IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 16–1013

CHIJIOKE BOMANI BEN-YISRAYL, Petitioner-A N.E.2d ppellant v. **RON NEAL**, Superintendent, Indiana State Prison, Respondent-Appellee.	))))))))))))	Appeal from the United States District Court for the Southern District of Indiana, Indianapolis Division Case No. 1:12–cv–661–TWP–MJD The Honorable Tanya Walton Pratt, Judge.

OPENING BRIEF AND REQUIRED SHORT APPENDIX OF CHIJIOKE BOMANI BEN-YISRAYL, PETITIONER-APPELLANT

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Disclosure Statement

No. 16–1013

Short Caption: **Chijioke Bomani Ben-Yisrayl v. Ron Neal.**

The undersigned, counsel of record for the Petitioner-Appellant, Chijioke Bomani Ben-Yisrayl, furnishes the following in compliance with 7th Circuit Rule 26.1:

(1) The full name of every party or amicus the attorney represents in the case:

Chijioke Bomani Ben-Yisrayl

(2) The names of all law firms whose partners or associates have appeared for the party in the case (including proceedings in the District Court or before an administrative agency) or are expected to appear for the party in this court:

Not Applicable

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Dated: January 30, 2017

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Ben-Yisrayl cannot have defaulted his trial ineffective- assistance claim by not raising it in his direct appeal or with a so-called *Davis* petition; he is also entitled to a hearing of that claim in the district court, because the district court had no basis to decide the merits of the claim either way without an evidentiary hearing. 22

A. Ben-Yisrayl raised his trial ineffective assistance claim at the time(s) and place(s) required by state law, and that is all that fair presentation requires. 22

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IN THE
UNITED STATES COURT OF APPEALS
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No. 16–1013

CHIJIOKE BOMANI BEN-YISRAYL,	)	Appeal from the United States District Court for the Southern District of Indiana, Indianapolis Division
Petitioner-Appellant,	)	
v.	)	Case No.1:12–cv–661–TWP–MJD
RON NEAL,	)	The Honorable Tanya Walton Pratt, Judge.
Superintendent, Indiana State Prison,	)	
Respondent-Appellee.	)	

OPENING BRIEF AND REQUIRED SHORT APPENDIX
OF CHIJIOKE BOMANI BEN-YISRAYL, PETITIONER-APPELLANT

Jurisdictional Statement

This is an appeal from the denial and dismissal of Chijioke Bomani Ben-Yisrayl's petition for a writ of habeas corpus under 28 U.S.C. § 2254. Ben-Yisrayl is in the custody of Ron Neal, the Superintendent of the Indiana State Prison in Michigan City, Indiana.

On May 16, 2012, Ben-Yisrayl filed his petition for a writ of habeas corpus under 28 U.S.C. § 2254 in the district court. D.E. 1.

On September 18, 2015, the district court issued its Order Denying Petition for Writ of Habeas Corpus and Denying Certificate of Appealability, D.E. 51; On the same day, the court also entered final judgment. D.E. 52.

On October 16, 2015, Under Federal Rule of Civil Procedure 59(e), Ben-Yisrayl filed a motion to alter or amend the district court's judgment. D.E. 53. On December 14, 2015, the district court denied Ben-Yisrayl's Rule 59(e) motion. D.E. 56.

On December 31, 2016, Ben-Yisrayl filed a timely notice of appeal. D.E. 57. 28 U.S.C. § 2107; Fed. R. App. P. 4(a)(1); *Browder v. Director*, 434 U.S. 257, 265 n.9 (1978).

On November 7, 2016, this Court granted a certificate of appealability with respect to the trial ineffective-assistance claim arising out of Ben-Yisrayl's resentencing:

> We find that Ben-Yisrayl has made a substantial showing of the denial of his right to the effective assistance of counsel at his resentencing hearing. See § 2253(c)(2). The parties must also address whether Ben-Yisrayl has defaulted review of his claim and whether the district court abused its discretion in only partly considering counsel's reply.

Doc. 9, App. 32a.

The district court had original jurisdiction of this case under 28 U.S.C. § 2254(a). This Court has jurisdiction of Ben-Yisrayl's appeal under 28 U.S.C. §§ 1291 & 2253(a).

This is an appeal from a final judgment disposing of all parties' claims.

Statement of the Issue

Should the Court remand this case for the district court to hear Ben-Yisrayl's trial ineffective-assistance claim, which cannot have been defaulted and which has never been heard, arising from his resentencing?

Statement of the Case

References to Documents

"App." will refer to the required short appendix included with this brief.

There are five state-court decisions underlying this case

***"Ben Yisrayl I*"**: *Davis v. State*, 598 N.E.2d 1041 (Ind. 1992), *reh'g denied*, *cert. denied* 510 U.S. 948 (1993). This was Ben-Yisrayl's direct appeal from his conviction and death sentence. (Ben-Yisrayl was then known as Greagree Davis.) This decision appears beginning at page 33a of the appendix.

"*Ben Yisrayl II*": *Ben-Yisrayl v. State*, 738 N.E.2d 253 (Ind. 2000), *reh'g denied*, *cert. denied* 534 U.S. 1164 (2002). This was Ben-Yisrayl's appeal from the partial denial of state post-conviction relief as well as the State's cross-appeal of the partial grant of post-conviction relief. The decision appears beginning at page 43a of the appendix.

"*Ben-Yisrayl III*": *State v. Ben-Yisrayl*, 809 N.E.2d 309 (Ind. 2004), *reh'g denied*, *cert. denied* 546 U.S. 1020 (2005). This was the State's appeal from a trial-court order declaring Indiana's death-penalty statute unconstitutional and does not play much of any part in this appeal. The decision appears beginning at page 56a of the appendix.

"*Ben-Yisrayl IV*": *Ben-Yisrayl v. State*, 908 N.E.2d 1223 (Ind. Ct. App. 2009), *trans. denied*. After Ben-Yisrayl obtained post-conviction sentencing relief that was affirmed by the Indiana Supreme Court in *Ben-Yisrayl II* above, the trial court imposed an alternative sentence for a term of years that had been entered after Ben-Yisrayl's trial—just in case the death sentence did not

survive review, which it didn't. The Indiana Court of Appeals remanded the case for a new sentencing hearing with respect to Ben-Yisrayl's murder convictioin. The decision appears beginning at page 59a of the appendix.

"Ben-Yisrayl V": *Ben-Yisrayl v. State*, 2010 Ind.App. Unpub. LEXIS 1744 (Ind. Ct App. December 14, 2010) (*mem.*), *reh'g denied*, *trans. denied*. This was Ben-Yisrayl's direct appeal of the sentence imposed after the new sentencing hearing ordered by the Indiana Court of Appeals in *Ben-Yisrayl IV* above. In the decision, the Court of Appeals affirmed Ben-Yisrayl's 60-year sentence for murder that was ordered to be served consecutively to the 90-year sentence for Ben-Yisrayl's other convictions. The decision appears beginning at page 69a of the appendix.

There are two district court discussions:

"Entry 1" will refer to the district court's Entry Denying Petition for Writ of Habeas Corpus and Denying Certificate of Appealability, D.E. 51, filed September 18, 2015. It appears beginning at page 2a of the appendix.

"Entry 2" will refer to the district court's Entry Denying Motion for Reconsideration, D.E. 56, filed on December 14, 2015. It appears beginning at page 21a of the appendix.

A. The History of the Case

1. *Before Ben-Yisrayl V*: The 26 Years Leading to Ben-Yisrayl's Final 150-Year Sentence

Chijioke Bomani Ben-Yisrayl, known at the time as Greagree Davis, was convicted for crimes related to the abduction and murder of Debra Weaver in April 1984. For the murder, Ben-Yisrayl was sentenced to death by the trial

judge after the jury could not reach a sentencing recommendation. For the other crimes—rape as a Class A felony, criminal confinement as a Class B felony, and burglary as a Class B felony—Ben Yisrayl was sentenced to consecutive terms totaling 90 years. *See Ben-Yisrayl IV*, 908 N.E.2d at 1225; App. 60a. In addition to sentencing Ben-Yisrayl to death for the murder, the trial judge imposed an "alternative" sentence of 60 years, intended as a backstop should the death sentence not stand up on review. *See id.*

After the Indiana Supreme Court affirmed Ben-Yisrayl's conviction and sentence in *Ben-Yisrayl I*, Ben-Yisrayl pursued post-conviction relief. Ben-Yisrayl raised a number of claims; Judge Cynthia Emkes, sitting as a special judge in the post-conviction trial proceedings, granted relief on two: his claims of trial ineffective assistance of counsel for an inadequate mitigation investigation and of appellate ineffective assistance for his appellate lawyer's blunder of raising trial ineffective assistance in Ben-Yisrayl's direct appeal. *See Ben-Yisrayl II*, 738 N.E.2d at 257, 259-60; App. 43a-44a, 45a-46a. As relief for the ineffective-assistance claims, Judgme Emkes ordered "a new penalty-phase and sentencing proceeding." *See id.* at 257; App. 43a. Ben-Yisrayl appealed Judge Emkes' denial of relief on his other claims; the State cross-appealed Judge Emkes' partial grant of relief. *See id.* at 257; App. 44a.

Ben-Yisrayl II affirmed Judge Emkes' denial of relief. It also said that Judge Emkes' should not have reached the merits of Ben-Yisrayl's trial ineffective-assistance claim, because that claim was *res judicata*, having been raised in Ben-Yisrayl's direct appeal, albeit on different grounds. *See id.* at 259-60; App. 45a.

Nonetheless, *Ben-Yisrayl II* affirmed Judge Emkes' grant of relief for Ben-Yisrayl's appellate ineffective assistance claim, even though that claim was based on essentially the same facts as the trial ineffective-assistance claim that the court had just held to be barred as *res judicata*. (Judge Emkes had concluded that Timothy Bookwalter, Ben-Yisrayl's trial lawyer, had been ineffective for a completely inadequate mitigation; she concluded Ben-Yisrayl's appellate lawyer had been ineffective for raising trial ineffectiveness with respect to the sentencing investigation that wasn't done without any record to support the claim. *See id*. at 266-268; App. 51a-52a.) *Ben-Yisrayl II* specifically affirmed the "grant of partial relief in the form of a new penalty phase trial and sentencing proceeding." *Id.* at 267-68; App. 52a.

After *Ben-Yisrayl II*, Ben-Yisrayl challenged the constitutionality of Indiana's death-penalty scheme. He succeeded in the trial court; and the Indiana Supreme Court reversed that decision, remanding the case "for reinstatement of the State's death penalty request and for penalty phase proceedings as previously ordered by this Court." *Ben Yisrayl III*, 809 N.E.2d at 311; App. 58a.

Back down in the trial court after *Ben-Yisrayl III*, it became known that, while the post-conviction cross-appeals in *Ben-Yisrayl II* had been pending, the Indianapolis Police Department had destroyed the testable biological evidence. And it had done so despite a specific order by Judge Emkes that that evidence be preserved. (There will be more about this later.)

The State dismissed its request that Ben-Yisrayl be sentenced to death. *See Ben-Yisrayl IV*, 908 N.E.2d at 1226; App. 61a. As a consequence, the trial court simply imposed the 60-year "alternative" sentence that the original trial judge

had imposed to backup the death sentence, leaving Ben-Yisrayl with a total sentence of 150 years. *See id.*

Ben-Yisrayl appealed that sentence, and the Indiana Court of Appeals reversed, concluding that the imposition of the "alternative" sentence had been improper. *See id.* at 1229; App. 65a. The court remanded the case "with instructions to conduct a sentencing hearing and resentence Ben-Yisrayl for his murder conviction." *Id.*

The trial court held the sentencing hearing ordered by *Ben-Yisrayl IV* and sentenced Ben-Yisrayl to 60 years in prison for the murder conviction. (There will be a great deal more to say about that hearing below.) It also ordered Ben-Yisrayl to serve that sentence consecutively to the other sentences, again for a total sentence of 150 years. *See Ben-Yisrayl V*, 2010 Ind. App. Unpub. LEXIS 1744, *9-*10; App. 72a.

Ben-Yisrayl appealed that sentence on a number of grounds, but the Indiana Court of Appeals affirmed the sentence. *Id.* at *35-*36; App. 80a.

2. *After* Ben-Yisrayl V*: Shut Out of State Court and into Federal Court*

In September 2011, after the failed appeal of his sentence in *Ben-Yisrayl V*, Ben-Yisrayl, *pro se*, sought post-conviction relief in Marion County by filing a post-conviction petition under Indiana Post-Conviction Rule 1, § 1. In September 2013, Ben-Yisrayl filed a post-conviction petition. D.E. 15-01. After the Indiana Public Defender appeared for Ben-Yisrayl in October 2011, in November the State filed its answer to Ben-Yisrayl's petition. D.E. 15-02. In that answer, the State asked that Ben-Yisrayl's claims not related to his resentencing be dismissed as an unauthorized under Indiana Post-Conviction Rule 1, § 12. D.E. 15-02 at 4. It also asked that the post-conviction trial court

take the entire petition under advisement until the petition could be investigated by the Indiana Public Defender. *Id*. The day after the State's answer was filed, the court noted on first page of the answer that the petition had been taken under advisement. *Id*. at 1.

Time passed with no action in the post-conviction court. Wisely, with just a couple of days left on the AEDPA clock, on May 16, 2012, Ben-Yisrayl, *pro se*, filed his habeas petition in this case. D.E. 1. In July I appeared in the district court for Ben-Yisrayl and filed a motion to stay the proceedings until the state-court post-conviction litigation could be concluded. D.E. 5. After the Respondent objected that Ben-Yisrayl was not entitled to a stay—and after some considerable further wrangling—the district court granted Ben-Yisrayl's stay request. D.E. 21.

The Respondent's objection to Ben-Yisrayl's request for a stay was based on Ben-Yisrayl's failure to exhaust his claims in state court. *See generally*, *e.g.*, D.E. 13. This was a most peculiar argument to make, because the State fought tooth and nail—successfully, as it turned out—to prevent Ben-Yisrayl from litigating his claims in state court at all. (If it was going to take that approach, it is puzzling to this day why the Respondent would not have simply waived the exhaustion requirement.)

Although he believed his post-conviction petition in Marion County to be proper, to cover all the bases, under Post-Conviction 1, § 12, Ben-Yisrayl filed a request with the Indiana Court of Appeals for permission to file a successive post-conviction petition that raised the same claims as the petition Ben-Yisrayl had filed in Marion County. The court denied permission. No transfer

petition to the Indiana Supreme Court lies from a denial of permission to file a successive post-conviction petition, so that was that there.

It was a different story with the petition filed in Marion County. On June 30, 2014, the post-conviction trial court dismissed Ben-Yisrayl's petition as successive and unauthorized. But an appeal lay from that order, and Ben-Yisrayl appealed. The Indiana Court of Appeals dismissed that appeal on December 17, 2015, and Ben-Yisrayl sought transfer.

The Indiana Public Defender, representing Ben-Yisrayl in the Indiana Supreme Court, pointed out that that office had any number of people who had obtained post-conviction relief and then, after new proceedings, had again filed a post-conviction as of right under Post-Conviction Rule 1, § 1, and that there had been no suggestion that those petitions were successive and unauthorized.

I filed an *amicus* brief on Ben-Yisrayl's behalf in the transfer case and explained why the Indiana Supreme Court needed to say either way what the law in this area is. It declined to do so and denied transfer. (The confusion continues to this day. Just recently the Indiana Court of Appeals decided *Stout v. State*, 2016 Ind. App. Unpub. LEXIS 838 (Ind. Ct. App. July 21, 2016) (*mem.*). *Stout* recites that Stout got post-conviction relief and a new trial. *Id.* at *1. It also recites that when Stout filed a new post-conviction petition after his new trial, the petition was originally dismissed as successive and unauthorized. The Court of Appeals reversed that decision: "[T]his court determined that Stout's petition should not be treated as a successive petition and remanded to the post-conviction court for further proceedings." *Id.* at * 4-5, n.1.)

Ben-Yisrayl notified the district court that the state-court proceedings were completely over, D.E. 38, and the case went live, as it were, in the district court.

The district court issued an order to show cause why Ben-Yisrayl's petition should not be granted. D.E. 39. The State filed its return to the show-cause order, D.E.42, and I failed to file a reply for Ben-Yisrayl within the time allotted. I filed a motion to file a belated reply together with the belated reply, D.E. 50 & 50-01, but the district court issued its decision denying and dismissing the petition, refusing to consider the belated reply. D.E. 51 at 7, 17; App. 8a &18a

Ben-Yisrayl filed a motion to alter the judgment under Rule 59(e), D.E. 53, the Respondent filed a reply to that motion answer, D.E. 55, and the district court denied the motion. D.E. 56.

This is the appeal of the an appeal from the denial denial and dismissal of Ben-Yisrayl's petition.

B. The Historical Facts as Found by the State Courts

As found by the Indiana Supreme Court in *Ben-Yisrayl I*, there follow the historical facts of the crimes in 1984 for which Ben-Yisrayl, then known as Greagree Davis, was convicted and originally sentenced to death:

> The defendant Greagree Davis was charged with Class B Burglary, Class B Criminal Confinement, Class A Rape, Class A Criminal Deviate Conduct, and Murder. The State sought imposition of the death penalty. The jury found the defendant not guilty of Criminal Deviate Conduct, but guilty on all other counts. The jurors were unable to agree upon a recommendation regarding the death penalty. The trial court, following a further sentencing hearing, ordered the death penalty.

. . . .

The evidence supporting the verdict is substantial. The defendant was acquainted with the victim's former roommate and had visited the victim's residence on many occasions during the summer of 1983. The defendant told the roommate several times of his sexual interest in the victim. About 7:00 p.m. on April 2, 1984, the defendant knocked on the door of the victim's neighbors, asking them whether the victim lived there, and was told that that she did not. The defendant then left. Sometime after 9:00 p.m., the victim arrived home and telephoned her brother. She told him that someone had broken into her residence through a back window and had removed all the light bulbs. The victim believed that the intruder might still be present. Her brother told her to leave immediately, and assumed that she would come to his residence. When she failed to arrive as he expected, he reported the incident to the police. The responding officer did not find the victim at her residence, but found a broken window. Later investigations discovered the keys to her new car on the porch and the missing light bulbs in a waste paper basket.

On April 4, a police officer found the gagged and substantially disrobed body of the victim at the top of a ramp under a bridge near her residence. An autopsy revealed chipped teeth; broken fingernails; abrasions on the hands, chin, and knees; multiple bruises to the lips and gums; and 113 stab or puncture wounds. The stab wounds were caused by two different knives. The victim’s neck evidenced manual strangulation. Seminal fluid was found in her vaginal cavity. The cause of her death was determined to be multiple stab wounds to the chest and abdomen.

The defendant told police investigators that he broke the back window of the victim’s home, entered it, unscrewed the light bulbs, waited, and hid behind a door when she returned home and made a phone call. When she walked towards the door, he got behind her. With the victim's hands tied in front of her, he took her to nearby railroad tracks, under a bridge, and up a slope. At some point he gagged her. The defendant told police that he stabbed her. He described the disposal of the knife, and took police to the creek where he had dropped

> it while trying to wash it off. Two knives were discovered at this location. One was the victim's pastry knife and the other was a chef's knife from the victim's kitchen knife set. The defendant also admitted taking the victim's watch and later selling it.
>
> Serological analysis of blood and seminal fluid obtained from the victim indicated characteristics representing less than one percent of the general population. The defendant's blood test results placed him within this category.

Ben-Yisrayl I, 598 N.E.2d at 1044-45; App. 33a-34a. The Indiana Court of Appeals quoted this recitation in *Ben-Yisrayl V*, the final direct appeal from Ben-Yisrayl's resentencing court. *Ben-Yisrayl V*, 2010 Ind. App. LEXIS 1744, *1-5; App. 70a. (*Ben-Yisrayl IV*, Ben-Yisrayl's direct appeal from his first resentencing after the partial grant of post-conviction relief, was essentially procedural and does not contain a detailed factual recitation.)

C. Ineffective Assistance Found by the Post-Conviction Court for a Failed Mitigation Investigation at Trial

Ben-Yisrayl II only spoke in general terms about the failed mitigation investigation that was the basis for relief for the strangely hybrid trial / appellate ineffective-assistance claim. The specific failures of that investigation as found by Judge Emkes are highly pertinent to the ineffective-assistance claim arising out of Ben-Yisrayl's resentencing and that is the subject of this appeal. The post-conviction trial court's order of May 31, 1996, appears most conveniently in the record below as D.E. 42-07, an attachment to the Respondent's return. (It also appears at pages 710-58 of the post-conviction transcript.) The following is the post-conviction trial court's itemized list of the available evidence not presented at Ben-Yisrayl's trial:

> There was substantial evidence available to Bookwalter [Ben-Yisrayl's trial lawyer] from family members and friends as to Petitioner's extreme substance abuse problem. However, due to Bookwalter's failure to investigate mitigation, he was unaware of said evidence. Furthermore, had Bookwalter employed a psychologist, he could have presented an expert's opinion on Petitioner's substance abuse addictions. . . . **Evidence to substantially question the Petitioner's capability to appreciate the criminality of his acts on the night of the murder due to his level of intoxication was available to Bookwalter and not adequately presented by him. Said evidence is critical under Indiana Code § 35-50-2-9 (c) (6), and should be presented thoroughly.**

Conclusion 16, D.E. 42-07 at 34 (emphasis added). The court went on:

> There was substantial credible evidence available to Bookwalter, had he properly investigated Petitioner's life, to argue against the death penalty based upon the specific factors in Petitioner's childhood affecting his mental health and emotional condition such as his mother's death at a young age, the extent of the responsibility he assumed for her care and his infant brother's care before her death, the extreme sense of isolation and guilt he felt as a result of her death, and the lack of his ability to recover from such trauma for the rest of his life. All this evidence, and more, was presented at the P.C.R. hearing, available to Bookwalter but not presented at the penalty phase, and considered mitigating evidence pursuant to Indiana Code § 35-50-2-9 (c) (2) (extreme mental or emotional influence upon the Petitioner at the time the murder occurred) and § 35-50-2-9 (c) (8) (any other circumstances appropriate for consideration) that should have been admitted thoroughly for jury consideration.in regard to said issue that it did not accurately represent the extent of Petitioner's addiction to marijuana and alcohol. . . . **Failure to investigate and present this evidence violates the *Strickland* standard.**

Conclusion 17, D.E. 42-07 at 34-35 (emphasis added).

In the post-conviction litigation, Ben-Yisrayl presented 18 witnesses who knew him. About those witnesses, the post-conviction trial court said:

> [They] testified about the Petitioner's childhood, character and attitude, frequent substance abuse, inability to cope with his mother's death, his lack of a father while growing up, his mental health, and his involvement in his church. All of said witnesses were available at the time of Petitioner's trial and none of them were called by Bookwalter to testify except Johnson and Chambers.

Finding 58, D.E. 42-07 at 14. In Finding 59, the court said: "The testimony of the witnesses called at the P.C.R. hearing was not merely cumulative of that presented." The court went on in Finding 59 to summarize the testimony of 8 of the 18 witnesses. Finding 59, D.E. 42-07 at 14-15. The court put together these two findings in Conclusion 18: "A great deal of the evidence presented at the P. C. R. hearing by the many character witnesses could have helped create a more sympathetic portrait of the Petitioner than was able to be presented through the two brief witnesses that Bookwalter chose to present." Conclusion 18, D.E. 42-07 at 35.

The post-conviction trial court found that Bookwalter had been ineffective at Ben-Yisrayl's original sentencing becaue "the mitigation evidence presented at the P. C. R. hearing present[ed] a substantially different picture of the Petitioner than the one the jury might have inferred in its absence." Conclusion 21, D.E. 42-07 at 37 (internal quotation marks omitted) (citation omitted).

D. The Case Put on at Ben-Yisrayl's Resentencing

In a murder case, with effectively a life sentence at stake, Ben-Yisrayl's trial counsel filed a 2-page, post-hearing memorandum that only addressed Ben-Yisrayl's post-conviction conduct in prison and his minimal criminal history. Sentencing Memorandum, D.E. 42-28 at 33 (Attachment I of proposed successive post-conviction petition). *See also Ben-Yisrayl V*, 2010 Ind. App. Unpub. LEXIS 1744 at *7, App. 71a. Ben-Yisrayl's trial counsel requested a presumptive sentence of 40 years to be served concurrently with the 90-year sentence unaffected by *Ben-Yisrayl II* or *Ben-Yisrayl IV*. Sentencing Memorandum, D.E. 42-28 at 33.

Ben-Yisrayl's trial counsel failed to raise almost every single mitigating factor that Bookwalter had failed to raise in mitigation at trial and for which failure Judge Emkes had, as rehearsed above, already found Bookwalter ineffective. Ben-Yisrayl's appellate lawyer tried gamely to insert this mitigation in the appeal in *Ben-Yisrayl V*, but the the Court of Appeals held the argument waived for the failure to make it at the sentencing hearing. *Ben-Yisrayl V*, 2010 Ind. App. Unpub. LEXIS 1744 at * *19-*20, *20 n.1; App. 76a.

E. The District Court's Decisions

In his belated reply, which the district court refused to consider, Ben-Yisrayl abandoned all but two of the claims from his original habeas petition. The two claims he did not abandon were that his trial lawyers had been ineffective at his resentencing and that his due process rights had been violated by the destruction of the testable biological evidence that Judge Emkes had ordered preserved. *See* Entry 1 at 9; App. 10a.

With respect to Ben-Yisrayl's due process claim, the district court concluded that Ben-Yisrayl had been denied any opportunity to raise the claim in the state courts, so it was properly before the court for *de novo* review. *Id*. at 11; App. 12a.

The district court denied relief on this claim on two theories. First, under *District Attorney's Office for Third Judicial Dist. v. Osborne*, 557 U.S. 52 (2009), Ben-Yisrayl had no due process right to test the evidence that had been destroyed. Entry 1 at 12; App. 13a. Second, under this Court's decision in *McCarthy v. Pollard*, 656 F.3d 478 (7th Cir. 2011), even if Ben-Yisrayl had a colorable due process right to test the evidence, he could not show that the Indianapolis Police Department knew that the evidence it destroyed was exculpatory. Entry 1 at 12-13; App. 13a-14a.

With respect to Ben-Yisrayl's trial ineffective-assistance claim, the district court first found that the claim had been procedurally defaulted by Ben-Yisrayl's failure to raise it in his direct appeal in *Ben-Yisrayl V*. Entry 1 at 14; App. 15a. Alternatively, taking into account *only* the allegations Ben-Yisrayl's petition and not the late reply, the district court concluded that: "Having not addressed how the short sentencing memorandum constituted deficient performance in light of the other efforts counsel made on Ben-Yisrayl's behalf at sentencing, Ben-Yisrayl has not carried his burden of demonstrating that resentencing counsel's performance was deficient, let alone that it prejudiced him." Entry 1 at 16; App. 17a.

Believing that the district court had made serious mistakes of law, Ben-Yisrayl filed a motion to alter the judgment under Rule 59(e). D.E. 56. The district court denied that as well. Feeling bound by *McCarthy*, the court

rejected Ben-Yisrayl's argument that this Court's decision in *McCarthy*, insofar as it requires *both* bad faith and knowledge of the exculpatory value of evidence before it is destroyed, is absolutely contrary to *Arizona v. Youngblood*, 488 U.S. 51 (1988). Entry 2 at 3-4; App. 23a-24a. (The district court characterized *McCarthy* as an "interpretation" of *Youngblood*. Entry 1 at 4; App. 24a. It is an interesting question whether a district court is bound by an "interpretation" by this Court that is absolutely contrary to the Supreme Court decision being "interpreted.")

With respect to Ben-Yisrayl's trial ineffective-assistance claim, the district court reiterated that Ben-Yisrayl had procedurally defaulted the claim by failing to raise it in his direct appeal. Entry 2 at 5; App. 25a. It added as well that Ben-Yisrayl could have tried to pursue a so-called *Davis* petition, *see Davis v. State*, 368 N.E.2d 1154 (Ind. 1977), suspending his direct appeal to pursue post-conviction relief. Entry 2 at 6-7; App. 26a-27a.

To Ben-Yisrayl's complaint, on the merits, that his trial counsel filed a two-page memorandum in a murder case with a life sentence at stake, the district court reiterated its position that "there is no correlation between the length of a brief and its quality." Entry 2 at 7; App. 27a (internal quotation marks omitted) (citation omitted). It also said: "To the extent that Ben-Yisrayl is now, for the first time, arguing that certain mitigation evidence was not presented and should have been presented, this argument was not raised in Ben-Yisrayl's habeas petition and thus cannot not be raised now by way of his Rule 59 motion." Entry 2 at 8; App. 28a.

Summary of the Argument

Quite simply, as a matter of law, Ben-Yisrayl cannot possibly have defaulted his trial ineffective-assistance claim by not raising the claim in his direct appeal from his resentencing. First, since 1998, the clear law in Indiana has been that if not raised in a direct appeal, trial ineffective-assistance claims may be brought in post-conviction proceedings. Second, as is clear from *Stout v. State* mentioned above, the Indiana courts simply cannot make up their mind about how to treat people in Ben-Yisrayl's position. (The Indiana Supreme Court was given the opportunity to make up every one's mind in Ben-Yisrayl's transfer petition, but declined the invitation.) Ben-Yisrayl's post-conviction petition was dismissed as successive and unauthorized. In *Stout*, Mr. Stout was in the identical position to Ben-Yisrayl, and the Court of Appeals sent Mr. Stout's petition back to the post-conviction trial court for hearing because it was not a successive petition, the court said.

Third, *Ben-Yisrayl II* had said, following the clear law since 1998, that Ben-Yisrayl's post-conviction trial ineffective-assistance claims were barred by *res judicata*, because trial ineffective assistance claims, albeit on other grounds, had been raised in Ben-Yisrayl's direct appeal in Ben-Yisrayl I. Under the circumstances, no sane lawyer would have made the same mistake a second time.

Fourth, and finally, the district court's idea that Ben-Yisrayl could have pursued a so-called *Davis* petition makes no sense. A *Davis* petition is a request to the appellate court to suspend the appeal so that post-conviction relief may be pursued. But the Indiana Court of Appeals twice denied Ben-

Yisrayl the opportunity to pursue state post-conviction relief. That should be sufficient proof that the Court of Appeals would have denied any *Davis* petition filed by Ben-Yisrayl.

Ben-Yisrayl raised his trial ineffective assistance claims at the time(s) and place(s) state law clearly required. That is all fair presentation, the flip side of exhaustion, requires.

