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FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 09-99027

D.C. No. 2:07-cv-02120-DGC

[Filed May 13, 2019]

GEORGE RUSSELL KAYER, *Petitioner-Appellant*,	)
v.	)
CHARLES L. RYAN, Warden, Director of the Arizona Department of Corrections, *Respondent-Appellee.*	)

OPINION

Appeal from the United States District Court
for the District of Arizona
David G. Campbell, District Judge, Presiding

Argued and Submitted March 8, 2018
Pasadena, California

Filed May 13, 2019

Before: William A. Fletcher, John B. Owens, and Michelle T. Friedland, Circuit Judges.

Opinion by Judge W. Fletcher; Partial Concurrence and Partial Dissent by Judge Owens

SUMMARY*

Habeas Corpus / Death Penalty

The panel reversed in part and affirmed in part the district court's judgment denying Arizona state prisoner George Russell Kayer's habeas corpus petition, and remanded with directions to grant the writ with respect to Kayer's death sentence.

The panel held that the Arizona Supreme Court erred in rejecting Kayer's proffered mental-impairment mitigation evidence on the ground that the alleged impairment did not have a causal nexus to the commission of the crime. The panel held that this erroneous ruling, which was an alternative holding, was harmless because the Arizona Supreme Court's principal holding – that Kayer presented so little evidence of mental impairment that he failed to establish even the existence of any such impairment – was a reasonable determination of the facts.

The panel reversed the district court's denial of relief on Kayer's claim that he was denied his Sixth Amendment right to effective assistance of counsel due

* This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

to his attorneys' inadequate mitigation investigation in preparation for his penalty phase hearing. The panel held that in failing to begin penalty-phase investigation promptly after they were appointed, Kayer's attorneys' representation fell below an objective standard of reasonableness; and that the conclusion of the state post-conviction-relief (PCR) court that Kayer's attorneys provided constitutionally adequate performance was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court. The panel concluded that but for counsel's deficient performance, there is a reasonable probability Kayer's sentence would have been less than death, and that the state PCR court was unreasonable in concluding otherwise.

The panel did not need to reach the question whether the sentencing court acted properly in denying a continuance, and agreed with the district court that none of the procedurally-defaulted claims Kayer sought to revive was substantial in the sense necessary to support a finding of cause and prejudice under *Martinez v. Ryan*, 566 U.S. 1 (2012). The panel declined to certify two additional claims.

Concurring in part and dissenting in part, Judge Owens disagreed that the death sentence must be reversed because he could not say that the Arizona PCR court acted unreasonably regarding prejudice in light of the aggravating and mitigating circumstances in this case.

COUNSEL

Jennifer Y. Garcia (argued) and Emma L. Smith, Assistant Federal Public Defenders; Jon M. Sands, Federal Public Defender; Office of the Federal Public Defender, Phoenix, Arizona; for Petitioner-Appellant.

John Pressley Todd (argued), Special Assistant Attorney General; Jacinda A. Lanum, Assistant Attorney General; Lacey Stover Gard, Chief Counsel; Dominic Draye, Solicitor General; Mark Brnovich, Attorney General; Office of the Attorney General, Phoenix, Arizona; for Respondent-Appellee.

OPINION

W. FLETCHER, Circuit Judge:

George Russell Kayer was convicted of first degree murder and sentenced to death in Arizona Superior Court in 1997. During a brief penalty-phase hearing, Kayer's counsel argued as a mitigating circumstance that Kayer suffered from mental illness and was a substance abuser, but provided very little evidence to support the argument. The judge held that Kayer had not established any mental impairment due to mental illness or substance abuse. He sentenced Kayer to death.

On direct appeal, the Arizona Supreme Court performed an independent review of Kayer's death sentence, as required under Arizona law. The Court found two statutory aggravating circumstances—a previous conviction of a "serious offense" in 1981, and "pecuniary gain" as a motivation for the murder. *State*

v. Kayer, 984 P.2d 31, 41–42 (Ariz. 1999). The Court found one non-statutory litigating circumstance—Kayer's importance in the life of his son. *Id.* at 42. After weighing the two aggravating circumstances against the one mitigating circumstance, the Arizona Supreme Court affirmed Kayer's death sentence.

As he had in the trial court, Kayer argued in the Arizona Supreme Court for a mitigating circumstance based on mental impairment due to mental illness and/or substance abuse. The Court refused to find a mitigating circumstance based on mental impairment, as either a statutory or non-statutory mitigator. First, the Court refused to find that such impairment existed at all. In the view of the Court, the existence of such impairment was merely speculative. Second, in the alternative, the Court held that even if there had been non-speculative evidence of the existence of such impairment, Kayer had failed to establish a "causal nexus" between the alleged impairment and the murder.

In a post-conviction relief ("PCR") proceeding in Arizona Superior Court, Kayer argued that his trial counsel had provided ineffective assistance at the penalty phase. Kayer presented evidence in the PCR court that his trial counsel had performed little investigation of mitigating circumstances. He also presented extensive evidence of mental impairment due to mental illness and substance abuse which, he contended, competent counsel would have discovered and presented to the sentencing court. The PCR court denied relief, holding that Kayer's counsel had not been ineffective, and that, in any event, any deficiencies in

his counsel's performance did not prejudice Kayer. The Arizona Supreme Court declined review without comment.

Kayer then sought federal habeas corpus. The district court denied relief. On appeal to us, Kayer makes two claims with which we are centrally concerned. First, Kayer claims that the Arizona Supreme Court on direct appeal violated his Eighth Amendment right to be free of cruel and unusual punishment by applying its unconstitutional "causal nexus" test to his proffered mitigating evidence of mental illness and substance abuse. *See Eddings v. Oklahoma*, 455 U.S. 104 (1982); *McKinney v. Ryan*, 813 F.3d 798 (9th Cir. 2015) (en banc). Second, Kayer claims that the Arizona Superior Court on post-conviction review erred in holding that his Sixth Amendment right to counsel was not violated by his counsel's deficient performance at the penalty phase. *See Strickland v. Washington*, 466 U.S. 668 (1984).

For the reasons that follow, we decline to grant relief on Kayer's *Eddings* causal-nexus claim but grant relief on his *Strickland* ineffective-assistance-of-counsel claim. We reverse the judgment of the district court and remand with directions to grant the writ with respect to Kayer's sentence.

I. Factual and Procedural History

A. Factual History

Lisa Kester approached a security guard at a Las Vegas hotel on December 12, 1994, to report that her boyfriend, George Russell Kayer, had killed Delbert Haas in Yavapai County, Arizona, ten days earlier.

State v. Kayer, 984 P.2d 31, 35 (Ariz. 1999). Kester was arrested and interrogated. The following account of the events leading up to and culminating in Haas's murder is largely based on Kester's narrative at trial, as summarized by the Arizona Supreme Court on direct appeal.

On November 30, 1994, Kayer, Kester, and Haas traveled in Haas's van from Arizona to Nevada on a gambling trip. The three of them spent their first night sharing a room at a hotel in Laughlin, Nevada. Kayer told Haas that night that he had "won big" during the day using a special gambling system. Kayer knew that Haas had recently received money from an insurance settlement. He convinced Haas to lend him about $100.

The next day, Kayer lost all the money Haas had lent him. Kayer lied to Haas, telling him that he had again "won big," *id*. at 36, but that someone had stolen his money. Kester asked Kayer what he planned to do now that he was out of cash. Kester testified that Kayer replied that he would rob Haas. Kester pointed out that Haas would easily identify Kayer as the thief. According to Kester, Kayer responded, "I guess I'll just have to kill him." *Id.*

On December 2, Kayer, Kester, and Haas drove back to Arizona. Kester recounted in a pretrial interview that the three of them consumed a case of beer during the several-hour drive. Haas argued with Kayer about how Kayer would repay him. During a stop to buy snacks and use the bathroom, Kayer pulled a gun from beneath a seat in the van and put it in his pants. He asked Kester if she was "going to be all right

with this." *Id*. Kester responded that she wanted Kayer to warn her before he pulled the trigger.

Kayer, who was driving, left the main highway, purporting to take a shortcut. He stopped the van by the side of a back road. Haas got out of the van and walked toward the back to urinate. Kester started to get out of the van, but Kayer stopped her, motioning to her with the gun. Through the back window of the van, Kester saw Kayer walk up behind Haas and shoot him in the head while he was urinating.

Kayer dragged Haas's body into the bushes; took Haas's wallet, watch and jewelry; got back in the van; and drove away with Kester. Kayer realized that he had forgotten to get Haas's house keys and drove back to where they had left his body. Kayer got out of the van to retrieve the keys, but returned and asked for the gun, saying that Haas did not appear to be dead. Kayer went back to Haas's body, and Kester heard a second shot.

Kayer and Kester drove to Haas's home in Arizona and stole several items to pawn and sell at flea markets. They spent the next week pawning and selling the stolen property and gambling with the proceeds. Ten days after the murder, Kester approached a security guard in Las Vegas and reported that Kayer had killed Haas. She was taken into custody. Kayer was taken into custody soon afterwards.

Kayer and Kester were indicted for first degree murder on December 29, 1994. The State initially announced that it would seek the death penalty against both of them. In September 1995, Kester entered into

a plea agreement under which the State agreed not to seek the death penalty and, further, to limit dramatically her potential sentence. Under the agreement, Kester would receive, at worst, a six-and-a-half-year prison sentence. At best, she would be sentenced to probation. In exchange, Kester agreed to testify truthfully at Kayer's trial, consistent with her previous statement to the police. Kester testified as promised. After Kayer was convicted, Kester was sentenced to three years probation.

B. Procedural History

1. Trial, Conviction, and Sentencing

The jury convicted Kayer of first degree murder on March 26, 1997. Kayer's "aggravation/migitation hearing" took place on July 8, 1997. His attorneys put on five witnesses. Their testimony was finished before noon.

First, Jerry Stoller, a "detention officer" who worked in the law library of the county jail, testified that Kayer was always "very busy" when at the library, always taking "the full three hours." When asked if Kayer's "conduct has always been good," Stoller responded, "In my presence, yes."

Second, Cherie Rottau, Kayer's seventy-six-year-old mother, testified that Kayer had been generally well behaved during high school. She testified that Kayer's father had died when he was in kindergarten and that she had not remarried until after Kayer had graduated from high school. She recounted that when Kayer was a teenager, he had shot two jackrabbits at her sister's house in the country. Afterwards, "He said, 'You know,

that's not right to go out there and kill things.' He said, 'I'll never kill another thing as long as I live.' And to my knowledge, he hasn't." She testified that she did not have "any concerns about him until he was older," when he was nineteen and had already graduated from high school. "I noticed a change in him. . . . [H]e would work 24 hours and then when he'd get to sleep he'd sleep a long time, . . . [W]hen he was happy he was real happy." "[W]hen he gets depressed, he just gets down at the bottom of the well, and when he's happy, . . . there's nothing he can't do when he's happy. And he does accomplish a lot." She testified that Kayer's fourteen-year-old son had been "dropped" in the delivery room, and that he had "difficulties with school and certain other developmental things." She testified that Kayer and his son were "real close" and that Kayer had been "active in trying to get . . . educational assistance" for his son.

Third, Kayer's older half-sister, Jean Hopson, testified that Kayer's father (her stepfather) had drinking and gambling problems, and that Kayer had the same problems, beginning in his early twenties. She testified, "[H]e was a happy kid as a school kid, and I think his problems started when he was in the service, and shortly afterwards, getting married." She testified, further, that Kayer had "[h]ighs and lows." "We did have a family discussion one time, and he . . . was diagnosed, I guess, as a bipolar manic-depressive, or something like that." "I believe [he was diagnosed] at the VA hospital. At one point, he checked himself in." "He is supposed to be on lithium now, but he read up on the side effects of lithium, how it can affect your liver and different body organs, and he will not take it."

"I don't really totally understand the bipolar manic-depressive. I understand it enough to know that there are ups and downs[.]"

Fourth, Mary Durand, who had just been hired as a mitigation specialist for Kayer, testified:

> In a normal mitigation case you would spend probably 100 hours at a minimum with the client, developing a rapport, learning information, taking a social history, gaining his confidence or her confidence so that you can get them to share with you things that are sometimes extraordinarily painful, sometimes things they don't want to relive, sometimes things they have buried and merely don't remember until other people start giving anecdotal evidence.

Durand testified that she had been able to interview Kayer only twice, for a total of six or seven hours.

Durand testified that although she had been able to interview some of Kayer's family members, the only documentary evidence she had been able to obtain was Kayer's "criminal court records from his prior involvements with the law." She had not been able "to get any of the psychiatric records from any of his stays at psychiatric hospitals around the country." She "didn't get any of his school records, medical records, any of his military records." Based on the information she was able to obtain, Durand testified that there was a "family history on both sides of alcoholism"; that there was a "history of mental illness"; and that Kayer

was slow to develop as a child. She testified that Kayer "was allegedly diagnosed as a manic-depressive and was having such a manic state and then such a severely depressive state while he was in the military that he was allowed to get out of his military enlistment honorably, but under medical conditions[.]"

When asked whether she had sufficient information "to give any sort of reliable opinions to the judge as far as mitigating elements," Durand responded:

> I would certainly not be qualified to give a medical opinion about a diagnosis of a psychiatric condition, and I do not feel comfortable giving an opinion about the length, breadth and depth of any other issue I have spoken to, *because I have not been able to do my investigation.* I do believe they exist. I do not know to what degree, for what length, and what duration, and how serious.

(Emphasis added.)

After Durand finished her testimony, the judge noted that sentencing was scheduled for July 15, a week later. He asked Kayer whether he wished more time for further investigation:

> Do you want more time? By asking you the question, I'm basically saying if you tell me right now that you've considered it, and you want more time, I'm prepared to give you more time. But I think you are an intelligent individual. You know what she's just testified to. . . . You got the

> information, you got the intelligence, you've talked to counsel, you've heard Ms. Durand. Your call.

Kayer replied that he did not want more time.

Finally, Kayer's son testified. His testimony took only eleven lines of transcript.

At sentencing on July 15, the trial judge held that the state had established two statutory aggravating circumstances—that Kayer had been previously convicted of a "serious offense" and that the murder was committed for "pecuniary gain." However, the judge refused to find as an additional aggravating circumstance that the murder was committed in "an especially heinous, cruel or depraved manner." He explained:

> The pathologist was not able to testify anything . . . as to the suffering of [the] victim in this case, so that would be the necessary finding as far as cruelty. As to heinous and depraved, that deals with your thoughts and conduct surrounding the murder and the events afterward. As I read the case law and the description, I do not find that the evidence presented rises beyond a reasonable doubt as far as proving heinous and depraved . . . .

The trial judge found that Kayer had established only one mitigating circumstance—the non-statutory mitigator that Kayer had "become an important figure in the life of his son." The judge held that he could not find mental impairment as a mitigating circumstance.

He stated, "I must find it by a preponderance of the evidence. I simply cannot. It has not been presented in any way, shape or form that would rise to that level." The judge concluded that Kayer's relationship with his son did not outweigh his prior conviction and his pecuniary motive for killing Haas. He sentenced Kayer to death.

2. Direct Appeal

Kayer appealed to the Arizona Supreme Court. *See* Ariz. Rev. Stat. § 13-4031 (1997); *State v. Kayer*, 984 P.2d 31 (Ariz. 1999). That Court conducted an independent review of Kayer's death sentence, in accordance with Arizona law.

On direct review, the Arizona Supreme Court found the same two statutory aggravating circumstances that the trial court had found—prior conviction of a serious offense and commission of murder for pecuniary gain. It also found the same non-statutory mitigating circumstance as the trial court—Kayer's "importance in the life" of his son.

As he had to the trial court, Kayer argued to the Arizona Supreme Court that he had a mental impairment that qualified as either a statutory or a non-statutory mitigating circumstance.

First, Kayer argued that his mental impairment qualified as a statutory mitigation circumstance under Arizona Revised Statutes § 3-703(G)(1) (as it was then numbered), which required that the "defendant's capacity to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of [the] law [be] significantly impaired, but not so impaired as

to constitute a defense to prosecution." *Kayer*, 984 P.2d at 45. Kayer argued that "his history of mental illness, including a history of suicide ideation, a history of alcoholism in his family, and his own polysubstance abuse, establishes the existence of this mitigating factor under the preponderance standard." *Id.* The Arizona Supreme Court disagreed. It held that Kayer had presented insufficient evidence to establish the existence of any mental impairment whatsoever. The Court wrote that Kayer "did not establish as threshold evidence the existence of any of these factors, let alone their influence on preventing him from conforming his conduct to the law or appreciating the wrongfulness of his conduct." *Id.* The Court also held, in the alternative, that Kayer had failed to establish a "causal nexus" between the alleged impairment and the murder.

Second, Kayer argued that his mental impairment qualified as a non-statutory mitigation circumstance. The Court held, as it had with respect to statutory mitigation, that Kayer had failed to present sufficient evidence to establish the existence of any impairment. The Court discounted Durand's tentative conclusions, writing that "Durand speculated that defendant suffered from mental difficulties." *Id.* at 46. The Court concluded, "[T]he record shows that the existence of impairment, from any source, is at best speculative." *Id*. In the alternative, the Court concluded that Kayer had failed to establish a causal nexus:

> Further, in addition to offering equivocal evidence of mental impairment, defendant offered no evidence to show the

> requisite causal nexus that mental impairment affected his judgment or his actions at the time of the murder.

Id.

After an independent weighing of the two aggravating circumstances and the one mitigating circumstance, the Arizona Supreme Court affirmed Kayer's death sentence.

3. Post-Conviction Proceedings

Kayer filed a post-conviction relief ("PCR") petition in Arizona Superior Court. *See* Ariz. R. Crim. P. 32.1. In accordance with Arizona law, Kayer's trial judge presided over his PCR proceedings.

Kayer claimed that the "trial court and the Arizona Supreme Court incorrectly applied United States Supreme Court law when they required [that] mitigating factors have a 'causal nexus' to the crime," in violation of *Eddings v. Oklahoma*, 455 U.S. 104 (1982). The state responded that Kayer had procedurally defaulted his causal nexus *Eddings* claim "by not raising it in his direct appeal, or in a motion for reconsideration." The PCR court agreed, concluding that Kayer had procedurally defaulted this claim under Arizona Rule of Criminal Procedure 32.2(a)(3).

Kayer also claimed that his Sixth Amendment right to counsel was violated when his trial counsel failed to conduct a constitutionally adequate mitigation investigation. The PCR court conducted a nine-day evidentiary hearing at the end of March 2006, during which Kayer's attorneys presented witnesses and

documentary evidence showing the mitigation evidence that Kayer's trial attorneys could have uncovered had they performed a constitutionally adequate investigation. We describe this evidence in detail below. *See infra*, Section IV.

The PCR court issued a very brief written decision on May 8, 2006, rejecting Kayer's Sixth Amendment ineffective assistance claim. The court concluded that Kayer had "voluntarily prohibited his attorneys from further pursuing and presenting any possible mitigating evidence." It concluded, in the alternative, that if deficient performance under *Strickland v. Washington*, 466 U.S. 668 (1984), had been shown, "no prejudice to the defendant can be found."

The Arizona Supreme Court denied without explanation Kayer's Petition for Review of the Superior Court's denial of post-conviction relief.

4. Federal Habeas Petition

On December 3, 2007, Kayer filed a timely petition in federal district court for a writ of habeas corpus under 28 U.S.C. § 2254(d). The district court denied relief, and Kayer appealed to this court. We remanded to the district court to give Kayer an opportunity to establish cause and prejudice pursuant to *Martinez v. Ryan*, 566 U.S. 1 (2012), for his counsel's procedural default in state court. The district court again denied relief. This appeal followed.

II. Standard of Review

"We review the district court's denial of [a] § 2254 habeas corpus petition de novo." *Deck v. Jenkins*, 814 F.3d 954, 977 (9th Cir. 2014).

Kayer's habeas petition is subject to the Antiterrorism and Effective Death Penalty Act ("AEDPA"). *See Lindh v. Murphy*, 521 U.S. 320, 322–23 (1997). Under AEDPA, "[w]e review the last reasoned state court opinion." *Musladin v. Lamarque*, 555 F.3d 830, 834 (9th Cir. 2009). In this case, that opinion is the written order of the state PCR court.

AEDPA provides that where a state court has adjudicated a claim on the merits, relief may be granted only if the state court decision was "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States," or if the state court decision rests on "an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d)(1), (2). "[A] state-court decision is contrary to [Supreme Court] precedent if the state court arrives at a conclusion opposite to that reached by [the] Court on a question of law . . . [or] if the state court confronts facts that are materially indistinguishable from a relevant Supreme Court precedent and arrives at [the opposite] result . . . ." *Williams v. Taylor*, 529 U.S. 362, 405 (2000). A state court unreasonably applies Supreme Court precedent "if the state court identifies the correct governing legal principle from the Supreme Court's decisions but unreasonably applies that principle to the facts of the prisoner's case." *Mann v. Ryan*, 828 F.3d 1143, 1151

(9th Cir. 2016) (en banc) (alteration omitted) (quoting *Williams*, 529 U.S. at 413). "[W]e may only hold that a state court's decision was based on an unreasonable determination of the facts if 'we are convinced that an appellate panel, applying the normal standards of appellate review, could not reasonably conclude that the finding is supported by the record.'" *Murray v. Schriro*, 745 F.3d 984, 999 (9th Cir. 2014) (quoting *Taylor v. Maddox*, 366 F.3d 992, 1000 (9th Cir. 2004)). Neither of these standards "require[s] citation of [Supreme Court] cases . . . [or] even require[s] awareness of [Supreme Court] cases, so long as neither the reasoning nor the result of the state-court decision contradicts them." *Early v. Packer*, 537 U.S. 3, 8 (2002) (per curiam).

We review de novo an exhausted claim that a state court has failed to decide on the merits. *See Pirtle v. Mogan*, 313 F.3d 1160, 1167 (9th Cir. 2002). We may not grant habeas relief if an error in state court was harmless. *See Brecht v. Abrahamson*, 507 U.S. 619, 638 (1993).

III. Causal Nexus and Ineffective Assistance of Counsel

There are four certified questions before us. The first two are the most important. First, Kayer contends that the trial court and the Arizona Supreme Court on direct appeal violated *Eddings v. Oklahoma*, 455 U.S. 104 (1982), by applying an unconstitutional "causal nexus" test under which a circumstance is not mitigating unless causally connected to the commission of the crime. *Eddings* held under the Eighth Amendment that a sentencer may not "refuse to

consider, *as a matter of law*, any relevant mitigating evidence." *Id.* at 113 (emphasis in original). Second, Kayer contends that the Arizona PCR court erred in holding that his right to counsel under the Sixth Amendment under *Strickland* had not been violated. We consider these two questions in turn.

A. Causal Nexus

Kayer contends that the trial court and the Arizona Supreme Court violated *Eddings*. The State responds that Kayer procedurally defaulted and failed to exhaust his *Eddings* claim. In the alternative, the State contends on the merits that the Arizona Supreme Court did not violate *Eddings*.

1. Procedural Default and Exhaustion

If Kayer procedurally defaulted and did not properly exhaust his causal nexus claim under *Eddings*, we may not grant his habeas petition on this claim. 28 U.S.C. § 2254(b)(1)(A), (c); *Wainwright v. Sykes*, 433 U.S. 72, 86–87 (1977). A petitioner "must give the state courts one full opportunity to resolve any constitutional issues by invoking one complete round of the State's established appellate review process." *O'Sullivan v. Boerckel*, 526 U.S. 838, 845 (1999). It is a close question whether Kayer has procedurally defaulted and failed to exhaust his *Eddings* claim. Because we conclude that if we reach Kayer's *Eddings* claim we must deny it on the merits, we will assume without deciding that there was no procedural default and failure to exhaust.

2. Merits

We held in *McKinney v. Ryan*, 813 F.3d 798, 802, 821 (9th Cir. 2015) (en banc), that the Arizona Supreme Court's "causal nexus" rule, which "forbade as a matter of law giving weight to mitigating evidence . . . unless the background or mental condition was causally connected to the crime," violated *Eddings*. Our opinion in *McKinney* included a long string cite of cases in which the Arizona Supreme Court had applied its unconstitutional causal nexus test. The string cite included the Court's affirmance of Kayer's death sentence on direct appeal. *See McKinney*, 813 F.3d at 816 (citing *Kayer*, 984 P.2d at 46).

In explaining its conclusion that Kayer's alleged "mental impairment" was not a mitigating circumstance, the Arizona Supreme Court on direct appeal wrote that Kayer "offered no evidence to show the *requisite causal nexus* that mental impairment affected his judgment or his actions at the time of the murder." *Kayer*, 984 P.2d at 46 (emphasis added). The emphasized language shows that the Arizona Supreme Court viewed causal nexus as a prerequisite to the existence of a mitigating circumstance—not merely, as the state argues, as a factor bearing on the weight to be accorded to a mitigating circumstance. The Court therefore erred in rejecting Kayer's proffered mental impairment evidence on the ground that the alleged impairment did not have a causal nexus to the commission of the crime. *See McKinney*, 813 F.3d at 821.

However, we cannot grant habeas relief if a constitutional error was harmless. *See Brecht*, 507 U.S.

at 637. Here, the error was harmless. The Arizona Supreme Court's causal nexus ruling was an alternative holding. The Court's principal holding was that Kayer had presented so little evidence of mental impairment that he had failed to establish even the existence of any such impairment. *See Kayer*, 984 P.2d at 46. We recounted above the scant evidence of mental impairment presented by Kayer's counsel during the penalty phase. Based on the evidence then before it, the Arizona Supreme Court made a reasonable determination of the facts in concluding that Kayer suffered from no mental impairment. 28 U.S.C. § 2254(d)(2).

B. Ineffective Assistance of Counsel

Kayer also contends that he was denied his Sixth Amendment right to effective assistance of counsel due to his attorneys' inadequate mitigation investigation in preparation for his penalty phase hearing. *See Wiggins v. Smith*, 539 U.S. 510, 521–22 (2003). Kayer argued to the state PCR court, and continues to argue here, that his defense attorneys should have taken steps to investigate mitigation evidence beginning at the time of their appointment. Kayer presented to the PCR court evidence relating to both deficient performance and prejudice.

1. Deficient Performance

a. Linda Williamson

Kayer was indicted on December 29, 1994. Linda Williamson was appointed to represent him in January 1995. Williamson was then in her fourth year as a lawyer. She testified in the state PCR court that after

graduating from law school she had worked for the Maricopa County Public Defender's office for three years. While there she had "participated in" "at least" six criminal trials. In December 1993, she left that office and moved to Prescott, Arizona, in Yavapai County. After arriving in Prescott, she worked for eight months for a criminal attorney and did one "misdemeanor DUI." She then began work as a contract attorney for the county. When Williamson got the contract to represent Kayer shortly thereafter, she had never represented a client in a murder case, let alone a capital case.

Williamson testified in the PCR court that Kayer told her that he had not killed Haas. Williamson's paralegal's billing records reflect that this interview took place around February 1995, about a month after Williamson was appointed. After interviewing Kester, Williamson concluded that a jury was likely to credit her account rather than Kayer's, and that Kayer's chance of acquittal if Kester testified was "slim to none." She testified, "I did not see this case as fact-wise being favorable to Mr. Kayer in any way, shape, or form."

Williamson testified that she concluded that the best guilt-phase strategy was to delay and to hope that Kester "would implode and not become the star witness for the state." Kester had previously suffered from drug addiction and she was pregnant with Kayer's child. Williamson hoped that Kester might again succumb to addiction, and that she might disappear or decide not to testify because of her personal relationship with Kayer.

Williamson testified that she asked a more experienced attorney, James Bond, to "second chair" the case. Williamson testified that she engaged Bond to help her with the trial rather than with pre-trial preparation. Bond testified in the PCR court that he billed no time on the case and knew almost nothing about it. The record is unclear as to whether Bond even entered an appearance on Kayer's behalf.

The county compensated Williamson at a very low rate. She testified that the county paid a lump sum of less than $500.00 for the first 80 hours of work, and at a rate of $40.00 per hour after that. Williamson billed a total of 122 hours, including the first 80 hours. Williamson had the assistance of a retired detective who worked as an investigator, though he was billed as a paralegal because he did not have an investigator's license. Williamson testified that the investigator "did a lot of investigation to find out what the State's case [was]."

Williamson represented Kayer for seventeen and a half months. She visited Kayer infrequently, once allowing eight to ten months to elapse between visits. She did no preparation for a penalty phase trial. She testified, "I can absolutely tell you there was no focus on mitigation as far as penalty phase." Williamson testified that she never consulted a mitigation expert. When asked whether her decision not to investigate mitigation was strategic, she testified, "I don't know if it was strategic." "I can't tell you specifically that I ever thought about mitigation pretrial." Her investigator spent no time preparing for the penalty phase.

On June 21, 1996, Williamson was allowed to withdraw from representing Kayer on the ground that the attorney-client relationship had broken down.

b. David Stoller and Marc Victor

David Stoller was appointed to replace Williamson at the end of June 1996. Before becoming a defense attorney, Stoller had worked for a number of years as a prosecutor. He testified in the PCR court that as a prosecutor he had tried "probably" forty to fifty felony cases, including one death penalty case. He also had done "some post-conviction relief matters that were death penalty as a prosecutor," and had done two post-conviction matters as a defense counsel. He had never defended a capital case as trial counsel.

Stoller worked on his own for three and a half months. He had no paralegal and he did much of his own secretarial work. Some secretarial work was hired out on a piece-work basis. On September 17, 1996, at the request of Kayer, Marc Victor was appointed as second chair. Victor had graduated from law school two years earlier, in the spring of 1994. Victor had formed a relationship with Kayer while representing him in a "prison contraband" case that arose while Kayer was being held in county jail awaiting trial in his capital case.

Stoller testified in the PCR court that no mitigation investigation had been done before he was appointed to represent Kayer. He found the guilt-phase work done by Williamson's investigator unhelpful. He testified, "I was going to have to redo, re-plow the ground myself." Stoller testified that he nonetheless did not "initially"

"seek the assistance of investigative services" when he was appointed to represent Kayer. Without consulting Stoller, Kayer's family had hired an investigator with their own money. Stoller spoke with that investigator several times on the telephone. He testified that he also found the work of that investigator unhelpful. Stoller never asked the investigator to do any mitigation investigation.

Victor testified in the PCR court that when he came on the case in mid-September 1996 very little had been done. When he first got the case file, it was "a disaster." "I was appalled. I felt that a lot of time had passed. Very little was done and I frankly was embarrassed that I now was an attorney on a case that was so disorganized[.]" Victor filed a "blizzard of motions" in January 1997. At that point, a little more than two years after Kayer's indictment for capital murder and six months after Stoller had been appointed to represent him, no mitigation investigation had been done.

One of Victor's motions, filed on January 15, sought funds for two investigators—a "general purpose" investigator, and a mitigation investigator. The motion was granted on February 24 as to the general purpose investigator, but was "deferred" as to the mitigation investigator "unless and until there was a guilty finding in the case." Victor testified that the deferral "put a halt to our mitigation efforts . . . . That would have been less of a problem had I been involved in this case from the very beginning, and then could have had a more reasonable opportunity to maybe both do a mitigation workup myself, as well as prepare motions

and get ready for the guilt phase." "[G]iven the circumstances [that] the case had substantially languished for an unreasonable length of time at the time I got involved[,] . . . [the deferral] was devastating to our ability to undertake mitigation." Neither Stoller nor Victor sought rehearing of the motion for funds for a mitigation investigator. Nor did they appeal the court's deferral of the motion.

Victor testified in the PCR court that, in his view, early investigation of mitigation evidence was less important at that time than it later became, after the Supreme Court decided *Ring v. Arizona*, 536 U.S. 584 (2002), requiring jury sentencing in capital cases. Victor was asked, "Would you agree . . . that counsel must begin mitigation investigation immediately upon an appointment to a capital case?" Victor responded, "[T]he answer today is a little different than the answer at the time that I was representing Mr. Kayer, where in Arizona, at least, the court made [the sentencing decision]. The reason that's important is because there is at least availability of much more time from the guilt phase to the sentencing phase, with the judge sentencing."

Trial began on March 5, two weeks after the deferral of the motion for funds for mitigation investigation. The jury returned a verdict of guilty on March 26. The court scheduled Kayer's sentencing hearing for May 27. On April 8, funds were authorized for a mitigation investigator. According to Stoller's records, his first substantive conversation with the investigator, Mary Durand, was on May 14, more than a month later, though Stoller testified that he may

have talked to her earlier: "Well, I had notes between April 9th and May 14th—whether they were lost—I can't believe I did nothing during this period, but I know that I spoke to her at length on the evening of May 14th and I think I may have had other contacts." Durand first met with Kayer on May 21, a week after the conversation with Stoller and six days before the original date for the sentencing hearing.

c. Mary Durand

When Mary Durand testified at Kayer's sentencing hearing, she had already worked as a mitigation specialist on almost one hundred capital cases. When she testified in the PCR court, she had worked on one hundred and fifty. She testified in the PCR court that to her knowledge no mitigation specialist in Arizona had worked on more capital cases.

Durand testified in the PCR court that spending a substantial amount of time with a capital defendant, beginning very early in the case, is essential in order to build trust. Most capital defendants "believe, at least initially, that the pursuit of a mitigation case is necessarily a concession of guilt." Durand testified that the "time required to develop rapport and trust with a capital client typically takes a hundred hours." She testified, "When you spend time talking to them, if you have the proper amount of time, every occasion but one, in capital cases that I have done, I have gotten the client's permission to do what I need to do." Durand wrote in an affidavit filed in the PCR court, "[T]o investigate and develop the mitigating factors in a capital case may well require up to 1500 hours," including "200 plus hours (40 hours a month for five

months) to interview, review and consult with the client."

Durand testified that it is important to begin mitigation investigation early: "You work with them to help them understand what mitigation is, why it's important[.]" She testified further:

> One of the most important things that you do in mitigation is get all the records that you possibly can, documents that you can have in your hand. And part of that is because many clients who have head injuries, high fevers, brain damage of any kind, accidents and mental illness, don't remember incidents that occurred, or remember them incorrectly.
>
> So I try not to talk to clients about important issues in their life until I have the records.

Durand testified in the PCR court that her first substantive conversation with Stoller was on May 14. She was emphatic that she had had no substantive conversation with Stoller before that date. When Stoller talked to Durand on May 14, the penalty phase hearing may already have been rescheduled from May 27 to June 24 or 25. (The hearing was ultimately held on July 8.) Durand testified that Stoller did not tell her during their conversation that the penalty phase hearing was imminent and that time was of the essence.

Durand testified that she met with Kayer twice for a total of seven hours, on May 21 and June 5. Durand

learned from Kayer when they met on May 21 that the hearing was imminent.

Durand's first meeting with Kayer was a "cold call." She testified, "I had no documents. I had nothing." At that meeting on May 21, Kayer "show[ed] an initial reluctance to allow [her] to pursue mitigation." However, he was willing to provide the names of his mother and sister, along with addresses and phone numbers. He also told Durand that he believed his mother would have some records, though, as it turned out, his mother was unable to locate any records when Durand went to see her. At the first meeting on May 21, Durand persuaded Kayer to sign releases, enabling her to request documents relevant to mitigation. Durand promptly sent requests, accompanied by the releases, to the institutions holding the documents, even though it was likely that few (perhaps none) of the requested documents would be provided in time for the penalty phase hearing. She testified, "I sent [the releases] to all the places that I believed there might be records." None of the school, mental health, and military records sought by Durand were provided by the date of the hearing on July 8.

When Kayer met Durand on May 21, he had never head the term "mitigation." Durand testified that Kayer "was extremely unhappy when he realized that [a mitigation investigation] should have been started the day he was arrested or indicted, and that the two and a half years he'd already been in the jail could have been used to do the mitigation." She testified:

> I explained what I did in broad terms. He said that he had never heard the term

> [mitigation] before. Had no idea what it meant. . . .
>
> We talked at great length about mitigation. He had lots of questions. But everything came back to time; "How much time will that take?"
>
> And I said, "Well, might take six or eight months just to get the military records."
>
> His response was, "You don't have six to eight months because I don't have six to eight months." And I could not get him past that.

Kayer allowed Durand to involve his mother and sister and was willing to sign releases. However, Kayer was adamant that he did not want to pursue mitigation research that would involve substantial delay. Kayer did not have "six to eight months" because, Durand testified, he "wanted desperately to get out of the Yavapai County Jail." She testified, "He hadn't been getting his medications [for his heart condition]." Further, and more important, "[H]e was terrified that he was going to be killed, that he would lose his life in that facility." There had already been a murder in the jail, and Kayer "had been assaulted and hospitalized in the jail infirmary for his injuries." Durand's contemporaneous notes of her interviews with Kayer recorded, "Afraid he'll lose his life here."

On June 6, the day after Durand's second meeting with Kayer, the trial court held a case management meeting. Durand was traveling and was unable to

attend. Kayer and Victor were present; Stoller appeared by telephone. Stoller informed the court that Kayer "simply did not want to be in the County jail system any longer" and that he opposed any continuance. Kayer told the court that he did not believe that Durand would be able to discover any useful mitigation information. Kayer stated:

> [F]rom what I understand in my conversation with Mary Durand, she is talking about a fetal alcohol syndrome that possibly existed. She hasn't had the opportunity to investigate it, and some minor areas and details in my life that I personally can't see how they would relate to mitigation in this case. . . . I'm saying I don't see anything here of substantial value. . . . I don't feel the lack of Mary Durand's mitigation is going to be a major factor in the decision [whether I am sentenced to death].

The court indicated that it might be willing to continue the date of the penalty phase hearing for perhaps thirty days and asked Kayer if he wanted a continuance:

> [I]f I do move it, I'm not about to move it anywhere near 180 days off. I'm probably not even thinking seriously about 90 days off. I'm thinking maybe I could be talked into an additional 30 days, something like that, if there was some specific purpose.

Based on his belief that Durand would not be able to discover useful information, Kayer opposed any continuance:

> Believe me, if I thought that—that Miss Durand had valid evidence that should be presented in front of this Court, I'd be scratching and clawing and asking for 180 days as well. I'm not in favor of any more continuances. Does that answer your question?

d. Keith Rohman

Keith Rohman testified as a mitigation specialist in the PCR court. Rohman had done mitigation work in capital cases for many years. He was a licensed private investigator and Adjunct Professor at Loyola Law School in Los Angeles. He testified in the PCR court: "[O]ne of the very first steps in any capital mitigation representation is to meet the client, start to establish a relationship with the client and attempt the process of collecting a life history, information that might be relevant. . . . [T]hat first meeting is really critical because it is [the] spot where you start the process of educating the client." Rohman testified that a "significant number," of capital defendants initially resist mitigation investigations, "[a]nd so it takes some time to work through[.]" Rohman testified that an additional reason to start mitigation investigation "from day 1" is that information learned in the investigation can sometimes help at the guilt phase of the case. Rohman testified that this "protocol and practice" in the "field of mitigation" had been well established by 1995, when Kayer was indicted.

e. Larry Hammond

Larry Hammond testified in the PCR court on behalf of Kayer. At the time of his testimony, Hammond had practiced law for thirty-six years. After graduation from law school, he had been a law clerk to Justices Hugo Black and Lewis Powell. He had been a founding board member of the Arizona Capital Representation Project in 1989, and had continued as a board member since then. He had been Chair of the State Bar Indigent Defense Task Force, paying particular attention to representation in capital cases, since the mid-1990s. He had been appointed in the late 1990s by the Arizona Supreme Court to serve on the Post-Conviction Relief Appointment Committee, whose function was to "screen applicants for appointment to undertake work as post-conviction relief counsel in capital cases." Hammond's Phoenix law firm had had at least one active capital case in the office at all times since 1981, and he had been the "lawyer primarily responsible for all of them." He had been lead counsel in ten capital cases. In three of those cases, he had been lead counsel from start to finish—two cases in Arizona state court in 1991 and 1994, and one case in federal court in Arizona in 2005.

Hammond's testimony focused on the standard for effective assistance of counsel in capital cases that had been established by 1995, when Kayer was indicted. Specifically, Hammond testified that the standard of practice he described was based on ABA guidelines from 1989 and other sources from that period. "[T]he information that I provided [in my testimony today]

was well known in Arizona and elsewhere from as far back as the 1980s."

Hammond testified that in a capital case "it is of critical importance to develop both the guilt-innocence side of the case and the sentencing side of the case from the beginning." Hammond testified, consistently with Durand, that capital defendants initially resist doing mitigation research at the beginning of a case. In part, defendants "instinctively" believe that mitigation will become relevant only after conviction, and they want their attorneys to focus on the guilt-innocence side of the case. Further, defendants are "embarrassed" and do not want to involve people such as "family members and their high school basketball coaches and people who they have known growing up." Still further, conditions in county jails are not conducive to effective communication: A client is "there for 19 months or 20 months or two years waiting for trial. So dealing with a client and explaining to a client why mitigation is important in that environment can be doubly difficult." Finally, "most people charged with capital crimes have some form of what I would call a mental health issue or problem."

Hammond testified that a capital defendant's initial resistance is almost always overcome when a client is properly advised at the beginning of the case:

> [I]n case after case after case the opening experience—not just with me and my clients—but with the other defendants facing death . . . was what I described earlier. This resistance. But eventually for virtually every one, virtually every one

> of those defendants, they began to see that the mitigation part of the case was important.

Hammond specifically addressed the need to educate judges, as well as clients, about the importance of getting an early start on mitigation work. He testified, "[A] mere denial of either the client to wanting to do mitigation or the court to providing the resources cannot be the end of the conversation." "[T]here is an inherent logic and simplicity in getting the resources necessary for capital defense. And in cases all across the country once the case is laid out, once the explanation is given to good judges about what is necessary and why it's necessary, the experience is that good judges say: 'I understand that and now we will work together to make it happen.' "

Hammond also specifically addressed Victor's view that getting an early start on mitigation work was less important during the pre-*Ring* period when judges rather than juries determined sentences in capital cases in Arizona. Hammond was unequivocal that Victor was incorrect:

> The need for the development of a mitigation case is no different in Arizona prior to *Ring* than it is after *Ring*. . . . [T]he concept that a lawyer can simply wait until after the guilt phase to begin doing mitigation is simply wrong. . . . If you knew nothing else other than that a capital defense lawyer said "I can defer all mitigation until after the trial", that lawyer is acting at a level far below what

> is deemed acceptable under any kind of a *Strickland* analysis for lawyers in Arizona or in any of the other six or seven states that prior to *Ring* had judge sentencing.

2. Prejudice

Kayer's post-conviction counsel presented extensive mitigation evidence in the PCR court. His post-conviction counsel contended that his trial attorneys could have uncovered and presented this evidence at his sentencing hearing if they had performed a proper mitigation investigation.

a. Personal and Family History

Kayer was born in Long Beach, California, in August 1954. In the first of many moves, the family moved to Denver when he was two. Kayer's father left the family shortly after arriving in Denver. He never returned to the family. He died of a heart attack at age thirty-nine. After his father left the family, Kayer, his older stepsister, and his mother moved to Bloomington, California.

According to his mother and his uncle, Kayer was slow to walk. He had poor balance and fell frequently. His mother recounted that "he always had bruises . . . on his head and body." His uncle recounted that his mother was afraid to take him shopping because he was "covered with bruises." According to his uncle, he was slow at all his developmental stages. His mother recounted that Kayer had great trouble falling asleep.

Kayer was dyslexic. In an interview with Mark Goff, an investigator for Keith Rohman, Kayer stated that he

was good with numbers, but that "[t]o this day he has to write things three or four times to get the spelling right." Kayer recounted in the interview that "[i]n school he flunked English, but got A's in everything else." (As will be seen in a moment, Kayer's recounting of his school grades was inaccurate to the point of being delusional.) Kayer told Goff that at age seven he came to believe (and then continued to believe) that he had come to earth from another planet.

Kayer and his mother moved to Arkansas after ninth grade. Kayer began using drugs when he was sixteen. He told Goff that he would "smoke weed almost every day," and would usually use speed on the weekends. He recounted "Speed works good for a night owl." Kayer would sometimes use LSD.

Some of Kayer's high school grades are in the record. In the fall of the ninth grade in Fontana, California, he got one B (in Drafting), five Cs, and one D (in English). In the spring, he got two Bs (in Typing and PE), one C, two Ds, and two Fs (in History and English). In fall of the tenth grade in Morrilton, Arkansas, he got one C (in English), four Ds, and one F (in Algebra). In the spring, he got one B (in Speech), two Ds, and two Fs (in English and PE). Kayer left high school, in Seligman, Arizona, without graduating, leaving either at the end of his junior year or part way through his senior year.

After leaving high school, Kayer enlisted in the Navy. He was seventeen years old. Within eight months, he had two "unauthorized absences" ("UAs"). He was arrested and jailed in Texas at the end of his first UA. He returned voluntarily from his second UA

"in order to see a psychiatrist." In May 1973, after his second UA, Kayer was referred to Bethesda Naval Hospital with a diagnosis of "schizoid personality." He was held there for a little more than three weeks. Kayer was discharged from Bethesda with a diagnosis of "passive-aggressive personality." In a written evaluation at discharge, Lieutenant Commander M. D. Fitz, head of the "Enlisted Psychiatric Service," characterized Kayer's "impairment" as "severe." Fitz wrote, "In view of the severity of his personality disorder it is recommended that he be administratively separated from the service."

After his release from the Navy, Kayer returned to Arizona. At various times, he attended Yuma Community College, Arizona State University, and Arizona Western College, but received no degrees. In his interview with Goff, Kayer stated that he never got a degree because he believed he could make more money buying and selling jewelry than with a degree.

