In the
Indiana Supreme Court

Benjamin Ritchie,
Appellant,

v.

State of Indiana,
Appellee.

Supreme Court Case Nos.
49S00-0409-PD-420
24S-SD-342

Trial Court Case No.
49G04-0010-CF-1729

Published Order

After completing a direct appeal, a post-conviction appeal, and federal habeas corpus proceedings, Benjamin Ritchie remains sentenced to death for the murder of Beech Grove police officer William Toney. By counsel, Ritchie has filed a request with this Court asking us to grant permission for him to file a successive Petition for Post-Conviction Relief. The State opposes Ritchie's request and asks us to set an execution date for Ritchie's death sentence. We have jurisdiction over this matter because Ritchie is sentenced to death. *See* Indiana Appellate Rule 4(A)(1)(a).

Background and Procedural History

In September 2000, Ritchie and two others stole a van from a gas station in Beech Grove. Someone reported the theft and police officers completed a stolen vehicle report. Later that night, a patrol officer recognized the stolen van and pursued it. After a short chase, the van pulled into someone's yard where Ritchie and another person jumped out of the van and fled on foot. Officer Toney chased Ritchie. Ritchie turned and fired four shots at Officer Toney, who died at the scene. The State sought the death penalty based on two qualifying aggravators: (1) Ritchie was on probation for a 1998 burglary conviction, and (2) Officer Toney was acting in the course of his duties.

In 2002, a jury convicted Ritchie of murder—among other criminal offenses—and the trial court imposed the jury's recommended death sentence. Ritchie challenged his convictions and sentence on direct appeal. This Court rejected all his claims and affirmed. *Ritchie v. State*, 809 N.E.2d 258 (Ind. 2004). We denied rehearing in August 2004, and the Supreme Court of the United States denied certiorari. *Ritchie v. Indiana*, 546 U.S. 828 (2005). Ritchie then sought post-conviction relief, which the Marion Superior Court granted in part and denied in part. Ritchie appealed. We found that Ritchie had waived three of his post-conviction claims and we addressed his remaining issues. We affirmed the post-conviction court on each issue, *Ritchie v. State*, 875 N.E.2d 706 (Ind. 2007), and later denied rehearing.

In July 2008, Ritchie initiated federal habeas corpus review in the United States District Court for the Southern District of Indiana. The district court denied habeas relief and later denied Ritchie's request for a certificate of appealability. Ritchie petitioned the 7th Circuit for a certificate

of appealability, which the court denied. The 7th Circuit also denied Ritchie's request for rehearing and rehearing en banc. The U.S. Supreme Court denied certiorari in April 2017, *Ritchie v. Neal*, 581 U.S. 920 (2017), which closed Ritchie's federal habeas proceedings.

I. Ritchie's Motion for Leave to Seek Successive Post-Conviction Relief

Ritchie now seeks leave to file a successive Petition for Post-Conviction Relief under P-C.R. 1 § (12)(a). He sets forth several prospective successive post-conviction relief claims, including that (1) his trial and post-conviction counsel provided ineffective assistance by (a) failing to investigate Fetal Alcohol Spectrum Disorders and (b) failing to analyze the effect of Ritchie's childhood exposure to excessive amounts of lead; (2) Ritchie was only twenty years old at the time of the crime and recent developments in the law require this Court to consider his age at sentencing; (3) the State engaged in prosecutorial misconduct throughout Ritchie's jury trial; and (4) developments in the law make *Baum v. State*, 533 N.E.2d 1200 (Ind. 1989), inadequate in meeting the heightened standard required for capital litigation due to insufficient review of post-conviction counsel's competency. Ritchie later filed a notice indicating that he has been examined by two experts and is prepared to proceed on these claims.

To receive permission from this Court to successively litigate post-conviction relief claims, Ritchie must persuade a majority of the Court that there is a "reasonable possibility" that he is entitled to relief on his successive claims. P-C.R. 1 § 12. Ritchie has not persuaded a majority of the Court that there is a reasonable possibility he is entitled to relief.

Being duly advised, and having considered the matter before us, the Court's evenly divided vote renders Ritchie's request to file a successive Petition for Post-Conviction Relief DENIED.

