CAPITAL CASE
No. 18-

IN THE

Supreme Court of the United States

MICHAEL APELT,

Petitioner,

v.

CHARLES L. RYAN,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. When determining if a capital defendant was prejudiced by counsel's deficient performance during state sentencing, whether the federal court may bypass the fact-specific reweighing mandated by *Strickland* and its progeny.

2. Whether a state court decision is based on an unreasonable determination of the facts under 28 U.S.C. § 2254(d)(2) when the court denies an evidentiary hearing, despite that the petition presents, for the first time, evidence of petitioner's traumatic upbringing, including physical and sexual abuse; placement in special education; and a history of mental illness.

3. Whether it is an unreasonable application of this Court's death-penalty jurisprudence to conclude that, notwithstanding a capital defendant's severe mental impairments, he may be sentenced to death because his crime was not impulsive.

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

Petitioner is Michael Apelt. Respondent is Charles L. Ryan, Director of the Arizona Department of Corrections. No party is a corporation.

TABLE OF CONTENTS

TABLE OF CONTENTS—continued

TABLE OF AUTHORITIES

CASES Page

TABLE OF AUTHORITIES—continued

TABLE OF AUTHORITIES—continued

COURT DOCUMENTS

STATUTES AND REGULATIONS

CONSTITUTION

TABLE OF AUTHORITIES—continued

PETITION FOR A WRIT OF CERTIORARI

Petitioner Michael Apelt respectfully petitions for a writ of certiorari to review the judgment of the Ninth Circuit Court of Appeals.

OPINIONS BELOW

The opinion of the Arizona Supreme Court is published at *State* v. *Apelt*, 861 P.2d 634 (Ariz. 1993) (en banc).

The opinion of the district court is published at *Apelt* v. *Ryan*, 148 F. Supp. 3d 837 (D. Ariz. 2015). Reproduced in the appendix to this petition at 96a ("Pet. App.")

The opinion of the Ninth Circuit is published at *Apelt* v. *Ryan*, 878 F.3d 800 (9th Cir. 2017) (vacating district court's grant of relief on issue of ineffective assistance of counsel at sentencing). Pet. App. 1a. The Ninth Circuit's order denying rehearing *en banc*, along with a dissent from that denial by three judges, is published at 906 F.3d 834 (9th Cir. 2018) (mem). Pet. App. 107a.

JURISDICTION

The Ninth Circuit entered its judgment on December 28, 2017. A petition for rehearing *en banc* was denied on October 11, 2018. Justice Kagan granted Mr. Apelt's timely application to extend the time to file. This Court has jurisdiction pursuant to 28 U.S.C. § 1254.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

28 U.S.C. § 2254(d) states in relevant part:

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the 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.

The Sixth Amendment states, in relevant part: "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence."

STATEMENT OF THE CASE

The district court granted habeas relief under § 2254(d)(1) because Apelt established, even under AEDPA'a high bar, that he suffered prejudice from his sentencing counsel's deficient performance. The Ninth Circuit, while agreeing that Apelt's counsel was grossly deficient, reversed because it concluded Apelt could not meet his burden of showing prejudice. The Ninth Circuit panel's decision is gravely mistaken: it ignores this Court's clear holdings requiring "fact-specific [prejudice] analysis," *Sears* v. *Upton*, 561 U.S. 945, 955 (2010), usurps Arizona's role in sentencing state defendants for state crimes, and results in a sentence of death simply because a panel of federal judges subjectively concluded the defendant to be a "monster" who deserves it. Pet. App. 69a.

The Ninth Circuit's decision cannot be squared with this Court's longstanding emphasis on the role of mitigating evidence. The panel inappropriately focused on the "premeditated" or "calculated" nature of the crime to the exclusion of "the other side of the ledger." *Porter* v. *McCollum*, 558 U.S. 30, 41 (2009). The panel then dismissed Apelt's traumatic childhood as too traumatic to be mitigating. The panel's decision conflicts with *Strickland* v. *Washington*, 466 U.S. 668 (1984), *Wiggins* v. *Smith*, 539 U.S. 510 (2003), and *Porter* v. *McCollum*, 558 U.S. 30 (2009), and "the principles of comity, finality, and federalism" that are embodied in AEDPA. *Duncan* v. *Walker*, 533 U.S. 167, 178 (2001) (quotation marks and citation omitted).

The panel's singular focus on premeditation also turned the Court's *Atkins* analysis on its head. The panel employed the inappropriate presumption that a defendant who has the ability to plan a crime, by definition, has sufficient adaptive strengths to preclude a finding of intellectual disability. But this conflicts with the diagnostic framework employed by the medical community, and with *Atkins* v. *Virginia*, 536 U.S. 304, 311-12 (2002), *Hall* v. *Florida*, 572 U.S. 701, 707-710 (2014), and their progeny.

By building its entire analysis on the fact that Apelt's crime was not impulsive, the panel's approach creates the functional equivalent of a categorical bar to demonstrating prejudice under *Strickland* and intellectual disability under *Atkins* when a defendant is sentenced to death for premeditated murder. As a result, the Ninth Circuit's decision effectively forecloses any *Strickland* or *Atkins* claims for an entire class of capital defendants in the Ninth Circuit.

The Ninth Circuit also shirked its duty to analyze Apelt's arguments under § 2254(d)(2). In post-

conviction proceedings, Apelt presented substantial new mitigating evidence detailing the abject terror he suffered as a child. Pet. App 29a. Although the State offered little to rebut this evidence, other than to argue it was not mitigating and was not credible because much of the evidence came from Apelt's mother, the state court ruled the claim was not colorable and denied an evidentiary hearing. This decision was based on an unreasonable determination of the facts under 28 U.S.C. § 2254(d)(2).

I. BACKGROUND OF THE CASE

A. Factual Background

Michael Apelt, born of rape, grew up in government-subsidized housing in Germany in the 1960s to an abusive and alcoholic father who was also a card-carrying member of the Nazi SS. Pet. App. 30a, 99a, 123a. His family was so poor that food was scarce, and his mother was always hungry during her pregnancy. Excerpts of Record, *Apelt* v. *Ryan*, No. 15-99013 (9th Cir. Mar. 9, 2016), ECF No. 6 at 1064 ("Dkt. 6"). Apelt suffered oxygen deprivation at birth. Pet. App. 123a. Apelt's father consistently tormented him, his siblings, and their mother throughout their lives. He regularly beat Apelt with sticks, fists, and iron rods. *Id.* at 30a. He sexually abused Apelt and raped his sisters. *Id.* at 30a, 110a, 117a. The torture grew even worse when his father invited his Nazi friends over. They would tie Apelt up in the basement and cane his genitals for fun. *Id.* at 110a. On two separate occasions adult men raped Apelt. Pet. App. 118a.

