Appendix A

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JOHN EDWARD SANSING, *Petitioner-Appellant*, v. CHARLES L. RYAN, Director, Arizona Department of Corrections; ERNEST TRUJILLO, Warden, Arizona State Prison - Eyman Complex, *Respondents-Appellees.*	No. 13-99001 D.C. No. 2:11-cv-01035-SRB ORDER AND AMENDED OPINION

Appeal from the United States District Court
for the District of Arizona
Susan R. Bolton, District Judge, Presiding

Argued and Submitted January 22, 2019
San Francisco, California

Filed May 17, 2021
Amended July 29, 2022

Before: Marsha S. Berzon, Consuelo M. Callahan, and Paul J. Watford, Circuit Judges.

Order;
Opinion by Judge Watford;
Dissent by Judge Berzon

SUMMARY*

Habeas Corpus / Death Penalty

The panel filed an order (1) stating that the opinion filed May 17, 2021, is amended by a concurrently filed opinion, and that Judge Berzon's dissent is amended by a concurrently filed dissent; (2) denying a petition for panel rehearing; and (3) denying on behalf of the court a petition for rehearing en banc, in a case in which the district court denied John Edward Sansing's federal petition for a writ of habeas corpus, which is governed by the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA).

Sansing pleaded guilty to first-degree murder and, in 1999, was sentenced to death by the State of Arizona.

Sansing's Claim 1 was predicated on the alleged denial of his Sixth Amendment right to trial by jury. At the time of his trial, Arizona law mandated that the trial judge alone determine whether a sentence of death should be imposed following a conviction for first-degree murder. The United States Supreme Court declared that sentencing scheme unconstitutional in *Ring v. Arizona*, 536 U.S. 584 (2002). On remand for further consideration in light of *Ring*, the Arizona Supreme Court ruled that the denial of Sansing's right to a jury trial during the penalty phase was harmless beyond a reasonable doubt.

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

To establish prejudice, a federal habeas petitioner must, under *Brecht v. Abrahamson*, 507 U.S. 619 (1993), demonstrate that a constitutional error resulted in "actual prejudice"—that is, a "substantial and injurious effect or influence" on the outcome.

In the amended opinion, the panel noted that the United States Supreme Court clarified in *Brown v. Davenport*, 142 S. Ct. 1510 (2022), that satisfying *Brecht* is only a necessary, not a sufficient condition to relief; a federal habeas petitioner must meet the requirements of AEDPA as well. So when, as here, the state court has determined on direct appeal that an error was harmless beyond a reasonable doubt—the standard required for review of non-structural constitutional errors under *Chapman v. California*, 386 U.S. 18 (1967)—a petitioner must demonstrate that the court applied *Chapman* in an objectively unreasonable manner.

The panel began by deciding whether the Arizona Supreme Court's application of *Chapman* was objectively unreasonable under AEDPA. Rejecting Sansing's contention that the Arizona Supreme Court's determination was "contrary to" or an "unreasonable application of" clearly established federal law, the panel concluded that fairminded jurists applying the governing beyond-a-reasonable-doubt standard could conclude that the absence of a jury trial did not affect the Arizona Supreme Court's conclusions (a) that any reasonable jury would have found that the murder was committed in both an "especially cruel" and an "especially heinous" manner (Ariz. Rev. Stat. § 13-703(F)(6) (1999)), or (b) that no rational jury would have found the existence of any statutory mitigating circumstances or that Sansing's non-statutory mitigating circumstances were sufficiently substantial to call for leniency. Because Sansing failed to satisfy AEDPA, the panel did not need to consider whether

the absence of a jury trial resulted in actual prejudice under *Brecht*.

Sansing's Claim 2 alleged that his trial counsel rendered ineffective assistance in presenting his mitigation defense during the penalty phase. The state post-conviction review (PCR) court held that Sansing failed to establish either deficient performance or prejudice under *Strickland v. Washington*, 466 U.S. 668 (1984). The panel concluded that, as to most of the challenged aspects of counsel's representation, Sansing did not demonstrate that the PCR court's resolution of *Strickland*'s deficient-performance prong was objectively unreasonable; and that as to the remaining aspects of the representation, the PCR court reasonably determined that Sansing did not demonstrate prejudice.

In Claim 8, Sansing alleged that his waiver of the privilege against self-incrimination was not knowing and voluntary because he was unaware that his admission, during the plea colloquy, that the victim was conscious when he raped her could be used to prove cruelty under § 13-703(F)(6). Affirming the denial of relief as to this claim, the panel observed that the United States Supreme Court has not yet held that the trial court must affirmatively discuss during the plea colloquy the potential impact of a defendant's factual admissions may have on capital sentencing proceedings.

In Claim 4, Sansing asserted an ineffective-assistance-of-counsel claim that used the same factual predicate as Claim 8. The panel concluded that even accepting that counsel rendered ineffective assistance, a fairminded jurist could conclude that Sansing failed to show a reasonable probability he would have received a different sentence.

In Claim 7, Sansing alleged that the Arizona courts violated the Eighth Amendment by applying an impermissible "causal nexus" test when assessing his non-statutory mitigating circumstances. *See Eddings v. Oklahoma*, 455 U.S. 104 (1982), and *McKinney v. Ryan*, 813 F.3d 798 (9th Cir. 2015) (en banc). The panel held that the sentencing court did not strip the mitigating circumstances of all weight by applying an unconstitutional causal-nexus test. The panel wrote that it is possible that the Arizona Supreme Court applied a rule contrary to *Eddings*, but did not need to resolve that issue because even if the Arizona Supreme Court erred in this regard, Sansing cannot show actual prejudice under *Brecht*.

Dissenting, Judge Berzon would grant the petition as to Claim 1, *Ring* error prejudice, and so would not reach the other challenges to the death sentence discussed in the majority opinion. She wrote that a court *granting* habeas relief must apply both the AEDPA/*Chapman* test as well as the standard set forth in *Brecht*; she therefore applied both tests. She wrote that the Arizona Supreme Court's application of the "harmless beyond a reasonable doubt" standard from *Chapman* was contrary to federal law, as clearly established by *Neder v. United States*, 527 U.S. 1 (1999), so this court owes no deference to its harmlessness determination. She would therefore review under *Brecht* whether the deprivation of the right to a jury determination had a "substantial and injurious effect" on Sansing's sentence, which was satisfied because Sansing presented sufficient evidence to allow a jury to conclude that, because of his crack cocaine use, his capacity to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law was "significantly impaired." Ariz. Rev. Stat. § 13-703(G)(1). She concurred in the majority's

analysis of Claims 4 and 8, relating to the factual basis offered when pleading guilty.

COUNSEL

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

Lacy Stover Gard (argued), Chief Counsel; John Pressley Todd, Special Assistant Attorney General; Mark Brnovich, Attorney General; Office of the Attorney General, Tucson, Arizona; for Respondents-Appellees.

ORDER

The opinion filed May 17, 2021, and appearing at 997 F.3d 1018, is amended by the opinion filed concurrently with this order. Judge Berzon's dissent is also amended by the dissent filed concurrently with this order.

With these amendments, the panel unanimously votes to deny the petition for panel rehearing. Judge Callahan and Judge Watford vote to deny the petition for rehearing en banc, and Judge Berzon so recommends. The full court has been advised of the petition for rehearing en banc, and no judge requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35. The petition for panel rehearing and rehearing en banc, filed June 27, 2022, is **DENIED**. No further petitions for panel rehearing or rehearing en banc will be entertained.

OPINION

WATFORD, Circuit Judge:

In 1999, the State of Arizona sentenced John Sansing to death for the murder of Trudy Calabrese. This appeal arises from the district court's denial of Sansing's federal petition for a writ of habeas corpus, which is governed by the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA). The district court granted a certificate of appealability as to five claims, and we later issued a certificate of appealability as to a sixth. We agree with the district court that Sansing has not shown an entitlement to relief on any of his claims.

I. Factual and Procedural Background

Our summary of the facts is drawn from the Arizona Supreme Court's first opinion on direct appeal. *State v. Sansing*, 26 P.3d 1118, 1122–23 (Ariz. 2001) (*Sansing I*). Sansing's wife, Kara Sansing, provided much of this narrative when she testified during the penalty phase of Sansing's trial. (Like the parties, we refer to Sansing's family members by their first names to avoid confusion.)

On February 24, 1998, Sansing and Kara were on the fourth consecutive day of heavy crack cocaine consumption. Sansing called Kara throughout the day to discuss the need to obtain money to buy more drugs. He also informed her that he had purchased crack cocaine, smoked a portion of it, and was saving the rest for her. Kara returned home from work around 3:20 p.m., and the two immediately smoked the leftover crack cocaine.

That afternoon, Sansing contacted a local church to request delivery of a box of food for his family. With his four young children present, Sansing told Kara that he planned to rob whomever the church sent to deliver the food.

Shortly after 4:00 p.m., Trudy Calabrese parked her truck in front of the Sansing home. She entered the house and delivered two boxes of food, chatting with Kara in the kitchen while Sansing signed paperwork verifying the delivery. As Ms. Calabrese turned to leave, Sansing grabbed her from behind and threw her to the floor. With the assistance of Kara, Sansing bound Ms. Calabrese's wrists and legs with electrical cords.

According to Kara, Ms. Calabrese fought "a great deal" and begged Sansing not to hurt her. She pleaded for the children to call the police and prayed for God's help until

Sansing gagged her with a sock. Sansing struck Ms. Calabrese twice in the head with a wooden club with enough force to knock her unconscious. He then retrieved her keys and drove her truck to a nearby parking lot. When Sansing returned, Ms. Calabrese was conscious, at least according to Sansing's and Kara's later statements. (Sansing now disputes this fact, pointing to the testimony of a medical examiner who expressed doubt that Ms. Calabrese regained consciousness given the severity of her head injuries.)

Sansing dragged Ms. Calabrese upstairs to his bedroom, where he raped her. Her arms and legs were still bound. Kara overheard Sansing and Ms. Calabrese speaking to each other. (Sansing disputes that Ms. Calabrese spoke, pointing to the use of the gag and again to her head injuries.) After raping Ms. Calabrese, Sansing stabbed her three times in the abdomen with a knife from the kitchen. Kara described Sansing as "grinding" the knife inside of Ms. Calabrese, and the medical examiner saw signs that the knife had been twisted in her abdomen. Ms. Calabrese died from these wounds, likely several minutes after the stabbing.

Sansing took Ms. Calabrese's jewelry and traded it for crack cocaine.

That evening, a pastor of the church called the Sansing home to check on Ms. Calabrese's whereabouts. Sansing gave a false home address and told the pastor that the delivery had never arrived. Sansing later dragged Ms. Calabrese's body to his backyard and attempted to hide it behind a shed under a piece of old carpeting. He washed the club he had used to strike Ms. Calabrese and hid other evidence of the crime.

By the next day, a search party had located Ms. Calabrese's truck; inside was a note with the Sansings'

true home address. The police visited the home and found Ms. Calabrese's body in the backyard. Her head was wrapped in a plastic bag that was bound to her neck by ligatures, and the police discovered that she had been blindfolded. At the time of the search, Sansing had already gone to work. He went straight from work to his sister Patsy's house, where he confessed to having killed Ms. Calabrese. Patsy called their father, who reported the murder and Sansing's location to the police. Sansing peaceably surrendered to the officers who arrived at Patsy's house.

The State of Arizona charged Sansing with first-degree murder, kidnapping, armed robbery, and sexual assault. The State also provided notice of its intent to seek the death penalty. Two deputy public defenders, Emmet Ronan and Sylvina Cotto, were appointed to represent Sansing. Professing a desire not to put either his family or the Calabrese family through a trial, Sansing pleaded guilty in September 1998 to all charges in the indictment.

Sansing's trial therefore proceeded directly to the penalty phase, at which the trial judge considered the aggravating and mitigating circumstances associated with the murder. Following a three-day hearing, the trial judge sentenced Sansing to death in a detailed, 17-page special verdict. The Arizona Supreme Court affirmed Sansing's death sentence on direct appeal. *Sansing I*, 26 P.3d at 1132; *State v. Sansing*, 77 P.3d 30, 39 (Ariz. 2003) (*Sansing II*).

Sansing sought post-conviction review (PCR) in state court. The PCR court summarily dismissed four claims on the merits and a fifth claim as procedurally defaulted. The court rejected Sansing's remaining claim, which alleged ineffective assistance of trial counsel, in a reasoned opinion following a four-day evidentiary hearing. The Arizona

Supreme Court denied Sansing's petition for review without reaching the merits of his claims.

In 2011, Sansing filed a 29-claim petition for a writ of habeas corpus in federal court. The district court denied his petition and granted a certificate of appealability as to five of Sansing's claims. Sansing filed a timely notice of appeal from the district court's judgment. As noted above, we issued a certificate of appealability as to one additional claim.

II. Claim 1

We address first the district court's rejection of Claim 1, which is predicated on the alleged denial of Sansing's Sixth Amendment right to trial by jury. At the time of Sansing's trial, Arizona law mandated that the trial judge alone determine whether a sentence of death should be imposed following a conviction for first-degree murder. The United States Supreme Court declared that sentencing scheme unconstitutional in *Ring v. Arizona*, 536 U.S. 584 (2002). Soon thereafter, the Court granted Sansing's pending petition for a writ of certiorari, vacated the judgment in *Sansing I*, and remanded the case for further consideration in light of *Ring*. *Sansing v. Arizona*, 536 U.S. 954 (2002). On remand, the Arizona Supreme Court ruled that the denial of Sansing's right to a jury trial during the penalty phase was harmless beyond a reasonable doubt. *Sansing II*, 77 P.3d at 36–39. In Claim 1, Sansing alleges that the Arizona Supreme Court's harmless-error determination was "contrary to" or "an unreasonable application of" clearly established federal law. 28 U.S.C. § 2254(d)(1). We begin by providing additional background relevant to the analysis of this claim before turning to the merits.

A

After Sansing pleaded guilty to first-degree murder, Arizona law required the sentencing court to decide whether he should be sentenced to death or life in prison. Ariz. Rev. Stat. § 13-703(B) (1999). (Unless otherwise noted, we cite the 1999 version of the Arizona Revised Statutes.) To make that determination, the sentencing court engaged in a three-step analysis.

First, the sentencing court determined whether the State had proved beyond a reasonable doubt any of the ten statutory aggravating factors that render a defendant eligible for the death penalty. § 13-703(F). In this case, the sentencing court found two such factors had been proved: that Sansing "committed the offense in an especially heinous, cruel or depraved manner," § 13-703(F)(6); and that he "committed the offense as consideration for the receipt, or in expectation of the receipt, of anything of pecuniary value," § 13-703(F)(5).

Second, the sentencing court determined whether Sansing had proved by a preponderance of the evidence any of the five statutory mitigating circumstances. § 13-703(G). As relevant here, Sansing argued that his "capacity to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law was significantly impaired" by his use of crack cocaine. § 13-703(G)(1). The sentencing court declined to find the (G)(1) mitigating circumstance, given the evidence that Sansing had planned the robbery and attempted to avoid detection "before, during and after the murder."

The sentencing court also assessed the evidence supporting non-statutory mitigating circumstances—that is, any aspect of Sansing's life or any circumstance of the

offense "relevant in determining whether to impose a sentence less than death." § 13-703(G). Although Sansing failed to prove the (G)(1) mitigating circumstance, the court considered his drug-induced impairment to be a non-statutory mitigating circumstance. The court also found that Sansing had "accepted responsibility for his actions and [was] genuinely remorseful," and "that he had a difficult childhood and family background." The court gave only minimal weight to Sansing's lack of education and his family's love and support.

Third, and finally, the sentencing court weighed the aggravating factors against the mitigating circumstances to determine whether the mitigating circumstances were "sufficiently substantial to call for leniency." § 13-703(E). The court considered the mitigating circumstances not sufficiently substantial to outweigh the two aggravating factors it had found. The court therefore imposed a sentence of death.

The Arizona Supreme Court affirmed Sansing's death sentence after independently reviewing "the trial court's findings of aggravation and mitigation and the propriety of the death sentence." Ariz. Rev. Stat. § 13-703.01(A) (2001). The court upheld the sentencing court's finding that the murder had been committed in an especially cruel manner, which was sufficient on its own to sustain the (F)(6) aggravating factor, and chose not to reach whether the murder was also heinous or depraved. *Sansing I*, 26 P.3d at 1127–29. The court struck the (F)(5) aggravating factor because the facts did not "clearly indicate a connection between a pecuniary motive and the killing itself." *Id.* at 1124–27. The court agreed that Sansing had not established the level of impairment required for the (G)(1) mitigating circumstance. *Id.* at 1130–31. Independently reweighing

the evidence, the Arizona Supreme Court concluded that a sentence of death was appropriate "[g]iven the strength of the [remaining] aggravating factor in this case and the minimal value of the mitigating evidence." *Id.* at 1131.

As noted above, a year after *Sansing I*, the United States Supreme Court ruled Arizona's judge-based capital-sentencing scheme unconstitutional in *Ring v. Arizona*. "Because Arizona's enumerated aggravating factors operate as 'the functional equivalent of an element of a greater offense,'" the Court explained, "the Sixth Amendment requires that they be found by a jury." *Ring*, 536 U.S. at 609 (quoting *Apprendi v. New Jersey*, 530 U.S. 466, 494 n.19 (2000)).

To address the fallout from *Ring*, the Arizona Supreme Court consolidated all pending direct appeals in capital cases, including Sansing's. *State v. Ring*, 65 P.3d 915, 925 (Ariz. 2003) (*Ring III*). The court held that a *Ring* error is not structural and thus can be subject to harmless-error review. *Id.* at 936; *see Mitchell v. Esparza*, 540 U.S. 12, 17 (2003) (per curiam) (noting that the Supreme Court left this issue open in *Ring*). Under the legal standard announced by the Arizona Supreme Court, a *Ring* error is deemed harmless if (1) the evidence supporting an aggravating factor is so overwhelming that "no reasonable jury would have failed to find the factor established beyond a reasonable doubt," and (2) "no reasonable jury could find that the mitigation evidence adduced during the penalty phase is sufficiently substantial to call for leniency." *Ring III*, 65 P.3d at 944, 946 (internal quotation marks omitted). In other words, the court stated, "[u]nless we conclude beyond a reasonable doubt that a jury would impose a death sentence, we must remand the case for resentencing." *Id.* at 944 (citing *Neder v. United States*, 527 U.S. 1, 19 (1999)).

In *Sansing II*, the Arizona Supreme Court applied this harmless-error standard to Sansing's death sentence. As to the (F)(6) aggravating factor, which applies if the defendant committed the murder in an especially heinous, cruel, or depraved manner, the court held that the error under *Ring* was harmless beyond a reasonable doubt. The court based that holding on two independent grounds. First, given the facts to which Sansing had admitted when pleading guilty and to which he had stipulated during the sentencing phase, *see Sansing II*, 77 P.3d at 33–34 n.3, the court concluded that "any reasonable jury would have found that Sansing murdered [Ms. Calabrese] in an especially cruel manner." *Id.* at 35. Second, "[g]iven the overwhelming and uncontroverted evidence," the court determined that "any reasonable jury would have concluded that Sansing inflicted gratuitous violence upon [Ms. Calabrese], who was rendered helpless" during the crime. *Id.* at 36. As a result, "[n]o reasonable jury could have failed to find that [Ms. Calabrese's] murder was especially heinous." *Id.*

Shifting focus to Sansing's mitigating evidence, the Arizona Supreme Court held, beyond a reasonable doubt, that "[n]o reasonable jury would have concluded that Sansing met his burden to establish" either of the statutory mitigating circumstances he sought to prove (age and significant impairment due to drug use). *Id.* at 37–38. As to Sansing's non-statutory mitigating circumstances, the court concluded that "no reasonable jury could have given more than minimal weight" to most of the mitigating evidence Sansing relied on, although the court assumed that a reasonable jury "would have accorded some weight to Sansing's family's love and support and to the fact that he accepted responsibility for his crime." *Id.* at 39. But, considering the "brutality" of Ms. Calabrese's murder and the relatively weak mitigating evidence offered by Sansing,

the court determined beyond a reasonable doubt that "any reasonable jury would have concluded that the mitigating evidence was not sufficiently substantial to call for leniency." *Id.* The Arizona Supreme Court therefore affirmed Sansing's death sentence.

B

We turn now to the merits of Claim 1. The parties agree that Sansing was not afforded the jury-trial right announced in *Ring*, so the only issue is whether this error was harmless. At the outset, the parties dispute the scope of the rule established in *Ring*. Sansing contends that, like the Arizona Supreme Court, we should consider whether any rational jury, after weighing the aggravating factors against the mitigating circumstances, would have returned a sentence of death. The State responds that *Ring* established only that one or more aggravating factors must be found by the jury—nothing more. According to the State, we need ask only whether it is clear, beyond a reasonable doubt, that overwhelming and uncontroverted evidence established the (F)(6) aggravating factor, such that no rational jury would have failed to find it.

The district court agreed with the State, reasoning that "[t]o the extent the Arizona Supreme Court chose to include review of mitigation as part of its harmless error analysis, it did so as a matter of state law." The court therefore limited its analysis to the evidence supporting the aggravating factors, and concluded that the evidence of cruelty, heinousness, and depravity underlying the (F)(6) aggravating factor was so strong that Sansing was not prejudiced by the *Ring* error. The court also held, albeit without further analysis, that the Arizona Supreme Court's "review of the mitigating evidence, while not required by

Ring, was thorough, and its assessment of the evidence was not objectively unreasonable."

Months after the district court rejected Claim 1, we adopted a broader reading of *Ring* in *Murdaugh v. Ryan*, 724 F.3d 1104 (9th Cir. 2013). *Murdaugh* acknowledged that a narrow reading of the Supreme Court's decision "would extend the Sixth Amendment right no further than its express holding by concluding that a defendant only has a right to have a jury determine aggravating factors." *Id.* at 1115. But we nonetheless defined the scope of the right more broadly to include the "determination that 'there are no mitigating circumstances sufficiently substantial to call for leniency.'" *Id.* Thus, harmless-error review must encompass not only the finding of aggravating factors, but also "the existence or absence of mitigating circumstances." *Id.* at 1117.[1]

To establish prejudice, a federal habeas petitioner must demonstrate that a constitutional error resulted in "actual prejudice"—that is, a "substantial and injurious effect or influence" on the outcome. *Brecht v. Abrahamson*, 507 U.S. 619, 637 (1993). In *Murdaugh*, we applied the *Brecht* standard "without regard for the state court's harmlessness determination." 724 F.3d at 1118 (quoting *Pulido v. Chrones*, 629 F.3d 1007, 1012 (9th Cir. 2010)). That approach is no longer sound after *Brown v. Davenport*, 142 S. Ct. 1510 (2022). There, the Supreme Court clarified that "satisfying *Brecht* is only a necessary, not a sufficient, condition to relief." *Id.* at 1520. A federal habeas petitioner

[1] We need not decide whether the Supreme Court's decision in *McKinney v. Arizona*, 140 S. Ct. 702 (2020), calls into question this aspect of *Murdaugh*'s holding, since we conclude below that the State is entitled to prevail in any event.

must meet the requirements of AEDPA as well. So when, as here, the state court has determined on direct appeal that an error was harmless beyond a reasonable doubt—the standard required for review of non-structural constitutional errors under *Chapman v. California*, 386 U.S. 18 (1967)—a petitioner must demonstrate that the court "applied *Chapman* in an objectively unreasonable manner." *Davis v. Ayala*, 576 U.S. 257, 269 (2015) (internal quotation marks omitted).

We begin by deciding whether the Arizona Supreme Court's application of *Chapman* was objectively unreasonable under AEDPA. That determination requires us to ask whether "fairminded jurists" could agree with the Arizona Supreme Court's conclusion in *Sansing II* that the *Ring* error was harmless beyond a reasonable doubt. *Ayala*, 576 U.S. at 269. If so, relief is precluded under 28 U.S.C. § 2254(d)(1). In our view, fairminded jurists applying the governing beyond-a-reasonable-doubt standard could conclude that the absence of a jury trial did not affect either the finding of the (F)(6) aggravating factor or the determination that the mitigating evidence was not sufficiently substantial to call for leniency. Because Sansing fails to satisfy AEDPA, we need not consider whether the absence of a jury trial resulted in actual prejudice under *Brecht*.

1. *Finding of the (F)(6) aggravating factor*. The Arizona Supreme Court reasonably concluded that, given the overwhelming and uncontroverted evidence, any reasonable jury would have found that the murder was committed in both an "especially cruel" and an "especially heinous" manner. *Sansing II*, 77 P.3d at 33–36. Either finding is sufficient on its own to establish the (F)(6) aggravating factor. *State v. Gretzler*, 659 P.2d 1, 10 (Ariz. 1983).

Under Arizona law, a murder is committed in an especially cruel manner if "the victim consciously experienced physical or mental pain prior to death." *Sansing II*, 77 P.3d at 33 (quoting *State v. Trostle*, 951 P.2d 869, 883 (Ariz. 1997)). The victim need not be conscious, however, when "each and every wound" is inflicted. *Id.* (quoting *State v. Lopez*, 786 P.2d 959, 966 (Ariz. 1990)).

Here, the Arizona Supreme Court found cruelty established on three different grounds. The first was the mental anguish Ms. Calabrese suffered before Sansing struck her in the head with the wooden club, when he tackled her, threw her to the ground, and tied her up. As the court stated, Ms. Calabrese's "defensive wounds, her pleas for help, and her attempts to resist Sansing's attack leave no doubt [she] suffered mental anguish as she contemplated her ultimate fate." *Id.* at 34. The second ground was the mental and physical suffering Ms. Calabrese endured when Sansing raped her while her arms and legs remained bound. *Id.* And the third ground was the physical pain Ms. Calabrese endured as a result of the "substantial" blows to her head, which caused "tremendous bleeding," and the three stab wounds to her abdomen, which struck the inferior vena cava and penetrated her colon, stomach, large intestine, and kidney—wounds that the medical examiner testified "would have caused pain and would not have resulted in immediate death." *Id.* Fairminded jurists could conclude, beyond a reasonable doubt, that the evidence of at least one and likely all three of these grounds was overwhelming.

Sansing's principal argument in response is that a rational jury could have found that Ms. Calabrese did not regain consciousness after he delivered the blows to her head, which would mean that she was not conscious when he raped and stabbed her. That contention, of course, does

not negate the first of the grounds on which the Arizona Supreme Court based its cruelty determination. But the Arizona Supreme Court reasonably rejected Sansing's factual contention in any event. The evidence Sansing relies on—the testimony of the medical examiner who performed Ms. Calabrese's autopsy—is itself equivocal. The medical examiner did testify that he doubted Ms. Calabrese regained consciousness after the blows, but he also stated that it was not "medically unlikely or impossible" that she did. Both Sansing and Kara made statements affirmatively establishing that Ms. Calabrese did regain consciousness. Sansing told a reporter who interviewed him following his arrest that Ms. Calabrese had regained consciousness by the time he returned to the house after moving her truck, and that "after beating her so badly, he decided to kill her to end her suffering." According to the reporter, Sansing said: "She was suffering. I wanted to end it. . . . I wasn't playing God. I just couldn't handle seeing the condition she was in." And Kara testified during the penalty phase that Ms. Calabrese was conscious during the rape, which occurred after Sansing inflicted the blows to her head. Fairminded jurists could conclude that, in the face of these admissions from Sansing and Kara, no rational jury could have found that Ms. Calabrese remained unconscious throughout almost the entirety of the attack.

Sansing's argument concerning the cruelty finding suffers from a lack of supporting legal authority as well. Sansing contends that under Arizona law the victim must have been conscious at the time of death, but the principal authority he relies on, *State v. Wallace*, 728 P.2d 232, 237 (Ariz. 1986), did not accurately state Arizona law at the time of his sentencing. As the Arizona Supreme Court held in *Sansing I*, "cruelty can exist even if the victim remained conscious for only a short period during the attack." 26 P.3d

at 1127; *see also State v. Schackart*, 947 P.2d 315, 325 (Ariz. 1997). Ms. Calabrese was indisputably conscious for at least a portion of the attack at issue here.

The Arizona Supreme Court's conclusion as to heinousness is also reasonable. Under Arizona law, the trier of fact considers the following factors in determining whether the defendant committed the murder in an especially heinous manner: "(1) relishing of the murder by the defendant; (2) infliction of gratuitous violence; (3) needless mutilation; (4) senselessness of the crime; and (5) helplessness of the victim." *Sansing II*, 77 P.3d at 35 (citing *Gretzler*, 659 P.2d at 11). A finding of helplessness "in conjunction with another *Gretzler* factor, such as gratuitous violence," is sufficient to establish that the murder was especially heinous. *Id.* at 36. The helplessness factor is present "when a victim is physically unable to resist the murder." *Id.* at 35 (citing *State v. Gulbrandson*, 906 P.2d 579, 602 (Ariz. 1995)). Gratuitous violence consists of "violence beyond that necessary to kill." *Id.* (citing *State v. Rienhardt*, 951 P.2d 454, 465 (Ariz. 1997)).

Here, as the Arizona Supreme Court concluded, "[o]verwhelming and uncontroverted evidence establishes beyond a reasonable doubt that Sansing inflicted gratuitous violence upon [Ms. Calabrese], a helpless victim." *Id.* at 36. Ms. Calabrese was helpless to defend herself because Sansing bound her wrists and legs with electrical cords. Sansing inflicted gratuitous violence upon her because "[t]he rape, facial wounds, neck ligatures, gagging, blind-folding, and grinding of the knife constitute violence beyond that necessary to kill." *Id.*

2. *Assessment of the mitigating circumstances*. The Arizona Supreme Court reasonably concluded, beyond a reasonable doubt, that no rational jury would have found the

existence of any statutory mitigating circumstances or found that Sansing's non-statutory mitigating circumstances were sufficiently substantial to call for leniency. *Id.* at 36–39.

As to the statutory mitigating circumstances, Sansing attempted to prove, based on his consumption of crack cocaine before the murder, that his "capacity to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law was significantly impaired." Ariz. Rev. Stat. § 13-703(G)(1). Sansing presented evidence that he consumed a large quantity of crack cocaine in the four days leading up to the murder. Drug use can constitute a mitigating circumstance under § 13-703(G)(1), but only if the defendant can show, typically through expert testimony, that a causal nexus exists between his ingestion of drugs and his commission of the offense. *Murdaugh*, 724 F.3d at 1119. The Arizona Supreme Court reasonably concluded that Sansing "failed entirely" to make that showing. *Sansing II*, 77 P.3d at 37. Most glaringly, Sansing did not present any expert testimony establishing the requisite causal nexus, *see id.*, which distinguishes this case from our decision in *Murdaugh*, where such evidence had been presented. *See* 724 F.3d at 1121 (noting that the record included "expert testimony establishing a direct causal link between Murdaugh's drug use and the murder"); *see also id.* at 1119. The Arizona Supreme Court also reasonably concluded that none of the other evidence Sansing presented, including Kara's testimony about their drug use on the day of the murder, was sufficient to allow a reasonable jury to find that Sansing's crack cocaine use caused the level of impairment that the (G)(1) mitigating circumstance requires. *Sansing II*, 77 P.3d at 37.

Although the lack of evidence supporting a causal nexus was alone fatal to Sansing's claim, the Arizona Supreme

Court noted additional deficiencies that would preclude a reasonable jury from finding the existence of the (G)(1) mitigating circumstance. The court concluded that the "deliberate actions" Sansing took in carrying out the crime, which were proved by uncontroverted evidence, "refute his impairment claim." *Id.* at 38. For example, Sansing devised a plan that involved robbing the person who would deliver a charitable gift of food, and he "contacted two different churches in his attempt to lure an unsuspecting victim to his home." *Id.* Far from supporting his impairment claim, these and the other actions Sansing took, such as driving Ms. Calabrese's truck to a nearby parking lot after the initial attack, "establish that the drug use did not overwhelm Sansing's ability to control his conduct." *Id.*; *see also State v. Kiles*, 857 P.2d 1212, 1229 (Ariz. 1993).

The Arizona Supreme Court further relied on uncontroverted evidence establishing that Sansing took steps to avoid detection after committing the murder. He moved Ms. Calabrese's truck away from his home, and when a church pastor called later that night to inquire about Ms. Calabrese, "Sansing gave him a false address and told him that [Ms. Calabrese] never arrived." *Sansing II*, 77 P.3d at 38. In addition, Sansing washed blood from the club that he used to perpetrate the initial attack, and he attempted to hide Ms. Calabrese's body after the murder. These steps to thwart discovery of the crime, the Arizona Supreme Court reasonably concluded, "negate any possibility that a reasonable jury would find that Sansing's capacity to appreciate the wrongfulness of his conduct was significantly impaired." *Id.*; *see also Rienhardt*, 951 P.2d at 466.

In short, while we acknowledge that fairminded jurists could disagree on this point, we think the Arizona Supreme Court reasonably concluded, beyond a reasonable doubt, that

no rational jury would have found the existence of the (G)(1) mitigating circumstance. The "possibility for fairminded disagreement" requires us to defer to the state court's determination, regardless of whether we would have reached the same conclusion following an independent review of the record. *Harrington v. Richter*, 562 U.S 86, 103 (2011).

As to the non-statutory mitigating circumstances, Sansing highlighted his impairment at the time of the murder and the fact that several family members attributed Sansing's violent conduct to his drug use. Sansing also emphasized his deep remorse and his decision to accept responsibility for his crimes by pleading guilty. In addition, Sansing submitted a report by a mitigation specialist that detailed his dysfunctional family background. The report noted that as a child Sansing witnessed frequent incidents of domestic violence between his mother and stepfather, that he began using drugs in the fifth grade, and that he dropped out of high school after his freshman year. Lastly, Sansing pointed to his rehabilitative potential and his family's love and support as non-statutory mitigating circumstances.

A fairminded jurist could nonetheless conclude, beyond a reasonable doubt, that "any reasonable jury would have concluded that the mitigating evidence was not sufficiently substantial to call for leniency." *Sansing II*, 77 P.3d at 39. The Arizona Supreme Court noted that "[t]he brutality of this murder clearly sets it apart from the norm of first degree murders." *Id.* And the court reasonably determined that "[c]ollectively, the mitigating evidence [was] minimal at most." *Id.* The court carefully reviewed the record and reached a reasonable conclusion under the standard established in *Chapman* and *Neder v. United States*, 527 U.S. 1 (1999).

C

The dissent disagrees with our decision to defer to the Arizona Supreme Court's harmless-error determination concerning the (G)(1) mitigating circumstance. According to the dissent, no deference is owed under AEDPA because the state court applied the wrong legal standard in making its determination. We disagree. The dissent is correct in asserting that *Neder* provides the applicable standard and that the Arizona Supreme Court was required to determine "whether a rational jury *could* have found that the facts called for leniency." *Murdaugh*, 724 F.3d at 1118 (emphasis added); *see also Neder*, 527 U.S. at 19; *United States v. Perez*, 962 F.3d 420, 442 (9th Cir. 2020). In our view, that is the standard the Arizona Supreme Court applied, even if it did not use the phrase "could have found" in explaining its conclusion.

As noted above, in *Sansing II* the court applied the harmless-error standard it had established in *Ring III*, a standard that was itself drawn from *Neder*. *See Sansing II*, 77 P.3d at 33; *Ring III*, 65 P.3d at 944 (citing *Neder*, 527 U.S. at 19). Under that standard, the Arizona Supreme Court's inquiry "focuse[d] on whether no reasonable jury *could* find that the mitigation evidence adduced during the penalty phase [was] sufficiently substantial to call for leniency." *Sansing II*, 77 P.3d at 33 (quoting *Ring III*, 65 P.3d at 944) (emphasis added). In other words, the court applied the same standard the dissent contends that *Neder* required.

It is true, as the dissent asserts, that in finding harmless error as to the (G)(1) mitigating circumstance, the Arizona Supreme Court framed its conclusion in terms of what any reasonable jury "would have" found rather than what a reasonable jury "could have" found. But nothing of

substance turns on this choice of language. We know that to be true because the Supreme Court in *Neder* used the same "would have" phrase in describing the harmless-error standard adopted there. It instructed reviewing courts to ask, "Is it clear beyond a reasonable doubt that a rational jury *would have* found the defendant guilty absent the error?" *Neder*, 527 U.S. at 18 (emphasis added). The Arizona Supreme Court asked that very question and concluded that the answer here is yes.

The dissent contends that, in answering this question, the state court ignored and discounted Sansing's evidence and generally failed to view the evidence in the light most favorable to him. We do not read the Arizona Supreme Court's decision that way. Rather, we understand the court to have concluded that Sansing's evidence, even if credited, was simply insufficient to allow a rational jury to find the existence of the (G)(1) mitigating circumstance, given his complete failure to establish a causal nexus and the uncontroverted evidence that otherwise refuted his impairment claim. The court stated that, given these evidentiary deficiencies, "[n]o reasonable jury would have concluded that Sansing met his burden to establish that his ability to control his behavior or his capacity to appreciate the wrongfulness of his conduct was significantly impaired." *Sansing II*, 77 P.3d at 37. If *no* reasonable jury would have found a given fact, then the defendant necessarily failed to present "sufficient evidence to permit a finding in his favor." Dissent at 46 (emphasis omitted). The Arizona Supreme Court thus asked the right question here; the dissent's disagreement is simply with the answer the court gave.

III. Claim 2

We turn next to Claim 2, which alleges that Sansing's trial counsel rendered ineffective assistance in presenting his

mitigation defense during the penalty phase. Sansing's two attorneys, Cotto and Ronan, divided responsibilities at the penalty phase. Cotto assumed responsibility for disputing the aggravating factors, and Ronan handled Sansing's mitigation defense. We therefore evaluate only Ronan's performance within the *Strickland v. Washington*, 466 U.S. 668 (1984), framework.

The PCR court held that Sansing failed to establish either deficient performance or prejudice under *Strickland*. Sansing contends that the PCR court's rejection of Claim 2 "was contrary to, or involved an unreasonable application of, clearly established Federal law," and "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). Section 2254(d) limits our review "to the record that was before the state court that adjudicated the claim on the merits." *Cullen v. Pinholster*, 563 U.S. 170, 181 (2011).

We conclude that, as to most of the challenged aspects of Ronan's representation, Sansing has not demonstrated that the PCR court's resolution of *Strickland*'s deficient-performance prong was objectively unreasonable. As to the two remaining aspects of the representation, we conclude that the PCR court reasonably determined that Sansing has not demonstrated prejudice.

A

We begin by assessing the PCR court's basis for concluding that Ronan did not render deficient performance, applying the "doubly deferential" standard of review mandated by AEDPA. *Knowles v. Mirzayance*, 556 U.S. 111, 123 (2009).

Sansing contends that several aspects of Ronan's performance fell below the Sixth Amendment standard for effective representation. First, Sansing claims that Ronan failed to provide his experts with the materials they needed "to develop an accurate profile of [his] mental health." *Clabourne v. Lewis*, 64 F.3d 1373, 1385 (9th Cir. 1995). Ronan could not specifically recall whether he gave the relevant files to Sansing's experts, but he testified that there was no reason why he would not have followed his standard practice of doing so. Noting that counsel is "strongly presumed to have rendered adequate assistance," *Strickland*, 466 U.S. at 690, the PCR court found no reason to doubt that Ronan did in fact provide the records to the experts.

Fairminded jurists could conclude that Sansing failed to overcome the presumption of competence accorded to Ronan's representation. *See Pinholster*, 563 U.S. at 194. The strongest contrary evidence Sansing can muster is a discrepancy in the report of Dr. Kathryn Menendez, who assessed Sansing for a learning disability. Her report states that Sansing described himself as "an average student," but the report does not mention that his grades in middle school were well below average—mostly D's and F's. From this inconsistency, one might infer that Dr. Menendez never received the school records from Ronan. But one could also infer that Dr. Menendez merely recorded Sansing's statement and failed to cross-reference her interview notes with the records Ronan had given her. The conflicting inferences that may reasonably be drawn from this evidence preclude us from saying that the PCR court's decision was "based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d)(2).

Second, Sansing contends that Ronan performed deficiently by failing to introduce Dr. Menendez's diagnosis that Sansing suffers from an anti-social personality disorder. The PCR court found that Ronan made a strategic decision not to present this evidence. Ronan testified at the evidentiary hearing that, "[b]ased on the report as I have now seen it, I would not see any reason to call [Dr. Menendez]" to introduce this diagnosis.

The PCR court reasonably determined that Ronan's choice not to call Dr. Menendez as a witness fell "well within the range of professionally reasonable judgments." *Strickland*, 466 U.S. at 699; *see Crittenden v. Ayers*, 624 F.3d 943, 968 n.15 (9th Cir. 2010). Evidence of Sansing's anti-social personality disorder could have called into question the sincerity of Sansing's repeated professions of remorse, *see Beardslee v. Woodford*, 358 F.3d 560, 582 (9th Cir. 2004), even if this diagnosis can be mitigating under Arizona law, *see Lambright v. Schriro*, 490 F.3d 1103, 1125 (9th Cir. 2007). As we have observed, a "remorse-oriented strategy" can sometimes represent the defendant's best path to avoid a death sentence. *Elmore v. Sinclair*, 799 F.3d 1238, 1250 (9th Cir. 2015).

Finally, Sansing alleges that Ronan's investigation into and presentation of his family background was deficient in several respects. We disagree. For each aspect of Ronan's representation, there is a "reasonable argument that counsel satisfied *Strickland*'s deferential standard." *Richter*, 562 U.S. at 105.

Sansing contends that Ronan failed to uphold his "obligation to conduct a thorough investigation of [Sansing's] background." *Williams v. Taylor*, 529 U.S. 362, 396 (2000). As the PCR court noted, however, Sansing's "difficult childhood was discovered, evaluated, and

reported" by the defense team's mitigation specialist, Pamela Davis. Davis's investigative efforts were extensive. She frequently visited Sansing in person and regularly corresponded with him about his upbringing and drug use. She spoke with Kara and Sansing's sister Patsy in Arizona. Davis traveled to Nevada to interview Sansing's mother, Glenda, and his sister Loretta. Davis also traveled to Utah to meet with Sansing's father, stepmother, and two half-siblings, and to collect court records related to Sansing's criminal history. And Davis traveled to Alabama to interview two more siblings, Allen and Susan, as well as Sansing's aunts and uncles.

Next, Sansing targets Ronan's failure to present expert testimony causally linking his dysfunctional upbringing to the circumstances of the murder. At the PCR evidentiary hearing, Sansing presented the testimony of a developmental psychologist, Dr. Paul Miller. Dr. Miller viewed several events in Sansing's childhood—multiple changes in residence, the constant proximity to domestic violence, his mother's divorces, and poor father figures, among others—as "risk factors" that molded Sansing's personality. He opined that these risk factors increased the probability of a "disruptive adulthood." Notably, Dr. Miller declined to offer an opinion on the "role [the risk factors] may have played in the offense" committed by Sansing.

The PCR court reasonably found that Ronan made a strategic decision not to present expert testimony linking Sansing's family background to the crime. Although a different calculus might apply if the case had been tried before a jury, Ronan believed that the sentencing judge "with his background and experience would understand the information that was going to be presented in" the Davis letter. This choice did not fall "outside the wide range of

professionally competent assistance." *Strickland*, 466 U.S. at 690. Much of the family-background evidence "was neither complex nor technical"; it merely required the judge to make "logical connections of the kind a layperson is well equipped to make." *Wong v. Belmontes*, 558 U.S. 15, 24 (2009) (per curiam).

Sansing also criticizes Ronan's method of presenting his traumatic childhood to the sentencing judge. Citing the 1989 American Bar Association Death Penalty Guidelines, Sansing argues that Ronan should have relied on the live testimony of his family members instead of (or in addition to) Davis's written report. But restatements of professional standards, such as the ABA guidelines, are useful "only to the extent they describe the professional norms prevailing when the representation took place." *Bobby v. Van Hook*, 558 U.S. 4, 7 (2009) (per curiam). A fairminded jurist could credit Davis's testimony that the submission of a written report was the standard way to present family-background evidence to a judge in Arizona in 1999.

B

Sansing challenges two remaining aspects of Ronan's representation during the penalty phase. As to both, we will assume for the sake of argument that Ronan's performance was deficient.

The first concerns an additional alleged deficiency in the presentation of evidence related to Sansing's family background. Sansing notes that new evidence was discovered post-conviction and presented during the PCR proceedings, which he contends Ronan should have discovered and presented during the penalty phase. For instance, Sansing's siblings testified that their mother, Glenda, neglected her children, frequently beat them, and

left her bedroom door open while she had sex. Glenda sometimes hit Sansing on the head with a spoon when he refused to eat his vegetables, and one stepfather would physically fight Sansing, then only 11 years old, to show him "what a real man can do." Witnesses also described numerous violent episodes between Glenda and her partners.

This new evidence "largely duplicated the mitigation evidence at trial." *Pinholster*, 563 U.S. at 200. The sentencing court was informed that Glenda's parenting skills were "ineffective," that she kept the home in an "unacceptable" condition, that Sansing was "exposed weekly to domestic abuse, fueled by his mother's and step-father's abuse of alcohol," and that "there were hundreds of calls to the police for domestic abuse" and frequent visits to the hospital for Glenda. Davis also reported to the sentencing court that Sansing was devastated by the death of his maternal grandfather and afterwards suffered from a "lack of positive male role models." The sentencing court was aware that, in the midst of an unstable childhood, Sansing began abusing drugs at a young age and completed only one year of high school. All told, Ronan convinced the sentencing court, by a preponderance of the evidence, that Sansing had a difficult childhood and a dysfunctional family. Thus, even if the new evidence had been presented during the penalty phase, it would not have altered the character of Sansing's mitigation defense in any significant respect. Sansing has failed to show a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694.

The final aspect of Ronan's representation at issue involves his failure to investigate whether Sansing's drug use was causally linked to the murder. Ronan was aware that

Sansing's intoxication would be a principal focus of the penalty phase. According to Kara, when she returned home prior to Ms. Calabrese's arrival, Sansing "was acting cold," "wasn't his normal" self, and "was in another world," a state she attributed to his consumption of crack cocaine. Yet Ronan failed to contact anyone with the requisite expertise in substance abuse. During the PCR evidentiary hearing, Sansing presented new expert testimony that he contends Ronan should have presented during the penalty phase of the trial.

We will assume that Ronan performed deficiently by failing to present evidence of a causal link between Sansing's crack cocaine use and the murder he committed. We nonetheless reject Sansing's claim because the PCR court reasonably determined that he failed to show prejudice. The expert testimony Sansing relies on had defects that, the PCR court permissibly found, would have undercut its weight with the sentencing court.

Additional background on the expert testimony Sansing presented during the PCR evidentiary hearing is necessary before proceeding. The first expert Sansing presented was Dr. Richard Lanyon, an expert in clinical and forensic psychology. Dr. Lanyon discussed "the research showing that extreme and heavy cocaine use can cause psychosis, and that such states can last several hours." In his view, Sansing "entered some kind of severely abnormal mental state" as Ms. Calabrese turned to leave his home. But his conclusion rested entirely on how Sansing described the day's events during an interview with Dr. Lanyon years later. Sansing explained that he "became convinced" that Ms. Calabrese would report him to the police because she had witnessed him make a "surreptitious hand motion to his wife" indicating that Ms. Calabrese had not brought a purse. At

this point, Sansing asserted, he "stepped into a hole [where] everything's dark," and he could not see Ms. Calabrese, only "the outline of her figure." Sansing told Dr. Lanyon that his heart was "racing and going so fast" that he thought he was going to die. After tackling her, Sansing "did the subsequent things 'out of panic.'"

Dr. Lanyon deemed Sansing's stated belief that Ms. Calabrese intended to contact the police to be a "serious and pivotal cognitive distortion [that] could have been a product of a paranoid personality disorder, or independently, a product of a delusional psychotic mental state brought about by his cocaine intoxication." "This delusion," Dr. Lanyon concluded, "triggered a series of behaviors that were grossly out of character for him and are best explained by a psychotic mental state."

Sansing also presented the testimony of Dr. Edward French, an expert in pharmacology. He too viewed Sansing's statements as establishing that "his chronic use of methamphetamine and crack cocaine negatively impacted the underlying cognitive and emotional dysfunctions described by Dr. Lanyon, and thereby diminished his ability to control his conduct toward the victim and his behavior several hours thereafter." Dr. French further explained that his expert conclusion did not depend on the quantity of crack cocaine that Sansing had consumed.

In response, the State presented its own expert, Dr. Michael Bayless. Dr. Bayless, a forensic and clinical psychologist, pointed to evidence that "Sansing admitted he knew what he was doing and that he knew it was wrong." Rather than suffering from a "paranoid delusion," Sansing took steps to avoid prosecution, albeit steps that were poorly calculated to that end. Sansing told Dr. Bayless that "after he initially attacked the victim he was aware he had crossed

the line and decided that he would attempt to make it look like a murder secondary to robbery and sexual assault." (Sansing's admission to Dr. Bayless is consistent with Kara's account of what Sansing told her just before he raped Ms. Calabrese.) In Dr. Bayless's view, "there is no indication that [Sansing] was suffering from any psychosis."

The PCR court reasonably concluded that Sansing had not shown a reasonable probability that the testimony of Dr. Lanyon and Dr. French would have allowed him to establish the (G)(1) mitigating circumstance. Although Dr. Lanyon and Dr. French opined that Sansing suffered from cocaine-induced psychosis, they did not describe the requisite impact on Sansing's "capacity to appreciate the wrongfulness of his conduct" or to "conform his conduct to the requirements of law." Ariz. Rev. Stat. § 13-703(G)(1). Dr. Lanyon posited that Sansing was psychotic but acknowledged that Sansing knew "he crossed the line," feared being arrested, and acted to avoid being caught. And Dr. French defined psychosis broadly as a "thought disorder" that prevents an individual from "cop[ing] well with emotional things that are occurring in [his] environment." This type of expert opinion falls short of proving substantial impairment under Arizona law, particularly given the evidence establishing Sansing's attempts to avoid prosecution. *See Medrano*, 914 P.2d at 228; *Kiles*, 857 P.2d at 1228–29.

Moreover, Dr. Lanyon and Dr. French did not base their conclusions on the amount of cocaine Sansing ingested. Instead, they drew speculative inferences from Sansing's descriptions of how he felt during the attack. The PCR court reasonably concluded that the sentencing court would have discounted expert testimony "marred by Sansing's motive to

fabricate." *See State v. Poyson*, 7 P.3d 79, 89 (Ariz. 2000); *Medrano*, 914 P.2d at 227.

Nor would the new expert testimony have significantly altered the character of the non-statutory mitigating circumstances before the sentencing court. The court already knew that Sansing was under the influence of crack cocaine at the time of the crime. Because Ronan had introduced enough evidence to establish Sansing's impairment as a non-statutory mitigating circumstance, the opinions of Dr. Lanyon and Dr. French would have been cumulative on that issue. *See Smith v. Ryan*, 823 F.3d 1270, 1296 (9th Cir. 2016). Thus, the PCR court reasonably concluded that the likelihood of a different sentencing outcome was merely "conceivable," not reasonably probable. *Richter*, 562 U.S. at 112.[2]

Finally, Sansing contends that, even if he has not shown a reasonable probability of a different outcome during the penalty phase of the trial, we should consider the impact Ronan's deficient performance had on the outcome of his direct appeal. Specifically, Sansing argues that, had Ronan presented expert testimony on crack cocaine abuse, there is a reasonable probability that the Arizona Supreme Court

[2] Although it does not impact our prejudice analysis, we note one credibility concern with the testimony of Dr. Bayless. Based primarily on a hand gesture Sansing allegedly made during their interview together, Dr. Bayless inferred an explanation for Sansing's decision to rape Ms. Calabrese—namely, that "her dress flew up," thereby exposing her vaginal area. The PCR court found Dr. Bayless's testimony credible, notwithstanding the fact that Ms. Calabrese was wearing pants during the attack. Despite the baseless nature of Dr. Bayless's testimony on this point, we do not think it affected the outcome here, as the reason Sansing committed the rape was immaterial both to the sentencing court's decision and to the PCR court's prejudice analysis.

would not have found the *Ring* error harmless beyond a reasonable doubt in *Sansing II*.

