## MEMORANDUM DECISION




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# IN THE COURT OF APPEALS OF INDIANA

Frankie A. Salyers,
*Appellant-Petitioner,*

v.

State of Indiana,
*Appellee-Respondent*

February 27, 2023

Court of Appeals Case No. 22A-PC-1737

Appeal from the Elkhart Circuit Court

The Honorable Kristine A. Osterday, Special Judge

Trial Court Cause No. 20C01-1605-PC-28

**Memorandum Decision by Judge Crone**
Judges Robb and Kenworthy concur.

**Crone, Judge.**

## Case Summary

[1] Frankie A. Salyers appeals the post-conviction court's denial of his petition for post-conviction relief (PCR), arguing that his trial and appellate counsel provided him with ineffective assistance. We affirm.

## Facts and Procedural History

[2] The evidence in support of the post-conviction court's judgment shows that on December 11, 1998, Goshen City Police Officer Thomas Goodwin was among the police officers responding to a report that shots were being fired at a mobile home park. While the police were securing the scene, Salyers shot Goodwin in the back of the head, killing him. The police identified Salyers, who lived in the area, as a suspect, took him into custody, and interviewed him. Salyers was advised of his *Miranda* rights and signed a waiver of those rights. Salyers admitted to the police that he possessed an SKS rifle and used it to shoot at a police officer. Salyers said that he had intended to kill the officer and knew that he had hit the officer because he saw the officer fall. He stated that he shot at the officer because he was trying to get shot and that he wanted to get shot because he wanted to die. Salyers also admitted that he had shot at two vehicles before shooting the officer. Salyers told the police that he used to smoke weed and huff gasoline but that he had not done so for the past six months and that he had not had any drugs or alcohol that day. In addition to his verbal

confession, Salyers signed a written statement confessing that he shot a police officer and had planned to do so because he wanted the police to kill him.

[3] On December 14, 1998, the State charged Salyers with murder. At the initial hearing on December 17, the trial court appointed the Elkhart County public defender to represent Salyers. The same day, Salyers's counsel filed a motion to determine Salyers's competency to stand trial. The trial court appointed Drs. Gerald Kauffman, Gary Seltman, and Paul Yoder to examine Salyers. On December 30, the State filed its notice of intent to seek the death penalty or life without parole (LWOP) based upon the existence of the statutory aggravating factor that Salyers murdered Officer Goodwin while Officer Goodwin was acting in the course of duty. *See* Ind. Code § 35-50-2-9(b)(6) (permitting death sentence or sentence of LWOP when defendant murders law enforcement officer while officer was acting in the course of duty).

[4] On March 19, 1999, after the court-appointed doctors had filed their reports, the trial court held a competency hearing. Trial counsel offered Dr. Kauffman's report, which the trial court admitted. In his report, Dr. Kauffman indicated that he interviewed Salyers on December 30, 1998, and diagnosed him with "schizophrenia undifferentiated type," depressive disorder secondary to schizophrenia, and probable borderline intellectual functioning. Direct Appeal Tr. at 14, 166. Dr. Kauffman reported that during his interview with Salyers, Salyers "would talk or curse to himself… and denie[d] hearing voices but clearly was preoccupied with internal stimuli during the interview." *Id*. at 166. Dr. Kauffman also reported that Salyers's "affect was despondent …. He

appears to be of low average intelligence and is affected by abnormal thought process and thought content. His sense of reality and reality testing was impaired as well as his impulse control and judgment." *Id*. Dr. Kauffman also testified at the hearing that he believed that Salyers was not competent to stand trial. Dr. Kauffman stated that Salyers had probably suffered from mental illness for years and that his illness was a "lifetime disorder." *Id.* at 10-11. Dr. Yoder testified that he believed that Salyers was not competent to stand trial and that there was a "strong possibility" that Salyers had "an actual psychotic disorder like schizophrenia," or a "schizotypal personality disorder" with "symptoms that border on delusional … or auditory or visual hallucinations." *Id*. at 31. Dr. Seltman was not called to testify, but in his report he concluded that Salyers was competent to stand trial. Appealed Order at 2. On March 23, the trial court issued an order finding that Salyers was not competent to stand trial and directed him to undergo treatment at the Logansport State Hospital.