On the merits of Ben-Yisrayl's trial ineffective assistance claim, without an evidentiary hearing, the district court simply had no basis to decide the claim's merits. Essentially, the district court decided the merits of the claim as if it had arrived before it on direct appeal. A habeas petition is a complaint; and Ben-Yisrayl is aware of no case not subject to the AEDPA that requires a habeas petition, itself, to establish an entitlement to relief.

Standards of Review

This Court reviews a district court's denial of habeas relief *de novo*. *E.g.*, *Coleman v. Hardy*, 690 F.3d 811, 814 (7th Cir. 2012).

Argument

Ben-Yisrayl cannot have defaulted his trial ineffective- assistance claim by not raising it in his direct appeal or with a so-called *Davis* petition; he is also entitled to a hearing of that claim in the district court, because the district court had no basis to decide the merits of the claim either way without an evidentiary hearing.

A. Ben-Yisrayl raised his trial ineffective assistance claim at the time(s) and place(s) required by state law, and that is all that fair presentation requires.

Fair presentation only requires that a claim be raised at the time and place required by state law. *See*, *e.g.*, *Carter v. Douma*, 796 F.3d 726, 733 (7th Cir. 2015). In *Woods v. State*, 701 N.E.2d 1208 (Ind. 1998), the Indiana Supreme Court made a promise:

> [T]he doors of postconviction must be open to adjudicate ineffective assistance if it is not raised on direct appeal. The defendant must decide the forum for adjudication of the issue—direct appeal or collateral review. The specific contentions supporting the claim, however, may not be divided between the two proceedings.

Woods, 701 N.E.2d at 1220; *see also Jewell v. State*, 887 N.E.2d 939, 941 (Ind. 2008) (if trial ineffective assistance has been raised on direct appeal, the entire issue will be *res judicata* on collateral review). In Ben-Yisrayl's case, the Indiana courts reneged on the promise in *Woods*, shutting Ben-Yisrayl out of the state courts altogether. But it cannot be said that Ben-Yisrayl did not attempt to raise his trial ineffective assistance-claim at precisely the time(s) and place(s) required by state law.

Second, in *Stout v. State* mentioned above, the Indiana Court of Appeals treated Mr. Stout exactly as Ben-Yisrayl expected he would be treated. Having obtained post-conviction relief and a new trial, after the new trial Mr. Stout filed another post-conviction petition. The post-conviction trial court dismissed

the petition as successive and unauthorized. The Indiana Court of Appeals sent it back to the post-conviction trial court, saying it wasn't. *See Stout*, 2016 Ind. App. Unpub. LEXIS 838 at *4-*5 n.1.

Third, *Ben-Yisrayl II* said that Ben-Yisrayl's trial ineffective-assistance raised in the post-conviction litigation were barred by *res judicata*, because trial ineffective assistance, albeit on other grounds, had been raised in Ben-Yisrayl's direct appeal in *Ben-Yisrayl I*. *See Ben-Yisrayl II*, 738 N.E.2d at 259; App. 45a. It is hard to imagine what sane lawyer would make that mistake a second time, especially in light of *Woods*, upon which the *Ben-Yisrayl II* court relied. *Ben-Yisrayl II*, 738 N.E.2d at 259; App. 45a.

Finally, the district court thought a so-called *Davis* petition a possible avenue that Ben-Yisrayl did not pursue. But *Davis* petitions are requests of an appellate court to suspend an appeal and for permission to immediately pursue post-conviction relief. *White v. State*, 25 N.E.3d 107, 121 (Ind. Ct. App. 2014), *reh'g denied*, *trans. denied*, *cert. denied* 193 L. Ed. 2d 477 (2015). The Indiana Court of Appeals twice denied Ben-Yisrayl's direct applications to pursue post-conviction relief; that should be sufficient to show that that court would have denied a *Davis* petition had Ben-Yisrayl filed one.

B. The district court had no basis to decide Ben-Yisrayl's trial ineffective assistance claim on its merits.

Rule 8(a) of the Rules Governing Section 2254 Cases provides: "If the petition is not dismissed, the judge must review the answer, any transcripts and records of state-court proceedings, and any materials submitted under Rule 7 to determine whether an evidentiary hearing is warranted." Even setting aside Ben-Yisrayl's late reply, the record, itself demonstrates why, in a

murder case with effectively a life sentence at stake, a two-page sentencing memorandum *might* constitute deficient performance. In particular, it is clear *from the record* that: 1) there was a veritable mountain of mitigation evidence that Ben-Yisrayl's trial lawyers did not present at the resentencing; 2) Ben-Yisrayl's trial lawyer had already been found ineffective for failing to present that mountain of evidence at Ben-Yisrayl's original sentencing; 3) Ben-Yisrayl's appellate lawyer tried to smuggle the mountain in in *Ben-Yisrayl V*; but 4) the *Ben-Yisrayl V* court found the arguments related to the mountain waived for the failure to present them to sentencing courts. *See Ben-Yisrayl V*, 2010 Ind. App. Unpub. LEXIS 1744 at *19-*20; App. 76a.

A habeas petition is a complaint. Ben-Yisrayl is aware of no case not subject to the AEDPA—which this one isn't—in which the petition itself must demonstrate entitlement to relief. Even in his reply, which the district court did not consider, Ben-Yisrayl did not claim that he was yet entitled to relief, nor could he have without the testimony of his trial lawyers. And even if, as the district court said, the length of a brief is unrelated to the brief's merits, then it is unrelated, and nothing can be said either way about the two-pages, in this case, without an evidentiary hearing.

In essence, without an evidentiary record, the district court decided the merits of Ben-Yisrayl's trial ineffective-assistance claim as if it had arrived before the court on direct appeal. That is precisely the result Ben-Yisrayl had tried doggedly to avoid in the state courts because, as *Woods* said: ineffective assistance claims raised in a direct appeal "almost always fail." 701 N.E.2d at 1216 (internal quotation marks omitted) (citation omitted).

The district court's decision with respect to default and its decision of the merits of Ben-Yisrayl's trial ineffective assistance claim without an evidentiary hearing are clear errors of law. This Court should reverse and remand the case for an evidentiary hearing on the claim.

Conclusion

For the foregoing reasons, the Petitioner respectfully requests that the Court: 1) reverse the judgment of the district court and remand the case for the district court to hear Ben-Yisrayl's trial ineffective-assistance claim arising out of his resentencing.

Respectfully submitted,

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Certificate of Service

I hereby certify that on February 2, 2017, 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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Circuit Rule 30(d) Statement

Under Circuit Rule 30(d), undersigned counsel of record for the Petitioner-Appellant, Chijioke Bomani Ben-Yisrayl, hereby certifies that all material required by Circuit Rules 30(a) & (b) is contained in the Required Short Appendix attached to this brief.

/s Michael K. Ausbrook
Attorney No. 17223-53

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

CHIJIOKE BOMANI BEN-YISRAYL,	)	
	)	
Petitioner,	)	
	)	
v.	)	Case No. 1:12-cv-661-TWP-MJD
	)	
BILL WILSON,	)	
	)	
Respondent.	)	

ENTRY DENYING PETITION FOR WRIT OF HABEAS CORPUS AND DENYING CERTIFICATE OF APPEALABILITY

This matter is before the Court on a Petition for Writ of Habeas Corpus filed by Petitioner Chijioke Bomani Ben-Yisrayl ("Ben-Yisrayl"). (Filing No. 1). In 1984 Ben-Yisrayl was convicted of murder and other serious felonies, following a jury trial in an Indiana state court. He is currently serving an aggregate one-hundred-and-fifty year sentence for these crimes. The Court stayed this action for two years pursuant to *Rhines v. Weber*, 544 U.S. 269 (2005)[1], so that Ben-Yisrayl could complete his post-conviction proceedings in the state courts. Following numerous state court proceedings, Ben-Yisrayl's petition is now ripe for decision and the stay has been terminated.

For the reasons explained in this Entry, the Petition for a Writ of Habeas Corpus is **DENIED** and the action dismissed with prejudice. In addition, the Court finds that a certificate of appealability should not issue.

[1] In *Rhines*, the Supreme Court held a federal habeas court should stay and hold in abeyance a federal habeas corpus proceeding where the petitioner has asserted both exhausted and unexhausted claims so as to permit the petitioner to return to state court to exhaust available state remedies on his unexhausted claims where (1) the petitioner has good cause for his failure to exhaust, (2) his unexhausted claims are potentially meritorious, and (3) there is no indication the petitioner engaged in intentionally dilatory litigation tactics. *Rhines v. Weber*, 544 U.S. at 278, 125 S.Ct. at 1535.

I. BACKGROUND

A. Procedural Background

Following a jury trial, Ben-Yisrayl was found guilty of murder, rape, burglary, and criminal confinement. The trial court sentenced him to death. His convictions and sentence were upheld by the Indiana Supreme Court. *See Davis v. State*, 598 N.E.2d 1041 (Ind. 1992) ("*Ben-Yisrayl I*"). Following this, the denial of post-conviction relief was affirmed by the Indiana Supreme Court in all respects except that Ben-Yisrayl's death sentence was vacated, and the case was remanded for a new penalty-phase proceeding. *See Ben-Yisrayl v. State*, 738 N.E.2d 253 (Ind. 2000) ("*Ben-Yisrayl II*").[2] On remand, the trial court held that Indiana's death penalty statute was unconstitutional, but the Indiana Supreme Court reversed that decision in *State v. Ben-Yisrayl*, 809 N.E.2d 309 (Ind. 2004) ("*Ben-Yisrayl III*").

The State subsequently dismissed its request for the death penalty. Ben-Yisrayl was sentenced, but that sentence was partially reversed by the Indiana Court of Appeals in *Ben-Yisrayl v. State*, 908 N.E.2d 1223 (Ind. Ct. App. 2009) ("*Ben-Yisrayl IV*"). Upon remand he received an aggregate one-hundred-and-fifty-year sentence. The sentence was upheld by the Indiana Court of Appeals in *Ben-Yisrayl v. State*, 939 N.E.2d 130, 2010 WL 5135369 (Ind. Ct. App. 2010) ("*Ben-Yisrayl V*"), and the Indiana Supreme Court denied transfer on February 17, 2011.

On September 20, 2011, Ben-Yisrayl filed a successive post-conviction petition in the state trial court, asserting claims not previously raised. That petition remained pending on May 16, 2012, when Ben-Yisrayl filed the instant petition for a writ of habeas corpus with this Court. He moved to stay the instant case pursuant to *Rhines* 544 U.S. 269 (2005) so that he could attempt to

[2] Mr. Ben-Yisrayl was formerly known as Greagree Davis. *See Ben-Yisrayl II*, 738 N.E.2d at 257.

exhaust the claims raised in his successive post-conviction petition. The Court granted his motion to stay, and, as noted, the case was stayed for approximately two years while Ben-Yisrayl completed his state court proceedings.

Ben-Yisrayl filed his application for authorization to file a successive post-conviction petition with the Indiana Court of Appeals on November 1, 2013. On January 10, 2014, the Indiana Court of Appeals held that Ben-Yisrayl failed to establish that there was a reasonable probability that he is entitled to post-conviction relief and therefore declined to authorize the filing of a successive post-conviction petition. His pending post-conviction petition was thereupon dismissed by the trial court. On April 23, 2015, the Indiana Supreme Court denied Ben-Yisrayl's petition to transfer the Indiana Court of Appeals' decision dismissing his appeal of his successive post-conviction petition. This was the conclusion of proceedings in state court and opened the door for development of the pending habeas petition in this Court. Briefing closed for this action on September 3, 2015.

B. Factual Background

The factual background supporting Ben-Yisrayl's convictions was summarized by the Indiana Supreme Court in *Ben-Yisrayl I* as follows:

> The defendant was acquainted with the victim's former roommate and had visited the victim's residence on many occasions during the summer of 1983. The defendant told the roommate several times of his sexual interest in the victim. About 7:00 p.m. on April 2, 1984, the defendant knocked on the door of the victim's neighbors, asking them whether the victim lived there, and was told that that she did not. The defendant then left. Sometime after 9:00 p.m., the victim arrived home and telephoned her brother. She told him that someone had broken into her residence through a back window and had removed all the light bulbs. The victim believed that the intruder might still be present. Her brother told her to leave immediately, and assumed that she would come to his residence. When she failed to arrive as he expected, he reported the incident to the police. The responding officer did not find the victim at her residence, but found a broken window. Later investigations discovered the keys to her new car on the porch and the missing light bulbs in a waste paper basket.

> On April 4, a police officer found the gagged and substantially disrobed body of the victim at the top of a ramp under a bridge near her residence. An autopsy revealed chipped teeth; broken fingernails; abrasions on the hands, chin, and knees; multiple bruises to the lips and gums; and 113 stab or puncture wounds. The stab wounds were caused by two different knives. The victim's neck evidenced manual strangulation. Seminal fluid was found in her vaginal cavity. The cause of her death was determined to be multiple stab wounds to the chest and abdomen.
>
> The defendant told police investigators that he broke the back window of the victim's home, entered it, unscrewed the light bulbs, waited, and hid behind a door when she returned home and made a phone call. When she walked towards the door, he got behind her. With the victim's hands tied in front of her, he took her to nearby railroad tracks, under a bridge, and up a slope. At some point he gagged her. The defendant told police that he stabbed her. He described the disposal of the knife, and took police to the creek where he had dropped it while trying to wash it off. Two knives were discovered at this location. One was the victim's pastry knife and the other was a chef's knife from the victim's kitchen knife set. The defendant also admitted taking the victim's watch and later selling it.
>
> Serological analysis of blood and seminal fluid obtained from the victim indicated characteristics representing less than one percent of the general population. The defendant's blood test results placed him within this category.

Ben-Yisrayl I, 598 N.E.2d at 1045.

II. APPLICABLE LAW

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) (1996). Ben-Yisrayl filed his 28 U.S.C. § 2254 petition after the effective date of the Antiterrorism and Effective Death Penalty Act ("AEDPA"). His petition, therefore, is subject to AEDPA. *See Lindh v. Murphy,* 521 U.S. 320, 336 (1997). As discussed further below, the two remaining claims from Ben-Yisrayl's habeas petitions were not adjudicated on the merits by the state courts, and thus they are subject to *de novo* review. *See Pruitt v. Neal*, 788 F.3d 248, 263 (7th Cir. 2015) ("If no state court has squarely addressed the merits of a habeas claim, [the Court] review[s] the claim *de novo* under the pre-AEDPA standard of 28 U.S.C. § 2243.").

In addition to the foregoing substantive standard, "federal courts will not review a habeas petition unless the prisoner has fairly presented his claims 'throughout at least one complete round of state-court review, whether on direct appeal of his conviction or in post-conviction proceedings.'" *Johnson v. Foster*, 786 F.3d 501, 504 (7th Cir. 2015) (quoting *Richardson v. Lemke*, 745 F.3d 258, 268 (7th Cir. 2014), and citing 28 U.S.C. § 2254(b)(1)); *see also Anderson v. Benik,* 471 F.3d 811, 814-15 (7th Cir. 2006) ("To avoid procedural default, a habeas petitioner must fully and fairly present his federal claims to the state courts.") (internal quotation marks and citation omitted); *Thomas v. McCaughtry,* 201 F.3d 995, 999 (7th Cir. 2000) ("A state prisoner … may obtain federal habeas review of his claim only if he has exhausted his state remedies and avoided procedurally defaulting his claim.").

Insofar as pertinent here, procedural default "occurs when a claim could have been but was not presented to the state court and cannot, at the time that the federal court reviews the habeas petition, be presented to the state court." *Resnover v. Pearson*, 965 F.2d 1453, 1458 (7th Cir. 1992). A federal claim is not fairly presented unless the petitioner "put[s] forward operative facts and controlling legal principles." *Simpson v. Battaglia*, 458 F.3d 585, 594 (7th Cir. 2006) (citation and quotation marks omitted). "A federal court may excuse a procedural default if the habeas petitioner establishes that (1) there was good cause for the default and consequent prejudice, or (2) a fundamental miscarriage of justice would result if the defaulted claim is not heard." *Johnson*, 786 F.3d at 505.

III. DISCUSSION

Ben-Yisrayl raises six claims in his petition for a writ of habeas corpus, four of which, as discussed further below, he subsequently abandoned. The Court first discusses the briefing of Ben-Yisrayl's habeas petition before addressing the two remaining grounds for habeas relief in

turn.

A. Briefing the Habeas Petition

When the Court terminated the stay and ordered the respondent to show cause why the relief requested in Ben-Yisrayl's habeas petition should not be granted, the Court had informed the parties that it did not anticipate extending the briefing deadlines in this case, given that the case had been stayed for two years at Ben-Yisrayl's request. On the date Ben-Yisrayl's reply brief was due, he requested through his attorney a thirty-day extension of time, until August 21, 2015, to file his reply brief. The Court had already provided the respondent with a single extension of time, thus the Court granted Ben-Yisrayl an extension as well, but clearly stated that no further extensions of time would be given. Nevertheless, again on the date his reply brief was due, Ben-Yisrayl filed an emergency motion for an extension of time in which to file his reply brief, explaining that extenuating circumstances arose that were out of his control and that prevented his attorney from timely filing the brief. The Court granted Ben-Yisrayl's requested seven-day extension, until August 28, 2015, but in doing so stated that if his "reply brief is not filed by the [set] deadline, the right to file a reply brief will be forfeited and any belatedly filed reply brief will not be considered by the Court." (Filing No. 48 at 1.) The deadline for Ben-Yisrayl to file a reply brief passed, and he did not file a reply brief or any other pleading.

The Court waited six days after Ben-Yisrayl's deadline before issuing an order, dated September 3, 2015, stating what the Court already had made clear would be the consequences of failing to meet the Court's deadline—namely, that Ben-Yisrayl forfeited the right to file a reply brief, that briefing for the matter was closed, and that the Court would decide his petition for habeas corpus is due course. Another five days passed before Ben-Yisrayl filed a motion on September 8, 2015, seeking leave to file a belated reply brief. In his motion, he explains that his counsel

endured certain personal difficulties that made him "literally incapable of writing anything" for a ten-day period—from August 25 to September 4, 2015. (Filing No. 50 at 1.)

Given the foregoing, Ben-Yisrayl's motion for leave to file a reply brief must be denied. "We live in a world of deadlines. . . . A good judge sets deadlines, and the judge has a right to assume that deadlines will be honored." *Spears v. City of Indianapolis*, 74 F.3d 153, 157 (7th Cir. 1996). The rules regarding deadlines "are intended to force parties and their attorneys to be diligent in prosecuting their causes of action." *Raymond v. Ameritech Corp.*, 442 F.3d 600, 607 (7th Cir. 2006) (citation and quotation marks omitted).

Ben-Yisrayl's counsel has fallen well short of the ideal—and minimum—diligence in prosecuting this action. As detailed above, Ben-Yisrayl requested an extension after the Court warned him that it was unlikely to grant one, and then he requested another emergency extension after the Court explicitly told him no more would be given; both of these requests were made on the day the reply brief was due. The Court reluctantly granted those motions, but stated in no uncertain terms that the final extension was just that—final. Instead of filing another motion for an extension of time, he simply failed to file anything until September 8, 2015, which was eleven days after the deadline. If waiting "until the last minute to comply with a deadline" is "playing with fire," *Spears*, 74 F.3d at 157, repeatedly waiting until the last minute to request extensions and then missing the twice-extended deadline by eleven days is inexcusable.

The Court is not unsympathetic with whatever personal calamities befell Ben-Yisrayl's counsel that prevented him from writing for ten days. But even if this were accepted as a justifiable excuse, the ten-day period where he was unable to work on the brief ended on September 4, 2015, yet the instant motion was not filed until four days later. If Ben-Yisrayl's counsel was acting with diligence, a motion would have been filed immediately explaining to the Court what occurred and

why he was unable to meet the Court's deadline. And if he "literally was unable to write," counsel could have contacted the Courtroom Deputy Clerk by telephone to give notice of a "calamity" and request advice on how to proceed. This did not occur, and thus these are not circumstances in which the Court should overlook a party's failure to meet the twice-extended deadline.

The consequences for missing deadlines can often be harsh. *Cf. Johnson v. McBride*, 381 F.3d 587, 591 (7th Cir. 2004) (holding that a petitioner's petition for habeas corpus in a death penalty case is time-barred because it was filed one day late). But the Seventh Circuit has made clear that even in such instances, a district court is well-within its discretion "to require adherence to a deadline that it had previously informed counsel it would not extend." *Yancick v. Hanna Steep Corp.*, 653 F.3d 532, 539 (7th Cir. 2011). The Supreme Court has emphasized that habeas corpus proceedings are intended to provide "swift, flexible, and summary determination[s]." *Browder v. Director, Dept. of Corrections*, 434 U.S. 257, 271 (1978). This was the Court's goal when informing the parties at the outset that extensions of time were not anticipated; after all, the tortured procedural history reveals that litigation over Ben-Yisrayl's convictions has been ongoing for over three decades. The Court nevertheless granted Ben-Yisrayl two extensions, all for him to not file his reply brief until eleven days after the final deadline. If the Court allowed Ben-Yisrayl "to continually ignore deadlines and seek neverending extensions without consequence, soon the court's scheduling orders would become meaningless." *Spears*, 74 F.3d at 158. The Court cannot allow this to occur. Accordingly, the Court will not alter its previous decision that briefing for this matter is closed, and therefore will not consider the arguments set forth in Ben-Yisrayl's proposed reply brief. *See Land v. Int'l Busi. Machines, Inc.*, 485 Fed. Appx. 830, 833 (7th Cir. 2012) (affirming the district court's decision to strike an untimely response brief due to the filing party's "pattern of delays" and missed deadlines).

Because of the foregoing, the Court is left with only Ben-Yisrayl's *pro se* petition for habeas corpus to discern his position regarding his claims. Nevertheless, given the Court's review of his claims and the record, no substantial injustice results from the Court's decision with respect to Ben-Yisrayl's motion to file a reply brief.

The Court notes, however, that in the proposed reply brief supporting his motion, Ben-Yisrayl informed the Court that he is abandoning certain claims. Even though briefing on this matter remains closed, the relinquishment of claims can be done wholly apart from the briefing process. The Court will thus permit Ben-Yisrayl to abandon claims 1, 4, 5, and 6 that are raised in his petition, as there is no benefit in adjudicating claims on the merits that the petitioner himself no longer wishes to pursue. The Court turns now to the parties' arguments regarding the remaining two claims.

B. <u>Intentional Destruction of Evidence</u>

Ben-Yisrayl asserts that his due process rights were violated because the State "knowingly and intentionally destroyed potentially exculpatory evidence in violation of a standing [state] court Order requiring said evidence to be preserved." (Filing No. 1 at 7.) The facts underlying this claim are not in dispute. During Ben-Yisrayl's initial post-conviction proceedings in 1994, the presiding post-conviction judge ordered that all evidence collected during the investigation of Ben-Yisrayl's case must be preserved. However, Ben-Yisrayl's request at that time for access to certain evidence to perform further DNA testing was denied. (*See* Filing No. 42-28 at 2.) His post-conviction proceedings ended at the trial level in 1996, but the appeals from those proceedings were not concluded until 2000. *See Ben-Yisrayl II*, 738 N.E.2d 253. The Property Section of the Indianapolis Police Department destroyed the evidence in May 1999, while the appeal was still pending. (*See* Filing No. 42-28 at 18.) As acknowledged by the respondent, Ben-Yisrayl was not

made aware of this until his resentencing was pending in early 2008. (*See* Filing No. 42 at 13.) During resentencing proceedings, Ben-Yisrayl again requested certain evidence so that he could perform further DNA testing, and it was at this time it was discovered that the relevant evidence had been destroyed. The parties dispute whether Ben-Yisrayl's due-process claim is procedurally defaulted and whether it has merit. The Court addresses both of these questions in turn.

1. Procedural Default

Ben-Yisrayl acknowledges that he only raised this claim in his unauthorized successive post-conviction petition and that it was therefore not decided on the merits by the Indiana courts. The respondent argues that, because of this, the claim is procedurally defaulted. Ben-Yisrayl maintains that this claim was not known to him at the time he filed his direct appeal during his initial post-conviction proceedings, which means he did not have an opportunity to raise it in state court.

"[F]ederal courts will not review a habeas petition unless the prisoner has fairly presented his claims throughout at least one complete round of state-court review, whether on direct appeal of his conviction or in post-conviction proceedings." *Johnson*, 786 F.3d at 504 (citation and quotation marks omitted). However, procedural default only occurs "when a claim *could have been* but was not presented to the state court and cannot, at the time that the federal court reviews the habeas petition, be presented to the state court." *Resnover*, 965 F.2d at 458 (emphasis added).

The foregoing facts make clear that Ben-Yisrayl could not have raised his destruction of evidence claim on direct appeal or during his initial post-conviction proceeding, and the Indiana courts denied him the opportunity to have it adjudicated in a subsequent post-conviction proceeding. The respondent admits that Ben-Yisrayl was unaware of the fact that the evidence was destroyed until at least early 2008, which is long after his post-conviction proceedings had

concluded. Accordingly, he could not have presented this claim to the Indiana courts, which precludes it from being barred by procedural default. *See Resnover*, 965 F.2d at 458. Accordingly, the Court must review the merits of this claim *de novo*. *See Pruitt*, 788 F.3d at 263.

2. <u>Merits</u>

The Supreme Court, in *California v. Trombetta*, 467 U.S. 479 (1984), and *Arizona v. Youngblood*, 488 U.S. 51 (1988), established that:

> the destruction of potentially exculpatory evidence violates the defendant's right to due process if (1) the State acted in bad faith; (2) the exculpatory value of the evidence was apparent before it was destroyed; and (3) the evidence was of such a nature that the petitioner was unable to obtain comparable evidence by other reasonably available means.

McCarthy v. Pollard, 656 F.3d 478, 485 (7th Cir. 2011). However, the Supreme Court has rejected the proposition that a state's denial of access to evidence during a post-conviction proceeding so that further testing may be performed on the evidence violates due process. *See District Attorney's Office for Third Judicial Dist. v. Osborne*, 557 U.S. 52, 69 (2009).

Ben-Yisrayl's due-process claim is not that he "did not receive a fair trial because of the concealment of exculpatory evidence known and in existence at the time of that trial," which would state a viable due-process claim under *Brady v. Maryland*, 373 U.S. 83 (1963). *See Whitlock v. Brueggemann*, 682 F.3d 567, 587-88 (7th Cir. 2012). Instead, he argues that the State's destruction of "potentially exculpatory evidence" denied him the opportunity to perform further DNA testing on that evidence. (*See* Filing No. 1 at 7-8; Filing No. 42-28 at 2-3.) At the time of his request for further testing, only Ben-Yisrayl's resentencing was pending, and his guilt could only be challenged via further post-conviction proceedings. (*See* Filing No. 42-28 at 19-21.) Thus, as in *Osborne*, Ben-Yisrayl was not entitled to "the opportunity to collect and submit entirely new, and he hoped exculpatory, evidence," since *Brady* does not require states "to allow the defendant

access to these new tests [when] the defendant had already been 'proved guilty after a fair trial.'" *Whitlock*, 682 F.3d at 587-88 (quoting *Osborne*, 557 U.S. at 68). Accordingly, because Ben-Yisrayl had no constitutional right to conduct further DNA testing on the "potentially exculpatory" destroyed evidence after he had been found guilty, he is not entitled to habeas relief on this basis.[3]

In the alternative, even if Ben-Yisrayl had a due-process right to test the potentially exculpatory evidence at the time of his resentencing, he would still not be entitled to habeas relief. To be entitled to such relief, Ben-Yisrayl would have to show that, in destroying the evidence, "(1) the State acted in bad faith; (2) the exculpatory value of the evidence was apparent before it was destroyed; and (3) the evidence was of such a nature that the petitioner was unable to obtain comparable evidence by other reasonably available means." *McCarthy*, 656 F.3d at 485. Ben-Yisrayl fails to even attempt to show that these three factors are met.

First, a finding of bad faith "turns on 'the [government's] knowledge of the exculpatory value of the evidence at the time it was lost or destroyed.'" *Id.* at 486 (quoting *Youngblood*, 488 U.S. at 57 n.*). The mere fact that the evidence was destroyed in violation of a state court order—the only evidence of bad faith to which Ben-Yisrayl points—does nothing to demonstrate the State's knowledge of the exculpatory value of the evidence when it was destroyed. But even if this was sufficient to demonstrate bad faith, Ben-Yisrayl has not carried his burden with respect to the second factor. There is no evidence that the exculpatory value of the evidence was apparent before it was destroyed, given that Ben-Yisrayl needed to conduct further tests on the evidence to *determine* whether the evidence was indeed exculpatory. The mere possibility that the evidence

[3] The Court notes that habeas relief cannot be awarded simply because a state court order to preserve the evidence in question may have been violated by the destruction of the evidence. This is because relief pursuant to § 2254 is not available for violations of state law or state procedures; it is available only for violations of federal law. *See Perruquet v. Briley*, 390 F.3d 505, 511 (7th Cir. 2004) ("[E]rrors of 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.") (citation omitted).

would be exculpatory is insufficient to make the necessary showing. *See id.* at 485-86 ("[T]he possibility that [the evidence] *could* have exculpated [the petitioner] *if* preserved or tested is [insufficient].") (emphasis added). For these reasons, Ben-Yisrayl is not entitled to habeas relief on this claim.

C. Ineffective Assistance of Counsel During 2010 Resentencing

Ben-Yisrayl contends that his counsel during his resentencing in 2010 provided ineffective assistance. Because the respondent argues that this claim is procedurally defaulted, the Court will address that contention first before turning to the merits.

1. Procedural Default

The respondent argues that this claim is procedurally defaulted because it was never properly raised in the Indiana courts. Like his destruction of evidence claim, Ben-Yisrayl raised this claim in his application for authorization to file a successive post-conviction petition, which was denied by the Indiana Court of Appeals. Ben-Yisrayl argues that he was thus denied the only opportunity he had to raise this claim, given that his initial post-conviction proceedings were completed long before the resentencing in 2010 during which counsel allegedly rendered ineffective assistance.

Unlike his destruction of evidence claim, this claim is procedurally defaulted. Again, procedural default occurs "when a claim *could have been* but was not presented to the state court and cannot, at the time that the federal court reviews the habeas petition, be presented to the state court." *Resnover*, 965 F.2d at 458 (emphasis added). Indiana allows ineffective assistance of counsel claims to be raised on direct appeal or during post-conviction proceedings. *See Jewell v. State*, 887 N.E.2d 939, 941 (Ind. 2008) ("A criminal defendant claiming ineffective assistance of trial counsel is at liberty to elect whether to raise this claim on direct appeal or in post-conviction

proceedings."). Therefore, Ben-Yisrayl could have, but did not, raise on direct appeal from the resentencing court the claim that his sentencing counsel rendered ineffective assistance during his 2010 sentencing. *See Ben-Yisrayl V*, 939 N.E.2d 130, 2010 WL 5135369, at *1. For this reason, Ben-Yisrayl's ineffective assistance of counsel claim is procedurally defaulted.[4] *See Resnover*, 965 F.2d at 458. Although Ben-Yisrayl's ineffective assistance of counsel claim is procedurally defaulted, the Court will proceed to address it on the merits as an alternative basis to deny relief.

