APPENDIX

APPENDIX A

SUPREME COURT OF ARIZONA

STATE OF ARIZONA,

Appellee,

v.

JAMES ERIN MCKINNEY,

Appellant.

No. CR-93-0362-AP

Filed September 27, 2018

The Honorable Steven Douglas Sheldon, Judge
No. CR1991-090926 (B)

Independent Review of Capital Sentence
SENTENCE AFFIRMED

COUNSEL:

Mark Brnovich, Arizona Attorney General, Dominic E. Draye, Solicitor General, Lacey Stover Gard, Chief Counsel, Capital Litigation Section, Jeffrey L. Sparks (argued), Assistant Attorney General, Phoenix, Attorneys for State of Arizona

Sharmila Roy (argued), Laveen, Attorney for James Erin McKinney

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JUSTICE GOULD authored the opinion of the Court, in which CHIEF JUSTICE BALES, VICE CHIEF JUSTICE BRUTINEL and JUSTICES PELANDER, TIMMER, BOLICK, and JUDGE VÁSQUEZ* joined.

JUSTICE GOULD, opinion of the Court:

¶1 We previously affirmed James Erin McKinney's two death sentences on independent review. *State v. McKinney* (*McKinney I*), 185 Ariz. 567, 587 (1996). However, in *McKinney v. Ryan* (*McKinney V*), 813 F.3d 798, 804, 823–24 (9th Cir. 2015) (en banc), the Ninth Circuit Court of Appeals held that *McKinney I* applied an unconstitutional "causal nexus" test to McKinney's mitigation evidence. We subsequently granted the State's motion to conduct a new independent review of McKinney's death sentences and, following such review, we affirm both sentences.

I.

¶2 In March 1991, McKinney and his half-brother, Charles Michael Hedlund, burglarized the home of Christine Mertens. *McKinney I*, 185 Ariz. at 572. Inside the residence, McKinney beat Mertens and stabbed her several times before holding her face-

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* Justice John R. Lopez IV has recused himself from this case. Pursuant to article 6, section 3, of the Arizona Constitution, the Honorable Garye L. Vásquez, Judge of the Arizona Court of Appeals, Division Two, was designated to sit in this matter.

down on the floor and shooting her in the back of the head. *Id.* Two weeks later, the brothers burglarized the home of sixty-five-year-old Jim McClain and shot him in the back of the head while he slept in his bed. *Id.* The cases were consolidated for trial, and a jury found McKinney guilty of first degree murder as to both victims. *Id.*

¶3 During the sentencing phase, the trial court found several aggravating and mitigating circumstances. *See infra* ¶¶ 7–9, 15–16. After determining that the mitigating circumstances were not sufficiently substantial to call for leniency, the court sentenced McKinney to death for both murders. *McKinney I*, 185 Ariz. at 571.

¶4 We affirmed McKinney's convictions and sentences upon independent review. *Id.* at 587. McKinney subsequently filed a petition for habeas corpus, which the federal district court denied. *McKinney v. Ryan*, 2009 WL 2437238 (D. Ariz. 2009). On appeal, the Ninth Circuit reversed and remanded the case to the federal district court with instructions to grant McKinney's writ of habeas corpus "unless the [S]tate, within a reasonable period, either corrects the constitutional error in his death sentence or vacates the sentence and imposes a lesser sentence consistent with law." *Id.* at 827.

¶5 Following the Ninth Circuit's reversal in *McKinney V*, the State requested this Court to conduct a new independent review. McKinney opposed that motion, arguing that in light of *Ring v. Arizona*, 536 U.S. 584 (2002), he is entitled to a new sentencing trial before a jury. We disagree. Independent review is warranted here because McKinney's case was "final" before the decision in

Ring. *See State v. Styers*, 227 Ariz. 186, 187–88 ¶¶ 5–6 (2011) (holding that "[b]ecause Styers had exhausted available appeals, his petition for certiorari had been denied, and the mandate had issued almost eight years before *Ring* was decided, his case was final, and he therefore is not entitled to have his case reconsidered in light of *Ring*").

II.

¶6 In conducting our independent review in pre-*Ring* cases like this, we examine "the trial court's findings of aggravation and mitigation and the propriety of the death sentence," and determine whether the defendant's proffered mitigation "is sufficiently substantial to warrant leniency in light of the existing aggravation." A.R.S. § 13–755(A); *see Styers*, 227 Ariz. at 188 ¶ 7. We must consider and weigh all mitigation evidence regardless of whether it bears a causal nexus to the underlying murders. *State v. Newell*, 212 Ariz. 389, 405 ¶ 82 (2006); *see also Eddings v. Oklahoma*, 455 U.S. 104, 112 (1982) (requiring sentencer to consider all relevant mitigating evidence). However, the lack of "a causal connection may be considered in assessing the quality and strength of the mitigation evidence." *Newell*, 212 Ariz. at 405 ¶ 82; *cf. Eddings*, 455 U.S. at 114–15 ("The sentencer, and the Court of Criminal Appeals on review, may determine the weight to be given relevant mitigating evidence.").

A.

¶7 There is no reasonable doubt as to the aggravating circumstances found by the trial court regarding Mertens' murder. Specifically, McKinney (1) committed the murder with the expectation of

pecuniary gain pursuant to former A.R.S. § 13-703(F)(5) (now § 13-751(F)(5)),[1] and (2) he killed Mertens in an especially heinous, cruel or depraved manner, pursuant to § 13-751(F)(6).

¶8 McKinney proved several mitigating circumstances. The record shows that he endured a horrific childhood. At the sentencing hearing, McKinney's sister and aunt testified that McKinney was verbally and physically abused by his stepmother. McKinney also experienced severe neglect. His stepmother frequently deprived him of food, forced him to live in filthy conditions and wear soiled clothes, and regularly locked him out of the home in extreme temperatures. *See McKinney V*, 813 F.3d at 805–06 (summarizing McKinney's evidence regarding childhood abuse and neglect).

¶9 McKinney also suffered from Post–Traumatic Stress Disorder ("PTSD") at the time of the murders. Dr. Mickey McMahon, a clinical psychologist, evaluated McKinney and testified that McKinney's PTSD was caused by the abuse and trauma he experienced as a child.

¶10 Given the aggravating circumstances in this case, we conclude that McKinney's mitigating evidence is not sufficiently substantial to warrant leniency. In weighing McKinney's mitigation evidence, we take into account the fact that it bears little or no relation to his behavior during Mertens' murder. For example, Dr. McMahon testified that due to the PTSD, he believed that McKinney would

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[1] A.R.S. § 13-703, the effective statute at the time of McKinney's crimes and first appeal, was renumbered as § 13-751 in 2008. We refer to the current version of the statute.

"rather withdraw from [a] situation" in which he might encounter violence, and that his evaluation of McKinney "did not indicate that he was [a] thrill-seeking kind of person" who would murder someone in cold blood. However, McKinney's actions during the Mertens murder were planned and deliberate. Specifically, McKinney entered Mertens' home armed with a gun and knowing she was inside (because her car was parked outside). Additionally, after invading Mertens' home, he intentionally beat, stabbed, and shot her.

¶11 We accord McKinney's remaining mitigation minimal weight. For example, he argues that his age (twenty-three) at the time of the murders is a mitigator warranting leniency. In deciding how heavily to weigh a defendant's age in mitigation, we consider the "defendant's level of intelligence, maturity, involvement in the crime, and past experience." *State v. Jackson*, 186 Ariz. 20, 30 (1996).

¶12 Here, McKinney was the leader in planning and executing the burglaries and expressed a willingness to kill to make them successful. We therefore give little weight to McKinney's age. *See State v. Garza*, 216 Ariz. 56, 72 ¶ 82 (2007) ("Age is of diminished significance in mitigation when the defendant is a major participant in the crime, especially when the defendant plans the crime in advance.").

¶13 McKinney also argued at sentencing that residual doubt as to his guilt calls for leniency. However, this Court has previously stated that "[o]nce a person is found guilty beyond a reasonable doubt, claims of innocence or residual doubt do not

constitute mitigation for sentencing purposes." *State v. Moore*, 222 Ariz. 1, 22 ¶ 133 (2009).

¶14 In contrast to the proffered mitigation, the (F)(5) aggravator weighs heavily in favor of a death sentence. We agree with the conclusion reached in *McKinney I*:

> In comparison to the mitigating circumstances here, the quality of the [pecuniary gain] aggravating circumstance is great. . . . [T]his is not the case of a convenience store robbery gone bad but, rather, one in which pecuniary gain was the catalyst for the entire chain of events leading to the murders. The possibility of murder was discussed and recognized as being a fully acceptable contingency.

185 Ariz. at 584.

¶15 Additionally, the (F)(6) aggravator is entitled to great weight. The evidence shows that Mertens struggled to stay alive while McKinney stabbed and beat her. *See State v. Jones*, 185 Ariz. 471, 487 (1996) (stating that cruelty focuses on the mental anguish or physical abuse inflicted by the defendant on the victim before her death); *State v. Lopez*, 175 Ariz. 407, 411 (1993) (holding that murder was especially cruel where victim suffered numerous injuries during a struggle). The medical examiner testified that Mertens was beaten, stabbed multiple times, suffered several defensive wounds, and sustained a broken finger before being held face down on the floor and shot in the back of the head. When her son found her body, Mertens was covered with blood and there was a pillow over her head. The carpet was soaked with blood, the telephone and cord were

strewn on the floor, and Mertens' glasses were broken, indicating a struggle.

B.

¶16 There is also no reasonable doubt as to the following aggravating circumstances found by the trial court regarding McClain's murder: (1) McKinney was convicted of another offense (first degree murder of Mertens) for which a sentence of life imprisonment or death was imposable under Arizona law, under § 13-751(F)(1); and (2) he committed the murder with the expectation of pecuniary gain pursuant to A.R.S. § 13- 751(F)(5).

¶17 McKinney proffered the same mitigation for both the McClain and Mertens murders. For the reasons discussed above, we place minimal weight on McKinney's mitigation. *See supra* ¶¶ 10–12. As part of this weighing, we simply note again that there is little or no connection between McKinney's mitigation and his behavior during the murder. For example, Dr. McMahon opined that burglarizing a home and shooting a sleeping man would be "the exact opposite" of what he would expect McKinney to do when affected by his PTSD.

¶18 In contrast, the aggravators for the McClain murder are particularly weighty. *See McKinney V*, 813 F.3d at 823 ("We recognize that there were important aggravating factors in this case. . . . McKinney [was] involved, as either the actual killer or as an accessory, in two murders; the murders had been done for pecuniary gain. . . ."). The (F)(1) aggravator involves the commission of multiple homicides and is therefore "extraordinarily weighty." *State v. Hampton*, 213 Ariz. 167, 184 ¶ 81 (2006) (discussing the extraordinary weight accorded the

(F)(8) multiple homicides aggravator); *Garza*, 216 Ariz. at 72 ¶ 81 (same). Additionally, (F)(5) is a strong aggravator in the McClain murder. *See supra* ¶ 14. The crime was planned and deliberate. McKinney and Hedlund targeted McClain as a victim in order to rob him. Additionally, as was the case for the Mertens murder, McKinney had previously stated his intent to kill anyone he encountered during the burglary, which was evidenced by the fact he and Hedlund were armed when they entered McClain's home and then shot the unarmed victim as he slept in his bed. *See supra* ¶ 12.

CONCLUSION

¶19 For the reasons discussed above, we affirm McKinney's death sentences.

APPENDIX B

SUPREME COURT OF ARIZONA

STATE OF ARIZONA,

Appellee,

v.

JAMES ERIN MCKINNEY,

Appellant.

Arizona Supreme Court
No. CR-93-0362-AP

Maricopa County
Superior Court
No. CR-91-090926 (B)

FILED 10/23/2018

ORDER

The Court having reviewed Appellee's Motion for Reconsideration filed October 12, 2018,

IT IS ORDERED denying the motion.

Dated this 23rd day of October, 2018.

/s/
Andrew W. Gould
Justice

TO:

Lacey Stover Gard

Jeffrey L Sparks

Sharmila Roy

James Erin McKinney, ADOC 055778, Arizona State Prison, Florence - Central Unit

Dale A Baich

Timothy R Geiger

Amy Armstrong

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JAMES ERIN MCKINNEY,
Petitioner-Appellant,
v.
CHARLES L. RYAN,
Respondent-Appellee.

No. 09-99018

Argued and Submitted En Banc
December 15, 2014

Filed December 29, 2015

Appeal from the United States District Court for the District of Arizona, David G. Campbell, District Judge, Presiding. D.C. No. 2:03-cv-00774-DGC.

Before: SIDNEY R. THOMAS, Chief Judge, and ALEX KOZINSKI, KIM MCLANE WARDLAW, WILLIAM A. FLETCHER, RONALD M. GOULD, MARSHA S. BERZON, RICHARD C. TALLMAN, CONSUELO M. CALLAHAN, CARLOS T. BEA, MORGAN CHRISTEN and JACQUELINE H. NGUYEN, Circuit Judges.

Opinion by Judge W. FLETCHER; Dissent by Judge BEA.

OPINION

W. FLETCHER, Circuit Judge:

Petitioner James McKinney was sentenced to death, and his sentence was affirmed by the Arizona Supreme Court on *de novo* review in 1996. *State v. McKinney*, 185 Ariz. 567, 917 P.2d 1214 (1996). A three-judge panel of this court denied McKinney's petition for a writ of habeas corpus. *McKinney v. Ryan*, 730 F.3d 903 (9th Cir.2013). We granted rehearing en banc and withdrew our three-judge panel opinion. *McKinney v. Ryan*, 745 F.3d 963 (9th Cir.2014). In his federal habeas petition, McKinney challenges both his conviction and sentence. We agree with the decision of the three-judge panel with respect to McKinney's challenges to his conviction, and to that extent we incorporate the decision of the panel. We address in this opinion only McKinney's challenge to his death sentence. For the reasons that follow, we grant the petition with respect to his sentence.

In *Eddings v. Oklahoma*, 455 U.S. 104, 114, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982), the Supreme Court held under the Eighth and Fourteenth Amendments that a sentencer in a capital case may not "refuse to consider, *as a matter of law*, any relevant mitigating evidence" offered by the defendant. (Emphasis in original.) Oklahoma state courts had refused, as a matter of law, to treat as relevant mitigating evidence a capital defendant's background of family violence, including beatings by his father, on the

ground that "it did not tend to provide a legal excuse from criminal responsibility." *Id.* at 113, 102 S.Ct. 869. The Supreme Court reversed. Recognizing the special character of the death penalty, the Court held that evidence of Eddings's background of family violence had to be treated as relevant evidence in determining whether to put him to death. The Court wrote, "The sentencer, and the Court of Criminal Appeals on review, may determine the weight to be given relevant mitigating evidence. But they may not give it no weight by excluding such evidence from their consideration." *Id.* at 114–15, 102 S.Ct. 869.

At all times relevant to this case, Arizona law provided for two kinds of mitigation factors in capital sentencing—statutory and nonstatutory. A nonexhaustive list of five statutory mitigating factors was provided in Ariz.Rev.Stat. Ann. § 13-703(G). Arizona case law applied, in addition, nonstatutory mitigating factors, such as a difficult family background or a mental condition not severe enough to qualify as a statutory mitigating factor.

For a period of a little over 15 years in capital cases, in clear violation of *Eddings*, 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. In *State v. Wallace*, 160 Ariz. 424, 773 P.2d 983, 986 (1989), decided seven years after *Eddings* and four years before petitioner was sentenced, the Arizona Supreme Court wrote, "A difficult family background, in and of itself, is not a mitigating

circumstance. . . . A difficult family background is a relevant mitigating circumstance if a defendant can show that something in that background had an effect or impact on his behavior that was beyond the defendant's control." In *State v. Ross*, 180 Ariz. 598, 886 P.2d 1354, 1363 (1994), decided one year after petitioner was sentenced but before his sentence was affirmed on appeal, the Arizona Supreme Court wrote, citing the precise page in *Wallace*, "A difficult family background is not a relevant mitigating circumstance unless 'a defendant can show that something in that background had an effect or impact on his behavior that was beyond the defendant's control.' *State v. Wallace*, . . . 160 Ariz. 424, 773 P.2d 983, 986 (1989)."

Two years after its decision in *Ross*, the Arizona Supreme Court affirmed McKinney's death sentence. In addressing the potential mitigating effect of his mental condition, the Court wrote that McKinney's PTSD had no causal nexus to his crimes. If anything, the Court wrote, "the effects of [his] childhood, specifically the diagnosis of post-traumatic stress disorder (PTSD)" would have influenced him *not* to commit the crimes. *McKinney*, 917 P.2d at 1234. The Court concluded its analysis of McKinney's PTSD, citing the precise page in *Ross* on which it had articulated the causal nexus test for nonstatutory mitigation: "[A] difficult family background, including childhood abuse, does not necessarily have substantial mitigating weight absent a showing that it significantly affected or impacted the defendant's ability to perceive, comprehend, or control his actions. *See State v. Ross*, . . . 180 Ariz. 598, 886 P.2d

1354, 1363 (1994)." *State v. McKinney*, 185 Ariz. 567, 917 P.2d 1214, 1234 (1996).

For just over fifteen years, the Arizona Supreme Court consistently articulated and applied its causal nexus test, in accordance with its strong view of stare decisis. *See Young v. Beck*, 227 Ariz. 1, 251 P.3d 380, 385 (2011) ("[S]tare decisis commands that 'precedents of the court should not be lightly overruled,' and mere disagreement with those who preceded us is not enough." (quoting *State v. Salazar*, 173 Ariz. 399, 416, 844 P.2d 566 . . . (1992))); *State ex re. Woods v. Cohen*, 173 Ariz. 497, 844 P.2d 1147, 1148 (1993) (referring to "a healthy respect for stare decisis"); *State v. Williker*, 107 Ariz. 611, 491 P.2d 465, 468 (1971) (referring to "a proper respect for the theory of stare decisis"); *White v. Bateman*, 89 Ariz. 110, 358 P.2d 712, 714 (1961) (prior case law "should be adhered to unless the reasons of the prior decisions have ceased to exist or the prior decision was clearly erroneous or manifestly wrong").

The case before us is unusual. In federal habeas cases under the Antiterrorism and Effective Death Penalty Act ("AEDPA"), we apply a "presumption that state courts know and follow the law" and accordingly give state-court decisions "the benefit of the doubt." *Woodford v. Visciotti*, 537 U.S. 19, 24, 123 S.Ct. 357, 154 L.Ed.2d 279 (2002). If the Arizona Supreme Court during the relevant period had been inconsistent in its articulation and application of its unconstitutional "causal nexus" test for nonstatutory mitigation, we would give the Court the benefit of the doubt and would accord it the presumption that it knew and followed governing federal law. But the Arizona Supreme Court's consistent articulation and

application of its causal nexus test, and its citation in McKinney's case to the specific page of *Ross* on which it articulated the test, make such a course impossible. While *Visciotti*'s presumption is appropriate in the great majority of habeas cases, the presumption is rebutted here where we know, based on its own words, that the Arizona Supreme Court did not "know and follow" federal law.

The precise question before us is whether the Arizona Supreme Court applied its unconstitutional "causal nexus" test in affirming McKinney's death sentence on *de novo* review. We must decide whether, under AEDPA, the Arizona Supreme Court refused to give weight, as a matter of law, to McKinney's nonstatutory mitigation evidence of PTSD, "contrary to . . . clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1). For the reasons that follow, we conclude that it did. We therefore grant the writ with respect to petitioner's sentence.

I. McKinney's Crimes, Conviction, and Sentence

James McKinney and his older half brother, Charles Michael Hedlund, committed two burglaries in February and March of 1991. One person was shot and killed during each of the burglaries. At the time of the crimes, McKinney was 23 years old. Hedlund was 26 years old. McKinney and Hedlund had learned about potential burglary targets from their half brother, Christopher Morris, and a friend, Joe Lemon, who had suggested Christine Mertens's home as a target. The four of them attempted to burglarize Ms. Mertens's home on February 28, 1991, but Ms. Mertens came home and they left to avoid detection.

The three half brothers, McKinney, Hedlund, and Morris, then committed two burglaries at other locations the following day.

McKinney, Hedlund, and possibly Morris went back to Ms. Mertens's house a little over a week later, on March 9, 1991. This time, Ms. Mertens was already at home. She was beaten and stabbed by one or more of the burglars. One of the burglars held Ms. Mertens down on the floor and shot her in the back of the head with a handgun, covering the gun with a pillow. (Morris turned state's evidence and testified against McKinney and Hedlund. He testified that he was at work at Burger King on the night of the Mertens murder, but Burger King had no record of him working that night.) McKinney and Hedlund later tried unsuccessfully to sell the gun. They ultimately disposed of the gun by burying it in the desert. Not quite two weeks later, on March 22, 1991, McKinney and Hedlund burglarized the home of Jim McClain, from whom Hedlund had bought a car several months earlier. Mr. McClain was asleep in the bedroom. He was shot in the back of the head by either McKinney or Hedlund. The bullet was consistent with having been fired from a sawed-off rifle owned by Hedlund.

McKinney and Hedlund were tried together before dual juries for the burglaries and homicides. McKinney's jury found him guilty of two first degree murders. Hedlund's jury found him guilty of second degree murder of Ms. Mertens and first degree murder of Mr. McClain. On July 23, 1993, the trial judge sentenced McKinney to death. The Supreme Court decision holding judge-sentencing in capital cases unconstitutional was nine years in the future.

See Ring v. Arizona, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002). In the last reasoned state court decision, the Arizona Supreme Court, reviewing *de novo*, affirmed McKinney's conviction and sentence in 1996. *McKinney*, 917 P.2d 1214. We describe the Arizona Supreme Court's sentencing decision at greater length below. McKinney filed for state post-conviction relief. His petition was denied by the trial court without an evidentiary hearing. The Arizona Supreme Court then summarily denied his petition for review.

II. McKinney's Family Background

McKinney suffered a traumatic childhood characterized by severe physical and psychological abuse, both by his biological parents, James McKinney, Sr. ("James") and Bobbie Jean Morris, and by his stepmother, Shirley Crow McKinney. At McKinney's sentencing hearing, his aunt (his father's sister), Susan Sesate, and his younger sister, Diana McKinney, described the abuse.

Susan and Diana both testified about the squalid conditions in which McKinney lived as a child. Susan testified that while McKinney's parents, James and Bobbie, were still married, their house was filthy. She testified, "[W]hen you walked through the door, it wasn't nothing to see, you know, diapers full of—all around. . . . Everything stunk." James was an alcoholic, and Bobbie left him when McKinney was about three years old.

When Bobbie left James, she took with her their three children, Diana, Donna, and McKinney. Susan testified, "She ran with them. . . . She ran to a lot of different states. I know she went to California first and Kansas twice. California again. I know she went

through Texas, New Mexico." James pursued and brought Bobbie and the children back to Arizona, but "she would run again." "As soon as he brought her back, within a week she'd be gone again to Kansas. She had the kids there." James told McKinney's presentence investigator that Bobbie had "kidnapped" the children, and that he took them back "after he found out they were being physically abused and were being locked in closets, hungry and sick."

Bobbie eventually left James for good, and he got remarried. James got custody of the children and brought them to Arizona to live with him and his new wife Shirley. The conditions in the house with James and Shirley were even worse than they had been with James and Bobbie. Susan, a teenager at the time, lived with her mother (who was also James's mother) in a house nearby. She was at the McKinney house frequently. Susan testified that the house "was gross. It was gross. I mean, the house was filthy, the kids were filthy, they never had clean clothes that I ever saw them in. If they had clothes, they were ill-fitting clothes. I mean, it was disgusting."

McKinney, his two sisters, and his older half brother Hedlund (Bobbie's son by a different father) shared one small bedroom. Shirley's daughter had a bedroom to herself. Susan testified that the floor of the four children's bedroom was always covered with dirty clothes because there were no bureaus and no hangers for the closet. There were no sheets on the beds. The children had to share their room with animals Shirley brought home, including dogs, cats, a goat, snakes, and a monkey. The animals regularly

defecated and urinated in the bedroom. Diana testified that the adults never cleaned the bedroom.

Diana was 18 months old when James took the children from Bobbie and brought them to the Arizona house he shared with his new wife Shirley. Donna was three, McKinney was four or five, and Hedlund was seven. Diana and Susan testified that the four children were responsible for all general household cooking and cleaning, including cleaning up the animal feces and urine that were "all over" the house; feeding farm animals, including cows, pigs, and goats; taking care of James's hunting dogs; doing all of their own laundry; and sometimes doing Shirley's laundry. Diana testified that she and the other children cleaned the house the best they could, but "the house still smell[ed]" all the time. Susan testified, "It was nothing to see James [Jr.] and Michael [Hedlund] standing on chairs at the stove cooking or having to stand on chairs to do the dishes" because they were too small to reach the stove and the counters. Shirley's daughter did not have to do any chores. Shirley kept the children from attending school as punishment for various supposed infractions. Susan testified that on one occasion McKinney sat on the porch for three days while the others went to school. When Susan's mother (McKinney's grandmother) sent Susan over to investigate, McKinney told her that Shirley would not allow him to go to school unless Bobbie bought him a new pair of tennis shoes. Susan's mother bought McKinney shoes so he could return to school.

The children never had regular baths and often had dirty hair. When the children went to school, they wore dirty clothes that reeked of urine from being on

the bedroom floor with the animals. The children's school sent letters home about their appearance and odor. They were regularly harassed and teased by other children. McKinney was frequently suspended for fighting on the school bus because other children made fun of his appearance and odor.

The four children suffered regular and extensive physical, verbal, and emotional abuse. Minor infractions of Shirley's rules, such as not doing the dishes properly, resulted in beatings. Diana testified that she could not recall a time when none of the children had a welt or bruise inflicted by Shirley. Susan testified, "They had bruises all the time. It was hard to tell what were new bruises and what weren't." Shirley used plastic switches, cords, belts, and a hose to hit them—"anything she could get in her hands." Diana estimated that McKinney was beaten two to three times a week. Susan testified to repeated serious beatings, including one particular beating with

> [a] water hose. It was about a yard long like that (indicating), and she had like a pocket knife, and she snipped the hose and she went after him. She beat him on the back of the head, down his back, all over his legs, his arms; anything that moved, she hit him. . . . He had bruises for weeks after that all over him. . . . Michael Hedlund tried to stop her. He grabbed her arm, and so she swung back and hit him across the side of the face and bruised his face.

Hedlund left the house to live with his mother when he was 14 years old. This left McKinney, approximately age 11, as the only boy and the oldest of the three remaining children. McKinney was too young to protect either himself or his younger

sisters. Diana, the younger of the two girls, described their childhood experience as "horrible. It was scary. It seems like we were all stressed out wondering when the next time we were getting beat; wondering when we were going to eat next."

Shirley's physical abuse was accompanied by verbal and emotional abuse. Diana testified that Shirley regularly yelled at them, telling them that they were "[s]tupid, ugly, [and] not worth anything." Diana testified that Shirley showed consistent favoritism toward her own daughter, while treating her stepchildren as the "four bad kids."

Shirley often locked the children out of the house for hours without food and, sometimes, water. There was a hose in the yard, but Susan testified that if Shirley "was really angry at them, they couldn't turn the water faucet on outside and even get a drink of water, and it would be 110 degrees outside." Susan remembered one occasion seeing the four children outside on a hot Arizona summer day, clustered in the shade of an eave of the house. None of the children had shoes; the girls were wearing only underwear, and the boys were wearing cutoff shorts with no shirts. When Susan and her mother returned to their house four hours later in the middle of the afternoon, the children were still there, their faces "beet red." They told her that they were not allowed to get any water and could not come back inside until their father got home, when he would "punish them." On another occasion, Susan testified, Shirley "pick[ed] James [Jr.] up by the scruff of the neck" and put him out on the porch with no shoes or coat during the winter, when the frozen grass "would crunch under your feet."

Shirley spent most of her time at home, while James was generally absent. When he was home, James drank heavily. Susan testified that James's mother confronted him about Shirley's physical abuse of the children, but he told her to "keep her nose out of his business." Susan testified to an incident in which McKinney, who was in first or second grade at the time, had stolen a lunch at school because Shirley and James had not given him any lunch money. McKinney was suspended for several days. James told his son that "he wasn't going to punish him for stealing lunch; he was going to punish him for getting caught."

By age nine or 10, McKinney had become distant, quiet and withdrawn. He avoided other children. He began using alcohol and marijuana at age 11. He dropped out of school in the seventh grade. At about this time, he began running away from home. Diana testified that McKinney ran away four or five times. Susan remembered one incident in which, at age 11, McKinney showed up unannounced at her house in Gilbert, Arizona after traveling alone from Oklahoma, where the family had moved. McKinney had taken a bus as far as Flagstaff, but did not have enough money to go farther. He spent the next two days hitchhiking the rest of the way to Susan's house. McKinney's arm, shoulder, and face were bruised; he told Susan he had gotten into a fight with Shirley. Susan called his mother Bobbie on the telephone to tell her that McKinney was at her house and that he was dirty and tired, and hadn't eaten in days. Bobbie did not come over to pick him up. She called the sheriff instead, who picked up McKinney and put him in juvenile detention.

III. McKinney's Post-traumatic Stress Disorder

Dr. Mickey McMahon, a psychologist, made a formal diagnosis of PTSD resulting from the horrific childhood McKinney had suffered. Before arriving at his diagnosis, Dr. McMahon had spent eight and a half hours with McKinney, talking to him and administering a battery of tests. He had also spoken with Susan for an hour and with Diana for half an hour. Finally, Dr. McMahon had listened to Susan and Diana's testimony in court before providing his own testimony. When asked, "[D]o you have any doubts about your diagnosis of James McKinney having Post-traumatic Stress Disorder?" Dr. McMahon answered, "No. None."

Dr. McMahon testified that his diagnosis of PTSD rested not only on the abuse that McKinney himself had suffered. He testified, "We know in research that witnessing can be even more damaging than actually being the recipient of abuse. . . . [T]here is a helplessness that is involved when you're witnessing . . . violence and you're too small to do anything about it." When asked whether "violence upon his sisters and brother would be . . . more traumatic to him possibly than himself," Dr. McMahon answered, "Yes." Dr. McMahon testified that his interview with McKinney "had gone into great depth about him witnessing Dian[]a being abused and beaten by her stepmother."

Dr. McMahon testified that McKinney's PTSD was characterized by "flashbacks," by "some sort of voidness, numbing, withdrawing," and by "substance abuse." The substances were "generally downers, opiates in prison, alcohol, marijuana." Dr. McMahon characterized McKinney as "basically passive," "quite

submissive," and "susceptible to manipulation, exploitation." "He can be emotionally overwhelmed by environmental stress and act in poorly-judged ways just to [re]duce the internal emotional turmoil." "He does not present [i]n the testing [as someone] who is . . . manipulative, sensation- or thrill-seeking, and we know often that people that get involved with violent kinds of crime are thrill-seeking sociopaths. These results do not look like that. It looks the opposite of that, since these tests are pretty much consistent. He is a lo[]ner; depressed."

When asked whether someone with PTSD would "suffer . . . constantly" from it, or whether it "may rear its head under certain situations," Dr. McMahon responded that for someone with PTSD "there is the potential for the trauma to be re-triggered, if things happen that are similar to what happened when you're originally traumatized." When asked about the Mertens burglary and murder, Dr. McMahon testified that if an altercation had taken place between Ms. Mertens and another person (not necessarily McKinney), it could "very possib[ly]" have "re-triggered" McKinney's trauma and could have produced "diminished capacity."

When asked about the McClain burglary and murder, Dr. McMahon testified that it would have been very uncharacteristic of McKinney to have shot a sleeping person. "Mr. McKinney's test[] results, in the more than eight hours I spent with him, did not indicate that he was that thrill-seeking kind of, execution-kind of person. He'd rather withdraw from the situation." Shooting a sleeping person "would be the exact opposite of what I would expect from Mr. McKinney."

Dr. Steven Gray, also a psychologist, testified for the prosecution. In preparation for his testimony, Dr. Gray had reviewed two presentence reports, a report prepared by Dr. McMahon, the raw data and results of tests performed by Dr. McMahon, and McKinney's school records. He had also interviewed McKinney in jail, in the company of one of his lawyers, for "an hour, hour-and-a-half." Dr. Gray had not spoken with Susan, Diana, or other family members. Dr. Gray testified, "I don't think there's enough evidence or diagnostic materials or work that's been done to conclusively diagnose [McKinney] as having Post-traumatic Stress Disorder." Dr. Gray's "tentative or provisional diagnosis" was "Antisocial Personality Disorder."

IV. Sentencing

The verdict forms submitted to McKinney's and Hedlund's juries asked only for general verdicts. The prosecutor had argued to the juries that they could find McKinney and Hedlund guilty of first degree murder either because they were guilty of actually killing Ms. Mertens or Mr. McClain, or because they were guilty of felony murder. At McKinney's sentencing hearing, the judge indicated that he believed that McKinney had shot Ms. Mertens and that Hedlund had shot Mr. McClain. But the judge recognized that the jury had not specifically found that McKinney had shot Ms. Mertens. The judge therefore relied on *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), to conclude that even if McKinney had not killed either Ms. Mertens or Mr. McClain, his involvement in the crimes leading up their murders

nevertheless made him death-eligible. He said with respect to the murder of Ms. Mertens, "[E]ven if [Helund] had committed the homicide of Mrs. Mertens, [McKinney] knew that [Hedlund] at the time of entering the McClain residence was capable of killing."