[5] Over the following months, Logansport filed three reports with the trial court indicating that Salyers was not competent to stand trial. In a separate cause number, Logansport initiated proceedings for a regular mental health commitment. "Public hearings were held with respect to [Salyers's] commitment and competency. [Salyers] was diagnosed with Schizophrenia, Depression, and Insufficient Comprehension to Stand Trial." *Id*. at 3.

[6] In December 2000, Salyers's counsel filed a notice of mental disease or defect with the trial court in this case.

[7] In May and October 2004, Logansport filed with the trial court reports prepared by two different doctors stating that Salyers was competent to stand trial. In November, the parties stipulated that Salyers was competent to stand trial, and the trial court issued an order finding that Salyers was competent to stand trial.

[8] On January 4, 2005, the parties entered into a plea agreement, in which the State agreed to drop its request for the death penalty, and Salyers agreed to plead guilty but mentally ill to murder. The plea agreement left sentencing, including whether to impose LWOP, to the trial court's discretion. The guilty plea and sentencing hearings were presided over by the same judge who had previously found Salyers incompetent to stand trial. At the guilty plea hearing, the State offered Salyers's written statement confessing to killing the police officer and the transcript of his police interview, which the trial court admitted without objection. Direct Appeal Tr. at 79, 108, 109-52. Salyers's trial counsel offered Dr. Kauffman's 1998 report, which was admitted without objection. The trial court accepted Salyers's plea.

[9] In preparation for the sentencing hearing, Salyers's counsel engaged Dr. James Merikangas, a doctor specializing in neurology and psychiatry, to complete a forensic neuropsychiatric evaluation of Salyers. Dr. Merikangas examined Salyers, performed an exhaustive review of his medical and educational records, and interviewed several of Salyers's caretakers, including his psychiatrist, social worker, and case manager. In his report, Dr. Merikangas stated that Salyers was psychotic, had a biologically based brain disease, and had a low IQ of 76 and "sub average intellectual functioning," PCR Ex. Vol. 5

at 5. In Dr. Merikangas's opinion, "there is no question that [Salyers] was suffering from this mental disease and defect at the time of the events for which he has been charged." *Id*.

[10] At the sentencing hearing, Salyers's counsel did not call any witnesses or introduce any exhibits. Salyers's counsel asked the trial court "to consider the reports of Drs. Kauffman, Yoder, Olvera, and Merikangas."[1] Appealed Order at 4. Salyers's counsel argued that several mitigating factors existed: Salyers's lack of history of criminal conduct, his young age (he was twenty years old when he committed the offense), and the serious nature of his mental disease. In support of his contention that Salyers's mental disease should be a mitigating factor, counsel asserted that Salyers's PET scan "indicate[d] damage to [his] brain" and that five separate psychiatrists over the past six years had diagnosed Salyers with schizophrenia. Direct Appeal Tr. at 87. Counsel further argued that Salyers's problems arising from his mental disease were compounded by his low IQ of 76. *Id*. Counsel also pointed out that in the months leading up to Officer Goodwin's murder, Salyers's "parents went to two health care providers describing [Salyers's] symptoms, and no help was forthcoming." *Id*. at 88. The trial court rejected Salyers's age as a mitigating factor but found two mitigating factors: his lack of prior criminal activity and "that his capacity to appreciate the criminality of his conduct and to conform his conduct to the requirements

[1] Dr. Merikangas's report states that Dennis Olvera, Ph.D., performed a "comprehensive evaluation" of Salyers. PCR. Ex. Vol. 5 at 4. The chronological case summary does not show that his report was filed with the trial court, and it is not in the record before us.

of the law was substantially impaired as a result of mental disease or defect." *Id*. at 95-96. The trial court found that the fact that Officer Goodwin was a law enforcement officer and was acting in the course of his duties when he was murdered was a significant aggravating factor. The trial court concluded that this aggravating factor outweighed the mitigating factors "by a substantial amount" and sentenced Salyers to LWOP. *Id*. at 96.

