United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

Submitted August 14, 2020
Decided August 20, 2020

Before

MICHAEL S. KANNE, *Circuit Judge*

AMY C. BARRETT, *Circuit Judge*

No. 17-2922

KEITH BARMORE,
Petitioner-Appellant,

v.

JOHN VARGA,
Respondent-Appellee.

Appeal from the United States District Court for the Northern District of Illinois, Western Division.

No. 15 C 50108

Philip G. Reinhard,
Judge.

ORDER

Keith Barmore has filed a notice of appeal from the denial of his petition under 28 U.S.C. § 2254 and an application for a certificate of appealability. This court has reviewed the final order of the district court and the record on appeal. We find no substantial showing of the denial of a constitutional right. *See* 28 U.S.C. § 2253(c)(2).

Accordingly, the request for a certificate of appealability is DENIED. Barmore's motions to proceed in forma pauperis and for appointment of counsel are DENIED. All other outstanding motions are DENIED.

Appendix A-1 Exhibit.

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS WESTERN DIVISION

Keith D. Barmore (R-00683),	)	
	)	
Petitioner,	)	Case No: 15 C 50108
	)	
v.	)	
	)	Judge Philip G. Reinhard
Thomas Spiller, Warden of Pinckneyville Correctional Center,	)	
	)	
Respondent.	)	

ORDER

For the following reasons, the court denies petitioner's 28 U.S.C. § 2254 petition [1]. The court declines to issue a certificate of appealability. This matter is terminated.

STATEMENT - OPINION

On January 10, 2000, petitioner Keith D. Barmore was convicted of Illinois first degree murder for the murder of his three-year-old stepson. [18-8] at 164. On October 25, 2000, petitioner was sentenced to 60 years imprisonment. *See* [18-12] at 75. On May 11, 2015, petitioner filed a 28 U.S.C. § 2254 petition in this court, challenging his Illinois sentence on eleven grounds. Respondent has filed a response [17] and petitioner has filed a reply [21], as well as additional affidavits and supplements to his reply and the record. *See* [22]; [23]; [33]; [35]. The court accepts all of petitioner's filings, including his supplemental responses and additions to the record. This matter is now ripe for the court's review.

As noted, petitioner has raised eleven grounds challenging his conviction with regard to all stages of his prosecution, ranging from claims of false testimony before the Grand Jury to ineffective assistance of post-trial counsel. Plaintiff presented these claims before state courts both on direct appeal and in a state postconviction petition. Both of these avenues resulted in Illinois Appellate Court decisions denying petitioner relief; the Illinois Supreme Court denied all relevant petitions for leave to appeal. As such, pursuant to the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), the decisions under review are "the last state court that substantively adjudicated [petitioner's] claim[s]," namely the Illinois Appellate Court's rulings in petitioner's direct appeal [18-13] and his postconviction petition appeal [18-27]. *See Alston v. Smith*, 840 F.3d 363, 367 (7th Cir. 2016).

Under AEDPA, to merit habeas relief, the petitioner:

> must demonstrate that the state court proceedings "(1) resulted in 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; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence

Appendix B-1 Exhibit.

> presented in the State court proceeding." 28 U.S.C. § 2254(d)(1) and (2). Under § 2254(d)(1), a state-court decision is contrary to Supreme Court precedent if it is inconsistent with the Supreme Court's treatment of a materially identical set of facts, or if the state court applied a legal standard that is inconsistent with the rule set forth in the relevant Supreme Court precedent. And a state-court decision constitutes an unreasonable application of Supreme Court precedent within the meaning of section 2254(d)(1) when, although it identifies the correct legal rule, it applies that rule to the facts in a way that is objectively unreasonable. Under § 2254(d)(2), a state court's decision involves an unreasonable determination of the facts if it "rests upon fact-finding that ignores the clear and convincing weight of the evidence." *Corcoran v. Neal*, 783 F.3d 676, 683 (7th Cir. 2015), cert. denied, 136 S. Ct. 1493 (2016); *see also Miller-El v. Cockrell*, 537 U.S. 322, 340 (2003) (a federal court can, guided by AEDPA, conclude that a state court's decision was unreasonable or that the factual premise was incorrect by clear and convincing evidence).

Dassey v. Dittmann, 2017— F.3d ----2017 WL 2683893, at *10 (7th Cir. June 22, 2017) (internal citations omitted).

Due to the large number of grounds petitioner has raised to challenge his sentence, the court will analyze each in turn and discuss the relevant factual and procedural history in the respective sections.[1] The parties are assumed to be familiar with the general facts of petitioner's prosecution, trial, and post-trial procedural history. For the following reasons, each of petitioner's grounds for relief are without merit and the court must deny his § 2254 petition.

A. Batson Claim.

Petitioner claims that prosecutors violated *Batson* by striking two prospective African-American jurors, Margie Rogers and Sheila Council, based on their race. The Illinois Appellate Court rejected this argument on direct appeal, finding that petitioner had not rebutted the prosecutors' race-neutral justification for striking the two prospective jurors by clear and convincing evidence. *See* [18-13] at 15-18.

The United States Supreme Court has recently reiterated the proper standard for courts in evaluating *Batson* claims:

> First, a defendant must make a prima facie showing that a peremptory challenge has been exercised on the basis of race; second, if that showing has been made, the prosecution must offer a race-neutral basis for striking the juror in question; and third, in light of the parties' submissions, the trial court must determine whether the defendant has shown purposeful discrimination.

Foster v. Chatman, 136 S.Ct. 1737, 1747 (2016) (internal quotations omitted). The Seventh Circuit has held that "[i]n the third step of the *Batson* analysis, the critical question is the persuasiveness of the race-neutral justification for the peremptory strike, which comes down to credibility." *Morgan v. City of Chicago*, 822 F.3d 317, 327 (7th Cir. 2016).