This nightmarish existence led Apelt to first attempt suicide at age seven. *Id.* at 30a. Additional later attempts led to repeated hospitalizations. *Id.* at

48a, 100a. This extreme trauma also delayed Apelt's development. *Id.* at 100a.

As a child, Apelt could not control his bowels until early grade school. *Id.* at 100a. He used a pacifier until around the same time. *Id.* Educators noticed these developmental delays and administered an IQ test after Apelt failed the first grade. *Id.* at 131a. He scored so low that the educators sent him to a Sonderschule—a special education school for intellectually disabled children. *Id.* at 124a, 131a. By age ten, Apelt could barely speak and often confused letters. *Id.* at 100a. When he left school after ninth grade, he still could not read or write. *Id.* at 101a, 131a.

Growing up, Apelt could not maintain appropriate hygiene or dress himself appropriately. *Id.* at 48a, 101a. At age sixteen, Apelt played with eleven-year-olds, "as though he was of the same age." Dkt. 6 at 386; Excerpts of Record, *Apelt* v. *Ryan*, No. 15-99013 (9th Cir. Oct. 13, 2016), ECF No. 23 at 2195 ("Dkt. 23"). By the time he reached eighteen-years-old he acted more like a ten- or eleven-year-old. Dkt. 6 at 303.

In 1984, at age twenty-one, Apelt again attempted suicide and was sent to a psychiatric institution. Pet. App. 101a. At that facility, a psychiatric nurse observed unusual behavior in Apelt, including severe nightmares followed by periods of memory loss and deep depression. *Id.* She concluded Apelt's traumatic childhood may have led to his intellectual disability. *Id.* at 24a. She further discerned that his severe stuttering and inability to articulate was also likely a result of the repeated beatings. Dkt 6 at 269.

Four years later, in 1988, Apelt and his brother came to the United States with their girlfriends.

Months later, Apelt met and married Cindy Monkman. *Apelt*, 861 P.2d at 639. The two applied for a life insurance policy shortly after their Vegas wedding and, nearly a week before the New Year, the insurer approved it. *Id.* The next day Apelt and his brother took Cindy to the desert and killed her. Police discovered Cindy on December 24, 1988. Arizona law enforcement immediately suspected and eventually arrested Apelt and his brother for Cindy's murder. *Id.* at 641.

During his pretrial incarceration and sentencing, Apelt received medical treatment for anxiety, depression, and difficulty sleeping, and spent time in a psychiatric unit on suicide watch. Pet. App. 62a. He is currently being treated for post-traumatic stress disorder and depression.

B. Proceedings Below

State Court Proceedings

In January 1989, the State charged Apelt with first-degree murder and conspiracy to commit first-degree murder. The following year, in April 1990, a jury convicted him on both charges and the trial court set a presentence hearing for four months later in August.

In preparation for the presentence hearing, defense counsel filed a motion for travel funds to investigate mitigating factors in Germany, where Apelt lived his entire life until the months prior to the murder. The trial court instructed defense counsel to file "a statement, 'a verification as to those items that you feel that your trip to Germany is a necessity for.'" Pet. App. 21a. Defense counsel failed to the file this statement. He reargued his request at the sentencing hearing on August 7, 1990, but the trial court denied the motion. *Id.* at 21a-22a.

Counsel's failure to investigate left the trial court unaware of Apelt's traumatic life in Germany. The judge saw no evidence of the gross poverty, alcoholism, sexual abuse, rape, and violence Apelt suffered throughout his childhood. Nor did the judge hear about Apelt's history of mental illness, including his suicide attempts in childhood and adolescence, his stay at a psychiatric hospital as a young adult, or his time in special education.

Defense counsel instead submitted eight documents he received from Germany four days prior to the single-day sentencing hearing. *Id.* at 21a-23a. Most of those documents were letters from friends and family calling for mercy. *Id.* Otherwise, defense counsel relied on what "is in the trial and . . . the Pre-Sentence Report"[1] for mitigating factors. Dkt. 6 at 1658.

After examining these documents, and others the State had provided, the trial judge found that the State proved three aggravating factors: procurement of the offense by payment or promise of payment; the offense was committed in expectation of pecuniary gain; and the offense was especially cruel, heinous, and depraved. Ariz. Rev. Stat. § 13-701(D)(4)-(6); Pet. App. 102a. The court sentenced Apelt to life for conspiracy to commit murder and to death for first-degree murder. *Apelt*, 861 P.2d at 642. Apelt's brother, tried a week after Apelt in a separate trial, was also sentenced to death.

The same defense counsel represented Apelt on direct appeal. He filed a petition for post-conviction relief at the same time he filed his direct appeal, lead-

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[1] The Pre-Sentence report did not include any investigation of Apelt's life history, but was based on statements of Apelt and the victim's family members.

ing to procedural problems later.[2] The post-conviction filing raised a single claim of newly discovered evidence: testimony that the person who killed the victim is right-handed. Pet. App. at 25a-26a. Apelt is left-handed. The petition was denied in May 1991. *Id.* at 26a. The Arizona Supreme Court consolidated the petition and Apelt's direct appeal, and denied relief in November 1993. *Apelt*, 861 P.2d 634.

A year later, the Arizona Supreme Court issued a notice of post-conviction relief and appointed new counsel to represent Apelt. Pet. App. 28a. Apelt's new post-conviction attorneys argued ineffective assistance of counsel during the penalty phase of his case, on direct appeal, and on his first post-conviction petition, basing this argument on newly discovered materials that the original defense counsel would have accessed had he investigated.

Such evidence included: medical records detailing Apelt's psychiatric hospitalization, two instances of sexual assault as a child by strangers, regular severe beatings by his father, the terror the Apelt family lived in due to his father's physical and emotional cruelty, and that Apelt was in special education. Pet. App. 29a. The evidence also included an affidavit from Apelt's sentencing counsel stating that his failure to investigate this mitigating evidence was not a tactical or strategic decision. Pet. App. at 31a. The second post-conviction court denied all claims without an evidentiary hearing. The state court found the claim precluded for not having been raised "at trial, on appeal, or in Apelt's first post-conviction petition."

