No. 18-287

IN THE
Supreme Court of the United States

RON NEAL,
Superintendent, Indiana State Prison,
Petitioner,

v.

FREDRICK MICHAEL BAER
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

REPLY BRIEF OF PETITIONER

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To grant Baer habeas relief, the Seventh Circuit needed to establish that *all* "fairminded jurists," *Harrington v. Richter*, 562 U.S. 86, 102, (2011), would agree that *any* "reasonably competent attorney," *Strickland v. Washington*, 466 U.S. 668, 687 (1984), would think (1) that there was a reasonable likelihood the jury instructions misled Baer's jurors into ignoring permissible mitigating evidence, or (2) that the prosecutor's statements were so egregious that no reasonable strategy could justify not objecting to them—*and* would agree that there is a "substantial" likelihood that the jury would have reached a different conclusion if Baer's counsel had objected to the jury instructions or prosecutor's statements, *Cullen v. Pinholster*, 563 U.S. 170, 189 (2011) (quoting *Harrington*, 562 U.S. at 112).

The Seventh Circuit did not come close to making this showing. Rather than apply AEDPA's stringent requirements with "scrupulous care," *id.* at 197 (quoting *Harrington*, 562 U.S. at 105), the Seventh Circuit "essentially evaluated the merits *de novo*," *Sexton v. Beadreaux*, 138 S.Ct. 2555, 2560 (2018) (per curiam) and thereby overturned the detailed and reasoned decision of the Indiana Supreme Court. Baer's brief in opposition, which merely repeats the panel's arguments, comes no closer. The Court should therefore reverse the Seventh Circuit and reinstate the death sentence Baer received for viciously murdering Cory and Jenna Clark.

I. The Seventh Circuit Failed to Defer to the Indiana Supreme Court's Reasoned Rejection of Baer's Jury-Instruction Claim

Baer acknowledges that his jury-instruction claim succeeds only if every fairminded jurist would find it reasonably likely that the penalty-phase instructions misled the jury into believing it had to ignore, for mitigation purposes, Baer's alleged intoxication. *See* Opp. 20 (citing *Boyde v. California*, 494 U.S. 370, 380 (1990)); *see also Johnson v. Texas*, 509 U.S. 350, 367 (1993). Neither Baer nor the Seventh Circuit has cleared this bar. On the contrary, the trial court directly and repeatedly told the jury it could consider *any* evidence in mitigation. The "jury is presumed to follow its instructions," and Baer has not overcome this presumption. *Weeks v. Angelone*, 528 U.S. 225, 234 (2000).

At the penalty phase Baer presented one witness, a forensic psychologist, who described Baer's history of drug abuse, including Baer's claim—contradicted by a blood test—that he smoked methamphetamine the morning of the murders. Opp. 9–10. The penalty-phase jury instructions twice informed jurors that they were free to consider this or any other evidence in mitigation: The instructions told the jury it could consider "[a]ny other circumstances[,] which includes the defendant's age, character, education, environment, mental state, life and background . . . which any individual juror believes makes him less deserving of the punishment of death." Trial Tr. 2570. And they explicitly reiterated that "there are no limits on what factors an individual juror may find as mitigating." *Id.* at 2572.

Baer claims that the jurors nevertheless thought they were obligated to ignore the psychologist's testimony. He and the Seventh Circuit, Opp. 20; *Baer v. Neal (Baer III)*, App. 17a–20a, support this counterintuitive conclusion principally on the basis of a penalty-phase jury instruction that correctly told the jury that voluntary "[i]ntoxication is not a defense in a prosecution for an offense and may not be taken into consideration *in determining the existence of a mental state that is an element of the offense* . . . ." Opp. 12 (emphasis added). The instruction specifically provided that the constraint on considering voluntary intoxication applies only to determining whether Baer had the mental state required by the elements of the offenses at issue in the penalty phase—namely, the charged aggravating factors, such as murder during attempted rape and murder during robbery. *See Baer v. State (Baer II)*, App. 130a ("This instruction was a correct statement of the law and was relevant in determining whether Baer *committed his crimes intentionally*.").[1]

