No. ________

OCTOBER TERM, 2020

IN THE SUPREME COURT OF THE UNITED STATES

Joseph Weldon Smith, Petitioner,

v.

Renee Baker, Warden, et al., Respondents.

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

PETITIONER'S APPENDIX

CAPITAL CASE

RENE L. VALLADARES
Federal Public Defender of Nevada
DAVID ANTHONY*
BRAD D. LEVENSON
ELLESSE HENDERSON
ROBERT FITZGERALD
Assistant Federal Public Defenders
411 E. Bonneville, Ste. 250
Las Vegas, Nevada 89101
(702) 388-6577
(702) 388-5819 (Fax)

** Counsel of Record*

APPENDIX

Appendix A	Order and Amended Opinion affirming denial of habeas relief and petition for rehearing, *Smith v. Baker, et al.*, United States Court of Appeals for the Ninth Circuit, Case No. 14-99003 (Dec 21, 2020)…………………………………………………………	App. 001 – 055
Appendix B	Opinion affirming denial of habeas relief, *Smith v. Baker, et al.*, United States Court of Appeals for the Ninth Circuit, Case No. 14-99003 (May 21, 2020)…………………………………………………………	App. 056 – 113
Appendix C	Order denying reconsideration, *Smith v. Baker, et al*, United States District Court of Nevada, Case No. 2:07-cv-00318-JCM-CWH (Nov. 5, 2014)……………	App. 114 – 127
Appendix D	Judgment in a Civil Case, *Smith v. E.K. McDaniel, et al.*, United States District Court of Nevada, Case No. 2:07-cv-00318-JCM-CWH (Mar. 13, 2014)………	App. 128 – 129
Appendix E	Order denying Petitioner's Petition for Writ of Habeas Corpus, *Smith v. Baker, et al.*, United States District Court of Nevada, Case No. 2:07-cv-00318-JCM-CWH (Mar. 13, 2014)………………………	App. 130 – 162
Appendix F	Opinion affirming denial of habeas relief, *Smith v. State,* Supreme Court of the State of Nevada, Case No. 228786 (Jan. 22, 1998)……………………………..	App. 163 – 168

APPENDIX A

Order and Amended Opinion affirming denial of habeas relief and petition for rehearing, *Smith v. Baker, et al.*, United States Court of Appeals for the Ninth Circuit, Case No. 14-99003 (Dec. 21, 2020)

FOR PUBLICATION

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

JOSEPH WELDON SMITH, *Petitioner-Appellant*, v. RENEE BAKER, Warden; AARON D. FORD, Attorney General of the State of Nevada, *Respondents-Appellees.*	No. 14-99003 D.C. No. 2:07-cv-00318-JCM-CWH ORDER AND AMENDED OPINION

Appeal from the United States District Court
for the District of Nevada
James C. Mahan, District Judge, Presiding

Argued and Submitted July 11, 2019
Seattle, Washington

Filed May 21, 2020
Amended December 21, 2020

Before: N. Randy Smith, Mary H. Murguia, and
Morgan Christen, Circuit Judges.

Order;
Opinion by Judge Christen;
Concurrence by Judge N.R. Smith

SUMMARY[**]

Habeas Corpus/Death Penalty

The panel affirmed the district court's judgment dismissing Joseph Weldon Smith's habeas corpus petition challenging his Nevada convictions for three murders and one attempted murder, and his death sentence for one of the murders.

The district court issued a certificate of appealability for Smith's argument that the procedural default of his ineffective-of-assistance-of-counsel claim should be excused pursuant to *Martinez v. Ryan*, 566 U.S. 1 (2012). The panel held that Smith did not show that he was prejudiced by the lack of an evidentiary hearing, and that the district court did not abuse its discretion by dismissing the *Martinez* claim without holding one. Applying *Martinez* and *Strickland v. Washington*, 466 U.S. 668 (1984), the panel held that Smith satisfied his burden of demonstrating a substantial argument that the performance of his second penalty-phase counsel was deficient for failing to investigate mental health mitigation evidence, but that Smith did not show that he was prejudiced by counsel's deficient performance.

The panel certified for appeal Smith's claim that the death verdict violated *Stromberg v. California*, 283 U.S. 359 (1931). The panel held that Smith demonstrated *Stromberg* error because it was impossible to tell whether the jury unanimously found mutilation, which was the sole basis to

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

support the death verdict after the Nevada Supreme Court invalidated the trial court's depravity-of-mind jury instruction. The panel concluded that the error was harmless because the invalid instruction did not have a substantial and injurious effect on the jury's verdict.

The panel declined to certify Smith's remaining uncertified claims.

Concurring, Judge N.R. Smith would affirm the dismissal of Smith's ineffective-assistance-of-counsel claim as procedurally barred on a different ground—that counsel's performance during the second penalty-phase hearing was not deficient, and that the claim is therefore insubstantial.

COUNSEL

Robert Fitzgerald (argued), David Anthony, Heather Fraley, Brad D. Levenson, and Ellesse Henderson, Assistant Federal Public Defenders; Rene L. Valladares, Federal Public Defender; Office of the Federal Public Defender, Las Vegas, Nevada, for Petitioner-Appellant.

Jeffrey M. Conner (argued), Deputy Solicitor General; Victor-Hugo Schulze II, Senior Deputy Attorney General; Heidi Parry Stern, Chief Deputy Attorney General; Aaron D. Ford, Attorney General; Office of the Attorney General, Carson City, Nevada; for Respondents-Appellees.

ORDER

The opinion filed on May 21, 2020, and appearing at 960 F.3d 522, is amended as follows:

At 522 F.3d at 544, at the end of the paragraph that begins with "*Brecht*'s harmlessness test asks . . . ," *add:* "Here, we see no reason to suspect that the arguments presented by the State or the defense would have varied at all had the narrowed instruction been given. The evidence strongly supported a finding of 'mutilation beyond the act of killing itself' and mutilation was a subset of depravity under Nevada law at the time Smith's case was tried."

With this amendment, the panel unanimously votes to deny Petitioner-Appellant's petition for panel rehearing. Judges Murguia and Christen have voted to deny the petition for rehearing en banc, and Judge N. R. Smith has so recommended.

The full court has been advised of Petitioner-Appellant's petition for rehearing en banc, and no judge of the court has requested a vote on the petition for rehearing en banc. Fed. R. App. P. 35.

The petition for rehearing and the petition for rehearing en banc are **DENIED**.

OPINION

CHRISTEN, Circuit Judge:

In 1992, a Nevada jury convicted Joseph Weldon Smith of three counts of first degree murder with use of a deadly weapon for beating and strangling his wife, Judith Smith, and his step-daughters, Wendy Jean Cox and Kristy Cox. The women were killed in a home the Smiths were renting in Henderson, Nevada. The jury also convicted Smith of attempting to murder Frank Allen with use of a deadly weapon. Allen owned the home the Cox family was renting. For Wendy's and Kristy's murders, Smith was sentenced to death. For Judith's murder, he was sentenced to life in prison without the possibility of parole.

Smith appealed his convictions and sentences. The Nevada Supreme Court affirmed the convictions, but it vacated the death sentences and remanded for a new penalty hearing. *See Smith v. State*, 881 P.2d 649 (Nev. 1994) (*Smith I*). After a second penalty hearing, Smith was again sentenced to death for Wendy's and Kristy's murders. On appeal, the Nevada Supreme Court vacated the death sentence for Kristy's murder and instead imposed a sentence of life without the possibility of parole, but it affirmed the death penalty for Wendy's murder. *See Smith v. State*, 953 P.2d 264 (Nev. 1998) (*Smith II*).

Smith filed a *pro per* habeas petition in state district court, which was denied, and the Nevada Supreme Court affirmed that ruling in an unpublished order. Smith then filed a *pro per* habeas petition in federal district court. That court appointed counsel for Smith and stayed the federal proceedings so Smith could return to state court to exhaust

certain claims. The state district court denied Smith's second state habeas petition on procedural default grounds, and the Nevada Supreme Court affirmed that decision. Smith then returned to federal court, where the State's motion to dismiss was granted in part and denied in part. The federal district court later denied the remainder of Smith's petition but issued a certificate of appealability for his argument that the procedural default of his ineffective assistance of counsel (IAC) claim should be excused pursuant to *Martinez v. Ryan*, 566 U.S. 1 (2012). Smith appeals the denial of his federal habeas petition.

We affirm the district court's judgment dismissing Smith's IAC claim as procedurally barred. Although we conclude that his counsel's performance at the second penalty-phase hearing was deficient, Smith has not shown that he was prejudiced by his counsel's performance. Smith's IAC claim therefore remains procedurally defaulted, and cannot serve as a basis for federal habeas relief.

Smith also asserts nine uncertified claims on appeal. We may issue a certificate of appealability when a petitioner shows "that reasonable jurists could debate whether . . . the petition should have been resolved in a different manner or that the issues presented were 'adequate to deserve encouragement to proceed further.'" *Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003) (quoting *Slack v. McDaniel*, 529 U.S. 473, 484 (2000)). We certify Smith's eighth claim, which alleges violation of the rule set out in *Stromberg v. California*, 283 U.S. 359 (1931), but we ultimately conclude that this claim does not entitle Smith to habeas relief because the *Stromberg* error was harmless. The remaining uncertified claims do not raise substantial questions of law. We decline to certify them because we are not persuaded that "reasonable

jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Miller-El*, 537 U.S. at 338 (quoting *Slack*, 529 U.S. at 484). We therefore affirm the district court's order dismissing Smith's federal habeas petition.

I. Factual Background

The facts relating to the murders and to Smith's first trial and penalty-phase hearing were recounted by the Nevada Supreme Court in *Smith I*, as follows:

> During the trial Michael Hull, a police officer for the City of Henderson, testified as follows: On Saturday, October 6, 1990, at approximately 2:29 a.m., he was dispatched to the Fountains, a gated community in Henderson. While on his way, Hull was flagged down by a man who subsequently identified himself as Frank Allen. Allen appeared frantic and Hull observed blood on his shirt and blood running down the left side of his head. Allen told Hull that Smith had attacked him with a hammer or a hatchet.
>
> After arriving at the Smiths' home, located at 2205 Versailles Court inside the gated community, Hull and two other officers observed a large broken window lying on the front porch outside the house. Allen had explained to the officers that he had left through that window. The officers entered the premises and, during a search of a bedroom, observed what appeared to be a figure beneath

a blanket. After lifting the blanket, they discovered a dead body, subsequently identified as twelve-year-old Kristy Cox. In an adjacent bedroom they discovered a second body, also dead and covered with a blanket, later identified as twenty-year-old Wendy Cox. Under a blanket in the master bed, the officers found a third victim, Kristy and Wendy's mother and Smith's wife, Judith.

The officers also located some notes written by Smith. The first, found inside a briefcase in the upstairs den, and dated October 5, 1990, read:

> A triple murder was committed here this morning. My wife, Judith Smith and my two stepdaughters, Wendy Cox and Kristy Cox, were assassinated. I know who did it. I know who sent them. I had been warned that this would happen if I did not pay a large sum of money to certain people. I have been owing it for a long time and simply could not come up with it. And I didn't believe the threat. I don't need any help from the police in this matter. I will take care of it myself. They will have to kill me, too. When and if you find me, I'm sure I will be dead, but that's okay. I already killed one of the murderers. And I am going to get the others and the man who I know sent them. There were three in all. You will

Case: 14-99003, 12/21/2020, ID: 11934117, DktEntry: 89, Page 9 of 54

> probably find my body within a day or two.
>
> Thank you, Joe Smith.
>
> P.S.: I thought I had gotten away when we moved here, but it didn't work. When we moved, we were being watched. If I am successful in my task at hand, I will turn myself into (sic) the police.

The second letter stated, "Frank [Allen], look in the locked room upstairs for your package. The key is on the wet bar. Joe." Dr. Giles Sheldon Green, Chief Medical Examiner for Clark County, testified that he performed the autopsies on the bodies of the three victims. Green stated that all three victims died from asphyxia due to manual strangulation. He also opined that the pattern of injuries found on the three victims could have been inflicted with a carpenter's hammer. On Kristy, Green observed three blunt lacerations to the scalp and a lot of blood in Kristy's hair, some bruising and a scratch on her neck, and substantial hemorrhaging as a result of the trauma to her scalp.

On Wendy, Green observed several "quite ragged, irregular, deep lacerations of the forehead," and at least six or seven wounds of the face. There were a total of thirty-two head lacerations, some of which were patterned injuries of pairs of penetrating wounds of the

Case: 14-99003, 12/21/2020, ID: 11934117, DktEntry: 89, Page 10 of 54

scalp tissue. On the left side of Wendy's head, a large laceration inside the ear almost cut the outer ear in two. Green found numerous scratches and abrasions on the front of Wendy's neck, as well as defensive wounds, such as a fractured finger, bruises on the backs of her hands and a finger with the skin over the knuckle knocked away. Green found areas in which the various head impacts had created depressed fractures of the outer and inner surfaces of the skull. There was also a great deal of hemorrhaging and damage to the soft tissues of Wendy's neck.

On Judith, Green found lacerations of the forehead and above her right eyebrow, abrasions and scratches on the front of her neck and a cluster of at least five lacerations of the scalp, mainly on the right side of the back of the head. It was Green's opinion that the five lacerations were inflicted after death.

Allen testified as follows: He met Smith in September 1990, when Smith came to Allen's home located at 2205 Versailles Court, inside the Fountains, wishing to purchase that home. Although Allen first indicated that the house was not for sale, after Smith agreed to pay $50,000 over the appraised value of $650,000, Allen agreed to sell him the house. Allen subsequently gave Smith the keys to the house, but retained one of the bedrooms for his use when he came to Las Vegas on weekends, until the sale was final. Smith

informed Allen that he was in a rush to move into the house because he wanted to make preparations for his step-daughter, Wendy's, wedding in November.

On September 21, 1990, Smith gave Allen a personal check for $35,000 as a good faith deposit. Approximately six days later, the bank notified Allen that the check had been returned because Smith had closed his account. Smith assured Allen that he would mail him a certified check immediately. Two days later, having not received a check, Allen indicated to Smith that he would be coming to Las Vegas on Friday, October 5, 1990, and would pick up the check then.

On Friday morning, Allen received a call from Smith who stated, "I thought you were coming up here this morning." Allen told Smith that he would be coming later in the day. Smith stated that he and his wife were going to California to shop for furniture that day, so they arranged for Smith to leave two checks, the $35,000 deposit check and a $3,338.80 check for the October mortgage payment, behind the wet bar in the house, along with Allen's mail.

Allen arrived at the house between 1:00 a.m. and 1:30 a.m. on Saturday, October 6, 1990, and noticed that the security system was off. He went behind the wet bar to retrieve his mail and found the note from Smith telling

him to look in the locked room upstairs for the package. Allen went to that room and, not finding any checks, went into the game room. Although the light was not on in the game room, the area was illuminated by a large chandelier in the hallway.

In the game room, Allen saw Smith crouched in the closet. Smith then jumped out and began to pound Allen in the head with an object, which Allen assumed was a hammer. Allen asked Smith what he was trying to do, but Smith did not say anything. Realizing that Smith was trying to kill him, Allen said, "You're not going to get away with this," and pushed Smith backward and ran down the stairway with Smith pursuing him. Allen tried to figure out the best way to get out of the house, and after realizing that he had locked himself in, ran straight through the full-length, leaded-glass front door. He then got into his car and drove to the guard shack at the entrance to the development and asked the guard to call the police.

Eric Lau, the security guard then on duty at the guard-gated entrance to the Fountains, testified that at approximately 2:30 a.m. on Saturday, October 6, 1990, Allen ran up to the side of the guard house and pounded on the window. Allen's shirt was covered with blood and he said, "He's after me! He's after me!" Lau immediately called for help and

then saw Smith's Lincoln automobile exit the Fountains, with Smith behind the wheel.

Yolanda Cook, Judith's daughter-in-law, testified that on the morning of Friday, October 5, 1990, at 8:00 a.m., she called the Smiths' house to see if someone could take her son to school. She spoke with Smith, who told her that he had to go to a meeting and that Judith, Wendy and Kristy had gone shopping for Wendy's wedding. Between 9:00 a.m. and 3:30 p.m., Yolanda called the Smiths' house three more times, and each time Smith told her that Judith and her daughters were away.

Yolanda further testified that on Saturday, October 6, 1990, at approximately 5:00 a.m., Smith called her and told her of the three murders. He told her that Allen came into the house and bludgeoned them to death. Smith requested that she tell all of Judith's other children and then go to the house and get the letters out of his briefcase explaining what happened. He then told her that he was going to kill himself and hung up the phone.

William Lawrence Cook, one of Judith's sons, testified that Smith had expressed concern and irritation over financial obligations such as Wendy's pending wedding and the new house. William testified that Smith would often refer to himself as the "Lone Wolf" and say, "I gotta get outta here." Sometimes Smith would say that he just wanted to go

Case: 14-99003, 12/21/2020, ID: 11934117, DktEntry: 89, Page 14 of 54

away and live on an island somewhere "around no kind of family or nothing like that." William also remembered Smith telling him that "the worse thing to f___ up a man was to have a family." Smith made these statements during a collection of conversations over a period of years.

Smith took the stand on his own behalf and testified as follows: In 1986 he encountered financial difficulties and agreed to accept a drug dealing opportunity in Los Angeles with an organization. That same year, Smith moved to Las Vegas and continued working for the organization. At some point, the organization falsely accused Smith of stealing cocaine and told Smith that he now owed the organization a big debt. Smith quit working for the organization and in 1989 Gino, a man from the organization, found Smith and reminded him of the debt, saying that "it had to be paid or else they were going to give [him] a fate worse than death."

He resumed working for the organization, and also began to look for a new house in a gated community. He found the house at the Fountains and arranged payment terms with Allen, which included giving Allen eleven kilograms of cocaine in exchange for the equity in the house. The eleven kilograms were part of a twenty kilogram shipment which Smith had received from the organization and had decided to keep for

Case: 14-99003, 12/21/2020, ID: 11934117, DktEntry: 89, Page 15 of 54

himself. Smith gave Allen ten kilograms of cocaine, worth approximately $200,000, on the same day that he gave Allen the $35,000 check. He claimed that Allen knew that the check was no good and served only to make the transaction seem legitimate, and said he would not deposit it.

On Thursday, October 4, 1990, Smith left the additional kilogram of cocaine owed Allen in Allen's bathroom sink, upstairs where Allen stayed when he was in town for weekends. That same day, Smith told the organization that he had sold twenty kilograms of cocaine and was keeping the money because he was "tired of working for peanuts."

Between 2:00 a.m. and 3:00 a.m. on the morning of Friday, October 5, while he was in bed with Judith, he was awakened by a tap on his toe. He then saw three men standing over his bed, one of whom picked up a hammer Smith had been using the previous night and began slapping it in his hand and asking Smith where the "stuff" was. Another man, who had a sawed-off shotgun, forced Smith to go into the game room and made him lay down and stay there. Smith subsequently discovered that his family had been killed.

On Friday, after the murders, he remembered receiving three phone calls from Yolanda. He stated that "I brushed her off like I had other things to do, a meeting I had to attend . . . I

really needed some time to sort this out. There was too many loose ends that I didn't have answers to." Smith stated that he did not go to the police because he would have to tell them about the drugs and because it looked like he committed the crime and he knew they would put him in jail. He stated that he was also trying to figure out if Allen might have been involved in the murders and might have provided the killers with keys to the house. He called Allen that Friday morning to see if he could find out from Allen's voice if Allen was involved in the murders. After the phone call, he decided that Allen was not involved.

At approximately 4:00 p.m. on Friday, Smith took some sleeping pills and lay down on the game room floor by the closet. Early Saturday morning, he awoke to the sounds of someone coming into the game room. He thought that the killers had returned and began swinging the hammer at a man. He did not know it was Allen because it was dark and Allen did not say anything during the attack.

Six months after the murders, Smith was arrested in California. When he was arrested, evidence was seized which indicated that he was attempting to change his identity. Smith was charged with three counts of murder with

> use of a deadly weapon and one count of attempted murder with use of a deadly weapon.

Id. at 650–53.

II. Procedural History

A. Trial and Direct Appeal

A Nevada jury convicted Smith of three counts of murder and one count of attempted murder. *Smith I*, 881 P.2d at 653. The State alleged a single statutory aggravator, that the murders involved "torture [, depravity of mind] or the mutilation of the victim." Nev. Rev. Stat. § 200.033(8). The jury imposed the death penalty for Kristy's and Wendy's murders, life without possibility of parole for Judith's murder, and a twenty-year term for the attempted murder of Frank Allen, enhanced by an additional twenty-year term for use of a deadly weapon. *Smith I*, 881 P.2d at 653–54. On direct appeal, the Nevada Supreme Court vacated the two death sentences and ordered a new penalty hearing because it deemed Instruction 10, which instructed the jury on "depravity of mind," unconstitutionally vague. The court reasoned that this Instruction failed to properly channel the jury's discretion. *See id.* at 654–56.

At the second penalty hearing, the State again alleged a single aggravator pursuant to Nev. Rev. Stat. § 200.033(8) and the court again used Jury Instruction 10. But the court also added Instruction 11 to further define "depravity of mind." Smith's counsel moved to dismiss the aggravating circumstances as to Kristy, arguing there was insufficient evidence of torture, mutilation, or depravity of mind. *Smith*

Case: 14-99003, 12/21/2020, ID: 11934117, DktEntry: 89, Page 18 of 54

II, 953 P.2d at 265. The trial court granted the motion in part, ruling there was insufficient evidence of torture and mutilation. The court allowed the jury to consider depravity of mind as to Kristy's murder, but the jury considered all three theories of the aggravator for Wendy's murder. *Id.* The special verdict form shows that the second jury found depravity of mind with respect to Kristy's murder, and depravity of mind *and* mutilation with respect to Wendy's murder. *Id.* The second jury reimposed the death penalty. *Id.*

Smith appealed, and the Nevada Supreme Court again vacated the death sentence for Kristy's murder. *Id.* at 265, 267. The court ruled that the instructions for depravity-of-mind still failed to properly channel the jury's discretion in connection with the charges stemming from Kristy's death. *Id.* at 267. The court imposed a life sentence without the possibility of parole for Kristy's murder. *Id.* As to Wendy's murder, the court upheld the death sentence, concluding that the jury instructions concerning mutilation were constitutionally sound, and that there was sufficient evidence from which a reasonable jury could find mutilation beyond a reasonable doubt. *Id.* at 267–68.

B. State Post-Conviction Review Proceedings

Smith filed a *pro per* state habeas petition in August 1998. Several attorneys were sequentially appointed to represent him—Gary Gowen, David Schieck, Karen Connolly, Cristina Hinds, and Christopher Oram—during the first post-conviction proceedings. An amended petition and two supplements were filed on Smith's behalf. The state district court denied Smith's post-conviction petition in 2005,

and the Nevada Supreme Court affirmed that decision in 2006.

In 2007, Smith filed a *pro per* habeas petition pursuant to 28 U.S.C. § 2254 in federal court. An attorney appointed to represent Smith filed an amended petition several months later. The federal district court stayed the proceedings so Smith could return to state court to exhaust additional claims. Back in state court, Smith's amended habeas petition was denied, and the Nevada Supreme Court affirmed that decision in 2010.

Smith then resumed pursuit of his federal claims. The district court denied his habeas petition in March 2014, but subsequently granted a Certificate of Appealability for Claim 4 (ineffective assistance by penalty-phase counsel for failing to investigate and present mitigation evidence of Smith's mental health). Smith timely filed a notice of appeal.

III. Standard of Review

We review de novo the district court's order denying Smith's federal habeas petition. *Rodney v. Filson*, 916 F.3d 1254, 1258 (9th Cir. 2019). Pursuant to the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), we may grant habeas relief on a claim adjudicated on the merits in state court only if the state court decision "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States," or if the decision "was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d)(1), (2). "[A]ny federally reviewable claims that were not adjudicated on the merits in state court are reviewed

de novo." *Rodney*, 916 F.3d at 1258 (citing *Runningeagle v. Ryan*, 825 F.3d 970, 978 (9th Cir. 2016)).

IV. Discussion

A. Claim 4—*Martinez*

Smith's federal habeas petition asserts that his second penalty-phase lawyers were ineffective for failing to investigate, develop, or present mitigation evidence during the second penalty phase. Smith exhausted this claim in state court, but the Nevada Supreme Court concluded that it had been procedurally defaulted. The claim was first presented in Smith's second habeas petition and the state supreme court ruled it was untimely pursuant to Nev. Rev. Stat. § 34.726(1), and successive pursuant to Nev. Rev. Stat. § 34.810(2). Smith's federal petition argued that the procedural default of this claim should be excused pursuant to the test set forth in *Martinez*, 566 U.S. at 10–17.

Martinez allows the procedural default of a claim to be excused under specific circumstances. *Id.* at 17. To show cause for excusing a procedural default, *Martinez* requires that a petitioner show that the state system in which he initially brought his IAC claim required that the claim be raised in initial-review collateral proceedings, and that the state did not permit the petitioner to raise the claim on direct appeal. *Runningeagle*, 825 F.3d at 973. A petitioner must further show that the attorney who represented him in state post-conviction proceedings performed deficiently and thereby prejudiced his case under the standard set out in *Strickland v. Washington*, 466 U.S. 668 (1984). *Runningeagle*, 825 F.3d at 973.

In support of his federal petition, Smith argued that his lawyers at the first state post-conviction review proceeding were ineffective because they failed to raise an IAC-by-trial-counsel claim. Smith highlighted numerous facts available to trial counsel that he considered to be evidence of mental illness and argued that his penalty-phase counsel should have raised evidence of mental illness in mitigation. Among other things, Smith contended that his counsel should have argued that he engaged in numerous fraudulent real estate deals over the years leading up to the murders, that he had an outburst during his guilt phase testimony where he threw newspaper articles at the jury, and that he had insisted on testifying at the trial even though his explanation of the circumstances surrounding the murders was obviously implausible.

Smith's counsel retained two mental health experts and submitted their declarations in support of his federal petition. One expert opined that Smith exhibited a "delusional disorder of the grandiose type" since early adulthood. This expert opined that individuals with delusional disorder "cannot escape their delusions or acting on the delusions," and that the letter Smith left at the crime scene indicating that intruders murdered his wife and step-daughters was evidence of this, as was Smith's persistence in relating his version of events to the jury despite his intelligence and despite the patent unbelievability of his story. The other expert's declaration agreed that Smith suffers from grandiose delusions, and observed, "Smith suffers from clinically significant psychiatric difficulties . . . far predat[ing] the above described crimes for which he has been convicted and sentenced[,] and [] these psychiatric difficulties have had and continue to have a significant impact on Mr. Smith's ability to function in important areas of his life." This expert explained that Smith's behavior "reflect[s] mental health

problems and distorted thinking," and that when the expert met with Smith, he "evidence[d] specific paranoid and grandiose delusions." Smith submitted to psychometric testing for a pre-guilt phase competency interview in 1992, and that evaluation was filed in support of his federal habeas petition. The competency assessment concluded that Smith was competent to stand trial and that Smith did not suffer from any acute or Axis I mental disorders, although it noted that he suffered from a mixed personality disorder and displayed antisocial behavior, grandiosity, and histrionic features during the competency interview.

The federal district court considered this evidence and discussed it in an order concluding that Smith's IAC claim was procedurally barred by Nev. Rev. Stat. § 34.726, Nevada's timeliness rule, because Smith did not assert this claim until he returned to state court to file his exhaustion petition. The district court also determined that Smith failed to show that habeas counsel provided ineffective assistance for purposes of satisfying the cause and prejudice components of *Martinez* because, even considering the new evidence relating to Smith's mental health, Smith did not show a reasonable probability that there would have been a more favorable outcome at the penalty phase of his trial.

On appeal, Smith argues that the record establishes cause and prejudice to excuse the procedural default of this IAC claim, and further argues that the district court erred by failing to grant an evidentiary hearing before denying it. "A claim is procedurally defaulted if it was rejected by the state courts based on 'independent' and 'adequate' state procedural grounds." *Rodney*, 916 F.3d at 1259 (citing *Coleman v. Thompson*, 501 U.S. 722, 729–32 (1991)). Because the Nevada Supreme Court rejected Claim Four as untimely and

successive pursuant to state law, we may not review it unless Smith demonstrates cause to excuse the default and actual prejudice resulting from a violation of federal law. *See id*. Specifically, Smith must show:

> (1) the claim of "ineffective assistance of trial counsel" was a "substantial" claim; (2) the "cause" consisted of there being "no counsel" or only "ineffective" counsel during the state collateral review proceeding; (3) the state collateral review proceeding was the "initial" review proceeding in respect to the "ineffective-assistance-of-trial-counsel claim"; and (4) state law requires that an "ineffective assistance of trial counsel [claim] . . . be raised in an initial-review collateral proceeding.

Trevino v. Thaler, 569 U.S. 413, 423 (2013) (emphasis omitted) (quoting *Martinez*, 566 U.S. at 12–22).

We first address Smith's contention that he was entitled to an evidentiary hearing. *See Tapia v. Roe*, 189 F.3d 1052, 1058 (9th Cir. 1999) (reviewing a district court's refusal to hold an evidentiary hearing for abuse of discretion). Smith must allege a colorable claim for relief on his IAC claim in order to obtain a remand for an evidentiary hearing. *West v. Ryan*, 608 F.3d 477, 485 (9th Cir. 2010). The district court allowed Smith to submit the mental health declarations his lawyers obtained in 2007 and the court explicitly considered this extra-record evidence in its order dismissing Smith's *Martinez* claim.[1]

[1] *Cf. Cullen v. Pinholster*, 563 U.S. 170, 181–82 (2011).

Case: 14-99003, 12/21/2020, ID: 11934117, DktEntry: 89, Page 24 of 54

Smith fails to demonstrate what additional factual development would be possible at an evidentiary hearing. He argues that his experts would be allowed to further explain their opinions at a hearing, but they would also be subject to cross examination. Neither of his experts had an opportunity to conduct testing and only one of them interviewed Smith. If an evidentiary hearing were held, the State would be permitted to cross-examine Smith's experts and introduce expert testimony of its own. Accordingly, we conclude that Smith has not shown that he was prejudiced by the lack of an evidentiary hearing, and the district court did not abuse its discretion by dismissing the *Martinez* claim without holding one.

Turning to *Martinez* Step One, Smith must demonstrate that his "underlying ineffective-assistance-of-trial-counsel claim is a substantial one, which is to say that the prisoner must demonstrate that the claim has some merit." *Martinez*, 566 U.S. at 14. Smith argues that the claim his penalty-phase lawyers were ineffective is "substantial" because trial counsel failed to investigate or present information regarding his history of mental illness. Smith asserts that his lawyers' penalty-phase investigation consisted solely of interviewing a few family members on the day they were scheduled to testify and presenting brief testimony regarding Smith's good character. He contends that no effort was taken to investigate mental health issues, and that testimony from mental health experts would have explained his actions. Because no alternate defense theory was aggressively pursued, Smith argues that the failure to provide any explanation for the crimes gave the jury no reason to impose a life sentence.

The State responds that introducing Smith's experts' declarations at the penalty phase would have been tantamount

to ineffective assistance of counsel because it would have painted Smith as a con man and torpedoed his defense. In the State's view, the 1992 competency assessment was "both broad and deep." It was also the only evaluation that included psychometric testing. The State acknowledges the competency assessment showed elevated scales for antisocial behavior and grandiosity with manic tendencies, but stresses that the competency assessment concluded Smith exhibited no acute or Axis I mental disorders and had no serious cognitive or affective psychological disorder. In short, the State argues that Smith was not prejudiced by the failure to present other mental health evidence.

The standard for showing a claim is "substantial" is comparable to the standard for granting a certificate of appealability pursuant to 28 U.S.C. § 2253(c)(2); a petitioner "need show only that 'jurists of reason could disagree with the district court's resolution of his constitutional claims . . . .'" *Runningeagle*, 825 F.3d at 983 n.14 (quoting *Miller-El*, 537 U.S. at 327). Proving the merits of an IAC claim requires showing that: (1) "counsel's representation fell below an objective standard of reasonableness . . . under prevailing professional norms"; and (2) "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Rodney*, 916 F.3d at 1260 (quoting *Strickland*, 466 U.S. at 688, 694).