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[2] Proper procedure in Arizona would be to initiate post-conviction proceedings after the conclusion of direct appeal proceedings. Ariz. R. Crim. P. 32.4(a)(2)(B).

Id. at 33a. The court alternatively found the claim not "colorable" and "meritless." *Id.* at 33a-34a.

Apelt filed a federal habeas petition in May 1998. Before the district court could resolve his petition, this Court decided *Atkins*, 536 U.S. 304, holding that the Eighth Amendment prohibits the execution of intellectually disabled persons. The district court stayed Apelt's petition to permit him to return to state court and exhaust his *Atkins* claim.

The state superior court conducted an *Atkins* hearing in May 2007. It found that Apelt did not meet the criteria for intellectual disability under Ariz. Rev. Stat. § 13-753(K)(3). The state court found that Apelt's co-defendant brother was intellectually disabled and resentenced him to life.

Federal Court Proceedings

Apelt returned to the district court and amended his habeas petition to include his newly exhausted *Atkins* claim. Pet. App. 35a. The district court rejected the *Atkins* claim, among other claims, but granted the writ as to ineffective assistance of counsel under § 2254(d)(1). In particular, the district court found that Apelt's trial counsel knew about his disturbing childhood in Germany and other indicia of psychiatric issues, but did not investigate his client's background for sentencing. Apelt's sentencing counsel did not collect records from social service agencies, welfare agencies, doctors, psychiatric hospitals, the special education school, or employers. He did not interview mitigation witnesses. Nor did he consult with any mental health experts. He did not obtain mental health records from jail showing various medications Apelt took as well as his placement on suicide watch. And defense counsel did not present any witnesses at the single-day sentencing hearing. *Apelt* v. *Ryan*, No.

CV-98-00882-PHX-ROS, 2015 WL 5119670 at *10 (D. Ariz. Sept. 1, 2015). The district court found that, in light of counsel's "weak presentation" at sentencing, the prejudice inquiry is "straightforward." *Id.* at *12. The court noted that the sentencer was informed that Apelt's childhood was "normal." *Id.* After summarizing the starkly different evidence presented in post-conviction, the district court concluded the new mitigating evidence undermined the outcome of the sentencing. *Id.* According to the district court, "[n]o fair-minded jurist could conclude otherwise." *Id.*

A three-judge panel of the Ninth Circuit Court of Appeals affirmed the district court's denial of the *Atkins* claim. Pet. App. at 44a-82a. The panel found the ineffective assistance of counsel claim procedurally defaulted, but that post-conviction counsel's ineffectiveness excused that default. *Id.* at 54a-59a (citing *Martinez* v. *Ryan*, 566 U.S. 1 (2012)). The panel affirmed the district court's finding that counsel's performance was deficient under *Strickland*, but disagreed that the prejudice determination was unreasonable under § 2254(d)(1). *Id.* at 59a-60a. The panel concluded, "[n]othing in the record indicates that any explanation for why Apelt became a monster would have changed the sentence." *Id.* at 69a.

The panel did not undertake a fact-intensive analysis as required by *Strickland*, but instead fixated on the presence of premeditation for Cindy's murder, finding that "none of the proffered mitigating evidence excuses Apelt's callousness, nor does it reduce Apelt's responsibility for planning and carrying out the murder." *Id.* The panel then determined Apelt's traumatic childhood was too severe to be mitigating. "Indeed," the panel opined, "presenting Apelt's upbringing and activities in Germany to explain how Apelt became a calculating killer arguably could

weigh in favor rather than against the death penalty." *Id.*

The Ninth Circuit denied rehearing and rehearing *en banc*, although three judges dissented. Pet. App. 107a. The dissenters found that the panel "seriously erred" in failing to reach Apelt's (d)(2) arguments and in its *Strickland* prejudice analysis under (d)(1). *Id.* at 111a-14a. The dissenters warned "The panel's decision . . . acknowledges none of the humanizing effects of mitigation evidence." *Id.* at 114a. The dissenters faulted the panel for failing to undertake a factual analysis and for conflating legal with moral culpability. *Id.* at 113a-14a. "Such a flawed prejudice analysis erroneously suggests that defendants convicted of premediated murder can *never* demonstrate prejudice for purposes of their IAC claims." *Id.* at 115a. The dissenters also found that the opinion was preordained "[o]nce the panel characterized Apelt as a monster . . . [t]his was judicial condemnation." *Id.* at 125a.

REASONS FOR GRANTING THE PETITION

I. THE DECISION BELOW FLATLY CONTRADICTS THE DECISIONS OF THIS COURT AND OF OTHER CIRCUITS.

A. The Ninth Circuit Failed to Undertake a Factual Analysis, Focused On Legal Instead of Moral Culpability, and Substituted its Own Subjective Condemnation for this Court's Precedents.

The Ninth Circuit panel eschewed *Strickland*'s legal framework in finding Apelt suffered no prejudice. This Court has consistently said that *Strickland* is a fact-intensive inquiry. *Strickland*, 466 U.S. at 695-96 (in assessing prejudice, a court "reweigh[s] . . . the to-

tality of the evidence" before it and the original sentence); *Wiggins*, 539 U.S. at 534 ("In assessing prejudice, we reweigh the evidence in aggravation against the totality of available mitigating evidence."); *Sears*, 561 U.S. at 955 ("[W]e have consistently explained that the *Strickland* inquiry requires . . . probing and fact-specific analysis . . . ."). Instead of weighing the substantial, new mitigating evidence against the aggravating evidence, the panel did not look beyond its observation that the crime "was premeditated and calculated." Pet. App. 67a. This approach entirely ignores Arizona's capital sentencing scheme and this Court's precedents finding prejudice in cases with substantial evidence of premeditation.

Despite this Court's clear mandate that a federal court must analyze a state's sentencing regime when considering whether a defendant was prejudiced, the Ninth Circuit here wholly ignored Arizona's sentencing laws, including that premeditation is present in all non-felony first-degree murders and that Arizona has granted penalty phase relief in cases with considerable premeditation. Indeed, the opinion below fails to even acknowledge that Arizona's intricate sentencing framework exists.

