IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 15-1933
FREDRICK MICHAEL BAER,
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.
No. 1:11-cv-1168 — **Sarah Evans Barker,** *Judge*.

ARGUED FEBRUARY 22, 2017 — DECIDED JANUARY 11, 2018

Before, BAUER, FLAUM and WILLIAMS, *Circuit Judges*.

WILLIAMS, *Circuit Judge*. Fredrick Michael Baer murdered a young woman and her four-year-old daughter in their home. In connection with this crime, he was convicted in Marion Superior Court of the two murders, robbery, theft and attempted rape. He was sentenced to death. He filed a direct appeal to the Indiana Supreme Court raising several issues including prosecutorial misconduct, but his

convictions and death sentence were affirmed. Baer filed state post-conviction proceedings alleging that his trial and appellate counsel were ineffective. The court denied his petition and this denial was affirmed by the Indiana Supreme Court. Baer then filed a petition for a writ of habeas corpus with the United States District Court for the Southern District of Indiana, which was also denied. After we issued a certificate of appealability, Baer appealed the district court's denial of his petition for a writ of habeas corpus.

Baer asserts that the Indiana Supreme Court's ruling was unreasonable under *Strickland v. Washington*, 466 U.S. 668 (1984), for failing to find that Baer's trial counsel was constitutionally ineffective for failing to (1) object to improper and confusing jury instructions given at the penalty phase of his trial, (2) object to prejudicial prosecutorial statements made throughout trial, and (3) investigate and present mitigating evidence on Baer's behalf. While we affirm his convictions, we agree with Baer that, at the penalty phase, Baer's counsel failed to challenge crucial misleading jury instructions and a pattern of prosecutorial misconduct, and that the state court unreasonably applied *Strickland* in denying Baer relief. Counsel's deficiency resulted in a denial of due process, and we find the errors were sufficient to undermine confidence in the outcome of Baer's penalty trial and so we find prejudice. While Baer's offenses were despicable and his guilt is clear, he is entitled to a penalty trial untainted by constitutional error.

I. BACKGROUND

A. Factual History

On February 25, 2004, Fredrick Michael Baer saw twenty-four-year-old Cory Clark on her front porch. He turned his car around and pulled into her driveway. He approached Cory's apartment, knocked, and asked to use her phone to call his boss. When she turned to go back inside, he followed her into her apartment with the intent to rape her. After attacking her, Baer decided against raping her because he feared contracting a disease so instead he cut Cory's throat with a foldable hunting knife. Witnessing this atrocity, Cory's four-year-old daughter, Jenna Clark, ran from the room. Baer caught her and cut her throat. Taking Cory's purse, three to four hundred dollars, and some decorative stones, Baer then left the apartment. He cleaned himself up, changed his shirt, and returned to work. When he was arrested as a suspect and police asked if he committed the murders, Baer shook his head affirmatively and told the officers the location of the knife and purse.

B. Procedural History

Early on, Baer conceded that he murdered the Clarks, and sought to plead guilty but mentally ill (GBMI).[1] The trial court rejected the plea, finding

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[1] In Indiana cases where the defense of insanity is raised, the jury may find that the defendant is: (1) guilty; (2) not guilty; (3) not responsible by reason of insanity at the time of the crime; or (4) guilty but mentally ill at the time of the crime. Ind. Code § 35-36-2-3. A defendant who is found or pleads guilty but mentally ill should be sentenced in the same manner as a defendant found guilty of the offense. Ind. Code § 35-36-2-5(a).

that there was insufficient evidence to show mental illness. The case proceeded to trial with the only issue being whether Baer was GBMI or simply guilty.

Voir dire began. In front of jurors and prospective jurors, the prosecutor persistently began stating the incorrect standard for a GBMI conviction. The prosecutor routinely suggested (incorrectly) that the GBMI standard and legal insanity standard were the same. He encouraged jurors to recite this incorrect standard in response to his questioning. The prosecutor also made statements suggesting that life without parole may be abolished and incorrectly stated that a GBMI conviction might not permit a death sentence. Baer's counsel did not object to any of these statements. The prosecutor also told jurors that the victims' family wanted Baer to be put to death. Toward the end of jury selection, during a bench conference, defense counsel asked for a mistrial for the prosecutor's comments mentioning the victims' family (referring to them as "victim impact" comments). The judge remarked that he was not paying attention, denied defense counsel's motion, and suggested the prosecutor tell jurors that he had misspoken. No objection or clarification was made in front of the jury.

After jury selection, Baer's trial began, and the defense focused on convincing the jury that Baer suffered from a mental illness. Defense counsel offered an expert witness, Dr. George Parker, who testified that Baer had a history of drug issues, including methamphetamine use. He also diagnosed Baer as suffering from a psychotic disorder. The court also provided appointed experts, Dr. Larry Davis and

Dr. Richard Lawler, who agreed that Baer suffered from mental illness, and also cited Baer's abuse of methamphetamine as something that would disturb his mental wellness and exacerbate his mental health problems. Dr. Davis testified that Baer was likely experiencing psychosis induced by heavy methamphetamine use at the time of the crime. Dr. Lawler described Baer's account that he used methamphetamine on the morning of the crimes. The experts' account of Baer's use of methamphetamine on the day of the crime was contradicted by Danny Trovig, the friend Baer reportedly used methamphetamine with that morning, who testified that Trovig was on parole at the time and did not consume or see Baer consume methamphetamine.

The prosecutor also offered a toxicology expert, Dr. Michael A. Evans, who testified that a blood sample collected from Baer 38 hours after the offense and tested 13 months after collection showed some marijuana usage, but tested "absolutely zero" for methamphetamine or any other drug. However, because of the delay in the blood draw and the testing of the blood, Dr. Evans could not conclude that Baer had not used any methamphetamine on the morning of the crime. At post-conviction proceedings, Dr. Evans clarified that he could not say whether methamphetamine existed in Baer's blood at the time it was collected, but he could only confirm that there was no such substance in his blood when it was tested.

The prosecution also presented evidence to counter whether Baer had a mental illness, and sought to prove that Baer instead was lying about his mental health. This evidence included playing a

portion of a telephone conversation recorded while Baer was incarcerated in which Baer told his sister, "[o]h, yeah, and while we're at it to boot, here let's go ahead and say you're stupid and insane so it will make it a little easier. I don't think so. Matter of fact, I ain't got to worry about that 'cause I'm ready to go out here to the f*cking doctor, tell this stupid son of a bitch a bunch of stupid lies."

At the close of evidence, the jury convicted Baer of murdering Cory and Jenna Clark, robbery, theft, and attempted rape without a finding of GBMI. The case then proceeded with the same jury to a penalty trial.

At the penalty phase, Baer's counsel offered one witness, Dr. Mark Cunningham. In approximately seven hours of testimony, Dr. Cunningham discussed Baer's prenatal and perinatal difficulties, including his mother having cancer while pregnant, drinking while pregnant, and Baer's malnourishment for the first several months of his life. Dr. Cunningham also testified about Baer's family troubles such as Baer's childhood in and out of foster care and the murder of his sister. Dr. Cunningham also stated that Baer had poor school performance and struggled with ADHD, head injuries, and extensive abuse of inhalants, alcohol, methamphetamine, and other substances. Dr. Cunningham reported that Baer was "extraordinarily damaged." However, while questioning Dr. Cunningham to show mitigating circumstances, Baer's counsel failed to ask Dr. Cunningham whether Baer met the definition of having a mental illness.

The jury found that the state had proved all five of the alleged aggravating circumstances in Baer's

crime (all which were uncontested), (1) murder while committing the crime of attempted rape, (2) murder while committing the crime of robbery, (3) murder of two human beings, (4) committing two murders while on parole, and (5) murder of a child under the age of twelve years. Finding that mitigating factors did not outweigh these aggravating factors, the jury recommended the death penalty. On June 9, 2005, the court sentenced Baer to death.

C. Appellate History

Baer filed a direct appeal of his death sentence to the Indiana Supreme Court, raising four issues: (1) prosecutorial misconduct, (2) failure to comply with proper procedures in handling prospective jurors, (3) erroneous admission of recorded telephone calls from jail, and (4) inappropriateness of the death sentence. On May 22, 2005, the Indiana Supreme Court affirmed Baer's convictions and death sentence. *Baer v. State*, 866 N.E.2d 752 (Ind. 2007) (*"Baer I"*). The state court discussed at length its holding that the prosecution did not commit misconduct by suggesting that a GBMI conviction may not support a death sentence. *Id*. at 755–61. The court also held that the death penalty was supported by the evidence of the brutal nature of the killings and the lack of evidence of Baer's positive character. *Id.* at 764–66. Baer filed a petition for writ of certiorari, which was denied. *Baer v. Indiana*, 552 U.S. 1313 (2008).

Baer filed a petition for post-conviction relief on May 1, 2008, raising numerous allegations that trial counsel and appellate counsel were ineffective, including challenging trial counsel's failure to object to jury instructions and prejudicial prosecutorial

statements. Baer's post-conviction counsel also raised prosecutorial misconduct, structural errors in the trial judge's rejection of Baer's GBMI plea and failure to correct the prosecutorial errors, cruel and unusual punishment based on Indiana's method of execution, and a challenge to Baer's death sentence based on his mental illness. At an evidentiary hearing, Baer presented the testimony of several witnesses to bolster his claim for mitigation, including a neuropsychologist, Baer's mother, Baer's juvenile probation officer, a former teacher, and former wife Zola Brown. After hearing this additional testimony, the court denied Baer's petition for relief. The court found Baer's prosecutorial misconduct, structural error, and method of execution claims were foreclosed because he had not raised them at trial or on direct appeal. The court rejected Baer's ineffective assistance of trial and appellate counsel claims on the merits, and found that the evidence about mental illness failed to undermine confidence in the verdict or sentence.

The Indiana Supreme Court affirmed the denial of post-conviction relief, holding, in part, that Baer's trial counsel and appellate counsel were not ineffective. *See Baer v. State*, 942 N.E.2d 80, 90–108 (Ind. 2011) ("*Baer II*"). The Indiana Supreme Court specifically addressed the merits of, and rejected, Baer's claims that counsel was ineffective for failing to challenge jury instructions relating to intoxication, failing to present a claim for prosecutorial misconduct, and failing to investigate or present adequate mitigating evidence. *Id.* at 97, 98, 102–03, 107.

On November 29, 2011, Baer filed his petition for a writ of habeas corpus in the United States District Court for the Southern District of Indiana. He again challenged trial and appellate counsel's effectiveness regarding the penalty phase jury instructions, for failing to challenge the prosecutor's comments, and for failing to investigate and present mitigating circumstances. The court denied Baer's petition and his motion to alter or amend the judgment, and declined to grant his request for a certificate of appealability. *Baer v. Wilson*, No. 1:11-cv-1168, 2014 WL 7272772, at *27 (S.D. Ind., Dec. 18, 2014). In its order, the district court ruled that the Indiana Supreme Court did not unreasonably apply *Strickland* when finding that Baer's counsel's performance was not deficient during voir dire or for failing to object to penalty phase jury instructions.

We granted a certificate of appealability and agreed to hear Baer's arguments that he had ineffective assistance of counsel. Baer presents three arguments under this theory: (1) counsel was ineffective for failing to object to penalty phase jury instructions that were likely interpreted to preclude the jury from considering central mitigating evidence; (2) counsel was ineffective for failing to object to numerous instances of prosecutorial misconduct; and (3) counsel was ineffective for failing to investigate and present evidence to prove mitigating factors that were described by medical experts. Our analysis of the first two arguments are determinative of the issue before us, so we decline to reach the third argument.

II. ANALYSIS

Baer appeals from the denial of habeas relief under 28 U.S.C. § 2254. Because his Sixth Amendment claims were adjudicated on the merits by the Indiana Supreme Court, they are subject to 28 U.S.C. § 2254(d), commonly referred to as the Anti-Terrorism and Effective Death Penalty Act (AEDPA). AEDPA permits a federal court to issue a writ of habeas corpus only if the state court reached a decision that was "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States," 28 U.S.C. § 2254(d)(1), or "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)(2). Needless to say, the AEDPA standard of review is a difficult standard, and it was meant to be.

Baer seeks relief for the alleged denial of his Sixth Amendment right to effective assistance of counsel. This claim is analyzed under *Strickland*, 466 U.S. 668, which requires a petitioner to show two things. "First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Strickland,* 466 U.S. at 687; *see also Ward v. Neal*, 835 F.3d 698, 702 (7th Cir. 2016), *cert. denied*,

137 S. Ct. 2161 (2017). "It is not enough for the defendant to show that the errors had some conceivable effect on the outcome of the proceeding"; there must be a possibility of prejudice that is "sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 693, 694.

Because we are under AEDPA review of a *Strickland* claim, the "pivotal question is whether the state court's application of the *Strickland* standard was unreasonable." *Harrington v. Richter*, 562 U.S. 86, 101 (2011). This is a difficult standard, and even a strong case for relief under *Strickland* does not necessarily mean the state court's contrary conclusion was unreasonable. *Id* at 102. But this is not an insurmountable standard. The writ of habeas corpus, as limited by AEDPA, is more than a dead letter. "The writ of habeas corpus stands as a safeguard … of those held in violation of the law." *Id.* at 91. The writ's purpose is to provide a "guard against extreme malfunctions in the state criminal justice systems." *Jackson v. Virginia*, 443 U.S. 307, 332 n.5 (1979) (Stevens, J., concurring in judgment). AEDPA "directs federal courts to attend every state-court judgment with utmost care, but it does not require them to defer to the opinion of every reasonable state-court judge on the content of federal law." *Williams*, 529 U.S. at 389. "If, after carefully weighing all the reasons for accepting a state court's judgment, a federal court is convinced that a prisoner's custody—or, as in this case, his sentence of death—violates the Constitution, that independent judgment should prevail." *Id.*

A. Failure to Object to Penalty Phase Instructions

1. Challenged Instructions

At the penalty phase of the capital trial, after Baer had been convicted of his crimes, defense counsel's strategy for avoiding a death sentence was ensuring that the jury considered and gave effect to Baer's mental health and intoxication (use of methamphetamine) evidence. During this penalty phase, the jury was instructed that the following was to be considered a mitigating factor:

> Defendant's capacity to appreciate the criminality of the defendant's conduct or to conform that conduct to the requirements of the law was substantially impaired as a result of mental disease or defect.

The language of this instruction came from a statutory mitigating factor provision, Indiana Code 35-50-2-9(c)(6), with one major difference. As given in Baer's penalty phase trial, this statutory jury instruction was modified to exclude the final words "or of intoxication." The complete Indiana Code 35-50-2-9(c)(6) reads:

> Defendant's capacity to appreciate the criminality of the defendant's conduct or to conform that conduct to the requirements of the law was substantially impaired as a result of mental disease or defect *or of intoxication*.

(emphasis added). Baer's counsel did not object to the modification of this statutory jury instruction.

After the court instructed on aggravating and mitigating factors, near the end of the penalty phase jury instructions, the following instruction was given:

> Intoxication 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 the requirements of [Indiana Code] 35-41-3-5.
>
> [Indiana Code] 35-41-3-5: It is a defense that the person who engaged in the prohibited conduct did so while intoxicated, only if the intoxication resulted from the introduction of a substance into his body: (1) without consent; or (2) when he did not know the substance might cause intoxication.

Baer's counsel did not object to this "voluntary intoxication" instruction as it was given at the penalty phase trial.

2. Failure to Object to Instructions Ineffective

"[T]he Eighth and Fourteenth Amendments require that the sentencer … not be precluded from considering, *as a mitigating factor*, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." *Lockett v. Ohio*, 438 U.S. 586, 604 (1978) (emphasis in original). Therefore, defense counsel in a death penalty case will fall deficient where he fails to object to removal of a mitigating factor from jurors'

consideration. *See id.* Baer argues that is precisely what happened here.

The Indiana Supreme Court separately evaluated defense counsel's failure to object to the modification of Indiana's statutory mitigating factor (removal of the words "or of intoxication" from Indiana Code 30-50-2-9(c)(6)) and inclusion of a "voluntary intoxication" instruction. Analyzing the modified mitigating factor instruction, the state court found that the trial judge could have believed that Baer failed to prove that he was intoxicated during the offense, and therefore the intoxication language in the mitigating factors was unnecessary. *Baer II*, 942 N.E.2d at 97. It also found that "[g]iven the link between ongoing methamphetamine usage and mental illness that repeatedly arose in expert testimony, the jury had an adequate opportunity to hear and act on this evidence even with the omission of 'or of intoxication' from the jury instruction." *Id.* at 107.

Separately, the state court concluded that defense counsel was not ineffective in failing to object to the voluntary intoxication instruction because it was a "correct statement of law and was relevant to determining whether Baer committed his crimes intentionally." *Id.* at 97 (internal emphasis omitted). Furthermore, the state court also determined that because the trial court told jurors they could consider "[a]ny … circumstances" in mitigation and that "there are no limits on what factors an individual juror may find as mitigating," jurors were instructed they could consider intoxication for purposes of mitigation.

In our view, it was unreasonable for the state court to analyze Baer's challenges to the jury instructions in isolation. *See Boyde v. California*, 494 U.S. 370, 378 (1990) (jury instructions "may not be judged in artificial isolation, but must be viewed in the context of the overall charge"). Further, "[t]he question … is not what the State Supreme Court declares the meaning of the charge to be, but rather what a reasonable juror could have understood the charge as meaning." *Francis v. Franklin*, 471 U.S. 307, 315–316 (1985). Here, a reasonable juror could have understood the complete penalty phase jury instructions as foreclosing evidence of voluntary intoxication from consideration for all purposes in sentencing, including barring voluntary intoxication as mitigating evidence.

Examining defense counsel's failure to object to jury instructions in the context of the entire charge illuminates the unreasonableness of the state court's rejection of Baer's first *Strickland* claim. First, the state court found that the trial court could have rejected Baer's counsel's request for adding the language "or of intoxication" to the statutory mitigation factor "because the evidence showed that Baer was not intoxicated at the time of the offense." *Baer* II, 942 N.E.2d at 97. Even on its own, this finding was clearly incorrect. The evidence of Baer's intoxication at the time of the crime was disputed, but there was evidence that he had used methamphetamine on the day of the crime and there was certainly ample evidence that the long-term effects of intoxication exacerbated Baer's psychosis and affected his capacity to conform his behavior. Two experts, Drs. Davis and Lawler, both testified that

Baer's drug use at the time of the crime likely impacted his behavior. This evidence was rebutted by Danny Trovig's testimony that he did not use methamphetamine with Baer on the morning of the crime and expert Dr. Evans's testimony that it was unclear whether Baer's blood contained any methamphetamine at the time of the crime. It was the jury's task to resolve the factual dispute. It would have been plainly erroneous for the trial judge to weigh the evidence in favor of the prosecution and determine that Baer was not intoxicated at the time of the crime. Therefore, this reason cited by the Indiana Supreme Court for finding that defense counsel's failure to object was not ineffective was unreasonable.

The state court also found that Baer's counsel was not ineffective because "the link between ongoing methamphetamine usage and mental illness … repeatedly arose in expert testimony," and the close tie between Baer's mental health evidence and intoxication gave the jury an "adequate opportunity to hear and act on this evidence even with the omission of 'or of intoxication' from the jury instruction." *Id.* at 107. However, this fails to consider the jury instructions as a whole. At the end of the instructional charge, the trial court expressly told jurors they could *not* consider intoxication unless it was involuntary. In light of the voluntary intoxication instruction, reasonable jurors would not have believed they could consider intoxication evidence as it related to Baer's mental health. Instead, it is likely jurors heeded the trial court's charge and refused to consider voluntary intoxication at all, including mental health evidence stemming from Baer's

voluntary drug use. It is unreasonable to assume jurors could catch the nuance that voluntary intoxication can be considered for mitigation, but not as evidence of criminal intent, without any clear instruction. Here, the instructions relating to mitigation did not mention the word "intoxication," as they should have under the statute. In fact, the only instruction addressing intoxication rendered Baer's use of methamphetamine and other drugs out of bounds for consideration for any purpose. The modification of the statutory mitigating factor worked in conjunction with the voluntary intoxication instruction to effectively exclude consideration of key mitigating evidence. Therefore, defense counsel's failure to object was constitutionally deficient.

Looking at the voluntary intoxication instruction, the state court reasoned that counsel was not ineffective for failing to object because it "was a correct statement of the law and was relevant in determining whether Baer *committed his crimes intentionally*." *Id.* at 97 (emphasis in original). Alone, this statement might seem reasonable, but in context, it is not. First of all, the challenged voluntary intoxication instruction was given at the penalty phase trial—*after* Baer had been convicted of intentionally committing his crimes. Intent was not challenged before the jury at the penalty phase; it was decided at the guilt phase. So, it is unlikely the jury understood that this instruction, given again at the penalty phase, was applicable only to the decided issue of intent. A reasonable juror would have understood this instruction as excluding evidence of voluntary intoxication for purposes of punishment,

specifically excluding voluntary intoxication as a mitigating factor.

Further, while this instruction was a correct statement of law, it was likely that the jurors' interpretation of this instruction was not legally correct. Jurors were unlikely to decipher that the voluntary intoxication instruction related only to proof of aggravating factors (which were not disputed by the defense) and did not plainly exclude voluntary intoxication evidence for all purposes, including in mitigation of sentencing. In fact, the jury had been primed to believe that voluntary intoxication could not impact sentencing. The prosecutor even told jurors in his closing argument that "self-induced drugs is[sic] no protection from law … we don't give anybody a pass who takes drugs on their own and then uses it as … some effort to make their sentence a little easier."

Furthermore, the voluntary intoxication instruction was not read with the aggravating factor instructions. This instruction was given at the end of the charge, well after aggravating and mitigating factor instructions, and soon before the jurors recessed to make a decision. There was no instruction or clarity provided that this instruction related only to proof of the aggravating factors, and the jury likely (and incorrectly) interpreted the instructions as a specific preclusion from considering Baer's voluntary drug use in deciding a just punishment. There was no reason for this instruction to be given at the penalty phase where the aggravating factors were not in dispute, and less so at the end of a lengthy instructional charge. So, Baer's trial counsel was

ineffective for failing to object, and the state court unreasonably found otherwise.

Finally, the state court concluded that any instructional error which may have inhibited consideration of Baer's intoxication by the voluntary intoxication instruction was cured by the court's instructions that there were "no limits on what factors an individual juror may find as mitigating," and Indiana's general instruction that "[a]ny … other circumstances" may be considered as mitigating.[2] *Id*. Looking at the state court's finding in light of the entire charge, we again find the state court's analysis unreasonable. While the "any other circumstance" and "no limits" instructions contradicted the instruction excluding voluntary intoxication evidence, the contradiction did not provide clarity. "Language that merely contradicts and does not explain a constitutionally infirm instruction will not suffice to absolve the infirmity." *Francis,* 471 U.S. at 322. Further, the general mitigation instructions were given earlier and separately from the voluntary intoxication instruction, making it unclear from the charge whether "any other circumstances" excluded voluntary intoxication. We are left with "no way of knowing which of the two irreconcilable instructions the jurors applied in reaching their verdict." *Id*. Therefore, we find that the state court's conclusion that the trial court's broad and generic mitigating

[2] The full "any other circumstances" instruction read: "any other circumstances, which includes the defendant's age, character, education, environment, mental state, life and background or any aspect of the offense itself and his involvement in it which any individual juror believes makes him less deserving of the punishment of death." (Tr. 2570–71.)

instructions cured the faulty instructions was not reasonable. Trial counsel's failure to object was deficient.

Prejudice is found where "[t]he result of a proceeding can be rendered unreliable, and hence the proceeding itself unfair, even if the errors of counsel cannot be shown by a preponderance of the evidence to have determined the outcome." *Strickland*, 466 U.S. at 694. Here, evidence of Baer's intoxication by methamphetamine use at the time of the offense, as well as his voluntary drug use for a large period of his life, was central mitigating evidence that the jurors should have considered. *See, e.g., Cone v. Bell*, 556 U.S. 449, 474–475 (2009) (finding that suppressed evidence of prior drug use may have been material to the jury's assessment of the proper punishment in a death penalty case, and finding a review of such evidence was warranted). Evidence of Baer's mental health and drug use were intertwined as the cornerstone of Baer's defense, and defense counsel's sole strategy for avoiding a death sentence was ensuring that the jury considered and gave effect to Baer's mental health and intoxication evidence. Yet, Baer's trial counsel failed to object to instructions that effectively blocked consideration of this crucial mitigating evidence. We find "there [was] a reasonable likelihood that the jury has applied the challenged instruction[s] in a way that prevent[ed] the consideration of constitutionally relevant evidence," *Boyde*, 494 U.S. at 380, and the mitigation evidence left unconsidered was central to Baer's claim for a penalty less than death. It was unreasonable for the state court to conclude otherwise.

B. Failure to Object to Prejudicial Prosecutorial Comments

While we need only find one reversible error to grant Baer's claim for habeas relief, we continue to consider Baer's second claim to address the troubling story of prosecutorial misconduct found in the transcript of this case. Baer asserts that his trial counsel was deficient for failing to object to Madison County Prosecutor Rodney Cummings's repeated improper and prejudicial comments. Our review of the record demonstrates a pattern of prosecutorial misbehavior that Baer's counsel deficiently failed to challenge. The refrain of prejudicial comments that went unaddressed by defense counsel or the trial court invited doubt into the reliability of Baer's penalty phase trial.

In evaluating prosecutorial misconduct under governing Supreme Court law, "[t]he relevant question is whether the prosecutors' comments so infected the trial with unfairness as to make the resulting conviction a denial of due process.' " *Darden v. Wainwright*, 477 U.S. 168, 181 (1986) (internal quotation omitted). We examine whether a prosecutor's comments were improper and whether in light of the entire record the defendant was denied a fair trial. *See United States v. Bowman,* 353 F.3d 546, 550 (7th Cir. 2003). In conducting this inquiry, we consider several factors, including the nature and seriousness of the misconduct; whether the comments were invited by the defense; the extent to which the remarks may have been neutralized by the court's instructions to the jury; the defense's opportunity to

counter any prejudice; and the weight of the evidence supporting the conviction. *Id.*

Baer challenges the following categories of comments by the prosecutor and argues that they should have generated objections by his attorneys at trial and on direct appeal: (1) prosecutor's misrepresentation of the law regarding the insanity defense and a guilty but mentally ill verdict; (2) prosecutor's false claim that no Indiana case authorizes the death penalty following a guilty but mentally ill verdict; (3) prosecutor's false claim that the legislature was about to abolish life without parole; (4) prosecutor's improper references to victim impact statements; (5) prosecutor's comments disparaging Baer, his counsel and his experts; and (6) prosecutor's use of personal opinion and facts not in evidence. We discuss only those categories in which we find the prosecutor's comments were most offensive and where Baer's counsel's failure to object was deficient. We look at comments made throughout the record and analyze the cumulative prejudice stemming from trial counsel's persistent failure to object.

1. Prosecutor's Misrepresentation of GBMI Law

Baer first argues that his trial counsel was deficient for failing to object to the prosecutor's consistent conflation of the standards of a legal insanity defense and guilty but mentally ill (GBMI). These comments were injected at the earliest phase of proceedings, voir dire. Baer asserts that the state court's finding that trial counsel's failure to object was a strategic decision (and therefore not deficient) was

an unreasonable application of *Strickland*, and we agree.

There is a clear legal difference between a jury's finding of "not responsible by reason of insanity at the time of the crime," Ind. Code § 35-36-2-3(3), and "guilty but mentally ill at the time of the crime," Ind. Code § 35-36-2-3(4). To be found legally insane, a defendant must suffer from "a severely abnormal mental condition that grossly and demonstrably impairs [his] perception," and renders him "unable to appreciate the wrongfulness of the conduct at the time of the offense." Ind. Code. 35-41-3-6. On the other hand, a verdict of GBMI is appropriate if a defendant suffers from an illness that "disturbs [his] thinking, feeling, or behavior and impairs [his] ability to function." Ind. Code 35-36-1-1. Another important distinction between an insanity defense and a GBMI conviction is that the latter has no effect on the defendant's conviction or sentence. Ind. Code 35-36-2-5(a). In a capital case, a jury may consider mental illness as a mitigating circumstance at the penalty phase trial, but it is not a defense to intent nor is it a defense to guilt.

In this case, Baer's counsel sought a guilty but mentally ill (GBMI) verdict.[3] He made clear that he was not seeking the insanity defense. However, from the earliest stages of voir dire, the prosecutor, Mr. Cummings, misstated the legal standard of a GBMI verdict and conflated it with an insanity defense. This

[3] Under Indiana law, Baer could not legally seek a GBMI verdict without having filed a notice of intent to raise the defense of insanity. Ind. Code § 35-36-2-3(4) (2008).

confusion continued from voir dire and into the prosecutor's closing statements.

In an early exchange at voir dire, Cummings led the following line of questioning in front of jurors and prospective jurors:

> Mr. Cummings: What do you think of this psychological evidence? Have a mental disease or defect so you should find me guilty but mentally ill?
>
> Mr. Davis: I never really give it much thought on that.
>
> Mr. Cummings: Do you think someone who can appreciate the wrongfulness of their conduct and knew what they were doing was wrong is guilty?
>
> Mr. Davis: I figure, you know … I look at he had the [sic] know he was doing it.
>
> Mr. Cummings: … then that's not someone that should get a pass.
>
> Mr. Davis: Yeah.
>
> Mr. Cummings: Or not somebody who you should find guilty but mentally ill?
>
> Mr. Davis: Yes.

(Tr. 469.)

