

**IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT**

No. 16-1013

CHIJOKE BOMANI BEN-YISRAYL,
Petitioner-Appellant,

v.

RON NEAL,
Superintendent, Indiana State Prison,
Respondent-Appellee.

Appeal from the United States District Court for the
Southern District of Indiana, Indianapolis Division
Cause No. 1:12-cv-661-TWP-MJD
Hon. Tanya Walton Pratt, Judge

**BRIEF OF RESPONDENT-APPELLEE
SUPERINTENDENT RON NEAL**

CURTIS T. HILL, JR.
Attorney General of Indiana

ANDREW A. KOBE
Deputy Attorney General

Attorneys for Respondent-Appellee
Superintendent Ron Neal

OFFICE OF THE ATTORNEY GENERAL
Indiana Government Center South, 5TH Floor
302 West Washington Street
Indianapolis, Indiana 46204
Telephone: (317) 233-3349

TABLE OF CONTENTS

Table of Authorities	ii
Jurisdictional Statement	1
Statement of the Issues	1
Statement of the Case	1
Summary of the Argument.....	8
Argument:	
I. Ben-Yisrayl’s claim of ineffective of assistance of resentencing counsel for failing to present different mitigation evidence is waived for appeal	10
II. Ben-Yisrayl’s current claim of ineffective assistance of counsel is barred from review by procedural default	11
III. If available for review, Ben-Yisrayl has not shown that he is entitled to relief on his ineffective assistance of resentencing counsel claim	13
IV. The district court did not abuse its discretion in refusing to accept Ben-Yisrayl’s untimely reply brief	16
Conclusion	17
Certificate of Service.....	17

TABLE OF AUTHORITIES

Cases

<i>Bell v. Cone</i> , 535 U.S. 685 (2002)	14
<i>Ben-Yisrayl v. State</i> , 738 N.E.2d 253 (Ind. 2000)	6
<i>Ben-Yisrayl v. State</i> , 908 N.E.2d 1223 (Ind. Ct. App. 2009)	6
<i>Ben-Yisrayl v. State</i> , No. 49A02-1003-CR-332 (Ind. Ct. App. Dec. 14, 2010).....	7
<i>Bolton v. Akpore</i> , 730 F.3d 685 (7th Cir. 2013).....	10
<i>Cty. of McHenry v. Ins. Co. of the W.</i> , 438 F.3d 813 (7th Cir. 2006)	10
<i>Davis v. State</i> , 598 N.E.2d 1041 (Ind. 1992).....	4, 5
<i>Denny v. Gudmanson</i> , 252 F.3d 896 (7th Cir. 2001)	9, 14
<i>Duncan v. Henry</i> , 513 U.S. 364 (1995).....	11
<i>Estelle v. McGuire</i> , 502 U.S. 62 (1991).....	9
<i>Gonzalez v. Ingersoll Milling Mach. Co.</i> , 133 F.3d 1025 (7th Cir.1998).....	16
<i>Haas v. Abrahamson</i> , 910 F.2d 384 (7th Cir. 1990)	9
<i>Harrington v. Richter</i> , 562 U.S. 86 (2011)	10, 15
<i>Hess v. Reg-Ellen Machine Tool Corp.</i> , 423 F.3d 653 (7th 2005).....	10
<i>LB Credit Corp. v. Resolution Trust Corp.</i> , 49 F.3d 1263 (7th Cir.1995)	10
<i>Lindh v. Murphy</i> , 521 U.S. 320 (1997).....	14
<i>Lockyer v. Andrade</i> , 538 U.S. 63 (2003).....	14
<i>O’Sullivan v. Boerckel</i> , 526 U.S. 838 (1999)	11
<i>Perruquet v. Briley</i> , 390 F.3d 505 (7th Cir. 2004).....	11
<i>Rastafari v. Anderson</i> , 278 F.3d 673 (7th Cir. 2002).....	14
<i>Schaff v. Snyder</i> , 190 F.3d 513 (7th Cir. 1999).....	15