Kayer had two unsuccessful marriages in his early twenties. Kayer's second marriage was to an Afghan woman. Kayer maintained in his interview with Goff that her uncle was "the deposed king of Afghanistan."

When Kayer was twenty-five or twenty-six, he met Cindy Seitzberg. Kayer and Seitzberg never married, but they lived together for several years. They had a son, Tao, who was dropped in the delivery room and suffered permanent brain damage. About six months after Tao's birth, Seitzberg began work as a stripper while Kayer stayed home to take care of Tao. When Tao was about one, Seitzberg left Kayer. Kayer's half-sister Jean Hopson testified in the PCR court, "[Cindy] had

brought [Tao] to my mother's and asked if she would like to keep him for the weekend, and my mother said 'yes.' And we never saw her again." Hopson and Kayer's mother became co-guardians of Tao.

Beginning in his mid-twenties, Kayer began committing property crimes. He first committed a series of burglaries with a friend, Peter Decell. They were caught, and Kayer served a short time in jail in Arizona. Shortly after his release from jail, Kayer was arrested for burglary in Arkansas. Later, when she was pregnant with Tao, Seitzberg served as a lookout for Kayer while he committed burglaries. Kayer continued committing burglaries well into his thirties.

Interspersed with his burglaries, Kayer worked as a photographer, a salesperson for a satellite communications company, a hazardous waste remover, and a buyer, maker and seller of jewelry. He never held a job for a sustained period. His cousin, Barbara Rogers, testified at the PCR hearing, "[H]e had trouble with holding . . . a job. . . . He had trouble working for others. . . . [H]e had a lot of emotional problems, depression."

Kayer began drinking alcohol regularly when he was about twenty-one, and soon became a very heavy drinker. Peter Decell recounted that during their time together Kayer would drink beer "for breakfast, lunch and dinner." Kayer reported that when he was twenty-five he was drinking half a quart of bourbon a day. When Kayer checked himself into a Veterans Administration hospital at age thirty-five, Dr. A. Rodriguez reported that Kayer was "acutely intoxicated." "He presented himself with a very strong

odor of alcohol, and it was very difficult for him to get his thoughts together because of alcohol intoxication. The patient had been drinking continuously and heavily for the past seven years[.]"

Sometime in his twenties, Kayer became a compulsive gambler. His half-sister Jean Hopson testified that he had a "gambling addiction." Kayer told Hopson that he had a gambling "system." Kayer's cousin, Barbara Rogers, testified that her close girlfriend dated Kayer for a time, and that when the girlfriend and Kayer went to Las Vegas, "she could not get him away from the . . . gambling table. He would not leave." In his mid-thirties, while in prison in Arizona on a burglary conviction, Kayer engaged in illegal bookmaking. After release and while on "house arrest," Kayer took off his ankle bracelet and flew to Las Vegas to gamble. Kayer turned himself in after he had lost all his money. He was sentenced to an additional nineteen months for violation of parole.

Beginning shortly after his release from the Navy at age eighteen, Kayer experienced severe mood swings. His mother and sister both described his mood swings in their testimony at his sentencing hearing. *See supra* at 9–10. Barbara Rogers testified in the PCR court about Kayer's "manic behavior." As an example, she described a trip Kayer decided to take, "out-of-the-blue when it wasn't prepared, it wasn't a good time." "I kept telling him no. And he was just real excited about it, wouldn't stop talking about it." In her interview with Goff, Seitzberg recounted, "I would stay up with him at night and . . . would see mood swings. . . . [He] would either work [at something] all out, or do nothing."

In 1983, shortly after the birth of his son Tao, Kayer went voluntarily to a VA hospital. Kayer was twenty-nine. He was observed to be "agitated" and "tearful." Kayer is quoted on the VA form as saying, "I just want to know what's wrong." The form records: "P: to see MD." Immediately below, a doctor with an illegible signature wrote, "Pt is depressed with some suicidal ideation" and "diagnosis: adjustment disorder with depressed mood."

Six years later, in 1989, Kayer checked himself into a VA hospital, where he was kept for eighteen days. Dr. A. Rodriguez wrote on the VA form that Kayer had been "admitted . . . with depression and suicidal ideation." "He admitted to suicidal and homicidal ideations towards his girlfriend [who had just left him] and her boyfriend, but didn't plan to do anything to them while he is in the hospital, and wanted some help." Dr. Rodriquez wrote that Kayer "showed bipolar traits." At the time of discharge, Kayer was "not considered to be a danger to himself or others." At discharge, he was prescribed one month's supply of lithium, a standard medication for bipolar disorder.

In 1990, Kayer was referred to a VA "Day Treatment Center" for therapy, with a "provisional diagnosis" of "Personality Disorder/Bipolar." Kayer told a probation officer in 1990 that until he was diagnosed during his stay at the VA hospital in 1989 "he had no idea what was wrong with him."

Kayer had a history on both sides of the family of alcoholism, compulsive gambling, and mental illness.

Kayer's father, who left the family when Kayer was two and died at age thirty-nine of a heart attack, was an alcoholic and compulsive gambler. One witness testified at the PCR hearing that Kayer's father "wasn't happy unless he was gambling."

On his mother's side, Kayer's Aunt Opal Irene Marchman (one of his mother's three sisters) testified about herself in the PCR court, "I have [heard voices] all my life. My grandpa heard voices. It runs in the family." She testified that Kayer heard voices, too: "I was just telling him about my life and he said 'I thought it was normal[.] I hear voices, too.'" She testified, further, that alcoholism and depression "run[] in the family."

Kayer's Aunt Ona Mae Tanner (another of his mother's sisters) was an alcoholic with severe mood swings. Ona Mae's daughter, Jean Reilly, was an alcoholic and compulsive gambler who was first diagnosed as schizophrenic and then as bipolar (manic depressive). Jean Reilly's niece, Barbara Rogers, testified in the PCR court that Jean had "electric shock therapy" after a "nervous breakdown." Jean's daughter, Constance Stabile, testified, "[A]bout every year [Jean] would get manic, very manic and hyper and she couldn't sleep and [would] lose weight[.]" Stabile testified that Jean married her last husband on a manic high a week after meeting him at an Alcoholics Anonymous meeting, and that she once went to Las Vegas on a manic high and "blew" her "entire retirement" in a single weekend.

Kayer's Aunt Olita "Aunt Tomi" Sandstrom (the third of his mother's sisters) was an alcoholic. Aunt

Opal Irene testified in the PCR court that her "baby sister" Olita drank "excessively." She testified that Olita was also severely depressed: "She would just sit and stare into space like—it was bad."

Kayer's Uncle John Williams (his mother's one brother) also had mental problems. Aunt Opal Irene testified, "He fell and hit his head in a creek in Oklahoma and he just never did do too good after that." John Williams' niece, Barbara Rogers, testified, "My Uncle John was a thief, a robber, he held his own family members at gunpoint and knifepoint a few times. And he just was not a good person to have around."

On October 21, 1994, Kayer was admitted to a VA hospital after suffering a severe heart attack. He had just turned forty. His father had died of a heart attack at age thirty-nine. The VA hospital form recorded, "The patient . . . presented . . . with a history of anterior precordial chest pain starting at about 1 o'clock in the afternoon, no relief after three beers." Doctors wanted to keep Kayer in the hospital, but after three days he checked himself out "against medical advice."

Kayer killed Haas six weeks later.

b. Professional Assessments

(1) Dr. Anne Herring

Dr. Anne Herring, an Associate Professor of Clinical Psychiatry and Neurology at the University of Arizona, examined Kayer in prison on March 16, 2005, and administered an extensive battery of tests. She testified in the PCR court that Kayer received average

scores on all tests except one. Dr. Herring wrote in her report that "on one of the more cognitively challenging tests" Kayer "demonstrated significant difficulty when required to execute complex problem solving and persisted in applying incorrect concepts despite receiving feedback." She wrote, "[S]imilar deficits have been associated with chronic heavy substance abuse, traumatic brain injury, and with bipolar disorder."

(2) Dr. Michael Sucher

Dr. Michael Sucher, a specialist in "alcohol and drug addiction medicine" and Acting Director for the Arizona Division of Behavioral Health in the Department of Health Services, examined Kayer in prison on April 5, 2005, for approximately two hours. Dr. Sucher reviewed Kayer's medical and psychological records in connection with his examination.

In his report, Dr. Sucher reviewed Kayer's history of "chronic alcohol dependence," and extensive history of compulsive gambling. Dr. Sucher wrote that Kayer had spent "probably one-quarter to one-third" of his interview discussing gambling and the "systems for winning" he had developed. Dr. Sucher wrote, "He really is in effect, completely obsessed with gambling."

Dr. Sucher testified in the PCR court that at the time of the crime Kayer was impaired by the combination of alcoholism and obsessive gambling:

> [H]e had untreated alcoholism and untreated pathological gambling; that both of those disorders impair one's judgment. And . . . the pursuit of continued gambling and the pursuit of

> continued drinking often make individuals who are so impaired do things that they would not normally do, some of which may involve the commission of a crime or crimes.

(3) Dr. Barry Morenz

Dr. Barry Morenz, an Associate Professor of Clinical Psychiatry at the University of Arizona, board certified in General Psychiatry and in Forensic Psychiatry, interviewed Kayer in prison on March 24 and April 19, 2005, for a total of five and a half hours. Like Dr. Sucher, Dr. Morenz reviewed Kayer's medical and psychological records in connection with his interviews.

Dr. Morenz wrote an extensive report and testified at length in the PCR court. Dr. Morenz wrote that Kayer spent much of the interview talking about gambling, explaining, among other things, how he had developed a system for predicting winning lottery numbers. Kayer told Dr. Morenz that "the numbers for tomorrow's lottery are already known in the collective unconscious," and that "using his spirit guides and his mathematical algorithm," he could predict these numbers and "when he is released make 20 million dollars." Kayer also explained his belief in reincarnation (which he called "recycling"), and his belief that there is "residue in him from when Mars was populated and perhaps populations from other worlds as well." (As noted above, *supra* p. 35, Kayer began at age seven to believe that he had come from another world.) Dr. Morenz characterized Kayer's beliefs as "really delusional."

Dr. Morenz provided a diagnosis of Kayer at the time of the interviews: "Bipolar type I disorder, hypomaniac; Alcohol dependence in a controlled environment; Polysubstance abuse in a controlled environment; Pathological gambling; Cognitive disorder not otherwise specified." More important for our purposes, Dr. Morenz provided a diagnosis as of 1994:

> There are a number of factors that have increased the risk of Mr. Kayer developing a number of psychiatric problems. First, there is considerable comorbidity among psychiatric diagnoses. . . . In Mr. Kayer this is relevant because people with bipolar disorders and personality disorders are at an increased risk of developing substance abuse disorders. Also, people with personality disorders have an increased risk of mood disorders. Secondly, Mr. Kayer had a family history of problems with alcohol, gambling and bipolar disorder that increased his risk of developing one or more of these disorders. Thirdly, as a child Mr. Kayer grew up with significant instability including frequent moves and his father's sudden death when Mr. Kayer was still very young which probably contributed to his later psychiatric difficulties. There is evidence that even as a child Mr. Kayer was showing signs of emotional problems as his performance in school was not

good. This poor school performance was probably an early sign of a bipolar disorder or a personality disorder or a combination of the two. By the time Mr. Kayer washed out of the military Mr. Kayer likely had moderately severe psychiatric problems that went untreated. . . . [I]t seems clear that he has suffered from serious psychiatric problems during most of his adult life and he continues to show signs of those problems today. . . .

At the time of the murder in 1994 Mr. Kayer was probably having serious psychiatric problems. He was having problems with bipolar disorder symptoms and may have been manic or hypomanic, he was having difficulties with out of control pathological gambling and he had difficulty with extensive alcohol abuse. These difficulties were likely superimposed on his personality disorder problems and his cognitive disorder not otherwise specified. Mr. Kayer's belief that he would not live long as a result of the heart attack he had suffered a few weeks before the murder was another important source of emotional distress that was likely exacerbating all his other problems during this period.

3. Discussion

The Sixth Amendment guarantees effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 686 (1984). A defendant is denied his or her right to effective assistance when "counsel's representation f[alls] below an objective standard of reasonableness" and "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 688, 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 694.

The right to effective assistance of counsel extends to the sentencing phase of a capital trial. *Id.* at 686–87. All criminal defense attorneys have a "duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." *Id.* at 691. For capital defense attorneys, this duty to investigate includes an "obligation to conduct a thorough investigation of the defendant's background." *Williams v. Taylor*, 529 U.S. 362, 396 (2000).

In a brief written order, the state PCR court held that Kayer had not established a Sixth Amendment violation under *Strickland*. The court wrote as to his attorneys' performance:

> The court concludes that at the time of sentencing, the defendant voluntarily prohibited his attorneys from further pursuing and presenting any possible mitigating evidence.

In the alternative, the court wrote as to prejudice:

> This court further concludes that **if** there had been a finding that the performance prong of the *Strickland* standard had been met, that no prejudice to the defendant can be found.

(Emphasis in the original.)

The order of the PCR court was the last reasoned decision of the state court. *Wilson v. Sellers*, 138 S. Ct. 1188, 1194 (2018). We must determine whether the PCR court's decision was "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court" as of May 8, 2006, when the state PCR court issued its decision, or was an "unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d)(1), (2).

a. Performance

With respect to the "performance prong," the state PCR court concluded that Kayer's attorneys had provided effective assistance. Its only finding in support of that conclusion was that "at the time of sentencing" Kayer had voluntarily prohibited his attorneys from pursuing and presenting any additional mitigating evidence. We need not disturb the PCR court's conclusion that Kayer acted voluntarily at the time of sentencing in prohibiting his counsel from pursuing mitigation, for the state PCR court asked, and answered, the wrong question. The question is not whether Kayer voluntarily prevented his counsel from pursuing mitigation in mid-1997. The question is

whether Kayer's counsel should have begun mitigation efforts when first appointed to represent him in January 1995. Kayer presented precisely this question to the PCR court.

"The failure to timely prepare a penalty-phase mitigation case is . . . error." *Allen v. Woodford*, 395 F.3d 979, 1001 (9th Cir. 2005). Mary Durand, Larry Hammond, and Keith Rohman all testified in the PCR court that in 1995 professionally competent representation required that mitigation efforts be started at the very beginning of a capital case. Durand testified that it is essential to spend substantial time with a capital defendant, beginning very early in the case, in order to build trust and understanding. Hammond testified that "it is of critical importance to develop both the guilt-innocence side of the case *and* sentencing side of the case from the beginning." (Emphasis added.) Rohman testified that "one of the very first steps in any capital mitigation representation is to meet the client, start to establish a relationship with the client and attempt the process of collecting a life history[.]" Hammond and Rohman both testified that by 1995 it had become standard practice in capital cases to begin mitigation efforts at the outset of a case. Hammond cited the 1989 American Bar Association guidance for capital representation, and testified that "the information I provided [in my testimony today] was well known in Arizona and elsewhere from as far back as the 1980s." Rohman testified that the "protocol and practice" he described had been well established by 1995.

In *Rompilla v. Beard*, 545 U.S. 374 (2005), decided a year before the decision of the PCR court, the Supreme Court held that defense counsel had rendered deficient performance by failing to investigate properly in preparation for the penalty phase hearing. In reaching its conclusion, the Court relied on performance standards established by the American Bar Association. The Court wrote, "[T]he American Bar Association Standards for Criminal Justice in circulation at the time of Rompilla's trial describes the obligation in terms no one could misunderstand[.]" *Rompilla*, 545 U.S. at 387. After quoting the relevant 1982 ABA Standards, the Court wrote, "'[W]e long have referred [to these ABA Standards] as 'guides to determining what is reasonable.'" *Id*. (alteration in original) (quoting *Wiggins v. Smith*, 539 U.S. at 510, 524 (2003). In a footnote, the Court referred to the 1989 ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases ("1989 ABA Guidelines"), promulgated shortly after Rompilla's trial, noting that they were "specifically devoted to setting forth the obligations of defense counsel in death penalty cases." *Id.* at 387 n.7. *See also Wiggins*, 539 U.S. at 524 (relying on the "well-defined norms" of the 1989 ABA Guidelines, describing them as "standards to which we long have referred as 'guides to determining what is reasonable'").

The 1989 ABA Guidelines state unambiguously that defense counsel in capital cases should begin investigation for the penalty phase as soon as they are appointed. Guideline 11.4.1(A) provides, "Both [guilt/innocence phase and penalty phase] investigations should begin immediately upon counsel's

entry into the case and should be pursued expeditiously." Guidelines 11.8.3(A) provides, "[P]reparation for the sentencing phase, in the form of investigation, should begin immediately upon counsel's entry into the case."

Linda Williamson was appointed to represent Kayer at the beginning of January 1995, six years after the issuance of the 1989 ABA Guidelines. Williamson represented Kayer for a year and a half. During that time, she did no mitigation investigation. David Stoller was appointed to replace Williamson at the end of June 1996. For six months, he did no mitigation investigation. Marc Victor, who was appointed to assist Stoller, moved on January 15, 1997, for funds to hire a mitigation investigator. On February 24, the judge deferred ruling on the motion until after conviction. Neither Stoller nor Victor appealed or sought reconsideration of the order. Funds for a mitigation investigator were finally authorized on April 8. Stoller had his first substantive conversation with the mitigation specialist, Mary Durand, on May 14. Durand first met with Kayer on May 21, almost eleven months after Stoller was appointed and almost two and half years after Williamson was appointed. When Durand met with Kayer on May 21, Kayer had never heard the term "mitigation." The penalty phase hearing, which had originally been set for May 27, was held on July 8.

We hold that in failing to begin penalty phase investigation promptly after they were appointed, Kayer's attorneys' "representation fell below an objective standard of reasonableness." *Strickland*, 466

U.S. at 688. The conclusion of the state PCR court that Kayer's attorneys provided constitutionally adequate performance was "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court." 28 U.S.C. § 2254(d)(1); *see Rompilla*, 545 U.S. at 387.

b. Prejudice

A habeas petitioner must establish not only deficient performance, but also "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694. There are two questions to be answered in determining whether Kayer was prejudiced by his attorneys' deficient performance. First, if his counsel had begun mitigation efforts at the outset of the case, would Kayer have cooperated? (Because, as will be seen in a moment, the answer to this question is "yes," we need not ask what his counsel would have been able to discover in the absence of Kayer's cooperation.) Second, was the mitigation evidence that was presented to the PCR court sufficient to establish a "reasonable probability," "sufficient to undermine confidence in the outcome," that the result of the sentencing hearing would have been different? We address each question in turn.

(1) Would Kayer Have Cooperated?

Mary Durand testified in the PCR court that it is common for capital defendants to resist mitigation efforts at the beginning, but that they virtually always come around and cooperate with such efforts. When Durand testified in the PCR court, she had worked on

one hundred and fifty capital cases. She testified, "When you spend time talking to them, if you have the proper amount of time, every occasion but one, in capital cases I have done, I have gotten the client's permission to do what I need to do." Larry Hammond testified to the same effect in the PCR court: "[E]ventually for virtually every one . . . of those defendants, they began to see that the mitigation part of the case was important."

Kayer's objection "at the time of sentencing" to further mitigation research was not based on a categorical objection to involving family members or to sharing personal information. Indeed, he willingly provided contact information for his mother, suggested that his mother might have relevant documents, and signed waivers that allowed Durand to seek school, military, medical and psychological records. Rather, his objection was based on two factors. First, he wanted to be transferred out of the Yavapai County Jail. There had been a murder in the jail, and Kayer had been attacked in the jail. Durand testified in the PCR court that Kayer "was terrified that he was going to be killed, that he would lose his life in that facility." When Durand told Kayer on May 21 that she needed six to eight months, he responded, "I don't have six to eight months." Second, as Kayer told the trial court on June 6, he believed (mistakenly) that nothing valuable would be discovered if a continuance were granted. If he had believed that a continuance would produce valuable information, he would have strongly supported a continuance. As he expressed it, "Believe me, if I thought that—that Miss Durand had valid evidence that should be presented in front of this Court, I'd be

scratching and clawing and asking for 180 days as well."

The state PCR court made no factual finding with respect to whether, if mitigation efforts had been begun at the outset of the case, Kayer would have cooperated in those efforts. So there is no factual finding to which we can defer. However, even if we were to assume that the PCR court had made such a finding, it would be have been "an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d)(2). The uncontradicted testimony of Durand and Hammond established that it was a virtual certainty that Kayer would have cooperated in a mitigation investigation if it had begun in January 1995, at the beginning of the case, rather than in late May 1997.

(2) Reasonable Probability of a Different Outcome?

(i) Waiver of Argument

Kayer presented to the PCR court extensive and uncontroverted evidence of mental impairment. The State could have argued to us that even if Kayer's counsel had sought to begin mitigation efforts at the outset of the case, funds for mitigation investigation would not have been authorized until after Kayer's conviction. If this were so, the State could have argued, much of the evidence presented to the PCR court would not have been discovered and developed even by competent counsel.

However, the State has not made this argument, perhaps because it does not want to implicate itself as contributing to the ineffectiveness of Kayer's

representation. We therefore consider the argument waived. However, even if the State had made the argument, we would reject it for essentially two reasons.

First, Larry Hammond testified that a competent capital defense attorney should work to persuade a judge of the necessity of early authorization of funds for mitigation investigation, and that a good judge will understand the necessity and will authorize the funds. As described above, Hammond testified, "[O]nce the explanation is given to good judges about what is necessary and why it's necessary, the experience is that good judges say: 'I understand that and now we will work together to make that happen.'"

Second, even if the State would not have provided mitigation investigation funds at the outset of the case, a competent attorney could have done a great deal in their absence. One of the keys to a competent investigation, as explained by Durand, is early gathering of medical, psychological, school, and other documents. It would have been a simple and inexpensive task to obtain waivers from Kayer and to send for such documents. Durand obtained waivers from Kayer at her first meeting with him and sent for the documents immediately thereafter. It would also have been a relatively simple task to interview known and easily accessible friends and relatives. Williamson had an investigator, but she never asked him to do such work. When Stoller took over the case, he learned that Kayer's family had hired an investigator at their own expense. Stoller could have asked that investigator to do such work, but he did not do so. It would likely

have been necessary to wait for state funding to hire expert witnesses such as Drs. Henning, Sucher and Morenz, but experts could have done their work fairly quickly, even after conviction, if the relevant documents had already been obtained and interviews had already been done.

(ii) Effect of New Evidence

Under Arizona law in 1997 when Kayer was sentenced to death, mental impairment could be either a statutory or nonstatutory mitigating circumstance, depending on the degree of impairment. There were five listed "statutory" mitigating circumstances under Arizona law. The first of these was mental impairment: "The defendant's capacity to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law was significantly impaired, but not so impaired as to constitute a defense to prosecution." Ariz. Rev. Stat. § 13-703(G)(1) (1977). (All references are to the 1997 version of Arizona Revised Statutes unless otherwise indicated.) If evidence of a "mental condition" did not establish a mental impairment within the meaning of the statutory mitigator and instead "merely establishe[d] a character or personality disorder," the mental condition was considered as a non-statutory mitigator. *State v. Fierro*, 804 P.2d 72, 86 (Ariz. 1991) (internal quotation marks omitted). In Kayer's case on direct appeal, the Supreme Court of Arizona held that he had presented insufficient evidence to establish the existence of any mental impairment, whether as a statutory or a non-statutory mitigator.

A comparison of Kayer's case with other Arizona cases demonstrates that the evidence he presented to the PCR court was sufficient to establish a statutory mitigating circumstance under Ariz. Rev. Stat. § 13-703(G)(1). *See*, *e.g.*, *State v. Stevens*, 764 P.2d 724, 727–29 (Ariz. 1988) ("capacity to appreciate the wrongfulness of his conduct had been impaired by his longterm use of drugs and alcohol" and constituted a mitigating circumstance under § 13-703(G)(1)); *State v. Gretzler*, 659 P.2d 1, 16–17 (Ariz. 1983) (drug use beginning at age thirteen and continuing for over nine years "likely impaired defendant's volitional capabilities" and constituted a mitigating circumstance under § 13-703(G)(1)).

In many ineffective assistance of counsel cases, enough evidence has already been presented at the time of sentencing to establish a mitigating circumstance. In such cases, when additional evidence relevant to that circumstance is later presented to the state habeas court, the additional evidence is cumulative and typically does not establish prejudice. *See*, *e.g.*, *Smith v. Ryan*, 823 F.3d 1270, 1296 (9th Cir. 2016) ("brain scans . . . were largely cumulative of the mitigating evidence presented by Dr. Parrish"); *Cunningham v. Wong*, 704 F.3d 1143, 1163 (9th Cir. 2013) ("Dr. Coburn's testimony about Cunningham's mental state . . . would [ ] have been cumulative"); *Lopez v. Ryan*, 678 F.3d 1131, 1138 (9th Cir. 2012) ("[T]he claim was a very narrow one and related only to supplemental evidence"); *Moormann v. Ryan*, 628 F.3d 1102, 1113 (9th Cir. 2010) (finding no prejudice because of the "cumulative nature of the new evidence").

Kayer's case is fundamentally different. The minimal evidence of mental impairment presented at Kayer's penalty phase hearing was so speculative that the sentencing judge and the Arizona Supreme Court on direct appeal found no mental impairment whatsoever. Not only was the evidence insufficient to establish a statutory mitigating circumstance under Ariz. Rev. Stat. § 13-703(G)(1); it was insufficient even to establish a non-statutory mitigating circumstance. Instead of being cumulative, the evidence presented to the PCR court of Kayer's mental impairment established for the first time its very existence.

The sentencing court and the Arizona Supreme Court on de novo direct review weighed two statutory aggravating circumstances against one non-statutory mitigating circumstance. If the evidence of Kayer's mental impairment presented to the PCR court had been presented to the sentencing court, that court and the Arizona Supreme Court would have added to the balance the statutory mitigating circumstance of Kayer's mental impairment.

The two aggravating circumstances were commission of the crime for "pecuniary value" under Ariz. Rev. Stat. § 13-703(F)(5), and a prior conviction of a "serious offense" under Ariz. Rev. Stat. § 13-703(F)(2). The second aggravating circumstance was relatively weak. "Serious offense" was broadly defined under the statute, and Kayer's offense was at the less serious end of the spectrum. Among the specified "serious offenses" were first degree murder, second degree murder, manslaughter, aggravated assault resulting in serious physical injury, sexual assault, and

any dangerous crime against children. Ariz. Rev. Stat. § 13-703(H)(1)–(6). Kayer's prior conviction was for first degree burglary.

The one mitigating circumstance at sentencing was the relatively weak non-statutory mitigator of Kayer's importance in the life of his son. If the evidence presented to the PCR court had been presented to the sentencing court, it would have established an additional mitigating circumstance—the statutory mitigator of mental impairment under Ariz. Rev. Stat. § 13-703(G)(1).

The evidence supporting a finding of mental impairment was extensive and uncontroverted. Kayer was slow to walk and develop. Starting at age seven and continuing into adulthood, Kayer believed that he was a reincarnated being from another planet. He was dyslexic, was moved from school to school, and got poor grades. He began using drugs, including marijuana and speed, beginning in his teens. Kayer left high school without graduating and joined the Navy. He was discharged from the Navy a year later due to "severe" mental "impairment." He began drinking heavily when he was about twenty-one and became severely addicted to alcohol. He became a compulsive gambler sometime in his twenties. His gambling addiction persisted unabated thereafter.

Kayer suffered the emotional highs and lows typical of bipolar disease. He voluntarily checked himself into VA hospitals in 1983 and 1989. At the VA hospital in 1989, he was given a prescription for lithium, a standard medication for bipolar disease. In 1990 as an outpatient, he was given a provisional diagnosis of

"Personality Disorder/Bipolar." In 1990, Kayer stated that until he was diagnosed and given lithium at the VA hospital in 1989, he had "no idea what was wrong with him."

Kayer had an extensive family history of mental disease. His father was an alcoholic and a compulsive gambler. One of his mother's three sisters "heard voices." That sister testified that Kayer had told her that he heard voices, too. The other two sisters were alcoholics and bipolar. His mother's one brother had mental problems. One of his cousins was bipolar and underwent electroshock therapy.

The evidence presented to the PCR court established the statutory mitigating circumstance of mental impairment under Ariz. Rev. Stat. § 13-703(G)(1). The evidence also established a causal connection between Kayer's mental impairment and the crime. Dr. Sucher testified that at the time of the crime Kayer "had untreated alcoholism and untreated pathological gambling." Dr. Morenz testified that at the time of the crime, Kayer "was having problems with bipolar disorder symptoms . . . , he was having difficulties with out of control pathological gambling and he had difficulty with extensive alcohol abuse." Kayer's near-fatal heart attack, at essentially the same age as his father's fatal heart attack, six weeks before the murder was "another important source of emotional distress that was likely exacerbating all of his other problems."

We must decide whether "it was objectively unreasonable [for the state PCR court] to conclude there was no reasonable probability the sentence would

have been different if the sentencing judge . . . had heard the significant mitigation evidence that [Kayer's] counsel neither uncovered nor presented." *Porter v. McCollum*, 558 U.S. 30, 31 (2009) (per curiam) (stating prejudice standard for ineffective assistance of counsel in an AEDPA case). "We do not require a defendant to show 'that counsel's deficient conduct more likely than not altered the outcome' of his penalty proceeding, but rather that he establish 'a probability sufficient to undermine confidence in [that] outcome.'" *Id.* at 44 (alteration in original) (quoting *Strickland*, 466 U.S. at 693–94).

The State argues that we must accord special deference to the PCR court's holding that Kayer suffered no prejudice because the judge who presided over the PCR proceedings was also the original sentencing judge. The State is incorrect. We assess prejudice independent of the particular judge or judges, as made clear by the Supreme Court in *Strickland*:

> The assessment of prejudice should proceed on the assumption that the decisionmaker is reasonably, conscientiously, and impartially applying the standards that govern the decision. It should not depend on the idiosyncracies of the particular decisionmaker, such as unusual propensities toward harshness or leniency.

466 U.S. at 695. A post-conviction court must assess whether there is a reasonable possibility that

> the sentencer—including an appellate court, to the extent it independently reweighs the evidence—would have concluded that the balance of the aggravating and mitigating factors did not warrant death.

Id.

"[T]he test for prejudice is an objective one." *White v. Ryan*, 895 F.3d 641, 670 (9th Cir. 2018). In *White*, we faulted the prejudice determination by the PCR court because that "court determined whether *it* would have imposed a death penalty if it had considered the mitigation evidence that [defendant] failed to present [at the penalty phase]." *Id.* (emphasis in original). We further faulted it for failing to take into account the fact that the Arizona Supreme Court was required to independently weigh the aggravating and mitigating circumstances: "The PCR court erred by . . . fail[ing] to consider the probability of a different outcome in the Arizona Supreme Court." *Id.* at 671. *See also Mann v. Ryan*, 828 F.3d 1143, 1167 (9th Cir. 2016) (en banc) (Thomas, C.J., concurring and dissenting) ("[T]he post-conviction court was not excused from its obligation to apply *Strickland* because the same judge presided over both [the defendant's] trial and post-conviction proceeding, and that judge concluded that the newly introduced evidence would not have changed *his* mind." (emphasis in original)).

For a number of reasons, we conclude that the addition of the statutory mitigating circumstance of mental impairment could have changed the outcome of the sentencing proceeding. In the words of the Supreme

Court, the addition of this mitigating circumstance created a "reasonable probability the sentence would have been different," *Porter*, 558 U.S. at 31, "sufficient to undermine confidence in the outcome," *id.* at 44 (quoting *Strickland*, 466 U.S. at 693–94), and it was unreasonable for the state court to conclude otherwise.

First, there was a substantial difference between the evidence submitted at sentencing and the evidence later submitted to the PCR court. In the sentencing court, there was evidence supporting two statutory aggravating circumstances and one weak non-statutory mitigating circumstance. In the PCR court, there were the same two statutory aggravators. But now there was an additional mitigator—for the first time, the statutory mitigator of mental impairment—where previously there had only been one weak non-statutory mitigator.

Second, Kayer's mental impairment had a direct causal relationship to the crime, and would have been given substantial weight at sentencing. In *McKinney v. Ryan*, 813 F.3d 798 (9th Cir. 2015) (en banc), we held that the Arizona Supreme Court had for many years violated *Eddings v. Oklahoma*, 455 U.S. 104 (1982), by refusing, as a matter of law, to give any weight to would-be mitigating circumstances such as mental impairment unless they had a "causal nexus" to the crime of conviction. In *State v. Anderson*, 111 P.3d 369 (Ariz. 2005), the Arizona Supreme Court finally abandoned the causal nexus test.

In post-*Anderson* cases, Arizona courts have considered a broad range of mitigating circumstances. Mitigating circumstances that are causally connected

to the crime have been given greater weight than circumstances with no causal nexus. The Arizona Supreme Court wrote in 2006, "We do not require that a nexus between the mitigating factors and the crime be established before we consider the mitigation evidence [but] the failure to establish such causal connection may be considered in assessing the quality and strength of the mitigation evidence." *State v. Newell*, 132 P.3d 833, 849 (Ariz. 2006); *see also*, *e.g.*, *State v. Velazquez*, 166 P.3d 91, 106 (Ariz. 2007) ("This mitigating circumstance [of drug and alcohol abuse] was proven by a preponderance of the evidence, but Velazquez did not establish that he was under the influence of drugs or alcohol at the time of the murder."); *State v. Pandeli*, 161 P.3d 557, 575 (Ariz. 2007) ("Pandeli's difficult childhood and extensive sexual abuse, while compelling, are not causally connected to the crime. . . . We do not give this mitigating evidence significant weight.").

Kayer's mental impairment under Ariz. Rev. Stat. § 13-703(G)(1) was causally connected to the crime and would therefore have been given substantial weight. The testimony of Drs. Sucher and Morenz made abundantly clear the causal connection between Kayer's mental problems and the crime. Dr. Sucher specifically referred to Kayer's "untreated alcoholism and untreated pathological gambling" at the time of the crime. Indeed, Kayer had been drinking heavily on the day of the killing, and Kayer killed the victim in order to obtain funds to continue gambling. Dr. Morenz specifically connected the crime to Kayer's "problems with bipolar disorder symptoms," his difficulties with "out of control pathological gambling" and "extensive

alcohol abuse," and his "heart attack . . . suffered a few weeks before the murder." Keith Rohman, the mitigation expert who testified in the PCR court, connected these factors to the crime, characterizing them as a "perfect storm."

Third, the aggravating circumstances supporting imposition of the death sentence were not overwhelming. The sentencing judge had specifically rejected the prosecution's argument for the aggravating circumstance that Haas had not been killed in "an especially heinous, cruel or depraved manner" under Ariz. Rev. Stat. § 13-703(F)(6). Further, one of the two aggravating circumstances found by the Arizona Supreme Court was relatively weak. The "serious crime" of which Kayer had previously been convicted was first degree burglary, one of the less serious crimes specified in Ariz. Rev. Stat. § 13-703(H). Indeed, all of the prior crimes of which Kayer had been convicted were property crimes. He had never been charged with, let alone convicted of, a crime in which he had physically harmed anyone. *See State v. Hyde*, 921 P.2d 655, 687 (Ariz. 1996) ("We . . . find that defendant's non-violent past is a non-statutory mitigating circumstance.").

Fourth, a comparison to other Arizona cases shows that there is a reasonable probability that Kayer would not have been sentenced to death if the mitigating evidence presented to the PCR court had been presented to the sentencing court. Cases in which the Arizona Supreme Court has imposed the death penalty typically involve extreme behavior by the defendant. Kayer's case is unlike these cases. For example, in

State v. Cruz, 672 P.2d 470 (Ariz. 1983), defendant and two accomplices robbed a married couple and the wife's mother. They bound the victims together on a bed, gagged them, and shot all three in the head. They cut the throat of one of the three victims. In *State v. Chaney*, 686 P.2d 1265 (Ariz. 1984), the defendant fired at least thirty shots with a high-powered automatic rifle at a deputy sheriff while he sat in a vehicle. One shot almost severed the deputy's arm. Another shot was fired at such close range that it left powder burns on his body. In *State v. Fisher*, 686 P.2d 750 (Ariz. 1984), the defendant, in order to keep $500 in rent money he had collected for the seventy-three-year-old victim, shattered her skull with three blows with a claw hammer. In *State v. Roscoe*, 700 P.2d 1312 (Ariz. 1984), the defendant kidnapped the victim, raped her vaginally and orally, strangled her, and left her body in the desert.

Several cases in which the Arizona Supreme Court has reversed a death penalty imposed by the trial court are similar to Kayer's case. For example, in *State v. Stevens*, 764 P.2d 724 (Ariz. 1988), the defendant robbed two people, shooting and killing one of them. An aggravating circumstance was killing for pecuniary gain. A mitigating circumstance was mental impairment resulting from drug use. On de novo review, the Arizona Supreme Court imposed a life sentence. In *State v. Rockwell*, 775 P.2d 1069 (Ariz. 1989), defendant stole money from the cash register at a truck stop and killed an employee by shooting him in the back of the head. An aggravating circumstance was killing for pecuniary gain. A mitigating circumstance was a motorcycle accident when the defendant was

seventeen-years-old, causing "violent and unpredictable behavior." *Id.* at 1079. On de novo review, the Arizona Supreme Court imposed a life sentence.

The Arizona Supreme Court case most closely on point is *State v. Brookover*, 601 P.2d 1322 (Ariz. 1979). Defendant Brookover had agreed to buy 750 pounds of marijuana from the victim. When the marijuana was delivered, Brookover shot the victim in order to avoid paying for it. "The victim fell to the floor moaning and asked the defendant what he had done. The defendant said 'Don't worry . . . it will be over soon' and shot him once more in the back," killing him. *Id.* at 1323. As in Kayer's case, the prosecutor had argued for the statutory aggravator that the murder had been committed in "an especially heinous, cruel or depraved manner," but the Court rejected the argument. *Id.* at 1325. An aggravating circumstance was that Brookover had previously been convicted of an offense "for which . . . a sentence of life imprisonment or death was imposable." *Id.* at 1323. The one mitigating circumstance was mental impairment. The Arizona Supreme Court set aside the death penalty that had been imposed by the trial court:

> We believe that the defendant's mental condition was not only a mitigating factor, but a major and contributing cause of his conduct which was "sufficiently substantial" to outweigh the aggravating factor of defendant's prior conviction. *Under the circumstances, leniency is mandated.*

Id. at 1326 (emphasis added).

The parallels between *Brookover* and Kayer's case are striking. In neither case was the killing committed in "an especially heinous, cruel or depraved manner." In both cases, the one mitigating circumstance was the statutory mitigator of mental impairment. In both cases, the killings were for pecuniary gain. In 1979, pecuniary gain had not yet been applied as a statutory mitigator beyond killings for hire, but a year later the Arizona Supreme Court recognized that the mitigator covered any killing for pecuniary gain. *See State v. Clark*, 616 P.2d 888, 896 (Ariz. 1980); *State v. Schad*, 788 P.2d 1162, 1170–71 (Ariz. 1989) (applying *Clark* to a murder that took place in 1978, a year before *Brookover*: "*Clark* . . . merely recognized the pre-existing scope of present law."). Finally, in both cases, there was a statutory aggravator for prior conviction of a serious offense. However, when Brookover was sentenced, the statutory aggravator required that the conviction have been for a crime for which the death penalty or life imprisonment could be imposed. In Kayer's case, the statutory aggravator required less. It required only a conviction for a "serious crime," which in Kayer's case was first degree burglary. On de novo review of the evidence and sentence, the Arizona Supreme Court sentenced Brookover to life imprisonment rather than death. The Court held that leniency was "mandated." *Brookover*, 601 P.2d at 1326.

In determining prejudice, we need not go so far as *Brookover*. We need not decide that leniency was "mandated" and that the state PCR court was unreasonable in concluding otherwise. We need only decide whether "it was objectively unreasonable" for the state court to conclude that there was "no

reasonable probability" that Kayer's sentence would have been different if Kayer's attorneys had presented to the sentencing court the mitigating evidence later presented to the PCR court. *Porter*, 558 U.S. at 31. In light of the foregoing, and particularly in light of the Arizona Supreme Court's decision in *Brookover*, we hold that there is a reasonable probability Kayer's sentence would have been less than death, and that the state PCR court was unreasonable in concluding otherwise.

(iii) Disagreement with the Dissent

Our dissenting colleague concludes that we have not given sufficient deference to the decisions of the Arizona state court in this case. We recognize, as does our dissenting colleague, that the standard under AEDPA is "highly deferential" and "difficult to meet." *Harrington v. Richter*, 562 U.S. 86, 102, 105 (2011) (citations omitted). The standard is indeed high. As stated by the Supreme Court, the precise standard in an ineffective assistance of counsel case is that in order to set aside a state-court death sentence based on new evidence, we must hold that the new evidence created a "reasonable probability the sentence would have been different," and that the state court unreasonably determined otherwise. *Porter*, 558 U.S. at 31.

Our colleague makes two related points. We respectfully disagree with both of them.

First, our colleague contends that the Supreme Court's decision in *Woodford v. Visciotti*, 537 U.S. 19 (2002) (per curiam), effectively determines the outcome

in this case. *Visciotti* cannot bear the weight our colleague places on it.

In *Visciotti*, defense counsel failed to perform an adequate penalty-phase investigation. On state habeas, extensive new mitigation evidence that defense counsel had not identified was presented to a referee appointed by the California Supreme Court. That Court engaged in a detailed analysis of the new evidence and concluded that the failure to present that evidence at sentencing did not prejudice *Visciotti*. *In re Visciotti*, 926 P.2d 987 (Cal. 1996). Our court held that the California Supreme Court had unreasonably concluded that the new evidence did not establish a "reasonable probability" of a different result at sentencing. *Visciotti v. Woodford*, 288 F.3d 1097, 1117–19 (9th Cir. 2002). The Supreme Court reversed, emphasizing the care with which the California Supreme Court had analyzed the new evidence and holding that the Court was not "objectively unreasonable" in finding no prejudice.

The facts in the two cases are similar, though, as our colleague recognizes, they were somewhat less favorable to Visciotti than they are to Kayer. But the cases arise in very different contexts. First, and most obviously, in our case we ask what an Arizona rather than a California sentencing court would have done. This is important because the statutes, procedures, and case law in the two jurisdictions are different. Second, in *Visciotti* there was a reasoned decision by the California Supreme Court, but in our case there was no reasoned decision by the Arizona Supreme Court. This is critically important, given the Arizona capital sentencing scheme at the time. Under Arizona law, the

Arizona Supreme Court was the ultimate sentencing court. On mandatory direct appeal from a sentencing court, the Arizona Supreme Court reviewed the evidence de novo and decided independently whether to impose the death penalty. *See*, *e.g.*, *Kayer*, 984 P.2d at 40–41.

In determining prejudice, therefore, we look to how the Arizona Supreme Court would have assessed the new evidence presented to the PCR court if that evidence had been presented on direct appeal. We do not know how the Arizona Supreme Court in Kayer's case would have assessed on direct appeal the evidence presented to the PCR court because that evidence was not then in the record. Nor do we know how the Arizona Supreme Court would have assessed that evidence on collateral review because the Court denied without explanation Kayer's petition for review. The best we can do is look at de novo sentencing decisions by the Arizona Supreme Court in comparable cases. Those cases are the best evidence of what the Court would have done if the new mitigating evidence had been presented in Kayer's direct appeal.

Second, our colleague contends that we have not given appropriate deference to the decision of the state PCR judge. The PCR judge was also the sentencing judge. However, "[t]he assessment of prejudice . . . should not depend on the idiosyncracies of the particular decisionmaker[.]" *Strickland*, 466 U.S. at 695. "[T]he test for prejudice is an objective one." *White v. Ryan*, 895 F.3d 641, 670 (9th Cir. 2018). The question is thus not what the PCR judge would have done in light of the new evidence. The question, rather,

is what the ultimate sentencing authority, the Arizona Supreme Court, would have done. We therefore must ask whether the PCR judge was unreasonable in concluding that there was no "reasonable probability" of a different result in the Arizona Supreme Court if that Court had had before it the evidence presented to the PCR court.

Unless we are to engage in sheer guesswork, the only way to determine what the Arizona Supreme Court would have done in light of Kayer's new evidence is to look at what that Court has done in comparable cases. We describe, above, several decisions of that Court. One of them, *Brookover*, is on all fours with Kayer's case. The only difference is that one of the statutory aggravators was stronger in *Brookover*. The Arizona Supreme Court held in *Brookover* that leniency was "mandated."

Our colleague refuses to acknowledge the striking parallels between *Brookover* and Kayer's case, writing only: "The majority's reliance on *State v. Brookover*, 601 P.2d 1322 (Ariz. 1979), *a forty-year-old case*, ignores what the state court did in this case." Diss. Op. at 75 (emphasis added). Our colleague maintains that we can safely ignore *Brookover* because of its age ("a forty-year-old case").

Our colleague misses the fact that when the Arizona Supreme Court reviewed Kayer's sentence de novo on direct appeal, *Brookover* had been decided only twenty (not forty) years earlier. The Arizona Supreme Court in capital cases routinely cites and treats as binding precedent its own decisions from twenty years (and more) before. *See*, *e.g.*, *State v. Hedlund*, 431 P.3d 181,

190 (Ariz. 2018) (discussing and distinguishing *State v. Graham*, 660 P.2d 460 (Ariz. 1983); *State v. Trostle*, 951 P.2d 869, 885 (Ariz. 1997) (discussing and relying on *State v. Richmond*, 560 P.2d 41, 52–53 (Ariz. 1976)). *See also State v. Stuard*, 863 P.2d 881, 902 (Ariz. 1993) (citing, inter alia, *State v. Doss*, 568 P.2d 1054, 1060 (Ariz. 1977), and writing, "Leniency is therefore required"). Nothing in the practice of the Arizona Supreme Court suggests that when it sentenced Kayer de novo in 1999, it would have treated as less-than-binding a twenty-year-old precedent. In that precedent— *Brookover*—the Arizona Supreme Court had held, on facts less favorable to the defendant than those in Kayer's case, that a non-capital sentence was "mandated." Given *Brookover*'s holding that "leniency" was "mandated," it was unreasonable for the PCR judge to conclude that in Kayer's case there was no "reasonable probability" that the Arizona Supreme Court on direct appeal would have imposed a non-capital sentence.