Similar lines of questioning persisted throughout voir dire. Cummings also incorrectly suggested that a GBMI verdict was a defense or an excuse, and mental

illness could only be considered (even as mitigation) if Baer did not know right from wrong. For example:

> Mr. Cummings: They don't want him put to death, and if he's found guilty but mentally ill, it will be more difficult for the State of Indiana to execute [him].
>
> Ms. Brumbaugh: Yes.
>
> Mr. Cummings: And what are the kinds of things you think you should look at before you decide whether he is guilty but mentally ill?
>
> Ms. Brumbaugh: If he knew it was right or wrong Mr. Cummings: He could appreciate the wrongfulness. You are right on top of it. I mean I'm feeling good already. You understand the issues.

(Tr. 494.)

> Mr. Cummings: [referencing the facts of Baer's case] Is that the kind of crime someone should be executed for?
>
> Mr. Brown:[4] Yes, I believe that could be a circumstance, unless there are mitigating circumstances.
>
> Mr. Cummings: Okay and what … what do you mean by mitigating circumstances?
>
> Mr. Brown: Not having the ability to know right from wrong …

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[4] Mr. Brown served as the jury foreperson. DA App. 1503–05.

Mr. Cummings: Okay.

Mr. Brown: at the time the crime occurred.

Tr. 769.

In Cummings's closing argument, he reiterated to the jury that "[m]ental illness. Well, that's what you do when you have to admit you did it, but I got some excuse." In his rebuttal argument, he again told the jury that mental illness "did not cause [Baer] to do it, it did not keep him from understanding what he was doing was wrong; and, if that's the evidence, you should not find him guilty but mentally ill." Defense counsel did not object to these statements.

The Indiana Supreme Court found no ineffectiveness of Baer's counsel in failing to object to the prosecutor's inaccurate and misleading conflations of GBMI and legal insanity. The court noted that "during *voir dire* the prosecutor did often conflate the separate concept of GBMI and insanity by referring to whether Baer could appreciate the wrongfulness of his actions," but it held:

> It seems likely that defense counsel consciously chose not to object to the prosecutor's misstatements as part of their general strategy of letting the prosecutor discredit himself. At PCR, [Defense Counsel] Williams testified that he had known Prosecutor Cummings for years and knew he was capable of overstating his case to the jury. Trial counsel planned to correctly state the law to the jury when it was their turn, have the judge echo their statement through the jury instructions, and hope the

> jury would decide from the contrast that the prosecutor was not credible.

Baer II, 942 N.E.2d at 99–100 (internal record cites omitted).

We cannot agree with the state court's analysis, nor do we find it reasonable. Under *Strickland* a strategy must be reasonable. *See Campbell v. Reardon*, 780 F.3d 752, 763–64 (7th Cir. 2015). Planning to state the law correctly and "hop[ing] the jury would decide … that the prosecutor was not credible," *Baer II*, 942 N.E.2d at 100, cannot be considered "strategic" here, where the prosecutor was never discredited and defense counsel's failure to object simply conceded to the prosecutor's confusing and prejudicial remarks, which put his client's life at risk. Case law does not mandate deference to unreasonable defense tactics. *See Strickland*, 466 U.S. at 681.

Further, the confusion created between GBMI and the insanity defense was never clarified. At the end of his closing argument, defense counsel stated "for the hundredth time: We are not saying that Fredrick Michael Baer is insane. I said it to you in jury selection. [Defense Counsel] Lockwood said it to you. I've said it to you repeatedly … Mental disease or defect." But, the difference between the GBMI standard and the insanity standard remained murky. To the extent defense counsel tried to clarify, it was the prosecutor's word versus defense counsel's word. Furthermore, the court did not instruct on the difference between GBMI standard and the insanity defense standard, and defense counsel requested no such instruction. Under these circumstances, the

state court's finding that trial counsel was not deficient was unreasonable.

2. Comments Regarding Victim Impact

Also during voir dire, the prosecutor told potential jurors that the victim's family wanted Baer to be given the death penalty. Prosecutor Cummings told the jury:

> [Y]our [sic] the ones sitting here in this seat who have this man's life in their hand and they have to be the one who makes a decision. I know he should be executed but I don't want to be the one that has to do that. If everyone felt that way, then this family is not gonna receive justice that the law entitles them to.

(Tr. 379.) He also stated:

> It's not just the life. It's the family that was left behind … who no longer have a wife and a four-year-old child and you're gonna see those people in the courtroom throughout this entire trial and they're here seeking justice and the[y] believe that's the death penalty.

(Tr. 405.) Again, he told prospective jurors

> It's serious for everyone and it's serious for the community to receive justice for a person who commits a crime like this in our community. For this man and for his family and for the man and the child who survives these horrible crimes. They're going to want justice don't you think?

(Tr. 766.) After yet another mention of the victim's family, Baer's trial counsel asked for a bench conference, in the following sequence:

> Mr. Cummings: But you are going to be standing in for the people of our community, and they're going to ask you to take this very seriously. Not just because of him, and it's very important for our system to take this very seriously, but what about you know the husband and the other child, or the woman and her child that were murdered and their family and everyone in the community. Justice …
>
> Mr. Williams: Your Honor may we approach?
>
> [*At bench conference*:]
>
> Mr. Williams: Judge, he's come close a few times … He's come close a few times, Judge, to Mr. Cummings arguing victim impact. Now we're there. Because of that, we're asking for a mistrial. Indiana law is clear that you cannot argue victim impact. During the situation like this, he's come close a few times.
>
> Judge: I got to tell you the truth, I wasn't listening to what Rodney said. I don't know about it in terms of jury selection. You can argue victim impact in the trial, but I don't know about jury selection, but you're risking …
>
> Mr. Williams: The record is clear … well, I want the record to be clear that we're asking for a mistrial at this point based upon he's come close a few times, but now say you need to consider the impact on the husband, the other

> child, that is victim … that is nothing but a victim impact argument. Because of that, we're asking for a mistrial.
>
> Judge: I don't think it's a mistrial, but you need to clean it up and say I misspoke. I the Judge instructs you, you will follow the instructions.

(Tr. 801–02.) No "clean up" was made, though the prosecutor generally adhered to the judge's warning and stopped referring to the victims' family's desired punishment. However, at closing of the penalty phase, the prosecutor again argued, "We would not be here if that's not what the Clarks wanted." Again, Baer's trial counsel did not object. Baer now argues that his trial counsel's persistent failure to object constituted deficient performance. We agree.

In *Payne v. Tennessee,* 501 U.S. 808, 830 n.2 (1991), the Supreme Court held that the Eighth Amendment does not require a complete ban on victim evidence, but upheld that "admission of a victim's family members' characterizations and opinions about the crime, the defendant, and the appropriate sentence violates the Eighth Amendment."[5] *See also Bosse v. Oklahoma*, 137 S. Ct. 1, 2 (2016) (per curiam). Cummings's comments here,

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[5] Baer incorrectly argues that victim impact evidence is *per se* inadmissible, citing *Booth v. Maryland*, 482 U.S. 496 (1987) and *Bivins v. State*, 642 N.E.2d 928 (Ind. 1994). He relies heavily on the Supreme Court's analysis in *Booth*, and quotes that victim impact statements "can serve no other purpose than to inflame the jury and divert it from deciding the case on any relevant evidence concerning the crime and the defendant." 482 U.S at 508. However, *Booth* was modified, and greatly limited, by *Payne,* 501 U.S. 808.

informing the jury what the victims' family thought the appropriate penalty was for "justice" were therefore made in violation of the law. The law permits some forms of "victim impact evidence" in both Indiana and federal law, but the statements made by the prosecutor here, made without support and well before the jury was to consider an appropriate penalty, were not permissible. *See Payne*, 501 U.S. at 809 (holding that a state may conclude that a jury should have access to properly admitted victim impact evidence at the sentencing phase); *see also Bivins*, 642 N.E.2d at 955–57 (holding victim impact evidence is inadmissible in Indiana unless it is relevant to an issue properly before the court). Cummings's comments were made without any admissible evidence and were made well before the penalty phase. His assertions that the Clark family wanted the death penalty were highly objectionable and could not be considered properly admitted evidence. Yet, trial counsel failed to object.

The Indiana Supreme Court acknowledged that the prosecutor's comments were problematic. In addressing Baer's arguments for ineffective assistance of counsel and the prosecutor's victim impact statements the state court found "[i]nappropriate though these comments may have been, we do not think they rendered Baer['']s trial fundamentally unfair." *Baer II*, 942 N.E.2d at 102. We agree that Cummings's remarks were inappropriate. It follows that defense counsel's failure to object to these improper statements on the record was deficient. The state court also concluded, "[t]he prosecutor then told the jury he misspoke. This is the sort of rebuke to the prosecutor that the defense

counsel likely found helpful." *Id.* This finding is not supported by the record. In fact, Cummings never told the jury he misspoke and no "rebuke" was given. Accordingly, no follow up statement by the prosecutor or the judge remedied the prosecutor's victim impact comments or alleviated defense counsel's deficiency for failing to make an objection before the jury.

As to the state court's conclusory statement that prosecutorial comments regarding the victims' family's desired punishment did not render Baer's trial fundamentally unfair, we cannot consider these statements in isolation. While these comments alone might not have rendered Baer's trial fundamentally unfair, they constituted a piece of a broader pattern of problematic prosecutorial comments. We also note that the trial judge's comment ("I got to tell you the truth, I wasn't listening to what Rodney said.") exposes another issue that seems to have infected Baer's trial. The record reflects that the trial judge missed numerous opportunities to stop or clarify the prosecutor's statements and his absence was noticeable throughout trial.

3. Personal Opinions & Facts Not in Evidence

Baer argues that from early in the trial Prosecutor Cummings also began a pattern of introducing facts not in evidence, which directed jurors toward a recommendation of the death penalty. This included introducing insecurity in life without parole sentences. For example, in voir dire, Cummings addressed questions about whether or not life without parole may result in probation or release:

> Mr. Cummings: The state of the Law in Indiana right now is life without parole means life without parole … That does not mean it's not going to chance [sic]. Hardly a year doesn't go by where there isn't a bill in the legislature that is … that wants to change the law and allow parole at some point after so many years. No one in this room is not going to be able to tell you that's not going to change. What they're going to do is ask you to do is at least consider something other than life without parole, other than the death penalty, and you should consider it.

Tr. 920. There is nothing in the record that supported Cummings's statement that: "Hardly a year doesn't go by where there isn't a bill in the legislature that is … that wants to change the law and allow parole at some point after so many years." The law in Indiana was clear that life without parole does not permit parole, ever. There was no reason for speculation about the future of the law.

Later, at the penalty phase of Baer's trial, Cummings made multiple comments in closing argument that Baer now maintains were prejudicial, and to which he contends his counsel should have objected. Specifically, Cummings stated:

> [i]n my career in law enforcement in this community, we have had at least one hundred and twenty-five murders … of those … no murder even comes close to the murders committed by Fredrick Michael Baer. Not even

> among the three men who have been sentenced to death.

He continued, commenting that:

> The depravity, the horror, I would challenge you to think, have you ever heard of a murder you've heard in the news or seen in the news that was more heinous and more deserving of the death penalty than this case. You might say 9/11 because of the 3,000 or so people that died there. Maybe the Oklahoma City bombing because of the numbers. But think about the violence, the horrific nature of this crime …

(Tr. 2513–14.)

Cummings then recounted the murders in graphic detail and told the jury that Baer was using "the abuse excuse," and that Cummings's childhood was worse than Baer's childhood:

> My mother is not here. She was a prostitute who died of a drug overdose. I got convicted of a felony when I was eighteen and spent time in jail, and I had a worse childhood than he did. Maybe that's why I say, "Suck it up." If you lived in this community, you would know that because people back there already know it. I had a tougher childhood than he did, and I somehow managed to become a lawyer and got elected prosecutor in this community three times now. And me and some other people who overcome tough circumstances like that get

> sick to our stomach when people like that sit around and cry about how tough they had it …

(Tr. 2548–49.)

Finally, Cummings urged the jury to vote for the death penalty to justify the money that was being spent on the trial:

> We are not anxious to file the death penalty … the cost is unbelievable. Who knows what it's going to cost our community. Probably a half a million dollars. We've got people laid off. It's not something you do haphazardly. It's something you do to seek justice in a community.

(Tr. 2551.)

Baer argues now, and argued before the state court, that these arguments went unchallenged by his trial counsel and were not cogently argued on appeal, which demonstrates his counsel's professional deficiency. The state court rejected Baer's claim, and determined that the prosecutor's arguments were unobjectionable because defense counsel introduced the topics. *Baer II,* 942 N.E.2d at 102.

Defense counsel did mention that Baer's crime wasn't the "worst of the worst," that they had positive childhood upbringings that put them in a better position to make good choices than Baer, and that the death penalty was an unnecessary financial burden on the state. However, just because defense counsel cracked open the door to these subjects, it did not permit the prosecutor to drive a truck through it. The seditious and specific comments about the

prosecutor's own mother, the community's layoffs, and 9/11 were all not hard blows, but beyond the pale foul ones. *See United States v. Young*, 470 U.S. 1, 7 (1985). "The kind of advocacy shown by this record has no place in the administration of justice and should neither be permitted nor rewarded." *Id*. at 9. The unsupported details about Prosecutor Cummings's personal history were unnecessarily provocative and highly improper. We find it was unreasonable for Baer's trial counsel not to object.

4. Cumulative Prejudice

The Indiana Supreme Court held that, after analyzing each of Baer's raised challenges to his counsel's performance, that the prosecutor's comments "did not affect the outcome of Baer's trial." *Baer II*, 942 N.E.2d at 103. We find that the Indiana Supreme Court's conclusion was unreasonable under *Strickland* because the state court failed to analyze the aggregate prejudice of Prosecutor Cummings's improper comments, and looking at the cumulative effect of these comments it was unreasonable to conclude that Baer's case did not suffer prejudice. The prosecutor's misleading and problematic statements were consistent and extensive, so finding prejudice is not "one of several equally plausible outcomes," but it is nearly impossible that the comments did not impact the juror's decision to recommend the death penalty. *See Hall v. Washington*, 106 F.3d 742, 749 (7th Cir. 1997) ("Congress would not have used the word 'unreasonable' if it really meant that federal courts were to defer in all cases to the state court's decision."); *see also Martin v. Grosshans*, 424 F.3d 588, 591 (7th Cir. 2005).

Under Indiana law, an ineffective assistance of counsel claim can be dismissed easily upon the prejudice prong and the court may do so without addressing whether counsel's performance was deficient. *See Baer II*, 942 N.E.2d at 91 (citing *Wentz v. State*, 766 N.E.2d 351 (Ind. 2002)). The Indiana Supreme Court based its rejection of Baer's ineffective assistance of counsel claims largely on Baer's alleged failure to show prejudice. *Id*. So, the reasonableness of the state court's holding on prejudice is the heart of its denial of Baer's claims.

"The well-settled standard of review [is] that we are to consider the prosecutor's conduct not in isolation, but in the context of the trial as a whole, to determine if such conduct was 'so inflammatory and prejudicial to the defendant … as to deprive him of a fair trial.'" *United States v. Chaimson*, 760 F.2d 798, 809 (7th Cir. 1985) (quoting *United States v. Zylstra*, 713 F.2d 1332, 1339 (7th Cir. 1983)). The state court stated simply that it reviewed prejudice "taken in the aggregate." *Baer II*, 942 N.E.2d at 102. But, analysis of the opinion does not support its conclusion. While the state court underwent a lengthy analysis on several of the categories of prosecutorial misstatements for Baer's counsel's deficiency, there was no analysis on the cumulative impact of all of these comments. Instead, the state court's pithy analysis on prejudice states only that "these comments did not affect the outcome of Baer's trial." *Id.* at 103. There was no further reasoning or explanation.

Cummings's misstatements were prolific and harmful to Baer's case, yet Baer's trial counsel failed

to object at every opportunity. Cummings's comments began in voir dire, where his comments conditioned jurors to believe that Baer was a liar, that mental illness was a "copout" and "defense," that Baer should not receive a GBMI conviction because he appreciated the wrongfulness of his actions (improperly using the insanity defense standard), life without parole was at a high risk of providing release, and the Clark family wanted a death sentence. All these comments were made before the jury heard any evidence in Baer's case. Then, at the close of the penalty phase, Cummings again injected inflammatory comments and facts not in evidence, including remarks about Cummings's mother's prostitution, people being laid off to afford the state's pursuit of the death penalty, and Baer's crime being worse than any of the prior 125 murders Cummings had heard of in his career in law enforcement. Each of these comments made by Cummings carried the weight and authority of the state.

Like the state court, we cannot say with surety that had Cummings refrained from injecting inflammatory, incorrect, and unsupported statements into this trial, Baer would not be on death row. We acknowledge that this is not a case where the defendant is sympathetic or a case where the defendant's guilt is uncertain. This makes finding prejudice less intuitive. But, "a defendant need not show that counsel's deficient conduct more likely than not altered the outcome in the case." *Strickland*, 466 U.S. at 693. The standard for prejudice is "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is

a probability sufficient to undermine confidence in the outcome." *Id.* at 694. The taint of the prosecutor's comments here infected the entire trial, and erodes confidence in the outcome of this case.

The state court was unreasonable to determine otherwise. The cumulative effect of 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 to even trust that life without parole would remain a barrier to Baer's reentry into society. Further, suggesting that Baer might serve less than the entirety of his life in prison if sentenced to life without parole, as Cummings did by saying legislation was proposed almost yearly to permit release, provided the jury with the belief that Baer could be released on parole if he were not executed. "To the extent this misunderstanding pervaded the jury's deliberations, it had the effect of creating a false choice between sentencing [him] to death and sentencing him to a limited period of incarceration." *Simmons v. South Carolina*, 512 U.S. 154, 161–62, 164 (1994) (plurality opinion) (reversing death sentence and remanding for further proceedings because this "grievous misperception" "cannot be reconciled with our well-established precedents interpreting the Due Process Clause").

Can we be certain that Baer would not have been sentenced to death if given a fair trial and effective counsel? No. But, it is "reasonably likely" that without the prosecutor's injection of impermissible statements and incorrect law the jurors would not have recommended death. *See Strickland*, 466 U.S. at 696

("[A] court making the prejudice inquiry must ask if the defendant has met the burden of showing that the decision reached would *reasonably likely* have been different absent the errors." (emphasis added)). Our confidence in the outcome of Baer's sentencing proceedings was undermined by the prejudicial prosecutorial comments throughout Baer's trial. Because Baer's counsel failed to object to these comments, and to the misleading jury instructions, Baer was denied a fair trial and was prejudiced by his counsel's unprofessional errors.

III. CONCLUSION

We REVERSE the district court's denial of Baer's petition for a writ of habeas corpus with regard to the penalty phase of the trial. Baer's convictions stand.

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 15-1933
FREDRICK MICHAEL BAER,
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.
No. 1:11-cv-1168 — **Sarah Evans Barker,** *Judge*.

APRIL 4, 2018

ORDER

On February 23, 2018, respondent-appellee filed a petition for en banc rehearing in connection with the above-referenced case. On March 19, 2018, an Answer was filed by the petitioner-appellant to the petition for rehearing en banc. No judge in active service has requested a vote on the petition for rehearing en banc, and both judges on the original panel have voted to

deny the petition for rehearing.* The petition for rehearing is therefore DENIED.

* Circuit Judge Williams retired on January 16, 2018, and did not participate in the consideration of this petition for rehearing and rehearing en banc, which is being resolved by a quorum of the panel under 28 U.S.C. § 46(d).

Filed: 12/22/15

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

Fredrick Michael Baer,
Petitioner,

v.

Bill Wilson, Superintendent,
Respondent.

CAUSE NO. 1:11-cv-1168-SEB-TAB

Entry Discussing Motion for Certificate of Appealability

SARAH EVANS BARKER, JUDGE

Fredrick Michael Baer's ("Baer") petition for a writ of habeas corpus was denied. Review of Baer's habeas petition was governed by the Antiterrorism and Effective Death Penalty Act ("AEDPA"). *Lambert v. McBride,* 365 F.3d 557, 561 (7th Cir. 2004). The AEDPA "place[s] a new constraint" on the ability of a federal court to grant habeas corpus relief to a state prisoner "with respect to claims adjudicated on the merits in state court." *Williams v. Taylor,* 529 U.S. 362, 412 (2000).

The AEDPA was enacted "to reduce delays in the

execution of state and federal criminal sentences, particularly in capital cases and 'to further the principles of comity, finality, and federalism.'" *Woodford v. Garceau,* 538 U.S. 202, 206 (2003) (quoting *Williams,* 529 U.S. at 436). The requirements of AEDPA "create an independent, high standard to be met before a federal court may issue a writ of habeas corpus to set aside state-court rulings," *Uttecht v. Brown,* 555 U.S. 1, 10 (2007) (citations omitted) and reflect "the view that habeas corpus is a 'guard against extreme malfunctions in the state criminal justice systems,' not a substitute for ordinary error correction through appeal." *Harrington v. Richter,* 131 S. Ct. 770, 786 (2011) (quoting *Jackson v. Virginia,* 443 U.S. 307, 332 n.5 (1979)).

A habeas petitioner does not have the absolute right to appeal a district court's denial of his habeas petition, instead, he must first request a certificate of appealability. *See Miller–El v. Cockrell,* 537 U.S. 322, 335 (2003). A habeas petitioner is entitled to a certificate of appealability only if he can make a substantial showing of the denial of a constitutional right. *Id.* at 336; *Thomas v. Zatecky,* 712 F.3d 1004, 1006 (7th Cir. 2013); 28 U.S.C. § 2253(c)(2). Under this standard, a habeas petitioner must demonstrate that "reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further." *Miller–El,* 537 U.S. at 336 (quoting *Slack v. McDaniel,* 529 U.S. 473, 484 (2000)).

The AEDPA "modified a federal habeas court's role in reviewing state prisoner applications in order to

prevent federal habeas 'retrials' and to ensure that state-court convictions are given effect to the extent possible under law." *Bell v. Cone,* 535 U.S. 685, 693-694 (2002). To that end, the AEDPA forbids habeas relief on issues "adjudicated on the merits" in state court unless the state decision "was contrary to, or an unreasonable application of, clearly established Federal law" or "was 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)(1), (2). This deferential standard reflects the view that habeas corpus is " 'a guard against extreme malfunctions in the state criminal justice systems,' not a substitute for ordinary error correction through appeal." *Harrington v. Richter*, 562 U.S. 86, 102-03 (2011) (quoting *Jackson v. Virginia*, 443 U.S. 307, 332 n.5 (1979)).

In the present case, the Court found that the Indiana Supreme Court's treatment of the claims as to which Baer seeks a certificate of appealability was reasonable. The controlling authority was recognized and applied in a reasonable manner. Because these decisions were reasonable, "[they] cannot be disturbed." *Hardy v. Cross*, 132 S. Ct. 490, 495 (2011) (per curiam); *see also Harrington v. Richter*, 131 S. Ct. 770, 786 (2011) ("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.") (quoting *Yarborough v. Alvarado*, 541 U.S. 652, 664 (2004)).

Baer has not made the required substantial showing of the denial of a constitutional right to justify the issuance of a certificate of appealability.

Reasonable jurists would not find the Court's determination that Petitioner is not entitled to federal habeas corpus relief debatable or wrong. Reasonable jurists could not debate whether Baer's petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further. Accordingly, his petition for a certificate of appealability [dkt 50] is **denied.**

IT IS SO ORDERED.

Filed 12/18/14

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

FREDRICK MICHAEL BAER,
Petitioner,

v.

BILL WILSON, Superintendent,
Respondent.

CAUSE NO. 1:11-cv-1168-SEB-TAB

Entry Discussing Petition for Writ of Habeas Corpus

I. Introduction

This cause is before the Court on the petition of Fredrick Michael Baer ("Baer") for a writ of habeas corpus, on Respondent's response to such petition, and on Baer's reply. The record has been appropriately expanded.

Whereupon, the Court, having read and considered said pleadings and having also considered the expanded record, finds that Baer's petition for a writ of habeas corpus must be DENIED.

II. Background

Mr. Baer was convicted of murdering Cory and Jenna Clark, and of robbery, theft and attempted rape, for which crimes the jury recommended the death penalty and the trial court sentenced Baer to death on June 9, 2005. Baer's conviction and sentence were affirmed on direct appeal in *Baer v. State*, 866 N.E.2d 752 (Ind. 2007) (*Baer I*). Baer's second amended petition for post-conviction relief was denied and the Indiana Supreme Court affirmed that denial in *Baer v. State*, 942 N.E.2d 80 (Ind. 2011) (*Baer II*). The facts and circumstances surrounding Baer's offenses were succinctly summarized in the ruling on his direct appeal, as follows:

> At about nine o'clock in the morning of February 25, 2004, in a rural Madison County residential neighborhood near Lapel High School, Cory Clark, age twenty-four, stepped onto the porch of her home as the defendant drove by. He turned his vehicle around and drove back, stopped in her driveway, and got out. Later that day, she and her four-year-old daughter Jenna were found murdered in their home, Cory in a bedroom nude from the waist down, lying in a pool of blood, her throat lacerated, and Jenna in another bedroom with spinal injuries and a severely lacerated throat that nearly decapitated her. Cory's purse containing three to four hundred dollars was missing from the house. Later that morning, after changing his clothes, the defendant returned to work. The defendant admitted committing the murders. There is no evidence

> that Cory and Jenna Clark were anything other than total strangers to the defendant.

Baer I, 866 N.E.2d at 764-65.

Baer's claims in his direct appeal were the following: 1) the prosecutor improperly urged jurors to consider the effect that guilty but mentally ill ("GBMI") verdicts might have on a death sentence in relation to issues raised on appeal; 2) the trial court erred in admitting recorded telephone calls from the jail; 3) the trial court erred by failing to administer an oath to each panel of prospective jurors; and 4) prosecutorial misconduct and trial errors rendered the jury's recommendation of death unreliable.

On appeal from the denial of his post-conviction petition, Baer claimed that: 1) due to prosecutorial misconduct, he was denied a fair trial; 2) he was denied the effective assistance of counsel at trial; 3) he was denied the effective assistance of counsel on appeal; 4) the trial court's rejection of his guilty but mentally ill plea constituted structural error; 5) his severe mental illness reduced his culpability and precluded a death sentence; and 6) previously undiscovered evidence of his longstanding psychosis undermines confidence in and the reliability of his death sentence.

Baer's claims also include that his trial and appellate counsel in *Baer I* rendered ineffective assistance.

III. Standard of Review

A federal court may grant habeas relief only if the petitioner demonstrates that he is in custody "in

violation of the Constitution or laws . . . of the United States." 28 U.S.C. § 2254(a) (1996). Our Court of Appeals has explicated the standard to be applied in ruling on a petition seeking relief under this statute:

> When a state court has ruled on the merits of a habeas claim, our review is circumscribed by the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"). *See* 28 U.S.C. § 2254(d); *Harrington v. Richter,* 131 S. Ct. 770, 783–84, 178 L.Ed.2d 624 (2011). Under AEDPA, we may grant relief only if the state court's decision on the merits "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States" or "resulted in a decision that was 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)(1) and (2). Plainly stated, these are demanding standards.

Atkins v. Zenk, 667 F.3d 939, 943-44 (7th Cir. 2012); *See also Bailey v. Lemke*, 735 F.3d 945, 949 (7th Cir. 2013).

Review of Baer's habeas petition is governed by the AEDPA, as noted above. *Lambert v. McBride,* 365 F.3d 557, 561 (7th Cir. 2004). The AEDPA "place[s] a new constraint" on the ability of a federal court to grant habeas corpus relief to a state prisoner "with respect to claims adjudicated on the merits in state court." *Williams v. Taylor,* 529 U.S. 362, 412 (2000).

The AEDPA was enacted "to reduce delays in the execution of state and federal criminal sentences, particularly in capital cases and 'to further the principles of comity, finality, and federalism.'" *Woodford v. Garceau,* 538 U.S. 202, 206 (2003) (quoting *Williams,* 529 U.S. at 436). The requirements of AEDPA "create an independent, high standard to be met before a federal court may issue a writ of habeas corpus to set aside state-court rulings," *Uttecht v. Brown,* 555 U.S. 1, 10 (2007) (citations omitted) and reflect "the view that habeas corpus is a 'guard against extreme malfunctions in the state criminal justice systems,' not a substitute for ordinary error correction through appeal." *Harrington v. Richter,* 131 S. Ct. 770, 786 (2011) (quoting *Jackson v. Virginia,* 443 U.S. 307, 332 n.5 (1979)).

Based on controlling case law precedent, the following guidelines apply to an AEDPA analysis:

1. A state court's decision is deemed contrary to clearly established federal law if it reaches a legal conclusion in direct conflict with a prior decision of the Supreme Court or if it reaches a different conclusion than the Supreme Court based on materially indistinguishable facts. *Williams,* 529 U.S. at 404-08.

2. "A state court decision is contrary to clearly established law if it applies a legal standard inconsistent with governing Supreme Court precedent or contradicts the Supreme Court's treatment of a materially identical set of facts. A state court unreasonably applies Supreme Court precedent if the state court identifies the correct legal rule but applies it in a way that is objectively

unreasonable." *Bynum v. Lemmon,* 560 F.3d 678, 683 (7th Cir. 2009) (internal citations omitted).

3. "Clearly established federal law" means "the governing principle or principles set forth by the Supreme Court at the time the state court renders its decision." *Lockyer v. Andrade,* 538 U.S. 63, 71-72 (2003).

