IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 15-1933

FREDRICK MICHAEL BAER,
Petitioner-Appellant,

v.

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

Appeal from the United States District Court for the
Southern District of Indiana, Indianapolis Division
Cause No. 1:11-cv-1168-SEB-TAB
Hon. Jane Magnus-Stinson, Judge

PETITION FOR REHEARING AND REHEARING EN BANC OF APPELLEE WARDEN RON NEAL

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Petition for Rehearing and Rehearing En Banc

An Indiana jury convicted Frederick Baer of two horrific murders and sentenced him to death. A panel of this Court granted Baer a new penalty-phase trial based on claims of bad jury instructions and prejudicial prosecutorial statements. In ordering this do-over, the panel breaks from this Court's approach to habeas corpus cases and Supreme Court jurisprudence; rehearing is necessary.

Reasons to Grant Rehearing or Rehearing En Banc

In reversing the jury's death sentence, the panel turned a blind eye to state law, neglected the record, and extended no respect to the Indiana Supreme Court's reasonable rejection of Baer's claims. The manner of the panel's grant of habeas corpus relief undermines the legitimacy of its collateral review in our federal system, and marks an abuse that warrants rehearing. The panel ignored the difficult standard under 28 U.S.C. § 2254 that requires Baer to show that the Indiana state court decision was not a conclusion that fair-minded jurists could reach under clearly established federal law. *See Harrington v. Richter*, 562 U.S. 86, 102 (2011). The Supreme Court has warned many times that "a federal habeas court *may not* issue the writ simply because the court concludes that the relevant state-court decision applied clearly established federal law erroneously or incorrectly." *Williams v. Taylor*, 529 U.S. 362, 410-11 (2000) (emphasis added).

Yet, the panel nit-picked every aspect of the state court judgment—getting state law wrong—in substituting the panel's judgment for that of the state court. This cannot be countenanced. *See Wilson v. Corcoran*, 562 U.S. 1, 7 (2010).

Background

1. Frederick Baer brutally killed a young mother and her child in their home. He picked Cory Clark as a victim when he saw her outside her house. Baer knocked on the door and faked needing to use the phone. Cory brought him the phone, and Baer followed Cory into the house. Armed with a knife, he pushed Cory into her bedroom as she began screaming. Baer cut off Cory's underwear but stopped because he lacked a condom and was concerned about venereal diseases. Next, Baer sliced Cory's throat in view of Cory's young daughter, Jenna. Jenna fled to the false safety of her bedroom with Baer chasing her. Catching Jenna, Baer nearly decapitated her. Baer stole money, collected some decorative rocks as a souvenir, and returned to his construction job.

Baer was identified as a suspect and police found physical evidence linking Baer to the crime, including Jenna's blood in his car. Baer admitted to the murders and stated that he deserved the death penalty.

2. Baer was convicted and sentenced to death. His convictions and sentence were affirmed by the Indiana Supreme Court on direct appeal and after post-conviction proceedings. *Baer v. State*, 866 N.E.2d 752 (Ind. 2007) (*Baer I*); *Baer v. State*, 942 N.E.2d 80 (Ind. 2011) (*Baer II*). The district court denied Baer's request for habeas relief and denied a certificate of appealability, but this Court permitted appeal, and now a panel has reversed, requiring a new penalty trial.

The panel decision found that trial counsel was deficient in handling the jury instructions because the instructions "blocked consideration of crucial mitigating

evidence." Slip op. 19. The panel also determined that trial counsel was ineffective for failing to object to the prosecutor's comments during *voir dire* and the penalty phase. The panel concluded, "The taint of the prosecutor's comments here infected the entire trial, and erodes confidence in the outcome of the case." Slip op. 35. It found the state court decision otherwise to be an unreasonable application of federal law.

I.
The panel's decision on Baer's jury instruction claim is based on a fundamental misunderstanding of Indiana law and an erroneous reading of the record.

The Indiana Supreme Court found the jury instructions to properly explain Indiana law, so this Court cannot find that trial counsel was ineffective for not objecting to them. The panel focuses on two instructions: one regarding voluntary intoxication and one regarding mitigating circumstances. These instructions correctly stated the law and did not preclude consideration of Baer's proffered mitigation.

