

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

George Russell Kayer, Petitioner,

vs.

David Shinn, Respondent.

****CAPITAL CASE****

**ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE NINTH CIRCUIT**

PETITION FOR WRIT OF CERTIORARI

JON M. SANDS
Federal Public Defender
District of Arizona

Jennifer Y. Garcia (AZ Bar No. 021782)
Counsel of Record
Edward Flores (LA Bar No. 37119)
Assistant Federal Public Defenders
850 West Adams Street, Suite 201
Phoenix, Arizona 85007
(602) 382-2816 telephone
(602) 889-3960 facsimile
jennifer_garcia@fd.org
edward_flores@fd.org

Counsel for Petitioner Kayer

****CAPITAL CASE****
QUESTION PRESENTED

In March 1997, a jury convicted George Russell Kayer of capital murder. Only after his conviction, and just two months before his sentencing hearing, did the trial court appoint a mitigation specialist to his case. At a presentencing conference, counsel for Kayer requested a three-to-six month continuance to allow for counsel and their mitigation specialist to investigate and prepare mitigation evidence for the sentencing hearing. Despite counsel's learned and informed decision that more time was needed to investigate, the trial court allowed Kayer to overrule his counsel's request for a continuance and proceed to sentencing with an incomplete mitigation case. The trial court sentenced Kayer to death.

The question presented is whether a state court's decision on direct appeal is based on an unreasonable determination of facts when it concludes that a defendant refused to cooperate with a mitigation specialist and was competent and understood the consequences of his decision, while ignoring evidence in the record to the contrary, when the trial court allowed him to overrule his trial counsel's decision to request a continuance to conduct a full and adequate mitigation investigation.

PARTIES TO THE PROCEEDING

The petitioner (and petitioner-appellant below) is condemned prisoner George Russell Kayer. The respondent (and respondent-appellee below) is David Shinn, Director of the Arizona Department of Corrections, Rehabilitation, and Reentry.

STATEMENT OF RELATED PROCEEDINGS

State of Arizona v. George Russell Kayer, No. CR-97-0280-AP (Ariz. June 29, 1999) (direct appeal decision)

George Russell Kayer v. Arizona, No. 99-7984 (Feb. 28, 2000) (denial of petition for writ of certiorari)

George Russell Kayer v. Charles L. Ryan, et al., No. 2:07-cv-02120-DGC (D. Ariz. Oct. 19, 2009) (denial of petition for writ of habeas corpus)

George Russell Kayer v. Charles L. Ryan, No. 09-99027 (9th Cir. May 13, 2019) (reversing, in part, and affirming, in part, the district court's denial of petition for writ of habeas corpus)

David Shinn v. George Russell Kayer, No. 19-1302 (Dec. 14, 2020) (granting State's petition for writ of certiorari and vacating the Ninth Circuit's judgment)

George Russell Kayer v. David Shinn, No. 09-99027 (Mar. 25, 2021) (affirming denial of petition for writ of habeas corpus on remaining issue)

George Russell Kayer v. David Shinn, et al., No. 09-99027 (July 8, 2021) (denial of petition for panel and/or en banc rehearing)

TABLE OF CONTENTS

QUESTION PRESENTED	i
PARTIES TO THE PROCEEDING	ii
STATEMENT OF RELATED PROCEEDINGS	iii
TABLE OF CONTENTS.....	iv
APPENDIX.....	v
TABLE OF AUTHORITIES	vi
PETITION FOR A WRIT OF CERTIORARI	1
OPINIONS BELOW	1
STATEMENT OF JURISDICTION	2
RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS	2
STATEMENT OF THE CASE.....	4
A. The crime	4
B. The trial	4
C. The sentencing	5
D. The appeal and post-conviction proceedings	12
E. Federal habeas proceedings	13
REASONS FOR GRANTING CERTIORARI.....	15
I. The state court’s decision on direct appeal was based on an unreasonable determination of facts and the Ninth Circuit erred when it affirmed the district court’s denial.....	15
CONCLUSION.....	25

APPENDIX

APPENDIX A: Order Denying Petition for Panel Rehearing and Rehearing En Banc, <i>Kayer v. Shinn</i> , 09-99027 (9th Cir. July 8, 2021), ECF No. 139.....	1a
APPENDIX B: Decision Affirming Denial of Writ of Habeas Corpus, <i>Kayer v. Shinn</i> , 09-99027 (9th Cir. Mar. 25, 2021), ECF No. 130-1.....	2a
APPENDIX C: Memorandum of Decision and Order, <i>Kayer v. Ryan</i> , 2:07-cv-02120-PHX-DGC (D. Ariz. Oct. 19, 2009), ECF No. 55.....	6a
APPENDIX D: Order Denying Petition for Writ of Certiorari, <i>Kayer v. Arizona</i> , No. 99-7984 (528 U.S. 1196 (2000)).....	74a
APPENDIX E: Opinion Affirming Conviction, <i>State v. Kayer</i> , CR-97-0280-AP (Ariz. June 29, 1999), Dkt. 33	75a
APPENDIX F: Order Granting Certiorari and Vacating the Ninth Circuit's Judgment, No. 19-1302 (592 U.S. ____ (2020)).....	115a
APPENDIX G: Opinion Reversing in Part, Affirming in Part, and Remanding to the District Court, <i>Kayer v. Ryan</i> , 09-99027 (9th Cir. May 13, 2019), ECF No. 105-1	128a

