No. _____

IN THE SUPREME COURT OF THE UNITED STATES

Charles Michael Hedlund, Petitioner,

vs.

State of Arizona, Respondent.

CAPITAL CASE

ON PETITION FOR A WRIT OF CERTIORARI TO THE ARIZONA SUPREME COURT

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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No. _____

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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IN THE

SUPREME COURT OF THE STATE OF ARIZONA

STATE OF ARIZONA,
Appellee,

v.

CHARLES MICHAEL HEDLUND,
Appellant.

No. CR-93-0377-AP
Filed December 10, 2018

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

Independent Review of Capital Sentence
SENTENCE AFFIRMED

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

JUSTICE BOLICK, opinion of the Court:

¶1 The Ninth Circuit Court of Appeals found error in this Court's independent review of Charles Michael Hedlund's death sentence and remanded the case to the federal district court with instructions to grant the writ of habeas corpus unless the State stipulates to have the death sentence vacated. We granted the State's motion to conduct a new independent review and now affirm Hedlund's death sentence.

BACKGROUND

¶2 In 1992, a jury found Hedlund guilty of first degree murder for killing Jim McClain and second degree murder for killing Christine Mertens. *State v. McKinney*, 185 Ariz. 567, 571 (1996) (reviewing factual and procedural history in a consolidated case involving Hedlund). Both killings occurred during a burglary spree committed by Hedlund and his half-brother and co-defendant, James McKinney. The trial judge found two aggravating factors concerning the first degree murder: (1) Hedlund was previously convicted of a serious offense; and (2) he committed the murder for pecuniary gain. *See* A.R.S. § 13-751(F)(2), (F)(5).[1] After hearing the mitigating evidence, the trial judge sentenced Hedlund to death. On appeal, this Court struck the first aggravating factor but affirmed Hedlund's death sentence because it found the mitigating evidence was not

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

[1] Section 13-703, the effective statute at the time of Hedlund's crimes and direct appeal, was renumbered as § 13-751 in 2008.

"sufficiently substantial to call for leniency" in light of the pecuniary gain aggravator. *McKinney*, 185 Ariz. at 580–84.

¶3 Hedlund filed a petition for post-conviction relief ("PCR"), which the trial court denied, and this Court denied his subsequent petition for review. In 2003, Hedlund filed a petition for a writ of habeas corpus in the United States District Court for the District of Arizona as well as a motion to expand the evidentiary record, which was denied. The district court ruled that Hedlund was not entitled to habeas relief. In 2017, the Ninth Circuit reversed, concluding that habeas relief was warranted because this Court had erred in its independent review of the death sentence when considering Hedlund's mitigation evidence. *Hedlund v. Ryan*, 854 F.3d 557, 587 (9th Cir. 2017). The Ninth Circuit reasoned that this Court's application of the "unconstitutional causal nexus test" constituted error under *Eddings v. Oklahoma*, 455 U.S. 104 (1982), and this "error 'had [a] substantial and injurious effect' on the sentencing decision." *Hedlund*, 854 F.3d at 586–87 (quoting *Brecht v. Abrahamson*, 507 U.S. 619, 623 (1993)).

¶4 Consistent with *State v. Styers*, 227 Ariz. 186, 187 ¶ 5 (2011), we granted the State's motion to conduct a new independent review. We have jurisdiction under article 6, section 5(6) of the Arizona Constitution and A.R.S. §§ 13-755(A), 13-4031, and 13-4032(4).

DISCUSSION

I. Scope of Review

¶5 In granting the State's motion, we ordered the parties to submit briefing on "[w]hether the proffered mitigation is sufficiently substantial to warrant leniency in light of the existing aggravation." This order reflects that our new independent review is focused on correcting the constitutional error identified by the Ninth Circuit. *See Styers*, 227 Ariz. at 187–88 ¶¶ 4–7 (conducting a new independent review in a procedurally similar case). That is, our review is limited to considering the mitigating factors without the causal nexus requirement and reweighing them against the established aggravator.

¶6 Hedlund argues that this Court does not have jurisdiction to conduct a new independent review because this is a non-final case and

instead asks us to remand this case to the trial court for resentencing before a jury. We disagree and reaffirm the scope of review and our holding in *Styers*. *Id.* at 187 ¶ 5 (holding that a "case is final when 'a judgment of conviction has been rendered, the availability of appeal exhausted, and . . . a petition for certiorari finally denied,'" and therefore does not need to be remanded for a new resentencing proceeding under *Ring v. Arizona*, 536 U.S. 584 (2002) (citation omitted)).

¶7 Hedlund also asserts that the United States Supreme Court's recent decision in *Hurst v. Florida*, 136 S. Ct. 616 (2016), requires that he be resentenced. However, *Hurst* only held that a jury must find the facts that support a death sentence—essentially reaffirming the rule the Court articulated in *Ring*. *Id.* at 624; *see also id.* at 621 (discussing *Ring* and stating that a defendant has a "right to have a jury find the facts behind his punishment"). These rules are reflected in Arizona's current statutory scheme. A.R.S. § 13-752.

¶8 We also reject Hedlund's argument that, because the Sixth Amendment requires the entire weighing of evidence be done by the jury, resentencing is required here. Although the United States Supreme Court has held that the Sixth Amendment requires that "the decision of issues of fact must be fairly left to the jury," *United States v. Murdock*, 290 U.S. 389, 394 (1933), *overruled in part on other grounds by Murphy v. Waterfront Comm'n of N.Y. Harbor*, 378 U.S. 52 (1964), the ultimate decision of whether mitigation is substantial enough to warrant leniency "is not a fact question to be decided based on the weight of evidence, but rather is a sentencing decision to be made by each juror based upon the juror's assessment of the quality and significance of the mitigating evidence that the juror has found to exist." *State ex rel. Thomas v. Granville* (*Baldwin*), 211 Ariz. 468, 473 ¶ 21 (2005); *cf. Blakely v. Washington*, 542 U.S. 296, 303 (2004) ("[T]he 'statutory maximum' for *Apprendi* purposes is the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant*." (citing *Ring*, 536 U.S. at 602)). Therefore, the Sixth Amendment does not require this Court to remand for resentencing as the independent review here is not a factfinding determination.

¶9 Finally, we decline Hedlund's invitation to include the evidence newly developed in PCR and habeas proceedings as part of our independent review. Section 13-755(C) establishes our jurisdiction for

independent review and provides that we may "remand[] a case for further action if the trial court erroneously excluded evidence or if the appellate record does not adequately reflect the evidence presented." Thus, § 13-755(C) indicates that additional evidence should be admitted first in the trial court rather than in this Court.

¶10 Further, although we reviewed evidence presented in habeas proceedings in *State v. Clabourne*, the procedural context was different. *See* 194 Ariz. 379 (1999). In *Clabourne*, the independent review was from resentencing in which the defendant presented evidence from habeas proceedings and the sentencing court made findings based on that evidence. *See id.* at 383 ¶ 11. That is not the case here. Hedlund should seek additional PCR if he believes the evidence he presented in the federal habeas proceedings entitles him to it.

II. Independent Review

¶11 In 1996, this Court upheld Hedlund's death sentence, specifically finding that the mitigating evidence was not "sufficiently substantial to call for leniency." *McKinney*, 185 Ariz. at 580–84. The Ninth Circuit concluded that this Court failed to consider mitigating evidence that was not causally related to Hedlund's crimes. *Hedlund*, 854 F.3d at 583–87. Accordingly, we here conduct a new independent review of the mitigation evidence and balance it against the aggravator.

¶12 Hedlund has the burden of proving mitigation factors by a preponderance of the evidence. *State v. Jones*, 188 Ariz. 388, 400 (1997). When he fails to do so, the asserted mitigation is entitled to no weight. *Id.* at 400–01.

¶13 Hedlund argues that the mitigating evidence—"his extremely abusive childhood, resulting alcohol abuse, [post-traumatic stress disorder], and brain damage, minor participation, remorse, and the plea agreement"—is substantial enough to call for leniency when considered against the sole remaining aggravator, pecuniary gain. However, the aggravator here is especially strong, and Hedlund's active complicity in the crimes is clear. We agree with the well-supported trial court conclusion that Hedlund was "consciously involved in an ongoing crime spree to

commit residential burglaries and intended to either kill or beat any of the victims who might have been present during these crimes."

¶14 Indeed, testimony at trial showed that Hedlund and McKinney asked their peers if they "knew any houses [from which] they could rob like a lot of money and stuff" when planning the crime spree. And as this Court observed in Hedlund's direct appeal, he stated that "anyone he found would be beaten in the head." *McKinney*, 185 Ariz. at 571, 580. Consistent with that statement, Hedlund indicated that if anyone was home during the Mertens burglary "they [could] just sneak in, hit them over the head, knock them out and then take the money." And Hedlund targeted McClain because, based on a prior car sale between them, Hedlund believed McClain had property that would be easy to sell as well as money within the residence. In fact, Hedlund's fingerprints were found on a briefcase within McClain's home, which suggests that Hedlund searched for valuable items. Finally, the evidence shows that Hedlund intentionally armed himself, as demonstrated by his acquisition of a new weapon for the McClain burglary, and actively concealed stolen property and weapons taken during that burglary. This evidence strongly established the pecuniary gain aggravator, which our Court affirmed in 1996, and the Ninth Circuit left undisturbed. *Id.* at 583–84 ("Clearly, the evidence of pecuniary gain as the primary, if not sole, purpose of the murders is overwhelming and inescapable.").

¶15 "When assessing the weight and quality of a mitigating factor, we take into account how the mitigating factor relates to the commission of the offense." *Styers*, 227 Ariz. at 189 ¶ 12. Moreover, although this Court will consider all mitigating evidence presented without requiring a causal nexus between the mitigating evidence and the crime, "we may consider the failure to show such a connection as we assess 'the quality and strength of the mitigation evidence,' and may attribute less weight to the mitigating effect of a disorder if the defendant fails to establish a relationship between the disorder and the criminal conduct." *Id.* (citations omitted). In such a review, this Court will consider statutory mitigating evidence under § 13-751(G) (formerly § 13-703(G)), in addition to non-statutory mitigating factors. *See* § 13-751(G); *State v. Gallegos*, 178 Ariz. 1, 17–18 (1994).

A. Expert mitigating testimony

¶16 Hedlund asserts that expert testimony he presented during sentencing establishes substantial mitigating weight under § 13-751(G)(1). That statute provides for mitigation when "[t]he defendant's capacity to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law was significantly impaired, but not so impaired as to constitute a defense to prosecution." § 13-751(G)(1).

¶17 At the sentencing hearing, two mental health experts testified for the defendant: Dr. Ronald Holler and Dr. Charles Shaw. Dr. Holler met with Hedlund for a two-day interview to evaluate Hedlund's "intellectual, cognitive, neuropsychological, [and] emotional functioning as related to his background with his family and other aspects of his environment." Dr. Holler also based much of his testimony on reports from other sources. Based on this information, Dr. Holler concluded that because Hedlund experienced emotional and physical abuse as a child, he suffered from battered child disorder, post-traumatic stress disorder ("PTSD"), and "intertwined disorders of much consequence including alcohol dependence and a depressive disorder."

¶18 Dr. Holler testified that Hedlund's "mental impairments would significantly impair his capacity to conform his conduct to the requirements of the law" because Hedlund's relationship with his brother, McKinney, "created an unusual or substantial duress in his life" resulting from his desire for family. However, on cross-examination, Dr. Holler also testified that it is possible that Hedlund had sufficient mental acuity to conform his behavior if, hypothetically, a police officer were present during the burglary that resulted in McClain's murder.

¶19 Based on a single interview, Dr. Shaw testified primarily about Hedlund's relationship with alcohol, concluding that Hedlund "suffer[ed] from alcohol dependence or alcoholism." Dr. Shaw testified that individuals with alcoholism can suffer "from perception, memory and judgment problems even [when] not intoxicated," and he had "encountered alcoholics who because of their alcoholism have committed acts they never would have committed but for the existence of alcoholism." Much of Dr. Shaw's testimony was based on Hedlund's self-reported use of alcohol, and Dr. Shaw could not state with any certainty if and by how much Hedlund

was intoxicated on the night of the McClain burglary and murder. However, Dr. Shaw's testimony established that even with alcohol in his system, an individual would not "lose complete awareness of what is moral" but it might affect judgment regarding what is wrong under the law or what the individual can "get away with." In addition, "Hedlund's character witnesses testified that Hedlund did not have a drinking problem, was not an alcoholic, and that his level of consumption was far below what Hedlund reported to the psychiatric experts." *McKinney*, 185 Ariz. at 579; *see also infra* ¶¶ 26–27.

¶20 Based on our independent analysis, we conclude, as did the trial court, that the expert testimony had little credibility or probative value. Though the dissent asserts that the experts' opinions provide strong evidence of mitigation because the State provided no expert testimony to rebut Hedlund's experts, *infra* ¶ 52, rebuttal was unnecessary as the State brought out key testimony during cross-examination of Dr. Holler and Dr. Shaw that effectively impeached their opinions and weighed against mitigation. We are particularly persuaded by Dr. Holler's opinion that Hedlund was capable of modifying his behavior if an officer had been present and Dr. Shaw's opinion that Hedlund remained aware of what was moral. This evidence undermines Hedlund's and the dissent's view that he suffered mental impairments that significantly impaired his capacity to conform his conduct to what the law requires. Additionally, the experts testified that Hedlund's mental impairments result from his childhood neglect and abuse at least a decade prior to the crimes. Just before the crime spree, Hedlund had a responsible job and exhibited no violent behavior; he acted lucidly in planning and executing the crimes and in attempting to dispose of and hide the murder weapon. The evidence does not support the conclusion that Hedlund lacked the ability to conform his conduct to the requirements of law.

¶21 The dissent asserts that *State v. Stevens*, 158 Ariz. 595 (1988), applies here and shows that we should give Dr. Holler's testimony strong mitigating weight. *Infra* ¶ 71. Because *Stevens* is inapposite, we disagree. In *Stevens*, we gave strong mitigating weight to expert testimony introduced by the defendant because it showed "his ability to conform his behavior [to] the requirements of the law were [sic] impaired at that time." *Stevens*, 158 Ariz. at 599–600 (alteration in original). The dissent suggests

that the *Stevens* Court relied on the fact that the defendant had a "mental disorder" that caused his diminished capacity. *Infra* ¶ 54. However, this Court actually concluded "Stevens' condition at the time of the offense was a major and contributing cause of his conduct" based primarily on the expert testimony that the defendant's "actions were the result of his heavy use of alcohol and drugs preceding his meeting with the victims and a well-developed habit of acting out on socially unacceptable impulses while under the influence of such intoxicants." *Stevens*, 158 Ariz. at 599–600. In contrast, the only evidence of Hedlund's alleged intoxication during the McClain murder was his own self-reporting to Dr. Shaw well after the murder; as such, *Stevens* is distinguishable as it is unclear if Hedlund was intoxicated during the commission of the crimes. Even if Hedlund was intoxicated when he committed the McClain burglary and murder, nothing in the record suggests alcohol affected his ability to appreciate right from wrong or conform his conduct to law, unlike the defendant in *Stevens*. *Infra* ¶¶ 26–27.

¶22 In sum, the expert testimony and the record do not establish that Hedlund could not appreciate right from wrong or conform his conduct to the requirements of law. Accordingly, we give the expert testimony regarding Hedlund's PTSD, alcoholism, and depressive disorder slight mitigating weight.

B. Other mitigating circumstances

¶23 Hedlund presents other mitigating evidence, namely his emotionally and physically abusive childhood and dysfunctional family life, intoxication, minor participation, remorse, and the rejected plea agreement. We address the proffered mitigation evidence in turn.

1. Emotionally and physically abusive childhood and dysfunctional family life

¶24 Testimony from Hedlund's family and friends establish that Hedlund experienced a very abusive childhood. He was neglected, beaten, and punished for basic daily activities like eating and drinking water. Moreover, his step-mother would frequently isolate Hedlund and punish him because he was born out of wedlock. And Hedlund grew up in a household where stealing was encouraged and rewarded.

¶25 Hedlund left the home around age thirteen, more than ten years before the crimes, and no evidence shows that Hedlund's difficult childhood affected his ability to control his actions to conform with the law. Hedlund's feeling of responsibility "to hang around with his brother, James, out of some twisted loyalty to the only family he knows"—as Dr. Holler suggested—does not amount to an inability to control his actions. Thus, despite the terrible conditions in which Hedlund was raised, we assign this evidence little weight because there is neither temporal proximity nor any demonstration that the conditions rendered Hedlund unable to differentiate right from wrong or to control his actions. *Supra* ¶¶ 16–22; *see, e.g.*, *State v. Burns*, 237 Ariz. 1, 34–35 ¶¶ 169–71 (2015) (affirming a death sentence despite a "difficult childhood" and "dysfunctional family"); *State v. Bocharski*, 218 Ariz. 476, 499 ¶ 111 (2008) ("Also, Bocharski committed this offense when he was thirty-three years old, lessening the relevance of abuse and neglect that occurred during his childhood.").

2. Intoxication

¶26 Hedlund argues that his intoxication at the time of the murder was a mitigating factor. We consider this evidence as both a statutory mitigating circumstance under § 13-751(G)(1) and a non-statutory mitigating factor. We find little credibility in Hedlund's self-reporting because he had a motive to lie and evidence presented at trial proved he had been untruthful. Moreover, witness testimony contradicts Hedlund's assertion that his behavior was affected by intoxication. In fact, Hedlund's own witnesses testified that his drinking habits did not interfere with his work and that he did not get violent when drinking, but instead became drowsy.

¶27 The methodical and obviously deliberate commission of the crime and his subsequent conduct in attempting to sell his gun the day after the McClain murder strongly suggest Hedlund was in possession of his faculties and not so impaired by alcohol as to constitute significant mitigation. *Cf. Bocharski*, 218 Ariz. at 499 ¶ 111 ("First, Bocharski's actions immediately following the crime constituted purposeful steps to avoid prosecution and therefore his claim of alcohol impairment is diminished."). Thus, we do not find sufficient reliable, credible evidence to satisfy

statutory mitigation under § 13-751(G)(1), and we give intoxication at the time of the murder little weight as a non-statutory mitigating factor.

3. Minor participation

¶28 Hedlund also presents his supposed minor participation as a mitigating factor based on witness testimony—by Chris Morris and Joe Lemon, two individuals who had participated in other burglaries during the crime spree—that he was only involved in the burglary as the driver and that the murder is inconsistent with his character. However, his claim of minor participation is contradicted by the jury finding him guilty of premeditated murder in a special verdict, which necessarily requires that Hedlund was a major participant. *See State v. Hoskins*, 199 Ariz. 127, 150 ¶ 100 (2000) (rejecting defendant's argument that he was a minor participant because the jury found that he committed premeditated murder and thus concluded that defendant was a major participant in the murder beyond a reasonable doubt). Moreover, we previously stated that "there is ample evidence pointing to Hedlund as the one who killed Jim McClain." *McKinney*, 185 Ariz. at 580. We therefore give no mitigation weight to this argument.

4. Remorse

¶29 Hedlund further offers his expressions of remorse as mitigating evidence. *See Bocharski*, 218 Ariz. at 498 ¶ 107. While Hedlund expressed remorse to his mitigation specialist for the victim's family, he

continues to maintain that he was not involved in the murder. At the sentencing hearing, Hedlund made this statement:

> I don't see how anybody could not have [remorse for this]. I can't imagine going through what these families have been through. . . .
>
> I met Mr. McClain on several different occasions. There's no way I could have done what happened to this man or let it happen if I would have known it was going to happen. There is no way I could have personally done that.
>
> . . . .
>
> . . . I personally did make some bad decisions when I first started hanging around with James [McKinney]. And, it's [sic] resulted in a good portion of this, yes. But I wasn't, I wasn't actually involved in hurting anybody, not directly.

Hedlund's continued evasions undercut the sincerity of his expressions of remorse.

5. Plea agreements

¶30 Hedlund also presents two plea agreements as mitigating evidence. The trial court rejected the first plea agreement requiring Hedlund to plead guilty to second degree murder and class 4 theft as the court concluded that the plea agreement did not require Hedlund to take sufficient responsibility for the McClain murder. The trial court recounted that "given the pending charges, the evidence and arguments that had previously been presented to the Court at that time and now, that such a disposition offered in the plea agreement was totally unwarranted in the interests of justice." We have considered the existence of the plea agreement and the extent to which it demonstrates the State's belief that Hedlund does not deserve the death penalty. We conclude it offers little mitigating weight. *Cf. State v. Miller*, 186 Ariz. 314, 326, 328 (1996) (affirming defendant's death penalty despite the presence of a plea agreement offer for a life sentence that the defendant rejected).

¶31 Plea offers can be made for reasons that have nothing to do with whether a prosecutor believes the defendant deserves the death penalty. For example, a prosecutor might offer a plea because of a

perceived weakness in the case or in an attempt to "turn" the defendant into a state witness. In addition, a court has discretion to accept or reject plea offers to facilitate the fair administration of justice. *See State v. Lee*, 191 Ariz. 542, 544 ¶¶ 6–7 (1998) (citing Ariz. R. Crim. P. 17.4(d)). Thus, the first plea agreement Hedlund presents is entitled to only slight mitigating weight.

¶32 Hedlund and the dissent assert that a purported second plea agreement should be given substantial mitigating weight, suggesting that had it been timely submitted to the trial court by trial counsel, it would have been accepted. *Infra* ¶¶ 58–59. Neither Hedlund nor the dissent provide any evidence supporting this assertion. Nothing in the record shows that a second plea agreement was ever formally submitted to the trial court. Moreover, even if the purported second plea agreement had been submitted to the trial court for consideration, nothing indicates the court would have accepted it. As the Ninth Circuit observed, it is likely that the trial judge would have rejected the purported second agreement given that it only added a plea to a burglary count on top of the pleas to second degree murder and theft from the first plea agreement. *Hedlund,* 854 F.3d at 579. Because the trial court had previously indicated it wanted Hedlund to take more responsibility for McClain's murder, the mere addition of a burglary count likely would not have persuaded the court to accept the plea agreement.

¶33 As such, we give this mitigating evidence some weight but do not consider it substantial.

C. Leniency is not warranted

¶34 In our independent review, we must consider the aggravator, pecuniary gain, and all mitigating evidence presented to determine whether the mitigation evidence individually or cumulatively is sufficiently substantial to call for leniency. Here, we believe that the (F)(5) aggravator is especially strong given that financial gain motivated a string of burglaries, in which the possibility of murders was expressly contemplated, culminating in the shooting of McClain in the back of the head while he slept. In fact, Hedlund was aware that McKinney, before holding Mertens face down and shooting her in the back of the head, had "[b]eaten and savagely stabbed" her, and she had futilely "struggled to save

her own life." *McKinney*, 185 Ariz. at 572. Despite that knowledge, Hedlund willingly planned and actively participated in the McClain burglary and murder less than two weeks later. *Id.* And Hedlund's only motive in shooting McClain was to facilitate the burglary—it was not merely the unintended result of a burglary gone awry. *See State v. Spears*, 184 Ariz. 277, 295 (1996) (finding sole aggravator of pecuniary gain was particularly strong given that "it was the only motive" for the murder and not simply a "robbery gone awry which result[ed] in a death"). Indeed, we previously stated that "pecuniary gain [w]as the primary, if not sole, purpose of the murders," *McKinney*, 185 Ariz. at 583–84, and that issue is not properly before us in this limited review.

¶35 The dissent takes issue with the weight we give the pecuniary gain aggravator because it contends "there is no evidence which brother shot McClain." *Infra* ¶ 67. The record says otherwise. Hedlund brought his gun to McClain's home the night of McClain's murder; Hedlund sawed off the gun to better conceal it prior to the McClain burglary; the bullet that killed McClain was not inconsistent with Hedlund's gun; Hedlund sought to sell his gun the day after McClain's murder; Hedlund concealed the gun after McClain's murder; Hedlund's fingerprints were found on the gun's magazine when it was seized by police; and forensic testing indicated there was blood on Hedlund's gun. This evidence also buttresses the jury's finding that Hedlund was a major participant in McClain's murder, *supra* ¶ 28, a point the dissent concedes, *infra* ¶ 59 n.4. In fact, this Court previously concluded there was "ample evidence" that Hedlund killed McClain, *McKinney*, 185 Ariz. at 580, an issue that is not before us.

¶36 The dissent also suggests that the murders were not motivated by pecuniary gain as Hedlund "took only some 'wheat pennies'" from an earlier burglary in which approximately $5.00 was stolen. *Infra* ¶ 65. The dissent's assertion is factually inaccurate; Hedlund received half the proceeds from the Mertens burglary and also took property from the McClain burglary, including a car and three guns. Further, the poor results of one burglary within the crime spree do not negate the fact that the burglary that resulted in McClain's murder was motivated by pecuniary gain. *See State v. Lynch*, 225 Ariz. 27, 40 ¶ 73 (2010) ("[T]he [pecuniary gain] aggravator requires only that the desire for pecuniary gain motivated the murder.").

¶37 Hedlund and the dissent assert that this case is factually similar to *Bocharski*, where we reduced the defendant's death sentence to a life sentence. 218 Ariz. at 499 ¶¶ 112–13. However, *Bocharski* is materially distinguishable. Bocharski presented seven mitigating factors including: "(1) A.R.S. § 13-703.G.1 (state of mind), (2) physical, mental, and sexual abuse of the defendant, (3) history of substance abuse and alcoholism, (4) dysfunctional family of origin including multigenerational violence, criminality, and substance, sexual, emotional, and physical abuse, (5) abandonment, severe neglect, starvation, and foster care placement, (6) impact of execution on the defendant's family, and (7) remorse." *Id.* at 495–96 ¶ 94. Although we specifically discounted the mitigating evidence of abuse, neglect, and alcohol impairment, *id.* at 499 ¶ 111, we ultimately found leniency was appropriate because we found substantial evidence of mitigation, while the sole aggravator, age of the victim, was "not particularly strong," *id.* ¶ 112. Indeed, the dissent's reliance on the evidence of the childhood abuse in *Bocharski* as establishing that Hedlund has shown substantial mitigation is misplaced as *Bocharski* specifically discounted evidence of childhood abuse as attenuated. *Id.* ¶ 111 ("Also, Bocharski committed this offense when he was thirty-three years old, lessening the relevance of abuse and neglect that occurred during his childhood."). Although the dissent argues this case is like *Bocharski* because "Hedlund's childhood abuse is 'unique in its depth and breadth,'" *infra* ¶ 53, it was not the "depth and breadth" of the history of childhood abuse in *Bocharski* that led this Court to grant leniency; rather, the defendant's "mitigation evidence was unique in its depth and breadth" as a whole while the aggravator was "not particularly strong." *Id.* at 498–99 ¶¶ 109–11. In contrast, here the aggravating factor of pecuniary gain is particularly strong while the mitigation evidence is not substantial.

¶38 *State v. Graham*, 135 Ariz. 209, 213 (1983), in which we determined that leniency was appropriate, is also distinguishable. We found that mitigating evidence of (1) impaired capacity, (2) lack of prior criminal history, and (3) Graham's age of twenty-one years old (although given little weight) outweighed the sole aggravator of pecuniary gain. *Id.* Our finding of impaired capacity was linked to credible expert testimony. *Id.* Indeed, the expert testimony showed Graham's impaired capacity was the product of drug abuse stemming from "legal and professional sanction" that was not entirely of his own making. *Id.* Here, however, the expert

testimony in the trial court was not persuasive and nothing else in the record indicates that Hedlund had impaired capacity, as discussed above. *Supra* ¶¶ 16–22.

¶39 Having considered all mitigating evidence, we conclude that the evidence presented is not sufficient to warrant leniency in light of the commission of a murder for pecuniary gain. *See State v. Harrod*, 218 Ariz. 268, 284 ¶¶ 63–64 (2008) (affirming the defendant's death sentence when the sole aggravating factor, pecuniary gain, was weighed against the mitigating evidence presented); *State v. Roseberry*, 210 Ariz. 360, 373–74 ¶¶ 77–79 (2005) (same); *Spears*, 184 Ariz. at 295 (same).

CONCLUSION

¶40 We affirm Hedlund's death sentence.

VASQUEZ, J., dissented.

¶41 At the State's request, this Court has conducted an independent review of Charles Michael Hedlund's death sentence and today affirms that sentence after concluding the mitigating evidence is not sufficiently substantial to outweigh the single aggravating circumstance. Because I disagree with this conclusion, I respectfully dissent. The death penalty is reserved for "those who stand out from the norm of first degree murderers." *State v. Spears*, 184 Ariz. 277, 295 (1996) (quoting *State v. Smith,* 146 Ariz. 491, 505 (1985)). As explained in more detail below, Hedlund does not meet this criterion.

Childhood Abuse and Expert Testimony

¶42 Although the majority characterizes Hedlund's childhood abuse and neglect as "very abusive," *supra* ¶ 24, it was nothing short of horrific. When he lived with his biological mother and stepfather, McKinney Sr., until the age of six or seven, he and his siblings were subjected to extreme neglect. They ate only if they were able to get food themselves, and, when they did, it was often moldy and rotten. They were rarely clothed and, when they were, it was in "filth-encrusted clothes." They lived and slept surrounded by animal feces and urine. Hedlund's mother "would stack used [feminine hygiene products] around rooms in the house" and never cleaned the children's diapers. Mary Durand, a presentence report investigator, described the conditions "as gruesome as anything that [she had] come across in 25-plus years in this business."

¶43 When the children moved in with McKinney Sr., their stepmother, and her daughter, the neglect continued, with the addition of severe physical and mental abuse. Hedlund, the oldest, was the only one of his siblings to have a different father, and his stepmother would tell him daily that "he was a bastard child" who "didn't have a father." The house was "always dirty," as were the children who often "smelled like animal dung." The McKinneys kept animals such as a goat and calf, chickens, monkeys, and snakes inside the house. Even though the children were terrified of snakes, their cage was kept inside the closet of the children's

bedroom. If the children did not clean up the animals' feces, it "didn't get cleaned up."

¶44 The children were not allowed to have food unless approved by their stepmother and were beaten if they ate or drank without her permission. She also frequently locked them out of the house, typically without adequate clothing and with no food or water for hours at a time and in temperatures upward of 100 degrees.

¶45 Their stepmother, often with the help of her daughter, beat the children daily with objects ranging from "belts with steel prongs" to "wire hangers" and cooking pans. Hedlund, however, "got more beatings than [the other children], because he wasn't a McKinney." Hedlund's sister[2] recalled that either their stepmother or her daughter would "hold [Hedlund] down on the ground . . . [and] the other one would beat him." In one incident, McKinney Sr.'s dog attacked Hedlund, resulting in over 200 stitches to his face. The next morning, his stepmother woke Hedlund and beat him for an hour "because it cost[] her money to take him to the hospital." Additionally, whenever Hedlund's half-brother and co-defendant, James McKinney, would get into trouble, Hedlund would be beaten as well because he "was the oldest and . . . should have known better."

¶46 A theme that pervades the family's recollections of Hedlund as a child was that he consistently tried to protect his siblings from the abuse and would take their beatings for them. His sister recalled, "If we were going to get a beating or slapped in the face or punched in the face, [Hedlund] would jump in the middle and he would take the hit for us." During one instance, their stepmother grabbed McKinney by the wrist, lifted him into the air, and began beating him with a piece of garden hose. Hedlund "jumped on her arm and was begging her, 'Momma, stop it. Momma, stop it.'" The stepmother flung Hedlund onto the sidewalk, where he hit the back of his head, and then hit him across the face with the hose. Not only did he protect, or try to protect, his siblings from his

[2] She is actually Hedlund's half-sister.

stepmother's abuse, he also tried to protect his sisters from McKinney, who would often hit them with boards, shovels, and rakes.

¶47 Dr. Holler explained that Hedlund's childhood abuse caused lasting neuropsychological impairments, as reflected, in part, by a disparity in his IQ scores. Hedlund's verbal IQ—associated with the left side of the brain—was 91, but his performance IQ—associated with the right side—was 78. The low performance IQ is indicative of difficulty "using good judgment and avoiding getting [oneself] into severe difficulties."

¶48 According to Dr. Holler, Hedlund's childhood experiences, in particular the constant reminders that he was not fully biologically related to his family, caused him to become "a very needy person psychologically" and he had "developed a distortion of motivations to be accepted in a familial sense." He was thus "very vulnerable and subject to becoming enmeshed with others . . . to try to become a member of a family." He also took on a "docile" and "accom[m]odating" nature, such that if someone were to become more aggressive, Hedlund "would be very much subject to going along" with that person in order to maintain his role as protector and fulfill his need to demonstrate loyalty. Dr. Holler ultimately concluded that Hedlund's childhood abuse and resulting mental impairments "significantly impair[ed] his capacity to conform his conduct to the requirements of the law."

¶49 Dr. Holler's opinions are supported not only by the testimony of Hedlund's siblings but also by others who knew him throughout his life. One of his aunts described him as a "quiet" child who "ached for someone to love him." His childhood friend noted he would always look out for her and keep her "out of trouble." And his sister testified that even though Hedlund was the oldest sibling, when they were children "whatever [McKinney] said [Hedlund] did."

¶50 Each person who knew Hedlund as a child and adult testified he was a quiet, "mild mannered," non-violent person who avoided confrontation and was "scared" of getting "into fights." As an example, while McKinney and C.M., Hedlund's other half-brother, were committing another burglary, Hedlund, who was supposed to pick them up afterwards,

abandoned them and drove away because he was "scared of getting caught and he didn't want to be near the burglary."