When McKinney was sentenced, Arizona provided by statute a nonexhaustive list of five specific mitigating factors. *See* Ariz.Rev.Stat. Ann. § 13-703(G) (1993). Among the statutory mitigators was a modified form of diminished capacity, contained in § 13-703(G)(1): "The defendant's capacity to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of the law was significantly impaired, but not so impaired as to constitute a defense to prosecution."

Arizona law also provided for nonstatutory mitigating factors, such as family background or mental conditions that did not rise to the level of impairment specified in § 13703(G)(1). For a little over fifteen years, from the late 1980s until 2006, Arizona Supreme Court applied a "causal nexus" test to nonstatutory mitigation factors. Under this test, evidence of a difficult family background or mental disorder was not in and of itself a relevant nonstatutory mitigating factor. As a matter of Arizona law, such evidence was relevant for nonstatutory mitigation only if it had a causal effect on the defendant's behavior in the commission of the crime at issue. Application of the causal nexus test to nonstatutory mitigation factors violated *Eddings*, for it resulted in Arizona courts being entirely forbidden, as a matter of state law, to treat as a mitigating factor a family background or a mental condition

that was not causally connected to a defendant's crime.

The trial judge sentenced McKinney to death. The judge weighed what he concluded were legally relevant aggravating and mitigating circumstances. He stated that "with respect to mitigation" he "considered" the exhibits that were admitted into evidence, and that he "did take . . . into consideration" the testimony of Susan Sestate, Diana McKinney, and Dr. McMahon. He stated as to McKinney's family history, "I agree that there was evidence of a difficult family history by the defendant. However, as I've indicated, I do not find that [it] is a substantial mitigating factor . . . ."

The judge accepted Dr. McMahon's PTSD diagnosis, but concluded that it was not causally connected to McKinney's criminal behavior. Twice the judge specifically addressed the relevance of McKinney's PTSD as a potential mitigating factor. Although the judge did not expressly so state, it appears (and we are willing to assume) that he was speaking both times in the context of statutory mitigation under § 13703(G)(1). The judge gave McKinney's PTSD no weight as a mitigating factor.

The judge stated:

> But I think more importantly than that, certainly not trying to dispute him as an expert on what all that meant, it appeared to me that Dr. McMahon did not at any time suggest in his testimony nor did I find any credible evidence to suggest that, even if the diagnosis of Post-traumatic Stress Syndrome were accurate in Mr. McKinney's case, *that [it] in any way significantly impaired Mr. McKinney's conduct*.

(Emphasis added.) He stated a short time (two transcript paragraphs) later:

> [I]t appeared to me that based upon all these circumstances that there simply was no substantial reason to believe that even if the trauma that Mr. McKinney had suffered in childhood had contributed to an appropriate diagnosis of Post-traumatic Stress Syndrome *that it in any way affected his conduct in this case.*

(Emphasis added.) Nowhere else in his sentencing colloquy did the judge specifically refer to McKinney's PTSD and its possible mitigating effect.

The italicized language in two paragraphs just quoted echoes the causal nexus test of the statutory mitigating factor in § 13-703(G)(1). When applied solely in the context of statutory mitigation under § 13-703(G)(1), the causal nexus test does not violate *Eddings*. However, the italicized language also echoes the restrictive language of Arizona's causal nexus test applicable to nonstatutory mitigation. When applied in the context of nonstatutory mitigation, the causal nexus test clearly violates *Eddings*.

The Arizona Supreme Court reviews capital sentences *de novo*, making its own determination of what constitute legally relevant aggravating and mitigating factors, and then independently weighing those factors. Ariz.Rev.Stat. Ann. § 13-755; *see also McKinney*, 917 P.2d at 1225. The Arizona Supreme Court affirmed McKinney's death sentence. The Court addressed "the effects of [McKinney's] childhood, specifically the diagnosis of post-traumatic stress disorder (PTSD)." *Id.* at 1234. The Court agreed with the trial judge that there was no

causal nexus between McKinney's PTSD and his crimes. Indeed, the Court went further, finding that McKinney's PTSD would have influenced him *not* to commit his crimes.

In sentencing McKinney to death, the Arizona Supreme Court gave no weight to McKinney's PTSD. It made no reference to statutory mitigation under § 13-703(G)(1). Instead, the Court recited its unconstitutional causal nexus test applicable to nonstatutory mitigation, citing the specific page of *Ross* on which it had articulated that test two years earlier. The Court wrote:

> [T]he record shows that the judge gave full consideration to McKinney's childhood and the expert testimony regarding *the effects of that childhood, specifically the diagnosis of post-traumatic stress disorder (PTSD)*. Assuming the diagnoses were correct, the judge found that none of the experts testified to, and none of the evidence showed, that such conditions in any way impaired McKinney's ability to conform his conduct to the law. The judge noted that McKinney was competent enough to have engaged in extensive and detailed preplanning of the crimes. McKinney's expert testified that persons with PTSD tended to avoid engaging in stressful situations, such as these burglaries and murders, which are likely to trigger symptoms of the syndrome. The judge observed that McKinney's conduct in engaging in the crimes was counter to the behavior McKinney's expert described as expected for people with PTSD. . . . [*A*] *difficult family background, including childhood abuse, does not necessarily have substantial mitigating weight absent a*

> *showing that it significantly affected or impacted the defendant's ability to perceive, comprehend, or control his actions. See State v. Ross*, 180 Ariz. 598, 607, 886 P.2d 1354, 1363 (1994)[.]

McKinney, 917 P.2d at 1234 (emphasis added).

V. Deference under AEDPA

McKinney's appeal is governed by AEDPA. Accordingly, we will not grant his petition for a writ of habeas corpus unless the state's adjudication of his claim

> (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). We review de novo the district court's decision whether to grant McKinney's habeas petition. *Dyer v. Hornbeck*, 706 F.3d 1134, 1137 (9th Cir. 2013).

Under the "contrary to" prong of § 2254(d)(1), a federal court may grant habeas relief only "if the state court arrives at a conclusion opposite to that reached by [the Supreme] Court on a question of law or if the state court decides a case differently than [the Supreme] Court has on a set of materially indistinguishable facts." *Williams v. Taylor*, 529 U.S. 362, 413, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000). Under the "unreasonable application" prong, a federal court may grant relief only if "the state court's application of clearly established federal law

was objectively unreasonable," *id.* at 409, 120 S.Ct. 1495, such that "fairminded jurists could [not] disagree that" the arguments or theories that supported the state court's decision were "inconsistent with the holding in a prior decision of [the Supreme] Court," *Harrington v. Richter*, 562 U.S. 86, 102, 131 S.Ct. 770, 178 L.Ed.2d 624 (2011) (internal quotation marks omitted).

For purposes of habeas review, we review the state court's "last reasoned decision." *Dyer*, 706 F.3d at 1137. We apply a "presumption that state courts know and follow the law." *Visciotti*, 537 U.S. at 24, 123 S.Ct. 357. "[Section] 2254(d)'s 'highly deferential standard for evaluating state-court rulings' . . . demands that state-court decisions be given the benefit of the doubt." *Id.* We "are not free to presume that a state court did not comply with constitutional dictates on the basis of nothing more than a lack of citation." *Bell v. Cone*, 543 U.S. 447, 455, 125 S.Ct. 847, 160 L.Ed.2d 881 (2005); *see also Early v. Packer*, 537 U.S. 3, 8, 123 S.Ct. 362, 154 L.Ed.2d 263 (2002) ("[AEDPA] does not require citation of our cases—indeed, it does not even require *awareness* of our cases, so long as neither the reasoning nor the result of the state-court decision contradicts them."). We should neither engage in hyper-technical analysis nor require "formulary statement[s]" that ignore "the fair import of the [state court's] opinion." *Packer*, 537 U.S. at 9, 123 S.Ct. 362. Our task is to determine what standard the state court actually applied to resolve the petitioner's claim. *See Lafler v. Cooper*, —— U.S. ——, 132 S.Ct. 1376, 1390, 182 L.Ed.2d 398 (2012).

VI. Clearly Established Law as Determined by the Supreme Court

The Supreme Court in *Lockett v. Ohio*, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978), and in *Eddings* established a clear rule governing the role of mitigating evidence in capital sentencing. In *Lockett*, Chief Justice Burger wrote a plurality opinion concluding that Ohio's death penalty statute was invalid because it restricted the mitigating circumstances that could be considered by the sentencer. The plurality concluded that under the Eighth and Fourteenth Amendments, "the sentencer . . . [must] not be precluded from considering, *as a mitigating factor*, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death" because a rule preventing "the sentencer in all capital cases from giving independent mitigating weight to aspects of the defendant's character and to circumstances of the offense proffered in mitigation creates the risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty." 438 U.S. at 604–05 , 98 S.Ct. 2954 (emphasis in original).

Four years later, in *Eddings*, the Court applied the principle articulated in Chief Justice Burger's opinion in *Lockett*. In *Eddings*, the sentencing judge had refused to consider evidence that Eddings had been raised in turbulent homes without supervision, had witnessed his mother's substance abuse, and had been beaten by his father. After "weigh[ing] the evidence of aggravating and mitigating circumstances," the sentencing judge concluded that

he could not, "in following the law . . . consider the fact of this young man's violent background." 455 U.S. at 108–09, 102 S.Ct. 869. Although the state appeals court acknowledged Eddings's family history and psychological and emotional disorders, it upheld his conviction because "all the evidence tends to show that [Eddings] knew the difference between right and wrong at the time he pulled the trigger, and that is the test of criminal responsibility in this State." *Id.* at 109–10, 102 S.Ct. 869. The Supreme Court endorsed the plurality opinion in *Lockett* and held that

> [j]ust as the State may not by statute preclude the sentencer from considering any mitigating factor, neither may the sentencer refuse to consider, *as a matter of law*, any relevant mitigating evidence. . . . The sentencer, and the Court of Criminal Appeals on review, may determine the weight to be given relevant mitigating evidence. But they may not give it no weight by excluding such evidence from their consideration.

Id. at 113–15, 102 S.Ct. 869 (emphasis in original).

The United States Supreme Court interpreted and applied the *Lockett/Eddings* rule in several other decisions prior to McKinney's sentencing in 1993 and the Arizona Supreme Court's affirmance in 1996. In those decisions, the Court reiterated its holding that the admission of relevant evidence is not enough to satisfy the Eighth and Fourteenth Amendments if the sentencer is prevented by state law from giving effect to that evidence. Because "full consideration of evidence that mitigates against the death penalty is essential if the [sentencer] is to give a 'reasoned *moral* response to the defendant's background,

character, and crime,'" *Eddings* requires that "[t]he sentencer must also be able to consider and give effect to that evidence in imposing sentence." *Penry v. Lynaugh* (*Penry I*), 492 U.S. 302, 319, 328, 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) (quoting *Franklin v. Lynaugh*, 487 U.S. 164, 184, 108 S.Ct. 2320, 101 L.Ed.2d 155 (1988) (O'Connor, J., concurring in the judgment)). "[T]he State cannot channel the sentencer's discretion, but must allow it to consider any relevant information offered by the defendant." *McCleskey v. Kemp*, 481 U.S. 279, 306, 107 S.Ct. 1756, 95 L.Ed.2d 262 (1987); *see also Skipper v. South Carolina*, 476 U.S. 1, 4–5, 106 S.Ct. 1669, 90 L.Ed.2d 1 (1986) (holding that even where mitigating evidence does "not relate specifically to . . . [the defendant's] culpability for the crime he committed," the defendant is entitled to offer any evidence that "would be 'mitigating' in the sense that they might serve 'as a basis for a sentence less than death'" (quoting *Lockett*, 438 U.S. at 604, 98 S.Ct. 2954)).

VII. The Causal Nexus Test and Its Application Here

A. Arizona's Test

The trial judge sentenced McKinney to death in 1993. The Arizona Supreme Court affirmed Kinney's conviction and sentence in 1996.

As briefly described above, Arizona capital sentencing law included a statutorily specified nonexhaustive list of five mitigating factors. *See* Ariz.Rev.Stat. Ann. § 13-703(G) (1993). Among the statutory mitigating factors was a modified form of diminished capacity, contained in § 13703(G)(1):

"The defendant's capacity to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of the law was significantly impaired, but not so impaired as to constitute a defense to prosecution."

Arizona capital sentencing law also included nonstatutory mitigating factors, such as family background or mental conditions that did not rise to the level of impairment specified in § 13-703(G)(1). Beginning in the late 1980s, Arizona Supreme Court developed a "causal nexus" test for nonstatutory mitigation. Under this test, as we noted above, evidence of a difficult family background or a mental condition was not in and of itself relevant mitigating evidence. As a matter of Arizona law, such evidence was relevant for mitigation purposes only if it had some causal effect contributing to the defendant's behavior in the commission of the crime at issue. Thus, while the defendant could submit evidence of his difficult family background or mental condition, the sentencing court was prohibited from treating it as legally relevant mitigation evidence unless the defendant proved a causal connection between his background or disorder and the crime. In capital cases from the late 1980s to the mid-2000s, the Arizona Supreme Court repeatedly articulated this causal nexus test for nonstatutory mitigation. The test was "contrary to . . . clearly established Federal law, as determined by the Supreme Court of the United States" in *Eddings*.

In the immediate aftermath of *Eddings*, the Arizona Supreme Court had not yet developed its causal nexus test for nonstatutory mitigation. One year after *Eddings*, the Arizona Supreme Court

understood and applied *Eddings* and *Lockett* correctly. In *State v. McMurtrey*, a capital case, the Court wrote:

> [T]he sentencer may not refuse to consider, as a matter of law, relevant evidence presented in mitigation. *Eddings v. Oklahoma*, 455 U.S. 104, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982). . . .
>
> . . . If after considering the offered evidence, the court concludes that with respect to the defendant's mental condition, it merely establishes a character or personality disorder then the court may under [*State v.*] *Richmond*, [114 Ariz. 186, 560 P.2d 41 (1976),] conclude that the mitigating circumstance in [Ariz.Rev.Stat. Ann.] § 13-703(G)(1) does not exist. In order to remain faithful to *Lockett* and [*State v.*] *Watson*, [120 Ariz. 441, 586 P.2d 1253 (1978),] however, the court's inquiry may not end there. The court must consider the offered evidence further to determine whether it in some other way suggests that the defendant should be treated with leniency.

136 Ariz. 93, 664 P.2d 637, 646 (1983); s*ee also State v. Gretzler*, 135 Ariz. 42, 659 P.2d 1, 14 (1983).

By the late 1980s, however, the Arizona Supreme Court had begun to articulate and apply its causal nexus test to nonstatutory mitigation. In *Wallace*, decided three years before the trial judge sentenced McKinney, the Arizona Supreme Court wrote in a capital case:

> *A difficult family background, in and of itself, is not a mitigating circumstance.* If it were, nearly every defendant could point to some circumstance in his or her background that would call for

> mitigation. A difficult family background *is a relevant mitigating circumstance if a defendant can show that something in that background had an effect or impact on his behavior that was beyond the defendant's control.* . . . [Appellant's] entire family background was before the court in the pre-sentence report. *Appellant, however, made no claim that his family background had anything to do with the murders he committed.*

Wallace, 773 P.2d at 986 (1989) (emphasis added). The Court could not have been clearer that, *as a matter of law*, nonstatutory mitigation evidence not satisfying the causal nexus test was irrelevant. This test was in direct contravention of *Eddings* and *Lockett*.

In *Ross*, decided two years after the trial judge sentenced McKinney, the Arizona Supreme Court wrote in another capital case, with a pin citation to the precise page in *Wallace*:

> A difficult family background *is not a relevant mitigating circumstance unless* "a defendant can show that something in that background had an effect or impact on his behavior that was beyond the defendant's control." *State v. Wallace*, 160 Ariz. 424, 773 P.2d 983, 986 (1989).

886 P.2d at 1363 (1994) (citation shortened) (emphasis added). Again, the Court could not have been clearer that, *as a matter of law*, nonstatutory mitigation evidence not satisfying the causal nexus test was irrelevant. In affirming McKinney's death sentence in 1996, the Arizona Supreme Court cited *Ross*, with a pin citation to this precise page. *McKinney*, 917 P.2d at 1234.

Two years after affirming McKinney's death sentence, the Arizona Supreme Court mentioned *Eddings* by name, in a passage manifesting its continued misreading of *Eddings* and *Lockett*. In *State v. Djerf*, 191 Ariz. 583, 959 P.2d 1274, 1289 (1998), the Arizona Supreme Court explained that it read *Eddings* and *Lockett* to require a sentencer to "consider" evidence offered in mitigation. In the usage of the Arizona Court, however, "considering" such evidence did not mean weighing it to determine how much mitigating effect to give it. Rather, it meant "considering" such evidence to determine whether it satisfied the causal nexus test for nonstatutory mitigation. If it satisfied the test, the sentencer was required to determine how much weight, if any, to give it. If did not satisfy the test, the sentencer was required, as a matter of law, to treat it as irrelevant and to give it no weight. As the Court wrote in *Djerf*:

> This court has held that *Lockett* and *Eddings* require only that the sentencer *consider* evidence proffered for mitigation. The sentencer, however, is entitled to give it the weight it deserves. *Arizona law states that a difficult family background is not relevant unless the defendant can establish that his family experience is linked to his criminal behavior*. *Ross*, 886 P.2d at 1362. The trial court *considered* the evidence *but found it irrelevant and declined to give it weight* because proof was lacking that his family background had any effect on the crimes.

Id. (emphasis added and some citations omitted).

Two years later, in *State v. Hoskins*, the Arizona Supreme Court reiterated what it had written in *Djerf* and explained the Arizona causal nexus test

and its two-step process for "consideration" of mitigating evidence. The Court wrote at length:

> The trial court found that defendant had shown by a preponderance of the evidence that he suffered from antisocial or borderline personality disorder. But proof that such disorder exists does not of itself establish mitigation. For our purposes on review, it is essential not only that a personality disorder be shown to exist but that it be causally linked to the crime at the time the crime is committed.
>
> . . .
>
> A dysfunctional family background or difficult childhood can be mitigating only if the defendant can establish that early experiences, however negative, affected later criminal behavior in ways that were beyond his control. Thus, family dysfunction, as with mental impairment under the (G)(1) statute, can be mitigating only when actual causation is demonstrated between early abuses suffered and the defendant's subsequent acts. We reaffirm that doctrine here. . . .
>
> . . . *If the defendant fails to prove causation, the circumstance will not be considered mitigating. However, if the defendant proves the causal link, the court will then determine what, if any, weight to accord the circumstance in mitigation.*
>
> . . . .
>
> The dissenting opinion expresses an impassioned description of the defendant's "horrific" childhood. We are aware of the circumstances of defendant's upbringing and have reviewed all aspects in minute detail. . . . Yet, it is clear that credible evidence in this record does not establish actual nexus with the

> crime, and our jurisprudence requires the nexus be proven. *Wallace (II)*, 773 P.2d at 985–86. Importantly, were we to hold otherwise, the family dysfunction factor and the impairment factor would become meaningless because virtually every homicide defendant can point to background dysfunction, abuse, or neglect as a basis for mitigation and leniency.

199 Ariz. 127, 14 P.3d 997, 1021–22 (2000) (emphasis added and some citations omitted).

The decisions of the Arizona Supreme Court make clear that family background or a mental condition could be given weight as a nonstatutory mitigating factor, but only if defendant established a causal connection between the background or condition and his criminal behavior. For a little over fifteen years, the Arizona Supreme Court routinely articulated and insisted on its unconstitutional causal nexus test, as seen in *Wallace* (1989), *Ross* (1994), *Djerf* (1998), and *Hoskins* (2000), as just described, and in many other cases. *See, e.g.*, *State v. White*, 168 Ariz. 500, 815 P.2d 869, 881 (1991) ("'A difficult family background, in and of itself, is not a mitigating circumstance.'" (quoting *Wallace*, 773 P.2d at 986)); *State v. Brewer*, 170 Ariz. 486, 826 P.2d 783, 802 (1992) ("The evidence of defendant's troubled background establishes only that a personality disorder exists. It does not prove that, at the time of the crime, the disorder controlled defendant's conduct or impaired his mental capacity to such a degree that leniency is required."); *State v. Bible*, 175 Ariz. 549, 858 P.2d 1152, 1209 (1993) (holding that the defendant's family history was not mitigating in part because "Defendant made no showing that any difficult

family history had anything to do with the murder" (citing *Wallace*, 773 P.2d at 986)); *State v. Bolton*, 182 Ariz. 290, 896 P.2d 830, 854 (1995) ("A difficult family background, however, is not always a mitigating circumstance. If it were, many homicide defendants could point to some circumstance in their background that would call for mitigation. A difficult family background is a mitigating circumstance if a defendant can show that something in that background had an effect or impact on his behavior that was beyond his control." (citing *Wallace*, 773 P.2d at 986)); *State v. Stokley*, 182 Ariz. 505, 898 P.2d 454, 473 (1995) ("A difficult family background alone is not a mitigating circumstance." (citing *Wallace*, 773 P.2d at 986)); *State v. Jones*, 185 Ariz. 471, 917 P.2d 200, 219–20 (1996) (defendant's "chaotic and abusive childhood [was] not a mitigating circumstance" because there was no causal nexus to the crime); *State v. Towery*, 186 Ariz. 168, 920 P.2d 290, 311 (1996) ("We have held that a difficult family background is not always entitled to great weight as a mitigating circumstance. *State v. Wallace*, [773 P.2d at 985–86] ('A difficult family background is a relevant mitigating circumstance if a defendant can show that something in that background had an effect or impact on his behavior that was beyond the defendant's control.')"); *State v. Rienhardt*, 190 Ariz. 579, 951 P.2d 454, 467 (1997) ("[T]his court has rejected past drug and alcohol use as a mitigating circumstance calling for leniency when there is no evidence of a causal connection between the substance abuse and the crime."); *State v. Greene*, 192 Ariz. 431, 967 P.2d 106, 117 (1998) ("Greene's mother may have introduced him to drugs, but Greene failed to show how this influenced his

behavior on the night of the murder. Thus, we do not find Greene's dysfunctional family history to be a mitigating circumstance." (internal citation omitted)); *State v. Sharp*, 193 Ariz. 414, 973 P.2d 1171, 1182 (1999) ("[W]e require a causal connection to justify considering evidence of a defendant's background as a mitigating circumstance."); *State v. Kayer*, 194 Ariz. 423, 984 P.2d 31, 46 (1999) (holding that the defendant's mental impairment "was not established as a nonstatutory mitigating factor" in part because "defendant offered no evidence to show the requisite causal nexus that mental impairment affected his judgment or his actions at the time of the murder"); *State v. Martinez*, 196 Ariz. 451, 999 P.2d 795, 809 (2000) ("There is simply no nexus between Martinez' family history and his actions on the Beeline Highway. His family history, though regrettable, is not entitled to weight as a non-statutory mitigating factor."); *State v. Canez*, 202 Ariz. 133, 42 P.3d 564, 594 (2002) ("[A] causal nexus between the intoxication and the offense is required to establish non-statutory impairment mitigation."); *id.* at 595 ("A defendant's difficult childhood is mitigating only where causally connected to his offense.").

The Arizona Supreme Court articulated the causal nexus test in various ways but always to the same effect: As a matter of law, a difficult family background or mental condition did not qualify as a nonstatutory mitigating factor unless it had a causal effect on the defendant's behavior in committing the crime at issue. The Arizona Court frequently stated categorically that, absent a causal nexus, would-be nonstatutory mitigation was simply "not a mitigating

circumstance." *Wallace*, 773 P.2d at 986. Sometimes, the court stated that evidence offered as nonstatutory mitigation that did not have a causal connection to the crime should be given no "weight." For example, as it wrote in *Djerf*:

> Arizona law states that a difficult family background is not relevant unless the defendant can establish that his family experience is linked to his criminal behavior. The trial court considered the evidence but found it irrelevant and declined to give it weight because proof was lacking that his family background had any effect on the crimes.

Djerf, 959 P.2d at 1289 (citation omitted). Similarly, the court wrote in *Martinez*, "There is simply no nexus between Martinez' family history and his actions on the Beeline Highway. His family history, though regrettable, is not entitled to weight as a non-statutory mitigating factor." *Martinez*, 999 P.2d at 809.

Sometimes, the Arizona Supreme Court stated that evidence of a difficult family background or mental illness was "not necessarily" or not "usually" mitigating, and then (often in the same paragraph) held as a matter of law that the evidence in the specific case before the Court was not mitigating because it had no causal connection to the crime. For example, the Court wrote in *Jones*,

> *A difficult family background is not necessarily a mitigating circumstance* unless defendant can show that something in his background had an effect on his behavior that was beyond his control. . . .*[H]owever, the trial court did not find any connection between defendant's family background and his conduct on the night of the*

> *murders, and our review of the record does not reveal any such connection. Thus, we find that defendant's chaotic and abusive childhood is not a mitigating circumstance.*

Jones, 917 P.2d at 219–20 (emphasis added).

Similarly, the Court wrote in *Hoskins*, quoting an earlier case, "'An abusive family background is *usually given significant weight as a mitigating factor only when* the abuse affected the defendant's behavior at the time of the crime.'" *Hoskins*, 14 P.3d at 1021 (emphasis added) (quoting *State v. Mann*, 188 Ariz. 220, 934 P.2d 784, 795 (1997)). The court in *Hoskins* then went to state and apply the unconstitutional causal nexus test as a matter of law to the evidence in the case before it, writing,

> [I]t is essential not only that a personality disorder be shown to exist but that it be causally linked to the crime at the time the crime is committed. . . .
>
> . . . Because defendant has not connected his anti-social or personality disorder to the car-jacking and murder, it cannot be considered a relevant mitigating circumstance. . . .
>
> . . . .
>
> *. . . If the defendant fails to prove causation, the circumstance will not be considered mitigating.* However, if the defendant proves the causal link, the court then will determine what, if any, weight to accord the circumstance in mitigation.

Id. at 1021–22 (emphasis added).

In the mid-2000s, after the United States Supreme Court emphatically reiterated the *Eddings* rule in *Tennard v. Dretke*, 542 U.S. 274, 124 S.Ct. 2562, 159

L.Ed.2d 384 (2004), the Arizona Supreme Court finally abandoned its unconstitutional causal nexus test for nonstatutory mitigation. In its first post-*Tennard* case addressing *Eddings*, the Arizona Supreme Court properly stated the rule in a jury sentencing case:

> While *Eddings* and various other Supreme Court decisions dictate a liberal rule of *admissibility* for mitigating evidence, they still leave it to the sentencer to "determine the weight to be given to relevant mitigating evidence." *Eddings*, 455 U.S. at 114–15, 102 S.Ct. 869. Once the jury has heard all the defendant's mitigation evidence, there is no constitutional prohibition against the State arguing that the evidence is not particularly relevant or that it is entitled to little weight.

State v. Anderson, 210 Ariz. 327, 111 P.3d 369, 392 (2005). A year later, in a judge-sentencing case, the Arizona Supreme Court, relying on *Anderson*, again properly stated the rule:

> We do not require that a nexus between the mitigating factors and the crime be established before we consider the mitigation evidence. *See Tennard v. Dretke*, 542 U.S. 274, 287, 124 S.Ct. 2562, 159 L.Ed.2d 384 (2004). But the failure to establish such a causal connection may be considered in assessing the quality and strength of the mitigation evidence.

State v. Newell, 212 Ariz. 389, 132 P.3d 833, 849 (2006).

B. Our "Clear Indication" Test

Not counting the case now before us, we have decided nine Arizona capital cases in which

petitioners have alleged that the Arizona Supreme Court, as a matter of law, treated would-be mitigation evidence as legally irrelevant in violation of *Eddings*. In two of these cases, we held that the Arizona Supreme Court committed *Eddings* error. *See Williams v. Ryan*, 623 F.3d 1258 (9th Cir.2010); *Styers v. Schriro*, 547 F.3d 1026 (9th Cir.2008) (per curiam). In the other seven, we held that the Arizona Court had not committed *Eddings* error. In six of these, we applied a test first articulated in *Schad v. Ryan*, 581 F.3d 1019, 1037 (9th Cir.2009) (per curiam) (unamended opinion), under which we could not find *Eddings* error unless there was a "clear indication in the record" that the Arizona Court had refused, as a matter of law, to treat nonstatutory mitigation evidence as relevant unless it had some effect on the petitioner's criminal behavior. *See Hedlund v. Ryan*, 750 F.3d 793, 818 (9th Cir.2014); *Murray v. Schriro*, 746 F.3d 418, 455 (9th Cir.2014); *Clabourne v. Ryan*, 745 F.3d 362, 373 (9th Cir.2014) (petition for panel rehearing and for rehearing en banc pending); *Poyson v. Ryan*, 743 F.3d 1185, 1188 (9th Cir.2013); *Lopez v. Ryan*, 630 F.3d 1198, 1203 (9th Cir.2011); *Schad v. Ryan*, 671 F.3d 708, 724 (9th Cir.2011) (per curiam) (amended opinion). In the seventh, we did not apply the "clear indication" test. *See Towery v. Ryan*, 673 F.3d 933 (9th Cir.2012). In none of the cases in which we held that there had been no *Eddings* error did we hold that the Arizona Supreme Court had renounced its causal nexus test. Rather, we held only that petitioners had not shown that the Court had applied the test in such a way as to treat nonstatutory mitigation evidence irrelevant as a matter of law.

In our amended opinion in *Schad*, we stated the "clear indication" test as follows:

> *Absent a clear indication in the record* that the state court applied the wrong standard, we cannot assume the courts violated *Edding*'s constitutional mandates. *See Bell v. Cone*, [543 U.S. 447, 455, 125 S.Ct. 847, 160 L.Ed.2d 881] (2005) ("Federal courts are not free to presume that a state court did not comply with constitutional dictates on the basis of nothing more than a lack of citation.").

Schad, 671 F.3d at 724 (emphasis added). The language from *Bell*, quoted in *Schad* in support of its "clear indication" rule, states only that we may not presume that a state court failed to follow federal constitutional law based on "nothing more than a lack of citation." But in *Schad* we broadened the language from *Bell* and transformed it into a prohibition against an "assumption" of unconstitutionality in the absence of a "clear indication" to the contrary.

When used in *Bell*, the quoted language stated a rule that is applicable in a narrow circumstance: a federal habeas court should not presume, merely because a state court has failed to cite a federal case, that the state court was unaware of or failed to follow the rule established in that case. The *Bell* rule is eminently sensible. A presumption of ignorance or disregard of federal law based merely on a failure of citation by a busy state court is both unrealistic and disrespectful. But the *Bell* rule, as stated by the Supreme Court, has a relatively narrow application. It is not a broad rule requiring federal habeas courts to assume in all circumstances, including *Eddings* cases, that absent a "clear indication" to the

contrary, a state understood and properly applied federal law.

Congress knows how to limit federal collateral review by requiring deference to state court decisions, and it has done so in AEDPA. Under 28 U.S.C. § 2254(d), federal courts shall not issue writs of habeas corpus on any claim adjudicated in state court unless the adjudication "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law" or "that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." Section 2254(d) is already a form of a clear statement or a clear indication rule, which all federal courts are required to follow. The "clear indication" rule stated by our circuit for the first time in *Schad*, and applicable in our circuit only in *Eddings* cases, is an inappropriate and unnecessary gloss on the deference already required under § 2254(d). We therefore overrule *Schad*, and the cases that have followed it, with respect to the "clear indication" test.

C. Application of the Causal Nexus Test in This Case

For the reasons that follow, we conclude that the Arizona Supreme Court applied its unconstitutional causal nexus test to McKinney's PTSD, refusing, as a matter of law, to treat it as a relevant nonstatutory mitigating factor. This was contrary to clearly established federal law as established in *Eddings*.