4. Under the "unreasonable application" prong of the AEDPA standard, a habeas petitioner must demonstrate that although the state court identified the correct legal rule, it unreasonably applied the controlling law to the facts of the case. *Williams*, 529 U.S. at 407; see also *Badelle v. Correll*, 452 F.3d 648, 653 (7th Cir. 2006). "[A] state-court factual determination is not unreasonable merely because the federal habeas court would have reached a different conclusion in the first instance." *Wood v. Allen*, 130 S. Ct. 841, 845 (2010). The Seventh Circuit "has defined 'objectively unreasonable' as lying well outside the boundaries of permissible differences of opinion and will allow the state court's decision to stand if it is one of several equally plausible outcomes." *Burgess v. Watters*, 467 F.3d 676, 681 (7th Cir. 2006) (international citations and quotations omitted).

5. "Under AEDPA, federal courts do not independently analyze the petitioner's claims; federal courts are limited to reviewing the relevant state court ruling on the claims." *Rever v. Acevedo*, 590 F.3d 533, 536 (7th Cir. 2010).

6. "The habeas applicant has the burden of proof to show that the application of federal law was unreasonable." *Harding v. Sternes*, 380 F.3d 1034, 1043 (7th Cir. 2004) (citing *Woodford v. Visciotti*, 537 U.S. 19, 25 (2002)).

7. With respect to § 2254(d)(2), state-court determinations of factual issues are "presumed correct" unless the petitioner can rebut the presumption "by clear and convincing evidence." 28 U.S.C. § 2254(e)(1); *Sprosty v. Buchler*, 79 F.3d 635, 643 (7th Cir. 1996). To overcome the presumption, a habeas petitioner must proffer clear and convincing evidence to show that a factual determination is "objectively unreasonable in light of the evidence presented in the state-court proceeding." *Williams v. Beard*, 637 F.3d 195, 204 (3rd Cir. 2011)(footnote omitted) (citing *Miller-El v. Cockrell*, 537 U.S. 322, 340 (2003)).

IV. Ineffective Assistance of Trial Counsel

A defendant has the right under the Sixth Amendment to effective assistance of counsel at trial. *Strickland v. Washington,* 466 U.S. 668, 687 (1984). To establish ineffective assistance of counsel under *Strickland,* the petitioner must show that counsel's performance was deficient and that the deficient performance prejudiced him. *Id.* For a petitioner to establish that "counsel's assistance was so defective as to require reversal" of a conviction or a sentence, he must make two showings: (1) deficient performance that (2) prejudiced his defense.

With respect to the first prong, "[t]he proper measure of attorney performance remains simply

reasonableness under prevailing professional norms." *Wiggins v. Smith,* 539 U.S. 510, 521 (2003) (quoting *Strickland,* 466 U.S. at 688). With respect to the prejudice requirement, the petitioner must show that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland,* 466 U.S. at 694; *see also Bell v. Cone,* 535 U.S. 685, 697-98 (2002). It is not enough for a petitioner to show that "the errors had some conceivable effect on the outcome of the proceeding." *Strickland,* 466 U.S. at 693. A petitioner must specifically explain how the outcome at trial would have been different absent counsel's ineffective assistance. *Berkey v. United States,* 318 F.3d 768, 773 (7th Cir. 2003). In the context of a capital sentencing proceeding, the relevant inquiry is "whether there is a reasonable probability that, absent the errors, the sentencer . . . would have concluded that the balance of aggravating and mitigating circumstances did not warrant death. In making this determination, a court hearing an ineffectiveness claim must consider the totality of the evidence before the judge or jury." *Strickland,* 466 U.S. at 695.

When the AEDPA standard is applied to a *Strickland* claim, the following analytical calculus emerges:

> Establishing that a state court's application of *Strickland* was unreasonable under § 2254(d) is all the more difficult. The standards created by *Strickland* and § 2254(d) are both "highly

> deferential," [*Strickland*] at 689, 104 S. Ct. 2052; *Lindh v. Murphy*, 521 U.S. 320, 333, n.7, 117 S. Ct. 2059, 138 L.Ed.2d 481 (1997), and when the two apply in tandem, review is "doubly" so, *Knowles*, 556 U.S. at __, 129 S. Ct. at 1420. The *Strickland* standard is a general one, so the range of reasonable applications is substantial. 556 U.S., at ___, 129 S. Ct. at 1420. Federal habeas courts must guard against the danger of equating unreasonableness under *Strickland* with unreasonableness under § 2254(d). When § 2254(d) applies, the question is not whether counsel's actions were reasonable. The question is whether there is any reasonable argument that counsel satisfied *Strickland's* deferential standard.

Harrington v. Richter, 131 S. Ct. at 788; *see also Murrell v. Frank,* 332 F.3d 1102, 1111-12 (7th Cir. 2003). "A failure to establish either prong results in a denial of the ineffective assistance of counsel claim." *Rastafari v. Anderson,* 278 F.3d 673, 688 (7th Cir. 2002) (citation omitted).

Baer advances multiple specifications of ineffective assistance of counsel during his trial and direct appeal: 1) trial counsel and appellate counsel failed to challenge the penalty phase jury instructions; 2) during *voir dire* trial counsel was ineffective by failing to explore with prospective jurors their ability to follow the law, and by impaneling jurors who would automatically vote for death and who were resistant to mitigation; 3) trial counsel failed to challenge the prosecutor's closing arguments on the basis of prosecutorial misconduct;

4) trial counsel failed to adequately prepare and present evidence supporting a sentence of less than death; and 5) appellate counsel failed in the selection and presentation of issues on direct appeal. We consider each claim in order below.

A. Counsel's Failure to Challenge the Penalty Phase Jury Instructions.

Baer claims that both his trial and appellate counsel failed to: (1) object to, or challenge on appeal, the omission of the words "or of intoxication" in a jury instruction identifying a statutory mitigating circumstance; (2) object to, or challenge on appeal, a jury instruction stating that only involuntary intoxication is a defense; (3) proffer an instruction to the jury that "life without parole" meant life without parole; and (4) object to instructions that referenced insanity.

Omission of the words "or of intoxication." Baer claims that his counsels' failure to object to, or challenge on appeal, the trial judge's omission of the words "or of intoxication" from jury instruction eleven on a statutory mitigating circumstance violated *Strickland* and *Lockett v. Ohio*, 438 U.S. 586, 604 (1978). A mitigating factor under the Constitution is Aany aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." *Id.* As former Justice O'Connor noted: "Evidence about the defendant's background and character is relevant because of the belief, long held by this society, that defendants who commit criminal acts that are attributable to a disadvantaged background, or to emotional and mental problems,

may be less culpable than defendants who have no such excuse." *California v. Brown*, 479 U.S. 538, 545 (1987) (O'Connor, concurring).

The Indiana Supreme Court determined that Baer's tendered instruction containing the intoxication reference, "could have been rejected by the trial court because the evidence showed that Baer was not intoxicated" when he murdered Cory and Jenna Clark. *Baer II*, 942 N.E.2d at 97.Baer claims that appellate counsel's failure to raise the issue relating to this jury instructionas constituting fundamental error also violated *Strickland*. The Indiana Supreme Court ruled that, "[g]iven the link between ongoing methamphetamine usage and mental illness that repeatedly arose in expert testimony, the jury had an adequate opportunity to hear and act on this evidence even with the omission of 'or of intoxication' from the jury instruction." *Id.* at 107 (citations to trial record omitted). Accordingly, trial counsel's omission did not constitute ineffective assistance, because the jury could have found mitigation based on the instruction as given, and appellate counsel's omission was not ineffective assistance as well for the same reason.

Jury instruction stating that only involuntary intoxication is a defense. Baer also contends that the jury was improperly instructed that voluntary intoxication was not a defense and that such instruction prevented jurors from considering intoxication as a mitigating factor. The Indiana Supreme Court rejected this argument, explaining:

> This instruction was a correct statement of the law and was relevant in determining whether

> Baer *committed his crimes intentionally*. As to mitigation, the court told jurors they could consider "[a]ny . . . circumstances" in mitigation and that "there are no limits on what factors an individual juror may find as mitigating." An objection to the instruction on voluntary intoxication as a defense to the crime would have been overruled at trial.

Baer II, 942 N.E.2d at 97 (citations omitted). The Indiana Supreme Court reviewed Baer's similar claim as to his appellate counsel and determined that "[l]ikewise, [attorney] Maynard's decision not to challenge the instruction that intoxication was not a defense to commission of any crime did not prejudice Baer's appeal because as we noted above it did nothing to muddy the waters by implying that intoxication could not be a mitigator." *Id.* at 107 (citations to trial transcript omitted). Baer fails in his petition before us to demonstrate that this determination was contrary to or an unreasonable application of federal law. 28 U.S.C. § 2254(d); *Williams*, 529 U.S. at 1519-22.

Failure to proffer a proper instruction as to the meaning of "life without parole." Baer next claims that trial counsel failed to tender an instruction properly apprising the jury that "life without parole" means life without parole or to challenge the trial court's failure to instruct the jury as to the meaning of "life without parole." As to the meaning of "life without parole," the Indiana Supreme Court held that the referenced phrase "consists of ordinary words that can easily be understood by the average person." *Baer II*, 942 N.E.2d at 97. The Indiana Supreme Court also

explained that Baer's appellate counsel's "decision not to challenge the court's failure to instruct that 'life without parole' really meant life without parole must be viewed against the fact that sentencing statutes do in fact change over time. The most a trial court could have told the jury was that the present statutes do not permit parole, something the jury obviously already knew." *Id.*, at 107 (footnote omitted) (internal quotation marks added). We are unable to fault this holding by the Indiana Supreme Court as an unreasonable application of the *Strickland* standard to Baer's claims of ineffective assistance of counsel. This claim thus falls short of establishing an entitlement to habeas corpus relief. *Murrell v. Frank,* 332 F.3d 1102, 1111 (7th Cir. 2003) (citing *Bell v. Cone,* 535 U.S. 685, 694 (2002)).

Failure to object to "insanity" reference. Baer further claims that his trial counsel rendered ineffective assistance by not objecting to penalty phase instruction number 22, which included the term, "insanity." The instruction stated that "the jury has the right to accept or reject any or all of the testimony of witnesses, whether expert or lay witnesses on the questions of insanity or mental illness." (Direct Appeal Appendix of Appellant at 1336). The Indiana Supreme Court ruled on this claim as follows: "We think it unlikely that most counsel would have worried much about this mention of insanity. The court properly instructed the jury on issues of GBMI and insanity. Baer's trial counsel told the jury repeatedly that they were not arguing that Baer was insane. The jury would not have inferred that Baer was claiming he was legally insane." *Baer II*, 942 N.E.2d at 97. The Indiana Supreme Court in

our view reasonably concluded that trial counsel did not render ineffective assistance by failing to object to penalty phase instruction number 22, thus removing a basis for habeas relief.

B. Counsel's Ineffectiveness During Voir Dire

Impaneling jurors who would automatically vote for death and failing to explore their ability to follow the law. In *Witherspoon v. Illinois,* 391 U.S. 510, 522 (1968), the Supreme Court held that "a sentence of death cannot be carried out if the jury that imposed or recommended it was chosen by excluding veniremen for cause simply because they voiced general objections to the death penalty or expressed conscientious or religious scruples against its infliction." The Supreme Court later clarified that "the proper standard for determining when a prospective juror may be excluded for cause because of his or her views on capital punishment" is "whether the juror's views would 'prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.'" *Wainwright v. Witt,* 469 U.S. 412, 424 (1985). In *Patton v. Yount,* 467 U.S. 1025, 1036 (1984), the Court held that the impartiality of a juror is a question of fact.

The Sixth Amendment requires that a state provide an impartial jury in all criminal prosecutions. "[D]ue process alone has long demanded that, if a jury is to be provided the defendant, regardless of whether the Sixth Amendment requires it, the jury must stand impartial and indifferent to the extent commanded by the Sixth Amendment." *Morgan v. Illinois,* 504 U.S.

719, 727 (1992). If "even one [partial] juror is empaneled and the death sentence is imposed, the State is disentitled to execute the sentence." *Id.* at 729. The Court in *Witt* noted:

> This standard likewise does not require that a juror's bias be proved with "unmistakable clarity." This is because determinations of juror bias cannot be reduced to question-and-answer sessions which obtain results in the manner of a catechism. What common sense should have realized experience has proved: many veniremen simply cannot be asked enough questions to reach the point where their bias has been made "unmistakably clear"; these veniremen may not know how they will react when faced with imposing the death sentence, or may be unable to articulate, or may wish to hide their true feelings. Despite this lack of clarity in the printed record, however, there will be situations where the trial judge is left with the definite impression that a prospective juror would be unable to faithfully and impartially apply the law . . . . [t]his is why deference must be paid to the trial judge who sees and hears the juror.

Witt, 469 U.S. at 424-426. The standard of review under the habeas statute posits that "the question is not whether a reviewing court might disagree with the trial court's findings, but whether those findings are fairly supported by the record." *Id.* at 434.

The Indiana Supreme Court considered the death penalty *voir dire* issues in *Baer II*. A decision contrary to the holdings in *Witherspoon* or *Morgan* did not

result from the Court's analysis. Thus, we address next the "unreasonable application" prong of § 2254(d)(1). The Indiana Supreme Court held as follows:

> During *voir dire,* juror Brown indicated that he would consider mitigating circumstances. (Trial Tr. at 769.) When Lockwood asked, "I want to have a chance with you for a vote of life. Do I have that chance with you," Brown responded "[y]es." (Trial Tr. at 790.) Juror Criss generally disfavored the death penalty but felt that it could be appropriate in some cases. (Trial Tr. at 658–59.) Further questioning revealed that juror Criss would base her decision on all the evidence. (Trial Tr. at 659–60.) Juror Lewis stated that he would decide the case based on the evidence. (Trial Tr. at 386.) Not even the most tortured reading of the transcript suggests that juror Lewis was an automatic death penalty juror.

Baer II, 942 N.E.2d at 94. The trial court's factual determinations are entitled to a presumption of correctness (28 U.S.C. § 2254(e)(1)) and it is clear that Baer has failed to rebut that presumption by clear and convincing evidence.

In finding no error, the Indiana Supreme Court also reasonably concluded that Baer's trial counsel had not rendered deficient performance. Baer's argument that the State Court's decision was based on an unreasonable determination of the facts in light of the evidence under § 2254(d)(2) also fails, given that the evidence considered by the Indiana Supreme Court included the extensive questioning of the jurors

as to their views on the death penalty and whether they would make their decisions based on the evidence. Regarding counsel's failure to explore with prospective jurors their ability to follow the law, the Indiana Supreme Court further noted that "Baer does not direct us to any particular place in the record where more questioning was required, and the record is full of defense counsel's thorough questioning on the potential jurors' ability to follow the law." *Id.* Baer has thus been unable to establish by clear and convincing evidence that the Indiana Supreme Court made an unreasonable determination of the facts in reaching its conclusion.

Impaneling jurors who were resistant to mitigation. In a similar vein, Baer also claims that trial counsel rendered ineffective assistance by allowing jurors resistant to mitigation to be impaneled. The Indiana Supreme Court reviewed this claim and held that:

> Counsel's discussion with Criss, Hartman, Zurcher, and Huett refutes the notion that they were mitigation resistant. (Trial Tr. at 660, 752–57, 784, 786–90, 919–21, 938–40, 973, 978, 980–81.) The juror questionnaires present multiple messages about the jurors' feelings on mitigation. Jurors Hartman, Huett, and Zurcher all checked a box stating: "Both a person's background and the nature and details of a particular crime should be considered in deciding appropriate punishment." Jurors Huett, Criss, and Hartman all checked a box on their questionnaires stating: "I would seriously

> weigh and consider the aggravating and mitigating factors in order to determine the appropriate penalty in this case." Those statements suggest that these jurors were open to mitigation. The jurors' answers during *voir dire* do not demonstrate that counsel were deficient in not challenging them for cause.
>
> Baer asserts that his trial counsel had a complete "failure to discuss issues of mitigation with prospective jurors." (Appellant's Br. at 54.) The record, however, shows just the opposite. Baer's trial counsel believed that mental illness was the strongest mitigating factor in this case and, consequently, they discussed mental illness extensively during *voir dire*. We conclude that trial counsel adequately conducted jury selection.

Baer II, 942 N.E.2d at 94-95. A decision contrary to the holding in *Morgan* and *Strickland* did not occur here. In addressing the "unreasonable application" prong of § 2254(d)(1), Baer's position that certain potential jurors were mitigation resistant is clearly contradicted by the record, as the Supreme Court ruled. The specific answers to direct questions posed on the juror questionnaires combined with the unequivocal responses of these jurors during *voir dire* demonstrate that there was neither an unreasonable application of *Morgan* and *Strickland* nor an unreasonable determination of the facts in *Baer II*.

C. Challenge to Prosecutorial Misconduct

In evaluating a claim of prosecutorial misconduct as a violation of the petitioner's due process right to a

fair trial, the legal issue to be resolved is whether the prosecutor's conduct "'so infected the trial with unfairness as to make the resulting conviction a denial of due process.'" *Darden v. Wainwright,* 477 U.S. 168, 181 (1986) (quoting *Donnelly v. DeChristoforo,* 416 U.S. 637, 643 (1974)).

> In evaluating prosecutorial misconduct under governing Supreme Court law, it is not enough that the prosecutor's remarks were "undesirable or even universally condemned. The relevant question is whether the prosecutors' comments so infected the trial with unfairness as to make the resulting conviction a denial of due process." As we pointed out in *Howard v. Gramley,* 225 F.3d 784, 793 (7th Cir. 2000), *Darden* sets forth several factors to inform this inquiry: "(1) whether the prosecutor misstated the evidence, (2) whether the remarks implicate specific rights of the accused, (3) whether the defense invited the response, (4) the trial court's instructions, (5) the weight of the evidence against the defendant, and (6) the defendant's opportunity to rebut." These factors, however, are not to be applied in a rigid manner, but should be used as a guide to determine whether there was fundamental unfairness that infected the bottom line. For that reason, we often have characterized the weight of the evidence as "the most important consideration."

Hough v. Anderson, 272 F.3d 878, 903 (7th Cir. 2001) (footnote and some internal citations omitted).

The specific comments by the prosecutor which Baer takes issue with that should have generated objections by his attorneys at trial and on direct appeal are the following: 1) the prosecutor's misrepresentation of the law regarding the insanity defense and a guilty but mentally ill verdict; 2) the prosecutor's false claim that no Indiana case authorizes the death penalty following a guilty but mentally ill verdict in light of *Harris v. State*, 499 N.E.2d 723 (Ind. 1986); 3)the prosecutor's false assertion that Baer refused to accept responsibility for his criminal acts;4)the prosecutor's comments about the meaning of "life without parole"; 5) the prosecutor's comments during *voir dire* inquiring of prospective jurors' as to their willingness to vote for the death penalty; 6) the prosecutor's remarks regarding the facts of the case that warranted a sentence of death; 7) the prosecutor's improper references to victim impact statements; 8) the prosecutor's disparagements during arguments of Baer and his legal defense team; 9) the prosecutor's remarks calling attention to Baer's courtroom demeanor; and 10) the prosecutor's improper arguments based on other Madison County murder convictions and sentences, the facts of which were, according to Baer, far worse than those in his case. We discuss each contention below.

The insanity defense and a guilty but mentally ill verdict. Baer claims that the prosecutor during his opening statement at trial erroneously equated a guilty but mentally ill verdict to insanity, to which error trial counsel failed to object. Specifically, Baer contends that the evidentiary standard for establishing guilty but mentally ill is less demanding

than the standard for proving insanity. Insanity requires, in part, a finding that the accused is unable to appreciate the wrongfulness of his actions, yet jurors were told, by the prosecutor that this case was about whether Baer could convince the jury that he did not know right from wrong. The Indiana Supreme Court addressed Baer's impugning of his defense counsel's strategic decision not to object, as follows:

> It seems likely that defense counsel consciously chose not to object to the prosecutor's misstatements as part of their general strategy of letting the prosecutor discredit himself. (PCR Tr. at 32.) At PCR, Williams testified that he had known Prosecutor Cummings for years and knew he was capable of overstating his case to the jury. (PCR Tr. at 32.) Trial counsel planned to correctly state the law to the jury when it was their turn, have the judge echo their statement of the law through the jury instructions, and hope the jury would decide from the contrast that the prosecutor was not credible. (PCR Tr. at 32.)
>
> Consistent with this approach, defense counsel correctly stated the law in closing argument:
>
> > Let me repeat this for the hundredth time: We are not saying that Fredrick Michael Baer is insane. I said it to you in jury selection. Mr. Lockwood said it to you. I've said it to you repeatedly. . . . Mental disease or defect.
>
> (Trial Tr. at 2105.) And the court's instructions correctly stated the law and made it clear that

> they took precedence over arguments by counsel on what the law was.
>
> (Trial Tr. at 1126, 1130–31, 2122, 2580.) It was not deficient for [defense counsel] Maynard to take a pass on this potential claim.

Baer II, 942 N.E.2d at 99-100. Thus, the Indiana Supreme Court recognized that trial counsel's failure to object reflected what appeared to be a deliberate trial strategy, augmented by Baer's trial counsel's correct statement of the law regarding guilty but mentally ill in his closing argument. In addition, the court's instructions made clear that, where there were inconsistencies, the court's instructions trump counsel's arguments. The Indiana Supreme Court concluded on these grounds that it was not ineffective for appellate counsel to fail to raise this issue in *Baer I*. We cannot quarrel either with this analysis or these conclusions by the Supreme Court. There simply was no unreasonable application of *Strickland* principles by the High Court.

Authorization of the death penalty after a guilty but mentally ill verdict. Baer claims that the prosecutor's misstatement of law created confusion over whether the state was authorized to execute a person who was found to be guilty but mentally ill, thereby violating the holding in *Caldwell v. Mississippi*, 472 U.S. 320 (1985).

Baer faults the failures of both his trial and appellate counsel to challenge the prosecutor's misstatement of the law. In *Caldwell*, the U.S. Supreme Court ruled that "it is constitutionally impermissible for a death sentence to rest on a

determination made by a sentencer who has been led to believe that the responsibility for determining the appropriateness of the defendant's death lies elsewhere." *Id.* at 328-29. A *Caldwell* violation occurs where the jury is affirmatively misled regarding its role in the sentencing process so as to diminish its sense of responsibility. *Romano v. Oklahoma*, 512 U.S. 1, 8-9 (1994). A petitioner can establish a *Caldwell* violation only if he is able to show that "the remarks to the jury improperly described the role assigned to the jury by local law." *Dugger v. Adams,* 489 U.S. 401, 407 (1989); *see also Fleenor v. Anderson,* 171 F.3d 1096, 1099 (7th Cir. 1999).

On direct appeal, the Indiana Supreme Court explicated its reasoning on this issue, as follows:

> [T]he perceived uncertain potential appellate affect of a verdict of guilty but mentally ill was first presented to prospective jurors in this case by the defense, not the State. With the acknowledged objective of seeking a verdict of guilty but mentally ill, the defense during voir dire sought to condition the jury to believe that there was no appreciable difference between that and a verdict of guilty, all the while hopefully anticipating that a significant difference may result on appeal. When challenged by the prosecutor at a bench conference for misleading the jury, the defense elected candidly to disclose its strategy to the jurors and explained its belief regarding the possible appellate affect of a verdict of guilty but mentally ill. The defendant cannot be heard on appeal to complain that the

> prosecutor committed misconduct by responding and presenting argument in order to resist the defense's strategy of gaining appellate advantage.

Baer I, 866 N.E.2d at 760-61 (footnote omitted). Baer again raised the issue relating to the prosecutor's misstatement of the law in the context of an ineffective assistance of counsel claim. In response, the Indiana Supreme Court again ruled:

> Baer's appellate ineffective assistance of counsel claim has much in common with his direct appeal claim about the prosecutor's statements and allegations about trial counsel on the same point. Prosecutors and defense counsel alike would have read our opinion in *Prowell v. State,* 741 N.E.2d 704, 717 (Ind. 2001), in which we observed that defendants formally found GBMI "normally receive a term of years or life imprisonment." We observed that many shared the view that death was inappropriate for a GBMI defendant. *Id.* at 718. We set aside Prowell's sentence partly on this basis.
>
> These judicial declarations explained why Baer's lawyers, from trial through PCR, have labored to obtain a GBMI conviction, and why the prosecutors have pushed back at each turn. It adequately explains why Maynard did no damage in not complaining about the prosecutor's statement to the jury.
>
> On another front, the prosecutor also discussed during *voir dire* the possibility that the

> legislature might one day change the law on life without parole and allow Baer to receive parole. (Trial Tr. at 920–21.) The prosecutor nevertheless correctly stated the current law on life without parole, as did trial counsel. (Trial Tr. at 428, 601, 920.) We rejected this claim on direct appeal because defense counsel initiated the discussion, so it was not improper for the prosecutor to respond. *Baer,* 866 N.E.2d at 760–61.

Baer II, 942 N.E.2d at 100 (footnote omitted). The prosecutor's comments to the jury did not diminish the jurors' role or responsibility in determining Baer's sentence. Here, the jurors were correctly apprised of the law relating to life without parole by both the prosecutor and defense trial counsel, thereby justifying appellate counsel's decision not to raise these issues on appeal. The Indiana Supreme Court's determination was not contrary to, nor was it an unreasonable application of, established federal law as determined by the Supreme Court. Once again, the record reflects that the Indiana Supreme Court "took the constitutional standard seriously and produced an answer within the range of defensible positions." *Mendiola v. Schomig,* 224 F.3d 589, 591 (7th Cir. 2000). There is no legal basis on which to set aside that decision in this habeas proceeding.

Baer's refusal to accept responsibility. Baer claims that the prosecutor told the jury that the reason for a trial was because Baer did not want to accept responsibility for his actions. The effect of this statement was to place Baer in a negative light and reduce his standing before the jury, which defense

counsel failed to ameliorate or correct by interposing an objection to the prosecutor's remark. The Indiana Supreme Court addressed the prosecutor's statement in the following manner:

> This statement did not deprive Baer of a fair trial. Baer's counsel repeatedly told the jury that Baer committed these crimes and was not disputing his innocence [sic]. The jury knew that Baer was not attempting to say that he was innocent. The prosecutor was seeking a guilty verdict and saw Baer's attempt to plead GBMI as an attempt to avoid full responsibility for his crimes. Baer's counsel acknowledged that Baer wanted a GBMI verdict because they thought it was Baer's best chance at avoiding the death penalty. This was part of the rhetorical struggle sensibly waged by both sides.

Baer II, 942 N.E.2d at 101. Clearly, the Indiana Supreme Court gave thoughtful consideration to this issue and determined that counsel's performance was not legally defective or deficient. This conclusion, combined with the directive from the U.S. Supreme Court that "[j]udicial scrutiny of counsel's performance must be highly deferential," *Strickland,* 466 U.S. at 689, makes clear that

> Baer's ineffective assistance of counsel argument based on the prosecution's statements regarding Baer's willingness to accept responsibility is a non-starter, because it is "at least minimally consistent with the facts and circumstances of the case or is one of several equally plausible outcomes." *Hennon v. Cooper*, 109 F.3d 330, 335 (7th Cir. 1997). Baer has thus shown no entitlement to habeas relief based on this claim.

The meaning of "life without parole." Baer asserts again that the prosecutor's statements to the jury as to the meaning of "life without parole" misled the jury when he speculated that the legislature may someday change the law to establish the option of life with parole. The fact that neither his trial nor appellate counsel challenged this remark, he says, exacerbated the level of prejudice he experienced. He continues by arguing that the state court "incorrectly stated that it had rejected this claim on direct review." The Indiana Supreme Court, in fact, did not address this as a prosecutorial misconduct claim in *Baer I*, only in *Baer II* where it explained that "[t]he prosecutor nevertheless correctly stated the current law on life without parole, as did trial counsel." *Baer II*, 942 N.E.2d at 98. We find no grounds for habeas relief based on these holdings or factual circumstances.

Comments during voir dire respecting prospective jurors' ability to vote for the death penalty. Baer includes among his numerous and varied claims of prosecutorial misconduct that went unchallenged by his counsel the allegedly inappropriate comments made by the prosecutor during *voir dire* regarding prospective jurors' ability to vote for the death penalty. The Indiana Supreme Court addressed this issue, as follows:

> Baer says his appellate lawyer should have cited as grounds for reversal the prosecutor's repeated inquiries to jurors whether they had the strength of character and the courage to impose the death penalty if they thought it was the appropriate sentence. He further asked them if they had the courage of their

> convictions to stand by that sentence if the trial court polled them after sentencing. Defense counsel's strategy was a mirror image: they attempted to draw out the prospective jurors who were predisposed to vote for the death penalty in order to strike them from the jury pool. The prosecutor's questions merely allowed him the similar opportunity to strike jurors who would not vote for the death penalty even if they thought it was warranted. Trial and appellate counsel both performed reasonably on this point.

Baer II, 942 N.E.2d at 101. The Indiana Supreme Court's analysis and resolution of the *voir dire* issues was not contrary to, or an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States. Again, we find no grounds for habeas relief in this context.