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[1] Baer and the Seventh Circuit also note the trial court's omission of the phrase "or of intoxication" from a statutory list of specific items the jury could consider in mitigation. *See* Opp. 22; *Baer III*, App. 17a. But both correctly decline to suggest that this omission is itself unconstitutional: As the State's petition explains, the instructions told the jury it could consider any evidence in mitigation, and this instruction is not contradicted by failing to mention intoxication specifically as a mitigating factor. Pet. 13. The Constitution does not require jury instructions to tell jurors that they can consider mitigating evidence at all, much less require listing every kind of mitigating evidence or specifically "telling the jury they may consider the defendant's voluntary intoxication as mitigation." Opp. 25; *see Buchanan v. Angelone*, 522 U.S. 269, 277 (1998).

Baer is therefore wrong to claim that "[n]othing" in this instruction informed the jury that the "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." Opp. 21. Contrary to his assertion that the instruction "plainly told the jury that they were precluded from considering a significant portion of defendant's proffered mitigation evidence," *id.* at 23, the instruction expressly informed the jurors that the limitation applied only to the elements of the offenses they were considering during the penalty phase.

Because the voluntary-intoxication instruction did not foreclose consideration of intoxication for mitigation purposes, Baer's reliance, Opp. 22–23, on *Francis v. Franklin*, 471 U.S. 307 (1985), is unavailing. *Francis* holds that "[l]anguage that merely contradicts and does not explain a constitutionally infirm instruction will not suffice to absolve the infirmity," because a "reviewing court has no way of knowing which of the two irreconcilable instructions the jurors applied in reaching their verdict." *Id.* at 322. Far from being infirm, the voluntary-intoxication instruction was, as Baer acknowledges, a correct statement of the law. *See* Opp. 20 (quoting *Baer II*, App. 18a). And because the voluntary-intoxication instruction was limited to determining whether Baer had the requisite mental state for the charged aggravating factors, it did not contradict the explicit instructions informing the jury that they could consider any factor in mitigation.

Baer also notes that the jury instructions did not arrange the voluntary-intoxication instruction together with the other aggravating-factor instructions, and he points out that the prosecutor referred to an identical voluntary-intoxication instruction during the guilt phase. Opp. 22. But these circumstances cannot defeat the presumption that the jurors understood and followed the instructions expressly telling them that they could consider any evidence in mitigation. *Weeks*, 528 U.S. at 234. That the prosecutor emphasized *during the trial's guilt phase* that voluntary intoxication is not a defense to a crime is irrelevant to whether the jury misunderstood the *penalty-phase* instructions. Jury instructions come in innumerable configurations; the Court has "never . . . held that the state must affirmatively structure in a particular way the manner in which juries consider mitigating evidence." *Buchanan v. Angelone*, 522 U.S. 269, 276 (1998).

Buchanan upheld the constitutionality of instructions that did not specifically mention mitigating evidence at all, *id.* at 279, and "[e]ven the dissenters in *Buchanan* said that the ambiguity that they found in the instruction there given would have been cleared up by 'some mention of mitigating evidence anywhere in the instructions,'" *Weeks*, 528 U.S. at 232 (quoting *Buchanan*, 522 U.S. at 283). Here, the trial court twice specifically told the jury that it could consider any evidence in mitigation; because no instruction provided to the contrary, the jury instructions complied with the Constitution's requirements.

Baer and the Seventh Circuit thus failed to show that his jury instructions were unconstitutional—

much less that the instructions' unconstitutionality was so obvious that the failure to object constituted ineffective assistance *and* that this unconstitutional ineffectiveness was so inconvertible that the Indiana Supreme Court unreasonably rejected his jury-instruction claim. Baer and the Seventh Circuit think Baer's jury may have misinterpreted the instructions; the Indiana Supreme Court concluded the jurors likely did not. AEDPA demands deference to the state court's decision, and the Seventh Circuit's failure to afford deference requires reversal.