We review the decision of the highest state court to have provided a reasoned decision. *Ylst v. Nunnemaker*, 501 U.S. 797, 804–06, 111 S.Ct. 2590, 115 L.Ed.2d 706 (1991). The Arizona Supreme Court reviews capital sentences *de novo*, making its own

determination of what constitute legally relevant aggravating and mitigating factors, and then weighing those factors independently. Ariz. Rev. Stat. Ann. § 13-755. The Arizona Supreme Court "conducts a thorough and independent review of the record and of the aggravating and mitigating evidence to determine whether the sentence is justified." *McKinney*, 917 P.2d at 1225. The Court "considers the quality and strength, not simply the number, of aggravating or mitigating factors." *Id.*

In reviewing the *de novo* sentencing decision of the Arizona Supreme Court, we look only to the decision of that Court. We look to the decision of the sentencing judge only to the degree it was adopted or substantially incorporated by the Arizona Supreme Court. *See Barker v. Fleming*, 423 F.3d 1085, 1903 (9th Cir.2005) (holding that when "the last reasoned decision adopted or substantially incorporated the reasoning from a previous decision," it is "reasonable for the reviewing court to look at both decisions to fully ascertain the reasoning of the last decision"). The sentencing judge accepted the factual accuracy of Dr. McMahon's diagnosis of PTSD, saying that he was "certainly not trying to dispute him as an expert on what all that meant." The judge then went on to say that "Dr. McMahon did not at any time suggest in his testimony nor did I find any credible evidence to suggest that, even if the diagnosis of Post-traumatic Stress Syndrome were accurate in Mr. McKinney's case, *that it in any way significantly impaired Mr. McKinney's conduct*." (Emphasis added.) He further stated:

> [I]t appeared to me that based upon all these circumstances that there simply was no substantial

> reason to believe that even if the trauma that Mr. McKinney had suffered in childhood had contributed to an appropriate diagnosis of Post-traumatic Stress Syndrome *that it in any way affected his conduct in this case.*

(Emphasis added.) The italicized language echoes the language of Arizona's statutory mitigator under Ariz.Rev.Stat. § 13-703(G)(1). It also echoes the language used by the Arizona Supreme Court to articulate the unconstitutional causal nexus test applied to nonstatutory mitigation. *See*, *e.g.*, *Wallace*, 773 P.2d at 986 ("A difficult family background is a relevant mitigating circumstance if a defendant can show that something in that back ground *had an effect or impact on his behavior that was beyond his control*.") (emphasis added).

The Arizona Supreme Court affirmed McKinney's death sentence in 1996, roughly in the middle of the fifteen-year-plus period during which it insisted on its unconstitutional nexus test for nonstatutory mitigation. The Court reviewed in its opinion the death sentences of both Hedlund and McKinney. The Court first affirmed Hedlund's death sentence, writing, "A difficult family background, including childhood abuse, does not necessarily have substantial mitigating weight absent a showing that it significantly affected or impacted a defendant's ability to perceive, to comprehend, or to control his actions. *See State v. Ross*, . . . 180 Ariz. 598, 886 P.2d 1354, 1363 (1994)." *McKinney*, 917 P.2d at 1226. As we pointed out above, the pin citation to *Ross* is a citation to the precise page on which the Arizona Supreme Court had two years earlier articulated its

unconstitutional "causal nexus" test for non-statutory mitigation.

When the Arizona Supreme Court reviewed McKinney's death sentence, it again relied on *Ross*. The Court wrote that the sentencing judge had given "full consideration" to McKinney's childhood and resulting PTSD, using the word "consideration" in the sense of considering whether the evidence was, or was not mitigating. *See Djerf*, 959 P.2d at 1289 ("This court has held that *Lockett* and *Eddings* require only that the sentencer *consider* evidence proffered for mitigation. The sentencer, however, is entitled to give it the weight it deserves. Arizona law states that a difficult family background is not relevant unless the defendant can establish that his family experience is linked to his criminal behavior.") (emphasis added).

Reviewing McKinney's sentence *de novo*, the Arizona Supreme Court addressed "the effects of [McKinney's] childhood, specifically the diagnosis of post-traumatic stress disorder (PTSD)." *McKinney*, 917 P.2d at 1234. The Court accepted the conclusion of the sentencing judge that, as a factual matter, McKinney had not shown that his PTSD had causally contributed to the murders of Mertens and McClain. Indeed, the Arizona Supreme Court went further, pointing out that McKinney's PTSD, if anything, would have had the opposite effect, influencing him *not* to have committed the murders. Because the Court concluded that McKinney's PTSD was not causally connected to his crimes, it refused, as a matter of law, to treat his PTSD as a mitigating factor. After describing McKinney's PTSD evidence and assessing *de novo* the effect of his PTSD on his

behavior, the Court recited its causal nexus test. The Court concluded with a pin citation to the precise page in *Ross* on which, two years earlier, it had articulated the causal nexus test for nonstatutory mitigation.

We quote in full the relevant paragraph:

> Here again, the record shows that the judge gave full *consideration* to McKinney's childhood and the expert testimony regarding the effects of that childhood, specifically the diagnosis of post-traumatic stress disorder (PTSD). Assuming the diagnoses were correct, the judge found that none of the experts testified to, and none of the evidence showed, that such conditions in any way impaired McKinney's ability to conform his conduct to the law. The judge noted that McKinney was competent enough to have engaged in extensive and detailed preplanning of the crimes. McKinney's expert testified that persons with PTSD tended to avoid engaging in stressful situations, such as these burglaries and murders, which are likely to trigger symptoms of the syndrome. The judge observed that McKinney's conduct in engaging in the crimes was counter to the behavior McKinney's expert described as expected for people with PTSD. As we noted in discussing Hedlund's claim on this same issue, *a difficult family background, including childhood abuse, does not necessarily have substantial mitigating weight absent a showing that it significantly affected or impacted the defendant's ability to perceive, comprehend, or control his actions. See State v. Ross*, . . . 180 Ariz. 598, 886 P.2d 1354, 1363 (1994)[.]

Id. at 1234 (emphasis added).

Based on (1) the factual conclusion by the sentencing judge, which the Arizona Supreme Court accepted, that McKinney's PTSD did not "in any way affect[] his conduct in this case," (2) the Arizona Supreme Court's additional factual conclusion that, if anything, McKinney's PTSD would have influenced him *not* to commit the crimes, and (3) the Arizona Supreme Court's recital of the causal nexus test for nonstatutory mitigation and its pin citation to the precise page in *Ross* where it had previously articulated that test, we conclude that the Arizona Supreme Court held, as a matter of law, that McKinney's PTSD was not a nonstatutory mitigating factor, and that it therefore gave it no weight. This holding was contrary to *Eddings*. We therefore hold that the decision of the Arizona Supreme Court applied a rule that was "contrary to . . . clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1).

D. Structural or Harmless Error

We have not heretofore decided whether an *Eddings* error is structural error. We do so now and conclude that it is not.

The Supreme Court has consistently characterized structural errors as "structural defects in the constitution of the trial mechanism." *Brecht v. Abrahamson*, 507 U.S. 619, 629, 113 S.Ct. 1710, 123 L.Ed.2d 353 (1993). Because such errors go to the framework within which judicial proceedings are conducted, they "infect the entire trial process" and accordingly require "automatic reversal of the conviction." *Id.* at 629–30, 113 S.Ct. 1710; *see also Arizona v. Fulminante*, 499 U.S. 279, 310, 111 S.Ct.

1246, 113 L.Ed.2d 302 (1991) (noting that structural errors "affect[] the framework within which the trial proceeds"). Some structural errors produce a fundamentally flawed record, so "any inquiry into [their] effect[s] on the outcome of the case would be purely speculative." *Satterwhite v. Texas*, 486 U.S. 249, 256, 108 S.Ct. 1792, 100 L.Ed.2d 284 (1988); *see also Rose v. Clark*, 478 U.S. 570, 579 & n.7, 106 S.Ct. 3101, 92 L.Ed.2d 460 (1986) (holding that harmless-error analysis was appropriate because "[u]nlike errors such as judicial bias or denial of counsel, the error in this case did not affect the composition of the record. Evaluation of whether the error prejudiced respondent thus does not require any difficult inquiries concerning matters that might have been, but were not, placed in evidence").

By contrast, harmless-error analysis applies to trial errors, "which may . . . be quantitatively assessed in the context of other evidence presented in order to determine whether its admission was harmless." *Fulminante*, 499 U.S. at 307–08, 111 S.Ct. 1246. Because "the error occurs at trial and its scope is readily identifiable[,] . . . the reviewing court can undertake with some confidence its relatively narrow task of assessing the likelihood that the error materially affected the deliberations of the jury." *Holloway v. Arkansas*, 435 U.S. 475, 490, 98 S.Ct. 1173, 55 L.Ed.2d 426 (1978). For example, in *Satterwhite*, the Court applied harmless-error analysis to a Sixth Amendment error resulting in the improper admission of testimony from a psychiatrist who had examined Satterwhite without notifying his attorney. 486 U.S. at 258, 108 S.Ct. 1792. The Court noted that "the evaluation of the consequences of an

error in the sentencing phase of a capital case may be more difficult because of the discretion that is given to the sentencer." *Id.* However, it held that the error at issue was subject to harmless-error analysis because the admission of testimony was an error of limited scope that was ready identifiable and whose impact could be assessed by a reviewing court. *Id.* at 257–58, 108 S.Ct. 1792.

E. Harmless Error

The harmless-error standard on habeas review provides that "relief must be granted" if the error "'had substantial and injurious effect or influence in determining the jury's verdict.'" *Brecht*, 507 U.S. at 623, 113 S.Ct. 1710 (quoting *Kotteakos v. United States*, 328 U.S. 750, 776, 66 S.Ct. 1239, 90 L.Ed. 1557 (1946)). "Under this standard, habeas petitioners may obtain plenary review of their constitutional claims, but they are not entitled to habeas relief based on trial error unless they can establish that it resulted in actual prejudice." *Id.* at 637, 113 S.Ct. 1710 (internal quotation marks omitted). But, as with the stricter *Chapman* standard, the "risk of doubt" is placed "on the State." *O'Neal v. McAninich*, 513 U.S. 432, 439, 115 S.Ct. 992, 130 L.Ed.2d 947 (1995). On federal habeas, in the absence of structural error that requires automatic reversal, "relief is appropriate only if the prosecutor cannot demonstrate harmless error." *Ayala v. Davis*, —— U.S. ——, 135 S.Ct. 2187, 2197, 192 L.Ed.2d 323 (2015).

The Court explained in *Kotteakos*,

> [I]f one cannot say, with fair assurance, after pondering all that happened without stripping the erroneous action from the whole, that the judgment

> was not substantially swayed by the error, it is impossible to conclude that substantial rights were not affected. The inquiry cannot be merely whether there was enough to support the result, apart from the phase affected by the error. It is rather, even so, whether the error itself had substantial influence. If so, or if one is left in grave doubt, the conviction cannot stand.

328 U.S. at 765, 66 S.Ct. 1239. Accordingly, "[w]hen a federal judge in a habeas proceeding is in grave doubt about whether a trial error of federal law had 'substantial and injurious effect or influence in determining the jury's verdict,' that error is not harmless. And, the petitioner must win." *O'Neal*, 513 U.S. at 436, 115 S.Ct. 992.

We hold that the *Eddings* error committed by the Arizona Supreme Court in this case had a "substantial and injurious effect" on McKinney's sentence within the meaning of *Brecht*. McKinney presented evidence of severe, prolonged childhood abuse that, in the words of the sentencing judge, was "beyond the comprehension and understanding of most people." Dr. McMahon diagnosed McKinney as suffering from PTSD as a result of his horrific childhood. McKinney's PTSD was important mitigating evidence, central to his plea for leniency, but the Arizona Supreme Court, as a matter of law, gave it no weight. *See Coleman v. Calderon*, 210 F.3d 1047, 1051 (9th Cir.2000) (constitutionally infirm jury instruction was not harmless because "it undermined the very core of Coleman's plea for life"). We hold here, as we did in *Styers*, that PTSD is mitigating evidence under *Eddings*. *Styers*, 547 F.3d at 1035–36 (granting the writ based on *Eddings*

error by the Arizona Supreme Court in treating PTSD mitigation evidence irrelevant as a matter of law). We hold, further, as we also did in *Styers*, that the Arizona Supreme Court's refusal, as matter of law, to give weight to petitioner's PTSD, requires resentencing. *Id.*

"[I]n capital cases the fundamental respect for humanity underlying the Eighth Amendment . . . requires consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death." *Woodson v. North Carolina*, 428 U.S. 280, 304, 96 S.Ct. 2978, 49 L.Ed.2d 944 (1976); *see also Lockett*, 438 U.S. at 605, 98 S.Ct. 2954 ("Given that the imposition of death by public authority is so profoundly different from all other penalties, we cannot avoid the conclusion that an individualized decision is essential in capital cases."). When a defendant's life is at stake, the Supreme Court has consistently emphasized the importance of a properly informed, individualized sentencing determination. *See, e.g.*, *Abdul-Kabir v. Quarterman*, 550 U.S. 233, 264, 127 S.Ct. 1654, 167 L.Ed.2d 585 (2007) (noting that *Lockett* and its progeny "have made clear that when the jury is not permitted to give meaningful effect or a 'reasoned moral response' to a defendant's mitigating evidence . . . the sentencing process is fatally flawed"); *Satterwhite*, 486 U.S. at 258, 108 S.Ct. 1792 ("It is important to avoid error in capital sentencing proceedings."); *McCleskey*, 481 U.S. at 304, 107 S.Ct. 1756; *Lockett*, 438 U.S. at 604, 98 S.Ct. 2954 ("We are satisfied that this qualitative difference between death and other penalties calls

for a greater degree of reliability when the death sentence is imposed.").

We recognize that there were important aggravating factors in this case. Although the jury had not found that McKinney had himself killed either Ms. Mertens or Mr. McClain, the sentencing judge concluded, based on substantial evidence, that McKinney had killed Ms. Mertens, though not Mr. McClain. Further, McKinney had been involved, as either the actual killer or as an accessory, in two murders; the murders had been done for pecuniary gain; and there had been cruelty to Mertens in the struggle preceding her death. We do not give "short shrift" to, or minimize the importance of, these aggravating factors. *Bobby v. Van Hook*, 558 U.S. 4, 13, 130 S.Ct. 13, 175 L.Ed.2d 255 (2009) (per curiam). But we conclude that McKinney's evidence of PTSD resulting from sustained, severe childhood abuse would have had a substantial impact on a capital sentencer who was permitted to evaluate and give appropriate weight to it as a nonstatutory mitigating factor. We conclude in this case that the Arizona Supreme Court's application of its causal nexus test to exclude, as a matter or law, evidence of McKinney's PTSD was "contrary to . . . clearly established Federal law, as determined by the Supreme Court of the United States," and that its application of the test had a "substantial and injurious effect or influence" on its decision to sentence McKinney to death. *Brecht*, 507 U.S. at 623, 113 S.Ct. 1710 (internal quotation marks omitted).

VIII. Response to Dissent

The foregoing opinion speaks for itself, but we add a few words to respond directly to two contentions in the dissent with which we particularly disagree.

A. Consistent Articulation and Application of the Causal Nexus Test

First, the dissent contends that during the relevant period the Arizona Supreme Court was inconsistent in its articulation and application of its unconstitutional causal nexus test for nonstatutory mitigation. We disagree. As we discuss in the body of our opinion, the 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.

The dissent particularly relies on four Arizona Supreme Court cases. Dissent at 89–96. Those cases are *State v. Towery*, 186 Ariz. 168, 920 P.2d 290 (1996), *State v. Thornton*, 187 Ariz. 325, 929 P.2d 676 (1996), *State v. Gonzales*, 181 Ariz. 502, 892 P.2d 838 (1995), and *State v. Trostle*, 191 Ariz. 4, 951 P.2d 869 (1997). None of the four cases even remotely supports the dissent's contention.

Of the four cases, the dissent emphasizes *Towery*. Dissent at 89–90. In *Towery*, however, the Arizona Supreme Court clearly articulated and applied its causal nexus test. The defendant in *Towery* had introduced, as a would-be mitigating factor, evidence of his difficult family background. The sentencing

judge "rejected the evidence as a mitigating factor because [Towery] failed to establish a nexus between his family background and his crime." *Towery*, 920 P.2d at 310. The Arizona Supreme Court, on *de novo* review, affirmed the death sentence. It wrote:

> We have held that a difficult family background is not always entitled to great weight as a mitigating circumstance. *State v. Wallace*, . . . 160 Ariz. 424, 773 P.2d 983, 985–86 (1989) ("A difficult family background is a relevant mitigating circumstance if a defendant can show that something in that background had an effect or impact on his behavior that was beyond the defendant's control.")[.] We have since reaffirmed that family background may be a substantial mitigating circumstance when it is shown to have some connection with the defendant's offense-related conduct. *White*, . . . 815 P.2d at 881–82.
>
> Defendant has failed to connect his family background to his criminal conduct.

Id. at 311 (citations shortened). The Court in *Towery* could hardly have been clearer. It both articulated and applied its unconstitutional causal nexus test to treat as irrelevant, as a matter of law, nonstatutory mitigation evidence of the defendant's family background because he had "failed to connect his family background to his criminal conduct." Our three-judge panel decision, reviewing Towery's conviction and sentence on federal habeas, held to the contrary, but it was mistaken in so holding. *See Towery v. Ryan*, 673 F.3d 933 (9th Cir.2012).

The other three cases are of no greater help to the dissent. In *Thornton*, the sentencing judge had given mitigating weight to defendant's "traumatic

childhood, dysfunctional family, and antisocial personality disorder," as it was permitted to do under Arizona law provided there was a causal nexus to the crime. The Arizona Supreme Court affirmed the judge on this point. It did not recite whether the judge had found a causal nexus; it simply affirmed without comment. The defendant contended that the sentencing judge should also have given weight to four other nonstatutory mitigating factors — mental illness, remorse, cooperation, and character. The Arizona Supreme Court rejected the contention that any of these factors were mitigating. It rejected three of them on the ground that they did not exist as a factual matter. It rejected the fourth with a citation to the precise page in *Ross* in which it had articulated its unconstitutional causal nexus test. In *Gonzales*, defendant contended his good character should have been given mitigating weight. The Arizona Supreme Court rejected the contention, holding as a factual matter that Gonzales did not have good character. In *Trostle*, the Arizona Supreme Court gave mitigating weight to the defendant's mental impairment because the causal nexus test was satisfied. The Court wrote,

> [W]eight to be given to mental impairment should be proportional to a defendant's ability to conform or appreciate the wrongfulness of his conduct.
>
> The defendant here established . . . that he was affected in no small measure by an impaired ability to conform his conduct to the law's requirements. . . . The trial court, therefore, should have given serious consideration to this evidence, either as statutory or nonstatutory mitigation.

951 P.2d at 886.

The dissent also relies on two cases cited in *Lopez v. Ryan*, 630 F.3d 1198, 1204 n.4 (9th Cir.2011) — *State v. Mann*, 188 Ariz. 220, 934 P.2d 784 (1997); and *State v. Medrano*, 185 Ariz. 192, 914 P.2d 225 (1996). Neither case supports the dissent's contention.

In *State v. Mann*, the defendant had advanced four proposed nonstatutory mitigators: (1) the possibility of consecutive life sentences rather than the death penalty; (2) defendant's relationship to his children; (3) a change in defendant's "lifestyle" after he committed the murders; and (4) defendant's difficult family background. 934 P.2d at 795. The Arizona Supreme Court held as a matter of law that the possibility of consecutive life sentences was "a sentencing option" rather than a mitigating factor. *Id.* With respect to defendant's relationship with his children and his change in lifestyle, the Court held that the defendant had not "established mitigation of sufficient weight to call for leniency." *Id.* Finally, the Court held that defendant's difficult family background was irrelevant as a matter of law. It recited its causal nexus test, citing the precise page in its *Wallace* opinion on which it had articulated and applied the test. The Court then wrote, "Defendant did not show any connection." *Id.*

In *State v. Medrano*, the defendant contended that his cocaine intoxication was both a statutory and nonstatutory mitigating factor. The sentencing judge had found as a factual matter that defendant's cocaine intoxication had not affected his behavior in committing the crime. The Arizona Supreme Court applied the causal nexus test, writing that the sentencing judge had found that the defendant had

"not proven by a preponderance of the evidence, either as a statutory or nonstatutory mitigating factor, that cocaine intoxication had contributed to his conduct on the night of the murder." 914 P.2d at 227. The Arizona Supreme Court accepted the factual finding of the sentencing judge that there had been no causal nexus. The Court wrote that defendant's evidence was "unpersuasive" and that his cocaine use therefore "fail[ed] as a non-statutory mitigating circumstance." *Id.* at 229.

As we noted at the beginning of our opinion, the Arizona Supreme Court has a strong view of stare decisis. The Court wrote in *White v. Bateman*, 89 Ariz. 110, 358 P.2d 712, 714 (1961), for example, that its prior case law "should be adhered to unless the reasons of the prior decisions have ceased to exist or the prior decision was clearly erroneous or manifestly wrong." *See also Young v. Beck*, 227 Ariz. 1, 251 P.3d 380, 385 (2011) ("[S]tare decisis commands that 'precedents of the court should not be lightly overruled,' and mere disagreement with those who preceded us is not enough." (quoting *State v. Salazar*, 173 Ariz. 399, 416, 844 P.2d 566 . . . (1992))); *State ex re. Woods v. Cohen*, 173 Ariz. 497, 844 P.2d 1147, 1148 (1993) (referring to "a healthy respect for stare decisis"); *State v. Williker*, 107 Ariz. 611, 491 P.2d 465, 468 (1971) (referring to "a proper respect for the theory of stare decisis").

Consistent with its view of stare decisis, the Arizona Supreme Court applied its unconstitutional causal nexus test consistently throughout during the relevant period. We would hardly expect the Court have done otherwise, given its view of stare decisis and the causal nexus test. The test was, of course,

premised on a mistaken understanding of *Eddings*. The Court corrected its mistake, consistent with its view of stare decisis under *Bateman* ("the prior decision was clearly erroneous or manifestly wrong"), after the United States Supreme Court emphatically reiterated the *Eddings* rule in 2004 in *Tennard v. Dretke*. *See State v. Anderson*, 210 Ariz. 327, 111 P.3d 369 (2005). But a mistake is only a mistake. All courts, even very good courts, make mistakes. A good court, however, 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.

B. Appellate Review and "Unreasonable Determination of Fact"

Second, the dissent contends that the critical question before us is whether the Arizona Supreme Court properly concluded that the sentencing judge "fully considered McKinney's PTSD." Dissent at 82. It further contends that we must review whether the Court properly so concluded under the "unreasonable determination of fact" standard of AEDPA. 28 U.S.C. § 2254(d)(2). According to the dissent, the Arizona Supreme Court did not unreasonably make the factual determination that the sentencing judge had "fully considered McKinney's PTSD." Therefore, according to the dissent, we must uphold the sentencing decision of the Arizona Supreme Court. The dissent misunderstands both the significance of the Arizona Supreme Court's *de novo* review in

capital cases, and the "unreasonable determination of fact" standard of review under AEDPA.

Contrary to the view of the dissent, the Arizona Supreme Court in reviewing capital sentences does not base its decision on whether the sentencing judge fully considered aggravating and mitigating factors. Rather, as we indicated above, the Arizona Supreme Court reviews capital sentences *de novo*, making its own independent determination of what constitute legally relevant aggravating and mitigating factors, and then performing an independent weighing of those factors. In its own words, the Arizona Supreme Court "conducts a thorough and independent review of the record and of the aggravating and mitigating evidence to determine whether the sentence is justified, . . . consider[ing] the quality and strength, not simply the number, of aggravating or mitigating factors." *McKinney*, 917 P.2d at 1225.

Further, and also contrary to the view of the dissent, the question whether the sentencing judge "fully considered McKinney's PTSD" is not a question of "fact" under § 2254(d)(2). A "fact" under § 2254(d)(2) is an evidentiary fact, such as whether a defendant had PTSD or whether a defendant's PTSD had a causal nexus to the crime. *See*, *e.g.*, *Wood v. Allen*, 558 U.S. 290, 130 S.Ct. 841, 850, 175 L.Ed.2d 738 (2010) (analyzing evidentiary facts under § 2254(d)(2)). Whether a sentencing judge fully considered an evidentiary fact is not a "fact" within the meaning of § 2254(d)(2).

Conclusion

We review the decision of the Arizona Supreme Court, as the last reasoned state court decision. The Arizona Supreme Court reviewed McKinney's death

sentence *de novo*. That Court accepted the factual conclusion of the trial judge that, as an evidentiary matter, there was no causal nexus between McKinney's PTSD and his crimes. After accepting the conclusion of the trial judge on this factual point, the Court went further, noting that, far from contributing to his crimes, McKinney's PTSD would have influenced him *not* to commit them. The Arizona Supreme Court then recited its unconstitutional causal nexus test for nonstatutory mitigation, followed by a pin citation to the page of *Ross* on which it had articulated that test two years earlier, making clear that, as matter of Arizona law, McKinney's PTSD was not relevant as a nonstatutory mitigating factor.

We **reverse** the district court's judgment denying the writ of habeas corpus. We **remand** with instructions to grant the writ with respect to McKinney's sentence unless the state, within a reasonable period, either corrects the constitutional error in his death sentence or vacates the sentence and imposes a lesser sentence consistent with law.

BEA, Circuit Judge, dissenting, with whom KOZINSKI, GOULD, TALLMAN, and CALLAHAN, Circuit Judges, join:

A state cannot impose the death penalty unless the sentencer has considered all evidence submitted as to the defendant's condition, character, and background. *Eddings v. Oklahoma*, 455 U.S. 104, 113–15, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982) (explaining that a sentencer may not "refuse to consider, as a matter of law, any relevant mitigating

evidence"). As a result, defendants so sentenced usually and legitimately proffer mitigation evidence provoking sympathy in the hope it will persuade the sentencer to grant leniency and impose a life sentence instead of the death penalty. Here, James McKinney submitted evidence of his squalid, horrid childhood and expert testimony that, as a result of that childhood, he developed Post-Traumatic Stress Disorder ("PTSD"). He urged his PTSD called for mercy for two reasons. First, he argued his PTSD affected his mental capacity "to appreciate the wrongfulness of his conduct" at the time of the murders. This is a statutory mitigation factor under Arizona law.[1] Second, he argued his childhood and childhood-caused PTSD justified leniency, separate from any effect it may have had on his mental state at the time of the murders. That second argument fits under Arizona's nonstatutory catchall that requires sentencers to consider all proffered mitigation evidence. [2] McKinney admits the sentencing judge, Judge Sheldon, considered his first argument. But McKinney contends Judge Sheldon did not consider the mitigating value of his PTSD for leniency purposes regardless its effect on him at the time of the murders.

McKinney pressed this same claim before the Arizona Supreme Court on direct appeal from the

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[1] Ariz. Rev. Stat. § 13-751(G)(1).

[2] Ariz. Rev. Stat. § 13-751(G) ("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 any aspect of the defendant's character, propensities or record and any of the circumstances of the offense.").

sentence Judge Sheldon imposed. That court correctly stated what *Eddings* requires: "[T]he trial judge must consider any aspect of [a defendant's] character or record and any circumstance of the offense relevant to determining whether a sentence less severe than the death penalty is appropriate."[3] It then rejected McKinney's argument that Judge Sheldon had failed to consider his PTSD separate from its effect on McKinney's mental capacity during the murders: "[T]he record shows that the judge gave *full consideration* to McKinney's childhood and the expert testimony regarding the effects of that childhood, *specifically the diagnosis of post-traumatic stress disorder*."[4] That conclusion makes sense given Judge Sheldon expressly stated at McKinney's sentencing:

> I have considered [McKinney's arguments] at length, and after considering *all of the mitigating circumstances, the mitigating evidence that was presented by the defense* in this case as against the aggravating circumstances, and *other matters which clearly are not set forth in the statute which should be considered by a court*, I have determined . . . that the mitigating circumstances simply are not sufficiently substantial to call for leniency under all of the facts of this case.

(Emphasis added.)

Our review of McKinney's claim must proceed differently than it did in the Arizona courts on direct appeal. The Supreme Court has told us we must

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[3] *State v. McKinney*, 185 Ariz. 567, 917 P.2d 1214, 1226 (1996).

[4] *Id.* at 1234 (emphasis added).

presume "state courts know and follow the law."[5] And, in the *Eddings* context, "[w]e must assume that the trial judge considered all [the] evidence before passing sentence."[6] This appeal could be resolved against McKinney, without the benefit of those presumptions, simply based on the above quotations from the record. This appeal presents even fewer problems to decide under the standard provided by the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), which prescribes "'a difficult to meet' and 'highly deferential standard for evaluating state-court rulings, [and] which demands state-court decisions be given the benefit of the doubt.'"[7] Yet the majority still somehow concludes that, under the standard of review prescribed by AEDPA, there was *Eddings* error in this case.

The majority starts by incorrectly summarizing the Arizona Supreme Court's *Eddings* jurisprudence between 1989 and 2005 as constituting continuous and recurrent *Eddings* error.[8] Not so at all, as our own decisions have repeatedly recognized.[9] Based on

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[5] *Woodford v. Visciotti*, 537 U.S. 19, 24, 123 S.Ct. 357, 154 L.Ed.2d 279 (2002).

[6] *Parker v. Dugger*, 498 U.S. 308, 314, 111 S.Ct. 731, 112 L.Ed.2d 812 (1991).

[7] *Cullen v. Pinholster*, 563 U.S. 170, 131 S.Ct. 1388, 1398, 179 L.Ed.2d 557 (2011) (citation omitted).

[8] Op. at 802–04, 812–18.

[9] *See Lopez v. Ryan*, 630 F.3d 1198, 1203–04 (9th Cir.2011) ("Some cases decided prior to *Tennard* applied a causal nexus requirement in an impermissible manner. Other cases, however, properly looked to causal nexus only as a factor in determining the weight or significance of mitigating evidence."); *Poyson v. Ryan*, 743 F.3d 1185, 1198 (9th Cir.2013); *Towery v. Ryan*, 673 F.3d 933, 946 (9th Cir.2012) (per curiam).

its incorrect summary of the Arizona decisions[10] and a paean to stare decisis, the majority then rejects our precedent[11] and concludes that we should never afford the Arizona Supreme Court the presumption that "state courts know and follow the law" with respect to any of that court's *Eddings* cases.[12] Rather, the majority creates a new and contrary presumption—that the Arizona courts did *not* know or follow *Eddings* between 1989 and 2005—and finds this presumption is not rebutted even where the Arizona courts have clearly complied with *Eddings*'s mandate.[13] Of course, this process is quite contrary to the deferential standard of review the Supreme Court has told us to use.

But the majority does not stop there. When the majority turns to the record in this case, it misreads it. The majority first suggests that when Judge Sheldon stated there was no evidence that McKinney's PTSD "in any way affected his conduct in this case," he applied an unconstitutional nexus test to exclude the PTSD from consideration

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[10] For a more accurate relation of the relevant Arizona Supreme Court cases, *see infra* Section III.B.1.

[11] *See Lopez*, 630 F.3d at 1203–04 ("In light of this backdrop, which highlights a range of treatment of the nexus issue, there is no reason to infer unconstitutional reasoning from judicial silence. Rather, we must look to what the record actually says."); *Clabourne v. Ryan*, 745 F.3d 362, 372–73 (9th Cir.2014), *petition for rehearing and rehearing en banc pending*, No. 09-99022 (9th Cir. Mar. 18, 2014); *Poyson*, 743 F.3d at 1198 n.7; *Schad v. Ryan*, 671 F.3d 708, 723–24 (9th Cir.2011); *Greenway v. Schriro*, 653 F.3d 790, 807–08 (9th Cir.2011).

[12] Op. at 803.

[13] *See id.*

altogether.[14] Not so. At that portion of the hearing, Judge Sheldon was dealing with, and rejecting, McKinney's *own argument* that his PTSD impaired his ability "to appreciate the wrongfulness of his conduct" at the time of the murders. Next, the majority states the Arizona Supreme Court "recited its unconstitutional causal nexus test" when it decided McKinney's appeal.[15] The court did no such thing; if it did state an unconstitutional nexus test, this case would be simple. Finally, the majority ignores the Arizona Supreme Court's careful articulation of *Eddings*'s requirements and focuses instead on a single case citation in the Arizona opinion.[16] None of this is permissible under AEDPA.

In short, the majority ignores Supreme Court precedent,[17] implicitly overrules our own precedent,[18] replaces AEDPA's deferential standard of review of state-court decisions with an impermissible de novo standard, and misstates the record when applying that standard. Also quite troubling, the majority wrongly smears the Arizona Supreme Court and calls into question every single death sentence imposed in Arizona between 1989 and 2005 and our cases which have denied habeas relief as to those sentences. Finally, the majority brushes by the facts

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[14] *Id.* at 809–10, 819–20.

[15] *Id.* at 810, 820–21, 827.

[16] *Id.*

[17] *Visciotti*, 537 U.S. at 22–24, 123 S.Ct. 357; *Parker*, 498 U.S. at 314–16, 111 S.Ct. 731.

[18] *See Clabourne*, 745 F.3d at 372–73, *petition for rehearing and rehearing en banc pending*, No. 09-99022 (9th Cir. Mar. 18, 2014); *Poyson*, 743 F.3d at 1198 & n.7; *Schad*, 671 F.3d at 723–24; *Greenway*, 653 F.3d at 807–08; *Lopez*, 630 F.3d at 1203–04.

of McKinney's gruesome crimes to find that the error the majority has manufactured was indeed prejudicial to the outcome of the sentencing, rather than harmless, in contravention of the prejudice standard stated in *Brecht v. Abrahamson*, 507 U.S. 619, 113 S.Ct. 1710, 123 L.Ed.2d 353 (1993).

I respectfully dissent.

I.

This case should come down to a review of only a few pages of the transcript from McKinney's sentencing, and a few pages from the Arizona Supreme Court's decision affirming his sentence. *State v. McKinney*, 185 Ariz. 567, 917 P.2d 1214, 1225–27, 1233–34 (1996). A brief discussion of the sentencing proceeding and Arizona's statute governing the application of the death penalty may help analyze these few pages.