Comments regarding the facts of the case warranting a death sentence. Baer's next contention is that the prosecutor's argument to the jury that the facts required the death penalty violated the Eighth Amendment guarantee of individualized and reliable sentencing, which argument again went unchallenged both by his trial and appellate counsel. The Indiana Supreme Court addressed contention in its review:

> Baer also says Maynard should have appealed by citing the fact that the prosecutor told the jurors the facts of the crime and then told the jury that these facts warranted death. (Appellants Br. at 24.) Here, too, the defense and the prosecution both found elaborating on

> the facts useful in the struggle over whether the sentence should be death. Baer's counsel told the jury, "I'm telling you right now up front, he committed these crimes. He cut the throat of a mother. He cut the throat of her four-year-old daughter." (Trial. Tr. at 641.) When the trial judge questioned the extensive recitation of facts occurring during *voir dire,* Baer's counsel told the court that he wanted the jury to know the facts as part of a technique called "stripping."[6] (Trial Tr. at 875.) Baer's appellate counsel could not be ineffective for not raising this argument on direct appeal because trial counsel made a reasonable professional judgment to allow the jury to hear the facts of the case during *voir dire.*

Baer II, 942 N.E.2d at 101. The Indiana Supreme Court further explained:

> According to the testimony on PCR, "stripping" involves asking jurors their opinion about a hypothetical murder of a completely innocent person with no defenses. (PCR Tr. at 617–19.) The idea seems to be that those jurors who say only death is suitable for the hypothetical defendant would be struck for cause. (PCR Tr. at 617–19.) Baer's counsel apparently decided to use this technique, but used the facts of Baer's actual crimes rather than a hypothetical. (*See* Trial Tr. at 875–76.) Baer's trial counsel stated, "I'm happy to go on the record as saying that Mr. Williams and I have thought this case through and our approach through. It is the exercise of our independent

> professional judgment to take this tactic and that we have consulted with our client thoroughly about this." (Trial Tr. at 886.) Uncommon as such declarations are in capital cases, they seem based in fact.

Baer II, 942 N.E.2d at 101, n. 6. "[C]apital punishment [must] be imposed fairly, and with reasonable consistency, or not at all." *Eddings v. Oklahoma,* 455 U.S. 104, 112. The decision of Baer's trial counsel not to challenge these prosecutorial assertions and his appellate counsel's decision not to raise an appeal issue on this basis were not legally, factually or professionally deficient, given that both parties included an explanation of these specific facts in addressing a potential death sentence. *See Galowski v. Murphy,* 891 F.2d 629, 635 (7th Cir. 1989) ("Judicial scrutiny of counsel's performance must be highly deferential. It is all too tempting for a defendant to second-guess counsel's assistance after conviction. . . . Because of the difficulties inherent in the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy."), *cert. denied,* 495 U.S. 921 (1990). After a careful review of these issues, the Indiana Supreme Court again concluded that neither trial nor appellate counsels' performance was deficient. We have identified no basis on which to conclude otherwise.

Even if the decision by Baer's counsel not to challenge the prosecutor's statements and appellate

counsel's decision not to raise this claim on appeal were deemed constitutionally deficient, their failures to do so did not redound to prejudice Baer's legal interests. These statements did not result in a trial that produced a fundamentally unfair and unreliable result. Because counsels' failures to object did not prejudice Baer, Baer cannot prevail on this ineffective assistance of counsel claim.

Improper inclusion of victim impact statements. Baer claims that the prosecutor improperly referenced before the jury the victim impact statements and that, when those statements were made, his trial counsel failed to object. The use of victim impact evidence as such does not violate the Eighth Amendment. *See Payne v. Tennessee,* 501 U.S. 808, 827 (1991).[1] "The *Payne* Court recognized that only where such evidence or argument is unfairly prejudicial may a court prevent its use through the Due Process Clause of the Fourteenth Amendment." *Castillo v. Johnson,* 141 F.3d 218, 224 (5th Cir.), *cert. denied,* 524 U.S. 979 (1998). The Indiana Supreme Court explained:

> As for the prosecutor's declaration that the facts warranted death, the prosecutor told the jury during *voir dire* that the State was seeking justice for the family because they would be without a mother and a child. (Trial Tr. at 378,

[1] In *Payne,* the Supreme Court overruled its prior decisions in *Booth v. Maryland,* 482 U.S. 496 (1987), and *South Carolina v. Gathers,* 490 U.S. 805, concerning the admissibility of victim impact evidence in a death penalty proceeding.

> 405, 480.) During the penalty phase, he told the jury it should sentence Baer to death because that was what the family wanted. (Trial Tr. at 2551.) Inappropriate though these comments may have been, we do not think they rendered Baer's trial fundamentally unfair. The trial court ruled that the prosecutor's statements at *voir dire* did not constitute victim impact evidence but told the prosecutor not to get that close to the line again. (Trial Tr. at 803–04.) The prosecutor then told the jury he misspoke. This is the sort of rebuke to the prosecutor that defense counsel likely found helpful.

Baer II, 942 N.E.2d at 101–102. As to the statements made during *voir dire*, the record reflects that the attorneys addressed with the trial judge the statements made by the prosecutor, but that none of the jurors who were in the jury box when the statements were made were ultimately selected to serve as members of the jury panel, although the ones who were selected had been in the courtroom at the time and would likely have heard the prosecutor's statements. In any event, the trial judge opined that the comments made during *voir dire* were not, in fact, victim impact statements. (TR 864–867). The Indiana Supreme Court did not find that the prosecutor's comments referencing the victim's family "inflame[d] the jury's passions more than did the facts of the crime," *Payne,* 501 U.S. at 832 (concurring opinion of Justice O'Connor).

"The well-settled standard of review [is] that we are to consider the prosecutor's conduct not in isolation, but in the context of the trial as a whole, to

determine if such conduct was `so inflammatory and prejudicial to the defendant . . . as to deprive him of a fair trial.'" *United States v. Chaimson,* 760 F.2d 798, 809 (7th Cir. 1985) (quoting *United States v. Zylstra,* 713 F.2d 1332, 1339 (7th Cir.), *cert. denied,* 464 U.S. 965, 344 (1983)). In making this "fundamental fairness" determination, we must "consider[ ] the pertinent surrounding circumstances at trial," *Mahorney v. Wallman*, 917 F.2d 469, 473 (10th Cir. 1990), including the strength of the state's case relating to the petitioner's guilt, *Coleman v. Brown*, 802 F.2d 1227, 1237 (10th Cir. 1986), *cert. denied,* 482 U.S. 909 (1987), and the prejudice, if any, attributable to the prosecutor's comments, *Mahorney*, 917 F.2d at 472–73. If, however, the impropriety complained of "'effectively deprived the defendant of a specific constitutional right, a habeas claim may be established without requiring proof that the entire trial was thereby rendered fundamentally unfair.'" *Yarrington v. Davies*, 992 F.2d 1077, 1079 (10th Cir. 1993) (*quoting Mahorney*, 917 F.2d at 472).

Regarding the statements made during the penalty phase of Baer's trial, there may have been strategic reasons for counsel not to object during the prosecutor's rebuttal, for example, counsel may not have wanted to draw attention to the improper statements as the judge had already addressed the issue with both the prosecutor and the jury. The comments were made in response to arguments made by Baer's attorneys regarding a death sentence and the Clark family. As detailed above, the Indiana Supreme Court determined that these statements during the penalty phase did not render Baer's trial fundamentally unfair. *Baer II*, 942 N.E.2d at 102. We

cannot fault the Indiana Supreme Court's conclusions on this issue, either as to the comments made during *voir dire* or during the penalty phase; they simply do not satisfy the AEDPA standard set out in § 2254(d).

Disparagement, comments on courtroom demeanor and statements about other Madison County murder convictions and sentences. Baer's final set of claims faulting the prosecutor are three: 1) he personally disparaged Baer, his defense team and experts; 2) he commented on Baer's courtroom demeanor; and 3) he referenced other, more egregious Madison County murder convictions. As to each of these, defense counsel failed to object. The Indiana Supreme Court reviewed each of these claims at length, explaining:

> Many of the comments directed at Baer and his experts were fair comments on the evidence. The comments directed at Baer's attorney, when read in full, are hardly misconduct.
>
> To take a few examples, the prosecutor commented in his closing argument on Baer's demeanor: "You've got a better look at him then I do because I am over here, but he seems to be joking around and talking to people in the audience all the time." (Trial Tr. at 2061.) During the penalty phase, the prosecutor quoted trial counsel's opening statement at trial and asked the jury to consider whether Baer's crimes were among "the worst of the worst." (Trial Tr. at 2513.) Based on his experience, he thought that they were. (Trial Tr. at 2513.) He conceded that jurors might think the September 11 terrorist attacks or the Oklahoma City bombing were worse but asked

that they consider the actual facts of Baer's murders. (Trial Tr. at 2514.) The prosecutor then recounted the facts of the murders in graphic detail. (Trial Tr. at 2514.)8 During rebuttal, the prosecutor referenced the hardships he himself faced while growing up and the time he spent in jail to argue that Baer was using his own childhood as an excuse that should save him from the death penalty. (Trial Tr. at 2548–50.) He also briefly mentioned the cost while telling the jury that the State was not seeking the death penalty haphazardly. (Trial Tr. at 2551.) Each of these arguments was a response to arguments made by defense counsel. (Trial Tr. at 2540–41, 2525–30.)

Baer asserts that these various statements violated his Fifth, Sixth, and Fourteenth Amendment rights. To the extent that any comments directed at Baer, his counsel, or his experts were misconduct, any impact on the fairness of Baer's trial was minimal. Even if taken in the aggregate, these comments did not affect the outcome of Baer's trial.

Moreover, a prosecutor may respond to the allegations and inferences trial counsel makes even if the way he responds would otherwise be objectionable. *Cooper v. State,* 854 N.E.2d 831, 836 (Ind.2006). Baer's trial counsel first brought up the financial burden of execution. (Trial Tr. at 427, 2540–41.) Both of Baer's trial counsel talked about their own families and upbringings as a contrast to Baer's family and upbringing. (Trial Tr. at 2527, 2532, 2544–45.)

> Then his counsel argued that Baer committed his crimes because society failed him. (Trial. Tr. at 2532.) The prosecutor's comments about his own rough upbringing was a fair rebuttal to these points made by Baer's counsel.

Baer II, 942 N.E.2d at 102. The Indiana Supreme Court also noted:

> Contrary to Baer's argument, the prosecutor did not directly compare Baer to the perpetrators of the September 11 terrorist attacks or the Oklahoma City bombing. (Trial Tr. at 2513.) He was arguing that even though other crimes were worse, that should not preclude the jury from imposing the death penalty in Baer's case. (Trial Tr. at 2513.) Defense counsel also had a chance to respond to this perceived impropriety, which was their avowed strategy throughout the trial. (Trial Tr. at 2525–47; PCR Tr. at 32.)

Id. at n.8. It is not enough for a petitioner to show that "the errors had some conceivable effect on the outcome of the proceeding." *Strickland,* 466 U.S. at 693. A petitioner must specifically explain how the outcome at trial would have been different absent counsel's ineffective assistance. *Berkey v. United States,* 318 F.3d 768, 773 (7th Cir. 2003). Here, the Indiana Supreme Court thoroughly reviewed these claims through *Strickland*'s lens. Accordingly, Baer is not entitled to habeas relief pursuant to the "unreasonable application" prong of § 2254(d)(1).

In summary, we conclude based on the evidence and the context of each of the identified comments as

thoroughly and properly considered by the state court(s), along with their determination(s) that none of those identified comments by the prosecutor deprived Baer of a fair trial were in all respects well founded in law and fact. As in *Hough v. Anderson*, 272 F.3d 878, 904 (7th Cir. 2001), the Indiana Supreme Court focused in Baer's case on the evidence and the possibility of prejudice to the defense, ruling that "the prosecutor did not misstate the evidence, nor was a specific right, such as the right to remain silent, implicated." *Hough,* 272 F.3d at 903. Moreover, in some instances, the prosecutor's comments were directly responsive to arguments made by Baer's attorneys. The challenged comments were brief and measured, such that, when viewed in light of the overwhelming weight of the evidence against Baer,[2] and that "[j]udicial scrutiny of counsel's performance must be highly deferential," *Strickland,* 466 U.S. at 689, the state court's determinations of Baer's ineffective assistance of counsel argument in *Baer II* must stand. Those decisions by the Indiana Supreme Court were "at least minimally consistent with the facts and circumstances of the case [and] is one of several equally plausible outcomes." *Hennon v. Cooper*, 109 F.3d 330, 335 (7th Cir. 1997). Accordingly, Baer is not entitled to habeas relief based on his claim that his attorneys were ineffective

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[2] S*ee Swofford v. Dobucki*, 137 F.3d 442, 445 (7th Cir. 1996) ("While the prosecutor's comments might have been improper, we do not believe that they tainted Swofford's trial with unfairness in light of the weight of evidence against him.").

for not objecting to certain remarks by the prosecutor or for failing to raise such claims on appeal.[3]

D. Presentation of Evidence Supporting a Sentence Less Than Death.

Baer claims that his trial counsel was ineffective in the preparation and presentation of evidence in support of a sentence of less than death, by failing to: 1) seek a continuance; 2) properly investigate and present evidence in both the guilt and penalty phase; 3) properly counseling Baer to plead Baer guilty but mentally ill due to counsel's ignorance of the applicable law and his failure to adduce evidence in support of plea; 4) properly present guilt phase evidence; 5) adequately cross-examine the toxicologist; 6) object to the use of Dr. Masbaum's report; 7) investigate and present mitigating evidence; 8) properly instruct the jury; and 9) provide effective assistance to a degree and extent to generate the cumulative effect of ineffective assistance.

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[3] Although Baer contends, in part, that the Indiana Supreme Court's decision was incomplete because it did not include an analysis as to the cumulative effect of all the unobjected to prosecutorial misconduct to find prejudice under *Strickland*, that argument does not warrant a different disposition. Each of the individual claims was rejected. These claims, in the aggregate, do not change the analysis or compel a different conclusion. As explained by the Seventh Circuit in *Alvarez v. Boyd,* 225 F.3d 820, 825 (7th Cir. 2000), "If there was no error, or just a single error, there are no ill effects to accumulate and so a petitioner in such a case could not prevail on this theory [of cumulative error]." Baer has failed to demonstrate error of constitutional dimension in his habeas petition, negating any cumulative effect from the alleged errors he has cited.

Deficient performance is "measured against an objective standard of reasonableness, under prevailing professional norms." *Rompilla v. Beard,* 545 U.S. 374, 380 (2005) (citations omitted). In making this determination, the court considers "the reasonableness of counsel's conduct in the context of the case as a whole, viewed at the time of the conduct . . . ." *United States v. Lindsey,* 157 F.3d 532, 535 (7th Cir. 1998); *see also Hough v. Anderson,* 272 F.3d 878, 891 (7th Cir. 2001) (holding that the court must consider the totality of the evidence known to the judge). There is a strong presumption that "any decisions by counsel fall within a wide range of reasonable trial strategies." *Lindsey,* 157 F.3d at 535. "To state the obvious: the trial lawyers, in every case, could have done something more or something different. So, omissions are inevitable. But, the issue is not what is possible or 'what is prudent or appropriate, but only what is constitutionally compelled.'" *Chandler v. United States,* 218 F.3d 1305, 1313 (11th Cir. 2000) (quoting *Burger v. Kemp,* 483 U.S. 776, 794 (1987)). "There are countless ways to provide effective assistance in any given case." *Strickland,* 466 U.S. at 689. There comes a point where a defense attorney will reasonably decide that another strategy is in order, thus "mak[ing] particular investigations unnecessary." *Id.* at 691.

Continuance of Trial. Baer claims that trial counsel failed to seek a continuance of the trial or to interview Dr. Evans about a report that was provided to counsel twelve days before trial. In determining that it was not deficient performance for counsel to fail to seek a continuance, the Indiana Supreme Court explained:

> Lead counsel Jeffrey Lockwood began representing Baer just four months before jury selection. (Direct Appeal App. at 1155.) Baer believes lead counsel should have requested a continuance because Lockwood did not have ample time to develop and litigate a respectable trial strategy, pointing to the fact that former lead counsel Douglas Long was not certain he would be ready for the trial in April 2005 because Long felt as though he was working on the case alone. Baer contends that the mitigation specialist was overwhelmed with the records in the case and further explains that more time "may have avoided the problems during Dr. Davis's testimony where he could not locate a particular record during cross-examination and appeared disorganized." (Appellant's Br. at 53.)
>
> Neither of Baer's trial lawyers believed they needed a continuance. (Appellant's Br. at 52.) Baer acknowledges that his second attorney, Bryan Williams, who had been his counsel from the beginning, had extensive trial experience. (Appellant's Br. at 51.) Both lawyers, of course, met the requirements of *Ind. Criminal Rule 24(B)*, and Lockwood had a great deal of experience in capital trials. (PCR Tr. at 20, 51–52.)

Baer II, 942 N.E.2d at 93-94. This assessment of counsels' readiness for trial accurately reflects the factual circumstances before the trial commenced and thus, was not objectively unreasonable.

Investigate and present evidence in both guilt and penalty phase. Baer also claims that his trial counsel failed to investigate his mental health and background, which resulted in an incomplete presentation of evidence in support of a GBMI verdict and of mitigation, that trial counsel failed to obtain a comprehensive and independent assessment of Baer's mental health, and that the Indiana Supreme Court's assumption that trial counsel's presentation was adequate without making an assessment of whether counsel "actually demonstrated reasonable profession judgment" was an unreasonable application of *Strickland*. Our review causes us to conclude that the Supreme Court correctly applied the ineffective-assistance standards regarding counsel's investigation into and presentation of evidence during the mitigation stage of death-penalty cases. *See Cullen v. Pinholster,* 131 S. Ct. 1388 (2011); *Rompilla v. Beard*, 545 U.S. 374 (2005); *Wiggins v.Smith,* 539 U.S. 510 (2003); *Williams v. Taylor,* 529 U.S. 362 (2000). The Indiana Supreme Court explained:

> [A]ll three mental health experts who testified at the guilt phase discussed Baer's auditory hallucinations and all three experts explicitly stated that Baer was mentally ill. (Trial Tr. at 1779–80, 1785–86, 1869–74, 1886–87, 1894, 1909, 1926, 1929–30, 1945, 1947–53, 1973–74, 1978–79, 1992–93.) The lack of testimony by two lay witnesses who could corroborate the facts used by the experts does not establish ineffective performance.

Baer II, 942 N.E.2d at 95. The Indiana Supreme Court continued:

> Trial counsel Bryan Williams explained the defense team's decision:
>
> > We had Dr. Cunningham who had spent a substantial amount of time putting together the entire family history, how certain folks were related, incidents, and we thought at the time that he was probably in as good a position as anybody to explain the entire family history, and we thought he was a very good witness so we decided to use him exclusively.
>
> (PCR Tr. at 33.) Lead trial counsel Jeffrey Lockwood confirmed this assessment when he testified at the post-conviction hearing:
>
> > I did not feel that we could rely on any of the family members under all circumstances to be helpful to us. And beyond that, there weren't many other people. And so what we did was we tried to incorporate in Dr. Cunningham's examination all of the things that he uncovered about social history. I mean we did think about [calling other witnesses], but we had ample reason in my opinion to believe that we would not gain ground by calling family members.
>
> (PCR Tr. at 73–74.) Our review of the PCR transcripts leads us to the conclusion that there were reasons that an experienced

attorney might hesitate to call Baer's family members; it was professionally reasonable not to call additional witnesses.

This case is hardly a case where no mitigating evidence was assembled. Trial counsel hired a mitigation consultant, and because of her efforts, counsel knew a great deal about the defendant's background, upbringing, and prior mental health problems. (PCR Tr. at 26, 56–57, 61–62, 71.) Dr. Cunningham conducted interviews with many of Baer's family members and reviewed Baer's records (including school and mental health records) and notes from interviews with many people from Baer's past. (Trial. Tr. at 2253–54, 2264–65.) He testified about many potential mitigators including previous mental health disorders, diagnoses, and institutionalizations (Trial Tr. at 2266, 2311, 2313–24, 2374–82, 2387, 2400–03), Baer's extremely troubled family situation (Trial Tr. at 2284, 2288–93, 2337–45, 2347–72, 2409–2410), Baer's extensive history of substance abuse (Trial Tr. at 2284, 2328–32, 2390–93, 2403–05), and Baer's history of neurological problems (Trial Tr. at 2306–11, 2325–28, 2332–36). We find that Dr. Cunningham's testimony presented an abundance of potential mitigating factors to the jury.

As in *Woods v. State,* 701 N.E.2d 1208, 1226 (1998), Baer's argument is essentially that counsel should have done more. In all post-conviction proceedings, the petitioner will

> always be able to find some information from his past that was not presented to the jury. Dr. Cunningham's testimony included almost all of the potential mitigators that Baer asserts should have been better presented to the jury. We do not believe the result of Baer's trial would have been different had the witnesses who testified at the PCR hearing been called at trial.

Baer II, 942 N.E.2d at 98. In evaluating a claim of ineffective assistance, we defer to "any strategic decision the lawyer made that falls within the 'wide range of reasonable professional assistance,' even if that strategy was ultimately unsuccessful." *Shaw v. Wilson,* 721 F.3d 908, 914 (7th Cir. 2013) (quoting *Strickland,* 466 U.S. at 689) *cert. denied*, 134 S.Ct. 2818. This is not a case in which inadequate investigation or inattention in discovering or assessing possible mitigating evidence including Baer's mental health issues has been criticized by the state courts. *See Charles v. Stephens*, 736 F.3d 380, 389-90 (5th Cir. 2013). Nothing about counsels' performance reflected inadequate preparation or a lack of attention to available arguments at the guilt and penalty phases of Baer's trial. *See Mertz v. Williams*, 2014 WL 643661, *6 (7th Cir. Nov. 18, 2014). ("The mere fact that additional documents would have corroborated Mertz's testimony does not support a conclusion that his sentencing counsel performed deficiently by not introducing them.")

Baer's ineffective assistance claims distill to a single contention that his counsel did not present *enough* mitigating evidence. "[S]uch arguments come

down to a matter of degrees, which are ill-suited to judicial second-guessing." *Woods v. McBride*, 430 F.3d 813, 826 (7th Cir. 2005) (citing *Conner v. McBride*, 375 F.3d 643, 666 (7th Cir. 2004)). We hold that the Indiana Supreme Court's rejection of these criticisms was a reasonable application of *Strickland* to the facts of this case.

Failing to plead Baer guilty but mentally ill. Baer claims that because his trial counsel did not know the law regarding a guilty but mentally ill plea, he was not counseled effectively as to that possible option, which failure amounted to ineffective assistance. The Indiana Supreme Court reviewed this claim concluding as follows: "Baer has failed to show that trial counsel's knowledge of the law led to any confusion or mistaken understanding of a GBMI plea by the trial court" and that, in any event, Baer was not prejudiced because "[Judge Spencer] would not have acted otherwise had trial counsel proceeded the way Baer says they should have." *Baer II*, 942 N.E.2d at 93. We find no basis on which to conclude that this conclusion was incorrect or unfounded.

Penalty Phase Evidence. Baer again claims that counsel failed to present mitigating evidence that would have created a more accurate, complete and ameliorated view of him. We have previously examined this claim and perceive no need for any additional analysis. It was properly resolved by the Indiana Supreme Court.

Toxicologist Cross-Examination. Baer next claims that his counsel conducted an inadequate investigation to properly and effectively cross-examine Dr. Evans, and that the Indiana Supreme

Court's determination that Baer was not prejudiced thereby, because there was no difference between Dr. Evans's testimony at trial and during post-conviction proceedings, is based on an unreasonable determination of the facts and an unreasonable application of *Strickland*. The Indiana Supreme Court's opinion that trial counsel was not ineffective in these respects was explained as follows:

> Dr. Evans testified that there was no methamphetamine, amphetamine (methamphetamine's break-down product), or any other drug of abuse in the blood sample taken from Baer. (Trial Tr. at 1635.) He said that drugs in the blood would have broken down some in the thirteen months between when the blood was drawn and the testing. (Trial Tr. at 1639.) During cross-examination, Dr. Evans said that if Baer used 250 milligrams or more of methamphetamine within thirty-six hours of the blood draw, methamphetamine or amphetamine would have shown up in the blood analysis. (Trial Tr. at 1642–44.) He said that he did not know when Baer had last used methamphetamine and that if Baer had a small dose on the day of the crime he would not have been able to detect any methamphetamine or amphetamine in the blood sample. (Trial Tr. at 1643.) He did say Baer could not have taken a gram or more the day of the crime. The prosecution later used this testimony to argue that Baer was malingering about his drug abuse around the time the crime was committed. (Trial Tr. at 2070.)

> At post-conviction, Dr. Evans testified that the best approach is to have blood collected at or near the time of an incident and test it as soon as possible because drugs are chemicals which break down and blood is not the most conducive environment for preserving chemicals. (PCR Tr. at 490.) Ultimately, Dr. Evans could not say whether methamphetamine existed in Baer's blood at the time it was collected, only that there was no such substance in his blood when it was tested. (PCR Tr. at 490.)
>
> The upshot of all this is that Dr. [Evans's] testimony before the jury and his testimony at PCR were pretty consistent: if Baer had a very small amount of meth in his system on the day of the crime the tests might not have revealed it, but if he had an amount typical for users or abusers it would have. If anything, the extra effort by PCR counsel demonstrates that extra effort by trial counsel would have been fruitless.

Baer II, 942 N.E.2d at 95-96.

"In many instances cross-examination will be sufficient to expose defects in an expert's presentation. When defense counsel does not have a solid case, the best strategy can be to say that there is too much doubt about the State's theory for a jury to convict. And while in some instances 'even an isolated error' can support an ineffective-assistance claim if it is 'sufficiently egregious and prejudicial,' *Murray v. Carrier,* 477 U.S. 478, 496 (1986), it is difficult to establish ineffective assistance when counsel's overall performance indicates active and capable advocacy."

Harrington, 131 S.Ct. at 791*; see also Miller v. Secretary, Department of Corrections*, 2009 WL 2436075, at *11 (M.D.Fla. Jul. 31, 2009). Here, the record reflects that Baer's counsel was active, engaged, and informed relative to Dr. Evans's toxicology determinations. The post-conviction record amply supports the Indiana Supreme Court's findings. Nothing in this analysis or decision suggests that it was "contrary to" clearly established federal law as determined by the Supreme Court of the United States nor was it an unreasonable interpretation of the facts. Similarly, this conclusion by the Indiana Supreme Court that Baer had failed to establish a deficient performance by counsel was not the product of an unreasonable application of *Strickland*; the Indiana Supreme Court clearly "took the constitutional standard seriously and produced an answer within the range of defensible positions." *Mendiola,* 224 F.3d at 591. There is no basis for our acceptance of Baer's contentions in these respects.

Objection to Dr. Masbaum's report. Baer has procedurally defaulted on his claim that his trial counsel failed to object to the use of Dr. Masbaum's report thereby violating his Sixth Amendment right of confrontation under *Crawford v. Washington* and his Fifth Amendment right to be free from self-incrimination. Baer's submissions in this petition do not overcome the consequences of his procedural default.

Properly instruct the jury. We incorporate here our prior discussions of Baer's claim(s) of ineffective assistance in the context of the court's instructions to the jury. Further discussion is unnecessary here.

Cumulative effect of ineffective assistance. As a separate claim in his petition for a writ of habeas corpus, Baer argues that he was denied a fair trial both at the guilt and penalty phases, due to the cumulative effect of trial counsel's overall ineffectiveness, in violation of his constitutional rights. This catchall claim is repetitious of other portions of his petition, each of which we have fully discussed and resolved. These claims, whether considered individually or in the aggregate, do not warrant further review or different outcomes by us. *See Alvarez v. Boyd,* 225 F.3d at 825.

The Supreme Court's death penalty jurisprudence includes the recognition that "death is different," *Woodson v. North Carolina,* 428 U.S. 280, 303-304, (1976), and that this difference creates a unique "need for reliability on the determination that death is the appropriate punishment in a specific case." *Zant v. Stephens,* 462 U.S. 862, 884-85 (1983) (quoting *Woodson,* 428 U.S. at 303-04). "Congress has recognized that federal habeas corpus has a particularly important role to play in promoting fundamental fairness in the imposition of the death penalty." *McFarland v. Scott,* 512 U.S. 849, 859 (1994). Having conducted the thorough review as required of a habeas court, our conclusion is firm: Baer has in the course of his trial and appeals received all the due process and protections the Constitution provides.

E. Selection and Presentation of Issues on Direct Appeal.

Baer's final claims center on his right to effective assistance of counsel from his appellate counsel,

whose performance, he maintains, was deficient in various ways with respect to the prosecution of his direct appeal. The standard for judging a claim of ineffective assistance of counsel is consistent whether applied to trial or appellate lawyers. *Matire v. Wainwright,* 811 F.2d 1430, 1435 (11th Cir. 1987). Where a defendant claims that counsel failed to raise the correct issues on appeal, the issue the court must resolve on habeas review is whether appellate counsel failed to raise a significant and obvious issue without it being based on a legitimate strategic purpose. *Franklin v. Gilmore,* 188 F.3d 877, 884 (7th Cir. 1999). Accordingly, we examine the "trial court record to determine whether appellate counsel failed to present significant and obvious issues on appeal. Significant issues which could have been raised are then compared to those which were raised. Generally, only when ignored issues are clearly stronger than those presented will the presumption of effective assistance of counsel be overcome." *Mason v. Hanks,* 97 F.3d 887, 893 (7th Cir. 1996).

Baer has raised several specifications of appellate ineffective assistance in *Baer II* in the context of his selection and presentation of issues in his direct appeal, to wit: 1) not properly presenting prosecutorial misconduct claims; 2) not challenging the trial court's rejection of Baer's guilty but mentally ill plea; 3) not challenging the use of Dr. Masbaum's report; and 4) not challenging the jury instructions. We address each claim below:

Presentation of prosecutorial misconduct claims. We find no need to expand on our prior discussions in

this context by revisiting this claim in the appellate context.