---

[1] The court notes that the arguments in petitioner's 40-page § 2254 petition are often difficult to discern. To the best of the court's ability, it has fairly presented petitioner's arguments and claims, which encompass virtually all of the claims made to the Illinois Court of Appeals in petitioner's direct appeal and state habeas appeal. To the extent that the court has failed to discern additional claims in the present § 2254 petition that were not presented to and addressed by the Illinois Court of Appeals, those claims must be dismissed for failure to exhaust.

Here, with regard to the Margie Rogers, the Illinois Appellate Court noted that the prosecution had argued to the trial court that Ms. Rogers had been the only prospective juror that had been a counselor for criminal offenders. Moreover, she had observed two murder trials out of personal interest where fathers had been accused of murdering their young children, and in one of those trials the defendant had been acquitted. As such, the prosecution argued that it believed she may have been biased in favor of criminal defendants and unduly inclined to acquit. The court found that the underlying facts were credible and the prosecution's race-neutral basis for striking Ms. Rogers was sufficiently persuasive to overcome petitioner's accusation of purposeful discrimination. *See id.*

With regard to Sheila Council, the Illinois Appellate Court noted that the prosecution had argued to the trial court that Ms. Council had been sleeping during voir dire, a factual finding that the trial court had credited due to the prosecution's credibility; the Illinois Appellate Court accepted the trial court's credibility finding. Moreover, the prosecution argued that questioning revealed that Ms. Council had shown a disregard for her son's ongoing legal issues, referring to him as a "bum." As such, the prosecution argued that it believed that this disregard, in combination with Ms. Council's failure to remain conscious during voir dire, suggested that she might not be committed to resolving the issues in the case. The Illinois Appellate Court credited the underlying facts and found that they adequately supported the prosecution's reasoning; as such, the prosecution's race-neutral basis for striking Ms. Council was sufficiently persuasive to overcome petitioner's accusation of purposeful discrimination. *See id.*

The court has reviewed the record and cannot find that the Illinois Appellate Court's findings were an unreasonable application of Federal law or based on an unreasonable determination of the facts. The court carefully reviewed the factual record and accorded the appropriate deference to the trial court's relevant factual and credibility findings. Moreover, with regard to Ms. Rogers, the Seventh Circuit has held that "[o]ur court has approved the exclusion of veniremen because of their professions." *See United States v. Griffin*, 194 F.3d 808, 826 (7th Cir. 1999) (collecting cases in which courts had found that striking social workers was a race-neutral justification). With regard to Ms. Council, the Seventh Circuit has found that "inattentiveness is a legitimate reason for striking a potential juror." *United States v. Jones*, 224 F.3d 621, 623-24 (7th Cir. 2000) (noting that the prosecution had accused one of the prospective jurors as sleeping and the trial court, while not observing the sleeping, "accepted the government's explanation regarding [the prospective juror] and we give that finding great deference"). As such, the court does not find that petitioner's *Batson* claim merits relief under 28 U.S.C. § 2254.

B. Sufficiency of the Evidence Claim.

Petitioner claims that the evidence at trial was insufficient to convict him of first degree murder. The Illinois Appellate Court rejected this argument on direct appeal, finding that the evidence was "sufficient to sustain the jury's verdict." *See* [18-13] at 19-21.

The United States Supreme Court has articulated the standard for evaluating a sufficiency of the evidence claim under § 2254:

> [E]vidence is sufficient to support a conviction so long as after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt . . . . [A] reviewing court faced with a record of historical facts that supports conflicting inferences must presume—even if it does not affirmatively appear in the record—that the trier of fact resolved any such conflicts in favor of the prosecution, and must defer to that resolution . . . . [T]he

Appendix B-3 Exhibit.

deference to state court decisions required by § 2254(d) is applied to the state court's already deferential review[.]

Cavazos v. Smith, 565 U.S. 1, 7 (2011).

Here, the Illinois Appellate Court expressly applied that standard. The court has reviewed the factual record and the Illinois Appellate Court's analysis of the facts in the case as they apply to the elements of Illinois first-degree murder. The court pointed out the evidence from a witness that petitioner took the victim into a bathroom after becoming angry when the victim had become ill. The witness heard a "bump," after which the victim was "out of it." *See* [18-13] at 20. Further, the court described expert testimony that the injuries that killed the victim were "caused by some combination of violent shaking and violent impact," and that the victim's injuries "had been so severe that they most likely had been 'deliberately inflicted.'" *See id.* at 20-21.

This court cannot find that the Illinois Appellate Court was unreasonable in determining that "any rational trial of fact could have found the essential elements of the crime beyond a reasonable doubt," and as such the court does not find that petitioner's sufficiency claim merits relief under 28 U.S.C. § 2254.

C. Improper Closing Arguments Claim.

Petitioner next raises a *Darden* claim, arguing that his trial was rendered unfair and he was deprived of due process because of certain comments made during the prosecutions' closing arguments. The Illinois Appellate Court rejected this argument on direct appeal, finding that the comments were not prejudicial due to the "overwhelming evidence" that petitioner was guilty of first-degree murder. *See* [18-13] at 22-24.

The Seventh Circuit has held that when a petitioner raises a *Darden* claim, "[i]n determining whether the prosecutors' remarks were prejudicial . . . 'it is not enough that the prosecutors' 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.'" *Ellison v. Acevedo*, 593 F.3d 625, (7th Cir. 2010) (quoting *Darden v. Wainwright*, 477 U.S. 168, 181 (1986)).

Here, petitioner requested that the jury consider an involuntary manslaughter verdict, which requires a mens rea of recklessness, rather than first-degree murder, which requires knowledge or intent. During closing argument, the prosecutor stated "what is even more despicable about this abuse [of the victim] is this abuser's attempt to play with the system here to go and get an involuntary manslaughter conviction, escape responsibility for delivering that abuse." See [18-8] at 141. It is clear from the context of the closing arguments that the prosecution was arguing that there was no evidence to find that, if petitioner had killed the victim, that he did it recklessly rather than knowingly or intentionally.