A. The Statutory Scheme and McKinney's Sentencing Arguments

Arizona law separates mitigating evidence into two categories, statutory and nonstatutory. There are five statutory mitigating factors under Arizona's sentencing statute: mental capacity, duress, minor participation, reasonable foreseeability, and age. Ariz.Rev.Stat. § 13-751(G)(1)–(5).[19] The nonstatutory category is a catchall that requires the sentencer to consider "any factors proffered by the defendant or the state that are relevant in determining whether to impose a sentence less than death," *id.* § 13-751(G),

[19] Arizona renumbered the statute in 2009, and it is now codified without any changes at Ariz.Rev.Stat. § 13-751. *See, e.g.*, *Robinson v. Schriro*, 595 F.3d 1086, 1111 (9th Cir. 2010). This dissent cites to the new location of the statute.

"including any aspect of the defendant's character or any circumstances 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).

McKinney's sentencing memorandum included 11 separate parts; each argued for leniency for different reasons. McKinney's two primary arguments in support of leniency were based on his troubled childhood and his claimed resulting PTSD diagnosis. McKinney relied on his PTSD to make two arguments in support of leniency. First, in Part VIII of his sentencing memorandum, McKinney argued his PTSD warranted leniency based on the statutory mitigation factor § 13-751(G)(1) ("Mental Capacity Factor"). The Mental Capacity Factor requires the court to consider 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." Ariz.Rev.Stat. § 13-751(G)(1). McKinney argued his PTSD diminished his capacity to appreciate the wrongfulness of his conduct during the murders of Christene Mertens and Jim McClain. It must be kept in mind that it was McKinney who claimed a causal nexus between his PTSD and his commission of the murders. So the sentencing judge can hardly be faulted for considering this as "nexus" evidence.

Second, in Parts I and VII of his sentencing memorandum, McKinney argued his PTSD warranted leniency separate from any effect that PTSD may have had on him at the time of the murders. This argument did not assert McKinney's

PTSD played a role in the two murders. Thus, it did not fall under the statutory Mental Capacity Factor, or any other specific statutory mitigation factor. *See id.* § 13-751(G) (duress, minor participation, reasonable foreseeability, and age). Instead, it fit under the nonstatutory catchall, quoted above.

B. The PTSD Testimony

McKinney called Diana McKinney, his sister, Susan Sesate, his aunt, and Dr. Mickey McMahon, a psychologist, to testify. The state called Dr. Steven Gray in rebuttal to Dr. McMahon's testimony. McKinney's sister and aunt testified to the conditions of McKinney's squalid, harsh childhood. Dr. McMahon opined McKinney's childhood caused McKinney to develop PTSD.

Dr. McMahon testified that McKinney was a "loner" and not the type of criminal who would engage in "thrill-seeking behavior," such as committing a crime for the sake of the excitement the crime provided. Instead, McKinney's PTSD would lead him to avoid confrontations and stressful situations; and McKinney "tries to respond to [stress] by withdrawing." Dr. McMahon agreed that McKinney would leave a stressful situation to avoid a confrontation if he could do so.

Dr. McMahon testified there was a "high likelihood" that McKinney's PTSD was triggered during his confrontation with his first victim, Christene Mertens, and McKinney's mental capacity was diminished as a result. With respect to the McClain robbery and murder, Dr. McMahon admitted, "I don't have enough facts to say that [McKinney] was suffering from diminished capacity." Dr. McMahon testified that the murder of McClain in

his sleep "would be the exact opposite of what I would expect from Mr. McKinney." Those acts were consistent with someone who seeks out stressful situations rather than avoids them; it was a contra-indication to the presence of PTSD.

The prosecution's expert, Dr. Gray, did not diagnose McKinney with PTSD. He did not "think there's enough evidence or diagnostic materials or work that's been done to conclusively diagnose him as having [PTSD]." His tentative diagnosis was that McKinney has antisocial personality disorder. He explained that "[m]ost antisocial people have [a] major disturbance in thinking, not to be confused with schizophrenia or psychosis. They tend to, for example blame others for their situation." Dr. Gray noted antisocial people typically avoid being a victim. Instead, "they want to be an offender, be in control, be in charge, be powerful even though the manner in which they do that is self-defeating, unhealthy and is abusive, harmful to others." Which is why "people with antisocial personality have a long history of conflict with the law."

At the conclusion of the evidence, trial judge Sheldon credited defense expert Dr. McMahon's testimony that McKinney had PTSD over Dr. Gray's contrary opinion. He found that Dr. McMahon's opinion was entitled "to more weight" than Dr. Gray's testimony. He then adjourned for three days to consider the evidence before ruling on McKinney's sentence.

C. Judge Sheldon Considers McKinney's PTSD Evidence

Judge Sheldon imposed his sentence on July 23, 1993. At the outset of that hearing, he found the

prosecution proved two aggravating factors for the Mertens murder: In the language of the statute, McKinney (1) "committed the offense as consideration for the receipt, or in expectation of the receipt, of anything of pecuniary value"; and (2) "committed the offense in an especially heinous, cruel or depraved manner." *See* Ariz.Rev.Stat. § 13-751(F)(5)–(6). No one disputes the solid footing in the record evidence for finding both of these aggravating factors. McKinney and Hedlund killed to get Mertens's money. And before dispatching Mertens with a bullet to her head, McKinney and Hedlund savagely injured her. Judge Sheldon also found the government proved two aggravating factors for the murder of Jim McClain: (1) the pecuniary-gain aggravating factor; and (2) that McKinney was "convicted of another offense in the United States for which under Arizona law a sentence of life imprisonment or death was imposable," *i.e.*, the earlier Mertens murder. *See* Ariz.Rev.Stat. § 13-751(F)(1), (5). Again, no one disputes the basis for these findings. McKinney and Hedlund killed McClain to get McClain's money, and McKinney was convicted for the earlier murder of Mertens.

Judge Sheldon then addressed McKinney's mitigation evidence. Judge Sheldon started by crediting Dr. McMahon's testimony twice and accepting Dr. McMahon's PTSD diagnosis as true. Judge Sheldon then addressed McKinney's nexus argument for leniency under the statutory Mental Capacity Factor, *id.* § 13-751(G)(1), which McKinney had cited in his sentencing memorandum. Judge Sheldon stated there was no evidence McKinney's PTSD "in any way significantly impaired Mr.

McKinney's conduct." He repeated that conclusion a second time moments later, where he concluded there was no evidence that McKinney's PTSD "in any way affected his conduct in this case." [20] Judge Sheldon reached that conclusion based on McKinney's planning of the burglaries and statements McKinney made to witnesses before the burglaries that he would shoot a resident if he encountered one during the burglaries. Judge Sheldon noted Dr. McMahon testified that a person suffering from PTSD would be withdrawn and would "avoid contacts which would either exacerbate or recreate the trauma that would bring on this type of stress from childhood." But McKinney sought out stressful situations by planning and executing the burglaries that led to the two murders. Judge Sheldon concluded leniency was not available based upon the statutory Mental Capacity Factor, and repeated a third time his belief that the PTSD did not "significantly impair[]" McKinney's conduct.

This analysis of PTSD under the statutory mitigation factors did not end Judge Sheldon's consideration of McKinney's PTSD for purposes of mitigation. Judge Sheldon next transitioned to address "the other mitigating factors raised by the

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[20] Early in its opinion, the majority admits that this language is directed to McKinney's argument for leniency under the statutory Mental Capacity Factor. Op. at 809. The majority nonetheless suggests these statements *also* show Judge Sheldon applied an unconstitutional nexus test. *Id.* at 809–10, 819–20. As I discuss in detail below, at this point in the sentencing colloquy, Judge Sheldon is addressing the statutory mitigating factors and only the statutory mitigating factors. *See infra* Section III.A.2.

defense in their memorandum." [21] Those other mitigation factors included, among others, McKinney's Part VII argument for leniency due to his difficult childhood and his psychological history, including his PTSD. After finding McKinney's childhood did not support leniency, Judge Sheldon concluded: "With respect to the *other* matters set out in the [defendant's sentencing] memorandum, I have considered them at length, and after considering all of the mitigating circumstances . . . I have determined that . . . the mitigating circumstances simply are not sufficiently substantial to call for a leniency under all of the facts of this case." (Emphasis added.) The court then sentenced McKinney to death for both first-degree murder convictions.

A week later, Judge Sheldon sentenced McKinney's co-defendant, Michael Hedlund, to death.

D. McKinney's Direct Appeal to the Arizona Supreme Court

McKinney appealed his sentence. *See McKinney*, 917 P.2d at 1232–34. The Arizona Supreme Court addressed both McKinney's and Hedlund's sentences together in the same opinion, taking Hedlund's first. As is common practice when a court addresses similar claims in the same opinion, the Arizona Supreme Court more fully articulated the legal standard applicable to both when it first addressed Hedlund's arguments. *Id.* at 1225–27. For Hedlund's

[21] This was the 27-page, 11-part sentencing memorandum, which Judge Sheldon specifically cited by date during his sentencing colloquy.

Eddings error argument, the court detailed what *Eddings* requires:

> Hedlund correctly observes that the trial judge must consider any aspect of his character or record and any circumstances of the offense relevant to determining whether a sentence less severe than death is appropriate. In considering such material, however, the judge has broad discretion to evaluate expert mental health evidence and to determine the weight and credibility given to it.

Id. at 1226. The court then rejected Hedlund's argument that Judge Sheldon failed to consider his mitigation evidence. *Id.* at 1226–27.

The court reached the same conclusion for McKinney's *Eddings* argument: "Here again, the record shows that the judge gave full consideration to McKinney's childhood and the expert testimony regarding the effects of that childhood, specifically the diagnosis of post-traumatic stress disorder." *Id.* at 1234. The court concluded: "The record clearly shows that the judge considered McKinney's abusive childhood and its impact on his behavior and ability to conform his conduct and found it insufficiently mitigating to call for leniency." *Id.* The court held Judge Sheldon did not err and affirmed McKinney's sentence. *Id.*

II.

A. What *Eddings v. Oklahoma* Requires and What It Prohibits

Eddings's command is simple. In *Eddings*, the trial judge stated that "in following the law" he could not "consider the fact of this young man's violent background" in determining whether to sentence him

to death. *Eddings*, 455 U.S. at 112–13, 102 S.Ct. 869. The Supreme Court held the trial judge's refusal to consider the evidence was unconstitutional under the Eighth Amendment. *Id.* at 113–15, 102 S.Ct. 869. "Just as the State may not by statute preclude the sentencer from considering any mitigating factor, neither may the sentencer refuse to consider, *as a matter of law*, any relevant mitigating evidence." *Id.* at 113–14, 102 S.Ct. 869. Yet the Court made clear that the sentencer "may determine the weight to be given relevant mitigating evidence. But [it] may not give it no weight by excluding such evidence from [its] consideration." *Id.* at 114–15, 102 S.Ct. 869. In later cases, the Supreme Court clarified that the sentencer cannot refuse to consider evidence because that evidence does not bear a causal nexus to the crime. *See, e.g.*, *Tennard v. Dretke*, 542 U.S. 274, 287, 124 S.Ct. 2562, 159 L.Ed.2d 384 (2004). We have recognized that the sentencer may consider a "causal nexus . . . as a factor in determining the weight or significance of mitigating evidence." *Lopez v. Ryan*, 630 F.3d 1198, 1204 (9th Cir.2011) (citing *Eddings*, 455 U.S. at 114–15, 102 S.Ct. 869).[22]

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[22] A sentencer is free to assign whatever weight, including *no* weight, that mitigating evidence deserves under the facts of the case, as long as the sentencer does not exclude from his consideration relevant mitigating evidence as a matter of law. *See, e.g.*, *Towery*, 673 F.3d at 945 ("One could question the wisdom of the Arizona Supreme Court's decision to accord Towery's evidence little or no weight. . . . However, the court's *reasoned and individualized decision* to give Towery's evidence little or no weight was not contrary to Supreme Court precedent."); *Allen v. Buss*, 558 F.3d 657, 667 (7th Cir.2009) ("The rule of *Eddings* is that a sentencing court may not exclude relevant mitigating evidence. But of course, a court may choose to give mitigating evidence little or no weight."

B. The "Last Reasoned Decision"

AEDPA governs when we review a state's determination whether a prisoner's rights under the federal Constitution have been violated. *See* 28 U.S.C. § 2254. Under AEDPA, our review is confined to the "last reasoned decision" of the state courts. *See Ylst v. Nunnemaker*, 501 U.S. 797, 803–04, 111 S.Ct. 2590, 115 L.Ed.2d 706 (1991); *Barker v. Fleming*, 423 F.3d 1085, 1091 (9th Cir.2005). The "last reasoned decision" is the most recent "adjudication on the merits" that "finally resolve[s] the rights of the parties on the substance of the claim, rather than on the basis of a procedural or other rule precluding state review of the merits." *Barker*, 423 F.3d at 1092.

I agree with the majority that the Arizona Supreme Court's opinion on direct review is the "last reasoned decision." Op. at 819. I do not agree with the majority's understanding of that opinion. The majority repeatedly refers to the Arizona Supreme Court's review of McKinney's sentence as a "de novo review." *See, e.g.*, *id.* at 802, 803–04, 804–05, 809–10, 819, 820, 826–27. The Arizona Supreme Court does independently review each death sentence. *See* Ariz.Rev.Stat. § 13-755. But the way it does its "independent review" is first to conduct a normal appellate review to determine whether the trial court made any legal errors when it imposed the death sentence. *See id.* § 13-755(a)–(b). We owe this finding double deference under AEDPA. *See, e.g.*, *Lopez v. Schriro*, 491 F.3d 1029, 1037–38 & n.2 (9th

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(citation omitted)); *United States v. Johnson*, 495 F.3d 951, 965 (8th Cir.2007) ("[J]urors are obliged to consider relevant mitigating evidence, but are permitted to accord that evidence whatever weight they choose, including no weight at all.").

Cir.2007). After the Arizona Supreme Court reviews for legal errors, it then decides whether the death sentence is justified. *See* Ariz. Rev. Stat. § 13-755(a)–(b); *State v. Roseberry*, 237 Ariz. 507, 353 P.3d 847, 849–50 (2015) ("[T]his Court reviews the entire record and independently considers whether a capital sentence is not only legally correct, but also appropriate."). Based on its own incorrect notion of what "independent review" means in Arizona practice, the majority converts this appellate review of death sentences into a new sentencing determination and treats McKinney's trial-court sentencing hearing as irrelevant, except insofar as the Arizona Supreme Court accepted Judge Sheldon's factual findings as its own. Op. at 810, 819–21.

Although at times we construe an appellate court's decision and a trial court's decision together as the "last reasoned decision," we do so only when the appellate court adopts the trial court's decision. *See, e.g.*, *Barker*, 423 F.3d at 1093. That is not what occurred here. The Arizona Supreme Court did not, as the majority posits, accept any of Judge Sheldon's factual findings as its own. *See* op. at 810, 819–21; *McKinney*, 917 P.2d at 1233–34. The court merely reviewed McKinney's argument that Judge Sheldon failed to consider McKinney's mitigation evidence and concluded, "On this record there was no error." *McKinney*, 917 P.2d at 1234. It also "independently reviewed the record," as it was required to do under Arizona law, and affirmed McKinney's death sentence. *Id.*; *see also id.* at 1225 (explaining the Arizona procedure for reviewing death sentences on direct appeal). For that reason, the Arizona Supreme

Court's opinion is the "last reasoned decision." *See Towery v. Ryan*, 673 F.3d 933, 944 n.3 (9th Cir. 2012) (per curiam) (refusing the petitioner's suggestion to "review the decisions of the sentencing court and the [Arizona Supreme Court] together").[23]

C. AEDPA's Deferential Review

The standard by which federal courts must review state-court decisions under AEDPA is well known, if not always well followed. *See* 28 U.S.C. § 2254(d). Under § 2254(d)(1), a federal court can issue a writ of habeas corpus only if the state court's decision "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." *Id.* § 2254(d)(1). Under § 2254(d)(2), a federal court can issue the writ only if the state court's decision "was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." *Id.* § 2254(d)(2).

We apply the "contrary to" prong of § 2254(d)(1) where, as here, the parties dispute whether a state appellate court applied the correct standard. *See Woodford v. Visciotti*, 537 U.S. 19, 22–24, 123 S.Ct. 357, 154 L.Ed.2d 279 (2002) (applying § 2254(d)(1) where the parties disputed whether the California Supreme Court applied the correct standard under *Strickland*). In this case, I apply § 2254(d)(1) when analyzing whether the Arizona Supreme Court used

[23] The majority's error in reviewing Judge Sheldon's colloquy as part of the "last reasoned decision" makes no difference. To dispel any doubts, as I explain below, the record shows both the Arizona Supreme Court and Judge Sheldon complied with *Eddings* even under a de novo review—which is the wrong standard under AEDPA. *See infra* Section III.

an unconstitutional nexus test in its review of McKinney's sentence.

The question whether a trial judge has considered all the proffered mitigation evidence is a factual question, not a legal one. *See Lopez*, 491 F.3d at 1037–38 & n.2. And a state appellate court's finding that the trial judge considered all the proffered mitigation evidence is itself a factual finding. *See id.*; *see also Parker v. Dugger*, 498 U.S. 308, 320, 111 S.Ct. 731, 112 L.Ed.2d 812 (1991). As a result, I apply § 2254(d)(2) to the Arizona Supreme Court's finding that Judge Sheldon considered all of McKinney's mitigation evidence, which can be overturned only if it was "unreasonable." *See Towery*, 673 F.3d at 945 n.4; *Lopez*, 491 F.3d at 1037–38 & n.2. Judge Sheldon's sentencing colloquy is relevant only for making that determination.[24]

III.

I begin by evaluating McKinney's appeal under the correct standard.[25] That standard requires that we

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[24] The majority's faulty understanding of the Arizona Supreme Court's opinion leads it to conclude that I am wrong to apply § 2254(d)(2) in this case. Op. at 826–27. We previously used § 2254(d)(2) in habeas review of Arizona death sentences, *see Towery*, 673 F.3d at 945 n.4; *Lopez*, 491 F.3d at 1037–38 & n.2, as did Judge Wardlaw—who joins the majority opinion—in her partial dissent to the original panel opinion in this case, *see McKinney v. Ryan*, 730 F.3d 903, 925–27 (9th Cir.2013) (Wardlaw, J., dissenting in part). The majority's disagreement on this point creates a circuit split with at least two other circuits. *See Corcoran v. Neal*, 783 F.3d 676, 685–87 (7th Cir.2015); *Quince v. Crosby*, 360 F.3d 1259, 1267 (11th Cir.2004).

[25] The majority's incorrect standard is dealt with later. *See infra* Section III.B.

first determine whether the Arizona Supreme Court's decision was "contrary to . . . clearly established Federal law" under § 2254(d)(1). Applied here, we must determine whether the Arizona Supreme Court treated McKinney's PTSD as irrelevant to consider whether leniency was justified, because McKinney did not show the PTSD affected his conduct at the time of the murders. If the Arizona Supreme Court treated the PTSD as mitigation evidence relevant to whether leniency was justified, we must then determine whether the Arizona Supreme Court's conclusion that Judge Sheldon fully considered McKinney's PTSD was an "unreasonable determination of fact" under § 2254(d)(2).

A. The Correct Analysis of the Arizona Supreme Court's Decision

1.

This case primarily boils down to what standard the Arizona Supreme Court applied when addressing *McKinney*'s *Eddings* claim. "A decision is contrary to clearly established law if the state court 'applies a rule that contradicts the governing law set forth in [Supreme Court] cases.'" *Lafler v. Cooper*, —— U.S. ——, 132 S.Ct. 1376, 1390, 182 L.Ed.2d 398 (2012) (citation omitted); *Frantz v. Hazey*, 533 F.3d 724, 734 (9th Cir. 2008) (en banc) ("[U]se of the wrong legal rule or framework . . . constitute[s] error under the 'contrary to' prong of § 2254(d)(1)."). The state argues the Arizona Supreme Court correctly applied *Eddings*; McKinney argues the Arizona Supreme Court applied a "nexus" standard to exclude his PTSD from consideration contrary to *Eddings*.

The Supreme Court's decision in *Visciotti* governs our analysis under the "contrary to" prong of §

2254(d)(1). *See Visciotti*, 537 U.S. at 22–24, 123 S.Ct. 357. In *Visciotti*, the petitioner argued the California Supreme Court applied the wrong standard for what constitutes prejudicial error under *Strickland*. *Id.* To prove such prejudice under *Strickland*, "the defendant must establish a 'reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'" *Id.* at 22, 123 S.Ct. 357 (quoting *Strickland v. Washington*, 466 U.S. 668, 694, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)). In its opinion, the California Supreme Court began its *Strickland* analysis by twice stating the correct standard: "reasonable probability." *Id.* at 22–23, 123 S.Ct. 357. The opinion then misstated the "prejudice" standard four times in other portions of the opinion because it used the term "probable" instead of "reasonably probable." *Id.* at 23, 123 S.Ct. 357.[26] Relying on the misstatements, we found the California Supreme Court applied the incorrect standard. *Id.* at 23–24, 123 S.Ct. 357. The decision was therefore "contrary to" *Strickland* under § 2254(d)(1). *Id.*

In a per curiam opinion, and without the benefit of merits briefing or oral argument, the Supreme Court reversed our judgment. *Id.* at 22–24, 123 S.Ct. 357. The Court chided us for mischaracterizing the California Supreme Court's decision,"which expressed and applied the proper standard for evaluating prejudice." *Id.* at 22, 123 S.Ct. 357. Our "readiness to attribute error [was] inconsistent with

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[26] Petitioner Visciotti made the point that the "reasonably probable" standard was an easier standard of proof for him to meet than the plain "probable." *Visciotti v. Woodford*, 288 F.3d 1097, 1108–09 (9th Cir. 2002).

the presumption that state courts know and follow the law." *Id.* at 24, 123 S.Ct. 357 (citing *Parker*, 498 U.S. at 314–16, 111 S.Ct. 731 (1991)). Our "readiness to attribute error" was "also incompatible with § 2254(d)'s 'highly deferential standard for evaluating state-court rulings,' which demands that state-court decisions be given the benefit of the doubt." *Id.* (quoting *Lindh v. Murphy*, 521 U.S. 320, 333 n.7, 117 S.Ct. 2059, 138 L.Ed.2d 481 (1997)).

Visciotti's teaching is not complicated. When we review a state-appellate-court decision under the "contrary to" prong of § 2254(d)(1), we must presume the state court knew and followed federal constitutional law. *Id.* And we must give the court the "benefit of the doubt." *Id.* For that reason, we must construe any ambiguity in language in the state court's favor. As applied to *Eddings* cases, when the state court identifies and articulates the correct *Eddings* standard, we must presume it applied that standard. That presumption can be rebutted by any action by the state court that shows the state court excluded the defendant's mitigation evidence as a matter of law. The easiest way to rebut the presumption would be an express statement from the state court that it was excluding evidence from consideration as a matter of law, such as the trial judge's statements in *Eddings* itself. *See Eddings*, 455 U.S. at 112–13, 102 S.Ct. 869. However, that is not the only way to rebut the presumption. If the state court's reasoning shows, without any ambiguity, that it did not consider relevant mitigation evidence at all, that would suffice to rebut the presumption. Any less deferential review rejects the presumption that *Visciotti* requires. This is the

analysis that should replace our "clear indication" test for *Eddings* cases. *See, e.g.*, *Schad v. Ryan*, 671 F.3d 708, 724 (9th Cir.2011) ("Absent a clear indication in the record that the state court applied the wrong standard, we cannot assume the courts violated *Eddings*'s constitutional mandates.").

Applying *Visciotti* to this case is quick work. At no point did the Arizona Supreme Court state either that Judge Sheldon had excluded McKinney's PTSD evidence as a matter of law, or that it would have been permissible to do so, under Arizona's nonstatutory catchall because the PTSD bore no nexus to the crime. Nor did the Arizona Supreme Court treat that evidence as if it had no weight as a matter of law. That should be the end of the matter and of McKinney's appeal. All the majority and McKinney do is speculate that, regardless what it stated, the Arizona Supreme Court applied a nexus test to conclude the PTSD evidence was irrelevant under the nonstatutory catchall. *Visciotti* prohibits such speculation.

But let us make a closer inquiry anyway to quell any doubts raised by the majority's flank attack on the Arizona Supreme Court's decision. That court first outlined the *Eddings* standard when, in its combined review of Hedlund's and McKinney's sentences, it stated:

> Hedlund correctly observes that the trial judge *must consider any aspect of his character or record and any circumstance of the offense* relevant to determining whether a sentence less severe than the death penalty is appropriate. In considering such material, however, the judge has broad discretion to evaluate expert mental health

> evidence and to determine *the weight* and credibility given to it.

McKinney, 917 P.2d at 1226 (emphasis added). This is what *Eddings* requires and all that it requires. *See Harris v. Alabama*, 513 U.S. 504, 512, 115 S.Ct. 1031, 130 L.Ed.2d 1004 (1995) ("[T]he Constitution does not require a State to ascribe any specific weight to particular factors, either in aggravation or mitigation, to be considered by the sentencer."). The Arizona Supreme Court then confirmed it knew the difference between excluding mitigation evidence altogether as a matter of law (*Eddings* error) and giving mitigation evidence little or no weight as a matter of fact (permissible under *Eddings* and *Harris*). *See McKinney*, 917 P.2d at 1231 (noting that Judge Sheldon "did not improperly exclude mitigating evidence at sentencing and the mitigating evidence is not of great weight").

The Arizona Supreme Court then found Judge Sheldon complied with *Eddings* in McKinney's case:

> Here again, the record shows that *the judge gave full consideration* to McKinney's childhood and the expert testimony regarding the effects of that childhood, *specifically the diagnosis of post-traumatic stress disorder* (PTSD).

Id. at 1234 (emphasis added). The court continued:

> [A] difficult family background, including childhood abuse, *does not necessarily have substantial mitigating weight absent* a showing that it significantly affected or impacted the defendant's ability to perceive, comprehend, or control his actions.

Id. (emphasis added). In other words, when a difficult background does affect the "defendant's ability to perceive, comprehend, or control his actions," it has "substantial mitigating weight." When there is no such effect, the evidence does not necessarily have substantial mitigating weight, but it can have such weight. That is up to the sentencer's discretion.

The best McKinney can do is point to the Arizona Supreme Court's citation to *State v. Ross*, 180 Ariz. 598, 886 P.2d 1354 (1994), which is a case where that court did indeed misapply *Eddings*. But that single citation is insufficient to rebut the presumption that the court knew and followed *Eddings*. In *Visciotti*, the California Supreme Court misstated the *Strickland* prejudice standard four times after stating it correctly. *Visciotti*, 537 U.S. at 22–24, 123 S.Ct. 357. If actually misstating the standard four times is insufficient to rebut the presumption that the state court applied the correct standard (*Visciotti*), then the lesser sin of citing a suspect case cannot overcome the court's correct statement of the law and the presumption it applied that law (*McKinney*). That is why we have previously held a single citation cannot be a basis for finding *Eddings* error on AEDPA review. *See Towery*, 673 F.3d at 946. Indeed, a prior en banc panel of this court rejected this exact argument in the less deferential, pre-AEDPA context. *See Jeffers v. Lewis*, 38 F.3d 411, 415 (9th Cir.1994) (en banc). As a result, we must conclude the Arizona Supreme Court's decision was not "contrary to . . . clearly established Federal law."

2.

I turn to the Arizona Supreme Court's conclusion that Judge Sheldon fully considered McKinney's PTSD. That is a conclusion we review to determine whether it was an "unreasonable determination of fact" under § 2254(d)(2). *See Lopez*, 491 F.3d at 1037–38 & n.2. We are barred from characterizing the Arizona Supreme Court's "factual determination[] as unreasonable 'merely because we would have reached a different conclusion in the first instance.'" *Brumfield v. Cain*, —— U.S. ——, 135 S.Ct. 2269, 2277, 192 L.Ed.2d 356 (2015) (citation omitted). "Instead, § 2254(d)(2) requires that we accord the state . . . court substantial deference." *Id.* "State-court factual findings . . . are presumed correct; the petitioner has the burden of rebutting the presumption by 'clear and convincing evidence.'" *Davis v. Ayala*, —— U.S. ——, 135 S.Ct. 2187, 2199–2200, 192 L.Ed.2d 323 (2015) (citation omitted). If "'reasonable minds reviewing the record might disagree' about the finding in question, 'on habeas review that does not suffice to supersede the [state court's] determination.'" *Brumfield*, 135 S. Ct. at 2277 (citation omitted).

It requires no strenuous effort to conclude that Judge Sheldon fully considered McKinney's PTSD. First, unlike the trial court judge in *Eddings*, at no point did Judge Sheldon state he was excluding the PTSD from consideration under the nonstatutory catchall as a matter of law because the PTSD had no effect on McKinney's criminal conduct. Quite the opposite. Before sentencing McKinney, Judge Sheldon stated he "consider[ed] all of the mitigating circumstances." That alone should preclude us from

concluding the Arizona Supreme Court's finding was an "unreasonable determination of fact."

But even were we to indulge in de novo review of the record, that review confirms that Judge Sheldon fully considered McKinney's PTSD. Judge Sheldon's discussion of McKinney's mitigation arguments proceeded in three steps. First, at pages 26 to 28 of the sentencing transcript, Judge Sheldon discussed the mitigation evidence McKinney proffered, specifically citing McKinney's sentencing memorandum by date. Second, at pages 28 to 31, Judge Sheldon addressed four statutory mitigating factors in Ariz. Rev. Stat. § 13-751(G), including McKinney's argument, under § 13-751(G)(1), that his PTSD affected his mental state at the time of the murders. Third, at pages 31 to 32, Judge Sheldon addressed the nonstatutory mitigating factors McKinney raised in his sentencing memorandum, including McKinney's argument for leniency under the nonstatutory catchall due to his PTSD separate from its effect on his mental state at the time of the murders.

That chronology proceeded as follows:

> At the conclusion of the evidentiary hearing, Judge Sheldon credited Dr. McMahon's testimony: "I do believe that for purposes of this hearing that some evidence of [McKinney's] possible manifestations of Post-traumatic Stress Syndrome were demonstrated by the testimony of Dr. McMahon. And I'll just—I don't know that I find it an overwhelmingly persuasive mitigating factor, but I will tell you that I'm, more inclined to believe that than Dr. Gray's determination that there is not enough evidence to assume that there is Post-

traumatic Stress Syndrome." Judge Sheldon later stated Dr. McMahon's PTSD diagnosis was entitled "to more weight under the circumstances of this case."

Judge Sheldon began his discussion of McKinney's mitigation evidence at the sentencing hearing by stating, "I have considered all the exhibits admitted into evidence, Numbers 1 through 8." At least one of those exhibits dealt with PTSD and its effects.[27]

Judge Sheldon again credited defense witness Dr. McMahon's testimony: "[I]t appears, and I believe that the statements made [about McKinney's childhood], both *by Dr. McMahon* and made by the witnesses at the time they were testifying, were truthful, and *I did take them into consideration in this case*." (Emphasis added.)

Judge Sheldon then credited Dr. McMahon's testimony that McKinney's childhood led him to develop PTSD: "For whatever reasons, some of which I believe were due to the traumatic circumstances that he grew up in and the circumstances which were testified to by the witnesses during the mitigation hearing, the circumstances of child abuse, which I accept as true for purposes of this hearing, I think manifest the causal factors linked to Post-traumatic Stress Syndrome as testified to by Dr. McMahon."

After discussing an exhibit the defense proffered, Judge Sheldon turned to the statutory mitigation factors under Ariz. Rev. Stat. § 13-751(G). He first addressed McKinney's primary argument, contained

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[27] The exhibits are not in the parties' excerpts of record, but they are discussed during the sentencing hearing.

in Part VIII of his sentencing memorandum, that McKinney was entitled to leniency under the statutory Mental Capacity Factor, § 13-751(G)(1) because his PTSD affected him at the time of the murders:

> Judge Sheldon began: "[I]t appeared to me that Dr. McMahon did not at any time suggest in his testimony nor did I find any credible evidence to suggest that, even if the diagnosis of Post-traumatic Stress Syndrome were accurate in Mr. McKinney's case, that in any way significantly impaired Mr. McKinney's conduct." Judge Sheldon repeated that conclusion a page later: "[A]nd it appeared to me that based upon all these circumstances that there simply was no substantial reason to believe that even if the trauma that Mr. McKinney had suffered in childhood had contributed to an appropriate diagnosis of Post-traumatic Stress Syndrome that it in any way affected his conduct in this case."
>
> Judge Sheldon explained why he believed the PTSD did not affect McKinney's state of mind at the time of the murders. Namely, McKinney's pre-planning of the burglaries and homicides was inconsistent with Dr. McMahon's testimony that PTSD would cause McKinney to avoid confrontation rather than seek it out.
>
> Judge Sheldon then concluded leniency was not available under the Mental Capacity Factor, § 13-751(G)(1), again repeating his belief that the PTSD did not "significantly impair[]" McKinney at the time of the murders.

