ARIZONA SUPERIOR COURT, PIMA COUNTY

JUDGE: HON. ROBERTO C. MONTIEL

CASE NO. **CR-06824**

COURT REPORTER:

DATE: **August 8, 1997**

STATE OF ARIZONA Kenneth Peasley, Deputy County Attorney
Joseph Maziarz, Assistant Attorney General

VS.

SCOTT D. CLABOURNE Michael Bloom
Carla G. Ryan

SPECIAL VERDICT IN A CAPITAL CASE

The Defendant, Scott D. Clabourne, was found guilty on November 23, 1982, after a trial before a Pima County jury of Murder in the First Degree of Laura Lynn Webster, as charged in Count One in the indictment. In 1995, the case was remanded by order of the U.S. District Court for re-sentencing on the First Degree Murder count. Accordingly, this Court has conducted separate sentencing hearings pursuant to A.R.S. § 13-703(B) on which occasions both parties had an opportunity to present evidence and argument concerning the existence or non-existence of the statutory aggravating circumstances enumerated in A.R.S. § 13-703(F) and any statutory and non-statutory mitigating circumstances.

The Court has reviewed the trial record and evidence admitted therein. In addition, the Court has reviewed and considered all admissible evidence proffered by the State in support of the single

aggravating circumstance it sought to prove and all relevant evidence proffered by the Defendant in support of mitigation. The Court has also reviewed a redacted version of the presentence report and an redacted addendum to said presentence report.

THE COURT: The record may show that the Court makes the following findings:

As to the aggravating circumstances to be considered pursuant to Section 13-703, subsection F as to aggravating circumstance Number 1, this Court finds that there has been no showing that the Defendant has been convicted of another offense in the United States for which under Arizona law a sentence of life imprisonment or death was imposable.

As to aggravating circumstance Number 2, the Court finds that there is no showing that the Defendant was previously convicted of a felony in the United States involving the use or threatened use of violence on another person.

As to aggravating circumstance Number 3, the Court finds that there's been no showing that in the commission of the offense the Defendant knowingly created a grave risk of death to another person or persons in addition to the victim of the offense.

As to aggravating circumstance Number 4, the Court finds there has been no showing that the Defendant procured the commission of the offense by payment or promise of payment of anything of pecuniary value.

As to aggravating circumstance Number 5, the Court finds that there has been no showing that the Defendant committed the offense

in consideration for the receipt or in expectation of the receipt of anything of pecuniary value.

As to aggravating circumstance Number 6, the Court finds that the Defendant committed the offense in an especially heinous, cruel and depraved manner.

AGGRAVATION

As to aggravating circumstance No. 6, the Court finds that the State has proven, beyond a reasonable doubt, the aggravating circumstance set forth in A.R.S. § 13-703(F)(6), that the Defendant committed the offense in an especially heinous, cruel, or depraved manner. To prove this circumstance, the State established that the murder was especially cruel, or that it was committed with a heinous or depraved state of mind. Cruelty addresses the actual suffering of the victim. To prove that the murder was especially cruel, the State established beyond a reasonable doubt that the victim consciously suffered physical or mental pain, that the suffering was beyond the norm experienced by other victims of first degree murder, and that the Defendant knew or should have known the effect his actions would have on the victim.

The offense was committed in a cruel manner because the victim consciously suffered physical or mental pain, the suffering of this victim was beyond the norm experienced by other victims of first degree murder, and the Defendant knew or should have known the effect his actions would have on the victim.

The victim suffered physical and mental pain because she was beaten, raped and humiliated by being forced to run naked among these three men during a period of approximately six hours. The autopsy report indicated many bruises and contusions on the body indicating a great deal of self-defense struggle on the part of the victim and extensive beatings during the course of six hours. There was further evidence of conscious suffering because the forensic expert testified that Laura Webster was still alive when she was stabbed by the Defendant. The foregoing evidence of conscious suffering of mental and physical pain also supports a finding that such suffering was beyond the suffering experienced by other victims of first degree murder. The evidence also establishes that the Defendant was aware of the effect of his actions upon the victim because the victim asked for help and protection from the Defendant, which pleas were not heeded by the Defendant. The evidence is clear that the victim was conscious for most if not all of the six hour period.

Although the cruelty finding alone is a sufficient basis to establish this aggravating circumstance, the facts also established that the murder was committed with a heinous and depraved state of mind. To make such a finding, the evidence must show that the Defendant either displayed a sense of pleasure in the killing or showed an indifference to the killing of Ms. Webster.

The depravity of the Defendant is established by the testimony of officer Bustamante.

Bustamante testified that the Defendant made the following statement: "Yeah, I had sexual intercourse with her 'cause she wanted to". Only a depraved mind would believe that this victim wanted to have intercourse with the Defendant. She had already been beaten, raped and unmercifully humiliated.

The evidence also established that the Defendant stabbed Laura Webster through the heart after he had strangled her.

He was also a witness to the repeated beating and sexual assaults by other co-defendants. At the very least this Defendant displayed a callous indifference to Laura Webster's life, demonstrating a heinous and depraved state of mind.

MITIGATION

Having reviewed and considered all the evidence and argument offered by the defense in support of the mitigating circumstances, the Court finds as follows:

AS TO STATUTORY MITIGATION THE COURT FINDS:

1) that despite the evidence of the Defendant's mental illness and use of thorozine for periods prior to and after the murder, the Defendant has not met the burden of proving by a preponderance of the evidence that, at the time of the murder, the Defendant's capacity to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law was significantly impaired, as expressed in A.R.S. § 13-703(G)(1).

Dr. Gelardin testified that the Defendant was not suffering from a psychotic condition or episode at the time of the criminal offense

2) that despite the evidence that Mr. Clabourne killed the victim at the urging of co-defendant Larry Lynn Langston, the Defendant has failed to prove by a preponderance of the evidence that he was under unusual or substantial duress, as expressed in A.R.S. § 13-703(G)(2); his sheer size and previous behavior indicates that he could be manipulated but only when he wanted to be manipulated.

3) that the Defendant has not offered any evidence in support of the mitigating circumstance expressed in A.R.S. § 13-703(G)(3) or (G)(4);

4) that, under A.R.S. § 13-703(G)(5), the Defendant has proven by a preponderance of the evidence that he was 20 years old at the time of the murder and that his age is a mitigating circumstance.

AS TO NON-STATUTORY MITIGATION THE COURT FINDS:

5) that the Defendant has not proven by a preponderance of the evidence that he was raised in a dysfunctional environment;

6) that the Defendant has proven that he has a passive personality, is impulsive, and is easily manipulated by others;

7) that the Defendant has proven that the economic cost to the State of Arizona arising from the prosecutor's decision to maintain its request for the death penalty in this case, as compared with the cost of seeking a life sentence, is mitigating;

8) that the Defendant has not proven that the prosecutor's unfettered discretion in seeking the death penalty is unconstitutional, and has therefore failed to prove by a preponderance of the evidence this mitigating factor;

9) that despite the disproportionate sentences received by Larry Langston and Edward Carrico, to co-defendants in this case, the disproportionately was based upon Carrico's agreement to give evidence against Langston, and upon Langston's agreement to plead guilty in exchange for a life sentence. Under the circumstances, the Defendant has failed to prove by a preponderance of the evidence that the disproportionately of the co-defendants' sentences was baseless or irrational, and the Court cannot consider the disproportionate outcomes as a mitigating circumstance in this case;

10) that, despite the Defendant's comparison of other cases in which co-defendants received disproportionate sentences, in view of the rationale for the disproportionate sentences in this case, the Defendant has failed to prove by a preponderance of the evidence that this is a mitigating circumstance.

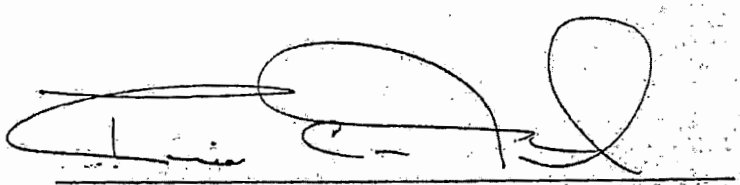
In summary, the Court has found three mitigating circumstances, the Defendant's age, the Defendant's personality or character traits of passivity, impulsivity, and easy manipulation by others, and the economic cost of the death penalty. However, when weighed against the finding that the murder was especially cruel, heinous or depraved, these mitigating factors, collectively

and individually, are not sufficiently substantial to call for leniency. The Court finds that the single aggravating factor, when balanced against any or all of the proven mitigation, warrants the imposition of the death penalty.

The jury having found the Defendant guilty of the crime of first degree murder, it is the judgment of the Court that the Defendant be sentenced to death.

It's ordered the defendant shall remain in custody of the Sheriff for transfer to the Arizona State Department of Corrections.

It's Ordered that the clerk shall file a Notice of Appeal to the Arizona Supreme Court.



HON. ROBERTO C. MONTIEL

Copy to:

Hon. Roberto C. Montiel, Santa Cruz County Superior Court
Criminal Calendaring
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County Attorney - Kenneth Peasley, Esq., Deputy County Attorney
Attorney General - Phoenix - Joseph Maziarz, Esq., Assistant Attorney General
Michael Bloom, Esq., Attorney for Defendant
Carla Ryan, Esq., Attorney for Defendant
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Jane C. Quale, Staff Attorney, Pima County Superior Court
Adult Probation--1 cert/2 copies
Department of Corrections--1 certified

194 Ariz. 379
Supreme Court of Arizona,
En Banc.

STATE of Arizona, Appellee/Cross-Appellant.
v.
Scott Drake CLABOURNE,
Appellant/Cross-Appellee.

No. CR-97-0334-AP.
|
June 18, 1999.

After conviction and death sentence for first-degree murder was affirmed by the Supreme Court, 142 Ariz. 335, 690 P.2d 54, the United States District Court for the District of Arizona granted defendant's petition for writ of habeas corpus on basis of ineffective assistance of counsel during sentencing phase, and the Ninth Circuit Court of Appeals affirmed, 64 F.3d 1373. On remand for new sentencing hearing, the Superior Court, Pima County, No. CR-06824, Roberto C. Montiel, J., resentenced defendant to death. Automatic appeal was taken, and state cross-appealed. The Supreme Court, Martone, J., held that: (1) evidence of cruelty was sufficient to support heinous, cruel, or depraved aggravating circumstance; (2) impaired capacity and unusual or substantial duress statutory mitigating factors were not shown; (3) defendant's mental personality deficiencies were entitled to negligible nonstatutory mitigating weight; (4) nonstatutory mitigating factors of dysfunctional family and intoxication were not shown; (5) economic cost to State arising from prosecutor's decision to request death penalty was not nonstatutory mitigating factor; (6) alleged bias of resentencing judge was not supported by factual basis; and (7) sentences for counts other than murder were not subject to resentencing.

Affirmed as modified.

Attorneys and Law Firms

****750 *381** Janet A. Napolitano, Attorney General By Paul J. McMurdie, Chief Counsel, Criminal Appeals and Joseph T. Maziarz, Assistant Attorney General, Phoenix, Attorneys for the State of Arizona.

Carla G. Ryan, Tucson, Attorney for Scott Drake Clabourne.

OPINION

MARTONE, Justice.

¶ 1 In November 1982, a jury convicted Scott Drake Clabourne of one count of first-degree murder, one count of kidnapping and three counts of sexual assault. He was sentenced ****751 *382** to death for the murder and to four concurrent terms of fourteen years for the remaining counts. We affirmed the conviction and sentence. *See State v. Clabourne,* 142 Ariz. 335, 690 P.2d 54 (1984) (*Clabourne I*). In September 1993, the United States District Court for the District of Arizona found ineffective assistance of counsel during the capital sentencing phase of Clabourne's trial and remanded the case for resentencing. The United States Court of Appeals for the Ninth Circuit affirmed. *Clabourne v. Lewis,* 64 F.3d 1373 (9th Cir. 1995) (*Lewis*). In August 1997, Clabourne was resentenced to death for the murder and to four consecutive fourteen-year terms for the felony convictions. Appeal to this court is automatic under Rules 26.15 and 31.2(b) of the Arizona Rules of Criminal Procedure, and direct under A.R.S. § 13-4031 (1989). The State cross appealed. We affirm the death sentence but vacate the resentencing court's imposition of consecutive noncapital sentences and reinstate the original order that runs the noncapital sentences concurrently.

I. BACKGROUND

¶ 2 The murder of Laura Webster at the hands of Clabourne, Larry Langston and Edward Carrico is undisputed and well documented in earlier decisions. *See Clabourne I; Lewis.* On the night of September 18, 1980, Webster, a twenty-two-year-old student at the University of Arizona, was approached by Clabourne and Langston at the Green Dolphin Bar in Tucson. According to Clabourne, they convinced Webster to leave with them by telling her they were going to a cocaine party. During the drive from the bar, Langston stopped the car, pulled Webster out, beat her and threw her back in the car. Webster pleaded with Clabourne to protect her. The men took Webster to a house where they forced her to remove her clothes and serve them drinks. She was

repeatedly beaten and raped for approximately six hours. Webster continued to beg Clabourne for help. Eventually Clabourne strangled her with a bandanna. When she was nearly dead, he stabbed her twice with a knife, piercing her lung and heart. The men wrapped her body in a sheet and threw it from a bridge into the dry bed of the Santa Cruz River where it was found the next day.

¶ 3 Clabourne told Shirley Martin, among others, that he had killed a woman he had met in a bar. A year after the body was discovered, Martin informed police. In October 1981, Clabourne confessed to Tucson Police Detective Luis Bustamante.

¶ 4 Clabourne was found competent to stand trial by court-appointed psychiatrists Drs. John S. LaWall and Edward S. Gelardin. Because Clabourne had advanced an insanity defense, they also examined Clabourne's mental state. Both testified at trial that he was legally sane at the time of the offense. Clabourne called Dr. Sanford Berlin, a psychiatrist who had treated him in 1975 for mental problems. Dr. Berlin said he was unable to determine what Clabourne's state of mind had been when he committed the crimes.

¶ 5 At the sentencing hearing following Clabourne's conviction, defense counsel suggested possible grounds for mitigation but gave the court no reasons to find them. In particular, counsel referred to the evidence of Clabourne's mental health presented at trial. But at trial the psychiatrists testified in terms of legal sanity; they did not address mitigation. Ultimately, the trial judge found one aggravating circumstance: that the defendant had committed the offense in an especially heinous, cruel and depraved manner. *See* A.R.S. § 13-703(F)(6) (Supp.1998). He found no mitigating factors sufficient to overcome the aggravating circumstance. In our independent review, we agreed with the trial court's evaluation of the evidence. *Clabourne I,* 142 Ariz. at 347-49, 690 P.2d at 66-68.

¶ 6 As for the others involved in the crime, Langston pled guilty to first-degree murder and was sentenced to life imprisonment. Carrico, who was not charged with murder and was convicted only of hindering prosecution, cooperated with the prosecution and was sentenced to a three-year term of probation.

¶ 7 While Clabourne's automatic appeal to this court was pending, his first petition for post-conviction relief was summarily denied.. ****752** ***383** He failed to seek review. In May 1985, Clabourne filed another petition for post-conviction relief. The trial court took no action on the petition and appointed new counsel to represent Clabourne. Clabourne then filed two amended petitions for post-conviction relief. In October 1986, the trial court summarily dismissed the petition and the amended petitions. This court denied Clabourne's petition for review in November 1987.

¶ 8 In March 1988, Clabourne filed a petition for writ of habeas corpus and an application for stay of execution in the district court. The district court granted the stay but dismissed the petition without prejudice because Clabourne had failed to exhaust state remedies. In June 1989, Clabourne filed another petition for post-conviction relief but the trial court found all claims waived or barred. This court denied a second petition for review in September 1990.

¶ 9 In August 1991, Clabourne filed a second petition for writ of habeas corpus that raised 104 challenges to his conviction and sentence. In September 1993, the district court held an evidentiary hearing on Clabourne's claim of ineffective assistance of counsel. The defense called the three psychiatric experts from Clabourne's trial, Drs. LaWall, Gelardin and Berlin. They were provided with a more complete history of Clabourne and more information about the crime than they had received before trial.

¶ 10 Based upon the testimony presented at the evidentiary hearing, the district court found no prejudice due to ineffective counsel during the guilt phase of the trial. But the court found that Clabourne had been prejudiced by ineffective counsel at the capital sentencing. Clabourne appealed the denial of his petition with respect to ineffective assistance at the guilt phase, and the State cross appealed the district court's grant of Clabourne's petition with respect to the penalty phase. In September 1995, the Ninth Circuit affirmed and remanded the case for resentencing. *See Lewis,* 64 F.3d 1373.

¶ 11 Instead of offering evidence at his resentencing, Clabourne relied upon his records and the transcript of the hearing before the district court. On August 14, 1997 the trial court resentenced Clabourne to death for the murder and to aggravated consecutive sentences of fourteen years

of imprisonment on the kidnapping and three sexual assault counts.

II. ISSUES

Clabourne raises the following issues:

1. Did the resentencing court fail to recognize and consider mitigating factors that taken alone or collectively were sufficiently substantial to call for leniency?

2. Did the resentencing court fail to give sufficient mitigating effect to the mitigating factors found?

3. Did the resentencing court err in refusing to preclude a witness' post-hypnotic testimony in its determination of aggravating and mitigating factors?

4. Did the resentencing judge lack, or appear to lack, impartiality due to a collateral interest in imposing the death penalty, and was he, therefore, biased against Clabourne in violation of the Fifth, Eighth, and Fourteenth Amendments?

5. Did the resentencing court err in denying Clabourne's request to preclude victim impact statements and in failing to bifurcate the capital convictions in violation of the Fifth, Eighth and Fourteenth Amendments and the Supremacy Clause?

6. Given prosecutors' unfettered discretion in determining when to seek the death penalty, did the resentencing court err in not conducting a proportionality review with sentences imposed in cases similar to this case and in finding that the sentences of the others involved in this crime were not mitigating, thereby rendering this death sentence arbitrary and capricious in violation of the Fifth, Eighth and Fourteenth Amendments?

7. Do Arizona's methods of execution violate the Eighth Amendment?

8. Did the resentencing court err in imposing consecutive terms of imprisonment for Clabourne's felony convictions when Clabourne had been sentenced to concurrent terms for the same convictions at an earlier sentencing?

**753 *384 ¶ 12 The State cross appealed on the following issue: did the resentencing court err in finding the economic cost of the death penalty to be a mitigating factor?

III. ANALYSIS

A. Independent Review

¶ 13 In capital cases, we independently review the trial court's findings of aggravation and mitigation and the propriety of the death sentence. A.R.S. § 13-703.01(A) (Supp.1998).

[1] ¶ 14 This case went to the jury on both premeditated and felony murder. The jury returned a general verdict. It is undisputed that Clabourne killed Webster and, therefore, *Enmund v. Florida,* 458 U.S. 782, 102 S.Ct. 3368, 73 L.Ed.2d 1140 (1982), and *Tison v. Arizona,* 481 U.S. 137, 107 S.Ct. 1676, 95 L.Ed.2d 127 (1987), are satisfied.

1. Aggravating Circumstances

¶ 15 This court in *Clabourne I* and both trial court judges have each independently found that the State had shown beyond a reasonable doubt that the murder of Webster was especially cruel and demonstrated a heinous and depraved state of mind in satisfaction of A.R.S. § 13-703(F)(6). No court has found any other aggravating factors. The State has presented no new evidence in support of an (F)(6) or any other aggravating circumstance since we last reviewed the propriety of the death penalty in this case.

¶ 16 On appeal, Clabourne does not challenge the (F)(6) finding. The State, however, seeks to bolster the (F)(6) finding by arguing that Clabourne relished the crime; that the victim was helpless; that the murder was senseless; and that Clabourne killed to eliminate a witness. *See State v. Ross,* 180 Ariz. 598, 605-06, 886 P.2d 1354, 1361-62 (1994) (discussing factors that support an (F)(6) finding); *State v. Gretzler,* 135 Ariz. 42, 52-53, 659 P.2d 1, 11-12 (1983).

[2] [3] ¶ 17 Because the elements of the (F)(6) factor-"heinous, cruel, or depraved"-are stated in the disjunctive, a finding of cruelty alone is sufficient to support an (F)(6) aggravating circumstance. *See Gretzler,* 135 Ariz. at 51, 659 P.2d at 10. In *Clabourne I* we

described the especially cruel circumstances of this murder as follows:

> [C]ruelty involves pain and distress visited upon the victim. This distress includes mental anguish.... [Here,] [Webster] suffered both mentally and physically. She was beaten and forced to undress and serve [Clabourne] and his friends drinks. In addition, she was raped over the course of a six hour period. She was obviously in great fear [for] her life as she begged [Clabourne] to protect her. The medical examiner testified that [Webster] had put up a tremendous struggle while being strangled, indicating a good deal of suffering. This evidence was sufficient to establish cruelty.

Clabourne I, 142 Ariz. at 347-48, 690 P.2d at 66-67 (citations omitted). For all of these reasons we again find that, beyond a reasonable doubt, this murder was especially cruel. We need not reach the heinous or depraved prongs and therefore do not address the State's new arguments as to the heinousness and depravity of the murder.

