claims." *Williams v. Taylor*, 529 U.S. 420, 430 (2000). Consequently, if a petitioner "establishes that he was diligent in his attempts to develop the factual record in the state court, he does not have to satisfy the remaining provisions of § 2254(e)(2) in order to obtain an evidentiary hearing." *Owens v. Frank*, 394 F.3d 490, 499

(7th Cir. 2005). In particular, where a petitioner "trie[s] repeatedly to obtain [evidence], only to be thwarted at all turns," he satisfies § 2254(e)(2). *Dalton*, 402 F.3d at 737.

That prerequisite is met here. As the district court observed, "Seventh Circuit precedent would suggest" that "Ford was diligent in his pursuit of testimony from his trial counsel." App. 15 n.2. In so finding, the district court cited *Lee v. Kink*, where petitioner—just like Mr. Ford—provided affidavits and "ask[ed] for a hearing to explore an ineffective-assistance theory," only to be denied in state court. 922 F.3d at 774. That denial "ma[de] it impossible to say that [petitioner] has failed to develop in state court the factual basis of his claim." *Id.* (alteration and internal quotation marks omitted). In short: § 2254(e)(2) has no place where, as here, Mr. Ford "filed every possible motion to subpoena, depose and compel affidavits to no avail, yet the Court of Appeals held this against him." R. 8-15 at 7.

Second, the State claims Mr. Ford "fails to discuss the standard for an evidentiary hearing in a federal habeas action." Opp. Br. at 20. That too is incorrect. "If § 2254(e)(2) does not apply, it is then necessary to evaluate the request for an evidentiary hearing under pre-AEDPA standards." *Davis v.*

Lambert, 388 F.3d 1052, 1061 (7th Cir. 2004) (internal quotation marks omitted). And what is that standard? If "(1) the petitioner alleges facts which, if proved, would entitle him to relief and (2) the state courts, for reasons beyond the control of the petitioner, never considered the claim in a full and fair hearing." *Id.* The opening brief explicitly references that standard. Pet. Br. at 32.

Finally, the State asserts that Mr. Ford did not raise "the claim on appeal." Opp. Br. at 20. That too is meritless. For one, Mr. Ford did point to the State's refusal to grant him a hearing on appeal, and explained why that refusal prejudiced him. *See* R. 8-11 at 7–8; R. 8-15 at 7. He likewise sought an evidentiary hearing when beginning federal habeas proceedings. App. 1.

More importantly, a claim is a legal basis for relief. A request for an evidentiary hearing to develop the factual basis behind a claim is not. That is why, to show diligence, a prisoner must "seek an evidentiary hearing in state court in the manner prescribed by state law." *Williams*, 529 U.S. at 437. There is, however, no corresponding requirement requiring a petitioner to make this same request in every filing to every single court of review. Rather "[i]f the state trial judge has made serious procedural errors (respecting the claim pressed in federal habeas)," a "federal hearing is required"—full stop. *Townsend v. Sain*, 372 U.S. 293, 316 (1963).

* * *

The ramifications of the State's theory are troubling. Taken seriously, they would excuse virtually all constitutionally ineffective assistance so long as (1) counsel refuses to cooperate in postconviction proceedings, and (2) state courts, presuming counsel acted reasonably, refuse to entertain evidence notwithstanding credible allegations. That is not the law. The Supreme Court has made that clear in *Lafler*, *Frye*, and *Miller-El*, and this Court has affirmed the point in *Dalton*, *Carlson*, and *Hampton.* It should do so again here.

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,

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I hereby certify:

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/s/ Xiao Wang
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DATED: March 7, 2023

CERTIFICATE OF SERVICE

I, Xiao Wang, counsel for Petitioner-Appellant, certify that, on March 7, 2023, a copy of the attached reply brief 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: MARCH 7, 2023