No. 18-287

**In The Supreme Court Of The United States**

---

RON NEAL, Superintendent, *Petitioner,*

v.

FREDRICK MICHAEL BAER, *Respondent.*

---

ON PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

---

# RESPONDENT'S BRIEF IN OPPOSITION

---

MARIE F. DONNELLY*
Attorney at Law
P.O. Box 6528
Evanston, Illinois 60204
Phone (773)680-7042
Mfdonnelly05@gmail.com

-and-

ALAN M. FREEDMAN
Midwest Center for Justice
P.O. Box 6528
Evanston, Illinois 60204
(847)492-1563
fbpc@aol.com

COUNSEL FOR

RESPONDENT,

FREDRICK MICHAEL BAER

*Counsel of record

## CAPITAL CASE

## QUESTIONS PRESENTED

1. Whether the Court of Appeals correctly applied 28 U.S.C. §2254(d) and *Strickland v. Washington*, to the specific facts of Respondent's claim that his counsel were ineffective for failing to object to an unusual set of penalty phase instructions that the jurors likely interpreted as precluding their consideration of mitigating evidence related to Baer's voluntary intoxication, in violation of the Eighth Amendment.

2. Whether the Court of Appeals correctly applied 28 U.S.C. §2254(d) and *Strickland v. Washington*, to the specific facts of Respondent's claim that his counsel were ineffective for persistently failing to object to the prosecutor's numerous, repeated, improper and prejudicial comments, which cumulatively undermine confidence in the outcome of the penalty phase.

## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

**Cases**

**Rules and Statutes**

## COUNTERSTATEMENT OF THE CASE

The Seventh Circuit's decision accurately sets forth the record evidence and procedural history of this case. Pet. App. 1a-19a. Because this Court's Rules dictate that respondents "have an obligation to the Court to point out in the brief in opposition, and not later, any perceived misstatement made in the petition," Sup. Ct. R. 15.2, Baer offers the following counter statement of facts.

### Background

Baer conceded his guilt at trial. On February 25, 2004, Baer entered Cory Clark's apartment after asking to use the phone to call his boss. He intended to rape her, but decided against it for fear of contracting a disease. 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. Pet. App. 109a.

Baer was charged with the murders, robbery, burglary, theft and attempted rape, in Madison County Indiana. DA App 708-715. The state requested the death penalty, based on five aggravating factors (two murders, the murder of a child, intentional murder during an attempted rape, intentional murder during a robbery and murder while on probation). *Id.*

Douglas Long and Bryan Williams were appointed to represent Baer. DA App 597. Trial counsel hired a mitigation specialist to investigate Baer's background. PCR 211. In July of 2004, they hired psychiatrist George Parker, initially to evaluate Baer and ascertain what psychiatric treatment was needed. TR 1774-75.

After nine months, Mr. Long withdrew as counsel, in part because he felt he was working alone. PCR 556, 563, 574-75. Jeffrey Lockwood replaced him as lead counsel. DA App 1157, 1143.

The case was tried for the State by Madison County Prosecutor, Rodney Cummings.

**Attempt to plead Guilty but Mentally Ill**

Before trial, Baer moved to plead guilty but mentally ill (GBMI). Under Indiana law, this alternative verdict is 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). 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. I.C. 35-36-2-5(a).

The court had previously appointed as "court's experts, " Dr. Larry Davis, a psychiatrist, and Dr. Richard Lawlor, a psychologist, to examine Baer with respect to insanity.[1] PC App at 1420, 1570. Both opined that Baer understood and was able to appreciate the wrongfulness of his conduct when he committed the murders

---

[1] Ind. Code § 35-41-3-6 describes the mental disease or defect that constitutes a complete defense to

(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.

and thus did not meet Indiana's statutory definition of insanity. PC App. 1419; 1570-71.

Dr. Davis diagnosed Baer as suffering from psychosis, "probably associated with methamphetamine abuse," polysubstance abuse, and major depression. PC App. at 1422. He noted that Baer had been committed to a psychiatric hospital as an adolescent and at that time was diagnosed with psychosis, severe depression, and ADHD. *Id.* at 1421-22. He also noted that Baer was addicted to methamphetamines, and exhibited characteristics of psychosis, "with paranoia, hallucinations, fearfulness and confusion in association with taking methamphetamines." *Id.* at 1422. He concluded that at the time of the offense, Baer had "a psychiatric disorder which substantially disturbs a person's thinking, feeling, or behavior and impairs the person's ability to function," as defined in the GBMI statute. *Id.* at 1424.

Dr. Lawlor reported that Baer suffered from paranoid personality disorder. He noted that, under the influence of drugs this condition can decompensate into a brief psychotic disorder characterized by hallucinations, and grossly disorganized behavior. PC App. 1570-71. Dr. Lawlor did not specifically mention the GBMI standard in his report.

After considering their reports, the court rejected Baer's proposed GBMI plea because he was hesitant to accept such a plea based on the expert reports alone. TR 172-73, 223. The court indicated it would like to set the matter for a hearing, but trial counsel did not pursue this and proceeded to trial. TR 173, 223.

**Jury Selection**

During jury selection, the defense immediately informed the venire that they were conceding that Baer committed the crimes charged. Counsel would be asking the jury to find Baer mentally ill, but would not be alleging that Baer is legally insane. TR 369-70.

Jury selection proceeded by interviewing small groups of prospective jurors. The jurors selected from each panel remained in the courtroom while subsequent panels were selected. During voir dire, the prosecution made several statements that would be challenged in subsequent appellate and post-conviction proceedings.

Throughout jury selection, the prosecutor repeatedly told the prospective jurors that this case would be about whether Baer did not know right from wrong, and otherwise injected the insanity standard into the discussion. For example, the prosecutor said:

> . . . did he know he shouldn't be killing someone? That's really what it's all about. His excuse is he didn't know what he was doing. He didn't know right from wrong.