2. Mitigating Circumstances

¶ 18 Neither the first sentencing judge nor this court in *Clabourne I* found any mitigating circumstances-perhaps due to Clabourne's ineffective counsel at sentencing. At resentencing, the court found three mitigating factors had been proven by a preponderance of the evidence: the statutory mitigating circumstance of age (twenty years), A.R.S. § 13-703(G)(5) (Supp.1998); and the two nonstatutory mitigating circumstances of (1) a passive, impulsive and easily manipulated personality, and (2) the economic cost of seeking the death penalty as compared to the cost of seeking a life sentence.

¶ 19 Clabourne argues the resentencing court failed to recognize and consider other mitigating factors that taken alone or collectively were sufficiently substantial to call for leniency. Clabourne also claims the resentencing court failed to give sufficient mitigating effect to the three factors found and thereby abused its discretion. On cross appeal, the State argues the resentencing court ****754** ***385** erred in finding the economic cost of execution is a mitigating circumstance.

a. Statutory Mitigation

1. Impaired Capacity: A.R.S. § 13-703(G)(1)

[4] ¶ 20 Clabourne claims that the expert and lay testimony at the evidentiary hearing together with his medical records demonstrate that his capacity to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law was significantly impaired by mental illness. *See* A.R.S. § 13-703(G)(1). The resentencing court rejected this claim because Dr. Gelardin "testified that [Clabourne] was not suffering from a psychotic condition or episode at the time of the criminal offense." Sp. Verdict at 6. Clabourne asserts the court used Dr. Gelardin's statement out of context and disregarded other, overwhelming evidence. He contends that evidence that he had a mental illness and that he was "controlled" by Langston is sufficient to support a(G)(1) finding. The State argues that a(G)(1) circumstance has not been shown because none of the experts testified that Clabourne was significantly mentally impaired at the time he murdered Webster.

¶ 21 The record shows Drs. Gelardin and Berlin believed that Clabourne suffered from mental illness, probably schizophrenia, during the time period when the murder occurred. Dr. LaWall said Clabourne had a personality disorder. Nevertheless, all three experts agreed that there was no evidence of Clabourne's state of mind at the particular time of the offense. None could say whether he was "psychotic" when he killed Webster. None stated or implied a causal relationship between Clabourne's mental health and the murder. Neither did any nonexpert party, including Clabourne, indicate that Clabourne had lost contact with reality or acted abnormally when he participated in the crime. The record does demonstrate that Langston was a manipulative and frightening man who, for the most part, choreographed the crime and urged Clabourne to kill Webster.

¶ 22 We reject the contention that the status of having a "mental illness" necessarily means a person is impaired for the purposes of (G)(1). The statute calls for the "significant" impairment of one of two specific abilities: (1) the capacity to appreciate the wrongfulness of conduct or (2) the capacity to conform conduct to the requirements

of the law. To say that all persons with a mental illness are always significantly impaired in at least one of these two specific ways is supported by neither medical evidence nor common sense.

[5] ¶ 23 In every case in which we have found the (G)(1) factor, the mental illness was "not only a substantial mitigating factor ... but a *major contributing cause* of [the defendant's] conduct that was 'sufficiently substantial' to outweigh the aggravating factors present...." *State v. Jimenez,* 165 Ariz. 444, 459, 799 P.2d 785, 800 (1990) (when voices told defendant to kill he could not control what he was doing) (emphasis added); *see also State v. Stuard,* 176 Ariz. 589, 608 n. 12, 863 P.2d 881, 892 n. 12 (1993) ("[E]vidence of causation is required before mental impairment can be considered a significant mitigating factor."); *State v. Brookover,* 124 Ariz. 38, 42, 601 P.2d 1322, 1326 (1979); *State v. Doss,* 116 Ariz. 156, 163, 568 P.2d 1054, 1061 (1977). Where we have been less explicit in announcing the causal connection between the mental illness and the murderous conduct, it was self evident. *See State v. Mauro I,* 149 Ariz. 24, 26, 716 P.2d 393, 395 (1986) (father killed his son because he believed him to be the devil), *sentence reduced in State v. Mauro II,* 159 Ariz. 186, 208, 766 P.2d 59, 73 (1988). We conclude that the status of being mentally ill alone is insufficient to support a(G)(1) finding.

¶ 24 Neither does Clabourne otherwise prove significant impairment. That he could appreciate the wrongfulness of his conduct is shown by his attempt to hide evidence of the murder: he and Langston wrapped Webster's body in a sheet, drove out of town and dropped the body in a wash. In addition, Clabourne said that he wanted to help Webster escape, demonstrating that he knew he was doing wrong. He offers no evidence that his capacity to appreciate wrongfulness was in any way impaired when he committed the crime.

**755 *386 ¶ 25 Nor has Clabourne demonstrated that his capacity to conform his conduct to the requirements of the law was significantly impaired. He implies that his mental illness causes a passivity and paranoia that allowed Langston to control him, and therefore he was unable to resist Langston's pressure to rape and kill Webster. But he makes no showing that he was passive or paranoid to any degree of impairment or that he had actually lost any control over his conduct when he committed the murder. We agree with the resentencing court that Clabourne did not prove the G(1) factor by a preponderance of the evidence.

2. Duress: A.R.S. § 13-703(G)(2)

[6] ¶ 26 Clabourne claims he was under "unusual or substantial duress" when he murdered Webster. A.R.S. § 13-703(G)(2). For this mitigating circumstance to exist, "one person must coerce or induce another person to do something against his will." *State v. Castaneda,* 150 Ariz. 382, 394, 724 P.2d 1, 13 (1986). The resentencing court determined that Langston urged Clabourne to murder but that Clabourne failed to prove by a preponderance that he was under unusual or substantial duress. We agree.

¶ 27 The evidence shows that Langston was a frightening sociopath who planned the crime. However, that Langston was the mastermind and influenced, even scared, Clabourne does not in itself show (G)(2) duress. Contrary to Clabourne's claim, the evidence (including his own and Carrico's testimony) shows he was a willing and active participant and was neither induced nor coerced to act contrary to his free will.

3. Age: A.R.S. § 13-703(G)(5)

[7] ¶ 28 The resentencing court found Clabourne proved by a preponderance of the evidence "that he was 20 years old at the time of the murder and that his age is a mitigating circumstance." Sp. Verdict at 6; *see* A.R.S. § 13-703(G)(5). In addition to chronological age, this circumstance requires that we consider a defendant's: (1) level of intelligence, (2) maturity, (3) participation in the murder, and (4) criminal history and past experience with law enforcement. *See State v. Jackson,* 186 Ariz. 20, 30-31, 918 P.2d 1038, 1048-49 (1996).

(1) *Intelligence:* at the time of his Rule 11 evaluation, Clabourne was found to be of average intelligence. He completed the eighth grade in regular elementary schools and later grades in juvenile institutions. He received a GED in 1978.

(2) *Maturity:* the evidence was uncontroverted that Clabourne has a tendency to act child-like and impulsively, and that he is more likely to drift into situations than to make plans.

(3) *Participation in murder:* while Langston planned the crime, Clabourne actually killed Webster. He was

also highly involved in the kidnapping and the sexual assaults.

(4) *Criminal history:* since his teenage years, Clabourne has spent most of his time in some form of detention for acting out, sometimes due to mental problems, and for committing crimes. At the time of Webster's murder in September 1980, he was living in a federal pre-release halfway house after having served time in juvenile detention for burglarizing homes on a military base. When he was charged with this crime in October 1981, he was in the Pima County jail for burglary and carrying a concealed weapon.

[8] ¶ 29 In sum, Clabourne has an average level of intelligence, a criminal history and he was a major participant in the crime. In other cases, these factors have tended to weigh against age as a mitigating circumstance. *See, e.g., State v. Gallegos II,* 185 Ariz. 340, 347, 916 P.2d 1056, 1063 (1996) (extensive and prolonged participation discounts defendant's young age of eighteen years and impulsivity); *State v. Bolton,* 182 Ariz. 290, 314, 896 P.2d 830, 854 (1995) (extensive criminal history and planning undermines claim of age seventeen as mitigating); *State v. Gillies,* 142 Ariz. 564, 571, 691 P.2d 655, 662 (1984) (impact of defendant's age twenty minimized by extent and duration of defendant's participation in murder).

¶ 30 Although close, we defer to the resentencing court's finding that Clabourne's ****756** ***387** relatively young age merits some, though very little, mitigating weight.

b. Nonstatutory Mitigation

1. Mental Impairment

[9] ¶ 31 When a defendant's mental capacity is insufficient to support a(G)(1) finding, the court must consider whether it is a nonstatutory mitigating circumstance.

[10] **[11]** ¶ 32 We reject Clabourne's contention that the resentencing court violated *State v. McMurtrey I,* 136 Ariz. 93, 102, 664 P.2d 637, 646 (1983) or *State v. Gallegos,* 178 Ariz. 1, 17-18, 870 P.2d 1097, 1113-14 (1994), by not explicitly stating that it had considered Clabourne's mental capacity evidence for nonstatutory effect after rejecting the statutory claim. A trial court need not explicitly indicate that mental problems carry no nonstatutory weight; the court must only consider the proffered mitigation for nonstatutory effect. *See id.* The resentencing court's finding of the nonstatutory mitigating factor, passive personality/ impulsive/ easily manipulated, discussed next, demonstrates consideration of Clabourne's mental health evidence.

2. Passive Personality/ Impulsive/ Easily Manipulated

[12] ¶ 33 We agree with the resentencing court's finding that Clabourne has a passive personality and that he is impulsive and easily manipulated by others. The evidence shows that these traits are rooted to some degree in his mental health problems. As such, we afford some nonstatutory mitigating weight to Clabourne's mental and personality deficiencies. However, Clabourne's active participation throughout the six-hour ordeal and the fact that he personally strangled and stabbed Webster renders negligible any mitigating effect Clabourne's problems and the traits they manifest may have.

3. Dysfunctional Family

[13] ¶ 34 Clabourne argues that he never knew his biological father; the family moved frequently because his stepfather was in the military; he was placed in residential treatment at age twelve and has barely lived with his family since; he has had no familial support for many years; and he has established no personal relationships. The State calls Clabourne's claim of a dysfunctional family "frivolous" because his family life has been "idyllic compared to [that of] the vast majority of first-degree murderers in this State." Appellee's Answering Brief/ Cross-Appellant's Opening Brief at 37-38.

¶ 35 Whatever the difficulty in Clabourne's family life, he has failed to link his family background to his murderous conduct or to otherwise show how it affected his behavior. *See State v. Spears,* 184 Ariz. 277, 293-94, 908 P.2d 1062, 1078-79 (1996). We agree with the resentencing court that this factor has not been proven.

4. Clabourne as Langston's Victim

¶ 36 Clabourne argues that the uncontroverted evidence that Langston was the mastermind of the crime supports a nonstatutory mitigating circumstance. However, neither the authority he cites nor this case persuade us that this fact is mitigating.

5. Intoxication

[14] ¶ 37 There is some indication that Clabourne, Langston and Carrico consumed large quantities of alcohol before and during the crime. But Clabourne failed to raise intoxication as a mitigating circumstance at his resentencing hearing, and we find he has failed to prove intoxication by a preponderance of the evidence. In particular, we find Clabourne's detailed recollection of the events of the evening of Webster's murder, as told to Detective Bustamante more than a year after the murder occurred, belies his claim that he was impaired.

6. Other Factors

¶ 38 Clabourne also claims a handful of factors that are not commonly advanced in the context of mitigation. He observes that A.R.S. § 13-703(G) requires that the sentencing court not be precluded from considering any factor as a mitigating circumstance. *See Lockett v. Ohio,* 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978).

757 *388 **[15] ¶ 39 While a court must consider any proffered evidence, it should not accept it as mitigating unless (1) the defendant has proven the fact or circumstance by a preponderance of the evidence, *see State v. Ramirez,* 178 Ariz. 116, 131, 871 P.2d 237, 252 (1994), and (2) the court has determined that it is in some way mitigating. Mitigating evidence is "any aspect of the defendant's character or record and any circumstance of the offense *relevant* to determining whether a sentence less than death might be appropriate." *State v. Spears,* 184 Ariz. 277, 293, 908 P.2d 1062, 1078 (1996) (quoting *State v. McCall,* 139 Ariz. 147, 162, 677 P.2d 920, 935 (1983)) (emphasis added).

a. Economic Cost of Death Penalty

[16] ¶ 40 The resentencing court found that Clabourne proved that "the economic cost to the State of Arizona arising from the prosecutor's decision to maintain its request for the death penalty in this case, as compared with the cost of seeking a life sentence, is mitigating." Sp. Verdict at 6. We disagree. Even if Clabourne has proven the circumstance, the economic cost of the death penalty is unrelated to Clabourne, his character or record, or the circumstances of his offense. The cost/benefit analysis of the death penalty is a decision left to the legislature in the first instance, and to the State in any given case. We agree with the State on its cross appeal.

b. Arbitrariness of Death Penalty; Prosecutor's Unfettered Discretion; Sentences of Others Involved in This and Other Similar Crimes

[17] ¶ 41 Clabourne raises these issues as three separate mitigating factors and as one combined constitutional claim. Because Clabourne makes no argument as to why these factors are mitigating, we reject them as such. As to the constitutional claims, we have rejected these before: 1) arbitrariness of the death penalty, *see State v. Salazar,* 173 Ariz. 399, 411, 844 P.2d 566, 578 (1992), *cert. denied,* 509 U.S. 912, 113 S.Ct. 3017, 125 L.Ed.2d 707 (1993); 2) prosecutor's unfettered discretion, *see State v. Atwood,* 171 Ariz. 576, 646, 832 P.2d 593, 663 (1992), *cert. denied,* 506 U.S. 1084, 113 S.Ct. 1058, 122 L.Ed.2d 364 (1993); 3) proportionality review, *see Salazar,* 173 Ariz. at 399, 416, 844 P.2d at 583. And we continue to reject these arguments here.

[18] **[19]** ¶ 42 With respect to the sentences of others involved in the crime, we note that only an unexplained disparity between sentences may be a mitigating circumstance. *See State v. Schurz,* 176 Ariz. 46, 57, 859 P.2d 156, 167 (1993). Here the disparity is explained: Carrico was not charged with murder and Langston pled guilty. *See State v. Detrich,* 188 Ariz. 57, 69, 932 P.2d 1328, 1340 (1997) (when disparity results from appropriate plea agreement, disparity not mitigating). Moreover, Clabourne was the killer, and the State was of the view that a plea agreement with Langston was necessary because "the case against Langston was, at best, shaky, while the case against [Clabourne] was overwhelming, with much of the evidence coming from his own mouth." Appellee's Answering Brief/Cross-Appellants Opening Brief at 51.

c. Length of Time on Death Row

[20] ¶ 43 Clabourne has been sentenced to death for eighteen years. He claims this is mitigating because he has a mental illness and Langston and Carrico, who do not, have not had to face the prospect of execution for the same period. We find these facts altogether unrelated to Clabourne's character or record and the circumstances of

his offense and, therefore, reject this proffered mitigation. *Cf. State v. Schackart,* 190 Ariz. 238, 259, 947 P.2d 315, 336 (1997) (holding that the fact that defendant spent years on death row awaiting execution does not render the death penalty cruel and unusual punishment).

c. Independent Reweighing

¶ 44 Upon independent review, we find that the mitigating circumstances are insufficiently substantial to warrant leniency.

B. Other Sentencing Issues

1. Rick Diaz's Post-Hypnotic Testimony

¶ 45 On the night Webster was murdered, she was accompanied to the Green ****758** ***389** Dolphin Bar by Rick Diaz. The day before trial, the State notified defense counsel that Diaz had been hypnotized after he had given statements. The State agreed to limit testimony to information contained in Diaz's original, unhypnotized statements. *See State ex rel. Collins v. Superior Court,* 132 Ariz. 180, 210-11, 644 P.2d 1266, 1296-97 (1982) (holding witness who has been hypnotized may testify only to facts demonstrably recalled prior to hypnosis and only where certain prerequisites have been met). Diaz testified at trial that Clabourne did not appear to be intoxicated when Diaz saw him at the bar. Defense counsel did not object to Diaz's testimony.

¶ 46 At resentencing, Clabourne asserted Diaz had not said Clabourne was not intoxicated prior to the hypnosis. The resentencing court summarily denied Clabourne's motion to preclude the Diaz testimony. Clabourne claims this was error and critical to mitigation because Diaz alone testified that Clabourne was not intoxicated.

[21] ¶ 47 The resentencing court correctly denied Clabourne's motion. At trial, Clabourne made no objection to the content of Diaz's testimony. And, a sentencing judge can consider all trial evidence. In any event, for the reasons discussed earlier, even without the Diaz testimony we would find that Clabourne has failed to prove intoxication by a preponderance of the evidence.

2. Bias of the Resentencing Judge

¶ 48 Clabourne claims that at the time he was resentenced, the judge was charged with sexual harassment and with failure to address sexual harassment charges against judges under his supervision. Clabourne contends the judge accepted this case, which involves the humiliation and sexual assault of a woman, and sentenced Clabourne to death in order to "deflect" the allegations of a sexual nature that were pending against him at the time of the resentencing. Clabourne filed a combined motion to vacate, recuse and for a new sentencing on October 30, 1997-seventy-seven days after his judgment was entered, the sentence imposed, and the appeal filed.

¶ 49 The presiding judge denied the motion as untimely. *See* Ariz. R.Crim. P. 24.2(a) (requiring motions be made "no later than 60 days after the entry of judgment and sentence but before the defendant's appeal, if any, is perfected"). The presiding judge also noted that a motion to recuse requires a supporting affidavit, and Clabourne failed to provide one. *See* Ariz. R.Crim. P. 10.1(b). In the alternative, he found Clabourne failed to provide valid factual support for the claim that the resentencing judge accepted the case to deflect allegations of a sexual nature pending against him. Clabourne filed a motion to clarify that was denied by the presiding judge. Now, on direct appeal, Clabourne argues the facts "minimally" give an appearance of bias and partiality and asks that the case be remanded for resentencing or at least an evidentiary hearing.

¶ 50 The State argues, first, that this court lacks jurisdiction to review the presiding judge's order because Clabourne failed to timely appeal that order to this court. Second, the State contends this court lacks jurisdiction because the presiding judge lacked jurisdiction to entertain a motion filed more than sixty days after entry of judgment and sentence. *See* Ariz. R.Crim. P. 24.2(a).

[22] ¶ 51 We need not reach the timeliness and jurisdictional issues because the record amply supports the presiding judge's conclusion that Clabourne's motion was unsupported by evidence. There was no abuse of discretion.

3. Victim Impact Statements/Bifurcation of Capital Convictions

¶ 52 Prior to resentencing, the State presented the court with letters from Webster's family. The resentencing court summarily denied Clabourne's motion for preclusion of

victim statements or bifurcation of capital and noncapital sentencing. Clabourne claims the denial violated his constitutional rights.

[23] **[24]** ¶ 53 Statements from a victim's family and friends concerning the impact of the crime should be considered to rebut mitigating evidence but are irrelevant to a determination of aggravating circumstances in capital sentencing. *See* ****759** ***390** *State v. Mann,* 188 Ariz. 220, 228, 934 P.2d 784, 792 (1997); *State v. Gulbrandson,* 184 Ariz. 46, 66-67, 906 P.2d 579, 599-600 (1995). They may also be considered in connection with noncapital offenses. We do not require sentencing judges to bifurcate capital and noncapital sentencing proceedings. *See id.* Instead we presume, absent indication to the contrary, that the resentencing court considered only evidence relevant to the sentencing at hand. *See id.*

[25] ¶ 54 Here, as Clabourne concedes, there is no indication that the resentencing court considered the victim impact statements when determining whether to impose the death penalty. Appellant's Reply Brief/Cross Appellee's Answering Brief at 37. Therefore, there was no error.

4. Methods of Execution

¶ 55 Clabourne argues the methods of execution used in Arizona violate the Eighth Amendment. As we have before, we reject this claim. *See State v. Lee,* 189 Ariz. 590, 607, 944 P.2d 1204, 1221 (1997), *cert. denied,* 523 U.S. 1007, 118 S.Ct. 1192, 140 L.Ed.2d 321 (1998) (lethal gas); *State v. Spreitz,* 190 Ariz. 129, 151, 945 P.2d 1260, 1282 (1997), *cert. denied,* 523 U.S. 1027, 118 S.Ct. 1315, 140 L.Ed.2d 479 (1998) (lethal injection).

5. Sentences for Counts Other Than Murder

[26] ¶ 56 Clabourne challenges the resentencing court's imposition of four *consecutive* fourteen-year terms for the noncapital charges (kidnapping and three sexual assault). The first sentencing court ordered these terms to run *concurrently.* The State agrees the noncapital sentences should run concurrently in the event the death penalty is affirmed.

¶ 57 Our review of the record shows that the district court order affirmed by the Ninth Circuit vacated only Clabourne's death sentence. The resentencing court, as well as Clabourne and the State, erroneously proceeded as if the district court had also set aside the sentences for the noncapital convictions. The resentencing court should not have addressed the noncapital sentences. Thus, we vacate the resentencing court's order for consecutive sentences and reinstate the concurrent noncapital sentences imposed at Clabourne's first sentencing.

