PETITION APPENDIX

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APPENDIX A

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

LEROY MCGILL, *Petitioner-Appellant*, v. DAVID SHINN, Director, Arizona Department of Corrections; WALTER HENSLEY, Warden, Arizona Department of Corrections - Eyman Complex, *Respondents-Appellees.*	No. 19-99002 D.C. No. 2:12-cv-01149-JJT OPINION

Appeal from the United States District Court
for the District of Arizona
John Joseph Tuchi, District Judge, Presiding

Argued and Submitted May 20, 2021
Pasadena, California

Filed October 21, 2021

Before: Jay S. Bybee, Milan D. Smith, Jr., and Daniel P. Collins, Circuit Judges.

Opinion by Judge Bybee;
Concurrence by Judge Collins;
Partial Concurrence and Partial Dissent by
Judge Milan D. Smith, Jr.

SUMMARY*

Habeas Corpus / Death Penalty

The panel affirmed the district court's judgment denying Leroy McGill's 28 U.S.C. § 2254 habeas petition challenging his Arizona conviction and death sentence for the murder of his former housemate, Charles Perez.

The district court granted a certificate of appealability (COA) as to one claim—ineffective assistance of counsel arising out of trial counsel's investigation and presentation of mitigation evidence at the penalty phase. Of McGill's remaining uncertified claims, one—a claim that counsel was deficient by failing to present mitigating circumstances of McGill's prior armed robbery convictions—also arose from counsel's performance at the penalty phase. Because the district court granted a COA with respect to other aspects of counsel's performance at the penalty phase, the panel applied *Browning v. Baker*, 875 F.3d 444 (9th Cir. 2017), and treated McGill's claim with respect to the circumstances of the armed robbery as if the district court had granted a COA.

McGill argued that this court owes no duty of deference under the Antiterrorism and Effective Death Penalty Act (AEDPA) to the post-conviction review (PCR) court's decision because, in denying his claim of ineffective assistance of counsel at the penalty phase, the PCR court misapplied *Strickland v. Washington*, 466 U.S. 668 (1984), under 28 U.S.C. § 2254(d)(1) and unreasonably determined

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

the facts under 28 U.S.C. § 2254(d)(2). Regarding § 2254(d)(1), the panel held that the PCR court correctly identified and reasonably applied clearly established law in assessing professional norms and evaluating new mitigation evidence, did not apply an unconstitutional causal-nexus test, and did not need to consider the cumulative effect of nonexistent errors. Regarding § 2254(d)(2), the panel held that the PCR court did not rely on unreasonable determinations of fact in finding that counsel's decision not to call an addictionologist was tactical, that McGill failed to substantiate his claims of childhood sexual assault, and that a retained neuropsychologist was a qualified expert witness upon whom counsel was entitled to rely.

Because the PCR court correctly identified and reasonably applied clearly established federal law, and its conclusions did not rely on unreasonable determinations of facts, the panel reviewed the merits of McGill's ineffective assistance of counsel claim under AEDPA's deferential standard of review. Applying that standard, the panel concluded that McGill did not show that counsel performed deficiently under *Strickland* at the penalty phase. The panel wrote that the PCR court reasonably concluded that counsel's preparation, investigation, and presentation of mitigation evidence was thorough and reasoned; that as a whole, the defense team uncovered a "not insignificant" amount of mitigation evidence that spanned decades of McGill's life and presented a comprehensive picture to the jury; that there is no evidence that counsel failed to uncover any reasonably available mitigation records; and that the PCR court's findings regarding the adequacy of counsel's presentation of the circumstances surrounding McGill's prior armed robbery convictions are not unreasonable. Because counsel's performance was not objectively deficient in light of the

prevailing professional norms, the panel did not reach McGill's claims of prejudice.

The panel treated McGill's briefing of two uncertified issues as an application for a COA. The panel denied a COA as to McGill's uncertified claim that counsel was ineffective at the guilt phase by failing to retain an expert arson investigator. The panel granted a COA as to McGill's claim that his death sentence violated the Ex Post Facto Clause in light of *Ring v. Arizona*, 536 U.S. 584 (2002), in which the Supreme Court invalidated Ariz. Rev. Stat. § 13-703(C) (2001), because it required the sentencing judge—not the jury—"to find an aggravating circumstance necessary for imposition of the death penalty." Perez's murder fell within the brief period between *Ring* and Arizona's amendment of § 13-703. Denying relief on the merits, the panel concluded that the Arizona Supreme Court reasonably applied clearly established federal law when it determined that Arizona had only made a procedural change to its death penalty process, and that change did not violate the Ex Post Facto Clause.

Concurring, Judge Collins wrote separately to note that *Browning*'s rule is plainly incorrect, defeats the screening purpose of 28 U.S.C. § 2253(c)(3), creates unnecessary work and delay, and should be revisited in the next en banc case in which that rule has played a role.

Judge M. Smith concurred in part and dissented in part. He concurred in the decision resolving McGill's challenges to the guilt phase of his trial, but he would grant relief with respect to the penalty phase because he believes sentencing McGill to death is unconstitutional pursuant to the Ex Post Facto Clause. He wrote that McGill could not have been sentenced to death for murder when he committed his crimes

because at that time there was no statute implementing the death penalty in Arizona, and yet because the Arizona legislature passed a law thirty-eight days later that purported to allow his execution, McGill now sits on death row.

COUNSEL

Jennifer Y. Garcia (argued) and Sara Chimene-Weiss, Assistant Federal Public Defenders; Jon M. Sands, Federal Public Defender; Office of the Federal Public Defender, Phoenix, Arizona; for Petitioner-Appellant.

Erin D. Bennett (argued), Assistant Attorney General; Lacey Stover Gard, Deputy Solicitor General/Chief of Capital Litigation; Mark Brnovich, Attorney General; Office of the Attorney General, Phoenix, Arizona; for Respondents-Appellees.

OPINION

BYBEE, Circuit Judge:

Petitioner Leroy McGill was sentenced to death in 2004 for the murder of his former housemate, Charles Perez. The Arizona Supreme Court affirmed McGill's conviction and sentence on direct review, and the state trial court denied post-conviction relief. McGill now appeals the district court's denial of his petition for habeas relief under 28 U.S.C. § 2254. The district court granted a certificate of appealability as to trial counsel's performance at the penalty phase of trial but denied a certificate as to McGill's remaining claims.

We evaluate McGill's claims under the Antiterrorism and Effective Death Penalty Act. Applying that deferential standard to his certified claim, we conclude that in denying McGill relief, the state court reasonably applied clearly established federal law and relied upon reasonable factual determinations. We further find that McGill has failed to make a substantial showing that he was denied a constitutional right to effective assistance of counsel at the guilt phase and therefore deny a certificate of appealability as to that claim. We grant a certificate of appealability on McGill's ex post facto claim but deny relief on the merits. Accordingly, we affirm the judgment of the district court.

I. FACTUAL AND PROCEDURAL BACKGROUND

A. *The Crime*

In July 2002, McGill and his girlfriend, Jonna (Angel) Hardesty, were nearly homeless and temporarily living with

a friend in the Sunnyslope area of Phoenix. *State v. McGill*, 140 P.3d 930, 933 (Ariz. 2006) (en banc) (*McGill I*). The couple had recently been ousted from a nearby duplex apartment owned by Jack Yates after Charles Perez, another occupant of the duplex, accused McGill and Hardesty of stealing his shotgun. *Id.* In the early morning hours of July 13, 2002, McGill walked to the Yates duplex to teach Perez and Yates "a lesson, that nobody gets away with talking about [McGill and Hardesty]." *Id.* (alterations in original). McGill was confronted by Eddie Keith who lived in the duplex with his wife and two daughters. McGill warned Keith to get his family out of the duplex, and Keith obediently fled. *Id.* at 933–34.

When McGill entered the duplex, he found Perez sitting on a couch in the living room with his girlfriend, Nova Banta. *Id.* at 934. McGill admonished the couple not to "talk behind other people's backs," and before either could respond, he doused the pair with gasoline and threw a lit match at them. *Id.* Flames engulfed Perez and Banta, who ran screaming from the apartment. *Id.* First responders transported Perez and Banta to the hospital with third-degree burns covering more than seventy-five percent of their bodies. *Id.* Perez died the following day. *Id.* Banta survived, identified McGill to her nurse as the man who set her on fire, and later identified McGill at trial. *Id.* Fortunately, the other residents of the duplex escaped the blaze without injury.

In March 2003, a Maricopa County grand jury indicted McGill on charges of first-degree murder for Perez's death, attempted first-degree murder for his attack on Banta, and several counts of arson and endangerment. *Id.* Shortly thereafter, the state gave notice of its intent to seek the death penalty under then-Arizona Revised Statute § 13-703.01(B)

(2003).[1] The state raised three statutory aggravating factors under Ariz. Rev. Stat. § 13-703(F) (2003): McGill's convictions for armed robbery, a "serious offense" under the statute; McGill's knowing creation of a "grave risk of death" to others during the crime; and McGill's commission of the crime in an especially heinous, cruel, or depraved manner. *See id.* § 13-703(F)(2), (3), (6).

Attorney Maria Schaffer of the Office of the Legal Advocate was appointed to represent McGill, and Elizabeth Todd was appointed as second chair. The defense team also retained Mitigation Specialist Marianne Brewer and private investigator Mark Mullavey. Counsel submitted several expert-witness requests to her supervisor at the Office of the Legal Advocate, Susan Sherwin, including requests for a neuropsychologist, addictionologist, and a domestic violence specialist. Director Sherwin approved the requests for a neuropsychologist and addictionologist but denied Schaffer's request for a domestic violence expert. Ultimately, counsel retained neuropsychologist Dr. Richard Lanyon and addictionologist Dr. Mace Beckson. Schaffer had wanted to retain Dr. Lesley Hoyt-Croft as McGill's addictionologist, but Sherwin refused to authorize it because Hoyt-Croft was a psychologist, not a medical doctor. Only Dr. Lanyon would testify at trial, however, because Dr. Beckson felt he could not offer helpful testimony unless McGill accepted responsibility for his actions, which McGill refused to do.

[1] Arizona has since amended and renumbered this portion of its death penalty statutes. Except where specified, we refer to the statutes as they were codified at the time of the crime.

B. *The Trial*

McGill was tried in October 2004.[2] At the guilt phase, the state presented evidence that witnesses saw McGill at the Yates duplex before the fire; McGill warned Keith to flee the duplex; and McGill mixed styrofoam pieces into the gasoline before dousing Perez and Banta, believing it would create a pasty substance that would be more difficult to extinguish. *See McGill I*, 140 P.3d at 934. After brief deliberations, the jury found McGill guilty on each charge in the indictment. At the aggravation phase, the jury determined beyond a reasonable doubt that sufficient aggravating factors existed under Ariz. Rev. Stat. § 13-703(F) to consider imposition of the death penalty.

Counsel presented mitigation evidence over the course of a four-day penalty-phase trial. The mitigation presentation focused on McGill's life history, including his dysfunctional childhood and removal from his home; early drug use and juvenile delinquency; drug and alcohol addiction later in life, including chronic methamphetamine use; a purported brain injury suffered in a car accident in the 1980s; and the dysfunctional and abusive relationship between McGill and his girlfriend, Jonna Hardesty. Mitigation Specialist Brewer and several of McGill's family members explained the

[2] Capital trials in Arizona are divided into three proceedings: the guilt phase, aggravation phase, and penalty phase. *See* Ariz. Rev. Stat. § 13-703(A)–(C). At the guilt phase, the jury determines the defendant's guilt or innocence. At the aggravation phase, the jury determines whether sufficient aggravating factors exist to warrant consideration of the death penalty. *See id.* § 13-703(B). If the state proves aggravating factors beyond a reasonable doubt, the proceeding moves to the penalty phase where the jury determines whether the death penalty is appropriate in light of any mitigating factors. *Id.* § 13-703(C).

dysfunction during McGill's childhood. The story was a difficult one. McGill's father was an alcoholic and was physically violent with McGill's mother, Ann. They divorced about the time McGill was born, and Ann took the five children from California to Arizona. McGill's father went to Arizona and took the children from Ann and returned to California. Ann regained custody and returned to Arizona, where she worked multiple jobs to support herself and the children. After another marriage, divorce, and a sixth child, Ann took her children to Texas. While she worked, McGill and his siblings were left to fend for themselves.

The children were removed from the home on several occasions because Ann was unable to care for them. In 1970, when McGill was eight years old, he and his brothers Cordell and Lonnie were placed briefly in foster care. Shortly thereafter, McGill and Cordell were transferred to Buckner's Boys Ranch, a harsh and structured environment, in San Antonio, Texas. Two years later, McGill was released to his mother. But by 1976, Ann was again unable to care for McGill and applied for his admission to Boysville, another all-boys reform school in San Antonio.

Witnesses testified that McGill's fractured home life affected him well into adulthood. McGill began using drugs and alcohol at a young age. By adulthood, McGill was a chronic, daily methamphetamine user. Methamphetamine affected McGill's behavior, sleep patterns, and decision-making ability. Counsel connected McGill's drug use to his criminal history, especially two armed robberies. The defense attempted to mitigate the effects of those convictions by framing them through the lens of substance abuse. To that end, the defense elicited testimony that McGill was intoxicated and nearly homeless at the time, and that he

accepted responsibility for the robberies by pleading guilty and serving his sentence. After McGill completed his sentence, he reconnected with family and held a job. Unfortunately, any progress McGill made was undercut by his relationship with Hardesty, who was described by his family as "one of the most evil people" they had ever met. Hardesty also enabled McGill's chronic methamphetamine use, which further disrupted his life.

McGill's expert neuropsychologist, Dr. Richard Lanyon, provided useful context for McGill's cognitive function, history of substance abuse, and relationship with Hardesty. Dr. Lanyon administered a battery of cognitive tests, which revealed slight impairments to McGill's language and symbolic skills development but did not uncover any other noteworthy cognitive deficiencies. Dr. Lanyon also reviewed "quite a lot of records" from McGill's childhood and found that McGill's neglectful and emotionally distant mother made him particularly susceptible to manipulation from women—especially Hardesty. When Hardesty "said jump, [McGill] jumped." According to Dr. Lanyon, McGill's unhealthy dependence on Hardesty was further exacerbated by his chronic methamphetamine use, which likely impaired McGill's judgment leading up to the crime.

The jury was unpersuaded by McGill's mitigation presentation and ultimately returned a sentence of death. The Arizona Supreme Court affirmed the conviction and sentence in a published opinion, with one justice concurring in part and dissenting with respect to a question under the Confrontation Clause. *McGill I*, 140 P.3d 930; *id.* at 946 (Hurwitz, J., concurring in part and dissenting in part). McGill sought certiorari review of the Confrontation Clause issue, which the

United States Supreme Court denied. *McGill v. Arizona*, 549 U.S. 1324 (2007) (mem.).

C. *Post-Conviction Relief*

In June 2010, McGill sought post-conviction relief (PCR) in the Maricopa County Superior Court. Raising multiple ineffective assistance claims, McGill argued that his counsel failed, *inter alia*, to: retain necessary expert witnesses and prepare Dr. Lanyon for his mitigation testimony; subpoena material witnesses and effectively cross-examine others; obtain necessary mitigation evidence; and discover and present evidence that McGill was sexually abused at Boysville. In preparation for the PCR proceedings, McGill underwent a PET scan, which produced digital imaging of his brain function. PCR counsel also retained additional expert witnesses: psychiatrist and brain imagine expert Dr. Joseph Wu, who reviewed McGill's PET scan; psychiatrist Dr. Richard Rosengard; and pharmacologist Dr. Edward French.

The PCR court summarily denied all but one of McGill's claims by written order in October 2010, but ordered an evidentiary hearing on McGill's challenge to trial counsel's failure to retain experts to explore the relationship between his purported brain injury and his crime. The PCR court held the evidentiary hearing the following October. It heard testimony from four witnesses: lead trial counsel Maria Schaffer, Dr. Wu, Dr. Rosengard, and Dr. Lanyon.[3]

[3] Although Dr. French provided a report in support of McGill's PCR petition, he did not testify at the evidentiary hearing.

Schaffer testified that she had difficulty retaining the experts in addictionology and domestic violence that she felt were necessary to defend McGill and thought that "Dr. Lanyon did a horrible job of preparing for his testimony." She felt that Dr. Lanyon's lack of preparation coupled with her earlier difficulty retaining necessary expert witnesses prevented her from adequately presenting mitigating evidence of McGill's drug addiction, brain injury, and domestic violence at the hands of Hardesty. But Schaffer also admitted that she had deliberately withheld from Dr. Lanyon a pre-sentence report that the state used to discredit his testimony on cross-examination.

Dr. Wu, who was the director of the Brain Imagery Center at the University of California, Irvine, testified that he had not personally examined McGill, but that he had reviewed McGill's PET scan and Dr. Lanyon's report. He explained that a PET scan acts as a "thermometer" for gauging cognitive conditions but added that diagnosing cognitive disorders requires separate neuropsychological testing. Dr. Wu further testified that he would have ordered additional testing to assess the actual effect of McGill's brain injury on his behavior had he reviewed McGill's PET scan prior to trial. Nevertheless, he conceded that Dr. Lanyon had administered a "comprehensive battery" of tests and that the results of those tests were compatible with the abnormalities revealed in McGill's PET scan.

Dr. Rosengard's testimony provided a psychiatric perspective to McGill's cognitive functioning. It also detailed the effects of McGill's relationship with Hardesty, and, for the first time, disclosed that McGill was a victim of childhood sexual assault. He opined that McGill's turbulent upbringing made him especially susceptible to Hardesty's

influence and that McGill suffered from Stockholm Syndrome as a result of her manipulations. Dr. Rosengard was not convinced, however, that McGill suffered from cognitive deficiencies as a result of a traumatic brain injury. He testified that his psychiatric evaluation independently revealed that McGill did not suffer any cognitive deficits—the same conclusion that Dr. Lanyon reached.

Dr. Lanyon stood by his trial testimony, stating that he had a "[v]ery good" working relationship with counsel and that neither Dr. Wu's nor Dr. Rosengard's findings would have significantly altered his testimony. He added that, although Dr. Wu's and Dr. Rosengard's reports indirectly supported his conclusions, neither doctor's report corroborated his findings or provided a "smoking gun" regarding McGill's brain damage. In hindsight, Dr. Lanyon conceded that McGill's PET scan would have been helpful in one way; it would have supported his finding that McGill's language functioning was deficient. Aside from that minor area, Dr. Lanyon was unpersuaded that Drs. Wu and Rosengard presented any evidence that would have altered his original analysis.

Following the evidentiary hearing, the PCR court denied McGill's final ineffective assistance claim in a written order. Applying *Strickland*, the PCR court held that counsel's performance at trial did not fall below an objective standard of reasonableness. The PCR court noted that defense counsel presented "a substantial amount of mitigation" evidence that covered McGill's "dysfunctional family background, his relationship with Ms. Hardesty, and his substance abuse." The PCR court also found that McGill's challenge to Dr. Lanyon's performance was flawed because Dr. Lanyon's "thorough and complete" evaluation of McGill simply did not

reveal evidence of "brain related impairment" that counsel hoped it would. Thus, the state court concluded that counsel was not deficient for failing to better present evidence of cognitive deficiency to the jury.

The PCR court also held that even if counsel had been deficient, none of her alleged errors prejudiced McGill. Especially persuasive to the PCR court was Dr. Lanyon's testimony that neither Dr. Wu nor Dr. Rosengard aided his trial testimony in any significant way. Neither expert demonstrated that McGill suffered from any cognitive deficiencies apart from minor language and speech functions. The PCR court also noted that Dr. Wu's and Dr. Rosengard's testimony disagreed on the central issue of whether McGill's prior drug use influenced his PET scan results. At best, their testimony would have been cumulative to Dr. Lanyon's testimony; at worst, the inherent contradictions would have weakened the mitigation presentation. As a result, even if counsel erred in failing to secure their expert opinions, it was not reasonably probable that their testimony would have changed McGill's sentence.

In 2013, McGill sought habeas relief under 28 U.S.C. § 2254. The district court denied his petition in January 2019, but granted McGill a certificate of appealability on his ineffective assistance of counsel claim arising out of trial counsel's investigation and presentation of mitigation evidence at the penalty phase of his trial. McGill timely appealed.

II. SCOPE AND STANDARD OF REVIEW

A. *Scope of Review*

McGill presents several claims for review, only one of which is certified for appeal. We may not review McGill's uncertified claims unless we grant a certificate of appealability (COA). 28 U.S.C. § 2253(c)(1)(A) ("Unless a . . . judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from . . . the final order in a habeas corpus proceeding."). We will treat McGill's briefing of his uncertified issues as an application for a COA. Fed. R. App. P. 22(b)(1)–(2); Ninth Cir. R. 22-1(e); *Slack v. McDaniel*, 529 U.S. 473, 483 (2000). We may issue a COA "only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2).

McGill's lone certified claim arises out of counsel's performance at the penalty phase of his trial. We take up this certified claim in Part III. Of McGill's remaining uncertified claims, one—a claim that counsel was deficient by failing to present the mitigating circumstances of McGill's armed robbery convictions—also arises from counsel's performance at the penalty phase. Although the district court considered this a separate grounds for a COA, and denied it, we have explained that the right to counsel secured by the Sixth and Fourteenth Amendments "is a guarantee of effective counsel *in toto*." *Browning v. Baker*, 875 F.3d 444, 471 (9th Cir. 2017). We must consider "counsel's conduct *as a whole* to determine whether it was constitutionally adequate." *Id.* In *Browning* we observed that separating counsel's alleged errors in a proceeding into different questions and considering whether to issue a COA as to each error "distort[s]" the ineffective assistance of counsel inquiry. The proper

procedure is for a district court to consider whether to grant a COA "at a higher level of generality" so that we may consider counsel's performance in the context of the entire proceeding. *Id.* *See White v. Ryan*, 895 F.3d 641, 645 n.1 (9th Cir. 2018) (treating counsel's failure to investigate and present mitigating evidence as "a single claim regarding his right to the effective assistance of counsel at the penalty phase of resentencing"). Because the district court granted a COA with respect to other aspects of counsel's performance at the penalty phase, we will treat McGill's claim with respect to the circumstances of his armed robbery as if the district court had granted a COA and consider it in Part III.

McGill also seeks a COA for two other claims. First, McGill asks that we issue a COA to review counsel's deficient performance at the *guilt* phase at his trial. McGill argues that trial counsel failed to retain an arson expert to rebut evidence that McGill mixed styrofoam into the gasoline before dousing Perez and Banta. Because this alleged omission occurred during the separate and discrete guilt phase, we will consider it apart from McGill's penalty phase claim. For reasons we will explain in Part IV.A, we deny a COA as to his guilt phase claim. Second, McGill challenges his death sentence under the Ex Post Facto Clause in light of *Ring v. Arizona*, 536 U.S. 584 (2002). Because we believe that "jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right," we will grant a COA with respect to McGill's claim under the Ex Post Facto Clause. *Slack*, 529 U.S. at 484. We consider this claim on the merits in Part IV.B.

B. *Standard of Review*

Although we review the district court's denial of a § 2254 petition de novo, *Ramirez v. Ryan*, 937 F.3d 1230, 1240 (9th Cir. 2019), our review of McGill's two certified claims is subject to the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), which "guard[s] against extreme malfunctions in the state criminal justice systems, and [is] not . . . a means of error correction." *Greene v. Fisher*, 565 U.S. 34, 38 (2011) (citation and internal quotation marks omitted). AEDPA provides that a federal court

> shall not . . . grant[] [a writ of habeas corpus] with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—
>
> > (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
> >
> > (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.

28 U.S.C. § 2254(d)(1)–(2); *see Harrington v. Richter*, 562 U.S. 86, 97–98 (2011). McGill challenges the PCR court's decision under both of § 2254(d)'s prongs.

We may only grant relief under § 2254(d)(1)

> if the state court arrives at a conclusion opposite to that reached by [the Supreme] Court on a question of law or if the state court decides a case differently than [the] Court has on a set of materially indistinguishable facts. Under the "unreasonable application" clause, a federal habeas court may grant the writ if the state court identifies the correct governing legal principle . . . but unreasonably applies that principle to the facts of the prisoner's case.

Williams v. Taylor, 529 U.S. 362, 413 (2000). "[C]learly established Federal law" is limited to "the holdings . . . of [Supreme] Court[] decisions" that existed when the state court issued its decision. *Id.* at 412. The "pivotal question" is whether the court's application of law was unreasonable. *Richter*, 562 U.S. at 101. A state court's application of federal law that is merely incorrect will not warrant relief, *Williams*, 529 U.S. at 410–11; *see White v. Woodall*, 572 U.S. 415, 427 (2014) ("[R]elief is available under § 2254(d)(1)'s unreasonable-application clause if, and only if, it is so obvious that a clearly established rule applies . . . that there could be no 'fairminded disagreement' on the question.") (citation omitted). Our review of state court factual determinations under § 2254(d)(2) is similarly deferential. We may not disturb the PCR court's factual findings unless they are "objectively unreasonable," *Miller-El v. Cockrell*, 537 U.S. 322, 340 (2003) (*Miller-El I*), which is "a substantially higher threshold" than merely "believ[ing] the state court's determination was incorrect." *Schriro v.*

Landrigan, 550 U.S. 465, 473 (2007) (citing *Williams*, 529 U.S. at 410).

III. CERTIFIED CLAIM

The Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence." U.S. Const. amend. VI. The Supreme Court has said that "the right to counsel is the right to the effective assistance of counsel," *McMann v. Richardson*, 397 U.S. 759, 771 n.14 (1970), which means that "the accused is entitled to 'a reasonably competent attorney,' whose advice is 'within the range of competence demanded of attorneys in criminal cases,'" *United States v. Cronic*, 466 U.S. 648, 655 (1984) (quoting *McMann*, 397 U.S. at 770–71). In evaluating a claim of ineffective assistance of counsel, *Strickland v. Washington*, 466 U.S. 668 (1984), supplies the "clearly established Federal law" for purposes of § 2254(d)(1). *Strickland* sets out a two-part test. First, "the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Id.* at 687. Second, "the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Id.* *Strickland* requires that a defendant prove that his "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Id.* at 686. In reviewing counsel's performance, our scrutiny "must be highly deferential," lest "a court, examining counsel's defense after it has proved unsuccessful, . . . conclude that a particular act or omission of

counsel was unreasonable." *Id.* at 689. A "fair assessment," accordingly, "requires that every effort be made to eliminate the distorting effects of hindsight." *Id.*

McGill argues that, in denying his claim of ineffective assistance of counsel at the penalty phase, the PCR court misapplied *Strickland* under § 2254(d)(1) and unreasonably determined the facts under § 2254(d)(2). If so, we would no longer owe deference to the PCR court's determinations, and we would then resolve his ineffective assistance of counsel claims "without the deference [to the PCR court] AEDPA otherwise requires." *Panetti v. Quarterman*, 551 U.S. 930, 953 (2007) (collecting cases); *see also Johnson v. Williams*, 568 U.S. 289, 303 (2013) ("AEDPA permits *de novo* review in those rare cases when a state court decides a federal claim in a way that is 'contrary to' clearly established Supreme Court precedent."); *Early v. Packer*, 537 U.S. 3, 8 (2002) (per curiam) (holding that § 2254 does not apply where "the reasoning [or] the result" of the PCR court's decision contradicts Supreme Court precedent (citation omitted)). Whether McGill has satisfied § 2254(d) is thus critical to his claims.

We will begin with McGill's claim that we owe no duty of deference under § 2254(d) to the PCR court's decision. Because we conclude that we do, we then review the merits of McGill's ineffective assistance of counsel claim through the lens of § 2254(d).

A. *Whether We Owe a Duty of Deference to the PCR Court's Decision*

1. Application of clearly established federal law under § 2254(d)(1)

We will first examine the PCR court's application of *Strickland*. Section 2254(d)(1) outlines two possible avenues to attack the state court's legal analysis: where the state court has misstated on-point Supreme Court precedent, and where the state court has correctly stated the standard, but its application of the precedent is unreasonable. The PCR court cited *Strickland* and *Richter* and correctly recited *Strickland*'s two-step test. McGill does not assert otherwise; rather, McGill limits his challenge to the second avenue, arguing that the PCR court unreasonably applied *Strickland*. He raises four claims: (a) "[r]ather than assessing if counsel acted in accordance with prevailing professional norms in investigating and presenting evidence, the [PCR] court focused on the specifics of the un-presented evidence and other mitigation that *was* presented"; (b) the PCR court asked whether the evidence would have changed "the court's view," rather than "whether this evidence might have affected an objective sentencer"; (c) the PCR court imposed a causal-nexus requirement; and (d) the PCR court failed to assess counsel's cumulative failures.

a. Assessing professional norms

McGill argues that the PCR court failed to evaluate counsel's performance "under prevailing professional norms" as required by *Strickland*, 466 U.S. at 688. In *Strickland*, the Court said that there were no "detailed rules for counsel's conduct" or "checklist for judicial evaluation," but that we

should look to "American Bar Association standards and the like" and judge counsel based on "all the circumstances." *Id.* at 688, 690. At this most elevated perch on the ladder of abstraction, we are unclear what errors McGill thinks the PCR court committed. The only case McGill points to in support of his claim is our decision in *Milke v. Ryan*, 711 F.3d 998 (9th Cir. 2013). That case does not advance McGill's claim. In *Milke*, we granted relief where a PCR court "applied the wrong legal authority" to the petitioner's claim that he was entitled to impeachment evidence under *Giglio v. United States*, 405 U.S. 150 (1972). *Milke*, 711 F.3d at 1006. We held that a state court unreasonably applies clearly established federal law when it applies the wrong legal standard. *Id.* at 1006–07.

McGill cannot argue that the PCR court set out the wrong standard. It did not. The PCR court cited *Strickland* and properly set out its two-step test. Under step one, the PCR court concluded that it could "not find that [Schaffer's] representation fell below an objective standard of reasonableness." The PCR court further held that *Strickland*'s "second prong which concerns prejudice [was] not met." To the extent we understand McGill's argument, we find no merit in it.

b. Evaluating new mitigation evidence

McGill claims that the PCR court misapplied *Strickland* by evaluating whether the mitigation evidence would have affected the *court's* judgment rather than asking if the evidence could reasonably have changed the outcome for the

trier of fact.[4] In this context, prejudice under *Strickland* requires a "reasonable probability" that, but for counsel errors, one juror would have voted against the death penalty. *Wiggins*, 539 U.S. at 537. The PCR court's duty is to "reweigh the evidence in aggravation against the totality of available mitigating evidence" and determine whether the result of the proceeding would have been different had the new evidence been presented. *Id.* at 534 (citing *Strickland*, 466 U.S. at 694); *White v. Ryan*, 895 F.3d 641, 670 (9th Cir. 2018). That review is objective, and the state court may not deny relief merely because "*it* would have imposed a death penalty if it had considered the mitigation evidence." *White*, 895 F.3d at 670.

We think that McGill has mischaracterized what the PCR court did. McGill highlights two isolated statements from the PCR court's order that he claims are evidence that the PCR court impermissibly relied on its subjective view: that McGill's newly presented evidence was "not significant in the Court's view," and the evidence "would not have been a significant game changer with regard to the outcome." To

[4] In this context, McGill claims that the trier of fact was the jury in the first instance and the Arizona Supreme Court in the second. He argues that the PCR court erred because "it focused only on the trial, and ignored that the Arizona Supreme Court had to independently reweigh the aggravation and mitigation." We refuse to fault the PCR court for not conducting two separate inquiries. We are hard pressed to understand how any reviewing court could decide that new mitigation evidence would not persuade a jury, but would persuade a majority of a state supreme court. *Cf. Shinn v. Kayer*, 141 S. Ct. 517, 525–26 (2020) (declining to address how the Arizona Supreme Court might have independently weighed the evidence because "the weighing of aggravating and mitigating evidence in a prior published decision is unlikely to provide clear guidance about how a state court would weigh the evidence in a later case.").

start, the PCR court's statement that newly presented evidence was insignificant "in the Court's view," does not betray the subjective analysis that McGill claims. As courts we are always asked for "our" opinion. We can do no other than state "in the court's view" what the record supports and what the law requires. Sometimes we are tasked with giving a second-order opinion—determining, for example, whether a set of facts might have altered the jury's view. In this case, it is clear from the context that the PCR court's reference to "the Court's view" was a shorthand expression—the equivalent of saying "the court concludes." Nothing in the PCR court's opinion suggests that it had stepped outside its role to say what it would have decided if it had been the jury or the Arizona Supreme Court. The court fully explained its reasoning. There is no constitutional error here. Nor can we find any error in the PCR court's reference to whether the evidence was a "game changer."

c. Causal-nexus test

McGill argues that the PCR court impermissibly conditioned relief on his ability to prove a causal nexus between his brain injury and his actions. We have previously explained the troubled history of the causal-nexus test in Arizona:

> Beginning in the late 1980s, [the] Arizona Supreme Court developed a "causal nexus" test for nonstatutory mitigation. Under this test . . . evidence of a difficult family background or a mental condition was not in and of itself relevant mitigating evidence. As a matter of Arizona law, such evidence was relevant for mitigation purposes only if it had

> some causal effect contributing to the defendant's behavior in the commission of the crime at issue. Thus, while the defendant could submit evidence of his difficult family background or mental condition, the sentencing court was prohibited from treating it as legally relevant mitigation evidence unless the defendant proved a causal connection between his background or disorder and the crime. In capital cases from the late 1980s to the mid-2000s, the Arizona Supreme Court repeatedly articulated this causal nexus test for nonstatutory mitigation. The test was "contrary to . . . clearly established Federal law, as determined by the Supreme Court of the United States" in *Eddings* [*v. Oklahoma*, 455 U.S. 104 (1982)].

McKinney v. Ryan, 813 F.3d 798, 813 (9th Cir. 2015) (en banc). Accordingly, after *Eddings*, it is constitutional error for a trial court to exclude mitigation evidence solely because the defendant cannot show a causal nexus between the evidence and his crime. *See* 455 U.S. at 113–14 (holding that a sentencing court cannot "refuse to consider, *as a matter of law*, any relevant mitigating evidence"). But *Eddings* does not hold that evidence of a causal nexus is *irrelevant* to the trier of fact. As we said in *McKinney*, "[o]nce the jury has heard all the defendant's mitigation evidence, there is no constitutional prohibition against the State arguing that the evidence is not particularly relevant or that it is entitled to little weight." *McKinney*, 813 F.3d at 817 (quoting with approval *State v. Anderson*, 111 P.3d 369, 392 (Ariz. 2005)). Moreover, "the failure to establish such a causal connection *may be considered in assessing the quality and strength of the*

mitigation evidence." *Id.* at 818 (emphasis added) (quoting with approval *State v. Newell*, 132 P.3d 833, 849 (Ariz. 2006)). Thus, after *Eddings*, the sentencing court may not exclude mitigation evidence because of a lack of a causal nexus, but the prosecutor may argue to the jury that such evidence is not deserving of any weight. *See* 455 U.S. at 114–15.

Here, McGill argues that the PCR court—not the trial court—erred by referring to the lack of a "causal nexus." In addressing that issue, the PCR court wrote:

> The nexus between the defendant's mental condition and his actions on the night of the murder would not have been significantly strengthened by the testimony of Dr. Wu and Dr. Rosengard, and thus the Court concludes that there would not have been a reasonable probability that the result of the proceedings would have been different.

