No. ____

In the Supreme Court of the United States

DAVID SHINN,

Petitioner,

v.

GEORGE RUSSELL KAYER,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

MARK BRNOVICH
Attorney General

JOSEPH A. KANEFIELD
Chief Deputy and Chief of Staff

BRUNN W. ROYSDEN III
Division Chief

ORAMEL H. (O.H.) SKINNER
Solicitor General
LACEY STOVER GARD
Chief Counsel
Counsel of Record
LAURA P. CHIASSON
JEFFREY L. SPARKS
WILLIAM SCOTT SIMON
Assistant Attorneys General

OFFICE OF THE ARIZONA ATTORNEY GENERAL
Capital Litigation Section
400 W. Congress, Bldg. S-215
Tucson, AZ 85701
(520) 628-6520
lacey.gard@azag.gov

Counsel for Petitioner

CAPITAL CASE
QUESTION PRESENTED

Respondent George Russell Kayer sits on Arizona's death row for shooting Delbert Haas twice in the head more than a quarter-century ago. The state post-conviction court denied on the merits Kayer's claim that his attorneys ineffectively investigated and presented mitigation at sentencing. Subsequently, bound by the Anti-terrorism and Effective Death Penalty Act (AEDPA), the district court denied habeas relief on that claim. App. 82–185. A divided Ninth Circuit panel, however, reversed the district court, applying no meaningful deference to the state court's decision. App. 2–81. Judge Carlos Bea then authored a twelve-judge dissent from the denial of en banc rehearing. App. 255–289.

The Question Presented is as follows:

Did the Ninth Circuit violate 28 U.S.C. § 2254's deferential standard, and employ a flawed methodology this Court has repeatedly condemned, when it granted habeas relief based on a de novo finding that a Sixth Amendment violation had occurred?

STATEMENT OF RELATED PROCEEDINGS

Kayer v. Ryan, No. 09–99027 (United States Court of Appeals for the Ninth Circuit) (order denying rehearing filed on December 18, 2019; opinion reversing in part district court's judgment filed on May 13, 2019).

Kayer v. Ryan, No. CV 07–2120–PHX–DGC (United States District Court for the District of Arizona) (judgment denying petition for writ of habeas corpus entered October 19, 2009).

State v. Kayer, No. CR–07–0163–PC (Arizona Supreme Court) (amended order denying petition for review of lower court's order denying post-conviction relief dated November 7, 2007).

State v. Kayer, No. CR–94–0694 (Superior Court of Arizona in and for the County of Yavapai) (order denying post-conviction relief filed May 8, 2006).

State v. Kayer, No. CR–02–0048–PC (Arizona Supreme Court) (order granting review of and relief from lower court's dismissal of post-conviction proceeding on timeliness grounds dated September 26, 2002).

Kayer v. Arizona, No. 99–7984 (United States Supreme Court) (order denying petition for writ of certiorari dated February 28, 2000).

State v. Kayer, No. CR–97–0280–AP (Arizona Supreme Court) (opinion affirming convictions and sentences on direct appeal filed June 29, 1999).

State v. Kayer, No. CR 94–0694 (Superior Court of Arizona in and for the County of Yavapai) (judgments of guilt and sentences entered on July 15, 1997).

TABLE OF CONTENTS

TABLE OF CONTENTS—Continued

TABLE OF AUTHORITIES

CASES

TABLE OF AUTHORITIES—Continued

STATUTES

OPINIONS BELOW

The panel opinion reversing in part the denial of habeas relief is reported at 923 F.3d 692. App. 1–81. The order and opinions respecting denial of panel rehearing and rehearing en banc are reported at 944 F.3d 1147. App. 230–289. The district court's order denying habeas relief is unpublished, App. 82–185, as is the state court's order denying post-conviction relief, App. 186–190. The Arizona Supreme Court's opinion affirming Kayer's convictions and death sentence on direct appeal is reported at 984 P.2d 31. App. 191–229.

STATEMENT OF JURISDICTION

The Ninth Circuit denied rehearing on December 18, 2019. App. 230–289. On February 21, 2020, Justice Kagan extended Petitioner's time for filing a petition for writ of certiorari to and including April 16, 2020. *See* No. 19A923. In March, the Court then extended the time for filing all certiorari petitions due on or after March 19, 2019, to 150 days from the date of, as relevant here, the order denying rehearing. 589 U.S. ___ (order dated March 19, 2020). This petition is filed within 150 days of December 18, 2019. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution provides:

> In all criminal prosecutions, the accused shall enjoy the right to … have the Assistance of Counsel for his defence.

AEDPA, 28 U.S.C. § 2254, provides, in pertinent part:

> (d) 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.

INTRODUCTION

Review and summary reversal are warranted here, where at least twelve judges believed the divided panel opinion warranted en banc review. Judge Bea authored a dissent for those judges, asking in explicit terms for this Court to correct yet another example of Ninth Circuit AEDPA defiance. App. 255–289.