II. State's Motion to Set Execution Date

On June 27, 2024, the State filed its "Verified Motion to Set Execution Date" and stated the following in support: (1) the state and federal review for Ritchie's convictions has ended; (2) Ritchie has never alleged he suffers from a mental disease or defect that prevents him from understanding court proceedings, assisting his counsel, or understanding the justification for his sentence; and (3) there are no stays pending on Ritchie's death sentence. In Ritchie's response to the State's motion, he asked this Court to hold the State's request to set an execution date in abeyance and allow him to litigate his successive post-conviction claims. In reply, the State opposed Ritchie's request to pursue successive post-conviction relief and reiterated its request for an execution date. Ritchie's request to litigate his successive post-conviction claims is denied with this Court's evenly divided vote.

Being duly advised, the Court finds there is no stay of execution now in effect and we must complete our administrative task to set an execution date under Indiana Code section 35-50-2-9(h) and Indiana Criminal Rule 6.1(G)(1).

It is ORDERED that execution of the death sentence imposed on Benjamin Ritchie be carried out on **May 20, 2025**, before the hour of sunrise. This order constitutes the warrant for execution described in Indiana Code sections 35-38-6-2, -3, and -8. The superintendent of the

Indiana State Prison is directed to carry out the execution in accordance with law.

Done at Indianapolis, Indiana, on 4/15/2025 .

FOR THE COURT

Loretta H. Rush
Chief Justice of Indiana

Slaughter, J., concurs with separate opinion in which Molter, J., joins.
Goff, J., dissents from Part I and concurs in result in Part II with separate opinion.
Rush, C.J, dissents from Part I and Part II with separate opinion.
Massa, J., did not participate in the decision of this matter.

Slaughter, J., concurring.

I write separately to explain why I vote to deny Benjamin Ritchie's motion for leave to file his successive petition for post-conviction relief.

Ritchie does not meet our standard for filing a successive petition. He fails to show a "reasonable possibility" that he is entitled to relief in this proposed second state collateral proceeding. Ind. Post-Conviction Rule 1(12)(b). Two of my colleagues disagree. Justice Goff would grant Ritchie permission to litigate his successive petition. *Post*, at 1 (opinion of Goff, J.). The Chief Justice believes the evidence before us suggests "a strong likelihood that Ritchie suffered from FASD", fetal alcohol spectrum disorder, when he murdered police officer William Toney in 2000. *Post*, at 1 (opinion of Rush, C.J.). In support, she notes that Ritchie has recently been evaluated by two FASD experts. *Ibid.* Though Ritchie's recent "notice" does not notify us what these experts found or concluded, the Chief Justice would nonetheless hold the State's request to set an execution date in abeyance so we can "receive and consider" the experts' evaluations. *Ibid.*

If Ritchie's FASD status then or now actually mattered, as both the Chief Justice and Justice Goff suggest, that might provide some justification for authorizing his proposed successive petition. In fact, what Ritchie's experts turned up is irrelevant. The issue before us is not whether Ritchie suffered from FASD in 2000 or whether he does so today; it is whether his trial counsel were constitutionally ineffective during sentencing for failing to investigate the possibility that Ritchie suffered from FASD then. On this claim, Ritchie cannot show a "reasonable possibility" of relief. Even if he suffered from FASD in 2000, as he now claims for the first time, he did not preserve that claim, so it is procedurally defaulted. And he cannot avoid his default of this claim because his counsel were not ineffective under either standard for assessing counsel's performance.

A

Post-conviction proceedings are not a second try at relief. They "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." *Ben-Yisrayl v. State*, 738 N.E.2d 253, 258 (Ind. 2000). If a petitioner fails to raise

a claim available to him at trial or on appeal, the claim is waived or "procedurally defaulted". *Isom v. State*, 235 N.E.3d 150, 152 (Ind. 2024).

Evidence of Ritchie's medical condition in 2000 was available to him at sentencing, but he did not raise it at sentencing. Thus, this claim is "procedurally defaulted". *Ibid.* This procedural default may give rise to a claim on post-conviction that trial counsel were ineffective. *Timberlake v. State*, 753 N.E.2d 591, 597–98 (Ind. 2001). But any claim that Richie's trial counsel were ineffective was procedurally defaulted when post-conviction counsel also failed to raise it—thus barring our review. *Isom*, 235 N.E.3d at 152.

B

To overcome this latter default, Ritchie now claims that his first post-conviction counsel were ineffective for failing to raise the claim that trial counsel were ineffective. Yet as Ritchie and my two colleagues implicitly acknowledge, he cannot win his claim-within-a-claim under our prevailing standard for assessing the competence of counsel in state post-conviction proceedings.