IV. Other Certified Claims

Kayer asserts two additional certified claims with which we may deal fairly quickly.

A. Continuance

Kayer argues that the sentencing court violated his Sixth Amendment rights by acceding to his objection to a continuation of his sentencing hearing. He argues that the court should have disregarded his objection and instead granted his attorneys' request for a continuance. In light of our holding, above, that the sentencing court unreasonably concluded that Kayer's

attorneys performed effectively and, in the alternative, if they performed ineffectively, that Kayer suffered no prejudice, we need not reach the question whether the court acted properly in denying the continuance.

B. *Martinez*

Kayer seeks to revive several procedurally barred guilt-phase ineffective assistance of counsel claims by showing cause and prejudice under *Martinez v. Ryan*, 566 U.S. 1 (2012). Post-conviction counsel's ineffectiveness in failing to raise a meritorious ineffective assistance of counsel claim may constitute "cause" sufficient to overcome a procedural bar. *Id.* at 17. To prevail, the petitioner must show that (1) post-conviction counsel performed deficiently, (2) effective counsel might have changed the result of the post-conviction proceedings, and (3) the underlying ineffectiveness claim was substantial. *Pizzuto v. Ramirez*, 783 F.3d 1171, 1178–79 (9th Cir. 2015). An evidentiary hearing is appropriate if "such a hearing could enable an applicant to prove the petition's factual allegations, which, if true, would entitle the applicant to federal habeas relief." *Runningeagle v. Ryan*, 825 F.3d 970, 990 (9th Cir. 2016) (quoting *Schriro v. Landrigan*, 550 U.S. 465, 474 (2007)).

Kayer sought to revive several claims in the district court and seeks to revive them here. The district court held that none of the claims was substantial in the sense necessary to support a finding of cause and prejudice under *Martinez*. Upon review of the evidence, we agree with the district court.

V. Uncertified Claims

Kayer seeks certification of two claims that the district court declined to certify. We also decline to certify these claims.

Conclusion

We reverse the decision of the district court with respect to ineffective assistance of counsel at the penalty phase. We otherwise affirm.

We remand to the district court with instructions to grant the writ with respect to the penalty phase unless the State, within a reasonable period, grants Kayer a rehearing with respect to the penalty or vacates the sentence of death and imposes a lesser sentence consistent with the law.

REVERSED in part, AFFIRMED in part, and REMANDED with instructions.

OWENS, Circuit Judge, concurring in part and dissenting in part:

While I agree with much of the majority's decision, I part ways as to its conclusion that we must reverse Kayer's death sentence. I cannot say that the Arizona PCR court acted unreasonably regarding prejudice in light of the aggravating and mitigating circumstances in this case.

The AEDPA standard is "highly deferential" and "difficult to meet." *Harrington v. Richter*, 562 U.S. 86, 102, 105 (2011) (citations omitted). The petitioner must show that the state court's decision was "so lacking in

justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." *Id*. at 103. In other words, AEDPA "demands that state-court decisions be given the benefit of the doubt." *Woodford v. Visciotti*, 537 U.S. 19, 24 (2002) (per curiam).

The majority concludes that the aggravating factors supporting imposition of Kayer's death sentence were "not overwhelming." Majority Opinion 62. It focuses on the prior serious offense aggravating factor as being "relatively weak," Majority Opinion 57, 63, but overlooks the strength of the pecuniary gain aggravating factor. For that aggravator, the defendant must have a financial "motive, cause, or impetus" for the murder. *State v. Kayer*, 984 P.2d 31, 41 (Ariz. 1999) (citation omitted). There is no dispute that Kayer had a financial motive for killing Haas, doing so for a mere few hundred dollars' worth of cash and other items. *See State v. Soto-Fong*, 928 P.2d 610, 632 (Ariz. 1996) ("Pecuniary gain does not focus on whether the defendants were effective or thorough robbers, but on whether their motive was financial gain.").

Moreover, the crime here was brutal, even if it did not rise to the level of "especially heinous, cruel or depraved." Kayer decided to rob and kill Haas, and the next day shot Haas in the head at point-blank range during a remote bathroom stop on their drive home from a gambling trip. Kayer took Haas's wallet, watch, and jewelry. Kayer left Haas in the bushes and drove away, but turned around upon realizing he had forgotten to take Haas's keys to loot his house. Kayer returned to the murder scene, retrieved the keys, and

shot Haas in the head again because he did not appear to be dead.

These facts are remarkably similar to *Visciotti*, where the U.S. Supreme Court reversed our grant of habeas relief. 537 U.S. at 20. There, in a preplanned armed robbery, the defendant and his co-worker shot two co-workers as they all drove to a party and made a remote bathroom stop (one victim died and one survived). *Id*. The defendant was sentenced to death. *Id*. At the PCR stage, the California Supreme Court determined that the defendant had not been prejudiced by his counsel's failure to introduce mitigating evidence about his background. *Id*. at 21. In particular, the California Supreme Court concluded that the mitigating evidence was outweighed by "the circumstances of the crime (a cold-blooded execution-style killing of one victim and attempted execution-style killing of another, both during the course of a preplanned armed robbery) coupled with the aggravating evidence of prior offenses (the knifing of one man, and the stabbing of a pregnant woman as she lay in bed trying to protect her unborn baby)." *Id*. at 26. We held that decision was objectively unreasonable and granted habeas relief. *Id*. at 21–22.

The U.S. Supreme Court reversed, stating that we had impermissibly "substituted [our] own judgment for that of the state court, in contravention of" AEDPA. *Id*. at 25. Likewise, here, the majority impermissibly substitutes its own judgment that Kayer was prejudiced. Granted, the prior offenses in *Visciotti* were more serious than Kayer's prior burglary conviction. However, the "federal habeas scheme leaves primary

responsibility with the state courts for these judgments, and authorizes federal-court intervention only when a state-court decision is objectively unreasonable. It is not that here." *Id.* at 27. The majority contends that *Visciotti* is different because it took place in California, involved a PCR decision by the state supreme court, and Arizona had a distinct capital sentencing scheme at the time. Majority Opinion 67–68. But those differences do not excuse AEDPA deference to the Arizona PCR court's decision here. *See Schriro v. Landrigan*, 550 U.S. 465, 473 (2007) (reversing Ninth Circuit in an Arizona capital case, and noting that "[t]he question under AEDPA is not whether a federal court believes the state court's determination was incorrect but whether that determination was unreasonable—a substantially higher threshold").

Further, Kayer's mitigation—mental illness, and gambling and alcohol addiction—was hardly overwhelming; we have denied habeas relief based on far worse mitigating facts than this one. *See, e.g.*, *Apelt v. Ryan*, 878 F.3d 800, 815–16 (9th Cir. 2017) (denying habeas relief even though trial counsel failed to uncover mitigating evidence that the defendant grew up very poor, had an alcoholic and violent father who beat his children with an iron rod, was raped twice as a child, and suffered from mental illness); *Cain v. Chappell*, 870 F.3d 1003, 1021 (9th Cir. 2017) (denying habeas relief despite new mitigating evidence that the defendant was severely beaten and punished by his stepmother, had an untreated childhood head injury, and had learning disabilities).

Here, we have an undisputedly strong aggravating factor, an arguably weak one, and some mitigation, all of which the Arizona PCR court reviewed. The majority's reliance on *State v. Brookover*, 601 P.2d 1322 (Ariz. 1979), a forty-year-old case, ignores what the state court did in this case. The U.S. Supreme Court has warned us again and again not to intrude on state court death sentences unless "so lacking in justification" as to give rise to constitutional error "beyond any possibility for fairminded disagreement." *Richter*, 562 U.S. at 103. I fear that we have done so again, so I respectfully dissent.

APPENDIX B

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

No. CV 07-2120-PHX-DGC

DEATH PENALTY CASE

[Filed October 19, 2009]

George Russell Kayer,	)
	)
Petitioner,	)
	)
vs.	)
	)
Charles L. Ryan, et al.,[1]	)
	)
Respondents.	)
	)

MEMORANDUM OF DECISION AND ORDER

Petitioner George Kayer, a state prisoner under sentence of death, has filed an Amended Petition for

[1] Charles L. Ryan, Interim Director of the Arizona Department of Corrections, is substituted as Respondent pursuant to Federal Rule of Civil Procedure 25(d).

Writ of Habeas Corpus. Dkt. 35.[2] Petitioner alleges, pursuant to 28 U.S.C. § 2254, that he is imprisoned and sentenced in violation of the United States Constitution. He has also filed a motion for evidentiary development. Dkt. 46. For the reasons set forth below, the Court concludes that Petitioner is not entitled to habeas relief or evidentiary development.

BACKGROUND

In 1997, a jury in Yavapai County convicted Petitioner of first degree murder for taking the life of Delbert L. Haas. The following facts concerning the circumstances of the crime and Petitioner's trial are derived from the opinion of the Arizona Supreme Court affirming Petitioner's conviction and sentence, *State v. Kayer*, 194 Ariz. 423, 427-30, 984 P.2d 31, 35-38 (1999), and from this Court's review of the record.

On December 3, 1994, two couples searching for Christmas trees on a dirt road in Yavapai County discovered a body, later identified as that of Delbert L. Haas. Haas had been shot twice, once behind each ear. On December 12, 1994, Yavapai County Detective Danny Martin received a phone call from Las Vegas police officer Larry Ross. Ross told Martin that a woman named Lisa Kester had approached a security guard at the Pioneer Hotel in Laughlin, Nevada, and said that her boyfriend, Petitioner, had killed a man in Arizona. Kester also indicated that a warrant had been issued for Petitioner's arrest in relation to a different crime, a fact Las Vegas police officers later confirmed.

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[2] "Dkt." refers to numbered documents in this Court's electronic case docket.

Kester gave Las Vegas officers the gun she said was used to kill Haas and led them to credit cards belonging to Haas that were found inside a white van in the hotel parking lot.

During her interaction with the officers, Kester appeared agitated. She told them she had not come forward sooner because she feared Petitioner would kill her, and asked to be placed in the witness protection program. Kester described Petitioner's physical appearance and agreed to accompany an officer to the police station.

Hotel security guards and Las Vegas police officers soon spotted Petitioner leaving the hotel. The officers arrested Petitioner and took him to the police station for questioning. Kester had already been arrested for carrying a concealed weapon. Detectives Martin and Roger Williamson flew to Las Vegas on December 13 to interrogate Kester and Petitioner. Kester gave a complete account of the events that led to Haas's death. Petitioner spoke briefly with the detectives before invoking his right to counsel.

Kester's statements to Detectives Martin and Williamson formed the basis of the State's prosecution of Petitioner. She said Petitioner continually bragged about a gambling system he had devised to beat the Las Vegas casinos, but neither Petitioner nor Kester had money with which to gamble. Petitioner earned some money selling t-shirts, jewelry, and knickknacks at swap meets. His only other income came from using fake identities to bilk the government of benefits. Petitioner learned that Haas had recently received money from an insurance settlement. He and Kester

visited Haas at his house near Cordes Lakes late in November 1994. Kester said that Petitioner convinced Haas to go gambling with them. On November 30, 1994, Petitioner, Kester, and Haas left for Laughlin, Nevada, in Petitioner's van.

The three stayed in the same hotel room in Laughlin. After the first night of gambling, Petitioner claimed to have "won big." Haas agreed to loan Petitioner about $100 of his settlement money so that Petitioner could further utilize his gambling system. Petitioner's system proved unsuccessful and he lost all of the money Haas had given him. Petitioner again told Haas that he had won big, but claimed that someone had stolen his winnings. Kester asked Petitioner what they were going to do now that they were out of money. Petitioner said he was going to rob Haas. When Kester asked how Petitioner was going to get away with robbing someone he knew, Petitioner replied, "I guess I'll just have to kill him."

The three left Laughlin to return to Arizona on December 2, 1994. On the road, all three consumed alcohol, especially Haas. Petitioner and Haas argued over how Petitioner was going to repay Haas. The van made several stops for bathroom breaks and to purchase snacks. At one of these stops, Petitioner took a gun that he stored under the seat of the van and put it in his pants. Petitioner asked Kester if she was "going to be all right with this." Kester said she wanted Petitioner to warn her before he killed Haas.

Petitioner traveled on a series of back roads that he claimed would be a shortcut to Haas's house. Eventually, he stopped the van near Camp Wood Road

in Yavapai County. At this stop, Kester said Haas exited the van and began urinating behind it. Kester started to climb out of the van as well, but Petitioner motioned to her with the gun and pushed her back into the vehicle. The van had windows in the rear and on each side through which Kester viewed what occurred next. Petitioner walked quietly up to Haas from behind while he was urinating and shot him behind the ear at point-blank range. He dragged the body off the side of the road to the bushes where it was eventually found, then returned to the car carrying Haas's wallet, watch, and jewelry.

Petitioner and Kester began to drive away in the van when Petitioner realized that he had forgotten to retrieve Haas's house keys. He turned the van around and returned to the murder scene. Kester and Petitioner both looked for the body. Kester spotted it and then returned to the van. Petitioner returned to the van, too, and asked for the gun, saying that Haas did not appear to be dead. Kester said Petitioner approached Haas's body and that she heard a second shot.

Petitioner and Kester then drove to Haas's home. Petitioner entered the home and removed several guns, a camera, and other items of personal property. He attempted unsuccessfully to find Haas's PIN number in order to access Haas's bank accounts. Petitioner and Kester sold Haas's guns and jewelry at pawn shops and flea markets over the course of the next week, usually under the aliases of David Flynn and Sharon Hughes. They then traveled to Laughlin where Petitioner used the proceeds from selling Haas's property to test his

gambling system again and to pay for a room at the Pioneer Hotel. Kester approached the Pioneer Hotel security guard and reported the shooting.

On December 29, 1994, a grand jury indicted Petitioner and Kester on several charges, including premeditated first degree murder and felony first degree murder. In February 1995, the State filed a notice that it would seek the death penalty against both Petitioner and Kester. In September 1995, Kester entered into a plea agreement with the State. In exchange for her truthful testimony, the original charges would be dropped and Kester would be charged with several lesser counts including facilitation to commit first degree murder.

Petitioner was tried in March 1997. His defense centered on the claim that Kester alone had killed Haas and was now framing Petitioner for the murder. The State presented evidence that corroborated Kester's testimony and discredited Petitioner's testimony. The jury convicted Petitioner of all charges, finding him guilty of first degree murder under both premeditated and felony murder theories.

At sentencing, the trial judge, Yavapai County Superior Court Judge William T. Kiger, found two aggravating factors: that Petitioner had previously been convicted of a serious offense, pursuant to A.R.S. § 13-703(F)(2), and that the murder was committed for pecuniary gain under § 13-703(F)(5). Dkt. 36, Ex. A. Judge Kiger found that Petitioner had failed to establish any statutory mitigating factors and had proved only one nonstatutory mitigator. *Id.* After

weighing the aggravating and mitigating factors, the judge sentenced Petitioner to death. *Id.*

The Arizona Supreme Court affirmed the convictions and sentences. *Kayer*, 194 Ariz. 423, 984 P.2d 31. Petitioner filed a petition for postconviction relief ("PCR") with the trial court.[3] PCR Pet., filed 6/6/05. Judge Kiger dismissed a number of claims as precluded and, following an evidentiary hearing on Petitioner's claims of ineffective assistance of counsel, denied the PCR petition. Dkt. 36, Exs. B, C. Petitioner filed a petition for review ("PR"), PR doc. 9, which the Arizona Supreme Court denied.

APPLICABLE LAW

Because it was filed after April 24, 1996, this case is governed by the Antiterrorism and Effective Death Penalty Act of 1996, 28 U.S.C. § 2254 (AEDPA). *Lindh v. Murphy*, 521 U.S. 320, 336 (1997); *see also Woodford v. Garceau*, 538 U.S. 202, 210 (2003).

PRINCIPLES OF EXHAUSTION AND PROCEDURAL DEFAULT

Under the AEDPA, a writ of habeas corpus cannot be granted unless it appears that the petitioner has exhausted all available state court remedies. 28 U.S.C. § 2254(b)(1); *see Coleman v. Thompson*, 501 U.S. 722, 731 (1991); *Rose v. Lundy*, 455 U.S. 509 (1982). To exhaust state remedies, the petitioner must "fairly

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[3] An earlier PCR notice had been vacated when initial PCR counsel failed to file a timely petition (Case No. CR-02-0048-PC). Counsel withdrew, new counsel were appointed, and a new PCR notice was filed (Case No. CR-07-0163-PC).

present" his claims to the state's highest court in a procedurally appropriate manner. *O'Sullivan v. Boerckel*, 526 U.S. 838, 848 (1999).

A claim is "fairly presented" if the petitioner has described the operative facts and the federal legal theory on which his claim is based so that the state courts have a fair opportunity to apply controlling legal principles to the facts bearing upon his constitutional claim. *Anderson v. Harless*, 459 U.S. 4, 6 (1982); *Picard v. Connor*, 404 U.S. 270, 277-78 (1971). Unless the petitioner clearly alerts the state court that he is alleging a specific federal constitutional violation, he has not fairly presented the claim. *See Casey v. Moore*, 386 F.3d 896, 913 (9th Cir. 2004). A petitioner must make the federal basis of a claim explicit either by citing specific provisions of federal law or federal case law, even if the federal basis of a claim is "self-evident," *Gatlin v. Madding*, 189 F.3d 882, 888 (9th Cir. 1999), or by citing state cases that explicitly analyze the same federal constitutional claim, *Peterson v. Lampert*, 319 F.3d 1153, 1158 (9th Cir. 2003) (en banc).

In Arizona, there are two primary procedurally appropriate avenues for petitioners to exhaust federal constitutional claims: direct appeal and PCR proceedings. Rule 32 of the Arizona Rules of Criminal Procedure governs PCR proceedings and provides that a petitioner is precluded from relief on any claim that could have been raised on appeal or in a prior PCR petition. Ariz. R. Crim. P. 32.2(a)(3). The preclusive effect of Rule 32.2(a) may be avoided only if a claim falls within certain exceptions (subsections (d) through (h) of Rule 32.1) and the petitioner can justify why the

claim was omitted from a prior petition or not presented in a timely manner. *See* Ariz. R. Crim. P. 32.1(d)-(h), 32.2(b), 32.4(a).

A habeas petitioner's claims may be precluded from federal review in two ways. First, a claim may be procedurally defaulted in federal court if it was actually raised in state court but found by that court to be defaulted on state procedural grounds. *Coleman*, 501 U.S. at 729-30. Second, a claim may be procedurally defaulted if the petitioner failed to present it in state court and "the court to which the petitioner would be required to present his claims in order to meet the exhaustion requirement would now find the claims procedurally barred." *Id.* at 735 n.1; *see also Ortiz v. Stewart*, 149 F.3d 923, 931 (9th Cir. 1998) (district court must consider whether the claim could be pursued by any presently available state remedy).

Therefore, in the present case, if there are claims which have not been raised previously in state court, the Court must determine whether Petitioner has state remedies currently available to him pursuant to Rule 32. *See Ortiz*, 149 F.3d at 931 (district court must consider whether the claim could be pursued by any presently available state remedy). If no remedies are currently available, petitioner's claims are "technically" exhausted but procedurally defaulted. *Coleman*, 501 U.S. at 732, 735 n.1.

In addition, if there are claims that were fairly presented in state court but found defaulted on state procedural grounds, such claims also will be found procedurally defaulted in federal court so long as the state procedural bar was independent of federal law

and adequate to warrant preclusion of federal review. *See Harris v. Reed*, 489 U.S. 255, 262 (1989). It is well established that Arizona's preclusion rule is independent of federal law, *see Stewart v. Smith*, 536 U.S. 856, 860 (2002), and the Ninth Circuit has repeatedly determined that Arizona regularly and consistently applies its procedural default rules such that they are an adequate bar to federal review of a claim. *See Ortiz*, 149 F.3d at 932 (Rule 32.2(a)(3) regularly followed and adequate); *Poland v. Stewart*, 117 F.3d 1094, 1106 (9th Cir. 1997) (same); *Martinez-Villareal v. Lewis*, 80 F.3d 1301, 1306 (9th Cir. 1996) (previous version of Arizona's preclusion rules "adequate").

Nonetheless, because the doctrine of procedural default is based on comity, not jurisdiction, federal courts retain the power to consider the merits of procedurally defaulted claims. *Reed v. Ross*, 468 U.S. 1, 9 (1984). As a general matter, however, the Court will not review the merits of procedurally defaulted claims unless a petitioner demonstrates legitimate cause for the failure to properly exhaust in state court and prejudice from the alleged constitutional violation, or shows that a fundamental miscarriage of justice would result if the claim were not heard on the merits in federal court. *Coleman*, 501 U.S. at 750.

Ordinarily, "cause" to excuse a default exists if a petitioner can demonstrate that "some objective factor external to the defense impeded counsel's efforts to comply with the State's procedural rule." *Id.* at 753. Objective factors which constitute cause include interference by officials that makes compliance with

the state's procedural rule impracticable, a showing that the factual or legal basis for a claim was not reasonably available to counsel, and constitutionally ineffective assistance of counsel. *Murray v. Carrier*, 477 U.S. 478, 488 (1986); *King v. LaMarque*, 455 F.3d 1040, 1045 (9th Cir. 2006). "Prejudice" is actual harm resulting from the alleged constitutional error or violation. *Vickers v. Stewart*, 144 F.3d 613, 617 (9th Cir. 1998). To establish prejudice resulting from a procedural default, a habeas petitioner bears the burden of showing not merely that the errors at his trial constituted a possibility of prejudice, but that they worked to his actual and substantial disadvantage, infecting his entire trial with errors of constitutional dimension. *United States v. Frady*, 456 U.S. 152, 170 (1982).

STANDARD FOR HABEAS RELIEF

For properly exhausted claims, the AEDPA established a "substantially higher threshold for habeas relief" with the "acknowledged purpose of 'reducing delays in the execution of state and federal criminal sentences.'" *Schriro v. Landrigan*, 550 U.S. 465, 475 (2007) (quoting *Woodford v. Garceau*, 538 U.S. 202, 206 (2003)). The AEDPA's "'highly deferential standard for evaluating state-court rulings' . . . demands that state-court decisions be given the benefit of the doubt." *Woodford v. Visciotti*, 537 U.S. 19, 24 (2002) (per curiam) (quoting *Lindh v. Murphy*, 521 U.S. 320, 333 n.7 (1997)).

Under the AEDPA, a petitioner is not entitled to habeas relief on any claim "adjudicated on the merits" by the state court unless that adjudication:

> (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 presented in the State court proceeding.

28 U.S.C. § 2254(d). The relevant state court decision is the last reasoned state decision regarding a claim. *Barker v. Fleming*, 423 F.3d 1085, 1091 (9th Cir. 2005) (citing *Ylst v. Nunnemaker*, 501 U.S. 797, 803-04 (1991)).

"The threshold question under AEDPA is whether [a petitioner] seeks to apply a rule of law that was clearly established at the time his state-court conviction became final." *Williams v. Taylor*, 529 U.S. 362, 390 (2000). Therefore, to assess a claim under subsection (d)(1), the Court must first identify the "clearly established Federal law," if any, that governs the sufficiency of the claims on habeas review. "Clearly established" federal law consists of the holdings of the Supreme Court at the time the petitioner's state court conviction became final. *Williams*, 529 U.S. at 365; *see Carey v. Musladin*, 549 U.S. 70, 76 (2006). Habeas relief cannot be granted if the Supreme Court has not "broken sufficient legal ground" on a constitutional principle advanced by a petitioner, even if lower federal courts have decided the issue. *Williams*, 529 U.S. at 381; *see Musladin*, 549 U.S. at 77. Nevertheless, while only Supreme Court authority is binding, circuit court precedent may be "persuasive" in determining what

law is clearly established and whether a state court applied that law unreasonably. *Clark v. Murphy*, 331 F.3d 1062, 1069 (9th Cir. 2003).

The Supreme Court has provided guidance in applying each prong of § 2254(d)(1). The Court has explained that a state court decision is "contrary to" the Supreme Court's clearly established precedents if the decision applies a rule that contradicts the governing law set forth in those precedents, thereby reaching a conclusion opposite to that reached by the Supreme Court on a matter of law, or if it confronts a set of facts that is materially indistinguishable from a decision of the Supreme Court but reaches a different result. *Williams*, 529 U.S. at 405-06; *see Early v. Packer,* 537 U.S. 3, 8 (2002) (per curiam). In characterizing the claims subject to analysis under the "contrary to" prong, the Court has observed that "a run-of-the-mill state-court decision applying the correct legal rule to the facts of the prisoner's case would not fit comfortably within § 2254(d)(1)'s 'contrary to' clause." *Williams*, 529 U.S. at 406.

Under the "unreasonable application" prong of § 2254(d)(1), a federal habeas court may grant relief where a state court "identifies the correct governing legal rule from [the Supreme] Court's cases but unreasonably applies it to the facts of the particular . . . case" or "unreasonably extends a legal principle from [Supreme Court] precedent to a new context where it should not apply or unreasonably refuses to extend that principle to a new context where it should apply." *Williams*, 529 U.S. at 407. For a federal court to find a state court's application of Supreme Court precedent

"unreasonable" under § 2254(d)(1), the petitioner must show that the state court's decision was not merely incorrect or erroneous, but "objectively unreasonable." *Id.* at 409; *Visciotti*, 537 U.S. at 25.

Under the standard set forth in § 2254(d)(2), habeas relief is available only if the state court decision was based on an unreasonable determination of the facts. *Miller-El v. Dretke*, 545 U.S. 231, 240 (2005) (*Miller-El II*). A state court decision "based on a factual determination will not be overturned on factual grounds unless objectively unreasonable in light of the evidence presented in the state-court proceeding." *Miller-El I*, 537 U.S. at 340; *see Taylor v. Maddox*, 366 F.3d 992, 999 (9th Cir. 2004). In considering a challenge under 2254(d)(2), state court factual determinations are presumed to be correct, and a petitioner bears the "burden of rebutting this presumption by clear and convincing evidence." 28 U.S.C. § 2254(e)(1); *Miller-El II*, 545 U.S. at 240. But only the state court's factual findings, not its ultimate decision, are subject to § 2254(e)(1)'s presumption of correctness. *Miller-El I*, 537 U.S. at 341-42.

DISCUSSION

PROCEDURAL ANALYSIS

Petitioner has raised 30 claims. Respondents contend that only five of the claims are properly exhausted. Dkt. 36 at 1. For the reasons set forth below, the Court finds that Claims 1(B)(1), 1(B)(2), 1(B)(3), 1(B)(5), 13-21, 24, and 26 are procedurally barred and will not be considered on the merits. The

Court will address procedural issues with respect to the remaining claims as necessary.

Claim 1

Petitioner raises five subclaims alleging ineffective assistance of counsel during the guilt and penalty phases of his trial. Dkt. 35 at 20. Respondents concede that subclaim 1(B)(4), alleging ineffective assistance at sentencing, is exhausted, but contend that the remaining subclaims were not exhausted in state court and are procedurally barred. Dkt. 36 at 25-26.

In subclaims 1(B)(1), 1(B)(2), and 1(B)(3), Petitioner alleges, respectively, that he was denied effective assistance of counsel because his attorneys failed to conduct an immediate and thorough investigation; his first lead counsel failed to seek second counsel in a timely manner and second counsel, when appointed, undertook little work on Petitioner's behalf; and neither of his lead attorneys was qualified to defend a capital case. In subclaim 1(B)(5), Petitioner alleges that he was denied effective assistance of counsel during death qualification of the jury.

In his PCR petition, Petitioner raised two claims of ineffective assistance of counsel, alleging that counsel failed to conduct an adequate mitigation investigation and that counsel performed ineffectively during voir dire. PCR Pet. at 32, 37. In his petition for review to the Arizona Supreme Court, Petitioner included only the claim that counsel's performance was ineffective with respect to mitigation. PR doc. 9. In neither filing did Petitioner raise a claim that his rights were violated by counsel's performance at the guilt stage of

trial as alleged in Claims 1(B)(1), 1(B)(2), or 1(B)(3). If Petitioner were to return to state court and attempt to exhaust these claims, the claims would be found waived and untimely under Rules 32.2(a)(3) and 32.4(a) of the Arizona Rules of Criminal Procedure because they do not fall within an exception to preclusion. *See* Ariz. R. Crim. P. 32.2(b); 32.1(d)-(h). Therefore, subclaims 1(B)(1), 1(B)(2), and 1(B)(3) are "technically" exhausted but procedurally defaulted because Petitioner no longer has an available state remedy. *Coleman,* 501 U.S. at 732, 735 n.1. Petitioner does not attempt to show cause and prejudice or a fundamental miscarriage of justice.

Claim 1(B)(5) is also procedurally defaulted. In Arizona, fair presentation requires that capital petitioners present their allegations not only to the PCR court but also to the Arizona Supreme Court upon denial of relief. *See O'Sullivan,* 526 U.S. at 848; *Swoopes v. Sublett,* 196 F.3d 1008 (9th Cir. 1999) (per curiam) (capital petitioners must seek review in Arizona Supreme Court to exhaust claims). In his petition for review, Petitioner did not include his claim regarding counsel's performance during voir dire. *See* PR doc. 9. Therefore, he did not fairly present the claim to the Arizona Supreme Court. Petitioner may not exhaust the claim now because he does not have an available state court remedy. Petitioner does not assert that cause and prejudice or a fundamental miscarriage of justice excuse the default of these subclaims. Therefore, subclaims 1(B)(1), 1(B)(2),1(B)(3), and 1(B)(5) are denied as procedurally barred.

Claims 13-21, 26

Petitioner raised these claims for the first time in his PCR petition. PCR Pet. at 3-9, 40-46. Judge Kiger denied them as "[p]recluded by Rule 32.2(a)(3)." Dkt. 36, Ex. B.

Rule 32.2(a)(3) constitutes a regularly followed and adequate state procedural bar. *See Ortiz*, 149 F.3d at 932. Petitioner nonetheless argues that the PCR ruling "was ambiguous and therefore insufficient to constitute a clear express invocation of a state procedural rule permitting preclusion." Dkt. 40 at 49. According to Petitioner, it is not clear whether the PCR court believed the claims should have been raised on direct appeal or in his prior PCR petition. *Id.* at 45-46. Petitioner cites no authority for the proposition that this alleged ambiguity renders the invocation of Rule 32.2(a)(3) inadequate as a procedural bar, and the Court is unconvinced. There is no ambiguity either in the PCR court's citation to Rule 32.2(a)(3) as the sole basis for finding the claims precluded or in the language of the Rule itself, which states that a claim is precluded if it was waived "at trial, on appeal, or in any previous collateral proceeding." Nothing in the rule requires the state court to specifically identify the proceeding in which the waiver occurred. Moreover, given that the first PCR notice was vacated before a petition was filed, there is no question that the PCR court's ruling referred to Petitioner's failure to raise the claims on direct appeal.

As cause for the default of Claims 13, 14, 16, 17, 19, and 20, Petitioner asserts ineffective assistance of appellate counsel. *See, e.g.*, Dkt. 40 at 39. Ineffective

assistance of counsel may constitute cause for failing properly to exhaust claims in state court and excuse procedural default. *Ortiz*, 149 F.3d at 932. To meet the "cause" requirement, however, the ineffective assistance must amount to an independent constitutional violation. *Id.*; *see also Coleman*, 501 U.S. at 755 ("We reiterate that counsel's ineffectiveness will constitute cause only if it is an independent constitutional violation."). As explained below with respect to Claim 22, Petitioner has failed to show that appellate counsel performed at a constitutionally ineffective level. Therefore, he cannot establish cause for the default of the claims. Claims 13-21 and 26 are denied as procedurally barred.

Claim 24

Petitioner alleges that the State improperly withheld exculpatory and impeachment evidence in violation of *Brady v. Maryland*. Dkt. 35 at 129. As Respondents note, Petitioner never presented this claim in state court. Dkt. 36 at 89. Because no state remedies remain, the claim is technically exhausted but procedurally defaulted. Petitioner does not allege cause and prejudice or a fundamental miscarriage of justice. Claim 24 is denied as procedurally barred.

MERITS ANALYSIS

Claim 1(B)(4):

Petitioner alleges that he was denied effective assistance of counsel at sentencing because his attorneys failed to conduct an immediate and thorough mitigation investigation. Dkt. 35 at 45.

Background

Pretrial, trial, and sentencing

Petitioner was indicted on December 29, 1994. On January 6, 1995, Linda Williamson was appointed to represent him. RT 1/6/95 at 3.[4] Williamson was under a contract with Yavapai County to represent indigent defendants and had been an attorney for nearly five years with significant experience in criminal law, although she had not tried a capital murder case. RT 3/22/06 at 7-8, 44.

Williamson asked James Bond, an experienced criminal attorney, to serve as second chair, with the intent that he would focus on mitigation and sentencing. RT 3/15/06 at 25, 47; RT 3/22/06 at 45-46. When Bond agreed to serve as second-chair, he understood that the trial would not occur for a long time; his involvement in the case was minimal. RT 3/22/06 at 48. Although Williamson never focused on the sentencing phase of trial, she spoke with Petitioner about mitigation in a general way. RT 3/22/06 at 32.

Williamson filed a number of pretrial motions, including one requesting a Rule 11 pre-screening psychiatric examination of Petitioner. *Id*. at 50; ROA 30. The court appointed Dr. Daniel Barack Wasserman

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[4] "RT" refers to the court reporter's transcript. "ROA" refers to the record on appeal from trial and sentencing prepared for Petitioner's direct appeal to the Arizona Supreme Court (Case. No. CR-97-0280-AP). "ME" refers to the minute entries of the trial court. Certified copies of the trial and post-conviction records were provided to this Court by the Arizona Supreme Court on May 12, 2009. Dkt. 50.

to conduct the examination. *Id*. at 53-54. Dr. Wasserman concluded that Petitioner did not suffer from an identifiable mental illness or defect, although some test results were suggestive of a "paranoid or depressive disorder." PCR pet., Ex. 6. Based on Dr. Wasserman's evaluation, the trial court found Petitioner competent to stand trial and no further evaluations took place. RT 3/22/06 at 57.

After investigating leads and interviewing witnesses, Williamson concluded that the case would be difficult to win. RT 3/22/06 at 46; RT 3/16/06 at 98. She believed that delay was her best option, hoping that Kester, the State's key witness, who was pregnant with Petitioner's child, would begin using drugs again, abscond, or otherwise become unavailable to testify. RT 3/22/06 at 47-48.

In June 1996, Petitioner sought to remove Williamson and replace her with Bond as lead counsel. The State wanted the case to proceed to trial, the trial court wanted to schedule a firm July trial date, and Bond was adamant that he could not be appointed lead counsel due to his heavy case load. RT 6/19/96 at 1-20; RT 3/30/06 at 122. Two days later, after further discussion, the court allowed Williamson to withdraw, directed Bond to remain as second-chair, and appointed David Stoller, the next contract attorney in line for capital cases, as lead counsel. RT 6/21/96 at 9.

At the time of his appointment, Stoller had been practicing criminal law for nearly 30 years, both as a prosecutor and a defense attorney. RT 3/15/06 at 57-60. As a prosecutor, he had taken 50 felony cases to jury trial, including one capital case. *Id*. at 58.

In August, the trial court allowed Bond to withdraw. RT 8/20/96 at 3. Petitioner subsequently requested that Marc Victor be appointed to replace Bond. RT 3/ 15/06 at 90; RT 3/16/06 at 38. Victor had represented Petitioner on another criminal matter. *Id*. He was appointed as second counsel. At the time, he had about two years of experience as a lawyer.

In January 1997, defense counsel filed a number of motions, including an *ex parte* application for funds to further investigate the crime and to conduct a mitigation investigation. ROA 107A. At the time of Petitioner's trial, requests for certain defense expenses were required to be made to the Yavapai County presiding judge. *See* RT 3/15/06 at 113. Judge Weaver, the presiding judge, granted additional funds for the crime investigation but deferred ruling on the request for funds relating to mitigation. ME 2/24/97; RT 2/24/97 at 3-8. Judge Weaver stated that he would wait to see if there was a conviction before he would authorize funds for a mitigation investigation. RT 3/15/06 at 115.

The trial began on March 5, 1997. The jury returned its verdict on March 26. The court scheduled the aggravation/mitigation hearing for May 27, with a sentencing date of June 17, 1997. ME 3/26/97.

On April 8, 1997, at Stoller's request, Judge Weaver authorized $6,000 for mitigation specialist Mary Durand to begin an investigation. ME 4/8/97. The order provided that the amount was not to be exceeded without prior authorization. *Id*. Counsel subsequently argued that Durand needed additional time to conduct her mitigation investigation; the court continued the

aggravation/mitigation hearing to June 24, and set sentencing for July 15, 1997. RT 5/16/97 at 13-14.

The court held a status conference on June 6. Defense counsel Victor informed the court that Durand had met twice with Petitioner, but that she needed an additional three to six months to complete her investigation. RT 6/6/97 at 10. Victor also told the court that Petitioner objected to such a continuance, explaining that Petitioner "understands exactly what is going on. He understands the nature of putting the mitigation case on. He understands that that would be to some extent compromised, if myself and Mr. Stoller are not able to push back the date." *Id.* at 11. Next, lead counsel Stoller, who wanted to make a "good record" of the issue, *id.* at 14, indicated that Petitioner understood Durand's position that potentially significant areas of mitigation needed to be explored.[5] *Id.* at 12. Petitioner, however, "simply didn't want to wait in the county jail and have that kind of diet and not have access to things to read and television, and things of that nature." *Id.* Based in part upon this "life-style choice," and against Stoller's "best advice" and "strong recommendation," *id.* at 13, Petitioner had informed counsel that he would not waive time to allow Durand to complete her investigation. *Id.* at 12.

The court next addressed Petitioner directly. Petitioner detailed his reasoning as follows:

> In speaking with Mary Durand, I had no idea what a mitigation specialist was before I sat

[5] Stoller appeared at the hearing telephonically. *See* RT 6/6/97 at 8.

> down and talked to her. Didn't know what they looked for, didn't know what she was looking for in this case with me or with my life. We talked as has been indicated on two separate occasions for several hours. There isn't any major areas of investigation that are open or available to her that her and I have discussed [sic].
>
> These areas that Mr. Stoller brings out that he is calling substantial evidence, from what I understand in my conversation with Mary Durand, she is talking about a fetal alcohol syndrome that possibly existed. She hasn't had the opportunity to investigate it, and some minor areas and details in my life that I personally can't see how they would relate to mitigation in this case.
>
> So it's with reservations when Mr. Stoller talks about vital areas and evidence that can be used in mitigation. It's a personal difference, and certainly of opinion [sic]. I'm saying I don't see anything here of substantial value. Obviously, Mr. Stoller is saying that he does.

Id. at 15-16. Petitioner also explained that Durand had told him that she would testify at the aggravation/mitigation hearing and do her best even if she was unable to complete her investigation. *Id.* at 16. Petitioner then continued to detail his rationale for objecting to a further continuance:

> I don't think that – I don't think that some people understand exactly where I'm at. It certainly hasn't been presented here, and I don't

> want to turn this into a mitigation hearing, but I feel that there's a few things that need to be said today in view of where we're at.
>
> One of them is that I don't have a death wish. I'm not trying to manipulate the Court to such a position that they have no alternative but to decide to give me the death penalty. I don't feel the lack of Mary Durand's mitigation is going to be a major factor in the decision.

Id. at 17.

Judge Kiger, explaining that he would look favorably on a request for an additional 30 days "or something like that," though not a continuance of 90 or 180 days, directly asked Petitioner if he wished to continue the June 24 aggravation/mitigation hearing. *Id.* at 20-21. Petitioner responded that he understood the court's position but was "not in favor of any more continuances." *Id.* at 21. Petitioner explained, "Believe me, if I thought that – that Miss Durand had valid evidence that should be presented to this Court, I'd be scratching and clawing and asking for 180 days." *Id.*

Citing Petitioner's waiver of a continuance and its effect on their ability to represent him, counsel moved to withdraw. *Id.* at 25. The court denied the motion. *Id.* at 25-26. At the end of the hearing, at defense counsel's request, the court rescheduled the aggravation/ mitigation hearing for July 8 while maintaining the sentencing date of July 15. *Id.* at 30.

Counsel filed a sentencing memorandum on Petitioner's behalf. ROA 166. In arguing against a death sentence, counsel offered one statutory

mitigating factor and several nonstatutory circumstances: intoxication causing an inability to appreciate the wrongfulness of one's conduct under A.R.S. § 13-703(G)(1); intoxication not rising to the level of the (G)(1) factor; Petitioner's military record; the disparity in sentences between Petitioner and Kester; Petitioner's poor physical health; his intelligence and ability to contribute to society; and his devotion to his mentally disabled son. *Id.* at 12-17.

At the July 8 aggravating/mitigation hearing, defense counsel called four witnesses: a corrections officer who testified briefly about Petitioner's non-disruptive conduct and his work with other inmates in the law library; Petitioner's mother and sister; and Mary Durand. Petitioner and his son also made statements to the court.

Sherry Rottau, Petitioner's mother, testified that his father, an aeronautical engineer, died when Petitioner was in kindergarten. RT 7/8/97 at 12. Rottau remarried when Petitioner was in high school. *Id.* at 13. When Petitioner was 15 the family relocated to Arkansas for a year before moving back to California where he graduated from high school. *Id.* at 14. In school Petitioner earned Bs and Cs and some As. *Id.* at 15. He was an "ambitious" child who earned money by mowing lawns and shining shoes. *Id.* at 16. Rottau testified that Petitioner was sick a lot as a child with colds, the flu, and earaches; he was also hyperactive and had trouble sleeping. *Id.* at 16-17.

After high school Petitioner joined the Navy and got married. *Id.* at 21. He began exhibiting manic depressive behavior following his military service. *Id.*

at 22-23. He would work for 24 hours straight and then sleep for a long period of time; he would start projects only to abandon them and become depressed. *Id.* Rottau was concerned about these cycles of happiness and depression. *Id.* at 24.

Rottau also testified that Petitioner had a history of heart problems. *Id.* at 25-26. Finally, she testified about the close relationship between Petitioner and his son, Tayo. *Id.* at 29-31.

Jean Hopson, Petitioner's older sister, testified that his father had drinking and gambling problems and that Petitioner suffered difficulties in those areas as well. *Id.* at 34-37. Hopson described Petitioner's mental state as consisting of highs and lows and testified that he had been diagnosed as bipolar, had experienced a nervous breakdown, and been treated with lithium. *Id.* at 36, 38, 41-43. She also described a loving relationship between Petitioner and Tayo. *Id.* at 40.

Mary Durand testified about the role of a mitigation specialist, which is to develop a social history of the defendant "in order to determine family dynamics, . . . mental, medical, emotional, familial, nutritional, and social factors, and behaviors that the defendant has been involved in and exposed to throughout the course of his life." *Id.* at 46-47. Durand explained that a mitigation specialist investigates "social and educational, medical, marital, sexual, any kind of issue that presents itself that gives us an idea of who the client is that we're dealing with, specifically to look at impairment." *Id.* at 47. She testified that the average number of hours needed to complete a mitigation investigation is "ideally" between 2,500 and 5,000, but

as a practical matter "between 1,000 and 1,500 hours . . . begins to approach a competent test and reliability." *Id.* at 50. According to Durand, a mitigation specialist must "attempt to get every piece of information you can," including medical and mental health records, military records, school records, and court documents. *Id.* at 49, 51.

Durand testified that she met with Petitioner twice for a total of six or seven hours. *Id.* at 52. She also met with his mother twice, his sister once, his uncle twice, and his son once. *Id.* at 53. She reviewed the presentence reports from Petitioner's criminal cases. *Id.* Durand did not obtain any of Petitioner's psychiatric, medical, school, or military records because Petitioner was "not interested in having the world know about his life."[6] *Id.* at 54. Concerning Petitioner's reluctance to allow a full-scale mitigation investigation, Durand explained:

> We talked for an extraordinarily long period of time, just about the issue of allowing me the time I needed to do an appropriate, complete and reliable mitigation on his behalf. He had very, very strong feelings where – the fact that he had been in jail two years and . . . five months at that time, and was not willing to wait another year.
>
> I was very direct with him, and I told him I couldn't do it in three weeks or six weeks or

[6] Petitioner did sign a waiver for the release of his military records, but at the time of the hearing Durand had not yet received them. RT 7/8/97 at 56.

> eight weeks, or three months, and he is very concerned about his emotional health, his physical health, and catching a new case, if you will, being in this particular environment for that period of time.
>
> He was very concerned about putting his family through any emotional, public hearing. He was concerned about his son. His mother is 76 and not in good health and has serious memory lapses, and he was concerned that he would add to her already fragile medical state, and he just didn't want to put anybody through this process. He felt like they've been through enough, and he didn't want to add to that.

Id. at 56-57.