1. *Strickland* Prong One

With respect to the first *Strickland* prong, deficient performance is performance that falls "below an objective standard of reasonableness" and is outside of "the range of competence demanded of attorneys in criminal cases." *Strickland*, 466 U.S. at 687–88 (quoting *McMann v.*

Case: 14-99003, 12/21/2020, ID: 11934117, DktEntry: 89, Page 26 of 54

Richardson, 397 U.S. 759, 771 (1970)). The objective measure of counsel's performance is determined by looking at the "reasonableness under prevailing professional norms." *Id.* at 688. Professional norms are measured at the time of counsel's actions rather than by reference to modern norms. *See Cullen v. Pinholster*, 563 U.S. 170, 196 (2011). This assessment is made "from counsel's perspective at the time," so as "to eliminate the distorting effects of hindsight." *Strickland*, 466 U.S. at 689. We "defer to a lawyer's strategic trial choices, [but] those choices must have been made after counsel [ ] conducted reasonable investigations or [made] a reasonable decision that ma[de] particular investigations unnecessary." *Summerlin v. Schriro*, 427 F.3d 623, 630 (9th Cir. 2005) (quoting *Strickland*, 466 U.S. at 691).

During the April 1996 second penalty hearing, counsel based Smith's sentencing argument on character evidence very similar to the evidence presented at the first trial, and did not arrange or request a mental health evaluation of Smith. Smith's first-chair counsel at the second penalty hearing, Donald York Evans, acknowledged in a 2007 declaration filed with Smith's federal habeas petition that Smith was "an interesting case, psychologically," and that when he first met Smith, Evans "wanted to do a complete psychological work-up on him." Evans admitted that he "did not press the issue" because Smith declined to submit to testing and Evans "wasn't confident that [he] would get anything [he] could use from an evaluation anyway." Evans "suspected [Smith] had schizoid tendencies and a high IQ but that was just [his] guess and [Smith] wouldn't participate in an evaluation." State habeas counsel's 2002 interview of second-chair counsel, Peter LaPorta, was consistent. Asked whether "there [was] anything else that [counsel felt] should have been done for [Smith's] second penalty phase" LaPorta responded, "[Y]es,

to put it succinctly. I was very uncomfortable with the background information that [had been] developed on the family and the family history, military history, educational history, any psychological history."

We agree with Smith that the performance of his second penalty-phase counsel was deficient. This is not a case in which counsel chose not to pursue mental health mitigation evidence because there were other defense theories to pursue; indeed, the presentation made on Smith's behalf at the second penalty phase was exceptionally sparse. The transcript reflects only about twenty-five pages of testimony from three family members and three family friends who testified about Smith's character and his relationship with his family, even though red flags regarding Smith's mental health were raised in the pre-trial competency assessment and by his behavior before and during trial. It was incumbent upon counsel to investigate Smith's mental health even though Smith denied mental illness. The record shows that Smith's lawyers did not conduct an investigation to ascertain the extent of any possible mental impairment, or to determine whether mental health could have been raised as a mitigating factor at sentencing. Counsel concluded that any psychological assessment performed without Smith's cooperation would be of little or no value, but one of the two expert declarations filed on Smith's behalf in 2007 was prepared solely based on the expert's review of the record. If nothing else, a comparable report could have been prepared at the time of the sentencing without Smith's participation. The applicable American Bar Association (ABA) guidelines made clear that "[t]he investigation for preparation of the sentencing phase . . . should comprise efforts to discover all reasonably available mitigating evidence." ABA Guidelines 11.4.1(C) (1989). The ABA guidelines further specified that counsel

should collect a medical history (including "mental and physical illness") and investigate a defendant's social history in preparation for the penalty phase. *Id.* 11.4.1(2)(C). On the record before us, we do not hesitate to conclude that the failure to investigate Smith's mental health history contravened the ABA guidelines.

We have said that "strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation." *Wiggins v. Smith*, 539 U.S. 510, 521 (2003) (quoting *Strickland*, 466 U.S. at 690–91). Smith's counsel had good reason to be concerned about Smith's mental state yet they acknowledged that they did not try to obtain a psychiatric report, apparently because Smith objected. We do not minimize the difficulty presented by Smith's failure to cooperate, but Smith had no other viable defense and his inability to recognize that and submit to a mental health evaluation may well have been another indicator of a mental health disorder. The failure to pursue mental health mitigation evidence "ignored pertinent avenues for investigation of which [counsel] should have been aware." *Porter v. McCollum*, 558 U.S. 30, 40 (2009) (per curiam). The record does not demonstrate that counsel's failure to investigate was strategic. No alternate mitigation evidence or argument was proffered to the jury, despite what appears to be agreement among Smith's attorneys that he may have suffered from some sort of mental illness. *See Evans v. Lewis*, 855 F.2d 631, 637 (9th Cir. 1988) ("Counsel's failure to investigate [a petitioner's] mental condition[, despite prior notice,] cannot be construed as a trial tactic."); *see also Hendricks v. Calderon*, 70 F.3d 1032, 1043 (9th Cir. 1995) ("[W]here counsel is on notice that his client may be mentally impaired, counsel's failure to investigate his client's mental

condition as a mitigating factor in a penalty phase hearing, without a supporting strategic reason, constitutes deficient performance.").

Our concurring colleague concludes that Smith's counsel's performance was not deficient, cautioning that counsel's performance must not be judged with hindsight. Concurrence at 47–48. We do not doubt this rule, but in our view it is the concurrence that misapplies it. By conflating *Strickland*'s prongs one and two, the concurring opinion decides that it was permissible to forgo a psychological evaluation because, without Smith's cooperation, his lawyers guessed that a psychological assessment would be of "no value." Concurrence at 50–52. There is no question that Smith's failure to cooperate with a psychological evaluation would have hindered any effort to muster persuasive mitigating evidence for the second penalty phase, but this comes into play at *Strickland* step two, when we consider whether counsel's deficient performance resulted in prejudice. At step one, we consider whether Smith's lawyers' performance fell below an objectively reasonable standard, and that question is largely a function of the choices that were available to counsel. Here, we consider the questions raised by Smith's pre-trial competency evaluation and by counsel's own observations of Smith's behavior; Smith's persistent failure to recognize the implausibility of his trial testimony; his concerning trial conduct; and the fact that there was almost nothing else to offer in defense of the death penalty. On this record, it was unreasonable to forgo a psychological evaluation merely because Smith had confidence in his own mental health and counsel assumed an assessment would be of little value. Indeed, it is easy to imagine that a defendant's insistence that he is not ill may be a symptom of mental illness. The out-of-circuit cases the concurring opinion cites

are not to the contrary. *See, e.g.*, *Coleman v. Mitchell*, 244 F.3d 533, 544–46 (6th Cir. 2001) (distinguishing cases in which the failure to investigate and present mitigating evidence constituted ineffective assistance, because defendant served as co-counsel and instructed counsel to pursue an alternate strategy); *Johnston v. Singletary*, 162 F.3d 630, 642 (11th Cir. 1998) (per curiam) (concluding that counsel's decision to forgo psychiatric testimony was strategic where defendant refused to cooperate and his medical records contained substantial data regarding his criminal history).

We conclude that Smith satisfied his burden of demonstrating a "substantial" argument that his second penalty-phase counsel's performance was deficient.

2. *Strickland* Prong Two

The second *Strickland* prong requires that Smith show "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694. The State argues that even if Smith had presented evidence to the jury showing he suffered from grandiose delusions as a result of his mixed personality disorder, this mitigation evidence would have paled in comparison to his vicious attack on his wife and step-daughters. The Supreme Court has cautioned that this type of evidence "is [] by no means clearly mitigating, as the jury might have concluded that [the defendant] was simply beyond rehabilitation." *Cullen*, 563 U.S. at 201. Moreover, in this case, testimony from a mental health expert would have opened the door to rebuttal from a State expert witness. *See id.* In light of the extraordinarily brutal nature of the murders, Smith has not shown that reasonable jurists would

debate whether the result of Smith's proceeding would have been different if mitigation evidence had been pursued.

Our conclusion on this point is heavily influenced by Smith's failure to submit to a psychiatric evaluation at the time of the penalty phase, and by the fact that only limited evaluations could have been prepared without Smith's cooperation. Without the ability to conduct psychometric testing and prepare detailed in-depth personal interviews with Smith, any expert's opinion would have been compromised and necessarily vulnerable to cross examination.

To support his federal petition, Smith relies on the opinions of Dr. Paula Lundberg-Love and Dr. Richard Dudley to argue that counsel failed to investigate, develop, and present mitigating mental health evidence. These experts connected Smith's "delusional thinking" with his long history of get-rich-quick schemes and fraudulent dealings. For example, Dr. Lundberg-Love attributed Smith's extensive history of fraudulent schemes to his delusions and "inflated sense of self-worth." She also juxtaposed Smith's numerous fraudulent schemes, ranging from real estate deals to gemstone trading to check fraud, with his incredulous protestations of innocence and claims that he had been set up at every turn. Dr. Lundberg-Love noted that despite Smith's obviously precarious financial situation, he negotiated a contract for the home in which the murders took place. Among her conclusions, Dr. Lundberg-Love determined that Smith had "persistent false beliefs" relating to these schemes, and that he had "exclusive insight or interpretation[s] of the facts that will free him from his predicament." Dr. Lundberg-Love concluded that Smith's schemes and plans, in light of the clear facts that he "never had sufficient resources to

Case: 14-99003, 12/21/2020, ID: 11934117, DktEntry: 89, Page 32 of 54

execute" them, "support[] the diagnosis of delusional disorder."

Dr. Dudley, who examined Smith in prison, reached similar conclusions. Dr. Dudley explained that, when he met Smith, "it was clear that he is extremely bright," but he "evidenced both a level of paranoid thinking and grandiosity that compromised his . . . decision-making capabilities and judgment." He determined that Smith's "grandiosity" included "pursuing big real estate deals while he had no assets, and he apparently did not succeed in any legitimate deals." Like Dr. Lundberg-Love, Dr. Dudley connected Smith's grandiose thinking to his decision to move his family into a mansion "despite the fact that his checking account had been closed for too many overdrafts, and despite him not having any means to pay the pending mortgage debt against the house."

Contrary to Smith's protestations that the information related to his mental health has "long [been] recognized as mitigating," this evidence is not "clearly mitigating." First, though it demonstrates Smith's grandiosity, it focuses extensively on Smith's unlawful schemes. For example, in one fraud detailed in Dr. Lundberg-Love's report, Smith offered handyman and remodeling services for a fee to homeowners, then disappeared after receiving money for the services. When confronted, Smith represented to the homeowners that "the freight lines stole the cabinets he ordered, and he [had to] travel[] to try to obtain the cabinets." Ultimately, Smith never returned to finish the remodel, and the homeowners lost the money they entrusted to Smith. In another scheme, Smith and his brother, Harold, "fronted money to homeowners in foreclosure," and, in return, "required that the homeowners provide . . . their deed as

security." Smith and his brother then pocketed the homeowners' mortgage payments, never applied the payments to the mortgage, and sold the property to third parties. Dr. Lundberg-Love's and Dr. Dudley's reports detailed other schemes in which Smith attempted to obtain loans on real property with forged deeds, attempted to sell property with forged deeds, and attempted to trade "valuable" amethysts (which were of little value) for real estate in Texas. Thus, while there is a chance the evidence "may have served to evoke sympathy for Smith or cast his culpability for the murders in a different light," there is an equal chance the jury would have decided that this evidence confirmed that Smith was a habitual fraudster who "was simply beyond rehabilitation." *Cullen*, 563 U.S. at 201.

The experts focused on Smith's delusional protestations of innocence, but these statements were not "clearly mitigating" because they underscored that Smith was willing to relate utterly implausible tales, as he did before the jury at trial. For example, Dr. Lundberg-Love attested, "In this case Mr. Smith's note indicated several intruders murdered his wife and stepchildren and that he killed one of the intruders. The only bodies found were those of his wife and step-children. As unbelievable as this recitation appeared, Mr. Smith persisted in relating these facts to the jury. . . . His delusional disorder compelled him to go forward as he did in his testimony, even though part of his story was contradicted by reality." We cannot conclude there is a reasonable probability that the expert declarations, prepared with little or no cooperation from Smith, and without the benefit of thorough testing and an opportunity for full evaluation, would have changed the outcome of Smith's penalty phase. *See id.* at 202.

Smith also argues that counsel spent only a few minutes preparing his mitigation witnesses prior to their testimony. But Smith glosses over the fact that Evans traveled to Los Angeles prior to trial and attempted to meet with Smith's brother. Smith's brother did not appear at the meeting and later refused to meet with Evans. Additionally, Smith's brother, mother, and father "were scheduled to testify at the penalty hearing, but on the day of their scheduled testimony," they did not appear. After a number of "frantic calls to the family, they appeared at court the next morning." As a result, Evans "did not get to meet with [Smith's] mom and dad until just before they testified." Finally, Smith fails to identify any additional mitigation evidence that could or would have been provided by family members if additional time had been invested. Because Smith did not meet his burden at *Strickland* Step Two, the district court did not err by ruling that Smith's ineffective assistance of counsel claim was procedurally defaulted.

B. Claim Eight—*Stromberg* Error

Smith's § 2254 petition argues that because the Nevada Supreme Court invalidated the trial court's depravity of mind instructions in *Smith I* and *Smith II*, *Smith II*'s affirmance of the death penalty for Wendy's murder was contrary to the clearly established federal law set forth in *Stromberg v. California*, 283 U.S. 359 (1931). *Stromberg* held that a verdict is subject to challenge if a jury, presented with alternative theories of guilt, may have relied on an unconstitutional theory to reach its verdict. *Id.* at 367–68. Smith argues that it is unclear whether twelve jurors unanimously found "mutilation" to support the statutory aggravator because some of them may have relied solely on

the invalid depravity-of-mind theory. If so, Smith argues, his death sentence contravenes *Stromberg*.

The State argued in federal court that Smith's *Stromberg* claim was procedurally defaulted. The district court disagreed, but it denied this claim on its merits. The district court concluded that any error in the depravity jury instruction was harmless because there was "strong indication" the jury unanimously agreed on the mutilation theory. On appeal to our court, the State abandoned its procedural default argument. The State conceded this waiver in its argument before our court, so we address the merits of Smith's *Stromberg* claim. *See United States v. Pridgette*, 831 F.3d 1253, 1259 (9th Cir. 2016).

To be eligible for the death penalty, Nevada law required Smith's second penalty-phase jury to find at least one aggravating circumstance that was not outweighed by any mitigating circumstances. Nev. Rev. Stat. § 175.554. The single aggravating circumstance alleged in Smith's case was that "the murder involved torture, depravity of mind or the mutilation of the victim." *See* Nev. Rev. Stat. § 200.033(8). The trial court instructed the first penalty jury that depravity of mind required:

> an inherent deficiency of moral sense and rectitude. It consists of evil, corrupt and perverted intent which is devoid of regard for human dignity and which is indifferent to human life. It is a state of mind outrageously, wantonly vile, horrible or inhuman.

In *Smith I*, the Nevada Supreme Court concluded that this depravity instruction was unconstitutionally vague. 881 P.2d

at 655–56. The court explained that its opinion in *Robins v. State*, 798 P.2d 558 (Nev. 1990) had addressed the constitutionality of the very same depravity-of-mind instruction, and found it deficient. *Robins* relied on *Godfrey v. Georgia*, 446 U.S. 420 (1980) to rule that the depravity instruction required "torture, mutilation or other serious and depraved physical abuse beyond the act of killing itself, as a qualifying requirement to an aggravating circumstance based in part upon depravity of mind." *Robins*, 798 P.2d at 629. The Nevada Supreme Court reiterated the same requirement in *Libby v. State*, 859 P.2d 1050, 1058 (Nev. 1993).

Smith I concluded that the depravity instruction given in Smith's first penalty hearing was unconstitutionally vague because "the jury was not instructed that depravity of mind must include torture, mutilation or other serious and depraved physical abuse beyond the act of killing itself." 881 P.2d at 655. *Smith I* also acknowledged a unanimity problem was presented by the possibility that some of Smith's jurors may have relied on the infirm instruction to impose the death penalty. *Id*. Because the special verdict form did not require that the jury separately consider depravity, or torture, or mutilation; the court observed, "the jury in the instant case found in the disjunctive torture, depravity of mind, *or* mutilation and did not specify which of the three it found. It therefore might well have based its finding of the aggravating circumstance on depravity of mind." *Id*. The court further observed that because the jury found no other aggravating circumstances, it could not "reweigh the aggravating and mitigating evidence" to determine whether this error was harmless. *Id* at 656. The court vacated the two death sentences and remanded for a second penalty-phase hearing. *Id*.

The second jury was instructed:

> You are instructed that the following factors are circumstances by which Murder of the First Degree may be aggravated:
>
> The murder involved torture, depravity of mind or the mutilation of the victim.
>
> The State is alleging depravity of mind in the murder of Kristy Cox [the twelve-year-old].
>
> The State is alleging torture or depravity of mind or mutilation in the murder of Wendy Cox [the twenty-year-old].

The trial court gave the second jury the same depravity-of-mind instruction that *Smith I* had declared unconstitutionally vague, Instruction 10, and added Instruction 11 to further define depravity of mind. Instruction 11 premised depravity of mind on the undefined phrase, "serious and depraved physical abuse":

> In order to find either torture or mutilation of a victim you must find that there was torture or mutilation beyond the act of killing itself.
>
> In order to find depravity of mind you must find *serious and depraved physical abuse* beyond the act of killing itself.

The court separately defined "torture" and "mutilate" in Instructions 9 and 12, but it did not further define the "serious and depraved physical abuse" required for depravity of mind.

Case: 14-99003, 12/21/2020, ID: 11934117, DktEntry: 89, Page 38 of 54

The trial court instructed the second jury: "you must be unanimous in your finding as to the aggravating circumstance," but it did not instruct the jury that it had to be unanimous as to the underlying *theory* supporting the aggravating circumstance (torture, mutilation, or depravity of mind). During defense counsel's closing argument, the trial court interrupted counsel to stress that there was only one statutory aggravating circumstance alleged, and that it had three subparts:

> to the extent that Mr. Evans is saying that there may be some confusion as to whether there is one aggravating circumstance or more than one, he's absolutely correct; there is only one aggravating circumstance that is alleged by the State in this case, and that is composed of the subparts mutilation, torture or depravity of mind. I'm going to correct what is a fairly broad instruction, which is Instruction Number 7, to specifically say, "The State has alleged that an aggravating circumstance is present in this case," so there can be no doubt that it is one aggravating circumstance with three subparts. One of those subparts is related to one of the victims or is alleged by the State with reference to one of the victims, all three of the subparts are alleged with reference to the other victim; but it is only one total aggravating circumstance.

Smith II, 953 P.2d at 266 n.4. In its closing, the prosecution argued to the second jury that "if . . . you are satisfied beyond a reasonable doubt that an aggravating factor exists, and it doesn't have to be all of the parts of the circumstance, it can

be one, in the case of Kristy, or one or two or three in the case of Wendy[.]" The second jury found "depravity of mind" as to Kristy's murder, and "depravity of mind" and "mutilation" for Wendy's murder, and it reimposed the death penalty for both murders.

Smith challenged Instructions 10 and 11 on direct appeal from the second sentencing hearing, and *Smith II* invalidated the depravity instructions again. The Nevada Supreme Court observed "[s]ince *Robins*, this court has upheld sentences of death based on depravity of mind only where there has been evidence of mutilation or of torture." *Id.* at 266. The court explained that to the extent "*Smith I* may have created some confusion on the issue, depravity of mind, as an aggravator, may only be relied upon where evidence of torture or mutilation exists." *Id.* at 266 n.3. *Smith II* held that "jury instruction [11] is a departure from what this court has previously determined is constitutionally acceptable," i.e., it did not conform to the standard the Nevada Supreme Court adopted in *Robins*. *Id.* at 267.

Because the second jury had "no guidance" as to what constituted "serious and depraved physical abuse," *Smith II* concluded "the jury instruction on depravity of mind failed to properly channel the jury's discretion in connection with the charges [] stemming from Kristy's death. An aggravating circumstance based on depravity of mind must include torture or mutilation beyond the act of killing itself." *Id.* at 267 (citations omitted). For Kristy's murder, depravity of mind was the State's sole theory supporting a death-eligible aggravator. Accordingly, the Nevada Supreme Court reversed the death sentence imposed for Kristy's murder and imposed a sentence of life imprisonment without the possibility of parole. *Id.*

This ruling left the aggravating circumstance in Wendy's murder as the sole support for the death penalty. The second jury checked boxes next to "depravity of mind" *and* "mutilation" for Wendy's murder, and the Nevada Supreme Court affirmed the death penalty based on the jury's finding of mutilation in Wendy's case. The court concluded that the instructions for mutilation were constitutionally sound and that sufficient evidence supported the finding, beyond a reasonable doubt, that Wendy's murder involved mutilation. *Id.* at 267–68. The court did not address whether there was indication that the jury unanimously decided upon mutilation.

C. *Stromberg* Error

Smith argues that the Nevada Supreme Court's decision to uphold the death verdict for Wendy's murder was contrary to clearly established federal law because it was impossible to tell whether the jury unanimously found mutilation. Nev. Rev. Stat. § 200.033(8). The State responds that the depravity instruction was constitutionally sound under federal law, and that the rule the Nevada Supreme Court set forth in *Robins* is a state law requirement that is immaterial to relief under § 2254(d).

A conviction is subject to challenge where a jury was instructed on alternative theories of guilt and it may have relied on an invalid one. *Hedgpeth v. Pulido*, 555 U.S. 57, 58 (2008) (per curiam) (citing *Stromberg v. California*, 283 U.S. 359 (1931)). In *Hedgpeth*, the Supreme Court observed that *Yates v. United States*, 354 U.S. 298 (1957) extended *Stromberg*'s rule to convictions based on multiple theories of guilt where it is shown that one of the prosecution's theories was not unconstitutional but was legally flawed. *See Hedgpeth*, 555 U.S. at 60. Such is the case here. In *Smith II*,

the Nevada Supreme Court invalidated the depravity-of-mind instructions used at Smith's second penalty hearing, and we do not second-guess that determination. *Smith II*, 953 P.2d at 267; *see Estelle v. McGuire*, 502 U.S. 62, 68 (1991) (observing "it is not the province of a federal habeas court to reexamine state-court determinations on state-law questions"). The State's argument that the depravity-of-mind instructions comported with federal law amounts to disagreement with the degree of specificity the Nevada Supreme Court requires for its statutory aggravator. The State fails to explain why we would question the Nevada Supreme Court's state law requirement.

The jury was not instructed that it must agree on which of the three underlying theories supported the statutory aggravator, or that, per *Robins*, it must find evidence of mutilation or torture to find depravity of mind. We can see no other clues in the record—such as jury polling—indicating whether the jury unanimously agreed on mutilation. From the jury's check marks next to "depravity" and "mutilation" on the special verdict form pertaining to Wendy's murder, it is impossible to tell whether the jury split their votes between the invalid depravity theory and the valid mutilation theory. We therefore conclude that Smith demonstrated *Stromberg* error. *See Hedgpeth*, 555 U.S. at 58.

In *Valerio v. Crawford*, an en banc panel of our court reviewed a jury's death verdict premised on two statutory aggravators, one unconstitutionally vague and one permissible. 306 F.3d 742, 759 (9th Cir. 2002) (en banc). Our en banc court ruled that "[a] state appellate court cannot 'affirm a [trial] court without a thorough analysis of the role an invalid aggravating factor played in the sentencing process.'" *Id.* (quoting *Stringer v. Black*, 503 U.S. 222, 230

Case: 14-99003, 12/21/2020, ID: 11934117, DktEntry: 89, Page 42 of 54

(1992)). The court announced three avenues by which a state appellate court can engage in close appellate scrutiny of an invalid aggravator and affirm imposition of the death penalty. *Id*. First, a state appellate court may affirm by finding the error harmless under the standard set forth in *Chapman v. California*, 386 U.S. 18 (1967). *Valerio*, 306 F.3d at 756. To do so, the state appellate court must conclude, beyond a reasonable doubt, that the same result would have been obtained without relying on the invalid aggravator. *Id.* Here, the State conceded at oral argument before our court, that *Smith II* did not engage in a *Chapman* harmless error analysis.

Valerio's second method for affirming a death verdict where a jury may have relied on an invalid aggravator instruction is to re-weigh the aggravating and mitigating evidence pursuant to *Clemons v. Mississippi*, 494 U.S. 738 (1990). *Valerio*, 306 F.3d at 757. *Clemons* described that a state appellate court may set aside an invalid aggravator and re-weigh the remaining aggravating and mitigating factors to determine whether an invalid instruction was harmless. *Id.* But it is clear the *Smith II* court did not re-weigh aggravating and mitigating evidence because Nev. Rev. Stat. § 200.033(8) was the single aggravating circumstance alleged in Smith's case.

Valerio's third proffered method is a *Walton* analysis, *see Walton v. Arizona*, 497 U.S. 639 (1990), in which a state appellate court "act[s] as a primary factfinder" by applying a corrected instruction to the evidence and determining de novo whether the state's evidence satisfied the aggravator. *Valerio*, 306 F.3d at 757. This option was also unavailable in Smith's case because, as we explained in *Valerio*, a state appellate

Case: 14-99003, 12/21/2020, ID: 11934117, DktEntry: 89, Page 43 of 54

court may not undertake a *Walton* analysis if the penalty-phase factfinder was a jury. *Id*. at 758.

The Nevada Supreme Court failed to undertake any of the options explained in *Valerio*, so there is no question that it did not engage in close appellate scrutiny of the invalid depravity instructions used at Smith's second penalty hearing. Instead, the state court relied on its conclusion that the evidence was sufficient to support the mutilation theory. *Smith II*, 953 P.2d at 267–68. But as the court recognized in *Smith I*, 881 P.2d at 655, sufficiency of the evidence is not the issue; Smith's argument is that the jury may not have been unanimous.

Valerio held that the resulting *Stromberg* error is not structural, so we do not assume prejudice. Rather, we assess the effect of the invalid depravity instructions and resulting *Stromberg* error under the harmless error standard set forth in *Brecht v. Abrahamson*, 507 U.S. 619 (1993). *See Hedgpeth*, 555 U.S. at 61–62 (concluding that a *Brecht* harmless error analysis is appropriate where the jury was instructed on alternative theories of guilt and may have relied on an invalid one); *Valerio*, 306 F.3d at 760–61.

Brecht's harmlessness test asks whether we are left with "grave doubt" about whether "the actual instruction had a 'substantial and injurious effect or influence' on the jury's verdict, in comparison to what the verdict would have been if the narrowed instruction had been given." *Valerio*, 306 F.3d at 762; *see also Hedgpeth*, 555 U.S. at 58. As the Nevada Supreme Court stated in *Smith II*, the narrowed construction of depravity of mind based on Nev. Rev. Stat. § 200.033(8) "requir[es] torture, mutilation or other serious and depraved physical abuse beyond the act of killing itself, as a qualifying requirement to an aggravating circumstance

based in part upon depravity of mind." *Smith II*, 953 P.2d at 266 (quoting *Robins*, 798 P.2d at 570). We therefore compare the result obtained with Instructions 10 and 11 against "what the verdict would have been if the [*Robins*] instruction had been given." *Valerio*, 306 F.3d at 762. Here, we see no reason to suspect that the arguments presented by the State or the defense would have varied at all had the narrowed instruction been given. The evidence strongly supported a finding of 'mutilation beyond the act of killing itself' and mutilation was a subset of depravity under Nevada law at the time Smith's case was tried.

The juxtaposition of the evidence pertaining to Kristy's murder and the evidence pertaining to Wendy's murder leads us to conclude that the invalid instruction did not have a substantial and injurious effect on the jury's verdict. The second jury heard the medical examiner's testimony about the extent of both of the murdered step-daughters' wounds. The medical examiner explained that Kristy, age twelve, suffered four wounds—three to the head, and one to the neck—and that there was a laceration on her finger. The medical examiner then moved on to Wendy's much more substantial injuries, and told the jury that Wendy suffered thirty-two blunt-force wounds to her head (including skull fractures), and that the extensive wounds Wendy suffered demonstrated that she fought for her life. The examiner testified that Wendy's wounds appeared to have been inflicted with the claw end of a hammer, and that her left ear was nearly cut in two. The examiner found prominent abrasions on Wendy's neck, and that she had defensive wounds on her hands. Despite these brutal injuries, the actual cause of Wendy's death was strangulation. The medical examiner opined that

Smith likely used hammer blows to subdue his victims and then strangled them to death.[2]

The numerous blunt-force wounds that fractured Wendy's skull, coupled with the medical examiner's testimony that a large laceration inside her ear almost cut her outer ear in two, do not leave us with grave doubt about whether the jury would have unanimously found mutilation. Photos and the medical examiner's testimony graphically illustrated that the wounds Wendy suffered radically altered essential parts of her body, and we are confident the invalid instruction did not have a substantial and injurious effect on the jury's verdict.

V. Conclusion

Smith persuasively argued that the performance of his second penalty-phase counsel was deficient for failing to investigate mental health mitigation evidence, but he has not shown that he was prejudiced. This claim was defaulted. Separately, we conclude that the *Stromberg* error in Smith's jury instructions was harmless under *Brecht*. We decline to grant a Certificate of Appealability for any of the other claims Smith briefed, and affirm the district court's judgment.

AFFIRMED.

---

[2] On appeal, the State argued there was "overwhelming evidence" of mutilation because Wendy was attacked with the claw end of a hammer. The State overlooks that the jury was instructed that, under Nevada law, mutilate "means to cut off or permanently destroy a limb or essential part of the body or to cut off or alter radically so as to make imperfect," and that "to find . . . mutilation of a victim you must find that there was . . . mutilation beyond the act of killing itself." In other words, it was the extent of Wendy's injuries that determined whether mutilation applied, not the means used to injure her.

N.R. SMITH, Circuit Judge, concurring:

The district court's order dismissing Joseph Smith's federal habeas petition should be affirmed. The majority got it right in: (1) finding that Smith failed to show he was prejudiced by the lack of an evidentiary hearing, and concluding that the district court did not abuse its discretion by dismissing his *Martinez*[1] claim without holding an evidentiary hearing; (2) certifying Smith's eighth claim, which alleges a violation of the rule set out in *Stromberg v. California*, 283 U.S. 359 (1931), and concluding that the *Stromberg* error in Smith's jury instruction was harmless; and (3) declining to certify Smith's remaining uncertified claims.

The district court's judgment dismissing Smith's ineffective assistance of counsel ("IAC") claim as procedurally barred should also be affirmed. However, I arrive at that conclusion via a different route than the majority. Unlike the majority, I believe Smith's counsel's performance during the second penalty-phase hearing was not deficient under the first prong of *Strickland v. Washington*, 466 U.S. 668 (1984), and therefore find his IAC claim insubstantial. I write separately to address this point.

To establish cause and prejudice to excuse the procedural default of his IAC claim, Smith must show, *inter alia*, that: "(1) the claim of 'ineffective assistance of trial counsel' was a 'substantial' claim; [and] (2) the 'cause' consisted of there being 'no counsel' or only 'ineffective' counsel during the state collateral review proceeding." *Trevino v. Thaler*, 569 U.S. 413, 423 (2013) (quoting *Martinez*, 566 U.S. at 13–18).

[1] *Martinez v. Ryan*, 566 U.S. 1 (2012).

With respect to *Martinez* Step One, Smith must "demonstrate that the underlying ineffective-assistance-of-trial-counsel claim is a substantial one, which is to say that the prisoner must demonstrate that the claim has some merit." *Martinez*, 566 U.S. at 14. To establish the merits of an IAC claim, "[t]he *Strickland* standard requires a showing of both deficient performance and prejudice." *Rodney v. Filson*, 916 F.3d 1254, 1260 (9th Cir. 2019) (citing *Strickland*, 466 U.S. at 687).

A.

Deficient performance under *Strickland* is performance that falls "below an objective standard of reasonableness." 466 U.S. at 688. "In any case presenting an ineffectiveness claim, the performance inquiry must be whether counsel's assistance was reasonable considering *all the circumstances*." *Id.* (emphasis added). Although "[p]revailing norms of practice as reflected in American Bar Association standards" may serve as "guides to determining what is reasonable, . . . they are only guides." *Id.* This is so, because no standards or set of rules "can satisfactorily take account of the variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how best to represent a criminal defendant." *Id.* at 688–89.