2. Merits

A defendant has a right under the Sixth Amendment to effective assistance of counsel. *See Strickland v. Washington,* 466 U.S. 668, 687 (1984). For a petitioner to establish that "counsel's assistance was so defective as to require reversal," he must make two showings: (1) that counsel rendered deficient performance that (2) prejudiced the petitioner. *Id.* With respect to the performance requirement, "'[t]he proper measure of attorney performance remains simply reasonableness under prevailing professional norms.'" *Wiggins v. Smith*, 539 U.S. 510, 521 (2003) (quoting *Strickland*, 466 U.S. at 688); *see Campbell v. Reardon*, 780 F.3d 752, 762 (7th Cir. 2015) ("The question is whether an attorney's representation amounted to incompetence under prevailing professional norms, not whether it deviated from best practices or most common custom."). "To establish prejudice, [the petitioner] 'must demonstrate a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Campbell*, 780 F.3d at 769 (quoting *Harrington v. Richter*, 562 U.S. 86, 104 (2011)). Because the Indiana courts did not address this claim on the merits, the Court reviews it *de novo*. *See Pruitt*,

[4] The Court notes that different counsel represented Mr. Ben-Yisrayl at sentencing and on direct appeal, *see Ben-Yisrayl V*, 939 N.E.2d 130, 2010 WL 5135369; Filing No. 42-28 at 33-34, so there was no concern that appellate counsel had a conflict of interest in raising an ineffective-assistance-of-counsel claim.

788 F.3d at 263 ("If no state court has squarely addressed the merits of a habeas claim, [the Court] review[s] the claim *de novo* under the pre-AEDPA standard of 28 U.S.C. § 2243.").

Ben-Yisrayl argues that his resentencing counsel provided ineffective assistance because counsel "made absolutely no attempt to bring before the sentencing court" the fact that allegedly exculpatory DNA evidence was destroyed by the State, and instead of highlighting this fact, filed only a two-page sentencing memorandum. (Filing No. 1 at 9-10.) The respondent contends that there is no evidence that the destroyed DNA evidence was exculpatory, and in any event, Ben-Yisrayl ignores the efforts counsel made at resentencing by presenting numerous letters of support and calling seven witnesses who testified as to Ben-Yisrayl's character. (Filing No. 42 at 18.)

Ben-Yisrayl has failed to demonstrate that his sentencing counsel provided ineffective assistance. First, as to his counsel's failure to raise the destruction of the allegedly exculpatory DNA evidence, it was not deficient performance to not raise this issue during resentencing. The Indiana Supreme Court remanded the case to the trial court only for purposes of resentencing Ben-Yisrayl on the murder count. *See Ben-Yisrayl IV*, 908 N.E.2d at 1233; *see also* Filing No. 42-28 at 21. In his application to file a successive post-conviction petition, Ben-Yisrayl himself acknowledged that the resentencing judge "ruled that no issues regarding the destruction of the evidence were relevant to the resentencing." (Filing No. 42-28 at 3.) Even though he now contends that this issue should have been raised at resentencing, his previous comments correctly reveal otherwise. The DNA testing that Ben-Yisrayl wished had been done is a matter that relates to his guilt, not to the sentence that is warranted once guilt is determined. Thus, the Court cannot conclude that counsel's decision not to address facts relating to guilt at the sentencing proceeding "amounted to incompetence under prevailing professional norms," and thus constituted deficient performance. *Campbell*, 780 F.3d at 762.

For this same reason, Ben-Yisrayl cannot show that his counsel's failure to raise the issue of the destroyed evidence prejudiced him. Since the destroyed evidence was relevant only to the question of guilt, not as to the appropriate sentence, Ben-Yisrayl was not prejudiced by this failure. In other words, Ben-Yisrayl cannot show that, had counsel raised an issue irrelevant to sentencing, there was a "reasonable probability . . . the result of the [sentencing] proceeding would have been different." *Id.* at 769.

Second, as to Ben-Yisrayl's criticism that his counsel only filed a two-page sentencing memorandum, criticism of brief length alone is insufficient to demonstrate that counsel's performance was deficient. "[T]here is no correlation between the length of a brief and its quality." *Nguyen v. Reynolds*, 131 F.3d 1340, 1351 (10th Cir. 1997); *see id.* (rejecting an ineffective assistance of counsel claim predicated on the argument that counsel's brief was too short). Moreover, the Court must measure "the totality of counsel's performance" in determining whether it was deficient, "and will not take any of his actions out of context in order to ascertain whether they are, by themselves, ineffective," *Kavanagh v. Berge*, 73 F.3d 733, 735 (7th Cir. 1996), yet this is precisely what Ben-Yisrayl asks this Court to do. For example, Ben-Yisrayl ignores the fact that resentencing counsel presented the testimony of seven witnesses regarding his character. Further, the record shows that resentencing counsel made an impassioned argument to the court on his client's behalf. Having not addressed how the short sentencing memorandum constituted deficient performance in light of the other efforts counsel made on Ben-Yisrayl's behalf at sentencing, Ben-Yisrayl has not carried his burden of demonstrating that resentencing counsel's performance was deficient, let alone that it prejudiced him.

For all of the reasons detailed above, Ben-Yisrayl is not entitled to habeas relief on this ground.

IV. CONCLUSION

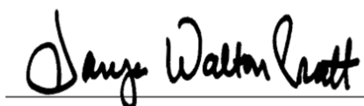
"[H]abeas corpus has its own peculiar set of hurdles a petitioner must clear before his claim is properly presented to the district court." *Keeney v. Tamayo-Reyes,* 504 U.S. 1, 14 (1992) (O'Connor, J., dissenting) (internal citations omitted). In this case, Ben-Yisrayl has encountered the hurdle of the doctrine of procedural default as to one claim. He has not shown the existence of circumstances permitting him to overcome this hurdle, although it is clear in any event that the claim lacks merit. As to the claim not barred by procedural default, this Court has carefully reviewed the state record in light of that claim, but Ben-Yisrayl has not demonstrated that he is entitled to habeas relief.

Ben-Yisrayl's Petition for a Writ of Habeas Corpus (Filing No. 1) is therefore **DENIED.** Ben-Yisrayl's motion for leave to file a belated reply brief (Filing No. 50) is **DENIED**. Judgment consistent with this Entry shall now issue.

CERTIFICATE OF APPEALABILITY

Pursuant to Federal Rule of Appellate Procedure 22(b), Rule 11(a) of the Rules Governing § 2254 proceedings, and 28 U.S.C. § 2253(c), the Court finds that Ben-Yisrayl has failed to show that reasonable jurists would find "it debatable whether the petition states a valid claim of the denial of a constitutional right" and "debatable whether [this court] was correct in its procedural ruling." *Slack v. McDaniel,* 529 U.S. 473, 484 (2000). The Court therefore **DENIES** a Certificate of Appealability.

SO ORDERED.



Date: 9/18/2015

TANYA WALTON PRATT, JUDGE
United States District Court
Southern District of Indiana

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

CHIJIOKE BOMANI BEN-YISRAYL,	)	
	)	
Petitioner,	)	
	)	
vs.	)	Case No. 1:12-cv-661-TWP-MJD
	)	
BILL WILSON,	)	
	)	
Respondent.	)	

FINAL JUDGMENT PURSUANT TO FED. R. CIV. PRO. 58

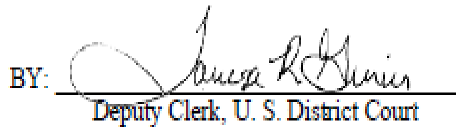
The Court having this day directed the entry of final judgment, the Court now enters FINAL JUDGMENT in favor of the respondent and against the petitioner.

The petitioner's petition for writ of habeas corpus is denied and the action is dismissed with prejudice.

Date: 9/18/2015

TANYA WALTON PRATT, JUDGE
United States District Court
Southern District of Indiana

Laura A. Briggs, Clerk



BY: ______________________
Deputy Clerk, U. S. District Court

Distribution:

All electronically registered counsel

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

CHIJIOKE BOMANI BEN-YISRAYL,	)	
	)	
Petitioner,	)	
	)	
v.	)	Case No. 1:12-cv-661-TWP-MJD
	)	
BILL WILSON,	)	
	)	
Respondent.	)	

ENTRY DENYING MOTION FOR RECONSIDERATION

This matter is before the Court on Petitioner Chijioke Bomani Ben-Yisrayl's Motion to Alter or Amend Judgment pursuant to Federal Rule of Civil Procedure 59(e). On September 18, 2015, the Court denied Ben-Yisrayl's Petition for a Writ of Habeas Corpus (*see* Filing No. 51) and entered final judgment that same date. For the reasons explained below, the Motion to Alter or Amend Judgment (Filing No. 53) is **DENIED**.

I. LEGAL STANDARD

Federal Rule of Civil Procedure 59(e) provides that "[a] motion to alter or amend a judgment must be filed no later than 28 days after the entry of the judgment." The purpose of a Rule 59(e) motion is to have the court reconsider matters "properly encompassed in a decision on the merits." *Osterneck v. Ernst and Whinney*, 489 U.S. 169, 174 (1988). However, a Rule 59(e) motion "is not a fresh opportunity to present evidence that could have been presented earlier." *Edgewood Manor Apartment Homes, LLC v. RSUI Indem. Co.*, 733 F.3d 761, 770 (7th Cir. 2013). Instead, to receive the requested relief, the moving party "must clearly establish (1) that the court committed a manifest error of law or fact, or (2) that newly discovered evidence precluded entry of judgment." *Id.*

II. DISCUSSION

The Court incorporates by reference the background section of its Entry denying Ben-Yisrayl's habeas petition. (Filing No. 51 at 2-4.) Ben-Yisrayl contends that the Court should alter the judgment dismissing his petition for writ of habeas corpus because the Court made manifest errors of law in denying his claims for relief. Specifically, the Court determined that Ben-Yisrayl's claims for relief based on the destruction of DNA and ineffective assistance of counsel were without merit. The Court will address each claim in turn.

A. Intentional Destruction of Evidence

In his habeas petition, Ben-Yisrayl argued that his due process rights were violated because the State "knowingly and intentionally destroyed potentially exculpatory evidence in violation of a standing [state] court Order requiring said evidence to be preserved." (Filing No. 1 at 7.) This claim was based on the undisputed fact that fifteen years after a jury found him guilty of the charges at issue, the Property Section of the Indiana Police Department destroyed evidence in May 1999, while his post-conviction appeal was still pending. (*See* Filing No. 42-28 at 18.) Subsequently, Ben-Yisrayl was ordered to be resentenced. During resentencing proceedings, Ben-Yisrayl requested that further DNA testing be done on the evidence, at which time it was discovered that the evidence had been destroyed.

This Court denied Ben-Yisrayl's due process claim on the merits for two independent reasons. First, the Court held that, pursuant to *District Attorney's Office for Third Judicial Dist. v. Osborne*, 557 U.S. 52 (2009), Ben-Yisrayl was not entitled to "the opportunity to collect and submit entirely new, and he hoped exculpatory, evidence," since *Brady* does not require states "to allow the defendant access to these new tests [when] the defendant had already been 'proved guilty after a fair trial.'" *Whitlock v. Bruggemann*, 682 F.3d 567, 587-88 (7th Cir. 2012) (quoting

Osborne, 557 U.S. at 68). Second, the Court held that even if such a due process right existed, Ben-Yisrayl would have to demonstrate that, in destroying the evidence in question, "(1) the State acted in bad faith; (2) the exculpatory value of the evidence was apparent before it was destroyed; and (3) the evidence was of such a nature that the petitioner was unable to obtain comparable evidence by other reasonably available means." *McCarthy v. Pollard*, 656 F.3d 478, 485 (7th Cir. 2011). The Court held that Ben-Yisrayl could not show that the second factor was met because the mere possibility that, if tested, the evidence would prove to be exculpatory is insufficient. (Filing No. 51 at 11-13.)

In the instant motion, Ben-Yisrayl takes issue with the Court's statement of the law as to both of the alternative bases for the decision. The Court will address only the second factor because on this issue, Ben-Yisrayl has most clearly not made the showing necessary for relief.

As to the second factor, Ben-Yisrayl argues that "despite the statement to the contrary in *McCarthy* . . . , *Arizona v. Youngblood*, 488 U.S. 51 (1988) specifically says that it is unnecessary to show that evidence was destroyed with actual knowledge of its exculpatory value."[1] (Filing No. 53 at 3.) The fundamental problem with Ben-Yisrayl's argument is that—as he acknowledges—the Seventh Circuit in *McCarthy* has explicitly interpreted *Youngblood* to require a showing that "the exculpatory value of the evidence was apparent before it was destroyed." *McCarthy*, 656 F.3d at 485. And, under *Youngblood*, for evidence "[t]o be considered 'apparently' exculpatory, the exculpatory nature of the evidence must be apparent *before* it is destroyed. Accordingly, '[t]he possibility that [the evidence] *could* have exculpated [the petitioner] *if* preserved or tested is not

[1] Ben-Yisrayl also argues that he has never had the opportunity to develop the record to show whether the police knew of the exculpatory value of the evidence when it was destroyed, and thus the Court should hold a hearing to allow him to develop the record on this point. (Filing No. 53 at 3.) But Ben-Yisrayl acknowledges, just as the Court reasoned in denying his claim, that the exculpatory value of the evidence would not be known without further DNA testing, and since the evidence in question was destroyed, no such testing can be conducted. Accordingly, a hearing or other evidentiary proceeding would not allow Ben-Yisrayl to make the showing necessary.

enough to satisfy the standard of constitutional materiality in *Trombetta*.'" *Id.* at 485-86 (quoting *Youngblood*, 488 U.S. at 57 n.*). As explained in the Court's Entry denying relief, Ben-Yisrayl's claim fails under this standard. (Filing No. 51 at 11-13.)

The Seventh Circuit's interpretation of *Youngblood* in *McCarthy* is, of course, binding on this Court. And it is precisely what the Court utilized in rejecting Ben-Yisrayl's claim. It was not a manifest error of law for the Court to do so, even if Ben-Yisrayl's view of *Youngblood* diverges from the Seventh Circuit's. Accordingly, there is no basis for the Court to alter or amend its judgment with respect to this claim.

B. <u>Ineffective Assistance of Counsel</u>

Ben-Yisrayl also raised a claim of ineffective assistance of counsel in his habeas petition. The Court denied this claim because it was procedurally defaulted and, in the alternative, because it lacked merit. (Filing No. 51 at 13-16.) Ben-Yisrayl contends that the Court made a manifest error of law in both respects.

Before addressing whether the Court made a manifest error of law regarding either of these issues, the Court will first clarify the scope of a Rule 59 motion. Specifically, Rule 59 motions do "not allow a party to . . . advance arguments that could and should have been presented to the district court prior to the judgment." *Cincinnati Life Ins. Co. v. Beyrer*, 722 F.3d 939, 954 (7th Cir. 2013). Nevertheless, Ben-Yisrayl attempts to do just that. This is no doubt in part because, in the Court's Entry denying Ben-Yisrayl habeas relief, it explained at length why the arguments in his belatedly filed reply brief would not be considered. (Filing No. 51 at 6-9.) These arguments, or any other new arguments, are not properly presented in a Rule 59 motion, as they should have been properly presented to the Court prior to entry of judgment, but they were not. *See Beyrer*, 722 F.3d at 954.

Turning first to procedural default, Ben-Yisrayl raised this claim in state court for the first time in his application for authorization to file a successive post-conviction petition, which was denied by the Indiana Court of Appeals. Therefore, no state court addressed this claim on the merits.

As explained in the Court's Entry, procedural default occurs "when a claim *could have been* but was not presented to the state court and cannot, at the time that the federal court reviews the habeas petition, be presented to the state court." *Resnover v. Pearson*, 965 F.2d 1453, 1458 (7th Cir. 1992) (emphasis added). Although Ben-Yisrayl was not permitted to pursue this claim via a successive post-conviction proceeding in state court, the claim could have been raised during his direct appeal. *See Jewell v. State*, 887 N.E.2d 939, 941 (Ind. 2008) ("A criminal defendant claiming ineffective assistance of trial counsel is at liberty to elect whether to raise this claim on direct appeal or in post-conviction proceedings."). Because it was not, the claim is procedurally defaulted. *See Johnson v. Foster*, 786 F.3d 501, 504 (7th Cir. 2015) ("[F]ederal courts will not review a habeas petition unless the prisoner has fairly presented his claims 'throughout at least one complete round of state-court review, whether on direct appeal of his conviction or in post-conviction proceedings.'") (quoting *Richardson v. Lemke*, 745 F.3d 258, 268 (7th Cir. 2014)).

Ben-Yisrayl takes issue with this because Indiana law allows, and in many instances prefers that ineffective assistance of counsel claims be raised in post-conviction proceedings rather than on direct appeal. This is undoubtedly true. *See Jewell*, 887 N.E.2d at 942 ("Unless foreclosed by raising the issue on direct appeal, a defendant should be permitted to present the issue of ineffective assistance of counsel utilizing the broader evidentiary opportunities afforded in post-conviction proceedings."). But this does not change the fact that Ben-Yisrayl *could have* raised the claim on direct appeal, and further, that it was a risk not to do so when there was no certainty that a

successive post-conviction proceeding would be authorized to raise the claim. *See Matheney v. State*, 834 N.E.2d 658, 661 (Ind. 2005) (noting that a petitioner is only entitled to a single post-conviction proceeding and that a successive post-conviction proceeding requires authorization under Indiana Post-Conviction Rule 1 § 12(b)).

Furthermore, not only could Ben-Yisrayl have made his ineffective assistance of counsel claim on direct appeal, he could have attempted to utilize the procedure set forth in *Davis v. State*, 368 N.E.2d 1154 (Ind. 1977), if he wanted to develop the record with respect to this claim. The Indiana Supreme Court has noted that a "*Davis* petition" presents a viable mechanism for a defendant to raise an ineffective assistance of counsel claim prior to his direct appeal, and it permits the defendant to develop the record to support the claim. *See Woods v. State*, 701 N.E.2d 1208, 1219-20 (Ind. 1998) (noting that a defendant can bring an ineffective assistance of counsel claim "on direct appeal by a *Davis* petition," which functions to "suspend the direct appeal to pursue an immediate petition for postconviction relief"); *see also Lee v. State*, 694 N.E.2d 719, 721 n.6 (Ind. 1998) (noting that a *Davis* petition may be an appropriate course when an ineffective assistance of counsel claim "arguably requires a certain level of fact finding not suitable for an appellate court"). By not raising his claim on direct appeal or attempting to file a *Davis* petition,[2] Ben-Yisrayl risked the very result that occurred—namely, that authorization for a successive post-conviction proceeding would be denied and thus he missed his opportunity for the state court to address his ineffective assistance of counsel claim on the merits. Unfortunately for Ben-Yisrayl, because he could have raised his ineffective assistance of counsel claim, the risk he took by not raising it when

[2] There is, of course, no guarantee that Ben-Yisrayl would have been permitted by the state courts to utilize a *Davis* petition to develop his claim, but as far as the Court knows, a *Davis* petition may have been a viable route. Given this, the Court cannot conclude that Ben-Yisrayl could not have adequately pursued his claim in state court.

he had the opportunity to do so has led to the procedural default of the claim. *See Resnover*, 965 F.2d at 1458.

For the foregoing reasons, Ben-Yisrayl has failed to demonstrate that the Court made a manifest error of law in concluding that his claim was procedurally defaulted. But even if the Court did, it did not make such an error when denying Ben-Yisrayl's ineffective assistance of counsel claim on the merits.

In his habeas petition, Ben-Yisrayl raised two ways in which his counsel at resentencing rendered ineffective assistance. He argued that his counsel failed to raise at sentencing the fact that the State destroyed the allegedly exculpatory evidence before he could test it further, and instead, that he only filed a two-page memorandum. As the Court explained in its Entry denying habeas relief, the failure to raise the destruction of evidence during resentencing could not have been deficient performance or prejudicial given that both Ben-Yisrayl himself recognized that the evidence spoke only to Ben-Yisrayl's guilt, not to the appropriate sentence once guilt was established. (Filing No. 51 at 15-16.) Further, the Court explained that brief length alone cannot establish that counsel's performance was deficient, as "'[t]here is no correlation between the length of a brief and its quality.'" (Filing No. 51 at 16 (quoting *Nguyen v. Reynolds*, 131 F.3d 1340, 1351 (10th Cir. 1997)).

In his present motion, Ben-Yisrayl does not explain how the Court made a manifest error of law in resolving either of these arguments. Instead, he argues that a hearing is necessary for him to develop the basis for his ineffective assistance of counsel claim. (Filing No. 53 at 9-10.) Specifically, he argues that "[w]ithout an evidentiary hearing, he cannot show what mitigation evidence his trial lawyers failed to present or why they failed to present it." (Filing No. 53 at 9.)

"In deciding whether to grant an evidentiary hearing, a federal court must consider whether such a hearing could enable an applicant to prove the petition's factual allegations, which, if true, would entitle the applicant to federal habeas relief." *Schriro v. Landrigan*, 127 S. Ct. 1933, 1940 (2007). "[I]f the record refutes the applicant's factual allegations or otherwise precludes habeas relief, a district court is not required to hold an evidentiary hearing." *Id.*

In this matter, however, the record alone was sufficient to definitively decide that neither of two reasons why Ben-Yisrayl maintains he received ineffective assistance of counsel were meritless, and thus an evidentiary proceeding was not warranted. As explained above and in the Court's Entry denying habeas relief, the failure to raise an argument that was irrelevant to sentencing is on its face a non-starter, as is a criticism regarding the length of counsel's brief. To the extent that Ben-Yisrayl is now, for the first time, arguing that certain mitigation evidence was not presented and should have been presented, this argument was not raised in Ben-Yisrayl's habeas petition and thus cannot not be raised now by way of his Rule 59 motion. *See Beyrer*, 722 F.3d at 954.

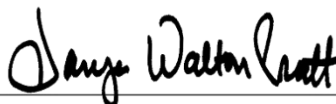
For these reasons, the Court did not make a manifest error of law in denying Ben-Yisrayl relief on the merits of his ineffective assistance of counsel claim.

III. CONCLUSION

Ben-Yisrayl has failed to show that the Court made a manifest error of law in denying him habeas relief. Therefore, his Motion to Alter or Amend Judgment (Filing No. 53) is **DENIED**.

SO OREDERED.

Date: 12/14/2015



TANYA WALTON PRATT, JUDGE
United States District Court
Southern District of Indiana

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IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

CHIJIOKE BOMANI BEN-YISRAYL,
Petitioner,

v.

RON NEAL,
Superintendent,
Indiana State Prison,
Respondent.

Case No. 1:12-CV-661-TWP-MJD

The Honorable
Tanya Walton Pratt, Judge

Petitioner's Notice of Appeal

Notice is hereby given that the Petitioner in the case named above, Chijioke Bomani Ben-Yisrayl, hereby appeals to the United States Circuit Court of Appeals for the Seventh Circuit two orders entered in this action: 1) the judgment, D.E. 52, entered on September 18, 2015, denying and dismissing with prejudice Ben-Yisrayl's petition for a writ of habeas corpus under 28 U.S.C. § 2254, D.E. 1; and 2) the Court's order, D.E. 56, of December 14, 2015, denying Ben-Yisrayl's motion to alter the Court's judgment under Federal Rule of Civil Procedure 59(e), D.E. 53.

Respectfully submitted,

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Counsel for Chijioke Bomani Ben-Yisrayl,
Petitioner

Certificate of Service

I affirm under penalty for perjury that on December 31, 2015, the foregoing was served on opposing counsel via the Court's electronic filing system.

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Counsel for Chijioke Bomani Ben-Yisrayl,
Petitioner

United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

Submitted November 4, 2016
Decided November 7, 2016

Before

WILLIAM J. BAUER, *Circuit Judge*

No. 16-1013

CHIJOKE B. BEN-YISRAYL, *Petitioner-Appellant*,	Appeal from the United States District Court for the Southern District of Indiana, Indianapolis Division.
v.	No. 1:12-cv-00661-TWP-MJD
RON NEAL, *Respondent-Appellee*.	Tanya Walton Pratt, *Judge*.

O R D E R

Chijoke Ben-Yisrayl has filed a notice of appeal from the denial of his petition under 28 U.S.C. § 2254, which we construe as an application for a certificate of appealability. This court has reviewed the final order of the district court and the record on appeal. We find that Ben-Yisrayl has made a substantial showing of the denial of his right to the effective assistance of counsel at his resentencing hearing. *See* § 2253(c)(2). The parties must also address whether Ben-Yisrayl has defaulted review of his claim and whether the district court abused its discretion in only partly considering counsel's reply brief.

Accordingly, the request for a certificate of appealability is GRANTED. Ben-Yisrayl's motion to proceed in forma pauperis is GRANTED.

LEXSEE 598 N.E.2D 1041, 1044

GREAGREE DAVIS, Appellant (Defendant Below), v. STATE OF INDIANA, Appellee (Plaintiff Below).

No. 49S00-8705-CR-510

SUPREME COURT OF INDIANA

598 N.E.2d 1041*; *1992 Ind. LEXIS 203

September 1, 1992, FILED

SUBSEQUENT HISTORY: **[**1]** Rehearing Denied January 4, 1993.
Rehearing denied by, 01/04/1993
Writ of certiorari denied *Davis v. Indiana, 510 U.S. 948, 126 L. Ed. 2d 340, 114 S. Ct. 392, 1993 U.S. LEXIS 6748 (1993)*
Judgment entered by, *Remanded by State v. Ben-Yisrayl, 2004 Ind. LEXIS 478 (Ind., May 25, 2004)*

PRIOR HISTORY: APPEAL FROM THE MARION COUNTY SUPERIOR COURT. The Honorable Roy E. Jones, Judge. Cause No.CR84-76E

DISPOSITION: The judgment of the trial court is affirmed.

COUNSEL: ATTORNEYS FOR APPELLANT: Alex R. Voils, Jr., Attorney at Law, 156 East Market Street, Suite 300, Indianapolis, Indiana 46204, J. Murray Clark, CLARK QUINN MOSES CLARK, 120 East Market Street, Suite 715, Indianapolis, Indiana 46204.

ATTORNEYS FOR APPELLEE: Linley E. Pearson, Attorney General of Indiana, Joseph N. Stevenson, Deputy Attorney General, 219 Statehouse, Indianapolis, Indiana 46204.

JUDGES: SHEPARD, GIVAN, DeBRULER, KRAHULIK

OPINION BY: DICKSON

OPINION

[*1044] DICKSON, J.

The defendant Greagree Davis was charged with Class B Burglary, Class B Criminal Confinement, Class A Rape, Class A Criminal Deviate Conduct, and Murder. The State sought imposition of the death penalty. The jury found the defendant not guilty of Criminal Deviate Conduct, but guilty on all other counts. The jurors were unable to agree upon a recommendation regarding the death penalty. The trial court, following a further sentencing hearing, ordered the death

penalty. This direct appeal presents the following issues: 1) sufficiency of evidence; 2) excusal of prospective jurors; 3) limitation **[**2]** on voir dire of prospective jurors; 4) admissibility of past misconduct evidence; 5) admissibility of forensic evidence; 6) admissibility of hearsay evidence; 7) admissibility of telephone conversation testimony; 8) sentencing final argument; and 9) ineffective assistance of counsel. We affirm the conviction and the sentence.

1. Sufficiency of Evidence

The defendant makes a general challenge to the sufficiency of the evidence supporting the conviction and imposition of the death penalty. Specifically, he contends that there is insufficient evidence to prove a) that he had the requisite intent to commit a felony at the time he broke and entered the victim's house; b) that the defendant and the victim were not engaged in **[*1045]** consensual sexual practices; and c) that the killing was not accidental.

In addressing the issue of sufficiency of evidence, we will affirm the conviction if, considering only the probative evidence and reasonable inferences supporting the verdict, without weighing evidence or assessing witness credibility, a reasonable trier of fact could conclude that the defendant was guilty beyond a reasonable doubt. *Case v. State* (1984), *Ind., 458 N.E.2d 223*; **[**3]** *Loyd v. State (1980), 272 Ind. 404, 398 N.E.2d 1260*, *cert. denied, 449 U.S. 881, 101 S.Ct. 231, 66 L.Ed.2d 105*. Where the verdict rests on circumstantial evidence, this Court need not find that the circumstantial evidence is adequate to overcome every reasonable hypothesis of innocence but only that inferences may reasonably be drawn to enable the jury to find guilt beyond a reasonable doubt. *See, Robinson v. State* (1989), *Ind., 541 N.E.2d 531, 532*; *Myers v. State* (1989), *Ind., 532 N.E.2d 1158, 1159*; *Mills v. State* (1987), *Ind., 512 N.E.2d 846, 848*; and *Lovell v. State* (1985), *Ind., 474 N.E.2d 505, 507.*

The evidence supporting the verdict is substantial. The defendant was acquainted with the victim's former roommate and had visited the victim's residence on many occasions during the summer of 1983. The defendant told the roommate several times of his sexual interest in the victim. About 7:00 p.m. on April 2, 1984, the defendant knocked on the door of the victim's neighbors, asking them whether the victim lived there, and **[**4]** was told that that she did not. The defendant then left. Sometime after 9:00 p.m., the victim arrived home and telephoned her brother. She told him that someone had broken into her residence through a back window and had removed all the light bulbs. The victim believed that the intruder might still be present. Her brother told her to leave immediately, and assumed that she would come to his residence. When she failed to arrive as he expected, he reported the incident to the police. The responding officer did not find the victim at her residence, but found a broken window. Later investigations discovered the keys to her new car on the porch and the missing light bulbs in a waste paper basket.

On April 4, a police officer found the gagged and substantially disrobed body of the victim at the top of a ramp under a bridge near her residence. An autopsy revealed chipped teeth; broken fingernails; abrasions on the hands, chin, and knees; multiple bruises to the lips and gums; and 113 stab or puncture wounds. The stab wounds were caused by two different knives. The victim's neck evidenced manual strangulation. Seminal fluid was found in her vaginal cavity. The cause of her death **[**5]** was determined to be multiple stab wounds to the chest and abdomen.

