PETITION APPENDIX

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APPENDIX A

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

THEODORE WASHINGTON, *Petitioner-Appellant*, v. DAVID SHINN, Director, *Respondent-Appellee.*	No. 05-99009 D.C. No. CV-95-02460-JAT ORDER AND AMENDED OPINION

Appeal from the United States District Court
for the District of Arizona
James A. Teilborg, District Judge, Presiding

Argued and Submitted September 8, 2021
San Francisco, California

Filed December 20, 2021
Amended August 29, 2022

Before: Ronald M. Gould, Consuelo M. Callahan, and Lawrence VanDyke, Circuit Judges.

Order;
Opinion by Judge Callahan;
Concurrence by Judge Gould

SUMMARY*

Habeas Corpus/Death Penalty

The panel (1) filed an amended opinion along with Judge Gould's separate concurrence, (2) denied a petition for panel rehearing, and (3) denied on behalf of the court a petition for rehearing en banc, in a case in which the panel affirmed the district court's denial of Theodore Washington's habeas corpus petition challenging his Arizona conviction and death sentence for first-degree murder.

Washington asserted that he is entitled to relief on several grounds, the majority of which the panel addressed in a memorandum disposition filed on January 15, 2021. In this opinion, as amended, the panel addressed Washington's certified claim for ineffective assistance of trial counsel—that counsel did not investigate and present mitigating evidence at the penalty phase, including evidence of diffuse brain damage, childhood abuse, and substance abuse.

Because Washington filed his habeas petition before the enactment of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), the panel reviewed the claim under the standard set out in *Strickland v. Washington*, 466 U.S. 668 (1984), and its progeny, without the added deference required under AEDPA.

The panel recognized that certain forms of investigation such as readily available school, employment, and medical records are fundamental to preparing for virtually every

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

capital sentencing proceeding, but wrote that there is a strong presumption that counsel's representation was within the wide range of reasonable professional assistance. This presumption of reasonableness means that not only does the court give the attorneys the benefit of the doubt, but the court must also affirmatively entertain the range of possible reasons counsel may have had for proceeding as they did. Accordingly, in reviewing specific claims of ineffective assistance of counsel based on counsel's alleged failure to investigate, the court must consider what information was readily available to trial counsel at the time and whether there is any evidence that undermines counsel's decisions at that time not to conduct further investigations.

The panel held that Washington did not meet his burden under the first *Strickland* prong of showing constitutionally deficient performance by failing to obtain and review Washington's education and incarceration records, where counsel did not ignore Washington's education and correction records, but believed that his interviews with Washington, Washington's common law wife, and others were sufficient; where counsel presented testimonial evidence of Washington struggling in school and dropping out in the tenth or eleventh grade; and where there was no showing that those records contained meaningful mitigation evidence.

The panel held that Washington did not meet his burden of showing that trial counsel erred by not further investigating Washington's childhood abuse, to the extent that he could have, or by not presenting the information he did not have regarding abuse at sentencing hearing.

The panel held that Washington's allegation that trial counsel erred by not investigating and presenting evidence

of his substance abuse fails because counsel was not timely informed of Washington's substance abuse.

The panel held that Washington also did not show that trial counsel erred by not seeking a psychological evaluation, where (1) counsel testified that nothing in his extensive interviews with Washington's family and friends triggered any red flags signaling that further investigation of Washington's mental condition would have been fruitful; (2) counsel for the most part knew neither of later assertions of diffuse brain damage, a dysfunctional family background, and alcohol and cocaine addiction, nor of evidence supporting the assertions; and (3) the record of post-conviction review (PCR) proceedings does not contain any medical records substantiating Washington's claims of head injuries.

The panel concluded that under the deferential standard required by *Strickland* and its progeny, counsel's investigation was more than adequate, and his performance was reasonable.

The panel held that even if trial counsel's performance had been deficient, Washington would not be entitled to relief because he cannot show prejudice, where the sentencing judge said that Washington's new evidence in the PCR hearing would not have made a difference, and a fair evaluation of the evidence in light of Supreme Court precedent confirms the soundness of the sentencing judge's finding of no prejudice.

The panel wrote that it is not insensitive to the fact that Washington is the only one of the three perpetrators who continues to face the death penalty. The panel emphasized, however, that the critical questions—whether counsel's

performance was constitutionally deficient and whether any deficiency resulted in prejudice—must be individually considered and separately considered in each case.

The panel rejected Washington's argument that trial counsel was ineffective because he allowed the state court to require a nexus between his proffered mitigating evidence and the crime. The panel wrote that the sentencing judge did consider the evidence of substance abuse, and that the judge's conclusion that the evidence of substance abuse lacked a causal nexus to the crime was appropriate because a court is free to assign less weight to mitigating factors that did not influence a defendant's conduct at the time of the crime.

Judge Gould concurred in part and concurred in the judgment. He joined the opening paragraph (except for the language on page 7 stating that "Washington has not shown either that his trial counsel's performance was constitutionally deficient or"), Sections I, II, III, V, VI, and VII, but did not join Sections IV and VIII, which he concluded are unnecessary to resolve the *Strickland* ineffective assistance of counsel issue.

COUNSEL

Nathaniel C. Love (argued), Grace L.W. St. Vicent, Andrew F. Rodheim, and Julia G. Tabat, Sidley Austin LLP, Chicago, Illinois; Jean-Claude André, Sidley Austin LLP, Los Angeles, California; Gilbert H. Levy, The Law Offices of Gilbert H. Levy, Seattle, Washington; Mark E. Haddad, University of Southern California Gould School of Law, Los Angeles, California; for Petitioner-Appellant.

Laura P. Chiasson (argued), Assistant Attorney General; Lacey Stover Gard, Acting Chief Counsel, Capital Litigation Section; Mark Brnovich, Attorney General; Office of the Attorney General, Tucson, Arizona; for Respondent-Appellee.

ORDER

The opinion filed on December 20, 2021, is amended by the opinion along with Judge Gould's separate concurrence filed concurrently with this order.

With these amendments, the panel has voted to deny the petition for panel rehearing and the petition for rehearing en banc. The full court has been advised of the petition for rehearing en banc, and no judge of the court has requested a vote on it. Fed. R. App. P. 35.

The petition for panel rehearing and the petition for rehearing en banc are otherwise **DENIED**, and no further petitions will be accepted.

OPINION

CALLAHAN, Circuit Judge:

Arizona state prisoner Theodore Washington appeals the district court's denial of his petition for a writ of habeas corpus under 28 U.S.C. § 2254. In 1987, a jury convicted Washington for the murder of Sterleen Hill and the attempted murder of Ralph Hill, and the trial court judge sentenced him to death.

In his habeas corpus petition, Washington challenges his conviction and sentence on the first-degree murder charge. He asserts that he is entitled to habeas relief on several grounds, the majority of which we addressed in our memorandum disposition filed on January 15, 2021, *Washington v. Ryan*, 840 F. App'x 143 (9th Cir. 2021). In this opinion we again address Washington's certified claim for ineffective assistance of trial counsel.[1] Washington contends that his counsel did not investigate and present mitigating evidence at the penalty phase, including evidence of diffuse brain damage, childhood abuse, and substance abuse. Applying the standard for evaluating ineffective assistance of counsel set forth in *Strickland v. Washington*, 466 U.S. 668 (1984),[2] we conclude that Washington has not shown either that his trial counsel's performance was constitutionally deficient or that the deficiencies were prejudicial. Accordingly, we affirm the district court's denial of his habeas petition.

I

At around 11:45 p.m. on the night of June 8, 1987, at least two men forced their way into Ralph and Sterleen Hill's home in Yuma, Arizona. The men forced the Hills to lie face down on the floor of the master bedroom with their hands bound in preparation to be shot execution-style. One of the men intermittently "screwed" a pistol in Ralph's ear while

[1] Our previous opinion, *Washington v. Ryan*, 922 F.3d 419 (9th Cir. 2019), was withdrawn on January 15, 2021. *Washington v. Ryan*, 840 F. App'x 143 (9th Cir. 2021). In that order we requested that the parties file supplemental briefs addressing the significance of *Shinn v. Kayer*, 141 S. Ct. 517 (2020). Following the submission of supplemental briefs, we heard re-argument on September 8, 2021.

[2] This opinion omits parallel citations.

both men yelled at the couple demanding that the Hills give them drugs or money. Ralph glimpsed one of the assailants as he ransacked the drawers and closets in the room. Sterleen was forced to listen helplessly as her husband was shot first and then wait as the shotgun was reloaded, knowing that she would be next. Had the Hills' teenage son, LeSean, not run off, it is evident that he would have suffered the same fate. (Ralph testified he heard a voice in the background say, "We better get the kid."). The Hills were discovered lying face down in their bedroom. Ralph survived the horrendous shot to his head, but was seriously injured. Sterleen did not survive the shooting.

Police arrested Fred Robinson shortly after the incident. Robinson was the common law husband of Susan Hill, Ralph Hill's daughter from a prior marriage. Police also arrested Jimmy Mathers and Theodore Washington in connection with the crimes. Arizona charged the three men with first-degree murder for the death of Sterleen Hill, attempted first degree murder, aggravated assault causing serious physical injury, aggravated assault using a deadly weapon, burglary in the first degree, and armed robbery. The three men were tried together, and the jury convicted on all counts.

A.

The penalty phase of the trial commenced on January 8, 1988. Washington's trial counsel, Robert Clarke, called three witnesses to testify on Washington's behalf: Washington's friend, Steve Thomas; Washington's mother, Willa Mae Skinner; and Washington's half-brother, John Mondy.

Steve Thomas testified that he knew Washington for two years. He testified that Washington was easily influenced but not violent. He also testified that Washington was a

dedicated father. When asked if Washington had a drug problem, Thomas testified that he had not noticed one. Skinner testified that Washington was a good child and that he dropped out of school when he was in high school. She also testified that Washington was a good father, and that he was gentle and "liked to party." Finally, Mondy reiterated that Washington was affable but easily led. He also confirmed that Washington had trouble in school as a child.

During closing argument, Clarke focused primarily on attacking the sufficiency of the court's findings under *Enmund v. Florida*, 458 U.S. 782 (1982), and *Tison v. Arizona*, 481 U.S. 137 (1987). Regarding mitigation, Clarke urged the court to consider Washington's age, his relatively minor criminal record, his good relationship with his son, and his general demeanor as a caring individual.

The trial court found that the state had established two aggravating factors beyond a reasonable doubt: (1) that the murder was committed in an especially cruel, heinous, or depraved manner, and (2) that the murder was committed for, or motivated by, pecuniary gain. With respect to mitigation, the court found that Washington's age was not a mitigating factor and that the remaining mitigating factors did not outweigh the aggravating factors. The court sentenced all three defendants to death on the first-degree murder charges.

B.

Washington, Robinson, and Mathers each appealed his conviction and sentence to the Arizona Supreme Court. The state high court affirmed Washington and Robinson's convictions and sentences, *State v. Robinson*, 796 P.2d 853 (Ariz. 1990), but found insufficient evidence to convict

James Mathers and vacated his conviction, *State v. Mathers*, 796 P.2d 866 (Ariz. 1990).

Following the direct appeal process, Washington and Robinson challenged their convictions and sentences on post-conviction review ("PCR"). The trial court held a joint PCR hearing on September 8, 1993. The Honorable Stewart Bradshaw, the same judge who presided over the trial, presided over the post-conviction review proceeding. Washington, through his appellate counsel, argued that Clarke was ineffective at the penalty phase due to his failure to present mitigating evidence. Specifically, Washington argued that Clarke erred by failing to conduct a more thorough review of his school, medical, and incarceration records. Washington also argued that Clarke should have obtained a psychological evaluation and presented the results to the court.

The bulk of the new evidence presented at the PCR hearing was elicited through the testimony of Dr. Tod Roy, the defense counsel's retained psychologist. Dr. Roy evaluated Washington in 1992. He conducted clinical interviews and several psychological tests. Dr. Roy's interviews with Washington revealed that he suffered abuse as a child in the form of daily whippings with straps and belts and that adults in the home used alcohol to sedate him as a child. Dr. Roy's review of Washington's school and Department of Corrections ("DOC") records revealed that Washington was placed in classes for the "educable mentally retarded" when he was five years old and that he had been marked as low-IQ while incarcerated. However, Dr. Roy testified that these records conflicted with his own clinical findings because Washington tested at a low-to-average IQ of 96.

Dr. Roy's interviews with Washington also disclosed that Washington had substance abuse problems relating to cocaine and alcohol use. Washington told Dr. Roy that he began drinking recreationally at age eight and was a functional alcoholic by age fourteen. He also told Dr. Roy that he was heavily intoxicated on the night of the murder. Washington also said that he was a heavy cocaine user and that he used about $175 in cocaine per day at the time of the crime.

Finally, Dr. Roy testified that he believed that Washington suffered from diffuse brain damage resulting from early and prolonged drug and alcohol use and numerous traumatic head injuries. Dr. Roy testified that diffuse brain damage can result in disinhibition and poor social judgment as well as poor impulse control and an inability to appreciate the long-term consequences of one's actions. Dr. Roy testified that, in his opinion, Washington's cocaine addiction and his impaired impulse control likely contributed to his ability to be manipulated by others into making poor decisions.

The state called Dr. Eva McCullars, a psychiatrist who also evaluated Washington. Dr. McCullars reviewed Dr. Roy's report and conducted clinical interviews with Washington in June 1993. Dr. McCullars testified that she did not review Washington's DOC records, school records, or adult incarceration records. Dr. McCullars agreed that Washington suffered from diffuse brain damage, but concluded that Washington also suffered from antisocial personality disorder. On direct examination, the state asked Dr. McCullars whether diffuse brain damage could cause hyperkinesis (hyperactive behavior or attention deficit disorder). Dr. McCullars explained that "[hyperkinesis] is one example of diffuse brain damage." She went on to

explain that several prominent individuals including Walt Disney and Thomas Edison exhibited hyperkinetic behavior as children. When questioned on cross examination, Dr. McCullars acknowledged that Washington came from a "significantly dysfunctional family." She also admitted that several of the markers for antisocial personality disorder, such as early truancy and an inability to maintain employment, were more frequently associated with lower socio-economic status Black adolescents, such as Washington, when compared to the general population.

Clarke, Washington's trial counsel, also testified at the PCR hearing. He testified that he did not request Washington's education or corrections records because he believed his interviews with Washington, Skinner, Mondy, and Washington's common law wife, Barbara Bryant, were sufficient. Clarke testified that he had "very extensive discussions" with Washington about what his life was like and any possible substance abuse issues. Clarke also testified that he had "relatively extensive" discussions with Washington's mother, half-brother, and girlfriend. Clarke testified that, based on these interviews, "there wasn't anything that clued me in that there was a special problem that would suggest I should obtain those types of records." With respect to Washington's drug use, Clarke testified that Washington never told him that he was addicted to cocaine or that he was using cocaine on the night of the murder. When questioned on the matter, Clarke acknowledged that Bryant had told him that Washington had a "cocaine problem," but that he did not investigate further.

In a written order, Judge Bradshaw held that Washington was not entitled to relief for ineffective assistance of counsel at the penalty phase. Judge Bradshaw credited Dr. McCullars's findings that Washington had antisocial

personality disorder and was poorly adjusted to living in society. However, Judge Bradshaw concluded that "there is nothing . . . which lessened his ability to differentiate right from wrong or conform his actions with the law." Judge Bradshaw also explained that he had been aware at the time of sentencing that Washington had been doing well while incarcerated. Judge Bradshaw further reasoned that any drug and alcohol dependency "taken separately or with any other mitigating circumstance or circumstances would [not] have mitigated against the sentence [Washington] has received."

On April 25, 1995, the Arizona Supreme Court summarily denied Washington's petition for review of the PCR court's decision.

C.

Washington then commenced his habeas action in the federal district court, culminating in this appeal. In his amended federal habeas corpus petition, Washington raised seventeen claims. The district court determined that certain claims were procedurally barred, and on April 22, 2005, the district court rejected the remaining claims on their merits and dismissed the petition. Washington filed a motion to alter the judgment on May 5, 2005, which the district court denied on June 8, 2005.

On July 11, 2005, Washington filed an untimely notice of appeal from the district court's denial of habeas relief. A three-judge panel of this court held that it lacked jurisdiction and affirmed the district court's denial of Rule 60(b) relief. *Washington v. Ryan*, 789 F.3d 1041 (9th Cir. 2015). We then granted Washington's motion for en banc rehearing. *Washington v. Ryan*, 811 F.3d 299 (9th Cir. 2015). In a 6–5 decision, we held that Washington was entitled to relief

under Rule 60(b)(1) and (6) from his untimely notice of appeal and ordered the district court to "vacate and reenter its judgment denying Washington's petition for writ of habeas corpus, *nunc pro tunc*, June 9, 2005," to render the notice of appeal timely. *Washington v. Ryan*, 833 F.3d 1087, 1102 (9th Cir. 2016). The U.S. Supreme Court denied the state's petition for writ of certiorari. *Ryan v. Washington*, 137 S. Ct. 1581 (2017) (mem.).

Meanwhile, in 2005, the district court issued a 48-page memorandum and order denying Washington's habeas petition. In his PCR proceedings, Washington had "alleged that Clarke rendered ineffective assistance of counsel by failing to interview him regarding potential mitigation and by failing to present evidence of good behavior during incarceration, his unstable family background, and the absence of a violent history or propensity."

In rejecting Washington's claims of ineffective assistance of counsel, the district court held that Washington had to "identify the acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment." It further noted that Washington had to "overcome the presumption that under the circumstances, the challenged action might be considered sound trial strategy," and that it must "judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct."

The district court recognized that counsel had a duty to conduct a reasonable investigation and that a failure to adequately investigate and present mitigating evidence can constitute deficient performance. However, the district court concluded that while Clarke could have conducted additional investigation of Washington's background for potential mitigation, it could not conclude "that Clarke

performed deficiently by failing to do so." The court noted that Clarke was an experienced attorney who had worked both as a prosecutor and as defense counsel, had tried thirty to fifty jury trials, and had tried three or four capital cases before he was appointed to represent Washington. The district court stated that Clarke had "began investigating possible mitigation as he investigated the facts of the case," had very extensive discussions with Washington "regarding what his life was like from when he was a young man to the present," and had rather extensive discussions with Washington's common-law wife (Bryant), brother, and mother. The court observed that Clarke testified that he had questioned Washington very closely about his drug use and alcohol intake and about possible physical abuse during his childhood.

Clarke acknowledged that he did not seek Washington's school records because he relied on family members to provide information regarding Washington's education. Clarke did not seek Washington's incarceration records because they were "unlikely to have records relevant to potential mitigation, such as psychological records, because Petitioner had only been incarcerated for two years for burglary and was not 'a hardened criminal.'" Clarke also explained that he did not seek a mental health evaluation of Washington because "he had not observed anything from his many lengthy meetings with Petitioner, or interviews of Petitioner's family, that suggested that such an evaluation was warranted." Clarke also testified that he had questioned family members about any "medical problems" or "anything out of the ordinary" in Washington's background, but had not requested his medical history. Finally, Clarke acknowledged that Bryant had told him that Washington had a "cocaine problem," but noted that Washington had never told Clarke that Washington was addicted to cocaine or had

used cocaine the day of the crime; he had only stated that he had been intoxicated.

The district court noted that Washington "presented no evidence at the state PCR evidentiary hearing to contradict Clarke's testimony." Although Washington in his affidavit averred that Clarke did not discuss the penalty phase with him until twenty minutes before the hearing, the district court determined that "Clarke's presentation of three witnesses at sentencing, each of whom had traveled to Yuma from at least as far away as Banning[,] is alone sufficient to discredit the implication that Clarke failed to prepare for the sentencing until minutes before the aggravation/mitigation hearing." The district court further found at his PCR hearing in state court, Washington had not presented any evidence from Bryant or family members that contradicted Clarke's testimony and that the PCR court "clearly found Clarke more credible than Petitioner's affidavit on these points." Furthermore, Washington presented no evidence that his school records or his incarceration records would have revealed potential mitigation. Rather, the single reference in Washington's school records that he was "educable mentally retarded" was contradicted by Dr. Roy's own testing of Washington, which showed that he had average or low-average intelligence and "was not retarded."

The district court determined that Washington had not shown that Clarke acted unreasonably in not seeking a mental health evaluation. The court observed that there was "scant evidence" that Washington had been treated for any prior mental illness or had any mental health history, and that there was no evidence that Washington, his family members, or friends ever disclosed any concerning incidents to Clarke or suggested that such incidents would have led to relevant

mitigation.[3] The district court noted that there was no evidence that anyone had told Clarke that Washington had suffered several head injuries during his childhood and adolescence.

The district court further credited Clarke's statements that Washington only told him that he was intoxicated the night of the crime and never said that he had also used cocaine and was an alcoholic and a drug addict. The court concluded that Clarke had little reason to further investigate Washington's substance abuse and that Clarke had not "conducted an unreasonable investigation." The district court concluded that "Clarke's investigation and presentation of mitigation was reasonable and that he did not perform deficiently."

The district court further found that even if Clarke had performed deficiently, Washington had not shown that he was prejudiced. Again citing *Strickland*, the court noted that "an error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment," that the petitioner "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different," and that a reasonable probability is a probability sufficient to

[3] In his affidavit Washington reported that after he got into trouble when he was fifteen, he received psychiatric counseling as part of his rehabilitation. He told Dr. Roy that the psychologist concluded that the death of Washington's father had left him without a male figure in his life and this was responsible for the difficulties he experienced. Washington also told Dr. Roy that in 1981 he was taken to the Sacramento County Hospital after overdosing on LSD and passing out, and was admitted to the psychiatric unit, but Dr. Roy noted that there was no evidence regarding the length of his stay, treatment, or diagnosis.

undermine confidence in the outcome. The court noted that it is "asked to imagine what the effect might have been upon a sentencing judge, who was following the law, especially one who had heard the testimony at trial."[4]

The district court noted that the state PCR court (Judge Bradshaw), "before whom Petitioner was tried, heard all of the additional mitigation evidence proffered by Petitioner, . . . credited Dr. McCullars's finding of antisocial personality disorder and concluded that Petitioner had not demonstrated a reasonable probability that his sentence would have been different if that mitigation had been presented at trial."