The Illinois Appellate Court correctly noted that the prosecution's comments would not deprive petitioner of due process if they were "harmless," and the court concluded after a review of the evidence that the comments were harmless because the evidence of first-degree murder was "overwhelming." *See* [18-13] at 22. This court agrees after a review of the relevant materials that if the jury were to find that petitioner had killed the victim, there was little basis to find that it was without knowledge or intent as specified by the Illinois first degree murder statute. As such, the court cannot find that the Illinois Appellate Court's findings were an unreasonable application of Federal law or based on an unreasonable determination of the facts. Thus, the court does not find that petitioner's *Darden* claim merits relief under 28 U.S.C. § 2254.

Appendix B-4 Exhibit.

D. Ineffective Assistance - Failure to Call an Expert.

Next, petitioner claims that his trial counsel was ineffective for failing to call an expert to testify that the victim's death could have been caused by an earlier fall at a jungle gym two weeks prior to his death. The Illinois Appellate Court applied *Strickland v. Washington*, 466 U.S. 668 (1984), and affirmed the dismissal of petitioner's state habeas claim on this issue, finding that there was no prejudice because "there is no reasonable probability that testimony from [defendant's purported expert] or another medical expert would have affected the outcome of the case." *See* [18-27] at 9.

The standard for *Strickland* claims for ineffective assistance of trial counsel are well established in the Seventh Circuit:

> In *Strickland*, the Supreme Court established a two-part test for adjudicating ineffective assistance of counsel claims that requires a petitioner to show (1) that counsel's performance was deficient, and (2) that the deficiency prejudiced his defense. To establish deficiency, the petitioner must show that counsel's representation fell below an objective standard of reasonableness. To demonstrate prejudice, 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.

Rodriguez v. Gossett, 842 F.3d 531, 537-38 (7th Cir. 2016) (internal quotations omitted). "Under AEDPA, the bar for establishing that a state court's application of the *Strickland* standard was 'unreasonable' is a high one. 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." *Makiel v. Butler*, 782 F.3d 882, 897 (7th Cir. 2015) (internal quotations omitted).

The court has reviewed the factual record, including a post-trial hearing for a new trial at which petitioner contended that an expert should have been called. Counsel testified he had thoroughly investigated whether an independent expert could have been called to testify that the death could have been a result of the jungle gym fall, but concluded based on discussions with expert consultants that his retained expert "would, in fact, have to concur with many of the State's witnesses" on cross examination and would "end up testifying and bolstering the State's case and their experts rather than helping us." *See* [18-11] at 59. Moreover, his discussions confirmed that no credible expert would be able to bolster petitioner's theory. *See id.* at 59-62. Also at the post-trial hearing, a physician that initially supplied testimony supportive of petitioner's theory changed his mind after re-reading the coroner's report and gave testimony consistent with the prosecution's theory that the injury could not have been from a simple fall but "would require a tremendous amount of force, that would immediately render one to an unconscious state." *See id.* at 90-91. Further, the court has reviewed the Illinois Appellate Court's analysis of the prosecution's expert witness testimony, which bolsters the reliability of trial counsel's testimony that no expert would be likely to credibly counter the prosecution's theory as to the cause of death. *See* [18-27] at 9.

After review of the record, the court cannot find that the Illinois Appellate Court's conclusion that petitioner failed to show prejudice was an unreasonable application of Federal law or based on an unreasonable determination of the facts. Further, the court notes that the Seventh Circuit has held that "counsel's failure to even reach out to an expert" may be deficient in certain cases. *See Thomas v. Clements*, 789 F.3d 760, 771 (7th Cir 2015). Here, however, counsel decided after consultation with an expert that calling a rebuttal expert would be harmful to the defense; as such, the decision falls under the category of "strategic choices made after thorough investigation of law and facts relevant to plausible options [which] are virtually unchallengeable." *Vinyard v. United States*, 804 F.3d 1218, (7th Cir. 2015).

Appendix B-5 Exhibit.

Thus, the court does not find that petitioner's first *Strickland* claim based on failure to call an expert merits relief under 28 U.S.C. § 2254.

E. The Right to Testify.

Next, petitioner raises two claims related to the fact that he did not testify at trial. First, he claims that his trial counsel was ineffective under *Strickland* because he "unduly pressured" petitioner not to testify. *See* [1] at 23. Petitioner also raises an independent claim that his constitutional right to testify was infringed by this "undue pressure." *See Barrow v. Uchtman*, 398 F.3d 597, 608 (7th Cir. 2005) (noting that "the right to testify in one's own defense is a fundamental procedural right" and that "a defendant must acquiesce fully and intelligently in counsel's attempts to waive that right-only the defendant himself, not his lawyer, can waive the right to testify"). The Illinois Appellate Court affirmed the dismissal of petitioner's state habeas claim on these grounds, finding that "[petitioner's] specific allegations suggest that counsel actively discouraged defendant from testifying, but do not reveal any 'undue' pressure." *See* [18-27] at 9. Because the two claims are inextricably intertwined, the court will analyze them together.

First, the court has reviewed the record to determine trial counsel's justification for persuading plaintiff not to testify, including trial counsel's testimony at the post-trial hearing related to petitioner's motion for a new trial. Trial counsel testified that petitioner's intention was to testify that he had never hurt the victim. If he had done so, the prosecution would be allowed to introduce otherwise inadmissible evidence that petitioner had previously abused the victim, including "one child that would testify that they would count how many times [the petitioner] hit [the victim] or hit some of the other children when he was disciplining them. Now that testimony would destroy our case." *See* [18-11] at 62-63. The Seventh Circuit has held that counsel's recommendation to a defendant not to testify is not ineffective when it is based on "a reasonable strategic decision . . . that he not testify because of the possible adverse consequences of his doing so." *See Lee v. Murphy*, 41 F.3d 311, 316 (7th Cir. 1994). Based on trial counsel's testimony and a review of the record that bolsters that testimony, this case does not support petitioner's contention that counsel's recommendation not to testify was ineffective.