Judge Sheldon then addressed, and rejected, the other statutory mitigation factors.

Finally, Judge Sheldon turned to McKinney's nonstatutory mitigation factors. McKinney's sentencing memorandum argued in two separate parts (Parts I and VII) that McKinney was entitled to leniency for his PTSD separate from any effect the PTSD had on his state of mind during the murders. Part I of the memorandum was titled: "Evidence of a Difficult Family History: *Eddings v. Oklahoma*, supra." In Part I, McKinney mentioned the childhood-caused PTSD as a mitigating factor along with his difficult childhood. The title's citation to *Eddings v. Oklahoma* brought front and center the constitutional requirement that the PTSD diagnosis be considered without restriction. Part VII of the memorandum was titled: "Psychological History." There, McKinney explained Dr. McMahon's PTSD diagnosis and stated: "Defendant submits that his psychological background is mitigating." Judge Sheldon made clear he considered both of these sections:

> Judge Sheldon started: "With respect to the other mitigating factors raised by the defense in their memorandum, defendant's mitigating memorandum received by this Court July 15th, 1993, I have had an opportunity to review that memorandum." Judge Sheldon then rejected the Part I argument that McKinney's childhood warranted leniency.
>
> Judge Sheldon then addressed the remaining arguments McKinney made, which included Part VII's argument that McKinney's PTSD warranted leniency: "With respect to the other matters set out in the memorandum, *I have considered them at length*, and after considering *all of the mitigating*

> *circumstances*, *the mitigating evidence that was presented* by the defense in this case as against the aggravating circumstances, and *other matters which clearly are not set forth in the statute which should be considered by the court*, I have determined that . . . the mitigating circumstances simply are not sufficiently substantial to call for leniency under all of the facts of this case." (Emphasis added.)[28]

As the sentencing transcript shows, Judge Sheldon considered "at length" McKinney's sentencing memorandum's arguments that his PTSD diagnosis warranted leniency without any reference to PTSD's possible effect on his mental capacity during the murders. And Judge Sheldon found the PTSD did not carry enough mitigating weight "to call for leniency." When combined with Judge Sheldon's prior crediting of Dr. McMahon's testimony as to the PTSD diagnosis, the only conclusion to reach is that Judge Sheldon complied with *Eddings*. Even were there an ambiguity in Judge Sheldon's statements (there isn't), the Supreme Court has admonished that "[w]e must assume that the trial judge considered all this evidence before passing sentence. For one thing, he said he did." *Parker*, 498 U.S. at 314, 111 S.Ct. 731.[29]

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[28] It was only in Part VIII of the sentencing memorandum that McKinney argued the causal relationship—"nexus"—between his PTSD and his criminal conduct.

[29] Nor was McKinney entitled to a "specific listing and discussion of each piece of mitigating evidence under federal constitutional law." *See Jeffers*, 38 F.3d at 418 ("While 'it is important that the record on appeal disclose to the reviewing court the considerations which motivated the death sentence,' 'due process does not require that the sentencer exhaustively document its analysis of each mitigating factor as long as a

In short, the Arizona Supreme Court's conclusion that Judge Sheldon properly considered all of McKinney's mitigation evidence was not an "unreasonable determination of fact." In fact, it was the correct conclusion.[30]

B. The Majority's Flawed Analysis

Perhaps because the Arizona Supreme Court was explicit in its compliance with *Eddings*, the majority takes a very different course to conclude McKinney's death sentence is invalid. The majority opinion proceeds in essentially two steps. First, it falsely

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reviewing federal court can discern from the record that the state court did indeed consider all mitigating evidence offered by the defendant.'" (citation omitted) (quoting *Gardner v. Florida*, 430 U.S. 349, 361, 97 S.Ct. 1197, 51 L.Ed.2d 393 (1977) (plurality opinion); *Jeffries v. Blodgett*, 5 F.3d 1180, 1197 (9th Cir.1993))).

[30] McKinney also argues the Arizona Supreme Court and Judge Sheldon failed to consider his horrific childhood in violation of *Eddings*. The majority does not address that claim, but the record makes clear that Judge Sheldon considered that evidence too. He listened to lengthy testimony about it; he mentioned it several times in his colloquy; and he expressly stated: "I agree that there was evidence of a difficult family history by the defendant. However, as I've indicated, I do not find that is a substantial mitigating factor *or* that there was any evidence that linked that in any way to demonstrate that . . . somehow significantly impaired the defendant's capacity to understand the wrongfulness of his conduct." (Emphasis added.) Just like the PTSD evidence, Judge Sheldon considered McKinney's childhood both as to its effect on McKinney at the time of the crimes and independently from any effect it may have had. The Arizona Supreme Court confirmed Judge Sheldon properly considered that evidence: "[T]he record shows that the judge gave full consideration to McKinney's childhood and the expert testimony regarding the effects of that childhood." *McKinney*, 917 P.2d at 1234.

paints the Arizona Supreme Court as a habitual violator of *Eddings* between 1989 and 2005. Based on that false assertion, the majority concludes the *Visciotti* presumption is automatically rebutted in this case and every other *Eddings* case coming out of Arizona within that time period. Op. at 803–04. In its place, the majority suggests the presumption is flipped and engages in a sort of de novo review to see if Arizona has rebutted the presumption it violated *Eddings*, with the burden of proof as to *Eddings* compliance on the Arizona courts. *Id.* at 819–21, 823–26. Second, the majority relies on a misreading of Judge Sheldon's sentencing colloquy and the Arizona Supreme Court opinion to conclude the Arizona Supreme Court violated *Eddings* despite that court's correct articulation of *Eddings*'s requirements. *Id.* I take each mistake in turn.

1.

The majority begins by acknowledging we are required to presume state courts know and follow the law. *Id.* at 803–04. But it concludes we should not afford the presumption in *any* Arizona *Eddings* case because the Arizona Supreme Court—like common-law courts generally—adheres to the principle of stare decisis and "applied its unconstitutional causal nexus test consistently throughout . . . the relevant period." *Id.* at 803–04, 826–27. Though such a presumption is "appropriate in the great majority of habeas cases," the majority posits, "the presumption is rebutted here where we know, based on its own words, that the Arizona Supreme Court did not 'know and follow' federal law." *Id.* at 804. In other words, the majority relies on *other* Arizona Supreme Court cases to conclude the Arizona Supreme Court

in *this* case is afforded no deference under AEDPA. Even if AEDPA permitted this type of analysis (it doesn't, and the majority cites no case in support of it), the analysis is based on a false premise. The Arizona courts did not consistently misapply *Eddings*.

The majority asserts that Arizona cases show a uniform error between 1989 and 2005. *Id.* at 812–18, 823–27. To see that assertion is wrong, one need look no further than a case the Arizona Supreme Court decided a mere six weeks after it decided McKinney's appeal and squarely within that time period. *See State v. Towery*, 186 Ariz. 168, 920 P.2d 290 (1996). There, the court cited to *Eddings* and its progeny for the proposition that "[t]he sentencer . . . *must* consider the defendant's upbringing if proffered but is not required to give it significant mitigating weight. How much weight should be given proffered mitigating factors is a matter within the sound discretion of the sentencing judge." *Id.* at 311 (applying *Penry v. Lynaugh*, 492 U.S. 302, 319, 109 S.Ct. 2934, 106 L.Ed.2d 256 (1989) (emphasis added)). The Arizona Supreme Court rejected defendant Towery's argument that the trial judge failed to comply with *Eddings* when he considered Towery's background and "gave it little or no mitigating value." *Id.* And, on habeas review of *Towery*, we concluded the Arizona Supreme Court complied with *Eddings* when it affirmed Towery's sentence. *Towery*, 673 F.3d at 944–46. In another case decided the same year as McKinney's appeal, the Arizona Supreme Court found the defendant's diagnosis of antisocial personality disorder to be a mitigating circumstance even though it did not find a

nexus between that mental illness and the defendant's crime. *State v. Thornton*, 187 Ariz. 325, 929 P.2d 676, 685–86 (1996) ("We agree with the trial court that Thornton's childhood, dysfunctional family, and personality disorder are mitigating factors.").

But *Towery* and *Thornton* are no outliers. A case decided a year before McKinney's appeal was decided, *see State v. Gonzales*, 181 Ariz. 502, 892 P.2d 838, 851 (1995) (applying *Eddings*), and a case decided a year after it, *see State v. Trostle*, 191 Ariz. 4, 951 P.2d 869, 885–86 (1997) (applying *Lockett*, *Eddings*'s precursor), confirm the Arizona Supreme Court knew how to apply *Eddings* correctly. Moreover, the Arizona Supreme Court relied on *non-nexus* mitigation evidence to *vacate* death sentences during the majority's chosen time period, a fact our court has already recognized. *See Lopez*, 630 F.3d at 1203–04 (collecting cases for the proposition that "the Arizona Supreme Court expressly took mitigating evidence into consideration when reducing a death sentence to life, *regardless of any causal nexus to the crime*" (emphasis added)).

Still, the majority would have us believe the Arizona Supreme Court *usually* applied an unconstitutional nexus test. It provides a long string citation in an attempt to prove its point. Op. at 815–16. But the Arizona Supreme Court did not even apply an invalid nexus test in many of the cases the majority cites. The majority cites two cases where we have already held on habeas review that the Arizona

Supreme Court did not commit *Eddings* error.[31] Indeed, as the majority recognizes, we have found there was no *Eddings* error in six additional cases during the relevant time period.[32] *Id.* at 818. The majority cites other cases where a federal district court has held there was no *Eddings* error and appeal is pending.[33] *Id.* at 815–16. The majority also cites cases as examples of *Eddings* error where the Arizona Supreme Court gave little weight to mitigation evidence because there was no nexus between that evidence and the murder.[34] *Id.* at 33.

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[31] *See State v. Towery*, 186 Ariz. 168, 920 P.2d 290, 310–11 (1996), *habeas relief denied in Towery*, 673 F.3d at 944–47; *State v. Stokley*, 182 Ariz. 505, 898 P.2d 454, 473 (1995), *habeas relief denied in part in Stokley v. Ryan*, 705 F.3d 401, 404 (9th Cir.2012) (explaining that "on balance, the Arizona Supreme Court's opinion suggests that the court did weigh and consider all the evidence presented in mitigation at sentencing").

[32] *Hedlund v. Ryan*, 750 F.3d 793, 818 (9th Cir.2014); *Murray v. Schriro*, 746 F.3d 418, 455 (9th Cir.2014); *Clabourne*, 745 F.3d at 371–74, *petition for rehearing and rehearing en banc pending*, No. 0999022 (9th Cir. Mar. 18, 2014); *Poyson*, 743 F.3d at 1196–1200; *Schad*, 671 F.3d at 722–26; *Lopez*, 630 F.3d at 1203–04.

[33] *See State v. Martinez*, 196 Ariz. 451, 999 P.2d 795 (2000), *habeas relief denied in Martinez v. Schriro*, No. CV-05-1561-PHX-EHC, 2008 WL 783355, at *33 (D. Ariz. Mar. 20, 2008), *appeal pending sub nom. Martinez v. Ryan*, No. 08-99009 (9th Cir. May 29, 2008); *State v. Rienhardt*, 190 Ariz. 579, 951 P.2d 454 (1997), *habeas relief denied in Rienhardt v. Ryan*, 669 F. Supp. 2d 1038, 1059–60 (D. Ariz. 2009), *appeal pending*, No. 10-99000 (9th Cir. Jan. 8, 2010).

[34] *State v. Jones*, 185 Ariz. 471, 917 P.2d 200, 219 (1996) ("A difficult family background is *not necessarily* a mitigating circumstance unless defendant can show that something in his background had an effect on his behavior that was beyond his control." (emphasis added)); *State v. Bible*, 175 Ariz. 549, 858

But giving little or no weight to such evidence as a factual matter is perfectly permissible under *Eddings*. *See, e.g.*, *Lopez*, 630 F.3d at 1204. Finally, the two cases upon which the majority most heavily relies, *State v. Djerf*, 191 Ariz. 583, 959 P.2d 1274 (1998), and *State v. Hoskins*, 199 Ariz. 127, 14 P.3d 997 (2000), came years after the Arizona Supreme Court affirmed McKinney's sentence. *See* op. at 814–15.

A close review of the majority's string cite shows that, at worst, the Arizona Supreme Court sometimes misapplied *Eddings* in the years before that court affirmed McKinney's sentence. *See, e.g.*, *Ross*, 886 P.2d at 1363; *State v. Wallace*, 160 Ariz. 424, 773 P.2d 983, 986 (1989). It is for that reason that we have *always* rejected the majority's conclusion that the Arizona Supreme Court consistently applied an unconstitutional nexus test during this time period.[35] As a result, we have *always* rejected the argument that the Arizona Supreme Court's prior mistakes in this area are relevant to the decision before us.[36] In fact, we have

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P.2d 1152, 1209 (1993) ("In sum, our independent review of the record shows no *significant* mitigating evidence." (emphasis added)).

[35] *See Poyson*, 743 F.3d at 1198; *Towery*, 673 F.3d at 946; *Lopez*, 630 F.3d at 1203–04.

[36] *See Poyson*, 743 F.3d at 1198 n.7 ("We reject the suggestion that because other Arizona cases may have involved causal nexus error we should presume that this case did as well."); *see also Clabourne*, 745 F.3d at 372–73, *petition for rehearing and rehearing en banc pending*, No. 0999022 (9th Cir. Mar. 18, 2014); *Schad*, 671 F.3d at 723–24 (finding the Arizona Supreme Court did not apply an unconstitutional nexus test in an

specifically rejected the argument that the Arizona Supreme Court is not entitled to the *Visciotti* presumption in *Eddings* cases. *See Poyson v. Ryan*, 743 F.3d 1185, 1198 (9th Cir. 2013). The majority today overrules these precedents *sub silentio*, and concludes Arizona is not entitled to the *Visciotti* presumption because Arizona has on occasion misapplied *Eddings* before.

The majority's response to the cases involving *Eddings* compliance reveals its view of the Arizona courts: No matter what the Arizona courts say, they never *really* considered all of the mitigation evidence. *See* op. at 823–27. For example, we previously held in *Lopez* that Arizona complied with *Eddings* during this time period and relied in part on three cases for that conclusion. *See Lopez*, 630 F.3d at 1204 n.4 (citing *State v. Trostle*, 191 Ariz. 4, 951 P.2d 869 (1997); *State v. Mann*, 188 Ariz. 220, 934 P.2d 784 (1997); *State v. Medrano*, 185 Ariz. 192, 914 P.2d 225 (1996)). The majority gets around those cases by disregarding the parts of the cases that show the Arizona Supreme Court quite understood and applied *Eddings*'s mandate.[37] Op. at 825–26. The

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opinion filed eight months after the court's *Wallace* decision); *Greenway*, 653 F.3d at 807–08; *Lopez*, 630 F.3d at 1203–04.

[37] These cases show the Arizona Supreme Court understood that *Eddings* requires consideration of non-nexus mitigation evidence but that the sentencing court retains discretion over how much weight, if any, to afford such evidence. In *Trostle*, the Arizona Supreme Court explicitly discussed *Eddings*'s mandate and concluded, "In considering evidence of mental impairment, our primary task is to determine its mitigating weight, if any." 951 P.2d at 885–86. The court expressly considered numerous pieces of non-nexus mitigating evidence: Trostle's cooperation with the police, past drug and alcohol abuse, good conduct

during trial, loving family relationships, ability to function well in a structured environment, lack of a prior felony conviction, and remorse. *Id.* at 887. The Arizona Supreme Court noted that the trial court should have considered such evidence and factored the evidence into its independent reweighing of the aggravating and mitigating factors. *Id.* at 887–88. The court reduced Trostle's death sentence to life imprisonment. *Id.* at 888.

In *Mann*, the Arizona Supreme Court reviewed four pieces of non-nexus mitigating evidence and found Mann did not "establish[] mitigation of sufficient weight to call for leniency." 934 P.2d at 795. The majority concedes that the Arizona Supreme Court considered, but gave little weight to, two pieces of non-nexus mitigating evidence: Mann's relationship with his children and a change in Mann's lifestyle post-dating his crimes. Op. at 825–26. The majority contends, however, that the court "held that defendant's difficult family background was irrelevant as a matter of law." *Id*. at 825. The Arizona Supreme Court did no such thing. It stated "[a]n abusive family background is *usually* given *significant weight* as a mitigating factor only when the abuse affected the defendant's behavior at the time of the crime." *Mann*, 934 P.2d at 795 (emphasis added). This statement is entirely consistent with *Eddings*: It shows the court understood it could ascribe Mann's family background the mitigating weight it deserves. *Cf. supra* Section III.A.1. The majority also contends *Mann*'s citation to *Wallace* shows the Arizona Supreme Court applied an unconstitutional causal-nexus test to Mann's evidence of a troubled family background. Op. at 825–26. However, the court also cited a case in which it did not ascribe "much weight" to the defendant's "difficult family background," which is entirely consistent with *Eddings*. *See Mann*, 934 P.2d at 795 (citing *State v. West*, 176 Ariz. 432, 862 P.2d 192, 211–12 (1993), *overruled on other grounds by State v. Rodriguez*, 192 Ariz. 58, 961 P.2d 1006 (1998)).

In *Medrano*, the Arizona Supreme Court reviewed Medrano's cocaine use both as a statutory mitigating factor and as a nonstatutory mitigating factor. 914 P.2d at 227–29. The court found Medrano's cocaine use did not qualify as a statutory mitigating factor under Ariz.Rev.Stat. § 13751(G)(1) because

majority similarly gives short shrift to *State v. Thornton*, 187 Ariz. 325, 929 P.2d 676 (1996), and *State v. Gonzales*, 181 Ariz. 502, 892 P.2d 838 (1995).[38] Op. at 824–25.

The majority is grasping at straws. First, the majority has flipped the presumption to require us to presume the Arizona courts violated *Eddings*. No law or case is cited for this proposition. Second, those cases demonstrate compliance with *Eddings* sufficient to rebut this newly created flipped presumption. Look at *Gonzales*. There, the Arizona Supreme Court explained that "[i]n capital

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Medrano failed to prove his cocaine use significantly impaired his ability to conform his conduct to the law or appreciate the wrongfulness of his actions. *Id.* at 228. The Arizona Supreme Court acknowledged it was required to consider Medrano's cocaine use regardless any causal connection, but found Medrano's cocaine use unpersuasive as mitigating evidence. *Id.* at 229 (citing *State v. Ramirez*, 178 Ariz. 116, 871 P.2d 237, 252 (1994) ("[A]lthough [courts] must consider all evidence offered in mitigation, they are not bound to accept such evidence as mitigating." (alterations in original))). The court then noted that the trial court, consistent with *Eddings*, rejected Medrano's "claim that cocaine intoxication, *under these facts*, is sufficiently mitigating to call for leniency." *Id.*; *see also id.* ("Judges are presumed to know and follow the law and to consider all relevant sentencing information before them.").

[38] The majority takes issue with *Thornton*'s citation to *Ross*, op. at 825, but ignores that the citation to *Ross* is for a point that is irrelevant to the majority's analysis. *See Thornton*, 929 P.2d at 686 ("Thornton argues that his cooperation with law enforcement is a mitigating factor. Thornton's admission of guilt after he was stopped and his offer to admit guilt in exchange for the state withdrawing the request for the death penalty furthered his own interest. Cooperation that is in the best interest of the accused is not a mitigating circumstance. *State v. Ross* . . . .").

sentencing proceedings, the trial court must consider the mitigating factors in [Ariz.Rev.Stat.] § 13-703(G) *as well as any aspect of the defendant's background or the offense* relevant to determining whether the death penalty is appropriate." *Gonzales*, 892 P.2d at 850 (emphasis added). The court later noted:

> From the detailed special verdict, it is clear that the trial court considered all evidence offered in mitigation. He was required to do no more. *See Eddings v. Oklahoma*, 455 U.S. 104, 112, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982) (applying the rule in *Lockett v. Ohio* that the "sentencer in capital punishment cases must be permitted to consider any relevant mitigating factor").

Id. at 851. Does that not show the Arizona Supreme Court here complied with *Eddings*? What else could the court have done to overcome the majority's flipped presumption?

In short, the majority's response to those cases showing compliance with *Eddings* is nothing short of an act of contortion. *See* op. at 823–27. It cannot escape the fact that the Arizona Supreme Court applied *Eddings* correctly during the relevant time period. As a result, there is no reason to invert the presumption that the Arizona courts knew and followed the law into a presumption they did not.

2.

After freeing itself from the presumption that state courts know and follow the law, the majority engages in de novo review and concludes the Arizona courts here applied an unconstitutional nexus test. *Id.* at 819–21. As I have shown, even a de novo review shows there was no *Eddings* error. The majority

reaches the opposite conclusion largely by selectively reading—better said, misreading—the record.

To start, the majority states that the Arizona Supreme Court accepted Judge Sheldon's conclusions, at pages 28 and 29 of the sentencing transcript, that McKinney's PTSD did not affect his state of mind at the time of the murders and, in any event, would have influenced him not to commit the murders. *Id.* at 819–21. The majority suggests this part of the sentencing colloquy "echoes" the Arizona Supreme Court's nexus test and implies these statements show the court applied a nexus test to exclude McKinney's PTSD evidence from consideration under the nonstatutory mitigation factor. *Id.* at 809–11, 819–21. But the majority admits these statements are directed to Judge Sheldon's analysis of the *statutory* mitigating factors, which, as I have explained, is the correct understanding. *Id.* at 809–10. So, even if the Arizona Supreme Court accepted Judge Sheldon's conclusion that there was no causal connection between McKinney's PTSD and the murders, there was no error.

Moreover, the majority's analysis rests on an assumption that the Arizona Supreme Court accepted a single factual finding by Judge Sheldon and ignored the rest of Judge Sheldon's sentencing colloquy. As I have already explained, the Arizona Supreme Court did not rely on any of Judge Sheldon's factual conclusions.[39] But if the Arizona

[39] The Arizona Supreme Court merely reviewed whether Judge Sheldon considered all of McKinney's mitigation evidence, found "[t]he record clearly shows that the judge considered McKinney's" mitigation evidence, and concluded,

Supreme Court did accept any of Judge Sheldon's findings regarding McKinney's mitigation evidence, it accepted all of them. *See McKinney*, 917 P.2d at 1234 ("[T]he record shows that the judge gave full consideration to McKinney's childhood *and* the expert testimony regarding the effects of that childhood, specifically the diagnosis of post-traumatic stress disorder." (emphasis added)); *id.* ("The record clearly shows that the judge considered McKinney's abusive childhood *and* its impact on his behavior *and* ability to conform his conduct." (emphasis added)).[40] The majority's selective reading

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"On this record there was no error." *McKinney*, 917 P.2d at 1234. It did not accept Judge Sheldon's factual findings as part of its own review of McKinney's sentence.

[40] During Hedlund's sentencing colloquy, Judge Sheldon specifically cited to *Eddings* and *Lockett v. Ohio*, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978), and explained those cases required him to "weigh carefully, fairly, objectively, all of the evidence offered at sentencing, recognizing that not everyone who commits murder should be put to death." *Hedlund v. Ryan*, 750 F.3d 793, 816 (9th Cir.2014). Judge Sheldon then considered Hedlund's alcohol abuse: "The Court has concluded that although evidence of alcohol use [is not] a mitigating circumstance under (G)(1), [it] *nevertheless should be considered as mitigating evidence*." (Emphasis added.) Judge Sheldon later reiterated that point: "The defendant's dependent personality traits, his past drug and alcohol abuse, and child abuse have been considered by the Court. If not demonstrating the existence of the mitigating factors under (G)(1), *they have nevertheless been given consideration by the Court*." (Emphasis added.) He then concluded with a discussion of Hedlund's childhood evidence: "I have considered [that evidence]. *I think it is the court's obligation to consider, whether or not it complies with the requirements in (G)(1).*" (Emphasis added.) The majority fails to explain why the Arizona Supreme Court ignored this discussion even though the court reviewed

of Judge Sheldon's analysis is therefore wrong on multiple levels. It is also irrelevant to the outcome of the case. That the Arizona Supreme Court may have accepted Judge Sheldon's conclusion that the evidence showed McKinney's PTSD did not affect his conduct does not show *Eddings* error. To violate *Eddings* the court must have excluded the evidence from consideration altogether because of the lack of a nexus.

The rest of the majority's evaluation of the Arizona Supreme Court's decision is just as flawed. The majority first asserts, citing *Djerf* for support, that the Arizona Supreme Court did not *really* consider McKinney's PTSD evidence even though it used the word "considering." Op. at 820. That is nonsense. The referenced case, *Djerf*, came two years after McKinney's appeal. *See Djerf*, 959 P.2d at 1274. It is irrelevant to the Arizona Supreme Court's decision in this case.

Next, the majority conclusorily asserts that the Arizona Supreme Court "recited its unconstitutional causal nexus test." Op. at 810, 820, 827. It did? If the Arizona Supreme Court recited a causal-nexus test, then why would the majority need so many pages to reach the conclusion that the court did, in fact, apply a causal-nexus test? It appears the majority believes the following to be an unconstitutional nexus test:

> [A] difficult family background, including childhood abuse, *does not necessarily have substantial mitigating weight absent* a showing that it significantly affected or impacted the defendant's

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Hedlund's and McKinney's death sentences in the same opinion.

> ability to perceive, comprehend, or control his actions.

McKinney, 917 P.2d at 1234 (emphasis added). Not so. As I have noted, this statement means that when a difficult background *does* affect the "defendant's ability to perceive, comprehend, or control his actions," it has "substantial mitigating weight." But when there is no such effect, the evidence does not *necessarily* have substantial mitigating weight, but it can have such weight. For that reason, I am at a loss to understand the majority's conclusion that the Arizona Supreme Court recited an unconstitutional nexus test.

Finally, the majority relies on the Arizona Supreme Court's citation to *Ross*. *See* op. at 819–21; *Ross*, 886 P.2d at 1363. *Visciotti* forecloses any reliance on the citation to *Ross* to find *Eddings* error.[41] But even if we looked at the Arizona Supreme Court's citation to *Ross* without the *Visciotti* presumption, we should conclude that court applied *Eddings* correctly. The court correctly stated *Eddings*'s requirements several times. *See McKinney*, 917 P.2d at 1226–27, 1234. The majority's reliance on that citation, rather than the words the Arizona Supreme Court actually used, demonstrates the majority is applying the flipped presumption it references elsewhere in its opinion.[42] *See* 803–04, 823–27.

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[41] To that end, the majority implicitly overrules our prior en banc decision where we held a citation to a suspect case does not show the Arizona court misapplied *Eddings*. *See Jeffers*, 38 F.3d at 415.

[42] The majority claims that a single citation to *Ross* in the Arizona Supreme Court's opinion renders the court's treatment of McKinney's mitigating evidence suspect. Op. at 819–21. By

In short, none of the reasons the majority relies on support its conclusion that the Arizona Supreme Court misapplied *Eddings*.

IV. The Harmless-Error Analysis

The majority's final mistake comes in its harmless-error analysis.[43] Habeas petitioners "are not entitled to habeas relief based on trial error unless they can establish that it resulted in 'actual prejudice.'" *Brecht*, 507 U.S. at 637, 113 S.Ct. 1710 (citation

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that logic, a citation to *Eddings*, *Lockett*, *Eddings's* precursor, or *State v. McMurtrey*, 136 Ariz. 93, 664 P.2d 637 (1983), an Arizona Supreme Court case the majority acknowledges applies *Eddings* correctly, should demonstrate compliance with *Eddings*. *See, e.g.*, *State v. Canez*, 202 Ariz. 133, 42 P.3d 564, 593 (2002) (citing *Lockett* and *McMurtrey*); *State v. Sharp*, 193 Ariz. 414, 973 P.2d 1171, 1183 (1999) (citing *Lockett*); *Trostle*, 951 P.2d at 885–86 (citing *Lockett* and *McMurtrey*); *Towery*, 920 P.2d at 311 n.2 (citing *Eddings* and *Lockett*); *Gonzales*, 892 P.2d at 851 (citing *Eddings*, *Lockett*, and *McMurtrey*); *Bible*, 858 P.2d at 1209 (citing *McMurtrey*); *State v. Brewer*, 170 Ariz. 486, 826 P.2d 783, 802 (1992) (citing *McMurtrey*); *State v. White*, 168 Ariz. 500, 815 P.2d 869, 889 (1991) (citing *Lockett*); *State v. Walton*, 159 Ariz. 571, 769 P.2d 1017, 1034 (1989) (citing *Lockett*).

[43] I agree that *Eddings* error is not structural and is instead subject to harmless-error analysis, as we have already recognized. *Henry v. Ryan*, 720 F.3d 1073, 1089 (9th Cir.2013). Indeed, most circuits have held *Eddings* error is not structural. *See Campbell v. Bradshaw*, 674 F.3d 578, 596 (6th Cir.2012); *McGehee v. Norris*, 588 F.3d 1185, 1197 (8th Cir.2009); *Ferguson v. Sec'y of Dep't of Corr.*, 580 F.3d 1183, 1201 (11th Cir.2009); *Martini v. Hendricks*, 348 F.3d 360, 371 (3d Cir.2003); *Bryson v. Ward*, 187 F.3d 1193, 1205–06 (10th Cir.1999); *Boyd v. French*, 147 F.3d 319, 327–28 (4th Cir.1998); *Williams v. Chrans*, 945 F.2d 926, 949 (7th Cir.1991). *But see Nelson v. Quarterman*, 472 F.3d 287, 314 (5th Cir.2006) (en banc) (finding *Eddings* error to be structural).

omitted). We can grant habeas relief only if we have "grave doubt about whether a trial error of federal law had 'substantial and injurious effect or influence in determining the [sentencer's] verdict.'" *O'Neal v. McAninch*, 513 U.S. 432, 436, 115 S.Ct. 992, 130 L.Ed.2d 947 (1995) (citation omitted). There must be more than a "reasonable possibility" that an error was harmful. *Brecht*, 507 U.S. at 637, 113 S.Ct. 1710. Anything less puts the state to the "arduous task [of retrying a defendant] based on mere speculation that the defendant was prejudiced by trial error." *Calderon v. Coleman*, 525 U.S. 141, 146, 119 S.Ct. 500, 142 L.Ed.2d 521 (1998) (per curiam). Here, would lack of consideration of McKinney's PTSD cause us to have "grave doubt" that Judge Sheldon would have imposed the death sentence? No.

Judge Sheldon found the prosecution established four aggravating factors, two as to each of the murders. *See* Ariz.Rev.Stat. § 13-751(F)(1), (5)–(6). First, Judge Sheldon found McKinney committed not one, but two murders, *i.e.*, the murders of Mertens and McClain. Second, he found Mertens was murdered "in an especially heinous, cruel or depraved manner." For that finding, Judge Sheldon credited testimony that McKinney admitted to his father that he shot Mertens. Judge Sheldon then explained the evidence at trial "showed that [Mertens] struggled violently to survive before being killed by a shot to the head." There were numerous "non-fatal wounds" and a "substantial amount of blood over large areas of [Mertens's] body, and the house, the bottom of her shoes, her slippers, which suggests that a struggle occurred while she was conscious." He concluded it was reasonable to

assume Mertens "suffered tremendous physical torment prior to her death." The murder was therefore "cruel." At the very least, Judge Sheldon found the "violence was gratuitous" and "clearly" unnecessary, which supported a finding that McKinney's state of mind was "heinous and depraved." Finally, Judge Sheldon found McKinney committed both murders with the expectation that they would lead to pecuniary gain. The Arizona Supreme Court did not disturb any of these findings on direct appeal. *McKinney*, 917 P.2d at 1233–34.

The majority opinion treats these aggravating factors as an afterthought. *See* op. at 823–24. It daintily elides a description of the facts by which the murders were committed. Yet the majority claims to have conducted a harmless-error analysis without giving the aggravating factors "short shrift." *See id.* Properly considered, these factors show the alleged failure to consider McKinney's PTSD, had it occurred, would have been harmless. As McKinney's expert admitted, there was no evidence that McKinney's PTSD affected McKinney's state of mind at the time of the murders. And Judge Sheldon found there was no link. Had Judge Sheldon not considered the PTSD diagnosis, forcing him to do so would not have altered the result. He would have given the PTSD diagnosis little weight (indeed, he did give it little weight).

The evidence of McKinney's childhood was much more compelling than his PTSD. As the majority thoroughly outlines, the evidence showed McKinney's childhood was horrible. *Id.* at 804–08. But that only bolsters the conclusion that the Arizona courts' alleged failure to consider

McKinney's PTSD was harmless. If McKinney's horrific childhood was not enough to justify leniency, then why would McKinney's resulting PTSD, which had no effect on McKinney at the time of the murders, have changed anything? I suppose it is possible that McKinney's PTSD would have nudged Judge Sheldon across the line to leniency on the supposition that "anything is possible"; but that is not the test for harmless error. "Possibility" does not mean "grave doubt" that the failure to consider the PTSD had a "substantial and injurious effect or influence in determining [his] verdict." *O'Neal*, 513 U.S. at 436, 115 S.Ct. 992. The brutal nature of the Mertens murder, the finding that McKinney committed the two murders for pecuniary gain, and the fact that McKinney had committed multiple murders all weigh heavily in favor of the death penalty. The failure to consider the marginal mitigating weight of McKinney's PTSD could not have affected the outcome. McKinney has not shown "actual prejudice," and thus any error in McKinney's sentencing was harmless.