¶ 58 Even if the district court had vacated the noncapital sentences so that resentencing as to those convictions was proper, in light of the fact that the death sentence was again imposed, consecutive sentences would have been inappropriate. *See* Ariz. R.Crim. P. 26.14 (Where a sentence has been set aside, "the court may not impose a sentence for the same offense ... more severe than the prior sentence," with exceptions not relevant here.).

IV. DISPOSITION

¶ 459 We affirm Clabourne's sentence of death for first-degree murder. We vacate the order that Clabourne's noncapital sentences be served consecutively and reinstate the order that they run concurrently.

CONCURRING: THOMAS A. ZLAKET, Chief Justice CHARLES E. JONES, Vice Chief Justice STANLEY G. FELDMAN, Justice RUTH V. McGREGOR, Justice

All Citations

194 Ariz. 379, 983 P.2d 748, 298 Ariz. Adv. Rep. 12

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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

Scott Drake Clabourne, Petitioner, v. Charles L. Ryan, et al.,[1] Respondents.	No. CV 03-542-TUC-RCC DEATH PENALTY CASE **MEMORANDUM OF DECISION AND ORDER**

Petitioner Scott Drake Clabourne has filed an Amended Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254, alleging that he is imprisoned and sentenced to death in violation of the United States Constitution. (Dkts. 25, 27.)[2] For the reasons set forth herein, the Court determines that Petitioner is not entitled to habeas relief.

PROCEDURAL HISTORY

In September 1980, the body of Laura Webster, a twenty-two-year-old University of Arizona student, was found lying in the dry bed of the Santa Cruz River in Tucson. Approximately one year later, a woman named Shirley Martin reported to police that her former boyfriend, Scott Clabourne, had claimed involvement in a murder. Petitioner was already in custody on an unrelated burglary charge and, after questioning by detectives, gave

[1] Charles L. Ryan, Interim Director of the Arizona Department of Corrections, is substituted for his predecessor pursuant to Fed. R. Civ. P. 25(d)(1).

[2] "Dkt." refers to the documents in this Court's file.

a detailed confession to Webster's rape and murder.

Petitioner was convicted by a jury in 1982 of sexual assault, kidnapping, and first degree murder. Pima County Superior Court Judge Richard Roylston sentenced him to death for the murder and to concurrent terms of imprisonment for the other counts. On direct appeal, the Arizona Supreme Court affirmed. *State v. Clabourne*, 142 Ariz. 335, 690 P.2d 54 (1984) (*Clabourne I*). Proceedings on Petitioner's requests for state postconviction relief concluded in September 1990, and Petitioner thereafter sought habeas corpus relief in federal court.

In September 1993, United States District Court Judge Richard M. Bilby held an evidentiary hearing on Petitioner's claims of ineffective assistance of counsel. The court concluded that counsel's representation at trial was not deficient, but that counsel was ineffective at sentencing. On appeal, the Ninth Circuit affirmed, and Petitioner returned to state court for resentencing. *Clabourne v. Lewis*, 64 F.3d 1373, 1387 (9th Cir. 1995).

After numerous Pima County superior court judges recused themselves, Petitioner's resentencing was assigned to Santa Cruz County Superior Court Judge Roberto Montiel. In August 1997, the court determined that Petitioner's proffered mitigating evidence was insufficient to call for leniency and resentenced Petitioner to death for the murder and to aggravated consecutive sentences of fourteen years imprisonment on the kidnapping and sexual assault counts.[3]

Petitioner appealed to the Arizona Supreme Court, which affirmed the capital sentence but modified the non-capital sentences to run concurrently. *State v. Clabourne*, 194 Ariz.

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[3] Arizona law at the time of Petitioner's 1997 resentencing required the presiding judge to decide whether to impose the death penalty. *See* A.R.S. § 13-703(B) (1990). Although the United States Supreme Court in *Ring v. Arizona*, 536 U.S. 584 (2002), later struck down as unconstitutional Arizona's requirement that aggravating factors be found by a judge rather than a jury, that ruling does not apply retroactively to cases like Petitioner's that were already final on direct review at the time *Ring* was decided. *Schriro v. Summerlin*, 542 U.S. 348, 358 (2004).

379, 390, 983 P.2d 748, 759 (1999) (*Clabourne II*), *cert. denied*, 529 U.S. 1028 (2000). He then sought state postconviction relief, which was denied in 2003. Thereafter, Petitioner initiated the instant federal habeas corpus proceeding.

PRINCIPLES OF EXHAUSTION AND PROCEDURAL DEFAULT

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 also 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 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 postconviction relief (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) (stating that the district court must consider whether the claim could be pursued by any presently available state remedy). If no remedies are currently available pursuant to Rule 32, the claim is "technically" exhausted but procedurally defaulted. *See Coleman*, 501 U.S. at 732, 735 n.1; *see also Gray v. Netherland*, 518 U.S. 152, 161-62 (1996).

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, the Court will not review the merits of a procedurally defaulted claim unless a petitioner demonstrates legitimate cause for the failure to properly exhaust the claim 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 which 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). "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).

There are two types of claims recognized under the fundamental miscarriage of justice exception to procedural default: (1) that a petitioner is "innocent of the death sentence," – in other words, that the death sentence was erroneously imposed; and (2) that a petitioner is innocent of the capital crime. In the first instance, the petitioner must show by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the existence of any aggravating circumstance or some other condition of eligibility for the death sentence under the applicable state law. *Sawyer v. Whitley*, 505 U.S. 333, 336, 345 (1992). In the second instance, the petitioner must show that "a constitutional violation has probably resulted in the conviction of one who is actually innocent." *Schlup v. Delo*, 513 U.S. 298, 327 (1995).

STANDARD FOR HABEAS RELIEF

Because this case was filed after April 24, 1996, it is governed by the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA). 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 phrase "adjudicated on the merits" refers to a decision resolving a party's claim which is based on the substance of the claim rather than on a procedural or other non-substantive ground. *Lambert v. Blodgett*, 393 F.3d 943, 969 (9th Cir. 2004). 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)); *Insyxiengmay v. Morgan*, 403 F.3d 657, 664 (9th Cir. 2005).

"The threshold question under AEDPA is whether [the 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. *Carey v. Musladin*, 549 U.S. 70 (2006); *Williams*, 529 U.S. at 365; *Clark v. Murphy*, 331 F.3d 1062, 1069 (9th Cir. 2003). 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. 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*, 331 F.3d at 1069.

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; *Lambert*, 393 F.3d at 974.

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. In order 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; *Woodford v. Visciotti*, 537 U.S. 19, 25 (2002) (per curiam).

Under the standard set forth in § 2254(d)(2), habeas relief is available only if the state court decision was based upon 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 v. Cockrell*, 537 U.S. 322, 340 (2003) (*Miller-El I*); *see Taylor v. Maddux*, 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.

FACTUAL BACKGROUND

The Offense and Trial

In his confession, Petitioner described how he and two friends, Larry Langston and Edward Carrico, went to the Green Dolphin bar in Tucson on September 18, 1980, to "find some women." (Dkt. 27, Ex. 2 at 1.) There, they met Laura Webster and convinced her to leave with them, telling her they were going to a "cocaine party." (*Id.* at 2.) After driving some distance, Langston stopped the car, pulled Webster out of the backseat, beat her, threw her back into the car, and then drove to the house where he was staying. On the way,

Webster begged Petitioner to protect her, and Petitioner said he would try. (*Id.* at 3.)

After arriving at the house, Langston beat Webster again and forced her to strip and serve the men drinks. Over a period of six hours, Langston and Carrico repeatedly beat and raped Webster. During this time, Petitioner also had sex with Webster but claimed it was consensual. At several points during the ordeal, Webster again pleaded with Petitioner to protect her from the others but he told her he couldn't do anything because he was outnumbered. Eventually, Langston told Petitioner to kill Webster and threatened him if he did not comply. Petitioner strangled Webster with a bandana and then stabbed her twice in the chest. The men wrapped her body in bedsheets and dumped her in a wash. (*Id.* at 4.) Her body was found the next day. (RT 11/17/82 at 217-18.)[4]

At trial, Shirley Martin, Petitioner's former girlfriend, testified that Petitioner had told her that he and two friends met a "white girl" at the Green Dolphin bar and then drove to the friends' home, where Petitioner eventually strangled the girl. (RT 11/18/82 at 328-31.) According to Martin, Petitioner said the girl begged not to be killed. (*Id.* at 332, 333.) Another witness, Barbara Bailon, who worked with Petitioner between August 1980 and early 1981, testified that she visited him in the spring or summer of 1981 while he was incarcerated in the Pima County Jail on unrelated charges. During one of these visits, Petitioner told her he had been at a house with two other men and that he had killed "some girl" by strangling her. (*Id.* at 317-18.) He told her the other two men "made" him do it. (*Id.* at 317.)

Dr. Valerie Rao, the medical examiner who autopsied the victim, testified that

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[4] At this Court's request, the Arizona Supreme Court provided the original transcripts from Petitioner's trial, sentencing, and resentencing (hereinafter "RT"); the ten-volume consecutively-paginated record on appeal from Petitioner's appeal to the Arizona Supreme Court following resentencing, Case No. CR-97-0334-AP (hereinafter "ROA"); the appellate briefs and other pleadings filed in the Arizona Supreme Court related to Petitioner's appeal and post-conviction proceedings; and Petitioner's and Carrico's presentencing reports. (*See* Dkt. 39.)

Webster was alive and conscious while being strangled. (RT 11/17/82 at 248.) Evidence of severe hemorrhaging of the blood vessels in her eyes and face indicated that Webster put up a "tremendous" struggle. (*Id.* at 248, 255.) Dr. Rao also noted two stab wounds to the chest, one of which punctured Webster's heart. (*Id.* at 253.) This wound was fatal and sustained prior to death. (*Id.* at 254.) In addition, multiple bruises and contusions over Webster's body supported the conclusion that she had been severely beaten and had suffered greatly prior to her death. (*Id.* at 255-62.)

Petitioner did not challenge the fact that he killed Laura Webster. Rather, his defense was insanity. (RT 11/23/82 at 632-40.) Several experts testified at trial. The State called two psychiatric experts, Drs. John LaWall and Edward Gelardin, who had been appointed by the court prior to trial to determine Petitioner's competency. Both testified to their opinions that Petitioner was competent to stand trial and was legally sane at the time of the murder. (RT 11/18/82 at 396; RT 11/19/82 at 466.)

Petitioner called Dr. Sanford Berlin, who testified that he had treated Petitioner for several weeks in 1975 when Petitioner was admitted to a hospital for possible "antisocial adolescent disorder" and paranoid schizophrenia. (RT 11/19/82 at 503.) Dr. Berlin believed that Petitioner suffered from a "thought disorder" and noted that he had been medicated with Thorazine. He described Thorazine as a powerful drug given only to those who suffer from thought disorders. (*Id.* at 506-07.) However, when Petitioner was discharged, Dr. Berlin confirmed that his closing report indicated that schizophrenia was not confirmed and that Petitioner was diagnosed only with "antisocial personality." (*Id.* at 523.) Dr. Berlin could offer no opinion as to whether Petitioner was sane at the time he committed the murder five years later. (*Id.* at 532.)

Resentencing

After Petitioner returned to state court for resentencing, Judge Montiel held a presentencing aggravation/mitigation hearing on August 8, 1997. Neither Petitioner nor the

State called any live witnesses at the hearing.[5] Instead, Petitioner proffered numerous paper exhibits, including the transcript of the two-day habeas evidentiary hearing held in federal court, the federal courts' rulings on his habeas claims, documents relating to his co-defendants' plea agreements, his jail medical records, the transcript of his original capital sentencing proceeding before Judge Roylston, and Judge Roylston's special sentencing verdict. (ROA at 11-893, 1199-1324, 1398-1421.)

At the federal evidentiary hearing, Drs. LaWall, Gelardin, and Berlin again testified, this time after reviewing new documents compiled during the habeas investigation that provided a fuller picture of Petitioner's medical history. Based on this additional information, Drs. Gelardin and Berlin opined that Petitioner probably suffered from schizophrenia. (ROA at 96-100, 145-48.) They testified that this condition rendered Petitioner susceptible to impulsive behavior and easy manipulation by Langston, whom they characterized as the ringleader in Webster's murder. (*Id.* at 101-08, 148-49.) However, neither expert believed Petitioner was legally insane at the time of the offense. (*Id.* at 110, 153.)

Dr. LaWall did not diagnose schizophrenia but conceded that Petitioner might be schizophrenic and displayed "symptoms" of that illness. (*Id.* at 32.) He too believed it was unlikely that Petitioner planned the murder and that Langston, whom he had also interviewed, was capable of murder and of manipulating Petitioner. (*Id.* at 36-37.) However, Dr. LaWall reiterated his belief that Petitioner was competent to stand trial and that he was sane at the time of the offense. (*Id.* at 43.)

Luis Bustamante, the police detective who obtained Petitioner's confession, also testified at the federal habeas evidentiary hearing. Bustamante stated that Langston was a

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[5] Petitioner's resentencing counsel also represented him on direct appeal. In her opening brief, counsel stated that she did not recall the experts at the presentencing hearing because she "was trying to conserve resources since a record had already been made." (Appellant's Opening Br. at 68 n.25.)

manipulative individual whom he believed had likely killed before. (*Id.* at 180.) He described Langston as a "psychopath" and Petitioner as a "follower" who was used by Langston to advance Langston's fantasies. (*Id.* at 181, 184.) According to Bustamante, Langston was the "major" in planning the murder and Petitioner was the "minor." (*Id.* at 185.) However, Bustamante agreed that Petitioner "went along" with the murder of his own volition. (*Id.*)

At oral argument before Judge Montiel, Petitioner's counsel urged several points of mitigation for consideration at resentencing. Counsel focused chiefly on the experts' diagnosis of Petitioner's mental deficiencies in general and his schizophrenia in particular. (RT 8/8/97 at 27-38, 41-46.) Counsel also cited duress and Petitioner's age as additional statutory mitigators and urged Petitioner's mental problems – and their impact on his tendency toward passiveness, impulsiveness, and easy manipulation by others – as nonstatutory mitigation. (*Id.* at 37-38, 41-42.) Counsel further asserted as mitigating information Petitioner's dysfunctional family life, including his treatment for mental health problems from an early age and the fact that he was raised in a military family that had to move frequently, inhibiting his ability to form lasting relationships. (*Id.*) Counsel also argued that the sentencing disparity with his accomplices was a mitigating circumstance. (*Id.* at 42-43.) These facts were also emphasized in Petitioner's resentencing memoranda. (ROA at 1176-93, 1346-53.)

Judge Montiel stated that he considered the record "in its totality," including the record of the habeas corpus evidentiary hearing, the trial record, the presentence reports, and the other documents proffered by Petitioner. (RT 8/14/97 at 4.) In aggravation, the judge found that the "especially heinous, cruel or depraved" factor had been established beyond a reasonable doubt. *See* A.R.S. § 13-703(F)(6) (1990). With respect to cruelty, the court stated:

> The offense was committed in a cruel manner, because the victim consciously suffered physical and mental pain, the suffering of the victim was beyond the norm experienced by other victims of first-degree murder, and the

> defendant knew or should have known the effect his actions would have on that victim.
>
> The victim suffered physical and mental pain because she was beaten, raped, and humiliated by being forced to run naked among three men during a period of approximately six hours.
>
> The autopsy report indicated many bruises and contusions on the body, indicating a great deal of self-defense struggle on the part of the victim and extensive beatings during the course of six hours.
>
> There was further evidence of conscious suffering because a forensic expert testified that Laura Webster was still alive when stabbed by the defendant.
>
> The foregoing evidence of conscious suffering of mental and physical pain also supports a finding that such suffering was beyond the suffering experienced by other victims of first-degree murder.
>
> The evidence also establishes that the [defendant] was aware of the effect of his actions upon the victim because the victim asked for help and protection from the defendant, which pleas were not heeded by the defendant.
>
> The evidence is clear that the victim was conscious for most, if not all, of the six-hour period.

(*Id.* at 5-7.) Although the court found cruelty alone sufficient to establish the (F)(6) aggravator, it also found that the murder had been committed in an especially heinous and depraved manner. (*Id.* at 7.)

With regard to mitigation, the court found that Petitioner's age at the time of the offense (20) was a statutory mitigating factor under A.R.S. § 13-703(G)(5). (*Id.* at 9.) However, it rejected Petitioner's other alleged statutory factors:

> [T]he Court finds that, despite the evidence of the defendant's mental illness and use of thorazine for periods prior to and after the murder, the defendant has not met the burden of proving by a preponderance of the evidence that at the time of the murder the defendant's capacity to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of the law were significantly impaired, as expressed in A.R.S. 13-703(G)(1). Dr. Gelardin testified that the defendant was not suffering from a psychotic condition or episode at the time of the criminal offense.
>
> That, despite the evidence that Mr. Clabourne killed the victim at the urging of the co-defendant Larry Lynn Langston, the defendant has failed to prove by a preponderance of the evidence that he was under unusual or substantial duress, as expressed in 13-703(G)(2). His sheer size and previous behavior indicates that he could be manipulated but only when he wanted to be manipulated.

(*Id.* at 8-9.) The court also considered the nonstatutory mitigation urged by Petitioner and found the following proven by a preponderance of the evidence: that Petitioner has a passive personality, is impulsive, and is easily manipulated by others, and that life imprisonment would be less costly than capital punishment. (*Id.* at 9-10.) The court concluded that the proven mitigation was not sufficiently substantial to warrant leniency when weighed against the aggravation and resentenced Petitioner to death. (*Id.* at 11.)

On appeal, the Arizona Supreme Court conducted an independent review of the sentencing factors. As to aggravation, the court focused exclusively on the cruelty prong of A.R.S. § 13-703(F)(6):

> [C]ruelty involves pain and distress visited upon the victim. This distress includes mental anguish. . . . [Here,] [Webster] suffered both mentally and physically. She was beaten and forced to undress and serve [Clabourne] and his friends drinks. In addition, she was raped over the course of a six hour period. She was obviously in great fear [for] her life as she begged [Clabourne] to protect her. The medical examiner testified that [Webster] had put up a tremendous struggle while being strangled, indicating a good deal of suffering. This evidence was sufficient to establish cruelty.

Clabourne II, 194 Ariz. at 384, 983 P.2d at 753 (quoting *Clabourne I*, 142 Ariz. at 347-48, 690 P.2d at 66-67) (alterations in original).

The court next addressed the statutory mitigation urged by Petitioner, including: (1) whether Petitioner's mental problems significantly impaired his capacity to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of the law under A.R.S. § 13-703(G)(1); (2) whether he was under "unusual or substantial duress" at the time of the murder under § 13-703(G)(2); and (3) his age under § 13-703(G)(5). *Id.* at 384-87, 983 P.2d at 753-56.

With respect to the diminished capacity mitigator, the court determined that Petitioner had not established that his mental deficiencies rendered him unable to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of the law. The court noted that, although Drs. Gelardin and Berlin believed Petitioner was schizophrenic, none of the experts could say he was "psychotic" at the time of the killing. *Id.* at 385, 983

P.2d at 754. The court found indicative of his ability to appreciate the wrongfulness of his conduct the fact that he tried to conceal the crime by hiding the victim's body and his statement to police that he had wanted to help Webster escape. *Id.* The court further found that Petitioner had failed to demonstrate any impairment to his ability to control his conduct. *Id.*

With regard to duress, the court determined that Petitioner had not established he was under unusual or substantial duress when he killed Webster. Although conceding that Langston may have been the mastermind in the murder, the court noted that Petitioner's own confession "shows he was a willing and active participant and was neither induced nor coerced to act contrary to his free will." *Id.* at 386, 983 P.2d at 755. The court also noted that Petitioner's age was mitigating but accorded it little weight in light of his "average level of intelligence, [] criminal history and [the fact] he was a major participant in the crime." *Id.*

Regarding nonstatutory mitigating factors, the Arizona Supreme Court first addressed Petitioner's mental problems, according "some" weight to his schizophrenia and personality traits of being passive, impulsive, and easily manipulated. *Id.* at 387, 983 P.2d at 756. However, the court found such mitigation "negligible" when weighed against evidence of Petitioner's "active participation throughout the six-hour ordeal and the fact that he personally strangled and stabbed Webster." *Id.* The court also accorded Petitioner's intoxication claim little weight, noting that his "detailed recollection of the events of the evening of Webster's murder, as told to Detective Bustamante more than a year after the murder occurred, belies his claim that he was impaired." *Id.* The court declined to find Petitioner's dysfunctional family history as a mitigating factor, noting that he had failed to establish how this background affected his behavior. *Id.* Likewise, the court found no mitigating value relevant to his co-defendants' sentences, noting that "only an unexplained disparity . . . may be a mitigating circumstance." *Id.* at 388, 983 P.2d at 757. Finally, the court declined to find as mitigation the economic cost of the death penalty because it "is unrelated to Clabourne, his character or record, or the circumstances of his offense." *Id.*

Weighing all the evidence in mitigation against the (F)(6) aggravating factor, the Arizona Supreme Court concluded that the mitigation was "insufficiently substantial to warrant leniency." *Id.*

DISCUSSION

Claim 1: Ineffective Assistance of Counsel

Petitioner contends that counsel was ineffective at his 1997 resentencing for not seeking to suppress his confession, which he alleges was obtained in violation of his Fifth Amendment right to counsel. (Dkt. 27 at 11-15.) He argues that without the confession there was insufficient evidence to establish cruelty under A.R.S. § 13-703(F)(6), the sole aggravating factor relied upon by the Arizona Supreme Court in affirming his death sentence. (*Id.*) Petitioner concedes this claim has not been properly exhausted in state court and blames deficient representation by PCR counsel for the default. (Dkt. 27 at 8-10.)