Our "scrutiny of counsel's performance must be highly deferential," because "[i]t is all too tempting for a defendant to second-guess counsel's assistance after . . . [an] adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable." *Id.* at 689. Thus, "[a] fair assessment of attorney performance requires that every effort be made to

eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." *Id.* Because of the difficulty in conducting this evaluation, we "must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Id.*; *see Cullen v. Pinholster*, 563 U.S. 170, 196 (2011) (noting that "*Strickland* specifically commands that a court 'must indulge [the] strong presumption' that counsel 'made all significant decisions in the exercise of reasonable professional judgment'" (alteration in original) (quoting *Strickland*, 466 U.S. at 689–90)).

Smith argues, and the majority agrees, that Smith's counsel's performance during the second penalty-phase hearing was deficient, because counsel failed to investigate Smith's mental health and retain an expert to opine thereon. Opinion at 27–30. I disagree.

The majority correctly notes that counsel's argument at the April 1996 penalty hearing was predicated on character evidence similar to that presented at the first trial, and counsel did not arrange or request a mental health evaluation of Smith. *Id.* at 26. However, the reason no mental health evaluation was arranged or requested is because Smith refused to cooperate with, or submit to, any mental health evaluation. Indeed, Donald York Evans, Smith's first-chair counsel at the second penalty hearing, stated:

> When I first was appointed to represent Joe, I wanted to do a complete psychological work-up on him. I discussed the idea with Joe, and he *refused* to submit to *any* testing. He insisted he was not crazy. Joe would have

> none of it, and so I did not press the issue. There was *no value in getting a mental health expert if Joe was not going to participate.* I wasn't confident that I would get anything I could use from an evaluation anyway. I suspected he had schizoid tendencies and a high IQ but that was just my guess and *he wouldn't participate in an evaluation*.

In *Strickland*, the Supreme Court recognized that "[t]he reasonableness of counsel's actions may be *determined or substantially influenced by the defendant's own statements or actions*. Counsel's actions are usually based, quite properly, on informed strategic choices made by the defendant and on information supplied by the defendant." 466 U.S. at 691 (emphasis added).

In *Campbell v. Kincheloe*, we applied the above-stated principle in a habeas action brought by an inmate convicted of three counts of aggravated murder and sentenced to death. 829 F.2d 1453, 1456–57, 1463 (9th Cir. 1987). There, the defendant argued that his attorneys' performance was deficient, because they "fail[ed] to interview his family and childhood friends, classmates, and teachers." *Id.* at 1463. However, the defendant had "specifically requested his attorneys not to contact members of his family." *Id.* Drawing on the Supreme Court's statement that "[t]he reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions," *Strickland*, 466 U.S. at 691, we held that trial counsels' performance was not deficient, because they abided by the defendant's wishes and the defendant's wishes were consistent with "the professional judgment of his attorneys that such interviews were unnecessary and would not have

made any difference in the context of the case." *Campbell*, 829 F.2d at 1463–64.

Relying on the principle discussed in *Strickland* and *Campbell*, other courts have declined to find counsel's performance deficient where a defendant refuses to cooperate with a certain line of investigation and subsequently alleges error based on the attorney's incomplete investigation into the frustrated line of inquiry. *See, e.g.*, *Coleman v. Mitchell*, 244 F.3d 533, 545–56 (6th Cir. 2001) (finding counsel's performance not deficient where, *inter alia*, the defendant "did not cooperate with counsel . . . and refused to submit to further psychological or psychiatric testing"); *Owens v. Guida*, 549 F.3d 399, 405–06, 411–12 (6th Cir. 2008) (finding counsel's performance not deficient where "[c]ounsel could have reasoned that additional investigation would be of little use because [the defendant's] own actions [(e.g., refusing to cooperate with mental health examiners)] shut off avenues for mitigation"); *Johnston v. Singletary*, 162 F.3d 630, 642 (11th Cir. 1998) (per curiam) (finding counsels' performance not deficient where, "despite his lawyers' efforts to have [the defendant] evaluated by a . . . mental health expert[, the defendant] was steadfast in his resistance to meeting with this expert"); *Thompson v. Wainwright*, 784 F.2d 1103, 1106 (11th Cir. 1986) (recognizing that a defendant "cannot blame the lack of additional psychiatric examinations on incompetent counsel" where the defendant refused to "cooperate" with the previous psychiatrist).

The reasonableness of Smith's penalty-phase counsel's decision not to retain a mental health expert is "substantially influenced by [Smith's] own statements [and] actions."

Case: 14-99003, 12/21/2020, ID: 11934117, DktEntry: 89, Page 51 of 54

Strickland, 466 U.S. at 691.[2] Evans discussed the possibility of obtaining a psychological evaluation of Smith, but Smith refused to submit to any such examination and adamantly insisted that he had no mental health issues. Smith's actions—i.e., his refusal to cooperate with, and submit to, any mental health evaluation—provided "counsel reason to believe that pursuing [a mental health] investigation[ ] would be fruitless," because any expert report prepared without Smith's participation would, in counsel's own words, be of little or "no value." *See Strickland*, 466 U.S. at 691; *see also Johnston*, 162 F.3d at 642 ("[W]hen the strategy an attorney might otherwise pursue is virtually foreclosed by his client's unwillingness to facilitate that strategic option, it is difficult for [a] court, in a collateral proceeding, to characterize as 'unreasonable' counsel's decision to abandon that otherwise preferable strategy."). Smith cannot now complain that his counsel acted unreasonably by failing to investigate and present mental health evidence at his sentencing when it was

[2] The majority argues that I conflate *Strickland*'s prongs one and two, but I consider Smith's "own statements [and] actions" in determining whether Smith's counsel's performance was deficient. *Strickland*, 466 U.S. at 691. Indeed, the majority contends that, "[a]t step one, we consider whether Smith's lawyers' performance fell below an objectively reasonable standard, and that question is largely a function of the choices that were available to counsel." Opinion at 29.

Contrary to the majority's argument, that is precisely what I have done here. Put simply, Smith's refusal to cooperate with, and submit to, any mental health evaluation presented counsel with two choices. Counsel could either retain a mental health expert to prepare an evaluation based entirely on the record—which counsel recognized would be of little or no value—or, considering Smith's refusal, counsel could reasonably choose not to retain a mental health expert to render a "compromised" opinion that would "necessarily [be] vulnerable to cross examination." Opinion at 31.

Case: 14-99003, 12/21/2020, ID: 11934117, DktEntry: 89, Page 52 of 54

Smith's own actions that effectively rendered any such evidence of "no value." *See Strickland*, 466 U.S. at 691; *Johnston*, 162 F.3d at 642.

Both Smith and the majority argue that an expert could have prepared a report without Smith's participation based solely on the expert's review of the record—a report similar to that prepared by Dr. Lundberg-Love in 2007. But, as discussed, Smith's counsel recognized that a report prepared without Smith's participation and based solely on a review of the record would be of "no value." The majority apparently reaches the same conclusion, stating that "any expert's opinion [prepared without Smith's cooperation] would have been *compromised* and *necessarily vulnerable to cross examination*." Opinion at 31 (emphasis added). Thus, counsel exercised reasonable professional judgment in declining to retain an expert to render a compromised opinion that would have been of little or no value. *See Owens*, 549 F.3d at 412 (finding counsel's performance not deficient where "[c]ounsel could have reasoned that additional investigation would be of little use because [the defendant's] own actions [(e.g., refusing to cooperate with mental health examiners)] shut off avenues for mitigation"); *cf. Jeffries v. Blodgett*, 5 F.3d 1180, 1198 (9th Cir. 1993) (recognizing that where "a defendant preempts his attorney's strategy" with his or her actions or statements, "no claim for ineffectiveness can be made" (quoting *Mitchell v. Kemp*, 762 F.2d 886, 889 (11th Cir. 1985))).

Moreover, even assuming Smith would have participated in an evaluation, counsel was not "confident that [he] would get anything [he] could use from [the] evaluation." This judgment is reasonable in light of the 1992 competency report, which was based on a two-day evaluation of Smith

and several psychometric tests and found that, despite a potential mixed personality disorder, Smith was "an intelligent individual without any serious cognitive or affective psychological disorder[s]" and exhibited no "acute or Axis I mental disorders." The report concluded that Smith was competent to stand trial and "competent at the time of the alleged offense."

Smith and the majority also rely on certain American Bar Association ("ABA") standards to show counsel acted unreasonably. Those standards require counsel to investigate "all reasonably available mitigating evidence," ABA Guidelines 11.4.1(C) (1989), including any evidence of a defendant's mental illness, *see id.* at 11.4.1(D)(2)(C). However, although the ABA standards may "guide[]" the inquiry into whether Smith's counsel's performance was reasonable, "*they are only guides*." *Strickland*, 466 U.S. at 688 (emphasis added). As noted above, "[t]he reasonableness of counsel's actions may be *determined or substantially influenced by the defendant's own statements or actions*." *Id.* at 691 (emphasis added). That is precisely what happened here. Smith's actions "substantially influenced" the reasonableness of his counsel's decision not to conduct a more in-depth investigation into Smith's mental health and mitigated any guidance gleaned from the ABA standards. *See id.*; *see also Jeffries*, 5 F.3d at 1197–98 (finding counsel's performance not deficient where counsel acquiesced in the defendant's decision "not to present any witnesses in mitigation," which contravened ABA standards).

Considering "all of the circumstances" and indulging "a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance," *Strickland*, 466 U.S. at 689, 691, Smith's second penalty-phase counsel's

judgment not to engage an expert to opine on Smith's mental health is reasonable in light of Smith's refusal to cooperate with any mental health expert. *See Owens*, 549 F.3d at 406, 411–12 (finding counsel's performance not deficient where "[c]ounsel could have reasoned that additional investigation would be of little use because [the defendant's] own actions [(e.g., refusing to cooperate with mental health examiners)] shut off avenues for mitigation"); *Johnston*, 162 F.3d 642 (finding counsel's performance not deficient where, "despite his lawyers' efforts to have [the defendant] evaluated by a . . . mental health expert[, the defendant] was steadfast in his resistance to meeting with this expert").

Therefore, Smith's IAC claim is insubstantial, because it lacks merit. *See Martinez*, 566 U.S. at 14. Because Smith cannot establish cause and prejudice to excuse his procedural default under *Martinez*, the district court did not err in holding that Smith's IAC claim was procedurally defaulted.

B.

Because Smith's second penalty-phase counsel's performance was not deficient, I would not reach the prejudice prong of *Strickland*. However, assuming that counsel's performance was deficient (as does the majority), Smith failed to show "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694.

APPENDIX B

Opinion affirming denial of habeas relief, *Smith v. Baker, et al.*, United States Court of Appeals for the Ninth Circuit, Case No. 14-99003 (May 21, 2020)

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JOSEPH WELDON SMITH, *Petitioner-Appellant*,	No. 14-99003
v.	D.C. No. 2:07-cv-00318-JCM-CWH
RENEE BAKER, Warden; AARON D. FORD,* Attorney General of the State of Nevada, *Respondents-Appellees.*	OPINION

Appeal from the United States District Court
for the District of Nevada
James C. Mahan, District Judge, Presiding

Argued and Submitted July 11, 2019
Seattle, Washington

Filed May 21, 2020

Before: N. Randy Smith, Mary H. Murguia, and
Morgan Christen, Circuit Judges.

Opinion by Judge Christen;
Concurrence by Judge N.R. Smith

---

* Aaron D. Ford is substituted for his predecessor, Adam Paul Laxalt, as Nevada Attorney General, pursuant to Fed. R. App. P. 43(c)(2).

SUMMARY[**]

Habeas Corpus/Death Penalty

The panel affirmed the district court's judgment dismissing Joseph Weldon Smith's habeas corpus petition challenging his Nevada convictions for three murders and one attempted murder, and his death sentence for one of the murders.

The district court issued a certificate of appealability for Smith's argument that the procedural default of his ineffective-of-assistance-of-counsel claim should be excused pursuant to *Martinez v. Ryan*, 566 U.S. 1 (2012). The panel held that Smith did not show that he was prejudiced by the lack of an evidentiary hearing, and that the district court did not abuse its discretion by dismissing the *Martinez* claim without holding one. Applying *Martinez* and *Strickland v. Washington*, 466 U.S. 668 (1984), the panel held that Smith satisfied his burden of demonstrating a substantial argument that the performance of his second penalty-phase counsel was deficient for failing to investigate mental health mitigation evidence, but that Smith did not show that he was prejudiced by counsel's deficient performance.

The panel certified for appeal Smith's claim that the death verdict violated *Stromberg v. California*, 283 U.S. 359 (1931). The panel held that Smith demonstrated *Stromberg* error because it was impossible to tell whether the jury unanimously found mutilation, which was the sole basis to

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

support the death verdict after the Nevada Supreme Court invalidated the trial court's depravity-of-mind jury instruction. The panel concluded that the error was harmless because the invalid instruction did not have a substantial and injurious effect on the jury's verdict.

The panel declined to certify Smith's remaining uncertified claims.

Concurring, Judge N.R. Smith would affirm the dismissal of Smith's ineffective-assistance-of-counsel claim as procedurally barred on a different ground—that counsel's performance during the second penalty-phase hearing was not deficient, and that the claim is therefore insubstantial.

COUNSEL

Robert Fitzgerald (argued), David Anthony, Heather Fraley, and Brad D. Levenson, Assistant Federal Public Defenders; Rene L. Valladares, Federal Public Defender; Office of the Federal Public Defender, Las Vegas, Nevada, for Petitioner-Appellant.

Jeffrey Morgan Conner (argued), Deputy Assistant Attorney General; Victor-Hugo Schulze II, Senior Deputy Attorney General; Heidi Parry Stern, Chief Deputy Attorney General; Office of the Attorney General, Las Vegas, Nevada; for Respondents-Appellees.

OPINION

CHRISTEN, Circuit Judge:

In 1992, a Nevada jury convicted Joseph Weldon Smith of three counts of first degree murder with use of a deadly weapon for beating and strangling his wife, Judith Smith, and his step-daughters, Wendy Jean Cox and Kristy Cox. The women were killed in a home the Smiths were renting in Henderson, Nevada. The jury also convicted Smith of attempting to murder Frank Allen with use of a deadly weapon. Allen owned the home the Cox family was renting. For Wendy's and Kristy's murders, Smith was sentenced to death. For Judith's murder, he was sentenced to life in prison without the possibility of parole.

Smith appealed his convictions and sentences. The Nevada Supreme Court affirmed the convictions, but it vacated the death sentences and remanded for a new penalty hearing. *See Smith v. State*, 881 P.2d 649 (Nev. 1994) (*Smith I*). After a second penalty hearing, Smith was again sentenced to death for Wendy's and Kristy's murders. On appeal, the Nevada Supreme Court vacated the death sentence for Kristy's murder and instead imposed a sentence of life without the possibility of parole, but it affirmed the death penalty for Wendy's murder. *See Smith v. State*, 953 P.2d 264 (Nev. 1998) (*Smith II*).

Smith filed a *pro per* habeas petition in state district court, which was denied, and the Nevada Supreme Court affirmed that ruling in an unpublished order. Smith then filed a *pro per* habeas petition in federal district court. That court appointed counsel for Smith and stayed the federal proceedings so Smith could return to state court to exhaust

certain claims. The state district court denied Smith's second state habeas petition on procedural default grounds, and the Nevada Supreme Court affirmed that decision. Smith then returned to federal court, where the State's motion to dismiss was granted in part and denied in part. The federal district court later denied the remainder of Smith's petition but issued a certificate of appealability for his argument that the procedural default of his ineffective assistance of counsel (IAC) claim should be excused pursuant to *Martinez v. Ryan*, 566 U.S. 1 (2012). Smith appeals the denial of his federal habeas petition.

We affirm the district court's judgment dismissing Smith's IAC claim as procedurally barred. Although we conclude that his counsel's performance at the second penalty-phase hearing was deficient, Smith has not shown that he was prejudiced by his counsel's performance. Smith's IAC claim therefore remains procedurally defaulted, and cannot serve as a basis for federal habeas relief.

Smith also asserts nine uncertified claims on appeal. We may issue a certificate of appealability when a petitioner shows "that reasonable jurists could debate whether . . . the petition should have been resolved in a different manner or that the issues presented were 'adequate to deserve encouragement to proceed further.'" *Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003) (quoting *Slack v. McDaniel*, 529 U.S. 473, 484 (2000)). We certify Smith's eighth claim, which alleges violation of the rule set out in *Stromberg v. California*, 283 U.S. 359 (1931), but we ultimately conclude that this claim does not entitle Smith to habeas relief because the *Stromberg* error was harmless. The remaining uncertified claims do not raise substantial questions of law. We decline to certify them because we are not persuaded that "reasonable

jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Miller-El*, 537 U.S. at 338 (quoting *Slack*, 529 U.S. at 484). We therefore affirm the district court's order dismissing Smith's federal habeas petition.

I. Factual Background

The facts relating to the murders and to Smith's first trial and penalty-phase hearing were recounted by the Nevada Supreme Court in *Smith I*, as follows:

> During the trial Michael Hull, a police officer for the City of Henderson, testified as follows: On Saturday, October 6, 1990, at approximately 2:29 a.m., he was dispatched to the Fountains, a gated community in Henderson. While on his way, Hull was flagged down by a man who subsequently identified himself as Frank Allen. Allen appeared frantic and Hull observed blood on his shirt and blood running down the left side of his head. Allen told Hull that Smith had attacked him with a hammer or a hatchet.
>
> After arriving at the Smiths' home, located at 2205 Versailles Court inside the gated community, Hull and two other officers observed a large broken window lying on the front porch outside the house. Allen had explained to the officers that he had left through that window. The officers entered the premises and, during a search of a bedroom, observed what appeared to be a figure beneath

a blanket. After lifting the blanket, they discovered a dead body, subsequently identified as twelve-year-old Kristy Cox. In an adjacent bedroom they discovered a second body, also dead and covered with a blanket, later identified as twenty-year-old Wendy Cox. Under a blanket in the master bed, the officers found a third victim, Kristy and Wendy's mother and Smith's wife, Judith.

The officers also located some notes written by Smith. The first, found inside a briefcase in the upstairs den, and dated October 5, 1990, read:

> A triple murder was committed here this morning. My wife, Judith Smith and my two stepdaughters, Wendy Cox and Kristy Cox, were assassinated. I know who did it. I know who sent them. I had been warned that this would happen if I did not pay a large sum of money to certain people. I have been owing it for a long time and simply could not come up with it. And I didn't believe the threat. I don't need any help from the police in this matter. I will take care of it myself. They will have to kill me, too. When and if you find me, I'm sure I will be dead, but that's okay. I already killed one of the murderers. And I am going to get the others and the man who I know sent them. There were three in all. You will

> probably find my body within a day or two.
>
> Thank you, Joe Smith.
>
> P.S.: I thought I had gotten away when we moved here, but it didn't work. When we moved, we were being watched. If I am successful in my task at hand, I will turn myself into (sic) the police.

The second letter stated, "Frank [Allen], look in the locked room upstairs for your package. The key is on the wet bar. Joe." Dr. Giles Sheldon Green, Chief Medical Examiner for Clark County, testified that he performed the autopsies on the bodies of the three victims. Green stated that all three victims died from asphyxia due to manual strangulation. He also opined that the pattern of injuries found on the three victims could have been inflicted with a carpenter's hammer. On Kristy, Green observed three blunt lacerations to the scalp and a lot of blood in Kristy's hair, some bruising and a scratch on her neck, and substantial hemorrhaging as a result of the trauma to her scalp.

On Wendy, Green observed several "quite ragged, irregular, deep lacerations of the forehead," and at least six or seven wounds of the face. There were a total of thirty-two head lacerations, some of which were patterned injuries of pairs of penetrating wounds of the

scalp tissue. On the left side of Wendy's head, a large laceration inside the ear almost cut the outer ear in two. Green found numerous scratches and abrasions on the front of Wendy's neck, as well as defensive wounds, such as a fractured finger, bruises on the backs of her hands and a finger with the skin over the knuckle knocked away. Green found areas in which the various head impacts had created depressed fractures of the outer and inner surfaces of the skull. There was also a great deal of hemorrhaging and damage to the soft tissues of Wendy's neck.

On Judith, Green found lacerations of the forehead and above her right eyebrow, abrasions and scratches on the front of her neck and a cluster of at least five lacerations of the scalp, mainly on the right side of the back of the head. It was Green's opinion that the five lacerations were inflicted after death.

Allen testified as follows: He met Smith in September 1990, when Smith came to Allen's home located at 2205 Versailles Court, inside the Fountains, wishing to purchase that home. Although Allen first indicated that the house was not for sale, after Smith agreed to pay $50,000 over the appraised value of $650,000, Allen agreed to sell him the house. Allen subsequently gave Smith the keys to the house, but retained one of the bedrooms for his use when he came to Las Vegas on weekends, until the sale was final. Smith

informed Allen that he was in a rush to move into the house because he wanted to make preparations for his step-daughter, Wendy's, wedding in November.

On September 21, 1990, Smith gave Allen a personal check for $35,000 as a good faith deposit. Approximately six days later, the bank notified Allen that the check had been returned because Smith had closed his account. Smith assured Allen that he would mail him a certified check immediately. Two days later, having not received a check, Allen indicated to Smith that he would be coming to Las Vegas on Friday, October 5, 1990, and would pick up the check then.

On Friday morning, Allen received a call from Smith who stated, "I thought you were coming up here this morning." Allen told Smith that he would be coming later in the day. Smith stated that he and his wife were going to California to shop for furniture that day, so they arranged for Smith to leave two checks, the $35,000 deposit check and a $3,338.80 check for the October mortgage payment, behind the wet bar in the house, along with Allen's mail.

Allen arrived at the house between 1:00 a.m. and 1:30 a.m. on Saturday, October 6, 1990, and noticed that the security system was off. He went behind the wet bar to retrieve his mail and found the note from Smith telling

him to look in the locked room upstairs for the package. Allen went to that room and, not finding any checks, went into the game room. Although the light was not on in the game room, the area was illuminated by a large chandelier in the hallway.

In the game room, Allen saw Smith crouched in the closet. Smith then jumped out and began to pound Allen in the head with an object, which Allen assumed was a hammer. Allen asked Smith what he was trying to do, but Smith did not say anything. Realizing that Smith was trying to kill him, Allen said, "You're not going to get away with this," and pushed Smith backward and ran down the stairway with Smith pursuing him. Allen tried to figure out the best way to get out of the house, and after realizing that he had locked himself in, ran straight through the full-length, leaded-glass front door. He then got into his car and drove to the guard shack at the entrance to the development and asked the guard to call the police.

Eric Lau, the security guard then on duty at the guard-gated entrance to the Fountains, testified that at approximately 2:30 a.m. on Saturday, October 6, 1990, Allen ran up to the side of the guard house and pounded on the window. Allen's shirt was covered with blood and he said, "He's after me! He's after me!" Lau immediately called for help and

then saw Smith's Lincoln automobile exit the Fountains, with Smith behind the wheel.

Yolanda Cook, Judith's daughter-in-law, testified that on the morning of Friday, October 5, 1990, at 8:00 a.m., she called the Smiths' house to see if someone could take her son to school. She spoke with Smith, who told her that he had to go to a meeting and that Judith, Wendy and Kristy had gone shopping for Wendy's wedding. Between 9:00 a.m. and 3:30 p.m., Yolanda called the Smiths' house three more times, and each time Smith told her that Judith and her daughters were away.

Yolanda further testified that on Saturday, October 6, 1990, at approximately 5:00 a.m., Smith called her and told her of the three murders. He told her that Allen came into the house and bludgeoned them to death. Smith requested that she tell all of Judith's other children and then go to the house and get the letters out of his briefcase explaining what happened. He then told her that he was going to kill himself and hung up the phone.

William Lawrence Cook, one of Judith's sons, testified that Smith had expressed concern and irritation over financial obligations such as Wendy's pending wedding and the new house. William testified that Smith would often refer to himself as the "Lone Wolf" and say, "I gotta get outta here." Sometimes Smith would say that he just wanted to go

away and live on an island somewhere "around no kind of family or nothing like that." William also remembered Smith telling him that "the worse thing to f___ up a man was to have a family." Smith made these statements during a collection of conversations over a period of years.

Smith took the stand on his own behalf and testified as follows: In 1986 he encountered financial difficulties and agreed to accept a drug dealing opportunity in Los Angeles with an organization. That same year, Smith moved to Las Vegas and continued working for the organization. At some point, the organization falsely accused Smith of stealing cocaine and told Smith that he now owed the organization a big debt. Smith quit working for the organization and in 1989 Gino, a man from the organization, found Smith and reminded him of the debt, saying that "it had to be paid or else they were going to give [him] a fate worse than death."

He resumed working for the organization, and also began to look for a new house in a gated community. He found the house at the Fountains and arranged payment terms with Allen, which included giving Allen eleven kilograms of cocaine in exchange for the equity in the house. The eleven kilograms were part of a twenty kilogram shipment which Smith had received from the organization and had decided to keep for

himself. Smith gave Allen ten kilograms of cocaine, worth approximately $200,000, on the same day that he gave Allen the $35,000 check. He claimed that Allen knew that the check was no good and served only to make the transaction seem legitimate, and said he would not deposit it.

On Thursday, October 4, 1990, Smith left the additional kilogram of cocaine owed Allen in Allen's bathroom sink, upstairs where Allen stayed when he was in town for weekends. That same day, Smith told the organization that he had sold twenty kilograms of cocaine and was keeping the money because he was "tired of working for peanuts."

Between 2:00 a.m. and 3:00 a.m. on the morning of Friday, October 5, while he was in bed with Judith, he was awakened by a tap on his toe. He then saw three men standing over his bed, one of whom picked up a hammer Smith had been using the previous night and began slapping it in his hand and asking Smith where the "stuff" was. Another man, who had a sawed-off shotgun, forced Smith to go into the game room and made him lay down and stay there. Smith subsequently discovered that his family had been killed.

On Friday, after the murders, he remembered receiving three phone calls from Yolanda. He stated that "I brushed her off like I had other things to do, a meeting I had to attend . . . I

really needed some time to sort this out. There was too many loose ends that I didn't have answers to." Smith stated that he did not go to the police because he would have to tell them about the drugs and because it looked like he committed the crime and he knew they would put him in jail. He stated that he was also trying to figure out if Allen might have been involved in the murders and might have provided the killers with keys to the house. He called Allen that Friday morning to see if he could find out from Allen's voice if Allen was involved in the murders. After the phone call, he decided that Allen was not involved.

At approximately 4:00 p.m. on Friday, Smith took some sleeping pills and lay down on the game room floor by the closet. Early Saturday morning, he awoke to the sounds of someone coming into the game room. He thought that the killers had returned and began swinging the hammer at a man. He did not know it was Allen because it was dark and Allen did not say anything during the attack.

Six months after the murders, Smith was arrested in California. When he was arrested, evidence was seized which indicated that he was attempting to change his identity. Smith was charged with three counts of murder with

> use of a deadly weapon and one count of attempted murder with use of a deadly weapon.

Id. at 650–53.

II. Procedural History

A. Trial and Direct Appeal

A Nevada jury convicted Smith of three counts of murder and one count of attempted murder. *Smith I*, 881 P.2d at 653. The State alleged a single statutory aggravator, that the murders involved "torture [, depravity of mind] or the mutilation of the victim." Nev. Rev. Stat. § 200.033(8). The jury imposed the death penalty for Kristy's and Wendy's murders, life without possibility of parole for Judith's murder, and a twenty-year term for the attempted murder of Frank Allen, enhanced by an additional twenty-year term for use of a deadly weapon. *Smith I*, 881 P.2d at 653–54. On direct appeal, the Nevada Supreme Court vacated the two death sentences and ordered a new penalty hearing because it deemed Instruction 10, which instructed the jury on "depravity of mind," unconstitutionally vague. The court reasoned that this Instruction failed to properly channel the jury's discretion. *See id.* at 654–56.

At the second penalty hearing, the State again alleged a single aggravator pursuant to Nev. Rev. Stat. § 200.033(8) and the court again used Jury Instruction 10. But the court also added Instruction 11 to further define "depravity of mind." Smith's counsel moved to dismiss the aggravating circumstances as to Kristy, arguing there was insufficient evidence of torture, mutilation, or depravity of mind. *Smith*

II, 953 P.2d at 265. The trial court granted the motion in part, ruling there was insufficient evidence of torture and mutilation. The court allowed the jury to consider depravity of mind as to Kristy's murder, but the jury considered all three theories of the aggravator for Wendy's murder. *Id.* The special verdict form shows that the second jury found depravity of mind with respect to Kristy's murder, and depravity of mind *and* mutilation with respect to Wendy's murder. *Id.* The second jury reimposed the death penalty. *Id.*

Smith appealed, and the Nevada Supreme Court again vacated the death sentence for Kristy's murder. *Id.* at 265, 267. The court ruled that the instructions for depravity-of-mind still failed to properly channel the jury's discretion in connection with the charges stemming from Kristy's death. *Id.* at 267. The court imposed a life sentence without the possibility of parole for Kristy's murder. *Id.* As to Wendy's murder, the court upheld the death sentence, concluding that the jury instructions concerning mutilation were constitutionally sound, and that there was sufficient evidence from which a reasonable jury could find mutilation beyond a reasonable doubt. *Id.* at 267–68.

B. State Post-Conviction Review Proceedings

Smith filed a *pro per* state habeas petition in August 1998. Several attorneys were sequentially appointed to represent him—Gary Gowen, David Schieck, Karen Connolly, Cristina Hinds, and Christopher Oram—during the first post-conviction proceedings. An amended petition and two supplements were filed on Smith's behalf. The state district court denied Smith's post-conviction petition in 2005,

and the Nevada Supreme Court affirmed that decision in 2006.

In 2007, Smith filed a *pro per* habeas petition pursuant to 28 U.S.C. § 2254 in federal court. An attorney appointed to represent Smith filed an amended petition several months later. The federal district court stayed the proceedings so Smith could return to state court to exhaust additional claims. Back in state court, Smith's amended habeas petition was denied, and the Nevada Supreme Court affirmed that decision in 2010.

Smith then resumed pursuit of his federal claims. The district court denied his habeas petition in March 2014, but subsequently granted a Certificate of Appealability for Claim 4 (ineffective assistance by penalty-phase counsel for failing to investigate and present mitigation evidence of Smith's mental health). Smith timely filed a notice of appeal.

III. Standard of Review

We review de novo the district court's order denying Smith's federal habeas petition. *Rodney v. Filson*, 916 F.3d 1254, 1258 (9th Cir. 2019). Pursuant to the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), we may grant habeas relief on a claim adjudicated on the merits in state court only if the state court decision "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States," or if the decision "was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d)(1), (2). "[A]ny federally reviewable claims that were not adjudicated on the merits in state court are reviewed

de novo." *Rodney*, 916 F.3d at 1258 (citing *Runningeagle v. Ryan*, 825 F.3d 970, 978 (9th Cir. 2016)).

IV. Discussion

A. Claim 4—*Martinez*

Smith's federal habeas petition asserts that his second penalty-phase lawyers were ineffective for failing to investigate, develop, or present mitigation evidence during the second penalty phase. Smith exhausted this claim in state court, but the Nevada Supreme Court concluded that it had been procedurally defaulted. The claim was first presented in Smith's second habeas petition and the state supreme court ruled it was untimely pursuant to Nev. Rev. Stat. § 34.726(1), and successive pursuant to Nev. Rev. Stat. § 34.810(2). Smith's federal petition argued that the procedural default of this claim should be excused pursuant to the test set forth in *Martinez*, 566 U.S. at 10–17.

Martinez allows the procedural default of a claim to be excused under specific circumstances. *Id.* at 17. To show cause for excusing a procedural default, *Martinez* requires that a petitioner show that the state system in which he initially brought his IAC claim required that the claim be raised in initial-review collateral proceedings, and that the state did not permit the petitioner to raise the claim on direct appeal. *Runningeagle*, 825 F.3d at 973. A petitioner must further show that the attorney who represented him in state post-conviction proceedings performed deficiently and thereby prejudiced his case under the standard set out in *Strickland v. Washington*, 466 U.S. 668 (1984). *Runningeagle*, 825 F.3d at 973.

