

**In the
Supreme Court of the United States**

GEORGE RUSSELL KAYER,
Petitioner,

v.

DAVID SHINN,
Respondent.

CAPITAL CASE

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

BRIEF IN OPPOSITION

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**CAPITAL CASE
QUESTION PRESENTED FOR REVIEW**

In affirming the trial court's acquiescence to Kayer's opposition to delaying the sentencing hearing to allow for a further mitigation investigation, did the Arizona Supreme Court unreasonably determine that Kayer refused to cooperate with the mitigation investigation and was competent to do so?

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INTRODUCTION

Petitioner George Kayer was sentenced to death for the killing of his friend, Delbert L. Haas, after an ongoing dispute over a gambling loan. Kayer then took items of value from both the deceased victim and the victim's home. Prior to sentencing, Kayer's counsel requested a lengthy continuance for a detailed mitigation investigation to be completed. Kayer objected to the continuance, opposing the requests of his counsel. Ultimately, the judge granted Kayer's request, and denied Kayer's counsel's requested continuances for further mitigation investigation.

Kayer now presents this Petition seeking correction of a perceived error from the Ninth Circuit, by claiming that it was an unreasonable determination of fact for the Arizona Supreme Court to find that Kayer refused to work with the mitigation specialist and was competent when he waived further mitigation investigation.¹ Thus, Kayer asserts that it was unreasonable for the trial court to do exactly what Kayer wanted at that time—to deny a continuance that would have allowed for a further mitigation investigation and delayed sentencing. At most, “fairminded jurists could disagree’ on the correctness of the state court’s decision,” precluding habeas relief. *Harrington v. Richter*, 562 U.S. 86, 101 (2011) (quoting *Yarborough v.*

¹ The Ninth Circuit previously granted Kayer habeas relief on other claims; however, this Court summarily reversed that decision. The Ninth Circuit then denied Kayer's present request for habeas relief.

Alvarado, 541 U.S. 652, 664 (2004)). Kayer has presented neither a legal nor factual basis making his voluntary waiver unlawful and entitling him to relief on this claim.

The petition for a writ of certiorari should be denied.

STATEMENT OF THE CASE

After George Kaye learned that his friend, Delbert L. Haas, had recently received money from an insurance settlement, Kaye convinced Haas to join him and Kaye's girlfriend, Lisa Kester, for a gambling outing in Laughlin, Nevada. Pet. App. 78a. Kaye had bragged about a gambling system he had concocted to defeat the Las Vegas casinos. Pet. App. 7a, 77a. Kaye's only sources of income were from selling T-shirts, jewelry, and knick-knacks at swap meets, and from bilking the government for benefits with fake identities that he and Kester created. Pet. App. 7a-8a.

On November 30, 1994, Kaye, Kester, and Haas left the Prescott, Arizona area for Laughlin, Nevada, in Kaye's van. Pet. App. 8a. The first night in Laughlin, Kaye claimed to have "won big," inducing Haas to loan him about \$100 of Haas' settlement money so Kaye could further use his gambling system. Pet. App. 78a. Kaye promptly lost all the money Haas had given him. He told Haas, however, that he won big again, but that someone stole the money. *Id.*

When Kester asked Kaye what they were going to do because they were out of money, Kaye told her that he was going to rob Haas. *Id.* When Kester questioned Kaye about robbing someone who knew him and getting away with it, Kaye said, "I guess I'll just have to kill him." *Id.*

On December 2, 1994, the trio left Laughlin in Kaye's van. *Id.* On the way to Arizona, they all drank, Haas consuming the most alcohol. *Id.* During the trip, Kaye and Haas continually argued over how Kaye was going to repay the loan.

Pet. App. 78a-79a. At one of several stops, Kayer took a gun from under the seat and put it in his pants. Pet. App. 79a. Kayer “asked Kester if she was ‘going to be all right with this.’” *Id.* Kester replied she wanted a warning before Kayer killed Haas. *Id.*

Rather than take the main interstate highways, Kayer “charted a course” through the back roads. *Id.* When the trio stopped on one back road, Haas left the van to urinate behind it. *Id.* Kayer motioned to Kester with the gun when she started to climb out of the van and pushed her back inside. *Id.* “The van had windows in the rear and on each side through which Kester viewed what occurred next.” *Id.*

[Kayer] walked quietly up to Haas from behind while he was urinating, trained the gun on at Haas’ head at point-blank range, and shot him behind the ear. [Kayer] dragged Haas’ body off the side of the road to the bushes where the body was eventually found. [Kayer] returned to the car carrying Haas’ wallet, watch, and jewelry.