[11] Salyers appealed directly to the Indiana Supreme Court. *Salyers v. State*, 862 N.E.2d 650 (Ind. 2007). His appellate counsel argued that the trial court's sentencing statement was inadequate. The supreme court agreed and issued an order remanding the case to the trial court for a new sentencing statement. The trial court issued a new sentencing statement, in which it found that Salyers's lack of adult convictions was a substantial mitigator. Direct Appeal Appellee's App. at 25. It also found that Dr. Kauffman reported that Salyers suffered from schizophrenia, depressive disorder, and probable borderline intellectual functioning. *Id*. The trial court found that Salyers's mental state at the time of the murder and his capacity to appreciate the criminality of his conduct or conform his behavior should be given substantial weight, but that "reconsideration of the weight assigned to this mitigator is necessary in light of other evidence submitted." *Id*. at 25-26. Specifically, the trial court found,

> The weight accorded to the mitigator is minimized by the fact that Mr. Salyers, in response to the question, "Do you have any idea if you killed that police officer?", said "I would say he is dead." When the questioner responded, "He is dead," Mr. Salyers asked "Is he dead?" The questioner answered "yes," to which Mr. Salyers said "That's good." The questioner then said

> "Pardon me?," and Mr. Salyers repeated "That's good." When the questioner said "Why, why do you say that?," Mr. Salyers said, "I don't know. I was trying to hit him I guess." Then the questioner said, "Did you have anything against that police officer?" Mr. Salyers responded, "I shot the mother fucker didn't I."

*Id*. at 26 (citations omitted). The trial court then found that the mitigator that Salyers's capacity to appreciate the criminality of his conduct and to conform his conduct to the requirements of the law was substantially impaired as a result of mental disease or defect "[did] not excuse or explain" Salyers's conduct and afforded it minimal weight. *Id*. The trial court assigned "[g]reat weight of the full, complete, and highest level" to the aggravating factor that Salyers intentionally killed a law enforcement officer who was acting in the course of his duties. *Id*. The trial court concluded that the mitigating factors were outweighed by the single aggravating circumstance and sentenced Salyers to LWOP. *Id*. at 27.

[12] After the trial court issued the new sentencing statement, Salyers filed a supplemental brief with the supreme court. The supreme court affirmed Salyers's sentence of LWOP. *Salyers*, 862 N.E.2d at 655. The court considered whether the trial court abused its discretion in weighing the aggravator and mitigators and concluded that the trial court did not abuse its discretion in determining that the single aggravator outweighed the two mitigators. *Id*. at 654. The court also considered the inappropriateness of LWOP and concluded it was not inappropriate based on the nature of the offense or Salyers's

character. *Id*. Justice Sullivan issued a dissenting opinion and would have imposed a term of sixty-five years in light of the weight of the mitigating circumstances. *Id*. at 656 (Sullivan J., dissenting).

[13] In June 2016, Salyers filed a pro se PCR petition, which was amended by counsel in March 2019. In his petition, Salyers asserted that his trial counsel provided ineffective assistance by failing to file a motion to suppress Salyers's statement to police or challenge its reliability and failing to investigate and present available mitigating evidence at the sentencing hearing. Salyers also asserted that his appellate counsel provided ineffective assistance by failing to present the sentencing issue well. At the hearing on the matter, Salyers called witnesses Dr. Merikangas, neuropsychologist Dr. John Fabian, Salyers's appellate counsel, mitigation specialist Manette Zietler, Salyers's aunt Teresa Bridges, and Salyers's twin brother Franklin Salyers, Jr., and submitted affidavits from two of his childhood friends. At the time of the hearing, Salyers's trial counsel were unavailable to testify because they had passed away. In June 2022, the post-conviction court issued findings of fact and conclusions of law denying relief. This appeal ensued. Additional facts will be provided.