We cannot accept Sansing's invitation to consider whether the testimony of Dr. French and Dr. Lanyon would have affected the outcome of his direct appeal. The PCR court did not fail to apply "clearly established Federal law, as determined by the Supreme Court," when it assessed only the probability of a different outcome at the penalty phase of the trial. 28 U.S.C. § 2254(d)(1). The Supreme Court has not yet held that courts must evaluate the impact of trial counsel's deficient performance on the outcome of a petitioner's direct appeal. *Cf. Weaver v. Massachusetts*, 137 S. Ct. 1899, 1910–11 (2017) (requiring petitioner to show a reasonable probability of a different outcome *at trial*, even though trial counsel's deficient performance consisted of failing to object to structural error that would have entitled petitioner to automatic reversal on direct appeal). Thus, under AEDPA, we cannot fault the PCR court for viewing the scope of *Strickland*'s prejudice analysis as extending no further than the trial itself.

IV. Claims 4 and 8

Sansing raises two closely related claims, Claims 4 and 8, stemming from the factual basis he offered when pleading guilty and a related sentencing stipulation. In Claim 8, which we address first, Sansing contends that he did not knowingly and intelligently waive his privilege against self-incrimination when admitting a particular fact during the plea colloquy. In Claim 4, he alleges that Ronan rendered ineffective assistance during the guilty-plea process in violation of his right to counsel under the Sixth Amendment.

A

Sansing frames Claim 8 as a due process challenge to the factual basis he provided during the plea colloquy. When he entered his guilty pleas, Sansing signed a written factual basis and orally attested to its truth at the change-of-plea hearing. That factual basis included an admission that "the victim was still conscious, alive and tied up with cords" when Sansing returned to the house after moving Ms. Calabrese's truck (and thus was likely conscious when he raped her). Sansing alleges that he was unaware that his admission that Ms. Calabrese was conscious during the rape could be used to prove cruelty under the (F)(6) aggravating factor. For this reason, Sansing argues, the waiver of his privilege against self-incrimination was not knowing and intelligent. Because the PCR court summarily denied this claim, we can grant relief only if no reasonable application of the Supreme Court's precedent as of 2008 "could have supported" the result. *Richter*, 562 U.S. at 102.

Sansing relies on the Supreme Court's decision in *Boykin v. Alabama*, 395 U.S. 238 (1969), but that case did not require the trial court to inform Sansing during the plea colloquy that the State could rely on the factual basis during the penalty phase. To ensure that a guilty plea is "intelligent and voluntary," the trial court must advise the defendant of three constitutional rights he waives by pleading guilty: his privilege against compulsory self-incrimination, his right to a jury trial, and his right to confront witnesses against him. *Id.* at 242–44. The trial court provided those advisements to Sansing during his change-of-plea hearing. The Supreme Court has not yet held that the trial court must affirmatively discuss during the plea colloquy the potential impact a defendant's factual admissions may have on capital sentencing proceedings. Section 2254(d)(1) "does not

require state courts to *extend* [the Supreme Court's] precedent or license federal courts to treat the failure to do so as error." *White v. Woodall*, 572 U.S. 415, 426 (2014).

B

In Claim 4, Sansing asserts an ineffective-assistance-of-counsel claim that shares the same factual predicate as Claim 8. We issued a certificate of appealability for this claim under 28 U.S.C. § 2253(c). *See Slack v. McDaniel*, 529 U.S. 473, 484 (2000).

Claim 4 centers on the same admission that Ms. Calabrese was conscious during the rape, but it encompasses a related sentencing stipulation as well. During the penalty phase, Sansing stipulated to the admission of hearsay statements made by his children so that the State would not call them as witnesses. The children reported that Sansing planned to rob whomever delivered the box of food, and they described how the attack unfolded. In addition, Sansing stipulated that Victoria Harker, a journalist, would have testified that Sansing told her while awaiting trial that "after raping and beating [Ms. Calabrese] so badly, he decided to kill her to end her suffering," and that when he returned from moving her truck, Ms. Calabrese "had regained consciousness."

Sansing contends that Ronan rendered ineffective assistance because (1) he did not inform Sansing that the State could use the factual basis during the penalty phase of his trial; (2) he permitted Sansing to admit that Ms. Calabrese was conscious during the rape even though that was not an element of any of the charged offenses; and (3) he stipulated to the admission of out-of-court statements by Sansing's children and Harker without first interviewing them.

Because the PCR court denied this claim without reasoning, we are again precluded from granting relief unless no reasonable application of Supreme Court precedent "could have supported" the result. *Richter*, 562 U.S. at 102. Here, we need discuss only the prejudice prong of *Strickland*. Sansing alleges that, absent Ronan's deficient performance, he would not have admitted Ms. Calabrese was conscious and would not have agreed to the sentencing stipulation. To establish prejudice under *Strickland*, he must show a reasonable probability that he would have received a different sentence had the admission and sentencing stipulation not been offered. *See Strickland*, 466 U.S. at 694.

Even accepting that Ronan rendered ineffective assistance in the three respects described above, a fairminded jurist could conclude that Sansing failed to show a reasonable probability he would have received a different sentence. Sansing's claim of prejudice is refuted by the State's ability to call witnesses who would have established the same facts covered by the factual basis and sentencing stipulation. The admission of Ms. Calabrese's consciousness in the factual basis did not change the mix of evidence before the sentencing court because Sansing had already told Harker that "the victim had regained consciousness" when he returned from moving Ms. Calabrese's truck, and that he killed her to "end her suffering." Nor was Ronan's use of a sentencing stipulation prejudicial, given that Sansing presented no evidence that his children or Harker would have testified differently if Ronan had refused to stipulate to the admission of their out-of-court statements. In other words, the State could have called Harker to repeat Sansing's admission that Ms. Calabrese was conscious, *see* Ariz. R. Evid. 801(d)(2)(A), and the State could have replaced the sentencing stipulation with in-court

testimony by Sansing's children. Their statements, moreover, largely tracked the narrative that Kara provided when she testified during the penalty phase.

V. Claim 7

In Claim 7, Sansing alleges that the Arizona courts violated the Eighth Amendment by applying an impermissible "causal nexus" test when assessing his non-statutory mitigating circumstances. *See Eddings v. Oklahoma*, 455 U.S. 104, 110 (1982).

Beginning in 1989, and continuing through the time of Sansing's trial in 1999, Arizona courts frequently applied "a 'causal nexus' test for nonstatutory mitigation that forbade as a matter of law giving weight to mitigating evidence, such as family background or mental condition, unless the background or mental condition was causally connected to the crime." *McKinney v. Ryan*, 813 F.3d 798, 802 (9th Cir. 2015) (en banc). In 2004, the Supreme Court "unequivocally rejected" causal-nexus tests like Arizona's. *Smith v. Texas*, 543 U.S. 37, 45 (2004) (per curiam); *see Tennard v. Dretke*, 542 U.S. 274, 285 (2004). We later held that *Tennard* and *Smith* apply retroactively on federal habeas review. *Schad v. Ryan*, 671 F.3d 708, 723 (9th Cir. 2011) (per curiam).

Sansing contends that the sentencing court and the Arizona Supreme Court both applied the causal-nexus test we condemned in *McKinney*. We address each court's actions in turn.

The sentencing court did not treat "would-be mitigation evidence as legally irrelevant in violation of *Eddings*." *McKinney*, 813 F.3d at 818. Although the court evaluated Sansing's evidence of intoxication for a causal link to the

crime, "[w]hen applied solely in the context of statutory mitigation under § 13-703(G)(1), the causal nexus test does not violate *Eddings*." *Id.* at 810. The court still considered Sansing's impairment to be a non-statutory mitigating circumstance, which shows that it "did not exclude evidence from [its] mitigation assessment based solely on the lack of a causal nexus." *Mann v. Ryan*, 828 F.3d 1143, 1159 (9th Cir. 2016) (en banc).

The sentencing court also reduced the weight accorded certain mitigating circumstances due to the absence of a causal nexus, a choice not foreclosed by *Eddings*. *See Poyson v. Ryan*, 879 F.3d 875, 888 (9th Cir. 2018). After finding that Sansing "has shown by a preponderance of the evidence that he had a difficult childhood and family background," the court noted that there was no "causal link to the horrific crime." On that basis, the court did "not give significant mitigating weight" to this factor. Similarly, the court gave "only minimal weight" to the evidence of love and support from Sansing's family "because it did not prevent the defendant from committing this horrible crime." The sentencing court's reference to the weight of these factors bolsters our conclusion that it did not strip the mitigating circumstances of all weight by applying an unconstitutional causal-nexus test.[3]

[3] For the same reason, we reject Sansing's argument that the Arizona Supreme Court improperly employed a causal-nexus test in *Sansing II* when it held that a rational jury would have given "only minimal weight" to Sansing's difficult childhood and lack of education absent a "causal link" to the crime. 77 P.3d at 39. As discussed, the lack of a causal nexus may appropriately bear on the weight to be given mitigating evidence, and a jury is "free to assign less weight to mitigating factors that did not influence a defendant's conduct at the time of the crime." *Hedlund v. Ryan*, 854 F.3d 557, 587 n.23 (9th Cir. 2017). Thus, the

Sansing argues that the Arizona Supreme Court also applied an impermissible causal-nexus test when adjudicating his claim in *Sansing I* that the sentencing court violated the Eighth Amendment. He highlights the Arizona Supreme Court's assertion that "'Arizona law states that a difficult family background is *not relevant* unless the defendant can establish that his family experience *is linked to his criminal behavior*.'" *Sansing I*, 26 P.3d at 1129–30 (emphasis added) (quoting *State v. Djerf*, 959 P.2d 1274, 1289 (Ariz. 1998)). And he points to the court's reliance on *Djerf* and *State v. Hoskins*, 14 P.3d 997 (Ariz. 2000), two cases we have identified as examples of Arizona's unconstitutional causal-nexus test. *See McKinney*, 813 F.3d at 814–15.

These factors raise the possibility that the Arizona Supreme Court applied a rule contrary to *Eddings*. We need not resolve that issue, however, because even if the Arizona Supreme Court erred in this regard, Sansing cannot show actual prejudice from the error under *Brecht*. *See Djerf v. Ryan*, 931 F.3d 870, 885–87 (9th Cir. 2019); *Greenway v. Ryan*, 866 F.3d 1094, 1100 (9th Cir. 2017) (per curiam). We see nothing in the record remotely suggesting that the Arizona Supreme Court would have reached a different conclusion had it followed the sentencing court's lead and accorded Sansing's difficult family background minimal weight rather than no weight.

Arizona Supreme Court permissibly "raised the issue of a causal nexus to determine the weight that a hypothetical jury would have given relevant mitigating evidence." *Murdaugh*, 724 F.3d at 1122 (internal quotation marks omitted).

VI. Claim 12

In Claim 12, Sansing alleges that the sentencing court violated his Eighth Amendment rights by refusing to consider a letter submitted by Ms. Calabrese's 10-year-old daughter. In the letter, handwritten and addressed to the sentencing judge, Ms. Calabrese's daughter expressed her view that Sansing "should go to jail instead of dying." The Arizona Supreme Court upheld the sentencing court's refusal to consider the letter on the ground that it was "irrelevant to either the defendant's character or the circumstances of the crime." *Sansing I*, 26 P.3d at 1129. The court also noted that state law forbade "the consideration of 'any recommendation made by the victim regarding the sentence to be imposed.'" *Id.* (quoting Ariz. Rev. Stat. § 13-703(D) (2001)).

Sansing contends that the Arizona Supreme Court's decision involved an unreasonable application of the Supreme Court's Eighth Amendment precedent, but relief on this claim is precluded under 28 U.S.C. § 2254(d)(1). The Supreme Court has held that the Eighth Amendment prohibits the State from introducing the victim's family's recommendation that the defendant be put to death. *Booth v. Maryland*, 482 U.S. 496, 502–03 (1987); *see Bosse v. Oklahoma*, 137 S. Ct. 1, 2 (2016) (per curiam) (noting that *Booth* remains good law on this point). But the Court has never held that a defendant in a capital case is entitled to have the jury consider the victim's family's recommendation of leniency. Indeed, to our knowledge, no court has adopted that interpretation of the Eighth Amendment, and at least two circuits and a number of state high courts have rejected it. *See United States v. Brown*, 441 F.3d 1330, 1351–52 n.8 (11th Cir. 2006); *Robison v. Maynard*, 829 F.2d 1501, 1504–05 (10th Cir. 1987); *see also Kaczmarek v. State*, 91 P.3d 16,

32 n.71 (Nev. 2004) (collecting cases). These "diverging approaches to the question illustrate the possibility of fairminded disagreement." *Woodall*, 572 U.S. at 422 n.3.

* * *

Because Sansing is not entitled to relief on any of the claims certified for our review, we affirm the district court's denial of his petition for a writ of habeas corpus.

AFFIRMED.

BERZON, Circuit Judge, dissenting:

I respectfully dissent. I would grant the petition as to Claim 1, *Ring* error prejudice, and so would not reach the other challenges to the death sentence discussed in the majority opinion. I concur in the majority's analysis of Claims 4 and 8, relating to the factual basis Sansing offered when pleading guilty.

The Arizona courts denied John Sansing's constitutional right to have the facts making him eligible for a death sentence determined by a jury, not a judge. *Ring v. Arizona*, 536 U.S. 584, 589 (2002). The Arizona Supreme Court then concluded that that constitutional error was harmless beyond a reasonable doubt because, in its view, any reasonable juror would have found that Sansing murdered Trudy Calabrese in an especially cruel and heinous way, and no reasonable jury "would have found" that the mitigating evidence was sufficiently substantial to call for leniency. *State v. Sansing (Sansing II)*, 77 P.3d 30, 35–36, 39 (Ariz. 2003). In so holding, the Arizona Supreme Court applied the wrong legal

standard, contrary to clearly established federal law. *See* 28 U.S.C. § 2254(d)(1).

Neder v. United States, 527 U.S. 1 (1999), instructs that the failure to have a jury determine a required element in a criminal case is not harmless if the defendant presented *sufficient* evidence to permit a finding in his favor. *Id.* at 19. The question is not what a court believes a reasonable jury *would* have found, but what a reasonable jury *could* have found, given the evidence in the record. *See id.* Critically, in reviewing whether Sansing presented sufficient evidence to support a finding that mitigating factors existed, the Arizona Supreme Court was required, but failed, to view the evidence in the light most favorable to Sansing. *Cf. Jackson v. Virginia*, 443 U.S. 307, 319 (1979) (explaining how to conduct a sufficiency-of-evidence review in the context of determining whether the evidence was sufficient to convict). The state court weighed and discounted witness testimony, but those determinations are improper in a sufficiency-of-evidence review, as it is the jury's role to assess the weight and credibility of testimony. *See Schlup v. Delo*, 513 U.S. 298, 330 (1995) (citing *Jackson*, 443 U.S. at 319).

Because the Arizona Supreme Court applied the wrong legal standard, we owe no deference to its harmlessness determination. *See Inthavong v. Lamarque*, 420 F.3d 1055, 1059 (9th Cir. 2005). I would therefore go on to review, under *Brecht v. Abrahamson*, 507 U.S. 619 (1993), whether the deprivation of the right to a jury determination had a "substantial and injurious effect" on Sansing's sentence. *Id.* at 637 (quoting *Kotteakos v. United States*, 328 U.S. 750, 765 (1946)). Under our precedent, we conduct that inquiry by asking the same question the Arizona Supreme Court should have asked: "whether a rational jury *could* have found" that Sansing had established the existence of

mitigating factors. *Murdaugh v. Ryan*, 724 F.3d 1104, 1118 (9th Cir. 2013) (emphasis added).

If the evidence is viewed in the light most favorable to Sansing, as is proper under *Neder* and *Murdaugh*, then Sansing assuredly presented sufficient evidence to allow a jury to conclude that, because of his crack cocaine use, his capacity to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law was "significantly impaired." Ariz. Rev. Stat. § 13-703(G)(1) (1999). In the present context—that is, where there was no jury determination at all, so the question is not the likely impact of a constitutional error in the jury trial—the possibility that a jury could have so found is enough to establish prejudice under *Brecht*. *Murdaugh*, 724 F.3d at 1120. Had a jury so found, the aggravating and mitigating factors in Sansing's case could reasonably have been weighed differently, and he could not have been sentenced to death. I would therefore grant Sansing's petition for a writ of habeas corpus as to Claim 1.

I.

As recounted by the majority, *Ring* ruled unconstitutional the judge-based capital-sentencing scheme in effect in Arizona at the time of Sansing's sentencing. *Ring*, 536 U.S. at 609; Majority op. 14. *Ring* relied on *Apprendi v. New Jersey*, 530 U.S. 466 (2000), which held that "the Sixth Amendment does not permit a defendant to be 'exposed . . . to a penalty *exceeding* the maximum he would receive if punished according to the facts reflected in the jury verdict alone.'" *Ring*, 536 U.S. at 588–89 (quoting *Apprendi*, 530 U.S. at 483) (alteration omitted). The Court concluded in *Ring* that "[c]apital defendants, no less than noncapital defendants, . . . are entitled to a jury

determination of any fact on which the legislature conditions an increase in their maximum punishment." *Id.* at 589.

The Arizona capital sentencing statute provided that, in "determining whether to impose a sentence of death or life imprisonment," the sentencing judge "shall take into account the aggravating and mitigating circumstances included in . . . this section and shall impose a sentence of death if the court finds one or more of the [enumerated] aggravating circumstances . . . and that there are no mitigating circumstances sufficiently substantial to call for leniency." Ariz. Rev. Stat. § 13-703(E) (1999). We have interpreted *Ring* to require that a jury determine not only the "presence or absence of the aggravating factors required by Arizona law for imposition of the death penalty," *Ring*, 536 U.S. at 588, but also "the existence or absence of mitigating circumstances," *Murdaugh*, 724 F.3d at 1117. *Murdaugh* concluded that *Ring* requires this dual finding because under the Arizona scheme, "a defendant's eligibility for a death sentence was effectively contingent on the judge's findings regarding *both* aggravating and mitigating circumstances," as the "'ultimate element' qualifying the defendant for death was 'at least one aggravating circumstance not outweighed by one or more mitigating factors.'" *Id.* at 1115 (quoting *State v. Ring*, 65 P.3d 915, 935 (Ariz. 2003)).

Notably, *Murdaugh* did *not* hold that the weighing of aggravating against mitigating factors is a factual determination that must under *Ring* be carried out by a jury. Recently, the Supreme Court held that "a jury (as opposed to a judge) is not constitutionally required to *weigh* the aggravating and mitigating circumstances or to make the ultimate sentencing decision within the relevant sentencing range." *McKinney v. Arizona*, 140 S. Ct. 702, 707 (2020) (emphasis added). *McKinney* does not affect *Murdaugh*'s

conclusion that a jury must find "the *existence or absence* of mitigating circumstances." *Murdaugh*, 724 F.3d at 1117 (emphasis added). We therefore remain bound by our precedent to consider whether the Arizona courts' deprivation of Sansing's right to have a jury determine the presence or absence of mitigating factors was harmless.[1]

II.

The majority determines that the Arizona Supreme Court's application of the "harmless beyond a reasonable doubt" standard from *Chapman v. California*, 386 U.S. 18, 24 (1967), was not objectively unreasonable under the Antiterrorism and Effective Death Penalty Act ("AEDPA"), 28 U.S.C. § 2254(d)(1). Majority op. 18. The majority concludes that habeas relief is therefore not warranted, and finds no need to apply the "substantial and injurious effect" standard from *Brecht*, 507 U.S. at 637. A court *granting* habeas relief must, however, apply both the

[1] In my view, the right to have a jury find the facts required to impose the death penalty is fundamental, and the deprivation of that right can never be harmless. *See Sullivan v. Louisiana*, 508 U.S. 275, 281–82 (1993) (deprivation of the right to trial by jury "unquestionably qualifies as structural error" (internal quotation marks omitted)); *Summerlin v. Stewart*, 341 F.3d 1082, 1116 (9th Cir. 2003) (en banc), *rev'd on other grounds*, *Schriro v. Summerlin*, 542 U.S. 348 (2004); *Sansing II*, 77 P.3d at 40 (Jones, C.J., concurring in part and dissenting in part); *State v. Ring*, 65 P.3d 915, 946–48 (Ariz. 2003) (Feldman, J., concurring in part and dissenting in part). Moreover, determining what a nonexistent jury would have done regarding a penalty phase record that would undoubtedly have been quite different if tried to a jury rather than a judge is an exercise in rank speculation that should not govern life-or-death determinations. But because the Supreme Court has specifically left open whether *Ring* error can be harmless, *see Mitchell v. Esparza*, 540 U.S. 12, 17 (2003) (citing *Ring*, 536 U.S. at 609 n.7), we have held that we must defer to the Arizona Supreme Court's decision to apply harmless error review, *see Murdaugh*, 724 F.3d at 1117. This opinion follows that course.

AEDPA/*Chapman* test as well as the standard set forth in *Brecht*. *Brown v. Davenport*, 142 S. Ct. 1510, 1517, 1520, 1524 (2022). I therefore apply both tests here.

A.

The majority errs in its review of the state court's application of *Chapman*. The state court's application was contrary to federal law, as clearly established by *Neder v. United States*, 527 U.S. 1 (1999). *Neder* set forth narrow parameters for applying *Chapman* in cases in which an essential element of a criminal offense was never submitted to a jury at all. *Id.* at 19.

In *Neder*, the defendant was convicted of federal charges involving tax fraud. Although materiality was an element of the crime, the district court refused to submit the materiality issue to the jury. *Id.* at 4. *Neder* applied harmless error review under *Chapman*, but it explained that because the omitted element was never submitted to a jury, the review must focus on "whether the record contains evidence that *could* rationally lead to a contrary finding with respect to the omitted element." *Id.* at 19 (emphasis added). If, after a "thorough examination of the record," the reviewing court "cannot conclude beyond a reasonable doubt that the jury verdict would have been the same absent the error—for example, where the defendant *contested* the omitted element and raised evidence *sufficient* to support a contrary finding—it should not find the error harmless." *Id.* (emphasis added).

The reason for conducting a sufficiency-of-evidence review in these circumstances instead of the typical record-as-a-whole *Chapman* inquiry is that the whole-record approach to *Chapman* cannot be applied directly where, as here, there was not simply a trial error during a jury trial but no jury at all. "[T]he question [*Chapman*] instructs the

reviewing court to consider is not what effect the constitutional error might generally be expected to have upon a reasonable jury, but rather what effect it *had* upon the [jury determination] in the case at hand." *Sullivan v. Louisiana*, 508 U.S. 275, 279 (1993) (emphasis added). Where the constitutional error is that there was no jury at all, a *Chapman* analysis cannot be directed at answering that question, but must instead take into account the difficulty of projecting what a jury would have done on an issue never presented to it. *See id.* at 280.

That is why, as we have recently observed, *Neder* sets "a high bar for finding harmlessness beyond a reasonable doubt" with regard to an issue never decided at all by a jury. *United States v. Perez*, 962 F.3d 420, 442 (9th Cir. 2020). In that circumstance, the question is not whether there is, beyond a reasonable doubt, strong evidence to support the trial judge's finding on the element in question, but whether there is sufficient evidence to support the *defendant's* contentions to the contrary. *Id.* Where there is, an appellate court cannot with any confidence predict beyond a reasonable doubt that a non-existent jury would have rejected the sufficient evidence in favor of the prosecution's case.

Importantly, a court reviewing that sufficiency-of-evidence question asks whether the record contains evidence that "could" lead to a particular finding. *Neder*, 527 U.S. at 19; *see Jackson*, 443 U.S. at 319. "[T]he use of the word 'could' focuses the inquiry on the power of the trier of fact to reach its conclusion," and not on the reviewing court's assessment of how a factfinder would "likely behav[e]" on the record as a whole. *Schlup*, 513 U.S. at 330 (quoting *Jackson*, 443 U.S. at 319). For that reason, a court applying *Neder*'s harmless error standard must view all the evidence

in the "light most favorable" to the defense assertion that there was sufficient evidence to support a finding in its favor, *see Jackson*, 443 U.S. at 319, and generally does not assess the "credibility of witnesses," *see Schlup*, 513 U.S. at 330.

A useful analogy is the context of determining whether a criminal defendant has a right to a jury instruction on a defense. In that instance, as here, the defendant is deprived of a jury determination that should have gone forward. In the precluded defense context, we ask only whether the defendant has presented sufficient evidence to warrant the requested instruction, recognizing that the "weight and credibility of the conflicting testimony are issues [for] the jury, not the court," to resolve. *United States v. Becerra*, 992 F.2d 960, 963–64 (9th Cir. 1993), *overruled on other grounds by United States v. Collazo*, 984 F.3d 1308, 1335 (9th Cir. 2021); *see also United States v. Bailey*, 444 U.S. 394, 414–15 (1980). Likewise, in assessing sufficiency in the civil summary judgment context, "[c]redibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986).

B.

Here, the sentencing judge found it "likely" that Sansing "was impaired or affected by his crack cocaine usage at the time of the murder" but held that Sansing had not shown he was sufficiently impaired to establish the (G)(1) mitigating factor. To meet that factor, Sansing was required to prove by a preponderance of the evidence that his "capacity to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law was *significantly* impaired, *but not so impaired as to constitute a defense to prosecution*." Ariz. Rev. Stat. § 13-703(G)(1) (1999)

(emphasis added); *Sansing II*, 77 P.3d at 36. In other words, Sansing had to show that his "mental capabilities were significantly, but only partially, impaired." *State v. Gretzler*, 659 P.2d 1, 17 (Ariz. 1983) (upholding finding of impairment where "continuous use of drugs likely impaired defendant's volitional capabilities" although he retained the ability to "distinguish right from wrong" and to "exercise some control over his behavior," *id.* at 16–17). In reviewing whether Sansing was prejudiced by the deprivation of his right to have a jury decide whether he had established the (G)(1) mitigating factor, the Arizona Supreme Court, contrary to *Neder*, failed to consider whether, *viewing the evidence in the light most favorable to Sansing*, the record contained *sufficient* evidence to allow a jury to find that Sansing's capacity to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law was significantly impaired. *See Sansing II*, 77 P.3d at 37–38; Ariz. Rev. Stat. § 13-703(G)(1) (1999).

1. The Arizona Supreme Court began by reasoning that Sansing had "failed entirely to show any causal nexus between his alleged drug use and impairment" because he "presented no expert testimony to support his assertion that his use of cocaine impaired either his capacity to control his conduct or his capacity to appreciate the wrongfulness of his actions." *Sansing II*, 77 P.3d at 37. But Sansing's failure to present expert testimony would not *preclude* a jury from finding significant impairment. The Arizona Supreme Court has not held expert testimony required to satisfy the (G)(1) mitigating factor, only that it is "[t]ypically" presented. *Id.* As discussed below, Sansing presented other evidence of his drug use and its effect on him at the time of the murder, which a jury could have credited.

The state court's critique of Sansing's failure to present expert testimony is particularly problematic given the nature of *Ring* error. At sentencing, Sansing's counsel presented a case for mitigation to a judge, not a jury. Had there been a jury, counsel unquestionably would have presented the case differently. In a hearing on Sansing's petition for postconviction review, his trial counsel stated that, although he did not remember the details of his decision-making process, he likely had not presented expert testimony regarding Sansing's drug use because he "felt that Judge Reinstein . . . with his background and experience . . . understood the nexus between substance abuse and the commission of crimes." In the analogous context of applying *Neder* to determine whether an *Apprendi* error was harmless, we emphasized, in a case in which the defendant was convicted after a guilty plea, that the "record is . . . a guide to determining what the evidence would have established if the case had proceeded to trial," but is "not a substitute for a trial, and there need only be evidence sufficient to support a contrary finding to show that the error was not harmless." *United States v. Hunt*, 656 F.3d 906, 913 (9th Cir. 2011).

Here, the bench trial was no substitute for a jury trial. The Arizona Supreme Court's conclusion that the deprivation of Sansing's right to present his mitigation case to a jury was harmless because defense counsel failed, in a hearing before a sophisticated judge, to present expert testimony that he may well have chosen to present to a jury of laypersons does not take account of the different strategies that are effective at jury and at judge trials, especially where the death penalty is at stake. *Cf. Gallegos v. Ryan*, 820 F.3d 1013, 1039 (9th Cir.), *opinion amended on reh'g*, 842 F.3d 1123 (9th Cir. 2016) (explaining that there is "really no way to know" how a jury would have weighed mitigating evidence rejected by the sentencing judge); *Gallegos v.*

Shinn, No. CV-01-01909-PHX-NVW, 2020 WL 7230698, at *28 (D. Ariz. Dec. 8, 2020) (quoting *Gallegos v. Ryan*, 820 F.3d at 1039).

2. At the penalty phase, Sansing did present evidence of his drug use and its impact, albeit without expert testimony. He did so through a letter from a mitigation specialist, Pamela Davis, and the testimony of his wife, Kara Sansing, and his sister, Patsy Hooper. In its harmlessness analysis, the Arizona Supreme Court entirely ignored the evidence from Davis and Hooper.

Davis reported, based on interviews with Sansing and his family members, that Sansing began using marijuana in fifth grade and struggled with drug addiction throughout his adult life. At the time of Ms. Calabrese's murder, Sansing and Kara "had been on a four day binge of crack cocaine use," during which time they had spent $750 on crack cocaine. Davis also quoted an article stating that heavy cocaine use can produce paranoia and aggression. Under *Neder*, the Arizona Supreme Court should have included this record evidence in its *Chapman*/sufficiency-of-evidence review. *See* 527 U.S. at 19.

Although the Arizona Supreme Court discussed Kara's testimony about Sansing's drug use on the day of the murder, the court weighed and discounted her testimony, contrary to *Neder*. *Sansing II*, 77 P.3d at 37–38. In the hours before the murder, Sansing smoked crack cocaine at least twice—first by himself, while Kara was at work, and later with Kara, about 40 minutes before Ms. Calabrese arrived at the Sansing home. *State v. Sansing* (*Sansing I*), 26 P.3d 1118, 1123 (2001). Kara testified that when she spoke with Sansing over the phone before coming home from work, he sounded "hyped up" and "[a]nxious." When she got home, she could "tell he was nervous" and that he had been using

cocaine. He was "pacing" and acting "cold." He did not give her a kiss or a hug as he normally did.

Kara testified that Sansing's demeanor while he was assaulting Ms. Calabrese was different from anything she had witnessed in him before. She said: "He was acting cold. It wasn't my husband. It wasn't his normal. Even though he has smoked crack before, he wouldn't act the way he did that day." Kara elaborated that Sansing was acting like "he wasn't there. It's like he was in another world. . . . It wasn't my husband."

The Arizona Supreme Court determined that Kara's testimony was "insufficient to establish, by a preponderance of the evidence, that Sansing's capacity to control his behavior was significantly impaired." *Sansing II*, 77 P.3d at 37. In so holding, the court reasoned, first, that "Kara did not quantify how much crack Sansing used." *Id.* But Sansing did present evidence relating to the quantity of crack cocaine he used: the evidence from Davis that Sansing and Kara had spent $750 on crack cocaine in the four days leading up to the murder. Again, the Arizona Supreme Court improperly ignored that evidence.

Second, the court held that "no reasonable jury *would* conclude that Kara's testimony that Sansing was not acting himself was sufficient to establish that his capacity was significantly impaired." *Id.* (emphasis added). The court quoted a sentence from *State v. Jordan*, 614 P.2d 825, 832 (Ariz. 1980), rejecting testimony that was "inexact as to defendant's level of intoxication at the time of the crime" and lacked a "description of how defendant's intoxication affected his conduct." *Sansing II*, 77 P.3d at 37–38. Again, the question the Arizona Supreme Court was required to ask was not whether, in its view, a jury *would* conclude that Sansing's capacity was significantly impaired, but whether

a jury *could* so conclude. In weighing and discounting Kara's testimony, the court usurped the role of the absent jury, whose province it was to make credibility and evidence-weighing determinations. *See Anderson*, 477 U.S. at 255.

Hooper testified that Sansing drove to her house the day after the murder and confessed to her. Hooper called their father, who called the police. Sansing waited with Hooper for the police to arrive and surrendered quietly. Hooper testified that Sansing looked like he "hadn't slept for days" and that he "had dark circles under his eyes." Hooper believed that Sansing had been "taken by the drugs he had been doing," and that the drugs contributed "a lot" to his murder of Ms. Calabrese. Again, the Arizona Supreme Court should have considered this record evidence as part of its sufficiency-of-evidence review. *See Neder*, 527 U.S. at 19.

3. In addition to improperly ignoring and discounting the evidence of drug use that Sansing presented, the Arizona Supreme Court concluded that Sansing's "deliberate actions" and "steps . . . to avoid detection" "refute[d]" and "negate[d]" his impairment claim. *Sansing II*, 77 P.3d at 38. In so holding, the state court put emphasis on the weight of the prosecution's evidence, and so failed to view the evidence in the light most favorable to Sansing, contrary to *Neder*.

The evidence that Sansing planned to rob the person who delivered food did not *preclude* a rational jury from finding significant impairment, even if it could support the opposite conclusion. Viewed in the light most favorable to Sansing, that evidence showed that Sansing planned to commit a robbery, not a murder. Sansing arranged for the food delivery while Kara was at work, and when she returned home, he smoked more crack cocaine and told Kara about

his plan to rob the delivery person. *Sansing I*, 26 P.3d at 1123. A rational jury could have concluded that Sansing's impairment increased *after* he made the robbery plan, and that his impairment played a significant role in the extreme escalation of events from a planned robbery to a murder.

Finally, the actions Sansing took to avoid detection did not preclude a finding of significant impairment. Viewed in the light most favorable to Sansing, those actions were minor and would have been obviously ineffective to a normally functioning person. Sansing moved Ms. Calabrese's truck, but only a short distance from his house. *Id.* at 1123. He "hid" her body by placing it under some debris in his own backyard, where it was visible from the alley. *Id.*

In *Murdaugh*, we addressed a defendant's similarly ineffectual attempts to avoid detection—first sprinkling horse manure over the victim's body, before dismembering it many hours later. We concluded that "a reasonable jury might not have found that [defendant's] actions to cover up the murder demonstrated any kind of sober sophistication." 724 F.3d at 1120. Similarly, here, a reasonable jury might not have found Sansing's efforts to avoid detection "to be inconsistent with a finding that [he] was 'significantly, but only partially, impaired' at the time of the offense." *Id.* (quoting *Gretzler*, 659 P.2d at 17). For example, viewed in the light most favorable to Sansing, a jury could conclude that Sansing's ability to drive a truck a short distance did not defeat his contention that he was significantly, but only partially, impaired. Additionally, a reasonable jury might have interpreted Sansing's confession to Hooper the next day, which the Arizona Supreme Court improperly ignored, as evidence that his capacity to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements

of law did not fully return until after he had regained a measure of sobriety.

Because the Arizona Supreme Court failed to conduct a sufficiency review under *Neder*, its harmlessness determination was "contrary to . . . clearly established Federal law," and the panel majority errs in holding otherwise. 28 U.S.C. § 2254(d)(1); *see Amado v. Gonzalez*, 758 F.3d 1119, 1136 (9th Cir. 2014) ("A decision is 'contrary to' Supreme Court precedent 'if it applies a rule that contradicts the governing law set forth in [the Supreme Court's] cases . . . .'" (quoting *Early v. Packer*, 537 U.S. 3, 8 (2002)) (alteration in original)). As discussed above, however, under current controlling law, it is not enough for a habeas petitioner to satisfy the AEDPA/*Chapman* test; the petitioner must still meet the *Brecht* standard before relief can be granted. *See supra* pp. 49–50. I turn now to the *Brecht* inquiry.

III.

Under *Brecht*, "habeas relief must be granted" if the *Ring* error "had substantial and injurious effect or influence in determining the jury's verdict." *Brecht*, 507 U.S. at 623 (quoting *Kotteakos*, 328 U.S. at 765).

> [I]f one cannot say, with fair assurance, after pondering all that happened without stripping the erroneous action from the whole, that the judgment was not substantially swayed by the error, it is impossible to conclude that substantial rights were not affected. The inquiry cannot be merely whether there was enough to support the result, apart from the phase affected by the error. It is rather, even

> so, whether the error itself had substantial influence.

Merolillo v. Yates, 663 F.3d 444, 454 (9th Cir. 2011) (quoting *Kotteakos v. United States*, 328 U.S. 750, 765 (1946)) (alteration in original).

Here, of course, "the underlying error is the absence of a jury itself." *Murdaugh*, 724 F.3d at 1118. Accordingly, as we held in analyzing whether *Ring* error was prejudicial in *Murdaugh*, "the *Brecht* inquiry is whether the absence of a jury as factfinder at the penalty stage 'substantially and injuriously' affected or influenced the outcome." *Id.* (quoting *Merolillo*, 663 F.3d at 454). To answer that question, we ask "whether a rational jury *could* have found" that Sansing had established the (G)(1) mitigating factor. *Id.* (emphasis added). If so, "it is impossible to conclude that substantial rights were not affected," *Merolillo*, 663 F.3d at 454 (quoting *Kotteakos*, 328 U.S. at 765), as we have no actual jury verdict against which to evaluate whether the verdict would have varied absent a particular trial error. In these circumstances, therefore, the *Brecht* inquiry is the same one the Arizona Supreme Court should have applied in its harmlessness review: "whether the record contains evidence that *could* rationally lead to a contrary finding with respect to the omitted element." *Neder*, 527 U.S. at 19 (emphasis added).

Again, the evidence in the record, when properly viewed in the light most favorable to Sansing, was *sufficient* to allow a rational jury to find that that Sansing had proved, by a preponderance of the evidence, that his capacity to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law was "significantly, but only partially, impaired," *Gretzler*, 659 P.2d at 17—even if

a jury might not have been *likely* to make such a finding, *see Schlup*, 513 U.S. at 330. Sansing presented testimony from Kara, who was present at the time of the crime; who knew him well, having been married to him for fourteen years; and who was familiar with both his use of crack cocaine and the effects that drug usually had on him. Kara testified that Sansing was high on crack cocaine when he assaulted Ms. Calabrese, that immediately beforehand he was anxious and uncharacteristically cold, that his demeanor was different from anything she had witnessed before, and that he seemed to be in another world. A jury could reasonably conclude based on Kara's testimony, along with the uncontested evidence of Sansing's long history of drug abuse starting in childhood, his recent struggle with addiction, and his and Kara's consumption of $750 worth of crack cocaine in the days leading up to the murder, that Sansing had demonstrated significant impairment. *Cf. State v. Hill*, 174 Ariz. 313, 330 & n.7 (1993) (holding that there was sufficient evidence to support the trial court's finding that the (G)(1) mitigating factor was established, where the trial court found that the defendant was "an alcoholic, that [he was] most likely under the influence of alcoholic beverages to some extent at the time of the murder, [and] that [he was] a product of an alcoholic family").

Because Sansing was deprived of his constitutional right to have a jury determine the facts on which his sentence depended, we cannot know what a jury would have done. "That a rational jury might have found that the evidence established the (G)(1) mitigating factor is sufficient to establish prejudice under *Brecht*." *Murdaugh*, 724 F.3d at 1120.

Had a jury found that Sansing had proven the (G)(1) mitigating factor, a reasonable sentencing judge could have

weighed the aggravating and mitigating circumstances differently and concluded that the latter were "sufficiently substantial to call for leniency." Ariz. Rev. Stat. § 13-703(E) (1999). Or the Arizona Supreme Court could reasonably have so concluded when it conducted its required independent reweighing of aggravating and mitigating circumstances. *See Sansing I*, 26 P.3d at 1131; *cf. Strickland v. Washington*, 466 U.S. 668, 695 (1984) (holding, in the context of an ineffective-assistance-of-counsel claim, that the prejudice inquiry asks "whether there is a reasonable probability that, absent the errors, the sentencer—including an appellate court, to the extent it independently reweighs the evidence—would have concluded that the balance of aggravating and mitigating circumstances did not warrant death," and further noting that the prejudice inquiry is objective and does "not depend on the idiosyncracies [*sic*] of the particular decisionmaker"). The deprivation of the right to a jury determination therefore had a "substantial and injurious effect" on Sansing's sentence. *Brecht*, 507 U.S. at 623 (quoting *Kotteakos*, 328 U.S. at 765).

Having concluded that Sansing has satisfied both the AEDPA/*Chapman* and *Brecht* tests for prejudicial error, I would grant his petition for a writ of habeas corpus as to Claim 1.

Appendix B

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JOHN EDWARD SANSING, *Petitioner-Appellant*, v. CHARLES L. RYAN, Director, Arizona Department of Corrections; ERNEST TRUJILLO, Warden, Arizona State Prison - Eyman Complex, *Respondents-Appellees.*	No. 13-99001 D.C. No. 2:11-cv-01035-SRB OPINION

Appeal from the United States District Court
for the District of Arizona
Susan R. Bolton, District Judge, Presiding

Argued and Submitted January 22, 2019
San Francisco, California

Filed May 17, 2021

Before: Marsha S. Berzon, Consuelo M. Callahan, and Paul J. Watford, Circuit Judges.

Opinion by Judge Watford;
Dissent by Judge Berzon

SUMMARY*

Habeas Corpus / Death Penalty

The panel affirmed the district court's denial of John Edward Sansing's federal petition for a writ of habeas corpus, governed by the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), in a case in which Sansing pleaded guilty to first-degree murder and was sentenced to death.

Sansing's Claim 1 was predicated on the alleged denial of his Sixth Amendment right to trial by jury. At the time of his trial, Arizona law mandated that the trial judge alone determine whether a sentence of death should be imposed following a conviction for first-degree murder. The United States Supreme Court declared that sentencing scheme unconstitutional in *Ring v. Arizona*, 536 U.S. 584 (2002). On remand for further consideration in light of *Ring*, the Arizona Supreme Court ruled that the denial of Sansing's right to a jury trial during the penalty phase was harmless beyond a reasonable doubt—the standard for review of non-structural constitutional errors under *Chapman v. California*, 386 U.S. 18 (1967).

Noting that the United States Supreme Court has instructed that a federal habeas court need not formally apply both *Brecht v. Abrahamson*, 507 U.S. 619 (1993) (requiring that a federal habeas petitioner must demonstrate that a constitutional error resulted in "actual prejudice"—that is, a

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

"substantial injurious effect or influence" on outcome) and AEDPA/*Chapman*, the panel chose to decide whether the Arizona Supreme Court's application of *Chapman* was objectively unreasonable under AEDPA. Rejecting Sansing's contention that the Arizona Supreme Court's determination was "contrary to" or an "unreasonable application of" clearly established federal law, the panel concluded that fairminded jurists applying the governing beyond-a-reasonable-doubt standard could conclude that the absence of a jury trial did not affect the Arizona Supreme Court's conclusions (a) that any reasonable jury would have found that the murder was committed in both an "especially cruel" and an "especially heinous" manner (Ariz. Rev. Stat. § 13-703(F)(6) (1999)), or (b) that no rational jury would have found the existence of any statutory mitigating circumstances or that Sansing's non-statutory mitigating circumstances were sufficiently substantial to call for leniency.

Sansing's Claim 2 alleged that his trial counsel rendered ineffective assistance in presenting his mitigation defense during the penalty phase. The state post-conviction review (PCR) court held that Sansing failed to establish either deficient performance or prejudice under *Strickland v. Washington*, 466 U.S. 668 (1984). The panel concluded that, as to most of the challenged aspects of counsel's representation, Sansing did not demonstrate that the PCR court's resolution of *Strickland*'s deficient-performance prong was objectively unreasonable; and that as to the remaining aspects of the representation, the PCR court reasonably determined that Sansing did not demonstrate prejudice.

In Claim 8, Sansing alleged that his waiver of the privilege against self-incrimination was not knowing and

voluntary because he was unaware that his admission, during the plea colloquy, that the victim was conscious when he raped her could be used to prove cruelty under § 13-703(F)(6). Affirming the denial of relief as to this claim, the panel observed that the United States Supreme Court has not yet held that the trial court must affirmatively discuss during the plea colloquy the potential impact of a defendant's factual admissions may have on capital sentencing proceedings.

In Claim 4, Sansing asserted an ineffective-assistance-of-counsel claim that used the same factual predicate as Claim 8. The panel concluded that even accepting that counsel rendered ineffective assistance, a fairminded jurist could conclude that Sansing failed to show a reasonable probability he would have received a different sentence.

In Claim 7, Sansing alleged that the Arizona courts violated the Eighth Amendment by applying an impermissible "causal nexus" test when assessing his non-statutory mitigating circumstances. *See Eddings v. Oklahoma*, 455 U.S. 104 (1982), and *McKinney v. Ryan*, 813 F.3d 798 (9th Cir. 2015) (en banc). The panel held that the sentencing court did not strip the mitigating circumstances of all weight by applying an unconstitutional causal-nexus test. The panel wrote that it is possible that the Arizona Supreme Court applied a rule contrary to *Eddings*, but did not need to resolve that issue because even if the Arizona Supreme Court erred in this regard, Sansing cannot show actual prejudice under *Brecht*.

Dissenting, Judge Berzon would grant the petition as to Claim 1, *Ring* error prejudice, and so would not reach the other challenges to the death sentence discussed in the majority opinion. She wrote that the Arizona Supreme Court

applied the wrong legal standard as to whether the *Ring* error was harmless, so this court owes no deference to its harmlessness determination. She would therefore review under *Brecht* whether the deprivation of the right to a jury determination had a "substantial and injurious effect" on Sansing's sentence, which was satisfied because Sansing presented sufficient evidence to allow a jury to conclude that, because of his crack cocaine use, his capacity to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law was "significantly impaired." Ariz. Rev. Stat. § 13-703(G)(1). She concurred in the majority's analysis of Claims 4 and 8, relating to the factual basis offered when pleading guilty.

COUNSEL

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

Lacy Stover Gard (argued), Chief Counsel; John Pressley Todd, Special Assistant Attorney General; Mark Brnovich, Attorney General; Office of the Attorney General, Tucson, Arizona; for Respondents-Appellees.

OPINION

WATFORD, Circuit Judge:

In 1999, the State of Arizona sentenced John Sansing to death for the murder of Trudy Calabrese. This appeal arises from the district court's denial of Sansing's federal petition for a writ of habeas corpus, which is governed by the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA). The district court granted a certificate of appealability as to five claims, and we later issued a certificate of appealability as to a sixth. We agree with the district court that Sansing has not shown an entitlement to relief on any of his claims.

I. Factual and Procedural Background

Our summary of the facts is drawn from the Arizona Supreme Court's first opinion on direct appeal. *State v. Sansing*, 26 P.3d 1118, 1122–23 (Ariz. 2001) (*Sansing I*). Sansing's wife, Kara Sansing, provided much of this narrative when she testified during the penalty phase of Sansing's trial. (Like the parties, we refer to Sansing's family members by their first names to avoid confusion.)

On February 24, 1998, Sansing and Kara were on the fourth consecutive day of heavy crack cocaine consumption. Sansing called Kara throughout the day to discuss the need to obtain money to buy more drugs. He also informed her that he had purchased crack cocaine, smoked a portion of it, and was saving the rest for her. Kara returned home from work around 3:20 p.m., and the two immediately smoked the leftover crack cocaine.

That afternoon, Sansing contacted a local church to request delivery of a box of food for his family. With his

four young children present, Sansing told Kara that he planned to rob whomever the church sent to deliver the food.

Shortly after 4:00 p.m., Trudy Calabrese parked her truck in front of the Sansing home. She entered the house and delivered two boxes of food, chatting with Kara in the kitchen while Sansing signed paperwork verifying the delivery. As Ms. Calabrese turned to leave, Sansing grabbed her from behind and threw her to the floor. With the assistance of Kara, Sansing bound Ms. Calabrese's wrists and legs with electrical cords.

According to Kara, Ms. Calabrese fought "a great deal" and begged Sansing not to hurt her. She pleaded for the children to call the police and prayed for God's help until Sansing gagged her with a sock. Sansing struck Ms. Calabrese twice in the head with a wooden club with enough force to knock her unconscious. He then retrieved her keys and drove her truck to a nearby parking lot. When Sansing returned, Ms. Calabrese was conscious, at least according to Sansing's and Kara's later statements. (Sansing now disputes this fact, pointing to the testimony of a medical examiner who expressed doubt that Ms. Calabrese regained consciousness given the severity of her head injuries.)

Sansing dragged Ms. Calabrese upstairs to his bedroom, where he raped her. Her arms and legs were still bound. Kara overheard Sansing and Ms. Calabrese speaking to each other. (Sansing disputes that Ms. Calabrese spoke, pointing to the use of the gag and again to her head injuries.) After raping Ms. Calabrese, Sansing stabbed her three times in the abdomen with a knife from the kitchen. Kara described Sansing as "grinding" the knife inside of Ms. Calabrese, and the medical examiner saw signs that the knife had been twisted in her abdomen. Ms. Calabrese died from these wounds, likely several minutes after the stabbing.

Sansing took Ms. Calabrese's jewelry and traded it for crack cocaine.

That evening, a pastor of the church called the Sansing home to check on Ms. Calabrese's whereabouts. Sansing gave a false home address and told the pastor that the delivery had never arrived. Sansing later dragged Ms. Calabrese's body to his backyard and attempted to hide it behind a shed under a piece of old carpeting. He washed the club he had used to strike Ms. Calabrese and hid other evidence of the crime.

By the next day, a search party had located Ms. Calabrese's truck; inside was a note with the Sansings' true home address. The police visited the home and found Ms. Calabrese's body in the backyard. Her head was wrapped in a plastic bag that was bound to her neck by ligatures, and the police discovered that she had been blindfolded. At the time of the search, Sansing had already gone to work. He went straight from work to his sister Patsy's house, where he confessed to having killed Ms. Calabrese. Patsy called their father, who reported the murder and Sansing's location to the police. Sansing peaceably surrendered to the officers who arrived at Patsy's house.

The State of Arizona charged Sansing with first-degree murder, kidnapping, armed robbery, and sexual assault. The State also provided notice of its intent to seek the death penalty. Two deputy public defenders, Emmet Ronan and Sylvina Cotto, were appointed to represent Sansing. Professing a desire not to put either his family or the Calabrese family through a trial, Sansing pleaded guilty in September 1998 to all charges in the indictment.

Sansing's trial therefore proceeded directly to the penalty phase, at which the trial judge considered the aggravating and mitigating circumstances associated with the murder. Following a three-day hearing, the trial judge sentenced Sansing to death in a detailed, 17-page special verdict. The Arizona Supreme Court affirmed Sansing's death sentence on direct appeal. *Sansing I*, 26 P.3d at 1132; *State v. Sansing*, 77 P.3d 30, 39 (Ariz. 2003) (*Sansing II*).

Sansing sought post-conviction review (PCR) in state court. The PCR court summarily dismissed four claims on the merits and a fifth claim as procedurally defaulted. The court rejected Sansing's remaining claim, which alleged ineffective assistance of trial counsel, in a reasoned opinion following a four-day evidentiary hearing. The Arizona Supreme Court denied Sansing's petition for review without reaching the merits of his claims.

In 2011, Sansing filed a 29-claim petition for a writ of habeas corpus in federal court. The district court denied his petition and granted a certificate of appealability as to five of Sansing's claims. Sansing filed a timely notice of appeal from the district court's judgment. As noted above, we issued a certificate of appealability as to one additional claim.

II. Claim 1

We address first the district court's rejection of Claim 1, which is predicated on the alleged denial of Sansing's Sixth Amendment right to trial by jury. At the time of Sansing's trial, Arizona law mandated that the trial judge alone determine whether a sentence of death should be imposed following a conviction for first-degree murder. The United States Supreme Court declared that sentencing scheme unconstitutional in *Ring v. Arizona*, 536 U.S. 584 (2002).

Soon thereafter, the Court granted Sansing's pending petition for a writ of certiorari, vacated the judgment in *Sansing I*, and remanded the case for further consideration in light of *Ring*. *Sansing v. Arizona*, 536 U.S. 954 (2002). On remand, the Arizona Supreme Court ruled that the denial of Sansing's right to a jury trial during the penalty phase was harmless beyond a reasonable doubt. *Sansing II*, 77 P.3d at 36–39. In Claim 1, Sansing alleges that the Arizona Supreme Court's harmless-error determination was "contrary to" or "an unreasonable application of" clearly established federal law. 28 U.S.C. § 2254(d)(1). We begin by providing additional background relevant to the analysis of this claim before turning to the merits.

A

After Sansing pleaded guilty to first-degree murder, Arizona law required the sentencing court to decide whether he should be sentenced to death or life in prison. Ariz. Rev. Stat. § 13-703(B) (1999). (Unless otherwise noted, we cite the 1999 version of the Arizona Revised Statutes.) To make that determination, the sentencing court engaged in a three-step analysis.

First, the sentencing court determined whether the State had proved beyond a reasonable doubt any of the ten statutory aggravating factors that render a defendant eligible for the death penalty. § 13-703(F). In this case, the sentencing court found two such factors had been proved: that Sansing "committed the offense in an especially heinous, cruel or depraved manner," § 13-703(F)(6); and that he "committed the offense as consideration for the receipt, or in expectation of the receipt, of anything of pecuniary value," § 13-703(F)(5).