II. The Seventh Circuit Failed to Defer to the Indiana Supreme Court's Reasoned Rejection of Baer's Prosecutorial-Misconduct Claim

Baer's discussion of his prosecutorial-misconduct claim comes no closer to salvaging the Seventh Circuit's decision. Because the lawfulness of prosecutorial comments is generally a state-law question, s*ee Jones v. Gibson*, 206 F.3d 946, 959 (10th Cir. 2000), and because AEDPA forbids federal courts from reexamining state-court determinations of such questions, *see Estelle v. McGuire*, 502 U.S. 62, 63 (1991), the Seventh Circuit could overturn the Indiana Supreme Court's rejection of Baer's prosecutorial-misconduct claim only after showing that 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) (internal quotation marks and citation omitted). The State's petition points out that the Seventh Circuit's decision fails to grapple with this standard, Pet. 18, and for

that reason alone it should be reversed—a point to which Baer's petition does not respond.

Even beyond this problem, the Seventh Circuit's decision, like Baer's brief in opposition, failed to analyze the Indiana Supreme Court's reasoning in terms of the "doubly deferential" standard of review required in AEDPA/*Strickland* cases. *Knowles v. Mirzayance*, 556 U.S. 111, 123 (2009). The Seventh Circuit dismissed the two independently sufficient reasons the Indiana Supreme Court gave for rejecting Baer's prosecutorial-misconduct claim: that Baer's counsel acted reasonably in declining to object to the alleged misconduct, *Baer II*, App. 134a–142a, and that any failure to object was not prejudicial because even "taken in the aggregate, these comments did not affect the outcome of Baer's trial," *id.* at 142a. The Seventh Circuit held that these rationales were unreasonable with respect to three categories of conduct: the prosecutor's conflation of a guilty but mentally ill (GBMI) verdict with a not guilty by reason of insanity (NRI) verdict, the prosecutor's introduction of victim-impact evidence, and the prosecutor's comments regarding personal opinions and facts not in evidence. *Baer III*, App. 22a–36a.

Regarding the prosecutor's confusion of GBMI and NRI verdicts, the Indiana Supreme Court held that Baer's counsel had a reasonable strategy—to which Baer's counsel personally attested, *Baer II*, App. 136a—of discrediting the prosecutor by correcting his erroneous conflation of GBMI and NRI. Baer's brief in opposition asserts that it "is false" to say that his counsel made these corrections, but in the very next

paragraph Baer admits that his counsel "did sometimes tell the jury" during *voir dire* and closing argument that the defense was pursuing a GBMI, not NRI, verdict. Opp. 28. It was well within the Indiana Supreme Court's discretion under AEDPA to find this strategy reasonable, particularly because the trial court "echo[ed defense counsel's] statement of the law through the jury instructions." *Baer II*, App. 136a.

The Indiana Supreme Court similarly held that it was reasonable for Baer's counsel to decline to push for a mistrial—his counsel initially objected and asked for a mistrial, Trial Tr. 802–03—on the basis of the prosecutor's victim-impact statements. After the prosecutor made these statements, the trial court reprimanded him, demanding that he "clean it up and say I misspoke," and warning that "[i]f the Judge instructs you, you will follow the instructions." *Id.* at 803. That this rebuke was made at the bench does not render unreasonable defense counsel's decision to let the issue rest.

The Indiana Supreme Court also held that the prosecutor's statements of personal opinion and facts not in evidence could not support Baer's prosecutorial-misconduct claim because defense counsel introduced the relevant topics. *Baer II*, App. 134a–142a. Whether invited remarks "warrant reversing a conviction" turns on whether they do no more than "right the scale," a question answered by "weigh[ing] the impact of the prosecutor's remarks" against "defense counsel's opening salvo." *United States v. Young*, 470 U.S. 1, 12–13 (1985). The Seventh Circuit disputed the Indiana Supreme Court's balancing of these factors, *Baer III*, App. 35a, but such disagreement does

not justify relief under AEDPA. The Seventh Circuit failed to accord any deference even to those Indiana Supreme Court conclusions that were based on precisely the sort of "general, fact-driven standard[]" where "deference to the state court should have been near its apex," *Sexton v. Beadreaux*, 138 S.Ct. 2555, 2560 (2018) (per curiam).