Schaffer testified at the PCR hearing that she was trying to connect the dots between McGill's head injury and his crime: "she wanted more mitigation to give a nexus to explain that the defendant had brain damage[,] which might explain his violent behavior on the night in question." The PCR court's findings are consistent with the record:

> Dr. Lanyon was clear in his testimony that Dr. Wu's report would have only helped him in one small minor way, that is[,] being consistent with his finding that [McGill] has some speech and language deficiencies. He testified that Dr. Wu's report was no

> "smoking gun" by any means but was simply not inconsistent with his findings. He also testified that Dr. Rosengard's findings did not assist him in any way and would not have added to the findings that he presented to the jury.
>
> . . . Further, had Dr. Wu and Dr. Rosengard testified at trial, they would have completely contradicted one another with regard to the effect of substance abuse upon the brain and whether or not the damage is permanent and irreversible. This would have been an opening for the State to poke holes in the mitigation and would have hurt the defense's presentation. The Court does not find that had Dr. Wu and Dr. Rosengard testified during the mitigation phase of the trial that there likely would have been a different result. At best, their testimony would have been cumulative and, at worst, would have contradicted each other and weakened the mitigation presentation.

Read in context, the PCR court's brief conclusion that "[t]he nexus between [McGill's] mental condition and his actions on the night of the murder would not have been significantly strengthened by the testimony of Dr. Wu and Dr. Rosengard" clearly goes to its weight and not to its admissibility. The court's order discounted the persuasive value—not the relevance—of McGill's evidence. Schaffer's trial strategy was to create a nexus between McGill's brain damage and the crime—evidence that would have been far more persuasive than simply proving that McGill had

suffered a head injury. It was thus reasonable for the PCR court to comment on the new evidence related to such a "nexus." And the PCR court reasonably concluded that even if McGill's PCR-stage evidence was admitted, its lack of nexus to his crime rendered it less persuasive in light of the contradictory evidence. Such an assessment is consistent with *Eddings*.

d. The cumulative effect of counsel's errors

Finally, McGill argues that the PCR court improperly applied *Strickland*'s prejudice prong by evaluating his PCR-stage evidence piecemeal instead of considering whether its cumulative effect would have sufficiently undermined confidence in the jury's death sentence. To assess prejudice, the PCR court was required to reweigh the aggravation evidence against the newly presented mitigation evidence, whether "adduced at trial . . . [or] in the habeas proceeding." *Williams*, 529 U.S. at 397–98; *see Wiggins*, 539 U.S. at 534. The purpose is to determine whether, considering counsel's errors, there is a reasonable probability that the result would have been different. *Strickland*, 466 U.S. at 694.

A PCR court, however, need only assess prejudice if counsel's performance was deficient. A court "cannot consider the cumulative effect of *non*-errors." *Williams v. Filson*, 908 F.3d 546, 570 (9th Cir. 2018); *see Strickland*, 466 U.S. at 697 ("[T]here is no reason for a court deciding an ineffective assistance claim to approach the inquiry in the same order or even to address both [the performance and prejudice] components of the inquiry if the defendant makes an insufficient showing on one."). McGill faults the PCR court for limiting its prejudice determination to the effect that Dr. Wu's and Dr. Rosengard's testimony would have had on

the jury during the penalty phase. But, for the reasons discussed, the PCR court reasonably determined in two separate orders that counsel's representation at trial satisfied *Strickland*'s objective standard of reasonableness. At that point, the prejudice evaluation was unnecessary, although the PCR court proceeded to step two of *Strickland* anyway. It would make little sense to require the PCR court to consider the cumulative effect of deficient decisions when the PCR court did not find any particular deficiency; such a requirement asks the court to take a pointillist view of counsel's performance—to see if the court can assemble a picture from indistinct impressions. To be sure, *Strickland* requires a reviewing court to consider "the totality of the evidence," but that holistic inquiry is a means of "taking due account of the effect of the *errors*." *Strickland*, 466 U.S. at 695–96 (emphasis added). If there are no errors, there is no need to consider their cumulative effect. The PCR court therefore reasonably applied *Strickland*'s objective standard to trial counsel's performance.

2. Determinations of fact under § 2254(d)(2)

Section 2254(d)(2) imposes a "daunting standard" to disrupt a state court's factual findings, which precludes relief in all but "relatively few cases." *Taylor v. Maddox*, 366 F.3d 992, 1000 (9th Cir. 2004), *abrogated on other grounds by Murray v. Schriro*, 745 F.3d 984, 999–1000 (9th Cir. 2014). We have recognized "several flavors" of unreasonable factual determinations that may satisfy § 2254(d)(2). *Id.* These include a state court plainly misapprehending or misstating the record, *id.* at 1001 (citing *Wiggins v. Smith*, 539 U.S. 510, 528 (2003)); failing to consider key aspects of the record, *id.* at 1008 (citing *Miller-El I*, 537 U.S. at 346); and ignoring "highly probative" evidence supporting the petitioner's claim,

id. at 1001. McGill identifies three PCR-court factual findings that, he claims, meet those "flavors" of erroneous fact finding: (a) that counsel's decision not to call addictionologist Dr. Beckson was tactical; (b) that McGill failed to substantiate his claims of childhood sexual assault; and (c) that Dr. Lanyon was a qualified expert witness upon whom Schaffer was entitled to rely. We conclude that these findings were reasonable.

a. Addictionologist testimony

The record supports the PCR court's determination that counsel's "tactical decision not to call Dr. [Beckson] was reasonable and does not constitute ineffective assistance of counsel." McGill challenges this finding with two arguments: first, that McGill's lead counsel did not make a "tactical" decision not to call an addictionologist because she was denied her addictionologist of choice; and, second, that when Schaffer decided not to call Dr. Beckson, she failed to seek additional funding for a different addictionologist.

As Schaffer was preparing her case, she approached Office of Legal Affairs Director Sherwin for funding to retain an addictionologist. Counsel's preferred addictionologist was Dr. Lesley Hoyt-Croft, but Sherwin denied Schaffer's request because Dr. Hoyt-Croft was not a medical doctor.[5] Instead, Schaffer hired Dr. Mace Beckson. McGill provides no explanation to support why Director Sherwin's preference to retain a medical doctor was unreasonable. Sherwin was not counsel of record, but as Schaffer's supervisor, she had some responsibility for managing the cases handled by the Office

[5] The record is not precise on Sherwin's reasons. Nothing in the record suggests that Sherwin thought that Hoyt-Croft was not qualified.

of Legal Affairs. When Dr. Beckson informed Schaffer that he could not testify unless McGill admitted his involvement in the crime, Schaffer decided against calling Beckson as a witness. That left her with Dr. Lanyon as McGill's only expert witness. The PCR court found that Schaffer's decision was "tactical."

McGill argues that the PCR court's finding is unreasonable. The PCR court found that "[Schaffer] did not call Dr. [Beckson] to testify because *she* 'ultimately opined that he could not assist in the case because Mr. McGill would not admit his guilt.'" McGill argues that the finding is clearly erroneous because Schaffer did not "opine" that Dr. Beckson could not testify; it was Dr. Beckson who "opined" he could not testify. According to McGill, the PCR court's finding should read "he" rather than "she." Assuming that this is indeed an error, we cannot tell whether this is an error in perception or transcription by the PCR court. But, in either case, it does not matter. Whether Dr. Beckson told Schaffer that he would not testify as an addictionologist without McGill admitting that he committed the crime, or whether Schaffer determined that she would not put Beckson on the stand, the context for the PCR court's finding is clear: Schaffer knew she could not put Beckson on the stand because he would not be an effective witness. The PCR court found the obvious: "[counsel] conceded that she did get an addictionologist but that she did not want to use that particular expert." In that sense, her decision not to force an ineffective expert witness to testify was "tactical."

That finding was especially reasonable in light of counsel's purpose for calling an addictionologist in the first place, which was to demonstrate the central role that McGill's drug abuse played in his behavior at the time of Perez's

murder. In essence, the addictionologist was there to portray McGill's drug use as a mitigating factor for his crime instead of an aggravating factor. But McGill's refusal to admit any involvement in Perez's murder hindered Dr. Beckson's ability to tie McGill's drug use to his actions leading up to the crime. Dr. Beckson was, therefore, justified in his professional assessment that "he could not assist in the case because Mr. McGill would not admit his guilt." From there, counsel's options were limited. Schaffer could subpoena Dr. Beckson to testify despite his stated reservations or she could decline to call Dr. Beckson at all. Because Dr. Beckson's testimony would not have been helpful to the defense, it was reasonable for the PCR court to conclude that counsel's decision was tactical.

McGill argues that once Schaffer realized she could not call Dr. Beckson, she should have secured a different addictionologist and that it was ineffective assistance of counsel to fail to do so. Nothing in Schaffer's decision to proceed without Dr. Beckson suggests she was ineffective because she did not procure a different addictionologist. A different addictionologist might have been willing to testify anyway, but that is not Schaffer's failing. She had sought funding for a qualified addictionologist, and Sherwin had approved funding for Dr. Beckson. Nothing in the Sixth Amendment guarantees McGill his choice of addictionologists, or an addictionologist who will testify favorably to him. *See Ake v. Oklahoma*, 470 U.S. 68, 83 (1985). Although Schaffer made clear that she wanted additional resources, in practice, attorneys must often decide how to use limited resources when confronted with these evidentiary "dead ends." *Carter v. Davis*, 946 F.3d 489, 524 (9th Cir. 2019) (per curiam); *see Bobby v. Van Hook*, 558 U.S. 4, 11 (2009) (per curiam).

The PCR court also found that McGill had not shown "how any other addiction specialist would have testified without [McGill's] admission." McGill argues that this finding is objectively unreasonable and points to Dr. French's PCR-stage report that an addictionologist could have testified regardless of McGill admitting guilt. Dr. French's report does not change our view of the PCR court's findings. Even if we accepted that some other addictionologist could have testified for McGill, the PCR court's decision rested on the tactical nature of counsel's decision not to call Dr. Beckson and not whether another addictionologist could have testified. At that point, McGill relied on Dr. Lanyon to put his drug use in context. Dr. Lanyon testified at the penalty phase of the trial about McGill's chronic methamphetamine use and that such use generally "makes [the user] paranoid, actively paranoid, and seriously impairs their judgment." Indeed, he said, such drug use "would remove any remaining fragment of ability to reason." The PCR court addressed Dr. French's report and found that Dr. French's report "would add nothing to Dr. Lanyon's testimony" because Dr. French "did not evaluate [McGill] so any testimony regarding [McGill's] substance abuse history, including amounts used on the night in question, history of abuse and brain damage is speculative." This finding is supported in the record, as Dr. French's report provided similar statements regarding chronic methamphetamine use as did Dr. Lanyon's. Like Dr. Beckson, neither Dr. French nor Dr. Lanyon could connect McGill's drug use to his actual behavior. Thus, regardless of whether a different addictionologist could have testified absent McGill's admission of guilt, the only evidence in the record suggests that testimony would have been substantially similar to Dr. Lanyon's. The PCR court reasonably determined that Dr. French's report added nothing

to Dr. Lanyon's testimony and that counsel's tactical decisions did not constitute ineffective assistance.

b. Unsubstantiated sexual abuse

McGill claims that counsel was ineffective for failing to investigate a sexual assault McGill said he experienced at Boysville. At the PCR stage, McGill alleged for the first time that he suffered two sexual assaults while at Boysville and that those assaults would have been persuasive mitigating evidence if presented to the jury. The PCR court rejected McGill's allegations of sexual assault as unsubstantiated. McGill now contends that the PCR court ignored credible evidence of the sexual abuse, including Dr. Rosengard's PCR-stage report and the account of McGill's brother Lonnie, explaining his own sexual abuse at Boysville.

Evidence of sexual abuse can be powerful evidence "relevant to assessing a defendant's moral culpability." *Wiggins*, 539 U.S. at 535; *see Wharton v. Chappell*, 765 F.3d 953, 978 (9th Cir. 2014). At the § 2254(d)(1) stage, the inquiry is not whether counsel reasonably investigated the sexual abuse, but whether the PCR court's conclusion that McGill failed to substantiate the abuse was reasonable in light of the new evidence. McGill offered no evidence at trial that he was sexually abused as a child and did not disclose sexual abuse to anyone until his 2009 evaluation with Dr. Rosengard—nearly a decade after Perez's murder. Yet, McGill had the opportunity to disclose the purported abuse as early as 2003, when Dr. Lanyon performed his pre-trial evaluation. Dr. Lanyon's report noted:

> Mr. McGill was questioned regarding abuse as a child. He stated that his mother's second

> husband (his step-father) physically abused him on one occasion. . . . Apparently this man frequently threatened physical violence and was very intimidating, but actually hit Mr. McGill only once. *Mr. McGill denied any sexual abuse and has never considered that he was emotionally abused.*

Dr. Lanyon's report and trial testimony demonstrate that McGill had no reservations about disclosing physical abuse he suffered at the hands of his step-father. Yet, there is no indication that McGill suffered the type of sexual abuse that McGill now alleges. The PCR court was not required to accept McGill's delayed allegation of abuse in light of his earlier denial that such abuse ever happened.

Lonnie's PCR-stage affidavit describing his own sexual abuse at Buckner's Boys Ranch does not render the state court's determination unreasonable. McGill asserts that Lonnie's affidavit was sufficiently corroborative of his own sexual abuse to have prompted an evidentiary hearing. But Lonnie's account does not support McGill's allegations of abuse. Lonnie claimed that the sexual assaults occurred at Buckner's Boys Ranch, while McGill claims that the abuse occurred at Boysville. McGill attempts to dismiss the discrepancy due to Dr. Rosengard's limited interaction with McGill. But the inconsistencies between the two brothers' reports support the PCR court's conclusion that McGill did not substantiate the sexual abuse. Even setting aside those discrepancies, counsel could not have known about the abuse Lonnie suffered because Lonnie was generally unhelpful to the investigation. As Schaffer testified, and the PCR court accepted, Lonnie "absolutely refused to cooperate in coming to court." Indeed, Schaffer testified that Lonnie threatened

her and "his brother's case should he be forced to appear." Under those circumstances, it might have been ineffective assistance of counsel to have called Lonnie as a witness; at the very least, it was a strategic decision. We agree with the PCR court that her decision not to call Lonnie as a witness was "tactically sound." In light of McGill's earlier denials that any sexual abuse occurred and the equivocal nature of the new evidence, it was not "an unreasonable determination of the facts," 28 U.S.C. § 2254(d)(2), for the PCR court to conclude that McGill "failed to substantiate his claim that he was sexually abused."

c. Expert witness qualifications

McGill claims that Schaffer was ineffective because she allowed Dr. Lanyon to testify despite her concerns with his preparation and testimony. During counsel's PCR testimony, she testified that Dr. Lanyon "did a horrible job of preparing for his testimony" and that he "was not qualified for the tasks presented in Mr. McGill's case." The PCR court disagreed, finding that Dr. Lanyon was "a qualified expert and [that counsel] was entitled to rely on the competency of his evaluation." McGill now argues that the PCR court's focus on whether counsel was reasonably entitled to rely upon Dr. Lanyon's testimony misses the point. McGill claims that because Schaffer was forced to use Dr. Lanyon, she could not have made a tactical decision to rely on his testimony. McGill also argues that the PCR court's finding that Dr. Lanyon was qualified to testify was unreasonable because Dr. Lanyon was an "all-purpose" expert, not tailored to McGill's case.

The PCR court's finding that Dr. Lanyon was qualified to testify was reasonable. Dr. Lanyon was a professor of

psychology at Arizona State University, a position he had held since 1975. He was board certified in clinical and forensic psychology with a specialty in psychological assessment, all of which were important to McGill's defense. He also had extensive experience testifying in capital and other cases for both the state and the defense, but more often for the defense. *See, e.g.*, *Sansing v. Ryan*, 997 F.3d 1018, 1037 (9th Cir. 2021); *Bible v. Ryan*, 571 F.3d 860, 869 (9th Cir. 2009); *Boggs v. Shinn*, No. CV-14-02165-PHX-GMS, 2020 WL 1494491, at *41 (D. Ariz. March 27, 2020); *Morris v. Ryan*, No. CV-17-00926-PHX-DGC, 2019 WL 1858137, at *5 (D. Ariz. April 25, 2019); *Newell v. Ryan*, No. CV-12-02038-PHX-JJT, 2019 WL 1280960, at *5 (D. Ariz. March 20, 2019); *State v. Young*, No. 1 CA-CR 13-0429, 2014 WL 6790746, at *1 (Ariz. Ct. App. Dec. 2, 2014); *State v. Carr*, No. 1 CA-CR 07-1046, 2009 WL 1879494, at *2 (Ariz. Ct. App. June 30, 2009). McGill's classification of Dr. Lanyon as an "all-purpose" witness "not tailored" to his specific case rings hollow in light of Dr. Lanyon's experience and credentials.

Furthermore, the record supports a conclusion that Schaffer made a tactical decision to go forward with Dr. Lanyon's testimony even though she had reservations about the strength of his conclusions. Schaffer made clear in her PCR hearing testimony that she was not happy with his performance on the stand. She had had reservations at the time of trial about his forthcoming testimony because he had told her that the case was "challenging," "he didn't like it," and "the facts of the case [were] horrendous; they're overwhelming." This is not the language of incompetence; it is an expert witness who was not impressed with the results of his testing. Dr. Lanyon's written report cited a series of tests he conducted in the approximately seven hours he spent

with McGill. He concluded that "Mr. McGill's scores on these tests were all in the average range. These results suggest that he does not currently suffer any cognitive deficits (that is, his ability to use his thinking processes) as a result of brain impairment." When Schaffer was asked by the state about this conclusion, she admitted that "the problem for [her] as a defense lawyer, reading that kind of assessment, [was] that it's not very useful . . . to make Mr. McGill sympathetic to the jury during the penalty phase. . . . It was a very difficult case to defend." It may be an understatement to say that Dr. Lanyon's report was not as favorable as counsel wished. That counsel went forward with the only expert witness she had is evidence of the weakness of her case and not her ineffective assistance.[6]

* * *

We conclude that McGill has not met § 2254(d)'s high bar. The PCR court correctly identified and reasonably applied clearly established federal law, and its conclusions did not rely on unreasonable determinations of fact. McGill's claims remain subject to AEDPA's deferential standard of review.

B. *AEDPA Review of McGill's Ineffective Assistance of Counsel Claim*

Having determined that AEDPA review is appropriate, we turn to the merits of McGill's multifaceted ineffective assistance claim. To assess the constitutional sufficiency of counsel's performance, we compare counsel's actions at trial

[6] We address in Part III.B.3 *infra* the claim that Schaffer was ineffective in her own preparation of Dr. Lanyon.

with the prevailing professional norms of the time. This is an objective test, and we must be cautious not to allow hindsight to color our evaluation. *Strickland*, 466 U.S. at 680, 689. The standard is "necessarily a general one" and reflects counsel's complex responsibility to "take account of the variety of circumstances faced by defense counsel." *Van Hook*, 558 U.S. at 7 (quoting *Strickland*, 466 U.S. at 688–89). We therefore begin our analysis with a "strong presumption" that counsel's decisions reflect "reasonable professional judgment." *Cullen v. Pinholster*, 563 U.S. 170, 190, 196 (quoting *Strickland*, 466 U.S. at 689–90)). Moreover, because our review under both AEDPA and *Strickland*'s standards are highly deferential to the PCR court's underlying decision, our review here must be "doubly deferential." *Id.* at 190 (citation omitted). Surmounting such a "high bar is never an easy task." *Padilla v. Kentucky*, 559 U.S. 356, 371 (2010).

McGill's ineffective assistance of counsel claim arises from counsel's purported failure at the penalty phase to (1) develop a "relationship of trust" with McGill and his family; (2) obtain "classic sources" of mitigation evidence; (3) prepare Dr. Lanyon for his testimony; and (4) uncover and present evidence of McGill's substance abuse, sexual assault, and domestic violence.

1. Development of a relationship of trust

McGill claims that "Schaffer and her team failed to develop a relationship of trust or a rapport with McGill and his family," and attributes McGill's refusal to share mitigating information to that failing. The PCR court concluded that it could "not find that Ms. [Schaffer's]

representation fell below an objective standard of reasonableness."

The PCR court's conclusion is not contrary to clearly established Supreme Court precedent. Nothing in the Sixth Amendment suggests that an accused is entitled to "rapport" with his attorney, and McGill has not directed us to any case from the Supreme Court establishing such a proposition. Indeed, McGill's argument is not only not *supported* by Supreme Court authority, it is *contrary* to *Morris v. Slappy*, 461 U.S. 1, 14 (1983). There, the Supreme Court held that the Sixth Amendment right to counsel did not guarantee criminal defendants "a meaningful attorney-client relationship." *Id.* at 13 (emphasis omitted). The Court explained that "[n]o court could possibly guarantee that a defendant will develop the kind of rapport with his attorney" necessary to meet such a standard. *Id.* Accordingly, the Court "reject[ed] the claim that the Sixth Amendment guarantees a 'meaningful relationship' between an accused and his counsel." *Id.* at 14 (footnote omitted).

Perhaps sensing the lack of any Supreme Court authority, McGill pivots to challenge the amount of time counsel spent with McGill and his family. He claims that Schaffer met with McGill for less than ten hours. He provides no further context, cites no cases establishing a standard for measuring time with a client, and refers only to the broadest of ABA guidelines for the criminal defense bar. That is not sufficient to satisfy his burden under AEDPA. The Court has consistently cautioned us against imposing a mechanical standard by which counsel may be evaluated. *See Van Hook*, 558 U.S. at 7 (recognizing that *Strickland*'s standard was "necessarily a general one"); *see also Strickland*, 466 U.S. at 689 (finding that formulaic rules or duties "interfere with the

constitutionally protected independence of counsel"). We must consider whether the time counsel spent in consultation reflects "reasonable professional judgment." *Strickland*, 466 U.S. at 690. There is no evidence that ten hours of consultation was unreasonable or that it undermined McGill's defense. Counsel's strategy was to focus on mitigation, which might not have required extensive time with McGill. The defense team traveled to interview McGill's family, obtained hundreds of pages of records, and presented four days of mitigation testimony.

Nor is there any evidence that the defense team violated McGill's trust or that of his family. McGill cannot escape the fact that, as Schaffer put it, much of his family was "either dishonest or not cooperative" in answering counsel's questions. Given the depth and breadth of mitigation evidence counsel presented, the PCR court reasonably concluded that counsel's performance did not fall below prevailing professional norms.

2. Investigation of additional mitigation records

McGill claims that Schaffer failed to obtain "classic" sources of mitigation evidence, such as McGill's juvenile adjudications, police reports, marriage and divorce records, school test scores, and his siblings' arrest records. The PCR court noted that McGill's mitigation specialist "testified for three days on the witness stand when she told [McGill's] life story including his difficult childhood, drug abuse, and alleged domestic violence. All these areas were explored in detail." The court also concluded that counsel "present[ed] to the jury a substantial amount of mitigation" evidence with respect to "substance abuse . . . . [his] dysfunctional family background, [and] his relationship with Ms. Hardesty." That

included "evidence that [McGill] had an abusive childhood; that he was psychologically immature and, as a result, his girlfriend had greater than normal influence over him; that he suffered from some degree of mental impairment; that he performed well in institutional settings; and that his family cares about him." The court also found that Dr. Lanyon "reviewed substantial relevant information concerning Defendant McGill's background." From this, the PCR court concluded that it could "not find that Ms. [Schaffer] was ineffective in presenting these issues to the jury."

"[M]itigation evidence [can] complete, deepen, or contextualize the picture of the defendant presented by the prosecution [and] can be crucial to persuading jurors that the life of a capital defendant is worth saving." *Allen v. Woodford*, 395 F.3d 979, 1000 (9th Cir. 2005). To that end, penalty-phase counsel must conduct a thorough investigation into the relevant mitigation evidence. *See Williams*, 529 U.S. at 396. Counsel need not "scour the globe on the off chance something will turn up," *Rompilla v. Beard*, 545 U.S. 374, 385 (2005), but it is nonetheless obligated "to conduct a thorough investigation of the defendant's background." *Williams*, 529 U.S. at 396; *see Boyde v. California*, 494 U.S. 370, 382 (1990).

The record amply supports the PCR court's findings. McGill's counsel presented extensive mitigation evidence and diligently attempted to discover much more. Mitigation Specialist Brewer obtained documents spanning much of McGill's life, including McGill's elementary and middle school records, foster care placement records, records from Buckner's and Boysville, records of his convictions and incarcerations, and post-incarceration employment records. Brewer also attempted to recover other records but was

thwarted by factors outside her control. For example, a hospital record-retention policy prevented her from obtaining medical records to corroborate McGill's head injury, and Buckner's Boys Ranch provided all of McGill's available records, which happened to be incomplete. McGill's public school records also proved difficult to obtain because the schools often did not keep full records and regularly forwarded records to new schools when McGill and his family moved. Nevertheless—and despite the difficulty in obtaining complete records—Brewer filled the gaps in the mitigation record with interviews and testimony from McGill's family and friends. Counsel and the defense team as a whole endeavored to uncover as much mitigation evidence as possible, and it is unclear what else they could have done to supplement the mitigation records they did obtain. We are not persuaded that their efforts were deficient.[7]

Nor is there any evidence that the mitigation records McGill now seeks were readily available. Without citations to the record, McGill alleges that there are juvenile records, boys'-home records, and elementary school records that would have aided the defense. We do not know what these documents are, and he offers no explanation for how counsel overlooked or otherwise should have discovered them. McGill's speculation that these records would have aided his

[7] Dr. Lanyon's penalty-phase testimony further illuminates the breadth of mitigation evidence that the defense team recovered. He testified that counsel provided "quite a lot of school records, junior high school records and records from the institutions [McGill] was put in as a child . . . and . . . interview notes from interviews of a variety of people who knew [McGill]." The Arizona Supreme Court echoed Dr. Lanyon's sentiment two years later, finding the amount of mitigation evidence presented was "not insignificant." *McGill I*, 140 P.3d at 945.

mitigation effort is unpersuasive given the extensive testimony presented during the penalty phase.

3. Preparation of Dr. Lanyon

McGill also claims that Schaffer did not adequately prepare Dr. Lanyon. The PCR court found that counsel was not deficient for failing to hire additional mental-health experts and that she adequately prepared Dr. Lanyon for his penalty-phase testimony. Both conclusions were reasonable.[8]

We will accept as a general proposition that counsel is under a duty to prepare witnesses for their testimony. At the same time, "there is no expectation" that an attorney prepare for every possible contingency; she need not be a "flawless strategist or tactician," and "may not be faulted for a reasonable miscalculation or lack of foresight or for failing to prepare for what appear to be remote possibilities." *Richter*, 562 U.S. at 110.

Much of McGill's frustration with Dr. Lanyon arises out of the state's effective cross-examination during his penalty-phase testimony. Before he submitted his written report, Dr. Lanyon examined McGill, conducted various psychological tests, and reviewed extensive records provided to him by counsel. At trial, counsel asked Dr. Lanyon about

[8] To the extent that McGill renews his argument that it was unreasonable for counsel to rely on Dr. Lanyon's testimony because she was forced to use him as an expert witness, that argument fails for the reasons discussed in Part III.A.2.c. Dr. Lanyon was qualified to evaluate McGill and had extensive experience testifying in capital cases. In any event, criminal defendants do not have a constitutional right "to choose [an expert] of his personal liking or to receive funds to hire his own." *Ake*, 470 U.S. at 83.

a head injury McGill suffered in a car accident about eight months before he committed two armed robberies, for which he served time in prison. Dr. Lanyon testified that McGill described the symptoms he suffered after the accident. Dr. Lanyon testified such symptoms were consistent with frontal lobe damage. Dr. Lanyon added that McGill told him "he had no recollection of these robberies at all." Dr. Lanyon then stated that his "opinion of this, having written the report and sort of reflected on it, [is] that it's more likely that the head injury itself wiped out his memory[,] which is a common occurrence with head injuries."

On cross-examination, the state jumped on McGill's statement to Dr. Lanyon that he had no recollection of the robberies and Dr. Lanyon's conclusion that such memory loss was consistent with frontal lobe damage. The state introduced two police reports and a pre-sentence report in which McGill described the robberies in great detail. What was unknown to Dr. Lanyon at the time was that defense counsel had previously obtained the reports used to impeach his testimony but chose not to disclose them to Dr. Lanyon—a decision that set Dr. Lanyon up. After being shown the reports counsel withheld from him, Dr. Lanyon had the following exchange with the prosecutor:

> Q: Does it appear from my reading of that portion of the police report, Dr. Lanyon, that Mr. McGill, in fact, had a memory of the events which occurred during the second robbery?
>
> A: If that is accurate as you say, it appears that he did.

. . . .

Q: And it appears that he had no blackout or amnesia at all which could be attributed to a head injury?

A: Not at that time, correct.

The result was devastating to the conclusion counsel was trying establish, and Schaffer later admitted "the lack of corroboration contributed to Dr. Lanyon being discredited by the State."

The consequences of counsel's decision to withhold the pre-sentence reports from Dr. Lanyon may entice us to find counsel's preparation of Dr. Lanyon deficient. But we may not second-guess counsel's decision based on "the distorting effects of hindsight." *Strickland*, 466 U.S. at 689. If counsel strategically withheld the reports after considering reasonable alternatives, *Strickland* prohibits us from critiquing counsel's decision after the fact. *Id.* Such tactical decisions represent "sound trial strategy" and are "virtually unchallengeable." *See id.* at 689, 690 (quoting *Michel v. Louisiana*, 350 U.S. 91, 101 (1955)). Despite the consequences of counsel's decision to withhold the pre-sentence reports from Dr. Lanyon, it was a reasonable and tactical decision at that time.

At her PCR-stage testimony, Schaffer explained that she purposefully withheld various pre-sentence reports to protect McGill's credibility with Dr. Lanyon. In particular, at the time, counsel believed that, in connection with one of the robberies, McGill had lied to a probation officer about having a child that he needed to care for, an allegation that counsel could not confirm. Counsel was concerned that if Dr. Lanyon

learned that McGill had been untruthful during the pre-sentence process that it would harm his credibility with Dr. Lanyon. As counsel saw it, she had two options, neither of which was particularly good. She could disclose the pre-sentence reports to Dr. Lanyon and risk destroying McGill's credibility with his only expert witness, or she could withhold the reports in an effort to protect McGill's credibility. Counsel chose the latter, a decision that she characterized as a "strategic decision on [her] part."

This is precisely the type of tactical decision that *Strickland* protects. 466 U.S. at 690–91. It is clear that counsel did not take lightly the decision to withhold information from Dr. Lanyon. In fact, counsel testified that the decision to withhold the reports was not unanimous among the defense team and that as lead counsel, she made the ultimate decision to do so. That the defense team discussed the benefits and potential consequences of not disclosing the pre-sentence reports is strong evidence that counsel's decision was sound trial strategy. Although counsel's decision may have ultimately harmed the mitigation effort, we cannot say that the decision fell outside "the wide range of reasonable professional assistance." *Id.* at 689. Had Schaffer decided to provide Dr. Lanyon with the pre-sentence reports, McGill may have had an even less effective case for mitigation.

4. Evidence of substance abuse, sexual assault, and domestic violence

McGill claims that counsel was ineffective in investigating evidence of substance abuse, sexual assault and domestic violence. Under *Williams*, counsel's investigation falls short if it was insufficient to uncover evidence that

reasonably should have been uncovered. *See* 529 U.S. at 396; *see also Porter v. McCollum*, 558 U.S. 30, 40 (2009) (granting relief where counsel ignored avenues of potential mitigation evidence "of which he should have been aware"). The PCR court concluded that the defense presented "a substantial amount of mitigation" with respect to McGill's substance abuse, and his abusive relationship with Hardesty was "thoroughly explored." As for McGill's claim that he was sexually abused at Boysville, that was carefully reviewed by the PCR court, which concluded that he "ha[d] failed to substantiate his claim that he was sexually abused as a child. Therefore his trial counsel was not ineffective for failing to further investigate this potential mitigation." In particular, the PCR court found, as we have discussed, that McGill himself "denied any such abuse." The PCR court found that counsel adequately investigated evidence of McGill's substance abuse history, prior sexual abuse, and domestic violence. Here, the PCR court reasonably concluded that counsel's investigation met *Williams*'s standard.

a. Substance abuse history

We previously discussed PCR counsel's interactions with addictionologist Dr. Mace Beckson through the lens of whether the PCR court relied on unreasonable determinations of fact under § 2254(d)(2). We must now evaluate whether counsel's investigation into McGill's drug-related mitigation evidence was sufficient and whether her decision not to retain a different addictionologist was reasonable. Although there is some overlap between this claim and the § 2254(d)(2) claim, here we focus on counsel's performance rather than the PCR court's factual determinations. We start with counsel's investigation into McGill's substance abuse history.

Counsel's investigation into McGill's substance abuse history was thorough and expansive. The defense team discovered and presented evidence of drug use spanning decades of McGill's life. Dr. Lanyon testified that McGill began using alcohol at nine years old and progressed to marijuana by thirteen. McGill eventually progressed to chronic, daily methamphetamine use, which often caused active paranoia, impaired his judgment, and interfered with "any remaining fragment of ability to reason." Dr. Lanyon's psychological evaluation also shed light on McGill's drug use in the weeks leading up to the crime. McGill actively used methamphetamine and "had been awake for several days at the time of the events with which he [was] charged." McGill's brother, Cordell, supported Dr. Lanyon's testimony, stating that McGill and Hardesty used crystal methamphetamine "all the time."

Nevertheless, McGill contends that counsel's investigation into his prior drug use was objectively deficient. He likens this case to *Porter*, where counsel "had only one short meeting with Porter regarding the penalty phase" and "did not obtain any of Porter's school, medical, or military service records or interview any members of Porter's family." 558 U.S. at 39 ("counsel did not even take the first step"). The Court had little difficulty concluding that a "decision not to investigate did not reflect reasonable professional judgment." *Id.* at 40. The investigation in McGill's case bears no resemblance whatsoever to the deficient investigation in *Porter*.

Nor was counsel deficient for failing to retain an alternate addictionologist. It is unclear exactly what additional evidence McGill believes counsel would have uncovered had she done so. After reviewing Dr. French's PCR-stage report,

we are unconvinced that an alternate addictionologist would have more effectively investigated or presented McGill's substance abuse history. McGill assumes that an addictionologist would have more precisely attributed McGill's behavior to his drug use by testifying to the effects that methamphetamine had on McGill. However, Dr. French's report suffers from the same ambiguity and generalization as Dr. Lanyon's trial testimony. Although Dr. French listed more potential symptoms of methamphetamine use than Dr. Lanyon, he did not link McGill's behavior to any particular one. Nor did he opine on whether the type, amount, or concentration of methamphetamine McGill was using could have influenced McGill's decision-making on the night of the crime. In the end, the PCR court found that Dr. French's conclusions were "speculative" because, unlike Dr. Lanyon, Dr. French never examined McGill. The PCR court, thus, reasonably concluded that counsel conducted a thorough investigation of McGill's background and presented substantial evidence of substance abuse to the jury.

b. Childhood sexual abuse

The PCR court similarly held that counsel adequately investigated whether McGill suffered childhood sexual abuse. Evidence of sexual assault can be particularly powerful at the penalty stage due to its devastating and long-lasting effect on the victim. *See Wiggins*, 539 U.S. at 534–35. Such evidence is especially powerful when the abuse occurs regularly over an extended period of time. *Id.*; *Wharton*, 765 F.3d at 977. However, evidence of sexual assault does not always "tip the scales" toward leniency. *Wharton*, 765 F.3d at 978. For instance, we have denied relief where allegations of sexual abuse were bare or unsupported, *Schurz v. Ryan*, 730 F.3d

812, 815 (9th Cir. 2013), or where it was unclear whether the alleged sexual abuse actually occurred, *Samayoa v. Ayers*, 649 F.3d 919, 929 (9th Cir. 2011). We have also recognized that even if evidence of sexual abuse may have made a petitioner more sympathetic to a jury, it may also have the unwanted effect of making him seem less likely to be rehabilitated. *Benson v. Chappell*, 958 F.3d 801, 833 (9th Cir. 2020).