Addressing Washington's intoxication on the night of the crime, the district court noted that under Arizona law, intoxication at the time of a crime can constitute a statutory mitigation if the defendant establishes that his capacity to appreciate the wrongfulness of his conduct or his ability to conform his conduct to the requirements of law was significantly impaired, but not so impaired as to constitute a defense to prosecution. The burden is on the defendant to establish this mitigation. *See State v. Woratzeck*, 657 P.2d 870, 870–71 (Ariz. 1982) (holding "appellant had failed to

[4] The district court noted that "[a]t the time [Washington] was sentenced, Arizona's death penalty statute required a judge to impose a death sentence if one or more aggravating circumstance were proven beyond a reasonable doubt and the mitigation established by a preponderance of the evidence was not sufficiently substantial to call for leniency." In *Ring v. Arizona*, 536 U.S. 584, 609 (2002), the Supreme Court ruled that a sentencing judge, sitting without a jury, may not find an aggravating factor necessary for imposition of the death penalty. However, in *Schriro v. Summerlin*, 542 U.S. 348, 358 (2004), the Supreme Court held that *Ring* does not apply retroactively to cases such as Washington's that were already final on direct review at the time *Ring* was decided.

show as a mitigating circumstance that intoxication caused significant impairment of his capacity to appreciate the wrongfulness of his conduct or to conform his conduct to the requirement of law"). The district court noted that under Arizona case law, "self-reports of voluntary intoxication at the time a crime was committed are subject to searching skepticism because of the obvious motive to fabricate," "a defendant's claim of alcohol or drug impairment may be rebutted by evidence that he took steps to avoid detection shortly after the murder or when it appears that intoxication did not overwhelm the defendant's ability to control his physical behavior," and "a long history of drug dependence, absent evidence that a defendant was actually impaired at the time of the crime, does not constitute mitigation."

The district court concluded that the newly proffered evidence of impairment would be accorded little weight. It noted that the only evidence, other than self-reporting, "was Bryant's testimony that Petitioner sounded intoxicated when he called her at least two hours *after* the offense." The court noted that although Washington told the experts that he was intoxicated the night of the crime, neither expert opined as to Washington's capacity to appreciate the wrongfulness of his conduct. Moreover, "evidence supports that Petitioner fled from the Hills' home immediately after they were shot, that he called Bryant, and ultimately purchased a bus ticket to return to Banning."

Addressing the proffered evidence of mental impairment, the district court noted that under Arizona law, "major mental impairments, such as mental illness or brain damage, carry far more mitigating weight than does a personality disorder *if* such impairments demonstrate a defendant's inability to control his conduct or to appreciate the differences between right and wrong." *See* Ariz. Rev.

Stat. § 13-703(G)(1) (2008). The court noted that although Dr. Roy concluded that Washington had diffuse brain damage, he did not find that such damage significantly impaired Washington's capacity to appreciate the wrongfulness of his conduct or to conform his conduct to the requirement of law. Dr. McCullars found no indication that diffuse brain damage impaired Washington's capacity. The district court concluded that the proffered evidence of mental impairment was entitled to minimal weight.

Addressing evidence of a dysfunctional family background, the district court noted that under Arizona law "while a difficult family background, including childhood abuse, may be relevant mitigation at the penalty phase, dysfunctional family history is entitled to significant mitigating weight only if it had a causal connection to the offense-related conduct." Moreover, the weight accorded a difficult family background may be discounted for an adult offender. The district court concluded that the additional evidence of Washington's family background was entitled to little weight because neither expert identified any causal connection to Washington's participation in the murder and Washington was 27 years old at the time of the crime.

The district court concluded that there was no reasonable probability that the additional mitigation proffered by Washington would have altered his sentence. The court noted that even if Washington "was not the actual shooter," there was evidence that he "went into the Hills' home seeking drugs and money and that he knew before entering the home that one or more of its occupants might be shot, 'if things [got] rough,'" and that he "participated in forcing entry into the home, tying up the elderly occupants (face down on the floor) and ransacking their bedroom for valuables." The district court concluded that Washington's

proffered evidence of voluntary intoxication at the time of the crime, a chronic substance abuse problem, diffuse brain damage, an antisocial personality disorder, and a dysfunctional family background, did not, separately or combined, impair "his capacity to control his conduct to the law's requirements or know the difference between right and wrong." Moreover, Washington had failed to show any causal connection between these factors and the crime that might help explain and thus mitigate his role in the murder. Accordingly, the district court found that Washington had not demonstrated that he was prejudiced by counsel's alleged deficient performance.

II

We review de novo a district court's decision to grant or deny a habeas petition under 28 U.S.C. § 2254. *See Bean v. Calderon*, 163 F.3d 1073, 1077 (9th Cir. 1998). Because Washington filed his habeas petition before the enactment of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), the provisions of AEDPA do not apply to this case. *Id*. (citing *Jeffries v. Wood*, 114 F.3d 1484, 1495–96 (9th Cir. 1997) (en banc)). Instead, we review the claim under the familiar standard set out in *Strickland* and its progeny without the added deference required under AEDPA.[5]

[5] Although we held this appeal for the Supreme Court's opinion in *Shinn*, 141 S. Ct. 517, its treatment of AEDPA is not applicable to this appeal. However, the Supreme Court reaffirmed that *Strickland* provides the framework for assessing claims of ineffective assistance of counsel. *Id*. at 522.

III

Although the principles underlying and governing a claim of ineffective assistance of counsel are familiar, they bear repeating. "The right to counsel is a fundamental right of criminal defendants; it assures the fairness, and thus the legitimacy, of our adversary process." *Kimmelman v. Morrison*, 477 U.S. 365, 374 (1986). "[T]he right to counsel is the right to the effective assistance of counsel." *Strickland*, 466 U.S. at 686 (quoting *McMann v. Richardson*, 397 U.S. 759, 771 n.14 (1970)). Under *Strickland*'s two-part test for claims of ineffective assistance of counsel, a convicted defendant must show (1) constitutionally deficient performance by counsel (2) that prejudiced the defense. *Id.* at 687.

"The essence of an ineffective-assistance claim is that counsel's unprofessional errors so upset the adversarial balance between defense and prosecution that the trial was rendered unfair and the verdict rendered suspect." *Kimmelman*, 477 U.S. at 374. "As is obvious, *Strickland*'s standard, although by no means insurmountable, is highly demanding." *Id.* at 382; *see also Padilla v. Kentucky*, 559 U.S. 356, 371 (2010) ("Surmounting *Strickland*'s high bar is never an easy task."). "Only those habeas petitioners who can prove under *Strickland* that they have been denied a fair trial by the gross incompetence of their attorneys will be granted the writ . . . ." *Kimmelman*, 477 U.S. at 382.

"When counsel focuses on some issues to the exclusion of others, there is a strong presumption that he did so for tactical reasons rather than through sheer neglect." *Yarborough v. Gentry*, 540 U.S. 1, 8 (2003) (citing *Strickland*, 466 U.S. at 690). Even if inadvertence (not tactical reasoning) results in non-pursuit of a particular issue, "relief is not automatic. The Sixth Amendment guarantees

reasonable competence, not perfect advocacy judged with the benefit of hindsight." *Id.*

To prevail on his claim for ineffective assistance of counsel, Washington must establish that Clarke's performance was deficient and that Washington suffered prejudice as a result. *See Strickland*, 466 U.S. at 687. To establish deficient performance, Washington must show that "counsel's representation fell below an objective standard of reasonableness." *Id*. at 688. To establish prejudice, Washington must show that there is "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694.

In articulating the standard against which counsel's performance should be judged, *Strickland* emphasized the deference due to a lawyer's decisions both as to scope of investigation and decisions made after investigation: "[S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable . . . ." *Strickland*, 466 U.S. at 690. We have likewise recognized the wide latitude to be given to counsel's tactical choices. *See, e.g.*, *United States v. Ferreira-Alameda*, 815 F.2d 1251, 1253 (9th Cir. 1986) ("Review of counsel's performance is highly deferential and there is a strong presumption that counsel's conduct fell within the wide range of reasonable representation."). Yet our deference to counsel's performance is not unlimited. As the Court explained in *Strickland*, counsel's strategic choices made after less than complete investigation are reasonable only to the extent that "reasonable professional judgments support the limitations on investigation." 466 U.S. at 690–91.

IV

Washington has not met his burden under the first *Strickland* prong of showing that Clarke provided constitutionally deficient performance by failing to obtain and review Washington's education and incarceration records, failing to investigate possible child abuse and substance abuse, and not seeking a psychological explanation for Washington's conduct.

We recognize that "certain forms of investigation" such as "readily available . . . school, employment, and medical records" "are fundamental to preparing for virtually every capital sentencing proceeding." *Robinson v. Schriro*, 595 F.3d 1086, 1108–09 (9th Cir. 2010). However, we are required to engage in a "'strong presumption' that counsel's representation was within the 'wide range' of reasonable professional assistance." *Harrington v. Richter*, 562 U.S. 86, 104 (2011) (quoting *Strickland*, 466 U.S. at 689). This presumption of reasonableness means that not only do we "give the attorneys the benefit of the doubt," we must also "affirmatively entertain the range of possible" reasons counsel may have had for proceeding as they did. *Cullen v. Pinholster*, 563 U.S. 170, 196 (2011) (cleaned up); *McGill v. Shinn*, 16 F.4th 666, 689 (noting that we begin our analysis with a "strong presumption" that counsel's decisions reflect "reasonable professional judgment") (quoting *Cullen*, 563 U.S. at 190)); *Gallegos v. Ryan*, 820 F.3d 1013, 1025 (9th Cir. 2016) (holding that "[w]e are 'highly deferential' in reviewing counsel's performance and must be careful not to 'conclude that a particular act or omission of counsel was unreasonable' simply because the defense was ultimately unsuccessful") (quoting *Strickland*, 466 U.S. at 689). Accordingly, in reviewing specific claims of ineffective assistance of counsel based on counsel's alleged failure to

investigate, we must consider what information was "readily available," *Robinson*, 595 F.3d at 1109, to trial counsel at the time and whether there is any evidence that undermines counsel's decisions at that time not to conduct further investigations.

A.

Clarke did not ignore Washington's education and correction records. Rather he believed that his interviews with Washington, Bryant, and others were sufficient. Clarke presented testimonial evidence of Washington struggling in school and dropping out in the tenth or eleventh grade. Moreover, there is no showing that the education records themselves contain meaningful mitigation evidence. The single proffered item of mitigation in Washington's education records is a 1965 comment (from when Washington was five years old) that he should be placed in special classes for the "educable mentally retarded." But that single, decades-old notation is inconsequential when compared with more than ten additional years of schooling in the general population. Also, any suggestion that the school records showed a meaningfully low IQ is contradicted by later IQ testing by Washington's own expert, Dr. Roy. Indeed, Washington has never even suggested the possibility of intellectual disability. Thus, the sufficiency of Clarke's investigation of Washington's educational records is affirmed by the district court's observation that Washington "presented no evidence that his school records . . . would have revealed potential mitigation."

Similarly, Clarke reasonably thought that Washington's incarceration records were unlikely to contain "records relevant to potential mitigation" because he "had only been incarcerated for two years for burglary and was not a 'hardened criminal.'" Washington has not countered that

assertion by showing that his California incarceration records contained any meaningful mitigating materials. Furthermore, Judge Bradshaw stated that he was aware at the time of sentencing of Washington's good behavior during his incarceration.

B.

Washington has also not met his burden of showing that Clarke erred by not investigating and presenting evidence of his childhood abuse. In his conversations with Dr. Roy, Washington revealed that he suffered physical abuse as a child in the form of daily whippings and beatings. Roy was also told that Washington was given alcohol as a child to control his behavior. Both psychological experts who testified at the PCR hearing agreed that Washington's childhood was significantly dysfunctional. However, none of this information had come to Clarke's attention before or during the trial. Clarke, at least initially, had to rely on representations by Washington and his family members in determining the extent to which Washington suffered childhood abuse. At the time of his trial, neither Washington nor his family members had indicated to Clarke that Washington had suffered extreme abuse growing up. Accordingly, Clarke did not err by not further investigating Washington's childhood abuse, to the extent that he could have, or by not presenting at the sentencing hearing information he did not have regarding abuse. *See Strickland*, 466 U.S. at 691 ("[W]hen a defendant has given counsel reason to believe that pursuing certain investigations would be fruitless or even harmful, counsel's failure to pursue those investigations may not later be challenged as unreasonable.").

C.

Similarly, Washington's allegation that Clarke erred by not investigating and presenting evidence of Washington's substance abuse fails because Clarke was not timely informed of Washington's substance abuse. Clarke reasonably relied on his conversations with Washington and his friends and family, which did not indicate any substance abuse. Washington had told Clarke that he was heavily intoxicated on the night of the crimes, but he did not mention any ongoing problems with drugs or with alcohol. Similarly, Washington's mother described him as someone who "liked to party," but also did not say that Washington had problems with addiction. Perhaps the single clue Clarke had that might have raised his suspicions about substance abuse was the statement of Washington's common-law wife that Washington had a "cocaine problem." However, when set against Washington's own statements and those of his family members, Clarke's decision not to further investigate Washington's drug addiction was not objectively unreasonable.

D.

Finally, Washington has not shown that Clarke erred by not seeking a psychological evaluation. Clarke's investigation included extensive discussions with Washington and Washington's family and friends. Clarke asked Washington and his family members about whether Washington "had any propensity to violence," "about his drug use," "about his alcohol intake," "about whether or not he was abused, growing up," about "what discipline was like," and "things of that nature." At the PCR hearing, Clarke testified that, in all the interviews with Washington and his family, nothing triggered any red flags signaling that further investigation of his mental condition would have

been fruitful. There does not appear to have been anything in Washington's education and incarceration records which contradicts this conclusion. Washington's later assertions of diffuse brain damage, a dysfunctional family background, and alcohol and cocaine addiction, if supported by evidence, might lead competent counsel to seek a psychological evaluation, but Clarke, for the most part, knew neither of the assertions nor of evidence supporting the assertions. At the PCR hearing, the experts disagreed as to whether diffuse brain damage was disabling[6] and the proffered evidence of head injuries was less than compelling. Dr. McCullars found that Washington's historical reporting varied from one interviewer to another. Indeed, the record of the PCR proceedings does not contain any medical records substantiating Washington's claims of head injuries. Also, Clarke had extensive discussions with Washington and his family and friends about whether he had been abused growing up, and reasonably determined that Washington's family members would make better witnesses than a psychologist who might examine Washington for a relatively brief period (and might not offer any mitigating conclusions). In addition, Washington's claims of addiction, for the most part, were self-reported well after his trial and do not square with his prior statements to Clarke only that he had been drinking on the day of the crime.

Under the deferential standard required by *Strickland* and its progeny, Clarke's investigation was more than adequate, and his performance was reasonable.

[6] Dr. McCullars stated that diffuse brain damage was present in approximately ten to fifteen percent of the population and did not necessarily impair an individual's functioning.

V

A.

But even if Clarke's performance had been deficient, under *Strickland*, Washington would not be entitled to relief unless he could also show that the deficiency was prejudicial. "The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Strickland*, 466 U.S. at 686. *Strickland* "requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Id*. at 687. To prove prejudice, a defendant must show "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 694.

"It is not enough 'to show that the errors had some conceivable effect on the outcome of the proceeding.' Counsel's errors must be 'so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.'" *Harrington*, 562 U.S. at 104 (citations omitted) (quoting *Strickland*, 466 U.S. at 687). Although the reasonable probability standard "does not require a showing that counsel's actions 'more likely than not altered the outcome,' . . . the difference between *Strickland*'s prejudice standard and a more-probable-than-not standard is slight and matters 'only in the rarest case.'" *Id*. at 111–12 (quoting *Strickland*, 466 U.S. at 693, 697); *see id*. at 112 ("The likelihood of a different result must be substantial, not just conceivable.").

To determine whether Washington has met his burden of showing prejudice, we must "reweigh the evidence in

aggravation against the totality of available mitigating evidence." *Wiggins v. Smith*, 539 U.S. 510, 534 (2003). This comparison cannot be made without first clearly identifying the evidence in mitigation that would have been offered at the penalty phase of trial but for counsel's grossly incompetent performance. As noted in our prior retracted opinion, perhaps Washington's best argument is that Clarke was incompetent in failing to present "evidence concerning Washington's potentially impaired cognitive functions." This refers to Dr. Roy's assertions that Washington had symptoms of diffuse brain damage, likely caused by multiple head injuries incurred when Washington was young, and that diffuse brain damage contributes to a "lack of judgment" and an "inability to establish stability in life."

In reweighing this evidence, we must take as our baseline the evidence of aggravation and mitigation offered at trial and the resulting sentence. After considering the details of the brutal, execution-style murder and attempted murder, and weighing it against the mitigation evidence Washington's counsel presented, Judge Bradshaw sentenced Washington to death. With that starting point in mind, we undertake the theoretical inquiry of determining whether it is reasonably likely that Washington would have received a different sentence if the new mitigation evidence were to be added to the mix of mitigation evidence that was presented at trial.

Of course, no guesswork is needed here. We know that Washington's new evidence would not have made a difference because the sentencing judge said so. *See Cook v. Ryan*, 688 F.3d 598, 612 (9th Cir. 2012) (finding no prejudice where "the same trial judge who sentenced" the petitioner to death stated that the new evidence "would not have made any difference"). Judge Bradshaw "considered

all of [the new] information in the post-conviction hearing and" definitively "held that none of it would have altered his judgment as to the proper penalty for" Washington. *Gerlaugh v. Stewart*, 129 F.3d 1027, 1036 (9th Cir. 1997).

B.

A fair evaluation of the evidence in light of Supreme Court precedent confirms the soundness of Judge Bradshaw's finding of no prejudice. Because of *Strickland*'s "highly demanding" standard, *Kimmelman,* 477 U.S. at 382, it is no surprise that petitioners have historically found little success bringing ineffective assistance of counsel claims. However, beginning in 2000, the Supreme Court found *Strickland*'s "high bar" satisfied in four cases involving claims of ineffective assistance of counsel at the penalty phase of a capital trial: *Williams v. Taylor*, 529 U.S. 362 (2000); *Wiggins*, 539 U.S. 510; *Rompilla v. Beard*, 545 U.S. 374 (2005); and *Porter v. McCollum*, 558 U.S. 30 (2009). These decisions serve as guideposts for determining when relief is warranted in such cases.

In *Williams*, the jury fixed the punishment at death after hearing evidence of a long history of criminal conduct including armed robbery, burglary and grand larceny, auto thefts, violent assaults on elderly victims, and arson. 529 U.S. at 368–70. At sentencing, defense counsel offered very little evidence. *Id.* at 369. In addressing Williams' *Strickland* claim, the Supreme Court cited "graphic" details "of Williams' childhood, filled with abuse and privation," evidence that Williams was "borderline mentally retarded," and other significant mitigation evidence that was not unearthed only because of counsel's deficient performance:

> [C]ounsel did not begin to prepare for that phase of the proceeding until a week before

> the trial. They failed to conduct an investigation that would have uncovered extensive records graphically describing Williams' nightmarish childhood, not because of any strategic calculation but because they incorrectly thought that state law barred access to such records. Had they done so, the jury would have learned that Williams' parents had been imprisoned for the criminal neglect of Williams and his siblings, that Williams had been severely and repeatedly beaten by his father, that he had been committed to the custody of the social services bureau for two years during his parents' incarceration (including one stint in an abusive foster home), and then, after his parents were released from prison, had been returned to his parents' custody.

Id. at 395, 398 (citation and footnote omitted). In concluding that Williams had shown prejudice, the Court noted that the same judge who presided over the criminal trial heard Williams' post-conviction review claims. *Id*. at 396. That trial judge, who initially "determined that the death penalty was 'just' and 'appropriate,' concluded that there existed 'a reasonable probability that the result of the sentencing phase would have been different'" if evidence developed in the post-conviction proceedings had been offered at sentencing. *Id.* 396–97.

In *Wiggins*, trial counsel focused their strategy at sentencing on arguing that the defendant was not directly responsible for the murder, and they did not present any other mitigation evidence, despite knowledge of at least some of the defendant's troubled background. 539 U.S.

at 515–16. The Court cited "powerful" mitigation evidence that counsel either had, or should have, discovered. *Id.* at 534–35. When Wiggins was a young child, his alcoholic mother frequently left him and his siblings home alone for days without food, "forcing them to beg for food and to eat paint chips and garbage." *Id.* at 516–17. The mother beat Wiggins and his siblings and had sex with men while her children slept in the same bed. *Id.* at 517. On one occasion, the mother forced Wiggins' hand against a hot stove burner, resulting in his hospitalization. *Id*. After being removed from his mother's custody and placed in foster care, Wiggins was physically abused and "repeatedly molested and raped" by one foster father, and gang-raped on multiple occasions by a foster mother's sons. *Id*. He ran away from one foster home and began living on the streets. *Id*. The Court held that had the jury been presented with Wiggins' "excruciating life history," rather than virtually no mitigation evidence, "there is a reasonable probability that at least one juror would have struck a different balance." *Id*. at 537.

In *Rompilla*, trial counsel undertook a number of efforts to investigate possible mitigating evidence, "including interviews with Rompilla and some members of his family, and examinations of reports by three mental health experts who gave opinions at the guilt phase," but none of these sources was helpful. 545 U.S. at 381. Notwithstanding these efforts, the Court found one "clear and dispositive" error by counsel. *Id*. at 383. Defense counsel knew the prosecution intended to seek the death penalty and would hinge its penalty case on Rompilla's prior conviction for rape and assault. *Id*. Counsel nevertheless failed to even look at the court file for the prior conviction; had they done so "they would have found a range of mitigation leads that no other source had opened up." *Id*. at 384, 390. The mitigation

evidence that would have been available from simply looking at the files included, among other things:

> Rompilla's parents were both severe alcoholics who drank constantly. His mother drank during her pregnancy with Rompilla, and he and his brothers eventually developed serious drinking problems. His father, who had a vicious temper, frequently beat Rompilla's mother, leaving her bruised and black-eyed, and bragged about his cheating on her. His parents fought violently, and on at least one occasion his mother stabbed his father. He was abused by his father who beat him when he was young with his hands, fists, leather straps, belts and sticks. All of the children lived in terror. There were no expressions of parental love, affection or approval. Instead, he was subjected to yelling and verbal abuse. His father locked Rompilla and his brother Richard in a small wire mesh dog pen that was filthy and excrement filled. He had an isolated background, and was not allowed to visit other children or to speak to anyone on the phone. They had no indoor plumbing in the house, he slept in the attic with no heat, and the children were not given clothes and attended school in rags.

Id. at 391–92. All the evidence counsel failed to discover simply by failing to look at the court file of the prior conviction "add[ed] up to a mitigation case that bears no relation to the few naked pleas for mercy actually put before the jury." *Id*. at 393. The Court thus concluded there was a

reasonable probability of a different result had counsel performed adequately. *Id*.