Second, the sentencing court determined whether Sansing had proved by a preponderance of the evidence any of the five statutory mitigating circumstances. § 13-703(G). As relevant here, Sansing argued that his "capacity to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law was significantly impaired" by his use of crack cocaine. § 13-703(G)(1). The sentencing court declined to find the (G)(1) mitigating circumstance, given the evidence that Sansing had planned the robbery and attempted to avoid detection "before, during and after the murder."

The sentencing court also assessed the evidence supporting non-statutory mitigating circumstances—that is, any aspect of Sansing's life or any circumstance of the offense "relevant in determining whether to impose a sentence less than death." § 13-703(G). Although Sansing failed to prove the (G)(1) mitigating circumstance, the court considered his drug-induced impairment to be a non-statutory mitigating circumstance. The court also found that Sansing had "accepted responsibility for his actions and [was] genuinely remorseful," and "that he had a difficult childhood and family background." The court gave only minimal weight to Sansing's lack of education and his family's love and support.

Third, and finally, the sentencing court weighed the aggravating factors against the mitigating circumstances to determine whether the mitigating circumstances were "sufficiently substantial to call for leniency." § 13-703(E). The court considered the mitigating circumstances not sufficiently substantial to outweigh the two aggravating factors it had found. The court therefore imposed a sentence of death.

The Arizona Supreme Court affirmed Sansing's death sentence after independently reviewing "the trial court's findings of aggravation and mitigation and the propriety of the death sentence." Ariz. Rev. Stat. § 13-703.01(A) (2001). The court upheld the sentencing court's finding that the murder had been committed in an especially cruel manner, which was sufficient on its own to sustain the (F)(6) aggravating factor, and chose not to reach whether the murder was also heinous or depraved. *Sansing I*, 26 P.3d at 1127–29. The court struck the (F)(5) aggravating factor because the facts did not "clearly indicate a connection between a pecuniary motive and the killing itself." *Id.* at 1124–27. The court agreed that Sansing had not established the level of impairment required for the (G)(1) mitigating circumstance. *Id.* at 1130–31. Independently reweighing the evidence, the Arizona Supreme Court concluded that a sentence of death was appropriate "[g]iven the strength of the [remaining] aggravating factor in this case and the minimal value of the mitigating evidence." *Id.* at 1131.

As noted above, a year after *Sansing I*, the United States Supreme Court ruled Arizona's judge-based capital-sentencing scheme unconstitutional in *Ring v. Arizona*. "Because Arizona's enumerated aggravating factors operate as 'the functional equivalent of an element of a greater offense,'" the Court explained, "the Sixth Amendment requires that they be found by a jury." *Ring*, 536 U.S. at 609 (quoting *Apprendi v. New Jersey*, 530 U.S. 466, 494 n.19 (2000)).

To address the fallout from *Ring*, the Arizona Supreme Court consolidated all pending direct appeals in capital cases, including Sansing's. *State v. Ring*, 65 P.3d 915, 925 (Ariz. 2003) (*Ring III*). The court held that a *Ring* error is not structural and thus can be subject to harmless-error

review. *Id.* at 936; *see Mitchell v. Esparza*, 540 U.S. 12, 17 (2003) (per curiam) (noting that the Supreme Court left this issue open in *Ring*). Under the legal standard announced by the Arizona Supreme Court, a *Ring* error is deemed harmless if (1) the evidence supporting an aggravating factor is so overwhelming that "no reasonable jury would have failed to find the factor established beyond a reasonable doubt," and (2) "no reasonable jury could find that the mitigation evidence adduced during the penalty phase is sufficiently substantial to call for leniency." *Ring III*, 65 P.3d at 944, 946 (internal quotation marks omitted). In other words, the court stated, "[u]nless we conclude beyond a reasonable doubt that a jury would impose a death sentence, we must remand the case for resentencing." *Id.* at 944 (citing *Neder v. United States*, 527 U.S. 1, 19 (1999)).

In *Sansing II*, the Arizona Supreme Court applied this harmless-error standard to Sansing's death sentence. As to the (F)(6) aggravating factor, which applies if the defendant committed the murder in an especially heinous, cruel, or depraved manner, the court held that the error under *Ring* was harmless beyond a reasonable doubt. The court based that holding on two independent grounds. First, given the facts to which Sansing had admitted when pleading guilty and to which he had stipulated during the sentencing phase, *see Sansing II*, 77 P.3d at 33–34 n.3, the court concluded that "any reasonable jury would have found that Sansing murdered [Ms. Calabrese] in an especially cruel manner." *Id.* at 35. Second, "[g]iven the overwhelming and uncontroverted evidence," the court determined that "any reasonable jury would have concluded that Sansing inflicted gratuitous violence upon [Ms. Calabrese], who was rendered helpless" during the crime. *Id.* at 36. As a result, "[n]o reasonable jury could have failed to find that [Ms. Calabrese's] murder was especially heinous." *Id.*

Shifting focus to Sansing's mitigating evidence, the Arizona Supreme Court held, beyond a reasonable doubt, that "[n]o reasonable jury would have concluded that Sansing met his burden to establish" either of the statutory mitigating circumstances he sought to prove (age and significant impairment due to drug use). *Id.* at 37–38. As to Sansing's non-statutory mitigating circumstances, the court concluded that "no reasonable jury could have given more than minimal weight" to most of the mitigating evidence Sansing relied on, although the court assumed that a reasonable jury "would have accorded some weight to Sansing's family's love and support and to the fact that he accepted responsibility for his crime." *Id.* at 39. But, considering the "brutality" of Ms. Calabrese's murder and the relatively weak mitigating evidence offered by Sansing, the court determined beyond a reasonable doubt that "any reasonable jury would have concluded that the mitigating evidence was not sufficiently substantial to call for leniency." *Id.* The Arizona Supreme Court therefore affirmed Sansing's death sentence.

B

We turn now to the merits of Claim 1. The parties agree that Sansing was not afforded the jury-trial right announced in *Ring*, so the only issue is whether this error was harmless. At the outset, the parties dispute the scope of the rule established in *Ring*. Sansing contends that, like the Arizona Supreme Court, we should consider whether any rational jury, after weighing the aggravating factors against the mitigating circumstances, would have returned a sentence of death. The State responds that *Ring* established only that one or more aggravating factors must be found by the jury—nothing more. According to the State, we need ask only whether it is clear, beyond a reasonable doubt, that

overwhelming and uncontroverted evidence established the (F)(6) aggravating factor, such that no rational jury would have failed to find it.

The district court agreed with the State, reasoning that "[t]o the extent the Arizona Supreme Court chose to include review of mitigation as part of its harmless error analysis, it did so as a matter of state law." The court therefore limited its analysis to the evidence supporting the aggravating factors, and concluded that the evidence of cruelty, heinousness, and depravity underlying the (F)(6) aggravating factor was so strong that Sansing was not prejudiced by the *Ring* error. The court also held, albeit without further analysis, that the Arizona Supreme Court's "review of the mitigating evidence, while not required by *Ring*, was thorough, and its assessment of the evidence was not objectively unreasonable."

Months after the district court rejected Claim 1, we adopted a broader reading of *Ring* in *Murdaugh v. Ryan*, 724 F.3d 1104 (9th Cir. 2013). *Murdaugh* acknowledged that a narrow reading of the Supreme Court's decision "would extend the Sixth Amendment right no further than its express holding by concluding that a defendant only has a right to have a jury determine aggravating factors." *Id.* at 1115. But we nonetheless defined the scope of the right more broadly to include the "determination that 'there are no mitigating circumstances sufficiently substantial to call for leniency.'" *Id.* Thus, harmless-error review must encompass not only the finding of aggravating factors, but

also "the existence or absence of mitigating circumstances." *Id.* at 1117.[1]

To establish prejudice, a federal habeas petitioner must demonstrate that a constitutional error resulted in "actual prejudice"—that is, a "substantial and injurious effect or influence" on the outcome. *Brecht v. Abrahamson*, 507 U.S. 619, 637 (1993). In *Murdaugh*, we applied the *Brecht* standard "without regard for the state court's harmlessness determination." 724 F.3d at 1118 (quoting *Pulido v. Chrones*, 629 F.3d 1007, 1012 (9th Cir. 2010)). That approach is no longer sound after *Davis v. Ayala*, 576 U.S. 257 (2015). There, the Supreme Court repudiated our approach and clarified that *Brecht* does not "abrogate[] the limitation on federal habeas relief that § 2254(d) plainly sets out." *Id.* at 268. So when, as here, the state court has determined on direct appeal that an error was harmless beyond a reasonable doubt—the standard required for review of non-structural constitutional errors under *Chapman v. California*, 386 U.S. 18 (1967)—a federal habeas petitioner must demonstrate that the court "applied *Chapman* in an objectively unreasonable manner." 576 U.S. at 269 (internal quotation marks omitted).

Although satisfying AEDPA's requirements remains a precondition to relief, the Supreme Court has instructed that we "need not formally apply both *Brecht* and AEDPA/*Chapman*," since the analysis under both approaches will lead to the same result. *Id.* at 268 (internal quotation marks and alteration omitted). If the constitutional

[1] We need not decide whether the Supreme Court's decision in *McKinney v. Arizona*, 140 S. Ct. 702 (2020), calls into question this aspect of *Murdaugh*'s holding, since we conclude below that the State is entitled to prevail in any event.

error caused "actual prejudice" under *Brecht*, then a state court's determination that the error was harmless under *Chapman* will necessarily be objectively unreasonable under AEDPA. *Deck v. Jenkins*, 814 F.3d 954, 985 (9th Cir. 2016). By the same token, if a state court's determination of harmlessness survives review under AEDPA, then no actual prejudice could be found under *Brecht*. *Sifuentes v. Brazelton*, 825 F.3d 506, 535 (9th Cir. 2016).

We choose to decide here whether the Arizona Supreme Court's application of *Chapman* was objectively unreasonable under AEDPA. That determination requires us to ask whether "fairminded jurists" could agree with the Arizona Supreme Court's conclusion in *Sansing II* that the *Ring* error was harmless beyond a reasonable doubt. *Ayala*, 576 U.S. at 269. If so, relief is precluded under 28 U.S.C. § 2254(d)(1). In our view, fairminded jurists applying the governing beyond-a-reasonable-doubt standard could conclude that the absence of a jury trial did not affect either the finding of the (F)(6) aggravating factor or the determination that the mitigating evidence was not sufficiently substantial to call for leniency.

1. *Finding of the (F)(6) aggravating factor*. The Arizona Supreme Court reasonably concluded that, given the overwhelming and uncontroverted evidence, any reasonable jury would have found that the murder was committed in both an "especially cruel" and an "especially heinous" manner. *Sansing II*, 77 P.3d at 33–36. Either finding is sufficient on its own to establish the (F)(6) aggravating factor. *State v. Gretzler*, 659 P.2d 1, 10 (Ariz. 1983).

Under Arizona law, a murder is committed in an especially cruel manner if "the victim consciously experienced physical or mental pain prior to death." *Sansing II*, 77 P.3d at 33 (quoting *State v. Trostle*, 951 P.2d 869, 883

(Ariz. 1997)). The victim need not be conscious, however, when "each and every wound" is inflicted. *Id.* (quoting *State v. Lopez*, 786 P.2d 959, 966 (Ariz. 1990)).

Here, the Arizona Supreme Court found cruelty established on three different grounds. The first was the mental anguish Ms. Calabrese suffered before Sansing struck her in the head with the wooden club, when he tackled her, threw her to the ground, and tied her up. As the court stated, Ms. Calabrese's "defensive wounds, her pleas for help, and her attempts to resist Sansing's attack leave no doubt [she] suffered mental anguish as she contemplated her ultimate fate." *Id.* at 34. The second ground was the mental and physical suffering Ms. Calabrese endured when Sansing raped her while her arms and legs remained bound. *Id.* And the third ground was the physical pain Ms. Calabrese endured as a result of the "substantial" blows to her head, which caused "tremendous bleeding," and the three stab wounds to her abdomen, which struck the inferior vena cava and penetrated her colon, stomach, large intestine, and kidney—wounds that the medical examiner testified "would have caused pain and would not have resulted in immediate death." *Id.* Fairminded jurists could conclude, beyond a reasonable doubt, that the evidence of at least one and likely all three of these grounds was overwhelming.

Sansing's principal argument in response is that a rational jury could have found that Ms. Calabrese did not regain consciousness after he delivered the blows to her head, which would mean that she was not conscious when he raped and stabbed her. That contention, of course, does not negate the first of the grounds on which the Arizona Supreme Court based its cruelty determination. But the Arizona Supreme Court reasonably rejected Sansing's factual contention in any event. The evidence Sansing relies

on—the testimony of the medical examiner who performed Ms. Calabrese's autopsy—is itself equivocal. The medical examiner did testify that he doubted Ms. Calabrese regained consciousness after the blows, but he also stated that it was not "medically unlikely or impossible" that she did. Both Sansing and Kara made statements affirmatively establishing that Ms. Calabrese did regain consciousness. Sansing told a reporter who interviewed him following his arrest that Ms. Calabrese had regained consciousness by the time he returned to the house after moving her truck, and that "after beating her so badly, he decided to kill her to end her suffering." According to the reporter, Sansing said: "She was suffering. I wanted to end it. . . . I wasn't playing God. I just couldn't handle seeing the condition she was in." And Kara testified during the penalty phase that Ms. Calabrese was conscious during the rape, which occurred after Sansing inflicted the blows to her head. Fairminded jurists could conclude that, in the face of these admissions from Sansing and Kara, no rational jury could have found that Ms. Calabrese remained unconscious throughout almost the entirety of the attack.

Sansing's argument concerning the cruelty finding suffers from a lack of supporting legal authority as well. Sansing contends that under Arizona law the victim must have been conscious at the time of death, but the principal authority he relies on, *State v. Wallace*, 728 P.2d 232, 237 (Ariz. 1986), did not accurately state Arizona law at the time of his sentencing. As the Arizona Supreme Court held in *Sansing I*, "cruelty can exist even if the victim remained conscious for only a short period during the attack." 26 P.3d at 1127; *see also State v. Schackart*, 947 P.2d 315, 325 (Ariz. 1997). Ms. Calabrese was indisputably conscious for at least a portion of the attack at issue here.

The Arizona Supreme Court's conclusion as to heinousness is also reasonable. Under Arizona law, the trier of fact considers the following factors in determining whether the defendant committed the murder in an especially heinous manner: "(1) relishing of the murder by the defendant; (2) infliction of gratuitous violence; (3) needless mutilation; (4) senselessness of the crime; and (5) helplessness of the victim." *Sansing II*, 77 P.3d at 35 (citing *Gretzler*, 659 P.2d at 11). A finding of helplessness "in conjunction with another *Gretzler* factor, such as gratuitous violence," is sufficient to establish that the murder was especially heinous. *Id.* at 36. The helplessness factor is present "when a victim is physically unable to resist the murder." *Id.* at 35 (citing *State v. Gulbrandson*, 906 P.2d 579, 602 (Ariz. 1995)). Gratuitous violence consists of "violence beyond that necessary to kill." *Id.* (citing *State v. Rienhardt*, 951 P.2d 454, 465 (Ariz. 1997)).

Here, as the Arizona Supreme Court concluded, "[o]verwhelming and uncontroverted evidence establishes beyond a reasonable doubt that Sansing inflicted gratuitous violence upon [Ms. Calabrese], a helpless victim." *Id.* at 36. Ms. Calabrese was helpless to defend herself because Sansing bound her wrists and legs with electrical cords. Sansing inflicted gratuitous violence upon her because "[t]he rape, facial wounds, neck ligatures, gagging, blind-folding, and grinding of the knife constitute violence beyond that necessary to kill." *Id.*

2. *Assessment of the mitigating circumstances*. The Arizona Supreme Court reasonably concluded, beyond a reasonable doubt, that no rational jury would have found the existence of any statutory mitigating circumstances or found that Sansing's non-statutory mitigating circumstances were sufficiently substantial to call for leniency. *Id.* at 36–39.

As to the statutory mitigating circumstances, Sansing attempted to prove, based on his consumption of crack cocaine before the murder, that his "capacity to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law was significantly impaired." Ariz. Rev. Stat. § 13-703(G)(1). Sansing presented evidence that he consumed a large quantity of crack cocaine in the four days leading up to the murder. Drug use can constitute a mitigating circumstance under § 13-703(G)(1), but only if the defendant can show, typically through expert testimony, that a causal nexus exists between his ingestion of drugs and his commission of the offense. *Murdaugh*, 724 F.3d at 1119. The Arizona Supreme Court reasonably concluded that Sansing "failed entirely" to make that showing. *Sansing II*, 77 P.3d at 37. Most glaringly, Sansing did not present any expert testimony establishing the requisite causal nexus, *see id.*, which distinguishes this case from our decision in *Murdaugh*, where such evidence had been presented. *See* 724 F.3d at 1121 (noting that the record included "expert testimony establishing a direct causal link between Murdaugh's drug use and the murder"); *see also id.* at 1119. The Arizona Supreme Court also reasonably concluded that none of the other evidence Sansing presented, including Kara's testimony about their drug use on the day of the murder, was sufficient to allow a reasonable jury to find that Sansing's crack cocaine use caused the level of impairment that the (G)(1) mitigating circumstance requires. *Sansing II*, 77 P.3d at 37.

Although the lack of evidence supporting a causal nexus was alone fatal to Sansing's claim, the Arizona Supreme Court noted additional deficiencies that would preclude a reasonable jury from finding the existence of the (G)(1) mitigating circumstance. The court concluded that the "deliberate actions" Sansing took in carrying out the crime,

which were proved by uncontroverted evidence, "refute his impairment claim." *Id.* at 38. For example, Sansing devised a plan that involved robbing the person who would deliver a charitable gift of food, and he "contacted two different churches in his attempt to lure an unsuspecting victim to his home." *Id.* Far from supporting his impairment claim, these and the other actions Sansing took, such as driving Ms. Calabrese's truck to a nearby parking lot after the initial attack, "establish that the drug use did not overwhelm Sansing's ability to control his conduct." *Id.*; *see also State v. Kiles*, 857 P.2d 1212, 1229 (Ariz. 1993).

The Arizona Supreme Court further relied on uncontroverted evidence establishing that Sansing took steps to avoid detection after committing the murder. He moved Ms. Calabrese's truck away from his home, and when a church pastor called later that night to inquire about Ms. Calabrese, "Sansing gave him a false address and told him that [Ms. Calabrese] never arrived." *Sansing II*, 77 P.3d at 38. In addition, Sansing washed blood from the club that he used to perpetrate the initial attack, and he attempted to hide Ms. Calabrese's body after the murder. These steps to thwart discovery of the crime, the Arizona Supreme Court reasonably concluded, "negate any possibility that a reasonable jury would find that Sansing's capacity to appreciate the wrongfulness of his conduct was significantly impaired." *Id.*; *see also Rienhardt*, 951 P.2d at 466.

In short, while we acknowledge that fairminded jurists could disagree on this point, we think the Arizona Supreme Court reasonably concluded, beyond a reasonable doubt, that no rational jury would have found the existence of the (G)(1) mitigating circumstance. The "possibility for fairminded disagreement" requires us to defer to the state court's determination, regardless of whether we would have reached

the same conclusion following an independent review of the record. *Harrington v. Richter*, 562 U.S 86, 103 (2011).

As to the non-statutory mitigating circumstances, Sansing highlighted his impairment at the time of the murder and the fact that several family members attributed Sansing's violent conduct to his drug use. Sansing also emphasized his deep remorse and his decision to accept responsibility for his crimes by pleading guilty. In addition, Sansing submitted a report by a mitigation specialist that detailed his dysfunctional family background. The report noted that as a child Sansing witnessed frequent incidents of domestic violence between his mother and stepfather, that he began using drugs in the fifth grade, and that he dropped out of high school after his freshman year. Lastly, Sansing pointed to his rehabilitative potential and his family's love and support as non-statutory mitigating circumstances.

A fairminded jurist could nonetheless conclude, beyond a reasonable doubt, that "any reasonable jury would have concluded that the mitigating evidence was not sufficiently substantial to call for leniency." *Sansing II*, 77 P.3d at 39. The Arizona Supreme Court noted that "[t]he brutality of this murder clearly sets it apart from the norm of first degree murders." *Id.* And the court reasonably determined that "[c]ollectively, the mitigating evidence [was] minimal at most." *Id.* The court carefully reviewed the record and reached a reasonable conclusion under the standard established in *Chapman* and *Neder v. United States*, 527 U.S. 1 (1999).

C

The dissent disagrees with our decision to defer to the Arizona Supreme Court's harmless-error determination concerning the (G)(1) mitigating circumstance. According

to the dissent, no deference is owed under AEDPA because the state court applied the wrong legal standard in making its determination. We disagree. The dissent is correct in asserting that *Neder* provides the applicable standard and that the Arizona Supreme Court was required to determine "whether a rational jury *could* have found that the facts called for leniency." *Murdaugh*, 724 F.3d at 1118 (emphasis added); *see also Neder*, 527 U.S. at 19; *United States v. Perez*, 962 F.3d 420, 442 (9th Cir. 2020). In our view, that is the standard the Arizona Supreme Court applied, even if it did not use the phrase "could have found" in explaining its conclusion.

As noted above, in *Sansing II* the court applied the harmless-error standard it had established in *Ring III*, a standard that was itself drawn from *Neder*. *See Sansing II*, 77 P.3d at 33; *Ring III*, 65 P.3d at 944 (citing *Neder*, 527 U.S. at 19). Under that standard, the Arizona Supreme Court's inquiry "focuse[d] on whether no reasonable jury *could* find that the mitigation evidence adduced during the penalty phase [was] sufficiently substantial to call for leniency." *Sansing II*, 77 P.3d at 33 (quoting *Ring III*, 65 P.3d at 944) (emphasis added). In other words, the court applied the same standard the dissent contends that *Neder* required.

It is true, as the dissent asserts, that in finding harmless error as to the (G)(1) mitigating circumstance, the Arizona Supreme Court framed its conclusion in terms of what any reasonable jury "would have" found rather than what a reasonable jury "could have" found. But nothing of substance turns on this choice of language. We know that to be true because the Supreme Court in *Neder* used the same "would have" phrase in describing the harmless-error standard adopted there. It instructed reviewing courts to ask,

"Is it clear beyond a reasonable doubt that a rational jury *would have* found the defendant guilty absent the error?" *Neder*, 527 U.S. at 18 (emphasis added). The Arizona Supreme Court asked that very question and concluded that the answer here is yes.

The dissent contends that, in answering this question, the state court ignored and discounted Sansing's evidence and generally failed to view the evidence in the light most favorable to him. We do not read the Arizona Supreme Court's decision that way. Rather, we understand the court to have concluded that Sansing's evidence, even if credited, was simply insufficient to allow a rational jury to find the existence of the (G)(1) mitigating circumstance, given his complete failure to establish a causal nexus and the uncontroverted evidence that otherwise refuted his impairment claim. The court stated that, given these evidentiary deficiencies, "[n]o reasonable jury would have concluded that Sansing met his burden to establish that his ability to control his behavior or his capacity to appreciate the wrongfulness of his conduct was significantly impaired." *Sansing II*, 77 P.3d at 37. If *no* reasonable jury would have found a given fact, then the defendant necessarily failed to present "sufficient evidence to permit a finding in his favor." Dissent at 44 (emphasis omitted). The Arizona Supreme Court thus asked the right question here; the dissent's disagreement is simply with the answer the court gave.

III. Claim 2

We turn next to Claim 2, which alleges that Sansing's trial counsel rendered ineffective assistance in presenting his mitigation defense during the penalty phase. Sansing's two attorneys, Cotto and Ronan, divided responsibilities at the penalty phase. Cotto assumed responsibility for disputing the aggravating factors, and Ronan handled Sansing's

mitigation defense. We therefore evaluate only Ronan's performance within the *Strickland v. Washington*, 466 U.S. 668 (1984), framework.

The PCR court held that Sansing failed to establish either deficient performance or prejudice under *Strickland*. Sansing contends that the PCR court's rejection of Claim 2 "was contrary to, or involved an unreasonable application of, clearly established Federal law," and "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). Section 2254(d) limits our review "to the record that was before the state court that adjudicated the claim on the merits." *Cullen v. Pinholster*, 563 U.S. 170, 181 (2011).

We conclude that, as to most of the challenged aspects of Ronan's representation, Sansing has not demonstrated that the PCR court's resolution of *Strickland*'s deficient-performance prong was objectively unreasonable. As to the two remaining aspects of the representation, we conclude that the PCR court reasonably determined that Sansing has not demonstrated prejudice.

A

We begin by assessing the PCR court's basis for concluding that Ronan did not render deficient performance, applying the "doubly deferential" standard of review mandated by AEDPA. *Knowles v. Mirzayance*, 556 U.S. 111, 123 (2009).

Sansing contends that several aspects of Ronan's performance fell below the Sixth Amendment standard for effective representation. First, Sansing claims that Ronan failed to provide his experts with the materials they needed "to develop an accurate profile of [his] mental health."

Clabourne v. Lewis, 64 F.3d 1373, 1385 (9th Cir. 1995). Ronan could not specifically recall whether he gave the relevant files to Sansing's experts, but he testified that there was no reason why he would not have followed his standard practice of doing so. Noting that counsel is "strongly presumed to have rendered adequate assistance," *Strickland*, 466 U.S. at 690, the PCR court found no reason to doubt that Ronan did in fact provide the records to the experts.

Fairminded jurists could conclude that Sansing failed to overcome the presumption of competence accorded to Ronan's representation. *See Pinholster*, 563 U.S. at 194. The strongest contrary evidence Sansing can muster is a discrepancy in the report of Dr. Kathryn Menendez, who assessed Sansing for a learning disability. Her report states that Sansing described himself as "an average student," but the report does not mention that his grades in middle school were well below average—mostly D's and F's. From this inconsistency, one might infer that Dr. Menendez never received the school records from Ronan. But one could also infer that Dr. Menendez merely recorded Sansing's statement and failed to cross-reference her interview notes with the records Ronan had given her. The conflicting inferences that may reasonably be drawn from this evidence preclude us from saying that the PCR court's decision was "based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d)(2).

Second, Sansing contends that Ronan performed deficiently by failing to introduce Dr. Menendez's diagnosis that Sansing suffers from an anti-social personality disorder. The PCR court found that Ronan made a strategic decision not to present this evidence. Ronan testified at the evidentiary hearing that, "[b]ased on the report as I have now

seen it, I would not see any reason to call [Dr. Menendez]" to introduce this diagnosis.

The PCR court reasonably determined that Ronan's choice not to call Dr. Menendez as a witness fell "well within the range of professionally reasonable judgments." *Strickland*, 466 U.S. at 699; *see Crittenden v. Ayers*, 624 F.3d 943, 968 n.15 (9th Cir. 2010). Evidence of Sansing's anti-social personality disorder could have called into question the sincerity of Sansing's repeated professions of remorse, *see Beardslee v. Woodford*, 358 F.3d 560, 582 (9th Cir. 2004), even if this diagnosis can be mitigating under Arizona law, *see Lambright v. Schriro*, 490 F.3d 1103, 1125 (9th Cir. 2007). As we have observed, a "remorse-oriented strategy" can sometimes represent the defendant's best path to avoid a death sentence. *Elmore v. Sinclair*, 799 F.3d 1238, 1250 (9th Cir. 2015).

Finally, Sansing alleges that Ronan's investigation into and presentation of his family background was deficient in several respects. We disagree. For each aspect of Ronan's representation, there is a "reasonable argument that counsel satisfied *Strickland*'s deferential standard." *Richter*, 562 U.S. at 105.

Sansing contends that Ronan failed to uphold his "obligation to conduct a thorough investigation of [Sansing's] background." *Williams v. Taylor*, 529 U.S. 362, 396 (2000). As the PCR court noted, however, Sansing's "difficult childhood was discovered, evaluated, and reported" by the defense team's mitigation specialist, Pamela Davis. Davis's investigative efforts were extensive. She frequently visited Sansing in person and regularly corresponded with him about his upbringing and drug use. She spoke with Kara and Sansing's sister Patsy in Arizona. Davis traveled to Nevada to interview Sansing's mother,

Glenda, and his sister Loretta. Davis also traveled to Utah to meet with Sansing's father, stepmother, and two half-siblings, and to collect court records related to Sansing's criminal history. And Davis traveled to Alabama to interview two more siblings, Allen and Susan, as well as Sansing's aunts and uncles.

Next, Sansing targets Ronan's failure to present expert testimony causally linking his dysfunctional upbringing to the circumstances of the murder. At the PCR evidentiary hearing, Sansing presented the testimony of a developmental psychologist, Dr. Paul Miller. Dr. Miller viewed several events in Sansing's childhood—multiple changes in residence, the constant proximity to domestic violence, his mother's divorces, and poor father figures, among others—as "risk factors" that molded Sansing's personality. He opined that these risk factors increased the probability of a "disruptive adulthood." Notably, Dr. Miller declined to offer an opinion on the "role [the risk factors] may have played in the offense" committed by Sansing.

The PCR court reasonably found that Ronan made a strategic decision not to present expert testimony linking Sansing's family background to the crime. Although a different calculus might apply if the case had been tried before a jury, Ronan believed that the sentencing judge "with his background and experience would understand the information that was going to be presented in" the Davis letter. This choice did not fall "outside the wide range of professionally competent assistance." *Strickland*, 466 U.S. at 690. Much of the family-background evidence "was neither complex nor technical"; it merely required the judge to make "logical connections of the kind a layperson is well equipped to make." *Wong v. Belmontes*, 558 U.S. 15, 24 (2009) (per curiam).

Sansing also criticizes Ronan's method of presenting his traumatic childhood to the sentencing judge. Citing the 1989 American Bar Association Death Penalty Guidelines, Sansing argues that Ronan should have relied on the live testimony of his family members instead of (or in addition to) Davis's written report. But restatements of professional standards, such as the ABA guidelines, are useful "only to the extent they describe the professional norms prevailing when the representation took place." *Bobby v. Van Hook*, 558 U.S. 4, 7 (2009) (per curiam). A fairminded jurist could credit Davis's testimony that the submission of a written report was the standard way to present family-background evidence to a judge in Arizona in 1999.

B

Sansing challenges two remaining aspects of Ronan's representation during the penalty phase. As to both, we will assume for the sake of argument that Ronan's performance was deficient.

The first concerns an additional alleged deficiency in the presentation of evidence related to Sansing's family background. Sansing notes that new evidence was discovered post-conviction and presented during the PCR proceedings, which he contends Ronan should have discovered and presented during the penalty phase. For instance, Sansing's siblings testified that their mother, Glenda, neglected her children, frequently beat them, and left her bedroom door open while she had sex. Glenda sometimes hit Sansing on the head with a spoon when he refused to eat his vegetables, and one stepfather would physically fight Sansing, then only 11 years old, to show him "what a real man can do." Witnesses also described numerous violent episodes between Glenda and her partners.

This new evidence "largely duplicated the mitigation evidence at trial." *Pinholster*, 563 U.S. at 200. The sentencing court was informed that Glenda's parenting skills were "ineffective," that she kept the home in an "unacceptable" condition, that Sansing was "exposed weekly to domestic abuse, fueled by his mother's and step-father's abuse of alcohol," and that "there were hundreds of calls to the police for domestic abuse" and frequent visits to the hospital for Glenda. Davis also reported to the sentencing court that Sansing was devastated by the death of his maternal grandfather and afterwards suffered from a "lack of positive male role models." The sentencing court was aware that, in the midst of an unstable childhood, Sansing began abusing drugs at a young age and completed only one year of high school. All told, Ronan convinced the sentencing court, by a preponderance of the evidence, that Sansing had a difficult childhood and a dysfunctional family. Thus, even if the new evidence had been presented during the penalty phase, it would not have altered the character of Sansing's mitigation defense in any significant respect. Sansing has failed to show a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694.

The final aspect of Ronan's representation at issue involves his failure to investigate whether Sansing's drug use was causally linked to the murder. Ronan was aware that Sansing's intoxication would be a principal focus of the penalty phase. According to Kara, when she returned home prior to Ms. Calabrese's arrival, Sansing "was acting cold," "wasn't his normal" self, and "was in another world," a state she attributed to his consumption of crack cocaine. Yet Ronan failed to contact anyone with the requisite expertise in substance abuse. During the PCR evidentiary hearing,

Sansing presented new expert testimony that he contends Ronan should have presented during the penalty phase of the trial.

We will assume that Ronan performed deficiently by failing to present evidence of a causal link between Sansing's crack cocaine use and the murder he committed. We nonetheless reject Sansing's claim because the PCR court reasonably determined that he failed to show prejudice. The expert testimony Sansing relies on had defects that, the PCR court permissibly found, would have undercut its weight with the sentencing court.

Additional background on the expert testimony Sansing presented during the PCR evidentiary hearing is necessary before proceeding. The first expert Sansing presented was Dr. Richard Lanyon, an expert in clinical and forensic psychology. Dr. Lanyon discussed "the research showing that extreme and heavy cocaine use can cause psychosis, and that such states can last several hours." In his view, Sansing "entered some kind of severely abnormal mental state" as Ms. Calabrese turned to leave his home. But his conclusion rested entirely on how Sansing described the day's events during an interview with Dr. Lanyon years later. Sansing explained that he "became convinced" that Ms. Calabrese would report him to the police because she had witnessed him make a "surreptitious hand motion to his wife" indicating that Ms. Calabrese had not brought a purse. At this point, Sansing asserted, he "stepped into a hole [where] everything's dark," and he could not see Ms. Calabrese, only "the outline of her figure." Sansing told Dr. Lanyon that his heart was "racing and going so fast" that he thought he was going to die. After tackling her, Sansing "did the subsequent things 'out of panic.'"

Dr. Lanyon deemed Sansing's stated belief that Ms. Calabrese intended to contact the police to be a "serious and pivotal cognitive distortion [that] could have been a product of a paranoid personality disorder, or independently, a product of a delusional psychotic mental state brought about by his cocaine intoxication." "This delusion," Dr. Lanyon concluded, "triggered a series of behaviors that were grossly out of character for him and are best explained by a psychotic mental state."

Sansing also presented the testimony of Dr. Edward French, an expert in pharmacology. He too viewed Sansing's statements as establishing that "his chronic use of methamphetamine and crack cocaine negatively impacted the underlying cognitive and emotional dysfunctions described by Dr. Lanyon, and thereby diminished his ability to control his conduct toward the victim and his behavior several hours thereafter." Dr. French further explained that his expert conclusion did not depend on the quantity of crack cocaine that Sansing had consumed.

In response, the State presented its own expert, Dr. Michael Bayless. Dr. Bayless, a forensic and clinical psychologist, pointed to evidence that "Sansing admitted he knew what he was doing and that he knew it was wrong." Rather than suffering from a "paranoid delusion," Sansing took steps to avoid prosecution, albeit steps that were poorly calculated to that end. Sansing told Dr. Bayless that "after he initially attacked the victim he was aware he had crossed the line and decided that he would attempt to make it look like a murder secondary to robbery and sexual assault." (Sansing's admission to Dr. Bayless is consistent with Kara's account of what Sansing told her just before he raped Ms. Calabrese.) In Dr. Bayless's view, "there is no indication that [Sansing] was suffering from any psychosis."

The PCR court reasonably concluded that Sansing had not shown a reasonable probability that the testimony of Dr. Lanyon and Dr. French would have allowed him to establish the (G)(1) mitigating circumstance. Although Dr. Lanyon and Dr. French opined that Sansing suffered from cocaine-induced psychosis, they did not describe the requisite impact on Sansing's "capacity to appreciate the wrongfulness of his conduct" or to "conform his conduct to the requirements of law." Ariz. Rev. Stat. § 13-703(G)(1). Dr. Lanyon posited that Sansing was psychotic but acknowledged that Sansing knew "he crossed the line," feared being arrested, and acted to avoid being caught. And Dr. French defined psychosis broadly as a "thought disorder" that prevents an individual from "cop[ing] well with emotional things that are occurring in [his] environment." This type of expert opinion falls short of proving substantial impairment under Arizona law, particularly given the evidence establishing Sansing's attempts to avoid prosecution. *See Medrano*, 914 P.2d at 228; *Kiles*, 857 P.2d at 1228–29.

Moreover, Dr. Lanyon and Dr. French did not base their conclusions on the amount of cocaine Sansing ingested. Instead, they drew speculative inferences from Sansing's descriptions of how he felt during the attack. The PCR court reasonably concluded that the sentencing court would have discounted expert testimony "marred by Sansing's motive to fabricate." *See State v. Poyson*, 7 P.3d 79, 89 (Ariz. 2000); *Medrano*, 914 P.2d at 227.

Nor would the new expert testimony have significantly altered the character of the non-statutory mitigating circumstances before the sentencing court. The court already knew that Sansing was under the influence of crack cocaine at the time of the crime. Because Ronan had

introduced enough evidence to establish Sansing's impairment as a non-statutory mitigating circumstance, the opinions of Dr. Lanyon and Dr. French would have been cumulative on that issue. *See Smith v. Ryan*, 823 F.3d 1270, 1296 (9th Cir. 2016). Thus, the PCR court reasonably concluded that the likelihood of a different sentencing outcome was merely "conceivable," not reasonably probable. *Richter*, 562 U.S. at 112.[2]

Finally, Sansing contends that, even if he has not shown a reasonable probability of a different outcome during the penalty phase of the trial, we should consider the impact Ronan's deficient performance had on the outcome of his direct appeal. Specifically, Sansing argues that, had Ronan presented expert testimony on crack cocaine abuse, there is a reasonable probability that the Arizona Supreme Court would not have found the *Ring* error harmless beyond a reasonable doubt in *Sansing II*.

We cannot accept Sansing's invitation to consider whether the testimony of Dr. French and Dr. Lanyon would have affected the outcome of his direct appeal. The PCR court did not fail to apply "clearly established Federal law, as determined by the Supreme Court," when it assessed only

[2] Although it does not impact our prejudice analysis, we note one credibility concern with the testimony of Dr. Bayless. Based primarily on a hand gesture Sansing allegedly made during their interview together, Dr. Bayless inferred an explanation for Sansing's decision to rape Ms. Calabrese—namely, that "her dress flew up," thereby exposing her vaginal area. The PCR court found Dr. Bayless's testimony credible, notwithstanding the fact that Ms. Calabrese was wearing pants during the attack. Despite the baseless nature of Dr. Bayless's testimony on this point, we do not think it affected the outcome here, as the reason Sansing committed the rape was immaterial both to the sentencing court's decision and to the PCR court's prejudice analysis.

the probability of a different outcome at the penalty phase of the trial. 28 U.S.C. § 2254(d)(1). The Supreme Court has not yet held that courts must evaluate the impact of trial counsel's deficient performance on the outcome of a petitioner's direct appeal. *Cf. Weaver v. Massachusetts*, 137 S. Ct. 1899, 1910–11 (2017) (requiring petitioner to show a reasonable probability of a different outcome *at trial*, even though trial counsel's deficient performance consisted of failing to object to structural error that would have entitled petitioner to automatic reversal on direct appeal). Thus, under AEDPA, we cannot fault the PCR court for viewing the scope of *Strickland*'s prejudice analysis as extending no further than the trial itself.

IV. Claims 4 and 8

Sansing raises two closely related claims, Claims 4 and 8, stemming from the factual basis he offered when pleading guilty and a related sentencing stipulation. In Claim 8, which we address first, Sansing contends that he did not knowingly and intelligently waive his privilege against self-incrimination when admitting a particular fact during the plea colloquy. In Claim 4, he alleges that Ronan rendered ineffective assistance during the guilty-plea process in violation of his right to counsel under the Sixth Amendment.

A

Sansing frames Claim 8 as a due process challenge to the factual basis he provided during the plea colloquy. When he entered his guilty pleas, Sansing signed a written factual basis and orally attested to its truth at the change-of-plea hearing. That factual basis included an admission that "the victim was still conscious, alive and tied up with cords" when Sansing returned to the house after moving Ms. Calabrese's truck (and thus was likely conscious when

he raped her). Sansing alleges that he was unaware that his admission that Ms. Calabrese was conscious during the rape could be used to prove cruelty under the (F)(6) aggravating factor. For this reason, Sansing argues, the waiver of his privilege against self-incrimination was not knowing and intelligent. Because the PCR court summarily denied this claim, we can grant relief only if no reasonable application of the Supreme Court's precedent as of 2008 "could have supported" the result. *Richter*, 562 U.S. at 102.

Sansing relies on the Supreme Court's decision in *Boykin v. Alabama*, 395 U.S. 238 (1969), but that case did not require the trial court to inform Sansing during the plea colloquy that the State could rely on the factual basis during the penalty phase. To ensure that a guilty plea is "intelligent and voluntary," the trial court must advise the defendant of three constitutional rights he waives by pleading guilty: his privilege against compulsory self-incrimination, his right to a jury trial, and his right to confront witnesses against him. *Id.* at 242–44. The trial court provided those advisements to Sansing during his change-of-plea hearing. The Supreme Court has not yet held that the trial court must affirmatively discuss during the plea colloquy the potential impact a defendant's factual admissions may have on capital sentencing proceedings. Section 2254(d)(1) "does not require state courts to *extend* [the Supreme Court's] precedent or license federal courts to treat the failure to do so as error." *White v. Woodall*, 572 U.S. 415, 426 (2014).

B

In Claim 4, Sansing asserts an ineffective-assistance-of-counsel claim that shares the same factual predicate as Claim 8. We issued a certificate of appealability for this claim under 28 U.S.C. § 2253(c). *See Slack v. McDaniel*, 529 U.S. 473, 484 (2000).

Claim 4 centers on the same admission that Ms. Calabrese was conscious during the rape, but it encompasses a related sentencing stipulation as well. During the penalty phase, Sansing stipulated to the admission of hearsay statements made by his children so that the State would not call them as witnesses. The children reported that Sansing planned to rob whomever delivered the box of food, and they described how the attack unfolded. In addition, Sansing stipulated that Victoria Harker, a journalist, would have testified that Sansing told her while awaiting trial that "after raping and beating [Ms. Calabrese] so badly, he decided to kill her to end her suffering," and that when he returned from moving her truck, Ms. Calabrese "had regained consciousness."

Sansing contends that Ronan rendered ineffective assistance because (1) he did not inform Sansing that the State could use the factual basis during the penalty phase of his trial; (2) he permitted Sansing to admit that Ms. Calabrese was conscious during the rape even though that was not an element of any of the charged offenses; and (3) he stipulated to the admission of out-of-court statements by Sansing's children and Harker without first interviewing them.

Because the PCR court denied this claim without reasoning, we are again precluded from granting relief unless no reasonable application of Supreme Court precedent "could have supported" the result. *Richter*, 562 U.S. at 102. Here, we need discuss only the prejudice prong of *Strickland*. Sansing alleges that, absent Ronan's deficient performance, he would not have admitted Ms. Calabrese was conscious and would not have agreed to the sentencing stipulation. To establish prejudice under *Strickland*, he must show a reasonable probability that he

would have received a different sentence had the admission and sentencing stipulation not been offered. *See Strickland*, 466 U.S. at 694.

Even accepting that Ronan rendered ineffective assistance in the three respects described above, a fairminded jurist could conclude that Sansing failed to show a reasonable probability he would have received a different sentence. Sansing's claim of prejudice is refuted by the State's ability to call witnesses who would have established the same facts covered by the factual basis and sentencing stipulation. The admission of Ms. Calabrese's consciousness in the factual basis did not change the mix of evidence before the sentencing court because Sansing had already told Harker that "the victim had regained consciousness" when he returned from moving Ms. Calabrese's truck, and that he killed her to "end her suffering." Nor was Ronan's use of a sentencing stipulation prejudicial, given that Sansing presented no evidence that his children or Harker would have testified differently if Ronan had refused to stipulate to the admission of their out-of-court statements. In other words, the State could have called Harker to repeat Sansing's admission that Ms. Calabrese was conscious, *see* Ariz. R. Evid. 801(d)(2)(A), and the State could have replaced the sentencing stipulation with in-court testimony by Sansing's children. Their statements, moreover, largely tracked the narrative that Kara provided when she testified during the penalty phase.

V. Claim 7

In Claim 7, Sansing alleges that the Arizona courts violated the Eighth Amendment by applying an impermissible "causal nexus" test when assessing his non-statutory mitigating circumstances. *See Eddings v. Oklahoma*, 455 U.S. 104, 110 (1982).

Beginning in 1989, and continuing through the time of Sansing's trial in 1999, Arizona courts frequently applied "a 'causal nexus' test for nonstatutory mitigation that forbade as a matter of law giving weight to mitigating evidence, such as family background or mental condition, unless the background or mental condition was causally connected to the crime." *McKinney v. Ryan*, 813 F.3d 798, 802 (9th Cir. 2015) (en banc). In 2004, the Supreme Court "unequivocally rejected" causal-nexus tests like Arizona's. *Smith v. Texas*, 543 U.S. 37, 45 (2004) (per curiam); *see Tennard v. Dretke*, 542 U.S. 274, 285 (2004). We later held that *Tennard* and *Smith* apply retroactively on federal habeas review. *Schad v. Ryan*, 671 F.3d 708, 723 (9th Cir. 2011) (per curiam).

Sansing contends that the sentencing court and the Arizona Supreme Court both applied the causal-nexus test we condemned in *McKinney*. We address each court's actions in turn.

The sentencing court did not treat "would-be mitigation evidence as legally irrelevant in violation of *Eddings*." *McKinney*, 813 F.3d at 818. Although the court evaluated Sansing's evidence of intoxication for a causal link to the crime, "[w]hen applied solely in the context of statutory mitigation under § 13-703(G)(1), the causal nexus test does not violate *Eddings*." *Id.* at 810. The court still considered Sansing's impairment to be a non-statutory mitigating circumstance, which shows that it "did not exclude evidence from [its] mitigation assessment based solely on the lack of a causal nexus." *Mann v. Ryan*, 828 F.3d 1143, 1159 (9th Cir. 2016) (en banc).

The sentencing court also reduced the weight accorded certain mitigating circumstances due to the absence of a causal nexus, a choice not foreclosed by *Eddings*. *See*

Poyson v. Ryan, 879 F.3d 875, 888 (9th Cir. 2018). After finding that Sansing "has shown by a preponderance of the evidence that he had a difficult childhood and family background," the court noted that there was no "causal link to the horrific crime." On that basis, the court did "not give significant mitigating weight" to this factor. Similarly, the court gave "only minimal weight" to the evidence of love and support from Sansing's family "because it did not prevent the defendant from committing this horrible crime." The sentencing court's reference to the weight of these factors bolsters our conclusion that it did not strip the mitigating circumstances of all weight by applying an unconstitutional causal-nexus test.[3]

Sansing argues that the Arizona Supreme Court also applied an impermissible causal-nexus test when adjudicating his claim in *Sansing I* that the sentencing court violated the Eighth Amendment. He highlights the Arizona Supreme Court's assertion that "'Arizona law states that a difficult family background is *not relevant* unless the defendant can establish that his family experience *is linked to his criminal behavior*.'" *Sansing I*, 26 P.3d at 1129–30 (emphasis added) (quoting *State v. Djerf*, 959 P.2d 1274,

[3] For the same reason, we reject Sansing's argument that the Arizona Supreme Court improperly employed a causal-nexus test in *Sansing II* when it held that a rational jury would have given "only minimal weight" to Sansing's difficult childhood and lack of education absent a "causal link" to the crime. 77 P.3d at 39. As discussed, the lack of a causal nexus may appropriately bear on the weight to be given mitigating evidence, and a jury is "free to assign less weight to mitigating factors that did not influence a defendant's conduct at the time of the crime." *Hedlund v. Ryan*, 854 F.3d 557, 587 n.23 (9th Cir. 2017). Thus, the Arizona Supreme Court permissibly "raised the issue of a causal nexus to determine the weight that a hypothetical jury would have given relevant mitigating evidence." *Murdaugh*, 724 F.3d at 1122 (internal quotation marks omitted).

1289 (Ariz. 1998)). And he points to the court's reliance on *Djerf* and *State v. Hoskins*, 14 P.3d 997 (Ariz. 2000), two cases we have identified as examples of Arizona's unconstitutional causal-nexus test. *See McKinney*, 813 F.3d at 814–15.

These factors raise the possibility that the Arizona Supreme Court applied a rule contrary to *Eddings*. We need not resolve that issue, however, because even if the Arizona Supreme Court erred in this regard, Sansing cannot show actual prejudice from the error under *Brecht*. *See Djerf v. Ryan*, 931 F.3d 870, 885–87 (9th Cir. 2019); *Greenway v. Ryan*, 866 F.3d 1094, 1100 (9th Cir. 2017) (per curiam). We see nothing in the record remotely suggesting that the Arizona Supreme Court would have reached a different conclusion had it followed the sentencing court's lead and accorded Sansing's difficult family background minimal weight rather than no weight.

VI. Claim 12

In Claim 12, Sansing alleges that the sentencing court violated his Eighth Amendment rights by refusing to consider a letter submitted by Ms. Calabrese's 10-year-old daughter. In the letter, handwritten and addressed to the sentencing judge, Ms. Calabrese's daughter expressed her view that Sansing "should go to jail instead of dying." The Arizona Supreme Court upheld the sentencing court's refusal to consider the letter on the ground that it was "irrelevant to either the defendant's character or the circumstances of the crime." *Sansing I*, 26 P.3d at 1129. The court also noted that state law forbade "the consideration of 'any recommendation made by the victim regarding the sentence to be imposed.'" *Id.* (quoting Ariz. Rev. Stat. § 13-703(D) (2001)).

Sansing contends that the Arizona Supreme Court's decision involved an unreasonable application of the Supreme Court's Eighth Amendment precedent, but relief on this claim is precluded under 28 U.S.C. § 2254(d)(1). The Supreme Court has held that the Eighth Amendment prohibits the State from introducing the victim's family's recommendation that the defendant be put to death. *Booth v. Maryland*, 482 U.S. 496, 502–03 (1987); *see Bosse v. Oklahoma*, 137 S. Ct. 1, 2 (2016) (per curiam) (noting that *Booth* remains good law on this point). But the Court has never held that a defendant in a capital case is entitled to have the jury consider the victim's family's recommendation of leniency. Indeed, to our knowledge, no court has adopted that interpretation of the Eighth Amendment, and at least two circuits and a number of state high courts have rejected it. *See United States v. Brown*, 441 F.3d 1330, 1351–52 n.8 (11th Cir. 2006); *Robison v. Maynard*, 829 F.2d 1501, 1504–05 (10th Cir. 1987); *see also Kaczmarek v. State*, 91 P.3d 16, 32 n.71 (Nev. 2004) (collecting cases). These "diverging approaches to the question illustrate the possibility of fairminded disagreement." *Woodall*, 572 U.S. at 422 n.3.

* * *

Because Sansing is not entitled to relief on any of the claims certified for our review, we affirm the district court's denial of his petition for a writ of habeas corpus.

AFFIRMED.

BERZON, Circuit Judge, dissenting:

I respectfully dissent. I would grant the petition as to Claim 1, *Ring* error prejudice, and so would not reach the other challenges to the death sentence discussed in the majority opinion. I concur in the majority's analysis of Claims 4 and 8, relating to the factual basis Sansing offered when pleading guilty.

The Arizona courts denied John Sansing's constitutional right to have the facts making him eligible for a death sentence determined by a jury, not a judge. *Ring v. Arizona*, 536 U.S. 584, 589 (2002). The Arizona Supreme Court then concluded that that constitutional error was harmless beyond a reasonable doubt because, in its view, any reasonable juror would have found that Sansing murdered Trudy Calabrese in an especially cruel and heinous way, and no reasonable jury "would have found" that the mitigating evidence was sufficiently substantial to call for leniency. *State v. Sansing (Sansing II)*, 77 P.3d 30, 35–36, 39 (Ariz. 2003). In so holding, the Arizona Supreme Court applied the wrong legal standard, contrary to clearly established federal law. *See* 28 U.S.C. § 2254(d)(1).