The problem for McGill is that there is no reliable evidence that he was sexually abused. The investigators did not turn up any well-grounded evidence, and McGill did not produce any such evidence for the PCR court. As the PCR court found, McGill came forward with evidence that his brother Lonnie had been abused at Buckner's Boys Ranch, but no one could testify that McGill had. And given that McGill had denied to Dr. Lanyon that he was sexually abused, there was nothing for counsel to investigate. Under any standard, "counsel is not deficient for failing to find mitigating evidence if, after a reasonable investigation, nothing has put the counsel on notice of the existence of that evidence." *Babbitt v. Calderon*, 151 F.3d 1170, 1174 (9th Cir. 1998) (quoting *Matthews v. Evatt*, 105 F.3d 907, 920 (4th Cir. 1997), *abrogated on other grounds by Miller-El v. Dretke*, 545 U.S. 231 (2005)).

Nevertheless, McGill argues that two red flags should have prompted reasonable counsel to investigate further: Lonnie's childhood sex abuse and McGill's placement in foster care. But neither piece of evidence renders counsel's investigation unreasonable. Evidence that Lonnie was sexually assaulted in a boy's home did not mean that McGill was also sexually assaulted there. For instance, a second brother, Cordell, testified during the penalty phase that he had

not suffered any type of sexual abuse at either Boysville or Buckner's and was unaware of whether McGill suffered such abuse. Further, investigating sexual abuse in McGill's past on the basis of Lonnie's allegations of abuse would have been particularly difficult because Lonnie was uncooperative and "absolutely refused" to come to court.

Second, the fact of foster-care placement is not itself indicative of sexual abuse. McGill points to *Wiggins* for support, but it does not stand for such a broad proposition. There, the Court granted relief in part based on counsel's failure to uncover reasonably available evidence of Wiggins's "repeated rape during his . . . years in foster care." *Wiggins*, 539 U.S. at 535. Nothing in *Wiggins* suggests a categorical imperative that counsel thoroughly investigate the possibility of sexual abuse for every capital defendant who has been placed in state care. Moreover, even if *Wiggins* did create some duty of inquiry, it does not stand for the proposition that counsel must continue to investigate sexual abuse after the defendant's express denial that such abuse ever occurred. Thus, *Wiggins* is not the "clearly established Federal law" that would require counsel to perform additional investigation into a claim of abuse that McGill's family did not disclose and that he actively denied.

In any event, we are unsure what more Schaffer should have done to investigate McGill's alleged sexual abuse. The defense team performed several interviews with McGill's family, but no one mentioned sexual abuse. Counsel retained Dr. Lanyon who probed McGill on any childhood abuse, but McGill denied suffering sexual abuse. Counsel requested several records from the boy's homes where McGill was placed, but the records did not include details of sexual abuse. After performing such a thorough investigation, we see

nothing that should have placed counsel on notice of the abuse or demanded further investigation. Thus, the PCR court reasonably concluded that counsel was not deficient for failing to conduct additional investigation into sexual abuse.

c. Domestic violence

The PCR court concluded that counsel presented adequate evidence of McGill's relationship with Hardesty to portray her effect on him and that counsel was not ineffective for failing to retain a domestic violence expert to explain the McGill-Hardesty relationship. These conclusions were reasonable.

Counsel left the jury little doubt that Hardesty was psychotic and abusive. During closing arguments, counsel characterized the relationship as "codependent" and "sick" and opined that Hardesty was "crazy." Counsel also explained McGill's apparent weakness for Hardesty, stating that McGill "simply cope[d] with her psychoses, her addictive behaviors and her serious mental and physical abuse." Dr. Lanyon and several of McGill's family members echoed those statements during the penalty phase. Dr. Lanyon added that McGill was uniquely susceptible to Hardesty's manipulation as a result of the deep-seated psychological wounds left by his mother. And even McGill's mother testified that Hardesty was "one of the most evil people" she had ever met. Indeed, the PCR court aptly noted that Hardesty's influence on McGill was, in part, "the focus of the mitigation [case]."

There is no indication that a domestic violence expert would have better conveyed that mitigation evidence to the jury. McGill speculates that an expert would have more

effectively explained the effects of Hardesty's domestic violence, but he does not provide any expert report, declaration, or other evidence to support that speculation. That none of McGill's witnesses used the words "domestic violence" does not detract from the clarity with which they described Hardesty's effect on McGill. The PCR court reasonably found that counsel performed an adequate investigation into Hardesty's abuse and McGill's unhealthy reliance on her.

5. Failure to Explain Adequately McGill's Prior Armed Robbery Convictions

McGill argues that Schaffer should have presented the circumstances surrounding his prior armed robbery convictions in a way that would have softened the convictions to the jury and that her failure to do so was ineffective assistance of counsel. The PCR court saw "no merit" in the claim and held that McGill "[did] not contest the validity of this prior conviction" as an aggravator. His claim that "his alleged brain damage" affected its commission was "speculative and not substantiated by any of the exhibits."

McGill's armed robbery convictions constituted statutory aggravating factors under Ariz. Rev. Stat. § 13-703(F)(2). Counsel attempted to soften the impact of the robberies as aggravators. Dr. Lanyon also gave the jury insight into McGill's state of mind at the time, testifying that he was essentially homeless, "living hand to mouth," and drinking heavily.[9]

[9] The PCR court did commit one clear error in its explanation of who communicated the details of McGill's robbery to the jury. The court found:

McGill now argues that counsel failed to investigate his brain damage and explore how it might have contributed to his robberies. He points to PCR testimony from Dr. Wu and Dr. Rosengard. We have previously discussed their testimony in connection with the causal-nexus test. *See* Part III.A.1.c. We will not repeat our analysis, except to note that the PCR court concluded that, at best, their testimony would have added little to Dr. Lanyon's testimony and, at worst, "would have been an opening for the State to poke holes in the mitigation and would have hurt the defense's presentation." These findings are not unreasonable.

* * *

> Further, *[McGill] recounted his prior crimes in detail on cross-examination* (as he did to the presentence writer), undermining any claim that he blacked out or could not recall his crimes.

McGill neither testified, nor was he cross-examined at trial, rendering that portion of the PCR court's factual findings verifiably false. McGill seizes on that error to argue that the PCR court's ultimate conclusion relied upon an unreasonable determination of fact under 28 U.S.C. § 2254(d)(2). Nothing, however, turned on whether McGill testified in court that he could not recall the robberies or told the presentence report writer that he could not recall the crimes.

The PCR court's error merely misrepresented the medium by which the jury received McGill's statements—not the statements themselves. Rather than McGill making those statements on cross-examination as the PCR court incorrectly stated, the prosecutor introduced McGill's prior statements during Dr. Lanyon's cross-examination. That does not change the fact that the jury heard McGill's own statements recounting the details of the robberies. The PCR court acknowledged as much when it noted that McGill also recounted the details to a pre-sentence writer. Thus, the PCR court's conclusion was reasonable despite its slip of the pen.

McGill has not shown that counsel performed deficiently under *Strickland* at the penalty phase of his trial. The PCR court reasonably concluded that counsel's preparation, investigation, and presentation of mitigation evidence was thorough and reasoned. As a whole, the defense team uncovered a "not insignificant" amount of mitigation evidence that spanned decades of McGill's life and presented a comprehensive picture to the jury. *See McGill I*, 140 P.3d at 945. Conversely, there is no evidence that counsel failed to uncover any reasonably available mitigation records. We therefore conclude that counsel's performance was not objectively deficient in light of the prevailing professional norms. Because counsel's trial performance was adequate, we do not reach McGill's claims of prejudice. *See Strickland*, 466 U.S. at 697.

IV. UNCERTIFIED CLAIMS

We now turn to the two claims that the district court did not certify for appeal: that counsel was ineffective at the guilt phase by failing to retain an expert arson investigator; and that his death sentence violated the Ex Post Facto Clause.

We must consider whether McGill has made the necessary showing of a constitutional deprivation to warrant a certificate of appealability on any of his claims. As we have previously set out, habeas petitioners cannot appeal the denial of a § 2254 petition without first obtaining a certificate of appealability. *See* 28 U.S.C. § 2253(c)(1); *Miller-El I*, 537 U.S. at 327, 335–36. To proceed, McGill must demonstrate a "substantial showing" that he suffered a deprivation of a constitutional right. 28 U.S.C. § 2253(c)(2); *Slack v. McDaniel*, 529 U.S. 473, 483–84 (2000). He meets that standard if reasonable jurists "could disagree with the

district court's resolution of his [case] . . . or that . . . the issues presented are adequate to . . . proceed further." *Miller-El I*, 537 U.S. at 327. Applying that standard, we deny a certificate of appealability on McGill's ineffective assistance claim at the guilt phase. We grant a certificate of appealability on McGill's ex post facto claim but deny relief on the merits.

A. *Ineffective Assistance at the Guilt Phase for Failure to Hire an Arson Expert*

This claim is unique among McGill's ineffective assistance claims as it is the only claim challenging counsel's performance at the guilt stage. McGill argues that counsel was deficient for failing to retain an arson expert at trial to rebut the state's evidence that McGill mixed styrofoam into the gasoline before dousing Perez and Banta. McGill did not raise this claim in his state PCR petition, however, resulting in the claim being procedurally defaulted. *See Martinez v. Ryan*, 566 U.S. 1, 9 (2012); *Coleman v. Thompson*, 501 U.S. 722, 753–54 (1991). To cure the default, McGill also argues that PCR counsel performed deficiently by failing to raise this claim before the PCR court.

Martinez announced a possible, narrow exception in cases, like this one, where the alleged cause of a procedural default is the ineffective assistance of PCR counsel. To cure the default, a petitioner must show that PCR counsel was ineffective under *Strickland* and that the underlying ineffective assistance claim is "substantial . . . which is to say that . . . the claim has some merit." *Martinez*, 566 U.S. at 14 (citation omitted). The analysis of a claim's substantiality mirrors the standard for issuing a certificate of appealability, *see id.*–namely, whether "reasonable jurists would find" the

denial of relief "debatable or wrong." *See Miller-El I*, 537 U.S. at 338 (citation omitted). *Martinez* thus created a layered analysis in which we must determine (1) whether PCR counsel was ineffective under *Strickland*—with its own two-part test—for failing to raise the underlying claim and (2) whether the underlying claim "has some merit." 566 U.S. at 14.

Reasonable jurists would find it undebatable that McGill has not satisfied *Martinez* because counsel's decision not to call an arson witness was reasonable under *Strickland*. McGill makes much out of witness testimony that he mixed styrofoam into the gasoline to make it more difficult for Perez and Banta to extinguish the flames. He assumes that, had counsel more effectively rebutted that testimony, the jury would not have found that he committed the crime in an especially cruel manner. But the state's reliance on the styrofoam testimony was inconsistent at best. Two state witnesses testified that McGill told them that he mixed styrofoam into the gas, which created a sticky "napalm-like" substance. On the other hand, the state's own experts discounted the styrofoam testimony. The state's expert arson investigator, for example, testified that he found no evidence of styrofoam at the scene and was unsure whether the mixture McGill described was even possible. The state's expert criminologist similarly testified that he would expect to find high concentrations of styrene at the scene had McGill used styrofoam but that he did not find above-average amounts of styrene in his testing. Whether McGill actually put styrofoam in the container of gasoline or merely said he did so is unclear as evidenced by the state's own experts. It was reasonable for counsel not to retain an arson expert to rebut that testimony. Such rebuttal would only have emphasized the disputed fact to the jury.

Moreover, reasonable jurists would not find it debatable that counsel's failure to retain an arson expert did not reasonably influence whether the jury would find that McGill committed this crime in an especially cruel manner. As both the Arizona Supreme Court and the district court noted, a crime is especially cruel "if the victim consciously experienced physical or mental pain prior to death, and the defendant knew or should have known that suffering would occur." *See McGill I*, 140 P.3d at 938 (citation omitted). Any reasonable defendant would know that dousing two people in gasoline and lighting them on fire would "necessarily cause[] . . . tremendous suffering." *Id.* Indeed, before Perez succumbed to his burns, he "scream[ed] in pain" and pleaded with nurses to "[g]et the pain away." *Id.* at 934. No reasonable jurist would conclude that the essential cruelty of McGill's crime in this case would turn on whether he did or did not mix styrofoam into the gasoline before igniting his victims. We therefore deny a certificate of appealability on this issue.

B. *McGill's Death Sentence and the Ex Post Facto Clause*

We turn, finally, to whether McGill's death sentence violated the Ex Post Facto Clause. In *Ring v. Arizona*, 536 U.S. 584 (2002) (*Ring I*), the Supreme Court invalidated Ariz. Rev. Stat. § 13-703(C) (2001) because it required the sentencing judge—not the jury—"to find an aggravating circumstance necessary for imposition of the death penalty." 536 U.S. at 609. Perez's murder fell within the brief period between *Ring I* and Arizona's amendment of § 13-703. On direct appeal to the Arizona Supreme Court, McGill argued that Arizona lacked a valid procedure to sentence him to death at the time he committed his crime, in violation of the Ex Post Facto Clause. The Arizona Supreme Court denied

relief, stating only that it had already rejected the argument. *See McGill I*, 140 P.3d at 945 (citing *State v. Ring*, 65 P.3d 915, 928 (Ariz. 2003) (en banc) (*Ring II*)). We believe that reasonable jurists could find debatable whether Arizona's death-sentencing process violates the Ex Post Facto Clause, and we therefore grant a certificate of appealability as to this issue. We conclude, however, that the Arizona Supreme Court reasonably applied clearly established federal law when it determined that Arizona had only made a procedural change to its death penalty process, and that change did not violate the Ex Post Facto Clause. *See Ring II*, 65 P.3d at 926–28.

A brief review of the timeline is helpful to frame McGill's argument. In the years leading up to Perez's murder, two separate statutory provisions codified the state's use and imposition of the death penalty: "availability" provisions and "procedural" provisions. The availability provisions specified what offenses were eligible for death and what aggravating factors were necessary to make that penalty available as punishment in a given case. Thus, Ariz. Rev. Stat. § 13-1105 (2001), stated that "[f]irst degree murder is a class 1 felony and is punishable by death or life imprisonment as provided by [Ariz. Rev. Stat.] section 13-703," and Ariz. Rev. Stat. § 13-703(G) (2001) listed the statutory aggravating circumstances that would make the death penalty available for a particular offender convicted of first degree murder. The procedural provisions, which were contained in the remaining provisions of § 13-703, outlined the procedure by which a death sentence was imposed. They allocated the burden of proof and provided for the broad admissibility of mitigating evidence. *Id.* § 13-703(B)–(F). Importantly, and relevant here, § 13-703(C) reserved for the "court alone" the duty to "make all factual determinations" regarding

aggravation and mitigation evidence to determine whether to impose a capital sentence. *Ring I*, 536 U.S. at 592–93 (citing Ariz. Rev. Stat. § 13-1105(C)); *see also* Ariz. Rev. Stat. § 13-703(F) (2001) ("court . . . shall impose a sentence of death if the court finds one or more of the aggravating circumstances enumerated in subsection G of this section and then determines that there are no mitigating circumstances sufficiently substantial to call for leniency").

In June 2002, the Court held unconstitutional the relevant portions of § 13-703(C) and § 13-703(F) under the Sixth Amendment, concluding that the right to a jury trial required the jury "to find an aggravating circumstance necessary for imposition of the death penalty." *Id.* at 609 (overruling *Walton v. Arizona*, 497 U.S. 639 (1990), in light of *Apprendi v. New Jersey*, 530 U.S. 466 (2000)). Thirty-eight days after *Ring I*, Arizona amended § 13-703 to require the "trier of fact" to "find[] one or more of the aggravating circumstances enumerated in subsection F" and to weigh any such aggravating factors against the mitigating circumstances in deciding whether to impose a capital sentence. *See* Ariz. Rev. Stat. § 13-703(E) (2002). McGill murdered Perez during that thirty-eight-day interregnum. He argues that Arizona lacked a valid death penalty when he committed his crime, and that Arizona's law curing the *Ring I* defect violates the Ex Post Facto Clause.

The Ex Post Facto Clause provides that "No State shall . . . pass any . . . ex post facto Law." U.S. Const. art. I, § 10, cl. 1. It prohibits a state from retroactively changing the definition of a crime to make formerly innocent behavior illegal or increasing the punishment for criminal acts. *See Collins v. Youngblood*, 497 U.S. 37, 42–43 (1990); *see also Dobbert v. Florida*, 432 U.S. 282, 292 (1977); *Beazell v.*

Ohio, 269 U.S. 167, 169–70 (1925); *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 390 (1798) (opinion of Chase, J.). The Supreme Court has set out three factors to determine whether a challenged law was issued ex post facto. First, the law must be retrospective, meaning that it applies to actions that pre-date its enactment. *Miller v. Florida*, 482 U.S. 423, 430 (1987) (citing *Weaver v. Graham*, 450 U.S. 24, 29 (1981)). Second, application of the new law must disadvantage the defendant. *Id.* Third, the law must affect the defendant's substantial rights such that it alters "the quantum of punishment." *Weaver*, 450 U.S. at 33 (quoting *Dobbert*, 432 U.S. at 293–94). Mere procedural changes that "simply alter[] the methods employed in determining [a sentence]" do not affect substantial rights because they do not change the "quantum of punishment attached to the crime." *Dobbert*, 432 U.S. at 293–94 (citing *Hopt v. Utah*, 110 U.S. 574, 589–90 (1884)). This is so even if the procedural change disadvantages the defendant. *Id.* at 293.

In *Ring II*, the Arizona Supreme Court held that Arizona's amended procedural statute did not violate the Ex Post Facto Clause of the U.S. Constitution. In that case, the Arizona high court consolidated the appeals of the thirty-one death-row inmates who were unconstitutionally sentenced under the state's prior version of § 13-703. *See Ring II*, 65 P.3d at 925. The court found two U.S. Supreme Court cases "particularly instructive." *Id.* at 927.

The first of these was *Dobbert v. Florida*, 432 U.S. 282 (1977). In that case Dobbert was accused of brutally murdering his own children in 1971 and 1972. Under the law in effect at the time, Florida required imposition of the death penalty for capital crimes unless the jury recommended mercy. The jury's recommendation was binding on the

judge. *Id*. at 287–88. After Dobbert committed his crimes, but before he could be tried, the U.S. Supreme Court struck down Georgia's death penalty statute in *Furman v. Georgia*, 408 U.S. 238 (1972). Weeks later the Florida Supreme Court, citing *Furman*, held that Florida's death penalty statute was similarly unconstitutional. *Dobbert*, 432 U.S. at 288 (citing *Donaldson v. Sack*, 265 So. 2d 499 (Fla. 1972)). Later that same year, the Florida legislature amended its death penalty statute to comply with *Furman*. The new statute provided that once a defendant was found guilty of a capital felony, the court must hold a separate hearing to consider aggravating and mitigating evidence. The jury would make a recommendation, which was not binding on the judge, and the judge would issue written findings of fact if imposing a death sentence. *Id.* at 290–92. Dobbert was tried under the new statute. The jury recommended a life sentence, but the trial court—under its authority under the revised Florida statute—overruled the jury and sentenced Dobbert to death. *Id.* at 287.

Dobbert argued that his rights under the Ex Post Facto Clause were violated by the change in Florida law. Under the Florida law in effect when he committed his crimes, the jury's recommendation of life would have been binding on the trial judge; under the new law, Dobbert got the death penalty. Dobbert raised two claims under the Ex Post Facto Clause that are relevant here. First, he alleged that Florida had altered the roles of the judge and jury and that he was entitled to proceed under the prior law. The Court rejected this argument. "Even though it may work to the disadvantage of a defendant, a procedural change is not *ex post facto*." *Id.* at 293. The Court found that "the change in the [Florida] statute was clearly procedural. The new statute simply altered the methods employed in determining whether the

death penalty was to be imposed; there was no change in the quantum of punishment attached to the crime." *Id.* at 293–94. The Court also took into account that "not only was the change in the law procedural, it was ameliorative"—the change was to deal with *Furman*—and it was not clear that the new law was "more onerous than the prior law." *Id.* at 294.

Dobbert also argued that because the statute in effect in Florida when he murdered his children was unconstitutional, "there was no death penalty 'in effect' in Florida." *Id.* at 297. The Court termed this argument "sophistic" and "highly technical," "mock[ing] the substance of the Ex Post Facto Clause." *Id.* For the Court, "[w]hether or not the old statute would in the future, withstand constitutional attack, it clearly indicated Florida's view of the severity of murder and of the degree of punishment which the legislature wished to impose upon murderers." *Id.*[10] The statute's "existence on the statute books provided fair warning" to Dobbert. *Id.*; *see also id.* at 303 (Burger, C.J., concurring) ("Petitioner was at least constructively on notice that this penalty might indeed follow his actions.").

[10] We note that the U.S. Supreme Court initially upheld the constitutionality of Florida's 1972 revised sentencing process, *see Proffitt v. Florida*, 428 U.S. 242 (1976), but it later invalidated the procedure under the Sixth Amendment, *Hurst v. Florida*, 577 U.S. 92, 98–99 (2016) (citing *Ring I*, 536 U.S. at 597). Florida's procedure was deficient because it did not require the jury to make "specific factual findings with regard to the existence of mitigating or aggravating circumstances[,] and its recommendation [was] not binding on the trial judge." *Hurst*, 577 U.S. at 99 (citation omitted). Arizona's amended sentencing procedure, on the other hand, required the jury to make those crucial findings of fact and makes the jury's determination final. *See* Ariz. Rev. Stat. § 13-703(E) (2002).

The second case the Arizona Supreme Court looked to was *Collins v. Youngblood*, 497 U.S. 37 (1990). In *Collins*, the defendant was convicted of aggravated sexual abuse. He was sentenced to life and fined $10,000. Collins filed in state court for a writ of habeas corpus on the grounds that the statute did not authorize a fine, and thus his sentence was void and he should be given a new trial. Before his habeas petition was reviewed, the Texas legislature adopted a statute allowing an appellate court to reform an improper sentence assessing a fine not authorized by law. *Id*. at 39–40. The Texas Court of Criminal Appeals ordered his fine deleted from his sentence and refused his request for a new trial. The U.S. Supreme Court held that the Texas statute did not run afoul of the Ex Post Facto Clause: it "[did] not punish as a crime an act previously committed, which was innocent when done; nor make more burdensome the punishment for a crime, after its commission." *Id.* at 52.

Relying on *Dobbert* and *Collins*, the Arizona Supreme Court thought it clear that "rights secured by the Sixth Amendment jury trial right, the right at issue here, are inherently procedural" and that "[t]he new sentencing statutes alter the method used to determine whether the death penalty will be imposed but make no change to the punishment attached to first degree murder." *Ring II*, 65 P.3d at 928. As a consequence, Arizona's new sentencing statute did not violate the Ex Post Facto Clause of the U.S. Constitution. *Id.*

McGill's case was not part of the cases consolidated in *Ring II* because unlike those defendants, McGill was sentenced under a constitutional version of Ariz. Rev. Stat. § 13-703. Nevertheless, the Arizona Supreme Court reviewed his case separately and found that it was governed by its decision in *Ring II*. *McGill I*, 140 P.3d at 945. McGill

argues that he is in a different position from the defendants in *Ring II*. The defendants sentenced before *Ring I* had notice of both the availability of the death penalty and the procedure by which the sentence would be imposed, even though that procedure was later held inconsistent with the Sixth Amendment. McGill, on the other hand, claims he had only half the puzzle, as § 13-703 had been invalidated by the U.S. Supreme Court just three weeks before McGill committed his crime. McGill claims that he was in limbo. According to McGill, § 13-1105(C) put him on notice that "[f]irst degree murder . . . [was] punishable by death . . . as provided by section 13-703," Ariz. Rev. Stat. § 13-1105 (2001), but there was no procedure by which he could be tried and sentenced to death until § 13-703 was re-implemented weeks after his crime. It is on that basis that McGill argues there was no functioning death penalty statute in place at the time he committed murder.

Although we recognize the different position that McGill is in, we are not persuaded that McGill is entitled to relief under AEDPA. And we wish to be very clear about our role here. On AEDPA review, we may not grant relief unless the Arizona Supreme Court's application of federal law was flawed "beyond any possibility for fairminded disagreement." *Richter*, 562 U.S. at 103. Even if we thought the Arizona Supreme Court's conclusion was wrong under the Ex Post Facto Clause as a matter of first impression, we could not issue relief. Rather, we can only review the decision to determine if it is an *unreasonable* application of *Dobbert* and *Collins*.

As the Court held in *Dobbert*, the existence of § 13-1105(C) when McGill murdered Perez was likewise an "operative fact" that gave fair warning to McGill that Arizona

could seek the death penalty if he was convicted of first-degree murder. 432 U.S. at 298. McGill was on full notice that Arizona could punish him for murder with death or life imprisonment. The fact that § 13-1105(C) cross-referenced § 13-703's procedural requirements does not detract from Arizona's "view of the severity of murder" and "the degree of punishment which the legislature wished to impose upon murderers." *Dobbert*, 432 U.S. at 297. Moreover, the 2002 amendments did not alter the pre-existing enumeration of statutory aggravating factors that was contained in § 13-703(G) (which was reclassified as § 13-703(F)). McGill thus received "fair warning as to the degree of culpability which the State ascribed to the act of murder." *Id.* There was no retroactive change in the penalty for his crime.

Furthermore, the Arizona Supreme Court reasonably concluded in light of *Dobbert* that the amendments to § 13-703 are plainly procedural, not substantive. *Ring I* did not invalidate the death penalty in Arizona. It held that Arizona could not confer on the judge the duty to find sufficient aggravating factors necessary for the imposition of the death penalty. *Ring I*, 536 U.S. at 609. Arizona's change to § 13-703 affected the allocation of responsibility between judge and jury, and that makes it analogous to the change Florida made to its system in *Dobbert*. *See* 432 U.S. at 293–94. And because Arizona was responding to *Ring I*, its change was "ameliorative," just as Florida's amendment responded to *Furman*. *Id.* at 294. Arizona did not impose a penalty that was previously unavailable, nor did the state criminalize innocent conduct after the fact. The state "simply altered the method[] employed in determining whether the death penalty was to be imposed." *Id.* at 293–94. As a consequence, McGill's substantial rights have not been affected. Such procedural changes fall outside the protections of the Ex Post

Facto Clause. *Id.* at 296–97; *see Styers v. Ryan*, 811 F.3d 292, 297 (9th Cir. 2015) ("The rule announced in *Ring [I]*, under which capital defendants are entitled to a jury determination of any fact on which the legislature conditions an increase in their maximum punishment . . . is a procedural rule that applies to capital defendants on direct review." (cleaned up)).

Our dissenting colleague takes a different view of the privilege or immunity against ex post facto laws. We have three observations. First, although the dissent briefly refers to AEDPA, Dissenting Op. at 80, 82, the dissent makes no serious effort to engage with AEDPA's standard. The dissent cited only the general test for ex post facto inquiries, *id.* at 79–80, conducted a de novo review for that test, *id.* at 79–83, and pronounced the Arizona Supreme Court's decision unreasonable, *id*. at 80, 82. The Supreme Court has previously reversed us for conducting precisely this kind of analysis. *Sexton v. Beaudreaux*, 138 S. Ct. 2555, 2560 (2018) (per curiam) ("The Ninth Circuit essentially evaluated the merits *de novo*, only tacking on a perfunctory statement at the end of its analysis asserting that the state court's decision was unreasonable."). Such analysis is "fundamentally inconsistent with AEDPA." *Shinn v. Kayer*, 141 S. Ct. 517, 523 (2020) (per curiam) (citing *Beaudreaux*, 138 S. Ct. at 2560). Second, the Court has made clear that we are to conduct AEDPA review of state court judgments, not at the highest level of abstraction, but at the lowest. It is not sufficient for purposes of AEDPA to cite a general rule; rather, the Supreme Court must have "squarely addresse[d]" the issue. *Wright v. Van Patten*, 552 U.S. 120, 125 (2008); *see Yarborough v. Alvarado*, 541 U.S. 652, 664 (2004) ("The more general the rule, the more leeway [state] courts have in reaching outcomes in case-by-case determinations."). We

identified two cases—*Collins* and *Dobbert*, which were also identified and addressed by the Arizona Supreme Court—as the closest factually to McGill's case. The dissent does not really grapple with either case, but dismisses *Collins* and *Dobbert* perfunctorily. Dissenting Op. at 82, 84. With all respect, that is not AEDPA review.[11]

Third, the dissent's analysis of the Ex Post Facto Clause is interesting and novel—to be sure, not grounds for granting habeas under AEDPA—but, we think, not sound. The dissent's principal point is that "McGill could not have been *sentenced* to death for murder *when he committed his crimes* because at that time there was no statute implementing the death penalty in Arizona." Dissenting Op. at 78 (emphasis added); *see also id.* at 80 ("There was no law that permitted McGill to be punished with a death sentence during the thirty-eight days between *Ring I* and the re-enactment of § 13-703."); *id.* at 81 ("[McGill was] on notice that he could *not* be sentenced to death for first-degree murder."); *id.* at 84

[11] The dissent states, for example, that "Here, the issue is whether the change from *no possibility of the death penalty* to *possibility of the death penalty* was procedural or substantive." Dissenting Op. at 82. The best answer to that question comes from *Dobbert*, in which the Court said that a statute that "simply altered the methods employed in determining whether the death penalty was to be imposed" was procedural because there was "no change in the quantum of punishment attached to the crime." *Dobbert*, 432 U.S. at 293–94. The dissent ignores the Court's analysis.

The dissent's argument that "By the time of McGill's sentencing, the Arizona legislature had increased the risk of a death sentence for conduct that had already taken place," Dissenting Op. at 84, has likewise been answered by *Dobbert*. Dobbert argued that when he committed his crime, "there was no death penalty 'in effect' in Florida." *Dobbert*, 432 U.S. at 297. The Court thought this argument "sophistic." *Id.*

("There was *no* risk that McGill would be sentenced to death for his crimes at the time they were committed . . . ."). And the dissent spins an interesting, creative counterfactual in which the Arizona legislature delays for years in fixing the *Ring I* problem. Dissenting Op. at 83. We are puzzled by this analysis, because we are not aware of anything in Ex Post Facto Clause jurisprudence that turns on whether, at the time the crime was committed, the proper *procedures* are in place to impose, at trial, the sentence of death that the substantive statute then authorizes as a punishment for the conduct that the defendant committed. McGill was plainly on notice that his conduct was *punishable* by death when he murdered Perez on July 13, 2002. The dissent's whole case for issuing the writ rests on the premise that, due to the declared invalidity of Arizona's capital sentencing procedure on the day he committed his crime, McGill could not have received his sentence if (in a remarkable and likely unconstitutional act of very swift justice) his trial had taken place later that same day. The dissent thus assumes that the protection of the Ex Post Facto Clause extends to the particular *procedures* that would be lawfully available to any sentencing conducted on the date of the offense, but that view seems difficult to square with *Dobbert*'s statement that "[e]ven though it may work to the disadvantage of a defendant, a procedural change is not ex post facto." 432 U.S. at 293. Here, as in *Dobbert*, "[t]he new statute simply altered the methods employed in determining whether the death penalty was to be imposed; there was no change in the quantum of punishment attached to the crime." *Id.* at 293–94.

We are not sure why the question of *sentencing* is the relevant inquiry. The dissent claims we have "invented [a] distinction between a law authorizing a 'punishment' and a law authorizing a 'sentence.'" Dissenting Op. at 83 n.4. The

dissent claims that there is no difference: "the punishment *is* the sentence." *Id*.[12] The line Arizona has drawn between the punishment prescribed for a crime and the procedure by which one can be convicted and sentenced is one that has been around for a long time. *See* Wayne R. LaFave, Jerold H. Israel & Nancy J. King, *Criminal Procedure* 24 (4th ed. 2004) ("'Legal procedure,' Roscoe Pound long ago noted, 'is a means, not an end; it must be made subsidiary to the substantive law as a means of making that law effective in action.'"). The dissent's argument marries the procedure and the substantive law for Ex Post Facto purposes—it concludes that because Arizona lacked a constitutional statutory scheme for imposing the sentence, there was no death penalty.[13]

[12] The dissent is playing fast and loose with its terms. Nothing in the substantive law changed for McGill—his crime was defined as punishable by death on the day he committed it and on the day he was sentenced. All that changed was the process by which his sentence was to be determined, and McGill was tried, convicted, and sentenced consistent with the U.S. Constitution. That puts McGill's case squarely within *Dobbert*: "not only was the change in the law procedural, it was ameliorative" and it was "[not] more onerous than the prior law." *Dobbert*, 432 U.S. at 294. To paraphrase the dissent, "the later penalty imposed [on McGill] was the same penalty that could have been imposed at the time of [McGill's] offense." Dissenting Op. at 84.

[13] The dissent assumes that if the Arizona legislature had not responded so promptly to *Ring I*, the Arizona courts could not have complied with the dictates of the Sixth Amendment for death-eligible defendants, consistent with *Ring I*. *See* Dissenting Op. at 83. What principle of Arizona law would prevent Arizona courts from complying with *Ring I*, even if the legislature had not amended the statute? The dissent has made a huge assumption about how Arizona law works, including state separation of powers principles. We are not sure why the dissent gets to decide such matters.

The Supreme Court might well agree with our colleague in the future, but on AEDPA review, we do not get to create new ex post facto law and then issue habeas on that basis. *Edwards v. Vannoy*, 141 S. Ct. 1547, 1554 (2021); *Teague v. Lane*, 489 U.S. 288, 310 (1989) (plurality opinion).

* * *

We need not go so far as to decide that Arizona's new scheme is consistent with the Ex Post Facto Clause. We are not called upon to predict whether the Supreme Court would have upheld McGill's conviction and sentence had it granted certiorari review from the judgment of the Arizona Supreme Court on direct appeal. We only decide that the Arizona Supreme Court's understanding of the Ex Post Facto Clause, which it based on its review of *Dobbert* and *Collins*, is not unreasonable.[14] If we are to take seriously the Court's declaration that "an *unreasonable* application of federal law is different from an *incorrect* application of federal law," *Richter*, 562 U.S. at 101 (citation omitted), we cannot say that

[14] We note that the standard for granting the COA on this issue requires only that we determine that "jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further." *Miller-El I*, 537 U.S. at 327. We are fully satisfied of the fairmindedness of our dissenting colleague, and so we have granted the COA.

In order to grant habeas, however, our colleague must be persuaded that *no* "fairminded jurist could take a different view," *Kayer*, 141 S. Ct. at 525, that is, that the constitutional error was "well understood and comprehended in existing law beyond any possibility for fairminded disagreement," *Richter*, 562 U.S. at 103. Our colleague has not returned the favor.

the Arizona Supreme Court's decision was an unreasonable one.

V. CONCLUSION

The judgment of the district court is **AFFIRMED**.

COLLINS, Circuit Judge, concurring:

I concur in Judge Bybee's opinion, including its conclusion that, under *Browning v. Baker*, 875 F.3d 444 (9th Cir. 2017), the district court erred in limiting its grant of a certificate of appealability ("COA") to only one claim concerning whether McGill's trial counsel was ineffective at the penalty phase. *See* Opin. at 16. *Browning* held that, in deciding whether to grant a COA with respect to challenges to the adequacy of counsel at a particular phase, a district court should not "separat[e]" the ineffective assistance "argument into individual 'claims' of [ineffective assistance] corresponding to particular instances of [the attorney's] conduct." 875 F.3d at 471. Rather, the ineffective assistance "portion of the COA should [be] crafted at a higher level of generality." *Id*. We have construed *Browning* to require a COA concerning an ineffective assistance claim to extend to all other properly preserved challenges to counsel's effectiveness at the same phase. *See White v. Ryan*, 895 F.3d 641, 645 n.1 (9th Cir. 2018) (following *Browning* in holding that, because "White has but a single claim regarding his right to the effective assistance of counsel at the penalty phase of resentencing," the district court committed "error" by failing to issue a COA covering additional portions of White's ineffective assistance claim concerning sentencing). Judge

Bybee's opinion faithfully applies this precedent, and I join it in full.