The Ninth Circuit's divided opinion granted relief as to Kayer's death sentence based on counsel's perceived ineffectiveness. *See* App. 1–81. The state post-conviction court had rejected this claim on the merits, but, as is frequently the case with Ninth Circuit habeas opinions, "it is not apparent how the [panel majority's] analysis would have been any different without AEDPA." *Harrington v. Richter*, 562 U.S. 86, 101 (2011). To find prejudice under *Strickland v. Washington*, 466 U.S. 668 (1984), the majority reviewed Kayer's sentencing-ineffectiveness claim de novo, conducting its own qualitative sentencing assessment and reaching an independent conclusion that Kayer's mitigation outweighed the two applicable aggravating factors.

To make matters worse, the majority ultimately rested its prejudice finding on an unrelated, 40-year-old Arizona Supreme Court direct-appeal opinion reducing a death sentence to life under what the majority perceived to be similar facts. In the majority's view, *Strickland* required the state post-conviction court to consider how the Arizona Supreme Court—rather than the sentencing judge—would have reacted to the new evidence, and the post-conviction court overlooked the 40-year-old state case. This analysis misconstrues the Arizona Supreme Court's role in the capital-sentencing

process, and cannot be squared with either AEDPA or *Strickland*.

In the words of Judge Bea: "It cannot be stressed enough just what the panel did wrong." App. 279 (Bea, J., dissenting). Not only did the majority ignore "the only question that matters" under AEDPA—whether fair-minded jurists could debate the state court's ruling, *Richter*, 562 U.S. at 102 (quotations omitted)—but it also contorted its analysis to avoid meaningfully engaging with the relevant state court decision. The Court has not hesitated to summarily reverse the Ninth Circuit based on similar—and arguably less egregious—AEDPA misapplications.[1] Twelve judges felt strongly below that lack of en banc review would warrant "the Supreme Court (again) [correcting an erroneous panel AEDPA opinion] for us." App. 259. The Court should serve the role Judge Bea and his colleagues identified, echo its past corrections of the Ninth Circuit in similar circumstances, and summarily reverse this case, again reminding the Ninth Circuit that AEDPA is a substantive limitation on its authority to grant habeas relief, not an optional guideline.

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[1] *See, e.g., Sexton v. Beaudreaux*, 138 S. Ct. 2555 (2018) (per curiam); *Kernan v. Cuero*, 138 S. Ct. 4 (2017) (per curiam); *Lopez v. Smith*, 574 U.S. 1 (2014) (per curiam); *Nevada v. Jackson*, 569 U.S. 505 (2013) (per curiam); *Cavazos v. Smith*, 565 U.S. 1 (2011) (per curiam); *Felkner v. Jackson*, 562 U.S. 594 (2011) (per curiam); *Woodford v. Visciotti*, 537 U.S. 19 (2002) (per curiam).

STATEMENT

A. Murder of Delbert Haas and Kayer's Conviction

Kayer and his girlfriend, Lisa Kester, were down on their luck in the winter of 1994. App. 192–194. Kayer worked as a traveling salesman, peddling jewelry, t-shirts, and knickknacks. *Id.* The couple supplemented their income by creating false identities to fraudulently obtain government benefits. *Id.* Still, they did not make enough to support Kayer's gambling habit. *See id.* This was particularly disappointing to Kayer because, in his mind, he had devised a foolproof system to defeat the Las Vegas casinos. *Id.*

Kayer learned that an acquaintance, Delbert Haas, had recently received an insurance settlement, so Kayer and Kester visited Haas in late November 1994 and convinced Haas to come on a gambling trip to Laughlin, Nevada. App. 194. On November 30, the group departed in Kayer's van. *Id.* On the trip, Kayer told Haas of imaginary gambling success while eliciting a $100 loan. *Id.* When the money was lost, Kayer told Haas that his winnings had been stolen. *Id.* Privately, Kayer confided in Kester an intention to rob Haas. *Id.* Kester asked how Kayer could get away with robbing a person he knew; Kayer replied, "I guess I'll just have to kill him." *Id.*

The trio returned to Arizona on December 2, consuming alcohol on the drive, with Kayer and Haas arguing about Kayer's gambling debt. App. 194. During a rest stop, Kayer removed a gun from beneath his van's driver's seat and placed it into his pants. App. 195. Kayer asked Kester whether she

would be "all right with this." *Id.* Kester requested that Kayer warn her before killing Haas. *Id.*

Kayer drove back roads through rural Yavapai County, eventually stopping so Haas could relieve himself by the roadside. App. 195. Kester also started to get out, but Kayer stopped her, signaling with the gun that the time had come to kill Haas. *Id.* Kayer walked up behind Haas, shot him in the back of the head as he was urinating, and dragged Haas's body into the bushes. *Id.* Before leaving, Kayer stripped Haas's body of valuables, including wallet, watch, and jewelry. *Id.* Shortly after departing, Kayer realized that he had neglected to collect Haas' house keys and drove back. *Id.* Believing that Haas was still alive, Kayer shot Haas again. *Id.*

After leaving Haas in the bushes by the road, Kayer and Kester ransacked Haas' home, stealing and later pawning or selling, under false names, additional items of value. App. 196. Kayer and Kester used their newly acquired cash to take another gambling trip, this time to Las Vegas. *Id.* By this time, Haas' body had been found. App. 192.