## Discussion and Decision

[14] "Post-conviction proceedings are civil proceedings in which a defendant may present limited collateral challenges to a conviction and sentence." *Gibson v. State*, 133 N.E.3d 673, 681 (Ind. 2019) (citing Ind. Post-Conviction Rule 1(1)(b)), *cert. denied* (2020). "The scope of potential relief is limited to issues

unknown at trial or unavailable on direct appeal." *Id*. A defendant who files a petition for post-conviction relief "bears the burden of establishing grounds for relief by a preponderance of the evidence." Ind. Post-Conviction Rule 1(5); *Humphrey v. State*, 73 N.E.3d 677, 681 (Ind. 2017). Because the defendant is appealing from the denial of post-conviction relief, he is appealing from a negative judgment:

> Thus, 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. In other words, the defendant must convince this Court that there is no way within the law that the court below could have reached the decision it did. We review the post-conviction court's factual findings for clear error, but do not defer to its conclusions of law.

*Wilkes v. State*, 984 N.E.2d 1236, 1240 (Ind. 2013) (citations and quotation marks omitted). We will not reweigh the evidence or judge the credibility of witnesses and will consider only the probative evidence and reasonable inferences flowing therefrom that support the post-conviction court's decision. *Hinesley v. State*, 999 N.E.2d 975, 981 (Ind. Ct. App. 2013), *trans. denied* (2014). Where, as here, the post-conviction court makes findings of fact and conclusions of law in accordance with Indiana Post-Conviction Rule 1(6), "we cannot affirm the judgment on any legal basis, but rather, must determine if the court's findings are sufficient to support its judgment." *Manzano v. State*, 12 N.E.3d 321, 325 (Ind. Ct. App. 2014), *trans. denied*, *cert. denied* (2015).

## Section 1 – Salyers has failed to establish that his trial counsel was ineffective.

[15] Salyers maintains that he is entitled to post-conviction relief because he was denied the right to effective assistance of trial counsel guaranteed by the Sixth Amendment to the United States Constitution. *See Strickland v. Washington*, 466 U.S. 668, 686 (1984) ("[T]he right to counsel is the right to effective assistance of counsel.") (quoting *McMann v. Richardson*, 397 U.S. 759, 771 n.14 (1970)). To succeed on an ineffective assistance of counsel claim, the defendant must satisfy the two-part test articulated in *Strickland*. *Humphrey*, 73 N.E.3d at 682. "To satisfy the first prong, 'the defendant must show deficient performance: representation that fell below an objective standard of reasonableness, committing errors so serious that the defendant did not have the 'counsel' guaranteed by the Sixth Amendment.'" *Id*. (quoting *McCary v. State*, 761 N.E.2d 389, 392 (Ind. 2002)). When considering a claim of ineffective assistance of counsel, we strongly presume "that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." *Hinesley*, 999 N.E.2d at 982 (citation omitted). We presume that counsel performed effectively, and a defendant must offer strong and convincing evidence to overcome this presumption. *Id*. Isolated poor strategy, inexperience, or bad tactics does not necessarily constitute ineffective assistance. *Id*.

[16] To satisfy the second prong of the *Strickland* test, the defendant must show prejudice. *Humphrey*, 73 N.E.3d at 682. To demonstrate prejudice from

counsel's deficient performance, a petitioner need only show "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Middleton v. State*, 72 N.E.3d 891, 891 (Ind. 2017) (emphasis and citation omitted). "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id*. at 891-92.

[17] "Although the performance prong and the prejudice prong are separate inquiries, failure to satisfy either prong will cause the claim to fail." *Baer v. State*, 942 N.E.2d 80, 91 (Ind. 2011). "If we can easily dismiss an ineffective assistance claim based upon the prejudice prong, we may do so without addressing whether counsel's performance was deficient." *Henley v. State*, 881 N.E.2d 639, 645 (Ind. 2008). "Most ineffective assistance of counsel claims can be resolved by a prejudice inquiry alone." *Id*.