Durand then testified that if Petitioner had been willing to allow additional time she would have investigated several areas of potential mitigation, foremost among them the issue of Petitioner's mental health. *Id.* at 59. Durand stated that "there's definitely very serious indications of serious psychiatric difficulties," including a diagnosis of bipolar disorder and an incident in which he was hospitalized with "suicide ideation." *Id.* at 59-60. Durand also testified, citing reports of alcohol abuse in Petitioner's family background, that she would have investigated the issue of alcoholism and poly-substance abuse. *Id.* at 60. Finally, she would have further investigated Petitioner's physical health based on reports that his mother experienced a difficult pregnancy and labor and that Petitioner was a sickly child. *Id.* at 61-62. Durand indicated that Petitioner's "educational record does

appear to be good in that there are areas in which he clearly is quite brilliant and very, very well-spoken." *Id*. at 62.

Durand reiterated that Petitioner did "not want to talk about" the proposed areas of mitigation. *Id*. at 62. She concluded that, in addition to Petitioner's unwillingness to spend additional time in the county jail and his reluctance to expose his mother and son to further legal proceedings, he did not wish to pursue a mitigation investigation due to his "pride," "dignity," and desire not to "relive" his past. *Id*. at 63.

At the conclusion of the aggravation/mitigation hearing, after listening to Durand's testimony, the trial court engaged in the following colloquy with Petitioner:

> Court: Change your mind about what you told me last time as far as go ahead with sentencing on the 15th of July? Do you want more time? By asking you the question, I'm basically saying if you tell me right now that you've considered it, and you want more time, I'm prepared to give you more time.
>
> But I think you're an intelligent individual. You know what she's just testified to. I believe strongly that an individual ought to have the ability to make some decisions on their own, if they have gotten all the information and have the requisite intelligence.

> You got the information, you got the intelligence, you've talked to your counsel, you've heard Ms. Durand. Your call.
>
> Petitioner: I appreciate your patience and your concern in this, and I have not changed my feeling. Thank you.

Id. at 71.

In addition to the testimony from the aggravation/mitigation hearing, Judge Kiger, in sentencing Petitioner, reviewed information contained in the presentence report. PCR Pet., Ex. 26. The report discussed Petitioner's mental health, describing an incident when "he became extremely depressed, had near suicide attempts [and] in September of 1989, he had been diagnosed as Manic Depressive at the Phoenix VA Hospital"; it further indicated that Petitioner had been prescribed lithium. *Id.* at 7. The report also noted Petitioner's substance abuse history, including the fact that he was a "heavy abuser of alcohol." *Id.*

The trial court also reviewed, along with Dr. Wasserman's Rule 11 report, the results of a mental status examination prepared in 1990 by Dr. Jeffrey Penney, a psychiatrist from Prescott. RT 7/15/98 at 38; *see* Dkt. 52, Attach. Dr. Penney reported that Petitioner described experiencing symptoms of mania and depression with "intermittent suicidal ideation"; Petitioner indicated that he was presently taking lithium and an anti-depressant. Dkt. 52, Attach. at 1. Dr. Penney noted that drug and alcohol use were often

associated with the manic episodes described by Petitioner. *Id.* Petitioner reported a "history of heavy alcohol usage throughout his life" and informed Dr. Penney that he currently drank "3 six-packs a week" and would drink more if he could afford to do so. *Id.* Dr. Penney observed that Petitioner experienced "notable" gaps in his memory and that his "[i]nsight seemed mildly impaired and judgment impaired based on his continued alcohol abuse with depression and with symptoms consistent with some alcohol-induced memory dysfunction." *Id.* at 2. Dr. Penney also reported that Petitioner carried a cyanide pill with him at all times, including during the evaluation, in the event he wanted to commit suicide. *Id.* Dr. Penney diagnosed Petitioner with amphetamine, marijuana, and alcohol abuse, as well as depression probably secondary to alcohol intake. *Id.* at 3. Because Petitioner would not authorize the release of his medical records, Dr. Penny reached a "rule out"diagnosis of Bipolar Affective Disorder. *Id.*

At the sentencing hearing on July 15, the court engaged in another colloquy with Petitioner, explaining that "if you told me you wanted more time, as your attorneys were requesting, as Miss Durand had requested, to find additional information and evidence to present to me, . . . I would certainly grant it." RT 7/15/97 at 3. Judge Kiger next outlined the applicable provisions of the death penalty statute and indicated that he was prepared to find two aggravating circumstances. *Id.* at 4. The court then asked Petitioner if, with that information in mind, he wished to proceed with sentencing. *Id.* at 5. While Petitioner consulted with counsel, the court elaborated:

> This is a very, very important decision, and I want Mr. Kayer to make it based upon discussion with counsel and reflection, and I want him to have as much information as possible. I hope he understands what I have just reviewed with him, and if there is any question about that, I'd be happy to respond.
>
> Before I officially get into the sentencing of this matter, if that's – I will tell you this, if Mr. Kayer, after review, still wants to go ahead with sentencing today, I'm ready to proceed. On the other hand, if Mr. Kayer believes that he needs to ask for additional time, I am willing to do it that way.

Id. at 6.

The court took a recess to allow further consultation. *Id.* at 6. After the recess Petitioner indicated that he understood the information provided by the court, but that he wished to proceed with sentencing. *Id.* at 6-7.

In his special verdict, Judge Kiger found that "the intentional and knowing decisions and actions of the defendant have blocked the attempts by his trial counsels [sic] to fully pursue mitigation pursuant to 13-703(G)(1) and the court is unable to find that any such factor has been proven by a preponderance of the evidence." Dkt. 36, Ex. A at 2. The court found that no statutory mitigating circumstances existed. *Id.* at 2-3. The court then "considered" Petitioner's proffered nonstatutory mitigating circumstances, finding that Petitioner had proved that he was "an important figure

in the life of his son." *Id.* at 3. The court found that the remaining nonstatutory circumstances had not been proved, explaining, in relevant part:

> 2. The defendant was apparently diagnosed and treated for a time for a mental condition referred to as a bipolar or manic/depressive problem. The court can speculate as to a possible relationship between such a condition and the murder; the court cannot find a relationship by a preponderance of the evidence.
>
> . . . .
>
> 4. The defendant has apparently had some level of addiction to both gambling and alcohol. There is no dispute that the defendant consumed several beers on the trip from Laughlin to the place where the murder took place. As with #2 above, there may be some possible connection between such a condition and the murder such that it effected [sic] the defendant's ability or capacity to conform his conduct with the requirements of the law. It would be at best speculation by the court and is not found by a preponderance of the evidence.
>
> 5. The Rule 11 evaluation conducted by Dr. Wasserman in 1995 found some unusual results in the MMPI and some possible problems with paranoia. As with #2 above, there may be some possible connection between such a condition and the murder

> such that it effected [sic] the defendant's ability or capacity to conform his conduct with the requirements of the law. It would be at best speculation by the court and is not found by a preponderance of the evidence.
>
> 6. There have been references to the defendant having suicide thoughts. Apparently at one time, the defendant carried a cyanide pill to the office of a doctor who was performing a mental health evaluation. His explanation was that he would use the pill if he decided it was needed. The court has considered the possibility that the defendant has determined to block the attempts by his attorneys to present mitigation as a way of now bringing about his death. This too is speculation by the court and does not rise to the point of proof by a preponderance of the evidence.

Id. at 3-4.

Judge Kiger concluded that "[s]ince these factors have not been proven, the court cannot find these factors applicable to the sentencing structure called for in 13-703. These factors as considered have essentially no weight to balance against the aggravating factors." *Id.* at 5.

On appeal, the Arizona Supreme Court agreed with the trial court's assessment of the mitigating evidence:

> Defendant's alleged mental impairment on the day he murdered Haas, whether attributed to historical substance abuse or a mental

> disorder, also must be considered as a nonstatutory mitigating circumstance.
>
> . . . .
>
> But the record shows that the existence of impairment, from any source, is at best speculative. Further, in addition to offering equivocal evidence of mental impairment, defendant offered no evidence to show the requisite causal nexus that mental impairment affected his judgment or his actions at the time of the murder. Thus, we conclude that the trial court ruled correctly that impairment was not established as a nonstatutory mitigating factor by a preponderance of the evidence.

Kayer, 194 Ariz. at 438, 984 P.2d at 46 (citations omitted).

Postconviction proceedings

In March 2006, Judge Kiger held an evidentiary hearing on Petitioner's ineffective assistance claims. The hearing lasted nine days. Petitioner called 17 witnesses, including each of the attorneys who had represented him at trial, along with Ms. Durand and his current mitigation specialist. He also presented expert testimony from a clinical neuropsychologist, a forensic psychiatrist, and a physician specializing in addiction medicine. Finally, several family members and a friend testified about Petitioner's family

background, problems with alcohol abuse and gambling, and mental health issues.[7]

Lead counsel Stoller testified that the defense plan was to obtain mitigating information and present a full mitigation case, including mental health evidence, through Durand's investigation; she would gather the information and submit it to the appropriate experts. RT 3/15/06 at 148-49. Petitioner, however, did not want the continuance necessary to allow such an investigation, nor did he want to explore issues concerning his metal health because, as Durand informed Stoller, "he felt they would cause him to be viewed as weak and vacillating in prison." RT 3/16/06 at 76. Petitioner also "thought it wouldn't make any difference." *Id.* at 100. In addition, he believed that his "living conditions" would improve in prison because he would have "smoking and television privileges." *Id.* at 103. Thus, Stoller testified, the defense team was prevented from developing more mitigation by Petitioner's waiver of a continuance. *Id.* at 78. Nevertheless, Stoller went to Phoenix to visit Petitioner's mother, son, and sister, and later had contact with other family members. *Id.* at 91, 99. He asked Petitioner's mother for a history of Petitioner's life. *Id.* at 165. Later, Stoller discussed mitigation with Petitioner's mother and explained that "bad is good" for purposes of mitigation. *Id.* at 173-74.

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[7] In addition, Larry Hammond, a local attorney with capital case experience, testified as an expert on the *Strickland* standard. In his opinion, Petitioner's trial counsel performed at a constitutionally ineffective level. *See, e.g.*, RT 3/23/06 at 27, 93, 96-97; PCR Pet., Ex. 32.

Second-chair Victor testified that he and Stoller had intended to pursue Petitioner's mental health as mitigating evidence. RT 3/22/06 at 49. Victor tried to "disabuse" Petitioner of the notion that to pursue mitigation was tantamount to admitting guilt. *Id.* at 59-60. Victor testified that he spoke in "great detail" with Petitioner until he was assured that Petitioner understood the nature and purpose of mitigation evidence. *Id* at 79. Petitioner explained to Victor why he did not wish to delay sentencing in order to pursue mitigation: first, he was very close to his mother and son and thus "he was very adverse [sic] to having things about his past . . . brought out in front of them, and so he was very adverse [sic] to having them exposed to that information and he was not willing to cooperate with mitigation." *Id.* at 88. Petitioner also cited the fact that he had been in the county jail for an extended period and he looked forward to the benefits of prison, primarily television and smoking privileges; he "perceived that whatever time he had to spend in the Department of Corrections would be more pleasurable than the time he had been spending in the Yavapai County Jail." *Id.* Victor argued "as persuasively as I could, on many occasions" to convince Petitioner to allow an investigation. *Id.* at 90. He was also hopeful that Durand would be able to change Petitioner's mind by outlining the scope of a full mitigation investigation and explaining that in his case persuasive mitigation information existed. *Id.* at 91. Victor adamantly opposed Petitioner's decision to waive a continuance, but "believe[d] Mr. Kayer understood things and had a rational position and didn't want to put his family through mitigation." *Id.* at 92.

Mary Durand testified that Petitioner was motivated to waive a continuance based on fear for his emotional and physical well being in the county jail. According to Durand, he "wanted desperately to get out." RT 3/29/06 at 72, 73. Nevertheless, despite his reluctance to pursue mitigation, Petitioner provided contact information for family members and executed some releases for documentary evidence. *Id.* at 76. Durand explained the purpose of mitigation to Petitioner, who became upset that counsel had waited so long to begin an investigation. *Id.* at 79-80. Notwithstanding their conversations, Durand felt Petitioner had only a "minimal understanding of [the] scope and breadth and depth of mitigation." *Id.* at 122.

Keith Rohman, Petitioner's post-conviction mitigation specialist, testified that a mitigation investigation should begin immediately, in part because it is necessary to "educate the client" and overcome his initial reluctance to present mitigating evidence. Rohman testified that Petitioner's decision not to "cooperate with the mitigation investigation" was based on several factors: "he did not have a clear understanding of mitigation," about which his lawyers had failed to educate him; "he was very concerned about the situation at the Yavapai Jail"; "he was frustrated with his attorneys for having waited so long"; he believed that the presentation of mitigation was an admission of guilt; and he thought that offering mitigating evidence would be futile. *Id.* at 61-64. Rohman testified that there were four areas of mitigation that trial counsel omitted or left insufficiently developed: Petitioner's bipolar disorder, alcoholism, pathological gambling, and his transient

living situation as a child. *Id.* at 68-78. Rohman then outlined his findings with respect to each of these areas. *Id.* Finally, Rohman testified about the violent, overcrowded conditions of the Yavapai County Jail. *Id.* at 81-88. He also noted that the jail failed to provide Petitioner with the special diet recommended for his heart condition. *Id.* at 89.

Petitioner presented testimony from a number of experts. Dr. Anne Marie Herring, a clinical neuropsychologist, testified that Petitioner had an average IQ (102) and that, with one exception, the results of the tests she administered were normal. RT 3/17/06 at 29; *see* PCR Pet., Ex. 39. The exception was one of the card sorting tests, designed to measure complex problem solving abilities, on which Petitioner achieved a low-average or borderline score. *Id.* at 37-38. This result was indicative of a cognitive deficit. *Id* at 38. According to Dr. Herring, such a deficit would be consistent with various etiologies, including chronic heavy substance abuse, bipolar disorder, and traumatic brain injury. *Id.*

Dr. Barry Morenz, a forensic psychiatrist, diagnosed Petitioner with the following conditions: bipolar type 1, hypomanic; alcohol dependence; personality disorder with schizotypal, narcissistic, and antisocial features; and, citing Dr. Herring's test results, cognitive disorder not otherwise specified. RT 3/17/06 at 94-95; *see* PCR Pet., Ex. 33. Dr. Morenz testified that Petitioner's cognitive disorder interfered with his capacity to address his other conditions, impairing his ability to recover from his alcohol and gambling addictions. *Id.* at 105. At the time of the murder, according to Dr.

Morenz, all of these conditions were manifesting themselves and combined to make Petitioner "very, very impaired." *Id.* at 107.

Dr. Morenz further testified that Petitioner was enjoying his life in prison, where he had completed and published one book and was working on two others. *Id.* at 109-110. He enjoyed receiving fan mail for his writing. *Id.* His laundry and trash were picked up and his meals were provided. *Id.* Dr. Morenz characterized Petitioner's positive state of mind as unrealistic and a function of his hypomania. *Id.*

Dr. Michel Sucher, a physician specializing in addiction medicine, diagnosed Petitioner with alcohol dependence, polysubstance abuse, and pathological gambling. RT 3/30/06 at 16; *see* PCR Pet., Ex. 34.

Several lay witnesses testified, including Petitioner's sister, two cousins, an aunt, and a friend. Their testimony indicated that several of Petitioner's relatives also suffered from mental health issues, including manic and depressive episodes. According to this testimony, Petitioner's maternal cousin was institutionalized in a psychiatric facility, where she was initially diagnosed with schizophrenia and later with manic depressive disorder. RT 3/24/06 at 63. Her mother had also experienced severe mood swings. *Id.* at 68. Petitioner's maternal aunt had a history of hearing voices, as did her grandfather and sister. RT 3/31/06 at 6-7. Petitioner's other maternal aunt suffered from depression. *Id.*

The testimony of these witnesses further indicated that Petitioner had longstanding issues with substance

abuse and gambling, as did other family members. *See, e.g.*, RT 3/24/06 at 66; RT 3/31/06 at 41. Pete Decell, a friend and coworker with whom Petitioner had committed a series of residential burglaries, testified that Petitioner had been a heavy drinker. RT 3/29/06 at 50. He also stated that Petitioner did not like to work and had gotten a "rush" from committing the burglaries. *Id.* at 32.

Judge Kiger, presiding over the PCR proceedings, rejected Petitioner's claim of ineffective assistance of counsel at sentencing. Judge Kiger determined "at the time of sentencing, the defendant voluntarily prohibited his attorneys from further pursuing and presenting any possible mitigating evidence." Dkt. 36, Ex. C at 2. He ruled that Petitioner had failed to demonstrate deficient performance, explaining that "trial counsel did not fall below the *Strickland* standard for effective representation concerning potential mitigation." *Id.* at 1. This finding was based on the judge's "own observations of the defendant during trial and the sentencing phase" and the Arizona Supreme Court's determination that Petitioner was competent when he waived a further mitigation investigation and that the waiver was knowing and voluntary. *Id.* at 2.

Judge Kiger also found that Petitioner had not shown that he was prejudiced by counsel's performance:

> This court further concludes that if there had been a finding that the performance prong of the *Strickland* standard had been met, that no prejudice to the defendant can be found. In

> stating this conclusion the court has considered the assertion of mental illness, jail conditions, childhood development, and any alcohol or gambling addictions.

Id. at 2.

Analysis

Petitioner contends that the PCR court's rejection of this claim constituted an unreasonable application of clearly established federal law and was based on an unreasonable determination of the facts. Dkt. 37 at 46-47. The Court does not agree.

The clearly established federal law governing claims of ineffective assistance of counsel is set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). To prevail under *Strickland*, a petitioner must show that counsel's representation fell below an objective standard of reasonableness and that the deficiency prejudiced the defense. 466 U.S. at 687-88.

In assessing whether counsel's performance was deficient under *Strickland*, the test is whether counsel's actions were objectively reasonable at the time of the decision. *Id.* at 689-90. A petitioner must overcome "the presumption that, under the circumstances, the challenged action might be considered sound trial strategy." *Id.* at 689. The question is "not whether another lawyer, with the benefit of hindsight, would have acted differently, but 'whether counsel made errors so serious that counsel was not functioning as the counsel guaranteed the defendant by the Sixth Amendment.'" *Babbitt v.*

Calderon, 151 F.3d 1170, 1173 (9th Cir. 1998) (quoting *Strickland*, 466 U.S. at 687).

While trial counsel has "a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary, . . . a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments." *Id.* at 691. In making this assessment, the court "must conduct an objective review of [counsel's] performance, measured for reasonableness under prevailing professional norms, which includes a context-dependent consideration of the challenged conduct as seen from counsel's perspective at the time." *Wiggins v. Smith*, 539 U.S. 510, 523 (2003) (citation and quotation marks omitted). The Supreme Court has instructed that "[i]n judging the defense's investigation, as in applying *Strickland* generally, hindsight is discounted by pegging adequacy to 'counsel's perspective at the time' investigative decisions are made" and by applying deference to counsel's judgments. *Rompilla v. Beard*, 545 U.S. 374, 381 (2005) (quoting *Strickland*, 466 U.S. at 689).

With respect to *Strickland*'s second prong, a petitioner must affirmatively prove prejudice by "show[ing] that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694. The *Strickland* Court explained that "[w]hen a defendant challenges a death sentence . . . the question

is whether there is a reasonable probability that, absent the errors, the sentencer . . . would have concluded that the balance of aggravating and mitigating circumstances did not warrant death." 466 U.S. at 695. In *Wiggins*, 539 U.S. at 534, the Court noted that "[i]n assessing prejudice, we reweigh the evidence in aggravation against the totality of available mitigating evidence." The totality of the available evidence includes "both that adduced at trial, and the evidence adduced in the habeas proceeding." *Id.* at 536 (quoting *Williams v. Taylor*, 529 U.S. at 397-98).

Under the AEDPA, this Court's review of the state court's decision is subject to another level of deference. *Bell v. Cone*, 535 U.S. 685, 698-99 (2002); *see Knowles v. Mirzayance*, 129 S. Ct. 1411, 1420 (2009) (noting that a "doubly deferential" standard applies to *Strickland* claims under AEDPA). Therefore, to prevail on this claim, Petitioner must make the additional showing that the state court's ruling that counsel was not ineffective constituted an objectively unreasonable application of *Strickland*. 28 U.S.C. § 2254(d)(1).

In reviewing Petitioner's allegations of ineffective assistance, this Court further notes that the judge who presided over Petitioner's trial and sentencing also presided over the PCR proceedings. Thus, in considering Petitioner's ineffective assistance claims, Judge Kiger was already familiar with the record and the evidence presented at trial and sentencing. This familiarity with the record provides the Court an additional reason to extend deference to the state court's ruling. *See Smith v. Stewart*, 140 F.3d 1263, 1271 (9th Cir. 1998). As the Ninth Circuit explained in

Smith, when the judge who presided at the post-conviction proceeding is the same as the trial and sentencing judge, the court is considerably less inclined to order relief because doing so "might at least approach 'a looking-glass exercise in folly.'" *Id.* (quoting *Gerlaugh v. Stewart*, 129 F.3d 1027, 1036 (9th Cir. 1997)).

Finally, because an ineffective assistance of counsel claim must satisfy both prongs of *Strickland*, the reviewing court "need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies." 466 U.S. at 697 ("if it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice . . . that course should be followed").

Petitioner is not entitled to relief because Judge Kiger did not apply *Strickland*'s second prong in an unreasonable manner when he determined that Petitioner failed to prove that he was prejudiced by counsel's performance.[8] First, under *Schriro v. Landrigan*, 550 U.S. 465, Petitioner cannot show prejudice because he waived an extension of the sentencing date and thereby waived presentation of the full-scale mitigation case that defense counsel and mitigation specialist Durand had intended to develop and present. Next, Petitioner cannot show prejudice

[8] Because this claim is more readily resolved on the basis of lack of prejudice, *see Strickland*, 466 U.S. at 697, the Court makes no finding regarding the alleged deficiency of trial counsel's performance at sentencing.

because the evidence produced during the PCR proceedings, which was the product of an exhaustive mitigation investigation, was largely cumulative of the evidence presented at sentencing and fell short of the type of mitigation information that would have influenced the sentencing decision. *See id.* at 481. Finally, the reasonableness of the PCR court's rejection of this claim is buttressed by the fact that Judge Kiger had presided over Petitioner's trial and sentencing and was therefore "ideally situated," *Landrigan*, 550 U.S. at 476, to gauge the validity of Petitioner's waiver and to weigh the totality of the mitigating evidence against the evidence presented at sentencing. *See Gerlaugh*, 129 F.3d at 1036.

In *Landrigan*, the petitioner refused to allow defense counsel to present the testimony of his ex-wife and birth mother as mitigating evidence. He also interrupted as counsel tried to proffer other evidence and told the Arizona trial judge that he did not wish to present any mitigating evidence and to bring on the death penalty. The court sentenced him to death and the sentence was affirmed on direct appeal. *State v. Landrigan*, 176 Ariz. 1, 859 P.2d 111 (1993). The PCR court rejected Landrigan's request for a hearing and denied his claim that counsel was ineffective for failing to conduct further investigation into mitigating circumstances, finding that he had instructed counsel at sentencing not to present any mitigating evidence at all. Landrigan then filed a federal habeas petition. The district court denied the petition and refused to grant an evidentiary hearing because Landrigan could not make out a colorable claim of ineffective assistance of counsel. A panel of the Ninth Circuit affirmed the

denial. *Landrigan v. Stewart*, 272 F.3d 1221 (9th Cir. 2001). The en banc Ninth Circuit reversed, holding that counsel's performance at sentencing was ineffective. 441 F.3d 638 (9th Cir. 2006). According to the court, Landrigan's "last-minute decision could not excuse counsel's failure to conduct an adequate investigation prior to sentencing." *Id.* at 647. The court then reiterated its view "that a lawyer's duty to investigate [mitigating circumstances] is virtually absolute, regardless of a client's expressed wishes." *Id.*

The Supreme Court reversed. *Schriro v. Landrigan*, 550 U.S. 465. The Court held that the district court did not abuse its discretion in failing to hold an evidentiary hearing on Landrigan's claim of sentencing-stage ineffectiveness and that the court was within its discretion in denying the claim based on Landrigan's unwillingness to present mitigation evidence.

Landrigan compels the conclusion that Petitioner is not entitled to habeas relief. *Landrigan* establishes the standard for evaluating a sentencing-stage ineffective assistance claim brought by a petitioner who directed counsel not to pursue a case in mitigation. "If [the petitioner] issued such an instruction, counsel's failure to investigate further could not have been prejudicial under *Strickland*." *Id.* at 475; *see Owen v. Guida,* 549 F.3d 399, 406 (6th Cir. 2008) ("a client who interferes with her attorney's attempts to present mitigating evidence cannot then claim prejudice based on the attorney's failure to present that evidence"); *see also Wood v. Quarterman*, 491 F.3d 196, 203 (5th Cir. 2007) ("Neither the Supreme Court nor this court has ever held that a lawyer provides ineffective assistance by

complying with the client's clear and unambiguous instructions to not present evidence."); *Lovitt v. True*, 403 F.3d 171, 179 (4th Cir. 2005) ("Lovitt is correct to insist that a client's decision in this regard should be an informed one. At the same time, Lovitt's lawyers were hardly ineffective for incorporating their client's wishes into their professional judgment."); *Rutherford v. Crosby*, 385 F.3d 1300, 1313-14 (11th Cir. 2004) ("[U]nder *Strickland* the duty is to investigate to a reasonable extent . . . and that duty does not include a requirement to disregard a mentally competent client's sincere and specific instructions about an area of defense and to obtain a court order in defiance of his wishes."); *Jeffries v. Blodgett*, 5 F.3d 1180, 1198 (9th Cir. 1993) ("[C]ounsel for Jeffries had been prepared to present evidence in mitigation and had discussed with Jeffries the ramifications of failing to present the evidence. Accordingly, counsel did not deprive Jeffries of effective assistance in acquiescing in the latter's considered decision.").

In Petitioner's case, prior to his conviction, counsel performed only a limited investigation into mitigating evidence. When funding for a mitigation specialist was authorized, Mary Durand began a full-scale investigation. Counsel planned to use the information she gathered to retain further experts, including mental health professionals. While Durand's investigation was still in its early stages, Petitioner indicated that he did not wish to delay the sentencing date. His waiver of a continuance – a continuance the trial court was prepared to grant – was based on several factors, including an unwillingness to involve his family in an investigation into his background and

a belief that no valuable information could be obtained. By the date of sentencing, when he was offered a final opportunity to rescind his waiver and allow additional investigation, Petitioner was fully informed of the nature, scope, and purpose of mitigating information, having spoken with counsel and Durand and having heard Durand's detailed testimony at the aggravation/mitigation hearing. After being afforded several opportunities by the judge to obtain a continuance, Petitioner chose to proceed to sentencing without a complete mitigation investigation.

Despite Petitioner's position, the defense investigation continued until the date of the aggravation/mitigation hearing, which had been extended at counsel's request. At the hearing, counsel presented testimony concerning Petitioner's childhood, alcohol dependence, gambling addiction, mental health history, and positive character traits and conduct.

Given all of these circumstances, Petitioner's claim for relief is even less persuasive than Landrigan's. Petitioner's waiver of a continuance was neither equivocal nor last-minute. The record demonstrates that he was fully aware of the consequences of his decision and persisted in that decision even after counsel's attempts to change his mind, exposure to Durand's testimony detailing the elements and potential benefits of a full-scale mitigation investigation, and repeated opportunities afforded by the court to reconsider his decision. His waiver did not prevent counsel from investigating and presenting a mitigation case within the parameters Petitioner had

set. Therefore, under the clearly-established law set forth in *Landrigan*, Petitioner is not entitled to relief.

The second factor dictating a conclusion that Petitioner has not demonstrated prejudice is the nature of the new mitigating information. At Petitioner's sentencing, counsel offered what amounted to an outline of the mitigation case presented during the PCR proceedings. The information later presented by PCR counsel supported the mitigating circumstances proffered at sentencing, including Petitioner's alcohol dependence, gambling addiction, and bipolar disorder. It also added a new diagnosis that Petitioner suffers from a cognitive deficit affecting his complex reasoning skills.

In his special verdict, Judge Kiger found that several of the nonstatutory mitigating factors advanced by defense counsel, including Petitioner's alcohol and gambling problems and his bipolar condition, had not been proved and therefore were not weighty. Dkt. 36, Ex. A at 3-5. In his PCR order, Judge Kiger considered all of the new evidence, but determined that Petitioner had not been prejudiced by counsel's performance at sentencing. Dkt. 36, Ex. C at 2. To obtain relief, Petitioner must show that Judge Kiger's determination was not merely incorrect, but "unreasonable – a substantially higher threshold." *Landrigan*, 550 U.S. at 473.

The reasonableness of Judge Kiger's ruling is supported by several considerations. First, most of the new mitigating evidence, while more detailed than the information offered at sentencing, duplicated the evidence already presented. *See Babbit*, 151 F.3d at

1176 (no prejudice where evidence omitted at sentencing was "largely cumulative of the evidence actually presented"). Thus, it did not alter the basic sentencing profile originally provided to the judge. *See Strickland*, 466 U.S. at 699-700; *see also Henley v. Bell*, 487 F.3d 379, 387-88 (6th Cir. 2007) (no prejudice resulting from counsel's failure to call a psychiatric expert to testify during sentencing phase of capital murder trial that defendant had learning disabilities, had dropped out of school, and at the time of the offense was depressed and acting out of character). To the extent that the new evidence supported a diagnosis that Petitioner suffered from a cognitive deficit, that diagnosis was the product of a single test result, which was the only indication that Petitioner was not within the normal range with respect to brain function. Moreover, Dr. Herring, who performed the test, did not herself make a diagnosis of cognitive deficit; nor could she say whether any such deficit was in place at the time of the murder, more than 10 years earlier. RT 3/17/06 at 41, 52. Therefore, the only new category of mitigating information was of limited impact.

Thus, in contrast to cases such as *Rompilla*, *Wiggins*, and *Williams*, where counsel's failure to investigate mitigating evidence prejudiced the defendant, the omitted mitigation evidence about Petitioner's background and mental health was relatively "weak." *Landrigan*, 550 U.S. at 481. For example, in *Rompilla*, counsel failed to present evidence that his client was beaten by his father with fists, straps, belts, and sticks; that his father locked him and his brother in a dog pen filled with excrement; and that he grew up in a home with no indoor

plumbing and was not given proper clothing. 545 U.S. at 391-92. In *Wiggins*, counsel failed to present evidence that the defendant suffered consistent abuse during the first six years of his life, was the victim of "physical torment, sexual molestation, and repeated rape during his subsequent years in foster care," was homeless for portions of his life, and had diminished mental capacities. 539 U.S. at 535. In *Williams*, counsel failed to discover "records graphically describing Williams's nightmarish childhood," including the fact that he had been committed at age 11, had suffered dramatic mistreatment and abuse during his early childhood, and was "borderline mentally retarded." 529 U.S. at 370-71, 395. *See also Stankewitz v. Woodford,* 365 F.3d 706, 717-19 (9th Cir. 2004) (prejudice existed where omitted evidence showed that Stankewitz was exposed to extreme deprivation and abuse from his family and in a variety of foster homes, was borderline retarded, and suffered from significant brain dysfunction). In *Landrigan* itself, the Court described as "poor quality," and therefore not supportive of a colorable claim of ineffective assistance, omitted mitigating evidence indicating that the petitioner suffered from fetal alcohol syndrome with attendant cognitive and behavioral defects, was abandoned by his birth mother, was raised by an alcoholic adoptive mother, began abusing alcohol and drugs at an early age, and had a genetic predisposition to violence. 550 U.S. at 480.

By contrast, the evidence presented to the PCR court simply corroborated Petitioner's alcohol dependence, gambling addiction, and bipolar disorder, while adding a diagnosis of cognitive deficit that was

neither significant nor well supported. It was not unreasonable for Judge Kiger to find that this evidence was not persuasive enough to have produced a different sentence. *See id.*; *see also Hill v. Mitchell*, 400 F.3d 308, 319 (6th Cir. 2005) ("to establish prejudice, the new evidence that a habeas petitioner presents must differ in a substantial way – in strength and subject matter – from the evidence actually presented at sentencing"). In sum, the mitigation case presented during the PCR proceedings "establishes at most the wholly unremarkable fact that with the luxury of time and the opportunity to focus resources on specific parts of a made record, post-conviction counsel will inevitably identify shortcomings in the performance of prior counsel." *Turner v. Crosby*, 339 F.3d 1247, 1279 (11th Cir. 2003) (quoting *Waters v. Thomas*, 46 F.3d 1506, 1514 (11th Cir. 1995)).

Finally, the reasonableness of Judge Kiger's ruling is supported by the fact that he had presided at Petitioner's sentencing and was familiar with the record and the efforts of trial counsel. During the PCR proceedings, the judge was presented with the results of an exhaustive mitigation investigation. He denied relief, again finding that Petitioner had waived additional mitigation and failed to show prejudice. The Ninth Circuit has commented on the appropriate review of cases where the judge considering a claim of ineffective assistance was also the judge who presided over trial and sentencing. In *Gerlaugh*, the court denied an ineffective assistance claim and rejected the petitioner's request for an evidentiary hearing in state court, explaining:

> The trial and sentencing judge has already considered *all* of this information in the post-conviction hearing and has held that none of it would have altered his judgment as to the proper penalty for Gerlaugh. And, the Arizona Supreme Court looked at the substance and results of the post-conviction proceeding and affirmed the trial judge in all respects. In effect, petitioner has already had what he is asking for – consideration in a formal hearing of this evidence.

Gerlaugh, 129 F.3d at 1036; *see Smith*, 140 F.3d at 1271.

Petitioner likewise was able to discover and present all available mitigating evidence to the sentencing judge during the PCR proceedings. Petitioner received a comprehensive mitigation investigation, carried out by a full complement of investigators and experts, followed by a hearing at which all of the mitigating information was presented. Judge Kiger heard and considered the evidence and determined that if it had been presented at sentencing it would not have altered his decision to sentence Petitioner to death. This Court cannot classify as objectively unreasonable Judge Kiger's assessment of the evidence and its impact on his sentencing determination.

Conclusion

The PCR court, in rejecting Petitioner's claim of ineffective assistance of counsel at sentencing, did not apply *Strickland* in an objectively unreasonable manner. Under *Landrigan*, Petitioner's waiver of

additional mitigation evidence forecloses relief. In addition, Judge Kiger did not unreasonably determined that the omitted mitigation evidence was not sufficient to result in a reasonable probability of a different sentence.

In *Owens*, the Sixth Circuit, citing *Landrigan*, cautioned that "[a] defendant cannot be permitted to manufacture a winning [ineffective assistance of counsel] claim by sabotaging her own defense, or else every defendant clever enough to thwart her own attorneys would be able to overturn her sentence on appeal." 549 F.3d at 412. That principle applies equally to Petitioner's case. Claim 1(B)(4) is denied.

Claim 2

Petitioner alleges that the trial court violated the Eighth Amendment prohibition against arbitrary and capricious sentencing in capital cases when it allowed Petitioner, over his counsel's objection, to determine that a continuance of the mitigation hearing was unnecessary. Dkt. 35 at 59. He further alleges that the court violated his Sixth Amendment right to counsel by ignoring defense counsel's "learned decision" that additional time was necessary to prepare mitigation in favor of Petitioner's uninformed desire to proceed to sentencing. *Id.* Respondents concede that the claim is exhausted to the extent it was raised on direct appeal. Dkt. 36 at 43-44.

Background

As explained above, Petitioner opposed a continuance of the sentencing proceedings and thereby foreclosed a complete mitigation investigation by the

defense team. On direct appeal, Petitioner contended that the trial judge improperly allowed him to waive the presentation of mitigation evidence against the advice of counsel. Opening Br. at 26. The Arizona Supreme Court rejected Petitioner's argument. *Kayer*, 194 Ariz. at 434-37, 984 P.2d at 42-45. The court held that its jurisprudence does not preclude a defendant from refusing to cooperate with a mitigation specialist, explaining that a competent defendant can waive counsel altogether and that "[a] defendant's right to waive counsel includes the ability to represent himself or herself at the sentencing phase of a case that could result in the death penalty." *Id.* at 436, 984 P.2d at 44. Therefore, according to the court, "[a]n anomaly would exist were we to accept defendant's argument that counsel exclusively controls the presentation of all mitigation evidence: a defendant could waive counsel at sentencing and thereby have exclusive control over the presentation of all mitigation evidence; yet if a defendant accepts counsel, he would have no input on what mitigating factors to offer." *Id.* at 436-37, 984 P.2d at 44-45. The court also noted that "[t]he United States Supreme Court has upheld a defendant's right to waive all mitigating evidence." *Id.* (citing *Blystone v. Pennsylvania*, 494 U.S. 299, 306 & n. 4 (1990)). The court then explained:

> [O]ur case law allows defendant the freedom not to cooperate with a mitigation specialist and thereby potentially limit the mitigation evidence that is offered. Significantly, defendant stressed to the trial judge that he wanted Durand to advocate on his behalf at the mitigation hearing. Defendant also wanted his attorneys to argue

> other mitigating evidence. Consequently, seven mitigating circumstances were offered. Durand testified on defendant's behalf, albeit without defendant's full cooperation. Defendant was not conceding defeat; he wanted advocacy in all areas except the psychological areas that Durand wanted to explore. . . .
>
> We conclude that the trial court properly allowed defendant not to cooperate with the court-appointed mitigation specialist, given the repeated warnings of the consequences of this decision and the factual record before us.

Id. at 437, 984 P.2d at 45 (citation omitted).

Analysis

Petitioner contends that the state courts violated his constitutional rights by allowing him to waive the presentation of additional mitigation and that the courts erred in finding that the waiver was knowing and voluntary. The Court disagrees.

First, as the Arizona Supreme Court noted, citing *Blystone v. Pennsylvania*, there is no dispute that a defendant may waive the presentation of mitigating evidence. In *Blystone*, the United States Supreme Court held that no constitutional violation occurred when a defendant was allowed to waive all mitigation evidence after repeated warnings from the judge and advice from counsel. 494 U.S. 299, 306 & n.4. That principle was buttressed by the holding in *Landrigan*, which denied an ineffective assistance claim based on the defendant's refusal to allow the presentation of a mitigation case. 550 U.S. at 475. Therefore, the fact

that the trial court accepted Petitioner's waiver of a more detailed mitigation case does not, by itself, establish a constitutional violation.

Petitioner asserts that his waiver was not knowing and voluntary because he did not understand the consequences of his decision. This argument is unavailing on both legal and factual grounds. In *Landrigan*, the Supreme Court explained that it had "never imposed an 'informed and knowing' requirement upon a defendant's decision not to introduce evidence" and has "never required a specific colloquy to ensure that a defendant knowingly and intelligently refused to present mitigating evidence." *Landrigan*, 550 U.S. at 479.

In Petitioner's case, nonetheless, the state courts reasonably found that his waiver was informed and voluntary. Judge Kiger afforded Petitioner repeated opportunities to reconsider his decision to limit the mitigation defense, ensured that Petitioner discussed the matter fully with counsel, determined that Petitioner had discussed the matter at length with his mitigation specialist, and afforded Petitioner an opportunity to reconsider the decision after he had heard the testimony at his own mitigation hearing. The judge determined that Petitioner "voluntarily prohibited his attorneys from further pursuing and presenting any possible mitigating evidence." Dkt. 36, Ex. A at 2.

The judge was "ideally situated" to make this assessment, and his factual findings are presumed correct. *Landrigan*, 550 U.S. at 474, 476; *see* 28 U.S.C. § 2254(e)(1). Petitioner has not met his burden of

rebutting that presumption with clear and convincing evidence. By the time of the sentencing hearing, when Petitioner again waived a continuance, he was fully aware of the nature and purpose of a mitigation investigation and its significance to his case. Durand's testimony at the aggravation/mitigation hearing alone was adequate to apprise Petitioner of the ramifications of his waiver. And Petitioner's colloquies with Judge Kiger further support a finding that his decision to limit the mitigation case was informed and voluntary. *See* RT 6/6/97 at 15-21; RT 7/8/97 at 71; RT 7/15/97 at 8.

The ruling of the Arizona Supreme Court rejecting this claim was neither contrary to nor an unreasonable application of clearly established federal law, nor was it based on an unreasonable determination of the facts. Therefore, Claim 2 is denied.

Claim 3

Petitioner alleges that he was denied effective assistance of counsel because trial counsel labored under a conflict of interest. Dkt. 35 at 67. Petitioner concedes that the claim is unexhausted because he failed to include it in his petition for review to the Arizona Supreme Court. Dkt. 40 at 30. He contends, however, that he has an available state court remedy under Rule 32.2 because his waiver of the claim was not knowing, voluntary, and intelligent, and he requests a stay of these proceeding so that he may return to state court and exhaust the claim. *Id.* The Court concludes that the claim, regardless of its procedural status, is plainly without merit. *See* 28

U.S.C. § 2254(b)(2); *Rhines v. Weber*, 544 U.S. 269, 277 (2005).

Analysis

To establish an ineffective assistance of counsel claim based on a conflict of interest, it is not sufficient to show that a "potential" conflict existed. *Mickens v. Taylor*, 535 U.S. 162, 171 (2002). Rather, "until a defendant shows that his counsel actively represented conflicting interests, he has not established the constitutional predicate for his claim of ineffective assistance." *Cuyler v. Sullivan*, 446 U.S. 335, 350 (1980). An actual conflict of interest for Sixth Amendment purposes is one that "adversely affected counsel's performance." *Mickens*, 535 U.S. at 171. Petitioner has not established that his attorneys actively represented conflicting interests or that any conflict of interest affected their performance.

At trial, lead counsel Stoller cross-examined the victim's widow, Wilma Haas. Near the conclusion of her testimony, Stoller asked for a sidebar conference. RT 3/19/97 at 57. He informed the court, the prosecutor, and Kayer that after observing Haas testify, he believed he may have represented her son by a prior marriage a few years earlier on DUI charges in Phoenix. *Id*. at 57-58. The prosecutor and Stoller questioned Haas outside the presence of the jury. *Id*. She confirmed that Stoller had represented her son, but stated that they had no contact regarding this case. *Id*. at 69-70. Under these circumstances, Petitioner has not established that an actual conflict existed based on Stoller's prior representation of the victim's widow's

son. Nor does Petitioner explain how Stoller's prior representation adversely affected his performance.

Petitioner contends that second counsel Victor was burdened with a conflict of interest based on his representation of an inmate named Pierce. Prior to Kester's testimony, the State filed a motion in limine to preclude the admission of various acts to impeach Kester. ROA 147, 148. One of those acts concerned an altercation between Kester and Pierce in the women's dorm of the Yavapai County Jail. *Id.* Later, while discussing the motion in court, the judge noted that Victor had represented Pierce on a different matter. RT 3/12/97 at 6.

Contrary to Petitioner's assertion that "Victor's loyalty to his prior client . . . prevented him from being able to use such information to impeach Kester," Dkt. 35 at 69, Victor forcefully argued that the dorm incident should be admissible to impeach Kester on cross-examination by showing that she was not the weak and submissive individual portrayed by the State. The court disagreed and precluded use of the incident. *Id.* at 6-7, 170-74. Petitioner therefore has failed to demonstrate that Victor's representation of Pierce affected his performance as Petitioner's counsel.

Claim 3 is without merit and will be denied.

Claim 4

Petitioner alleges that his right to trial by an impartial and representative jury under the Sixth and Fourteenth Amendments was violated when the trial court death-qualified his jury. Dkt. 35 at 69.

Respondents concede that this claim is exhausted. Dkt. 36 at 50.

Prior to trial Judge Kiger informed the parties that during voir dire he would explain to the jurors that the death penalty was a possible sentence, but that the judge, not the jurors, determined the sentence. After providing such information the judge would then ask if the juror could still be fair and impartial. RT 5/5/97 at 7-8. Judge Kiger overruled defense counsel's "vehement" objection to this process. *Id.* at 12.

Judge Kiger questioned the jurors in groups of three, asking each juror, "knowing what your duty as a juror is, do you believe that this kind of a case [a potential death penalty case] would be such that you could not be a fair and impartial juror?" *See, e.g.*, RT 3/6/97 at 36-38. Upon receiving confirmation that a particular juror would be fair and impartial, the judge asked no further questions regarding the death penalty.[9] *Id.*

On direct appeal, the Arizona Supreme Court, relying on its own precedent as well as *Wainwright v. Witt*, 469 U.S. 412, 424 (1985), and *Adams v. Texas*, 448 U.S. 38, 45 (1980), held that "voir dire questioning related to a juror's views on capital punishment is permitted to determine whether those views would prevent or substantially impair the performance of the juror's duties to decide the case in accordance with the

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[9] During this process, Stoller asked each of the potential jurors their views about the role of the jury in a criminal trial, with his questions focusing on the guilt rather than sentencing phase of the trial. *See, e.g.*, RT 3/6/97 at 40.

court's instructions and the juror's oath." *Kayer*, 194 Ariz. at 431, 984 P.2d at 39 (quoting *State v. Martinez-Villareal*, 145 Ariz. 441, 449, 702 P.2d 670, 678 (1985)).

The Arizona Supreme Court reasonably applied clearly established federal law, which holds that the death-qualification process in a capital case does not violate a defendant's right to a fair and impartial jury. *See Lockhart v. McCree,* 476 U.S. 162, 178 (1986); *Witt*, 469 U.S. at 424; *Adams*, 448 U.S. at 45 (1980); *see also Ceja v. Stewart*, 97 F.3d 1246, 1253 (9th Cir. 1996) (death qualification of Arizona jurors not inappropriate). The fact that the trial court death-qualified the venire does not establish a federal constitutional violation. Petitioner is not entitled to relief on Claim 4.

Claim 5

Petitioner alleges that his right to trial by an impartial and representative jury under the Sixth and Fourteenth Amendments was violated when the trial court dismissed a juror because of his views concerning the death penalty. Dkt. 35 at 73. Respondents concede that the claim is exhausted. Dkt. 36 at 53.