Rejection of Baer's guilty but mentally ill plea. Baer claims that appellate counsel did not challenge the trial court's rejection of the GBMI plea because counsel erroneously believed that such a plea required a stipulation from the State, and that his failure to challenge Judge Spencer's rejection of the GBMI plea constituted deficient performance that greatly prejudiced Baer. The Indiana Supreme Court carefully and thoroughly reviewed this claim, along with the relevant statutes and the related facts, finding as follows:

> The instant contention largely rests on two statutes. Indiana Code § 35–36–1–1 considers a person mentally ill if he has "a psychiatric disorder which substantially disturbs [the] person's thinking, feeling, or behavior and impairs the person's ability to function." Indiana Code § 35–35–1–3 says, "The court shall not enter judgment upon a plea of guilty or guilty but mentally ill at the time of the crime unless it is satisfied from its examination of the defendant or the evidence presented that there is a factual basis for the plea."
>
> Baer's argument assumes that once a factual basis for a mental illness exists, a trial court is *required* to accept a GBMI plea. (*See* Appellant's Br. at 35–36.) The statute does not require a court to accept a GBMI plea once there is any factual basis for it; instead, it prohibits a court from accepting a GBMI plea without one. Indeed, we have held that a

defendant does not have an absolute right to a guilty plea and that a trial court may refuse to accept one in the exercise of sound judicial discretion. *Elsten v. State,* 698 N.E.2d 292, 295 (Ind.1998) (discretion not abused in rejecting a GBMI plea when two court-appointed physicians testified that the defendant was not mentally ill and a physician commissioned by the defendant disagreed).

Dr. Davis's and Dr. Lawlor's conclusions were not so "uncontradicted" as Baer claims. (Appellant's Br. at 35–36.) Dr. Davis thought that Baer qualified as mentally ill based on his methamphetamine addiction. (Direct Appeal App. at 1419.) Although Dr. Lawlor agreed, he did not think that "his psychiatric illnesses 'grossly or demonstratively impair[ed] his perceptions.'" (Direct Appeal App. at 1581.) The trial court also had before it a report from Dr. Groff's examination of Baer after he committed an unrelated crime shortly before the murders. (Trial Tr. at 222–23.) Dr. Groff expressly raised the possibility that Baer was malingering. (Direct Appeal App. at 1557–58.)

Based on this issue of fact, an appellate court would not have found that the trial court abused its discretion by rejecting Baer's GBMI plea and submitting the GBMI issue to the jury. We do think most appellate lawyers would have raised this contention, and they would have lost. There is not a reasonable probability that the outcome of Baer's appeal would have been different but for Maynard's failure to raise

> the issue. *See Strickland,* 466 U.S. at 694, 104 S.Ct. 2052.

Baer II, at 103-04.

"Experienced advocates since time beyond memory have emphasized the importance of winnowing out weaker arguments on appeal." *Jones v. Barnes*, 463 U.S. 745, 751 (1983). Therefore, absent contrary evidence, "we assume that appellate counsel's failure to raise a claim was an exercise of sound appellate strategy." *Roe v. Delo*, 160 F.3d 416, 418 (8th Cir. 1998) (quotation omitted). Here, the Indiana Supreme Court explained that even if Attorney Maynard had raised this claim on appeal, he would not have prevailed—that despite Baer's argument, the court-appointed mental health experts did not view Baer's mental illness as entitling him to the required judicial acceptance of his GBMI plea. Because we have no basis on which to conclude that the Indiana Supreme Court "unreasonably applie[d] [the *Strickland* standard] to the facts of the case," Baer's claim of ineffective assistance of counsel on appeal does not survive and certainly does not support habeas corpus relief based on appellate counsel's failure to challenge the trial court's rejection of Baer's GBMI plea in *Baer I. Murrell v. Frank,* 332 F.3d at 1111 (citing *Bell v. Cone,* 535 U.S. 685, 694 (2002)).

Not challenging the use of Dr. Masbaum's report. Baer next asserts that appellate counsel's failure to raise the claim that he was denied his right to confrontation through references to Dr. Masbaum's report during cross examination of the mental health experts, Dr. Davis and Dr. Lawlor, violated *Crawford*

v. Washington, 541 U.S. 36 (2004). Specifically, Baer claims that the report was prepared following examination of Baer in an unrelated case and should not have been used during this trial in the manner described. *Crawford*'s prohibition applies to the admission of testimonial hearsay unless its use is predicated on a showing both as to the unavailability of the declarant to testify and that a prior opportunity by defendant to cross-examine the declarant had been afforded. In reviewing this claim, the Indiana Supreme Court reviewed the holding in *Crawford*, in the context of Baer's trial:

> Giving Baer the benefit of the doubt as to the form of defense counsel's objections, a defendant has a right to be confronted with witnesses against him in a criminal prosecution. The Confrontation Clause of the Sixth Amendment effectively codified existing common law, which prevented a trial court from admitting testimonial hearsay statements unless the State showed both that the declarant was unavailable to testify and that the defendant had a prior opportunity to cross-examine the declarant. *Crawford,* 541 U.S. at 53–54, 124 S.Ct. 1354.
>
> Although the U.S. Supreme Court did not comprehensively define the breadth of testimonial statements in *Crawford,* it did describe a core class of testimonial statements that included (1) *ex parte* in-court testimony such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial

> statements that declarants would reasonably expect to be used prosecutorially; (2) extrajudicial statements contained in formalized testimonial materials, affidavits, depositions, prior testimony, or confessions; and (3) statements made under circumstances that would lead an objective witness to reasonably believe that the statement would be available for later use at a trial. *Id.* at 51–52, 124 S.Ct. 1354.

Baer II, 942 N.E.2d at 106. There followed a detailed analysis culminating in the Court's determination that Baer was not prejudiced because the use of the report was, at most, harmless error. *Id.* Specifically,

> Dr. Lawlor had diagnosed Baer with a personality disorder but testified that he thought Baer could appreciate the wrongfulness of his actions at the time of the crimes. (Trial Tr. at 1864, 1871.) He recounted receiving reports about Baer having auditory hallucinations and ADHD as a child. (Trial Tr. at 1869–71.) Dr. Lawlor also gave a detailed account of the crimes as Baer described them to him, although he did not think that the voices Baer claimed to have heard during the murders constituted auditory hallucinations. (Trial Tr. at 1874–86.) In response to defense counsel's questioning, Dr. Lawlor stated that he did not think Baer was malingering, or faking, a mental illness. (Trial Tr. at 1893.)
>
> When the State asked Dr. Lawlor about Baer's voices, Dr. Lawlor maintained that Baer's description did not indicate a split personality

and that Baer did not mention anything about a voice called "Super Beast." (Trial Tr. at 1904–05.) Defense counsel quickly objected on grounds of relevance when the prosecutor asked Dr. Lawlor to review a report from Dr. Masbaum, but the trial court overruled the objection to the extent that the report was relevant to the issue of malingering. (Trial Tr. at 1905–07.) According to Dr. Masbaum's report, Baer once tried to present himself to Masbaum as having a split personality, telling Dr. Masbaum that he was talking to "Fred" on one day but talking to "Michael" on another. (Trial Tr. at 1907.) Dr. Lawlor conceded that Baer could have been malingering, to Dr. Masbaum if not to him, and that this information was inconsistent with his diagnosis because "typically, the discrete personalities aren't aware of each other's existence." (Trial Tr. at 1908.)

Dr. Davis then testified that he considered Baer mentally ill to the level of having a mental disease or defect. (Trial Tr. at 1929.) According to Dr. Davis, Baer admitted committing the murders and described having auditory hallucinations, hearing voices, and having a raging, out-of-control part of himself that "came out" on the day of the murders. (Trial Tr. at 1922.) Baer had called this raging part of himself Super Beast. (Trial Tr. at 1923.) Dr. Davis also reviewed Baer's childhood experiences with depression, custody issues, hospitalization for suicide attempts, prescription drug use, and illicit drug abuse.

(Trial Tr. at 1925–28.) Finally, he discussed the clinical link between drug abuse and psychosis, one that might materialize in some patients but not in others. (Trial Tr. at 1929–37, 1940–43.)

In response to the State's questioning, Dr. Davis stated his impression that the phrase "Super Beast" did not refer to a voice Baer heard but rather to the "raging part of him." (Trial Tr. at 1977.) After the prosecutor and Dr. Davis speculated over whether Super Beast originated from a tattoo on Baer's left forearm, the prosecutor asked Davis to read passages from Dr. Masbaum's report suggesting that Baer had heard voices since he was a child that appeared to come from a Winnie the Pooh doll. (Trial Tr. at 1978–80.) After the prosecutor asked Dr. Davis if Baer thought that voices telling him to kill his brother came from the Winnie the Pooh doll, trial counsel objected, "Mr. Puckett is having a pretty good time, but I can't cross-examine that report. . . . He's made fun of my client for claiming that he heard Winnie the Pooh when that's not what the report said, so I'm going to object to this. This is not funny." (Trial Tr. at 1979–80.)

***

Regardless of whether the trial court should have admitted this evidence under *Crawford,* Maynard's decision not to present this issue on appeal did not prejudice Baer because admitting it for this limited purpose constituted harmless error. The jury heard

> evidence from two experts that Baer was mentally ill to the level required by Ind. Code § 35–36–1–1. (Trial Tr. at 1908–09, 1929, 1992–93.) It heard evidence that Baer suffered from ADHD and depression as a child, that he was hospitalized, that he used prescription drugs, and that he eventually started huffing and abusing illicit drugs. (Trial Tr. at 1925–28.) It heard evidence that chronic drug abuse could damage a person's mental abilities to the point of near-retardation and could exacerbate any preexisting mental illnesses. (Trial Tr. at 1929–37, 1940–43.) It is unlikely that a jury unconvinced by this evidence would have entered a GBMI verdict or recommended a sentence of life if only the State had not cross-examined Dr. Lawlor and Dr. Davis mentioning Dr. Masbaum's report.

Baer II, 942 N.E.2d at 105-06. This thorough review and analysis by the Indiana Supreme Court culminated in its reasonable conclusion that Baer was not prejudiced by references to Dr. Masbaum's report. First, the Indiana Supreme Court noted that the use of the report was very limited. Second, the Indiana Supreme Court reasonably concluded that there was not a substantial likelihood that the substance of the report prejudiced Baer in light of other expert opinion determining that Baer was mentally ill, based on various biographical details of his life, such that as a child he had ADHD and depression for which he had been hospitalized, and that he had a history of illicit drug use that likely adversely effected his mental abilities and medical conditions. This analysis included a reasonable application of the controlling

federal standard of review for a claim of ineffective assistance under *Strickland*, and also supported a reasonable finding of harmless error. *See Brecht v. Abrahamson*, 507 U.S. 619, 638 (1993). The Indiana Supreme Court clearly understood and conscientiously applied the constitutional standard that produced a ruling that fell within the range of defensible conclusions. Accordingly, we find that Baer is not entitled to habeas corpus relief based on this claim. *Atkins v. Zenk*, 667 F.3d 939, 944 (7th Cir. 2012).

Not challenging the jury instructions. We need not dwell further on this claim beyond the thorough discussions given it in this opinion in other contexts.

V. Conclusion

Our methodical review of the issues raised by Petitioner Baer discloses no instance or aspect of the decisions of the Indiana Supreme Court in which the Court "appl[ied] a rule that contradicts the governing law . . . [or made] a decision that involve[d] a set of facts materially indistinguishable from a Supreme Court case that arrives at a different result." *Williams,* 529 U.S. at 405-06. We have examined the issue before us as to whether Baer has successfully demonstrated that the Indiana Supreme Court, despite identifying the correct rule of law, nonetheless unreasonably applied those principles to the facts of the case. In *Wiggins v. Smith*, 539 U.S. 510, 523 (2003), the Court explained its role in reviewing ineffective assistance of counsel claims in these terms: to "conduct an objective review of [counsel's] performance, measured for 'reasonableness under prevailing professional norms,' *Strickland,* 466 U.S.

at 688, which includes a context-dependent consideration of the challenged conduct as seen 'from counsel's perspective at the time.' *id.,* at 689" (omitting parallel citations). Such a review has occurred here. Accordingly, we hold that: (1) AEDPA deference applies to each of the specifications of deficient performance by Baer's counsel raised here; (2) the "contrary to" prong of ' 2254(d)(1) is not implicated in any fashion by the circumstances of this case; and (3) the Indiana Supreme Court's decisions did not embody an "unreasonable application of" clearly established federal law. Similarly, Baer has failed to establish by clear and convincing evidence that the factual findings by the Indiana courts were unreasonable.

By well established precedent, it is clear that "only a clear error in applying *Strickland's* standard would support a writ of habeas corpus," *Holman v. Gilmore,* 126 F.3d 876, 8882 (7th Cir. 1997). No such error occurred here. Accordingly, no relief is available.

Apart from the deference owed to the Indiana Supreme Court under the AEDPA, Baer has failed to show that he was prejudiced by the performance of his trial or appellate counsel in any respect. *See Bieghler v. McBride,* 389 F.3d 701, 708 (7th Cir. 2004)(noting that capital habeas petitioner's failure to "demonstrate that additional mitigating evidence would have made any difference, let alone that counsels' investigation into these matters fell below objective standards of professional conduct" did not support claim of ineffective assistance of counsel) (citing *Conner v.McBride,* 375 F.3d 643, 662-63 (7th Cir. 2004)). His arguments fall decidedly short of

supporting a grant of habeas relief on these claims as well.

Baer's conviction has withstood all levels of challenge in the Indiana courts. Thus, a presumption of constitutional regularity attaches to his conviction. *See Farmer v. Litscher,* 303 F.3d 840, 845 (7th Cir. 2002) (citing *Parke v. Raley,* 506 U.S. 20, 29-30 (1992)); *Milone v. Camp,* 22 F.3d 693, 698-99 (7th Cir. 1994) ("Federal courts can grant habeas relief only when there is a violation of federal statutory or constitutional law").[4]

AA defendant whose position depends on anything other than a straightforward application of established rules cannot obtain a writ of habeas corpus." *Liegakos v. Cooke,* 106 F.3d 1381, 1388 (7th Cir. 1997). Based on such established rules, Baer is not entitled to relief, and his petition for a writ of habeas corpus must be denied. Judgment consistent with this Entry shall now issue.

VI. Certificate of Appealability

The petitioner is allowed 30 days from the date of entry of Final Judgment in this cause to seek a certificate of appealability as to the issues he may specify. Be advised that this deadline does not extend the deadline for filing a notice of appeal.

IT IS SO ORDERED.

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[4] Obviously, this is not a presumption related to the AEDPA, but is "the 'presumption of regularity' that attaches to final judgments, even when the question is waiver of constitutional rights." *Parke v. Raley,* 506 U.S. at 29 (citing *Johnson v. Zerbst,* 304 U.S. 458, 464, 468 (1938)).

IN THE
INDIANA SUPREME COURT

No. 48S00-0709-PD-362

FREDRICK MICHAEL BAER,

Appellant (Petitioner below),

v.

STATE OF INDIANA,

Appellee (Respondent below).

Appeal from the Madison County Superior Court,
No. 48D01-0805-PC-126
The Honorable Thomas Newman Jr., Special Judge

January 26, 2011

Shepard, Chief Justice.

A jury found Fredrick Michael Baer guilty of two counts of murder and sentenced him to death. In doing so, it rejected his request for a verdict of guilty but mentally ill. We affirmed on direct appeal. Baer then sought post-conviction relief, which the trial court denied. On appeal from that denial he argues

ineffective assistance of trial and appellate counsel, that his death sentence violates the Eighth Amendment of the U.S. Constitution, and that the trial judge erred in rejecting his guilty but mentally ill plea. We affirm the post-conviction court.

Facts and Procedural History

Fredrick Michael Baer saw Cory Clark outside her duplex as he passed in his car, turned around, and went back to her home. He entered Clark's apartment after asking to use the phone to call his boss. He intended to rape Cory Clark, but after exposing her vagina decided against it for fear of contracting a disease. Realizing she could identify him, he cut her throat with a foldable hunting knife. Upon seeing what Baer was doing, four-year-old Jenna Clark ran from the room, but Baer caught her and cut her throat to avoid her identifying him. (PCR Ex. E at 2.)

Baer was charged with two counts of murder and various other offenses. The court entered pleas of not guilty on all counts. Baer subsequently moved to withdraw his not-guilty pleas and instead to plead guilty but mentally ill (GBMI). The prosecution objected. The court appointed two mental health experts to examine Baer. After considering their reports, the court rejected Baer's proposed GBMI plea, reasoning that although both experts concluded Baer was mentally ill, neither report sufficiently stated he was mentally ill at the time of the crime. (Trial Tr. at 172–73, 223.)

Both the prosecution and the defense made clear their intended strategies during jury selection. The defense previewed its case as one in which it would

only argue for the jury to find Baer mentally ill, not that he had not committed the crimes. (Trial Tr. at 369–70.) In response to the prosecutor's concerns raised in a bench conference, Baer's counsel also stated that the appellate consequences of a GBMI verdict coupled with a death sentence were unclear. (Trial Tr. at 435.) This was the first time either side raised this issue. Baer v. State, 866 N.E.2d 752, 760 (Ind. 2007).

Throughout jury selection, the prosecutor referred to these appellate uncertainties, saying for example, "The law is not clear in this state on whether we can execute somebody who's guilty but mentally ill. The jury makes a finding of guilty but mentally ill. It may happen. It may not. Our Supreme Court has not decided that case yet." (Trial Tr. at 649.) He frequently stated or implied that finding Baer guilty but mentally ill would mean concluding that he did not know the wrongfulness of his actions, which is not an element of GBMI but is required for insanity. (Trial Tr. at 386, 494–95, 924–26, 937, 941–43.) The prosecutor also told the jury that the legislature might someday make parole available to defendants sentenced to life without parole, though he made clear that this was not presently the case. (Trial Tr. at 920–21.) Finally, in qualifying jurors for a death penalty trial, he inquired about the ability to sentence Baer to death very directly, asking one juror, "Do you have the strength to tell that man, that defendant, the guy with the striped shirt on . . . you killed these two people and you should forfeit your life for that. Something you could do?" (Trial Tr. at 568.)

During trial, Baer's defense focused almost entirely on convincing the jury he suffered mental illness at the time of the crime. All the expert witnesses who testified, whether called by the defense or the court, concluded that Baer suffered from mental illness. (Trial Tr. at 1779, 1902, 1909, 1929–30; PCR App. at 345.) In closing argument, the prosecution compared mental illness to self-defense as an "excuse" to evade responsibility for Baer's actions and continuing to mention wrongfulness as something which the jury should consider. (Trial Tr. at 2055, 2113–14.)

The jury found Baer guilty on all counts and rejected his GBMI request. During the penalty phase, it considered the aggravating and mitigating circumstances and recommended a death sentence, finding that the State had proven all five charged aggravators and that they outweighed the mitigating circumstances. (PCR App. at 328.) The court sentenced Baer to death for the two murders.

Baer's appeal asserted (1) prosecutorial misconduct; (2) erroneous admission of recorded telephone calls from jail; (3) trial court failure to comply with proper procedures in handling prospective jurors; and (4) inappropriateness of the death sentence. Baer, 866 N.E.2d at 755. Baer's prosecutorial misconduct claims focused on the prosecutor's attempt "to condition the jury to consider the effect that guilty but mentally ill verdicts might eventually have on the execution of a death sentence." Id. at 755–56. Extensively quoting the record, we concluded that because the defense first raised any appellate uncertainty the prosecutor did not act

improperly in his "responding and presenting argument in order to resist the defense's strategy of gaining appellate advantage." Id. at 761.

Baer's subsequent challenge in post-conviction totaled 103 allegations. (PCR App. at 329–39, 521–23.) In short, these covered the following areas: prosecutorial misconduct, structural errors in the trial judge's rejection of Baer's GBMI plea and failure to correct the alleged prosecutorial errors, ineffective assistance of appellate counsel, ineffective assistance of trial counsel, cruel and unusual punishment based on Indiana's method of execution, and a challenge to Baer's death sentence based on being mentally ill. (PCR App. at 329–39.)

Baer presented the PCR court with additional expert and lay testimony about his mental illness. This included a youth counselor who worked with him at a school for juveniles with criminal histories, an ex-wife who had known him most of his life, and a fellow prisoner, all of whom testified about his mental illness, notably his auditory hallucinations. (PCR Tr. at 86–89, 136, 154, 182, 187.) None of these witnesses had testified at trial. The PCR court did not consider the prisoner's testimony because rather than "previously undiscovered evidence" under Ind. Code § 35-50-2-9(k) (2008), he was simply a witness about whom Baer did not tell defense counsel. (PCR App. at 349–50.) The PCR court determined that the other witnesses largely duplicated the evidence presented at trial, thus failing to undermine confidence in the jury's rejection of the GBMI verdict. (PCR App. at 345.)

In rejecting Baer's prosecutorial misconduct, structural error, and method of execution claims, the PCR court found these arguments foreclosed because he had not raised them at trial or on direct appeal. (PCR App. at 340, 348.) As for Baer's claim of ineffective assistance of trial and appellate counsel, the PCR court reasoned that the PCR evidence about mental illness failed to undermine confidence in the verdict or Baer's sentence. (PCR App. at 341–48.)

The PCR court rejected Baer's constitutional challenge to the death penalty as applied to mentally ill defendants, saying it was "procedurally defaulted" in light of the fact that the U.S. Supreme Court's precedent has not changed since Baer's 2005 trial and Baer had made this argument first on PCR. (PCR App. at 351–52.) Baer argued that Kennedy v. Louisiana, 554 U.S. 407 (2008), opened the door to such a challenge, but the court rejected this argument because Kennedy involved the Court's rejection of the death penalty for a class of crimes, not a class of criminals as in prior relevant cases. (PCR App. at 351–52.)

Because this is an appeal from post-conviction determination on a sentence of death, we have exclusive jurisdiction. Ind. Post-Conviction Rule 1(7). In post-conviction proceedings, we will reverse a trial court's findings and judgment only upon a showing of clear error in a factual determination or error of law. Helton v. State, 907 N.E.2d 1020 (Ind. 2009).

I. Guilty But Mentally Ill

Baer's various GBMI strategies sought an alternative verdict available when a defendant

suffers from mental illness or deficiency but nonetheless remains capable of discerning right from wrong. Ind. Code § 35-36-2-3 (2008). "Mentally ill" for these purposes means "having a psychiatric disorder which substantially disturbs a person's thinking, feeling, or behavior and impairs the person's ability to function; 'mentally ill' also includes having any mental retardation." Ind. Code § 35-36-1-1 (2008).

The difference between guilty and guilty but mentally ill does not compel a difference in sentencing. Ind. Code § 35-36-2-5(a) (2008 & Supp. 2010). When a court enters a verdict of GBMI, the defendant must be psychiatrically evaluated before sentencing. Ind. Code § 35-36-2-5(b). Then, when the Department of Correction receives the defendant as a prisoner, he is further evaluated and treated in a manner as indicated by the mental illness. Ind. Code § 35-36-2-5(c). This treatment may be done by the Department of Correction or the Division of Mental Health and Addiction, either during imprisonment or during defendant's probation. Ind. Code § 35-36-2-5(c) & (d).[5]

Baer never argued that he was insane or that he was otherwise not guilty. (Appellant's Br. at 14.) Judge Spencer having declined to accept Baer's

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[5] If a mentally ill prisoner is diagnosed while incarcerated rather than on a GBMI verdict, the Department of Correction must provide for the prisoner's care. Ind. Code § 11-10-4-2 (2008). Baer had received "very substantial antipsychotic treatment since he's been incarcerated" aimed at his schizophrenia symptoms. (PCR App. at 278.) "In fact, almost as soon as he was incarcerated, they started treating him with antipsychotic medications." (PCR App. at 290.)

pretrial plea of guilty but mentally ill, Baer's lawyers emphasized to the jury that he was mentally ill. The guilt phase of Baer's trial thus determined only which of the two possible versions of guilty verdicts should be entered.

The trial court's decision to decline Baer's plea of GBMI was available as an issue for direct appeal. It is therefore barred as a freestanding claim in post-conviction. Whether it reflects on the effectiveness of his lawyers we address below.

II. Baer's Trial Counsel Did Not Perform Ineffectively.

To establish a violation of the Sixth Amendment right to effective assistance of counsel, the defendant must show that (1) counsel's performance fell below an objective standard of reasonableness based on prevailing professional norms; and (2) there is a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different. Strickland v. Washington, 466 U.S. 668, 687 (1984). When analyzing such claims, we begin with the presumption that counsel was effective. Autrey v. State, 700 N.E.2d 1140 (Ind. 1998).

Although the performance prong and the prejudice prong are separate inquiries, failure to satisfy either prong will cause the claim to fail. French v. State, 778 N.E.2d 816 (Ind. 2002). 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. Wentz v. State, 766 N.E.2d 351 (Ind. 2002).

As with other aspects of Baer's petition for post-conviction relief, the performance of his lawyers is implicated in a good many of the 103 identifiable contentions. We have considered all of these, but discuss only those that seem the weightiest.

A. Timely and Comprehensive Mental Health Evaluations

Baer asserts that his "trial counsel failed to obtain timely and comprehensive evaluations in a case where mental health was the pivotal issue." (Appellant's Br. at 44.) Baer's theory is that he suffers from "cognitive impairments, substance-induced psychotic disorder, and schizotypal, paranoid, and borderline personality disorders . . . which substantially impaired his ability to conform his conduct to the law at the time of the crime and are extreme mental disturbances[,]" and the jury was unaware that Baer had brain damage and the "biopsychosocial causes of his many personality disorders." (Appellant's Br. at 44.) Counsel asserts that there is a "reasonable likelihood that, had the jury heard the evidence, it would have found Baer GBMI or, at a minimum, voted against death." (Appellant's Br. at 47.)

The State, by contrast, points to trial counsel's substantial work investigating, preparing, and presenting evidence of Baer's background and mental health. (Appellee's Br. at 51–53.) It says Baer's post-conviction evidence is substantially cumulative of the testimony and opinion presented at trial, his experts were qualified and judiciously chosen, and that these experts used appropriate and reliable methodology. (Appellee's Br. at 51–53.)

Trial counsel hired Dr. George Parker to render a psychiatric evaluation to determine whether Baer had any existing symptoms of mental illness and ascertain what treatment was needed. (Trial Tr. at 1774–75.) Dr. Parker found that Baer "had a history of some significant drug issues[,]" including methamphetamine, cocaine, inhalant dependence, and marijuana abuse. (Trial Tr. at 1778.) These issues began in his adolescent years and continued into his adult years. (Trial Tr. at 1778.) Dr. Parker noted that Baer's substance abuse "may well have caused significant changes to [his] brain." (Direct Appeal App. at 1551.)

At trial, Dr. Mark Cunningham discussed some of Baer's family background and certain risk factors. He discussed Baer's prenatal and perinatal difficulties including his mother having cancer while pregnant, drinking while pregnant, and Baer being malnourished during the first three to six months of his life. (Trial Tr. at 2277, 2305–06, 2308–11.) Dr. Cunningham detailed alcohol abuse in Baer's family history including by his parents during his childhood. He testified extensively about Baer's family, including the number of men his mother bore children with, the multiple family members who were victims of domestic violence, and the many who had psychological disorders. (Trial Tr. at 2288–92, 2341–44, 2347–68.) Dr. Cunningham also testified at length about what he referred to as "toxic parenting." (Trial Tr. 2347–68.) He detailed Baer's poor school performance and struggles with ADHD as well as several head injuries suffered during his youth. (Trial Tr. at 2316–28.) Cunningham also extensively discussed Baer's abuse of inhalants, alcohol,

methamphetamine, and other substances. (Trial Tr. at 2328–41, 2390–92.) Trial counsel did not directly ask whether Baer met Indiana's statutory definition of mental illness or the statutory mitigators related to his mental health, but Cunningham did say that Baer was "extraordinarily damaged." (Trial Tr. at 2410.)

At post-conviction, Dr. Philip Harvey, a neuropsychologist with a specialty in psychosis, performed a thorough neuropsychological examination on Baer and determined that there was no evidence Baer was malingering. (PCR Tr. at 275–76.) He diagnosed Baer with persisting dementia, most likely the result of his substance abuse, including methamphetamine and inhalants. (PCR Tr. at 274–78.) Dr. Harvey diagnosed Baer with substance-induced psychosis, a disorder not dependent on Baer taking drugs, but rather persisting long after the discontinuation of substance abuse. (PCR Tr. at 289.) Baer contends the "combination of these illnesses meant Baer was under an extreme mental or emotional disturbance at the time of the crime which affected his ability to conform his conduct." (Appellant's Br. at 45.)

Dr. George Savarese, a licensed clinical social worker, also testified at PCR. He explained that Baer's mental illnesses were the result of years of abuse, saying that Baer lacked a strong father-figure and experienced an unduly enmeshed relationship with his mother and a turbulent relationship between his parents—all which led to an emotional defense

mechanism known as "splitting."[6] (PCR Tr. at 377, 387–88, 391, 436.) Dr. Savarese concluded that Baer was under extreme mental/emotional disturbance at the time of the crime, but could understand his conduct though "he could not control his behavior." (PCR Tr. at 444.)

Baer cites Prowell v. State, 741 N.E.2d 704, 714 (Ind. 2001), for the notion that "failure to retain an appropriate mental health expert in a timely manner and provide that expert with essential information is ineffective assistance of counsel." (Appellant's Br. at 44.) This is obviously correct, but unlike Prowell's lawyers, Baer's counsel did more than "rely on the good graces of the Circuit Court judge not to put [Baer] on death row." Prowell, 741 N.E.2d at 715. Baer's counsel enlisted their own experts who were able to help them establish a relationship and acquire useful information to convey at trial. Moreover, Dr. Parker and Dr. Cunningham were not badly chosen or lacking in qualification (indeed trial counsel testified at post-conviction that they had a strategy for their selection), and Baer has not cast any particular doubt about their methodology or demonstrated that the results of their examinations and assessments were unreliable. The PCR court was warranted in concluding that the evidence by additional experts was substantially cumulative of the testimony and opinion presented at trial. The expert testimony and quality of evidence does not

[6] According to the testimony on post-conviction review, splitting is an emotional defense mechanism where people see things as completely black and white with no grey areas. (PCR Tr. at 391.)

appear to be more credible or more deserving of weight than the testimony offered on mental issues at trial.