TR 386-7.

The prosecutor went beyond inquiring as to the juror's own beliefs, as he indicated to one of Baer's actual jurors (TR 532), and the rest of the panel, that this "right or wrong" standard was the correct standard for GBMI:

> 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.

The prosecutor also encouraged jurors to define mental illness in this manner in relation to mitigating circumstances. For example, in response to the prosecutor's questioning, juror Brown indicated that the facts of this crime warranted execution "unless there are mitigating circumstances." Asked to define mitigating circumstances, Brown said: "Not having he ability to know right from wrong . . . at the time the crime occurred." TR 769-70. Brown, who served as jury foreperson, DA App 1503-05, 1514-16, was not informed that appreciation of wrongfulness only applied to the defense of insanity. TR 769-93.

The prosecutor knew the defense was pursuing a GBMI verdict, not insanity. *See e.g.*, TR 566. Nevertheless, the prosecutor continued to attach the "right from wrong" standard to the definition of mental illness, and/or referred to mental illness as a "defense" or an "excuse" throughout *voir dire*. *See e.g.,* TR 383, 388, 390, 392, 394, 396, 398, 407, 419, 464, 466, 467, 469, 470, 477, 483, 484, 486, 494, 509, 536, 541, 549, 925-27, 937, 941. Defense counsel did not object to these statements.

Throughout jury selection, the prosecutor also incorrectly told the jurors that a GBMI verdict may not permit a death sentence: "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." TR 649; *see also* TR 494-95, 565-67, 664, 743-44, 817-18, 929-30, 935, 952.

The prosecutor also told the jury that the legislature was considering bills that would abolish life without parole, though he made clear that this was not presently the case. TR 920-21.

Trial counsel did not object to any of the foregoing statements.

The prosecutor also state or insinuated on several occasions that the victim's family wanted a death sentence. TR 378, 480, 405, 559, 766, 801-02. 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. TR 801-804.

**Guilt Phase Evidence and Arguments**

At trial, Baer's defense focused on convincing the jury he suffered mental illness at the time of the crime. The defense expert, Dr. Parker, and the two court's experts, Drs. Davis and Lawler, all agreed that Baer suffered from mental illness. TR 1779, 1902, 1909, 1929-30; PCR App. at 345.

Dr. Parker found that Baer "had a history of some significant drug issues," including methamphetamine, cocaine, inhalant dependence, and marijuana abuse. TR 1778. These issues began in his adolescent years and continued into his adult years. TR 1778. He diagnosed Baer as dependent upon methamphetamines and other drugs, and as suffering from underlying anxiety and psychotic disorders. TR

1778-79, 1822. He explained that individuals who use methamphetamines can become quite agitated, psychotic, paranoid and disorganized as a result of their drug use. TR 1802. He noted that Baer had been treated with two anti-psychotic drugs during his pre-trial incarceration. TR 1787-88.

Dr. Davis, the Court's psychiatrist stated, "it is probable that psychosis induced by heavy, steady methamphetamine abuse was operating at the time [of the offense]." TR 1929. He explained that the most dangerous phase of meth abuse was a period known as "tweaking," which is a period at the end of a binge when the user either runs out of the drug or the drug stops creating the same euphoric effect. At this point the user will become unpredictable, violent and explosive. TR 1936. This period can last for 4-5 days. TR 1937. He also testified that the symptoms of methamphetamine-induced psychosis typically continue beyond the cessation of the drug use, often for weeks. TR 1940.

Dr. Lawlor, the Court's psychologist, described in detail Baer's account of meth use on the day of the offense. TR1874-75. He diagnosed Baer as suffering from paranoid personality disorder, TR 1873, and stated that methamphetamine use could enhance paranoia. TR 1899.

Dr. Lawlor also described in detail Baer's account of his meth use on the day of the crimes. TR 1874-76. He indicated he had met up "friend" before work, and his friend had shared some of his meth. *Id.* Baer told Lawlor that he had consumed approximately 3.5-4 grams of meth throughout the day. TR 1876.

Baer's "friend," Danny Trovig, acknowledge being with Baer that morning. However, Trovig, who was on parole at the time, TR 1261, said he did not consume any methamphetamine or see Baer do so. TR 1258. When asked if Baer was high that morning was "Not that I know of. I couldn't tell." TR 1263.

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. TR 1621, 1629, 1635, 1640-46. 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. TR 1642-45. 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. PC 491-92.

The state also played a portion of a telephone conversation between Baer and his sister, where Baer said, "Oh, 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." TR 2067.

During his closing argument, the prosecutor repeatedly suggested that defense counsel, the mitigation specialist and Dr. Parker conspired to fabricate

Baer's mental illness. TR 2056-57, 2062, 2064, 2066, 2069, 2070, 2072-73, 2076. Defense counsel devoted much of his closing argument to defending himself and the defense team against these accusations. TR 2082-90.

The prosecution again compared mental illness to self-defense, an "excuse" to evade responsibility, and continued to suggest that a mental illness must rendered Bear unable appreciate the wrongfulness of his conduct to be relevant under the law. TR 2055, 2076, 2113-14.

The prosecutor also reiterated that Baer and his lawyers were fabricating a mental illness defense so they could pitch that argument to the Indiana Supreme Court on appeal. TR 2109-10.

Defense counsel did not object to these statements.

The jury found Baer guilty on all counts and rejected his GBMI request. DA App. 30-31.