Background

Only one juror was excused as a result of the death-qualification questioning described above. In response to inquiries by Judge Kiger, juror Ed DeMar indicated that he had "reservations" about a proceeding that involved the potential of a death sentence. RT 3/6/97 at 91. Rather than have DeMar explain further, Judge Kiger asked him to step outside so that questioning could continue with the two jurors who had not

expressed concern regarding the death penalty. *Id.* at 91-92. DeMar was then brought before the judge and the parties, and the following exchange took place:

> Court: So we are talking about whether or not you had any personally-held beliefs, philosophical opinions, or religious convictions that would get in the way and make it difficult or impossible for you to be a fair and impartial juror knowing that the death penalty was a possibility.
>
> DeMar: Yes. That would be a – I would have reservations about an action in which the death penalty might be imposed or could be imposed.
>
> Court: Let me emphasize, again, though, your duty as a juror is to – and there is a specific instruction that I'm going to give these jurors, do not consider the possible punishment in making your deliberations.
>
> DeMar: Well, that would put me in a sort of difficult position.
>
> Court: That's why I'm asking the question.
>
> . . . .
>
> DeMar: I'm not opposed to the death penalty, but I – it would depend on the conditions involving questions of premeditation, of stalking, of cruelty,

of a particularly heinous crime, of multiple deaths, things of the sort that would tend to follow the Federal application of the death penalty rather than the State application.

And that's what would perhaps give me some difficulty. If I – and also the question of degree, whether it's first degree, second, third, or manslaughter. Those things would be considerations that I think would affect my impartiality, if I knew that the State had stated that it might seek the death penalty, not knowing those other conditions.

In other words, conditionally, I would not necessarily be against the death penalty, but I would be looking toward the kinds of things that I told you that would – would perhaps affect that decision.

. . . .

Court: And I guess – and listen carefully. I'm going to try to summarize what you're telling me so that I can understand it. And if I'm missing the point, I'll trust that you will try to help me. But what you're saying to me seems like knowing that there is that possibility of the death penalty out there would

be bumping into your thoughts on, making it –

DeMar: Yes. I would need to know more, really, and it doesn't mean that I'd be against it, but it means that under certain conditions I would, and not knowing those other factors would trouble me somewhat.

Court: And would it get in your way, then, of being a fair and impartial juror as the process continued?

DeMar: It might, again depending on what – how much of a factor became evidence in testimony and what have you.

Court: Okay.

DeMar: But it would not be – be a hands-down opposition to the death penalty as such.

Court: I understand what you're saying, and of course at this point we are looking for whether or not you can work in this trial as a fair and impartial juror to both defendant and the State.

DeMar: I understand.

Court: Let me – let me try it this way, to – knowing what you know right now, knowing your personal opinions and beliefs and what you know the job of the juror to be, because this is a

possibility of a death penalty case at this point, would you like me to excuse you from jury duty in this case?

DeMar: I think that probably would be fair to the – to the State and to the defense, both really, since that reservation is honestly held.

Court: Okay. Okay. Mr. DeMar, I'm going to accept what you tell me. I'm going to thank you for spending now a day and a half with us and putting up with all of our questioning, and I'm going to excuse you from jury duty in this case, with our sincere appreciation.

Id. at 98-101. Neither party challenged DeMar for cause or objected to his excusal. *Id.*

On direct appeal, Petitioner argued that DeMar's dismissal was not supported by a finding that his views on the death penalty would prevent him from performing his duties as a juror. Opening Br. at 18-20. The Arizona Supreme Court rejected this claim, explaining:

> [T]he judge was willing to allow DeMar to continue as a potential juror upon a simple assurance that DeMar could be fair and impartial. Because DeMar could not give such an assurance, he accepted the court's decision that he be excused from the jury panel in order to be fair to both the defendant and the State.

> Similarly, our case law is clear that a trial judge must excuse any potential jurors who cannot provide assurance that their death penalty views will not affect their ability to decide issues of guilt. *See Detrich,* 188 Ariz. at 65, 932 P.2d at 1336 (urging as "imperative" the dismissal of any juror who cannot assure impartiality on guilt issues because of views regarding the death penalty (citing *State v. Hyde,* 186 Ariz. 252, 921 P.2d 655 (1996))). Thus, the trial court did not err in asking DeMar questions regarding the death penalty, nor did the court err in allowing DeMar to be excused from jury service given the presence of "honestly held" reservations regarding the death penalty that might have affected DeMar's ability to carry out his oath with respect to issues of guilt.

Kayer, 194 Ariz. at 431-32, 984 P.2d at 39-40.

Analysis

Clearly established Supreme Court law provides that, when selecting a jury in a capital case, jurors cannot be struck for cause "because they voiced general objections to the death penalty or expressed conscientious or religious scruples against its infliction." *Witherspoon v. Illinois***,** 391 U.S. 510, 522 & n.21 (1968) (noting that exclusion for cause is appropriate if views on the death penalty would "prevent them from making an impartial decision as to the defendant's guilt"). Therefore, "[a] juror may not be challenged for cause based on his views about capital punishment unless those views would prevent or substantially impair the performance of his duties as a

juror in accordance with his instructions and his oath." *Adams v. Texas*, 448 U.S. at 45; *see Wainwright v. Witt*, 469 U.S. at 424.

In Petitioner's case, the record indicates that DeMar was not challenged for cause. Instead, at the end of a colloquy in which he consistently expressed reservations about his ability to sit as a fair and impartial juror in a death penalty case, the judge asked him if he would prefer to be excused. He stated that he would, in fairness to both parties, and neither Petitioner nor the State objected.[10] Under these circumstances, Petitioner cannot demonstrate that the Arizona Supreme Court unreasonably applied *Witherspoon* in rejecting this claim.

Even assuming that DeMar was struck for cause, under *Uttecht v. Brown*, 551 U.S. 1 (2007), Petitioner would not be entitled to relief. In *Uttecht* the prosecution struck for cause a panel member referred to as "Juror Z." *Id.* at 5. Juror Z initially indicated that he could impose the death penalty in "severe situations"– for example, if a defendant would inevitably re-offend if released. *Id.* at 14-15. When informed by defense counsel that the defendant would never be released from prison, Juror Z expressed uncertainty about his ability to impose a death sentence. Pressed by the prosecution, he continued to equivocate regarding his willingness to consider the death penalty in the circumstances of the case before

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[10] During the PCR evidentiary hearing, both Stoller and Victor testified that they did not want DeMar on the jury. RT 3/16/06 at 42; RT 3/22/06 at 96.

him, though he generally stated "that he could consider the death penalty or follow the law." *Id.* at 15. The prosecution challenged Juror Z for cause, citing his confusion about the proper circumstances for the imposition of a death sentence. The defense indicated that it had no objection, and the trial court excused the juror. The Ninth Circuit granted habeas relief on the grounds that the state courts had not made a finding that the juror was "substantially impaired" and that "the transcript unambiguously proved Juror Z was not substantially impaired." *Id.* at 15-16. The Supreme Court reversed, holding that the record established that Juror Z "had both serious misunderstandings about his responsibility as a juror and an attitude toward capital punishment that could have prevented him from returning a death sentence under the facts of this case." *Id.* at 13. As illustrated above, DeMar in his colloquy with Judge Kiger demonstrated similar characteristics – confusion about his role as a juror and an attitude toward the death penalty suggesting that he might have been unable to serve as a fair and impartial juror. Indeed, DeMar himself stated that he thought his excusal from the jury would be fair to the State and the defense.

In addition, if, as Petitioner contends, Judge Kiger dismissed DeMar for cause after finding that his ability to be fair and impartial was substantially impaired due to his beliefs about the death penalty, then the judge's determination was "based in part on [DeMar's] demeanor" and is "owed deference by reviewing courts." *Id.* at 8. Judge Kiger had "broad discretion" to dismiss DeMar after conducting a "diligent and thoughtful voir

dire" that revealed "considerable confusion" on the part of the juror. *Id.* at 20.

Petitioner notes that DeMar indicated that he was not unambiguously opposed to the death penalty and would vote to apply it in certain circumstances. But "such isolated statements indicating an ability to impose the death penalty do not suffice to preclude the prosecution from striking for cause a juror whose responses, taken together, indicate a lack of such ability or a failure to comprehend the responsibilities of a juror." *Morales v. Mitchell*, 507 F.3d 916, 941 (6th Cir. 2007).

The Arizona Supreme Court did not unreasonably apply clearly established federal law in rejecting this claim on appeal. Therefore, Claim 5 is denied.

Claim 6

Petitioner alleges that the state courts violated his rights to due process and to be free from cruel and unusual punishment under the Fifth, Eighth, and Fourteenth Amendments by finding that he committed the murder with the expectation of the receipt of anything of pecuniary value under A.R.S. § 13-703(F)(5). Dkt. 35 at 76. Petitioner contends that "[t]he State failed to prove beyond a reasonable doubt that Petitioner's motive was not revenge or some other reason beyond the expectation of pecuniary gain." *Id.* at 77.

Respondents counter that Claim 6 is unexhausted and procedurally barred. Dkt. 36 at 56. They correctly note that on direct appeal Petitioner did not allege a violation of his federal constitutional rights but argued

only that the factor had not been proved. *See* Opening Br. at 31-37. The Arizona Supreme Court, however, considered the pecuniary gain aggravating factor during its independent sentencing review. *Kayer*, 194 Ariz. at 433-34, 984 P.2d at 41-42. This Court must determine whether that review exhausted the claim.

The Arizona Supreme Court independently reviews each capital case to determine whether the death sentence is appropriate. In *State v. Gretzler,* 135 Ariz. 42, 54, 659 P.2d 1, 13 (1983), the court stated that the purpose of independent review is to assess the presence or absence of aggravating and mitigating circumstances and the weight to give to each. To ensure compliance with Arizona's death penalty statute, the state supreme court reviews the record regarding aggravation and mitigation findings and decides independently whether the death sentence should be imposed. *State v. Brewer*, 170 Ariz. 486, 493-94, 826 P.2d 783, 790-91 (1992). The Arizona Supreme Court has also stated that in conducting its review it determines whether the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factors. *State v. Richmond*, 114 Ariz. 186, 196, 560 P.2d 41, 51 (1976), *sentence overturned on other grounds, Richmond v. Cardwell,* 450 F.Supp. 519 (D. Ariz. 1978). Arguably, such a review rests on both state and federal grounds. *See Brewer*, 170 Ariz. at 493, 826 P.2d at 790 (finding that statutory duty to review death sentences arises from need to ensure compliance with constitutional safeguards imposed by the Eighth and Fourteenth Amendments).

While the state supreme court's independent review does not encompass all alleged constitutional errors at sentencing, the Court must determine if it encompassed Petitioner's claim that the trial court erred in finding the pecuniary gain aggravating factor. In its written opinion, the Arizona Supreme Court reviewed the aggravating factors found by the sentencing judge to determine their existence and whether a death sentence was appropriate. *Kayer*, 194 Ariz. at 432-33, 984 P.2d at 40-41. With respect to the pecuniary gain factor, the supreme court reviewed the evidence in the record and determined that the pecuniary gain factor had been satisfied. *Id.* at 433-34, 984 P.3d at 41-42. The supreme court's actual review of the trial court's finding of the (F)(5) factor sufficiently exhausted Claim 16. *See Sandstrom v. Butterworth,* 738 F.2d 1200, 1206 (11th Cir. 1984). Thus, the Court finds that Claim 6 was actually exhausted, and it will be reviewed on the merits.

Analysis

In rejecting this claim on appeal, the Arizona Supreme Court explained:

> The State proved pecuniary gain in this case beyond a reasonable doubt. Kester and other witnesses testified that defendant continually bragged about his gambling system and observed his addictive behavior of constantly wanting money with which to gamble. Kester testified that defendant said he planned to steal from Haas and then kill him so that defendant could get away with killing someone he knew. Defendant took Haas' money, credit cards, and

> other personal items from the crime scene. Kester testified that defendant also took Haas' house keys after the murder, entered the home, and stole several additional items of personal property. Another witness at trial observed Kester and defendant at Haas' home at about the time established by Kester. Pawn shop receipts and witness testimony established that after Haas was murdered, defendant sold virtually all of Haas' jewelry and guns. In short, the State presented overwhelming circumstantial and direct evidence that defendant killed with the expectation of pecuniary gain. This proof far exceeds the requirement that pecuniary gain must be only a motive for the crime.

Kayer, 194 Ariz. at 433-34, 984 P.2d at 41-42.

With respect to a state court's application of an aggravating factor, habeas review "is limited, at most, to determining whether the state court's finding was so arbitrary and capricious as to constitute an independent due process or Eighth Amendment violation." *Lewis v. Jeffers*, 497 U.S. 764, 780 (1990). In making that determination, the reviewing court must inquire "whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found that the factor had been satisfied." *Id.* at 781 (quoting *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)). This standard "gives full play to the responsibility of the trier of fact fairly to resolve conflicts in the testimony, to weigh the evidence, and to

draw reasonable inferences from basic facts to ultimate facts." *Jackson*, 443 U.S. at 319.

"[A] finding that a murder was motivated by pecuniary gain for purposes of § 13-703(F)(5) must be supported by evidence that the pecuniary gain was the impetus of the murder, not merely the result of the murder." *Moormann v. Schriro*, 426 F.3d 1044, 1054 (9th Cir. 2005). Based upon the evidence produced at trial, a rational factfinder could have determined that Petitioner, short of cash from his gambling losses, planned and carried out the murder of Haas in order to gain access to the victim's property.

Petitioner argues that additional motives may have led to the killing. As the Arizona Supreme Court noted, however, "[t]he State can establish pecuniary gain beyond reasonable doubt through presentation of direct, tangible evidence or through strong circumstantial evidence," and a "financial motive need not be the only reason the murder was committed for the pecuniary gain aggravator to apply." *Kayer*, 194 Ariz. at 434, 984 P.2d at 42. Here, Kester's testimony of a financial motive for the killing is corroborated by circumstantial evidence concerning the missing property and the sale of items belonging to Haas. Thus, application of the pecuniary gain factor was not unreasonable even if other motives for the killing may have existed. Petitioner is not entitled to relief on Claim 6.

Claim 7

Petitioner alleges that the state courts violated his rights under the Fifth, Sixth, Eighth, and Fourteenth

Amendments when they determined that the prosecution had proven as an aggravating factor that Petitioner was previously convicted of a serious offense under A.R.S. §13-703(F)(2). Dkt. 35 at 78. Respondents contend that the claim is unexhausted and procedurally barred. Dkt. 36 at 57. For the reasons set forth above with respect to the pecuniary gain factor, the Court concludes that this claim was exhausted by the Arizona Supreme Court's independent review of Petitioner's sentence.

In its special verdict, the trial court indicated that it had "received and reviewed the documents submitted by the State" with respect to Petitioner's first-degree burglary conviction. Dkt. 36, Ex. A at 1. On direct appeal, the Arizona Supreme Court upheld the trial court's application of the (F)(2) factor. *Kayer*, 194 Ariz. at 433, 984 P.2d at 41. The court stated, in relevant part:

> The State presented documentation of defendant's 1981 conviction of first-degree burglary. Based on this documentation, the court determined the (F)(2) aggravator had been proved beyond a reasonable doubt. The State thus met its burden of showing that defendant had been previously convicted of a "serious offense" under section 13-703(F)(2).

Id.

Petitioner asserts that the trial court based its findings regarding the prior conviction on documents it had reviewed but that had not properly been admitted into evidence. In affirming the application of (F)(2),

Petitioner contends that "the supreme court ignored the fact the trial court did not admit any evidence regarding this potential aggravating circumstance" and thereby "violated its own precedent." Dkt. 35 at 80.

Even assuming that the state courts erred by failing to admit into evidence the records of Petitioner's first-degree burglary conviction, Petitioner is not entitled to habeas relief. A state court's error in applying state law does not warrant federal habeas corpus relief. *Estelle v. McGuire*, 502 U.S. 62, 71-72 (1981). On habeas review, this Court is limited to determining whether the state court's application of state law was so arbitrary and capricious that it amounted an independent due process or Eighth Amendment violation. *Lewis v. Jeffers*, 497 U.S. at 780.

Claim 7 does not meet this standard. Petitioner does not contest the existence of the prior conviction or contend that it fails to satisfy the statutory definition of a serious offense. He simply argues that the trial court considered the documents proving the conviction without first having admitted them into evidence. The state supreme court found that the record presented to the trial court was sufficient to prove that Petitioner had previously been convicted of a serious offense under § 13-703(F)(2). Whether or not the Arizona Supreme Court erred in upholding the process by which the prior conviction was proved, the state courts' application of the (F)(2) factor, under the circumstances described above, was not so arbitrary and capricious as to constitute an independent constitutional violation. Claim 7 is therefore denied.

Claims 8 and 10

In Claim 8, Petitioner alleges that the "trial court violated [his] rights under the Eighth and Fourteenth Amendments . . . when it failed to find and/or consider mitigating circumstances established by the record." Dkt. 35 at 80. In Claim 10, Petitioner alleges that the trial court and the Arizona Supreme Court violated his Eighth and Fourteenth Amendment right to the consideration of all relevant mitigation evidence by refusing to consider mitigating factors that did not have a "causal nexus" to the crime. Dkt. 35 at 85.

On direct appeal, Petitioner did not allege that his federal constitutional rights were violated by the manner in which the trial court considered the proffered mitigating circumstances. *See* Opening Br. at 37. He simply argued, with no citation to the federal constitution or relevant case law, that the trial court erred in not finding that the mitigating circumstances had been proved. *Id.* Therefore, he failed to exhaust Claims 8 and 10 on direct appeal. *See Duncan v. Henry*, 513 U.S. 364, 365-66 (1995).

Petitioner raised the allegations contained in Claims 8 and 10 for the first time in Claim 1 of his PCR petition. PCR Pet. at 1-3. The court found the claim precluded under Rule 32.2(a)(3). Dkt. 36, Ex. B at 1. Respondents contend, therefore, that Claims 8 and 10 are procedurally barred. Dkt. 36 at 59. Petitioner counters that the PCR court's ruling was erroneous because the claims could not have been raised on direct appeal because they challenge the holding of the Arizona Supreme Court. The Court disagrees. A petitioner seeking habeas relief has not properly

exhausted a claim "if he has the right under the law of the State to raise, *by any available procedure*, the question presented." 28 U.S.C. § 2254(c) (emphasis added). Thus, a petitioner "must present his claims to a state supreme court in a petition for discretionary review" in order to properly exhaust a claim in state court. *O'Sullivan v. Boerckel*, 526 U.S. at 839-40. A motion for reconsideration is "an avenue of relief that the Arizona Rules of Criminal Procedure clearly outline." *Correll v. Stewart*, 137 F.3d 1404, 1418 (9th Cir. 1998); *see Styers v. Schriro*, 547 F.3d 1026, 1034 (9th Cir. 2008). Petitioner could have raised these claims in his motion for reconsideration to the Arizona Supreme Court following the denial of his direct appeal. He did not. *See* PCR Pet., Ex. 29. Therefore, the PCR court did not err in finding the claims precluded as waived pursuant to Rule 32.2(a)(3).

Alternatively, Petitioner offers ineffective assistance of appellate counsel as cause for the default.[11] Dkt. 40 at 39, 43. Where ineffective assistance of appellate counsel is raised as cause for excusing a procedural default, application of *Strickland* requires the Court to look to the merits of the omitted issue. *Hain v. Gibson*, 287 F.3d 1224, 1231 (10th Cir. 2002); *United States v. Cook*, 45 F.3d 388, 392 (10th Cir. 1995) (to determine if appellate counsel provided ineffective assistance by failing to raise an issue on appeal "we examine the merits of the omitted issue"). If the omitted issue is

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[11] As discussed below in Claim 22, Petitioner exhausted his claims of ineffective assistance of appellate counsel by raising them in his PCR petition and petition for review. PCR Pet. at 46; PR doc. 9 at 31.

meritless, counsel's failure to appeal does not constitute a Sixth Amendment deprivation. *Cook*, 45 F.3d at 392-93. The Court concludes, as set forth below, that Claims 8 and 10 lack merit. Therefore, appellate counsel was not ineffective for failing to raise them and ineffective assistance of appellate counsel does not excuse their default.

Background

As detailed above, the trial court found that Petitioner had failed to prove the nonstatutory mitigation evidence proffered at sentencing regarding his substance abuse and mental health, finding that Petitioner had established neither the existence of the conditions nor their effect on his behavior at the time of the murders. Dkt 36, Ex. A at 3-4. In his special verdict, Judge Kiger stated that he had "considered" all of the nonstatutory mitigating circumstances but found them of "essentially no weight." *Id.* at 5.

The Arizona Supreme Court agreed "that impairment was not established as a nonstatutory mitigating factor by a preponderance of the evidence," explaining that "in addition to offering equivocal evidence of mental impairment, defendant offered no evidence to show the requisite causal nexus that mental impairment affected his judgment or his actions at the time of the murder." *Kayer*, 194 Ariz. at 438, 984 P.2d at 46. In considering other nonstatutory mitigating circumstances, the Arizona Supreme Court found that Petitioner's poor "post-murder physical health" was entitled to "no weight" as a mitigating factor because it did not bear on his pre-murder character or his propensities, record, or other

circumstances of the offense. *Id.* at 440, 984 P.2d at 48. The court likewise found that Petitioner's intelligence and ability to contribute to society did not constitute a mitigating factor. *Id.*

Analysis

The Supreme Court has explained that "evidence about the defendant's background and character is relevant because of the belief, long held by this society, that defendants who commit criminal acts that are attributable to a disadvantaged background [or to emotional and mental problems] may be less culpable than defendants who have no such excuse." *Wiggins*, 539 U.S. at 535 (quoting *Penry v. Lynaugh*, 492 U.S. 302, 319 (1989)). Therefore, a sentencing court is required to consider any mitigating information offered by a defendant, including non-statutory mitigation. *See Lockett v. Ohio*, 438 U.S. 586, 604 (1978); *see also Ceja v. Stewart*, 97 F.3d 1246, 1251 (9th Cir. 1996). In *Lockett* and *Eddings v. Oklahoma*, 455 U.S. 104, 113-14 (1982), the Court held that under the Eighth and Fourteenth Amendments the sentencer must be allowed to consider, and may not refuse to consider, "any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." *See also Burger v. Kemp*, 483 U.S. 776, 789 n.7 (1987). While the sentencer must not be foreclosed from considering relevant mitigation, "it is free to assess how much weight to assign such evidence." *Ortiz v. Stewart*, 149 F.3d 923, 943 (9th Cir. 1998); *see Eddings*, 455 U.S. at 114-15 ("The sentencer . . . may determine the weight to be given the relevant mitigating

evidence."); *see also State v. Newell*, 212 Ariz. 389, 405, 132 P.3d 833, 849 (2006) (explaining that mitigating evidence must be considered regardless of whether there is a "nexus" between the mitigating factor and the crime, but the lack of a causal connection may be considered in assessing the weight of the evidence).

On habeas review, a federal court does not evaluate the substance of each piece of evidence submitted as mitigation. Instead, it reviews the record to ensure the state court allowed and considered all relevant mitigating information. *See Jeffers v. Lewis*, 38 F.3d 411, 418 (9th Cir. 1994) (en banc) (when it is evident that all mitigating evidence was considered, the trial court is not required to discuss each piece of evidence); *see also Lopez v. Schriro*, 491 F.3d 1029, 1037 (9th Cir. 2007), *cert. denied*, 128 S. Ct. 1227 (2008) (rejecting claim that the sentencing court failed to consider proffered mitigation where the court did not prevent the defendant from presenting any evidence in mitigation, did not affirmatively indicate there was any evidence it would not consider, and expressly stated it had considered all mitigation evidence proffered by the defendant). In *LaGrand v. Stewart*, 133 F.3d 1253, 1263 (9th Cir. 1998), the Ninth Circuit discussed the habeas court's role when considering whether the state court properly weighed mitigation evidence:

> federal courts do not review the imposition of the sentence *de novo*. Here, as in the state courts' finding of the existence of an aggravating factor, we must use the rational fact-finder test of *Lewis v. Jeffers*. That is, considering the aggravating and mitigating circumstances, could

> a rational fact-finder have imposed the death penalty?

Applying these principles, it is apparent in Petitioner's case that the trial court and the Arizona Supreme Court fulfilled their constitutional obligation by allowing and considering all of the mitigating evidence. As noted above, the trial court and the state supreme court discussed the mitigating circumstances advanced by Petitioner at sentencing, including his family background, mental health, and history of substance abuse. The fact that the courts found the mitigating information not weighty enough to call for leniency does not amount to a constitutional violation. *Eddings*, 455 U.S. at 114-15. This is true notwithstanding the courts' discussion of the lack of a causal link between the mitigating circumstances and the crime.

In *Tennard v. Dretke*, 542 U.S. 274, 289 (2004), the Supreme Court held that the habeas petitioner was entitled to a certificate of appealability on his claim that Texas's capital sentencing scheme failed to provide a constitutionally adequate opportunity to present his low I.Q. as a mitigating factor. The Court rejected the "screening" test applied by the Fifth Circuit, according to which mitigating information is constitutionally relevant only if it shows "uniquely severe" circumstances to which the criminal act was attributable. *Id.* at 283-84. Instead, the Court explained, the test for the relevance of mitigation evidence is the same standard applied to evidence proffered in other contexts – namely, whether the evidence has any tendency to make the existence of any

fact that is of consequence to a determination of the action more or less likely than it would be without the evidence. *Id.* at 284.

The courts in Petitioner's case did not impose any barrier to consideration of the proffered mitigation. To the contrary, the trial court and the Arizona Supreme Court explicitly considered the evidence of Petitioner's mental health issues and substance abuse history. Again, no constitutional violation occurred when the state courts, perceiving the lack of a causal or explanatory relationship between the mitigating evidence and Petitioner's criminal conduct, assigned less weight to that evidence than Petitioner believes it warranted. *See Eddings*, 455 U.S. at 114-15; *Ortiz*, 149 F.3d at 943. In addition, contrary to Petitioner's arguments in Claim 8, the courts considered his current poor health and his ability to contribute to society, but found they were not mitigating because they did not relate to his character, record, or the circumstances of the offense. This determination was permissible. *See Lockett*, 438 U.S. at 604 n.12 ("Nothing in this opinion limits the traditional authority of a court to exclude, as irrelevant, evidence not bearing on the defendant's character, prior record, or circumstances of the offense.").

The United States Supreme Court has emphasized that there is no required formula for weighing mitigating evidence; indeed, the sentencer may be given "unbridled discretion in determining whether the death penalty should be imposed after it has found that the defendant is a member of the class made eligible for that penalty." *Zant v. Stephens*, 462 U.S. 862, 875

(1983); *see Kansas v. Marsh*, 548 U.S. 163, 175 (2006) ("our precedents confer upon defendants the right to present sentencers with information relevant to the sentencing decision and oblige sentencers to consider that information in determining the appropriate sentence. The thrust of our mitigation jurisprudence ends here."); *Harris v. Alabama*, 513 U.S. 504, 512 (1995) (Constitution does not require that a specific weight be given to any particular mitigating factor); *Tuilaepa v. California*, 512 U.S. 967, 979-80 (1994). This Court knows of no Supreme Court precedent holding that mitigation evidence, once presented and under consideration, is entitled to a particular weight or that it is inappropriate for a sentencer, when weighing such evidence, to consider, along with its humanizing impact, the extent to which the evidence offers an explanation of the criminal conduct.[12]

Conclusion

Neither the trial court nor the Arizona Supreme Court violated Petitioner's rights in their evaluation of proffered mitigation evidence. Claims 8 and 10 are meritless. Appellate counsel was not ineffective because if had he raised the claims in a motion for reconsideration there is no likelihood the Arizona Supreme Court would have granted relief. Therefore, Petitioner has failed to establish cause to his excuse

[12] The Ninth Circuit has recognized that mitigating evidence may serve both a "humanizing" and an "explanatory" or "exculpatory" purpose, with greater weight generally being ascribed to the latter category. *See Allen v. Woodford*, 395 F.3d 979, 1005-10 (2005).

the default of Claims 8 and 10 and the claims are procedurally barred.

Claim 9

Petitioner alleges that execution by lethal injection, as it will be imposed, is cruel and unusual punishment in violation of his rights under the Eighth and Fourteenth Amendments of the United States Constitution. Dkt. 35 at 82. This claim was raised on direct appeal and rejected by the Arizona Supreme Court. *Kayer*, 194 Ariz. at 441, 984 P.2d at 49.

Petitioner is not entitled to habeas relief on this claim. The United States Supreme Court has never held that lethal injection constitutes cruel and unusual punishment, *see Baze v. Rees*, 128 S. Ct. 1520 (2008), and the Ninth Circuit has concluded that death by lethal injection in Arizona does not violate the Eighth Amendment. *See LaGrand v. Stewart*, 133 F.3d 1253, 1265 (9th Cir. 1998); *Poland v. Stewart*, 117 F.3d 1094, 1104-05 (9th Cir. 1997); *see also Dickens v. Brewer*, 07-CV-1770, 2009 WL 1904294 (D. Ariz. July 1, 2009) (Arizona's lethal injection protocol does not violate Eighth Amendment). Therefore, the Arizona Supreme Court's rejection of the claim was neither contrary to nor an unreasonable application of clearly established federal law. Claim 9 is denied.

Claim 11

Petitioner alleges that he was denied a jury finding beyond a reasonable doubt on the facts that increased his sentence beyond the maximum imposable in violation of the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution. Dkt.

35 at 94. The PCR court found this claim precluded under Rule 32.2(a)(3), and Respondents contend that it is unexhausted and procedurally barred. Dkt. 36 at 68-69. Regardless of the claim's procedural status, it is plainly meritless and will be denied. *See* 28 U.S.C. § 2254(b)(2); *Rhines*, 544 U.S. at 277.

Petitioner asserts that he "is entitled to the benefit of the rule announced in *Apprendi v. New Jersey*, 530 U.S. 466 (2000), and that the holding in *Schriro v. Summerlin*, 542 U.S. 348 (2004), does not apply to his case.[13] Dkt. 35 at 95-96. These propositions are premised on Petitioner's claim that his conviction became final after the decision in *Apprendi* – on January 25, 2001, when the Arizona Supreme Court issued its mandate in Petitioner's case, as opposed to February 28, 2000, when the United States Supreme Court denied his petition for writ of certiorari.[14] Petitioner is incorrect. "State convictions are final 'for purposes of retroactivity analysis when the availability of direct appeal to the state courts has been exhausted and the time for filing a petition for a writ of certiorari has elapsed or a timely filed petition has been finally denied.'"[15] *Beard v. Banks*, 542 U.S. 406, 411 (2004)

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[13] *Apprendi* held that any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury and proved beyond a reasonable doubt. 530 U.S. at 489.

[14] *Kayer v. Arizona*, 528 U.S. 1196 (2000) (mem.).

[15] Petitioner asserts that for purposes of retroactivity analysis, an Arizona conviction becomes final only with the issuance of the mandate because until that point an appellate court may still

(quoting *Caspari v. Bohlen,* 510 U.S. 383, 390 (1994)). Petitioner's case was final when his petition for writ of certiorari was denied, which occurred prior to June 26, 2000, the date on which *Apprendi* was decided.

At the time of Petitioner's sentencing, Supreme Court precedent held that judges could find the aggravating circumstances that made a defendant eligible for capital punishment. *Walton v. Arizona*, 497 U.S. 639, 647-49 (1990). That law changed with *Ring v. Arizona*, 536 U.S. 584 (2002), but *Schriro v. Summerlin* 542 U.S. 348, 358 (2004), held that *Ring* announced a new procedural rule that does not apply retroactively to cases, like Petitioner's, that were already final on direct review at the time *Ring* was decided. Notwithstanding the inapplicability of *Ring* to his case, Petitioner counters that *Apprendi* "is sufficient to establish the Sixth Amendment violation requiring relief from his death sentence." Dkt. 35 at 96. This argument is unavailing because *Apprendi*, like *Ring*, does not apply retroactively, *see Cooper-Smith v. Palmateer*, 397 F.3d 1236, 1245-46 (9th Cir. 2005), and, as just discussed, Petitioner's conviction was final before *Apprendi* was decided. Claim 11 is therefore denied.

Claim 12

Petitioner alleges that his death sentence violates his jury trial rights under the Fifth, Sixth, and Fourteenth Amendments because the aggravating factors alleged by the State were not presented in an

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modify the sentence. Dkt. 40 at 46-47. He offers no support for this proposition, and the Court rejects it as contrary to *Banks*.

indictment and subjected to a pretrial probable cause determination. Dkt. 35 at 101. The PCR court found this claim precluded under Rule 32.2(a)(3). Respondents' argument that the claim is procedurally barred, but the Court will address the claim because it is plainly meritless. *See* 28 U.S.C. § 2254(b)(2); *Rhines*, 544 U.S. at 277.

While the Due Process Clause guarantees defendants a fair trial, it does not require the states to observe the Fifth Amendment's provision for presentment or indictment by a grand jury. *Hurtado v. California,* 110 U.S. 516, 538 (1884); *Branzburg v. Hayes,* 408 U.S. 665, 688 n.25 (1972). Although Petitioner contends that *Ring* and *Apprendi* support his position in this claim, in neither case did the Supreme Court address the issue, let alone hold that aggravating factors must be included in an indictment and subjected to a probable cause determination. *See Ring*, 536 U.S. at 597 n.4. Moreover, the Arizona Supreme Court has expressly rejected the argument that *Ring* requires that aggravating factors be alleged in an indictment and supported by probable cause. *McKaney v. Foreman,* 209 Ariz. 268, 270, 100 P.3d 18, 20 (2004). Claim 12 is without merit and will be denied.

Claim 22

Petitioner cites several instances in which he was denied effective assistance of counsel on appeal in violation of his rights under the Sixth and Fourteenth Amendments. Dkt. 35 at 119. Respondents contend that the claim is unexhausted because Petitioner failed to include it in his petition for review to the Arizona Supreme Court. Dkt. 36 at 82. Petitioner counters that

he did raise a claim of ineffective assistance of appellate counsel in his petition for review. Dkt. 40 at 62.

In his PCR petition, Petitioner raised the allegations of ineffective assistance of appellate counsel contained in his habeas petition. PCR Pet. at 45. The court found the claims "not colorable" because "the prejudice portion of the *Strickland* test has not been met." Dkt. 36, Ex. B at 2. In his petition for review, Petitioner raised such allegations as a defense against the preclusion rulings reached by the PCR court. *See* PR doc. 9 at 31. The Court finds that this was sufficient to exhaust the allegations and will consider Claim 22 on the merits.

Analysis

The Fourteenth Amendment guarantees a criminal defendant the effective assistance of counsel on his first appeal as of right. *Evitts v. Lucey*, 469 U.S. 387, 396 (1985). A claim of ineffective assistance of appellate counsel is reviewed under the standard set out in *Strickland*. *See Miller v. Keeney*, 882 F.2d 1428, 1433-34 (9th Cir. 1989). A petitioner must show that counsel's appellate advocacy fell below an objective standard of reasonableness and that there is a reasonable probability that, but for counsel's deficient performance, the petitioner would have prevailed on appeal. *Smith v. Robbins*, 528 U.S. 259, 285-86 (2000); *see Miller*, 882 F.2d at 1434 n.9 (citing *Strickland*, 466 U.S. at 688, 694).

"A failure to raise untenable issues on appeal does not fall below the *Strickland* standard." *Turner v.*

Calderon, 281 F.3d 851, 872 (9th Cir. 2002); *see also Wildman v. Johnson*, 261 F.3d 832, 840 (9th Cir. 2001) (appellate counsel could not be found to have rendered ineffective assistance for failing to raise issues that "are without merit"); *Boag v. Raines*, 769 F.2d 1341, 1344 (9th Cir. 1985). Moreover, appellate counsel does not have a constitutional duty to raise every nonfrivolous issue requested by a petitioner. *Miller,* 882 F.2d at 1434 n.10 (citing *Jones v. Barnes*, 463 U.S. 745, 751-54 (1983)); *see Smith v. Stewart*, 140 F.3d at 1274 n.4 (counsel not required to file "kitchen-sink briefs" because doing so "is not necessary, and is not even particularly good appellate advocacy"). Courts have frequently observed that the "weeding out of weaker issues is . . . one of the hallmarks of effective appellate advocacy." *Miller*, 882 F.2d at 1434; *see Smith v. Murray*, 477 U.S. 527, 536 (1986). Therefore, even if appellate counsel declines to raise weak issues, he will likely remain above an objective standard of competence and will have caused no prejudice. *Id.*

The PCR court's finding that Petitioner failed to show he was prejudiced by appellate counsel's performance did not constitute an unreasonable application of *Strickland*. As described below, the issues appellate counsel failed to raise were without merit. Therefore, Petitioner has not met his burden of affirmatively proving that he was prejudiced by appellate counsel's performance.

In Claim 13, Petitioner alleges that the trial court misapplied Arizona's capital-sentencing statute, thus violating Petitioner's right to due process of law under the Fifth and Fourteenth Amendments and his right to

be free from cruel and unusual punishment under the Eighth and Fourteenth Amendments. Dkt. 35 at 105.

Arizona's capital sentencing statute provides: "The trier of fact shall impose a sentence of death if . . . there are no mitigating circumstances sufficiently substantial to call for leniency." A.R.S. § 13-703(E). Petitioner argues that the trial court did not properly apply this standard because it found that "one mitigating factor does not provide sufficient weight to offset the aggravating factors." Dkt. 36, Ex. A at 5. According to Petitioner, the court "placed the burden of proof on [him] to prove that the mitigating circumstance outweighed the aggravating circumstances." Dkt. 35 at 105.

Petitioner's argument is unpersuasive. The Supreme Court has held that a state may place the burden of proving that mitigating circumstances outweigh aggravating circumstances on a defendant. *Kansas v. Marsh*, 548 U.S. at 173 (citing *Walton v. Arizona*, 497 U.S. 639 (1990)). Claim 13 is therefore meritless.

In Claim 14, Petitioner alleges that the trial court improperly considered victim-impact questionnaires in violation of the Eighth Amendment. Dkt. 35 at 106. Petitioner refers to a statement provided by Deanne Haas, the victim's daughter, recommending the death sentence. In *Payne v. Tennessee*, 501 U.S. 808, 827 (1991), the United States Supreme Court held that while a state may permit the admission of victim impact evidence, it is not allowed to present evidence concerning a victim's opinion about the appropriate sentence. Judges are presumed to know and follow the

law, *Walton*, 497 U.S. at 653, and in his special verdict, Judge Kiger did not cite the victim's opinion as a reason for imposing the death penalty. Dkt. 36, Ex. A. Petitioner has not rebutted the presumption that Judge Kiger considered only appropriate factors in sentencing Petitioner to death. *See Gretzler v. Stewart*, 112 F.3d 992, 1009 (9th Cir. 1997) ("in the absence of any evidence to the contrary, [the Court] must assume that the trial judge properly applied the law and considered only the evidence he knew to be admissible"). Claim 14 is without merit.

In Claim 16, Petitioner alleges that the trial court denied his rights under the Fifth, Sixth, and Fourteenth Amendments by forcing him to choose between wearing a leg brace or having courtroom deputies placed so close to him that, according to Petitioner, they infringed on his right to communicate with counsel. Dkt. 35 at 109.

Under clearly-established federal law, the State is precluded from using visible shackles on a defendant before a jury absent special security needs. *See Deck v. Missouri*, 544 U.S. 622 (2005); *Holbrook v. Flynn*, 475 U.S. 560 (1986); *Illinois v. Allen*, 397 U.S. 337 (1970). Petitioner chose not to wear a leg brace and therefore was not visibly shackled. *See* RT 3/7/97 at 3-5. Nothing in the record demonstrates that deputies were able to overhear or view any confidential communications between Petitioner and his attorneys or that their presence had any effect on Petitioner's ability to communicate with counsel. Claim 16 is meritless.

In Claim 17, Petitioner alleges that the reasonable doubt instruction given by the trial court lowered the

State's burden of proof, depriving Petitioner of his right to due process under the Fourteenth Amendment and his right to trial by jury under the Sixth and Fourteenth Amendments. Dkt. 35 at 110. This claim is meritless under *Victor v. Nebraska*, 511 U.S. 1 (1994), and *State v. Portillo*, 182 Ariz. 592, 596, 898 P.2d 970, 974 (1995) (adopting standard instruction consistent with that approved in *Victor*).

In Claim 19, Petitioner alleges that his conviction for armed robbery violated his right to due process pursuant to the Fourteenth Amendment because there was insufficient evidence to support the conviction. Dkt. 35 at 114. In Claim 20, Petitioner contends that because insufficient evidence exists to support the armed robbery conviction, his felony murder conviction violates the due process clause of the Fourteenth Amendment and must be vacated. *Id.* at 20.

A habeas petitioner challenging the sufficiency of the evidence is entitled to relief only "if no rational trier of fact" could have found proof of guilt beyond a reasonable doubt based on the trial evidence. *Jackson*, 443 U.S. at 324. The evidence must be considered "in the light most favorable to the prosecution" and a court may not substitute its judgment for that of the jury. *Id.* at 319. "[A] federal habeas court faced with a record of historical facts 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." *Id.* at 326.

At the time of the time of the murder, robbery was defined as follows:

> A person commits robbery if in the course of taking any property of another from his person or immediate presence and against his will, such person threatens or uses force against any person with intent either to coerce surrender of property or to prevent resistance to such person taking or retaining property.

A.R.S § 13-1902. To commit armed robbery the defendant must have been armed with or threatened the use of a deadly weapon. A.R.S. § 13-1904. From the evidence presented at trial, namely Kester's testimony, a rational juror could find beyond a reasonable doubt that Petitioner used force to prevent resistance when he shot Haas to death and took his property. Claim 19 is meritless.

Claim 20 is meritless because sufficient evidence supported the underlying armed robbery conviction and because the jury also convicted Petitioner of premeditated first-degree murder.

In Claim 26, Petitioner alleges that his sentences for the non-capital offenses were aggravated in violation of his Sixth Amendment right to trial by jury. Dkt. 35 at 124. As described above in the Court's analysis of Claim 11, this claim is meritless because neither *Apprendi* nor *Blakely v. Washington*, 542 U.S. 296 (2004), applies retroactively. *See Cooper-Smith*, 397 F.3d at 1246.

Conclusion

Because the claims appellate counsel failed to raise are without merit, Petitioner cannot show a reasonable probability that he would have prevailed on appeal if they had been raised. Therefore, he has failed to show that he was prejudiced by appellate counsel's performance and he is not entitled to relief on Claim 22.

Claim 23

Petitioner asserts that "[g]iven the procedures for post-conviction review in Arizona capital cases, [he] is constitutionally entitled to the effective representation of post-conviction counsel." Dkt. 35 at 121. Petitioner specifically alleges that he was denied the effective assistance of post-conviction counsel and his right to due process because of an unresolved conflict between himself and counsel. *Id.*

There is no constitutional right to counsel in state post-conviction proceedings. *See Pennsylvania v. Finley*, 481 U.S. 551, 555 (1987); *Murray v. Giarratano*, 492 U.S. 1, 7-12 (1989); *Bonin v. Vasquez*, 999 F.2d 425, 429-30 (9th Cir. 1993). Therefore, ineffective assistance of PCR counsel is not a cognizable habeas claim. *See* 28 U.S.C. § 2254(I) ("The ineffectiveness or incompetence of counsel during Federal or State collateral post-conviction proceedings shall not be a ground for relief in a proceeding arising under section 2254."). Claim 23 is denied.

Claim 25

Petitioner alleges that his convictions were obtained in violation of his right to a fair trial and to due process of law under the Fifth, Sixth, Eighth, and Fourteenth Amendments because Lisa Kester's plea agreement contained an unenforceable "consistency" provision. Dkt. 35 at 131. Respondents concede that the claim is exhausted. Dkt. 36 at 91.

As Petitioner's trial approached, Kester entered into a plea agreement with the State. The agreement required Kester to verify "that all prior statements made to [Yavapai County Detectives] Danny Martin and Roger Williamson were truthful." Appellee's Answering Br., Ex. A at 2. It also required Kester to "appear at any proceeding including trial upon the request of the State and testify truthfully to all questions asked" and to "cooperate completely with the State of Arizona in the prosecution of" Petitioner. *Id.* at 2-3. The State was allowed to dishonor the agreement if Kester violated any of its terms. *Id.* at 3.

The Arizona Supreme Court rejected Petitioner's claim that the plea agreement contained a consistency provision in violation of his due process rights. *Kayer*, 194 Ariz. at 430-31, 984 P.2d at 38-39. Because Petitioner did not object to the agreement at trial, and in fact used the agreement to attack Kester's credibility, the court reviewed the claim only for fundamental error and found none. *Id*. The court did not reach a conclusion as to whether the agreement actually contained a consistency provision. *Id*. at 431 n.1, 984 P.2d at 39.

Even if the plea agreement had contained a consistency provision, Petitioner would not be entitled to relief on this claim. Petitioner has not cited, nor has the Court identified, any Supreme Court authority addressing the due process implications of consistency agreements.[16] As the Ninth Circuit observed in *Cook v. Schriro*, "there is no Supreme Court case law establishing that consistency clauses violate due process or any other constitutional provision." 538 F.3d 1000, 1017 (9th Cir. 2008). The Ninth Circuit concluded that, "[b]ecause it is an open question in the Supreme Court's jurisprudence, we cannot say 'that the state court unreasonably applied clearly established Federal law'" by rejecting Petitioner's claim. *Id.* (quoting *Musladin*, 549 U.S. at 77) (internal quotations omitted). Claim 25 is denied.

