No. 19-1302

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

BRIEF IN OPPOSITION

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CAPITAL CASE

QUESTION PRESENTED

Respondent George Russell Kayer was convicted of murder in 1997. His counsel did not prepare for the penalty phase until after the verdict, resulting in a grossly inadequate mitigation case that failed to uncover extensive and uncontroverted evidence establishing the statutory mitigator of mental impairment. At the time, under Arizona's unique (but since constitutionally invalidated) capital sentencing regime, judges—not juries—weighed aggravators and mitigators and determined whether to impose the death penalty. Based on the failure of Kayer's counsel to establish any statutory mitigators, the judge sentenced Kayer to death.

On state post-conviction review ("PCR"), Kayer argued ineffective assistance of counsel under *Strickland* v. *Washington*, 466 U.S. 668 (1984). The PCR court disagreed, and the Arizona Supreme Court denied review. On federal habeas review, the Ninth Circuit duly applied the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") and this Court's precedent interpreting it, and held: (1) that it was objectively unreasonable to find counsel's performance constitutionally acceptable, and (2) that it was objectively unreasonable to find there was no reasonable possibility that the statutory mitigator of mental impairment would have affected Kayer's sentence. All three Ninth Circuit judges agreed on the performance issue, with one judge dissenting on the issue of prejudice.

The question presented is:

Whether this Court should summarily reverse a fact-bound application of *Strickland*'s prejudice requirement in the context of Arizona's now-obsolete judicial sentencing regime, where it is undisputed that counsel

performed deficiently and failed to uncover a statutory mitigator and the panel correctly identified and applied the deferential governing standards from *Strickland* and this Court's precedents interpreting and applying AEDPA.

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

Petitioner David Shinn, Director of the Arizona Department of Corrections. Respondent, George Russell Kayer, is incarcerated in an Arizona state prison. No party is a corporation.

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INTRODUCTION

Petitioner seeks fact-bound error correction on a question of *Strickland* prejudice and a now-unconstitutional, Arizona-specific sentencing regime. Pet. 20–22. Petitioner does not argue that there is any disagreement among the courts of appeals. Nor does he purport to identify a situation where this Court or any court of appeals or state court of last resort has reached a different conclusion on similar facts. Indeed, there is no question that the circumstances of this case are peculiar: because Kayer's death sentence was handed down before *Ring* v. *Arizona*, 536 U.S. 584 (2002), a judge, not a jury, weighed mitigating and aggravating circumstances, and Kayer's counsel indisputably failed to uncover the extensive and uncontroverted proof of Kayer's mental impairment with a causal connection to his crime, which was a statutory mitigator entitled to substantial weight.

In evaluating those circumstances, petitioner acknowledges (Pet. 22) that the court of appeals identified and purported to follow the correct standard. But straining to analogize this case to past instances where the Ninth Circuit failed to apply AEDPA deference, petitioner asserts that the panel applied the proper standard as only an "afterthought." *Ibid.* In so doing, petitioner underscores that the decision here looks nothing like this Court's past summary-reversal decisions, which involve federal disregard for discretionary calls by state courts, particularly on the issue of *Strickland* performance—*not* prejudice. The Ninth Circuit here afforded the state post-conviction review ("PCR") court ample deference, indulged every conceivable argument in support of the PCR court's decision (even those that petitioner does not advance), and em-

phasized the unique nature of Arizona's judicial sentencing regime at the time. Accordingly, petitioner has identified no reason for this Court to intervene in this case at all, whether by a grant of plenary review or the even more-extraordinary remedy of summary reversal. See *id.* at 26 (seeking only summary reversal).

Even if this Court were in the business of simple error correction, there is no error below to correct. Indeed, despite petitioner's rhetoric that "[i]t cannot be stressed enough just what the panel did wrong," Pet. 4 (quoting App. 279 (Bea, J., dissenting)), the petition never articulates what exactly the purported error was. Petitioner does not contest that the failure of Kayer's counsel to prepare for the penalty phase of a capital case until the eve of sentencing constituted "egregious" deficient performance. App. 238. That deficient preparation resulted in a shoddy penalty-phase case that failed to uncover and thus to present the extensive and uncontroverted evidence that would have established the statutory mitigator of mental impairment. Without that evidence, Kayer was left to be sentenced by a judge who was weighing two statutory aggravators against *zero* statutory mitigators and one non-statutory mitigator (Kayer's importance in the life of his disabled son). Given the circumstances, the only reasonable answer to the prejudice question under *Strickland* v. *Washington*, 466 U.S. 668, 695 (1984)—whether there is a "reasonable probability" that the outcome would have been different had counsel established a statutory mitigator of mental impairment with a causal nexus to the crime, where there previously had been none—is yes.

As the Ninth Circuit majority subsequently explained in denying Petitioner's request for en banc review, even after "filter[ing] the *Strickland* standard

through the lens of AEDPA to give appropriate deference to the decision of the state PCR judge," App. 241, it was "objectively unreasonable" for the PCR court to hold that there was "no reasonable probability" that Kayer's sentence would have been different if Kayer's evidence of a strong statutory mitigator had been presented at his original, pre-*Ring* judicial sentencing hearing. This was particularly so in light of another Arizona decision, *State* v. *Brookover*, 601 P.2d 1322 (Ariz. 1979), which held that the same mix of aggravating and a mitigating circumstances categorically forbade a sentence of death. While petitioner contends that the Ninth Circuit's invocation of *Brookover* was somehow inappropriate, that argument ignores that questions of *Strickland* prejudice frequently turn on questions of state law and that, especially under the peculiar pre-*Ring*, judicial-sentencing regime in Arizona, a nearly identical decision from the state's highest court involving the same mitigator and similar aggravators was the most reliable benchmark for evaluating prejudice.

Putting aside rhetorical criticism of the court of appeals, the petition contains nothing indicating that this case is an appropriate candidate for an exercise of this Court's certiorari jurisdiction. The decision below is not only a fact-bound application of a correctly stated standard, it is also correct on its face. It therefore comes nowhere close to satisfying the extraordinarily high bar applicable for summary reversal. Certiorari should be denied.

COUNTERSTATEMENT

1. The facts of Kayer's crime are not in dispute, and the Ninth Circuit's decision here does not disturb the jury's findings of guilt. Kayer shot and killed his friend

Delbert Haas in Arizona after a gambling trip to Nevada. Kayer, Lisa Kester (Kayer's girlfriend), and Haas shared a car for the road trip back to Arizona. Kayer had previously told Kester that he was going to kill Haas for cash to feed his gambling and alcohol addictions. Over several hours of driving, the three of them drank a case of beer. On a deserted road, Kayer stopped the van, and when Hass got out to urinate, Kayer shot him. A week and a half later, while gambling in Nevada again, Kester turned the pair in, and both were charged with capital murder. Kester testified against Kayer in return for a reduced sentence of three years' probation. See App. 6–9.