In Arizona, only those convicted of first-degree murder are eligible to be sentenced to death. *State* v. *Greenway*, 823 P.2d 22, 31 (Ariz. 1991). First-degree murder can be proven in Arizona through premeditation or felony murder.[3] The prosecution proceeded

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[3] For a defendant to be death-eligible after a conviction of felony murder, the prosecution must first prove beyond a reasonable doubt that the defendant actually killed, attempted to kill, intended to kill, or was a major participant in the felony committed and acted with reckless indifference to human life. *Enmund* v. *Florida*, 458 U.S. 782, 790, 797 (1982); *Tison* v. *Arizona*, 481 U.S. 137, 157-58 (1987).

against Apelt on a premeditation theory only. In this context, it is the element of premeditation that separates first-degree murder from second-degree murder, and triggers Arizona's death penalty statute. Ariz. Rev. Stat. § 13-751(A)(1); *State* v. *Cook*, 821 P.2d 731, 740 (Ariz. 1991) ("[a] person commits first degree murder if '[i]ntending or knowing that his conduct will cause death, such person causes the death of another with premeditation . . . .'" (quoting Ariz. Rev. Stat. § 13-1105(A)(1)); *State* v. *Sprang*, 251 P.3d 389, 391 (Ariz. Ct. App. 2011) ("Second-degree murder is a lesser-included offense of premeditated first-degree murder, the difference . . . being premeditation.").

Although premeditation therefore was a *necessary* element to the imposition of the death penalty here, in Arizona premeditation was not *sufficient*. Rather, in Arizona the death penalty is "reserved for those who stand out from the norm of first degree murderers either because of the act committed or because of the defendant's background." *State* v. *Smith*, 707 P.2d 289, 303 (Ariz. 1985); see also *State* v. *Carlson*, 48 P.3d 1180, 1192 (Ariz. 2002) ("As we have repeatedly held, the death penalty should not be imposed in every capital murder case but, rather, it should be reserved for cases in which either the manner of the commission of the offense or the background of the defendant places the crime 'above the norm of first-degree murders.'").

Under this framework, the Arizona Supreme Court has reversed death sentences for those with mitigation similar to Apelt's who were convicted of premeditated crimes that were appropriately considered heinous. See, *e.g.*, *State* v. *Roque*, 141 P.3d 368, 405-06 (Ariz. 2006) (After 9/11, Roque intended to kill people of Arab descent; he fired shots at one Sikh victim outside a convenience store, then shot and killed a Sikh

man outside a separate convenience store; Arizona Supreme Court found death was not an appropriate sentence in light of Roque's low I.Q. and mental illness, which resulted in an extreme "emotional and behavioral reaction to the events of September 11, 2001"), *abrogated by State* v. *Escalante-Orozco*, 368 P.3d 798 (Ariz. 2006); *State* v. *Grell (Grell III),* 291 P.3d 350 (Ariz. 2013) and *State* v. *Grell (Grell I)*, 66 P.3d 1234, 1237 (Ariz. 2003) (defendant murdered his two-year-old daughter by driving her out to the desert, pouring gasoline on her and lighting her on fire; despite "overwhelming evidence of premeditation" and three aggravating factors, the Arizona Supreme Court reversed Grell's death sentence because of his intellectual disability).[4] The panel ignored that Apelt's mitigating evidence is the type that Arizona would consider relevant. *Wiggins*, 539 U.S. at 537 (considering in the *Strickland* prejudice analysis that the mitigating evidence in petitioner's case was the type Maryland would consider relevant).

The panel found that the new mitigating evidence "paints a very different picture of Apelt's background and character than was presented at sentencing." Pet. App. at 66a. The panel further acknowledged that there was no suggestion in the record that the new mitigating evidence led to new rebuttal evidence, or in other words, was "double-edged." *Id*. However, in assessing whether there was a reasonable probability of a different outcome, the panel failed to undertake the "probing and fact-specific" prejudice analysis this Court requires. *Id.* at 63a-71a. Instead, the panel myopically focused on premeditation, giving far too much weight to Apelt's legal culpability and

[4] *See also*, *State* v. *Marlow*, 786 P.2d 395, 402 (Ariz. 1989) ("[W]here there is doubt whether the death penalty should be imposed, we will resolve that doubt in favor of a life sentence.").

not nearly enough to his moral culpability. Compare with *Wiggins*, 539 U.S. at 535 (childhood trauma is the "kind of troubled history relevant to assessing a defendant's moral culpability"). As the dissenters from rehearing *en banc* explained, the panel's decision "skirts Supreme Court precedent . . . [and] creates the functional equivalent of a categorical bar to demonstrating prejudice when a defendant is convicted of premeditated murder." Pet. App. 116a.

Indeed, the panel's only mention of the new mitigating evidence in its prejudice discussion is to note that the mitigation does not "excuse[] Apelt's callousness" or "reduce[his] responsibility" for the crime, *id.* at 69a—something the Eighth Amendment does not require. *Lockett* v. *Ohio*, 438 U.S. 586, 604 (1978) ("[T]he Eighth and Fourteenth Amendments require that the sentencer 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.") (original emphasis); *Tennard* v. *Dretke*, 542 U.S. 274, 285 (2004) (striking down Texas's causal nexus test; defining mitigating evidence as any evidence that has "any tendency" to "warrant[] a sentence less than death") (*citing McKoy* v. *North Carolina*, 494 U.S. 433, 441 (1990)). This type of "truncated prejudice inquiry" has been rejected repeatedly by this Court. *Sears*, 561 U.S. at 955-56; *Williams* v. *Taylor*, 529 U.S. 362, 397-98 (2000).

The panel dismissed Apelt's argument that even capital defendants who have committed heinous crimes can suffer prejudice from sentencing counsel's failures. Pet. App. 67a-69a (discussing *Wiggins* and *Stankewitz* v. *Woodford*, 365 F.3d 706 (9th Cir. 2004)). The panel reasoned that these cases are distinguishable because the crimes were not premedi-

tated. *Id*. However, this Court and many courts of appeal have found *Strickland* prejudice in premeditated murder cases where counsel failed to develop evidence of childhood trauma and mental illness. *Porter*, 558 U.S. at 42 (state court objectively unreasonable for finding no prejudice where counsel failed to develop evidence of extreme child abuse and heroic military service in case where murder was "premeditated in a heightened degree"); *Bemore* v. *Chappell*, 788 F.3d 1151, 1170, 1174, 1176 (9th Cir. 2015) (objectively unreasonable under § 2254(d)(1) for the state court to have concluded that the "compelling" mental health evidence would not have persuaded at least "one juror . . . to show mercy" despite "that the killing was done in a calculated manner"); *Griffin* v. *Pierce*, 622 F.3d 831 (7th Cir. 2010) (finding prejudice under § 2254(d)(1) where the mitigation evidence revealed petitioner's father's alcoholism and abusiveness, his mother's absence from the home, the impact of his mother's death, his diagnosis of schizophrenic reaction, and his drug addictions, despite petitioner;s conviction for premeditated murder-for-hire); *Marshall* v. *Cathel*, 428 F.3d 452, 473-74 (3d Cir. 2005) (finding prejudice under 2254(d)(1) where an adequate investigation would have revealed numerous family members and friends willing to ask for mercy and to testify about the harmful impact of execution on the defendant's family, despite that defendant hired someone to murder his wife).