¶51 Hedlund's childhood efforts to protect his siblings, even at the risk of his own personal safety, continued into his adulthood. His sister testified that Hedlund protected her from abusive boyfriends. C.M. testified that Hedlund's involvement in the Mertens's burglary came about because he "wanted to protect [C.M.]" from "get[ting] caught or get[ting] in trouble" because the people in the Mertens's house knew C.M. and would be able to identify him. And, in the months leading up to these crimes, when McKinney and Hedlund were spending considerable time together, Hedlund told their sister he feared McKinney "would go right back to prison" if "he had no one to talk to . . . and be his friend and a family member."

¶52 The State did not call any of its own expert witnesses to contradict those presented by Hedlund. Additionally, because the lay witnesses' testimony supported Dr. Holler's opinions, his testimony is entitled to "serious consideration" as a mitigating factor. *State v. Trostle*, 191 Ariz. 4, 21 (1997) (defendant's unrebutted expert testimony regarding mental illness and social dysfunction, supported by lay witnesses' descriptions of defendant, warranted "serious consideration" as a mitigating factor). Thus, contrary to the majority's assertion that "no evidence shows that Hedlund's difficult childhood affected his ability to control his actions to conform with the law," *supra* ¶ 25, the expert testimony introduced by Hedlund, together with the corroborating lay testimony, did exactly that. It demonstrates a causal connection between Hedlund's childhood that contributed to the murder of McClain: When faced with a choice between demonstrating loyalty to and protecting his brother, or conforming his conduct to the law, Hedlund's judgment and ability to choose the latter was significantly impaired. *See State v. Bocharski*, 218 Ariz. 476, 496 ¶¶ 96–97, 110 (2008) (causal connection established by expert testimony that defendant's "troubled upbringing" caused lasting psychological damage that likely played "substantial role in the events that led to" victim's murder).

¶53 The majority contends this case is distinguishable from *Bocharski*. *Supra* ¶ 37. I disagree. The mitigating evidence in this case is very much like that presented in *Bocharski*. *See Bocharski*, 218 Ariz. at 497 ¶¶ 102–07, 109–10. For instance, like Bocharski, Hedlund's childhood abuse is "unique in its depth and breadth." *Id.* at 498–99 ¶ 109. Dr. Holler's testimony, like the expert in *Bocharski*, established a "causal connection" demonstrating that Hedlund's childhood abuse significantly impaired his cognitive reasoning and ability to exercise good judgment. *Id.* at 499 ¶ 110.

¶54 The majority gives "slight" weight to Dr. Holler's testimony based, in part, on his opinion that Hedlund could have modified his behavior had a police officer been present. *Supra* ¶¶ 20–22. Dr. Holler, however, clarified that without the hypothetical police officer's immediate presence, Hedlund's "dynamics [would] become predominant" and "lead him into actions which in terms of strictly intellectual capability, he would not do." Although the majority overlooks this nuanced opinion, there was no police officer present on the night of McClain's murder, so Hedlund's judgment indeed was influenced by what Dr. Holler characterized as his "neuropsychological impairment" at the time. *See State v. Stevens*, 158 Ariz. 595, 599–600 (1988) (reducing death sentence to life imprisonment based, in part, on psychiatrist's testimony that defendant had "capacity to appreciate right from wrong" but "mental disorder" impaired his "ability to conform his behavior [to] the requirements of the law" at time of crime).

¶55 The majority also assigns "little weight" to the evidence of Hedlund's childhood abuse and its impact on Hedlund's psyche because "[he] left the home around age thirteen, more than ten years before the crimes." *Supra* ¶ 25. For the following reasons, I disagree with that assessment as well.

¶56 First, Dr. Holler's testimony shows that although Hedlund physically removed himself from the abuse, its effects did not simply end with a change in his physical surroundings. His neuropsychology and brain development were shaped by the years of abuse he endured, and it is unreasonable to believe any negative impact resolved after he moved out of the abusive environment. Second, Hedlund's life after leaving McKinney Sr.'s home was far from idyllic. After he moved out, he dropped out of

school at age fourteen and began working as an agricultural field worker, picking cotton, vegetables, and sugar cane. When he was seventeen or eighteen, Hedlund attempted suicide. Third, after Hedlund left McKinney Sr.'s home, McKinney stayed behind and the brothers were separated. Before McKinney reappeared in Hedlund's life, Hedlund had held a steady job, been a reliable employee, and paid his bills. In the few months before these crimes, however, McKinney was released from jail and began demanding Hedlund's attention. Also during that time, McKinney Sr. and their stepmother had begun living with their aunt. Both of those circumstances caused Hedlund to "[get] back around his father" during this time. Thus, although Hedlund was not living in the same house with the daily abuse at the time of the crimes, he had recently become surrounded by circumstances reminiscent of that time in his life.

¶57 Viewing the evidence cumulatively, as we must, *see State v. White*, 194 Ariz. 344, 350 ¶ 19 (1999); *see also State v. Kayer*, 194 Ariz. 423, 432–33 ¶ 28 (1999), it shows that Hedlund's childhood abuse and neglect significantly impacted his behavior and is therefore entitled to substantial weight, *see State v. Towery*, 186 Ariz. 168, 189 (1996); *see also State v. Wallace*, 160 Ariz. 424, 427 (1989).

Plea Agreement

¶58 I further disagree with the weight the majority attributes to the plea agreement that the trial court rejected. *See supra* ¶¶ 30–31. The initial plea agreement provided that Hedlund would plead guilty to second-degree murder as to Mertens and theft "[s]tacked with a prior" as to McClain. After the trial court rejected this agreement, the State and Hedlund reached a second plea agreement with the court's guidance.[3]

[3] In 1996, this Court stated that there was no record of a second plea agreement. *McKinney*, 185 Ariz. at 575. The Ninth Circuit, however, stated that the parties "reportedly arrived at a second agreement consisting of a guilty plea for the second degree murder of Mertens, and theft with a prior and burglary non-dangerous with respect to McClain." *Hedlund v. Ryan*, 854 F.3d 557, 575 (9th Cir. 2017). This is supported by Hedlund's notice for

Under that agreement, Hedlund would plead guilty to second-degree murder for Mertens's murder, and theft and burglary in the McClain case. The plea was never presented to the court, however, because Hedlund's counsel allowed the deadline to lapse, choosing instead to file a notice for change of judge to hear the plea.

¶59 The majority assigns only "some weight" to the plea agreements, asserting: "Plea offers can be made for reasons that have nothing to do with whether a prosecutor believes the defendant deserves the death penalty." *Supra* ¶ 31. This may be true generally, but this case involves not one but two plea offers, the second of which would have permitted Hedlund to plead guilty to theft and burglary for the crimes committed against McClain, the same incident for which the death penalty is being affirmed. It is significant that had Hedlund's counsel not missed the deadline for entering a plea, Hedlund might not be facing the death penalty. Although we cannot know whether the trial court would have accepted the second plea, both offers are evidence that the State did not regard Hedlund as being as culpable as McKinney, who, from the record, it appears was never offered a plea. "The plea offer's mitigatory effect is clear: the prosecution thought this was not a clear-cut death penalty case." *Scott v. Schriro*, 567 F.3d 573, 584 (9th Cir. 2009). Accordingly, I believe this is entitled to substantial weight.[4]

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change of judge, in which he indicated the parties had reached the second agreement, as well as the prosecutor's testimony that they had been in negotiations for a second plea agreement.

[4] As to the remaining mitigating factors, I agree that, despite evidence supporting them, *see State v. Watson*, 129 Ariz. 60, 63 (1981) (court must review "all the records"), they are entitled to little or no weight, *see State v. Hargrave*, 225 Ariz. 1, 19 ¶ 82 (2010) ("minor participation" not established in killings when defendant involved in planning and execution of robbery and knew co-defendant prepared to kill, despite not being shooter and not intending victims harm); *see also State v. Dann*, 220 Ariz. 351, 376 ¶ 150 (2009) (evidence of remorse entitled to little weight "when the defendant denies

Sole Aggravator: Pecuniary Gain

¶60 The majority states the pecuniary gain aggravator here is "especially strong." *Supra* ¶¶ 13, 34. Although I agree that we must accept this aggravator as having been proven, I disagree with the characterization of its strength. *See State v. Richmond*, 136 Ariz. 312, 320 (1983) (independent review requires this Court to "determine for ourselves the . . . weight to give" aggravating factor).

¶61 Cases in which this Court affirmed the death penalty where the sole aggravator was pecuniary gain are not common. And, a comparison of those cases reveals striking similarities that shed light on the strength of the aggravating circumstance in this case. Not only were the murders in those cases carefully conceived and planned, but there was an intimate relationship of trust between the victim and the defendant, or they involved a murder-for-hire killing arranged by the victim's loved one. *See State v. Harrod*, 218 Ariz. 268, 284 ¶ 63 (2008) (pecuniary gain in context of contract killings "especially strong"); *see also Spears*, 184 Ariz. at 282, 292–93 (defendant began romantic relationship with victim in preconceived plan to obtain her truck and money); *State v. Willoughby*, 181 Ariz. 530, 533, 548–49 (1995) (pecuniary gain based on "deliberate, carefully conceived, meticulously planned, and cold-blooded scheme to kill . . . [defendant's] unsuspecting wife"); *State v. White*, 168 Ariz. 500, 503, 510–13 (1991) (defendant and romantic partner schemed to kill partner's husband to collect insurance proceeds), *abrogated on other grounds by State v. Salazar*, 173 Ariz. 399, 416–17 (1992). Indeed, in *Willoughby*, this Court noted that although the mitigating evidence in that case would typically "weigh heavily in favor of leniency," it was not warranted "given the strength and quality of the aggravating circumstance." 181 Ariz. at 549.

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responsibility for his conduct"); *State v. Medrano*, 185 Ariz. 192, 194–95 (1996) (no question defendant used cocaine on night of murder, but "primary issue is whether defendant has shown that he was significantly impaired at the time, and that is where the evidence falls short").

¶62 Conversely, in the cases where this Court reduced to life imprisonment a death sentence that had been based on pecuniary gain as the sole aggravator, there was no indication of a well thought-out, long-term plan, nor was there an intimate relationship of trust between the defendant and the victim. *See Stevens*, 158 Ariz. at 596 (reducing death penalty to life imprisonment where defendant, at pre-arranged drug sale with co-worker, robbed and shot co-worker's companion); *State v. Marlow*, 163 Ariz. 65, 71–72 (1989) (leniency warranted where defendant robbed and killed victim who had won substantial sum at casino earlier that night); *see also State v. Rockwell*, 161 Ariz. 5, 8, 16 (1989) (death penalty reduced to life sentence for murder that occurred in course of truck-stop robbery).

¶63 In *State v. Graham*, for example, the defendant, after a night of drinking, decided to rob the victim at his home, obtained a gun, and shot the victim when he opened the door. 135 Ariz. 209, 210 (1983). In mitigation, the defendant showed he suffered from a long-term substance abuse problem, had no prior record revealing a tendency toward that type of violent crime, and was described as "a nonaggressive and passive individual who [was] easily influenced by others." *Id.* at 213. By focusing on the lack of mitigating evidence of substance abuse in this case, the majority has discounted its similarities to *Graham* with respect to the aggravating circumstance of pecuniary gain. *See supra* ¶ 38.

¶64 I acknowledge that Hedlund knew McClain, having previously purchased a car from him, and the crimes involved some planning, arguably making them somewhat similar to cases like *Spears*, *Willoughby*, and *White*. *See State v. McKinney*, 245 Ariz. 225, 228 ¶ 12 (2018) (McKinney leader in planning and executing burglaries). But the relationship between Hedlund and McClain is far from the intimate relationships in *Spears*, *Willoughby*, and *White* and more akin to that of an acquaintance, as in *Graham* or *Stevens*. Moreover, the common thread in all the above cases—reduced sentence or not—is that pecuniary gain was *the* motivating factor. Here, however, the record shows that not only was pecuniary gain just one

of Hedlund's motives, it likely was not his primary motivating factor.[5] *See State v. Acuna Valenzuela*, 245 Ariz. 197, 222 ¶ 42 (2018) ("[P]ecuniary gain need not be the only motive for the . . . aggravator to apply."); *see also State v. Martinez*, 218 Ariz. 421, 435 ¶ 66 (2008) ("Pecuniary gain . . . need only be a motive for the murder, not the sole motive."). Thus, although the state proved pecuniary gain beyond a reasonable doubt, the evidence supporting it, given Hedlund's competing motivations, is not especially strong. *See State v. Bearup*, 221 Ariz. 163, 172 ¶ 44 (2009) (court must independently consider quality and strength of aggravating factors).

¶65 On the night McKinney proposed committing burglary, Hedlund repeatedly stated he was not interested and thought it was "a stupid idea." Hedlund had a steady job, owned his car, could afford what small bills he had, and was able to financially assist his sisters and mother. When McKinney offered Hedlund items stolen from the burglaries McKinney and C.M. committed, Hedlund took only some "wheat pennies," saying he did not want anything else. These facts suggest financial gain was not Hedlund's primary motivation. Conversely, the evidence shows that financial gain was the motivating factor for McKinney. He had no job, no car, owed thousands of dollars in fines, and he was the one who proposed the burglaries to find cash and property to sell. *See McKinney*, 245 Ariz. at 227–28 ¶ 12; *see also Spears*, 184 Ariz. at 292–93 (defendant's lack of money and source of income supported finding pecuniary gain).

¶66 The majority points out that Hedlund stated that "anyone he found would be beaten in the head" as evidence of Hedlund's "active complicity in the crimes." *Supra* ¶ 14 (quoting *McKinney*, 185 Ariz. at 571, 580). Indeed, Hedlund did say that he would hit anyone on the head who

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[5] On direct review in 1996, this Court stated, and the majority now quotes, *see supra* ¶ 14, "Clearly, the evidence of pecuniary gain as the primary, if not sole, purpose of the murders is overwhelming and inescapable." *State v. McKinney*, 185 Ariz. 567, 584 (1996). The Court, however, provided no analysis supporting that statement. Although it is true as it applies to McKinney, for the reasons that follow, the evidence simply does not support that same conclusion as it applies to Hedlund.

was home. But that was only in response to McKinney's assertion that he would shoot whomever he encountered and, according to C.M., was meant to "give [McKinney] a different idea" and get McKinney "away from the idea . . . of hurting anyone." Placed in context, this statement does not so clearly imply what the majority asserts it does. Rather, it again fits Hedlund's profile of attempting to mitigate McKinney's aggressive tendencies.

¶67 As further support for its assertion that the aggravator is particularly strong in this case, the majority states that "Hedlund's only motive in shooting McClain in the back of the head while McClain slept was to facilitate the robbery." *Supra* ¶ 34. And this Court has previously stated there was "ample evidence" that Hedlund was the one who shot McClain. *McKinney*, 185 Ariz. at 580. However, there is no evidence which brother shot McClain, and while the evidence relied upon in *McKinney* does demonstrate that Hedlund participated in the McClain robbery, it does not, in fact, support the conclusion that he shot McClain. *See id.* At Hedlund's sentencing, the trial court, after citing that same evidence, asserted "it is unclear as to whether Mr. Hedlund or Mr. McKinney fired the shot which actually killed Mr. McClain."

¶68 As discussed above, the mitigation evidence established Hedlund's overarching motivation was, as it had been since childhood, to protect his siblings, follow along with McKinney, particularly as McKinney grew more aggressive in the months leading up to the crimes, and to mitigate, to the extent he could, his brother's criminal tendencies. Thus, the fact that he attempted to sell or hide the weapons after the crime is not, contrary to the majority's assertion, illustrative of his financial motives. *See supra* ¶¶ 35–36. McKinney's aggressiveness in demanding Hedlund's car and companionship before the crime also makes it unclear whether Hedlund supplied the gun used in the McClain murder or McKinney simply commandeered it. *See supra* ¶¶ 35–36. Further, although Hedlund participated in the McClain burglary despite knowing McKinney had killed Mertens, that fact, again, fits with both Dr. Holler's and the lay witnesses' testimony about Hedlund's loyalty to McKinney. Shortly before the burglaries, Hedlund expressed his distress over McKinney being "up to his old things again" and "had broken into houses." When his friend advised

Hedlund to stay away from McKinney, Hedlund replied "That's very impossible, with him being my brother."

¶69 After considering all the evidence, it is clear that Hedlund's motivation to participate in the crimes could just as easily have been out of love for and loyalty to McKinney, as well as a misguided attempt to mitigate McKinney's actions and their consequences, as it was out of a personal desire to benefit financially. *Cf. White v. Ryan*, 895 F.3d 641, 645–46, 658–59, 673 (9th Cir. 2018) (counsel ineffective for not challenging pecuniary gain where evidence showed co-defendant planned murder and pressured defendant into committing crime on her behalf, "suggesting [defendant] acted out of love rather than pecuniary gain"); *State v. Prasertphong*, 206 Ariz. 167, 170 ¶¶ 6, 11–13 (2003) (pecuniary gain not proved where evidence showed defendant may have been "unaware" of co-defendant's intent to kill and post-murder actions possibly committed "out of shock or panic"). Accordingly, the evidence does not suggest, like the cases in which this Court affirmed the death penalty based solely on pecuniary gain, that Hedlund abused a position of trust with McClain with the primary intent to benefit financially. This aggravator, while proven beyond a reasonable doubt, is therefore not entitled to the great weight the majority attributes to it.

Balancing

¶70 In considering the mitigating factors, this Court is obligated to weigh them separately and cumulatively, and then determine whether that evidence outweighs the state's aggravating evidence. *See White*, 194 Ariz. at 350 ¶ 19. Put another way, this Court cannot view each piece of mitigating evidence in isolation, but must consider the sum of its parts. We do not merely compare the number of aggravating and mitigating factors, *see State v. Greene*, 192 Ariz. 431, 443–44 ¶ 60 (1998), but "where significant mitigating evidence is balanced against a single aggravating factor, a serious question is raised as to whether a death sentence is warranted," *Marlow*, 163 Ariz. at 72; *see also Bocharski*, 218 Ariz. at 499 ¶ 112 (when faced with "limited aggravation evidence and . . . strong mitigation evidence," leniency warranted).

¶71 *Stevens* is instructive. There, the defendant called his co-worker to arrange a drug sale. 158 Ariz. at 596. When his co-worker arrived with the victim, the defendant robbed them and then shot the victim in the head. *Id.* The mitigation evidence was substantially similar to that presented in this case and in *Graham*: the defendant had no prior criminal history, no record revealing a propensity for violent crime, was described as nonaggressive and passive, and his past harmful actions were nearly always the result of an outside influence. *Id.* at 599–600. Leniency was thus warranted because "Stevens' condition at the time of the offense was a major and contributing cause of his conduct and was sufficiently substantial to outweigh the aggravating factor of pecuniary gain." *Id.* at 600; *see also Marlow*, 163 Ariz. at 71–72 (pecuniary gain outweighed by "dramatic disparity" in sentence compared to co-defendant); *Rockwell*, 161 Ariz. at 15–16 (mitigation evidence showing defendant suffered severe trauma and head injuries following motorcycle accident years earlier outweighed financial motive); *cf. State v. Hensley*, 142 Ariz. 598, 604 (1984) (leniency not warranted where defendant shot victims in back of head after robbery to eliminate witnesses and only mitigating evidence that defendant "obtained a G.E.D. degree").

¶72 In this case, the substantial mitigating evidence outweighs the aggravating evidence presented. Notably, I joined with the majority in affirming the death sentence for McKinney. *See McKinney*, 245 Ariz. 225. Notwithstanding the additional aggravators present in McKinney's case, *see id.* at 227–28 ¶¶ 7, 16, a comparison between the two men illustrates why each case compels a different conclusion on the appropriateness of the death penalty.

¶73 To begin, the difference in how the family described the two men is telling. *See State v. Watson*, 129 Ariz. 60, 63 (1981) (court must review "all the records"). Their sister described McKinney, whom she was aware also faced the death penalty, as "a very, very vicious child" who "scared the hell out of [her]," whereas Hedlund was "mild mannered" and "timid." Whereas McKinney would frequently steal for his stepmother, Hedlund refused and instead would tell his grandmother or another adult about his stepmother's requests. Their sister recounted that McKinney often hit the other children and "provoked every fight there was and then would blame

it on [his siblings]." In one instance, she, Hedlund, and their other sister climbed into a treehouse, and McKinney then set the tree on fire. In another incident, McKinney told the family he was digging "graves" in a canal bank near their house "[b]ecause [he was] going to kill all of [them]."

¶74 In relation to the crimes themselves, when C.M. told McKinney and Hedlund that he had heard about Mertens's death, Hedlund "had a very serious, somber look," but McKinney "smil[ed]." Hedlund became "agitated," "somber," and "distressed" after the crimes and told C.M. he had a "bad conscience," but McKinney's personality did not change. Hedlund was "glad" C.M. talked with the police about the case, but McKinney told C.M. he would "go down as well" if he "snitched [McKinney] off." And the manner in which McKinney killed Mertens was "especially heinous, cruel or depraved." *McKinney*, 245 Ariz. at 227 ¶ 7.

¶75 McKinney's disturbing background and actions "set[] him apart from the usual murderer." *Watson*, 129 Ariz. at 63; *see also Spears*, 184 Ariz. at 295. Hedlund, however, does not stand out as "the worst of the worst." *White*, 194 Ariz. at 357–58 ¶ 55 (Zlaket, J., dissenting). Despite his abusive childhood, he did not develop the violent and homicidal tendencies of his brother. Rather, as the oldest child, he developed a strong, seemingly pathological, need to protect his younger siblings and facilitate a sense of belonging and family. Until McKinney reentered his life, Hedlund worked a steady job, supported his sisters and mother, and generally led a quiet life. Indeed, Durand testified that, of all the family she had talked to, none of them was "surprised by the accusations against [McKinney]," but they "were in utter disbelief that [Hedlund] could have been involved." In sum, Hedlund's background and neuropsychological impairments, "while not making [him] unaccountable for his crime," support leniency in the form of a sentence of life imprisonment. *Rockwell*, 161 Ariz. at 15.

¶76 "Where there is a doubt whether the death sentence should be imposed, we will resolve that doubt in favor of a life sentence." *State v. Valencia*, 132 Ariz. 248, 250 (1982); *see also Marlow*, 163 Ariz. at 72; *Rockwell*, 161 Ariz. at 16. In this case, the substantial mitigating evidence, taken as a whole, when balanced against a single aggravating factor that is not, in my view, "especially strong," as the majority characterizes it, *supra* ¶¶ 13, 34 is

at least enough "to question whether death is appropriate," *Trostle*, 191 Ariz. at 23. For this reason, Hedlund's death sentence should be reduced to life imprisonment.

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CHARLES MICHAEL HEDLUND, *Petitioner-Appellant*, v. CHARLES L. RYAN, *Respondent-Appellee*.	No. 09-99019 D.C. No. 2:02-cv-00110-DGC ORDER AND AMENDED OPINION

Appeal from the United States District Court
for the District of Arizona
David G. Campbell, District Judge, Presiding

Argued and Submitted
December 6, 2012—Pasadena, California

Filed March 4, 2016
Amended April 13, 2017

Before: Kim McLane Wardlaw, Carlos T. Bea,
and N. Randy Smith, Circuit Judges.

Order;
Opinion by Judge N.R. Smith;
Concurrence by Judge Bea;
Partial Concurrence and Partial Dissent by Judge Wardlaw

SUMMARY*

Habeas Corpus/Death Penalty

The panel filed (1) an amended opinion reversing in part and affirming in part the district court's denial of a habeas corpus petition and remanding with instructions to grant the petition with respect to the petitioner's death sentence; and (2) an order denying a petition for rehearing en banc.

In the amended opinion, the panel held that the district court properly denied relief on the petitioner's claims regarding (1) the use of a visible leg brace as a security measure during trial; (2) the use of dual juries for the petitioner and his co-defendant; (3) juror bias; (4) ineffective assistance of counsel during the plea process; and (5) ineffective assistance of counsel during the penalty phase.

Applying *McKinney v. Ryan*, No. 09-99018, 2015 WL 9466506 (9th Cir. Dec. 29, 2015) (en banc), the panel held that the Arizona Supreme Court's application of a "causal nexus" test – whereby not all mitigating evidence was considered under *Lockett v. Ohio*, 438 U.S. 586 (1978), *Eddings v. Oklahoma*, 455 U.S. 104 (1982), and their progeny – was contrary to clearly established federal law, and that the error was not harmless.

Judge Bea concurred in the majority opinion in full because the panel is bound to follow *McKinney*, whose analysis of the *Eddings* issue he believes conflicts with

* This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

Supreme Court precedent requiring this court to presume that state courts know and follow the law.

Concurring in part and dissenting in part, Judge Wardlaw disagreed with the majority's disposition of the petitioner's claims of unconstitutional shackling during trial and ineffective assistance of counsel during the plea process and penalty phase.

COUNSEL

Paula Kay Harms, Federal Public Defender's Office, Phoenix, Arizona, for Petitioner-Appellant.

Jon Anderson, Arizona Attorney General's Office, Phoenix, Arizona, for Respondent-Appellee.

ORDER

The opinion filed March 4, 2016, and reported at 815 F.3d 1233, is hereby amended concurrent with the filing of an Amended Opinion today. With these amendments, Judges Bea and N.R. Smith voted to deny the petition for rehearing en banc, and Judge Wardlaw voted to grant the petition for rehearing en banc.

The full court was advised of the petition for rehearing en banc. A judge requested a vote on whether to rehear the matter en banc. The matter failed to receive a majority of the votes of the nonrecused active judges in favor of en banc consideration. Fed. R. App. P. 35.

The petition for rehearing en banc is **DENIED**. No further petitions for rehearing or rehearing en banc may be filed in response to the amended disposition.

OPINION

N.R. SMITH, Circuit Judge:

Petitioner Charles Michael Hedlund, an Arizona state prisoner, appeals the district court's denial of his 28 U.S.C. § 2254 habeas corpus petition. A jury convicted Hedlund of one count of first degree murder for the 1991 killing of Jim McClain. The trial court sentenced Hedlund to death for the murder. The jury also convicted Hedlund of the second degree murder of Christene Mertens.

The relevant state court decision, relating to Hedlund's claims regarding (1) the use of a leg brace as a security measure during trial; (2) the use of dual juries; (3) juror bias; (4) counsel's performance during the plea process; and (5) counsel's performance during the penalty phase, was not contrary to, nor an unreasonable application of, clearly established federal law or based on an unreasonable determination of the facts before that court.[1] *See* 28 U.S.C. § 2254(d).

[1] Judge Wardlaw dissents from Parts I, IV, and V of this disposition, stating that she has "previously explained [her] disagreement with the majority's disposition of Hedlund's claims of unconstitutional shackling during trial and ineffective assistance of counsel during the plea process and penalty phase." Slip op. at 67 (Wardlaw, J., concurring in part and dissenting in part) (citing *Hedlund v. Ryan*, 750 F.3d 793, 831–43 (9th Cir. 2014) (Wardlaw, J., concurring in part and dissenting in part)). In our prior opinion, we responded to her disagreement. *Hedlund*, 750 F.3d at 811 n.15, 811–12, 813 n.16, 817, 820, 823 n.25. Similar to Judge Wardlaw's statement, we see no need to repeat our disagreement with her prior dissent here.

However, the Arizona Supreme Court applied a "causal nexus" test, whereby not all mitigating evidence was considered under *Lockett v. Ohio*, 438 U.S. 586 (1978), *Eddings v. Oklahoma*, 455 U.S. 104 (1982), and their progeny. *See McKinney v. Ryan*, No. 09-99018, 2015 WL 9466506 (9th Cir. Dec. 29, 2015) (en banc). Therefore, such decision was contrary to clearly established federal law. *See* 28 U.S.C. § 2254(d). We must reverse the district court and remand with instructions to grant the petition with respect to Hedlund's sentence.[2]

FACTS AND PROCEDURAL HISTORY

Findings of fact in the last reasoned state court decision are entitled to a presumption of correctness, rebuttable only by clear and convincing evidence. *See Runningeagle v. Ryan*, 686 F.3d 758, 763 n.1 (9th Cir. 2012); *Moses v. Payne*, 555 F.3d 742, 746 n.1 (9th Cir. 2008). Therefore, we adopt the statement of facts as presented by the Arizona Supreme Court in its 1996 opinion on consolidated direct appeal.

> Beginning February 28, 1991, James Erin McKinney and Charles Michael Hedlund (Defendants) commenced a residential burglary spree for the purpose of obtaining cash or property. In the course of their extensive planning for these crimes, McKinney boasted that he would kill anyone

[2] Because Hedlund has not shown that resolution of his remaining claims is "debatable amongst jurists of reason," *Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003), we decline to reach the other uncertified issues on appeal. *See* 28 U.S.C. § 2253(c); *Hiivala v. Wood*, 195 F.3d 1098, 1102–04 (9th Cir. 1999) (per curiam).

who happened to be home during a burglary and Hedlund stated that anyone he found would be beaten in the head.

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

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

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

A. The first murder

The fourth burglary took place on March 9, 1991. This time only McKinney and Hedlund were involved. Mertens was picked again

because Defendants had been told by Lemon and Morris, who knew Mertens' son, that Mertens kept several thousand dollars in an orange juice container in her refrigerator.

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

B. The second murder

Defendants committed the fifth burglary on March 22, 1991. The target was Jim McClain, a sixty-five-year-old retiree who restored cars for a hobby. McClain was targeted because Hedlund had bought a car from him some months earlier and thought McClain had money at his house. Entry was gained through an open window late at night while McClain was sleeping. Hedlund brought along his .22 rifle, which he had sawed-off to facilitate concealment. Defendants ransacked the front part of the house then moved to the bedroom. While he was sleeping, McClain was shot in the back of the head with Hedlund's rifle. Defendants then ransacked the bedroom, taking a pocket

> watch and three hand guns; they also stole McClain's car.

State v. McKinney, 917 P.2d 1214, 1218–19 (Ariz. 1996) (en banc), *superseded by statute on other grounds as stated in State v. Martinez*, 999 P.2d 795, 806 (Ariz. 2000) (en banc).

Hedlund and McKinney were each indicted on two counts of first degree murder and four other counts relating to the robberies. Both Defendants were tried in the same courtroom before dual juries. Before returning its verdict, Hedlund's jury asked whether he could "be convicted as an accomplice to the burglary and not be convicted in the murder charge." On November 12, 1992, the jury found Hedlund guilty of the second-degree murder of Mertens, the first-degree murder of McClain, and lesser charges. In a special verdict, the jury unanimously found that Hedlund was guilty of the premeditated murder of McClain, rejecting a felony murder theory. The trial court sentenced Hedlund to death for the first degree murder of McClain and to terms of imprisonment on the lesser charges.

Upon direct appeal, the Arizona Supreme Court affirmed the conviction and sentence. *McKinney*, 917 P.2d at 1214. In its opinion, the Arizona Supreme Court considered five claims relevant to this appeal: (1) whether the use of dual juries deprived Hedlund of his right to a fair trial, (2) whether ordering Hedlund to wear a visible leg restraint during trial deprived Hedlund of his right to a fair trial, (3) whether Hedlund was denied his right to a fair and impartial jury when the trial court refused to dismiss a juror distantly related to one of the victims, (4) claims surrounding the negotiation of a second plea deal, and (5) the consideration and weighing of aggravating and mitigating factors.

The Arizona Supreme Court denied relief on all claims and noted "ample evidence" that Hedlund killed McClain, including: Hedlund's finger and palm prints were on McClain's briefcase, which had been rifled during the burglary; Hedlund's fingerprints were on the magazine of his sawed-off rifle; the bullet that killed McClain was consistent with having come from Hedlund's rifle; Hedlund had modified his rifle by sawing it off in order to conceal it; Hedlund hid the rifle after the murder; Hedlund asked Morris to get rid of the rifle before police found it; and Hedlund expressed remorse after he was arrested.

After the Arizona Supreme Court rejected Hedlund's claims, Hedlund filed a petition for post-conviction relief (PCR) and then an amended PCR petition in the state trial court. On PCR review, the trial court denied the amended petition without an evidentiary hearing. The Arizona Supreme Court summarily denied Hedlund's petition for review.

On August 5, 2003, Hedlund filed the operative amended petition for a writ of habeas corpus in federal district court. Hedlund later filed a motion to expand the record and for evidentiary development as to certain claims. On March 31, 2005, the district court denied the motion to expand the record and denied six of Hedlund's claims. On August 10, 2009, the district court denied Hedlund's remaining claims, found Hedlund not entitled to habeas relief, and entered judgment.

The district court granted a certificate of appealability (COA) on three claims. We expand the COA to include three additional claims, as explained below. We otherwise deny Hedlund's request to expand the COA.