I write separately only to note that, on this point, *Browning* seems to me to be plainly incorrect. *Browning* based its holding on two premises: (1) under the Antiterrorism and Effective Death Penalty Act ("AEDPA"), a COA may issue "only if the applicant has made a substantial showing of the denial of a constitutional right," 28 U.S.C. § 2253(c)(2); and (2) because the underlying constitutional right at issue—the effective assistance of counsel—requires consideration of counsel's performance "as a whole," *all* asserted errors of counsel at a particular phase of the proceedings must be considered. 875 F.3d at 471 (emphasis omitted). The second premise is, I think, contrary to the statute and to common sense.

Browning failed even to mention § 2253(c)(3), which states that any COA that is issued "shall indicate which *specific issue or issues* satisfy the showing required by paragraph (2)." 28 U.S.C. § 2253(c)(3) (emphasis added). This aspect of the COA process, although not jurisdictional in the strict sense, "screens out *issues* unworthy of judicial time and attention." *Gonzalez v. Thaler*, 565 U.S. 134, 145 (2012) (emphasis added). The statute itself thus refutes *Browning*'s suggestion that a COA must be granted with respect to every single "issue" concerning alleged ineffective assistance of counsel at a particular phase of the proceedings. Under § 2253(c)(3), a COA must be limited to only those particular issues relating to the alleged deprivation of effective assistance of counsel that "reasonable jurists could debate" or that are "adequate to deserve encouragement to proceed further." *Slack v. McDaniel*, 529 U.S. 473, 483–84 (2000) (citation and internal quotation marks omitted); *see*

also Strickland v. Washington, 466 U.S. 668, 690 (1984) ("A convicted defendant making a claim of ineffective assistance must identify the acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment.").

More broadly, *Browning*'s in-for-a-penny-in-for-a-pound approach to ineffective assistance claims is divorced from the reality of habeas litigation. It is quite often the case—as it is here—that habeas counsel *themselves* carve up the ineffective assistance claim for a single phase of the proceeding into multiple separate claims. McGill's counsel thus separated the alleged ineffective assistance of counsel at the penalty phase into several different claims, with "Claim One" relating to multiple closely related alleged deficiencies in developing and presenting mitigating evidence and "Claim Two" relating to the asserted failure to challenge the weight to be given to the "prior serious offense aggravator." I can see no reason in law or logic why, if a COA is granted on Claim One, it must also be granted on Claim Two. Even McGill did not see these two points as raising the same claim—much less the same "specific issue," 28 U.S.C. § 2253(c)(3)—and nothing in § 2253(c) says that if a COA is granted for one issue, it must also be granted for the other. On the contrary, McGill's own division of his attack on the effectiveness of his counsel into multiple separate claims reflects the common-sense notion that these separate aspects of counsel's behavior are sufficiently distinct that they may be addressed and considered separately.

Moreover, the procedural rules governing habeas litigation may *require* separating out the distinct challenges to trial counsel's performance. For example, an ineffective assistance claim based on a particular aspect of trial counsel's

conduct may be procedurally defaulted if it was not presented to the state courts, meaning that an ineffective assistance claim based on *that* aspect may be unable to proceed in federal court. *See*, *e.g.*, *Landrum v. Mitchell*, 625 F.3d 905, 918–19 (6th Cir. 2010) (holding that, "[a]lthough Landrum did raise an ineffective assistance of trial counsel claim in his [state] post-conviction petition, he did not include the allegation about introducing [a particular witness's] testimony in the guilt phase" and that claim was therefore procedurally defaulted). Indeed, a COA cannot issue with respect to a procedurally defaulted claim unless the petitioner makes a sufficient showing "directed at the underlying constitutional claims *and* . . . directed at the district court's procedural holding." *Slack*, 529 U.S. at 484–85 (emphasis added). That further confirms that claims concerning distinct aspects of a counsel's alleged ineffective assistance may warrant separate consideration for COA purposes.[1] *See*, *e.g.*, *Roberts v. Dretke*, 356 F.3d 632, 641 & n.6 (5th Cir. 2004) (granting a COA only with respect to two particular aspects of the petitioner's ineffective assistance claims, while denying it as to two others, one of which was procedurally defaulted).

[1] I do not mean to suggest, however, that *Browning* would require COA expansion in such a scenario, in direct contravention of *Slack*. *Browning* did not address the question of whether a COA should be expanded to cover other ineffective assistance claims that were procedurally defaulted, and its rule therefore applies only to additional ineffective assistance claims involving the same phase that have *not* been procedurally defaulted. Here, McGill's Claim Two (which is the claim that is the beneficiary of *Browning*'s rule) was not procedurally defaulted, and so *Slack*'s rule for COAs involving procedurally defaulted claims provides no obstacle to applying *Browning* here.

I am not entirely optimistic that *Browning*'s error will ever be fixed, because its only effect is to create unnecessary work, rather than to change the outcome. Any case in which the *Browning* rule makes a difference—*i.e.*, a case in which, but for *Browning*, a COA would have been *denied* by the relevant judges of this court as to an additional ineffective assistance claim—is necessarily one in which that additional claim will fail on the merits under AEDPA's standards after the COA is wrongly granted. Indeed, I would have denied a COA as to Claim Two here, but for that very reason I obviously agree with Judge Bybee's conclusion, in his opinion, that Claim Two fails on the merits under AEDPA. But because *Browning*'s rule is clearly wrong, defeats the screening purpose of § 2253(c)(3), and creates unnecessary work and delay, I would hope that, perhaps in the next en banc case in which that rule has played a role, we will take the time to revisit it.

M. SMITH, Circuit Judge, concurring in part and dissenting in part:

LeRoy McGill could not have been sentenced to death for murder when he committed his crimes because at that time there was no statute implementing the death penalty in Arizona. Yet because the Arizona legislature passed a law thirty-eight days later that purported to allow his execution, McGill now sits on death row. For the reasons hereafter noted, I believe that McGill's death sentence is unconstitutional. I respectfully dissent.

I

Up until June 2002, imposition of the death penalty in Arizona was governed by Arizona Revised Statutes §§ 13-1105 and 13-703 (2001). As the majority notes, § 13-1105 stated, "First degree murder . . . is punishable by death or life imprisonment as provided by § 13-703." Ariz. Rev. Stat. § 13-1105 (2001). The part of § 13-703 that permitted the death penalty required the judge in a criminal case to determine whether aggravating factors for a particular crime warranted execution. *See id.* § 13-703(C) (2001). But on June 24, 2002, § 13-703 was struck down as unconstitutional in *Ring v. Arizona (Ring I)*, 536 U.S. 584, 609 (2002), when the Supreme Court held that the jury (not the judge) must determine whether aggravating factors exist to impose the death penalty. Thirty-eight days later, on August 1, 2002, the Arizona legislature enacted a new capital punishment statute that passed constitutional muster. On July 13, 2002, during the time period between *Ring I* and re-enactment of § 13-703, McGill committed the murder underlying this appeal, for which he was sentenced to death.

II

To determine whether a criminal law is *ex post facto*, the Supreme Court has instructed us to apply a three-prong test. "[F]irst, the law must be retrospective, that is, it must apply to events occurring before its enactment." *Miller v. Florida*, 482 U.S. 423, 430 (1987) (internal quotation marks omitted). Second, the law "must disadvantage the offender affected by it." *Id.* (internal quotation marks omitted). Finally, "no *ex post facto* violation occurs if a change does not alter 'substantial personal rights,' but merely changes 'modes of procedure which do not affect matters of substance.'" *Id.*

(quoting *Dobbert v. Florida*, 432 U.S. 282, 293 (1977)). Ultimately, "[t]he touchstone of [the Supreme] Court's inquiry is whether a given change in law presents a 'sufficient risk of increasing the measure of punishment attached to the covered crimes.'" *Peugh v. United States*, 569 U.S. 530, 539 (2013) (quoting *Garner v. Jones*, 529 U.S. 244, 250 (2000)) (some internal quotation marks omitted).

McGill's claim plainly satisfies the first two prongs of the *ex post facto* test. The remaining question is whether the re-enactment of the death penalty via § 13-703 altered McGill's "substantial personal rights," or whether it was merely a procedural change. There was no law that permitted McGill to be punished with a death sentence during the thirty-eight days between *Ring I* and the re-enactment of § 13-703.[1] I therefore believe that a retroactive death sentence for crimes committed during this period is unconstitutional. Furthermore, the Arizona Supreme Court's decision to the contrary was an unreasonable application of clearly

[1] The State conceded multiple times during oral argument that if the Arizona legislature had never re-enacted § 13-703, McGill could not have been sentenced to death. This quickly disposes of the majority's speculation that the Arizona courts could have, on their own, imposed the death penalty in compliance with *Ring I* absent the legislature's revision of § 13-703. Slip op. at 72 n.13. Moreover, the Supreme Court has made clear that the death penalty cannot be imposed without an implementing statute, since "*Furman* mandates that where discretion is afforded a sentencing body on a matter so grave as the determination of whether a human life should be taken or spared, that discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action." *Gregg v. Georgia*, 428 U.S. 153, 189 (1976) (opinion of Stewart, Powell, and Stevens, JJ.). And if all that were not enough, § 13-1105 allows the death penalty only "as provided by" § 13-703. Clearly, the plain text of the statute would not permit a court to impose the death penalty outside of the requirements of § 13-703.

established Supreme Court case law. *See* 28 U.S.C. § 2254(d)(1).

The State argued, and the majority agrees, that § 13-1105 gave McGill notice of the possibility of a death sentence even after the Supreme Court struck § 13-703 from the books. I believe the opposite is true. After the Supreme Court prohibited application of the portion of § 13-703 that allowed the judge to make factual findings concerning aggravating factors, a look at § 13-1105 would actually put a potential offender on notice that he could *not* be sentenced to death for first-degree murder. If, as § 13-1105 says, "[f]irst degree murder . . . is punishable by death or life imprisonment as provided by § 13-703," and the death penalty prescribed in § 13-703 is a legal nullity, the statute is crystal clear that life imprisonment alone is the punishment for first degree murder committed during the period between *Ring I* and the reenactment of § 13-703.

In reviewing McGill's ex post facto claim, the Arizona Supreme Court gave it one sentence: "We rejected this argument in *State v. Ring [(Ring II)]*, 204 Ariz. 534, 547 ¶ 23, 65 P.3d 915, 928 (2003)." *State v. McGill*, 140 P.3d 930, 945 (Ariz. 2006). But the Arizona Supreme Court did not, in fact, reject McGill's argument in *Ring II*. Instead, in *Ring II*, the Arizona Supreme Court considered whether the *ex post facto* clause prohibited the state from resentencing defendants sentenced under the old (unconstitutional) death penalty statute to new death sentences under the new death penalty statute. 65 P.3d 915, 926 (Ariz. 2003). The court held that "[t]he new sentencing statutes do not place the defendants in jeopardy of any greater punishment than that *already imposed* under the superseded statutes. Accordingly, applying the new sentencing statutes does not violate the federal or state Ex

Post Facto Clause[s]." *Id.* at 928 (emphasis added). *Ring II* examined whether the change from the old § 13-703 to the new § 13-703 was procedural or substantive. That is not the question here. Here, the issue is whether the change from *no possibility of the death penalty* to *possibility of the death penalty* was procedural or substantive. It is a very different question from the one answered in *Ring II* and, thus, has a very different answer.

For the same reason, the cases that the majority relies upon (the same cases that *Ring II* relies upon) simply do not apply. *Dobbert v. Florida*, 432 U.S. at 291, and *Collins v. Youngblood*, 497 U.S. 37, 38 (1990), addressed situations in which a law in effect at the time of the crime permitted the punishment that was eventually imposed (in *Dobbert*, the death penalty, and in *Collins*, a sentence of imprisonment without a monetary fine). That is not the situation here, and I have just explained why the distinction is relevant. (In fact, one might say that the *most* important distinction in evaluating these ex post facto claims is whether a law in effect at the time of the offense punished that offense.) Treating this case as if it *is* like *Dobbert* and *Collins* was precisely the unreasonable application of Supreme Court precedent that would lead me to grant relief under AEDPA's deferential standard of review.[2]

[2] I believe my colleagues misapply AEDPA's standard of review. I do not think that my colleagues' opinion that the Arizona court acted reasonably *is itself unreasonable*. *See* Slip Op. at 73 n.14. Where I differ with my colleagues is that they "need not go so far as to decide that Arizona's" decision was "consistent with the Ex Post Facto Clause," Slip Op. at 73, while I believe that the state court decision was inconsistent with the Ex Post Facto Clause—and unreasonably so.

A hypothetical illustrates the error of the majority's position that McGill is not entitled to relief. Between 2003 and 2006, Arizona courts sentenced nineteen individuals to death.[3] But imagine that, rather than thirty-eight days, the Arizona legislature waited five years after *Ring I* to re-enact a death penalty implementation statute. Without re-enactment of § 13-703, those nineteen people—everyone acknowledges—would have been sentenced to life in prison. If the Arizona legislature had not passed a new version of § 13-703 until 2006, would the State then be able to retroactively execute the nineteen individuals who had been sentenced to life in prison for murder convictions during those five years? What if the legislature had taken fifteen years to re-enact § 13-703, or thirty? The Ex Post Facto Clause provides that "No State shall . . . pass any . . . ex post facto Law." U.S. CONST. art. I, § 10, cl. 1. The Constitution does not state: "No State shall pass any ex post facto Law, unless such a law is passed within thirty-eight days." Lengthening the gap between valid death penalty statutes shows the unworkability of the standard that the majority endorses and imputes a "reasonableness" inquiry into the Ex Post Facto Clause when the text mandates a bright line rule.[4]

[3] *See* https://corrections.az.gov/public-resources/death-row.

[4] My colleagues in the majority make much of an invented distinction between a law authorizing a "punishment" and a law authorizing a "sentence." Slip Op. at 70–72. The plain text of § 13-1105 puts this argument to bed. That section states that first degree murder "is punishable by death" "as provided by § 13-703." Section 13-1105 is dependent on § 13-703 alone, which provides for the imposition of a death sentence. Thus, the punishment *is* the sentence. The operative fact for McGill's claim is that at the time of his offense, no law allowed him to be punished with a death sentence.

My colleagues in the majority do quite a bit more to defend the Arizona Supreme Court's ruling on McGill's ex post facto claim than the Arizona Supreme Court did itself (though the majority stops short of endorsing it as correct). However, even the majority's reasoning requires incorrectly assuming that the analysis in *Ring II* applies with equal force to McGill's situation. That assumption contradicts Supreme Court precedent requiring courts to examine "whether a given change in law presents a 'sufficient risk of increasing the measure of punishment attached to the covered crimes.'" *Peugh*, 569 at 540 (quoting *Garner*, 529 at 250) (some internal quotation marks omitted). There was *no* risk that McGill would be sentenced to death for his crimes at the time they were committed, as such a sentence would run afoul of *Gregg*. *See supra*, n.1. By the time of McGill's sentencing, the Arizona legislature had increased the risk of a death sentence for conduct that had already taken place. Thus, McGill could not constitutionally be sentenced to death. The state court failed to reasonably apply *Peugh* and the three-prong test articulated in *Miller* when evaluating McGill's federal *ex post facto* claim. Instead, the state court relied on *Dobbert* and *Collins*, cases in which the later penalty imposed was the same penalty that could have been imposed at the time of the offense. That makes *Dobbert* and *Collins* not just *different* from McGill's case but *different in the one outcome-determinative way*. Therefore, I believe McGill is entitled to habeas relief.

III

I concur in my colleagues' decision resolving McGill's challenges to the guilt phase of his trial. However, I would grant McGill's petition for the writ of habeas corpus with respect to the penalty phase because I believe sentencing

McGill to death is unconstitutional pursuant to the Ex Post Facto Clause. I respectfully dissent.

APPENDIX B

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Leroy McGill, Petitioner, v. Charles L. Ryan, et al., Respondents.	No. CV-12-01149-PHX-JJT **ORDER** DEATH PENALTY CASE

Before the Court is Petitioner Leroy McGill's petition for writ of habeas corpus. (Doc. 30.) Respondents filed an answer and McGill filed a reply. (Docs. 34, 43.)

The Court previously denied, in part, McGill's motion for evidentiary development. (Doc. 78.) In doing so the Court denied Claims 4 and 6 as procedurally barred and Claims 5 and 7 as meritless. (*Id.*) McGill subsequently withdrew Claims 8 and 9. (Doc. 43 at 53.) The Court rules on the remaining claims as follows.

I. BACKGROUND

In 2004, a jury convicted McGill of first-degree murder and other counts and sentenced him to death. The following factual summary is taken from the opinion of the Arizona Supreme Court affirming the convictions and death sentence. *State v. McGill*, 213 Ariz. 147, 150–51, 140 P.3d 930, 933–34 (2006).

In July 2002, McGill was living in Sophia Barnhart's house, along with his girlfriend, Jonna Hardesty, and an acquaintance named Justin Johnson.

Jack Yates had an apartment in a nearby duplex. Hardesty's brother, Jeff Uhl, sometimes stayed in Yates's apartment. Eddie and Kim Keith, along with their two daughters, also stayed with Yates, as did the victims in this case, Charles Perez and his girlfriend, Nova Banta.

On July 12, 2002, McGill, Hardesty, Barnhart, and Johnson spent the evening at Barnhart's house. At approximately 3:30 a.m. on July 13, McGill went to Yates's apartment. Uhl and Eddie Keith came outside to talk with McGill. McGill told Keith to get his wife and children out of the apartment because he was going to teach Yates and Perez, who had previously accused McGill of stealing a gun, "that nobody gets away with talking about [McGill and Hardesty]." McGill agreed to spare Yates, but said it was too late for Perez. Keith and his family fled the apartment.

Uhl let McGill into the apartment. Perez and Banta were sitting next to each other on a couch. McGill told them they should not talk about people behind their backs. Then, as Banta testified, McGill "poured the gasoline on us and quickly lit a match and threw it at us." McGill told witnesses that he had added pieces of Styrofoam to the gasoline to create a napalm-like substance that would stick to the victims and increase their suffering. Perez and Banta, both on fire, ran out of the apartment.

Yates and Uhl also escaped the apartment, which was fully engulfed in flames when firefighters arrived.

Burns covered eighty percent of Perez's body. He died the next day. Third-degree burns covered three-quarters of Banta's body. At the hospital, Banta identified McGill as the person who set her on fire.

A grand jury indicted McGill for the first-degree premeditated murder of Perez, the attempted first-degree murder of Nova Banta, two counts of arson, and endangerment.

At trial, Banta identified McGill as the man who attacked her. She showed the jury the injuries she sustained from the fire. The medical examiner testified about the severity of Perez's injuries. The defense put on one witness, Sophia Barnhart, who claimed that McGill was not involved with the fire. The jury convicted on all counts.

At the close of the aggravation phase of the trial, the jury unanimously found that McGill had been convicted of prior serious offenses, pursuant to A.R.S. § 13-703(F)(2); that he knowingly created a grave risk of death to persons other than the victim, A.R.S. § 13-703(F)(3); and that he committed the offense in both an "especially cruel" and an "especially heinous or depraved" manner, A.R.S. § 13-703(F)(6).[1]

In the penalty phase, McGill offered mitigation evidence that he had experienced an abusive childhood; that he was psychologically immature and as a result his girlfriend, Jonna Hardesty, had greater than normal influence over him; that he suffered from some degree of mental impairment; that he performed well in institutional settings; and that his family cared about him. The State put on rebuttal evidence, including evidence that while awaiting trial McGill attempted to have a potential witness killed. The jury found that McGill's mitigation evidence was not sufficiently substantial to call for leniency and determined that death was the appropriate sentence. The Arizona Supreme Court affirmed. *McGill*, 213 Ariz. at 163, 140 P.3d at 946.

On June 1, 2010, McGill filed a petition for post-conviction relief ("PCR") raising claims of ineffective assistance of counsel. He alleged that trial counsel performed ineffectively by failing to prepare the defense expert, Dr. Richard Lanyon, who testified in mitigation; failing to retain additional experts and develop mitigation evidence; failing to present mitigation evidence of cognitive impairment, sexual abuse, and neglect; and failing to challenge McGill's prior convictions. (Doc. 35, Ex. CC, PCR petition.)

The court dismissed all but one of the claims as not colorable. (*Id.*, Ex. JJ, ME 10/25/10.) The court found that McGill had stated a colorable claim with respect to his allegation that counsel should have "retained additional experts to investigate further the defendant's alleged brain damage and to corroborate Dr. Lanyon's conclusions,

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[1] At the time of the murder in 2002, Arizona's capital sentencing scheme was set forth in A.R.S. §§ 13-703 and 13-703.01 to -703.04. It is presently set forth in A.R.S. §§ 13-751 to -759. The Court refers throughout this order to the statutes in effect at the time McGill committed the murder.

particularly one who could have shown a causal nexus between his impairment and the crime." (*Id.* at 4, 6.) The court ordered an evidentiary hearing on that claim. (*Id.*)

In October 2011, the PCR court conducted an evidentiary hearing. McGill presented testimony from Dr. Lanyon and lead trial counsel, Maria Schaffer, plus two additional expert witnesses, Drs. Joseph Wu and Richard Rosengard. Following the hearing, the court denied relief. (*Id.*, Ex. Y, ME 10/25/11 at 4–11.6) The Arizona Supreme Court denied review on May 30, 2012. (*Id.*, Exhibit AA.)

McGill filed his petition for writ of habeas corpus in this Court on April 8, 2013. (Doc. 30.)

II. APPLICABLE LAW

Federal habeas claims are analyzed under the Antiterrorism and Effective Death Penalty Act ("AEDPA"). Under the AEDPA, a petitioner is not entitled to habeas relief on any claim adjudicated on the merits in state court unless the state court's adjudication (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established federal law or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in state court. 28 U.S.C. § 2254(d).

The Supreme Court has emphasized that "an *unreasonable* application of federal law is different from an *incorrect* application of federal law." *Williams v. Taylor*, 529 U.S. 362, 410 (2000). Under § 2254(d)(1), "[a] state court's determination that a claim lacks merit precludes federal habeas relief so long as 'fairminded jurists could disagree' on the correctness of the state court's decision." *Harrington v. Richter*, 562 U.S. 86, 101 (2011).

Under § 2254(d)(2), a state court's factual determination is presumed correct and a petitioner bears the burden of overcoming that presumption with clear and convincing evidence. 28 U.S.C. § 2254(e)(1). Satisfying § 2254(d)(2) is a "daunting" burden, "one that will be satisfied in relatively few cases." *Taylor v. Maddox*, 366 F.3d 992, 1000 (9th Cir. 2004) *overruled on other grounds by Murray (Robert) v. Schriro*, 745 F.3d 984, 1000 (9th Cir. 2014). A state court's "factual determination is not unreasonable merely because [a]

federal habeas court would have reached a different conclusion in the first instance." *Wood v. Allen*, 558 U.S. 290, 301 (2010). Instead, a federal habeas court "must be convinced that an appellate panel, applying the normal standards of appellate review, could not reasonably conclude that the finding is supported by the record." *Taylor*, 366 F.3d at 1000.

In *Cullen v. Pinholster*, 563 U.S. 170, 181 (2011), the Supreme Court reiterated that "review under § 2254(d)(1) is limited to the record that was before the state court that adjudicated the claim on the merits." *See Murray (Robert)*, 745 F.3d at 998 ("Along with the significant deference AEDPA requires us to afford state courts' decisions, AEDPA also restricts the scope of the evidence that we can rely on in the normal course of discharging our responsibilities under § 2254(d)(1).").

However, *Pinholster* does not bar evidentiary development where the court has determined, based solely on the state court record, that the petitioner "has cleared the § 2254(d) hurdle." *Madison v. Commissioner, Alabama Dept. of Corrections*, 761 F.3d 1240, 1249–50 (11th Cir. 2014); *see Pinholster*, 563 U.S. at 185; *Henry v. Ryan*, 720 F.3d 1073, 1093 n.15 (9th Cir. 2013) (explaining that *Pinholster* bars evidentiary hearing unless petitioner satisfies § 2254(d)); *Williams v. Woodford*, 859 F.Supp.2d 1154, 1161 (E.D. Cal. 2012).

For claims not adjudicated on the merits in state court, federal review is generally not available when the claims have been denied pursuant to an independent and adequate state procedural rule. *Coleman v. Thompson*, 501 U.S. 722, 750 (1991). In Arizona, there are two avenues for petitioners to exhaust federal constitutional claims: direct appeal and PCR proceedings. Rule 32 of the Arizona Rules of Criminal Procedure governs PCR proceedings and provides that a petitioner is precluded from relief on any claim that could have been raised on appeal or in a prior PCR petition. Ariz. R. Crim. P. 32.2(a)(3).

For unexhausted and defaulted claims, "federal habeas review . . . is barred unless the prisoner can demonstrate cause for the default and actual prejudice as a result of the alleged violation of federal law, or demonstrate that failure to consider the claims will result in a fundamental miscarriage of justice." *Coleman*, 501 U.S. at 750. *Coleman* further held

that ineffective assistance of counsel in PCR proceedings does not establish cause for the procedural default of a claim. *Id.*

In *Martinez v. Ryan*, 566 U.S. 1 (2012), however, the Court established a "narrow exception" to *Coleman*. Under *Martinez*, a petitioner may establish cause for the procedural default of an ineffective assistance claim "by demonstrating two things: (1) 'counsel in the initial-review collateral proceeding, where the claim should have been raised, was ineffective under the standards of *Strickland* . . .' and (2) '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.'" *Cook v. Ryan*, 688 F.3d 598, 607 (9th Cir. 2012) (quoting *Martinez*, 566 U.S. at 14); *see Clabourne v. Ryan*, 745 F.3d 362, 377 (9th Cir. 2014), *overruled on other grounds by McKinney v. Ryan*, 813 F.3d 798 (9th Cir. 2015). The Ninth Circuit has explained that "PCR counsel would not be ineffective for failure to raise an ineffective assistance of counsel claim with respect to trial counsel who was not constitutionally ineffective." *Sexton v. Cozner*, 679 F.3d 1150, 1157 (9th Cir. 2012).

Martinez applies only to claims of ineffective assistance of trial counsel; it has not been expanded to other types of claims. *Pizzuto v. Ramirez*, 783 F.3d 1171, 1177 (9th Cir. 2015) (explaining that the Ninth Circuit has "not allowed petitioners to substantially expand the scope of *Martinez* beyond the circumstances present in *Martinez*"); *Hunton v. Sinclair*, 732 F.3d 1124, 1126–27 (9th Cir. 2013) (denying petitioner's argument that *Martinez* permitted the resuscitation of a procedurally defaulted *Brady* claim, holding that only the Supreme Court could expand the application of *Martinez* to other areas); *see Davila v. Davis*, 137 S. Ct. 2058, 2062–63 (2017) (explaining that the *Martinez* exception does not apply to claims of ineffective assistance of appellate counsel).

III. ANALYSIS

A. Ineffective Assistance of Counsel Claims

McGill raises several claims of ineffective assistance of counsel. Claims 1 and 2 concern counsel's performance at sentencing. The claims were raised during McGill's PCR proceedings and denied on the merits. Claim 3 alleges ineffective assistance during jury

selection while Claim 29 alleges ineffective assistance of appellate counsel. These were not raised in state court.

Claims of ineffective assistance of counsel are governed by *Strickland v. Washington*, 466 U.S. 668, 674 (1984). To prevail under *Strickland*, a petitioner must show that counsel's representation fell below an objective standard of reasonableness and that the deficiency prejudiced the defense. *Id.* at 687–88.

The inquiry under *Strickland* is highly deferential, and "every effort [must] 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.* at 689; *see Wong v. Belmontes*, 558 U.S. 15 (2009) (per curiam); *Bobby v. Van Hook*, 558 U.S. 4, 7 (2009) (per curiam); *Cox v. Ayers*, 613 F.3d 883, 893 (9th Cir. 2010). To satisfy *Strickland*'s first prong, a petitioner must overcome "the presumption that, under the circumstances, the challenged action might be considered sound trial strategy." *Id.* "The test has nothing to do with what the best lawyers would have done. Nor is the test even what most good lawyers would have done. We ask only whether some reasonable lawyer at the trial could have acted, in the circumstances, as defense counsel acted at trial." *Id.* at 687–88.

With respect to *Strickland*'s second prong, a petitioner must affirmatively prove prejudice by "show[ing] that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 694.

"Surmounting *Strickland*'s high bar is never an easy task," *Padilla v. Kentucky*, 559 U.S. 356, 371 (2010), and "[e]stablishing that a state court's application of *Strickland* was unreasonable under § 2254(d) is all the more difficult." *Richter*, 562 U.S. at 105. As the Court explained in *Richter*:

> Even under *de novo* review, the standard for judging counsel's representation is a most deferential one. Unlike a later reviewing court, the attorney observed the relevant proceedings, knew of materials outside the record, and interacted with the client, with opposing counsel, and with the judge. It is "all too tempting" to "second-guess counsel's assistance after conviction or adverse sentence." [*Strickland*, 466 U.S.] at 689. The question is whether an

> attorney's representation amounted to incompetence under "prevailing professional norms," not whether it deviated from best practices or most common custom. [*Id.*] at 690.
>
> The standards created by *Strickland* and § 2254(d) are both "highly deferential," and when the two apply in tandem, review is "doubly" so. The *Strickland* standard is a general one, so the range of reasonable applications is substantial. Federal habeas courts must guard against the danger of equating unreasonableness under *Strickland* with unreasonableness under § 2254(d). When § 2254(d) applies, the question is not whether counsel's actions were reasonable. The question is whether there is any reasonable argument that counsel satisfied *Strickland*'s deferential standard.

Id. (additional citations omitted); *see Knowles v. Mirzayance*, 556 U.S. 111, 123 (2009) (discussing "doubly deferential judicial review that applies to a *Strickland* claim evaluated under the § 2254(d)(1) standard").

Claim 1:

In Claim 1, McGill alleges that counsel performed ineffectively at sentencing by failing to develop a relationship of trust with McGill that would have resulted in the discovery of additional mitigating evidence; failing to obtain additional school, out-of-home-placement, and medical records; failing to prepare Dr. Lanyon by providing him with pre-sentence and police reports; failing to retain and present testimony from additional mental health experts; and failing to discover and present additional evidence of substance abuse and childhood sexual assault. (Doc. 30 at 67–80.)

The PCR court rejected this claim after holding an evidentiary hearing on the allegation that counsel should have presented additional mental health evidence at sentencing. (ME 10/25/11.)[2] McGill contends that the state court's decision constituted an unreasonable application of clearly established federal law and was based on an unreasonable determination of the facts under 28 U.S.C. § 2254(d)(1) and (2). (Doc. 30 at 55.)

1. Sentencing hearing

McGill was represented at trial by lead counsel Schaffer, of the Maricopa County Office of the Legal Advocate, and Elizabeth Todd as second chair. The defense team also

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[2] "ME" stands for the minute entries of the state court.

included mitigation specialist Marianna Brewer and investigator Mark Mullavey. Schaffer retained Dr. Lanyon, a neuropsychologist who examined McGill and testified at sentencing. Schaffer sought authorization from her office to retain an addictionologist and an expert on domestic abuse. The office denied the latter but authorized Schaffer to retain an addictionologist.

At the sentencing phase of trial McGill's counsel called 10 mitigation witnesses over four days. The witnesses included McGill's mother, grandmother, and siblings Roxanne, Cordell, and Kean McGill. (RT 11/1/04 at 25, 105, 116; RT 11/2/04 at 12, 46.)[3] Mitigation specialist Brewer testified about the results of her investigation into McGill's background, and presented several videotaped interviews, including an interview she conducted with McGill's brother Brian. (RT 11/8/04 at 12.) Brewer also prepared an exhibit, submitted to the jury as an exhibit at sentencing, which included her interview notes and voluminous records documenting McGill's educational, medical, and legal history. (Doc. 34, Ex. S.) Finally, Dr. Lanyon testified about the results of his evaluation of McGill.

Through these witnesses the jury learned about McGill's chaotic, neglectful, and abusive upbringing. McGill's mother, Ann, left his father, Clyde, while she was pregnant with McGill. (RT 11/1/04 at 28.) She moved with her children from California to Phoenix. (*Id.*) Later, Clyde kidnapped McGill and two of his siblings and brought them to California. (*Id.* at 30.) It took four months for Ann to get the children back. (*Id.*)

Although she remarried and had other men in her life, Ann was essentially a single mother raising six children. (*See id.* at 39.) Arthur Foster was her second husband and the father of her sixth child, Lonnie. She divorced him after an assault that left her blind in one eye. (*Id.* at 36–37.) Foster also beat McGill and his brothers. (*Id.* at 45, 125.)

[3] RT refers to the court reporter's transcript from McGill's state court proceedings.

Because Ann worked frequently, including nights as a bartender, the children largely fended for themselves, with the older siblings, primarily Roxanne, responsible for looking after the younger children. (*Id.* at 39–40.)

The family moved frequently, from Arizona to New Mexico to Texas and back to Arizona, so McGill attended a number of schools. In 1971, he and Cordell were sent to Buckner's Boys' Ranch, a group home in Texas, after authorities concluded that Ann could not adequately care for her children. (RT 11/1/04 at 40–42; RT 11/3/04, P.M., at 4–6, 8; RT 11/8/04 at 53; Doc. 34, Ex. S at 88–89.) McGill spent two years at Buckner's before returning home. (RT 11/1/04 at 86; RT 11/3/04. P.M., at 12, 15–16, 32–33.)

In 1976, McGill was sent to another group home, Boysville, after being expelled from school for truancy and placed on juvenile probation. (RT 11/1/04 at 48, 84–89, 102; RT 11/3/04, P.M., at 24–30, 33.) Cordell, Kean, and their half-brother, Lonnie Foster, were also at Boysville. Boysville was stricter than Buckner's. There was corporal punishment, and both Cordell and Leroy were disciplined by being spanked with a wooden paddle. (RT 11/2/04 at 31.) The boys were essentially "warehoused" at Boysville. (*Id.* at 32.) It was a "rough place" and there were lots of fights between the boys. (*Id.*) While McGill was in these group homes, his mother visited him infrequently (*See* RT 11/3/04, P.M., at 12, 34, 44.)

McGill left Boysville at age 15 and returned to Phoenix to live with his family. He attended high school but dropped out before graduating. (RT 11/1/04 at 49–50, 53, 89–90; RT 11/3/04, P.M., at 33; RT 11/8/04 at 16–18.) The testimony and records contained in Brewer's exhibit showed that McGill's academic performance was poor. (*See* RT 11/3/04, P.M., at 19, 34.)

Brewer testified at length about her mitigation findings. She testified that McGill claimed to have been injured in a car accident in 1985, with his head crashing through the windshield. (RT 11/8/04 at 19–21, 62–63.) However, Brewer was unable to obtain any medical records documenting McGill's injuries. (*Id.*)

Brewer testified that in 1985 McGill was placed on probation for using another person's credit card. While on probation, he committed two armed robberies and was imprisoned from 1986 to 1993. (RT 11/8/04 at 21–22, 65–66.) McGill was not actually armed during the robberies; he put his hand in his jacket and pretended to have a gun. (*Id.* at 22.)

Brewer testified that McGill's prison record was largely positive. He held a number of jobs, required little or no supervision, attended AA meetings, and earned his GED. (RT 11/8/04 at 25–35, 73–74.)

Counsel presented mitigating evidence about the negative influence of McGill's girlfriend, Jonna Hardesty. McGill's family believed Hardesty was "sick," "evil," and a bad influence who "called the shots" in her relationship with McGill and isolated him from the rest of his family. (RT 11/1/04, at 57–59, 143–44; RT 11/2/04, at 25, 27–28, 60–61; RT 11/8/04 at 10, 76.) McGill told people that he wanted to get away from Hardesty, but did not leave because he was afraid she would retaliate by harming his family or setting fire to his apartment. (RT 11/2/04 at 57, 61.)