Additionally, there is no merit to Baer's contention that AEDPA deference does not apply to the Indiana Supreme Court's rejection of his claim involving the prosecutor's observation during *voir dire* that the Indiana legislature might change the consequences of life-without-parole (LWOP) sentences. Opp. 30–31. The Indiana Supreme Court's first rationale for rejecting Baer's argument was that "[t]he prosecutor nevertheless correctly stated the *current* law on life without parole, as did trial counsel." *Baer II*, App. 138a (emphasis added). Its second rationale was that it had already "rejected this claim on direct appeal because defense counsel initiated the discussion, so it was not improper for the prosecutor to respond." *Id.* Baer argues AEDPA does not apply to the court's rejection of his claim because the court's second rationale was mistaken, Opp. 30–31, but he is wrong.

The Indiana Supreme Court's first rationale—that the prosecutor and Baer's counsel correctly described current LWOP law—is sufficient to support rejection of Baer's claim. Regardless, the court's second rationale was *correct*. It examined the prosecutor's LWOP comment within a more general discussion of his *voir dire* comments regarding the uncertain consequences of a GBMI verdict. *Baer II*, App. 137a–

139a. The court's allegedly mistaken rationale referred to a portion of the direct-appeal opinion holding that the issue of a GBMI verdict's consequences "was first presented to prospective jurors in this case by the defense." *Baer v. State (Baer I)*, 866 N.E.2d 752, 760 (Ind. 2007) (cited in *Baer II*, App. 138a). The Indiana Supreme Court thus correctly cited its prior rejection of *all* of Baer's complaints arising from the prosecutor's comments on the ramifications of a GBMI verdict.

Finally, regardless whether defense counsel was reasonable in not objecting to individual instances of alleged prosecutorial misconduct, the Seventh Circuit failed to justify its rejection of the Indiana Supreme Court's conclusion that "[e]ven if taken in the aggregate," the prosecutor's allegedly improper comments "did not affect the outcome of Baer's trial" and were therefore not prejudicial under *Strickland*. *Id.* at 142a.[2] As the Seventh Circuit conceded, "this is not a case where the defendant is sympathetic or a case where the defendant's guilt is uncertain." *Baer III*, App. 38a. It was thus perfectly reasonable for the Indiana Supreme Court to conclude that it was not "reasonably likely" that the jury would have imposed a different sentence for Baer's brutal crime—a crime he admitted—if the defense had lodged more objections to the prosecutor's statements. *Harrington v. Richter*,

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[2] Baer claims that this conclusion only applied to a subset of the alleged misconduct, Opp. 34, but even the Seventh Circuit did not adopt such a strained reading of the Indiana Supreme Court's decision, *Baer III*, App. 36a. For good reason: The Indiana Supreme Court's conclusion comes at the very end of its subsection addressing "Prosecutorial Misconduct." *Baer II*, App. 134a, 142a.

562 U.S. 86, 111 (2011) (quoting *Strickland v. Washington*, 466 U.S. 668, 696 (1984)).

Baer and the Seventh Circuit have attempted to justify overturning the Indiana Supreme Court's conclusion by simply rehashing the prosecutor's statements, "only tacking on a perfunctory statement at the end of its analysis asserting that the state court's decision was unreasonable." *Sexton*, 138 S.Ct. at 2560; *see* Opp. 33–36; *Baer III*, App. 36a–40a. AEDPA's demanding standard requires far more. It is not enough that the *Seventh Circuit* thought it "'reasonably likely' that without the prosecutor's injection of impermissible statements and incorrect law the jurors would not have recommended death." *Baer III*, App. 39a. The Seventh Circuit needed to establish that *any fairminded judge* must find it reasonably likely. It did not do so.

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"This Court has repeatedly admonished" federal courts that deference to state courts' decisions is "near its apex" when, as here, those decisions involve "*Strickland* claim[s] . . . that turn[] on general, fact-driven standards." *Sexton*, 138 S.Ct. at 2558. The Seventh Circuit failed to accord such deference to the Indiana Supreme Court's reasoned rejection of Baer's *Strickland* claims. It analyzed Baer's claims as if it were considering them on direct appeal, violating AEDPA and undermining the statute's "goal of promoting comity, finality, and federalism." *Cullen v. Pinholster*, 563 U.S. 170, 185 (2011) (quoting *Jimenez v. Quarterman*, 555 U.S. 113, 121 (2009)). The Seventh Circuit's decision should be reversed.

CONCLUSION

The Court should grant the petition, reverse the judgement below, and reinstate Baer's death sentence.

Respectfully submitted,

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