STANDARD OF REVIEW

"We review *de novo* the district court's decision to grant or deny a petition for writ of habeas corpus." *Rhoades v. Henry*, 598 F.3d 495, 500 (9th Cir. 2010). Because Hedlund initiated district court proceedings in 2002, the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) applies. *See Lindh v. Murphy*, 521 U.S. 320, 336–37 (1997). "Before we can apply AEDPA's standards, we must identify the state court decision that is appropriate for our review." *Barker v. Fleming*, 423 F.3d 1085, 1091 (9th Cir. 2005). Although "AEDPA generally requires federal courts to review one state decision," where "the last reasoned decision adopted or substantially incorporated the reasoning from a previous decision . . . it [is] reasonable for the reviewing court to look at both decisions to fully ascertain the reasoning of the last decision." *Id.* at 1093; *see also Amado v. Gonzalez*, 758 F.3d 1119, 1130 (9th Cir. 2014) ("When the last reasoned decision is a state appellate court decision which 'adopt[s]' or 'substantially incorporate[s]' lower state court decisions, we may review those lower state court decisions as part of our review of the state appellate court's decision." (quoting *Barker*, 423 F.3d at 1093)); *Lewis v. Lewis*, 321 F.3d 824, 829 (9th Cir. 2003) (Although this court was required to review the last reasoned opinion of the state appellate court, our analysis "necessarily include[d] discussion of the trial court's decision" "[b]ecause th[e appellate] decision affirmed the trial court and adopted one of the reasons cited by the trial court.").

A petitioner must overcome a high threshold to obtain relief under AEDPA:

> Federal habeas relief may not be granted for claims subject to [28 U.S.C.] § 2254(d) unless it is shown that the earlier state court's decision was contrary to federal law then clearly established in the holdings of [the Supreme] Court, § 2254(d)(1); or that it involved an unreasonable application of such law, § 2254(d)(1); or that it was based on an unreasonable determination of the facts in light of the record before the state court, § 2254(d)(2).

Harrington v. Richter, 562 U.S. 86, 100 (2011) (internal quotation marks and citation omitted). "[T]he *only* definitive source of clearly established federal law under AEDPA is the holdings (as opposed to the dicta) of the Supreme Court as of the time of the state court decision." *Clark v. Murphy*, 331 F.3d 1062, 1069 (9th Cir. 2003), *overruled on other grounds by Lockyer v. Andrade*, 538 U.S. 63, 71 (2003).

If Supreme Court "cases give no clear answer to the question presented, . . . it cannot be said that the state court unreasonably applied clearly established Federal law." *Wright v. Van Patten*, 552 U.S. 120, 126 (2008) (internal quotation marks and alterations omitted). In other words, "[i]t is not an unreasonable application of clearly established Federal law for a state court to decline to apply a specific legal rule that has not been squarely established by [the Supreme Court]." *Harrington*, 562 U.S. at 101 (alterations omitted) (quoting *Knowles v. Mirzayance*, 556 U.S. 111, 122 (2009)).

In cases where a petitioner identifies clearly established federal law and challenges the state court's application of that

law, our task under AEDPA is not to decide whether a state court decision applied the law correctly. *See id.* Rather, we must decide whether the state court decision applied the law reasonably. *See id.* ("[A]n *unreasonable* application of federal law is different from an *incorrect* application of federal law." (quoting *Williams v. Taylor*, 529 U.S. 362, 410 (2000))). If the state court applied the law reasonably, we must deny relief. *See id.* Thus, relief is proper only "in cases where there is no possibility fairminded jurists could disagree that the state court's decision conflicts with [the Supreme Court's] precedents." *Id.* at 102.

DISCUSSION

I. Visible Leg Brace at Trial

A. Background and procedural history

The trial court ordered both Hedlund and McKinney to wear a leg brace during trial, because it was important to courtroom security. During a pretrial hearing, Deputy Sheriff Jack Roger Lane testified that he was aware of a 1992 escape plot by Hedlund and McKinney. The plan was to "jump one of the guards, take his uniform and his weapon and one of them would put the uniform on and they would walk out together. They would handcuff the guard and leave him there." Lane received this information thirdhand from a subordinate officer, who heard it from an inmate. McKinney was specifically identified in the plot. The other individual was someone "charged with murder," but Hedlund was not

specifically named in the discussion on the record.[3] Although Lane could not confirm it, the prosecutor was aware of an earlier escape attempt by McKinney during the summer of 1991.

Hedlund's counsel challenged the leg brace, arguing that McKinney was the flight risk, not Hedlund. Recognizing its responsibility to maintain courtroom security, the trial court found it would be "irresponsible" to ignore the nature of the charges filed and the fact that both Defendants would be in close proximity to the jurors, staff, and others. The court denied the request to remove Hedlund's leg brace, finding "reasonably reliable evidence that there is indeed a real escape risk in this case." The court concluded that the leg brace was "a reasonable alternative to any other type of restraint that could be imposed on [Hedlund and McKinney] to assist in the preservation of a safe environment for everyone [in the courtroom]." The court also attempted to minimize any potential prejudice by making the leg brace less visible. The court ordered new defense tables with backs covering two feet of the four-foot gap between the table top and the floor. The court also ensured that the Defendants would be seated in the courtroom before the juries arrived so

[3] When Lane was recalled at a later time, he testified that Hedlund's "jail card" (which tells officers about the risks posed by inmates), contained a narrative about an escape plan. Specifically, the narrative read, "Warning, take keys and clothing per class A1920. McKinney planning escape by jumping guard per information, 300120, per request CPD 2525." While no specific mention of Hedlund was given in this narrative, the escape warning was presumably applied to him as well because the narrative appeared on *Hedlund's* jail card.

the jurors would not see the Defendants walking stiff-legged in the braces.[4]

Hedlund's counsel later filed multiple written motions objecting to the leg brace. During a post-trial evidentiary hearing, the court called Officer Richard Morris, one of the deputies present during trial. Officer Morris testified that during trial he was able to see the leg brace, similar to what was shown in a picture taken from the jury box. Hedlund's investigator testified that she spoke with several jurors regarding the leg brace. The jurors agreed that it was understandable that the Defendants (who had been charged with such serious crimes) were put in some sort of restraint. While the restraints seemed to provide a sense of security to the jurors, the jurors stated that the leg brace did not have any impact on their verdict.

On Hedlund's motion for new trial, after considering the escape risk by two Defendants charged with serious crimes and considering all of the various options (including limiting or increasing the number of deputies in the courtroom), the court concluded that the leg braces were proper to ensure the safety of the jurors, court staff, and everyone in the courtroom. While Hedlund could have helped facilitate concealment of the leg brace, the court noted that the leg brace did not "overwhelm" the jury to cause them to convict Hedlund on all charges.

[4] Although the leg restraint was intended to be invisible, the record demonstrates that it was in fact visible to the jury. Indeed, Respondent conceded visibility at oral argument. Insofar as the restraints were visible, however, the trial court found Hedlund largely to blame. In particular, it found that "had [he] chosen to do so, [Hedlund] could have facilitated the concealment of the leg brace by keeping [his] pants pulled down, and [his] legs back from the front of the desk."

On direct appeal, the Arizona Supreme Court credited the trial court's record of security concerns, noting that "Hedlund attempted an escape during the summer of 1991 and also made plans with another capital defendant to escape by attacking a guard and taking his uniform and gun."[5] The court concluded that the leg restraint was not an abuse of discretion, given the trial judge's well-founded security concerns and the absence of specific prejudice to Hedlund.

On habeas review, the federal district court noted that the Arizona Supreme Court erroneously attributed the 1991 escape attempt to Hedlund. However, the district court found no indication, let alone clear and convincing evidence, that the state court erred in finding both Hedlund and McKinney involved in the 1992 escape plot.

B. Hedlund's leg restraint was not imposed based on a clearly unreasonable determination of the facts, nor was its imposition contrary to, or an unreasonable application of, clearly established federal law.

1. Standard of Review

As an initial matter, Hedlund argues that we should review this claim de novo because the Arizona Supreme Court erroneously attributed McKinney's 1991 escape attempt to Hedlund. While the Arizona Supreme Court's recitation of that fact is in error, as the federal district court correctly recognized, there is no indication that the trial court or the Arizona Supreme Court on direct review erred in

[5] As fully discussed below, this recitation of the facts is in error. The record shows that it was McKinney, not Hedlund, who attempted an escape in 1991.

concluding that Hedlund was involved in the 1992 escape plot with McKinney. The trial court presumed that Hedlund was the other capital inmate plotting an escape with McKinney in 1992. Hedlund has not shown that this presumption was an unreasonable determination of the facts. Nor has he rebutted this factual determination with clear and convincing evidence.

Deputy Lane testified that an inmate (who knew McKinney) overheard McKinney plotting with another capital defendant. While the inmate-informant did not know Hedlund by name, jail security personnel drew the inference that the unnamed capital defendant was Hedlund. Jail security personnel then acted upon this tip by noting the security risk on Hedlund's jail card. Thus, when the Arizona Supreme Court stated that Hedlund made plans with another capital defendant (i.e., McKinney) to escape, this was neither factually erroneous nor objectively unreasonable based on Deputy Lane's testimony.[6]

2. An essential state interest justified the leg restraint.

The Arizona Supreme Court's decision affirming the use of the leg brace was not contrary to, or an unreasonable application of, clearly established federal law. Relevant to the state interest in requiring Hedlund to wear the leg brace, the Arizona Supreme Court recognized the need to leave courtroom security matters to the trial court's discretion and

[6] Even if we assume that the Arizona Supreme Court's erroneous factual statement (misattributing the 1991 escape attempt to Hedlund) is enough to call into question the entirety of the factual findings regarding shackling, conducting de novo review would not change the outcome.

upheld the trial court's decision based on the fact that "the trial judge specifically made a record to document . . . [his] well-founded security concerns." Because the state appellate court affirmed based on the trial court's security concerns, our review of the appellate court's reasoned decision necessarily considers the trial record reflecting those concerns. Ordering the leg brace was justified by an essential state interest. The Supreme Court has defined shackling as "the sort of inherently prejudicial practice that . . . should be permitted *only* where justified by an essential state interest specific to each trial."[7] *Holbrook v. Flynn*, 475 U.S. 560, 568–69 (1986) (emphasis added). This determination turns on the facts of the case. Where an obstreperous defendant's actions threaten the proceedings, even fully binding and gagging the defendant could be constitutionally permissible. *Illinois v. Allen*, 397 U.S. 337, 344 (1970).

Here, the trial court found that Hedlund posed a security risk, thus warranting the minimally intrusive restraint. The trial court based this finding on the alleged 1992 escape plot involving both Defendants, the nature of the charges, and the

[7] Where the decision to physically restrain a defendant violates due process, on habeas review, a petitioner must show that the error had "substantial and injurious effect or influence in determining the jury's verdict." *Brecht v. Abrahamson*, 507 U.S. 619, 623 (1993) (quoting *Kotteakos v. United States*, 328 U.S. 750, 776 (1946)). "To determine whether the imposition of physical restraints constitutes prejudicial error, we have considered the *appearance and visibility* of the restraining device, the nature of the crime with which the defendant was charged and the strength of the state's evidence against the defendant." *Larson v. Palmateer*, 515 F.3d 1057, 1064 (9th Cir. 2008) (emphasis added). However, we have also recognized that this multi-factor test is not clearly established federal law. *Walker v. Martel*, 709 F.3d 925, 938 (9th Cir. 2013). In any event, because we find that the use of a leg restraint did not violate due process, we do not reach the issue of prejudice.

safety of all persons in the courtroom during trial. The trial court's conclusion, that specific security interests presented by the facts of this case warranted the leg restraint, was not contrary to, or an unreasonable application of, *Holbrook* (i.e., whether an essential state interest justified the use of a leg brace in this case). *Holbrook*, 475 U.S. at 569; *see also Hamilton v. Vasquez*, 882 F.2d 1469, 1471 (9th Cir. 1989) ("Shackling is proper where there is a serious threat of escape or danger to those in and around the courtroom, or where disruption in the courtroom is likely if the defendant is not restrained."); *Crittenden v. Ayers*, 624 F.3d 943, 971 (9th Cir. 2010) ("[Defendant] fail[ed] to rebut by clear and convincing evidence the trial court's finding on the record that the restraints were justified by a state interest specific to Crittenden's trial, namely his likelihood of escape or 'nonconforming conduct.'").

The record shows that jail personnel became aware of the 1992 escape plan after a tip from another inmate. While the inmate knew McKinney's name, the inmate knew only that the co-plotter was another inmate charged with capital murder. Jail personnel then reviewed and acted upon this information. We do not know how jail personnel made the inference that the second inmate was Hedlund (e.g., whether Hedlund was the only other capital murder defendant who had been talking to McKinney, or was the only capital murder defendant housed in close proximity to McKinney). However, we do know that, after learning of the plot, jail personnel applied special security procedures to both Defendants and provided this information to the trial court.

While the trial court based its conclusion regarding the escape plot on information provided by jail personnel, the trial court's reliance on this testimony was not contrary to, or

an unreasonable application of, clearly established federal law. The trial court could have used the jail's security-based decision as support for its conclusion that Hedlund posed an escape risk, because such decisions are subjective and discretionary. *Cf. Rhodes v. Chapman*, 452 U.S. 337, 349 n.14 (1981) ("[A] prison's internal security is peculiarly a matter normally left to the discretion of prison administrators.").

The trial court relied on Deputy Lane's assertion and concluded as follows:

> I have been provided with what I have weighed and considered as reasonably reliable evidence that there is indeed a real escape risk in this case; perhaps not in the courtroom, but one that has been articulated outside the hearing of the Court in a fashion that indicates that both defendants were anticipated to be involved in it. . . . [There was] certainly some thought being given on the nature and mode of escape.

Although the trial court based this decision on hearsay coming from within the jail, there is no clearly established federal law suggesting that such a finding is impermissible. Challenging the trial court's reliance upon such hearsay, Hedlund cites *Gonzalez v. Pliler*, 341 F.3d 897, 902 (9th Cir. 2003). However, *Gonzalez* is inapplicable to this case. First, *Gonzalez* applies the "less restrictive alternatives" test that was not clearly established federal law for AEDPA purposes. *See Crittenden*, 624 F.3d at 971–72 (recognizing that "case law requiring a court to weigh the benefits and burdens of shackling and pursue less restrictive alternatives was not

clearly established federal law" before *Deck v. Missouri*, 544 U.S. 622 (2005)). Second, while *Gonzalez* recognized that the rules regarding physical restraints in California and the Ninth Circuit are largely coextensive, 341 F.3d at 901 n.1, the language stating that a court may not rely upon "the unsubstantiated comments of others" is drawn from California precedent, not clearly established federal law, *id.* at 902 (quoting *People v. Mar*, 52 P.3d 95, 107 (Cal. 2002)).

It was not objectively unreasonable for the Arizona Supreme Court to find an essential state interest based on Lane's testimony regarding the 1992 Hedlund/McKinney escape attempt. Therefore, upholding the decision to impose the leg brace was not contrary to, or an unreasonable application of, clearly established federal law.

3. Prejudice

Because the Arizona Supreme Court's adoption of the finding that Hedlund's leg brace was justified by an essential state interest is not contrary to, or an unreasonable application of, *Holbrook*, we do not reach the question of prejudice.

II. Use of Dual Juries

A. Background and procedural history

Over the Defendants' and prosecutor's objections, the trial court ordered the Defendants' cases tried before dual juries. The trial court reasoned that two trials would cause needless duplication, the victims' families would suffer twice, and the only evidence that was not admissible to both juries

could be covered in a single afternoon.[8] The court set forth detailed procedures to be used at trial to avoid any problems.[9]

Hedlund challenged the use of dual juries in a special action to the Arizona Court of Appeals. *See Hedlund v. Sheldon*, 840 P.2d 1008, 1009 (Ariz. 1992) (en banc). The Court of Appeals reversed, holding that the trial court exceeded its authority under the Arizona Rules of Criminal Procedure and the Arizona Supreme Court's decision in *State v. Lambright*. *Id.* However, the Arizona Supreme Court

[8] The court arranged for this evidence to be heard separately to avoid a possible *Bruton v. United States*, 391 U.S. 123 (1968), violation. In *Bruton*, during a joint trial, the trial court instructed the jury that a codefendant's confession inculpating both the codefendant and the defendant could be used only against the codefendant, and should be disregarded with respect to the defendant. *Id.* at 124–25. Where the jury was allowed to consider the codefendant's confession, the Supreme Court found that the confession "added substantial, perhaps even critical, weight to the Government's case in a form not subject to cross-examination, since [the codefendant] did not take the stand. [The defendant] thus was denied his constitutional right of confrontation." *Id.* at 128. The Court recognized that "[t]he unreliability of [inculpatory statements by a codefendant] is intolerably compounded when the alleged accomplice, as here, does not testify and cannot be tested by cross-examination." *Id.* at 136. The Court concluded that "in the context of a joint trial we cannot accept limiting instructions as an adequate substitute for petitioner's constitutional right of cross-examination." *Id.* at 137.

[9] Those procedures included separate voir dire of the jury panels, a courtroom layout that allowed both Defendants full view of the jurors and witnesses, separate preliminary instructions, separate opening statements, separate reading of the charges, special procedures for handling codefendant inculpatory statements, separate closing statements, and special procedures for the return of the verdicts.

reversed the Court of Appeals,[10] concluding that the decision to empanel a dual jury is an "exercise of an individual judge's discretion to use a particular technique in order to meet a specific problem in a single case." *Id.* at 1011 (internal quotation marks omitted). Thus, the court affirmed the decision to empanel dual juries.

Post-trial, the trial court rejected Hedlund's renewed dual jury challenge. The court found that it had eliminated the risk of possible prejudice by empaneling dual juries rather than having one jury consider both Defendants' guilt. The court concluded that this strategy worked, because the verdicts reflected that the juries were able to do their jobs intelligently.

B. The use of dual juries at trial was not contrary to, or an unreasonable application of, clearly established federal law.

Because Hedlund cannot point to clearly established federal law governing this claim, habeas relief is unavailable. The Supreme Court has not spoken on the issue of dual juries, and Hedlund cites no relevant authority.

In *Zafiro v. United States*, 506 U.S. 534, 538–39 (1993), the Court held that severance is not required in the face of antagonistic defenses. Even where prejudice is shown, Rule 14 of the Federal Rules of Criminal Procedure "leaves the tailoring of the relief to be granted, if any, to the district court's sound discretion." *Id.* at 539. The Court went on to

[10] At the same time, the Arizona Supreme Court also reversed its earlier decision in *State v. Lambright*, 673 P.2d 1 (Ariz. 1983) (en banc), which had found that the use of dual juries violated state law.

say that severance should be granted "only if there is a serious risk that a joint trial would compromise a specific trial right of one of the defendants, or prevent the jury from making a reliable judgment about guilt or innocence." *Id.*

Hedlund argues that this claim is valid, because certain of his specific trial rights were violated. While *Zafiro* holds that severance should be granted if there were a serious risk that a specific trial right would be compromised, *Zafiro* does not apply to § 2254 cases. *Zafiro* was a direct appeal originating in federal district court (i.e., a case in which the Federal Rules of Criminal Procedure applied). *See Collins v. Runnels*, 603 F.3d 1127, 1131–32 (9th Cir. 2010) ("By its own wording, *Zafiro* only applies to federal and not state court trials. It analyzes only the *Federal* Rules of Criminal Procedure applicable to *federal* district courts.").

Even if we could apply *Zafiro*'s prejudice holding, Hedlund has not identified any specific constitutional right that has been violated. While he alludes to several constitutional violations, none of these arguments is well developed with citation to authority. To the extent Hedlund argues that the prosecutor was improperly allowed to ask leading questions or elicit ambiguous testimony, he does not cite specific examples. Moreover, defense counsel had the opportunity to object at trial and did so. Although some objections were overruled, it is not clear the subject questions were leading or ambiguous, and if so, whether these evidentiary rulings were improper or harmed Hedlund in any way.

Even if ambiguous testimony or leading questions could somehow amount to a constitutional violation, the testimony did not prevent Hedlund from demonstrating lack of motive

or putting on a full defense. The jury heard testimony that Hedlund had a steady job and did not need to steal for money, and Lemon and Morris testified that Hedlund wanted nothing to do with the early burglaries.

Hedlund's antagonistic defenses argument similarly fails. There is no constitutional right to severance merely because codefendants point the finger at each other. Moreover, the trial court's remedy of employing procedural safeguards for the use of dual juries was within its discretion. Because none of Hedlund's dual jury arguments demonstrate prejudice that is so "clear, manifest or undue that he was denied a fair trial," even if *Zafiro* applied, this claim fails. *See Lambright v. Stewart*, 191 F.3d 1181, 1185–87 (9th Cir. 1999) (dual juries are permissible in capital cases so long as they comport with due process; denial of a motion to sever for antagonistic defenses not reversible without a showing of clear prejudice).

III. Juror Bias

A. Background and procedural history

On the second day of trial, one juror ("the Juror") wrote a letter to the trial court disclosing the fact that she discovered she was distantly related to McClain, the second murder victim. In the letter, the Juror explained that she had become aware of this fact only that morning. When the Juror informed her mother she was serving on a jury, her mother stated that "she had read of a trial starting in Mesa in which one of the victims had been married to a cousin of [the Juror's] stepfather." The Juror told her mother she could not discuss the trial and did not want to hear anything further. However, the Juror realized she would have to disclose this to the judge, so she asked her mother the name of the victim

who was married to the stepfather's cousin. The Juror stated that she didn't personally recognize the name of the victim and had "never met, nor even heard of, [her] stepfather's cousin, who is deceased." She then concluded with the following statement regarding her ability to serve on the jury: "I don't believe it would affect my ability to be fair and impartial, but I do not wish to compromise the proceedings in any way, so I wish to make the court aware of the situation."

In response to the letter, the trial court held a hearing in chambers to explore whether the Juror should remain on the jury. The court read the Juror's statement about impartiality back to her and asked if this was her belief. She responded, "Yes, it is." In response to the court's questions, the Juror explained that she had never met her stepfather's now-deceased cousin who used to be married to McClain. In fact, until the conversation with her mother, she didn't even know the cousin existed. Hedlund's counsel inquired about the Juror's relationship with her stepfather. The Juror explained that they "have a very superficial relationship."

Hedlund's counsel moved to strike the Juror for cause on the basis that she was a distant relative of the victim. The court stated, "given what she said here today I would not, based on what I've heard . . . have stricken her for cause. . . . She is now on the jury. And based on the circumstances she has relayed to me, I'm going to deny the motion. She'll remain on the panel."

On appeal, the Arizona Supreme Court affirmed, finding that nothing in the record suggested the Juror was untruthful in stating she could be fair and impartial. The federal district court agreed. The district court found no risk of "substantial emotional involvement based on [the Juror's] highly

attenuated connection with the victim, about which the [J]uror was not even aware."

B. The trial court complied with clearly established federal law when it determined no juror bias was present.

1. Hedlund has failed to prove actual bias.

Because the trial court followed clearly established federal law regarding actual juror bias, Hedlund's claim fails. In *Remmer v. United States*, the Supreme Court held that juror bias should be determined "in a hearing with all interested parties permitted to participate." 347 U.S. 227, 230 (1954). In *Smith v. Phillips*, the Supreme Court reversed a grant of habeas where the lower federal courts found insufficient a hearing to determine juror bias. 455 U.S. 209, 214–16, 221 (1982). During the *Smith* trial, one of the jurors applied for a job as an investigator with the district attorney's office. *Id.* at 212. The prosecutors were aware of the application, but did not tell the court or defense counsel until after the jury returned its verdict. *Id.* at 212–13. Upon learning of the juror's job application, the defendant moved to set aside the verdict. *Id.* at 213. The trial court held a hearing on this motion, at which both the prosecutors and the juror testified. *Id.* After the hearing, the trial court found that the juror was not biased as a result of his job application to the district attorney; and no evidence suggested a "sinister or dishonest motive" on the prosecutors' part. *Id.* at 214. On habeas review, the federal district court found the trial court's bias hearing insufficient and granted relief, which the Second Circuit affirmed.

The Supreme Court reversed the lower federal courts, finding that the trial court's hearing (exploring the issue of juror bias) was sufficient to comply with due process. *Id.* at 221. The Court reiterated that it "has long held that the remedy for allegations of juror partiality is a hearing in which the defendant has the opportunity to prove actual bias." *Id.* at 215. The Court rejected the argument that a trial court "cannot possibly ascertain the impartiality of a juror by relying solely upon the testimony of the juror in question." *Id.* The Court disagreed that "the law must impute bias to jurors" in this situation. *Id.* Rather than ordering a new trial any time the issue of juror bias arises, the Court explained that holding a hearing to determine actual bias, such as that conducted by the trial court, is the appropriate course of action. *Id.* at 217.

The *Smith* Court concluded:

> [D]ue process does not require a new trial every time a juror has been placed in a potentially compromising situation. Were that the rule, few trials would be constitutionally acceptable. The safeguards of juror impartiality, such as *voir dire* and protective instructions from the trial judge, are not infallible; it is virtually impossible to shield jurors from every contact or influence that might theoretically affect their vote. Due process means a jury capable and willing to decide the case solely on the evidence before it, and a trial judge ever watchful to prevent prejudicial occurrences and to determine the effect of such occurrences when they happen. Such determinations may properly be made at

> a hearing like that ordered in *Remmer* and held in this case.

Id. (footnote omitted).

The Court recognized that hearings of this sort will "frequently turn upon testimony of the juror in question," but rejected the contention that "such evidence is inherently suspect." *Id.* at 217 n.7. When a juror tries "as an honest man to live up to the sanctity of his oath[, the juror] is well qualified to say whether he has an unbiased mind in a certain matter." *Id.* Lastly, the Court reiterated that, because the case was a § 2254 proceeding, the trial judge's findings were "presumptively correct" and could not be overcome without clear and convincing evidence. *Id.* at 218.

The Arizona Supreme Court's finding that the trial court did not abuse its discretion in refusing to dismiss the Juror was not contrary to, nor an unreasonable application of, *Smith* and *Remmer*. The trial judge conducted a hearing involving all interested parties to explore the issue of juror bias. At this hearing, Hedlund had the opportunity to prove actual bias. This is the remedy prescribed by the Supreme Court. *Id.* at 215.

Hedlund challenges the sufficiency of the in-chambers hearing, arguing that the hearing was cursory, defense counsel was not given time to prepare, and it was the judge's duty to question the Juror sufficiently. Hedlund argues that defense counsel could not be expected to conduct a vigorous cross-examination that might place Hedlund in a negative light. However, *Smith* does not dictate that an in-chambers hearing is insufficient, must be of a particular length, or must be conducted only after certain notice. *Id.*; *see also Dyer v.*

Calderon, 151 F.3d 970, 974–75 (9th Cir. 1998) ("An informal in camera hearing may be adequate for this purpose; due process requires only that all parties be represented, and that the investigation be reasonably calculated to resolve the doubts raised about the juror's impartiality."). Here, the trial court questioned the Juror about her ability to be impartial, it did not rush defense counsel as counsel familiarized himself with the Juror's letter, and it followed up with additional questions. Based on the Juror's responses that she was unaware of both her stepfather's now-deceased cousin and the victim, her relationship with her stepfather was superficial, and her belief was that she could remain impartial, the court was satisfied that no actual bias was present. As we explained in *Calderon*: "So long as the fact-finding process is objective and reasonably explores the issues presented, the state trial judge's findings based on that investigation are entitled to a presumption of correctness." 151 F.3d at 975. Thus, the court complied with clearly established federal law.

Although the Juror stated that she "believed" she could be impartial, she did not equivocate and the judge found this affirmation sufficient. Hedlund points to no authority requiring more of an assurance from the Juror. *See Bashor v. Risley*, 730 F.2d 1228, 1237 (9th Cir. 1984) (no error in keeping juror when juror responded to the question whether she could be impartial with, "Yes, I think I could.").[11]

[11] Citing *United States v. Gonzalez*, 214 F.3d 1109, 1114 (9th Cir. 2000), Hedlund argues that the Juror's statement was "somewhat equivocal." In *Gonzalez*, we noted the difference between a juror who is somewhat indirect in their responses (e.g. Q: "Would your husband's experience keep you from serving impartially?" A: "I don't believe so, no."; Q: "Could you set aside your feelings and act impartially?" A: "I believe so, yes."), and a juror who answers equivocally three times in a row to whether she could be fair ("I will try to"; "Right. I'll try"; and "I'll try").

2. There is no clearly established law governing implied bias, and Hedlund has not shown that implied bias should apply here.

There is no clearly established federal law regarding the issue of implied bias. The Supreme Court has never explicitly adopted or rejected the doctrine of implied bias. *See Fields v. Woodford*, 309 F.3d 1095, 1104 (9th Cir.) (noting that the "Supreme Court has never explicitly adopted (or rejected) the doctrine of implied bias"), *amended by* 315 F.3d 1062 (9th Cir. 2002). Thus, Hedlund's claim fails on grounds of implied bias.[12]

Id. at 1111, 1114. We recognized that it would be acceptable to retain the first juror, because after stating her belief, the juror followed up with "an unqualified affirmative or negative" regarding impartiality. *Id.* at 1114. The same can be said for the Juror. In her letter, she initially stated "I don't believe it would affect my ability to be fair and impartial," then when questioned by the trial court, she added "an unqualified affirmative" when she was asked to confirm her belief that she could be impartial (Q: "You state here at the end that, 'I don't believe it would affect my ability to be fair and impartial.' Is that your belief?" A: "Yes, it is."). While the trial court asked the question somewhat inartfully, the Juror's response does not display equivocation. Moreover, the trial court credited her response after asking further questions, observing her demeanor, and judging her credibility. This finding is entitled to a presumption of correctness. *Rushen v. Spain*, 464 U.S. 114, 120 (1983).

[12] Although not controlling, Justice O'Connor's concurrence in *Smith* expressed concern about cases involving juror misconduct. Therein, she listed certain "extreme situations" in which she believed a bias hearing may be inadequate and implied bias could be found. Examples may include: "a revelation that the juror is an actual employee of the prosecuting agency, that the juror is a *close* relative of one of the participants in the trial or the criminal transaction, or that the juror was a witness or somehow involved in the criminal transaction." *Smith*, 455 U.S. at 222 (O'Connor, J., concurring) (emphasis added). Because

Although we have presumed bias on a rare occasion, we have based this finding on close relationships or the fact that a juror has lied. *See, e.g.*, *United States v. Allsup*, 566 F.2d 68, 71–72 (9th Cir. 1977) (bias of bank teller employees presumed where defendant robbed another branch of same bank and tellers had "reasonable apprehension of violence by bank robbers"); *Green v. White*, 232 F.3d 671, 676–78 (9th Cir. 2000) (presuming bias biased on juror's pattern of lies). However, these cases are not clearly established federal law. In any event, nothing in the record suggests the Juror lied during voir dire or had a close relationship with McClain.

IV. Ineffective Assistance of Counsel During Plea Process[13]

A. Background and procedural history

Before trial, Hedlund reached a plea deal with the prosecutor. During an informal chambers discussion, defense

she read the majority opinion as not foreclosing the use of implied bias in certain situations, Justice O'Connor concurred. *Id.* at 224.

Even if this concurrence could be construed as clearly established federal law, the notion that implied bias could be found when a juror is a *close* relative does not lead to the conclusion that implied bias should be found when the juror is a former distant relative by virtue of two marriages, one now dissolved and the former relative now deceased. Moreover, Hedlund does not allege juror misconduct in this case. The Juror was forthcoming as soon as she found out about the former relation and there is no indication she tried to conceal bias to influence the outcome of the trial.

[13] The district court declined to grant a COA on this issue. However, because we conclude that the district court's resolution of the issue is "debatable amongst jurists of reason," *Miller-El*, 537 U.S. at 336, we address it.

counsel and the prosecutor were asked to explain the factual basis for the plea, which offered a guilty plea for the second degree murder of Mertens and theft with a prior for taking McClain's guns. The trial court rejected the plea agreement, because it did not involve enough accountability for the McClain homicide. The court suggested a plea involving a burglary count with respect to McClain could be considered. However, as discussed below, the court had other reservations with respect to this and any future plea agreement. The parties continued negotiating and reportedly arrived at a second agreement consisting of a guilty plea for the second degree murder of Mertens, and theft with a prior and burglary non-dangerous with respect to McClain.

On the day the second plea was to be presented in chambers, Hedlund's counsel instead called chambers and asked the judge if he would recuse himself. When the judge responded that he would not, Hedlund filed a motion for recusal of judge, followed by a motion for change of judge. A second judge heard the latter motion. The motion made clear that Hedlund wanted to plead guilty to the new plea agreement, but that he refused to do so in front of the trial judge, Judge Sheldon. The second judge denied the motion and trial began immediately. The substance of the motion hearing is discussed below in the context of the ineffective assistance of counsel analysis.

On appeal, the Arizona Supreme Court questioned whether a second plea was ever reached. The court also noted that the prosecutor's testimony at the hearing on the change-of-judge motion was that Hedlund in fact rejected the second plea. Thus, the court rejected the claim that the trial court erred in any way with respect to the purported second

plea. The claim challenging counsel's performance was similarly rejected on PCR review.

B. The state PCR court did not unreasonably apply *Strickland*.

The two-part test for demonstrating ineffective assistance of counsel, set forth in *Strickland v. Washington*, 466 U.S. 688 (1984), is "applicable to ineffective-assistance claims arising out of the plea process." *Hill v. Lockhart*, 474 U.S. 52, 57 (1985). We must first ask whether "counsel's assistance was reasonable considering all the circumstances." *Strickland*, 466 U.S. at 688. Counsel must have "wide latitude . . . in making tactical decisions," and "[j]udicial scrutiny of counsel's performance must be highly deferential." *Id.* at 689. We "must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Id.* In the context of that presumption, we "must then determine whether, in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance." *Id.* at 690.