The defendant told police investigators that he broke the back window of the victim's home, entered it, unscrewed the light bulbs, waited, and hid behind a door when she returned home and made a phone call. When she walked towards the door, he got behind her. With the victim's hands tied in front of her, he took her to nearby railroad tracks, under a bridge, and up a slope. At some point he gagged her. The defendant told police that he stabbed her. He described the disposal of the knife, and took police to the creek where he had dropped it while trying to wash it off. Two knives were discovered at this location. One was the victim's pastry knife and the other was a chef's knife from the victim's kitchen knife set. The defendant also admitted taking the victim's watch and later selling it.

Serological analysis of blood and seminal fluid obtained from the victim indicated characteristics representing less than one percent of the general population. The defendant's blood test results placed him within this category.

In a burglary case, evidence of a defendant's actions after breaking is relevant in determining **[**6]** his intent at the

time of entry. *Smith v. State (1971), 256 Ind. 603, 271 N.E.2d 133*. Here, the defendant's removal of light bulbs to avoid detection and his lying in wait for the victim provide evidence of his intent to confine the victim upon her arrival. The likelihood that a guest does not normally break into a **[*1046]** friend's home and conceal himself refutes the claim that on this occasion the defendant was a welcome visitor in the victim's home. The evidence is sufficient to enable a reasonable trier of fact to find the defendant guilty of burglary beyond a reasonable doubt.

Regarding the criminal confinement and rape, the defendant presented evidence that the victim had previously enjoyed bondage during sexual intercourse with others. For this reason, he contends that the evidence is insufficient to prove that the confinement and intercourse were not consensual and that the killing was accidental. We disagree.

As a question of fact, the issue of consent is for the jury. *Roland v. State* (1986), *Ind., 501 N.E.2d 1034*. The intent to kill can be inferred from the intentional use of a deadly weapon in a manner likely to cause **[**7]** death. *Burse v. State* (1987), *Ind., 515 N.E.2d 1383*; *Mihay v. State* (1987), *Ind., 515 N.E.2d 498*.

The evidence shows that the defendant concealed himself in order to attack or abduct the victim. The victim sounded disturbed and apprehensive when she called her brother. The defendant took the victim to an isolated area. Her hands were bound. She told him that she wanted to go home. She was gagged. Eleven stab wounds were inflicted before her death. The massive brutal injuries to the head, face, mouth, hands, chest, and abdomen of the victim clearly contradict the claim of consensual confinement and bondage. Sexual intercourse is proven by the presence in the victim's vaginal cavity of seminal fluid which, to an extremely high degree of probability, came from the defendant. From the totality of evidence the jury could conclude beyond a reasonable doubt that the defendant was guilty of Criminal Confinement, Rape, and Murder as charged.

Regarding imposition of the death penalty, the defendant makes only the general assertion of insufficiency of evidence (Brief of Appellant at 42), and does not present any separate argument concerning **[**8]** the evidence or findings as to aggravating and mitigating circumstances. The court's judgment ordering imposition of the death penalty expressly concluded that the defendant did intentionally kill the victim during the course of committing the burglary, criminally confining and raping her after lying in wait. These findings encompass the statutory aggravating circumstances enumerated in subsections (1) and (3) of *Indiana Code Section 35-50-2-9(b)*. The court expressly found no mitigating factors that could be considered, and that to the extent that any mitigating factors might exist, they were outweighed by the aggravating factors.

The evidence is sufficient to support the trial court's finding, beyond a reasonable doubt, that the defendant intentionally killed the victim while committing Burglary and Rape, and that the defendant committed the murder by lying in wait. Furthermore, the defendant does not demonstrate any inadequacy in the trial court's consideration of aggravating and mitigating circumstances, or in its imposition of the death penalty in accordance with the Indiana Code. We find no error on the issue of sufficiency of the evidence to support the imposition of the **[**9]** death penalty.

2. Excusal of Prospective Jurors

The defendant claims that the trial court erred in excusing for cause two prospective jurors for their opposition to the death penalty. He contends that the jurors, while equivocating on the imposition of the death penalty, stated they could follow the law and, therefore, should not have been excused.

The standard to be applied is found in *Adams v. Texas (1980), 448 U.S. 38, 44, 100 S.Ct. 2521, 2526, 65 L.Ed.2d 581, 589*, and expressly approved in *Wainwright v. Witt (1985), 469 U.S. 412, 420, 105 S.Ct. 844, 850, 83 L.Ed.2d 841, 849*:

[A] juror may not be challenged for cause based on his views about capital punishment *unless those views would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.* The State may insist, however, **[*1047]** that jurors will consider and decide the facts impartially and

conscientiously apply the law as charged by the court. [Emphasis added in *Wainwright.]*

The defendant here contends trial court error in removing for cause Mrs. Sullivan and Mrs. **[**10]** Lynch. After voir dire questions directed to several prospective jurors, the record reveals the following relevant passages clearly involving Mrs. Sullivan: [1]

Mr. Cook: I want you to tell me again what your position is.

Mrs. Sullivan: My position is that I can listen fairly and determine guilt, but I could not vote for the death penalty.

Mr. Cook: Okay. Under any circumstances that you can imagine uh, as have been described to you in this case?

Mrs. Sullivan: No.

Record at 549-50. The relevant voir dire colloquy involving Mrs. Lynch is as follows:

Mr. Cook: Okay. So can you answer my question one way or the other? Do you think you can follow the Court's instructions?

Mrs. Lynch: Yes.

Record at 715.

Mrs. Lynch: Uh, sitting here I've been trying to do a little bit of thinking. I've been reviewing my personality and my moral convictions. I honestly do believe that the person that is accused that God is his final judge . . . so I could not myself bring judgment upon him.

Mr. Cook: Alright. So are you saying to me that there are no circumstances were you asked to consider the death penalty as an alternative sentence that you could envision that you would **[**11]** vote yes to impose the death penalty?

Mrs. Lynch: I could not vote yes.

Mr. Cook: Okay Are there any circumstances under which you would?

Mrs. Lynch: No sir.

Record at 728-29. The defendant argues that there was insufficient questioning to establish that these jurors were irrevocably committed to vote against the death penalty. However, that is not the standard to be applied. There need be no ritualistic adherence to a requirement that a prospective juror make it unmistakably clear that he or she would automatically vote against the imposition of capital punishment. A juror's bias need not be proven with unmistakable clarity. *Underwood v. State* (1989), *Ind., 535 N.E.2d 507*; *cert. denied, 493 U.S. 900, 110 S.Ct. 257, 107 L.Ed.2d 206* ; *Rondon v. State* (1989), *Ind., 534 N.E.2d 719*, *cert. denied, 493 U.S. 969, 110 S.Ct. 418, 107 L.Ed.2d 383*.

There is no error on this issue.

1 We are not persuaded by the defendant's assertion that the responses attributed to "Potential Juror" by the record are necessarily those of Mrs. Sullivan, and we find that her subsequent recapitulation of her position, set forth herein, reliably expresses her views.

[12]** *3. Limitation on Voir Dire*

The defendant contends that the trial court prevented him from ascertaining prospective jurors' attitudes on capital punishment. On the morning of the first day of trial, the State made an oral motion in limine. In its motion, the State sought to prevent either side from asking prospective jurors about their views on the death penalty in extreme cases,

such as if "Hitler were on trial" or if their child was the victim. The trial judge agreed that neither side should begin voir dire with extreme examples and then continue with examples of either increasing or decreasing severity. The defendant claims that this ruling prevented him from asking prospective jurors whether their consideration would be affected by the defendant being black and the victim being white.

The defendant indicates two instances where the trial judge sustained a State's objection to the defendant's questioning of a prospective juror. The trial judge sustained the objections because the defendant's questions asked the prospective jurors how they would vote in the present case. Record at 588. Questions which seek to shape a favorable jury by deliberate exposure to the substantive **[**13]** issues in the case are improper. *Von Almen v. State* (1986), *Ind., 496 N.E.2d 55*.

[*1048] The ruling on the motion in limine did not prevent the defendant from asking about possible racial prejudice of prospective jurors. In fact, the defense counsel did ask the jury as a group about any such prejudice. Record at 576.

The trial court did not deny the defendant the opportunity to make reasonable inquiry regarding the prospective jurors' attitudes regarding the death penalty.

4. Admissibility of Past Misconduct Evidence

Acknowledging that his counsel failed to object at trial, the defendant claims that admission of two instances of his prior misconduct amounts to fundamental error. The victim's former roommate testified that in the summer of 1983 the defendant tried to sexually assault the roommate, but she was able to resist him. On redirect examination, the roommate also mentioned a prior incident in which the defendant had broken into a residence.

The defendant correctly asserts that evidence of crimes and uncharged criminal acts is generally inadmissible to prove the guilt of the accused. *Stwalley v. State* (1989), *Ind., 534 N.E.2d 229*; **[**14]** *Staton v. State* (1988), *Ind., 524 N.E.2d 6*. The State contends that the evidence was admissible under either the "depraved sexual instinct" or the "common scheme or plan" exceptions to this general rule.

The depraved sexual instinct exception allows evidence of prior acts showing the same perverted sexual instinct that is involved in the charged offense. *Miller v. State* (1991), *Ind., 575 N.E.2d 272*. However, this exception does not allow the admission of evidence of the prior rape of an adult woman. *Stwalley, 534 N.E.2d 229*; *Reichard v. State* (1987), *Ind., 510 N.E.2d 163*. In the present case, the nature of the defendant's prior attempted sexual assault upon the roommate cannot be distinguished from an attempted rape; thus, it is not admissible under the exception.

Two branches of the common scheme or plan exception are recognized. The first permits proof of identity by showing the defendant committed other crimes with identical *modus operandi.* The second permits proof of an uncharged crime as evidence of a preconceived plan which included the charged crime. *Penley v. State* (1987), *Ind., 506 N.E.2d 806*. **[**15]** The State urges application of the common scheme or plan exception arguing only that the prior break-in occurred in the same building. This is insufficient to meet the "so strikingly similar" standard [2] required for admissibility under the *modus operandi* branch of the common scheme or plan exception. *Id. at 810*.

2 Specifically, the inquiry must be, "Are these crimes so strikingly similar that one can say with reasonable certainty that one and the same person committed them?" *Id.*

While evidence of the defendant's past misconduct should not have been admitted, trial counsel's failure to object waives such error unless the admission of evidence constitutes fundamental error. *Wright v. State* (1985), *Ind., 474 N.E.2d 89*. Even when procedural default does not preclude asserting the claim of error, such error may nevertheless be found harmless and thus insufficient to require reversal. *Collins v. State* (1991), *Ind., 567 N.E.2d 798*. A finding of **[**16]** fundamental error results only when the error is a substantial blatant violation of basic principles rendering the trial unfair. *Hart v. State* (1991), *Ind., 578 N.E.2d 336*. This determination includes consideration of the potential for

resulting harm. *Id.* Similarly, an evaluation for harmless error involves considering the likelihood that the questioned evidence may have contributed to the conviction. *Jaske v. State* (1989), *Ind., 539 N.E.2d 14*. Erroneously admitted evidence may be found to be harmless where a determination of guilt is supported by overwhelming independent evidence. *Staton, 524 N.E.2d 6, 9*; *Howell v. State (1981), 274 Ind. 490, 493, 413 N.E.2d 225, 226*; *Stevens v. State (1976), 265 Ind. 396, 408, 354 N.E.2d 727, 735*.

As outlined in our discussion in Issue 1, the other evidence is overwhelming **[*1049]** and leads us to conclude that the erroneously admitted evidence of the defendant's prior misconduct did not amount to fundamental error. If a timely objection had been made and overruled, the error would have been harmless.

5. Admissibility **[**17]** *of Forensic Evidence*

The defendant asserts that the testimony of two forensic serologists regarding blood-typing test results lacked the proper foundation in that an expert must first establish the acceptance and reliability of the tests used. As the defendant failed to object at trial, he asserts that the lack of proper foundation amounts to fundamental error.

The first serologist discussed blood typing and serological test results. She stated that the methods she used were recognized in the area of forensic serology. The second serologist stated that the methods she used conformed to recognized methods in the field. The results of the tests were probative evidence that the victim had sexual intercourse with a person whose almost unique blood features were consistent with those of the defendant.

The defendant contends that the results of expert testing are admissible only if the methodology is demonstrated to have gained general acceptance in its particular field. Disclaiming any contest regarding the acceptance of general blood typing, the defendant argues that there was no specific indicia of the acceptance of "the remaining tests," (presumably the secretor-nonsecretor **[**18]** determinations). Brief of Appellant at 64.

The sufficiency of a foundation for expert testimony is a matter for the sound discretion of the trial court. We will reverse only for an abuse of that discretion. *Hill v. State* (1984), *Ind., 470 N.E.2d 1332*. Here, the expert testimony provided reasonably specific details regarding the testing process utilized and explained the basis for the resulting expert opinion. There was reference to compliance with generally accepted standards in the field. There was ample opportunity to expose any weakness on cross examination. On appeal, the defendant does not make any showing or claim that the test methodology was in fact contrary to prevailing general acceptance. The defendant has failed to demonstrate reversible error on this issue.

6. Admissibility of Hearsay Evidence

The defendant claims that admission of a telephone conversation between the victim and her brother denied him a fair trial because it was hearsay, an out-of-court declaration repeated in court to prove the truth of its content.

The victim's brother testified that he received a telephone call from her on the night of the killing. He related her **[**19]** statements that someone had broken into her residence and had removed all the light bulbs from their sockets. When she returned to the telephone after checking on the lights, she said she believed that someone was still in her home. Understandably, her brother told her to leave immediately, but he heard nothing else from her. In the conversation, the victim sounded disturbed but not frightened. Other evidence at trial provided proof that two window panes had been broken out and that light bulbs were missing from the light fixtures at the victim's residence.

The victim-declarant's statements were not offered to show the truth of their content, but rather to show the victim's state of mind prior to the confinement. *See Dunaway v. State* (1982), *Ind., 440 N.E.2d 682*. Because the defendant claimed that the victim consented to the confinement and sex acts, the victim's state of mind was in issue. Her statements reflect her state of apprehension while she was at her home just prior to the crimes. Her apprehension was relevant to the issue of consent. Admission of the conversation was not error.

7. Admissibility of Telephone Conversation Testimony

The defendant **[**20]** contends that the trial court denied him fundamental due process and his right of confrontation by permitting certain State witnesses to repeat telephone conversations held with an unidentified caller who had information about the **[*1050]** victim. Claiming this testimony lacked the requisite foundation, the defendant argues that the witnesses should be required to identify the caller before relating the substance of the conversation. Acknowledging that he did not object at trial, the defendant asserts that the admission of the testimony constitutes fundamental error.

Two police officers testified about telephone calls they received on April 4, 1984 from a person claiming to have information about the victim. According to the first officer, the caller reported seeing the victim walking down the street with a black man who had two shiny objects in his hands. The officer did not know who the caller was. The second officer listened to the latter part of the first telephone call and later took calls from a man who identified himself as Greagree Davis. This officer recognized the caller as the person who made the first call. In a subsequent personal interview at which the second officer **[**21]** was present, the defendant repeated his story about seeing the victim with a black man on the night of the killing, and then he abruptly confessed to the criminal episode. The officer recognized the defendant's voice as being the same voice that made the two prior telephone calls.

The defendant is correct that a caller's identity must be established as a foundation for the admission of the content of a telephone call. *Starks v. State* (1987), *Ind., 517 N.E.2d 46*. Any doubt regarding the credibility of a voice identification generally goes to the weight of the evidence and not its admissibility. *Ashley v. State* (1986), *Ind., 493 N.E.2d 768*. Because the second officer provided the identification testimony, an adequate foundation was provided. We find no error in admitting this telephone conversation testimony.

A manager at the victim's place of employment related a telephone conversation he had with an unknown caller who had found some of the victim's personal items upon the ground in the area where the victim's body was later found. The manager opined that the caller was an adolescent black male. The defendant was a black male then in **[**22]** his early twenties. Upon a proper objection, the manager's testimony regarding the phone call would have been inadmissible. However, its admission here was not a blatant violation of basic principles rendering the trial unfair. The manager's testimony regarding the comments of the unknown caller did not provide any facts not otherwise clearly shown by other evidence, including the defendant's confession to police. Admission of this testimony does not amount to fundamental error.

8. Sentencing Final Argument

The defendant contends that the prosecutor's final argument in the sentencing phase of his trial was highly improper and placed him in great peril in two respects.

First, he claims that the State improperly urged the jury to recommend the death penalty simply because state government had authorized it through the enactment and upholding of death penalty legislation. Citing *State v. Sloan (1982), 278 S.C. 435, 298 S.E.2d 92*, he asserts that such content in final argument is highly improper and prejudicial. In *Sloan,* the final argument had emphasized government approval of the death penalty in general and in the particular case stressing **[**23]** the involvement of the legislature, the governor, the arresting police officers, the grand jury, and the prosecutor. The *Sloan* court found this final argument to be improper in significant part due to the attempt "to minimize the jury's sense of responsibility for the appellant's fate." *Sloan, 278 S.Car. at 441, 298 S.E.2d at 95.*

In reviewing the propriety of remarks during final argument, we first determine whether the prosecutor engaged in misconduct, and then assess whether any such misconduct placed the defendant in a position of grave peril or evinced a deliberate attempt to improperly prejudice the defendant. *Collins v. State* (1987), *Ind., 509 N.E.2d 827*; *Burris v. State* (1984), *Ind., 465 N.E.2d 171*; *Maldonado v. State (1976), 265 Ind. 492, 355 N.E.2d 843.*

The allegedly improper remarks are contained in the following passage:

[*1051] We've got the burden of proving the aggravating circumstances in this case to you beyond a reasonable doubt. And then you have the job of weighing the aggravating circumstances that have been proven to you against any mitigating circumstances **[**24]** that have been presented and then you make your decision on whether the death penalty is an appropriate penalty or not. *Is the death penalty appropriate? Well, let's stop and think about that just for a brief moment. It is the law of the State of Indiana. Uh, the congress has uh, our legislature has debated the moral issues of the death penalty. The people of the State of Indiana have legislated the death penalty into law. The governor has signed it and it is on the books.* And it is an alternative punishment. And that's why we're here. Now the death penalty has not been instituted for every murder case. That's why we have this entire list of aggravating circumstances . . .. *Now, uh, should we decide uh, whether the legislators at this point, or is it our prerogative to take into our own hands and decide that the legislators and the people of the State of Indiana don't know what they're talking about.*

Record at 949-51 (emphasis added). The defendant contends that the portions of argument shown emphasized in the foregoing passage were highly improper and placed him in great peril. There are similarities between these final argument comments and those condemned in **[**25]** *Sloan.* When considering the comments in context, however, the jurors here were not being asked to abandon their sense of responsibility. This argument does not constitute misconduct.

The defendant also contends that the prosecutor's final argument was improper because it touched on the value of the victim's life to family and loved ones, contrary to *Booth v. Maryland (1987), 482 U.S. 496, 107 S.Ct. 2529, 96 L.Ed.2d 440*. However, *Booth* and its rationale were expressly overruled and rejected in *Payne v. Tennessee (1991), 501 U.S. 1004 , 111 S.Ct. 2597, 115 L.Ed.2d 720*. As a newly declared constitutional rule regarding the conduct of criminal prosecutions, *Payne* should be retroactively applied to all cases pending on direct review. *Griffith v. Kentucky (1987), 479 U.S. 314, 107 S.Ct. 708, 93 L.Ed.2d 649*; *Wilson v. State* (1987), *Ind., 514 N.E.2d 282*; *cf. Daniels v. State* (1990), *Ind., 561 N.E.2d 487* (retroactivity in cases pending on collateral review); *see also Leonard v. State* (1991), *Ind. App., 573 N.E.2d 463*. **[**26]**

9. Ineffective Assistance of Counsel

The defendant claims that his trial counsel was deficient in not objecting to the following: 1) testimony on the telephone conversations of two police officers and the victim's manager; 2) testimony on the defendant's past misconduct; 3) forensic serology evidence; 4) the victim's telephone conversation with her brother; and 5) the prosecutor's comments during final argument. We have determined that no error occurred regarding the latter three points, preventing their consideration here.

Reversal for ineffective assistance of counsel is appropriate in cases where a defendant shows both (a) deficient performance by counsel and (b) resulting prejudice from errors of counsel so serious as to deprive the defendant of a trial whose result is reliable. *Strickland v. Washington (1984), 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674*. A claim of ineffective assistance must identify the claimed errors of counsel, so that the court may determine whether, in light of all circumstances, the counsel's actions were outside the range of professionally competent assistance. The proper measure of attorney performance **[**27]** is reasonableness under prevailing professional norms. It shall be strongly presumed that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Judicial scrutiny of counsel's performance is highly deferential and should not be exercised through the distortions of hindsight. Isolated poor strategy, inexperience, or bad tactics do not necessarily amount to ineffectiveness of counsel. *Id.; Burr v. State* (1986), *Ind., 492 N.E.2d 306*; **[*1052]** *Jackson v. State* (1985), *Ind., 483 N.E.2d 1374*; *Price v. State* (1985), *Ind., 482 N.E.2d 719*; *Seaton v. State* (1985), *Ind., 478 N.E.2d 51*.

As discussed above, we find no merit in the defendant's claims of error regarding the forensic serology evidence, the victim's telephone comments to her brother, the alleged lack of foundation for the police officers' testimony regarding the telephone calls from the initially unidentified caller, and the prosecutor's final argument. Timely objection by trial counsel would have properly been overruled. With regard to the failure of counsel to object to the past misconduct **[**28]** testimony and the manager's testimony regarding telephone remarks from an unknown caller, we

conclude that these errors do not establish ineffective assistance of counsel. They did not result in prejudice so serious as to deprive the defendant of a trial whose result is reliable.

The judgment of the trial court is affirmed.

SHEPARD, C.J. and GIVAN, J., concur. DeBRULER, J., concurs with separate opinion in which KRAHULIK, J., concurs.

CONCUR BY: DeBRULER

CONCUR

DeBRULER, J. concurring.

I vote to affirm these convictions, and, despite numerous errors in the sentencing process find on review that the lone aggravator outweighs the mitigators and that the death sentence is appropriate.

The trial court in its written judgment included the following findings with reference to the aggravating and mitigating circumstances:

1. That the defendant . . . did commit the crime of Murder upon the person of . . . while lying in wait in her dwelling.

3. That the Defendant . . . did commit the offense of Criminal Confinement. . . .

5. That the defendant . . . did intentionally kill . . . during the course of committing the burglary, criminally confining and raping . . . after lying in wait for her.

7. **[**29]** That the Court has found no mitigating factors that could be considered.

I interpret this order as representing that the court found and weighed four distinct death aggravators, namely intentional killing-burglary, intentional killing-criminal confinement, intentional killing-rape, and intentional killing-by lying in wait.

In this case the defendant broke into the victim's house at night, removed light bulbs, armed himself with a knife from the kitchen, drank the victim's wine, and secreted himself. Appellant was well acquainted with the victim and her house, having visited it many times as a social guest. She appeared in the house, and when she sought to leave he jumped out, seized her, tied her hands, led her from the house at knife point to a bridge about a block away where he finished a pint of whiskey, removed articles of her clothing, had sexual intercourse with her, and stabbed and killed her. The length of time between the abduction and the stabbing is not proved in the evidence.

There is real difficulty here with the trial court's interpretation and application of the aggravator stated in *I.C. 35-50-2-9(3)*, "The defendant committed the murder by lying in wait." The **[**30]** trial court ignores the preposition "by," chosen by the legislature for this formulation, and substitutes "while" and "after" for it. The essential elements of this aggravator are watching, waiting and concealment from the person with the intent to kill, and choosing to act upon that intent with the appearance of the hapless victim. *Davis v. State* (1985), *Ind., 477 N.E.2d 889. Thacker v. State* (1990), *Ind., 556 N.E.2d 1315*. Because this killing by appellant occurred a considerable distance away from the house where the concealment occurred, and because it may have occurred several hours after the abduction, there is an insufficient connection or nexus to show that the murder was by lying in wait. Moreover, the trial court's finding No. 1, that appellant killed while lying in wait in the house, is patently unsupported in the record, as it is uncontroverted that the killing did not occur at the dwelling but a good distance away on another **[*1053]** street. Also, finding No. 5 is erroneous in that it misinterprets the aggravator to require only that the watching, waiting and concealment precede the

act of killing in time. Clearly, more in the way of **[**31]** connection is required. *Davis v. State, 477 N.E.2d 889* .

Findings Nos. 3 and 5 are contrary to law in employing as an aggravator the conclusion that appellant intentionally killed during the course of criminally confining. The crime which the jury was given in its sentence recommendation instructions and the crime used by the trial court in sentencing is that of criminal confinement, established by *I.C. 35-42-3-3*. There is no such death aggravator. An intentional killing while committing kidnapping, *I.C. 35-42-3-2*, is an aggravator, however, that crime was not charged or included in instructions.

The remaining aggravator, i.e., killing intentionally in the course of a rape, I find properly found and supported by the evidence. Appellant was twenty two years of age. The circumstances surrounding this killing include a beating, physical choking, and the use of at least three separate weapons: two different knives and a needle. The weight of this aggravator is in the high range.

The trial court found no mitigating factors. I disagree. Appellant was incessantly drunk at this period of his life. When placed on probation a few months before this murder for a **[**32]** burglary committed while intoxicated, he was determined an alcoholic in need of treatment. All four psychiatrists, while finding no mental illness or disturbance, deemed his history of drinking excessively to be at least credible. I find this condition to be a mitigator having a low range value.

Appellant's conduct following the killing included immediately identifying himself to the police and telling them and others a fanciful and incredible story about having seen the crime. He thusly made himself an immediate major suspect. Upon modest interrogation, he confessed. I find this conduct to be a mitigator having a low range value.

Appellant has no significant history of prior criminal conduct. His recent felony conviction was for breaking into the other side of the double that the victim occupied, and did not extend further. As a juvenile he had a true finding of delinquency, but was placed on probation and showed a satisfactory adjustment. I find this mitigator to be in the medium range.

The jury was unable to unanimously recommend the death penalty for appellant. I would grant this fact mitigating value in the low range.

Appellant's crime, character, and background is **[**33]** similar to those considered in *Woods v. State* (1989), *Ind., 547 N.E.2d 772*, and *Johnson v. State* (1992), *Ind., 584 N.E.2d 1092*. Woods was nineteen, Johnson was twenty, and appellant was twenty-two. Woods stabbed an elderly neighbor in his home, killing him and stealing his property. Johnson beat an elderly woman in her home, killing her, stealing her property and burning the house down. Appellant stabbed his victim with three different instruments, choked her, and violated her person sexually, while she was bound and gagged. The weight of the aggravator in this case is greater than in *Woods* and *Johnson.*

Woods was suffering from a borderline mental disorder, while Johnson was a longtime abuser of drugs and alcohol. Woods also received the benefit on appeal of mitigation for his lack of an adult criminal record and a turbulent childhood. The Woods and Johnson cases differ in two significant respects in the area of mitigation. In those two cases the jury made recommendations of death, whereas here the jury was unable to make a recommendation of death. In those two cases there was no conduct by Woods or Johnson which rendered them **[**34]** immediate major suspects, whereas here such conduct is present. Despite the presence of the additional weight of these mitigating factors in appellant's case, it is my judgment that the death penalty is not arbitrary or capricious, is not manifestly unreasonable, and is here appropriate as it was in *Woods* and *Johnson.* The mitigators here have a greater **[*1054]** weight, but so also does the aggravator. The mitigators are outweighed by this lone aggravator.

Krahulik, J. concurs.

LEXSEE 738 N.E.2D 253

CHIJIOKE BOMANI BEN-YISRAYL, f/k/a GREAGREE DAVIS, Defendant-Appellant, v. STATE OF INDIANA, Plaintiff-Appellee.

49S00-9307-PD-826

SUPREME COURT OF INDIANA

738 N.E.2d 253*; *2000 Ind. LEXIS 1081

November 8, 2000, Decided

SUBSEQUENT HISTORY: **[**1]** Appellant's Rehearing Denied September 5, 2001, Reported at: *2001 Ind. LEXIS 849*. Certiorari Denied February 25, 2002, Reported at: *2002 U.S. LEXIS 1226*.

PRIOR HISTORY: APPEAL FROM THE MARION SUPERIOR COURT. Cause No. CR84-76E. The Honorable Cynthia S. Emkes, Special Judge.

DISPOSITION: Post conviction judgment affirmed and remanded for further proceedings.

COUNSEL: FOR APPELLANT: Susan K. Carpenter, Public Defender of Indiana, Steven H. Schutte, Deputy Public Defender, Joanna Green, Deputy Public Defender, Indianapolis, Indiana.

FOR APPELLEE: Jeffrey A. Modisett, Attorney General of Indiana, James D. Dimitri, Deputy Attorney General, Indianapolis, Indiana.

JUDGES: DICKSON, Justice. SHEPARD, C.J., and SULLIVAN, BOEHM, and RUCKER, JJ., concur.

OPINION BY: DICKSON

OPINION

[*257] On Appeal from Denial of Post-Conviction Relief

DICKSON, Justice

The defendant, Chijioke Bomane Ben-Yisrayl, formerly known as Greagree Davis, was convicted of the murder, [1] rape, [2] burglary, [3] and criminal confinement [4] of Debra Weaver, and the trial court ordered the death penalty. We affirmed the conviction and sentence on direct appeal. *Davis v. State, 598 N.E.2d 1041 (Ind. 1992)*, cert. denied, *510 U.S. 948, 114 S. Ct. 392, 126 L. Ed. 2d 340 (1993)*. In the subsequent post-conviction proceeding, the post-conviction court partially granted the defendant's **[**2]** petition for post-conviction relief, vacating the death sentence and ordering a remand to the trial court for a new penalty phase trial and sentencing proceeding, but otherwise denied his petition.

The defendant appeals from the post-conviction court's partial denial of post-conviction relief, raising issues regarding the effectiveness of counsel, the State's alleged failure to disclose exculpatory evidence, alleged extraneous influence on the jury, and alleged defects in the charging information. The State cross-appeals from the post-conviction court's partial grant of post-conviction relief, raising issues regarding the sufficiency of the sentencing order and the effectiveness of the defendant's counsel. We affirm the judgment of the post-conviction court.

1 *IND. CODE 35-42-1-1* (1978).
2 *IND. CODE 35-42-1-1* (1978).
3 *IND. CODE 35-43-2-1* (1978).
4 *IND. CODE 35-42-3-3* (1978).

