

No. 21-6559

**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**

---

**REPLY TO BRIEF IN OPPOSITION**

---

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*

## TABLE OF CONTENTS

TABLE OF AUTHORITIES .....	ii
INTRODUCTION .....	1
ARGUMENT .....	1
CONCLUSION.....	5

## TABLE OF AUTHORITIES

### Federal Cases

<i>Beck v. Alabama</i> , 447 U.S. 625 (1980) .....	4
<i>Caldwell v. Mississippi</i> , 472 U.S. 320 (1985) .....	4
<i>Eddings v. Oklahoma</i> , 455 U.S. 104 (1982) .....	3
<i>Jones v. Walker</i> , 540 F.3d 1277 (11th Cir. 2008) (en banc) .....	1
<i>Maxwell v. Roe</i> , 628 F.3d 486 (9th Cir. 2010) .....	1
<i>Taylor v. Maddox</i> , 366 F.3d 992 (9th Cir. 2004) .....	2
<i>Woodson v. North Carolina</i> , 428 U.S. 280 (1976) .....	4

### State Statutes

Ariz. Rev. Stat. § 13-703(E) (1993).....	3
--	---

## **INTRODUCTION**

George Russell Kayer's petition for certiorari made clear the constitutional violation in his case: despite ample evidence to the contrary, the Arizona Supreme Court unreasonably determined that Kayer was both competent and understood the consequences of his failure to cooperate with the trial mitigation investigator and thus affirmed the trial court's decision to allow Kayer to overrule his counsel's request for a continuance. Respondents repeat the Arizona Supreme Court's errors in refusing to acknowledge the evidence contradicting these findings and failing to recognize the plain evidence regarding Kayer's state of mind and understanding.

## **ARGUMENT**

When the state court's adjudication of a claim was based on an unreasonable determination of facts, then federal courts review the claim de novo. *See Maxwell v. Roe*, 628 F.3d 486, 494-95 (9th Cir. 2010) ("[W]hen a state court adjudication is based on an antecedent unreasonable determination of fact, we proceed to consider the petitioner's related claim de novo."); *Jones v. Walker*, 540 F.3d 1277, 1288 (11th Cir. 2008) (en banc) (reviewing claim de novo because, although petitioner had not satisfied § 2254(d)(1), he had satisfied § 2554(d)(2)). The Arizona Supreme Court's decision on appeal rested primarily on its unreasonable findings that Kayer failed to cooperate with his mitigation specialist and was knowledgeable about the consequences he faced. The state court's unreasonable findings are "highly probative

and central to [Kayer's] claim." *Taylor v. Maddox*, 366 F.3d 992, 1001 (9th Cir. 2004). In fact, this determination was the crux of the denial of relief on Kayer's claim. Because the state supreme court's findings were an unreasonable determination of the facts in light of the evidence before it, Kayer has met AEDPA's limitation on relief by satisfying § 2254(d)(2).

In the brief in opposition, Respondents dismiss Kayer's arguments about his initial cooperation with the mitigation investigator Mary Durand by arguing that this "does not overcome his later refusal to agree to extend time to permit a full mitigation investigation." (Brief in Opp. at 11.) But it was not just Kayer's cooperation that matters here, but his competency and understanding of the issues. First, Respondents concede here that Kayer did work with the investigator, which is the erroneous factual determination made by the Arizona Supreme Court. (See Pet. at 16-17 (noting court's repeated statements that Kayer did not cooperate with the investigator); Br. in Opp. at 12.) Respondents give no explanation why Kayer's multiple instances of cooperating with Durand do not clearly refute the state court finding otherwise.

Similarly, Respondents attempt to counter Kayer's argument that the state court relied on an unreasonable determination of the facts when it found that he understood the consequences of waiving additional time by repeating his statements that instead underscore his lack of understanding. (Br. in Opp. at 12.) For example,

Kayer said that he could not see how the details of his life “relate to mitigation in this case,” a statement upon which Respondents rely. (5-ER-951; Br. in Opp. at 12.) But the details of Kayer’s life are by definition mitigation evidence, *see, e.g.*, *Eddings v. Oklahoma*, 455 U.S. 104, 112 (1982), and this statement proves that Kayer did not understand what mitigation evidence was or why it was important. The same is true of Kayer’s statement, also relied on by Respondents (Br. in Opp. at 11), that he did not think “the lack of Mary Durand’s mitigation [investigation] is going to be a major factor in the decision.” (5-ER-952.) Arizona’s capital sentencing statute made clear that to arrive at a sentencing decision, the decisionmaker must decide whether the mitigation evidence is sufficiently substantial to call for leniency. Ariz. Rev. Stat. § 13-703(E) (1993). The trial court here relied on that statute in sentencing Kayer to death. (See 1-ER-167 (trial court’s special verdict).) Kayer’s plain statement that he did not think the mitigation would be “a major factor” in the court’s decision makes clear his lack of rational understanding. Like the Arizona Supreme Court before, Respondents ignore the meaning of this evidence.

Further, Respondents continue to frame Kayer’s actions as a waiver of mitigation evidence, despite the evidence to the contrary. (Br. in Opp. at 13-14.) But this claim is not about Kayer’s right to “waive” the presentation of mitigating evidence, but on the trial court’s decision to allow Kayer to usurp the role of his counsel. That ruling violated Kayer’s Sixth Amendment right to counsel and his

Eighth Amendment right to an individualized sentencing because the trial court then sentenced him without considering his mitigation evidence and the Arizona Supreme Court affirmed his sentence on independent review the same way.

The Constitution requires that there be a heightened reliability in the process afforded to people who are subjected to the ultimate punishment. *See, e.g., Woodson v. North Carolina*, 428 U.S. 280, 305 (1976) (noting that “the penalty of death is qualitatively different from a sentence of imprisonment” and therefore “there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case”); *Caldwell v. Mississippi*, 472 U.S. 320, 329 (1985) (“This Court has repeatedly said that under the Eighth Amendment ‘the qualitative difference of death from all other punishments requires a correspondingly greater degree of scrutiny of the capital sentencing determination.’”) (citing *California v. Ramos*, 463 U.S. 992, 998-99 (1983)); *Beck v. Alabama*, 447 U.S. 625, 637-38 (1980) (“It is of vital importance to the defendant and to the community that any decision to impose the death sentence be, and appear to be, based on reason rather than caprice or emotion.”) (quoting *Gardner v. Florida*, 430 U.S. 349, 357-58 (1977) (opinion of Stevens, J.)). Trial counsel here made the reasoned decision that a continuance was necessary and the trial court allowed Kayer to countermand that decision, thereby eviscerating Kayer’s right to counsel and denying him both reliability and an individualized determination of sentence. As Kayer has illustrated

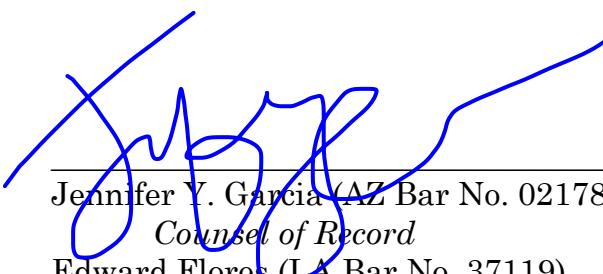
(Pet. at 22-24), the evidence that should have been presented in mitigation of his crime would likely have resulted in a life sentence and Kayer should receive relief.

## 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: February 22, 2022.

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*