Based on the evidence of his guilt and concealment of Cindy's premeditated murder, the panel branded Apelt a "monster." Pet. App. 69a. As the dissenters from rehearing *en banc* explain, "Once the panel characterized Apelt as a monster, the result was inevitable. This was no true balancing analysis by the panel. This was judicial condemnation." *Id.* at 125a.

In so doing, the panel subverted the *Strickland* test. Instead of asking whether there was a reasonable probability of a "different result," *Strickland*, 466 U.S. at 694, the panel asked whether there could be another death sentence. This Court has explicitly rejected this approach. *Rompilla* v. *Beard*, 545 U.S. 374, 394 (2005) ("[A]lthough we suppose it is possible that a jury could have heard it all and still have decided on the death penalty, that is not the test.").[5] Rather, Apelt merely needed to show that there is a reasonable probability that, had the mitigating evidence been considered, "at least one juror would have struck a different balance." *Wiggins*, 539 U.S. at 513. Given the substantial mitigating evidence concerning Apelt's horrific upbringing, the Arizona Supreme Court's consistent guidance that "where there is doubt whether the death penalty should be imposed, we will resolve that doubt in favor of a life sentence," *Marlow*, 786 P.2d at 402, and this Court's AEDPA jurisprudence involving similar situations, see *Porter*, 558 U.S. 30, there can be no question that Apelt was prejudiced here and the state court's decision was unreasonable. The district court found just that. The Ninth Circuit panel's focus on whether there could be another death sentence, instead of whether there was a reasonable probability of life, resulted in a contrary conclusion that is the result of an unreasonable application of this Court's precedents.

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[5] The Ninth Circuit recently granted rehearing *en banc* in a case with similar legal errors. *See Andrews* v. *Davis*, 866 F.3d 994 (9th Cir. 2017), *reh'g en banc granted by* 888 F.3d 1020 (9th Cir. 2018).

1. In Conflict with This Court's Precedents, the Ninth Circuit Applied "Double Deference" to its Prejudice Analysis.

This Court has long held that counsel's strategic decisions are deserving of great deference in assessing deficient performance. *Strickland*, 466 U.S. at 690. This Court has also recognized that AEDPA's § 2254(d) framework is "highly deferential" to state court decisions. *Lindh* v. *Murphy*, 521 U.S. 320, 333 n.7 (1997). In *Yarborough* v. *Gentry,* 540 U.S. 1, 6 (2003), this Court reasoned that "[j]udicial review of a defense attorney's [performance] is therefore . . . doubly deferential when it is conducted through the lens of federal habeas." See also *Cullen* v. *Pinholster*, 563 U.S. 170, 190 (2011) (same); *Harrington* v. *Richter*, 562 U.S. 86, 105 (2011) (same).

The Ninth Circuit panel erred, however, when it applied this "double deference" to Apelt's prejudice analysis. Pet. App. 86a-87a (analyzing prejudice in section C of the opinion: "*The state courts' determination that counsel's inadequate representation of Apelt at sentencing was not prejudicial is not unreasonable* . . . [O]ur review of the state court decision is "doubly deferential.") (citing *Pinholster*, 563 U.S. at 190 (further citation omitted) (original emphasis)). While the state court decision denying relief on Apelt's claim was entitled to AEDPA deference, the prejudice analysis receives no additional deference under *Strickland*. To the contrary, in assessing prejudice, *Strickland* requires the reviewing court to engage in a fact-intensive "reweighing" process. 466 U.S. at 695-96. As explained *supra*, the panel failed to undertake this principled process. Instead, it uncritically, doubly-deferred to the state court decision.

2. It Was Objectively Unreasonable for the State Court and Panel to Conclude that Apelt was not Prejudiced.

As the district court found, a straightforward application of Arizona's sentencing law at the time of Apelt's sentencing unequivocally shows that Apelt was prejudiced by his counsel's abject failure to present the substantial mitigating evidence concerning Apelt's intellectual challenges and horrific childhood.

Apelt's post-conviction petition presented, for the first time, evidence that: his father subjected the family to regular physical and sexual abuse, including, beatings with an iron rod; the family lived in poverty; Apelt attended special education; Apelt was sexually assaulted at ages seven and thirteen by adult men; and Apelt was later institutionalized in a psychiatric hospital. Pet. App. 30a-31a, 122a. The State did not offer anything to contradict Apelt's evidence, but instead argued it was not mitigating and that it was not credible because the facts regarding Apelt's upbringing were provided by his mother. Dkt. 6 at 1277-1280. The state court's decision that Apelt suffered no prejudice as a result of trial counsel's failure to uncover this evidence was an unreasonable application of *Strickland* under § 2254(d)(1).

Apelt's history of severe childhood abuse is precisely the kind of classic mitigation evidence that often causes Arizona to decline to impose a death sentence. But Apelt has yet to have a court properly consider this evidence and bring it to bear on his case, in the first instance, due to the deficient performance of his sentencing counsel who knew of Apelt's history but did not pursue it; in the second instance, as discussed below, due to the post-conviction court's denial of his claim without an evidentiary hearing; and in the third instance, because the Ninth Circuit deviated

from *Strickland*'s "reasonable probability of a different outcome" test and created a new rule that no amount of new mitigating evidence can outweigh a premeditated murder.

"'[E]vidence about the defendant's background and character is relevant because of the belief, long held by this society, that defendants who commit criminal acts that are attributable to a disadvantaged background . . . may be less culpable than defendants who have no such excuse.'" *Penry* v. *Lynaugh*, 492 U.S. 302, 319 (1989), *abrogated by Atkins* v. *Virginia*, 536 U.S. 304 (2002). Neither this Court nor the Arizona Supreme Court has ever held that some crimes are so terrible as to make this careful consideration of moral culpability irrelevant. All capital crimes are by definition egregious, but "consideration of the character and record of the individual offender and the circumstances of the particular offense [are] a constitutionally indispensable part of the process of inflicting the penalty of death." *Woodson* v. *North Carolina*, 428 U.S. 280, 304 (1976). The Ninth Circuit refused to undertake the constitutionally mandated consideration.