2. No judge on the Ninth Circuit disputes that Kayer's counsel performed deficiently in connection with his sentencing. His first lawyer, Linda Williamson, was both inexperienced, with only four years as a practicing attorney, and incompetent. During the year and a half that she represented Kayer, she did not prepare for the penalty phase of his trial at all. App. 53. Kayer's second lawyer, David Stoller, had more experience but was equally incompetent. He also failed to prepare whatsoever for the penalty phase in the months leading up to trial. *Id.* at 26–28. The jury returned a guilty verdict on March 26, 1997. Two months later, on May 21, 1997, with the penalty phase hearing just a few weeks away, Stoller's mitigation expert interviewed Kayer for the first time. *Id.* at 29–30.

As a result of counsels' deficient preparation, the mitigation portion of the hearing took only a few hours and yielded little probative evidence. Just five witnesses testified on Kayer's behalf: a detention officer, who said that Kayer had behaved well in the jail law library; Kayer's mother, who described his childhood and his relationship with his disabled son; Kayer's half-sister, who testified that Kayer had "[h]ighs and

lows," had drinking and gambling problems, and had, she thought, been diagnosed "as a bipolar manic-depressive, or something like that"; the belatedly hired mitigation expert, who explained she had insufficient time to gather information that could support "a medical opinion about a diagnosis of a psychiatric condition"; and Kayer's mentally impaired son. App. 9–13.

Because capital sentences in Arizona were, at that time, imposed by judges rather than juries—it would take another five years for this Court to find such judicial determinations unconstitutional, see *Ring*, 536 U.S. 584—Kayer's sentencing judge was required to balance the aggravating and mitigating circumstances of Kayer's crime. Some mitigating circumstances were specified by statute, Ariz. Rev. Stat. Ann. § 13-703(G) (1993), but any other mitigating circumstances could be considered as well, see App. 58. Critically, statutory mitigators were given greater weight than non-statutory mitigators. See *id.* at 235; accord *id.* at 261 (Bea, J., dissenting).

The sentencing judge found two statutory aggravating factors: (1) that Kayer had previously been convicted of a "serious offense"; and (2) that the murder had been committed for pecuniary gain. Ariz. Rev. Stat. Ann. § 13-703(F)(2), (F)(5) (1993). But the judge explicitly rejected the State's argument that Kayer had killed his friend in "an especially heinous, cruel or depraved manner," pursuant to Ariz. Rev. Stat. Ann. § 13-703(F)(6). App. 67. In light of the meager mitigating evidence proffered by Kayer's deficient counsel, the judge found no statutory mitigators and only a single non-statutory one—Kayer's importance in the life of his son. *Id.* at 61. The judge sentenced Kayer to death. *Id.* at 14.

During this pre-*Ring* period, the Arizona Supreme Court reviewed all capital cases de novo on direct appeal. App. 74. Thus, the Arizona Supreme Court reviewed Kayer's sentence and found, based on the same minimal mitigating evidence, only the one non-statutory mitigating factor along with the same two statutory aggravating factors. The court likewise sentenced Kayer to death. *Id.* at 228.

4. On state post-conviction review ("PCR"), Kayer's lawyers claimed that he had received ineffective assistance of counsel at the sentencing phase. And they presented "extensive and uncontroverted" evidence of Kayer's own mental illness and of mental illness in Kayer's family, none of which had been presented at the sentencing hearing.[1] App. 61.

The Ninth Circuit described this evidence of mental illness, which an expert at the PCR hearing characterized as a "perfect storm" with respect to Kayer's crime, at length in its decision. App. 37–48, 67. Of note, the

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[1] As the petition only briefly alludes to (Pet. 10, 12), Petitioner focused his en banc rehearing briefing on a theory that Kayer "waived" his ineffective-assistance-at-sentencing argument because he "obstructed" his counsel's mitigation case by rejecting the trial court's offer for a six-to-eight month continuance to develop a mitigation case. *See* App. 54–56. As the panel explained, however, Kayer's rejection of the continuance was based on his credible fear of harm if he remained in the county jail any longer, and on his unfounded pessimism after being pronounced guilty about what mitigation his lawyers could uncover. *Id.* at 55; *see also id.* at 31–33. More importantly, as *Rompilla* v. *Beard*, 545 U.S. 374, 387 (2005), makes clear, counsel should have begun a mitigation case at the beginning of the case, and "it was a virtual certainty that Kayer would have cooperated . . . if it had begun in January 1995 . . . rather than in late May 1997," making his conduct in May 1997 irrelevant. App. 56. Aside from two passing references to "obstruction," Pet. 7, 12, Petitioner appears to have abandoned this theory before this Court.

evidence showed that Kayer's father was an alcoholic and obsessive gambler who died at age 39, when Kayer was only 2. *Id.* at 43. Kayer's Aunt Opal on his mother's side was a schizophrenic who heard voices and testified that this condition ran in the family. *Id.* She testified that Kayer had told her, "I thought it was normal[.] I hear voices, too." *Id.* Kayer's Aunt Ona, also on his mother's side, was an alcoholic with severe mood swings. *Id.* Yet another aunt on his mother's side was an alcoholic who suffered from severe depression. *Id.* at 43–44. Kayer's cousin on his mother's side was initially diagnosed with schizophrenia and later with manic depressive disorder. *Id.* at 121.

Kayer himself had developmental difficulties with walking and balance. In fact, his mother feared taking him out in public when he was a child because he was so heavily bruised from his falls. App. 37. Kayer was also dyslexic. *Id.* He received very poor grades in school (though he delusionally insisted that got straight A's in school except for English). *Id.* at 38. He never finished high school. Instead, he enlisted in the Navy but was quickly discharged with a mental "impairment" described in the discharge papers as "severe." *Id.* at 38–39. He ran through two brief and tumultuous marriages in his early twenties. *Id.* at 39. Around the same time, he began committing property crimes and became a heavy drinker and compulsive gambler. *Id.* at 40–41. Also around the same time, he met Cindy Seitzberg, with whom he had a son, Tao, who was dropped in the delivery room and suffered permanent brain damage. *Id.* at 39. Seitzberg worked as a stripper while Kayer took care of his son, and she eventually abandoned both Kayer and Tao within a year of the child's birth. *Id.* at 39–40.