Next, with regard to petitioner's right to testify, the Seventh Circuit has held that a defendant's right to testify may be infringed where "the totality of the circumstances evidences that [the defendant] didn't knowingly acquiesce in his counsel's decision." *Ward v. Sternes*, 334 F.3d 696, 707 (7th Cir. 2003). However, "a direct, unequivocal answer to a trial court's colloquy will suffice to find a knowing, intelligent waiver" of the right to testify sufficient to overcome such a claim. *See id.* Here, the record reveals that the trial court advised petitioner that "you alone posses the right to choose whether to testify in your own behalf. You should make that decision after consulting with counsel." *See* [18-8] at 60. When petitioner consulted with counsel and stated that he did not wish to testify, the trial court also advised that "the decision to testify or not testify is an intensely personal one" and that "the decision is yours, yours alone." *See id.* at 62. The trial court asked petitioner whether "you can assure me that [trial counsel] has not forced, coerced you , or put any undue pressure on you to make this decision?" and petitioner stated "Yes, Your Honor." *Id.* The trial court asked whether petitioner had decided not to testify "because that's what you wish to do, because you consider that it is in your best interest" and petitioner said "Yes, Your Honor" *Id.* Based on this unequivocal waiver, it is clear that petitioner's right to testify was not infringed.

Based on the foregoing, the court finds that petitioner's claim of ineffectiveness and his claim that his right to testify was infringed both do not merit relief under 28 U.S.C. § 2254.

F. Grand Jury False Evidence Claims.

Next, petitioner claims that the prosecution presented false evidence to the Grand Jury. His claim is based: (1) on the date that prosecutors stated the victim's injury occurred, which was the date petitioner allegedly struck the victim, rather than the date the victim had fallen from a jungle gym weeks prior; and (2) that an altered version of a written statement he had made was read to the jury rather than the original. The Illinois Appellate Court affirmed the dismissal of his state habeas claims on these grounds, finding that "there is no basis for defendant's assertion that [the prosecution's] grand jury testimony [regarding the date of injury] was false or misleading" and that the court's review of petitioner's "original" and "altered" statements "does not reveal any substantive discrepancies or support the implication that false evidence was submitted to the grand jury." *See* [18-27] at 5-7.

The court has reviewed the record and agrees with the Illinois Appellate Court. The prosecution's statement to the grand jury as to the date of the injury was based on the prosecution's theory of what had caused the victim's death, which was supported by ample evidence. As such, it was not misleading. Moreover, the "original" and "altered" statements by petitioner are functionally identical in content, and as such even presenting an "altered" statement would not have been misleading. As such, even assuming that misconduct before the grand jury would be the basis for section 2254 relief, in this case petitioner's "claim that alleged prosecutorial misconduct before the grand jury violated his due process rights is without merit." *See United States, ex rel. Brown v. Pierce*, 2012 WL 851519, at *4 (N.D. Ill. 2012) (noting that "[t]here is no clearly established Supreme Court precedent providing state prisoners a due process right to be indicted by a grand jury solely on truthful testimony").

G. Indictment Notice Claim.

Next, petitioner claims that his indictment was deficient and failed to give him sufficient notice because it did not precisely mirror the Illinois murder statute and the jury instructions at trial. Specifically, petitioner contends that his indictment did not provide him with sufficient constitutional notice because it stated that his actions against the victim were made with knowledge of the strong probability of "great bodily injury" rather than "death or great bodily injury." The Illinois Appellate Court affirmed the dismissal of petitioner's state habeas claim on this ground, finding that "the argument is refuted by the record, which shows that the jury was properly instructed on the offense charged in the indictment." *See* [18-27] at 10.

The Seventh Circuit has held that

> [T]he United States Constitution does not require States to charge a defendant by indictment. Accordingly, in considering the validity of an indictment, general due process standards govern.
>
> The question thus is whether [the defendant] had sufficient notice of the specific charge, and a chance to be heard in a trial of the issues raised by that charge. So long as the defendant has received adequate notice of the charges against him so that he has a fair opportunity to defend himself, the constitutional requirement is met.

Ashburn v. Korte, 761 F.3d 741, 758 (7th Cir. 2014) (internal quotations and citations omitted) (finding that the defendant "had more than adequate notice of the charges against him" when the indictment set forth the facts that supported the substantive offense, despite the fact that the indictment and jury instructions set forth "alternative manners" of proving the substantive offense of murder). Here, whether

Appendix B-7 Exhibit.

the language of the indictment precisely tracked the Illinois murder statute, it provided petitioner with a fair opportunity to defend himself. As such, his claim of inadequate notice does not merit relief under 28 U.S.C. § 2254.

H. False Testimony at Trial Claims.

Next, petitioner claims that the prosecution presented false evidence at trial by (1) allegedly coaching the victim's brother to testify falsely; and (2) presenting allegedly perjured evidence from an expert physician witness that he had reviewed a medical report regarding the victim's fall from a jungle gym, when email correspondence suggested that the physician had not read the report as of September 1998. The Illinois Appellate Court affirmed the dismissal of his state habeas claim on these grounds, finding that, with regard to the brother's alleged perjury, petitioner's proffered evidence "suggests that [the brother's] testimony was coached [but does not indicate in what respect, if any, the testimony was actually false" and, with regard to the expert's alleged perjury, the "witness had an ample opportunity to review the report" because "[t]he case did not proceed to trial until 2000." *See* [18-27] at 7-8.

