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

REPLY TO BRIEF IN OPPOSITION

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REPLY BRIEF FOR PETITIONER

The Ninth Circuit panel majority defied the Antiterrorism and Effective Death Penalty Act (AEDPA) in the same manner this Court condemned in *Sexton v. Beaudreaux*, 138 S. Ct. 2555 (2018), and *Harrington v. Richter*, 562 U.S. 86 (2011). The majority conducted a de novo review, in the process contorting Arizona law by using an unrelated, 40-year-old case involving dissimilar facts and aggravation to dictate the outcome of Kayer's sentencing-ineffectiveness claim. Ultimately, the majority granted relief even though the state court's finding that Kayer had failed to prove prejudice under *Strickland v. Washington*, 466 U.S. 668 (1984), was—at a minimum—subject to fairminded disagreement. *See Richter*, 562 U.S. at 101–02.

Kayer minimizes the panel decision's significance and the need for review, even though twelve Ninth Circuit judges and eight states have compellingly explained the need for the Court to speak here. *See* App. 289 (Bea, J., dissenting) ("[I]t is likely time for the Supreme Court to remind us of AEDPA's requirements."); Idaho Amicus (decision creates issues of nationwide concern and impedes the very interests AEDPA was meant to protect); *see also Richter*, 562 U.S. at 103.

Kayer's remaining arguments do not militate against review but, instead, bring the panel majority's missteps into even sharper focus. Kayer attempts to confine *Richter* and *Beaudreaux* to cases involving *Strickland*'s deficient-performance prong, but he misapprehends the scope of those cases and ignores this Court's broad application of *Richter* outside the ineffective-assistance context. Kayer de-

fends the panel majority's reliance on an unrelated and antiquated Arizona case—a mode of analysis "that is quite literally unprecedented," App. 277 (Bea, J., dissenting)—but his mistake-laden discussion of Arizona law adds to the confusion already created by the panel majority. This confusion, in turn, highlights the negative consequences of departing from AEDPA's reasonableness standard and binding the *Strickland* inquiry to a federal court's ill-informed interpretation of state law.

This case calls for summary reversal from this Court. This Court's jurisprudence is replete with summary reversals for similar failures to comply with AEDPA. *See, e.g.*, *Sexton*, 138 S. Ct. at 2560; *Shoop v. Hill*, 139 S. Ct. 504 (2019) (per curiam); *Kernan v. Cuero*, 138 S. Ct. 4 (2017) (per curiam); *Lopez v. Smith*, 574 U.S. 1 (2014) (per curiam). And, as Justice Scalia so well explained in *Cash v. Maxwell*, keeping a watchful eye on cases like this out of the Ninth Circuit is critical, even if it requires what might otherwise look like mere error correction:

> The only way this Court can ensure observance of Congress's abridgment of their habeas power is to perform the unaccustomed task of reviewing utterly fact-bound decisions that present no disputed issues of law. We have often not shrunk from that task, which we have found particularly needful with regard to decisions of the Ninth Circuit.

Cash v. Maxwell, 132 S. Ct. 611, 616–17 (2012) (Scalia, J., dissenting from denial of certiorari) (collecting cases).

I. The Ninth Circuit's Most Recent AEDPA Evasion Is Worthy of the Court's Attention

AEDPA is not a discretionary guideline; it is a substantive and "important limitation[]" on a federal court's power to grant habeas relief. *Hill*, 139 S. Ct. at 506. Yet, the panel majority failed to "determine what arguments or theories supported or … could have supported" the state court's finding of no *Strickland* prejudice, and then failed to "ask whether it is possible fairminded jurists could disagree that those arguments or theories are inconsistent with the holding in a prior decision of this Court." *Richter*, 562 U.S. at 102. In other words, the majority failed to answer "the only question that matters under [28 U.S.C.] § 2254(d)(1)." *Id.* (quotations omitted).[1]