<i>Searcy v. Jaimet</i> , 332 F.3d 1081 (7th Cir. 2003)	15
<i>State v. Ben-Yisrayl</i> , 809 N.E.2d 309 (Ind. 2004)	6
<i>Williams v. Taylor</i> , 529 U.S. 362 (2000)	14
<i>Wilson v. Briley</i> , 243 F.3d 325 (7th Cir. 2001).....	11
<i>Yarborough v. Alvarado</i> , 541 U.S. 652 (2004)	15

Statutes

28 U.S.C. § 2241.....	9
28 U.S.C. § 2254 (d)	13, 14, 15

Other Authorities

Ind. Post-Conviction Rule 1(12)	15
Fed. Rule Civil Procedure 59(e).....	3, 10

Jurisdictional Statement

Petitioner-Appellant's Jurisdictional Statement is complete and correct.

Statement of the Issues

I. Whether Ben-Yisrayl's current claim of ineffective assistance of trial counsel for failing to present and argue different mitigation evidence at the resentencing is preserved for review in this appeal.

II. Whether Ben-Yisrayl's current claim of ineffective assistance of resentencing counsel is barred from review by procedural default.

III. Whether, if found to be available for review, Ben-Yisrayl has shown that he is entitled to relief under his current claim of ineffective assistance of resentencing counsel.

IV. Whether the district court abused its discretion in refusing to consider Ben-Yisrayl's untimely reply brief.

Statement of the Case

Nature of the Case

Ben-Yisrayl appeals from the district court's orders denying his request for habeas relief from his 1984 Marion County convictions and 150-year sentence for Murder, Rape, Burglary, and Criminal Confinement.

Statement of Federal Proceedings

In May 2012, Ben-Yisrayl filed a habeas corpus petition in the district court. D.E. 1.¹ Shortly thereafter, Ben-Yisrayl sought and received a stay of the proceedings so that he could conclude his ongoing litigation in state court. D.E. 5, 21. In May 2015, Ben-Yisrayl informed the district court that his state court proceedings were at an end, and the district court terminated the stay. D.E. 38, 39. On July 1, 2015, Respondent filed his Return to Order to Show Cause. D.E. 42.

On July 22, 2015, Ben-Yisrayl filed his first request for extension of time to file his reply brief. D.E. 45. The district court granted the request, extending the time to August 21, 2015, but warned Ben-Yisrayl that “no further extensions of time will be given.” D.E. 46. Nonetheless, on August 21, 2015, Ben-Yisrayl filed an emergency motion for extension of time. D.E. 47. The district court extended the time until August 28, 2015. D.E. 48. Ben-Yisrayl did not file a reply brief on August 28, 2015. On September 3, 2015, the district court noted that Ben-Yisrayl had not filed a reply brief, determined that he forfeited the right to file a reply brief, and took the matter under advisement as fully briefed. D.E. 49. Five days later, on September 8, 2015, Ben-Yisrayl filed a Motion for Leave to File Petitioner’s Reply Instanter. D.E. 50.

On September 18, 2015, the district court denied Ben-Yisrayl’s habeas petition. D.E. 51. The district court reaffirmed its decision that Ben-Yisrayl forfeited

¹ For clarity, Respondent uses the same designations to the record and decisions in this case as Ben-Yisrayl.

his right to file a reply brief, and so the district court did not consider the arguments made by Ben-Yisrayl in his reply brief. D.E. 51 at 8. However, the district court did accept Ben-Yisrayl's abandonment of four claims. D.E. 51 at 9. The district court turned to the remaining two claims contained in Ben-Yisrayl's petition. On the destruction of evidence claim, the district court found that the issue was preserved for habeas review and then determined the claim fails on the merits. D.E. 51 at 10-13. On the ineffective assistance of counsel at the 2010 resentencing claim, the district court found the claim to be barred from review by procedural default and to be otherwise without merit. D.E. 51 at 13-16. The district court did not grant a certificate of appealability. D.E. 51.