In *Porter*, penalty phase counsel offered scant evidence on behalf of Porter. "The sum total of the mitigating evidence was inconsistent testimony about Porter's behavior when intoxicated and testimony that Porter had a good relationship with his son." *Porter*, 558 U.S. at 32. Post-conviction review proceedings revealed several facts about Porter's "abusive childhood, his heroic military service and the trauma he suffered because of it, his long-term substance abuse, and his impaired mental health and mental capacity." *Id*. at 33.

> Porter routinely witnessed his father beat his mother, one time so severely that she had to go to the hospital and lost a child. Porter's father was violent every weekend, and by his siblings' account, Porter was his father's favorite target, particularly when Porter tried to protect his mother. On one occasion, Porter's father shot at him for coming home late, but missed and just beat Porter instead.

Id. Porter's company commander in the Army also offered a "moving" account of Porter's heroic efforts "in two of the most critical—and horrific—battles of the Korean War," for which Porter "received two Purple Hearts and the Combat Infantryman Badge, along with other decorations." *Id*. at 30, 34–35, 41. A neuropsychologist "concluded that Porter suffered from brain damage that could manifest in impulsive, violent behavior." *Id*. at 36. The expert also testified that "[a]t the time of the crime . . . Porter was substantially impaired in his ability to conform his conduct to the law and suffered from an extreme mental or emotional

disturbance," which would have provided a basis for two statutory mitigating circumstances. *Id*.

In concluding Porter established prejudice, the Court reasoned that "[t]he judge and jury at Porter's original sentencing heard almost nothing that would humanize Porter or allow them to accurately gauge his moral culpability. They learned about Porter's turbulent relationship with [the victim], his crimes, and almost nothing else." *Id*. at 41. The Court emphasized the significance of Porter's military service, both because "he served honorably under extreme hardship and gruesome conditions" and because "the jury might find mitigating the intense stress and mental and emotional toll that combat took on Porter." *Id.* at 43–44 (footnote omitted).

A comparison of the failures by counsel in *Williams*, *Wiggins*, *Rompilla*, and *Porter*, with Washington's situation confirms the adequacy of counsel's representation of Washington and that Washington was not prejudiced by any alleged shortcoming on Clarke's part. First, *Porter* is distinguishable because of the Court's emphasis on the unique significance of military service in potentially mitigating against aggravating factors. *See Porter*, 558 U.S. at 43 ("Our Nation has a long tradition of according leniency to veterans in recognition of their service, especially for those who fought on the front lines as Porter did."). Likewise, *Rompilla* is distinguishable because there is no analog here to the "dispositive" failure of trial counsel in *Rompilla* to look at the records that prosecution had indicated would serve as the basis for its case for the death penalty.

Second, although the evidence of Washington's head injuries suggests a difficult childhood and perhaps might provide a more complete picture of his background than was

presented at trial, that evidence is not nearly as substantial or extreme as the mitigating evidence in the four Supreme Court decisions. The possible head injuries and the suggested harsh discipline of Washington's mother are not comparable to the outright beatings and criminal neglect of Williams' parents, the starvation, neglect, physical abuse, molestation and rape, and gang-rape Wiggins suffered at the hands of his mother and foster families, Rompilla being locked up with his brother "in a small wire mesh dog pen that was filthy and excrement filled," deprived of clothing, and beaten by his alcoholic father, or the other harrowing facts in those cases. *See Rhoades v. Henry*, 638 F.3d 1027, 1051 (9th Cir. 2011) ("Even the more complete picture portrayed in the proffer of Rhoades's dysfunctional family with its alcoholism, abuse, aberrant sexual behavior, and criminal conduct does not depict a life history of Rhoades himself that is nightmarish as it was for the petitioners in cases such as *Rompilla*, *Wiggins*, and *Williams* . . . .").

Thus, even if Judge Bradshaw's finding of no prejudice were not dispositive, we would nonetheless find that Washington has not met his burden of showing that his counsel's failure to present additional evidence at sentencing was prejudicial.

VI

We are not insensitive to the fact that Washington is the only one of the three perpetrators who continues to face the death penalty. All three were initially sentenced to death. On appeal, the Arizona Supreme Court affirmed Washington and Robinson's convictions and sentences, *State v. Robinson*, 796 P.2d 853 (Ariz. 1990), but found insufficient evidence to convict James Mathers and vacated his conviction, *State v. Mathers*, 796 P.2d 866 (Ariz. 1990). Even though the record suggests that Mathers was the

shooter, and Judge Bradshaw thought that the evidence against Washington was no greater than the evidence against Mathers, Judge Bradshaw nonetheless denied Washington's PCR petition.

In 2010, in a split decision, we granted a writ of habeas corpus vacating the sentence of Washington's co-defendant Fred Robinson in large part because he received ineffective assistance of counsel. *Robinson*, 595 F.3d at 1086.[7] As noted, Washington and Robinson were tried and sentenced together, and their convictions and sentences were affirmed in state court following joint PCR proceedings, in nearly identical written orders. Like Washington, Robinson alleged that he received ineffective assistance of counsel based on his trial counsel's failure to present mitigation evidence at the penalty phase. *Id*. at 1108–10. As he did with Washington, Judge Bradshaw concluded that the mitigation evidence Robinson produced in the state PCR proceeding would not have made a difference.

[7] Judge Rawlinson dissented. She concluded:

> The state post-conviction court fully considered the mitigation evidence presented by Robinson. Its subsequent emphatic ruling that the mitigation evidence would not have affected the sentence imposed compels a conclusion of no prejudice under the rationale of *Van Hook* and *Wong*. For that reason and because Robinson's challenge to the cruelty prong of the statutory aggravating factors is procedurally barred, I respectfully dissent.

595 F.3d at 1118–19. Robinson was resentenced to 67 years to life. Robinson has since passed away. Ariz. Dep't of Corrections, *Inmate Death Notification – Robinson* (Mar. 7, 2016), https://corrections.az.gov/article/inmate-death-notification-robinson.

However, the sharing of a procedural history does not make two cases analogous. Rather, the critical questions—whether counsel's performance was constitutionally deficient and whether any deficiency resulted in prejudice—must be individually considered and separately considered in each case. *See, e.g.*, *Strickland*, 466 U.S. at 705 (Brennan, J. concurring in part and dissenting in part) ("In the sentencing phase of a capital case, '[w]hat is essential is that the jury have before it all possible relevant information about the individual whose fate it must determine.'") (alteration in original) (citing *Jurek v. Texas*, 428 U.S. 262, 276 (1976) (opinion of Stewart, Powell, and Stevens, J.J.). Indeed, Judge Bradshaw commented: "[h]owever one may view the reversal of Mathers' conviction, it does not follow, either legally or logically, that this petitioner is entitled to the same treatment as his co-defendant, James Mathers. It most certainly does not mandate a change in his sentence." He instructed the jury in Washington's case at the trial court to "consider the charge against each defendant separately." Thus, even though the record suggests that Robinson was the mastermind of the crime, in reviewing the Washington's state conviction and sentence we are limited to considering the facts and legal arguments particular to his case.

On the issues of attorney competence and prejudice, the facts of *Robinson* differ starkly from the facts here. Robinson's trial counsel "engaged in virtually no investigation" and "did not call a single witness or introduce any evidence" at the sentencing hearing. *Robinson*, 595 F.3d at 1109. In contrast, here, Clarke investigated potential mitigation evidence by having "very extensive" discussions with Washington about his background and by interviewing—both before trial and after the verdict—Washington's mother, brother, and common-law wife. Clarke also called three witnesses, each of whom offered

testimony supporting a cogent narrative that Washington was friendly yet gullible, non-violent, and a loving father (and son) and that he desired to make something of his life.

In *Robinson*, the utter failure of Robinson's counsel was critical. We based our finding of prejudice on counsel's non-performance because, under Arizona's death penalty statute at the time of sentencing, the "failure to present a mitigation defense all but assured the imposition of a death sentence." *Robinson*, 595 F.3d at 1111 (quoting *Summerlin v. Schriro*, 427 F.3d 623, 640 (9th Cir. 2005)). We also distinguished two Supreme Court cases—*Bobby v. Van Hook*, 558 U.S. 4 (2009) and *Wong v. Belmontes*, 558 U.S. 15 (2009)—on the basis that Robinson's counsel failed to put on any mitigation evidence. *Robinson*, 595 F.3d at 1111 n.21 (stating that in both *Van Hook* and *Wong* "defense counsel presented a significant amount of mitigating evidence"). Here, Clarke presented substantial mitigating evidence and Washington has not shown that the evidence proffered in his PCR was likely to make a difference.

VII

Washington also argues that counsel was ineffective because he allowed the state court to require a nexus between his proffered mitigating evidence and the crime. A similar issue was raised in *Robinson*. The state had argued that the new evidence should be disregarded altogether because it lacked a "causal connection" to the crime. *See id*. at 1111–12. We rejected that argument based on Supreme Court precedent holding that evidence of a defendant's background and mental capacity is relevant to mitigation and cannot be ruled inadmissible simply because the defendant fails to show a causal connection between the evidence and the crime. *Id*. at 1112; *see Smith v. Texas*, 543 U.S. 37, 45 (2004) (reaffirming the holdings of *Eddings v. Oklahoma*,

455 U.S. 104 (1982), and *Tennard v. Dretke*, 542 U.S. 274 (2004)).

Washington argues that in his PCR proceeding the state court failed to consider his proffered mitigating evidence because of a lack of causal nexus. We do not agree. There is a critical difference between the admissibility of evidence and the weight given to that evidence. Although a court must allow a defendant to present any mitigation evidence, *see Smith*, 543 U.S. at 44–45, *Eddings*, 455 U.S. at 114, and *Tennard*, 542 U.S. at 284–85, "the failure to establish . . . a causal connection may be considered in assessing the quality and strength of the mitigation evidence," *State v. Newell*, 132 P.3d 833, 849 (Ariz. 2006). *See McKinney v. Ryan*, 813 F.3d 798, 817–18 (9th Cir. 2015) (en banc) (referring to *Newell*'s rule as "proper[]").

In discussing Washington's evidence of substance abuse, Judge Bradshaw concluded that the asserted drug and alcohol dependence did not affect Washington's "ability to conform his actions to the demands of society." This could be construed as echoing Arizona's former improper causal nexus test. *See McKinney*, 813 F.3d at 810; Ariz. Rev. Stat. § 13-703(G)(1) (2008). Had Judge Bradshaw said nothing more, it might be inferred that he failed to consider Washington's evidence for purposes of non-statutory mitigation. But Judge Bradshaw didn't stop there; the very next sentence in his order shows that he in fact considered the evidence. He concluded that the evidence of substance abuse, considered alone or together with other mitigation evidence, would not "have mitigated against the sentence [Washington] has received."

The district court recognized that the state court properly considered Washington's mitigating evidence. It commented that the state court "neither [mis]understood

state law to preclude consideration of relevant proffered mitigation, nor to impose a minimum threshold before such mitigation could be considered." The district court understood Judge Bradshaw to have "considered the mitigation [evidence] proffered to show prejudice, but [Judge Bradshaw] determined that it carried insufficient *weight* to alter the sentence."

Thus, the conclusion that the evidence of substance abuse lacked a causal nexus to the crime was appropriate because "a court 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). The state court's weighing of Washington's evidence of substance abuse does not support his claims of ineffective assistance of counsel.[8]

VIII

Washington and his two co-defendants were convicted and sentenced to death for the murder of Sterleen Hill and the attempted murder of Ralph Hill. Over the past 30 years, one of Washington's co-defendants had his conviction overturned and the other had his sentence vacated (and has died). Under these circumstances, there may be a temptation to bend the governing legal standards to equalize the outcomes for the three defendants in an effort "to achieve what appears a just result." *Holland v. Florida*, 560 U.S. 631, 673 (2010) (Scalia, J., dissenting). However enticing the impulse, that is not our role. Although Judge Bradshaw had the power to temper justice with mercy, in our role as a

[8] Washington's able and zealous habeas counsel does not contend Judge Bradshaw committed an *Eddings* error as to the psychological evidence.

federal court on habeas review, we do not. Ours is the duty to determine whether Washington has met his high burden of showing pursuant to *Strickland* that his attorney performed deficiently to his prejudice. The Supreme Court reiterated in *Harrington*, 562 U.S. at 104, that to be entitled to relief, the petitioner "had to show both that his counsel provided deficient assistance and that there was prejudice as a result." A failure to heed this standard would constitute "an improper intervention in state criminal processes," and violate "the now well-settled meaning and function of habeas corpus in the federal system." *Id*. at 104. Accordingly, we may not ignore this exacting standard to "remedy" Judge Bradshaw's choice against leniency.

Rather, applying the familiar standard articulated in *Strickland*, we assess the state court record to determine whether Washington's counsel was constitutionally deficient and whether the deficient performance resulted in prejudice. *See Van Hook*, 558 U.S. at 7 (applying the *Strickland* analysis in a pre-AEDPA case). We conclude that Washington has not met his burden of showing that his counsel performed deficiently or that the alleged deficiency was prejudicial. He has not shown that the omission of the new mitigation evidence deprived him of "a fair trial," *see Strickland*, 466 U.S. at 687, or that the omission undermines our confidence that the trial "produced a just result," *see id*. at 686. Accordingly, the district court's denial of Washington's habeas petition is **AFFIRMED**.

GOULD, Circuit Judge, concurring in part and concurring in the judgment:

I concur in part, joining the opening paragraph (except for the language on page 7 stating that "Washington has not

shown either that his trial counsel's performance was constitutionally deficient or"), Sections I, II, III, V, VI, and VII, but do not join Sections IV and VIII, which I conclude are unnecessary to resolve the *Strickland* ineffective assistance of counsel issue. I also concur in the judgment.

APPENDIX B

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

THEODORE WASHINGTON, *Petitioner-Appellant*, v. DAVID SHINN, Director, *Respondent-Appellee.*	No. 05-99009 D.C. No. CV-95-02460-JAT OPINION

Appeal from the United States District Court
for the District of Arizona
James A. Teilborg, District Judge, Presiding

Argued and Submitted September 8, 2021
San Francisco, California

Filed December 20, 2021

Before: Ronald M. Gould, Consuelo M. Callahan, and Lawrence VanDyke, Circuit Judges.

Opinion by Judge Callahan

SUMMARY*

Habeas Corpus/Death Penalty

The panel affirmed the district court's denial of Theodore Washington's habeas corpus petition challenging his Arizona conviction and death sentence for first-degree murder.

Washington asserted that he is entitled to relief on several grounds, the majority of which the panel addressed in a memorandum disposition filed on January 15, 2021. In this opinion, the panel addressed Washington's certified claim for ineffective assistance of trial counsel—that counsel did not investigate and present mitigating evidence at the penalty phase, including evidence of diffuse brain damage, childhood abuse, and substance abuse.

Because Washington filed his habeas petition before the enactment of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), the panel reviewed the claim under the standard set out in *Strickland v. Washington*, 466 U.S. 668 (1984), and its progeny, without the added deference required under AEDPA.

The panel held that Washington did not meet his burden under the first *Strickland* prong of showing constitutionally deficient performance by failing to obtain and review Washington's education and incarceration records, where there was no showing that those records contained meaningful mitigation evidence. The panel held that

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

Washington did not meet his burden of showing that trial counsel erred by not further investigating Washington's childhood abuse, to the extent that he could have, or by not presenting the information he did not have regarding abuse at sentencing hearing. The panel held that Washington's allegation that trial counsel erred by not investigating and presenting evidence of his substance abuse fails because counsel was not timely informed of Washington's substance abuse. The panel held that Washington also did not show that trial counsel erred by not seeking a psychological evaluation, where (1) counsel testified that nothing in his extensive interviews with Washington's family and friends triggered any red flags signaling that further investigation of Washington's mental condition would have been fruitful; (2) counsel for the most part knew neither of later assertions of diffuse brain damage, a dysfunctional family background, and alcohol and cocaine addiction, nor of evidence supporting the assertions; and (3) the record of post-conviction review (PCR) proceedings does not contain any medical records substantiating Washington's claims of head injuries. The panel concluded that under the deferential standard required by *Strickland* and its progeny, counsel's investigation was more than adequate, and his performance was reasonable.

The panel held that even if trial counsel's performance had been deficient, Washington would not be entitled to relief because he cannot show prejudice, where the sentencing judge said that Washington's new evidence in the PCR hearing would not have made a difference, and a fair evaluation of the evidence in light of Supreme Court precedent confirms the soundness of the sentencing judge's finding of no prejudice.

The panel wrote that it is not insensitive to the fact that Washington is the only one of the three perpetrators who continues to face the death penalty. The panel emphasized, however, that the critical questions—whether counsel's performance was constitutionally deficient and whether any deficiency resulted in prejudice—must be individually considered and separately considered in each case.

The panel rejected Washington's argument that trial counsel was ineffective because he allowed the state court to require a nexus between his proffered mitigating evidence and the crime. The panel wrote that the sentencing judge did consider the evidence of substance abuse, and that the judge's conclusion that the evidence of substance abuse lacked a causal nexus to the crime was appropriate because a court is free to assign less weight to mitigating factors that did not influence a defendant's conduct at the time of the crime.

COUNSEL

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Laura P. Chiasson (argued), Assistant Attorney General, Capital Litigation Section; Lacey Stover Gard, Deputy Solicitor General/Chief of Capital Litigation; Mark Brnovich, Attorney General; Office of the Attorney General, Tucson, Arizona; for Respondent-Appellee.

OPINION

CALLAHAN, Circuit Judge:

Arizona state prisoner Theodore Washington appeals the district court's denial of his petition for a writ of habeas corpus under 28 U.S.C. § 2254. In 1987, a jury convicted Washington for the murder of Sterleen Hill and the attempted murder of Ralph Hill, and the trial court judge sentenced him to death.

In his habeas corpus petition, Washington challenges his conviction and sentence on the first-degree murder charge. He asserts that he is entitled to habeas relief on several grounds, the majority of which we addressed in our memorandum disposition filed on January 15, 2021, *Washington v. Ryan*, 840 Fed. App'x 143 (9th Cir. 2021). In this opinion we again address Washington's certified claim for ineffective assistance of trial counsel.[1] Washington contends that his counsel did not investigate and present mitigating evidence at the penalty phase, including evidence of diffuse brain damage, childhood abuse, and substance abuse. Applying the standard for evaluating ineffective assistance of counsel set forth in *Strickland v. Washington*, 466 U.S. 668 (1984),[2] we conclude that Washington has not shown either that his trial counsel's performance was constitutionally deficient or that the deficiencies were

[1] Our previous opinion, *Washington v. Ryan*, 922 F.3d 419 (9th Cir. 2109), was withdrawn on January 15, 2021. *Washington v. Ryan*, 840 Fed. App'x. 143 (9th Cir. 2021). In that order we requested that the parties file supplemental briefs addressing the significance of *Shinn v. Kayer*, 141 S. Ct. 517 (2020). Following the submission of supplemental briefs, we heard re-argument on September 8, 2021.

[2] This opinion omits parallel citations.

prejudicial. Accordingly, we affirm the district court's denial of his habeas petition.

I

At around 11:45 p.m. on the night of June 8, 1987, at least two men forced their way into Ralph and Sterleen Hill's home in Yuma, Arizona. The men forced the Hills to lie face down on the floor of the master bedroom with their hands bound in preparation to be shot execution-style. One of the men intermittently "screwed" a pistol in Ralph's ear while both men yelled at the couple demanding that the Hills give them drugs or money. Ralph glimpsed one of the assailants as he ransacked the drawers and closets in the room. Sterleen was forced to listen helplessly as her husband was shot first and then wait as the shotgun was reloaded, knowing that she would be next. Had the Hills' teenage son, LeSean, not run off, it is evident that he would have suffered the same fate. (Ralph testified he heard a voice in the background say, "We better get the kid."). The Hills were discovered lying face down in their bedroom. Ralph survived the horrendous shot to his head, but was seriously injured. Sterleen did not survive the shooting.

Police arrested Fred Robinson shortly after the incident. Robinson was the common law husband of Susan Hill, Ralph Hill's daughter from a prior marriage. Police also arrested Jimmy Mathers and Theodore Washington in connection with the crimes. Arizona charged the three men with first-degree murder for the death of Sterleen Hill, attempted first degree murder, aggravated assault causing serious physical injury, aggravated assault using a deadly weapon, burglary in the first degree, and armed robbery. The three men were tried together, and the jury convicted all three on all counts.

A

The penalty phase of the trial commenced on January 8, 1988. Washington's trial counsel, Robert Clarke, called three witnesses to testify on Washington's behalf: Washington's friend, Steve Thomas; Washington's mother, Willa Mae Skinner; and Washington's half-brother, John Mondy.

Steve Thomas testified that he had known Washington for two years. He testified that Washington was easily influenced but not violent. He also testified that Washington was a dedicated father. When asked if Washington had a drug problem, Thomas testified that he had not noticed one. Willa Mae Skinner testified that Washington was a good child and that he dropped out of school when he was in high school. She also testified that Washington was a good father, and that he was gentle and "liked to party." Finally, John Mondy reiterated that Washington was affable but easily led. He also confirmed that Washington had trouble in school as a child.

During closing argument, Clarke focused primarily on attacking the sufficiency of the court's findings under *Enmund v. Florida*, 458 U.S. 782 (1982), and *Tison v. Arizona*, 481 U.S. 137 (1987). Regarding mitigation, Clarke urged the court to consider Washington's age, his relatively minor criminal record, his good relationship with his son, and his general demeanor as a caring individual.

The trial court found that the state had established two aggravating factors beyond a reasonable doubt: (1) that the murder was committed in an especially cruel, heinous, or depraved manner, and (2) that the murder was committed for, or motivated by, pecuniary gain. With respect to mitigation, the court found that Washington's age was not a

mitigating factor and that the remaining mitigating factors did not outweigh the aggravating factors. The court sentenced all three defendants to death on the first-degree murder charges.

B

Washington, Robinson, and Mathers each appealed their convictions and sentences to the Arizona Supreme Court. The state high court affirmed Washington and Robinson's convictions and sentences, *State v. Robinson*, 796 P.2d 853 (Ariz. 1990), but found insufficient evidence to convict James Mathers and vacated his conviction, *State v. Mathers*, 796 P.2d 866 (Ariz. 1990).

Following the direct appeal process, Washington and Robinson challenged their convictions and sentences on post-conviction review ("PCR"). The trial court held a joint PCR hearing on September 8, 1993. The Honorable Stewart Bradshaw, the same judge who presided over the trial, presided over the post-conviction review proceeding. Washington, through his appellate counsel, argued that Clarke was ineffective at the penalty phase due to his failure to present mitigating evidence. Specifically, Washington argued that Clarke erred by failing to conduct a more thorough review of his school, medical, and incarceration records. He also argued that Clarke should have obtained a psychological evaluation and presented the results to the court.