We hold that trial counsel's performance was not deficient in this respect.

B. Trial Counsel's Attempt to Plead GBMI

Baer contends that trial counsel's attempt to plead GBMI was ineffective because of counsel's failure to know the law and failure to present available evidence in support of the plea. (Appellant's Br. at 47–50.)

Baer says that his lawyers did not know the law relevant to GBMI and the death penalty. (Appellant's Br. at 48.) Specifically, he contends that counsel did not know the holding of Harris v. State, 499 N.E.2d 723 (Ind. 1986), or that there was a statute for GBMI. (Appellant's Br. at 48.) The State contends that "trial counsel held an accurate view and interpretation on the current state of the law regarding GBMI and the death penalty." (Appellee's Br. at 58.)

Trial counsel discussed both Harris and Prowell with the court during the two hearings on Baer's GBMI plea. (Trial Tr. at 183–84.) It seems that the current debate focuses on the parties' contentions before (and during) trial about whether a GBMI defendant might be ineligible for the death penalty or avoid death because a formal finding of GBMI might be a winning mitigator in a penalty phase or on appeal. The latter was among the prosecutor's objections to a GBMI judgment either by plea or jury finding.

Baer has failed to show that trial counsel's knowledge of the law led to any confusion or mistaken understanding of a GBMI plea by the trial court. As for whether counsel were deficient in supplying enough mental health evidence to persuade the judge to accept his GBMI plea, it is plain that counsel believed there was adequate evidence to support such a finding, "an abundance of evidence that there was mental illness in Mr. Baer's past," as counsel testified during post-conviction proceedings. (PCR Tr. at 59–60.)

The heart of the current contention is that had counsel called live witnesses and used more of them, rather than submitting the experts' written reports, Judge Spencer would have permitted a plea of GBMI. The written reports reflect some disagreement among the experts about the impact of Baer's illness on him at the time of the crime. In light of that and given the strategic advantage both sides sought in gaining or preventing a GBMI finding, we think Judge Spencer was right to disallow the plea and that he would not have acted otherwise had trial counsel proceeded the way Baer says they should have.

C. Failure to Seek a Continuance

Baer argues that trial counsel violated his Sixth Amendment rights by failing to ensure they had adequate time to prepare. (Appellant's Br. at 51.) His theory is that requesting more time may have avoided the problems that occurred in Dr. Davis' testimony, during which he could not locate a particular record during cross-examination and appeared disorganized. (Appellant's Br. at 52–53.)

Lead counsel Jeffrey Lockwood began representing Baer just four months before jury selection. (Direct Appeal App. at 1155.) Baer believes lead counsel should have requested a continuance because Lockwood did not have ample time to develop and litigate a respectable trial strategy, pointing to the fact that former lead counsel Douglas Long was not certain he would be ready for the trial in April 2005 because Long felt as though he was working on the case alone. Baer contends that the mitigation specialist was overwhelmed with the records in the case and further explains that more time "may have avoided the problems during Dr. Davis's testimony where he could not locate a particular record during cross-examination and appeared disorganized." (Appellant's Br. at 53.)

Neither of Baer's trial lawyers believed they needed a continuance. (Appellant's Br. at 52.) Baer acknowledges that his second attorney Bryan Williams, who had been his counsel from the beginning, had extensive trial experience. (Appellant's Br. at 51.) Both lawyers, of course, met the requirements of Ind. Criminal Rule 24(B), and Lockwood had a great deal of experience in capital trials. (PCR Tr. at 20, 51–52.)

We are not convinced that some momentary fumbling to locate certain documents during cross-examination is sufficient to demonstrate deficient performance.

D. Failure to Conduct Adequate Jury Selection

Baer asserts that several jurors susceptible to challenge for cause went unchallenged. In particular,

he asserts that trial counsel failed to object to the prosecutor's misstatements and failed to educate the jury appropriately about relevant mitigation, the meaning of life without parole, and other issues. (Appellant's Br. at 53–57.)

For example, Baer says his counsel did not adequately explore jurors' ability to follow the law. (Appellant's Br. at 53.) Baer does not direct us to any particular place in the record where more questioning was required, and the record is full of defense counsel's thorough questioning on the potential jurors' ability to follow the law. (Trial Tr. at 430, 435–38, 441–43, 511–12, 515, 526–27, 593–94, 597–602, 787–90, 834–36, 840–42, 845, 965–69, 973–75, 977–80, 1025.)

Baer does argue that jurors Brown, Criss and Lewis were "automatic death penalty" jurors. (Appellant's Br. at 54.)

During voir dire, juror Brown indicated that he would consider mitigating circumstances. (Trial Tr. at 769.) When Lockwood asked, "I want to have a chance with you for a vote of life. Do I have that chance with you," Brown responded "[y]es." (Trial Tr. at 790.) Juror Criss generally disfavored the death penalty but felt that it could be appropriate in some cases. (Trial Tr. at 658–59.) Further questioning revealed that juror Criss would base her decision on all the evidence. (Trial Tr. at 659–60.) Juror Lewis stated that he would decide the case based on the evidence. (Trial Tr. at 386.) Not even the most tortured reading of the transcript suggests that juror Lewis was an automatic death penalty juror.

Baer also argues that jurors Criss, Hartman, Zurcher, and Huett were "resistant to mitigation" because they checked a box on their juror questionnaires that stated they "[d]isagree[d] strongly" with the statement: "A person's upbringing and background are relevant to the punishment he should receive if he is committing a crime."[7] (Appellant's Br. at 54.) Baer also argues that his trial counsel did not discuss mitigation at all during voir dire and that there should have been an extensive discussion.

Counsel's discussion with Criss, Hartman, Zurcher, and Huett refutes the notion that they were mitigation resistant. (Trial Tr. at 660, 752–57, 784, 786–90, 919–21, 938–40, 973, 978, 980–81.) The juror questionnaires present multiple messages about the jurors' feelings on mitigation. Jurors Hartman, Huett, and Zurcher all checked a box stating: "Both a person's background and the nature and details of a particular crime should be considered in deciding appropriate punishment." Jurors Huett, Criss, and Hartman all checked a box on their questionnaires stating: "I would seriously weigh and consider the aggravating and mitigating factors in order to determine the appropriate penalty in this case." Those statements suggest that these jurors were open to mitigation. The jurors' answers during voir dire do not demonstrate that counsel were deficient in not challenging them for cause.

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[7] Our review of the record indicates that juror Hartmann checked the box "[d]isagree somewhat" rather than "[d]isagree strongly." (Court's Ex. 3.) (Exhibits Vol. VIII).

Baer asserts that his trial counsel had a complete "failure to discuss issues of mitigation with prospective jurors." (Appellant's Br. at 54.) The record, however, shows just the opposite. Baer's trial counsel believed that mental illness was the strongest mitigating factor in this case and, consequently, they discussed mental illness extensively during voir dire. We conclude that trial counsel adequately conducted jury selection.

E. Trial Counsel's Presentation of GBMI at Guilt Phase

Baer asserts "trial counsel were ineffective in their investigation and presentation of evidence to support a guilty but mentally ill verdict." (Appellant's Br. at 57.) His contentions are counsel failed to present the jury with additional corroborating evidence about Baer's mental health, failed to withdraw the insanity defense, and failed to offer a preliminary instruction on GBMI that tracked the applicable statute. (Appellant's Br. at 58.)

Baer says counsel should have discovered Zola Brown and William Ogden, both of whom could testify that that he heard voices during the years before the crime. But all three mental health experts who testified at the guilt phase discussed Baer's auditory hallucinations and all three experts explicitly stated that Baer was mentally ill. (Trial Tr. at 1779–80, 1785–86, 1869–74, 1886–87, 1894, 1909, 1926, 1929–30, 1945, 1947–53, 1973–74, 1978–79, 1992–93.) The lack of testimony by two lay witnesses who could corroborate the facts used by the experts does not establish ineffective performance.

As for failing to withdraw the insanity defense, the Indiana Code provides only two ways that a defendant can be found GBMI. First, a defendant may seek to plead GBMI if that plea is voluntary and supported by an adequate factual basis. Ind. Code §§ 35-35-1-2 & -3 (2008). Second, a jury can return a GBMI verdict if the defendant interposes the insanity defense. Ind. Code § 35-36-2-3(4) (2008). The instant argument is that counsel should have tried to create a third way by asking to pursue GBMI without a plea of insanity in place.

Taking the road authorized by the Code conferred multiple advantages. Not the least of these was defense counsel's ability to play off against the prosecutor's contention that Baer was not taking responsibility. Trial counsel frequently told the jury that Baer was not insane and was not using the insanity defense. (Trial. Tr. at 423, 426, 590–91, 641–42, 706–08, 710, 721, 783, 844–45, 910–11, 965, 1023, 1031–33.)

As for whether a preliminary instruction on GBMI was required, failure to tender one was not ineffective assistance of counsel because there was a final instruction given on GBMI. Phillips v. State, 550 N.E.2d 1290, 1296 (Ind. 1990); Everly v. State, 271 Ind. 687, 691–92, 395 N.E.2d 254, 257 (1979).

The post-conviction court was right to deny Baer's claims on these points.

F. Cross-Examination of Dr. Evans

Dr. Evans is a toxicologist who testified about a sample of blood collected after Baer's arrest and tested by AIT Laboratories about thirteen months

later. (Trial Tr. at 1616, 1621, 1623–47.) Twelve days before trial, the State disclosed the results. The test revealed some marijuana usage and "absolutely zero" for all other drug classes, including methamphetamine. (Trial Tr. at 1630–31, 1635.)

Dr. Evans testified that there was no methamphetamine, amphetamine (methamphetamine's break-down product), or any other drug of abuse in the blood sample taken from Baer. (Trial Tr. at 1635.) He said that drugs in the blood would have broken down some in the thirteen months between when the blood was drawn and the testing. (Trial Tr. at 1639.) During cross-examination, Dr. Evans said that if Baer used 250 milligrams or more of methamphetamine within thirty-six hours of the blood draw, methamphetamine or amphetamine would have shown up in the blood analysis. (Trial Tr. at 1642–44.) He said that he did not know when Baer had last used methamphetamine and that if Baer had a small dose on the day of the crime he would not have been able to detect any methamphetamine or amphetamine in the blood sample. (Trial Tr. at 1643.) He did say Baer could not have taken a gram or more the day of the crime. The prosecution later used this testimony to argue that Baer was malingering about his drug abuse around the time the crime was committed. (Trial Tr. at 2070.)

At post-conviction, Dr. Evans testified that the best approach is to have blood collected at or near the time of an incident and test it as soon as possible because drugs are chemicals which break down and blood is not the most conducive environment for preserving chemicals. (PCR Tr. at 490.) Ultimately,

Dr. Evans could not say whether methamphetamine existed in Baer's blood at the time it was collected, only that there was no such substance in his blood when it was tested. (PCR Tr. at 490.)

The upshot of all this is that Dr. Davis's testimony before the jury and his testimony at PCR were pretty consistent: if Baer had a very small amount of meth in his system on the day of the crime the tests might not have revealed it, but if he had an amount typical for users or abusers it would have. If anything, the extra effort by PCR counsel demonstrates that extra effort by trial counsel would have been fruitless.

G. Using Projection of Gruesome Photos

Baer contends that trial counsel was deficient for failing to object to the projection of the crime scene photographs on a very large screen. (Appellant's Br. at 64–65.) Specifically, he argues that there could be "no strategic reason for failing to object to photographs the prosecutor himself described as 'horrifying'" and "[h]ad trial counsel objected to the manner in which the crime scene photographs were displayed the objection would have been sustained." (Appellant's Br. at 65.)

The photographs in question provided a sense of the location of the crime, and they corroborated the responding officer's testimony about the discovery of the victims' bodies, the testimony of other witnesses who described the crime scene, and the extent of the injuries. (See Trial Tr. at 1174–76.) Although the photographs are most unpleasant, they were admissible to give the jury an understanding of the crime scene and the nature of the crime. See Phillip

v. State, 550 N.E.2d 1290, 1299 (Ind. 1990). The photos were also pertinent to the jury's task of assessing Baer's level of mental culpability.

The current contention is not about admissibility but about manner of display. Respectable counsel could take differing views about whether it was more prejudicial to the defense for jurors to see such photographs on a large screen or to linger over the images while holding them in their own hands.

H. Did Trial Counsel Fail to Ensure Proper Instructions?

We will reverse a post-conviction court's decision regarding ineffective assistance for failure to object to instructions only if Baer can show that the trial court was compelled as a matter of law to sustain his objections. Lambert v. State, 743 N.E.2d 719 (Ind. 2001). Similarly, for claims that different instructions should have been tendered by trial counsel, we will not reverse if "the trial court could have properly refused the instruction under applicable law," meaning, that we will not reverse the post-conviction court unless the trial court would have been compelled by law to give the instruction. Id. at 738–39.

Indiana Code § 35-50-2-9(c)(6) allows the jury to consider in mitigation "[t]he defendant's capacity to appreciate the criminality of the defendant's conduct or to conform that conduct to the requirements of law was substantially impaired as a result of mental disease or defect or of intoxication." Jury instruction number eleven parroted this statute, but did not include the last three words. (Direct Appeal App. at

1324.) Baer argues that instruction eleven should have ended with the words "of intoxication." An instruction tendered by Baer with the intoxication language could have been rejected by the trial court because the evidence showed that Baer was not intoxicated at the time of the offense. (Trial Tr. at 1257–63, 1627–47, 2404–05.)

Another challenge relates to an instruction telling the jury that voluntary intoxication was not a defense and could not be taken into account when determining the mental state required for conviction. (Direct Appeal App. at 1333–34.) Baer argues that this instruction prevented the jury from considering intoxication as a mitigating factor. (Appellant's Br. at 66–67.) This instruction was a correct statement of the law and was relevant in determining whether Baer committed his crimes intentionally. As to mitigation, the court told jurors they could consider "[a]ny . . . circumstances" (Direct Appeal App. at 1324) in mitigation and that "there are no limits on what factors an individual juror may find as mitigating." (Direct Appeal App. at 1325.) An objection to the instruction on voluntary intoxication as a defense to the crime would have been overruled at trial.

Baer also argues that counsel should have objected to an instruction that "the jury has the right to accept or reject any or all of the testimony of witnesses, whether expert or lay witnesses on the questions of insanity or mental illness." (Direct Appeal App. at 1336.) We think it unlikely that most counsel would have worried much about this mention of insanity. The court properly instructed the jury on issues of GBMI and insanity. Baer's trial counsel told the jury

repeatedly that they were not arguing that Baer was insane. The jury would not have inferred that Baer was claiming he was legally insane.

Lastly, Baer claims that counsel was ineffective for not offering an instruction stating that life without parole means life without parole. (Appellant's Br. at 68.) The term "life without parole" consists of ordinary words that can easily be understood by the average person. See Stevens v. State, 770 N.E.2d 739, 756 (Ind. 2002).

I. Baer's Eligibility for the Death Penalty

Baer contends that had "trial counsel competently litigated Baer's ineligibility for the death sentence, there is a reasonable likelihood Baer would not have been sentenced to death" because he is mentally ill and therefore ineligible for the death penalty. (Appellant's Br. at 69.) There is no state or federal constitutional bar to executing the mentally ill, Matheny v. State, 833 N.E.2d 454 (Ind. 2005), and counsel acted within the bounds of reasonable performance to recognize the law on this point.

J. Investigating and Presenting Mitigating Evidence

Baer asserts that trial counsel's decision "not to present any witnesses other than Dr. Cunningham was not a decision based on a reasonable investigation" and therefore is not entitled to deference because a reasonable investigation would have helped uncover mitigating evidence. (Appellant's Br. at 70.)

Trial counsel Bryan Williams explained the defense team's decision:

> We had Dr. Cunningham who had spent a substantial amount of time putting together the entire family history, how certain folks were related, incidents, and we thought at the time that he was probably in as good a position as anybody to explain the entire family history, and we thought he was a very good witness so we decided to use him exclusively.

(PCR Tr. at 33.) Lead trial counsel Jeffrey Lockwood confirmed this assessment when he testified at the post-conviction hearing:

> I did not feel that we could rely on any of the family members under all circumstances to be helpful to us. And beyond that, there weren't many other people. And so what we did was we tried to incorporate in Dr. Cunningham's examination all of the things that he uncovered about social history. I mean we did think about [calling other witnesses], but we had ample reason in my opinion to believe that we would not gain ground by calling family members.

(PCR Tr. at 73–74.) Our review of the PCR transcripts leads us to the conclusion that there were reasons that an experienced attorney might hesitate to call Baer's family members; it was professionally reasonable not to call additional witnesses.

This case is hardly a case where no mitigating evidence was assembled. Trial counsel hired a mitigation consultant, and because of her efforts, counsel knew a great deal about the defendant's

background, upbringing, and prior mental health problems. (PCR Tr. at 26, 56–57, 61–62, 71.) Dr. Cunningham conducted interviews with many of Baer's family members and reviewed Baer's records (including school and mental health records) and notes from interviews with many people from Baer's past. (Trial. Tr. at 2253–54, 2264–65.) He testified about many potential mitigators including previous mental health disorders, diagnoses, and institutionalizations (Trial Tr. at 2266, 2311, 2313–24, 2374–82, 2387, 2400–03), Baer's extremely troubled family situation (Trial Tr. at 2284, 2288–93, 2337–45, 2347–72, 2409–2410), Baer's extensive history of substance abuse (Trial Tr. at 2284, 2328–32, 2390–93, 2403–05), and Baer's history of neurological problems (Trial Tr. at 2306–11, 2325–28, 2332–36). We find that Dr. Cunningham's testimony presented an abundance of potential mitigating factors to the jury.

As in Woods v. State, 701 N.E.2d 1226 (1998), Baer's argument is essentially that counsel should have done more. In all post-conviction proceedings, the petitioner will always be able to find some information from his past that was not presented to the jury. Dr. Cunningham's testimony included almost all of the potential mitigators that Baer asserts should have been better presented to the jury. We do not believe the result of Baer's trial would have been different had the witnesses who testified at the PCR hearing been called at trial.

III. Baer's Appellate Counsel Was Not Ineffective.

Ineffective assistance of appellate counsel claims generally fall into three basic categories: (1) denial of access to an appeal; (2) waiver of issues; and (3) failure to present issues well. Henley v. State, 881 N.E.2d 639, 644 (Ind. 2008) (citing Reed v. State, 856 N.E.2d 1189, 1195 (Ind. 2006)). Baer's arguments on these points fall into seven categories.

A. Prosecutorial Misconduct

Baer first argues that appellate counsel Mark Maynard was ineffective because he inadequately presented a claim of prosecutorial misconduct. (Appellant's Br. at 33.)

Maynard testified that he intended to present the full range of prosecutorial misconduct claims on appeal. (PCR Tr. at 515.) He did not categorize the types of comments the prosecutor made, listing them instead in chronological order because he felt "they were pretty patent on their face as to what sort of misconduct each comment was." (PCR Tr. at 514–15.) On appeal, however, we found that Maynard raised only the prosecutor's statements to the jury that finding Baer GBMI would reduce the chances of him receiving the death penalty. Baer, 866 N.E.2d at 755.[8]

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[8] Baer presents his freestanding claim for prosecutorial misconduct as the lead argument in his brief. (Appellant's Br. at 8.) Maynard clearly raised the issue of prosecutorial misconduct by arguing that the prosecutor's statements on GBMI were inappropriate; it is res judicata by virtue of our opinion in Baer, 866 N.E.2d at 761. We examine it here as it may reflect on his

There are other contentions about Maynard's presentation of prosecutorial misconduct that we now examine, the question being whether it was so badly done as to violate the Sixth Amendment.

Maynard correctly realized that because trial counsel failed to object to "virtually all" instances of alleged prosecutorial misconduct, an appellate court would review them only for fundamental error. (PCR Tr. at 514); see also Ortiz v. State, 766 N.E.2d 370, 375 (Ind. 2002). It is highly unlikely that Baer would have prevailed on any fundamental error claims as respects prosecutorial misconduct on direct appeal. Benson v. State, 762 N.E.2d 748, 755 (Ind. 2002) (fundamental error is recognized only when record reveals clearly blatant violation of basic and elementary principles, where the harm or potential for harm cannot be denied, and which violation is so prejudicial to the rights of the defendant as to make fair trial impossible).

Getting to specific instances, during voir dire the prosecutor did often conflate the separate concepts of GBMI and insanity by referring to whether Baer could appreciate the wrongfulness of his actions. (first panel—Trial Tr. at 236–37, 386–92, 396–98, 407; second panel—Trial Tr. at 464, 469–70, 484, 494; third panel—Trial Tr. at 536.) The ability to appreciate the wrongfulness of one's actions is relevant to an insanity defense but not to a GBMI verdict, which requires instead that a psychiatric

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claim about the performance of appellate counsel. Timberlake v. State, 753 N.E.2d 591, at 597–98 (Ind. 2001); see also Harris v. State, 861 N.E.2d 1182, 1186 (Ind. 2007).

disorder substantially disturb a person's thinking, feeling, or behavior and impair his ability to function. Compare Ind. Code § 35-36-1-1 with Ind. Code § 35-41-3-6(a).

It seems likely that defense counsel consciously chose not to object to the prosecutor's misstatements as part of their general strategy of letting the prosecutor discredit himself. (PCR Tr. at 32.) At PCR, Williams testified that he had known Prosecutor Cummings for years and knew he was capable of overstating his case to the jury. (PCR Tr. at 32.) Trial counsel planned to correctly state the law to the jury when it was their turn, have the judge echo their statement of the law through the jury instructions, and hope the jury would decide from the contrast that the prosecutor was not credible. (PCR Tr. at 32.)

Consistent with this approach, defense counsel correctly stated the law in closing argument:

> Let me repeat this for the hundredth time: We are not saying that Fredrick Michael Baer is insane. I said it to you in jury selection. Mr. Lockwood said it to you. I've said it to you repeatedly. . . . Mental disease or defect.

(Trial Tr. at 2105.) And the court's instructions correctly stated the law and made it clear that they took precedence over arguments by counsel on what the law was. (Trial Tr. at 1126, 1130–31, 2122, 2580.) It was not deficient for Maynard to take a pass on this potential claim.

The prosecutor also spoke equivocally about whether the State could execute a defendant found GBMI, telling the jury, "The law is not clear in this

state on whether we can execute somebody who's guilty but mentally ill. Our Supreme Court has not decided that case yet." (Trial Tr. at 649.) He made this statement even though we upheld a death sentence of a defendant found GBMI in Harris v. State, 499 N.E.2d 723, 725–27 (Ind. 1986) (analyzing only Eighth Amendment and Indiana statutory claims).

Baer's appellate ineffective assistance of counsel claim has much in common with his direct appeal claim about the prosecutor's statements and allegations about trial counsel on the same point. Prosecutors and defense counsel alike would have read our opinion in Prowell v. State, 741 N.E.2d 704, 717 (Ind. 2001), in which we observed that defendants formally found GBMI "normally receive a term of years or life imprisonment." We observed that many shared the view that death was inappropriate for a GBMI defendant. Id. at 718. We set aside Prowell's sentence partly on this basis.

These judicial declarations explained why Baer's lawyers, from trial through PCR, have labored to obtain a GBMI conviction, and why the prosecutors have pushed back at each turn. It adequately explains why Maynard did no damage in not complaining about the prosecutor's statement to the jury.[9]

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[9] About the time of Baer's trial, we held that the Indiana Constitution did not forbid death sentences for defendants who were mentally ill when they committed the murders. Matheney v. State, 833 N.E.2d 454, 457 (Ind. 2005); Baird v. State, 831 N.E.2d 109, 111 (Ind. 2005). Both these decisions noted that the juries in the respective cases did not find the defendants GBMI. In a dissent to an earlier decision, Justice Rucker took the

On another front, the prosecutor also discussed during voir dire the possibility that the legislature might one day change the law on life without parole and allow Baer to receive parole. (Trial Tr. at 920–21.) The prosecutor nevertheless correctly stated the current law on life without parole, as did trial counsel. (Trial Tr. at 428, 601, 920.) We rejected this claim on direct appeal because defense counsel initiated the discussion, so it was not improper for the prosecutor to respond. Baer, 866 N.E.2d at 760–61.

Baer also argues that the State falsely claimed that Baer refused to accept responsibility because Baer attempted to plead GBMI. (Appellant's Br. at 20.) Baer says that his attempted GBMI plea should have been "considered a significant mitigating circumstance" and that the State "essentially turned a potentially mitigating factor into a nonstatutory aggravating factor." (Appellant's Br. at 21–22.)

This statement did not deprive Baer of a fair trial. Baer's counsel repeatedly told the jury that Baer committed these crimes and was not disputing his innocence. The jury knew that Baer was not attempting to say that he was innocent. The prosecutor was seeking a guilty verdict and saw Baer's attempt to plead GBMI as an attempt to avoid full responsibility for his crimes. Baer's counsel acknowledged that Baer wanted a GBMI verdict because they thought it was Baer's best chance at

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position that executing a person suffering a severe mental illness would violate the Cruel and Unusual Punishment Clause of art. I, § 16, of the Indiana Constitution. Corcoran v. State, 774 N.E.2d 495, 503 (Ind. 2002) (Rucker, J., dissenting).

avoiding the death penalty. This was part of the rhetorical struggle sensibly waged by both sides.

Baer says his appellate lawyer should have cited as grounds for reversal the prosecutor's repeated inquiries to jurors whether they had the strength of character and the courage to impose the death penalty if they thought it was the appropriate sentence. He further asked them if they had the courage of their convictions to stand by that sentence if the trial court polled them after sentencing. Defense counsel's strategy was a mirror image: they attempted to draw out the prospective jurors who were predisposed to vote for the death penalty in order to strike them from the jury pool. The prosecutor's questions merely allowed him the similar opportunity to strike jurors who would not vote for the death penalty even if they thought it was warranted. Trial and appellate counsel both performed reasonably on this point.

Baer also says Maynard should have appealed by citing the fact that the prosecutor told the jurors the facts of the crime and then told the jury that these facts warranted death. (Appellants Br. at 24.) Here, too, the defense and the prosecution both found elaborating on the facts useful in the struggle over whether the sentence should be death. Baer's counsel told the jury "I'm telling you right now up front, he committed these crimes. He cut the throat of a mother. He cut the throat of her four-year-old daughter." (Trial. Tr. at 641.) When the trial judge questioned the extensive recitation of facts occurring during voir dire, Baer's counsel told the court that he wanted the jury to know the facts as part of a

technique called "stripping."[10] (Trial Tr. at 875.) Baer's appellate counsel could not be ineffective for not raising this argument on direct appeal because trial counsel made a reasonable professional judgment to allow the jury to hear the facts of the case during voir dire.

As for the prosecutor's declaration that the facts warranted death, the prosecutor told the jury during voir dire that the State was seeking justice for the family because they would be without a mother and a child. (Trial Tr. at 378, 405, 480.) During the penalty phase, he told the jury it should sentence Baer to death because that was what the family wanted. (Trial Tr. at 2551.) Inappropriate though these comments may have been, we do not think they rendered Baer's trial fundamentally unfair. The trial court ruled that the prosecutor's statements at voir dire did not constitute victim impact evidence but told the prosecutor not to get that close to the line again. (Trial Tr. at 803–04.) The prosecutor then told the

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[10] According to the testimony on PCR, "stripping" involves asking jurors their opinion about a hypothetical murder of a completely innocent person with no defenses. (PCR Tr. at 617–19.) The idea seems to be that those jurors who say only death is suitable for the hypothetical defendant would be struck for cause. (PCR Tr. at 617–19.) Baer's counsel apparently decided to use this technique, but used the facts of Baer's actual crimes rather than a hypothetical. (See Trial Tr. at 875–76.) Baer's trial counsel stated "I'm happy to go on the record as saying that Mr. Williams and I have thought this case through and our approach through. It is the exercise of our independent professional judgment to take this tactic and that we have consulted with our client thoroughly about this." (Trial Tr. at 886.) Uncommon as such declarations are in capital cases, they seem based in fact.

jury he misspoke. This is the sort of rebuke to the prosecutor that defense counsel likely found helpful.

Baer next contends that his appellate counsel was ineffective for not arguing that his trial was unfair because the prosecutor disparaged Baer, disparaged his counsel, and disparaged Baer's experts.[11] (Appellant's Br. at 26–28.) Many of the comments directed at Baer and his experts were fair comments on the evidence. The comments directed at Baer's attorney, when read in full, are hardly misconduct.

To take a few examples, the prosecutor commented in his closing argument on Baer's demeanor: "You've got a better look at him then I do because I am over here, but he seems to be joking around and talking to people in the audience all the time." (Trial Tr. at 2061.) During the penalty phase, the prosecutor quoted trial counsel's opening statement at trial and asked the jury to consider whether Baer's crimes were among "the worst of the worst." (Trial Tr. at 2513.) Based on his experience, he thought that they were. (Trial Tr. at 2513.) He conceded that jurors might think the September 11 terrorist attacks or the Oklahoma City bombing were worse but asked that they consider the actual facts of Baer's murders. (Trial Tr. at 2514.) The prosecutor then recounted the facts of the murders in graphic detail. (Trial Tr. at 2514.)[12] During rebuttal, the

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[11] As characteristic of such statements, Baer points to the prosecutor's comment that "I don't think anybody in this courtroom likes him." (Trial Tr. at 558.)