EVIDENTIARY DEVELOPMENT

Petitioner requests an evidentiary hearing or other forms of evidentiary development with respect to

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[16] The federal appellate courts do not appear to have addressed the issue directly, although they have consistently held that "[a]n agreement that requires a witness to testify truthfully in exchange for a plea is proper so long as 'the jury is informed of the exact nature of the agreement, defense counsel is permitted to cross-examine the accomplice about the agreement, and the jury is instructed to weigh the accomplice's testimony with care.'" *Allen v. Woodford,* 395 F.3d 979, 995 (9th Cir. 2005) (quoting *United States v. Yarbrough,* 852 F.2d 1522, 1537 (9th Cir. 1988)). Nor is Petitioner's claim supported by state law. In *State v. Rivera,* 210 Ariz. 188, 191, 109 P.3d 83, 86 (2005), the Arizona Supreme Court held that the co-defendants' plea agreements, which required truthful testimony and avowals that prior statements were true, were not impermissible "consistency agreements."

Claims 9, 15, 16, 22, and 23. Dkt. 46. Pursuant to *Townsend v. Sain*, 372 U.S. 293, 312-13 (1963), *overruled in part by Keeney v. Tamayo-Reyes*, 504 U.S. 1 (1992), *and limited by* § 2254(e)(2), a federal district court must hold an evidentiary hearing in a § 2254 case when: (1) the facts are in dispute; (2) the petitioner "alleges facts which, if proved, would entitle him to relief;" and (3) the state court has not "reliably found the relevant facts" after a "full and fair evidentiary hearing" at trial or in a collateral proceeding. *See Hill v. Lockhart*, 474 U.S. 52, 60 (1985) (upholding the denial of a hearing when petitioner's allegations were insufficient to satisfy the governing legal standard); *Bashor v. Risley*, 730 F.2d 1228, 1233-34 (9th Cir. 1984) (hearing not required when claim must be resolved on state court record or claim is based on non-specific conclusory allegations); *see also Landrigan*, 550 U.S. at 474 ("Because the deferential standards prescribed by § 2254 control whether to grant habeas relief, a federal court must take into account those standards in deciding whether an evidentiary hearing is appropriate."). Based on these principles, Petitioner is not entitled to an evidentiary hearing or further evidentiary development.

With respect to Claim 9, because there is no Supreme Court precedent holding that lethal injection violates the Constitution, Petitioner cannot gain habeas relief under the AEDPA and is not entitled to evidentiary development.

As explained above, Claim 15 is procedurally barred.

With respect to Claim 16, alleging violations arising from the courtroom security arrangements, Petitioner has neither identified any disputed facts nor "allege[d] facts which, if proved, would entitle him to relief." *Townsend,* 372 U.S. at 312-13. Therefore, he is not entitled to an evidentiary hearing.

With respect to Claim 22, Petitioner's allegations of ineffective assistance of appellate counsel are properly resolved on the record. *See Gray v. Greer,* 800 F.2d 644, 647 (7th Cir.1985) ("it is the exceptional case" where a claim ineffective assistance of appellate counsel "could not be resolved on the record alone"). Moreover, Petitioner has not identified any disputed facts or alleged facts that would entitle him to relief.

Claim 23, alleging ineffective assistance of PCR counsel, is not cognizable.

CONCLUSION

For the reasons set forth above, Petitioner has failed to show that he is entitled to habeas relief on any of his claims, and additional evidentiary development is neither required nor warranted.

CERTIFICATE OF APPEALABILITY

In the event Petitioner appeals from this Court's judgment, and in the interests of conserving scarce resources that might be consumed drafting and reviewing an application for a certificate of appealability ("COA") to this Court, the Court on its own initiative has evaluated the claims within the petition for suitability for the issuance of a certificate

of appealability. *See* 28 U.S.C. § 2253(c); *Turner v. Calderon*, 281 F.3d 851, 864-65 (9th Cir. 2002).

Rule 22(b) of the Federal Rules of Appellate Procedure provides that when an appeal is taken by a petitioner, the district judge who rendered the judgment "shall" either issue a COA or state the reasons why such a certificate should not issue. Pursuant to 28 U.S.C. § 2253(c)(2), a COA may issue only when the petitioner "has made a substantial showing of the denial of a constitutional right." This showing can be established by demonstrating that "reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner" or that the issues were "adequate to deserve encouragement to proceed further." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000) (citing *Barefoot v. Estelle*, 463 U.S. 880, 893 & n.4 (1983)).

The Court finds that reasonable jurists could debate its resolution of Claims 1(B)(4) and 2. For the reasons stated in this order, the Court declines to issue a COA with respect to any other claims.

Based on the foregoing,

IT IS ORDERED that Petitioner's Amended Petition for Writ of Habeas Corpus, Dkt. 35, is **DENIED**. The Clerk of Court shall enter judgment accordingly.

IT IS FURTHER ORDERED that Petitioner's motion for evidentiary development, Dkt. 46, is **DENIED**.

IT IS FURTHER ORDERED that the stay of execution entered by this Court on November 5, 2007, Dkt. 5, is **VACATED.**

IT IS FURTHER ORDERED GRANTING a Certificate of Appealability as to the following issues:

> Whether Claim 1(B)(4) of the Amended Petition – alleging ineffective assistance of counsel at sentencing – is without merit.
>
> Whether Claim 2 of the Amended Petition – alleging that Petitioner's rights were violated when the trial court accepted his waiver of a continuance at sentencing – is without merit.

IT IS FURTHER ORDERED that the Clerk of Court forward a courtesy copy of this Order to the Clerk of the Arizona Supreme Court, 1501 W. Washington, Phoenix, AZ 85007-3329.

DATED this 19th day of October, 2009.

/s/David G. Campbell
David G. Campbell
United States District Judge

UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA

CV07-2120-PHX-DGC

[Filed October 19, 2009]

George Russell Kayer,	)
	)
Petitioner,	)
	)
v.	)
	)
Charles L. Ryan, et al.,	)
	)
Respondents.	)
	)

JUDGMENT IN A CIVIL CASE

___ Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

XX Decision by Court. This action came for consideration before the Court. The issues have been considered and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that, per the Court's order entered October 19, 2009, that Petitioner's Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254 is denied. Judgment is entered for respondents and against petitioner. The action is dismissed and the stay of execution entered by this Court on November 5, 2007, is vacated.

October 19, 2009

RICHARD H. WEARE
District Court
Executive/Clerk

s/E.Leon
By: Deputy Clerk

cc: (all counsel)

APPENDIX C

SUPERIOR COURT, STATE OF ARIZONA, IN AND FOR THE COUNTY OF YAVAPAI

Case No. CR 94-0694

[Filed May 10, 2006]

State of Arizona,	)
	)
Plaintiff/Respondent	)
	)
vs	)
	)
George Russell Kayer,	)
	)
Defendant/Petitioner	)
	)

Rule 32 decision and order

HONORABLE WILLIAM T. KIGER

DIVISION 5 **DATE:** May 8, 2006

The court has now read and considered the defendant/petitioner's petition for Rule 32 relief, the state's response and the reply. The court has also listened to and considered the testimony presented at the evidentiary hearing and the exhibits admitted at that hearing. Since the conclusion of the hearing, the court has also received, read and considered the stipulation re: witness Don Hulen, and the post hearing

memoranda submitted by the petitioner and the state. Based on the above, the court finds and orders as follows:

1. The petitioner has submitted eighteen issues upon which he asserts that Rule 32 relief should be granted. Previously, this court ruled that no relief could be granted as to seventeen of those issues and no evidentiary hearing was necessary. The issue for which the court held an evidentiary hearing was the claim that trial counsel were ineffective in the representation of Mr. Kayer:

    a. Concerning investigation of potentially mitigating information and

    b. During death qualification of potential jurors during *voir dire.*

2. As to la, the court concludes that trial counsel did not fall below the *Strickland* standard for effective representation concerning potential mitigation. In reaching this conclusion; the court considers:

    a. It's own observations of the defendant during the trial and the sentencing phase.

    b. The analysis and observations of the Supreme Court in this case stated:

        > Defendant repeatedly refused to cooperate with his court- appointed mitigation specialist and instead sought to expedite sentencing. He now argues the trial court erred when it allowed him this freedom. On appeal, defendant characterizes his refusal

as legal incompetence or improper control over the presentation of mitigation evidence that amounts to a *de facto* and improper waiver of his right to counsel. We disagree ....

After thoroughly reviewing the entire record, we conclude that defendant was competent when he decided not to cooperate with Durand. Taken in context, these bizarre passages quoted do not refute but rather bolster the conclusion that defendant was intelligent, had an understanding of what was occurring, and voluntarily made the decision not to cooperate. He understood the alternatives and the consequences of refusing to cooperate and nevertheless chose that path. He reaffirmed his decision not to cooperate several times, once saying that he did not have a death wish but that he believed the psychological evidence Durand wished to pursue would not produce mitigating evidence....

The record indicates that defendant was articulate, aware of the proceedings, and knowledgeable about the potential consequences of his choices. On this record, we conclude that defendant was competent when he chose not to cooperate with Durand and chose to expedite his sentencing proceedings, despite the fact that his decision may have limited the mitigation evidence offered on his behalf.

c. The reports and testimony of the expert witnesses who testified at the evidentiary hearing.

The court concludes that at the time of sentencing, the defendant voluntarily prohibited his attorneys from further pursuing and presenting any possible mitigating evidence.

This court further concludes that **if** there had been a finding that the performance prong of the *Strickland* standard had been met, that no prejudice to the defendant can be found. In stating this conclusion the court has considered the assertion of mental illness, physical illness, jail conditions, childhood development, and any alcohol or gambling addictions.

3. As to 1b above, the court finds no evidence supporting the claim that trial counsel fell below the *Strickland* standard for effective representation of counsel during the *voir dire.*

4. The petition for post conviction relief is dismissed.

Dated this 8th of May, 2006.

/s/William T. Kiger
William T. Kiger
Judge of the Superior Court

cc: John Pressley Todd, Esq., Assistant Attorney General
Thomas J. Phalen, Esq., Counsel for Defendant

Philip A. Seplow, Esq., Counsel for Defendant
Victim Services

APPENDIX D

IN THE SUPREME COURT OF ARIZONA
En Banc

Supreme Court No. CR-97-0280-AP

Yavapai County No. CR-94-0694

[Filed June 29, 1999]

STATE OF ARIZONA,	)
	)
Appellee,	)
	)
v.	)
	)
GEORGE RUSSELL KAYER,	)
aka DAVID FLYNN,	)
aka DAVID WORTHAM,	)
	)
Appellant.	)
	)

O P I N I O N

Appeal from the Superior Court of
Yavapai County

The Honorable William T. Kiger, Judge Pro Tempore

AFFIRMED

Janet Napolitano, Attorney General Phoenix
by Paul J. McMurdie, Chief Counsel
Criminal Appeals Division
John Pressley Todd, Assistant Attorney General
Attorneys for Appellee

John M. Sears Prescott
Attorney for Appellant

J O N E S, Vice Chief Justice

¶1 A jury convicted defendant George Russell Kayer of first-degree murder for taking the life of Delbert L. Haas. The jury also convicted him of other felonies related to the killing. Because defendant was sentenced to death on the murder charge, direct appeal of all convictions and sentences to this court is mandatory pursuant to Rules 26.15 and 31.2(b) of the Arizona Rules of Criminal Procedure. Jurisdiction exists pursuant to article VI, section 5(3) of the Arizona Constitution and section 13-4031 of the Arizona Revised Statutes. We affirm the judgment and sentences imposed by the trial court.

FACTS

¶2 On December 3, 1994, two couples searching for Christmas trees on a dirt road in Yavapai County discovered a body, later identified as Haas. Haas had been shot twice, evidenced by entry bullet wounds located roughly behind each ear. On December 12, 1994, Yavapai County Detective Danny Martin received a phone call from Las Vegas police officer Larry Ross. Ross told Martin that a woman named Lisa Kester approached a security guard at the Pioneer

Hotel in Las Vegas and said that her boyfriend, the defendant, had killed a man in Arizona. Kester said a warrant had been issued for defendant's arrest in relation to a different crime, a fact Las Vegas police officers later confirmed. Kester gave Las Vegas police officers the gun she said was used to kill Haas, and she led the officers to credit cards belonging to Haas that were found inside a white van in the hotel parking lot. Kester appeared agitated to the police officers and security guards present and said she had not come forward sooner because she feared defendant would kill her, too. She asked to be placed in the witness protection program. She described defendant's physical appearance to the assembled officers and agreed to go with an officer to the police station.

¶3 A combination of Pioneer Hotel security guards and Las Vegas police officers soon spotted defendant leaving the hotel. The officers arrested defendant and took him to the police station for questioning. Kester had already been arrested for carrying a concealed weapon. Detectives Martin and Roger Williamson flew to Las Vegas on December 13 to interrogate Kester and the defendant. Kester gave a complete account of events that she said led to Haas' death. Defendant, in contrast, spoke briefly with the detectives before invoking his Miranda right to have an attorney present. Miranda v. Arizona, 384 U.S. 436, 444 (1966).

¶4 Kester's statements to Detectives Martin and Williamson formed the basis of the State's prosecution of defendant. She said that defendant continually bragged about a gambling system that he had concocted to defeat the Las Vegas casinos. However,

neither defendant nor Kester ever had money with which to gamble. Defendant was a traveling salesman of sorts, selling T-shirts, jewelry, and knickknacks. His only other income came from bilking the government of benefits through fake identities that both defendant and Kester created. Defendant learned that Haas recently received money from an insurance settlement. Kester and defendant visited Haas at his house near Cordes Lakes late in November 1994. Kester said that defendant convinced Haas to come gambling with them. On November 30, 1994, defendant, Kester, and Haas left for Laughlin, Nevada in defendant's van.

¶5 The trio stayed in the same hotel room in Laughlin, and after the first night of gambling, defendant claimed to have "won big." Haas agreed to loan the defendant about $100 of his settlement money so that defendant could further utilize his gambling system. Defendant's gambling system proved unsuccessful, and he promptly lost all the money Haas had given him. However, defendant told Haas again that he had won big but that someone had stolen his winnings. Kester asked defendant what they were going to do now that they were out of money. Defendant said he was going to rob Haas. When Kester asked how defendant was going to get away with robbing someone he knew, defendant said, "I guess I'll just have to kill him."

¶6 The three left Laughlin to return to Arizona on December 2, 1994. On the road, all three -- but mostly Haas -- consumed alcohol. Defendant and Haas argued continually over how defendant was going to repay Haas. The van made several stops for bathroom breaks

and to purchase snacks. At one of these stops, defendant took a gun that he stored under the seat of the van and put it in his pants. Defendant asked Kester if she was "going to be all right with this." Kester said she would need a warning before defendant killed Haas.

¶7 Defendant charted a course through back roads that he claimed would be a shortcut to Haas' house. While on one such road, defendant stopped the van near Camp Wood Road in Yavapai County. At this stop, Kester said Haas exited the van and began urinating behind it. Kester started to climb out of the van as well, but defendant motioned to her with the gun and pushed her back into the van. The van had windows in the rear and on each side through which Kester viewed what occurred next. Defendant walked quietly up to Haas from behind while he was urinating, trained the gun at Haas' head at point-blank range, and shot him behind the ear. Defendant dragged Haas' body off the side of the road to the bushes where the body was eventually found. Defendant returned to the car carrying Haas' wallet, watch, and jewelry.

¶8 Defendant and Kester began to drive away in the van when defendant realized that he had forgotten to retrieve Haas' house keys. He turned the van around and returned to the murder scene. Kester and defendant both looked for the body; Kester spotted it and then returned to the van. Defendant returned to the van, too, and asked for the gun, saying that Haas did not appear to be dead. Kester said defendant approached Haas' body and that she heard a second shot.

¶9 Kester and defendant then drove to Haas' home. Defendant entered the home and stole several guns, a camera, and other of Haas' personal property. He attempted unsuccessfully to find Haas' bank PIN number in order to access Haas' bank accounts. Defendant and Kester sold Haas' guns and jewelry at pawn shops and flea markets over the course of the next week, usually under the aliases of David Flynn and Sharon Hughes. Defendant and Kester went to Las Vegas where defendant used the proceeds from selling these items to test his gambling system once again and to pay for a room at the Pioneer Hotel. At this time, Kester approached the Pioneer Hotel security guard and reported defendant's crime.

PROCEDURAL HISTORY

¶10 On December 29, 1994, a Yavapai County grand jury indicted both defendant and Kester. Both were charged with: (1) premeditated first-degree murder, (2) felony first-degree murder, (3) armed robbery, (4) residential burglary, (5) theft, (6) trafficking in stolen property, and (7) conspiracy. In February 1995, the State filed a notice that it would be seeking the death penalty against both defendant and Kester.

¶11 In September 1995, as trial approached, Kester entered into a plea agreement with the State. The plea agreement required Kester to verify "that all prior statements made to [Yavapai County Detectives Martin and Williamson in December 1994] were truthful." It also required Kester to "appear at any proceeding including trial upon the request of the State and testify truthfully to all questions asked." It mandated that Kester "cooperate completely with the

State of Arizona in the prosecution of" defendant, and it allowed the State to dishonor the agreement if Kester violated any term or condition. In return for these promises, Kester was charged with facilitation to commit first-degree murder, facilitation to commit residential burglary, and facilitation to commit theft/trafficking in stolen property. These crimes are class 5 and class 6 felonies and carry significantly lesser penalties than the murder and felony charges with which Kester had been charged.

¶12 As the trial date approached and after the State's attorney and defendant's originally appointed attorney had engaged in substantial pretrial activity, defendant became disenchanted with his attorney and refused to cooperate any further. The trial judge was forced to appoint new counsel for defendant, delaying the trial for nearly a year. The State dropped all conspiracy charges, and defendant was eventually tried in March 1997. At trial, defendant's entire defense centered on a claim that Kester -- not defendant -- had killed Haas and was now framing defendant for the murder. The State presented extensive evidence, including forensic evidence, that corroborated Kester's testimony and discredited defendant's testimony. The jury found defendant guilty on all charges.

¶13 Upon being found guilty, defendant made clear his desire to expedite the sentencing process. The trial judge scheduled the initial conference to discuss sentencing procedures for May 16, 1997, about seven weeks after defendant's trial ended. Defendant reluctantly agreed to continue the initial sentencing conference until June 6 to allow a court-appointed

mitigation specialist, Mary Durand, to begin working with him. An aggravation/mitigation hearing was scheduled for June 24 with sentencing to follow July 8. Durand sought to interview defendant, his family members, and others in order to discover genetic, physical, and/or psychological impairments that might explain defendant's behavior and thus provide mitigating evidence that might affect whether the death penalty or a life sentence should be imposed. After learning of Durand's goals with respect to him, defendant refused to cooperate.

¶14 At the June 6, 1997 sentencing conference, defendant's counsel stated that Durand wanted a minimum of ninety more days to evaluate defendant. Defendant wanted to proceed with sentencing immediately and expressed his refusal to cooperate with Durand. The judge, defendant's counsel, and defendant all expressed a belief that defendant was competent and followed his wish to press forward with sentencing. However, the judge moved the aggravation/mitigation hearing from June 24 to July 8, which required moving sentencing from July 8 to July 15 in order to allow Durand more time with defendant.

¶15 At both the aggravation/mitigation hearing and the sentencing hearing, the judge again asked if defendant had reconsidered and would like more time to allow Durand to investigate potential mitigating evidence. Each time, defendant refused the offer and stated he would not cooperate with Durand no matter how long sentencing was delayed.

¶16 On July 15, 1997, the trial judge sentenced defendant to death for the first-degree murder and

felony murder charges, thirty-five years in prison for the armed robbery and trafficking in stolen property charges, twenty-five years in prison for the residential burglary charge, and just under six years for the theft charge. All sentences were aggravated and consecutive, except the theft charge, which the court ordered to be served concurrent with the trafficking in stolen property offense but consecutive to the residential burglary offense. The judge found that the state established two aggravating factors beyond a reasonable doubt -- previous conviction of a "serious offense" pursuant to A.R.S. § 13-703(F)(2) and committing murder for pecuniary gain pursuant to A.R.S. § 13-703(F)(5). The judge found that defendant established no statutory mitigating factors under A.R.S. § 13-703(G) and found the presence of only one nonstatutory mitigator -- defendant's importance in the life of one of his children. After weighing the aggravating and mitigating factors, the judge imposed the death sentence, expressly finding that by failing to cooperate with Durand, defendant hampered his own ability to present mitigating evidence that might have reduced his sentence to life imprisonment.

ISSUES

I. Kester's Plea Agreement

¶17 Defendant argues that Kester's plea agreement violated his federal and state constitutional rights against being tried and convicted without due process of law. In State v. Fisher, 176 Ariz. 69, 73, 859 P.2d 179, 183 (1993), this court held that plea agreements must "properly be conditioned upon truthful and complete testimony." In contrast, "consistency

provisions," which require that testimony at trial "will not vary substantially in relevant areas to the statements previously given to investigative officers," are invalid. Id. Defendant claims that Kester's agreement contained a consistency provision, barred by Fisher, because it improperly coerced Kester to testify against him and prevented her from ever recanting her story unless she wanted to face the death penalty again.

¶18 Defendant did not object to the form of the agreement at trial. Instead, defendant's attorney cross-examined Kester with respect to the agreement in an attempt to impeach her credibility as a witness. Because no objection was made to Kester's plea agreement at trial, we review the claim only for fundamental error. See State v. Cook, 170 Ariz. 40, 58, 821 P.2d 731, 749 (1991).

¶19 In Cook, we addressed a similar claim regarding "consistency provisions" in a plea agreement. Drawing an analogy to claims of ineffective assistance of counsel, we determined that this court was not the forum to challenge a plea agreement for the first time because "the trial court has not had the opportunity to conduct an evidentiary hearing on the question and to develop a record on the issue for us to examine on appeal." Id. We determined that when no objection is made at trial, this court, on direct appeal, can neither determine whether fundamental error has been committed, nor can we, in the absence of an evidentiary record, review the alleged "consistency provisions" in the plea agreement. The "preferred procedure" is to

attack the agreement in a proceeding for post-conviction relief. Id. at 58-59, 821 P.2d at 749-50.

¶20 Defendant's claim suffers the same deficiencies decried in Cook. No objection was made before trial or at trial to the form of Kester's plea agreement. Thus, the trial court was not able to conduct an evidentiary hearing with respect to the plea agreement and its validity. In fact, instead of objecting to the form of the plea agreement, defendant's own attorneys insisted that the plea agreement, which defendant now attacks on appeal, be entered into evidence when State attorneys appeared content to have Kester recite excerpts of the agreement's terms into the record. Trial counsel must object to a potentially invalid plea agreement at the trial level in order for this court, on appeal, to assess whether the agreement runs afoul of our holding in Fisher as well as our subsequent analysis and holding in Cook.[1]

II. Jury Selection

¶21 Defendant argues that the jury selection process violated his federal and state constitutional rights to be tried by an impartial and representative jury. See U.S. Const., amend. VI; Ariz. Const. art. II, § 24. Defendant asserts two broad claims in this regard. First, he argues that the "death qualification" procedures used by the trial judge created a jury that was biased against him and was prone to impose the death penalty. Second, he contends that the court improperly

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[1] Given our resolution of this issue, we do not decide whether Kester's plea agreement includes a "consistency provision" of the kind we held unenforceable in Fisher.

dismissed one juror who expressed reservations about serving as a juror in a case that could result in a death sentence.

A. Death Penalty Questioning

¶22 Defendant's general attack on the use of any questions addressing the death penalty is subject to *de novo* review to assess whether the judge's questions were allowable under Arizona law. See State v. Hyde, 186 Ariz. 252, 278, 921 P.2d 655, 681 (1996); cf. State v. Orendain, 188 Ariz. 54, 56, 932 P.2d 1325, 1327 (1997) (requiring jury instructions accurately to state the law). In State v. Martinez-Villareal, 145 Ariz. 441, 702 P.2d 670 (1985), we discussed voir dire questioning related to a juror's personal views of the death penalty:

> We have expressly held that jury questioning regarding capital punishment is permissible where the questioning determines bias of a nature which would prevent a juror from performing his duty. Under the procedure used in Arizona in death penalty cases, the jurors' duty is to determine guilt or innocence, while the sentence of death is solely the responsibility of the trial judge. Nevertheless, **voir dire questioning related to a juror's views on capital punishment is permitted to determine whether those views would prevent or substantially impair the performance of the juror's duties to decide the case in accordance with the court's instructions and the juror's oath.**

Id. at 449, 702 P.2d at 678 (emphasis added). We have reiterated this holding several times. See State v. Stokley, 182 Ariz. 505, 514, 898 P.2d 454, 463 (1995) (finding that death-qualification questioning does not constitute error, "fundamental or otherwise"); State v. Salazar, 173 Ariz. 399, 411, 844 P.2d 566, 578 (1992) (finding that the death-qualification issue had been waived, but "there is, in any event, no error, fundamental or otherwise"); State v. Atwood, 171 Ariz. 576, 624, 832 P.2d 593, 641 (1992) (impartial jury requirement is fulfilled when conscientious jurors are selected, quoting Martinez-Villareal). The United States Supreme Court standard under the Sixth Amendment is identical to that stated by this court in Martinez-Villareal. See Wainwright v. Witt, 469 U.S. 412, 424 (1985) (juror could be dismissed for cause upon a showing that the juror's views with respect to the death penalty would "prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath" (quoting Adams v. Texas, 448 U.S. 38, 45, (1980)); State v. Detrich, 188 Ariz. 57, 65, 932 P.2d 1328, 1336 (1997) (observing that Arizona follows the federal standard stated in Wainwright).

¶23 The court's voir dire questioning in the instant case followed the strictures of federal and Arizona law. The trial judge questioned the jurors in groups of three and asked each juror, "[K]nowing what your duty as a juror is, do you believe that this kind of a case [a potential death penalty case] would be such that you could not be a fair and impartial juror?" Upon receiving confirmation that a particular juror would be fair and impartial, as mandated by a juror's oath, the judge

asked no further questions regarding the death penalty. We find no error in the court's questions.

B. Juror DeMar

¶24 Only one juror was excused as a result of the death-qualification questioning -- Juror Ed DeMar. Defendant challenges DeMar's dismissal. We have held that a general objection to death penalty questioning does not serve as an objection to preserve on direct appeal the issue of whether individual jurors were improperly dismissed for cause because of their death penalty views. See Detrich, 188 Ariz. at 65, 932 P.2d at 1336. Because defendant failed specifically to object to Juror DeMar's dismissal, we review DeMar's dismissal only for fundamental error. See id.

¶25 In response to death-penalty questioning by the court, DeMar expressed some concern about a proceeding that might lead to the death penalty. Rather than have DeMar explain further in front of the other two jurors present, the judge asked DeMar to step outside for a moment so that questioning could continue with the other two jurors who had expressed no concern regarding the death penalty. DeMar later was brought before the judge alone, and this exchange took place:

> **Court**: So we are talking about whether or not you had any personally-held beliefs, philosophical opinions, or religious convictions that would get in the way and make it difficult or impossible for you to be a fair and impartial juror knowing that the death penalty was a possibility.

DeMar: Yes. That would be a -- I would have reservations about an action in which the death penalty might be imposed or could be imposed.

. . . .

Court: And would it get in your way, then, of being a fair and impartial juror as the process continued?

DeMar: It might, again depending on what -- how much of a factor became evidence in testimony and what have you.

Court: Okay.

DeMar: But it would not be -- be a hands-down opposition to the death penalty as such.

Court: I understand what you're saying, and of course at this point we are looking for whether or not you can work in this trial as a fair and impartial juror to both defendant and the State.

DeMar: I understand.

Court: Let me -- let me try it this way, to -- knowing what you know right now, knowing your personal opinions and beliefs and what you know the job of the juror to be, because this is a possibility of a death penalty case at this point, would you like me to excuse you from jury duty in this case?

> **DeMar**: I think that probably would be fair to the -- to the State and to the defense, both really, since that reservation is honestly held.
>
> **Court**: Okay. Okay.
>
> Mr. DeMar, I'm going to accept what you tell me. I'm going to thank you for spending now a day and a half with us and putting up with all of our questioning, and I'm going to excuse you from jury duty in this case, with our sincere appreciation.

¶26 This exchange makes clear that the judge was willing to allow DeMar to continue as a potential juror upon a simple assurance that DeMar could be fair and impartial. Because DeMar could not give such an assurance, he accepted the court's decision that he be excused from the jury panel in order to be fair to both the defendant and the State.

¶27 Similarly, our case law is clear that a trial judge must excuse any potential jurors who cannot provide assurance that their death penalty views will not affect their ability to decide issues of guilt. See Detrich, 188 Ariz. at 65, 932 P.2d at 1336 (urging as "imperative" the dismissal of any juror who cannot assure impartiality on guilt issues because of views regarding the death penalty (citing State v. Hyde, 186 Ariz. 252, 921 P.2d 655 (1996))). Thus, the trial court did not err in asking DeMar questions regarding the death penalty, nor did the court err in allowing DeMar to be excused from jury service given the presence of "honestly held" reservations regarding the death

penalty that might have affected DeMar's ability to carry out his oath with respect to issues of guilt.

III. Sentencing Issues

¶28 In assessing the propriety of a death sentence, this court reviews independently the findings of the trial court regarding aggravating and mitigating circumstances. See A.R.S. § 13-703.01; State v. Djerf, 191 Ariz. 583, 595, 959 P.2d 1274, 1286 (1998); State v. Jones, 185 Ariz. 471, 492, 917 P.2d 200, 221 (1996); State v. Roscoe, 184 Ariz. 484, 500, 910 P.2d 635, 651 (1996). The State must prove the existence of statutory aggravating factors beyond a reasonable doubt. See State v. Brewer, 170 Ariz. 486, 500, 826 P.2d 783, 797 (1992). Defendant has the burden of presenting and proving mitigating circumstances -- statutory and nonstatutory -- by a preponderance of the evidence. See id. at 504, 826 P.2d at 801; State v. Ramirez, 178 Ariz. 116, 131, 871 P.2d 237, 252 (1994). On appeal, this court must determine whether defendant's mitigating evidence, assessed separately or cumulatively, outweighs aggravating evidence presented by the State. See Djerf, 191 Ariz. at 595, 959 P.2d at 1286; Brewer, 170 Ariz. at 500, 826 P.2d at 797.

A. Aggravating Circumstances

¶29 At trial, the State argued that three aggravating circumstances under section 13-703 applied to defendant. The court determined the State proved the existence of two such circumstances beyond reasonable doubt -- sections 13-703(F)(2) and 13-703(F)(5).

1. A.R.S. § 13-703(F)(2): Previous Conviction of a Serious Offense

¶30 Defendant argues the trial court improperly found that he "was previously convicted of a serious offense, whether preparatory or completed." A.R.S. § 13-703(F)(2) (Supp. 1998). The legislature amended the (F)(2) factor in 1993. Prior to the amendment, (F)(2) was established if "[t]he defendant ha[d] been convicted of a felony in the United States involving the use or threat of violence on another person." The language "use or threat of violence" proved nebulous and difficult to apply, which led to the 1993 amendment and the addition of subsection (H). See State v. Rienhardt, 190 Ariz. 579, 589, 951 P.2d 454, 464 (1997); State v. Walden, 183 Ariz. 595, 616 & n.10, 905 P.2d 974, 995 & n.10 (1995). Subsection (H) enumerates "serious offense[s]" that trigger the (F)(2) aggravator. Because Haas was murdered in 1994, the amended version of (F)(2), with the subsection (H) enumeration, applies. See Rienhardt, 190 Ariz. at 589, 951 P.2d at 464.

¶31 Section 13-703(H)(9) declares that burglary in the first degree is a "serious offense" that qualifies as a predicate to the (F)(2) aggravator. The State presented documentation of defendant's 1981 conviction of first-degree burglary. Based on this documentation, the court determined the (F)(2) aggravator had been proved beyond a reasonable doubt. The State thus met its burden of showing that defendant had been previously convicted of a "serious offense" under section 13-703(F)(2).

2. A.R.S. § 13-703(F)(5): Pecuniary Gain

¶32 Defendant challenges the trial court's finding that the State proved the "pecuniary gain" factor beyond a reasonable doubt. This aggravator exists when "[t]he defendant committed the offense as consideration for the receipt, or in expectation of the receipt, of anything of pecuniary value." A.R.S. § 13-703(F)(5). To establish (F)(5), "pecuniary gain [must be] a motive, cause, or impetus for the murder and not merely the result of the murder." State v. Spears, 184 Ariz. 277, 292, 908 P.2d 1062, 1077 (1996). See also State v. Spencer, 176 Ariz. 36, 43, 859 P.2d 146, 153 (1993); State v. Correll, 148 Ariz. 468, 479, 715 P.2d 721, 732 (1986) (noting that pecuniary gain does not exist in every case where "a person has been killed and at the same time defendant has made a financial gain").

¶33 The State can establish pecuniary gain beyond reasonable doubt through presentation of direct, tangible evidence or through strong circumstantial evidence. See State v. Greene, 192 Ariz. 431, 439, 967 P.2d 106, 114 (1998); State v. Hyde, 186 Ariz. 252, 280, 921 P.2d 655, 683 (1996). A financial motive need not be the only reason the murder was committed for the pecuniary gain aggravator to apply. See Greene, 192 Ariz. at 438-39, 967 P.2d at 113-14; State v. Soto-Fong, 187 Ariz. 186, 208, 928 P.2d 610, 632 (1996); Hyde, 186 Ariz. at 280, 921 P.2d at 683 ("Pecuniary gain need not be the exclusive cause for a murder" in order to satisfy (F)(5)); State v. Greenway, 170 Ariz. 155, 164, 823 P.2d 22, 31 (1991) (motive of witness elimination did not

foreclose the possibility of finding an additional motive to commit murder for pecuniary gain).

¶34 The State proved pecuniary gain in this case beyond a reasonable doubt. Kester and other witnesses testified that defendant continually bragged about his gambling system and observed his addictive behavior of constantly wanting money with which to gamble. Kester testified that defendant said he planned to steal from Haas and then kill him so that defendant could get away with killing someone he knew. Defendant took Haas' money, credit cards, and other personal items from the crime scene. Kester testified that defendant also took Haas' house keys after the murder, entered the home, and stole several additional items of personal property. Another witness at trial observed Kester and defendant at Haas' home at about the time established by Kester. Pawn shop receipts and witness testimony established that after Haas was murdered, defendant sold virtually all of Haas' jewelry and guns. In short, the State presented overwhelming circumstantial and direct evidence that defendant killed with the expectation of pecuniary gain. This proof far exceeds the requirement that pecuniary gain must be only a motive for the crime.

B. Mitigating Circumstances

¶35 Defendant offered seven mitigating circumstances, one statutory and six nonstatutory, for the court to consider at the sentencing hearing: (1) intoxication causing an inability to appreciate the wrongfulness of his conduct under A.R.S. § 13-703(G)(1), (2) intoxication not rising to the level of establishing the statutory (G)(1) mitigator,

(3) defendant's military record, (4) the disparity in sentences between defendant and Kester, (5) defendant's poor health, (6) defendant's intelligence and ability to contribute to society, and (7) defendant's devotion to his youngest child. The court found the existence of only one mitigating factor -- the importance of defendant in the life of his son.

¶36 Defendant argues on appeal that in addition to these factors, the court should have: (1) forced defendant to cooperate with his court-appointed mitigation specialist, (2) found defendant mentally impaired, and (3) considered *sua sponte* the high cost of execution as a mitigating circumstance.

1. Failure to Cooperate with a Court-Appointed Mitigation Expert

¶37 Defendant repeatedly refused to cooperate with his court-appointed mitigation specialist and instead sought to expedite sentencing. He now argues the trial court erred when it allowed him this freedom. On appeal, defendant characterizes his refusal as legal incompetence or improper control over the presentation of mitigation evidence that amounts to a *de facto* and improper waiver of his right to counsel. We disagree.

a. Competency

¶38 A defendant is deemed legally competent if he or she has demonstrated an ability to make a reasoned choice among alternatives, with an understanding of the consequences of the choice. See State v. Brewer, 170 Ariz. 486, 495, 826 P.2d 783, 792 (1992) (citing Sieling v. Eyman, 478 F.2d 211, 215 (9th Cir. 1973)); State v. Bishop, 162 Ariz. 103, 781 P.2d 581 (1989);

State v. Pierce, 116 Ariz. 435, 569 P.2d 865 (App. 1977). For a defendant's choice to be found competent, proof must exist that the defendant's decision was voluntary, knowing, and intelligent. See Djerf, 191 Ariz. at 592, 959 P.2d at 1283 (discussing competency as it relates to a decision to waive counsel). Competent choices are not to be equated with wise choices; competent defendants are allowed to make choices that may not objectively serve their best interests. See Brewer, 170 Ariz. at 495, 826 P.2d at 792.

¶39 Defendant's competency claim centers on certain snippets of dialogue he was allowed to interject at various sentencing hearings wherein he referred to UFOs and biblical passages. At the June 6 preliminary sentencing hearing, defendant referred to a heart attack he suffered two months before Haas was murdered, saying that "[i]n October of 1994, in Oklahoma City in the emergency room, I expired. I died. I was brought back to life." Later during this same hearing, defendant again spoke about his decision not to cooperate with Durand and with his desire to expedite sentencing:

> I think one of the points that needs to be brought out is that none of us know [sic] what is right. One of the things that God didn't instill in human beings is the ability to judge. We can't see around the corner. . . .
>
> I think that . . . an example of this is to be found in the Bible where it says every hair on your head is counted. I've been grabbed by the balls and drug here by destiny, and I don't know what's going to be around the corner any more

> than anybody else here does. But I think it's important to the Court that the Court understands just a little of where I'm at, and hear it from me instead of a specialist or the counsel or presentence report lady.
>
> And that's really all I have to say. Thank you.

¶40 At the July 8 aggravation/mitigation hearing, defendant addressed the court after all the aggravation and mitigation evidence had been presented:

> I've been convicted of a murder, premeditated, a murder to rob -- the people of Arizona through their laws say perhaps I should be murdered, premeditated, by the State. An eye for an eye, . . . the death penalty it's now called.
>
> That kind of amazes me, because I've lived -- lived in a dorm full of men for two years and nine months, and it's -- excuse me -- it's rare to see them agree on anything, even as bad as the food is. I have had to ask myself what reason could I possibly have that 70 percent of the people would understand, what reason did I have for that? Sixteen [sic] jurors that found me guilty. What reason did I have for the judge passing sentence on me? I didn't have one.
>
> I had a lot of reasons, but I was seeking [something] deeper, something profound, yet simple, something that would reach the very center of the people involved. Four days ago I still didn't have one, and the reason that I was seeking -- I haven't been able to sleep very well lately, and I awoke about an hour into the 4th of

July, restless, still wondering what I would say or do on this very day.

I reached over and picked up the Bible. I don't read the Bible a lot, but I was given the reason. It was profound and simple, and astonishingly from the very source the people of Arizona find an eye for an eye. The source is, of course, the Old Testament, Deuteronomy 19, but before I reached the Verse 21, an eye for an eye, I ask you to back up and look at Verse 15. And I quote:

"One witness shall not rise up against a man, but by the mouths of two or three witnesses the matter shall be established."

Beware of one witness wherein the source the people use. Beware of one witness that would lie -- or, excuse me -- that would die if she didn't lie. Beware of one witness who in her presentence report on page 9 said she spent all her thousands of money that she received on drugs before she met me, then lied during the trial saying I gambled away four or five thousand of her money.

Beware of one witness that offered to sell her soul to Detective Dan Martin for $100 a week in an apartment until the trial, but only after the tape recorder was turned off. She didn't know the video camera was running in the video room. On March 13th, 1997, 10,000 people in Arizona saw seven UFO's over Phoenix; 11 people came forward with a videotape of this. And the government says it didn't happen.

Yet one witness, one ex-drug addict, one witness, staring down the barrel of the death

> penalty herself but is getting probation, one witness is good enough for the same government to kill me. Somebody needs to wake up and change the channel, because there's definitely something wrong with that picture.
>
> There's one other thing that I'd like to say, and that's -- I really regret not going to the authorities when this initially happened.
>
> Thank you.

¶41 After thoroughly reviewing the entire record, we conclude that defendant was competent when he decided not to cooperate with Durand. Taken in context, these bizarre passages quoted do not refute but rather bolster the conclusion that defendant was intelligent, had an understanding of what was occurring, and voluntarily made the decision not to cooperate. He understood the alternatives and the consequences of refusing to cooperate and nevertheless chose that path. He reaffirmed his decision not to cooperate several times, once saying that he did not have a death wish but that he believed the psychological evidence Durand wished to pursue would not produce mitigating evidence. Significantly, defendant's own attorneys expressed on the record a belief that defendant understood his choices and the consequences of those choices. See Djerf, 191 Ariz. at 592, 959 P.2d at 1283 (noting that attorneys' assurances of competence were significant to the competency issue).

¶42 The trial judge, too, stated that defendant understood the proceedings and the consequences of his choices. Defendant was evaluated pursuant to Rule

11, Arizona Rules of Criminal Procedure, before his trial started and was deemed competent to stand trial at that time. Nothing occurred in the interim to question the validity of this determination or to suggest that a new evaluation was necessary. See 17 A.R.S. Rules of Crim. Proc., Rule 26.5 (providing trial judges with discretion to order a mental health or diagnostic examination at any time before a sentence is pronounced); cf. Roscoe, 184 Ariz. at 498, 910 P.2d at 649 (subjecting defendant to two mental health examinations after repeated suicide attempts). The record indicates that defendant was articulate, aware of the proceedings, and knowledgeable about the potential consequences of his choices. On this record, we conclude that defendant was competent when he chose not to cooperate with Durand and chose to expedite his sentencing proceedings, despite the fact that his decision may have limited the mitigation evidence offered on his behalf.

b. Waiver of Mitigation Evidence

¶43 Defendant argues that even if he was competent, the trial judge improperly allowed him to control the presentation of mitigation evidence. Defendant relies heavily on our decision in State v. Nirschel, 155 Ariz. 206, 745 P.2d 953 (1987) to support his argument. In Nirschel, we held that three decisions are exclusively within the province of the defendant: (1) whether to plead guilty, (2) whether to waive a jury trial, and (3) whether to testify. See id. at 208, 745 P.2d at 955. "Beyond these matters, most trial decisions are matters of trial strategy resting with counsel." Id. (emphasis added).

¶44 Nirschel, which specifically addressed the attorney's right to control a motion to suppress, does not preclude a defendant from refusing to cooperate with a mitigation specialist. We have stated that a competent defendant can waive counsel altogether. See Djerf, 191 Ariz. at 592, 959 P.2d at 1283. A defendant's right to waive counsel includes the ability to represent himself or herself at the sentencing phase of a case that could result in the death penalty. See State v. Henry, 189 Ariz. 542, 550, 944 P.2d 57, 65 (1997).

¶45 In State v. Roscoe, we allowed the defendant to control whether or not mitigation evidence regarding two prior suicide attempts was presented, determining that this freedom was "especially appropriate . . . where the client's request involves a strong privacy interest." 184 Ariz. 484, 499, 910 P.2d 635, 650 (1996). The United States Supreme Court has upheld a defendant's right to waive all mitigating evidence. See Blystone v. Pennsylvania, 494 U.S. 299, 306 & n.4 (1990) (no constitutional violation occurred when a defendant was allowed to waive all mitigation evidence after repeated warnings from the judge and advice from counsel). Thus, read in context with other cases, Nirschel cannot be seen as providing an exclusive list of the areas in which a defendant's decision controls, especially since Nirschel's list does not include the Roscoe right to waive mitigation evidence. An anomaly would exist were we to accept defendant's argument that counsel exclusively controls the presentation of all mitigation evidence: a defendant could waive counsel at sentencing and thereby have exclusive control over the presentation of all mitigation evidence; yet if a

defendant accepts counsel, he would have no input on what mitigating factors to offer.

¶46 Far from creating such an anomaly, our case law allows defendant the freedom not to cooperate with a mitigation specialist and thereby potentially limit the mitigation evidence that is offered. Significantly, defendant stressed to the trial judge that he wanted Durand to advocate on his behalf at the mitigation hearing. Defendant also wanted his attorneys to argue other mitigating evidence. Consequently, seven mitigating circumstances were offered. Durand testified on defendant's behalf, albeit without defendant's full cooperation. Defendant was not conceding defeat; he wanted advocacy in all areas except the psychological areas that Durand wanted to explore. Just as the defendant in Roscoe "got exactly what he wanted" when the trial judge honored his request and thereby potentially limited the mitigating evidence that was offered, so, too, did the defendant here. 184 Ariz. at 499, 910 P.2d at 650.

¶47 We conclude that the trial court properly allowed defendant not to cooperate with the court-appointed mitigation specialist, given the repeated warnings of the consequences of this decision and the factual record before us.

2. A.R.S. § 13-703(G)(1): Inability to Appreciate Wrongfulness of Conduct

¶48 Defendant argues that Durand's testimony and information from defendant's Rule 11 pretrial mental health evaluation combined to establish the (G)(1) mitigating factor -- that "defendant's capacity to

appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law was significantly impaired, but not so impaired as to constitute a defense to prosecution." Defendant argues that his history of mental illness, including a history of suicide ideation, a history of alcoholism in his family, and his own polysubstance abuse, establishes the existence of this mitigating factor under the preponderance standard.