B. The State Court Decision Was Based On an Unreasonable Determination of the Facts in Light of the Evidence Presented in the State Court.

In addition to its misapplication of *Strickland*'s prejudice standard under (d)(1), the Ninth Circuit panel also erred in failing to reach Apelt's § 2254(d)(2) argument. Under § 2254(d)(2), habeas relief is warranted where the federal court determines that a state court decision is "objectively unreasonable in light of the evidence presented in the state court proceeding." *Miller-El* v. *Cockrell*, 537

U.S. 322, 340 (2003) (citing § 2254(d)(2); *Williams*, 529 U.S. 362, 399 (2000) (O'Connor, J., concurring)).

This Court has held that the "objectively unreasonable" standard of § 2254(d)(2) imposes a highly deferential standard for federal review of state court decisions. See *Schriro* v. *Landrigan*, 550 U.S. 465, 473-74 (2007). While high, this standard is not beyond reach and is satisfied where the reviewing court examines the state court evidence and finds that a different outcome is compelled. *Miller-El* v. *Dretke*, 545 U.S. 231, 265-66 (2005).

Pursuant to Rule 32 of the Arizona Rules of Criminal Procedure, a post-conviction petitioner is entitled to an evidentiary hearing on any colorable claim. A colorable claim under Arizona law is "one that, if the allegations are true, *might have changed the outcome*." *State* v. *Runningeagle*, 859 P.2d 169, 173 (Ariz. 1993) (citing *State* v. *Watton*, 793 P.2d 80, 85 (Ariz. 1990) (emphasis added)). In Arizona, post-conviction allegations merely need to have "the appearance of validity" and are "taken as true." *State* v. *Richmond,* 560 P.2d 41, 49 (Ariz. 1976), *abrogated by State* v. *Salazar*, 844 P.2d 566 (Ariz. 1992). This is a much lower standard that *Strickland*'s prejudice standard. *State* v. *Fillmore*, 927 P.2d 1303, 1311 (Ariz. Ct. App. 1996) ("Reiterat[ing]" that a finding that petitioner had raised a colorable claim of ineffective assistance of counsel was not a finding on the merits of the claim).

As described above, the petition presented, for the first time, evidence of Apelt's childhood trauma, placement in special education, and psychiatric hospitalizations. The State did not offer anything to contradict Apelt's evidence, but instead argued it was not mitigating and that it was not credible because the

facts regarding Apelt's upbringing were provided by his mother. Dkt. 6 at 386, 1277-1280.

The state court summarily dismissed Apelt's ineffective assistance of counsel claim, finding it precluded and, alternatively, finding the claim not colorable because it "fails to make a sufficient preliminary showing that counsel's performance fell below objective standards of reasonableness, and fails to make a preliminary showing that, in light of the allegations, there exists a reasonable probability that the result of the trial or sentencing would have been different." Pet. App. 34a.

1. The Ninth Circuit Failed to Address Apelt's Argument that the State Court Decision Was Unreasonable Under § 2254(d)(2).

The Ninth Circuit panel's decision contravened AEDPA by failing to address Apelt's argument that the state court's rejection of the ineffective assistance of counsel claim was based on an unreasonable determination of the facts under § 2254(d)(2). Although the argument was made in the district court and the Ninth Circuit, the panel remained silent on the issue. Pet. App. 121a.

This Court has not yet examined this important question—whether a state court's ruling that a petitioner has failed to present a colorable claim of ineffective assistance of counsel, despite presenting new weighty mitigation, renders the state court decision objectively unreasonable under § 2254(d)(2). This Court has, however, recognized the importance of factual development to prove the merits of a constitutional claim for relief. See, *e.g., Landrigan*, 550 U.S. at 474 ("In deciding whether to grant an evidentiary hearing, a federal court must consider whether such

a hearing could enable an applicant to prove the petition's factual allegations, which, if true, would entitle the applicant to federal habeas relief."). This Court has also held that a state court's failure to provide a petitioner any "rudimentary process" by which to litigate his constitutional claims renders the state court decision unreasonable. *Panetti* v. *Quarterman*, 551 U.S. 930, 952 (2007) (analyzing state court process pursuant to § 2254(d)(1)).

More recently, this Court held that a state post-conviction court's failure to grant an evidentiary hearing on an *Atkins* claim rendered the state court decision unreasonable under (d)(2). *Brumfield* v. *Cain*, 135 S. Ct. 2269 (2015). The petitioner in *Brumfield* was sentenced to death prior to this Court's decision in *Atkins*, but raised the issue of his intellectual disability in a state post-conviction petition. 135 S. Ct. at 2274-75. In support of the claim, the petition "pointed to mitigation evidence introduced at the sentencing phase of his trial." *Id*. at 2274. The Louisiana state court denied Brumfield's claim without a hearing or funds to further develop the facts. *Id*. at 2275.

This Court determined the state court decision denying Brumfield's *Atkins* claim was unreasonable under (d)(2) because "[t]he record before the state court contained sufficient evidence to raise a question as to whether Brumfield" satisfied *Atkins*' criteria for demonstrating intellectual disability. 135 S. Ct. at 2279. Notably, Louisiana, like Arizona, imposes a far lower burden on a petitioner to be entitled to an evidentiary hearing than to be entitled to relief on the underlying claim. *Id.* at 2281 (citing *State* v. *Williams*, 831 So.2d 835, 858 n.33 (La. 2002)). This Court determined the record before the state court contained "ample evidence" to meet the threshold for an evidentiary hearing and the state court's rejection of

the claim without one was unreasonable under (d)(2). *Id*. at 2283.

Apelt's case offers this Court the opportunity to clearly hold that a state court decision is unreasonable under § 2254(d)(2) where a post-conviction petitioner raises sufficient facts to warrant evidentiary development and the state court denies the claim without evidentiary development. This case is a uniquely strong vehicle for resolving this issue because once Apelt was given the opportunity for further factual development, in the district court and in a later post-conviction proceeding on his *Atkins* claim, he presented even more substantial details about his traumatic history, most of which went uncontested by the State.