On October 16, 2015, Ben-Yisrayl filed a Motion to Alter or Amend Judgment under Rule 59(e). D.E. 53. On November 24, 2015, Respondent filed his response. D.E. 55. The district court denied Ben-Yisrayl's Motion to Alter or Amend Judgment on December 14, 2015. D.E. 56. Ben-Yisrayl raised three claims of error in his post-judgment motion. First, he claimed that the district court erred by not holding an evidentiary hearing before denying his destruction of evidence claim. D.E. 53 at 1. Second, he argued that his ineffective assistance of counsel claim was not barred from review by procedural default. D.E. 53 at 4. Third, he argued that the district court erred in ruling on his ineffective assistance of counsel claim without holding an evidentiary hearing. D.E. 53 at 8.

In denying Ben-Yisrayl's motion, the district court found no basis to alter or amend its decision on the destruction of evidence claim. D.E. 56 at 4. On the

ineffective assistance of counsel at the 2010 resentencing claim, the district court reiterated and expanded on its finding that the claim was procedurally defaulted. D.E. 56 at 4-7. The district court highlighted the fact that the only two instances of alleged deficient performance listed in Ben-Yisrayl's petition were trial counsel's failure to raise the destruction of evidence claim at resentencing and the deficiency of counsel's two-page sentencing memorandum, and the district court found that any other claim of deficient performance at resentencing was waived. D.E. 56 at 7-8. The district court again denied a certificate of appealability. D.E. 56 at 8.

On December 31, 2015, Ben-Yisrayl filed a notice of appeal. D.E. 57. On January 9, 2016, Ben-Yisrayl filed an amended docketing statement. Doc. 3. On November 7, 2016, this Court granted a certificate of appealability. Doc. 9. This appeal has proceeded in due course.

Statement of State Court Proceedings²

In 1984, Ben-Yisrayl, then known as Greagree Davis, was convicted of Murder, Burglary, Rape and Criminal Confinement. The jury was unable to reach a recommendation on the death penalty, but the trial court imposed a sentence of death for the murder conviction. *Davis v. State*, 598 N.E.2d 1041, 1045 (Ind. 1992) (*Ben-Yisrayl I*). The facts underlying Ben-Yisrayl's convictions were recounted in his direct appeal:

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.

² This case has a long history spanning over 30 years, Respondent in this section highlights only the proceedings most relevant to the current appeal.

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.

Id. at 1045.

The trial court sentenced Ben-Yisrayl to death on the murder count and to an aggregate term of 90 years on the remaining counts. *Id.* On direct appeal, the Indiana Supreme Court affirmed in all respects. *Id.*

Ben-Yisrayl sought post-conviction relief. The post-conviction court vacated the death sentence and ordered a new penalty phase trial and sentencing proceeding, but otherwise denied the petition. *Ben-Yisrayl v. State*, 738 N.E.2d 253, 257 (Ind. 2000) (*Ben-Yisrayl II*); App. 43a. The Indiana Supreme Court affirmed the post-conviction court. *Id.* at 271; App. 55a. On remand, after an interlocutory appeal on the constitutionality of Indiana’s death penalty statute,³ the State withdrew its request for the death penalty. *Ben-Yisrayl v. State*, 908 N.E.2d 1223, 1226 (Ind. Ct. App. 2009) (*Ben-Yisrayl IV*); App. 60a). The trial court then issued an amended abstract of judgment imposing the alternate sentence of 60 years for the murder count that had been imposed at Ben-Yisrayl’s original sentencing. *Id.* at 1226; App. 61a. Ben-Yisrayl appealed the procedure used by the trial court. The Court of Appeals of Indiana found the procedure flawed and ordered a new sentencing hearing for Ben-Yisrayl’s murder conviction. *Id.* at 1233; App. 68a.

On remand, the trial court held a sentencing hearing. At the sentencing hearing:

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. . . . The Court identified Ben-Yisrayl’s criminal history and the fact that he was on probation at the time of the offense as significant aggravating circumstances. . . . The court noted the statements of Ben-Yisral’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-

³ *State v. Ben-Yisrayl*, 809 N.E.2d 309 (Ind. 2004) (*Ben-Yisrayl III*); App. 56a-58a.