The bulk of the new evidence presented at the PCR hearing was elicited through the testimony of Dr. Roy, the defense counsel's retained psychologist. Dr. Roy evaluated Washington in 1992. He conducted clinical interviews and several psychological tests. Dr. Roy's interviews with Washington revealed that he suffered abuse as a child in the

form of daily whippings with straps and belts and that adults in the home used alcohol to sedate him as a child. His review of Washington's school and Department of Corrections ("DOC") records revealed that he was placed in classes for the "educable mentally retarded" when he was five years old and that he had been marked as low-IQ while incarcerated. However, Dr. Roy testified that these records conflicted with his own clinical findings because Washington tested at a low-to-average IQ of 96.

Dr. Roy's interviews with Washington also disclosed that Washington had substance abuse problems with cocaine and alcohol. Washington told Dr. Roy that he began drinking recreationally at age eight and was a functional alcoholic by age fourteen. He also told Dr. Roy that he was heavily intoxicated on the night of the murder. Washington also said that he was a heavy cocaine user and that, at the time of the crime, he used about $175's worth of cocaine per day.

Finally, Dr. Roy testified that he believed that Washington suffered from diffuse brain damage resulting from early and prolonged drug and alcohol use and numerous traumatic head injuries. Dr. Roy testified that diffuse brain damage can result in disinhibition and poor social judgment as well as poor impulse control and an inability to appreciate the long-term consequences of one's actions. Dr. Roy testified that, in his opinion, Washington's cocaine addiction and his impaired impulse control likely contributed to his ability to be manipulated by others into making poor decisions.

The state called Dr. Eva McCullars, a psychiatrist who also evaluated Washington. Dr. McCullars reviewed Dr. Roy's report and conducted clinical interviews with Washington in June 1993. Dr. McCullars testified that she

did not review Washington's DOC records, school records, or adult incarceration records. Dr. McCullars agreed that Washington suffered from diffuse brain damage, but concluded that Washington also suffered from antisocial personality disorder. On direct examination, the state asked Dr. McCullars whether diffuse brain damage could cause hyperkinesis (hyperactive behavior or attention deficit disorder). Dr. McCullars explained that "[hyperkinesis] is one example of diffuse brain damage." She went on to explain that several prominent individuals including Walt Disney and Thomas Edison exhibited hyperkinetic behavior as children. When questioned on cross examination, Dr. McCullars acknowledged that Washington came from a "significantly dysfunctional family." She also admitted that several of the markers for antisocial personality disorder, such as early truancy and an inability to maintain employment, were more frequently associated with lower socio-economic status Black adolescents, such as Washington, when compared to the general population.

Clarke, Washington's trial counsel, also testified at the PCR hearing. He testified that he did not request Washington's education or corrections records because he believed his interviews with Washington, Skinner, Mondy, and Washington's common law wife, Barbara Bryant, were sufficient. Clarke testified that he had "very extensive discussions" with Washington about what his life was like and any possible substance abuse issues. He also testified that he had "relatively extensive" discussions with Washington's mother, half-brother, and Bryant. Clarke testified that, based on these interviews, "there wasn't anything that clued me in that there was a special problem that would suggest I should obtain those types of records." With respect to Washington's drug use, Clarke testified that Washington never told him that he was addicted to cocaine

or that he was using cocaine on the night of the murder. When questioned on the matter, Clarke acknowledged that Bryant had told him that Washington had a "cocaine problem," but that he did not investigate further.

In a written order, Judge Bradshaw held that Washington was not entitled to relief for ineffective assistance of counsel at the penalty phase. Judge Bradshaw credited Dr. McCullars's findings that Washington had antisocial personality disorder and was poorly adjusted to living in society. However, Judge Bradshaw concluded that "there is nothing . . . which lessened his ability to differentiate right from wrong or conform his actions with the law." Judge Bradshaw also explained that he had been aware at the time of sentencing that Washington had been doing well while incarcerated. Judge Bradshaw further reasoned that any drug and alcohol dependency "taken separately or with any other mitigating circumstance or circumstances would [not] have mitigated against the sentence [Washington] has received."

On April 25, 1995, the Arizona Supreme Court summarily denied Washington's petition for review of the PCR court's decision.

C

Washington then commenced his habeas action in the federal district court, culminating in this appeal. In his amended federal habeas corpus petition, Washington raised 17 claims. The district court determined that certain claims were procedurally barred, and on April 22, 2005, the district court rejected the remaining claims on their merits and dismissed the petition. Washington filed a motion to alter the judgment on May 5, 2005, which the district court denied on June 8, 2005.

On July 11, 2005, Washington filed an untimely notice of appeal from the district court's denial of habeas relief. A three-judge panel of this court held that it lacked jurisdiction and affirmed the district court's denial of Rule 60(b) relief. *Washington v. Ryan*, 789 F.3d 1041 (9th Cir. 2015). We then granted Washington's motion for en banc rehearing. *Washington v. Ryan*, 811 F.3d 299 (9th Cir. 2015). In a 6–5 decision, we held that Washington was entitled to relief under Rule 60(b)(1) and (6) from his untimely notice of appeal and ordered the district court to "vacate and reenter its judgment denying Washington's petition for writ of habeas corpus, *nunc pro tunc*, June 9, 2005," to render the notice of appeal timely. *Washington v. Ryan*, 833 F.3d 1087, 1102 (9th Cir. 2016). The United States Supreme Court denied the state's petition for writ of certiorari. *Ryan v. Washington*, 137 S. Ct. 1581 (2017) (mem.).

Meanwhile, in 2005, the district court issued a 48-page memorandum and order denying Washington's habeas petition. In his PCR proceedings, Washington had "alleged that Clarke rendered ineffective assistance of counsel by failing to interview him regarding potential mitigation and by failing to present evidence of good behavior during incarceration, his unstable family background, and the absence of a violent history or propensity."

In rejecting Washington's claims of ineffective assistance of counsel, the district court held that Washington had to "identify the acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment," (quoting *Strickland*, 466 U.S. at 690). It further noted that Washington had to "overcome the presumption that under the circumstances, the challenged action might be considered sound trial strategy," and that it must "judge the reasonableness of counsel's challenged conduct on the facts

of the particular case, viewed as of the time of counsel's conduct."

The district court recognized that counsel had a duty to conduct a reasonable investigation and that a failure to adequately investigate and present mitigating evidence can constitute deficient performance. However, the district court concluded that while Clarke could have conducted additional investigation of Washington's background for potential mitigation, it could not conclude "that Clarke performed deficiently by failing to do so." The court noted that Clarke was an experienced attorney who had worked both as a prosecutor and as defense counsel, had tried 30 to 50 jury trials, and had tried three or four capital cases before he was appointed to represent Washington. The district court stated that Clarke had "began investigating possible mitigation as he investigated the facts of the case," had very extensive discussions with Washington "regarding what his life was like from when he was a young man to the present," and had rather extensive discussions with Washington's common-law wife (Bryant), brother, and mother. The court observed that Clarke testified that he had questioned Washington very closely about his drug use and alcohol intake and about possible physical abuse during his childhood.

Clarke acknowledged that he did not seek Washington's school records because he relied on family members to provide information regarding his education. Clarke did not seek Washington's incarceration records because they were "unlikely to have records relevant to potential mitigation, such as psychological records, because Petitioner had only been incarcerated for two years for burglary and was not 'a hardened criminal.'" Clarke also explained that he did not seek a mental health evaluation of Washington because "he

had not observed anything from his many lengthy meetings with Petitioner, or interviews of Petitioner's family, that suggested that such an evaluation was warranted." Clarke further testified that he had questioned family members about any "medical problems" or "anything out of the ordinary" in Washington's background, but had not requested his medical history. Finally, Clarke, while acknowledging that Bryant had told him that Washington had a "cocaine problem," claimed that Washington had never told him that he was addicted to cocaine or had used cocaine the day of the crime; Washington had only stated that he had been intoxicated.

The district court noted that Washington "presented no evidence at the state PCR evidentiary hearing to contradict Clarke's testimony." Although Washington in his affidavit averred that Clarke did not discuss the penalty phase with him until twenty minutes before the hearing, the district court determined that "Clarke's presentation of three witnesses at sentencing, each of whom had traveled to Yuma from at least as far away as Banning is alone sufficient to discredit the implication that Clarke failed to prepare for the sentencing until minutes before the aggravation/mitigation hearing." The district court further found at his PCR hearing in state court, Washington had not presented any evidence from Bryant or family members that contradicted Clarke's testimony and that the PCR court "clearly found Clarke more credible than Petitioner's affidavit on these points." Furthermore, Washington presented no evidence that his school records or his incarceration records would have revealed potential mitigation. Rather, the single reference in Washington's school records that he was "educable mentally retarded" was contradicted by Dr. Roy's own testing of Washington which showed that he had average or low-average intelligence and "was not retarded."

The district court determined that Washington had not shown that Clarke acted unreasonably in not seeking a mental health evaluation. The court observed that there was "scant evidence" that Washington had been treated for any prior mental illness or had any mental health history, and that there was no evidence that Washington, his family members, or friends ever disclosed any concerning incidents to Clarke or suggested that such incidents would have led to relevant mitigation.[3] The district court noted that there was no evidence that anyone had told Clarke that Washington had suffered several head injuries during his childhood and adolescence.

The district court further credited Clarke's statements that Washington only told him that he was intoxicated the night of the crime and never said that he had also used cocaine and was an alcoholic and a drug addict. The court concluded that Clarke had little reason to further investigate Washington's substance abuse and that Clarke had not "conducted an unreasonable investigation." The district court concluded that "Clarke's investigation and presentation of mitigation was reasonable and that he did not perform deficiently."

The district court further found that even if Clarke had performed deficiently, Washington had not shown that he

[3] In his affidavit Washington reported that after he got into trouble when he was fifteen, he received psychiatric counseling as part of his rehabilitation. He told Dr. Roy that the psychologist concluded that the death of Washington's father had left him without a male figure in his life and this was responsible for the difficulties he experienced. Washington also told Dr. Roy that in 1981 he was taken to the Sacramento County Hospital after overdosing on LSD and passing out, and was admitted to the psychiatric unit, but Dr. Roy noted that there was no evidence regarding the length of his stay, treatment, or diagnosis.

was prejudiced. Again citing *Strickland*, 466 U.S. at 691, 694, the court noted that "an error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment," that the petitioner "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different," and that a reasonable probability is a probability sufficient to undermine confidence in the outcome. The court noted that it is "asked to imagine what the effect might have been upon a sentencing judge, who was following the law, especially one who had heard the testimony at trial."[4]

The district court noted that the state PCR court (Judge Bradshaw), "before whom Petitioner was tried, heard all of the additional mitigation evidence proffered by Petitioner, . . . credited Dr. McCullars's finding of antisocial personality disorder and concluded that Petitioner had not demonstrated a reasonable probability that his sentence would have been different if that mitigation had been presented at trial."

[4] The district court noted that "[a]t the time [Washington] was sentenced, Arizona's death penalty statute required a judge to impose a death sentence if one or more aggravating circumstance were proven beyond a reasonable doubt and the mitigation established by a preponderance of the evidence was not sufficiently substantial to call for leniency." In *Ring v. Arizona*, 536 U.S. 584, 609 (2002), the Supreme Court ruled that a sentencing judge, sitting without a jury, may not find an aggravating factor necessary for imposition of the death penalty. However, in *Schriro v. Summerlin*, 542 U.S. 348, 358 (2004), the Supreme Court held that *Ring* does not apply retroactively to cases such as Washington's that were already final on direct review at the time *Ring* was decided.

Addressing Washington's intoxication on the night of the crime, the district court noted that under Arizona law, intoxication at the time of a crime can constitute a statutory mitigation if the defendant establishes that his capacity to appreciate the wrongfulness of his conduct or his ability to conform his conduct to the requirements of law was significantly impaired, but not so impaired as to constitute a defense to prosecution. The burden is on the defendant to establish this mitigation. *See State v. Woratzeck*, 657 P.2d 870–71 (Ariz. 1982) (holding "appellant had failed to show as a mitigating circumstance that intoxication caused significant impairment of his capacity to appreciate the wrongfulness of his conduct or to conform his conduct to the requirement of law"). The district court noted that under Arizona case law, "self-reports of voluntary intoxication at the time a crime was committed are subject to searching skepticism because of the obvious motive to fabricate," "a defendant's claim of alcohol or drug impairment may be rebutted by evidence that he took steps to avoid detection shortly after the murder or when it appears that intoxication did not overwhelm the defendant's ability to control his physical behavior," and "a long history of drug dependence, absent evidence that a defendant was actually impaired at the time of the crime, does not constitute mitigation."

The district court concluded that the newly proffered evidence of impairment would be accorded little weight. It noted that the only evidence, other than self-reporting, "was Bryant's testimony that Petitioner sounded intoxicated when he called her at least two hours *after* the offense." The court noted that although Washington told the experts that he was intoxicated the night of the crime, neither expert opined as to his capacity to appreciate the wrongfulness of his conduct. Moreover, "evidence supports that Petitioner fled from the Hills' home immediately after they were shot, that he called

Bryant, and ultimately purchased a bus ticket to return to Banning."

Addressing the proffered evidence of mental impairment, the district court noted that under Arizona law, "major mental impairments, such as mental illness or brain damage, carry far more mitigating weight than does a personality disorder *if* such impairments demonstrate a defendant's inability to control his conduct or to appreciate the differences between right and wrong." *See* Ariz. Rev. Stat. § 13-703(G)(1) (2008). The court noted that although Dr. Roy concluded that Washington had diffuse brain damage, he did not find that such damage significantly impaired Washington's capacity to appreciate the wrongfulness of his conduct or to conform his conduct to the requirement of law. Dr. McCullars found no indication that diffuse brain damage impaired Washington's capacity. The district court concluded that the proffered evidence of mental impairment was entitled to minimal weight.

Addressing evidence of a dysfunctional family background, the district court noted that under Arizona law "while a difficult family background, including childhood abuse, may be relevant mitigation at the penalty phase, dysfunctional family history is entitled to significant mitigating weight only if it had a causal connection to the offense-related conduct." Moreover, the weight accorded a difficult family background may be discounted for an adult offender. The district court concluded that the additional evidence of Washington's family background was entitled to little weight because neither expert identified any causal connection to Washington's participation in the murder and Washington was 27 years-old at the time of the crime.

The district court concluded that there was no reasonable probability that the additional mitigation proffered by

Washington would have altered his sentence. The court noted that even if Washington "was not the actual shooter," there was evidence that he "went into the Hills' home seeking drugs and money and that he knew before entering the home that one or more of its occupants might be shot, 'if things [got] rough,'" and that he "participated in forcing entry into the home, tying up the elderly occupants (face down on the floor) and ransacking their bedroom for valuables." The district court concluded that Washington's proffered evidence of voluntary intoxication at the time of the crime, a chronic substance abuse problem, diffuse brain damage, an antisocial personality disorder, and a dysfunctional family background, did not, separately or combined, impair "his capacity to control his conduct to the law's requirements or know the difference between right and wrong." Moreover, Washington had failed to show any causal connection of these factors with the crime that might help explain and thus mitigate his role in the murder. Accordingly, the district court found that Washington had not demonstrated that he was prejudiced by counsel's alleged deficient performance.

II

We review de novo a district court's decision to grant or deny a habeas petition under 28 U.S.C. § 2254. *See Bean v. Calderon*, 163 F.3d 1073, 1077 (9th Cir. 1998). Because Washington filed his habeas petition before the enactment of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), the provisions of AEDPA do not apply to this case. *Id*. (citing *Jeffries v. Wood*, 114 F.3d 1484, 1495–96 (9th Cir. 1997) (en banc)). Instead, we review the claim under the familiar standard set out in *Strickland* and its

progeny without the added deference required under AEDPA.[5]

III

Although the principles underlying and governing a claim of ineffective assistance of counsel are familiar, they bear repeating. "The right to counsel is a fundamental right of criminal defendants; it assures the fairness, and thus the legitimacy, of our adversary process." *Kimmelman v. Morrison*, 477 U.S. 365, 374 (1986). "[T]he right to counsel is the right to the effective assistance of counsel." *Strickland*, 466 U.S. at 686 (quoting *McMann v. Richardson*, 397 U.S. 759, 771 n.14 (1970)). Under *Strickland*'s two-part test for claims of ineffective assistance of counsel, a convicted defendant must show (1) constitutionally deficient performance by counsel (2) that prejudiced the defense. *Id*. at 687.

"The essence of an ineffective-assistance claim is that counsel's unprofessional errors so upset the adversarial balance between defense and prosecution that the trial was rendered unfair and the verdict rendered suspect." *Kimmelman*, 477 U.S. at 374. "As is obvious, *Strickland*'s standard, although by no means insurmountable, is highly demanding." *Id.* at 382; *see also Padilla v. Kentucky*, 559 U.S. 356, 371 (2010) ("Surmounting *Strickland*'s high bar is never an easy task."). "Only those habeas petitioners who can prove under *Strickland* that they have been denied

[5] Although we held this appeal for the Supreme Court's opinion in *Shinn*, 141 S. Ct. 517, its treatment of AEDPA is not applicable to this appeal. However, the Supreme Court reaffirmed that *Strickland* provides the framework for assessing claims of ineffective assistance of counsel. *Id*. at 522.

a fair trial by the gross incompetence of their attorneys will be granted the writ . . . ." *Kimmelman*, 477 U.S. at 382.

"When counsel focuses on some issues to the exclusion of others, there is a strong presumption that he did so for tactical reasons rather than through sheer neglect." *Yarborough v. Gentry*, 540 U.S. 1, 8 (2003) (citing *Strickland*, 466 U.S. at 690). Even if inadvertence (not tactical reasoning) results in non-pursuit of a particular issue, "relief is not automatic. The Sixth Amendment guarantees reasonable competence, not perfect advocacy judged with the benefit of hindsight." *Id.*

To prevail on his claim for ineffective assistance of counsel, Washington must establish that Clarke's performance was deficient and that he suffered prejudice as a result. *See Strickland*, 466 U.S. at 687. To establish deficient performance, Washington must show that "counsel's representation fell below an objective standard of reasonableness." *Id*. at 688. To establish prejudice, Washington must show that there is "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694.

In articulating the standard against which counsel's performance should be judged, *Strickland* emphasized the deference due to a lawyer's decisions both as to scope of investigation and decisions made after investigation: "[S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable . . . ." *Strickland*, 466 U.S. at 690. We have likewise recognized the wide latitude to be given to counsel's tactical choices. *See, e.g.*, *United States v. Ferreira-Alameda*, 815 F.2d 1251, 1253 (9th Cir. 1986) ("Review of counsel's performance is highly deferential and

there is a strong presumption that counsel's conduct fell within the wide range of reasonable representation."). Yet our deference to counsel's performance is not unlimited. As the Court explained in *Strickland*, counsel's strategic choices made after less than complete investigation are reasonable only to the extent that "reasonable professional judgments support the limitations on investigation." 466 U.S. at 690–91.

IV

A

Washington has not met his burden under the first *Strickland* prong of showing that Clarke provided constitutionally deficient performance by failing to obtain and review Washington's education and incarceration records.

First, there is no showing that the education records themselves contain meaningful mitigation evidence. The single proffered item of mitigation in Washington's education records is a 1965 comment (from when Washington was five years old) that he should be placed in special classes for the "educable mentally retarded." But that single, decades-old notation is inconsequential when compared with more than ten additional years of schooling in the general population. Among the evidence Clarke presented at trial was testimony about Washington struggling in school and dropping out in the tenth or eleventh grade. Moreover, any suggestion that the school records showed a meaningfully low IQ is contradicted by later IQ testing by Washington's own expert, Dr. Roy. Indeed, Washington has never even suggested the possibility of intellectual disability. In sum, the district court was correct in observing that Washington "presented no evidence that

his school records . . . would have revealed potential mitigation."

Similarly, Washington has not shown that his California incarceration records contained any meaningful mitigating materials. As noted by Clarke, Washington was only incarcerated for two years for burglary. Washington does not indicate what the incarceration records would have revealed. Furthermore, Judge Bradshaw stated that he was aware at the time of sentencing of Washington's good behavior during his incarceration.

B

Washington has also not met his burden of showing that Clarke erred by not investigating and presenting evidence of his childhood abuse. In his conversations with Dr. Roy, Washington revealed that he suffered physical abuse as a child in the form of daily whippings and beatings. Roy was also told that Washington was given alcohol as a child to control his behavior. Both psychological experts who testified at the PCR hearing agreed that Washington's childhood was significantly dysfunctional. However, none of this information had come to Clarke's attention before or during the trial. Clarke, at least initially, had to rely on representations by Washington and his family members in determining the extent of Washington suffered childhood abuse. At the time of his trial, neither Washington nor his family members had indicated to Clarke that Washington had suffered extreme abuse growing up. Accordingly, Clarke did not err by not further investigating Washington's childhood abuse, to the extent that he could have, or by not presenting the information he did not have regarding abuse at the sentencing hearing. *See Strickland*, 466 U.S. at 691 ("[W]hen a defendant has given counsel reason to believe that pursuing certain investigations would be fruitless or

even harmful, counsel's failure to pursue those investigations may not later be challenged as unreasonable.").

C

Similarly, Washington's allegation that Clarke erred by not investigating and presenting evidence of his substance abuse fails because Clarke was not timely informed of Washington's substance abuse. Clarke reasonably relied on his conversations with Washington and his friends and family, which did not indicate any substance abuse. Washington had told Clarke that he was heavily intoxicated on the night of the crimes, but he did not mention any ongoing problems with drugs or with alcohol. Similarly, Washington's mother described him as someone who "liked to party," but also did not say that Washington had problems with addiction. Perhaps the single clue Clarke had that might have raised his suspicions about substance abuse was the statement of Washington's common-law wife that Washington had a "cocaine problem." However, when set against Washington's own statements and those of his family members, Clarke's decision not to further investigate Washington's drug addiction was not objectively unreasonable.