[*258] I. Preliminary Considerations

Post-conviction proceedings do not afford an opportunity for a "super-appeal. **[**3]** " *Bailey v. State, 472 N.E.2d 1260, 1263 (Ind. 1985)*; *Langley v. State, 256 Ind. 199, 210, 267 N.E.2d 538, 544 (1971)*. Rather, post-conviction proceedings provide defendants the opportunity to raise issues that were not known at the time of the original trial or that were not available on direct appeal. *Lowery v. State, 640 N.E.2d 1031, 1036 (Ind. 1994)* ("Post-conviction actions are special, quasi-civil remedies whereby a party can present an error which, for various reasons, was not available or known at the time of the original trial or appeal."), cert. denied, *516 U.S. 992, 116 S. Ct. 525, 133 L. Ed. 2d 432 (1995)*. These proceedings do not substitute for direct appeals but provide a narrow remedy for subsequent collateral challenges to convictions. *Weatherford v. State, 619 N.E.2d 915, 916-17 (Ind. 1993)*. The petitioner for post-conviction relief has the burden of establishing his grounds for relief by a preponderance of the evidence. Ind. Post-Conviction Rule 1(5).

As a general rule, when this Court decides an issue on direct appeal, the doctrine of res judicata applies, thereby precluding its review in post-conviction **[**4]** proceedings. *Lowery, 640 N.E.2d at 1037*. The doctrine of res judicata prevents the repetitious litigation of that which is essentially the same dispute. *Sweeney v. State, 704 N.E.2d 86, 94 (Ind. 1998)*; *Wagle v. Henry, 679 N.E.2d 1002, 1005 (Ind. Ct. App. 1997)*; *Scott v. Scott, 668 N.E.2d 691, 699 (Ind. Ct. App. 1996)*. A petitioner for post-conviction relief cannot escape the effect of claim preclusion merely by using different language to phrase an issue and define an alleged error. *Maxey v. State, 596 N.E.2d 908, 911 (Ind. Ct. App. 1992)*. Issues that were available, but not presented, on direct appeal are forfeited on post-conviction review. *Spranger v. State, 650 N.E.2d 1117, 1121 (Ind. 1995)*; *Lowery, 640 N.E.2d at 1036-37*. But cf. *Woods v. State, 701 N.E.2d 1208 (Ind. 1998)* (regarding claims of ineffective assistance of trial counsel).

Because the defendant is appealing from a denial of relief in a claim on which he had the burden of proof, he is appealing from a negative judgment. The standard of review in appeals from post-conviction negative judgments is well settled: **[**5]** the defendant must establish that the evidence, as a whole, unmistakably and unerringly points to a conclusion contrary to the post-conviction court's decision. *Spranger, 650 N.E.2d at 1119*. The reviewing court accepts the trial court's findings of fact unless "clearly erroneous." Ind. Trial Rule 52(A).

The State, on the other hand, appeals from that portion of the post-conviction court's judgment that grants relief to the defendant. Because the State claims that the court erred in concluding that the defendant established one of his claims sufficiently to be entitled to relief, the judgment from which the State appeals is not a negative judgment. When an appeal after a non-jury trial does not challenge a negative judgment, the applicable standard is simply that prescribed by Trial Rule 52(A):

On appeal of claims tried by the court without a jury or with an advisory jury, at law or in equity, the court on appeal shall not set aside the findings or judgment unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses.

In reviewing a judgment granting post-conviction relief, "'we reverse **[**6]** only upon a showing of 'clear error'-that which leaves us with a definite and firm conviction that mistake has been made.'" *State v. Van Cleave, 674*

N.E.2d 1293, 1295 (Ind. 1996) (quoting *Spranger, 650 N.E.2d at 1119*), reh'g granted in part, *681 N.E.2d 181 (Ind. 1997)*, cert. denied, *522 U.S. 1119, 118 S. Ct. 1060, 140 L. Ed. 2d 121 (1998)*. Because this "clearly erroneous" standard is a review for sufficiency of evidence, we **[*259]** neither reweigh the evidence nor determine the credibility of witnesses but consider only the evidence that supports the judgment and the reasonable inferences to be drawn from that evidence. *Estate of Reasor v. Putnam County, 635 N.E.2d 153, 158 (Ind. 1994)*; *Chidester v. City of Hobart, 631 N.E.2d 908, 910 (Ind. 1994)*; *Indianapolis Convention & Visitors Ass'n., Inc. v. Indianapolis Newspapers, Inc., 577 N.E.2d 208, 211 (Ind. 1991)*. When a "clearly erroneous" judgment results from an application of the wrong legal standard to properly found facts, we do not defer to the trial court. *Van Cleave, 674 N.E.2d at 1296*. We are not bound by the trial court's characterization **[**7]** of its results as "findings of fact" or "conclusions of law," but look to the substance of the judgment and review a legal conclusion as such even if the judgment wrongly classifies it as a finding of fact. Id. (citing *Indiana State Bd. of Public Welfare v. Tioga Pines Living Ctr., Inc., 575 N.E.2d 303, 306 & n.1 (Ind. Ct. App. 1991))*.

II. Effective Assistance of Counsel

Indiana Post-Conviction Rule 1(7) authorizes either the defendant-petitioner or the State to take an appeal. Both the defendant and the State contend that the post-conviction court erred in its determinations regarding the denial of the right to the effective assistance of counsel, but they each challenge a different aspect of the post-conviction court's conclusions. The defendant urges that the court erred in denying his claims that his trial counsel provided ineffective assistance at the guilt phase and that his appellate counsel was ineffective in asserting this claim. The State contends on cross-appeal that the post-conviction court erred in finding that the defendant's trial counsel provided ineffective assistance at the penalty/sentencing phase because this claim was subject to res judicata **[**8]** and forfeiture. The State also argues that the post-conviction court erred in finding that the defendant's appellate counsel provided ineffective assistance in challenging trial counsel's penalty phase performance.

A. Claim of Trial Counsel Ineffectiveness

In Woods, we held that a defendant may raise a claim of ineffective assistance of trial counsel for the first time in a post-conviction proceeding, but we emphasized that once the defendant chooses to raise his claim of ineffective assistance of trial counsel (either on direct appeal or post-conviction), he must raise all issues relating to that claim, whether record-based or otherwise. *701 N.E.2d at 1220*. A defendant who chooses to raise on direct appeal a claim of ineffective assistance of trial counsel is foreclosed from relitigating that claim. Id. ("Ineffective assistance of trial counsel is not available in post-conviction if the direct appeal raises any claim of deprivation of Sixth Amendment right to counsel."). See also *Bieghler v. State, 690 N.E.2d 188, 200-01 (Ind. 1997)* ("Some of the [defendant's arguments on post-conviction appeal] are new arguments about aspects of trial counsel's **[**9]** performance we considered on direct appeal; others focus on aspects not mentioned earlier. In either case, the earlier ruling that trial counsel was not ineffective is res judicata."); *Sawyer v. State, 679 N.E.2d 1328, 1329 (Ind. 1997)* ("[The defendant], having once litigated his Sixth Amendment claim concerning ineffective assistance of counsel, is not entitled to litigate it again, by alleging different grounds."); *Morris v. State, 466 N.E.2d 13, 14 (Ind. 1984)* ("Notwithstanding the fact that petitioner gave several additional examples of his counsel's alleged ineffectiveness during the post-conviction hearing, a consideration of the ineffectiveness issue would constitute review of an issue already decided on direct appeal.").

In his direct appeal, the defendant raised, and this Court considered and rejected, a claim of ineffective assistance of trial counsel. *Davis, 598 N.E.2d at 1051-52*. Res judicata thus barred him from relitigating this issue in post-conviction proceedings. The post-conviction court **[*260]** erred as a matter of law in considering the merits of the defendant's claim directly challenging trial counsel's effectiveness.

B. **[**10]** Claim of Appellate Counsel Ineffectiveness

In addition to directly challenging trial counsel's effectiveness, however, the defendant separately claimed on post-conviction that he was denied the effective assistance of appellate counsel on direct appeal. He alleged that

appellate counsel failed to raise properly preserved meritorious issues and errors apparent in the record, failed to take necessary steps to adequately present issues that were raised, and pursued the issue of ineffective assistance of trial counsel without completely investigating and raising all related issues. P.C.R. Record at 457-63. [5] On the defendant's claim that his appellate counsel provided ineffective assistance, the post-conviction court entered findings of fact and conclusions of law, determining that appellate counsel was deficient in presenting the issue of trial counsel ineffectiveness.

5 The defendant's Exhibit A in the post-conviction proceeding is a transcript of the record of proceedings on direct appeal. To avoid confusion, when citing the record, we refer to the record in the present proceeding as "P.C.R. Record" and the record on direct appeal as "Trial Record."

[11]** The Sixth Amendment entitles a criminal defendant to the effective assistance of counsel not only at trial, but during his first appeal as of right. *Evitts v. Lucey, 469 U.S. 387, 396, 105 S. Ct. 830, 836, 83 L. Ed. 2d 821, 830 (1985)*. To prevail on his claim that he was deprived of his right to the effective assistance of appellate counsel in presenting the claim of ineffective assistance of trial counsel, the defendant had to establish to the post-conviction court the two components set forth in *Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)*. See *Williams v. Taylor, 529 U.S. 362, , 120 S. Ct. 1495, 1511-12, 146 L. Ed. 2d 389, 416 (2000)*; *Roe v. Flores-Ortega, 528 U.S. 470, , 120 S. Ct. 1029, 1034, 145 L. Ed. 2d 985, 994 (2000)*. First, the defendant had to show that appellate counsel's performance was deficient. *Strickland, 466 U.S. at 687, 104 S. Ct. at 2064, 80 L. Ed. 2d at 693*. This required showing that counsel's representation fell below an objective standard of reasonableness. *Id. at 688, 104 S. Ct. at 2064, 80 L. Ed. 2d at 693*. Second, the **[**12]** defendant had to show that the deficient performance actually prejudiced the defense, that is, that his appellate counsel's errors were so serious as to deprive the defendant of a fair proceeding, one whose result is reliable. *Id. at 687, 104 S. Ct. at 2064, 80 L. Ed. 2d at 693*. In other words, to establish the element of prejudice, the defendant had to show that there is a reasonable probability that, but for his appellate counsel's unprofessional errors, the result of the proceeding would have been different. *Id. at 694, 104 S. Ct. at 2068, 80 L. Ed. 2d at 698*. A reasonable probability is a probability sufficient to undermine confidence in the outcome. Id.

Although we have generally considered claims of ineffective assistance of appellate counsel as analogous to claims of trial counsel ineffectiveness, *Taylor v. State, 717 N.E.2d 90, 94 (Ind. 1999)*; *Lowery, 640 N.E.2d at 1048*, there are significant and important differences between the roles of appellate counsel and trial counsel. In Woods, this Court observed:

Expecting appellate lawyers to look outside the record for error is unreasonable in light of the realities of **[**13]** appellate practice. Direct appeal counsel should not be forced to become a second trial counsel. Appellate lawyers may have neither the skills nor the resources nor the time to investigate extra-record claims, much less to present them coherently and persuasively to the trial court.

701 N.E.2d at 1216. [6]

6 In Woods, we emphasized that the right to challenge appellate counsel's performance is not equivalent to a direct challenge to trial counsel's representation by means of post-conviction relief proceedings:

First, ineffective assistance of appellate counsel requires the petitioner to overcome the double presumption of attorney competence at both trial and appellate levels. This is no mere quibble. Appellate lawyers must make difficult judgment calls in narrowing a broad range of possible claims to a select few that are thought to have the best chance of success. In this winnowing process, possibly valid claims may be eliminated due to page limits, time limits on oral argument, or the strategic judgment that the perceived strongest contentions not be diluted. . . .

Second, in elaborating the right to effective assistance of appellate counsel, the Supreme Court of the United States has never suggested that counsel must look outside the record for possible claims of error for the

performance to be constitutionally effective. To the contrary, courts adjudicating appellate ineffectiveness claims have rejected imposing this burden on appellate counsel. . . . Because there is no constitutional requirement for appellate counsel to search outside the record for error, an ineffective assistance of appellate counsel claim that is in substance a trial counsel claim requiring extrinsic evidence may be dead on arrival.

In short, a claim of ineffective assistance of appellate counsel is not an adequate back door to a full adjudication of ineffectiveness of trial counsel.

701 N.E.2d at 1221-22 (internal citations omitted).

[14]**

In a claim that appellate counsel provided ineffective assistance regarding **[*261]** the selection and presentation of issues, the defendant must overcome the strongest presumption of adequate assistance, and judicial scrutiny is highly deferential. *Conner v. State, 711 N.E.2d 1238, 1252 (Ind. 1999)*; *Bieghler, 690 N.E.2d at 195-96*. In determining whether appellate counsel's performance was deficient, the reviewing court considers the information available in the trial record or otherwise known to appellate counsel. Because the role and function of appellate counsel on direct appeal is different from that of post-conviction counsel, however, the performance of appellate counsel should not be measured by information unknown to appellate counsel but later developed after the appeal by post-conviction counsel. A defendant may establish that his appellate counsel's performance was deficient where counsel failed to present a significant and obvious issue for reasons that cannot be explained by any strategic decision. [7] See *Mason v. State, 689 N.E.2d 1233 (Ind. 1997)* (describing the rationale employed in *Mason v. Hanks, 97 F.3d 887 (7th Cir. 1996))*. **[**15]** Appellate counsel's decision regarding "what issues to raise and what arguments to make is 'one of the most important strategic decisions to be made by appellate counsel.'" *Conner, 711 N.E.2d at 1252* (quoting *Bieghler, 690 N.E.2d at 193* (quoting Lissa Griffin, The Right to Effective Assistance of Appellate Counsel, *97 W. VA. L. RE V. 1, 26 (1994)))*. Appellate counsel must consider various factors, including the likelihood of appellate success and the principles of res judicata and procedural default, which may foreclose future review in subsequent post-conviction proceedings. When assessing challenges to an appellate counsel's strategic decision to include or exclude issues, reviewing courts should be particularly deferential "unless such a decision was unquestionably unreasonable." *Bieghler, 690 N.E.2d at 194*. Appellate counsel's performance, as to the selection and presentation of issues, will thus be presumed adequate unless found unquestionably unreasonable considering the information available in the trial record or otherwise known to appellate counsel. To prevail on a claim of ineffective assistance of appellate counsel, a defendant **[**16]** must therefore show from the information available in the trial record or otherwise known to appellate counsel that appellate counsel failed to present a significant and obvious issue and that this failure cannot be explained by any reasonable strategy.

7 After the Seventh Circuit's opinion in Mason, however, we emphasized in Woods that the issue of trial counsel ineffectiveness may be raised for the first time in post-conviction proceedings notwithstanding the failure of appellate counsel to raise it on direct appeal. *Woods, 701 N.E.2d at 1216*.

When the claim of ineffective assistance is directed at appellate counsel for **[*262]** failing fully and properly to raise and support a claim of ineffective assistance of trial counsel, a defendant faces a compound burden on post-conviction. If the claim relates to issue selection, defense counsel on post-conviction must demonstrate that appellate counsel's performance was deficient and that, but for the deficiency of appellate counsel, trial counsel's performance **[**17]** would have been found deficient and prejudicial. Thus, the defendant's burden before the post-conviction court was to establish the two elements of ineffective assistance of counsel separately as to both trial and appellate counsel.

B(1) Effectiveness of Appellate Counsel as to Guilt Phase Claims

The post-conviction court denied relief on the defendant's claim that appellate counsel provided ineffective

assistance in asserting the ineffective assistance of trial counsel as to the guilt phase of the trial. In the course of its evaluation, however, the post-conviction court found that appellate counsel's performance was deficient for claiming trial counsel ineffectiveness without challenging trial counsel's investigation and preparation. [8] This determination of deficient appellate performance was incorrectly based in substantial part upon information not presented in the trial record or otherwise known to appellate counsel. We could remand this case to the post-conviction court to apply the correct legal standard, but this would serve no useful purpose. Even when it erroneously considered additional evidence favorable to the defendant but not in the record on direct appeal **[**18]** or known to appellate counsel, the post-conviction court found against the defendant on this claim. To now remand this issue for reconsideration on less evidence would thus be pointless. The post-conviction court addressed the merits of the issue of ineffective assistance of trial counsel in the guilt phase, but nevertheless found that there was no resulting prejudice because trial counsel's performance was neither deficient nor prejudicial. The court concluded, in part:

8 The post-conviction court concluded that appellate counsel, having asserted this claim by raising it only as to five specific instances, failed to present the claim adequately on appeal "both in the guilt and penalty phases of trial due to [trial counsel's] lack of preparation, effort and general concern about the case." P.C.R. Record at 737.

[Trial counsel's] assistance was not so defective as to require reversal of the jury's verdicts herein. The Court concludes the [defendant] has failed to prove that [trial counsel's] performance **[**19]** fell below the objective standard of reasonableness for such representation at the time, and further, [defendant] failed to show that considering the totality of the case, any acts or omissions of [trial counsel] which were less than acceptable deprived him of a fair trial. The [defendant] did not prove herein that he was prejudiced by [trial counsel's] representation of him in the guilt phase of the trial because he did not prove a reasonable probability exists that but for [trial counsel's] representation, the result of the trial would have been different. [Trial counsel] did conduct a reasonable investigation into the State's theory of the case and he did a reasonable investigation to formulate a defense for the [defendant] considering the norms for the same at the time.

P.C.R. Record at 742.

Faced with the burden on appeal to demonstrate that the post-conviction evidence unmistakably and unerringly points to a contrary conclusion, the defendant argues that the outcome of his trial is unreliable and that he would not have been convicted had his trial counsel investigated, discovered, and presented the following evidence: the victim's neighbor's description **[**20]** of the man he saw on the night of the murder; identification of the watch that the defendant allegedly stole from the victim and sold to a co-worker; expert testimony concerning the victim's wounds and whether the weapons recovered could have inflicted those wounds; inconsistencies in **[*263]** the defendant's incriminatory statements to police; expert testimony concerning serological evidence; and potentially exculpatory evidence.

The defendant contends that interviewing the victim's neighbor before trial would have disclosed weaknesses in the witness's trial testimony regarding his identification of the defendant as the man who came to his door seeking the victim on the night of the murder. The post-conviction court noted, however, that counsel established through cross-examination at trial that the witness "was not completely certain of his identification of [the defendant]," P.C.R. Record at 715, and that, when asked to identify the defendant from a photo line-up, "he said that it was most possible, but he was 'not sure' that it was the [defendant]," P.C.R. Record at 716 (citing the trial transcript). In addition, the witness's roommate also identified the defendant as the man asking **[**21]** about the victim.

The defendant contends that investigation regarding the watch he sold to a co-worker after the murder, which the State alleged belonged to the victim, would have disclosed discrepancies in the evidence. The post-conviction court found that the defendant's trial counsel effectively cross-examined the witnesses regarding this evidence and that other trial evidence contained the defendant's admission that he took the victim's watch and no longer possessed it.

The defendant contends that his counsel's failure to investigate prevented a challenge to the evidence regarding the

weapons used in the crime and the nature of the wounds inflicted. After indicating to police that he had been involved in the crime, the defendant led the police to a location where two knives from the victim's kitchen were found-a chef's knife and a pastry knife. At trial, these knives and two hypodermic needles were alleged to be the weapons used in the crime. The State's expert testified that these weapons could have been used to inflict sixteen knife wounds and forty-five puncture wounds to the victim. At post-conviction, the defendant introduced the testimony of Dr. Werner Spitz, a **[**22]** forensic pathologist, who testified that one of the knives was not sharp enough to penetrate human skin and the syringes were not strong enough to withstand repeated stabbing. As noted by the post-conviction court, however, he also acknowledged that the larger knife could have inflicted the large incision wounds. The knife was found near the location identified by the defendant, who told police he had dropped the knife in the creek while washing it on April 2. The young boy who found the knife testified that he played daily in the creek and that he did not see the knife on April 3, but did see it the next day. Another witness testified that the knife introduced into evidence belonged to the victim and was missing from the victim's kitchen.

The defendant contends that trial counsel failed to challenge his confession, given to police during their second interview. Although the defendant would not allow the police to tape the interview, the officers took notes and later transcribed the following information. The defendant waited for the victim in her house, removed the light bulbs from the lamps, and drank some of the victim's wine. He also stated that "he observed a car pull into **[**23]** the driveway and that he didn't know she had a car like that." Trial Record at 1568-69. He waited while she made a phone call and then grabbed her from behind as she was leaving the house. After tying a rope around her hands and a handkerchief around her mouth, he led her to various places and eventually to a place under a bridge, while he drank a bottle of whiskey. When asked if he stabbed the victim, he responded, "I didn't know it was her until it was too late, and then I saw her face." Trial Record at 1574. He told police that afterward he took the knife to a creek to wash off the blood, but that he dropped it and left it there. He also led police to the area where the knives were found.

[*264] At post-conviction, the defendant presented the testimony of Dr. Richard Ofshe as an expert witness in police interrogation and confessions. He testified that the defendant's statements to the detectives were likely a result of the defendant repeating back information supplied by police. Detailing numerous items of physical evidence admitted at the guilt phase, the post-conviction court found "substantial physical evidence" consistent with the defendant's statements "despite Dr. Ofshe's testimony **[**24]** about some inconsistency." P.C.R. Record at 720. The court also found that trial counsel thoroughly cross-examined the detectives about the interviews and statements made by the defendant.

The defendant contends that trial counsel failed to challenge the serological evidence. At post-conviction, the defendant presented testimony of a forensic serologist challenging the evidence presented by the State at trial, particularly testimony regarding the vaginal swabs taken from the victim. At trial, the State's expert testified that the defendant was a blood type B secretor, [9] that he was within the 0.21% of the population who could have donated the seminal fluid found on the vaginal swabs, and that the defendant's shirt contained different secretions that were consistent with both the defendant's and the victim's blood types. The defendant's post-conviction witness disputed the State's trial expert witness on two bases: (1) assuming that the testing of the swab actually found activity from a blood type B semen donor, the group of potential donors would be 13.5% of the population rather than .21% as the State's witness indicated; and (2) the testing done on the swab was inconclusive **[**25]** as to blood type, and thus any conclusion as to the semen was subject to dispute. On cross-examination, however, the defendant's post-conviction witness acknowledged that he could not eliminate the defendant as the donor. The post-conviction court found that trial counsel for the defendant effectively questioned the source of the semen and blood and established that potentially thousands of people in a population group of one million would have blood-typing characteristics consistent with the recovered semen samples. The court also carefully noted the extent of trial counsel's preparation regarding the topic of secretors and review of discovery.

9 A secretor is one whose blood type may be determined by examination of other bodily fluids because the antigens in the blood "leak" into those other fluids.

The defendant also argues that the ineffectiveness of his trial counsel during the guilt phase is demonstrated by his failure to present evidence that "suggests someone else committed this crime." Brief of **[**26]** Petitioner-Appellant at 39. Specifically, the defendant points to fingerprints found on light bulbs and wine glasses that matched neither the defendant's nor the victim's, a bloody palm print found near the victim's body that could not be definitively identified as the victim's and was too small to be the defendant's, and the absence of any signs of a struggle evident on the defendant or his clothes. [10] He also notes that five cigarette butts found in the victim's home showed evidence that they had been smoked by someone with a blood type different from both the defendant's and the victim's. Such evidence is speculative at best and is substantially overshadowed by other evidence of the defendant's guilt, including his own statements to police.

10 The defendant also characterizes testimony by the neighbor as exculpatory, but this misstates the testimony. The defendant contends that the witness testified that he "saw someone else ask for [the victim]," Brief of Petitioner-Appellant at 39, and that the defendant asked "where [the victim] lived, although he had been to her home many times before." Id. In fact, the witness testified that he was asked whether he had seen the woman who lived next door. Trial Record at 1068.

[27]** The defendant also contends that the post-conviction court erred in denying relief due to "fundamentally flawed" **[*265]** jury instructions used in the guilt proceeding that caused the jury to have "an incorrect understanding of the State's burden." Brief of Petitioner-Appellant at 57. The defendant contends that guilt phase preliminary instruction No. 6 violated both the United States Constitution and the Indiana Constitution by "improperly defining 'reasonable doubt' as a doubt which 'arises in [the juror's] mind' after considering the evidence." Brief of Petitioner-Appellant at 57. The defendant urges that this language caused the jury to expect that reasonable doubt would be created by something in the evidence, erroneously placing the burden on the defendant to prove or disprove something. He also argues that guilt phase final instruction No. 3 informed the jurors that they should acquit the defendant if the State failed to meet its burden of proof. The defendant claims this instruction impermissibly allowed the jury to convict on less than a reasonable doubt because it did not state that the jury must acquit if the State failed to meet its burden of proof. These instructions were **[**28]** not challenged at trial or on direct appeal, but the defendant asserts that his counsel provided ineffective assistance by failing to challenge them effectively.

In determining the adequacy of jury instructions, we do not consider each instruction in isolation, but instead read them as a whole. *Hurt v. State, 570 N.E.2d 16, 18 (Ind. 1991)*; *Kirland v. State, 43 Ind. 146, 154 (1873)*. In this case, preliminary instruction No. 5 clearly stated that the presumption of innocence "remains during the entire trial. The defendant is not required to present any evidence or prove his innocence." Trial Record at 172. Thus, the jury was informed that the defendant had no burden of proof as to his innocence. As to the defendant's claim that the jury was inadequately instructed on acquittal, preliminary instruction No. 6 stated: "Each of you must refuse to vote for conviction unless you are convinced beyond a reasonable doubt of the defendant's guilt." Trial Record at 173 (emphasis added). In addition, we have previously determined that the use of "should" adequately instructs the jury as to the proper course of conduct in the event there is a failure of proof by the **[**29]** prosecution. *Holmes v. State, 671 N.E.2d 841, 849 (Ind. 1996)*. The challenged instructions were not erroneous, particularly in light of the other instructions given.

Considering all of these alleged deficiencies in trial counsel's performance during the guilt phase, the defendant has not established that the evidence points unerringly and unmistakably to a conclusion contrary to that of the post-conviction court. Although it was improper for the post-conviction court to evaluate the claim of ineffective assistance of appellate counsel based on information outside the trial record or otherwise unknown to appellate counsel, we agree with the post-conviction court's determination that the defendant was not denied his right to effective assistance of counsel during the guilt phase of his trial. We conclude that the defendant has not established that the post-conviction court erred in its determination that, because the defendant was not deprived of the effective assistance of counsel during the guilt phase of his trial, he was not entitled to prevail on his claim of ineffective assistance of his appellate counsel's direct appeal challenge to trial counsel effectiveness during **[**30]** the guilt phase.

B(2) Effectiveness of Appellate Counsel as to Penalty Phase Claims

We next consider the State's claim on cross-appeal that the post-conviction court erred in its determination that the defendant's sentence should be vacated and this case remanded for a new penalty phase trial and sentencing because of ineffective assistance of appellate and trial counsel. The State argues that trial counsel presented three mitigation witnesses and pursued theories of mitigation based on the defendant's childhood and his substance abuse. As noted above, however, a party challenging the grant of post-conviction relief **[*266]** must demonstrate that the findings of the post-conviction court are clearly erroneous, and we give due regard to the opportunity of the post-conviction court to judge the credibility of the witnesses.

The post-conviction court's findings and conclusions reveal that the court expected appellate counsel, having elected to raise the issue of trial counsel ineffectiveness, to investigate, develop, and present fully the claim of trial counsel ineffectiveness, including a challenge to trial counsel's failure to investigate and present mitigation evidence. As discussed **[**31]** above, this is not the correct standard as to claims of appellate counsel effectiveness. An appellate lawyer who asserts a claim on direct appeal of trial counsel ineffectiveness is not required to undertake a full, extra-record investigation, as counsel on post-conviction would undertake. In determining a post-conviction claim that appellate counsel's performance was deficient, the proper focus is not merely whether appellate counsel, having chosen to raise on direct appeal a claim of the ineffectiveness of trial counsel, failed to fully raise and present the claim. Rather, the post-conviction court must assess whether the defendant has shown from the information available in the trial record or otherwise known to appellate counsel that appellate counsel failed to present a significant and obvious issue and that this failure cannot be explained by any reasonable strategy.

In the defendant's direct appeal, appellate counsel presented the claim of ineffective assistance of trial counsel, asserting that counsel was deficient in not objecting to five matters. *Davis, 598 N.E.2d at 1051*. We found that, as to three of these matters, "timely objection by trial counsel would **[**32]** have properly been overruled." *Davis, 598 N.E.2d at 1052*. We concluded that the other two allegations of trial counsel deficiency "did not result in prejudice so serious as to deprive the defendant of a trial whose result is reliable." Id. Appellate counsel raised the issue of trial counsel effectiveness without including any claim that trial counsel failed to investigate and present mitigation evidence. The trial record shows that trial counsel presented three witnesses in the penalty phase, and their direct examination testimony together occupies only thirteen pages of the record. Two of the witnesses were the defendant's aunts, with whom he had lived for five years during his adolescence. The third was a police detective who testified regarding evidence of whiskey consumed by the defendant at the time of the crimes. Appellate counsel's opinion as to the adequacy of the mitigation evidence in the record is revealed in his testimony at the post-conviction hearing that "what does stick out in my mind is the fact that there . . . was no mitigation offered. . . . The bifurcated-second stage, the penalty phase, if I recall correctly, there was no evidence presented." P.C.R. Record at 2080. **[**33]** The post-conviction court found that appellate counsel "intended to challenge [trial counsel's] preparation for the penalty phase because he knew it was not sufficient in that there basically was not any investigation done by [trial counsel]." P.C.R. Record at 731.

Appellate counsel elected to raise the issue of trial counsel effectiveness, notwithstanding the risk that the doctrine of res judicata could prevent relitigation of the issue in later proceedings. He supported his claim of trial counsel ineffectiveness only by alleging trial counsel errors in failing to make objections, but this claim did not have a strong likelihood of success on direct appeal. Appellate counsel's claim of trial counsel ineffectiveness did not challenge counsel's investigation and presentation of mitigation evidence, even though appellate counsel was of the opinion that there was basically no mitigation investigation done by trial counsel and that there was no mitigation presented. We conclude the post-conviction court's finding of appellate counsel's deficient performance is not clearly erroneous. Appellate counsel believed that trial counsel had essentially presented no mitigation evidence, **[**34]** **[*267]** and yet appellate counsel elected to raise the issue of trial counsel effectiveness without including the failure to present mitigation evidence in the face of the risk of res judicata. This failure cannot be explained by any reasonable strategy.

Having found deficient performance, we proceed to the prejudice component-whether appellate counsel's errors were so serious as to deprive the defendant of a fair proceeding whose result is reliable. In other words, did the

defendant establish a reasonable probability that, but for his appellate counsel's actions in raising the claim of trial counsel ineffectiveness based only upon relatively weak examples, which barred the defendant of post-conviction review of the trial counsel ineffectiveness claim based on lack of investigation and presentation of mitigation evidence, the result of the proceeding would have been different?