### *Section – 1.1 Salyers has failed to show that trial counsel performed deficiently by failing to move to suppress or object to the admission of his confession.*

[18] Salyers contends that trial counsel was ineffective by "fail[ing] to file a motion to suppress [his] confession, to object to its admission, or to challenge its reliability or weight in any way." Appellant's Br. at 35. He maintains that he was prejudiced by this failure because the trial court relied on statements from his police interview to reduce the mitigating weight assigned to his mental illness, and that if his mental illness had received its full weight, there is a reasonable probability that the trial court would not have concluded that the aggravating factor outweighed the mitigating factors. In its findings of fact and

conclusions of law, the post-conviction court found that there could have been strategic reasons to choose not to file a motion to suppress, such as

> a strategic decision to develop good will with the State while negotiating for the State to withdraw its request for the death penalty … or to refrain from further drawing the trial court's attention to [his] statement because counsel anticipated the trial court making the ultimate decision on whether [he] would serve life without parole or a term of years.

Appealed Order at 8-9. The post-conviction court found that Salyers presented no evidence at the post-conviction hearing as to why trial counsel did not file a motion to suppress and acknowledged that trial counsel were deceased and were unable to testify. *Id*. at 9. But the post-conviction court found that "to grant the relief [Salyers] requests on this basis, the Court would have to conclude that under no circumstances would it be reasonable for trial counsel to have decided not to file a motion to suppress," but Salyers had failed to develop that argument. *Id.* The post-conviction court concluded that Salyers failed to carry his burden to show that trial counsel's failure to move to suppress or object to the admission of his confession was not a strategic decision that unreasonably fell below professional norms.

[19] On appeal, Salyers claims that there was no rational strategic reason not to file a motion to suppress or object to the admission of the confession during the guilty plea hearing. We disagree. The two possibilities suggested by the post-conviction court are sound strategic reasons that support a rational decision not to file a motion to suppress or object to the admission of the confession, and

Salyers ignores these possibilities. Indeed, under our standard of review, we presume that counsel performed effectively. Accordingly, Salyers has failed to show that the trial court erred in concluding that he failed to carry his burden to show that trial counsel's performance fell below an objective standard of reasonableness.[2] Therefore, Salyers's ineffectiveness claim on this basis fails.

### *Section – 1.2 Salyers has failed to show that trial counsel was ineffective in failing to investigate and present mitigating circumstances.*

[20] Salyers also asserts that trial counsel was ineffective for failing to investigate and present mitigating circumstances during sentencing and that if counsel had, the evidence would have "tipped the balance of the aggravating and mitigating factors in favor of a term of years." Appellant's Br. at 26. Specifically, he contends that trial counsel should have called Dr. Merikangas to testify, hired a neuropsychologist like Dr. Fabian, offered the record of the regular commitment proceedings, presented evidence of the developing brain and its effects on decision-making, and presented testimony from family members to show that Salyers came from a large, supportive family. He maintains that mitigating evidence of his mental health would have resulted in the trial court assigning significant weight to two mental health mitigators, namely that he "was under the influence of extreme mental or emotional disturbance when the

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[2] Salyers also contends, "If, after trial counsel's objection, the trial court admitted the confession, trial counsel should have challenged the reliability of the confession as a product of and consistent with Salyers' severe, untreated mental illness [at sentencing]." Appellant's Br. at 39-40. Because trial counsel did not move to suppress or object to the admission of Salyers's confession and Salyers failed to carry his burden to show that counsel performed deficiently in so doing, we need not address this argument.

murder was committed" and that his "capacity to appreciate the criminality of [his] conduct or to conform that conduct to the requirements of law was substantially impaired as a result of mental disease or defect." Ind. Code § 35-50-2-9(c)(2), -(6).

[21] The post-conviction court found that trial counsel had not performed deficiently because the choice not to call witnesses could have been a product of reasonable strategy. We agree. Such a decision could have been part of the negotiation between trial counsel and the prosecution to persuade the prosecution to agree to a plea of guilty but mentally ill and drop the request for the death penalty.