In support of his federal petition, Smith argued that his lawyers at the first state post-conviction review proceeding were ineffective because they failed to raise an IAC-by-trial-counsel claim. Smith highlighted numerous facts available to trial counsel that he considered to be evidence of mental illness and argued that his penalty-phase counsel should have raised evidence of mental illness in mitigation. Among other things, Smith contended that his counsel should have argued that he engaged in numerous fraudulent real estate deals over the years leading up to the murders, that he had an outburst during his guilt phase testimony where he threw newspaper articles at the jury, and that he had insisted on testifying at the trial even though his explanation of the circumstances surrounding the murders was obviously implausible.

Smith's counsel retained two mental health experts and submitted their declarations in support of his federal petition. One expert opined that Smith exhibited a "delusional disorder of the grandiose type" since early adulthood. This expert opined that individuals with delusional disorder "cannot escape their delusions or acting on the delusions," and that the letter Smith left at the crime scene indicating that intruders murdered his wife and step-daughters was evidence of this, as was Smith's persistence in relating his version of events to the jury despite his intelligence and despite the patent unbelievability of his story. The other expert's declaration agreed that Smith suffers from grandiose delusions, and observed, "Smith suffers from clinically significant psychiatric difficulties . . . far predat[ing] the above described crimes for which he has been convicted and sentenced[,] and [] these psychiatric difficulties have had and continue to have a significant impact on Mr. Smith's ability to function in important areas of his life." This expert explained that Smith's behavior "reflect[s] mental health

problems and distorted thinking," and that when the expert met with Smith, he "evidence[d] specific paranoid and grandiose delusions." Smith submitted to psychometric testing for a pre-guilt phase competency interview in 1992, and that evaluation was filed in support of his federal habeas petition. The competency assessment concluded that Smith was competent to stand trial and that Smith did not suffer from any acute or Axis I mental disorders, although it noted that he suffered from a mixed personality disorder and displayed antisocial behavior, grandiosity, and histrionic features during the competency interview.

The federal district court considered this evidence and discussed it in an order concluding that Smith's IAC claim was procedurally barred by Nev. Rev. Stat. § 34.726, Nevada's timeliness rule, because Smith did not assert this claim until he returned to state court to file his exhaustion petition. The district court also determined that Smith failed to show that habeas counsel provided ineffective assistance for purposes of satisfying the cause and prejudice components of *Martinez* because, even considering the new evidence relating to Smith's mental health, Smith did not show a reasonable probability that there would have been a more favorable outcome at the penalty phase of his trial.

On appeal, Smith argues that the record establishes cause and prejudice to excuse the procedural default of this IAC claim, and further argues that the district court erred by failing to grant an evidentiary hearing before denying it. "A claim is procedurally defaulted if it was rejected by the state courts based on 'independent' and 'adequate' state procedural grounds." *Rodney*, 916 F.3d at 1259 (citing *Coleman v. Thompson*, 501 U.S. 722, 729–32 (1991)). Because the Nevada Supreme Court rejected Claim Four as untimely and

successive pursuant to state law, we may not review it unless Smith demonstrates cause to excuse the default and actual prejudice resulting from a violation of federal law. *See id*. Specifically, Smith must show:

> (1) the claim of "ineffective assistance of trial counsel" was a "substantial" claim; (2) the "cause" consisted of there being "no counsel" or only "ineffective" counsel during the state collateral review proceeding; (3) the state collateral review proceeding was the "initial" review proceeding in respect to the "ineffective-assistance-of-trial-counsel claim"; and (4) state law requires that an "ineffective assistance of trial counsel [claim] . . . be raised in an initial-review collateral proceeding.

Trevino v. Thaler, 569 U.S. 413, 423 (2013) (emphasis omitted) (quoting *Martinez*, 566 U.S. at 12–22).

We first address Smith's contention that he was entitled to an evidentiary hearing. *See Tapia v. Roe*, 189 F.3d 1052, 1058 (9th Cir. 1999) (reviewing a district court's refusal to hold an evidentiary hearing for abuse of discretion). Smith must allege a colorable claim for relief on his IAC claim in order to obtain a remand for an evidentiary hearing. *West v. Ryan*, 608 F.3d 477, 485 (9th Cir. 2010). The district court allowed Smith to submit the mental health declarations his lawyers obtained in 2007 and the court explicitly considered this extra-record evidence in its order dismissing Smith's *Martinez* claim.[1]

[1] *Cf. Cullen v. Pinholster*, 563 U.S. 170, 181–82 (2011).

Smith fails to demonstrate what additional factual development would be possible at an evidentiary hearing. He argues that his experts would be allowed to further explain their opinions at a hearing, but they would also be subject to cross examination. Neither of his experts had an opportunity to conduct testing and only one of them interviewed Smith. If an evidentiary hearing were held, the State would be permitted to cross-examine Smith's experts and introduce expert testimony of its own. Accordingly, we conclude that Smith has not shown that he was prejudiced by the lack of an evidentiary hearing, and the district court did not abuse its discretion by dismissing the *Martinez* claim without holding one.

Turning to *Martinez* Step One, Smith must demonstrate that his "underlying ineffective-assistance-of-trial-counsel claim is a substantial one, which is to say that the prisoner must demonstrate that the claim has some merit." *Martinez*, 566 U.S. at 14. Smith argues that the claim his penalty-phase lawyers were ineffective is "substantial" because trial counsel failed to investigate or present information regarding his history of mental illness. Smith asserts that his lawyers' penalty-phase investigation consisted solely of interviewing a few family members on the day they were scheduled to testify and presenting brief testimony regarding Smith's good character. He contends that no effort was taken to investigate mental health issues, and that testimony from mental health experts would have explained his actions. Because no alternate defense theory was aggressively pursued, Smith argues that the failure to provide any explanation for the crimes gave the jury no reason to impose a life sentence.

The State responds that introducing Smith's experts' declarations at the penalty phase would have been tantamount

to ineffective assistance of counsel because it would have painted Smith as a con man and torpedoed his defense. In the State's view, the 1992 competency assessment was "both broad and deep." It was also the only evaluation that included psychometric testing. The State acknowledges the competency assessment showed elevated scales for antisocial behavior and grandiosity with manic tendencies, but stresses that the competency assessment concluded Smith exhibited no acute or Axis I mental disorders and had no serious cognitive or affective psychological disorder. In short, the State argues that Smith was not prejudiced by the failure to present other mental health evidence.

The standard for showing a claim is "substantial" is comparable to the standard for granting a certificate of appealability pursuant to 28 U.S.C. § 2253(c)(2); a petitioner "need show only that 'jurists of reason could disagree with the district court's resolution of his constitutional claims . . . .'" *Runningeagle*, 825 F.3d at 983 n.14 (quoting *Miller-El*, 537 U.S. at 327). Proving the merits of an IAC claim requires showing that: (1) "counsel's representation fell below an objective standard of reasonableness . . . under prevailing professional norms"; and (2) "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Rodney*, 916 F.3d at 1260 (quoting *Strickland*, 466 U.S. at 688, 694).

1. ***Strickland*** **Prong One**

With respect to the first *Strickland* prong, deficient performance is performance that falls "below an objective standard of reasonableness" and is outside of "the range of competence demanded of attorneys in criminal cases." *Strickland*, 466 U.S. at 687–88 (quoting *McMann v.*

Richardson, 397 U.S. 759, 771 (1970)). The objective measure of counsel's performance is determined by looking at the "reasonableness under prevailing professional norms." *Id.* at 688. Professional norms are measured at the time of counsel's actions rather than by reference to modern norms. *See Cullen v. Pinholster*, 563 U.S. 170, 196 (2011). This assessment is made "from counsel's perspective at the time," so as "to eliminate the distorting effects of hindsight." *Strickland*, 466 U.S. at 689. We "defer to a lawyer's strategic trial choices, [but] those choices must have been made after counsel [ ] conducted reasonable investigations or [made] a reasonable decision that ma[de] particular investigations unnecessary." *Summerlin v. Schriro*, 427 F.3d 623, 630 (9th Cir. 2005) (quoting *Strickland*, 466 U.S. at 691).

During the April 1996 second penalty hearing, counsel based Smith's sentencing argument on character evidence very similar to the evidence presented at the first trial, and did not arrange or request a mental health evaluation of Smith. Smith's first-chair counsel at the second penalty hearing, Donald York Evans, acknowledged in a 2007 declaration filed with Smith's federal habeas petition that Smith was "an interesting case, psychologically," and that when he first met Smith, Evans "wanted to do a complete psychological work-up on him." Evans admitted that he "did not press the issue" because Smith declined to submit to testing and Evans "wasn't confident that [he] would get anything [he] could use from an evaluation anyway." Evans "suspected [Smith] had schizoid tendencies and a high IQ but that was just [his] guess and [Smith] wouldn't participate in an evaluation." State habeas counsel's 2002 interview of second-chair counsel, Peter LaPorta, was consistent. Asked whether "there [was] anything else that [counsel felt] should have been done for [Smith's] second penalty phase" LaPorta responded, "[Y]es,

to put it succinctly. I was very uncomfortable with the background information that [had been] developed on the family and the family history, military history, educational history, any psychological history."

We agree with Smith that the performance of his second penalty-phase counsel was deficient. This is not a case in which counsel chose not to pursue mental health mitigation evidence because there were other defense theories to pursue; indeed, the presentation made on Smith's behalf at the second penalty phase was exceptionally sparse. The transcript reflects only about twenty-five pages of testimony from three family members and three family friends who testified about Smith's character and his relationship with his family, even though red flags regarding Smith's mental health were raised in the pre-trial competency assessment and by his behavior before and during trial. It was incumbent upon counsel to investigate Smith's mental health even though Smith denied mental illness. The record shows that Smith's lawyers did not conduct an investigation to ascertain the extent of any possible mental impairment, or to determine whether mental health could have been raised as a mitigating factor at sentencing. Counsel concluded that any psychological assessment performed without Smith's cooperation would be of little or no value, but one of the two expert declarations filed on Smith's behalf in 2007 was prepared solely based on the expert's review of the record. If nothing else, a comparable report could have been prepared at the time of the sentencing without Smith's participation. The applicable American Bar Association (ABA) guidelines made clear that "[t]he investigation for preparation of the sentencing phase . . . should comprise efforts to discover all reasonably available mitigating evidence." ABA Guidelines 11.4.1(C) (1989). The ABA guidelines further specified that counsel

should collect a medical history (including "mental and physical illness") and investigate a defendant's social history in preparation for the penalty phase. *Id.* 11.4.1(2)(C). On the record before us, we do not hesitate to conclude that the failure to investigate Smith's mental health history contravened the ABA guidelines.

We have said that "strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation." *Wiggins v. Smith*, 539 U.S. 510, 521 (2003) (quoting *Strickland*, 466 U.S. at 690–91). Smith's counsel had good reason to be concerned about Smith's mental state yet they acknowledged that they did not try to obtain a psychiatric report, apparently because Smith objected. We do not minimize the difficulty presented by Smith's failure to cooperate, but Smith had no other viable defense and his inability to recognize that and submit to a mental health evaluation may well have been another indicator of a mental health disorder. The failure to pursue mental health mitigation evidence "ignored pertinent avenues for investigation of which [counsel] should have been aware." *Porter v. McCollum*, 558 U.S. 30, 40 (2009) (per curiam). The record does not demonstrate that counsel's failure to investigate was strategic. No alternate mitigation evidence or argument was proffered to the jury, despite what appears to be agreement among Smith's attorneys that he may have suffered from some sort of mental illness. *See Evans v. Lewis*, 855 F.2d 631, 637 (9th Cir. 1988) ("Counsel's failure to investigate [a petitioner's] mental condition[, despite prior notice,] cannot be construed as a trial tactic."); *see also Hendricks v. Calderon*, 70 F.3d 1032, 1043 (9th Cir. 1995) ("[W]here counsel is on notice that his client may be mentally impaired, counsel's failure to investigate his client's mental

condition as a mitigating factor in a penalty phase hearing, without a supporting strategic reason, constitutes deficient performance.").

Our concurring colleague concludes that Smith's counsel's performance was not deficient, cautioning that counsel's performance must not be judged with hindsight. Concurrence at 46–47. We do not doubt this rule, but in our view it is the concurrence that misapplies it. By conflating *Strickland*'s prongs one and two, the concurring opinion decides that it was permissible to forgo a psychological evaluation because, without Smith's cooperation, his lawyers guessed that a psychological assessment would be of "no value." Concurrence at 49–51. There is no question that Smith's failure to cooperate with a psychological evaluation would have hindered any effort to muster persuasive mitigating evidence for the second penalty phase, but this comes into play at *Strickland* step two, when we consider whether counsel's deficient performance resulted in prejudice. At step one, we consider whether Smith's lawyers' performance fell below an objectively reasonable standard, and that question is largely a function of the choices that were available to counsel. Here, we consider the questions raised by Smith's pre-trial competency evaluation and by counsel's own observations of Smith's behavior; Smith's persistent failure to recognize the implausibility of his trial testimony; his concerning trial conduct; and the fact that there was almost nothing else to offer in defense of the death penalty. On this record, it was unreasonable to forgo a psychological evaluation merely because Smith had confidence in his own mental health and counsel assumed an assessment would be of little value. Indeed, it is easy to imagine that a defendant's insistence that he is not ill may be a symptom of mental illness. The out-of-circuit cases the concurring opinion cites

are not to the contrary. *See, e.g.*, *Coleman v. Mitchell*, 244 F.3d 533, 544–46 (6th Cir. 2001) (distinguishing cases in which the failure to investigate and present mitigating evidence constituted ineffective assistance, because defendant served as co-counsel and instructed counsel to pursue an alternate strategy); *Johnston v. Singletary*, 162 F.3d 630, 642 (11th Cir. 1998) (per curiam) (concluding that counsel's decision to forgo psychiatric testimony was strategic where defendant refused to cooperate and his medical records contained substantial data regarding his criminal history).

We conclude that Smith satisfied his burden of demonstrating a "substantial" argument that his second penalty-phase counsel's performance was deficient.

2. *Strickland* Prong Two

The second *Strickland* prong requires that Smith show "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694. The State argues that even if Smith had presented evidence to the jury showing he suffered from grandiose delusions as a result of his mixed personality disorder, this mitigation evidence would have paled in comparison to his vicious attack on his wife and step-daughters. The Supreme Court has cautioned that this type of evidence "is [] by no means clearly mitigating, as the jury might have concluded that [the defendant] was simply beyond rehabilitation." *Cullen*, 563 U.S. at 201. Moreover, in this case, testimony from a mental health expert would have opened the door to rebuttal from a State expert witness. *See id.* In light of the extraordinarily brutal nature of the murders, Smith has not shown that reasonable jurists would

debate whether the result of Smith's proceeding would have been different if mitigation evidence had been pursued.

Our conclusion on this point is heavily influenced by Smith's failure to submit to a psychiatric evaluation at the time of the penalty phase, and by the fact that only limited evaluations could have been prepared without Smith's cooperation. Without the ability to conduct psychometric testing and prepare detailed in-depth personal interviews with Smith, any expert's opinion would have been compromised and necessarily vulnerable to cross examination.

To support his federal petition, Smith relies on the opinions of Dr. Paula Lundberg-Love and Dr. Richard Dudley to argue that counsel failed to investigate, develop, and present mitigating mental health evidence. These experts connected Smith's "delusional thinking" with his long history of get-rich-quick schemes and fraudulent dealings. For example, Dr. Lundberg-Love attributed Smith's extensive history of fraudulent schemes to his delusions and "inflated sense of self-worth." She also juxtaposed Smith's numerous fraudulent schemes, ranging from real estate deals to gemstone trading to check fraud, with his incredulous protestations of innocence and claims that he had been set up at every turn. Dr. Lundberg-Love noted that despite Smith's obviously precarious financial situation, he negotiated a contract for the home in which the murders took place. Among her conclusions, Dr. Lundberg-Love determined that Smith had "persistent false beliefs" relating to these schemes, and that he had "exclusive insight or interpretation[s] of the facts that will free him from his predicament." Dr. Lundberg-Love concluded that Smith's schemes and plans, in light of the clear facts that he "never had sufficient resources to

execute" them, "support[] the diagnosis of delusional disorder."

Dr. Dudley, who examined Smith in prison, reached similar conclusions. Dr. Dudley explained that, when he met Smith, "it was clear that he is extremely bright," but he "evidenced both a level of paranoid thinking and grandiosity that compromised his . . . decision-making capabilities and judgment." He determined that Smith's "grandiosity" included "pursuing big real estate deals while he had no assets, and he apparently did not succeed in any legitimate deals." Like Dr. Lundberg-Love, Dr. Dudley connected Smith's grandiose thinking to his decision to move his family into a mansion "despite the fact that his checking account had been closed for too many overdrafts, and despite him not having any means to pay the pending mortgage debt against the house."

Contrary to Smith's protestations that the information related to his mental health has "long [been] recognized as mitigating," this evidence is not "clearly mitigating." First, though it demonstrates Smith's grandiosity, it focuses extensively on Smith's unlawful schemes. For example, in one fraud detailed in Dr. Lundberg-Love's report, Smith offered handyman and remodeling services for a fee to homeowners, then disappeared after receiving money for the services. When confronted, Smith represented to the homeowners that "the freight lines stole the cabinets he ordered, and he [had to] travel[] to try to obtain the cabinets." Ultimately, Smith never returned to finish the remodel, and the homeowners lost the money they entrusted to Smith. In another scheme, Smith and his brother, Harold, "fronted money to homeowners in foreclosure," and, in return, "required that the homeowners provide . . . their deed as

security." Smith and his brother then pocketed the homeowners' mortgage payments, never applied the payments to the mortgage, and sold the property to third parties. Dr. Lundberg-Love's and Dr. Dudley's reports detailed other schemes in which Smith attempted to obtain loans on real property with forged deeds, attempted to sell property with forged deeds, and attempted to trade "valuable" amethysts (which were of little value) for real estate in Texas. Thus, while there is a chance the evidence "may have served to evoke sympathy for Smith or cast his culpability for the murders in a different light," there is an equal chance the jury would have decided that this evidence confirmed that Smith was a habitual fraudster who "was simply beyond rehabilitation." *Cullen*, 563 U.S. at 201.

The experts focused on Smith's delusional protestations of innocence, but these statements were not "clearly mitigating" because they underscored that Smith was willing to relate utterly implausible tales, as he did before the jury at trial. For example, Dr. Lundberg-Love attested, "In this case Mr. Smith's note indicated several intruders murdered his wife and stepchildren and that he killed one of the intruders. The only bodies found were those of his wife and step-children. As unbelievable as this recitation appeared, Mr. Smith persisted in relating these facts to the jury. . . . His delusional disorder compelled him to go forward as he did in his testimony, even though part of his story was contradicted by reality." We cannot conclude there is a reasonable probability that the expert declarations, prepared with little or no cooperation from Smith, and without the benefit of thorough testing and an opportunity for full evaluation, would have changed the outcome of Smith's penalty phase. *See id.* at 202.

Smith also argues that counsel spent only a few minutes preparing his mitigation witnesses prior to their testimony. But Smith glosses over the fact that Evans traveled to Los Angeles prior to trial and attempted to meet with Smith's brother. Smith's brother did not appear at the meeting and later refused to meet with Evans. Additionally, Smith's brother, mother, and father "were scheduled to testify at the penalty hearing, but on the day of their scheduled testimony," they did not appear. After a number of "frantic calls to the family, they appeared at court the next morning." As a result, Evans "did not get to meet with [Smith's] mom and dad until just before they testified." Finally, Smith fails to identify any additional mitigation evidence that could or would have been provided by family members if additional time had been invested. Because Smith did not meet his burden at *Strickland* Step Two, the district court did not err by ruling that Smith's ineffective assistance of counsel claim was procedurally defaulted.

B. Claim Eight—*Stromberg* Error

Smith's § 2254 petition argues that because the Nevada Supreme Court invalidated the trial court's depravity of mind instructions in *Smith I* and *Smith II*, *Smith II*'s affirmance of the death penalty for Wendy's murder was contrary to the clearly established federal law set forth in *Stromberg v. California*, 283 U.S. 359 (1931). *Stromberg* held that a verdict is subject to challenge if a jury, presented with alternative theories of guilt, may have relied on an unconstitutional theory to reach its verdict. *Id.* at 367–68. Smith argues that it is unclear whether twelve jurors unanimously found "mutilation" to support the statutory aggravator because some of them may have relied solely on

the invalid depravity-of-mind theory. If so, Smith argues, his death sentence contravenes *Stromberg*.

The State argued in federal court that Smith's *Stromberg* claim was procedurally defaulted. The district court disagreed, but it denied this claim on its merits. The district court concluded that any error in the depravity jury instruction was harmless because there was "strong indication" the jury unanimously agreed on the mutilation theory. On appeal to our court, the State abandoned its procedural default argument. The State conceded this waiver in its argument before our court, so we address the merits of Smith's *Stromberg* claim. *See United States v. Pridgette*, 831 F.3d 1253, 1259 (9th Cir. 2016).

To be eligible for the death penalty, Nevada law required Smith's second penalty-phase jury to find at least one aggravating circumstance that was not outweighed by any mitigating circumstances. Nev. Rev. Stat. § 175.554. The single aggravating circumstance alleged in Smith's case was that "the murder involved torture, depravity of mind or the mutilation of the victim." *See* Nev. Rev. Stat. § 200.033(8). The trial court instructed the first penalty jury that depravity of mind required:

> an inherent deficiency of moral sense and rectitude. It consists of evil, corrupt and perverted intent which is devoid of regard for human dignity and which is indifferent to human life. It is a state of mind outrageously, wantonly vile, horrible or inhuman.

In *Smith I*, the Nevada Supreme Court concluded that this depravity instruction was unconstitutionally vague. 881 P.2d

at 655–56. The court explained that its opinion in *Robins v. State*, 798 P.2d 558 (Nev. 1990) had addressed the constitutionality of the very same depravity-of-mind instruction, and found it deficient. *Robins* relied on *Godfrey v. Georgia*, 446 U.S. 420 (1980) to rule that the depravity instruction required "torture, mutilation or other serious and depraved physical abuse beyond the act of killing itself, as a qualifying requirement to an aggravating circumstance based in part upon depravity of mind." *Robins*, 798 P.2d at 629. The Nevada Supreme Court reiterated the same requirement in *Libby v. State*, 859 P.2d 1050, 1058 (Nev. 1993).

Smith I concluded that the depravity instruction given in Smith's first penalty hearing was unconstitutionally vague because "the jury was not instructed that depravity of mind must include torture, mutilation or other serious and depraved physical abuse beyond the act of killing itself." 881 P.2d at 655. *Smith I* also acknowledged a unanimity problem was presented by the possibility that some of Smith's jurors may have relied on the infirm instruction to impose the death penalty. *Id*. Because the special verdict form did not require that the jury separately consider depravity, or torture, or mutilation; the court observed, "the jury in the instant case found in the disjunctive torture, depravity of mind, *or* mutilation and did not specify which of the three it found. It therefore might well have based its finding of the aggravating circumstance on depravity of mind." *Id*. The court further observed that because the jury found no other aggravating circumstances, it could not "reweigh the aggravating and mitigating evidence" to determine whether this error was harmless. *Id* at 656. The court vacated the two death sentences and remanded for a second penalty-phase hearing. *Id*.

The second jury was instructed:

> You are instructed that the following factors are circumstances by which Murder of the First Degree may be aggravated:
>
> The murder involved torture, depravity of mind or the mutilation of the victim.
>
> The State is alleging depravity of mind in the murder of Kristy Cox [the twelve-year-old].
>
> The State is alleging torture or depravity of mind or mutilation in the murder of Wendy Cox [the twenty-year-old].

The trial court gave the second jury the same depravity-of-mind instruction that *Smith I* had declared unconstitutionally vague, Instruction 10, and added Instruction 11 to further define depravity of mind. Instruction 11 premised depravity of mind on the undefined phrase, "serious and depraved physical abuse":

> In order to find either torture or mutilation of a victim you must find that there was torture or mutilation beyond the act of killing itself.
>
> In order to find depravity of mind you must find *serious and depraved physical abuse* beyond the act of killing itself.

The court separately defined "torture" and "mutilate" in Instructions 9 and 12, but it did not further define the "serious and depraved physical abuse" required for depravity of mind.

The trial court instructed the second jury: "you must be unanimous in your finding as to the aggravating circumstance," but it did not instruct the jury that it had to be unanimous as to the underlying *theory* supporting the aggravating circumstance (torture, mutilation, or depravity of mind). During defense counsel's closing argument, the trial court interrupted counsel to stress that there was only one statutory aggravating circumstance alleged, and that it had three subparts:

> to the extent that Mr. Evans is saying that there may be some confusion as to whether there is one aggravating circumstance or more than one, he's absolutely correct; there is only one aggravating circumstance that is alleged by the State in this case, and that is composed of the subparts mutilation, torture or depravity of mind. I'm going to correct what is a fairly broad instruction, which is Instruction Number 7, to specifically say, "The State has alleged that an aggravating circumstance is present in this case," so there can be no doubt that it is one aggravating circumstance with three subparts. One of those subparts is related to one of the victims or is alleged by the State with reference to one of the victims, all three of the subparts are alleged with reference to the other victim; but it is only one total aggravating circumstance.

Smith II, 953 P.2d at 266 n.4. In its closing, the prosecution argued to the second jury that "if . . . you are satisfied beyond a reasonable doubt that an aggravating factor exists, and it doesn't have to be all of the parts of the circumstance, it can

be one, in the case of Kristy, or one or two or three in the case of Wendy[.]" The second jury found "depravity of mind" as to Kristy's murder, and "depravity of mind" and "mutilation" for Wendy's murder, and it reimposed the death penalty for both murders.

Smith challenged Instructions 10 and 11 on direct appeal from the second sentencing hearing, and *Smith II* invalidated the depravity instructions again. The Nevada Supreme Court observed "[s]ince *Robins*, this court has upheld sentences of death based on depravity of mind only where there has been evidence of mutilation or of torture." *Id.* at 266. The court explained that to the extent "*Smith I* may have created some confusion on the issue, depravity of mind, as an aggravator, may only be relied upon where evidence of torture or mutilation exists." *Id.* at 266 n.3. *Smith II* held that "jury instruction [11] is a departure from what this court has previously determined is constitutionally acceptable," i.e., it did not conform to the standard the Nevada Supreme Court adopted in *Robins*. *Id.* at 267.

Because the second jury had "no guidance" as to what constituted "serious and depraved physical abuse," *Smith II* concluded "the jury instruction on depravity of mind failed to properly channel the jury's discretion in connection with the charges [] stemming from Kristy's death. An aggravating circumstance based on depravity of mind must include torture or mutilation beyond the act of killing itself." *Id.* at 267 (citations omitted). For Kristy's murder, depravity of mind was the State's sole theory supporting a death-eligible aggravator. Accordingly, the Nevada Supreme Court reversed the death sentence imposed for Kristy's murder and imposed a sentence of life imprisonment without the possibility of parole. *Id.*

This ruling left the aggravating circumstance in Wendy's murder as the sole support for the death penalty. The second jury checked boxes next to "depravity of mind" *and* "mutilation" for Wendy's murder, and the Nevada Supreme Court affirmed the death penalty based on the jury's finding of mutilation in Wendy's case. The court concluded that the instructions for mutilation were constitutionally sound and that sufficient evidence supported the finding, beyond a reasonable doubt, that Wendy's murder involved mutilation. *Id.* at 267–68. The court did not address whether there was indication that the jury unanimously decided upon mutilation.

C. *Stromberg* Error

Smith argues that the Nevada Supreme Court's decision to uphold the death verdict for Wendy's murder was contrary to clearly established federal law because it was impossible to tell whether the jury unanimously found mutilation. Nev. Rev. Stat. § 200.033(8). The State responds that the depravity instruction was constitutionally sound under federal law, and that the rule the Nevada Supreme Court set forth in *Robins* is a state law requirement that is immaterial to relief under § 2254(d).

A conviction is subject to challenge where a jury was instructed on alternative theories of guilt and it may have relied on an invalid one. *Hedgpeth v. Pulido*, 555 U.S. 57, 58 (2008) (per curiam) (citing *Stromberg v. California*, 283 U.S. 359 (1931)). In *Hedgpeth*, the Supreme Court observed that *Yates v. United States*, 354 U.S. 298 (1957) extended *Stromberg*'s rule to convictions based on multiple theories of guilt where it is shown that one of the prosecution's theories was not unconstitutional but was legally flawed. *See Hedgpeth*, 555 U.S. at 60. Such is the case here. In *Smith II*,

the Nevada Supreme Court invalidated the depravity-of-mind instructions used at Smith's second penalty hearing, and we do not second-guess that determination. *Smith II*, 953 P.2d at 267; *see Estelle v. McGuire*, 502 U.S. 62, 68 (1991) (observing "it is not the province of a federal habeas court to reexamine state-court determinations on state-law questions"). The State's argument that the depravity-of-mind instructions comported with federal law amounts to disagreement with the degree of specificity the Nevada Supreme Court requires for its statutory aggravator. The State fails to explain why we would question the Nevada Supreme Court's state law requirement.

The jury was not instructed that it must agree on which of the three underlying theories supported the statutory aggravator, or that, per *Robins*, it must find evidence of mutilation or torture to find depravity of mind. We can see no other clues in the record—such as jury polling—indicating whether the jury unanimously agreed on mutilation. From the jury's check marks next to "depravity" and "mutilation" on the special verdict form pertaining to Wendy's murder, it is impossible to tell whether the jury split their votes between the invalid depravity theory and the valid mutilation theory. We therefore conclude that Smith demonstrated *Stromberg* error. *See Hedgpeth*, 555 U.S. at 58.

In *Valerio v. Crawford*, an en banc panel of our court reviewed a jury's death verdict premised on two statutory aggravators, one unconstitutionally vague and one permissible. 306 F.3d 742, 759 (9th Cir. 2002) (en banc). Our en banc court ruled that "[a] state appellate court cannot 'affirm a [trial] court without a thorough analysis of the role an invalid aggravating factor played in the sentencing process.'" *Id.* (quoting *Stringer v. Black*, 503 U.S. 222, 230

(1992)). The court announced three avenues by which a state appellate court can engage in close appellate scrutiny of an invalid aggravator and affirm imposition of the death penalty. *Id.* First, a state appellate court may affirm by finding the error harmless under the standard set forth in *Chapman v. California*, 386 U.S. 18 (1967). *Valerio*, 306 F.3d at 756. To do so, the state appellate court must conclude, beyond a reasonable doubt, that the same result would have been obtained without relying on the invalid aggravator. *Id.* Here, the State conceded at oral argument before our court, that *Smith II* did not engage in a *Chapman* harmless error analysis.

Valerio's second method for affirming a death verdict where a jury may have relied on an invalid aggravator instruction is to re-weigh the aggravating and mitigating evidence pursuant to *Clemons v. Mississippi*, 494 U.S. 738 (1990). *Valerio*, 306 F.3d at 757. *Clemons* described that a state appellate court may set aside an invalid aggravator and re-weigh the remaining aggravating and mitigating factors to determine whether an invalid instruction was harmless. *Id.* But it is clear the *Smith II* court did not re-weigh aggravating and mitigating evidence because Nev. Rev. Stat. § 200.033(8) was the single aggravating circumstance alleged in Smith's case.

Valerio's third proffered method is a *Walton* analysis, *see Walton v. Arizona*, 497 U.S. 639 (1990), in which a state appellate court "act[s] as a primary factfinder" by applying a corrected instruction to the evidence and determining de novo whether the state's evidence satisfied the aggravator. *Valerio*, 306 F.3d at 757. This option was also unavailable in Smith's case because, as we explained in *Valerio*, a state appellate

court may not undertake a *Walton* analysis if the penalty-phase factfinder was a jury. *Id*. at 758.

The Nevada Supreme Court failed to undertake any of the options explained in *Valerio*, so there is no question that it did not engage in close appellate scrutiny of the invalid depravity instructions used at Smith's second penalty hearing. Instead, the state court relied on its conclusion that the evidence was sufficient to support the mutilation theory. *Smith II*, 953 P.2d at 267–68. But as the court recognized in *Smith I*, 881 P.2d at 655, sufficiency of the evidence is not the issue; Smith's argument is that the jury may not have been unanimous.

Valerio held that the resulting *Stromberg* error is not structural, so we do not assume prejudice. Rather, we assess the effect of the invalid depravity instructions and resulting *Stromberg* error under the harmless error standard set forth in *Brecht v. Abrahamson*, 507 U.S. 619 (1993). *See Hedgpeth*, 555 U.S. at 61–62 (concluding that a *Brecht* harmless error analysis is appropriate where the jury was instructed on alternative theories of guilt and may have relied on an invalid one); *Valerio*, 306 F.3d at 760–61.