D

Finally, Washington has not shown that Clarke erred by not seeking a psychological evaluation. Clarke's investigation included extensive discussions with Washington and Washington's family and friends. Clarke asked Washington and his family members about whether Washington "had any propensity to violence," "about his drug use," "about his alcohol intake," "about whether or not he was abused, growing up," about "what discipline was

like," and "things of that nature." At the PCR hearing, Clarke testified that, in all the interviews with Washington and his family, nothing triggered any red flags signaling that further investigation of his mental condition would have been fruitful. There does not appear to have been anything in Washington's education and incarceration records that contradicts this conclusion. Washington's later assertions of diffuse brain damage, a dysfunctional family background, and alcohol and cocaine addiction, if supported by evidence, might lead competent counsel to seek a psychological evaluation, but Clarke, for the most part, knew neither of the assertions nor of evidence supporting the assertions. At the PCR hearing, the experts disagreed as to whether diffuse brain damage was disabling[6] and the proffered evidence of head injuries was less than compelling. Dr. McCullars found that Washington's historical reporting varied from one interviewer to another. Indeed, the record of the PCR proceedings does not contain any medical records substantiating Washington's claims of head injuries. Also, Clarke had extensive discussions with Washington and his family and friends about whether he had been abused growing up, and reasonably determined that Washington's family members would make better witnesses than a psychologist who might examine Washington for a relatively brief period (and might not offer any mitigating conclusions). In addition, Washington's claims of addiction, for the most part, were self-reported well after his trial and do not square with his prior statements to Clarke admitting only that he had been drinking on the day of the crime.

[6] Dr. McCullars stated that diffuse brain damage was present in approximately ten to fifteen percent of the population and did not necessarily impair an individual's functioning.

Under the deferential standard required by *Strickland* and its progeny, Clarke's investigation was more than adequate, and his performance was reasonable.

V

A

Even if Clarke's performance had been deficient, under *Strickland*, Washington would not be entitled to relief unless he could also show that the deficiency was prejudicial. "The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Strickland*, 466 U.S. at 686. *Strickland* "requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Id*. at 687. To prove prejudice, a defendant must show "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 694.

"It is not enough 'to show that the errors had some conceivable effect on the outcome of the proceeding.' Counsel's errors must be 'so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.'" *Harrington v. Richter*, 562 U.S. 86, 104 (2011) (citations omitted) (quoting *Strickland*, 466 U.S. at 687). Although the reasonable probability standard "does not require a showing that counsel's actions 'more likely than not altered the outcome,' . . . the difference between *Strickland*'s prejudice standard and a more-probable-than-not standard is slight and matters 'only in the rarest case.'" *Id*. at 111–12 (quoting *Strickland*, 466 U.S. at 693, 697); *see id*. at 112 ("The

likelihood of a different result must be substantial, not just conceivable.").

To determine whether Washington has met his burden of showing prejudice, we must "reweigh the evidence in aggravation against the totality of available mitigating evidence." *Wiggins v. Smith*, 539 U.S. 510, 534 (2003). This comparison cannot be made without first clearly identifying the evidence in mitigation that would have been offered at the penalty phase of trial but for counsel's grossly incompetent performance. As noted in our prior retracted opinion, perhaps Washington's best argument is that Clarke was incompetent in failing to present "evidence concerning Washington's potentially impaired cognitive functions." This refers to Dr. Roy's assertions that Washington had symptoms of diffuse brain damage, likely caused by multiple head injuries incurred when Washington was young, and that diffuse brain damage contributes to a "lack of judgment" and an "inability to establish stability in life."

In reweighing this evidence, we must take as our baseline the evidence of aggravation and mitigation offered at trial and the resulting sentence. After considering the details of the brutal, execution-style murder and attempted murder, and weighing it against the mitigation evidence Washington's counsel presented, Judge Bradshaw sentenced Washington to death. With that starting point in mind, we undertake the theoretical inquiry of determining whether it is reasonably likely that Washington would have received a different sentence if the new mitigation evidence were to be added to the mix of mitigation evidence that was presented at trial.

Of course, no guesswork is needed here. We know that Washington's new evidence would not have made a difference because the sentencing judge said so. *See Cook v.*

Ryan, 688 F.3d 598, 612 (9th Cir. 2012) (finding no prejudice where "the same trial judge who sentenced" the petitioner to death stated that the new evidence "would not have made any difference"). Judge Bradshaw "considered *all* of [the new] information in the post-conviction hearing and" definitively "held that none of it would have altered his judgment as to the proper penalty for" Washington. *Gerlaugh v. Stewart*, 129 F.3d 1027, 1036 (9th Cir. 1997).

B

A fair evaluation of the evidence in light of Supreme Court precedent confirms the soundness of Judge Bradshaw's finding of no prejudice. Because of *Strickland*'s "highly demanding" standard, *Kimmelman,* 477 U.S. at 382, it is no surprise that petitioners have historically found little success bringing ineffective assistance of counsel claims. However, beginning in 2000, the Supreme Court found *Strickland*'s "high bar" satisfied in four cases involving claims of ineffective assistance of counsel at the penalty phase of a capital trial: *Williams v. Taylor*, 529 U.S. 362 (2000); *Wiggins*, 539 U.S. 510; *Rompilla v. Beard*, 545 U.S. 374 (2005); and *Porter v. McCollum*, 558 U.S. 30 (2009). These decisions serve as guideposts for determining when relief is warranted in such cases.

In *Williams*, the jury fixed the punishment at death after hearing evidence of a long history of criminal conduct including armed robbery, burglary and grand larceny, auto thefts, violent assaults on elderly victims, and arson. 529 U.S. at 368–70. At sentencing, defense counsel offered very little evidence. *Id*. at 369. In addressing Williams' *Strickland* claim, the Supreme Court cited "graphic" details "of Williams' childhood, filled with abuse and privation," evidence that Williams was "borderline mentally retarded,"

and other significant mitigation evidence that was not unearthed only because of counsel's deficient performance:

> [C]ounsel did not begin to prepare for that phase of the proceeding until a week before the trial. They failed to conduct an investigation that would have uncovered extensive records graphically describing Williams' nightmarish childhood, not because of any strategic calculation but because they incorrectly thought that state law barred access to such records. Had they done so, the jury would have learned that Williams' parents had been imprisoned for the criminal neglect of Williams and his siblings, that Williams had been severely and repeatedly beaten by his father, that he had been committed to the custody of the social services bureau for two years during his parents' incarceration (including one stint in an abusive foster home), and then, after his parents were released from prison, had been returned to his parents' custody.

Id. at 395, 398 (citation and footnote omitted). In concluding Williams had shown prejudice, the Court noted that the same judge who presided over the criminal trial heard Williams' post-conviction review claims. *Id*. at 396. That trial judge, who initially "determined that the death penalty was 'just' and 'appropriate,' concluded that there existed 'a reasonable probability that the result of the sentencing phase would have been different'" if evidence developed in the post-conviction proceedings had been offered at sentencing. *Id.* 396–97.

In *Wiggins*, trial counsel focused their strategy at sentencing on arguing that the defendant was not directly responsible for the murder, and they did not present any other mitigation evidence, despite knowledge of at least some of the defendant's troubled background. 539 U.S. at 515–26. The Court cited "powerful" mitigation evidence that counsel either had, or should have, discovered. *Id.* at 534–35. When Wiggins was a young child, his alcoholic mother frequently left him and his siblings home alone for days without food, "forcing them to beg for food and to eat paint chips and garbage." *Id.* at 516–17. The mother beat Wiggins and his siblings and had sex with men while her children slept in the same bed. *Id.* at 517. On one occasion, the mother forced Wiggins' hand against a hot stove burner, resulting in his hospitalization. *Id*. After being removed from his mother's custody and placed in foster care, Wiggins was physically abused and "repeatedly molested and raped" by one foster father, and gang-raped on multiple occasions by a foster mother's sons. *Id*. He ran away from one foster home and began living on the streets. *Id*. The Court held that had the jury been presented with Wiggins' "excruciating life history," rather than virtually no mitigation evidence, "there is a reasonable probability that at least one juror would have struck a different balance." *Id*. at 537.

In *Rompilla*, trial counsel undertook a number of efforts to investigate possible mitigating evidence, "including interviews with Rompilla and some members of his family, and examinations of reports by three mental health experts who gave opinions at the guilt phase," but none of these sources was helpful. 545 U.S. at 381. Notwithstanding these efforts, the Court found one "clear and dispositive" error by counsel. *Id*. at 383. Defense counsel knew the prosecution intended to seek the death penalty and would hinge its penalty case on Rompilla's prior conviction for rape and

assault. *Id*. Counsel nevertheless failed to even look at the court file for the prior conviction; had they done so "they would have found a range of mitigation leads that no other source had opened up." *Id*. at 384, 390. The mitigation evidence that would have been available from simply looking at the files included, among other things:

> Rompilla's parents were both severe alcoholics who drank constantly. His mother drank during her pregnancy with Rompilla, and he and his brothers eventually developed serious drinking problems. His father, who had a vicious temper, frequently beat Rompilla's mother, leaving her bruised and black-eyed, and bragged about his cheating on her. His parents fought violently, and on at least one occasion his mother stabbed his father. He was abused by his father who beat him when he was young with his hands, fists, leather straps, belts and sticks. All of the children lived in terror. There were no expressions of parental love, affection or approval. Instead, he was subjected to yelling and verbal abuse. His father locked Rompilla and his brother Richard in a small wire mesh dog pen that was filthy and excrement filled. He had an isolated background, and was not allowed to visit other children or to speak to anyone on the phone. They had no indoor plumbing in the house, he slept in the attic with no heat, and the children were not given clothes and attended school in rags.

Id. at 391–92. All the evidence counsel failed to discover simply by failing to look at the court file of the prior conviction "add[ed] up to a mitigation case that bears no relation to the few naked pleas for mercy actually put before the jury." *Id*. at 393. The Court thus concluded there was a reasonable probability of a different result had counsel performed adequately. *Id*.

In *Porter*, penalty phase counsel offered scant evidence on behalf of Porter. "The sum total of the mitigating evidence was inconsistent testimony about Porter's behavior when intoxicated and testimony that Porter had a good relationship with his son." *Porter*, 558 U.S. at 32. Post-conviction review proceedings revealed several facts about Porter's "abusive childhood, his heroic military service and the trauma he suffered because of it, his long-term substance abuse, and his impaired mental health and mental capacity." *Id*. at 33.

> Porter routinely witnessed his father beat his mother, one time so severely that she had to go to the hospital and lost a child. Porter's father was violent every weekend, and by his siblings' account, Porter was his father's favorite target, particularly when Porter tried to protect his mother. On one occasion, Porter's father shot at him for coming home late, but missed and just beat Porter instead.

Id. Porter's company commander in the Army also offered a "moving" account of Porter's heroic efforts "in two of the most critical—and horrific—battles of the Korean War," for which Porter "received two Purple Hearts and the Combat Infantryman Badge, along with other decorations." *Id*. at 30, 34–35, 41. A neuropsychologist "concluded that Porter

suffered from brain damage that could manifest in impulsive, violent behavior." *Id*. at 36. The expert also testified that "[a]t the time of the crime . . . Porter was substantially impaired in his ability to conform his conduct to the law and suffered from an extreme mental or emotional disturbance," which would have provided a basis for two statutory mitigating circumstances. *Id*.

In concluding Porter established prejudice, the Court reasoned that "[t]he judge and jury at Porter's original sentencing heard almost nothing that would humanize Porter or allow them to accurately gauge his moral culpability. They learned about Porter's turbulent relationship with [the victim], his crimes, and almost nothing else." *Id*. at 41. The Court emphasized the significance of Porter's military service, both because "he served honorably under extreme hardship and gruesome conditions" and because "the jury might find mitigating the intense stress and mental and emotional toll that combat took on Porter." *Id.* at 43–44.

A comparison of the failures by counsel in *Williams*, *Wiggins*, *Rompilla*, and *Porter*, with Washington's situation confirms the adequacy of counsel's representation of Washington and that Washington was not prejudiced by any alleged shortcoming on Clarke's part. First, *Porter* is distinguishable because of the Court's emphasis on the unique significance of military service in potentially mitigating against aggravating factors. *See Porter*, 558 U.S. at 43 ("Our Nation has a long tradition of according leniency to veterans in recognition of their service, especially for those who fought on the front lines as Porter did."). Likewise, *Rompilla* is distinguishable because there is no analog here to the "dispositive" failure of trial counsel in Rompilla to look at the records that prosecution had

indicated would serve as the basis for its case for the death penalty.

Second, although the evidence of Washington's head injuries suggests a difficult childhood and perhaps might provide a more complete picture of his background than was presented at trial, that evidence is not nearly as substantial or extreme as the mitigating evidence in the four Supreme Court decisions. The possible head injuries and the suggested harsh discipline by Washington's mother are not comparable to the outright beatings and criminal neglect of Williams' parents, the starvation, neglect, physical abuse, molestation and rape, and gang-rape Wiggins suffered at the hands of his mother and foster families, Rompilla being locked up with his brother "in a small wire mesh dog pen that was filthy and excrement filled," deprived of clothing, and beaten by his alcoholic father, or the other harrowing facts in those cases. *See Rhoades v. Henry*, 638 F.3d 1027, 1051 (9th Cir. 2011) ("Even the more complete picture portrayed in the proffer of Rhoades's dysfunctional family with its alcoholism, abuse, aberrant sexual behavior, and criminal conduct does not depict a life history of Rhoades himself that is nightmarish as it was for the petitioners in cases such as *Rompilla*, *Wiggins*, and *Williams* . . . .").

Thus, even if Judge Bradshaw's finding of no prejudice was not dispositive, we would nonetheless find that Washington has not met his burden of showing that his counsel's failure to present additional evidence at sentencing was prejudicial.

VI

We are not insensitive to the fact that Washington is the only one of the three perpetrators who continues to face the death penalty. All three were initially sentenced to death.

On appeal, the Arizona Supreme Court affirmed Washington and Robinson's convictions and sentences, *State v. Robinson*, 796 P.2d 853, 865 (Ariz. 1990), but found insufficient evidence to convict James Mathers and vacated his conviction, *State v. Mathers*, 796 P.2d 866 (Ariz. 1990). Even though the record suggests that Mathers was the shooter, and Judge Bradshaw thought that the evidence against Washington was no greater than the evidence against Mathers, Judge Bradshaw nonetheless denied Washington's PCR petition.

In 2010, in a split decision, we granted a writ of habeas corpus vacating the sentence of Washington's co-defendant Fred Robinson in large part because he received ineffective assistance of counsel. *Robinson v. Schriro*, 595 F.3d 1086 (9th Cir. 2010).[7] As noted, Washington and Robinson were tried and sentenced together, and their convictions and sentences were affirmed in state court following joint PCR proceedings, in nearly identical written orders. Like Washington, Robinson alleged that he received ineffective

[7] Judge Rawlinson dissented. She concluded:

> The state post-conviction court fully considered the mitigation evidence presented by Robinson. Its subsequent emphatic ruling that the mitigation evidence would not have affected the sentence imposed compels a conclusion of no prejudice under the rationale of *Van Hook* and *Wong*. For that reason and because Robinson's challenge to the cruelty prong of the statutory aggravating factors is procedurally barred, I respectfully dissent.

595 F.3d at 1118–19. Robinson was resentenced to 67 years to life. Robinson has since passed away. Ariz. Dep't of Corrections, *Inmate Death Notification – Robinson* (Mar. 7, 2016), https://corrections.az.gov/article/inmate-death-notification-robinson.

assistance of counsel based on his trial counsel's failure to present mitigation evidence at the penalty phase. *Id.* at 1108–10. As he did with Washington, Judge Bradshaw concluded that the mitigation evidence Robinson produced in the state PCR proceeding would not have made a difference.

However, the sharing of a procedural history does not make two cases analogous. Rather, the critical questions—whether counsel's performance was constitutionally deficient and whether any deficiency resulted in prejudice—must be individually considered and separately considered in each case. *See, e.g.*, *Strickland*, 466 U.S. at 705 (Brennan, J. concurring in part and dissenting in part) ("In the sentencing phase of a capital case, '[w]hat is essential is that the jury have before it all possible relevant information about the individual whose fate it must determine.'") (citing *Jurek v. Texas*, 428 U.S. 262, 276 (1976) (opinion of Stewart, Powell, and Stevens, J.J.). Indeed, Judge Bradshaw commented: "[h]owever one may view the reversal of Mathers' conviction, it does not follow, either legally or logically, that this petitioner is entitled to the same treatment as his co-defendant, James Mathers. It most certainly does not mandate a change in his sentence." He instructed the jury in Washington's case at the trial court to "consider the charge against each defendant separately." Thus, even though the record suggests that Robinson was the mastermind of the crime, in reviewing the Washington's state conviction and sentence we are limited to considering the facts and legal arguments particular to his case.

On the issues of attorney competence and prejudice, the facts of Robinson's case differed starkly from the facts here. Robinson's trial counsel "engaged in virtually no investigation" and "did not call a single witness or introduce

any evidence" at the sentencing hearing. *Robinson*, 595 F.3d at 1109. In contrast, here, Clarke investigated potential mitigation evidence by having "very extensive" discussions with Washington about his background and by interviewing—both before trial and after the verdict—Washington's mother, brother, and common-law wife. Clarke also called three witnesses, each of whom offered testimony supporting a cogent narrative that Washington was friendly yet gullible, non-violent, and a loving father (and son) and that he desired to make something of his life.

In *Robinson*, the utter failure of Robinson's counsel was critical. We based our finding of prejudice on counsel's non-performance because, under Arizona's death penalty statute at the time of sentencing, the "failure to present a mitigation defense all but assured the imposition of a death sentence." *Robinson*, 595 F.3d at 1111 (quoting *Summerlin v. Schriro*, 427 F.3d 623, 640 (9th Cir. 2005)). We also distinguished two Supreme Court cases—*Bobby v. Van Hook*, 558 U.S. 4 (2009) and *Wong*, 558 U.S. 15 (2009)—on the basis that Robinson's counsel failed to put on any mitigation evidence. *Robinson*, 595 F.3d at 1111 n.21 (stating that in both *Bobby* and *Wong* "defense counsel presented a significant amount of mitigating evidence"). Here, Clarke presented substantial mitigating evidence and Washington has not shown that the evidence proffered in his PCR was likely to make a difference.

VII

Washington also argues that counsel was ineffective because he allowed the state court to require a nexus between his proffered mitigating evidence and the crime. A similar issue was raised in *Robinson*. The state had argued that the new evidence should be disregarded altogether because it lacked a "causal connection" to the crime. *See id*. at 1111–

12. We rejected that argument based on Supreme Court precedent holding that evidence of a defendant's background and mental capacity is relevant to mitigation and cannot be ruled inadmissible simply because the defendant fails to show a causal connection between the evidence and the crime. *Id*. at 1112; *see Smith v. Texas*, 543 U.S. 37, 45 (2004) (reaffirming the holdings of *Eddings v. Oklahoma*, 455 U.S. 104 (1982), and *Tennard v. Dretke*, 542 U.S. 274 (2004)).

Washington argues that in his PCR proceeding the state court failed to consider his proffered mitigating evidence because of a lack of causal nexus. We do not agree. There is a critical difference between the admissibility of evidence and the weight given to that evidence. Although a court must allow a defendant to present any mitigation evidence, *see Smith*, 543 U.S. at 44–45, *Eddings*, 455 U.S. at 114, and *Tennard*, 542 U.S. at 284–85, "the failure to establish . . . a causal connection may be considered in assessing the quality and strength of the mitigation evidence," *State v. Newell*, 132 P.3d 833, 849 (Ariz. 2006). *See McKinney v. Ryan*, 813 F.3d 798, 817–18 (9th Cir. 2015) (en banc) (referring to *Newell*'s rule as "proper[]").

In discussing Washington's evidence of substance abuse, Judge Bradshaw concluded that the asserted drug and alcohol dependence did not affect Washington's "ability to conform his actions to the demands of society." This could be construed as echoing Arizona's former improper causal nexus test. *See McKinney*, 813 F.3d at 810; Ariz. Rev. Stat. § 13-703(G)(1) (2008). Had Judge Bradshaw said nothing more, it might be inferred that he failed to consider Washington's evidence for purposes of non-statutory mitigation. But Judge Bradshaw didn't stop there; the very next sentence in his order shows that he in fact considered the evidence. He concluded that the evidence of substance

abuse, considered alone or together with other mitigation evidence, would not "have mitigated against the sentence [Washington] has received."

The district court recognized that the state court properly considered Washington's mitigating evidence. It commented that the state court "neither [mis]understood state law to preclude consideration of relevant proffered mitigation, nor to impose a minimum threshold before such mitigation could be considered." The district court understood Judge Bradshaw to have "considered the mitigation [evidence] proffered to show prejudice, but [Judge Bradshaw] determined that it carried insufficient *weight* to alter the sentence."

Thus, the conclusion that the evidence of substance abuse lacked a causal nexus to the crime was appropriate because "a court 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). The state court's weighing of Washington's evidence of substance abuse does not support his claims of ineffective assistance of counsel.[8]

VIII

Washington and his two co-defendants were convicted and sentenced to death for the murder of Sterleen Hill and the attempted murder of Ralph Hill. Over the past 30 years, one of Washington's co-defendants had his conviction overturned and the other had his capital sentence vacated

[8] Washington's able and zealous habeas counsel does not contend Judge Bradshaw committed an *Eddings* error as to the psychological evidence.

(and has died). Under these circumstances, there may be a temptation to bend the governing legal standards to equalize the outcomes for the three defendants in an effort "to achieve what appears a just result." *Holland v. Florida*, 560 U.S. 631, 673 (2010) (Scalia, J., dissenting). However enticing the impulse, that is not our role. Although Judge Bradshaw had the power to temper justice with mercy, in our role as a federal court on habeas review, we do not. Ours is the duty to determine whether Washington has met his high burden of showing pursuant to *Strickland* that his attorney performed deficiently to his prejudice. The Supreme Court reiterated in *Harrington*, 562 U.S. at 104, that to be entitled to relief, the petitioner "had to show both that his counsel provided deficient assistance and that there was prejudice as a result." A failure to heed this standard would constitute "an improper intervention in state criminal processes," and violate "the now well-settled meaning and function of habeas corpus in the federal system." *Id*. at 103. Accordingly, we may not ignore this exacting standard to "remedy" Judge Bradshaw's choice against leniency.

Rather, applying the familiar standard articulated in *Strickland*, we assess the state court record to determine whether Washington's counsel was constitutionally deficient and whether the deficient performance resulted in prejudice. *See Van Hook*, 558 U.S. at 7 (applying the *Strickland* analysis in a pre-AEDPA case). We conclude that Washington has not met his burden of showing that his counsel performed deficiently or that the alleged deficiency was prejudicial. He has not shown that the omission of the new mitigation evidence deprived him of "a fair trial," *see Strickland*, 466 U.S. at 687, or that the omission undermines our confidence that the trial "produced a just result," *see id*. at 686. Accordingly, the district court's denial of Washington's habeas petition is **AFFIRMED**.

APPENDIX C

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

JAN 15 2021

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

THEODORE WASHINGTON, Petitioner-Appellant, v. CHARLES L. RYAN, Respondent-Appellee.	No. 05-99009 D.C. No. CV-95-02460-JAT District of Arizona, Phoenix ORDER

Before: GOULD, CALLAHAN, and N.R. SMITH, Circuit Judges.