A. The Panel Majority Inverted the Mode of Analysis This Court Articulated in *Richter*

The Petition establishes the striking similarities between *Richter*, *Beaudreaux*, and the decision here. Pet. 17–22. In each case, the Ninth Circuit failed to consider arguments or theories supporting the state court's ruling and instead found the state court's decision unreasonable merely because the Ninth Circuit reached a different conclusion on de novo review. *See Beaudreaux*, 138 S. Ct. 2558–60; *Richter*, 562 U.S. at 100–04. In both *Beaudreaux* and this case, the Ninth Circuit granted relief based on arguments

[1] Kayer complains (at 2, 13) that petitioner did not "articulat[e] what exactly the purported error was." But the petition (at 16-26) was clear: the majority failed to apply AEDPA deference, instead conducting a de novo review tainted by its misunderstanding of Arizona law and using that review's results to proclaim the state court's contrary decision unreasonable, even though proper AEDPA review would have produced no relief.

never presented in state court. 138 S. Ct. at 2560. And in all three cases, there was ample room for fairminded jurists to disagree whether the state-court decisions were consistent with this Court's precedent, thus proving the decisions' reasonableness and precluding habeas relief under AEDPA. Pet. 23–25; *Beaudreaux*, 138 S. Ct. at 2559–60; *Richter*, 562 U.S. at 104–13.

The AEDPA methodology this Court articulated in *Richter* and applied in *Beaudreaux* is not limited to *Strickland*'s deficient-performance prong (which receives "double deference" under *Strickland* and AEDPA, *see Richter*, 562 U.S. at 105) or even to the ineffective-assistance context. *See* BIO 1, 17–18, 21–22; *see also Hill*, 139 S. Ct. at 506 (citing *Richter* standard in resolving intellectual-disability claim); *Dunn v. Madison*, 138 S. Ct. 9, 11 (2017) (applying *Richter* standard to competency-to-be-executed claim).[2] Rather, this Court's recognition in *Richter* of the "only question that matters under § 2254(d)(1)," and its directive that courts deny habeas relief if a state-court decision is arguably correct under *any* theory, was a construction of AEDPA itself, untethered to either prong of *Strickland*. *Richter*, 562 U.S. at 100–04. And in fact, this Court in *Richter* addressed the prejudice prong under the standard it had pronounced. *Id.* at 111–13.

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[2] In addition to trying to ward off the import of *Richter* and *Beaudreaux,* Kayer (at 18) works to distinguish *Cuero* and *Smith*—each cited in the petition and herein as examples of this Court's summary reversals in AEDPA cases. But the specific constitutional right at issue in these cases is beside the point, which is that this Court specifically and decisively intervened to rectify the court of appeals' AEDPA violations.

This Court did not reach *Strickland*'s prejudice prong in *Beaudreaux*, but that does not make *Beaudreaux* irrelevant. *Contra* BIO 17. This Court in *Beaudreaux* expressly applied § 2254(d)(1), and double deference was not essential to its decision; in fact, this Court did not mention double deference until the second part of its opinion, after it had already found an AEDPA violation, when it chastised the Ninth Circuit for its repeated errors. *Beaudreaux*, 138 S. Ct. at 2558–62 & n.3. The critical problem in *Beaudreaux*—as here—was the Ninth Circuit's inversion of the *Richter* standard that is applicable to all AEDPA-governed claims.[3]

B. The Panel Majority Allowed Its Incorrect Interpretation of Arizona Law to Dictate the Outcome of *Strickland*'s Prejudice Prong

Strickland's prejudice prong turns on whether, in light of the aggravation weighed against the totality of the available mitigation, there is a reasonable probability that the sentencer would have determined that a life sentence was warranted. *Cullen v. Pinholster*, 563 U.S. 170, 198 (2011). This assessment proceeds from a reasonable sentencer's perspective and does not turn on the particular decisionmaker's idiosyncracies. *Strickland*, 466 U.S. at 695.

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[3] Kayer also relies (at 22 n.4) on *Porter v. McCollum*, 558 U.S. 30 (2009), for the proposition that the omitted humanizing evidence proves prejudice and the state court was unreasonable for concluding otherwise. But in *Porter*, the state courts, in resolving the *Strickland* claim, had failed entirely to consider certain categories of mitigation, rendering the prejudice assessment unreasonable. *Id.* at 40–44. There is no allegation of that here.