Neder v. United States, 527 U.S. 1 (1999), instructs that the failure to have a jury determine a required element in a criminal case is not harmless if the defendant presented *sufficient* evidence to permit a finding in his favor. *Id.* at 19. The question is not what a court believes a reasonable jury *would* have found, but what a reasonable jury *could* have found, given the evidence in the record. *See id.* Critically, in reviewing whether Sansing presented sufficient evidence to support a finding that mitigating factors existed, the Arizona Supreme Court was required, but failed, to view the evidence in the light most favorable to Sansing. *Cf. Jackson v. Virginia*, 443 U.S. 307, 319 (1979) (explaining how to

conduct a sufficiency-of-evidence review in the context of determining whether the evidence was sufficient to convict). The state court weighed and discounted witness testimony, but those determinations are improper in a sufficiency-of-evidence review, as it is the jury's role to assess the weight and credibility of testimony. *See Schlup v. Delo*, 513 U.S. 298, 330 (1995) (citing *Jackson*, 443 U.S. at 319).

Because the Arizona Supreme Court applied the wrong legal standard, we owe no deference to its harmlessness determination. *See Inthavong v. Lamarque*, 420 F.3d 1055, 1059 (9th Cir. 2005). I would therefore go on to review, under *Brecht v. Abrahamson*, 507 U.S. 619 (1993), whether the deprivation of the right to a jury determination had a "substantial and injurious effect" on Sansing's sentence. *Id.* at 637 (quoting *Kotteakos v. United States*, 328 U.S. 750, 765 (1946)). Under our precedent, we conduct that inquiry by asking the same question the Arizona Supreme Court should have asked: "whether a rational jury *could* have found" that Sansing had established the existence of mitigating factors. *Murdaugh v. Ryan*, 724 F.3d 1104, 1118 (9th Cir. 2013) (emphasis added).

If the evidence is viewed in the light most favorable to Sansing, as is proper under *Neder* and *Murdaugh*, then Sansing assuredly presented sufficient evidence to allow a jury to conclude that, because of his crack cocaine use, his capacity to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law was "significantly impaired." Ariz. Rev. Stat. § 13-703(G)(1) (1999). In the present context—that is, where there was no jury determination at all, so the question is not the likely impact of a constitutional error in the jury trial—the possibility that a jury could have so found is enough to establish prejudice under *Brecht*. *Murdaugh*, 724 F.3d

at 1120. Had a jury so found, the aggravating and mitigating factors in Sansing's case could reasonably have been weighed differently, and he could not have been sentenced to death. I would therefore grant Sansing's petition for a writ of habeas corpus as to Claim 1.

I.

As recounted by the majority, *Ring* ruled unconstitutional the judge-based capital-sentencing scheme in effect in Arizona at the time of Sansing's sentencing. *Ring*, 536 U.S. at 609; Majority op. 12. *Ring* relied on *Apprendi v. New Jersey*, 530 U.S. 466 (2000), which held that "the Sixth Amendment does not permit a defendant to be 'exposed . . . to a penalty *exceeding* the maximum he would receive if punished according to the facts reflected in the jury verdict alone.'" *Ring*, 536 U.S. at 588–89 (quoting *Apprendi*, 530 U.S. at 483) (alteration omitted). The Court concluded in *Ring* that "[c]apital defendants, no less than noncapital defendants, . . . are entitled to a jury determination of any fact on which the legislature conditions an increase in their maximum punishment." *Id.* at 589.

The Arizona capital sentencing statute provided that, in "determining whether to impose a sentence of death or life imprisonment," the sentencing judge "shall take into account the aggravating and mitigating circumstances included in . . . this section and shall impose a sentence of death if the court finds one or more of the [enumerated] aggravating circumstances . . . and that there are no mitigating circumstances sufficiently substantial to call for leniency." Ariz. Rev. Stat. § 13-703(E) (1999). We have interpreted *Ring* to require that a jury determine not only the "presence or absence of the aggravating factors required by Arizona law for imposition of the death penalty," *Ring*, 536 U.S. at 588, but also "the existence or absence of mitigating

circumstances," *Murdaugh*, 724 F.3d at 1117. *Murdaugh* concluded that *Ring* requires this dual finding because under the Arizona scheme, "a defendant's eligibility for a death sentence was effectively contingent on the judge's findings regarding *both* aggravating and mitigating circumstances," as the "'ultimate element' qualifying the defendant for death was 'at least one aggravating circumstance not outweighed by one or more mitigating factors.'" *Id.* at 1115 (quoting *State v. Ring*, 65 P.3d 915, 935 (Ariz. 2003)).

Notably, *Murdaugh* did *not* hold that the weighing of aggravating against mitigating factors is a factual determination that must under *Ring* be carried out by a jury. Recently, the Supreme Court held that "a jury (as opposed to a judge) is not constitutionally required to *weigh* the aggravating and mitigating circumstances or to make the ultimate sentencing decision within the relevant sentencing range." *McKinney v. Arizona*, 140 S. Ct. 702, 707 (2020) (emphasis added). *McKinney* does not affect *Murdaugh*'s conclusion that a jury must find "the *existence or absence* of mitigating circumstances." *Murdaugh*, 724 F.3d at 1117 (emphasis added). We therefore remain bound by our precedent to consider whether the Arizona courts' deprivation of Sansing's right to have a jury determine the presence or absence of mitigating factors was harmless.[1]

[1] In my view, the right to have a jury find the facts required to impose the death penalty is fundamental, and the deprivation of that right can never be harmless. *See Sullivan v. Louisiana*, 508 U.S. 275, 281–82 (1993) (deprivation of the right to trial by jury "unquestionably qualifies as structural error" (internal quotation marks omitted)); *Summerlin v. Stewart*, 341 F.3d 1082, 1116 (9th Cir. 2003) (en banc), *rev'd on other grounds*, *Schriro v. Summerlin*, 542 U.S. 348 (2004); *Sansing II*, 77 P.3d at 40 (Jones, C.J., concurring in part and dissenting in part); *State v. Ring*, 65 P.3d 915, 946–48 (Ariz. 2003) (Feldman, J., concurring in part and

II.

The majority determines that the Arizona Supreme Court's application of the "harmless beyond a reasonable doubt" standard from *Chapman v. California*, 386 U.S. 18, 24 (1967), was not objectively unreasonable under the Antiterrorism and Effective Death Penalty Act ("AEDPA"), 28 U.S.C. § 2254(d)(1). Majority op. 17. The majority concludes that habeas relief is therefore not warranted, and finds no need to apply the "substantial and injurious effect" standard from *Brecht*, 507 U.S. at 637.

I note that the majority's approach of applying the AEDPA/*Chapman* test in lieu of *Brecht* is permissible under our case law, *see Sifuentes v. Brazelton*, 825 F.3d 506, 536 (9th Cir. 2016), but to the extent the majority suggests that it *must* apply AEDPA/*Chapman*, Majority op. 16–17, that suggestion is erroneous, *see Deck v. Jenkins*, 814 F.3d 954, 985 (9th Cir. 2016). A court *denying* habeas relief may apply either AEDPA/*Chapman* or *Brecht*, as *Brecht*'s more stringent standard subsumes the AEDPA standard. *Id.*[2]

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dissenting in part). Moreover, determining what a nonexistent jury would have done regarding a penalty phase record that would undoubtedly have been quite different if tried to a jury rather than a judge is an exercise in rank speculation that should not govern life-or-death determinations. But because the Supreme Court has specifically left open whether *Ring* error can be harmless, *see Mitchell v. Esparza*, 540 U.S. 12, 17 (2003) (citing *Ring*, 536 U.S. at 609 n.7), we have held that we must defer to the Arizona Supreme Court's decision to apply harmless error review, *see Murdaugh*, 724 F.3d at 1117. This opinion follows that course.

[2] The Supreme Court recently granted certiorari on the question whether "a federal habeas court [may] grant relief based *solely* on its conclusion that the *Brecht* test is satisfied" or whether it "must . . . also find that the state court's *Chapman* application was unreasonable under

A court *granting* habeas relief must apply *Brecht*, however. *See Fry v. Pliler*, 551 U.S. 112, 119–20 (2007); *Sifuentes*, 825 F.3d at 534–35 & n.6; *Inthavong*, 420 F.3d at 1059.[3] Because the majority applied AEDPA/*Chapman* and because Supreme Court case law still requires *Brecht* to be met before habeas relief can be granted, I apply both tests here.

A.

The majority errs in its review of the state court's application of *Chapman*. The state court's application was contrary to federal law, as clearly established by *Neder v. United States*, 527 U.S. 1 (1999). *Neder* set forth narrow parameters for applying *Chapman* in cases in which an essential element of a criminal offense was never submitted to a jury at all. *Id.* at 19.

In *Neder*, the defendant was convicted of federal charges involving tax fraud. Although materiality was an element of the crime, the district court refused to submit the materiality

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[28 U.S.C.] § 2254(d)(1)." *Brown v. Davenport*, No. 20-826 (U.S. cert. granted Apr. 5, 2021).

[3] In my view, the Supreme Court has not adequately explained why *Brecht* still applies *after* an AEDPA analysis results in the conclusion that the state court's harmlessness analysis is not entitled to AEDPA deference. *Fry* observed only that it was "implausible" that Congress intended for AEDPA to replace the *Brecht* standard and that "it certainly [made] no sense to require formal application of both tests." 551 U.S. at 119–20 (emphasis omitted). Writing on a blank slate, I would hold that it is anomalous to allow one test, AEDPA/*Chapman*, to suffice if a court is ruling that any error is harmless—as the majority does here—but to require a second analysis, *Brecht*, if it first rules, applying AEDPA, against the state court's harmlessness conclusion, even if on full *de novo* review the result would be otherwise.

issue to the jury. *Id.* at 4. *Neder* applied harmless error review under *Chapman*, but it explained that because the omitted element was never submitted to a jury, the review must focus on "whether the record contains evidence that *could* rationally lead to a contrary finding with respect to the omitted element." *Id.* at 19 (emphasis added). If, after a "thorough examination of the record," the reviewing court "cannot conclude beyond a reasonable doubt that the jury verdict would have been the same absent the error—for example, where the defendant *contested* the omitted element and raised evidence *sufficient* to support a contrary finding—it should not find the error harmless." *Id.* (emphasis added).

The reason for conducting a sufficiency-of-evidence review in these circumstances instead of the typical record-as-a-whole *Chapman* inquiry is that the whole-record approach to *Chapman* cannot be applied directly where, as here, there was not simply a trial error during a jury trial but no jury at all. "[T]he question [*Chapman*] instructs the reviewing court to consider is not what effect the constitutional error might generally be expected to have upon a reasonable jury, but rather what effect it *had* upon the [jury determination] in the case at hand." *Sullivan v. Louisiana*, 508 U.S. 275, 279 (1993) (emphasis added). Where the constitutional error is that there was no jury at all, a *Chapman* analysis cannot be directed at answering that question, but must instead take into account the difficulty of projecting what a jury would have done on an issue never presented to it. *See id.* at 280.

That is why, as we have recently observed, *Neder* sets "a high bar for finding harmlessness beyond a reasonable doubt" with regard to an issue never decided at all by a jury. *United States v. Perez*, 962 F.3d 420, 442 (9th Cir. 2020). In that circumstance, the question is not whether there is,

beyond a reasonable doubt, strong evidence to support the trial judge's finding on the element in question, but whether there is sufficient evidence to support the *defendant's* contentions to the contrary. *Id.* Where there is, an appellate court cannot with any confidence predict beyond a reasonable doubt that a non-existent jury would have rejected the sufficient evidence in favor of the prosecution's case.

Importantly, a court reviewing that sufficiency-of-evidence question asks whether the record contains evidence that "could" lead to a particular finding. *Neder*, 527 U.S. at 19; *see Jackson*, 443 U.S. at 319. "[T]he use of the word 'could' focuses the inquiry on the power of the trier of fact to reach its conclusion," and not on the reviewing court's assessment of how a factfinder would "likely behav[e]" on the record as a whole. *Schlup*, 513 U.S. at 330 (quoting *Jackson*, 443 U.S. at 319). For that reason, a court applying *Neder*'s harmless error standard must view all the evidence in the "light most favorable" to the defense assertion that there was sufficient evidence to support a finding in its favor, *see Jackson*, 443 U.S. at 319, and generally does not assess the "credibility of witnesses," *see Schlup*, 513 U.S. at 330.

A useful analogy is the context of determining whether a criminal defendant has a right to a jury instruction on a defense. In that instance, as here, the defendant is deprived of a jury determination that should have gone forward. In the precluded defense context, we ask only whether the defendant has presented sufficient evidence to warrant the requested instruction, recognizing that the "weight and credibility of the conflicting testimony are issues [for] the jury, not the court," to resolve. *United States v. Becerra*, 992 F.2d 960, 963–64 (9th Cir. 1993), *overruled on other grounds by United States v. Collazo*, 984 F.3d 1308, 1335

(9th Cir. 2021); *see also United States v. Bailey*, 444 U.S. 394, 414–15 (1980). Likewise, in assessing sufficiency in the civil summary judgment context, "[c]redibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986).

B.

Here, the sentencing judge found it "likely" that Sansing "was impaired or affected by his crack cocaine usage at the time of the murder" but held that Sansing had not shown he was sufficiently impaired to establish the (G)(1) mitigating factor. To meet that factor, Sansing was required to prove by a preponderance of the evidence that his "capacity to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law was *significantly* impaired, *but not so impaired as to constitute a defense to prosecution*." Ariz. Rev. Stat. § 13-703(G)(1) (1999) (emphasis added); *Sansing II*, 77 P.3d at 36. In other words, Sansing had to show that his "mental capabilities were significantly, but only partially, impaired." *State v. Gretzler*, 659 P.2d 1, 17 (Ariz. 1983) (upholding finding of impairment where "continuous use of drugs likely impaired defendant's volitional capabilities" although he retained the ability to "distinguish right from wrong" and to "exercise some control over his behavior," *id.* at 16–17). In reviewing whether Sansing was prejudiced by the deprivation of his right to have a jury decide whether he had established the (G)(1) mitigating factor, the Arizona Supreme Court, contrary to *Neder*, failed to consider whether, *viewing the evidence in the light most favorable to Sansing*, the record contained *sufficient* evidence to allow a jury to find that Sansing's capacity to appreciate the wrongfulness of his

conduct or to conform his conduct to the requirements of law was significantly impaired. *See Sansing II*, 77 P.3d at 37–38; Ariz. Rev. Stat. § 13-703(G)(1) (1999).

1. The Arizona Supreme Court began by reasoning that Sansing had "failed entirely to show any causal nexus between his alleged drug use and impairment" because he "presented no expert testimony to support his assertion that his use of cocaine impaired either his capacity to control his conduct or his capacity to appreciate the wrongfulness of his actions." *Sansing II*, 77 P.3d at 37. But Sansing's failure to present expert testimony would not *preclude* a jury from finding significant impairment. The Arizona Supreme Court has not held expert testimony required to satisfy the (G)(1) mitigating factor, only that it is "[t]ypically" presented. *Id.* As discussed below, Sansing presented other evidence of his drug use and its effect on him at the time of the murder, which a jury could have credited.

The state court's critique of Sansing's failure to present expert testimony is particularly problematic given the nature of *Ring* error. At sentencing, Sansing's counsel presented a case for mitigation to a judge, not a jury. Had there been a jury, counsel unquestionably would have presented the case differently. In a hearing on Sansing's petition for postconviction review, his trial counsel stated that, although he did not remember the details of his decision-making process, he likely had not presented expert testimony regarding Sansing's drug use because he "felt that Judge Reinstein . . . with his background and experience . . . understood the nexus between substance abuse and the commission of crimes." In the analogous context of applying *Neder* to determine whether an *Apprendi* error was harmless, we emphasized, in a case in which the defendant was convicted after a guilty plea, that the "record is . . . a guide

to determining what the evidence would have established if the case had proceeded to trial," but is "not a substitute for a trial, and there need only be evidence sufficient to support a contrary finding to show that the error was not harmless." *United States v. Hunt*, 656 F.3d 906, 913 (9th Cir. 2011).

Here, the bench trial was no substitute for a jury trial. The Arizona Supreme Court's conclusion that the deprivation of Sansing's right to present his mitigation case to a jury was harmless because defense counsel failed, in a hearing before a sophisticated judge, to present expert testimony that he may well have chosen to present to a jury of laypersons does not take account of the different strategies that are effective at jury and at judge trials, especially where the death penalty is at stake. *Cf. Gallegos v. Ryan*, 820 F.3d 1013, 1039 (9th Cir.), *opinion amended on reh'g*, 842 F.3d 1123 (9th Cir. 2016) (explaining that there is "really no way to know" how a jury would have weighed mitigating evidence rejected by the sentencing judge); *Gallegos v. Shinn*, No. CV-01-01909-PHX-NVW, 2020 WL 7230698, at *28 (D. Ariz. Dec. 8, 2020) (quoting *Gallegos v. Ryan*, 820 F.3d at 1039).

2. At the penalty phase, Sansing did present evidence of his drug use and its impact, albeit without expert testimony. He did so through a letter from a mitigation specialist, Pamela Davis, and the testimony of his wife, Kara Sansing, and his sister, Patsy Hooper. In its harmlessness analysis, the Arizona Supreme Court entirely ignored the evidence from Davis and Hooper.

Davis reported, based on interviews with Sansing and his family members, that Sansing began using marijuana in fifth grade and struggled with drug addiction throughout his adult life. At the time of Ms. Calabrese's murder, Sansing and Kara "had been on a four day binge of crack cocaine use,"

during which time they had spent $750 on crack cocaine. Davis also quoted an article stating that heavy cocaine use can produce paranoia and aggression. Under *Neder*, the Arizona Supreme Court should have included this record evidence in its *Chapman*/sufficiency-of-evidence review. *See* 527 U.S. at 19.

Although the Arizona Supreme Court discussed Kara's testimony about Sansing's drug use on the day of the murder, the court weighed and discounted her testimony, contrary to *Neder*. *Sansing II*, 77 P.3d at 37–38. In the hours before the murder, Sansing smoked crack cocaine at least twice—first by himself, while Kara was at work, and later with Kara, about 40 minutes before Ms. Calabrese arrived at the Sansing home. *State v. Sansing* (*Sansing I*), 26 P.3d 1118, 1123 (2001). Kara testified that when she spoke with Sansing over the phone before coming home from work, he sounded "hyped up" and "[a]nxious." When she got home, she could "tell he was nervous" and that he had been using cocaine. He was "pacing" and acting "cold." He did not give her a kiss or a hug as he normally did.

Kara testified that Sansing's demeanor while he was assaulting Ms. Calabrese was different from anything she had witnessed in him before. She said: "He was acting cold. It wasn't my husband. It wasn't his normal. Even though he has smoked crack before, he wouldn't act the way he did that day." Kara elaborated that Sansing was acting like "he wasn't there. It's like he was in another world. . . . It wasn't my husband."

The Arizona Supreme Court determined that Kara's testimony was "insufficient to establish, by a preponderance of the evidence, that Sansing's capacity to control his behavior was significantly impaired." *Sansing II*, 77 P.3d at 37. In so holding, the court reasoned, first, that "Kara did not

quantify how much crack Sansing used." *Id.* But Sansing did present evidence relating to the quantity of crack cocaine he used: the evidence from Davis that Sansing and Kara had spent $750 on crack cocaine in the four days leading up to the murder. Again, the Arizona Supreme Court improperly ignored that evidence.

Second, the court held that "no reasonable jury *would* conclude that Kara's testimony that Sansing was not acting himself was sufficient to establish that his capacity was significantly impaired." *Id.* (emphasis added). The court quoted a sentence from *State v. Jordan*, 614 P.2d 825, 832 (Ariz. 1980), rejecting testimony that was "inexact as to defendant's level of intoxication at the time of the crime" and lacked a "description of how defendant's intoxication affected his conduct." *Sansing II*, 77 P.3d at 37–38. Again, the question the Arizona Supreme Court was required to ask was not whether, in its view, a jury *would* conclude that Sansing's capacity was significantly impaired, but whether a jury *could* so conclude. In weighing and discounting Kara's testimony, the court usurped the role of the absent jury, whose province it was to make credibility and evidence-weighing determinations. *See Anderson*, 477 U.S. at 255.

Hooper testified that Sansing drove to her house the day after the murder and confessed to her. Hooper called their father, who called the police. Sansing waited with Hooper for the police to arrive and surrendered quietly. Hooper testified that Sansing looked like he "hadn't slept for days" and that he "had dark circles under his eyes." Hooper believed that Sansing had been "taken by the drugs he had been doing," and that the drugs contributed "a lot" to his murder of Ms. Calabrese. Again, the Arizona Supreme Court

should have considered this record evidence as part of its sufficiency-of-evidence review. *See Neder*, 527 U.S. at 19.

3. In addition to improperly ignoring and discounting the evidence of drug use that Sansing presented, the Arizona Supreme Court concluded that Sansing's "deliberate actions" and "steps . . . to avoid detection" "refute[d]" and "negate[d]" his impairment claim. *Sansing II*, 77 P.3d at 38. In so holding, the state court put emphasis on the weight of the prosecution's evidence, and so failed to view the evidence in the light most favorable to Sansing, contrary to *Neder*.

The evidence that Sansing planned to rob the person who delivered food did not *preclude* a rational jury from finding significant impairment, even if it could support the opposite conclusion. Viewed in the light most favorable to Sansing, that evidence showed that Sansing planned to commit a robbery, not a murder. Sansing arranged for the food delivery while Kara was at work, and when she returned home, he smoked more crack cocaine and told Kara about his plan to rob the delivery person. *Sansing I*, 26 P.3d at 1123. A rational jury could have concluded that Sansing's impairment increased *after* he made the robbery plan, and that his impairment played a significant role in the extreme escalation of events from a planned robbery to a murder.

Finally, the actions Sansing took to avoid detection did not preclude a finding of significant impairment. Viewed in the light most favorable to Sansing, those actions were minor and would have been obviously ineffective to a normally functioning person. Sansing moved Ms. Calabrese's truck, but only a short distance from his house. *Id.* at 1123. He "hid" her body by placing it under some debris in his own backyard, where it was visible from the alley. *Id.*

In *Murdaugh*, we addressed a defendant's similarly ineffectual attempts to avoid detection—first sprinkling horse manure over the victim's body, before dismembering it many hours later. We concluded that "a reasonable jury might not have found that [defendant's] actions to cover up the murder demonstrated any kind of sober sophistication." 724 F.3d at 1120. Similarly, here, a reasonable jury might not have found Sansing's efforts to avoid detection "to be inconsistent with a finding that [he] was 'significantly, but only partially, impaired' at the time of the offense." *Id.* (quoting *Gretzler*, 659 P.2d at 17). For example, viewed in the light most favorable to Sansing, a jury could conclude that Sansing's ability to drive a truck a short distance did not defeat his contention that he was significantly, but only partially, impaired. Additionally, a reasonable jury might have interpreted Sansing's confession to Hooper the next day, which the Arizona Supreme Court improperly ignored, as evidence that his capacity to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law did not fully return until after he had regained a measure of sobriety.

Because the Arizona Supreme Court failed to conduct a sufficiency review under *Neder*, its harmlessness determination was "contrary to . . . clearly established Federal law," and the panel majority errs in holding otherwise. 28 U.S.C. § 2254(d)(1); *see Amado v. Gonzalez*, 758 F.3d 1119, 1136 (9th Cir. 2014) ("A decision is 'contrary to' Supreme Court precedent 'if it applies a rule that contradicts the governing law set forth in [the Supreme Court's] cases . . . .'" (quoting *Early v. Packer*, 537 U.S. 3, 8 (2002)) (alteration in original)). As discussed above, however, under current controlling law, it is not enough for a habeas petitioner to satisfy the AEDPA/*Chapman* test; the petitioner must still meet the *Brecht* standard before relief

can be granted. *See supra* pp. 48–49. I turn now to the *Brecht* inquiry.

III.

Under *Brecht*, "habeas relief must be granted" if the *Ring* error "had substantial and injurious effect or influence in determining the jury's verdict." *Brecht*, 507 U.S. at 623 (quoting *Kotteakos*, 328 U.S. at 765).

> [I]f one cannot say, with fair assurance, after pondering all that happened without stripping the erroneous action from the whole, that the judgment was not substantially swayed by the error, it is impossible to conclude that substantial rights were not affected. The inquiry cannot be merely whether there was enough to support the result, apart from the phase affected by the error. It is rather, even so, whether the error itself had substantial influence.

Merolillo v. Yates, 663 F.3d 444, 454 (9th Cir. 2011) (quoting *Kotteakos v. United States*, 328 U.S. 750, 765 (1946)) (alteration in original).

Here, of course, "the underlying error is the absence of a jury itself." *Murdaugh*, 724 F.3d at 1118. Accordingly, as we held in analyzing whether *Ring* error was prejudicial in *Murdaugh*, "the *Brecht* inquiry is whether the absence of a jury as factfinder at the penalty stage 'substantially and injuriously' affected or influenced the outcome." *Id.* (quoting *Merolillo*, 663 F.3d at 454). To answer that question, we ask "whether a rational jury *could* have found" that Sansing had established the (G)(1) mitigating factor. *Id.* (emphasis added). If so, "it is impossible to conclude that

substantial rights were not affected," *Merolillo*, 663 F.3d at 454 (quoting *Kotteakos*, 328 U.S. at 765), as we have no actual jury verdict against which to evaluate whether the verdict would have varied absent a particular trial error. In these circumstances, therefore, the *Brecht* inquiry is the same one the Arizona Supreme Court should have applied in its harmlessness review: "whether the record contains evidence that *could* rationally lead to a contrary finding with respect to the omitted element." *Neder*, 527 U.S. at 19 (emphasis added); *cf. Deck*, 814 F.3d at 985 (addressing a situation in which the *Brecht* analysis "overlap[ped] completely" with the analysis of whether the state court's determination that there was no constitutional error was objectively unreasonable).

Again, the evidence in the record, when properly viewed in the light most favorable to Sansing, was *sufficient* to allow a rational jury to find that that Sansing had proved, by a preponderance of the evidence, that his capacity to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law was "significantly, but only partially, impaired," *Gretzler*, 659 P.2d at 17—even if a jury might not have been *likely* to make such a finding, *see Schlup*, 513 U.S. at 330. Sansing presented testimony from Kara, who was present at the time of the crime; who knew him well, having been married to him for fourteen years; and who was familiar with both his use of crack cocaine and the effects that drug usually had on him. Kara testified that Sansing was high on crack cocaine when he assaulted Ms. Calabrese, that immediately beforehand he was anxious and uncharacteristically cold, that his demeanor was different from anything she had witnessed before, and that he seemed to be in another world. A jury could reasonably conclude based on Kara's testimony, along with the uncontested evidence of Sansing's long history of drug abuse starting in

childhood, his recent struggle with addiction, and his and Kara's consumption of $750 worth of crack cocaine in the days leading up to the murder, that Sansing had demonstrated significant impairment. *Cf. State v. Hill*, 174 Ariz. 313, 330 & n.7 (1993) (holding that there was sufficient evidence to support the trial court's finding that the (G)(1) mitigating factor was established, where the trial court found that the defendant was "an alcoholic, that [he was] most likely under the influence of alcoholic beverages to some extent at the time of the murder, [and] that [he was] a product of an alcoholic family").

Because Sansing was deprived of his constitutional right to have a jury determine the facts on which his sentence depended, we cannot know what a jury would have done. "That a rational jury might have found that the evidence established the (G)(1) mitigating factor is sufficient to establish prejudice under *Brecht*." *Murdaugh*, 724 F.3d at 1120.

Had a jury found that Sansing had proven the (G)(1) mitigating factor, a reasonable sentencing judge could have weighed the aggravating and mitigating circumstances differently and concluded that the latter were "sufficiently substantial to call for leniency." Ariz. Rev. Stat. § 13-703(E) (1999). Or the Arizona Supreme Court could reasonably have so concluded when it conducted its required independent reweighing of aggravating and mitigating circumstances. *See Sansing I*, 26 P.3d at 1131; *cf. Strickland v. Washington*, 466 U.S. 668, 695 (1984) (holding, in the context of an ineffective-assistance-of-counsel claim, that the prejudice inquiry asks "whether there is a reasonable probability that, absent the errors, the sentencer—including an appellate court, to the extent it independently reweighs the evidence—would have concluded that the balance of

aggravating and mitigating circumstances did not warrant death," and further noting that the prejudice inquiry is objective and does "not depend on the idiosyncracies [*sic*] of the particular decisionmaker"). The deprivation of the right to a jury determination therefore had a "substantial and injurious effect" on Sansing's sentence. *Brecht*, 507 U.S. at 623 (quoting *Kotteakos*, 328 U.S. at 765).

Having concluded that Sansing has satisfied both the AEDPA/*Chapman* and *Brecht* tests for prejudicial error, I would grant his petition for a writ of habeas corpus as to Claim 1.

Appendix C

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

John Edward Sansing, Petitioner, vs. Charles L. Ryan et al., Respondents.	No. CV-11-1035-PHX-SRB DEATH PENALTY CASE **MEMORANDUM OF DECISION AND ORDER**

Petitioner John Edward Sansing, a state prisoner under sentence of death, has filed a Petition for Writ of Habeas Corpus alleging that he is imprisoned and sentenced in violation of the United States Constitution. (Doc. 35.)[1] The petition raises 29 claims. Pursuant to the Court's general procedures governing resolution of capital habeas proceedings, the parties have briefed both the procedural status and merits of Petitioner's claims. (Docs. 37, 51.) Petitioner has also filed a Motion for Evidentiary Development regarding four of his claims. (Doc. 53.) As set forth below, the Court concludes that Petitioner is not entitled to either evidentiary development or federal habeas relief.

BACKGROUND

[1] "Doc." refers to the documents in this Court's Electronic Case File (ECF). "RT" refers to reporter's transcript; "ROA" refers to the trial court record prepared for Petitioner's direct appeal (Case No. CR-99-0438-AP). The original reporter's transcripts and a certified paper copy of the record on appeal were provided to this Court by the Arizona Supreme Court. (Doc. 63.) Additional state court records have been filed electronically by the parties. (Docs. 37-44, 46, 52.) Citation to these records is to the ECF docket and page number.

In September 1998, Petitioner pled guilty to the first-degree murder, kidnapping, armed robbery, and sexual assault of Trudy Calabrese. The Arizona Supreme Court summarized the facts as follows:

> On February 24, 1998, the defendant called the Living Springs Church and requested delivery of a food box for his family. He gave the church secretary his name and home address for the delivery. The defendant then telephoned his wife, Kara Sansing, at work several times, primarily to discuss how to obtain more crack cocaine for the two of them to smoke. During these calls, the defendant informed his wife that he had obtained some crack cocaine, that he had smoked some of it and was saving the rest for her. He also told her that he had called a church and arranged for delivery of some food. When Kara Sansing returned home at approximately 3:20 p.m., the couple smoked the remaining crack cocaine. The defendant, in the presence of his four children, informed Kara of his plan to rob the person who came from the church with the food boxes so he could purchase more crack cocaine.
>
> Trudy Calabrese left the Living Springs Church in her truck at approximately 4:00 p.m. She arrived at the Sansing home shortly thereafter, parked in front of the house, and delivered two boxes of food. Ms. Calabrese chatted with Kara Sansing in the kitchen while the defendant signed a receipt for the delivery. Before Ms. Calabrese could leave, the defendant grabbed her from behind and threw her to the dining room floor. Aided by his wife and with his children watching, the defendant bound her wrists while she cried, "Lord, please help me" and, "I don't want to die, but if this is the way you want me to come home, I am ready," and repeatedly asked the defendant's children to call the police. The defendant instructed his children to go into the living room and watch television.
>
> Using a club, the defendant struck Ms. Calabrese in the head several times with force sufficient to break the club into two pieces and render her temporarily unconscious. Leaving her on the dining room floor, the defendant took her keys and moved her truck to a business parking lot nearby. At some point before he returned, Ms. Calabrese regained consciousness. Upon his return, the defendant dragged her into his bedroom and sexually assaulted her. Kara Sansing, who witnessed the rape, testified that she heard the defendant and Ms. Calabrese speaking during the rape. The defendant then fatally stabbed her in the abdomen three times with a kitchen knife. During the attack, the defendant placed a sock in Ms. Calabrese's mouth and secured two plastic bags over her head with additional cords and a necktie. According to the medical examiner, she lived several minutes after being stabbed. After the murder, the defendant left the bedroom and went to look out the dining room window to make certain no one had observed his actions.
>
> The defendant then removed Ms. Calabrese's jewelry and left her body in his bedroom, covered with laundry, for several hours. The defendant engaged in two separate drug transactions shortly after the murder. First, he telephoned a drug dealer and arranged to trade the victim's rings for crack cocaine. Later, he arranged to trade her necklace for more crack cocaine.
>
> Later in the evening, Pastor Becker from Living Springs Church called the Sansing home looking for Ms. Calabrese and spoke to the defendant. The defendant, giving a false address, told the pastor that she had never arrived.

> Late that night, the defendant dragged Ms. Calabrese from the bedroom to the backyard and placed her body in a narrow space between the back of his shed and the fence. He covered her with a piece of old carpeting and other debris. At least three of the four Sansing children saw the body behind the shed. At some point, the defendant washed the bloody club and hid the clothes he had used to cover her body in a box in the bedroom.
>
> The next day, searchers found Ms. Calabrese's truck in a parking lot near the Sansing home. Inside, they found a piece of paper with the Sansings' correct address. The police went to the Sansing home and discovered the victim's body behind the shed. The defendant, who had driven to his sister's house, admitted to her that he and his wife had killed Ms. Calabrese. Eventually, the defendant's father telephoned the police and reported the defendant's location. The defendant knew the police were coming and did not attempt to flee. When the police arrived, he submitted to custody peaceably and without resistance.

State v. Sansing, 200 Ariz. 347, 351-52, 26 P.3d 1118, 1122-23 (2001) (*Sansing I*).

In September 1999, Maricopa County Superior Court Judge Ronald S. Reinstein held a sentencing hearing to determine the existence of aggravating and mitigating circumstances. The court found that the State had proven beyond a reasonable doubt that Petitioner committed the crime in the expectation of pecuniary gain, A.R.S. § 13-703(F)(5),[2] and that Petitioner committed the murder in an especially cruel, heinous, or depraved manner, A.R.S. § 13-703(F)(6). The court further found that Petitioner had failed to prove any statutory mitigating circumstances under A.R.S. § 13-703(G), but that he had established five non-statutory mitigating circumstances: (1) impairment from the use of crack cocaine; (2) a difficult childhood; (3) acceptance of responsibility and remorse; (4) lack of education; and (5) family support. Weighing the sentencing factors, the court determined that the proven mitigation was not sufficiently substantial to outweigh the aggravation and sentenced Petitioner to death.

On appeal, the Arizona Supreme Court struck the pecuniary gain aggravating factor but nonetheless affirmed. *Sansing I*, 200 Ariz. at 355-56, 26 P.3d at 1126-27. Subsequently, the United States Supreme Court decided *Ring v. Arizona*, 536 U.S. 584 (2002), holding that

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[2] Section 13-703 has since been transferred and renumbered as A.R.S. § 13-751 (2011).

Arizona's aggravating factors are an element of the offense of capital murder and therefore must be found by a jury. The Court granted Petitioner's petition for certiorari, vacated the Arizona Supreme Court's judgment, and remanded for further consideration in light of *Ring*. *Sansing v. Arizona*, 536 U.S. 954 (2002) (mem.). On remand, the state court determined that the lack of jury findings as to aggravation constituted harmless error in Petitioner's case. *State v. Sansing*, 206 Ariz. 232, 77 P.3d 30 (2003) (*Sansing II*). The Supreme Court denied a petition for certiorari. *Sansing v. Arizona*, 542 U.S. 939 (2004).

Petitioner then sought post-conviction relief in state court, raising six claims for relief. In July 2008, the trial court dismissed five of the claims as meritless or procedurally precluded. It held a four-day evidentiary hearing on the remaining claim, which alleged ineffective assistance of counsel at sentencing, and ultimately denied relief in July 2010. The Arizona Supreme Court summarily denied a petition for review in May 2011, and Petitioner thereafter initiated these habeas corpus proceedings.[3]

APPLICABLE LAW

Because it was filed after April 24, 1996, this case is governed by the Antiterrorism and Effective Death Penalty Act of 1996, 28 U.S.C. § 2254 (AEDPA). *Lindh v. Murphy*, 521 U.S. 320, 336 (1997); *see also Woodford v. Garceau*, 538 U.S. 202, 210 (2003). The following provisions of the AEDPA will guide the Court's consideration of Petitioner's claims.

I. Principles of Exhaustion and Procedural Default

Under the AEDPA, a writ of habeas corpus cannot be granted unless it appears that the petitioner has exhausted all available state court remedies. 28 U.S.C. § 2254(b)(1); *see also Coleman v. Thompson*, 501 U.S. 722, 731 (1991); *Rose v. Lundy*, 455 U.S. 509 (1982).

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[3] Petitioner complains that he was directed to file his habeas petition prior to expiration of the statute of limitations under 28 U.S.C. § 2244(d) and that he therefore "reserves the right to amend this petition any time before the one year statutory deadline expires without being required to meet the strict requirements for amendment imposed by *Mayle v. Felix*, 545 U.S. 657." (Doc. 35 at 10.) Because Petitioner did not seek to amend his petition, either before expiration of the limitations period or after, this issue is moot.

To exhaust state remedies, the petitioner must "fairly present" his claims to the state's highest court in a procedurally appropriate manner. *O'Sullivan v. Boerckel*, 526 U.S. 838, 848 (1999).

A claim is "fairly presented" if the petitioner has described the operative facts and the federal legal theory on which his claim is based so that the state courts have a fair opportunity to apply controlling legal principles to the facts bearing upon his constitutional claim. *Anderson v. Harless*, 459 U.S. 4, 6 (1982); *Picard v. Connor*, 404 U.S. 270, 277-78 (1971). Unless the petitioner clearly alerts the state court that he is alleging a specific federal constitutional violation, he has not fairly presented the claim. *See Casey v. Moore*, 386 F.3d 896, 913 (9th Cir. 2004). A petitioner must make the federal basis of a claim explicit either by citing specific provisions of federal law or federal case law, even if the federal basis of a claim is "self-evident," *Gatlin v. Madding*, 189 F.3d 882, 888 (9th Cir. 1999), or by citing state cases that explicitly analyze the same federal constitutional claim, *Peterson v. Lampert*, 319 F.3d 1153, 1158 (9th Cir. 2003) (en banc).

In Arizona, there are two primary procedurally appropriate avenues for petitioners to exhaust federal constitutional claims: direct appeal and post-conviction relief (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). The preclusive effect of Rule 32.2(a) may be avoided only if a claim falls within certain exceptions (subsections (d) through (h) of Rule 32.1) and the petitioner can justify why the claim was omitted from a prior petition or not presented in a timely manner. *See* Ariz. R. Crim. P. 32.1(d)-(h), 32.2(b), 32.4(a).

A habeas petitioner's claims may be precluded from federal review in two ways. First, a claim may be procedurally defaulted in federal court if it was actually raised in state court but found by that court to be defaulted on state procedural grounds. *Coleman*, 501 U.S. at 729-30. Second, a claim may be procedurally defaulted if the petitioner failed to present it in state court and "the court to which the petitioner would be required to present his claims

in order to meet the exhaustion requirement would now find the claims procedurally barred." *Id.* at 735 n.1. If no remedies are currently available pursuant to Rule 32, the claim is "technically" exhausted but procedurally defaulted. *Coleman*, 501 U.S. at 732, 735 n.1; *see also Gray v. Netherland*, 518 U.S. 152, 161-62 (1996).

Because the doctrine of procedural default is based on comity, not jurisdiction, federal courts retain the power to consider the merits of procedurally defaulted claims. *Reed v. Ross*, 468 U.S. 1, 9 (1984). As a general matter, the Court will not review the merits of a procedurally defaulted claim unless a petitioner demonstrates legitimate cause for the failure to properly exhaust the claim in state court and prejudice from the alleged constitutional violation, or shows that a fundamental miscarriage of justice would result if the claim were not heard on the merits in federal court. *Coleman*, 501 U.S. at 750. Ordinarily, "cause" to excuse a default exists if a petitioner can demonstrate that "some objective factor external to the defense impeded counsel's efforts to comply with the State's procedural rule." *Id*. at 753; *see also Martinez v. Ryan*, 132 S. Ct. 1309 (2012). "Prejudice" is actual harm resulting from the alleged constitutional error or violation. *Vickers v. Stewart*, 144 F.3d 613, 617 (9th Cir. 1998).

II. Standard for Habeas Relief

The AEDPA established a "substantially higher threshold for habeas relief" with the "acknowledged purpose of 'reducing delays in the execution of state and federal criminal sentences.'" *Schriro v. Landrigan*, 550 U.S. 465, 473, 475 (2007) (quoting *Woodford v. Garceau*, 538 U.S. 202, 206 (2003)). The AEDPA's "'highly deferential standard for evaluating state-court rulings' . . . demands that state-court decisions be given the benefit of the doubt." *Woodford v. Visciotti*, 537 U.S. 19, 24 (2002) (per curiam) (quoting *Lindh v. Murphy,* 521 U.S. 320, 333 n.7 (1997)).

Under the AEDPA, a petitioner is not entitled to habeas relief on any claim "adjudicated on the merits" by the state court unless that adjudication:

> (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). In conducting review under § 2254(d)(1), this Court "is limited to the record that was before the state court that adjudicated the claim on the merits." *Cullen v. Pinholster*, 131 S. Ct. 1388, 1398-99 (2011).

DISCUSSION

I. DENIAL OF JURY TRIAL

Petitioner contends that he was denied his Sixth Amendment right to a jury determination on the factors that rendered him eligible for capital punishment, in violation of *Ring v. Arizona*. He argues that this denial amounted to structural error and, therefore, the Arizona Supreme Court's decision to review for harmless error was contrary to or an unreasonable application of controlling federal law. Petitioner further contends that, even if subject to harmless error review, the Arizona Supreme Court's finding of harmlessness was contrary to federal law and based on an unreasonable determination of the facts.

A. Harmless Error Standard

In *Ring*, the United States Supreme Court invalidated Arizona's judge-only capital sentencing scheme by holding that a jury must determine the existence of facts rendering a defendant eligible for the death penalty. 536 U.S. at 609. Subsequently, the Arizona Supreme Court, in *State v. Ring*, 204 Ariz. 534, 552, 65 P.3d 915, 933 (2003) ("*Ring III*"), held that the Sixth Amendment "does not require automatic reversal of a death sentence imposed under [Arizona's] former sentencing statutes." Instead, relying on *Neder v. United States*, 527 U.S. 1, 8 (1999), and *Arizona v. Fulminante*, 499 U.S. 279, 306-07 (1991), the court held that it would review capital sentences under the harmless error standard. *Id.* at 552-53, 65 P.3d at 933-34. Having rejected the argument that *Ring* error is structural, the Arizona Supreme Court applied the harmless error test in evaluating Petitioner's death sentence. *Sansing II*, 206 Ariz. at 235, 77 P.3d at 33. This was not contrary to or an unreasonable application of clearly established federal law.

A structural error is a "defect affecting the framework within which the trial proceeds,

rather than simply an error in the trial process itself." *Fulminante*, 499 U.S. at 310. Structural error affects "the entire conduct of the trial from beginning to end." *Id.* at 309. The "very limited class of cases" in which structural error has been found feature "such defects as the complete deprivation of counsel or trial before a biased judge," which "necessarily render a criminal trial fundamentally unfair or an unreliable vehicle for determining guilt or innocence." *Neder*, 527 U.S. at 8 (finding that a jury instruction omitting an element of the offense does not constitute structural error).

The United States Supreme Court has never held that *Ring* error is included in that limited class of cases. In *Ring* itself, the Court declined to "reach the State's assertion that any error was harmless because a pecuniary gain finding was implicit in the jury's guilty verdict." 536 U.S. at 609 n.7; *see id.* at 621 (Justice O'Connor dissenting) ("I believe many of these challenges will ultimately be unsuccessful . . . because the prisoners will be unable to satisfy the standards of harmless error."). Subsequently, in *Schriro v. Summerlin*, holding that *Ring* did not apply retroactively, the Court rejected claims that *Ring* was either a substantive ruling or a "watershed rule[] of criminal procedure implicating the fundamental fairness and accuracy of the criminal proceeding," explaining that it could not "confidently say that judicial factfinding so *seriously* diminishe[s] accuracy that there is a large risk of punishing conduct the law does not reach." 542 U.S. 348, 355-356 (2004) (internal quotations omitted).

As the Arizona Supreme Court explained in *Ring III*, 204 Ariz. at 545, 554-55, 65 P.3d at 926, 935-36, the holding in *Ring* was preceded by, and premised on, the ruling in *Apprendi v. New Jersey*, which held that "any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." 530 U.S. 466, 490 (2000). There is no question that *Apprendi* errors are subject to harmless error analysis. *See Washington v. Recuenco*, 548 U.S. 212, 218-22 (2006) (holding that *Apprendi* errors are reviewed for harmlessness using the framework of *Neder*); *see also United States v. Zepeda-Martinez*, 470 F.3d 909, 910 (9th Cir. 2006).

The Arizona Supreme Court did not unreasonably apply Supreme Court precedent

when it determined that harmless error was the appropriate standard of review. *Ring* error does not affect the framework within which the trial proceeds or the entire conduct of the trial, but only the trial process itself. The state court properly found that *Ring* error, like the failure to instruct a jury on an element of the offense, was not so fundamental that it necessarily rendered Petitioner's capital sentence unfair or unreliable.

B. Harmless Error Analysis

On direct appeal, the Arizona Supreme Court rejected Petitioner's argument that it could not determine beyond a reasonable doubt that no jury would find the mitigating circumstances sufficient to call for leniency. *Sansing*, 206 Ariz. at 241, 77 P.3d at 39. Petitioner argues that the state court's harmless error analysis was unreasonable and contrary to Supreme Court law.

Relevant Facts

Petitioner pled guilty on September 18, 1998, to all of the charged offenses. The plea agreement provided that Petitioner could be sentenced on the first-degree murder count to life imprisonment for a minimum of 25 years, life imprisonment without the possibility of release, or death. (ROA doc. 61.) In a written factual basis statement accompanying the plea, Petitioner admitted that he planned to rob the victim before her arrival and that he struck her in the head with a wooden stick after detaining her in his home. (ROA doc. 60.) He also admitted that the victim was conscious after he returned from moving her vehicle and that he "knowingly engaged" in sexual intercourse with her without her consent while she was bound and tied. Petitioner further stated that the victim was blindfolded, gagged, and had two plastic bags placed over her head, and that he stabbed her in the abdomen.

Sentencing Proceedings

Sentencing took place one year after entry of the guilty plea. In its presentencing memorandum, the State urged the trial court to find three aggravating factors: the (F)(5) pecuniary gain factor, the (F)(6) heinous, cruel, or depraved factor, and the (F)(2) prior serious offense factor. (ROA doc. 96 at 7-31.) At the aggravation/mitigation hearing, the State proffered testimony from Detective Joseph Petrosino, Dr. Mark Fischione, and Kara

Sansing, Petitioner's wife. In addition, the parties jointly stipulated to admission of audio/video taped interviews of Petitioner's four children as well as statements made by the children to a counselor, Dr. Carol Ainley, in lieu of calling the children as witnesses. (Doc. 38-7 at 5.) The parties also stipulated to the admission of statements made by Petitioner to a reporter, Victoria Harker, as well as DNA test results from (1) a vaginal swab of the victim indicating the presence of Petitioner's semen, and (2) a carpet swatch from Petitioner's home indicating the presence of the victim's blood. (*Id.* at 7-8.)

Det. Petrosino described the crime scene, including the numerous items that covered the victim's body when it was found behind a shed in Petitioner's backyard. (RT 8/2/99 at 25-29.) He also described discovering in Petitioner's home a broken piece of a wooden club in a sink cabinet and a rusty boning knife later identified by Kara Sansing as the one used by Petitioner to stab Trudy Calabrese. (*Id.* at 45-49.) Dr. Fischione testified concerning the victim's numerous injuries. He opined that she died as a result of multiple stab wounds to her abdomen and blunt force head trauma. (RT 8/3/99 at 55.) He further testified that it was possible Calabrese regained consciousness after receiving the head injuries but he "doubt[ed] it." (*Id.* at 34.)

Kara Sansing, who pled guilty to first-degree murder in exchange for a life sentence with the possibility of release after 25 years, testified to the events surrounding Calabrese's death. On the day of the murder, Petitioner called her at work several times and at one point said he had obtained and smoked some crack cocaine. (RT 8/2/99 at 55.) After returning home from work, Kara smoked crack and waited with her husband for Calabrese to arrive less than an hour later. She testified that her children could see her and Petitioner tie up the victim, who kicked and struggled against the bindings and pleaded not to be hurt. (*Id.* at 64-69.) Calabrese also repeatedly asked the Sansing children to call 911 and became unconscious when Petitioner struck her in the head with a wooden club. Petitioner then moved Calabrese's truck and upon returning dragged her to a bedroom and raped her. Kara also testified that she heard Calabrese speak with Petitioner during the sexual assault. (*Id.* at 78-79.) Afterward, Petitioner stabbed Calabrese with a knife and then used her jewelry

to twice buy crack from dealers who came to the house in the hours following the murder. Kara also testified that she had been married to Petitioner for 14 years and that he was not acting normal that day compared to previous times he took drugs. (RT 8/3/99 at 6-7.)

Each of Petitioner's children reported to investigators that their father grabbed the victim from behind and held her down while their mother helped tie her up. (Doc. 38-5 at 6, 17-19; Doc. 38-6 at 9-10, 21.) In her report, Dr. Ainley stated that Petitioner's 12-year-old son saw his father hit Calabrese with a wooden pole and that his parents would not let him help her. (Doc. 38-7 at 5-6.) Dr. Ainley further stated that this son suffers from severe guilt at having followed his father's direction to find an extension cord to bind the victim. (*Id.* at 7.) Petitioner's ten-year-old son described seeing his father break a stick on Calabrese's head and wash one of the pieces before stashing it under the sink. (Doc. 38-6 at 6-7, 11.) The children further told investigators that the victim prayed to God for help and asked them to call 911. Dr. Ainley also relayed that each of the children reported seeing the victim in the bedroom under a pile of clothes and again the next day behind the shed. (Doc. 38-7 at 7.) In addition, two of the children told Dr. Ainley that their parents regularly used drugs. (*Id.*)

The parties stipulated that Victoria Harker, a reporter for the Arizona Republic, would testify that Petitioner told her in January 1999 that he had not planned to rob or harm the victim prior to her arrival at his house but decided to end her suffering after raping and beating her so badly. (Doc. 38-7 at 8.) Petitioner also denied to Harker that his children witnessed the attack but conceded that they may have seen Calabrese tied up and that she had regained consciousness after he moved her truck. (*Id.*) Petitioner told Harker that once he attacked the victim he "had to finish it up because I was going to jail anyway. . . . Once you start something, you just can't stop." (*Id.* at 9.)

During the mitigation portion of the presentencing hearing, Petitioner proffered statements and testimony from four witnesses: his wife Kara, his sister Patsy Hooper, his mother Glenda Singh, and his brother Allan Sansing. Petitioner also made a statement, and the parties stipulated that Petitioner was arrested peaceably at his sister's house after their father called the police. (ROA doc. 90.)

Kara Sansing pleaded with the court to spare her husband's life. (RT 8/31/99 at 4.) She reiterated her previous testimony that Petitioner was not acting normal, even under the influence of drugs, on the day of the murder. (*Id.* at 8.) Patsy Hooper testified about the close bond she shared with Petitioner, whom she said was the baby of the family and loved by all. (*Id.* at 9.) She described the struggles he and his wife endured trying to raise four children and how Petitioner visited her to confess the crime and wait to be arrested after she asked their father to call the police. (*Id.* at 10-11.) She begged the court to spare his life, noting that her brother was willing to take responsibility for what he had done while on drugs and that his children would suffer if he was sentenced to death. (*Id.* at 11-12.)