[12] Contrary to Baer's argument, the prosecutor did not directly compare Baer to the perpetrators of the September 11 terrorist

prosecutor referenced the hardships he himself faced while growing up and the time he spent in jail to argue that Baer was using his own childhood as an excuse that should save him from the death penalty. (Trial Tr. at 2548–50.) He also briefly mentioned the cost while telling the jury that the State was not seeking the death penalty haphazardly. (Trial Tr. at 2551.) Each of these arguments was a response to arguments made by defense counsel. (Trial Tr. at 2540–41, 2525–30.)

Baer asserts that these various statements violated his Fifth, Sixth, and Fourteenth Amendment rights. To the extent that any comments directed at Baer, his counsel, or his experts were misconduct, any impact on the fairness of Baer's trial was minimal. Even if taken in the aggregate, these comments did not affect the outcome of Baer's trial.

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attacks or the Oklahoma City bombing. (Trial Tr. at 2513.) He was arguing that even though other crimes were worse, that should not preclude the jury from imposing the death penalty in Baer's case. (Trial Tr. at 2513.) Defense counsel also had a chance to respond to this perceived impropriety, which was their avowed strategy throughout the trial. (Trial Tr. at 2525–47; PCR Tr. at 32.)

Moreover, a prosecutor may respond to the allegations and inferences trial counsel makes even if the way he responds would otherwise be objectionable. Cooper v. State, 854 N.E.2d 831, 836 (Ind. 2006). Baer's trial counsel first brought up the financial burden of execution. (Trial Tr. at 427, 2540–41.) Both of Baer's trial counsel talked about their own families and upbringings as a contrast to Baer's family and upbringing. (Trial Tr. at 2527, 2532, 2544–45.) Then his counsel argued that Baer committed his crimes because society failed him. (Trial. Tr. at 2532.) The prosecutor's comments about his own rough upbringing was a fair rebuttal to these points made by Baer's counsel.

B. Appropriateness of the Death Penalty

Second, Baer argues that Maynard inadequately challenged the appropriateness of Baer's death sentence. (Appellant's Br. at 36–38.) Maynard's brief contained only twenty-one lines of argument on the appropriateness of the death penalty and incorporated other issues in his brief. (PCR Ex. at 19, 21–22.) He did not argue that Baer's mental illness precluded his execution based on recent holdings from the U.S. Supreme Court limiting the application of the death penalty. See, e.g., Kennedy v. Louisiana, 554 U.S. 407, 421–24 (2008) (defendant who raped but did not kill a child); Roper v. Simmons, 543 U.S. 551, 568 (2005) (juveniles); Atkins v. Virginia, 536 U.S. 304, 321 (2002) (mentally retarded).

When Indiana law placed capital-sentencing decisions fully in the hands of trial judges, this Court set aside multiple death sentences by exercise of our power to review and revise sentences, sometimes finding death "inappropriate in light of the nature of the offense and the character of the offender." Ind. Appellate Rule 7(B); see also Ind. Const. art. VII, § 4. Sentencing is now largely in the hands of juries, and as we observed in Wilkes v. State, 917 N.E.2d 675, 693 (Ind. 2009), we have affirmed sentences in cases much like Baer's. Maynard's argument sufficed.

As for whether Maynard should have tried to break new ground, the U.S. Supreme Court has never held that the U.S. Constitution precludes executing the mentally ill. See Baird v. State, 831 N.E.2d 109, 115–16 (Ind. 2005). In fact, this Court has expressly held that the U.S. Constitution does not, and we have held, with one dissent, that the Indiana Constitution

does permit the State to execute the mentally ill. See, e.g., Matheney, 833 N.E.2d at 457 (Article I, Section 16 of the Indiana Constitution); Baird, 831 N.E.2d at 111 (same). These holdings reflect in part the fact that "mental illness" is a very elastic term. The relative seriousness or mildness of a defendant's illness is well suited to the weighing process that occurs when considering aggravators and mitigators and not well suited to reliable bright lines that would place a defendant as eligible or ineligible.

C. Rejection of Baer's GBMI Plea

Third, Baer says Maynard should have challenged the trial court's rejection of his GBMI plea. (Appellant's Br. at 34–36.) He argues that there was a sufficient factual basis for the plea because two court-appointed mental health experts, Dr. Davis and Dr. Lawlor, both thought Baer was mentally ill. (Appellant's Br. at 35–36; Direct Appeal App. at 1491, 1581.) Although both trial counsel believed that the court's rejection of Baer's plea was erroneous, Maynard did not raise this issue on appeal, apparently because he believed that such a plea required the State's agreement, which it did not give. (PCR Tr. at 23, 60, 510.)

The instant contention largely rests on two statutes. Indiana Code § 35-36-1-1 considers a person mentally ill if he has "a psychiatric disorder which substantially disturbs [the] person's thinking, feeling, or behavior and impairs the person's ability to function." Indiana Code § 35-35-1-3 says, "The court shall not enter judgment upon a plea of guilty or guilty but mentally ill at the time of the crime unless it is satisfied from its examination of the defendant or

the evidence presented that there is a factual basis for the plea."

Baer's argument assumes that once a factual basis for a mental illness exists, a trial court is required to accept a GBMI plea. (See Appellant's Br. at 35–36.) The statute does not require a court to accept a GBMI plea once there is any factual basis for it; instead, it prohibits a court from accepting a GBMI plea without one. Indeed, we have held that a defendant does not have an absolute right to a guilty plea and that a trial court may refuse to accept one in the exercise of sound judicial discretion. Elsten v. State, 698 N.E.2d 292, 295 (Ind. 1998) (discretion not abused in rejecting a GBMI plea when two court-appointed physicians testified that the defendant was not mentally ill and a physician commissioned by the defendant disagreed).

Dr. Davis's and Dr. Lawlor's conclusions were not so "uncontradicted" as Baer claims. (Appellant's Br. at 35–36.) Dr. Davis thought that Baer qualified as mentally ill based on his methamphetamine addiction. (Direct Appeal App. at 1419.) Although Dr. Lawlor agreed, he did not think that "his psychiatric illnesses 'grossly or demonstratively impair[ed] his perceptions.'" (Direct Appeal App. at 1581.) The trial court also had before it a report from Dr. Groff's examination of Baer after he committed an unrelated crime shortly before the murders. (Trial Tr. at 222–23.) Dr. Groff expressly raised the possibility that Baer was malingering. (Direct Appeal App. at 1557–58.)

Based on this issue of fact, an appellate court would not have found that the trial court abused its

discretion by rejecting Baer's GBMI plea and submitting the GBMI issue to the jury. We do think most appellate lawyers would have raised this contention, and they would have lost. There is not a reasonable probability that the outcome of Baer's appeal would have been different but for Maynard's failure to raise the issue. See Strickland, 466 U.S. at 694.

D. Admission of Baer's Knife into Evidence

Fourth, Baer argues that Maynard was ineffective because he failed to challenge the admission of Baer's knife into evidence. (Appellant's Br. at 38.) The trial court admitted the knife over counsel's objection about relevancy. (Trial Tr. at 1557–58.) Trial counsel later moved to strike the knife at the close of evidence on the grounds that the State had not tied it to the crime, but the trial court denied the motion. (Trial Tr. at 1757.) Maynard's testimony at the PCR hearing suggested that he did not raise the issue on appeal because he thought trial counsel had not objected to it. (See PCR Tr. at 512–14.) Maynard was correct enough that this was a reason for omitting the issue on appeal, but there was a second reason.

There was substantial evidence that the knife was probative of issues the State had the burden of proving at trial, including the identity of the murderer and the manner of the murder. See Ind. Code § 35-42-1-1(1). Both Cory and Jenna Clark died of cuts to their throats that pathologist Dr. Paul Mellen testified were consistent with an intentional killing with a knife. (Trial Tr. at 1672–81.) Police later seized from Baer's apartment a knife Baer said he carried with him every day but was not carrying that

day because he knew the police were looking for him. (Trial Tr. at 1421–22.) A serology examination of the sheath to Baer's knife produced a weak positive result for blood. (Trial Tr. at 1561–63.)

E. Raising a Crawford Claim

Fifth, Baer argues that Maynard was ineffective because he failed to challenge an alleged violation of Crawford v. Washington, 541 U.S. 36 (2003). (Appellant's Br. at 38–39.) Under Crawford, testimonial hearsay is not admissible unless the declarant is unavailable and the defendant had a prior opportunity to cross-examine him. Crawford, 541 U.S. at 68. In this case, Court-appointed physicians Dr. Lawlor and Dr. Davis both testified that Baer was mentally ill. (Trial Tr. at 1908–09, 1929, 1992–93.) The State questioned both doctors using a report Dr. Masbaum had prepared after examining Baer in December 2004 for an unrelated case. (Trial Tr. at 1905–08, 1977–82.) Trial counsel objected both times, first on the grounds that it was outside the scope of defense counsel's own examination, and then on grounds the prosecutor was making a spectacle using a report counsel could not cross-examine. (Trial Tr. at 1905–07, 1980.)

Dr. Lawlor had diagnosed Baer with a personality disorder but testified that he thought Baer could appreciate the wrongfulness of his actions at the time of the crimes. (Trial Tr. at 1864, 1871.) He recounted receiving reports about Baer having auditory hallucinations and ADHD as a child. (Trial Tr. at 1869–71.) Dr. Lawlor also gave a detailed account of the crimes as Baer described them to him, although he did not think that the voices Baer claimed to have

heard during the murders constituted auditory hallucinations. (Trial Tr. at 1874–86.) In response to defense counsel's questioning, Dr. Lawlor stated that he did not think Baer was malingering, or faking, a mental illness. (Trial Tr. at 1893.)

When the State asked Dr. Lawlor about Baer's voices, Dr. Lawlor maintained that Baer's description did not indicate a split personality and that Baer did not mention anything about a voice called "Super Beast." (Trial Tr. at 1904–05.) Defense counsel quickly objected on grounds of relevance when the prosecutor asked Dr. Lawlor to review a report from Dr. Masbaum, but the trial court overruled the objection to the extent that the report was relevant to the issue of malingering. (Trial Tr. at 1905–07.) According to Dr. Masbaum's report, Baer once tried to present himself to Masbaum as having a split personality, telling Dr. Masbaum that he was talking to "Fred" on one day but talking to "Michael" on another. (Trial Tr. at 1907.) Dr. Lawlor conceded that Baer could have been malingering, to Dr. Masbaum if not to him, and that this information was inconsistent with his diagnosis because "typically, the discrete personalities aren't aware of each other's existence." (Trial Tr. at 1908.)

Dr. Davis then testified that he considered Baer mentally ill to the level of having a mental disease or defect. (Trial Tr. at 1929.) According to Dr. Davis, Baer admitted committing the murders and described having auditory hallucinations, hearing voices, and having a raging, out-of-control part of himself that "came out" on the day of the murders. (Trial Tr. at 1922.) Baer had called this raging part of himself

Super Beast. (Trial Tr. at 1923.) Dr. Davis also reviewed Baer's childhood experiences with depression, custody issues, hospitalization for suicide attempts, prescription drug use, and illicit drug abuse. (Trial Tr. at 1925–28.) Finally, he discussed the clinical link between drug abuse and psychosis, one that might materialize in some patients but not in others. (Trial Tr. at 1929–37, 1940–43.)

In response to the State's questioning, Dr. Davis stated his impression that the phrase "Super Beast" did not refer to a voice Baer heard but rather to the "raging part of him." (Trial Tr. at 1977.) After the prosecutor and Dr. Davis speculated over whether Super Beast originated from a tattoo on Baer's left forearm, the prosecutor asked Davis to read passages from Dr. Masbaum's report suggesting that Baer had heard voices since he was a child that appeared to come from a Winnie the Pooh doll. (Trial Tr. at 1978–80.) After the prosecutor asked Dr. Davis if Baer thought that voices telling him to kill his brother came from the Winnie the Pooh doll, trial counsel objected, "Mr. Puckett is having a pretty good time, but I can't cross-examine that report. . . . He's made fun of my client for claiming that he heard Winnie the Pooh when that's not what the report said, so I'm going to object to this. This is not funny." (Trial Tr. at 1979–80.)

Giving Baer the benefit of the doubt as to the form of defense counsel's objections, a defendant has a right to be confronted with witnesses against him in a criminal prosecution. The Confrontation Clause of the Sixth Amendment effectively codified existing common law, which prevented a trial court from

admitting testimonial hearsay statements unless the State showed both that the declarant was unavailable to testify and that the defendant had a prior opportunity to cross-examine the declarant. Crawford, 541 U.S. at 53–54.

Although the U.S. Supreme Court did not comprehensively define the breadth of testimonial statements in Crawford, it did describe a core class of testimonial statements that included (1) ex parte in-court testimony such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements that declarants would reasonably expect to be used prosecutorially; (2) extrajudicial statements contained in formalized testimonial materials, affidavits, depositions, prior testimony, or confessions; and (3) statements made under circumstances that would lead an objective witness to reasonably believe that the statement would be available for later use at a trial. Id. at 51–52.

Regardless of whether the trial court should have admitted this evidence under Crawford, Maynard's decision not to present this issue on appeal did not prejudice Baer because admitting it for this limited purpose constituted harmless error. The jury heard evidence from two experts that Baer was mentally ill to the level required by Ind. Code § 35-36-1-1. (Trial Tr. at 1908–09, 1929, 1992–93.) It heard evidence that Baer suffered from ADHD and depression as a child, that he was hospitalized, that he used prescription drugs, and that he eventually started huffing and abusing illicit drugs. (Trial Tr. at 1925–28.) It heard evidence that chronic drug abuse could damage a

person's mental abilities to the point of near-retardation and could exacerbate any preexisting mental illnesses. (Trial Tr. at 1929–37, 1940–43.) It is unlikely that a jury unconvinced by this evidence would have entered a GBMI verdict or recommended a sentence of life if only the State had not cross-examined Dr. Lawlor and Dr. Davis mentioning Dr. Masbaum's report.

F. Penalty-Phase Jury Instructions

Sixth, Baer argues that Maynard should have challenged certain penalty-phase jury instructions. (Appellant's Br. at 39–41.) Because trial counsel failed to raise an objection to these instructions, Maynard was faced with presenting them as fundamental error. Ritchie v. State, 809 N.E.2d 258, 273–74 (Ind. 2004). The four instructions Baer references here are the same mentioned on trial counsel ineffective assistance of counsel: omitting reference to "intoxication" on mitigation; stating that intoxication that appeared in the statutory definition; stated that intoxication was not a defense in a prosecution for any crime; using the instruction on insanity and lay witness testimony; and not declaring that life without parole really did mean life without parole. (Appellant's Br. at 39–41.)

Maynard could reasonably decide not to challenge omission of the "intoxication" phrase. After all, the same jury instruction required the jury to consider the fact that the defendant "was under the influence of extreme mental or emotional disturbance" and that his capacity to appreciate the criminality of his conduct or to conform it to the law "was substantially impaired as a result of mental disease or defect." (PCR

App. at 637.) Given the link between ongoing methamphetamine usage and mental illness that repeatedly arose in expert testimony, the jury had an adequate opportunity to hear and act on this evidence even with the omission of "or of intoxication" from the jury instruction. (Trial Tr. at 1872–73, 1897–1901, 1929–37, 1940–46.)

Likewise, Maynard's decision not to challenge the instruction that intoxication was not a defense to commission of any crime did not prejudice Baer's appeal because as we noted above it did nothing to muddy the waters by implying that intoxication could not be a mitigator. (Appellant's Br. at 40.)

Maynard's decision not to challenge the court's instructions that a lay witness could express an opinion on sanity and that the jury must weigh both lay and expert testimony to determine whether Baer was insane or mentally ill did not prejudice Baer's appeal. Giving the instructions did not amount to fundamental error. Trial counsel made perfectly clear that they were seeking a GBMI verdict, not raising an insanity defense. (Trial Tr. at 1908–09, 2105.)

Finally, Maynard's decision not to challenge the court's failure to instruct that life without parole really did mean life without parole must be viewed against the fact that that sentencing statutes do in fact change over time. The most a trial court could have told the jury was that the present statutes do not

permit parole, something the jury obviously already knew.[13]

G. Requesting Co-Counsel

Finally, Bear argues that Maynard should have requested co-counsel. (Appellant's Br. at 41–42.) He does not cite any authority for the proposition that reasonably effective performance requires co-counsel on appeal. (Appellant's Br. at 41–42.) Baer does point to the testimony of expert witness Monica Foster, a

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[13] Baer relies on Schafer v. South Carolina, 532 U.S. 36 (2001), for the proposition that due process requires an instruction that life without parole really does mean life without parole whenever future dangerousness is at issue. (Appellant's Br. at 41.) Schafer actually applies to the instance of not telling a jury that a facially ambiguous phrase like "life imprisonment" or "imprisonment for life" or some other such variation carried no possibility of parole. See Schafer, 532 U.S. at 48 & n.4. As the Court noted, excluding convicts of certain crimes from the possibility of parole was a recent development, so a jury might not know whether a phrase like "life imprisonment" excluded the possibility of parole. Id. at 52–53.

The jury instructions in Baer's penalty phase and the Indiana statute on which it was based clearly used the unambiguous phrase "life without parole." (PCR App. at 637.) As trial counsel explained to prospective jurors:

> There are a couple of others [prospective jurors] that said that they thought it was thirty (30) or forty (40) years. Okay. You're right if we were in Colorado. Life without parole in some other states means that the person who is sentence [sic] for life is eligible to be considered for parole in forty (40) years. Not in Indiana. In Indiana, life without parole means life without parole.

(Trial Tr. at 428.)

good source, who thought a capital appeal was such an "enormous undertaking" that no single lawyer could handle one without co-counsel. (Appellant's Br. at 41–42; PCR Tr. at 715–16.)

Neither the ABA Model Rules of Professional Conduct nor the ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases require appellate counsel to associate with co-counsel. We decline to hold that not requesting co-counsel in a capital appeal falls below that standard required by the Sixth Amendment. See Lowery v. State, 640 N.E.2d 1031, 1041 (Ind. 1994).

Baer notes that "[e]nlisting co-counsel could only have helped Maynard formulate and present all arguably meritorious issues." (Appellant's Br. at 41–42.) Maynard had been practicing law for twenty-seven years and specialized in personal injury and criminal defense. (PCR Tr. at 497.) Given the deferential standard of review Maynard was facing on many issues on appeal and the overwhelming evidence of Baer's guilt, we cannot say that requesting co-counsel would have changed the outcome. See Strickland, 466 U.S. at 694.

IV. Taylor's Testimony Is Not Newly Discovered Evidence.

Baer claims that previously undiscovered evidence reveals his longstanding psychosis, undermining confidence in his sentence. (Appellant's Br. at 84–87.) The evidence he cites is PCR testimony by Earl Taylor, a former fellow inmate from the late 1990's, before Baer committed these double murders. (PCR App. at 349.) Taylor testified that "most of the time,

[Baer] appears to be reasonable, sane, and lucid. Other times, when the voices take over, he is completely the opposite." (PCR App. at 349.)

To qualify as newly discovered evidence, the evidence must be discovered since the trial and the defendant must have used due diligence to discover it before trial. Stephenson v. State, 864 N.E.2d 1022, 1050 (Ind. 2007). Even if counsel were unaware of witnesses before trial, the statute requires diligence in discovering them and places the burden on Baer to show why the testimony was unavailable at trial. Id. at 1053. To establish that newly discovered evidence undermines the confidence in his sentence, Baer must show a reasonable probability of a different result had the evidence been known at the time of the trial. Id. at 1049.

The PCR court disregarded Taylor's testimony because Baer "obviously knew of any conversations he might have had with Taylor over a several-year period," and therefore Baer had not shown Taylor was unavailable at trial, "an essential showing required by I.C. 35-50-2-9." (PCR App. at 349.) Rejecting Baer's argument that he could not be expected to participate in his own defense, the PCR court noted that there had never before been any such suggestion about Baer's competence. (PCR App. at 350.) The PCR court pointed to Baer's ability to assist his counsel and his capability "of understanding that he might have benefited from telling his trial attorneys his pre-arrest conversations with Taylor." (PCR App. at 350.) He also understood that "he might benefit from portraying himself as being incapable of killing Cory and Jenna Clark because, he asserted, he is so 'soft

and sentimental' that he cries 'when a freakin' butterfly gets hit on the windshield.'" (PCR App. at 350.)

On appeal, Baer reiterates that his mental state precludes the court from holding him responsible for assisting in his defense. (Appellant's Br. at 87.) He also argues, "Taylor's testimony concerning Baer's long-standing auditory hallucinations, corroborated at PCR by counselor Ogden and ex-wife Brown, undermines confidence in Baer's death sentence." (Appellant's Br. at 87.)

The PCR court was not clearly erroneous in concluding that Baer has not met the burden required for relief on new evidence. While additional evidence about Baer hearing voices during an earlier prison stay would be material, the record at trial presented considerable evidence and evaluation of the "voices question." What Taylor has to add does not suggest a reasonable probability of a different result.

VI. Baer's Potential Mental Retardation

The record contains very occasional mention of mental retardation. We thus pause to consider whether there might be any claim under Atkins v. Virginia, 536 U.S. 304 (2002), though none of his lawyers nor any of the multitude of medical experts have made this an issue.

Dr. Richard Lawlor and Dr. Philip Harvey, two of the experts who testified at PCR, tested Baer's IQ. (PCR Tr. at 336; PCR Ex. 15.) Dr. Lawlor tested Baer's IQ in December 2004, and Dr. Harvey tested it in 2008. (Direct Appeal App. at 1581; PCR Ex. 15.) The test result administered by Dr. Lawlor was a

borderline score of sixty-nine to seventy-one, and the test administered by Dr. Harvey was in the low eighties. (PCR Tr. at 336; PCR Ex. 15.) As Dr. Harvey acknowledged, Baer had been incarcerated and under psychiatric treatment for several years, so he based his conclusions about Baer's mental state at the time of the crime on the assumption that his cognition in 2008 was "at least not likely to be worse" than at the time of the crime. (PCR Tr. at 282–84.) This is because "[s]ubstance abuse-related disorders improve fairly substantially during periods of abstinence." (PCR Tr. at 282.) Therefore, Baer's cognitive performance data Dr. Harvey collected "is quite likely an underestimate of his level of cognitive impairment at the time of the crime." (PCR Tr. at 282.)

Dr. Lawlor concluded that the 2004 test results meant Baer "would be a person who, with effort and motivation, could pass in school, but it would take a lot of motivation and effort with that level of functioning. And he certainly wouldn't be an honor roll student." (PCR Tr. at 336.) After discussing Dr. Harvey's IQ test results, Dr. Lawlor expressly stated that Baer "is not mentally retarded." (PCR Tr. at 336.)

Dr. Harvey did not discuss the IQ results in his report at PCR, but he did discuss Baer's cognitive abilities. (PCR Tr. at 272–74.) He found that Baer "has a wide range or scatter in his abilities. There are a number of his abilities that I examined that are essentially in the average range of performance." (PCR Tr. at 272.) As an example, Baer's vocabulary scores were "above average for someone with his educational attainment and his opportunities." (PCR Tr. at 273.) On the other hand, other aspects of his

performance, such as his working memory, were "quite impaired." (PCR Tr. at 273.) Further, Dr. Harvey found that Baer's "family history is positive for mental retardation," though he did not attribute any significance to this observation. (PCR Tr. at 299.)

In Atkins, the U.S. Supreme Court, citing the American Psychiatric Association's definition, noted that "mild" mental retardation applies to people with an IQ level of fifty or fifty-five to approximately seventy. Atkins, 536 U.S. at 309 n.3. In State v. McManus, this Court restated what qualifies as "significantly subaverage intellectual functioning" under Ind. Code § 35-36-9-2: "a person is considered to meet the subaverage intellectual functioning component if the person's full-scale IQ test score is two standard deviations below the mean; i.e., an IQ between 70 and 75 or lower." 868 N.E.2d 778, 785 (Ind. 2007) (quoting Woods v. State, 863 N.E.2d 301, 304 (Ind. 2007)); see also, Atkins, 536 U.S. at 308 n.3.

In McManus we concluded that the post-conviction court's finding that the defendant was significantly subaverage was clearly erroneous and not supported by the record. McManus, 868 N.E.2d at 787. McManus presented scores from five IQ tests, all of which indicated scores of seventy or above and three of which indicated scores above the seventy to seventy-five cutoff. Id. at 785–86. The record also included expert testimony that McManus was not within the definition of mental retardation. Id. at 786.

Given our holding in McManus and the extensive record in Baer's case, it appears that the Eighth Amendment does not bar application of the death penalty on grounds of retardation.

Conclusion

We affirm.

Dickson, Sullivan, Rucker, and David, JJ., concur.

IN THE
INDIANA SUPREME COURT

No. 48S00-0404-DP-181

FREDRICK MICHAEL BAER,

Appellant (Defendant below),

v.

STATE OF INDIANA,

Appellee (Plaintiff below).

Appeal from the Madison County Superior Court,
No. 48D01-0403-MR-62
The Honorable Fredrick R. Spencer, Special Judge

May 22, 2007

Dickson, Justice.

Fredrick Michael Baer was sentenced to death following his convictions for two murders and the jury's unanimous recommendation that he receive the death sentence. His direct appeal asserts the following claims of error: (1) prosecutorial misconduct; (2) erroneous admission of recorded

telephone calls from jail; (3) trial court failure to comply with proper procedures in handling prospective jurors; and (4) inappropriateness of the death sentence. We affirm the judgment of the trial court.

On February 26, 2004, four-year-old Jenna Clark and her mother Cory Clark were discovered mortally wounded from deep cuts to the right side of their necks. Jenna was partially decapitated. The defendant was charged with two counts of murder and various other offenses.[1] The State requested the death sentence. At trial, the jury declined to return a verdict of guilty but mentally ill, but rather found the defendant guilty on each murder charge and on the charges of robbery, theft, and attempted rape. After consideration of evidence presented in the penalty phase, the jury found the five alleged aggravating circumstances proved beyond a reasonable doubt, found the aggravating circumstances not outweighed by the mitigating circumstances, and recommended the death sentence. Appellant's App'x. at 1514-16. Thereafter, the trial court sentenced the defendant

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[1] The charges included: Count I, for the murder of Cory R. Clark; Count II, for the murder of Jenna Clark; Count III, for robbery of Cory Clark; Count IV, for burglary of the Clark residence; Count V, for burglary of the Douglas Brooks residence; Count VI, for theft of the Cory Clark property; Count VII, for theft of the Douglas Brooks property; Count VIII, for attempted rape; and Count IX, alleging the defendant to be a habitual offender. Prior to trial, the judge granted Baer's motion to sever Counts V and VII relating to burglary and theft of Douglas Brooks, and prior to the case being submitted to the jury at the close of evidence, the State filed an amended information deleting Count IV relating to burglary of the Clark residence. Appellant's Br. at 4.

accordingly, ordering the death sentence for each count of murder.[2] The defendant presents his direct appeal to this Court, which has jurisdiction pursuant to Indiana Code § 35-50-2-9(j) and Indiana Appellate Rule 4(A)(1)(a).

1. Prosecutorial Misconduct

The defendant first contends that the prosecutor engaged in a general pattern of misconduct throughout both the guilt and penalty phases of the trial, "embark[ing] upon a planned attack on the defense" using "an assortment of improper and highly prejudicial comments and arguments." Appellant's Br. at 9. His appellant's brief, however, specifically identifies and focuses his appellate argument upon only one claim of prejudicial misconduct. He asserts that the prosecutor improperly:

> sought to condition the jury to consider the effect that guilty but mentally ill verdicts[3]

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[2] The judge sentenced Baer to death in accordance with the jury's recommendation for the two counts of murder, but sentencing on the remaining counts for robbery, theft, and attempted rape was held in abeyance "to avoid any suggestion that the Court was considering any non-death penalty aggravators during the sentencing hearing." Appellant's App'x. at 1007.

[3] Under Indiana law, when the defense of insanity is interposed, the jury must determine whether a defendant is (1) guilty, (2) not guilty, (3) not responsible by reason of insanity at the time of the crime, or (4) guilty but mentally ill at the time of the crime. Ind. Code § 35-36-2-3. If found guilty but mentally ill at the time of the crime, a defendant is sentenced "in the same manner as a defendant found guilty of the offense." Ind. Code § 35-36-2-5(a). Such a defendant shall, however, be further evaluated at the

> might eventually have on the execution of a death sentence due to issues which might be raised on appeal. In effect, he was urging them to use their decision at the guilt phase to insulate a death sentence from appropriate appellate review.

Id. at 14. The defendant contends that these are "improper considerations for the jury at the guilt phase," and that the prosecutor's behavior impaired his right "to have an impartial jury decide if he should live or die, rather than one predisposed through prosecutorial conditioning to impose death." *Id.* at 15.

The State urges that the issue is procedurally defaulted for failure to make a contemporaneous objection and, in the alternative, that there was no prosecutorial misconduct, but that if there was, it is neither fundamental error nor a basis for reversal because of the doctrine of invited error.

The defendant does not identify any objection presented at trial by his defense counsel and concedes that the claimed prosecutorial misconduct "went largely unchallenged." *Id.* at 15. He seeks to avoid procedural default, however, contending that the misconduct constitutes fundamental error.

If a defendant properly raises and preserves the issue of prosecutorial misconduct, the reviewing appellate court determines "(1) whether the prosecutor engaged in misconduct, and if so, (2)

Department of Correction and treated as is psychiatrically indicated for the illness. *See* Ind. Code § 35-36-2-5(c).

whether the misconduct, under all of the circumstances, placed the defendant in a position of grave peril to which he or she would not have been subjected." Cooper v. State, 854 N.E.2d 831, 835 (Ind. 2006); Booher v. State, 773 N.E.2d 814, 817 (Ind. 2002); *accord* Roach v. State, 695 N.E.2d 934, 942 (Ind. 1998); Mahla v. State, 496 N.E.2d 568, 572 (Ind. 1986). "The gravity of peril is measured by the probable persuasive effect of the misconduct on the jury's decision rather than the degree of impropriety of the conduct." Cooper, 854 N.E.2d at 835; *accord* Coleman v. State, 750 N.E.2d 370, 374 (Ind. 2001).