* * *

The majority's application of § 2254(d)(1) will have far-reaching effects beyond this case. Most immediately, the opinion potentially undermines every Arizona death sentence between 1989 and 2005. If we cannot find the Arizona Supreme Court complied with *Eddings* in this case, where it stated the *Eddings* standard correctly and made explicit findings that illustrate it observed *Eddings* to avoid error, then I don't quite see how future cases could come out differently. The ineluctable effect from today's majority is that, no matter what they said or

did during this time period, Arizona courts violated *Eddings*. This is not idle speculation. The majority may have already passed judgment on two cases that are currently pending appeal before our court.[44]

Most importantly, the majority's reliance on *other* Arizona Supreme Court cases will spread to all § 2254(d)(1) cases. Before today, we applied the correct standard under § 2254(d)(1). *See, e.g.*, *Elmore v. Sinclair*, 781 F.3d 1160, 1168 (9th Cir.2015). After today, three-judge panels must abandon the correct standard and apply not the deference the Supreme Court instructs, but the majority's analysis. *See generally Miller v. Gammie*, 335 F.3d 889 (9th Cir.2003) (en banc). We will be flooded with string citations claiming to show how state appellate courts have misapplied the federal Constitution in past cases. And petitioners will rely on those cases to argue we cannot presume those courts applied the law correctly. This cannot be how AEDPA operates, which this court recognized when it previously rejected the arguments the majority revives today.

I conclude by noting that, today, we once again misapply AEDPA. But we do so only in this case. In our future cases, the Supreme Court should not presume we always misapply AEDPA because of today's decision or because of prior reversals in this area. That is, one hopes the Supreme Court will not apply a past performance test to us similar to that which the majority opinion applies to the Arizona Supreme Court.

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[44] *See Martinez*, 2008 WL 783355, at *33, *appeal pending sub nom. Martinez v. Ryan*, No. 08-99009 (9th Cir. May 29, 2008); *Rienhardt*, 669 F. Supp. 2d at 1059–60, *appeal pending*, No. 10-99000 (9th Cir. Jan. 8, 2010).

I respectfully dissent.

APPENDIX D

SUPREME COURT OF ARIZONA

STATE OF ARIZONA,

Appellee,

v.

JAMES ERIN MCKINNEY,

Appellant.

STATE OF ARIZONA,

Appellee,

v.

CHARLES MICHAEL HEDLUND,

Appellant.

Nos. CR-93-0362-AP, CR-93-0377-AP

May 16, 1996

OPINION

FELDMAN, Chief Justice.

This consolidated appeal is the first for these defendants following their convictions for two murders, committed two weeks apart, during the commission of residential burglaries. The trials were held simultaneously using dual juries, which this

court approved in advance.[1] On November 12, 1992, McKinney's jury found him guilty of first degree murder for the deaths of Christene Mertens and Jim McClain. That same day, Hedlund's jury found him guilty of second degree murder for Mertens' death and guilty of first degree murder for McClain's death. The court sentenced McKinney to death on both of his first degree murder convictions and sentenced Hedlund to death for his first degree murder conviction. Appeal of each judgment and sentence is automatic. Ariz.R.Crim.P. 26.15 and 31.2(b). This court has jurisdiction under Ariz. Const. art. VI, § 5(3) and A.R.S. §§ 13-4031 and 13-4033(A).

BACKGROUND

Beginning February 28, 1991, James Erin McKinney and Charles Michael Hedlund (Defendants) commenced a residential burglary spree for the purpose of obtaining cash or property. In the course of their extensive planning for these crimes, McKinney boasted that he would kill anyone who happened to be home during a burglary and Hedlund stated that anyone he found would be beaten in the head.

Defendants enlisted two friends to provide information on good burglary targets and to help with the burglaries. These two friends, Joe Lemon and Chris Morris, were not physically involved in the burglaries in which the murders occurred. It was from Lemon and Morris, however, that Defendants learned that Christene Mertens would make a good burglary target.

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[1] *Hedlund v. Sheldon*, 173 Ariz. 143, 840 P.2d 1008 (1992).

The first burglary in the spree occurred on February 28, 1991. Mertens' home was the intended target that night, but she came home and scared the would-be burglars away. A different residence was chosen to burglarize, but Defendants obtained nothing of value. Both Defendants, as well as Lemon and Morris, were involved in this crime.

The second and third burglaries occurred the next night, March 1. This time Lemon was not involved. The three participants stole a .22 revolver, $12, some wheat pennies, a tool belt, and a Rolex watch.

A. The first murder

The fourth burglary took place on March 9, 1991. This time only McKinney and Hedlund were involved. Mertens was picked again because Defendants had been told by Lemon and Morris, who knew Mertens' son, that Mertens kept several thousand dollars in an orange juice container in her refrigerator.

Mertens was home alone when Defendants entered the residence and attacked her. Beaten and savagely stabbed, Mertens struggled to save her own life. Ultimately, McKinney held her face down on the floor and shot her in the back of the head, covering his pistol with a pillow to muffle the shot. Defendants then ransacked the house and ultimately stole $120 in cash.

B. The second murder

Defendants committed the fifth burglary on March 22, 1991. The target was Jim McClain, a sixty-five-year-old retiree who restored cars for a hobby. McClain was targeted because Hedlund had bought a car from him some months earlier and thought

McClain had money at his house. Entry was gained through an open window late at night while McClain was sleeping. Hedlund brought along his .22 rifle, which he had sawed-off to facilitate concealment. Defendants ransacked the front part of the house then moved to the bedroom. While he was sleeping, McClain was shot in the back of the head with Hedlund's rifle. Defendants then ransacked the bedroom, taking a pocket watch and three hand guns; they also stole McClain's car.

State v. Hedlund

TRIAL ISSUES

A. Was Hedlund denied his right to counsel?

Hedlund claims that a hearing conducted in the absence of one of his attorneys was structural error requiring automatic reversal and violated his Sixth Amendment right to counsel because the hearing was a critical stage of the proceedings.

At trial, Lemon was called as one of the state's witnesses. After Lemon provided some preliminary testimony, a brief recess was called and a hearing conducted out of the jury's presence to determine if Lemon could be impeached with his juvenile record. One of Hedlund's lawyers, Mr. Leander, stepped out of the courtroom because he was not feeling well. While still on the record, the judge allowed Mr. Allen, McKinney's counsel, to question Lemon under Ariz.R.Evid. 609.[2]

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[2] Ariz.R.Evid. 609(d) provides that:

Evidence of juvenile adjudication is generally not admissible under this rule. The court may, however, in a criminal case allow evidence of juvenile adjudication of a witness other than the accused if conviction of the offense would be admissible to

Lemon had previously been interviewed by all attorneys involved, and no evidence of any juvenile adjudications ever surfaced. The prosecutor told Defendants' attorneys that Lemon had no juvenile convictions, but neither counsel was satisfied and wanted to question him again.

While Mr. Leander was out of the courtroom, Lemon testified to having once been formally charged as a juvenile for aggravated battery. Lemon testified that he had gone before a judge on this charge, but that he never had a hearing where witnesses were called, never pleaded guilty, and had not been adjudicated. Lemon also testified that he was placed under house arrest for two weeks. Although Lemon's encounter with the juvenile justice system is not well explained in the record, it appears that Lemon was present, but not involved, when another juvenile was beaten by some other person, and that the juvenile judge ordered Lemon to serve some in-home detention and required him to get a job or go back to school. At the conclusion of Mr. Allen's examination and the state's cross-examination of Lemon, no evidence of any adjudication had been presented. Thus, the judge ruled that Lemon could not be impeached with his juvenile record.

When the trial resumed a few minutes later, Mr. Leander had returned and objected to the hearing having taken place without him. The judge refused to reopen the hearing unless Mr. Leander was

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attack the credibility of an adult and the court is satisfied that admission in evidence is necessary for a fair determination of the issue of guilt or innocence.

prepared to introduce substantive evidence of juvenile adjudications. Mr. Leander had no such evidence and stated that he would like to question Lemon. The judge refused to allow any more questioning, concluding that Messrs. Leander and Allen had an identity of interest, that Mr. Allen had adequately explored the issue, and that in doing so had discovered no evidence of a juvenile adjudication.

Whether counsel's absence during a hearing violates the Sixth Amendment depends on whether the absence created a structural defect. *See Arizona v. Fulminante*, 499 U.S. 279, 309-10, 111 S.Ct. 1246, 1265, 113 L.Ed.2d 302 (1991). This determination may turn on whether the hearing was a critical stage of the adversary proceedings. *See United States v. Cronic*, 466 U.S. 648, 658-59, 104 S.Ct. 2039, 2046-47, 80 L.Ed.2d 657 (1984); *United States v. Olano*, 62 F.3d 1180, 1193 (9th Cir.1995); *United States v. Benlian*, 63 F.3d 824, 827 (9th Cir.1995).

1. What is a structural defect?

A "structural defect" is an error that affects "the framework within which the trial proceeds, rather than simply an error in the trial process itself." *Fulminante*, 499 U.S. at 309-10, 111 S.Ct. at 1264-65. In general, per se structural defects affect "[t]he *entire* conduct of the trial from beginning to end. . . ." *Id.* at 310, 111 S.Ct. at 1265 (emphasis added). Such defects include total deprivation of counsel, a judge who is not impartial, unlawful exclusion of jurors who are of the defendant's race from a grand jury, denial of the right to self-representation, and denial of the right to a public trial. *Id.*

Hedlund does not claim, and the record does not show, that he suffered anything approaching a total absence of counsel. Accordingly, there is no per se structural defect. Therefore, Hedlund is entitled to *Cronic*'s presumption of prejudice only if the Rule 609 hearing was a critical stage of the trial. *See Benlian*, 63 F.3d at 827.

2. What is a critical stage of the trial?

A "critical stage" is one at which "substantial rights of the accused may be affected." *State v. Conner*, 163 Ariz. 97, 104, 786 P.2d 948, 955 (1990); *Menefield v. Borg*, 881 F.2d 696, 698 (9th Cir.1989) (quoting *Mempa v. Rhay*, 389 U.S. 128, 134, 88 S.Ct. 254, 257, 19 L.Ed.2d 336 (1967)) ("[C]ounsel . . . is required at every stage of a criminal proceeding where substantial rights of a criminal accused may be affected.") (sentencing). Whether a particular proceeding is a critical stage may depend on state law as well as the facts of the case. *See Chester v. California*, 355 F.2d 778, 779 (9th Cir.1966) ("An accused has a constitutional right to [counsel] at a preliminary examination in a state court if, under facts of the particular case, the examination is a [critical stage]."). The test for a critical stage is based on the following factors:

> First, if failure to pursue strategies or remedies results in a loss of significant rights.... Second, where skilled counsel would be useful in helping the accused understand the legal confrontation.... Third, ... if the proceeding tests the merits of the accused's case.

Menefield, 881 F.2d at 698-99 (citations omitted). Hedlund offers no authority, and research reveals

none, to support his contention that a Rule 609 hearing is necessarily a critical stage of the trial under Arizona law.[3] Thus, under the facts of this case, we conclude that the Rule 609 hearing was not a critical stage of Hedlund's proceedings.

B. Denial of confrontation

Hedlund also claims that the refusal to let his attorney question Lemon at the hearing was a denial of the right to confrontation and that such denial prevented impeaching Lemon with his juvenile record. Hedlund argues that his right to confrontation is paramount to the state's interest in protecting Lemon as a juvenile offender-witness. *See Davis v. Alaska*, 415 U.S. 308, 94 S.Ct. 1105, 39 L.Ed.2d 347 (1974); *State v. McDaniel*, 127 Ariz. 13, 617 P.2d 1129 (1980). In the abstract we agree with Hedlund's proposition, but we find his argument inapplicable to the facts of his case because Hedlund and his lawyer were present when Lemon testified and the lawyer was permitted to and did examine Lemon.

Hedlund's complaint here is confined to the lawyer's absence at a hearing much like a motion in limine. Hedlund, however, has never proffered any

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[3] *Cf. Gilbert v. California*, 388 U.S. 263, 87 S.Ct. 1951, 18 L.Ed.2d 1178 (1967) (taking of handwriting exemplars *not* critical stage); *United States v. Benlian*, 63 F.3d 824 (9th Cir.1995) (presentence interview is *not* a critical stage); *United States v. Olano*, 62 F.3d 1180 (9th Cir.1995) (minor matters discussed by the court in the absence of defendant's counsel are *not* a critical phase of the trial); *United States v. LaPierre*, 998 F.2d 1460 (9th Cir.1993) (post-charge line-up *is* critical stage); *United States v. Birtle*, 792 F.2d 846, 848 (9th Cir.1986) (oral argument and filing of reply brief *not* critical stages).

evidence to show that Lemon had *any* juvenile adjudication, let alone one with which he could have been impeached. Indeed, as late as oral arguments in this court, Hedlund's counsel possessed no evidence that Lemon had ever been adjudicated as a juvenile. Furthermore, Lemon was not an accomplice in the crimes, was never charged, and was never offered immunity for his testimony. He was eighteen years old at trial and therefore could not have been on juvenile probation at the time of the trial. *See* Ariz. Const. art. VI, § 15. In sum, Hedlund fails to demonstrate how Lemon's juvenile record could have been used for anything other than a general attack on his character. *See State v. Morales*, 120 Ariz. 517, 520-21, 587 P.2d 236, 239-40 (1978); *cf. McDaniel*, 127 Ariz. at 15-16, 617 P.2d at 1131-32. We refuse to speculate whether Hedlund's lawyer would have discovered something at the Rule 609 hearing that McKinney's lawyer could not and did not and that neither lawyer has discovered to this day.

C. Right to enter a change of plea

On September 18, 1992, Hedlund's attorney and the prosecutor had an informal conference in the judge's chambers regarding a plea agreement that had been reached between Hedlund and the prosecutor. Because this meeting was off-the-record, there is no contemporaneous documentation of what took place. There is also no record of the substance of the proffered plea agreement. Both parties agree, however, that the judge indicated he would not accept the plea because it lacked accountability for Hedlund with respect to the McClain homicide.

Following the informal conference, the court convened on the record and put counsel on notice

that it was setting a firm trial date of October 13, 1992. After this, there is nothing in the record regarding the status of plea negotiations until October 13. In the interim, Hedlund filed a motion to require the trial judge to recuse himself so that he could enter a plea in front of another judge. Hedlund's proffered reason for seeking the recusal was the appearance of impropriety arising from the judge having read letters from a victim's family expressing their feelings about the plea rejected by the judge on September 18.

A hearing on the recusal motion was held, at which Hedlund attempted to "memorialize" the substance of the September 18 informal meeting. In actuality, the recusal hearing consisted primarily of hearsay and recollection about what happened at that meeting, what was said during telephone calls placed in the interim, and what was supposedly contained in the latest plea agreement.

The crux of Hedlund's complaint on this point is a claim that the trial judge refused to make himself available on Friday, October 9 to review the latest plea agreement. Hedlund contends that because of this refusal, he was unable enter a plea and avoid the death penalty. The trial judge testified at the recusal hearing that pursuant to a telephonic agreement earlier in the week, the attorneys were to be in his office on Thursday, October 8, but were not.

There is nothing in the record showing a plea agreement was reached between Hedlund and the prosecutor after the September 18 plea was rejected. The prosecutor testified that Hedlund rejected his subsequent offer on October 6, that there was never an offer outstanding after October 7, and because no

further agreement was reached, there was never a reason to go to the judge. Because this record does not indicate that a second plea agreement was ever reached and submitted, we reject the claim that the trial judge declined to further entertain a plea.

It is well settled that criminal defendants have no constitutional right to a plea agreement and the state is not required to offer one. *See State v. Draper*, 162 Ariz 433, 440, 784 P.2d 259, 266 (1989); *State v. Morse*, 127 Ariz. 25, 31-32, 617 P.2d 1141, 1147-48 (1980). Furthermore, a plea bargain can be revoked by any party, at any time, prior to its acceptance by the court. *Id.*; Ariz.R.Crim.P. 17.4(b) and (d). With no right to a plea bargain and the ability of the prosecution to discontinue negotiations at will or withdraw a plea offer prior to court acceptance, we also cannot conclude that the trial judge abused his discretion by refusing to schedule a hearing to review a plea agreement that does not appear to have existed.

D. Use of leading questions

Hedlund complains of two specific instances in which he claims the prosecutor was improperly allowed to ask leading questions. Hedlund contends the court allowed leading questions on direct examination, thereby violating his rights under the Sixth and Fourteenth Amendments to the United States Constitution. The specific complaints stem from the following testimony at trial:

> Q. [PROSECUTOR] Did you see anything else in the trunk?
>
> A. [LEMON] No, not that I can recall.

Q. Did you see at any time Mike Hedlund's .22 rifle?

MR. LEANDER: Your Honor, again, leading. He said he didn't see anything in the trunk.

THE COURT: The objection is overruled. You can answer.

THE WITNESS: At any time?

Q. That evening when you looked into the trunk.

A. No, I don't recall.

. . . . .

Q. [PROSECUTOR] When you were around Michael Hedlund after Christene Mertens was killed, did Michael Hedlund appear to be slightly more aggressive towards you or Chris [Morris]?

MR. LEANDER: Objection your Honor, leading. Prosecutor can ask how he acted.

THE COURT: The objection is overruled. You can answer.

THE WITNESS: No, not that I can recall. He acted like, like he wasn't nice, as nice to us anymore, like, but he wasn't aggressive.

Hedlund has not demonstrated that the questions he complains of are leading. Leading question are those "suggesting the desired answers." *See* MODEL CODE OF EVIDENCE, Rule 105 (A.L.I.1942); MORRIS K. UDALL ET AL., ARIZONA EVIDENCE § 33 (3d ed. 1991). An example of such a question would be "The cat was black, wasn't it?" *State v. Agnew*, 132 Ariz. 567, 577, 647 P.2d 1165, 1175 (App.1982).

This court has stated that the "general rule is that questions that put the *answer* into the mouth of one's witness in chief should not be asked." *Ball v. State*, 43 Ariz. 556, 558, 33 P.2d 601, 602 (1934) (emphasis added). As UDALL notes, "[w]hat is desired is that the trier hear what the witness perceived, not the acquiescence of the witness in counsel's interpretation of what he perceived." UDALL, *supra* § 33, at 55.

Obviously, from the questions asked of Lemon, counsel sought to elicit "yes" or "no" answers. However, a "question is not leading just because the answer is obvious." *Agnew*, 132 Ariz. at 577, 647 P.2d at 1175. Counsel did not suggest what the answers should be; therefore, the questions were not leading. Furthermore, even if the questions were leading, Lemon's answers were favorable to Hedlund, as he testified that he did *not* see the rifle and that Hedlund was *not* aggressive. Any error was therefore harmless beyond a reasonable doubt.

E. The jury's view of Hedlund in leg shackles

Hedlund was required to wear leg shackles during the trial. The layout of the courtroom resulted in the defense table being directly across from the jury box and there was no covering on the front of the table to hide Hedlund's legs from the jury. Hedlund argues that his constitutional rights were violated because the jury was facing the defense table and necessarily saw the shackles.

In *State v. Boag*, this court commented on the obvious need to leave matters of courtroom security to the discretion of the judge, stating that "absent incontrovertible evidence of [harm to the defendant], the trial court should be permitted to use such

means, to secure the named ends [as circumstances require]." 104 Ariz. 362, 366, 453 P.2d 508, 512 (1969). The only evidence of harm Hedlund offers is a third-party, hearsay statement from a defense investigator alleging one juror said she made eye contact with one of the defendants and that it was "eerie." Such an unsubstantiated allegation falls far short of the evidence contemplated in *Boag*.

When a trial judge's decision to restrain a defendant is supported by the record, this court has upheld that decision, even when the jury views the defendant in restraints. *State v. Harding*, 137 Ariz. 278, 288-89, 670 P.2d 383, 393-94 (1983) (*pro se* defendant wore shackles), *cert. denied*, 465 U.S. 1013, 104 S.Ct. 1017, 79 L.Ed.2d 246 (1984); *State v. Stewart*, 139 Ariz. 50, 53-57, 676 P.2d 1108, 1111-12 (1984) (defendant wore leg brace, visible shackles, and was gagged); *State v. Johnson*, 122 Ariz. 260, 272, 594 P.2d 514, 526 (1979) (defendant wore leg irons and was heavily guarded). Here, the trial judge specifically made a record to document his security concerns: Hedlund attempted an escape during the summer of 1991 and also made plans with another capital defendant to escape by attacking a guard and taking his uniform and gun. Given the judge's well-founded security concerns and the absence of evidence of specific prejudice to Hedlund, we cannot find that the judge abused his discretion.

F. The consensual search

Two uniformed officers from the Mesa Police Department and Detectives Click and Kelly of the Chandler Police Department approached Hedlund at his home. Detective Kelly told Hedlund there was an investigation regarding James McKinney and asked

if he would go with them to the police department. Hedlund agreed. Detective Click then asked Hedlund if he would consent to a search of his bedroom. Hedlund consented, and he and the officers went to the bedroom.

While Detectives Click and Kelly remained in the bedroom, Hedlund stepped out of the room to get his shoes. During Hedlund's absence, Detective Click opened a dresser drawer and found various items, including two pocket watches, one silver or chrome and the other gold-colored. Thinking the watches looked out of place, Detective Click removed them from the drawer and placed them on top of the dresser.

When Hedlund returned to the room, he was asked about the watches. Hedlund stated one was stolen by his sister from an ex-boyfriend and that he had owned the other for some time. Detective Click *asked* Hedlund if he would take the watches with him to the police station. Hedlund agreed and put the watches in his pocket. Click testified that if Hedlund had not agreed to take the watches, they would have been left at the house.

Once at the Chandler jail, Hedlund's property, including the watches, was taken from him and placed in an interview property bag for safekeeping. Hedlund was then placed in a holding cell. About an hour later Hedlund was taken to an interview room where he was read his *Miranda* rights and interviewed by two officers. After a short time Hedlund cut off the interview and asked for a lawyer. The interview was terminated, and Hedlund was placed under arrest.

The property taken from him earlier, including the two watches, was inventoried. At the time of the post-arrest inventory, the evidentiary value of the two watches was not known to the police. It was not until later in the week that McClain's relatives identified the silver-colored pocket watch as being very similar to McClain's pocket watch, which was missing after the burglary. The goldcolored watch had in fact been stolen by Hedlund's sister.

Hedlund argues that the officers exceeded the scope of his consent to search the room when they looked in the dresser drawer, that removal of the watches from the drawer was an illegal seizure exceeding the necessary scope of the search under the plain view doctrine, that the request by police to have Hedlund take the watches with him to the police station constituted a seizure of the watches by police, and that the watches were seized without probable cause.

1. Scope of the search

It is undisputed that the search of Hedlund's bedroom was consensual and that Hedlund placed no explicit restrictions on the scope of the search. Thus, the only issue regarding this consensual search is whether there was some implicit limitation that prevented the officers from lawfully looking in the dresser drawer. The standard of review for granting or denying a motion to suppress evidence is abuse of discretion. *State v. Carter*, 145 Ariz. 101, 110, 700 P.2d 488, 497 (1985). We therefore view the evidence in the light most favorable to upholding the trial court's ruling. *State v. Sheko*, 146 Ariz. 140, 141, 704 P.2d 270, 271 (App.1985).

A consent to search one's bedroom is not necessarily a *carte blanche* invitation to look anywhere and everywhere. *See State v. Atwood*, 171 Ariz. 576, 618, 832 P.2d 593, 635 (1992), *cert. denied*, 506 U.S. 1084, 113 S.Ct. 1058, 122 L.Ed.2d 364 (1993); *State v. Paredes*, 167 Ariz. 609, 612, 810 P.2d 607, 610 (App.1991). Neither the record nor any discovered authority supports Hedlund's submission that the search of the drawer was beyond the scope of his consent, although the scope of a consensual search may be implicitly circumscribed. *Florida v. Jimeno*, 500 U.S. 248, 251, 111 S.Ct. 1801, 1804, 114 L.Ed.2d 297 (1991) (scope is generally defined by its expressed object). Contrary to Hedlund's characterization, permission was not limited to a plain view search, which is the concept Hedlund relies on to support his argument of limitation by implication.

The typical plain view search occurs when an officer sees something from a lawful vantage point that is located in a place he has no right to physically search. *See* WAYNE R. LAFAVE & JEROLD H. ISRAEL, CRIMINAL PROCEDURE § 3.7(f) (2d ed. 1992). Because Hedlund consented, however, Detective Click had a right to make a reasonable search of the bedroom. *Id.* § 3.1(f) ("if the person responds with a consent which is general and unqualified, then ordinarily the police may conduct a general search of that place"). Because the dresser was in the bedroom, it was not unreasonable for Officer Click to look in the drawers under the unrestricted consent given by Hedlund. *See Jimeno*, 500 U.S. at 251, 111 S.Ct. at 1804 (unqualified consent to search car for narcotics extended beyond

the surfaces of the car's interior to paper bag lying on the car's floor). Therefore, the search of the drawer was within the scope of the consent given.

2. Seizure of the watches

We likewise reject Hedlund's contention that the watches were illegally seized when the police removed them from the drawer and placed them on the dresser. This movement of the watches did not meaningfully interfere with or deprive Hedlund of any possessory interest in the watches. *See Arizona v. Hicks*, 480 U.S. 321, 324, 107 S.Ct. 1149, 1152, 94 L.Ed.2d 347 (1987).

Equally unpersuasive is Hedlund's argument that the watches were illegally seized when he put them in his pocket and took them to the police station. It is undisputed, and in fact conceded in Hedlund's brief, that he was asked, not ordered, to go to the police station, and that he was asked, not ordered, to take the watches with him.

G. Relation of juror to one of the victims

After the trial began, a juror learned from her mother that she had once been distantly related to Jim McClain, the second victim. The juror was told that her stepfather's cousin had at one time been married to McClain.

This juror was interviewed in the judge's chambers; she stated that she did not know the stepfather's cousin, that her relationship with her stepfather was superficial, and that she believed she could be fair and impartial. Hedlund claims the judge abused his discretion by refusing to dismiss the juror for cause. To prevail on this argument, Hedlund must establish an abuse of discretion with evidence to show that the

juror was biased and could not reasonably render a fair or impartial verdict. *State v. Cocio*, 147 Ariz. 277, 279-80, 709 P.2d 1336, 1338-39 (1985).

Although this juror had been distantly related to McClain, the degree of relation was extremely tenuous and existed only by virtue of two marriages: the marriage of the juror's mother to the juror's stepfather, and the marriage of her stepfather's cousin to McClain. Furthermore, because McClain was no longer married to the stepfather's cousin at the time of his murder, the juror would no longer have been related. There is nothing in the record to indicate that the juror knew the victim or the distant cousin, or that she was untruthful in stating she could be fair and impartial. The judge did not abuse his discretion by refusing to dismiss the juror for cause.

SENTENCING ISSUES

A. Summary issues

Hedlund claims that Arizona's death penalty scheme violates the Eighth Amendment because it does not sufficiently channel the trial judge's discretion. We rejected this argument in *State v. West*, 176 Ariz. 432, 454, 862 P.2d 192, 214 (1993), *cert. denied*, 511 U.S. 1063, 114 S.Ct. 1635, 128 L.Ed.2d 358 (1994).

Hedlund also claims that Arizona's death penalty statute violates the Eighth and Fourteenth Amendments because it is cruel and unusual punishment. We disagree. *State v. Hinchey*, 181 Ariz. 307, 315, 890 P.2d 602, 610, *cert. denied*, 516 U.S. 993, 116 S.Ct. 528, 133 L.Ed.2d 434 (1995); *accord LaGrand v. Lewis*, 883 F.Supp. 469 (D.Ariz.1995)

(noting that every court to address this issue has upheld the constitutionality of execution by lethal injection).

Hedlund also claims that he was denied his Fourteenth Amendment right to equal protection because he was deprived of a jury trial on aggravating factors in his capital case while defendants in non-capital cases have juries determine aggravating factors. This argument was rejected in *State v. Landrigan*, 176 Ariz. 1, 6, 859 P.2d 111, 116, *cert. denied*, 510 U.S. 927, 114 S.Ct. 334, 126 L.Ed.2d 279 (1993).

Hedlund argues that a proportionality review of his death sentence is constitutionally required. The United States Supreme Court rejected such a requirement in *Pulley v. Harris*, 465 U.S. 37, 44, 104 S.Ct. 871, 876, 79 L.Ed.2d 29 (1984); we rejected it in *State v. Salazar*, 173 Ariz. 399, 417, 844 P.2d 566, 584 (1992), *cert. denied*, 509 U.S. 912, 113 S.Ct. 3017, 125 L.Ed.2d 707 (1993).

B. Independent review

When the trial court imposes the death sentence, this court conducts a thorough and independent review of the record and of the aggravating and mitigating evidence to determine whether the sentence is justified. *State v. Brewer*, 170 Ariz. 486, 500, 826 P.2d 783, 797, *cert. denied*, 506 U.S. 872, 113 S.Ct. 206, 121 L.Ed.2d 147 (1992).

The trial court weighs aggravating and mitigating circumstances to determine whether the death sentence is warranted. A.R.S. § 13-703. The state must prove aggravating circumstances beyond a reasonable doubt. *See* A.R.S. § 13-703(C); *Brewer*,

170 Ariz. at 500, 826 P.2d at 797. The defendant must prove mitigating circumstances by a preponderance of the evidence, but the trial court may consider evidence that tends to refute a mitigating circumstance. *State v. Lopez*, 174 Ariz. 131, 145, 847 P.2d 1078, 1092 (1992), *cert. denied*, 510 U.S. 894, 114 S.Ct. 258, 126 L.Ed.2d 210 (1993). In weighing, this court considers the quality and the strength, not simply the number, of aggravating or mitigating factors. *State v. Willoughby*, 181 Ariz. 530, 549, 892 P.2d 1319, 1338 (1995), *cert. denied*, 516 U.S. 1054, 116 S.Ct. 725, 133 L.Ed.2d 677 (1996).

1. Mitigating value of expert testimony

Hedlund claims the trial judge discounted expert psychological testimony offered in mitigation and thus violated his rights to due process and equal protection and against cruel and unusual punishment. We do not agree.

Two psychiatric experts testified for Hedlund. The first was Dr. Holler, whose testimony focused on Hedlund's childhood abuse and the resultant psychoneurological effects. Dr. Holler's evaluation was based on a two-day interview with Hedlund, numerous tests, and background material about Hedlund's childhood.

It is clear from the record that most, if not all, of Dr. Holler's testimony regarding Hedlund's childhood was based on reports he received from other sources and not from his own investigation. Dr. Holler characterized Hedlund as a follower but also said he could sometimes be a leader. He testified that Hedlund's ability to conform his conduct to the law

was impaired but that Hedlund knew right from wrong.

Based on reports of others, Dr. Holler also testified about Hedlund's difficult childhood and concluded that Hedlund suffered from post-traumatic stress disorder, alcohol dependence, and a depressive disorder. Crossexamination, however, revealed that Dr. Holler made these diagnoses only after defense counsel told him they would be helpful.

The testimony of Dr. Shaw, the second psychiatric expert, was based on a single interview with Hedlund in 1993, two years following his arrest. Dr. Shaw's testimony related to the effect of Hedlund's alleged alcoholism and Hedlund's judgment at the time of the murders. Based on Hedlund's self-reporting, Dr. Shaw believed that Hedlund would not have been present at the crime scenes had he not been drinking. However, Dr. Shaw could not tell whether the amount of alcohol Hedlund said he regularly consumed was, in fact, consumed on the nights of the murders, whether it was consumed during the other burglaries, or whether there was any consumption at all before the criminal acts. Dr. Shaw was also unable to give an opinion about whether Hedlund could discern right from wrong at the time of the crimes.

Hedlund told Dr. Holler that at age nineteen he was drinking six to twelve and sometimes twenty beers, four or five nights a week. In a presentence report from an unrelated conviction in 1984, when he was nineteen years old, Hedlund stated that he had consumed alcohol in the past but had quit, and that he had quit so long ago that he could not remember when he had done so. Hedlund's character witnesses

testified that Hedlund did not have a drinking problem, was not an alcoholic, and that his level of consumption was far below what Hedlund reported to the psychiatric experts.

Hedlund correctly observes that the trial judge must consider any aspect of his character or record and any circumstance of the offense relevant to determining whether a sentence less severe than the death penalty is appropriate. In considering such material, however, the judge has broad discretion to evaluate expert mental health evidence and to determine the weight and credibility given to it. *State v. Ramirez*, 178 Ariz. 116, 131, 871 P.2d 237, 252, *cert. denied*, 513 U.S. 968, 115 S.Ct. 435, 130 L.Ed.2d 347 (1994); *State v. Milke*, 177 Ariz. 118, 128, 865 P.2d 779, 789 (1993), *cert. denied*, 512 U.S. 1227, 114 S.Ct. 2726, 129 L.Ed.2d 849 (1994); *State v. Smith*, 123 Ariz. 231, 243, 599 P.2d 187, 199 (1979). This record does not establish that the judge failed to consider any of the expert psychological testimony, only that he found some of the factual evidence for the experts' opinions lacking in credibility. The judge therefore did not violate Hedlund's constitutional rights by discounting his experts' testimony.