TABLE OF AUTHORITIES

Federal Cases

<i>Brumfield v. Cain</i> , 576 U.S. 305 (2015)	15
<i>Correll v. Ryan</i> , 539 F.3d 938 (9th Cir. 2008)	8
<i>Kayer v. Arizona</i> , 528 U.S. 1196 (2000)	1
<i>Kayer v. Buchanan</i> , No. 3:95-cv-01174-SMM (D. Ariz. Sept. 1, 1998), Dkt. No. 77	22
<i>Kayer v. Ryan</i> , 923 F.3d 692 (9th Cir. 2019)	2, 14
<i>Kayer v. Ryan</i> , No. CV 07-2120-PHX-DGC, 2009 U.S. Dist. LEXIS 96671 (D. Ariz. Oct. 19, 2009)	1
<i>Kayer v. Shinn</i> , No. 09-99027 (9th Cir. Mar. 25, 2021), ECF No. 139	1
<i>Lockyer v. Andrade</i> , 538 U.S. 63 (2003)	15
<i>Martinez v. Ryan</i> , 566 U.S. 1 (2012)	14
<i>Miller-El v. Cockrell</i> , 537 U.S. 322 (2003)	15
<i>Ring v. Arizona</i> , 536 U.S. 584 (2002)	5
<i>Shinn v. Kayer</i> , 141 S. Ct. 517 (2020)	2, 14

State Cases

<i>State v. Brewer,</i> 826 P.2d 783 (Ariz. 1992)	22
<i>State v. Brookover,</i> 601 P.2d 1322 (Ariz. 1979)	24
<i>State v. Kayer,</i> 984 P.2d 31 (Ariz. 1999)	1
<i>State v. Richmond,</i> 560 P.2d 41 (Ariz. 1976)	22
<i>State v. Rockwell,</i> 775 P.2d 1069 (Ariz. 1989)	24
<i>State v. Stevens,</i> 764 P.2d 724 (Ariz. 1988)	24

Federal Statutes

28 U.S.C. § 1254(1)	2
28 U.S.C. § 2254(d)	3, 13, 15, 16

State Statutes

Ariz. Rev. Stat. § 13-703 (1978) (amended 1993)	8
Ariz. Rev. Stat. § 13-703	20, 23
Ariz. Rev. Stat. § 13-703.01	22

Rules

Sup. Ct. R. 10(a)	15
-------------------------	----

Constitutional Provisions

U.S. Const. Amendment VI	2
U.S. Const. Amendment VIII	3, 14

PETITION FOR A WRIT OF CERTIORARI

George Russell Kayer, an Arizona death-row prisoner, respectfully petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit affirming the United States District Court for the District of Arizona's denial of his petition for a writ of habeas corpus.

OPINIONS BELOW

The Ninth Circuit's opinion affirming the denial of Kayer's petition for writ of habeas corpus is reported at *Kayer v. Shinn*, No. 09-99027 (9th Cir. Mar. 25, 2021), ECF No. 139, and included in Petitioner's Appendix ("Pet's App.") at 2a. The Ninth Circuit's order denying Kayer's petition for rehearing is reported at *Kayer v. Shinn*, No. 09-99027, 2021 U.S. App. LEXIS 20300 (9th Cir. July 8, 2021), and included in Pet's App. at 1a. The initial U.S. District Court order denying Kayer's petition for writ of habeas corpus is available at *Kayer v. Ryan*, No. CV 07-2120-PHX-DGC, 2009 U.S. Dist. LEXIS 96671 (D. Ariz. Oct. 19, 2009), and included in Pet's App. at 6a.

The opinion of the Arizona Supreme Court affirming Kayer's convictions and sentences on direct appeal is reported at *State v. Kayer*, 984 P.2d 31 (Ariz. 1999), and included in Pet's App. at 75a. This Court's denial of Kayer's petition for writ of certiorari after the direct appeal is reported at *Kayer v. Arizona*, 528 U.S. 1196 (2000), and included in Pet's App. at 74a.

The Ninth Circuit's original opinion reversing, in part, and affirming, in part,

the denial of Kayer's petition for writ of habeas corpus is reported at *Kayer v. Ryan*, 923 F.3d 692 (9th Cir. 2019), and included in Pet's App. at 128a. This Court's order granting Respondent's petition for certiorari and vacating the Ninth Circuit's judgment is reported at *Shinn v. Kayer*, 141 S. Ct. 517 (2020), and included in Pet's App. at 115a.