Kayer checked himself into a VA hospital in his late twenties, saying "I just want to know what's wrong."

App. 42. Six years later, he again checked himself into a VA hospital, where a doctor wrote that he "showed bipolar traits" and prescribed lithium (a standard medication for bipolar disorder). A year later, he was referred to a VA treatment center and received a "provisional diagnosis" of "Personality Disorder/Bipolar." *Id.* Kayer later told a probation officer that until the second stay in the VA hospital, "he had no idea what was wrong with him." *Id.* When Kayer was 40—a year older than when his father had died of a heart attack—he suffered a severe heart attack and was yet again admitted to a VA hospital. *Id.* at 44. Kayer checked himself out of the hospital "against medical advice." *Id.* He killed Haas only six weeks later. *Id.*

Three doctors testified in the PCR court without contradiction. Dr. Anne Herring testified that Kayer "demonstrated significant difficulty when required to execute complex problem solving," and that "[s]imilar deficits have been associated with chronic heavy substance abuse, traumatic brain injury, and with bipolar disorder." App. 45. Dr. Michael Sucher, an addiction specialist, testified to Kayer's "untreated alcoholism and untreated pathological gambling." *Id.* Dr. Barry Morenz, a psychiatrist, characterized Kayer's beliefs as "really delusional." *Id.* at 46. Among other things, Kayer had believed ever since he was a boy, and continued to believe as an adult, that he was a reincarnated being from another planet. *Id.*; see also *id.* at 38. Dr. Morenz diagnosed Kayer's mental state at the time of the murder: "He was having problems with bipolar disorder symptoms and may have been manic or hypomanic, he was having difficulties with out of control pathological gambling and he had difficulty with extensive alcohol abuse." *Id.* at 48.

The Arizona judge who presided over Kayer's trial and sentencing also presided over his state PCR proceeding. The judge denied Kayer's ineffective-assistance claim in a brief, four-page order. App. 186–89. He held that Kayer's trial attorneys, Williamson and Stoller, performed competently, notwithstanding that Williamson did no mitigation work whatsoever, and Stoller's mitigation expert did not even begin work until just a few weeks before the penalty phase hearing. *Id.* at 189. And despite the "perfect storm" of mental health issues that contributed to Kayer's crime, *id.* at 67, the state PCR judge also held, in the alternative, that Kayer had not shown prejudice in a single sentence: "This court further concludes that *if* there had been a finding that the performance prong of the *Strickland* standard had been met, that no prejudice to the defendant can be found." *Id.* at 50, 189 (emphasis in the judge's order). The Arizona Supreme Court denied Kayer's petition for review without explanation. *Id.* at 17. The state PCR judge's decision was therefore the last reasoned state-court decision.

5. On December 3, 2007, Kayer filed a timely petition in federal district court for a writ of habeas corpus under 28 U.S.C. § 2254(d). The district court denied relief on Kayer's ineffective-assistance claim, and Kayer appealed.

The court of appeals (W. Fletcher, Owens & Friedland, JJ.) unanimously held that "[c]ounsels' failure to prepare for the penalty phase hearing was egregious, and the mitigation evidence presented at the hearing was pathetically inadequate." App. 238 (citing *Rompilla* v. *Beard*, 545 U.S. 374 (2005)); see also *id.* at 54.

Next, a majority of the panel (W. Fletcher and Friedland, JJ.) held that the no-prejudice decision by the state PCR judge was an objectively unreasonable application of *Strickland* under § 2254(d)(1), particularly

given the overwhelming evidence of Kayer's mental impairment, its causal connection to his crime, and the weight such evidence would have been given at sentencing under Arizona's pre-*Ring* regime. App. 58–71. In particular, the majority looked to Arizona Supreme Court decisions in which that court, on de novo review of death sentences imposed by trial courts, imposed life sentences based on mental impairment causally connected to the crimes notwithstanding the pecuniary-gain aggravator. *Id.* at 68–69 (discussing *State* v. *Rockwell*, 775 P.2d 1069 (Ariz. 1989) ("violent and unpredictable behavior" and alcoholism following motorcycle accident four years before crime); *State* v. *Stevens*, 764 P.2d 724 (Ariz. 1988) (mental impairment from "long-term use of drugs and alcohol")). The prior decision with the most "striking" "parallels" to Kayer's case was the Arizona Supreme Court's decision in *Brookover*, *id.* at 69–71, in which the defendant shot his supplier of 750 pounds of marijuana instead of paying for it, he previously had been convicted of a serious offense, he suffered from a mental impairment causally connected to his crime, and the Arizona Supreme Court held that the mix of aggravating and mitigating circumstances "mandated" "leniency" in the form of a life sentence instead of death. 601 P.2d at 1326.

Judge Owens dissented on the issue of prejudice, writing that the aggravating evidence was strong, and Kayer's mitigation evidence was "hardly overwhelming." Significantly, Judge Owens took the position that, instead of relying on *Brookover*, the majority should have analogized the facts to those in *Woodford* v. *Visciotti*, 537 U.S. 19 (2002) (per curiam), where this Court reversed the court of appeals for misapplying the AEDPA standard in a capital case prosecuted under California, rather than Arizona, law. App. 77–81.

Petitioner sought rehearing en banc. Petitioner's main argument was that Kayer waived his mitigation case by "obstructing" an investigation into it after the guilt phase of trial, followed by the contentions that Kayer's counsel was not deficient, and that the PCR court's determinations should be entitled to extra deference because the same judge who sentenced Kayer also reviewed his habeas petition. Only as an "additional point" did the state criticize the panel majority's reliance on *Brookover*. See Pet. for Reh'g En Banc at 13–15, ECF No. 106-1.

The Ninth Circuit denied the petition, over a dissent by Judge Bea, which was joined by eleven other judges. The dissent assumed the panel had correctly resolved the deficient-performance prong, but took issue with the panel's prejudice findings, accusing the panel of citing the right AEDPA standards while purportedly conducting a de novo review of the facts. App. 255–89. The dissent also, like Judge Owens, argued that the majority's focus on Arizona law was inapposite. *Id.* at 275–77. And the dissent concluded that other federal decisions, like this Court's decision in *Visciotti*, were sufficient "to demonstrate that fairminded jurists could disagree" about whether the state PCR court's prejudice determination was objectively unreasonable. *Id.* at 288.