The post-conviction court considered the allegations of deficient trial counsel investigation and presentation of mitigation evidence and made findings and conclusions thereon. It concluded that defense trial counsel's performance fell below the professional norms by failing to adequately investigate, develop, **[**35]** and present available mitigating evidence. [11] Finding trial counsel's failure to investigate and present this evidence to fall below existing professional norms, the post-conviction court concluded that the development and presentation of the omitted evidence "could have caused the jury to recommend against death and the judge not to impose the death penalty." P.C.R. Record at 744. The court concluded that trial counsel's acts and omissions were "sufficiently serious" to cause it to view the jury's inability to render any recommendation as "unreliable." P.C.R. Record at 746 (citing *Burris v. State, 558 N.E.2d 1067, 1076 (Ind. 1990))*. Noting that the trial court may have sentenced the defendant to death notwithstanding a contrary jury recommendation, the post-conviction court found "a reasonable probability that, absent the omissions of [defense trial counsel] and thus the thorough presentation of mitigation, Judge Jones would have concluded that the balancing of aggravating and mitigating circumstances did not warrant a death penalty recommendation." P.C.R. Record at 747.

11 The post-conviction court found that trial counsel fell below applicable professional norms "by his fail[ure] to investigate mitigation himself, his failure to hire a mitigation expert, and his failure to hire an independent psychologist to interview the [defendant] when evidence and experts were readily available to him." P.C.R. Record at 745. To the extent that this finding may be read to require counsel in every death penalty case to hire a "mitigation expert" (an investigator specializing in the gathering and evaluation of mitigation evidence), it is wrong. Although such a specialist may assist counsel in performing investigative and evaluative tasks that counsel would otherwise perform, the need for such assistance will vary from case to case, depending on the issues, strategies, resources, and needs of counsel. While we disagree with the post-conviction court's separate reference to the failure to hire a mitigation expert, we understand the court's determination to be that counsel failed to adequately investigate, develop, and present available mitigating evidence, regardless whether by counsel's own efforts or that of hired specialists.

[36]** The State argues that the mitigation evidence presented on collateral review but not at trial was largely cumulative, would have been subject to attack, and does not undermine confidence in the outcome of the proceeding. Because these are matters largely within the discretion of the post-conviction court, we do not conduct a de novo review. Considering the totality of the evidence that supports the judgment and the reasonable inferences to be drawn therefrom, we find that the State has not persuaded us to a firm and definite conviction that the post-conviction court erred in its determination that the defendant was denied the right to effective assistance of appellate counsel in adequately presenting the issue of trial counsel's ineffectiveness during the penalty phase. We affirm the post-conviction court's grant of **[*268]** partial relief in the form of a new penalty phase trial and sentencing proceeding. [12]

12 Our determination that the post-conviction court did not err in granting relief as to the defendant's claim of ineffective assistance of appellate counsel renders moot the claims by both parties as to the sufficiency of the sentencing order. In the remainder of this opinion, we address only those claims unaffected by the remand of this cause for a new penalty proceeding.

[37]** III. Failure to Disclose Exculpatory Evidence

The defendant contends that the post-conviction court erred in failing to reverse his conviction due to the State's failure to disclose a lab report that he contends his trial counsel might have used had it been available. The lab report at issue described test results for saliva samples taken from five cigarette butts found in the victim's home, concluding that the samples were inconsistent with both the victim's and the defendant's saliva. The defendant alleges that this lab report supported his theory that someone else committed the crime. The post-conviction court concluded that the mere fact that

the cigarettes were smoked by someone other than the defendant or the victim, absent evidence that they were smoked by the perpetrator of the crimes, made it reasonable for the State to conclude that the lab report was not relevant and thus that there was no duty to disclose it.

A prosecutor has a duty to disclose exculpatory evidence and the "suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good **[**38]** faith or bad faith of the prosecution." *Brady v. Maryland, 373 U.S. 83, 87, 83 S. Ct. 1194, 1196-97, 10 L. Ed. 2d 215, 218 (1963).* A prosecutor's omission does not violate her constitutional duty of disclosure unless it results in the denial of the defendant's right to a fair trial. *United States v. Agurs, 427 U.S. 97, 108, 96 S. Ct. 2392, 2399-2400, 49 L. Ed. 2d 342, 352 (1976).* Evidence is material "only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *United States v. Bagley, 473 U.S. 667, 682, 105 S. Ct. 3375, 3383, 87 L. Ed. 2d 481, 494 (1985)* (adopting the Strickland formulation of materiality to cover cases of prosecutorial failure to disclose evidence).

In order to establish his claim before the post-conviction court, the defendant must have shown: (1) that the prosecutor suppressed evidence; (2) that such evidence was favorable to the defense; and (3) that the suppressed evidence was material, that is to say, if it had been disclosed to the defense, there is a reasonable probability that the result of the proceeding would have been **[**39]** different. *Minnick v. State, 698 N.E.2d 745, 755 (Ind. 1998)* (citing *Bagley, 473 U.S. at 685, 105 S. Ct. at 3385, 87 L. Ed. 2d at 496*; *Brady, 373 U.S. at 87, 83 S. Ct. at 1196-97, 10 L. Ed. 2d at 218*).

The lab report at issue here suggests only that someone else had smoked in the apartment. No evidence links the cigarettes to the perpetrator of the crime or even suggests that they were smoked on the night of the crime. The simple fact that they were found in the victim's home after her death would not lead a reasonable person to conclude that the person who smoked these cigarettes was the perpetrator of the crime in light of other, more compelling evidence, nor would it impeach any of the other serological evidence presented. In light of the remaining evidence, the defendant has not established that this evidence was material either to guilt or punishment, and thus the prosecutor's duty to disclose was never triggered.

Even if the prosecutor had disclosed this report, it was unlikely to have changed the result of the proceeding. The other evidence supporting the verdict includes serological **[*269]** evidence of the defendant's presence at the crime **[**40]** scene, an eyewitness who placed him at the victim's apartment shortly before the incident, a confession to police of facts otherwise unknown to the public, and the defendant personally leading the police to a location where the weapon used in the murder was found. We conclude that the defendant has not met his burden of establishing that the evidence is without conflict and points unerringly or unmistakably to a conclusion contrary to the post-conviction court's.

I V. Jury Influence

The defendant contends that the post-conviction court erred in rejecting his claim that he was denied an impartial jury and that a new trial is warranted because the jury that convicted him was racially biased. The defendant contends that one juror's vote against the recommendation of death "was not taken seriously because the color of her skin was the same as the defendant's," Brief of Petitioner-Appellant at 48, and that the presence of bias at the penalty phase shows that the jury was biased at the time of conviction.

In support of this claim, the defendant produced a note written by the jury foreman (a Caucasian male) during the penalty deliberations that informed the trial court that **[**41]** he believed that the jury could not reach a unanimous decision on death due to a race issue. The defendant also presented testimony from one African-American juror who denied knowledge of the contents of the note. She testified that the jury foreman had been angry with her for being uncooperative on the issue of the death recommendation. The juror testified that the jury foreman attributed the disagreement to a "race thing," but denied that her decision was race-based. P.C.R. Record at 2620.

After reviewing the defendant's evidence on post-conviction (the testimony of one juror and a copy of the note sent to the trial court), the record of voir dire, and the trial record as a whole, the post-conviction court concluded that the defendant had not met his burden of showing that he was denied an impartial jury. The burden is on the defendant to show a juror's bias or prejudice. *Martin v. State, 535 N.E.2d 493, 495 (Ind. 1989)*. Both the juror who testified and another African-American juror who was not identified agreed with the guilty verdict. The defendant's evidence fails to establish that either the jury foreman or the jury as a whole was racially motivated to find **[**42]** the defendant guilty. We cannot conclude that the evidence leads unerringly and unmistakably to a conclusion contrary to that of the post-conviction court.

V. Defects in the Charging Information

The defendant contends that the post-conviction court erred in determining that the defendant's conviction and sentence did not violate the United States and Indiana Constitutions due to alleged defects in the charging instrument. The defendant also contends that he was entitled to default judgment on this issue because the State failed to respond to his amended petition in which he raised this claim.

Turning first to the default judgment claim, we note that when the State answers a petition for post-conviction relief with legitimate defenses, that answer is deemed to be sufficient to challenge a later petition that raises the same issues of fact as the first. *State v. Fair, 450 N.E.2d 66, 69 (Ind. 1983)*. A second or additional answer is unnecessary when the State's initial answer makes it clear that it believes legitimate defenses are available that apply to all of the petitioner's claims for relief. Id. Having raised a general denial and affirmative defenses of laches, **[**43]** waiver, and res judicata, the State provided an answer sufficient to allow the defendant to understand its position. The defendant was not prejudiced by any failure of the State to amend its answer. The post-conviction **[*270]** court did not err in denying the defendant's request for default judgment.

Turning to the defendant's specific claim that the charging instrument was defective, the defendant argues that all of the charges against him derive from the class B felony burglary charge, which alleged burglary with intent to confine, not burglary with serious bodily injury. The defendant urges that because the State charged him with class B felony burglary, because this burglary "established the entire episode," Brief of Petitioner-Appellant at 51, and because "all of the charged offenses begin with, and extend from, the burglary," Brief of Petitioner-Appellant at 52, the State was limited in obtaining convictions to offenses "logically included with that crime," Brief of Petitioner-Appellant at 52. The defendant contends that because the State chose not to charge him with burglary with serious bodily injury as a class A felony, the State was "not entitled to conviction of crimes consistent **[**44]** only with a theory it chose not to pursue, namely burglary with bodily injury." Brief of Petitioner-Appellant at 55. The defendant cites *Rodriguez v. State, 179 Ind. App. 464, 385 N.E.2d 1208 (1979)*, for the proposition that "the State is bound by the charges it brings and allows instruction on." Brief of Petitioner-Appellant at 54. The defendant also asserts that "an alleged course of conduct by a defendant cannot be artificially separated into distinct parts" and that "all essential elements of a criminal offense must be contained within the charging instrument filed against a defendant." Reply/Cross-Appellee Brief at 46. The defendant argues that his convictions and sentences for the crimes of criminal confinement, murder, and rape "lack the necessary foundation in the State's charging method," Brief of Petitioner-Appellant at 55, that after charging the defendant with class B burglary the State cannot later "reap the benefit of an improper conviction of a greater offense," Reply/Cross-Appellee Brief at 46, and that, accordingly, these convictions and sentences should be vacated.

The post-conviction court restated the defendant's contention as follows: "since all **[**45]** charges against [the defendant] flow from the burglary charge, . . . there is no jury finding that the burglary resulted in serious bodily injury (death) and the judgment of guilt of criminal confinement, murder, and rape result in verdicts greater than that charged, and therefore cannot stand." P.C.R. Record at 735. The court concluded that the "Judgments which entered herein as a result of the charging informations filed, and the jury instructions given, do not violate the principle announced in *Rodriguez v. State, 179 Ind. App. 464, 385 N.E.2d 1208 (1979)*." P.C.R. Record at 755. The court also concluded that the law was with the State on this issue.

The defendant asserts this claim, despite procedural default, alleging fundamental error. An otherwise forfeited claim may be reviewed when we find blatant violations of basic principles, the harm or potential for harm is substantial, and the resulting error denied the defendant fundamental due process. *Baird v. State, 688 N.E.2d 911, 917 (Ind. 1997)*.

When the defendant stood trial, he was charged with burglary, as a class B felony, criminal confinement, rape, criminal deviate conduct, and murder. **[**46]** The jury was instructed regarding the following offenses: burglary, both as a class C felony and a class B felony; confinement, both as a class D felony and a class B felony; rape, both as a class B felony and a class A felony; criminal deviate conduct; and murder. We agree with the post-conviction court and find no error, fundamental or otherwise.

The defendant argues in the alternative that this claim is available because appellate counsel was ineffective. We need not address the adequacy of counsel's performance unless the defendant establishes prejudice as a result of the claimed error. *Miller v. State, 702 N.E.2d 1053, 1070* **[*271]** *(Ind. 1998)*. The purpose of the charging instrument is to provide a defendant with notice of the crime of which he is charged so that he is able to prepare a defense. *Wisehart v. State, 693 N.E.2d 23, 63 (Ind. 1998)*. The defendant does not allege or present any evidence that suggests that he was unable to defend himself based upon the charges as written. In fact, the charges as written clearly included allegations of bodily injury and death within the multi-count information. The charges upon which the defendant was convicted **[**47]** were set forth in a valid charging instrument, and we have previously determined that the evidence was sufficient to support the convictions on those charges. *Davis, 598 N.E.2d at 1046*. The defendant has not established a reasonable possibility that he was deprived of a fair trial, a trial whose result is reliable, because of appellate counsel's alleged error in failing to raise this issue. We decline to find post-conviction error on this issue.

VI. Conclusion

We affirm the judgment of the post-conviction court, and this cause is accordingly remanded for further proceedings.

SHEPARD, C.J., and SULLIVAN, BOEHM, and RUCKER, JJ., concur.

FOCUS - 1 of 4 DOCUMENTS

STATE OF INDIANA, Appellant (Plaintiff below), v. CHIJOIKE BOMANI BEN-YISRAYL, f/k/a GREAGREE DAVIS, Appellee (Defendant below).

No. 49S00-0308-PD-391

SUPREME COURT OF INDIANA

809 N.E.2d 309*; *2004 Ind. LEXIS 478

May 25, 2004, Decided

SUBSEQUENT HISTORY: Rehearing denied by *State v. Yisaryl, 2005 Ind. LEXIS 366 (Ind., Apr. 13, 2005)*
US Supreme Court certiorari denied by *Ben-Yisrayl v. Indiana, 546 U.S. 1020, 126 S. Ct. 659, 163 L. Ed. 2d 533, 2005 U.S. LEXIS 8453 (2005)*
On remand at, Remanded by *Ben-Yisrayl v. State, 908 N.E.2d 1223, 2009 Ind. App. LEXIS 949 (Ind. Ct. App., 2009)*

PRIOR HISTORY: **[**1]** Interlocutory Appeal from the Marion Superior Court, No. CR84-076E. The Honorable Grant W. Hawkins, Judge.
Davis v. State, 598 N.E.2d 1041, 1992 Ind. LEXIS 203 (Ind., 1992)

DISPOSITION: Trial court's order reversed; remanded for reinstatement of death penalty request.

COUNSEL: FOR APPELLANT: Steve Carter, Attorney General of Indiana, Franklin, Indiana, Stephen R. Creason, Deputy Attorney General, Indianapolis, Indiana.

FOR APPELLEE: Russell A. Johnson, Johnson Gray & Macabee, Ann M. Sutton, Marion County Public Defender Agency, Indianapolis, Indiana.

JUDGES: Dickson, Justice. Shepard, C.J., and Sullivan and Boehm, JJ., concur. Rucker, J., concurs in result with separate opinion.

OPINION BY: Dickson

OPINION

[*310] Dickson, Justice.

The State brings this interlocutory appeal of the trial court's order holding the Death Penalty Statute, *Indiana Code § 35-50-2-9*, to be unconstitutional, dismissing the State's request for the death penalty, and remanding for a sentencing hearing where a term of years is the only available option. We reverse and remand for reinstatement of the death penalty request.

The defendant, Chijoike Bomani Ben-Yisrayl, formerly known as Greagree Davis, was convicted of murder, burglary, and rape in 1984 following a jury trial. His penalty phase jury was unable to reach a unanimous recommendation, and the trial **[**2]** judge thereafter sentenced the defendant to death pursuant to then-existing procedure. *Ind. Code 35-50-2-9(f)* (West 1984). We affirmed. *Davis v. State, 598 N.E.2d 1041 (Ind. 1992)*. In subsequent post-conviction proceedings, the post-conviction court vacated the death sentence due to ineffective assistance of penalty-phase counsel and remanded for a new penalty phase trial. We affirmed. *Ben-Yisrayl v. State, 738 N.E.2d 253 (Ind. 2000)*. On remand, the trial court granted the defendant's motion to dismiss the death penalty request, concluding that the Indiana death penalty statute is unconstitutional because it permits a sentence of death without requiring the jury to find beyond a reasonable doubt that the aggravating circumstance or circumstances outweigh any mitigating circumstances, which the trial court believed violated *Apprendi v. New Jersey, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000)*, and *Ring v. Arizona, 536 U.S. 584, 122 S. Ct. 2428, 153 L. Ed. 2d 556 (2002)*.

The trial court certified its order for interlocutory appeal. Because the Court of Appeals has jurisdiction **[**3]** over interlocutory appeals, *Ind. App. R. 14(B)(1)*, we granted the State's petition to transfer before consideration by the Court of Appeals, *App. R. 56(A)*, and we accepted appellate jurisdiction over the interlocutory appeal. *App. R. 14(B)(1)*. The trial court's order dismissing the State's death penalty request and holding the statute unconstitutional was issued on the same day that the same trial court similarly ruled in the case of *Barker v. State*, which we also decide today. *809 N.E.2d 312, 2004 Ind. LEXIS 477 (Ind. 2004)*.

The State's appeal in the present case presents arguments that are identical to those it made in *Barker*. [1] The State contends that the trial court erred in concluding that, because it does not require a penalty-phase jury to find that mitigating circumstances outweigh aggravating circumstances beyond a reasonable doubt, the Indiana death penalty statute was unconstitutional. The State's appeal argues that weighing is not a "fact" that requires proof beyond reasonable doubt under *Apprendi* and *Ring*. It also urges that the *Ring* requirement for a jury to find beyond **[*311]** a reasonable doubt any fact that makes a murder defendant eligible for the death penalty applies **[**4]** only to aggravating circumstances under the Indiana scheme because it is these circumstances, not the "outweighing" factor, that determines a murder defendant's eligibility to be considered for the death sentence.

1 The "summary of argument" and "argument" sections of the State's briefs in *Ben Yisrayl* are verbatim duplicates of the same sections of its brief in *Barker*.

The argument section of Ben-Yisrayl's appellate brief consists of his declaration that he "adopts and incorporates the argument advanced by the appellee" in *Barker*, except that Ben-Yisrayl additionally emphasizes that in his case, unlike that of Barker, the penalty phase jury could not reach a decision. Br. of Appellee at 4.

As we discussed in our decision today in *Barker*, this Court recently held that "the Indiana Death Penalty Statute does not violate the *Sixth Amendment* as interpreted by *Apprendi* and *Ring*." *Ritchie v. State, 809 N.E.2d 258, 268, 2004 Ind. LEXIS 476 at *22 (Ind. 2004)*. Because the weighing factor need not **[**5]** be found beyond a reasonable doubt, the omission of such a requirement in the Indiana death penalty statute, *Ind. Code § 35-50-2-9(l)*, does not render the statute unconstitutional. *Ritchie, 809 N.E.2d 258, 2004 Ind. LEXIS 476 (slip op. at 11)*. The trial court erred in its conclusion to the contrary.

For the reasons set forth in *Barker*, we reject the alternative arguments urging affirmance of the dismissal of the death penalty request on other grounds. As to the fact that Barker's penalty phase jury recommended death, but Ben-Yisrayl's jury was unable to reach a sentencing decision, Ben-Yisrayl does not present any basis requiring a result different from *Barker*. [2]

2 While it does not affect our decisions today in *Barker* or *Ben-Yisrayl*, we note that the trial court found that removing *subsection 9(f)* "does not leave a complete and operative statute as required by *Brady [v. State, 575 N.E.2d 981, 984-85 (Ind. 1991)]*." Appellant's Appendix at 236. This appears inconsistent with the same trial court's order on the same date in *Barker*, wherein the court stated that *subsection 9(f)*, "although improper, does

not jeopardize the constitutionality of *I.C. § 35-50-2-9* inasmuch as the statutory framework remains intact, and viable, in the absence of the offending subsection." *State v. Barker, 809 N.E.2d 312, ___ n.2, 2004 Ind. LEXIS 477 at *10 (Ind. 2004).*

[6]** Having presented only the arguments advanced in *Barker*, Ben-Yisrayl's appeal is governed by our opinion in *Barker*.

We reverse the trial court's order of June 27, 2003, finding that *Indiana Code § 35-50-2-9* is unconstitutional and dismissing the State's request for the death penalty. We remand for reinstatement of the State's death penalty request and for penalty phase proceedings as previously ordered by this Court.

Shepard, C.J., and Sullivan and Boehm, JJ., concur. Rucker, J., concurs in result with separate opinion.

CONCUR BY: Rucker

CONCUR

Rucker, J., concurring in result.

I concur in result for the reasons expressed in *Barker v. State, 809 N.E.2d 312, 2004 Ind. LEXIS 477 (Ind. 2004)* (Rucker, J., concurring in result).

CHIJOIKE BOMANI BEN-YISRAYL, f/k/a GREAGREE DAVIS, Appellant-Defendant, vs. STATE OF INDIANA, Appellee-Plaintiff.

No. 49A02-0806-CR-512

COURT OF APPEALS OF INDIANA

908 N.E.2d 1223*; *2009 Ind. App. LEXIS 949

July 10, 2009, Decided
July 10, 2009, Filed

SUBSEQUENT HISTORY: Transfer denied by *Davis v. State, 919 N.E.2d 554, 2009 Ind. LEXIS 1334 (Ind., 2009)*
Appeal after remand at *Chijoike Bomani Ben-Yisrayl v. State, 2010 Ind. App. LEXIS 2422 (Ind. Ct. App., Dec. 14, 2010)*

PRIOR HISTORY: [1]**
APPEAL FROM THE MARION SUPERIOR COURT. The Honorable Sheila A. Carlisle, Judge. Cause No. CR84-076E/84-005165.
State v. Ben-Yisrayl, 809 N.E.2d 309, 2004 Ind. LEXIS 478 (Ind., 2004)

COUNSEL: FOR APPELLANT: ELIZABETH A. GABIG, ANN M. SUTTON, Marion County Public Defender Agency, Indianapolis, Indiana.

FOR APPELLEE: GREGORY F. ZOELLER, Attorney General of Indiana; STEPHEN R. CREASON, Deputy Attorney General, Indianapolis, Indiana.

JUDGES: BRADFORD, Judge. FRIEDLANDER, J., and MAY, J., concur.

OPINION BY: BRADFORD

OPINION

[*1224] OPINION - FOR PUBLICATION

BRADFORD, Judge

Following dismissal of his death penalty, Appellant-Defendant Chijoike Bomani Ben-Yisrayl, f/k/a Greagree Davis, appeals his aggregate sentence of 150 years in the Department of Correction. Upon appeal, Ben-Yisrayl claims that the trial court erred by adopting and imposing the alternative term-of-years sentence provided for in the original sentencing order rather than conducting a new

sentencing hearing. **[*1225]** In addition, Ben-Yisrayl challenges the appropriateness of his sentence and the trial judge's recusal from his case. We affirm in part, reverse in part, and remand for resentencing.

FACTS AND PROCEDURAL HISTORY

In 1984, Ben-Yisrayl was convicted in Marion Superior Court, Criminal Division, Room Five ("Court Five"), of the murder, rape, burglary, **[**2]** and criminal confinement of Debra Weaver. *See Ben-Yisrayl v. State (Ben-Yisrayl I), 738 N.E.2d 253, 257 (Ind. 2000)*. The trial court imposed the death penalty for Ben-Yisrayl's murder conviction and also provided for an alternative sentence of sixty years in the event that the death penalty was set aside. [1] The trial court also imposed consecutive terms of fifty years, twenty years, and twenty years, for Ben-Yisrayl's rape, criminal confinement and burglary convictions, respectively. In the event that Ben-Yisrayl did not receive the death penalty, therefore, his aggregate term-of-years sentence was 150 years.

1 The jury was unable to agree upon a recommendation regarding the death penalty. *Davis v. State, 598 N.E.2d 1041, 1044 (Ind. 1992)*.

The Indiana Supreme Court affirmed Ben-Yisrayl's convictions and death sentence on direct appeal. *Id*. (citing *Davis v. State, 598 N.E.2d 1041, 1044 (Ind. 1992))*. Ben-Yisrayl's direct appeal did not challenge his sentences for ape, criminal confinement, and burglary.

In subsequent post-conviction proceedings, the post-conviction court, the Honorable Cynthia S. Emkes, Special Judge, presiding, granted Ben-Yisrayl partial relief with respect to the death **[**3]** sentence, but it denied him relief with respect to the verdicts and 150-year aggregate sentence. The post-conviction court specifically ordered that the death sentence be set aside but that the "sentence imposed of 150 years total on Counts I, II, III, and V remain as imposed." [2] App. p. 277.

2 Count I was burglary; Count II, criminal confinement; Count III, rape; and Count V, murder.

Ben-Yisrayl appealed, and the State cross-appealed, the post-conviction court's judgment. *Ben-Yisrayl I, 738 N.E.2d at 257*. Among his claims, Ben-Yisrayl challenged the post-conviction court's adoption of what it alleged was the trial court's "inadequate and improper sentencing order." App. p. 346. On November 8, 2000, the Supreme Court, viewing the post-conviction court's action as "a remand to the trial court for a new penalty phase trial and sentencing proceeding," affirmed the post-conviction court and remanded to the trial court for this "new penalty phase trial and sentencing proceeding." *Ben-Yisrayl I, 738 N.E.2d at 267-68*. The Supreme Court concluded that its affirmance and remand "render[ed] moot" the parties' challenges to the sentencing order. *Id. at 268 n.12*.

On November 1, 2001, Ben-Yisrayl moved **[**4]** to dismiss the death penalty on constitutional grounds. On June 27, 2003, the trial court, the Honorable Grant W. Hawkins presiding, concluded that Indiana's death penalty statute was unconstitutional based *upon Apprendi v. New Jersey, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000)*, and *Ring v. Arizona, 536 U.S. 584, 122 S. Ct. 2428, 153 L. Ed. 2d 556 (2002)*, and granted Ben-Yisrayl's motion. On May 25, 2004, the Supreme Court reversed the trial court's judgment and remanded for reinstatement of the death penalty request and for the penalty phase proceedings which it had previously **[*1226]** ordered. *State v. Ben-Yisrayl (Ben-Yisrayl II), 809 N.E.2d 309, 311 (Ind. 2004)*.

On May 26, 2005, Judge Hawkins recused himself. The case was randomly reassigned to Room G03 of the Marion Superior Court ("Court Three"), the Honorable Sheila A. Carlisle presiding. On June 27, 2005, Ben-Yisrayl moved to set aside Judge Hawkins's recusal or for a hearing on the matter, which Judge Hawkins denied.

On January 16, 2008, following multiple hearings in Court Three, the State moved to dismiss its request for imposition of the death penalty based upon the inadvertent destruction of physical evidence. The trial court granted the State's motion on January 18, 2008. On January 22, **[**5]** 2008, the trial court issued an amended abstract of judgment reflecting the dismissal of the death penalty but otherwise adopting the 150-year sentence originally imposed by the trial court.

On February 12, 2008, Ben-Yisrayl filed a motion to correct error, challenging the trial court's amended abstract of judgment adopting the 150-year sentence. The trial court held a hearing on March 28, 2008, after which Ben-Yisrayl filed a motion to transfer his case back to Criminal Court Five, which the trial court denied. The trial court denied Ben-Yisrayl's motion to correct error on May 22, 2008. This appeal follows.

DISCUSSION AND DECISION

Ben-Yisrayl first claims that the trial court erred upon remand when it adopted, without a sentencing hearing, the 150-year sentence originally imposed by the trial court in the event that the death penalty was set aside. Ben-Yisrayl argues that such action contravened the Supreme Court's orders upon remand. Ben-Yisrayl further challenges his alternative sentence on the grounds that it is unauthorized by Indiana law, and he requests a resentencing proceeding which conforms to the dictates of *Blakely v. Washington, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004)*. The State responds by **[**6]** first arguing that Ben-Yisrayl's challenge to his sentence is barred by waiver and *res judicata*.

I. Waiver / *Res Judicata*

A. Sentences for Burglary, Criminal Confinement, and Rape

Ben-Yisrayl's only death-penalty-eligible conviction was murder, so the trial court's original imposition and subsequent adoption of an alternative sentence to the death penalty implicates Ben-Yisrayl's sixty-year murder sentence only. *See Ind. Code § 35-50-2-9* (1983). Ben-Yisrayl's separate sentences for his burglary, criminal confinement, and rape convictions, in contrast, were fully imposed at the time of Ben-Yisrayl's direct appeal. Ben-Yisrayl did not challenge these sentences on direct appeal, nor did he target them in his collateral attack during post-conviction proceedings. Furthermore, although the post-conviction court granted relief, this was only with respect to Ben-Yisrayl's death penalty. To the extent, therefore, that Ben-Yisrayl's 150-year sentence reflects the ninety-year aggregate sentence imposed for the separate convictions of burglary, criminal confinement, and rape, his claim is waived. *See Becker v. State, 719 N.E.2d 858, 860 (Ind. Ct. App. 1999)* ("On an appeal from resentencing, the appellate **[**7]** court is confined to reviewing only the errors alleged to have occurred as a result of the resentencing. If an issue was available for litigation in direct appeal but was not in fact raised, then the issue has been waived.").

B. Sentence for Murder

Ben-Yisrayl's sixty-year sentence for murder, in contrast, was not available for **[*1227]** review at the time of his direct appeal. At that time, Ben-Yisrayl's sentence for his murder conviction,

which the Supreme Court affirmed, was the death sentence. *Davis, 598 N.E.2d at 1044, 1046*. Because Ben-Yisrayl's sixty-year sentence was merely a contingent sentence at the time of his direct appeal, his failure to challenge this sentence on direct appeal cannot be construed as waiver. *See Ben-Yisrayl I, 738 N.E.2d at 258* (observing, as a general matter, that post-conviction issues are forfeited in the event that they were available and not presented on direct appeal).

In his post-conviction petition, Ben-Yisrayl challenged the permissibility of his alternative sentence by claiming that appellate counsel had rendered ineffective assistance on multiple grounds, including by failing to challenge the trial court's imposition of "multiple sentences." App. p. 208. **[**8]** The post-conviction court later found that appellate counsel had rendered ineffective assistance on several grounds and that Ben-Yisrayl had been prejudiced with respect to the imposition of the death penalty, which it set aside. The post-conviction court did not address the issue of alternative sentences and ordered that the 150-year sentence, including the sixty-year sentence for murder, "remain as imposed." App. p. 277.

In his post-conviction appellate brief, Ben-Yisrayl challenged the post-conviction court's adoption of what it alleged was the trial court's "inadequate and improper sentencing order." App. p. 346. The Supreme Court did not address this claim, concluding that challenges to the sentencing order were moot, given its remand order on the penalty proceedings. *Ben-Yisrayl I, 738 N.E.2d at 268 n.12*.