Under *Baum v. State*, a claim that post-conviction counsel were ineffective fails if "counsel in fact appeared and represented the petitioner in a procedurally fair setting which resulted in a judgment of the court". 533 N.E.2d 1200, 1201 (Ind. 1989). This is, to be sure, a low bar for the State to meet—and a correspondingly high bar for a would-be successive petitioner. All seem to agree that Ritchie loses under *Baum* because his post-conviction counsel appeared and represented him during his first post-conviction proceeding. Ritchie thus cannot make the required showing of a "reasonable possibility" of success on his claim that his first post-conviction counsel were ineffective.

C

Recognizing these procedural hurdles, Ritchie urges us to replace the *Baum* standard with *Strickland v. Washington*, 466 U.S. 668 (1984). Unlike my two colleagues, I am not interested in revisiting *Baum* in this case. Ritchie does not make the case that applying a different standard than *Baum* would matter on this record. He does not establish, in other words, that he would be entitled to relief under *Strickland*. Specifically, he shows

neither that his post-conviction counsel were deficient nor a reasonable probability that his sentence would have been different had trial counsel investigated him for FASD, as Ritchie now urges. Moreover, we proceed here as a four-member Court because Justice Massa is not participating. Overturning a longstanding precedent is not to be undertaken lightly in any case. That is especially true when the Court sits with fewer than all its members.

1

Justice Goff disagrees, urging us to "order additional briefing on" whether to adopt *Strickland*. *Post*, at 2 (opinion of Goff, J.). And Justice Goff suggests that Ritchie's trial counsel were deficient under *Strickland*. In support, he points to an American Bar Association guideline that says trial counsel should consider whether the defendant suffered from FASD in every death-penalty case. *Id.* at 1 (citing Am. Bar Ass'n, *Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases* 10.7 (rev. ed. 2003)). But we have never held that the ABA's death-penalty guidelines generally (or its FASD guideline specifically) establish the governing standard for assessing counsel's competence in a capital case. Nor should we. *Strickland* itself, no less, states that ABA standards might be "guides to determining what is reasonable, but they are **only** guides." 466 U.S. at 688 (emphasis added). Relying on *Strickland*, just last year the Kansas supreme court observed that the ABA's death-penalty guidelines "are a relevant guidepost for evaluating an ineffective assistance of counsel claim in a capital case, but they are not 'coextensive with constitutional requirements.'" *State v. Flack*, 541 P.3d 717, 734 (Kan. 2024) (quoting *State v. Cheatham*, 292 P.3d 318, 329 (Kan. 2013) (in turn quoting *Strickland*, 466 U.S. at 688)).

Even if the ABA's guidelines set the floor for trial counsel's performance, as Justice Goff suggests, the FASD guideline would not help Ritchie on this record. The ABA did not issue its FASD guideline until 2003. The timing here matters. Issuance of the FASD guideline in 2003 was **after** Ritchie was tried, convicted, and sentenced in 2002. Ritchie's trial counsel can hardly be charged with deficient performance during sentencing for failing to anticipate a guideline adopted later. Of the many skills

and experiences required of death-penalty counsel, prescience is not among them.

And even if the FASD guideline had been in place in 2002, Ritchie's counsel **did** present evidence to the jury of his mother's alcohol abuse and of his resulting cognitive impairment. His mother testified during the penalty phase that she abused drugs and alcohol throughout her pregnancy with him. The jury also heard from Michael Gelbort, Ph.D., a neuropsychologist, who testified for Ritchie during the penalty phase that his mother's substance abuse while pregnant with him probably contributed to his cognitive limits. Dr. Gelbort even testified that Richie has "the cognitive disorder" associated with "fetal alcohol effect and syndrome".

The ABA's guidelines aside, Dr. Gelbort's testimony undercuts today's claim that Ritchie's trial counsel were ineffective. Dr. Gelbort testified at the penalty phase that scans of Ritchie's brain (the scans Ritchie now claims trial counsel were deficient for not seeking) "would not be appropriate tests" to evaluate him because they have not been "found to be terribly helpful in terms of congenital disorders", of which FASD is one. Nat'l Inst. on Alcohol Abuse and Alcoholism, *Understanding Fetal Alcohol Spectrum Disorders* (Last Updated August 2023), https://perma.cc/C4U4-VGTV. Ritchie does not establish that trial counsel were ineffective for following the opinion of his qualified expert. And neither, then, does he establish that post-conviction counsel were ineffective for failing to allege trial counsel's ineffectiveness.