Brecht's harmlessness test asks whether we are left with "grave doubt" about whether "the actual instruction had a 'substantial and injurious effect or influence' on the jury's verdict, in comparison to what the verdict would have been if the narrowed instruction had been given." *Valerio*, 306 F.3d at 762; *see also Hedgpeth*, 555 U.S. at 58. As the Nevada Supreme Court stated in *Smith II*, the narrowed construction of depravity of mind based on Nev. Rev. Stat. § 200.033(8) "requir[es] torture, mutilation or other serious and depraved physical abuse beyond the act of killing itself, as a qualifying requirement to an aggravating circumstance

based in part upon depravity of mind." *Smith II*, 953 P.2d at 266 (quoting *Robins*, 798 P.2d at 570). We therefore compare the result obtained with Instructions 10 and 11 against "what the verdict would have been if the [*Robins*] instruction had been given." *Valerio*, 306 F.3d at 762.

The juxtaposition of the evidence pertaining to Kristy's murder and the evidence pertaining to Wendy's murder leads us to conclude that the invalid instruction did not have a substantial and injurious effect on the jury's verdict. The second jury heard the medical examiner's testimony about the extent of both of the murdered step-daughters' wounds. The medical examiner explained that Kristy, age twelve, suffered four wounds—three to the head, and one to the neck—and that there was a laceration on her finger. The medical examiner then moved on to Wendy's much more substantial injuries, and told the jury that Wendy suffered thirty-two blunt-force wounds to her head (including skull fractures), and that the extensive wounds Wendy suffered demonstrated that she fought for her life. The examiner testified that Wendy's wounds appeared to have been inflicted with the claw end of a hammer, and that her left ear was nearly cut in two. The examiner found prominent abrasions on Wendy's neck, and that she had defensive wounds on her hands. Despite these brutal injuries, the actual cause of Wendy's death was strangulation. The medical examiner opined that Smith likely used hammer blows to subdue his victims and then strangled them to death.[2]

---

[2] On appeal, the State argued there was "overwhelming evidence" of mutilation because Wendy was attacked with the claw end of a hammer. The State overlooks that the jury was instructed that, under Nevada law, mutilate "means to cut off or permanently destroy a limb or essential part of the body or to cut off or alter radically so as to make imperfect," and

The numerous blunt-force wounds that fractured Wendy's skull, coupled with the medical examiner's testimony that a large laceration inside her ear almost cut her outer ear in two, do not leave us with grave doubt about whether the jury would have unanimously found mutilation. Photos and the medical examiner's testimony graphically illustrated that the wounds Wendy suffered radically altered essential parts of her body, and we are confident the invalid instruction did not have a substantial and injurious effect on the jury's verdict.

V. Conclusion

Smith persuasively argued that the performance of his second penalty-phase counsel was deficient for failing to investigate mental health mitigation evidence, but he has not shown that he was prejudiced. This claim was defaulted. Separately, we conclude that the *Stromberg* error in Smith's jury instructions was harmless under *Brecht*. We decline to grant a Certificate of Appealability for any of the other claims Smith briefed, and affirm the district court's judgment.

AFFIRMED.

---

that "to find . . . mutilation of a victim you must find that there was . . . mutilation beyond the act of killing itself." In other words, it was the extent of Wendy's injuries that determined whether mutilation applied, not the means used to injure her.

N.R. SMITH, Circuit Judge, concurring:

The district court's order dismissing Joseph Smith's federal habeas petition should be affirmed. The majority got it right in: (1) finding that Smith failed to show he was prejudiced by the lack of an evidentiary hearing, and concluding that the district court did not abuse its discretion by dismissing his *Martinez*[1] claim without holding an evidentiary hearing; (2) certifying Smith's eighth claim, which alleges a violation of the rule set out in *Stromberg v. California*, 283 U.S. 359 (1931), and concluding that the *Stromberg* error in Smith's jury instruction was harmless; and (3) declining to certify Smith's remaining uncertified claims.

The district court's judgment dismissing Smith's ineffective assistance of counsel ("IAC") claim as procedurally barred should also be affirmed. However, I arrive at that conclusion via a different route than the majority. Unlike the majority, I believe Smith's counsel's performance during the second penalty-phase hearing was not deficient under the first prong of *Strickland v. Washington*, 466 U.S. 668 (1984), and therefore find his IAC claim insubstantial. I write separately to address this point.

To establish cause and prejudice to excuse the procedural default of his IAC claim, Smith must show, *inter alia*, that: "(1) the claim of 'ineffective assistance of trial counsel' was a 'substantial' claim; [and] (2) the 'cause' consisted of there being 'no counsel' or only 'ineffective' counsel during the state collateral review proceeding." *Trevino v. Thaler*, 569 U.S. 413, 423 (2013) (quoting *Martinez*, 566 U.S. at 13–18).

[1] *Martinez v. Ryan*, 566 U.S. 1 (2012).

With respect to *Martinez* Step One, Smith must "demonstrate that the underlying ineffective-assistance-of-trial-counsel claim is a substantial one, which is to say that the prisoner must demonstrate that the claim has some merit." *Martinez*, 566 U.S. at 14. To establish the merits of an IAC claim, "[t]he *Strickland* standard requires a showing of both deficient performance and prejudice." *Rodney v. Filson*, 916 F.3d 1254, 1260 (9th Cir. 2019) (citing *Strickland*, 466 U.S. at 687).

A.

Deficient performance under *Strickland* is performance that falls "below an objective standard of reasonableness." 466 U.S. at 688. "In any case presenting an ineffectiveness claim, the performance inquiry must be whether counsel's assistance was reasonable considering *all the circumstances*." *Id.* (emphasis added). Although "[p]revailing norms of practice as reflected in American Bar Association standards" may serve as "guides to determining what is reasonable, . . . they are only guides." *Id.* This is so, because no standards or set of rules "can satisfactorily take account of the variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how best to represent a criminal defendant." *Id.* at 688–89.

Our "scrutiny of counsel's performance must be highly deferential," because "[i]t is all too tempting for a defendant to second-guess counsel's assistance after . . . [an] adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable." *Id.* at 689. Thus, "[a] fair assessment of attorney performance requires that every effort be made to

eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." *Id.* Because of the difficulty in conducting this evaluation, we "must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Id.*; *see Cullen v. Pinholster*, 563 U.S. 170, 196 (2011) (noting that "*Strickland* specifically commands that a court 'must indulge [the] strong presumption' that counsel 'made all significant decisions in the exercise of reasonable professional judgment'" (alteration in original) (quoting *Strickland*, 466 U.S. at 689–90)).

Smith argues, and the majority agrees, that Smith's counsel's performance during the second penalty-phase hearing was deficient, because counsel failed to investigate Smith's mental health and retain an expert to opine thereon. Opinion at 26–29. I disagree.

The majority correctly notes that counsel's argument at the April 1996 penalty hearing was predicated on character evidence similar to that presented at the first trial, and counsel did not arrange or request a mental health evaluation of Smith. *Id.* at 25. However, the reason no mental health evaluation was arranged or requested is because Smith refused to cooperate with, or submit to, any mental health evaluation. Indeed, Donald York Evans, Smith's first-chair counsel at the second penalty hearing, stated:

> When I first was appointed to represent Joe, I wanted to do a complete psychological work-up on him. I discussed the idea with Joe, and he *refused* to submit to *any* testing. He insisted he was not crazy. Joe would have

> none of it, and so I did not press the issue. There was *no value in getting a mental health expert if Joe was not going to participate.* I wasn't confident that I would get anything I could use from an evaluation anyway. I suspected he had schizoid tendencies and a high IQ but that was just my guess and *he wouldn't participate in an evaluation*.

In *Strickland*, the Supreme Court recognized that "[t]he reasonableness of counsel's actions may be *determined or substantially influenced by the defendant's own statements or actions*. Counsel's actions are usually based, quite properly, on informed strategic choices made by the defendant and on information supplied by the defendant." 466 U.S. at 691 (emphasis added).

In *Campbell v. Kincheloe*, we applied the above-stated principle in a habeas action brought by an inmate convicted of three counts of aggravated murder and sentenced to death. 829 F.2d 1453, 1456–57, 1463 (9th Cir. 1987). There, the defendant argued that his attorneys' performance was deficient, because they "fail[ed] to interview his family and childhood friends, classmates, and teachers." *Id.* at 1463. However, the defendant had "specifically requested his attorneys not to contact members of his family." *Id.* Drawing on the Supreme Court's statement that "[t]he reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions," *Strickland*, 466 U.S. at 691, we held that trial counsels' performance was not deficient, because they abided by the defendant's wishes and the defendant's wishes were consistent with "the professional judgment of his attorneys that such interviews were unnecessary and would not have

made any difference in the context of the case." *Campbell*, 829 F.2d at 1463–64.

Relying on the principle discussed in *Strickland* and *Campbell*, other courts have declined to find counsel's performance deficient where a defendant refuses to cooperate with a certain line of investigation and subsequently alleges error based on the attorney's incomplete investigation into the frustrated line of inquiry. *See, e.g.*, *Coleman v. Mitchell*, 244 F.3d 533, 545–56 (6th Cir. 2001) (finding counsel's performance not deficient where, *inter alia*, the defendant "did not cooperate with counsel . . . and refused to submit to further psychological or psychiatric testing"); *Owens v. Guida*, 549 F.3d 399, 405–06, 411–12 (6th Cir. 2008) (finding counsel's performance not deficient where "[c]ounsel could have reasoned that additional investigation would be of little use because [the defendant's] own actions [(e.g., refusing to cooperate with mental health examiners)] shut off avenues for mitigation"); *Johnston v. Singletary*, 162 F.3d 630, 642 (11th Cir. 1998) (per curiam) (finding counsels' performance not deficient where, "despite his lawyers' efforts to have [the defendant] evaluated by a . . . mental health expert[, the defendant] was steadfast in his resistance to meeting with this expert"); *Thompson v. Wainwright*, 784 F.2d 1103, 1106 (11th Cir. 1986) (recognizing that a defendant "cannot blame the lack of additional psychiatric examinations on incompetent counsel" where the defendant refused to "cooperate" with the previous psychiatrist).

The reasonableness of Smith's penalty-phase counsel's decision not to retain a mental health expert is "substantially influenced by [Smith's] own statements [and] actions."

Strickland, 466 U.S. at 691.[2] Evans discussed the possibility of obtaining a psychological evaluation of Smith, but Smith refused to submit to any such examination and adamantly insisted that he had no mental health issues. Smith's actions—i.e., his refusal to cooperate with, and submit to, any mental health evaluation—provided "counsel reason to believe that pursuing [a mental health] investigation[ ] would be fruitless," because any expert report prepared without Smith's participation would, in counsel's own words, be of little or "no value." *See Strickland*, 466 U.S. at 691; *see also Johnston*, 162 F.3d at 642 ("[W]hen the strategy an attorney might otherwise pursue is virtually foreclosed by his client's unwillingness to facilitate that strategic option, it is difficult for [a] court, in a collateral proceeding, to characterize as 'unreasonable' counsel's decision to abandon that otherwise preferable strategy."). Smith cannot now complain that his counsel acted unreasonably by failing to investigate and present mental health evidence at his sentencing when it was

---

[2] The majority argues that I conflate *Strickland*'s prongs one and two, but I consider Smith's "own statements [and] actions" in determining whether Smith's counsel's performance was deficient. *Strickland*, 466 U.S. at 691. Indeed, the majority contends that, "[a]t step one, we consider whether Smith's lawyers' performance fell below an objectively reasonable standard, and that question is largely a function of the choices that were available to counsel." Opinion at 28.

Contrary to the majority's argument, that is precisely what I have done here. Put simply, Smith's refusal to cooperate with, and submit to, any mental health evaluation presented counsel with two choices. Counsel could either retain a mental health expert to prepare an evaluation based entirely on the record—which counsel recognized would be of little or no value—or, considering Smith's refusal, counsel could reasonably choose not to retain a mental health expert to render a "compromised" opinion that would "necessarily [be] vulnerable to cross examination." Opinion at 30.

Smith's own actions that effectively rendered any such evidence of "no value." *See Strickland*, 466 U.S. at 691; *Johnston*, 162 F.3d at 642.

Both Smith and the majority argue that an expert could have prepared a report without Smith's participation based solely on the expert's review of the record—a report similar to that prepared by Dr. Lundberg-Love in 2007. But, as discussed, Smith's counsel recognized that a report prepared without Smith's participation and based solely on a review of the record would be of "no value." The majority apparently reaches the same conclusion, stating that "any expert's opinion [prepared without Smith's cooperation] would have been *compromised* and *necessarily vulnerable to cross examination*." Opinion at 30 (emphasis added). Thus, counsel exercised reasonable professional judgment in declining to retain an expert to render a compromised opinion that would have been of little or no value. *See Owens*, 549 F.3d at 412 (finding counsel's performance not deficient where "[c]ounsel could have reasoned that additional investigation would be of little use because [the defendant's] own actions [(e.g., refusing to cooperate with mental health examiners)] shut off avenues for mitigation"); *cf. Jeffries v. Blodgett*, 5 F.3d 1180, 1198 (9th Cir. 1993) (recognizing that where "a defendant preempts his attorney's strategy" with his or her actions or statements, "no claim for ineffectiveness can be made" (quoting *Mitchell v. Kemp*, 762 F.2d 886, 889 (11th Cir. 1985))).

Moreover, even assuming Smith would have participated in an evaluation, counsel was not "confident that [he] would get anything [he] could use from [the] evaluation." This judgment is reasonable in light of the 1992 competency report, which was based on a two-day evaluation of Smith

and several psychometric tests and found that, despite a potential mixed personality disorder, Smith was "an intelligent individual without any serious cognitive or affective psychological disorder[s]" and exhibited no "acute or Axis I mental disorders." The report concluded that Smith was competent to stand trial and "competent at the time of the alleged offense."

Smith and the majority also rely on certain American Bar Association ("ABA") standards to show counsel acted unreasonably. Those standards require counsel to investigate "all reasonably available mitigating evidence," ABA Guidelines 11.4.1(C) (1989), including any evidence of a defendant's mental illness, *see id.* at 11.4.1(D)(2)(C). However, although the ABA standards may "guide[]" the inquiry into whether Smith's counsel's performance was reasonable, "*they are only guides*." *Strickland*, 466 U.S. at 688 (emphasis added). As noted above, "[t]he reasonableness of counsel's actions may be *determined or substantially influenced by the defendant's own statements or actions*." *Id.* at 691 (emphasis added). That is precisely what happened here. Smith's actions "substantially influenced" the reasonableness of his counsel's decision not to conduct a more in-depth investigation into Smith's mental health and mitigated any guidance gleaned from the ABA standards. *See id.*; *see also Jeffries*, 5 F.3d at 1197–98 (finding counsel's performance not deficient where counsel acquiesced in the defendant's decision "not to present any witnesses in mitigation," which contravened ABA standards).

Considering "all of the circumstances" and indulging "a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance," *Strickland*, 466 U.S. at 689, 691, Smith's second penalty-phase counsel's

judgment not to engage an expert to opine on Smith's mental health is reasonable in light of Smith's refusal to cooperate with any mental health expert. *See Owens*, 549 F.3d at 406, 411–12 (finding counsel's performance not deficient where "[c]ounsel could have reasoned that additional investigation would be of little use because [the defendant's] own actions [(e.g., refusing to cooperate with mental health examiners)] shut off avenues for mitigation"); *Johnston*, 162 F.3d 642 (finding counsel's performance not deficient where, "despite his lawyers' efforts to have [the defendant] evaluated by a . . . mental health expert[, the defendant] was steadfast in his resistance to meeting with this expert").

Therefore, Smith's IAC claim is insubstantial, because it lacks merit. *See Martinez*, 566 U.S. at 14. Because Smith cannot establish cause and prejudice to excuse his procedural default under *Martinez*, the district court did not err in holding that Smith's IAC claim was procedurally defaulted.

B.

Because Smith's second penalty-phase counsel's performance was not deficient, I would not reach the prejudice prong of *Strickland*. However, assuming that counsel's performance was deficient (as does the majority), Smith failed to show "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694.

United States Court of Appeals for the Ninth Circuit

Office of the Clerk
95 Seventh Street
San Francisco, CA 94103

Information Regarding Judgment and Post-Judgment Proceedings

Judgment

- This Court has filed and entered the attached judgment in your case. Fed. R. App. P. 36. Please note the filed date on the attached decision because all of the dates described below run from that date, not from the date you receive this notice.

Mandate (Fed. R. App. P. 41; 9th Cir. R. 41-1 & -2)

- The mandate will issue 7 days after the expiration of the time for filing a petition for rehearing or 7 days from the denial of a petition for rehearing, unless the Court directs otherwise. To file a motion to stay the mandate, file it electronically via the appellate ECF system or, if you are a pro se litigant or an attorney with an exemption from using appellate ECF, file one original motion on paper.

Petition for Panel Rehearing (Fed. R. App. P. 40; 9th Cir. R. 40-1)
Petition for Rehearing En Banc (Fed. R. App. P. 35; 9th Cir. R. 35-1 to -3)

(1) A. Purpose (Panel Rehearing):

- A party should seek panel rehearing only if one or more of the following grounds exist:
  - ► A material point of fact or law was overlooked in the decision;
  - ► A change in the law occurred after the case was submitted which appears to have been overlooked by the panel; or
  - ► An apparent conflict with another decision of the Court was not addressed in the opinion.
- Do not file a petition for panel rehearing merely to reargue the case.

B. Purpose (Rehearing En Banc)

- A party should seek en banc rehearing only if one or more of the following grounds exist:

- ► Consideration by the full Court is necessary to secure or maintain uniformity of the Court's decisions; or
- ► The proceeding involves a question of exceptional importance; or
- ► The opinion directly conflicts with an existing opinion by another court of appeals or the Supreme Court and substantially affects a rule of national application in which there is an overriding need for national uniformity.

(2) Deadlines for Filing:

- A petition for rehearing may be filed within 14 days after entry of judgment. Fed. R. App. P. 40(a)(1).
- If the United States or an agency or officer thereof is a party in a civil case, the time for filing a petition for rehearing is 45 days after entry of judgment. Fed. R. App. P. 40(a)(1).
- If the mandate has issued, the petition for rehearing should be accompanied by a motion to recall the mandate.
- *See* Advisory Note to 9th Cir. R. 40-1 (petitions must be received on the due date).
- An order to publish a previously unpublished memorandum disposition extends the time to file a petition for rehearing to 14 days after the date of the order of publication or, in all civil cases in which the United States or an agency or officer thereof is a party, 45 days after the date of the order of publication. 9th Cir. R. 40-2.

(3) Statement of Counsel

- A petition should contain an introduction stating that, in counsel's judgment, one or more of the situations described in the "purpose" section above exist. The points to be raised must be stated clearly.

(4) Form & Number of Copies (9th Cir. R. 40-1; Fed. R. App. P. 32(c)(2))

- The petition shall not exceed 15 pages unless it complies with the alternative length limitations of 4,200 words or 390 lines of text.
- The petition must be accompanied by a copy of the panel's decision being challenged.
- An answer, when ordered by the Court, shall comply with the same length limitations as the petition.
- If a pro se litigant elects to file a form brief pursuant to Circuit Rule 28-1, a petition for panel rehearing or for rehearing en banc need not comply with Fed. R. App. P. 32.

- The petition or answer must be accompanied by a Certificate of Compliance found at Form 11, available on our website at www.ca9.uscourts.gov under *Forms.*
- You may file a petition electronically via the appellate ECF system. No paper copies are required unless the Court orders otherwise. If you are a pro se litigant or an attorney exempted from using the appellate ECF system, file one original petition on paper. No additional paper copies are required unless the Court orders otherwise.

Bill of Costs (Fed. R. App. P. 39, 9th Cir. R. 39-1)

- The Bill of Costs must be filed within 14 days after entry of judgment.
- See Form 10 for additional information, available on our website at www.ca9.uscourts.gov under *Forms.*

Attorneys Fees

- Ninth Circuit Rule 39-1 describes the content and due dates for attorneys fees applications.
- All relevant forms are available on our website at www.ca9.uscourts.gov under *Forms* or by telephoning (415) 355-7806.

Petition for a Writ of Certiorari

- Please refer to the Rules of the United States Supreme Court at www.supremecourt.gov

Counsel Listing in Published Opinions

- Please check counsel listing on the attached decision.
- If there are any errors in a published opinion, please send a letter **in writing within 10 days** to:
  - ► Thomson Reuters; 610 Opperman Drive; PO Box 64526; Eagan, MN 55123 (Attn: Jean Green, Senior Publications Coordinator);
  - ► and electronically file a copy of the letter via the appellate ECF system by using "File Correspondence to Court," or if you are an attorney exempted from using the appellate ECF system, mail the Court one copy of the letter.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Form 10. Bill of Costs

Instructions for this form: http://www.ca9.uscourts.gov/forms/form10instructions.pdf

9th Cir. Case Number(s)

Case Name

The Clerk is requested to award costs to (*party name(s)*):

I swear under penalty of perjury that the copies for which costs are requested were actually and necessarily produced, and that the requested costs were actually expended.

Signature **Date**

(use "s/[typed name]" *to sign electronically-filed documents)*

COST TAXABLE	**REQUESTED** *(each column must be completed)*			
DOCUMENTS / FEE PAID	No. of Copies	Pages per Copy	Cost per Page	TOTAL COST
Excerpts of Record*			$	$
Principal Brief(s) *(Opening Brief; Answering Brief; 1st, 2nd , and/or 3rd Brief on Cross-Appeal; Intervenor Brief)*			$	$
Reply Brief / Cross-Appeal Reply Brief			$	$
Supplemental Brief(s)			$	$
Petition for Review Docket Fee / Petition for Writ of Mandamus Docket Fee				$
			TOTAL:	$

Example: *Calculate 4 copies of 3 volumes of excerpts of record that total 500 pages [Vol. 1 (10 pgs.) + Vol. 2 (250 pgs.) + Vol. 3 (240 pgs.)] as:*
No. of Copies: 4; Pages per Copy: 500; Cost per Page: $.10 (or actual cost IF less than $.10);
TOTAL: 4 x 500 x $.10 = $200.

Feedback or questions about this form? Email us at forms@ca9.uscourts.gov

APPENDIX C

Order denying reconsideration, *Smith v. Baker, et al*.,
United States District Court of Nevada, Case No. 2:07-
cv-00318-JCM-CWH (Nov. 5, 2014)

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

JOSEPH WELDON SMITH,

Petitioner,

vs.

RENEE BAKER, *et al.*,

Respondents.

2:07-CV-00318-JCM-CWH

ORDER

Petitioner Smith has filed a motion seeking relief from the order and judgment denying his petition for writ of habeas corpus. ECF No. 198. Relying on Fed. R. Civ. P. 59(e), he argues that this court should reconsider: (1) its ruling that alleged ineffective assistance of post-conviction counsel cannot overcome the default of his claims of ineffective assistance of appellate counsel; (2) its denial of Claims Eight, Ten, and Eleven on the merits; (3) its ruling that certain claims were unexhausted on direct appeal pursuant to Nevada's mandatory review statute; (4) its dismissal of Claim Twenty-five; (5) its treatment of his claims of ineffective assistance of trial counsel under *Martinez v. Ryan*, 132 S. Ct. 1309 (2012); and (6) its denial of claims regarding the state court's alleged lack of jurisdiction (Claims One and Two). In the alternative, Smith asks the court to grant a certificate of appealability for the foregoing issues.

I. *Rule 59(e) standard*.

Under Federal Rule of Civil Procedure 59(e), a party may move to have the court amend its

1 judgment within twenty-eight days after entry of the judgment. "A motion for reconsideration under
2 Rule 59(e) 'should not be granted, absent highly unusual circumstances, unless the district court is
3 presented with newly discovered evidence, committed *clear error*, or if there is an intervening change
4 in the controlling law.'" *McDowell v. Calderon*, 197 F.3d 1253, 1255 (9th Cir. 1999) (quoting *389*
5 *Orange St. Partners v. Arnold*, 179 F.3d 656, 665 (9th Cir.1999) (emphasis added)). "Since specific
6 grounds for a motion to amend or alter are not listed in the rule, the district court enjoys considerable
7 discretion in granting or denying the motion." *Id*. at 1255, n.1 (quoting 11 Charles Alan Wright et al.,
8 Federal Practice and Procedure § 2810.1 (2d ed.1995)). Even so, amending a judgment after its entry
9 remains "an extraordinary remedy which should be used sparingly." *Id*.

10 II. *Discussion*.

11 1. Ineffective assistance of appellate counsel claims

12 Smith argues that this court erred when it concluded that alleged ineffective assistance of post-
13 conviction counsel cannot serve as cause to excuse the default of claims of ineffective assistance of
14 appellate counsel. He points to the decision in *Ha Van Nguyen v. Curry*, 736 F.3d 1287 (9th Cir.
15 2013), which was issued subsequent to this court's procedural default ruling. In that case, the Ninth
16 Circuit expanded the holding of *Martinez v. Ryan*, 132 S.Ct. 1309 (2012), to include claims of
17 ineffective assistance of appellate counsel: "We therefore conclude that the *Martinez* standard for
18 'cause' applies to all Sixth Amendment ineffective-assistance claims, *both trial and appellate*, that
19 have been procedurally defaulted by ineffective counsel in the initial-review state-court collateral
20 proceeding." *Nguyen*, 736 F.3d at 1295 (emphasis added).

21 Smith contends that, in light of *Nguyen*, this court must reconsider whether he can show cause
22 and prejudice to excuse the default of certain ineffective assistance of appellate counsel claims –
23 specifically, claims based on counsel's failure to raise on direct appeal the claims asserted in his
24 federal petition as Claims Twelve and Thirteen, Claim Twenty, Claims Sixteen and Twenty-three, and
25 Claim Twenty-seven. For the following reasons, this court does not agree.

26

To begin with, Smith did not allege in his federal petition that appellate counsel was ineffective for failing to raise Claims Twelve and Thirteen. ECF No. 40, p. 120-21. He cannot claim that this court should excuse the procedural default of a claim he did not include in his federal petition.

In Claim Twenty, Smith alleged that his constitutional rights were violated as a result of the trial court's failure to instruct the jury that it could not consider "other matter" evidence under Nev. Rev. Stat. § 175.552(3) before it first found Smith eligible for the death penalty – i.e., before it found the existence of an aggravating circumstance beyond a reasonable doubt and that the aggravating circumstance was not outweighed by mitigating evidence. According to Smith, the decision in *Hollaway v. State*, 6 P.3d 987 (Nev. 2000), demonstrates a reasonable probability that his direct appeal would have succeeded if his appellate counsel had raised the issue.

The facts in *Hollaway*, however, bear little resemblance to those in this case. The aggravating circumstance in *Hollaway* was the robbery of a gas station attendant at knife point that resulted in a conviction for second-degree armed robbery and false imprisonment (*Hollaway*, 6 P.3d at 990), whereas the aggravating circumstance in Smith's case was the mutilation of his daughter, with evidence establishing that he struck her in the head with a claw hammer at least 16 times prior to strangling her (ECF No. 109-4, pp. 21-30, 39-40 8-10, 37-38[1]). Moreover, the Nevada Supreme Court's reversal in *Hollaway* was based, in part, on the likely prejudice that resulted from "the unprovoked electric shocking of a capital defendant at his penalty hearing." *Hollaway v. State*, 6 P.3d at 997. The other case Smith relies upon – *Butler v. State*, 102 P.3d 71 (Nev. 2004) – is also distinguishable inasmuch as the Nevada Supreme Court, in concluding that there was a strong likelihood that Butler was prejudiced by a misleading "other matter" instruction, "stress[ed] that Butler presented compelling evidence of extreme neglect and abuse in his childhood, which the jurors

---

[1] Citations to page numbers for electronically filed documents are based on the CM/ECF pagination.

obviously recognized in finding several mitigating circumstances, while the State alleged and the jury found only one aggravating circumstance." *Butler*, 102 P.3d at 83.

Claim Sixteen and Twenty-three consist of allegations that the trial court's jury instructions on reasonable doubt (Claim Sixteen) and "equal and exact justice" (Claim Twenty-three) impermissibly lowered the State's burden of proof. Appellate counsel was not ineffective for not raising these claims because the instructions have been routinely upheld by state and federal courts. *Leonard v. State*, 969 P.2d 288, 296 (Nev. 1998) (upholding instruction on equal and exact justice); *Buchanan v. State*, 69 P.3d 694, 708 (Nev. 2003) ("This court has repeatedly reaffirmed the constitutionality of Nevada's reasonable doubt instruction."); *Ramirez v. Hatcher*, 136 F.3d 1209, 1215 (9th Cir. 1998) (holding that the questionable language in Nevada's reasonable doubt instruction "did not render the charge unconstitutional"). In like fashion, there is not a reasonable probability that the Nevada Supreme Court would have found merit in Smith's claim that appellate counsel was ineffective for failing to challenge his conviction and sentence because his proceedings were conducted before elected judges (i.e., Claim Twenty-seven). *See Nika v. Baker*, 59776, 2014 WL 3784142, *2 (Nev. July 30, 2014).

In light of the foregoing, this court did not error by not excusing the procedural default of Smith's ineffective assistance of appellate counsel claims.

2. Denial of Claims Eight, Ten, and Eleven

Smith argues that this court committed errors of law or made erroneous factual findings in the process of denying Claims Eight, Ten, and Eleven on the merits.[2] For the most part, however, he merely repeats or elaborates upon his prior arguments with respect to these claims. He has not demonstrated the existence of *clear error*. *See U.S. v. Westlands Water Dist*., 134 F.Supp.2d 1111, 1131 (E.D.Cal. 2001) (explaining that a party seeking reconsideration must do more than disagree

---

[2] He also argues that the court made erroneous factual findings in relation to its analysis of Claim Four under *Martinez*. The dismissal of Claim Four is discussed below.

with the court's decision or recapitulate that which the court has previously considered). Thus, Smith is not entitled to Rule 59(e) relief with respect to the court's denial of the claims.

3. Exhaustion pursuant to Nevada's mandatory review statute

Smith challenges this court's analysis as to whether some of his claims were exhausted on direct appeal by virtue of the Nevada Supreme Court's mandatory review of death sentences under Nev. Rev. Stat. § 177.055. Nev. Rev. Stat. § 177.055 requires the state supreme court to consider whether the evidence supported the finding of the aggravating circumstances; whether the sentence was imposed under the influence of passion, prejudice, or any other arbitrary factor; and whether the death sentence was excessive. Relying on *Comer v. Schriro*, 463 F.3d 934, 954-56 (9th Cir. 2006), and citing to *Sechrest v.Ignacio*, 943 F.Supp. 1245, 1250 (D.Nev. 1996), this court determined that Smith claims were not exhausted on direct appeal because (1) neither the statute itself nor Nevada case law obligates the Nevada Supreme Court to apply federal law standards in conducting its review under Nev. Rev. Stat. § 177.055 and (2) Smith had not shown that any of the claims at issue are "clearly encompassed" within the scope of Nev. Rev. Stat. § 177.055 and "readily apparent" in the record reviewed by the Nevada Supreme Court. ECF No. 162, p. 14.

According to Smith, the court's analysis was flawed because it does not offer "any rational reason why Arizona's mandatory review scheme serves to exhaust federal claims under *Comer*, and Idaho's mandatory review scheme serves to exhaust federal claims under *Beam v. Paskett*, 3 F.3d 1301, 1305-07 (9th Cir. 1993), but Nevada's mandatory review scheme, which is nearly identical to those in Arizona and Idaho, does not serve to exhaust federal claims." ECF No. 182, p. 5. While this argument addresses the first point above, Smith still has not demonstrated that the particular claims at issue[3] were "clearly encompassed" within the scope of Nevada's mandatory review provision and "readily apparent" in the record before the Nevada Supreme Court.

---

[3] Claims Eight, Nine, Ten, Fourteen, Sixteen, Twenty, Twenty-three, and Twenty-eight are the claims Smith identifies as the ones exhausted by the Nevada Supreme Court's mandatory review. ECF No. 141, p. 21.