Petitioner's mother stated that she had been a single mother, who worked hard as a waitress to make enough money to feed and house her family. (*Id.* at 20.) She said her son and his wife had been going to church and were doing well until drugs took over Petitioner's life. (*Id.*) She acknowledged the wrongfulness of Petitioner's conduct, but asked that his life be spared for the sake of his children. (*Id.* at 20-21.) Petitioner's brother told the court that despite not being a close family, he loved his brother and hoped his life would be spared. (*Id.* at 22.) He said that Petitioner was not a monster, that drugs led Petitioner to commit such a horrific crime, and that life imprisonment would be sufficient punishment because Petitioner was tormented daily by the knowledge of what he did to the victim and her family. (*Id.* at 22-23.) He further said that he lived in the same room with Petitioner from age five to 15 and that Petitioner did not have a violent side despite their hard life. (*Id.*)

Petitioner concluded the presentence hearing with a lengthy statement. He began with an apology to the victim's family for his "really terrible" and "awful" acts. (*Id.* at 24-25.) "[A]s I have said many times before to the media and also to the Court, that what I have done deserves the death penalty but I ask for mercy from the Court to spare my life and give me a chance to prove myself as a human being, not as a monster that people make me out to be." (*Id.* at 25.) Petitioner acknowledged essentially asking for the death penalty at one point in the process but realized after speaking with a jail psychiatrist that it would be better for his wife and children if his life was spared. (*Id.* at 26.) Next, Petitioner addressed the victim's

husband directly and again apologized for the nightmare he created. (*Id.* at 27.) Petitioner said he had been praying for the Calabrese family and that he pled guilty to spare them additional pain. (*Id.* at 27-28.) Petitioner then addressed his own family, saying he did not "blame no one or nothing in my past to lead to what I had done." (*Id.* at 29.) He remarked that everyone knew he had problems with drugs and wished the family "could have taken some actions to get me the help I needed." (*Id.*) However, he also acknowledged he "would have refused it because drugs meant the world" to him. (*Id.*) Petitioner apologized for the pain he caused his family, emphasized his love for them, and asked them to go along with his desire to donate his organs should he be sentenced to death. (*Id.* at 30-31.) Finally, Petitioner addressed his wife, stating that he probably would have hurt her had she not gone along with his attack on the victim, that he was to blame for letting drugs take over his life, and that he loved her deeply. (*Id.* at 32-33.) In conclusion, Petitioner told the judge he was a new person now that he was off of drugs and asked that his life be spared for the sake of his loved ones. (*Id.* at 34-35.)

Prior to sentencing, a mitigation specialist employed by the defense provided a notebook of materials to the judge. These included a letter reporting Petitioner's social history, numerous photographs, school records, and articles about crack cocaine and marijuana. (Doc. 44-3.) The report provided details of Petitioner's genetic background, developmental years, and criminal background. It stated that between the ages of six and ten, Petitioner was exposed to weekly domestic abuse, fueled by his mother's and stepfather's alcohol abuse. It further stated that at age 14 Petitioner was sent to a juvenile corrections facility for breaking into a school while on probation and that testing there found him to be functioning in the borderline IQ range. Available school records indicated that Petitioner failed classes and quit school shortly after ninth grade. The report described Petitioner's abusive relationship with his wife and their drug addiction, asserting that they attempted to quit and sought help from family members and their church but relapsed shortly before the offense. According to the mitigation specialist, at the time of the murder, Petitioner and his wife had been on a four-day crack cocaine binge. In conclusion, the report asked the court

to sentence Petitioner to life without the possibility of parole based on his genetics, childhood environment, cooperation with authorities, genuine remorse, and the influence of drugs during the offense.

In a presentencing memorandum, defense counsel refuted application of the State's alleged aggravating factors and urged the trial court to find that the proffered mitigation outweighed any aggravation. (ROA doc. 97.) With regard to statutory mitigating factors, counsel argued that Petitioner's capacity to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law was significantly impaired by the abuse of alcohol and crack cocaine. *See* A.R.S. § 13-703(G)(1). Counsel also argued that Petitioner's 31 years of age was a mitigating factor under § 13-703(G)(5) because he lacked intelligence, as indicated by his poor academic history and the "lack of planning" and "unsophisticated approach" to the crime. (ROA doc. 97 at 15.) In the event the court did not find the existence of significant impairment and age under (G)(1) and (G)(5), counsel asked the court to nonetheless find them to be non-statutory mitigating factors.

Defense counsel also urged numerous other non-statutory mitigating factors, asserting that Petitioner had a difficult childhood, grew up in a dysfunctional family, and witnessed significant abuse during his formative years. (ROA doc. 97 at 15.) Counsel noted Petitioner's low intelligence and lack of education. (*Id.* at 16.) Counsel argued that Petitioner did not have a violent character or history and would not likely be a future danger, especially in the controlled setting of a prison; that Petitioner's pleading guilty and accepting responsibility demonstrated that he had potential for rehabilitation; and that as a result of Petitioner's reflection on his actions he was committed to changing his behavior for the better. (*Id.* at 16-17.) Counsel emphasized that Petitioner's family loved and supported him, despite what he had done, and that Petitioner's children in particular would be devastated if he were sentenced to death. (*Id.* at 17-18.) Counsel also noted that the victim's husband had not requested the death penalty and that her ten-year-old daughter expressly asked that Petitioner not be sentenced to death. (*Id.* at 18.)

Finally, counsel addressed Petitioner's remorse, observing that Petitioner "has

accepted full responsibility for his conduct and expressed deep and genuine remorse for his actions almost from the beginning of this litigation." (*Id.* at 18.) Counsel continued:

> This was never a part of any strategy to seek leniency from this Court. As counsel told the Court at the time of the change of plea in September of 1998, John Sansing told his lawyers at their second visit, just a few days after his arrest, that "There isn't going to be a trial . . . I am responsible for what I have done . . . I'm not going to put the victim's family or my children through a trial."
>
> From that day forward, John Sansing expressed a desire to public [sic] apologize to the victim's family and plead guilty to what he had done. It was counsel undersigned who delayed the process until September of 1998, so that they could investigate the case and properly advise the defendant of his options. John Sansing on numerous occasions expressed his frustration with his counsel about the delay in going to court and pleading guilty.
>
> Counsel undersigned has had numerous conversations with John Sansing since February of 1998. We believe that his remorse and acceptance of responsibility are complete and absolutely genuine. He has spoken with deep regret about the pain and suffering that he has caused the Calabrese family and the trauma that he has caused to his own children.

(*Id.* at 18-19.) In support, counsel appended to their memorandum the transcript from a November 1998 sentencing status conference during which Petitioner apologized for his actions, explained why he pled guilty, minimized his wife's involvement, and stated that he was willing to accept the death penalty. (RT 11/24/98 at 3-7.) Counsel concluded by noting that Petitioner's level of remorse and acceptance of responsibility were, in their experience, unique for this type of case and asked that these factors be given substantial mitigating weight. (*Id.* at 19-20.)

Prior to sentencing Petitioner sent two letters to the trial judge. In the first, Petitioner requested an opportunity to speak with his wife about their children and to physically say goodbye to her and other family members. He also noted his willingness to accept the death penalty if the court believed that to be the appropriate punishment. In the second, Petitioner requested that his sentencing be postponed a few days while he figured out how to donate his organs.

A presentence report (PSR) was also prepared by the court's probation department. (ROA doc. 101.) On the advice of counsel, Petitioner declined to discuss his background, substance abuse issues, or the offense, and the PSR writer noted that defense counsel would

be providing that information directly to the court. The PSR did include a statement from Petitioner's sister, Patsy Hooper, who opined that drugs influenced Petitioner's actions and that he was remorseful. In addition, the victim's husband stated that he would agree with any sentence the judge chose to hand down.

Sentencing took place on September 30, 1999. Prior to imposition of sentence, Petitioner made another statement, again apologizing, expressing remorse, and asking that his organs be donated if sentenced to death. (RT 9/30/99 at 3-5.) The court indicated that it had considered the evidence presented at the aggravation/mitigation hearing, the parties' written memoranda, and the written mitigation materials proffered by the defense. (*Id.* at 6-7.) The court also indicated that it had not considered any information contained in the PSR or any victim impact statements in determining the existence or nonexistence of aggravating factors, but did consider the PSR to determine the existence of mitigating circumstances. (*Id.* at 7.)

Regarding aggravation, the trial court rejected the State's argument that Petitioner's contemporaneous convictions for kidnapping, sexual assault, and robbery of the victim constituted a prior "serious offense" for purposes of A.R.S. § 13-703(F)(2). However, the court agreed with the State that the evidence established beyond a reasonable doubt that Petitioner committed the offense for pecuniary gain under § 13-703(F)(5) and that the murder was committed in an "especially heinous, cruel, or depraved" manner under § 13-703(F)(6). For the latter, the court found both (F)(6) prongs—that the killing was cruel as well as heinous and depraved.

In finding that the murder was especially cruel, the court first determined that the victim "suffered unimaginable mental anguish during the approximately one hour or more that she was held hostage prior to her death." (RT 9/30/99 at 11.) Citing the testimony of Kara Sansing, as well as the Sansing children's statements to the police and Dr. Ainley, the court found that the victim had prayed to God and pleaded with them to call 911. (*Id.* at 11-12.) The court further noted that both Petitioner, in an interview with a newspaper reporter, and his wife stated that the victim had regained consciousness before Petitioner raped her.

This also established "beyond a reasonable doubt that Trudy Calabrese suffered extraordinary mental anguish, including uncertainty as to her ultimate fate." (*Id.* at 13.)

Second, the court found cruelty based on its determination that the victim consciously suffered severe physical pain prior to her death and that the defendant knew or should have known she would suffer. In support, the court referenced ligature wounds and bruises on the victim's wrists and ankles, defensive wounds to her hands, trauma to her face, and "two deep blows to the back her head, which caused bruising of the brain and hemorrhaging." (*Id.*) Although the court agreed the victim likely passed out from the head blows, it found that she regained consciousness before the rape and was then stabbed three times in the abdomen with a rusty knife. (*Id.*) Citing the medical examiner's testimony, the court found that it would have taken several minutes to die from the loss of blood caused by the stab wounds. (*Id.* at 14.) Finally, the court referenced Petitioner's own statement to a reporter that he killed the victim to end her suffering as proof she was consciously suffering severe physical pain. (*Id.*)

In finding that the murder was committed in an especially heinous or depraved manner, the court determined that Petitioner inflicted gratuitous violence, that the victim was helpless, and that the killing was senseless. *See State v. Gretzler*, 135 Ariz. 42, 659 P.2d 1 (1983) (identifying factors to be considered in determining whether a killing is heinous or depraved). In finding gratuitous violence, the court stated that Petitioner hit the victim "so hard with the club that it broke in two pieces. He hogtied her ankles and wrists and brutally sexually assaulted her. Finally, he stabbed her, not once but three times, even grinding the rusty butcher knife into her as witnessed by Kara Sansing." (RT 9/30/99 at 15.) As to the other factors, the court stated that the victim "was rendered utterly and completely helpless by the defendant's surprise attack" and that the killing was senseless because it "was completely unnecessary in order for the defendant to accomplish his goal of robbing Trudy." (*Id.* at 16.)

Turning to mitigation, the court found it likely that Petitioner was impaired or affected by his crack cocaine usage at the time of the murder. However, it did not find that this established by a preponderance of the evidence that Petitioner's capacity to appreciate the

wrongfulness of his conduct or to conform his conduct to the requirements of the law was *significantly* impaired, pursuant to A.R.S. § 13-703(G)(1). (RT 9/30/99 at 17-18.) In making this determination, the court noted that Petitioner "devised and carried out a plan to lure a Good Samaritan to his home and then rob her," consciously sought to hide her truck, and concealed her body to avoid detection. (*Id.* at 18.) The court also rejected the (G)(5) age factor, finding that Petitioner was a 31-year-old married father of four who had been living an adult lifestyle for many years. (*Id.* at 19.)

With regard to non-statutory mitigating factors, the court again declined to find that Petitioner had established age as a mitigator and ruled that the victim's daughter's recommendation of leniency was not a mitigating circumstance. (*Id.* at 20, 23.) The court also found that Petitioner had failed to prove by a preponderance of the evidence that he had changed his life, would not be a future danger, or had potential for rehabilitation. (*Id.* at 22.)

In support of mitigation, the court determined that although Petitioner did not establish significant impairment under (G)(1), Petitioner's capacity to conform his conduct to the law's requirements was somewhat impaired by his use of crack cocaine. The court also found that Petitioner had proven by a preponderance of the evidence that he had a difficult childhood and family background. In support, the court noted that Petitioner's parents were divorced shortly after his birth, he had virtually no relationship with his father, his early developmental years were chaotic, his mother married three more times, and when he was six to ten years of age, his mother and stepfather abused alcohol and he was exposed to weekly episodes of domestic abuse by his stepfather upon his mother. (*Id.* at 20-21.) Although the court found the existence of a difficult childhood as a mitigating factor, it determined this circumstance was not entitled to significant mitigating weight due to the lack of a causal link between Petitioner's background and the crime. (*Id.* at 21.)

The court further found as mitigating that Petitioner had accepted responsibility for his actions, was genuinely remorseful, and entered a guilty plea to avoid putting the victim's family and his children through a trial. (*Id.*) In addition, the court found that Petitioner presented sufficient evidence to establish a lack of education, but determined this had only

minimal mitigating weight. (*Id.* at 22.) Finally, the court found that Petitioner established by a preponderance of the evidence that he had the love and support of his family but assigned it only minimal weight because it did not prevent Petitioner from committing the crime or victimizing his own children. (*Id.*)

In determining that the proven mitigation did not outweigh the aggravation, the court considered the mitigating circumstances both individually and cumulatively. (*Id.* at 23.) It further found that even considering all of the proposed mitigating factors, they would be insufficient to call for leniency "when balanced against the especially cruel manner in which defendant murdered Trudy Calabrese." (*Id.* at 24.) The court explained:

> The infliction of such grotesque, emotional and physical pain to a woman who, with all the hate, violence and lack of compassion we see, stood out like a shining light, as a true Samaritan, is shockingly evil. Throughout her ordeal, enveloped in defendant's drugged out and twisted plan of greed and violence, Trudy Calabrese kept her faith in God to the end.
>
> The surprise attack on this good woman, followed by being beaten with a club defendant eventually broke in two on her head, then brutally stripped of her dignity as she was raped, and finally being stabbed three times, all together resulted in a terror-filled and horrible murder.

(*Id.*)

On appeal, the Arizona Supreme Court found insufficient evidence to establish that the murder was committed "to facilitate the taking of or ability to retain items of pecuniary value." *Sansing I*, 200 Ariz. at 354, 26 P.3d at 1125. However, on independent review after striking the pecuniary gain aggravating factor, it found that the murder was especially cruel and that the mitigation was insufficient to call for leniency.

Harmless Error Review

In conducting its harmless error review following *Ring*, the Arizona Supreme Court considered the (F)(6) aggravating factor found at sentencing and upheld on appeal—that the murder was committed in an especially heinous, cruel, or depraved manner. The court explained that the State needed to prove only one of the (F)(6) elements. *Sansing II*, 206 Ariz. at 235, 77 P.3d at 33.

The court first determined that cruelty was established in three independent ways: (1)

the victim suffered mental anguish, as evidenced by the victim's defensive wounds, pleas for help, and attempts to resist the attack; (2) the victim suffered both mental and physical suffering when she was raped while her arms and legs were bound; and (3) the victim endured physical pain, as demonstrated by the multiple injuries to her head and abdomen, none of which caused immediate death. *Id.* at 235-36, 77 P.3d at 33-34. The court rejected Petitioner's argument that the evidence was inconclusive as to whether the victim was conscious during all portions of the attack, citing Petitioner's own admissions, including to a reporter, as well as his wife's testimony. *Id.* at 237, 77 P.3d at 35. The court concluded beyond a reasonable doubt that any reasonable jury would have found that the murder was committed in an especially cruel manner, and it was thus harmless error for the trial court to have determined the existence of this aggravating factor.

The court then determined that heinousness and depravity were established by "[o]verwhelming and uncontroverted evidence" that Petitioner inflicted gratuitous violence upon a helpless victim. *Id.* It concluded that the "rape, facial wounds, neck ligatures, gagging, blind-folding, and grinding of the knife constitute[d] violence beyond that necessary to kill," and that the victim, having been bound by both her wrists and ankles, which were then tied together, was helpless to defend herself. *Id.* at 238, 77 P.3d at 36. The court found beyond a reasonable doubt that any reasonable jury would have concluded that Petitioner inflicted gratuitous violence upon a helpless victim and that consequently the murder was especially heinous. *Id.*

Next, the court considered whether the mitigating evidence was sufficiently substantial to call for leniency. The court first assessed the evidence concerning A.R.S. § 13-703(G)(1), which provides a mitigating circumstance where "[t]he defendant's capacity to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law was significantly impaired, but not so impaired as to constitute a defense to prosecution." *Id.* at 239, 77 P.3d at 37. Like the trial court, the supreme court found that this factor had not been proved:

> No reasonable jury would have concluded that Sansing met his burden

> to establish that his ability to control his behavior or his capacity to appreciate the wrongfulness of his conduct was significantly impaired. Sansing presented no expert testimony to support his assertion that his use of cocaine impaired either his capacity to control his conduct or his capacity to appreciate the wrongfulness of his actions. He therefore failed entirely to show any causal nexus between his alleged drug use and impairment.
>
> Sansing also presented only minimal testimony about his drug use on the day of the murder. Kara testified that Sansing telephoned her while she was work at approximately 1:30 p.m. During this conversation, Sansing informed her that he had purchased some crack cocaine. He told her that he had smoked some of the crack but was saving the rest for her. Kara testified that she could tell he had ingested the crack from the sound of his voice. She testified that when she returned home from work several hours later, Sansing was not "acting normal." However, she also testified that Sansing's actions were thought out and that he was not acting as if he were in a trance.
>
> That evidence is insufficient to establish, by a preponderance of the evidence, that Sansing's capacity to control his behavior was significantly impaired. First, Kara did not quantify how much crack Sansing used. Moreover, no reasonable jury would conclude that Kara's testimony that Sansing was not acting himself was sufficient to establish that his capacity was significantly impaired.
>
> Furthermore, Sansing's deliberate actions refute his impairment claim and establish that the drug use did not overwhelm Sansing's ability to control his conduct. Kara testified that Sansing planned to rob the person who delivered the food. Additionally, Sansing contacted two different churches in his attempt to lure an unsuspecting victim to his home.
>
> Sansing's impairment argument fails on yet another basis. Sansing admitted and stipulated to facts that leave no doubt that he attempted to avoid detection. After beating and hog-tying Trudy, Sansing left and moved her truck away from the apartment. When Pastor Becker called the Sansing home, inquiring about Trudy's whereabouts, Sansing gave him a false address and told him that Trudy never arrived. Additionally, Sansing's ten-year-old son told the police Sansing washed blood from the club that he used to strike Trudy. These steps, which can only be regarded as part of an attempt to avoid detection, negate any possibility that a reasonable jury would find that Sansing's capacity to appreciate the wrongfulness of his conduct was significantly impaired.

Id. at 239-40, 77 P.3d at 37-38 (citations omitted). The court further found beyond a reasonable doubt that any reasonable jury would have rejected Petitioner's age as a statutory mitigating circumstance.

The court then proceeded to examine the non-statutory mitigating circumstances found by the trial court. For the same reasons the court determined that the (G)(1) impairment factor would not have been found, the court reasoned that no reasonable jury could have accorded Petitioner's impairment more than minimal weight as a non-statutory

mitigating factor. *Id.* at 240-41, 77 P.3d at 38-39. The court further concluded that although a jury "might have concluded that Sansing established a difficult, although not abusive, childhood and lack of education," it would have accorded these factors only minimal weight because Petitioner had failed to demonstrate any causal link between them and the crime. *Id.* at 241, 77 P.3d at 39. Next, the court assumed that "a reasonable jury would have accorded some weight to Sansing's family's love and support and to the fact that he accepted responsibility for his crime." *Id.* Lastly, the court determined that no reasonable jury could have given more than minimal weight to Petitioner's claim that he presents no future threat and that a jury could not have considered the victim's daughter's request that he be given a life sentence because such evidence is not proper mitigation. *Id.*

The Arizona Supreme Court concluded its harmless error review as follows:

> The evidence leaves no doubt that Sansing murdered Trudy Calabrese in an especially cruel, heinous, or depraved manner. The brutality of this murder clearly sets it apart from the norm of first degree murders. Collectively, the mitigating evidence is minimal at most. We conclude beyond a reasonable doubt that any reasonable jury would have concluded that the mitigating evidence was not sufficiently substantial to call for leniency. Accordingly, we hold the [*Ring*] violation constituted harmless error.

Id.

Analysis

Petitioner is entitled to relief on this aspect of Claim 1 only if the Arizona Supreme Court's ruling was "in conflict with the reasoning or the holdings of [Supreme Court] precedent" or if it "applied harmless-error review in an 'objectively unreasonable' manner." *Mitchell v. Esparza*, 540 U.S. 12, 17, 18 (2003) (per curiam) (quoting *Lockyer v. Andrade*, 538 U.S. 63, 75-77 (2003)); *see also Fry v. Pliler*, 551 U.S. 112, 119 (2007) ("In *Mitchell v. Esparza*, we held that, when a state court determines that a constitutional violation is harmless, a federal court may not award habeas relief under § 2254 unless *the harmlessness determination itself* was unreasonable."). He is not entitled to relief if the state court "simply erred" in concluding that the *Ring* error was harmless. *Esparza*, 540 U.S. at 18.

Petitioner first argues that the Arizona Supreme Court's determination that the victim was conscious, upon which he asserts its finding of cruelty rests, was based upon an

unreasonable determination of the facts. (Doc. 35 at 42-44.) He contends that the evidence was inconclusive in light of the medical examiner's doubt about the victim regaining consciousness after the head injuries, the alleged unreliability of Kara Sansing's statements, and questions concerning the voluntariness of the written factual basis supporting Petitioner's plea. (*Id.*) However, the latter two allegations are based on evidence that was not part of the record on appeal to the Arizona Supreme Court. Under AEDPA, this Court must consider whether the state court's decision "was based on an unreasonable determination of facts *in light of the evidence presented in the State court proceeding*." 28 U.S.C. § 2254(d)(2) (emphasis added); *see also Pinholster*, 131 S. Ct. at 1398-99 (limiting review under § 2254(d)(1) "to the record that was before the state court that adjudicated the claim on the merits").

Petitioner alleges that Kara Sansing's statement to police regarding an exchange between Petitioner and the victim during the rape is "completely unbelievable." (Doc. 35 at 43.) He acknowledges, however, that evidence of the actual exchange was not admitted during the sentencing proceeding. During her testimony, Kara initially denied hearing the victim speak and was then impeached with her statement to police concerning the fact the victim had spoken. However, in doing so, the prosecutor directed her not to repeat the content of the conversation she overheard. (RT 8/2/99 at 78.) That this evidence was not before the state court is confirmed by Petitioner's motion for evidentiary development, in which he seeks to expand the record to include Kara Sansing's statement to police, arguing it is relevant to demonstrate the unreliability of her testimony regarding consciousness. (Doc. 53 at 21.) Similarly, Petitioner's allegation concerning involuntariness of the factual basis of his plea was not developed until his state PCR proceedings and thus was not before the Arizona Supreme Court when it conducted its harmless error review. Accordingly, the Court does not consider either of these allegations in determining under AEDPA the reasonableness of the state court's ruling.

Looking at the record that was before the state court, this Court cannot say that its finding of fact as to consciousness was objectively unreasonable. Petitioner admitted in the

factual basis for the plea that the victim was conscious when he raped her and also stipulated that he told a reporter the victim had regained consciousness when he returned from moving her truck. Petitioner's wife also testified that she heard the victim speak during the rape, and Petitioner told the reporter that he decided to kill the victim because she was suffering. The Arizona Supreme Court considered the medical examiner's speculation about the victim's consciousness but found the direct evidence uncontroverted. This was not an unreasonable determination of fact.

Moreover, Arizona law provides that a victim need not be conscious for "each and every wound" inflicted for cruelty to apply. *Sansing*, 206 Ariz. at 235, 77 P.3d at 33 (citation omitted). There is no dispute that Trudy Calabrese was conscious when she was grabbed from behind, thrown to the ground, and hogtied. She sustained numerous defensive wounds and other injuries during her struggle, pleaded for help, and prayed to God. The Arizona Supreme Court's finding of cruelty based on the victim's mental anguish as to her fate while she struggled with her attackers was not objectively unreasonable. This alone was sufficient under state law to sustain the cruelty factor, regardless of whether the victim was conscious during the rape and stabbing.

Petitioner further contends that the court's cruelty analysis is unreasonable when compared with its decisions in other *Ring*-remand cases. However, to the extent that his argument is based on a comparison with the analyses undertaken in other cases, Petitioner's critique of the Arizona Supreme Court's cruelty finding in his case is unavailing. The fact that the court did not find cruelty beyond a reasonable doubt in other cases, each of which involved distinct facts and circumstances, does not demonstrate that the same court's ruling in Petitioner's case was objectively unreasonable.

Petitioner next argues that the Arizona Supreme Court unreasonably found that the murder was especially heinous. He asserts that the evidence was insufficient to establish beyond a reasonable doubt that Petitioner inflicted gratuitous violence because "it was impossible to determine which of the three stab wounds were fatal." (Doc. 35 at 47.) However, the state court's determination was not based solely on the stab wounds. Rather,

it cited the numerous injuries sustained by the victim, including to her forehead, left orbital region, and mouth, as well as the rape, neck ligatures, gagging, blindfolding, and grinding of the knife as constituting violence beyond that necessary to kill. *Sansing*, 206 Ariz. at 238, 77 P.3d at 36. The state court's finding as to gratuitous violence was not based on an unreasonable determination of the facts in light of the evidence.

Lastly, Petitioner criticizes the court's assessment of the mitigating evidence. This criticism is unwarranted. The Supreme Court in *Ring* held only that a jury must determine the aggravating factors in a capital case that render a person eligible for the death penalty; it did not require jury determination of the ultimate sentence. Therefore, the Arizona Supreme Court's review of *Ring* error was complete when it determined beyond a reasonable doubt that no rational jury would have found that the (F)(6) aggravating factor had not been proved. *Cf. Butler v. Curry*, 528 F.3d 624, 648-49 (9th Cir. 2008) (reviewing *Apprendi* violation for harmless error by asking whether jury would have found aggravating factor rendering defendant eligible for increased sentence). To the extent the Arizona Supreme Court chose to include review of mitigation as part of its harmless error analysis, it did so as a matter of state law. Furthermore, the court's review of the mitigating evidence, while not required by *Ring*, was thorough, and its assessment of the evidence was not objectively unreasonable. Petitioner's argument that the court improperly imposed a causal nexus on its consideration of the mitigating evidence is discussed as part of Claim 7 in Section IV.A below.

C. Conclusion

The Arizona Supreme Court did not unreasonably apply United States Supreme Court precedent when it determined that harmless error was the appropriate standard of review for *Ring* error. In addition, the state court's harmless error analysis in this case neither conflicted with controlling Supreme Court law nor was applied in an objectively unreasonable manner. Because Petitioner is precluded from relief by § 2254(d), the Court declines to expand the record to include new evidence allegedly refuting the state court's finding as to the consciousness of the victim when she was sexually assaulted and stabbed.

II. VOLUNTARINESS OF PLEA

In Claim 8, Petitioner argues that his guilty plea was not knowing, intelligent, or voluntary because the written factual basis established an aggravating factor and he did not waive his privilege against self-incrimination for the penalty phase. He asserts that he was unaware his admission concerning the victim's consciousness would be used to establish cruelty under A.R.S. § 13-703(F)(6) and that the trial court failed to explain the consequences this admission would have at sentencing.

Relevant Facts

Petitioner's written plea agreement included a summary of the rights waived by pleading guilty, including the privilege against self-incrimination. (ROA doc. 61.) The signed plea agreement did not give Petitioner any benefits in terms of sentencing, but did provide that the State would dismiss charges filed against Petitioner in a separate action.[4] (*Id.*) Before accepting Petitioner's plea, the court first determined that Petitioner was mentally competent. (RT 9/18/08 at 2-3). The court then engaged Petitioner in a personal colloquy that included ascertaining whether Petitioner had read and understood the plea agreement, including the paragraph setting forth the constitutional rights he was giving up by pleading guilty. (*Id.* at 6-7.)

After Petitioner entered his guilty plea, the court read the factual basis signed by Petitioner and counsel, asking if the facts were true and if the statement accurately recounted the offense; Petitioner replied affirmatively to both inquiries. (*Id.* at 8-11.) The prosecutor then sought to orally add several additional facts, including that the victim suffered severe blows to the head, that semen found inside the victim was determined to contain DNA matching Petitioner, and that a different charitable organization had delivered a food box to Petitioner's home the day before the offense. (*Id.* at 11.) Petitioner disputed only the latter assertion that he had received an earlier food box. (*Id.* at 11-12.)

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[4] Although not apparent on the face of the agreement, Respondents assert that this separate matter involved four counts of child abuse.

In his PCR petition, Petitioner argued that he would not have pled guilty had he understood the sentencing consequences of the factual admissions accompanying the plea. (Doc. 38-10 at 24-27.) In support, he appended an affidavit attesting that at the time of the plea he was unaware that (1) the State would have to prove aggravating factors to render him eligible for the death penalty; (2) the victim's consciousness would be relevant to a finding of cruelty; and (3) the admission regarding consciousness was not a necessary component of the guilty plea. (Doc. 39-7 at 14-15.) Petitioner also denied that the victim was in fact conscious after he moved her truck and claimed that he lied about this fact because he feared being attacked by other inmates for having sexually assaulted the victim and thought "it would be better if she was conscious during my assault." (*Id.* at 15-16.)

The state PCR court denied relief without explanation, stating that the claim failed to present "a material issue of fact or law." (Doc. 38-9 at 29.) The Arizona Supreme Court summarily denied review.

Analysis

When a state court does not explain its reasons for denying relief, a reviewing habeas court must determine what arguments or theories could have supported the state court's decision and "then it must ask whether it is possible fairminded jurists could disagree that those arguments or theories are inconsistent with the holding in a prior decision" of the Supreme Court. *Harrington v. Richter*, 131 S. Ct. 770, 786 (2011). The burden is on Petitioner to show "there was no reasonable basis for the state court to deny relief." *Id.* at 784.

Due process requires that a defendant's guilty plea be voluntary and intelligent. *Boykin v. Alabama*, 395 U.S. 238, 242 (1969). Because a guilty plea waives the rights against self-incrimination, to trial by jury, and to confront one's accusers, its acceptance requires that the accused "has a full understanding of what the plea connotes and of its consequence." *Id.* at 244. "Among other circumstances, a plea of guilty can be voluntary only if it is 'entered by one fully aware of the *direct* consequences' of his plea." *Carter v. McCarthy*, 806 F.2d 1373, 1375 (9th Cir. 1986) (quoting *Brady v. United States*, 397 U.S.

742, 755 (1970)) (emphasis in original). This includes being advised of the "range of allowable punishment" that will result from the plea. *U.S. ex rel. Pebworth v. Conte*, 489 F.2d 266, 268 (9th Cir. 1974).

The Ninth Circuit has held that "although a defendant is entitled to be informed of the direct consequences of the plea, the court need not advise him of all the possible collateral consequences." *Torrey v. Estelle*, 842 F.2d 234, 235 (9th Cir. 1988) (internal quotation omitted). "The distinction between a direct and collateral consequence of a plea turns on whether the result represents a definite, immediate and largely automatic effect on the range of the defendant's punishment." *Id.* at 236 (internal quotation omitted). Under this standard, direct consequences include a mandatory parole term, ineligibility for parole, and the maximum punishment provided by law. *Id.* A consequence is generally "collateral" if it does not derive automatically as a result of the plea, but rather results from some discretionary decisionmaking proceeding, such as whether a defendant's sentences may run consecutively or the possibility of parole revocation. *Id.*

Petitioner argues that the failure to inform him of the sentencing-related consequences attendant to his admission in the plea's factual basis renders the plea involuntary. However, the trial court's aggravation findings were not a *direct* consequence of the plea, but rather the result of a separate, discretionary proceeding during which Petitioner retained all his constitutional rights and the burden was on the prosecution to establish aggravating factors beyond a reasonable doubt. Petitioner did not admit the existence of the (F)(6) aggravating factor in his plea, and the trial court was under no obligation to find this factor proven beyond a reasonable doubt. That Petitioner admitted facts from which the judge ultimately found the (F)(6) factor is not the same as stipulating to the existence of the factor. *Cf. Adams v. Peterson*, 968 F.2d 835, 839 (9th Cir. 1992) (en banc) ("A stipulation to facts from which a judge or jury may *infer* guilt is simply not the same as a stipulation *to* guilt, or a guilty plea."). Because Petitioner's plea had only collateral consequences on the aggravation phase of sentencing, no constitutional violation arose out of the court's failure to advise Petitioner of the possibility he would be found eligible for the death penalty as a result of the

admissions contained in the plea's factual basis. Petitioner has failed to show that there was no reasonable basis for the state court to deny relief on this claim.

III. INEFFECTIVE ASSISTANCE OF COUNSEL

Petitioner contends that he was denied his Sixth Amendment right to the effective assistance of counsel when counsel failed to investigate and present mitigating evidence (Claim 2), investigate and rebut the (F)(6) "heinous, cruel, or depraved" aggravating factor (Claim 3), and properly advise him about the consequences of his plea, stipulated factual basis, and sentencing stipulation (Claim 4). Petitioner also asserts cumulative prejudice from counsel's alleged deficient performance (Claim 5).

A. Failure to Investigate and Present Mitigating Evidence

Petitioner alleges that sentencing counsel failed to competently investigate and present substantial mitigating evidence. He further alleges that counsel failed to select competent mental health and substance abuse experts and provide them with his social history. Petitioner argues that competent experts would have explained how mental disorders and substance abuse played a role in the commission of the offense and, consequently, would have established the (G)(1) substantial impairment mitigating factor. (Doc. 35 at 53.) Respondents concede exhaustion except to the extent Petitioner alleges that counsel was ineffective for failing to retain a neuropsychologist. It appears to this Court from its review of the PCR record, including the evidence and arguments presented during the state court evidentiary hearing, that the entirety of Claim 2 was exhausted.

Relevant Facts

Petitioner was represented at sentencing by Maricopa County Deputy Public Defenders Emmet Ronan and Sylvina Cotto. During PCR proceedings, Petitioner alleged that counsel provided constitutionally ineffective representation by failing to investigate and present substantial mitigating evidence and failing to provide Petitioner's social history to competent mental health and substance abuse experts. (Doc. 38-10 at 11.) The PCR court found this to be a colorable claim and held a four-day evidentiary hearing in January 2010.

At the hearing, Petitioner called as witnesses two of his siblings, four experts, trial

counsel Ronan, and mitigation specialist Pamela Davis. The State presented testimony from a psychologist. In addition, the parties stipulated to admission of deposition transcripts, in lieu of live testimony, from co-counsel Cotto and a mental health expert who evaluated Petitioner before sentencing. (Doc. 43-10 at 21.) The parties also agreed to the admission of numerous exhibits, including the 1989 American Bar Association Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases (ABA Guidelines), pre-sentencing psychological reports, post-conviction expert reports, and a 1986 psychological evaluation. (Doc. 43-9 at 2-3.)

Evidence Regarding Counsel's Investigation

Mitigation specialist Davis testified that she began working as a non-capital mitigation specialist for the Maricopa County Public Defender in 1991, after having worked more than five years in adult probation departments. (Doc. 39-9 at 12.) Before being recruited by Ronan to assist in Petitioner's case, she had worked on only one capital case. Davis recalled meeting frequently with Petitioner at the jail and traveling to Alabama, Nevada, and Utah to interview family members and obtain records. Davis said she did not meet with any of the experts retained by counsel to evaluate Petitioner and did not know whether they were given any of the background information she had compiled. (*Id.* at 20-21.) However, Davis also testified that at the time she began working on Petitioner's case in 1998, mitigation specialists were not commonly used in capital cases and she believed her role was to compile a written social history for presentation to the court, not to recommend experts to counsel. (*Id.* at 37-38.) Trial counsel Ronan also testified that in 1999 the concept of a capital mitigation specialist was new in his public defender office. (Doc. 40-6 at 11-12.)

Petitioner's brother, Allen Sansing, and one of his sisters, Susan Mitchell, testified that they recalled meeting jointly with Davis in Alabama prior to Petitioner's sentencing. Allen told Davis about his mother's alcohol abuse, methods of discipline, husbands, and problems the children encountered with their stepfathers. (Doc. 39-8 at 55-56.) Likewise, Susan told Davis everything she believed was important about their upbringing, including Petitioner's drug use and their mother's neglect and beatings. (Doc. 39-9 at 1-3.)

In addition to investigating Petitioner's social history, trial counsel consulted three mental health experts. Dr. Sara Hill, a clinical psychologist, was asked to determine Petitioner's competency to stand trial or plead guilty. In her report, Dr. Hill noted that Petitioner said he had a long history of using marijuana, was on probation for a drug charge prior to the murder, and went from smoking marijuana to smoking crack cocaine, which he was doing "all day long at the time of his arrest." (Doc. 41-8 at 12.) She found Petitioner to be "quite conversant in discussing legal matters" and "unequivocally competent to stand trial." (*Id.* at 13.) She further found that Petitioner had a history of antisocial behaviors, but required more background information to make a diagnosis of antisocial personality disorder. (*Id.*)

Dr. Katherine Menendez, a psychologist, evaluated Petitioner "for the purpose of establishing learning capacity and the presence of a learning disorder." (Doc. 41-8 at 15.) In the background section of her report, Dr. Menendez described Petitioner as saying that his mother had "treated him well," that he recalled only one incident of harsh physical discipline from his first stepfather, that he had a "normal" early family life, and that he had been an "average" student. (*Id.* at 15-16.) Petitioner reported that he began smoking crack cocaine at age 28 and became "very paranoid, violent and hypersexual." (*Id.* at 17.) Dr. Menendez determined that Petitioner had a full scale IQ of 80, which is below average, but that he did not appear to have a "pronounced, significant learning disorder." (*Id.* at 20.) She also diagnosed Petitioner with cocaine abuse in remission and an antisocial personality disorder.

Lastly, defense counsel enlisted the assistance of Dr. Susan Parrish, a psychologist specializing in neuropsychological testing and post-traumatic stress disorder. (Doc. 40-7 at 30.) Dr. Parrish retained notes from her presentence interview with Petitioner, but could not recall whether she performed any tests, made a diagnosis, or prepared a report. (*Id.* at 8.) However, she believed she was asked to meet with Petitioner to determine whether he displayed any obvious psychological difficulties and that "nothing jumped out at me that he had any difficulties" such as an "obvious neuropsychological symptom" that would have justified more testing or that needed to be pursued. (*Id.* at 17-18, 26-27.)

Trial counsel Ronan had few specific recollections of his conversations with the experts and did not know whether he had provided Petitioner's social history to Dr. Hill or school records to Dr. Menendez. (Doc. 40-5 at 63, 68, 71.) He testified that it was his usual custom and practice to provide background information to consulting experts, but acknowledged statements in Dr. Menendez's report about Petitioner's upbringing, such as being an average student and getting along well with his mother, that contradicted information compiled by Davis. (Doc. 40-6 at 7, 17-18.) Although he had no recall of speaking with Dr. Menendez, Ronan testified that he did not consider a diagnosis of antisocial personality disorder to be mitigating and "[b]ased on the report as I have now seen it, I would not see any reason to call her." (*Id.* at 8.) He also acknowledged that evidence concerning an antisocial personality disorder generally opens the door for prosecutors to proffer evidence of bad acts consistent with that diagnosis. (*Id.* at 30.) Regarding Dr. Parrish, Ronan believed it likely she found nothing helpful after meeting with Petitioner because otherwise he would have had her prepare a report and testify at the sentencing hearing. (*Id.* at 9.) He also would have consulted with others types of experts if Dr. Parrish had made such a recommendation. (*Id.* at 9-10.)

Regarding Petitioner's drug use, Ronan believed the information that Petitioner had purchased $750 of crack cocaine in the four days prior to the offense was presented to the sentencing judge in Davis's mitigation report. (Doc. 40-5 at 82-83.) Ronan did not know whether Dr. Parrish had relayed to counsel that Petitioner told her he had spent $2,000 during the same time period, as reflected in her interview notes. (*Id.* at 73-74.) In response to a question as to why he did not enlist and present testimony from experts in child development and pharmacology, Ronan said he had no recollection of why those types of experts were not utilized:

> [M]y best guess is that I felt that Judge Reinstein, with his background and experience would understand the information that was going to be presented in Pam Davis's letter, that with his background and experience he understood the nexus between substance abuse and the commission of crimes, substance abuse and dysfunctional childhood, and those types of things, and that it was simply going to be a question of whether he found that significant enough as a mitigating factor to outweigh the aggravate [sic] factors.

(*Id.* at 84; Doc. 40-6 at 1.) In hindsight, he would not have made the same decisions on how mitigation evidence was presented to the sentencing judge. (Doc. 40-6 at 5.)

In her deposition, co-counsel Cotto said that her representation was limited to drafting the aggravation section of the presentencing memorandum and that Ronan was teaching her how to handle a capital case. (Doc. 40-6 at 46.) She recalled that Ronan was "very clear" that the mitigation investigation "needed to begin from the very onset." (*Id.*) Cotto had no recollection of meeting with experts but, after reviewing Dr. Menendez's report, did not believe her diagnosis of antisocial personality disorder was mitigating. (*Id.* at 50.) She recalled meeting with Ronan to "discuss things as they developed and trying to figure out what could be useful or not" and also recalled discussing Dr. Parrish, but had no specific recollection of what was said. (*Id.* at 50-51.)

Petitioner's *Strickland* expert, Vicki Liles, testified that counsel's failure to provide experts with background information, retain a substance abuse expert, and engage a psychologist to "pull all [the background information] together" fell below the standard of care for a capital defense attorney at the time of Petitioner's sentencing. (Doc. 40-4 at 3-8.) She further opined that antisocial personality disorder is mitigating and that counsel was ineffective for failing to present that diagnosis at sentencing. (*Id.* at 15.) In addition, Liles suggested that counsel was ineffective for failing, in light of Petitioner's substance abuse, to obtain a neuropsychological examination at the start of the case because a brain can "heal and can repair itself." (*Id.* at 21.)

At the time of Petitioner's offense, Liles was employed by the Maricopa County Public Defender but had no involvement in Petitioner's case because she had a "more generalized caseload at that time." (Doc. 40-3 at 53.) She recalled that sometime in 1998 or 1999, her office formed a major felony unit comprised of three attorneys, including Ronan. When Petitioner was sentenced in 1999, Liles had tried only one capital case through sentencing and that was as second chair in an effort to become qualified to serve as lead counsel in a capital case. (Doc. 40-4 at 88-89.) In a declaration proffered to the PCR court, Liles opined that "it was standard practice to use the services of a mitigation specialist in

capital representation in 1998 and 1999" and that the "specialist would then locate and suggest the participation of necessary experts." (Doc. 43-4 at 4.) However, at the PCR hearing, she acknowledged that under the 1989 ABA Guidelines in effect at the time a "mitigation specialist wasn't really required as part of the defense team." (Doc. 40-3 at 71-72.)

Mitigation Evidence

Petitioner's brother Allen and sister Susan testified at the PCR hearing. Each described their mother as a self-centered woman, who showed no love or affection, who on occasion abandoned and regularly neglected their basic needs, and who routinely hit them with belts and sticks for perceived infractions. (Doc. 39-8 at 14-86.) They also reported that their mother drank heavily, had numerous failed marriages, and frequently fought with her husbands. One of their stepfathers liked to pick fights and beat up on Allen and Petitioner. Each saw Petitioner begin to use marijuana and inhalants when he was around 10 or 11 years of age. Allen left home at age 17, when Petitioner was about 11, and Susan left home and moved in with Allen when she was 14 and Petitioner was 13.

Petitioner also presented testimony from three new experts. Dr. Paul Miller, a developmental psychologist, interviewed Petitioner, Allen, and Petitioner's sister Patsy. Based on these interviews as well as Davis's mitigation report, Davis's notes, and Petitioner's school records, Miller prepared a 60-page developmental assessment report that examined the nature of the risk factors to which Petitioner was exposed as a child and the relationship of those factors to later negative outcomes, such as conduct disorders and drug abuse. (Doc. 39-9 at 63-64.) In summary, Dr. Miller opined that various life stressors, including parental neglect, harsh discipline, exposure to domestic violence, maternal alcohol abuse, frequent changes in residences and maternal marital relationships, and extreme poverty led Petitioner to use drugs as a coping mechanism. (Doc. 39-6 at 17-20.) Because he focused only on Petitioner's adolescent development, Dr. Miller had no opinion on the role Petitioner's risk factors played in the offense. (Doc. 40-1 at 11.)

Dr. Edward French, a pharmacologist, testified regarding the physiological effects of

cocaine. Although Petitioner did not tell him the amount of crack cocaine he consumed prior to the offense, Dr. French opined that Petitioner was in a cocaine-induced psychosis when he attacked and killed the victim. (Doc. 40-3 at 26-27.) As support for this conclusion, Dr. French cited statements made by Petitioner that (1) his heart was racing so fast during the offense that he thought he would die (classic physiological effect of cocaine); (2) he believed the victim knew his intentions based on an innocuous gesture to his wife (evidence of paranoia); and (3) he had "no conscious there" during the attack (indicating a break in reality). (*Id.* at 30-33.) In conclusion, Dr. French stated that drugs "hijack the brain," cause "pronounced behavioral and cognitive changes," take over the behavior of an individual, and diminish the ability "to process information correctly." (*Id.* at 33-34.) On cross-examination, Dr. French acknowledged that he was not qualified to diagnose mental disease or defects and that the information about the effects of cocaine included in the mitigation specialist's report to the sentencing judge was accurate. (*Id.* at 35, 39.)

Dr. Richard Lanyon, a forensic and clinical psychologist, also testified. (Doc. 40-4 at 36-84; Doc. 40-5 at 1-43.) On the basis of record review, interviews, and psychological testing, Dr. Lanyon prepared a lengthy report in which he concluded that Petitioner's profile "suggests the likelihood of a significant anxiety disorder, depression, and thought disorder" but "does not indicate antisocial characteristics or the likelihood of impulsive acting-out." (Doc. 39-6 at 43.) He determined that Petitioner has a full scale IQ of 87, placing him in the low-average range of intelligence. (*Id.* at 43-44.) He also found no suggestion of impaired functioning due to brain damage. (*Id.* at 44.)

With regard to the offense, Dr. Lanyon opined it was highly probable that, as a result of a cocaine-induced delusional psychotic state as well as a paranoid personality disorder, Petitioner's capacity to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of the law was significantly diminished. (*Id.* at 45.) Similar to Dr. French, Dr. Lanyon based this opinion on the "serious and pivotal cognitive distortion" that the victim knew he was going to do something to her. (*Id.*) According to Petitioner's account to Dr. Lanyon, he made a hand gesture to his wife signifying that the victim's purse

was not in her truck, that there was "no way anyone could read that to mean anything," but nonetheless he "became convinced that the [victim] somehow knew what it was and was going to, therefore, turn him in." (Doc. 40-4 at 56-57.)

> He has a delusion she knows exactly what he intends to do, and, in fact, these thoughts are in his mind and it suggests that he feels very guilty about them, then he becomes delusional that she knows exactly what's going on, it's in her mind, too, and he then finds himself in these unusual physiological reactions which signal, to me, are a likelihood of a cocaine induced psychosis, which a major aspect of that is delusions.

(*Id.* at 74-75.)

Dr. Lanyon opined that this paranoid delusion caused Petitioner to enter into a severely abnormal mental state, as evidenced by Petitioner's statements that "[i]t was not me" and that he had no thoughts or feelings when he attacked her. Rather, there was "[c]omplete blackness. I stepped into a hole . . . everything's dark." (Doc. 39-6 at 41.) Petitioner told Dr. Lanyon that he had no control over the initial attack and that his subsequent actions were done out of panic. (*Id.* at 42.) In Dr. Lanyon's opinion, Petitioner remained in a psychotic state while taking deliberate actions not to get caught. (Doc. 40-5 at 8-10.) Regarding antisocial personality disorder, Dr. Lanyon declined to make such a diagnosis, but acknowledged there were "enough symptoms or characteristics" to put him into that category. (*Id.* at 19-20.) Finally, Dr. Lanyon concluded that Petitioner's cocaine use was a product of the extreme dysfunction in his childhood environment and thus "the effects of his childhood environment can also be considered to be a causal factor in significantly diminishing his capacity to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law." (Doc. 39-6 at 46.)

The State presented Dr. Michael Bayless in rebuttal. Dr. Bayless determined that Petitioner has a full scale IQ of 88 and found no indication of neurological impairment. (Doc. 43-9 at 11.) In his report, Dr. Bayless concluded that Petitioner has a personality disorder not otherwise specified, with antisocial and obsessive compulsive traits. He changed his diagnosis to an antisocial personality disorder after reviewing a 1986 psychological evaluation conducted as part of a diagnostic evaluation for the Utah

Department of Corrections. (Doc. 40-1 at 29.) In that report, clinical psychologist Dr. Donald Long diagnosed Petitioner, then 18 years old, with a conduct disorder and extreme emotional immaturity. (Doc. 44-2 at 20.) He also derived an abstract IQ of 89. (*Id.* at 19.)

Dr. Bayless's interview notes reveal that Petitioner relayed essentially the same story regarding the offense as he told to Drs. French and Lanyon, namely that he made a motion to his wife to indicate "there's nothing [in the victim's truck]," that the victim "saw and got spooked and said I've got to go," and that when she turned toward the door, "the darkness came over me, heart racing, and I grabbed her in bear hug." (Doc. 44-2 at 9; Doc. 40-2 at 10.) The notes also reported Petitioner as saying that he "crossed line—blackness clearing—on probation, hit her with wooden pole." (Doc. 44-2 at 9; Doc. 40-2 at 13.) Dr. Bayless testified that when he asked Petitioner why he raped her, Petitioner smiled and gestured in a way that angered Dr. Bayless, who interpreted the gesture to mean "seeing a vaginal area would make me do such a thing." (Doc. 40-1 at 45.) In relaying this impression, Dr. Bayless stated that the victim's dress had flown up. (*Id.*) On cross-examination, Dr. Bayless acknowledged that the victim had not been wearing a dress and that his notes did not include this aspect of Petitioner's statement, but that he remembered it "precisely" and despite the inaccuracy concerning her clothing was "what [Petitioner] said to me." (Doc. 40-2 at 15-16.)

Addressing antisocial personality disorders, Dr. Bayless testified that such a disorder would not render a person incapable of knowing right from wrong or from having the ability to control his or her conduct. (Doc. 40-1 at 53.) Rather, "it's choice issues"—such individuals know what's right, know what is acceptable, but choose not to act appropriately. (*Id.*) He further testified that the "central feature of a substance induced psychotic disorder are hallucinations and delusions that are due to the direct physiologic effects of [the] substance" and that in this case Petitioner "knew exactly what was going on. He was not seeing things. He was not hearing voices. He was not delusional." (*Id.* at 48.) Dr. Bayless concluded that Petitioner was "fully aware of what he was doing" when he committed the offense and "knew it was wrong." (*Id.* at 46.)

> He explained to me, he talked about it very clearly. He remembered the essence of what had taken place. He was very much focused. He was very much in reality when we talked about what happened on the day of the offense.
>
> Look, there is no indication that he was suffering from any psychosis. There is no indication that he did not know what he was doing. There is no indication that cocaine played a role in his behavior, his choices at the time. Was he high on cocaine? He had done some cocaine. But was he at a point where now he did not know what he was doing? No.
>
> His voluntary intoxication at that time was voluntary intoxication, but he was not at a level that he did not know what he was doing. Pure and simple. He knew why he moved the car. He knew why he put a blanket over her stomach when he stabbed her. He knew what he was doing when he raped her. He said to me specifically: I'm going to make this look—I wanted to make this look like she was raped in a robbery. He said that to us specifically, that he thought that before he did it. I don't know what all the fight is about.

(Doc. 40-2 at 29.)

State Court Ruling

Following the hearing and submission of post-hearing memoranda, the state PCR court denied relief in a 15-page ruling. (Doc. 38-9.) After setting forth in detail the standard for relief under *Strickland v. Washington*, 466 U.S. 668 (1984), the court addressed the credibility of the expert opinions. It found that much of "Dr. French's opinions were based on speculation about the quantity of cocaine that was used by the Defendant." (Doc. 38-9 at 35-36.) It further found that Dr. Lanyon's opinions "were less than persuasive." (*Id.* at 36.) Specifically the court wrote:

> Dr. Lanyon believed that Sansing's statement to him that everything went black and blank was a strong indication of psychosis. [Footnote 20: Sansing's trial attorney testified at the evidentiary hearing that he does not ever recall Sansing saying this to him. If Sansing had said this to him, he would have followed up on these statements.] However, Dr. Lanyon's opinions were contradicted by Dr. Michael Bayless (a psychologist called by the state) and several versions of the facts of the crime provided by Sansing in which he remembers many details after the alleged "going black" episode. Dr. Bayless opined that the Defendant suffered from a classic anti-social personality disorder, that Sansing was high on cocaine at the time of the crime, but that he knew what he was doing was wrong. Significantly, Sansing smiled as he described to Dr. Bayless the reason why he committed the rape: he saw Trudy Calabrese's vaginal area. Sansing also described that he placed a blanket over Trudy to stab her so as to avoid blood splatter. This court finds the testimony of Dr. Bayless to be the more credible and more persuasive.