STATEMENT OF JURISDICTION

On March 25, 2021, a panel for the Ninth Circuit Court of Appeals affirmed the district court's denial of the sole remaining claim in Kayer's petition for writ of habeas corpus. Kayer timely petitioned for rehearing, which the Ninth Circuit denied on July 8, 2021. Pursuant to this Court's Order Regarding Filing Deadlines, 589 U.S. ____ (order dated March 19, 2020), and Order Rescinding Prior COVID Orders, 594 U.S. ____ (order dated July 19, 2021), the deadline for Kayer to petition for a writ of certiorari was extended to 150 days from the date the Ninth Circuit denied his timely request for rehearing. One-hundred and fifty days from July 8, 2021, is December 6, 2021. Kayer now timely files this petition asking the Court to review the judgment of the Ninth Circuit affirming the denial of habeas relief. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

U.S. Const. amend. VI

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

U.S. Const. amend. VIII

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

28 U.S.C. § 2254(d)(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 that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—

...

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

STATEMENT OF THE CASE

A. The crime

Shortly after Thanksgiving in 1994, George Russell Kayer and his girlfriend, Lisa Kester, travelled to Laughlin, Nevada with Kayer's friend, Delbert Haas. (5-ER-1023, 1027.)¹ After two days of gambling in Laughlin, they returned to Arizona. (4-ER-748.) On the return trip, Haas was shot twice in the back of the head and his body was left on the side of a forested dirt road. (6-ER-1079-80, 1082; 1084-85.) Ten days later, Kester, carrying the murder weapon under her sweatshirt, approached a security guard at a Laughlin casino and told him that she was traveling with someone who had killed a man in Prescott. (5-ER-1057.) A police officer soon arrived at the casino and Kester gave him the gun. (5-ER-1058-59.) Kester and Kayer were arrested.

B. The trial

On December 29, 1994, George Russell Kayer and Lisa Kester were charged in an eight-count indictment for the murder of Delbert Haas. The Yavapai County Superior Court appointed Linda Williamson to represent Kayer. (6-ER-1165, 1163; 3-ER-574-75.) At the time of her appointment, Williamson had been out of law school for less than five years, had never represented a capital defendant, and had never even tried a first-degree murder case. (3-ER-570-75, 582.) Williamson represented Kayer for nineteen months but did no significant work on his case. (3-ER-576.)

¹ "ER" refers to the Excerpts of Record filed in support of Kayer's appeal to the Ninth Circuit, *Kayer v. Shinn*, No. 09-99027, ECF Nos. 45-1 to 45-6.

Kayer filed a pro per motion to remove Williamson after he developed concerns about her ineffective representation and experienced a breakdown of their attorney-client relationship. (6-ER-1139-41.) The trial court granted the motion, removed Williamson, and appointed David Stoller who, like Williamson, had never tried a capital murder case. (6-ER-1142.) The court also appointed Marc J. Victor as co-counsel. (6-ER-1136.) Victor had only been out of law school for two years.

Eight months after Stoller's appointment, Kayer's trial commenced in March 1997. By that time, Kester, who like Kayer had originally been charged with capital murder, had pled guilty to lesser crimes in exchange for her testimony against Kayer. (5-ER-1061-62; 6-ER-1145.) Indeed, Kester's testimony was the sole evidence linking Kayer to Haas's murder. Relying on Kester's testimony, the jury convicted Kayer of first-degree murder, armed robbery, residential burglary, trafficking in stolen property, and theft. (1-ER-173.)

C. The sentencing

After the jury's guilty verdict, Kayer's sentence would be decided by the trial judge, who would determine the existence of aggravation and mitigation and whether Kayer would be sentenced to death.² Although trial counsel had requested funding for a mitigation investigation on January 15, 1997—two months before Kayer's jury trial—the court deferred any decision on the funding request until after Kayer had

² Kayer's sentencing preceded *Ring v. Arizona*, 536 U.S. 584 (2002), and thus was conducted solely by the trial judge.

been found guilty. (6-ER-1118, 1122-23, 1113, 1116-17.) In April 1997, one month after Kayer was convicted, the trial court finally approved trial counsel's funding request, allowing counsel to hire a mitigation specialist. (5-ER-972). Compounding the trial court's delay, trial counsel did not actually hire Mary Durand, a mitigation specialist, until May 1997. (2-ER-398.)

When Durand joined the case in May 1997, Kayer's sentencing hearing was scheduled to proceed that same month. (5-ER-982.) Due to her workload, Durand could not even meet with Kayer until less than a week before the scheduled aggravation/mitigation hearing. (5-ER-968-69.) Based on the arguments made by trial counsel—namely that they needed additional time to allow Durand to "meet with [Kayer] and talk about that particular aspect of mitigation" (5-ER-969)—the court granted a mere one-month continuance. (5-ER-970-71.)

At a pre-hearing conference on June 6, 1997, Victor informed the trial court that Durand would need at least three to six months of additional time to investigate and prepare mitigation for the hearing. (5-ER-945.) Durand had met with Kayer twice, on May 21 and June 6, 1997, and had spoken to some family members, which led to the discovery of avenues of investigation. (5-ER-945.) Stoller informed the trial court that Durand "had found what she thought were valid areas to be explored and presented. She outlined them for me in a very general form. I believe that they are things which would be, in my view, substantial evidence toward mitigation." (5-ER-

946.) Victor represented to the court that Kayer understood “the nature of putting the mitigation case on” and that it would be “compromised” if the sentencing hearing was not continued. (5-ER-946.) Stoller added that Kayer “agreed that [Durand] had outlined things which will be of a serious evidentiary value” but alerted the court that he “simply did not want to be in the Count jail system any longer.” (5-ER-947.) Stoller emphasized that Kayer’s opposition to the continuance was not driven by a disagreement on “whether Mary [Durand] had things of value to contribute to the defense.” (5-ER-947.) Stoller described Kayer’s opposition as a “life-style choice” since he believed Kayer “didn’t want to wait in the County jail and have that kind of diet and not have access to things to read and television, and things of that nature[.]” (5-ER-947.)