The panel majority responded in a published concurrence in the denial of rehearing, App. 232–54, observing that the dissenting judges' criticisms were both "new" (insofar as they were not raised by petitioner) and "unfounded." *Id.* at 233. The majority rejected the argument that additional deference was owed to the PCR judge because he also made the initial sentencing decision, reasoning that the argument contravened *Strickland*'s admonition that the "assessment of prejudice . . . should not depend on the idiosyncracies of

the particular decisionmaker." *Id.* at 246–47 (quoting *Strickland*, 466 U.S. at 695).[2]

In response to the criticisms about relying on *Brookover*, the panel majority stressed that ineffective-assistance claims "are often—even usually—premised on the law of the particular state in which the petitioner was convicted[,] [such that] a federal habeas court determines prejudice by asking what the decision under *that state*[*'s*] law would likely have been if the claim had been made." App. 251 (emphasis added). For this reason, the majority also emphasized the unique nature of Arizona's sentencing regime at the time—including the fact that the Arizona Supreme Court reviewed de novo on direct appeal all sentencing decisions in capital cases—which meant that "[t]he only way to answer [whether there is a reasonable possibility of a different decision] is to compare the evidence . . . to the evidence in other cases reviewed by the Arizona Supreme Court on direct appeal." *Id.* at 249–50.

Finally, the panel majority noted that "this is not the usual case in which the evidence presented in the state PCR proceeding was merely cumulative of evidence already presented at the sentencing phase . . . . Instead, this is a case in which new evidence established for the first time the existence of a new and important mitigating factor." App. 253–54. It is also an "unusual" case, the majority explained, because "there is a state supreme court decision in a capital case with strikingly similar facts [namely, *Brookover*], in which the [state supreme court] held that a non-capital sentence was 'mandated.'" *Id.* at 254. The existence of such a

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[2] Petitioner has not renewed this claim in his petition for a writ of certiorari.

case coupled with the new and overwhelming mitigation evidence, made it "'objectively unreasonable' for the state PCR judge to conclude that there was 'no reasonable probability' of a different sentence." *Id.* The majority then closed by noting that it was "acutely aware of the deference required under AEDPA. Even after giving all appropriate deference to the decision of the PCR judge, [the majority] concluded that habeas relief is warranted." *Id.*

REASONS FOR DENYING THE PETITION

The question the petition presents does not merit review.

Petitioner seeks splitless, fact-bound error correction on issues it did not press before the lower courts—all for an "error" that, despite much bluster, petitioner never concretely articulates. Petitioner makes no effort to identify a single court of appeals or state court of last resort that has reached a different result on a similar fact pattern. Nor does petitioner present any on-point, contrary precedent of this Court that would approach a basis for summary reversal. The Ninth Circuit's rationale is not even debatable: It held only that, in Arizona's pre-*Ring* world, where a capital defendant with adequate counsel would have been able to establish with nonduplicative evidence a statutory mitigator that aligned his case with one in which the Arizona Supreme Court found a non-capital sentenced to have been "*mandated*," it cannot be reasonably denied that there was at least a "reasonable probability" of a different outcome. And even if that were a debatable holding, it would at most be a basis for granting plenary review on an otherwise certworthy question, not summary reversal on a plainly uncertworthy one. Certiorari should be denied.

I. NO TRADITIONAL CERTIORARI CRITERIA ARE PRESENTED.

Petitioner asks the Court to summarily reverse the Ninth Circuit on the ground that its fact-bound decision about prejudice at sentencing showed inadequate deference to the state courts under AEDPA. Neither certiorari nor the extraordinary relief of summary reversal is appropriate here.

1. As an initial matter, petitioner makes no pretense of attempting to satisfy the ordinary criteria for certiorari. For example, petitioner does not try to show a disagreement among the courts of appeals or state courts of last resort as to the existence of prejudice in the rare, peculiar-to-Arizona scenario here. In the period before *Ring*, 536 U.S. 584, capital sentencing in Arizona rested entirely with judges rather than juries, and was based on the weighing of aggravating and mitigating circumstances. See App. 235. Here, counsel's inarguably deficient performance precluded a sentencing judge (rather than a jury) from considering a statutory mitigating factor that, at the time, was required to be given more weight than non-statutory mitigators. See *id.*; accord *id.* at 261 (Bea, J., dissenting) (acknowledging "greater weight *due* to statutory factors" (emphasis added)). Petitioner does not purport to identify any other state or federal case involving such a fact pattern where the court ultimately found such ineffective assistance of counsel to be non-prejudicial. In fact, petitioner has not even pressed the one case, *Visciotti*, 537 U.S. 19, that Judge Owens suggested in his panel dissent might have been on point.[3] Nor does petitioner

[3] In his panel dissent, Judge Owens wrote that *Visciotti* was more similar to this case than *Brookover*. App. 79–81. As the

attempt to demonstrate that such factually and legally complex scenarios are common or recurring, or that review here could have any impact on the outcome of future cases—particularly nearly two decades after *Ring* forbade such sentencing, and *Rompilla* erased all doubt about a lawyer's duty to prepare for mitigation at the outset of capital cases. Instead, petitioner appends to the end of the petition a list of vague concerns about the decision's effects on "comity, finality, federalism, and the rule of law," Pet. 26, but does not even pretend to explain how this case implicates those concerns any more or less than other habeas cases.

In all, petitioner's focus on putative errors needing correction, while not even trying to fit this case into any of this Court's articulated bases for review, counsels strongly against a grant of certiorari. See Sup. Ct. R. 10 ("A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law."); Stephen M. Shapiro et al., *Supreme Court Practice* § 5.12(C)(3) (11th ed. 2019) ("[E]rror correction . . . is outside the mainstream of

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panel explained, *id.* at 71–74, however, the two cases arose in materially different contexts. *Visciotti* asked whether the defendant was prejudiced by the failure to introduce cumulative evidence to a California jury in the face of a reasoned decision by the California Supreme Court about the impact of that evidence. This case (and *Brookover*) dealt with the uniquely Arizona context of a judge weighing a nearly identical set of Arizona-specified statutory aggravating and mitigating factors.