¶49 Voluntary intoxication or substance abuse can be a mitigating factor that supports a (G)(1) finding. See State v. Stokley, 182 Ariz. 505, 520, 898 P.2d 454, 469 (1995) (intoxication); State v. Medrano, 185 Ariz. 192, 194-95; 914 P.2d 225, 227-28 (1996) (substance abuse). Proving a mental illness by a preponderance of the evidence also may establish the (G)(1) mitigator. See State v. Bolton, 182 Ariz. 290, 313, 896 P.2d 830, 853 (1995); State v. (Rudi) Apelt, 176 Ariz. 369, 377, 861 P.2d 654, 662 (1993); Brewer, 170 Ariz. at 505, 826 P.2d at 802. However, personality or character disorders usually are not sufficient to satisfy this statutory mitigator. See Bolton, 182 Ariz. at 313, 896 P.2d at 853; Apelt, 176 Ariz. at 377, 861 P.2d at 662. A defendant must show a causal link between the alcohol abuse, substance abuse, or mental illness and the crime itself in order to meet the preponderance standard. See State v. Henry, 189 Ariz. 542, 552-53, 944 P.2d 57, 67-68 (1997); State v. Jones, 185 30 Ariz. 471, 492, 917 P.2d 200, 221 (1996); Apelt, 176 Ariz. at 377, 861 P.2d at 662. A trial judge has broad discretion to determine the credibility and weight of evidence offered to support the (G)(1) mitigator, especially mental health evidence. See State v. Doerr, 193 Ariz.

56, 69, 969 P.2d 1168, 1181 (1998); Ramirez, 178 Ariz. at 131, 871 P.2d at 252.

¶50 Defendant did not establish as threshold evidence the existence of any of these factors, let alone their influence on preventing him from conforming his conduct to the law or appreciating the wrongfulness of his conduct. Defendant's Rule 11 mental health evaluation revealed no impairment that would prevent him from standing trial. His court-appointed mitigation specialist did not identify the existence of any mental illness with the certainty required to establish this mitigating circumstance. Further, he offered no proof that he was intoxicated or impaired at the time of the murder.

¶51 He also offered no proof that his past polysubstance abuse prevented him from conforming his conduct to the law or appreciating its wrongfulness when the murder occurred. We have consistently held, and we hold now, that voluntary intoxication, polysubstance abuse, or claimed mental illness will not satisfy the (G)(1) mitigator when the evidence, as here, is speculative, conflicting, or nonexistent. See State v. Tankersley, 191 Ariz. 359, 372, 956 P.2d 486, 499 (1998) (alcohol may have caused some impairment, but not enough to meet the (G)(1) mitigator); Rienhardt, 190 Ariz. at 591-92, 951 P.2d at 466-67 (no evidence offered that could establish the level of intoxication); State v. Schackart, 190 Ariz. 238, 251, 947 P.2d 315, 328 (1997) (mental health expert offered inconclusive evidence related to mental illness); State v. Spreitz, 190 Ariz. 129, 149-50, 945 P.2d 1260, 1280-81 (1997) (long-time substance abuse problems insufficient to

establish the (G)(1) mitigator); State v. Jones, 188 Ariz. 388, 400, 937 P.2d 310, 322 (1997) (insufficient evidence to show methamphetamine use impaired conduct on the day of the murder); State v. Thornton, 187 Ariz. 325, 335, 929 P.2d 676, 686 (1996) (expert testimony conflicted with respect to mental illness; (G)(1) not established); State v. Miller, 186 Ariz. 314, 326, 921 P.2d 1151, 1163 (1996) (defendant's ability to drive after the murder discredited any assertion that intoxication existed to establish (G)(1) mitigator); State v. Medrano, 185 Ariz. 192, 194-95, 914 P.2d 225, 227-28 (1996) (self-reported use of cocaine on day of murder not enough to establish (G)(1) mitigator); Bolton, 182 Ariz. at 313, 896 P.2d at 853 (insufficient evidence to establish mental illness, despite two psychiatric experts' testimony on defendant's behalf); State v. King, 180 Ariz. 268, 282, 883 P.2d 1024, 1038 (1994) (nothing in the record showed intoxication or level of intoxication).

3. Mental Impairment as a Nonstatutory Mitigator

¶52 Defendant's alleged mental impairment on the day he murdered Haas, whether attributed to historical substance abuse or a mental disorder, also must be considered as a nonstatutory mitigating circumstance. See Jones, 185 Ariz. at 491, 917 P.2d at 220 (mental health disorders); State v. Gallegos, 178 Ariz. 1, 18-19, 870 P.2d 1097, 1114-15 (1994) (intoxication); State v. Kiles, 175 Ariz. 358, 373, 857 P.2d 1212, 1227 (1993) (intoxication/substance abuse); Brewer, 170 Ariz. at 505, 826 P.2d at 802 (character and personality disorders weighed as nonstatutory

mitigating evidence). The trial judge limited his discussion of impairment to impairment caused by intoxication. Our discussion of impairment, however, includes the mental health considerations urged on appeal. In the special verdict form, the trial judge referred to defendant's past diagnosis and treatment for a bipolar or manic depressive condition. The judge noted that defendant had consumed some beer on the trip back to Haas' home and that defendant had historically been a polysubstance abuser. The court discussed defendant's Rule 11 evaluation before trial, which "found some unusual results in the MMPI and some possible problems with paranoia." The judge referred to an incident that occurred before Haas' murder where defendant once carried a cyanide pill to a mental health evaluation. Defendant told the doctor that he brought the pill in case he needed it to kill himself.

¶53 Further, at the aggravation/mitigation hearing, Durand speculated that defendant suffered from mental difficulties, based on interviews with defendant's family and probation department reports. Durand conjectured that defendant's bed-wetting as a child and the existence of several dysfunctional relationships were factors indicating potential mental problems.

¶54 But the record shows that the existence of impairment, from any source, is at best speculative. Further, in addition to offering equivocal evidence of mental impairment, defendant offered no evidence to show the requisite causal nexus that mental impairment affected his judgment or his actions at the

time of the murder. See Jones, 185 Ariz. at 492, 917 P.2d at 221; Apelt, 176 Ariz. at 377, 861 P.2d at 662. Thus, we conclude that the trial court ruled correctly that impairment was not established as a nonstatutory mitigating factor by a preponderance of the evidence.

4. Military Record

¶55 We have on rare occasions found that a defendant's military record warranted consideration as a mitigating circumstance. See Spears, 184 Ariz. at 293-94, 908 P.2d at 1078-79 (giving "some weight" to this factor in combination with defendant's background, love of family, employment history, and good conduct during incarceration); State v. Lavers, 168 Ariz. 376, 396, 814 P.2d 333, 353 (1991) (considering military service and employment history together as a mitigating circumstance); State v. Johnson, 131 Ariz. 299, 305, 640 P.2d 861, 867 (1982) (considering defendant's military history, family ties, and good reputation as mitigation, but not enough to warrant leniency).

¶56 In Spears, the defendant served two full terms in the military (each lasting four years) and had compiled an unblemished record. 184 Ariz. at 294, 908 P.2d at 1079. In contrast, defendant herein served one year in the military before requesting release. Given the record before us in relation to defendant's military service, we find no error in the trial judge's conclusion that defendant's service was not a mitigating circumstance worthy of consideration in this case.

5. Sentencing Disparity

¶57 A disparity in sentences between codefendants and/or accomplices can be a mitigating circumstance if no reasonable explanation exists for the disparity. See Henry, 189 Ariz. at 551, 944 P.2d at 66; State v. Mann, 188 Ariz. 220, 230, 934 P.2d 784, 794 (1997); State v. Schurz, 176 Ariz. 46, 57, 859 P.2d 156, 167 (1993). Here, the trial court stated that "[i]n this case, there is a clear explanation that is essentially the same as noted by the Supreme Court in the Mann case." In Mann, we did not find sentencing disparity to be a mitigating factor when an accomplice who aided in stealing drugs and in committing the murder was not charged with any crime and the defendant received a death sentence. We determined the disparity was explained because defendant was the instigator of the crime and the actual killer; further, the accomplice was given sentencing immunity by the State in exchange for testimony against the actual killer. See State v. White, 1999 WL 374369 (Ariz.) (1999).

¶58 The trial judge correctly observed that the same explanation for sentencing disparity exists in this case. The State entered a plea agreement with Kester and presented substantial evidence that showed defendant was the instigator of Haas' murder and the actual killer. See also State v. Dickens, 187 Ariz. 1, 26, 926 P.2d 468, 493 (1996) (age differences and existence of plea agreement justified sentencing disparity); Stokley, 182 Ariz. at 523-24, 898 P.2d at 472-73 (existence of valid plea agreement explained sentencing disparity); State v. Detrich, 188 Ariz. 57, 68-69, 932 P.2d 1328, 1339-40 (1997) (appropriate plea agreement and less

culpability explained sentencing disparity). The trial court did not err when it concluded that sentencing disparity was not established as a mitigating factor by a preponderance of the evidence.

6. Intelligence

¶59 Intelligence is most often considered in our case law on mitigation as part of our assessment whether the age factor should apply. See A.R.S. § 13-703(G)(5); Djerf, 191 Ariz. at 598, 959 P.2d at 1289; Soto-Fong, 187 Ariz. at 210, 928 P.2d at 634; State v. Gallegos, 185 Ariz. 340, 346, 916 P.2d 1056, 1062 (1996). Intelligence also has been considered as part of determining whether a head injury caused damage sufficient to warrant consideration as a mitigating factor. See Stokley, 182 Ariz. at 521, 898 P.2d at 470. The cases that have evaluated intelligence as an independent mitigating factor have concluded that evidence of intelligence, as in defendant's case, is not a mitigating factor. See Henry, 189 Ariz. at 552, 944 P.2d at 67 (finding intelligence was used to deceive investigating authorities and was therefore entitled to no mitigating consideration); Atwood, 171 Ariz. at 653-54, 832 P.2d at 670-71 (high IQ was not a mitigating factor because defendant's record showed that he would not use his intelligence to seek reform, as argued).

¶60 In contrast, some cases have found low intelligence a mitigating factor. See State v. Lee, 185 Ariz. 549, 553, 917 P.2d 692, 696 (1996); State v. Amaya-Ruiz, 166 Ariz. 152, 178, 800 P.2d 1260, 1286 (1990); State v. Bishop, 127 Ariz. 531, 535, 622 P.2d 478, 482 (1980). Considering these cases, the trial

judge committed no error by finding defendant's relatively high intelligence was not a mitigating factor.

7. Post-Murder Physical Health

¶61 Defendant asks us to consider his poor post-murder physical health as a mitigating circumstance. We have addressed defendant's mental health; however, he now argues that poor post-murder physical health, as well, can constitute a mitigating circumstance. The trial court did not address this factor because it is offered for the first time on appeal. Section 13-703(G) requires us to consider factors that are "relevant in determining whether to impose a sentence less than death, including any aspect of the defendant's character, propensities or record and any of the circumstances of the offense." We find no case in which poor post-murder physical health was found as a mitigating factor, and defendant has directed us to none. This absence of authority is expected because defendant's post-murder physical health does not address his pre-murder character, nor does it address his propensities, his record, or the circumstances of the offense, as mandated by A.R.S. § 13-703(G). On the present record, no weight can be accorded this factor in our assessment of defendant's sentence.

8. Ability to Contribute to Society

¶62 This factor, too, strays from the section 13-703(G) mandate that mitigating factors must relate to the "defendant's character, propensities or record and any of the circumstances of the offense." The trial judge did not err when he failed to find defendant's alleged ability to contribute to society as a mitigating factor.

9. High Cost of Execution

¶63 Defendant argues the trial judge should have considered *sua sponte* the high cost of execution as mitigation, when compared to life imprisonment. Some commentators have asserted that executing a convicted murderer costs a state more money and resources than the imposition of a life sentence. See, e.g., Justin Brooks & Jeanne Huey Erickson, *The Dire Wolf Collects His Due While the Boys Sit by the Fire: Why Michigan Cannot Afford to Buy into the Death Penalty*, 13 T.M. Cooley L. Rev. 877 (1996); Joseph W. Bellacosa, *Ethical Impulses from the Death Penalty: "Old Sparky's" Jolt to the Legal Profession*, 14 Pace L. Rev. 1 (1994); Steven G. Gey, *Justice Scalia's Death Penalty*, 20 Fla. St. U. L. Rev. 67 (1992). Even assuming the expense factor is accurate, the cost of execution cannot be considered a mitigating factor. The death penalty represents a legislative policy choice by the people's representatives regarding the level of punishment for Arizona's most serious criminal offenders, and it transcends a financial cost/benefit analysis. The United States Supreme Court has determined that nothing in the U.S. Constitution forbids state legislatures from making this choice so long as constitutional boundaries are satisfied. See Gregg v. Georgia, 428 U.S. 153, 179-80 (1976); Proffitt v. Florida, 428 U.S. 242, 260 (1976); Jurek v. Texas, 428 U.S. 262, 277 (1976).

¶64 We therefore do not consider as mitigation the high cost of execution. To do so would contradict Arizona's public policy decision and would violate the court's mandate to consider mitigating factors that

relate not to cost, but to a "defendant's character, propensities or record and any circumstances of the offense" under section 13-703(G). Defendant's argument that the death penalty be cast aside because of the alleged financial drain should be addressed to the legislature. The trial court did not err when it failed *sua sponte* to consider cost a mitigating factor.

C. Summary of Aggravating and Mitigating Evidence

¶65 We conclude that the State proved beyond a reasonable doubt the existence of two statutory aggravating factors -- previous conviction of a serious offense pursuant to A.R.S. § 13-703(F)(2) and pecuniary gain pursuant to A.R.S. § 13-703(F)(5). Defendant proved only one mitigating circumstance by a preponderance of the evidence -- defendant's importance in the life of his youngest child. On this record, we approve the trial court's decision that aggravating factors substantially outweigh mitigating factors.

IV. Constitutionality of Lethal Injection

¶66 Appellant contends that death by lethal injection is cruel and unusual punishment under the Eighth Amendment to the U.S. Constitution. This court has concluded previously that lethal injection is a constitutional form of execution. See State v. Hinchey, 181 Ariz. 307, 315, 890 P.2d 602, 610 (1995).

DISPOSITION

¶67 Upon full review, we affirm defendant's convictions and sentences.

Charles E. Jones
Vice Chief Justice

CONCURRING:

Thomas A. Zlaket, Chief Justice

Stanley G. Feldman, Justice

Frederick J. Martone, Justice

Ruth V. McGregor, Justice

APPENDIX E

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 09-99027

D.C. No. 2:07-cv-02120-DGC

[Filed December 18, 2019]

GEORGE RUSSELL KAYER, *Petitioner-Appellant*,	)
v.	)
CHARLES L. RYAN, Director of the Arizona Department of Corrections, *Respondent-Appellee.*	)

ORDER

Before: William A. Fletcher, John B. Owens, and Michelle T. Friedland, Circuit Judges.

Order;
Concurrence by Judges W. Fletcher and Friedland;
Dissent by Judge Bea

SUMMARY*

Habeas Corpus / Death Penalty

The panel filed an order denying a petition for panel rehearing, and denying on behalf of the court a petition for rehearing en banc, in a case in which the panel (1) reversed in part and affirmed in part the district court's judgment denying Arizona state prisoner George Russell Kayer's habeas corpus petition and (2) remanded with directions to grant the writ with respect to Kayer's death sentence.

Judges W. Fletcher and Friedland concurred in the denial of rehearing en banc. Responding to their dissenting colleagues' arguments, they wrote that they are acutely aware of the deference required under AEDPA, and that even giving all appropriate deference to the decision of the post-conviction-relief court judge, habeas relief is warranted.

Judge Bea, joined by Judges Bybee, Callahan, M. Smith, Ikuta, Owens, Bennett, R. Nelson, Bade, Collins, Lee, and Bress, dissented from the denial of rehearing en banc. He wrote that by any fair reading of the panel majority's opinion, it reviewed the post-conviction-review court's decision de novo as to whether an Arizona court, applying Arizona precedent, would have granted relief—a radical approach unwarranted under the Antiterrorism and Effective Death Penalty Act. He also wrote that beyond the legal

* This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

errors, Kayer's proposed mitigating evidence is hardly overwhelming, and reasonable jurists could find that it did not undermine confidence in the death sentence, providing no basis for relief under AEDPA's deferential standard.

COUNSEL

Jennifer Y. Garcia (argued) and Emma L. Smith, Assistant Federal Public Defenders; Jon M. Sands, Federal Public Defender; Office of the Federal Public Defender, Phoenix, Arizona; for Petitioner-Appellant.

John Pressley Todd (argued), Special Assistant Attorney General; Jacinda A. Lanum, Assistant Attorney General; Lacey Stover Gard, Chief Counsel; Dominic Draye, Solicitor General; Mark Brnovich, Attorney General; Office of the Attorney General, Phoenix, Arizona; for Respondent-Appellee.

ORDER

Judges W. Fletcher and Friedland voted to deny the petition for panel rehearing and rehearing en banc. Judge Owens voted to grant the petition for panel rehearing and rehearing en banc.

The full court has been advised of the petition for rehearing en banc. A judge of the court requested a vote on en banc rehearing. The matter failed to receive a majority of the votes of non-recused active judges in favor of en banc consideration. Fed. R. App. P. 35.

Judge Hurwitz was recused and did not participate in the deliberations or vote in this case.

The petition for panel rehearing and rehearing en banc is **DENIED.** A concurrence in the denial by Judges W. Fletcher and Friedland and a dissent from the denial by Judge Bea are filed concurrently with this order.

W. FLETCHER and FRIEDLAND, Circuit Judges, concurring in the denial of rehearing en banc:

Our opinion in this capital case speaks for itself. *See Kayer v. Ryan*, 923 F.3d 692 (9th Cir. 2019). However, our colleagues' dissent from the denial of en banc review makes new and unfounded arguments to which we feel it appropriate to respond.

George Kayer shot and killed his friend Delbert Haas in Arizona while returning from a gambling trip to Nevada. Kayer, Lisa Kester (Kayer's girlfriend), and Haas were in Haas's van. Kayer was driving. Kayer had already indicated to Kester that he would kill Haas. The three of them had consumed a case of beer during the several-hour drive. Kayer took a back road and stopped the van. When Haas went to the back of the van to urinate, Kayer shot him. Kayer and Kester drove away, but returned when they realized Kayer had not gotten Haas's house keys. When they returned, Haas did not appear to be dead. Kayer shot him again, killing him. Ten days later, when Kayer and Kester returned to Nevada, Kester approached a security guard at a Las Vegas hotel and told him what had happened. Kayer and Kester were both charged with capital murder. Kester testified against Kayer in return for a reduced sentence of three years probation. *Id.* at 695–96.

Our dissenting colleagues do not dispute that Kayer's counsel performed deficiently. Kayer's first lawyer, Linda Williamson, was inexperienced and incompetent. She represented Kayer for a year and a half. During that time, she did no work to prepare for the penalty phase of Kayer's trial. *Id.* at 702–03. Kayer's second lawyer, David Stoller, was experienced but incompetent. He represented Kayer for eleven months. During that time, he, like Williamson, did no work to prepare for the penalty phase. *Id.* at 703–04. The jury returned a guilty verdict on March 26, 1997. Stoller's mitigation expert first interviewed Kayer on May 21, 1997, almost two months later, six days before the date originally set for the sentencing hearing. *Id.* at 704.

As a result of counsels' deficient preparation, the mitigation evidence at the sentencing hearing was meager. It took only part of a morning. There were five witnesses: (1) a detention officer who testified that Kayer was well behaved in the jail law library; (2) Kayer's mother, who testified that, to her knowledge, Kayer had never killed anything or anyone since shooting jackrabbits as a teenager; (3) Kayer's half-sister, who testified that Kayer had "highs and lows," had drinking and gambling problems, and had, "I guess," been diagnosed "as a bipolar manic-depressive, or something like that"; (4) the mitigation expert, who testified she had not had enough time to gather information that would support "a medical opinion about a diagnosis of a psychiatric condition"; and (5) Kayer's mentally impaired son, who gave eleven lines of testimony. *Id.* at 696–98.

In Arizona at the time, capital sentences were imposed by judges rather than juries. The Supreme Court would not decide *Ring v. Arizona*, 536 U.S. 584 (2002), until five years later. Under Arizona law, a sentencing judge balanced aggravating and mitigating circumstances. There were specified statutory aggravating circumstances, but no non-statutory aggravating circumstances. There were specified statutory mitigating circumstances, but any other mitigating circumstances could be considered as well. Statutory mitigators were given greater weight than non-statutory mitigators.

The sentencing judge found two statutory aggravating factors under Arizona law: (1) that Kayer had previously been convicted of a "serious offense"; and (2) that the murder had been committed for "pecuniary gain." ARIZ. REV. STAT. § 13-703(F)(2), (F)(5) (1977). (All references are to the 1997 version of Arizona Revised Statutes.) The judge explicitly refused to find as an additional aggravating circumstance that the murder had been committed in "an especially heinous, cruel or depraved manner." *Id.* at § 13-703(F)(6); *Kayer*, 923 F.3d at 698. The judge found one non-statutory mitigating factor—that Kayer had "become an important figure in the life of his son." The judge sentenced Kayer to death. *Id.* at 698.

During this pre-*Ring* period, the Arizona Supreme Court resentenced *de novo* in capital cases on direct appeal, giving no deference to a sentencing decision of the trial judge. In its *de novo* resentencing of Kayer in 1999, the Arizona Supreme Court found the same two statutory aggravating factors and the same single non-

statutory mitigating factor. Like the sentencing judge, it did not find the additional statutory aggravating circumstance that the murder had been committed in "an especially heinous, cruel or depraved manner." It sentenced Kayer to death. *State v. Kayer*, 194 Ariz. 423, 984 P.2d 31 (1999).

On state post-conviction review ("PCR"), Kayer's lawyers claimed that he had received ineffective assistance of counsel ("IAC") at the sentencing phase. His lawyers presented extensive evidence of Kayer's mental illness and of mental illness in Kayer's family, none of which had been presented at the sentencing hearing. We describe that evidence at length in our opinion. To recapitulate the main points:

Kayer's father was an alcoholic and obsessive gambler. Kayer's Aunt Opal on his mother's side was schizophrenic ("I have [heard voices] all my life. . . . It runs in the family"). She testified that Kayer had told her, "I thought it was normal[.] I hear voices, too." *Kayer*, 923 F.3d at 711. Kayer's Aunt Ona Mae on his mother's side was an alcoholic with severe mood swings. Kayer's Aunt Tomi on his mother's side was an alcoholic and a severe depressive. Kayer's cousin on his mother's side was schizophrenic and bipolar. *Id.*

Kayer himself was slow to walk and fell often. As a small boy, he had so many bruises on his body that his mother would not take him out in public. He was dyslexic and got very poor grades in school. He enlisted in the Navy after high school but was quickly discharged with a mental "impairment" described in the discharge papers as "severe." *Id.* at 709. He had two unsuccessful marriages in his early twenties. He

began committing property crimes in his mid-twenties, and became a heavy drinker and compulsive gambler. He checked himself into a VA hospital in his late twenties, saying "I just want to know what's wrong." *Id.* at 710. Six years later, he again checked himself into a VA hospital, where a doctor wrote that he "showed bipolar traits" and prescribed lithium (a standard medication for bipolar disorder). He was given a "provisional diagnosis" of "Personality Disorder/Bipolar." *Id.* at 710–11. Kayer told a probation officer a year later that until the second stay in the VA hospital, "he had no idea what was wrong with him." *Id.* When Kayer was forty, he suffered a severe heart attack and was admitted to a VA hospital. He checked himself out of the hospital "against medical advice." *Id.* He killed Haas six weeks later.

Three doctors testified in the PCR court without contradiction. Dr. Anne Herring testified that Kayer "demonstrated significant difficulty when required to execute complex problem solving," and that "similar deficits have been associated with chronic heavy substance abuse, traumatic brain injury, and with bipolar disorder." *Id.* at 712. Dr. Michael Sucher, an addiction specialist, testified to his "untreated alcoholism and untreated pathological gambling." *Id.* Dr. Barry Morenz, a psychiatrist, characterized Kayer's beliefs as "really delusional." Among other things, Kayer had believed ever since he was a boy, and continued to believe as an adult, that he was a reincarnated being from another planet. *Id.* Dr. Morenz diagnosed Kayer's mental state at the time of the murder: "He was having problems with bipolar disorder symptoms and may have been manic or

hypomanic, he was having difficulties with out of control pathological gambling and he had difficulty with extensive alcohol abuse." *Id.* at 713.

The Arizona judge who presided over Kayer's trial and sentenced him to death also presided over his state PCR proceeding. In a very brief order, the state PCR judge denied Kayer's IAC claim. He held that Kayer's trial attorneys, Williamson and Stoller, had provided professionally competent service, despite the fact that Williamson did no mitigation work whatsoever, and Stoller's mitigation expert did not even begin work until six days before the originally scheduled sentencing hearing. Alternatively, the state PCR judge held that Kayer had not shown prejudice: "This court further concludes that **if** there had been a finding that the performance prong of the *Strickland* standard had been met, that no prejudice to the defendant can be found." *Id.* at 714 (emphasis in the judge's order). The Arizona Supreme Court denied Kayer's petition for review without explanation. *Id.* at 700. The state PCR judge's decision was therefore the last reasoned state court decision.

We held that there had been deficient performance by counsel at the penalty phase, and that the state PCR judge had been objectively unreasonable, within the meaning of AEDPA, in concluding otherwise. Our colleagues have not disputed this holding. Counsels' failure to prepare for the penalty phase hearing was egregious, and the mitigation evidence presented at the hearing was pathetically inadequate. *See Rompilla v. Beard*, 545 U.S. 374 (2005).

We also held that the no-prejudice decision by the state PCR judge was an objectively unreasonable decision within the meaning of AEDPA. Our dissenting colleagues object to this holding.

I. Our Reasoning

There were three steps in our reasoning:

A. Step One

First, we compared the aggravators and mitigators at the two different stages in state court:

1. Sentencing Phase and Direct Appeal

In the trial court and in the Arizona Supreme Court on direct *de novo* review, there were two statutory aggravators and one non-statutory mitigator. No mitigating factor—either statutory or non-statutory—was found based on mental impairment. Given the meager evidence presented at sentencing, we held that the Arizona Supreme Court had "made a reasonable determination of the facts in concluding that Kayer suffered from no mental impairment." *Kayer*, 923 F.3d at 702.

The first statutory aggravator was a prior conviction for a "serious offense." ARIZ. REV. STAT. § 13-703(F)(2). Kayer's prior conviction was for first degree burglary. This conviction is the least serious of the "serious offenses" under the aggravator. Serious offenses range from burglary to first degree murder, second degree murder, manslaughter, aggravated assault resulting in serious physical injury, sexual assault, and any dangerous crime against children. *See*

ARIZ. REV. STAT. § 13-703(H)(1)–(6). The second statutory aggravator was commission of a crime for "pecuniary gain." *See* ARIZ. REV. STAT. § 13-703(F)(5). The gain in Kayer's case was relatively modest: avoiding repayment of a $100 loan from Haas, and stealing money and jewelry from Haas's person and personal property from his house. Neither the sentencing judge nor the Arizona Supreme Court found the proposed statutory aggravator of killing in "an especially heinous, cruel or depraved manner." ARIZ. REV. STAT. § 13- 703(F)(6).

The one non-statutory mitigator was Kayer's importance in the life of his son.

2. State PCR Proceeding

Based on the extensive evidence presented during the state PCR proceeding, we concluded that Kayer had established the statutory mitigator of mental impairment under Arizona law: "The defendant's capacity to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law was significantly impaired, but not so impaired as to constitute a defense to prosecution." ARIZ. REV. STAT. § 13-703(G)(1). In order to reach that conclusion, we analyzed Arizona Supreme Court cases in which that statutory mitigator had been found. *Kayer*, 923 F.3d at 718 (providing as examples *State v. Stevens*, 158 Ariz. 595, 764 P.2d 724, 727–29 (1988) (long-term alcohol and drug use); *State v. Gretzler*, 135 Ariz. 42, 659 P.2d 1, 16–17 (1983) (long-term drug use)). The state PCR judge made no finding, one way or the other, whether Kayer had established the statutory mitigator of mental impairment. If he had made a finding that

Kayer had not established this statutory mitigator, the finding would have been objectively unreasonable, given the clear case law of the Arizona Supreme Court.

The *Strickland* prejudice question in the PCR court was the effect of the addition of the new statutory mitigator of "mental impairment" to the relatively weak non-statutory mitigator of "importance in the life of his son," balanced against the same two statutory aggravators.

B. Step Two

Second, we recited the established law for determining prejudice in a *Strickland* IAC case under AEDPA. Under that law, we do not look to what the initial sentencing judge would have done if the later-presented evidence had been presented at the sentencing hearing. Instead, we look to the probability of a different outcome in the Arizona Supreme Court, which sentences *de novo* in capital cases. We filter the *Strickland* standard through the lens of AEDPA to give appropriate deference to the decision of the state PCR judge. *Kayer*, 923 F.3d at 719–20.

The prejudice standard under *Strickland* is not whether the newly introduced evidence would "more likely than not have produced a different outcome." Rather, the *Strickland* prejudice standard is the less demanding standard of "reasonable probability":

> The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a

> probability sufficient to undermine confidence in the outcome.

Strickland v. Washington, 466 U.S. 668, 694 (1984). When filtered through the lens of AEDPA, the standard is that articulated by the Supreme Court in *Porter v. McCollum*. The *Strickland* prejudice question for a federal habeas court under AEDPA is whether

> it was objectively unreasonable [for the state habeas court] to conclude there was no reasonable probability the sentence would have been different if the sentencing judge . . . had heard the significant mitigation evidence that [defendant's trial] counsel neither uncovered nor presented.

Porter v. McCollum, 558 U.S. 30, 31 (2009) (per curiam).

C. Step Three

Third, we compared the facts of Kayer's case to the facts of other Arizona capital cases to determine prejudice. We discussed several Arizona Supreme Court cases and concluded that one case in particular predicted what that court would likely have done if the information presented during Kayer's state PCR proceeding had been presented at the original sentencing hearing. *Id.* at 721–23.

In *State v. Brookover*, 124 Ariz. 38, 601 P.2d 1322 (1979), defendant Brookover had agreed to buy 750 pounds of marijuana from the victim. When the marijuana was delivered, Brookover shot the victim in

order to avoid paying for it. "The victim fell to the floor moaning and asked the defendant what he had done. The defendant said 'Don't worry . . . it will be over soon' and shot him once more in the back," killing him. *Id.* at 1323. There were essentially the same two statutory aggravators in Brookover's case as in Kayer's case: (1) conviction for a prior "serious offense," though this aggravator, at the time of Brookover's sentencing, required the crime be one for which the death penalty could be imposed; and (2) killing for pecuniary gain (recognized a year later, retroactively, as a statutory aggravator). As in Kayer's case, the *Brookover* court rejected a statutory aggravator of killing in "an especially heinous, cruel, or depraved manner." There was also the same mitigating factor that in Kayer's case had been established only after he obtained competent counsel during the state court PCR proceedings: "mental impairment." Unlike in Kayer's case, there was no additional mitigator in Brookover's case. In its *de novo* sentencing determination in *Brookover*, the Arizona Supreme Court held that a death sentence could not be imposed. It held, "Under the circumstances, leniency is *mandated*." *Id.* at 1326 (emphasis added).

The comparison between Kayer's case and *Brookover* is striking. To summarize: Both shot their victims twice, wounding them with the first shot and, after time for deliberation, killing them with the second shot. Both men shot and killed their victims for "pecuniary gain." In neither case was the pecuniary gain great. Both men had prior convictions for "serious crimes," though Kayer's was a much less serious crime than Brookover's. Both men had the statutory

mitigator of "mental impairment." Kayer had an additional mitigator, the non-statutory mitigator of importance in the life of his son. Our dissenting colleagues call Kayer's crime a "brutal and venal murder." Dissent at 43. But it was no worse than the murder in *Brookover*. Indeed, the courts in both Kayer's case and in *Brookover* specifically rejected the proposed statutory aggravator that the murder had been committed in "an especially, heinous, cruel or depraved manner."

Given the striking similarity between the facts of *Brookover* and the facts of Kayer's case, and given that the Arizona Supreme Court had held in *Brookover* that a non-capital sentence was "mandated," we held that the state court judge was "objectively unreasonable" in holding that there was "no reasonable probability" that Kayer's sentence would have been different if the evidence presented to the PCR court had been presented in the original sentencing hearing. We wrote:

> In determining prejudice, we need not go so far as *Brookover*. We need not decide that leniency was "mandated" and that the state PCR court was unreasonable in concluding otherwise. We need only decide whether "it was objectively unreasonable" for the state court to conclude that there was "no reasonable probability" that Kayer's sentence would have been different if Kayer's attorneys had presented to the sentencing court the mitigating evidence later presented to the PCR court. *Porter*

> [*v. McCollum*], 558 U.S. at 31 . . . . In light of the foregoing, and particularly in light of the Arizona Supreme Court's decision in *Brookover*, we hold that there is a reasonable probability Kayer's sentence would have been less than death, and that the state PCR court was unreasonable in concluding otherwise.

Kayer, 923 F.3d at 723.

II. Our Colleagues' Dissent

Our dissenting colleagues make two arguments based on mistakes of law.

First, our colleagues argue that we were required to give deference to the prejudice decision of the state PCR judge on the ground that he made the initial sentencing decision. They write:

> *[W]ho better to determine whether the new evidence would have made a difference at sentencing than the judge who sentenced Kayer to death.* Judge Kiger presided over both sentencing and the PCR proceedings, and he concluded the new evidence would have made no difference. His "unique knowledge of the trial court proceedings"—including his front-row seat to the presentation of evidence showing Kayer's brutal and venal murder—"render[ed] him 'ideally situated'" to evaluate Kayer's claim that the introduction of new evidence would have changed the sentencing outcome.

> *Murray v. Schriro*, 882 F.3d 778, 821 (9th Cir. 2018) (quoting *Landrigan*, 550 U.S. at 476). This is not to say that Judge Kiger is entitled to some sort of super-deference simply because he sentenced Kayer to death. But there is something particularly troubling about the panel majority affording no deference whatsoever to Judge Kiger's PCR court decision, as the last reasoned state court opinion.

Dissent at 42–43 (emphasis added). They also write:

> All this evidence was before the state PCR court, which concluded that Kayer had not been prejudiced by his trial counsel's failure to introduce this evidence in mitigation and before sentencing. *He should know*, because in Arizona the same judge who presides over a defendant's trial and sentencing also presides over the PCR proceeding.

Id. at 41 (emphasis added).

In making their "he-should-know" argument, our colleagues ignore clear Supreme Court law to the contrary. *Strickland* itself—the foundation case—tells us not to give deference to the prejudice determination of the state PCR judge on the ground that he or she was also the sentencing judge. Under AEDPA, we give deference to the decision of the last reasoned state court decision. If that is the decision of the state PCR judge at the trial court level, we of course give

deference to that decision. But the fact that the PCR judge was also the sentencing judge is irrelevant to the deference we should give to his or her prejudice determination. The Court wrote:

> The assessment of prejudice should proceed on the assumption that the decisionmaker is reasonably, conscientiously, and impartially applying the standards that govern the decision. It should not depend on the idiosyncracies of the particular decisionmaker, such as unusual propensities toward harshness or leniency.

Strickland, 466 U.S. at 695.

Our colleagues' reliance on *Murray* and *Landrigan* is misplaced. In *Murray*, we held only that it does not violate due process to have the same person act as both the trial judge and PCR judge. *Murray*, 882 F.3d at 820–821. In *Landrigan*, the Supreme Court held that the PCR judge, who had also been the trial judge, was "ideally situated" to evaluate a factual claim about what had been said during trial in a colloquy between the judge and the defendant. *Schriro v. Landrigan*, 550 U.S. 465, 476 (2007). Neither *Murray* nor *Landrigan* even remotely support the proposition that we owe deference to a *Strickland* prejudice determination by the PCR judge on the ground that he or she was also the trial judge.

Second, our colleagues argue that in determining prejudice we should not have looked to precedential

decisions of the Arizona Supreme Court. Calling our approach a "stunning error," they write that

> the panel majority . . . proposes that the yardstick for whether there is a reasonable probability Kayer would not have been sentenced to death if the new evidence were presented to the sentencing court is whether this case is more like cases in which the Arizona Supreme Court at one point affirmed a death penalty imposed by the trial court *on direct de novo review* or more like cases in which the Arizona Supreme Court reversed. . . . [This] mode of habeas review of a *Strickland* claim [] is quite literally unprecedented.

Dissent at 44–45 (emphasis in original).

As a factual matter, our colleagues are mistaken in saying that this mode of analysis is "quite literally unprecedented." In *White v. Ryan*, 895 F.3d 641 (9th Cir. 2018)—another Arizona capital case, which we discussed and applied in our opinion—we spoke directly to this issue. *Kayer*, 923 F.3d at 720. We wrote in *White* that an analysis of prejudice at sentencing must look to what the Arizona Supreme Court would likely have done if the evidence has been presented to it on direct appellate review. We faulted the state habeas court for failing to perform this analysis. We wrote, "The PCR court erred by . . . fail[ing] to consider the probability of a different outcome in the Arizona Supreme Court." *Id.* at 671.

As we pointed out in our en banc opinion in *McKinney v. Ryan*, 813 F.3d 798 (9th Cir. 2015) (en banc), the Arizona Supreme Court is conscientious in following its own precedents. There, we wrote:

> [T]he Arizona Supreme Court has a strong view of stare decisis. The Court wrote in *White v. Bateman*, 89 Ariz. 110, 358 P.2d 712, 714 (1961), for example, that its prior caselaw "should be adhered to unless the reasons of the prior decisions have ceased to exist or the prior decision was clearly erroneous or manifestly wrong." *See also Young v. Beck*, 227 Ariz. 1, 251 P.3d 380, 385 (2011) ("[S]tare decisis commands that 'precedents of the court should not be lightly overruled,' and mere disagreement with those who preceded us is not enough." (quoting *State v. Salazar*, 173 Ariz. 399, 416, 844 P.2d 566 (1992))); *State ex rel. Woods v. Cohen*, 173 Ariz. 497, 844 P.2d 1147, 1148 (1993) (referring to a "healthy respect for stare decisis"); *State v. Williker*, 107 Ariz. 611, 491 P.2d 465, 468 (1971) (referring to a "proper respect for the theory of stare decisis").

Id. at 826.

As a matter of law, our colleagues are also mistaken. At all times relevant to our decision, the Arizona Supreme Court reviewed *de novo* on direct appeal all sentencing decisions in capital cases. The prejudice question is necessarily the following: Is there

a reasonable possibility that there would have been a different decision by the Arizona Supreme Court if that court had seen the newly presented evidence on direct appeal? The only way to answer that question is to compare the evidence—including the newly presented evidence—to the evidence in other cases reviewed by the Arizona Supreme Court on direct appeal.

Our colleagues write further:

> The [panel majority's] rule is as misguided as it is novel. For starters, [its] approach would make federal habeas review of every *Strickland* claim turn on the state in which the petitioner was sentenced. So U.S. Supreme Court habeas precedents that involve California apparently could be distinguished away in habeas appeals from Arizona, on the sole ground that "we ask what an Arizona rather than a California sentencing court would have done." [*Kayer*, 923 F.3d at 724.] The panel majority appears untroubled by this point, but its implications are striking: Their approach—at least for *Strickland* prejudice—transmutes "clearly established Federal law, as determined by the Supreme Court of the United States" into law as determined by state supreme courts. 28 U.S.C. § 2254(d)(1).

Dissent at 45–46.

Our colleagues misunderstand the nature of an IAC claim. IAC claims in § 2254 habeas petitions are often—even usually—premised on the law of the particular state in which the petitioner was convicted. If an attorney fails to make what would have been a winning claim under state law, a federal habeas court determines prejudice by asking what the decision under that state law would likely have been if the claim had been made. We do not look to the law of another state or to federal law when the state court would never have applied that law. For example, in an IAC claim where a petitioner argues that counsel should have raised a claim in Arizona state court under Arizona law, we do not ask what California or federal law exists on the point, or what a California or federal court would have done. The IAC claim is based on what the Arizona court would have done under Arizona law had the claim been presented. Our colleagues are right that our approach would often have us look to state law in addressing petitions raising IAC claims. But they are mistaken in contending that the approach is "novel." On the contrary, it is the normal and uncontroversial approach.

III. *Brookover*

Our colleagues do not want to confront the Arizona Supreme Court's decision in *Brookover*. Both arguments just reviewed are designed to persuade the reader that decisions of the Arizona Supreme Court in capital cases, and *Brookover* in particular, are irrelevant to the *Strickland* prejudice question. Our colleagues would prefer to regard as the controlling

case a habeas challenge to a decision by the California Supreme Court. Dissent at 54–56.

Our colleagues discuss *Brookover* only briefly, and only at the very end of their long dissent. They try to avoid the effect of Brookover in two ways.

First, our colleagues point out that Brookover's mental impairment came from an "organic brain injury." *Id.* at 53. They compare Brookover's impairment to what they characterize as Kayer's "self-administered 'untreated alcoholism and untreated pathological gambling.'" *Id.* In thus referring to Kayer's mental state, they ignore his "severe" "mental impairment" when he was discharged from the Navy as a very young man; his two stays in VA hospitals, resulting in a bipolar diagnosis and lithium prescription; his hearing voices, as described by his aunt; his delusional beliefs, including the belief that he came from another planet; and the extensive mental illness in his family. More important, the Arizona Supreme Court concluded that Brookover's "mental impairment" was a statutory mitigator because his "mental condition was . . . a major and contributing cause of his conduct . . . ." *Brookover*, 601 P.2d at 1326. There is nothing in the Court's opinion specifying that the cause of the impairment is relevant. The relevant fact is the impairment itself.

Second, our colleagues dismiss *Brookover* as a case decided "forty years ago." Dissent at 44–45. When Kayer's case was decided on direct appeal by the Arizona Supreme Court, *Brookover* was twenty (not forty) years old. We wrote in our opinion:

> The Arizona Supreme Court in capital cases routinely cites and treats as binding precedent its own decisions from twenty years (and more) before. *See*, *e.g.*, *State v. Hedlund*, 245 Ariz. 467, 431 P.3d 181, 190 (2018) (discussing and distinguishing *State v. Graham*, 135 Ariz. 209, 660 P.2d 460 (1983); *State v. Trostle*, 191 Ariz. 4, 951 P.2d 869, 885 (1997) (discussing and relying on *State v. Richmond*, 114 Ariz. 186, 560 P.2d 41, 52–53 (1976))). *See also State v. Stuard*, 176 Ariz. 589, 863 P.2d 881, 902 (1993) (citing, inter alia, *State v. Doss*, 116 Ariz. 156, 568 P.2d 1054, 1060 (1977), and writing, "Leniency is therefore required."). Nothing in the practice of the Arizona Supreme Court suggests that when it sentenced Kayer de novo in 1999, it would have treated as less-than-binding a twenty-year-old precedent. In that precedent—*Brookover*—the Arizona Supreme Court had held, on facts less favorable to the defendant than those in Kayer's case, that a non-capital sentence was "mandated."

Kayer, 923 F.3d at 725.

IV. Summary

There are two things that differentiate this case from run-of- the-mill IAC habeas cases under AEDPA.

First, this is not the usual case in which the evidence presented in the state PCR proceeding was

merely cumulative of evidence already presented at the sentencing phase, establishing more firmly an already established proposition. Instead, this is a case in which new evidence established for the first time the existence of a new and important mitigating factor. The effect of the new evidence was to change the evidence in favor of mitigation, from one weak non-statutory mitigator (importance in the life of Kayer's son) to two mitigators—the continuing non-statutory mitigator, plus the new statutory mitigator of mental impairment. The two mitigators must now be weighed against two existing, relatively weak aggravators.

Second, this is an unusual case in that there is a state supreme court decision in a capital case with strikingly similar facts, in which the Court held that a non-capital sentence was "mandated." We did not hold, based on *Brookover*, that the Arizona Supreme Court would necessarily have held that a non-capital sentence was "mandated." But we did hold, based on *Brookover*, that it was "objectively unreasonable" for the state PCR judge to conclude that there was "no reasonable probability" of a different sentence. *Porter*, 558 U.S. at 31.

Contrary to the contention of our dissenting colleagues, we are acutely aware of the deference required under AEDPA. Even after giving all appropriate deference to the decision of the PCR judge, we concluded that habeas relief is warranted.

BEA, Circuit Judge, joined by BYBEE, CALLAHAN, M. SMITH, IKUTA, OWENS, BENNETT, R. NELSON, BADE, COLLINS, LEE, and BRESS, Circuit Judges, dissenting from the denial of rehearing en banc:

Like clockwork, practically on a yearly basis since the Millennium, we have forced the Supreme Court to correct our inability to apply the proper legal standards under the Antiterrorism and Effective Death Penalty Act ("AEDPA").[1] A divided panel in this case took that

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[1] *See, e.g.*, *Sexton v. Beaudreaux*, 138 S. Ct. 2555, 2558 (2018) (per curiam) (finding "[t]he Ninth Circuit failed to [] apply" the proper standard and instead "spent most of its opinion conducting a *de novo* analysis"); *Kernan v. Cuero*, 138 S. Ct. 4, 9 (2017) (per curiam) (finding "several problems with the Ninth Circuit's reasoning," including that it failed to recognize that "fairminded jurists could disagree" about how to construe Supreme Court precedent); *Davis v. Ayala*, 135 S. Ct. 2187, 2193 (2015) ("The Ninth Circuit's decision was based on the misapplication of basic rules regarding harmless error."); *Lopez v. Smith*, 574 U.S. 1, 6 (2014) (per curiam) (criticizing "the Ninth Circuit in particular" for applying a legal standard nowhere found in AEDPA); *Johnson v. Williams*, 568 U.S. 289, 297 (2013) (holding that "the Ninth Circuit declined to apply the deferential standard of review" mandated by AEDPA); *Cavazos v. Smith*, 565 U.S. 1, 7 (2011) (per curiam) (citation omitted) ("When the deference to state court decisions required by § 2254(d) is applied to the state court's already deferential review, there can be no doubt of the Ninth Circuit's error below."); *Felkner v. Jackson*, 562 U.S. 594, 598 (2011) (per curiam) (explaining that "[t]here was simply no basis for the Ninth Circuit" to grant habeas relief under AEDPA's highly deferential standard, "particularly in such a dismissive manner"); *Premo v. Moore*, 562 U.S. 115, 123 (2011) ("The [Ninth Circuit] was wrong to accord scant deference to counsel's judgment, and doubly wrong to conclude it would have been unreasonable to find that the defense attorney qualified as counsel for Sixth Amendment purposes."); *Harrington v. Richter*, 562 U.S. 86, 92 (2011)

tradition one step further, though, by re-writing AEDPA entirely: to institute the federal habeas court as a mere second state appellate court of state law error review.