Stoller, however, failed to inform the trial court of Kayer’s serious issues with the county jail where he was subjected to dangerous, unsanitary, and violent conditions. Kayer had been assaulted by another prisoner within his first year in jail, resulting in a visit to the emergency room (4-ER-689), and Kayer was continually witnessing violence among the residents (4-ER-693, 699.) The conditions were so horrible that the United States Department of Justice was then investigating the Yavapai County Jail. (4-ER-687.) The DOJ report stated that “[t]he Prescott Jail continues to present serious security/safety problems.” (4-ER-696.)

Rather than accept counsel's representations about the necessity for extra time to investigate and develop mitigation evidence, the trial court allowed Kayer to override his counsel's informed decision. Kayer opposed the continuance. However, he also told the court he did not "have a death wish" and was not trying to "manipulate the court to such a position that they have no alternative but to decide to give me the death penalty."³ (5-ER-952.) The court indicated it was considering allowing a continuance shorter than six months but left the decision solely in Kayer's hands: "I would favorably look on that kind of a continuance, but I won't, if you tell me no more continuances[.]" (5-ER-956.) Kayer responded: "I'm not in favor of any more continuances. Does that answer your question?" (5-ER-956.) Despite hearing from counsel of the necessity for more time, and failing to examine the real reasons behind Kayer's opposition (*i.e.*, the county jail conditions), the court concluded that it was "going to go with Mr. Kayer" and denied the continuance. (5-ER-957.)

Upon the court's denial, Victor immediately moved to withdraw from the case. He stated to the court that he did not believe they could "effectively put on our mitigation case until our mitigation investigator has completed her investigation, and that's, from what I'm hearing, not going to happen before the 24th [of June], and therefore, we are not, from what I can see, meeting our duty to zealously represent

³ Yet, under Arizona's capital sentencing scheme, the judge was required to sentence Kayer to death if at least one aggravating factor was proven and no mitigating factors were proven. See Ariz. Rev. Stat. § 13-703 (1978) (amended 1993); *see also, e.g., Correll v. Ryan*, 539 F.3d 938, 947-48 (9th Cir. 2008).

our client's interest." (5-ER-960.) The court dismissed Victor's oral motion to withdraw as a "professional disagreement with [Kayer] as far as how to proceed[.]" (5-ER-961.) Victor then agreed that he would represent Kayer at the aggravation/mitigation hearing.

The aggravation/mitigation hearing occurred on July 7, 1997. At the hearing, counsel presented evidence from five witnesses: Jerry Mullican, a detention officer with the Yavapai County Sheriff's Office; Cherie Rottau, Kayer's mother; Jean Hopson, Kayer's half-sister; Mary Durand, mitigation specialist; and Tao Kayer, Kayer's son. The testimony of these individuals amounted to less than seventy pages in the transcript of the proceedings. (5-ER-862-928.)

Tao told the court that he cared for his father. (5-ER-928.) Mullican testified that Kayer got along with and was helpful to other prisoners. (5-ER-862-65.) Kayer's mother testified briefly about Kayer's background, yet she was mistaken in her recollection of some matters, such as her son's educational abilities. She indicated that Kayer did well as a child in school—"made about B's and C's, I think, A's in a lot of things, math, science"—and that he graduated from high school in the normal course of his studies. (5-ER-870-71, 876.) None of this was correct. She also testified regarding her son's depression, describing a "pattern" in which Kayer would be alternatively depressed and then extremely happy and productive. (5-ER-879-80.) In addition, she described Kayer's close and supportive relationship with his son. (5-ER-

885-86.) Kayer's half-sister, Jean Hopson, briefly testified that her stepfather (Kayer's father) had a drinking and gambling problem. (5-ER-890.) Hopson stated that her brother also had a drinking and gambling problem, and that he displayed signs of manic depression, having been diagnosed with bipolar disorder shortly after Tao's birth. (5-ER-891-94.)

Mitigation specialist Mary Durand also testified. Because she held no degree in psychology or psychiatry (5-ER-900), Durand explained that she normally would gather information and provide that information to mental-health professionals. (5-ER-913-14.) She indicated that the records she gathered, including presentence reports from this case and Kayer's prior convictions, indicated "serious psychiatric difficulties." (5-ER-915.) However, due to time constraints, Durand did not collect Kayer's school, medical, or military records. Indeed, the substance of Durand's testimony described what she would have done if she had had sufficient time, which would have included investigating facts supporting Kayer's bipolar disorder, history of alcoholism, suicidal tendencies, and dysfunctional relationships. (5-ER-915-18.) Durand stated that while these problems existed, she could not opine as "to what degree, for what length, and what duration, and how serious." (5-ER-925.) Durand repeated what trial counsel had represented to the court when seeking a continuance: Kayer's opposition to additional time to investigate was directly linked to his desire to leave the county jail. (5-ER-912 (testifying that Kayer "is very concerned about his

emotional health, his physical health, and catching a new case, if you will, being in [the county jail]" for a longer period of time); 5-ER-919 (testifying that Kayer told her "he was afraid to stay another year and a half in the County jail for his own emotional, physical and mental health").)