Brewer testified that the instability McGill experienced as a child disrupted his learning and impaired his socialization, behavior, and self-esteem. (RT 11/3/04, A.M., at 6; RT 11/3/04 P.M. at 54–55, 57.) She concluded that McGill was "severely" abused as a child. (RT 11/8/04 at 42–44.)

Counsel presented testimony from Dr. Lanyon. Dr. Lanyon reviewed records, met with McGill for six or seven hours, performed a neuropsychological evaluation, and administered general psychological dysfunction tests. (RT 11/8/04 at 91–92, 110.) Dr. Lanyon testified that McGill's IQ was in the average range. (*Id.* at 93.)

Dr. Lanyon testified about the effects of the instability, neglect, and abuse McGill experienced as a child. He explained that McGill had no positive male role models, nor any role models for appropriate adult relationships. (*Id.* at 97–99, 101–02,104, 116–17.)

Dr. Lanyon testified about McGill's relationship with Jonna Hardesty, whom Lanyon described as schizophrenic and "actively psychotic." (*Id.* at 95.) McGill himself

was "pathological" enough to tolerate Jonna's bizarre behavior. (*Id.* at 96.) The maternal neglect McGill experienced as a child led to a distorted view of interpersonal relationships with women. (*Id.* at 96–97.) According to Dr. Lanyon, McGill was passive in his relationship with Jonna, and "when she said jump, he jumped." (*Id.* at 95–97.)

Dr. Lanyon testified that McGill reported suffering a head injury in a car crash in 1985. (*Id.* at 105.) According to Dr. Lanyon, after the injury McGill displayed symptoms consistent with frontal lobe damage. (*Id.* at 106.) He became apathetic, lost his motivation to work, and ended up homeless before committing the armed robberies. (*Id.* at 105–06.) He also suffered depression and suicidal thoughts. (*Id.* at 107.) McGill told Dr. Lanyon that he had no memory of the robberies. (*Id.* at 106–07.)

Dr. Lanyon testified about McGill's history of substance abuse. McGill began drinking alcohol at age nine and using marijuana at thirteen. (*Id.* at 108.) He then became a heavy, chronic user of methamphetamine. (*Id.* at 109.) Dr. Lanyon testified that methamphetamine use causes paranoia and impaired judgment. (*Id.*)

Dr. Lanyon administered the Minnesota Multiphasic Personality Inventory (MMPI II). The results suggested that McGill was anxious, withdrawn, and passive. (*Id.* at 111.)

Neuropsychological testing indicated no major difficulties due to brain impairment, with the exception of evidence of brain injury related to McGill's ability to communicate, which Dr. Lanyon described as "residual impairment of brain damage." (*Id.* at 114.) There was no deficit in executive functioning. (*Id.* at 149–50.) Dr. Lanyon concluded that it was likely McGill had minimal frontal lobe damage affecting his motivation and drive rather than his cognition. (*Id.* at 175.)

Schaffer focused her closing argument on the factors that led McGill to become involved in a "sick," "codependent" relationship with Jonna Hardesty. (11/10/04 at 29.) These factors included the chaos, neglect, and abuse McGill experienced in his childhood, and the absence of role models for normal family life and healthy adult relationships. (*Id.* at 12–28.) McGill became desperate for companionship, which he found in Hardesty. (*Id.* at 29.) He was protective of her, despite her bizarre, destructive behavior, in the same way

he and his siblings were protective of their mother. (*Id.*) It was under Hardesty's influence, and in order to protect her reputation, that he committed the crimes. (*Id.* at 31.)

The jury found that the mitigating evidence was not substantially sufficient to call for leniency and determined that McGill should be sentenced to death. (*See id.* at 85.)

2. PCR proceedings

In his PCR petition, McGill presented several claims of ineffective assistance of counsel at sentencing. The PCR court denied all but one of these claims as not colorable. (ME 10/25/10.) The court found counsel performed reasonably in not calling an addictionologist; that there was no evidence of domestic abuse between McGill and Hardesty so counsel did not perform ineffectively in failing to secure appointment of a domestic abuse expert; and that the allegation of sexual abuse was unsubstantiated so counsel did not perform ineffectively by failing to investigate and present such evidence. (*Id.* at 3–5.)

The court held an evidentiary hearing on McGill's claim that counsel performed ineffectively by failing to retain additional experts to present evidence of his cognitive impairment and establish a causal nexus between that impairment and the crimes.

At the evidentiary hearing, held October 4 and 5, 2011, McGill submitted a number of exhibits, including an affidavit from lead counsel Schaffer; Dr. Lanyon's original report and a supplemental report; PET scan results and a report prepared by Dr. Joseph Wu, a psychiatrist and brain imaging expert; a report and supplemental report by psychiatrist Dr. Richard Rosengard; and a letter from Dr. Edward French, a pharmacologist. As discussed in more detail below, McGill also presented testimony from Schaffer, Lanyon, Wu, and Rosengard.

The PCR court denied relief, finding that counsel's performance was neither deficient nor prejudicial. (ME 10/25/11.) The court noted that trial counsel presented "a substantial amount of mitigation" concerning McGill's "dysfunctional family background, his relationship with Ms. Hardesty, and his substance abuse." (*Id.* at 7.) The court explained that counsel retained Dr. Lanyon to evaluate McGill for possible brain damage, but his

findings were not significant, and the new evidence from Drs. Wu and Rosengard was largely cumulative to the testimony of Dr. Lanyon. (*Id.* at 7–8.) The court concluded there was not a reasonable probability that their testimony at sentencing would have produced a difference outcome. (*Id.* at 8)

3. Discussion

McGill alleges that trial counsel performed ineffectively at sentencing by failing to (a) develop a relationship of trust with McGill and his family; (b) obtain necessary records; (c) prepare Dr. Lanyon for his testimony; (d) retain other necessary experts; (e) present evidence of substance abuse; and (f) present evidence of sexual abuse. (Doc. 30 at 67–80.) He further alleges that the PCR court erred in its findings about trial counsel's performance with respect to mitigating evidence of substance abuse, sexual abuse, and cognitive dysfunction, and was objectively unreasonable in its application of *Strickland*. (*Id.* at 57–62.)

As set forth below, the PCR court's denial of these claims was neither contrary to nor an unreasonable application of clearly established federal law, nor was it based on an unreasonable determination of the facts. Consequently, because the claim does not satisfy 28 U.S.C. § 2254(d), McGill is not entitled to evidentiary development and this Court reviews the claim based on the record before the PCR court. *Pinholster*, 563 U.S. at 183, 185.

a. Failure to develop a relationship of trust

McGill specifically alleges that trial counsel failed to develop a relationship of trust with him and his family and as a result they were reluctant to disclose crucial mitigation information to the defense team. (Doc. 30 at 67.) This claim is meritless. First, there is no right to a "'meaningful relationship' between an accused and his counsel." *Morris v. Slappy*, 461 U.S. 1, 14 (1983); *see also Plumlee v. Masto*, 512 F.3d 1204, 1211 (9th Cir. 2008).

Next, McGill cites no support in the state court record for his assertion that a lack of trust in the defense team caused the McGills to withhold mitigating information. (*See*

Doc. 30 at 68–70.) During the PCR proceedings, McGill offered an affidavit from Schaffer in which she attested that members of McGill's family "were not forthcoming with information" and "were either dishonest or not cooperative," and that Lonnie "absolutely refused to cooperate in coming to court" and threatened to harm Schaffer or McGill's case if forced to testify. (Doc. 34, Ex. Y at 15.) McGill did not, however, offer evidence that his family distrusted the defense team. He presents that evidence for the first time in affidavits from his siblings that were prepared in 2013 for these habeas proceedings. (Doc. 70, Ex's 58, 59, and 61.) *Pinholster* forbids the consideration of this new evidence. 563 U.S. at 183, 185.

Finally, the argument that counsel performed deficiently by failing to consult with McGill is not supported by the record or the cases McGill cites. In *Summerlin v. Schriro*, 427 F.3d 623, 634 (9th Cir. 2005), "penalty phase counsel did not conduct any independent investigation, not even consulting with his client." In *Correll v. Stewart*, 137 F.3d 1404, 1412 (9th Cir. 1998), there was an "almost complete absence of effort on the part of Correll's counsel to investigate, develop, and present mitigating evidence." Here, by contrast, neither the status of the lawyer-client relationship nor the number of hours spent in direct consultation with McGill prevented counsel from investigating and presenting a wealth of mitigating information, including detailed testimony from several family members and voluminous records documenting McGill's family and social background.

b. Failure to obtain necessary records

McGill alleges that trial counsel performed ineffectively by failing to obtain records from his juvenile adjudications, police reports from some of his prior arrests, additional school records, Ann's marriage and divorce records, his siblings' arrest records, records from Lonnie's stay at Boysville, and McGill's complete records from Buckner's Boys Ranch and Boysville. (Doc. 30 at 71.) According to McGill, these materials "include crucial evidence in mitigation of McGill's crime, including test scores and grades from third and fourth grade, information about his drug use, and information about his juvenile record." (*Id.*)

The PCR court's denial of this claim was not objectively unreasonable. *See Richter*, 562 U.S. at 105. Counsel's performance was neither deficient nor prejudicial.

As outlined above, counsel presented evidence of McGill's academic difficulties, placement in group homes, and juvenile crimes. This evidence included the extensive record compiled by Brewer and submitted as an exhibit at sentencing. (Docs. 35-1 Ex. S.) The exhibit contains records from McGill's placements at Buckner's and Boysville, school records, employment records, and military records, along with Brewer's interview notes detailing McGill's family background and personal history. (*Id.*)

The omitted materials would have covered the same ground as the records and other information counsel offered as mitigation evidence. Being cumulative, it would not "alter the sentencing profile" presented to the jury. *Strickland*, 466 U.S. at 700; *see Runningeagle v. Ryan*, 825 F.3d 970, 985 (9th Cir. 2016); *Babbitt v. Calderon*, 151 F.3d 1170, 1175 (9th Cir. 1998).

c. Failure to prepare Dr. Lanyon

McGill alleges that counsel performed ineffectively by failing to provide Dr. Lanyon with the police reports and presentence reports from McGill's armed robberies. (Doc. 30 at 70–74.) Dr. Lanyon testified that McGill told him he had no memory of committing the robberies. Dr. Lanyon opined that the memory loss was caused by drug use or, more likely, a head injury McGill reportedly suffered shortly before the robberies. (RT 11/8/04 at 107.) On cross-examination, the prosecutor impeached Dr. Lanyon with the reports in which McGill was able to recount the details of the robberies. (*Id.* at 138–45.)

Lead counsel Schaffer testified at the PCR hearing that she made a strategic decision, after discussing the matter with co-counsel, not to provide Dr. Lanyon with the documents. (RT 10/4/11 at 142.) She was concerned about disclosing the documents because McGill "had allegedly told the probation officer when she interviewed him that he had a child . . . and he needed to get out to be with that child, and we couldn't prove that." (*Id.*) Counsel believed she was "protecting" McGill by not providing the report containing his false claim of being a father. (*Id.* at 143.)

By the time of her testimony at the PCR hearing, however, Schaffer believed she should have disclosed the reports to Dr. Lanyon. (*Id.*) Her second thoughts are not sufficient to establish deficient performance. *See, e.g.*, *Chandler v. United States*, 218 F.3d 1305, 1315 n.16 (11th Cir. 2000) (explaining that the ineffective-assistance inquiry is objective, so counsel's postconviction admission of deficient performance "matters little"). In determining whether counsel's performance was deficient, a reviewing court "will neither second-guess counsel's decisions, nor apply the fabled twenty-twenty vision of hindsight." *Karis v. Calderon*, 283 F.3d 1117, 1130 (9th Cir. 2002) (quoting *Strickland*, 466 U.S. at 689). McGill has not met his burden of showing deficient performance because Schaffer's choice not to provide Dr. Lanyon with the report was a strategic decision and therefore "virtually unchallengeable." *Strickland*, 466 U.S. at 690. Although this strategy allowed the impeachment of Dr. Lanyon's testimony that McGill suffered from amnesia at the time of the armed robberies, "we do not second guess trial counsel on strategic decisions that prove to be unsuccessful." *Mayfield v. Woodford*, 270 F.3d 915, 934 (9th Cir. 2001).

The PCR court's denial of this claim was not objectively unreasonable. *See Richter*, 562 U.S. at 105.

d. Failure to retain other necessary experts

McGill alleges that trial counsel performed ineffectively by failing to retain additional experts to explain the nexus between the mitigation evidence and the crimes; to determine whether McGill's drug use or mental health conditions satisfied the "diminished capacity" mitigating circumstance, A.R.S. § 13-703(G)(1), or impaired his ability to premeditate; and to explain his dysfunctional relationship with Jonna Hardesty. (Doc. 30 at 74.) McGill also argues that counsel should have retained the type of expert to whom he would have been comfortable disclosing his alleged childhood sexual abuse. (*Id.* at 74–75.) He asserts that "Schaffer's use of Dr. Lanyon at trial did not discharge her duty to retain other necessary expert witnesses." (Doc. 30 at 75.)

In support of these allegations during the PCR proceedings, McGill presented testimony from two experts in addition to Dr. Lanyon. Dr. Wu testified that McGill's PET

scan revealed a decrease in frontal lobe activity relative to the occipital cortex and asymmetry between the left and right superior parietal lobule. (RT 10/4/11 at 83–85, 88.) He explained that the frontal lobe governs impulse control and judgment, and the asymmetry revealed in McGill's PET scan was consistent with Dr. Lanyon's report of some impairment in language and symbolic skills. (*Id.* at 84–85, 89.) Dr. Wu testified that the scan, although conducted eight years after the crimes, most likely reflected the state of McGill's brain at the time of the murder. (*Id.* at 89–90.) Dr. Wu also opined that although recent drug use may affect a PET scan, any abnormality caused by drug use would no longer be visible on a PET scan after about six months. (*Id.* at 103–04, 117.) Dr. Wu acknowledged that a PET scan alone cannot be used to render a diagnosis. (*Id.* at 71.)

Dr. Rosengard testified that childhood trauma of the kind McGill experienced increases the likelihood of later substance abuse and other difficulties. (RT 10/5/11 at 16–19.) He opined that McGill exhibited "Stockholm Syndrome" in his relationship with Jonna Hardesty, and diagnosed McGill with traits of dependent personality disorder. (*Id.* at 19–23.)

Dr. Rosengard also testified, contrary to Dr. Wu's opinion, that brain damage caused by substance abuse is "permanent and irreversible." (*Id.* at 29–30.) He testified that Dr. Wu's findings were helpful because they corroborated his "concern . . . that there may be some neuropsychiatric pathology or damage to the brain." (*Id.* at 26.) Dr. Rosengard agreed with Dr. Lanyon, however, that McGill had no cognitive deficits. (*Id.* at 47.) Dr. Rosengard concluded that McGill's history of trauma and abuse, along with his dependent personality disorder, combined to lower his ability to resist Hardesty's will, and that the brain damage suggested by Dr. Wu's report affected his ability to make good decisions. (*Id.* at 52–53.)

Dr. Lanyon reviewed Dr. Wu's PET scan results during the preparation of his supplemental report for the PCR proceedings. (*Id.* at 30.) He testified that Dr. Wu's findings would have aided his earlier evaluation only "in one minor way": the impairment Dr. Wu observed in the left parietal area was consistent with Dr. Lanyon's findings of minor impairment in McGill's speech and language functioning. (*Id.* at 30.) Dr. Lanyon

reiterated that he found no evidence of frontal lobe damage in his evaluation. (*Id.* at 31.) He concluded that Dr. Wu's findings would not have altered or even corroborated his original evaluation and trial testimony because the findings were "too minor" and "no smoking gun." (*Id.* at 33, 55.)

Following the hearing the PCR court rejected McGill's ineffective-assistance claim, finding neither deficient performance nor prejudice. (ME 10/25/11.) The court found that Dr. Lanyon's evaluation of McGill was "thorough and complete," that counsel presented substantial mitigation evidence, and that the new evidence offered by Drs. Wu and Rosengard was cumulative and not significant enough to have resulted in a reasonable probability of a life sentence if presented at sentencing. (*Id*. at 8.) This decision was neither contrary to nor an unreasonable application of clearly-established federal law.

At sentencing, counsel presented mitigating evidence concerning McGill's psychological condition as it related to the murder and evidence about the nature of his dysfunctional relationship with Jonna Hardesty. The jury was not, as McGill argues, "left to wonder why McGill stayed with Hardesty despite her bizarre and abusive behavior." (Doc. 30 at 75.) Instead, family members and Dr. Lanyon testified about the dynamics of the relationship and its negative effects on McGill. He was under her control, passive, a follower; she was violent, destructive, controlling, and a bad influence. (*See* RT 11/1/04 at 58, 144–45; RT 11/2/04 at 26–28, 55–57, 76–83, 94–95.) Dr. Lanyon described Hardesty as "actively psychotic." (RT 11/8/04 at 95–96.) He explained that McGill was particularly vulnerable to Hardesty because of his own pathologies and the distorted view of relationships he developed as the child of a neglectful mother. (*Id.* at 97–98.) Dr. Lanyon testified that to "survive emotionally" McGill had to accommodate his mother's behavior in abandoning and neglecting him. (*Id.*) He repeated this pattern in his relationship with Hardesty, tolerating her bad behavior in order to preserve the relationship. (*Id.* at 98.)

Counsel did not perform ineffectively by failing to hire another expert to explain McGill's relationship with Hardesty. Dr. Rosengard's diagnosis of dependent personality disorder does nothing but add a name to the condition described by the witnesses at

sentencing, including Dr. Lanyon, who detailed the dysfunctional relationship between McGill and Hardesty. Dr. Wu simply echoed Dr. Lanyon's opinion that only a pathological person would maintain a relationship with a person like Hardesty. (RT 10/4/11 at 93.)

Similarly, McGill has not shown that counsel performed ineffectively by failing to retain experts who could establish a connection between McGill's psychological condition and the crimes. The testimony of Drs. Wu and Rosengard at the PCR evidentiary hearing does not support this claim. They offered little new information about McGill's neuropsychological condition. Dr. Wu's interpretation of the PET scan, showing a decrease in frontal lobe activity, was consistent with the testimony Dr. Lanyon offered at sentencing. (*See* RT 10/4/11 at 100–01.)

The PCR court correctly determined that this evidence was cumulative. (Doc. 34, Ex. Y at 8.) It did not "alter[] the sentencing profile" presented to the jury. *Strickland*, 466 U.S. at 700; *see Runningeagle*, 825 F.3d at 985; *Babbitt*, 151 F.3d at 1175.

In denying this claim the PCR court also found that "Dr. Lanyon is a qualified expert and Ms. Schaffer was entitled to rely on the competency of his evaluation of the defendant." (ME 10/25/11 at 4.) McGill contends that this conclusion was unreasonable (Doc. 30 at 61–62), citing Schaffer's assertion that Dr. Lanyon "did a horrible job of preparing for his testimony" and "was not qualified for the tasks presented in Mr. McGill's case." (Doc. 34, Ex. Y at 13–14.)

McGill's argument is unpersuasive. First, the PCR court correctly noted that Schaffer was entitled to rely on Dr. Lanyon. Beyond Schaffer's opinion, nothing in the record indicates that Dr. Lanyon was not qualified to examine McGill. *See Turner v. Calderon*, 281 F.3d 851, 876 (9th Cir. 2002). Reliance on a "properly selected expert" is "within the wide range of professionally competent assistance." *Harris v. Vasquez*, 949 F.2d 1497, 1525 (9th Cir. 1990). In fact, Dr. Wu testified at the PCR evidentiary hearing that Dr. Lanyon administered a comprehensive battery of neuropsychological tests. (RT 10/4/11 at 100–101.)

Next, even if McGill offered valid challenges to Dr. Lanyon's performance, "[t]he Constitution does not entitle a criminal defendant to the effective assistance of an expert witness." *Wilson v. Greene*, 155 F.3d 396, 401 (4th Cir. 1998); *see Harris*, 949 F.2d at 1518; *Silagy v. Peters*, 905 F.2d 986, 1013 (7th Cir. 1990). Therefore, "while there may be a duty to seek out psychiatric evaluation of a client where appropriate, there is no duty to ensure the trustworthiness of the expert's conclusions." *Babbitt*, 151 F.3d at 1174; *cf. Hendricks v. Calderon*, 70 F.3d 1032, 1038–39 (9th Cir. 1995) ("To now impose a duty on attorneys to acquire sufficient background material on which an expert can base reliable psychiatric conclusions, independent of any request for information from an expert, would defeat the whole aim of having experts participate in the investigation.").

As the PCR court found, trial counsel performed reasonably in using Dr. Lanyon as an expert at sentencing.

e. Failure to present evidence of substance abuse

McGill alleges that counsel performed ineffectively by failing to "obtain detailed evidence regarding McGill's history of drug use, or establish with any certainty the amount and type of substances McGill had abused in the days and hours leading up to the crime." (Doc. 30 at 76.)

The addiction expert approved by Schaffer's office, Dr. Mace Beckman, a medical doctor from California, would not assist in McGill's defense because McGill refused to admit his involvement in the crimes.[4] (RT 10/4/11 at 130, 147–48.) Counsel did not retain another addiction expert. The PCR court found that counsel's "tactical decision not to call Dr. Beckman was reasonable." (ME 10/25/10 at 4.) The court considered Dr. French's letter but found that because he did not evaluate McGill his testimony about McGill's drug use and its effects would be speculative and "add nothing to Dr. Lanyon's testimony." (*Id.*) This decision was not contrary to or an unreasonable application of *Strickland*, nor was it based on an unreasonable determination of the facts.

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[4] The Office of Legal Advocate approved the appointment of Dr. Beckman after denying counsel's request to appoint Dr. Lesley Hoyt-Croft, a substance abuse counselor.

At sentencing, Dr. Lanyon testified about McGill's extensive drug abuse. McGill reported using marijuana from the age of 13 and, except for his periods of incarceration, had used it daily since. (RT 11/8/04 at 108–09.) After his release from prison in 1993, "he became a heavy crystal meth user instead, a daily crystal meth user." (*Id.* at 109.) Dr. Lanyon testified that methamphetamine use causes paranoia and impairs judgment, and chronic use "would remove any remaining fragment of ability to reason." (*Id.*) In addition, Dr. Lanyon's report, admitted at trial, stated that McGill "had been actively using methamphetamine and had been awake for several days at the time of the events with which he is charged." (Doc. 34, Ex. S at 260.)

McGill argues that it was not reasonable for counsel to rely on Dr. Lanyon's testimony because "methamphetamine use was not his area of expertise." (Doc. 30 at 76–77.) This ignores the fact that Schaffer had retained the addiction specialist who was authorized by her office, but he refused to evaluate McGill based on McGill's unwillingness to acknowledge his participation in the crimes. McGill offers only speculation that an alternative course of action by counsel, such as renewing her request for a different addictionologist, would have resulted in the appointment of an expert whose testimony about McGill's drug use would have been more persuasive than Dr. Lanyon's. (*See* Doc. 30 at 77.)

"The choice of what type of expert to use is one of trial strategy and deserves 'a heavy measure of deference.'" *Turner*, 281 F.3d at 876 (quoting *Strickland*, 466 U.S. at 691); *see Harris*, 949 F.2d at 1525. In *Turner*, the Ninth Circuit rejected the claim that counsel performed ineffectively by retaining a general psychologist and not an expert on PCP. 281 F.3d at 876. The court held that the argument that "a more specialized expert would have been more persuasive" failed to support a claim of ineffective assistance of counsel. *Id.*; *see Richter*, 562 U.S. at 107 ("Counsel was entitled to formulate a strategy that was reasonable at the time and to balance limited resources in accord with effective trial tactics and strategies.").

In addition, McGill cannot establish that he was prejudiced by counsel's inability to retain a different expert. McGill presented the PCR court with the letter by Dr. French discussing the effects of methamphetamine use.(Doc. 35-4, Ex. QQ.) Dr. French explained that chronic use can cause "methamphetamine psychosis," with effects such as delusions, hallucinations, paranoia, and impulsive and aggressive behavior. (*Id.* at 3.) Citing the PET scan that showed an abnormality "compatible with brain injury or neuropsychiatric illness," Dr. French opined that "the combination of heavy chronic methamphetamine abuse and an underlying brain injury negatively affected Mr. Gill's [sic] cognitive abilities and control over his behavior." (*Id.* at 4.)

Dr. French's opinions are not sufficient to establish that the PCR court's findings were objectively unreasonable. As the PCR court noted, Dr. French, unlike Dr. Lanyon, did not evaluate McGill to determine the extent of his drug use preceding the murder. (ME 10/25/10 at 4.) Even assuming counsel had been able to retain an expert such as Dr. French, and that the expert's opinions after examining McGill were consistent with the opinions offered in Dr. French's letter, McGill cannot show that he was prejudiced by counsel's performance. Dr. French's findings are not substantially different from Dr. Lanyon's testimony about the effects of chronic methamphetamine use on McGill at the time of the murder. The jury was fully aware that McGill abused methamphetamine and was impaired at the time of the crimes.

f. Failure to present evidence of sexual abuse

McGill alleges that counsel performed ineffectively by failing to present evidence that McGill had been sexually abused at Boysville. (Doc. 30 at 60, 77–80.) In raising this claim during the PCR proceedings, McGill relied on Dr. Rosengard's report, dated March 1, 2010, which stated that "[McGill] indicated that he was abused in a boys' home by an older boy, when he was 8 or 9 and raped two different times by that person. He hit that person with a two-by-four and then the abuse stopped."[5] (Doc. 52-3, Ex. 48 at 4.) The PCR

[5] McGill stated that the abuse occurred at Buckner's. (PCR petition at 31.) Lonnie Foster also stated in his 2010 affidavit that the abuse occurred at Buckner's. (Doc. 35-4,

court found the ineffective-assistance claim was not colorable because the allegation of sexual abuse was unsubstantiated. (ME 10/25/10 at 5.) This decision was not contrary to or an unreasonable application of *Strickland*, nor was it based on an unreasonable determination of the facts before the court.

In his report Dr. Lanyon noted that McGill had denied any sexual abuse. (Doc. 34, Ex. S at 259.) McGill now claims, however, that trial counsel should have pursued the issue because "there were several indications that McGill had been sexually assaulted while at Boysville," including the fact that "sexual abuse and assault are all too common in such institutions" and that his half-brother Lonnie reported being sexually abused at Boysville. (Doc. 30 at 78.) Therefore, according to McGill, "Even if [he] did deny being sexually abused during this interview, [counsel] should not have considered that statement to indicate that no further investigation was necessary." (*Id.* at 79.)

"The 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. The Ninth Circuit has explained that "counsel is not deficient for failing to find mitigating evidence if, after a reasonable investigation, nothing has put the counsel on notice of the existence of that evidence." *Babbitt*, 151 F.3d at 1174 (quoting *Matthews v. Evatt*, 105 F.3d 907, 920 (4th Cir. 1997)). Accordingly, "[a]n attorney does not render ineffective assistance by failing to discover and develop evidence of childhood abuse that his client does not mention to him." *Newland v. Hall*, 527 F.3d 1162, 1202 (11th Cir. 2008) (quoting *Williams v. Head*, 185, 1223, 1237 (11th Cir. 1999)); *see Stewart v. Sec'y, Dep't of Corr.*, 476 F.3d 1193, 1210–11 (11th Cir. 2007) (denying claim of ineffective assistance based on counsel's failure to discover defendant's childhood abuse because defendant never told counsel about it); *Henyard v. McDonough*, 459 F.3d 1217, 1245 (11th Cir. 2006) (determining that counsel did not perform deficiently by failing to investigate or present evidence of defendant's childhood

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Ex. NN at 2.) Despite this, the claim now is that McGill and Lonnie were both abused at Boysville.

sexual abuse because defendant denied being sexually abused). "It is black-letter law that counsel cannot be found deficient for believing what his client plausibly tells him." *Mickey v. Ayers*, 606 F.3d 1223, 1242 (9th Cir. 2010).

Lonnie's claim that he was sexually abused did put the defense team on notice of the issue, but both McGill and his brother Cordell denied being sexually abused. There is no support for McGill's argument that counsel ignored the issue. To the contrary, McGill's mitigation specialist focused much of her investigation on McGill's placement at Boysville, speaking to institution's current administration, gathering records, and interviewing family members. That evidence was presented to the jury. The fact that the defense team did not find evidence of an event McGill denied does not render counsel's performance ineffective. *See Babbitt*, 151 F.3d at 1174 (finding counsel's failure to uncover family history of mental illness was "not unreasonable" where "[c]ounsel's investigator did speak with Babbitt's family members and friends and others who might have had such information, but none of them indicated there was any history of mental illness in Babbitt's family.").

"[W]hen a defendant has given counsel reason to believe that pursuing certain investigations would be fruitless or even harmful, counsel's failure to pursue those investigations may not later be challenged as unreasonable." *Strickland*, 466 U.S. at 691. Here, it was not unreasonable of counsel to fail to discover evidence of an incident that McGill explicitly denied and did not disclose until six years after his trial. McGill does not cite any additional steps counsel could have taken that would have led him to disclose the alleged sexual abuse.

4. Conclusion

"The Sixth Amendment guarantees reasonable competence, not perfect advocacy judged with the benefit of hindsight." *Yarborough v. Gentry*, 540 U.S. 1, 8 (2003) (per curiam) (citations omitted). Under *Strickland*'s highly deferential standard, counsel's performance at McGill's sentencing was "well within the range of professionally reasonable judgments." *Van Hook*, 558 U.S. at 12 (quoting *Strickland*, 466 U.S. at 699).

In *Van Hook*, defense counsel spoke with the defendant's mother, father, aunt, and a family friend; met with two expert witnesses; reviewed military and medical records; and considered retaining a mitigation specialist. *Id.* at 9–10. Counsel presented mitigating evidence about the defendant's traumatic childhood and his impairment on the day of the crime. *Id.* The Court found that the scope of counsel's investigation was reasonable even though counsel did not interview all of the defendant's relatives or the psychiatrist who treated his mother. *Id.* at 11.

In McGill's case, the defense team exceeded the scope of the investigation in *Van Hook*, and their efforts produced a thorough picture of McGill's tumultuous childhood, his substance abuse, his mental health, and his relationship with Hardesty. As with *Van Hook*, "[t]his is not a case in which the defendant's attorneys failed to act while potentially powerful mitigating evidence stared them in the face, or would have been apparent from documents any reasonable attorney would have obtained." 558 U.S. at 11 (citations omitted). Although McGill argues that the mitigation investigation should have produced more or different information, the scope of the investigation was not limited and counsel did not ignore any potential leads. "[T]he relevant inquiry under *Strickland* is not what defense counsel could have pursued, but rather whether the choices made by defense counsel were reasonable." *Babbitt*, 151 F.3d at 1173 (quoting *Siripongs v. Calderon*, 133 F.3d 732, 736 (9th Cir. 1998)). Here, the choices made by counsel were reasonable. *See Cox*, 613 F.3d at 896 (finding "counsel's thorough mitigation investigation was more than reasonable. Counsel interviewed most of Petitioner's close relatives, CYA counselors, school teachers, and other people familiar with Petitioner's background").

In addition, McGill has failed to show he was prejudiced by counsel's performance at sentencing. To establish prejudice, McGill must demonstrate "a reasonable probability that a competent attorney, aware of [the available mitigating evidence], would have introduced it at sentencing," and "that had the jury been confronted with this . . . mitigating evidence, there is a reasonable probability that it would have returned with a different sentence." *Belmontes*, 558 U.S. at 20 (quoting *Wiggins v. Smith*, 539 U.S. 510, 535, 536

(2003)); *see Apelt v. Ryan*, 878 F.3d 800, 832 (9th Cir. 2017) (setting out the steps for analyzing prejudice).

McGill cannot make that showing. The evidence he alleges was omitted was either cumulative or unsubstantiated. The additional evidence concerning McGill's brain abnormality and substance abuse adds little weight to the evidence offered at sentencing. McGill's claim that he was sexually assaulted at Boysville remains, as the PCR court found, unsubstantiated and contradicted by his earlier denial of abuse, reducing whatever weight it would have had as a mitigating circumstance.

The new evidence does not "clear[] the first hurdle" of "paint[ing] a very different picture of [McGill's] background and character than was presented at sentencing." *Apelt*, 878 F.3d at 832; *see Strickland*, 466 U.S. at 700. The portrait of McGill's background and character as presented at sentencing was not altered by the new evidence produced during the PCR proceedings. Trial counsel presented the jury with evidence of McGill's chaotic and traumatic childhood, his history of substance abuse and possible brain impairment, and the causes and results of his dysfunctional relationship with Jonna Hardesty. The Arizona Supreme Court recognized that the mitigating evidence presented at sentencing was "not insignificant." *McGill*, 213 Ariz. at 162, 140 P.3d at 945.

Because the essentials of McGill's mitigating case were unchanged by the new evidence developed during the PCR proceedings, McGill "has not shown that, after reweighing the aggravating and mitigating evidence, there is a reasonable probability that, absent the errors, the sentencer would have concluded that the balance of aggravating and mitigating circumstances did not warrant death." *Apelt*, 878 F.3d at 832–33. A reasonable jurist could find that totality of the mitigating evidence, when reweighed against the gruesome nature of the crime and the strong aggravating factors, was not sufficient to establish a reasonable probability that McGill would not have been sentenced to death absent trial counsel's errors. *See id.* at 833; *Belmontes*, 558 U.S. at 27–28.

As the Ninth Circuit has observed, "There will always be more documents that could be reviewed, more family members that could be interviewed and more psychiatric

examinations that could be performed." *Leavitt v. Arave*, 646 F.3d 605, 612 (9th Cir. 2011). In McGill's case, the record before the PCR court demonstrated that counsel conducted a reasonable investigation and that, even if the scope of the investigation had been expanded, significant new mitigation evidence was not available.

Accordingly, under AEDPA's doubly deferential standard, *Richter*, 562 U.S. at 105, the PCR court's denial of the claim does not satisfy 28 U.S.C. § 2254(d). Claim 1 is denied. McGill's request for evidentiary development of the claims is also denied.

Claim 2:

McGill alleges that trial counsel performed ineffectively at the aggravation phase of sentencing by failing to challenge the prior serious offense aggravating circumstance, A.R.S. § 13-751(F)(2). (Doc. 30 at 85.) McGill contends that counsel should have reduced the weight of the factor by presenting evidence that he suffered from brain injury and cognitive dysfunction, and that at the time of the prior offenses he was intoxicated and unarmed. (*Id.* at 86, 88.)

McGill raised this claim in his PCR petition. The court rejected the claim as not colorable:

> The Court understands this claim to be made in the context of mitigation at the penalty phase. The defendant does not contest the validity of this prior conviction [sic] as a (F)(2) aggravator; rather, he appears to argue that its severity could have been minimized by showing the effect that his alleged brain damage had on its commission. This assertion is speculative and not substantiated by any of the exhibits offered by the defendant. Further, Defendant recounted his prior crimes in detail on cross-examination (as he did to the presentence writer), undermining any claim that he blacked out or could not recall his crimes. He plead guilty, not no contest, and the F(2) factor is the fact of conviction.

(ME 10/25/10 at 5–6.) McGill contends that the PCR court's decision was based on an unreasonable determination of the facts. (Doc. 30 at 85.)

Respondents acknowledge that the PCR court erred in stating that McGill testified about his prior convictions. The court was correct, however, in noting that McGill was able to recount the details of the robberies, as he did when questioned by the police.

McGill contends that the PCR court also erred in characterizing as speculative and unsubstantiated McGill's assertion that brain damage affected his conduct in committing the robberies. (Doc. 30 at 86–87.) This finding was reasonable. The reports of Drs. Wu and Rosengard did not substantiate a claim that brain damage affected McGill's conduct in committing the robberies in 1985. To the contrary, as described above, the evidence supporting that assertion was supplied by Dr. Lanyon at sentencing.