A divided panel in this federal habeas appeal granted petitioner George Russell Kayer relief. *Kayer v. Ryan*, 923 F.3d 692, 726 (9th Cir. 2019). Kayer claimed that the Arizona Superior Court erred in holding, on post-conviction review ("PCR"), that the failure of Kayer's trial counsel to conduct an adequate penalty phase investigation did not violate his Sixth Amendment right to counsel under *Strickland v. Washington*, 466 U.S. 668 (1984).

Kayer was sentenced to death for the first-degree, premeditated murder of an acquaintance over a minor

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("[J]udicial disregard [for the sound and established principles of when to issue a writ of habeas corpus] is inherent in the opinion of the Court of Appeals for the Ninth Circuit here under review."); *Knowles v. Mirzayance*, 556 U.S. 111, 121 (2009) (holding the Ninth Circuit's erroneous issuance of a writ was "based, in large measure, on its application of an improper standard of review"); *Uttecht v. Brown*, 551 U.S. 1, 22 (2007) (finding "[t]he Court of Appeals neglected to accord" the proper deference to the state trial court); *Schriro v. Landrigan*, 550 U.S. 465, 473 (2007) ("The question under AEDPA is not whether a federal court believes the state court's determination was incorrect but whether that determination was unreasonable—a substantially higher threshold."); *Rice v. Collins*, 546 U.S. 333, 342 (2006) ("[The Ninth Circuit's] attempt to use a set of debatable inferences to set aside the conclusion reached by the state court does not satisfy AEDPA's requirements for granting a writ of habeas corpus."); *Woodford v. Visciotti*, 537 U.S. 19, 25 (2002) (per curiam) (criticizing the Ninth Circuit for "substitut[ing] its own judgment for that of the state court, in contravention of 28 U.S.C. § 2254(d)").

debt that Kayer owed the victim. Kayer shot the victim in the head, stripped the victim's body of any valuables, returned to steal the victim's house keys, shot the victim again for good measure, ransacked the victim's home, and pawned off the loot. Kayer's attorneys by all accounts did little investigation for the penalty phase, and the panel majority concluded that an adequate penalty phase investigation would have uncovered evidence of Kayer's "mental illness, and gambling and alcohol addiction." *Kayer*, 923 F.3d at 727 (Owens, J., concurring in part and dissenting in part). But even assuming Kayer's penalty-phase counsel was ineffective, the state PCR court reasonably determined that Kayer's counsel's failure to investigate did not prejudice Kayer. The state supreme court denied review.

Reviewing the PCR court's decision, the panel majority cast aside (albeit with some lip service) AEDPA's highly deferential standard of review. By any fair reading of the panel majority's opinion, it reviewed the PCR court's decision de novo as to whether an Arizona court, applying *Arizona* precedent, would have granted relief—a radical approach unwarranted under AEDPA. In short, the panel majority reasoned that because *it* believed there was a reasonable probability Kayer's sentence would have been less than death if the evidence of mental impairment produced to the PCR court were presented to the sentencing court, the PCR court's contrary finding was objectively unreasonable. Taking the panel majority at its word, it views as objectively unreasonable—and thus meritorious of a federal writ of habeas corpus—that the PCR court reached a different conclusion about

prejudice than did the panel majority. *That is de novo review, plain and simple*. As noted, and making matters worse, the panel majority evaluated whether the state court's no-prejudice finding adhered to Arizona's inapplicable state law—not federal law.

Beyond the legal errors, Kayer's proposed mitigating evidence—relating mostly to his "untreated alcoholism and untreated pathological gambling," *Kayer*, 923 F.3d at 719, and absent any findings of organic brain damage—is hardly overwhelming, and reasonable jurists could find that it did not undermine confidence in the death sentence. As such, it provides no basis for relief under AEDPA's deferential standard. As Judge Owens convincingly observed, given the "brutal" manner in which Kayer killed the victim and the "hardly overwhelming" mitigating evidence, ample room remains for fairminded disagreement whether the failure of Kayer's counsel to investigate prejudiced him. *Id.*at 726–27 (Owens, J., concurring in part and dissenting in part).

Contrary to the panel majority's opinion, AEDPA as interpreted by the Supreme Court nowhere instructs that entitlement to federal habeas relief turns on a de novo review of whether an Arizona court in PCR proceedings adhered to Arizona precedent regarding de novo review of death penalty sentences. AEDPA instead requires that Kayer show that the Arizona Superior Court's PCR determination was "so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." *Harrington*, 562 U.S. at 103.

From our position, the issue is *not* what we think the state PCR court *should have* done to conform to Arizona law. The issue is whether what the state PCR court *in fact did* (its decision, not how it arrived at its decision) was objectively unreasonable under the standard articulated in *Harrington*. The Supreme Court has told us—specifically us—not to "ignore[]" that this is literally "the only question that matters." *Id.* at 102 (quoting *Lockyer v. Andrade*, 538 U.S. 63, 71 (2003)). How the panel majority's opinion could outright ignore (and replace) this standard is incomprehensible. We should have taken this case en banc to correct the panel majority's opinion's errors before the Supreme Court (again) does it for us.

I

George Russell Kayer was convicted of first-degree murder for the death of Delbert Haas and sentenced to death in Arizona Superior Court in 1997.

The series of events that led to Kayer's conviction all began with a gambling trip gone awry. In 1994, Kayer, his girlfriend Lisa Kester, and pal Delbert Haas hopped in Haas's van to travel from Arizona to Nevada for a gambling trip. The three spent their first night sharing a room at a hotel in Laughlin, Nevada. Kayer that night told Haas that he had "won big" during the day using a special gambling system. This was apparently a lie, but Kayer knew Haas had recently received money from an insurance settlement, and Kayer used the lie to convince Haas to lend him about $100 in gambling money.

The next day, Kayer of course lost Haas's money gambling. But Kayer lied to Haas again, this time fabricating a story about how he had in fact "won big" but that someone stole the winnings. In private, Kester asked Kayer what he planned to do now that he was out of cash. Kayer replied that he would rob Haas. Kester pointed out the obvious fact that Haas would identify Kayer as the thief. According to Kester, Kayer responded, "I guess I'll just have to kill him."

The following day, the trio drove back to Arizona, consuming a case of beer between the three during the several-hour drive. Haas and Kayer argued about Kayer's debt. During a stop to buy snacks and use the bathroom, Kayer pulled a gun from beneath a seat in the van and put it in his pants. Kayer asked Kester if she was "going to be all right with this." Kester asked Kayer to warn her before he pulled the trigger.

The three continued on their way. Kayer, who was driving, left the main highway, telling his companions he was taking a shortcut. Kayer stopped the van by the side of the road, at which point Haas exited and walked toward the back to urinate. Kester went to exit the van as well, but Kayer stopped her, gesturing to the gun. Kester received her warning. Through the back window of the van, Kester saw Kayer walk up behind Haas and—as Kayer had planned to do—shoot Haas in the head while he was urinating.

Kayer dragged Haas's body into the bushes; took Haas's wallet, watch and jewelry; got back in the van; and drove away with Kester. Back on the road, Kayer realized he forgot to take Haas's house keys and drove back to where he dumped the body. Kayer exited the

van to retrieve the keys from Haas's body, but then returned and asked for the gun. Haas, Kayer said, did not appear to be dead. Kayer went back to Haas's body, and Kester heard a second shot. Kayer and Kester then drove to Haas's Arizona home and looted it. They spent the next week pawning and selling items from Haas's home and gambling with the proceeds.

Ten days after the murder, Kester got cold feet and approached a security guard at a Las Vegas hotel to report Kayer's murder of Haas. Kayer was indicted for, and eventually convicted of, first-degree murder. During the penalty phase hearing, Kayer's counsel argued as mitigating circumstances that Kayer suffered from mental illness and substance abuse. But Kayer's counsel adduced virtually no evidence to support that argument. The judge[2] held that Kayer had not established any mental impairment and sentenced him to death.

On direct appeal, the Arizona Supreme Court independently reviewed and affirmed Kayer's death sentence. In Arizona, mitigating evidence can serve either as a statutory or non-statutory mitigating factor, with greater weight due to statutory factors. The Court refused to find a mitigating circumstance based on mental impairment, either as a statutory or non-statutory factor. The Court did find one nonstatutory mitigating circumstance (Kayer's importance in his son's life), but held it was outweighed by two statutory aggravating circumstances—a previous conviction of a

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[2] This ruling pre-dated *Ring v. Arizona*, 536 U.S. 584 (2002).

"serious offense" for first-degree burglary in 1981 and "pecuniary gain" as motivation for the murder.

On state habeas review, Kayer argued that his trial counsel provided ineffective assistance of counsel at the penalty phase. Kayer presented evidence in his PCR proceeding that his trial counsel performed little investigation of mitigating circumstances. Had counsel properly investigated, Kayer argued, trial counsel would have discovered that: Kayer suffered from bipolar disorder and "personality disorders"; Kayer had "a family history of problems with alcohol, gambling and bipolar disorder that increased his risk of developing one or more of these disorders"; Kayer's father died when he was young, resulting in "significant instability including frequent moves"; Kayer's "performance in school was not good"; Kayer was "having difficulties with out of control pathological gambling" and "extensive alcohol abuse" at the time of the murder; and, to top it all off, Kayer had suffered a heart attack weeks before the murder, an "important source of emotional distress that was likely exacerbating all his other problems." *Kayer*, 923 F.3d at 713. The PCR court denied relief, holding that Kayer's counsel had not been ineffective, and that, in any event, any deficiencies did not prejudice Kayer. The Arizona Supreme Court denied review without comment.

Kayer then sought federal habeas relief. The district court denied relief. Kayer appealed, contending, as relevant here, that the Arizona PCR court erred in holding that his Sixth Amendment right to counsel was not violated by his counsel's deficient

performance at the penalty phase. A divided panel reversed, holding that no reasonable jurist could conclude that Kayer's counsel had rendered effective representation by failing to conduct a mitigation investigation in preparation for the penalty phase, and that counsel's failure to investigate prejudiced Kayer.[3] Judge Owens dissented as to whether counsel's failure prejudiced Kayer. A reasonable jurist could find the purported mitigation evidence would not have made a difference, Judge Owens reasoned, given the "brutal" manner in which Kayer killed Haas and the "hardly overwhelming" mitigating evidence. *Id.* at 726–27 (Owens, J., concurring in part and dissenting in part).

II

The Court of Appeals reviews the district court's denial of a 28 U.S.C. § 2254 habeas corpus petition de novo. *Deck v. Jenkins*, 814 F.3d 954, 977 (9th Cir. 2016).

Because Kayer's state conviction was entered after April 24, 1996, Kayer's habeas petition is subject to AEDPA, under which "[w]e review the last reasoned state court opinion." *Musladin v. Lamarque*, 555 F.3d 830, 834 (9th Cir. 2009). In this case, that opinion is the written order of the state PCR court.

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[3] Apparently, the following are thus unreasonable jurists: Arizona Superior Court Judge William T. Kiger, the state PCR court judge; the five members of the Arizona Supreme Court who denied Kayer's petition for review of Judge Kiger's PCR decision; U.S. District Court Judge David G. Campbell, who denied federal habeas relief; Judge Owens; and me.

AEDPA bars relitigation of any claim the state court decided on the merits unless the state court's determination was "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1). A state court unreasonably applies Supreme Court precedent "if the state court identifies the correct governing legal principle from the Supreme Court's decisions but unreasonably applies that principle to the facts of the prisoner's case." *Mann v. Ryan*, 828 F.3d 1143, 1151 (9th Cir. 2016) (en banc) (alteration omitted) (quoting *Williams v. Taylor*, 529 U.S. 362, 413 (2000)).

AEDPA's standard is "highly deferential" and "difficult to meet." *Harrington*, 562 U.S. at 102, 105 (citations omitted). To meet it, a petitioner must show that the state court's decision was "so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." *Id.* at 103. According to the Supreme Court, this is literally "the only question that matters." *Id.* at 102 (quoting *Lockyer*, 538 U.S. at 71). In other words, AEDPA "demands that state-court decisions be given the benefit of the doubt." *Visciotti*, 537 U.S. at 24.

III

Kayer contends that the state PCR court's review of his Sixth Amendment claim involved an unreasonable application of the Supreme Court's decision in *Strickland*. *See* 28 U.S.C. § 2254(d)(1). Specifically, Kayer contends that he was denied his Sixth Amendment right to effective assistance of counsel due

to his attorneys' inadequate mitigation investigation in preparation for his penalty phase hearing. *See Wiggins v. Smith*, 539 U.S. 510, 521–22 (2003).

For the sake of argument, I assume the panel rightly concluded that Kayer's attorneys performed deficiently by failing to conduct an adequate penalty phase investigation.[4] But a habeas petitioner must establish both deficient performance and "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694. No matter how inadequate Kayer's attorneys may have been, deficient performance alone is not enough to merit relief. And "[a] reasonable probability is a probability sufficient to undermine confidence in the [verdict]." *Id.* As is critical here, after a state PCR court finds there was no reasonable probability the result would have been different but for counsel's unprofessional errors, that finding must stand unless it was "objectively unreasonable." *Porter v. McCollum*, 558 U.S. 30, 31 (2009) (per curiam).

IV

The discussion that follows proceeds in three steps. First, I relate the mitigating evidence Kayer presented to the PCR court. Second, I explain why the panel majority's review of the PCR court's opinion applied a de novo review that flouts AEDPA's highly deferential standards. Third, I explain why the mitigation

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[4] Judge Owens appears to have concurred in this conclusion. *See Kayer*, 923 F.3d at 727 (Owens, J., concurring in part and dissenting in part).

evidence was not "sufficient to undermine confidence in the [verdict]," *Strickland*, 466 U.S. at 694—certainly not "beyond any possibility for fairminded disagreement," *Harrington*, 562 U.S. at 103.

A

Personal Background. According to some, Kayer was "slow to walk" and "slow at all developmental stages." Kayer was dyslexic and struggled in school. His high school transcript is smattered with Cs, Ds, and Fs, though, also, with the occasional Bs (in "Speech," "Typing," and "Drafting"). Kayer left high school without graduating and enlisted in the Navy. There, he had two "unauthorized absences" ("Uas") in eight months. He returned from his second UA "to see a psychiatrist." At Bethesda Naval Hospital, in May 1973 and at the age of eighteen, Kayer was diagnosed with a "passive-aggressive personality." On discharge, his Lieutenant Commander noted that he had a "sever[e] . . . personality disorder."

In his twenties, Kayer didn't fare much better. He bounced around Arizona state colleges but never graduated. Kayer also "never held a job for a sustained period." Throughout his twenties and thirties, he was a serial burglar (arrested twice). He married twice in his early twenties, but both ended in divorce. He then met Cindy Seitzberg, with whom he fathered a son. His son was dropped in the delivery room and suffered permanent brain damage. Seitzberg left a year later, and Kayer's half-sister and mother became his infant son's co-guardians.

Addictive Behavior. Throughout this period, Kayer "smoke[d] weed almost every day" (beginning at sixteen),[5] drank regularly (beginning in his early twenties), and became a compulsive gambler ("[s]ometime in his twenties"). *Kayer*, 923 F.3d at 709–10. As to his alcohol abuse, a former accomplice to his burglaries recounted that together they would drink beer "for breakfast, lunch and dinner." When Kayer voluntarily checked himself into a Veterans Administration ("VA") hospital at the age of thirty-five, the observing doctor reported that Kayer "had been drinking continuously and heavily for the past seven years." As to his gambling, Kayer's half-sister described his obsession with a personal gambling "system" and countless trips to Las Vegas—including, once, while on house arrest after release for a burglary conviction. That time, Kayer turned himself in after he lost all his money and was sentenced to an additional nineteen months for violating parole.

Family History. Kayer came from a family of unsavory characters. His father was an alcoholic and compulsive gambler who left the family when Kayer was two and died at age thirty-nine of a heart attack. On his mother's side, one of his aunts was "an alcoholic with severe mood swings," and another was an alcoholic who was "severely depressed." One of his cousins—diagnosed first as schizophrenic and then as bipolar—"blew" her "entire retirement" in a single weekend in Vegas. And that's not to mention his Uncle

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[5] The panel majority opinion contains passing references to Kayer "us[ing] speed on the weekends" and using LSD "sometimes" in his late teens. *Kayer*, 923 F.3d at 709.

John: "a thief, a robber," who "held his own family members at gunpoint and knifepoint a few times." Uncle John, one of Kayer's aunts testified, "hit his head in a creek in Oklahoma and he just never did do too good after that."

Despite the cast of characters circling Kayer's youth, there is no evidence Kayer was ever the subject of abuse, either by beatings or sexual molestation. Nor is there any evidence Kayer suffered organic brain damage from an accident or some traumatic childhood event.

Mental Health. Kayer's mother and sister testified before the PCR court that Kayer experienced "severe mood swings"—for example, proposing to take a trip "out-of-the blue" when "it wasn't a good time," and "either work[ing] [at something] all out, or do[ing] nothing."

In 1983 and at the age of twenty-nine, Kayer voluntarily went to a VA hospital. The doctor diagnosed him with an "adjustment disorder with depressed mood." Six years later, he was "admitted . . . with depression and suicidal ideation" after his then-girlfriend left him. Kayer was kept at the hospital for eighteen days. The observing doctor wrote that Kayer "showed bipolar traits," but was not "considered to be a danger to himself or others" at the time of discharge. A year later, he was referred to a VA "Day Treatment Center" with a "provisional diagnosis" of "Personality Disorder/Bipolar."

Some evidence suggests Kayer held delusional beliefs and heard voices. In an interview with a private

investigator for one of Kayer's mitigation experts, Kayer stated that he came to believe at age seven—and continues to believe—that he came to earth from another planet. He also maintained, in the same interview, that the uncle of Kayer's second wife—an Afghan woman—was "the deposed king of Afghanistan." Finally, one of Kayer's aunts testified in the PCR court that she has heard voices her entire life, and that Kayer too heard voices: "I was just telling him about my life and he said 'I thought it was normal[.] I hear voices, too.'"

Professional Assessments. Three experts evaluated Kayer in Arizona prison, after Kayer's murder conviction. First, Dr. Anne Herring met with Kayer in March 2005 (over a decade after the murder), and administered a battery of tests. Dr. Herring testified before the PCR court that Kayer received average scores on all tests except for "one of the more cognitively challenging" ones due to Kayer's "persist[ence] in applying incorrect concepts despite receiving feedback." Dr. Herring suggested that applying such "incorrect concepts" is similar to deficits that "have been associated with chronic heavy substance abuse, traumatic brain injury, and with bipolar disorder."[6]

Next, Dr. Michael Sucher, a specialist in "alcohol and drug addiction medicine," met with Kayer in April 2005. Dr. Sucher's notes reflect that Kayer spent

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[6] But again, Dr. Herring did not cite to any record evidence, nor did anything in the record reflect, that Kayer ever experienced traumatic brain injury.

"probably one-quarter to one-third" of his interview discussing his gambling "system." Dr. Sucher testified that Kayer had "untreated alcoholism and untreated pathological gambling." And he gave this incisive take: Gambling and drinking "often make individuals who are so impaired do things that they would not normally do."

Finally, Dr. Barry Morenz twice interviewed Kayer in March and April 2005 for a total of five and a half hours and reviewed Kayer's medical records. Dr. Morenz wrote in his subsequent report that Kayer spent much of the interview talking about his system for predicting winning lottery numbers. Kayer explained that he believed in reincarnation and that there is "residue in him from when Mars was populated and perhaps populations from other worlds as well." Dr. Morenz characterized Kayer as "really delusional," and ultimately diagnosed Kayer with "Bipolar type I disorder, hypomaniac; Alcohol dependence in a controlled environment; Polysubstance abuse in a controlled environment; Pathological gambling; Cognitive disorder not otherwise specified." And Dr. Morenz purported to offer an account of Kayer's conditions in 1994 that tied together the various strands of evidence discussed above:

> There are a number of factors that have increased the risk of Mr. Kayer developing a number of psychiatric problems. First, there is considerable comorbidity among psychiatric diagnoses. . . . In Mr. Kayer this is relevant because people with bipolar

disorders and personality disorders are at an increased risk of developing substance abuse disorders. Also, people with personality disorders have an increased risk of mood disorders. Secondly, Mr. Kayer had a family history of problems with alcohol, gambling and bipolar disorder that increased his risk of developing one or more of these disorders. Thirdly, as a child Mr. Kayer grew up with significant instability including frequent moves and his father's sudden death when Mr. Kayer was still very young which probably contributed to his later psychiatric difficulties. There is evidence that even as a child Mr. Kayer was showing signs of emotional problems as his performance in school was not good. This poor school performance was probably an early sign of a bipolar disorder or a personality disorder or a combination of the two. By the time Mr. Kayer washed out of the military Mr. Kayer likely had moderately severe psychiatric problems that went untreated. . . . [I]t seems clear that he has suffered from serious psychiatric problems during most of his adult life and he continues to show signs of those problems today. . . .

At the time of the murder in 1994 Mr. Kayer was probably having serious psychiatric problems. He was having

> problems with bipolar disorder symptoms and may have been manic or hypomanic, he was having difficulties with out of control pathological gambling and he had difficulty with extensive alcohol abuse. These difficulties were likely superimposed on his personality disorder problems and his cognitive disorder not otherwise specified. Mr. Kayer's belief that he would not live long as a result of the heart attack he had suffered a few weeks before the murder was another important source of emotional distress that was likely exacerbating all his other problems during this period.

All this evidence was before the state PCR court, which concluded that Kayer had not been prejudiced by his trial counsel's failure to introduce this evidence in mitigation and before sentencing. He should know, because in Arizona the same judge who presides over a defendant's trial and sentencing also presides over the PCR proceeding. After first noting that counsel had performed adequately, the PCR court noted: "This court further concludes that **if** there had been a finding that the performance prong of the *Strickland* standard had been met, that no prejudice to the defendant can be found." *Kayer*, 923 F.3d at 714 (quoting PCR court order).

B

As detailed below, there is no ignoring the obvious conclusion that a reasonable jurist could conclude that Kayer was not in fact prejudiced by his counsel's

failings in this case, but broader legal errors permeate the panel majority's opinion, which counseled en banc correction.

As discussed above, but it bears repeating, AEDPA's standard of review is "highly deferential" and "difficult to meet." *Harrington*, 562 U.S. at 102, 105 (citations omitted). Here, we must apply that strong deference and decide whether "it was objectively unreasonable [for the state PCR court] to conclude there was no reasonable probability the sentence would have been different if the sentencing judge" heard the mitigation evidence Kayer's counsel presented to the PCR court. *Porter*, 558 U.S. at 31. Whether the PCR court's no-prejudice conclusion was objectively unreasonable depends on whether it was "so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." *Harrington*, 562 U.S. at 103.

What standard did the panel majority apply? The panel majority stated that in its own view (affording no deference whatsoever), "the evidence [Kayer] presented to the PCR court was sufficient to establish [an Arizona] statutory mitigating circumstance" of mental impairment. *Kayer*, 923 F.3d at 718. Then (again, in its own view), the panel majority posited that the sentencing court "would have added" the Arizona statutory mitigating mental impairment to the balance of aggravating and mitigating factors, and the addition "could have changed the outcome of the sentencing proceeding." *Id.* at 718–20. Thus, in the majority's independent judgment, it pronounced "that there is a

reasonable probability Kayer's sentence would have been less than death" if the sentencing judge heard the mitigation evidence. *Id.* at 723. And because the panel majority believed there was such a probability, that alone meant "that the state PCR court was unreasonable in concluding otherwise." *Id.* Again: "unreasonable in concluding otherwise." *Id.*

The panel majority's opinion is de novo review, plain and simple. Nothing in its review of the state PCR court's decision included any deference whatsoever, particularly the high deference mandated by AEDPA. And the dearth of deference is particularly unnerving here because who better to determine whether the new evidence would have made a difference at sentencing than the judge who sentenced Kayer to death. Judge Kiger presided over both sentencing and the PCR proceedings, and he concluded the new evidence would have made no difference. His "unique knowledge of the trial court proceedings"—including his front-row seat to the presentation of evidence showing Kayer's brutal and venal murder—"render[ed] him 'ideally situated'" to evaluate Kayer's claim that the introduction of new evidence would have changed the sentencing outcome. *Murray v. Schriro*, 882 F.3d 778, 821 (9th Cir. 2018) (quoting *Landrigan*, 550 U.S. at 476).[7] This is not to say that Judge Kiger is entitled to some sort of super-deference simply because he sentenced Kayer to death.

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[7] Apparently, the panel majority here is not alone in improperly second-guessing state court judges in this regard recently. *See Washington v. Ryan*, 922 F.3d 419, 433–34 (9th Cir. 2019) (Callahan, J., dissenting).

But there is something particularly troubling about the panel majority affording no deference whatsoever to Judge Kiger's PCR court decision, as the last reasoned state court opinion.

In failing to accord the state PCR court decision any deference whatsoever, the panel majority committed two errors. First, the majority contended the PCR court is entitled to no "special" deference—really, no deference at all—because *Strickland* demands that PCR courts assess whether there is a reasonable possibility that "the sentencer—including an appellate court, to the extent it independently reweighs the evidence—would have concluded that the balance of the aggravating and mitigating factors did not warrant death." *Kayer*, 923 F.3d at 720 (quoting *Strickland*, 466 U.S. at 695). Put differently, the panel majority did not defer to Judge Kiger's analysis of whether there is a reasonable possibility that new evidence would have resulted in a sentence less than death because Judge Kiger in his PCR role must conduct this analysis in an objective and independent manner. And Judge Kiger in his PCR role must objectively consider what an independent reviewing court might think. But just because Judge Kiger in his PCR role here was required to "consider the probability of a different outcome in the Arizona Supreme Court," *White v. Ryan*, 895 F.3d 641, 671 (9th Cir. 2018), does not mean Judge Kiger merits no deference at all in gauging whether the new evidence would have made a difference.

The panel majority's second, and more stunning error concerns its discussion of the probability of a different outcome in the Arizona Supreme Court. After

just saying that "we assess prejudice independent of the particular judge or judges" to take away deference to Judge Kiger, the panel majority then proposes that the yardstick for whether there is a reasonable probability Kayer would not have been sentenced to death if the new evidence were presented to the sentencing court is whether this case is more like cases in which the Arizona Supreme Court at one point affirmed a death penalty imposed by the trial court *on direct de novo review* or more like cases in which the Arizona Supreme Court reversed. *Kayer*, 923 F.3d at 721–23. Purportedly because Kayer's case looks more like the reversals—and in particular, *State v. Brookover*, 601 P.2d 1322 (Ariz. 1979) (in banc)—the panel majority concludes that Kayer established a reasonable probability of a different outcome.

The panel majority does not explain why it is appropriate for AEDPA review to turn on Arizona Supreme Court reversal trends on de novo review of direct appeals. Just because the Arizona Supreme Court in *Brookover* reversed a case with some similarities, but also with a glaring dissimilarity (as discussed further below), forty years ago on de novo review does not mean the PCR court's conclusion that in *this* case the new evidence would not have made a difference is objectively unreasonable and beyond room for fairminded disagreement. *Harrington*, 562 U.S. at 103.

Admittedly, the panel majority's resort to the "best evidence" of what the Arizona Supreme Court would have done—its decisions—has a certain first-blush plausibility. But by holding that the Arizona courts

were objectively unreasonable in failing to adopt this court's analysis of Arizona law, the panel majority employs a mode of habeas review of a *Strickland* claim that is quite literally unprecedented. The panel majority's defense of its approach cites not *a single authority* for the proposition that the measure for federal habeas review of a state PCR court's *Strickland*-prejudice conclusion may be evaluated by "look[ing] at de novo sentencing decisions by the [state] Supreme Court in comparable cases." *Kayer*, 923 F.3d at 724.

The rule is as misguided as it is novel. For starters, the panel majority's approach would make federal habeas review of every *Strickland* claim turn on the state in which the petitioner was sentenced. So U.S. Supreme Court habeas precedents that involve California apparently could be distinguished away in habeas appeals from Arizona, on the sole ground that "we ask what an Arizona rather than a California sentencing court would have done." *Id.* The panel majority appears untroubled by this point, but its implications are striking: Their approach—at least for *Strickland* prejudice—transmutes "clearly established Federal law, as determined by the Supreme Court of the United States" into law as determined by state supreme courts. 28 U.S.C. § 2254(d)(1).

The panel majority's approach is also impossible to square with Judge W. Fletcher's earlier en banc majority opinion in *McKinney v. Ryan*, 813 F.3d 798 (9th Cir. 2015) (en banc). There, McKinney was sentenced to death and his sentence was affirmed by the Arizona Supreme Court. *Id.* at 802. McKinney filed

a federal habeas petition, challenging in relevant part his death sentence, because the state courts—following Arizona Supreme Court precedent—forbade consideration of certain mitigating evidence unless it bore a "causal nexus to his crimes." *Id.* at 803. And the en banc panel granted McKinney's writ with respect to his sentence because Arizona's "causal nexus" requirement was contrary to clearly established federal law established in *Eddings v. Oklahoma*, 455 U.S. 104, 114 (1982), which held that a sentencer in a capital case may not refuse to consider *as a matter of law* relevant mitigating evidence. *Id.* at 810.

Unlike here, the en banc majority in *McKinney* not once queried whether the Arizona courts' analysis of Arizona law was based on an objectively reasonable reading of Arizona precedent. Because unlike here, the en banc majority in *McKinney* cited the proper standard of review set forth in *Harrington*, which is that *federal* courts may grant relief under AEDPA "only if the state court's application of clearly established federal law was objectively unreasonable, such that fairminded jurists could not disagree that the arguments or theories that supported the state court's decision were inconsistent with the holding in a prior decision of the Supreme Court." *Id.* at 811 (internal quotation marks, citations, and brackets omitted).

How then did the panel majority here rationalize tethering the propriety of the state PCR court's no-prejudice finding to a comparison of the facts with "de novo sentencing decisions by the Arizona Supreme Court in comparable cases"? *Kayer*, 923 F.3d at 724. In short, it did not. Nor could it, unless the panel majority

meant to create a rule that under AEDPA, adherence to state precedent is relevant (and mandatory) when it leads to relief, but not when it leads to denial of relief. *See* discussion *supra* of *McKinney*. It should go without saying that AEDPA condones no such a rule. Rather, federal courts should be concerned only with what the Supreme Court has repeatedly instructed is "the only question that matters": whether "there is no possibility fairminded jurists could disagree" that the Arizona decision itself conflicts with federal precedent. *Harrington*, 562 U.S. at 102.

At a more fundamental level, the panel majority's approach is deeply anathema to AEDPA's basic purpose. "Section 2254(d) reflects the view that habeas corpus is a 'guard against extreme malfunctions in the state criminal justice systems,' not a substitute for ordinary error correction through appeal." *Id.* at 102–03 (quoting *Jackson v. Virginia*, 443 U.S. 307, 332 n.5 (1979) (Stevens, J., concurring in judgment)). It is hard to see here how the panel majority's analysis differs at all from de novo review—indeed, a de novo sentencing direct appeal analysis the Arizona Supreme Court itself has already done in denying relief to Kayer.

It cannot be stressed enough just what the panel did wrong. Rather than ask whether fairminded jurists could disagree about whether the new mitigation evidence was sufficient to undermine confidence in the outcome, the panel majority began its inquiry by asking from scratch: "[W]as the mitigation evidence that was presented to the PCR court sufficient to establish a 'reasonable probability,' 'sufficient to

undermine confidence in the outcome,' that the result of the sentencing hearing would have been different?" *Kayer*, 923 F.3d at 716. Looking to Arizona Supreme Court de novo sentencing appeals, the panel majority then concluded that those cases indeed "show[] that there is a reasonable probability that Kayer would not have been sentenced to death if the mitigating evidence presented to the PCR court had been presented to the sentencing court." *Id.* at 721. The panel majority therefore held "there is a reasonable probability Kayer's sentence would have been less than death, and"—almost as an afterthought—"that the state PCR court was unreasonable in concluding otherwise." *Id.* at 723. (Here, of course, neglecting to mention that the standard is whether the state PCR court was "objectively" unreasonable: that its decision was one "beyond any possibility for fairminded disagreement," the "only question that matters." *Harrington*, 562 U.S. at 102–03.)

The Supreme Court has repeatedly condemned this de-novo-masquerading-as-deference approach. In *Harrington*, for example, the Court chastised the Ninth Circuit for "treat[ing] the unreasonableness question as a test of its confidence in the result it would reach under *de novo* review." 562 U.S. at 102. But that is precisely what the panel majority did here. And if there were any remote doubt about the impropriety of panel majority's analysis, one need only ask themselves if the following sounds familiar:

> Here it is not apparent how the Court of Appeals' analysis would have been any different without AEDPA. The court

> explicitly conducted a *de novo* review; and after finding a *Strickland* violation, it declared, without further explanation, that the state court's decision to the contrary constituted an unreasonable application of *Strickland*. AEDPA demands more. Under § 2254(d), a habeas court must determine what arguments or theories supported or, as here, could have supported, the state court's decision; and then it must ask whether it is possible fairminded jurists could disagree that those arguments or theories are inconsistent with the holding in a prior decision of this Court. The opinion of the Court of Appeals all but ignored the only question that matters under § 2254(d)(1).

Id. at 101–02 (internal quotation marks and citations omitted).

The panel majority's approach evinces no deference: In both the panel majority's actual analysis and an Arizona Supreme Court de novo sentencing direct review, the inquiry begins and ends with "de novo sentencing decisions by the Arizona Supreme Court in comparable cases." *Kayer*, 923 F.3d at 724. It should go without saying that AEDPA does not authorize Article III judges to role-play as super state Supreme Court justices.[8]

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[8] As should be understood, the proper approach instead requires federal courts to "presum[e] that state courts know and follow the law." *Visciotti*, 537 U.S. at 24. Federal courts must determine what arguments supported or could have supported the state court's

C

As just discussed, the panel majority mangled the law in reviewing de novo a state court decision and making out of whole cloth a method of review that requires idiosyncratically comparing a given case's facts to past state supreme court cases engaged in their own de novo review. If these errors were not reason enough to take the case en banc, the panel majority's conclusions are clearly unwarranted under the proper AEDPA framework.

Assuming that all of the mitigating evidence Kayer presented in the PCR proceeding (and summarized above) would have been introduced to the trial court, is it possible that fairminded jurists could find that evidence *insufficient* to establish a reasonable probability of a different outcome? *See Harrington*, 562 U.S. at 102. Based on the above description of the evidence alone, one would think the answer obvious. As Judge Owens notes, Kayer's crime was "brutal" and the mitigation evidence "hardly overwhelming." *Kayer*, 923 F.3d at 726–27 (Owens, J., concurring in part and dissenting in part). What is more, Kayer deliberated about committing the brutal, venal crime before (twice) pulling the trigger.

Kayer killed Haas for a few hundred dollars' worth of cash and other items. He did so in a premeditated fashion, telling his girlfriend that, unable to repay his

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decision, and ask "whether it is possible fairminded jurists could disagree that those arguments or theories are inconsistent with the holding in a prior decision" of the U.S. Supreme Court. *Harrington*, 562 U.S. at 102.

minor gambling debt to Haas, "I guess I'll just have to kill him." Kayer then deliberately took Haas to a remote location, shot Haas in the head at point-blank range, and stripped Haas's body of valuables. But even that wasn't enough, apparently. Once on the road, Kayer turned around to retrieve Haas's house keys from the body, to loot Haas's home. After shooting Haas again for good measure, Kayer took Haas's keys and in an act of increased venality, ransacked Haas's home—before spending the next week gambling and pawning off the loot. And while Kayer's girlfriend later thought better of what happened and turned herself in, Kayer never looked back.

In the face of that brutal crime, "assuring the court that genetics made him the way he is could not have been very helpful." *Landrigan*, 550 U.S. at 481. And that is indeed what Kayer's mitigation evidence amounts to—"mental illness, and gambling and alcohol addiction." *Kayer*, 923 F.3d at 727 (Owens, J., concurring in part and dissenting in part). There is no evidence of childhood "severe privation and abuse," or "physical torment," or sexual molestation—no broken bones, concussions, hospitalization, or any kind of serious or lasting injury from childhood abuse. *Cf. Wiggins*, 539 U.S. at 512; *Williams*, 529 U.S. at 370. Despite Dr. Herring writing in her report that Kayer's deficits were akin to those associated with traumatic brain injury, nothing in the record indicates that Kayer ever actually experienced any traumatic brain injury.

Although Kayer started smoking weed at sixteen and drinking in his twenties, his family did not appear to have introduced him to alcohol or drugs. And he was

not hospitalized for drinking when he was very young. *Cf. Williams*, 529 U.S. at 395 n.19. Notwithstanding descriptions of Kayer as "slow," there is no evidence Kayer suffered organic brain damage, or has an IQ in the modern-day equivalent of what was previously termed the "mentally retarded range." *Cf. Rompilla v. Beard*, 545 U.S. 374, 393 (2005); *Wiggins*, 539 U.S. at 535. Indeed, Dr. Herring testified that Kayer's results were "average" on all but one in an extensive battery of psychiatric tests. On direct appeal, Kayer even cited his "relatively *high* intelligence" as a mitigating factor. *Arizona v. Kayer*, 984 P.2d 31, 48 (Ariz. 1999) (en banc) (emphasis added).

Taking at face value Kayer's evidence, "[w]hether, and to what degree, [it] is mitigating is highly debatable." *Pinholster v. Ayers*, 590 F.3d 651, 715 (9th Cir. 2009) (Kozinski, J., dissenting), *rev'd sub nom. Cullen v. Pinholster*, 563 U.S. 170 (2011). For instance, one ordinarily might think that evidence the defendant drinks and gambles to excess would cast his character in a particularly *un*favorable light. Yet because "Kayer had been drinking heavily on the day of the killing, and Kayer killed the victim in order to obtain funds to continue gambling," the panel majority suggested, his alcoholism and pathological gambling are *especially mitigating*. *Kayer*, 923 F.3d at 721. The panel majority of course ignored that Kayer first planned to kill Haas before the day of the killing and thus had time to change his mind. This was a planned and brutal murder. Only a jurist caught up in the throes of an "infatuation with 'humanizing' the defendant" could take seriously the panel majority's conclusions to the

contrary. *Pinholster*, 590 F.3d at 692 (Kozinski, J., dissenting).

Making matters worse, although the panel majority's unprecedented new standard of review that requires comparing cases to state supreme court reversals is unwarranted as a matter of law, the panel majority's analysis further errs by "overlook[ing] arguments that would otherwise justify the state court's result." *Harrington*, 562 U.S. at 102. The panel majority relies heavily on *Brookover* as its Arizona Supreme Court de-novo-reversal analogue. There, defendant Brookover agreed to buy 750 pounds of marijuana from the victim. Upon delivery, Brookover shot the victim to avoid paying for it, and shot him once more in the back when the victim fell to the floor.

There, as in Kayer's case, the Arizona Supreme Court did not find a statutory aggravating factor that the murder had been committed in "an especially heinous, cruel, or depraved manner." Like Kayer, Brookover had been previously convicted of a serious crime, and he committed the crime for pecuniary gain. "The one mitigating circumstance was mental impairment." *See Kayer*, 923 F.3d at 722. The Arizona Supreme Court set aside the death sentence imposed by the trial court.

"The only difference," says the panel majority, between *Brookover* and Kayer's case is "that one of the statutory aggravators was stronger in *Brookover*": Although the *Brookover* opinion does not describe the prior conviction, the statutory aggravator at the time required a crime "for which the death penalty or life imprisonment could be imposed." *Id.* at 723–24.

(Arizona later changed the statutory aggravator to a prior conviction for a "serious crime"). Neither death nor life imprisonment could be imposed for first-degree burglary, Kayer's prior conviction. Thus, the panel majority reasoned, the reversal of Brookover's sentence on worse facts compels reversal of Kayer's sentence on better facts.

But the panel majority's mechanistic weighing of the "statutory" and "non-statutory" mitigators elided obvious distinctions between the cases. Just to take one: Brookover's mental impairment involved an organic brain injury: a "pre existing" "neurological lesion" associated with serious "anti social" behavior. *Brookover*, 601 P.2d at 1325. Kayer's claimed mitigating evidence was merely self-administered "untreated alcoholism and untreated pathological gambling." This is no trivial distinction. In countless cases finding *Strickland* prejudice on federal habeas review for failing to investigate at the penalty phase, the Supreme Court has found particularly sympathetic claims of "organic brain damage" and mental retardation, *see Rompilla*, 545 U.S at 392; "brain damage" and "brain abnormality," *see Porter*, 558 U.S. at 36; and "frontal lobe brain damage," with "bottom first percentile" cognitive functioning, *see Sears v. Upton*, 561 U.S. 945, 946 (2010). Kayer, by contrast, has adduced no evidence of such injury or functioning. A fairminded jurist could reasonably distinguish *Brookover* on that ground alone.

Consider as well that (at least in the panel majority's view) Kayer's mental impairment was so significant because he was at least provisionally

diagnosed bipolar, which purportedly may have manifested "manic or hypomanic" symptoms at the time of the murder. *Kayer*, 923 F.3d at 713. But relying on Kayer's bipolar disorder is not so simple. As the panel majority noted, Kayer at one point was prescribed lithium, the standard drug to treat the disorder. *Id.* at 719. Evidence in the record, however, reflects that Kayer *intentionally refused to take the medication. See id.* at 697. Why couldn't a fairminded jurist review that evidence and reason that to the extent Kayer's bipolar disorder in some sense influenced Kayer's decision to murder his friend, Kayer should still be held responsible for his conduct because he refused to medicate?

Finally, as Judge Owens's dissent carefully explains, *Visciotti*, 537 U.S. at 24, puts any lingering doubt to rest. *Kayer*, 923 F.3d at 726–27 (Owens, J., concurring in part and dissenting in part). "There, in a preplanned armed robbery, the defendant and his co-worker shot two co-workers as they all drove to a party and made a remote bathroom stop (one victim died and one survived)." *Id.* The defendant was sentenced to death and, "[a]t the PCR stage, the California Supreme Court determined that the defendant had not been prejudiced by his counsel's failure to introduce mitigating evidence" of Visciotti's brain damage and impulse disorder. *Id.* at 727.

The California Supreme Court held that the mitigating evidence was outweighed by "the circumstances of the crime (a cold-blooded execution-style killing of one victim and attempted execution-style killing of another, both during the course of a

preplanned armed robbery) coupled with the aggravating evidence of prior offenses (the knifing of one man, and the stabbing of a pregnant woman as she lay in bed trying to protect her unborn baby)." *Visciotti*, 537 U.S. at 26. The Ninth Circuit granted habeas relief. But the Supreme Court summarily reversed, faulting the Ninth Circuit for impermissibly "substitut[ing] its own judgment for that of the state court." *Id.* at 25. The Supreme Court had to remind the Ninth Circuit that "[a]n *unreasonable* application of federal law is different from an *incorrect* application of federal law." *Id.* (internal quotation marks omitted).

The panel majority freely admitted that the facts in *Visciotti* "are similar" to Kayer's, though it halfheartedly distinguished *Visciotti* as a California (not Arizona) case. *Kayer*, 923 F.3d at 724. This admission alone should have decided this case. It strains credulity to suggest that Kayer's case marks an "extreme malfunction[] in the state criminal justice system[]," *Harrington*, 562 U.S. at 102, when the facts of his case admittedly resemble so starkly the facts of a case in which the Ninth Circuit was reversed (summarily) by the Supreme Court.

Again, that this case is similar to *Visciotti* should be enough by itself to demonstrate that fairminded jurists could disagree whether the mitigation evidence would have outweighed the aggravating evidence.

Perhaps the most telling indication of the panel majority's error in review by case-comparison is that the panel majority rests its holding on an Arizona Supreme Court de novo review reversal bearing "striking" parallels to this case. *Kayer*, 923 F.3d at 722.

To reach the opposite result, Judge Owens too cites a precedent with "remarkably similar" facts. *Id.* at 726 (Owens, J., concurring in part and dissenting in part). The difference? The panel majority's is a decades-old Arizona Supreme Court de novo review of a sentencing decision involving a defendant with organic brain damage, a critical fact. Judge Owens's is a Supreme Court summary reversal of a Ninth Circuit habeas grant for one of errors the majority now repeats. I'll side with Judge Owens.

V

No one disputes Kayer has lived an unfortunate life. But sympathy alone is not a basis to cast aside AEDPA in favor of a novel de-novo-masquerading-as-deference approach never sanctioned by the Supreme Court. And if that were not bad enough, the panel majority's de novo review fails as well. AEDPA—as the Supreme Court has told *us*—does not permit such conclusions. It is likely time for the Supreme Court to remind us of AEDPA's requirements. For these reasons, I respectfully dissent from our court's unwillingness to rehear this case en banc.