Kester began to regret her actions and reported Kayer to Nevada authorities on December 12, 1994. App. 192. She also surrendered various items of evidence, including the murder weapon and Haas's credit cards. App. 192–193. Kayer was arrested and indicted for multiple offenses, including first-degree murder. App. 193, 196. Kester entered into a plea agreement and testified against Kayer. App. 196–197. A jury found Kayer guilty as charged. App. 197.

B. Kayer's Sentencing

The State alleged three death-qualifying aggravating factors: Kayer had (1) been convicted of a prior offense involving violence, (2) killed Haas for pecuniary gain, and (3) killed Haas in an especially cruel, heinous or depraved manner. Record on Appeal ("ROA") 214; *see* A.R.S. §§ 13–703(F)(2), (F)(5), (F)(6) (1994).

Kayer's attorneys attempted to investigate mitigation with well-known Arizona mitigation specialist Mary Durand. App. 197–198. Kayer, however, obstructed Durand's efforts and refused to agree to the continuances Durand believed were necessary to complete her work. *Id.*

Kayer's attorneys submitted a sentencing memorandum proposing several bases for mitigation. In terms of statutory mitigators, Kayer's attorneys submitted that Kayer's intoxication made him unable to appreciate his conduct's wrongfulness. App. 210; *see* A.R.S. § 13–703(G)(1) (1994). As for non-statutory mitigation, they submitted that: (1) Kayer's intoxication was mitigating even if it fell short of establishing statutory mitigation, (2) Kayer had served in the military, (3) Kayer had poor physical health, (4) Kayer was intelligent and could contribute to society, (5) Kayer had a positive relationship with his son, and (6) Kester had received a more lenient sentence. App. 105–106, 211.

Kayer's attorneys also presented witness testimony. App. 106. A Yavapai County correctional officer testified regarding Kayer's good behavior in the law library. *Id.* Kayer's mother and sister recounted Kayer's early life. App. 106–107. This

family testimony established that Kayer had both a familial and personal history of substance-abuse and gambling problems, that he displayed mood swings, and that he suffered from serious heart problems. *Id.* Kayer's sister believed that Kayer was, at some point, diagnosed with bipolar disorder. *Id.* Both women testified regarding Kayer's close relationship with his son, who had special needs. *Id.* Kayer's son also made a brief statement to the court. *Id.*

In addition, Durand, the well-known Arizona mitigation specialist, testified regarding her mitigation investigation which, despite Kayer's limitations, had uncovered "indications of serious psychiatric difficulties," childhood illness, and a family history of alcoholism and substance abuse. App. 107–109. And the sentencing judge received documentary evidence, including a prior mental-health report showing that Kayer had been diagnosed with manic depression and treated with lithium. App. 111–112. The documents also revealed Kayer's history of heavy alcohol use, other substance abuse, suicidal ideation, and alcohol-induced memory deficits. *Id.*

The sentencing judge, the Honorable William T. Kiger, found the pecuniary-gain aggravator and the prior-serious-offense aggravator (based on a 1981 burglary during which Kayer was armed with a handgun); Judge Kiger did not find the cruel, heinous or depraved factor. App. 207–208; ROA 232.

Because Kayer's evidence was speculative, Judge Kiger did not find mental impairment as either a statutory or a non-statutory mitigating factor. App. 113–115. Judge Kiger likewise found Kayer's evidence of alcohol and gambling abuse and mental-

health troubles speculative. *Id.* Judge Kiger found Kayer's relationship with his son mitigating, but insufficient to warrant leniency in light of the aggravation. *Id.* Accordingly, Judge Kiger sentenced Kayer to death. *Id.*; App. 199.

C. Direct Appeal Proceedings

Direct appeal from a death sentence in Arizona is mandatory and automatic to the Arizona Supreme Court, bypassing the Arizona Court of Appeals. A.R.S. §§ 13–4031; –4033; *State v. Brewer*, 826 P.2d 783, 789–794 (Ariz. 1992). At the time of Kayer's direct appeal, the Arizona Supreme Court independently reviewed the aggravating and mitigating circumstances a sentencing judge had found to determine whether, in its view, the death penalty was appropriate. *See* A.R.S. § 13–703.01 (1994).

The Arizona Supreme Court did not act as a sentencer during this process but as an appellate court empowered with de novo review of the sentencing judge's findings. *See generally, e.g., State v. Roseberry*, 353 P.3d 847, 849–850, ¶ 13 (Ariz. 2015); *see also State v. Lacy*, 929 P.2d 1288, 1301 (Ariz. 1996) ("While we are charged with the duty of reviewing and, where appropriate, reweighing the various factors relied on by the trial court in imposing a death sentence, we are uncomfortable with any process permitting the *de novo* application of statutory aggravators on appeal. It is for the trial court to make such determinations in the first instance ….").