On July 11, 1997, the day before the trial court was to announce its written special verdict imposing sentence, Kayer's counsel filed a seventeen-page sentencing memorandum. (4-ER-839.) Kayer's counsel argued that the court should find the following mitigating factors in support of a life sentence: that Kayer's capacity to appreciate the wrongfulness of his conduct at the time of the crime was significantly impaired by alcohol (4-ER-850); that he had a history of substance abuse (ER 851); that he served in the military (4-ER-851); that his co-defendant, who was also charged with first-degree murder, received a significantly reduced sentence of probation (4-ER-851-52); that he had very poor physical health (4-ER-852-53); that he had poor mental health (4-ER-853); that he was an intelligent person who could contribute to society (4-ER-853-54); and that Kayer was a devoted father to his special-needs son (4-ER-854).

On July 15, 1997, the trial court sentenced Kayer to death. (1-ER-163.) The court found that two of the three aggravating factors alleged by the State were proven beyond a reasonable doubt: (1) that Kayer was previously convicted of a serious offense; and (2) that Kayer committed the offense as consideration for the receipt, or

in expectation of the receipt, of anything of pecuniary value. (1-ER-163-64.) Despite the uncontested evidence supporting the mitigating factors presented, the court found only one mitigating circumstance: Kayer's important role in his son's life. (1-ER-164-66.) In reaching its decision, the court refused to consider evidence of Kayer's bipolar disorder, alcoholism, gambling addiction, or possible paranoia because Kayer did not present evidence of a causal relationship between those mitigating factors and the murder. (1-ER-165-66.)

D. The appeal and post-conviction proceedings

On direct appeal, Kayer argued that the trial court improperly permitted him, rather than his counsel, to make decisions regarding the scheduling of the mitigation hearing, "effectively thwart[ing]" the Arizona Supreme Court's independent review of the mitigation evidence by sentencing him on an incomplete record. (4-ER-822-23.) The Arizona Supreme Court denied this claim and affirmed Kayer's convictions and sentences. In rejecting this claim, the Arizona Supreme Court determined that Kayer was competent when he opposed his trial counsel's request for a continuance and found that Kayer refused to cooperate with Durand. (1-ER-144-151.)

During post-conviction proceedings in state court, the Yavapai County Superior Court held an evidentiary hearing to address whether Kayer was denied effective assistance of counsel based on his trial counsel's (1) failure to investigate and present mitigating evidence; and (2) failure to properly question potential jurors

during voir dire. (See e.g., 1-ER-108, 169; 3-ER-598, 593, 586, 557, 568; 2-ER-389.) The superior court denied relief on both claims. (1-ER-105.) The Arizona Supreme Court summarily denied Kayer's subsequent petition for review from the superior court's ruling. (1-ER-102.)

E. Federal habeas proceedings

Kayer filed a timely petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254(d) in the United States District Court for the District of Arizona on December 3, 2007. (D. Ariz. ECF No. 22.) He filed an amended habeas petition on September 17, 2008. (2-ER-296.) In his amended petition, Kayer once again challenged the trial court's decision to allow him to overrule his counsel's request for a continuance. (See 2-ER-342-50.) The district court denied Kayer's amended habeas petition on October 19, 2009. (1-ER-32.) In rejecting the claim relevant to this cert petition, the district court found that Kayer waived the presentation of mitigation and the waiver was informed and voluntary. (1-ER-69-70.) The district court concluded that the "ruling of the Arizona Supreme Court rejecting this claim was neither contrary to nor an unreasonable application of clearly established federal law, nor was it based on an unreasonable determination of the facts." (1-ER-70-71.)

On appeal to the United States Court of Appeals for the Ninth Circuit, Kayer timely filed his opening brief on August 17, 2010. (9th Cir. ECF No. 6.1.) On April 23, 2012, Kayer filed a motion for partial remand of his case to the district court pursuant

to *Martinez v. Ryan*, 566 U.S. 1 (2012). (9th Cir. ECF No. 19.) Following responsive briefing (9th Cir. ECF Nos. 21, 24), the Court granted Kayer’s motion on December 1, 2014 (9th Cir. ECF No. 27). On remand, the district court denied Kayer’s arguments regarding *Martinez* and the procedural default of his claims and denied all requested evidentiary development. (1-ER-4; *see also* 1-ER-1.)