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 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." [citation omitted] 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.

Ben-Yisrayl v. State, No. 49A02-1003-CR-332 (Ind. Ct. App. Dec. 14, 2010) (*Ben-Yisrayl V*); App. 71a-72a. Ben-Yisrayl appealed his sentence for murder. In affirming Ben-Yisrayl's consecutive sixty year sentence for murder, the Court of Appeals of Indiana concluded:

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.

Id.; App. 80a.

In September 2011, Ben-Yisrayl filed a petition for post-conviction relief in Marion County. D.E. 42-1 at 111. The trial court stayed the petition while Ben-Yisrayl went to the appellate courts to receive permission to file the successive petition. In November 2013, Ben-Yisrayl filed a request for permission to file a successive petition for post-conviction relief in the Indiana Court of Appeals. D.E. 42-28 (Exhibit AA). In that request, Petitioner raised two claims, first, that destruction of biological evidence by the Indianapolis Police Department in 1999 violated his constitutional rights, and second, that his 2010 resentencing counsel rendered ineffective assistance for not raising the destruction of evidence claim and

for submitting a two-page sentencing memorandum at the resentencing hearing. D.E. 42-28 at 37-38 (Exhibit AA). The Court of Appeals of Indiana denied Ben-Yisrayl's request on January 10, 2014. D.E. 42-30 at 1 (Exhibit CC).

In turn, Marion Superior Court dismissed Petitioner's post-conviction relief petition. Ben-Yisrayl appealed this dismissal. D.E. 42-27 (Exhibit Z). The Court of Appeals of Indiana dismissed the appeal on December 17, 2014. D.E. 42-27 (Exhibit Z). On April 23, 2015, the Indiana Supreme Court denied Ben-Yisrayl's request to grant transfer.

Summary of the Argument

The only claim that Ben-Yisrayl presents in this appeal is his claim that resentencing counsel performed deficiently by failing to present and argue available mitigation evidence. This claim of ineffective assistance of resentencing counsel that Ben-Yisrayl attempts to raise in this appeal is waived. Ben-Yisrayl raised it for the first time in his Rule 59 Motion to Correct Error, and this did not properly place the issue before the district court. The district court found the claim waived. Because the only claim raised by Ben-Yisrayl is waived, this Court should dismiss this appeal.

The current claim of ineffective assistance of resentencing counsel is also barred from review by procedural default. Ben-Yisrayl did not present this claim at any stage of state court proceedings. He did not present the claim in his direct appeal from the resentencing, and he did not present the claim in his request for permission to pursue successive post-conviction relief. Even had Ben-Yisrayl raised

this claim in his federal habeas petition, the claim is barred from review by procedural default.

If Ben-Yisrayl were to convince this Court to ignore his waiver of the issue and to find that he had fairly presented his claim to the state courts at the successive petition stage, Ben-Yisrayl has not even attempted to argue that the state court decision is contrary to or an unreasonable application of clearly established federal law. The Indiana Court of Appeals determined that the issues raised in his request for permission to file a successive petition for post-conviction relief did not have a possibility of success. Ben-Yisrayl has not shown that he is entitled to relief on his current ineffective assistance of resentencing counsel claim.

The district court did not abuse its discretion in refusing to accept or consider Ben-Yisrayl's untimely reply brief. The district court was fair with giving Ben-Yisrayl a chance to timely file a reply brief, and Ben-Yisrayl makes no argument that the district court erred. This Court should affirm the district court in all respects.

Standard of Review

In an appeal from a ruling on a petition for habeas relief, this Court reviews the district court's rulings on issues of law de novo and its factual determinations for clear error. *Denny v. Gudmanson*, 252 F.3d 896, 900 (7th Cir. 2001). In order to be entitled to federal habeas relief, a petitioner must establish that he is being held in violation of the United States Constitution or the laws or treaties of the United States. 28 U.S.C. § 2241; *Estelle v. McGuire*, 502 U.S. 62, 67 (1991); *Haas v.*

Abrahamson, 910 F.2d 384, 389 (7th Cir. 1990). The burden of establishing a right to federal collateral relief resides with the petitioner. *Harrington v. Richter*, 562 U.S. 86, 98 (2011).