Moreover, counsel did investigate the robberies and presented evidence and argument at sentencing to put the crimes in context and minimize their seriousness. Mitigation specialist Brewer testified that McGill was not in fact armed, but had placed his hand in his jacket pocket to simulate a gun. (RT 11/8/04 at 22.) The jury also heard this fact when the prosecutor read McGill's version of the crimes from a police report during Dr. Lanyon's cross-examination. (*Id.* at 139–45.) Dr. Lanyon also testified that McGill was homeless, "living hand to mouth," and drinking when he committed the robberies. (*Id.* at 106–07.)

During her closing argument counsel addressed the robberies and placed them in context of McGill's life circumstances at the time:

> So Leroy at that point is homeless and he's drinking and he's probably using drugs and he does some armed robberies for petty cash and these are serious offenses. We in no way mean to minimize them. We know that he was drinking at the time that these offenses occurred.
>
> I would invite you to look at the presentence reports that talk about these offenses, it gives you a glimpse into Leroy's life at this time. He is staying at a girl named Debbie's house, he's staying in an abandoned car in Cortez Park. He's desperate for money. He's basically just hanging out jobless and he robs a Dairy Queen and a donut store for some chump change. And he paid for those crimes with eight years of his life.

(RT 11/10/04 at 22.)

The PCR court's denial of this claim was not contrary to or an unreasonable application of *Strickland.* Trial counsel presented the evidence McGill contends was omitted, including the fact that McGill was not actually armed when he committed the robberies and that he was impaired by alcohol and possibly suffering from brain damage at the time. McGill does not cite additional evidence that would have more-effectively

challenged the prior offenses as an aggravating factor. To the extent the aggravating factor's weight could be minimized, counsel performed competently.

Claim 2 is denied. Because 28 U.S.C. § 2254(d) is not satisfied, *Pinholster* bars the introduction of new evidence and McGill's request for evidentiary development is denied.

Claim 3:

McGill alleges that counsel performed ineffectively during jury selection by failing to rehabilitate a prospective juror ("Juror 21") who expressed opposition to the death penalty. (Doc. 30 at 89.) McGill did not raise this claim in state court. He argues that its default is excused under *Martinez*. The Court disagrees. PCR counsel did not perform ineffectively by failing to raise this claim, so the default is not excused.

Based on her response to a question on the juror questionnaire, the State and McGill's counsel stipulated that Juror 21 be excused for cause. (RT 10/12/04 at 3.) Counsel stipulated to the dismissal despite having attempted to rehabilitate two other prospective jurors who also expressed unequivocal reservations about the death penalty. (*See* Doc. 30 at 92.) According to McGill, this means that counsel performed ineffectively by failing to do the same for Juror 21.

McGill cannot meet his burden of showing deficient performance based simply on the fact that counsel proceeded differently with respect to individual jurors who expressed opposition to the death penalty. *See Bridge v. Lynaugh*, 838 F.2d 770, 776 (5th Cir. 1988) ("A trial counsel's decision not to attempt to rehabilitate a venire member under such circumstances does not constitute ineffective assistance of counsel."). He cannot rebut the presumption that counsel acted reasonably in stipulating to the excusal of Juror 21. *See Hughes v. United States*, 258 F.3d 453, 457 (6th Cir. 2001) ("Counsel is also accorded particular deference when conducting voir dire. An attorney's actions during voir dire are considered to be matters of trial strategy.").

Because the underlying allegation of ineffective assistance of trial counsel is not substantial and unsupported by any factual basis, PCR counsel did not perform

ineffectively by failing to raise the claim. *See Sexton*, 679 F.3d at 1157. Claim 3 remains procedurally defaulted and barred from federal review.

Claim 29:

McGill alleges that his appellate counsel performed ineffectively by failing to raise meritorious claims. (Doc. 30 at 164.) He did not raise the claim in state court. Its default is not excused under *Martinez*. *See Davila*, 137 S. Ct. at 2062–63. Claim 29 is denied as barred from federal review.

B. Remaining Exhausted Claims

McGill raised the following claim on direct appeal, where they were rejected by the Arizona Supreme Court. McGill is not entitled to relief on these claims.

Claim 10:

McGill alleges that the State failed to prove the "zone of danger" aggravating factor set forth in A.R.S. § 13-703(F)(3).[6] (Doc. 30 at 114.) McGill contends that the Arizona Supreme Court's rejection of this claim, *McGill*, 213 Ariz. at 154, 140 P.3d at 937, was contrary to or an unreasonable application of clearly established federal law and based on an unreasonable determination of the facts.

Whether a state court misapplied an aggravating factor to the facts of a case is a question of state law. *See Lewis v. Jeffers*, 497 U.S. 764, 780 (1990). Federal habeas review of a state court's application of an aggravating factor is limited to determining whether the state court's finding was so arbitrary or capricious as to constitute an independent due process or Eighth Amendment violation. *Id.* The appropriate standard of federal habeas review of a state court's application of an aggravating circumstance is the "rational factfinder" standard: "whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found" the aggravating factor to exist. *Id.* (quoting *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)).

[6] The trial court granted McGill's motion to dismiss the (F)(3) factor as it related to Mary Near, a neighbor who lived in an adjoining apartment, because McGill did not know the apartment was occupied.

Section 13-703(F)(3) establishes an aggravating factor when "[i]n the commission of the offense the defendant knowingly created a grave risk of death to another person or persons in addition to the person murdered during the commission of the offense." The State must prove that "during the course of the killing, the defendant knowingly engaged in conduct that created a real and substantial likelihood that a specific third person might suffer fatal injuries.'" *State v. Carreon*, 210 Ariz. 54, 67, 107 P.3d 900, 913 (2005) (quoting *State v. Gonzales*, 181 Ariz. 502, 514, 892 P.2d 838, 850 (1995)). The factor requires proof that others are physically present in the "zone of danger" created by the murderous act. *Id.*

In finding that the State proved this factor, the Arizona Supreme Court explained that because McGill knew that Uhl and Yates were in the apartment "the only questions remaining are whether McGill should have known that he would create a risk of grave harm to the two men and whether he did create such a risk." *McGill*, 213 Ariz. at 154, 140 P.3d at 937. The court answered the questions in the affirmative:

> McGill set two people on fire using gasoline in a very small apartment. He used enough gasoline to cause the entire structure to quickly become engulfed in flames. On the other hand, both of these adult men easily escaped the burning apartment. Yates was awake behind a closed door, and Uhl had just let McGill into the apartment and was aware of McGill's plan based on his conversation with him moments earlier. The law does not require, however, that McGill's actions be the most risky imaginable. McGill "[wa]s aware or believe[d]," that setting the structure on fire "created a grave risk of death," for Uhl and Yates. The State proved this aggravator beyond a reasonable doubt.

Id. (citations omitted).

A reasonable fact-finder, viewing the evidence in the light most favorable to the prosecution, could have determined that the (F)(3) factor was satisfied. *See Jeffers*, 497 U.S. at 780. According to Banta's testimony, Yates and Uhl were present in the living room with her and Perez when McGill entered the apartment, tossed the gasoline, and started the fire.[7] (RT 10/20/04 at 48.) Gasoline was found not only on the victims' clothes but on

[7] When interviewed by Detective Kulesa, McGill indicated that Yates was in the bedroom with the door closed when the fire started. (*See* RT 10/25/04 at 37–38.) Again, in reviewing this claim the Court must assess the evidence in the light most favorable to the prosecution. *See Jeffers*, 497 U.S. at 780.

carpet pad samples taken near the front door. (RT 10/21/04 at 98–99.) The fire destroyed Yates's apartment and spread to the adjoining apartment. When Yates escaped from the apartment he was coughing so hard he had difficulty speaking and was given oxygen. (RT 10/20/04 at 93–94.) Based upon these circumstances, a rational trier of fact could have found that McGill knowingly created a grave risk of death to another person when he used an accelerant to start a fire in a small one-bedroom apartment.

Claim 10 is denied

Claim 11:

McGill contends that his rights under the Double Jeopardy Clause were violated when he was convicted of endangerment and the same conduct was used as an aggravating factor in sentencing him to death. (Doc. 30 at 118.) The Arizona Supreme Court denied this claim on direct appeal. *McGill,* 213 Ariz. at 153–54, 140 P.3d at 936–37.[8] McGill asserts that the ruling was an unreasonable application of clearly established federal law. This claim is denied because there was no double jeopardy violation.

The Double Jeopardy Clause of the Fifth Amendment protects against a second prosecution for the same offense after acquittal or conviction and against multiple punishments for the same offense. *Schiro v. Farley*, 510 U.S. 222, 229 (1994). Clearly-established federal law holds that the sentencing phase of a capital case is not a successive prosecution for double jeopardy purposes. *Id.* at 230; *Williams v. Oklahoma*, 358 U.S. 576 (1959). "Aggravating circumstances are not separate penalties or offenses, but are 'standards to guide the making of [the] choice' between the alternative verdicts of death and life imprisonment." *Poland v. Arizona*, 476 U.S. 147, 156 (1986) (quoting *Bullington v. Missouri*, 451 U.S. 430, 438 (1981)). Therefore, use of prior convictions to enhance a sentence for a subsequent offense does not constitute double jeopardy. *Schiro,* 510 U.S. at 230; *see Witte v. United States*, 515 U.S. 389, 399 (1995) (holding that use of evidence of

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[8] In rejecting this claim, the Arizona Supreme Court found that double jeopardy was not violated because the crimes of endangerment and first-degree murder did not satisfy the same-elements test set out in *Blockburger v. United* States, 284 U.S. 299 (1932). *McGill,* 213 Ariz. at 153–54, 140 P.3d at 936–37. The Court need not reach that issue.

related criminal conduct to enhance a defendant's sentence for a separate crime does not constitute punishment for that conduct within the meaning of the Double Jeopardy Clause); *Lowenfield v. Phelps*, 484 U.S. 231, 246 (1988) ("[T]he fact that the aggravating circumstance duplicated one of the elements of the crime does not make this sentence constitutionally infirm.").

McGill's rights under the Double Jeopardy Clause were not violated by the use of the "zone of danger" aggravating factor. Claim 11 is denied.

Claim 12:

McGill alleges that his Fifth and Sixth Amendment rights were violated when the court dismissed a potential juror ("Juror 58") for cause "based on her generalized objections to the death penalty." (Doc. 30 at 120.) The Arizona Supreme Court denied this claim on direct appeal. *McGill*, 213 Ariz. at 152, 140 P.3d at 935.

Clearly established federal law provides that in a capital case jurors cannot be struck for cause "because they voiced general objections to the death penalty or expressed conscientious or religious scruples against its infliction." *Witherspoon v. Illinois*, 391 U.S. 510, 522 & n.21 (1968) (noting that exclusion for cause is appropriate if views on the death penalty would prevent prospective jurors "from making an impartial decision as to the defendant's guilt"). "[A] juror may not be challenged for cause based on his views about capital punishment unless those views would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath." *Adams v. Texas*, 448 U.S. 38, 45 (1980); *see Wainwright v. Witt*, 469 U.S. 412, 424 (1985).

A trial judge's exclusion of a juror for cause is a finding of fact entitled to deference. 28 U.S.C. § 2254(e)(1); *see Witt*, 469 U.S. at 428–29. McGill bears the burden of rebutting the presumption with clear and convincing evidence. *Id.*

The Arizona Supreme Court held that the trial court did not abuse its discretion in dismissing the juror for cause because her religious "beliefs would 'substantially impair the performance of [her] duties.'" *McGill*, 213 Ariz. at 152, 140 P.3d at 935 (quoting

Wainwright, 469 U.S. at 424 n.5). This decision was neither contrary to nor an unreasonable application of *Witherspoon*, nor was it based on an unreasonable determination of the facts. As the court noted, "When asked explicitly, 'Do you think that your ability to do the things that you're supposed to do as a juror—do you think that ability would be impaired,' Juror 58 said, 'Yes.'" *Id.*

McGill relies on an exchange with the judge where Juror 58 suggested that she could follow the law and impose the death penalty. (RT 10/13/04 at 44.) She immediately qualified that answer, however, by explaining that she would follow the law only "because you guys would come after me . . . but I'd still have like the fear of God on my shoulders." *(Id.* at 43–44.) Apart from this equivocal response, Juror 58 was consistent in stating that her opposition to the death penalty would impair her ability to perform her duties as a juror. For example, on the juror questionnaire she responded repeatedly that her religious beliefs would prohibit her from voting for a death sentence.

The record supports a finding that under *Witherspoon* Juror 58 was properly excused for cause. The Arizona Supreme Court's denial of this claim does not satisfy § 2254(d). Claim 12 is denied.

Claims 13 and 14:

In Claim 13, McGill alleges that the admission of testimonial hearsay during the penalty phase of his trial violated his rights under the Confrontation Clause. (Doc. 30 at 123.) In Claim 14, he alleges that the evidence violated his right to due process. (*Id.* at 130.) The Arizona Supreme Court rejected these claims on direct appeal. *McGill*, 213 Ariz. at 156–161, 140 P.3d at 939–944. These rulings were not contrary to or an unreasonable application of clearly established federal law, nor were they based on an unreasonable determination of the facts.

To rebut McGill's mitigation evidence, the State presented, over defense objections, testimony from Steve Lewis, an investigator with the Maricopa County Attorney's Office, and Detective Tom Kulesa. Lewis testified about a statement made by inmate Floyd Lipps. (RT 11/9/04 at 49.) Lipps, who died before trial, claimed that McGill had asked him to kill

Uhl because McGill believed that the State could convict him only if Uhl testified. (*Id.* at 59–60.) Lewis also testified that Lipps gave the State a note that contained a description of Uhl. (*Id.* at 61.)

Detective Kulesa testified that he had interviewed Uhl, who also died before trial. (*Id.* at 96.) He testified that Uhl had identified McGill as the person who set Banta and Perez on fire and provided details that were corroborated by the testimony of other witnesses. (*Id.* at 99–103.)

In denying McGill's Confrontation Clause argument, the Arizona Supreme Court relied on *Williams v. New York*, 337 U.S. 241, 250–51 (1949), which held that hearsay is admissible in sentencing proceedings. *McGill*, 213 Ariz. at 158, 140 P.3d at 941. McGill argues that *Williams* was overruled by *Crawford v. Washington*, 541 U.S. 36, 54–55 (2004), which held that the Confrontation Clause prohibits the "admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had had a prior opportunity for cross-examination." The Ninth Circuit has rejected this argument, however, explaining that "the law on hearsay at sentencing is still what it was before *Crawford*: hearsay is admissible at sentencing, so long as it is accompanied by some minimal indicia of reliability." *United States v. Ingham*, 486 F.3d 1068, 1076 (9th Cir. 2007) (quoting *United States v. Littlesun*, 444 F.3d 1196, 1200 (9th Cir. 2006)); *see Sivak v. Hardison*, 658 F.3d 898, 927 (9th Cir. 2011) (explaining that *Williams* remains dispositive on the issue of confrontation rights at sentencing). Claim 13 is meritless.

In addressing McGill's due process challenge to the use of testimonial hearsay at sentencing, the Arizona Supreme Court explained that a defendant may "not be sentenced to death 'on the basis of information which he had no opportunity to deny or explain.'" *McGill*, 213 Ariz. at 160, 140 P.3d at 943 (quoting *Skipper v. South Carolina*, 476 U.S. 1, 5 n.1 (1986)). The court also noted that such evidence must "bear some indicia of reliability." *Id.*

The court determined that these due process requirements were satisfied in McGill's case, first noting that "McGill does not argue that he lacked notice of and an opportunity to respond to the contents of Lipps's and Uhl's statements." *Id.* The court then explained that statements were accompanied by sufficient indicia of reliability:

> Other evidence corroborated Uhl's statement, thereby providing indicia of reliability. The testimony of Banta, Johnson, and Keith corroborated the information Uhl provided Detective Kulesa. Sufficient indicia of reliability also supported Lipps's statement. The note that Lipps produced contained McGill's fingerprints and handwriting; Uhl, the target of the murder for hire, indeed could have been a witness against McGill; Uhl's physical appearance matched the description on the note; and Lipps did have an opportunity to receive the note from McGill. All these facts corroborate the account that Lipps gave.

Id. at 160–61, 140 P.3d at 943–44.

McGill contends that these conclusions are based on an unreasonable determination of the facts. (Doc. 30 at 132–34.) He points to inconsistencies between Uhl's statement and the testimony of trial witnesses Johnson and Keith, who indicated that "Uhl played a much larger role in the events leading up to the fire than Uhl's statements to Kulesa indicated." (*Id.* at 132.) In the face of the testimony that directly corroborated information in Uhl's statement—that McGill put pieces of Styrofoam in the cup of gasoline, threw the mixture on Perez and Banta, and set them on fire—this inconsistency does not satisfy the "daunting standard" of § 2254(d)(2). *See Maddox,* 366 F.3d at 1000.

McGill likewise asserts that the Arizona Supreme Court made an unreasonable factual determination in finding that Lipps' statement was sufficiently reliable. (*Id.* at 133–34.) He suggests that his fingerprints and handwriting on the note "could easily have been a fabrication or manipulation orchestrated by Lipps." (*Id.*) This speculation falls far short of satisfying McGill's burden under § 2254(d)(2) and (e)(1). *See Maddox*, 366 F.3d at 1000.

Claims 13 and 14 are denied.

Claim 15:

McGill alleges that his rights under the Eighth and Fourteenth Amendments were violated by Arizona's requirement that mitigating factors be proved by a preponderance of the evidence. (Doc. 30 at 134.) The Arizona Supreme Court denied the claim on direct appeal. *McGill*, 213 Ariz. at 161, 140 P.3d at 944.

The Supreme Court has upheld the constitutionality of Arizona's death penalty sentencing scheme, including its requirement that a defendant bear the burden of proving mitigating circumstances sufficiently substantial to call for leniency. *See Walton v. Arizona*, 497 U.S. 639, 650 (1990) *overruled on other grounds by Ring v. Arizona*, 536 U.S. 584 (2002). The decision of the Arizona Supreme Court denying relief on this claim was neither contrary to nor an unreasonable application of clearly established federal law. Claim 15 is denied.

Claim 16:

McGill contends that the State's failure to allege the aggravating circumstances in the indictment violated his Fifth, Sixth, Eighth, and Fourteenth Amendment rights. (Doc. 30 at 136.) The Arizona Supreme Court denied the claim on direct appeal. *McGill*, 213 Ariz. at 162, 140 P.3d at 945.

While the Due Process Clause guarantees defendants a fair trial, it does not require the states to observe the Fifth Amendment's provision for presentment or indictment by a grand jury. *Hurtado v. California*, 110 U.S. 516, 538 (1884); *Branzburg v. Hayes*, 408 U.S. 665, 688 n.25 (1972). Although McGill contends that *Ring* and *Apprendi v. New Jersey*, 530 U.S. 466 (2000), support his position, in neither of those cases did the Supreme Court address this issue, let alone hold that aggravating factors must be included in an indictment and subjected to a probable cause determination. *See Ring*, 536 U.S. at 597 n.4. The Arizona Supreme Court has expressly rejected the argument that *Ring* requires aggravating factors to be alleged in an indictment and supported by probable cause. *McKaney v. Foreman*, 209 Ariz. 268, 270, 100 P.3d 18, 20 (2004). Claim 16 is without merit and will be denied.

Claim 17:

McGill alleges that the application of Arizona's newly-enacted death penalty statute violated the *ex post facto* doctrine. (Doc. 30 at 138.) The Arizona Supreme Court denied the claim. *McGill*, 213 Ariz. at 162, 140 P.3d at 945.

On June 24, 2002, the United States Supreme Court invalidated Arizona's death penalty scheme under which judges rather than juries found the facts making a defendant eligible for the death penalty. *Ring*, 536 U.S. 584. On August 1, 2002, Arizona amended its death penalty statute to comply with *Ring*. McGill murdered Perez on July 3, 2002. He argues that when he committed the murder "Arizona did not have a constitutional death penalty statute in effect." (Doc. 30 at 139.) Therefore, according to McGill, he could not have been sentenced to death under the law in place at the time of the murder, and application of the amended statute constituted an *ex post facto* violation. (*Id.* at 130–40.)

In denying this claim, the Arizona Supreme Court cited its opinion in *State v. Ring*, 204 Ariz. 534, 545–47, 65 P.3d 915, 926–28 (2003), holding that the *ex post facto* clause did not prohibit the resentencing of capital defendants after *Ring v. Arizona* because the new statute provided for only procedural changes and did not place defendants in jeopardy of a greater punishment. *McGill*, 213 Ariz. at 162, 140 P.3d at 945.

The *ex post facto* doctrine prohibits a state from "retroactively alter[ing] the definitions of crimes or increas[ing] the punishment for criminal acts." *Collins v. Youngblood*, 497 U.S. 37, 43 (1990). "[A]ny statute which punishes as a crime an act previously committed, which was innocent when done; which makes more burdensome the punishment for a crime, after its commission, or which deprives one charged with crime of any defense available according to law at the time when the act was committed, is prohibited as *ex post facto*." *Dobbert v. Florida*, 432 U.S. 282, 292 (1977) (quoting *Beazell v. Ohio*, 269 U.S. 167, 169–70 (1925)).

In *Dobbert*, the defendant was sentenced to death in Florida under a capital sentencing system that was subsequently declared unconstitutional. 432 U.S. at 288. Dobbert argued that he could not be sentenced to death under the amended Florida

procedures because at the time of his original sentencing the death penalty was not an available punishment. *Id.* at 297. The Supreme Court rejected this argument and held there was no *ex post facto* violation because the changes in Florida's statute were "clearly procedural." *Id.* at 293. "The new statute simply altered the methods employed in determining whether the death penalty was to be imposed; there was no change in the quantum of punishment attached to the crime." *Id.* at 293–94.

Under *Dobbert*, the post-*Ring* procedural changes in Arizona's death penalty are not *ex post facto* laws. *See Schriro v. Summerlin*, 542 U.S. 348, 353–54 (2004) ("*Ring*'s holding is properly classified as procedural."). Nonetheless, McGill argues that "the newly enacted death penalty statute changes the 'quantum' of punishment attached to the crime of homicide, because for thirty-eight days prior to the statute's enactment, the death penalty was not an available punishment and the maximum sentence available was life without the possibility of parole." (Doc. 30 at 140.)

This argument is not distinguishable from the claim rejected in *Dobbert*, where the defendant contended there was "no death penalty 'in effect' in Florida" when he committed the murders. 432 U.S. at 297. The Court responded that "this sophistic argument mocks the substance of the Ex Post Facto Clause." *Id.* Similarly, the statute in place at the time McGill committed the murder and the statute enacted after *Ring* provided for the same quantum of punishment. While *Ring* invalidated the procedure by which the death penalty was imposed in Arizona, it did not eliminate the death penalty as a possible sentence for first-degree murder.

The decision of the Arizona Supreme Court rejecting McGill's *ex post facto* claim was neither contrary to nor an unreasonable application of clearly established federal law. Claim 17 is denied.

Claim 18:

McGill alleges that Arizona's "heinous, cruel, or depraved" aggravating factor does not genuinely narrow the class of death-eligible offenders, in violation of the Eighth and

Fourteenth Amendments. (Doc. 30 at 143.) The Arizona Supreme Court denied the claim on direct appeal. *McGill*, 213 Ariz. at 162, 140 P.3d at 945.

Rulings of both the Ninth Circuit and the United States Supreme Court have upheld Arizona's death penalty statute against allegations that particular aggravating factors, including the "heinous, cruel, or depraved" factor, do not adequately narrow the sentencer's discretion. *See Jeffers*, 497 U.S. at 774–77; *Walton*, 497 U.S. at 652–56; *Woratzeck v. Stewart*, 97 F.3d 329, 334–35 (9th Cir. 1996). The Ninth Circuit has also explicitly rejected the contention that Arizona's death penalty statute is unconstitutional because it "does not properly narrow the class of death penalty recipients." *Smith v. Stewart*, 140 F.3d 1263, 1272 (9th Cir. 1998). Claim 18 is denied.

Claim 19:

McGill alleges that the trial court improperly permitted the introduction of victim impact evidence in violation of his due process and Eighth Amendment rights and his rights under the Confrontation Clause. (Doc. 30 at 147–52.) The Arizona Supreme Court denied McGill's Confrontation Clause argument on direct appeal. *McGill*, 213 Ariz. at 162, 140 P.3d at 945.

Respondents contend that McGill's due process and Eighth Amendment claims are unexhausted. The Court disagrees. In his appellate brief McGill claimed that the introduction of the victim impact evidence "violated [McGill's] constitutional rights under the Fifth, Sixth, Eighth, and Fourteenth Amendments." (Doc. 34, Ex. A at 153.) This reference to a "specific provision[] of the federal constitution" is sufficient to fairly present the claim, *Lyons v. Crawford*, 232 F.3d 666, 670 (9th Cir. 2000), *as modified by* 247 F.3d 904 (9th Cir. 2001), and the Court will consider its merits.

In *Booth v. Maryland*, 482 U.S. 496, 509 (1987), the Supreme Court held that the introduction of a victim impact statement during the sentencing phase of a capital case violated the Eighth Amendment. The Court revisited *Booth* in *Payne v. Tennessee*, 501 U.S. 808, 827, 830 (1991), overruling it in part and holding that the Eighth Amendment does not erect a per se barrier to the admission of victim impact evidence but leaving

intact *Booth*'s prohibition on characterizations and opinions from the victim's family about the crime, the defendant, or the appropriate sentence. *Id.* at 830 n.2.

In rebuttal to McGill's mitigation evidence, the State presented a victim impact statement in the form of a letter written by Perez's sister, Lizette. The prosecutor read the letter to the jury. (RT 11/9/04 at 44–47.) In the letter, Lizette stated that she could not believe how Perez looked after the fire and recalled that he was bandaged from head to toe. (*Id.* at 46.) She also described her reaction to the gruesome autopsy photos of her brother, telling the jurors that she "couldn't believe that a human person could do that to another person." (*Id.* at 47.) McGill argues that these statements constitute improper characterizations and opinions regarding McGill and the crime. (Doc. 30 at 150–51.)

These brief, isolated portions of the letter, which otherwise expressed Lizette's feelings about her brother and the impact of his murder, were arguably comments about McGill and the crime. They were not, however, unduly prejudicial. *See Payne*, 501 U.S. at 825.

First, the trial court provided the following instruction with respect to the victim impact evidence:

> The victim's sister has made a statement relating to the personal characteristics of the victim and the impact of his murder on the victim's family. You may consider this information only to the extent that it may rebut the mitigation presented by the defendant. You may not consider the information as a new aggravating circumstance.

(RT 11/10/04 at 10.)

The jury is presumed to follow its instructions. *Weeks v. Angelone*, 528 U.S. 225, 234 (2000) (citing *Richardson v. Marsh*, 481 U.S. 200 (1987)). McGill's assumption that his jury considered the excerpts from Lizette's letter for improper purposes ignores the plain language of the instructions given at trial.

Moreover, taken in context, Lizette's brief comments about her brother's condition after the burning would not have prejudiced the jury, which was fully aware of the nature of the crime and had viewed photos of Perez's body. Lizette did not express an opinion about the proper sentence or otherwise attack McGill. The bulk of her statement consisted

of permissible comments about her brother and the effect of this death. Therefore, admission of the statement did not have a "substantial and injurious effect or influence in determining" McGill's sentence. *Brecht v. Abrahamson*, 507 U.S. 619, 637 (1993); *see, e.g.*, *Hooper v. Mullin*, 314 F.3d 1162, 1174 (10th Cir. 2002) (applying harmless error standard to admission of improper victim impact statement).

The due process and Eighth Amendment allegations of Claim 19 are denied. The Confrontation Clause allegation is denied for the reasons discussed in the Court's analysis of Claim 13.

Claim 20:

McGill alleges that the trial court's jury instructions improperly limited the mitigation evidence the jury could consider in violation of McGill's rights under the Eighth and Fourteenth Amendments. (Doc. 30 at 152.) The Arizona Supreme Court denied the claim on direct appeal. *McGill*, 213 Ariz. at 162, 140 P.3d at 945. That decision was neither contrary to nor an unreasonable application of clearly established federal law.

The court instructed McGill's jury: "You should not guess about any fact and you must not be influenced by mere sympathy or by prejudice in determining these facts." (RT 11/10/04 at 4–5.) The court also instructed the jurors that mitigating circumstances "may be any evidence presented by either the defendant or the state that would lead you to apply leniency in this case and find that death is not an appropriate sentence," and that the evidence to consider in determining mitigation "includes any aspect of the defendant's background, character, propensity or record, and any of the circumstances of the offense that might justify a penalty less severe than death." (*Id.* at 7–8.) The court also explained that, "You are free to assign whatever value you deem appropriate to each and all of the various factors you are permitted to consider." (*Id.* at 9.)

State jury instructions must be upheld against constitutional attack unless "there is a reasonable likelihood that the jury has applied the challenged instruction in a way that prevents the consideration of constitutionally relevant evidence." *Boyde v. California*, 494 U.S. 370, 380 (1990). At the penalty phase of a capital trial, this requires that "the sentencer

. . . be able to consider and give effect to mitigating evidence in imposing the sentence, so that the sentence imposed reflects a reasoned moral response to the defendant's background, character, and crime." *Penry v. Johnson*, 532 U.S. 782, 788 (2001) (quotations and citations omitted).

"[F]ederal courts have consistently held that jury instructions admonishing the jury to base its penalty determination on mitigating or aggravating evidence, not on sympathy for the defendant, pass constitutional muster." *Mayfield*, 270 F.3d at 923; *see, e.g.*, *Victor v. Nebraska*, 511 U.S. 1, 13 (1994); *California v. Brown*, 479 U.S. 538, 542–43, (1987). In *Brown*, the trial court had instructed the jury that it "must not be swayed by mere sentiment, conjecture, sympathy, passion, prejudice, public opinion or public feeling." 479 U.S. at 540. The Court found that a reasonable juror would understand the instruction "as a directive to ignore only the sort of sympathy that would be totally divorced from the evidence adduced during the penalty phase." *Id.* at 542. The Court held that an "instruction prohibiting juries from basing their sentencing decisions on factors not presented at the trial, and irrelevant to the issues at the trial, does not violate the United States Constitution." *Id.* at 543.

The trial court's jury instructions, which were indistinguishable from those in *Brown*, did not prevent the consideration of constitutionally relevant mitigation evidence. Claim 20 is denied.

Claim 21:

McGill alleges that his Fifth Amendment rights were violated because the Arizona Supreme Court improperly weighed his silence when reviewing the propriety of his death sentence. (Doc. 30 at 155.) McGill raised this claim in a motion for reconsideration (Doc. 34, Ex. F at 5–7), which the Arizona Supreme Court denied. (*Id.*, Ex. G.)

The claim is based on the following passage in the Arizona Supreme Court's opinion:

> During her closing argument at the penalty phase, McGill's attorney reminded the jury that "[t]he evidence suggests that [Hardesty] is very, very much in control of this relationship with [McGill] and evidence suggests that

> [McGill] will do anything, absolutely anything to keep [Hardesty] happy." McGill did not, however, provide any evidence that Hardesty specifically urged him to murder Perez. . . . Moreover, McGill did not explain why, when in jail and outside the influence of Hardesty, he nonetheless attempted to have Uhl killed. Although McGill demonstrated that Hardesty influenced him, the preponderance of the evidence does not suggest that her influence was so strong as to explain his conduct.

McGill, 213 Ariz. at 161, 140 P.3d at 944. McGill contends that the court "impermissibly drew adverse inferences from [his] failure to provide information that would have required his personal testimony." (Doc. 30 at 156.)

In *Mitchell v. United States*, 526 U.S. 314 (1999), the Supreme Court held that the Fifth Amendment applies to sentencing proceedings and therefore no adverse factual inference may be drawn from a defendant's silence during a sentencing hearing. 526 U.S. at 329–30. However, as Respondents argue, the Arizona Supreme Court, in commenting about the lack of evidence supporting McGill's arguments about Hardesty's influence over his conduct, was properly weighing a mitigating circumstance put forward by McGill. It was McGill's burden to prove his mitigating circumstances by a preponderance of the evidence. The Arizona Supreme Court's comments represent an assessment of the evidence McGill presented, not an inference drawn from his silence.

McGill cites no clearly established federal law prohibiting the sentencing jury from drawing a negative inference from a defendant's silence with respect to a mitigating factor that the defendant has introduced and for which he bears the burden of proof. *See Mitchell*, 526 U.S. at 330 (leaving open the question of whether, at sentencing, a defendant's silence "bears upon the determination of a lack of remorse"); *White v. Woodall*, 572 U.S. 415, 420 (2014) (explaining that the *Mitchell* holding only precludes negative inferences of a defendant's assertion of his or her Fifth Amendment privilege pertaining to the facts of the underlying crime and left open whether sentencing courts might permissibly draw some inferences for other purposes).

The state court's rejection of this claim was not contrary to or an unreasonable application of clearly established federal law. Claim 21 is denied.

Claim 22:

McGill alleges that the death penalty is categorically cruel and unusual punishment in violation of the Eighth Amendment. (Doc. 30 at 156.) The Arizona Supreme Court's denial of this claim, *McGill*, 213 Ariz. at 162, 140 P.3d at 945, was neither contrary to nor an unreasonable application of clearly established federal law. There is no clearly established federal law supporting the claim that the death penalty is categorically cruel and unusual punishment or that it serves no purpose. *See Hall v. Florida*, 134 S. Ct. 1986, 1992–93 (2014); *Gregg v. Georgia*, 428 U.S. 153, 187 (1976). Claim 22 is denied.

Claim 23:

McGill alleges that Arizona's capital sentencing scheme violates the Eighth and Fourteenth Amendments because it affords the prosecutor with unbridled discretion to seek the death penalty. (Doc. 30 at 157.) The Arizona Supreme Court denied the claim on direct appeal. *McGill*, 213 Ariz. at 162, 140 P.3d at 945.

Prosecutors have wide discretion in deciding whether to seek the death penalty. *See McCleskey v. Kemp*, 481 U.S. 279, 296–97 (1987); *Gregg*, 428 U.S. at 199 (explaining that pre-sentencing decisions by actors in the criminal justice system that may remove an accused from consideration for the death penalty are not unconstitutional). In *Smith*, the Ninth Circuit rejected the argument that Arizona's death penalty statute is constitutionally infirm because "the prosecutor can decide whether to seek the death penalty." 140 F.3d at 1272. Claim 23 is meritless and will be denied.

Claim 24:

McGill alleges that Arizona's capital sentencing scheme discriminates against poor, young, and male defendants in violation of the Fourteenth Amendment. (Doc. 30 at 158.) The Arizona Supreme Court denied the claim on direct appeal. *McGill*, 213 Ariz. at 162, 140 P.3d at 945.

Clearly established federal law holds that "a defendant who alleges an equal protection violation has the burden of proving 'the existence of purposeful discrimination'"

and must demonstrate that the purposeful discrimination "had a discriminatory effect" on him. *McCleskey*, 481 U.S. at 292 (quoting *Whitus v. Georgia*, 385 U.S. 545, 550 (1967)). Therefore, to prevail on this claim, McGill "must prove that the decisionmakers in *his* case acted with discriminatory purpose." *Id.* McGill does not attempt to meet this burden. He offers no evidence specific to his case that would support an inference that his sex, age, or economic status played a part in his sentence. *See Richmond v. Lewis*, 948 F.2d 1473, 1490–91 (9th Cir. 1990), *vacated on other grounds*, 986 F.2d 1583 (9th Cir. 1993) (holding statistical evidence that Arizona's death penalty is discriminatorily imposed based on race, sex, and socioeconomic background is insufficient to prove that decision-makers in his case acted with discriminatory purpose). Claim 24 is denied.