The mitigating circumstance instruction—based on an Indiana statute—correctly stated the law in light of the record evidence. The panel objected that the instruction did not explicitly tell the jury it could find mitigation based on the defendant's intoxication. The question before the Indiana Supreme Court was whether the trial court was required by Indiana law to add language regarding intoxication to the instruction. *See Lambert v. State*, 743 N.E.2d 719, 739 (Ind. 2001). As the Indiana Supreme Court correctly held, the trial court could have refused the additional language in the instruction because of the lack of evidence

that Baer was intoxicated at the time of the offense. *Baer II*, 942 N.E.2d at 97; *see Cutter v. State*, 725 N.E.2d 401, 409 (Ind. 2000) ("[A] trial court need not give a tendered instruction when there is no evidence in the record to support the giving of the instruction."). Accordingly, any objection by counsel would be unsuccessful because "the evidence showed that Baer was not intoxicated at the time of the offense." *Baer II*, 942 N.E.2d at 98.

The panel decision deemed that conclusion "clearly incorrect," but cited to no legal authority showing that the Indiana Supreme Court was wrong about Indiana law or federal law. The panel just disagreed with the probative value of the two defense experts who opined that Baer's extended drug use contributed to his actions. Slip op. at 14.

This Court may not second-guess the state courts and the district court in that way. Neither expert testified that Baer was intoxicated at the time of the crime.[1] The overwhelming evidence that Baer was not intoxicated at the time of the crime rebuts any positive inference that Baer was intoxicated, even if one believed his self-report of methamphetamine use on the day of the crime. Dr. Evans, a toxicologist, testified that test results of Baer's blood showed "absolutely no" methamphetamine present (TR 1635). Baer's friend and co-worker testified that Baer was not "high" the morning of the crime (TR 1263). Further, Baer's self-report lacked any probative value in light of his statement to his sister that he was going

[1] Dr. Davis stated, "I still don't have a good handle on . . . whether he was intoxicated at the time of the offense . . . ." (TR 1922).

to lie to the doctors (DA Ex. 65). The Indiana Supreme Court properly concluded that the trial court would not have been compelled by law to give the instruction. *Baer II*, 942 N.E.2d at 97. There is simply no federal law that required the instruction; indeed neither the panel nor Baer has identified any. Slip op. 14-15.

Moreover, Baer cannot show any prejudice from the lack of additional intoxication language. The mental health experts relied on Baer's extended substance abuse in reaching their conclusions that Baer suffered from various disorders, and the jury was instructed that they could consider any circumstance as mitigating (DA App. 1324-25). The lack of an explicit instruction to the jury that it could consider the long-term effects of intoxication as a mitigating circumstance is not the same as precluding their consideration of it, especially in light of the instructions that the jury could consider anything to be mitigating. Nothing in the record suggests that the jury did not fully consider all the evidence when determining the presence and weight to give mitigating circumstances, so federal law prohibits this Court from rejecting the Indiana Supreme Court's wholly reasonable resolution of this claim.

Likewise, the panel decision misunderstood Indiana law and overlooked the record when it held that trial counsel was deficient for failing to object to the voluntary intoxication instruction. At the penalty phase, the jury was instructed that "[i]ntoxication is not a defense in a prosecution for an offense and may not be taken into consideration in determining the existence of a mental state that is an element of the offense unless the defendant meets" certain requirements (DA App.

1333). The Indiana Supreme Court found, "This instruction was a correct statement of the law and was relevant in determining whether Baer *committed his crimes intentionally." Baer II*, 942 N.E.2d at 97 (emphasis in original). The panel held that the instruction was objectionable not on its face, but because "it was likely that the jurors' interpretation of this instruction was not legally correct." Slip op. 16. The panel concluded that the jury likely misunderstood the instruction because it was not relevant to issues presented in the penalty phase. Slip op. 17.