Ineffective assistance of counsel can establish cause to excuse a procedural default only when it rises to the level of an independent constitutional violation. *Coleman*, 501 U.S. at 755. However, when a petitioner has no constitutional right to counsel, there can be no constitutional violation arising out counsel's ineffectiveness. *Id.* at 752. There is no constitutional right to the effective assistance of counsel in state postconviction proceedings. *See Pennsylvania v. Finley*, 481 U.S. 551, 555 (1987); *Murray v. Giarratano*, 492 U.S. 1, 7-12 (1989). Thus, a claim of ineffectiveness by PCR counsel cannot establish cause for a procedural default. *See Ortiz*, 149 F.3d at 932 (because there is no right to effective assistance of counsel in a state collateral proceeding, a claim of ineffective assistance of such counsel cannot provide cause for a procedural default).

Petitioner argues that because Arizona requires that claims of ineffective assistance of counsel be raised only in postconviction proceedings and because he has no constitutionally guaranteed right to counsel in such proceedings, there is "no effective state corrective process" and any failure to exhaust this claim in state court should be excused pursuant to 28 U.S.C. § 2254(b)(1)(B)(I). (Dkt. 27 at 13.) Petitioner proffers no legal

authority to support this novel assertion. There is little question that Arizona's PCR scheme provides an effective means of seeking relief for constitutional infirmities. Moreover, the Ninth Circuit has reiterated that there is no constitutional right to counsel in PCR proceedings even if the PCR proceeding is a petitioner's only opportunity to assert claims of ineffective assistance of counsel. *See Ellis v. Armenakis*, 222 F.3d 627, 633 (9th Cir. 2000); *Bonin v. Calderon*, 77 F.3d 1155, 1159 (9th Cir. 1996) (ineffective assistance of counsel claim defaulted for not being raised in first habeas petition, even though same counsel represented petitioner in both proceedings); *Jeffers v. Lewis*, 68 F.3d 299, 300 (9th Cir. 1995) (en banc) (plurality) (ruling an Arizona petitioner had "no Sixth Amendment right to counsel during his state habeas proceedings even if that was the first forum in which he could challenge constitutional effectiveness on the part of trial counsel"). The Court concludes that Petitioner has failed to establish cause for his failure to exhaust Claim 1 in state court.

Alternatively, Petitioner contends that a fundamental miscarriage of justice will occur if Claim 1 is not heard on the merits because he is actually innocent of the death penalty. (Dkt. 36 at 8-9.) To satisfy this exception to procedural default, Petitioner must show by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the existence of any aggravating circumstance or some other condition of eligibility for the death sentence under the applicable state law. *Sawyer*, 505 U.S. at 335-36.

Petitioner argues that his confession was illegally obtained and that it should have been suppressed at resentencing. He further asserts that, because the confession provided the sole basis for the Arizona Supreme Court's cruelty finding, no reasonable factfinder would have found him eligible for the death penalty. Therefore, he is actually innocent of the death penalty and Claim 1 should be addressed on the merits. The Court disagrees.

First and foremost, other evidence supported the cruelty finding. At trial, Shirley Martin testified that Petitioner told her the victim had begged not to be killed. (RT 11/18/82 at 332, 333.) The medical examiner testified that Webster was alive and conscious while being strangled and that she put up a "tremendous" struggle. (RT 11/17/82 at 248, 255.)

Webster also sustained numerous bruises and contusions over her body, likely inflicted prior to death. (*Id.* at 255-62.) Thus, even without Petitioner's confession, there was sufficient evidence from which a trier of fact could conclude that the victim feared for her life and suffered greatly before being killed.

Furthermore, the resentencing court was obligated to consider the confession because it had been properly admitted at trial. When he confessed, Petitioner was incarcerated on unrelated charges and had invoked his right to counsel. *Clabourne*, 64 F.3d at 1378. However, without his counsel's knowledge, Petitioner was interviewed by police and during the interview confessed to murdering Webster. *Id.* Subsequently, in *Arizona v. Roberson*, 486 U.S. 675, 682-85 (1988), the United States Supreme Court held that once a defendant invokes his right to counsel, the right is not offense specific and questioning about a defendant's involvement in any crime outside the presence of his lawyer is prohibited. Nonetheless, the Ninth Circuit held that Petitioner's confession had been properly admitted because *Roberson* did not apply retroactively. *Clabourne*, 64 F.3d at 1379; *see also Butler v. McKellar*, 494 U.S. 407 (1990) (holding that *Roberson* does not apply retroactively). Under Arizona law in effect at the time of Petitioner's resentencing, a sentencing judge was required to consider any evidence admitted at trial that related to aggravating or mitigating circumstances "without reintroducing it at the sentencing proceeding." A.R.S. § 13-703(C) (West Supp. 1997) (amended 2001). Thus, even though Petitioner's confession would not be admissible under present law, at the time of his trial it was properly admitted and therefore the resentencing court was obligated by state law to consider it.

Petitioner has failed to demonstrate that no reasonable factfinder would have found, even without consideration of his confession, the existence of the cruelty prong of the (F)(6) aggravating factor. Therefore, he has failed to show that he is actually innocent of the death penalty and that a fundamental miscarriage of justice will occur if Claim 1 is not decided on the merits. Because he has failed to establish either cause and prejudice or a fundamental miscarriage of justice to excuse his procedural default, Claim 1 is procedurally barred.

Claim 2: Failure to Consider Mental Illness as Mitigation

Petitioner alleges that the state courts unconstitutionally required that he show a "causal connection" between his schizophrenia and the crime before they would consider his schizophrenia as mitigation.[6] The Court disagrees.

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 v. Smith*, 539 U.S. 510, 535 (2003) (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); *Kansas v. Marsh*, 548 U.S. 163, 175 (2006); *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 constitutionally relevant mitigating evidence. *See also Tennard v. Dretke*, 542 U.S. 274, 283 (2004); *Burger v. Kemp*, 483 U.S. 776, 789 n.7 (1987). However, while the sentencer must not be foreclosed from considering relevant mitigation, "it is free to assess how much weight to assign such evidence." *Ortiz*, 149 F.3d at 943; *see Eddings*, 455 U.S. at 114-15 ("The sentencer . . . may determine the weight to be

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[6] Respondents contend that this claim was not raised in state court and is now procedurally defaulted. The Court disagrees. On appeal, Petitioner alleged that the resentencing court failed to consider all proffered mitigation, including evidence he suffered from schizophrenia. (Appellant's Opening Br. at 19-37.) He raised the issue again in a motion for reconsideration from the direct appeal. (Motion for Reconsideration at 4-8, State v. Clabourne, No. CR-97-0334-AP (Ariz. Jul. 6, 1999).) This was sufficient to exhaust Claim 2. *See Styers*, 547 F.3d 1026, 1034 (9th Cir. 2008) (assertion in motion for reconsideration "that the court had failed to consider relevant mitigating evidence" sufficient to adequately inform state court of factual and legal basis of challenge under *Eddings v. Oklahoma*, 455 U.S. 104 (1982)).

given the relevant mitigating evidence."); *see also State v. Newell*, 212 Ariz. 389, 405, 132 P.3d 833, 849 (2006) (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 sentencing court allowed and considered all relevant mitigation. *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) (rejecting a 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).

Applying these principles, it is apparent in Petitioner's case that the resentencing court fulfilled its constitutional obligation by allowing and considering Petitioner's proffered mental health evidence, both as statutory and nonstatutory mitigation. Arizona Revised Statute § 13-703(G)(1) provides as a statutory mitigating factor that 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." The plain language of the statute requires the sentencer to consider the defendant's state of mind at the time of the offense. To ensure, however, that proffered evidence insufficient to satisfy the (G)(1) factor is nonetheless considered pursuant to the dictates of *Lockett* and *Eddings*, the Arizona Supreme Court has repeatedly directed that such evidence be considered as nonstatutory mitigation "to determine whether it in some other way suggests that the defendant should be treated with leniency." *State v. McMurtrey*, 136 Ariz. 93, 102, 664, P.2d 637, 646 (1983).

On direct appeal, the Arizona Supreme Court expressly addressed Petitioner's claim that the resentencing judge, after failing to find the existence of the (G)(1) factor, had failed to further consider his mental health evidence as nonstatutory mitigation:

> **1. Mental Impairment**
>
> We reject Clabourne's contention that the resentencing court violated *State v. McMurtrey I,* 136 Ariz. 93, 102, 664 P.2d 637, 646 (1983) or *State v. Gallegos,* 178 Ariz. 1, 17-18, 870 P.2d 1097, 1113-14 (1994), by not explicitly stating that it had considered Clabourne's mental capacity evidence for nonstatutory effect after rejecting the statutory claim. A trial court need not explicitly indicate that mental problems carry no nonstatutory weight; the court must only consider the proffered mitigation for nonstatutory effect. *See id. The resentencing court's finding of the nonstatutory mitigating factor, passive personality/impulsive/easily manipulated, discussed next, demonstrates consideration of Clabourne's mental health evidence.*
>
> **2. Passive Personality/Impulsive/Easily Manipulated**
>
> We agree with the resentencing court's finding that Clabourne has a passive personality and that he is impulsive and easily manipulated by others. The evidence shows that these traits are rooted to some degree in his mental health problems. *As such, we afford some nonstatutory mitigating weight to Clabourne's mental and personality deficiencies.* However, Clabourne's active participation throughout the six-hour ordeal and the fact that he personally strangled and stabbed Webster renders negligible any mitigating effect Clabourne's problems and the traits they manifest may have.

Clabourne II, 194 Ariz. at 387, 983 P.2d at 756 (emphasis added).

Petitioner's contention that the state courts failed to consider evidence of his mental problems as mitigation is baseless. Both the resentencing judge and the state supreme court considered the evidence but concluded that it was not sufficiently weighty to warrant leniency under the circumstances. The sentencer was free to determine the mitigating weight of Petitioner's mental health evidence; its failure to assign such evidence the weight Petitioner believes it warranted does not implicate his federal constitutional rights. *Harris v. Alabama*, 513 U.S. 504, 512 (1995); *Eddings*, 455 U.S. at 114-15. The Arizona Supreme Court's denial of this claim was neither contrary to, nor an unreasonable application of, controlling Supreme Court law. Therefore, Petitioner is not entitled to relief on Claim 2.

Claim 3: Judicial Vindictiveness

At his original sentencing, Judge Roylston sentenced Petitioner to four 14-year terms

of imprisonment, all to run concurrently, for the kidnapping and sexual assault convictions. *Clabourne I*, 142 Ariz. at 340, 690 P.2d at 59. At his capital resentencing, Judge Montiel reimposed the separate 14-year terms but ordered that they run consecutively. (RT 8/14/97 at 4.) On appeal, the Arizona Supreme Court reversed this aspect of the resentencing court's order and restored the original concurrent sentences. *Clabourne II*, 194 Ariz. at 390, 983 P.2d at 759.

Petitioner now alleges that his capital sentence must be vacated because it was part of the sentencing "package" imposed by the judge.[7] (Dkt. 27 at 25.) The Court disagrees.

Due process requires that a defendant not be subject to vindictiveness at resentencing after successfully attacking his original sentence. *United States v. Peyton*, 353 F.3d 1080, 1085 (9th Cir. 2003). To assure an absence of vindictiveness, if a greater sentence is handed down at resentencing, the judge must affirmatively explain his reasons for doing so. *North Carolina v. Pearce*, 395 U.S. 711, 726 (1969). If the court fails to explain its reasons, a presumption arises that the sentence was imposed for a vindictive purpose. *United States v. Garcia-Guizar*, 234 F.3d 483, 489 (9th Cir. 2000). Such a presumption arises, however, only where there is a "reasonable likelihood" that the increase is a product of actual vindictiveness. *Peyton*, 353 F.3d at 1086 (citing *Garcia-Guizar*, 234 F.3d at 489). The prosecution may rebut this presumption by presenting objective information explaining the increased sentence. *Nulph v. Cook*, 333 F.3d 1052, 1057 (9th Cir. 2003).

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[7] Respondents assert that Petitioner exhausted a vindictiveness allegation only with regard to Petitioner's noncapital sentences and that any allegation concerning his capital sentence is procedurally defaulted. On appeal, Petitioner argued that Judge Montiel's imposition of consecutive sentences violated his rights under *North Carolina v. Pearce*, 395 U.S. 711 (1969), to be free from retribution for the successful exercise of his right to appeal. (Request to Supplement Opening Brief with One Issue at 1, State v. Clabourne, No. CR-97-0334-AP (Ariz. Jan. 12, 1999).) Any conclusion that the judge behaved in such a manner with respect to the noncapital sentences would necessarily implicate the constitutional validity of the death sentence as well. Therefore, the Court will address this claim on the merits.

In Petitioner's case, the resentencing court did not provide a rationale for sentencing Petitioner to consecutive rather than concurrent terms on the noncapital convictions. Nevertheless, the Court concludes that the facts and posture of this case weigh against a presumption of vindictiveness by the resentencing court. First, the judge at resentencing was different than the judge who imposed the original sentences. *United States v. Atehortva*, 69 F.3d 679, 683 (2nd Cir. 1995) (holding that there is no presumption of vindictiveness if the greater sentence is imposed by a different sentencing judge). In addition, Petitioner himself suggests that confusion rather than animus motivated the court; he concedes that the court did not know which counts were set for resentencing or even what the original sentences were.[8] (Dkt. 27 at 25.) The Arizona Supreme Court also noted that the resentencing court and both parties proceeded under the "erroneous" belief that all the sentences, not just the death sentence, had been set aside. *Clabourne II*, 194 Ariz. at 390, 983 P.2d at 759. The Arizona Supreme Court concluded simply that this was a factual mistake and remand from federal court was for resentencing on the murder conviction only. *Id.* Thus, it appears that error rather than animus explains the court's resentencing of Petitioner on the noncapital counts. Under these circumstances, it is not appropriate to presume vindictiveness. Therefore, absent evidence of actual vindictiveness, the claim fails. *Peyton*, 353 F.3d at 1086; *Garcia-Guizar*, 234 F.3d at 489.

Petitioner has presented no evidence of actual vindictiveness on the part of the resentencing judge in imposing consecutive noncapital sentences. Likewise, any suggestion that the state court vindictively reimposed the death sentence is without merit. The court

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[8] Petitioner contends that his counsel at resentencing also failed to understand "what counts they were there for resentencing on or what the sentence was the last time" and that this amounted to ineffective assistance. (Dkt. 27 at 25-26.) He further contends that appellate counsel was ineffective for failing to raise this issue on appeal. (*Id.* at 26.) These cursory allegations are unsupported and were not fairly presented in state court. As a result, to the extent Petitioner is now raising these claims on habeas review, they are procedurally barred.

exhaustively explained its basis for reimposing a death sentence. (RT 8/14/97 at 4-11.) Judge Montiel reviewed the evidence at trial and the additional evidence presented at the federal habeas evidentiary hearing and determined that the (F)(6) aggravating factor had been established. (*Id.* at 4-7.) He then concluded that when this factor was weighed against the proffered mitigation evidence, death was an appropriate sentence. (*Id.* at 11.) Nothing in the court's imposition of the death sentence indicates that its decision was based on vindictiveness, bias, or personal animus. Thus, Petitioner has not established that the judge acted vindictively in resentencing him to death.

Finally, in its independent review, the Arizona Supreme Court affirmed the death sentence and corrected the lower court's error in imposing consecutive sentences on the noncapital convictions. *Clabourne II*, 194 Ariz. at 389, 983 P.2d at 758. The supreme court's correction of the lower court's error in resentencing on the noncapital convictions, along with its independent review and reweighing of the aggravating and mitigating factors with regard to the death sentence, insured that Petitioner received due process at resentencing. *Clemons v. Mississippi*, 494 U.S. 738, 750, 754 (1990) (holding that appellate courts are able to fully consider mitigating evidence and are constitutionally permitted to affirm a death sentence based on independent reweighing despite any error at sentencing).

For all of these reasons, Petitioner has failed to establish that his capital sentence was imposed vindictively in violation of his constitutional rights. He is not entitled to relief on Claim 3.

Claim 4: Judicial Conflict of Interest

Petitioner alleges that Judge Montiel had a conflict of interest that inhibited his ability to fairly preside at Petitioner's resentencing. In support of the claim, Petitioner references a lawsuit filed by a court administrator alleging sexual abuse and harassment that was widely reported in the media. According to Petitioner, these allegations made the judge prone to impose a harsh sentence on him, evincing a form of "compensatory bias" since Petitioner had been convicted of three counts of sexual assault as well as murder. (Dkt. 27 at 26-27.)

Petitioner raised this claim in a motion to vacate judgment following resentencing. (ROA at 1993.) Attached to the motion were several newspaper articles reporting various claims of misconduct against Judge Montiel. (*Id.* at 2001-16.) The articles recount claims of sexual harassment leveled by a court administrator, who was suing Judge Montiel and another judge for wrongful termination. (*Id.*) However, at least one of the articles noted that the EEOC had found the employee's termination to be based on professional concerns and that her claims of sexual harassment had not been substantiated. (*Id.* at 2016.) The plaintiff dropped the suit in February 1997, seven months prior to Petitioner's resentencing. (*Id.* at 2015.)

Petitioner's motion to vacate went before Judge Michael Brown, then the presiding judge of the Pima County Superior Court. (ROA at 2021.) In denying the motion, the judge concluded that

> counsel for the defendant has failed to provide valid factual support for her claim that the sentencing judge "accepted this case and sentenced defendant to death to deflect allegations of a sexual nature that were pending against him." Instead, counsel has attached newspaper articles which repeat claims against Judge Montiel which have been investigated by the EEOC and determined to be unsubstantiated. Counsel both misquotes and misrepresents the news reports and has failed to further investigate the facts responsibly to present the outcome of the charges made against the judge by a former employee.
>
> . . . .
>
> Had counsel conducted a responsible investigation to determine the underlying facts, rather than misrepresenting the allegations reported in the newspaper articles, she would have discovered that these same, unsubstantiated claims of sexual harassment were dismissed in February, 1997, well before the sentencing occurred in this case. These "facts" provide no credible support for Counsel's claim that Judge Montiel imposed the death penalty in this case in order to deflect pending claims against him. Counsel's reliance upon these circumstances for the purpose of this motion is irresponsible and goes dangerously beyond zealous advocacy.
>
> Additionally, counsel impliedly alleges . . . that Judge Montiel was under investigation by the Commission of Judicial Conduct for sexual harassment at the time of the sentencing in this case. Yet a simple investigation would have revealed to Counsel that the Commission's charge against Judge Montiel was based upon his failure to admonish a junior Judge for inappropriate behavior. It is irresponsible for counsel to mischaracterize the record by implying that the Commission on Judicial Conduct was

> investigating a charge of sexual harassment against Judge Montiel. Moreover, the article in Exhibit C reports that the "failure to admonish" charge was filed against Judge Montiel on September 19, 1997, fully a month after sentencing in this case had been completed. There is no indication, other than counsel's unverified and unsubstantiated statement, that Judge Montiel was ever charged with sexual harassment. Thus, the allegation that Judge Montiel sentenced the defendant to death in this case in order to "deflect" the allegations pending against him is totally unsupported, even by the hearsay newspaper articles attached to the present motion.

(*Id.* at 2021-22.)

On appeal, the Arizona Supreme Court also rejected this claim, noting that "the record amply supports the presiding judge's conclusion that Clabourne's motion was unsupported by evidence. There is no abuse of discretion." *Clabourne II*, 194 Ariz. at 389, 983 P.2d at 758.

Analysis

Petitioner alleges that Judge Montiel was biased and therefore the sentences he rendered were in violation of Petitioner's constitutional rights. A defendant is entitled to a fair trial, free from judicial bias. *In re Murchison*, 349 U.S. 133, 136 (1955). There is a presumption that judges are unbiased, honest, and have integrity. *Schweicker v. McClure*, 456 U.S. 188, 195 (1982); *Withrow v. Larkin*, 421 U.S. 35, 47 (1975). Similarly, there is a presumption that judicial officials have "properly discharged their official duties." *Bracy v. Gramley*, 520 U.S. 899, 909 (1997) (quoting *United States v. Armstrong*, 517 U.S. 456, 464 (1996)). On federal habeas review, the Court "must ask whether the state trial judge's behavior rendered the trial so fundamentally unfair as to violate federal due process under the United States Constitution." *Duckett v. Godinez,* 67 F.3d 734, 740 (9th Cir. 1995). "To sustain a claim of this kind, there must be an 'extremely high level of interference' by the trial judge which creates 'a pervasive climate of partiality and unfairness.'" *Id.* (quoting *United States v. DeLuca,* 692 F.2d 1277, 1282 (9th Cir. 1982)).