Second, if counsel's performance was deficient, we assess prejudice. Prejudice "focuses on whether counsel's constitutionally ineffective performance affected the outcome of the plea process." *Hill*, 474 U.S. at 59. "In other words, in order to satisfy the 'prejudice' requirement, the defendant must show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." *Id.* (footnote omitted).

Under AEDPA, review of the state court's application of *Strickland* is "doubly deferential" to the performance of

counsel, because a petitioner must show that the state court's ruling was an objectively unreasonable application of *Strickland*. 28 U.S.C. § 2254(d)(1); *see also Mirzayance*, 556 U.S. at 123; *Bell v. Cone*, 535 U.S. 685, 698–99 (2002).

1. It was not objectively unreasonable for the state PCR court to conclude that counsel's performance was not deficient.

The state court did not unreasonably apply *Strickland*. Because Hedlund has not shown that his counsel performed deficiently in making the tactical decision to attempt to move Hedlund's plea proceedings before a different judge, relief is unavailable. Hedlund's arguments that counsel failed to present the second plea in a timely manner and that there was a reasonable probability that the trial judge would have accepted that plea are not supported by the record.[14]

First, on the day both counsel were supposed to appear in chambers to discuss the second plea agreement, Hedlund's counsel called the court to ask informally whether the judge would recuse himself. Counsel explained that "Mr. Hedlund would be willing to enter into a plea agreement but not in front of Judge Sheldon." The judge's assistant responded that the judge would not recuse himself and since counsel did not appear that day as required, the court would no longer entertain further plea agreements. Based on Judge Sheldon's response, Hedlund's counsel filed a motion for change of judge for cause in which he challenged "the bias exhibited by

[14] As an initial matter, it is not clear that the second offer was still valid at the time in question. According to the prosecutor, Hedlund rejected the second plea offer two days before defense counsel called chambers and asked the judge to recuse himself.

the court with regard to Mr. Hedlund." In the motion, counsel explained:

> Hedlund is willing to enter into [the second] plea agreement in any court other than this court. Defendant Hedlund feels that this court has become biased against him. He feels that he will not be offered a realistic opportunity to persuade this court at the time of sentencing that any sentence other than the maximum consecutive sentence is appropriate. This feeling is based, in part, on the court[']s sua sponte decision to impanel dual juries, the denial of all substantive pretrial motions filed by the defense and the court's demeanor leading up to trial. . . . The court[']s failure to recuse itself would be tantamount to forcing the death penalty upon defendant Hedlund. As the court is aware, there is a significant amount of evidence against Mr. Hedlund in these cases. It is Mr. Hedlund's purpose to avoid the death penalty in this case.

At the motion hearing before another judge, Judge Sheldon testified regarding his concerns with the first plea agreement and the fact that a second plea agreement was never formally offered. When Hedlund's counsel examined Judge Sheldon, Judge Sheldon also explained that (1) he was concerned about the plea being commensurate with culpability, (2) he took into account victim letters received from McClain's family, and (3) continuing the plea process when a plausible plea was not on the table would only waste

time and thwart the arrangements for a single trial with dual juries.

In his closing remarks, defense counsel argued why he thought Judge Sheldon was biased and why it would result in an unfair trial for Hedlund. With respect to the plea process, counsel highlighted the fact that Hedlund refused to plead before Judge Sheldon. Specifically, counsel stated that Hedlund

> would be willing to enter into a plea but not in front of that Court [Judge Sheldon]. He would be willing to enter it in front of any other Court and this is again, a plea Judge Sheldon would most likely have been amenable to, but Mr. Hedlund felt he would not get a fair shake and still the Court said, no, we will not recuse ourselves so let justice be done.

Counsel concluded with an impassioned argument about the justice system and the importance of maintaining the community perception of fairness to victims and defendants alike. Counsel pleaded he was not asking for a handout, but "[w]hat he [was] asking on behalf of [Hedlund] is fairness, the ability to be heard before a Court without the appearance of impropriety."

In rebuttal, counsel argued that, when you put all of the things Judge Sheldon did together, "it is enough for [Hedlund] and I to believe for the community to say, hold it, he is not getting a fair shake. There is the appearance of impropriety in reading those [victim] letters at that time and not giving him the benefit of a presentence report." Counsel

argued that the letters were not merely victim letters, but ex parte communications from state witnesses who also happened to be victims. Counsel reiterated that rejection of the plea to facilitate moving forward with the dual jury procedure was also improper.

This record demonstrates that counsel's motion to have Hedlund's case moved before a different judge was purely a tactical decision.[15] Counsel apparently honestly believed that Hedlund could not get a "fair shake" in front of Judge Sheldon. Even though counsel believed Judge Sheldon was likely to accept the second plea, counsel persisted with the request. He persisted, because he thought Hedlund faced an undue risk of bias and would surely receive a death sentence from Judge Sheldon if the second plea agreement were not accepted and the case proceeded to trial. Counsel's written motion and arguments made clear that it was Hedlund's primary goal at this point to avoid the death penalty. We must give deference to counsel's tactical decision to do whatever he could to put his client in front of a non-biased judge (who was not pre-inclined to sentence Hedlund to death). It was not error for the state PCR court to conclude that counsel's performance was not deficient. Indeed, counsel made strong arguments about the judge having ex parte communication with the state's witnesses (who were also victims) and gave many reasons for wanting the case moved before another judge.

Hedlund's argument that counsel missed the deadline for the second plea agreement is a red herring. At base, this

[15] With respect to preserving the plea in the record, counsel set forth the terms of the plea in his written motion and explained the terms of the plea at the motion hearing.

argument again challenges counsel's tactical decision. On the day defense counsel and the prosecutor were supposed to appear in chambers to discuss the second plea agreement, counsel instead put the wheels of recusal in motion. He called chambers requesting recusal. When the judge declined, he proceeded with a formal motion to have the recusal motion heard before another judge so that the plea process could continue in front of an unbiased jurist and without the dual jury deadline hanging over his head. This too was a tactical decision; it was not an act of incompetency. Because counsel's performance did not fall outside of the wide range of professionally competent advice, the state courts did not unreasonably apply the first prong of *Strickland*.

2. No prejudice has been shown.

Even assuming the state PCR court's application of *Strickland* was objectively unreasonable, Hedlund has not shown a reasonable probability that, but for counsel's errors, Hedlund would not have gone to trial. In other words, the record does not demonstrate that, if counsel would have presented the second plea agreement to Judge Sheldon (instead of calling chambers to ask for recusal), there is a reasonable probability Judge Sheldon would have accepted the agreement and Hedlund would have avoided the death penalty. *See Lafler v. Cooper*, 132 S. Ct. 1376, 1385 (2012) ("In these circumstances a defendant must show that but for the ineffective advice of counsel there is a reasonable probability that the plea offer would have been presented to the court . . . , that the court would have accepted its terms, and that the conviction or sentence, or both, under the offer's terms would have been less severe than under the judgment and sentence that in fact were imposed.").

Although Hedlund argues that the second plea with respect to the McClain homicide would have complied with the range of acceptable penalties to which the trial court would have agreed, it is unlikely that the court would have accepted the plea as to either the Mertens *or* the McClain crimes.

First, with respect to the McClain homicide, while Judge Sheldon had indicated that first degree burglary would be a starting point, "[a]t that point, [Judge Sheldon] had not made up [his] mind whether or not that would be an appropriate disposition because [he] still . . . continued to have serious reservations about the disposition of this case given the charges against [Hedlund]." Judge Sheldon testified with respect to the first plea agreement, "Quite frankly, I was very surprised there had not been a plea to First Degree Murder with the State stipulating it would not seek the death penalty, and I was surprised there had been a plea to Second Degree Murder and I think from what I gathered in [defense counsel's] conversations, that [counsel] shared my reservations about being able to establish a factual basis for Second Degree Murder to a Felony Murder charge because the law is quite clear, there are no lesser included offenses to Felony Murder." Based on the court's statements, this plea would not have provided sufficient accountability for the McClain homicide. There is nothing else in the record suggesting a reasonable probability that the court would have accepted the new offer of a plea to theft with a prior and burglary non-dangerous with respect to McClain.

Second, with respect to Mertens, during the hearing on the change-of-judge motion, Judge Sheldon testified that, after reviewing the first plea agreement, he

> continue[d] to have reservations about [the second degree murder plea for the Mertens homicide] and as I indicated to [defense counsel], at the conclusion of that hearing, that I was — [defense counsel] had indicated to me apparently [he] and [the prosecutor] were going to continue plea negotiations or try and work something out.

Judge Sheldon further testified that he "continued to have reservations as you all did in stating to me you weren't sure whether or not a plea to Second Degree Murder, you would be able to establish a factual basis, so there were reservations . . . between all parties at that point." With respect to the first plea agreement, even after the parties recited a factual basis for second degree murder, the court's concerns "were not dispelled" as to whether the plea could be accepted for the Mertens homicide. Again, there is nothing in the record to suggest that the court's concerns would have been dispelled such that it would have accepted the second plea agreement's identical offer of second degree murder for the Mertens crime.

Third, Judge Sheldon expressed concern about "disparate treatment given to . . . co-defendants" and whether this would create due process concerns under existing Supreme Court precedent. Judge Sheldon also explained that, if it turned out Hedlund was just as culpable or more culpable than McKinney, he would have been allowed less severe punishment under the plea agreement while McKinney faced the death penalty. Counsel was given the opportunity to explain during the informal plea discussion how Hedlund was less culpable than McKinney, but the judge "simply did not hear it."

In sum, Judge Sheldon expressed (1) ongoing reservations about even accepting a second degree murder plea for the Mertens homicide, (2) concern that the plea reflect the appropriate amount of culpability for the McClain homicide (given the strong evidence against Hedlund), and (3) a desire to avoid disparate sentences. Moreover, the record indicates that Hedlund was not willing to enter a plea agreement in front of Judge Sheldon. When defense counsel called Judge Sheldon's chambers asking the judge to recuse himself, the explanation defense counsel provided was that "Hedlund would be willing to enter into a plea agreement but not in front of Judge Sheldon." He provided the same explanation in his motion to recuse. On this record, it cannot be said that, if Hedlund's counsel had presented the second plea to Judge Sheldon, there is a reasonable probability it would have been accepted and the death penalty avoided. Thus, Hedlund has failed to show prejudice.

V. Ineffective Assistance of Counsel During Penalty Phase[16]

A. Background and procedural history

At trial, Hedlund presented expert testimony from Dr. Ronald Holler, who had conducted a "Neuropsychological and Psychological Evaluation" of Hedlund before trial. Dr. Holler noted that Hedlund reported drinking up to twelve beers on the night of the burglary-murder. He found that Hedlund's intoxication was a function of his "alcohol

[16] The district court declined to grant a COA on this issue. However, because we conclude that the district court's resolution of the issue is "debatable amongst jurists of reason," *Miller-El*, 537 U.S. at 336, we address it.

dependence." He then discussed in some detail Hedlund's "extremely dysfunctional" early childhood experiences. Dr. Holler found that Hedlund had a "misguided loyalty" toward McKinney and had a limited understanding of his "personality inadequacies." Regarding Hedlund's "Intellectual/Neuropsychological Functioning," he found a "low average" IQ. He also found Hedlund may have scored low on certain tests due to an "underlying depressive status" and that Hedlund displayed "a slight indication of a learning disability."

Dr. Holler "evaluate[d] various aspects of [Hedlund's] intellectual, cognitive, neuropsychological, [and] emotional functioning as related to his background with his family and other aspects of his environment." One of the tests Dr. Holler administered was the "Concise Neuropsychological Scale." He focused on "the abuse [Hedlund] suffered and the resulting psychoneurological effects" of that abuse. He opined that Hedlund suffered from "Post-traumatic Stress Disorder [PTSD], as well as some intertwined disorders of much consequence, including the alcohol dependence and a depressive disorder." He explained how the psychological and physical abuse Hedlund suffered can lead to these disorders.

Specifically, Dr. Holler explained the "neuropsychological impairment" that can result and stated that Hedlund showed "some indications of a very significant but yet in a sense mild neuropsychological deficit." Counsel then specifically inquired about brain damage.

> Q: Did you find any indication of right hemisphere brain dysfunction or disorder?

> A: There were indications of this. His verbal IQ was 91, performance IQ was 78. Essentially we talk about the verbal IQ as being primarily associated with left hemisphere functioning and this does refer then to receptive and expressive speech, reading capability and verbal memory. . . . [The test results provide] further evidence that the right hemisphere is not functioning as well as the left hemisphere. This may well be related to some of the physical abuse that he experienced, including being hit on the back of the head.

Dr. Holler went on to explain that damage to the right hemisphere could affect someone's judgment. On redirect, he clarified that, while Hedlund was not "severely retarded" or "totally psychotic," Hedlund did have "neurological impairments which impaired his judgment."

Dr. Charles Shaw, a medical addiction specialist, also testified regarding Hedlund's alcoholism. He testified that alcoholism can lead to organic brain damage. He also believed that Hedlund's actions with respect to the crimes were influenced by his alcoholism.

At sentencing, the trial court did not find credible evidence to support Dr. Shaw's conclusion that Hedlund was affected by alcohol at the time of the crimes. Instead, the court found that Hedlund had a motive to lie about the extent of his alcohol consumption and his statements conflicted with those of his sisters and a presentence report from an earlier conviction.

The court also discounted Dr. Holler's testimony, because (1) he did not raise PTSD in his initial report, instead announcing it for the first time while testifying; (2) some of the foundational information upon which Dr. Holler based his opinions was self-reported by Hedlund; and (3) some of the conclusions were based on an erroneous presentence report.

During PCR proceedings, Hedlund proffered a report from Dr. Marc S. Walter, a neuropsychologist. Dr. Walter conducted a battery of tests on Hedlund and found certain results consistent with a diagnosis of alcohol abuse. He also found "Cognitive Disorder, Not Otherwise Specified," a disorder "that used to be termed Organic Mental Disorder and indicates the presence of brain damage," and stated that Hedlund may have "residual problems" with PTSD. In light of these results, Dr. Walter concluded that Hedlund had brain damage at the time of the offenses in 1991.

Dr. Walter admitted that the test used by Dr. Holler was a "screening test for brain damage." He expressed a preference, however, for the battery of tests he administered because they are a "comprehensive neuropsychological test battery." Dr. Walter stated that screening tests such as those used by Dr. Holler "are relatively insensitive and often miss the presence of brain damage." Dr. Walter concluded by stating that he believed that Hedlund's brain damage, as augmented by his alcohol use, prevented Hedlund from "understand[ing] the consequences of his involvement in the burglaries and the murders."

The PCR court reviewed Dr. Walter's report but concluded that counsel's efforts during sentencing did not fall below the standard expected of reasonable death-penalty trial lawyers. The court noted that Dr. Walter's report would not

support an insanity defense, and nothing in the record suggested Hedlund was unaware of his involvement in the crimes. The court continued that "[t]he fact that an attorney, after the fact, obtains an opinion from an expert which might have supported an alternative theory at trial does not demonstrate, without more, that the strategy chosen by defense counsel at the time of trial was ineffective."

The court rejected the argument that counsel did not present sufficient evidence of the neuropsychological effects of Hedlund's child abuse and alcohol abuse. The court stated that it was adequately informed of these conditions by Drs. Holler and Shaw. The court found that Dr. Walter's report was not substantially or significantly different from the earlier expert reports. The court challenged Dr. Walter's conclusion that Holler did not diagnose brain damage, which in fact he did.

The district court reviewed all of the expert testimony and reports proffered during the penalty phase and in PCR proceedings. Based on that review, the court concluded that it was not objectively unreasonable for the PCR court to find that (1) the penalty phase experts' opinions and PCR expert's opinion were substantially the same, and (2) Dr. Holler entertained a diagnosis of brain impairment. The district court also found that the PCR court did not unreasonably apply *Strickland*. It rested this holding only on the performance prong, finding analysis of the prejudice prong unnecessary.

B. The state court did not unreasonably apply *Strickland*.

On federal habeas review of ineffective assistance of counsel claims, courts apply the clearly established federal

law set forth in *Strickland*. *See e.g.*, *Cullen v. Pinholster*, 563 U.S. 170, 189 (2011). Under *Strickland*, we must first ask whether "counsel's assistance was reasonable considering all the circumstances." *Strickland*, 466 U.S. at 688. Counsel is granted "wide latitude . . . in making tactical decisions," and "[j]udicial scrutiny of counsel's performance must be highly deferential." *Id.* at 689. We must also "indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Id.* In the context of that presumption, we "determine whether, in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance." *Id.* at 690.

Even a "professionally unreasonable" error by counsel will not warrant setting aside a judgment, unless it was "prejudicial to the defense." *Id.* at 691–92. To establish prejudice, a "defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 694.

The PCR court's factual findings were not objectively unreasonable. The findings, that the reports of Drs. Holler and Shaw were substantially the same as Dr. Walter's proffered report and that Dr. Holler diagnosed brain damage, are supported by the record. Dr. Holler found that Hedlund suffered from alcohol dependence, PTSD, and a depressive disorder. Dr. Holler also explained how neurological impairment can result from those factors, and that Hedlund had indications of "a very significant but yet in a sense mild neuropsychological deficit." Dr. Walter admitted that the test used by Dr. Holler screens for brain damage and Dr. Holler

found that Hedlund had a right hemisphere dysfunction or disorder and that this could impair his judgment. Dr. Shaw testified about Hedlund's alcoholism and its effects on Hedlund. Similarly, Dr. Walter opined about brain damage and its impact at the time of the offense.

1. It was not objectively unreasonable for the state PCR court to conclude that counsel's performance was not deficient.

The PCR court's application of *Strickland* was also not unreasonable. Hedlund's counsel's performance was reasonable considering the circumstances. Counsel hired a psychologist to testify about Hedlund's various mental and personality defects, including neuropsychological impairments to his brain. Counsel also hired a psychiatrist to testify about Hedlund's severe alcoholism. Counsel's tactical decisions of precisely which experts to hire must be afforded deference. Hedlund's proffer of additional experts on collateral review who say substantially the same thing does not call into question the reasonableness of counsel's decisions. Counsel's strategy to present testimony about Hedlund's troubled childhood and ongoing psychological, neuropsychological, and medical conditions cannot be said to fall outside the wide range of professionally competent assistance.

Hedlund argues that the PCR court contradicted itself with respect to the expert testimony presented during sentencing. Specifically, on PCR review, the court found testimony by Drs. Holler and Shaw sufficient to paint a picture of Hedlund's condition. However, Hedlund argues that when sitting as the sentencing court, the court discredited the same experts' testimony.

That the sentencing court discredited certain aspects of Drs. Holler and Shaw's testimony does not discredit the PCR court's conclusion that their opinions were substantially the same as that proffered by Dr. Walter. During sentencing, the court discredited Dr. Shaw's conclusion that Hedlund was affected by alcohol at the time of the crimes. The court found this self-reported information suspect, because of Hedlund's motive to lie. The court also questioned why Dr. Holler raised PTSD for the first time while testifying—when he had not cited it in his report—and noted that some of the conclusions were based on erroneous information contained in a presentence report. These observations do not call into question Dr. Shaw's conclusion that Hedlund suffered from alcoholism or Dr. Holler's conclusion that Hedlund suffered from a brain impairment. They simply speak to the weight afforded the experts' opinions in determining mitigation—weight based on reliability and credibility. To the extent Dr. Walter's testimony also relied on the sentencing transcript, reports from family members, and information self-reported by Hedlund, it would be unreliable for the same reasons.

Hedlund also argues that counsel did not have "a complete picture" of his brain damage and, if counsel would have hired a neuropsychology expert, the expert could have "definitively concluded" that Hedlund had brain damage. However, as explained above, the PCR court did not make objectively unreasonable factual determinations that evidence of brain damage presented at sentencing was similar to that proffered to the PCR court. Hedlund has also failed to rebut the presumption that counsel's preparation of the expert witnesses for sentencing fell below the wide range of professionally acceptable conduct.

2. Prejudice

Because Hedlund has not shown that counsel's performance was deficient, we need not reach the question of prejudice.

VI. Consideration of Mitigating Evidence Under *Lockett*/*Eddings*[17]

A. Background and procedural history

During the penalty phase of trial, the trial court found evidence of Hedlund's tortured childhood to be compelling and credible. However, the court found that the mitigating factors (Hedlund's childhood abuse and long-term alcohol use) did not outweigh the aggravating factors. The court reached this conclusion because, at the time of the crime, these factors did not affect Hedlund's behavior or prevent him from knowing right from wrong. The trial court thus sentenced Hedlund to death.

When the Arizona Supreme Court conducted an independent review of the mitigating factors, it struck one of Hedlund's aggravating factors and reweighed the remaining aggravating factor against the mitigating evidence. The court then found that the aggravating factor was not overcome.

The federal district court also found that Hedlund's trial court fulfilled its duty to consider all of the mitigating

[17] The district court declined to grant a COA on this issue. However, because we conclude that the district court's resolution of the issue is "debatable amongst jurists of reason," *Miller-El*, 537 U.S. at 336, we address it.

evidence and that it did not impose a relevancy test "or any other barrier" to consideration of this evidence. The district court concluded that no constitutional error arose when the trial court assigned less weight to the family background and alcohol mitigating evidence because it did not influence Hedlund's criminal conduct.

B. The Arizona Supreme Court applied an unconstitutional causal nexus test to Hedlund's mitigating evidence.

We now consider whether the Arizona Supreme Court applied an unconstitutional causal nexus test in affirming Hedlund's death sentence on its independent review of Hedlund's death sentence. We first look at our precedent regarding the role mitigation evidence plays in sentencing decisions. We then apply our recent decision in *McKinney v. Ryan*, No. 09-99018, 2015 WL 9466506 (9th Cir. Dec. 29, 2015) (en banc).

1. A sentencing court may not refuse to consider any relevant mitigating evidence.

In *Lockett v. Ohio*, 438 U.S. 586 (1978), the Supreme Court held:

> [T]he Eighth and Fourteenth Amendments require that the sentencer . . . not be precluded from considering, *as a mitigating factor*, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death. . . .

> Given that the imposition of death by public authority is so profoundly different from all other penalties, . . . [the sentencer must be free to give] independent mitigating weight to aspects of the defendant's character and record and to circumstances of the offense proffered in mitigation . . . .

Id. at 604–05 (finding Ohio death penalty statute invalid where it permitted consideration of only three mitigating circumstances).

Later, in *Eddings v. Oklahoma*, the Supreme Court applied *Lockett* in a capital case where the trial judge stated that he could not consider mitigating evidence of the defendant's family history.[18] 455 U.S. 104, 112–13 (1982). The appeals court affirmed the trial court, finding that the mitigation evidence was "not relevant because it did not tend to provide a legal excuse" from criminal responsibility. *Id.* at 113. The Supreme Court reversed, explaining:

> Just as the State may not by statute preclude the sentencer from considering any mitigating factor, neither may the sentencer refuse to consider, *as a matter of law*, any relevant mitigating evidence. . . . The sentencer . . . may determine the weight to be given relevant

[18] In *Eddings*, the sentencing judge made clear, on the record, that he could not consider certain evidence as a matter of law. He stated: "[T]he Court cannot be persuaded entirely by the . . . fact that the youth was sixteen years old when this heinous crime was committed. *Nor can the Court in following the law, in my opinion, consider the fact of this young man's violent background.*" 455 U.S. at 109 (alterations in original).

> mitigating evidence. But [it] may not give it no weight by excluding such evidence from [its] consideration.

Id. at 113–15.[19]

For a period of a little over 15 years, in violation of *Eddings*, the Arizona Supreme Court articulated and applied a "causal nexus" test in capital cases. The test forbade giving weight to nonstatutory mitigating evidence, such as family background, unless such evidence was causally connected to the crime.[20] *See, e.g.*, *State v. Wallace*, 773 P.2d 983, 986 (Ariz. 1989) (en banc) ("A difficult family background is a relevant mitigating circumstance if a defendant can show that something in that background had an effect or impact on his behavior that was beyond the defendant's control."); *accord State v. Ross*, 886 P.2d 1354, 1363 (Ariz. 1994) (en banc) ("A difficult family background is not a relevant mitigating circumstance unless 'a defendant can show that something in that background had an effect or impact on his behavior that

[19] The Court later explained that "*Eddings* makes clear that it is not enough simply to allow the defendant to present mitigating evidence to the sentencer. The sentencer must also be able to consider and give effect to that evidence in imposing sentence." *Penry v. Lynaugh*, 492 U.S. 302, 319 (1989), *abrogated on other grounds by Atkins v. Virginia*, 536 U.S. 304 (2002).

[20] Arizona law provides five statutory mitigating factors, as well as a catchall nonstatutory mitigating factor encompassing "any factors proffered by the defendant or the state that are relevant in determining whether to impose a sentence less than death, including any aspect of the defendant's character, propensities or record and any of the circumstances of the offense." Ariz. Rev. Stat. § 13-751(G). *Eddings* and *Lockett* apply only to nonstatutory mitigating evidence. *See McKinney*, 2015 WL 9466506, at *9.

was beyond the defendant's control.'" (quoting *Wallace*, 773 P.2d at 986)).

In *Tennard v. Dretke*, the Supreme Court rejected a "nexus test" that would find mitigating evidence relevant only where it bears a causal nexus to the crime. 542 U.S. 274, 287 (2004) ("[W]e cannot countenance the suggestion that low IQ evidence is not relevant mitigating evidence . . . unless the defendant also establishes a nexus to the crime.").[21] In *Smith v. Texas*, the Court again considered the use of a nexus test to determine whether any mitigating evidence is relevant. 543 U.S. 37, 45 (2004) (per curiam). The Court "unequivocally rejected" any test requiring a causal nexus between mitigating evidence and the crime. *Id.* We have held that *Tennard* and *Smith* are retroactively applicable to decisions such as the Arizona Supreme Court's 1996 decision in this case. *See Schad v. Ryan*, 671 F.3d 708, 723 (9th Cir. 2009) (per curiam), *overruled on other grounds by McKinney*, 2015 WL 9466506, at *17.

In the past, to determine whether the Arizona Supreme Court used its causal nexus test, we applied a "clear indication" rule: We could find *Eddings* error only if there was a clear indication in the record that the court had refused, as a matter of law, to treat nonstatutory mitigation evidence as relevant unless it had some effect on the petitioner's criminal behavior. *See Schad*, 671 F.3d at 724. However, in *McKinney*, we determined that the "clear indication" rule was an "inappropriate and unnecessary gloss on the deference

[21] Following the Supreme Court's decision in *Tennard*, the Arizona Supreme Court abandoned its causal nexus test. *See State v. Newell*, 132 P.3d 833, 849 (Ariz. 2006) (en banc); *State v. Anderson*, 111 P.3d 369, 391–92 (Ariz. 2005) (en banc).

already required under § 2254(d)." 2015 WL 9466506, at *17.[22]

2. Application of the causal nexus test in this case.

The question (whether the Arizona Supreme Court applied the unconstitutional causal nexus test in sentencing Hedlund) has already been answered in the affirmative by our en banc court in *McKinney*, 2015 WL 9466506, at *17–20. As companion cases, the Arizona Supreme Court reviewed the death sentences of both Hedlund and McKinney in the same opinion. *See McKinney*, 917 P.2d at 1214. In doing so, the Arizona Supreme Court intertwined its analysis for both Hedlund and McKinney, requiring the same outcome regarding this issue. Because we are bound by our court's decision in *McKinney*, we follow its conclusion that the Arizona Supreme Court applied the unconstitutional causal nexus test in affirming Hedlund's sentence.

The Arizona Supreme Court used much of the same reasoning in affirming the sentences for Hedlund and McKinney. First, the court cited to its prior opinion in *Ross* to support its conclusion that Hedlund's and McKinney's difficult family background and childhood abuse did not necessarily have substantial mitigating weight. *See McKinney*, 917 P.2d at 1227 (Hedlund); *id.* at 1234 (McKinney). In *McKinney*, we noted regarding Hedlund's sentence:

> The [Arizona Supreme Court] first affirmed Hedlund's death sentence, writing, "A

[22] We express no opinion as to how to apply *McKinney* in future Arizona capital cases from the suspect time period.

> difficult family background, including childhood abuse, does not necessarily have substantial mitigating weight absent a showing that it significantly affected or impacted a defendant's ability to perceive, to comprehend, or to control his actions. *See State v. Ross*, . . . 886 P.2d 1354, 1363 (1994)." *McKinney*, 917 P.2d at 122[7]. As we pointed out above, the pin citation to *Ross* is a citation to the precise page on which the Arizona Supreme Court had two years earlier articulated its unconstitutional "causal nexus" test for non-statutory mitigation.

2015 WL 9466506, at *18. Later, when discussing McKinney's sentence, we referred back to the Arizona Supreme Court's analysis of Hedlund's sentence, in which it said: "As we noted in discussing Hedlund's claim on this same issue, *a difficult family background, including childhood abuse, does not necessarily have substantial mitigating weight absent a showing that it significantly affected or impacted the defendant's ability to perceive, comprehend, or control his actions*. *See State v. Ross*, . . . 886 P.2d 1354, 1363 (1994)[.]" *Id.* at *19 (alterations in original) (quoting *McKinney*, 917 P.2d at 1234).

Second, the Arizona Supreme Court adopted the sentencing court's analysis of the mitigation evidence for both Hedlund and McKinney. For Hedlund, the sentencing court determined "that none of [Hedlund's] mitigating factors considered separately or cumulatively indicates to the Court that these factors affected the defendant's ability to control his physical behavior at the time of the offense or to appreciate the wrongfulness of his conduct." For McKinney,

the sentencing court similarly found that the mitigation evidence did not "in any way affect[] [McKinney's] conduct in this case." As we explained in *McKinney*, "[The sentencing court's] language . . . echoes the language of Arizona's statutory mitigator under Ariz. Rev. Stat. § 13-703(G)(1). It also echoes the language used by the Arizona Supreme Court to articulate the unconstitutional causal nexus test applied to nonstatutory mitigation." *McKinney*, 2015 WL 9466506, at *18.

Thus, in *McKinney*, we concluded that the Arizona Supreme Court's decision was contrary to *Eddings*, based in part on (1) "the Arizona Supreme Court's recital of the causal nexus test for nonstatutory mitigation and its pin citation to the precise page in *Ross* where it had previously articulated that test," and (2) "the factual conclusion by the sentencing judge, which the Arizona Supreme Court accepted, that McKinney's [mitigation evidence] did not 'in any way affect[] his conduct in this case.'" *Id.* at *20 (second alteration in original). This same reasoning applies to the Arizona Supreme Court's decision for Hedlund. Accordingly, we adopt our en banc court's conclusion in *McKinney* that the Arizona Supreme Court's decision of Hedlund's claims was contrary to *Eddings*.[23]

[23] We note that a court is free to assign less weight to mitigating factors that did not influence a defendant's conduct at the time of the crime. *See Schad*, 671 F.3d at 723 ("The United States Supreme Court has said that the use of the nexus test in this manner is not unconstitutional because state courts are free to assess the weight to be given to particular mitigating evidence."). However, a court may not refuse to consider mitigating evidence because it lacked a causal nexus to the crime. In sum, a court may consider causal nexus in assessing the *weight* of mitigating evidence, but not in assessing its *relevance*. The Arizona Supreme Court has correctly recognized this in post-*Tennard* cases. *See Newell*, 132 P.3d

Having determined that the Arizona Supreme Court committed *Eddings* error, we next must decide whether such error was harmless. *See id.* The harmless error standard on habeas review provides that "relief must be granted" if the error "had substantial and injurious effect" on the sentencing decision. *See Brecht*, 507 U.S. at 623 (quoting *Kotteakos*, 328 U.S. at 776); *McKinney*, 2015 WL 9466506, at *21. Again, we adopt our conclusion in *McKinney*. The *Eddings* error (committed by the Arizona Supreme Court in this case) had a "substantial and injurious effect" on Hedlund's sentence within the meaning of *Brecht*, and was, therefore, not harmless. *See McKinney*, 2015 WL 9466506, at *21–22.

CONCLUSION

The district court properly denied relief on Hedlund's claims regarding (1) use of the visible leg brace, (2) use of dual juries, (3) juror bias, (4) ineffective assistance of counsel during the plea process, and (5) ineffective assistance of counsel during the penalty phase. However, the district court should have granted the petition with respect to Hedlund's sentence, based on Hedlund's claim regarding (6) the Arizona Supreme Court's consideration of mitigating evidence under *Lockett*, *Eddings*, and their progeny. Accordingly, we reverse the district court's judgment denying the writ of habeas corpus. We remand with instructions to grant the writ with respect to Hedlund's sentence unless the state, within a reasonable period, either corrects the constitutional error in

at 849 ("We do not require that a nexus between the mitigating factors and the crime be established before we consider the mitigation evidence. But the failure to establish such a causal connection may be considered in assessing the quality and strength of the mitigation evidence." (citation omitted)).

his death sentence or vacates the sentence and imposes a lesser sentence consistent with law.

Each party shall bear its own costs on appeal.

REVERSED in part, AFFIRMED in part, and REMANDED.