After rejecting Kayer's conviction-related claims, the Arizona Supreme Court independently reviewed Judge Kiger's findings and affirmed his

determination that the prior-serious-offense and pecuniary-gain factors had been proven. App. 207–210. With respect to mitigation, the Arizona Supreme Court rejected Kayer's arguments that he was incompetent when he refused to cooperate with Duran's investigation, which effectively resulted in a waiver of some mitigation evidence. App. 211–218. The court agreed with Judge Kiger that Kayer's proffered addiction mitigation was speculative, as was his mental-health evidence, and proved neither a statutory nor a non-statutory mitigating factor. App. 218–228. The court determined that the remainder of Kayer's proffered mitigation was either not relevant, not proven, or not significantly mitigating. *Id.* Because the "aggravating factors substantially outweigh[ed] [the] mitigating factors," the court affirmed the death sentence. *Id.*

D. State Post-Conviction Proceedings

Kayer sought state post-conviction relief. Among other things, he alleged that counsel ineffectively investigated and presented mitigating evidence. Judge Kiger presided over the post-conviction proceeding and oversaw a 9-day evidentiary hearing on the ineffectiveness claim. Kayer's former attorneys testified, along with Durand (the mitigation specialist), another mitigation specialist, a defense attorney appearing as a "*Strickland* expert," and various friends and family members who attested to Kayer's family history of mental-health issues, substance abuse, and gambling abuse. App. 116–120.

Kayer also called a number of mental-health experts. Dr. Anne Herring, a neuropsychologist, administered a battery of tests, all but one of which

yielded normal results. App. 120. The lone abnormal test suggested a cognitive deficit, which could have resulted from substance abuse, bipolar disorder, or a traumatic brain injury. *Id.* There was, however, no evidence Kayer had suffered a traumatic brain injury. *See* App. 283. Forensic psychiatrist Dr. Barry Morenz diagnosed a cognitive disorder, along with bipolar disorder, alcohol dependence, and a mixed personality disorder, which included antisocial features. App. 120. And Dr. Michael Sucher, an addiction specialist, diagnosed alcohol dependence, pathological gambling, and polysubstance abuse. App. 121.

Following the hearing, Judge Kiger found no deficient performance because, by refusing to consent to continuances, Kayer had "voluntarily prohibited his attorneys from further pursuing and presenting any possible mitigating evidence." App. 186–189. In the alternative, Judge Kiger found no prejudice:

> This court further concludes that **if** there had been a finding that the performance prong of the *Strickland* standard had been met, that no prejudice to the defendant can be found. In stating this conclusion the court has considered the assertion of mental illness, physical illness, jail conditions, childhood development, and any alcohol or gambling addictions. App. 189. The Arizona Supreme Court denied review in a summary order. *See* App. 17.

E. Federal Habeas Proceedings

Kayer sought federal habeas relief, again raising his sentencing-ineffectiveness claim. The district court declined to reach *Strickland*'s deficient-

performance prong but, applying AEDPA, concluded that Judge Kiger had reasonably found a lack of prejudice. App. 123–136. After exhaustively reviewing the evidence, App. 99–123, the court reasoned that 1) Kayer had waived some mitigation and therefore could not show prejudice from any errors by counsel, 2) the post-conviction evidence was cumulative to the sentencing evidence, and 3) the fact that Judge Kiger had also sentenced Kayer buttressed his post-conviction ruling's reasonableness. App. 123–135.

On appeal, a divided three-judge Ninth Circuit panel reversed. The panel majority, authored by Judge Fletcher, found deficient performance, despite Kayer's obstruction of Durand's investigation, because in the majority's view Kayer's counsel unreasonably delayed commencing their mitigation investigation. App. 50–54.

With respect to prejudice, the panel majority dismissed any suggestion that Kayer's obstructionism affected the case's outcome, citing testimony from Durand and the *Strickland* expert that, in their experience, most reluctant defendants eventually cooperate with mitigation development. App 54–56. Based on this testimony, the majority found a "virtual certainty" that Kayer would have done the same had counsel been more proactive. *Id.*

The majority then turned to the new evidence's impact, concluding that the post-conviction evidence proved Arizona's significant-impairment statutory mitigating factor because Kayer's case was, in the majority's view, similar to Arizona Supreme Court

opinions finding the factor proven. App. 58–62, 65–67. The majority relied on evidence of Kayer's alcohol abuse, compulsive gambling, bipolar disorder, developmental delays, and family history of mental illness. *Id.* And it found Kayer's mitigation causally connected to Haas' murder through testimony from Dr. Sucher that Kayer suffered from untreated alcohol and gambling addictions at the time of the offense, and testimony from Dr. Morenz that Kayer not only suffered from these addictions but also bipolar disorder and the emotional impact of a serious heart attack he had experienced 6 weeks earlier. *Id.* The majority discounted Judge Kiger's involvement in both sentencing and the post-conviction proceeding, citing *Strickland*'s objective standard and observing that a court must "assess prejudice independent of the particular judge or judges" deciding the claim in state court. App. 63–64.

The majority further opined that the aggravating factors were insignificant compared to the mitigation. App. 60–61, 67. In particular, the majority stated that the prior-serious-offense aggravating factor was "relatively weak" because Kayer's prior burglary conviction "was at the less serious end of the spectrum." App. 60–61, 67.