Six months before trial, the defendant requested permission to file a belated notice of mental disease or defect. The tendered notice stated that it was being filed pursuant to Indiana Code § 35-36-2-1. When a defense under this section is asserted, the jury may find a defendant guilty, not guilty, not responsible by reason of insanity at the time of the crime, or guilty but mentally ill at the time of the crime. Ind. Code § 35-36-2-3. In the notice, however, the defendant advised his intention to assert the defense of mental disease or defect "as set out in" Indiana Code § 35-41-3-6. Appellant's App'x. at 1200. This statute provides:

> (a) A person is not responsible for having engaged in prohibited conduct if, as a result of mental disease or defect, he was unable to appreciate the wrongfulness of the conduct at the time of the offense.
>
> (b) As used in this section, "mental disease or defect" means a severely abnormal mental condition that grossly and demonstrably impairs a person's perception, but the term

> does not include an abnormality manifested only by repeated unlawful or antisocial conduct.

Ind. Code § 35-41-3-6. This provision describes the mental disease or defect that constitutes a complete defense to criminal liability, commonly referred to as the insanity defense. The trial court granted the request and the motion was filed. At the final conference between the trial court and counsel the week before trial began, the prosecutor asserted: "They have filed a motion for insanity defense. They are asking for a not guilty by reason of insanity . . . ." Trial Tr. at 338. Defense counsel did not challenge or provide any clarification of this statement.

At the beginning of the jury selection process on the first day of trial, the parties were each permitted to present a "mini opening statement," briefly summarizing the facts and issues, to "facilitate the jury panel's understanding of the case." Ind. Jury Rule 14(b). The State briefly described the alleged crime and provided the names of expected witnesses. The defense's mini opening statement primarily consisted of the following:

> I will tell you right up front we plan to be very open with you from the word go and tell you Mr. Baer committed the crimes that Mr. Cummings [the prosecutor] just indicated. He killed two people, a mother and a daughter. We plan to present evidence that Mr. Baer has suffered from serious mental illness from about the time he was thirteen years old up through his adult life. We will not be asking you to excuse him. What we will be asking for is that you find him

> guilty of the crimes alleged but also that he's mentally ill.

Trial Tr. at 369-70.

In the course of the prosecutor's initial questioning of the first panel of prospective jurors,[4] he asserted that the defense would be requesting the jury to excuse the defendant's actions because of mental illness. When the defense had its first opportunity to speak with the prospective jurors, defense counsel immediately stated: "This is not an insanity defense. You are never going to hear the defense in this case say that Mike Baer ought to be excused because he was insane at the time of this crime." *Id.* at 423. Shortly thereafter, the defense began to talk with the prospective jurors about the penal consequences when a defendant is found guilty in comparison to those when a defendant is found guilty but mentally ill, and stated:

> No difference. None. No difference in where you're placed. No difference in the amount of time that you get and in this case, ladies and gentlemen, you could find Mike Baer guilty but mentally ill, deliberate and recommend the death penalty. There is no case in Indiana that says that a person who's found guilty but mentally ill is not . . .

Id. 431-32. The prosecutor interrupted at this point, and a bench conference ensued, in which the

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[4] During voir dire, twelve jurors at a time were questioned by the attorneys. Trial Tr. at 370. The jurors selected from each panel of twelve then remained in the courtroom during the voir dire of succeeding panels. *Id.* at 457-59.

prosecutor asserted that the defense counsel's statements were misleading. *Id.* at 432. The defendant's attorney then continued, explaining to the prospective jurors as follows:

> Let me state it concisely. A person who is found guilty but mentally ill is treated by statute the same as a person who may be found just straight guilty. Now there is a debate in Indiana about whether or not certain justices of the Supreme Court or all the justices of the Supreme Court would ever uphold the execution of somebody who is found guilty but mentally ill. I don't know the answer to that question. I don't think anybody does, but as we stay today you know there is no difference statutorily the way you treat somebody in Indiana under the law who is found guilty but mentally ill.

Id. at 435. In response to one prospective juror's question whether a verdict of guilty but mentally ill might "[p]ossibly result in an appeal to the Indiana Supreme Court," defense counsel responded:

> Well, I can't answer that question. You then will deliberate again if you found that verdict and recommend whether he should get the death penalty and if you did that and then recommend the death penalty, do you think that's gonna be an issue on appeal? You're darn right it is. You're darn right it is.

Id. at 436-37.

When the prosecutor resumed questioning the potential jurors, he further commented on the appeals process:

> Now, even if . . . he's guilty or guilty but mentally ill, we're still going to be in a penalty phase, but some appellate court is going to decide at some point and the law in this state is in dispute of whether or not that can happen, whether or not a person is found guilty but mentally ill can be executed. Right now retarded people cannot be executed. Do we extend that to anybody who's guilty but mentally ill? That's an open question and the Supreme Court has not decided, so of course, if the defense wants to save this man's life, guilty but mentally ill is where they want to go. . . .

Trial Tr. at 494-95. The prosecutor explained to one prospective juror:

> But I am saying . . . you know I've heard the defense attorneys twice say well, it's not letting him off the hook. Sure it is. Sure it is. Cause if he's not getting the death penalty in this case because you believe he's got some mental disease or defect, that is letting him off the hook. If you would impose the death penalty on anyone else who didn't have this condition, then it is letting him off the hook. It doesn't mean he's going to walk free. It just means he's not going to get executed or may not get executed.

Id. at 563. At this point, the defense counsel asked to approach the bench where he said:

> I really think that saying to the jury that voting guilty but mentally ill doesn't involve the death penalty at least is far afield as I was. I was talking to them because there is law that says that . . . we don't know if it says that. . . . That's my objection.

Id. at 563-64. After the judge suggested an alternative way to explain the issue to the jurors, the prosecuting attorney volunteered, "I went farther than the law permitted . . . than the law states. I can clean that up." *Id.* at 564. The prosecutor then stated to the prospective jurors:

> Let me be clear on what I'm telling you. It does not mean that he won't be executed if you vote for guilty but mentally ill. These lawyers will tell you they believe that it's less likely that will occur. The law in this state is not clear. We do not execute retarded people. The next battleground is people who are guilty but mentally ill and there are cases that the Supreme Court is deciding now and I suspect they want to be able to argue to the Supreme Court that it should not . . . you should not execute people who are guilty but mentally ill and that's why we're at this point in this case. Even if you find him guilty but mentally ill, we're going to have a hearing on penalty and whether he should be executed or not. But they will acknowledge that they want to be in a position to argue to the Supreme Court that people who are guilty but mentally ill should not be executed, and it's going to put them in a

> better position. That's why that is letting him off the hook.

Id. at 565. During subsequent questioning of prospective jurors, the prosecution similarly addressed the issue, for example:

> But there is significance on which one of those verdicts that you decide. Guilty or guilty but mentally ill does have some consequence on how this case turns out. It may in five or ten years have some consequence on whether he's ever executed or not. I think it's going to be more difficult for the State to execute this man if he's found guilty but mentally ill. I'm not saying that to tell you that if you really think he's guilty but mentally ill, don't vote that way. You should vote just the way you believe in your heart that the evidence in this case comes out. But you shouldn't cave in and got [sic] for guilty but mentally ill just because you think it really doesn't matter one way or the other.

Id. at 931. Shortly thereafter, in a colloquy with another prospective juror, the prosecutor stated:

> [I]s there any difference between guilty but mentally ill in terms of what the potential punishment will be? . . . It's going to be harder to execute him. . . . You could still do it in our state the way the law exists now. We still have the legal authority and the law permits people who are found guilty but mentally ill to be executed. Now we don't execute people who are insane who are not responsible by reason of insanity, but there's . . . you have guilty, guilty

> but mentally ill and not responsible because you're insane. . . . They don't know what they did was wrong. We don't execute people like that. You have guilty but mentally ill and you have guilty and at some point in the course of this case there's going to be an argument made to our Supreme Court that people who are guilty but mentally ill should not be executed. Even though the law permits it now, there's going to be an argument and it's not a decided fact in our state whether or not that can happen or not. So a vote for guilty but mentally ill may very well mean this defendant doesn't get executed. Does that . . . do you understand that?

Id. at 942-43.

Because of possible confusion that might arise when a jury is asked to consider verdicts of not guilty by reason of insanity and guilty but mentally ill, trial courts are required to instruct a jury on the differing penal consequences of these verdicts if requested by the defendant. Georgopolus v. State, 735 N.E.2d 1138, 1143 (Ind. 2000). We have explained:

> It is generally inappropriate . . . to give an instruction identifying specific penal consequences of a determination of guilt. . . . However, in cases involving the insanity defense, there will be increased speculation on the part of the jury on the differences in sentencing between verdicts of guilty, guilty but mentally ill and not responsible by reason of insanity. In order to dispel the speculation and to focus the jury on the issue of guilt,

> rather than possible punishment, an instruction explaining the consequences of each determination in a general way can be appropriate and beneficial to the accused.

Barany v. State, 658 N.E.2d 60, 65 (Ind. 1995) (quoting Smith v. State, 502 N.E.2d 485, 488 (Ind. 1987)).[5] In addition to minimizing confusion, jury instructions on post-trial procedures may be required to correct "an erroneous view of the law," Dipert v. State, 259 Ind. 260, 262, 286 N.E.2d 405, 407 (1972), or "an erroneous impression of the law," Caldwell v. State, 722 N.E.2d 814, 817 (Ind. 2000). In the present case, the defendant did not request any such instruction, and none was given.

It is clear that prospective jurors in this case were initially informed by both the defense and the prosecution regarding the lawyers' shared uncertainty about whether an Indiana death sentence would be upheld on appeal if it followed a verdict of

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[5] In these opinions, this Court approved the following instruction describing the verdict of guilty but mentally ill:

> Whenever a defendant is found guilty but mentally ill at the time of the crime, the court shall sentence the defendant in the same manner as a defendant found guilty of the offense. At the Department of Correction, the defendant found guilty but mentally ill shall be further evaluated and treated as is psychiatrically indicated for his illness.

Georgopolus, 735 N.E.2d at 1143 n.3; Barany, 658 N.E.2d at 64.

guilty but mentally ill. The defendant contends that the prosecutor's comments amounted to misconduct by seeking "to condition the jury to consider the effect that guilty but mentally ill verdicts might eventually have on the execution of a death sentence due to issues which might be raised on appeal," thus impairing the defendant's right to an impartial jury and predisposing the jury against returning a verdict of guilty but mentally ill. Appellant's Br. at 14, 15. Urging that these are "improper considerations for the jury in the guilt phase," *id.* at 15, the defendant cites Debose v. State, 270 Ind. 675, 389 N.E.2d 272 (1979), and Feggins v. State, 265 Ind. 674, 359 N.E.2d 517 (1977).

Neither Debose nor Feggins involves jurors being given information regarding the possible appellate consequences of their verdict choices. But in *dicta*, these cases do recognize important judicial policy considerations.

> The danger to be avoided in such a case is that the jury, informed of the possibility of factors which could diminish the defendant's sentence, will convict the defendant of a more serious offense than that which they actually believe him to be guilty of, in order to provide a penalty which they consider more appropriate.

Feggins, 265 Ind. at 683, 359 N.E.2d at 523. And in Debose, Justice DeBruler, writing for the Court, cautioned against "condoning verdicts in which the jury might compromise, to the defendant's benefit or detriment, in order to reach a certain number of years of imprisonment." 270 Ind. at 676, 389 N.E.2d at 273-74.

Informing a jury that one of their sentencing options, here a verdict of guilty but mentally ill, may carry a special risk of appellate reversal of any resulting death sentence presents analogous concerns. Under some circumstances, standing alone, and absent proper instruction from the court, this information might influence a jury to disfavor a verdict of guilty but mentally ill for reasons unrelated to the evidence regarding the crime and the defendant's claim of mental illness. We therefore generally disapprove of a trial court or prosecutor gratuitously informing the jury, or prospective jurors, that varying appellate consequences may attach to the different verdict choices before the jury.

But the perceived uncertain potential appellate affect of a verdict of guilty but mentally ill was first presented to prospective jurors in this case by the defense, not the State.[6] With the acknowledged objective of seeking a verdict of guilty but mentally ill, the defense during voir dire sought to condition the jury to believe that there was no appreciable difference between that and a verdict of guilty, all the while hopefully anticipating that a significant difference may result on appeal. When challenged by the prosecutor at a bench conference for misleading the jury, the defense elected candidly to disclose its strategy to the jurors and explained its belief regarding the possible appellate affect of a verdict of guilty but mentally ill. The defendant cannot be heard

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[6] Both the defendant and the State agree that it was the defendant who first broached the subject of the post-trial appellate question regarding the effect of a guilty but mentally ill verdict. Appellant's Reply Br. at 2; Appellee's Br. at 8.

on appeal to complain that the prosecutor committed misconduct by responding and presenting argument in order to resist the defense's strategy of gaining appellate advantage.

Included within the defendant's argument addressing prosecutorial misconduct is a claim that he was thereby deprived of his due process rights to have an impartial jury decide if he should live or die, rather than one predisposed through prosecutorial conditioning to impose death. In analyzing a due process claim based on alleged prosecutorial misconduct, the "touchstone" is "the fairness of the trial, not the culpability of the prosecutor." Smith v. Phillips, 455 U.S. 209, 219, 102 S.Ct. 940, 947, 71 L.Ed.2d 78, 87 (1982). Even if prosecutorial misconduct is established, a new trial is not necessarily required where the conduct did not impair the jurors' ability to render an impartial verdict. *Id.* at 217, 220, 102 S.Ct. at 946, 948, 71 L.Ed.2d at 86, 88. "Due process means a jury capable and willing to decide the case solely on the evidence before it." *Id.* at 217, 102 S.Ct. at 946, 71 L.Ed.2d at 86.

We are not persuaded that the lawyers' discussion of the issue impinged on the fairness or accuracy of the jury's decision-making or resulting verdict. The jurors were instructed that they were "to determine the facts in the case solely from the evidence in the case, which consists of the testimony of witnesses and exhibits received in evidence" and that "statements and arguments of counsel are not evidence." Trial Tr. 1130, 1131. They were likewise instructed: "Your sole interest is to ascertain the truth from evidence in this case." *Id.* at 2129, 2580. Substantial evidence was

presented, and it focused on the facts of the alleged crime and the defendant's claim of mental illness. From our review of the record, we find it extremely unlikely that the issue of possible appellate consequences distracted or diverted the jury's attention from its task of rendering an individualized determination of guilt and sentence in this case. And although the defense and prosecution lawyers' comments expressing uncertainty about possible appellate consequences were both speculative and irrelevant to the jury's function, because of the minimal role of such extraneous comments, a reversal and new trial are not required because we find the comments neither "constitutionally irrelevant" nor "too speculative." California v. Ramos, 463 U.S. 992, 1001-02, 103 S.Ct. 3446, 3453-54, 77 L.Ed.2d 1171, 1181 (1983).

This is not a case where the State sought a death sentence by referring to potential appellate review in order to diminish a jury's sense of its responsibility. Rather, here first the defense, and then in response the State, each tried to enhance the role and responsibility of the jury for a result that might be more vulnerable to or more immune from appellate modification. But there was no diminution of the jury's sense of responsibility and care in determining the verdict.

We conclude that the prosecution did not commit misconduct in voir dire or thereafter in responding to the disclosure by the defense of its belief that a death sentence based on a verdict of guilty but mentally ill might not be upheld on appellate review.

2. Admission of Telephone Calls from Jail

The defendant contends that the trial court improperly admitted into evidence and played for the jury two excerpts of recorded telephone calls placed by the defendant to his sister from the Marion County jail, where the defendant was located for a portion of his pre-trial incarceration. He argues that the foundation for admission of the recordings did not comport with the requirements of Packer v. State, 800 N.E.2d 574 (Ind. Ct. App. 2003), regarding the Indiana Wiretap Act ("IWA"), and that the resulting prejudice outweighed the probative value pursuant to Indiana Evidence Rule 403.

In Packer, the Court of Appeals affirmed a murder conviction over the defendant's claim of error in the admission of tapes of his telephone calls from jail to his girlfriend. One of Packer's contentions was that the tapes were obtained without a warrant as required by the IWA, Indiana Code § 35-33.5-5-1. The court held that the recordings did not qualify as "interceptions" under the Act, considering that Packer had, in effect, consented to the recordings because the handbook given to all jail inmates (for which Packer had signed a receipt and statement that he understood its contents) warned that their phone calls were subject to being recorded and monitored, because an announcement of that fact was made whenever an inmate made a telephone call, because Packer could have requested and received permission from the warden for an unrecorded telephone conversation, and because Packer could have refrained from making the calls. Packer, 800 N.E.2d at 582.

Characterizing Packer as if delineating prerequisite foundational requirements for admission of recorded phone calls, the defendant argues that in the present case, there was no signed acknowledgment that he received and understood the jail handbook, and that there was no procedure permitting him to request that his calls not be monitored. Packer does not, however, purport to announce a list of foundational requirements for establishing consent under the IWA. Rather, the court merely discussed the evidence in Packer's case in the context of finding that the trial court did not abuse its discretion in admitting the tape. *Id.* at 582-83.

In the present case, before he made the calls, the defendant received the Marion County Jail Inmate Handbook, which specifically warned that all calls from inmates were subject to being monitored and recorded. When he placed calls as an inmate from the jail, a pre-recorded message advised both parties to the telephone call that it was from the Marion County Jail and that the call may be monitored and recorded. There is no doubt that the defendant voluntarily acted despite his actual knowledge of the recording policy. In proceedings outside the presence of the jury, the trial court received in evidence an earlier recorded telephone call from the defendant to his sister, this one from the Madison County jail, in which the defendant read aloud to his sister a portion of a letter from his attorney stating: "Conversations over jail phone are generally taped, so you don't want to say anything over the phone which might be confidential in nature, even to your spouse." State's Ex. 63, Exhibits Vol. XXII. Despite the warning from his

lawyer, the jail handbook, and the pre-recorded reminder that accompanied his telephone calls from the jail, the defendant nevertheless elected to make the calls and the statements contained in the challenged recordings. We find that the trial court did not err in overruling the defendant's objection claiming that the recorded calls lacked the foundation of consent as discussed in Packer.

Emphasizing the prejudicial content of the two recordings, the defendant argues that the unfair prejudice far outweighed the probative value, rendering them inadmissible pursuant to Evidence Rule 403, which provides in relevant part: "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury . . . ." Evaluation of whether the probative value of an evidentiary matter is substantially outweighed by the danger of unfair prejudice "is a discretionary task best performed by the trial court." Dunlap v. State, 761 N.E.2d 837, 842 (Ind. 2002). Such rulings are reviewed for abuse of discretion. Daniels v. State, 683 N.E.2d 557, 559 (Ind. 1997). We have emphasized that the relevant inquiry is not merely whether the matter is prejudicial to the defendant's interests, but whether "it is *unfairly* prejudicial." Steward v. State, 652 N.E.2d 490, 499 (Ind. 1995).

The defendant's claim of unfair prejudice is that the excerpts played to the jury discredited his claim of mental illness by implying a conspiracy by the defense to encourage him to lie, and that they were highly misleading because his words were not heard

by the jury in the context of the full telephone conversations. As to the latter claim, the complete recorded telephone conversations (which were admitted for foundation purposes although not played in their entirety to the jury) demonstrate that the portions thereof actually played to the jury were not misleading. But the content of these excerpts was definitely harmful to the defendant.

The excerpts played to the jury consisted of two passages. One included the defendant requesting "before I go to this doctor's appointment," that someone come to him "so I know what to talk about" and "to brief me on what to say or whatever or anything." State's Exhibit 65, Exhibits Vol. XXII. The other played back the defendant's voice telling his sister:

> "Oh yeah, and while we're at it to boot, here let's go ahead and say you're stupid and insane so it'd make it a little bit easier. I don't think so. . . . Matter of fact, I ain't got to worry about that cause I'm getting ready to go out here to the f***ing doctor and tell this stupid son of a b**** a bunch of stupid-a** lies."

Id.

Because the defendant was seeking a jury verdict of guilty but mentally ill, the substance of these excerpts was obviously relevant and of high probative value, but also quite prejudicial to the defense. We are not persuaded, however, that there was anything *unfairly* prejudicial in the excerpts of the recorded telephone calls that were played to the jury. The high probative value was not outweighed by unfair

resulting prejudice. We find no abuse of discretion on this issue.

3. Omissions in Handling Prospective Jurors

The defendant further seeks a new trial on grounds that the trial court failed to properly administer an oath to each panel of prospective jurors and that the court's introduction of the case to prospective jurors omitted certain information, as specified by Indiana Jury Rules 13 and 14. The defense acknowledges that neither party objected, but argues that the omissions "rendered a fair trial impossible." Appellant's Br. at 20.

A contemporaneous objection would have enabled the trial judge promptly to correct any omission. The failure to present a timely proper objection at trial results in procedural default preventing the issue from being raised on appeal, unless the trial court's action is found to constitute fundamental error. Booher, 773 N.E.2d at 817; Mitchell v. State, 726 N.E.2d 1228, 1235 (Ind. 2000); *see also* Harvey v. State, 546 N.E.2d 844, 846 (Ind. 1989). Fundamental error is an extremely narrow exception "and applies only when the error constitutes a blatant violation of basic principles, the harm or potential for harm is substantial, and the resulting error denies the defendant fundamental due process." Mathews v. State, 849 N.E.2d 578, 587 (Ind. 2006).

The defendant concedes that the Chronological Case Summary of trial court proceedings states that the potential jurors were sworn, but he asserts that the trial transcript does not include such procedure for the first two days and that on the third day, the

oath was administered by the bailiff rather than the judge.

The defendant further contends that the trial judge's introduction of the case to the potential jurors covered several necessary topics but omitted information regarding the applicable standard and burden of proof, the presumption of innocence, the means by which jurors may address private concerns to the judge, the standard of juror conduct, and the rules regarding challenges. These are among the items that Jury Rule 14 requires in a trial judge's introduction of the case "[u]nless sufficiently covered by the jury orientation." Ind. Jury Rule 14. The defendant does not allege nor establish that the prospective jurors did not receive the standard jury orientation presentation recommended by the Indiana Judicial Conference. *See* Ind. Jury Rule 11.

In addition to the oaths of prospective jurors recorded in the Chronological Case Summary, the final jury panel selected was properly sworn, and the substance of the information allegedly omitted from the judge's introduction of the case to prospective juror was included in preliminary instructions given to the jury before the opening statements and presentation of evidence. We conclude that the alleged omissions of the trial court in the management of prospective jurors did not constitute fundamental error.

4. Appropriateness of Death Sentence

The defendant seeks our review of his death sentence for appropriateness. The Indiana General Assembly has determined that in capital jury trials,

the question of whether to sentence a defendant to the death penalty is determined by the jury, after which the trial court "shall sentence the defendant accordingly." Ind. Code § 35-50-2-9(e). Article 7, Section 4, of the Indiana Constitution grants to this Court, in all criminal appeals, the power "to review and revise the sentence imposed." We have implemented this discretionary authority in all criminal cases through our adoption of Indiana Appellate Rule 7: "The Court may revise a sentence authorized by statute if, after due consideration of the trial court's decision, the Court finds that the sentence is inappropriate in light of the nature of the offense and the character of the offender."[7]

At about nine o'clock in the morning of February 25, 2004, in a rural Madison County residential neighborhood near Lapel High School, Cory Clark, age twenty-four, stepped onto the porch of her home as the defendant drove by. He turned his vehicle around and drove back, stopped in her driveway, and got out. Later that day, she and her four-year-old daughter Jenna were found murdered in their home, Cory in a bedroom nude from the waist down, lying in a pool of blood, her throat lacerated, and Jenna in another bedroom with spinal injuries and a severely

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[7] In his concurring opinion, Chief Justice Shepard questions whether, in light of the statutory sentencing function now assigned to capital juries, appellate courts should revisit the appropriateness of a jury's particular sentence determination. Because neither the State nor the defense herein challenges the propriety of Appellate Rule 7, by which we exercise our constitutional review and revise authority, we decline consideration of this issue.

lacerated throat that nearly decapitated her. Cory's purse containing three to four hundred dollars was missing from the house. Later that morning, after changing his clothes, the defendant returned to work. The defendant admitted committing the murders. There is no evidence that Cory and Jenna Clark were anything other than total strangers to the defendant.

The defendant, a thirty-two-year-old man at the time of the offense, was working as a traffic control worker for a construction company. He was in his third marriage. In addition to mental health testimony during both the guilt and penalty phases, considerable evidence regarding the defendant's personal background was presented in the penalty phase testimony of Mark Douglas Cunningham, Ph.D, a clinical and forensic psychologist retained by the defense to evaluate the defendant and testify as to his findings concerning "factors that may have affected Michael Baer's life." Trial Tr. at 2243. Dr. Cunningham provided extensive details regarding the defendant's early childhood, adolescence, and early adult years, explaining that during the defendant's early childhood, he had been a victim of inadequate mothering, unstable home environment, and abandonment by his biological father. During his middle years, the defendant experienced lack of parental supervision and guidance, alcohol abuse by both his mother and adoptive father, rejection by his adoptive father, and domestic abuse in the home. The defendant exhibited cognitive and emotional problems, ADHD symptoms, and school misbehavior. By this time he was abusing inhalants and other drugs. He has a record of juvenile offenses beginning with three thefts at ages fourteen and fifteen. As an

adult, he has had multiple convictions for property-related offenses. The defendant received treatment at an adolescent drug treatment center at age fourteen. Chronic marital conflicts led to the separation of his mother and his adoptive father when the defendant was about age fifteen. The defendant received drug rehabilitation treatment for periods of three and eighteen months and had several episodes of short incarceration. Dr. Cunningham estimated that between the ages of 16 and 32, the defendant was in custody or drug treatment about eighty-five percent of the time. During his late adolescent and early adult years, the defendant's cocaine and methamphetamine addiction escalated.

The aggravating circumstances alleged by the State were the murder of a child under age twelve, murder after committing another murder, murder during attempted rape, murder during robbery, and murder while on probation. The jury unanimously found all of the aggravating circumstances to have been proved beyond a reasonable doubt and that they were not outweighed by mitigating circumstances. The jury recommended a sentence of death.

The trial court entered a judgment accordingly, and made written findings, which included a description of the opinions of the mental health professionals. The defendant was examined by several health care professionals. Providing an opinion on behalf of the defense, one clinical psychiatrist, Dr. George Parker, advised that the defendant "meets the diagnostic criteria for several drug dependence diagnoses, Generalized Anxiety Disorder, and Psychosis not otherwise specified."

Appellant's App'x. at 1551. Other defense experts testified that the defendant had a dysfunctional childhood and suffered as a child from ADHD. The two mental health experts appointed by the trial court agreed that the defendant understood and was able to appreciate the wrongfulness of his conduct when he committed the murders. Psychiatrist Dr. Larry Davis reported: "Fred Baer indicated that both his evil manifestation and his rational and loving persona understood the wrongfulness of his conduct. It is probable that the psychosis induced by heavy and steady methamphetamine abuse was operating at the time and was at the level of mental disease or defect. . . ." *Id.* at 1564. Dr. Davis noted that "his methamphetamine addiction in itself is an important mental illness under Axis I, diagnostically," and expressed the opinion that the defendant fits the description of "having a psychiatric disorder which substantially disturbs a person's thinking, feeling, or behavior and impairs the person's ability to function." *Id.* Dr. Richard L. Lawlor, a clinical psychologist, believed that the defendant "does have a mental disease or defect, namely an ongoing paranoid personality with potential to decompensate into brief psychotic episodes when he is using drugs, but even under those circumstances I do not think that his psychiatric illnesses 'grossly and demonstratively impairs his perceptions.'" *Id.* at 1581.

Tests on the defendant's blood taken about thirty-eight hours after the crime revealed only a trace amount of carboxy THC, a breakdown product of marijuana, and tested negative—"absolutely zero"—for methamphetamine and amphetamine. Trial Tr. at 1635, 1640-46.

The trial court observed that the "common thread running through every opinion is that Mr. Baer could appreciate the wrongfulness of his conduct," that he "has some mental health difficulties, but he knows what he is doing." Appellant's App'x. at 1005. The trial court found the defendant's "mental illness findings, his difficult childhood, and his in-court expressions of remorse" to be mitigating circumstances, but concluded that they were clearly outweighed by the aggravators that were "proven overwhelmingly." *Id.* at 1006.

The record does not provide evidence of any particularly strong, positive character attributes of the defendant. Giving due consideration to the trial court's decision, and in light of the nature of the offense shown by the defendant's brutal and savage slaying of a four-year-old child and her young mother, and the lack of demonstrated virtuous character in the defendant, we decline to intervene in the jury's determination that the death sentence is appropriate under the laws of Indiana for this defendant in this case.

Conclusion

We affirm the judgment of the trial court.

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

Shepard, Chief Justice, concurring.

For the last several decades at least, Indiana law has assigned to judges the duty to decide sentences in criminal cases. Appellate court review of such trial court decisions has been highly deferential, but we

have undertaken to review and revise sentences when persuaded that the trial court's sentence is "inappropriate."

As for death penalty and life without parole cases, the legislature has now largely shifted the sentencing decision from judges and assigned it instead to juries. I am inclined to think that we should be even less ready to set aside the sentencing judgment of jurors, and that the standard we adopted during the era of judicial sentencing should probably not apply to second-guess Indiana juries.

The parties here have not joined this question, however, and there appears no reason to reverse the jury's decision. Accordingly, I join in the Court's opinion.