Id. They took off, but returned when Kayer realized he forgot to get Haas’ house keys. *Id.* After seeing Haas’ body, Kayer got the gun and told Kester that Haas did not appear to be dead. Pet. App. 80a. Kester then heard a second shot. *Id.*

Kayer and Kester drove to Haas’ home and stole several guns, a camera, and other property. *Id.* Kayer was unable to find Haas’ PIN number so he was not able to access Haas’ bank accounts. *Id.*

The next day, December 3, 1994, two couples looking for Christmas trees discovered Haas’ body. Pet. App. 76a. Haas had been shot twice, with bullet wounds located roughly behind each ear. *Id.*

Meanwhile, Kayer and Kester, using aliases most of the time, fenced the stolen items at pawn shops and flea markets over the course of the next week. Pet. App. 80a. Eventually they went to Las Vegas, where Kayer tried his gambling system with the proceeds from the sale of the stolen items. *Id.* While at the Pioneer Hotel, on December 12, 1994, Kester reported the murder to a hotel security guard. *Id.* Las Vegas police officer Larry Ross contacted Yavapai County Detective Danny Martin and told him what Kester had said about her boyfriend. Pet. App. 77a. Kester turned over the gun, and led police to Haas' credit cards, which were inside Kayer's van. Pet. App. 76-77a. At the time she had contacted the police, Kester "appeared agitated to the police officers and security guards present and said she had not come forward sooner because she feared [Kayer] would kill her, too." Pet. App. 77a. She wanted to be placed in the witness protection program. *Id.*

Las Vegas police arrested Kayer as he was leaving the hotel. *Id.* The next day, Detectives Martin and Roger Williamson flew to Las Vegas and obtained from Kester "a complete account of the events that she said led to Haas' death." *Id.* Among other things, Kester told the detectives that Kayer continually bragged about his gambling system, however, neither of them had any money with which to gamble. *Id.* Kayer invoked his *Miranda* rights after briefly speaking with detectives. *Id.*

An Arizona grand jury indicted Kayer and Kester for the first-degree murder of Haas, as well as a multitude of related crimes. In September 1995, Kester entered into a plea agreement with the State in exchange for her truthful testimony

and a reduction of charges. Pet. App. 9a. In March 1997, a jury convicted Kayser of all charges, finding him guilty of first-degree murder under both premeditated and felony murder theories. *Id.*

Kayser's first sentencing conference was scheduled seven weeks after his trial, for May 16, 1997. Pet. App. 82a. It was then rescheduled for June 6, so that a mitigation specialist could work with Kayser. *Id.* At the June 6 sentencing conference, Kayser informed the court that he wanted to proceed with sentencing immediately, even though his counsel was requesting a 90-day continuance to further evaluate Kayser. *Id.* Kayser went into great detail regarding his discussions with Mary Durand, the mitigation specialist, and areas of his life she wanted to investigate, as well as why Kayser thought this would not be beneficial to his case. R.T. 6/6/97, at 15-18. Kayser described to the court, in detail, his discussions with his attorneys as well as his disagreement with them over the value of the mitigation investigation. *Id.* Kayser reported he wanted to proceed with sentencing and did not wish to cooperate with the mitigation specialist. Pet. App. 82a-83a. Furthermore, Kayser indicated that he understood the gravity of what was at stake in his sentencing:

I don't have a death wish. I'm not trying to manipulate the Court to such a position that they have no alternative but to decide to give me the death penalty. I don't feel the lack of Mary Durand's mitigation [investigation] is going to be a major factor in the decision. . . .

In October of 1994, in Oklahoma City in the emergency room, I expired. I died. And I was brought back to life. I don't fear death. I don't necessarily embrace it. As I stated, I'm not asking this Court to kill me or not to kill me. I've had a good life. I don't fear death. I'm content. Very few people can say that.

. . .

Believe me, if I thought 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 day[continuance] as well. I'm not in favor of any more continuances.

R.T. 6/6/97, at 17-18, 21.

The court told Kayer that it would look favorably on a long continuance, but “I won’t, if you tell me no more continuance.” R.T. 6/6/97, at 21. Regardless, the judge moved the mitigation hearing from June 24, 1997, to July 8, 1997, and the sentencing from July 8 to July 15. Pet. App. 82a. At both the July 8 and July 15 hearings, Kayer again refused the judge’s offer to allow more time for the mitigation investigation, and stated that he would not cooperate with the mitigation specialist. *Id.*

At the July 15, 1997 sentencing hearing, the judge found that the State established two aggravating factors beyond a reasonable doubt: 1) Kayer had previously been convicted of a serious felony offense, and 2) the murder was committed for pecuniary gain. The court further found that Kayer had established no statutory mitigating factors and only one nonstatutory mitigating factor. Pet. App. 83a-84a. After weighing the aggravating and mitigating factors, the trial court sentenced Kayer to death. Pet. App. 84a.