After making these findings, the panel majority looked toward the Arizona Supreme Court's death-penalty jurisprudence to inform the prejudice determination. App. 67–71. The majority identified several purportedly similar cases in which the state court had reduced death sentences to life, emphasizing one in particular, *State v. Brookover*, 601 P.2d 1322 (Ariz. 1979), which the majority perceived to be similar to Kayer's case. App. 67–71,

72–75. The majority explained that it looked to the Arizona Supreme Court because that court was, in its view, "the ultimate sentencing court," and that it turned to the purportedly similar cases for circumstantial evidence of how the Arizona Supreme Court approached cases like Kayer's. App. 70–75. The majority found prejudice, "particularly in light of … *Brookover*," and stated that Judge Kiger in the post-conviction proceeding "was unreasonable in concluding otherwise." App. 71.

Judge John Owens dissented from the majority's ruling as to *Strickland* prejudice. App. 77–81. In Judge Owens' view, the state post-conviction court had reasonably found a lack of prejudice; Judge Owens noted that the pecuniary-gain aggravating factor was strong and undisputed, Kayer's mitigation was "hardly overwhelming," and the crime was "brutal." *Id.* Judge Owens observed that the majority's reliance on *Brookover* ignored "what the state court did in this case," and he pointed out that Kayer's case was equally similar to *Visciotti*, 537 U.S. at 21–27, an AEDPA case in which this Court had reversed the Ninth Circuit's decision granting habeas relief. App. 79–81.

F. Denial of En Banc Review and Judge Bea's Dissent for Twelve Judges

Petitioner sought panel and en banc rehearing. The court denied his motion, but Judge Bea authored a stinging dissent for twelve judges. App. 255–289.

Judge Bea assumed the majority had correctly resolved *Strickland*'s deficient-performance prong, but excoriated the majority for its prejudice determination. *Id.* Judge Bea observed that the majority had conducted an unauthorized de novo

review disguised as AEDPA deference, had ignored this Court's prior case law defining AEDPA's limitations, and had made "out of whole cloth a method of review that requires idiosyncratically comparing a given case's facts to past state supreme court cases engaged in their own de novo review." App. 255–282. Under the correct standards, Judge Bea continued, AEDPA precludes relief because reasonable jurists could debate the state court's decision. App. 282–289.

The panel majority responded to Judge Bea in a published opinion concurring in the denial of rehearing. App. 232–254. For the most part, the majority repeated the analysis from its opinion. *Id.* The majority stated that it had "look[ed] to the probability of a different outcome in the Arizona Supreme Court" which, in the majority's view, "sentences *de novo* in capital cases." App. 241. The majority again emphasized that *Brookover* "predicted what [the state supreme] court would likely have done" if counsel had presented Kayer's post-conviction mitigation at sentencing. App. 242, 249–250.

REASONS FOR GRANTING THE PETITION

As Judge Bea well explained in his forceful dissent for twelve judges from the denial of rehearing en banc, this case calls out for the Court's review and summary correction. Judge Bea could not have been clearer in placing this case as an outlier worthy of swift and summary treatment. *E.g.*, App. 255–256 (Bea, J., dissenting) ("Like clockwork, practically on a yearly basis since the Millennium, we have forced the Supreme Court to correct our inability to apply the proper legal standards under [AEDPA]."

(collecting cases)); App. 259 ("We should have taken this case en banc to correct the panel majority's opinion's errors before the Supreme Court (again) does it for us.").

Judge Bea was correct; the panel majority's opinion finding *Strickland* prejudice "was not just wrong," "[i]t also committed fundamental errors that this Court has repeatedly admonished courts to avoid." *Beaudreaux*, 138 S. Ct. at 2560. In particular, it made the oft-repeated mistake of substituting its de novo finding of a *Strickland* violation for the state court's reasoned opinion to the contrary. And it did so while misconstruing Arizona law and the Arizona Supreme Court's role in the capital-sentencing process.

The panel majority's willful failure to abide by AEDPA's limitations and this Court's prior warnings reduces confidence in the habeas process and wastes scarce resources, particularly in this exhaustively litigated capital case. *See Richter*, 562 U.S. at 91–92. It also frustrates the interests in comity, finality, and federalism AEDPA safeguards. *See, e.g., Williams v. Taylor*, 529 U.S. 420, 436 (2000).

The opinion warrants summary reversal.