Argument

I.

Ben-Yisrayl's claim of ineffective of assistance of resentencing counsel for failing to present different mitigation evidence is waived for appeal.

Ben-Yisrayl did not claim in his petition for habeas relief that resentencing counsel were ineffective for failing to present and argue different mitigation evidence. To preserve a claim on appeal, a petitioner must raise the claim in his habeas petition or briefing before the district court. *Bolton v. Akpore*, 730 F.3d 685, 694 (7th Cir. 2013). Here, Ben-Yisrayl first raised this claim in his motion to correct error filed in the district court.⁴ But a Rule 59(e) motion “is not appropriately used to advance arguments or theories that could and should have been made before the district court rendered a judgment.” *Cty. of McHenry v. Ins. Co. of the W.*, 438 F.3d 813, 819 (7th Cir. 2006), as amended (Apr. 11, 2006)(quoting *LB Credit Corp. v. Resolution Trust Corp.*, 49 F.3d 1263 (7th Cir.1995)). The district court found that this issue was waived. D.E. 56 at 7-8. Because Ben-Yisrayl failed to argue his ineffective assistance of resentencing counsel claim in his petition, the claim is waived for appellate review.

⁴ Ben-Yisrayl did include this claim in his Reply Brief, but this pleading was not accepted by the district court, and in any event, did not preserve the issue for appeal. See *Hess v. Reg-Ellen Machine Tool Corp.*, 423 F.3d 653, 665 (7th 2005) (holding that issues raised for the first time in reply briefs are waived).

II.

Ben-Yisrayl's current claim of ineffective assistance of counsel is barred from review by procedural default.

Ben-Yisrayl did not present his claim of ineffective assistance of resentencing counsel to the Indiana state courts when given the opportunity to do so. This claim is barred from review by procedural default. A habeas petitioner may not resort to the federal court without first giving the highest state court a full and fair opportunity to address his federal claims and to correct any error of constitutional magnitude. *O'Sullivan v. Boerckel*, 526 U.S. 838, 844–45 (1999) (“Section 2254(c) requires only that state prisoners give state courts a fair opportunity to act on their claims.”); *Duncan v. Henry*, 513 U.S. 364, 365–66 (1995); *Wilson v. Briley*, 243 F.3d 325, 327 (7th Cir. 2001). In order to satisfy this requirement, the petitioner “must present both the operative facts and the legal principles that control each claim to the state judiciary; otherwise, he will forfeit federal review of the claim.” *Wilson*, 243 F.3d at 327. When a habeas petitioner has failed to fairly present to the state courts the claim on which he seeks relief in federal court and the opportunity to raise that claim in state court has passed, the petitioner has procedurally defaulted that claim. *Perruquet v. Briley*, 390 F.3d 505, 514 (7th Cir. 2004).

Ben-Yisrayl did not present this claim to the Indiana state courts at any stage. Ben-Yisrayl did not present this claim on direct appeal from his resentencing on the murder conviction. And while Ben-Yisrayl contends that it would have been bad strategy to raise this claim on direct appeal, he implicitly acknowledges that he was not procedurally barred from raising the claim in that proceeding. Br. of

Appellant at 21. Although procedurally available, Ben-Yisrayl did not present his claim on direct appeal.