This case is functionally similar to *Wilson v. Bryant*, F. App'x. 782 (7th Cir. 2003), in which the Seventh Circuit noted that "[t]he Supreme Court has made clear that a due process violation may occur if a prosecutor knowingly introduces false testimony[,]" but found that "[t]he problem, however, is that [the petitioner] has not shown that [witness] testimony-or any other evidence presented by the prosecution-was false, much less that the prosecutor knew of its falsity." *Id.* at 784. Here, the court has reviewed the record and petitioner's arguments to this court, which does not deviate in any material respect from the arguments and evidence considered by the Illinois Appellate Court when affirming the dismissal of petitioner's state habeas claim. For substantially the same reasons as the Illinois Appellate Court, this court does not find that the petitioner has supplied any evidence that would tend to show even a reasonable likelihood that the prosecution was knowingly aware of false testimony from the victim's brother or its expert witness. As such, the court cannot find that the Illinois Appellate Court's findings were an unreasonable application of Federal law or based on an unreasonable determination of the facts.

Thus, the court does not find that petitioner's false evidence claim merits relief under 28 U.S.C. § 2254.

I. Jury Instructions Claims.

Next, petitioner claims that the trial court did not orally instruct the jury as required. While it does not appear that the Illinois Appellate Court ruled as to petitioner's claim that the trial court failed to orally instruct the jury, after review it is clear that petitioner raised the claim at every level of his state habeas proceedings, including during his appeal and PLA to the Illinois Supreme Court; as such, he has met his exhaustion "duty to fairly present his federal claims to the state courts." *Lewis v. Sternes*, 390 F.3d 1019, 1025 (7th Cir. 2004) ("Fair presentment in turn requires the petitioner to assert his federal claim through one complete round of state-court review, either on direct appeal of his conviction or in post-conviction proceedings."). As such, the last state court to rule on the issue was the trial court that dismissed his habeas petition, which noted that "the Defendant's claim is contradicted by the record which indicates that the Judge read the instructions and verdict forms to the jury." *See* [18-23] at 2. The court notes that the record supports the trial court's determination that the jury was orally instructed and with proper instructions. *See* [18-8] at 148; [18-9]. Regardless, petitioner does not convince the court that the failure to orally instruct the jury, even if a violation of state law, would constitute a violation of his constitutional rights. *See U.S. ex rel. Searcy v. Greer*, 768 F.2d 906, 910 (7th Cir. 1985). As such, petitioner's claim on this ground does not merit relief under 28 U.S.C. § 2254.

Appendix B-8 Exhibit.

J. Claims Regarding Post-Trial Motion to Reconsider.

Finally, petitioner raises two claims related to his sentence and appeal. Immediately following his sentencing hearing, post-trial counsel for petitioner informed the trial court that "Mr. Barmore has a Notice of Appeal I would like to file right now" and "Also, he prepared a motion for reconsideration of sentencing he would like to have filed today." [18-12] at 76. Immediately, while petitioner was still present, the prosecutor objected to the simultaneous filings and noted that "Just for the record, the Defendant has filed Notice of Appeal, and he has filed a motion to reconsider sentence, and filing of Notice of Appeal divests this Court of Jurisdiction." *Id.* at 78. However, at the time, it appears that at that time the trial court erroneously believed it could still hear the motion to reconsider, and a hearing on that motion was scheduled. *See id.*

On the date that the hearing was scheduled, at which petitioner was not present, the trial court appears to have reconsidered and correctly pointed out "I believe the motion, the Notice of Appeal, has to be filed after a disposition on the Motion to Reconsider." [18-12] at 88. The prosecutor agreed and stated "I think they have to withdraw their appeal at this time if they want the Court to rule on the Motion to Reconsider. I believe maybe [post-trial counsel] has to consult with his client on that." *Id.* Post-trial counsel responded "Yes, I would. He [petitioner] was insistent on filing it that day, so I think I will consult with him to see what, you know, what he wants to do." *Id.* at 89. The matter was again rescheduled.

At the date of the rescheduled hearing, at which petitioner was again not present, post-trial counsel informed the court "Judge, this was up today for status Mr. Barmore's Motion to Reconsider Sentence. I spoke to Mr. Barmore on Monday. He indicated to me he wanted to withdraw that motion. I explained to him the legal ramifications of that. He would not be able to appeal his sentence if that motion was not heard. He wants to just go ahead with the appeal. He wants to withdraw that motion." [18-12] at 96. The trial court responded "He wants to withdraw the Motion to Reconsider?" and also pointed out that the court had "brought up an issue regarding timing of the Notice of Appeal." *Id.* Post-trial counsel responded "What I was going to talk to him about, I thought what we would do is withdraw the Notice of Appeal and then proceed on the Motion to Reconsider, but he said he did not want to do that. He wanted to withdraw this one." *Id.* As such, the motion to reconsider was withdrawn and petitioner proceeded with his appeal, which challenged his sentence along with the other claims discussed above. The Illinois Appellate Court on direct appeal affirmed the sentence because petitioner had withdrawn the motion to reconsider with knowledge that he could not therefore challenge his sentence and thus had "acquiesced in any alleged error in sentencing[.]" *See* [18-13] at 24.

Here, petitioner claims that: (1) the trial court committed error at the sentencing hearing for not admonishing him that to challenge his sentence on appeal, he would need to first pursue the motion to reconsider; and (2) post-trial counsel was ineffective for filing a motion to reconsider sentence simultaneously with his notice of appeal. The Illinois Appellate Court affirmed the dismissal of petitioner's state habeas claim as to the failure to admonish, finding that the state law requiring admonishment "was not in effect when defendant was sentenced." *See* [18-27] at 10.