**Penalty Phase Evidence and Arguments**

At the penalty phase, the defense presented one witness, Dr. Mark Cunningham. Dr. Cunningham had reviewed Baer's history for "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. TR 2277, 2305-06, 2308-11. He detailed alcohol abuse in Baer's family history including by his parents during his childhood. He testified 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 psychiatric disorders (including schizophrenia). TR 2288-92, 2341-44, 2347-68. Dr. Cunningham also testified at length about what he referred to as "toxic parenting." TR 2347-68. He detailed Baer's poor school performance and struggles with ADHD, as well as several head injuries suffered during his youth. TR 2316-28.

Dr. Cunningham also extensively discussed Baer's abuse of inhalants, alcohol, methamphetamine, and other substances. TR 2328-41, 2390-92. Dr. Cunningham stated that Baer reported that he had been on a "three-day run prior to the offense," and that he smoked meth at nine a.m., the morning of the offense, but noted that the blood-sample analyzed a year later did not detect meth. TR 2404. He also explained that methamphetamines have destabilizing effects that are both "acute"– the immediate effects from using the drug – and "chronic kind of toxic effects." Thus, "even if he were not abusing methamphetamines immediately prior to this offense, a historic pattern of chronic abuse may well serve to destabilize somebody psychologically. In other words, increase the presence of psychotic-like thinking, makes them more paranoid, has more on-going corrosive effect on their emotional and psychological adjustment." TR 2403-04. Dr. Cunningham pointed to evidence that Baer was driving erratically and behaving in a manner to attract attention to himself at the time of the offense, and that, after his arrest, he was exhibiting sufficient signs of disorganization such that the jail put him on anti-psychotic medication. TR 2404-05.

Trial counsel did not ask Dr. Cunningham whether Baer met the Indiana's statutory mitigating factors related to mental illness. I.C. 10-9(c)(2) & (c)(6).

During closing argument, the prosecutor again told the jury that the victim's family wanted a death sentence: "we would not be here if that's not what the Clarks wanted." TR 2551.

The prosecutor also told the jury:

> [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.

TR 2513.

He told the jury how much he had experienced a "worse" childhood that Baer, but had managed to overcome it:

> 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 [Baer] did. Maybe that's why I say, "Suck it up." . . .I had a tougher childhood than [Baer] 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 [Baer] sit around and cry about how tough they had it ...

TR 2548-49.

He urged the jury to vote for death 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.

**Sentencing Instructions**

At the penalty phase, the jury was provided an instruction that modified the language from Indiana's pattern instruction concerning a statutory mitigating factor. In Indiana, it is a mitigating factor if "the 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." I.C. 35-50-2-9(c)(6). Without objection, TR 2186, the jury instruction on this factor omitted the words "of intoxication." DA App. 1324; TR 2198, 2570.

The jury was also instructed at the penalty phase that intoxication may not be considered in determining the existence of a mental state that is an element of the offense, unless it is involuntary:

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

TR 2202-03, 2575; DA App. 1333-34. (*hereinafter* "voluntary intoxication instruction").

This instruction was given late in the charge, *after* the instructions concerning the aggravating factors and mitigation. Both of the foregoing

instructions were submitted by the prosecutor, and given to the jury by the court, without objection by trial counsel. TR 2153-2185.

**Penalty Phase Verdict**

The jury found the State had proven all five charged aggravators and that they outweighed the mitigating circumstances, and recommended Baer is sentenced to death. PCR App. at 328.

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." DA App. 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 outweighed by the aggravators that were "proven overwhelmingly." *Id.* at 1006. The court sentenced Baer to death. *Id.*

**Direct Review**

The Indiana Supreme Court affirmed Baer's convictions and death sentence. *Baer v. State* (*Baer I*), 866 N.E.2d 752 (Ind. 2007) *cert. denied sub nom, Baer v. Indiana*, 552 U.S. 1313 (2008).

On direct review, Appellate counsel raised four claims, the first of which alleged 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." Pet. App. 162a. Appellate counsel actually listed 38 instances of

prosecutorial misconduct, but conceded that trial counsel had not objected to any of them. Appellant's Br. at 9-14. As appellate counsel provided an argument on only one of these allegations, the state court considered and rejected only one prosecutorial misconduct claim on direct review, concerning comments regarding the appellate consequences to a death sentence imposed after Guilty But Mentally Ill (GBMI). Pet. App. 162a -172a.

**State Post Conviction Proceedings.**

Baer filed a timely petition for post-conviction relief, raising numerous allegations of ineffective assistance of counsel, including trial counsel's failure to (1) object to penalty phase jury instructions; (2) object to numerous instances of prejudicial prosecutorial statements; and, (3) investigate and present additional mitigating evidence.

At an evidentiary hearing, Baer presented the testimony of several witnesses to bolster his claim for mitigation, including a neuropsychologist, Dr. Lawler (who reviewed mental health records not made available to him at trial), Baer's mother, Baer's juvenile probation officer, former foster mother, prior mental health treatment providers, a former teacher, and former wife Zola Brown. Pet. App. 8a.

The post-conviction court reject Baer's claims, and 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. *Baer v. State*, 942 N.E.2d 80, 87 (Ind. 2011), *reh'g denied*, Baer v. State, 2011 Ind. LEXIS 576 (Ind., June 28, 2011).

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. Pet. App. 131a-133a, 151a-152a; 134a-142a; 129a-131a.

**Federal Habeas Proceedings**

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. Pet. App. 47a & 43a.

In a unanimous decision, the Court of Appeals for the Seventh Circuit affirmed Baer's convictions, but vacated his death sentence, granting relief on the first two of Baer's claims. Pet. App. 9a.