2

As to *Strickland*'s prejudice prong, Ritchie must establish there is a reasonable probability he would have received a sentence other than death if trial counsel had investigated the possibility that Ritchie suffers from FASD. Ritchie does not make this required showing either. Again, the jury already heard considerable evidence during the penalty phase about his mother's substance abuse as well as expert testimony that her substance abuse during pregnancy contributed to Ritchie's cognitive limits, which were "consistent with" FASD.

It is far from clear the jury would have responded favorably to additional evidence of Ritchie's alleged impairment. It is at least as plausible, on this record, that Ritchie's jury would have found him undeterrable and held it against him. As Judge Easterbrook observed in another death-penalty case from Indiana, "jurors may not be impressed with the idea that to know the cause of viciousness is to excuse it; they may conclude instead that, when violent behavior appears to be outside the defendant's power of control, capital punishment is appropriate to incapacitate." *Burris v. Parke*, 130 F.3d 782, 784–85 (7th Cir. 1997). Without more, we cannot assume that further evidence of Richie's cognitive impairment given his mother's alcohol abuse while pregnant with him would have been reasonably likely to sway his jury toward mercy.

* * *

For these reasons, my vote is to deny Ritchie's motion for leave to file a successive post-conviction petition. His tendered petition does not show a "reasonable possibility" that he is entitled to relief.

Molter, J., concurs.

Goff, J., dissenting in part, concurring in result.

In response to the State's verified motion to set an execution date, Benjamin Ritchie has asked this Court to exercise its exclusive jurisdiction to stay the execution of his death sentence while it considers his proposed successive petition for post-conviction relief. *See* Ind. Code § 35-50-2-9(h). By a 2-2 vote, this Court has effectively denied that request. Thus, with no stay in effect, we are obligated by statute and by court rule to set an execution date. *See id.*; Ind. Crim. Rule 6.1(G). Accordingly, I concur—albeit reluctantly—with the Court's order granting the State's motion. Still, I write separately to explain why I would have temporarily stayed the execution date to consider Ritchie's claim.

I. Assessment for Fetal Alcohol Spectrum Disorder (FASD)

In his proposed petition, Ritchie argues that his post-conviction counsel failed to investigate whether his trial counsel was ineffective for failing to present evidence at trial that Ritchie suffered from Fetal Alcohol Spectrum Disorder (FASD). The American Bar Association has identified FASD as an issue that should be considered in every death-penalty case. Am. Bar Ass'n, Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases 10.7 (rev. ed. 2003). Importantly, unlike an investigation "into other mental illnesses and behavioral issues," a diagnosis of FASD can establish "both *cause and effect*" of a criminal defendant's actions. *Williams v. Stirling*, 914 F.3d 302, 315 (4th Cir. 2019).

Ritchie submitted reports from four medical practitioners, each of whom concluded that he likely falls on the FASD spectrum, and Ritchie has now been evaluated by two experts. Because Ritchie need only establish a "reasonable possibility" that he is entitled to post-conviction relief for this Court to authorize a successive filing, I would order a stay to allow Ritchie to litigate whether his trial and post-conviction counsel provided ineffective assistance by failing to investigate FASD. *See* Ind. Post-Conviction Rule 1(12)(b).

II. The Standard for Assessing Claims of Ineffective Assistance of Post-Conviction Counsel

Neither the Sixth Amendment of the United States Constitution nor Article 1, Section 13 of the Indiana Constitution expressly guarantees the right to counsel in post-conviction proceedings. *Baum v. State*, 533 N.E.2d 1200, 1201 (Ind. 1989). Thus, courts do not apply the same constitutional standards under *Strickland v. Washington*, 466 U.S. 668 (1984), to judge counsel's performance when prosecuting a post-conviction petition. *Id.* Instead, courts apply a "lesser standard" akin to the "due course of law or due process of law principles which are at the heart of the civil post-conviction remedy." *Id.* Under this standard, courts will consider counsel's performance sufficient "if counsel in fact appeared and represented the petitioner in a procedurally fair setting which resulted in a judgment of the court." *Id.*

In my view, there's no greater need to ensure effective counsel than in the final review of a capital case. After all, there's "no penalty more severe—more irrevocable—than death." *Corcoran v. State*, 246 N.E.3d 782, 801 (Ind. 2024) (Goff, J., dissenting). And when the State "seeks to impose the ultimate form of punishment, it's not simply the defendant's interests at stake." *Wright v. State*, 168 N.E.3d 244, 261 (Ind. 2021). "Rather," we've observed, the State "has a vested interest in—indeed, a constitutional **duty** to ensure—the reliability and integrity of a capital-murder trial." *Id.*