Ben-Yisrayl also did not raise the claim in his request for permission to file a successive post-conviction relief petition. In his request for permission to file a successive post-conviction relief petition, Ben-Yisrayl raised two claims. The first claim was the destruction of evidence claim. In his second claim, Ben-Yisrayl alleged that counsel performed deficiently at the resentencing by not raising the destruction of evidence issue and by filing a short sentencing memorandum. The claim stated: "After twenty-three and one-half (23½) years on Death Row for crimes that Ben-Yisrayl did not commit; after the destruction of evidence; and after Ben-Yisrayl's repeated claims of innocence, counsel submitted a two (2) page sentencing memorandum without so much a mention of any of the above." D.E. 42-28 at 36-37 (Exhibit AA). In the facts to support his claim, Ben-Yisrayl stated the following:

That the violation of the 1994 order to preserve the evidence used against Ben-Yisrayl was discovered while his resentencing was pending. That while that resentencing was pending, the [S]tate of Indiana agreed to conduct a Deoxyribonucleic Acid (DNA) Testing. That this occurred in 2007 after Ben-Yisrayl's second attempt to gain access t[o] that evidence which began in 1994. That not long after the violation was discovered, the State of Indiana withdrew its request that Ben-Yisrayl be resentenced to death, and that the death penalty certified attorneys that were assigned to represent Ben-Yisrayl were removed from his case. That legal counsel when submitting Petitioner's Sentencing Memorandum in the instant case, legal counsel made absolutely no attempt to bring before the Sentencing Court those issues which would draw attention to the fact that exculpatory evidence which would have exonerated Ben-Yisrayl was destroyed. That legal counsel provided to the Sentencing Court with simply a two (2) page memorandum that provided little support to Petitioner Ben-Yisrayl.

D.E. 42-28 at 37-38 (Exhibit AA). The two claims raised in the above pleading are that counsel should have argued the destruction of evidence claim to the resentencing court and that counsel's two page sentencing memorandum was deficient. Ben-Yisrayl failed to raise the claim that he raises now, namely, that "there was a mountain of mitigation evidence Ben-Yisrayl's trial lawyers did not present at the resentencing." Br. of Appellant at 23. Because Ben-Yisrayl did not present his claim to the state courts and the time to do so has passed,⁵ this claim is barred from review by procedural default.

III.

If available for review, Ben-Yisrayl has not shown that he is entitled to relief on his ineffective assistance of resentencing counsel.

To the extent that Ben-Yisrayl can be said to have raised his current claim of ineffective assistance of resentencing counsel in his request for permission to file a successive petition for post-conviction review, the Indiana Court of Appeals denied his request on the merits, finding that there was no reasonable probability that his claim would succeed. Ben-Yisrayl has failed to argue and fails to show that the decision of the Court of Appeals of Indiana is contrary to or an unreasonable application of clearly established federal law.

This Court's review of Ben-Yisrayl's habeas petition is governed by the provisions of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA").

⁵ There is no limitation under state law preventing Ben-Yisrayl from raising this issue in a new petition for request for permission to file a successive post-conviction relief petition. However, Ben-Yisrayl takes the position that he has fairly presented his claim to the Indiana courts. Br. of Appellant at 21.

Lindh v. Murphy, 521 U.S. 320, 326 (1997). The AEDPA provides that if a constitutional claim was adjudicated on the merits by the state courts, a federal court may grant habeas relief based on that claim only if the state court’s decision was: (1) “contrary to” or “involved an unreasonable application” of clearly established federal law as determined by the Supreme Court; or (2) based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding. 28 U.S.C. § 2254 (d); *Rastafari v. Anderson*, 278 F.3d 673, 687 & n.10 (7th Cir. 2002). A state court decision is “contrary to” established Supreme Court precedent when (1) the state court applies a rule that contradicts governing Supreme Court cases or (2) the state court confronts a set of facts that is materially indistinguishable from those of a Supreme Court decision and nevertheless arrives at a different conclusion. *Williams v. Taylor*, 529 U.S. 362, 405-06 (2000); *Rastafari*, 278 F.3d at 687. When the case falls under the “contrary to” clause of § 2254(d)(1), this Court reviews the state court decision de novo to determine the legal question of what is clearly established law as determined by the Supreme Court and whether the state court decision is “contrary to” that precedent. *Denny*, 252 F.3d at 900. When the case fits within the “unreasonable application” provision of § 2254 (d)(1), this Court defers to a reasonable state court decision. *Bell v. Cone*, 535 U.S. 685, 693-94 (2002); *Williams*, 529 U.S. at 405-06. It is not enough that a state court decision be “erroneous” or “incorrect” in the eyes of this court, but rather the state court’s adjudication must also be objectively unreasonable. *Lockyer v. Andrade*, 538 U.S. 63, 75 (2003); *Rastafari*, 278 F.3d at 688. “Under such a