In this regard, this court notes that it addressed three of the claims (Claims Eight, Ten, and Fourteen) on the merits, in any case. Of the remaining claims, a few are arguably within the scope of mandatory review, but this court is not convinced that any of them were obvious from the state court record. *Cf. Comer*, 463 F.3d at 955-56 (finding that claims based on petitioner's compromised physical and mental condition during sentencing and his absence from a competency hearing were readily apparent from transcripts and videotape before the Arizona Supreme Court). As such, the court did not commit clear error with respect to this issue.

4. Dismissal of Claim Twenty-five

Smith contends that this court should reconsider its decision to dismiss Claim Twenty-five, a claim in which Smith alleged that Nevada's death sentence by means of lethal injection violates the Eighth Amendment. The dismissal of the claim was based on a finding that it was barred by the doctrine of procedural default because Smith had not presented it to the state court until his second state post-conviction proceeding, in which the Nevada Supreme Court dismissed it as untimely-filed under Nevada law. ECF No.162, p. 12. This court rejected Smith's arguments that the procedural default should be excused because of the State's alleged suppression of execution protocols and the absence of a state forum to litigate the claim. *Id.*, p. 24.

As to the latter point, the court cited *Roberts v. Arave*, 847 F.2d 528, 530 (9th Cir. 1988), for the proposition that the apparent futility of presenting a claim to the state court does not constitute cause for procedural default. Smith argues that his was error because *Roberts* is not on point and the Nevada Supreme Court held, in *McConnell v. State*, 212 P.3d 307, 310-11 & n.5 (Nev. 2009), that challenges to the Nevada's lethal injection protocol and procedure are not cognizable in a state court. The correct approach, according to Smith, is that found in *Harris v. Duckworth*, 909 F.2d 1057 (7th Cir. 1990), where the Seventh Circuit held that a petitioner was excused from presenting to the state courts a federal constitutional claim that the Indiana Supreme Court "definitively decid[ed]" it would not entertain in any case. *Harris*, 909 F.2d.at 1058-59.

As an initial matter, the issue as to whether a claim challenging the constitutionality of Nevada's lethal injection procedures was cognizable in a state post-conviction habeas petition was far from "definitively decided" at the time Smith defaulted the claim. *See*, *e.g.*, *State v. Haberstroh*, 69 P.3d 676, 686 (Nev. 2003) (rejecting petitioner's claim because he failed "to provide any facts demonstrating that pain inflicted during lethal injection is unnecessary or gratuitous"). Even if it was not procedurally defaulted in this court, however, the claim would not, for the reasons that follow, provide a basis for granting relief in this proceeding.

To the extent that it presents a general challenge to lethal injection as a method of execution, Claim Twenty-five is meritless in light of *Baze v. Rees*, 553 U.S. 35 (2008). In *Baze*, the Supreme Court, on an appeal from a judgment in a civil rights action, ruled Kentucky's lethal injection protocol to be constitutional. *Baze*, 553 U.S. at 62-63. The *Baze* holding essentially forecloses any argument that lethal injection, no matter how administered, is necessarily unconstitutional. It also demonstrates that lethal injection can be administered in a manner that does not constitute cruel and unusual punishment in violation of the Eighth Amendment.

To the extent that Smith challenges the specific protocol employed by the State of Nevada, such a challenge is not cognizable in this federal habeas corpus action. In *Nelson v. Campbell*, 541 U.S. 637 (2004), a state prisoner sentenced to death filed a civil rights action, under 42 U.S.C. § 1983, alleging that the state's proposed use of a certain procedure, not mandated by state law, to access his veins during a lethal injection would constitute cruel and unusual punishment. *Nelson*, 541 U.S. at 641. The Supreme Court reversed the lower courts' conclusion that the claim sounded in habeas corpus and could not be brought as a section 1983 action. The Supreme Court ruled that section 1983 was an appropriate vehicle for the prisoner to challenge the particular lethal-injection procedure prescribed by state officials. *Nelson*, 541 U.S. at 645. The Court stated that the prisoner's suit challenging "a particular means of effectuating a sentence of death does not directly call into question the 'fact' or 'validity' of the sentence itself [because by altering the lethal-injection procedure] the

State can go forward with the sentence." *Id.* at 644.

In *Hill v. McDonough*, 547 U.S. 573 (2006), the Court reaffirmed the principles articulated in *Nelson*, ruling that an as-applied challenge to lethal injection was properly brought by means of a section 1983 action. *Hill* 547 U.S. at 580-83. Both *Nelson* and *Hill* suggest that a section 1983 claim is the more appropriate vehicle for an as-applied challenge to a method of execution. *See also Beardslee v. Woodford*, 395 F.3d 1064, 1068-69 (9th Cir. 2005) (holding that claim that California's lethal injection protocol violates the Eighth Amendment "is more properly considered as a 'conditions of confinement' challenge, which is cognizable under § 1983, than as a challenge that would implicate the legality of his sentence and thus be appropriate for federal habeas review.").

Because an as-applied challenge to a method of execution is more akin to a suit challenging the conditions of custody rather than the constitutionality of the petitioner's custody or sentence, it must be brought as a civil rights action under 42 U.S.C. § 1983. Accordingly, Claim Twenty-five, to the extent that it challenges Nevada's specific execution procedures, is subject to dismissal as not cognizable in this federal habeas corpus action. Smith is not entitled to Rule 59(e) relief with respect to the court's dismissal of the claim.

5. Treatment of ineffective assistance of trial counsel claims under *Martinez*

In its decision on respondents' motion to dismiss, this court rejected Smith's arguments that *Martinez* provided cause and prejudice to overcome the procedural default of several of his claims. ECF No. 162, p. 17-24. Smith argues that this court's *Martinez* analysis was flawed because the court did not adhere to the then-recent holding in *Detrich v. Ryan*, 740 F.3d 1237 (9th Cir. 2013), as to showing necessary to meet the substantiality requirement for defaulted ineffective assistance of trial counsel claims.[4]

In *Trevino v. Thaler*, 133 S.Ct. 1911 (2013), the United States Supreme Court described the

---

[4] The claims for which Smith seeks reconsideration on this ground are Claims Four, Five, Nine, Fourteen, and Eighteen.

Martinez test as consisting of four requirements:

> We consequently read Coleman as containing an exception, allowing a federal habeas court to find "cause," thereby excusing a defendant's procedural default, where (1) the claim of "ineffective assistance of trial counsel was a "substantial" claim; (2) the "cause" consisted of there being "no counsel" or only "ineffective" counsel during the state collateral review proceeding; (3) the state collateral review proceeding was the "initial" review proceeding in respect to the "ineffective-assistance-of-trial-counsel claim;" and (4) state law requires that an "ineffective assistance of trial counsel [claim] . . . be raised in an initial-review collateral proceeding."

Trevino, 133 S.Ct. at 1918 (citing and quoting *Martinez*, 132 S.Ct. at 1318–19, 1320–21). The court of appeals in *Detrich* noted that, for a claim of ineffective assistance of trial counsel to be "substantial," the petitioner must only to show that the merit of the claim is debatable among reasonable jurists. *Detrich*, 740 F.3d at 1245 (noting that the *Martinez* court cited to *Miller–El v. Cockrell*, 537 U.S. 322 (2003), in discussing substantiality). A plurality of the court sitting *en banc* also held that "[a] prisoner need not show actual prejudice resulting from his PCR counsel's deficient performance, over and above his required showing that the trial-counsel IAC claim be 'substantial' under the first *Martinez* requirement." *Id*. at 1245-46.

As to the latter holding, however, the court in *Clabourne v. Ryan*, 745 F.3d 362 (9th Cir. 2014), noted that a majority of the *Detrich* panel rejected that view and concluded instead that, to demonstrate cause, "the petitioner must show that his post-conviction relief counsel was ineffective under *Strickland* . . . ." *Clabourne*, 745 F.3d at 376; *see also Sexton v. Cozner*, 679 F.3d 1150, 1157 (9th Cir. 2012). That is, the petitioner must "establish that both (a) post-conviction counsel's performance was deficient, and (b) there was a reasonable probability that, absent the deficient performance, the result of the post-conviction proceedings would have been different." *Id*. at 377.

This was the exact standard that this court employed in its *Martinez* analysis of Smith's defaulted ineffective assistance of trial counsel claims. See ECF No. 162, p. 18. For all of those claims except for Claim Eighteen, the court determined that Smith could not establish cause and, therefore, it did not address the prejudice prong (i.e., the substantiality of the underlying trial IAC

claim) of the *Martinez* test. With respect to Claim Eighteen, the court stands by its prior determination that the claim is wholly without merit – i.e., insubstantial. Accordingly, Smith is not entitled to Rule 59(e) relief with respect to the court's treatment of his ineffective assistance of trial counsel claims under *Martinez*.

6. Claims premised on the state court's alleged lack of jurisdiction

Claims One and Two of Smith's petition alleged that his constitutional rights were violated because the Nevada courts lacked jurisdiction over the criminal proceeding that resulted in his convictions and sentences. This court denied the claims because the determination of whether a state court is vested with jurisdiction under state law is a function of the state courts, not the federal judiciary, and because merely alleging a due process violation does not transform a state law issue into a federal one. ECF No. 175, p. 10.

Smith argues that this court neglected to address whether the state court made an unreasonable determination of the facts for the purposes of 28 U.S.C. § 2254(d)(2) – specifically, the state court finding that the absence of a file stamp on his complaint did not mean that it was not properly filed before the issuance of the arrest warrant and the beginning of the preliminary hearing. The court did not reach that issue, however, because it was not relevant to its analysis of the two claims. A determination that a state court adjudication is based on an unreasonable determination of the facts under § 2254(d)(2) means only that the federal habeas court is not required to give deference to that adjudication. Because, the court denied the claims *de novo*, it did not delve into the question of deference under § 2254(d). *See Berghuis v. Thompkins*, 560 U.S. 370, 390 (2010) ("Courts can . . . deny writs of habeas corpus under § 2254 by engaging in *de novo* review when it is unclear whether AEDPA deference applies, because a habeas petitioner will not be entitled to a writ of habeas corpus if his or her claim is rejected on *de novo* review.").

Smith also claims that, in denying Claims One and Two, this court failed to recognize "the importance of subject matter jurisdiction as one of the oldest and most sacred purposes of the Great

Writ." ECF No. 177, p. 40. He misses the point, however. This court did not suggest that a judgment rendered by a court lacking subject matter jurisdiction can nonetheless be valid. Rather, the court concluded that the question whether the state court possessed subject matter jurisdiction in this case was a matter of state law beyond the province of the federal habeas court. The following excerpt from an Eighth Circuit case is instructive:

> The district court stated that "[t]his Court can think of no greater denial of due process or of a greater miscarriage of justice than to be sentenced to prison for a term of four years by a court which has no jurisdiction." To reach the question of denial of due process or miscarriage of justice, however, the court must first determine that the sentencing court has no jurisdiction. This is not, however, a determination for the federal courts when the question of jurisdiction is one of valid state law only.
>
> Jurisdiction is no exception to the general rule that federal courts will not engage in collateral review of state court decisions based on state law: "The adequacy of an information is primarily a question of state law and we are bound by a state court's conclusion respecting jurisdiction. . . . This determination of jurisdiction is binding on this [federal] court." *Chandler v. Armontrout*, 940 F.2d 363, 366 (8th Cir. 1991); *see Johnson v. Trickey*, 882 F.2d 316, 320 (8th Cir. 1989) (adequacy of information is question of state law binding on federal courts). The Second Circuit has directly addressed the question of federal review of state court jurisdiction based on state law, denying a habeas petition brought on the claim that a New York statute deprived the state trial court of jurisdiction. *Roche v. Scully*, 739 F.2d 739, 741 (2nd Cir. 1984). The court stated that "'no federal court to our knowledge has ever granted a writ where a state court's asserted lack of jurisdiction resulted solely from the provisions of state law.'" *Id*. at 741-42 (quoting *United States v. Mancusi*, 415 F.2d 205, 209 (2nd Cir. 1969)).
>
> The question of whether the Missouri courts had jurisdiction to sentence Poe was one solely of state law and is therefore not properly before this court. . . .

Poe v. Caspari, 39 F.3d 204, 207 (8th Cir. 1994). *See also Wills v. Egeler*, 532 F.2d 1058, 1059 (6th Cir. 1976) ("Determination of whether a state court is vested with jurisdiction under state law is a function of the state courts, not the federal judiciary."). Smith cites to no authority that would permit a federal habeas court to set aside a state court determination regarding the existence of subject matter jurisdiction under state law. Thus, the court stands by its denial of Claim One and Two.

7. Certificate of appealability

Smith argues that, to the extent the court does not grant him relief from the order and

judgment denying his petition, he is at least entitled to a certificate of appealability with respect to the issues presented above. Pursuant to 28 U.S.C. § 2253(c)(2), a COA may issue only when the petitioner "has made a substantial showing of the denial of a constitutional right." With respect to claims rejected on the merits, a petitioner "must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong" or that the issues were "adequate to deserve encouragement to proceed further." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000) (citing *Barefoot v. Estelle*, 463 U.S. 880, 893 & n.4 (1983)). For procedural rulings, a COA will issue only if reasonable jurists could debate (1) whether the petition states a valid claim of the denial of a constitutional right and (2) whether the court's procedural ruling was correct. *Id.*

Having revisited the rulings discussed above, the court agrees that its rejection of Smith's *Martinez*-based cause and prejudice claim in relation to Claim Four is at least debatable among reasonable jurists. In Claim Four, Smith alleged that trial counsel were ineffective for failing to present mitigating evidence of mental illness. In concluding that Smith had failed to make an adequate showing to excuse his procedural default of the claim, this court questioned the mitigatory value of the mental health evidence that he had proffered. It is at least arguable, however, that trial counsel were ineffective by not presenting the testimony of mental health experts at Smith's penalty hearing and that post-conviction counsel was ineffective by failing to present the issue in Smith's initial collateral proceeding. *See Clabourne*, 745 F.3d at 382-83 (discussing the history of petitioner's mitigation-based claim).

III. *Conclusion*

For the reasons discussed above, Smith is not entitled to relief under Rule 59(e) with respect to this court's order and judgment denying his habeas petition on the merits, except for the court's decision to deny a COA.

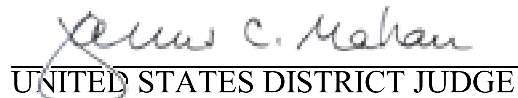
IT IS THEREFORE ORDERED that petitioner's motion to alter or amend judgment under Rule 59(e) (ECF No. 177) is GRANTED with respect to the court's decision to deny a COA. In all

other respects, the motion is DENIED.

IT IS FURTHER ORDERED that the Certificate of Appealability is amended to include the following issue:

> Whether petitioner can establish cause and prejudice to overcome the procedural default of Claim Four, which alleges that trial counsel were ineffective in failing to present mental health evidence in the penalty phase of petitioner's trial.

DATED: November 5, 2014.



UNITED STATES DISTRICT JUDGE

APPENDIX D

Judgment in a Civil Case, *Smith v. E.K. McDaniel, et al*., United States District Court of Nevada, Case No. 2:07-cv-00318-JCM-CWH (Mar. 13, 2014)

UNITED STATES DISTRICT COURT

DISTRICT OF Nevada

Joseph Weldon Smith,

Petitioner,

V.

E.K. McDaniel, et al.,

Respondents.

JUDGMENT IN A CIVIL CASE

Case Number: 2:07-cv-00318-JCM-CWH

☐ **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

☒ **Decision by Court.** This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

☐ **Notice of Acceptance with Offer of Judgment.** A notice of acceptance with offer of judgment has been filed in this case.

IT IS ORDERED AND ADJUDGED

that Judgment is entered in favor of Respondents Catherine Cortez Masto and Renee Baker and against Petitioner Joseph Weldon Smith. IT IS FURTHER ORDERED that a Certificate of Appealability is DENIED.

March 13, 2014

Date

/s/ Lance S. Wilson

Clerk

/s/ Ari Caytuero

(By) Deputy Clerk

APPENDIX E

Order denying Petitioner's Petition for Writ of Habeas Corpus, *Smith v. Baker, et al.*, United States District Court of Nevada, Case No. 2:07-cv-00318-JCM-CWH (Mar. 13, 2014)

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

JOSEPH WELDON SMITH, Petitioner, vs. RENEE BAKER, *et al.*, Respondents.	2:07-CV-00318-JCM-CWH **ORDER**

Before the court for a decision on the merits is an application for a writ of habeas corpus filed by Joseph Weldon Smith, a Nevada prisoner sentenced to death. ECF No. 40.

I. FACTUAL AND PROCEDURAL HISTORY

On December 11, 1992, Smith was convicted of three counts of murder with the use of a deadly weapon, and one count of attempted murder with the use of a deadly weapon. The convictions were pursuant to jury verdicts in the Eighth Judicial District Court, Clark County, Nevada. The facts of Smith's case are recounted in Nevada Supreme Court's decision on Smith's initial direct appeal:

> During the trial Michael Hull, a police officer for the City of Henderson, testified as follows: On Saturday, October 6, 1990, at approximately 2:29 a.m., he was dispatched to the Fountains, a gated community in Henderson. While on his way, Hull was flagged down by a man who subsequently identified himself as Frank Allen. Allen appeared frantic and Hull observed blood on his shirt and blood running down the left side of his head. Allen told Hull that Smith had attacked him with a hammer or a hatchet.
>
> After arriving at the Smiths' home, located at 2205 Versailles Court inside the gated community, Hull and two other officers observed a large broken window laying

on the front porch outside the house. Allen had explained to the officers that he had left through that window. The officers entered the premises and, during a search of a bedroom, observed what appeared to be a figure beneath a blanket. After lifting the blanket, they discovered a dead body, subsequently identified as twelve-year-old Kristy Cox. In an adjacent bedroom they discovered a second body, also dead and covered with a blanket, later identified as twenty-year-old Wendy Cox. Under a blanket in the master bed, the officers found a third victim, Kristy and Wendy's mother and Smith's wife, Judith.

The officers also located some notes written by Smith. The first, found inside a briefcase in the upstairs den, and dated October 5, 1990, read:

> A triple murder was committed here this morning. My wife, Judith Smith and my two stepdaughters, Wendy Cox and Kristy Cox, were assassinated. I know who did it. I know who sent them. I had been warned that this would happen if I did not pay a large sum of money to certain people. I have been owing it for a long time and simply could not come up with it. And I didn't believe the threat. I don't need any help from the police in this matter. I will take care of it myself. They will have to kill me, too. When and if you find me, I'm sure I will be dead, but that's okay. I already killed one of the murderers. And I am going to get the others and the man who I know sent them. There were three in all. You will probably find my body within a day or two.
>
> Thank you, Joe Smith.
>
> P.S.: I thought I had gotten away when we moved here, but it didn't work. When we moved, we were being watched. If I am successful in my task at hand, I will turn myself into (sic) the police.

The second letter stated, "Frank [Allen], look in the locked room upstairs for your package. The key is on the wet bar. Joe."

Dr. Giles Sheldon Green, Chief Medical Examiner for Clark County, testified that he performed the autopsies on the bodies of the three victims. Green stated that all three victims died from asphyxia due to manual strangulation. He also opined that the pattern of injuries found on the three victims could have been inflicted with a carpenter's hammer. On Kristy, Green observed three blunt lacerations to the scalp and a lot of blood in Kristy's hair, some bruising and a scratch on her neck, and substantial hemorrhaging as a result of the trauma to her scalp.

On Wendy, Green observed several "quite ragged, irregular, deep lacerations of the forehead," and at least six or seven wounds of the face. There were a total of thirty-two head lacerations, some of which were patterned injuries of pairs of penetrating wounds of the scalp tissue. On the left side of Wendy's head, a large laceration inside the ear almost cut the outer ear in two. Green found numerous scratches and abrasions on the front of Wendy's neck, as well as defensive wounds, such as a fractured finger, bruises on the backs of her hands and a finger with the skin over the knuckle knocked away. Green found areas in which the various head impacts had created depressed fractures of the outer and inner surfaces of the skull. There was

also a great deal of hemorrhaging and damage to the soft tissues of Wendy's neck.

On Judith, Green found lacerations of the forehead and above her right eyebrow, abrasions and scratches on the front of her neck and a cluster of at least five lacerations of the scalp, mainly on the right side of the back of the head. It was Green's opinion that the five lacerations were inflicted after death.

Allen testified as follows: He met Smith in September 1990, when Smith came to Allen's home located at 2205 Versailles Court, inside the Fountains, wishing to purchase that home. Although Allen first indicated that the house was not for sale, after Smith agreed to pay $50,000 over the appraised value of $650,000, Allen agreed to sell him the house. Allen subsequently gave Smith the keys to the house, but retained one of the bedrooms for his use when he came to Las Vegas on weekends, until the sale was final. Smith informed Allen that he was in a rush to move into the house because he wanted to make preparations for his step-daughter, Wendy's, wedding in November.

On September 21, 1990, Smith gave Allen a personal check for $35,000 as a good faith deposit. Approximately six days later, the bank notified Allen that the check had been returned because Smith had closed his account. Smith assured Allen that he would mail him a certified check immediately. Two days later, having not received a check, Allen indicated to Smith that he would be coming to Las Vegas on Friday, October 5, 1990, and would pick up the check then.

On Friday morning, Allen received a call from Smith who stated, "I thought you were coming up here this morning." Allen told Smith that he would be coming later in the day. Smith stated that he and his wife were going to California to shop for furniture that day, so they arranged for Smith to leave two checks, the $35,000 deposit check and a $3,338.80 check for the October mortgage payment, behind the wet bar in the house, along with Allen's mail.

Allen arrived at the house between 1:00 a.m. and 1:30 a.m. on Saturday, October 6, 1990, and noticed that the security system was off. He went behind the wet bar to retrieve his mail and found the note from Smith telling him to look in the locked room upstairs for the package. Allen went to that room and, not finding any checks, went into the game room. Although the light was not on in the game room, the area was illuminated by a large chandelier in the hallway.

In the game room, Allen saw Smith crouched in the closet. Smith then jumped out and began to pound Allen in the head with an object, which Allen assumed was a hammer. Allen asked Smith what he was trying to do, but Smith did not say anything. Realizing that Smith was trying to kill him, Allen said, "You're not going to get away with this," and pushed Smith backward and ran down the stairway with Smith pursuing him. Allen tried to figure out the best way to get out of the house, and after realizing that he had locked himself in, ran straight through the full-length, leaded-glass front door. He then got into his car and drove to the guard shack at the entrance to the development and asked the guard to call the police.

Eric Lau, the security guard then on duty at the guard-gated entrance to the Fountains, testified that at approximately 2:30 a.m. on Saturday, October 6, 1990,

Allen ran up to the side of the guard house and pounded on the window. Allen's shirt was covered with blood and he said, “He's after me! He's after me!” Lau immediately called for help and then saw Smith's Lincoln automobile exit the Fountains, with Smith behind the wheel.

Yolanda Cook, Judith's daughter-in-law, testified that on the morning of Friday, October 5, 1990, at 8:00 a.m., she called the Smiths' house to see if someone could take her son to school. She spoke with Smith, who told her that he had to go to a meeting and that Judith, Wendy and Kristy had gone shopping for Wendy's wedding. Between 9:00 a.m. and 3:30 p.m., Yolanda called the Smiths' house three more times, and each time Smith told her that Judith and her daughters were away.

Yolanda further testified that on Saturday, October 6, 1990, at approximately 5:00 a.m., Smith called her and told her of the three murders. He told her that Allen came into the house and bludgeoned them to death. Smith requested that she tell all of Judith's other children and then go to the house and get the letters out of his briefcase explaining what happened. He then told her that he was going to kill himself and hung up the phone.

William Lawrence Cook, one of Judith's sons, testified that Smith had expressed concern and irritation over financial obligations such as Wendy's pending wedding and the new house. William testified that Smith would often refer to himself as the “Lone Wolf” and say, “I gotta get outta here.” Sometimes Smith would say that he just wanted to go away and live on an island somewhere “around no kind of family or nothing like that.” William also remembered Smith telling him that “the worse thing to f___ up a man was to have a family.” Smith made these statements during a collection of conversations over a period of years.

Smith took the stand on his own behalf and testified as follows: In 1986 he encountered financial difficulties and agreed to accept a drug dealing opportunity in Los Angeles with an organization. That same year, Smith moved to Las Vegas and continued working for the organization. At some point, the organization falsely accused Smith of stealing cocaine and told Smith that he now owed the organization a big debt. Smith quit working for the organization and in 1989 Gino, a man from the organization, found Smith and reminded him of the debt, saying that “it had to be paid or else they were going to give [him] a fate worse than death.”

He resumed working for the organization, and also began to look for a new house in a gated community. He found the house at the Fountains and arranged payment terms with Allen, which included giving Allen eleven kilograms of cocaine in exchange for the equity in the house. The eleven kilograms were part of a twenty kilogram shipment which Smith had received from the organization and had decided to keep for himself. Smith gave Allen ten kilograms of cocaine, worth approximately $200,000, on the same day that he gave Allen the $35,000 check. He claimed that Allen knew that the check was no good and served only to make the transaction seem legitimate, and said he would not deposit it.

On Thursday, October 4, 1990, Smith left the additional kilogram of cocaine owed Allen in Allen's bathroom sink, upstairs where Allen stayed when he was in town for weekends. That same day, Smith told the organization that he had sold

> twenty kilograms of cocaine and was keeping the money because he was "tired of working for peanuts."
>
> Between 2:00 a.m. and 3:00 a.m. on the morning of Friday, October 5, while he was in bed with Judith, he was awakened by a tap on his toe. He then saw three men standing over his bed, one of whom picked up a hammer Smith had been using the previous night and began slapping it in his hand and asking Smith where the "stuff" was. Another man, who had a sawed-off shotgun, forced Smith to go into the game room and made him lay down and stay there. Smith subsequently discovered that his family had been killed.
>
> On Friday, after the murders, he remembered receiving three phone calls from Yolanda. He stated that "I brushed her off like I had other things to do, a meeting I had to attend . . . I really needed some time to sort this out. There was too many loose ends that I didn't have answers to." Smith stated that he did not go to the police because he would have to tell them about the drugs and because it looked like he committed the crime and he knew they would put him in jail. He stated that he was also trying to figure out if Allen might have been involved in the murders and might have provided the killers with keys to the house. He called Allen that Friday morning to see if he could find out from Allen's voice if Allen was involved in the murders. After the phone call, he decided that Allen was not involved.
>
> At approximately 4:00 p.m. on Friday, Smith took some sleeping pills and lay down on the game room floor by the closet. Early Saturday morning, he awoke to the sounds of someone coming into the game room. He thought that the killers had returned and began swinging the hammer at a man. He did not know it was Allen because it was dark and Allen did not say anything during the attack.
>
> Six months after the murders, Smith was arrested in California. When he was arrested, evidence was seized which indicated that he was attempting to change his identity. Smith was charged with three counts of murder with use of a deadly weapon and one count of attempted murder with use of a deadly weapon. He was convicted of all four counts and sentenced to death for the murders of Kristy and Wendy, life without possibility of parole for Judith's murder and to two consecutive twenty-year terms for the attempted murder of Allen with use of a deadly weapon.

Smith v. State, 881 P.2d 649, 650-53 (Nev. 1994).

The Nevada Supreme Court affirmed the convictions but vacated the deadly weapon enhancement. *Id.* at 654. The state supreme court also vacated the death sentences and remanded for a new punishment trial. *Id.* at 655-56.

On April 18, 1996, a jury again sentenced Smith to death for the murders of Wendy and Kristy Cox. On appeal, the Nevada Supreme Court vacated the death sentence as to the murder of Kristy (replacing it with a life sentence without the possibility of parole), but affirmed the death sentence for

the murder of Wendy. *Smith v. State*, 953 P.2d 264 (Nev. 1998). The Nevada Supreme Court denied Smith's petition for rehearing and issued its remittitur on March 31, 1998. On May 20, 1998, Smith was sentenced by the lower court in accordance with the state supreme court's remand.

On August 11, 1998, Smith filed, *pro se*, a state habeas petition in the Eighth Judicial District Court, Clark County. Having been appointed counsel, he filed an amended petition on September 21, 1999. On July 15, 2003, he filed supplemental points and authorities in support of his petition. On January 5, 2005, Smith filed a supplemental brief in support of his petition. The Eighth Judicial District Court denied relief on April 25, 2005. Smith appealed. On September 29, 2006, the Nevada Supreme Court affirmed the lower court in an unpublished order. The Nevada Supreme Court denied rehearing on November 29, 2006.

On March 13, 2007, Smith initiated this action by filing, *pro se*, a federal petition for writ of habeas corpus. ECF No. 1. Represented by the Federal Public Defender's office (FPD), Smith filed his first amended petition in this court on October 9, 2007. ECF No. 40. On February 28, 2008, this court granted a stipulation to stay the proceedings and hold them in abeyance pending Smith's exhaustion of state remedies. ECF No. 53.

On April 2, 2009, the FPD was relieved as counsel for Smith. ECF No. 79. Mario Valencia was appointed as counsel on June 29, 2009. ECF No. 85. On February 9, 2011, this court granted Smith's motion to lift the stay and reopen the proceedings. ECF No. 98. On April 4, 2011, the State filed a motion to dismiss in which they argued that numerous claims in the petition should be dismissed under the doctrine of procedural default or for failure to state a federal claim for relief. ECF No. 118. Pursuant to that motion, this court dismissed several claims from the first amended petition. ECF No. 165. Claims One, Two, Six through Eight, Ten through Fifteen, and Thirty remain before the court for a decision on the merits.

II. STANDARDS OF REVIEW

This action is governed by the Antiterrorism and Effective Death Penalty Act (AEDPA). 28

1 U.S.C. § 2254(d) sets forth the standard of review under AEDPA:.

2 An application for a writ of habeas corpus on behalf of a person in custody
pursuant to the judgment of a State court shall not be granted with respect to any claim
3 that was adjudicated on the merits in State court proceedings unless the adjudication of
the claim –
4
(1) resulted in a decision that was contrary to, or involved an unreasonable
5 application of, clearly established Federal law, as determined by the Supreme Court of
the United States; or
6
(2) resulted in a decision that was based on an unreasonable determination of
7 the facts in light of the evidence presented in the State court proceeding.

8 28 U.S.C. § 2254(d).

9 A decision of a state court is "contrary to" clearly established federal law if the state court
10 arrives at a conclusion opposite that reached by the Supreme Court on a question of law or if the state
11 court decides a case differently than the Supreme Court has on a set of materially indistinguishable
12 facts. *Williams v. Taylor*, 529 U.S. 362, 405–06 (2000). An "unreasonable application" occurs when
13 "a state-court decision unreasonably applies the law of [the Supreme Court] to the facts of a
14 prisoner's case." *Id*. at 409. "[A] federal habeas court may not "issue the writ simply because that
15 court concludes in its independent judgment that the relevant state-court decision applied clearly
16 established federal law erroneously or incorrectly." *Id*. at 411.

17 The Supreme Court has explained that "[a] federal court's collateral review of a state-court
18 decision must be consistent with the respect due state courts in our federal system." *Miller–El v.*
19 *Cockrell*, 537 U.S. 322, 340 (2003). The "AEDPA thus imposes a 'highly deferential standard for
20 evaluating state-court rulings,' and 'demands that state-court decisions be given the benefit of the
21 doubt.'" *Renico v. Lett*, 559 U.S. 766, 773 (2010) (quoting *Lindh v. Murphy*, 521 U.S. 320, 333, n. 7
22 (1997); *Woodford v. Viscotti*, 537 U.S. 19, 24 (2002) (per curiam)). "A state court's determination
23 that a claim lacks merit precludes federal habeas relief so long as 'fairminded jurists could disagree'
24 on the correctness of the state court's decision." *Harrington v. Richter*, 131 S.Ct. 770, 786 (2011)
25 (citing *Yarborough v. Alvarado*, 541 U.S. 652, 664 (2004)). The Supreme Court has emphasized
26

"that even a strong case for relief does not mean the state court's contrary conclusion was unreasonable." *Id*. (citing *Lockyer v. Andrade*, 538 U.S. 63, 75 (2003)); *see also Cullen v. Pinholster*, 131 S.Ct.1388, 1398 (2011) (describing the AEDPA standard as "a difficult to meet and highly deferential standard for evaluating state-court rulings, which demands that state-court decisions be given the benefit of the doubt") (internal quotation marks and citations omitted).

"[R]eview under § 2254(d)(1) is limited to the record that was before the state court that adjudicated the claim on the merits." *Pinholster*, 131 S.Ct. at 1398. In *Pinholster*, the Court reasoned that the "backward-looking language" present in § 2254(d)(1) "requires an examination of the state-court decision at the time it was made," and, therefore, the record under review must be "limited to the record in existence at that same time, i.e., the record before the state court." *Id*.