BEA, Circuit Judge, concurring:

I write separately to express my own views as to Part VI of the majority opinion, which holds that the Arizona Supreme Court applied a "causal nexus" test to Hedlund's nonstatutory mitigating evidence, in violation of *Eddings v. Oklahoma*, 455 U.S. 104 (1982). Our about-face on this issue, *see Hedlund v. Ryan*, 750 F.3d 793, 813–20 (9th Cir. 2014) (finding no *Eddings* error), is solely the result of our court's recent decision in *McKinney v. Ryan*, No. 09-99018, 2015 WL 9466506 (9th Cir. Dec. 29, 2015) (en banc). For the reasons discussed at length in my *McKinney* dissent, *id.* at *25–*45 (Bea, J., dissenting), I think our analysis of the *Eddings* issue was wrong and conflicts with Supreme Court precedent requiring us to "presum[e] that state courts know and follow the law," *Woodford v. Visciotti*, 537 U.S. 19, 24 (2002). I will not here rehash that dissent.

It is unfortunate that *McKinney*'s errors have determined this case, because it is more difficult to find a true *Eddings* violation here than it was in *McKinney*. As detailed below, Judge Sheldon, the trial judge who sentenced both Hedlund and McKinney to death, was crystal clear that he understood *Eddings*'s mandate and considered all of Hedlund's

mitigating evidence before imposing the death penalty.[1] Judge Sheldon plainly did not commit *Eddings* error.

Judge Wardlaw disputes my interpretation of Judge Sheldon's statements during Hedlund's sentencing hearing. Partial concurrence at 68–70. To do so, she plucks a snippet from the sentencing hearing that, in her view, shows that Judge Sheldon applied an unconstitutional causal-nexus test to exclude certain mitigating evidence from his consideration. *Id.* at 68–69. However, this "smoking gun" evidence of an *Eddings* violation demonstrates only that Judge Sheldon considered whether there was a causal connection between Hedlund's proffered mitigating evidence and his crimes when considering the existence of a *statutory* mitigating factor, Ariz. Rev. Stat. § 13-751(G)(1),[2] which was perfectly permissible. *See McKinney*, 2105 WL 9466506, at *9 ("When applied solely in the context of statutory mitigation under [Ariz. Rev. Stat. § 13-751(G)(1)], the causal nexus test does not violate *Eddings*."). To dispel any doubts, I recount here Judge Sheldon's statements during Hedlund's sentencing hearing:

- Judge Sheldon first sentenced Hedlund for several non-capital crimes before turning to the question whether Hedlund was eligible for the death penalty for the homicide of Jim McClain. Sentencing Hr'g Tr. 2–5.

[1] Although Hedlund and McKinney were tried together (albeit with separate juries) and sentenced by the same trial judge, their sentencing hearings took place on separate days a week apart.

[2] Arizona's statute enumerating death-penalty aggravating and mitigating factors was previously codified at Ariz. Rev. Stat. § 13-703. I reference the statute's current location, Ariz. Rev. Stat. § 13-751.

Judge Sheldon concluded that the McClain homicide made Hedlund eligible for the death penalty under the Supreme Court decisions *Enmund v. Florida*, 458 U.S. 782 (1982), and *Tison v. Arizona*, 481 U.S. 137 (1987). Sentencing Hr'g Tr. 5–12.

- Judge Sheldon then "proceed[ed] to a discussion of the aggravating or mitigating circumstances in this case." *Id.* at 12. He started by setting out the (correct) parameters of his inquiry:

> [T]he punishment must be tailored to a defendant's personal responsibility and moral guilt. The sentence imposed should reflect a reasoned, moral response to the defendant's background, character, and the crime. Although the requirements of channeled or guided discretion enunciated in *Gregg v. Georgia*, [428 U.S. 153 (1976),] which sought consistent, rational application of the death penalty, may appear in a superficial analysis to be in conflict with an expansive reading of *Eddings v. Oklahoma*[,] *Lockett [v.] Ohio* and other cases which require individualized sentences and consideration of all mitigating evidence offered, these cases when read together simply require the sentencing judge, as the conscience of the community, to weigh carefully, fairly, objectively, all of the evidence offered at sentencing, recognizing that not everyone who commits murder should be put to death.

Id. at 12–13.

- Judge Sheldon then found that Arizona had established two statutory aggravating factors, Ariz. Rev. Stat. § 13-751(F)(2), (5), before he "move[d] to a consideration of the mitigating factors." Sentencing Hr'g Tr. 13–16. He found that the facts and circumstances of this case ruled out three statutory mitigating factors, Ariz. Rev. Stat. § 13-751(G)(3)–(5). Sentencing Hr'g Tr. 16–17.

- Judge Sheldon next considered Hedlund's mitigating evidence of mental retardation, alcohol and drug use, and child abuse. He considered this evidence in the context of two statutory mitigating statutory factors, Ariz. Rev. Stat. § 13-751(G)(1) ("The defendant's capacity to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law was significantly impaired, but not so impaired as to constitute a defense to prosecution.") and (G)(2) ("The defendant was under unusual and substantial duress, although not such as to constitute a defense to prosecution."), and *also* as nonstatutory mitigating evidence:

    - Based on the information provided to Judge Sheldon, he found, as a matter of fact, that Hedlund was "an intelligent, reflective individual, certainly not retarded." Sentencing Hr'g Tr. 17–18.

    - Judge Sheldon discredited the evidence that Hedlund's conduct during the McClain homicide was affected by alcohol use. *Id.* at 18–20. As such, Judge Sheldon concluded that Hedlund's alcohol use did not establish the (G)(1) statutory mitigating factor, but he considered Hedlund's alcohol use as nonstatutory mitigating evidence: "Although the Court has considered evidence of alcohol consumption as

> evidence of mitigation, there is little to demonstrate that it in any [way] substantially affected the defendant's ability to understand the lawfulness of his conduct. . . . The Court has concluded that although evidence of alcohol use not being a mitigating circumstance under (G)(1), [it] nevertheless should be considered as mitigating evidence." *Id.* at 19–20.

- Judge Sheldon then found that evidence and testimony supporting Hedlund's "psychological symptoms" were entitled to "little weight" and did not establish the (G)(1) or (G)(2) statutory mitigating factor. *Id.* at 20–21.

- With respect to evidence of child abuse, Judge Sheldon found: "[T]here was no persuasive testimony presented that leads to the conclusion that the abuse by—that the defendant suffered as a child resulted in him being under unusual or substantial duress at the time of the murders. I'm specifically finding that there is no substantial evidence to support a finding under (G)(1)." *Id.* at 21.[3]

- Judge Sheldon wrapped up his analysis, reiterating that he considered all of the mitigating evidence, for purposes of the statutory *and* nonstatutory mitigating factors:

> The defendant's personality traits, his past drug and alcohol abuse, and child abuse have been considered by the Court. If not demonstrating the existence of the mitigating

[3] This may be a misstatement, as the "unusual or substantial duress" factor is (G)(2), not (G)(1). *See* Ariz. Rev. Stat. § 13-751(G)(1)–(2).

> factors under (G)(1), they have nevertheless been given consideration by the Court. I have concluded . . . that the evidence regarding Mr. Hedlund's childhood can be considered as truthful by the Court, that there were significant aspects of his childhood which were clearly abusive.
>
> Certainly the memories of children may . . . become exaggerated with age. But there certainly were specific incidences that were testified to by the witnesses in this case that clearly have made an impression upon them which they will probably not forget for the rest of their lives. This has made an impact on me. I have considered it. I think it is the Court's obligation to consider it, whether or not it complies with the requirements in (G)(1).

Id. at 23.

- Judge Sheldon also found, as a fact, that "none of those mitigating factors considered separately or cumulatively indicates to the Court that these factors affected the defendant's ability to control his physical behavior at the time of the offense or to appreciate the wrongfulness of his conduct." *Id.* at 24. Judge Wardlaw reads this to mean that Judge Sheldon excluded all of those mitigating factors because of the lack of a causal nexus. *See* partial concurrence at 68–70. This reading stretches Judge Sheldon's words far beyond what they say. Judge Sheldon's statement merely parroted the text of the (G)(1) statutory mitigating factor, *see* Ariz. Rev. Stat. § 13-

751(G)(1) ("The defendant's capacity to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law was significantly impaired, but not so impaired as to constitute a defense to prosecution."), and is best understood to reiterate that the (G)(1) statutory mitigating factor was not established. It does not conflict with Judge Sheldon's other statements making clear that he had considered all of Hedlund's mitigating evidence.

- Judge Sheldon also specifically considered various non-nexus mitigating evidence, including Hedlund's "intellectual ability to engage in rehabilitation," Sentencing Hr'g Tr. 22, "[Hedlund's] character as a young person," *id.* at 25, and "the impact that the sentence in this case will have on [Hedlund's] sister and [his] family," *id.*

- In the end, however, Judge Sheldon concluded: "[H]aving reviewed all of this evidence, [Hedlund's] past character, I've concluded that none of the mitigation evidence considered by the Court in this case, either individually or cumulatively, are sufficiently substantial to call for leniency. And I am ordering that [Hedlund] be sentenced to death for the death of Mr. McClain." *Id.* at 26.

Reading the entire transcript of the sentencing hearing can lead to only one conclusion: Judge Sheldon understood *Eddings*'s mandate and considered all of Hedlund's proffered mitigating evidence, but ultimately found the evidence insufficient to warrant leniency. *Id.* The single statement on which Judge Wardlaw relies shows only that Judge Sheldon constitutionally applied a causal-nexus test in the context of an Arizona statutory mitigating factor. That statement does

not show that Judge Sheldon excluded mitigating evidence from his consideration, and Judge Sheldon's other statements repeatedly demonstrate otherwise.

In any event, *McKinney* teaches us that what Judge Sheldon said is of little consequence, because the Arizona Supreme Court, on independent review of Hedlund's and McKinney's death sentences, independently violated *Eddings*. *See McKinney*, 2015 WL 9466506, at *17–*20. Indeed, after *McKinney*, we must assume that the Arizona Supreme Court misunderstood *Eddings* and ignored Judge Sheldon's (quite correct) discussion of what *Eddings* requires—even though the Arizona Supreme Court apparently accepted some of Judge Sheldon's other findings. *See id.* at *20; *id.* at *42 & n.40 (Bea, J., dissenting); *see also* slip op. at 55–57.[4]

In light of *McKinney* I agree that we must find that the Arizona Supreme Court also committed *Eddings* error as to Hedlund. The Arizona Supreme Court reviewed both Hedlund's and McKinney's death sentences in the same opinion, *State v. McKinney*, 917 P.2d 1214 (Ariz. 1996), and it would make little sense for us to hold that the court applied

[4] If I were convinced that the Arizona Supreme Court applied an unconstitutional causal-nexus test to exclude Hedlund's proffered mitigating evidence, I would have no trouble reversing the district court's decision denying Hedlund's petition. With respect to Hedlund, but not McKinney, the Arizona Supreme Court struck one of the aggravating factors found by Judge Sheldon. *See State v. McKinney*, 917 P.2d 1214, 1228–31 (Ariz. 1996) (en banc). If the Arizona Supreme Court did violate *Eddings*, its independent reweighing of the remaining aggravating factor against the mitigating evidence was likely flawed. *See Styers v. Schriro*, 547 F.3d 1026, 1034–36 (9th Cir. 2008) (per curiam); *see also Clemons v. Mississippi*, 494 U.S. 738, 748–49 (1990).

Eddings properly in one part of the opinion and improperly in another part. My agreement on this point should not be construed as a concession that *McKinney* was correctly decided. It was not. But, I recognize that, as a three-judge panel, we are bound to follow *McKinney* until it is overruled by the Supreme Court or a future en banc panel of our court. *See generally Miller v. Gammie*, 335 F.3d 889 (9th Cir. 2003) (en banc). As a result, I concur in the majority opinion in full.

WARDLAW, Circuit Judge, concurring in part and dissenting in part:

I join Parts II, III, and VI of the majority opinion. The Arizona Supreme Court's *Eddings* error requires us to grant the writ with respect to Hedlund's sentence. *See* 28 U.S.C. § 2254(d). I have previously explained my disagreement with the majority's disposition of Hedlund's claims of unconstitutional shackling during trial and ineffective assistance of counsel during the plea process and penalty phase. *Hedlund v. Ryan*, 750 F.3d 793, 831–43 (9th Cir. 2014) (Wardlaw, J., concurring in part and dissenting in part). I see no need to do so again here.

The majority opinion correctly concludes that the Arizona state courts violated *Eddings v. Oklahoma*, 455 U.S. 104 (1982), in their treatment of Hedlund's mitigating evidence. They "did precisely what *Eddings* prohibits: they found mitigating evidence of Hedlund's abusive childhood as a matter of fact, but treated it as non-mitigating as a matter of law because it lacked a causal connection to the crime." *Hedlund*, 750 F.3d at 826 (Wardlaw, J., concurring in part and dissenting in part).

It is unfortunate that Judge Bea believes it is "more difficult to find a true *Eddings* violation" in Hedlund's case than in his half-brother McKinney's. Slip op. at 59 (Bea, J., concurring). Judge N.R. Smith, in his majority opinion, aptly and accurately describes how the Arizona Supreme Court "intertwined its analysis for both Hedlund and McKinney" in its unconstitutional application of the causal nexus test. Slip op. at 55; *see id.* at 55–57. Judge Bea minimizes the import of this violation of Hedlund's constitutional rights. Judge Bea characterizes this as a case in which *McKinney* forces us unfairly to disregard the findings of the sentencing court, which he concludes the Arizona Supreme Court most likely considered. Slip op. at 66 (Bea, J., concurring). He contends the sentencing court, for its part, "plainly did not commit *Eddings* error." *Id.* at 60. He is wrong.

The sentencing court's analysis of Hedlund's mitigating evidence was thoroughly, and fatally, infected with *Eddings* error. Before it imposed a sentence of death, the sentencing court stated:

> I have also considered all of the other mitigating factors which were set forth in three separate pleadings submitted by defense counsel in this case. I have reviewed all of them again as recently as yesterday and some of those factors this morning. The Court, after carefully considering and weighing all of the aggravating or mitigating factors presented in this case, and not limited to the personality traits discussed by Dr. Holler, past drug and alcohol use discussed about [sic] Dr. Shaw, Dr. Holler and the other witnesses who testified, and the child abuse which the Court

> finds is a fact, that *none of those mitigating factors considered separately or cumulatively indicates to the Court that these factors affected the defendant's ability to control his physical behavior at the time of the offense or to appreciate the wrongfulness of his conduct*, that the defendant was aware at all times while these offenses were occurring that what he was doing was wrong, that he continued to participate in them and that he had the intelligence and the ability to refuse continued participation.

Sentencing Hr'g Tr. at 23–24, July 30, 1993 (emphasis added). Thus, the sentencing court required a nexus between Hedlund's horrifically abusive childhood and his crime before it would consider Hedlund's evidence in mitigation. The sentencing court gave no indication that this requirement went merely to the weight of this evidence rather than its relevance. "This refusal to consider and give effect to significant mitigating evidence that the court found credible because it was not tied to [Hedlund's] behavior in committing the crime is contrary to *Eddings*." *Hedlund*, 750 F.3d at 829 (Wardlaw, J., concurring in part and dissenting in part).

The Arizona Supreme Court, in turn, plainly and improperly applied a causal nexus requirement to its own consideration of Hedlund's tormented childhood. In so doing, that Court directly relied upon its analysis in *State v. Ross*, 886 P.2d 1354 (Ariz. 1994). *See State v. McKinney*, 917 P.2d 1214, 1227 (Ariz. 1996). *Ross* held unambiguously that a "difficult family background is not a relevant mitigating circumstance *unless* a defendant can show that something in that background had an effect or impact on his

behavior that was beyond the defendant's control." 886 P.2d at 1363 (citation and internal quotation marks omitted) (emphasis added). The *Ross* Court then flatly rejected mitigating evidence of Ross's abusive childhood. *Id.* As the majority opinion observes, when the Arizona Supreme Court deemed Hedlund's mitigation evidence irrelevant and affirmed his sentence of death, it recited the unconstitutional causal nexus test and gave a pin citation to the precise page in *Ross* where it had previously articulated that test—just as it did when it affirmed the death sentence of Hedlund's half-brother and co-defendant, McKinney. Slip op. at 57.

Judge Bea's concurrence resurrects from his *McKinney* dissent the conclusion that "our analysis of the *Eddings* issue was wrong and conflicts with Supreme Court precedent requiring us to 'presum[e] that state courts know and follow the law.'" Slip op. at 59 (Bea, J., concurring) (quoting *Woodford v. Visciotti*, 537 U.S. 19, 24 (2002)). As Judge Bea refrains from "rehash[ing] that dissent," *id.* at 59, I will not rehash the *McKinney* en banc panel majority's decisive refutation of it. Suffice it here to say that the presumption that state courts know and follow the law is not irrebuttable, and the Arizona Supreme Court thoroughly rebutted this presumption in Hedlund's case, as in others. *McKinney v. Ryan*, No. 09-99018, 2015 WL 9466506, at *2 (9th Cir. Dec. 29, 2015) (en banc). As our *McKinney* en banc opinion exhaustively documents, the Arizona Supreme Court consistently applied the unconstitutional causal nexus test during the fifteen-year period it was in effect. *Id.* at *12–16, *18–20, *23–25. And it did so here.

In Hedlund's case, as in McKinney's, the Arizona Supreme Court's decision was "contrary to clearly established federal law as established in *Eddings*." *Id.* at *17;

see id. at *26. In Hedlund's case, as in McKinney's, the Arizona Supreme Court's error went deeper than the way it structured its opinion or cited authority. Like the sentencing court, the Arizona Supreme Court completely disregarded important mitigating evidence, and violated Hedlund's Eighth and Fourteenth Amendment rights by depriving him of a properly informed, individualized determination before he was punished with a sentence of death. *See id.* at *11, *22 (citing *Eddings*, 455 U.S. at 113–15; *Woodson v. North Carolina*, 428 U.S. 280, 304 (1976)). Because the Arizona courts "applied the prohibited causal nexus test, Hedlund has not yet received the constitutionally-required review that he is due." *Hedlund*, 750 F.3d at 827 (Wardlaw, J., concurring in part and dissenting in part). We must, and should, grant the writ with respect to Hedlund's death sentence.

(37)

IN THE SUPREME COURT OF THE STATE OF ARIZONA
En Banc

STATE OF ARIZONA, Appellee, vs. JAMES ERIN McKINNEY, Appellant.	Supreme Court No. CR-93-0362-AP Maricopa County No. CR-91-90926
STATE OF ARIZONA, Appellee, vs. CHARLES MICHAEL HEDLUND, Appellant.	Supreme Court No. CR-93-0377-AP Maricopa County No. CR-91-90926 (A) **O P I N I O N**

Appeal from the Superior Court of Maricopa County

The Honorable Steven D. Sheldon, Judge

AFFIRMED

Grant Woods, Attorney General — Phoenix
By: Paul J. McMurdie
Mona S. Peugh-Baskin
Attorneys for State of Arizona

Neal W. Bassett — Phoenix
Attorney for James Erin McKinney

Karen Kemper — Phoenix
Attorney for Charles Michael Hedlund

FELDMAN, Chief Justice.

This consolidated appeal is the first for these defendants following their convictions for two murders, committed two weeks apart, during the commission of residential burglaries. The trials were held simultaneously using dual juries, which this court approved in advance.[1] On November 12, 1992, McKinney's jury found him guilty of first degree murder for the deaths of Christene Mertens and Jim McClain. That same day, Hedlund's jury found him guilty of second degree murder for Mertens' death and guilty of first degree murder McClain's death. The court sentenced McKinney to death on both of his first degree murder convictions and sentenced Hedlund to death for his first degree murder conviction. Appeal of each judgment and sentence is automatic. Ariz.R.Crim.P. 26.15 and 31.2(b). This court has jurisdiction under Ariz. Const. art. VI, § 5(3) and A.R.S. §§ 13-4031 and 13-4033(A).

BACKGROUND

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

Defendants enlisted two friends to provide information on good burglary targets and to help with the burglaries. These two friends, Joe Lemon and Chris Morris, were not physically involved in the burglaries in which the murders occurred. It was from Lemon and Morris,

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

however, that Defendants learned that Christene Mertens would make a good burglary target.

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

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

A. The first murder

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

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

B. The second murder

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

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

State v. Hedlund

TRIAL ISSUES

A. Was Hedlund denied his right to counsel?

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

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

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

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

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

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

When the trial resumed a few minutes later, Mr. Leander had returned and objected to the hearing having taken place without him. The judge refused to re-open the hearing unless Mr. Leander was prepared to introduce substantive evidence of juvenile adjudications. Mr. Leander had no such evidence and stated that he would like to question Lemon. The judge refused to allow any more questioning, concluding

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

that Messrs. Leander and Allen had an identity of interest, that Mr. Allen had adequately explored the issue, and that in doing so had discovered no evidence of a juvenile adjudication.

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

*1. **What is a structural defect?***

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

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

2. What is a critical stage of the trial?

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

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

Menefield, 881 F.2d at 698-99 (citations omitted). Hedlund offers no authority, and research reveals none, to support his contention that a Rule 609 hearing is necessarily a critical stage of the trial under Arizona law.[3] Thus, under the facts of this case, we conclude

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[3] *Cf.* Gilbert v. California, 388 U.S. 263, 87 S.Ct. 1951 (1967) (taking of handwriting exemplars *not* critical stage); United States v. Benlian, 63 F.3d 824 (9th Cir. 1995) (presentence interview is *not* a critical stage); United States v. Olano, 62 F.3d 1179 (9th Cir. 1995) (minor matters discussed by the court in the absence of defendant's counsel are *not* a critical phase of the trial); United States v. LaPierre, 998 F.2d 1460 (9th Cir. 1993) (post-charge line-up *is* critical stage); United States v. Birtle, 792 F.2d 846, 848 (9th Cir. 1986) (oral argument and filing of reply brief *not* critical stages).

that the Rule 609 hearing was not a critical stage of Hedlund's proceedings.

B. Denial of confrontation

Hedlund also claims that the refusal to let his attorney question Lemon at the hearing was a denial of the right to confrontation and that such denial prevented impeaching Lemon with his juvenile record. Hedlund argues that his right to confrontation is paramount to the state's interest in protecting Lemon as a juvenile offender-witness. *See* Davis v. Alaska, 415 U.S. 308, 94 S.Ct. 1105 (1974); State v. McDaniel, 127 Ariz. 13, 617 P.2d 1129 (1980), *cert. denied*, 499 U.S. 952, 111 S.Ct. 1426 (1991). In the abstract we agree with Hedlund's proposition, but we find his argument inapplicable to the facts of his case because Hedlund and his lawyer were present when Lemon testified and the lawyer was permitted to and did examine Lemon.

Hedlund's complaint here is confined to the lawyer's absence at a hearing much like a motion in limine. Hedlund, however, has never proffered any evidence to show that Lemon had *any* juvenile adjudication, let alone one with which he could have been impeached. Indeed, as late as oral arguments in this court, Hedlund's counsel possessed no evidence that Lemon had ever been adjudicated as a juvenile. Furthermore, Lemon was not an accomplice in the crimes, was never charged, and was never offered immunity for his testimony. He was eighteen years old at trial and therefore could not have been on juvenile probation at the time of the trial. *See* Ariz. Const. art. VI, § 15. In sum, Hedlund fails to demonstrate how Lemon's juvenile record could have been used for anything other than a general attack on his character. *See* State v. Morales, 120 Ariz. 517, 520-21, 587 P.2d 236, 239-40

(1978); *cf.* McDaniel, 127 Ariz. at 15-16, 617 P.2d at 1131-32. We refuse to speculate whether Hedlund's lawyer would have discovered something at the Rule 609 hearing that McKinney's lawyer could not and did not and that neither lawyer has discovered to this day.

C. Right to enter a change of plea

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

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

A hearing on the recusal motion was held, at which Hedlund attempted to "memorialize" the substance of the September 18 informal meeting. In actuality, the recusal hearing consisted primarily of hearsay and recollection about what happened at that meeting, what was said during

telephone calls placed in the interim, and what was supposedly contained in the latest plea agreement.

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

There is nothing in the record showing a plea agreement was reached between Hedlund and the prosecutor after the September 18 plea was rejected. The prosecutor testified that Hedlund rejected his subsequent offer on October 6, that there was never an offer outstanding after October 7, and because no further agreement was reached, there was never a reason to go to the judge. Because this record does not indicate that a second plea agreement was ever reached and submitted, we reject the claim that the trial judge declined to further entertain a plea.

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

his discretion by refusing to schedule a hearing to review a plea agreement that does not appear to have existed.

D. Use of leading questions

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

> Q. [PROSECUTOR] Did you see anything else in the trunk?
>
> A. [LEMON] No, not that I can recall.
>
> Q. Did you see at any time Mike Hedlund's .22 rifle?
>
> MR. LEANDER: Your Honor, again, leading. He said he didn't see anything in the trunk.
>
> THE COURT: The objection is overruled. You can answer.
>
> THE WITNESS: At any time?
>
> Q. That evening when you looked into the trunk.
>
> A. No, I don't recall.
>
> . . .
>
> Q. [PROSECUTOR] When you were around Michael Hedlund after Christene Mertens was killed, did Michael Hedlund appear to be slightly more aggressive towards you or Chris [Morris]?
>
> MR. LEANDER: Objection your Honor, leading. Prosecutor can ask how he acted.
>
> THE COURT: The objection is overruled. You can answer.

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

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

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

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

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

Hedlund was required to wear leg shackles during the trial. The layout of the courtroom resulted in the defense table being directly

across from the jury box and there was no covering on the front of the table to hide Hedlund's legs from the jury. Hedlund argues that his constitutional rights were violated because the jury was facing the defense table and necessarily saw the shackles.

In State v. Boag, this court commented on the obvious need to leave matters of courtroom security to the discretion of the judge, stating that "absent incontrovertible evidence of [harm to the defendant], the trial court should be permitted to use such means, to secure the named ends [as circumstances require]." 104 Ariz. 362, 366, 453 P.2d 508, 512 (1969). The only evidence of harm Hedlund offers is a third-party, hearsay statement from a defense investigator alleging one juror said she made eye contact with one of the defendants and that it was "eerie." Such an unsubstantiated allegation falls far short of the evidence contemplated in Boag.

When a trial judge's decision to restrain a defendant is supported by the record, this court has upheld that decision, even when the jury views the defendant in restraints. State v. Harding, 137 Ariz. 278, 288-89, 670 P.2d 383, 393-94 (1983) (*pro se* defendant wore shackles), *cert. denied*, 465 U.S. 1013, 104 S.Ct. 1017 (1984); State v. Stewart, 139 Ariz. 50, 53-57, 676 P.2d 1108, 1111-12 (1984) (defendant wore leg brace, visible shackles, and was gagged); State v. Johnson, 122 Ariz. 260, 272, 594 P.2d 514, 526 (1979) (defendant wore leg irons and was heavily guarded). Here, the trial judge specifically made a record to document his security concerns: Hedlund attempted an escape during the summer of 1991 and also made plans with another capital defendant to escape by attacking a guard and taking his uniform and gun. Given the judge's well-founded security concerns and the absence

of evidence of specific prejudice to Hedlund, we cannot find that the judge abused his discretion.

F. The consensual search

Two uniformed officers from the Mesa Police Department and Detectives Click and Kelly of the Chandler Police Department approached Hedlund at his home. Detective Kelly told Hedlund there was an investigation regarding James McKinney and asked if he would go with them to the police department. Hedlund agreed. Detective Click then asked Hedlund if he would consent to a search of his bedroom. Hedlund consented, and he and the officers went to the bedroom.

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

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

Once at the Chandler jail, Hedlund's property, including the watches, was taken from him and placed in an interview property bag for safekeeping. Hedlund was then placed in a holding cell. About an hour later Hedlund was taken to an interview room where he was read

his Miranda rights and interviewed by two officers. After a short time Hedlund cut off the interview and asked for a lawyer. The interview was terminated, and Hedlund was placed under arrest.

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

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

1. Scope of the search

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

favorable to upholding the trial court's ruling. State v. Sheko, 146 Ariz. 140, 141, 704 P.2d 270, 271 (App. 1985).

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

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

car's floor). Therefore, the search of the drawer was within the scope of the consent given.

2. Seizure of the watches

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

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

G. Relation of juror to one of the victims

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

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

or impartial verdict. State v. Cocio, 147 Ariz. 277, 279-80, 709 P.2d 1336, 1338-39 (1985).

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

SENTENCING ISSUES

A. Summary issues

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

Hedlund also claims that Arizona's death penalty statute violates the Eighth and Fourteenth Amendments because it is cruel and unusual punishment. We disagree. State v. Hinchey, 181 Ariz. 307, 315, 890 P.2d 602, 610, *cert. denied*, --- U.S. ---, 116 S.Ct. 528 (1995); *accord* LaGrand v. Lewis, 883 F.Supp. 469 (D. Ariz. 1995) (noting that every court to address this issue has upheld the constitutionality of execution by lethal injection).

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

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

B. Independent review

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

The trial court weighs aggravating and mitigating circumstances to determine whether the death sentence is warranted. A.R.S. § 13-703. The state must prove aggravating circumstances beyond a reasonable doubt. *See* A.R.S. § 13-703(C); Brewer, 170 Ariz. at 500, 826 P.2d at 797. The defendant must prove mitigating circumstances by a preponderance of the evidence, but the trial court may consider evidence that tends to refute a mitigating circumstance. State v. Lopez, 174 Ariz. 131, 145, 847 P.2d 1078, 1092 (1992), *cert. denied*, --- U.S. ---, 114 S.Ct. 258 (1993). In weighing, this court considers the

quality and the strength, not simply the number, of aggravating or mitigating factors. State v. Willoughby, 181 Ariz. 530, 549, 892 P.2d 1319, 1338 (1995), *cert. denied*, --- U.S. ---, 116 S.Ct. 725 (1996).

1. Mitigating value of expert testimony

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

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

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

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

The testimony of Dr. Shaw, the second psychiatric expert, was based on a single interview with Hedlund in 1993, two years following

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

Hedlund told Dr. Holler that at age nineteen he was drinking six to twelve and sometimes twenty beers, four or five nights a week. In a presentence report from an unrelated conviction in 1984, when he was nineteen years old, Hedlund stated that he had consumed alcohol in the past but had quit, and that he had quit so long ago that he could not remember when he had done so. Hedlund's character witnesses testified that Hedlund did not have a drinking problem, was not an alcoholic, and that his level of consumption was far below what Hedlund reported to the psychiatric experts.

Hedlund correctly observes that the trial judge must consider any aspect of his character or record and any circumstance of the offense relevant to determining whether a sentence less severe than the death penalty is appropriate. In considering such material, however, the judge has broad discretion to evaluate expert mental health evidence and to determine the weight and credibility given to it. State v. Ramirez, 178 Ariz. 116, 131, 871 P.2d 237, 252, *cert. denied*, --- U.S. ---, 115 S.Ct. 435 (1994); State v. Milke, 177 Ariz. 118, 128, 865 P.2d 779, 789 (1993), *cert. denied*, --- U.S. ---, 114 S.Ct.

2726 (1994); State v. Smith, 123 Ariz. 231, 243, 599 P.2d 187, 199 (1979). This record does not establish that the judge failed to consider any of the expert psychological testimony, only that he found some of the factual evidence for the experts' opinions lacking in credibility. The judge therefore did not violate Hedlund's constitutional rights by discounting his experts' testimony.

2. Other mitigating circumstances

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

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

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

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

Hedlund also claims minor participation in the murder, but there is ample evidence pointing to Hedlund as the one who killed Jim McClain. Hedlund's finger and palmprints were on McClain's briefcase, which had been rifled during the burglary and then left behind; his fingerprints were on the magazine of the rifle he had sawed off; the bullet that killed McClain could have come from his rifle; he had modified his rifle to conceal it; he concealed the rifle after the murder; he tried to convince Morris to get rid of the rifle before the police found it; and he expressed remorse after his arrest.

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

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

a. *Was there a prior conviction?*

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

A conviction occurs when the jury renders its verdict. *See* State v. Walden, 183 Ariz. 595, 616, 905 P.2d 974, 995 (1995), *cert. denied*, 1996 WL 122511; *see also* State v. Green, 174 Ariz. 586, 587, 852 P.2d 401, 402 (1993); State v. Gretzler, 135 Ariz. 42, 57 n.2, 659 P.2d 1, 16 n.2, *cert. denied*, 461 U.S. 971, 103 S.Ct. 2444 (1983) (convictions entered prior to the sentencing hearing may be considered regardless of the order in which the underlying crimes occurred or the order in which the convictions were entered); State v. Richmond, 136 Ariz. 312, 318-19, 666 P.2d 57, 63-64, *cert. denied*, 464 U.S. 986, 104 S.Ct. 435 (1983). These cases all dealt with A.R.S. § 13-703(F)(1).[5] The guiding principle in all these cases has been that the purpose of a sentencing hearing is to determine the character and propensities of the defendant and impose a sentence that fits the offender. These same principles apply to the (F)(2) factor present in this case. Walden, 183 Ariz. at 615-16, 905 P.2d at 994-95. Thus, for purposes

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

[5] A.R.S. § 13-703(F)(1) provides that when the "defendant has been convicted of another offense in the United States for which under Arizona law a sentence of life imprisonment or death was imposable," that conviction shall be considered an aggravating circumstance.

of § 13-702(F)(2), Hedlund's second degree murder conviction occurred when the jury returned its verdict and was prior to his capital sentencing hearing.

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

The legislature, not this court, has imposed the duty to "independently review the trial court's findings of aggravation and mitigation and the propriety of the death sentence." A.R.S. § 13-703.01(A). Therefore, despite the dissenting justice's objection to our doing so, we must fulfill our duty under this statute and determine whether Hedlund's conviction for second degree murder qualifies as an aggravating circumstance under § 13-703(F)(2). Was it a conviction for a felony "involving the use or threat of violence on another person"?