Kayer filed his Replacement Opening Brief in the Ninth Circuit on February 6, 2017. (9th Cir. ECF No. 44.) After the State’s Answering Brief, Kayer’s Replacement Reply Brief, and supplemental briefing, the Ninth Circuit held oral argument on March 8, 2018. The Ninth Circuit granted relief on a penalty phase ineffective assistance of counsel claim, *Kayer*, 923 F.3d 692, but this Court vacated the judgment and remanded to the Ninth Circuit, *Shinn v. Kayer*, 141 S. Ct. 517 (2020). On remand, the sole remaining issue was whether the trial court violated Kayer’s Sixth and Eighth Amendment rights when it rejected trial counsel’s request for a continuance of the mitigation hearing and, as a result, thwarted the Arizona Supreme Court’s review of Kayer’s death sentence.

The Ninth Circuit affirmed the district court’s denial of this issue. In a memorandum opinion, the Court held that the Arizona Supreme Court’s rejection of the claim on direct appeal—where it found that Kayer understood the consequences of his opposition to a continuance and refused to participate with the mitigation specialist, Durand—was not an unreasonable determination of facts or unreasonable

application of clearly established federal law under 28 U.S.C. § 2254(d)(1)–(2). (Pet’s App. at 2a.)

Kayer timely petitioned for rehearing from the Ninth Circuit’s denial of relief. (9th Cir. ECF No. 138-1.) The petition was denied on July 8, 2021. (Pet’s App. at 1a.) As noted *ante* at 2, Kayer’s petition for certiorari is timely.

This petition for writ of certiorari follows.

REASONS FOR GRANTING CERTIORARI

I. The state court’s decision on direct appeal was based on an unreasonable determination of facts and the Ninth Circuit erred when it affirmed the district court’s denial.

Review under 28 U.S.C. § 2254(d)(2) questions whether the state court’s factual determinations were reasonable. *Lockyer v. Andrade*, 538 U.S. 63, 75 (2003); *see also Miller-El v. Cockrell*, 537 U.S. 322, 346 (2003) (noting the fact-finding process is undermined where the state court has, but appears to ignore, evidence that supports a petitioner’s claim). In this case, the state courts ignored substantial evidence in support of Kayer’s claims, rendering their factual findings unreasonable, and this Court should grant certiorari. *See* Sup. Ct. R. 10(a) (stating that certiorari is appropriate where a circuit court “has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court’s supervisory power”); *Brumfield v. Cain*, 576 U.S.

305, 314 (2015) (holding that “critical factual determinations” made by the state courts were unreasonable under § 2254(d)(2)).

On direct appeal, the Arizona Supreme Court denied Kayer’s claim after determining that he “was competent when he chose not to cooperate with [mitigation specialist Mary] Durand” and was “articulate, aware of the proceedings, and knowledgeable about the potential consequences of his choices.” (1-ER-148.)

Like the district court below, the Ninth Circuit erroneously determined that the state court’s denial of Kayer’s claim was not unreasonable under § 2254(d)(2). (Pet’s App. at 4a-5a.) The court overlooked many facts that established that Kayer did not refuse to cooperate with the mitigation specialist and was not aware of the proceedings or knowledgeable about the consequences of waiving additional time, which directly contradict the state court’s factual basis for its denial of Kayer’s claim.

First, the Arizona Supreme Court’s decision was based on an erroneous factual finding that Kayer refused to cooperate with Durand. (See 1-ER-144 (finding that Kayer “repeatedly refused to cooperate with his court-appointed mitigation specialist”); 1-ER-147 (finding Kayer “competent when he decided not to cooperate with Durand”); 1-ER-148 (Kayer “chose not to cooperate with Durand”); 1-ER-151 (concluding that “trial court properly allowed defendant not to cooperate with the court-appointed mitigation specialist”)). But the record directly contradicts this

finding and demonstrates that Kayer, in fact, cooperated with Durand in different ways.

Durand was not hired until May 1997—two months before Kayer was sentenced to death. Despite this short period of time, Durand identified important avenues of investigation that warranted further attention, and which formed the basis of trial counsel’s request for a continuance. (See 5-ER-915–18 (identifying several signs of mitigating evidence, including but not limited to Kayer’s “mental health, physical health, and psychiatric health”; his family history of alcoholism; and his own alcoholism and poly-substance abuse); 5-ER-945 (one of Kayer’s trial counsel, Marc Victor, requesting a three-to-six-month continuance after informing the court that Durand has “some areas she needs to explore that she believes . . . are potential mitigation areas[.]”).) Ultimately, Durand was unable to provide any opinions about these areas because she had “not been able to do [her] investigation” in the short period of time she worked on the case. (5-ER-925.)

Contrary to the state court’s factual finding, Durand testified at the mitigation hearing that Kayer was cooperative. Kayer met with her “on two separate occasions for several hours,” signed multiple releases at her request so she could attempt to gather important records, and allowed her to meet and correspond with his family members on multiple occasions. (See 5-ER-951, 945 (counsel noting that Durand had two “extended visits” with Kayer); 5-ER-912, 909.) The state court’s factual finding is

belied by the record and the Ninth Circuit overlooked these facts when it affirmed the state court's decision.