2. Applying the Correct Standard, the Ninth Circuit Panel Would Have Been Compelled to Find the State Court Decision Was Unreasonable Under § 2254(d)(2) and Apelt Was Denied the Effective Assistance of Counsel at His Capital Sentencing Hearing.

The state court's decision that Apelt did not provide sufficient facts to warrant an evidentiary hearing is objectively unreasonable under §2254(d)(2). Unlike at his sentencing hearing, Apelt's post-conviction petition did not offer the mere vague assertion that evidence of a "difficult childhood" exists in Germany. Pet. App. 61a. Rather, the petition offered specific evidence of childhood poverty, family alcoholism, and emotional, physical, and sexual abuse; a history of mental illness, suicide attempts, and psychiatric treatment; and that Apelt was in special education. *Id.* at 28a-31a. The State did not meaningfully contest the evidence. In light of this record, it was objectively unreasonable for the state court to find that

Apelt had failed to raise a colorable claim warranting evidentiary development.

After satisfying (d)(2), Apelt's ineffective assistance of counsel claim would be subject to *de novo* review. *Panetti*, 551 U.S. at 953-54. The district court and panel already found Apelt's sentencing counsel to be constitutionally deficient under (d)(1)'s deferential standard. The Ninth Circuit panel further acknowledged that the mitigating evidence "paints a very different picture of Apelt's background and character than was presented at sentencing." Pet. App. 66a. The panel also found that "there is little evidence in the record as to what rebuttal evidence Arizona might have produced in response to the mitigating evidence proffered in the PCR." *Id.* at 66a-67a (footnote omitted). But in analyzing prejudice *de novo*, the federal courts would not be limited to the evidence produced in the PCR proceeding. The additional, substantial mitigating evidence developed at Apelt's *Atkins* hearing would weigh heavily on the prejudice side of the ledger.

Under *de novo* review, the new evidence the court would be able to consider includes the following:

Apelt was the product of rape and was "referred to . . . as an unwanted 'hate child.'" *Id.* at 123a. He was "extremely undernourished" and "suffered daily abuse at the hands of his father . . . a former Nazi and alcoholic." *Id.* His father beat him, his mother, and his siblings "with anything he could get his hands on," and frequently beat Apelt "to the point of unconsciousness." *Id.* at 123a-24a. His father drugged him and his siblings with tranquilizers as young children to keep them compliant and avoid having to supervise. *Id.* at 124a. His father and "a group of men dressed in dark uniforms would tie up Apelt and his brother Rudi in the basement and torture them, beat-

ing them on their genitals." *Id*. His father once burned a tattoo off Apelt's arm with a scalding iron, and punched him in the mouth when he screamed. *Id*. As a result of multiple sexual assaults, Apelt attempted suicide at age seven and again at thirteen. *Id*. He suffered developmental delays and attended a special education school. *Id*. His IQ was in the low to mid-60's and his older brother described him as having "zero IQ" growing up. *Id*. He played with children much younger than himself, "as though he was of the same age." Dkt. 6 at 359-60, 386, 2195. A teaching assistant at Apelt's Sonderschule found Apelt's impairments so notable that she described them in her graduate thesis. *Id.* at 338-340.

As an adult, Apelt was discharged from compulsory service in the German Federation Armed Forces for "mental inadequacy." Pet. App 101a. He was unable to successfully complete the training "even for fairly simple professions" or hold a full-time job due to his impairments. *Id*. Apelt was hospitalized with "severe nightmares, memory loss, and deep depression as a result of the 'abusive treatment he endured as a child.'" Pet. App. At 124a.

The panel shirked its duty in failing to reach this preserved, meritorious argument. This Court should grant this petition, vacate the judgment below, and remand in light of *Brumfield*.

C. The Decision Below Violates the Eighth Amendment By Allowing a Defendant with Severe Mental Impairments To Be Sentenced to Death Because His Crime Was Not Impulsive.

For nearly two decades, this Court has recognized that execution of an intellectually disabled individual is "cruel and unusual" in violation of the Eighth

Amendment. *Atkins*, 536 U.S. at 311-12 ("The Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society."); *Hall*, 572 U.S. at 707-09; *Moore* v. *Texas*, 137 S. Ct. 1039, 1048 (2017). Intellectually disabled defendants "do not act with the level of moral culpability that characterizes the most serious adult criminal conduct." *Atkins*, 536 U.S. at 306. This is true no matter how serious or premeditated the crime. *Id*. at 307. The decisions in both the state and federal courts below, by focusing on premeditation as a proxy for intellectual capacity, would permit the execution of an intellectually disabled person in violation of the Eighth Amendment. Review is required to ensure that the constitutional rights of all intellectually disabled defendants—even those convicted of crimes of premeditation—are protected.

1. The Ninth Circuit's Decision Bars *Atkins* Claims for Defendants Convicted of Premeditated Crimes, and is Inconsistent with This Court's Precedent.

The Ninth Circuit ruled that Apelt is not entitled to relief on his *Atkins* claim because, in the commission of the crime of premeditated murder, he exhibited adaptive strengths in the form of "ingenuity, cleverness, and an ability to manipulate others." Pet. App. 77a. In doing so, the Ninth Circuit has layered in a significant additional hurdle for any individual asserting an *Atkins* claim who has been convicted of premeditated murder by employing a presumption that any individual who plans a crime in advance is ingenious or clever enough that he cannot be intellectually disabled.

In concluding the "strongest evidence of [Apelt's] adaptive behavior" was "the record of his activities in

the United States," the Ninth Circuit focused in detail upon Apelt's activities undertaken to plan and conceal his crime. See *id.* In practical effect, the Ninth Circuit determined that because Apelt was smart enough to plan this murder in advance, he is smart enough to be sentenced to death.

This novel standard would foreclose any defendant convicted of premeditated first-degree murder in Arizona from prevailing on an *Atkins* claim—regardless of the severity of deficits in his intellectual or adaptive functioning. It is at odds with the standards employed by the medical community, and this Court's precedent. See *Hall*, 572 U.S. at 710 ("In determining who qualifies as intellectually disabled, it is proper to consult the medial community's opinions."). Indeed, this Court routinely recognizes that individuals convicted of crimes that required premeditation or planning may nonetheless pursue an *Atkins* challenge. See *id.* at 724 (remanding for reconsideration of whether a defendant convicted for premeditated kidnapping, rape, and murder was intellectually disabled); *Brumfield*, 135 S. Ct. at 2279 (finding evidence that a defendant met the criteria for deficits in adaptive functioning for a defendant convicted of the premeditated murder of a police officer).