More importantly, whether this case is more like *Visciotti* or *Brookver* misses the point. Knowing that *Brookover* "mandated" a non-capital sentence in Arizona on nearly identical facts, it is not reasonable to foreclose the possibility of a non-capital sentence in Kayer's case. Perhaps because of those distinctions, petitioner does not press *Visciotti* in support of summary reversal or certiorari.

the Court's functions and . . . not among the 'compelling reasons' . . . that govern the grant of certiorari . . . ."). Disagreement among the circuits is the principle justification for granting plenary review in this Court. See Sup. Ct. R. 10(a). But there is none here. And, absent a split, this Court typically does not grant certiorari for error correction. See *City & Cty. of San Francisco* v. *Sheehan*, 135 S. Ct. 1765, 1780 (2015) (Scalia, J., concurring in part and dissenting in part) ("[W]e are not, and for well over a century have not been, a court of error correction."); *Kyles* v. *Whitley*, 514 U.S. 419, 460 (1995) (Scalia, J., dissenting) (noting that a fact-bound case in which the court of appeals unquestionably stated the correct rule of law is "the type of case in which we are *most* inclined to deny certiorari"); *United States* v. *Johnston*, 268 U.S. 220, 227 (1925) ("We do not grant a certiorari to review evidence and discuss specific facts."). Certiorari is all the more inappropriate here given petitioner's failure to even advance its current arguments before the Ninth Circuit, depriving that court the chance to fully address the arguments made here. Cf. *Cutter* v. *Wilkinson*, 544 U.S. 709, 718 n.7 (2005) ("[W]e are a court of review, not of first view, we do not consider them here."); *United States* v. *Williams*, 504 U.S. 36, 41 (1992) (explaining the "traditional rule" precluding certiorari when "the question presented was not pressed or passed upon below").

2. The absence of an identified split or precedential effect also counsels strongly against summary reversal, because it demonstrates that the Ninth Circuit's decision is neither an outlier nor contrary to this Court's AEDPA precedents. Those precedents in no way undermine the court of appeals' holding here that the state PCR court unreasonably applied *Strickland*'s

prejudice standard in the face of such powerful, newly presented mitigating evidence.

Indeed, this case is nothing like the series of summary reversal cases referenced in the petition, as there is no "fundamental error[] that this Court has repeatedly admonished courts to avoid." *Sexton* v. *Beaudreaux*, 138 S. Ct. 2555, 2560 (2018) (per curiam); see *id.* (summary reversal unwarranted for decisions that are "just wrong"). Not only do summary reversals have limited precedential value in the first place, see *Gray* v. *Mississippi*, 481 U.S. 648, 651 n.1 (1987) (observing that "summary action" in this Court without merits briefing or oral argument "does not have the same precedential effect as does a case decided upon full briefing and argument" (citing *Edelman* v. *Jordan*, 415 U.S. 651, 671 (1974)), but the cases petitioner cites involve the distinct problem of a federal court blatantly failing to apply AEDPA deference to discretionary determinations by state courts—in particular, on the issue of counsel's *performance*, rather than prejudice—and thus are inapposite here, see *Renico* v. *Lett*, 559 U.S. 766, 776 (2010) ("'[T]he more general the rule' . . . 'the more leeway [state] courts have . . ..'" (second alteration in original) (quoting *Yarborough* v. *Alvarado*, 541 U.S. 652, 664 (2004))).

Beaudreaux, for instance, involved the Ninth Circuit's "*de novo* analysis" of a lawyer's allegedly deficient failure to move to suppress certain eyewitness evidence. 138 S. Ct. at 2558. In holding that a fair-minded jurist could conclude that counsel's performance was not deficient, the Court emphasized that "deference to the state court should have been near its apex . . . [for] a *Strickland* [performance] claim based on a motion that turns on general, fact-driven standards such as suggestiveness and reliability." *Id.* at 2560.

Harrington v. *Richter*, 562 U.S. 86 (2011) is similarly inapposite. There, the defendant claimed his trial counsel was ineffective for failing to obtain and present expert testimony about blood spatter evidence. *Id.* at 96. But, this Court stressed, numerous explanations supported counsel's decision not to call such an expert, including because it was questionable whether such testimony would help the defendant, leaving "no basis to rule that the state court's determination [of adequate performance] was unreasonable." *Id.* at 109. In addition, "[t]here was ample basis for the California Supreme Court to think any real possibility of Richter's being acquitted was eclipsed by the remaining evidence pointing to guilt." *Id.* at 113.

The non-*Strickland* cases petitioner cites are even further afield. In *Kernan* v. *Cuero*, 138 S. Ct. 4 (2017) (per curiam), the Court summarily reversed the Ninth Circuit's grant of habeas relief on a claim seeking specific performance of a plea deal. The Court explained that the state court's decision not to enforce that plea deal was quintessentially a determination of a remedy that "must be left 'to the discretion of the state court,'" *id.* at 8, and, thus, could not be contrary to clearly established federal law. Nor is this case anything like *Lopez* v. *Smith*, 135 S. Ct. 1 (2014) (per curiam), where "substantial incriminating evidence" supported the jury's finding that the defendant was guilty of murder, *id.* at 2, the state court found that the defendant was "adequately notified" of the charges against him, and the Ninth Circuit "pointed to no case of" this Court that "clearly establishes that a prosecutor's focus on one theory of liability at trial can render earlier notice of another theory of liability inadequate," *id.* at 3–4.

Here, unlike in those cases, the Ninth Circuit did not ignore binding precedent, fail to defer to a state court's exercise of discretion, or trample a jury's weighing of

guilt. Contra *Cavazos* v. *Smith*, 565 U.S. 1, 2 (2011) (per curiam) ("The Court of Appeals . . . substituted its judgment for that of a California jury on the question whether the prosecution's or the defense's expert witnesses more persuasively explained the cause of a death."). The *Strickland* standard for mitigation is plain and uncontroversial: counsel must begin preparing for the penalty phase as soon as they are appointed. *Rompilla*, 545 U.S. at 387. And there is no dispute that Kayer's counsel abjectly failed to prepare for the penalty phase.

On the issue of prejudice, Arizona's sentencing regime at the time of Kayer's trial likewise involved minimal discretion—judges, not juries, imposed capital sentences, and they did so by balancing aggravating and mitigating circumstances, "with greater weight *due* to statutory factors." App. 261 (Bea, J., dissenting). In that context, it does not matter, as petitioner urges, that a "jury" might have disregarded evidence of Kayer's mental impairment, Pet. 25, or that some federal judges "might think that evidence the defendant drinks and gambles to excess would cast his character in a particularly *un*favorable light," App. 284 (Bea, J., dissenting). Here, there *was no jury* who would have heard this mitigation evidence, and the sentencing judge who did hear it was not free to ignore evidence as he saw fit. See Ariz. Rev. Stat. Ann. § 13-703(G) (1993) (providing that "[m]itigating circumstances *shall* be" the list of specified factors including mental impairment (emphasis added)). Rather, Arizona law required the judge to give Kayer's proof of mental impairment the substantial weight it deserved as a statutory mitigator—with a causal nexus to the crime, no less—regardless whether the impairment was caused by drinking or gambling or some other factor the sentencing judge believed to be unseemly. See

id. § 13-703(G)(1) (providing statutory mitigator when "capacity to appreciate the wrongfulness of [] conduct . . . was significantly impaired" without limiting what may cause that impairment); *Stevens*, 764 P.2d at 727–29 (holding that impairment from "longterm use of drugs and alcohol" constituted a mitigating circumstance under § 13-703(G)(1)). Thus, in those circumstances, the Ninth Circuit's evaluation of prejudice under Arizona's idiosyncratic sentencing regime was unobjectionable, and did not involve any of the second-guessing of discretionary state-court judgment calls that has led this this Court to summarily reverse in other cases.