2. Other mitigating circumstances

Hedlund argues that the trial judge abused his discretion when he did not find the evidence of Hedlund's abusive childhood, dysfunctional family, alcohol-induced impairment, and level of participation in the crime sufficiently mitigating to call for a sentence less than death.

Testimony by Hedlund's friends and relatives shows an abusive childhood. Hedlund was beaten

and tormented by his mother, who frequently reminded him of his illegitimacy. The judge specifically found that Hedlund was abused as a child but that the latest episodes of abuse occurred ten to eleven years before the crimes and that there was no evidence of a causal relationship between the abuse and the murders.

A difficult family background, including childhood abuse, does not necessarily have substantial mitigating weight absent a showing that it significantly affected or impacted a defendant's ability to perceive, to comprehend, or to control his actions. *See State v. Ross*, 180 Ariz. 598, 607, 886 P.2d 1354, 1363 (1994), *cert. denied*, 516 U.S. 878, 116 S.Ct. 210, 133 L.Ed.2d 142 (1995). No such evidence was offered, and the judge did not err in concluding that Hedlund's family background was not sufficiently mitigating to require a life sentence.

Additionally, there was little evidence corroborating Hedlund's allegation that alcohol impaired his judgment, his ability to tell right from wrong, or his ability to control his behavior. Given the substantial conflicting evidence and nothing other than Hedlund's self-report to one of the psychiatric experts regarding his intoxication at the time of the murders, the judge did not err in rejecting alcoholic impairment as a mitigating circumstance. *See State v. Bible*, 175 Ariz. 549, 605-06, 858 P.2d 1152, 1208-09 (1993), *cert. denied*, 511 U.S. 1046, 114 S.Ct. 1578, 128 L.Ed.2d 221 (1994).

Hedlund also claims minor participation in the murder, but there is ample evidence pointing to Hedlund as the one who killed Jim McClain. Hedlund's finger and palmprints were on McClain's

briefcase, which had been rifled during the burglary and then left behind; his fingerprints were on the magazine of the rifle he had sawed off; the bullet that killed McClain could have come from his rifle; he had modified his rifle to conceal it; he concealed the rifle after the murder; he tried to convince Morris to get rid of the rifle before the police found it; and he expressed remorse after his arrest.

Many facts also indicate Hedlund's major degree of participation in both murders. He knew McKinney had threatened to kill anyone who was at the scene of a burglary; Hedlund had threatened to beat in the head anyone encountered at the scene of a burglary; he was responsible for hiding the pistol used by McKinney to kill Christene Mertens; and he participated in the attempt to conceal property stolen from McClain and in the sale of the guns stolen from McClain's house.

3. Use of second degree murder conviction as an aggravator under A.R.S. § 13-703(F)(2)

a. Was there a prior conviction?

Hedlund's jury returned its verdict on all counts on November 12, 1992. Hedlund claims the jury verdict convicting him of the second degree murder of Christene Mertens cannot be a prior conviction for purposes of A.R.S. § 13-703(F)(2)[4] because it was rendered simultaneously with the capital offense verdict. We disagree.

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[4] A.R.S. § 13-703(F)(2), at the time of Hedlund's sentencing, provided that when a "defendant was previously convicted of a felony in the United States involving the use or threat of violence on another person," that conviction shall be considered an aggravating circumstance.

A conviction occurs when the jury renders its verdict. *See State v. Walden*, 183 Ariz. 595, 616, 905 P.2d 974, 995 (1995), *cert. denied*, 517 U.S. 1146, 116 S.Ct. 1444, 134 L.Ed.2d 564; *see also State v. Green*, 174 Ariz. 586, 587, 852 P.2d 401, 402 (1993); *State v. Gretzler*, 135 Ariz. 42, 57 n. 2, 659 P.2d 1, 16 n. 2, *cert. denied*, 461 U.S. 971, 103 S.Ct. 2444, 77 L.Ed.2d 1327 (1983) (convictions entered prior to the sentencing hearing may be considered regardless of the order in which the underlying crimes occurred or the order in which the convictions were entered); *State v. Richmond*, 136 Ariz. 312, 318-19, 666 P.2d 57, 63-64, *cert. denied*, 464 U.S. 986, 104 S.Ct. 435, 78 L.Ed.2d 367 (1983). These cases all dealt with A.R.S. § 13-703(F)(1).[5] The guiding principle in all these cases has been that the purpose of a sentencing hearing is to determine the character and propensities of the defendant and impose a sentence that fits the offender. These same principles apply to the (F)(2) factor present in this case. *Walden*, 183 Ariz. at 615-16, 905 P.2d at 994-95. Thus, for purposes of § 13-702(F)(2), Hedlund's second degree murder conviction occurred when the jury returned its verdict and was prior to his capital sentencing hearing.

b. Does the conviction satisfy former § 13-703(F)(2)?

The legislature, not this court, has imposed the duty to "independently review the trial court's

[5] A.R.S. § 13-703(F)(1) provides that when 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 impossible," that conviction shall be considered an aggravating circumstance.

findings of aggravation and mitigation and the propriety of the death sentence." A.R.S. § 13-703.01(A). Therefore, despite the dissenting justice's objection to our doing so, we must fulfill our duty under this statute and determine whether Hedlund's conviction for second degree murder qualifies as an aggravating circumstance under § 13-703(F)(2). Was it a conviction for a felony "involving the use or threat of violence on another person"?

In determining whether a prior conviction was for a crime of violence, we are bound by the statutory elements of the crime for which the person was convicted and cannot look behind the conviction to determine the true facts of the case. *Walden*, 183 Ariz. at 616, 905 P.2d at 995; *State v. Romanosky*, 162 Ariz. 217, 228, 782 P.2d 693, 704 (1989); *State v. Gillies*, 135 Ariz. 500, 511, 662 P.2d 1007, 1018 (1983).

In *State v. Arnett*, we defined violence as the "exertion of physical force so as to injure or abuse." 119 Ariz. 38, 51, 579 P.2d 542, 555 (1978). In *State v. Lopez*, we held that a prior conviction for resisting arrest did not death qualify the defendant because conduct that only created a "substantial risk" of physical injury to an officer was not conduct "involving the use or threat of violence." 163 Ariz. 108, 114, 786 P.2d 959, 965 (1990). In other words, under the resisting arrest statute, Lopez could have been convicted for acting recklessly-conduct that disregards the "substantial and unjustifiable risk" of harm. *See* A.R.S. § 13-105(c).

The same year that we decided *Lopez*, we held in *State v. Fierro* that the defendant's Texas robbery conviction was not a crime of violence. 166 Ariz. 539,

549, 804 P.2d 72, 82 (1990). We reached this conclusion after pointing out that according to the Texas robbery statute underlying Fierro's conviction, "violence is not necessary," and a person commits robbery if, in the course of committing theft, he "intentionally, knowingly, *or recklessly* causes bodily injury to another." *Id.* (quoting Texas Penal Code Ann. § 19.02 and 1972 Texas Practice Commentary) (emphasis added).

The reason for holdings such as *Lopez* and *Fierro*, rejecting prior convictions based on conduct that is less than knowing or intentional, is straightforward: The legislature intended that the aggravating circumstances contained in § 13-703 be used to narrow the class of death-eligible defendants. *Brewer*, 170 Ariz. at 500, 826 P.2d at 797. Thus, the statutory factors are interpreted and applied in a manner that narrows the class of those who are most deserving of that ultimate sanction. *Id.* We further that purpose by defining the crimes of violence that qualify as an aggravating circumstances under § 13-703(F)(2) to exclude those committed with a mental state that was merely reckless or negligent. This principle, of course, was recognized just last year by today's dissenter in *Walden*, in which he stated that "violence requires an intent to injure or abuse." 183 Ariz. at 617, 905 P.2d at 996. In Walden, this court held that a conviction that could have been obtained for merely reckless conduct did not qualify as a prior under the (F)(2) factor. *Id.*

The dissent characterizes *Fierro* as "engrafting" a culpable mental state onto § 13-703(F)(2). Dissent at 588, 917 P.2d at 1235. But it did not. To assert, as the dissent does, that the "legislature did not limit

the application of A.R.S. § 13-703(F)(2) to crimes with any particular culpable mental state" presupposes that violence encompasses any and all crimes that result in injury or abuse, even those resulting from reckless or negligent conduct. *See* dissent at 588, 917 P.2d at 1235. It does not. The legislature used the more narrow phrase we find in § 13-703(F)(2), not the phrase "crime causing or risking physical injury."

Other authorities have recognized not only the distinction between violence and non-intentional, non-knowing acts resulting in harm, but also the inherently intentional or knowing element of violence. In *Morris & Co. v. Industrial Board*, 284 Ill. 67, 119 N.E. 944, 946 (1918), the court construed a statute that empowered the coroner's jury to investigate when the deceased "is supposed to have come to his or her death by violence, casualty, or any undue means." The *Morris* court noted that "casualty" was defined as "chance, accident, contingency; also that which comes *without design* [(not intended)] or *without being foreseen* [(not knowing)]," and pointed out that there must be a distinction between "casualty" and "violence," otherwise the term casualty would not have been needed in the statute. *Id.* (emphasis added).

More on point, in construing a riot statute, the Illinois Supreme Court stated that the words "force" and "violence" do not contemplate merely the manual force necessary to commit the act, but were intended to be construed in the light of the common law, under which "force" or "violence" meant a concerted *intent* of the perpetrators to assist one another against those who would resist them. *Walter v. Northern Ins.*

Co., 370 Ill. 283, 18 N.E.2d 906, 908 (1938). The Georgia Supreme Court has also recognized a distinction between death caused by violence and that caused by accident. *Jackson v. State*, 210 Ga. 303, 79 S.E.2d 812, 816 (1954). In *Landry v. Daley*, the court stated that "the use of force or violence carries with it *sub silentio* a destructive or threatening intent." 280 F.Supp. 938, 955 (N.D.Ill.1968), *rev'd on other grounds*, 401 U.S. 77, 91 S.Ct. 758, 27 L.Ed.2d 696 (1971).

More recently, and in a context more closely resembling *Fierro*, the Texas Court of Criminal Appeals had occasion to construe the word "violence" in a statute prohibiting the possession of firearms by persons convicted of a felony "involving an act of violence or threatened violence...." *Hamilton v. State*, 676 S.W.2d 120, 121 (Tex.Cr.App.1984). The court concluded that "violence inheres, not in the result, but in the *intent* and the act." *Id.* (emphasis added). The same court later elaborated on the definition, stating:

> in determining if an act of violence has occurred, the focus must be on the intent of the actor and the concurrence between that mental state and the act which creates the injury. The clear holding of *Hamilton* requires that any crime which involves an "act of violence" is by definition one which requires a culpable mental state on the part of the offender.

Ware v. State, 749 S.W.2d 852, 854 (Tex.Cr.App.1988). Thus, *Fierro* did nothing more than articulate the inherent culpable mental state of violence that other courts have long recognized. We

turn then to decide whether Hedlund's prior conviction for second degree murder is an aggravating circumstance under § 13-703(F)(2).

Hedlund was charged with first degree murder, but the jury was instructed on second degree murder as a lesser included offense. The jury instructions on this offense contained language setting forth all the statutory elements and degrees of the crime, which include the following:

> A. A person commits second degree murder if without premeditation:
>
> 1. [Such person intentionally causes another's death]; or
>
> 2. [Engages in conduct knowing it will cause another's death or serious injury and in fact causes another's death]; or
>
> 3. Under circumstances manifesting extreme indifference to human life, such person *recklessly* engages in conduct which creates a grave risk of death and thereby causes the death of another person.

A.R.S. § 13-1104(A) (emphasis added). Hedlund's jury returned a general verdict. Thus, under the charge to the jury and its verdict, it is possible that Hedlund was convicted under the third subsection, a statutory element that permits a finding of guilt when the defendant engages in reckless conduct.

Because Hedlund's prior conviction was for a crime that, on the face of the statute, might have been committed recklessly, it does not qualify as a crime of

violence.[6] In A.R.S. § 13-703(D)(2), the legislature used the term "violence," not the phrase "conviction for a crime which resulted in or threatened physical injury." Accordingly, Hedlund's second degree murder conviction cannot be an aggravating circumstance for purposes of former § 13-703(F)(2).

Because the dissent mischaracterizes our holding, we must emphasize that we did not hold in *Fierro*, *Lopez*, and *Walden*, and do not hold today, that prior convictions for first degree murder under A.R.S. § 13-1105, second degree murder committed with an intentional or knowing *mens rea* under § 13-1104(A), manslaughter committed with a *mens rea* of intentional or knowing under § 13-1103, assault committed with an intentional or knowing *mens rea* under § 13-1203, aggravated assault committed with an intentional or knowing *mens rea* under § 13-1204, sexual abuse under § 13-1404, or sexual assault under § 13-1406 cannot be an aggravating circumstance under former § 13-703(F)(2).[7]

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[6] This problem has been mooted by the recent amendment of A.R.S. § 13-703(F)(2). This section of the statute mandates finding an aggravating circumstance when:

> The defendant was previously convicted of a serious offense, whether preparatory or completed.

A "serious offense" is defined by A.R.S. § 13-703(H) as any of a list of specific crimes, which now includes second degree murder in any of its degrees. *See* A.R.S. § 13-703(H)(2).

[7] We note that the legislature has amended § 13-703(F)(2); in doing so, it disqualified some of the entries in the dissent's parade of horribles. Assault, attempted assault, several forms of aggravated assault, as well as attempted murder and sexual abuse, are not included in the list of serious offenses in § 13-703(H).

Hedlund's prior conviction is not disqualified merely because the statutory definition of the crime permits it to be committed with a reckless mental state. It is disqualified because the instructions and the non-specific form of verdict used in his case did not narrow the mental state of the charge; thus, it is possible that his conviction was based on a reckless mental state. Had Hedlund's instructions or form of verdict specified that the mental state for his second degree murder conviction was based on either an intentional or knowing *mens rea*, the conviction would have qualified, regardless of the fact that the crime's statutory definition allows for conviction under a lesser mental state. *Walden*, 183 Ariz. at 617, 905 P.2d at 996 (sufficiently specific jury instructions made kidnapping charge one that satisfied definition of violence).

For reasons quite unclear, the dissent also insists on expanding our holding. To prevent confusion, we restate that holding. Under *Gillies*, *Fierro*, *Lopez*, and *Walden*, prior convictions obtained by a procedure such as was followed in this case, so that they could have been based on conduct that was merely reckless or negligent, do not qualify under § 13-703(F)(2) as prior crimes of violence. Convictions obtained under statutes criminalizing conduct that was intentional or knowing, and by a procedure establishing that the conviction was based on one of these levels of culpability, can qualify.

Thus, defendants who committed prior crimes, including first and second degree murder, manslaughter, aggravated assault, robbery, and a host of others, while acting intentionally or knowingly, can be death eligible; those defendants

who acted only recklessly or negligently are not. We neither expand on *Fierro*, *Lopez*, and *Walden* nor retreat from them. In this opinion there is only an independent review as required by statute and application of settled law; there is neither syllogism, major premise, nor minor premise. *See* dissent at 41-42.

The state, aware of our duty of independent review and well aware of the *Fierro*/*Walden* rule, made no request in this proceeding that these cases be overruled. The dissent argues we should do so *sua sponte*. We refuse. As the dissent says, advocacy has its limits. Dissent at 589, 917 P.2d at 1236.

One final point. The dissent accuses the court of opening the floodgates for Rule 32 petitions. We invite no petitions based on the dissent's construction of this opinion. As noted, we go no further than *Fierro*, decided six years ago. Any flood caused by that decision has failed to reach our court.

4. Pecuniary gain

Simply receiving profit as the result of a murder is not enough to satisfy the requirements of § 13-703(F)(5), but killing for the purpose of financial gain is sufficient. *See State v. White*, 168 Ariz. 500, 511, 815 P.2d 869, 880 (1991), *cert. denied*, 502 U.S. 1105, 112 S.Ct. 1199, 117 L.Ed.2d 439 (1992). Both of these murders were committed in the course of an ongoing burglary spree. The purpose of the burglaries was to find cash or property to fence. Items stolen from the McClain residence were in fact sold. Clearly, the evidence of pecuniary gain as the primary, if not sole, purpose of the murders is overwhelming and inescapable. Thus, we affirm the finding that Hedlund murdered for pecuniary gain.

5. Reweighing

We have concluded that the trial judge erred in finding Hedlund had a prior conviction for a felony involving violence and agree with the finding of the (F)(5) aggravating circumstance. Therefore, we reweigh the aggravating and mitigating circumstances. *See Bible*, 175 Ariz. at 606-09, 858 P.2d at 1209-12. Because the judge did not improperly exclude mitigating evidence at sentencing and the mitigating evidence is not of great weight, this case is appropriate for reweighing by this court rather than remanding to the trial court. *State v. King*, 180 Ariz. 268, 288, 883 P.2d 1024, 1044 (1994), *cert. denied*, 516 U.S. 880, 116 S.Ct. 215, 133 L.Ed.2d 146 (1995). In our reweighing, we must decide whether the sole aggravator-pecuniary gain-outweighs the mitigating circumstances discussed above or whether those mitigators are sufficiently substantial to call for leniency.

In comparison to the mitigating circumstances here, the quality of the aggravating circumstance is great. To apply a recent analogy, this is not the case of a convenience store robbery gone bad but, rather, one in which pecuniary gain was the catalyst for the entire chain of events leading to the murders. The possibility of murder was discussed and recognized as being a fully acceptable contingency. *See State v. Spears*, 184 Ariz. 277, 908 P.2d 1062 (1996) (affirming death sentence where pecuniary gain was only aggravator, and military service and lack of

significant prior criminal record were only mitigators).[8]

As in *Spears*, this is a case in which Defendants deliberately and unnecessarily killed to accomplish the burglary. We have encountered pecuniary gain as the sole aggravator in other cases[9] in which the death penalty was not imposed, but the quality of Hedlund's conduct in this case certainly gives great weight to the aggravating circumstance. We therefore believe that the aggravating circumstance of pecuniary gain clearly outweighs the minimal mitigating evidence.

6. The special verdict

Hedlund claims that the trial judge's failure to issue a written special verdict, separate from the special verdict read into the record at the time of

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[8] *See also Willoughby*, 181 Ariz. at 549, 892 P.2d at 1338 (affirming death sentence where pecuniary gain was only aggravator but was extremely compelling and overshadowed substantial mitigating evidence); *White*, 168 Ariz. at 510-13, 815 P.2d at 879-82 (1991) (affirming death sentence where pecuniary gain was only aggravator and lack of felony record was only mitigator); *State v. Hensley*, 142 Ariz. 598, 603-04, 691 P.2d 689, 694-95 (1984) (affirming death sentence where pecuniary gain was only aggravator and defendant's G.E.D. degree was only mitigator).

[9] *State v. Rockwell*, 161 Ariz. 5, 775 P.2d 1069 (1989) (reducing sentence to life imprisonment where pecuniary gain was sole aggravator but mitigation was great); *State v. Marlow*, 163 Ariz. 65, 72, 786 P.2d 395, 402 (1989) (where same evidence was used to support both pecuniary gain and heinous and depraved, it can be weighed only once; thus only one aggravating factor could be weighed against substantial mitigating evidence, making life imprisonment the appropriate sentence).

sentencing, violates A.R.S. § 13-703(D) and requires resentencing. We disagree.

This court has stated that the better practice is for the trial court to place the special verdict on the record, which the judge in this case did by reading it in open court, on the record. *State v. Hill*, 174 Ariz. 313, 330, 848 P.2d 1375, 1392, *cert. denied*, 510 U.S. 898, 114 S.Ct. 268, 126 L.Ed.2d 219 (1993); *State v. Wallace*, 160 Ariz. 424, 427, 773 P.2d 983, 986 (1989), *cert. denied*, 494 U.S. 1047, 110 S.Ct. 1513, 108 L.Ed.2d 649 (1990). *State v. Beaty*, 158 Ariz. 232, 246, 762 P.2d 519, 533 (1988), *cert. denied*, 491 U.S. 910, 109 S.Ct. 3200, 105 L.Ed.2d 708 (1989); There is no allegation that the transcript is inaccurate or that any prejudice resulted from the verdict being read into the record rather than filed separately. Neither the text of A.R.S. § 13-703(D) nor the cases construing it require a separately filed, written special verdict.

State v. McKinney

CLAIMS OF TRIAL ERROR

A. The courtroom layout

McKinney claims that the courtroom layout, with Defendants facing the jurors, was intimidating and resulted in fundamental error requiring reversal. McKinney has not demonstrated any prejudice and provides no authority for his argument that there is a constitutional right to a standard American courtroom arrangement, and we decline to invent such a right.

B. Denial of impeachment

McKinney next claims that the trial judge erred in refusing to allow Lemon to be impeached with a prior felony conviction. This claim and the supporting argument duplicate Hedlund's claim regarding Lemon's juvenile record. The only difference is that McKinney attempts to characterize it as a prior felony conviction. We reject McKinney's argument on this issue for the same reasons we did in Hedlund's case.

C. The expert status of witnesses

The state called several witnesses with expertise in areas such as fingerprinting, forensic pathology, and other specialized fields. After counsel established a proper foundation, the witnesses were submitted to the court as experts.[10] There was no objection to this submission at trial, but on appeal McKinney contends that the judge conferred expert status on the witnesses, thus making an improper comment on the evidence. McKinney argues that the "judge has no business telling jurors who he believes should be

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[10] After eliciting information on the experts' credentials, the prosecutor submitted them as experts in their respective areas. Illustrative of this practice is the following excerpt from the trial.

Q. [PROSECUTOR] Your Honor, I submit Mr. Kowalski as an expert in the area of criminalistics.

[McKINNEY'S COUNSEL] No objection.

[HEDLUND'S COUNSEL] No objection.

[THE COURT] Okay. You may proceed.

This manner of submitting and approving experts was the same for all of the testifying experts.

considered an expert [because] [t]hat decision is the jury's."

As we have previously stated, the primary concern in admitting so-called expert testimony is whether the subject matter of the testimony is beyond the common experience of people of ordinary education, so that the opinions of experts would assist the trier of fact. *State v. Dixon*, 153 Ariz. 151, 155, 735 P.2d 761, 765 (1987). "Whether a witness is competent to testify as an expert is a matter primarily for the trial court and largely within its discretion." *Id.*

Here, the witnesses' credentials and qualifications to give such testimony were established, the prosecutor submitted the witnesses as experts, and after defense counsel stated they had no objection, the judge allowed them to give factual and opinion testimony in their respective subject areas. The witnesses' testimony concerned technical and scientific subjects beyond the common experience of people of ordinary education. Thus, we find no abuse of discretion in the judge's admission of the witnesses' opinion testimony.

We do not recommend, however, the process of submitting a witness as an expert. The trial judge does not decide whether the witness is actually an expert but only whether the witness is "qualified as an expert by knowledge, skill, experience, training, or education ... [to] testify ... in the form of an opinion or otherwise." Ariz.R.Evid. 702. By submitting the witness as an expert in the presence of the jury, counsel may make it appear that he or she is seeking the judge's endorsement that the witness is to be considered an expert. The trial judge, of course, does not endorse the witness's status but only determines

whether a sufficient foundation has been laid in terms of qualification for the witness to give opinion or technical testimony. *See United States v. Bartley*, 855 F.2d 547, 552 (8th Cir.1988) ("Although it is for the court to determine whether a witness is qualified to testify as an expert, there is no requirement that the court specifically make that finding in open court upon proffer of the offering party").

In our view, the trial judge should discourage procedures that may make it appear that the court endorses the expert status of the witness. The strategic value of the process is quite apparent but entirely improper. Suppose, as is frequently the case, there are two experts with conflicting opinions. Is the trial judge to endorse them both or only one? In our view, the answer is neither. The trial judge is only to determine whether one or the other or both are qualified to give opinion or technical evidence. "Such an offer and finding [of expert status] by the Court might influence the jury in its evaluation of the expert and the better procedure is to avoid an acknowledgement of the witnesses' expertise by the Court." *Id.* Thus, we disapprove of the procedure followed in this case. However, no objection was made, and the issue falls far short of fundamental error. *See State v. Gendron*, 168 Ariz. 153, 154, 812 P.2d 626, 627 (1991).

D. The verdict

The gravamen of McKinney's argument on this point is that the failure to announce the verdict orally in his presence violated his right to a public and open trial under art. II, §§ 11 and 24 of the Arizona Constitution and the Sixth Amendment to the United States Constitution.

The two juries were not sequestered, so it was possible that the deliberations of one could continue well past the verdict and discharge of the other. To ensure that the jury that deliberated longer would not be influenced by the first jury's verdict, the procedure for this dual jury trial worked as follows: When McKinney's jury returned its verdict, the form was taken by the bailiff to the clerk, who read it silently and recorded it. McKinney was present to observe this process, as were the attorneys for both defendants. After the attorneys were called to the bench to review the verdict, the bailiff gave the verdict forms to the jurors, who were polled in McKinney's presence to ensure that the returned verdict was that which they had voted for, but the actual verdict was not orally announced. McKinney's jury was then dismissed. When Hedlund's jury later reached its verdict, that verdict was announced in the normal course, following which the clerk read aloud the previously returned verdict for McKinney.

While McKinney was present for the return of his verdict, he was then sent back to jail for security reasons; neither he nor his jury was present when his verdict was subsequently read aloud following the reading of Hedlund's verdict. McKinney argues that because he was not present when his jury's verdict was orally announced, his verdict was a secret verdict, denying his rights to due process, open justice, and a public trial in violation of an assortment of constitutional provisions and court rules. On appeal, McKinney asks this court to believe that despite the fact his attorney read the verdict and the jury was polled while he sat in court, his rights were violated because he did not know, and

his lawyer did not tell him, that he had been convicted of first degree murder. We decline to indulge in such fantasy. McKinney also argues that the procedure outlined above did not constitute the return of an actual verdict. We disagree. Our rules require that verdicts "shall be in writing, signed by the foreman, and returned to the judge in open court." Ariz.R.Crim.P. 23.1(a). McKinney had an open and public trial, as required by the Arizona and United States Constitutions. The verdict was in writing, signed by the foreman, and returned to the judge in open court, as required by our Rules of Criminal Procedure. McKinney was present at all times, including the return of the verdict and polling of the jury. This is all he is entitled to by law. Therefore, we reject McKinney's claim of error regarding the verdict procedure.

SENTENCING ISSUES

A. The special verdict

This claim, and the supporting argument, duplicates Hedlund's claim regarding the absence of a written special verdict. As in Hedlund's sentencing, the judge read McKinney's special verdict in open court and it was made part of the record. We reject McKinney's claim of error on this point for the same reasons we rejected Hedlund's claim.

B. The mitigating value of childhood abuse

McKinney asserts that executing him would be cruel and unusual punishment because his childhood abuse caused him to commit murder. McKinney offered evidence from several witnesses that he, like Hedlund, endured a terrible childhood. The judge

found as a fact that McKinney had an abusive childhood.

Here again, the record shows that the judge gave full consideration to McKinney's childhood and the expert testimony regarding the effects of that childhood, specifically the diagnosis of post-traumatic stress disorder (PTSD). Assuming the diagnoses were correct, the judge found that none of the experts testified to, and none of the evidence showed, that such conditions in any way significantly impaired McKinney's ability to conform his conduct to the law. The judge noted that McKinney was competent enough to have engaged in extensive and detailed pre-planning of the crimes. McKinney's expert testified that persons with PTSD tended to avoid engaging in stressful situations, such as these burglaries and murders, which are likely to trigger symptoms of the syndrome. The judge observed that McKinney's conduct in engaging in the crimes was counter to the behavior McKinney's expert described as expected for people with PTSD. As we noted in discussing Hedlund's claim on this same issue, a difficult family background, including childhood abuse, does not necessarily have substantial mitigating weight absent a showing that it significantly affected or impacted the defendant's ability to perceive, comprehend, or control his actions. *See State v. Ross*, 180 Ariz. 598, 607, 886 P.2d 1354, 1363 (1994), *cert. denied*, 516 U.S. 878, 116 S.Ct. 210, 133 L.Ed.2d 142 (1995).

The record clearly shows that the judge considered McKinney's abusive childhood and its impact on his behavior and ability to conform his conduct and

found it insufficiently mitigating to call for leniency. On this record there was no error.

DISPOSITION

Having considered all claims made by Defendants and concluding they are all without merit, and having independently reviewed the record in both cases for fundamental error and finding none, the convictions and sentences of Defendants are affirmed in all respects.

ZLAKET, V.C.J., MOELLER, J., and ROBERT J. CORCORAN, J. (retired), concur.

MARTONE, Justice, dissenting in part.

I join the court in affirming the judgment of conviction and sentence of death but, unlike the majority, I believe that murder is a crime of violence. Because its conclusion cannot be sound, the court should reexamine its premises to find where the defect in reasoning lies. I conclude that the court's decision and dicta in *State v. Fierro*, 166 Ariz. 539, 549, 804 P.2d 72, 82 (1991), are plainly wrong. *Fierro* is a serious departure from the statute it purports to construe.

We first examine the majority's analysis. To begin with, not even the defendant argues that second degree murder is not a crime of violence. He only argues that his second degree murder conviction was not a "previous" conviction within the meaning of § 13-703(F)(2). After concluding that Hedlund was previously convicted within the meaning of the statute, the majority sua sponte imposes upon itself

the duty to decide whether that conviction involved the use or threat of violence on another person. *Ante*, at 581, 917 P.2d 1228.[1]

The majority uses the following syllogism. Its major premise is that a crime that can be committed with a culpable mental state of reckless cannot be a crime of violence within the meaning of § 13-703(F)(2). It relies upon *Fierro*. Its minor premise is that second degree murder can be committed with the culpable mental state of reckless. A.R.S. § 13-1104(A)(3). Therefore, it concludes that second degree murder is not a crime of violence.

The court's major premise is false. The legislature did not limit the application of A.R.S. § 13-703(F)(2) to crimes with any particular culpable mental state. Subsection (F) (2) reads as follows:

> the defendant was previously convicted of a felony in the United States involving the use or threat of violence on another person.

Note that the statute does not include the words "intentionally," "knowingly," "recklessly," or "negligently." Culpable mental state is simply not relevant under this statute. If the crime involves the use or threat of violence on a person, it qualifies.

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[1] Our independent review extends to "the *facts* that establish the presence or absence of aggravating and mitigating circumstances." *State v. Richmond*, 114 Ariz. 186, 196, 560 P.2d 41, 51 (1976) (emphasis added). It does not extend to a consideration of *legal* issues not raised by the parties at trial and on appeal. *State v. Stuard*, 176 Ariz 589, 611, 863 P.2d 881, 903 (1993) (Martone, J., dissenting). We take the case as we find it.

Our cases were once consistent with the plain meaning of the statute. In *State v. Arnett*, 119 Ariz. 38, 51, 579 P.2d 542, 555 (1978), in construing the word "violence," we turned to the dictionary. We said that violence was the "exertion of any physical force so as to injure or abuse." *Id.* We made no reference to any culpable mental state. We just gave the statute its plain meaning. In *State v. Watson*, 120 Ariz. 441, 448, 586 P.2d 1253, 1260 (1978), we said that robbery was a crime of violence because "fear of force is an element of robbery and that conviction of robbery presumes that such fear was present." In *State v. Romanosky*, 162 Ariz. 217, 227, 782 P.2d 693, 703 (1989), we said "[i]f either force or fear is a required element of the crime for which the defendant was previously convicted, it is conclusively presumed that the conviction encompassed force or fear." We said nothing about culpable mental state. We said the same as recently as *State v. Spencer*, 176 Ariz. 36, 43, 859 P.2d 146, 153 (1993).

From whence then did this engrafting of culpable mental state on an otherwise plain statute come? Turn to *State v. Fierro*, 166 Ariz. 539, 804 P.2d 72 (1991). It quotes the *Arnett* definition of violence, but then departs from it with the now infamous sentence, "[i]n determining whether a defendant's prior convictions under § 13-703(F) (2) warrant aggravating a life sentence to death, only those felony convictions in which force was employed or threatened *with the intent to injure or abuse will be considered in aggravation*." *Id.* at 549, 804 P.2d at 82 (emphasis added). This sentence was followed by a *cf.* cite to *State v. Lopez*, 163 Ariz. 108, 114, 786 P.2d 959, 965 (1990). The use of the *cf.* cite is a frank

acknowledgement that there is no clear support for the proposition. "*Cf.*" means that the "[c]ited authority *supports a proposition different from the main proposition but sufficiently analogous to lend support*. Literally, '*cf.*' means 'compare.' " *The Blue Book: A Uniform System of Citation* at 23 (15th ed.1991) (emphasis in original). *Lopez* only held that under an alternative definition of resisting arrest, the offense could be committed without the use or threat of violence. There was no discussion of culpable mental state and certainly no reference to "with intent to."