(*Id.* at 36-37.)

Addressing *Strickland*'s performance prong, the PCR court noted that trial counsel

had consulted with three different mental health experts, one of whom diagnosed Petitioner with an antisocial personality disorder and another who recalled no issues that required further testing. The court noted that although Ronan could not recall what information he supplied to Dr. Menendez, he did not doubt supplying her with any available records, as was his standard practice. The court further noted Ronan's belief that proffering evidence of an antisocial personality disorder as mitigation would have opened the door to the prosecution submitting evidence of Petitioner's other violent, antisocial acts. "This type of 'double-edged' mitigation evidence would be more detrimental than helpful, and making a strategic decision to avoid damaging a case for mitigation despite losing a slim advantage cannot be unreasonable." (*Id.* at 38-39.) Regarding counsel's failure to utilize expert witnesses, the court credited Ronan's belief that the trial judge's background and experience would allow him to understand the nexus between Petitioner's difficult childhood, his drug use, and the murder.

In conclusion, the court stated:

> [T]he issue presented is whether Sansing's counsel performed deficiently, or rather, unreasonably based on the information he knew at the time, and based on the extent of his investigations and reliance on medical and mental health experts. Based on the factual accounts from the evidentiary hearing, counsel appears to have acted reasonably, even though no expert witnesses were called during the mitigation phase to attempt to create a causal nexus between Sansing's drug usage, tough childhood and antisocial personality disorder and the crime. This court finds that the testimony of Dr. Paul Miller regarding the Defendant's abusive childhood was duplicative of the investigation of Pamela Davis. The court further finds that the proposed expert testimony such as that offered by Drs. French and Lanyon regarding the effects and nexus between Defendant's cocaine use and the commission of the crime to be speculative and unpersuasive. The evidence of a "cocaine-induced psychosis" is speculative at best. Many of the facts upon which Dr. Lanyon based his testimony were quite effectively disputed by Dr. Michael Bayless. Dr. Bayless' opinions (including those disputing that any psychosis existed at the time of the crime given Sansing's detailed memory of what had occurred) were far more credible and reasonable. More importantly, [trial counsel] did not call expert witnesses for strategic or tactical reasons. I find no deficient performance by trial counsel.

(*Id.* at 39-40.)

Turning to *Strickland*'s prejudice prong, the court found that, even assuming counsel performed deficiently in failing to investigate and call experts, Petitioner had failed to

demonstrate a reasonable probability of a different outcome. First, it concluded that, in light of his attempts to avoid prosecution, expert testimony connecting his dysfunctional upbringing to the offense would not have established that he was unable to appreciate the wrongfulness of his actions or to conform his conduct to the requirements of the law. Specifically, the court noted that Petitioner moved the victim's truck, lied and gave false information when asked about the victim's whereabouts, and hid the body. Analogizing to decisions by the Arizona Supreme Court in other capital cases, the PCR court concluded that each of these actions "was performed in order to elude suspicion and avoid prosecution" and "clearly demonstrated that he fully appreciated the wrongfulness of his conduct." (*Id.* at 41-42.)

Similarly, the court found that expert testimony concerning cocaine intoxication would not have established that he was unable to conform his conduct to the requirements of the law due to drug impairment at the time of the offense. Again referencing a state supreme court case, the court noted that most of the testimony about Petitioner's drug use was derived from Petitioner himself. Because of Petitioner's "motive to fabricate self-serving testimony," this evidence would have been met with skepticism. (*Id.* at 42-43.) The court also observed that although "no expert testified about Sansing's tough childhood, drug use, anti-social personality disorders or a causal nexus between his personality disorder and the crime, the *factual information* regarding Sansing's difficult childhood, his drug use, and the crime was presented to the sentencing judge." (*Id.* at 43.) Finally, the court found that the murder was "horribly cruel" and that even if all of the proffered mitigating circumstances were proven, no reasonable jury would find the mitigation sufficiently substantial to outweigh the aggravation. (*Id.* at 43-44.)

Controlling Law

As recognized by the state court, claims of ineffective assistance of counsel are governed by the principles set forth in *Strickland*. To prevail, a petitioner must show that counsel's representation fell below an objective standard of reasonableness and that the deficiency prejudiced the defense. 466 U.S. 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*, 130 S. Ct. 383, 384 (2009) (per curiam); *Bobby v. Van Hook*, 130 S. Ct. 13, 16 (2009) (per curiam). Thus, to satisfy *Strickland*'s first prong, a defendant 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." *Strickland*, 466 U.S. at 694. "When a defendant challenges a death sentence . . . the question is whether 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." 466 U.S. at 695. In *Wiggins v. Smith*, the Court further noted that "[i]n assessing prejudice, we reweigh the evidence in aggravation against the totality of available mitigating evidence." 539 U.S. 510, 534 (2003); *see also Mayfield v. Woodford*, 270 F.3d at 928. The "totality of the available evidence" includes "both that adduced at trial, and the evidence adduced" in subsequent proceedings. *Wiggins*, 539 U.S. at 536 (quoting *Williams v. Taylor*, 529 U.S. 362, 397-98 (2000)).

Under the AEDPA, this Court's already-deferential review of trial counsel's performance is subject to another level of deference under § 2244(d) and is thus "doubly" deferential. *Richter*, 131 S. Ct. at 788 (quoting *Knowles v. Mirzayance*, 129 S. Ct. 1411, 1420 (2009)). Therefore, to establish entitlement to relief, Petitioner must make the additional showing that the PCR court, in ruling that trial counsel was not ineffective, applied

Strickland in an objectively unreasonable manner. In making this determination, "the question is not whether counsel's actions were reasonable," but "whether there is any reasonable argument that counsel satisfied *Strickland*'s deferential standard." *Id.* Because the *Strickland* standard is a general one, "the range of reasonable applications is substantial." *Id.*

Analysis

Petitioner first asserts that the PCR court made no findings of fact nor reached any conclusions of law on his allegations concerning counsel's failure to investigate and to present Petitioner's social history to the experts, and that he is thus entitled to *de novo* review on these claims. However, it is apparent from the record that the court at least implicitly ruled on these allegations when it stated that "the issue presented is whether Sansing's counsel performed deficiently, or rather, unreasonably based on the information he knew at the time, and based on the extent of his investigations and reliance on medical and mental health experts."[5] (Doc. 38-9 at 39.) In addition, the court described the extent of counsel's investigation and noted counsel's testimony regarding his standard practice with respect to providing background information to experts. In the absence of a clear indication that the state court declined to reach the merits of Petitioner's claim, this court "must assume that the state court has decided all the issues." *Murdoch v. Castro*, 609 F.3d 983, 990 n.6 (9th Cir. 2010) (en banc) (plurality opinion); *see Muth v. Frank*, 412 F.3d 808, 815 (7th Cir. 2005) ("An adjudication on the merits is perhaps best understood by stating what it is not: it is not the resolution of a claim on procedural grounds."); *see also Miller-El v. Cockrell*, 537 U.S. 322, 347 (2003) (noting that "a state court need not make detailed findings addressing all the

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[5] The court also described Petitioner's claim as failing "to fully investigate and develop possible mitigating factors, because expert witnesses were not presented," failing "to utilize an expert to explain his difficult childhood and polysubstance abuse," failing "to establish a causal nexus between Sansing's upbringing, antisocial personality disorder and the crime," failing to consult "with an expert in cocaine addiction," and failing "to produce an expert to develop the causal nexus between his substance abuse and the crime." (Doc. 38-9 at 35.)

evidence before it"); *Delgado v. Lewis*, 223 F.3d 976, 982 (9th Cir. 2000) (holding that "Federal habeas review is not *de novo* when the state court does not supply reasoning for its decision").

Addressing review under § 2254(d), Petitioner argues that the PCR court unreasonably applied *Strickland* in finding neither deficient performance nor prejudice. He further asserts that the state court's decision was based on the following seven instances of "unreasonable" factual determinations:

> (1) The court's implicit determination that Ronan provided background information to Dr. Menendez, despite the discrepancies between her report and the available information concerning Petitioner's academic performance and relationship with his mother;
>
> (2) The court's adoption of Dr. Bayless's account that Petitioner raped the victim because he saw her vaginal area when her dress flew up, despite the fact the victim had not been wearing a dress, Petitioner had not relayed seeing her vaginal area in any of his previous statements about the offense, and the absence of this alleged statement in Dr. Bayless's report and interview notes.
>
> (3) The court's determination that Dr. Bayless was more credible than Petitioner's experts, in light of Dr. Bayless's testimony the victim was wearing a dress, his assertion that Petitioner suffered from no mental illness despite antisocial personality disorder being identified in the DSM as a mental illness, his unfounded assertions concerning the cost and amount of cocaine used by Petitioner, and his unprofessional personal feelings against Petitioner;
>
> (4) The court's determination that Dr. French's opinion was based upon speculation about the quantity of cocaine used by Petitioner, despite Dr. French testifying that his opinion was not based on the amount of drugs Petitioner consumed;
>
> (5) The court's finding that trial counsel chose to not offer the diagnosis of antisocial personality disorder as a mitigating factor because it could have opened the door to damaging rebuttal evidence, given that Ronan did not expressly testify he made such a decision in Petitioner's case, only that he agreed generally that prior bad acts would be part of the calculus an attorney would consider in deciding whether to present evidence of an antisocial personality disorder;
>
> (6) The court's finding that Dr. Miller's report was duplicative of that prepared by the mitigation specialist, given that as a developmental psychologist Dr. Miller's report "goes much further" than Davis's investigation and had a different purpose; and
>
> (7) The court's finding that trial counsel made a tactical decision not to present expert witnesses, given that Ronan had no recollection of why he did not do so.

(Doc. 35 at 58-67.)

Under the standard set forth in § 2254(d)(2), a state court decision "based on a factual determination will not be overturned on factual grounds unless objectively unreasonable in light of the evidence presented in the state-court proceeding." *Miller-El*, 537 U.S. at 340 (2003); *see Taylor v. Maddox*, 366 F.3d 992, 999 (9th Cir. 2004) ("[A] federal court may not second-guess a state court's fact-finding process unless, after review of the state-court record, it determines that the state court was not merely wrong, but actually unreasonable."). A state court's factual determination "is not unreasonable merely because the federal habeas court would have reached a different conclusion in the first instance." *Wood v. Allen*, 130 S. Ct. 841, 849 (2010). "This is a daunting standard—one that will be satisfied in relatively few cases." *Taylor*, 366 F.3d at 1000.

Counsel's Performance

After reviewing the entirety of the record, this Court concludes that the state court reasonably determined that Ronan made a tactical decision, after conducting a reasonable investigation, not to present evidence of an antisocial personality disorder or to utilize expert witnesses to testify concerning Petitioner's difficult childhood, drug addiction, and cocaine intoxication at the time of the offense.

The evidence at the PCR hearing established that counsel consulted three different experts. Dr. Hill's report indicated that she was retained to determine Petitioner's competency to stand trial or plead guilty. Dr. Menendez's report stated that she was asked to determine whether Petitioner suffered from a learning disability. Neither counsel nor Dr. Parrish could recall her role in the case, but given her specialization in neuropsychology and post-traumatic stress disorder, it is not unreasonable to conclude that she was on the lookout for problems in these areas.

In addition, counsel enlisted a mitigation specialist to investigate and prepare a detailed social history report. According to Davis's report, she had extensive personal interviews with Petitioner and his wife, mother, father, stepmother, brother, three sisters, and several aunts and uncles. She described Petitioner's positive relationship with the only significant male figure in his life—a maternal grandfather who died unexpectedly when

Petitioner was seven years old. She relayed that between the ages of six and 14, Petitioner lived in a very unstable home, that his mother went through a succession of relationships with men, none of which were positive or supportive, that they lived in poverty, and that Petitioner's mother did not permit his father to have contact with Petitioner and his siblings. Davis recounted that Petitioner's mother "forbid her children to play outside or have friends in their home" and that there was one instance when a welfare worker arrived unannounced and found their living conditions to be "unacceptable." Describing Petitioner's mother's marriage to her second husband, when Petitioner was between the ages of six and ten, Davis reported that Petitioner's stepfather was an extremely abusive alcoholic, who would spend the weekends drinking and fighting with his wife. During these times, Petitioner and his siblings would be denied food and sleep until the fighting ended for the night, and Petitioner's mother would forbid her children from eating or going to bed until a fight was resolved. The mitigation report also detailed Petitioner's juvenile criminal history, poor academic record, drug use beginning in the fifth grade, relationship with Kara Sansing, adult criminal history, and crack cocaine addiction.

Petitioner argues it was unreasonable for the court to implicitly find that Ronan provided this background information to Dr. Menendez. However, while Dr. Menendez's report contains some factual discrepancies compared to the information gathered by mitigation specialist Davis, this Court cannot say that the state court's finding was objectively unreasonable in light of Ronan's testimony concerning his standard practice of providing available background materials to experts and his having no reason to believe he did not follow this practice in this case. Because Dr. Menendez did not testify at the PCR hearing, there is no way to know whether she was given background materials but for whatever reason neglected to review them. Nor is there anything in the record to suggest that counsel failed to provide Petitioner's social history to Drs. Hill and Parrish; Dr. Hill did not testify and Dr. Parrish had no specific recollection.

In addition, Petitioner does not allege that any of the experts requested additional information, *see Hendricks v. Calderon*, 70 F.3d 1032, 1038 (9th Cir. 1995) (holding that

counsel does not have a duty to provide an expert with information necessary to reach a mental health diagnosis in the absence of a specific request to do so), or that the absence of any particular information precluded an accurate evaluation of Petitioner's mental state, *see Crittenden v. Ayers*, 624 F.3d 943, 965 (9th Cir. 2010) (noting that none of the experts suggested that additional background information or testing was necessary to accurately evaluate the defendant's mental health). Nor does Petitioner assert how additional background information would have affected any of the expert's conclusions.

Petitioner argues that it was unreasonable for the court to find that Ronan made a strategic decision not to offer the diagnosis of antisocial personality disorder as a mitigating factor. However, the record supports the state court's finding that Ronan likely concluded that the antisocial personality disorder diagnosed by Dr. Menendez would have harmed more than helped the mitigation case. Although Ronan could not recall whether he considered presenting evidence of Petitioner's antisocial personality disorder, he testified that in his opinion such a diagnosis is not mitigating. He also testified that evidence of an antisocial personality disorder generally opens the door for prosecutors to present evidence of prior bad acts consistent with that diagnosis. Based on this testimony, it was not unreasonable for the state court to conclude that Ronan made a strategic decision in Petitioner's case not to call Dr. Menendez as a witness at sentencing.

Nor was it unreasonable for the state court to determine that the strategy itself was reasonable. *Cf. Crittenden*, 624 F.3d at 968 n.15 (finding that counsel made tactical decision supported by adequate investigation to keep evidence of antisocial personality disorder away from sentencing jury). The Ninth Circuit has repeatedly observed that evidence of an antisocial personality disorder may be potentially more harmful than helpful. *See, e.g.*, *Daniels v. Woodford*, 428 F.3d 1181, 1204, 1210 (9th Cir. 2005) (suggesting that evidence the defendant may have been a sociopath was aggravating); *Beardslee v. Woodford*, 358 F.3d 560, 583 (9th Cir. 2004) (acknowledging that an antisocial personality diagnosis can be damaging); *Clabourne v. Lewis,* 64 F.3d 1373, 1384 (9th Cir. 1995) (noting that mental health records omitted from the sentencing hearing "hardly turned out to be helpful" because

they indicated that the defendant had an antisocial personality, not a thought disorder). Here, evidence of Petitioner's antisocial personality disorder would have opened the door to Petitioner's history of antisocial behavior, including violence against his wife, involvement of his children in other illegal activities, and other past crimes. Thus, this case differs from *Stankewitz v. Wong*, 698 F.3d 1163, 1174 (9th Cir. 2012), where the court found that evidence of an antisocial personality would not have had a significant adverse impact because the prosecution had "already painted a grim picture of Stankewitz's violent, antisocial tendencies" and the jury had "heard next to nothing about Stankewitz's traumatic childhood."

Petitioner also argues that the state court unreasonably determined that Ronan made a strategic decision not to present expert witnesses to establish a nexus between Petitioner's commission of the offense and his substance abuse and dysfunctional upbringing. Information about Petitioner's dysfunctional upbringing, past substance abuse, and cocaine use at the time of the crime were presented to the judge through the mitigation specialist's report. Although Ronan had difficulty remembering his exact thought process, he speculated that he presented the mitigation case without experts because he believed the sentencing judge had the background and experience to understand the connection between Petitioner's background, drug abuse, and the crime. This was sufficient evidence from which the state court could reasonably conclude that counsel made a strategic decision.

Moreover, it was not objectively unreasonable for the state court to find that Ronan acted reasonably in not utilizing expert witnesses to establish a nexus between Petitioner's dysfunctional upbringing, drug abuse, and the crime. *See Hurles v. Ryan*, No. 08-99032, 2013 WL 219222 (9th Cir. Jan. 18, 2013) (finding that "counsel did not perform below the objective standard of care when she did not establish a causal nexus between Hurles's mental conditions and the crime" because Supreme Court precedent did not require such a showing). The connection between Petitioner's difficult childhood and drug addiction "was neither complex nor technical. It required only that the [judge] make logical connections of the kind a layperson is well equipped to make." *Wong v. Belmontes*, 130 S. Ct. 383, 388 (2009); *see*

Fairbank v. Ayers, 650 F.3d 1243, 1253 (9th Cir. 2011) (finding no ineffectiveness from counsel's failure to utilize an expert to link substance abuse and abusive childhood to the defendant's behavior during the crime); *see also Raley v. Ylst*, 470 F.3d 792, 803 (9th Cir. 2006) (noting that "the link between suffering abuse as a child and later committing abusive acts is not so esoteric as to be beyond the understanding of a lay jury"); *Nields v. Bradshaw*, 482 F.3d 442, 455-56 (6th Cir. 2007) (finding no ineffectiveness from counsel's failure to have an expert testify about the causal relationship between the defendant's alcoholism and his behavior on the night of the murder). In hindsight Ronan questioned whether he made the right decision on how the mitigation evidence was presented. However, this is insufficient to establish deficient performance under *Strickland*'s highly deferential standard.

In light of the record developed in state court, the Court concludes that the state court's finding of no deficient performance was based on neither an unreasonable application of *Strickland* nor an unreasonable determination of fact. Ronan could not recall many of the specifics of his decision-making process; however, there was sufficient other evidence in the record to support the state court's findings. *See Greiner v. Wells*, 417 F.3d 305, 326 (2nd Cir. 2005) ("Time inevitably fogs the memory of busy attorneys. That inevitability does not reverse the *Strickland* presumption of effective performance."); *see also Richter*, 131 S. Ct. at 790 ("Although courts may not indulge *post hoc* rationalization for counsel's decisionmaking that contradicts the available evidence of counsel's actions, neither may they insist counsel confirm every aspect of the strategic basis for his or her actions.") (internal quotation omitted). Counsel undertook a reasonable investigation and made strategic decisions about the evidence to proffer in mitigation and how that evidence would be presented. "A disagreement with counsel's tactical decisions does not prove that the representation was constitutionally deficient." *Cox v. Ayers*, 613 F.3d 883, 893 (9th Cir. 2010).

Prejudice

In ultimately concluding that Petitioner was not prejudiced by any of counsel's alleged deficiencies, the state court made numerous findings, including that Dr. Bayless was more

credible than Dr. Lanyon, that the opinions of Drs. French and Lanyon regarding a cocaine-induced psychosis were speculative and unpersuasive, that the proposed expert testimony would not have established that Petitioner's ability to appreciate the wrongfulness of his actions or to conform his conduct to the law's requirements was substantially impaired, that Dr. Miller's report was duplicative of that prepared by the mitigation specialist, and that the factual information regarding Petitioner's difficult childhood and drug abuse was before the sentencing judge.

Petitioner takes issue with the state court's credibility determinations concerning the experts, but federal courts have "no license to redetermine credibility of witnesses whose demeanor has been observed by the state trial court, but not by them." *Marshall v. Lonberger*, 459 U.S. 422, 434 (1983). Even if reasonable minds reviewing a record might disagree about a witness's credibility, "on habeas review that does not suffice to supersede the trial court's credibility determination." *Rice v. Collins*, 546 U.S. 333, 341-42 (2006). Rather, "so long as 'fairminded jurists could disagree' on the correctness" of the state court's credibility findings, Petitioner cannot demonstrate that these findings were objectively unreasonable. *Richter*, 131 S. Ct. at 786 (citing *Yarborough v. Alvarado*, 541 U.S. 652, 664 (2004)).

Petitioner argues that it was objectively unreasonable for the PCR court to find that Petitioner committed the rape after seeing the victim's vaginal area because Dr. Bayless failed to document this alleged statement in his report or notes, Petitioner never made such an assertion in his other numerous statements about the offense, and the victim was not wearing a dress. In making this finding, the state court concluded that Dr. Bayless was a credible witness. Because as discussed next it was not objectively unreasonable for the state court to credit Dr. Bayless's testimony, none of Petitioner's alleged grounds are sufficient to overturn the state court's determination that Petitioner raped the victim after seeing her vaginal area. Moreover, the state court's reference to Petitioner's alleged sexual arousal played no significant role in its ultimate findings concerning counsel's representation. Petitioner had also reported both to Dr. Bayless and other experts that he raped the victim in

order to make it look like she had been raped during a robbery. And it was this fact, separate from Petitioner's alleged arousal, that formed the basis of Dr. Bayless's opinion that Petitioner was fully aware of his actions when he committed the offense.

In a related argument, Petitioner asserts that it was objectively unreasonable for the state court to find Dr. Bayless more credible than Drs. Lanyon and French. However, this is a classic credibility determination to which this Court must defer so long as "fairminded jurists could disagree." *Richter*, 131 S. Ct. at 786. The essence of Petitioner's experts' testimony was that Petitioner entered a cocaine-induced psychotic state when Petitioner irrationally concluded that the victim could read his mind and was going to report him to the police. They based their conclusion on not only Petitioner having been on a crack binge for days, but also on his describing having "no conscious there" and experiencing "blackness" when he initiated the attack on Calabrese. However, as noted by the state court, trial counsel did not recall Petitioner ever telling him that he had no control over his actions and that counsel would have followed up on such a statement. (Doc. 38-9 at 36 n.20; Doc. 40-6 at 10.) It is also noteworthy that in interviews with the post-conviction experts Petitioner said the victim never regained consciousness. This change in narrative, in the face of his stipulated plea, his wife's testimony, and his statement to a reporter concerning the victim's consciousness, casts some doubt on the veracity of his newly-claimed lack of control. Regardless, Dr. Bayless testified that a cocaine-induced psychosis requires hallucinations and delusions and that in this case Petitioner was not delusional but knew exactly what he was doing as evidenced by Petitioner's logical and deliberate actions. In light of the competing experts' opinions and the evidentiary record, it was not objectively unreasonable for the state court to credit Dr. Bayless's testimony over that of Drs. Lanyon and French.

Petitioner also complains that the state court unreasonably determined that the testimony of Dr. Miller regarding Petitioner's difficult childhood was duplicative of that reported by mitigation specialist Davis because Dr. Miller's report examined the nature of the risk factors that Petitioner was exposed to as a child, "such as abuse, neglect, parental alcoholism, multiple marriages and divorces, and violent, aggressive behavior between adults

in the home." (Doc. 35 at 58.) He further asserts that Davis was unqualified to opine whether Petitioner's "background contributed to psychological conditions or was a causal factor in the commission of the offense." (*Id.*) However, Dr. Miller rendered no such opinion, testifying only that the identified risk factors increase the probability a child will someday engage in criminal activity. He expressly declined to offer an opinion about what role Petitioner's risk factors may have played in the offense or to assess Petitioner's psychological condition. (Doc. 40-1 at 11.) In addition, Dr. Miller's report is based in large measure on Davis's mitigation report and her interview notes. It was not objectively unreasonable for the state court to find that Dr. Miller's contributions were largely duplicative of mitigation specialist Davis.

After careful review of the record, the Court concludes that it was not objectively unreasonable for the PCR court to find no reasonable probability of a different outcome had counsel presented expert testimony concerning cocaine intoxication and connecting Petitioner's dysfunctional upbringing to his drug addiction and to the offense. The testimony at the PCR hearing of Petitioner's siblings and Dr. Miller was largely duplicative and cumulative of the information contained in the mitigation specialist's report. The sentencing judge found, based on Davis's report, that Petitioner had established a difficult childhood as a mitigating factor. Similarly, the sentencing judge found as a nonstatutory mitigating factor that Petitioner was somewhat impaired by crack cocaine at the time of the offense. Petitioner argues that expert testimony would have shown that he was in a cocaine-induced psychosis and thus *substantially* impaired under A.R.S. § 13-703(G)(1), but the PCR court found otherwise. This was not an unreasonable determination in light of the evidence of Petitioner's planning, deliberate actions to conceal the crime, and his detailed memory of what occurred. Specifically, it was not unreasonable to find that Petitioner had the ability to appreciate the wrongfulness of his actions based on his discussing a plan to rob the victim before she arrived at the house, moving the victim's truck, lying to her church about her whereabouts and his home address, washing the stick used to bludgeon her head, and hiding the body.

Conclusion

In determining that Petitioner's Sixth Amendment right to the effective assistance of counsel was not violated by counsel's alleged deficiencies in investigating and presenting mitigating evidence, the PCR court neither unreasonably applied *Strickland* nor unreasonably determined the facts in light of the evidence developed in state court. Because Petitioner is precluded from relief by § 2254(d), the Court declines to permit discovery, expansion of the record, and an evidentiary hearing on Claim 2.

B. Failure to Investigate and to Rebut Aggravation

In Claim 3, Petitioner alleges that counsel was ineffective for failing to investigate generally and failing to present evidence to rebut the cruelty prong of the (F)(6) aggravating factor. Specifically, he asserts counsel should have interviewed Petitioner's wife and children, and hired an independent forensic pathologist to offer an opinion on whether the victim was conscious at the time of the sexual assault and stabbing.

Respondents contend that Claim 3 was never fairly presented in state court and is now procedurally defaulted. Petitioner counters that the claim was raised in Claim Three of his second amended PCR petition, which alleged that Petitioner's plea and sentencing were the product of ineffective assistance of counsel because counsel failed to inform Petitioner of the effects of his plea and sentencing stipulations. (Doc. 38-10 at 27-28.) Within the body of this claim, counsel asserted that the defense had not interviewed Petitioner's children. In support, he appended declarations from Petitioner, asserting that counsel did not interview the children, and his *Strickland* expert, asserting that counsel should not have permitted the sentencing stipulation "without first having interviewed the children and explaining the severe consequences of the stipulation." (Doc. 43-10 at 13; Doc. 43-4 at 6.)

The Court finds that Claim 3 was not fairly presented in state court. While the PCR petition mentions an alleged failure to interview Petitioner's children, it does so in the context of arguing counsel's ineffectiveness for failing to properly advise Petitioner of the consequences of signing a stipulation summarizing the children's statements to police and a counselor (which forms the basis of Claim 4 below), not as part of a claim asserting

ineffectiveness for failing to investigate and uncover evidence necessary to rebut the (F)(6) aggravating factor. Petitioner's PCR petition did not alert the state court to either the legal theory or operative facts underlying Claim 3. *See Wood v. Ryan*, 693 F.3d 1104, 1120 (9th Cir. 2012) ("[A] general allegation of ineffective assistance of counsel is not sufficient to alert a state court to separate specific instances of ineffective assistance."); *Moormann v. Schriro*, 426 F.3d 1044, 1056 (9th Cir. 2005) (noting that a petitioner cannot add unrelated alleged instances of ineffectiveness to any ineffectiveness claim raised in state court). Because he has no available state court remedies, *see* Ariz. R. Crim. P. 32.2(b) and 32.1(d)-(h), Claim 3 is procedurally barred absent a showing of cause and prejudice or fundamental miscarriage of justice. *Coleman*, 501 U.S. at 732, 735 n.1.

Cause and Prejudice

Petitioner argues that the ineffective assistance of PCR counsel constitutes cause for the procedural default. In states like Arizona, which require that ineffective-assistance-of-trial-counsel claims be raised in an initial-review collateral proceeding, failure of counsel in an initial-review collateral proceeding to raise a substantial trial ineffectiveness claim may provide cause to excuse the procedural default of such a claim. *Martinez v. Ryan*, 132 S. Ct. 1309, 1315 (2012). To establish cause under *Martinez*, Petitioner must demonstrate that PCR counsel was ineffective under the standards of *Strickland* for not raising a substantial ineffective-assistance-of-trial-counsel claim. This requires showing that the underlying ineffectiveness claim is "rooted in 'a potentially legitimate claim of ineffective assistance of trial counsel.'" *Lopez v. Ryan*, 678 F.3d 1131, 1138 (9th Cir. 2012) (citing *Martinez*, 132 S. Ct. at 1318). "To have a legitimate IAC claim a petitioner must be able to establish both deficient representation *and* prejudice." *Id.*; *see also Leavitt v. Arave*, 682 F.3d 1138, 1140 (9th Cir. 2012); *Sexton v. Cozner*, 679 F.3d 1150, 1159 (9th Cir. 2012). Because the Court concludes that Petitioner "fails to meet the *Martinez* test of substantiality as to prejudice,"

it does not address substantiality of the deficiency prong.[6] *Lopez*, 678 F.3d at 1138; *see also Leavitt*, 682 F.3d at 1140 (finding no substantial ineffectiveness claims where record demonstrated no prejudice from alleged ineffectiveness).

Petitioner argues that his trial counsel was deficient for failing to interview Petitioner's children, interview Petitioner's wife, and enlist a forensic pathologist to opine about the unlikelihood the victim regained consciousness after being bludgeoned in the head. He asserts this investigation would have led him to discover that the victim was not conscious at the time of the rape or stabbing and, consequently, the sentencer would not have found that the murder was committed in an especially cruel manner under A.R.S. § 13-703(F)(6).

Petitioner does not specifically allege what would have been gained by counsel interviewing his children. With regard to his wife, Petitioner argues that on cross-examination counsel could have demonstrated the unreliability of Kara Sansing's testimony by eliciting the details of her statement to the police, which he describes as "unbelievable." (Doc. 35 at 88.) In support, he proffers a transcript of Kara's police interview, which contains the following exchange:

> INT: Okay, you saw him having sex with her?
>
> KS: Yes.
>
> INT: Okay, were her pants down or just off or—?
>
> KS: Pants down to her knees.
>
> INT: Just down to her knees, okay. What was she saying?
>
> KS: She asked him how it feels, and he says, well my wife's better. And hear what I'm saying, when I walked in when I heard her say that, and I just, looked at him Johnny, I says, you know, I can't believe you would say that to her, I mean, I want to say, say something like well, how would you feel if I was doing it to a guy, and asking a guy, or guy asking me, so what my husband's feels better, when you (inaudible)

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[6] Nonetheless, the Court notes that the state court record reflects that defense counsel did, in fact, interview Petitioner's wife before the aggravation/mitigation hearing. At the hearing, Kara Sansing acknowledged a previous interview with Ronan and testified to statements she made at that time. (RT 8/2/99 at 78-79.)

making uncomfortable to hear you're wife's in another room and you're doing it with another woman and you're murdering her?

. . . .

INT: Okay. So he stabs her with this knife, uh, what does she do?

KS: She would just say, please don't, please don't, just let me go, I won't call the cops. I won't do nothing, and he's like yes you will, yes you will, as soon as you walk out of this house, you will call the cops.

(Doc. 53-2 at 14-15.)

Petitioner also points to declarations from Kara and Petitioner admitted during the state PCR hearing and proffers a newly-obtained report from a forensic pathologist. Petitioner's declaration states that he made false statements about the victim speaking during the sexual assault so as to minimize risk of a jail assault and that Calabrese was not in fact conscious when he returned from moving her truck. (Doc. 43-10 at 11-12.) In her declaration, Kara denies hearing the victim speak during the sexual assault and says the "only time she spoke was when she was being tied up in the kitchen area." (*Id.* at 5.) The forensic pathologist opines that if the victim did regain consciousness, it likely would have been for no more than five to ten minutes, during which her perception of pain and her ability to speak cognitively likely would have been impaired given the brain damage she had sustained. (Doc. 53-2 at 25.)

To establish prejudice from counsel's alleged deficiencies, Petitioner must show a reasonable probability of a different outcome. For several reasons, there is no reasonable probability the sentencer would not have found the (F)(6) "especially heinous, cruel or depraved" aggravating factor. First, the new evidence Petitioner alleges counsel could have presented is not significant. The new pathologist's report is not appreciably different from the testimony of the medical examiner, who opined it was possible but doubtful the victim regained consciousness. In addition, Petitioner's and Kara's post-conviction declarations lack credibility in light of their self-serving nature and Petitioner's previous admissions to the court and a newspaper reporter.

Second, even if Petitioner's new evidence raised a reasonable doubt as to whether the

victim regained consciousness, he cannot show prejudice because the sentencing judge found beyond a reasonable doubt that the murder was committed in an especially heinous or depraved manner. This finding alone, separate from cruelty, was sufficient to establish the (F)(6) factor. *Sansing I*, 200 Ariz. at 356, 26 P.3d at 1127 ("Because the statute is written in the disjunctive, the sentencing judge need find only one of the factors to establish an F.6 aggravating factor."); *see also Sansing II*, 206 Ariz. at 237-38, 77 P.3d at 35-36 (concluding that no reasonable jury would have failed to find that Calabrese's murder was especially heinous).

Third, in finding cruelty, the sentencing judge did not rely solely on the victim's physical pain and mental suffering during the rape and stabbing. The court found that Calabrese consciously experienced physical pain during the initial attack, as indicated by the ligature wounds and bruises on her wrists and ankles, the defensive wounds to her hands, the trauma to her face, and the "two deep blows to the back of her head, which caused bruising of the brain and hemorrhaging." (RT 9/30/99 at 13.) It further found that Calabrese suffered mental anguish, as demonstrated by her praying to God and pleading with Petitioner's children to summon help. There is no dispute that the victim was conscious throughout the initial attack when she struggled against being tied up. Likewise, the Arizona Supreme Court also found during its independent review that the cruelty prong had been established based on the mental suffering that occurred between the beginning of the attack and the victim's loss of consciousness. *Sansing I*, 200 Ariz. at 358, 26 P.3d at 1128 ("The evidence shows beyond a reasonable doubt that the victim was aware and had sufficient time to contemplate her fate.") Moreover, in reviewing the *Ring* violation for harmless error, the Arizona Supreme Court expressly stated that cruelty had been established in three independent ways, one being mental anguish during the initial attack. *Sansing II*, 206 Ariz. at 235-36, 77 P.3d at 33-34.

Because Petitioner has not alleged facts that, even if true, support a finding of prejudice from counsel's failure to investigate and present evidence to rebut the (F)(6) factor, the Court finds that it is not a substantial ineffectiveness claim. Therefore, PCR counsel's

failure to raise Claim 3 in the PCR petition was not ineffective and does not provide cause for its procedural default.

Miscarriage of Justice

Petitioner contends that a fundamental miscarriage of justice will occur if Claim 3 is not heard on the merits because he is actually innocent of the death penalty. To satisfy this exception to procedural default, Petitioner must show by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the existence of *any* aggravating circumstance or some other condition of eligibility for the death sentence under the applicable state law. *Sawyer*, 505 U.S. at 335-36.

Petitioner argues that the (F)(6) aggravating factor would not have been established, and thus Petitioner would not be eligible for the death penalty, if counsel had conducted a proper investigation and rebutted the finding of consciousness. However, as already explained, the state court's (F)(6) finding rested on both the cruelty and "heinous or depraved" prongs, either of which rendered Petitioner eligible for the death penalty. Accordingly, Petitioner has not established by clear and convincing evidence that he is actually innocent of the death penalty.

Evidentiary Development

Because Claim 3 is procedurally barred, Petitioner's requests for discovery, expansion of the record, and an evidentiary hearing are denied.

C. Failure to Properly Advise

In Claim 4, Petitioner alleges that had counsel properly advised him about the consequences of his plea's stipulated factual basis and the sentencing stipulation, he would not have signed these documents and the admissions contained therein would not have been used by the prosecution to establish the cruelty prong of the (F)(6) aggravating factor. Respondents acknowledge that Claim 4 was raised in Petitioner's PCR petition, but argue it is procedurally defaulted because in his petition for review to the Arizona Supreme Court Petitioner merely incorporated the arguments and authorities set forth in his PCR petition, which he appended to his petition for review in lieu of restating the argument in the body of

the petition. However, the Ninth Circuit has held that this is sufficient to fairly present a claim to an appellate court. *See Scott v. Schriro*, 567 F.3d 573, 582-83 (9th Cir. 2009).

The state PCR court denied relief on Claim 4 without explanation, stating that the claim failed to present "a material issue of fact or law." (Doc. 38-9 at 29.) The Arizona Supreme Court summarily denied review. "Where a state court's decision is unaccompanied by an explanation, the habeas petitioner's burden still must be met by showing there was no reasonable basis for the state court to deny relief." *Richter*, 131 S. Ct. at 784. In addition, this Court must apply the "doubly deferential" standard of review under *Strickland* and § 2254(d). *Id.* at 788. Doing so, and in light of the record that was before the state court, the Court finds that the state court's denial was not objectively unreasonable because "fairminded jurists could disagree" on whether counsel's performance was deficient or Petitioner suffered prejudice. *Richter*, 131 S. Ct. at 786.

First, Petitioner stated during his change-of-plea hearing that he reviewed the factual basis with counsel. Although Petitioner now asserts in his declaration that counsel did not advise him of all the potential sentencing consequences from his admissions, it would not be unreasonable to discount this evidence, especially in the absence (as here) of any evidence relating to counsel's recollections of their pre-plea discussions and in light of Petitioner's own admission in his declaration that he is not a truthful person. Second, the record suggests that Petitioner did not want his children to be called as witnesses and therefore agreed to the sentencing stipulation to minimize their involvement in the proceedings. Third, even if Petitioner had refused to sign the factual basis or agreed to the sentencing stipulation, there is no reasonable probability of a different outcome.

Kara Sansing testified at sentencing that she heard the victim speak during the sexual assault. Had the parties not agreed to the sentencing stipulation, the prosecution likely would have called as witnesses the reporter to whom Petitioner admitted that the victim had regained consciousness, as well as Petitioner's children. Moreover, as just discussed with respect to Claim 3, the sentencing court determined that the (F)(6) factor was established both because the crime was committed in a heinous and depraved manner and because it was

especially cruel. Either one of these prongs was sufficient to sustain the factor. In addition, the court found cruelty based on the mental anguish and physical pain suffered by the victim prior to losing consciousness.

D. Cumulative Prejudice

In Claim 5, Petitioner contends that trial counsel's errors resulted in cumulative prejudice. Respondents assert that this claim was never presented in state court. Regardless, because Petitioner has not established any constitutional deficiencies in counsel's representation, his claim of cumulative prejudice fails.

IV. SENTENCING ERRORS

A. Causal Nexus

In Claim 7, Petitioner alleges that his right to an individualized sentencing determination was violated when the trial court and the Arizona Supreme Court employed a causal nexus test to avoid giving effect to his mitigating evidence. Citing *Tennard v. Dretke*, 542 U.S. 274, 289 (2004), Petitioner asserts that the trial court improperly refused to give weight to his difficult childhood, dysfunctional family background, and family support, and that the Arizona Supreme Court similarly refused to give any weight to his alleged drug impairment, background, and lack of education when it reviewed the *Ring* violation for harmless error. Respondents assert that Petitioner did not properly exhaust all aspects of this claim. However, because the claim lacks merit, the Court declines to reach the exhaustion issue. *See* 28 U.S.C. § 2254(b)(2) ("An application for a writ of habeas corpus may be denied on the merits, notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the State."); *Rhines v. Weber*, 544 U.S. 269, 277 (2005) (noting that a district could would abuse its discretion if it were to grant a stay so that a petitioner could attempt to exhaust "plainly meritless" claims).

Relevant Facts

On direct appeal, Petitioner argued that the trial court violated his constitutional rights by refusing to consider his difficult childhood and dysfunctional family background absent a causal link to the offense. (Doc. 37-2 at 50-56.) The Arizona Supreme Court addressed

this claim as follows:

> The defendant proffered his difficult childhood and family background as non-statutory mitigating circumstances. At sentencing, the judge held that the defendant had established by a preponderance of the evidence that he had a difficult childhood and family background but declined to give the evidence "significant mitigating weight" because "there [was] nothing in the defendant's childhood or family background that provides a causal link to the horrific crime committed." The defendant argues the judge's refusal to give the evidence significant weight due to a lack of a causal nexus violates his due process and Eighth Amendment rights under *Penry v. Lynaugh,* 492 U.S. 302, 109 S. Ct. 2934 (1989); *Eddings v. Oklahoma,* 455 U.S. 104, 102 S. Ct. 869 (1982); and *Lockett v. Ohio,* 438 U.S. 586, 98 S. Ct. 2954 (1978).
>
> We have previously considered and rejected this argument. We have interpreted *Penry, Eddings,* and *Lockett* as directing the sentencing judge to "consider evidence proffered for mitigation." *State v. Djerf,* 191 Ariz. 583, 598 ¶ 61, 959 P.2d 1274, 1289 ¶ 61 (1998) (with respect to mitigating evidence, the sentencing judge is "entitled to give it the weight it deserves"); *see also State v. Towery,* 186 Ariz. 168, 189, 920 P.2d 290, 311 (1996) ("The sentencer therefore must consider the defendant's upbringing if proffered but is not required to give it significant mitigating weight."). However, "[h]ow much weight should be given proffered mitigating factors is a matter within the sound discretion of the sentencing judge." *Towery,* 186 Ariz. at 189, 920 P.2d at 311.
>
> "Arizona law states that a difficult family background is not relevant unless the defendant can establish that his family experience is linked to his criminal behavior." *Djerf,* 191 Ariz. at 598 ¶ 61, 959 P.2d at 1289 ¶ 61; *see also State v. Hoskins,* 199 Ariz. 127, 151 ¶ 110, 14 P.3d 997, 1021 ¶ 110 (2000) (Family dysfunction "can be mitigating only when actual causation is demonstrated between early abuses suffered and the defendant's subsequent acts."); *Towery,* 186 Ariz. at 189, 920 P.2d at 311 ("family background may be a substantial mitigating circumstance when it is shown to have some connection with the defendant's offense-related conduct"); *State v. Wallace,* 160 Ariz. 424, 427, 773 P.2d 983, 986 (1989) ("A difficult family background is a relevant mitigating circumstance if a defendant can show that something in that background had an effect or impact on his behavior that was beyond the defendant's control."). No testimony suggested that the defendant's childhood affected his behavior on the day of the murder. The evidence on this subject did not "prove a loss of impulse control or explain what caused him to kill." *Towery,* 186 Ariz. at 189, 920 P.2d at 311. The sentencing judge properly considered the defendant's difficult childhood as a non-statutory mitigating circumstance and gave the evidence appropriate weight.

Sansing I, 200 Ariz. at 358-59, 26 P.3d at 1129-30.

As discussed above, in reviewing for harmless error following *Ring*, the Arizona Supreme Court, assessed the evidence and agreed with the trial court that the (G)(1) factor was not proved and that the non-statutory mitigating evidence was entitled to little weight. *Sansing II*, 206 Ariz. at 238-41, 77 P.3d at 36-39. In making these determinations the court

noted that Petitioner "failed entirely to show any causal nexus between his alleged drug use and impairment." *Id.* at 239, 77 P.3d at 37. This, combined with Petitioner's failure to quantify how much crack he had used along with evidence of planning and taking steps to avoid detection, led the court to conclude that Petitioner had failed to prove the existence of the (G)(1) substantial impairment factor. When the court later discussed impairment as a non-statutory mitigating circumstance, it found based on its previous discussion of (G)(1) that "no reasonable jury could have accorded the impairment claim more than minimal weight." *Id.* at 240-41, 77 P.3d at 38-39. The court also noted that Petitioner had failed to "demonstrate any causal link between his crimes and his childhood and lack of education." *Id.* at 241, 77 P.3d at 39. Therefore, "a reasonable jury could have accorded these two factors only minimal weight." *Id.* Petitioner sought rehearing, arguing *inter alia* that a causal nexus is not required to establish mitigation. (Doc. 38-3 at 54.) The Arizona Supreme Court, evenly divided on a 2-2 vote, summarily denied the motion. (Doc. 38-4 at 2.)

Analysis

Once a determination is made that a person is eligible for the death penalty, the sentencer must consider relevant mitigating evidence, allowing for "an individualized determination on the basis of the character of the individual and the circumstances of the crime." *Tuilaepa v. California*, 512 U.S. 967, 972 (1994). The Supreme Court has explained that "evidence about the defendant's background and character is relevant because of the belief, long held by this society, that defendants who commit criminal acts that are attributable to a disadvantaged background may be less culpable than defendants who have no such excuse." *Wiggins v. Smith*, 539 U.S. 510, 535 (2003) (quoting *Penry v. Lynaugh*, 492 U.S. 302, 319 (1989)). Therefore, the sentencer in a capital case is required to consider any mitigating information offered by a defendant, including non-statutory mitigation. *See Lockett v. Ohio*, 438 U.S. 586, 604 (1978) (right to individualized sentencing in capital cases violated by Ohio statute that permitted consideration of only three mitigating factors); *Eddings v. Oklahoma*, 455 U.S. 104, 113-15 (1982) (*Lockett* violated where state courts refused as a matter of law to consider mitigating evidence that did not excuse the crime).

In *Lockett* and *Eddings*, the Court held that under the Eighth and Fourteenth Amendments the sentencer must be allowed to consider, and may not refuse to consider, "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." *Lockett*, 438 U.S. at 604. However, while the sentencer must not be foreclosed from considering relevant mitigation, "it is free to assess how much weight to assign such evidence." *Ortiz v. Stewart*, 149 F.3d 923, 943 (9th Cir. 1998). As the *Eddings* court explained: "The sentencer . . . may determine the weight to be given relevant mitigating evidence. But they may not give it no weight by excluding such evidence from their consideration." 455 U.S. at 114-15.

In *Tennard v. Dretke*, the Court reiterated the general principle that it is not enough simply to allow a defendant to present mitigating evidence, the sentencer must be able to consider and give effect to that evidence. 542 U.S. 274, 283 (2004). In that case, involving a prisoner's low IQ, the Court invalidated a "screening test" applied by the Fifth Circuit that required the defendant to prove a "nexus" between mitigating evidence and the offense in order for the evidence to be considered by the sentencer.

In *Schad v. Ryan*, the Ninth Circuit observed that prior to *Tennard* Arizona courts recognized a nexus test to preclude consideration of evidence of childhood abuse unless the abuse bore a casual connection to the offense. 671 F.3d 708, 723 (9th Cir. 2011), *cert. denied*, 133 S. Ct. 432 (2012). "After *Tennard*, however, the Arizona Supreme Court has clarified that the nexus test affects only the weight of mitigating evidence, not its admissibility." *Id.* (citing *State v. Newell*, 212 Ariz. 389, 405, 132 P.3d 833, 849 (2006)). The *Schad* court further observed that the "United States Supreme Court has said that the use of the nexus test in this manner is not unconstitutional because state courts are free to assess the weight to be given to particular mitigating evidence." 671 F.3d at 723. Indeed, the Supreme Court has held that there is no constitutional requirement of unfettered discretion in the sentencer, noting that "States are free to structure and shape consideration of mitigating evidence 'in an effort to achieve a more rational and equitable administration of the death penalty.'" *Boyde v. California*, 494 U.S. 370, 377 (1990) (quoting *Franklin v. Lynaugh*, 487

U.S. 164, 181 (1988) (plurality opinion)). It has further explained that "*Lockett* and its progeny stand only for the proposition that a State may not cut off in an absolute manner the presentation of mitigating evidence, either by statute or judicial instruction, or by limiting the inquiries to which it is relevant so severely that the evidence could never be part of the sentencing decision at all." *Johnson v. Texas*, 509 U.S.350, 361-62 (1993) (quoting *McKoy v. North Carolina*, 494 U.S. 433, 456 (1990) (Kennedy, J., concurring in judgment)). Thus, "[a]lthough *Lockett* and *Eddings* prevent a State from placing relevant mitigating evidence 'beyond the effective reach of the sentencer,' *Graham v. Collins*, [506 U.S. 461, 475 (1993)], those cases and others in that decisional line do not bar a State from guiding the sentencer's consideration of mitigating evidence." *Id.* at 362; *see Saffle v. Parks*, 494 U.S. 484, 492-93 (1990) (holding that an instruction directing the jury to avoid any influence of sympathy when imposing sentence did not violate *Lockett* and *Eddings* and noting the "distinction between allowing the jury to consider mitigating evidence and guiding their consideration").

Applying these principles, it is apparent in Petitioner's case that the trial court fulfilled its constitutional obligation by allowing and considering all of the mitigating evidence, and that the Arizona Supreme Court's decision rejecting Petitioner's arguments to the contrary was neither contrary to, nor based on an unreasonable application of, Supreme Court law. The record supports the conclusion that the state courts gave Petitioner's drug impairment, difficult childhood, lack of education, and family support "little or no weight as a matter of *fact*, after giving individualized consideration to the evidence, rather than treating the evidence as irrelevant or nonmitigating as a matter of law." *Towery v. Ryan*, 673 F.3d 933, 946 (9th Cir.), *cert. denied*, 132 S. Ct. 1738 (2012); *see also Lopez v. Ryan*, 630 F.3d 1198, 1203 (9th Cir.), *cert. denied*, 132 S. Ct. 577 (2011) (reviewing record to determine whether state court applied impermissible casual nexus requirement). The trial court thoroughly discussed the mitigating circumstances presented at sentencing and did not exclude or refuse to consider any mitigating evidence. The court did not state that the lack of a causal connection foreclosed consideration of the evidence or that such evidence could not "constitute" mitigation. Rather, it chose to not to give "significant mitigating weight to the

defendant's childhood and family background." (RT 9/30/99 at 21.) Similarly, the court found family love and support to be a non-statutory mitigating circumstance, but gave it "only minimal weight because it did not prevent the defendant from committing" the offense or victimizing his children. (*Id.* at 22.)

On appeal, the Arizona Supreme Court correctly recognized that the sentencing court was required to "consider evidence proffered for mitigation" but further noted that the amount of weight that should be given to such evidence "is a matter within the sound discretion of the sentencing judge." *Sansing I*, 200 Ariz. at 358, 26 P.3d at 1129. It concluded that the "sentencing judge properly considered the defendant's difficult childhood as a non-statutory mitigating circumstance and gave the evidence appropriate weight." *Id.* at 359, 26 P.3d at 1130. This was not contrary to Supreme Court precedent. *See Lopez*, 673 F.3d at 944-45.

In conducting its own independent review of Petitioner's sentence, the supreme court disagreed with the trial court's finding of pecuniary gain as an aggravating factor but nonetheless concluded that the mitigation failed to outweigh the especially cruel aggravating factor because of the "minimal value of the mitigating evidence." *Sansing II*, 200 Ariz. at 360, 26 P.3d at 1132. In doing so, the court again noted that the trial judge "gave the defendant's difficult family background *little mitigating weight* because the defendant failed to establish the required causal link." *Id.* (emphasis added). Furthermore, in carrying out its harmless error review of Petitioner's sentence, the Arizona Supreme Court considered and evaluated all of the proffered mitigating circumstances to determine whether a jury would have reached a different sentencing decision than the trial judge. The court cited the lack of a nexus between the mitigating circumstances and the crime simply as one of the criteria by which a jury would have *weighed* the mitigating information. *Sansing II*, 206 Ariz. at 240-41, 77 P.3d at 38-39.

It is evident from the record that both the trial court and the Arizona Supreme Court considered all of Petitioner's proffered mitigation. The fact that some of the proven circumstances were not accorded significant weight does not amount to a constitutional

violation under *Lockett* and *Eddings*. *Towery*, 673 F.3d at 945; *Schad*, 671 F.3d at 724; *Lopez*, 630 F.3d at 1204; *see also Atkins v. Singletary*, 965 F.2d 952, 962 (11th Cir. 1992) ("Although Atkins argues that the trial judge did not *consider* non-statutory factors, it is more correct to say that the trial judge did not *accept*—that is, give much weight to—Atkins' non-statutory factors. Acceptance of non-statutory mitigating factors is not constitutionally required; the Constitution only requires that the sentencer *consider* the factors."); *State v. Mata*, 185 Ariz. 319, 331 n.6, 916 P.2d 1035, 1047 (1996) ("Defendant seems to believe that a trial court only 'considers' mitigating evidence if it imposes a mitigated sentence. The law is to the contrary. So long as the trial court considers the evidence, the judge is not bound to conclude that the evidence calls for leniency.").