Specifically, the Court of Appeals found that the Indiana Supreme Court's ruling was unreasonable under 28 U.S. §2254(d) of the Anti-Terrorism and Effective Death Penalty Act (AEDPA) for failing to find that Baer's trial counsel was constitutionally ineffective under *Strickland v. Washington*, 466 U.S. 668 (1984), for failing object when the jury was given penalty phase instructions that, in the context of the entire charge, were likely interpreted to preclude their consideration of much of Baer's proffered mitigating evidence – specifically, that

related to his methamphetamine abuse and its effects on Baer's mental state -- in violation of *Lockett v. Ohio*, 438 U.S. 586 (1978) and it's progeny. Pet. App. 12a-20a.

The Court of Appeals also found that the Indiana Supreme Court's ruling was unreasonable under §2254(d), for failing to find that Baer's trial counsel was ineffective under *Strickland* for failing to object to numerous instances of prosecutorial misconduct including: repeatedly misstating the legal standard for mental illness, telling the jury that the Indiana legislature was considering a bill to repeal life without parole and the victim's family wanted death, and several inflammatory and prejudicial comments during closing argument based on facts not in evidence. The Court found that this pervasive misconduct undermined the reliability of Baer's death sentence and prejudiced Baer. Pet. App. 21a – 40a.

The Court of Appeals determined that in light of these decisions it was unnecessary to review Baer's third *Strickland* claim concerning trial counsel's failure investigate and present mitigating evidence on Baer's behalf. Pet. App. 9a.

## REASONS FOR DENYING CERTIORARI

There are no grounds for this Court to grant certiorari to review the Court of Appeals' unanimous, highly fact-specific, and in any event correct, decision granting relief on two distinct *Strickland* claims in this case. Petitioner fails to identify any conflict between the Seventh Circuit's decision and the decisions of other Circuits or this Court. Nor does Petitioner contend that this case involves an important issue of federal law. Rather, as described below, Petitioner: (1) regurgitates the some of the

same arguments considered and expressly rejected by the Court of Appeals; (2) mischaracterizes the record evidence, the claims and the Court of Appeals' opinion; or, (3) simply insists the Court of Appeals was wrong without clearly identifying the alleged error. Under these circumstances, this Court's review is not warranted.

**1. Contrary to Petitioner's argument (Pet. at 10), the Court of Appeals did not "ignore" the standard set forth in 28 U.S.C. §2254(d).**

The Court of Appeals correctly observed that, "[b]ecause [Baer's] *Sixth Amendment* claims were adjudicated on the merits by the Indiana Supreme Court, they are subject to 28 U.S.C. § 2254(d)," and therefore the Court was precluded from granting relief unless the state court decision was unreasonable under §2254(d)(1) or (d)(2). Pet. App. 10a. The Court of Appeals also correctly observed that the "'pivotal question'" in this case "is whether the state court's application of the *Strickland* standard was reasonable.'" *Id.* at 11a (quoting *Harrington v. Richter*, 562 U.S. 86, 101 (2011)). The further acknowledged: "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.* (*citing Richter*, 562 U.S. at 102).

Contrary to Petitioner's argument (Pet. at 10, 16), the Court of Appeals analysis in this case bears no resemblance to the Ninth Circuit's decision in *Sexton v. Beadreaux*, 138 S.Ct. 2555 (2018), where the Ninth Circuit failed to consider arguments or theories that could have supported the state court's summary denial in that case. Here, the state court did not issue a summary denial, but provided a

explanation for its decision rejecting Baer's claims. Recently, in *Wilson v. Sellers*, this Court explained that "[d]eciding whether a state court's decision 'involved' an unreasonable application of federal law or 'was based on' an unreasonable determination of fact requires the federal habeas court to train its attention on the particular reasons—both legal and factual—why state courts rejected a state prisoner's federal claims." 138 S. Ct. 1188, 1191-92 (2018)(*internal quotations and citation omitted*). That is, when, as here, the state court "explains its decision on the merits in a reasoned opinion . . . a federal habeas court simply reviews the specific reasons given by the state court and defers to those reasons if they are reasonable." *Id.* at 1192.

That is precisely what the Court of Appeals did in this case. The Court of Appeals conducted a detailed analysis of the state court's decision, with respect to two of Baer's *Strickland* claims. Applying the standard of §2254(d), the Court of Appeals found *all* of the reasons the state court provided in support of its decision regarding the instruction claim were unreasonable, and determined that Baer was entitled to relief on this claim. Pet. App. 14a-20a. Applying the standard of §2254(d), the Court of Appeals also found *all* of the reasons the state court provided in support of its decision regarding the prosecutorial misconduct claim were unreasonable, and determined that Baer was entitled to relief on this claim as well. Pet. App. 21a-40a. If anything, the Court of Appeals analysis was far more thorough in its analysis than the state court, as the Court of Appeals identified

instances where the state court decision was based on facts that were clearly rebutted by the record. *E.g.,* Pet. App. 15a-16a; 32a.

Petitioner's disagreement with the result of the Court of Appeals' application of §2254(d) does not constitute "ignoring" §2254(d). Petitioner fails to identify any aspect of the Court of Appeals' decision that is in conflict with any decision of this Court. Petitioner's unsupported allegations are not a basis for this Court's review.

**2. Contrary to petitioner's assertions (Pet. 11-16), the Court of Appeals' fact-bound decision regarding trial counsel's failure to object to penalty phase instructions is correct.**

Baer's first *Strickland* claim concerned counsel's failure to object to an unusual set of penalty phase instructions. Late in the charge, well after the instructions concerning the aggravating factors and mitigation, the jury was instructed that Baer's voluntary intoxication "may not be taken into consideration in determining the existence of a mental state that is an element of the offense." DA App 1333-34; TR 2575 (*hereinafter* "voluntary intoxication instruction"). In addition, the standard instruction that would have ordinarily told the jury that intoxication was a statutory mitigating factor "intoxication" language from the statutory mitigation instruction. The Court of Appeals ultimately concluded that, reviewing these instructions in the context of the entire charged, it is reasonably likely that the jury interpreted the penalty phase instructions to preclude consideration of mitigating factors based on Baer's voluntary drug use, which constituted a significant portion of the mitigating evidence presented in this case. Pet. App. 20a.