Ultimately, petitioner's presentation is indistinguishable from an appellant's opening brief on direct appeal—a mere complaint about asserted case- and fact-specific error with which he (as the appellant) disagrees and nothing more. Thus, even if the court of appeals' decision were debatable or ultimately incorrect (and, as explained below, it is not), that alone is not a basis for a grant of certiorari or summary reversal.

II. EVEN IF THIS COURT WERE INCLINED TO ENGAGE IN ERROR CORRECTION, THERE IS NO ERROR TO CORRECT.

In any event, the Ninth Circuit did not err in finding that the only reasonable conclusion in this case was that *Strickland*'s prejudice prong had been met. Petitioner's contrary arguments rely on vague and haphazard citations to this Court's decisions discussing applications of *Strickland* in the AEDPA context on the issue of counsel's *performance*—the issue that is not even disputed here. None of these decisions remotely suggests that the state courts' application of *Strickland*'s standard regarding *prejudice* was reasonable here. Nor does petitioner cite a single case from this

Court disapproving of looking to state-court practice to assess prejudice, as the Ninth Circuit did here.

1. Petitioner's repeated argument that the Ninth Circuit erred by somehow failing to "defer" to the state court and by engaging in impermissible "de novo [fact] finding," Pet. 16, is without merit, and stems from petitioner's misguided conflating of *Strickland* performance cases with *Strickland* prejudice cases. On the question of *performance*, federal courts exercising AEDPA review must layer their deference to state courts on top of *Strickland*'s deference to the original attorney, given the "strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Strickland*, 466 U.S. at 689; see *Cullen* v. *Pinholster*, 563 U.S. 170, 190 (2011) (citing this "strong presumption" as reason for "doubly deferential" standard when AEDPA deference also applies); see also *Richter*, 562 U.S. at 105 ("When [28 U.S.C.] §2254(d) applies, the question is not whether counsel's actions were reasonable. In short, the question is whether there is any reasonable argument that counsel satisfied *Strickland*'s deferential standard."). *Strickland* evaluates the attorney's conduct deferentially, and then AEDPA does the same for the state court's judgment about that conduct. Because reversal entails a rejection of one decisionmaker's (the state court's) deferential review of *another* decisionmaker's (the original attorney's) strategic choices, AEDPA analysis of ineffective assistance claims is correctly described as requiring "doubly deferential" review.

Here, however, because there is no question as to the deficient performance of Kayer's counsel, the double-deference analysis petitioner cites is altogether inapt. The sole remaining question is whether that deficient performance was prejudicial. There is only one decisionmaker that receives deferential review on that

question—the state PCR judge—and under Arizona's peculiar sentencing regime at the time, that decisionmaker's discretion was circumscribed by statute—and by the controlling state supreme court decisions interpreting that statute.

None of this is to deny that AEDPA requires considerable deference to state-court determinations under *Strickland*'s general prejudice standard. But the Ninth Circuit recognized as much, stating correctly that it "must decide whether 'it was objectively unreasonable [for the state PCR court] to conclude there was no reasonable probability the sentence would have been different if the sentencing judge . . . had heard the significant mitigation evidence that [Kayer's] counsel neither uncovered nor presented." App. 62–63 (alterations in original) (quoting *Porter* v. *McCollum*, 558 U.S. 30, 31 (2009) (per curiam)).[4] In light of the substantial deference owed to the state courts, the Ninth Circuit then concluded only that the state

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[4] The Ninth Circuit's reference to *Porter* was especially apt. Indeed, if any decision of this Court is materially similar to this one, it is *Porter*. In *Porter*, this Court unanimously held that, even applying deferential AEDPA review, the state PCR court erred by concluding that "there was no reasonable probability [Porter's capital] sentence would have been different if the sentencing judge and jury had heard the significant mitigation evidence that Porter's counsel neither uncovered nor presented." 558 U.S. at 31. There, much like here, counsel had failed to uncover significant mitigating evidence, leaving the judge and jury at sentencing with "almost nothing that would humanize Porter or allow them to accurately gauge his moral culpability." *Id.* at 41. And this Court recognized that if the sentencing judge and jury had "been able to place [the newly presented mitigating evidence] 'on the mitigating side of the scale,' and appropriately reduced the ballast on the aggravating side of the scale . . . there is clearly a reasonable probability that [they] 'would have struck a different balance.'" *Id.* at 42 (quoting *Wiggins* v. *Smith*, 539 U.S. 510, 537 (2003)). The same is true here.

court's decision fell outside the broad range of reasonable determinations, because the state court failed to take into account the effect that a strong statutory mitigator would have had on Kayer's sentencing, particularly in light of *Brookover*.

That fact-bound determination was correct under the AEDPA standard, and as the Ninth Circuit explained, did not amount to second-guessing the state court's conclusions on anything approaching de novo review. See App. 70–71 ("We need not decide that leniency was 'mandated' and that the state PCR court was unreasonable in concluding otherwise. We need only decide whether 'it was objectively unreasonable' for the state court to conclude that there was 'no reasonable probability' that Kayer's sentence would have been different if Kayer's attorneys had presented to the sentencing court the mitigating evidence later presented to the PCR court." (quoting *Porter*, 558 U.S. at 31)). Rather, in the face of this type of mitigating evidence, courts have routinely found that state courts unreasonably determined that there was no probability of a different sentence based on the new evidence. See, *e.g.*, *Williams* v. *Taylor*, 529 U.S. 362, 370, 397–98 (2000); *Bemore* v. *Chappell*, 788 F.3d 1151, 1171, 1174–76 (9th Cir. 2015); *Debruce* v. *Comm'r*, 758 F.3d 1263, 1275–79 (11th Cir. 2014); *Cauthern* v. *Colson*, 736 F.3d 465, 486–87 (6th Cir. 2013); *Ferrell* v. *Hall*, 640 F.3d 1199, 1234–36 (11th Cir. 2011); *Griffin* v. *Pierce*, 622 F.3d 831, 844–46 (7th Cir. 2010); *Gray* v. *Branker*, 529 F.3d 220, 234–40 (4th Cir. 2008); *Jells* v. *Mitchell*, 538 F.3d 478, 498–501 (6th Cir. 2008).