I. The Ninth Circuit Defied This Court's Multiple Prior Reprimands and Again Exceeded Its Authority under AEDPA

AEDPA permits habeas relief only when a state court's decision, as relevant here, unreasonably applies this Court's clearly established precedent. 28 U.S.C. § 2254(d)(1). The Court has emphasized the correct approach under AEDPA: a court must first identify what theories supported the state-court

ruling under review and must then determine whether reasonable jurists could disagree that those theories are consistent with this Court's precedent. *See Beaudreaux*, 138 S. Ct. at 2558; *Richter*, 562 U.S. at 102. Habeas relief is appropriate only if "there is no possibility fairminded jurists could disagree that the state court's decision conflicts with this Court's precedents." *Richter*, 562 U.S. at 102. This is "'the only question that matters under § 2254(d)(1).'" *Id.*

A. The Ninth Circuit Again Disregarded AEDPA and Engaged in De Novo Review

The Ninth Circuit has a long and infamous history, which it repeated here, of taking a "de-novo-masquerading-as-deference approach" to AEDPA cases. App. 280 (Bea, J., dissenting); *see also Beaudreaux*, 138 S. Ct. at 2558–2560 (faulting Ninth Circuit for "invert[ing] the rule established in *Richter*" by conducting de novo review, failing to recognize that "at least one theory" supported state court's decision, and "tacking on a perfunctory statement … that the state court's decision was unreasonable"); *Richter*, 562 U.S. at 101–102 (chastising Ninth Circuit for "treat[ing] the unreasonableness question as a test of its confidence in the result it would reach under *de novo* review").

The panel majority, as did the Ninth Circuit in *Beaudreaux* and *Richter*, "spent most of its opinion conducting a *de novo* analysis" of prejudice. *Beaudreaux*, 138 S. Ct. at 2558. The majority determined in the first instance that Kayer's post-conviction evidence proved the A.R.S. § 13–703(G)(1) (1994) significant-impairment mitigating factor and that this factor carried significant weight because, in the majority's view, it was causally connected to

Haas' murder. App. 58–75. The majority then made a qualitative assessment that the two aggravating factors were of minimal value. *Id.* This was error.

But the majority's "more stunning error concerns its discussion of the probability of a different outcome in the Arizona Supreme Court." App. 275 (Bea, J., dissenting). The majority framed the inquiry as whether Kayer had shown a reasonable probability of a "different decision by the Arizona Supreme Court if that court had seen the newly presented evidence on direct appeal." App. 249–250. Armed with its de novo conclusion that the A.R.S. § 13–703(G)(1) (1994) factor had been proven and was significantly weighty, the majority turned to the Arizona Supreme Court's precedent to deduce that court's subjective sentence-reduction trends in similar cases, and settled on the Arizona Supreme Court opinion in *Brookover*. App. 69–75. The majority then concluded that the post-conviction court had erred by not recognizing that, under *Brookover*, the Arizona Supreme Court was reasonably likely to reduce Kayer's sentence to life. *Id.*

There are a number of problems with this analysis. Perhaps most important, Kayer did not argue in his state post-conviction petition that he was prejudiced because the Arizona Supreme Court was likely to reduce his sentence on independent review. *See Beaudreaux*, 138 S. Ct. at 2560 (noting that Ninth Circuit "considered arguments against the state court's decision that Beaudreaux never even made in his state habeas petition"); *see also* Preliminary PCR Petition, dated 2/27/03; Mem. in Support of PCR, dated 6/1/05; Reply to Opposition to PCR, dated 9/12/05; Petitioner's Post-Hearing Memorandum,

dated 4/28/06. Nor did Kayer cite *Brookover* (the dispositive, analogous case according to the majority) in his state postconviction filings. *See id.* For that matter, Kayer did not cite *Brookover* to the district court or the Ninth Circuit. *See Kayer v. Ryan,* No. 07-cv-02120, Dkt. 22, 35, 40 (D. Ariz. Dec. 3, 2007, Sept. 17, 2008, Dec. 31, 2008); *Kayer v. Shinn,* No. 09-99027, Dkt. 44, 66 (9th Cir. Feb. 6, 2017, June 30, 2017). The majority's mode of analysis is purely its own invention. And the invention of arguments to undermine a state-court decision is the exact opposite of what *Richter* requires. *See Richter*, 562 U.S. at 102.

As Judge Bea put it, the majority created its methodology "out of whole cloth," and that methodology finds no support in this Court's precedent. App. 282. Although *Strickland*, 466 U.S. at 695, refers to independent appellate review, this Court has directed that a court simply "reweigh the evidence in aggravation against the totality of available mitigating evidence" to determine prejudice from a capital-sentencing error. *Wiggins v. Smith*, 539 U.S. 510, 534 (2003). The outcome of this process does not depend on the sentencer's identity. *See Strickland*, 466 U.S. at 695 (prejudice presumes a reasonable sentencer and does "not depend on the idiosyncracies of the particular decisionmaker"). Nor does it depend on how an appellate court, applying a de novo review standard, has resolved cases involving unrelated and differently situated capital defendants.[2]

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[2] The panel majority's analysis also conflicts with the objective-sentencer perspective by asking how an appellate court, reviewing an already imposed death sentence, would

Further, as Judge Bea also observed, the panel's analysis creates a non-uniform approach to *Strickland* claims that shifts the focus from clearly established federal law, as determined by this Court, to the law of the state in which the defendant was sentenced. App. 277 ("U.S. Supreme Court habeas precedents that involve California apparently could be distinguished away in habeas appeals from Arizona, on the sole ground that we ask what an Arizona rather than a California sentencing court would have done.") (quotations omitted). And generally speaking, the panel's analytical method encourages the *Strickland* inquiry to devolve into hyper-technical factual comparisons between the case under review and other state and federal cases. The debate between the panel majority and Judges Owens and Bea concerning whether *Brookover* or *Visciotti* is more similar to Kayer's case illustrates this point. App. 71–75, 77–81, 251–253, 288–289.