The death penalty proceedings did not conclude until January 18, 2008, when the trial court dismissed the State's request for imposition of the death penalty. Following the trial court's amendment of the abstract of judgment to reflect the dismissal of the death penalty and adoption of the term of years, Ben-Yisrayl filed a timely motion to correct error.

Ben-Yisrayl challenged **[**9]** his term-of-years sentence in the post-conviction proceedings as soon as his death penalty was set aside, and the Supreme Court dismissed this challenge as moot given its remand order with respect to proceedings which did not conclude until 2008. We therefore cannot say that Ben-Yisrayl waived his challenge to this sentence. Similarly, because the Supreme Court did not address Ben-Yisrayl's sentencing challenges on their merits, *res judicata* does not bar his relitigation of this issue. *See In re Sheaffer, 655 N.E.2d 1214, 1217 (Ind. 1995)* ("For principles of *res judicata* to apply, there must have been a final judgment on the merits[.]") In any event, a sentence that exceeds statutory authority constitutes fundamental error and is subject to correction at any time. *Lane v. State, 727 N.E.2d 454, 456 (Ind. Ct. App. 2000).*

II. Compliance with Order on Remand

With respect to Ben-Yisrayl's substantive claims, we first address his argument that the trial court, in adopting the term-of-years sentence originally imposed, failed to follow the Supreme Court's directive on remand to conduct "a new penalty phase trial and sentencing proceeding." *Ben-Yisrayl I v. State, 738 N.E.2d at 268*.

In setting **[**10]** aside Ben-Yisrayl's death penalty, the post-conviction court found that he had received ineffective assistance of appellate counsel. Based upon this and other errors, which in the post-conviction court's view were prejudicial only with respect to the death penalty, the post-conviction **[*1228]** court set aside the death penalty and ordered that the judgments and sentences, including the sixty-year murder sentence, remain intact.

Upon reviewing the post-conviction court's judgment, the Supreme Court "affirm[ed] the post-conviction court's grant of partial relief in the form of a new penalty phase trial and sentencing

proceeding." *Id. at 267-68*. It is Ben-Yisrayl's view that the Supreme Court's ordering a "new penalty phase trial *and sentencing proceeding*" also operated to require the trial court to conduct a new sentencing proceeding before imposing a term of years. *Id. at 268* (emphasis supplied).

Had the Supreme Court construed the post-conviction court's judgment as ordering a new penalty phase trial only, Ben-Yisrayl's interpretation of the Supreme Court's directive would be more persuasive. But the Supreme Court construed the post-conviction court's judgment, which set aside the death penalty **[**11]** but specifically ordered that the 150-year sentence remain intact, as "ordering a remand to the trial court for a new penalty phase trial and sentencing proceeding." *Id. at 257*; *see id. at 265*. Based upon the Supreme Court's language, therefore, the "new penalty phase trial and sentencing proceeding" related to the death penalty only. [3] The Supreme Court's remand order therefore did not apply to the imposition of a term of years, and the trial court cannot have been said to have violated the Supreme Court's instructions on remand. [4]

3 Our view on this point is supported by the Supreme Court's subsequent references to its *Ben-Yisrayl I* remand order as one for a new "penalty phase trial." *Bostick v. State, 773 N.E.2d 266, 273 n.5 (2002)* (citing *Ben-Yisrayl I* for proposition that it has "remanded for new penalty phase trials in capital cases where the penalty phase jurors were unable to reach a unanimous recommendation"); *see also Ben-Yisrayl II, 809 N.E.2d at 310* (emphasizing affirmance of remand in *Ben-Yisrayl I* for new "penalty phase trial.").

4 In reaching this conclusion, we are aware that the Supreme Court dismissed as moot the parties' challenges to the sentencing order on the grounds **[**12]** that the cause had been remanded for a new penalty proceeding. *Ben-Yisrayl I, 738 N.E.2d at 268 n.12*. Given the Court's plain language directly adopting the post-conviction court's ordered relief, we are not inclined to infer to the contrary that the dismissal of all sentencing order challenges--including those apparently to the term of years--suggests that the Court intended to remand for a new sentencing hearing on the term of years as well as the death penalty. Indeed, to the extent the death penalty remained a viable sentence and would necessarily replace Ben-Yisrayl's term of years if reimposed upon remand, the merits of Ben-Yisrayl's challenges to his term of years were moot.

III. Permissibility of Alternative Sentence

A. Standard of Review

Ben-Yisrayl argues that the trial court exceeded its statutory authority in providing for a term-of-years sentence to serve as the alternative sentence to the death penalty. A trial judge is required to sentence convicted criminals within statutorily prescribed limits, and any sentence which is contrary to, or violative of, the penalty mandated by the applicable statute is an illegal sentence. *Bedwell v. State, 481 N.E.2d 1090, 1092 (Ind. 1985)*, **[**13]** *cited in Mitchell v. State, 659 N.E.2d 112, 115 (Ind. 1995)*. A sentence that is contrary to, or violative of, a penalty mandated by statute is illegal in the sense that it is without statutory authorization. *Rhodes v. State, 698 N.E.2d 304, 307 (Ind. 1998)* (citing *Bedwell, 481 N.E.2d at 1092*). A sentence that exceeds statutory authority constitutes fundamental error. *Id*. It is subject to correction at any time. *Lane, 727 N.E.2d at 456*.

[*1229] To the extent that this case rests upon statutory interpretation, our review is de novo. *See Ashley v. State, 757 N.E.2d 1037, 1039 (Ind. Ct. App. 2001)*. Penal statutes should be construed strictly against the State and ambiguities should be resolved in favor of the accused. *Merritt v. State, 829 N.E.2d 472, 475 (Ind. 2005)*. At the same time, however, statutes should not be narrowed

so much as to exclude cases they would fairly cover. *Id*. Also, we assume that the language in a statute was used intentionally and that every word should be given effect and meaning. *Id*. We seek to give a statute practical application by construing it in a way favoring public convenience and avoiding absurdity, hardship, and injustice. *Id*. Statutes concerning the same subject **[**14]** matter must be read together to harmonize and give effect to each. *Id*.

B. Plain Language

In challenging the trial court's authority to impose alternative sentences, Ben-Yisrayl points to Indiana's death penalty statute, *Indiana Code section 35-50-2-9*, and argues that it does not authorize a contingent term-of-years sentence. The State does not dispute Ben-Yisrayl's characterization of *section 35-50-2-9*, but responds by pointing to *Indiana Code section 35-50-2-3* (1983), the sentencing statute for murder, and arguing that it specifically provides for the possibility of such an alternative sentence.

Indiana Code section 35-50-2-3, which provides for a term of years and for the death penalty, states as follows:

> (a) A person who commits murder shall be imprisoned for a fixed term of forty (40) years, with not more than twenty (20) years added for aggravating circumstances or not more than ten (10) years subtracted for mitigating circumstances; in addition, he may be fined not more than ten thousand dollars ($ 10,000).
>
> (b) Notwithstanding subsection (a) of this section, a person who commits murder may be sentenced to death under section 9 of this chapter.

Section 35-50-2-3 provides options for **[**15]** murder sentences, with the death penalty permissible notwithstanding the requirement that the trial court impose a term of years within the specified range. This plain language, however, does not explicitly authorize the imposition of both sentences for a single conviction, with the term of years to serve as an alternative to the death penalty. Without explicit authority for such an alternative sentencing scheme, and in light of the fact that *section 35-50-2-9* makes no reference to it, we are not inclined to infer from the availability of options in *section 35-50-2-3* that the trial court may elect both options simultaneously. Indeed, the above statute also authorizes the trial court to sentence a defendant to a term of years falling within a specified range, but we do not infer from this grant of authority and the availability of numerous sentencing options within this range that the trial court may then impose multiple alternative terms of years. It is standard procedure to conduct a resentencing proceeding in the event that a sentence does not survive appellate review. Without explicit language providing otherwise, the trial court is not authorized to circumvent that procedure by **[**16]** imposing alternative sentences. [5]

> 5 To the extent it is analogous, the current alternative misdemeanor sentencing scheme is consistent with this analysis. Like the murder statute at issue in this case, *Indiana Code section 35-50-2-7* (2008), which governs Class D felonies, provides that the trial court shall sentence a defendant who commits a Class D felony to a term of years within a specified range. Notwithstanding this requirement, the court may enter judgment of conviction on a Class A misdemeanor and sentence accordingly. *See Ind. Code § 35-50-2-7*. However, if the

trial court wishes to provide that a Class D felony conviction will be converted to a Class A misdemeanor conviction upon the fulfillment of certain conditions, such action is authorized by a separate statute expressly permitting this action. *See Ind. Code § 35-38-1-1.5* (2008). In the instant case, there is no separate statute expressly authorizing the death penalty to convert into a term of years upon the happening of certain conditions.

[*1230] C. Other Considerations

We reach this conclusion with due consideration for double jeopardy principles and practical considerations. Double jeopardy principles prevent a defendant from **[**17]** being twice punished for the same offense in a single trial. *See Richardson v. State, 717 N.E.2d 32, 37 n.3 (Ind. 1999).* Here, because the death penalty and term of years were designated alternative sentences, in theory they were arguably never simultaneously imposed in violation of double jeopardy. Nevertheless, the imposition of two sentences, with one automatically to take effect upon the vacation of the other, especially when the other remains viable and the focus of the proceedings, creates needless risk for overlap and accompanying double jeopardy violations.

With respect to practical considerations, it is apparent from this case that the alternative sentencing scheme is fraught with peril. By providing for one imposed sentence and another potential sentence, this scheme creates ambiguity and confusion with respect to questions of waiver and preservation of error, it blurs issues available for and addressed upon review, and it obfuscates orders and instructions upon remand. Perhaps most significantly, it fundamentally alters standard appellate procedure by either circumventing the direct appeal process or tolling it indefinitely, as it has done here. [6] We are convinced that the **[**18]** original trial court exceeded its statutory authority in imposing Ben-Yisrayl's alternative sixty-year consecutive sentence for murder. This sentence is therefore illegal. *See Rhodes, 698 N.E.2d at 307.* Accordingly, we remand to the trial court with instructions to conduct a sentencing hearing and resentence Ben-Yisrayl for his murder conviction. *See Lockhart v. State, 671 N.E.2d 893, 904 (Ind. Ct. App. 1996)* (observing general rule that trial court has power to vacate illegal sentence and impose proper one).

6 Ben-Yisrayl's sixty-year term of years for murder was imposed in 1984. We are now, twenty-five years later, reviewing his direct challenge to that sentence.

IV. Applicability of *Blakely v. Washington*

Ben-Yisrayl claims that his resentencing hearing should comport with the dictates of *Blakely v. Washington, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004).* In *Apprendi v. New Jersey, 530 U.S. 466, 490, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000)*, the United States Supreme Court determined that the *Sixth Amendment to the U.S. Constitution* requires that "any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." In *Blakely*, this "statutory maximum" was **[**19]** construed to be "& # 8222;the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant.'" *Trusley v. State, 829 N.E.2d 923, 925 (Ind. 2005)* (quoting *Blakely, 542 U.S. at 303* (emphasis omitted)). The Indiana Supreme Court subsequently interpreted *Blakely* to dictate that sentences imposed under Indiana's presumptive sentencing scheme violated the *Sixth Amendment* when aggravating circumstances found by **[*1231]** the trial court were not based on facts found to exist by a jury. *See Young v. State, 834 N.E.2d 1015, 1017 (Ind. 2005)* (citing *Smylie v. State, 823 N.E.2d 679, 685 (Ind. 2005)).*

Here, Ben-Yisrayl committed his crimes in 1983, long before the April 2005 statutory amendments creating an "advisory" sentencing scheme took effect. He is therefore subject to the "presumptive" statutory scheme in effect at the time of his crimes. *See Weaver v. State, 845 N.E.2d 1066, 1071-72 (Ind. Ct. App. 2006)* (concluding that change from presumptive to advisory scheme constitutes a substantive, not procedural, change, which should not be applied retroactively), *trans. denied*; *Patterson v. State, 846 N.E.2d 723, 727 n.5 (Ind. Ct. App. 2006)* **[**20]** (same). [7] Accordingly, under the rule in *Blakely*, the trial court upon remand cannot enhance his sentence based on additional facts, unless those facts are either (1) a prior conviction; (2) facts found by a jury beyond a reasonable doubt; (3) facts admitted by the defendant; or (4) facts found by the sentencing judge after the defendant had waived *Apprendi* rights and consented to judicial factfinding. *Robertson v. State, 871 N.E.2d 280, 286 (Ind. 2007).*

7 *Samaniego-Hernandez v. State, 839 N.E.2d 798 (Ind. Ct. App. 2005)*, referenced by both *Weaver* and *Patterson*, holds to the contrary that the "advisory" sentencing scheme reflects a procedural, rather than substantive, change.

The fact that Ben-Yisrayl's original sentencing hearing took place long before *Blakely* does not alter our view that Ben-Yisrayl is entitled to a *Blakely* hearing upon resentencing. *See Kline v. State, 875 N.E.2d 435, 438 (Ind. Ct. App. 2007)* (observing, in case where "*pre-Blakely* conviction" was remanded for resentencing in "*post-Blakely* world," that trial court must comply with the "current state of constitutional law" and that any facts used to enhance the defendant's sentence must be found pursuant to *Blakely*). **[**21]** In addition, to the extent it might appear that Ben-Yisrayl has received a windfall, we observe that even if Ben-Yisrayl's term of years had not been deemed unauthorized and this were a direct appeal on the merits of that term, he would nevertheless be entitled to the retroactive application of *Blakely*. *See Smylie, 823 N.E.2d at 690-91* (concluding that *Blakely* constitutes a new rule of constitutional procedure and applies retroactively to all cases on direct review or not yet final at the time it was announced) *and Gutermuth v. State, 868 N.E.2d 427, 431, 434 (Ind. 2007)* (concluding that a defendant's case becomes "final" for purposes of retroactivity when the time for filing a timely direct appeal has expired).

Accordingly, we order the trial court upon remand to conduct a full sentencing hearing for Ben-Yisrayl's murder conviction. Pursuant to *Indiana Code section 35-50-2-3*, such sentence shall be in the range of from thirty to sixty years, with forty years being the presumptive sentence, and with any term in excess of this forty-year sentence to be justified by aggravating circumstances found pursuant to the dictates of *Blakely*. In addition, the trial court shall determine whether **[**22]** such sentence shall be served concurrent or consecutive to Ben-Yisrayl's existing ninety-year term and provide proper justification in the event that a consecutive sentence is imposed. Of course, any aggravator used to justify the imposition of a consecutive sentence need not be found in accordance with *Blakely. See Smylie, 823 N.E.2d at 686* (observing that *Blakely* does not implicate the imposition of consecutive sentences). Having reached this conclusion, we find it unnecessary to address Ben-Yisrayl's challenge to the propriety of his 150-year sentence.

[*1232] V. Recusal

Ben-Yisrayl's final challenge is to Judge Hawkins's recusal from his case. On May 26, 2005, during the pendency of Ben-Yisrayl's penalty proceedings in Judge Hawkins's Court Five, Judge Hawkins recused himself from Ben-Yisrayl's case. Judge Hawkins explained his recusal by issuing an order stating as follows:

> The Court, in an unrelated case captioned State of Indiana versus Jeffrey Voss, cause number 49G05-0412-MR-232452, having granted the State's request for recusal finds that the reasons for requesting that recusal would equally apply to this cause. In other words, if it would appear improper for the Judge presiding in **[**23]** Criminal Court Five to preside over the Voss matter, it would also appear improper for that Judge to preside over this cause. Accordingly, the Clerk is to randomly reassign this cause to any appropriate Court in Marion County.

App. p. 116(a).

The "Voss" case referenced by the court was similarly a death penalty case assigned to Judge Hawkins's Court Five. *Voss v. State, 856 N.E.2d 1211, 1214-15 (Ind. 2006)*. Following its request for the death penalty in *Voss*, the State filed an *Indiana Criminal Rule 12(B)* motion requesting Judge Hawkins to remove himself as judge based upon what the State alleged was Judge Hawkins's bias against the death penalty. *Id. at 1215, 1217*. In support of its motion, the State attached an affidavit asserting certain facts, including certain decisions in which Judge Hawkins had held the death penalty unconstitutional, media remarks by Judge Hawkins which were allegedly critical of the death penalty, and instances of conduct by Judge Hawkins in his prior representation of defendants facing the death penalty. *Id. at 1217*. Judge Hawkins subsequently issued an order appointing Judge Jeffrey V. Boles to decide the removal motion. *Id. at 1215*. On May 26, 2005, Judge **[**24]** Boles directed that the case be reassigned on a random basis to another Marion Superior Court, Criminal Division. *Id.*

On this same date, Judge Hawkins *sua sponte* recused himself from the instant case based upon Judge Boles's ruling in the Voss case. On June 2, 2005, Ben-Yisrayl's case was randomly reassigned to Court Three. On June 27, 2005, Ben-Yisrayl objected to Judge Hawkins's recusal, requesting that the ruling be set aside and the matter set for an evidentiary hearing. On June 28, 2005, Judge Hawkins denied the motion and ordered that the case be returned to Court Three.

On June 29, 2005, Ben-Yisrayl's defense counsel appeared in Court Three, acknowledged Judge Hawkins's denial of the motion to set aside his recusal, and made no further objection to the proceedings in Court Three. The parties agreed to set Ben-Yisrayl's resentencing matter for a pre-trial conference. Status hearings on October 28, 2005; December 9, 2005; January 13, 2006; February 17, 2006; March 31, 2006; May 26, 2006; June 23, 2006; and August 18, 2006 ensued, and a trial date was set.

On November 22, 2006, the Supreme Court handed down its decision in *Voss*, in which it vacated both Judge Hawkins's order transferring **[**25]** the case to Judge Boles for ruling on the State's recusal motion, as well as Judge Boles's May 26, 2005 order implicitly granting the State's motion for a change of judge and ordering reassignment to a different judge. *Id. at 1221*. In doing so, the Supreme Court concluded that the facts alleged in the State's affidavit did not support a rational inference of bias or prejudice and were therefore inadequate to support a *Rule 12(B)* change of judge. *Id. at 1219*.

[*1233] At a December 1, 2006 pre-trial conference, the parties discussed *Voss* and the possibility of its affecting Ben-Yisrayl's case, but defense counsel made no objection on *Voss* grounds. On February 15, 2007, Ben-Yisrayl filed a motion to continue on the basis of his anticipated motion to transfer the cause back to Court Five due to *Voss*. The trial court granted the

motion but ordered that any pleading be filed prior to March 16, 2007, the date of the next-scheduled pre-trial conference. Ben-Yisrayl subsequently moved to continue the March 16, 2007 conference and filed no *Voss* pleadings by the designated date.

Additional status hearings were held on May 23, 2007; June 15, 2007; July 13, 2007; October 31, 2007; and November 14, 2007. **[**26]** Defense counsel did not object on *Voss* grounds in any of these hearings.

On January 16, 2008, the State moved to dismiss its request for imposition of the death penalty. The trial court subsequently granted the motion, issued an amended abstract of judgment, and held a March 28, 2008 hearing on Ben-Yisrayl's *non-Voss-related* motion to correct error. It was not until almost two weeks later that Ben-Yisrayl, on April 10, 2008, again sought to transfer his case back to Judge Hawkins's court on the basis of "new rulings," presumably in *Voss*. The trial court denied his motion on the grounds that Ben-Yisrayl's claim was waived.

On appeal, Ben-Yisrayl points to the Supreme Court's reversal of Judge Hawkins's removal in *Voss* and argues that Judge Hawkins's recusal in his case is similarly suspect. We find it unnecessary to reach the merits of this claim. As the State argues, "[t]imeliness is important on recusal issues." *Tyson v. State, 622 N.E.2d 457, 460 (Ind. 1993)*. "'Counsel ... may not lie in wait, raising the recusal issue only after learning the court's ruling on the merits.'" *Id*. (quoting *Phillips v. Amoco Oil Co., 799 F.2d 1464, 1472 (11th Cir. 1986))*. Here, Ben-Yisrayl submitted to the **[**27]** jurisdiction of Court Three for almost three years before seeking to transfer the case back to Judge Hawkins's Court Five. Indeed, by the time Ben-Yisrayl sought to challenge the presence of his case in Court Three, the Supreme Court's decision in *Voss* was almost a year and a half old, the court had held multiple hearings with no objection by the parties, the court had granted the State's motion to dismiss the death penalty, and the hearing on Ben-Yisrayl's motion to correct error had been held. We therefore conclude that Ben-Yisrayl has waived his challenge to the trial court's denial of his motion to transfer based upon an allegedly improper change of judge. *See Angleton v. State, 714 N.E.2d 156, 158 (Ind. 1999)* (failure to lodge timely objection to change of judge waives any claim of error on appeal).

In any event, as the trial court observed, it could not properly transfer the case back to Judge Hawkins's court because Judge Hawkins had never set aside his recusal. Once a judge disqualifies himself from a case he cannot thereafter reinstate himself without revoking or setting aside his prior order of disqualification. *Wilson v. State, 521 N.E.2d 363, 365 (Ind. Ct. App. 1988)*, *trans.* **[**28]** *denied*. In seeking transfer, Ben-Yisrayl made no showing that Judge Hawkins had since rescinded his recusal. We find no error.

CONCLUSION

We have concluded that Ben-Yisrayl is entitled to a new sentencing hearing for his murder conviction which comports with the dictates of *Blakely*, but that he has waived his challenge to Judge Hawkins's recusal from his case. Accordingly, we affirm in part, reverse in part, and remand to Court Three for a new sentencing hearing on the murder conviction only.

[*1234] The judgment of the trial court is affirmed in part and reversed in part, and the cause is remanded for further proceedings.

FRIEDLANDER, J., and MAY, J., concur.

Ben-Yisrayl v. State

Court of Appeals of Indiana

December 14, 2010, Decided; December 14, 2010, Filed

No. 49A02-1003-CR-332

Reporter
2010 Ind. App. Unpub. LEXIS 1744 *

CHIJOIKE BOMANI BEN-YISRAYL f/k/a GREAGREE DAVIS, Appellant-Defendant, vs. STATE OF INDIANA, Appellee-Plaintiff.

Notice: PURSUANT TO *INDIANA APPELLATE RULE 65(D)*, THIS MEMORANDUM DECISION SHALL NOT BE REGARDED AS PRECEDENT OR CITED BEFORE ANY COURT EXCEPT FOR THE PURPOSE OF ESTABLISHING THE DEFENSE OF RES JUDICATA, COLLATERAL ESTOPPEL, OR THE LAW OF THE CASE.

Subsequent History: Reported at *Ben-Yisrayl v. State, 939 N.E.2d 130, 2010 Ind. App. LEXIS 2422 (Ind. Ct. App., 2010)*

Habeas corpus proceeding at, Stay granted by *Ben-Yisrayl v. Zatecky, 2013 U.S. Dist. LEXIS 45793 (S.D. Ind., Mar. 29, 2013)*

Prior History: **[*1]** APPEAL FROM THE MARION SUPERIOR COURT. The Honorable Sheila A. Carlisle, Judge. Cause No. 49G03-8404-CF-5165.

Ben-Yisrayl v. State, 908 N.E.2d 1223, 2009 Ind. App. LEXIS 949 (Ind. Ct. App., 2009)

Counsel: FOR APPELLANT: LISA M. JOHNSON, Brownsburg, Indiana.

FOR APPELLEE: GREGORY F. ZOELLER, Attorney General of Indiana; ELLEN H. MEILAENDER, Deputy Attorney General, Indianapolis, Indiana.

Judges: BROWN, Judge. DARDEN, J., and BRADFORD, J., concur.

Opinion by: BROWN

Opinion

MEMORANDUM DECISION - NOT FOR PUBLICATION

BROWN, Judge

Chijoike Bomani Ben-Yisrayl, formerly known as Greagree Davis, appeals his sentence for murder. Ben-Yisrayl raises three issues, which we revise and restate as:

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I. Whether the trial court sentenced Ben-Yisrayl in violation of *Blakely v. Washington, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004)*, reh'g denied;

II. Whether the trial court abused its discretion in sentencing Ben-Yisrayl; and

III. Whether his sentence is inappropriate in light of the nature of the offense and the character of the offender.

We affirm.

The relevant facts as discussed in Ben-Yisrayl's direct appeal follow:

> [Ben-Yisrayl] was acquainted with [Debra Weaver's] former roommate and had visited [Weaver's] residence on many occasions during the summer of 1983. [Ben-Yisrayl] told the roommate several times of his sexual interest in [Weaver]. **[*2]** About 7:00 p.m. on April 2, 1984, [Ben-Yisrayl] knocked on the door of [Weaver's] neighbors, asking them whether [Weaver] lived there, and was told that . . . she did not. [Ben-Yisrayl] then left. Sometime after 9:00 p.m., [Weaver] arrived home and telephoned her brother. She told him that someone had broken into her residence through a back window and had removed all the light bulbs. [Weaver] believed that the intruder might still be present. Her brother told her to leave immediately, and assumed that she would come to his residence. When she failed to arrive as he expected, he reported the incident to the police. The responding officer did not find [Weaver] at her residence, but found a broken window. Later investigations discovered the keys to her new car on the porch and the missing light bulbs in a waste paper basket.
>
> On April 4, a police officer found the gagged and substantially disrobed body of [Weaver] at the top of a ramp under a bridge near her residence. An autopsy revealed chipped teeth; broken fingernails; abrasions on the hands, chin, and knees; multiple bruises to the lips and gums; and 113 stab or puncture wounds. The stab wounds were caused by two different knives. **[*3]** [Weaver's] neck evidenced manual strangulation. Seminal fluid was found in her vaginal cavity. The cause of her death was determined to be multiple stab wounds to the chest and abdomen.
>
> [Ben-Yisrayl] told police investigators that he broke the back window of [Weaver's] home, entered it, unscrewed the light bulbs, waited, and hid behind a door when she returned home and made a phone call. When she walked towards the door, he got behind her. With [Weaver's] hands tied in front of her, he took her to nearby railroad tracks, under a bridge, and up a slope. At some point he gagged her. [Ben-Yisrayl] told police that he stabbed her. He described the disposal of the knife, and took police to the creek where he had dropped it while trying to wash it off. Two knives were discovered at this location. One was [Weaver's] pastry knife and the other was a chef's knife from [Weaver's] kitchen knife set. [Ben-Yisrayl] also admitted taking [Weaver's] watch and later selling it.
>
> Serological analysis of blood and seminal fluid obtained from [Weaver] indicated characteristics representing less than one percent of the general population. [Ben-Yisrayl's] blood test results placed him within this category.

Davis v. State, 598 N.E.2d 1041, 1044-1045 (Ind. 1992), **[*4]** reh'g denied, cert. denied, *510 U.S. 948, 114 S. Ct. 392, 126 L. Ed. 2d 340 (1993)*.

The State charged Ben-Yisrayl with burglary as a class B felony, criminal confinement as a class B felony, rape as a class A felony, criminal deviate conduct as a class A felony, and murder. *Id. at 1044*. The State sought imposition of the death penalty. Id. The jury found Ben-Yisrayl not guilty of criminal deviate conduct, but guilty on all other counts. Id. The jurors were unable to agree upon a recommendation regarding the death penalty. Id. The trial court, following a further sentencing hearing, ordered the death

penalty on the murder conviction, with an alternate sixty-year sentence should the death penalty not be upheld on appeal, and a ninety-year aggregate sentence on the remaining convictions. Id. On direct appeal, the Indiana Supreme Court affirmed Ben-Yisrayl's convictions and sentence. Id.

On February 16, 1994, Ben-Yisrayl filed a petition for post-conviction relief. The post-conviction court partially granted Ben-Yisrayl's petition, vacating the death sentence and remanding to the trial court for a new penalty phase trial and sentencing proceeding, but otherwise denying his petition. *Ben-Yisrayl v. State, 738 N.E.2d 253, 257 (Ind. 2000)*, **[*5]** reh'g denied, cert. denied, *534 U.S. 1164, 122 S. Ct. 1178, 152 L. Ed. 2d 120 (2002)*. On appeal, the Indiana Supreme Court affirmed the judgment of the post-conviction court. Id.

On remand for sentencing, the trial court granted Ben-Yisrayl's motion to dismiss the death penalty request, concluding that the Indiana death penalty statute was unconstitutional because it permitted a sentence of death without requiring the jury to find beyond a reasonable doubt that the aggravating circumstance or circumstances outweighed any mitigating circumstances. *State v. Ben-Yisrayl, 809 N.E.2d 309, 310 (Ind. 2004)*, reh'g denied, cert. denied, *546 U.S. 1020, 126 S. Ct. 659, 163 L. Ed. 2d 533 (2005)*. On appeal, the Indiana Supreme Court reversed the trial court's order and remanded for reinstatement of the State's death penalty request and for penalty phase proceedings as previously ordered by the Court. *Id. at 311*.

On January 16, 2008, the State moved to dismiss its request for imposition of the death penalty based upon the inadvertent destruction of physical evidence, which the trial court granted. *Ben-Yisrayl v. State, 908 N.E.2d 1223, 1226 (Ind. Ct. App. 2009)*, trans. denied. On January 22, 2008, the trial court issued an amended abstract **[*6]** of judgment reflecting the dismissal of the death penalty but otherwise adopting the 150-year sentence originally imposed by the trial court. Id. On February 12, 2008, Ben-Yisrayl filed a motion to correct error, which the trial court denied. Id.

On appeal, this court held that the original trial court exceeded its statutory authority in imposing Ben-Yisrayl's alternative sixty-year consecutive sentence for murder. *Id. at 1230*. This court remanded to the trial court with instructions to conduct a sentencing hearing and resentence Ben-Yisrayl for his murder conviction. Id. The court also held that Ben-Yisrayl was subject to the "presumptive" statutory scheme in effect at the time of his crimes. *Id. at 1231*. The court held: "Accordingly, under the rule in Blakely, the trial court upon remand cannot enhance his sentence based on additional facts, unless those facts are either (1) a prior conviction; (2) facts found by a jury beyond a reasonable doubt; (3) facts admitted by the defendant; or (4) facts found by the sentencing judge after the defendant had waived Apprendi rights and consented to judicial factfinding." Id. The court also ordered the trial court to conduct a full sentencing **[*7]** hearing for Ben-Yisrayl's murder conviction. Id.

On remand, the trial court held a sentencing hearing on February 16, 2010, and Ben-Yisrayl presented multiple character witnesses. At the end of the hearing, the court and the parties agreed to have the parties submit arguments in writing. Ben-Yisrayl submitted a two-page Sentencing Memorandum, which argued that he had made progress, had responded positively to rehabilitation, had a minimal criminal history, and had family members and members of the community that spoke on his behalf. On February 26, 2010, the court continued the sentencing hearing. The court asked the parties if they had additional argument or evidence, and Ben-Yisrayl's counsel stated: "No thank you, Your Honor. I said what I came to say in my written memorandum." Transcript at 108.