[22] As for prejudice, our supreme court has explained that "[f]ailure to investigate and present mitigating evidence could constitute ineffective assistance of counsel." *Ritchie v. State*, 875 N.E.2d 706, 719 (Ind. 2007). However, "trial counsel need not investigate 'every conceivable line of mitigating evidence.'" *Gibson v. State*, 133 N.E.3d 673, 689 (Ind. 2019) (quoting *Ritchie*, 875 N.E.2d at 719), *cert. denied* (2020). "In assessing prejudice in the context of a claim of an inadequate mitigation investigation, we consider 'the totality of the available mitigation evidence—both that adduced at trial, and the evidence adduced in the post-conviction proceeding—and reweigh it against the evidence in aggravation.'" *Ward v. State*, 969 N.E.2d 46, 52 (Ind. 2012) (quoting *Porter v. McCollum*, 558 U.S. 30, 41 (2009) (per curiam)) (brackets omitted).

[23] We begin by noting that many medical reports had been filed with the trial court and that the same trial court presided over both Salyers's competency and sentencing hearings. As such, the trial court was well aware that Salyers had been diagnosed with schizophrenia, depression, and low cognitive functioning, and that it had taken approximately five years for Salyers to attain competence. At sentencing, trial counsel requested that the trial court consider all the reports before it, including Dr. Merikangas's report.

[24] In his report, Dr. Merikangas explained that Salyers was being heavily medicated for "treatment of a chronic psychosis, which is manifested by auditory hallucinations of command type, including voices telling him to kill himself." PCR Ex. Vol. 5 at 3. Dr. Merikangas stated that the results of his examination of Salyers's cranial nerves were "consistent with long-standing brain damage." *Id*. at 4. Dr. Merikangas indicated that psychological testing "documented significantly sub average intellectual functioning and substantial impairment of adaptive functioning with a measured I.Q. of 76." *Id*. at 5. Dr. Merikangas reviewed Salyers's 2003 PET scan, which was "[a]bnormal," demonstrated "areas of reduced metabolism in areas of the brain necessary for perception and impulse control," and was evidence of Salyers's "mental defect." *Id*. at 4-5. Dr. Merikangas concluded that Salyers had "a biologically based brain disease which … remains active and which but for the large dose of antipsychotic medication he receives by injection would be floridly evident with hallucinations and delusions." *Id*. at 5. Dr. Merikangas opined that Salyers "is a chronically psychotic young man of low intelligence" and that "there is no

question that he was suffering from this mental disease and defect at the time of the events for which he has been charged." *Id*.

[25] The post-conviction court found that Dr. Merikangas's report stated that Salyers "is psychotic, has low cognitive functioning, and has brain damage," that Dr. Merikangas's conclusions at the post-conviction hearing were the same as they were in his report, and that Salyers presented no evidence that the trial court did not understand the report. Appealed Order at 5, 12-13. The post-conviction court concluded there was no evidence that Dr. Merikangas's live testimony would have affected the trial court's decision and that Salyers was not prejudiced by counsel's failure to call Dr. Merikangas to the stand. *Id*. at 12.

[26] On appeal, Salyers sets forth what Dr. Merikangas would have testified to at the sentencing hearing, but a comparison of that testimony and his report shows that the testimony reflects what was in the report. Dr. Merikangas's live testimony would have been cumulative of the evidence in the report. We conclude that Salyers has failed to show that the post-conviction court erred in concluding that he was not prejudiced by trial counsel's failure to call Dr. Merikangas.

[27] Salyers also claims that trial counsel should have hired a neuropsychologist like Dr. Fabian to examine "the neurodevelopmental disorder that was not previously investigated." Appellant's Br. at 20 (citing PCR Tr. Vol. 2 at 47). Dr. Fabian diagnosed Salyers with "schizophrenia and other specified neurodevelopmental disorder." PCR Tr. Vol. 2 at 55. At the post-conviction