Whether Baer murdered Cory and Jenna intentionally *was* critically relevant to deciding the existence of two of the aggravating circumstances at the penalty phase. Because Baer was charged with the knowing or intentional killing of Cory and Jenna, (DA App. 1349), the guilty verdict only required the jury to agree that Baer acted knowingly (DA App. 1358). In contrast, two of the alleged aggravating circumstances required Baer to have committed the killings intentionally (DA App. 1319, 1322). So, intent was an issue that the jury had to decide at the penalty phase, the burden was on the State to prove that mental state, and the trial court correctly instructed the jury on the law regarding intoxication and the *mens rea* of the aggravating circumstances. The Indiana Supreme Court, as well as the district court, properly understood this fundamental characteristic of Indiana death penalty trials, and this Court must defer to that controlling understanding.

As to possible prejudice, the panel overstated the role of acute intoxication in Baer's defense at the penalty phase. Neither side discussed acute intoxication in any detail during argument. There was no argument from either side that mental

health issues from long-term substance abuse could not be considered mitigating. The quote the panel uses from the prosecutor regarding voluntary intoxication was from the closing argument in the *guilt* phase, not the closing argument at the *penalty* phase. Slip op. at 17; TR 2065. Even if the instruction could be read as eliminating acute intoxication as a mitigating circumstance, it is a huge leap to also suggest that the jury could have reasonably read the instructions to prohibit considering any mental or emotional deficiencies due to long term drug use as a mitigating circumstance. Further, had the instruction not been given, there is no reasonable probability that the jury would have given more weight to Baer's long term drug use.[2] The Indiana Supreme Court was not required to view state law or the record in the same manner that the panel, as an original matter, would have. Because the Indiana Supreme Court reasonably decided the claim, the panel was obligated to affirm the denial of relief.

II.
The panel's view of the alleged prosecutorial misconduct is based on a fundamental misreading of the record.

The Indiana Supreme Court decided Baer's amorphous prosecutorial misconduct claims in three different contexts: first on direct appeal as a stand-alone claim, second on post-conviction review as an ineffective assistance of trial counsel claim, and third on post-conviction as an ineffective assistance of appellate counsel claim. The panel gives no understanding of that context in its evaluation of Baer's

[2] Without citation to the record, the panel claims that acute and long-term drug use was "central mitigating evidence" of Baer's defense. Slip op. at 18. This was not a central theme of defense counsel's argument.

claims. This necessarily resulted in a distortion of the state court's decisions. Trial counsel testified that his strategy was to let the prosecutor discredit himself rather than continually object (PCR TR 32). The panel summarily declared this strategy patently unreasonable, which colored all its further analysis. Perhaps even more importantly, the decision below misreads the record.

A. The prosecutor's comments about insanity and guilty but mentally ill did not affect the penalty phase

The panel takes a large section of its decision to show that the Indiana Supreme Court was unreasonable to find trial counsel did not perform deficiently in failing to object to the prosecutor's commingling of the concepts of insanity and guilty but mentally ill (GBMI). However, the panel could not identify a way in which any commingling of these concepts could have changed Baer's sentence. Nor can it because the debate was only relevant to the guilt phase. Even if the jury were confused about these concepts, the most Baer could argue is that he missed out on a GBMI verdict. But, with a GBMI verdict, neither Indiana law nor federal law would have prevented him from receiving a death sentence.

From the beginning of this case, it was the defense strategy to secure a GBMI verdict in an attempt to avoid a death sentence. The defense strategy was not based on a legal prohibition of imposing a death sentence on someone found GBMI, rather defense counsel hoped to use a GBMI verdict to convince the Indiana Supreme Court to reduce any resulting death sentence under its state law power to revise sentences. The Indiana Supreme Court explained the strategy: "the defense during voir dire sought to condition the jury to believe that there was no appreciable

difference between [a GBMI verdict] and a verdict of guilty, all the while hopefully anticipating that a significant difference may result on appeal." *Baer I*, 866 N.E.2d at 760. The state court noted that discussing appellate consequences of verdicts is generally disapproved, but here the prosecutor was simply "responding and presenting argument in order to resist the defense's strategy of gaining appellate advantage." *Id*. at 761. Because the prosecutor's comments were a response to defense argument, the state court found that the comments could not be considered misconduct. *Id*. Further, the court found no prejudice to Baer from the discussions as each sides' discussion of the issue did not "impinge[ ] on the fairness or accuracy of the jury's decision-making or resulting verdict." *Id*. In other words, the comments of the prosecutor in the context of this trial did not deny Baer a fundamentally fair proceeding.