The opinion in the above-captioned matter filed on April 17, 2019, and published at 922 F.3d 419, is WITHDRAWN and the appeal is reopened. Appellee Charles L. Ryan's petition for panel rehearing and petition for rehearing *en banc* (DE 266) are DENIED as moot. The parties are requested to file simultaneous briefs addressing the significance of *Shinn v. Kayer*, 592 U.S. ____ (2020) to the above-captioned case within 30 days of the date of this order. The briefs shall not exceed fifteen (15) pages.

The full court has been advised of Appellant Theodore Washington's petition for rehearing *en banc* from our memorandum disposition and no judge has requested a vote on whether to rehear the matter *en banc*. Fed. R. App. P. 35. The memorandum disposition filed April 17, 2019 is amended by replacing the fourth sentence with: "Washington's certified claim for ineffective assistance of counsel

remains under consideration." Appellant Theodore Washington's petition for panel rehearing and petition for rehearing *en banc* (DE 267) are DENIED. The memorandum disposition in the above-captioned matter filed on April 17, 2019, is hereby amended, and filed concurrently with this order.

NOT FOR PUBLICATION

FILED

JAN 15 2021

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

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

THEODORE WASHINGTON, Petitioner-Appellant, v. CHARLES L. RYAN, Warden, Respondent-Appellee.	No. 05-99009 D.C. No. CV-95-02460-JAT AMENDED MEMORANDUM*

Appeal from the United States District Court
for the District of Arizona
James A. Teilborg, District Judge, Presiding

Argued and Submitted September 26, 2018
Pasadena, California

Before: GOULD, CALLAHAN, and N.R. SMITH, Circuit Judges.

Arizona state prisoner Theodore Washington was sentenced to death in 1987 for the first degree murder of Sterleen Hill. Washington appeals the district court's denial of his petition for writ of habeas corpus under 28 U.S.C. § 2254. On appeal, Washington raises three certified issues and four uncertified issues. Washington's certified claim for ineffective assistance of counsel remains under consideration.

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

We address Washington's remaining claims here, and on all these claims we affirm the district court.

1. Although Washington filed his habeas corpus petition before the effective date of the Antiterrorism and Effective Death Penalty Act of 1996, his appeal is subject to the certificate of appealability (COA) requirements of 28 U.S.C. § 2253. *Slack v. McDaniel*, 529 U.S. 473, 478 (2000). We construe uncertified issues raised on appeal as a motion to expand the COA. Ninth Cir. R. 22-1(d), (e); *Mardesich v. Cate*, 668 F.3d 1164, 1169 n.4 (9th Cir. 2012). We conclude that reasonable jurists could disagree as to the propriety of the district court's resolution of the uncertified issues and therefore expand the COA and address them on the merits.

2. The trial court's failure to sever Washington's case from Fred Robinson's did not result in prejudice so fundamental as to deny his due process right to a fair trial. We review denial of a severance motion for abuse of discretion. *See, e.g. United States v. Cuozzo*, 962 F.2d 945, 949 (9th Cir. 1992). The primary inquiry in determining whether a failure to sever was prejudicial to the defendant is whether the evidence is easily compartmentalized. *United States v. Patterson*, 819 F.2d 1495, 1501 (9th Cir. 1987). Here, the evidence of Fred Robinson's prior abductions of Susan Hill was reasonably easy to separate from the evidence pertaining to the murder of Sterleen Hill. Washington's lawyer established that

Washington was not present for the prior abductions, and both the prosecution and defense noted that Washington was not involved with the prior abductions in their closing arguments. Finally, the trial court offered limiting instructions, which the jurors are presumed to have followed. *See Cheney v. Washington*, 614 F.3d 987, 997 (9th Cir. 2010). Washington therefore cannot show prejudice. There was no abuse of discretion in denying severance.

3. The trial court did not err in applying the statutory cruel, heinous, and depraved aggravating factor under Ariz. Rev. Stat. Ann. § 13-751(F)(6). Because the statute is written in the disjunctive, the trial court only needed to find one of the elements proven beyond a reasonable doubt to apply the aggravator. *See State v. Carlson*, 48 P.3d 1180, 1191 (Ariz. 2002). The trial court's finding that the killing satisfied the cruelty prong, which was affirmed by the Arizona Supreme Court, is amply supported by substantial evidence in the record. Sterleen Hill was forced to listen helplessly as her husband was shot and then wait as the shotgun was reloaded, knowing that she would be next. The trial court's conclusion that the suffering was reasonably foreseeable is also supported by the evidence. Washington had been told before the invasion that the "real purpose of the trip to Yuma was to take out a drug dealer and get his dope and his money." And he was, at a minimum, present while Sterleen Hill was bound and forced to lie on the floor in preparation for the execution-style shootings of her and her husband. The trial

court's application of the cruelty aggravator was not arbitrary and capricious and did not violate Washington's due process rights.

4. There is sufficient evidence to support Washington's conviction. When assessing whether sufficient evidence exists to support a conviction, we determine "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) (emphasis in original). Under this standard, the evidence shows that Robinson, Mathers, and Washington discussed going to Yuma on the day of the crimes. The evidence further shows that Washington was seen in Robinson's car with Mathers and Robinson leaving Banning on the night of the crime wearing a red bandana and a tan trench coat. Moreover, Ralph Hill's description of one of his attackers as a young black man wearing a red bandana with a moustache and long sideburns matched Washington's appearance that night. Ralph knew Robinson, who is also black, and testified the man he saw was not Robinson. The jury could reasonably conclude that Washington was one of the culpable intruders. Also, the shotgun used to shoot the Hills and a tan trench coat containing a slip of paper with Eric Robinson's name on it were found in a nearby field. A few hours after the murder, Washington called his girlfriend from Yuma, telling her he was stranded. From all this evidence, a rational trier of fact could have found beyond a reasonable doubt

that Washington participated in the crime.

5. We are also not persuaded that Washington's counsel on direct appeal was constitutionally ineffective for failing to raise a sufficiency of the evidence challenge. To establish ineffective assistance of counsel, Washington must show that his appellate counsel's performance fell below an objective standard of reasonableness under prevailing professional norms at the time and that the ineffective assistance resulted in prejudice. *Correll v. Ryan*, 539 F.3d 938, 942 (9th Cir. 2008) (quoting *Strickland v. Washington*, 466 U.S. 668, 694 (1984)). Clarke testified that he made a tactical decision to focus on other issues on appeal and there is nothing to suggest this decision was unreasonable. Even if Clarke erred by failing to raise the issue on direct review, the evidence adduced at trial was sufficient to support Washington's conviction. As a result, Washington cannot show a reasonable probability of a different outcome but for Clarke's alleged error; without prejudice, this claim fails.

6. The trial court did not unconstitutionally apply the "pecuniary gain" aggravator. The pecuniary gain aggravator applies when "the defendant committed the offense as consideration for the receipt, or in expectation of the receipt, of anything of pecuniary value." Ariz. Rev. Stat. Ann. § 13-751(F)(5). The expectation of pecuniary gain must have been "a motive, cause, or impetus for the murder and not merely the result of the murder." *State v. Hyde*, 921 P.2d 655, 683

(Ariz. 1996). The evidence shows that Washington was advised that the real purpose of the trip to Yuma was to "knock off a dope dealer" and "take his coke and take the cash." In addition, Washington forced his way into the Hills' home, repeatedly demanded drugs or money from the couple, and searched for and took items of value from the Hills' home. The application of the pecuniary gain factor is supported by evidence in the record and was not "so arbitrary or capricious as to constitute an independent due process or Eighth Amendment violation." *Lewis v. Jeffers*, 497 U.S. 764, 780 (1990).

7. Washington's death sentence is not constitutionally inadequate under *Enmund v. Florida*, 458 U.S. 782 (1982), and *Tison v. Arizona*, 481 U.S. 137 (1987). For a death sentence to be constitutional under the Eighth Amendment, the state must show that (1) the defendant was a major participant in the felony committed, and (2) the crime was committed with reckless indifference to human life. *See Tison*, 481 U.S. at 158. The evidence supports the trial court's conclusion that Washington was a major participant in the crime. Washington entered the Hills' home and forced them into the master bedroom while demanding drugs and money. Ralph Hill saw Washington riffling through drawers before he was shot. And the gun used to shoot the Hills was recovered near the trench coat Washington was seen wearing that day. The evidence likewise supports the trial court's finding that the crime was committed with reckless disregard for human life. Washington

and his partner entered the Hills' home armed and forced the couple to lie face down while demanding drugs and money. Whether or not Washington pulled the trigger, he was present and failed to render aid to the Hills. *See Dickens v. Ryan*, 740 F.3d 1302, 1316 (9th Cir. 2014). Washington was a major participant in the tragic acts of that day. The Arizona court's determination that Washington was eligible for the death sentence is therefore well supported by the evidence in the record.

8. The district court did not err in denying Washington's motion to expand the record because Washington cannot show cause for his failure to develop the facts in the state PCR proceedings or that failure to admit the evidence resulted in a fundamental miscarriage of justice. *See Keeney v. Tomayao-Reyes*, 504 U.S. 1, 11–12 (1992).

9. In conclusion, on all the claims discussed in this memorandum disposition, we **AFFIRM** the district court and deny relief.

APPENDIX D

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

THEODORE WASHINGTON, *Petitioner-Appellant,* v. CHARLES L. RYAN, Warden, *Respondent-Appellee.*	No. 05-99009 D.C. No. CV-95-02460-JAT OPINION

Appeal from the United States District Court
for the District of Arizona
James A. Teilborg, District Judge, Presiding

Argued and Submitted September 26, 2018
Pasadena, California

Filed April 17, 2019

Before: Ronald M. Gould, Consuelo M. Callahan,
and N. Randy Smith, Circuit Judges.

Opinion by Judge Gould;
Dissent by Judge Callahan

SUMMARY*

Habeas Corpus / Death Penalty

The panel reversed the district court's denial of habeas relief as to the penalty phase, and remanded, in a case in which Arizona state prisoner Theodore Washington, who was sentenced to death for first-degree murder, asserted that his trial counsel rendered ineffective assistance by not investigating and presenting mitigating evidence at the penalty phase.

The panel reviewed the district court's decision *de novo* in this pre-AEDPA case and applied the standard articulated in *Strickland v. Washington*, 466 U.S. 668 (1984) – assessing the state court record to determine whether Washington's counsel was constitutionally deficient and whether the deficient performance resulted in prejudice.

The panel held that counsel performed ineffectively by not properly investigating Washington's background, and as a result, the trial court was not presented at the penalty phase with substantial mitigation evidence regarding Washington's education and incarceration, his diffuse brain damage, and his history of substance abuse. The panel held that this raises a probability that, had the court been presented with the mitigation evidence in the first instance, the outcome would have been different, as the sentencing judge might have decided that Washington should be spared death and be imprisoned for life.

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

Dissenting, Judge Callahan wrote that in second-guessing the performance of Washington's trial counsel, the majority uses a standard for gross incompetence that doesn't square with precedent, and doesn't hold Washington to his heavy burden of prejudice.

The panel addressed other issues in a concurrently filed memorandum disposition.

COUNSEL

Nathaniel C. Love (argued), Sidley Austin LLP, Chicago, Illinois; Gilbert H. Levy, The Law Offices of Gilbert H. Levy, Seattle, Washington; Mark E. Haddad, Sidley Austin LLP, Los Angeles, California; for Petitioner-Appellant.

Laura P. Chiasson (argued), Assistant Attorney General; Lacey Stover Gard, Chief Counsel; Mark Brnovich, Attorney General, Office of the Attorney General, Tucson, Arizona; for Respondent-Appellee.

OPINION

GOULD, Circuit Judge:

Arizona state prisoner Theodore Washington appeals the district court's denial of his petition for a writ of habeas corpus under 28 U.S.C. § 2254. In 1987, a jury found Washington guilty of six crimes involving the robbery and murder of Sterleen Hill in her Arizona home. The court sentenced Washington to death.

In his habeas corpus petition, Washington challenges his conviction and sentence on the first-degree murder charge.

He asserts that he is entitled to habeas relief on several grounds, the majority of which are addressed in a separate memorandum disposition filed concurrently with this opinion. This opinion solely addresses Washington's certified claim for ineffective assistance of trial counsel. Washington contends that his counsel did not investigate and present mitigating evidence at the penalty phase, including evidence of diffuse brain damage, childhood abuse, and substance abuse. The Arizona court previously considered and rejected this claim on post-conviction review.

Because review under the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-122, 100 Stat. 1214 ("AEDPA"), does not apply in this case, we are not bound by the highly deferential "double deference" in considering Washington's claim of ineffective assistance of counsel and its proper analysis. *See Hardy v. Chappell*, 849 F.3d 803, 824–26 (9th Cir. 2016) (explaining the interaction of 28 U.S.C. § 2254(d) and the standard for deficiency under *Strickland v. Washington*, 466 U.S. 668 (1984)). Instead, we apply the familiar standard articulated in *Strickland*, and assess the state court record to determine whether Washington's counsel was constitutionally deficient and whether the deficient performance resulted in prejudice. *See Bobby v. Van Hook*, 558 U.S. 4, 7 (2009) (applying the *Strickland* analysis in a pre-AEDPA case). Because Washington's counsel did not properly investigate Washington's background, the trial court at the penalty phase was not presented with substantial mitigation evidence regarding Washington's education and incarceration, his diffuse brain damage, and his history of substance abuse. This raises a reasonable probability that, had the court been presented with the mitigation evidence in the first instance, the outcome would have been different. The sentencing judge might have decided that Washington should be spared

death and be imprisoned for life.[1] We reverse the district court's denial of habeas relief and remand with instructions to grant habeas relief against the death penalty, unless within a reasonable time the state retries the penalty phase or decides to modify the sentence to life in prison.

I

At around 11:45 p.m. on the night of June 8, 1987, two men forced their way into Ralph and Sterleen Hill's Yuma, Arizona home in what turned out to be a disastrously violent home invasion. The men forced the Hills to lie face down on the floor of the master bedroom and bound their hands behind their backs. One of the men intermittently "screwed" a pistol in Ralph's ear while both men yelled at the couple demanding that the Hills give them drugs or money. Ralph glimpsed one of the assailants as he ransacked the drawers and closets in the room. The Hills were discovered lying face down in their bedroom. Both had been shot in the back of the head. Ralph survived the horrendous shot to his head, but was seriously injured. Sterleen did not survive the shooting.

Police arrested Fred Robinson shortly after the incident. Robinson was the common law husband of Susan Hill, Ralph

[1] In this case, because it predated the rule in *Ring v. Arizona*, 536 U.S. 584 (2002), the judge had the power the power to select life imprisonment rather than death. For cases after the effective date of *Ring*, a jury has this power. In either case, the decision maker at the penalty phase need not account for its decision. *See generally Ring*, 536 U.S. 584; *Gregg v. Georgia*, 428 U.S. 153 (1976). Accordingly, the decision maker after hearing all mitigation and aggravation evidence, will be left, to borrow a phrase from Milton, with the power "to temper justice with mercy." John Milton, *Paradise Lost*, book x, lines 77–78 (1674).

Hill's daughter from a prior marriage. Police also arrested Jimmy Mathers and Theodore Washington in connection with the crimes. The state charged the three men with (1) first degree murder for the death of Sterleen Hill, (2) attempted first degree murder, (3) aggravated assault causing serious physical injury, (4) aggravated assault using a deadly weapon, (5) burglary in the first degree, and (6) armed robbery. The three men were tried together, and the jury convicted on all counts.

A

The penalty phase of the trial commenced on January 8, 1988. In this appeal, we are concerned with the penalty phase of Washington's trial and the death penalty sentence he received.

Washington's trial counsel, Robert Clarke, called three witnesses to testify on Washington's behalf: Washington's friend, Steve Thomas; Washington's mother, Willa Mae Skinner; and Washington's half-brother, John Mondy.

Steve Thomas testified that he knew Washington for two years. He testified that Washington was easily influenced but not violent. He also testified that Washington was a dedicated father. When asked if Washington had a drug problem, Thomas testified that he had not noticed one. Willa Mae Skinner testified that Washington was a good child and that he dropped out of school when he was in high school. She also testified that Washington was a good father, and that he was gentle and "liked to party." Finally, John Mondy reiterated that Washington was affable but easily led. He also confirmed that Washington had trouble in school as a child.

During closing argument, Clarke focused primarily on attacking the sufficiency of the court's findings under *Enmund v. Florida*, 458 U.S. 782 (1982), and *Tison v. Arizona*, 481 U.S. 137 (1987). Regarding mitigation, Clarke did not entirely ignore all mitigation, but rather urged the court to consider Washington's age, his relatively minor criminal record, his good relationship with his son, and his general demeanor as a caring individual. This appeal is concerned primarily with the mitigation evidence and argument that Clarke did not present.

The trial court found that the state had established two aggravating factors beyond a reasonable doubt: (1) that the murder was committed in an especially cruel, heinous, or depraved manner, and (2) that the murder was committed for, or motivated by, pecuniary gain. With respect to mitigation, the court found that Washington's age was not a mitigating factor and that the remaining mitigating factors did not outweigh the aggravating factors. The court sentenced all three defendants to death on the first-degree murder charges.

B

Washington, Robinson, and Mathers each appealed their convictions and sentences to the Arizona Supreme Court. The state high court affirmed Washington and Robinson's convictions and sentences, *State v. Robinson*, 796 P.2d 853, 865 (Ariz. 1990), but found insufficient evidence to convict James Mathers and vacated his conviction, *State v. Mathers*, 796 P.2d 866 (Ariz. 1990).

Following the direct appeal process, Washington and Robinson challenged their convictions and sentences on post-conviction review ("PCR"). The court held a joint PCR hearing on September 8, 1993. The Honorable Stewart

Bradshaw, the same judge who presided over the trial, also presided over the post-conviction review proceeding. Washington, through his appellate counsel, argued that Clarke was ineffective at the penalty phase due to his failure to present mitigating evidence. Specifically, Washington argued that Clarke erred by failing to conduct a more thorough review of his school, medical, and incarceration records. He also argued that Clarke should have obtained a psychological evaluation and presented the results to the court.

The bulk of the new evidence presented at the PCR hearing was elicited through the testimony of Dr. Roy, the defense counsel's retained psychologist. Dr. Roy evaluated Washington in 1992. He conducted clinical interviews and several psychological tests. Dr. Roy's interviews with Washington revealed that he suffered abuse as a child in the form of daily whippings with straps and belts and that adults in the home used alcohol as a means to sedate him as a child. His review of Washington's school and Department of Corrections ("DOC") records revealed that he was placed in classes for the "educable mentally retarded" when he was five years old and that he had been marked as low-IQ while incarcerated. However, Dr. Roy testified that these records conflicted with his own clinical findings because Washington tested at a low-average IQ of 96.

Dr. Roy's interviews with Washington also revealed that Washington had substance abuse problems relating to alcohol and cocaine use. Washington told Dr. Roy that he began drinking recreationally at age eight and was a functional alcoholic by age fourteen. He also told Dr. Roy that he was heavily intoxicated on the night of the murder. Washington also said that he was a heavy cocaine user and

that he consumed about $175 in cocaine per day at the time of the crime.

Finally, Dr. Roy testified that he believed that Washington suffered from diffuse brain damage resulting from early and prolonged drug and alcohol use and numerous traumatic head injuries. Dr. Roy testified that diffuse brain damage can result in disinhibition and poor social judgment as well as poor impulse control and an inability to appreciate the long-term consequences of one's actions. Dr. Roy testified that, in his opinion, Washington's cocaine addiction and his impaired impulse control likely contributed to his ability to be manipulated by others into making poor decisions.

The state called Dr. Eva McCullars, a psychiatrist who also evaluated Washington. Dr. McCullars reviewed Dr. Roy's report and conducted clinical interviews with Washington in June 1993. Dr. McCullars testified that she did not review Washington's DOC records, school records, or adult incarceration records. Dr. McCullars agreed that Washington suffered from diffuse brain damage, but concluded that Washington also suffered from antisocial personality disorder. On direct examination, the state asked Dr. McCullars whether diffuse brain damage could cause hyperkenesis (hyperactive behavior or attention deficit disorder). Dr. McCullars explained that "[hyperkenesis] is one example of diffuse brain damage." She went on to explain that several prominent individuals including Walt Disney and Thomas Edison exhibited hyperkinetic behavior as children. When questioned on cross examination, Dr. McCullars acknowledged that Washington came from a "significantly dysfunctional family." She also admitted that several of the markers for antisocial personality disorder, such as early truancy and an inability to maintain

employment, were more frequently associated with lower socio-economic status black adolescents when compared to the general population.

Robert Clarke, Washington's trial counsel, also testified at the PCR hearing. Clarke testified that he did not request Washington's education or corrections records because he believed his interviews with Washington, Skinner, Mondy and Bryant were sufficient. Clarke testified that he had "very extensive discussions" with Washington about what his life was like and any possible substance abuse issues. He also testified that he had "relatively extensive" discussions with Washington's mother, half-brother, and girlfriend. Clarke testified that, based on these interviews, "there wasn't anything that clued me in that there was a special problem that would suggest I should obtain those types of records." With respect to Washington's drug use, Clarke testified that Washington never told him that he was addicted to cocaine or that he was using cocaine on the night of the murder. When questioned on the matter, Clarke acknowledged that Bryant had told Clarke that Washington had a "cocaine problem," but that he did not investigate further.

In a written order, Judge Bradshaw held that Washington was not entitled to relief for ineffective assistance of counsel at the penalty phase. Judge Bradshaw credited Dr. McCullars's findings that Washington had antisocial personality disorder and was poorly adjusted to living in society. However, Judge Bradshaw concluded that "there is nothing . . . which lessened his ability to differentiate right from wrong or conform his actions with the law." Judge Bradshaw also explained that he had been aware at the time of sentencing that Washington had been doing well while incarcerated. Judge Bradshaw further reasoned that any drug and alcohol dependency "taken separately or with any

other mitigating circumstance or circumstances would [not] have mitigated against the sentence [Washington] has received."

C

On April 25, 1995, the Arizona Supreme Court summarily denied Washington's petition for review of the PCR court's decision. Washington then commenced his habeas action in the federal district court, culminating in this appeal.

In his amended federal habeas corpus petition, Washington raised 17 claims. The district court determined that claims 1, 2, 3 (in part), 6, 7, 8 (in part), 9, 11 (in part), 12, 14 (in part), 16, and 17 were procedurally barred. On April 22, 2005, the district court rejected the remaining claims on their merits and dismissed the petition. Washington filed a motion to alter the judgment on May 5, 2005, which the district court denied on June 8, 2005.