For any habeas claim that has not been adjudicated on the merits by the state court, the federal court reviews the claim *de novo* without the deference usually accorded state courts under 28 U.S.C. § 2254(d)(1). *Chaker v. Crogan*, 428 F.3d 1215, 1221 (9th Cir. 2005); *Pirtle v. Morgan*, 313 F.3d 1160, 1167 (9th Cir. 2002). *See also James v. Schriro*, 659 F.3d 855, 876 (9th Cir. 2011) (noting that federal court review is *de novo* where a state court does not reach the merits, but instead denies relief based on a procedural bar later held inadequate to foreclose federal habeas review). In such instances, however, the provisions of 28 U.S.C. § 2254(e) still apply. *Pinholster*, 131 S.Ct at 1401 ("Section 2254(e)(2) continues to have force where § 2254(d)(1) does not bar federal habeas relief."); *Pirtle*, 313 F.3d at 1167-68 (stating that state court findings of fact are presumed correct under § 2254(e)(1) even if legal review is *de novo*).

Lastly, the Court in *Lockyer* rejected a Ninth Circuit mandate for habeas courts to review habeas claims by conducting a *de novo* review prior to applying the "contrary to or unreasonable application of" limitations of 28 U.S.C. § 2254(d)(1). *Lockyer*, 538 U.S. at 71. In doing so, however, the Court did not preclude such an approach. "AEDPA does not require a federal habeas court to adopt any one methodology in deciding the only question that matters under § 2254(d)(1) – whether a

state court decision is contrary to, or involved an unreasonable application of, clearly established Federal law." *Id.*

III. ANALYSIS OF CLAIMS

Claims One and Two

In Claim One, Smith contends that his constitutional rights were violated because the Nevada courts lacked jurisdiction to adjudicate the criminal proceeding that resulted in his convictions and sentences. In Claim Two, he contends that the prosecutors and the Nevada courts failed to follow the relevant state statute that vested the trial court with jurisdiction. Both of these claims are premised on the factual allegation that the State did not file a criminal complaint prior to Smith's preliminary examination.

Smith exhausted the claims by presenting them to the Nevada Supreme Court in his first post-conviction proceeding. ECF No. 111-12, p. 8-10, 37-38.[1] In his opening brief, Smith argued that, under state law, the absence of a criminal complaint on file means that the warrant for his arrest was invalid, that the state justice court lacked jurisdiction to conduct a preliminary hearing and bind him over to the district court for trial, and, consequently, that the district court never acquired jurisdiction to adjudicate his case. ECF No. 111-10, p. 19-25. In his reply brief, Smith claimed that, due to the state court's lack of jurisdiction, his convictions violate the Fifth, Sixth, and Fourteenth Amendments of the Unites States Constitution. ECF No. 111-12, p. 8-10.

The Nevada Supreme Court denied relief on two grounds. First, the court held that any challenge to the arrest warrant or the jurisdiction of the justice court should have been raised prior to trial. ECF No. 111-12, p. 37-38. Second, the court concluded "that Smith had failed to show that the warrant was infirm or that the justice of the peace who issued it lacked the authority to do so." *Id.*

The absence of a reference to federal law in the Nevada Supreme Court's decision does not

---

[1] Citations to page numbers for electronically filed documents are based on the CM/ECF pagination.

1 necessarily mean that the deferential standards imposed by § 2254(d) do not apply here. *See Richter*,
2 131 S.Ct. at 784. Even considered *de novo*, however, neither Claim One nor Claim Two is a ground
3 for granting Smith relief.

4 With respect to Claim One, the Nevada Supreme Court was satisfied that the trial court had
5 jurisdiction under Nevada law to adjudicate Smith's case. As stated by the Supreme Court in *Estelle*
6 *v. McGuire*, 502 U.S. 62 (1991), "it is not the province of a federal habeas court to reexamine state
7 court determinations on state law questions." 502 U.S. at 67-68. Determinations regarding
8 jurisdiction are not an exception to this general rule. *Poe v. Caspari*, 39 F.3d 204, 207 (8th Cir. 1994);
9 *see also Wills v. Egeler*, 532 F.2d 1058, 1059 (6th Cir. 1976) ("Determination of whether a state court
10 is vested with jurisdiction under state law is a function of the state courts, not the federal judiciary.").

11 As for Claim Two, a habeas petitioner may not transform a state law issue into a federal one
12 merely by asserting a due process violation. *Langford v. Day*, 110 F.3d 1380, 1389 (9th Cir. 1996).
13 At a minimum, Smith needs to show that the alleged failure to follow state procedures resulted in the
14 deprivation of a substantive right. *See Moran v. Godinez*, 57 F.3d 690, 695 (9th Cir. 1994) ("Only the
15 denial or misapplication of state procedures that results in the deprivation of a substantive right will
16 implicate a federally recognized liberty interest."). While Smith claims that he had "a state-created,
17 constitutionally protected liberty interest in the fair administration of state procedures governing
18 charging and arresting those suspected of committing felonies" (ECF No. 168, p. 59), he fails to
19 explain how the procedures in his case resulted in unfairness. "Process is not an end in itself;" and
20 "an expectation of receiving process is not, without more, a liberty interest protected by the Due
21 Process Clause." *Olim v. Wakinekona*, 461 U.S. 238, 251 n. 12 (1983).

22 Claims One and Two are denied.

23 **Claim Six**

24 In Claim Six, Smith claims that he was denied his constitutional rights because the trial court
25 failed to inquire into his competence. According to Smith, the trial court was constitutionally
26

required to make a *sua sponte* inquiry into his competence to stand trial after Smith "had an outburst in the courtroom, threw newspaper articles in the direction of the jury, and refused to further participate in his trial." ECF No. 40, p. 50.

In *Pate v. Robinson*, 383 U.S. 375 (1966), the Supreme Court held that, where evidence had been presented raising a doubt as to defendant's competence to stand trial, the state trial court violated the defendant's constitutional right to a fair trial by not conducting a hearing on the issue. *Id*. at 385. The Ninth Circuit has interpreted *Pate* as requiring a trial judge to conduct a competency hearing whenever the evidence before him raises a bona fide doubt about the defendant's competence to stand trial, even if defense counsel does not ask for one. *See De Kaplany v. Enomoto*, 540 F.2d 975, 979 (9th Cir. 1976) (en banc). "A bona fide doubt exists if there is substantial evidence of incompetence, or substantial evidence that the defendant lacks sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding or a rational as well as factual understanding of the proceedings against him." *Williams v. Woodford*, 384 F.3d 567, 604 (9th Cir.2004) (internal quotation marks and citations omitted).

In his first state post-conviction proceeding, Smith argued to the Nevada Supreme Court that trial counsel was ineffective in failing to request a competency hearing at Smith's trial. ECF No. 111-12, p. 12-13. The Nevada Supreme Court rejected the claim, stating that "[n]othing in the transcripts or Smith's submissions to this court suggests incompetence or that his counsel should have questioned his competence." *Id*., p. 35.

Given that Smith presented the competency issue in the context of alleging ineffective assistance of counsel, the Nevada Supreme Court understandably did not cite to *Pate*. Even so, the state court's factual finding as to the lack of evidence of Smith's alleged incompetence is presumed correct absent clear and convincing evidence to the contrary. 28 U.S.C. § 2254(e)(1); *see also Davis v. Woodford*, 384 F.3d 628, 644 (9th Cir. 2004) (noting that the state trial and appellate courts' findings that the evidence did not require a competency hearing under *Pate* are findings of fact to which we

must defer unless they are 'unreasonable' within the meaning of 28 U.S.C. § 2254(d)(2)).

In *Davis*, the court of appeals concluded that the trial judge did not err in declining to hold a competency hearing even though the defendant, against counsel's advice, decided to not wear civilian clothes and to remain in the doorway of the courtroom rather than face the prosecution witnesses. 384 F.3d at 645-46. This case is similar in that Smith's conduct in the courtroom, while obviously inappropriate, was not necessarily a reason for the trial judge to question whether Smith was able to consult with his lawyer with a reasonable degree of rational understanding or whether he possessed a rational as well as factual understanding of the proceedings against him. Accordingly, Smith is not entitled to relief under Claim Six.

Claim Seven

In Claim Seven, Smith claims that he was denied his constitutional right to effective assistance of counsel because his trial counsel did not request a competency hearing prior to Smith's second penalty phase hearing. In addition to the outburst mentioned above, other factors Smith points to as reasons for counsel to request a competency hearing are Smith's refusal to cooperate with new counsel after his death sentences were reversed, allegations he made that new counsel was involved in a conspiracy with the state court judge presiding over his second penalty phase hearing, and a lawsuit he filed against the district attorney.

In *Strickland v. Washington*, 466 U.S. 668 (1984), the Supreme Court propounded a two prong test for analysis of claims of ineffective assistance of counsel: a petitioner claiming ineffective assistance of counsel must demonstrate (1) that the defense attorney's representation "fell below an objective standard of reasonableness," and (2) that the attorney's deficient performance prejudiced the defendant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 688, 694.

As noted above, this claim was presented to, and rejected by, the Nevada Supreme Court in his first state post-conviction proceeding. ECF No. 111-12, pp. 12-13, 35. Smith claims that the

Nevada Supreme Court's decision was an unreasonable application of federal law and was based on an unreasonable determination of the facts in light of evidence presented to the state court, but his supporting argument consists of little more than citing Smith's various actions and asserting either that they "do not reflect a rational understanding of the proceedings" or that they "do not reflect the ability to consult with counsel." ECF No. 168, p. 49-50. What is missing is credible evidence that Smith lacked the capacity to either consult with his lawyers with a reasonable degree of rational understanding or understand the nature of the proceedings against him. *See Godinez v. Moran*, 509 U.S. 389, 402 (1993) (noting that the competency requirement "has a modest aim: It seeks to ensure that [the defendant] has the capacity to understand the proceedings and to assist counsel"); *see also Dennis v. Budge*, 378 F.3d 880 (9th Cir. 2004) ("The question . . . is not whether mental illness substantially affects a *decision*, but whether a mental disease, disorder or defect substantially affects the prisoner's *capacity* to appreciate his options and make a rational choice among them.).

Even setting aside the limitation on new evidence mandated by *Pinholster*, Smith has not established that he was prejudiced by his counsel's failure to request a competency hearing. In an attempt to show prejudice, Smith proffers the opinion of Dr. Richard Dudley, a forensic psychiatrist who evaluated Smith in 2007, more than ten years after his second penalty phase hearing. ECF No. 168, p. 50. Dr. Dudley noted that, despite being extremely bright, Smith exhibited paranoid and grandiose thinking that compromised his decision-making capabilities and judgment. ECF No. 40-4, p. 248. He also noted that Smith's paranoid thinking and grandiosity can elevate to the point that Smith "evidences specific paranoid and grandiose delusions." *Id*. Nowhere in his report, however, does Dr. Dudley indicate that Smith failed, at any point, to meet the standard for competence to stand trial. Claim Seven is denied.

Claim Eight

In Claim Eight, Smith challenges the constitutionality of the trial court's instructions to the jury regarding depravity of mind, torture, and mutilation, as an aggravating circumstance. At Smith's

second penalty hearing, the only aggravating circumstance alleged by the State as to the murders of Wendy Cox and Kristy Cox was that the murders involved "torture, depravity of mind, or the mutilation of the victim."[2] Prior to jury deliberation, the trial court determined that there was insufficient evidence to support a finding of torture or mutilation with respect the murder of Kristy and, therefore, eliminated those grounds as a potential aggravating factor. ECF No. 109-5, p. 34-41. Thus, the jury was instructed as follows:

> You are instructed that the following factors are circumstances by which Murder of the First Degree may be aggravated:
>
> The murder involved torture, depravity of mind, or the mutilation of the victim.
>
> The State is alleging depravity of mind in the murder of Kristy Cox.
>
> The State is alleging torture or depravity of mind or mutilation in the murder of Wendy Cox.

ECF No. 109-6, p. 9.

The jury found that the murder of Kristy involved depravity of mind, but the Nevada Supreme Court subsequently concluded that the court's jury instruction defining the term "failed to properly channel the jury's discretion" and vacated the death sentence on that basis. *Smith*, 953 P.2d at 267. With respect to the murder of Wendy, the jury returned a special verdict form on which it indicated that it had found that the murder had involved both depravity of mind and mutilation. ECF No. 109-6, p. 28. Smith argues that the aggravating circumstance with respect to Wendy's murder is constitutionally infirm because the depravity of mind factor is invalid and there is no way to know for sure that the jury was unanimous as to the mutilation factor.

This court does not agree. The trial court instructed the jury that, in order to find depravity of mind, it must find serious and depraved physical abuse beyond the act itself. *Id*., p. 12. The Nevada Supreme Court concluded that the instruction was lacking because it did not require a finding of

---

[2] The statute that supplied this aggravating factor, Nev. Rev. Stat. 200.033(8), was amended in 1995, deleting the language of "depravity of mind." 1995 Nev. Stat., ch. 467, §§ 1-3, at 1490-91.

torture or mutilation beyond the act of killing itself. *Smith*, 953 P.3d 267. In both *Ybarra v. McDaniel*, 656 F.3d 984, 995 n. 6 (9th Cir. 2011) and *Valerio v. Crawford*, 306 F.3d 742, 752, 762 (9th Cir. 2002), however, the Ninth Circuit accepted that the same instruction in those respective cases was constitutional. Moreover, respondents correctly point out that no federal court has required that, as a matter of federal law, the jury must be unanimous in finding one of the three component parts of the aggravating circumstance – i.e., torture, mutilation, or depravity mind.[3]

Even if the Nevada court erred, as a matter of federal law, in instructing the jury on the aggravating circumstance, habeas relief is not warranted because the error was harmless. The appropriate harmless error standard in this context is the one set forth in *Brecht v. Abrahamson*, 507 U.S. 619 (1993). *Ybarra*, 656 F.3d at 995; *Valerio*, 306 F.3d at 762. Under *Brecht*, the question is "whether, in light of the record as a whole," the error "had substantial and injurious effect or influence in determining the jury's verdict." *Brecht*, 507 U.S. at 638. Following the approach in *Ybarra* and *Valerio*, this court assesses whether the challenged instructions "had a substantial and injurious effect or influence on the jury's decision to impose the death sentence, in comparison to what its decision would have been had it been instructed on a constitutionally narrowed version of the [aggravating] factor." *Ybarra*, 656 F.3d at 995.

Based on the state court record, there is a "fair assurance" (*id*. at 996) that the jury would have imposed the death sentence based on the mutilation factor alone. The jury was instructed that, to find mutilation, it must find that there was mutilation "beyond that act of killing itself" and that "the term 'mutilate' means to cut off or permanently destroy a limb or essential part of the body or to cut off or alter radically so as to make imperfect." ECF No. 109-6, p. 12-13. Evidence presented at the second

---

[3] Smith's citation to *Stromberg v. California*, 283 U.S. 359 (1931), is unavailing. In that case, the Supreme Court set aside a conviction arising from a jury verdict that did not specify which of three clauses in a criminal statute it rested upon and one of those clauses was indisputably invalid under the Federal Constitution. 283 U.S. at 368-69. Here, the jury did specify which grounds it relied upon to find the aggravating circumstance; and, Smith has not established that either is unconstitutional.

penalty hearing established that strangulation was the cause of Wendy's death. ECF No. 109-4, p. 25. If further established Smith struck Wendy in the head with a claw hammer at least 16 times prior to strangling her, that her skull was fractured in several places, and that her ear was nearly cut in two. *Id*., pp. 21-30, 39-40.

Given that the jury was instructed that it must be unanimous in its finding as to the aggravating circumstance, the special verdict form, on which depravity of mind and mutilation were individually checkmarked, is a strong indication that all the jurors found that the murder involved mutilation. ECF No. 109-6, pp. 16; 28. Moreover, it is almost certain that, even with the depravity of mind factor stripped away, the jury would have nonetheless imposed the death sentence inasmuch as a finding of mutilation subsumes or exceeds in gravity a finding of "serious and depraved physical abuse." *See Smith*, 953 P.3d at 267 (noting that the trial judge "may have implicitly decided that 'serious and depraved physical abuse' involved less physical abuse than torture or mutilation"). Smith is not entitled to habeas relief based on Claim Eight.

Claim Ten

In Claim Ten, Smith claims that his constitutional rights were violated by virtue of the trial court's jury instruction on mutilation as an aggravating circumstance and the fact that no rational juror could have found mutilation beyond the act of killing itself. According to Smith, the jury instruction defining mutilation (discussed above) is overbroad because it does not include and element of intent and, under the definition, "every murderer is death eligible because every murderer has rendered his victim's body imperfect." ECF No. 168, p. 31.

In *Godfrey v. Georgia*, the Supreme Court considered an aggravating circumstance instruction that allowed for the death penalty if the jury found that the murder was "'outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim.'" 446 U.S. 420, 422 (1980) (quoting Georgia statute). The Court held that the instruction was unconstitutional *as applied in that case* because it resulted in "standardless and unchanneled

imposition of death sentences in the uncontrolled discretion of a basically uninstructed jury." *Id*. at 429. The Court further held that the Georgia Supreme Court failed to cure the defect because it did not apply a constitutional construction of the statutory language in affirming the death sentences on appeal. *Id*. at 432-33.

As explained in *Tuilaepa v. California*, the Supreme Court has found very few aggravating factors to be impermissibly vague and all of those have been similar to each other. 512 U.S. 967, 973-74 (1994) (citing to *Godfrey* and *Maynard v. Cartwright*, 486 U.S. 356, 361-364 (1988) as examples, the latter of which addressed an aggravating circumstance that asked whether the murder was "especially heinous, atrocious, or cruel").[4] An aggravating factor withstands a constitutional challenge if it has some "common sense core of meaning . . . that criminal juries should be capable of understanding." *Id*. at 973 (quoting *Jurek v. Texas*, 428 U.S. 262, 279 (1976)). However, to be constitutional, an aggravating circumstance must "not apply to every defendant convicted of a murder; it must apply only to a subclass of defendants convicted of murder." *Tuilaepa*, 512 U.S. at 972; *see also Arave v. Creech*, 507 U.S. 463, 474 (1993) ("If the sentencer fairly could conclude that an aggravating circumstance applies to every defendant eligible for the death penalty, the circumstance is constitutionally infirm.").

In deciding this claim on appeal from Smith's second penalty hearing, Nevada Supreme Court stated:

> Smith contends that the jury instruction regarding mutilation was unconstitutionally vague and ambiguous. Smith further contends that because the medical examiner testified that Wendy's external injuries occurred at about the same time as her death and that the blows to her head could have rendered her unconscious, torture or mutilation could not be proved beyond a reasonable doubt.

[4] Though *Tuilaeapa* was decided nearly 20 years ago, this state of affairs still applies today. In the rare instances since *Tuilaeapa* where the Court has found an aggravator invalid on vagueness grounds, the aggravator has consisted of pejorative adjectives that generally apply to all murders. *See, e.g.*, *Barber v. Tennessee*, 513 U.S. 1184 (1995) (mem.) (denying certiorari on other grounds, but noting "wicked or morally corrupt" as an aggravator is "plainly impermissible" because such a state of mind is characteristic of every murder).

> The jury was instructed "that the term mutilate means to cut off or permanently destroy a limb or essential part of the body or to cut off or alter radically so as to make imperfect." This court upheld this definition of mutilation in *Deutscher v. State*, 95 Nev. 669, 677, 601 P.2d 407, 412–13 (1979), *vacated on other grounds*, 500 U.S. 901, 111 S.Ct. 1678, 114 L.Ed.2d 73 (1991).
>
> We conclude that the jury instructions regarding mutilation were constitutionally sound. We further conclude that there was sufficient evidence from which a reasonable jury could conclude beyond a reasonable doubt that the murder of Wendy involved mutilation.

Smith, 953 P.2d at 267-68.

As noted above, the jury was instructed that, to find mutilation, it must find that there was mutilation "beyond that act of killing itself" and that "the term 'mutilate' means to cut off or permanently destroy a limb or essential part of the body or to cut off or alter radically so as to make imperfect." ECF No. 109-6, p. 12-13. This instruction provides a "common sense core of meaning" that a jury should be able to understand. Moreover, the Ninth Circuit Court of Appeals addressed the same definition of mutilation in *Deutscher v. Whitley*, and concluded that it was "sufficiently clear and objective to satisfy the requirements of *Godfrey*." 884 F.2d 1152, 1162 (9th Cir. 1989). In particular, the court of appeals noted that "[t]he cutting off or destruction of a portion of the body (mutilation) is an objective difference between a murder by mutilation and any other murder." *Id*.

As for Smith's claim about the sufficiency of the evidence, the standard used by the federal habeas court to determine whether a state court finding of an aggravating circumstance is supported by sufficient evidence is the same "rational factfinder" standard established in *Jackson v. Virginia*, 443 U.S. 307 (1979), to test whether sufficient evidence supports a state conviction. *Lewis v. Jeffers*, 497 U.S. 764, 781 (1990). Under that standard, the court inquires as to "whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson*, 443 U.S. at 319 (citation omitted).

The evidence discussed above in relation to Claim Eight was sufficient for a rational jury to

1 find beyond a reasonable doubt that Smith's murder of Wendy Cox involved mutilation as defined by
2 the jury instruction. Thus, Smith is not entitled to habeas relief under the *Jackson* standard, especially
3 in light of the extra layer of deference imposed by AEDPA. *See Boyer v. Belleque*, 659 F.3d 957,
4 964 -65 (9th Cir. 2011) (noting that "the state court's application of the *Jackson* standard must be
5 'objectively unreasonable' to warrant habeas relief for a state prisoner). Claim Ten is denied.

6 **Claim Eleven**.

7 In Claim Eleven, Smith claims that his death sentence is in violation of his rights under the
8 Sixth Amendment because the trial court erroneously denied his request to represent himself at his
9 second penalty hearing. After his death sentences were set aside in his first direct appeal, the trial
10 court granted Smith's request to represent himself with the county public defender acting as stand-by
11 counsel. Several months later, however, the court rejected Smith's renewed request for self-
12 representation based, in part, on a finding that he was attempting to "toy with the courts." ECF No.
13 107-10, p. 43-46. Smith argues that there was insufficient evidence to support the trial court's
14 decision.

15 A criminal defendant has a Sixth Amendment right to self-representation. *Faretta v.*
16 *California*, 422 U.S. 806, 819–20 (1975). A defendant's decision to represent himself and waive the
17 right to counsel, however, must be unequivocal, knowing and intelligent, timely, and not for purposes
18 of securing delay. *Id*. at 835; *United States v. Arlt*, 41 F.3d 516, 519 (9th Cir. 1994). A defendant
19 must be allowed to exercise his right to self-representation so long as he knowingly and intelligently
20 waives his right to counsel and is "able and willing to abide by rules of procedure and courtroom
21 protocol." *See McKaskle v. Wiggins*, 465 U.S. 168, 173 (1984). "[A] trial court may terminate
22 self-representation by a defendant who deliberately engages in serious and obstructionist
23 misconduct." *Faretta*, 422 U.S. at 834 n. 46.

24 On July 25, 1995, less than two weeks before the scheduled date for the penalty hearing to
25 begin and a more than two months after the trial court ordered that Smith would be permitted to
26

represent himself with the county public defender acting as stand-by counsel, Smith filed a petition for post-conviction relief in the trial court claiming that the county public defender had provided ineffective assistance of counsel at his first trial. ECF No. 107-9, p. 26-39. A few days later, he also filed a motion to hold his penalty hearing in abeyance pending the outcome of his post-conviction petition. *Id*., p. 40-43. However, at a status hearing held on August 1, 1995, Smith did not mention either filing. *Id.*, p. 44-47.

On August 3, 1995, the court held another status hearing, apparently prompted by Smith having set a hearing on his petition for the following Tuesday, a day after his penalty hearing was set to begin. ECF No. 107-10, p. 1-11. At that status hearing, the court discussed the conflicts – in terms of both scheduling and stand-by representation by the county public defender – occasioned by Smith's filings. *Id*. Smith indicated that he had spoken with Donald York Evans, an attorney in Reno, about representation and proposed that the court appoint him as counsel. *Id*., p. 8. The court vacated the date set for the penalty hearing to allow Smith to make arrangements with Evans. *Id*., p. 10.

The court held a status hearing on August 17, 1995, at which the trial court confirmed that Evans would represent Smith at the penalty hearing as lead counsel and that the state public defender (a different office than the county public defender) would assist as second chair. *Id*., p. 25-28. Smith agreed to this arrangement. *Id*. The court set the penalty hearing for April 15, 1996. *Id*.

In early September, Smith filed a motion to discharge counsel and to allow Smith to represent himself. *Id*., p. 33-36. At a hearing on October 17, 1995, the trial court stated as follows:

> Okay. Mr. Smith, really, the only way to not allow somebody to represent themselves is a finding that either it's going to delay things, or that the defendant is playing with the system.
>
> My feeling is, really, for two reasons: I'm not satisfied that a waiver of counsel in this case should be granted to you.
>
> One: you showed during the trial, an absolute disrespect for the orderly processes of the Court by standing up and dropping into the jury box things you wanted them to see which included your offer to take a lie detector test.
>
> Secondly: during the trial, after that didn't work and I guess they didn't read

them, you just refused to be cross examined at any point after that.

Despite that, I'd let you waive counsel and get stand-by counsel. And on the very eve of trial when we had everything set up, you concocted a way to get that counsel off the case.

I don't think you can toy with the courts the way I believe you are attempting to do so and I'm going to deny your motion to terminate counsel. Mr. Evans and the State Public Defender will continue to represent you.

Id., p. 43-46.

In addressing Smith's claim of a *Faretta* violation on direct appeal, the Nevada Supreme Court stated as follows:

Smith argues that the trial judge committed reversible error in denying his constitutional right to represent himself at the second penalty hearing. Smith argues that he was forced to proceed with court-appointed counsel whom he had clearly rejected and with whom he refused to cooperate.

A defendant has an "unqualified right" to self representation provided he has made a voluntary and intelligent waiver of the right to counsel. *Lyons v. State*, 106 Nev. 438, 443, 796 P.2d 210, 213 (1990). However, self representation may be denied where the defendant abuses the right of self representation by disrupting the judicial process. *Id.* at 443–44, 796 P.2d at 213.

At the hearing on Smith's motion to waive counsel, the trial judge noted that Smith had engaged in several disruptive acts during trial. Additionally, the trial judge believed Smith had dilatory purposes when he moved to waive counsel. We conclude that the trial judge did not abuse his discretion when he denied Smith's motion to waive counsel.

Smith, 953 P.2d at 268.

The trial court accepted Smith's waiver of counsel after Smith assured the court that he would not disrupt proceedings as he had done at his initial trial.[5] ECF No. 107-9, p. 11-12. The court was understandably skeptical of Smith's motives when he filed his petition for post-conviction relief shortly before the scheduled date for his penalty hearing, then asked the court to appoint Evans:

. . . I think this is so calculated what you are doing now. I've never seen you do anything that wasn't calculated. And I think this is calculated to do exactly what

[5] In asking for this assurance, the trial court referred the episode in which Smith left the witness and dropped newspaper clippings in the jury box, then refused further questioning from the prosecutor.

> we're doing which is vacate this hearing. Now, we're only doing this once. And I want to get this over in not only an expeditious fashion, but in a fashion where there is some finality.

ECF No. 107-10, p. 9. So, when Smith moved to discharge counsel a few weeks after agreeing to the court's appointment of Evans, the court had sufficient grounds to find that Smith was attempting to "toy with the courts." As such, this court is satisfied that, under 28 U.S.C. § 2254(d), the finding was not "based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding."

Moreover, the Nevada Supreme Court applied a standard that comports with *Faretta* in concluding that Smith was not denied his right to self-representation under the Sixth Amendment. The court's denial of Smith's claim was not contrary to, or an unreasonable application of, clearly established federal law. Therefore, Claim Eleven shall be denied.

Claim Twelve

In Claim Twelve, Smith claims that his constitutional rights were violated when his trial counsel refused to testify on his behalf. Smith argues that his counsel should have testified at trial to rebut the implication that he had "concocted his testimony with counsel." ECF No. 40, p. 67.

In cross-examining Smith at trial, the prosecutor asked a series of questions suggesting that Smith's lengthy pre-trial incarceration had given him the opportunity to prepare his testimony, perhaps with the assistance of counsel. ECF No. 105-8, p. 16-20. The court granted defense counsel's request to approach the bench, whereupon counsel and the court discussed whether the prosecutor's line of questioning was appropriate. *Id*., p. 17-27.

During that discussion, the following exchange took place:

> THE COURT: Well, I think what it goes to is possible bias. I don't see how it really prejudices him to ask those questions.
>
> MR. MARTIN: Well I think that it just highlights that. [The prosecutor's] going to argue, as I may as well, he knows what he faces. It's obvious to the jury that my defendant has an interest in the outcome, that's part of the system. I think this just highlights that, it just highlights any argument that now he's going to make. Well, he's had all this time to prepare his testimony.

> It puts us in a bind, Mr. Baker, Mr. Dahl and myself, having worked with Joseph Smith for a year and a half, now we are potential witnesses. We could be called to testify, and rightfully so, that from the time we first met him until today his story has never changed.
>
> THE COURT: And I don't think that that's inappropriate.
>
> MR. MARTIN: And we may need to do that. How do we do that when we're sitting here as his counsel, now we are potential witnesses. And I think we're in a bind that's--something that's hard for us to get out of.

Id., p. 25.

Although the court was willing to allow counsel to testify, counsel insisted that the more appropriate course was for the court to grant a mistrial and allow counsel to withdraw. ECF No. 106-3, p. 3-37. At one point, defense counsel Stephen Dahl stated:

> . . . To be candid with the Court, no matter what your ruling is, we won't testify at this trial. And I think the case law I've provided will explain why as attorneys who are involved in representing somebody cannot be put in a position of a witness for a number of reasons including problems that the jury might perceive, problems of arguing your own credibility. That fact that if we testify and the jury, for some reason, takes offense to that, for whatever reason, we've still got to argue the guilt phase, plus put on a penalty phase.
>
> So, no matter what the Court's ruling is, we will not be testifying. We think that we should be allowed to withdraw, that other counsel should be appointed for another trial. And that counsel, new counsel can make the assessment of waiving attorney/client privilege, what would be in the best interest of Mr. Smith under the circumstances rather than us, who would be involved as witnesses, making that determination.

Id., p. 6.

In ruling upon the respondents' motion to dismiss Claim Twelve, this court concluded that this claim was not procedurally defaulted because it was fairly presented to the Nevada Supreme Court in Smith's first state post-conviction proceeding. ECF No. 162, p. 10. Having again reviewed the state court record in relation to the claim, the court now recognizes that that conclusion was erroneous – i.e, the claim was presented for the first time in Smith's second post-conviction

proceeding and is, therefore, procedurally defaulted.[6] *See id.*, p. 4-10. In any case, the claim fails because Smith cannot meet either prong of the *Strickland* test.

The record shows that counsel made a reasoned tactical decision to not testify. As such, *Strickland* establishes a deferential presumption that the decision was reasonable. *Strickland*, 466 U.S. at 690–9. While Smith argues that "no valid strategic justification" supported counsel's choice (ECF No. 168, p. 37-41), counsel's concern about the perception it would create for the jury is sufficient to support a finding that counsel's performance was within the range of reasonable competence, especially given the possibility that counsel had undisclosed reasons to believe that their testimony could be harmful to Smith's defense. *See Yarborough v. Gentry*, 540 U.S. 1, 5-6 (2003) (noting the presumption of competence "has particular force where a petitioner bases his ineffective-assistance claim solely on the trial record").