B. (F)(6) Finding

In Claim 9, Petitioner contends that the trial court erred in finding the especially heinous, cruel, or depraved aggravating factor under A.R.S. § 13-703(F)(6), in violation of his rights under the Fifth, Eighth, and Fourteenth Amendments. Respondents contend that the Fifth and Fourteenth Amendment aspects of this claim are procedurally barred because Petitioner did not cite these provisions when raising the claim on direct appeal. Regardless, the Court will address the entirety of the claim because it is plainly meritless. *See* 28 U.S.C. § 2254(b)(2); *Rhines v. Weber*, 544 U.S. at 277.

Whether a state court correctly applied an aggravating factor to the facts is a question of state law. *See Lewis v. Jeffers*, 497 U.S. 764, 780 (1990). Federal habeas review 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*. A state court's finding of an aggravating factor is arbitrary or capricious only if no reasonable sentencer could have reached the same conclusion. *Id*. at 783. In reviewing the sufficiency of the evidence under this "rational factfinder" standard, the question is "whether after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact" could have made the finding beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319 (1979). A habeas court faced with a record of historical facts which supports conflicting inferences

must presume (even if it does not appear in the record) that the trier of fact resolved any such conflicts in favor of the prosecution. *Id*. at 326.

Arizona's (F)(6) aggravating factor, phrased in the disjunctive, is satisfied if the murder is either especially heinous, or cruel, or depraved. *State v. Murray*, 184 Ariz. 9, 37, 906 P.2d 542, 570 (1995). The especially cruel prong is satisfied "if the victim consciously experienced physical or mental pain and suffering prior to dying." *State v. Lopez*, 174 Ariz. 131, 143, 847 P.2d 1078, 1090 (1992). Evidence about "[a] victim's certainty or uncertainty as to his or her ultimate fate can be indicative of cruelty and heinousness." *State v. Gillies*, 142 Ariz. 564, 569, 691 P.2d 655, 660 (1984); *see also State v. Kemp*, 185 Ariz. 52, 65, 912 P.2d 1281, 1294 (1996). Heinousness and depravity focus the defendant's state of mind. *State v. Ceja*, 126 Ariz. 35, 39, 612 P.2d 491, 495 (1980). Factors supporting a finding that a murder was heinous and depraved include the infliction of gratuitous violence and helplessness of the victim. *See Gretzler*, 135 Ariz. at 52, 659 P.2d at 11.

As set forth above, the trial court found that the State had proven both cruelty and heinousness/depravity beyond a reasonable doubt. On direct appeal, the Arizona Supreme Court concurred with the trial court's cruelty findings and rejected Petitioner's argument that the victim had not been conscious long enough to suffer within the meaning of (F)(6). *Sansing I*, 200 Ariz. at 357, 26 P.3d at 1128. The court also rejected Petitioner's argument that the time frame between the beginning of the attack and the victim's initial loss of consciousness was too short to support a finding of cruelty. *Id.* Because it concurred in the trial court's cruelty findings, the supreme court declined to address the question of heinousness or depravity. *Id.* However, it did address this aspect of the (F)(6) finding when it reviewed the *Ring* violation for harmless error, finding that the rape, facial wounds, neck ligatures, gagging, blindfolding, and grinding of the knife in the victim's abdomen all constituted violence beyond that necessary to kill. *Sansing II*, 206 Ariz. at 238, 77 P.3d at 36.

Petitioner argues that the facts do not support a conclusion that the victim regained consciousness after being hit in the head. Similar to his arguments in Claim 1, Petitioner

argues that Kara Sansing's statements to police are unreliable and that Petitioner did not knowingly, intelligently, and voluntarily make the admissions contained within the factual basis of his plea. He further argues that a finding of cruelty could not be based on the limited time the victim was known to be conscious before the first blow to her head, asserting that under Arizona law the suffering had to have occurred at the time of death.

To the extent Petitioner relies on new evidence regarding the victim's consciousness, the Court does not consider it because a sufficiency-of-the-evidence claim is necessarily limited to the state court record. *See Jackson*, 443 U.S. at 322 (this type of claim almost never necessitates an evidentiary hearing); *Bashor v. Risley*, 730 F.2d 1228, 1233 (9th Cir. 1984) ("Whether the evidence was sufficient . . . must be determined from a review of the evidence in the record in the *state* proceedings.").

Viewed in the light most favorable to the State, there was sufficient evidence to establish cruelty. Based upon the evidence admitted at the sentencing hearing, a rational factfinder could have determined from the numerous injuries sustained during the initial struggle and from her pleas for help that the victim suffered mental anguish and uncertainty as to her fate when she was attacked, pinned to the floor, and bound at her hands and wrists. Moreover, given the uncontradicted testimony of Kara Sansing and Petitioner's admissions that the victim regained consciousness, a rational factfinder could have determined that the victim suffered both mentally and physically when she was sexually assaulted and repeatedly stabbed. The Arizona Supreme Court's decision upholding the cruelty finding was not objectively unreasonable. *See Cavazos v. Smith*, 132 S. Ct. 2, 4 (2011) (applying deference required by § 2254(d) to already deferential review of state court's resolution of sufficiency-of-evidence claim).

Petitioner also challenges the trial court's finding that the murder was committed in an especially heinous or depraved manner, arguing there was insufficient evidence that gratuitous violence was inflicted. However, a rational trier of fact could have found gratuitous violence based on the numerous injuries to the victim beyond the stab wounds. The Arizona Supreme Court's decision upholding this aspect of the (F)(6) factor was not

objectively unreasonable.

C. (G)(1) Finding

In Claim 10, Petitioner alleges that the trial court erred in not finding as mitigation that his ability to appreciate the wrongfulness of his conduct or to conform his conduct to the law was significantly impaired under A.R.S. § 13-703(G)(1), in violation of his rights under the Eighth and Fourteenth Amendments. (Doc. 35 at 117.) However, in his reply, Petitioner asserts that this claim is based on the mitigating weight accorded by the state court to the evidence of his impaired capacity. (Doc. 51 at 55.) Regardless of how the claim is characterized, it is plainly meritless.

The Supreme Court has reiterated that its "precedents confer upon defendants the right to present sentencers with information relevant to the sentencing decision and oblige sentencers to consider that information in determining the appropriate sentence," but that the "thrust of our mitigation jurisprudence ends here." *Kansas v. Marsh*, 548 U.S. 163, 175 (2006). "Once mitigating evidence is allowed in, a finding that there are "no mitigating circumstances" does not violate the Constitution." *Williams v. Stewart*, 441 F.3d 1030, 1057 (9th Cir. 2006).

Applying the rule of *Lockett* and its progeny to the case at bar, it is clear that the sentencing court complied with its federal constitutional duties by considering in a thorough manner Petitioner's impairment-related mitigating evidence. *Eddings*, 455 U.S. at 113. The court specifically stated that it gave some mitigating weight to Petitioner's claim that he was impaired by crack cocaine at the time of the crime. That the court found the evidence insufficient to establish significant impairment under (G)(1) is not problematic in light of the settled principle that a sentencer is not required to find proffered evidence mitigating, nor must it accord the evidence the weight which a defendant believes is appropriate. *Harris v. Alabama*, 513 U.S. 504, 512 (1995).

D. Victim's Character

In Claim 11, Petitioner asserts that the trial court improperly considered the victim's good character in imposing the death penalty, in violation of his rights under the Eighth and

Fourteenth Amendments. The Arizona Supreme Court addressed this claim on direct appeal:

> The defendant asserts that the judge improperly based his sentencing decision on Ms. Calabrese's good character. In his special verdict, the judge referred to the victim as a "Good Samaritan" and as a person who "took great joy in helping people in need." The judge's concluding remarks, after considering all aggravating and mitigating factors, described Ms. Calabrese as a person who "stood out like a shining light, as a true Samaritan" and who "kept her faith in God to the end." The defendant argues that the judge imposed the death sentence because he viewed the victim as a person above the norm of other murder victims. That approach, he argues, violates A.R.S. section 13-703, which does not define the character of the victim as an aggravating factor, and discriminates on the basis of the victim's status. A.R.S. § 13-703.A H (2001).
>
> We agree with the State that the judge's comments, taken in context, do not show that the trial judge relied upon the victim's good character in imposing the sentence. Taken in context, the comments merely state the judge's summary of the aggravating factors, particularly the senselessness of the crime and the helplessness of the victim. The fact that the victim was delivering food when attacked is related to the senselessness of the crime; the judge's comments related to "resorting to prayer for comfort" describe the helplessness of the victim after she had been beaten and bound.
>
> The defendant relies on *Gerlaugh v. Lewis,* 898 F.Supp. 1388 (D.Ariz.1995), *aff'd* 129 F.3d 1027 (9th Cir.1997), to support his argument that imposing a death sentence based on the social or economic background of the victim or defendant supports a claim of discrimination. In *Gerlaugh,* the habeas petitioner alleged that Arizona's death sentence is "discriminately applied because the death penalty is more likely to be imposed if the victim is white and the defendant is a young male from a lower socio-economic background." *Gerlaugh,* 898 F.Supp. at 1416. The court stated that "[t]o prevail on an equal protection claim, Petitioner must prove 'that the decision-makers in *his* case acted with discriminatory purpose.'" *Id.* (citing *McCleskey v. Kemp,* 481 U.S. 279, 292, 107 S. Ct. 1756 (1987)). The defendant points to no facts that support a finding that the trial judge acted with discriminatory purpose, and nothing in the special verdict suggests that the victim's social or economic background affected the judge's decision.

Sansing I, 200 Ariz. at 352-53, 26 P.3d at 1123-24.

Petitioner asserts summarily that the state court's ruling was both contrary to and an unreasonable application of clearly established federal law, and was based on an unreasonable determination of the facts. He argues that the trial court's reliance on the victim's character "so infected the sentence hearing with unfairness as to make the resulting death sentence a denial of due process." (Doc. 35 at 121; internal quote and alteration marks omitted.) He further asserts that the trial court's consideration of the victim's character and status in the community resulted in the death penalty being imposed in a discriminatory

manner.

The Arizona Supreme Court's resolution of this claim was neither objectively unreasonable nor contrary to controlling Supreme Court law. The supreme court reasonably concluded based on the record that the trial court's comments regarding the victim's good character reflected the judge's determination that the murder was committed in an especially heinous, cruel, or depraved manner under A.R.S. § 13-703(F)(6) because the victim was helpless and the crime was senseless. The fact that the victim went to Petitioner's home to deliver food from her church underscored both of these factors—she simply had no reason to suspect Petitioner would attack, rob, and rape her. Additionally, the state supreme court reasonably concluded that Petitioner had failed to demonstrate purposeful discriminatory intent.

E. Request for Leniency

In Claim 12, Petitioner contends that his rights under the Eighth and Fourteenth Amendments were violated when the trial court failed to find and consider as mitigation the victim's daughter's request that Petitioner not be sentenced to death. The Arizona Supreme Court addressed this claim on direct appeal:

> At sentencing, the judge considered and rejected the request of the victim's ten-year-old daughter for mercy as a mitigating circumstance. The defendant asserts the judge thereby violated the rights of a victim to be heard, as guaranteed by Article 2, Section 2.1.(A)4 of the Arizona Constitution, A.R.S. section 13-4426.A, and Arizona Rule of Criminal Procedure 39.b.7. The State responds that a victim's rights are satisfied when the court gives the victim a chance to speak, orally or in writing, at sentencing. *See Gulbrandson,* 184 Ariz. at 66, 906 P.2d at 599 ("The Victims' Bill of Rights of the Arizona Constitution, however, guarantees victims of crime the right '[t]o be heard at ... sentencing.' [Citation omitted.] Here, the victim's family made statements at the sentencing hearing and in letters and statements attached to the presentence report.").
>
> In *State v. Trostle,* we rejected the defendant's argument. There, the defendant "claim[ed] that the judge should have considered requests from the victim's family that he be sentenced to life imprisonment [rather than death]." 191 Ariz. 4, 22, 951 P.2d 869, 887 (1997). We disagreed, stating "such evidence is irrelevant to either the defendant's character or the circumstances of the crime and is therefore not proper mitigation." *Id.* (citing *State v. Williams,* 183 Ariz. 368, 385, 904 P.2d 437, 454 (1995)). Moreover, A.R.S. section 13-703.D expressly forbids the consideration of "any recommendation made by the victim regarding the sentence to be imposed."

> In this case, the victim's rights were satisfied by the presence of Mr. Calabrese at the sentencing hearing and the court's acceptance of documents submitted by the victim's daughter. The judge correctly refused to consider the daughter's sentencing recommendation when imposing the sentence.

Sansing I, 200 Ariz. at 358, 26 P.3d at 1129.

In reviewing the *Ring* error for harmless error, the Arizona Supreme Court ruled that no reasonable jury could have accorded mitigating weight to the request for leniency because a "victim's sentencing request is not proper mitigation evidence." *Sansing II*, 206 Ariz. at 241, 77 P.3d at 39. The court cited its earlier decision in *Lynn v. Reinstein*, 205 Ariz. 186, 68 P.3d 412, (2003), in which a murder victim's husband asserted a right under Arizona's Victims' Bill of Rights to recommend life imprisonment over the death penalty during the sentencing phase of a defendant's trial. Citing *Booth v. Maryland*, 482 U.S. 496, 509 (1987), and *Payne v. Tennessee*, 501 U.S. 808, 825, 827 (1991), the court in *Lynn* held that the Eighth Amendment prohibits victims' recommendations regarding the appropriate sentence for a capital defendant. 205 Ariz. at 191, 68 P.3d at 417. It further held that [v]ictims' recommendations to the jury regarding the appropriate sentence a capital defendant should receive are not constitutionally relevant to the harm caused by the defendant's criminal acts or to the defendant's blameworthiness or culpability." *Id.*

Petitioner argues that the state court's ruling was contrary to, and based on an unreasonable application of, *Lockett*, *Eddings*, and *Skipper v. South Carolina*, 476 U.S. 1, 4 (1986), because the recommendation of a life sentence from the victim's daughter was relevant mitigating evidence. He further asserts, citing *Brecht v. Abrahamson*, 507 U.S. 619, 623 (1993), that this error had a substantial and injurious effect on his sentence.

In *Skipper*, the Court restated the well-settled rule of *Eddings* that a sentencer must consider 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." 476 U.S. at 4. "Equally clear is the corollary rule that the sentencer may not refuse to consider or be precluded from considering 'any relevant mitigating evidence.'" *Id.* (citing *Eddings*, 455 U.S. at 114).

Petitioner here argues that a victim's favorable sentencing recommendation is relevant because it has mitigating value and could be found by a sentencer to warrant a sentence less than death. The Arizona Supreme Court determined that such evidence is not relevant as mitigation. The United States Supreme Court has not addressed the issue or ever held that a victim's recommendation of leniency constitutes relevant mitigation. Thus, Petitioner cannot show that the Arizona Supreme Court's decision was contrary to or based on an unreasonable application of "clearly established Federal law," as determined by the Supreme Court. 28 U.S.C. § 2254(d)(1); s*ee, e.g.*, *Thaler v. Haynes*, 130 S. Ct. 1171, 1174 (2010) (finding that no decision of the Court clearly established "that a demeanor-based explanation for a peremptory challenge must be rejected unless the judge personally observed and recalls the relevant aspect of the prospective juror's demeanor"); *Carey v. Musladin*, 549 U.S. 70, 77 (2006) (finding that no decision of the Court clearly established "the potential prejudicial effect of spectators' courtroom conduct"); *see also Mirzayance*, 129 S. Ct. at 1413-14 ("[I]t is not an unreasonable application of clearly established Federal law for a state court to decline to apply a specific legal rule that has not been squarely established by this Court.") (internal quotation marks omitted).

Furthermore, the Supreme Court has held that the Eighth Amendment bars the admission of a victim's family members' opinions about the appropriate sentence in a capital case. In *Booth*, the Court held that introduction of a victim impact statement during the sentencing phase of a capital case violated the Eighth Amendment. 482 U.S. at 509. In *Payne*, the Court overruled *Booth*, in part, holding that the Eighth Amendment does not erect a *per se* barrier to the admission of all victim impact evidence. 501 U.S. at 827. However, the *Payne* decision retained *Booth*'s prohibition on admitting "characterizations and opinions" from the victim's family "about the crime, the defendant, and the appropriate sentence." *Id.* at 830 n.2; *see also Booth*, 482 U.S. at 508-09 ("The admissions of these emotionally charged opinions as to what conclusions the jury should draw from the evidence clearly is inconsistent with the reasoned decisionmaking we require in capital cases."). Given this general prohibition on victim testimony regarding the "appropriate sentence" for

a capital defendant, the Court cannot say that the Arizona Supreme Court's failure to recognize an exception for "favorable" sentencing recommendations constituted an unreasonable application of *Booth* and *Payne*.

F. Cumulative Error

In Claim 13, Petitioner alleges that was he was prejudiced by the cumulative effect of errors committed during his guilty plea and sentencing hearings. Respondents contend that the claim was never presented in state court and therefore is procedurally defaulted because Petitioner has no available state court remedies. Petitioner counters that he exhausted the claim by identifying the individual errors in state court, thereby affording the court an opportunity to consider his claim of cumulative error. The Court disagrees and concludes that Petitioner failed to fairly present his cumulative error claim in state court. *See, e.g.*, *Jimenez v. Walker*, 458 F.3d 130, 148-49 (2d Cir. 2006) (finding cumulative error claim not properly exhausted). Petitioner alleges neither cause and prejudice nor a fundamental miscarriage of justice to excuse the default. Therefore, the claim is barred.

The claim is also meritless. "Because there is no single constitutional error in this case, there is nothing to accumulate to the level of a constitutional violation." *Mancuso v. Olivarez*, 292 F.3d 939, 957 (9th Cir. 2002).

V. REMAINING CLAIMS

A. Ineffective Assistance of PCR Counsel

In Claim 6, Petitioner alleges that he was denied the effective assistance of counsel during his state post-conviction proceedings. However, there is no constitutional right to counsel in state collateral review proceedings. *See Coleman*, 501 U.S. at 752 (citing *Pennsylvania v. Finley*, 481 U.S. 551 (1987)); *see also Martinez*, 132 S. Ct. at 1315 (declining to decide whether a prisoner has a right to effective counsel in collateral proceedings which provide the first occasion to raise a claim of ineffective assistance at trial). Where there is no right to counsel there can be no deprivation of effective assistance of counsel. *Wainwright v. Torna*, 455 U.S. 586, 587-88 (1982). Consequently, Petitioner cannot claim constitutionally ineffective assistance of counsel in state post-conviction collateral

proceedings. *See Coleman*, 501 U.S. at 752; *Campbell v. Wood*, 18 F.3d 662, 677 (9th Cir. 1994) (en banc). Further, this claim is not cognizable: "The ineffectiveness or incompetence of counsel during Federal or State collateral post-conviction proceedings shall not be a ground for relief in a proceeding arising under section 2254." 28 U.S.C. § 2254(I). For these reasons, Petitioner's request for evidentiary development of Claim 6 is denied.

B. Challenges to Arizona's Death Penalty

In Claims 14-26, Petitioner asserts various challenges to Arizona's capital sentencing statutory scheme. Respondents assert that some were not properly exhausted in state court and are now procedurally barred. Regardless, the Court will address the claims because each is plainly meritless. *See* 28 U.S.C. § 2254(b)(2); *Rhines v. Weber*, 544 U.S. at 277.

Petitioner asserts that the death penalty is categorically cruel and unusual punishment (Claim 15), but acknowledges that the Supreme Court held otherwise in *Gregg v. Georgia*, 428 U.S. 153, 187 (1976).

Petitioner contends that Arizona's capital sentencing scheme fails to sufficiently channel the sentencer's discretion (Claim 14), provide an opportunity to "death qualify" the sentencing judge (Claim 17), provide objective standards for weighing aggravation and mitigation (Claim 18), require the cumulative consideration of all mitigating evidence (Claim 20) and proportionality review (Claim 25), and require the prosecution to obtain probable cause findings for aggravating factors at the indictment stage (Claim 26) and to prove that death is the appropriate sentence (Claim 21). He further argues that Arizona law unconstitutionally requires a death sentence if no mitigating circumstances are found (Claim 16), requires a defendant to affirmatively prove that his life should be spared (Claim 19), requires that mitigating factors be proven by a preponderance of the evidence (Claim 23), and provides unbridled discretion for prosecutors to seek the death penalty (Claim 24). In addition, he asserts that the (F)(6) "heinous, cruel, or depraved" aggravating factor fails to genuinely narrow the class of offenders eligible for the death penalty (Claim 22).

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 (F)(6) factor, do not adequately narrow the sentencer's discretion. *See Jeffers*, 497 U.S. at 774-77; *Walton v. Arizona*, 497 U.S. 639, 652-56 (1990), *overruled on other grounds by Ring v. Arizona*, 536 U.S. 584 (2002); *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).

In *Walton*, the Supreme Court rejected the argument that "Arizona's allocation of the burdens of proof in a capital sentencing proceeding violates the Constitution." 497 U.S. at 651. *Walton* also rejected the claim that Arizona's death penalty statute is impermissibly mandatory and creates a presumption in favor of the death penalty 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. *Id.* at 651-52 (citing *Blystone v. Pennsylvania*, 494 U.S. 299 (1990), and *Boyde*, 494 U.S. at 370); *see also Marsh*, 548 U.S. at 173-74 (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" quality of Arizona's death penalty statute and its failure to apply a beyond-a-reasonable-doubt standard). In addition, 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. at 979.

Prosecutors have wide discretion in making the decision whether to seek the death penalty. *See McCleskey v. Kemp*, 481 U.S. 279, 296-97 (1987); *Gregg*, 428 U.S. at 199 (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.

With regard to probable cause for aggravating factors, the Supreme Court has held

that facts constituting the elements of an offense rather than just a sentencing enhancement must be charged in a federal indictment. *See Jones v. United States*, 526 U.S. 227, 252 (1999). However, the Fifth Amendment Due Process Clause does not incorporate the same requirements upon state criminal prosecutions by virtue of the Fourteenth Amendment. *See Hurtado v. California*, 110 U.S. 516, 538 (1884); *Branzburg v. Hayes*, 408 U.S. 665, 688 n.25 (1972). And the Arizona Supreme Court has expressly rejected the argument that *Ring* requires that aggravating factors be alleged in an indictment and be supported by probable cause. *McKaney v. Foreman*, 209 Ariz. 268, 270, 100 P.3d 18, 20 (2004). Petitioner cites no authority to the contrary.

Nor has Petitioner cited authority that he was entitled to voir dire the sentencing judge. Although the Constitution requires that a defendant receive a fair trial before a fair and impartial judge with no bias or interest in the outcome, *see Bracy v. Gramley*, 520 U.S. 899, 904-05 (1997), trial judges, like other public officials, operate under a presumption that they properly discharge their official duties. *See United States v. Armstrong*, 517 U.S. 456, 464 (1996); *see also State v. Perkins*, 141 Ariz. 278, 286, 686 P.2d 1248, 1256 (1984) (trial judge is presumed to be free of bias and prejudice). The presumption of regularity applies absent clear evidence to the contrary. *See Armstrong*, 517 U.S. at 464; *see also State v. Rossi*, 154 Ariz. 245, 248, 741 P.2d 1223, 1226 (1987) (mere possibility of bias or prejudice does not entitle a criminal defendant to voir dire the trial judge at sentencing). Petitioner made no allegation of bias or prejudice when he raised this issue before the Arizona Supreme Court and makes no such allegation here.

Finally, 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*, 97 F.3d at 1252.

C. Lethal Injection Protocol

In Claim 27, Petitioner alleges that Arizona's lethal injection protocol constitutes cruel and unusual punishment. The Arizona Supreme Court rejected this claim. *Sansing I*, 200 Ariz. at 361, 26 P.3d at 1132. Petitioner does not assert how this ruling conflicts with or unreasonably applies controlling Supreme Court law. *See Baze v. Rees*, 553 U.S. 35 (2008). Moreover, the Ninth Circuit has concluded that Arizona's lethal injection protocol does not violate the Eighth Amendment. *Dickens v. Brewer*, 631 F.3d 1139 (9th Cir. 2011).

D. Length of Time on Death Row

In Claim 28, Petitioner asserts that inordinate delay in carrying out his sentence violates his rights under the Eighth Amendment. However, the United States Supreme Court has never held that lengthy incarceration prior to execution constitutes cruel and unusual punishment. *See Lackey v. Texas*, 514 U.S. 1045 (1995) (mem.) (Stevens, J. & Breyer, J., discussing denial of certiorari and noting the claim has not been addressed); *Thompson v. McNeil*, 129 S. Ct. 1299 (2009) (mem.) (Stevens, J. & Breyer, J., dissenting from denial of certiorari; Thomas, J., concurring, discussing *Lackey* issue). Circuit courts, including the Ninth Circuit, have also held that prolonged incarceration under a sentence of death does not violate the Eighth Amendment. *See McKenzie v. Day*, 57 F.3d 1493, 1493-94 (9th Cir. 1995) (en banc); *White v. Johnson*, 79 F.3d 432, 438 (5th Cir. 1996); *Stafford v. Ward*, 59 F.3d 1025, 1028 (10th Cir. 1995).

E. Clemency Proceeding

In Claim 29, Petitioner alleges that his constitutional rights will be violated because he will not receive a fair clemency proceeding. In particular, he alleges the proceeding will not be fair and impartial based on the Clemency Board's selection process, composition, training and procedures, and because the Attorney General will act as the Board's legal advisor and as an advocate against Petitioner.

This claim is not cognizable on federal habeas review. Habeas relief can only be granted on claims that a prisoner "is in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2254(a). Petitioner's challenge to state clemency

procedures and proceedings does not represent an attack on his detention—i.e., his conviction or sentence—and thus does not constitute a proper ground for relief. *See Franzen v. Brinkman*, 877 F.2d 26, 26 (9th Cir. 1989) (per curiam); *see also Woratzeck v. Stewart*, 118 F.3d 648, 653 (9th Cir. 1997) (per curiam) (clemency claims are not cognizable under federal habeas law).

CONCLUSION

Petitioner has failed to show entitlement to habeas relief on any of his claims. In addition, the requested evidentiary development of Claims 1, 2, 3, and 6 is neither required nor warranted.

CERTIFICATE OF APPEALABILITY

Rule 22(b) of the Federal Rules of Appellate Procedure provides that 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). Pursuant to 28 U.S.C. § 2253(c)(2), a COA may issue only when the petitioner "has made a substantial showing of the denial of a constitutional right." 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) (citing *Barefoot v. Estelle*, 463 U.S. 880, 893 & n.4 (1983)).

The Court finds that reasonable jurists could debate its resolution of Claims 1, 2, 7, 8, and 12. For the reasons stated in this order, the Court declines to issue a COA with respect to any other claims or procedural issues.

Based on the foregoing,

IT IS ORDERED that Petitioner's Petition for Writ of Habeas Corpus (Doc. 35) is **DENIED**. The Clerk of Court shall enter judgment accordingly.

IT IS FURTHER ORDERED that Petitioner's Motion for Evidentiary Development (Doc. 53) is **DENIED**.

IT IS FURTHER ORDERED that the stay of execution entered by the Court on May 26, 2011 (Doc. 7) is **VACATED.**

IT IS FURTHER ORDERED that a Certificate of Appealability is **GRANTED** as to the following issues:

> Whether Claim 1—alleging that Petitioner is entitled to relief based on *Ring* error—is without merit;
>
> Whether Claim 2—alleging that trial counsel performed ineffectively with respect to the investigation and presentation of mitigating evidence—is without merit;
>
> Whether Claim 7—alleging that the state courts violated Petitioner's rights by applying a "causal nexus" test to his mitigating evidence—is without merit;
>
> Whether Claim 8—alleging that Petitioner's plea was not knowing, intelligent, or voluntary—is without merit; and
>
> Whether Claim 12—alleging that the state court violated Petitioner's rights by refusing to consider the victim's daughter's recommendation of leniency as a mitigating factor—is without merit.

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 7th day of February, 2013.

Susan R. Bolton
United States District Judge

Appendix D

SUPREME COURT OF ARIZONA
En Banc

STATE OF ARIZONA,	)	Arizona Supreme Court
	)	No. CR-99-0438-AP
Appellee,	)	
	)	Maricopa County
v.	)	Superior Court
	)	No. CR-98-003520
	)	
JOHN EDWARD SANSING,	)	
	)	
Appellant.	)	**O P I N I O N**
	)	
	)	

Appeal from the Superior Court of Maricopa County

The Honorable Ronald S. Reinstein

AFFIRMED

Maricopa County Public Defender — Phoenix
by Terry J. Adams, Deputy Public Defender
and Spencer D. Heffel, Deputy Public Defender
Attorneys for John Edward Sansing

Janet Napolitano, The Attorney General — Phoenix
by Kent E. Cattani, Chief Counsel,
Capital Litigation Section
and Monica Beerling Klapper, Assistant Attorney General
Attorneys for State

M c G R E G O R, Justice

¶1 On March 4, 1998, a grand jury indicted the defendant, John Edward Sansing, on four counts: first-degree murder, kidnaping, armed robbery, and sexual assault. The defendant pled guilty to all charges on September 18, 1998. Following a sentencing hearing, Judge Ronald S. Reinstein sentenced the defendant to death on September 30, 1999. Appeal to this court is

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automatic and direct when the court imposes a sentence of death. Ariz. Rev. Stat. (A.R.S.) § 13-703.01 (2001). We exercise jurisdiction pursuant to Article 6, Section 5.3 of the Arizona Constitution, A.R.S. section 13-4031, and Arizona Rule of Criminal Procedure 31.2.b.

I.

¶2 On February 24, 1998, the defendant called the Living Springs Church and requested delivery of a food box for his family. He gave the church secretary his name and home address for the delivery. The defendant then telephoned his wife, Kara Sansing, at work several times, primarily to discuss how to obtain more crack cocaine for the two of them to smoke. During these calls, the defendant informed his wife that he had obtained some crack cocaine, that he had smoked some of it and was saving the rest for her. He also told her that he had called a church and arranged for delivery of some food. When Kara Sansing returned home at approximately 3:20 p.m., the couple smoked the remaining crack cocaine. The defendant, in the presence of his four children, informed Kara of his plan to rob the person who came from the church with the food boxes so he could purchase more crack cocaine.

¶3 Trudy Calabrese left the Living Springs Church in her truck at approximately 4:00 p.m. She arrived at the Sansing home shortly thereafter, parked in front of the house, and delivered two boxes of food. Ms. Calabrese chatted with Kara Sansing in the

kitchen while the defendant signed a receipt for the delivery. Before Ms. Calabrese could leave, the defendant grabbed her from behind and threw her to the dining room floor. Aided by his wife and with his children watching, the defendant bound her wrists while she cried, "Lord, please help me" and, "I don't want to die, but if this is the way you want me to come home, I am ready," and repeatedly asked the defendant's children to call the police. The defendant instructed his children to go into the living room and watch television.

¶4 Using a club, the defendant struck Ms. Calabrese in the head several times with force sufficient to break the club into two pieces and render her temporarily unconscious. Leaving her on the dining room floor, the defendant took her keys and moved her truck to a business parking lot nearby. At some point before he returned, Ms. Calabrese regained consciousness. Upon his return, the defendant dragged her into his bedroom and sexually assaulted her. Kara Sansing, who witnessed the rape, testified that she heard the defendant and Ms. Calabrese speaking during the rape. The defendant then fatally stabbed her in the abdomen three times with a kitchen knife. During the attack, the defendant placed a sock in Ms. Calabrese's mouth and secured two plastic bags over her head with additional cords and a necktie. According to the medical examiner, she lived several minutes after being stabbed. After the murder, the defendant left the bedroom and went to look out the

dining room window to make certain no one had observed his actions.

¶5 The defendant then removed Ms. Calabrese's jewelry and left her body in his bedroom, covered with laundry, for several hours. The defendant engaged in two separate drug transactions shortly after the murder. First, he telephoned a drug dealer and arranged to trade the victim's rings for crack cocaine. Later, he arranged to trade her necklace for more crack cocaine.

¶6 Later in the evening, Pastor Becker from Living Springs Church called the Sansing home looking for Ms. Calabrese and spoke to the defendant. The defendant, giving a false address, told the pastor that she had never arrived.

¶7 Late that night, the defendant dragged Ms. Calabrese from the bedroom to the backyard and placed her body in a narrow space between the back of his shed and the fence. He covered her with a piece of old carpeting and other debris. At least three of the four Sansing children saw the body behind the shed. At some point, the defendant washed the bloody club and hid the clothes he had used to cover her body in a box in the bedroom.

¶8 The next day, searchers found Ms. Calabrese's truck in a parking lot near the Sansing home. Inside, they found a piece of paper with the Sansings' correct address. The police went to the Sansing home and discovered the victim's body behind the shed. The defendant, who had driven to his sister's house, admitted to her that he and his wife had killed Ms. Calabrese. Eventually, the

defendant's father telephoned the police and reported the defendant's location. The defendant knew the police were coming and did not attempt to flee. When the police arrived, he submitted to custody peaceably and without resistance.

II.

A. Aggravating Factors

1. Consideration of Character of the Victim

¶9 The defendant asserts that the judge improperly based his sentencing decision on Ms. Calabrese's good character. In his special verdict, the judge referred to the victim as a "Good Samaritan" and as a person who "took great joy in helping people in need." The judge's concluding remarks, after considering all aggravating and mitigating factors, described Ms. Calabrese as a person who "stood out like a shining light, as a true Samaritan" and who "kept her faith in God to the end." The defendant argues that the judge imposed the death sentence because he viewed the victim as a person above the norm of other murder victims. That approach, he argues, violates A.R.S. section 13-703, which does not define the character of the victim as an aggravating factor, and discriminates on the basis of the victim's status. A.R.S. § 13-703.A-H (2001).

¶10 We agree with the State that the judge's comments, taken in context, do not show that the trial judge relied upon the victim's good character in imposing the sentence. Taken in

context, the comments merely state the judge's summary of the aggravating factors, particularly the senselessness of the crime and the helplessness of the victim. The fact that the victim was delivering food when attacked is related to the senselessness of the crime; the judge's comments related to "resorting to prayer for comfort" describe the helplessness of the victim after she had been beaten and bound.

¶11 The defendant relies on *Gerlaugh v. Lewis*, 898 F. Supp. 1388 (D. Ariz. 1995), *aff'd* 129 F.3d 1027 (9th Cir. 1997), to support his argument that imposing a death sentence based on the social or economic background of the victim or defendant supports a claim of discrimination. In *Gerlaugh*, the habeas petitioner alleged that Arizona's death sentence is "discriminately applied because the death penalty is more likely to be imposed if the victim is white and the defendant is a young male from a lower socio-economic background." *Gerlaugh*, 898 F. Supp. at 1416. The court stated that "[t]o prevail on an equal protection claim, Petitioner must prove 'that the decision-makers in *his* case acted with discriminatory purpose.'" *Id.* (citing *McCleskey v. Kemp*, 481 U.S. 279, 292 (1987)). The defendant points to no facts that support a finding that the trial judge acted with discriminatory purpose, and nothing in the special verdict suggests that the victim's social or economic background affected the judge's decision.

2. Pecuniary Gain as an Aggravating Factor

¶12 When a defendant commits murder "as consideration for the receipt, or in expectation of the receipt, of anything of pecuniary value," the court shall consider this an aggravating circumstance. A.R.S. § 13-703.F.5 (2001). To establish the F.5 factor, the State must prove beyond a reasonable doubt that pecuniary gain was "a motive, cause, or impetus for the murder and not merely the result of the murder." *State v. Kayer*, 194 Ariz. 423, 433 ¶ 32, 984 P.2d 31, 41 ¶ 32 (1999) (quoting *State v. Spears*, 184 Ariz. 277, 292, 908 P.2d 1062, 1077 (1996)), *cert. denied*, 528 U.S. 1196 (2000). We conclude the court erred in finding the State established the F.5 factor in this matter.

¶13 The State, relying on *LaGrand* and *Greene*, argues that the defendant's overall motive was to rob the victim and "this desire infect[ed] all other conduct of the defendant." *State v. LaGrand*, 153 Ariz. 21, 35, 734 P.2d 563, 577 (1987); *State v. Greene*, 192 Ariz. 431, 439 ¶ 32, 967 P.2d 106, 114 ¶ 32 (1998), *cert. denied*, 526 U.S. 1120 (1999). The State interprets the language from *LaGrand* too broadly and ignores relevant restrictions that apply when evaluating the F.5 aggravating factor. A murder committed in the context of a robbery or burglary is not per se motivated by pecuniary gain. Rather, we reserve the death penalty for murders committed during a robbery or burglary for those cases in which the facts clearly indicate a connection between a pecuniary motive and

the killing itself; the expectation of pecuniary gain must be a motive for the murder.

¶14 We distinguish a murder that occurs during a robbery or burglary in which the expectation of pecuniary gain serves as a catalyst for the entire chain of events, including the murder, from a "robbery gone bad" or a robbery that occurs close in time to a murder but that constitutes a separate event for the purpose of an F.5 determination. *State v. McKinney*, 185 Ariz. 567, 584, 917 P.2d 1214, 1231 (1996). "The existence of an economic motive at some point during the events surrounding a murder is not enough to establish" pecuniary gain as a motive. *State v. Medina*, 193 Ariz. 504, 513 ¶ 32, 975 P.2d 94, 103 ¶ 32 (1999). "There must be a connection between the motive and the killing." *Id.*

¶15 Whether the needed connection exists between expected pecuniary gain and the motive for killing involves a highly fact-intensive inquiry. The inquiry usually involves deciding whether a motive for the murder was to facilitate the taking of or the ability to keep items of pecuniary value. *See, e.g., State v. Smith*, 146 Ariz. 491, 501, 707 P.2d 289, 299 (1985) (defendant killed a convenience store clerk to gain access to the cash register; court found "[u]nder the facts of *this* case (but certainly not of all robberies) the commission of the killing necessarily carried with it the expectation of pecuniary gain"); *State v. Correll*, 148 Ariz. 468, 479, 715 P.2d 721, 732 (1986)

(defendant robbed home of victims, then took victims to desert where he shot and killed them; court held that defendant "very carefully executed the armed robbery, and the murders were part of the scheme of robbery. The only motivation for the killings was to leave no witnesses to the robbery."); *State v. Hensley*, 142 Ariz. 598, 604, 691 P.2d 689, 695 (1984) (defendant executed the victims during the robbery of a bar; court found "the murders were a part of the overall scheme of the robbery with the specific purpose to facilitate the robbers' escape"); *LaGrand,* 153 Ariz. at 36, 734 P.2d at 578 (defendant stabbed the bank clerk when the clerk "frustrat[ed] defendant's continuing attempt for pecuniary gain"). *But see State v. Gillies*, 135 Ariz. 500, 512, 662 P.2d 1007, 1019 (1983) (defendant confessed that the purpose of murdering the rape victim was to eliminate her as a witness to her own rape, not to steal her credit cards and cash; court held "[w]ithout some tangible evidence, or strong circumstantial inference, it is not for the sentencing court to conclude that because money and items were taken, the purpose of the murder was pecuniary gain."). If the State fails to show the needed connection between pecuniary gain and the motive for murder, the F.5 factor cannot be used as an aggravator. As we emphasized in *LaGrand*, an unexpected or accidental death that occurs during the course of or flight from a robbery, but which was not committed in furtherance of pecuniary gain, does not provide sufficient basis for an F.5 finding. 153

Ariz. at 35, 734 P.2d at 577. Similarly, the sole fact that a defendant takes items or money from the victim does not establish pecuniary gain as a motive for the murder. *See State v. Wallace*, 151 Ariz. 362, 368, 728 P.2d 232, 238 (1986). Even a conviction for robbery, during which a murder occurs, does not necessarily prove pecuniary gain as motivation for the murder. *See State v. Greenway*, 170 Ariz. 155, 164, 823 P.2d 22, 31 (1991); *State v. Carriger*, 143 Ariz. 142, 161, 692 P.2d 991, 1010 (1984). Although a factual finding of pecuniary gain as a motive may be based upon "tangible evidence or strong circumstantial inference," *State v. Hyde*, 186 Ariz. 252, 280, 921 P.2d 655, 683 (1996), a finding that pecuniary gain served as a motive is essential to establishing the F.5 factor.

¶16 The needed connection between expectation of pecuniary gain and a motive for murder often results from a finding that one of the defendant's motives in committing the murder was to facilitate the taking of or ability to retain items of pecuniary value. A review of prior decisions illustrates the distinction between those situations and "robberies gone bad."

¶17 For instance, in *LaGrand*, the defendant stabbed the victim twenty-four times when the victim was unable to open the bank safe. When evaluating the F.5 aggravating circumstance, we focused on the reason the defendant was present and the reason he stabbed the victim. LaGrand was present because he intended to rob

the bank and killed the bank employee when the victim "frustrat[ed] defendant's continuing attempt for pecuniary gain." *LaGrand*, 153 Ariz. at 36, 734 P.2d at 578. While the defendant's action in *LaGrand* may not have been a rational method for achieving his pecuniary goal, a clear connection existed between the desire for pecuniary gain and the motive for murder.

¶18 No comparable connection between pecuniary gain and motive for murder existed in *State v. Rienhardt*, 190 Ariz. 579, 951 P.2d 454 (1997), in which the murder took place in the context of a drug deal. The defendant held the victim as human collateral in exchange for either methamphetamine or payment of a debt. When a third party failed to return with either, the defendant killed the victim. The State, again relying on a broad interpretation of *LaGrand*, argued that the defendant's desire for drugs or money infected all other conduct. We rejected the State's argument and distinguished *LaGrand*:

> In *LaGrand*, the defendant came to rob, and killed the employee during the robbery itself. Here, while Rienhardt held his human collateral hostage in expectation of the receipt of something of pecuniary value, his decision to take Ellis to the desert and kill him signified the end of his expectation of receipt of anything of pecuniary value, because killing Ellis frustrated this purpose. The killing was also removed in time and place from the underlying drug deal that was supposed to have happened hours earlier . . . .

Rienhardt, 190 Ariz. at 591, 951 P.2d at 466.

¶19 *State v. Jones*, 197 Ariz. 290, 4 P.3d 345 (2000), *cert.*

denied, ___ U.S. ___, 121 S. Ct. 1616 (2001), provides another example of the needed connection between pecuniary gain and motive for murder. There, the evidence demonstrated that the defendant "began the robbery intending to murder anyone who happened to be in the store at the time." *Jones*, 197 Ariz. at 309 ¶ 56, 4 P.3d at 364 ¶ 56. We found that the defendant "murdered the individuals to facilitate the robberies and then escape punishment," stating:

> These murders were not "robberies gone bad." Instead, Jones and his co-defendant set out to accomplish the results they obtained, simply to acquire money. Thus, the F.5 factor applies and has been proven beyond a reasonable doubt.

Id.

¶20 In contrast to the defendant's motive in *Jones*, the defendant's motive in *State v. Medina*, 193 Ariz. 504, 975 P.2d 94 (1999), had no apparent connection to his desire for pecuniary gain. In *Medina*, the defendant and two companions, in an effort to steal the victim's car, beat the victim, dragged him from his car, beat and kicked him again, and then repeatedly drove over him. We concluded, "while the reason for *beating* him may have been a desire to steal, the same is not necessarily true of the homicide." 193 Ariz. at 513 ¶ 30, 975 P.2d at 103 ¶ 30. Instead, the evidence suggested that it was just as likely the defendant acted for his own amusement. *Id.*

¶21 We have also found that a murder committed to facilitate escape and/or hinder detection by police furthers the pecuniary

interest of the criminal. *See Greenway*, 170 Ariz. at 165, 823 P.2d at 32; *State v. Hoskins*, 199 Ariz. 127, 137 ¶ 87, 14 P.3d 997, 1017 ¶ 87 (2000) (finding F.5 present "[w]hen a robbery victim is executed to facilitate the killer's escape and hinder detection for the purpose of successfully procuring something of value"). In *Greenway*, the defendant murdered his victims execution-style after robbing their home. Greenway entered the home knowing the victims were present and made no attempt to disguise his identity; the practical effect of the murders was to eliminate the only witnesses to the crime. 170 Ariz. at 165, 823 P.2d at 32. We found "[t]he specific purpose of the murders was to facilitate defendant's escape and hinder detection, thereby furthering his pecuniary goal." *Id.*

¶22 The facts of this case do not establish that the expectation of pecuniary gain provided a motive for the murder. Although pecuniary gain certainly was a motive for the defendant's decision to beat and bind the victim, her rape and the murder appear to be separate events. Unlike *LaGrand* or the cases cited therein, this murder did not facilitate the taking or keeping of the stolen property. While the defendant's initial intention was to rob the victim, we cannot conclude that his motive for killing her was pecuniary in nature. *Cf. Medina*, 193 Ariz. at 513 ¶ 32, 975 P.2d at 103 ¶ 32 (concluding "[e]ven if the defendant's initial intention was to take the car or radio, we cannot conclude that his

motive for later running over and killing the victim was pecuniary gain"). The murder, which occurred at least an hour after the victim's arrival, did not facilitate the defendant's ability to secure pecuniary gain, particularly in light of the fact that he bound the victim almost as soon as she entered his home.

¶23 We also disagree with the State's assertion that the defendant committed this murder to facilitate escape and hinder detection by police. After the murder, the defendant left Ms. Calabrese in his bedroom for four to five hours, then placed her in the backyard where she was visible over a low fence. The next morning, without any further attempts to escape or evade detection, he left for work but instead drove to his sister's home, where he confessed to her. The defendant's father eventually summoned the police, who peaceably took the defendant into custody. Further, in distinction to the facts in *Greenway*, the defendant's decision to kill Ms. Calabrese did not eliminate the only witness to the crime: the defendant's wife and their children were present during the entire chain of events. The State did not prove beyond a reasonable doubt "a connection between the motive and the killing" related to pecuniary gain for the purpose of F.5. *Medina*, 193 Ariz. at 513 ¶ 32, 975 P.2d at 103 ¶ 32.

¶24 We conclude that the trial court erred in finding the State established the F.5 factor beyond a reasonable doubt.

3. Cruelty, Heinousness and Depravity as an Aggravating Circumstance

¶25 When a "defendant commit[s] the offense in an especially heinous, cruel or depraved manner," it shall be considered an aggravating circumstance. A.R.S. § 13-703.F.6 (2001). We have defined the terms used in F.6 as follows, "heinous: hatefully or shockingly evil: grossly bad. cruel: disposed to inflict pain esp. in a wanton, insensate or vindictive manner: sadistic. depraved: marked by debasement, corruption, perversion or deterioration." *State v. Knapp*, 114 Ariz. 531, 543, 562 P.2d 704, 716 (1977). We narrowly construe these terms to apply only to "killing[s] wherein additional circumstances of the nature enumerated above set the crime apart from the usual or the norm." *Id.* Because the statute is written in the disjunctive, the sentencing judge need find only one of the factors to establish an F.6 aggravating factor. *State v. Gretzler*, 135 Ariz. 42, 51, 659 P.2d 1, 10 (1983); *State v. Bolton*, 182 Ariz. 290, 312, 896 P.2d 830, 852 (1995) (cruelty alone is sufficient to support a finding of F.6); *State v. Gulbrandson*, 184 Ariz. 46, 68, 906 P.2d 579, 601 (1995) (heinousness or depravity alone is sufficient to support a F.6 finding).

a. Cruelty

¶26 To find cruelty, the court must find beyond a reasonable doubt that the victim was conscious during the attack and that the defendant knew or should have known that the victim would suffer.

See State v. Trostle, 191 Ariz. 4, 18, 951 P.2d 869, 883 (1997). However, the victim need not be conscious for each and every wound inflicted. *See State v. Lopez,* 163 Ariz. 108, 115, 786 P.2d 959, 966 (1990). Further, cruelty can exist even if the victim remained conscious for only a short period during the attack. *State v. Van Adams*, 194 Ariz. 408, 421 ¶ 44, 984 P.2d 16, 29 ¶ 44 (1999), *cert. denied*, 528 U.S. 1172 (2000); *State v. Mann*, 188 Ariz. 220, 226, 934 P.2d 784, 790 (1997); *State v. Herrera*, 176 Ariz. 21, 34, 859 P.2d 131, 144 (1993); *State v. Rossi*, 146 Ariz. 359, 365, 706 P.2d 371, 377 (1985).

¶27 The judge made three specific findings at sentencing that relate to Ms. Calabrese's consciousness. First, the judge concluded that she was rendered unconscious by the blows to the head but later regained consciousness. Second, she suffered defensive wounds, indicating that she was conscious during the attack. Finally, she would not have died for several minutes after the defendant stabbed her.

¶28 The defendant contends that the evidence was insufficient to show that the victim was conscious long enough to suffer within the meaning of F.6. He argues that the only evidence of her consciousness came from Kara Sansing, who had to be refreshed with an earlier interview during the sentencing hearing.

¶29 The defendant asks us to focus on the testimony of the medical examiner. The medical examiner, discussing the blunt force

trauma that caused a large laceration on the back of Ms. Calabrese's head, expressed some doubt as to whether she could have regained consciousness. When asked directly, however, the medical examiner stated, "It is possible, yes. I wasn't there. Is it possible? Yes, but I doubt it." The State then asked the doctor if it was "medically unlikely or impossible" that the victim had a conversation with the defendant during the sexual assault, to which the doctor replied, "Not at all." The medical examiner also testified that if Ms. Calabrese had regained consciousness, the blows and resulting injuries would have been painful. These facts support the sentencing judge's findings.

¶30 Furthermore, Ms. Calabrese was conscious when the defendant grabbed her from behind and threw her, face down, into the carpet in the defendant's dining room. She was conscious while the defendant and his wife bound her wrists and ankles with extension cords. All four of the defendant's children reported that she said, "Lord, please help me." The defendant stipulated in his plea agreement that she was conscious when he returned from moving her truck. Finally, Kara Sansing testified that she heard Ms. Calabrese and the defendant talking during the sexual assault. The record is replete with evidence that the victim was conscious for at least part, if not the majority, of the attack.

¶31 The defendant also argues that the time frame between the beginning of the attack and Ms. Calabrese's loss of consciousness

was too short to support a finding of cruelty. The defendant compares the facts of his case to other cases in which we upheld a finding of cruelty and asks us to distinguish his facts from those. *See, e.g., State v. Lavers*, 168 Ariz. 376, 814 P.2d 333 (1991) (defendant cut victims several times before stabbing them, and one of the victims saw his own mother stabbed in the back prior to murder); *State v. Walton*, 159 Ariz. 571, 769 P.2d 1017 (1989) (defendant drove victim to desert, forced victim to lie on ground while captors debated victim's fate); *State v. McCall*, 139 Ariz. 147, 677 P.2d 920 (1983) (armed defendants broke into victims' home, victims listened while defendant shot family members and waited for their turn).

¶32 We disagree that the time frame cannot support a finding of cruelty. This case closely resembles the factual situation in *State v. Mann*, 188 Ariz. 220, 934 P.2d 784 (1997). In *Mann*, the central issue with respect to the F.6 finding involved conflicting information regarding the consciousness of the victim. The defendant argued "that the medical examiner testified that [the victim] probably was conscious only for ten to twenty seconds and during that time may have been in a state of shock." *Mann*, 188 Ariz. at 226, 934 P.2d at 790. In contrast, an eyewitness testified that the victim was alive for three to five minutes. The trial judge and this court found the testimony of the eyewitness to be "more persuasive." *Id.* In the instant case, the medical

examiner expressed doubt about the victim's consciousness after the blow that caused the large laceration but did not opine that consciousness was impossible. We find the testimony of the five eyewitnesses to be more persuasive than that of the medical examiner who admitted, "It is possible [that the victim did regain consciousness], yes. I wasn't there." The evidence provides substantial support for the sentencing judge's findings.

¶33 Furthermore, considering whether a victim had time to contemplate her ultimate fate, we have found cruelty present when the victim suffered for only a short time before death. All four of the defendant's children reported hearing Ms. Calabrese pray, "Lord, please help me." Kara Sansing testified hearing the victim say, "God please help me," and, "If this is the way you want me to come home, then I will come home." Additionally, Kara Sansing testified that the victim asked the defendant's children to call the police "about three, four times." The evidence shows beyond a reasonable doubt that the victim was aware and had sufficient time to contemplate her fate.