On July 11, 2005, Washington filed an untimely notice of appeal from the district court's denial of habeas relief. A three-judge panel of this court held that it lacked jurisdiction and affirmed the district court's denial of Rule 60(b) relief. *Washington v. Ryan*, 789 F.3d 1041 (9th Cir. 2015). The court then granted Washington's motion for en banc rehearing. *Washington v. Ryan*, 811 F.3d 299 (9th Cir. 2015). In a 6–5 decision, the en banc panel held that Washington was entitled to relief under Rule 60(b)(1) and (6) from his untimely notice of appeal and ordered the district court to "vacate and reenter its judgment denying Washington's petition for writ of habeas corpus, *nunc pro tunc*, June 9, 2005," to render the notice of appeal timely. *Washington v. Ryan*, 833 F.3d 1087, 1102 (9th Cir. 2016). The United States Supreme Court denied the state's petition

for writ of certiorari. *Ryan v. Washington*, 137 S. Ct. 1581 (2017) (mem.).

In his opening brief, Washington raised three certified issues and four uncertified issues. In this opinion, we address Washington's certified claim for ineffective assistance of counsel at the penalty phase. The remaining issues are addressed in a memorandum disposition filed concurrently with this opinion.

II

We review *de novo* a district court's decision to grant or deny a habeas petition under 28 U.S.C. § 2254. *See Bean v. Calderon*, 163 F.3d 1073, 1077 (9th Cir. 1998). Because Washington filed his habeas petition before the enactment of AEDPA, the provisions of AEDPA do not apply to this case. *Id.* (citing *Jeffries v. Wood*, 114 F.3d 1484, 1495–96 (9th Cir. 1997) (en banc)). Instead, we review the claim under the familiar standard set out in *Strickland* and its progeny without the added deference required under AEDPA.

III

To prevail on his claim for ineffective assistance of counsel, Washington must establish that Clarke's performance was deficient and that he suffered prejudice as a result. *See Strickland*, 466 U.S. at 687–89. To establish deficient performance, Washington must show that "counsel's representation fell below an objective standard of reasonableness." *Id.* at 688. To establish prejudice, Washington must show that there is "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694. These are formidable barriers to habeas corpus

petition relief in federal court to state prisoners even absent application of AEDPA.

A

To prevail under *Strickland's* performance prong, Washington must show that his "counsel's representation fell below an objective standard of reasonableness." *See Strickland*, 466 U.S. at 688. Even without the added layer of deference to the state court decision under AEDPA, "[s]urmounting *Strickland's* high bar is never an easy task." *Padilla v. Kentucky*, 559 U.S. 356, 371 (2010). In articulating the standard against which counsel's performance should be judged, the *Strickland* Court emphasized the deference due to a lawyer's decisions both as to scope of investigation and decisions made after investigation: "[S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable. . . ." *Strickland*, 466 U.S. at 690. We have likewise recognized the wide latitude to be given to counsel's tactical choices. *See, e.g.*, *United States v. Ferreira-Alameda*, 815 F.2d 1251, 1253 (9th Cir. 1993) ("Review of counsel's performance is highly deferential and there is a strong presumption that counsel's conduct fell within the wide range of reasonable representation.").

But our deference to counsel's performance is not unlimited. As the Court explained in *Strickland*, counsel's strategic choices made after less than complete investigation are reasonable only to the extent that "reasonable professional judgments support the limitations on investigation." 466 U.S. at 690–91.

The mitigation obligation applies even when a person is clearly guilty. *See Penry v. Lynaugh*, 492 U.S. 302, 318–20 (1989), *abrogated on other grounds by Atkins v. Virginia*,

536 U.S. 304 (2002) ("[R]ather than creating a risk of an unguided emotional response, full consideration of evidence that mitigates against the death penalty is essential if the jury is to give a 'reasoned moral response to the defendant's background, character, and crime.'" (quoting *Franklin v. Lynaugh*, 487 U.S. 164, 184 (1988), *abrogated on other grounds by Atkins*, 536 U.S. 304)). Indeed, that is a key point of the penalty phase of a capital case, which proceeds only after a determination of guilt in the earlier phase. *See Gregg*, 428 U.S. at 191–92 (endorsing the use of a bifurcated trial to determine guilt and penalty). In the penalty phase, the focus shifts from guilt to culpability, and evidence on both aggravating and mitigating factors is properly considered. *See* Ariz. Rev. Stat. Ann. § 13-751 (2018) (identifying statutory aggravating and mitigating circumstances in capital-eligible cases); *Buchanan v. Angelone*, 522 U.S. 269, 275–76 (1998) (observing that the penalty phase of capital sentencing involves a determination of eligibility, where "the jury narrows the class of defendants eligible for the death penalty, often through consideration of aggravating circumstances," and selection, where "the jury determines whether to impose a death sentence on an eligible defendant" and must consider "any constitutionally relevant mitigating evidence").

At the penalty phase, "[a] decision not to . . . offer particular mitigating evidence is unreasonable unless counsel has explored the issue sufficiently to discover the facts that might be relevant to his making an informed decision." *Lambright v. Schriro*, 490 F.3d 1103, 1116 (9th Cir. 2007); *see also Ainsworth v. Woodford*, 268 F.3d 868, 874 (9th Cir. 2001) (holding counsel's performance was ineffective where counsel "failed to adequately investigate, develop, and present mitigating evidence to the jury even

though the issue before the jury was whether [the defendant] would live or die").

Washington asserts that Clarke erred by not reviewing his education records and incarceration records. "In preparing for the penalty phase of a capital trial, defense counsel has a duty to 'conduct a thorough investigation of the defendant's background' in order to discover all relevant mitigating evidence." *Robinson v. Schriro*, 595 F.3d 1086, 1108 (9th Cir. 2010) (quoting *Correll v. Ryan*, 539 F.3d 938, 942 (9th Cir. 2008)). We have recognized that, "[a]t the very least, counsel should obtain readily available documentary evidence such as school, employment, and medical records." *Id.* at 1109. Clarke did not request or review any such records and provided no tactical reason for his failure to do so. Instead, Clarke relied entirely on his interviews with Washington, Skinner, Mondy, and Bryant and testified that he did not believe other sources of information would have been fruitful. Clarke's failure to review these basic and readily-available sources of mitigating information fell below prevailing professional norms at the time. *See id.*

Washington also alleges that Clarke erred by not retaining an expert to conduct a psychological evaluation. A psychological evaluation at the penalty phase is not always required. *Gentry v. Sinclair*, 705 F.3d 884, 900 (9th Cir. 2013). Instead, "[t]rial counsel has a duty to investigate a defendant's mental state if there is evidence to suggest that the defendant is impaired." *Douglas v. Woodford*, 316 F.3d 1079, 1085 (9th Cir. 2003).

In assessing counsel's performance, we must keep in mind that "[i]t is imperative that all relevant mitigating information be unearthed for consideration at the capital sentencing phase." *Caro v. Calderon*, 165 F.3d 1223, 1227 (9th Cir. 1999). Whereas evidence of mental impairment is

relevant at the guilt phase of a capital trial if it tends to negate the mens rea and criminal liability, evidence of mental impairment is relevant at the penalty phase for broader purpose; namely, where it "might provide a basis for refusing to impose the death penalty on a particular individual, notwithstanding the severity of his crime or his potential to commit similar offenses in the future." *Abdul-Kabir v. Quarterman*, 550 U.S. 233, 246 (2007); *see also McKoy v. North Carolina*, 494 U.S. 433, 440 (U.S. 1990) ("Relevant mitigating evidence is evidence which tends logically to prove or disprove some fact or circumstance which a fact-finder could reasonably deem to have mitigating value." (quotation omitted)). In light of the broad scope of evidence relevant to mitigation at the penalty phase of a capital case, we have recognized that counsel's duty to investigate possible psychological mitigation evidence is higher at the penalty phase than it might be during the guilt phase of trial: "At the penalty phase, counsel's duty to follow up on indicia of mental impairment is quite different from—and much broader and less contingent than—the more confined guilt-phase responsibility." *Bemore v. Chappell*, 788 F.3d 1151, 1171 (9th Cir. 2015).

We may conclude, *arguendo*, that based solely on the limited facts known to Clarke during his investigation—which included Clarke's discussions with Washington and his friends and family, but not Washington's education and incarceration records—Clarke's decision not to seek a psychological evaluation was not objectively unreasonable. But our analysis does not end there. In a case such as this, the question under *Strickland* is "whether the investigation supporting [counsel's] decision not to introduce mitigating evidence . . . was itself reasonable." *Id.* (alterations in original) (quoting *Wiggins v. Smith*, 539 U.S. 510, 523 (2003)).

As discussed above, Clarke performed unreasonably by not reviewing Washington's education and incarceration records. We must therefore determine whether, if Clarke had performed reasonably in reviewing those records, he would have uncovered information that would have prompted him to obtain a psychological evaluation for Washington. *See Rompilla v. Beard*, 545 U.S. 374, 390–93 (2005). We conclude that an objectively reasonable lawyer would have done so. If Clarke had reviewed Washington's education and incarceration records, he would have seen that Washington's elementary school had placed Washington in classes for the educable mentally retarded and that the DOC had indicated that Washington had a low IQ. Although the Supreme Court had not yet recognized that the Eighth Amendment bars the execution of mentally retarded individuals at the time of Washington's penalty trial, *Atkins*, 536 U.S. at 321, the Court had made clear that evidence of mental retardation was important mitigation evidence that should be presented at the penalty phase, *Penry*, 492 U.S. at 322–24 (noting that evidence of a defendant's mental retardation may render him less culpable for his crime). A reasonable attorney would have investigated the potential that Washington may have been mentally retarded after reviewing Washington's education and incarceration records.

In sum, although Clarke did not perform unreasonably by not requesting a psychological evaluation based on the evidence known to him at the time, his unreasonable failure to review Washington's education and incarceration records prevented Clarke from gaining information that would have led him to request a psychological evaluation. *See Rompilla*, 545 U.S. at 390–93 (concluding that counsel erred by failing to review defendant's prison file, which would have prompted counsel to further investigate potential

psychological mitigation evidence). As discussed below, these errors prevented Washington from presenting substantial mitigation evidence at the penalty phase.

Washington also argues that Clarke erred by not investigating and presenting evidence of his childhood abuse. Through his conversations with Dr. Roy, Washington revealed that he suffered physical abuse as a child in the form of daily whippings and beatings. Roy was also told that Washington was given alcohol as a child to control his behavior. None of this information later given to Dr. Roy had come to Clarke's attention during the trial. By contrast, both psychological experts who testified at the PCR hearing agreed that Washington's childhood was significantly dysfunctional. Unlike other categories of information that are easily verified through documentary evidence, Clarke had to rely entirely on the word of Washington and his family members in determining whether Washington suffered childhood abuse. Because neither Washington nor his family members had then indicated that Washington suffered abuse as a child, Clarke did not err by not further investigating Washington's childhood abuse, to the extent that he could have, or by not presenting the information he did not have regarding abuse at the sentencing hearing. *See Strickland*, 466 U.S. at 691 ("[W]hen a defendant has given counsel reason to believe that pursuing certain investigations would be fruitless or even harmful, counsel's failure to pursue those investigations may not later be challenged as unreasonable.").

Finally, Washington alleges that Clarke erred by not investigating and presenting evidence of his substance abuse. Again, Clarke did not err by failing to investigate Washington's substance abuse, because Clarke reasonably relied on his conversations with Washington and his friends

and family, wherein substance abuse was not indicated. Washington had told Clarke that he was heavily intoxicated on the night of the crimes, but he denied that he had any ongoing problems with drugs or with alcohol. Similarly, Washington's mother described him as someone who "liked to party," but also did not say that Washington had problems with addiction. Perhaps the single clue Clarke had that might have raised his suspicions about substance abuse was the statement of Washington's girlfriend that Washington had a "cocaine problem." However, when set against Washington's own statements and those of his family members, Clarke's decision not to further investigate Washington's drug abuse was not objectively unreasonable.

In summary, Clarke performed ineffectively by not reviewing Washington's education and incarceration records. If Clarke had performed effectively, he would have known about and acted on information regarding Washington's potentially impaired cognitive function. While we recognize that, as a general rule, deficient lawyer performance should be found only in exceptional cases presenting extraordinarily poor performance, we nonetheless conclude that the record here amply demonstrates that Clarke's representation of Washington at the penalty phase was objectively unreasonable and deficient for the reasons articulated above.

B

Relief for ineffective assistance of counsel under *Strickland* requires both deficient performance in representation and prejudice. Even in light of Clarke's performance, Washington can succeed on his ineffective assistance of counsel claim only if Clarke's performance resulted in prejudice. To establish prejudice, Washington must 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. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* To determine whether a reasonable probability exists that the sentencing judge would not have imposed the death sentence in light of the mitigation evidence, we "reweigh the evidence in aggravation against the totality of the available mitigating evidence." *Wiggins*, 539 U.S. at 534.

Here, as a result of Clarke's performance, the sentencing court did not hear any evidence concerning Washington's potentially impaired cognitive functions or his possible mental retardation. However, to establish that those omissions prejudiced him, Washington must show that there is a reasonable probability that he would have received a different sentence if those materials and evidence had been introduced at sentencing. *Strickland*, 466 U.S. at 694. Washington faces a significant obstacle in doing so, because we need not guess at whether the outcome would have been different if that evidence had been available to the court at sentencing. The sentencing judge, Judge Bradshaw, considered that evidence during the PCR proceeding and concluded in a written order that those materials would not have made a difference. Judge Bradshaw's unequivocal ruling might ordinarily persuade us that Washington cannot show prejudice. The materials that Clarke missed, though they undoubtedly had mitigating value, were not so overwhelming that they influenced Judge Bradshaw's no-prejudice finding.

However, the case of Washington's co-defendant, Fred Robinson, casts a long shadow on our prejudice analysis

here.[2] In *Robinson v. Schriro*, we considered Fred Robinson's habeas corpus petition. 595 F.3d at 1098–99. That case is important here because Washington and Robinson were tried and sentenced together, and their convictions and sentences were affirmed in state court following joint PCR proceedings, in nearly identical written orders. Like Washington, Robinson alleged that he received ineffective assistance of counsel based on his trial counsel's failure to present mitigation evidence at the penalty phase. *Id.* at 1108–10. Judge Bradshaw (like here) concluded that the mitigation evidence Robinson produced in the state PCR proceeding would not have made a difference. Yet, we determined that Judge Bradshaw, who presided at both Robinson's and Washington's trial and PCR proceedings, applied an unconstitutional "nexus test" in considering Robinson's newly-presented mitigation evidence.[3]

[2] We recognize that the Supreme Court has said that each case assessing deficiency or prejudice must be judged on its own facts, in a separate determination, and that a broad general rule could not be used. *See Strickland*, 466 U.S. at 696 ("[I]n adjudicating a claim of actual ineffectiveness of counsel, a court should keep in mind that the principles we have stated do not establish mechanical rules."). However, we also recognize that longstanding principles of justice demand that like cases be treated alike, *see, e.g.*, H.L.A. Hart, *The Concept of Law* 159–166 (3d ed. 2012), and the relevant aspects of Robinson's and Washington's cases are substantially congruent for the purposes of our prejudice analysis.

[3] Arizona's nexus test required that mitigation evidence must have a direct or causal relationship with the crime itself. *See State v. Djerf*, 959 P.2d 1274, 1289 (Ariz. 1998). However, as we explained in *Robinson*, the nexus test is unconstitutional, and federal law is clear that a sentencing court must consider all mitigating evidence. *See, e.g.*, *Smith v. Texas*, 543 U.S. 37, 45 (2004) (rejecting a Texas court's refusal to consider mitigating evidence unless there was a "nexus" between the mitigating circumstance and the murder); *Tennard v. Dretke*, 542 U.S. 274, 283 (2004) (rejecting a Fifth Circuit test that barred the

Therefore, we concluded that Judge Bradshaw had not "properly evaluated the mitigating evidence offered in the evidentiary hearing," 595 F.3d at 1113, and that the possibility that Judge Bradshaw would have imposed a sentence other than death if he had applied the correct standard when considering that evidence was enough to establish prejudice. *Id*.

Turning now to this case, Judge Bradshaw committed precisely the same error by imposing the nexus test when evaluating Washington's mitigation evidence. Evidence of brain damage and mental disorders is important to the mitigation analysis. *See, e.g.*, *Daniels v. Woodford*, 428 F.3d 1181, 1209 (9th Cir. 2005); *Caro v. Woodford*, 280 F.3d 1247, 1258 (9th Cir. 2002) ("More than any other singular factor, mental defects have been respected as a reason for leniency in our criminal justice system."); *Mitchell v. United States*, 790 F.3d 881, 903–04 (9th Cir. 2015) ("Evidence that [Petitioner] was a chronic user of alcohol and drugs from a young age is the kind of 'classic mitigating evidence' that counsel must pursue at the penalty phase . . . ."). However, when evaluating Washington's newly-presented evidence of diffuse brain damage, Judge Bradshaw discounted the value of the evidence because "[there was nothing] at the time of the offenses, which lessened his ability to differentiate right from wrong or to conform his actions with the law." As we concluded in *Robinson*, Judge Bradshaw's analysis erroneously demanded that the newly-presented evidence relate to Washington's guilt for the charged offense, a standard that has been squarely rejected by the United States

consideration of mitigating evidence unless "the criminal act was attributable to [a] severe permanent condition").

Supreme Court. *See, e.g.*, *Smith*, 543 U.S. at 45; *Tennard*, 542 U.S. at 283.

Thus, we must conclude here that there is a reasonable probability that the outcome of sentencing would have been different if the trial court had been presented with evidence of Washington's cognitive defects and had properly evaluated that evidence consistently with the Supreme Court decision in *Smith*. As in *Robinson*, our confidence in the Arizona court's imposition of the death sentence has been undermined, and we remand.

IV

Washington received ineffective assistance of counsel at the penalty phase and was prejudiced thereby. He is thus entitled to relief in the form of a new penalty phase trial. We reverse the district court's denial of a writ of habeas corpus as to the penalty phase and remand with instructions to grant the writ of habeas corpus unless the state court undertakes resentencing proceedings within a reasonable time to be determined by the district court.[4]

[4] The majority's reasoning throughout its opinion responds in substance to the contentions asserted by the dissent, and we do not address all of the dissent's errors of reasoning and disregard of precedent here. However, we include the following points in brief response to the contentions of the dissent: First, the dissent without any proper basis asserts that the majority has stated the *Strickland* standard but then "might have applied" a different standard. Our majority opinion discusses and applies the *Strickland* standard. Second, the dissent relies on Judge Bradshaw's conclusion that the new evidence would not have made a difference. But this ignores Supreme Court precedent that made clear the Arizona sentencing judge could not have constitutionally required a causal nexus between the mitigation evidence and the crimes. As explained *supra* at 20–22, that erroneous premise almost certainly

REVERSED and **REMANDED** for issuance of a writ of habeas corpus.[5]

CALLAHAN, Circuit Judge, dissenting:

I dissent. A jury properly convicted Theodore Washington for the murder of Sterleen Hill and the attempted murder of Ralph Hill, and the trial court judge properly sentenced him to death. Washington's claim of ineffective assistance of counsel presents no basis for vacating his sentence.

The majority errs in its application of both prongs of *Strickland v. Washington*, 466 U.S. 668 (1984). First, in second-guessing the performance of Theodore Washington's trial counsel, the majority uses a standard for gross incompetence that doesn't square with precedent. A post-conviction petition can always point to something that trial counsel should have done differently. Here, more than 30 years after Washington was sentenced to death, the majority grants Washington relief because his trial counsel failed to investigate Washington's education and incarceration records. But trial counsel's performance was

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affected Judge Bradshaw's assessment. Third, the dissent does not correctly apply the Supreme Court's precedent in *Eddings v. Oklahoma*, 455 U.S. 104 (1982) (suggesting that the sentencer in a capital case cannot "refuse to consider, as a matter of law, any relevant mitigating evidence" offered by the defendant), and *Smith v. Texas*, 543 U.S. 37 (2004) (holding that there may not be a requirement of a causal nexus between mitigation evidence and the crime).

[5] In a separate memorandum disposition filed simultaneously with this opinion, we affirm against all other issues raised by Washington.

reasonable because his extensive discussions with Washington and Washington's family and friends gave him no reason to suspect that those records contained helpful information.

Second, the majority doesn't hold Washington to his heavy burden of showing prejudice. Instead, the majority erroneously presumes prejudice. The evidence that the majority concludes Washington's trial counsel should have unearthed would not have fundamentally altered the narrative counsel competently (even if not perfectly) presented at sentencing. Indeed, we need not guess whether the new evidence would have made a difference at sentencing because the same judge who sentenced Washington to death (Judge Bradshaw) later presided over the post-conviction review proceedings. Judge Bradshaw unequivocally concluded the new evidence would not have made a difference. His "unique knowledge of the trial proceedings"—including his front-row seat to the presentation of evidence showing brutality of the execution-style murder of Sterleen Hill—"render[ed] him 'ideally situated'" to evaluate Washington's claim at post-conviction review. *Murray v. Schriro*, 882 F.3d 778, 818, 821 (9th Cir. 2018) (quoting *Schriro v. Landrigan*, 550 U.S. 465, 476 (2007)). There is no good reason for us to dismiss Judge Bradshaw's conclusion from our lofty perch 25 years later.

I.

Before describing the lengthy procedural history of the case, the majority opinion briefly describes the home invasion turned execution-style murder. As this case wound its way through the courts, what has been lost is the cruelty and senselessness of the defendants' acts.

The victims, Sterleen and Ralph Hill, were bound, and forced to lie face down on their bedroom floor in preparation to be shot, execution-style, with a shotgun. Sterleen was forced to listen helplessly as her husband was shot first and then wait as the shotgun was reloaded, knowing that she would be next. Had the Hills' teenage son, LeSean, not run off, it is evident that he would have suffered the same fate. (Ralph testified he heard a voice in the background say, "We better get the kid."). The murder and attempted murder appear to have been completely unnecessary to the completion of the robbery. It does not appear that the victims could have identified the defendants, and there was no sign of struggle. There simply was no need to kill.

The panel unanimously agrees that substantial evidence supports the jury's finding that Washington was one of the men who carried out the execution-style murder and attempted murder of the Hills. The heinous nature of the crimes led the sentencing judge to impose the death penalty. The panel also agrees the state court's application of the aggravating factors warranting the death sentence was proper.

II.