In June 1999, the Arizona Supreme Court affirmed Kayer’s convictions and sentences. Pet. App. 75a-114a. His convictions became final when this Court denied certiorari on February 28, 2000. *Kayer v. Arizona*, 528 U.S. 1196 (2000). Subsequently, the Arizona Supreme Court filed Kayer’s first Notice of Post-Conviction Relief. Over 6 years later, following a 9-day evidentiary hearing, Judge

William T. Kiger, the judge who had presided over Kayer's jury trial, denied Kayer's post-conviction relief petition. Pet. App. 142a. The Arizona Supreme Court denied review. Pet. App. 143a.

Kayer filed an amended petition for federal habeas corpus relief denominating 25 claims. The district court denied Kayer's amended habeas petition and granted a certificate of appealability for two claims: Claim 1(B)(4) (alleging ineffective assistance of counsel at sentencing) and Claim 2 (Kayer's waiver of a continuance for sentencing). Pet. App. 72a-73a.

In December 2014, pursuant to Kayer's motion, the Ninth Circuit remanded the case to the district court to reconsider, in light of *Martinez v. Ryan*, 566 U.S. 1 (2012), and *Dickens v. Ryan*, 740 F.3d 1302 (9th Cir. 2014) (en banc), Claims 1(B)(1), 1(B)(2), 1(B)(3) and 1(B)(5), ineffective assistance of counsel claims that the district court had previously found procedurally defaulted. Following briefing, on June 14, 2016, the district court again found these claims procedurally barred after considering the change in the case law. Pet. App. 143a. The court denied Kayer's requests for an evidentiary hearing and certificate of appealability, and denied Kayer's motion to reconsider.

The Ninth Circuit granted habeas relief on Kayer's ineffective assistance of counsel claim as it related to the presentation of mitigating evidence at sentencing. Pet. App. 199a. The court subsequently denied the State's request for en banc rehearing, with Judge Bea, joined by eleven other justices, dissenting from that denial. Pet. App. 119a. This Court then granted the State's Petition for Writ of

Certiorari, vacated the judgment of the Ninth Circuit, and remanded for further proceedings. Pet. App. 127a.

On remand, the Ninth Circuit denied Kayer's final claim that the Arizona Supreme Court unreasonably acceded to Kayer's desire to waive continuing his sentencing to allow a mitigation investigation to be completed. Pet. App. 2a. This petition followed.

REASONS FOR DENYING THE WRIT

This Court grants certiorari “only for compelling reasons,” and Kayer has presented no such reason. Sup. Ct. R. 10. In particular, Kayer has not established that the Ninth Circuit has “entered a decision in conflict with the decision of another United States court of appeals.” Sup. Ct. R. 10(a). Rather, Kayer “assert[s] error consist[ing] of erroneous factual findings [and] the misapplication of a properly stated rule of law,” for which this Court “rarely grant[s]” certiorari review. Sup. Ct. R. 10. Kayer has not pointed to a decision from any jurisdiction applying a rule that conflicts with the Ninth Circuit’s ruling. Kayer has not identified any ruling that decided an important question of federal law “that has not been, but should be, settled by this Court.” Sup. Ct. R. 10(c). Because Kayer merely seeks correction of the Ninth Circuit’s perceived error in denying habeas relief, this Court should deny the petition.

The Arizona Supreme Court Did Not Make an Unreasonable Determination of Facts when it Found Kayer Could Prevent His Counsel from Presenting Mitigation Evidence.

Kayer opposed delaying his sentencing to allow more time for a mitigation investigation. *See* Pet. App 82a-83a; R.T. 6/6/97, at 15-18, 21. On direct appeal, the Arizona Supreme Court held that the trial court did not err by acquiescing to Kayer’s desire to end the mitigation investigation and be sentenced. Pet. App. 96a. It found that Kayer had refused to cooperate with his mitigation specialist and was competent to do so. Pet. App. 96a–100a. Kayer argues that the Arizona Supreme Court’s rejection of this claim was based on an unreasonable determination of the

facts under 28 U.S.C. § 2254(d)(2).² Specifically, Kaye challenges the Arizona Supreme Court’s findings that (1) Kaye had refused to work with the mitigation specialist, and (2) Kaye understood the consequences of waiving further investigation of mitigation. Pet. at 16. The Ninth Circuit, District Court, and Arizona Supreme Court have all disagreed with Kaye on this issue. Pet. App. 2a, 6a, 75a.