hearing, Dr. Fabian testified that there are four neurodevelopmental disorders: "autism spectrum disorder, ASD; intellectual disability, ID; learning disorders, LD; and attention deficit hyperactivity disorder, ADHD." *Id.* at 32. Dr. Fabian said that Salyers's "borderline intellectual functioning" suggests that he has a neurodevelopmental disorder, which could be one of the four mentioned, but that "often you're in a no man's land with those where the person has either learning disorder, multiple learning disorders, intellectual disability or somewhere in between and in my opinion it's somewhere in between. He's not mentally retarded or intellectually disabled but he … has … IQs [of] 73 and 76. *Id.* at 39. He testified that Salyers is not mentally retarded or intellectually disabled, but "he's close to intellectual disability." *Id.* He explained, "In essence, he's low functioning cognitively and that's going to be separate from the effects of schizophrenia." *Id.* Dr. Fabian testified that a neurodevelopmental order is a "compromise in brain development … leading to deficits typically in a number of areas, interpersonal and social, emotional, cognitive behavioral, basically in all areas of your life." *Id.* at 41.

[28] The post-conviction court found that "Dr. Fabian has diagnosed [Salyers] with schizophrenia, low cognitive functioning, and organic brain damage." Appealed Order at 12-13. The post-conviction court concluded that these conclusions were not materially different from Dr. Merikangas's conclusions that Salyers is psychotic, has low cognitive functioning, and has brain damage, and therefore there was not a reasonable probability that Dr. Fabian's testimony would have led to a different result.

[29] On appeal, Salyers emphasizes that Dr. Fabian testified that Salyers has a "neurodevelopmental disorder that was not previously investigated." Appellant's Br. at 20-21. PCR Tr. Vol. 2 at 47. Our review of Dr. Fabian's testimony shows that his opinion that Salyers suffered from a neurodevelopmental disorder was closely linked to the fact that Salyers had a low IQ. Our review of Dr. Fabian's testimony shows that both Dr. Merikangas's and Dr. Kauffman's reports informed the trial court of Salyers's low cognitive functioning. Therefore, we are unpersuaded that the post-conviction court erred in concluding that Dr. Fabian's and Dr. Merikangas's conclusions were not materially different and that there was not a reasonable probability that Dr. Fabian's testimony would have led to a different result.

[30] As for the record of the regular commitment proceedings, Salyers directs us to a doctor's testimony that he had schizophrenia, was being provided with the most aggressive treatment available, and that his mental illness precipitated the crime. Again, this information is largely cumulative of the evidence already in front of the trial court, and thus we are unpersuaded that there is a reasonable probability that it would have resulted in a different outcome.

[31] Regarding counsel's failure to call Salyers's family members to testify, Salyers asserts that if their testimony had been offered, the trial court would have considered that Salyers came from a large, supportive family, that his mother realized that he was sick and tried to get him help, and that his family loves him and visited him every chance they got while he was hospitalized. But, as the State points out, trial counsel informed the trial court that his family had tried

to obtain treatment for him. Given that the trial court assigned the single aggravator "[g]reat weight of the full, complete, and highest level," Direct Appeal Appellee's App. at 21, we are unpersuaded that additional information about Salyers's family and childhood friends would have tipped the balance of aggravators and mitigators in favor of a sentence of a term of years. We reach the same conclusion with regard to trial counsel's failure to present evidence that the frontal lobe is not fully developed in a healthy brain until about twenty-three years of age, and that at the age of twenty, Salyers's brain had not fully developed. We conclude that Salyers has failed to carry his burden to show that the post-conviction court erred in denying relief on his claim that trial counsel was ineffective.

## Section 2 – Salyers has failed to establish that his appellate counsel was ineffective.

[32] "The standard for gauging appellate counsel's performance is the same as that for trial counsel." *Weisheit v. State*, 109 N.E.3d 978, 992 (Ind. 2018), *cert. denied* (2019). The petitioner must show that counsel's performance was deficient in that counsel's representation fell below an objective standard of reasonableness and that but for appellate counsel's deficient performance, there is a reasonable probability that the result of the appeal would have been different. *Overstreet v. State*, 877 N.E.2d 144, 165 (Ind. 2007). Generally, claims of ineffective assistance of appellate counsel fall into three basic categories: "(1) counsel's actions denied the defendant access to appeal; (2) counsel failed to raise issues

on direct appeal resulting in waiver of those issues; and (3) counsel failed to present issues well." *Massey v. State*, 955 N.E.2d 247, 258 (Ind. Ct. App. 2011).