A petitioner may show judicial bias in one of two ways – by demonstrating the judge's actual bias or by showing that the judge had an incentive to be biased sufficiently strong to overcome the presumption of judicial integrity (i.e., a substantial likelihood of bias). *Paradis*

v. Arave, 20 F.3d 950, 958 (9th Cir. 1994); *Fero v. Kerby*, 39 F.3d 1462, 1478-79 (10th Cir. 1994). "Supreme Court precedent reveals only three circumstances in which an appearance of bias – as opposed to evidence of actual bias – necessitates recusal." *Crater v. Galaza*, 491 F.3d 1119, 1131 (9th Cir. 2007) (citing *Withrow v. Larkin*, 421 U.S. at 47). These are (1) when the judge has a direct, substantial pecuniary interest in the outcome of the case; (2) when the judge becomes embroiled in a running, bitter controversy with one of the litigants; and (3) when the judge acts as part of the accusatory process. *Id.* (citing *Tumey v. Ohio*, 273 U.S. 510, 523 (1927); *Mayberry v. Pennsylvania*, 400 U.S. 455, 465 (1971); and *In re Murchison*, 349 U.S. at 137)). In *Johnson v. Mississippi*, 403 U.S. 212, 215-16 (1971), the Supreme Court held that due process of law requires a judge to recuse himself when "it is plain that he was so enmeshed in matters involving the petitioner as to make it appropriate for another judge to sit." The Court has further explained that "most questions concerning a judge's qualifications to hear a case are not constitutional ones, because the Due Process Clause of the Fourteenth Amendment establishes a constitutional floor, not a uniform standard." *Bracy*, 520 U.S. at 904. Thus, "these questions are, in most cases, answered by common law, statute, or the professional standards of the bench and bar." *Id.*

Petitioner has not presented facts supporting a presumption of bias. He has not alleged or presented evidence that Judge Montiel had a direct, substantial pecuniary interest in sentencing Petitioner. Nor has he alleged or presented evidence that he and Judge Montiel were embroiled in a running, bitter controversy, or that the judge was effectively part of the accusatory process. Therefore, the Court will not presume bias.

There is also no support in the record for a claim of actual bias. Petitioner merely speculates that a wrongful termination lawsuit by a court employee against Judge Montiel raising claims of sexual abuse or harassment rendered the judge incapable of passing a fair and unbiased sentence in Petitioner's case. This speculative assertion, without more, cannot support a finding of actual bias. As noted by Judge Brown, the lawsuit against Judge Montiel was resolved in February 1997 when the plaintiff withdrew the suit, seven months before

Petitioner's resentencing. (ROA at 2015.) In addition, the EEOC issued a statement which effectively exonerated Judge Montiel of any wrongful behavior in the employee's termination, including any claims of sexual abuse or harassment. Judge Brown's finding that the harassment allegations were baseless is entitled to deference and is supported by the record. Petitioner has failed to rebut the finding with clear and convincing evidence. *See* 28 U.S.C. § 2254(e)(1).

The state court's rejection of this claim was based on neither an unreasonable application of relevant Supreme Court law nor an unreasonable determination of the facts. Therefore, Petitioner is not entitled to habeas relief on Claim 4.

Claim 5: Cruelty Aggravating Factor

Petitioner contends that the cruelty prong of A.R.S. § 13-703(F)(6) does not sufficiently narrow the class of persons eligible for the death penalty. Respondents assert that Petitioner did not raise this claim in state court, that it is now technically exhausted, and that it should be denied on the basis of procedural default. Petitioner concedes the claim was not raised in state court but argues this failure should be excused because Arizona courts have repeatedly rejected this claim and therefore it would have been futile to present it in state court. (Dkt. 27 at 32.)

Petitioner's futility argument is insufficient to excuse his failure to exhaust a claim in state court. *Roberts v. Arave*, 847 F.2d 528, 530 (9th Cir. 1988) ("the apparent futility of presenting claims to state courts does not constitute cause for procedural default") (citing *Engle v. Isaac*, 456 U.S. 107, 130 (1982)). Petitioner presents no other basis for failing to exhaust this claim in state court. Nor has he alleged that a fundamental miscarriage of justice will occur if this claim is not addressed on the merits. Consequently, Claim 5 is procedurally barred.

Claim 6: Victim Impact Statements

Petitioner contends that his constitutional rights were violated because, prior to resentencing, victim impact letters "poured in unchecked presenting the writers' opinions

about the crime, about the defendant, and about the appropriate sentence." (Dkt. 27 at 33.) Petitioner has not proffered copies of the letters nor were they included in the state court record provided to this Court. Nonetheless, Respondents do not contest the accuracy of the excerpts cited by Petitioner in his habeas petition. (*See* Dkt. 33 at 44-47.)

On appeal, the Arizona Supreme Court rejected Petitioner's claim that the submission of letters advocating capital punishment violated his constitutional rights and tainted his resentencing. *Clabourne II*, 194 Ariz. at 390, 983 P.2d at 759. The court noted that "there is no indication that the resentencing court considered the victim impact statements when determining whether to impose the death penalty. Therefore, there was no error." *Id.*

Analysis

In *Booth v. Maryland*, 482 U.S. 496, 509 (1987), the Supreme Court held that the introduction of a victim impact statement during the sentencing phase of a capital case violated the Eighth Amendment. In *Payne v. Tennessee*, 501 U.S. 808, 827 n.2 (1991), the Supreme Court revisited *Booth* and overruled it in part, holding that the Eighth Amendment does not erect a per se barrier to admission of victim impact evidence, but left intact *Booth's* prohibition on the admissibility of opinions from the victim's family about the crime, the defendant, or the appropriate sentence.

Under Arizona law at the time of Petitioner's trial, the judge, not the jury, determined the penalty in a capital case. A.R.S. § 13-703 (West Supp. 1997). As the Arizona Supreme Court has explained, judges are presumed to know and follow the law and are capable of setting aside any irrelevant, inflammatory, or emotional factors in selecting the appropriate sentence. *State v. Mann*, 188 Ariz. 220, 228, 934 P.2d 784, 792 (1997); *see also Jeffers v. Lewis*, 38 F.3d 411, 415 (9th Cir. 1994). Therefore, "in the absence of 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." *Gretzler v. Stewart*, 112 F.3d 992, 1009 (9th Cir. 1997).

Although the letters submitted by friends of family of the victim impermissibly

request that Petitioner be sentenced to death, Petitioner has pointed to nothing in the record to indicate the resentencing court relied on these letters in passing sentence. In fact, as already recounted in detail, the resentencing court's special verdict imposing the death penalty was predicated solely on its weighing of the (F)(6) aggravating factor against the mitigating circumstances offered by Petitioner. (RT 8/14/97 at 5-11.)

Likewise, the Arizona Supreme Court, in its independent review affirming the death sentence, focused exclusively on the evidence supporting the aggravating factor of cruelty and the mitigating factors presented by Petitioner. *Clabourne II*, 194 Ariz. at 384-88, 983 P.2d at 753-57. In the absence of any clear indication that the state courts improperly considered the letters in passing sentence, this Court assumes that the state courts followed the law. *Gretzler*, 112 F.3d at 1009. For this reason, the Arizona Supreme Court's rejection of this claim was neither contrary to nor an unreasonable application of relevant Supreme Court law. Petitioner is not entitled to relief on Claim 6.

Claim 7: Ineffective Assistance of Counsel

Petitioner appears to assert that resentencing counsel was ineffective for failing to have Petitioner re-evaluated by a mental health expert prior to resentencing. (Dkt. 27 at 37; Dkt. 36 at 24.) Petitioner concedes this claim has not been properly exhausted in state court and blames deficient representation by PCR counsel for the default. (Dkt. 36 at 24.) To this end, he asserts that direct appeal counsel (who also served as resentencing counsel) was concerned that she may have erred in not having experts provide live testimony at the resentencing hearing and that she relayed this concern to PCR counsel, who allegedly agreed to raise an ineffective assistance claim on this ground. (*Id.* at 24 & n.5.) However, PCR counsel "never asked for money to hire any psychological experts" and never presented the claim in the PCR petition. (*Id.* at 24.)

As already noted with regard to Claim 1, there is no right to the effective assistance of counsel in a postconviction proceeding, even if that is the first opportunity to assert an ineffective assistance claim. *Ellis v. Armenakis*, 222 F.3d at 633. Therefore, PCR counsel's

alleged ineffectiveness cannot establish cause for the default, *Ortiz*, 149 F.3d at 932, and Claim 7 is procedurally barred.

Claim 8: Sentencing Disparity

Petitioner's co-defendants, Larry Langston and Edward Carrico, received lesser sentences for their roles in the murder of Laura Webster. Langston, pursuant to a plea agreement, pleaded guilty to first degree murder and received a life sentence with a possibility of parole after 25 years; Carrico pleaded guilty to hindering prosecution, a Class Five felony, and was sentenced to a term of probation. Petitioner contends that the trial court erred in failing to accord mitigating weight to the disparity between his death sentence and the lesser sentences of his co-defendants. (Dkt. 27 at 38.)

As already discussed with respect to Claim 2, the sentencer in a capital case may not refuse to consider, as a matter of law, any relevant mitigating evidence. *Eddings*, 455 U.S. at 113-14; *Lockett*, 438 U.S. at 604. However, provided the sentencing court has not refused to consider relevant evidence, it is not required to find the proffered evidence mitigating or to accord it the weight a defendant believes is appropriate. *Tuilaepa v. California*, 512 U.S. 967, 979-80 (1994); *Eddings*, 455 U.S. at 114-15.

In this case, review of the record reveals that the state courts considered sentencing disparity as potential mitigation but declined to accord it mitigating weight. In its special verdict, the resentencing court noted that the disparity between the sentences "was based upon Carrico's agreement to give evidence against Langston and upon Langston's agreement to plead guilty in exchange for a life sentence." (RT 8/14/97 at 10.) As a result, Petitioner failed to show that "the disproportionality of the co-defendants' sentences was baseless or irrational, and the Court cannot consider the disproportionate outcomes as a mitigating circumstance in this case." (*Id.*) Likewise, the Arizona Supreme Court noted that under Arizona law "only an unexplained disparity between sentences may be a mitigating circumstance." *Clabourne II*, 194 Ariz. at 388, 983 P.2d at 757 (citing *State v. Schurz*, 176 Ariz. 46, 57, 859 P.2d 156, 167 (1993)). The court concluded that the disparity was justified

because "Carrico was not charged with murder and Langston pled guilty. Moreover, Clabourne was the killer, and the State was of the view that a plea agreement with Langston was necessary because 'the case against Langston was, at best, shaky, while the case against [Clabourne] was overwhelming, with much of the evidence coming from his own mouth.'" *Id.* (internal citation omitted; alteration in original).

Petitioner's principal argument is not that the state courts failed to consider his proffered mitigation, but that they failed to accord it the weight he believes it deserved. However, there is a distinction between "a failure to consider relevant evidence and a conclusion that such evidence was not mitigating"; the latter determination does not implicate a defendant's federal constitutional rights. *Williams v. Stewart*, 441 F.3d 1030, 1057 (9th Cir. 2006). Thus, the fact that the court found the evidence "inadequate to justify leniency . . . did not violate the constitution." *Ortiz*, 149 F.3d at 943; *Eddings*, 455 at 114-15. Petitioner is not entitled to relief on Claim 8.

CONCLUSION

The Court finds that Petitioner has failed to establish entitlement to habeas relief on any of his claims. Therefore, the Amended Petition for Writ of Habeas Corpus will be denied and judgment entered accordingly.

CERTIFICATE OF APPEALABILITY

In the event Petitioner appeals from this Court's judgment, and in the interests of conserving scarce resources that otherwise might be consumed drafting an application for a certificate of appealability to this Court, the Court on its own initiative has evaluated the claims within the Amended 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 certificate of appealability ("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." With respect to claims rejected on the merits, a petitioner "must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000) (citing *Barefoot v. Estelle*, 463 U.S. 880, 893 & n.4 (1983)). For procedural rulings, a COA will issue only if reasonable jurists could debate (1) whether the petition states a valid claim of the denial of a constitutional right and (2) whether the court's procedural ruling was correct. *Id.*

The Court finds that reasonable jurists could debate its resolution of Claim 2. The Court therefore grants a certificate of appealability as to this claim. For the reasons stated in this Order, the Court declines to issue a certificate of appealability for Petitioner's remaining claims and procedural issues.

Accordingly,

IT IS ORDERED that Petitioner's Amended Petition for Writ of Habeas Corpus (Dkt. 25) is **DENIED**. The Clerk of Court shall enter judgment accordingly.

IT IS FURTHER ORDERED that the stay of execution entered by the Court on November 3, 2003 (Dkt. 3) is **VACATED.**

IT IS FURTHER ORDERED that a Certificate of Appealability is **GRANTED** as to the following issues:

> Whether Claim 2, alleging that the state courts failed to consider evidence of schizophrenia as mitigation, fails on the merits.

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

DATED this 29th day of September, 2009.

Raner C. Collins
United States District Judge

745 F.3d 362
United States Court of Appeals,
Ninth Circuit.

Scott D. CLABOURNE, Petitioner–Appellant,
v.
Charles L. RYAN, Respondent–Appellee.

No. 09–99022.
|
Argued and Submitted Dec. 4, 2012.
|
Filed March 5, 2014.

Synopsis

Background: After affirmance of state prisoner's conviction and death sentence for first-degree murder, 142 Ariz. 335, 690 P.2d 54, affirmance of federal habeas relief with respect to sentencing, 64 F.3d 1373, and affirmance of death sentence imposed at resentencing, 194 Ariz. 379, 983 P.2d 748, prisoner petitioned for federal habeas relief. The United States District Court for the District of Arizona, Raner C. Collins, J., 2009 WL 3188471, denied the petition. Prisoner appealed.

Holdings: The Court of Appeals, Clifton, Circuit Judge, held that:

[1] state court did not fail to consider and give mitigating weight, for capital sentencing, to prisoner's mental health problems that lacked a causal nexus to the crime, and

[2] state post-conviction counsel performed deficiently, as element for cause for procedural default of prisoner's federal habeas claim that counsel was ineffective at capital resentencing.

Affirmed in part, vacated in part, and remanded.

Attorneys and Law Firms

*366 S. Jonathan Young, Williamson & Young, PC, Tucson, AZ, for Petitioner–Appellant.

*367 Jeffrey A. Zick (argued), Office of the Attorney General, Phoenix, AZ; Kent Cattani and Amy Pignatella Cain, Office of the Attorney General, Tucson, AZ, for Respondent–Appellee.

Appeal from the United States District Court for the District of Arizona, Raner C. Collins, District Judge, Presiding. D.C. No. 4:03–cv–00542–RCC.

Before: MARSHA S. BERZON, RICHARD R. CLIFTON, and SANDRA S. IKUTA, Circuit Judges.

OPINION

CLIFTON, Circuit Judge:

Petitioner Scott Clabourne was convicted of murder and was sentenced to death in 1982. His first petition for federal habeas relief was denied by the district court as to his conviction but was granted as to the capital sentence. That decision was affirmed by our court in *Clabourne v. Lewis,* 64 F.3d 1373 (9th Cir.1995). Clabourne was resentenced in state court in 1997, and he was again sentenced to death. His petition for federal habeas relief from that sentence was denied by the district court, and he appeals that denial to this court.

The district court certified one issue for appeal, based on Clabourne's argument that the Arizona Supreme Court refused to consider mitigation evidence contrary to *Eddings v. Oklahoma,* 455 U.S. 104, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982), specifically evidence regarding his mental illness. We affirm the district court's denial of this claim because the Arizona Supreme Court did in fact consider, and gave weight to, Clabourne's mental condition.

Clabourne asks us to issue a certificate of appealability for other claims. After consideration, we decline to certify most of those claims, as they lack merit, even measured by the low standard for issuing a certificate of appealability under 28 U.S.C. § 2253.

We do issue a certificate of appealability as to two additional claims. Both allege ineffective assistance of counsel at the 1997 resentencing. The district court denied habeas relief as to those claims because they had been procedurally defaulted due to Clabourne's failure to present them properly to the state court. Subsequent to the district court's order, the Supreme Court in *Martinez v. Ryan,* —— U.S. ——, 132 S.Ct. 1309, 182 L.Ed.2d 272

(2012), opened a narrow path to excuse procedural default in certain circumstances. In light of *Martinez,* we vacate the district court's denial of habeas relief as to one of Clabourne's ineffective assistance claims: the claim based on the failure of his counsel at resentencing to object to the court's consideration of a confession Clabourne had given to the police in 1982. We remand that claim to the district court for further proceedings. As to the other claim, however, regarding the alleged failure of resentencing counsel to submit additional psychological evidence, we affirm the denial of habeas relief.

In sum, we affirm the denial of habeas relief as to all but one claim. On that claim, we vacate the denial of habeas relief and remand for further proceedings.

I. Background

We previously described the facts of this case in *Clabourne,* 64 F.3d at 1375–77, which led to Clabourne's resentencing. They have not changed. We will briefly summarize those facts and add the subsequent history that is pertinent to Clabourne's current claims.

The victim, a 22 year old student at the University of Arizona, was murdered in September 1980. That night, she left the Green Dolphin bar in Tucson with Clabourne, ***368** Larry Langston, and Edward Carrico. The next morning, her body was found naked and wrapped in a sheet, lying in a dry river bed. She had been severely beaten, raped, strangled, and stabbed in the chest.

Her killers remained unknown for almost a year. A tipster then reported to the Tucson police that her boyfriend, Scott Clabourne, had on several occasions admitted that he had been involved in a murder. When the tipster came forward, Clabourne was already in custody on unrelated burglary charges, for which he was represented by counsel and had filed a written invocation of his right to remain silent or have an attorney present for questioning.

Detectives interviewed Clabourne at the Pima County Jail. Clabourne gave a detailed confession. Clabourne, Langston, and Carrico convinced the victim to leave the bar with them and took her to Langston's friend's house. There, they forced her to remove all of her clothes and to serve them drinks. Then they repeatedly raped her before Clabourne strangled her with a bandana and stabbed her. Clabourne was charged with first degree murder, sexual assault, and kidnapping. The court found Clabourne competent to stand trial. He was tried alone and was the only one of the three offenders to go to trial: Langston pleaded guilty to first degree murder, and Carrico pleaded guilty to hindering the prosecution.

Clabourne's confession was an important part of the case against him, but it was not the only evidence. In addition to his taped confession to the detectives, Clabourne had also confessed his involvement in the rape and murder to several other people, and several witnesses testified to incriminating statements made by him. Clabourne confessed to a prison guard that he and a friend had sex with a girl and then killed her. Another prison guard overheard Clabourne say to a fellow inmate, "Yeah, I raped her. She didn't want it but I know she liked it." Prosecutors corroborated Clabourne's confession with additional evidence. A witness identified Clabourne as one of the men who left the Green Dolphin with the victim. Clabourne's girlfriend testified that he had told her about strangling a girl and that the bandana used to strangle the victim was similar to one that belonged to Clabourne.

Clabourne called only one witness in his defense, Dr. Sanford Berlin, a psychiatrist. Dr. Berlin had treated Clabourne at the University of Arizona Medical Center several years earlier. But Clabourne's trial counsel did not contact Dr. Berlin until the day of trial, so he had no opportunity to update his observations and little opportunity to prepare to testify. Not surprisingly, under those circumstances, his testimony was of little help to Clabourne's defense. On the subject of Clabourne's mental condition, the State called two psychiatrists, Dr. Gelardin and Dr. LaWall, who testified that Clabourne was legally sane at the time of the murder.

The jury returned a unanimous guilty verdict. Clabourne was sentenced to death, and his capital sentence was affirmed by the Arizona Supreme Court. He exhausted his state postconviction remedies on his conviction and his original sentence, but he failed to obtain relief.

Clabourne then sought federal habeas relief. In his September 1993 federal habeas proceeding, Clabourne presented evidence in support of his claim that he received ineffective assistance of counsel at his initial trial and sentencing.

Doctors LaWall, Gelardin, and Berlin all testified again at the federal evidentiary hearing on Clabourne's first petition for a writ of habeas corpus. In contrast to the incomplete records the doctors received ***369** prior to trial, before the evidentiary hearing they received records of Clabourne's full medical history regarding his mental health issues. Their testimony changed considerably, to Clabourne's benefit.

Dr. Berlin testified that Clabourne suffered from some form of schizophrenia. Dr. Gelardin testified that, in light of Clabourne's entire mental health record, which had not been provided to him at the time of trial, Clabourne likely suffered from schizophrenia. He testified that Clabourne had a childlike way of responding to the world and had grandiose thought processes that made him prone to manipulation. Dr. LaWall similarly supplemented his testimony at trial with opinions favorable to Clabourne.

The district court granted Clabourne habeas relief on the grounds that Clabourne received ineffective assistance of counsel at sentencing. It held that trial counsel was ineffective because he failed to obtain medical records that supported Clabourne's claims that he suffered from mental illness and because he failed to properly prepare Dr. Berlin or any expert witness in support of mitigation. *Clabourne,* 64 F.3d at 1387 (affirming the district court's ruling that Clabourne's trial counsel's performance at sentencing "amounted in every respect to no representation at all") (internal quotations, citation, and alteration omitted). The district court granted Clabourne's petition for a writ of habeas corpus as to the capital sentence phase of Clabourne's trial, and this court affirmed. *Id.*

Clabourne was resentenced by the state court in 1997. A different judge from outside of Pima County presided over the proceedings. The same counsel who had successfully represented Clabourne in the federal habeas proceedings represented him at resentencing. Clabourne's attorney submitted to the resentencing court the entire record that was created in the 1993 federal habeas proceedings, including the evidence regarding Clabourne's mental condition. The resentencing court also considered the state trial, sentencing, and appellate records.