As Petitioner observed (Pet. 12), this Court has clearly established that the relevant Eighth Amendment inquiry is whether there was a reasonable likelihood that the jury would interpret the penalty phase instructions in a manner that precluded it from fully considering and giving full effect to all of the defendant's mitigating evidence. *Boyde v. California*, 494 U.S. 370, 380 (1990)). In order to meet this standard, "a defendant need not establish that the jury was more likely than not to have been impermissibly inhibited by the instruction." *Id.*

Petitioner's argument for certiorari focuses on the voluntary intoxication instruction. Petitioner renews his contention (Pet. 11, 13, 15) that because the state court held that the voluntary intoxication instruction "was a correct statement of the law, and was relevant in determining whether Baer committed his crimes intentionally," the jury necessary interpreted the instructions in the same manner.

As the Court of Appeals correctly observed, "[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." Pet App. 15a. quoting *Francis v. Franklin*, 471 U.S. 307, 315-316 (1985). The Court of Appeals did not dispute the state court's holding that "this instruction was a correct statement of law," but observed that, "it was likely that the jurors' interpretation of this instruction was not legally correct." Pet. App. 18a. The Court of Appeals explained that, in light of the entire charge, "[j]urors 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." *Id.*

The Court gave several reasons for its decision:

(1) "There was no instruction or clarity provided that this instruction related only to proof of the aggravating factors[.]" *Id.* Nothing in the penalty phase instructions in this case informed the jury that limitation on the consideration of intoxication evidence was only relevant to the "intent" requirement of the aggravating circumstance, but not relevant to their consideration of mitigation – and this was certainly not a concept one was likely to intuit.

Petitioner's claim that the voluntary intoxication instruction itself "explained" that its prohibition pertained only to "*the mental state required for the aggravating factors*," (Pet. at 15 (*emphasis in original*)) is false. This instruction is typically given at the guilt phase of a trial and its language was not altered in any way when it was injected into the penalty phase instructions in this case. That is not what the instruction said, and the trial court made no such statement when he read the instructions to the jury. This is Petitioner's *interpretation* of what the instruction was *supposed* to mean.

(2) "[T]he 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." *Id.*

(3) "[T]he jury had been primed to believe that voluntary intoxication could not impact sentencing," by the prosecutor's argument. *Id.* During closing argument at the guilt phase, specifically referencing this instruction,[3] the prosecutor had already indicated that the voluntary instruction would apply to "some effort to make [defendant's] sentence a little easier":

> Self-induced drugs [sic] is no protection from the law. You're accountable for it. Now, if somebody accidentally slips you drugs and that causes you to commit a crime, then you're not responsible for that. But if you use drugs, and you commit a crime because you use those drugs, the law could really care less. Doesn't make any difference. You are just as guilty as if you didn't have them when you committed the crime. We don't give anybody a pass who takes drugs on their own and then uses it as some defense *or some effort to make their sentence a little easier.* The law does not permit that.

TR 2065 (emphasis supplied).

(4) "The instructions relating to mitigation did not mention 'intoxication' as they should have under the statute because the trial court had omitted that language." Pet. App. 17a.

Petitioner also renews his contention (Pet. 12) that any problem with 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] The Court of Appeals correctly found this theory is at odds with this Court's decision in *Francis*, 471 U.S. at 320, where the Court held that the use of a

---

[3] The same involuntary intoxication instruction was given at the guilt phase. TR 2124-25.

[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.)

contrary general instruction does not automatically cure a deficient specific instruction:

> 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 instructions cured the faulty instructions was not reasonable.

Pet. App. 19a.

Under these specific circumstances, the Court of Appeals correctly concluded it is reasonably likely that the jury would have interpreted the voluntary intoxication instruction as precluding the consideration of evidence of Baer's voluntary drug use for any purpose, including as mitigation, and the state court's contrary conclusion was unreasonable.

Finally, contrary to Petitioner's contention (Pet. at 13-14), the Court of Appeals decision is not inconsistent with this Court's decisions in *Boyde v. California*, 494 U.S. 370, 383 (1990) or *Johnson v. Texas*, 509 U.S. 370 (1990). Neither case involved an instruction, such as the voluntary intoxication instruction in this case, that plainly told the jury that they were precluded from considering a significant portion of defendant's proffered mitigation evidence.

*Johnson* was one of a series of decisions where this Court considered whether Texas's capital sentencing scheme – which, unlike Indiana's scheme, asks the jury

to determine a defendant's sentence based on its answers to a series of enumerated questions or "special issues" -- allows the jury to consider and give effect to various categories of proffered mitigating evidence. *Compare, Penry v. Lynaugh*, 492 U.S. 302, 322-26 (1989)(future dangerous special issue instruction precluded jury from giving effect to mental retardation as mitigating factor) *with Johnson*, 509 U.S. at 369 (same special issue instruction does not preclude jury from giving effect to youth at mitigating factor).

The Court's decision in *Boyde* actually supports the Court of Appeals decision. In *Boyde*, the instruction at issue told the jury to consider as mitigation, "[a]ny other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime."494 U.S. at 381. The Court rejected defendant's contention that the jury would likely have interpreted this instruction more narrowly than the language suggested – *i.e.*, as "any other circumstance *of the crime* which extenuates the gravity of the crime" -- so as to preclude consideration of mitigating evidence not specifically related to crime . *Id.* at 382. The Court noted that there were other instructions specifically telling the jury they may consider mitigating evidence not associated with the crime, *id.* at 383, and that the prosecutor had not specifically argued that factors unrelated to crime should not be considered. *Id.* at 384.