Here, however, the panel majority—beginning with the erroneous assumption that the Arizona Supreme Court is the ultimate capital sentencer in Arizona—not only considered that court's subjective "sentencing" trends, as the majority inferred them from *State v. Brookover*, 601 P.2d 1322 (Ariz. 1979), but it also regarded them as dispositive. And to make matters worse, the majority did so despite the stark differences between Kayer's case and *Brookover*. While a federal habeas court should not necessarily ignore state law, a post-conviction court's perceived misapplication of state law should not dictate the outcome of an AEDPA-governed review of a *Strickland* claim.[4]

Kayer tries but fails to defend the majority's analysis. He first contends that the Arizona Supreme Court is, in fact, the ultimate sentencer, citing a passage from *State v. Watson*, 628 P.2d 943, 946 (Ariz. 1981), that does no more than summarize the court's de novo appellate review. BIO 24–25. He does not acknowledge the contravening authority cited in the Petition, which establishes that the Arizona Supreme Court on independent review acts not as a sentencer but as an appellate court empowered with de novo review. *See* Pet. 21.[5]

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[4] Kayer (at 16) rebukes Petitioner for failing "to even advance [his] current arguments before the Ninth Circuit." But even setting aside other points, Kayer admits that Petitioner argued in the rehearing petition that the majority's reliance on *Brookover* was misplaced and *Brookover* was inapposite. *See* BIO 11; C.A. Dkt. 106 at 13–15.

[5] Kayer is equally incorrect that under Arizona law, statutory mitigation is automatically entitled to more weight than non-statutory mitigation. *See State v. Gallegos*, 178 Ariz. 1, 23 (1994) ("[A] trial court has discretion in determining how much weight to give each mitigating circumstance."). *Gallegos* also

Kayer's contention that Petitioner draws "a distinction without a difference" concerning whether the state supreme court is a sentencer magnifies one of the biggest problems with the majority's analysis. As the Petition highlighted already, by focusing on the outcome of appellate review, the majority effectively presumed that the outcome of the trial sentencing proceeding would have been the same notwithstanding the additional mitigation (the Arizona Supreme Court would only have conducted an independent review if the trial court imposed death). *See* Pet. 21–22. In other words, the majority presumed a lack of prejudice.

Kayer further proclaims this case an outlier because it arises from Arizona's long-repealed judge-sentencing procedure, and he proposes that the error will not recur. BIO 13, 15. But although independent review has been replaced by abuse-of-discretion review, *see* A.R.S. § 13–756, the former still applies to homicides committed before August 1, 2002. *See, e.g.*, *State v. Morris*, 160 P.3d 203, 219 (Ariz. 2007). Thus, the panel majority's erroneous assumption that the Arizona Supreme Court is the final sentencer, and its directive that federal habeas courts look to unrelated state direct-appeal decisions as dispositive of the *Strickland* prejudice inquiry, is quite capable of affecting other cases (just consider that the murder here happened over 25 years ago). And as previously stated, the misapplication of AEDPA itself is an issue of recurring concern.

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refutes Kayer's belief that a sentencing judge had "minimal discretion" how to weigh mitigation. BIO 19.

Kayer next asserts that *Brookover* is "materially indistinguishable" from his case and that the panel majority correctly granted relief because *Brookover* "mandated leniency." BIO 13, 15, 26. According to Kayer, it does not matter that his case involved two aggravating factors, including pecuniary gain (*see* A.R.S. § 13–703(F)(5) (1994)), while *Brookover* involved only one. *See* BIO 25–27. After all, he reasons, the defendant in *Brookover* was also motivated by pecuniary gain, and that aggravating factor was added to the statute the year after *Brookover*. But it is beyond dispute that, while pecuniary gain may have been part of the circumstances in *Brookover*, it was not an aggravating factor and thus not entitled to aggravating *weight*. Accordingly, Kayer had two factors on the aggravating side of his ledger while the defendant in *Brookover* had one.[6]