The resentencing court found that the State proved an aggravating circumstance under Ariz.Rev.Stat. § 13–703(F)(6), *renumbered at* 13–751(F)(6), namely that Clabourne committed the offense in an especially heinous, cruel, or depraved manner. The offense was committed in a cruel manner, the court held, because the victim consciously suffered beyond the norm experienced by other victims of first-degree murder. Although the cruelty finding was sufficient to establish the (F)(6) aggravating factor, the court also found that Clabourne committed the offense with an especially heinous or depraved state of mind because the facts established that Clabourne showed an indifference to the murder of the victim and a callous indifference to her life.

The resentencing court held that Clabourne failed to establish any statutory mitigating factors, but it found several nonstatutory mitigating factors. The resentencing court found to be mitigating that Clabourne "has a passive personality, is impulsive, and is easily manipulated by others." It held, however, that the mitigating evidence did not outweigh the aggravating circumstances of the crime and sentenced Clabourne to death. Clabourne appealed.

The Arizona Supreme Court conducted an independent review of Clabourne's capital sentence. *State v. Clabourne,* 194 Ariz. 379, 983 P.2d 748, 753 (1999) (en banc) (hereafter "*Az Clabourne* "). It found that the murder was especially cruel because of the pain and distress visited upon the victim. *Id.* It gave Clabourne's mental illness some nonstatutory mitigating weight but ultimately held that the mitigating circumstances ***370** were insufficient to warrant leniency. *Id.* at 753–57. It affirmed Clabourne's death sentence. *Id.* at 759.

Following direct review of his resentencing, Clabourne was appointed new counsel for state post-conviction proceedings. Post-conviction counsel filed several petitions that did not comply with Arizona's procedural requirements for post-conviction proceedings. The Arizona trial court dismissed all claims with prejudice after giving Clabourne's newly appointed counsel several attempts to cure the deficiencies. Counsel had asserted many claims in the deficient petitions, but he raised only one issue on appeal from the final dismissal of the petition: the constitutionality of Clabourne's judge-imposed capital sentence in light of *Ring v. Arizona,* 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002) (holding that a jury must decide aggravating factors in capital sentencing). The Arizona Supreme Court denied discretionary review. *Az Clabourne, supra.*

Clabourne initiated the current federal habeas proceeding with a petition under 28 U.S.C. § 2254 filed in the district court, asserting eight claims for relief in his amended petition. He raised two claims of ineffective assistance by his resentencing counsel. Those claims were based on (1) the failure of counsel at resentencing to seek suppression of his 1982 confession; and (2) the failure of counsel to obtain and present an additional evaluation of Clabourne's mental health in support of mitigation. The district court concluded that the claims were procedurally defaulted because they had not been presented to the state courts on appeal or during postconviction relief proceedings following the resentencing. The district court further held that Clabourne did not establish cause to excuse the procedural defaults. It also denied Clabourne's five other claims, but granted a certificate of appealability on one claim: that the Arizona courts unconstitutionally required proof of a causal nexus between Clabourne's mental health issues and the crime.

Clabourne appeals and requests a certificate of appealability on all claims he asserted in his petition. We grant a certificate of appealability, required under 28 U.S.C. § 2253, on Clabourne's two ineffective assistance of counsel claims. We deny a certificate of appealability as to the other claims. *See infra* at 375 n. 2.

II. Discussion

[1] We review de novo the district court's decision to deny Clabourne's habeas petition. *Dyer v. Hornbeck,* 706 F.3d 1134, 1137 (9th Cir.2013). Because the petition was filed after April 24, 1996, the effective date of the Anti–Terrorism and Death Penalty Act of 1996 (AEDPA), its provisions apply. *Jackson v. Nevada,* 688 F.3d 1091, 1095–96 (9th Cir.2012).

[2] [3] Under AEDPA, a habeas petition cannot be granted unless the state court decision was (1) "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States;" or (2) "based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d)(1)-(2). AEDPA's "clearly established law" requirement limits the area of law on which a habeas court may rely to those constitutional principles enunciated in Supreme Court decisions. *See Williams v. Taylor,* 529 U.S. 362, 381–82, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000). Only Supreme Court precedents are binding on state courts under AEDPA, but our precedents may be pertinent to the extent that they illuminate the meaning and application of Supreme Court precedents. *Moses v. Payne,* 555 F.3d 742, 759 (9th Cir.2009); *see also* ***371** *Parker v. Matthews,* —— U.S. ——, 132 S.Ct. 2148, 2155–56, 183 L.Ed.2d 32 (2012) (reversing the Sixth Circuit for relying on circuit precedent as illustrating "clearly established federal law," where the circuit precedent bore "scant resemblance" to the Supreme Court precedent it was said to illustrate). When applying these standards, we review the "last reasoned decision" by a state court. *Dyer,* 706 F.3d at 1137.

A. The Arizona Supreme Court's consideration of Clabourne's mental illness.

[4] We first consider the issue certified by the district court: did the Arizona Supreme Court rule contrary to or unreasonably apply *Eddings v. Oklahoma,* 455 U.S. 104, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982), by refusing to consider Clabourne's mental illness because there was not a causal nexus between his mental condition and his crimes? Our answer is that it did not. The Arizona Supreme Court considered and gave mitigating weight to Clabourne's mental health problems, so its decision was not contrary to federal law. We affirm the district court's decision to deny Clabourne's *Eddings* claim.

[5] [6] Under the Eighth and Fourteenth Amendments, a sentencing court cannot "refuse to consider, *as a matter of law,* any relevant mitigating evidence." *Id.* at 114, 102 S.Ct. 869 (emphasis in original). *Eddings* is grounded in the principle that punishment should be based on an individual assessment of the personal culpability of the criminal defendant. *Penry v. Lynaugh,* 492 U.S. 302, 319, 109 S.Ct. 2934, 106 L.Ed.2d 256 (1989), *abrogated on other grounds by Atkins v. Virginia,* 536 U.S. 304, 122 S.Ct. 2242, 153 L.Ed.2d 335 (2002). The sentencer must be able to give effect to the proffered mitigating evidence. *Id.* A court cannot disregard mitigating evidence because the defendant failed to connect the evidence to the crime. *Styers v. Schriro,* 547 F.3d 1026, 1035 (9th Cir.2008) (holding that the Arizona Supreme Court unconstitutionally disregarded mitigating evidence of the defendant's post-traumatic stress disorder by requiring the defendant to show that his disorder was causally related to his crime).

[7] When the record reflects that the court considered and weighed the value of the proffered mitigating evidence,

even when the court does not specifically cite the mitigating evidence, there is no violation of the principle described in *Eddings*. *Schad v. Ryan,* 671 F.3d 708, 724 (9th Cir.2011) (holding that the Arizona Supreme Court did not violate *Eddings* when it gave little weight to mitigating evidence because, "[a]bsent a clear indication in the record that the state court applied the wrong standard, we cannot assume the courts violated *Eddings*'s constitutional mandates") (citing *Bell v. Cone,* 543 U.S. 447, 455, 125 S.Ct. 847, 160 L.Ed.2d 881 (2005)).

[8] Arizona law separates mitigating evidence into two categories, statutory and nonstatutory. There are five statutory mitigating factors under Arizona's capital sentencing statute: mental capacity, duress, minor participation, reasonable foreseeability, and age. Ariz.Rev.Stat. § 13–703(G)(1)–(5).[1] Arizona law also requires ***372** the sentencing court to separately consider nonstatutory mitigators, "including any aspect of the defendant's character or any circumstance of the offense relevant to determining whether a capital sentence is too severe." *State v. White,* 194 Ariz. 344, 982 P.2d 819, 824 (1999) (en banc) (citing, among other sources, Ariz.Rev.Stat. § 13–703(G)).

The Arizona Supreme Court considered Clabourne's mental health first within the framework of Arizona's statutory mitigation requirements. The court reviewed the proffered expert testimony and Clabourne's mental health records to determine whether the evidence demonstrated that he had an impaired mental capacity under the terms of subsection (G)(1). Two of the experts had testified that Clabourne suffered from mental illness, probably schizophrenia, during the time when the murder occurred, and the third testified that Clabourne had a personality disorder. *Az Clabourne,* 983 P.2d at 754. But there was no evidence of a causal relationship between Clabourne's mental condition and the murder. *Id.* The court noted that in every prior case in which a defendant was held to have demonstrated impaired capacity justifying leniency under A.R.S. § 13–703(G)(1), the mental illness was not only a substantial mitigating factor, it was a major contributing cause sufficiently substantial to outweigh the aggravating factors present. *Id.* (citing *State v. Jimenez,* 165 Ariz. 444, 799 P.2d 785, 800 (1990)). The court therefore held that "the status of being mentally ill alone is insufficient to support a(G)(1) finding." *Id.*

[9] But that did not end the Arizona Supreme Court's consideration of Clabourne's mental health problems. It again addressed Clabourne's mental illness within its review of nonstatutory mitigation factors. Under Arizona law, "[w]hen a defendant's mental capacity is insufficient to support a(G)(1) finding, the court must consider whether it is a nonstatutory mitigating circumstance." *Az Clabourne,* 983 P.2d at 756. The Arizona Supreme Court held that the resentencing court had considered Clabourne's mental health evidence in its nonstatutory mitigation finding. *Id.* And, conducting its independent review of the evidence, the Arizona Supreme Court stated that Clabourne's passive personality and vulnerability to manipulation were "rooted to some degree in his mental health problems." *Id.* The court held, "As such, we afford some nonstatutory mitigating weight to Clabourne's mental and personality deficiencies." *Id.* By its own words, the Arizona Supreme Court considered and gave mitigating weight to Clabourne's mental condition.

Clabourne argues nonetheless that the Arizona Supreme Court failed to consider his proffered mental health evidence as mitigation. He contends that Arizona law at the time of his resentencing generally required a causal nexus before giving mitigating weight to a defendant's mitigation evidence. He also asks us to look to decisions of this court that granted habeas relief based on Arizona's application of a causal nexus test, such as *Styers v. Schriro,* 547 F.3d 1026, 1035 (9th Cir.2008). And, he asserts that subsequent decisions of the Arizona Supreme Court suggest that the court applied a causal nexus requirement because they cite to the *Az Clabourne* decision for support on that issue. *See, e.g., State v. Carlson,* 202 Ariz. 570, 48 P.3d 1180, 1196 (2002) (en banc); *State v. Phillips,* 202 Ariz. 427, 46 P.3d 1048, 1060 (2002); *State v. Cañez,* 202 Ariz. 133, 42 P.3d 564, 595 (2002) (en banc).

We rejected similar arguments in ***373** *Schad v. Ryan,* 671 F.3d 708, 722–24 (9th Cir.2011). In that case, the petitioner argued that Arizona law precluded the Arizona Supreme Court from considering evidence of his troubled background if that evidence did not share a causal nexus with the crime. *Id.* at 723. Rather than look to Arizona law generally, we looked to the Arizona Supreme Court's decision in Schad's case. *Id.* at 724. The Arizona Supreme Court stated that Schad's evidence of a difficult childhood "was not 'a persuasive mitigating circumstance in this case.' " *Id.* (quoting the sentencing court). We noted that this statement reflected the court's consideration of the

mitigating evidence and that there was no part of the record that reflected the court's application of a nexus test to Schad's childhood. *Id.* We held that a federal court sitting in review of a state court decision could not assume that a state court violated *Eddings* without a clear indication from the record that the state applied an unconstitutional rule. *Id.*

[10] **[11]** We cannot make that assumption here, either. Relief must be justified by the decision adjudicating Clabourne's claim. 28 U.S.C. § 2254(d) (precluding a court from granting a writ of habeas corpus unless "the adjudication of the claim ... resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law"); *see Towery v. Ryan,* 673 F.3d 933, 946 (9th Cir.2012) ("Our review must be of the record in *Towery* itself, rather than the state supreme court's subsequent interpretations of *Towery*."). A federal court reviewing a state court decision on a petition for a writ of habeas corpus sits in review of the last decision that resulted in the prisoner's incarceration, not subsequent interpretations justifying results in other cases. *Towery,* 673 F.3d at 946. The Arizona Supreme Court's decision here gave "some nonstatutory mitigating weight to Clabourne's mental and personality deficiencies." *Az Clabourne,* 983 P.2d at 756. We cannot construe the court to have violated *Eddings* by giving Clabourne's mental health issues "no weight by excluding such evidence from their consideration." *Eddings,* 455 U.S. at 115, 102 S.Ct. 869 (1982). The Arizona Supreme Court's decision under review was not contrary to federal law, because it considered Clabourne's mental health condition as mitigating evidence. *Eddings* requires no more.

Clabourne's remaining arguments focus on statements made in his case, rather than others, but they do not warrant relief, either. He argues that the Arizona Supreme Court failed to consider the evidence of Clabourne's schizophrenia because it never mentioned schizophrenia in its discussion of nonstatutory mitigation. He also contends that the prosecutor's arguments at resentencing indicate that the court relied on a causal nexus test. Neither argument has merit.

[12] A state is "free to determine the manner in which a [sentencer] may consider mitigating evidence" so long as those who impose the sentence have the discretion to consider the mitigating evidence. *Kansas v. Marsh,* 548 U.S. 163, 171, 126 S.Ct. 2516, 165 L.Ed.2d 429 (2006) (citing *Walton v. Arizona,* 497 U.S. 639, 652, 110 S.Ct. 3047, 111 L.Ed.2d 511 (1990), *overruled on other grounds by Ring v. Arizona,* 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002)). Here, the Arizona Supreme Court first summarized the testimony of the three expert witnesses who testified in support of Clabourne's mental illness. It stated, "The record shows Drs. Gelardin and Berlin believed that Clabourne suffered from mental illness, probably schizophrenia, during the time period when the murder occurred." *Az Clabourne,* 983 P.2d at 754. After the court concluded that Clabourne's mental illness ***374** did not meet the requirements for statutory mitigation, it examined that evidence through the lens of nonstatutory mitigation. It did not repeat the summary of the evidence. For nonstatutory mitigation, the court held that Clabourne's mental illness was entitled to some mitigating weight. *Id.* at 756.

[13] Clabourne asks us to conclude that the Arizona Supreme Court's failure to mention "schizophrenia" in its discussion of nonstatutory mitigation rendered its decision constitutionally deficient. Clabourne's argument surmises that the court considered schizophrenia in its discussion of Clabourne's "mental illness" for purposes of statutory mitigation, *Az Clabourne,* 983 P.2d at 754, but disregarded schizophrenia when it later discussed Clabourne's "mental and personality deficiencies" in its analysis of nonstatutory mitigation, because it did not use the word "schizophrenia," *id.* at 756. We cannot draw that inference. It is illogical to conclude that the Arizona Supreme Court considered that diagnosis and explicitly referenced it in one portion of its opinion but forgot it when considering nonstatutory mitigation, discussed just a few pages later in the opinion. The court considered Clabourne's schizophrenia, so it did not rule contrary to federal law.

[14] Clabourne also points to the prosecutor's references to a causal nexus test at the resentencing hearing. This argument lends no support to Clabourne's claim. We only review whether the last reasoned state court decision was contrary to federal law. 28 U.S.C. § 2254(d). Prosecutors' arguments provide no basis for relief, in this context, when the decision does not rely on them. Because the Arizona Supreme Court's adjudication considered Clabourne's mental health record, it complied with federal law. We thus affirm the district court's denial of habeas relief on this ground, the only ground covered by the certificate of appealability issued by the district court.

B. Ineffective assistance of resentencing counsel and Martinez v. Ryan.

Clabourne asserts two ineffective assistance of counsel claims arising from his resentencing. As noted above, we grant a certificate of appealability as to those issues. One argument is that his resentencing counsel was ineffective in failing to suppress the confession that police obtained after Clabourne invoked his right to counsel. We refer to this as the confession-based ineffectiveness claim. The other argument is that his resentencing counsel was ineffective in failing to obtain additional psychological examinations to support mitigation. We call this the mitigation-based ineffectiveness claim.

Clabourne concedes that these claims were not exhausted in state court. The confession-based ineffectiveness claim was never raised in state court, and the mitigation-based ineffectiveness claim was abandoned on appeal in state postconviction proceedings. The district court held that they were procedurally defaulted and that Clabourne failed to establish cause to excuse the default. *See Coleman v. Thompson,* 501 U.S. 722, 750, 111 S.Ct. 2546, 115 L.Ed.2d 640 (1991) (holding that a prisoner may obtain federal review of a procedurally defaulted claim by showing cause and prejudice).

The district court, however, did not have the benefit of the Supreme Court's later decision in *Martinez v. Ryan,* —— U.S. ——, 132 S.Ct. 1309, 182 L.Ed.2d 272 (2012). We must consider (1) whether *Martinez* opens the door to consideration of Clabourne's procedurally defaulted claims; and (2) if so, whether Clabourne's procedural default can be excused in light of *Martinez.*

*375 1. *Martinez v. Ryan*

[15] Federal review is generally not available for a state prisoner's claims when those claims have been denied pursuant to an independent and adequate state procedural rule. *Coleman,* 501 U.S. at 750, 111 S.Ct. 2546. In such situations, "federal habeas review of the claims is barred unless the prisoner can demonstrate cause for the default and actual prejudice as a result of the alleged violation of federal law." *Id.* Thus, habeas petitioners can overcome procedural default under this exception only if they are able to make two showings: (1) "cause" for the default, where the cause is something external to the prisoner that cannot be fairly attributed to him; and (2) prejudice. *Id.* [2]

[16] **[17]** **[18]** *Martinez* provides one route by which a habeas petitioner attempting to excuse a procedural bar by showing cause and prejudice can establish "cause." Until the Supreme Court's recent decision in *Martinez,* a prisoner could not demonstrate cause by claiming that he received ineffective assistance of counsel during state post-conviction proceedings. *See Coleman,* 501 U.S. at 752–53, 111 S.Ct. 2546 (holding that attorney error is not cause to excuse a default). That barrier was based on the premise, unchanged by *Martinez,* that an individual does not have a constitutional right to counsel in post-conviction proceedings, so the prisoner "must bear the risk of attorney error that results in a procedural default." *Id.* (internal quotations omitted). But in *Martinez,* the Supreme Court announced that in certain narrow circumstances, "when a State requires a prisoner to raise an ineffective-assistance-of-trial-counsel claim in a collateral proceeding," a prisoner may establish "cause" to excuse the procedural default of a claim that the prisoner had received ineffective assistance of counsel at trial or during sentencing proceedings by demonstrating that counsel in the initial-review collateral proceeding was ineffective or there was no counsel in such a proceeding. *Martinez,* 132 S.Ct. at 1315, 1318, 1320. *Martinez* applies to Clabourne's confession-based and mitigation-based ineffectiveness claims because Arizona law required that he raise them in collateral proceedings. *See State v. Maturana,* 180 Ariz. 126, 882 P.2d 933, 940 (1994) (en banc).

In *Detrich v. Ryan,* 740 F.3d 1237 (9th Cir.2013) (en banc), an en banc panel of our court considered the impact of *Martinez,* albeit through four separate opinions, none of which commanded a majority of six out of the eleven judge panel. An opinion by Judge W. Fletcher announced the judgment, but that opinion was joined in full by only two other judges (Judges Pregerson and Reinhardt). Another judge (Judge Christen) concurred in Section II of Judge Fletcher's opinion and also the result. Judges Nguyen and Watford each concurred in the result, and each wrote a separate opinion. Judge Graber authored a dissent, joined in full by four other judges (Chief Judge Kozinski and Judges Gould, Bea, and Murguia).

[19] Despite the apparent fragmentation, a review of the several opinions reveals at least three important conclusions supported by a majority of the en banc panel. To reach these three conclusions, outlined below,

and determine holdings from our court's divided en banc opinions, we adapt for purposes of determining the ***376** impact of a fragmented en banc opinion of this court on three judge panels the approach taken by the First, Third, Seventh, and Eighth Circuits to derive holdings from fragmented Supreme Court decisions.[3] Under this approach, we "look to the votes of dissenting [judges] if they, combined with votes from plurality or concurring opinions, establish a majority view on the relevant issue." *United States v. Donovan,* 661 F.3d 174, 182 (3rd Cir.2011); *see also United States v. Johnson,* 467 F.3d 56, 62–66 (1st Cir.2006); *United States v. Gerke Excavating, Inc.,* 464 F.3d 723, 724–25 (7th Cir.2006); *United States v. Bailey,* 571 F.3d 791, 799 (8th Cir.2009).