Claim 25:

McGill alleges that Arizona's capital sentencing scheme violates the Fifth, Eighth, and Fourteenth Amendments because it denies capital defendants the benefit of proportionality review of their sentences. (Doc. 30 at 159.) The Arizona Supreme Court rejected the claim on direct appeal. *McGill*, 213 Ariz. at 163, 140 P.3d at 946.

There is no federal constitutional right to proportionality review of a death sentence, *McCleskey*, 481 U.S. at 306 (citing *Pulley v. Harris*, 465 U.S. 37, 43–44 (1984)), and the Arizona Supreme Court discontinued the practice in 1992, *State v. Salazar*, 173 Ariz. 399, 417, 844 P.2d 566, 584 (1992). The Ninth Circuit has explained that the interest implicated by proportionality review—the "substantive right to be free from a disproportionate sentence"—is protected by the application of "adequately narrowed aggravating circumstance[s]." *Ceja v. Stewart*, 97 F.3d 1246, 1252 (9th Cir. 1996). Claim 25 is denied.

Claim 26:

McGill alleges that Arizona's capital sentencing scheme violates the Fifth, Eighth, and Fourteenth Amendments because it does not require the State to prove or the jury to find beyond a reasonable doubt that the aggravating circumstances outweigh the mitigating circumstances. (Doc. 30 at 160.) The Arizona Supreme Court denied the claim on direct appeal. *McGill*, 213 Ariz. at 163, 140 P.3d at 946.

There is no Supreme Court authority requiring a jury to be instructed on a burden of proof in the sentencing phase of a capital case. Further, "[t]he United States Supreme Court has never stated that a beyond-a-reasonable-doubt standard is required when determining whether a death penalty should be imposed." *Harris v. Pulley*, 692 F.2d 1189, 1195 (9th Cir. 1982), *rev'd on other grounds*, 465 U.S. 37 (1984). Nor is there any Supreme Court authority which would require a burden of proof or persuasion be assigned to any of the jury's penalty phase determinations. On the contrary, the Supreme Court has held that a "capital sentencer need not be instructed how to weigh any particular fact in the capital sentencing decision." *Tuilaepa v. California*, 512 U.S. 967, 979 (1994); *see Franklin v. Lynaugh*, 487 U.S. 164, 179 (1988) ("[W]e have never held that a specific method for balancing mitigating and aggravating factors in a capital sentencing proceeding is constitutionally required."); *Zant v. Stephens*, 462 U.S. 862, 875 n.13 (1983) (explaining that "specific standards for balancing aggravating against mitigating circumstances are not constitutionally required"). Because the Arizona Supreme Court's decision was not contrary to or an unreasonable application of clearly established federal law, nor an unreasonable determination of facts, Claim 26 is denied.

Claim 27:

McGill alleges that Arizona's capital sentencing scheme violates the Eighth and Fourteenth Amendments because it does not sufficiently channel the discretion of the sentencing authority. (Doc. 30 at 161.) The Arizona Supreme Court denied the claim on direct appeal. *McGill*, 213 Ariz. at 163, 140 P.3d at 946.

The Ninth Circuit has rejected the contention that Arizona's death penalty statute is unconstitutional because it "does not properly narrow the class of death penalty recipients." *Smith*, 140 F.3d at 1272. The Arizona capital sentencing scheme requires proof of a specific "aggravating circumstance" before a sentence of death may be imposed. *See* A.R.S. § 13-703.1(D). This is an accepted "means of genuinely narrowing the class of death-eligible persons." *See Lowenfield*, 484 U.S. at 244. Claim 27 is denied.

Claim 28:

McGill alleges that Arizona's capital sentencing scheme violates the Eighth and Fourteenth Amendments because it requires a death sentence whenever an aggravating circumstance and no mitigating circumstances are found with respect to an eligible defendant. (Doc. 30 at 162.) The Arizona Supreme Court denied the claim on direct appeal. *McGill*, 213 Ariz. at 163, 140 P.3d at 946.

The Supreme Court has rejected the argument that Arizona's death penalty statute is impermissibly mandatory and establishes a presumption of death because it provides that the death penalty "shall" be imposed if one or more aggravating factors are found and mitigating circumstances are insufficient to call for leniency. *See Walton*, 497 U.S. at 651–52 (citing *Blystone v. Pennsylvania*, 494 U.S. 299, 255 (1990)); *see also Kansas v. Marsh*, 548 U.S. 163, 172–73 (2006) (relying on *Walton* to uphold Kansas's death penalty statute, which directs imposition of the death penalty when the state has proved that mitigating factors do not outweigh aggravators); *Smith*, 140 F.3d at 1272 (summarily rejecting challenges to the mandatory nature of Arizona's death penalty statute). Therefore, the Arizona Supreme Court's balancing test for the weighing of aggravating and mitigating circumstances is not unconstitutional. Claim 28 is denied.

IV. CERTIFICATE OF APPEALABILITY

Pursuant to Rule 22(b) of the Federal Rules of Appellate Procedure, an applicant cannot take an appeal unless a certificate of appealability has been issued by an appropriate judicial officer. Rule 11(a) of the Rules Governing Section 2254 Cases provides that the district judge must either issue or deny a certificate of appealability when it enters a final order adverse to the applicant. If a certificate is issued, the court must state the specific issue or issues that satisfy 28 U.S.C. § 2253(c)(2).

Under § 2253(c)(2), a certificate of appealability may issue only when the petitioner "has made a substantial showing of the denial of a constitutional right." This showing can be established by demonstrating that "reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner" or that the

issues were "adequate to deserve encouragement to proceed further." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). For procedural rulings, a certificate of appealability will issue only if reasonable jurists could debate whether the petition states a valid claim of the denial of a constitutional right and whether the court's procedural ruling was correct. *Id.*

The Court finds that reasonable jurists could debate its resolution of Claim 1, alleging ineffective assistance of counsel at sentencing.

V. CONCLUSION

Based on the foregoing,

IT IS HEREBY ORDERED that McGill's Petition for Writ of Habeas Corpus (Doc. 30) is **DENIED**. The Clerk of Court shall enter judgment accordingly.

IT IS FURTHER ORDERED that the stay of execution entered by this Court on May 31, 2012 (Doc 5), is **VACATED.**

IT IS FURTHER ORDERED that McGill's motion for evidentiary development (Doc. 57) is **DENIED.**

IT IS FURTHER ORDERED granting a certificate of appealability with respect to Claim 1.

IT IS FURTHER ORDERED that the Clerk of Court forward a courtesy copy of this Order to the Clerk of the Arizona Supreme Court, 1501 W. Washington, Phoenix, AZ 85007-3329.

Dated this 9th day of January, 2019.

Honorable John J. Tuchi
United States District Judge

APPENDIX C

FILED

FEB 9 2022

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

LEROY MCGILL, Petitioner-Appellant, v. DAVID SHINN, Director, Arizona Department of Corrections; WALTER HENSLEY, Warden, Arizona Department of Corrections - Eyman Complex, Respondents-Appellees.	No. 19-99002 D.C. No. 2:12-cv-01149-JJT District of Arizona, Phoenix ORDER

Before: BYBEE, M. SMITH, and COLLINS, Circuit Judges.

The panel has voted to deny the petition for rehearing. Judge Collins has voted to deny the petition for rehearing en banc, and Judge Bybee so recommends. Judge M. Smith has voted to grant the petition for rehearing en banc.

The full court has been advised of the petition for rehearing en banc, and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petitions for rehearing and rehearing en banc are DENIED.

APPENDIX D

SUPREME COURT OF ARIZONA
En Banc

STATE OF ARIZONA,	)	Arizona Supreme Court
	)	No. CR-04-0405-AP
Appellee,	)	
	)	Maricopa County
v.	)	Superior Court
	)	No. CR2003-005315
LEROY DEAN McGILL,	)	
	)	
Appellant.	)	
	)	**O P I N I O N**
_____	)	

Appeal from the Superior Court in Maricopa County
The Honorable Frank T. Galati, Judge

AFFIRMED

TERRY GODDARD, ARIZONA ATTORNEY GENERAL — Phoenix
By Kent E. Cattani, Chief Counsel
Capital Litigation Section
Jim D. Nielsen, Assistant Attorney General
Attorneys for the State of Arizona

SUSAN M. SHERWIN, MARICOPA COUNTY LEGAL ADVOCATE — Phoenix
By Thomas J. Dennis, Deputy Legal Advocate
Attorneys for Leroy Dean McGill

M c G R E G O R, Chief Justice

¶1 On November 10, 2004, a jury sentenced Leroy McGill to death for the murder of Charles Perez. Pursuant to Arizona Rule of Criminal Procedure 31.2(b), McGill's appeal to this Court is automatic. This Court has jurisdiction pursuant to Article 6, Section 5.3 of the Arizona Constitution, and section 13-4031 (2001) of the Arizona Revised Statutes.

I.

A.

¶2 In July 2002, thirty-nine–year-old Leroy McGill was living in Sophia Barnhart's house. His girlfriend, Jonna "Angel" Hardesty, also lived there, as did Justin Johnson and Barnhart's oldest son, Dean. Jack Yates had a small one-bedroom apartment in a duplex within walking distance of Barnhart's home. Hardesty's brother, Jeff Uhl, sometimes stayed in Yates' apartment. Eddie and Kim Keith, along with their two daughters, also stayed with Yates, as did Charles Perez and his girlfriend, Nova Banta. Yates had his own bedroom, and the others slept in a common room that also served as kitchen and living room.

¶3 Perez and Banta had recently accused McGill and Hardesty of stealing a shotgun from the Yates apartment. This accusation exacerbated an already contentious relationship between Banta and Hardesty.

¶4 On July 12, 2002, McGill, Hardesty, Barnhart, and Johnson spent the evening at Barnhart's house smoking marijuana purchased from Perez. At approximately 3:30 a.m. on July 13, McGill went to Yates' apartment. Uhl and Eddie Keith came out of the apartment to talk with McGill. McGill told Keith to get his wife and children out of the apartment because he "was going to teach [Perez] and [Yates] a lesson, that nobody gets away with talking about [McGill and Hardesty]." In response to

Keith's pleading, McGill agreed to spare Yates, but said it was too late for Perez. McGill also told Keith that he "was the only one who knew about it and that if anybody said anything about it, that [McGill] would know who said it," then remarked that Keith "had pretty little girls." Keith and his family fled the apartment.

¶5 Uhl admitted McGill into the apartment shortly thereafter. Perez and Banta were sitting next to each other on a couch that was next to the front door. Yates was also inside and either lying down on another couch or in his bedroom. Banta testified that McGill "turned around and looked at me and [Perez] and said [Perez] shouldn't talk behind other people's backs, and he poured the gasoline on us and quickly lit a match and threw it at us." McGill had added pieces of a styrofoam cup to the gasoline to create a napalm-like substance that would stick to his victims and cause them more pain. Perez and Banta, both engulfed in flames, ran out of the apartment.

¶6 Yates and Uhl also escaped the apartment, which had caught on fire. Yates put out the flames on Banta using a blanket. Mary Near, the occupant of the other apartment in the duplex, awoke to the smell of smoke, quickly dressed, and ran from her apartment, which was also on fire. When firefighters arrived, the apartment was fully engulfed in flames.

¶7 At the hospital, Perez, screaming in pain, pleaded,

"Help me, help me. Get the pain away." Burns covered eighty percent of Perez's body and caused his death on July 14, 2002. Banta was also conscious and in extreme pain; third degree burns covered approximately three-quarters of her body. At the hospital, Banta identified McGill as the person who set her on fire.

¶8 Meanwhile, at Barnhart's house, Hardesty told Johnson that McGill had just called and asked "if it smelled like burning flesh." Referring to Johnson, McGill asked Hardesty or Barnhart, "Is he going to talk?" Johnson testified that someone, either McGill, Hardesty, or Barnhart, threatened him with harm if he reported anything about the murder.

B.

¶9 A grand jury indicted McGill for the first degree premeditated murder of Charles Perez, the attempted first degree murder of Nova Banta, two counts of arson, and the endangerment of Jack Yates, Jeffrey Uhl, and Mary Near.

¶10 As a prosecution witness, Nova Banta identified Leroy McGill as the man who attacked her. She also showed the jury the injuries she sustained from the fire. Dr. Phillip Keen testified to the nature and extent of Perez's injuries. During his testimony, he discussed photographs of Perez's corpse, once before the jury saw the photographs, and then again as the State displayed them. The defense put on only one witness, Sophia

Barnhart, who claimed that McGill was not involved with the fire. After deliberating less than an hour, the jury returned a guilty verdict on all counts.

¶11 At the close of the aggravation phase of the trial, the jury unanimously found that McGill had been convicted of prior serious offenses, Ariz. Rev. Stat. (A.R.S.) § 13-703.F.2 (2001); that he knowingly created a grave risk of death to persons other than the victim, A.R.S. § 13-703.F.3; and that he committed the offense in both an "especially cruel" and an "especially heinous or depraved" manner, A.R.S. § 13-703.F.6.

¶12 In the penalty phase, McGill put on evidence that he had an abusive childhood; that he was psychologically immature and, as a result, his girlfriend had greater than normal influence over him; that he suffered from some degree of mental impairment; that he performed well in institutional settings; and that his family cares about him. The State put on rebuttal evidence, including evidence that while awaiting trial McGill attempted to have a potential witness against him killed. The prosecution also read into the record a letter from Perez's sister, which expressed the sorrow Perez's family experienced as a result of his death. The jury found that McGill's mitigation evidence was not sufficiently substantial to call for leniency and, therefore, determined that death was the appropriate sentence. *See* A.R.S. § 13-703.01.H (Supp. 2005).

II.

¶13 McGill raises issues concerning each phase of his trial. We first address his assertion that the trial court abused its discretion in dismissing one of the jurors for cause. Next, we consider issues related to the assertion that McGill endangered Uhl, Yates, and Near by starting a fire in their building. We also address issues related to the State's allegation that McGill murdered Perez in an especially heinous, cruel, or depraved manner, *see* A.R.S. § 13-703.F.6. Finally, we consider issues arising from the penalty phase and independently determine whether the mitigation is sufficiently substantial to merit leniency. A.R.S. §§ 13-703.E, -703.04 (Supp. 2005).

A.

¶14 McGill contends that the trial court abused its discretion in dismissing Juror 58 for cause. "[T]he State may exclude from capital sentencing juries that 'class' of veniremen whose views would prevent or substantially impair the performance of their duties in accordance with their instructions or their oaths." *Wainwright v. Witt*, 469 U.S. 412, 424 n.5 (1985). This Court reviews a decision to excuse a juror for cause for abuse of discretion. *State v. Medina*, 193 Ariz. 504, 511 ¶ 18, 975 P.2d 94, 101 (1999).

¶15 Juror 58 stated that, if called upon to impose the death penalty, she would have to choose between being sanctioned

by the government or punished by God. She said that she could follow the law, but only because "you guys would come after me. I would—if it was the law, I would, but I'd still have like the fear of God on my shoulders." When asked explicitly, "Do you think that your ability to do the things that you're supposed to do as a juror—do you think that ability would be impaired," Juror 58 said, "Yes." The trial court did not abuse its discretion in determining that Juror 58's beliefs would "substantially impair the performance of [her] duties," *Wainwright*, 469 U.S. at 424 n.5.

B.

¶16 We consider three issues related to the State's allegation that McGill placed Uhl, Yates, and Near in danger by starting a fire in their building. McGill asserts that the trial court erred in denying his motion to dismiss the three counts of endangerment. He also argues that convicting him of endangerment under A.R.S. § 13-1201.A (2001) and then using the same conduct to establish his eligibility for the death penalty under A.R.S. § 13-703.F.3 violates the Double Jeopardy Clause of the Fifth Amendment, U.S. Const. amend. V. We also independently determine whether, in killing Perez, McGill "knowingly created a grave risk of death to another person or persons in addition to the person murdered during the commission of the offense," A.R.S. § 13-703.F.3.

1.

¶17 McGill argues that the State presented insufficient evidence to support the three endangerment convictions. "A person commits endangerment by recklessly endangering another person with a substantial risk of imminent death or physical injury." A.R.S. § 13-1201.A. The statute requires the State to show that McGill was "aware of and consciously disregard[ed] a substantial and unjustifiable risk that" his actions would place another person in substantial risk. A.R.S. § 13-105.9(c) (2002) (defining recklessly). When reviewing for sufficiency of the evidence, we determine whether, viewing the evidence in the light most favorable to the prosecution, a rational trier of fact could have convicted the defendant of the crime in question. *State v. Montaño*, 204 Ariz. 413, 423 ¶ 43, 65 P.3d 61, 71 (2003).

¶18 The facts presented permitted the jury to convict McGill of endangerment of Uhl and Yates. McGill knew that Uhl and Yates were in the apartment before he threw gasoline on Banta and Perez. He told Detective Thomas Kulesa that he saw Yates go into the bedroom shortly before the fire, and Uhl answered the door to let McGill into the apartment. Also, in warning the Keiths to leave the apartment, McGill demonstrated that he knew his actions would create a danger for those inside. Thus, sufficient evidence permitted a rational trier of fact to

convict McGill of endangerment with regard to Uhl and Yates.

¶19 McGill asserts that the trial judge should have dismissed the endangerment count involving Near because McGill did not know that anyone lived in the other apartment. Even assuming the truth of that statement, a reasonable jury could find that, in starting a fire in such a small building, McGill was "aware of and consciously disregard[ed] a substantial and unjustifiable risk," A.R.S. § 13-105.9(c), that the other apartment would be occupied and that his actions would create a "substantial risk of imminent death or physical injury" for its occupant, A.R.S. § 13-1201.A. Thus, sufficient evidence permitted a rational trier of fact to convict McGill of endangerment with regard to Near.

2.

¶20 McGill next argues that the State punished him twice for the same offense and thus violated his protection against double jeopardy. According to McGill, he was punished once for putting Uhl and Yates in danger when he was sentenced to two years of incarceration for each of the endangerment counts under A.R.S. § 13-1201.A and again when he was sentenced to death, based in part on the zone of danger aggravator under A.R.S. § 13-703.F.3.

¶21 The Double Jeopardy Clause, U.S. Const. amend. V, protects defendants against both multiple prosecutions and

multiple punishments for the same offense. *Witte v. United States*, 515 U.S. 389, 391 (1995). This Court determines de novo whether the State violated a defendant's right against double jeopardy. *State v. Moody*, 208 Ariz. 424, 437 ¶ 18, 94 P.3d 1119, 1132 (2004). Because violation of the Double Jeopardy Clause would be fundamental error, we consider the issue even though McGill raised it for the first time on appeal. *See State v. Bible*, 175 Ariz. 549, 572, 858 P.2d 1152, 1175 (1993).

¶22 As a preliminary matter, we must decide whether to compare the elements of the endangerment offense with only the F.3 aggravator or with capital murder as a whole. The United States Supreme Court has held that "Arizona's enumerated aggravating factors operate as 'the functional equivalent of an element of a greater offense.'" *Ring v. Arizona*, 536 U.S. 584, 609 (2002) (quoting *Apprendi v. New Jersey*, 530 U.S. 466, 494 n.19 (2000)). Thus, because we regard the F.3 aggravator as an element of capital murder, and not as a separate offense, we will compare the elements of endangerment to the elements of capital murder to determine whether they are the same offense. *See also Sattazahn v. Pennsylvania*, 537 U.S. 101, 108–09 (2003) (holding that aggravating factors are not independent offenses for purposes of double jeopardy analysis).

¶23 "[W]here the two offenses for which the defendant is punished or tried cannot survive the 'same-elements' test, the

double jeopardy bar applies." *United States v. Dixon*, 509 U.S. 688, 696 (1993). In applying the same-elements test, we compare the elements required by statute to establish each offense. *Id.* at 697. If "each offense contains an element not contained in the other," then they are two separate offenses. *Id.* at 696.

¶24 To satisfy the statutory elements of endangerment, a person must "recklessly endanger[] another person with a substantial risk of imminent death *or physical injury*." A.R.S. § 13-1201.A (emphasis added). First degree murder requires that a person knowingly cause the death of another with premeditation. A.R.S. § 13-1105.A (2001 & Supp. 2005). When the State proves at least one aggravator defined in A.R.S. § 13-703.F, murder is punishable by death. A.R.S. § 13-703.01.D.

¶25 A person guilty of endangerment has not necessarily satisfied any element of capital murder because one may be guilty of endangerment by recklessly creating a substantial risk of physical injury; to satisfy the functional equivalent of an element of capital murder, the F.3 aggravator, a person must knowingly create a grave risk of death. Likewise, a person guilty of capital murder has not necessarily satisfied the elements of endangerment because one may be guilty of capital murder if one of the aggravators other than F.3 applies. *See, e.g.*, A.R.S. § 13-703.F.2 (defendant "was previously convicted of a serious offense"); -703.F.5 (committing the murder "as

consideration for the receipt, or in expectation of the receipt, of anything of pecuniary value"); -703.F.6. (committing the murder in "an especially heinous, cruel or depraved manner"). Thus, under the same-elements test, McGill may be punished both for endangering Uhl and Yates and for murdering Perez without violating the Double Jeopardy Clause.

3.

¶26 We independently determine whether the State established the F.3 aggravator. A.R.S. § 13-703.04; *State v. Roseberry*, 210 Ariz. 360, 373 ¶ 77, 111 P.3d 402, 415 (2005). Section 13-703.F.3 directs the trier of fact to consider it an aggravating circumstance if "[i]n the commission of the offense the defendant knowingly created a grave risk of death to another person or persons in addition to the person murdered during the commission of the offense." The grave risk of death must be the result of the murderous act and the person at risk must be a person other than an intended victim. *See, e.g.*, *State v. Carreon*, 210 Ariz. 54, 67 ¶ 63, 107 P.3d 900, 913 (2005) (collecting recent cases). Because the statute requires that McGill knowingly created the risk, the State must show that McGill was aware that bystanders were present and "believe[d] that his . . . conduct" would create a grave risk of death to those bystanders. A.R.S. § 13-105.9(b) (defining knowingly); *see State v. Wood*, 180 Ariz. 53, 69, 881 P.2d 1158, 1174 (1994).

¶27 The trial court correctly granted McGill's motion to dismiss the aggravator as it related to Mary Near because McGill did not know that the attached apartment was occupied. Indeed, the prosecutor conceded, "I don't have any evidence that he knew that Mary Near was there."

¶28 McGill did know that Uhl was in the apartment because the two men had just finished a conversation with Eddie Keith before McGill entered the apartment. During that conversation, McGill agreed to spare Yates, which indicates he knew Yates was in the apartment. Also, McGill told Detective Kulesa that just before the fire, he saw Yates go into the bedroom. McGill apparently did not intend to harm either Uhl or Yates. Thus, the only questions remaining are whether McGill should have known that he would create a risk of grave harm to the two men and whether he did create such a risk.

¶29 McGill set two people on fire using gasoline in a very small apartment. He used enough gasoline to cause the entire structure to quickly become engulfed in flames. On the other hand, both of these adult men easily escaped the burning apartment. Yates was awake behind a closed door, and Uhl had just let McGill into the apartment and was aware of McGill's plan based on his conversation with him moments earlier. The law does not require, however, that McGill's actions be the most risky imaginable. McGill "[wa]s aware or believe[d]," A.R.S. §

13-105.9(b), that setting the structure on fire "created a grave risk of death," A.R.S. § 13-703.F.3, for Uhl and Yates. The State proved this aggravator beyond a reasonable doubt.

C.

1.

¶30 We next review issues related to the State's allegation that McGill murdered Perez in an especially heinous, cruel, or depraved manner, *see* A.R.S. § 13-703.F.6. McGill argues that the trial court abused its discretion by admitting photographs of Perez's body into evidence. In assessing the admissibility of photographs, courts consider the photographs' relevance, the likelihood that the photographs will incite the jurors' passions, and the photographs' probative value compared to their prejudicial impact. *State v. Davolt*, 207 Ariz. 191, 208 ¶ 60, 84 P.3d 456, 473 (2004). This Court reviews a trial court's rulings on the admissibility of evidence for abuse of discretion. *Id.*

¶31 During the guilt phase, in what the trial court described as "an overabundance of caution," it did not admit a picture of Perez's face, but did admit photographs of Perez's hand, his full body, his back, and his leg. During the aggravation phase, the court admitted the picture of Perez's face as well. In each photograph, the body is discolored and swollen. The prosecution's medical expert, Dr. Keen, explained

to the jury that the surgical incisions visible in the photographs resulted from medical procedures to relieve swelling caused by the burns. The judge described the pictures as "certainly unpleasant" but not "gruesome."

¶32 McGill does not argue that the pictures are irrelevant, and the likelihood that they would incite the passions of the jury is slight because the photographs are not gruesome. Therefore, we focus on whether the photographs' prejudicial impact substantially outweighs their probative value. *Davolt*, 207 Ariz. at 209 ¶ 63, 84 P.3d at 474. We agree with McGill that the probative value of these photographs is reduced because he did not contest the manner of death or the suffering associated with being burned alive, the facts the State established with the photographs. *See id.* at 208-09 ¶¶ 62–63, 84 P.3d at 473-74 ("The probative value of relevant evidence is minimal when the defendant does not contest a fact that is of consequence."). On the other hand, the trial judge could justifiably conclude that their prejudicial impact on the jury also was minimal. The prosecution needed to provide the jury with descriptions of the manner in which the victim was killed and the pain the victim suffered because the State had the burden of proving each element of the murder and that the murder was especially cruel. *See id.* at 208 ¶ 61, 84 P.3d at 473. We consider it unlikely that the pictures added much to

any sense of shock the jurors experienced from hearing the injuries described. *See State v. Harding*, 141 Ariz. 492, 499, 687 P.2d 1247, 1254 (1984) (holding that permitting photographs of "little probative value" was not reversible error because they were also not "unfairly prejudicial"). The trial court did not abuse its discretion, during either the guilt or aggravation phase, in admitting the photographs.[1]

2.

¶33 This Court independently determines whether the State has proven that McGill murdered Perez in an especially cruel manner. "Cruelty exists if the victim consciously experienced physical or mental pain prior to death, and the defendant knew or should have known that suffering would occur." *State v. Trostle*, 191 Ariz. 4, 18, 951 P.2d 869, 883 (1997) (citation omitted).

¶34 Setting a conscious person on fire necessarily causes the victim tremendous suffering. *See State v. Schurz*, 176 Ariz.

[1] McGill also asserted that (1) the trial court erred in separating the F.6 aggravator into only two factors, "cruel" and "heinous/depraved," on the verdict form, thus preventing the jury from separately indicating its findings as to heinousness and depravity and (2) the trial court erred by instructing the jury on helplessness because the evidence in this case did not support such a finding. We need not consider either argument, however, because in this case the jurors unanimously found the murder to be cruel, which alone satisfies the F.6 aggravator, *see State v. Clark*, 126 Ariz. 428, 436, 616 P.2d 888, 896 (1980) ("The statutory expression is in the disjunctive, so either all or one could constitute an aggravating circumstance.").

46, 56, 859 P.2d 156, 166 (1993). In addition, McGill enhanced Perez's suffering by concocting a napalm-like mixture of gasoline and styrofoam intended to stick to his victims and make it more difficult for rescuers to put out the fire. The State proved beyond a reasonable doubt that McGill's murder of Perez was especially cruel and therefore established the F.6 aggravator. *See State v. Towery*, 186 Ariz. 168, 187, 920 P.2d 290, 309 (1996) (holding that a finding of cruelty establishes the F.6 aggravator even without reaching heinousness or depravity).

3.

¶35 In addition to the two aggravators discussed above, the State alleged that McGill was eligible for the death penalty because he was "previously convicted of a serious offense," A.R.S. § 13-703.F.2. The State alleged that McGill had been convicted of two counts of armed robbery in 1986. Robbery is a serious offense, A.R.S. § 13-703.H.8, and the defense did not challenge the fact of the convictions. The State proved this aggravator beyond a reasonable doubt.

D.

¶36 McGill makes two arguments related to the penalty phase. He asserts that the trial court erred in admitting certain testimonial hearsay during the penalty phase and that the Constitution forbids requiring a defendant to prove

mitigating evidence by a preponderance of the evidence.

1.

¶37 McGill claims that the trial court improperly allowed testimony, which McGill had no opportunity to cross-examine, to be admitted as rebuttal to his mitigation evidence. He bases his argument on three alternative theories: the testimony is improper rebuttal; allowing the testimony violates the Confrontation Clause, U.S. Const. amend. VI; and allowing the testimony violates his rights under the Due Process Clause, U.S. Const. amend. XIV.

¶38 In June 2003, the State deposed Floyd Lipps, who told the prosecutor that he met McGill while they were both incarcerated at the Madison Street jail. Defense counsel was not present during this deposition, and Lipps was not subject to cross-examination. Lipps claimed that McGill asked him to kill Uhl because McGill believed that the State could convict him only if Uhl testified. In October 2004, the prosecution scheduled a second deposition that defense counsel attended. Unfortunately, Lipps, who was hospitalized at the time, was either too sick or too uncooperative to permit an effective examination. Lipps died before the trial. During the guilt phase of the trial, the prosecution did not introduce the statement Lipps provided in June 2003. During the penalty phase, however, Detective Stephen Lewis testified, over McGill's

objection, about Lipps's statements made during the 2003 deposition. Detective Lewis also testified that Lipps gave the State a note during the first interview. The note, on which the State found McGill's fingerprints, contained a description of Uhl. The prosecution also argued that the handwriting on the note matched the handwriting on a letter McGill wrote to his niece.

¶39 In December 2002, Detective Kulesa interviewed Uhl as a part of the investigation into Perez's murder. Because Uhl died before the trial, Kulesa related his conversation with Uhl to the jury. Uhl identified McGill as the person who set Banta and Perez on fire and provided many of the details that would later be corroborated by the testimony of Keith, Johnson, and Banta. Kulesa also gave the jury a physical description of Uhl that included reference to a tear drop tattoo under his right eye and the fact that his right eye was deformed. This description matches the description on the note Lipps provided to Detective Lewis. McGill's counsel objected to Kulesa's testimony "based on the Sixth Amendment"; the trial court overruled her objection.

a.

¶40 We first decide whether the trial court erred in admitting the statements of Lipps and Uhl as relevant rebuttal evidence. Under A.R.S. § 13-703.C (Supp. 2005),

> [a]t the penalty phase of the sentencing proceeding that is held pursuant to § 13-703.01, the prosecution or the defendant may present *any information that is relevant to any of the mitigating circumstances* included in subsection G of this section, regardless of its admissibility under the rules governing admission of evidence at criminal trials.

(Emphasis added.) Because the statute expressly states that the rules of evidence do not govern questions of admissibility at the penalty phase,[2] the relevancy requirement of A.R.S. § 13-703.C, rather than the rules of evidence, determines whether evidence is admissible at the penalty phase. That statutory directive requires that we examine our customary standard for reviewing evidentiary issues decided by a trial court. When a trial court's ruling depends upon its interpretation of a statute, we generally review that ruling de novo. *State v. Gomez*, 212 Ariz. 55, ___ ¶ 3, 127 P.3d 873, 874 (2006). We review a trial court's evidentiary rulings, however, for abuse of discretion. *Davolt*, 207 Ariz. at 208 ¶ 60, 84 P.3d at 473. For two reasons, we conclude that we will give deference to a trial judge's determination of whether rebuttal evidence offered during the penalty phase is "relevant" within the meaning of the statute. First, although the relevance requirement derives from the statute, and explicitly is not governed by "admissibility

[2] In contrast, A.R.S. § 13-703.B (Supp. 2005) expressly provides that the rules of evidence applicable to criminal trials govern the admissibility of evidence at the aggravation phase of the sentencing hearing.

under the rules governing admission of evidence at criminal trials," A.R.S. § 17-703.C, the judge's analysis in determining relevance involves fundamentally the same considerations as does a relevancy determination under Arizona Rule of Evidence 401 or 403. In addition, in interpreting a statute, courts apply the ordinary meaning of the statute's terms. A.R.S. § 1-213 (2002); *State v. Raffaele*, 113 Ariz. 259, 262, 550 P.2d 1060, 1063 (1976). The ordinary meaning of relevant, "affording evidence tending to prove or disprove the matter at issue or under discussion," *Merriam-Webster's Collegiate Dictionary* 1051 (11th ed. 2003), is very similar to Rule 401's definition of relevant evidence as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." For these reasons, we will give deference to the trial court's decision as to the relevance of evidence offered pursuant to section 13-703.C.

¶41 The State argued that Floyd Lipps's initial deposition was relevant to two components of McGill's mitigation case. The trial judge agreed, explaining that the testimony "directly rebuts what was presented to the jury about both [Hardesty]'s alleged influence over the defendant and, secondly, the fact that he does well when incarcerated."

¶42 McGill had presented extensive mitigation testimony

from his friends and family regarding Hardesty's wickedness and her control over him. For example, one family friend testified, "I don't know how to describe it, but I seen it in her eyes the day I met her, that she's a person that tries to take control of your mind, your soul and your being."

¶43 McGill also attempted to show the jury that he would do well while incarcerated. As a boy, McGill stayed in two children's homes. His mitigation specialist testified that McGill's school attendance and behavior improved while in these homes. The defense psychologist said, "[McGill] just blossomed under those sort of circumstances, but that's the only place I can find that ever happened, he ever had that kind of environment." The mitigation specialist also discussed McGill's time in prison for armed robbery, reading from an evaluation that stated that McGill worked well in prison and required little supervision.

¶44 Lipps's testimony was relevant to both theories of mitigation. Contracting while incarcerated to have a potential witness against him killed suggests that McGill would not be a model prisoner. The testimony also illustrates that McGill is capable of attempting to harm others, even when he is away from Hardesty. Lipps's testimony is, therefore, "information that is relevant to any of the mitigating circumstances," A.R.S. § 13-703.C. Information gathered from Detective Kulesa's questioning

of Uhl is also relevant in that it not only corroborates the statement Lipps gave to the prosecution and the testimony of Banta but also explains why McGill would want to have Uhl killed. The trial court did not err in applying the relevancy requirement of A.R.S. § 13-703.C to the statements of Lipps and Uhl.

b.

¶45 McGill also asserts that the Sixth Amendment's Confrontation Clause, as interpreted in *Crawford v. Washington,* 541 U.S. 36 (2004), prohibits the use of the statements of Lipps and Uhl to rebut mitigation offered during the penalty phase.[3] This Court reviews alleged constitutional violations de novo. *State v. Glassel*, 211 Ariz. 33, 50 ¶ 59, 116 P.3d 1193, 1210 (2005).

¶46 The Sixth Amendment guarantees that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be

[3] The protections of the Confrontation Clause apply only to testimonial evidence. In *Crawford v. Washington*, the Court explained that testimonial statements include, among others, "extrajudicial statements contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions." 541 U.S. 36, 51–52 (2004) (internal quotation marks omitted). *See also Davis v. Washington*, 126 S.Ct. 2266, 2274-75 (2006) (holding that statements "are testimonial when the circumstances objectively indicate that . . . the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution") (footnote omitted). For the purpose of our analysis, we assume that the statements made by Lipps and Uhl are testimonial.

confronted with the witnesses against him." Just as "[t]he Constitution's text does not alone resolve" to what extent statements not subject to cross-examination may be admitted during trial, *Crawford*, 541 U.S. at 42, the Constitution's text does not alone resolve whether the right to confront adverse witnesses extends to sentencing hearings.

¶47 To decide that question, we look first to *Williams v. New York*, the only case in which the United States Supreme Court directly addressed a defendant's right to confront witnesses during sentencing. 337 U.S. 241 (1949).[4] The Court held that the right does not apply to sentencing proceedings. *Id.* at 251-52.