On both issues that petitioner has raised, the court notes that to succeed in a § 2254 petition, petitioner must show prejudice for the trial court's failure to admonish at sentencing or his post-trial counsel's ineffectiveness in filing both the notice of appeal and motion to reconsider simultaneously. *See Thompkins v. Pfister*, 698 F.3d 976, 986 (7th Cir. 2012). The fact remains that regardless of any error by the trial court or deficient performance by counsel, the issue was immediately pointed out by the prosecutor while petitioner was present. Later, post-trial counsel explained the legal ramifications of the

issue and its solution to petitioner, namely that he temporarily withdraw the notice of appeal until the motion to reconsider had been resolved. Post-trial counsel's solution was presented to petitioner at a time when the issue could have easily been rectified with no prejudice to petitioner's appeal. Petitioner nevertheless knowingly chose to withdraw his motion to reconsider rather than follow post-trial counsel's proposed solution. Petitioner has not proposed and the court has found no evidence to support a finding that post-trial counsel was being disingenuous when explaining his conversations with petitioner on this point. As such, the court cannot find that petitioner was prejudiced by any error of the trial court at sentencing or post-trial counsel's initial error in filing the motion to reconsider and notice of appeal simultaneously. Thus, petitioner's claims on these grounds do not merit relief under 28 U.S.C. § 2254.

While petitioner attempted to raise various claims for relief in his § 2254 petition, the court finds his collateral claims are without merit and does not find that "reasonable jurists could debate whether . . . the petition should have been resolved in a different matter[.]" *Id.* Thus, because there is no substantial constitutional question for appeal, the court declines to issue a certificate of appealability. The matter is terminated.

Date: 7/12/2017

ENTER:

Philip G. Reinhard

United States District Court Judge

Notices mailed by Judicial Staff. (LC)

Appendix B-10 Exhibit.

United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

October 15, 2020

Before

MICHAEL S. KANNE, *Circuit Judge*

MICHAEL Y. SCUDDER, *Circuit Judge*

No. 17-2922

KEITH BARMORE,
Petitioner-Appellant,

v.

JOHN VARGA,
Respondent-Appellee.

Appeal from the United States District Court for the Northern District of Illinois, Western Division.

No. 15 C 50108

Philip G. Reinhard,
Judge.

ORDER

On consideration of the petition for rehearing and for rehearing *en banc* filed on September 18, 2020, no judge in active service has requested a vote on the petition for rehearing *en banc*. Judge Kanne has voted to deny panel rehearing. Judge Scudder, who has been substituted for Judge Barrett, likewise has voted to deny panel rehearing.

Accordingly, IT IS ORDERED that the petition is **DENIED**.

Appendix C-1 Exhibit.

CALLUM, J., with O'MALLEY, J., concurring.

JUSTICE BOWMAN dissenting:

I respectfully dissent because I believe the majority erred in finding that the prosecutor's remarks during closing argument were harmless beyond a reasonable doubt.

A prosecutor is allowed a great deal of latitude in presenting closing argument. People v. Buss, 187 Ill. 2d 144, 244 (1999). Every defendant, however, has a right to a trial free from improper prejudicial comments or arguments by the prosecutor. People v. Simms, 192 Ill. 2d 348, 396 (2000). Whether a prosecutor's comments or remarks constitute prejudicial error is determined by the language used, its relation to the evidence, and the effect of the argument on the defendant's right to a fair and impartial trial. Simms, 192 Ill. 2d at 396. The test for reversing a conviction based on the remarks of a prosecutor is whether the jury would have reached a contrary verdict had the improper remarks not been made. People v. Heard, 187 Ill. 2d 36, 73 (1999). Whether the remarks require reversal of the defendant's conviction depends upon the facts of each case. People v. Coleman, 51 Ill. App. 3d 499, 515 (1977).

In his closing argument the prosecutor referred to defendant's conduct as "beyond comprehension *** reprehensible *** despicable." He then remarked:

> "But what is even more despicable about this abuse is this abuser's attempt to play with the system here and go and get an involuntary manslaughter conviction, escape responsibility for delivering that abuse." (Emphasis added.)

Appendix D-1 Exhibit.

This remark constituted a misstatement of the law, as it told the jury that finding defendant guilty of involuntary manslaughter, rather than first degree murder, would permit him to "escape responsibility." Also, by stating that defendant was attempting to "play with the system" the prosecutor implied that defendant did not have the right to seek a conviction on the lesser-included offense of involuntary manslaughter.

In People v. Howard, 232 Ill. App. 3d 386 (1992), the prosecutor in asking the jury to find defendant guilty of murder remarked in his closing argument that "involuntary manslaughter does not apply" and "it is a cop-out." As in the present case, the prosecutor in Howard was telling the jury that a finding of involuntary manslaughter provided the defendant with a means for avoiding responsibility for killing the victim. The court in Howard determined that "there is not a scintilla of evidence to support the prosecutor's conclusion that involuntary manslaughter did 'not apply' and was a 'cop-out.'" Howard, 232 Ill. App. 3d at 390.

The majority recognizes that comments such as those made in Howard and in the present case have been deemed "highly improper." Nonetheless, the majority determines that the prosecutor's comments in the present case are harmless given the overwhelming evidence of defendant's guilt.

In the present case the indictment charged that defendant knowingly caused Kevon's death by striking the child's head on a surface. The evidence the State presented was essentially circumstantial, as there was no eyewitness to the act charged in

Appendix D-2 Exhibit.

the indictment as causing the child's death. Thus, based on the evidence presented, I believe the jury could have found defendant acted recklessly rather than knowingly in performing the act which caused the child's death. However, by arguing to the jury that a finding of involuntary manslaughter would allow defendant to "play with the system" and "escape responsibility" for his conduct, the prosecutor may have influenced the jury to find otherwise.

The majority asserts that the only evidence suggesting that defendant acted recklessly was the fact that "he had acted out of rage" and that, under the holding in People v. Rodriguez, 275 Ill. App. 3d 274 (1995), such emotion indicates knowledge and not recklessness. In Rodriguez the defendant admitted hitting the three-year-old victim in the stomach because he was angry that she had defecated in her pants and he had soiled his hand on her feces. The court determined that defendant's admission that he struck the victim out of anger negated a finding of recklessness because ' "[a] person who is driven by his bad temper to injure or kill another acts knowingly, or intentionally, not recklessly." ' Rodriguez, 275 Ill. App. 3d at 285, quoting People v. Summers, 202 Ill. App. 3d 1, 11 (1990).