Fierro went on to hold that because in Texas aggravated assault and robbery could be committed with a culpable mental state of less than intent (there reckless), those crimes did not satisfy § 13-703(F)(2). *Fierro*, 166 Ariz. at 549, 804 P.2d at 82.

Fierro thus defined the (F)(2) factor almost out of existence. This was so because under *State v. Gillies*, 135 Ariz. 500, 662 P.2d 1007 (1983), the court held that the prior conviction must have been for a felony which by its statutory definition involves violence or the threat of violence. *Id.* at 511, 662 P.2d at 1018. One could not look at the specific facts of the case.

When you add *Fierro* to *Gillies*, the result is absurdity. For example, one is forced to reach the quite remarkable proposition that first degree murder is not a crime of violence. Under A.R.S. § 13-1105(A), first degree murder is committed if "[i]ntending or *knowing* that his conduct will cause death, such person causes the death of another with premeditation." Under the majority's analysis, because first degree murder can be committed "knowingly," and without intent, first degree murder

would not constitute a crime of violence.[2] For the same reason, second degree murder would not be a crime of violence. *See* A.R.S. § 13-1104. Manslaughter would not be a crime of violence. *See* A.R.S. § 13-1103. Aggravated assault would not be a crime of violence. *See* A.R.S. § 13-1204. Assault would not be a crime of violence. *See* A.R.S. § 13-1203. Sexual Assault would not be a crime of violence. *State v. Bible*, 175 Ariz. 549, 604, 858 P.2d 1152, 1207 (1993); *see* A.R.S. § 13-1406. Sexual Abuse would not be a crime of violence. *See* A.R.S. § 13-1404. And yet attempted murder and attempted assault would be crimes of violence because "intent" is an element of the offense of attempt. *See* A.R.S. § 13-1001.

When a court reaches remarkable conclusions such as these, we have a choice. We can accept absurd results or we can go back and reevaluate our premises. I would simply acknowledge *Fierro* as insupportable error, acknowledge our distraction in post-*Fierro* cases, including my own opinion *in State v. Walden*, 183 Ariz. 595, 616-18, 905 P.2d 974, 995-97 (1995), acknowledge that its application to second degree murder and first degree murder is absurd, and hold that murder is simply a crime of violence. Those who have profited by *Fierro* in the past will suffer no harm. Those who do not profit by it in present and future cases are entitled to no benefit from it. Instead, the court says *it* must narrow the class of defendants who are death eligible. *Ante*, at 581, 917 P.2d at 1228. But it is the statute that

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[2] The majority's attempt to limit *Fierro*'s damage at the point of "reckless" has no support in *Fierro* or our cases.

narrows the class. The court ends up eliminating the narrowing factor.

I fear that the court's refusal to acknowledge our prior error will simply open the floodgates of Rule 32 petitions in those many cases in which the (F)(2) factor was upheld without any consideration of culpable mental state. This is especially regrettable in light of the repeal of the old (F) (2) factor and the substitution of the new and improved "serious offense" (F)(2) factor. A.R.S. § 13-703(F)(2), *amended by* Laws 1993, Ch. 153, § 1.

The soundness of legal reasoning gives law its legitimacy. Unsound results flow from unsound reasoning. Not even the defendant took the position that second degree murder was not a crime of violence. Advocacy, after all, has its limits. I respectfully dissent from that part of the opinion that concludes that murder is not a crime of violence.

APPENDIX E

IN THE SUPERIOR COURT
OF THE STATE OF ARIZONA
IN AND FOR THE COUNTY OF MARICOPA

STATE OF ARIZONA,

Plaintiff,

v.

JAMES ERIN MCKINNEY,

Defendant.

Supreme Court No. CR-93-0362-AP

No. CR 91-90926 (B)

Filed September 20, 1993

REPORTER'S TRANSCRIPT OF PROCEEDINGS

(Sentencing)

BEFORE: THE HONORABLE STEVEN D. SHELDON, Judge

APPEARANCES: Mr. Louis F. Stalzer
Deputy County Attorney
Representing the State

Mr. Scott F. Allen
Deputy Public Defender
Representing the Defendant

Mr. Alex D. Gonzalez
Deputy Public Defender
Representing the Defendant

Mesa, Arizona
July 23, 1993
4:30 o'clock p.m.

PROCEEDINGS

THE COURT: We're on the record in State of Arizona versus James Erin McKinney, CR 91-90926. This is the time set for sentencing.

Counsel, we've concluded the evidentiary portion of the hearing; the arguments that you wanted to present on, I believe; the mitigation/aggravation circumstances. What I would propose that we do this afternoon before you both make your final statements to the Court, and Mr. McKinney has an opportunity to make his statements, that I will ask the State if there were any victims present who wish to be heard and then proceed with the defendant's allocution and further statements by defense counsel.

MR. ALLEN: That's fine.

THE COURT: Mr. Stalzer?

MR. STALZER: Just briefly, my memorandum dealt with the obvious sentencing for purposes of Counts I and III. Regarding the overall sentence as to the other Counts, the State would be requesting the maximum sentence in those matters for the reasons of Mr. McKinney's prior criminal history, the nature of the offenses, the burglaries involving weapon or weapons, the crimes being committed while the defendant was on parole status.

Judge, as to the Counts for aggravation on the homicide charges with respect to Ms. Mertens, State submits there are evidence to support the F(5) allegation, and further evidence to support the F(6) allegation. On Mr. McClain, again, evidence to support the crime was committed with the expectation of pecuniary gain, and also the fact that there was the conviction by the jury's verdict on Count I; that being the homicide of Ms. Mertens.

Regarding some of the mitigation -- recognizing the evidence that you heard at length regarding the background of Mr. McKinney; the type of childhood he had; the circumstances and the nature of what was called abuse; physical or mental abuse regarding the children in the home at the hands of Shirley McKinney and possibly Jim McKinney -- there were allegations that there was some type of remorse as a mitigating factor and I submit that has not been shown at all.

There is an allegation of age as a mitigating factor, and I submit that the defendant's age, although young in years to what a person normally lives these days, is not a sufficient mitigating factor to call for a life sentence.

And there is the other aspect of the diminished capacity that Dr. McMahon spoke about, and the fact that that has not been truly addressed as far as the time of the offenses, as to the defendant's mental state, and the existence or the impact of the possible Post-traumatic Stress Disorder. And the impact it may have had, if any, on the defendant has not really been demonstrated.

For the reasons stated in prior arguments from last week, as well as those addressed in the memorandum, we would be asking for the imposition of the death penalty, maximum sentence, for the Burglary in the First Degree for Christine Mertens; the maximum for the Burglary, First Degree, with respect to the Jim McClain residence; and the maximum penalty for the theft of the various items; specifically, there's the car that belonged to Jim McClain.

I would ask further that this sentence from those offenses regarding Ms. Mertens be either consecutive -- that the McClain set of offenses be consecutive to those from the Mertens' set of offenses. And with that, Judge, the State would rest and has nothing further to add at this time.

THE COURT: Mr. Stalzer, are there any victims or family members of victims who wish to be heard today?

MR. STALZER: Yes, your Honor. Barbara Phillips would wish to address the Court briefly, collectively, on behalf of the McClain family.

THE COURT: Ms. Phillips?

MS. PHILLIPS: Thank you. I briefly just would like to state a couple of things to the Court. We had a

long speech prepared and I'm speaking on behalf of all of my family. We, as a family, know that the Court realizes and understands all the pain that we've gone through and all the suffering with the loss of our father, and I'm sure the Mertens family has also felt all the pain. With that in mind, we would like to ask the Court to give the maximum possible sentence to Mr. McKinney for the offenses that he has ensued on our family. And that's it.

THE COURT: All right. Thank you.

MS. PHILLIPS: Thank you.

MR. STALZER: Judge, also for the record, present today is Mr. Todd Mertens. I inquired of him and he desires not to make a statement at this time.

THE COURT: Is there anything further from any other victims who are present in the courtroom who would like to be heard?

MR. STALZER: Yes, your Honor. Another victim of the McClain family wishes to make a statement.

MS. MCCLAIN: My name is Sharon McClain. I'm the second daughter and I, too, would like to ask that Mr. McKinney get the maximum sentence allowed for murdering our father. He murdered -- it was senseless.

What you did was senseless, cruel, and I hope that you -- whatever the Court decides to impose upon you, that it's enough so that you do not commit this crime on somebody else and cause undue punishment on other victims and families.

THE COURT: Thank you, Ms. McClain.

Mr. Stalzer, anything further?

MR. STALZER: No, your Honor, not at this time.

THE COURT: Mr. Allen or Mr. Gonzalez or both of you, if you would like to make any statements at this time. And also if you would move the microphone forward, Mr. McKinney may remain seated and begin to make his allocution at this time.

MR. ALLEN: Judge, I'm going to be brief. We heard two days of basically mitigation, and there was a little bit by way of aggravation, but it was mainly argument. You heard the evidence. We briefed the issues. We're going to rely on our briefs, on the evidence that you heard, and the arguments that were made last time.

I realize that you've made your decision at this point in time. I would just point out that we feel that we did meet our burden for mitigation; that the evidence provided by the family members of the abuse and Dr. McMahon's diagnosis from the time he spent with James McKinney testing and the clinical interview and dealing with the -- the abusive stories that he did hear from the family, I think provides the Court for mitigation, your Honor. And I would add that I feel that mitigation in that will also apply to the Counts where James is not facing the death penalty and the presumptive term -- terms would be appropriate for those sentences.

Your Honor, I think that the Court has a very serious choice here. I realize that. And like I said earlier, I know at this point in time that the Court has made its decision. I would just point out that my time -- two years almost -- of dealing with James McKinney, I've had a very good attorney/client relationship with him. I found him to be a person that most people probably don't understand because they wouldn't have the opportunity to get to know

him. I think that he's an individual that I've had no problems with; that we've had no problems together, and in some respects, we look at his background history and say, well, this is a person who's been in trouble before. It doesn't surprise us. If you didn't know about his background history, James is the type of person that really -- it is surprising that he is here under these types of charges.

I would urge the Court again to -- as I ended last time, to give James McKinney life sentences. I feel that -- we talked about this in the mitigation hearing as far as locking someone up for the rest of his life, which the Court has an opportunity as punishment, obviously, and this is not a person who would be eligible for any type of parole, and the Court can see that. So I ask the Court to give life sentences in the two Counts of first degree murder and presumptive terms in the prison-eligible sentences. Thank you.

THE COURT: Mr. Gonzalez, anything you would like to say?

MR. GONZALEZ:Yes, your Honor. Briefly, in listening to some of what happened or has been said here today, I'm somewhat interested in Mr. Stalzer's use of the word "'we' will ask for the imposition of the death penalty." I'm not sure who he means by "we." I suspect it may be him. I suspect it may be the McClain family. I suspect it may be the Mertens family. I suspect it may be the State of Arizona, I suppose, or perhaps even the head prosecutor in his division. I think that when we're talking about imposing this type of sentence on an individual, we have to take responsibility for it. A judge may say that, "I had no choice under the law but to impose the sentence, because when I took the oath of office, I

said I would follow the law." But that, in a sense, is a cop-out. The fact of the matter is that Mr. Stalzer's asking for the death penalty; not "we." The fact of the matter is that this Court has the opportunity to impose the death penalty solely.

When we think about that particular offense or these offenses and then the potential punishment meted out by this Court, at least in my mind, it's absolutely awesome that we think of ourselves as being civilized, yet we impose uncivilized punishment. The fact of the matter is, as Mr. Allen said, you have the opportunity to do something I think that's even worse than the imposition of the death penalty. That would be a final act executed by somebody else, but ordered by none other than you. And the most severe penalty, I think, would be for a person to be spending the rest of his life in prison and getting up every morning knowing that they're there for the particular crimes he committed. In this case, James McKinney, he's been convicted and knowing on any given day -- he gets up and faces the population in that prison, as crazy as it is -- that he himself could die; knowing that he can never get out; knowing that he will spend the rest of his natural life there, day after day, week after week, and month after month.

I've heard others say that once an individual was executed for a particular crime, family members, cousins, people of that nature, that they were relieved. I wonder whether the relief came from the press coverage and other publicity that occurred just prior to the carrying out of the execution, and then that being the ending point, and I wonder whether the relief is that they now feel somewhat vindicated.

Realistically, anybody who loses a loved one in this type of act, a homicide, will never be vindicated. If they forget the person, it's probably because they never loved the person, If they loved the person, then they're going to remember that person for the rest of their lives. So it doesn't end anything.

Judge, under the circumstances of this case -- you've heard the mitigation -- James McKinney had some real serious, significant, and traumatic problems when he grew up. You've received articles that seemed to, at least in my mind, convincingly say or establish the profile that he fell into at a young age, not through his own fault; because of the conduct of others. That has to be considered very seriously by you. I think that information, combined with the expert testimony that you heard in this case, calls for a sentence other than death. And as Mr. Allen indicated, chances are, whatever sentence you impose, assuming that it is not death, James McKinney is not going to get out of prison. And if he ever does, which I seriously doubt, he is going to be an extremely old man.

I have nothing else to add.

THE COURT: Thank you, Mr. Gonzalez.

Mr. Allen or Mr. Gonzalez, did Mr. McKinney wish to make any statements today?

MR. ALLEN: Briefly, your Honor.

THE COURT: All right. Would you pull the microphone over.

THE DEFENDANT: All I can say is, your Honor, I'm sorry for the victims, the victims' family in this case, the pain that they've all gone through,

and I just ask the Court for mercy. That's all. That's all I can say.

THE COURT: Is there anything further from the defense?

MR. ALLEN: No, your Honor.

THE COURT: Mr. Stalzer, anything further?

MR. STALZER: No, your Honor.

THE COURT: Based on the prior determinations of guilt by the jury in this matter, it is the judgment of the Court that with respect to Counts II and IV in this matter on the offenses of Burglary, First Degree, Class 2, non-dangerous, non-repetitive felonies, committed in violation of A.R.S. Sections 13-1501, 1507, 1508, 13-301 through 304, 701, 702, 801, and 812, and 13-604(K); that the defendant, after considering the mitigating and aggravating circumstances presented to this Court previously, be sentenced to the maximum 21 terms -- 21-year terms of imprisonment for the following reasons:

I find the following statutory factors justify the imposition of the maximum sentence on each of these Counts:

That is, the use of a gun; the fact that there was a death in the two burglaries; that there was needless infliction of serious physical injury on each of the victims; that each of the offenses were for pecuniary gain; that the defendant has prior felony convictions, three prior felonies, for which he has served prison terms on two separate occasions; the number of other burglaries, criminal in conduct, that were engaged in in a clear pattern prior to the two felony offenses in this case; the fact that these -- the defendant

committed these while on parole, he is an extreme and extraordinary danger to the community. All of those aggravating circumstances so far outweigh any mitigating circumstances that they do justify the maximum term of imprisonment on Counts II and IV. It is further ordered that Count II run consecutively to Count IV.

And with respect to Count VI, the offense of Theft, a Class 3 felony, non-dangerous, non-repetitive felony committed in violation of A.R.S. Sections 13-1801, 1802, 13-301 through 304, 701, 702, 801, and 812; that for the reasons previously stated that the maximum term of imprisonment be imposed, which is 10 years; that sentence run consecutive to Count II and concurrently with Count IV; that the defendant receive 654 days of presentence incarceration credit on each of those Counts.

Counsel, as you are aware, the Court is required to return a special verdict, and with respect to Counts I and III, although this is fairly lengthy and I have written out my discussion of the aggravating circumstances, the Enmund-Tison analysis, and final mitigating discussion, this discussion will take some time. I've written these notes down and will follow them as I go through this discussion at this time.

Considering the aggravating circumstances with respect to the Mertens homicide, and specifically with respect to the aggravating circumstances alleged by the State under F(5), I find the following circumstances have been proven by the State in support of this allegation with proof beyond a reasonable doubt:

That is, that the defendant engaged in a number of discussions with others prior to this offense, at least

on three separate occasions -- that being approximately the date of February the 28th and March 1st -- at which time he was in the company of other individuals, including co-defendant.

On the first evening, there was a discussion about the need for money by the defendant. There was also a discussion regarding the location of the victim's home. There were a number of times that the defendant, co-defendant, and other individuals, drove by that residence. There was some discussion about entering the residence that night, but they declined to do so because there were people at home.

The next evening, after he completed a burglary at another residence at which the defendant and another uncharged individual entered a home while the defendant was armed, they again drove by this location of the Mertens residence before ending their evening of activities on that date.

Later, on or about March the 3rd, which was a Sunday, there was a discussion at an uncharged individual's home. He accompanied them on the evening of both of these burglaries. The defendant, co-defendant, again discussed the Mertens residence. During this time, there was a discussion by the defendant regarding the need for money. Other homes were entered prior to entering the Mertens property to obtain property. The defendant, in the company of the co-defendant and other uncharged individuals, received information and elicited information about Mrs. Mertens having a lot of money. There was a discussion regarding where the money was kept.

With respect to the offense itself, there was evidence of a theft at the home, physical evidence,

and photographs introduced. There was evidence of a blood imprint which was linked to yellow gloves which were later found at a vehicle in the pond, and where discussion or evidence showed that gloves were also found in Mr. McKinney's residence. There was property strewn about the Mertens residence which showed that it had been ransacked, and reasonable inference can be drawn that both the defendant and co-defendant attempted to obtain the property from that residence.

There was also a discussion by the defendant or co-defendant in each other's company with these other individuals as to the times that the occupants were at work or were away from the home; that there was a discussion regarding the vehicles driven by the occupants. There was a need for secrecy expressed, in that co-defendant indicated that an uncharged member of the group, Mr. Morris, could not enter the home because family members knew him.

The facts and evidence in this case I think suggest and demonstrate that there was a desire, expectation for pecuniary gain and expected assault. Other conduct engaged in by the defendant and co-defendant; that they went armed -- or the defendant went armed to other burglaries, but he expressed an intent to kill the occupants of the home in which they were burglarizing if present; there was a need not to be recognized; and there was a need for concealment.

With respect to the Mertens residence, there was evidence that showed the victim had money; that it was missing; that the jewelry box inside the residence had been ransacked; and that jewelry was missing. The evidence shows that the killing occurred to permit both defendants to complete the

plan to obtain money first discussed approximately two weeks before the offense and the killing in Mrs. Mertens' home. The killing occurred during the commission of the burglary.

The Court also finds that the cases relied upon by the State to support the finding of this factor under sub-paragraph (5) are persuasive with respect to the aggravated circumstance under F(6). The Court finds that the killing in this case was cruel. It was heinous and depraved as discussed by the case law. "Cruelty" discusses the mental or physical pain or distress suffered by the victim, and the elements "heinous" and "depraved" discuss the conduct by the defendant.

In this case, the defendant admitted shooting the victim, Mrs. Mertens. Although this was a matter of some controversy at court, there was evidence introduced through the defendant's father, a statement the Court would find extremely viable under which it was made, in which the defendant acknowledged responsibility for the killing of Mrs. Mertens.

There was evidence that showed that the victim struggled violently to survive before being killed by a shot to the head in this case there were numerous non-fatal wounds described by the evidence. There was a substantial amount of blood over large areas of the victim's body, and the house, the bottom of her shoes, her slippers, which suggests that a struggle occurred while she was still conscious.

As in State v. LaGrand, again, it can reasonably be assumed that the victim did not die instantly, but suffered tremendous physical torment prior to her death. Even if the victim were unconscious before the wounds were inflicted, then the infliction of wounds

after the victim was unconscious, and later the gun wound, demonstrate that the violence was gratuitous, and the state of mind of the defendant or the co-defendant, which demonstrates the requirements for finding it, heinous and depraved under the circumstances of this. The violence in this case appeared clearly to be unnecessary. It was the use of force and violence inflicted upon the victim which was unnecessary.

With respect to victim James McClain, with respect to the State's allegation of the aggravating circumstance of Paragraph 5 being for pecuniary gain, I find that all of the evidence in this case showed that the victims were known either by the defendant, co-defendant, or other uncharged individuals that were with them prior to the occurrence of all of the burglaries. In this case, the co-defendant knew the victim. Here, the co-defendant's fingerprints were found inside the home. They were fingerprints of a co-defendant who had been with the defendant at the Mertens homicide.

In addition, it appears that the defendant or co-defendant modified a weapon owned by the co-defendant at a time subsequent to March 17th in order to reduce the dimensions of that weapon in an effort to make it more concealable or usable in a residential burglary.

There was an admission by the defendant of knowledge of a manner of death to Mr. McClain to his father, which I believe evidences a continuing scheme by the defendant and the co-defendant to burglarize residences in the Southeast Valley and kill the occupants of those residences.

There was an attempt to conceal property, the victim's car and wallet, in the pond where the defendant and co-defendant previously had gone shooting with other individuals in this case. A glove was also found at that location, which indicates that two or more persons at least were involved in the McClain homicide. Property was removed from it. And shortly after the homicide, there was evidence showing that the car had not been in the pond the day before, Friday or Saturday morning before the offense, but was found early the next morning, which tends to support the inference that it was the defendant or co-defendant who removed it from the victim's residence.

Shortly after the vehicle was found and the offense against Mr. McClain had occurred, there was an attempted sale or sale of weapons by both the defendant and the co-defendant, which included an attempt to sell the modified .22 rifle. And this conduct appeared to be similar to an attempt to sell the handgun previously possessed by Mr. McKinney when they had driven to the desert on or about March 17th. And failing in their attempts to sell the weapon to other individuals who were out in the desert, they then buried the weapon. The conduct appears to be similar under the circumstances; that is, the attempt to eliminate or get rid of the weapon after the offense had occurred.

With respect to the allegation under F(1), the aggravating circumstance of a prior conviction, I would note that the legislature in this statute clearly intends the use of multiple killing convictions be regarded as an aggravating circumstance by the Court. It does not appear logical to the Court that

convictions from other states would carry more weight or be considered more severely than convictions for a similar offense committed in this state.

The Cook and Smith case is logical, and common sense, I think, dictates that an individual involved in an ongoing scheme and plan to burglarize and kill should be subject to greater punishment than an individual involved in the killing of only one person. The only distinction between Subsection (1) and Subsection (F) -- or F(8) is that the latter subsection expressly deals with a subset of multiple killings., It appears to be consistent with the legislative intent that individuals convicted, not necessarily sentenced, for prior first degree murder convictions have that considered as an aggravating factor by the Court. In reviewing the facts and the evidence that were presented in this case under the Enmund-Tison requirements, I think it is necessary in this case because the verdicts may be based on accessory liability by the defendant.

In reviewing the Enmund-Tison case, that case does require that the evidence show that the defendant either killed, intended to kill or attempted to kill the individual, the victim in this case. The Enmund-Tison case, in modifying that decision, indicated that if those factors are not showing, nevertheless, the death penalty may be imposed on an accomplice when it is shown that substantial participation in a violent offense has occurred that were likely to result in loss of human life or that there was reckless indifference to human life.

With respect to the Mertens case, prior to the commission of the offense in this case, there were

statements about the planning of this offense between the defendant, co-defendant, and other witnesses who overheard the plans. There were statements made by the defendant regarding an intent to kill if there was anyone present at the residence. He, at the time of making these statements, showed a .22 pistol, long barrel, which was identified by several witnesses at trial; and because the pistol was buried in the desert on or about March 16, approximately a week after the Mertens homicide. There was also a glove present at the Mertens residence which suggests or permits the inference of participation by the defendant. There were statements of complicity by the defendant to his father in that the defendant claimed that he had shot Mrs. Mertens.

In addition, at the time of the burying of the gun, the defendant was driving a vehicle in which other occupants were located, approximately three or four other individuals. While the co-defendant and Mr. Morris were outside the vehicle at one point, the defendant circled back with the vehicle to find out what had been accomplished and if the task was finished by the co-defendant. They had not returned to the area at a later time.

In addition, there were statements made in the defendant's residence by the co-defendant in which the co-defendant suggested that rather than shooting the victim in the head, if anyone were home, that they simply beat the person; that they would beat him in the head.

There was also a statement by the co-defendant in this case which under the circumstances and the corroborating evidence, particularly the defendant's

statements to his father, that the co-defendant acknowledged that Mr. McKinney had split the proceeds of the burglary and theft from the Mertens residence. It is clear that he participated substantially in this offense, and under the Enmund-Tison analysis, his statement claiming credit for having shot the victim, I think all of those factors apply and comply with both of those cases.

With respect to the McClain homicide, it is not clear from the evidence in this case, other than the defendant's statement, as to who shot Mr. McClain. The defendant indicated that the co-defendant had caused the death of Mr. McClain. However, the statement to his father regarding the death of Mr. McClain at the time indicated he knew the cause of death. These facts had not been made public which demonstrated awareness of the cause of death with Mr. McKinney, which could have only been known to a person who is present or spoken to someone who had been present. The defendant, Mr. McKinney, was in possession of the guns taken from the McClain residence shortly after the killing and attempted to sell them. Again, the car and the stock pond suggests there were multiple offenders involved in the offense, and under all the circumstances in this case, it is beyond any reasonable doubt that at least the defendant and co-defendant continued to be involved in a plan and scheme to burglarize a number of residences in the community.

The defendant was also aware that a death had occurred approximately two weeks before, during the burglary in which he was involved in at the Mertens residence. And even if the co-defendants had committed the homicide of Mrs. Mertens, he knew

that the co-defendant at the time of entering the McClain residence was capable of killing; and that the co-defendant was with him at the McClain residence, as was demonstrated by the handprints and fingerprints at the McClain residence; and throughout all of these incidents, it appeared that there was a continuing need for money, which is demonstrated by the sale of guns shortly after the homicide and offense at the Mertens residence.

Again, I find all of those circumstances demonstrate, at least under the Tison modification of the Enmund case, substantial participation in the McClain homicide by Mr. McKinney.

With respect to mitigation, I have considered all of the exhibits that were admitted into evidence, Numbers 1 through 8. I've reviewed them. Dr. McMahon gave lengthy testimony. Dr. Gray also testified. And there were several witnesses that testified on behalf of the defendant. And I think that after hearing those witnesses' testimony and Dr. McMahon's testimony, it is clear that the defendant in this case, at the very least, be described as having a traumatic childhood. The circumstances that he grew up in, I think, were extraordinary. I think they are beyond the comprehension and understanding of most people who have not grown up under those circumstances. And it appears, and I believe, that the statements made both by Dr. McMahon and made by the witness at the time they were testifying, were truthful, and I did take them into consideration in this case.

It also appears that neither Dr. Gray nor Dr. McMahon disagree that the defendant is on the low end of the normal I.Q. scale, but neither of them also

disagree that the defendant, in fact, has normal intelligence. It is clear, however, that the defendant lacked normal progress in school. For whatever reasons, some of which I believe were due to the traumatic circumstances that he grew up in and the circumstances which were testified to by the witnesses during the mitigation hearing, the circumstances of child abuse, which I accept as true for purposes of this hearing, I think manifest the causal factors linked to Post-traumatic Stress Syndrome as testified to by Dr. McMahon that have been seen in other individuals resulting from childhood abuse.

However, in viewing Exhibit 3, which defense introduced and Dr. McMahon acknowledged either reviewing or relying upon, it appeared that in reviewing that exhibit that even those experts who agree that Post-traumatic Stress Syndrome can result from childhood abuse and be a lingering problem of individuals who have been abused, beaten, and deprived of the necessary care, clothing, and parental love and affection that Mr. McKinney was -- obviously, through the testimony, was deprived of in this case -- nevertheless have concluded as Dr. McMahon indicated, there was a cognitive impairment of the defendant. There was no evidence presented of any organic brain damage or disease of the defendant; that in Exhibit 3, it appears at least in the sample of individuals in that case and comparing those individuals with cognitive impairment, with abuse, where there was not psychotic episodes or neurological damage to a defendant, where at least two or three of those things were present, that if only cognitive impairment and

abuse were present, if there was nothing significantly significant in the violent offenses expected to be committed by those individuals, the experts found that there was no significant difference between an individual with cognitive impairment who suffered with child abuse with no history of cognitive abuse or those who had only been abused or only had a cognitive deficit.

But I think more importantly than that, certainly not trying to dispute him as an expert on what all that meant, it appeared to me that Dr. McMahon did not at any time suggest in his testimony nor did I find any credible evidence to suggest that, even if the diagnosis of Post-traumatic Stress Syndrome were accurate in Mr. McKinney's case, that in any way significantly impaired Mr. McKinney's conduct.

I reached that conclusion based on the other evidence that was presented at trial which Dr. McMahon does not discuss in his testimony and was unclear whether he relied upon or whether he would have drawn the same conclusion had he been aware of it. There was extensive pre-planning of the homicide and multiple occasions planning the homicide, or at least the Burglary offense appeared to be well thought out.

There was an attempt to evaluate the approaches to the residence; an attempt to determine which entrances the defendants could effect entry into the home; a discussion about concealment by not using an uncharged individual who was with them; statements regarding the intended use of guns to get entry into the home; the use of gloves to conceal their identity; and it appeared to me that based all these circumstances that there simply was no substantial

reason to believe that even if the trauma that Mr. McKinney had suffered in childhood had contributed to an appropriate diagnosis of Post-traumatic Stress Syndrome that it in any way affected his conduct in this case.

I found it interesting Dr. McMahon also indicated that one of the techniques -- or the manifestations of Post-traumatic Stress Syndrome that might be expected were that the individual be depressed, would be withdrawn. It appears to me that defense attempted to demonstrate that in their presentation of mitigating circumstances and that such an individual would expect to avoid contacts which would either exacerbate or recreate the trauma that would bring on this type of stress from childhood. And yet, rather than continue to avoid any of these circumstances after the Mertens homicide, it appears that the same thoughtful, reflective planning went into, then, the burglary of a known target to both the defendant and the co-defendant, Mr. McClain.

In reviewing all of these circumstances, I've determined that even though there may be some evidence by Mr. McMahon that would demonstrate under (G)(1) a capacity by the defendant to appreciate the wrongfulness of conduct, it was not significantly impaired, either by the use of drugs, alcohol or the possibility of a diagnosis of Post-traumatic Stress Syndrome.

Under all of the facts that were presented to the Court, rather, it appeared that the defendant continued to involve a process of calculating, reflective criminal thought that was bent on successful, illegal conduct and that he was prepared, and demonstrated that he was prepared, to kill in

order to be successful in completing these burglaries if confronted by the occupants in the home.

With respect to Number (2), there was no duress indicated in this case. There was no evidence which would support it. If there was, I don't think there were any reasonable inferences that could be drawn that there was any duress demonstrated.

With respect to the mitigating factor, Number (3), for the reasons set out on the record with respect to my analysis of the Enmund-Tison findings, I don't believe there is any substantial mitigation demonstrated under Number (3).

With respect to Number (4), the defendant's conduct in this case did demonstrate and create a great risk of causing death to another, so that mitigating circumstance is also not applicable. He not only expressed an intent to kill; there were then two later offenses in which the victims were, in fact, killed.

With respect to the other mitigating factors raised by the defense in their memorandum, defendant's mitigating memorandum received by this Court July 15th, 1993, I have had an opportunity to review that memorandum. I agree that there was evidence of a difficult family history by the defendant. However, as I've indicated, I do not find that is a substantial mitigating factor or that there was any evidence that linked that in any way to demonstrate that at a later time -- coupled either with drugs, alcohol or a cognitive impairment -- that that somehow significantly impaired the defendant's capacity to understand the wrongfulness of his conduct.

With respect to the other matters set out in the memorandum, I have considered them at length, and after considering all of the mitigating circumstances, the mitigating evidence that was presented by the defense in this case as against the aggravating circumstances, and other matters which clearly are not set forth in the statute which should be considered by a court, I have determined that given the pre-planning, the methodicalness of the offenses that occurred here, the senselessness of the violence of the killings, that the aggravating circumstances which have been proven beyond a reasonable doubt by the State with respect to each of these homicides in Counts I and III have concluded that the mitigating circumstances simply are not sufficiently substantial to call for a leniency under all of the facts of this case.

Therefore, with respect to both Counts I and III, it is the order of this Court that Mr. McKinney be sentenced to death on each of those Counts.

Finally, you do have the right to appeal from the judgment and sentence entered here today by filing a written Notice of Appeal. And I will direct that the clerk immediately file the Notice of Appeal which is required under the Rules of Criminal Procedure and the statute.

At this time, you will be turned over to the Maricopa County Sheriff for further transportation to the Department of Corrections for carrying out of this sentence.

Court will stand in recess.

(Court adjourns at 5:17 p.m.)

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C E R T I F I C A T E

I, SUSAN D. WENTLEJEWSKI, do hereby certify that the proceedings had upon the hearing of the foregoing cause are contained fully and accurately in the shorthand record made by me thereof, and that such shorthand was reduced to writing under my direction and the foregoing 33 typewritten pages of said transcript contain a full, true and correct transcript of my shorthand notes taken by me as aforesaid, all to the best of my skill and ability.

DATED, this 30th day of August, 1993, at Tempe, Arizona.

My Commission Expires Dec. 30, 1995

/s/ Susan D. Wentlejewski

Susan D. Wentlejewski, RPR
Certified Court Reporter