¶48 The trial judge sentenced Williams to death based, in part, on testimonial information contained in a presentence report. *Id.* at 242–43. Williams asserted that because the information was "supplied by witnesses with whom [he] had not been confronted and as to whom he had no opportunity for cross-examination or rebuttal," the process was unconstitutional. *Id.* at 243 (citing *People v. Williams*, 83 N.E.2d 698 (N.Y. 1949)). Applying an historical analysis similar to that employed later

[4] The Court decided *Williams* based on the Fourteenth Amendment's Due Process Clause because the Sixth Amendment's Confrontation Clause was not applied to the states until 1965 by *Pointer v. Texas*, 380 U.S. 400, 403 (1965).

by the Court in *Crawford*,[5] the *Williams* Court relied on historical practices to evaluate Williams' claim. The Court noted that "[o]ut-of-court affidavits have been used frequently" during sentencing and that

> both before and since the American colonies became a nation, courts in this country and in England practiced a policy under which a sentencing judge could exercise a wide discretion in the sources and types of evidence used to assist him in determining the kind and extent of punishment to be imposed within limits fixed by law.

Id. at 246. This practice ensured "that a sentencing judge [would] not be denied an opportunity to obtain pertinent information by a requirement of rigid adherence to restrictive rules of evidence properly applicable to the trial." *Id.* at 247. In accord with its historical review and analysis, the *Williams* Court concluded that the right to confront adverse witnesses has never applied to sentencing.[6] In the more than

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[5] In *Crawford*, the Court explained that it must "turn to the historical background of the [Confrontation] Clause to understand its meaning." 541 U.S. at 43.

[6] At the turn of the last century, the South Carolina Supreme Court traced the common usage of affidavits in sentencing to the English courts, writing:

> Certainly there is no ground for saying that [using affidavits in sentencing] would deny to the defendant the constitutional right to be confronted by witnesses against him and to have the privilege of cross-examining them, for the reason that the verdict of the jury is not affected. Thus, in this case, the defendant would remain guilty of manslaughter in spite of the affidavits that were submitted to the presiding

fifty years since it decided *Williams*, the Supreme Court has never suggested otherwise.

¶49 Arizona also has long held that use of hearsay evidence at the penalty phase of a trial does not violate the Confrontation Clause. In *State v. Ortiz*, this Court addressed the admissibility of evidence used to rebut the defendant's mitigation evidence. 131 Ariz. 195, 208–09, 639 P.2d 1020, 1033–34 (1981), *overruled on other grounds by State v. Gretzler*, 135 Ariz. 42, 57 n.2, 659 P.2d 1, 16 n.2 (1983). Ortiz had been convicted of conspiracy and, during the sentencing hearing, the State presented the testimony Ortiz's wife had given during her earlier conspiracy trial to rebut Ortiz's assertion that he was a good father and husband. *Id.* at 208, 639 P.2d at 1033. The transcript of her sentencing hearing included descriptions of Ortiz beating her and threatening her with a gun. *Id.* Because she did not testify at Ortiz's hearing, he asserted that "admission of this testimony violated his confrontation clause rights under the Sixth and Fourteenth Amendments to the United States Constitution." *Id.*

¶50 In *Ortiz*, we began our analysis by "observing that by its terms, the confrontation clause applies only to 'trials' and

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judge.

State v. Reeder, 60 S.E. 434, 435 (S.C. 1908).

not to sentencing hearings," *id.* at 209, 639 P.2d at 1034, which, consistent with *Williams*, indicates that the right of confrontation does not apply to sentencing. Although we acknowledged that *State v. Hanley*, 108 Ariz. 144, 493 P.2d 1201 (1972), held that, at sentencing, a defendant has a "right to produce mitigating evidence through cross-examination," we concluded that a defendant has no right to an "opportunity to rebut rebuttal evidence through cross-examination." 131 Ariz. at 209, 639 P.2d at 1034.

¶51 In *State v. Greenway*, we distinguished between hearsay used to *establish an aggravating factor*, to which the Confrontation Clause applies, and hearsay used to *rebut mitigation*, to which the Confrontation Clause does not apply. 170 Ariz. 155, 161 n.1, 823 P.2d 22, 28 n.1 (1991). In that case, we allowed the statement of a codefendant to be used to rebut Greenway's assertion that he was non-violent and had a diminished mental capacity. *Id.* at 161, 823 P.2d at 28; *see also State v. Nash*, 143 Ariz. 392, 401–02, 694 P.2d 222, 231–32 (1985) (allowing the State to submit reports from psychologists the defense could not cross-examine for the purpose of rebutting his mitigation evidence).

¶52 Thus, Arizona has long held that the Confrontation Clause does not apply to rebuttal testimony at a sentencing hearing because (1) the penalty phase is not a criminal

prosecution, (2) historical practices support the use of out-of-court statements in sentencing, and (3) the sentencing body requires complete information to make its determination.[7] We will overturn long-standing precedent only for a compelling reason, *State v. Hickman*, 205 Ariz. 192, 200 ¶ 37, 68 P.3d 418, 426 (2003), and McGill has not presented a compelling reason to do so here. Applying the long line of decisions, from *Williams* to *Greenway*, we conclude that the trial court did not violate the Confrontation Clause in admitting the statements of Lipps

[7] Other state and federal courts have reached the same conclusion. *See, e.g.*, *United States v. Littlesun*, 444 F.3d 1196, 1200 (9th Cir. 2006) (holding that *Crawford* does not overrule *Williams*); *United States v. Luciano*, 414 F.3d 174, 179 (1st Cir. 2005) (holding that "nothing in *Blakely* or *Booker* necessitates a change in the majority view that there is no Sixth Amendment right to confront witnesses during the sentencing phase"); *Szabo v. Walls*, 313 F.3d 392, 398 (7th Cir. 2002) (holding that the Confrontation Clause "applies through the finding of guilt, but not to sentencing, even when that sentence is the death penalty"); *Holland v. State*, 705 So. 2d 307, 328 (Miss. 1997) (holding that a defendant has "no Confrontation Clause guarantees at sentencing"); *State v. Rust*, 388 N.W.2d 483, 494 (Neb. 1986) (same); *State v. Reid*, 164 S.W.3d 286, 318-19 (Tenn. 2005) (holding that neither the Due Process Clause nor the Confrontation Clause requires Tennessee to apply the rules of evidence at sentencing). *But see, e.g.*, *Rodriguez v. State*, 753 So. 2d 29, 43 (Fla. 2000) ("We start with the uncontroverted proposition that the Sixth Amendment right of confrontation applies to all three phases of the capital trial."); *Ball v. State*, 699 A.2d 1170, 1190 (Md. 1997) (holding the Confrontation Clause "extends to the sentencing phase of a capital trial and applies to [live,] victim impact witnesses as well as factual witnesses") (quoting *Grandison v. Shade*, 670 A.2d 398, 413 (Md. 1995)); *Commonwealth v. Green*, 581 A.2d 544, 564 (Pa. 1990) (vacating death sentence and remanding for resentencing because defendant could not cross-examine state's rebuttal witness during mitigation).

and Uhl to rebut McGill's mitigation evidence.

c.

¶53 McGill also claims that the trial court violated his right to due process by allowing the State to rebut his mitigation evidence with testimonial hearsay. This Court reviews alleged constitutional violations de novo. *Glassel*, 211 Ariz. at 50 ¶ 59, 116 P.3d at 1210.

¶54 In *Skipper v. South Carolina*, the Court noted that due process requires "that a defendant not be sentenced to death 'on the basis of information which he had no opportunity to deny or explain.'" 476 U.S. 1, 5 n.1 (1986) (quoting *Gardner v. Florida*, 430 U.S. 349, 362 (1977)). In compliance with that principle, this Court has allowed testimonial hearsay to rebut mitigation when the "defendant knew about the statements and had an opportunity to either explain or deny them." *Greenway*, 170 Ariz. at 161, 823 P.2d at 28.

¶55 In *Gardner v. Florida*, the sentencing judge used a "presentence investigation report contain[ing] a confidential portion which was not disclosed to defense counsel." 430 U.S. at 353. The Supreme Court explained that sentencing a defendant to death without disclosing all of the information used in making that decision denied the defendant due process because "[t]he risk that some of the information accepted in confidence may be erroneous, or may be misinterpreted, by the investigator or by

the sentencing judge, is manifest." *Id.* at 359. The State argued that it could lose confidential sources if forced to reveal the information they provided to the defendant, but the Court found that "the interest in reliability plainly outweighs the State's interest in preserving the availability of comparable information in other cases." *Id.* Thus, the defendant must be given an opportunity to test the State's allegations for reliability.

¶56 The requirement that a defendant be given an opportunity to explain or deny testimonial hearsay necessarily encompasses a requirement that the evidence bear some indicia of reliability. A defendant cannot explain or deny fanciful statements or hearsay several times removed, and a jury must consider reliable information in making the difficult decision of whether to impose capital punishment. To give substance to the protection afforded by the Due Process Clause, several courts have made explicit a requirement that the evidence bear "minimal indicia of reliability" to be admitted during sentencing. *See Kuenzel v. State,* 577 So. 2d 474, 528 (Ala. Crim. App. 1990) ("While hearsay evidence may be considered in sentencing, due process requires both that the defendant be given an opportunity to refute it and that it bear minimal indicia of reliability . . . ." (quoting *United States v.*

Giltner, 889 F.2d 1004, 1007 (11th Cir. 1989)).[8] We agree that, in addition to the requirements explicitly stated in *Greenway*, hearsay testimony must have sufficient indicia of reliability to be responsible evidence. *See Williams v. Oklahoma*, 358 U.S. 576, 584 (1959) (holding that a court may "consider *responsible* unsworn or 'out-of-court' information relative to the circumstances of the crime and to the convicted person's life and characteristics" without running afoul of due process) (emphasis added). We conclude that the State's rebuttal evidence met these requirements.

¶57 McGill does not argue that he lacked notice of and an opportunity to respond to the contents of Lipps's and Uhl's statements. The question then is whether these statements were accompanied by sufficient indicia of reliability.

¶58 Other evidence corroborated Uhl's statement, thereby

[8] *See also People v. Hall*, 743 N.E.2d 521, 548 (Ill. 2000) (holding that hearsay is admissible at sentencing "as long as the evidence satisfies the relevancy and reliability requirement"); *State v. Pierce*, 138 S.W.3d 820, 825 (Tenn. 2004) (noting that Tennessee statute allows "reliable hearsay" to be used at sentencing); *Peden v. State*, 129 P.3d 869, 872 (Wyo. 2006) ("[S]entencing must ensure that the information the sentencing court relies upon is reliable and accurate . . . ." (quoting *Kenyon v. State*, 96 P.3d 1016, 1021 (Wyo. 2004)(internal quotation marks omitted)). Section 6.A.1.3(a) of the Federal Sentencing Guidelines (2003) also requires a showing of reliability, stating that "the court may consider relevant information without regard to its admissibility under the rules of evidence applicable at trial, *provided that the information has sufficient indicia of reliability* to support its probable accuracy." (Emphasis added.)

providing indicia of reliability. The testimony of Banta, Johnson, and Keith corroborated the information Uhl provided Detective Kulesa. Sufficient indicia of reliability also supported Lipps's statement. The note that Lipps produced contained McGill's fingerprints and handwriting; Uhl, the target of the murder for hire, indeed could have been a witness against McGill; Uhl's physical appearance matched the description on the note; and Lipps did have an opportunity to receive the note from McGill. All these facts corroborate the account that Lipps gave. We conclude, therefore, that admitting Lipps's and Uhl's statements did not offend McGill's right to due process.

2.

¶59 McGill also asserts that it is unconstitutional to require that he prove mitigation evidence by a preponderance of the evidence. This Court has held on several occasions that requiring a defendant to prove mitigating circumstances by a preponderance of the evidence does not violate the federal Constitution. *See, e.g.*, *Medina*, 193 Ariz. at 514-15 ¶ 43, 975 P.2d at 104-05. The trial court did not err in requiring that McGill prove his mitigating circumstances by a preponderance of the evidence.

E.

¶60 This Court "independently determines 'if the mitigation is sufficiently substantial to warrant leniency in

light of existing aggravation.'" *Roseberry*, 210 Ariz. at 373 ¶ 77, 111 P.3d at 415 (quoting *State v. Greene*, 192 Ariz. 431, 443-44 ¶ 60, 967 P.2d 106, 118-19 (1998)); A.R.S. § 13-703.04.

¶61 The trial court instructed the jury on the following non-exclusive list of mitigating factors: (1) the Defendant suffered from an abusive childhood; (2) the Defendant was psychologically immature; and (3) the Defendant was mentally impaired. In addition to these factors, McGill presented evidence that he would do well in an institutional setting and that his family would suffer if he is put to death.

¶62 McGill suffered from an abusive and neglectful childhood. His mother first sent him to an institution for troubled children when he was only eight years old, visited him infrequently, told a school official that thirteen-year-old McGill "has no interests or talents," and banished McGill from her home when he was sixteen years old. His stepfather beat him and his brothers. McGill proved by a preponderance of the evidence the existence of a troubled childhood.

¶63 He argues that his troubled childhood interfered with his ability to develop a sense of right and wrong and that the cruel and senseless murder of Charles Perez manifested that deficiency. Although McGill's mother was neglectful and his stepfather was abusive, even the defense psychologist recognized that McGill was given an opportunity to thrive while at the

homes for troubled children. McGill was able to maintain a healthy relationship with his siblings. He had opportunities to reform his life. Moreover, the impact of McGill's upbringing on his choices has become attenuated during the two decades between his reaching adulthood and committing this murder. For these reasons, McGill's neglectful and abusive childhood provides only slight mitigation for this crime.

¶64 During her closing argument at the penalty phase, McGill's attorney reminded the jury that "[t]he evidence suggests that [Hardesty] is very, very much in control of this relationship with [McGill] and evidence suggests that [McGill] will do anything, absolutely anything to keep [Hardesty] happy." McGill did not, however, provide any evidence that Hardesty specifically urged him to murder Perez. Proving that McGill desired to impress his girlfriend, even if that desire was extreme and exceeded that found in a psychologically healthy person, does not itself demonstrate that Hardesty's influence caused this murder. The lack of "a causal connection may be considered in assessing the quality and strength of the mitigation evidence." *State v. Newell*, 212 Ariz. 389, ___ ¶ 82, 132 P.3d 833, 849 (2006). Moreover, McGill did not explain why, when in jail and outside the influence of Hardesty, he nonetheless attempted to have Uhl killed. Although McGill demonstrated that Hardesty influenced him, the preponderance of

the evidence does not suggest that her influence was so strong as to explain his conduct.

¶65 McGill is neither mentally retarded nor insane. His overall IQ is 92, which is at the low end of the average range. The defense expert noted that McGill "has chronic and significant psychological difficulties," but could not identify any mental disorder from which McGill suffers. The defense did not prove mental impairment by a preponderance of the evidence.

¶66 Much of McGill's evidence during the mitigation phase focused on his improved performance while in institutions. Evidence that a defendant will be a "model prisoner" provides non-statutory mitigation. *State v. White*, 194 Ariz. 344, 355 ¶ 47, 982 P.2d 819, 830 (1999). As a child, McGill's grades and behavior improved while under intense supervision. Likewise, while in prison for robbery, McGill did not have any serious discipline problems. In light of the State's evidence that McGill attempted to have a potential witness against him murdered, however, the evidence provides little support for the claim that McGill would be a model prisoner.

¶67 The testimony of McGill's sister and brothers demonstrated that McGill's family will be hurt by his execution. The existence of family ties is a mitigating factor. *State v. Carriger*, 143 Ariz. 142, 162, 692 P.2d 991, 1011 (1984). The defense proved this mitigation by a preponderance of the

evidence.

¶68 Although McGill's mitigation is not insignificant, it does little to offset the considerable aggravation established by the State. On balance, the mitigation is not sufficiently substantial to call for leniency.

III.

¶69 For purposes of federal review, McGill raises fourteen challenges to the constitutionality of Arizona's death penalty scheme. He concedes that this Court has previously rejected these arguments.

¶70 (1) McGill claims that the State's failure to allege an element of a charged offense, the aggravating factors that made the Defendant death eligible, is a fundamental defect that renders the indictment constitutionally defective. We rejected this argument in *McKaney v. Foreman*, 209 Ariz. 268, 271 ¶ 13, 100 P.3d 18, 21 (2004).

¶71 (2) He asserts that the application of the new death penalty statute passed in response to *Ring v. Arizona*, 536 U.S. 584 (2002), violates a defendant's right against *ex post facto* application of new laws. We rejected this argument in *State v. Ring*, 204 Ariz. 534, 547 ¶ 23, 65 P.3d 915, 928 (2003).

¶72 (3) He claims that the F.6 aggravator is unconstitutionally vague and overbroad because the jury does not have enough experience or guidance to determine when it is met.

The Court rejected this argument in *State v. Cromwell*, 211 Ariz. 181, 188-90 ¶¶ 38–45, 119 P.3d 448, 455–57 (2005).

¶73 (4) According to McGill, introducing victim impact evidence at the penalty phase of the trial is improper because a defendant does not receive prior notice of the information and is denied the right to cross-examine the evidence. The Court rejected challenges to the use of victim impact evidence in *Lynn v. Reinstein*, 205 Ariz. 186, 191 ¶ 16, 68 P.3d 412, 417 (2003).

¶74 (5) McGill claims that the jury instruction told jurors to assign whatever value they deemed appropriate to mitigation but instructed them not to be influenced by mere sympathy, thus limiting the mitigation the jury could consider. The Court rejected this argument in *Carreon*, 210 Ariz. at 70–71 ¶¶ 81–87, 107 P.3d at 916–17.

¶75 (6) He asserts that the death penalty is cruel and unusual under any circumstances. The Supreme Court rejected this argument in *Gregg v. Georgia*, 428 U.S. 153, 187 (1976).

¶76 (7) He claims that the death penalty is irrational and arbitrarily imposed because it serves no purpose that is not adequately addressed by life in prison. The Court rejected this argument in *State v. Smith*, 203 Ariz. 75, 82 ¶ 36, 50 P.3d 825, 832 (2002).

¶77 (8) McGill argues that the prosecutor's discretion to seek the death penalty has no standards and therefore violates

the Eighth and Fourteenth Amendments, and Article 2, Sections 1, 4, and 15 of the Arizona Constitution. The Court rejected this argument in *Cromwell*, 211 Ariz. at 192 ¶ 58, 119 P.3d at 459.

¶78 (9) He claims that Arizona's death penalty discriminates against poor, young, and male defendants in violation of Article 2, Sections 1, 4, and 13 of the Arizona Constitution. We rejected this argument in *State v. Stokley*, 182 Ariz. 505, 516, 898 P.2d 454, 465 (1995).

¶79 (10) McGill asserts that the absence of proportionality review denies defendants due process of law. We rejected that argument in *State v. Gulbrandson*, 284 Ariz. 46, 73, 960 P.2d 579, 606 (1995).

¶80 (11) He claims that Arizona's death penalty scheme violates the Fifth, Eighth, and Fourteenth Amendments by shifting the burden of proof and requiring that a capital defendant convince jurors his life should be spared. This Court rejected this argument in *Carreon*, 210 Ariz. at 76 ¶ 122, 107 P.3d at 922.

¶81 (12) He asserts that the death penalty is unconstitutional because it permits jurors unfettered discretion to impose a death sentence without adequate guidelines to weigh and consider appropriate factors and fails to provide a principled means to distinguish between those defendants who deserve death and those who do not. This Court rejected this

argument in *State v. Johnson*, 212 Ariz. 425, ___ ¶ 69, 133 P.3d 735, 750 (2006).

¶82 (13) McGill claims that execution by lethal injection is cruel and unusual punishment. We rejected this argument in *State v. Van Adams*, 194 Ariz. 408, 422 ¶ 55, 984 P.2d 16, 30 (1999).

¶83 (14) According to McGill, Arizona's death penalty unconstitutionally requires the death penalty whenever at least one aggravating circumstance and no mitigating circumstances exist. The Court rejected this argument in *State v. Miles*, 186 Ariz. 10, 19, 918 P.2d 1028, 1037 (1996).

IV.

¶84 For the foregoing reasons, we affirm McGill's convictions and sentences, including the capital sentence.

_____
Ruth V. McGregor, Chief Justice

CONCURRING:

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Rebecca White Berch, Vice Chief Justice

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Michael D. Ryan, Justice

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W. Scott Bales, Justice

H U R W I T Z, Justice, concurring in part and dissenting in part

¶85 I concur in the Court's opinion insofar as it affirms McGill's convictions and the jury's findings of statutory aggravating circumstances. I respectfully part company with the majority, however, with respect to its rejection of McGill's Confrontation Clause claims. *See* Op. ¶¶ 45-52. I believe that the Confrontation Clause of the Sixth Amendment applies to the penalty phase of a capital sentencing proceeding[9] and that testimonial hearsay cannot be used to impose a death sentence.

I.

A.

¶86 The Sixth Amendment to the United States Constitution provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." The Supreme Court has made plain that the Confrontation Clause prohibits "admission of testimonial

[9] Arizona law provides that when a defendant is convicted of first degree murder and the State seeks the death penalty, sentencing proceedings begin with an "aggravation phase" (sometimes referred to in case law as the "eligibility phase") in which the trier of fact determines whether any alleged aggravating circumstance listed in Arizona Revised Statutes ("A.R.S.") § 13-703(F) (Supp. 2005) has been proved. A.R.S. § 13-703.01(C) (Supp. 2005). If the trier of fact finds one or more aggravating circumstances, the sentencing proceedings move on to a "penalty phase" (sometimes referred to in case law as the "selection phase") in which the issue is whether the death penalty should be imposed. A.R.S. § 13-703.01(D).

statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had had a prior opportunity for cross-examination." *Crawford v. Washington*, 541 U.S. 36, 53-54 (2004); *see also Davis v. Washington*, 126 S. Ct. 2266, 2273 (2006) (quoting *Crawford*).

¶87 The majority assumes that the deposition of Floyd Lipps and the police interview of Jeff Uhl were "testimonial." Op. ¶ 45 n.3. That assumption is clearly warranted. Both Lipps and Uhl were questioned by agents of the state for the express purpose of obtaining evidence to be used against McGill during the penalty phase of a capital trial. *Crawford* teaches that "the principal evil at which the Confrontation Clause was directed" was the "use of *ex parte* examinations as evidence against the accused." 541 U.S. at 50; *see also id.* at 52 ("Statements taken by police officers in the course of interrogations are . . . testimonial."); *accord Davis*, 126 S. Ct. at 2276 (holding that the product of "interrogations solely directed at establishing the facts of a past crime, in order to identify (or provide evidence to convict) . . . is testimonial").

¶88 Because the challenged statements were testimonial and McGill had no opportunity to cross-examine either witness, the Confrontation Clause applies on its face if the statements were introduced in a "criminal prosecution." The issue before us,

therefore, is whether the penalty phase of a capital sentencing proceeding is part of a criminal prosecution.[10]

B.

¶89 As a matter of pure logic and textualism, it is difficult to characterize the penalty phase as anything other than part of a criminal prosecution. The proceeding is, of course, designed to determine what *criminal* penalty will be imposed on one convicted of first degree murder. Under A.R.S. § 13-703.01, the penalty phase is structured much in the same manner as the rest of a criminal trial – each side presents evidence, examines the witnesses, makes summations, and the jury is eventually left to make the ultimate determination – whether any mitigation is sufficiently substantial to call for leniency in light of the aggravation previously found. The majority quite correctly concludes that the *aggravation* phase of a capital case is part of a criminal prosecution for Confrontation Clause purposes. Op. ¶ 51. Because both the aggravation and penalty phases are parts of a single capital "sentencing proceeding" under Arizona law, *see* A.R.S. § 13-703.01(A), (C),

[10] Our state constitution provides that "[i]n criminal prosecutions, the accused shall have the right . . . to meet the witnesses against him face to face." Ariz. Const. art. 2, § 24. McGill does not argue that this guarantee is different than the Sixth Amendment Confrontation Clause. I therefore assume arguendo that the two are congruent. *See State v. Vincent*, 159 Ariz. 418, 432-33, 768 P.2d 150, 164-65 (1989).

(D), it is difficult to understand why one phase would be part of a criminal prosecution while the other would not.

¶90 The textual argument is buttressed by the Supreme Court's prior interpretations of the Sixth Amendment. The Sixth Amendment sets forth a list of rights guaranteed "[i]n all criminal prosecutions," including the right to counsel. The Supreme Court has held that the right to counsel is applicable to sentencing proceedings. *Mempa v. Rhay*, 389 U.S. 128, 137 (1967). Because the Sixth Amendment does not contain separate definitions of "criminal prosecutions" with respect to its various guarantees, it would therefore seem to logically follow that the Confrontation Clause also applies to sentencing proceedings.

¶91 But in Sixth Amendment jurisprudence, as *Crawford* warns, textualism - or even logic - is often a trap for the unwary. *See* 541 U.S. at 42-43. For example, the Supreme Court has held that the right to counsel applies to preliminary hearings. *White v. Maryland*, 373 U.S. 59, 60 (1963). Yet, hearsay is traditionally admissible in preliminary hearings. *Costello v. United States*, 350 U.S. 359, 363-64 (1956). It is therefore difficult to conclude that the term "criminal prosecutions" has the same meaning for all rights guaranteed by the Sixth Amendment.

¶92 As one commentator has aptly noted, the Supreme Court's Sixth Amendment jurisprudence is "best described as fragmentary." John G. Douglass, *Confronting Death: Sixth Amendment Rights at Capital Sentencing*, 105 Colum. L. Rev. 1967, 1969 (2005). I therefore do not rely simply on the language of the Sixth Amendment in concluding that the Confrontation Clause applies to the penalty phase of a capital trial, and instead turn, as does the majority, to the case law in interpreting that language.

C.

¶93 The majority relies upon *Williams v. New York*, 337 U.S. 241 (1949), in concluding that capital sentencing proceedings are excluded from the term "criminal prosecution" for Confrontation Clause purposes. But, as the majority acknowledges, Op. ¶ 47 n.4, *Williams* was not a Confrontation Clause case. Indeed, under the Supreme Court's jurisprudence in 1949 it could not have been; the Court did not hold the Confrontation Clause applicable to the States until sixteen years later, in *Pointer v. Texas*, 380 U.S. 400, 403 (1965). *Williams* is simply a case setting forth the minimum requirements of Fourteenth Amendment due process with respect to the use of hearsay testimony. As the majority correctly notes in its due process discussion (which I join), the Due Process Clause is

satisfied when hearsay is reliable and the defendant is given notice and an opportunity to rebut the evidence. Op. ¶ 56.

¶94 As *Crawford* now makes clear, however, the Confrontation Clause requires more. Due process requires minimal substantive reliability, but the Confrontation Clause requires "procedural" reliability - reliability obtained "by testing in the crucible of cross-examination." *Crawford*, 541 U.S. at 61. It is not sufficient for Confrontation Clause purposes that "testimonial hearsay" be objectively reliable; it must also be subject to cross-examination.

¶95 *Williams* does not resolve the issue of whether the Confrontation Clause applies to the penalty phase of capital trials. Nor does any other Supreme Court decision. I therefore regard the question as open. A number of federal courts agree. *See United States v. Higgs*, 353 F.3d 281, 324 (4th Cir. 2003) (noting that it "remains unclear whether the Confrontation Clause applies" in capital sentencing proceedings); *Proffitt v. Wainright*, 685 F.2d 1227, 1253 (11th Cir. 1982) ("Whether the right to cross-examine adverse witnesses extends to capital sentencing proceedings has not been specifically addressed by the Supreme Court."); *United States v. Jordan*, 357 F. Supp. 2d 889, 901 (E.D. Va. 2005) (stating that "it appears that no court has specifically addressed this issue" since *Crawford*). Indeed, several state courts have directly held that the Confrontation

Clause applies at capital sentencing. *See, e.g.*, *Rodriguez v. State*, 753 So. 2d 29, 44 (Fla. 2000) (holding that the admission of hearsay statements "in the penalty phase violated the Confrontation Clause"); *Ball v. State*, 699 A.2d 1170, 1190 (Md. 1997) (holding that the right of confrontation "extends to the sentencing phase of a capital trial and applies to live, victim impact witnesses as well as factual witnesses") (alteration and quotation omitted); *Russeau v. State*, 171 S.W.3d 871, 880-81 (Tex. Crim. App. 2005) (finding the Confrontation Clause applicable to capital sentencing), *cert. denied*, 126 S. Ct. 2982 (2006). Whatever the merit of these decisions (a topic I address below) they surely undercut the contention that the issue was definitively resolved in *Williams*.

D.

¶96 Nor do I believe that our prior cases provide conclusive guidance. Our jurisprudence on the topic has been, to put it charitably, somewhat inconsistent. In *State v. Hanley*, a non-capital case, this Court concluded that the right of cross-examination applied at sentencing. 108 Ariz. 144, 148, 493 P.2d 1201, 1205 (1972). One year later, however, in another non-capital case, this Court held, without citation to *Hanley*, that after guilt had been established, the Due Process Clause did not require a sentencing judge to allow confrontation and

cross-examination. *State v. Thomas*, 110 Ariz. 106, 109, 515 P.2d 851, 854 (1973).

¶97 In *State v. Ortiz*, a capital case, this Court stated that "the confrontation clause applies only to 'trials' and not to sentencing hearings." 131 Ariz. 195, 209, 639 P.2d 1020, 1034 (1981), *overruled on other grounds by State v. Gretzler*, 135 Ariz. 42, 57 n.2, 659 P.2d 1, 16 n.2 (1983). But four years later, in another capital case, we stated that Sixth Amendment confrontation "rights extend to the sentencing phase of a trial" but are not "as strong at the sentencing phase as at trial." *State v. Nash*, 143 Ariz. 392, 401, 694 P.2d 222, 231 (1985). Then, *State v. Greenway*, another capital case, held that there is no right to confrontation during sentencing when testimony is admitted to rebut mitigating evidence (as opposed to establishing aggravating factors). 170 Ariz. 155, 161 n.1, 823 P.2d 22, 28 n.1 (1991).

¶98 Even assuming that *Ortiz* and *Greenway* were correctly decided in 1983 and 1991, they do not resolve the issue before us today. Both cases were decided against the backdrop of *Ohio v. Roberts*, 448 U.S. 56 (1980). *Roberts* held that the Confrontation Clause did not bar admission of an unavailable witness's statements that either fell within a "firmly rooted hearsay exception" or otherwise bore "adequate 'indicia of reliability.'" *Id*. at 66. *Crawford*, however, abrogated the

Roberts rule, providing that when hearsay is "testimonial," reliability can only be shown through an opportunity for cross-examination. 541 U.S. at 61-62. More importantly for present purposes, *Crawford* also clarified the historical understanding of the scope of the Confrontation Clause. Thus, our prior opinions must be reexamined in light of *Crawford*.

E.

¶99 *Crawford* makes clear that the extent of the Confrontation Clause is to be determined not by reference to modern rules of evidence, but rather by the expectation of the Framers at the time the Sixth Amendment was adopted in 1791. *Id.* at 43 ("We must therefore turn to the historical background of the Clause to understand its meaning."). Thus, the ultimate issue is whether the Framers would have expected that "testimonial" hearsay could be used by a jury to determine whether a murder defendant should live or die.

¶100 The history of capital sentencing is most instructive on this point. "[I]n 1791, the States uniformly followed the common-law practice of making death the exclusive and mandatory sentence for certain specified offenses," including murder. *Woodson v. North Carolina*, 428 U.S. 280, 289 (1976). The jury's verdict of guilt for murder thus automatically resulted in a death sentence in 1791. Because "[t]here was no distinction between trial rights and sentencing rights . . . in both purpose

and effect, the trial was the sentencing." Douglass, *supra*, at 1973.

¶101 At the time the Sixth Amendment was adopted, juries were well aware of the mandatory nature of death sentences. "Almost from the outset jurors reacted unfavorably to the harshness of mandatory death sentences." *Woodson*, 428 U.S. at 289. When unwilling to put a defendant to death, jurors would often either acquit the defendant outright or convict of a lesser crime. *Id.* at 290 (noting the "not infrequent refusal of juries to convict murderers rather than subject them to automatic death sentences"); *see also* William Blackstone, 4 *Commentaries* 238-39 (1966) (explaining "pious perjury," under which juries would return verdicts resulting in acquittal or conviction of a lesser crime when unwilling to sentence a defendant to death); John H. Langbein, *The English Criminal Trial Jury on the Eve of the French Revolution*, *in The Trial Jury in England, France, Germany 1700-1900* 37 (Antonio Padoa Schioppa ed. 1987) (same).

¶102 Thus, the only evidence relied upon by juries in 1791 in determining whether a defendant should receive the death sentence was the evidence presented at trial on the issue of guilt or innocence – evidence plainly covered by the Confrontation Clause. The Framers could therefore have had no expectation that "testimonial" hearsay could have played any

part in the decision about whether a defendant should live or die. Consequently, *Crawford* teaches that the Confrontation Clause bars the use of such hearsay in the selection phase of modern capital penalty proceedings.

¶103 To be sure, much has changed in capital litigation since 1791. Dissatisfaction with automatic death sentences led a number of states in the nineteenth century to "abandon mandatory death sentences in favor of discretionary death penalty statutes." *Woodson*, 428 U.S. at 291. Such systems, which had become widespread by the twentieth century, permit the jury (or a sentencing judge) "to respond to mitigating factors by withholding the death penalty." *Id*. Thus, by the time *Williams* was decided, it was accurate to say that in capital cases, a sentencing judge had long exercised "wide discretion in the sources and types of evidence used to assist him in determining the kind and extent of punishment to be imposed within limits fixed by law." *Williams*, 337 U.S. at 246.

¶104 But this was not the case at the time the Sixth Amendment was adopted. Whatever the virtues of modern capital sentencing, in 1791 the decision about whether a defendant should live or die was made solely on the basis of the evidence introduced during the trial on guilt or innocence. Because it has always been clear that the trial on guilt or innocence is a "criminal prosecution," subject to the guarantees of the

Confrontation Clause, "testimonial" hearsay could have played no role in the sentencing calculus in 1791. Even though capital sentencing procedures have today changed, *Crawford* teaches that the Sixth Amendment requires that "testimonial" hearsay has no place in the capital sentencing decision.[11]

II.

¶105 In my view, the Confrontation Clause precludes the use of testimonial hearsay by the State in the penalty phase of a capital sentencing proceeding.[12] The Lipps deposition and the Uhl interview should not have been admitted during the penalty

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[11] This case does not require us to decide whether the Confrontation Clause applies to non-capital sentencing proceedings. While it is clear that "testimonial" hearsay played no role in capital sentencing proceedings in 1791, the historical record as to non-capital proceedings is less clear. *See Apprendi v. New Jersey*, 530 U.S. 466, 480 n.7 (2000) (noting that at the time of our founding, judicial discretion was prominent in sentencing of lesser and misdemeanor crimes); *Williams*, 337 U.S. at 246 (noting the wide discretion that sentencing judges had in colonial times with regard to the type of evidence that could be considered in cases in which the sentence was not automatically mandated by a guilty verdict).

[12] By its terms, the Confrontation Clause does not apply to evidence submitted by the defendant. Thus, my reading of the Clause does not conflict with the Supreme Court's command that the Eighth Amendment requires that the defendant be able to present a broad scope of mitigation evidence. *See Lockett v. Ohio*, 438 U.S. 586, 604 (1978) ("[T]he Eighth and Fourteenth Amendments require that the sentencer, in all but the rarest kind of capital case, not be precluded from considering, *as a mitigating factor*, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death.") (footnote omitted).

phase of this case.[13] I would therefore remand for a new penalty phase proceeding.

_____
Andrew D. Hurwitz, Justice

[13] The jury might very well have returned a death verdict even in the absence of the Lipps deposition and the Uhl interview, given the strong aggravation and the relatively minimal mitigating evidence. Because of the nature of the testimonial hearsay at issue (which accused McGill of plotting the death of Uhl), however, I cannot conclude beyond a reasonable doubt (nor does the majority suggest) that any Confrontation Clause error here was harmless. *See Chapman v. California*, 386 U.S. 18, 23 (1967) (holding that before constitutional error can be found harmless, "the court must be able to declare a belief that it was harmless beyond a reasonable doubt").