Second, after unreasonably finding that Kayer refused to cooperate with Durand, the state court concluded that he was competent in opposing trial counsel's continuance request—and thereby foreclosing further mitigation investigation—because he “was articulate, aware of the proceedings, and knowledgeable about the potential consequences of his choices.” (1-ER-148.) In its decision, the Ninth Circuit pointed to the trial court and trial counsel's belief that Kayer understood the consequences of not allowing a mitigation investigation, and Kayer's refusal to support trial counsel's request despite multiple opportunities to do so. (Pet's App. at 4a3.) These state court findings, too, are contradicted in numerous instances by the record.

Kayer's own statements to the court demonstrate a lack of knowledge not only of the consequences of opposing a continuance to investigate mitigating evidence, but also of what mitigating evidence was and the critical role it played in the penalty phase. For example, Kayer explained to the court that Durand identified “some minor areas and details in my life that I personally can't see how they would relate to mitigation in this case I'm saying I don't see anything here of substantial value.” (5-ER-950-51.) Kayer later repeated that he saw no value in what Durand sought to investigate: “Believe me, if I thought that -- that Miss Durand had valid evidence that

should be presented in front of this Court, I'd be scratching and clawing and asking for 180 days as well.” (5-ER-956.)

It is impossible for Kayer to have been “aware of the proceedings” without knowing how the details of his life related to mitigation because the details of a capital defendant’s life are, by definition, mitigating evidence. However, Kayer’s lack of knowledge is unsurprising; Kayer told the court that, prior to meeting with Durand, he “had no idea what a mitigation specialist was” and “[d]idn’t know what they looked for, didn’t know what [Durand] was looking for in this case with me or with my life.” (5-ER-950.) Durand’s limited time with Kayer meant it was not possible for her to impart the importance of mitigation evidence. Consequently, the state court’s factual finding that Kayer was “aware of the proceedings” when he did not understand mitigating evidence or even consider it as “valid evidence” was unreasonable.

Moreover, Kayer’s statements also show that he was not “knowledgeable about the potential consequences of his choices[,]” as the state court found. (1-ER-148.) Kayer did not believe “the lack of Mary Durand’s mitigation is going to be a major factor in the [sentencing] decision.” (5-ER-952.) Indeed, Kayer implied that he saw no use for an investigation beyond the guilt-phase issues in his case, which he was still fixated on during the penalty phase: “I feel that if you turn Mary Durand’s investigative skills and aim them at [co-defendant] Lisa Kester, you would certainly

find many colorful areas that would indicate the possibility of a killer.” (5-ER-952; *see also* 5-ER-929–31 (Kayer focusing on the unreliability of Kester’s testimony during his penalty-phase allocution).) But under Arizona law at the time, the trial court was required to “take into account the aggravating and mitigating circumstances” and “impose a sentence of death if the court [found] one or more of the aggravating circumstances . . . and that there [we]re no mitigating circumstances sufficiently substantial to call for leniency.” Ariz. Rev. Stat. § 13-703(E).

While both the trial court and Kayer’s counsel believed he was knowledgeable about the consequences when making his decision, as the Ninth Circuit’s decision explicitly relied on this finding, the instances from the record above leave no doubt that he failed to grasp the purpose and significance of mitigation evidence. This is further supported by trial counsel and Durand repeatedly telling the trial court throughout the penalty phase the real reason for Kayer’s opposition to a continuance: he feared for his safety and physical health at the Yavapai County Jail.

By the time the parties were preparing for the penalty phase, Kayer had spent two-and-a-half years in jail. During that time, Kayer had been injured in an assault by another prisoner, had witnessed other violence among the prisoners, and was denied medical care for his heart condition. (4-ER-689, 693; 4-ER-699; 4-ER-769.) Durand, who had spent the most time with Kayer discussing the mitigation investigation, made clear what was driving Kayer’s decision:

I was very direct with him, and I told him I couldn't do [the mitigation investigation] in three weeks or six weeks or eight weeks, or three months, and *he is very concerned about his emotional health, his physical health, and catching a new case, if you will, being in this particular environment for that period of time.*

(5-ER-912-13 (emphasis added).) Durand further explained that "he was afraid to stay another year and a half in the County jail for his own emotional, physical, and mental health[.]" (5-ER-918.)

Kayer's fears about the jail were well-founded. The Special Litigation Section, Civil Rights Division of the Department of Justice ("DOJ") had been investigating the substandard conditions at Yavapai County Jail beginning at the time Kayer was there. (See PSER-8-42; PSER-43-51; PSER-52-73; *see also* 4-ER-686-94 (detailing conditions at Yavapai County Jail during Kayer's confinement).)⁴ As the DOJ documents point out, the jail was at 180% capacity during Kayer's confinement there (PSER-13), was severely understaffed leading to concerns about safety and security (PSER-19-21), lacked adequate sanitation practices (PSER-28 (noting a "build-up . . . of filth" in the kitchen and unwashed utensils and cooking implements)), and had problems with attorney visits and mail (PSER-33). Another DOJ official warned in 2001 that conditions since 1998 had not improved, and that these conditions "continue[d] to place inmates at risk of harm and are constitutionally deficient." (PSER-43.) Kayer even filed two lawsuits in federal court against the jail regarding

⁴ "PSER" refers to the Plaintiff's Supplemental Excerpts of Record filed in support of Kayer's appeal to the Ninth Circuit, *Kayer v. Shinn*, No. 09-99027, ECF Nos 67, 88.

the abysmal conditions during his time there; the second one resulted in a settlement between Kayer and the jail. Notice of Settlement, *Kayer v. Buchanan*, No. 3:95-cv-01174-SMM (D. Ariz. Sept. 1, 1998), Dkt. No. 77.