deferential regime, a reasonable state court judgment is one ‘at least minimally consistent with the facts and circumstances of the case . . . even if it is not well reasoned or fully reasoned, or even if it is one of several equally plausible outcomes.’” *Searcy v. Jaimet*, 332 F.3d 1081, 1089 (7th Cir. 2003) (quoting *Schaff v. Snyder*, 190 F.3d 513, 523 (7th Cir. 1999)).

Under the provisions of the AEDPA, a state court’s determination that a claim lacks merit precludes federal habeas relief so long as “fairminded jurists could disagree” on the correctness of the state court’s decision. *Richter*, 562 U.S. at 101 (quoting *Yarborough v. Alvarado*, 541 U.S. 652, 664 (2004)). Under § 2254(d), a habeas court must determine what arguments or theories supported, or could have supported the state court’s decision. *Richter*, 562 U.S. at 102. The habeas court must then ask whether it is possible fair-minded jurists could disagree that those arguments or theories are inconsistent with the holding in a prior decision of this Court. *Id.*

In denying Ben-Yisrayl’s request for permission to file a successive petition for post-conviction relief, the Indiana Court of Appeals determined that Ben-Yisrayl failed to establish “a reasonable possibility” that he is entitled to relief. In other words, the claims presented by Ben-Yisrayl to the Indiana Court of Appeals were without merit.⁶ *See* Ind. Post-Conviction Rule 1(12). Ben-Yisrayl has not shown that

⁶ Often the denial of a request for permission to file a successive post-conviction petition is an adequate and independent state procedural rule that does not operate as a merits determination, but here, given the procedural posture of this case, it was a merits determination.

this decision is contrary to or an unreasonable application of federal law. Instead, Ben-Yisrayl wants to litigate this claim in federal district court without considering what occurred in state court, conceding that the current record does not support a grant of relief. Br. of Appellant at 23-24.⁷ Even if this claim were available for review at this stage of the proceeding, Ben-Yisrayl has not shown that he is entitled to relief.

IV.

The district court did not abuse its discretion in refusing to accept Ben-Yisrayl's untimely reply brief.

After giving Ben-Yisrayl two chances, the district court did not accept Ben-Yisrayl's subsequently filed late reply brief.⁸ This Court reviews a district court's decision not to accept an untimely response for abuse of discretion, and will “intervene only when it is apparent the judge has acted unreasonably.” *Gonzalez v. Ingersoll Milling Mach. Co.*, 133 F.3d 1025, 1030 (7th Cir.1998)). Ben-Yisrayl offers no argument in his brief that the district court abused its discretion, implicitly conceding that the district court did not overstep its bounds. The district court did not abuse its discretion in refusing to accept Ben-Yisrayl's untimely reply brief.

⁷ In denying Ben-Yisrayl's motion to correct error, the district court rightly determined that an evidentiary hearing was not warranted for the claims raised in Ben-Yisrayl's petition, and refused to consider the new claim of ineffective assistance of resentencing counsel. App. 28a.

⁸ The Certificate of Appealability issued by this Court invited the parties to address the district court's action in regard to the filing of the reply brief. Ben-Yisrayl did not discuss this issue, but Respondent includes this section because of the Court's invitation.

Conclusion

This Court should affirm the district court's denial of Ben-Yisrayl's petition for a writ of habeas corpus.

s/Andrew A. Kobe
Andrew A. Kobe
Deputy Attorney General

Certificate of Service

I hereby certify that on March 1, 2017, I electronically filed the foregoing document 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 that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

s/Andrew A. Kobe
Andrew A. Kobe
Deputy Attorney General

Office of the Attorney General
Indiana Government Center South, Fifth Floor
302 West Washington Street
Indianapolis, IN 46204
Telephone: (317) 233-3349
Andrew.Kobe@atg.in.gov