[20] First, where it is necessary to consider whether a procedural default should be excused under *Martinez* in a case where the district court's holding that there had been a procedural default preceded *Martinez,* and the result is uncertain, we should remand the matter to the district court to let it to conduct such a review in the first instance, if the result is uncertain. *Detrich,* 740 F.3d at 1248–49 (W. Fletcher, J., plurality) ("[O]ur general assumption is that we operate more effectively as a reviewing court than as a court of first instance. We see no reason why ... a *Martinez* case should be treated differently[.]"); *id.* at 1262 (Nguyen, J., concurring) ("the district court is best situated to apply *Martinez* in the first instance"); *id.* (Watford, J., concurring) ("we should grant petitioner's motion to remand the case to the district court, so that the district court can determine in the first instance whether petitioner's procedural default may be excused under *Martinez* "). The dissent, joined by five judges, disagreed, *see id.* at 1266–67 (Graber, J., dissenting), but the majority voted to remand, and that was the ultimate holding of the case.

[21] Second, to demonstrate "cause"—the first part of the showing of "cause and prejudice" required in order to excuse a procedural default under *Coleman*—the petitioner must show that his post-conviction relief counsel was ineffective under *Strickland v. Washington,* 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *see Detrich,* 740 F.3d at 1265 (Graber, J., dissenting) ("A meritorious *Strickland* claim requires a showing of *both* deficient performance *and* prejudice.") (emphasis in original); *id.* at 1262 (Nguyen, J., concurring) ("I agree with the dissent inasmuch as it would require the usual *Strickland* prejudice showing to overcome the procedural default."). A majority of the panel thus explicitly rejected the view expressed in Judge Fletcher's plurality opinion that "a prisoner need show only that his PCR [post-conviction relief] counsel performed in a deficient manner" and "need not show actual prejudice resulting from his PCR counsel's deficient performance, over and above his required showing that the trial-counsel IAC [ineffective assistance of counsel] claim be 'substantial' under the first *Martinez* requirement." *Id.* at 1245 (W. Fletcher, J., plurality).[4]

***377** **[22]** Third, "prejudice" for purposes of the *Coleman* "cause and prejudice" analysis in the *Martinez* context requires only a showing that the trial-level ineffective assistance of counsel claim was "substantial." Nine of the eleven judges reached that conclusion. Those nine judges were the four judges joining the relevant part of Judge Fletcher's plurality opinion plus the five judges joining Judge Graber's dissent. *Id.* at 1245–46 (W. Fletcher, J., plurality) ("A prisoner need not show actual prejudice resulting from his PCR counsel's deficient performance, over and above his required showing that the trial-counsel IAC claim be 'substantial' under the first *Martinez* requirement."); *id.* at 1261 (Graber, J., dissenting) ("Under *Martinez,* a court may excuse the procedural default of an IAC claim in cases like this one if the petitioner establishes both (1) cause, ...; and (2) prejudice, by showing that the underlying claim of trial counsel's ineffectiveness is 'substantial,' meaning that it has 'some merit.' " (quoting *Martinez v. Ryan,* —— U.S. ——, 132 S.Ct. 1309, 1318, 182 L.Ed.2d 272)). Only Judge Nguyen took the opposite position. *Id.* at 1261 (Nguyen, J., concurring) ("I also disagree with the dissent to the extent it wrongly reads *Martinez* as modifying *Coleman*'s prejudice prong.").[5]

To demonstrate cause and prejudice sufficient to excuse the procedural default, therefore, *Martinez* and *Detrich* require that Clabourne make two showings. First, to establish "cause," he must establish that his counsel in the state postconviction proceeding was ineffective under the standards of *Strickland. Strickland,* in turn, requires him to establish that both (a) post-conviction counsel's performance was deficient, and (b) there was a reasonable probability that, absent the deficient performance, the result of the post-conviction proceedings would have been different. *See Strickland,* 466 U.S. at 687, 694, 104 S.Ct. 2052. Second, to establish "prejudice," he must establish that his "underlying ineffective-assistance-of-trial-counsel

claim is a substantial one, which is to say that the prisoner must demonstrate that the claim has some merit." *Martinez,* 132 S.Ct. at 1318.

There is, to be sure, overlap between the two requirements. Within the "cause" prong there is an element of "prejudice" that must be established: to show ineffective assistance of post-conviction relief counsel, a petitioner must establish a reasonable probability that the result of the postconviction proceeding would have been different. The reasonable probability that the result of the post-conviction proceedings would have been different, absent deficient performance by post-conviction counsel, is necessarily connected to the strength of the argument that trial counsel's assistance was ineffective. The prejudice at issue is prejudice at the post-conviction relief level, but if the claim of ineffective assistance of trial counsel is implausible, then there could not be a reasonable probability that the result of post-conviction proceedings would have been different.

Put in terms of the conclusions drawn from *Detrich,* the third conclusion—"prejudice" for purposes of the "cause and prejudice" analysis requires only a showing that the trial-level ineffective assistance of counsel claim was "substantial"—does not diminish the requirement of the second conclusion that petitioner satisfy the "prejudice" prong under *Strickland* in establishing ineffective assistance by post-conviction counsel. To demonstrate that ***378** there was a reasonable probability that, absent the deficient performance, the result of the post-conviction proceedings would have been different, it will generally be necessary to look through to what happened at the trial stage. Both Judge Fletcher's plurality opinion and Judge Graber's dissent did so in *Detrich,* discussing the evidence that was or could have been submitted at trial at some length. *See Detrich,* 740 F.3d at 1254 (W. Fletcher, J., plurality) ("we feel compelled, given the dissent, to show that some of Detrich's trial-counsel IAC claims are sufficiently plausible to warrant remanding to the district court"); *id.* at 1268 (Graber, J., dissenting) ("*none* of [the trial-counsel errors] establishes prejudice, which requires that '[t]he defendant ... show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the [trial] would have been different.' " (quoting *Strickland,* 466 U.S. at 694, 104 S.Ct. 2052)).

2. Cause in Clabourne's Case

[23] There is no dispute in this case about the deficient performance of Clabourne's post-conviction counsel, as the State concedes that his representation was deficient. Clabourne's post-conviction counsel, who had no experience with Arizona post-conviction proceedings, filed several postconviction petitions in state court that failed to comply with Arizona's procedural rules. After admonishing the lawyer to comply with the rules and assert valid claims, the Arizona post-conviction court denied all claims with prejudice for his failure to comply. On appeal from that denial by the trial level court, post-conviction counsel abandoned almost all claims, including the two *Strickland* claims arising from Clabourne's resentencing. *Strickland*' s first prong, as applied to Clabourne's post-conviction counsel, is satisfied.

Strickland's second prong requires consideration of whether Clabourne can establish that he was prejudiced by post-conviction counsel's failure to exhaust either of the two claims of ineffective assistance of counsel at resentencing, the confession-based claim or the mitigation-based claim. Under *Strickland,* Clabourne must show that, but for post-conviction counsel's failure to raise those claims, there is a reasonable probability that the result of the post-conviction proceeding would have been different. *Strickland,* 466 U.S. at 694, 104 S.Ct. 2052.

We address each claim individually. We conclude that there is sufficient strength to Clabourne's confession-based claim to warrant remanding that claim to the district court, but that the mitigation-based claim is without merit and does not warrant further consideration.

a. Confession-based claim

Clabourne contends that, but for the deficient performance of his state post-conviction counsel in failing to raise the confession-based ineffectiveness claim, there was a reasonable probability that he would have succeeded on his state petition for post-conviction relief. As a result, he argues that his post-conviction counsel's deficient performance satisfies the second prong of *Strickland.*

The argument Clabourne contends his post-conviction counsel should have pursued is that Clabourne received ineffective assistance of counsel at resentencing because his attorney at that stage failed to object to the admission

of his confession, which was obtained by detectives while he was in custody and after he had invoked his right to counsel. He argues that the admission of the confession was prejudicial because there was little other evidence, absent the confession, to support the aggravating factor that rendered him eligible *379 for the death penalty. There may be merit to this argument.

[24] In *Arizona v. Roberson,* 486 U.S. 675 at 677–78, 682–83, 108 S.Ct. 2093, 100 L.Ed.2d 704 (1988), the Supreme Court held that a suspect's refusal to answer questions without presence of counsel precluded questioning related to any offense, not just the particular offense for which the suspect invoked his right to counsel. *Roberson* was an extension of the Court's holding in *Miranda v. Arizona,* 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966), that once a suspect indicates that he wishes to remain silent, his exercise of the Fifth Amendment privilege must be respected and questioning may not continue. In *Edwards v. Arizona,* 451 U.S. 477, 484–85, 101 S.Ct. 1880, 68 L.Ed.2d 378 (1981), the Court applied *Miranda* to a suspect's invocation of his right to counsel, holding that when a suspect has invoked his right to have counsel present during custodial interrogation, he cannot be subject to further interrogation. *Edwards* left unanswered the question whether a suspect who invoked his right to counsel after being taken into custody for one crime could be questioned about other crimes for which he had not invoked that right. That was the state of the law at the time of Clabourne's original trial. Later, *Roberson* answered that question, holding that such a suspect could not be questioned about other crimes. 486 U.S. at 684–85, 108 S.Ct. 2093. Because an individual's Fifth Amendment right is not offense specific, *Roberson* held, a suspect's request for counsel applies to any questions the police want to ask. *Id.*

The statement given by Clabourne regarding the murder fits that pattern. Law enforcement obtained Clabourne's confession after he had been taken into custody on unrelated burglary charges and after he had invoked his right to have counsel present. Clabourne filed and served on the county attorney's office a written declaration that he was invoking his right to remain silent and that he would not waive his right to the presence of an attorney except through a written waiver that would also be signed by his attorney. Thereafter, detectives received a tip that Clabourne was involved in the murder and went to the Pima County Jail to interview him. There was no written waiver by Clabourne, and detectives did not inform Clabourne's attorney about the interview. Nonetheless, detectives interrogated Clabourne, without his attorney present, and during that interrogation he gave the statement that is the subject of this claim, a statement in which he described in detail the kidnapping, rape, and murder.

[25] The State does not dispute that Clabourne would benefit from *Roberson* if that decision applied but argues that it did not apply to him. *Roberson* was decided in 1988, after police obtained Clabourne's confession, and after his original trial in 1982. His confession was admitted without error at his trial based on the law as it then stood. *Roberson* does not apply retroactively to cases on collateral review. *Butler v. McKellar,* 494 U.S. 407, 415–16, 110 S.Ct. 1212, 108 L.Ed.2d 347 (1990); *see Clabourne,* 64 F.3d at 1379 (noting that *Roberson* did not apply retroactively on collateral review). The State argues, therefore, that the confession could properly be admitted against Clabourne at his resentencing. We disagree.

[26] The resentencing occurred in 1997. The State acknowledges that Clabourne's statement to the police would not have been admissible against him under the law as it stood in 1997. That the statement might have been admissible at the time of the original trial in 1982 did not make it properly admissible at the resentencing trial in 1997.

*380 **[27]** **[28]** A constitutional error occurs, if at all, when a confession is admitted into evidence. *See United States v. Verdugo–Urquidez,* 494 U.S. 259, 264, 110 S.Ct. 1056, 108 L.Ed.2d 222 (1990) (citing *Kastigar v. United States,* 406 U.S. 441, 453, 92 S.Ct. 1653, 32 L.Ed.2d 212 (1972)). After *Roberson,* Clabourne's confession could not be used against him without violating the Fifth Amendment. *Roberson,* 486 U.S. at 682–83, 108 S.Ct. 2093. If a full retrial of Clabourne had been ordered, it would have been required to comply with the then-current constitutional standards. A retrial is not a collateral proceeding.

[29] A resentencing is not a collateral proceeding, either. *See Magwood v. Patterson,* 561 U.S. 320, 130 S.Ct. 2788, 2791–92, 177 L.Ed.2d 592 (2010) (holding that after a federal court grants a writ of habeas corpus as to a petitioner's sentence, any resentencing is an entirely "new judgment"). Constitutional protections apply at the

penalty phase just as they do at the guilt phase. *See Estelle v. Smith,* 451 U.S. 454, 462–63, 101 S.Ct. 1866, 68 L.Ed.2d 359 (1981) (holding that there is "no basis to distinguish between the guilt and penalty phases of [a defendant's] capital murder trial so far as the protection of the Fifth Amendment privilege is concerned").

[30] It does not matter that the legal standards might have changed subsequent to the original trial. The proper admission of evidence based on the law as it stood at the time of trial does not mean that the admission of that evidence is invulnerable to any future challenge. It has been held for centuries, for example, that even if the law changed following a trial, " '[t]he general rule ... is that an appellate court must apply the law in effect at the time it renders its decision.' " *Henderson v. United States,* —— U.S. ——, 133 S.Ct. 1121, 1126, 185 L.Ed.2d 85 (2013) (alteration in original) (quoting *Thorpe v. Housing Authority of Durham,* 393 U.S. 268, 281, 89 S.Ct. 518, 21 L.Ed.2d 474 (1969), and citing *United States v. Schooner Peggy,* 1 Cranch 103, 110, 2 L.Ed. 49 (1801)). That the trial court may not have ruled improperly when it admitted Clabourne's statement into evidence in 1982 does not mean that the same evidence was necessarily admissible in 1997. By 1997 it was established that the admission of Clabourne's statement violated his rights under the Fifth Amendment.

The State offers a related argument that is no more persuasive. It argues that an Arizona statute, Ariz.Rev.Stat. § 13–703(C), required the court at the penalty phase, in this case the resentencing phase, to consider all evidence admitted during the guilt phase. Clabourne's statement was admitted during the guilt phase of his trial in 1982, so the State argues that the resentencing court was obligated to consider it. But such a state law does not trump federal constitutional protections or the exclusion of evidence required to enforce those protections. Whatever a state might provide in its own statutes, no court can consider evidence that must be excluded under the federal constitution. Under *Roberson,* Clabourne's confession could not properly be used against him at his resentencing in 1997.

That there was a basis to object to the use of Clabourne's statement at resentencing (or to move to suppress it) does not by itself establish that Clabourne suffered from ineffective assistance through resentencing counsel's failure to make that objection. Addressing this claim requires assessing resentencing counsel's performance under both prongs of *Strickland:* (a) whether the failure to object to admission of that confession amounted to deficient performance, and (b) whether there was a reasonable probability that Clabourne would have received a lesser sentence but ***381** for resentencing counsel's failure to object to admission of the confession. [6]

No court has yet evaluated whether the failure to object to the admission of the confession at the resentencing hearing in 1997 constituted ineffective assistance of counsel under *Strickland.* The district court did not have reason, prior to *Martinez,* to analyze Clabourne's confession-based ineffectiveness claim, as it appeared to have been defaulted.

The answer to this question is not obvious to us on appeal. As to prejudice, for example, the evidence is mixed. We note that Clabourne's statement to the police included a detailed description about beating the victim, raping, strangling, and then stabbing her. The Arizona Supreme Court relied, at least in part, on that statement in its aggravation discussion. The court's decision specifically noted, for example, that the victim was forced to undress and serve the men drinks. *Az Clabourne,* 983 P.2d at 753. This fact was found nowhere else in the record. Other facts identified in the Arizona Supreme Court's discussion of the aggravating circumstances were supported by other evidence in the record. Multiple witnesses testified concerning incriminating statements made by Clabourne, including that the victim had been raped and that she had begged for help. Based on the autopsy she performed on the victim, the medical examiner testified at trial about the beating and sexual activity that the victim suffered before her death, as well as the strangling and stabbing. It is not clear to us that a death sentence would have been imposed at resentencing (and affirmed by the Arizona Supreme Court on appeal) based on the evidence without Clabourne's confession.

Put in terms of *Strickland*'s second prong, we are not sure whether there was a reasonable probability that the exclusion of Clabourne's statement would have made a difference at resentencing. That means, put in terms of *Martinez*'s second prong, we are not sure that the underlying claim is substantial. We thus follow our holding in *Detrich* and remand to the district court for it to consider in the first instance whether the previous default

of Clabourne's confession-based claims can be excused under *Martinez*.

On remand, the district court must determine whether Clabourne has demonstrated cause and prejudice sufficient to excuse the procedural default. As outlined ***382** above, *supra* pp. 376–77, that requires Clabourne to make two showings. First, to establish "cause," he must establish that his counsel in the state post-conviction proceeding was ineffective under *Strickland* by establishing both (a) that post-conviction counsel's performance was deficient, and (b) that there was a reasonable probability that, absent the deficient performance, the result of the post-conviction proceedings would have been different. The State concedes the first prong has been met, so the focus of the district court's review should be on the prejudice prong. Determining whether the result of the post-conviction proceedings would have been different will require consideration of the underlying claim of ineffective assistance by resentencing counsel and the questions of (a) whether resentencing counsel performed deficiently, and (b) whether there was a reasonable probability that, absent deficient performance at resentencing, the result of the resentencing proceedings would have been different.

If the district court concludes that Clabourne has established "cause" to excuse the procedural default, then it should move to the question of whether he suffered "prejudice" as a result. In that context, though, the answer would be obvious. As outlined, *supra* pp. 376–77, to meet the "prejudice" requirement to excuse a procedural default, it is only necessary for Clabourne to establish that his "underlying ineffective-assistance-of-trial-counsel claim is a substantial one, which is to say that the prisoner must demonstrate that the claim has some merit." *Martinez,* 132 S.Ct. at 1318. Under the circumstances of this case, if he succeeds in demonstrating that he was prejudiced by the failure of his post-conviction counsel, he will necessarily have established that there is at least "some merit" to his claim that he suffered ineffective assistance of trial counsel at resentencing.

If the district court concludes that Clabourne has established cause and prejudice sufficient to excuse the procedural default of the confession-based claim, it should proceed to adjudicate that claim on the merits.

b. Mitigation-based claim

Clabourne also argues that he received ineffective assistance of counsel at resentencing because his resentencing counsel failed to obtain additional mental health evaluations in support of mitigation prior to his resentencing. The district court dismissed the claim because it was procedurally defaulted. Though *Martinez* now opens a new path to excusing the procedural default, we address the mitigation-based claim ourselves here because it is clear that the claim fails. *See Sexton v. Cozner,* 679 F.3d 1150, 1159 (9th Cir.2012) (denying relief under *Martinez* on the record before it because the record regarding trial counsel's performance established that the underlying ineffective-assistance claim failed).

Clabourne presents no argument as to how resentencing counsel's representation with regard to Clabourne's mitigating mental health satisfies either prong of *Strickland.* The history of the case makes evident the flaws in this claim.

Our court previously granted habeas relief to Clabourne because he received ineffective assistance of counsel at his original capital sentencing. *Clabourne,* 64 F.3d at 1384. We held that counsel was ineffective at the original capital sentencing on three grounds related to mitigation:

(1) counsel called no witnesses in support of a sentence less than death;

(2) counsel introduced no evidence of Clabourne's history of mental illness; and

***383** (3) counsel failed to provide any mental health expert with health records sufficient to develop an accurate psychological profile of Clabourne.

Id. at 1384–85. We held that Clabourne was prejudiced by this deficient performance, in part, because of the additional mitigating evidence that was available at Clabourne's original sentencing and ultimately presented by Clabourne's federal habeas counsel to the federal district court in support of his habeas petition. *Id.* at 1384–86.

Clabourne's federal habeas counsel was his resentencing counsel. Before the federal district court on habeas review, Clabourne's counsel:

(1) called several witnesses to provide testimony in support of mitigation;

(2) introduced Clabourne's full mental health records; and

(3) provided three expert witnesses with Clabourne's full medical records, from which all three concluded that Clabourne suffered from mental illness.

At the evidentiary hearing, three experts testified to Clabourne's psychological disorders in support of mitigation. *See id.* at 1385–86 (comparing the doctors' testimony).

Unlike counsel at the original trial, resentencing counsel developed and submitted an extensive record in support of mitigation. Counsel submitted to the resentencing court the entire record developed before the district court, including the expert testimony. There is no reason to believe that additional evaluation would have yielded more favorable testimony, and Clabourne has not established that it would have.

When state post-conviction counsel raised the claim regarding Clabourne's lack of additional mental health examinations, albeit deficiently under Arizona procedural rules, the Arizona post-conviction court alternatively addressed the merits and held that resentencing counsel's representation did not fall below prevailing professional norms and that Clabourne failed to establish prejudice because he offered no mitigating evidence that an additional mental examination might have revealed. AEDPA deference applies to this alternative holding on the merits. *See Stephens v. Branker,* 570 F.3d 198, 208 (4th Cir.2009); *Brooks v. Bagley,* 513 F.3d 618, 624–25 (6th Cir.2008); *cf. Johnson v. Williams,* —— U.S. ——, 133 S.Ct. 1088, 1097–98, 185 L.Ed.2d 105 (2013) (applying AEDPA deference to federal claim rejected by state court despite state court's failure to expressly dismiss claim on the merits).

The record provides no support for Clabourne's claim that he received ineffective assistance of counsel at resentencing based on a failure to obtain additional psychological examinations. The Arizona court's decision was not contrary to, nor an unreasonable application of federal law. Accordingly, we affirm the district court's denial of Clabourne's petition for a writ of habeas corpus on this claim.