Both in Rodriguez and in Summers, however, there was a pattern of abuse by the defendants against the victims which, as pointed out by the court in Summers, demonstrated hatred of the victim and the wish to seriously harm the victim (Summers, 202 Ill. App. 3d at 11). Under such facts, I would agree that one acting out of anger acts knowingly or intentionally and not recklessly. Here, however, the only evidence of defendant's anger was O.D.'s

Appendix D-3 Exhibit.

testimony that he observed defendant shaking Kevon and asking him why he was going back to his old habits. There was no evidence of prior verbal or physical abuse and no evidence of defendant's hatred or desire to seriously injure Kevon. Consequently, I do not believe the evidence showed defendant was "driven by his bad temper" to injure or kill the victim, as were the defendants in Rodriquez and Summers.

In my opinion, this case presented a close question concerning whether the injury causing Kevon's death was performed knowingly or recklessly by defendant, as no one witnessed the impact that caused the "bump noise" heard by O.D. That the jury had some concerns regarding defendant's mental state was reflected in the question the jury sent to the judge after 2½ hours of deliberations. The jury asked the judge to interpret the meaning of "knowing" in the murder elements instruction asking, "Does this mean the defendant has to know 'instantly,' and not at some later point?" The majority maintains that this question does not give rise to the inference that the jury must not have thought that the evidence of defendant's mental state for first-degree murder was overwhelming, as defendant contends. Rather, the majority asserts, "[t]he question does not bear on the strength of the evidence that, as a matter of fact, defendant satisfied the legal definition of the mental state for first-degree murder."

In my view, the jury's question directly pertained to whether the evidence established that defendant acted knowingly or recklessly. The question implied that the jury was experiencing some confusion regarding whether defendant had to know at the time

of his act that the act created a strong probability of death or great bodily harm or whether that knowledge could occur after the act had been performed. The latter scenario would support defendant's contention that he acted recklessly.

The death of Kevon was a horrible tragedy. Yet, I believe the evidence was such that the jury could have found that defendant acted recklessly rather than knowingly in causing the child's death. The prosecutor's improper comment to the jury that an involuntary manslaughter conviction would allow defendant to escape responsibility for Kevon's death told the jury that it should not reach this result. Under the facts of this case, I would find that, without the prosecutor's improper remarks, the jury may have reached a different verdict. Accordingly, I would reverse defendant's conviction and remand for a new trial.

No. 17-2922

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

KEITH D. BARMORE, Petitioner-Appellant, v. JOHN E. VARGA, Respondent-Appellee.	)	Appeal from the United States District Court for the Northern District of Illinois, Western Division No. 15 C 50108 The Honorable Philip G. Reinhard, Judge Presiding

CORRECTED DOCKETING STATEMENT

Pursuant to Circuit Rule 3(c), respondent JOHN E. VARGA files this corrected docketing statement.

1. Petitioner filed a petition for a writ of habeas corpus in the district court. Doc. 1. The district court had jurisdiction pursuant to 28 U.S.C. §§ 1331, 2241, and 2254.

2. The district court entered a judgment disposing of all parties' claims on July 12, 2017. Doc. 39.[1] In an accompanying memorandum opinion, the district court denied the habeas petition and denied a certificate of appealability. Doc. 38.

3. On August 7, 2017, petitioner filed both a motion to alter or amend the judgment pursuant to Fed. R. Civ. P. 59(e), Doc. 40, and a notice of appeal, Doc. 41. The case was docketed in this Court as *Barmore v. Varga*, Appeal No. 17-2595.

[1] Unless otherwise specified, citations to "Doc._" refer to entries on the district court's electronic docket.

4. Because the district court had not yet ruled on the Rule 59 motion, the notice of appeal was premature, and petitioner voluntarily dismissed Appeal No. 17-2595. *See* 7th Cir. Appeal No. 17-2595, Docs. 12 (motion to dismiss) & 13 (order granting motion).

5. The district court denied petitioner's Rule 59 motion on September 5, 2017. Doc. 53. Petitioner filed a timely notice of appeal on September 18, 2017. Doc. 54; *see* Fed. R. App. P. 4(a)(4)(A) (thirty-day period for filing notice of appeal "runs . . . from the entry of the order disposing" of last Rule 59 motion).

6. This Court has jurisdiction pursuant to 28 U.S.C. §§ 1291 and 2253.

7. Petitioner is currently confined at Dixon Correctional Center, where Respondent-Appellee John Varga is warden. Respondent appears in his official capacity.

October 12, 2017

Respectfully submitted,

LISA MADIGAN
Attorney General of Illinois

/s/ Erin M. O'Connell
ERIN M. O'CONNELL
Assistant Attorneys General
100 West Randolph Street, 12th Floor
Chicago, Illinois 60601-3218
PHONE: (312) 814-1235
FAX: (312) 814-2253
EMAIL: eoconnell@atg.state.il.us

Appendix E-2 Exhibit.

CERTIFICATE OF SERVICE

I certify that on October 12, 2017, I electronically filed the foregoing **Corrected Docketing Statement** with the Clerk of the Court for the United States Court of Appeals for the Seventh Circuit by using the CM/ECF system. On the same date, I mailed a copy of this document, via the United States Postal Service, to the following non-CM/ECF-user:

Keith D. Barmore, R00683
Dixon Correctional Center
2600 N. Brinton Avenue
Dixon, Illinois 61021

/s/ Erin M. O'Connell
ERIN M. O'CONNELL
Assistant Attorney General

Appendix E-3 EXhibit.

said she did but that his grandfather didn't see them.

I asked Danetrik if he loved his dad. Danetrik said, "No, because he's mean".