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

In State v. Arnett, we defined violence as the "exertion of physical force so as to injure or abuse." 119 Ariz. 38, 51, 579 P.2d 542, 555 (1978). In State v. Lopez, we held that a prior conviction for resisting arrest did not death qualify the defendant because conduct that only created a "substantial risk" of physical injury to an officer was not conduct "involving the use or threat of violence." 163 Ariz. 108, 114, 786 P.2d 959, 965 (1990). In other words, under the resisting

arrest statute, Lopez could have been convicted for acting recklessly – conduct that disregards the "substantial and unjustifiable risk" of harm. *See* A.R.S. § 13-105(c).

The same year that we decided Lopez, we held in State v. Fierro that the defendant's Texas robbery conviction was not a crime of violence. 166 Ariz. 539, 549, 804 P.2d 72, 82 (1990). We reached this conclusion after pointing out that according to the Texas robbery statute underlying Fierro's conviction, "violence is not necessary," and a person commits robbery if, in the course of committing theft, he "intentionally, knowingly, *or recklessly* causes bodily injury to another. *Id.* (quoting Texas Penal Code Ann. § 19.02 and 1972 Texas Practice Commentary) (emphasis added).

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

The dissent characterizes Fierro as "engrafting" a culpable mental state onto § 13-703(F)(2). Dissent at 43. But it did not. To assert, as the dissent does, that the "legislature did not limit the application of A.R.S. § 13-703(F)(2) to crimes with any particular culpable mental state" presupposes that violence encompasses any and all crimes that result in injury or abuse, even those resulting from reckless or negligent conduct. *See* dissent at 42. It does not. The legislature used the more narrow phrase we find in § 13-703(F)(2), not the phrase "crime causing or risking physical injury."

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

More on point, in construing a riot statute, the Illinois Supreme Court stated that the words "force" and "violence" do not contemplate merely the manual force necessary to commit the act, but were intended to be construed in the light of the common law, under which "force" or "violence" meant a concerted *intent* of the perpetrators to assist one another against those who would resist them. Walter v. Northern Ins. Co., 18 N.E.2d 906, 908 (1938). The Georgia Supreme Court has

also recognized a distinction between death caused by violence and that caused by accident. Jackson v. State, 79 S.E.2d 812, 816 (1954). In Landry v. Daley, the court stated that "the use of force or violence carries with it *sub silentio* a destructive or threatening intent." 280 F.Supp 938, 955 (N.D. Ill. 1968), *rev'd. on other grounds*, 401 U.S. 77, 91 S.Ct. 758 (1971).

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

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

Ware v. State, 749 S.W.2d 852, 854 (Tex.Cr.App. 1988). Thus, Fierro did nothing more than articulate the inherent culpable mental state of violence that other courts have long recognized. We turn then to decide whether Hedlund's prior conviction for second degree murder is an aggravating circumstance under § 13-703(F)(2).

Hedlund was charged with first degree murder, but the jury was instructed on second degree murder as a lesser included offense. The jury instructions on this offense contained language setting forth

all the statutory elements and degrees of the crime, which include the following:

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

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

Because Hedlund's prior conviction was for a crime that, on the face of the statute, might have been committed recklessly, it does not qualify as a crime of violence.[6] In A.R.S. § 13-703(D)(2), the legislature used the term "violence," not the phrase "conviction for a crime which resulted in or threatened physical injury." Accordingly,

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

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

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

Hedlund's second degree murder conviction cannot be an aggravating circumstance for purposes of former § 13-703(F)(2).

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

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

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

specific jury instructions made kidnapping charge one that satisfied definition of violence).

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

Thus, defendants who committed prior crimes, including first and second degree murder, manslaughter, aggravated assault, robbery, and a host of others, while acting intentionally or knowingly, can be death eligible; those defendants who acted only recklessly or negligently are not. We neither expand on Fierro, Lopez, and Walden nor retreat from them. In this opinion there is only an independent review as required by statute and application of settled law; there is neither syllogism, major premise, nor minor premise. *See* dissent at 41-42.

The state, aware of our duty of independent review and well aware of the Fierro/Walden rule, made no request in this proceeding that these cases be overruled. The dissent argues we should do so *sua sponte*. We refuse. As the dissent says, advocacy has its limits. Dissent at 46.

One final point. The dissent accuses the court of opening the floodgates for Rule 32 petitions. We invite no petitions based on the dissent's construction of this opinion. As noted, we go no further

than Fierro, decided six years ago. Any flood caused by that decision has failed to reach our court.

4. Pecuniary gain

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

5. Reweighing

We have concluded that the trial judge erred in finding Hedlund had a prior conviction for a felony involving violence and agree with the finding of the (F)(5) aggravating circumstance. Therefore, we reweigh the aggravating and mitigating circumstances. *See* Bible, 175 Ariz. at 606-09, 838 P.2d at 1209-12. Because the judge did not improperly exclude mitigating evidence at sentencing and the mitigating evidence is not of great weight, this case is appropriate for reweighing by this court rather than remanding to the trial court. State v. King, 180 Ariz. 268, 288, 883 P.2d 1024, 1044 (1994), *cert. denied*, --- U.S. ---, 116 S.Ct. 215 (1995). In our reweighing, we must decide whether the sole aggravator – pecuniary gain – outweighs

the mitigating circumstances discussed above or whether those mitigators are sufficiently substantial to call for leniency.

In comparison to the mitigating circumstances here, the quality of the aggravating circumstance is great. To apply a recent analogy, this is not the case of a convenience store robbery gone bad but, rather, one in which pecuniary gain was the catalyst for the entire chain of events leading to the murders. The possibility of murder was discussed and recognized as being a fully acceptable contingency. *See* State v. Spears, 184 Ariz. 277, 908 P.2d 1062 (1996) (affirming death sentence where pecuniary gain was only aggravator, and military service and lack of significant prior criminal record were only mitigators).[8]

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

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

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

6. The special verdict

Hedlund claims that the trial judge's failure to issue a written special verdict, separate from the special verdict read into the record at the time of sentencing, violates A.R.S. § 13-703(D) and requires resentencing. We disagree.

This court has stated that the better practice is for the trial court to place the special verdict on the record, which the judge in this case did by reading it in open court, on the record. State v. Hill, 174 Ariz. 313, 330, 848 P.2d 1375, 1392, *cert. denied*, --- U.S. ---, 114 S.Ct. 268 (1993); State v. Wallace, 160 Ariz. 424, 427, 773 P.2d 983, 986 (1989), *cert. denied*, 494 U.S. 1047, 110 S.Ct. 1513 (1990). State v. Beaty, 158 Ariz. 232, 246, 762 P.2d 519, 525 (1988), *cert. denied*, 491 U.S. 901, 109 S.Ct. 3200 (1989); There is no allegation that the transcript is inaccurate or that any prejudice resulted from the verdict being read into the record rather than filed separately. Neither the text of A.R.S. § 13-703(D) nor the cases construing it require a separately filed, written special verdict.

State v. McKinney

CLAIMS OF TRIAL ERROR

A. The courtroom layout

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

B. Denial of impeachment

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

C. The expert status of witnesses

The state called several witnesses with expertise in areas such as fingerprinting, forensic pathology, and other specialized fields. After counsel established a proper foundation, the witnesses were submitted to the court as experts.[10] There was no objection to this submission at trial, but on appeal McKinney contends that the judge conferred expert status on the witnesses, thus making an improper comment on the evidence. McKinney argues that the "judge has no business telling jurors who he believes should be considered an expert [because] [t]hat decision is the jury's."

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

> Q. [PROSECUTOR] Your Honor, I submit Mr. Kowalski as an expert in the area of criminalistics.
>
> [McKINNEY'S COUNSEL] No objection.
>
> [HEDLUND'S COUNSEL] No objection.
>
> [THE COURT] Okay. You may proceed.

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

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

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

We do not recommend, however, the process of submitting a witness as an expert. The trial judge does not decide whether the witness is actually an expert but only whether the witness is "qualified as an expert by knowledge, skill, experience, training, or education . . . [to] testify . . . in the form of an opinion or otherwise." Ariz.R.Evid. 702. By submitting the witness as an expert in the presence of the jury, counsel may make it appear that he or she is seeking the judge's endorsement that the witness is to be considered an expert. The trial judge, of course, does not endorse the witness's status but only determines whether a sufficient foundation has been laid in terms of qualification for the witness to give opinion or technical testimony. *See* United States v. Bartley, 855 F.2d 547, 552 (8th Cir. 1988) ("Although it is for the court to determine whether a witness is qualified

to testify as an expert, there is no requirement that the court specifically make that finding in open court upon proffer of the offering party").

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

D. The verdict

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

The two juries were not sequestered, so it was possible that the deliberations of one could continue well past the verdict and discharge of the other. To ensure that the jury that deliberated longer would not be influenced by the first jury's verdict, the procedure for this

dual jury trial worked as follows: When McKinney's jury returned its verdict, the form was taken by the bailiff to the clerk, who read it silently and recorded it. McKinney was present to observe this process, as were the attorneys for both defendants. After the attorneys were called to the bench to review the verdict, the bailiff gave the verdict forms to the jurors, who were polled in McKinney's presence to ensure that the returned verdict was that which they had voted for, but the actual verdict was not orally announced. McKinney's jury was then dismissed. When Hedlund's jury later reached its verdict, that verdict was announced in the normal course, following which the clerk read aloud the previously returned verdict for McKinney.

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

McKinney also argues that the procedure outlined above did not constitute the return of an actual verdict. We disagree. Our rules require that verdicts "shall be in writing, signed by the foreman, and returned to the judge in open court." Ariz.R.Crim.P. 23.1(1).

McKinney had an open and public trial, as required by the Arizona and United States Constitutions. The verdict was in writing, signed by the foreman, and returned to the judge in open court, as required by our Rules of Criminal Procedure. McKinney was present at all times, including the return of the verdict and polling of the jury. This is all he is entitled to by law. Therefore, we reject McKinney's claim of error regarding the verdict procedure.

SENTENCING ISSUES

A. The special verdict

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

B. The mitigating value of childhood abuse

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

Here again, the record shows that the judge gave full consideration to McKinney's childhood and the expert testimony regarding the effects of that childhood, specifically the diagnosis of post-traumatic stress disorder (PTSD). Assuming the diagnoses were correct, the judge found that none of the experts testified to, and none of the evidence showed,

that such conditions in any way significantly impaired McKinney's ability to conform his conduct to the law. The judge noted that McKinney was competent enough to have engaged in extensive and detailed pre-planning of the crimes. McKinney's expert testified that persons with PTSD tended to avoid engaging in stressful situations, such as these burglaries and murders, which are likely to trigger symptoms of the syndrome. The judge observed that McKinney's conduct in engaging in the crimes was counter to the behavior McKinney's expert described as expected for people with PTSD. As we noted in discussing Hedlund's claim on this same issue, a difficult family background, including childhood abuse, does not necessarily have substantial mitigating weight absent a showing that it significantly affected or impacted the defendant's ability to perceive, comprehend, or control his actions. *See* State v. Ross, 180 Ariz. 598, 607, 886 P.2d 1354, 1363 (1994), *cert. denied*, --- U.S. ---, 116 S.Ct. 210 (1995).

The record clearly shows that the judge considered McKinney's abusive childhood and its impact on his behavior and ability to conform his conduct and found it insufficiently mitigating to call for leniency. On this record there was no error.

DISPOSITION

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

STANLEY G. FELDMAN, Chief Justice

CONCURRING:

THOMAS A. ZLAKET, Vice Chief Justice

JAMES MOELLER, Justice

ROBERT J. CORCORAN, Justice (retired)

M A R T O N E, Justice, dissenting in part.

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

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

involved the use or threat of violence on another person. Ante, at 25.[1]

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

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

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

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

Our cases were once consistent with the plain meaning of the statute. In State v. Arnett, 119 Ariz. 38, 51, 579 P.2d 542, 555 (1978), in construing the word "violence," we turned to the

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

dictionary. We said that violence was the "exertion of any physical force so as to injure or abuse." Id. We made no reference to any culpable mental state. We just gave the statute its plain meaning. In State v. Watson, 120 Ariz. 441, 448, 586 P.2d 125, 1260 (1978), we said that robbery was a crime of violence because "fear of force is an element of robbery and that conviction of robbery presumes that such fear was present." In State v. Romanosky, 162 Ariz. 217, 227, 782 P.2d 693, 703 (1989), we said "[i]f either force or fear is a required element of the crime for which the defendant was previously convicted, it is conclusively presumed that the conviction encompassed force or fear." We said nothing about culpable mental state. We said the same as recently as State v. Spencer, 176 Ariz. 36, 43, 859 P.2d 146, 153 (1993).

From whence then did this engrafting of culpable mental state on an otherwise plain statute come? Turn to State v. Fierro, 166 Ariz. 539, 804 P.2d 72 (1991). It quotes the Arnett definition of violence, but then departs from it with the now infamous sentence, "[i]n determining whether a defendant's prior convictions under § 13-703(F)(2) warrant aggravating a life sentence to death, only those felony convictions in which force was employed or threatened with the intent to injure or abuse will be considered in aggravation." Id. at 549, 804 P.2d at 82 (emphasis added). This sentence was followed by a cf. cite to State v. Lopez, 163 Ariz. 108, 114, 786 P.2d 959, 965 (1990). The use of the cf. cite is a frank acknowledgement that there is no clear support for the proposition. "Cf." means that the "[c]ited authority supports a proposition different from the main proposition but sufficiently analogous to lend support. Literally, 'cf.' means 'compare.'" The

Blue Book: A Uniform System of Citation at 23 (15th ed. 1991)(emphasis in original). Lopez only held that under an alternative definition of resisting arrest, the offense could be committed without the use or threat of violence. There was no discussion of culpable mental state and certainly no reference to "with intent to."

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

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

When you add Fierro to Gillies, the result is absurdity. For example, one is forced to reach the quite remarkable proposition that first degree murder is not a crime of violence. Under A.R.S. § 13-1105(A), first degree murder is committed if "[i]ntending or knowing that his conduct will cause death, such person causes the death of another with premeditation." Under the majority's analysis, because first degree murder can be committed "knowingly," and without intent, first degree murder would not constitute a crime of violence.[2] For the same reason, second degree murder would not be a crime of violence. See A.R.S. § 13-1104. Manslaughter would

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

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

When a court reaches remarkable conclusions such as these, we have a choice. We can accept absurd results or we can go back and reevaluate our premises. I would simply acknowledge Fierro as insupportable error, acknowledge our distraction in post-Fierro cases, including my own opinion in State v. Walden, 183 Ariz. 595, 616-18, 905 P.2d 974, 995-97 (1995), acknowledge that its application to second degree murder and first degree murder is absurd, and hold that murder is simply a crime of violence. Those who have profited by Fierro in the past will suffer no harm. Those who do not profit by it in present and future cases are entitled to no benefit from it. Instead, the court says it must narrow the class of defendants who are death eligible. Ante, at 26. But it is the statute that narrows the class. The court ends up eliminating the narrowing factor.

I fear that the court's refusal to acknowledge our prior error will simply open the floodgates of Rule 32 petitions in those many cases in which the (F)(2) factor was upheld without any consideration of culpable mental state. This is especially regrettable in light of the repeal of the old (F)(2) factor and the

substitution of the new and improved "serious offense" (F)(2) factor. A.R.S. § 13-703(F)(2), amended by Laws 1993, Ch. 153, § 1.

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

Frederick J. Martone, Justice

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF MARICOPA

STATE OF ARIZONA, Plaintiff, vs. CHARLES MICHAEL HEDLUND, Defendant.	No. CR 91-90926 A

July 30, 1993
Mesa, Arizona

BEFORE: The Honorable STEVEN D. SHELDON, Judge

REPORTER'S TRANSCRIPT OF PROCEEDINGS
SENTENCING AND SPECIAL VERDICT

APPEARANCES:

FOR THE PLAINTIFF:
Louis Stalzer, Deputy County Attorney

FOR THE DEFENDANT:
Peter Leander, Court-Appointed Counsel
Thomas Phalen, Court-Appointed Counsel

Penny Heins, RPR-CM
Superior Court Reporter

P R O C E E D I N G S

(The following proceedings are held in open court.)

THE COURT: We're on the record in State of Arizona versus Michael Hedlund. This is the time set for entry of judgment of sentence and guilt in this case and rendering of special verdict by the Court.

Counsel, as in Mr. McKinney's sentencing, I will be reading a lengthy special verdict in this case. Before I do that, I am going to enter judgments of guilt on each of these matters.

On Count 1, Murder in the Second Degree, a Class 1 dangerous, nonrepetitive, felony committed in violation of A.R.S. Section 13-1104, 1101, 301 through 304, 13-703, 801, 812; and in Count 2 of Burglary in the First Degree, a Class 2 dangerous, nonrepetitive felony, committed in violation of A.R.S. Section 13-1501, 1507, 1508, 301 through 304, 701, 702, 801, 812 and 13-604(K) in Count 3, Murder in the First Degree, a Class 1 dangerous felony, committed in violation of A.R.S. Section 13-1101, 1105, 301 through 304, 703, 801, 812, an offense committed on or between March 22nd and March 23rd, 1991; Count 4, Burglary in the First Degree, a Class 2 dangerous, nonrepetitive felony, committed in violation of A.R.S. Section 13-1501, 1507, 1508, 301 through 304, 701, 702, 801, 812 and 13-604(K), again an

offense committed between March 22nd and March 23rd, 1991; and finally Count 6, Theft, a Class 3 nondangerous, nonrepetitive felony committed in violation of A.R.S. Section 13-1801, 1802, 301 through 304, 701, 702, 801 and 812, offenses committed between March 22nd and March 23rd, 1991.

I should note for the record that Counts 1 and 2 occurred between March 9th and March 10th of 1991.

MR. LEANDER: Excuse me, your Honor.

THE COURT: Yes?

MR. LEANDER: I just wanted to note for the Court, the defense notes an objection to the consideration of victim impact statements as noted and for including those in the presentence report. We also note our objection to the dispatch with which the Court acted in handing down the special verdict. We don't believe the Court had adequate time after the presentence hearings to consider its decision.

THE COURT: Mr. Leander, the length of time that has elapsed between the return of verdict in this case and the Court's opportunity to review its notes and the day of sentence I think will be apparent on the record, and I don't think I need to comment on it.

With respect to sentencing in these matters, on Count 1, Murder in the Second Degree, a Class 1 dangerous felony, the Court has considered evidence presented in mitigation at the capital sentencing hearing in respect to all

of the sentences to be imposed here today, and with respect to Count 1 has concluded that the aggravating circumstances, in that the defendant has a prior felony conviction, that a deadly weapon was used, that there was serious physical injury to the victim, that the offense was clearly for pecuniary gain, that there was an accomplice involved, and that there was trauma to survivors, demonstrate unequivocally that the maximum sentence of 20 years imprisonment should be imposed.

And the Court is going to impose that sentence and give the defendant credit for the time already served in custody in this matter, which I believe is a total at this point of 600 -- Counsel, I believe, in adding the number of time that's elapsed since the date of sentencing was initially set, that the computation of presentence credit is 850 days. Does that sound accurate?

MR. LEANDER: Your Honor, I haven't computed it. I will and will tell the Court if there's a difference.

THE COURT: With respect to Count 2, the offense of Burglary in the First Degree, a Class 2 dangerous felony, and again weighing the mitigating factors presented to the Court and the aggravating factors previously listed, and finding each of them applicable to this count, it is the judgment of the Court that the defendant be sentenced to the maximum term of 21 years imprisonment, that it run concurrently with Count 1.

And it is ordered that the sentences in Counts 1 and 2, although running concurrently, run consecutively to Count 3.

With respect to Count 4, the charge of Burglary in the First Degree, a Class 2 dangerous felony, again for the reasons previously stated in mitigation and aggravation, the Court finds that the maximum term of 21 years imprisonment be imposed. No credit for time served is permitted, the Court having previously allowed that time with respect to Counts 1 and 2. And it will be ordered that the sentence run consecutive to Counts 1, 2 and 3.

And, finally, with respect to Count 6, for the reasons previously stated, the Court finding that the identical aggravating factors apply, it's ordered that the defendant be sentenced to the maximum term of ten years in prison, that this run concurrent with the sentence imposed in Count 4.

Counsel, I am going to begin by discussion of factors that should be considered, I think, pursuant to the requirements in Enmund and Tison, because I think without a finding of compliance, the requirement in those cases, that it is simply moot to decide whether or not aggravating factors or mitigating circumstances exist, because constitutionally the death sentence could not be imposed. There would be no choice to the Court other than to impose life imprisonment because

the defendant has been convicted of First Degree Murder in Count 3.

I apologize for not being able to speak extemporaneously with respect to all of the findings and statements I'm going to make, but I think that this is a serious matter. I am going to refer to the notes and thoughts in my review of my trial notes that I have taken considerable time and effort to review in this matter.

Although the defendant argues vehemently that he was not involved in the McClain homicide, the trial evidence overwhelmingly demonstrated -- Counsel, if you and your client would prefer to be seated while I do this, please do that. And before I impose sentence I will ask you to stand.

MR. LEANDER: That's fine with me, your Honor

THE COURT: I'll leave it entirely up to you.

Although he argues that he was not involved in the McClain homicide, the trial evidence overwhelmingly demonstrates otherwise, as does obviously the jury's verdict. Even assuming the defendant were at least arguing at this point that his participation should be considered in the killing and the burglary as relatively minor because here, as was argued in State v. Tison, he didn't specifically intend death, did not plot in advance that death, and did not actually pull the trigger, under the facts of this case, as in Tison, I believe that those factors would be of little

importance. The defendant associated himself with a known killer. He assisted in burying and concealing the first murder weapon, provided the weapon used in the McClain homicide.

I've arrived at this conclusion based on the following circumstances. First, Criminalist Joyce Lee did testify during the trial that there was blood found on the tip of a modified .22 rifle possessed by the defendant. Although there was not sufficient blood to type the blood and to indicate what type it was, it is a matter that may be considered along with all of the other circumstantial evidence related to the weapon which I am going to discuss.

The gun was modified before the burglary. Witnesses testified during trial that the weapon was shot on March 17th and between that date and the date that the homicide occurred in this case that the weapon was seen in the defendant's trunk of his automobile in the modified condition which it was seized pursuant to a search warrant at a later date.

Secondly -- or third, the weapon was hidden in a manner which prevented police officers from discovering it during the first time that a search warrant was executed at a residence that Mr. Hedlund was residing in. There was evidence that Mr. Hedlund tried to sell the weapon the day after the homicide occurred. He contacted Chris Morris and

attempted to have Chris Morris obtain the weapon and remove it from the home without alerting the residents to the fact that it was being removed.

And the evidence in this case clearly indicates that the phone call was made after the defendant was in custody for the homicides in this case, as Detective Franzen testified during his testimony that a search warrant had already been executed on the premises and the weapon had not been discovered and was seized at a later date.

Criminalist at trial identified Exhibit 116 as a bullet that was not inconsistent with having been fired from the weapon, although the criminalist testified that it could neither be included or excluded as the bullet actually fired from that weapon.

Finally, the defendant's fingerprints were found on the gun's magazine at the time that it was seized. The defendant's conduct, circumstantially I think, supports the Court's conclusion that it evidenced a consciousness of guilt and an attempt to conceal the weapon which allows the inference that it, in fact, was the weapon provided and used during the homicide, although it is unclear as to whether Mr. Hedlund or Mr. McKinney fired the shot which actually killed Mr. McClain. And for purposes of this sentencing the Court is not making any conclusions at all because there is simply no evidence to support a conclusion as to which of these two

defendants killed the victim in this case.

There was evidence presented at trial that the defendant participated in the selection of the victim. He had purchased an automobile from the defendant in October and stated that he knew the victim and it is likely that he was aware of circumstances which targeted this person for a burglary.

The defendant stood by while the victim was senselessly killed. He did -- if he did not kill the victim himself, then he ransacked the defendant's home. He provided transportation to and away from the residence. He helped negotiate the sale of the guns the next day and followed up with, with the negotiations attempting to obtain the money from the individual to whom they had sold the weapons.

He also attempted to sell the modified .22 rifle the next day, conduct which was almost identical to that engaged in a week before when both of the defendants attempted to sell a handgun used in the Mertens homicide while they were in the desert, later simply buried or concealed the weapon, which was done in this case.

In fact, in reviewing the evidence in this case the only physical evidence at the scene putting either of the defendants in the McClain home is evidence showing that the defendant was present. And only his fingerprints were found on the weapon.

However, this evidence cannot and should not be considered in isolation. The conduct of the two defendants demonstrates unequivocally beyond any reasonable doubt an intent to participate in an ongoing scheme to burglarize residences of known victims which began in late February 1991 and continued through the arrest, through their arrest in April 1991.

These facts conclusively demonstrate the defendant's level of participation and reckless disregard for human life enunciated in Tison and Enmund in that it was clear that the conduct in burglarizing the victims' residences was likely to result in the loss of human life. Reckless disregard for human life is implicit in knowingly engaging in criminal activities known to carry grave risk of death.

In State v. Correll our Supreme Court also noted that the phrase "intended to kill" encompasses those situations in which a defendant contemplates or anticipates that lethal force be used or that life might be taken in accomplishing the underlying felony. This interpretation clearly anticipated the extension of Enmund in Tison versus Arizona. The defendant's recklessness, knowledge, belief, or intent can be inferred from circumstances surrounding not only Mr. McClain's murder but from the ongoing participation of the defendant's attempts to conceal involvement through disposal of weapons and sharing in the proceeds of the burglaries that

occurred.

Additionally, the defendant knew the codefendant had threatened to kill anyone present during a burglary. The defendant himself willingly offered to beat any victims who were encountered during burglaries. The defendant accompanied the codefendant and others as a driver on a number of other burglaries prior to the McClain burglary and homicide. He methodically and meticulously plotted the burglary of the Mertens residence with the codefendant. He was absolutely aware of how she had been killed and how -- and details which were unknown to the general public at that time that he advised Chris Morris of during that drive to the desert on March 17th.

Both Joe Lemon and Chris Morris testified as to marked personality changes observed in the defendant during the outing in the desert on March 17th. Chris Morris' then girlfriend, Heather Bissing, testified that after Chris Morris returned to the car, after being told by the defendant how Mrs. Mertens was killed, in assisting him in burying the gun, that he, Chris Morris, seemed different, sad, not talkative.

In addition, both of these individuals testified regarding the marked personality changes exhibited by the defendant. Despite his apparent change in demeanor expressed on March 17th, however, within a week the defendant was accompanying the same individual to another residential home,

with a victim they knew about, whom the defendant may well have known or suspected had valuable items to steal including weapons, that he provided transportation, rifled through the items in the victim's home. His fingerprints were found on Exhibit 19, the briefcase.

He attempted to sell the guns the very next day and through his conduct permits the drawing of an inference also as previously noted that he provided the weapon which killed the victim.

The above facts demonstrate beyond any doubt that the defendant was a major participant in the killing of Mr. McClain and demonstrated a reckless disregard for Mr. McClain's life. Having concluded that the defendant's conduct complies with the constitutional requirements set forth in the Enmund Tison cases, I am going to proceed to a discussion of the aggravating or mitigating circumstances in this case.

In determining the appropriate punishment called for by law, the Court recognizes the punishment must be tailored to a defendant's personal responsibility and moral guilt. The sentence imposed should reflect a reasoned, moral response to the defendant's background, character, and the crime. Although the requirements of channeled or guided discretion enunciated in Gregg v. Georgia, which sought consistent, rational application of the death penalty, may appear in a superficial analysis to be in conflict with an

expansive reading of Eddings v. Oklahoma, Lockett versus Ohio and other cases which require individualized sentences and consideration of all mitigating evidence offered, these cases when read together simply require the sentencing judge, as the conscience of the community, to weigh carefully, fairly, objectively, all of the evidence offered at sentencing, recognizing that not everyone who commits murder should be put to death.

The Court, however, should not be swayed by mere advocacy, no matter how strident or insistent, and cannot rely on arguments unsupported by any reliable evidence to make the sentencing decisions. In the end, the Court has the soul obligation of reviewing the evidence presented in coming to a conclusion in accordance with the law.

I have found beyond any reasonable doubt that the State has established the aggravating factors set forth under A.R.S. Section 13-703(F)(2) and (F)(5) for the following reasons. With respect to the prior conviction in (F)(2) the Court finds that the Cook, Smith and Gretzler cases all suggest that under the circumstances presented in a case such as this where the defendant's conduct in an ongoing crime spree has resulted in the death of several individuals and the burglary of a number of residences, that that person's conduct must be considered more culpable and dangerous.

An analogy regarding legislative intent is easily

gleaned from a review of the aggravating factors listed under 13-703(F)(8). Furthermore, the statutory scheme, for example 13-603 and our criminal rules, are logically consistent with such an interpretation, since the statutory aggravating factor requires only a conviction and not judgment and sentencing.

With respect to the aggravating factor of (F)(5), I believe that the evidence is overwhelming in this case for the reasons previously stated during Mr. McKinney's sentencing of the fact that both of these individuals were consciously involved in an ongoing crime spree to commit residential burglaries and intended to either kill or beat any of the victims who might have been present during these crimes.

In this case I specifically find that the defendant knew the victim, as all others, and knew that the victim probably had property that would be subject to easy resale. The fingerprints of the defendant were found on the briefcase within the residence.

I would further note that during the trial there was evidence offered by Barbara Phillips that she had been consistently involved with the financial affairs of her father since their mother had died, that she spent a great deal of time with the victim in this case, that she knew his habits, and testified that no one touched the briefcase.

I think that under the circumstances of this case that the witness' statements are entitled to a great deal of

credibility. And I reject categorically any suggestion by the defense that Mr. Hedlund's palm and fingerprints somehow found their way onto that briefcase when he purchased his vehicle back in 1982 -- or 1990, 1990, in October, which I would also note was approximately two months before the codefendant, Mr. McKinney, returned to the area and began associating with the defendant on almost a daily basis.

I would also note that the use of a new weapon is indicated under the facts of this case, indicating that the defendant and codefendant's prior agreed upon plan of burglaries on residents had not changed at all, that Mr. McKinney's intent to be armed and to inflict death, if met with any occupants of the residents, apparently continued in full force and effect, with the assistance of this defendant.

Further, the evidence shows that the defendant actively participated in attempts to conceal the property in the pond in this case, including the wallet and other personal items of the victim, that he was involved in the sale of weapons shortly after this offense, that he shared in proceeds of other burglaries.

The evidence showed that during other burglaries committed on or about February 28th through March 1st the defendant shared in the proceeds of other burglaries which were variously described as junk for the most part by the witnesses testifying at trial, but that the defendant did

obtain some of the wheat pennies, as were described by the witnesses, in a prior burglary. He also indicated that he had received half the proceeds from the Mertens homicide.

In addition, there was testimony offered by one of the witnesses at trial that the defendant had previously stated with respect to the planning of the Mertens burglary that they could simply sneak into the Mertens residence, knock them out and steal money. This clearly evidences an ongoing intent by the defendant to be involved in burglaries in this case.

The evidence, I think, presented at trial overwhelmingly demonstrates a knowing, active, continuing participation of criminal activity by the defendant which resulted in two senseless killings in the community.

I would also note that with respect to the aggravating factors the Court has found the existence of two and has determined that as a result of not finding or analyzing the existence of that aggravating factor with respect to Mr. McKinney's case, that I am not going to analyze the existence of that aggravating factor in this case.

I'm now going to move to a consideration of the mitigating factors. In this case I believe that it is reasonable to conclude that one who accompanies another person to a residential burglary who has, one, stated an intent to shoot residents who are home and knows that the resident of a

prior planned executed burglary has been senselessly stabbed and shot, who provides transportation to that individual, a weapon and support to that individual, knew with substantial certainty that his actions would contribute to the death of the victim resident so that the giving of a felony murder instruction is entitled to very little weight at sentencing and is not a mitigating factor or circumstance in this case.

The analysis is also supported by my discussion of the Enmund-Tison circumstances. And this is specifically addressed in the mitigating factors set forth under our statutes under (G)(3) and (G)(4). I'm relying also on the discussion of this matter in State versus Zaragoza, Z-a-r-a-g-o-z-a.

Counsel, I would note that I may have misspoke, that I did not analyze (F)(6) in this case because in my opinion Mr. Stalzer simply did not urge it, as it was discussed under -- in Ms. Mertens' and Mr. McKinney's case.

In this case I've determined under (G)(5) that age is no mitigating circumstance at all.

Under State v. Smith, 141 Ariz. 510, contrary to statements that were made in closing arguments, I found the defendant in this case, at least through information provided to me and available to me, to be an intelligent, reflective individual, certainly not retarded.

I had an opportunity to review the letters

submitted by defense counsel in this case, including a very lengthy letter from the defendant to a person named Rhonda in which he discussed his relationship with that individual, her brother, Rick or Ricky, and some individual who I assume was her father, which I assume was the nickname Daddo, in a letter. I reviewed that letter. It demonstrated to me and corroborated the defendant's level of reading at the twelfth grade level. And I think it would be apparent to any reviewing court that this simply was not the letters or writings of a retarded individual or someone who did not understand what he was saying.

With respect to Dr. Shaw's offered opinion in this case regarding the defendant's conduct being affected by alcohol, I don't believe that there was any reliable, credible evidence to support the conclusion that the information relied upon by Dr. Shaw was accurate or truthful. An expert's opinion is only as persuasive as the reliability of the factual information upon which it is based.