A. The Arizona Supreme Court reasonably found that Kaye had refused to work with the mitigation specialist.

In an attempt to show that the Arizona Supreme Court’s factual findings were unreasonable, Kaye contends that he initially cooperated with Durand—he had extensive visits with her and he signed releases so Durand could gather records. Pet. 17. Even if Kaye cooperated with Durand early on, this does not render the Arizona Supreme Court’s finding unreasonable or overcome his later refusal to agree to extend time to permit a full mitigation investigation. R.T. 6/6/97, at 17-18, 21 (“I don’t have a death wish. I’m not trying to manipulate the Court to such a position that they have no alternative but to decide to give me the death penalty. I don’t feel the lack of Mary Durand’s mitigation [investigation] is going to be a major factor in the decision”); *see also* Pet. App. 82a-83a.

² To the extent Kaye’s Petition infers a violation of his Sixth Amendment right to counsel, *see* Pet. 2, this Court already found there was no Sixth Amendment violation in this case. Pet. App. 115a.

On multiple occasions and at multiple hearings, Kayer objected to a continuance for a mitigation investigation to be completed. *Id.*; *see also* Pet. App. 3a-4a. Kayer understood that he was facing a possible death sentence, and while he may not have explicitly stated he would not cooperate with the mitigation specialist, he frequently made it clear to the trial court that he opposed more continuances for that purpose. Pet. App. 82a. Accordingly, it was not an unreasonable determination of fact for the Arizona Supreme Court to find that Kayer was refusing to work with the mitigation specialist due to his repeated requests to not allow more time for her investigation.

B. The Arizona Supreme Court reasonably found that Kayer was competent to waive further mitigation investigation.

Kayer claims that the Arizona Supreme Court's conclusion that he was "knowledgeable about the potential consequences of his choices," was not reasonable because Kayer told the trial court he could not see how the details of his life would relate to mitigation. R.T. 6/6/97, at 16. Kayer explained that this was simply a difference of opinion between him and his attorney. *Id.* He did not see anything about the details of his life having substantial value for mitigation. *Id.* The subsequent exhaustive investigation years later confirmed his opinion.

The trial court explained to Kayer the potential consequences of his choices, as well as the fact the court was prepared to find two aggravating circumstances. Pet. App. 25a-26a. The Ninth Circuit also agreed that the Arizona Supreme Court's finding that Kayer was competent when he opposed the continuance was not "an unreasonable determination of the facts within the meaning of § 2254(d)(2)." Pet.

App. 4a. The record simply does not support Kayer's claim that the state court findings were objectively unreasonable.

Moreover, the Arizona Supreme Court held that the trial court did not improperly allow Kayer to control the presentation when it accepted his waiver of a continuance for the sentencing proceeding. Pet. App. 96a-103a. The court noted that under its previous case law, a defendant is allowed to control mitigation evidence and that this Court in *Blystone v. Pennsylvania*, 494 U.S. 299, 306 & n.4 (1990), had upheld a defendant's right to waive all mitigating evidence. Pet. App. 79a. "[O]ur case law allows defendant the freedom not to cooperate with a mitigation specialist and thereby potentially limit the mitigation evidence that is offered." Pet. App. 102a.

In reviewing this claim, the district court noted that "there is no dispute that a defendant may waive the presentation of mitigating evidence." Pet. App. 43a.

In *Blystone*, the United States Supreme Court held that no constitutional violation occurred when a defendant was allowed to waive all mitigation evidence after repeated warnings from the judge and advice from counsel. 494 U.S. 299, 306 & n.4. That principle was buttressed by the holding in *Landrigan*, which denied an ineffective assistance claim based on the defendant's refusal to allow the presentation of a mitigation case. 550 U.S. at 475.

Pet. App. 43a-44a.

Here, the district court found that there was no factual or legal basis for Kayer's argument that he did not understand the consequences of his decision. Pet. App. 44a. The Ninth Circuit affirmed this finding, noting that "[u]nder the AEDPA's deferential review, we cannot say the Arizona Supreme Court's conclusion

was objectively unreasonable.” Pet. App. 4a-5a (citing *Pizzuto v. Yordy*, 947 F.3d 510, 523 (9th Cir. 2019) (per curiam)). The Supreme Court has never imposed “an informed and knowing” requirement on a defendant’s decision not to introduce evidence, or required a specific colloquy to ensure a knowing and intelligent refusal of the presentation of mitigating evidence. Pet. App. 44a (citing *Schriro v. Landrigan*, 550 U.S. 465, 479 (2007)). Even so, the district court further concluded that the record supported the trial court’s factual finding that Kayer’s waiver was “informed and voluntary.” *Id.* “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.” Pet. App. 44a-45a. The Ninth Circuit agreed by recognizing that “[b]oth the judge and Kayer’s Counsel stated on the record that they believed Kayer understood the importance of the mitigation evidence and the consequences of opposing the continuance.” Pet. App. 3a.

CONCLUSION

The petition for a writ of certiorari should be denied.

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