B. The Improper De Novo Review Compounded Error on Error by Misinterpreting Arizona Law and Procedures

The majority's analysis also rests on a misunderstanding of Arizona's capital-sentencing

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have subjectively reacted to new mitigating evidence, as measured by other opinions that court had reached based on different defendants. The majority's reliance on the Arizona Supreme Court's subjective review trends is particularly insidious here because the majority simultaneously invoked *Strickland*'s objective standard to strip all deference from Judge Kiger, who was "ideally situated" to assess the post-conviction evidence's probable impact because he had also presided over Kayer's trial and sentencing. *Schriro v. Landrigan*, 550 U.S. 465, 476 (2007); App. 63–64, 73–74.

scheme, reflecting the dangers inherent in permitting a federal habeas court to interpret state law and use that interpretation to upend a reasonable state court conclusion in the course of granting habeas relief. The Arizona Supreme Court is not, as the majority believed, "the ultimate sentencing court," nor did it "decide[] independently whether to impose the death penalty." App. 73; *see* App. 249–250. To the contrary, under the independent-review procedure then being applied, the Arizona Supreme Court acted as an appellate court applying a de novo *standard of review*, not as a sentencer. *See Roseberry*, 353 P.3d at 849–850, ¶ 13; *Lacy*, 929 P.2d at 1301; *see also McKinney v. Arizona*, 140 S. Ct. 702, 708–709 (2020) (recognizing that independent appellate reweighing is not a resentencing but is akin to harmless-error review).

A death-penalty case would not have reached the Arizona Supreme Court until after the death penalty was already imposed. The majority's approach thus presumes that the state sentencer—Judge Kiger—would still have imposed death had he heard the additional mitigation, and that the propriety of that decision would have been reviewed by the Arizona Supreme Court, at which point the sentence would have been reduced to life as a result of *Brookover*.

In other words, the majority's approach presumes a *lack* of *Strickland* prejudice in the course of awarding habeas relief. It also overlooks an obvious point—the Arizona Supreme Court had the opportunity, through Kayer's petition for review from the denial of post-conviction relief, to point out Judge Kiger's purported error and express a belief that a life sentence was warranted, under *Brookover* or otherwise, in light of the postconviction arguments

raised regarding prejudice. The Arizona Supreme Court declined this opportunity.

The panel majority also erred factually by invoking *Brookover* as similar. For one thing, while the majority is correct that pecuniary gain was a motive in *Brookover*, there was no pecuniary gain *aggravating factor* in that case. 601 P.2d at 1323–1325. The *Brookover* court was therefore precluded from giving aggravating weight to the pecuniary-gain motive. Thus, there was only one aggravating factor in *Brookover*, while in Kayer's case there were two. And with respect to mitigation, Brookover suffered from a brain lesion that explained his anti-social behavior, while Kayer is of generally normal functioning. *Id.* at 1325–1326; *see* Section II, *infra*.

* * *

The panel majority engaged in extraordinary gymnastics to sidestep AEDPA deference in this case. As in *Beaudreaux*, the majority's reference to AEDPA's standards came almost as an afterthought, when it proclaimed the state court unreasonable for reaching a different conclusion from the majority. App. 65, 71, 75. But "AEDPA demands more." *Richter*, 562 U.S. at 102. It demands that a federal court give a state-court judgment the benefit of the doubt, *see Cullen v. Pinholster*, 563 U.S. 170, 181 (2011), and that it grant habeas relief only when "there is no possibility fairminded jurists could disagree that the state court's decision conflicts with this Court's precedents." *Richter*, 562 U.S. at 102. Despite the Court's repeated warnings, the majority failed to heed those principles here, and it did so while misinterpreting the contours and processes of Arizona law.

II. AEDPA Precludes Relief Because Fairminded Jurists Could Debate the Ninth Circuit's Prejudice Ruling

At a minimum, reasonable jurists could disagree whether Kayer had proved *Strickland* prejudice. *See Richter*, 562 U.S. at 102. In fact, a total of 19 state and federal judges (including those that joined Judge Bea's dissent from denial of en banc review) have acknowledged that the omitted mitigation would not have made a difference to a reasonable sentencer. *See* App. 263 n.3. Multiple theories support this position. *See Richter*, 562 U.S. at 102.

First, the post-conviction court found as a factual matter that Kayer had "voluntarily prohibited his attorneys from further pursuing and presenting any possible mitigation evidence." App. 189. A reasonable jurist could have concluded, as did the district court, that Kayer could not show prejudice, regardless of his attorneys' perceived failures early in the proceeding, because he refused to agree to continuances necessary to permit Durand to continue her investigation after trial. App. 127–131; *see Landrigan*, 550 U.S. at 469–478 ("it was not objectively unreasonable" for the state court to "conclude that a defendant who refused to allow the presentation of any mitigating evidence could not establish *Strickland* prejudice based on his counsel's failure to investigate further possible mitigating evidence"). Kayer's unwavering opposition reasonably supports a determination that he would not have permitted additional mitigation investigation under any circumstances.[3]

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[3] The panel majority found, based on Durand's testimony and that of the *Strickland* expert, that Kayer would have cooperated

Second, a reasonable jurist could have found Kayer's mitigation of minimal value in light of the aggravation and the facts and circumstances of the offense. Judge Owens reached this conclusion in dissenting from the panel majority. App. 77–81. So did Judge Bea in his opinion for the twelve judges who wrote in dissent from the denial of rehearing en banc. App. 282–289.