What's more, the legal landscape on due process has changed significantly in the fifteen years that have lapsed between the latest execution (2024) and the one before (2009). In 2019, we concluded that the *Baum* standard, which basically asks only whether the attorney was present, "provides too low a benchmark for measuring counsel's performance" in certain juvenile proceedings. *A.M. v. State*, 134 N.E.3d 361, 365 (Ind. 2019). In *A.M.*, we applied a due process test that "considers counsel's overall performance" and "focuses on whether that performance ensured the juvenile received a fundamentally fair hearing." *Id.*

Given this Court's willingness to depart from *Baum* in the juvenile context, and given the "state's heightened-reliability interests in death-

penalty cases," *Corcoran*, 246 N.E.3d at 802 (Goff, J., dissenting), I would order additional briefing on the continued viability of that standard when assessing the effectiveness of post-conviction counsel in such cases and Ritchie's likelihood of success under a different standard.[1] Though a defendant in Indiana enjoys no constitutional right to counsel in a post-conviction proceeding, we've long observed that a "death sentence cannot be imposed on anyone in this State until it has been reviewed by this Court and found to comport with the laws of this State and the principles of our state and federal constitutions." *Judy v. State*, 416 N.E.2d 95, 102 (Ind. 1981).

Rush, C.J., joins in part.

[1] It's worth noting that other jurisdictions apply *Strickland* to counsel appointed in post-conviction proceedings. *See, e.g., People v. Hickey*, 914 P.2d 377, 379 (Colo. App. 1995); *Lozada v. Warden*, 613 A.2d 818, 823 (Conn. 1992); *Stovall v. State*, 800 A.2d 31, 37, 38 (Md. Ct. Spec. App. 2002); *Jackson v. Weber*, 637 N.W.2d 19, 23 (S.D. 2001); *Johnson v. State*, 681 N.W.2d 769, 776–77 (N.D. 2004).

Rush, C.J., dissenting.

Our Court has "exclusive jurisdiction to stay the execution of a death sentence." Ind. Code § 35-50-2-9(h); Ind. Crim. Rule 6.1(G)(1). And here, Ritchie has asked us to hold the State's motion to set an execution date "in abeyance until the pending issues . . . are resolved." One of those issues is whether post-conviction counsel provided ineffective assistance by failing to investigate whether Ritchie suffered from Fetal Alcohol Spectrum Disorder (FASD) when he committed his crimes. As my colleague points out, "Ritchie submitted reports from four medical practitioners, each of whom concluded that he likely falls on the FASD spectrum, and Ritchie has now been evaluated by two experts." *Ante*, at 1. Because I would hold the State's request in abeyance for a short time to receive and consider those evaluations, I dissent from the order setting an execution date and the order denying Ritchie's request to file a successive petition for post-conviction relief.

To authorize a successive petition, Ritchie need only establish "a reasonable possibility" that he is entitled to relief. Ind. Post-Conviction Rule 1(12)(b). In making that determination, we can consider any material we deem relevant. *Id.* If, as Ritchie asserts, the evaluations "provide specific diagnosis on the FASD spectrum" and explain how the injuries to his "brain diminish the weight of the aggravating circumstances and increase the weight of the mitigating circumstances," that relevant evidence would establish the requisite "reasonable possibility." Additionally, one of Ritchie's post-conviction attorneys filed an affidavit confirming "Ritchie had easily identifiable red flags associated with" FASD "that should have alerted" post-conviction counsel "to seek an evaluation." Notably, the attorney also affirmed that "Ritchie was provided inadequate post-conviction representation."

All the evidence before us points to a strong likelihood that Ritchie suffered from FASD when he committed his crimes. Holding in abeyance the State's request to set an execution date for a short period of time is therefore necessary to receive and consider the evaluations that have recently been completed. If those evaluations both confirm that Ritchie suffers from FASD and explain its effect on his behavior when he

committed his crimes, a successive petition for post-conviction relief would be authorized. And litigation of Ritchie's claim of ineffective assistance of post-conviction counsel would ultimately offer a chance to revisit whether the *Baum* standard is appropriate for assessing the effectiveness of post-conviction counsel's performance in capital cases. Like my concurring colleague, I have doubts. *See ante*, at 2–3.

When reviewing cases imposing the death penalty, "justice demands not haste but precision and care." *Corcoran v. State*, 246 N.E.3d 782, 801 (Ind. 2024) (Goff, J., dissenting). To comply with this demand, we should not set a date for the most irrevocable of punishments without first ensuring that Ritchie was not denied the effective assistance of counsel. Because we currently have no such assurance, I dissent.