I asked Danetrik where Keith pushed Kee Kee down. Danetrik said, "In the hallway". I asked Danetrik why that happened. Danetrik said, "Because Kee Kee threw up".

I asked Danetrik if he ever got pushed down. He said he did and told me that Keith (Sr) did that to Danetrik. Danetrik told me he had seen Keith (Sr) push Kee Kee down before.

We concluded our interview with Danetrik at 1020 hours and spoke to Pam Parks.

Pam Parks told us that O.D. refused to talk to us (police) anymore because he explained to her that he already told us the truth. She told me he seems to have a difficult time thinking about Kevon.

Pam Parks explained that when Danetrik told Karel Dunlap this recent information about the note being a "lie" she (Pam) was very surprised. Pam explained to us that the kids seem to be opening up more with her and mentioned that they feel safe.

We left the Park's residence at 1045 hours.

I called Dave Reinhard from the States Atorney's Office on 06-09-98 because I was told he was handling the case against Cynthia Barmore. I asked him if he could add a "no contact clause" if/when Cynthia posted bond or received a bond reduction. He agreed.

I spoke to Karel Dunlap on 06-15-98. She told me that Cynthia is no longer incarcerated and has supervised visitations with her children

UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Everett McKinley Dirksen United States Courthouse
Room 2722 - 219 S. Dearborn Street
Chicago, Illinois 60604

Office of the Clerk
Phone: (312) 435-5850
www.ca7.uscourts.gov

ORDER

September 18, 2020

By the Court:

No. 17-2922	KEITH D. BARMORE, Petitioner - Appellant v. JOHN E. VARGA, Respondent - Appellee

Originating Case Information:

District Court No: 3:15-cv-50108
Northern District of Illinois, Western Division
District Judge Philip G. Reinhard

The following is before the court: **PETITION FOR REHEARING BY PLAINTIFF/ PETITIONER FOR EN BANC**, filed on September 15, 2020, by pro se appellant.

On September 15, 2020, this court received a petition for rehearing from the pro se appellant, which the court construes as a motion to recall the mandate and file a petition for rehearing.

IT IS ORDERED that the motion is **GRANTED** and the mandate is **RECALLED**. The clerk of this court shall file **INSTANTER** the tendered petition for rehearing.

form name: **c7_Order_BTC**(form ID: **178**)

Appendix G-1 Exhibit.

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS WESTERN DIVISION

Keith D. Barmore (R-00683),	)	
	)	
Petitioner,	)	Case No: 15 C 50108
	)	
v.	)	
	)	Judge Philip G. Reinhard
Thomas Spiller, Warden of Pinckneyville Correctional Center,	)	
	)	
Respondent.	)	

ORDER

The court has received petitioner's timely-filed motion for reconsideration [40] as to the court's order [38] denying his 28 U.S.C. § 2254 petition [1]. In the motion to reconsider, petitioner challenges the court's reasoning as to his various respective claims for relief. However, while petitioner uses the boilerplate language that the court has made a manifest error of law or fact, after thorough review, the court can discern no argument that was not already articulated by petitioner in the materials previously considered by the court. In short, the court has already considered the arguments and factual statements made by petitioner in his motion for reconsideration, and has concluded that petitioner is not entitled to relief for the reasons articulated in the court's July 12, 2017 order. Petitioner's motion does not convince the court that it has made any "manifest error of fact or law," including any misapprehension of petitioner's arguments. *See Baker v. Lindgren*, 856 F.3d 498, 507 (7th Cir. 2017). As such, petitioner's motion to reconsider [40] is denied. Finally, the court notes that a number of other motions remain pending, which pertain to petitioner's appeal of the court's July 12, 2017 order. Petitioner's appeal has subsequently been voluntarily withdrawn and, as such, all pending motions [45]; [46]; [48]; [50] are denied as moot.

Date: 9/05/2017

ENTER:

Philip G. Reinhard

United States District Court Judge

Notices mailed by Judicial Staff. (LC)

Exhibit 2.

Appendix H-1 Exhibit.

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF ILLINOIS
WESTERN DIVISION

Keith D. Barmore (R-00683),	)	
	)	
Petitioner,	)	Case No: 15 C 50108
	)	
v.	)	
	)	Judge Philip G. Reinhard
Thomas Spiller, Warden of Pinckneyville Correctional Center,	)	
	)	
Respondent.	)	

ORDER

This matter pertains to the 28 U.S.C. § 2254 petition petitioner Keith D. Barmore filed in this court [1], challenging his state sentence. On July 12, 2017, the court denied the petition [38; 39] and on September 5, 2017, the court denied petitioner's motion for reconsideration [53]. Petitioner has since filed a notice of appeal [54], a motion to appeal in forma pauperis [59], a motion for production of the record on appeal [56], and a motion directed to the Seventh Circuit for appointment of counsel [59]. With regard to the motion to appeal IFP, the court notes that in its order denying the petition, the court also denied petitioner a certificate of appealability, finding that there was no substantial basis for appeal because there was no basis to find that "reasonable jurists could debate whether . . . the petition should have been resolved in a different matter[.]" *See* [38]. For substantially the same reasons, the court finds that appeal is not taken in good faith, and as such denies the motion for leave to appeal *in forma pauperis* [59]. *See* 28 U.S.C. § 1915(a)(3); *Hains v. Washington*, 131 F.3d 1248, 1250 (7th Cir. 1997) (per curiam). The court also dismisses the motion for production of the record [56] as not ripe; if the Seventh Circuit chooses to consider petitioner's appeal, the record will be forthcoming at that time. Finally, the motion for attorney representation [58] is dismissed in this court as it was correctly directed to the Court of Appeals. The clerk is directed to send a copy of petitioner's motion [58] to the Seventh Circuit, along with this order.

Date: 9/20/2017

ENTER:

Philip G. Reinhard

United States District Court Judge

Notices mailed by Judicial Staff. (LC)

Exhibit 3.

Appendix I-1 Exhibit.

Exhibit A.