Here there is no substantial reason to believe that the defendant was reporting accurately. First, because he had an extraordinary motive to lie and embellish the facts. Second, that he indeed was untruthful as supported by the objective evidence presented both during the trial and at the sentencing hearing.

I rely on this conclusion based on the testimony

of not only the defendant's sisters, but other testimony offered both at trial and during the sentencing hearing. I also have relied on the defendant's own statements made in a prior presentence report for a Burglary conviction which occurred in 1984 and 1985 which he eventually did prison time on.

I'm also considering the absence of any such claim in the letters provided to the Court which the defendant sent to various individuals while in jail. While certainly not of substantial weight, it is of some weight. It gave the Court some insight into the defendant's thinking about this case.

And I would also note that the defendant and counsel claim that part of the reason of mitigation in this case was that the defendant was simply not involved, although the Court analyzed this in terms of being mutually exclusive defenses for mitigation, that the defendant was not present, but that if he were present he was so intoxicated that he did not understand what was going on. I've considered the mitigation from both of those perspectives and rejected it on both bases.

Although the Court has considered evidence of alcohol consumption as evidence of mitigation, there is little to demonstrate that it in any substantially affected the defendant's ability to understand the unlawfulness of his

conduct. Part of the reason the Court has reached this conclusion is defendant's own demonstrated conduct of remorse during the desert during the burying of the gun on March 17th, the change in his personality which indicated he knew full well what had happened, experienced some remorse over what had happened; nevertheless, continued in this conduct. The Court has concluded that although evidence of alcohol use not being a mitigating circumstance under (G)(1), nevertheless should be considered as mitigating evidence.

The Court has also considered whether the prior offered plea agreement by the State in this case should be considered as mitigating evidence and has rejected it, concluding that there was no action by the defendant which caused the State to proceed, only the Court's rejection of the plea agreement, so that no due process concern regarding the vindictive sentencing or persecution of the defendant by the State should be considered in this case.

The Court concluded then that given the pending charges, the evidence and arguments that had previously been presented to the Court at that time and now, that such a disposition offered in the plea agreement was totally unwarranted in the interests of justice.

Considering Dr. Holler's testimony regarding the psychological symptoms exhibited by the defendant, the Court has concluded that pursuant to (G)(1) and (G)(2) that the

doctor's testimony is entitled to little weight. Dr. Holler's explanation for failing to include a diagnosis of post traumatic stress syndrome in his initial report to defense counsel was unpersuasive at best.

In addition, Dr. Holler's testimony relied in part upon factual information self-reported by the defendant which the Court has concluded is not entitled to significant weight, and because some of the information upon which the doctor arrived at initial conclusions provided by defense counsel was demonstrated at sentencing to have been erroneous.

Although the matters were attempted to be clarified during the sentencing, the Court believes that the doctor's opinions were initially formed in the absence of presenting any diagnosis and upon information which the defense disputed the accuracy of.

Furthermore, there was no persuasive testimony presented that leads to the conclusion that the abuse by -- that the defendant suffered as a child resulted in him being under unusual or substantial duress at the time of the murders. I'm specifically finding that there is no substantial evidence to support a finding under (G)(1).

The lingering doubt of the defendant's guilt is not a mitigating circumstance sufficient to call for leniency when a jury verdict is supported by substantial evidence. In this case I believe it is supported by substantial if not

overwhelming evidence relying on State v. Atwood decision handed down by the Court in 1992.

The Court has also specifically given consideration to the fact that the defendant refused to be interviewed by Dr. Gray in this case and has determined that no weight and no consideration to that fact should be given at all. The Court has reached this conclusion for the reason that there was no objection to the defendant's refusal to cooperate with Dr. Gray and therefore precluded the Court from taking any steps to require participation in the interview which would then have allowed the Court under those circumstances to draw some inference regarding the weight of the psychological evidence offered by the defense.

But in this case, because of the ambiguity of whether the defendant did it himself or did it based on information provided to him or recommendation by his defense counsel, the Court has concluded that that ambiguity is so great that I have not given any consideration to the defendant's refusal to cooperate with Dr. Gray.

The lack of interest in the rehabilitation while on probation previously by the defendant suggests that even though he possesses the intellectual ability to engage in rehabilitation, that that factor -- that mitigating factor is not so substantial that it calls for any leniency in this case.

The defendant's dependent personality traits, his past drug and alcohol abuse, and child abuse have been considered by the Court. If not demonstrating the existence of the mitigating factors under (G)(1), they have nevertheless been given consideration by the Court. I have concluded, as in Mr. McKinney's case, that the evidence regarding Mr. Hedlund's childhood can be considered as truthful by the Court, that there were significant aspects of his childhood which were clearly abusive.

Certainly the memories of children may, may become exaggerated with age. But there certainly were specific incidences that were testified to by the witnesses in this case that clearly have made an impression upon them which they will probably not forget for the rest of their lives. This has made an impact on me. I have considered it. I think it is the Court's obligation to consider it, whether or not it complies with the requirements in (G)(1).

I have also considered all of the other mitigating factors which were set forth in three separate pleadings submitted by defense counsel in this case. I have reviewed all of them again as recently as yesterday and some of those factors this morning. The Court, after carefully considering and weighing all of the aggravating or mitigating factors presented in this case, and not limited to the personality traits discussed by Dr. Holler, past drug and

alcohol use discussed about Dr. Shaw, Dr. Holler and the other witnesses who testified, and the child abuse which the Court finds is a fact, that none of those mitigating factors considered separately or cumulatively indicates to the Court that these factors affected the defendant's ability to control his physical behavior at the time of the offense or to appreciate the wrongfulness of his conduct, that the defendant was aware at all times while these offenses were occurring that what he was doing was wrong, that he continued to participate in them and that he had the intelligence and the ability to refuse continued participation.

The Court has also considered as evidence in contradiction to mitigating evidence of good character of the defendant that he knowingly encouraged and assisted in the participation of minors in residential burglaries and provided alcohol to them during these burglaries and continued to elicit cooperation and participation in the criminal scheme by these teen-agers, including the attempt to dispose of and hide a weapon that he knew was involved or could be linked to a homicide which had occurred.

Counsel, would you come forward?

(Discussion off the record between Court and counsel.)

THE COURT: Mr. Leander, if you and your client, Mr. Phalen, then would please rise.

Mr. Hedlund, I've given a great deal of consideration to the evidence that has been presented to me over the last four days by your attorneys. I don't think anyone could listen to the evidence presented by your sisters without feeling a great deal of anguish and compassion for the kind of existence that you lived as a small child.

But I did note that the latest evidence of testimony that was given placed some of these things, the people knowing you and determining their opinions about your character, were back when you were about 14 or 15 years old. And you were 26 1/2 years old when these offenses occurred.

I think that some of the qualities that you exhibited as a child were commendable, certainly protecting your sisters from the beatings that they received. And I believe that that is accurate, truthful testimony. I have considered your character as a young person. I've considered too the impact that the sentence in this case will have on your sisters and your family.

I've also considered, however, your conduct as an individual. And I've rejected absolutely your defense that you were not involved in the McClain homicide. The jury verdict has resolved that issue for me. It is something I simply don't have to consider. But even were I asked to consider it based on the sentence, it is my conclusion for the reasons stated on the record that you were a major

participant, that you knew what was going on, and that if you did not pull the trigger yourself, you knew in all likelihood that it could very well happen because your stepbrother had already killed someone just two weeks before and you nevertheless chose to continue going along with that individual.

I've also considered the fact that the death penalty should not be simply imposed on every individual that commits a homicide. That is not the way the system is intended to work. That is not the way our society works. Each individual has to be considered. And I've tried to disassociate myself from the arguments of counsel. I've certainly listened to them, and being guided in my review of the evidence of this case, but in the end it is the evidence, it is the statute, it is the law, it's the constitutional guidelines that I have to follow.

And having reviewed all of this evidence, your past character, I've concluded that none of the mitigation considered by the Court in this case, either individually or cumulatively, are sufficiently substantial to call for leniency. And I am ordering that you be sentenced to death for the death of Mr. McClain. I'm going to order that this sentence be carried out in accordance with the law. I am going to order that an appeal be filed immediately on your behalf as required by law in this state.

Counsel, we'll stand in recess.

(Proceeding concluded.)

* * * * *

SUPREME COURT OF ARIZONA

STATE OF ARIZONA,	)	Arizona Supreme Court
	)	No. CR-93-0377-AP
Appellee,	)	
	)	Maricopa County
v.	)	Superior Court
	)	No. CR1991-090926
CHARLES MICHAEL HEDLUND,	)	
	)	
Appellant.	)	
	)	**FILED 2/22/2019**
	)	

O R D E R

On January 31, 2019, Appellant Hedlund filed a "Motion for Reconsideration." On February 20, 2019, Appellee State filed a "Response to Motion for Reconsideration." After consideration by the entire court (Judge Vasquez sitting in for Justice Lopez),

IT IS ORDERED denying the Motion for Reconsideration.

DATED this 22nd day of February, 2019.

/s/
JOHN PELANDER
Duty Justice

TO:
Lacey Stover Gard
John Pressley Todd
Paula Harms
Charles Michael Hedlund, ADOC 056613, Arizona State Prison,
Florence - Central Unit
Dale A Baich
Timothy R Geiger
Amy Armstrong
bp

ARIZONA SUPREME COURT

STATE OF ARIZONA, Appellee, v. CHARLES MICHAEL HEDLUND, Appellant.	CR–93–0377–AP Maricopa County Superior Court No. CR–1991–90926 **MOTION TO CONDUCT NEW INDEPENDENT REVIEW OF DEATH SENTENCE**

The State of Arizona respectfully requests that this Court conduct a new independent review of Charles Hedlund's death sentence and reweigh the aggravating and mitigating factors pursuant to *Clemons v. Mississippi*, 494 U.S. 738 (1990), and *State v. Styers*, 227 Ariz. 186, 254 P.3d 1132 (2011). Applying *McKinney v. Ryan*, 813 F.3d 798 (9th Cir. 2015) (en banc), the United States Court of Appeals for the Ninth Circuit found that this Court applied an unconstitutional causal nexus test to Hedlund's mitigating factors in violation of *Eddings v. Oklahoma*, 455 U.S. 104 (1982). *Hedlund v. Ryan (Hedlund II)*, 854 F.3d 557 (9th Cir. 2017). For the reasons stated in the following Memorandum of Points and Authorities, the State asks this Court to conduct a new independent review of Hedlund's death sentence to correct the Ninth Circuit's perceived constitutional error, and set a briefing schedule.

MEMORANDUM OF POINTS AND AUTHORITIES

A. *Procedural History.*

In 1991, Hedlund and James McKinney committed two murders two weeks apart during night-time residential burglaries. *State v. McKinney (McKinney I)*, 185 Ariz. 567, 571, 917 P.2d 1214, 1218 (1996).[1] During the first burglary the pair beat and savagely stabbed the victim, Christene Mertens, as she struggle to save her life. *Id.* at 572, 917 P.2d at 1219. McKinney ultimately held her face down on the floor and shot her in the back of the head, using a pillow to muffle the sound of the shot. *Id.* In the second burglary, Hedlund and McKinney broke into the home of 65-year-old Jim McClain, who was shot in the back of the head with Hedlund's rifle. *Id.* The jury convicted Hedlund of second degree murder for Mertens' death and first degree murder for McClain's death. *Id.* The trial court sentenced Hedlund to death for McClain's murder. *Id.*

On direct appeal, this Court addressed Hedlund's argument that the sentencing judge improperly discounted expert psychological testimony offered in mitigation which concluded that Hedlund suffered from post-traumatic stress disorder, alcohol dependence, and depressive disorder and abused its discretion when it failed to find his mitigating evidence sufficiently mitigating to call for a life sentence. *Id.* at 578–79, 917 P.2d at 1225–26. This Court observed that while

[1] Hedlund and McKinney were tried together with dual juries and their appeals were consolidated. *See McKinney*, 185 Ariz. at 571, 917 P.2d at 1218.

the trial judge must consider any aspect of a defendant's character or record and any circumstances of the offense relevant to determining whether a life sentence was appropriate, the judge had broad discretion to evaluate the evidence and determine the weight and credibility to give it. *Id.* at 579, 917 P.2d at 1226. This Court examined the record and concluded that the trial court did not fail to consider any of the expert psychological testimony, "only that he found some of the factual evidence for the experts' opinions lacking in credibility." *Id.* Furthermore, this Court found that the trial court did not abuse its discretion by imposing a death sentence because there was no evidence that Hedlund's difficult family background significantly affected or impacted his ability to perceive, comprehend, or control his actions, little evidence corroborated Hedlund's self-report of alcoholic impairment at the time of the murder, and the evidence indicated Hedlund's major participation in both murders. *Id.* at 579–80, 917 P.2d at 1226–27.

Next, after affirming the trial court's finding of the (F)(5) pecuniary gain aggravating factor, but concluding that the trial court erred in finding the (F)(2) prior conviction aggravating factor, this Court reweighed the aggravating and mitigating circumstances:

> Because the judge did not improperly exclude mitigating evidence at sentencing and the mitigating evidence is not of great weight, this case is appropriate for reweighing by this court rather than remanding to the trial court. *State v. King*, 180 Ariz. 268, 288, 883 P.2d 1024, 1044 (1994), *cert. denied*, 516 U.S. 880, 116 S.Ct.

> 215, 133 L.Ed.2d 146 (1995). In our reweighing, we must decide whether the sole aggravator-pecuniary gain-outweighs the mitigating circumstances discussed above or whether those mitigators are sufficiently substantial to call for leniency.
>
> In comparison to the mitigating circumstances here, the quality of the aggravating circumstance is great. To apply a recent analogy, this is not the case of a convenience store robbery gone bad but, rather, one in which pecuniary gain was the catalyst for the entire chain of events leading to the murders. The possibility of murder was discussed and recognized as being a fully acceptable contingency. *See State v. Spears*, 184 Ariz. 277, 908 P.2d 1062 (1996) (affirming death sentence where pecuniary gain was only aggravator, and military service and lack of significant prior criminal record were only mitigators).
>
> As in *Spears*, this is a case in which Defendants deliberately and unnecessarily killed to accomplish the burglary. We have encountered pecuniary gain as the sole aggravator in other cases in which the death penalty was not imposed, but the quality of Hedlund's conduct in this case certainly gives great weight to the aggravating circumstance. We therefore believe that the aggravating circumstance of pecuniary gain clearly outweighs the minimal mitigating evidence.

Id. at 584, 917 P.2d at 1231.

After exhausting his state direct appeal and collateral review remedies, Hedlund filed a petition for a writ of habeas corpus in federal district court. After the district court denied his habeas petition, Hedlund appealed to the Ninth Circuit. The Ninth Circuit initially affirmed the district court's denial of habeas relief, concluding that this Court had properly applied *Eddings*, "considered all mitigating evidence presented by Hedlund" as required by *Eddings*, and "did not apply" any causal nexus test before considering mitigating evidence to be relevant." *Hedlund v. Ryan (Hedlund I)*, 750 F.3d 793, 814–20 (9th Cir. 2014).

Several months later, however, in a 6–5 en banc opinion in McKinney's federal habeas case, the court of appeals found that this Court violated *Eddings* and granted McKinney habeas relief on both of his death sentences. *McKinney*, 813 F.3d 798. The majority then concluded, after examining 16 years of this Court's opinions (from 1989 to 2005), that this Court had created and systematically applied an unconstitutional causal nexus rule, contrary to *Eddings*, that precluded consideration of mitigating evidence as a matter of law for that entire 16-year period, no matter what this Court said about the mitigation in a particular case. *Id.* at 813–18.

In response to the decision in *McKinney*, the Ninth Circuit withdrew and reissued its opinion. *Hedlund II*, 854 F.3d 557. Finding that the "same reasoning applies to the Arizona Supreme Court's decision for Hedlund," the court "adopt[ed] [the] en banc court's conclusion in *McKinney* that the Arizona Supreme Court's decision of Hedlund's claims was contrary to *Eddings*." *Id.* at 587. Concluding that the perceived error was not harmless, the court reversed the district court's judgment denying the writ of habeas corpus and remanded with instructions to grant the writ with respect to Hedlund's sentence unless the State, with a reasonable period, "either corrects the constitutional errors in his death sentence or vacates and imposes a lesser sentence consistent with law." *Id.* at 587–88. On July 3, 2017, the district court issued a judgment granting the writ of habeas corpus "unless the State of Arizona, within 120 days from the entry of this

Judgment, initiates proceedings either to correct the constitutional error in Hedlund's death sentence or to vacate the sentence and impose a lesser sentence consistent with law." (Attachment.)

B. ***Request for briefing schedule***.

The remedy to correct the federal courts' perceived error in this Court's independent review is to have this Court conduct a new independent review of Hedlund's death sentence and reconsider the proffered mitigation he presented. It is clear from the Ninth Circuit's opinion that it perceived that this Court erred by failing to follow its obligation under *Eddings* in considering the mitigation evidence Hedlund presented. Therefore, this Court should conduct a new independent review of Hedlund's death sentence pursuant to *Clemons v. Mississippi*, 494 U.S. 738 (1990), and *State v. Styers*, 227 Ariz. 186, 254 P.3d 1132 (2011). The State requests that this Court set a briefing schedule.

. . .

DATED this 10th day of July, 2017.

Respectfully submitted,

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ARIZONA SUPREME COURT

STATE OF ARIZONA, Appellee, v. CHARLES MICHAEL HEDLUND, Appellant.	CR-93-0377-AP Maricopa County Superior Court Case No. CR-1991-90926 **RESPONSE TO MOTION TO CONDUCT NEW INDEPENDENT REVIEW OF DEATH SENTENCE**

I. FACTUAL AND PROCEDURAL BACKGROUND

This case is unusual in that serious errors permeated every aspect of the proceedings. As Judge Wardlaw summarized: "Hedlund's constitutional rights were violated at every stage . . . , from his plea negotiations to his sentencing."

Hedlund v. Ryan (hereinafter "*Hedlund I*"), 750 F.3d 793, 824 (9th Cir. 2014) (Wardlaw, J. concurring in part and dissenting in part), *opinion withdrawn and superceded by Hedlund v. Ryan*, (hereinafter "*Hedlund II*") 854 F.3d 557 (9th Cir. 2017).[1] Hedlund takes issue with the State's presentation of the facts in its procedural history because it leaves the impression that Mr. Hedlund is as equally culpable in these murders as his brother. That is simply not the case. Even prior to trial, the State recognized Hedlund as the least culpable of the two brothers, offering him a plea deal for a term of years that Hedlund was ready to accept. The court rejected the plea deal and when plea negotiations resumed, counsel missed the deadline to enter a new plea. *See Hedlund I*, 750 F.3d at 834 (Wardlaw, J., dissenting) ("Hedlund's trial counsel committed gross error when he allowed the second offer of a plea agreement, which would have saved Hedlund from the death penalty, to expire even though Hedlund had told him he was willing to accept the plea.").

At their dual jury trial, Hedlund's brother, McKinney, was found guilty of

[1]Although the new opinion granted relief on causal nexus grounds, Judge Wardlaw made it clear that she continued to dissent on other grounds, based upon the reasoning set forth in the withdrawn opinion. *Hedlund II*, 854 F.3d at 592 (Wardlaw, J., concurring in part and dissenting in part).

two counts of first-degree murder and received two death sentences. Hedlund was found guilty of second-degree murder on one count, and first-degree murder on the other. *State v. McKinney*, 917 P.2d 1214, 1218 (Ariz. 1996), *overruled by Hedlund II*, 854 F.3d 557. Before returning the verdict, the jury asked if Hedlund could "be convicted as an accomplice to the burglary and not be convicted in the murder charge." ROA 118. The testimony of the State's two key witnesses, who had participated in prior burglaries, made it clear that McKinney was the ring leader and Hedlund was only reluctantly involved in driving the car. TR 10/28/92 at 68-69, 98; TR 10/29/92 at 115-137. In sentencing Hedlund to death, the sentencing judge noted that although there was "simply no evidence to support a conclusion as to which of these two defendants killed the victim," it found that Hedlund "associated himself with a known killer" (his brother) and assisted in providing, burying, and concealing the murder weapon. TR 7/30/93 at 7-9. After one of the aggravating factors was rejected by this Court on direct appeal, the sole aggravating factor that remained was pecuniary gain. *See McKinney*, 917 P.2d at 582-83 (striking the aggravating factor of prior conviction for crime of violence).

Since the verdict was rendered, evidence has come to light indicating that

Mr. Hedlund was not even present when the murders occurred and did not know about the murders until after they were committed by his brother, which is consistent with his prior actions in the other burglaries in which he simply drove the car. *See* Exh. A (Letter from McKinney to Chris Morris). The only physical evidence Hedlund's presence during any of the murders was the existence of a fingerprint on a briefcase of Mr. McClain's that he used to store car titles in. TR 10/26/92 at 117-121; TR 11/2/92 at 123-128, 131-135. However, evidence introduced at trial indicated that there was a plausible innocuous explanation for this. The prosecution stipulated that Mr. Hedlund bought a car from Mr. McClain prior to the crime, so it was entirely plausible that Hedlund touched the briefcase when he bought the car. The state's own expert testified there was no way to tell when the fingerprint was placed on the briefcase. TR 11/2/92 at 135; TR 11/4/92 at 42. Further, McKinney always insisted everyone wear gloves who went with him on a burglary, so as to avoid leaving fingerprints. TR 11/2/92 at 16-17. Finally, additional mitigation has been uncovered since the verdict that also makes independent review inappropriate.[2] *See, e.g.*, Exh. B (Declaration of Ricardo

[2]The federal court was unable to consider some of the new mitigating evidence,

Weinstein and attachments).

Even absent new evidence of mitigation, the mitigation evidence that Hedlund did present at sentencing was powerful. Judge Wardlaw's words on this topic bear repeating:

> Words fail to adequately describe the horrors that Hedlund suffered as a child. Indeed, Hedlund's mental health expert, Dr. Holler, described Hedlund's childhood as "probably as gruesome as anything that I have come across in 25–plus years in this business." The testimony of Hedlund's half-sisters and aunt paint a ghastly picture of extreme physical and emotional abuse. Hedlund and his three half-siblings were raised in the outskirts of Chandler, Arizona, by Shirley and James McKinney, Sr. Shirley and James Senior, however, were not Hedlund's biological parents. Hedlund was conceived during an extramarital affair that Hedlund's mother, who was James Senior's first wife, had with a man named Charles Hedlund. Growing up with the McKinneys, Hedlund was reminded daily that he was not a McKinney.

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such as Dr. Weinstein's report, because it was offered for the first time in federal habeas and was inadmissible under the federal habeas statute. *See, e.g.*, *Hedlund v. Ryan*, 854 F.3d 557, 582 (9th Cir. 2017) (hereinafter "*Hedlund II*") ("The district court reviewed all of the expert testimony and reports proffered during the penalty phase and in PCR proceedings."). Even without this evidence, Judge Wardlaw would have remanded for a hearing on the issue of ineffective assistance of sentencing counsel based upon the new evidence of mitigation submitted during post-conviction. *See Hedlund I*, 750 F.3d at 831-32 (Wardlaw, J., dissenting).

Hedlund lacked even the basic necessities as a child. He grew up living in filth and was rarely clothed. His home was covered in animal feces, bile, urine, used female hygiene products, and dirty diapers. Hedlund and his siblings were forced to share a very small room with a variety of domesticated and exotic animals, including, at times, a goat, a calf, a spider monkey, and snakes. The children were terrified of snakes, but Hedlund's stepparents nevertheless housed the snakes in the children's closet. Hedlund and his siblings were also not allowed to eat anything unless they received permission from Shirley McKinney. At least once a month, she would lock the children in the house while she went shopping and threaten that if they ate anything while she was gone, she would beat them. During the summer, Shirley would lock Hedlund and his siblings out of the house in heat exceeding 100 degrees. Because they were usually wearing only underwear, Hedlund and his siblings were frequently sunburned while locked out of their home. On one occasion, Hedlund's aunt saw the children locked outside in the heat, while Shirley and her own biological daughter, who was favored and spared from Shirley's abuse, sat inside and told Hedlund and his siblings that they were not allowed to drink water from the hose outside. In effect, Shirley and James Senior treated Hedlund and his siblings like the animals they housed in the children's bedroom.

Shirley McKinney tormented her stepchildren, especially Hedlund, who was the oldest and the "bastard." She hit them with belts, old wooden boards, skillets, wire hangers, shovels, garden hoses, or anything else that was within reach when she grew angry.

She struck indiscriminately and was often helped by her own biological daughter, who held down her stepsiblings as they were beaten. Hedlund's half-sister Donna testified that she and her half-siblings were punched in the face at least once a day. Hedlund's half-sisters and aunt testified to a number of particular episodes where Hedlund was beaten. For instance, James Senior kept a vicious dog that once attacked Hedlund, who was a small child at the time, and injured his face so badly that he had to receive over 200 stitches. The day after Hedlund received medical treatment, Shirley and her daughter woke Hedlund up in the early morning and beat him for over an hour because his medical treatment had cost them money. Hedlund's aunt also testified to another incident where she saw Shirley violently beat Hedlund and his half-brother James McKinney. James had been kicked off the school bus for fighting and as Shirley was marching him to the house, she clipped off a foot-long piece of a water hose and began beating James with it. James was small enough at the time that Shirley was holding him in the air by his arm while she beat him with the water hose. Hedlund tried to stop Shirley's strikes by jumping on her arm and yelling, "Momma, stop it. Momma, stop it." In response, Shirley pushed Hedlund off and struck him across the face with the hose. Hedlund fell to the ground, hitting the back of his head against the concrete sidewalk.

By any measure, Hedlund's savage childhood was a mitigating factor that the Arizona courts should have considered. But because they applied the prohibited

> causal nexus test, Hedlund has not yet received the constitutionally-required review that he is due.

Hedlund I, 750 F.3d at 826-27 (Wardlaw, J., dissenting).

The sentencing judge found that the childhood evidence was "truthful" and "that there were significant aspects of his childhood which were clearly abusive." TR 7/30/93 at 23. He described the testimony of relatives who witnessed the abuse as having "made an impression upon them which they will probably not forget for the rest of their lives. This has made an impact on me." TR 7/30/93 at 23. Addressing Hedlund personally, the judge stated "I don't think anyone could listen to the evidence presented by your sisters without feeling a great deal of anguish and compassion for the kind of existence that you lived as a small child." *Id.* at 25. He stated that "I think that some of the qualities that you exhibited as a child were commendable, certainly protecting your sisters from the beatings that they received. And I believe that that is accurate, truthful testimony." *Id.* at 25. Despite the power of Hedlund's mitigation, Arizona Supreme Court precedent at the time prevented this evidence from being "given effect to" – in the form of a life sentence – because the sentencing judge found it was not causally connected to the crime:

> The Court, after carefully considering and weighing all of the aggravating or mitigating factors presented in this case, and not limited to the personality traits discussed by Dr. Holler, past drug and alcohol use discussed about Dr. Shaw, Dr. Holler and the other witnesses who testified, and the child abuse which the Court finds is a fact, that none of those mitigating factors considered separately or cumulatively indicates to the Court that these factors affected the defendant's ability to control his physical behavior at the time of the offense or to appreciate the wrongfulness of his conduct, that the defendant was aware at all times while these offenses were occurring that what he was doing was wrong, that he continued to participate in them and that he had the intelligence and the ability to refuse continued participation.

Id. at 24.

It was not enough that Hedlund's sentencing judge was able to consider the mitigating evidence, there must be no barriers in place to that mitigation forming the basis of a life sentence. Arizona precedent prevented the sentencing judge from finding this mitigation to be "sufficiently substantial to call for leniency" because of the unconstitutional requirement of a causal nexus. *See Hedlund II*, 854 F.3d at 583-84 (finding that although the trial court found evidence of Hedlund's "tortured childhood to be compelling and credible," he sentenced him to death "because, at the time of the crime, these factors did not affect Hedlund's behavior

or prevent him from knowing right from wrong."). Now that the error has been acknowledged, the power of Hedlund's mitigating evidence is best assessed by a jury who can hear from live witnesses, judge their credibility first-hand, and speak as the conscience of the community.

II. *HURST* HAS CLARIFIED THAT APPELLATE REWEIGHING IS NO LONGER CONSTITUTIONAL

Resentencing is the only proper remedy for the causal nexus error in this case. The writ of habeas corpus has been granted and the death sentence reversed. This Court no longer has jurisdiction to conduct a second independent review without first submitting this case to a jury for capital sentencing. This is the only available constitutional remedy in the face of *Ring v. Arizona*, 536 U.S. 584 (2002) and *Hurst v. Florida*, 136 S. Ct. 616 (2016). *Clemons v. Mississippi*, 494 U.S. 738 (1990), and *State v. Styers*, 254 P.3d 1132 (2011), with their remedies of appellate reweighing, are no longer allowed under the Constitution. They have been expressly overruled by the United States Supreme Court.

Clemons upheld appellate reweighing after one of the aggravating factors was struck on appeal. 494 U.S. at 741. It did so by relying upon *Hildwin v.*

Florida, 490 U.S. 638 (1989) and *Spaziano v. Florida*, 468 U.S. 447 (1984). *Id.* at 746. *Hildwin* held that the Sixth Amendment does not require a jury finding on aggravating circumstances. 490 U.S. at 640. *Spaziano* held that neither the Sixth nor the Eighth Amendment provide a constitutional right to have a jury determine whether a capital sentence is appropriate. 468 U.S. at 459. Relying on these two cases read together, *Clemons* held that because a jury was unnecessary for the findings supporting the death sentence, there was no constitutional reason an appellate court could not reweigh the facts supporting a death sentence after that death sentence was found to be infirm. 494 U.S. at 746.

The invalidity of *Clemons* is clear in light of *Hurst*. *Styers*, also relied upon by the state to justify a "do-over" of independent review, pre-dates *Hurst.* In *Hurst*, the United States Supreme Court expressly overruled both *Spaziano* and *Hildwin* because "[t]ime and subsequent cases have washed away the logic" of those holdings. 136 S. Ct. at 624-25. Again, echoing the pronouncement of *Ring*, *Hurst* reiterated that it is juries, not judges, who must make all the findings supporting a death sentence. *Id.* at 624.

Similar to *Ring*, which invalidated Arizona's judge sentencing scheme, the

Supreme Court in *Hurst* invalidated the Florida capital sentencing scheme which allowed a jury to make a recommendation as to sentence during the penalty phase, but left the ultimate finding of facts as to sentence to the judge. 136 S. Ct. at 619. The Court held that under *Apprendi v. New Jersey*, 530 U.S. 466 (2000), and *Ring*, such a scheme violated a capital defendant's Sixth Amendment right to a jury trial. *Id.* at 622. In its analysis, the Court recognized that the weight to be accorded to aggravating and mitigating circumstances, under Florida law, is a finding of fact that must be decided by a jury. *Id.* Therefore, in light of *Hurst*, there is no sound basis to treat the weighing of aggravating and mitigating circumstances outside of the scope of the *Apprendi* doctrine. Like Florida, Arizona is a weighing state with a similar statute. Pursuant to *Hurst* a jury, not the Arizona Supreme Court, must make the weighing determination in Hedlund's case.

The State of Florida argued that the weighing process fell outside the ambit of *Ring* and *Apprendi* because the finding of an aggravating circumstance made the defendant death-eligible, an argument the Supreme Court rejected. *Id.* at 622. In the wake of *Hurst*, the Florida Supreme Court agreed that it is not simply the existence of aggravating factors that must be found by a jury, it is also the

weighing process which requires the involvement of the jury. *See Hurst v. State*, 202 So. 3d 40, 53 (Fla. 2016) ("Thus, before a sentence of death may be considered by a trial court in Florida, the jury must find the existence of the aggravating factors proven beyond a reasonable doubt, that the aggravating factors are sufficient to impose death, and that the *aggravating factors outweigh the mitigating circumstances*") (emphasis added). *See also Rauf v. State*, 145 A.3d 430, 434 (Del. 2016) (requiring a jury, not a sentencing judge, to find that the aggravating circumstances outweigh the mitigating circumstances and to make that finding unanimously and beyond a reasonable doubt).

The Ninth Circuit has reached a similar conclusion for Arizona. In *Murdaugh v. Ryan*, 724 F.3d 1104, 1115-16 (9th Cir. 2013), the Court explained that under the Arizona statute, a sentence of death cannot be imposed based on a statutory aggravating circumstance alone. *Id.*at 1115. The Arizona statute requires the trier of fact to find at least one statutory aggravating circumstance and the other constitutional element for death qualification is that those circumstances not be outweighed by one of more mitigating factors. *Id.* *Ring* and the Sixth Amendment should not be read so narrowly as to only require a finding of aggravating factors,

it is also the weighing decision which requires a jury. *Id.* If this Court's second shot at independent review is the method to "cure" the error, then the court's decision alone is what increases Hedlund's maximum punishment to death. This violates the Sixth Amendment. If there was any doubt about the scope of *Ring*, *Hurst* has resolved it and the previous remedy set forth in *Styers* is no longer viable.