In Baer's case, the Court of Appeals also found it unreasonable that the jury would likely have interpreted the voluntary intoxication instruction more narrowly than the language suggested, such that the preclusion applied only to aggravating

factors, but not mitigation; there were no other instructions specifically telling the jury they may consider the defendant's voluntary intoxication as mitigation; and, the prosecutor did specifically argue that the law precluded consideration of defendant's voluntary intoxication as it pertained to sentencing.

Petitioner had failed to show that the Court of Appeals decision is inconsistent with this Court's decisions; therefore, this Court's review is not warranted.

### 3. Contrary to Petitioner's assertions (Pet.16-21), the Court of Appeals' fact-bound decision regarding trial counsel's persistent failure to object to prosecutorial misconduct is also correct.

While the penalty phase instructions in this case were unusual, the conduct of the prosecutor, Rodney Cummings, was positively astonishing. The Court of Appeals was correct when it stated, "'The kind of advocacy shown by this record has no place in the administration of justice and should neither be permitted nor rewarded.'" Pet. App. 36a (*quoting United States v. Young*, 470 U.S. 1, 9 (1985)). Indeed, the Court of Appeals found Mr. Cummings conduct in this case so troubling, that they decided to address this additional claim of ineffective assistance of counsel, even though they had already granted relief on the instruction claim. Pet. App. 9a.

Mr. Cummings, the elected prosecutor of Madison County, has a history of prosecutorial misconduct.[4] Here, Mr. Cummings engaged in a pervasive pattern of

[4] *See Marcum v. State*, 725 N.E.2d 852, 858-860 (Ind. 2000); *Reynolds v. State*, 797 N.E.2d 864 (Ind. Ct. App. 2003). The Seventh Circuit also overturned a Madison County murder conviction

misconduct that began in voir dire, and continued throughout the trial. He repeatedly misled the jury as to the law governing mental illness, such that the jury was likely to discount evidence of Baer's mental illness because it did not render him incapable of discerning right from wrong (i.e., legally insane). A prominent theme of his closing argument was that Baer's attorneys, his investigator and a defense expert conspired to fabricate Baer's mental illness – to such an extent that lead counsel's closing argument was devoted to defending himself and the trial team from these false allegations, rather than discussing his client's mitigation. He repeatedly urged the jury to consider "facts" not in evidence, several of which were untrue and involved matters that are prohibited by the constitution and Indiana law: *e.g.,* he falsely claimed the legislature was considering bills to overturn life without parole (LWOP); he falsely claimed the Indiana Supreme Court had not yet determined whether a mentally ill person can be sentenced to death, then argued that Baer's lawyers were fabricating his mental illness so they could pitch that argument to the Supreme Court on appeal; he repeatedly indicated that the victim's family wanted a death sentence, in violation of Indiana and federal law; he urged the jury to return a death sentence to justify the cost of the trial ("half a million dollars") to a community with people laid off; he gave a detailed description of his own life history, including his mother's prostitution; he insisted Baer's crime was worse than any of the prior 125 murders Cummings had heard of in his career

---

due to Mr. Cummings' misconduct as both a police officer and prosecutor, in *Goudy v. Basinger,* 604 F.3d 394, 399-401 (7th Cir. 2010).

in law enforcement. And Baer's trial lawyers failed to object to any of this. Pet. App. 22a.

The Court of Appeals declined to address all of Baer's allegations, instead focusing on "those categories in which we find the prosecutor's comments were most offensive and where Baer's counsel's failure to object was deficient." *Id.* These three categories were: (A) repeatedly misstating the law regarding mental illness; (B) arguing the victim's family wanted the death penalty, in violation of state and federal law; and (C) numerous instances where the prosecutor argued facts and opinion not in evidence. *Id.* at 23a-28a. The Court of Appeals then carefully considered the reasonableness of the state court's prejudice decision and, finding it unreasonable, concluded that Baer was prejudiced by the aggregate effect of the prosecutor's unchecked misconduct – both alone, and in conjunction with counsel's failure to object to the penalty phase instructions. *Id.* at 40a.

The Court of Appeals conducted a detailed analysis of the state court's decision and found *all* of the reasons the state court provided in support of its decision were unreasonable under §2254(d). Pet App. 21a-40a. As described below, Petitioner's complaints concerning the Court of Appeals Petitioner's §2254(d) analysis of these issues rely on misrepresentations of the facts or mischaracterizations of the opinions of the Court of Appeals and/or the state court.

### A. Repeatedly misstating law regarding mental illness

As the Court of Appeals described, the prosecutor repeatedly misstated the law regarding mental illness: first, throughout the *voir dire*, and later, during

closing argument. Pet.App. 22a-26a. As Court of Appeals correctly observed, the effect of the prosecutor's misstatements of the law regarding mental illness inaccurately suggested that "mental illness could only be considered (even as mitigation) if Baer did not know right from wrong," Pet. App. 24a-25a.

The state court had acknowledged that the prosecutor had often conflated the separate concepts of mental illness and legal insanity, but concluded that trial counsel's failure to object was, "likely . . .part of their general strategy of letting the prosecutor discredit himself." Pet. App. 26a. The court opined that counsel intended to correctly state the law and "hope the jury would decide from the contrast that the prosecutor was not credible." *Id.* at 26a-27a.

The Court of Appeals correctly held this strategy was unreasonable because, whatever counsel's "intention," the "correction" did not happen: the trial record shows that counsel did not clarify or correct the prosecutor's misstatements. *Id.* at 27a. Petitioner's unsupported assertion (Pet. at 19) that "counsel repeatedly did so," is false.