[33] Here, Salyers claims that counsel failed to adequately present the sentencing issues involving the appropriateness of a sentence of LWOP under Indiana Appellate Rule 7(B) and the statutory mitigators. The post-conviction court found that regardless of counsel's performance, Salyers suffered no prejudice.[3]

[34] "Claims of inadequate presentation of certain issues ... are the most difficult for convicts to advance and reviewing tribunals to support." *Weisheit*, 109 N.E.3d at 992 (quoting *Bieghler v. State*, 690 N.E.2d 188, 195 (Ind. 1997), *cert. denied* (1998)). Our supreme court explained that this is true for two reasons:

> First, these claims essentially require the reviewing tribunal to review specific issues it has already adjudicated to determine whether the new record citations, case references, or arguments would have had any marginal effect on their previous decision. Thus, this kind of ineffectiveness claim, as compared to the others mentioned, most implicates concerns of finality, judicial economy, and repose while least affecting assurance of a valid conviction.
>
> Second, an Indiana appellate court is not limited in its review of issues to the facts and cases cited and arguments made by the appellant's counsel. We commonly review relevant portions of the record, perform separate legal research, and often decide cases based on legal arguments and reasoning not advanced by

[3] The post-conviction court did not address the adequacy of appellate counsel's inappropriateness argument but did find that appellate counsel did not fully develop an argument on the statutory mitigating factors.

> either party. While impressive appellate advocacy can influence the decisions appellate judges make and does make our task easier, a less than top notch performance does not necessarily prevent us from appreciating the full measure of an appellant's claim, or amount to a breakdown in the adversarial process that our system counts on to produce just results.
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> ….
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> For these reasons, an ineffectiveness challenge resting on counsel's presentation of a claim must overcome the strongest presumption of adequate assistance. Judicial scrutiny of counsel's performance, already highly deferential is properly at its highest. Relief is only appropriate when the appellate court is confident it would have ruled differently.

*Bieghler*, 690 N.E.2d at 195-96 (citations and quotation marks omitted).

[35] We observe that appellate counsel successfully argued that the trial court's sentencing statement was inadequate, and the supreme court remanded for a new sentencing statement. Appellate counsel then filed a supplemental appellant's brief arguing that under Indiana Appellate Rule 7(B) a sentence of LWOP was inappropriate based on the nature of the offense and Salyers's character. Appellate counsel set forth the applicable standard of review and discussed several cases with similar facts in which the appellate court had reduced the defendant's sentence. As for the statutory mitigators, appellate counsel provided the four factors that a court must consider in determining the weight to be afforded to a defendant's mental illness and cited a case in support of his argument.

[36] We agree with the post-conviction court that regardless of appellate counsel's presentation of the issues, Salyers did not suffer any prejudice because the supreme court developed these arguments and analyzed them. Our supreme court addressed the trial court's weighing of aggravating and mitigating factors and examined the trial court's reasoning in light of the sentencing requirements for a sentence of LWOP as well as the four factors to be considered in weighing a defendant's mental illness. *Salyers,* 862 N.E.2d at 653-54. The supreme court concluded that the trial court's explanation satisfied the requirements and that "it was not an abuse of discretion for the trial court to determine that killing a police officer was a weighty aggravator that under the circumstances outweighed the two mitigators." *Id*. at 654. The court also reviewed whether a sentence of LWOP was inappropriate in light of the nature of the offense and Salyers's character. After discussing both prongs for inappropriateness, it concluded that "[n]othing about the nature of the offense or Salyers's character [led it] to find that Salyers's sentence is inappropriate." *Id*. Accordingly, we conclude that the post-conviction court did not err in rejecting Salyers's claim that his appellate counsel provided ineffective assistance, and we affirm the judgment.

[37] Affirmed.

Robb, J., and Kenworthy, J., concur.