Moreover, Smith falls well short of establishing that he suffered *Strickland*-level prejudice as a result of counsel's decision to not testify. Evidence presented by the State at trial was far more damaging to Smith's credibility than the prosecutor's questions suggesting Smith prepared his testimony while waiting for trial in jail. For example, the State introduced a letter dated October 9, 1990, that Smith sent to Judith Smith's son, Jeffrey Cook, in which he related an elaborate story about the murders and the circumstances leading up to them. ECF No. 104-4, p. 31-35, 45-50. That version of events differed significantly from the version Smith gave in his testimony at trial (ECF No. 105-7, p. 9-43) and from the version Smith related to Cook in a telephone conversation on October 11, 1990 (ECF No. 104-4, p. 11-21). Testimony from defense counsel that Smith had consistently told them the same story would not have added appreciable weight to Smith's credibility in the eyes of the jury and, as such, would not have created a reasonable probability of a more favorable outcome to Smith's

---

[6] The claim presented to the state court was a Sixth Amendment violation based on the allegation that trial counsel did not withdraw despite an actual conflict of interest arising from their position as witnesses. ECF No. 111-10, p. 31-33; ECF No. 111-12, p. 36-37. This is the factual basis for Claim Thirteen, discussed below, and a fundamentally different factual theory than that advanced in support of Claim Twelve.

trial.

Claim Twelve is denied.

Claim Thirteen

In Claim Thirteen, Smith claims that he was deprived of effective assistance of counsel because counsel's decision to not testify was infected by an actual conflict of interest. He argues that counsel were placed in a position of choosing between Smith's interest in having counsel testify and their own interests in "not violating what [they] believed to be the rules of ethics, not losing credibility, and not feeling uncomfortable." ECF No. 168, p. 43. He further argues that this conflict adversely affected counsel's representation and, therefore, he is not required to show prejudice in order to obtain relief. *Id.* (citing *Cuyler v. Sullivan*, 446 U.S. 335, 349-50 (1980)).

Smith presented this claim to the Nevada Supreme Court in his first state post-conviction proceeding. ECF No. 111-10, p. 31-33. The court rejected the claim on the ground that Smith "failed to make specific allegations that indicate an actual conflict arose." ECF No. 111-12, p. 35.

The problem for Smith is that no U.S. Supreme Court case has recognized a meritorious Sixth Amendment claim based on a claim of conflict of interest due to counsel refusing to testify on a defendant's behalf. When no Supreme Court precedent controls the legal issue raised by a habeas petitioner in state court, the state court's decision cannot be contrary to, or an unreasonable application of, clearly established federal law. *Wright v. Van Patten*, 552 U.S. 120, 125–26 (2008); *see also Carey v. Musladin*, 549 U.S. 70, 76–77 (2006). The Ninth Circuit Court of Appeals' decision in *Foote v. Del Papa*, 492 F.3d 1026 (2007), confirms that AEDPA forecloses habeas relief in this instance.

Claim Thirteen is denied.

Claim Fourteen

In Claim Fourteen, Smith claims that his rights to due process and fundamental fairness were violated by virtue of comments made by the prosecutor during closing argument at his second penalty

trial.[7] The allegedly improper argument that serves as the basis for Claim Fourteen consists of the following:

> It has been said that evil is easy and has infinite forms. This case supports that statement. In this case evil was as easy as picking up a carpenter hammer, using a pair of hands guided by a mind set which was in reckless disregard of consequence or social duty.
>
> This case profiles a family tragedy. . . . This case also profiles certain evil violent, and murderous acts. During the early morning hours of Friday, October the 5th, 1990, an evil assailant stalked forty-seven-year-old Judith Ruth Smith, twenty year- old Wendy Cox, and twelve-year old Kristy Cox in their bedrooms as they slept.
>
> . . . .
>
> When you use a hammer on a twelve-year old, is that prompted by someone with an immoral sense, with no rectitude? Is that evil?

ECF No. 152, p. 27 (excerpts are located at ECF No. 109-7, p. 27-28, 34).

When considered within the context of the evidence presented at trial, these remarks are not necessarily objectionable, let alone grounds for habeas relief. *See Fields v. Woodford*, 309 F.3d 1095, 1109, *amended* 315 F.3d 1062 (9th Cir. 2002) (holding that relief will be granted when prosecutorial misconduct amounts to constitutional error, and such error is not harmless). During closing argument, the prosecutor is permitted to argue reasonable inferences based on the evidence. *United States v. Molina*, 934 F.2d 1440, 1445 (9th Cir. 1991). The prosecutor is "allowed to strike hard blows based upon the testimony and its inferences." *United States v. Gorostiza*, 468 F.2d 915, 916 (9th Cir. 1972); *see also United States v. Bracy*, 67 F.3d 1421, 1431 (9th Cir. 1995) (upholding statement that the defendant was an "imminent source of evil in this courtroom—at this moment"). While Smith claims that they were "inflammatory" and intended "to inspire personal contempt" for him, the prosecutor's remarks were an accurate description of Smith's acts and inferences arising therefrom, based on evidence presented at trial. Thus, Smith is not entitled to relief based on Claim Fourteen.

---

[7] The portion of Claim Fourteen in which Smith's alleges that he was deprived of effective assistance of counsel as a result of counsel's failure to object to the prosecutor's misconduct during closing arguments has been dismissed as procedurally defaulted. ECF No. 162, p. 10.

Claim Fifteen

In Claim Fifteen, Smith claims his constitutional rights were violated because the prosecutor used Smith's invocation of his right to counsel against him during cross-examination. More specifically, Smith argues that the prosecutor's questions were intended to suggest that Smith's testimony could not be believed because he invoked his right to counsel. Here again, Smith is referring to the series of questions about Smith conferring with counsel during his pre-trial incarceration, which, according to Smith, implied that he concocted his testimony with the assistance of counsel. ECF No. 105-8, p. 16-20.

Smith contends that he is entitled to relief under *Griffin v. California*, 380 U.S. 609 (1965), and *Doyle v. Ohio*, 426 U.S. 610 (1976). In *Griffin*, the Court held that that the trial court's and the prosecutor's comments on the defendant's failure to testify violated the self-incrimination clause of the Fifth Amendment. 380 U.S. at 614. The Court held in *Doyle* that the prosecution may not impeach a defendant with his post- *Miranda* warnings silence because those warnings carry an implicit "assurance that silence will carry no penalty." 426 U.S. at 618. Though *Griffin* and *Doyle* both involved a defendant's Fifth Amendment right against self-incrimination, Smith argues that the principles established in those cases extend to the prosecutor's comments regarding Smith's invocation of his Sixth Amendment right to counsel.

To support such an extension, he cites to several cases from other circuits – *United States ex rel. Macon v. Yeager*, 476 F.2d 613 (3rd Cir. 1973); *Marshall v. Hendricks*, 307 F.3d 36 (3rd Cir. 2002); *United States v. McDonald*, 620 F.2d 559 (5th Cir. 1980); and *Zemina v. Solem*, 573 F.2d 1027 (8th Cir. 1978). In each of those cases, the comments at issue were made in an effort to suggest that defendant's retention of counsel was an indication of guilt. *See Macon*, 476 F.2d at 614 (prosecutor argued that defendant's actions immediately after the commission of the crime, including his hiring of an attorney, were inconsistent with his claim of innocence); *Marshall*, 307 F.3d at 71-72 (in cross-examining defendant's sister, prosecutor suggested that it was unreasonable for defendant to hire a

lawyer if he was innocent of the murder of his wife); *McDonald*, 620 F.2d at 562 (prosecutor argued that guilt could be inferred from the presence of defendant's attorney during the search of defendant's home); *Zemina*, 573 F.2d at 1028 (prosecutor suggested in closing argument that Zemina's phone call to his attorney after his arrest indicated his guilt).

The court in *McDonald* recognized a distinction between comments "that 'strike at the jugular' of a defendant's story and those dealing only tangentially with it." 620 F.2d at 563. Only comments on a defendant's exercise of his right to counsel that fall into the former category will result in a *Doyle*-type constitutional violation. *Id*.

Here, after the prosecutor asked Smith several questions about being incarcerated, the following exchange took place:

Q. You're represented by able attorneys. Have you conferred with them throughout these proceedings?

A. Yes, I have, sir.

Q. Are you fully advised as we sit here in the courtroom this morning regarding the potential punishment –

A. Yes, I am.

Q. – that you may receive if convicted for murder of the first degree?

A. Yes, sir, but I don't expect to be convicted.

Q. My question was, sir, have you been fully advised –

A. My answer is "yes," sir.

Q. – of the punishment you may receive?

A. Yes.

Q. What have you been told?

A. I've been told that you filed for the death penalty on me, sir, if I'm convicted.

Q. So you understand that first degree murder carries the potential of capital punishment?

A. Yes, I do.

1 ECF No. 105-8, p. 18.

2 Then, after the prosecutor asked Smith more questions about the possible sentences he faced if
3 convicted, the cross-examination continued as follows:

4 Q. So, you certainly have a great interest in how this case comes out, don't you?

5 A. Yes, I do, a great interest.

6 Q. Has that great interest caused you to reflect considerably during the months you spent in the Clark County Detention Center about what you should say on the day when you
7 assumed the witness stand?

8 A. All I decided to say is the truth, sir.

9 *Id*., p. 20.

10 Far from striking "at the jugular of defendant's story," the prosecutor's comments about Smith
11 consulting with counsel were designed to demonstrate that Smith had been advised of the possible
12 sentences that could result if convicted of first degree murder. The intent of the comments was to
13 establish bias, not to suggest Smith was guilty because he exercised his right to counsel. Thus, the
14 prosecutor's comments did not burden Smith's constitutional right to counsel. Claim Fifteen is
15 denied.

16 **Claim Thirty**

17 In Claim Thirty, Smith asserts that he is entitled to relief because of cumulative error. Under
18 Ninth Circuit precedent, habeas relief may be available based on the aggregate effect of multiple
19 errors even though the errors considered in isolation do not rise to the level of a constitutional
20 violation. *See Davis*, 384 F.3d at 654. "[C]umulative error warrants habeas relief only where the
21 errors have 'so infected the trial with unfairness as to make the resulting conviction a denial of due
22 process.'" *Parle v. Runnels*, 505 F.3d 922, 927 (9th Cir. 2007) (quoting *Donnelly v. DeChristoforo*,
23 416 U.S. 637, 643 (1974)).

24 As set forth herein, Smith's claims of error are, for the most part, without merit. In addition,
25 the varied nature of his alleged errors does not lend itself to a conclusion of cumulative prejudice.

26

1 The evidence establishing Smith's guilt was overwhelming and incontrovertible, thus the cumulative
2 impact of any errors occurring in that portion of the trial falls well short of rendering it fundamentally
3 unfair.

4 With respect to the penalty phase, the prejudice arising from the allegedly defective jury
5 instructions is addressed above and found wanting as a ground for relief. And, for reasons discussed
6 above, the challenged portion of the prosecutor's closing argument did not arise to the level of
7 prosecutorial misconduct.

8 Claim Thirty is denied.

9 IV. MOTION FOR EVIDENTIARY HEARING

10 Smith asks this court to grant him an evidentiary hearing not only as to the merits of claims in
11 his petition (specifically, Claims Seven and Twelve), but also to demonstrate that the failure to
12 develop the factual bases of his claims in state court was due to ineffective post-conviction counsel.
13 ECF No. 169.

14 After *Pinholster*, an evidentiary hearing is pointless once this court has determined that §
15 2254(d) precludes habeas relief. *See Pinholster*, 131 S. Ct. at 1411 n. 20 ("Because Pinholster has
16 failed to demonstrate that the adjudication of his claim based on the state-court record resulted in a
17 decision 'contrary to' or 'involv[ing] an unreasonable application' of federal law, a writ of habeas
18 corpus 'shall not be granted' and our analysis is at an end."); *see*, *also*, *Sully v. Ayers*, 725 F.3d 1057,
19 1075-76 (9th Cir. 2013) (holding that lower court did not abuse its discretion in denying an evidentiary
20 hearing on ineffective assistance claims that had been adjudicated in state court).

21 As noted above, the Nevada Supreme Court addressed Claim Seven on the merits and rejected
22 it. This court has concluded that § 2254(d) bars relief, so, under *Pinholster*, an evidentiary hearing
23 would not serve any purpose with respect to that claim. Beyond that, the court has considered the
24 evidence Smith relies upon to establish prejudice under *Strickland* (the opinion of Dr. Dudley
25 discussed above) and finds that, even taken at face value, it falls short of meeting the *Strickland*
26

1 standard.

2 For reasons discussed above, Claim Twelve was not adjudicated on the merits by the Nevada
3 Supreme Court, but, instead, was procedurally defaulted. As such, *Pinholster* does not bar
4 consideration of new evidence with respect to the claim. In addition, Smith argues that he is allowed
5 to bypass the restrictions on evidentiary hearings imposed by 28 U.S.C. § 2254(e)(2) because his
6 failure to develop the factual bases for the claim in state court was due ineffective assistance of post-
7 conviction counsel.

8 Setting aside whether a hearing is barred by § 2254(e)(2), Smith has not cited to any additional
9 relevant evidence that he intends to present in support of Claim Twelve. As discussed above, the
10 reasons for counsel's actions are set forth in the existing record and, even if counsel had testified in
11 the manner Smith claims they would have, it would not have resulted in a more favorable outcome to
12 his trial. Because he has not demonstrated that an evidentiary hearing would assist him in showing
13 that he is entitled to relief, his motion for an evidentiary hearing shall be denied. *See Schriro v.*
14 *Landrigan*, 550 U.S. 465, 474 (2007) ("In deciding whether to grant an evidentiary hearing, a federal
15 court must consider whether such a hearing could enable an applicant to prove the petition's factual
16 allegations, which, if true, would entitle the applicant to federal habeas relief.") (citation omitted).

17 V. CONCLUSION

18 For the reasons set forth above, Smith is not entitled to habeas relief.

19 *Certificate of Appealability*

20 This is a final order adverse to the petitioner. As such, Rule 11 of the Rules Governing
21 Section 2254 Cases requires this court to issue or deny a certificate of appealability (COA).
22 Accordingly, the court has *sua sponte* evaluated the claims within the petition for suitability for the
23 issuance of a COA. *See* 28 U.S.C. § 2253(c); *Turner v. Calderon*, 281 F.3d 851, 864-65 (9th Cir.
24 2002).

25 Pursuant to 28 U.S.C. § 2253(c)(2), a COA may issue only when the petitioner "has made a
26

substantial showing of the denial of a constitutional right." With respect to claims rejected on the merits, a petitioner "must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000) (citing *Barefoot v. Estelle*, 463 U.S. 880, 893 & n.4 (1983)). For procedural rulings, a COA will issue only if reasonable jurists could debate (1) whether the petition states a valid claim of the denial of a constitutional right and (2) whether the court's procedural ruling was correct. *Id.*

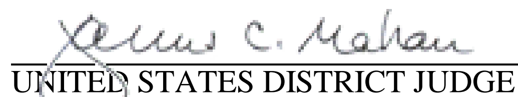
Having reviewed its determinations and rulings in adjudicating Smith's petition, the court finds that none of those rulings meets the *Slack* standard. The court therefore declines to issue a certificate of appealability for its resolution of any procedural issues or any of Smith's habeas claims.

IT IS THEREFORE ORDERED that petitioner's first amended petition for writ of habeas corpus (ECF No. 40) is DENIED. The clerk shall enter judgment accordingly.

IT IS FURTHER ORDERED that petitioner's motion for evidentiary hearing (ECF No. 169) is DENIED.

IT IS FURTHER ORDERED that a certificate of appealability is DENIED.

DATED: March 13, 2014.



UNITED STATES DISTRICT JUDGE

APPENDIX F

Opinion affirming denial of habeas relief, *Smith v. State*, Supreme Court of the State of Nevada, Case No. 228786 (Jan. 22, 1998)

JSmith-FPDT00514

Joseph Weldon SMITH, Appellant,
v.
The STATE of Nevada, Respondent.

No. 28786.

Supreme Court of Nevada.

Jan. 22, 1998.

Rehearing Denied March 23, 1998.

Defendant, convicted and sentenced to death for first-degree murder with use of deadly weapon of his wife and her two daughters, appealed sentences. The Supreme Court, 110 Nev. 1094, 881 P.2d 649, vacated sentences, and remanded for new penalty hearing. On remand, defendant was sentenced to death in the District Court, Clark County, Jeffrey D. Sobel, J. Defendant appealed. The Supreme Court, Shearing, J., held that: (1) instruction on depravity of mind was deficient; (2) instruction on mutilation was proper; (3) evidence of wife's murder was admissible; and (4) evidence supported denial of defendant's motion to waive counsel.

Affirmed in part, vacated in part.

Springer, C.J., dissented.

[1] HOMICIDE ⚬═351
203k351
Depravity of mind aspect of aggravating circumstance under first-degree murder statute, as narrowly construed to require torture, mutilation or other serious and depraved physical abuse beyond killing itself, was not unconstitutionally vague and ambiguous as written. N.R.S. 200.033, subd. 8 (1994).

[2] HOMICIDE ⚬═357(11)
203k357(11)
Depravity of mind, as aggravator under first-degree murder statute, may only be relied on where evidence of torture or mutilation exists. N.R.S. 200.033, subd. 8 (1994).

[3] HOMICIDE ⚬═311
203k311
In first-degree murder sentencing, instruction on aggravating circumstance of "depravity of mind" was deficient in failing to give guidance as to what constituted "serious and depraved physical abuse"; aggravating circumstance based upon depravity of mind must include torture or mutilation beyond act of killing itself. N.R.S. 200.033, subd. 8 (1994).
See publication Words and Phrases for other judicial constructions and definitions.

[4] HOMICIDE ⚬═311
203k311
Instruction, that term "mutilate" means to cut off or permanently destroy limb or essential part of body or to cut off or alter radically so as to make imperfect, was proper for determining existence of aggravating circumstance in first-degree murder sentencing. N.R.S. 200.033, subd. 8 (1994).
See publication Words and Phrases for other judicial constructions and definitions.

[5] HOMICIDE ⚬═357(11)
203k357(11)
In first-degree murder sentencing, despite defendant's contention that because medical examiner testified external injuries of one victim occurred at about same time as her death and that blows to her head could have rendered her unconscious, torture or mutilation could not be proved beyond reasonable doubt, there was sufficient evidence from which reasonable jury could conclude beyond reasonable doubt that murder involved mutilation. N.R.S. 200.033, subd. 8 (1994).

[6] HOMICIDE ⚬═343
203k343
In step-father's sentencing for first-degree murder of his two step-daughters, any error in admitting testimony and autopsy photographs regarding murdered mother was harmless; evidence regarding mother was cumulative of other evidence of violence to daughters, and revealed that mother suffered fewer blows in comparison to one daughter. N.R.S. 200.033, subd. 8 (1994).

[7] CRIMINAL LAW ⚬═641.4(1)
110k641.4(1)
Defendant has "unqualified right" to self-representation provided he has made voluntary and intelligent waiver of right to counsel; however, self-representation may be denied where defendant abuses right of self- representation by disrupting judicial process. U.S.C.A. Const.Amend. 6.

Copr. © West 1998 No Claim to Orig. U.S. Govt. Works

JSmith-FPDT00515

[7] CRIMINAL LAW ⚖641.8
110k641.8
Defendant has "unqualified right" to self-representation provided he has made voluntary and intelligent waiver of right to counsel; however, self-representation may be denied where defendant abuses right of self- representation by disrupting judicial process. U.S.C.A. Const.Amend. 6.

[8] CRIMINAL LAW ⚖641.8
110k641.8
Trial judge, who noted that defendant had engaged in several disruptive acts during trial, and who additionally believed that defendant had dilatory purpose when he moved to waive counsel, did not abuse his discretion in denying motion to waive counsel. U.S.C.A. Const.Amend. 6.

*265 Steven G. McGuire, State Public Defender, Carson City, Donald York Evans, Reno, for Appellant.

Frankie Sue Del Papa, Attorney General, Carson City, Stewart L. Bell, District Attorney, and James Tufteland, Chief Deputy District Attorney, Clark County, for Respondent.

OPINION

SHEARING, Justice.

The facts of this case are set forth in Smith v. State, 110 Nev. 1094, 881 P.2d 649 (1994) ("Smith I "). On October 6, 1990, police officers for the City of Henderson entered the home of appellant Joseph Weldon Smith ("Smith") and discovered, in separate bedrooms, the bodies of Judith Cox ("Judith"), Smith's wife, and Smith's stepdaughters Kristy Cox ("Kristy") and Wendy Jean Cox ("Wendy"). On December 11, 1992, Smith was convicted of three counts of first-degree murder with use of a deadly weapon and sentenced to death for the murders of Kristy and Wendy.

In Smith I, we stated:

> Since the jury was not instructed that depravity of mind must include torture, mutilation or other serious and depraved physical abuse beyond the act of killing itself and since the jury may have found depravity of mind and not torture or mutilation, we hold that NRS 200.033(8) was unconstitutionally applied in this case.

110 Nev. at 1104, 881 P.2d at 655-56. Since NRS 200.033(8) [FN1] was the single aggravating circumstance at issue, we vacated the sentences of death and remanded the case to the district court for a new penalty hearing.

> FN1. Prior to October 1995, NRS 200.033(8) read: "The only circumstances by which murder of the first degree may be aggravated are: .... (8) The murder involved torture, depravity of mind or the mutilation of the victim." The revised provision states in pertinent part: "The murder involved torture or the mutilation of the victim." NRS 200.033(8). This amendment went into effect on October 1, 1995 and did not apply to murders committed before that date. 1995 Nev. Stat., ch. 467, § 2, at 1491. Accordingly, the pre-1995 version was the law at the time of Smith's trial.

On April 16, 1996, a second penalty hearing was held. After the close of evidence, Smith's counsel made a motion to dismiss all aggravating circumstances as to Kristy, arguing that there was insufficient evidence of torture, mutilation, or depravity of mind. The court granted the motion in part, eliminating the grounds of torture and mutilation of Kristy.

The jury found that the murder of Wendy involved depravity of mind and mutilation and that the murder of Kristy involved depravity of mind. The jury then found that the aggravating circumstances outweighed any mitigating circumstance or circumstances in each case and imposed a sentence of death for each murder. On May 7, 1996, the district court entered an amended judgment of conviction. Smith now appeals.

Smith argues that NRS 200.033(8) was unconstitutionally vague and ambiguous as written and as applied.

To avoid "the arbitrary and capricious infliction of the death penalty," a state "must channel the sentencer's discretion by 'clear and objective standards' that provide 'specific and detailed guidance,' and that 'make rationally reviewable the process for imposing a sentence of death.' " Godfrey v. Georgia, 446 U.S. 420, 428, 100 S.Ct. 1759, 1764-1765, 64 L.Ed.2d 398 (1980) (footnotes omitted).

In Godfrey, the statutory aggravating circumstance at issue authorized imposition of the death penalty if

Copr. © West 1998 No Claim to Orig. U.S. Govt. Works

JSmith-FPD100516

a murder was "outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim." 446 U.S. at 422, 100 S.Ct. at 1762. A plurality of the United States Supreme Court held that the petitioner's death sentence must be reversed *266 because the state courts had failed to apply a narrowing construction of this aggravating circumstance. Id. at 432, 100 S.Ct. at 1767.

Writing for the plurality, Justice Stewart explained the state supreme court's responsibility to keep the statutory aggravating circumstance within constitutional bounds. Id. at 429, 100 S.Ct. at 1765. In Gregg v. Georgia, 428 U.S. 153, 201, 96 S.Ct. 2909, 2938, 49 L.Ed.2d 859 (1976), the joint opinion by Justices Stewart, Powell, and Stevens had stated, "It is ... arguable that any murder involves depravity of mind or an aggravated battery. But this language need not be construed in this way, and there is no reason to assume that the Supreme Court of Georgia will adopt such an open-ended construction." Thus, the state courts' construction of this aggravating circumstance determines its constitutionality.

[1] In Deutscher v. Whitley, 884 F.2d 1152, 1162 (9th Cir.1989), vacated on other grounds, 500 U.S. 901, 111 S.Ct. 1678, 114 L.Ed.2d 73 (1991), the Ninth Circuit held that a jury instruction on depravity of mind based on NRS 200.033(8) did not satisfy the Godfrey requirements. [FN2] Accordingly, in Robins v. State, 106 Nev. 611, 629, 798 P.2d 558, 570 (1990), we adopted a narrow construction, "requiring torture, mutilation or other serious and depraved physical abuse beyond the act of killing itself, as a qualifying requirement to an aggravating circumstance based in part upon depravity of mind." Thus construed, the depravity of mind aspect of the aggravating circumstance is not unconstitutional as written. Id.

FN2. The instruction in Deutscher stated:
[T]he condition of mind described as depravity of mind is characterized by an inherent deficiency of moral sense and rectitude. It consists of evil, corrupt and perverted intent which is devoid of regard for human dignity and which is indifferent to human life. It is a state of mind outrageously, wantonly vile, horrible or inhuman.
884 F.2d at 1162 n. 1.

[2] Since Robins, this court has upheld sentences of death based on depravity of mind only where there has been evidence of mutilation or of torture. In Jones v. State, 107 Nev. 632, 635, 817 P.2d 1179, 1181 (1991), we explained, "According to NRS 200.033(8), as construed by this court, depravity of mind is an aggravating circumstance where the murder involves torture or mutilation of the victim." In Domingues v. State, 112 Nev. 683, 917 P.2d 1364 (1996), cert. denied, --- U.S. ----, 117 S.Ct. 396, 136 L.Ed.2d 311 (1996), we held that there was insufficient evidence to support the aggravating circumstance of torture, depravity of mind, or mutilation because there was no evidence that the defendant had committed an act of torture or mutilation. [FN3]

FN3. To the extent that the above-quoted passage from Smith I may have created some confusion on the issue, depravity of mind, as an aggravator, may only be relied upon where evidence of torture or mutilation exists.

In the present case, the trial judge determined that there was insufficient evidence that mutilation and torture were involved in the murder of Kristy. Accordingly, the trial judge ruled that mutilation and torture would not be considered as to Kristy, and the jury was instructed as follows:
Instruction No. 7: [FN4]

FN4. The trial judge interrupted defense counsel's closing argument to elaborate on Instruction No. 7 as follows:
--to the extent that Mr. Evans is saying that there may be some confusion as to whether there is one aggravating circumstance or more than one, he's absolutely correct; there is only one aggravating circumstance that is alleged by the State in this case, and that is composed of the subparts mutilation, torture or depravity of mind.
I'm going to correct what is a fairly broad instruction, which is Instruction Number 7, to specifically say, "The State has alleged that an aggravating circumstance is present in this case," so there can be no doubt that it is one aggravating circumstance with three subparts. One of those subparts is related to one of the victims or is alleged by the State with reference to one of the victims, all three of the subparts are alleged with reference to the other victim; but it is only one total aggravating circumstance.

The State has alleged that an aggravating circumstance is present in this case.

Copr. © West 1998 No Claim to Orig. U.S. Govt. Works

JSmith-FPDT00517

The defendant have [sic] alleged that certain mitigating circumstances are present in this case.
It shall be your duty to determine:
*267 (a) Whether an aggravating circumstance or circumstances are found to exist; and
(b) Whether a mitigating circumstance or circumstances are found to exist; and
(c) Based upon these findings, whether a defendant should be sentenced to life imprisonment or death.
The law never requires that you impose a sentence of death. The jury may impose a sentence of death only if it finds at least one aggravating circumstance has been established beyond a reasonable doubt and further finds that there are no mitigating circumstances sufficient to outweigh the aggravating circumstances found.
Otherwise, the punishment imposed shall be imprisonment in the State Prison for life with or without the possibility of parole.
Instruction No. 8:
You are instructed that the following factors are circumstances by which Murder of the First Degree may be aggravated:
The murder involved, torture, depravity of mind or the mutilation of the victim.
The State is alleging depravity of mind in the murder of Kristy Cox.
The State is alleging torture or depravity of mind or mutilation in the murder of Wendy Cox.

Jury instruction No. 10 was identical to the instruction on depravity of mind given in the first penalty hearing:
The condition of mind described as depravity of mind is characterized by an inherent deficiency of moral sense and rectitude. It consists of evil, corrupt and perverted intent which is devoid of regard for human dignity and which is indifferent to human life. It is a state of mind outrageously, wantonly vile, horrible or inhuman.
In addition, on remand, the jury was given instruction No. 11:
In order to find either torture or mutilation of a victim you must find that there was torture or mutilation beyond the act of killing itself.
In order to find depravity of mind you must find serious and depraved physical abuse beyond the act of killing itself.

Given the insufficient evidence that the murder of Kristy involved torture or mutilation, the trial judge may have implicitly decided that "serious and depraved physical abuse" involved less physical abuse than torture or mutilation. In any event, the jury was given definitions for torture and mutilation, but given no guidance as to what constitutes "serious and depraved physical abuse." This jury instruction is a departure from what this court has previously determined is constitutionally acceptable.

[3] We conclude that the jury instruction on depravity of mind failed to properly channel the jury's discretion in connection with the charges, stemming from Kristy's death. See Godfrey, 446 U.S. at 428, 100 S.Ct. at 1765. An aggravating circumstance based upon depravity of mind must include torture or mutilation beyond the act of killing itself. We vacate the sentence of death as to Kristy and impose a sentence of life imprisonment without the possibility of parole in its place. NRS 177.055(3)(c).

Smith contends that the jury instruction regarding mutilation was unconstitutionally vague and ambiguous. Smith further contends that because the medical examiner testified that Wendy's external injuries occurred at about the same time as her death and that the blows to her head could have rendered her unconscious, torture or mutilation could not be proved beyond a reasonable doubt.

The jury was instructed "that the term mutilate means to cut off or permanently destroy a limb or essential part of the body or to cut off or alter radically so as to make imperfect." This court upheld this definition of mutilation in Deutscher v. State, 95 Nev. 669, 677, 601 P.2d 407, 412-13 (1979), vacated on other grounds, 500 U.S. 901, 111 S.Ct. 1678, 114 L.Ed.2d 73 (1991).

[4][5] We conclude that the jury instructions regarding mutilation were constitutionally sound. We further conclude that there was sufficient evidence from which a reasonable jury could conclude beyond a reasonable *268 doubt that the murder of Wendy involved mutilation.

Smith argues that the trial judge abused his discretion by admitting testimony and autopsy photographs regarding Judith's death. Smith contends that any probative value of this evidence was outweighed by its prejudicial effect because the hearing only concerned the murders of Kristy and Wendy.

Copr. © West 1998 No Claim to Orig. U.S. Govt. Works

JSmith-FPD T00518

The State argues that the probative value of evidence regarding Judith outweighed its prejudicial effect because the crimes against Judith, Kristy and Wendy were intertwined.

"The decision to admit particular evidence during the penalty phase is within the sound discretion of the trial court, and will not be overturned absent an abuse of that discretion. The evidence must be relevant and must be more probative than prejudicial." Pellegrini v. State, 104 Nev. 625, 631, 764 P.2d 484, 488 (1988) (citations omitted); see NRS 48.035.

[6] The testimony and photographs regarding Judith had little probative value because Smith was not being resentenced for Judith's murder. However, the record reveals that Judith suffered few blows in comparison to Wendy. The State presented extensive testimony and autopsy photographs regarding Kristy's and Wendy's physical injuries. Evidence regarding Judith was cumulative of other evidence of violence to Wendy and Kristy; therefore, we conclude that any error in admitting it was harmless.

Smith argues that the trial judge committed reversible error in denying his constitutional right to represent himself at the second penalty hearing. Smith argues that he was forced to proceed with court-appointed counsel whom he had clearly rejected and with whom he refused to cooperate.

[7] A defendant has an "unqualified right" to self representation provided he has made a voluntary and intelligent waiver of the right to counsel. Lyons v. State, 106 Nev. 438, 443, 796 P.2d 210, 213 (1990). However, self representation may be denied where the defendant abuses the right of self representation by disrupting the judicial process. Id. at 443-44, 796 P.2d at 213.

[8] At the hearing on Smith's motion to waive counsel, the trial judge noted that Smith had engaged in several disruptive acts during trial. Additionally, the trial judge believed Smith had dilatory purposes when he moved to waive counsel. We conclude that the trial judge did not abuse his discretion when he denied Smith's motion to waive counsel.

We vacate the sentence of death for the murder of Kristy, and impose a sentence of life imprisonment without the possibility of parole in its place. We affirm Smith's sentence of death for the murder of Wendy.

ROSE, YOUNG and MAUPIN, JJ., concur.

SPRINGER, Chief Justice, dissenting:

I dissent to the death penalty judgment with respect to the murder of Wendy. The death penalty is based entirely upon mutilation as the sole aggravating factor. The definition of mutilation given by the court is incomplete and lacks the element of specific intent. See Browne v. State, 113 Nev. 305, 933 P.2d 187 (1997) (Springer, J., dissenting).

END OF DOCUMENT

Copr. © West 1998 No Claim to Orig. U.S. Govt. Works