As the Court of Appeals explained, Pet. App. 27a, during *voir dire* defense counsel did sometimes tell the jury that they were not pursing an "insanity defense" *e.g.,* TR 965, and repeated this same admonishment at the end of his closing argument. TR. 2015. However, jurors were never told, nor were they reasonably likely to intuit, that the "inability to know right from wrong" standard that the prosecutor kept discussing in relation to mental illness hinged on that legal distinction, particularly since they were never given an instruction on insanity. Pet.

App. 27a. As the Court of Appeals correctly observed, because there was no instruction defining insanity or otherwise clarifying the matter, the jury had no way of knowing that the definition the prosecutor was giving them applied only to a insanity defense; thus, counsel's statement that Baer was not "insane" did not clarify the matter. *Id.*

**B. Repeatedly Injecting Victim Impact Evidence**

As the Court of Appeals described in detail, Pet. App. 28a-30a, the prosecutor repeatedly told the jury that the victim's family wanted Baer to receive the death penalty during voir dire, TR 378, 480, 405, 559, 766, 801-02, and reiterated the point in his penalty phase final argument for death: "we would not be here if that's not what the Clarks wanted." TR 2551. The Court of Appeals was correct that evidence concerning the victim's family's desire for a death sentence is inadmissible under both Indiana law, *Bivins v. State,* 642 N.E.2d 928, 955-57 (Ind. 1994) and the Eighth Amendment. *Booth v. Maryland,* 482 U.S. 496, 508-09 (1987). Pet. App. 30a-31a. Trial counsel did not object to the comments during voir dire until jury selection was nearly completed and several jurors had already been selected. TR 802. They did not object the prosecutor's statement during closing argument at all.

The state court acknowledged that these comments were "improper," but decided it did not render Baer's trial "fundamentally unfair," because the trial judge "rebuked" the prosecutor and "the prosecutor then told the jury he misspoke." Pet. App. 31a Contrary to Petitioner's assertion (Pet. 19), the Court of Appeals correctly held this decision was unreasonable because it was clearly rebutted by the record.

TR 801-803; 866. As Court of Appeals explained, "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." Pet. App. 32a.

**C. Repeatedly Injecting Personal Opinion and Facts Not in Evidence**

The Court of Appeals also considered several unobjected to instances where the prosecutor had made improper and inflammatory remarks based on facts not in evidence.

First, at the end of voir dire, when all selected jurors were present, prosecutor told the jurors, without objection:

> The state of the law in Indiana right now is that 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 to permit parole at some point after so many years.**

TR 920 (*second ellipsis in original*). The statement did not just invite the jury to speculate that the law "may" change, but improperly and inaccurately suggested the legislature was in process of changing it, thus giving the jury reason to believe it would. The statement was not invited by defense counsel's argument that Baer should be sentenced to LWOP, nor could it be remedied by correct descriptions of the current law.

Contrary to Petitioner's assertion, (Pet. at 17), the state court did not conclude that this statement had been "invited" by defense counsel. Indeed, the state court

did not rule on the statement at all, but incorrectly stated that it had rejected this claim on direct review. 942 N.E.2d at 100.[5] This is false. 866 N.E.2d at 755-61. Because the state court incorrectly believed this issue had been decided previously and did not review the claim on its merits, the provisions of §2254(d) do not apply to this portion of Baer's claim. *See Cone v. Bell*, 556 U.S. 449, 466 (2009).

The Court of Appeals correctly concluded that the statement introduces alleged facts not in evidence, Pet. App. 33a, and created the substantial risk the jury would impose the death penalty based on the belief that Baer could be released unless executed. *Id.* at 39a.

The Court of Appeals also conducted a detailed analysis of the numerous other instances where the prosecutor made inflammatory references to facts not in evidence during his penalty phase closing argument. *Id.* at 33a-35a. Contrary to Petitioner's argument (Pet. at 17-18), the Court of Appeals clearly explained why the state court's "invited response" conclusion was unreasonable. Pet App. 35a-36a. As this Court explained in *United States v. Young*, 470 U.S. 1, 13 (1985), when evaluating claims of prosecutorial misconduct, "the idea of 'invited response' is used not to excuse improper comments, but to determine their effect on the trial as a whole. *Darden v. Wainwright*, 477 U.S. 168, 182 (1986)(*citing Young*, 470 U.S. at 13). Improper remarks do not become proper, let alone harmless, merely because they were made in response to a "topic" introduced by opposing counsel. A court

[5] To the extent the state court's statement that "prosecutor nevertheless correctly stated the current law on life without parole, as did trial counsel," 942 N.E.2d at 100, can be construed as a decision, it is unreasonable because it fails to address the prosecutor's reference to the alleged LWOP abolition bill before the legislature. This statement was neither correct nor a statement of the law.

must assess whether the comments represent *reasonable* response opposing counsel's argument, and whether the comments rendered the trial unfair. *See Young*, 470 U.S. at 11-13. The state court performed no such analysis; the Court of Appeals did.

The Court of Appeals correctly observed, "just because defense counsel cracked open the door to these subjects, it did not permit the prosecutor to drive a truck through it." Pet. App. 35a. For example, defense counsel's statement that, "We reserve the death penalty for the worst of the worst," did not justify the prosecutions interjection of his personal experience and beliefs about whom that is. TR 2513-14. Both trial counsel suggested that had they been raised under the same circumstances as Baer, their lives may have turned out differently. TR 2527, 2532, 2544-45. This was part of an argument, supported by the evidence, that various factors in Baer's upbringing affected how he turned out as an adult, in response to the prosecutor's earlier argument that such factors have no effect. *Id.* This did not justify the prosecutor's detailed discussion of his personal history:

> 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. The Court was correct when it held that Mr. Cummings' "seditious and specific comments" were not a reasonable response to the defense counsel's argument. Pet. App. 36a (*citing Young*, 470 U.S. at 7).