In short, while petitioner insists that "it is not apparent how the [panel majority's] analysis would have been any different without AEDPA," Pet. 3 (alteration in original) (quoting *Richter*, 562 U.S. at 101), the petition nowhere explains what a "more deferential"

opinion would have looked like in evaluating the decision of a PCR judge who was supposed to weigh specific mitigators and aggravators according to state judicial precedent.

2. Aside from the imagined lack of deference, the principal "error" petitioner and amici advance is the Ninth Circuit's reliance on *Brookover* to support its prejudice analysis. Pet. 3, 18 (calling it a "stunning error"); Idaho Br. 12 (arguing that the Ninth Circuit's "*Brookover*-bound journey into state law turned deference inside out"). But that was neither erroneous nor controversial; nor does it "shift[] the focus from clearly established federal law" to state law, as they claim. Pet. 20. Rather, as the panel majority explained, given that the Arizona Supreme Court reviewed de novo on direct appeal all sentencing decisions in capital cases, "the prejudice question is necessarily the following: Is there a reasonable possibility that there would have been a different decision by the Arizona Supreme Court if that court had seen the newly presented evidence on direct appeal?" App. 249–50. And, in the context of this case and Arizona's judicial sentencing regime at the time, "[t]he *only* way to answer to that question is to compare the evidence—including the newly presented evidence—to the evidence in other cases reviewed by the Arizona Supreme Court on direct appeal." *Id.* at 250 (emphasis added).

The petition accuses the panel of "misconstruing Arizona law" in its understanding of the Arizona Supreme Court's role in reviewing death sentences de novo. Pet. 16. According to petitioner, the "Arizona Supreme Court act[s] as an appellate court applying a de novo standard of review, not as a sentencer." *Id.* at 21 (emphasis omitted). That is simply untrue. As the Arizona Supreme Court has explained in an oft-repeated passage:

> The question before us is not whether the trial court properly imposed the death penalty, but whether, based upon the record before us, we believe that the death penalty should be imposed. A finding merely that the imposition of the death penalty by the trial court was "factually supported" or "justified by the evidence" is not the separate and independent judgment by this court that the death penalty warrants.

State v. *Watson*, 628 P.2d 943, 946 (Ariz. 1981); see also, *e.g.*, *State* v. *Trostle*, 951 P.2d 869, 888 (Ariz. 1997) (reciting *Watson* and reducing sentence to life imprisonment).

But even if true, that is a distinction without a difference here, since the Arizona Supreme Court inarguably reviewed each death sentence on direct appeal and independently reweighed aggravating and mitigating circumstances under a de novo standard—and not infrequently reversed trial courts' imposition of the death penalty, as in *Brookover*. See also *Trostle*, 951 P.2d at 888; *State* v. *Fierro*, 804 P.2d 72, 88–90 (Ariz. 1990); *State* v. *Marlow*, 786 P.2d 395, 402–03 (Ariz. 1989); *Rockwell*, 775 P.2d at 1078–80; *State* v. *Johnson*, 710 P.2d 1050, 1055–56 (Ariz. 1985); *State* v. *McDaniel*, 665 P.2d 70, 82–83 (Ariz. 1983); *State* v. *Graham*, 660 P.2d 460, 463–64 (Ariz. 1983); *State* v. *Valencia*, 645 P.2d 239, 241–42 (Ariz. 1982); *Watson*, 628 P.2d at 946–47. In any event, an immaterial misunderstanding of an academic point of state law quintessentially does not warrant this Court's review. *Leavitt* v. *Jane L.*, 518 U.S. 137, 144 (1996) (per curiam) ("[W]e do not normally grant petitions for certiorari solely to review what purports to be a[] [mis]application of state law . . . .").

a. In looking to such cases, *Brookover* is meaningfully indistinguishable from this case. Brookover had

agreed to buy 750 pounds of marijuana from the victim. At the exchange, Brookover shot the victim to avoid paying. "The victim fell to the floor moaning and asked [Brookover] what he had done. [Brookover] said 'Don't worry . . . it will be over soon' and shot him once more in the back," killing him. 601 P.2d at 1323 (omission in original). As in Kayer's case, the court rejected the argument that the murder had been committed in "an 'especially heinous, cruel and depraved manner.'" *Id.* at 1325. And, again as in Kayer's case, the court found the statutory aggravator that Brookover had previously been convicted of an offense "for which . . . a sentence of life imprisonment or death was imposable." *Id.* at 1323. The one mitigating circumstance was mental impairment. The Arizona Supreme Court set aside the death penalty that had been imposed by the trial court:

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

Id. at 1326 (emphasis added).

As the panel majority explained, "[t]he parallels between *Brookover* and Kayer's case are striking." App. 70. "In neither case was the killing committed in 'an especially heinous, cruel or depraved manner.' In both cases, the one mitigating circumstance was the statutory mitigator of mental impairment. In both cases, the killings were for pecuniary gain. . . . Finally, in both cases, there was a statutory aggravator for prior conviction of a serious offense." *Id.* With those facts, all of which track Kayer's case, "the Arizona Supreme

Court sentenced Brookover to life imprisonment rather than death[,] [holding] that leniency was 'mandated.'" *Id.* (citing *Brookover*, 601 P.2d at 1326).

b. On the substance, petitioner has no real way to distinguish *Brookover*, though he tries half-heartedly at the end of his petition. See Pet. 22. Petitioner first argues that pecuniary gain was not a statutory aggravator in *Brookover*, leaving Kayer with more aggravators. *Id.* That is true, but misleading. As the panel majority explained, pecuniary gain had not yet been applied as a statutory aggravator beyond killings for hire when Brookover was sentence; however, just one year later the Arizona Supreme Court recognized that the aggravator covered any killing for pecuniary gain, which Brookover's certainly was. See *State* v. *Clark*, 616 P.2d 888, 896 (Ariz. 1980) ("[I]f the receipt of money is established as a cause of the murder then the fifth aggravating circumstance would have been established."); *State* v. *Schad*, 788 P.2d 1162, 1170–71 (Ariz. 1989) (applying *Clark* to a murder that took place in 1978, a year before *Brookover*: "*Clark* . . . merely recognized the pre-existing scope of present law"), *aff'd*, 501 U.S. 624 (1991).