Nor is the Arizona Supreme Court's statement that leniency was "mandated" in *Brookover* relevant to Kayer's case. 601 P.2d at 1326; *see* BIO 10, 12–13, 15, 26–27. Kayer divorces this language from its context. Under Arizona law, both at the time of *Brookover* and now, leniency is mandated when there is mitigation sufficiently substantial to warrant leniency. *See Brookover*, 601 P.2d at 1325–26. In *Brookover*, the court found that the "defendant's mental condition was … a major and contributing cause of his conduct which was 'sufficiently substantial' to outweigh the aggravating factor of defendant's prior

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[6] Kayer also conflates Arizona's two separate prior-conviction aggravating factors: A.R.S. § 13–751(F)(1) (which was found in *Brookover* and is based on a prior conviction for which life or death was imposable) and (F)(2) (which was found in Kayer's case and is based on a prior conviction for a statutorily defined serious offense). *See* BIO 27–28; *see* App. 208.

conviction." *Id.* at 1326. "Under the circumstances," the court continued, "leniency is mandated." *Id.*

Thus, the court found that leniency was required not because of the particular type of mitigation proven in that case, but because, in the court's qualitative assessment, that mitigation outweighed the sole aggravating factor. The court's holding does not dictate the same result in any other arguably similar case (much less one with additional aggravation); in fact, the court realized that the weighing process is specific to each defendant and the sentencing decision does not turn on any particular combination of aggravation and mitigation. 601 P.2d at 1326. The post-conviction judge here necessarily found no reasonable probability that Kayer's post-conviction mitigation would have skewed the weighing process in favor of a life sentence. That decision was not unreasonable merely because the Arizona Supreme Court had found a differently situated defendant entitled to leniency decades earlier.

C. AEDPA Precludes Habeas Relief—at a Minimum, Fairminded Jurists Could Debate Whether Kayer Had Proved *Strickland* Prejudice

In asserting that Petitioner has failed to explain "what a 'more deferential' opinion would have looked like" in this case, BIO 23-24, Kayer overlooks that Petitioner has explained exactly what such a review should have looked like, *see* Pet. 23–25. Petitioner has established (at 23-25) why the state post-conviction judge's ruling was, at a minimum, debatable among reasonable jurists.[7] And Petitioner high-

[7] Kayer attributes to the Petition a quote that a "jury" might have disregarded mental-impairment evidence and discusses

lighted (at 23-25) multiple reasonable theories that supported the state court's ruling. Unlike either the panel majority or Kayer, Petitioner asked and answered "the only question that matters under § 2254(d)(1)"—whether fairminded jurists could disagree that the state postconviction court's decision reasonably applied *Strickland*'s prejudice prong—and demonstrated that the decision was reasonable. *Richter*, 562 U.S. at 102 (quotations omitted).

Kayer offers no meaningful response to the multiple reasonable theories Petitioner laid out. Rather, he parrots a talking point common to capital defendants: that mental-health evidence or other humanizing-type mitigation is often found to warrant a life sentence. BIO 23. To be sure, a sentencer has discretion to weigh this type of evidence heavily, but it would not be *unreasonable* for a sentencer not to do so. That is particularly true here, where there are two substantial aggravating factors and Kayer's actions evidence significant planning and preparation, undermining any theory that his mental-health issues, addictions, or any other factor explains his conduct. Because AEDPA applies, the panel majority should have recognized a reasonable basis for the state court's judgment and ended its analysis there, with the denial of habeas relief.

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the perceived difference between judge and jury sentencing under Arizona law. BIO 19. But the word "jury" appears on the page only in a case parenthetical. *See* Pet. 25. Petitioner discussed the evidence's impact on a reasonable sentencer in general. *Id.* In any event, as previously discussed, the sentencer's identity is irrelevant to the *Strickland* analysis.

CONCLUSION

This Court should grant the petition.

September 2, 2020

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