The Ninth Circuit's singular focus on Apelt's ability to devise a plan to commit a crime and attempt to conceal his misdeeds from the police as evidence of the strengths in his "adaptive behavior" distorts the guidance of the medical community and this Court.

2. The State Court Ignored or Disregarded Important Evidence Demonstrating Severe Intellectual Disability.

Although this Court "leave[s] to the State[s] the task of developing appropriate ways to enforce the constitutional restriction upon [their] execution of sentences," *Atkins*, 536 U.S. at 317 (quoting *Ford v. Wainwright*, 477 U.S. 399, 416–417 (1986)), the state court must reasonably apply the strictures set forth by this Court to the circumstances of each case. Under Arizona law, intellectual disability requires a showing of (1) significant subaverage general intellectual functioning, (2) concurrent significant impairment in adaptive behavior, and (3) onset before the defendant reached the age of eighteen. Ariz. Rev. Stat. § 13-753(K)(3). This definition comports with those adopted by the American Association on Intellectual and Developmental Disabilities and the American Psychological Association. *Atkins*, 536 U.S. at 309 n.3, 317 n.22; *Hall*, 572 U.S. at 710. Application of these standards compels the conclusion that Apelt is intellectually disabled and thus exempt from the death penalty. The state court's decision to the contrary is both a manifestly unreasonable application of federal law and an unreasonable determination of the facts.

First, in determining that Apelt did not exhibit deficiencies in intellectual or adaptive functioning, the state court unreasonably applied clearly established federal law requiring courts to assess intellectual ability with reference to the current standards of the medical community. 28 U.S.C. § 2254(d)(1); see *Moore*, 137 S. Ct. at 1044 ("[A]djudications of intellectual disability should be 'informed by the views of medical experts.'") (citing *Hall,* 572 U.S. at 721). With

respect to Apelt's intellectual functioning, two experts testified his IQ was 61 or 65. Pet. App. 76a. The Ninth Circuit correctly found that the state court unreasonably considered a single IQ score above 70—one of questionable accuracy[6]—as dispositive. *Id*. The panel noted that even the State's expert "questioned the accuracy of this test," and that Apelt attended a school for intellectually disabled children. *Id*. Therefore, the state court unreasonably "disregard[ed] established medical practice" when it "t[ook] an IQ score as final and conclusive evidence of a defendant's intellectual capacity . . . while refusing to recognize that the score is, on its own terms, imprecise." *Hall*, 572 U.S. at 712

With respect to Apelt's adaptive functioning the state court and Ninth Circuit deviated from current medical standards, in an unreasonable application of *Moore* and *Hall*, by focusing on Apelt's adaptive *strengths* as an adult. In assessing adaptive functioning, "the medical community focuses the adaptive-functioning inquiry on adaptive *deficits,*" regardless of whether the individual also possesses certain strengths. See *Moore*, 137 S. Ct. at 1050 (original emphasis). But the state court expressly *discounted* the substantial evidence of Apelt's adaptive deficits and even criticized an expert who assessed Apelt for "focus[ing] more on maladaptive behavior and his inabil-

[6] The state court was confronted with overwhelming evidence that Apelt's childhood IQ score was unreliable. It was derived from a group IQ test given in a classroom setting in Germany when Apelt was a child. There was no raw testing data from the childhood exam, no evidence of the identity or qualifications of the person who administered the test, and the test itself is known to overestimate intelligence. Dkt. 23 at 2033. In addition, the IQ test had a margin of error of "plus or minus 15" that was not reflected in the score, and which the state court failed to acknowledge. *Id*. at 2034-35.

ity to behave lawfully, rather than his ability to perform daily life tasks and manage his life." Pet. App. 93a-94a. The state court "overemphasized" evidence of Apelt's strengths as an adult, in an objectively unreasonable application of the law. *Moore*, 137 S. Ct. at 1050.

Second, in light of the evidence presented during the evidentiary hearing, the state court's factual determination that Apelt did not suffer from intellectual and adaptive deficits was unreasonable. 28 U.S.C. § 2254(d)(2). As the panel found, the evidence presented to the state court compels the conclusion that Apelt had subaverage intellectual functioning and deficits in adaptive functioning during his childhood. Pet. App. 76a-77a (discussed, *supra*).

The evidence considered by the state court demonstrates that Apelt experienced significant deficits in adaptive functioning, including significant impairments in his communication skills and an inability to care for himself by brushing his teeth, combing his hair, or dressing himself appropriately. Pet. App. 100a. On nearly identical facts, the state court concluded that Apelt's co-defendant brother—who also attended a special education school—exhibited delayed development in communication and self-care skills, was subjected to horrific abuse at the hands of their father, and suffered other significant adaptive deficits could not be executed by the State because he was intellectually disabled. Dkt. 23 at 1904-10. Its determination to the contrary for Apelt was both arbitrary and unreasonable.

Although "[t]he states are laboratories for experimentation," "those experiments may not deny the basic dignity the Constitution protects." *Hall*, 572 U.S. at 724. The Constitution restricts the State's power to take the life of *any* intellectually disabled

individual. *Roper* v. *Simmons*, 543 U.S. 551, 563-64 (2005). The state court's grave errors in assessing Apelt's intellectual and adaptive functioning represent a plainly unreasonable application of this Court's precedent to Apelt's unique personal circumstances. Review is needed to correct this error and ensure that Apelt is not put to death in violation of his Eighth Amendment rights.

II. THIS CASE IS AN APPROPRIATE VEHICLE TO ADDRESS THE QUESTIONS PRESENTED.

The facts of this case are stark and undisputed. There can be no doubt that Apelt's background is one of the most disadvantaged and heart-wrenching, and that the judge who sentenced him to death knew nothing of it. There is no significant dispute over the facts or procedural history. Instead, this case involves a legal dispute over whether the Ninth Circuit can forego this Court's *Strickland* framework, fail to rule on a (d)(2) argument, and use premeditation as a bar to an intellectual disability finding. The questions were raised below, and the Ninth Circuit's opinion directly addressed Question 1. Questions 2 and 3 are also squarely presented here.

For Apelt, the issues could not be of more importance. His life hangs in the balance.

CONCLUSION

For the foregoing reasons, the Court should grant the petition for a writ of certiorari.

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