### D. Cumulative Prejudice

The Court of Appeals was also correct when it held "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." Pet. App. 36a. It is well established that the prejudicial effect of counsel's errors should be assessed cumulatively, in light of the entire record. *See, e.g., Strickland.* 466 U.S. at 695-96; *see also Williams v. Taylor,* 529 U.S. 362, 397 (2000) (reviewing court must consider the "totality of the evidence" when assessing prejudice); *Kyles v. Whitley*, 514 U.S. 419, 436-37 (1995) (materiality standard under *Brady,* which is identical the prejudice standard in *Strickland,* requires prejudicial effect of omitted evidence be assessed "collectively, not item by item").

Petitioner does not dispute that under *Strickland,* the state court was required to assess the cumulative effect of the prosecutorial misconduct in this case to ascertain whether Baer was prejudiced. Instead, Petitioner suggests the state court did assess the cumulative effect of the comments, pointing to the Indiana Supreme Court's statement that "[e]ven if taken in the aggregate, these comments did not affect the outcome of Baer's trial," apparently to suggest that the Indiana

Supreme Court actually performed such and analysis. (Pet. at 20, citing "Baer II, App. at 142a"). It is very clear from the context that the state court was not considering the "aggregate" effect of all the prosecutor's misconduct, but the "aggregate" effect of comments directed at Baer, his counsel, and his expert, a small subsection of the claim. Pet. App. 142a. That is, the Court of Appeals was correct when it concluded that this statement does not support a conclusion that that the state court considered the cumulative prejudice of counsel's errors. Pet. App. 37a.

Contrary to the rest of Petitioner's argument (Pet. 20-21), the Court of Appeals properly found that Baer was prejudiced – *i.e.,* there was a reasonable probability that he would not have been sentence to death – but for counsel's failure to object to the numerous instances of prosecutorial misconduct in this case. Pet App. 37a-40a. The Court of appeals properly considered, for example:

Far from involving only isolated improprieties, Cummings conduct in this case featured a constant torrent of prejudicial tactics, from repeatedly misstating the law regarding mental illness, repeatedly claiming the victim's family wanted the death penalty, and repeatedly injecting inflammatory assertions based on his personal opinion and facts not in evidence. Pet.App. 37a-38a.

Mr. Cummings's improper statements were specific, not ambiguous. They were not merely emotionally inflammatory but also repeatedly implicated Baer's independent Eighth Amendment right to an individualized sentencing determination that, under *Woodson v. North Carolina*, 428 U.S. 280, 304 (1976), is "a constitutionally indispensable part of the process of inflicting the penalty of

death." For example the, as the Court of Appeals correctly observed, the effect of the prosecutor's misstatements of the law regarding mental illness inaccurately suggested that "mental illness could only be considered (even as mitigation) if Baer did not know right from wrong," Pet.App. 24a-25a, and prejudiced Baer. *Id.* at 38a. The prosecutor's claim that the legislature was considering a bill to abolish LWOP created the substantial risk the jury would impose the death penalty based on the belief that Baer could be released unless executed. *Id.* at 39a (*citing Simmons v. South Carolina*, 512 U.S. 154, 161-62, 164 (1994)). The prosecutor's repeated assertions that the victim's family wanted the death penalty clearly violated under both Indiana law, *Bivins v. State,* 642 N.E.2d 928, 955-57 (Ind. 1994) and the Eighth Amendment. *Booth v. Maryland,* 482 U.S. 496, 508-09 (1987). Pet. App. 30a-31a.

Most of the challenged remarks were not even arguably invited by counsel, and even those few that responded to "topics" mentioned by the defense counsel were improper, inflammatory and went way beyond what was reasonably necessary to "right the scale." *Id.* at 35-36a.

Trial counsel not only did not object these remarks, but also filed to effectively counter them in any way. Moreover, "[t]he record reflects that the trial judge missed numerous opportunities to stop or clarify the prosecutor's statements and his absence was noticeable throughout trial." Pet. App. 32a.

Petitioner is correct, (Pet. 20) that the Court of Appeals was clearly aware of, and certainly did not discount, the aggravating factors and the tragic nature of the

crime. *E.g.,* Pet.App. 38a. But this was also a penalty trial in which mitigating evidence was presented on the defendant's behalf, and death was certainly not a foregone conclusion. *See, e.g., Woodson, supra,* 482 U.S. at 304. The prosecution's evidence for death was less likely to overwhelm the jury than was the sheer breadth, volume, variety and audacity of the impermissible comments and argument delivered by the prosecutor.

In sum, the Court of Appeals conclusion that Baer was prejudiced at sentencing by counsel's failure to object to the prosecutorial misconduct - both alone, and in conjunction with counsel's failure to object to the jury instructions, Pet. App. 40a,is well supported.

**4. Conclusion.**

In sum, the Court of Appeals could not have been more aware of this Court's precedents or of the demanding and deferential standard that § 2254(d) imposes under AEDPA. Petitioner has not pointed to a single misstatement of law or error of fact made by the Court of Appeals. The Court of Appeals' decision is not only fact-bound and free from legal error, it is correct.

## CONCLUSION

For the above reasons, the Petition for Writ of Certiorari should be denied.

Respectfully Submitted,

MARIE F. DONNELLY*
Attorney at Law
P.O. Box 6528
Evanston, Illinois 60204
Phone (773)680-7042
Mfdonnelly05@gmail.com

-and-

ALAN M. FREEDMAN
Midwest Center for Justice
P.O. Box 6528
Evanston, Illinois 60204
Phone (847)492-1563
fbpc@aol.com

COUNSEL FOR RESPONDENT,
FREDRICK MICHAEL BAER

*Counsel of record