So then on post-conviction review, Baer changed his argument and claimed that his appellate counsel was ineffective for the way that he raised the claim on direct appeal, claiming that the issue was too narrowly raised and should have encompassed other aspects of the GBMI verdict comments. Because trial counsel did not object to the now challenged instances of prosecutorial misconduct, appellate counsel was left to raise the claims as "fundamental error." Nevertheless, the Indiana Supreme Court concluded that on this record it was reasonable for appellate counsel to forego expanding the claim because there was a potential strategic reason for trial counsel to not object and that the jury was correctly instructed on the law. *Baer II*, 942 N.E.2d at 99-100.

In determining that appellate counsel could forego the claim because it was a reasonable strategic reason not to object to the prosecutor co-mingling the concepts of insanity and GBMI, the Indiana Supreme Court pointed to trial counsel's strategy of letting the prosecutor overstate his case so that the jury would rely on defense counsel and the court as sources of reliable information. *Id*. at 99-100. The panel decision declared this strategy to be patently unreasonable. The panel cites no law or provides no reason other than its bald assertion or the panel's conclusion that the strategy did not work. Slip op. 25. But a strategy's success does not govern its reasonableness. *See Richter*, 562 U.S. at 790-91. Even so, this strategy bore fruit, such as when the judge allowed defense counsel to correct the prosecutor's admitted misstatement of law just before the jury retired for deliberations (TR 2563-64). However, all of this is an academic exercise when looking at the penalty phase because neither of these concepts were at issue.

In further support of deficient performance, the panel inexplicably claims, "Furthermore, the court did not instruct the jury on the difference between GBMI standard and the insanity defense standard, and defense counsel requested no such instruction." Slip op. at 25. This misses the point: defense counsel did not request an instruction on insanity because that was not Baer's defense.[3] The jury was correctly instructed on the definition of mental illness and GBMI—the only

[3] As defense counsel stated in closing argument, "Let me repeat this for the one hundredth time: We are not saying that Fredrick Michael Baer is insane. . . . Mr. Cummings still either doesn't get it or chooses to try to scare you. Mental disease or defect. The statute he put up there goes with insanity. The judge is going to instruct you on what the law is [for GBMI], and you're not going to hear that." (TR 2105-06).

alternative verdict defense counsel wanted before the jury (TR 2121-22). And by confusing the effect of GBMI before the jury, defense counsel made prosecutors respond and reinforce Baer's mental health theme for them. Baer had no other choice, because the evidence so overwhelmingly proved his calculated, brutal, and chilling crimes and anything that might distract from the actual evidence had a greater chance of saving Baer's life. That distraction did not work on the jury, the state courts and the district court. It should not have worked to confuse this Court either.

B. The only comment about victim impact said to the jury was a response to defense argument and therefore not misconduct

In analyzing the state court's disposition of Baer's claim of prosecutor misconduct by suggesting to the jury that the victim's family supported the decision to seek the death penalty, the panel once again identified the wrong claim and the wrong law. The Indiana Supreme Court reviewed Baer's claim that his appellate counsel was ineffective for failing to assert a claim of "fundamental error" (because trial counsel had not objected), the court rejected this claim because the comment did not render the trial fundamentally unfair. *Baer II*, 942 N.E.2d at 101-02. Instead of reviewing the state court decision of the ineffective assistance of appellate counsel claim, as it should have, the panel recast the claim as one of trial counsel ineffectiveness. Slip op. at 29. As counsel *did* object to the voir dire statement—a statement which no selected juror likely heard (TR 864-68)—the panel's analysis could only apply to the prosecutor's comment in closing argument.

The prosecutor's brief comment in closing that the family supported the prosecution was a direct response to defendant's argument:

> [Y]ou may think that [a death sentence] will heal John Clark and his family, and I guarantee you that if this was my family, I would want you to impose the death penalty. I don't know that. I probably know more about it than I should. So I might not. There are a couple of reasons I might not, and I'll speak to you about those in just a second.