Moreover, insofar as the aggravating factors in *Brookover* were weaker, that is plainly more than offset for two reasons. First, as the panel majority carefully explained, the prior conviction aggravator for Brookover was necessarily stronger than for Kayer. This is because when Brookover was sentenced, the statutory aggravator required that the conviction have been for a crime for which the death penalty or life imprisonment could be imposed. But in Kayer's case, the statutory aggravator required only a conviction for a "serious crime," which in Kayer's case was first-degree

burglary.[5] See App. 70. Thus, Kayer would not even have qualified for the prior conviction aggravator when Brookover was sentenced. Second, whereas Brookover had only one mitigator—mental impairment—Kayer had two: mental impairment *and* significance in the life of his disabled child. If anything, then, balancing the mitigating and aggravating factors weighs even more heavily in Kayer's favor than in Brookover's.

Petitioner's only other argument to distinguish *Brookover* is that the reason for Brookover's mental impairment was a permanent condition caused by a "brain lesion," instead of by, in Kayer's case, addictions to gambling and alcohol. Pet. 22 (misleadingly describing Kayer as "generally normal functioning"). That argument ignores Kayer's "severe mental impairment" when he was discharged from the Navy as a very young man; his two stays in VA hospitals, resulting in a bipolar diagnosis and lithium prescription; his hearing voices, as described by his aunt; his delusional beliefs, including the belief that he came from another planet; and the extensive mental illness in his family. More importantly, there was no distinction in Arizona law at the time of *Brookover* or at Kayer's sentencing based on the cause of the impairment—the only relevant fact is the impairment itself. See Ariz. Rev. Stat. Ann. § 13-703(G)(1) (1993) (providing a mitigator when "capacity to appreciate the wrongfulness of [] conduct . . . was significantly impaired," without limiting what may cause that impairment). In fact, courts routinely found the mitigator to have been established due to substance abuse alone. *State* v. *Medina*, 975

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[5] Even then, at the time that Kayer was sentenced, a prior first-degree burglary conviction was "at the less serious end of the ['serious offense'] spectrum" under the aggravator. *See* Ariz. Rev. Stat. Ann. § 13-703(F)(2) (1993); *see also* App. 60.

P.2d 94, 106 (Ariz. 1999) ("the influence of alcohol, marijuana and paint fumes at the time of the murder" established "a significantly impaired capacity to conform his conduct to the law's requirements" and constituted a mitigating circumstance under § 13-703(G)(1)); *State* v. *Rossi*, 830 P.2d 797, 799 (Ariz. 1992) ("defendant's cocaine addiction significantly impaired his capacity"); *Stevens*, 764 P.2d at 727–29 (holding "capacity to appreciate the wrongfulness of his conduct had been impaired by his longterm use of drugs and alcohol" and constituted a mitigating circumstance under § 13-703(G)(1)).

Unable to distinguish *Brookover*, petitioner is left with the argument that federal habeas courts should simply *ignore* apposite state case law like *Brookover*. Pet. 18–20. Such an approach to federal habeas review is illogical and unworkable, as an understanding of state law is critical to assessing prejudice. As the panel majority underscored and other courts of appeals expressly recognize, ineffective assistance claims "are often—even usually—premised on the law of the particularly state in which the petitioner was convicted." App. 251. "If an attorney fails to make what would have been a winning claim under state law, a federal habeas court determines prejudice by asking what the decision under that state law would likely have been if the claim had been made." *Id.*; see also, *e.g.*, *Jones* v. *Zatecky*, 917 F.3d 578, 581–83 (7th Cir. 2019) (finding that "[t]he facts here speak for themselves" in establishing prejudice where counsel failed to seek dismissal of a belatedly added charge "account[ing] for the lion's share of [the petitioner's] sentence" based on a state statute and state Supreme Court decision establishing a "reasonable probability" of dismissal, notwithstanding the state PCR court's rejection of the claim).

In evaluating that prejudice, federal courts do not and cannot reasonably "look to the law of another state or to federal law when the state court would never have applied that law." App. 251. Thus, in this case, the prejudice question is inextricably linked to considerations of state law—*e.g.*, whether facts were found by a judge or jury, what statutory mitigators and aggravators existed, how they were defined, and how they were supposed to be weighed. See *id.* ("The IAC claim is based on what the Arizona court would have done under Arizona law had the claim been presented."). And to evaluate how an objective Arizona state judge, bound by precedent, would have weighed specific mitigators and aggravators, there is no better source than a decision by the Arizona Supreme Court dictating how those factors should be weighed. See *Young* v. *Beck*, 251 P.3d 380, 385 (Ariz. 2011) ("[S]tare decisis commands that 'precedents of the court should not lightly be overruled,' and mere disagreement with those who preceded us is not enough." (quoting *State* v. *Salazar*, 844 P.2d 566, 583 (1992))).[6]

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[6] Petitioner also suggests that it was wrong for the court of appeals to rely on *Brookover* when Kayer did not do so in his merits briefing, arguing that to do so is to "invent[] arguments to undermine a state-court decision." Pet. 19. Not so. The panel's role was to evaluate what the Arizona courts would have done with Kayer's evidence of mental impairment, and *Brookover* provided the clearest (though not only) answer to that question. *E.g.*, *State* v. *Mauro*, 766 P.2d 59, 81 (Ariz. 1988) (reversing death sentence after finding Ariz. Rev. Stat. Ann. § 13-703(G)(1) proven because of the defendant's bipolar disorder). To ignore apposite judicial precedent because it was not cited by a party would lead to the same unworkable and illogical results discussed above. *E.g.*, *Kamen* v. *Kemper Fin. Servs., Inc.*, 500 U.S. 90, 99 (1991) ("When an issue or claim is properly before the court, the court is not limited to the particular legal theories advanced by the parties, but rather retains the independent power to identify and apply the

Ultimately, the Ninth Circuit's determination was a correct application of AEDPA deference; certainly it was not an out-of-the-mainstream application that would in any way justify a request for extraordinary relief like summary reversal. And given petitioner's failure to even attempt to show the existence of any issue warranting plenary review, certiorari should be denied altogether.

CONCLUSION

The petition should be denied.

Respectfully submitted,

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proper construction of governing law."); *de Fontbrune* v. *Wofsy*, 838 F.3d 992, 999 (9th Cir. 2016) ("[J]udges are free to undertake independent *legal* research beyond the parties' submissions."); *Hampton* v. *Wyant*, 296 F.3d 560, 565 (7th Cir. 2002) (Easterbrook, J.) ("There is no federal entitlement to have a case decided strictly on the basis of precedent cited to the tribunal.").