In sum, only by overlooking significant factual points in the record could the Ninth Circuit's opinion conclude that the state court's factual findings were not unreasonable. As the foregoing demonstrates, Kayer cooperated with Durand to the furthest extent possible during the two months she spent working on the case and Kayer did not understand the purpose of mitigating evidence and its importance to the trial court's sentencing decision under Arizona law. Kayer's decision to oppose his experienced trial counsel's request for additional time was based entirely on concerns over remaining in the county jail any longer, and the trial court erred in allowing Kayer to override his experienced trial counsel's reasonable request for a continuance.

This trial court error, in turn, infected the entire death-penalty review process. In Arizona, at the time Kayer was sentenced to death, the law required the state supreme court to conduct an "independent review" of the aggravating and mitigating circumstances in each case. *See* Ariz. Rev. Stat. § 13-703.01; *State v. Richmond*, 560 P.2d 41, 51 (Ariz. 1976). That review was automatic, and a capitally sentenced defendant could not waive it. *State v. Brewer*, 826 P.2d 783, 789 (Ariz. 1992).

Had the trial court not "effectively thwarted" the Arizona Supreme Court's independent review by allowing Kayer to waive additional time to prepare his case

for the penalty phase, thus ensuring that the Arizona Supreme Court would conduct its independent review on an incomplete record, the outcome in this case would have been different on independent review. On direct appeal, the Arizona Supreme Court held that Kayer had not established either a statutory or non-statutory mitigating factor for mental impairment. (*See* 1-ER-151-55.) Of course, this was a direct product of the trial court allowing Kayer to override the experience and knowledge of his counsel and waive additional time. This evidence, in turn, would have been sufficient to establish a statutory mitigating circumstance—or a non-statutory mitigating circumstance at the least—under Arizona law. *See* Ariz. Rev. Stat. § 13-703(G)(1).

The extensive and compelling mitigation evidence that Kayer would have presented would have had a substantial impact on the Arizona Supreme Court's independent review, especially the uncontested evidence of Kayer's undiagnosed and untreated bipolar disorder (1-ER-88; 2-ER-317; 4-ER-752-53; *see also* Pet's App. at 162a–172a). Instead of one non-statutory mitigating circumstance for having a strong relationship with his son, the Arizona Supreme Court would have had to weigh an additional statutory mitigating circumstance for mental impairment. *See* Ariz. Rev. Stat. § 13-703(E). The statutory and non-statutory mitigating circumstances, then, would have been weighed against two aggravating circumstances that were weaker in comparison, especially since Kayer's statutory mitigating circumstance for mental

impairment would have been causally connected to the crime, which involved Kayer's addictions to alcohol and gambling. (See 1-ER-125-27.)

In similar murder cases involving robberies where the Arizona Supreme Court weighed the mental impairment mitigating circumstance against aggravating circumstances comparable to Kayer's, the Arizona Supreme Court reversed death sentences and imposed life. *See State v. Stevens*, 764 P.2d 724 (Ariz. 1988) (reversing death sentence where defendant killed victim during robbery, pecuniary gain was an aggravating circumstance, and the defendant had established a mitigating circumstance for mental impairment related to drug use); *State v. Rockwell*, 775 P.2d 1069 (Ariz. 1989) (reversing death sentence where defendant killed victim during a robbery, an aggravating circumstance was pecuniary gain, and a mitigating circumstance involved an accident when defendant was a teenager that caused violent and unpredictable behavior); *State v. Brookover*, 601 P.2d 1322 (Ariz. 1979) (reversing death sentence where defendant killed victim during a robbery for pecuniary gain, the trial court found that the crime was not especially heinous, cruel, or depraved but did find a statutory aggravating circumstance for a prior serious offense, and where defendant established the mitigating circumstance of mental impairment). Had Kayer's additional mitigation evidence been presented, his case would likely have had a different outcome as well.

CONCLUSION

Kayer respectfully requests that this Court grant his petition for writ of certiorari and reverse the order and judgment of the Ninth Circuit Court of Appeals affirming the district court's denial of his petition for writ of habeas corpus.

Respectfully submitted: December 6, 2021.

JON M. SANDS
Federal Public Defender
District of Arizona

s/ Jennifer Y. Garcia
Jennifer Y. Garcia (AZ Bar No. 021782)

Counsel of Record
Edward Flores (LA Bar No. 37119)
Assistant Federal Public Defenders
850 West Adams Street, Suite 201
Phoenix, Arizona 85007
(602) 382-2816 telephone
(602) 889-3960 facsimile
jennifer_garcia@fd.org
edward_flores@fd.org

Counsel for Petitioner Kayer