(TR 2542). Even if the prosecutor's comment were found to be impermissible, the comment was a direct response to defendant's statements and so was proper rebuttal. "Prosecutors are entitled to respond to allegations and inferences raised by the defense even if the prosecutor's response would otherwise be objectionable." *Cooper v. State*, 854 N.E.2d 831, 836 (Ind. 2006). When considering all the record, trial counsel had no grounds to object. Failure to make a pointless objection can never constitute deficient performance, let alone result in prejudice. Moreover, in no way can the state court's adjudication of the presented appellate counsel claim be objectively unreasonable.

C. The comments about personal opinions and facts not in evidence were permissible as responses to defense arguments

The Indiana Supreme Court determined that "The prosecutor's comments about his own rough upbringing was a fair rebuttal to [the] points made by Baer's counsel." *Baer II*, 942 N.E.2d at 102 f.8. Citing *United States* v. *Young*, 470 U.S. 1 (1985), the panel determined that those comments were "seditious" and "beyond the pale foul blows," slip. op. 33, but did not even give lip-service to the standard of review. The panel does not even discuss defense arguments or explain how the prosecutor's arguments were not fair rebuttal. *Young*, which approved a

prosecutor's discussion of his personal opinion of the case in response to a challenge by defense counsel, only confirms that the state court decision was reasonable. *Id.* at 20. The panel neglected *Young*'s admonition that reviewing courts must examine the claimed error in the context of the entire record. *Id.* at 16.

Further, the panel once again reviewed prosecutorial comments as if Baer had properly raised a claim of ineffective assistance of trial counsel rather than ineffective assistance of appellate counsel. The Indiana Supreme Court applied a fundamental error standard, *i.e.*, it addressed whether the prosecutor's comments resulted in the denial of a fundamentally fair trial—the proper inquiry when the state is using otherwise impermissible argument to respond to defense arguments. *See Cooper*, 854 N.E.2d at 835, 838; *accord Young*, 470 U.S. at 16. Because the comments were not fundamental error, appellate counsel's performance was not deficient nor prejudicial.

Even though each of the comments reviewed by the panel were responses to defense argument, the panel finds prejudice through aggregating the comments. It seems that the main reason that the panel finds cumulative prejudice is that "the prosecutor's remarks likely hampered the jurors' ability to decide dispassionately whether Baer should receive a term of years or life without parole rather than a death sentence, or even trust the life without parole would remain a barrier to Baer's reentry into society." Slip op. 36. This is based on one comment about life without parole (LWOP) that the prosecutor made during *voir dire* in response to defense counsel and prospective jurors broaching the topic (TR 428, 601, 920). It

ignores the multiple times that both sides stated that life without parole means imprisonment without parole (Tr. 427, 517, 601, 839, 920-21). It ignores that the jury was also presented with a contrasting sentence of a term of years. (DA App. 1320, 1323). It ignores the reality that the legislature could change the law to allow parole in the future. *Baer II*, 942 N.E.2d at 107. It ignores the fact that defense counsel argued that LWOP would be a worse sentence for Baer because he would grow old and die in prison, and the prosecutor argued that the jury should not let him grow old and die in prison because death is the only punishment fitting the crime. (TR 2546-47). Faced with a difficult task of convincing a jury to spare Baer's life, defense counsel reasonably presented various arguments to the jury and the State reasonably responded. Cumulative prejudice simply did not result here.

* * *

The panel looked at the wrong issues, relied on the wrong law, and wrongly read the record. It failed to review the state court decision on the issues Baer presented to it and judge them by the correct standard. Baer committed a horrific crime and had very few mitigating circumstances. The trial was hard-fought by both sides. The jury made its decision after being correctly instructed. The Indiana Supreme Court reasonably determined that Baer received a fair penalty phase. Unnecessarily retrying even the penalty phase of a capital case is an extraordinary burden on a State and its citizens. This Court should agree and grant rehearing.

Conclusion

This Court should grant rehearing or rehearing en banc and affirm the denial of habeas relief.

Respectfully submitted,

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I do hereby certify that the foregoing document was filed electronically. I certify that a copy of the foregoing document has been duly served upon the following CM/ECF participants listed below through this Court's electric filing system on February 23, 2018:

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