The court recognized that it was constrained by Blakely. The court then identified Ben-Yisrayl's criminal history and the fact that he was on probation at the time of the offense as significant aggravating circumstances. Regarding Ben-Yisrayl's criminal history, the court stated:

> [O]n November 1, [19]74, as a juvenile, you were found to have drawn a deadly weapon on another person. Specifically, **[*8]** that you drew a knife on another individual at school. You were 12 years old by my calculation at that time.
>
> Also as part of this aggravating circumstance of a prior criminal history, on October 3, 1978, again as a juvenile, unlawful deviate conduct. You and another individual forced an 11 year-old female to commit sodomy and then placed your penis in her vagina. My calculation was that you were 16 years old at that time.
>
> And then on July 16th of 1983, you committed the burglary class B felony that you've already alluded to. You broke and entered the dwelling at 3801 North Ridgeview Drive, and you did so with intent to exert unauthorized control over property.
>
> * * * *
>
> So at age 22 you had these three prior convictions that comprise the aggravating circumstance of a prior criminal history. The Court, in reviewing those and considering those, especially in light of the charge that you're being sentenced on, finds that these prior convictions served as your foundation for your preparation for the conviction in this case.
>
> And I say that because at age 12 you pulled a knife on someone, and when you committed this murder you used a knife on [Weaver]. At age 16 you chased and then forced intercourse **[*9]** on a young female, and the day you committed this murder you also raped [Weaver]. And then at age 21, just months before you committed this murder, you broke into another person's home, specifically the neighbor of [Weaver].
>
> So it looks to the Court that your prior criminal history is rather significant in light of it being a training ground for you to commit the most heinous crime of murder; that murder of [Weaver]. You had already used a knife, you had already committed a violent act against another female and you had already broken into another person's home.
>
> So I find that this prior criminal history is deserving of significant weight as an aggravating circumstance.

Id. at 114-116.

The court noted the statements of Ben-Yisrayl's character witnesses and identified Ben-Yisrayl's network of support of family and friends as a mitigating circumstance of minimal weight. The court also identified Ben-Yisrayl's record of good conduct in prison since the early 1990s as a mitigator of medium weight. The court found that the aggravating circumstances outweighed the mitigating circumstances and sentenced Ben-Yisrayl to an executed sentence of sixty years. In determining whether to impose a consecutive **[*10]** sentence, the court found that the offense was premeditated, that Ben-Yisrayl "did lie in wait," and noted the fact that he knocked on the neighbors' door "to see if there's anyone next door that might possibly be able to hear or see what you're about to do." Id. at 122-123. The court ordered that the sixty-year sentence be served consecutive to the aggregate ninety-year sentence Ben-Yisrayl was serving for his other convictions.

I.

The first issue is whether the trial court sentenced Ben-Yisrayl in violation of Blakely. As expressed in this court's earlier opinion, Ben-Yisrayl committed his crimes in 1983, long before the April 2005 statutory amendments creating an "advisory" sentencing scheme took effect. *908 N.E.2d at 1231*. Accordingly, Ben-Yisrayl is subject to the "presumptive" statutory scheme in effect at the time of his crimes and Blakely. Id. The Indiana Supreme Court has explained:

> We recently held that Blakely was applicable to Indiana's sentencing scheme because our presumptive term constituted the statutory maximum as defined in Blakely. *Smylie v. State, 823 N.E.2d 679, 683 (Ind. 2005)*[, cert. denied, *546 U.S. 976, 126 S. Ct. 545, 163 L. Ed. 2d 459 (2005)]*. Consequently, we held that to enhance **[*11]** a sentence under Indiana's then existing system "the sort of facts envisioned by Blakely as necessitating a jury finding must be found by a jury . . . ." *Id. at 686*.
>
> Blakely is not concerned, primarily, with what facts a judge uses to enhance a sentence, but with how those facts are found. Under Blakely, a trial court in a determinate sentencing system such as Indiana's may enhance a sentence based only on those facts that are established in one of several ways: 1) as a fact of prior conviction; 2) by a jury beyond a reasonable doubt; 3) when admitted by a defendant; and 4) in the course of a guilty plea where the defendant has waived Apprendi[v. *New Jersey, 530 U.S. 466, 490, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000)*,] rights and stipulated to certain facts or consented to judicial factfinding.

Trusley v. State, 829 N.E.2d 923, 925 (Ind. 2005). Juvenile adjudications may be considered as "prior convictions" for purposes of sentencing under *Blakely. Mitchell v. State, 844 N.E.2d 88, 92 (Ind. 2006)*. "In a case where a trial court has relied on some Blakely-permissible aggravators and others that are not Blakely-permissible, the 'sentence may still be upheld if there are other valid aggravating factors **[*12]** from which we can discern that the trial court would have imposed the same sentence.'" *Sullivan v. State, 836 N.E.2d 1031, 1037 (Ind. Ct. App. 2005)* (quoting *Edwards v. State, 822 N.E.2d 1106, 1110 (Ind. Ct. App. 2005))*.

Ben-Yisrayl argues that whether the aggravators outweigh the mitigators is a finding of fact that must be made by a jury. The trial court may enhance a sentence based upon properly found aggravators and mitigators. See *Trusley, 829 N.E.2d at 925*; see also *Kubsch v. State, 866 N.E.2d 726, 738 (Ind. 2007)* (holding that the weighing of the aggravators and mitigators does not have to be proven beyond a reasonable doubt) (citing *Ritchie v. State, 809 N.E.2d 258 (Ind. 2004)*, reh'g denied, cert. denied, *546 U.S. 828, 126 S. Ct. 42, 163 L. Ed. 2d 76 (2005))*, reh'g denied, cert. denied, *553 U.S. 1067, 128 S. Ct. 2501, 171 L. Ed. 2d 791 (2008)*; *Strong v. State, 817 N.E.2d 256, 262 (Ind. Ct. App. 2004)* (holding that "we do not discern from the Blakely decision that the trial courts [sic] sentencing authority of balancing and weighing mitigating and aggravating circumstances has been usurped"), clarified on reh'g, *820 N.E.2d 688*, trans. denied.

Ben-Yisrayl also argues that the trial court "went beyond the statutory **[*13]** elements and cited additional 'facts' which were not established by the prior convictions," including the fact that Ben-Yisrayl "at age 12, drew a knife on another child at school; that at age 16, he and another individual forced an 11 year old girl to commit sodomy and submit to sexual intercourse; that he burglarized [the victim's] neighbor; and that his prior offenses served as a 'training ground' for the instant offense." Appellant's Brief at 23. Ben-Yisrayl argues that the court also cited the use of a knife in the instant offense as an aggravating circumstance but the use of a knife was not a statutory element of murder.

Initially, we observe that the Order of Judgment of Conviction listed two aggravators: (1) Ben-Yisrayl's prior criminal history; and (2) the fact that Ben-Yisrayl was on probation at the time of the crime. We also observe that the trial court recognized at the sentencing hearing that it was bound by the constraints of Blakely. Specifically, the court stated:

> [T]his court understands that this sentencing hearing must comply with the dictates of *Blakely v. Washington*, which was a United States Supreme Court case in 2004, *542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403*.
>
> As there was no request for a **[*14]** trial by a jury on the aggravating factors, any aggravators that the Court would find in this hearing must be either a prior conviction, facts found by jury beyond a reasonable doubt, facts admitted by the defendant or facts found by the judge after a waiver of operandi [sic] rights. Since that didn't occur and since there was no jury, any facts for purposes of aggravating circumstances that would cause a sentence to be above the presumptive[] sentence must be either a prior conviction or facts admitted by the defendant.

Transcript at 111.

To the extent that Ben-Yisrayl argues that the court's recognition that a knife was used in the instant offense violated Blakely, we observe that the charging information for the present offense stated that Ben-Yisrayl "did knowingly and intentionally kill another human being, to-wit: DEBRA A. WEAVER by stabbing at and against the person of DEBRA A. WEAVER by means of a deadly weapon, to-wit: A KNIFE, thereby inflicting mortal wounds upon the person of DEBRA A. WEAVER, causing her to die . . . ." Appellant's Appendix at 118. Moreover, at trial, Ben-Yisrayl's trial counsel admitted "[t]here's going to be no argument that Debra Weaver was murdered in **[*15]** a heinous fashion. It was a gruesome murder. And that's going to be brought out. There's going to be gory photo's [sic]. I'm not contending that. What I'm contending is do we have the right man on trial here today." Trial Transcript at 860. Ben-Yisrayl's trial counsel also discussed the knife or knives, referred to "a hundred and thirteen (113) stab wounds," stated "there are some large stab wounds in the chest that killed Debra Weaver, basically eleven (11)," and argued that "[t]here were obviously two (2) knives involved." Id. at 908-909.

To the extent that Ben-Yisrayl argues that the court improperly considered the fact that he burglarized Weaver's neighbor, we observe that Ben-Yisrayl admitted at the sentencing hearing that he burglarized the house next door to Weaver. Specifically, the following exchange occurred:

> THE COURT: And [Debra Weaver] lived next door to the residence that you burglarized?
>
> THE DEFENDANT: Yes.

Transcript at 105.

We cannot say that the court sentenced Ben-Yisrayl in violation of Blakely by its reliance on these factors. See *Trusley, 829 N.E.2d at 925* (holding that facts of prior convictions are appropriate for the trial court to consider in enhancing a sentence); **[*16]** *Kincaid v. State, 839 N.E.2d 1201, 1205 (Ind. Ct. App. 2005)* (holding that the trial court properly considered the defendant's position of trust because he admitted during his trial testimony that the victim was his son).

To the extent that Ben-Yisrayl argues that the court improperly relied upon the specific facts from his juvenile adjudications, we observe that the presentence investigation report ("PSI") reveals that Ben-Yisrayl was adjudicated a delinquent for drawing a deadly weapon and unlawful deviate conduct. The PSI describes the offense of drawing a deadly weapon as follows: "[Ben-Yisrayl] was arrested after he drew a

knife on another individual while attending Public School #73." The PSI describes the offense of unlawful deviate conduct as follows: "[Ben-Yisrayl] and another individual chased and forced an eleven year old female to commit sodomy and then place [sic] their penis' [sic] in her vagina." Even assuming, without deciding, that the court improperly relied upon the statements in the PSI that Ben-Yisrayl drew a knife or that he forced a female to commit sodomy and then placed his penis in her vagina, we conclude that the remaining aggravators of Ben-Yisrayl's criminal **[*17]** history, including his juvenile adjudications, and the fact that he was on probation at the time of the offense adequately support Ben-Yisrayl's sentence. See *infra* Part II.B.

II.

The next issue is whether the trial court abused its discretion in sentencing Ben-Yisrayl. [1] Sentencing decisions rest within the discretion of the trial court and are reviewed on appeal only for an abuse of discretion. *Smallwood v. State, 773 N.E.2d 259, 263 (Ind. 2002)*. An abuse of discretion occurs if "the decision is clearly against the logic and effect of the facts and circumstances." *Pierce v. State, 705 N.E.2d 173, 175 (Ind. 1998)*. In order for a trial court to impose an enhanced sentence, it must: (1) identify the significant aggravating factors and mitigating factors; (2) relate the specific facts and reasons that the court found those to be aggravators and mitigators; and (3) demonstrate that the court has balanced the aggravators with the mitigators. *Veal v. State, 784 N.E.2d 490, 494 (Ind. 2003)*.

Ben-Yisrayl argues that **[*18]** the trial court failed to consider mitigating circumstances and improperly relied on aggravating circumstances. We address each argument separately.

A. Mitigators

"The finding of mitigating factors is not mandatory and rests within the discretion of the trial court." *O'Neill v. State, 719 N.E.2d 1243, 1244 (Ind. 1999)*. The trial court is not obligated to accept the defendant's arguments as to what constitutes a mitigating factor. *Gross v. State, 769 N.E.2d 1136, 1140 (Ind. 2002)*. "Nor is the court required to give the same weight to proffered mitigating factors as the defendant does." Id. Further, the trial court is not obligated to explain why it did not find a factor to be significantly mitigating. *Sherwood v. State, 749 N.E.2d 36, 38 (Ind. 2001)*. However, the trial court may "not ignore facts in the record that would mitigate an offense, and a failure to find mitigating circumstances that are clearly supported by the record may imply that the trial court failed to properly consider them." Id. An allegation that the trial court failed to identify or find a mitigating factor requires the defendant to establish that the mitigating evidence is both significant and clearly supported by **[*19]** the record. *Carter v. State, 711 N.E.2d 835, 838 (Ind. 1999)*.

1. Residual Doubt & Mental Status

Ben-Yisrayl argues that the trial court failed to consider "residual doubt" as a mitigating circumstance. Appellant's Brief at 26. Ben-Yisrayl argues that the "post-conviction evidence revealed numerous holes in the State's case and showed that much of the State's evidence was not nearly as incriminating as it appeared to be." Id. at 28. Ben-Yisrayl then discusses serology, the watch that he sold to a co-worker a few days after the murder, his confession to police, the knives, and other evidence. Ben-Yisrayl also

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[1] We observe that this court previously held that Ben-Yisrayl was subject to the "presumptive" statutory scheme in effect at the time of his crimes. *Ben-Yisrayl, 908 N.E.2d at 1231*.

points to the post-conviction record to suggest that he is "borderline retarded," has an IQ of 76, suffers from "PTSD and NPD," and suffered from "chronic substance abuse." Id. at 43. Ben-Yisrayl argues that the sentencing court "abused its discretion by failing to assign any mitigating weight to Ben-Yisrayl's mental impairments and chronic substance abuse." Id. at 44. Ben-Yisrayl has waived these claims because he failed to ask the sentencing court to consider these facts as mitigators. [2] See *Carter, 711 N.E.2d at 838-839* (holding that the trial court did not abuse its discretion **[*20]** in failing to consider evidence of defendant's low I.Q. where the issue was not raised at sentencing); *Creekmore v. State, 853 N.E.2d 523, 530 (Ind. Ct. App. 2006)* ("[I]f the defendant fails to advance a mitigating circumstance at sentencing, this court will presume that the factor is not significant, and the defendant is precluded from advancing it as a mitigating circumstance for the first time on appeal."), clarified on reh'g, *858 N.E.2d 230*.

2. Ben-Yisrayl's Childhood

Ben-Yisrayl argues that he suffered considerable trauma as a child. The State concedes that Ben-Yisrayl "never had much of a relationship with his father, and his mother, with whom he did have an excellent relationship, died when he was only thirteen," but argues that "[n]evertheless, many people have equally sad experiences yet do not therefore become brutal rapists and murderers." Appellee's Brief at 19.

The record reveals that Ben-Yisrayl's mother died in 1974, and Ben-Yisrayl lived with his aunt who worked in the mental health field. Ben-Yisrayl's cousin became like a sister to him. Ben-Yisrayl connected with his family, his family's friends, and his community. Ben-Yisrayl was also active in a church choir. We cannot say that Ben-Yisrayl has shown that the mitigating evidence is both significant and clearly supported by the record. Accordingly, we cannot say that the trial court abused its discretion by not finding Ben-Yisrayl's childhood as a mitigator. **[*23]** [3] See *Rose v. State, 810 N.E.2d 361, 366 (Ind. Ct. App. 2004)* (holding that the trial court did not abuse its discretion when it declined to find that a troubled childhood was a mitigator); see also *Coleman v. State, 741 N.E.2d 697, 700 (Ind. 2000)* (noting

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[2] In his reply brief, Ben-Yisrayl argues that "the post-conviction court explicitly found that residual doubt and Ben-Yisrayl's mental status were significant mitigating circumstances in this case." Appellant's Reply Brief at 2. Ben-Yisrayl points to the Findings of Fact, Conclusions of Law and Order on Petition for Post-Conviction Relief dated May 31, 1996. The statements in the post-conviction court's May 31, 1996 order were made in the context of ineffective assistance of counsel at the penalty phase or sentencing, and we cannot say that the post-conviction court's mention of residual doubt or Ben-Yisrayl's mental health at that time and in that context constitute a proposed mitigating circumstance by Ben-Yisrayl at the 2010 sentencing hearing. **[*21]** We also observe that the May 31, 1996 order does not clearly support Ben-Yisrayl's arguments. The 1996 order concluded in part that "the evidence at the guilt phase of the trial was substantial that the watch was in fact the victim's watch," that Ben-Yisrayl's trial counsel was not ineffective for failing to investigate the serology evidence, and that "[t]he evidence at trial was substantial and credible regarding the large knife being used in the commission of the murder by [Ben-Yisrayl] and the evidence regarding the pastry knife was also persuasive." Post-Conviction Record at 739-740.

Ben-Yisrayl also appears to argue that the court abused its discretion in finding that the circumstances warranted consecutive sentences because the court "relied on many 'facts' that were refuted by the post-conviction evidence." Appellant's Brief at 48-49. Ben-Yisrayl points to evidence presented at the post-conviction hearing and argues that there was considerable evidence suggesting that he "was not the black man who knocked on the neighbors' door," his fingerprints were not found on the light bulbs or anywhere inside the apartment, and that a demonstration with a virtually identical knife to the **[*22]** one allegedly used revealed that it was too dull and flimsy to penetrate human skin. Id. at 49. Again, Ben-Yisrayl has waived this claim because he failed to ask the court to consider these facts as mitigators.

[3] As part of Ben-Yisrayl's discussion of his background, he discusses his childhood and his work history. Ben-Yisrayl cites to portions of the trial record and the post-conviction record and states that he maintained regular employment until his arrest in 1984 and was "liked and respected by his co-workers and supervisors." Appellant's Brief at 42. To the extent that Ben-Yisrayl suggests that his work history constituted a mitigator, Ben-Yisrayl has waived this claim because he failed to ask the trial court to consider these facts as mitigators. See *Carter, 711 N.E.2d at 838-839*; *Creekmore, 853 N.E.2d at 530*.

"this court has consistently held that evidence of a difficult childhood warrants little, if any, mitigating weight"), reh'g denied, cert. denied *534 U.S. 1057, 122 S. Ct. 649, 151 L. Ed. 2d 566 (2001)*, reh'g denied.

3. Character

Ben-Yisrayl states that the sentencing court "correctly found that [his] character was a mitigating circumstance." Appellant's **[*24]** Brief at 45. Ben-Yisrayl points to the post-conviction record, the trial transcript, and the sentencing transcript and exhibits, and argues that his "[p]astors, friends, family members, and co-workers described him as kindhearted, well-mannered, hard working, helpful, respectful, dependable, considerate, responsible, and caring." Id. To the extent that Ben-Yisrayl attempts to argue that the sentencing court abused its discretion by failing to award this mitigator more weight, we disagree.

At the sentencing hearing, the court stated:

> Your lawyers presented several witnesses, both in person and through exhibits. Those individuals either testified or wrote to the Court about you, the man as you sit here today. Some of those people also knew you either when this crime was committed or prior to this crime being committed. And I recognize that they must not have known all there was to know about Greagree Davis or they would have known about your prior criminal history, which they didn't seem to be aware of. But despite that, they continued, even after you were convicted of this offense, they continued to maintain contact with you, to have a relationship with you and to deem you worthy of their **[*25]** support some 25-plus years later here in this courtroom. I find that as a mitigating circumstance because it speaks to you as you sit here now . . . .

Transcript at 117-118.

The record reveals that Richard E. Willoughby, a pastor, testified that Ben-Yisrayl attended church and sang in the church choir in 1983 and 1984 and was a "very friendly guy" and "well-liked." Id. at 31. Willoughby also testified that he was not aware that Ben-Yisrayl was convicted of burglary in 1983 until the time of the sentencing hearing. Raymond Triggs, Jr., a social minister at a church and a retired teacher, testified that Ben-Yisrayl was a talented singer and made people at the church "feel good." Id. at 59. Triggs testified that he did not believe Ben-Yisrayl was "capable of [committing the current offenses], you know, with the way he sang and the way he carried himself around the church," and that it was "not in his character." Id. at 60. Triggs also testified that he had regular contact with Ben-Yisrayl beginning when Ben-Yisrayl was twelve or thirteen years old through the time of the current offenses but that he first heard that Ben-Yisrayl was convicted of burglary at the sentencing hearing. Based **[*26]** upon our review of the record, we cannot say that the trial court abused its discretion by failing to give this mitigator additional weight.

4. Potential for Rehabilitation

Ben-Yisrayl appears to argue that the sentencing court abused its discretion by failing to consider his potential for rehabilitation. Ben-Yisrayl argues that he has the potential to rehabilitate and points to his progress in prison and his network of family and friends. Initially, we observe that the court found that Ben-Yisrayl had a supportive network of family and friends as a mitigator of minimal weight. The court also found that Ben-Yisrayl had maintained good conduct in prison since 1992 as a mitigating factor of medium weight. At the sentencing hearing, the court stated:

> The second mitigating circumstance that I found in reviewing all of the information I've reviewed about you is that, at least since the early [19]90s, you have maintained a very good record at the prison of good conduct. You've spent approximately 25 years in the Department of Correction. . . . And while I recognize that Indiana's law is structured so that inmates in prison maintain good conduct because we give them the privilege of having a **[*27]** day of credit time for every day of good conduct that they have, in essence meaning that someone with a 100-year sentence can reduce their sentence to 50 years with good time credit. So by the way we've set that up in this state, we encourage prisoners to maintain good conduct. However, I'm well aware of the fact that many of them don't.
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> * * * *
>
> In addition, though, to your conduct, I note that they indicated that you've never had a positive drug test, that you've received above average job evaluations while incarcerated and that you most recently are involved in the Plus Program at the prison and you've been taking advantage of many of the programs that they offer and some of those aren't programs that will do anything to reduce your time in prison, those are just programs to make you a better person. So for all of them [sic] reasons, I'm assigning medium weight to this mitigating circumstance.

Transcript at 118-120.

Based upon the record, we cannot say that the trial court abused its discretion regarding this mitigator.

5. Age

Ben-Yisrayl points out that he was twenty-two years old at the time of the offense and that a young age has been recognized as a mitigating circumstance. A defendant's **[*28]** youth may be a mitigating factor in some circumstances. *Gross v. State, 769 N.E.2d 1136, 1141 n.4 (Ind. 2002)*. However, age is not a *per se* mitigating factor. Id. The trial court recognized Ben-Yisrayl's age at the time of the offense and stated "at age 22 you had these three prior convictions that comprise the aggravating circumstance of a prior criminal history." Transcript at 115. In light of Ben-Yisrayl's criminal history and the present offenses, we cannot say that Ben-Yisrayl has demonstrated that this proposed mitigator was significant or that the trial court abused its discretion. See, e.g., *Green v. State, 850 N.E.2d 977, 992 (Ind. Ct. App. 2006)* (holding that the trial court did not abuse its discretion when it concluded that the defendant's age of twenty years was not a mitigating factor), summarily affirmed in relevant part by *856 N.E.2d 703 (Ind. 2006)*.

B. Aggravators

1. Criminal History

Ben-Yisrayl appears to argue that the trial court abused its discretion in considering his criminal history. Specifically, he argues that "there are several circumstances which reduce the aggravating nature of [his] criminal history." Appellant's Brief at 47. Ben-Yisrayl points to the finding **[*29]** of the post-conviction court that he made substantial progress while on juvenile probation. [4] Ben-Yisrayl also argues that the burglary was not an act of violence.

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[4] Ben-Yisrayl also argues that "[w]hen the police found him at the scene of the 1983 burglary, he was severely intoxicated and did not remember entering the house." Appellant's Brief at 48. Ben-Yisrayl cites page 1567 of the post-conviction record, but our review of this page does not support Ben-Yisrayl's argument.

The significance of a criminal history "varies based on the gravity, nature and number of prior offenses as they relate to the current offense." *Wooley v. State, 716 N.E.2d 919, 929 n.4 (Ind. 1999)*, reh'g denied. For example, a "non-violent misdemeanor ten years in the past . . . would hardly warrant adding ten or twenty years to the standard sentence" in a murder case. *Deane v. State, 759 N.E.2d 201, 205 (Ind. 2001)*. Ben-Yisrayl has juvenile adjudications for drawing a deadly weapon and unlawful deviate conduct. [5] Ben-Yisrayl was convicted of burglary in 1983 and received six years suspended with two years probation. These convictions relate to the present case as it involved the use of a deadly weapon, a sexual **[*30]** act, and burglary. We cannot say that the trial court abused its discretion in considering Ben-Yisrayl's criminal history as a significant aggravating factor. See *Corbett v. State, 764 N.E.2d 622, 631-632 (Ind. 2002)* (holding that the trial court did not abuse its discretion by using the defendant's criminal history, which consisted of convictions for burglary and theft, as an aggravating factor in his sentence for murder and robbery); *Johnson v. State, 837 N.E.2d 209, 215 (Ind. Ct. App. 2005)* (holding that the trial court did not abuse its discretion by giving defendant's criminal history, which included three prior felony convictions, significant aggravating weight), trans. denied.

2. Probation

Ben-Yisrayl concedes that the sentencing court correctly found the fact that he was on probation at the time of the current offenses as an aggravating circumstance. Ben-Yisrayl points out that "up until the time of his arrest in the instant case, he did very well on probation" and "was in the process of completing a substance abuse evaluation." Appellant's Brief at 48. To the extent that Ben-Yisrayl argues that the court abused its discretion in relying upon the fact that he was on probation at the time of the current offense, we disagree.

The Indiana Supreme Court has held that "[p]robation stands on its own as an aggravator." *Ryle v. State, 842 N.E.2d 320, 323 n.5 (Ind. 2005)*, cert. denied, *549 U.S. 836, 127 S. Ct. 90, 166 L. Ed. 2d 63 (2006)*. "While a criminal history aggravates a subsequent crime because of recidivism, probation further aggravates a subsequent crime because the defendant was still serving a court-imposed sentence." Id. The record reveals that Ben-Yisrayl committed the present offenses less than nine months after his previous burglary for which he was on probation **[*32]** and less than five months after he was sentenced to probation for his previous burglary. We cannot say that the sentencing court abused its discretion by considering the fact that Ben-Yisrayl was on probation at the time of the current offense as a significant aggravator.

III.

The third issue is whether Ben-Yisrayl's sentence is inappropriate in light of the nature of the offense and the character of the offender. *Ind. Appellate Rule 7(B)* provides that we "may revise a sentence authorized by statute if, after due consideration of the trial court's decision, [we find] that the sentence is inappropriate in light of the nature of the offense and the character of the offender." Under this rule, the burden is on the defendant to persuade the appellate court that his or her sentence is inappropriate. *Childress v. State, 848 N.E.2d 1073, 1080 (Ind. 2006)*.

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[5] For the first time in his reply brief, Ben-Yisrayl argues that the trial court abused its discretion by considering his juvenile record as a part of his criminal history. Ben-Yisrayl did not raise the issue of the trial court's reliance on his juvenile record in his appellant's brief. Therefore, we do not address this argument. See *Carden v. State, 873 N.E.2d 160, 162 n.1 (Ind. Ct. App. 2007)* **[*31]** (holding that an issue not raised in an appellant's brief may not be raised for the first time in a reply brief).

Ben-Yisrayl argues that the maximum sentence is inappropriate and requests a sentence of forty years served concurrent with his other sentences. Ben-Yisrayl also argues that his sentence is inappropriate because he is "borderline retarded," suffers from "mental illness," and suffered from a "serious substance abuse problem which was the result **[*33]** of his PTSD." Appellant's Brief at 50.

The Indiana Supreme Court has noted that "the maximum possible sentences are generally most appropriate for the worst offenders." *Buchanan v. State, 767 N.E.2d 967, 973 (Ind. 2002)*.

> This is not, however, a guideline to determine whether a worse offender could be imagined. Despite the nature of any particular offense and offender, it will always be possible to identify or hypothesize a significantly more despicable scenario. Although maximum sentences are ordinarily appropriate for the worst offenders, we refer generally to the class of offenses and offenders that warrant the maximum punishment. But such class encompasses a considerable variety of offenses and offenders.

Id. (internal citations omitted).

Our review of the nature of the offense reveals that Ben-Yisrayl was acquainted with Weaver's former roommate and had visited her residence on many occasions. *598 N.E.2d at 1045*. He knocked on the door of Weaver's neighbors, and left after speaking with the neighbors. Id. He broke the back window of Weaver's home, entered it, unscrewed the light bulbs, waited, and hid behind a door when Weaver returned home. Id. Weaver telephoned her brother who told **[*34]** her to leave immediately. Id. The police later discovered the gagged and substantially disrobed body of Weaver at the top of a ramp under a bridge near her residence. Id. An autopsy revealed chipped teeth; broken fingernails; abrasions on the hands, chin, and knees; multiple bruises to the lips and gums; and 113 stab or puncture wounds. Id. Weaver's neck evidenced manual strangulation, and seminal fluid was found in her vaginal cavity. Id. The cause of her death was determined to be multiple stab wounds to the chest and abdomen. Id. Ben-Yisrayl concedes that the circumstances of the offense were "unquestionably brutal." Appellant's Brief at 48, 50.

Our review of the character of the offender reveals that a prison progress report states that Ben-Yisrayl had one minor infraction in 1992 within the past twenty-five years and never received a positive drug urinalysis or violence charge within the past twenty-five years. Ben-Yisrayl has juvenile adjudications for drawing a deadly weapon and unlawful deviate conduct and an adult conviction for burglary. Ben-Yisrayl was on probation at the time of the present offenses. To the extent that Ben-Yisrayl suggests that he suffers from mental illness, **[*35]** we observe that Ben-Yisrayl does not argue that there was any nexus between his alleged mental illness and the commission of the crime. We also observe that the PSI states that he "appeared to be a physically and mentally stable individual who stated he has no emotional problems," and that his progress report dated December 7, 2009 states that "[a]ccording to this facility's medical staff, [Ben-Yisrayl] has no mental health diagnosis." Appellant's Appendix at 168.

Given the facts of the case and Ben-Yisrayl's criminal history and after due consideration of the sentencing court's decision, we cannot say that the sentence imposed by the court is inappropriate in light of the nature of the offense and the character of the offender. See *Roney v. State, 872 N.E.2d 192, 206-207 (Ind. Ct. App. 2007)* (noting the brutal nature of the offense in concluding a maximum sentence for murder was not inappropriate), trans. denied; *Williams v. State, 782 N.E.2d 1039, 1052 (Ind. Ct. App. 2003)* (holding that the defendant's sixty-five-year sentence for murder was not inappropriate in light of the nature of the offense and the character of the offender), trans. denied.

For the foregoing reasons, we affirm **[*36]** Ben-Yisrayl's sentence for murder.

Affirmed.

DARDEN, J., and BRADFORD, J., concur.

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