III. Conclusion

[31] We vacate the district court's denial of the claim that Clabourne received ineffective assistance of counsel at resentencing based on counsel's failure to object to the admission of his confession to the police. We remand in order to give the district court an opportunity to revisit the procedural default issue anew in light of *Martinez.* We affirm the district court's denial of Clabourne's petition on all other grounds. [7]

***384 AFFIRMED in part, VACATED in part, and REMANDED.**

All Citations

745 F.3d 362, 14 Cal. Daily Op. Serv. 2365, 2014 Daily Journal D.A.R. 2726

Footnotes

1 The statute was renumbered in 2009, and is now codified without amendment at A.R.S. § 13–751. Because the Arizona courts and both parties refer to the old numbering, we do the same. Subsection (G)(1), at issue here, provides: "The trier of fact shall consider as mitigating circumstances any factors proffered by the defendant or the state that are relevant in determining whether to impose a sentence less than death, including [whether] ... [t]he 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."

2 *Coleman* also recognized that a prisoner can overcome a procedural default without showing cause and prejudice by "demonstrat[ing] that failure to consider the claims will result in a fundamental miscarriage of justice." 501 U.S. at 750, 111 S.Ct. 2546. This second exception is not at issue in the present case.

3 By doing so, we do not determine whether the Supreme Court has prescribed the same approach to application of its own fragmented opinions, as the issue is not before us. *See Marks v. United States,* 430 U.S. 188, 193, 97 S.Ct. 990, 51 L.Ed.2d 260 (1977). There is a circuit split on that question. *Compare United States v. Johnson,* 467 F.3d 56, 62–66 (1st Cir.2006), *United States v. Donovan,* 661 F.3d 174, 182–83 (3d Cir.2011), *United States v. Gerke Excavating, Inc.,*

464 F.3d 723, 724–25 (7th Cir.2006), *and United States v. Bailey,* 571 F.3d 791, 799 (8th Cir.2009) *with United States v. Robison,* 505 F.3d 1208, 1221 (11th Cir.2007), *and King v. Palmer,* 950 F.2d 771, 783 (D.C.Cir.1991) (en banc).

4 Judge Watford's separate opinion did not express a view as to this issue. That opinion commented only on the need to remand to the district court for further proceedings.

5 Judge Watford's separate opinion did not express a view as to this conclusion, either.

6 At this stage of review, the second-prong prejudice inquiry is technically whether there is a reasonable probability that, had PCR counsel raised the confession claim, the state PCR court would have concluded that the *Strickland* prejudice standard was met regarding the alleged ineffective assistance of trial counsel at resentencing. But in practical terms, at least in this case, that amounts to the federal habeas court trying to answer itself the same question that would have been put to the PCR court: whether a different outcome at resentencing by the trial court was reasonably probable, absent deficient performance by resentencing counsel. Here, the information needed to assess this issue is entirely ascertainable from the trial court record. The federal court sitting in habeas need only review the same trial court record that the state PCR court would have reviewed. There is no actual decision by the state PCR court, due to the deficient performance by counsel. There is no logical basis for us to conclude that the federal habeas court and the state PCR court would reach different conclusions in answering the same question. Under these circumstances, the two inquiries, in effect, collapse into one, and our inquiry into the reasonably probable conclusion of the PCR court's inquiry into the reasonably probable conclusion of resentencing in the trial court is better treated as a single question. That question is whether there was a reasonable probability that Clabourne would have received a lesser sentence but for resentencing counsel's failure to object to admission of the confession.

7 Clabourne also raises several other issues that have not been certified for appeal by the district court and for which we decline to issue a certificate of appealability. Those issues are as follows: whether the resentencing court impermissibly failed to consider the disparate sentences of Clabourne's co-defendants as a mitigating factor; whether the resentencing court acted with bias in imposing his capital sentence; whether the resentencing court impermissibly considered victim impact statements; whether Arizona's aggravating factor statute is unconstitutionally vague; and whether the resentencing court acted vindictively. After ordering the parties to submit supplemental briefing on most of the uncertified issues, we applied the certificate of appealability standard articulated in *Miller–El v. Cockrell,* 537 U.S. 322, 123 S.Ct. 1029, 154 L.Ed.2d 931 (2003), to all of the uncertified claims. *Miller–El* requires a petitioner to demonstrate "that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Id.* at 338, 123 S.Ct. 1029 (internal quotations and citation omitted). We agree with the district court's determination that these uncertified claims do not meet this standard. *See Bible v. Ryan,* 571 F.3d 860, 872 n. 5 (2009).

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868 F.3d 753
United States Court of Appeals,
Ninth Circuit.

Scott D. CLABOURNE, Petitioner-Appellant,
v.
Charles L. RYAN, Respondent-Appellee.

No. 09-99022
|
Filed August 1, 2017

D.C. No. 4:03-cv-00542-RCC

Attorneys and Law Firms

S. Jonathan Young, Williamson & Young PC, Tucson, Arizona, for Petitioner-Appellant.

Jeffrey A. Zick (argued), Jacinda A. Lanum, and Amy Pignatella Cain, Assistant Attorneys General; Lacey Stover Gard and Kent Cattani, Capital Litigation Section Chief Counsel; Mark Brnovich, Attorney General; Office of the Attorney General, Tucson, Arizona; for Respondent-Appellee.

Before: Marsha S. Berzon, Richard R. Clifton, and Sandra S. Ikuta, Circuit Judges.

Concurrence by Judges Clifton and Ikuta;

Dissent by Judge Berzon

ORDER

Judges Clifton and Ikuta have voted to deny the petition for panel rehearing. Judge Berzon has voted to grant the petition for panel rehearing.

Judge Ikuta has voted to deny the petition for rehearing en banc, and Judge Clifton so recommends. Judge Berzon has voted to grant the petition for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc, and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for panel rehearing and the petition for rehearing en banc are therefore **DENIED**.

CLIFTON and IKUTA, Circuit Judges, concurring in the denial of rehearing:

After careful consideration of this case, including a close review of the decision of the Arizona Supreme Court, *State v. Clabourne*, 194 Ariz. 379, 983 P.2d 748 (1999) (en banc), we entered a unanimous opinion that concluded that the Arizona court "gave Clabourne's mental illness some nonstatutory mitigating weight but ultimately held that the mitigating circumstances were insufficient to warrant leniency." *Clabourne v. Ryan*, 745 F.3d 362, 369–70 (9th Cir. 2014). After explaining the basis for our determination that the Arizona Supreme Court had given mitigating weight to Clabourne's mental deficiencies, we concluded, at 373:

> We cannot construe the court to have violated *Eddings* [*v. Oklahoma*, 455 U.S. 104, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982)] by giving Clabourne's mental health issues ***754** "no weight by excluding such evidence from their consideration." *Eddings*, [at 115]. The Arizona Supreme Court's decision under review was not contrary to federal law, because it considered Clabourne's mental health condition as mitigating evidence. *Eddings* requires no more.

Although there have been developments in our court's precedents since we filed our opinion, none alter our assessment of what the Arizona Supreme Court did in resolving Clabourne's appeal. We do not doubt the sincerity of Judge Berzon's current view, but we conclude that our previous analysis of that court's action, which she joined, remains correct.

BERZON, Circuit Judge, dissenting from the denial of rehearing:
I dissent from the denial of rehearing in this case.

We held the rehearing petition in this case for *McKinney v. Ryan*, 813 F.3d 798 (9th Cir. 2015) (en banc), *cert. denied*, — U.S. —, 137 S.Ct. 39, 196 L.Ed.2d 197 (2016), an en banc opinion of this court issued after our panel opinion, and then ordered supplemental briefing about the impact of *McKinney*. *See* Order to File Supplemental Briefs, *Clabourne v. Ryan*, 745 F.3d 362, 371 (9th Cir.

2014) (No. 09-99022). Ignoring both that briefing and *McKinney* itself, the panel majority now refuses to rehear the case. I am convinced that we are obligated to do so and, in light of *McKinney*, to grant the petition for habeas corpus with regard to the penalty phase. *See, e.g.*, *Hedlund v. Ryan*, 815 F.3d 1233, 1236 (9th Cir. 2016), *amended and superseded on denial of rehearing en banc*, 854 F.3d 557 (9th Cir. 2017) (withdrawing original panel opinion and reconsidering a petitioner's claim in light of the intervening decision in *McKinney*).

I.

In *McKinney*, an en banc panel of this court stated unequivocally that, from the late 1980s to 2002, the "Supreme Court of Arizona articulated and applied a 'causal nexus' test for nonstatutory mitigation that forbade as a matter of law giving weight to mitigating evidence, such as family background or mental condition, unless the background or mental condition was causally connected to the crime." 813 F.3d at 802. That causal nexus test, we held, violated *Eddings v. Oklahoma*, 455 U.S. 104, 114, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982), which bars a sentencing court in a capital case from refusing as a matter of law to consider any relevant mitigating evidence. *McKinney*, 813 F.3d at 802.

McKinney emphasized repeatedly the consistency with which the Arizona Supreme Court articulated and applied the unconstitutional causal nexus rule during the relevant period. *Id.* at 824 ("[T]he Arizona Supreme Court, during a period of just over fifteen years, consistently insisted upon and applied its causal nexus test to nonstatutory mitigation. In no case during this period did the court give any indication that the causal nexus test was not the law in Arizona, or any indication that it had the slightest doubt about the constitutionality of the test."); *see also id.* at 803, 815, 826. It was in 1999 that the Arizona Supreme Court affirmed Clabourne's death sentence, which, like the timing of the decision in *McKinney*, was "roughly in the middle of the fifteen-year-plus period during which it insisted on its unconstitutional nexus test for nonstatutory mitigation." *See id.* at 820.

Of course, *McKinney* does not dispose of Clabourne's petition for rehearing outright. But *McKinney*'s holding that the Arizona Supreme Court consistently applied an unconstitutional rule at the time it reviewed Clabourne's sentence provides ***755** the baseline from which we must review the decision in *State v. Clabourne*, 194 Ariz. 379, 983 P.2d 748 (1999) (en banc) ("*Az Clabourne*"), and interpret any ambiguity therein.

Critically, *McKinney* also overruled the requirement established in *Schad v. Ryan*, 671 F.3d 708, 724 (9th Cir. 2011), that a federal habeas court may grant a petitioner relief on an *Eddings* claim only if there is a "clear indication in the record" that a state court refused as a matter of law to consider relevant nonstatutory mitigation evidence. *McKinney*, 813 F.3d at 819. *McKinney* held instead that a federal habeas court examining a claimed *Eddings* error need give a state court decision only the normal deference required under the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"). *Id.* In adhering to *Schad*'s "clear indication" test, *see Clabourne v. Ryan*, 745 F.3d 362, 371, 373 (9th Cir. 2014), the panel opinion thus depends upon a standard that an en banc panel of this court expressly rejected as "an inappropriate and unnecessary gloss on the deference already required under" AEDPA, *see McKinney*, 813 F.3d at 819.

In short, by denying Clabourne's petition for rehearing and leaving the opinion in this case unamended, the panel majority does not grapple with the significance of the intervening decision in *McKinney*, with regard either to its holding that the Arizona Supreme Court consistently applied an unconstitutional causal nexus rule during the relevant period or to its rejection of *Schad*'s heightened standard of review. At a minimum then—whatever the proper outcome—the panel opinion's reasoning as it stands is inconsistent with the current law of this circuit and should be reconsidered.

But, the problem is not, in my view, one that can be simply papered over by revisions to the existing panel opinion. Rather, if the reliance on *Schad* is eliminated, as it must be, and *McKinney* is properly applied, we must change the outcome of this case by granting the petition for habeas corpus with regard to the penalty phase.

II.

In light of *McKinney*'s review of Arizona case law during the period *Az Clabourne* was decided, and absent the *Schad* mandate that we find a "clear indication in the record" that the state court committed *Eddings* error, I am

convinced that *Az Clabourne* applied the unconstitutional causal nexus test identified in *McKinney* by declining to consider evidence of Clabourne's schizophrenia as a nonstatutory mitigating factor.

The Arizona Supreme Court initially addressed Clabourne's mental health conditions in the context of statutory mitigation under Arizona Revised Statutes § 13-703(G)(1), impaired capacity. *Az Clabourne*, 194 Ariz. at 385, 983 P.2d 748. Statutory mitigation based on impaired capacity is available in Arizona only when mental illness is a "*major contributing cause*" of the defendant's conduct *and* the substantive requirements of (G)(1) are met. *Id.* (emphasis in original) (citation omitted). Substantively, "[t]he statute calls for 'significant' impairment of one of two specific abilities: (1) the capacity to appreciate the wrongfulness of conduct or (2) the capacity to conform conduct to the requirements of the law." *Id.*; *see* Ariz. Rev. Stat. § 13-703(G)(1) (current version at Ariz. Rev. Stat. § 13-751(G)(1)).

In considering whether Clabourne was entitled to statutory mitigation for impaired capacity, the Arizona Supreme Court first recounted the evidence related to Clabourne's mental health. Two mental health experts believed Clabourne suffered from mental illness, probably schizophrenia ***756** , and another believed he had a personality disorder. *Az Clabourne*, 194 Ariz. at 385, 983 P.2d 748. Nevertheless, these experts agreed "that there was no evidence of Clabourne's state of mind at the particular time of the offense." *Id.* In particular, the experts "could [not] say whether [Clabourne] was 'psychotic,' " and none had "stated or implied a causal relationship between Clabourne's mental health and the murder." *Id.* "Neither did any nonexpert party, including Clabourne, indicate that Clabourne had lost contact with reality or acted abnormally when he participated in the crime." *Id.*

After emphasizing the requirement that mental illness be a "*major contributing cause*" of the defendant's conduct for a finding of impaired capacity under the statute, the court held Clabourne's "status of being mentally ill alone [ ] insufficient to support a (G)(1) finding." *Id.* (emphasis in original).

The Arizona Supreme Court then proceeded to consider, still in the context of statutory mitigation, Clabourne's argument that "his mental illness causes a passivity and paranoia that allowed Langston to control him, and therefore he was unable to resist Langston's pressure to rape and kill Webster." *Id.* at 386, 983 P.2d 748. The court had earlier in its discussion of impaired capacity noted that "[t]he record does demonstrate that Langston was a manipulative and frightening man who, for the most part, choreographed the crime and urged Clabourne to kill Webster." *Id.* at 385, 983 P.2d 748. Accordingly, whereas the court rejected Clabourne's status of being mentally ill because there was no causal link, the court rejected Clabourne's passive personality and paranoia as a basis for mitigation under subsection (G)(1) because Clabourne had not satisfied the statute's *substantive* standard. That is, Clabourne had not demonstrated "that his capacity to conform his conduct to the requirements of the law was significantly impaired" because he had shown neither that "he was passive or paranoid to any degree of impairment [n]or that he had actually lost any control over his conduct when he committed the murder." *Id.* at 386, 983 P.2d 748; *see* Ariz. Rev. Stat. § 13-703(G)(1) (current version at Ariz. Rev. Stat. § 13-751(G)(1)).

When the Arizona Supreme Court turned to Clabourne's mental health in the context of *nonstatutory* mitigating circumstances, it addressed only the specific fact that "Clabourne has a passive personality and that he is impulsive and easily manipulated by others." *Id.* at 387, 983 P.2d 748. As the court had indicated earlier, there was a plausible causal connection between *these* personality traits and the crime, given Langston's manipulative personality and his leadership role in Webster's murder. *See id.* at 385, 983 P.2d 748. So, under the Arizona Supreme Court's causal nexus standard, those traits required weighing as to nonstatutory mitigation. The court recognized Clabourne's passive personality and related characteristics to be "rooted to some degree in his mental health problems," *id.* at 387, 983 P.2d 748, but, as I have explained, it considered those problems distinct from his schizophrenia diagnosis. It was thus only as to the specific "mental and personality deficiencies" of passive personality, impulsiveness, and manipulability—which *did* have a connection to the crime—that the court "afford[ed] some nonstatutory mitigating weight." *Id.*

That the court gave some nonstatutory mitigating weight only to *these* specific mental and personality deficiencies, and *not* to his schizophrenia, is further evidenced by the court's justification (in the very next sentence) for ultimately granting those characteristics little mitigating

***757** weight. *See id.* The court highlighted Clabourne's "active participation throughout the six-hour ordeal and the fact that he personally strangled and stabbed Webster," holding that those facts "render[ed] negligible any mitigating effect [of] Clabourne's problems and the traits they manifest." *Id.* Clabourne's active involvement in a lengthy crime was pertinent to weighing the evidence that Clabourne had a passive, impulsive, and manipulable personality, but that active involvement would have no bearing on what mitigating weight to give a schizophrenia diagnosis.

To hold that the Arizona Supreme Court refused to consider Clabourne's schizophrenia at the nonstatutory mitigation phase thus does not, as the panel opinion suggests, require reaching the "illogical [ ] conclu[sion] that the Arizona Supreme Court considered [Clabourne's schizophrenia] diagnosis and explicitly referenced it in one portion of its opinion but forgot it when considering nonstatutory mitigation, discussed just a few pages later in the opinion." *Clabourne*, 745 F.3d at 374. The better inference, in light of *McKinney* and based on the reasoning and structure of *Az Clabourne*, is that the Arizona Supreme Court applied its causal nexus test—which, *McKinney* held, was its governing standard at the time, consistently applied—to exclude Clabourne's schizophrenia from consideration as a nonstatutory mitigating factor.

This understanding is bolstered by the fact that the Arizona Supreme Court expressly applied the causal nexus standard in the very next subsection of the nonstatutory mitigation discussion. The court rejected Clabourne's evidence of his dysfunctional family background because "[w]hatever the difficulty in Clabourne's family life, he has failed to link his family background to his murderous conduct or to otherwise show how it affected his behavior." *Az Clabourne*, 194 Ariz. at 387, 983 P.2d 748 (citing *State v. Spears*, 184 Ariz. 277, 293–94, 908 P.2d 1062 (1996)).

The conclusion that the Arizona Supreme Court applied the unconstitutional causal nexus test to preclude consideration of Clabourne's schizophrenia diagnosis as a nonstatutory mitigating factor is further supported by the Arizona Supreme Court's citation to its own decision in *Az Clabourne* in later cases when applying the causal nexus standard. *See, e.g.*, *State v. Carlson*, 202 Ariz. 570, 586, 48 P.3d 1180 (2002) (en banc); *State v. Cañez*, 202 Ariz. 133, 164, 42 P.3d 564 (2002) (en banc). Those later citations to *Az Clabourne* for the causal nexus standard are relevant in light of *McKinney*. To the extent *Towery v. Ryan*, 673 F.3d 933, 946 (9th Cir. 2012), limited our review in habeas cases to the record in the case before us, barring consideration of post-hoc characterizations of a decision by a state court, *Towery* is inconsistent with *McKinney* and so does not control. *McKinney* looked freely beyond the record of the case before it, examining Arizona Supreme Court decisions in numerous other cases to establish that court's pattern of applying an unconstitutional rule. [1] Of course, later Arizona Supreme Court citations to *Az Clabourne* for the causal nexus standard are not dispositive, as a federal habeas court may grant relief only based on an error in the decision adjudicating a petitioner's claim. *See* 28 U.S.C. § 2254(d). But those later decisions do corroborate what a careful reading of the opinion, in light of *McKinney*, demonstrates. [2]

***758** Again, that *Az Clabourne* applied the unconstitutional nexus test disapproved in *McKinney* is no wonder. As *McKinney* held, the Arizona courts applied the unconstitutional nexus test *consistently* during the period it decided *Az Clabourne*. "A good court [ ] does not apply an established rule erratically, enforcing it arbitrarily in some cases but not in others. We have great respect for the Supreme Court of Arizona, whose institutional integrity is demonstrated, *inter alia*, by the consistent application of the causal nexus test during the fifteen-year period it was in effect." *McKinney*, 813 F.3d at 826. To hold, as does the current panel opinion, that the Arizona Supreme Court for some unexplained reason did not apply its own prior precedents in this case alone is to disregard not only *McKinney* but the Arizona Supreme Court's own later references to this case as one in which the nexus requirement *was* applied.

In sum, after *McKinney*, I see no choice but to grant Clabourne's petition and remand this case for resentencing. There is just no principled way to reconcile the panel opinion's reasoning and holding with this court's en banc opinion. I would rehear this case and grant the petition for habeas corpus with regard to the penalty phase. I therefore strongly dissent from the panel's refusal to do either.

All Citations

868 F.3d 753 (Mem), 17 Cal. Daily Op. Serv. 7380, 2017 Daily Journal D.A.R. 7444

Footnotes

1 *McKinney* also held *Towery* was wrongly decided as to the *Eddings* issue in that case, further undermining *Towery*'s persuasive value. *See McKinney*, 813 F.3d at 824.

2 Similarly, the prosecutor's arguments at Clabourne's resentencing hearing regarding a causal nexus confirm that Arizona law required such a nexus at the time Clabourne was resentenced, as *McKinney* held.

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UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

AUG 10 2017

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

SCOTT D. CLABOURNE,

Petitioner - Appellant,

v.

CHARLES L. RYAN,

Respondent - Appellee.

No. 09-99022

D.C. No. 4:03-cv-00542-RCC
U.S. District Court for Arizona, Tucson

MANDATE

The judgment of this Court, entered March 05, 2014, takes effect this date.

This constitutes the formal mandate of this Court issued pursuant to Rule 41(a) of the Federal Rules of Appellate Procedure.

FOR THE COURT:

MOLLY C. DWYER
CLERK OF COURT

By: Synitha Walker
Deputy Clerk
Ninth Circuit Rule 27-7