Other courts, when faced with causal nexus error, have determined that resentencing, not appellate reweighing, is the appropriate remedy. *See Williams v. Ryan*, 623 F.3d 1258, 1271 (9th Cir. 2010) (remanding for resentencing and granting the writ for causal nexus error); *Cole v. Dretke*, 265 F. Appx. 380 (5th Cir. 2008) (remanding for granting of writ and resentencing, not additional appellate review, after the Supreme Court reversed their appellate findings on causal nexus error in *Abdul-Kabir v. Quarterman*, 550 U.S. 233 (2007)); *Ex parte Smith*, No. AP-74228, 2007 WL 1839892 (Tex. Crim. App. 2007) (remanding for new sentencing trial after Supreme Court found error in their appellate review of the causal nexus issue in *Smith v. Texas*, 543 U.S. 27 (2007)).

As Justice Hurwitz explained in his dissent in *Styers*, the lack of direction

from the Ninth Circuit Court of Appeals on remedy has created a "procedural morass" but more importantly, the Arizona Supreme Court's "do-over" of the death sentence was "not constitutionally permitted." *Styers*, 254 P.3d 1136 (Hurwitz, J., dissenting). Independent review can only occur on direct review. *Id.* at 1137. However, after *Ring*, Hedlund would first be entitled to a jury trial "unless the original jury made the requisite findings or no reasonable jury could have failed to find them." *Id.* The jury did not find the aggravating factors in Hedlund's case, nor did they weigh them against the mitigation. This task was performed by the sentencing judge. In this scenario, Hedlund is entitled to a new sentencing proceeding before a jury. *Id.* *Hurst* has proven that Justice Hurwitz's analysis is correct.

The causal nexus error in this case, originating in the trial court and continued in the Arizona Supreme Court, resulted in an unconstitutional death sentence that can only be cured by the involvement on the jury, as the arbiter of society's reasoned moral response. Supreme Court cases "following *Lockett* have made clear that when the [fact-finder] is not permitted to give meaningful effect or a 'reasoned moral response' to a defendant's mitigating evidence – because it is

forbidden from doing so by statute or a judicial interpretation of a statute – the sentencing process is *fatally flawed*." *Abdul-Kabir v. Quarterman*, 550 U.S. 233, 264 (2007) (emphasis added) (examining the Texas equivalent of Arizona's causal nexus error). A defendant whose rights have been substantially, prejudicially affected, cannot have his rights to a fair trial restored by the independent review of an appellate court.

III. UNLIKE *STYERS*, WHERE THE ERROR WAS COMMITTED SOLELY IN THE APPELLATE COURT, THE ERROR HERE ORIGINATED IN THE TRIAL COURT. APPELLATE REWEIGHING IS NOT AVAILABLE AS A REMEDY IN THIS CASE.

Even if *Styers* were still good law, Hedlund is distinguishable. Unlike *Styers*, where the causal nexus error occurred solely at the Arizona Supreme Court, Hedlund's causal nexus error occurred at the trial court level and its reasoning was simply adopted by the Arizona Supreme Court. In this situation, a remand for a simple "do-over" of independent review is not appropriate. *See Hedlund v. Ryan*, 854 F.3d 557, 586 (9th Cir. 2017) (hereinafter "*Hedlund II*") ("[T]he Arizona Supreme Court adopted the sentencing court's analysis of the mitigation evidence for both Hedlund and McKinney.").

The case which sanctioned the use of the "do-over," *Styers*, is not typical because the *Lockett/Eddings* error occurred only in the reweighing process on appeal – it was a pure *Clemons* error, involving reweighing after the striking of an aggravating factor on appeal. *See Styers v. Schriro* (hereinafter "*Styers I*"), 547 F.3d 1026, 1028 (9th Cir. 2008) (noting that Styers' claim was only that the Arizona Supreme Court erred in its appellate reweighing). That is not the case here. The causal nexus error began in the trial court, and those credibility and factual findings were merely upheld in the Arizona Supreme Court, with repetition of the constitutionally prohibited causal nexus text. It was the analysis of the trial court, tied to the nexus test, that lead to the unconstitutional death sentence. Because the genesis of the error was at the trial level, the only constitutional remedy in the wake of *Ring* is jury resentencing. *See Ring*, 536 U.S. 584. This is also consistent with the holding in *Williams*, where the causal nexus error occurred both at the trial level and in the Arizona Supreme Court and "further sentencing" was held to be the appropriate remedy. *See Williams*, 623 F.3d at 1270-71 (citation omitted).

In cases with similar sentencing errors at the trial level, this Court has

established a practice of remand for resentencing. In *State v. Bible*, 858 P.2d 1152 (1993), the Arizona Supreme Court examined its procedure in capital cases in which, as here, an error occurred during the sentencing process. *Id.* at 1209-1212. The established procedure for those circumstances required the case be remanded for a new sentencing proceeding unless the record "compelled" the conclusion that a different sentence was not possible. *State v. Medrano*, 844 P.2d 560, 565 (Ariz. 1992) ("Because . . . we can only speculate whether the court would have found mitigation sufficient to overcome the single remaining aggravating circumstance, we remand for another hearing and resentencing."); *State v. Robinson*, 796 P.2d 853, 862 (Ariz. 1990) (no remand where "the record compels a finding on the issue as a matter of law."). This Court then established the rule that, in cases where additional mitigation must be weighed, remand was the better rule if the mitigating evidence possessed "some weight." *Bible*, 858 P.2d at 1211. This rule derived from the Court's recognition that "it is simply impossible to determine how the trial judge—who heard the evidence and saw the witnesses—evaluated and weighed that evidence and testimony. Without these imperative determinations, the aggravating and mitigating factors cannot be balanced." *Id.* This is

particularly so given the "inherently subjective" nature of the capital sentencing decision. *Id.*

After enumerating additional reasons for remand over appellate reweighing, the Court went on to explain that, because death is different, it was critical to "continue to take the extra step—indeed walk the extra mile—to ensure fairness and accuracy" in cases such as this. *Id.* at 1212. Thus, "remand is an extra step that should be taken in all but the rarest cases." *Id.* Hedlund's state and federal constitutional rights to due process, equal protection, and to be free from cruel and unusual punishment, are all violated if that rule is not followed in this case. Because there is no basis for treating Hedlund differently than other capital defendants whose cases have been remanded for a new sentencing in light of an error in the sentencing process, his case must also be remanded resentencing.

In *State v. Gallegos*, 870 P.2d 1097, 1117-1118 (Ariz. 1994), the Arizona Supreme Court reiterated the *Bible* rule, remanding because "clearly 'there [wa]s mitigating evidence of some weight'" to be considered. It did so even though the defendant killed the eight-year-old victim, anally raped her, and participated in a "feigned search" for her body, "deliberately avoiding the area where he had

dumped her naked body the night before." *Id.*at 1115. The additional mitigation consisted of alcohol impairment. *Id.* at 1114.

In *State v. Cornell*, 878 P.2d 1352, 1372-74 (Ariz. 1994), the Arizona Supreme Court found that the defendant's age of 25 and his remorse were more than *de minimus* mitigation. Again the Court "reaffirm[ed] the continuing validity of this holding" that, when there is an error in the sentencing process and the mitigation is not *de minimis*, this Court "will remand unless the state concedes that sentence reduction to preferable to remand." *Id.* at 1373. As here, in *Cornell* the Court could not have "any confidence that the record contains all of the mitigating evidence and circumstances that a reasonable investigation and preparation might have enabled counsel to present to the court and that might properly have been part of the record." *Id.* at 1373-74 (footnote omitted).

Twenty-one Arizona capital defendants had the *Ring* error reviewed for harmlessness. *State v. Lamar*, 115 P.3d 611 (Ariz. 2005); *State v. Murdaugh*, 97 P.3d 844 (Ariz. 2004); *State v. Moody*, 94 P.3d 1119 (Ariz. 2004); *State v. Dann*, 79 P.3d 58 (Ariz. 2003); *State v. Montano*, 77 P.3d 1246 (Ariz. 2003); *State v. Sansing*, 77 P.3d 30 (Ariz. 2003); *State v. Nordstrom*, 77 P.3d 40 (Ariz. 2003);

State v. Rutledge,76 P.3d 443 (Ariz. 2003); *State v. Prasertphong*, 76 P.3d 438 (Ariz. 2003); *State v. Ring*, 76 P.3d 421 (Ariz. 2003); *State v. Cropper*, 76 P.3d 424 (Ariz. 2003); *State v. Prince*, 75 P.3d 114 (Ariz. 2003); *State v. Jones*, 72 P.3d 1264 (Ariz. 2003); *State v. Phillips*, 67 P.3d 1228 (Ariz. 2003); *State v. Finch*, 68 P.3d 123 (Ariz. 2003); *State v. Tucker*, 68 P.3d 110 (Ariz. 2003); *State v. Lehr*, 67 P.3d 703 (Ariz. 2003); *State v. Harrod*, 65 P.3d 948 (Ariz. 2003); *State v. Pandeli*, 65 P.3d 950 (Ariz. 2003); *State v. Hoskins*, 65 P.3d 953 (Ariz. 2003); *State v. Cañez*, 42 P.3d 564 (Ariz. 2002). In 19 of these cases, the error was not harmless and the cases were remanded for resentencing. *Id*.

Of the 21 defendants, nine of them were remanded even though there was a prior conviction aggravating factor. *Moody*, 94 P.3d 1119; *Montano*, 77 P.3d 1246; *Nordstrom*, 77 P.3d 40; *Cropper*, 76 P.3d 424; *Phillips*, 67 P.3d 1228; *Finch*, 68 P.3d123; *Lehr*, 67 P.3d 703; *Pandeli*, 65 P.3d 950; *Cañez*, 42 P.3d 564. Five were remanded even though there was no error on any of the aggravating factors. *Dann*,79 P.3d 58; *Nordstrom*, 77 P.3d 40; *Jones*, 72 P.3d 1264; *Finch*, 68 P.3d 123; *Pandeli*, 65 P.3d 950.

In *Phillips*, the "only proven mitigation consisted of the support he receives

from his family." *State v. Phillips*, 46 P.3d 1048, 1062 (Ariz. 2002), *rev'd, Ring*, 536 U.S. 584. In *State v. Harrod*, 26 P.3d 492 (Ariz. 2001), his mitigation was "lack of criminal record, adjustment to incarceration, and family issues." *Id*. at 494, 502, *rev'd, Ring*. The "family issue" involved the absence of Harrod's biological father in his life and that his family supported him. *Id*. Both were given minimal weight. *Id*. A remand was still granted. *Id.*

In *Pandeli*, 65 P.3d 950, the defendant was convicted of two murders, separate in time. *Id*. at 952. Pandeli only received the death penalty for one. *Id*. The crime involved in *Pandeli* was a particularly brutal one, involving the mutilation of the victim's breasts after her death. *State v. Pandeli*, 26 P.3d 1136, 1142-43 (Ariz. 2001), *rev'd, Ring*, 536 U.S. 584.

Pandeli put on expert testimony regarding his mental illness that was contradicted by the state's expert and rejected by the sentencing judge. *Pandeli*, 26P.3d at 1149. The Arizona Supreme Court found some evidence of non-statutory mitigation, such as his drug use and mental health, but discounted it because it was not linked to the crime. *Pandeli*, 26 P.3d at 1150.

Despite this, Pandeli was remanded for resentencing. *Pandeli*, 65P.3d at

953. On *Ring* remand, the Arizona Supreme Court found that no reasonable jury would have failed to find the prior conviction and cruel, heinous, and depraved aggravating factors. *Id*. at 952-53. However, the court found it had to reverse the death sentence because a reasonable jury may have assessed the mental health evidence differently.

In *Lehr*, 67 P.3d 703, both of the aggravating circumstances involved prior convictions. The mitigation found in Lehr's case was "weak": good father, husband, and son, no prior record, and a model prisoner. *Id*. at 705; *State v. Lehr*, 38 P.3d1172, 1186 (Ariz. 2002), *rev'd, Ring*, 536 U.S. 584. Lehr's charges stemmed from the brutal sexual assault and kidnapping of ten different women over the course of approximately one year. *Lehr*, 38 P.3d at 1175. Lehr's victims included girls as young as ten. *Id*. at 1176-78.

In *Lehr*, the aggravating factor of especially cruel was struck on appeal because"[v]ery little [was] known about the circumstances of the victim's death. Her remains were out in the desert for several months." *Id*. Lehr maintained his innocence and his multitude of surviving victims were forced to testify regarding their brutal rapes.

In *Jones*, 72 P.3d at 1266, a twelve-year-old girl was found behind a dumpster, bound, and with a severely shattered skull. *Id*. The victim had been abducted, sodomized, and beaten. *Id*. at 1268. The Arizona Supreme Court found no reasonable jury could not have found the murder to be heinous and depraved. *Id*. at1268. There was evidence Jones suffered from a mental disorder, but it was countered by evidence of malingering. *Id*. at 1270. However, because a jury could have viewed the mental disorder evidence differently, Jones received resentencing.

Counsel will not belabor the point further, but an examination of the other *Ring* harmlessness cases illustrates that if some evidence of mitigation was offered, especially of the import of Hedlund's mitigation–the Court found reason to remand for resentencing. A review of cold transcripts, on an issue as emotional and subjective as the power of mitigating evidence, especially evidence of childhood abuse, cannot withstand Sixth or Eighth Amendment scrutiny. Anyone who has ever attended a court proceeding involving mitigating testimony regarding childhood abuse understands that the written word does not convey the power of the emotion being displayed by the witnesses, much of which can only come across through observation in the courtroom. Without live testimony, it is easy for

a fact-finder unfamiliar with the powerful lifelong effects of childhood abuse to minimize the power of this type of testimony.

IV. THE GRANTING OF THE WRIT OF HABEAS CORPUS MEANS THAT HEDLUND'S DEATH SENTENCE IS NO LONGER FINAL – REQUIRING THE APPLICATION OF *HURST* TO HIS CASE

Habeas petitioners challenge the validity of the judgments authorizing their confinement. In *Magwood v. Patterson*, 561 U.S. 320 (2010), the Supreme Court found that the grant of a conditional writ of habeas corpus invalidates the underlying judgment and allows "the State [to] seek a *new* judgment (through a new trial or a new sentencing proceeding)." *Id.* at 332 (quoting *Wilkinson v. Dotson*, 544 U.S. 74, 83 (2005) (alteration in the original). *Magwood* makes clear that because the Ninth Circuit granted a conditional writ of habeas corpus, Hedlund's state judgment is, as a matter of law, no longer final, thereby entitling him to the right to a jury trial under *Hurst*.

In Arizona independent review can only take place on direct appeal. Although Hedlund was not afforded the benefit of *Ring* or *Hurst* when his case was pending in habeas, he has to be afforded those constitutional requirements now that he is back on direct review following the district court's conditional grant of the

writ. *See, e.g.*, *State v. Wallace*, 191 P.3d 164, 166 (2008) (jury sentencing after judge-sentenced petitioner granted federal habeas relief on other grounds); *State v. Joe C. Smith*, 159 P.3d 531, 536 (2007) (same). In *Wallace* and *Smith*, the defendant had been sentenced to death by a judge but was afforded a jury sentencing after being granted federal habeas relief for a non-*Ring* claim related to a constitutional failure in the penalty phase. In those cases as well, the sentences had become final following direct review, certorari proceedings, and the issuance of a mandate. But the finality of both cases was disturbed by the grant of a conditional writ and *Ring* was then applied. Because his case is no longer final, Hedlund is entitled to the same procedural protections as any other capital defendant who is not beyond direct review or whose case is otherwise not final, including a jury determination of the facts necessary to support a death sentence. As the Supreme Court has explained, the "failure to apply a newly declared constitutional rule to criminal cases pending on direct review violates basic norms of constitutional adjudication." *Griffith v. Kentucky*, 479 U.S. 314, 322 (1987).

In *Thompson v. Lea*, 681 F.3d 1093 (9th Cir. 2012), the court examined finality where the conviction originally became final ninety days after the

California Supreme Court denied discretionary review on direct appeal. However, in denying review, the California Supreme Court noted that petitioner could seek any relief available after the United States Supreme Court issued a decision in a pending case. After that opinion came out, petitioner did seek relief and although the state supreme court dismissed review on the merits, the Ninth Circuit held that, the state supreme court reopened direct review and made Thompson's conviction "'again capable of modification through direct appeal.'" *Id.* (quotation and citation omitted). Given the minimal action taken by the state supreme court in *Thompson*, which was enough to maintain direct review, the far more extensive action contemplated by this court, by redoing independent review, certainly does as well. In *Thompson*, the state court merely left open the possibility that it could consider the case again. Here, this Court has accepted the case and ordered briefing.

Similarly, in *Jimenez v. Quarterman*, 555 U.S. 113 (2009), the state court granted the defendant the right to file a late direct appeal during state collateral review. The Court pointed out that his judgment was not final until the conclusion of that appeal or the expiration of the time to seek certiorari. Once the state court reopened direct review, the conviction was no longer final. *Id.* at 119-120. Until

the availability of direct appeal to state courts and certiorari to the Supreme Court has been exhausted, the process of direct review has not come to an end and a presumption of finality cannot attach to Hedlund's sentence. *Id.* at 120. *See also Styer*, 254 P.3d at 1137 (Hurwitz, J., dissenting) (noting that once the conditional writ has issued, a death sentence could not be imposed without further action from this Court and Styers could seek further review in the United State Supreme Court). If a petition for certiorari can be filed from a new judgment, that judgment is not final.

Once the writ of habeas corpus was granted, it does not make any difference how the state court characterizes the new proceeding. Mr. Hedlund's case is no longer final on direct review because his original sentence was invalidated by the federal courts. This is demonstrated by the practical effect of the writ: had the state court not taken action to impose a new sentence, Hedlund's death sentence could not be carried out.

The conditional federal habeas corpus writ permits the state court an opportunity to correct a constitutional error before the prisoner is ordered released. This does not diminish the fact that a constitutional error was committed and as a

result, the death sentence is invalid. As the dissenting justice pointed out in *Styers*, there are only two procedural contexts in which the Arizona Supreme Court hears capital cases: direct review and postconviction review. *Id.* (Hurwitz, J., dissenting). The only way to characterize the current proceeding is direct review since that it the only proceeding in which independent review can take place. Hedlund's death sentence is no longer final now that it has returned to state court.

V. IN THE ALTERNATIVE, IF THIS COURT'S FINDS THAT THE FINALITY OF HEDLUND'S DEATH SENTENCE HAS NOT BEEN DISTURBED, HE IS ENTITLED TO THE RETROACTIVE APPLICATION OF *HURST*

A. *Hurst* announced a watershed procedural rule

Alternatively, Hedlund argues that *Hurst* is a "watershed procedural rule" because a jury's determination that aggravation outweighs mitigation beyond a reasonable doubt "implicat[es] the fundamental fairness and accuracy" of a death verdict. *Summerlin*, 542 U.S. at 352. Put differently, where the rule announced in *Hurst* is *not* applied, as happened in Hedlund's case, "the likelihood of an accurate [death sentence] is *seriously* diminished." *Id.* (quoting *Teague*, 489 U.S. at 313). The burden of proof requirement that *Hurst* imposed upon a capital jury's weighing determination is plainly a watershed procedural rule, when viewed in

light of the Supreme Court's burden of proof jurisprudence.

In the case of *In re Winship*, 397 U.S. 358 (1970), the Supreme Court explained that the beyond-a-reasonable-doubt standard was historically designed "to safeguard men from dubious and unjust convictions, with resulting forfeitures of life, liberty and property." 397 U.S. at 362 (quoting *Brinegar v. United States*, 338 U.S. 160, 174 (1949)). This standard, the Court said, "plays a vital role in the American scheme of criminal procedure" by operating as "a prime instrument" for reducing the risk of factual error. *Id.* at 363. Elaborating upon this principle, the Supreme Court in *Ivan V. v. City of New York*, 407 U.S. 203 (1972), explained that the major purpose of the beyond-a-reasonable-doubt standard "is to overcome an aspect of the criminal trial that substantially impairs its truth-finding function." 407 U.S. at 204-05; *see also id.* (noting that the "beyond a reasonable doubt" standard is "indispensable" to the accuracy of verdicts). The absence of this standard "raises serious questions" about the accuracy of Hedlund's death-verdict rendering it fundamental. *Id.* at 204.

While the Court's analysis in *Winship* and *Ivan V.* focused upon the beyond-a-reasonable-doubt standard in the context of guilty verdicts, its rationale applies

with equal, if not greater, force to death verdicts—that is, this standard governs factual determinations about whether or not a defendant's very existence, and not simply his liberty, should be forfeited. "Due process commands that no man shall lose his liberty unless the Government has borne the burden of . . . convincing the factfinder of his guilt," the Court explained. *Id.* at 204-05. "To this end, the reasonable-doubt standard is indispensable, for it impresses on the trier of fact the necessity of reaching a subjective state of certitude of the facts in issue." *Id.* at 205. This certitude is all the more critical where an accused's very life is at stake. *See also Rauf*, 145 A.3d at 437 (Strine, C.J., concurring) ("From the inception of our Republic[ ] . . . the beyond a reasonable doubt standard ha[s] been integral to the jury's role in ensuring that no defendant should suffer death unless a cross section of the community unanimously determines that should be the case, under a standard that requires them to have a high degree of confidence that execution is the just result.").

The Supreme Court of Delaware has held that the *Hurst* is fully retroactive under the second *Teague* exception to individuals whose convictions and sentences were already final on direct appeal when *Hurst* was decided. *Powell v. State*, 153

A.3d 69, 76 (Del. 2016). The court cited *Ivan V.* as the basis for its decision. *Id.* at 75.

B. Alternatively, *Hurst* announced a substantive rule of constitutional law

If *Hurst* did not simply clarify existing precedent, and instead created a new rule of constitutional law, the Supreme Court in *Hurst* made its ruling retroactive to cases on collateral review. The Supreme Court had occasion to explicate its retroactivity jurisprudence in the recent case of *Montgomery v. Louisiana*, 136 S. Ct. 718 (2016). There, the Court explained that under *Teague v. Lane*, 109 S. Ct. 1060 (1989), "courts *must* give retroactive effect to new substantive rules of constitutional law." *Montgomery*, 136 S. Ct. at 728 (emphasis added). "Substantive rules," the Court stated, "include . . . rules prohibiting a certain category of punishment for a class of defendants because of their status or offense." *Id.* (quoting *Penry v. Lynaugh*, 492 U.S. 302, 330 (1989)). *Hurst* is such a rule. This is because *Hurst* prohibited a category of punishment—the death penalty—for an entire class of defendants—those made eligible for the death penalty—unless the State proves that aggravation outweighs mitigation beyond a reasonable doubt. *Hurst*, 136 S. Ct. at 622.

Hurst is substantive in yet another respect: it imposes a new burden on the State whenever it seeks death sentences and places that most extreme punishment beyond its power to impose unless this weighty burden is surmounted. *See Summerlin*, 542 U.S. at 352 (describing "substantive" rules as those that put particular punishments beyond the power of the State to impose). And finally, *Hurst* narrowed the scope of Arizona's capital sentencing statute—which does not impose *any* standard of proof on a capital jury's weighing determination—by making it more difficult for juries to return death verdicts. *See Summerlin*, 542 U.S. at 351 (describing "substantive" rules as those that "narrow the scope of a criminal statute by interpreting its terms"). "It is undisputed, then, that *Teague requires* the retroactive application of new substantive . . . rules in federal habeas proceedings." *Montgomery*, 136 S. Ct. at 728 (emphasis added). *Montgomery* went on to declare: "The Court now holds that *when a new substantive rule of constitutional law* controls the outcome of a case, *the Constitution requires* state collateral review courts to give retroactive effect to that rule." *Id.* at 729 (emphasis added).

By announcing a new and substantive rule in *Hurst*, the Supreme Court

made it retroactive. *See id.* at 730 ("By holding that *new substantive rules are, indeed, retroactive, Teague* continued a long tradition of giving retroactive effect to constitutional rights that go beyond procedural guarantees" (emphasis added)). Pursuant to this general rule, the Supreme Court does not have to explicitly declare a new rule of constitutional law retroactive where that rule is substantive in nature. *See id*; *see also Price v. United State*s, 795 F.3d 731, 734 (7th Cir. 2015) (allowing a successive habeas petition to be filed based upon the holding in *Johnson v. United States*, 135 S. Ct. 2551 (2015), because *Johnson* was substantive in nature, even though the Supreme Court had not explicitly declared it retroactive in the opinion). Furthermore, "if [the Supreme Court] hold[s] in Case One that a particular type of rule applies retroactively," as it did in the beyond-a-reasonable-doubt cases noted, *supra*, "and holds in Case Two that a given rule is of that particular type," as it did in *Hurst*, "then it necessarily follows that the given rule applies retroactively to cases on collateral review." *Tyler v. Cain*, 533 U.S. 656, 668-69 (2001) (O'Connor, J., concurring). "In such circumstances, [the Supreme Court] can be said to have 'made' the given rule retroactive to cases on collateral review." *Id.* at 669. In *Ivan V. v. City of New York*, 407 U.S. 203 (1972), the

Supreme Court declared that precedent extending the beyond a reasonable doubt standard is to be given retroactive effect. *Id*. at 205. Therefore, the rule of *Hurst* must be given retroactive effect also.

VI. INDEPENDENT REVIEW IS UNNECESSARY BECAUSE THE NINTH CIRCUIT HAS ALREADY DETERMINED THAT THE ERROR HAD A SUBSTANTIAL AND INJURIOUS EFFECT ON THE DEATH SENTENCE

In determining whether there had been an unconstitutional determination of Hedlund's death sentence, pursuant to Supreme Court precedent, the Ninth Circuit determined that Hedlund's mitigation was of such import that the causal nexus error had a substantial and injurious effect upon the verdict. *See Hedlund II*, 854 F.3d at 587. If this Court holds that that same mitigating evidence is not substantial and upholds the death sentence, there is a clear conflict and inconsistency with the Ninth Circuit opinion. Because the harmful effect of the causal nexus error has already been reviewed and determined to be prejudicial, there is nothing left for this Court to do but remand the case for resentencing and/or settlement negotiations.

CONCLUSION

Hedlund requests that the State's request for independent review be denied and that this case be sent back for resentencing and possible settlement negotiations. To allow otherwise would violate Hedlund's rights under the Sixth, Eighth, and Fourteenth Amendment to the federal Constitution, and his corresponding rights under the Arizona Constitution.

Respectfully submitted this 31st day of August, 2017.

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SUPREME COURT OF ARIZONA

State of Arizona, Appellee, vs. Charles Michael Hedlund, Appellant.	Arizona Supreme Court No. CR-93-0377-AP Maricopa County Superior Court No. CR1991-090926

APPELLANT'S OPENING BRIEF

observed: "[W]here significant mitigating evidence is balanced against a single aggravating factor, a serious question is raised as to whether a death sentence is warranted." *Id.* (citation omitted).

In *Doss*, this Court reduced a sentence to life on independent review where there was only one aggravating circumstance, and the trial court had found no mitigation. 116 Ariz. at 163. This Court found that the defendant's mental condition was significantly impaired, and this warranted leniency. *Id.*

D. EVIDENCE OF SOLE AGGRAVATING FACTOR NOT PROVEN BEYOND A REASONABLE DOUBT.

In multiple cases, this Court on independent review has disagreed with the sentencer's finding that the sole aggravating factor had been proven beyond a reasonable doubt, thus necessitating the reduction of a death sentence to life. In *State v. Snelling*, this Court reduced a sentence to life on independent review because it found that the only aggravating factor, (F)(6) cruelty, was not proven beyond a reasonable doubt. 225 Ariz. 182, 190 (2010).

Similarly, in *State v. Wallace*, this Court reduced two death sentences to life because the State failed to prove beyond a reasonable doubt the only aggravator, (F)(6), 229 Ariz. 155 (2012). Wallace was convicted of three deaths, including two children.

In *State v. Barreras*, this Court reduced a sentence to life on independent review, finding that the aggravating circumstance of an especially heinous or depraved manner had not been proven beyond a reasonable doubt. 181 Ariz. 516, 523 (1995). As argued earlier, the sole aggravating factor in Hedlund's case, pecuniary gain, was not proven beyond a reasonable doubt.

As these cases illustrate, this Court would be acting in line with scores of precedent in reducing Hedlund's sentence to life upon independent review.

VII. IT WOULD BE INCONSISTENT WITH THE RULING OF THE NINTH CIRCUIT NOT TO GRANT RELIEF GIVEN THAT THE ERROR HAS ALREADY BEEN DETERMINED TO HAVE A

SUBSTANTIAL AND INJURIOUS EFFECT ON THE DEATH SENTENCE. IN ADDITION, RELIEF SHOULD BE GRANTED UNDER THE REASONING OF *BROWN V. SANDERS*.

As noted earlier in this brief, most cases of causal nexus error will not reach this Court on remand because the federal court will conclude that the error did not have a "substantial and injurious effect" on the death sentence because the crime is too highly aggravated and the mitigation is not substantial enough to inspire leniency. In *Brecht v. Abrahamson*, 507 U.S. 619 (1993), the United States Supreme Court created a higher hurdle for habeas petitioners, requiring them to show that the constitutional error in their case had a "substantial and injurious effect or influence in determining the jury's verdict." *Id.* at 623 (citation omitted). *Brecht* did away with the notion that the State bore the burden of proving that a constitutional error was harmless beyond a reasonable doubt. *Id.* at 637-38. In placing this heavy burden upon petitioner, the Court noted that the granting of the writ of habeas corpus is "an extraordinary remedy, 'a bulwark against convictions that violate fundamental fairness.'" *Id.* at 633 (citation omitted). Habeas relief cannot be granted simply where there is a '"a reasonable possibility' that trial error contributed to the verdict[.]" *Id.* at 637 (citation omitted).

Habeas relief is instead reserved for "errors that undermine confidence in the fundamental fairness of the state adjudication." *Williams v. Taylor*, 529 U.S. 362, 374 (2000). To put it more simply, the federal court sitting in habeas "must find that the defendant was actually prejudiced by the error." *Calderon v. Coleman*, 525 U.S. 141, 146 (1998). The test is considered more stringent than the normal tests employed under the federal statute governing habeas relief, known as the AEDPA, and the harmless beyond a reasonable doubt standard of *Chapman v. California*, 386 U.S. 18 (1967). *Mays v. Clark*, 807 F.3d 968, 980 (9th Cir. 2015). Hedlund has already met this high hurdle, showing that his crime is not highly aggravated and that his mitigating evidence is sufficiently substantial to call for leniency.

This Court should also be guided by the Eighth Amendment principles set forth in *Brown v. Sanders*, 546 U.S. 212 (2006). *Brown* addressed the situation in which it was determined on appeal that the fact-finder took into account an impermissible aggravating factor. *Id.* at 214. In the original direct appeal, this Court struck one of the two aggravating factors found by the sentencing judge, leaving just pecuniary gain. *McKinney*, 185 Ariz. at 581-84. *Brown* clarifies that Hedlund is entitled to sentencing relief under the Eighth Amendment, because no other permissible sentencing factor allowed the sentencing judge to give weight to the same facts and circumstances presented by the invalidated factor regarding the Mertens homicide:

> An invalidated sentencing factor (whether an eligibility factor or not) will render the sentence unconstitutional by reason of its adding an improper element to the aggravation scale in the weighing process *unless* one of the other sentencing factors enables the sentence to give aggravating weight to the same facts and circumstances.

Brown, 546 U.S. at 220. The sentencing judge's balancing was inevitably affected by factoring the Mertens homicide into the equation when considering Hedlund's eligibility for the death for McClain. When coupled with the causal nexus error and its substantial and injurious effect on the death sentence, it is clear that Hedlund's death sentence is constitutionally flawed in more ways than one. In addition, because the appellate court must rely so heavily on the lower court's determinations as to credibility and other factors, and has no ability to judge the power of the evidence through live testimony, the best course of action is to reduce the sentence to life rather than try to reweigh the evidence on a cold appellate record.

VIII. THIS COURT DOES NOT HAVE JURISDICTION TO CONDUCT INDEPENDENT REVIEW, AND THIS CASE MUST BE REMANDED FOR RESENTENCING.

Pursuant to stipulation of the parties (ECF No. 29), Hedlund incorporates by reference the constitutional and jurisdictional issues raised in the Response to Motion to Conduct Independent Review (ECF No. 21) and Notice of Supplemental

Authority (ECF No. 22). The effect of the granting of the federal writ of habeas corpus as to Hedlund's sentence means that the death sentence is no longer final and the State must seek a new judgment. Because Hedlund's death sentence is no longer final, he is entitled to a jury resentencing, not appellate reweighing, pursuant to the Sixth Amendment. In addition, the causal nexus error in his case did not occur solely at the Arizona Supreme Court; it began at the trial court level, and its reasoning was simply adopted by the Arizona Supreme Court. *See Hedlund II*, 854 F.3d at 586 ("[T]he Arizona Supreme Court adopted the sentencing court's analysis of the mitigation evidence for both Hedlund and McKinney."). In this situation, a remand for a simple "do-over" of independent review is not appropriate. The emotional power of the testimony that Hedlund presented – which the trial judge noted moved him to feel compassion for Hedlund – simply cannot be fairly judged on a paper record. (AppV1 725 ("I don't think anyone could listen to the evidence presented by your sisters without feeling a great deal of anguish and compassion for the kind of existence that you lived as a small child.")).

CONCLUSION

Hedlund requests that this Court reduce his sentence to life. In the alternative, Hedlund requests that he be remanded to post-conviction court to present claims regarding counsels' ineffectiveness, or that he be remanded for jury resentencing.

Respectfully submitted this 5th day of April, 2018.

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