¶34 The finding of cruelty alone is sufficient to establish the F.6 aggravating factor. *State v. Clabourne*, 194 Ariz. 379, 384 ¶ 17, 983 P.2d 748, 753 ¶ 17 (1999), *cert. denied*, 529 U.S. 1028 (2000); *State v. Bolton*, 182 Ariz. 290, 312, 896 P.2d 830, 852 (1995); *State v. Lopez*, 175 Ariz. 407, 411, 857 P.2d 1261, 1265 (1993). Because we concur with the sentencing judge's finding with

respect to cruelty, we find it unnecessary to address the question of heinousness or depravity.

B. Mitigating Factors

1. Statement by the Victim's Daughter

¶35 At sentencing, the judge considered and rejected the request of the victim's ten-year-old daughter for mercy as a mitigating circumstance. The defendant asserts the judge thereby violated the rights of a victim to be heard, as guaranteed by Article 2, Section 2.1.(A)4 of the Arizona Constitution, A.R.S. section 13-4426.A, and Arizona Rule of Criminal Procedure 39.b.7. The State responds that a victim's rights are satisfied when the court gives the victim a chance to speak, orally or in writing, at sentencing. *See Gulbrandson*, 184 Ariz. at 66, 906 P.2d at 599 ("The Victims' Bill of Rights of the Arizona Constitution, however, guarantees victims of crime the right '[t]o be heard at . . . sentencing.' [Citation omitted.] Here, the victim's family made statements at the sentencing hearing and in letters and statements attached to the presentence report.").

¶36 In *State v. Trostle*, we rejected the defendant's argument. There, the defendant "claim[ed] that the judge should have considered requests from the victim's family that he be sentenced to life imprisonment [rather than death]." 191 Ariz. 4, 22, 951 P.2d 869, 887 (1997). We disagreed, stating "such evidence is irrelevant to either the defendant's character or the

circumstances of the crime and is therefore not proper mitigation." *Id.* (citing *State v. Williams*, 183 Ariz. 368, 385, 904 P.2d 437, 454 (1995)). Moreover, A.R.S. section 13-703.D expressly forbids the consideration of "any recommendation made by the victim regarding the sentence to be imposed."

¶37 In this case, the victim's rights were satisfied by the presence of Mr. Calabrese at the sentencing hearing and the court's acceptance of documents submitted by the victim's daughter. The judge correctly refused to consider the daughter's sentencing recommendation when imposing the sentence.

2. The Defendant's Childhood

¶38 The defendant proffered his difficult childhood and family background as non-statutory mitigating circumstances. At sentencing, the judge held that the defendant had established by a preponderance of the evidence that he had a difficult childhood and family background but declined to give the evidence "significant mitigating weight" because "there [was] nothing in the defendant's childhood or family background that provides a causal link to the horrific crime committed." The defendant argues the judge's refusal to give the evidence significant weight due to a lack of a causal nexus violates his due process and Eighth Amendment rights under *Penry v. Lynaugh*, 492 U.S. 302 (1989); *Eddings v. Oklahoma*, 455 U.S. 104 (1982); and *Lockett v. Ohio*, 438 U.S. 586 (1978).

¶39 We have previously considered and rejected this argument.

We have interpreted *Penry*, *Eddings*, and *Lockett* as directing the sentencing judge to "consider evidence proffered for mitigation." *State v. Djerf*, 191 Ariz. 583, 598 ¶ 61, 959 P.2d 1274, 1289 ¶ 61 (1998) (with respect to mitigating evidence, the sentencing judge is "entitled to give it the weight it deserves"); *see also State v. Towery*, 186 Ariz. 168, 189, 920 P.2d 290, 311 (1996) ("The sentencer therefore must consider the defendant's upbringing if proffered but is not required to give it significant mitigating weight."). However, "[h]ow much weight should be given proffered mitigating factors is a matter within the sound discretion of the sentencing judge." *Towery*, 186 Ariz. at 189, 920 P.2d at 311.

¶40 "Arizona law states that a difficult family background is not relevant unless the defendant can establish that his family experience is linked to his criminal behavior." *Djerf*, 191 Ariz. at 598 ¶ 61, 959 P.2d at 1289 ¶ 61; *see also State v. Hoskins*, 199 Ariz. 127, 151 ¶ 110, 14 P.3d 997, 1021 ¶ 110 (2001) (Family dysfunction "can be mitigating only when actual causation is demonstrated between early abuses suffered and the defendant's subsequent acts."); *Towery*, 186 Ariz. at 189, 920 P.2d at 311 ("family background may be a substantial mitigating circumstance when it is shown to have some connection with the defendant's offense-related conduct"); *State v. Wallace*, 160 Ariz. 424, 427, 773 P.2d 983, 986 (1989) ("A difficult family background is a relevant mitigating circumstance if a defendant can show that

something in that background had an effect or impact on his behavior that was beyond the defendant's control."). No testimony suggested that the defendant's childhood affected his behavior on the day of the murder. The evidence on this subject did not "prove a loss of impulse control or explain what caused him to kill." *Towery*, 186 Ariz. at 189, 920 P.2d at 311. The sentencing judge properly considered the defendant's difficult childhood as a non-statutory mitigating circumstance and gave the evidence appropriate weight.

3. Impaired Capacity

¶41 If "[t]he defendant's capacity to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law was significantly impaired, but not so impaired as to constitute a defense to prosecution," the court can consider the impaired capacity as a mitigating circumstance. A.R.S. § 13-703.G.1 (2001). A defendant bears the burden of establishing the existence of any statutory mitigating circumstance by a preponderance of the evidence. Because the statute is written in the disjunctive, proof of either attribute is sufficient to find G.1. *See State v. Rossi*, 154 Ariz. 245, 251, 741 P.2d 1223, 1229 (1987). The judge first should consider proffered evidence to determine whether it satisfies the statute, and, if it does not, evaluate the evidence as a non-statutory mitigating factor. *See, e.g., State v. Vickers*, 129 Ariz. 506, 515-16, 633 P.2d 315, 324-25

(1981).

¶42 The defendant argues that his behavior and the testimony of his wife, sister, mother, and brother prove by a preponderance of the evidence that he was significantly impaired at the time of the murder. Kara Sansing testified that her husband sounded "hyped up" and "anxious" on the telephone when he called her to plan the attack. She further testified that when she arrived home the defendant was "not acting himself" and described the defendant as "cold," "in another world," and "spaced out" during the commission of the crime. Finally, Kara testified that she had observed her husband on drugs previously and had never seen him react as he did on the day of the murder. The defendant's sister described her brother as "someone taken by the drugs he had been doing." She described his demeanor as "nervous" and "uptight." The defendant's mother stated that the defendant had "let drugs take over his life." The defendant's older brother agreed that drugs "just took over his life."

¶43 The State argues the defendant's actions before and after the murder reveal that his abuse of crack cocaine prior to the murder did not so significantly impair his ability to appreciate his conduct as to establish the G.1 mitigator. The State does not, however, contest the use of the information as non-statutory mitigating evidence. In arguing the defendant did not establish the statutory factor, the State points out that the defendant

planned his attack and then phoned his wife to discuss it. After the murder, the defendant repeatedly looked out the window to determine whether anyone had seen him. After beating and binding the victim, the defendant moved the victim's truck so it would not be seen in front of his house. Shortly after the murder, the defendant completed two drug transactions. When Ms. Calabrese's church telephoned, the defendant lied about his address. In addition, the defendant cleaned the club used to beat the victim, and hid it in a box in his bedroom. The next morning, the defendant fled to his sister's home and told her what he had done. While it is undisputed that the defendant had ingested crack cocaine on the day of the murder and for several days prior to the crime, the evidence regarding his actions before, during, and after shows he maintained the ability to appreciate the wrongfulness of his actions and to conform his conduct to the requirements of the law within the meaning of G.1.

¶44 The sentencing judge concluded that "[t]he defendant's actions before, during and after the murder, demonstrate[d] that neither his capacity to appreciate the wrongfulness of his conduct nor his capacity to conform his conduct to the requirements of the law was <u>significantly</u> impaired at the time he murdered Trudy Calabrese." *See State v. Rienhardt*, 190 Ariz. 579, 591-92, 951 P.2d 454, 466-67 (1997) (when evidence shows that the defendant took steps to avoid prosecution shortly after the murder, the claim

of impairment fails). Upon review of the evidence, we agree that the defendant did not establish the existence of the statutory mitigating circumstance by a preponderance of the evidence. We also agree that the sentencing judge properly considered the evidence as non-statutory mitigation but that the lack of causal nexus justifies giving this factor limited mitigating value.

C. Independent Reweighing

¶45 As directed by statute, we "independently review the trial court's findings of aggravation and mitigation" to determine the propriety of a death sentence. A.R.S. § 13-703.01.A (2001). "The process of weighing or reweighing aggravating and mitigating circumstances is not scientific, but, rather, inherently subjective." *State v. Hoskins*, 199 Ariz. 127, 151 ¶ 123, 14 P.3d 997, 1024 ¶ 123 (2001). While we disagree with the sentencing judge's finding of a pecuniary motive, we agree that the State proved beyond a reasonable doubt that the defendant committed this murder in an especially cruel manner. In contrast, the defendant failed to establish any statutory mitigating circumstances, and the judge gave the defendant's difficult family background little mitigating weight because the defendant failed to establish the required causal link. Given the strength of the aggravating factor in this case and the minimal value of the mitigating evidence, we conclude the judge appropriately imposed a sentence of death.

III.

¶46 We have previously rejected the following challenges to the constitutionality of the Arizona death sentencing scheme:

A. The defendant claims denial of a jury trial violated his rights under the Fourteenth Amendment Equal Protection Clause because defendants in non-capital cases are permitted to have juries determine aggravating factors. The United States Supreme Court and this court have rejected this argument. *Walton v. Arizona*, 497 U.S. 639, 648 (1990); *State v. Landrigan*, 176 Ariz. 1, 6, 859 P.2d 111, 116 (1993); see *also Clark v. Ricketts*, 958 F.2d 851, 859 (9th Cir. 1992).

B. The defendant argues Arizona's death penalty scheme violates the Eighth Amendment by insufficiently channeling the sentencer's discretion. We previously rejected this argument. *See, e.g., State v. West*, 176 Ariz. 432, 449, 862 P.2d 192, 209 (1993) ("Federal cases hold that Arizona's capital sentencing scheme, as construed by this court, does narrow the class of death eligible defendants sufficiently to comply with the Eighth Amendment."), *overruled on other grounds, State v. Rodriguez*, 192 Ariz. 58, 961 P.2d 1006 (1998).

C. The defendant asserts that recent decisions by the Supreme Court raise doubt about the validity of judge sentencing in capital cases, upheld in *Walton v. Arizona*, 497 U.S. 639 (1990). *See Apprendi v. New Jersey*, 530 U.S. 466 (2000); *Castillo v. United*

States, 530 U.S. 120 (2000); *Jones v. United States*, 526 U.S. 227 (1999). This question is not one that may be answered by this court. *See State v. Ring*, No. CR-97-0428-AP, Slip Op. at 17-20 ¶¶ 40-44 (June 20, 2001).

D. Issues Raised by the Defendant to Preserve for Appeal

1. The death penalty is per se cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments. Rejected in *State v. Gulbrandson*, 184 Ariz. 46, 72-73, 906 P.2d 579, 605-606 (1995).

2. Execution by lethal injection is cruel and unusual punishment. Rejected in *State v. Spears*, 184 Ariz. 277, 291, 908 P.2d 1062, 1076 (1996).

3. Arizona's death penalty statute is unconstitutional because it requires death wherever an aggravating circumstance and no mitigating circumstances are found. Rejected in *State v. Bolton*, 182 Ariz. 290, 310, 896 P.2d 830, 850 (1995).

4. Arizona's death penalty statute is unconstitutional because the defendant does not have the right to death qualify the sentencing judge. Rejected in *Spears*, 184 Ariz. at 291, 908 P.2d at 1076.

5. Arizona's death penalty statute fails to provide guidance to sentencing court. Rejected in *Spears*, 184 Ariz. at 291, 908 P.2d at 1076.

6. Arizona's death penalty statute violates the Eighth

and Fourteenth Amendments and Article 2, Sections 4 and 15 of the Arizona Constitution because it does not require multiple mitigating factors to be considered cumulatively or require the trial court to make specific findings as to each mitigating factor. Rejected in *State v. Van Adams*, 194 Ariz. 408, 423 ¶ 55, 984 P.2d 16, 31 ¶ 55 (1999), *cert. denied*, 528 U.S. 1172 (2000).

7. Arizona's death penalty statute is constitutionally defective because it fails to require the State to prove that death is appropriate. Rejected in *Spears*, 184 Ariz. at 291, 908 P.2d at 1076.

8. Arizona's death penalty statute is unconstitutional because the aggravating factor of cruel, heinous or depraved is vague and fails to perform its necessary function under the Eighth and Fourteenth Amendments. Rejected in *Gulbrandson*, 184 Ariz. at 72, 906 P.2d at 605.

9. The Arizona statutory scheme for consideration of mitigating evidence is unconstitutional because it limits full consideration of that evidence. Rejected in *Spears*, 184 Ariz. at 291, 908 P.2d at 1076.

10. The prosecutor's discretion to seek the death penalty is unconstitutional because it lacks standards. Rejected in *Spears*, 184 Ariz. at 291, 908 P.2d at 1076.

11. The death sentence has been applied discriminatorily in Arizona against poor males whose victims have been Caucasian, in

violation of the Eighth and Fourteenth Amendments and Article 2, Sections 13 and 15 of the Arizona Constitution. Rejected in *State v. Stokley*, 182 Ariz. 505, 516, 898 P.2d 454, 465 (1995).

12. A proportionality review of a defendant's death sentence is constitutionally required. Rejected in *Gulbrandson*, 184 Ariz. at 73, 906 P.2d at 606.

IV.

¶47 For the foregoing reasons, we affirm the defendant's convictions and sentences.

Ruth V. McGregor, Justice

CONCURRING:

Thomas A. Zlaket, Chief Justice

Charles E. Jones, Vice-Chief Justice

Stanley G. Feldman, Justice

M A R T O N E, Justice, concurring.

¶48 I write separately to affirm the trial judge's findings that pecuniary gain was a motive for this murder, and that Sansing committed this murder in an especially heinous or depraved manner. In all other respects, I join the court's opinion and judgment.

I.

¶49 The court acknowledges that Sansing planned to rob the person who delivered the food boxes so he could purchase more crack cocaine. Ante, ¶ 2. It also acknowledges that he removed the victim's jewelry from her body and traded it for more crack cocaine. Ante, ¶ 5. Yet the court concludes that "[a]lthough pecuniary gain certainly was a motive for the defendant's decision to beat and bind the victim, her rape and the murder appear to be separate events." Ante, ¶ 22. I believe the evidence is to the contrary. As the trial court noted, Sansing called the victim's church seeking food and assistance for his family, "all the while planning to rob the unsuspecting Good Samaritan who delivered the food, so that he could purchase crack cocaine." Special Verdict, Sept. 30, 1999, at 4. When she arrived, he robbed her of a small amount of money and her jewelry and then twice traded pieces of her jewelry for crack cocaine. Id. Sansing said that he had to rape the victim so that it would look like a robbery, beating, and rape. Id. at 8. Thus the beating, rape, and the murder of the victim were all part of the same plan to get money to buy cocaine. In my

view, therefore, it cannot be said that pecuniary gain was a motive for the beating and the rape, but not for the murder.

¶50 The court says that the murder "did not facilitate the defendant's ability to secure pecuniary gain." Ante, ¶ 22. But this confuses pecuniary gain with senselessness. It is true that Sansing did not have to kill her to get her money. This just shows that the murder was senseless within the meaning of State v. Ross, 180 Ariz. 598, 605, 886 P.2d 1354, 1361 (1994), because the murder was unnecessary to allow the defendant to complete his objective. In Ross, we upheld both pecuniary gain and senselessness. See also State v. Lee, 189 Ariz. 608, 619, 944 P.2d 1222, 1233 (1997); State v. Hyde, 186 Ariz. 252, 281, 921 P.2d 655, 684 (1996). The same is true here. Sansing did not have to kill to get the money (and therefore the crime is senseless), but he did kill to get the money (and therefore a motive was pecuniary gain). Indeed, on the facts of this case, pecuniary gain is the only motive for this senseless murder. See State v. Rienhardt, 190 Ariz. 579, 591, 951 P.2d 454, 466 (1997) ("In LaGrand, the defendant came to rob, and killed the employee during the robbery itself."); State v. Medina, 193 Ariz. 504, 518, 975 P.2d 94, 108 (1999) (Martone, J., concurring in part, dissenting in part) ("In Rienhardt, we said that LaGrand did not apply because Rienhardt did not 'come to rob.'"). The evidence here shows beyond all reasonable doubt that Sansing's motivation before, during, and after the killing was to obtain something of

value to exchange for cocaine.

II.

¶51 Having found that this murder was especially cruel, the court found it unnecessary to address the question of heinousness or depravity. Ante, ¶ 34. While it may be unnecessary to address it, I believe it is very desirable to do so. First, where cruelty, heinousness, and depravity are present the (F)(6) factor is the stronger for it. Second, the heinousness and depravity of this crime are so evident, we should not let anyone wonder why we do not acknowledge this. Judge Reinstein found that "the Gretzler factors of gratuitous violence, senselessness and helplessness all exist in this case and that the state has proved beyond a reasonable doubt that the defendant committed the murder in an especially heinous or depraved manner." Special Verdict at 9. Gratuitous violence is violence beyond that necessary to kill. Judge Reinstein noted that Sansing hit the victim so hard that the club broke in two pieces. He hogtied her ankles and wrists and brutally raped her. He stabbed her not once but three times and ground the butcher knife into her. As if this were not enough, he tried to suffocate her. As this experienced trial judge noted, the rape itself was gratuitous violence and absolutely unnecessary to kill her.

¶52 The trial judge found that the victim was made completely helpless by being attacked, then hogtied. And he found that the

killing was senseless because it was completely unnecessary to accomplish his goal of robbing the victim. Special Verdict at 9.

¶53 I believe all of these findings are unassailable and our failure to address them as a court introduces an element of needless uncertainty. In all other respects, I join the court's opinion in affirming Sansing's convictions and sentences.

Frederick J. Martone, Justice

Appendix E

Supreme Court of the United States
Office of the Clerk
Washington, DC 20543-0001

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William K. Suter
Clerk of the Court
(202) 479-3011

June 28, 2004

Clerk
Supreme Court of Arizona
1501 West Washington Street
Suite 402
Phoenix, AZ 85007-3231

Re: John Edward Sansing
v. Arizona
No. 03-9273
(Your No. CR-99-0438-AP)

Dear Clerk:

The Court today entered the following order in the above-entitled case:

The petition for a writ of certiorari is denied.

Sincerely,

William K. Suter

William K. Suter, Clerk

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Appendix F

SUPREME COURT OF ARIZONA

STATE OF ARIZONA, Appellee, v. JOHN EDWARD SANSING, Appellant.	)	Arizona Supreme Court No. CR-99-0438-AP Maricopa County Superior Court No. CR-98-003520 **S U P P L E M E N T A L O P I N I O N**

Appeal from the Superior Court of Maricopa County
No. CR-98-003520
The Honorable Ronald S. Reinstein, Judge

DEATH SENTENCE AFFIRMED

Janet A. Napolitano, Former Arizona Attorney General — Phoenix
Terry Goddard, Arizona Attorney General
by Kent E. Cattani, Chief Counsel,
Capital Litigation Section
and Robert L. Ellman, Assistant Attorney General
and James P. Beene, Assistant Attorney General
and John P. Todd, Assistant Attorney General
and Monica B. Klapper, Assistant Attorney General
and Bruce M. Ferg, Assistant Attorney General — Tucson
Attorneys for State of Arizona

James J. Haas, Maricopa County Public Defender — Phoenix
by Terry J. Adams
and Spencer D. Heffel
Attorneys for John Edward Sansing

M c G R E G O R, Vice Chief Justice

¶1 On September 18, 1998, Sansing pled guilty to first

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degree murder, kidnapping, armed robbery, and sexual assault. The trial judge conducted a sentencing hearing to determine if any aggravating and mitigating circumstances existed. A.R.S. § 13-703.B (2001).[1] The judge found that the State proved, beyond a reasonable doubt, two aggravating circumstances: (1) Sansing committed the crime in expectation of the receipt of pecuniary gain, A.R.S. section 13-703.F.5; and (2) Sansing committed the murder in an especially cruel, heinous, or depraved manner, A.R.S. section 13-703.F.6. The trial judge found Sansing failed to prove any statutory mitigating circumstances, A.R.S. section 13-703.G., but found Sansing established five non-statutory mitigating circumstances: (1) impairment from the use of crack cocaine; (2) difficult childhood; (3) acceptance of responsibility and remorse; (4) lack of education; and (5) family support. The judge determined that the mitigating circumstances were not sufficiently substantial to outweigh the aggravating circumstances and therefore sentenced Sansing to death. A.R.S. § 13-703.E.

¶2 We affirmed Sansing's convictions and sentences on his direct appeal. *State v. Sansing*, 200 Ariz. 347, 361 ¶ 47, 26 P.3d 1118, 1132 (2001). We struck the pecuniary gain finding, concurred with the trial court's finding of cruelty, and did not address the question of heinousness or depravity. *Id.* at 356, 358 ¶¶ 24, 34,

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[1] The legislature has since amended A.R.S. section 13-703. *See* 2002 Ariz. Sess. Laws, 5th Spec. Sess., ch. 1, § 1.

26 P.3d at 1127, 1129. After independently reweighing the aggravating and mitigating circumstances, we affirmed Sansing's death sentence. *Id.* at 360 ¶ 45, 26 P.3d at 1131.

¶3 The United States Supreme Court vacated the *Sansing* judgment and remanded for further consideration in light of *Ring v. Arizona*, 536 U.S. 584, 122 S. Ct. 2428 (2002) (*Ring II*). *Sansing v. Arizona*, 536 U.S. 954, 122 S. Ct. 2654 (2002) (mem.). The only issue before this court is whether reversible error occurred when the trial judge sentenced John Edward Sansing to death under a procedure that violated *Ring II*. We conclude that the *Ring II* violation constituted harmless error.

I.

¶4 In *Ring II*, the United States Supreme Court held that Arizona's former capital sentencing scheme violated the right to a jury trial guaranteed by the Sixth Amendment to the United States Constitution. *Ring II*, 536 U.S. at 609, 122 S. Ct. at 2443. The Court declared that "[c]apital defendants, no less than non-capital defendants . . . are entitled to a jury determination of any fact on which the legislature conditions an increase in their maximum punishment." *Id.* at 589, 122 S. Ct. at 2432. The Court reversed our decision in *State v. Ring*, 200 Ariz. 267, 25 P.3d 1139 (2001)(*Ring I*), and remanded for further proceedings consistent with its decision. *Ring II*, 536 U.S. at 609, 122 S. Ct. at 2443.

¶5 Following the Supreme Court's *Ring II* decision, we consolidated all death penalty cases for which we had not yet issued a direct appeal mandate to determine whether *Ring II* requires us to reverse or vacate the defendants' death sentences. In *State v. Ring*, 204 Ariz. 534, 555 ¶ 53, 65 P.3d 915, 936 (2003) (*Ring III*), we held that we will examine a death sentence imposed under Arizona's superseded capital sentencing statutes for harmless error.[2] "In cases in which a defendant stipulates, confesses or admits to facts sufficient to establish an aggravating circumstance, we will regard that factor as established." *Id.* at 563 ¶ 93, 65 P.3d at 944. As we further explained, "[o]ur harmless error inquiry then focuses on whether no reasonable jury could find that the mitigation evidence adduced during the penalty phase is 'sufficiently substantial to call for leniency.'" *Id.* (quoting A.R.S. § 13-703.E).

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[2] In *Summerlin v. Stewart*, No. 98-99002, 2003 WL 22038399 (9th Cir. Sept. 2, 2003), the court held that the rule announced in *Ring II* applies retroactively to cases on federal habeas review and concluded that a judge's imposition of a death penalty "cannot be subject to harmless error analysis." *Id.* at *33. We are not bound by the Ninth Circuit's interpretation of what the Constitution requires. See *State v. Vickers*, 159 Ariz. 532, 543 n.2, 768 P.2d 1177, 1188 n.2 (1989)(declining to follow a Ninth Circuit decision which held Arizona's death penalty statute unconstitutional because that decision rested on "grounds on which different courts may reasonably hold different views of what the Constitution requires"); *State v. Clark*, 196 Ariz. 530, 533 ¶ 14, 2 P.3d 89, 92 (App. 1999) (same). Accordingly, we decline to revisit our conclusion that *Ring II* error can be reviewed for harmless error.

II.

¶6 To establish the F.6 aggravating circumstance, the state needs to prove beyond a reasonable doubt only one of the heinous, cruel, or depraved elements. *State v. Gretzler*, 135 Ariz. 42, 51, 659 P.2d 1, 10 (1983). The term especially cruel refers to the mental anguish or physical pain that the victim suffered prior to death. *State v. Trostle*, 191 Ariz. 4, 18, 951 P.2d 869, 883 (1997). Heinousness and depravity encompass the "mental state and attitude of the perpetrator as reflected in his words and actions." *State v. Clark*, 126 Ariz. 428, 436, 616 P.2d 888, 896 (1980).

A.

¶7 For the especially cruel element to exist, the trier of fact must find beyond a reasonable doubt that "the victim consciously experienced physical or mental pain prior to death." *Trostle*, 191 Ariz. at 18, 951 P.2d at 883. The victim, however, does not need to be conscious for "each and every wound" inflicted for cruelty to apply. *See State v. Lopez* (*Lopez I*), 163 Ariz. 108, 115, 786 P.2d 959, 966 (1990).

¶8 Sansing's admissions and stipulations, coupled with uncontroverted evidence presented at his sentencing hearing, painted a chilling picture of the events leading to Trudy's death. Admitted and stipulated facts indisputably establish that he

murdered Trudy in an especially cruel manner.[3] The testimony of Sansing's wife Kara and of the medical examiner provide further evidence of the cruelty.

¶9 On February 24, 1998, Sansing called the Victory Assembly Church to request a delivery of food for his family. When that church could not assist him, he called the Living Springs Assembly of God Church and made the same request. In response, Trudy Calabrese delivered two food boxes to the Sansing home. Before Trudy could leave, Sansing grabbed her from behind, threw her to the floor, and bound her wrists and ankles. Using a wooden club, Sansing then struck Trudy on the head with force sufficient to break the club into two pieces. Sansing later dragged Trudy into his bedroom, where he sexually assaulted her. He also stabbed her in the abdomen three times with a kitchen knife. The medical examiner determined the cause of death was multiple stab wounds and blunt force head trauma.

¶10 It took Sansing approximately fifteen minutes to subdue Trudy after first attacking her. Kara Sansing testified that Trudy fought a great deal. The medical examiner observed defensive

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[3] Sansing signed a statement setting forth a factual basis, accompanying his guilty plea, which included admissions related to his crimes. Sansing also signed and submitted a stipulation of facts to the trial court. Additionally, Sansing stipulated to the admission of videos and transcripts of police interviews of the Sansing children, as well as statements attributed to the children by Dr. Carol Ainley, who counseled the children after Sansing's arrest.

wounds on Trudy's hands and wrists. Trudy begged the Sansing children to call 9-1-1, but Sansing ordered them to watch television. All four children told police that Trudy prayed for help. Kara's testimony corroborates her children's statements. She testified that before being struck Trudy pleaded, "God, please help me . . . . If this is the way you want me to come home, then I will come home." Trudy's defensive wounds, her pleas for help, and her attempts to resist Sansing's attack leave no doubt Trudy suffered mental anguish as she contemplated her ultimate fate. *See State v. Carriger*, 143 Ariz. 142, 160, 692 P.2d 991, 1009 (1984) (inferring victim's mental distress and uncertainty of fate from pleas for mercy); *State v. Summerlin*, 138 Ariz. 426, 436, 675 P.2d 686, 696 (1983) ("Evidence of the victim's bruised hand indicat[es] that she attempted to ward off blows. . . . [and] indicat[es] of physical and mental pain."); *State v. Lambright*, 138 Ariz. 63, 75, 673 P.2d 1, 13 (1983) (finding the victim suffered mental anguish because evidence showed that the victim was abducted, sexually assaulted, and in fear for her life as shown by her trembling and begging to be released) *overruled on other grounds by Hedlund v. Sheldon*, 173 Ariz. 143, 840 P.2d 1008 (1992).

¶11 Furthermore, after binding and beating Trudy with a club, Sansing dragged Trudy into his bedroom and, by his own admission, raped her "while her arms and legs were bound." Kara testified that Trudy was conscious when Sansing raped her and that she heard

Trudy speak during the sexual assault. The evidence of the rape independently establishes both mental and physical suffering. *See Summerlin*, 138 Ariz. at 436, 675 P.2d at 696 (finding rape an indication of physical and mental pain).

¶12 Sansing admitted that he struck Trudy on the head with a club. The medical examiner testified that the blows to the head were substantial, resulting in a tremendous amount of bleeding and would have caused pain. Sansing also admitted stabbing Trudy in the abdomen with a knife. The medical examiner observed three stab wounds. The deepest stab wound measured three and three-quarter inches and formed a criss-cross pattern, which the medical examiner attributed to a twisting of the knife. This physical finding was consistent with Kara Sansing's testimony that she observed her husband "grinding" the knife into Trudy. This wound struck both the colon and interior vena cava, causing a hemorrhage within the abdominal cavity. The other two wounds penetrated Trudy's stomach, large intestine, and kidney. The medical examiner testified that the stab wounds would have caused pain and would not have resulted in an immediate death. He explained several minutes had to have elapsed for Trudy to lose the amount of blood that she did. Accordingly, this evidence also separately establishes beyond a reasonable doubt that Trudy endured physical pain. *See State v. Salazar*, 173 Ariz. 399, 412, 844 P.2d 566, 579 (1992) (finding murder especially cruel where victim suffered a cranial hemorrhage

and broken nose and was strangled with a phone cord).

¶13 Sansing argues, however, that this court cannot conclude beyond a reasonable doubt that a jury would have found the murder especially cruel because the evidence is inconclusive as to whether Trudy was conscious during all portions of the attack. Sansing relies on the medical examiner's testimony that it would be unlikely, although certainly possible, for Trudy to have regained consciousness after being struck on the head.[4] Kara Sansing testified that Trudy fell unconscious after Sansing struck her on the head with the club, but was conscious when Sansing later raped her. Sansing contends that his wife's testimony that she heard Trudy speaking during the sexual assault provides the only evidence that Trudy regained consciousness.

¶14 Sansing's argument relies upon his mischaracterization of the evidence. Sansing's own admissions and stipulations establish that Trudy was conscious during the attack. In addition, all four Sansing children told the police that Trudy prayed for help.[5]

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[4] The State asked the medical examiner whether Trudy could have regained consciousness after being struck with the club. The medical examiner responded: "Is it possible, yes. I wasn't there. Is it possible? Yes, but I doubt it." However, when the State inquired if it was "medically unlikely or impossible" that Trudy had a conversation with Sansing during the sexual assault the medical examiner replied, "Not at all."

[5] The children's recollections of the precise words Trudy used varied only slightly. They reported that she said, "Please, God, help me," "God, just help me." "Please, Lord, help me," or "God, help me. Lord, help me, please."

Sansing's ten-year old son told police that Sansing threatened Trudy, "Make a move, I'll hit you in the head." Sansing's son observed Trudy struggling to escape and then Sansing striking her on the head. Moreover, Sansing admitted twice that by the time he returned from moving Trudy's truck, which was after he struck Trudy with the club, she had regained consciousness.[6]

¶15 In addition, Sansing stipulated that a reporter who interviewed him would testify that Sansing told her that, after raping and beating Trudy, he decided to kill her to end her suffering. He told the reporter, "She was suffering. I wanted to end it. . . . I wasn't playing God. I just couldn't handle seeing the condition she was in." Accordingly, Sansing's own admissions and stipulations establish Trudy consciously suffered, both mentally and physically, during the attack.

¶16 Given these facts, we conclude beyond a reasonable doubt that any reasonable jury would have found that Sansing murdered Trudy in an especially cruel manner. The *Ring II* error that resulted from allowing a judge to find this aggravating factor is harmless error.

B.

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[6] In the factual basis for his guilty plea, Sansing admitted that "[w]hen he returned [from moving Trudy's truck], the victim was *still conscious*, alive and tied up with cords." Additionally, in his stipulation of facts, Sansing stipulated that "[w]hen he returned [from moving the truck], the victim had regained consciousness."

¶17 The terms especially heinous and depraved describe the defendant's state of mind. *State v. Ceja*, 126 Ariz. 35, 39, 612 P.2d 491, 495 (1980). The trier of fact considers five factors to determine whether the defendant committed the murder in an especially heinous or depraved manner: (1) relishing of the murder by the defendant; (2) infliction of gratuitous violence; (3) needless mutilation; (4) senselessness of the crime; and (5) helplessness of the victim. *Gretzler*, 135 Ariz. at 52, 659 P.2d at 11. The trial judge found gratuitous violence, helplessness, and senselessness.[7]

¶18 The helplessness factor may be present when a victim is physically unable to resist the murder. *See State v. Gulbrandson*, 184 Ariz. 46, 69, 906 P.2d 579, 602 (1995) (finding defendant rendered victim helpless by binding her). Gratuitous violence is violence beyond that necessary to kill. *State v. Rienhardt*, 190 Ariz. 579, 590, 951 P.2d 454, 465 (1997). Helplessness by itself is usually insufficient to find heinousness and depravity. *Gulbrandson*, 184 Ariz. at 67, 906 P.2d at 600. However, helplessness in conjunction with another *Gretzler* factor, such as gratuitous violence, can establish the murder was especially

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[7] The trial judge's finding of senselessness was related to his finding that Sansing murdered Trudy in expectation of pecuniary gain. Because we struck the pecuniary gain finding on Sansing's direct appeal, we do not consider the senselessness finding in this harmless error review.

heinous and depraved. *Id.* Overwhelming and uncontroverted evidence establishes beyond a reasonable doubt that Sansing inflicted gratuitous violence upon Trudy, a helpless victim.

¶19 Sansing admitted that, as Trudy prepared to leave, he "grabbed her from behind and threw her to the floor." Sansing restrained Trudy by driving one knee into her back and placing the other knee on the floor. He separately bound both her wrists and ankles with electrical cords. He then tied Trudy's wrists and ankles together. No reasonable jury would have failed to conclude that Trudy was helpless to defend herself.

¶20 Admitted, stipulated, and uncontroverted facts also establish that Sansing inflicted gratuitous violence upon Trudy. Sansing's ten-year-old son told the police that as Trudy struggled, Sansing struck her on the head with the club. Sansing employed enough force to break the club into two pieces and lacerate Trudy's scalp. Later, he dragged Trudy into his bedroom and raped her "while her arms and legs were bound." Sansing admitted "[a]t some point the victim was blindfolded and gagged by having a sock placed in her mouth." He eventually stabbed her in the abdomen three times. Trudy was found with ligatures around her neck.

¶21 Trudy suffered severe injuries from her attack. The medical examiner observed swelling and bruises on Trudy's forehead and her left orbital region. Her face and lips were swollen and her frenulum was severed, which the medical examiner attributed to

a blunt force trauma to the mouth. The medical examiner also noticed a laceration near Trudy's right ear. The ligatures were affixed to Trudy's neck with tension sufficient to leave two marks. The medical examiner testified that the neck ligatures would have decreased the oxygen flow to and from Trudy's brain. Sansing admitted stabbing Trudy in the abdomen. Kara Sansing observed Sansing "grinding" the knife into Trudy. Collectively, the three stab wounds caused blood and body fluid to enter the abdominal cavity.

¶22 The rape, facial wounds, neck ligatures, gagging, blindfolding, and grinding of the knife constitute violence beyond that necessary to kill. *See State v. Walden*, 183 Ariz. 595, 619, 905 P.2d 974, 998 (1995) (finding bruises on arms and legs, neck and chest injuries, head wound, slash wounds, and strangulation gratuitous violence) *rejected on other grounds by State v. Ives*, 187 Ariz. 102, 927 P.2d 762 (1996); *State* v. Lopez (*Lopez II*), 175 Ariz. 407, 412, 857 P.2d 1261, 1266 (1993) (finding knife wounds to face, sexual assault, gagging, and binding of eyes gratuitous violence); *State v. Harding*, 137 Ariz. 278, 295, 670 P.2d 383, 400 (1983) (finding gagging one of the victims with socks constituted gratuitous violence).

¶23 Given the overwhelming and uncontroverted evidence, we conclude beyond a reasonable doubt that any reasonable jury would have concluded that Sansing inflicted gratuitous violence upon

Trudy, who was rendered helpless. No reasonable jury could have failed to find that Trudy's murder was especially heinous.

III.

¶24 Because Sansing either admitted or stipulated to facts that incontrovertibly established the especially cruel element, and overwhelming and uncontroverted evidence established the heinous nature of the murder, we now focus our harmless error inquiry on whether the mitigating evidence was sufficiently substantial to call for leniency. *Ring III*, 204 Ariz. at 563 ¶ 93, 65 P.3d at 944.

¶25 A defendant bears the burden of establishing mitigating circumstances by a preponderance of the evidence. *State v. Dickens*, 187 Ariz. 1, 24, 926 P.2d 468, 491 (1996). Sansing offered impaired capacity due to drug ingestion and his age as the only statutory mitigating circumstances. A.R.S. § 13-703.G.1, .G.5. The trial court rejected both. We conclude beyond a reasonable doubt that a jury would have found that Sansing failed to establish any statutory mitigating circumstances.

¶26 Drug impairment can be a statutory mitigating circumstance if "[t]he defendant's capacity to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of the law was *significantly* impaired, but not so impaired as to constitute a defense to prosecution." A.R.S. § 13-703.G.1 (emphasis added). Mere evidence of drug ingestion or

intoxication, however, is insufficient to establish statutory mitigation.[8] The defendant must also prove a causal nexus between his drug use and the offense. Typically, in those cases in which a defendant established statutory impairment, the defendant presented an expert witness who testified that drugs or alcohol affected the defendant's capacity.[9] Furthermore, "a defendant's claim of alcohol or drug impairment fails when there is evidence that the defendant took steps to avoid prosecution shortly after the murder, or when it appears that intoxication did not overwhelm

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[8] *See, e.g., State v. Jones*, 188 Ariz. 388, 400, 937 P.2d 310, 322 (1997) (holding defendant did not establish either statutory or non-statutory impaired capacity because "no testimony establishes, either because of his use of drugs or because he was coming off of the drugs, that the defendant could not appreciate the wrongfulness of his conduct or conform his conduct to the law."); *State v. Jordan*, 126 Ariz. 283, 290, 614 P.2d 825, 832 (1980) (explaining that defendant did not establish the G.1 mitigating circumstance because "[n]ot only is [the evidence] inexact as to defendant's level of intoxication at the time of the crime, it is also devoid of any description of how defendant's intoxication affected his conduct, other than he was 'mumbling.'").

[9] *State v. Medina*, 193 Ariz. 504, 516, 975 P.2d 94, 106 (1999)(statutory impaired capacity predicated on two expert witnesses who testified that ingestion of alcohol, marijuana, and paint fumes could have significantly impaired defendant's ability to conform his conduct to the law); *State v. Ramirez*, 178 Ariz. 116, 131, 871 P.2d 237, 2512 (1994) (defendant's expert concluded "with reasonable psychological certainty that the defendant's capacity . . . was significantly diminished"); *State v. Stevens*, 158 Ariz. 595, 599, 764 P.2d 724, 728 (1988) (finding of impaired capacity based on two experts' testimony regarding defendant's impaired capacity); *State v. Graham*, 135 Ariz. 209, 213 660 P.2d 460, 464 (1983) (same); *Gretzler*, 135 Ariz. at 57-58, 659 P.2d at 16-17 (concluding defendant's mental capabilities were significantly, but only partially, impaired based on "medical testimony that this continuous use of drugs likely impaired defendant's volitional capabilities").

the defendant's ability to control his physical behavior." *Rienhardt*, 190 Ariz. at 591-92, 951 P.2d at 466-67.

¶27 No reasonable jury would have concluded that Sansing met his burden to establish that his ability to control his behavior or his capacity to appreciate the wrongfulness of his conduct was significantly impaired. Sansing presented no expert testimony to support his assertion that his use of cocaine impaired either his capacity to control his conduct or his capacity to appreciate the wrongfulness of his actions. He therefore failed entirely to show any causal nexus between his alleged drug use and impairment.

¶28 Sansing also presented only minimal testimony about his drug use on the day of the murder. Kara testified that Sansing telephoned her while she was at work at approximately 1:30 p.m. During this conversation, Sansing informed her that he had purchased some crack cocaine. He told her that he had smoked some of the crack but was saving the rest for her. Kara testified that she could tell he had ingested the crack from the sound of his voice. She testified that when she returned home from work several hours later, Sansing was not "acting normal." However, she also testified that Sansing's actions were thought out and that he was not acting as if he were in a trance.

¶29 That evidence is insufficient to establish, by a preponderance of the evidence, that Sansing's capacity to control his behavior was significantly impaired. First, Kara did not

quantify how much crack Sansing used. *Cf. Rienhardt*, 190 Ariz. at 592, 951 P.2d at 467 (relying, in part, on the defendant's failure to provide "even a rough estimate of his level of intoxication" to find the defendant did not establish the G.1 factor). Moreover, no reasonable jury would conclude that Kara's testimony that Sansing was not acting himself was sufficient to establish that his capacity was significantly impaired. *Cf. Jordan*, 126 Ariz. at 290, 614 P.2d at 832 ("Not only is [the] testimony inexact as to defendant's level of intoxication at the time of the crime, it is also devoid of any description of how defendant's intoxication affected his conduct, other than that he was 'mumbling.'").

¶30 Furthermore, Sansing's deliberate actions refute his impairment claim and establish that the drug use did not overwhelm Sansing's ability to control his conduct. *Cf. State v. Poyson*, 198 Ariz. 70, 80 ¶ 34, 7 P.3d 79, 89 (2000) (finding that the defendant's deliberate actions "belie[] the defendant's claim of impairment"); *Rienhardt*, 190 Ariz. at 592, 951 P.2d at 467 (considering the defendant's conscious actions to refute defendant's claim of impairment). Kara testified that Sansing planned to rob the person who delivered the food. Additionally, Sansing contacted two different churches in his attempt to lure an unsuspecting victim to his home.

¶31 Sansing's impairment argument fails on yet another basis. Sansing admitted and stipulated to facts that leave no doubt that

he attempted to avoid detection. After beating and hog-tying Trudy, Sansing left and moved her truck away from the apartment. When Pastor Becker called the Sansing home, inquiring about Trudy's whereabouts, Sansing gave him a false address and told him that Trudy never arrived. Additionally, Sansing's ten-year-old son told the police Sansing washed blood from the club that he used to strike Trudy. These steps, which can only be regarded as part of an attempt to avoid detection, negate any possibility that a reasonable jury would find that Sansing's capacity to appreciate the wrongfulness of his conduct was significantly impaired. *See, e.g., Poyson*, 198 Ariz. at 80 ¶ 35, 7 P.3d at 89 (finding that defendant's attempt to conceal the crime indicates he could appreciate the wrongfulness of his actions); *State v. Zaragoza*, 135 Ariz. 63, 71, 659 P.2d 22, 30 (1983) ("The fact that appellant tried to dispose of evidence or instrumentalities suggests that he did appreciate the wrongfulness of his conduct.")

¶32 Given Sansing's failure to present any evidence sufficient to show significant impairment, this case differs from *State v. Hoskins*, 204 Ariz. 572, 574 ¶ 7, 65 P.3d 953, 955 (2003), and *State v. Pandeli*, 204 Ariz. 569, 572 ¶ 10, 65 P.3d 950, 953 (2003), in which we could not conclude, beyond a reasonable doubt, that a reasonable jury would have failed to have found statutory mental impairment. In both *Pandeli* and *Hoskins*, the defendants

presented expert testimony regarding their impairment.[10] *Hoskins*, 204 Ariz. at 574 ¶ 7, 65 P.3d at 955; *Pandeli*, 204 Ariz. at 572 ¶ 10, 65 P.3d at 953. Importantly, in both cases, the experts testified that the defendants' various disorders could have contributed to their conduct. *Hoskins*, 204 Ariz. at 574 ¶ 7, 65 P.3d at 955; *Pandeli*, 204 Ariz. at 572 ¶ 10, 65 P.3d at 953. Thus, both Pandeli and Hoskins met their burden of production. Because the State refuted both Pandeli's and Hoskins' expert testimony, a credibility issue existed. We could not conclude beyond a reasonable doubt that a jury would have assessed Pandeli's and Hoskins' expert testimony as did the judge and thus could not hold the error harmless. Here, in contrast, Sansing failed to meet his burden of production.

¶33 We further conclude beyond a reasonable doubt that any reasonable jury would have rejected Sansing's age as a statutory mitigating circumstance. Sansing was thirty-one when he committed these violent acts. He was a married man and a father of four. No reasonable jury would have accorded his age any mitigating weight.

¶34 Sansing offered his impaired capacity, age, difficult childhood, lack of education, acceptance of responsibility and remorse, potential for rehabilitation/lack of future dangerousness,

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[10] Hoskins' expert witness testified that he suffered from Bipolar II disorder. 204 Ariz. at 574 ¶ 7, 65 P.3d at 955. Pandeli's expert testified that he suffered from paranoid schizophrenia and post traumatic stress disorder. 204 Ariz. at 572 ¶ 10, 65 P.3d at 953.

family support, and the victim's family's request that Sansing not be sentenced to death as non-statutory mitigating circumstances. Although the trial court did not find that Sansing was significantly impaired within the meaning of A.R.S. section 13-703.G.1, the court did find that Sansing's impairment qualified as a non-statutory mitigating circumstance. For the reasons discussed above, *see supra* ¶¶ 28-31, we find beyond a reasonable doubt that no reasonable jury could have accorded the impairment claim more than minimal weight.

¶35 The court also considered Sansing's difficult childhood, acceptance of responsibility and remorse, lack of education, and family support as a non-statutory mitigating circumstances. The court rejected Sansing's argument that his age, potential for rehabilitation/lack of future dangerousness, and the victim's family's sentencing request constituted non-statutory mitigating circumstances.

¶36 We conclude beyond a reasonable doubt that a reasonable jury would have found the mitigating non-statutory evidence not sufficiently substantial to call for leniency. Sansing presented evidence that his parents divorced when he was young, that he had basically no relationship with his biological father, and that he did not complete high school and achieved poor grades. A jury might have concluded that Sansing established a difficult, although not abusive, childhood and lack of education. Sansing, however,

did not demonstrate any causal link between his crimes and his childhood and lack of education. Therefore, a reasonable jury could have accorded these two factors only minimal weight. We assume, for purposes of this opinion, that a reasonable jury would have accorded some weight to Sansing's family's love and support and to the fact that he accepted responsibility for his crime.

¶37 Given the shocking circumstances of this crime, no reasonable jury could have given more than minimal weight to Sansing's argument that he presents no future threat. Sansing presented no evidence to support this claim and instead relied upon the fact that he would be incarcerated. Moreover, no reasonable jury could have accorded mitigating weight to the victim's family's request that he be given a life sentence: A victim's sentencing request is not proper mitigation evidence and therefore a jury could not have considered it. *Lynn v. Reinstein*, 205 Ariz. 186, 191 ¶ 17, 68 P.3d 412, 417 (2003) (A victim's "statements regarding sentencing . . . violate the Eighth Amendment, and therefore are prohibited."); *Trostle*, 191 Ariz. at 22, 951 P.2d at 887 (Victim's recommendation "is irrelevant to either the defendant's character or the circumstances of the crime and is therefore not proper mitigation.").

¶38 The evidence leaves no doubt that Sansing murdered Trudy Calabrese in an especially cruel, heinous, or depraved manner. The brutality of this murder clearly sets it apart from the norm of

first degree murders. Collectively, the mitigating evidence is minimal at most. We conclude beyond a reasonable doubt that any reasonable jury would have concluded that the mitigating evidence was not sufficiently substantial to call for leniency. Accordingly, we hold the *Ring II* violation constituted harmless error.

IV.

¶39 For the foregoing reasons, we affirm Sansing's death sentence.

Ruth V. McGregor, Vice Chief Justice

CONCURRING:

Rebecca White Berch, Justice

Michael D. Ryan, Justice

* Justice Hurwitz took no part in the consideration or decision of this case.

J O N E S, Chief Justice, dissenting:

¶40 I respectfully dissent. In my view, the *Ring II* mandate

is clear that this court, by reason of the Sixth Amendment, is not free to affirm as harmless error a determination made solely by the trial judge that sentencing aggravators call for the death penalty. *See Ring v. Arizona*, 536 U.S. 584, 122 S. Ct. 2428 (2002) (*Ring II*).

¶41 The Supreme Court, in *Apprendi v. New Jersey*, a non-capital case, observed that an enhancement factor capable of increasing a defendant's sentence beyond the maximum permitted under the jury verdict operates as "the functional equivalent of an element of a greater offense." 530 U.S. at 494, n.19, 120 S. Ct. 2348 (2000). The Court held that the sentence enhancement violated Apprendi's right to a jury determination on whether he was guilty of every element of the crime with which he was charged, beyond a reasonable doubt. Thus, where the enhancement factor was determined solely and uniquely by the trial judge, the Court held a Sixth Amendment violation had occurred.

¶42 The principle was extended to capital cases in *Ring II* in which the Supreme Court stated "[b]ecause Arizona's enumerated aggravating factors operate as 'the functional equivalent of an element of a greater offense,' the Sixth Amendment requires that they be found by a jury." *Ring II*, 536 U.S. at ___, 122 S. Ct. at

2443 (citation omitted).

¶43 *Ring II* thus instructs that under the Sixth Amendment a jury must determine an aggravator which exposes a defendant in a capital case to a penalty exceeding the maximum he would receive if punished according to the facts reflected in the jury verdict alone.

¶44 Today the majority concludes, notwithstanding *Apprendi/Ring*, that factual findings by the judge alone on capital aggravators may nevertheless be allowed to stand on the basis that the constitutional violation is harmless. I disagree. The right to jury trial under the Sixth Amendment is fundamental, and because total jury deprivation occurred in the phase of Sansing's trial that resulted in the capital sentence, the error cannot be deemed harmless. Error of such magnitude undermines the very structure of the process. In light of *Ring II*, I do not believe this court is authorized to speculate on what a jury *might* have done. We cannot, with propriety, substitute our judgment on factual issues so critical to a defendant facing a possible death sentence.

¶45 Nor can I accept the premise, advanced by the State, that the instant case is controlled or influenced by *Neder v. United States*, 527 U.S. 1, 119 S. Ct. 827 (1999). *Neder* is a different

case. There, the error stemmed from a jury instruction that failed to provide direction on a prosecutorial issue in the government's substantive case. But evidence against Neder had been properly introduced on the issue in question, and the jury did deliberate and reach a verdict that necessarily included resolution of that issue. Moreover, the issue appears to have been uncontested. Accordingly, the Supreme Court found error, but reviewed it under a harmless standard. The error was viewed and treated as inconsequential because the jury heard all the evidence and its determinations were predicated on a completed record. Conversely, in the instant case, the jury neither heard the evidence in support of the aggravating factors nor did the jury deliberate thereon or make the ultimate factual determination that resulted in the defendant's capital sentence.

¶46 I would remand the case for jury resentencing, strictly on the basis of the Sixth Amendment violation. *See also State v. Ring*, 204 Ariz. 534, ___, ¶¶ 105-14, 65 P.3d 915, 946-48 (2003) (Feldman, J., concurring in part, dissenting in part) (*Ring III*).

Charles E. Jones, Chief Justice

Appendix G

Supreme Court of the United States
Office of the Clerk
Washington, DC 20543-0001

(92)

William K. Suter
Clerk of the Court
(202) 479-3011

June 28, 2004

Clerk
Supreme Court of Arizona
1501 West Washington Street
Suite 402
Phoenix, AZ 85007-3231

Re: John Edward Sansing
v. Arizona
No. 03-9273
(Your No. CR-99-0438-AP)

Dear Clerk:

The Court today entered the following order in the above-entitled case:

The petition for a writ of certiorari is denied.

Sincerely,

William K. Suter

William K. Suter, Clerk

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