The State proved two aggravating factors. App. 199. Despite the panel majority's opinion that the prior-serious-offense aggravator results from a "minor" burglary offense and is inconsequential, a reasonable sentencer could have given the factor heavy weight because it reflects Kayer's habitual refusal to adhere to the law (and Kayer was armed with a firearm during the offense). *See* App. 60–61, 67, 239–240; *see also* R.O.A. 232.

Likewise, the pecuniary-gain factor could reasonably be afforded substantial weight. The majority minimized that factor by noting that Kayer's gains were "relatively modest." App. 240. But it would have been equally reasonable to conclude that this fact *increases* the aggravator's weight because it shows how little Kayer valued human life. And the facts and circumstances of the crime—which involved Kayer shooting Haas execution-style and later shooting him again to ensure he was dead—reasonably militate against leniency.

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with mitigation efforts had counsel initiated the investigation earlier. App. 54–56. The majority's conclusion, however, is speculative and based entirely on the witnesses' general experience with other defendants. *Id.*

Conversely, a reasonable sentencer could have given Kayer's mitigation, consisting of alcohol and gambling addictions and mental-health difficulties, minimal weight. Most critically, a reasonable jurist could have disagreed with the panel majority that Kayer's purported ailments explained the offense. Kayer premeditated Haas' murder for a significant period and had multiple chances to abandon his plan. *See* App. 194–195. Although Kayer, Haas, and Kester had consumed alcohol on the day of Haas' murder, some of the planning had occurred earlier. *Id.*; App. 284.

It is also debatable whether Kayer's gambling addiction is significantly mitigating. At a minimum, it is double-edged, as Kayer's lifestyle choices could be interpreted to reflect negative character traits, and Kayer's desire for gambling money proves both his motive and the basis for the pecuniary-gain factor. *See* App. 284 (Bea, J., dissenting) ("[O]ne ordinarily might think that evidence the defendant drinks and gambles to excess would cast his character in a particularly *un*favorable light."); *see also Pinholster*, 563 U.S. at 201 (new evidence not "clearly mitigating" where jury could conclude defendant was "simply beyond rehabilitation").

Accordingly, multiple reasonable arguments supported the state court's denial of relief. Had the panel majority asked the right question under *Richter*—whether these theories were reasonable—it would have been compelled to deny relief. "Even if the Court of Appeals might have reached a different conclusion as an initial matter, it was not an unreasonable application of [this Court's] precedent" for Judge Kiger to find a lack of prejudice. *Pinholster*, 563 U.S. at 202–203.

III. Correcting The Ninth Circuit's Contravention of AEDPA Is Important for Comity, Finality, Federalism, and the Rule of Law

"Federal habeas review of state convictions frustrates both the States' sovereign power to punish offenders and their good-faith attempts to honor constitutional rights." *Richter*, 562 U.S. at 103 (quotations omitted). Habeas review impedes finality, hinders the states' ability to punish indisputably guilty offenders, "and intrudes on state sovereignty to a degree matched by few exercises of federal judicial authority." *Id.* (quotations omitted).

Because habeas review intrudes so deeply on state sovereignty, and the consequences of a federal court exceeding its power are so great, this Court frequently intervenes, often in summary fashion, to redress AEDPA misapplications. *See* n. 1, *supra.* As this Court recognized in *Richter*, judicial resources "are diminished and misspent," "and confidence in the writ and the law it vindicates undermined, if there is judicial disregard" for AEDPA. 562 U.S. at 91–92.

That disregard occurred here, and it again warrants this Court's intervention. The Ninth Circuit's latest overreach threatens comity, finality, federalism, and the rule of law in general—the very interests Congress intended AEDPA to safeguard. *Williams*, 529 U.S. at 436. The decision warrants summary reversal.

CONCLUSION

This Court should grant the petition for writ of certiorari.

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Respectfully submitted,

MARK BRNOVICH
Attorney General

JOSEPH A. KANEFIELD
Chief Deputy and Chief of Staff

BRUNN W. ROYSDEN III
Division Chief

ORAMEL H. (O.H.) SKINNER
Solicitor General
LACEY STOVER GARD
Chief Counsel
Counsel of Record
LAURA P. CHIASSON
JEFFREY L. SPARKS
WILLIAM SCOTT SIMON
Assistant Attorneys General

OFFICE OF THE ARIZONA ATTORNEY GENERAL
Capital Litigation Section
400 W. Congress, Bldg. S-215
Tucson, AZ 85701
(520) 628-6520
lacey.gard@azag.gov

Counsel for Petitioner