The principles underlying and governing a claim of ineffective assistance of counsel are familiar. But they bear repeating here because the majority strays from them. "The right to counsel is a fundamental right of criminal defendants; it assures the fairness, and thus the legitimacy, of our adversary process." *Kimmelman v. Morrison*, 477 U.S. 365, 374 (1986). "[T]he right to counsel is the right to the effective assistance of counsel." *Strickland*, 466 U.S. at 686 (quoting *McMann v. Richardson*, 397 U.S. 759, 771 n.14 (1970)). Under *Strickland*'s two-part test for claims of ineffective assistance of counsel, a convicted defendant must

show (1) constitutionally deficient performance by counsel (2) that prejudiced the defense. *Id.* at 687.

"The essence of an ineffective-assistance claim is that counsel's unprofessional errors so upset the adversarial balance between defense and prosecution that the trial was rendered unfair and the verdict rendered suspect." *Kimmelman*, 477 U.S. at 374. "As is obvious, *Strickland*'s standard, although by no means insurmountable, is highly demanding." *Id.* at 382; *see also Padilla v. Kentucky*, 559 U.S. 356, 371 (2010) ("Surmounting *Strickland*'s high bar is never an easy task."). "Only those habeas petitioners who can prove under *Strickland* that they have been denied a fair trial by the gross incompetence of their attorneys will be granted the writ . . . ." *Kimmelman*, 477 U.S. at 382.

"When counsel focuses on some issues to the exclusion of others, there is a strong presumption that he did so for tactical reasons rather than through sheer neglect." *Yarborough v. Gentry*, 540 U.S. 1, 8 (2003) (citing *Strickland*, 466 U.S. at 690). Even if inadvertence (not tactical reasoning) results in non-pursuit of a particular issue, "relief is not automatic. The Sixth Amendment guarantees reasonable competence, not perfect advocacy judged with the benefit of hindsight." *Id.*

III.

The majority pays lip service to the rules placing an exacting burden on an inmate claiming ineffective assistance of counsel, but it doesn't actually hold Washington to

Strickland's "highly demanding" standard. *See Kimmelman*, 477 U.S. at 382.[1]

A.

Washington failed to meet his burden on the first *Strickland* prong. I agree with the majority's conclusion that much of the alleged deficiencies of counsel do not amount to gross incompetence. The majority is wrong, however, in concluding that Washington's trial counsel, Robert Clarke, provided constitutionally deficient performance by failing to obtain and review Washington's education and incarceration records.

First, the record does not support the majority's implicit suggestion that the education records themselves contain meaningful mitigation evidence. The majority states that the sentencing court did not hear evidence concerning Washington's "possible mental retardation." Maj. Op. at 20. The only conceivable evidence for such a possibility is a notation in a 1965 education record (from when Washington was five years old) of the need for placement in special classes for the "educable mentally retarded." But that single, decades-old notation is inconsequential when compared with more than ten additional years of schooling in the general population. And any suggestion that the school records showed a low IQ is contradicted by later IQ testing by Washington's own expert, Dr. Roy. Washington has never even suggested the possibility of mental retardation.

[1] The Supreme Court has on occasion corrected our court for reciting yet straying from *Strickland*. *See, e.g.*, *Wong v. Belmontes*, 558 U.S. 15, 27–28 (2009) (reversing where the Ninth Circuit recited the correct standard for prejudice but its analysis "suggested it might have applied" a different standard).

In short, the district court was correct in observing that Washington "presented no evidence that either his school records or his California incarceration records would have revealed potential mitigation."[2]

Second, even assuming it were proper to conclude so reflexively that the failure to obtain the education records was categorically incompetent, that conclusion alone wouldn't justify the majority's finding of incompetence. Instead, the majority's holding necessarily requires a second layer of attorney deficiency. To the majority, if Clarke had reviewed Washington's education records, he would have seen the 1965 notation about the need for placement in special classes. Upon seeing that notation, the majority reasons, all but the grossly incompetent lawyer would obtain a psychological evaluation—even absent any other indications from Washington's life since kindergarten of subnormal mental capacity.

[2] As for the incarceration records, Washington, through his able habeas counsel, points out that Clarke never obtained them, but he does not even assert that, let alone explain why, such a failure was constitutionally deficient. Nor does Washington indicate in his briefs what the incarceration records would have revealed. The majority doesn't supply the missing reasoning or the missing description of mitigation evidence in the incarceration records. We have held that *Strickland*'s prejudice prong cannot be satisfied without "specification of the mitigating evidence that counsel failed to unearth." *Cox v. Del Papa*, 542 F.3d 669, 681 (9th Cir. 2008). In the post-conviction review proceedings, there was a suggestion that the incarceration records might show good behavior. But Judge Bradshaw (who both sentenced Washington and presided over the post-conviction review proceedings) stated that he was already aware of Washington's good behavior at the time of sentencing.

The majority is too quick to find gross incompetence. If Clarke had obtained the education records and seen the single notation from over twenty years earlier indicating a need for placement in special education classes, that notation would have been considered in context with everything else Clarke learned about Washington's background. Clarke's investigation included "extensive discussions" with Washington and Washington's family and friends. Clarke asked Washington and his family members about whether Washington "had any propensity to violence," "about his drug use," "about his alcohol intake," "about whether or not he was abused, growing up," about "what discipline was like," and "things of that nature." For example, from his interviews, Clarke knew that Washington went to school in the general population and that he struggled in high school, dropping out in tenth or eleventh grade.[3] At the post-conviction review hearing, Clarke testified that, in all the interviews with Washington and his family, nothing triggered any red flags signaling that further investigation would have been fruitful. Clarke stated that he considered that Washington's family members would make better witnesses than a psychologist who might examine Washington for a relatively brief period. The majority's conclusion that only the grossly incompetent lawyer would not have obtained a psychological evaluation under these circumstances cannot be squared with *Strickland*'s deferential standard for determining the competence of counsel. *See Yarborough*, 540 U.S. at 8 ("The Sixth Amendment guarantees reasonable competence, not perfect advocacy judged with the benefit of hindsight.").

[3] Among the evidence Clarke presented at trial was testimony about Washington struggling in school and dropping out in tenth or eleventh grade.

Under the deferential standard required by *Strickland* and its progeny, Clarke's investigation was thorough and his performance was reasonable. If Clarke's performance amounts to the "gross incompetence" habeas relief is reserved for, it's doubtful many attorneys could withstand the second-guessing scrutiny of the majority's approach for determining constitutional competence.

B.

"The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Strickland*, 466 U.S. at 686. *Strickland* "requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Id.* at 687. To prove prejudice, a defendant must show "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 694.

"It is not enough 'to show that the errors had some conceivable effect on the outcome of the proceeding.' Counsel's errors must be 'so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.'" *Harrington v. Richter*, 562 U.S. 86, 104 (2011) (citations omitted) (quoting *Strickland*, 466 U.S. at 693, 687). Although the reasonable probability standard "does not require a showing that counsel's actions 'more likely than not altered the outcome,' . . . the difference between *Strickland*'s prejudice standard and a more-probable-than-not standard is slight and matters 'only in the rarest case.'" *Id.* at 111–12 (quoting *Strickland*, 466 U.S. at 693, 697); *see*

id. at 112 ("The likelihood of a different result must be substantial, not just conceivable.").

To determine whether Washington has met his burden of showing prejudice, we must "reweigh the evidence in aggravation against the totality of available mitigating evidence." *Wiggins v. Smith*, 539 U.S. 510, 534 (2003). This comparison cannot be made without first clearly identifying the evidence in mitigation that would have been offered at the penalty phase of trial but for counsel's grossly incompetent performance. The majority concludes that Clarke's incompetence resulted in the omission of "evidence concerning Washington's potentially impaired cognitive functions."[4] Maj. Op. at 20. By this, the majority presumably refers to Dr. Roy's conclusion that Washington had symptoms of diffuse brain damage, likely caused by multiple head injuries while Washington was young. Dr. Roy further concluded that diffuse brain damage contributes to a "lack of judgment" and an "inability to establish stability in life."

In reweighing this evidence, we must take as our baseline the evidence of aggravation and mitigation offered at trial and the resulting sentence.[5] After considering the details of

[4] The majority also suggests the omitted evidence includes Washington's "possible mental retardation." Maj. Op. at 20. As discussed above, that possibility has been ruled out and Washington himself has never claimed (even now) a possibility of mental retardation.

[5] The majority quotes Milton in suggesting that the sentencing judge has "the power 'to temper justice with mercy.'" Maj. Op. at 5 n.1. Although that is valid as an abstract proposition, it tells us nothing about—and even obfuscates—the proper analysis under *Strickland*. Because a sentencing judge (or jury) has the power of leniency in *every* capital case, it's always possible that, as the majority states, "[t]he

the brutal, execution-style murder and attempted murder, and weighing it against the mitigation evidence Washington's counsel presented, Judge Bradshaw sentenced Washington to death. With that starting point in mind, we must undertake the theoretical inquiry of determining whether it is reasonably likely that Washington would have received a different sentence if the new mitigation evidence were to be added to the mix of mitigation evidence that was presented at trial.

Of course, no guesswork is needed here. We know that Washington's new evidence would not have made a difference because the sentencing judge said so. *See Cook v. Ryan*, 688 F.3d 598, 612 (9th Cir. 2012) (finding no prejudice where "the same trial judge who sentenced" the petitioner to death stated that the new evidence "would not have made any difference"). Judge Bradshaw "considered *all* of [the new] information in the post-conviction hearing and" definitively "held that none of it would have altered his judgment as to the proper penalty for" Washington. *Gerlaugh v. Stewart*, 129 F.3d 1027, 1036 (9th Cir. 1997).

A fair evaluation of the evidence in light of Supreme Court precedent confirms the soundness of Judge Bradshaw's finding of no prejudice. Because of *Strickland*'s

sentencing judge might have decided that [the defendant] should be spared death and imprisoned for life." *Id.* at 4–5. That is true even if the hypothetical second trial were a redo of the first without any new evidence. Of course, in engaging in the *Strickland* prejudice analysis, we have to control for that. In other words, because we are rejecting Washington's other challenges to his sentence (i.e., he was properly convicted and sentenced to death), we must presume that he would have received the same sentence upon the same evidence. That is easier said than done; but we must do so to analyze properly whether Washington has met his burden of showing prejudice.

"highly demanding" standard, *Kimmelman*, 477 U.S. at 382, it's no surprise that petitioners have historically found little success bringing ineffective assistance of counsel claims. However, beginning in 2000, the Supreme Court found *Strickland*'s "high bar" satisfied in four cases involving claims of ineffective assistance of counsel at the penalty phase of a capital trial. *Williams v. Taylor*, 529 U.S. 362 (2000); *Wiggins*, 539 U.S. 510; *Rompilla v. Beard*, 545 U.S. 374 (2005); *Porter v. McCollum*, 558 U.S. 30 (2009). These decisions serve as guideposts for determining when relief is warranted in such cases.

In *Williams*, the jury fixed the punishment at death after hearing evidence of a long history of criminal conduct including armed robbery, burglary and grand larceny, auto thefts, violent assaults on elderly victims, and arson. 529 U.S. at 368. At sentencing, defense counsel offered very little evidence. *Id.* at 369.[6] In addressing Williams' *Strickland* claim, the Supreme Court cited "graphic" details "of Williams' childhood, filled with abuse and privation," evidence that Williams was "borderline mentally retarded," and other significant mitigation evidence that was not unearthed only because of counsel's deficient performance:

> [C]ounsel did not begin to prepare for that phase of the proceeding until a week before the trial. They failed to conduct an investigation that would have uncovered

[6] Counsel presented testimony from Williams' mother and two neighbors who briefly described Williams as a "nice boy" and non-violent. *Williams*, 529 U.S. at 369. They also played a taped excerpt from a statement by a psychiatrist that merely related "Williams' statement during an examination that in the course of one of his earlier robberies, he had removed the bullets from a gun so as not to injure anyone." *Id.*

> extensive records graphically describing Williams' nightmarish childhood, not because of any strategic calculation but because they incorrectly thought that state law barred access to such records. Had they done so, the jury would have learned that Williams' parents had been imprisoned for the criminal neglect of Williams and his siblings, that Williams had been severely and repeatedly beaten by his father, that he had been committed to the custody of the social services bureau for two years during his parents' incarceration (including one stint in an abusive foster home), and then, after his parents were released from prison, had been returned to his parents' custody.

Id. at 395, 398 (citation and footnote omitted). In concluding Williams had shown prejudice, the Court noted that the same judge who presided over the criminal trial heard Williams' post-conviction review claims. That trial judge, who initially "determined that the death penalty was 'just' and 'appropriate,' concluded that there existed 'a reasonable probability that the result of the sentencing phase would have been different'" if evidence developed in the post-conviction proceedings had been offered at sentencing. *Id.* 396–97.

In *Wiggins*, trial counsel focused their strategy at sentencing on arguing that the defendant was not directly responsible for the murder, and they did not present any other mitigation evidence, despite knowledge of at least some of the defendant's troubled background. 539 U.S. at 523–24. The Court cited "powerful" mitigation evidence that counsel either had, or should have, discovered. *Id.*

at 534–35. When Wiggins was a young child, his alcoholic mother frequently left him and his siblings home alone for days without food, "forcing them to beg for food and to eat paint chips and garbage." *Id.* at 516–17. The mother beat Wiggins and his siblings and had sex with men while her children slept in the same bed. *Id.* at 517. On one occasion, the mother forced Wiggins' hand against a hot stove burner, resulting in his hospitalization. *Id.* After being removed from his mother's custody and placed in foster care, Wiggins was physically abused and "repeatedly molested and raped" by one foster father, and gang-raped on multiple occasions by a foster mother's sons. *Id.* He ran away from one foster home and began living on the streets. *Id.* The Court held that had the jury been presented with Wiggins' "excruciating life history," rather than virtually no mitigation evidence, "there is a reasonable probability that at least one juror would have struck a different balance." *Id.* at 537.

In *Rompilla*, trial counsel undertook a number of efforts to investigate possible mitigating evidence, "including interviews with Rompilla and some members of his family, and examinations of reports by three mental health experts who gave opinions at the guilt phase," but none of these sources was helpful. 545 U.S. at 381. Notwithstanding these efforts, the Court found one "clear and dispositive" error by counsel. *Id.* at 383. Defense counsel knew the prosecution intended to seek the death penalty and would hinge its penalty case on Rompilla's prior conviction for rape and assault. *Id.* Counsel nevertheless failed to even look at the court file for the prior conviction; had they done so "they would have found a range of mitigation leads that no other source had opened up." *Id.* at 384, 390. The mitigation evidence that would have been available from simply looking at the files included, among other things:

> Rompilla's parents were both severe alcoholics who drank constantly. His mother drank during her pregnancy with Rompilla, and he and his brothers eventually developed serious drinking problems. His father, who had a vicious temper, frequently beat Rompilla's mother, leaving her bruised and black-eyed, and bragged about his cheating on her. His parents fought violently, and on at least one occasion his mother stabbed his father. He was abused by his father who beat him when he was young with his hands, fists, leather straps, belts and sticks. All of the children lived in terror. There were no expressions of parental love, affection or approval. Instead, he was subjected to yelling and verbal abuse. His father locked Rompilla and his brother Richard in a small wire mesh dog pen that was filthy and excrement filled. He had an isolated background, and was not allowed to visit other children or to speak to anyone on the phone. They had no indoor plumbing in the house, he slept in the attic with no heat, and the children were not given clothes and attended school in rags.

Id. at 391–92. All the evidence counsel failed to discover simply by failing to look at the court file of the prior conviction "add[ed] up to a mitigation case that bears no relation to the few naked pleas for mercy actually put before the jury." *Id.* at 393. The Court thus concluded there was a reasonable probability of a different result had counsel performed adequately. *Id.*

In *Porter*, penalty phase counsel offered scant evidence on behalf of Porter. "The sum total of the mitigating evidence was inconsistent testimony about Porter's behavior when intoxicated and testimony that Porter had a good relationship with his son." *Porter*, 558 U.S. at 32. Post-conviction review proceedings revealed several facts about Porter's "abusive childhood, his heroic military service and the trauma he suffered because of it, his long-term substance abuse, and his impaired mental health and mental capacity." *Id.* at 33.

> Porter routinely witnessed his father beat his mother, one time so severely that she had to go to the hospital and lost a child. Porter's father was violent every weekend, and by his siblings' account, Porter was his father's favorite target, particularly when Porter tried to protect his mother. On one occasion, Porter's father shot at him for coming home late, but missed and just beat Porter instead.

Id. Porter's company commander in the Army also offered a "moving" account of Porter's heroic efforts "in two of the most critical—and horrific—battles of the Korean War," for which Porter "received two Purple Hearts and the Combat Infantryman Badge, along with other decorations." *Id.* at 30, 34–35, 41. A neuropsychologist "concluded that Porter suffered from brain damage that could manifest in impulsive, violent behavior." *Id.* at 36. The expert also testified that "[a]t the time of the crime . . . Porter was substantially impaired in his ability to conform his conduct to the law and suffered from an extreme mental or emotional disturbance," which would have provided a basis for two statutory mitigating circumstances. *Id.*

In concluding Porter established prejudice, the Court reasoned that "[t]he judge and jury at Porter's original sentencing heard almost nothing that would humanize Porter or allow them to accurately gauge his moral culpability. They learned about Porter's turbulent relationship with [the victim], his crimes, and almost nothing else." *Id.* at 41. The Court emphasized the significance of Porter's military service, both because "he served honorably under extreme hardship and gruesome conditions" and because "the jury might find mitigating the intense stress and mental and emotional toll that combat took on Porter." *Id.* at 43–44.

Washington's case has little in common with *Williams*, *Wiggins*, *Rompilla* and *Porter*. First, *Porter* is distinguishable because of the Court's emphasis on the unique significance of military service in potentially mitigating against aggravating factors. *See Porter*, 558 U.S. at 43 ("Our Nation has a long tradition of according leniency to veterans in recognition of their service, especially for those who fought on the front lines as Porter did."). Likewise, *Rompilla* is distinguishable because there is no analog here to the "dispositive" failure of trial counsel in *Rompilla* to look at the records that prosecution had indicated would serve as the basis for its case for the death penalty.

Second, although the evidence of Washington's head injuries suggests a difficult childhood and perhaps provides a more complete picture of his background than was presented at trial, that evidence is not nearly as extreme as the mitigating evidence in the Supreme Court decisions. The head injuries and the suggested harsh discipline of Washington's mother are not comparable to the outright beatings and criminal neglect of Williams' parents, the starvation, neglect, physical abuse, molestation and rape,

and gang-rape Wiggins suffered at the hands of his mother and foster families, Rompilla being locked up with his brother "in a small wire mesh dog pen that was filthy and excrement filled," deprived of clothing, and beaten by his alcoholic father, or the other harrowing facts in those cases. *See Rhoades v. Henry*, 638 F.3d 1027, 1051 (9th Cir. 2011) ("Even the more complete picture portrayed in the proffer of Rhoades's dysfunctional family with its alcoholism, abuse, aberrant sexual behavior, and criminal conduct does not depict a life history of Rhoades himself that is nightmarish as it was for the petitioners in cases such as *Rompilla*, *Wiggins*, and *Williams*. . . .").

Even if we didn't have the benefit of Judge Bradshaw's finding of no prejudice, in considering how Washington's sentencing might have gone had his counsel presented the evidence that the majority concludes was unfairly omitted, I seriously doubt the sentencing judge would have elected not to impose the death penalty.

Although the majority acknowledges Washington's heavy burden of showing prejudice, it doesn't actually hold him to making such a showing. Nor does the majority even engage in the necessary reweighing of evidence. Instead, the majority effectively presumes prejudice, concluding that our decision in *Robinson v. Schriro*, 595 F.3d 1086 (9th Cir. 2010), casts such "a long shadow" that the question of whether Washington can show prejudice has already been decided. *See* Maj. Op. at 20–22. The majority perceives itself within the "shadow" of *Robinson* because Washington and Robinson were co-defendants, tried and sentenced together by the same judge, and the same judge denied their petitions for post-conviction review. But the sharing of a procedural history does not make two cases analogous. Only similarities on the issue in question—here, whether

counsel's performance was constitutionally deficient and whether any deficiency resulted in prejudice—can render cases analogous. On the issues of attorney competence and prejudice, the facts of *Robinson* starkly differ from the facts here.

Robinson's trial counsel "engaged in virtually no investigation" and "did not call a single witness or introduce any evidence" at the sentencing hearing. *Robinson*, 595 F.3d at 1109. In contrast, here, Clarke investigated potential mitigation evidence by having "very extensive" discussions with Washington about his background and by interviewing—both before trial and after the verdict—Washington's mother, brother, and common-law wife. Clarke also called three witnesses, each of whom offered testimony supporting a cogent narrative that Washington was friendly yet gullible, non-violent, and a loving father (and son) and that he desired to make something of his life.

In *Robinson*, the significance we placed on the utter failure of Robinson's counsel cannot be overstated. For starters, we based our finding of prejudice on counsel's non-performance because, under Arizona's death penalty statute at the time of sentencing, the "failure to present a mitigation defense all but assured the imposition of a death sentence." *Robinson*, 595 F.3d at 1111 (quoting *Summerlin v. Schriro*, 427 F.3d 623, 640 (9th Cir. 2005)). We also distinguished two Supreme Court cases—*Bobby v. Van Hook*, 558 U.S. 4 (2009) and *Wong*, 558 U.S. 15—on the basis that Robinson's counsel failed to put on *any* mitigation evidence. *Robinson*, 595 F.3d at 1111 n.21 (stating that in both *Bobby* and *Wong* "defense counsel presented a significant amount of mitigating evidence").

Because the utter failure of Robinson's counsel all but compelled a conclusion of prejudice, the state's best

argument perhaps was that the new evidence should be disregarded altogether because it lacked a "causal connection" to the crime. *See id.* at 1111–12. We rejected that argument based on Supreme Court precedent holding that evidence of a defendant's background and mental capacity is relevant to mitigation and cannot be ruled inadmissible simply because the defendant fails to show a causal connection between the evidence and the crime. *Id.* at 1112; *see Smith v. Texas*, 543 U.S. 37, 45 (2004) (reaffirming the holdings of *Eddings v. Oklahoma*, 455 U.S. 104 (1982), and *Tennard v. Dretke*, 542 U.S. 274 (2004)).

There is a difference, of course, between the *admissibility* of evidence and the *weight* given to that evidence. Thus, although a court must allow a defendant to present any mitigation evidence (think *Smith*/*Eddings*/*Tennard*), "the failure to establish . . . a causal connection may be considered in assessing the quality and strength of the mitigation evidence," *State v. Newell*, 132 P.3d 833, 849 (Ariz. 2006). *See McKinney v. Ryan*, 813 F.3d 798, 817–18 (9th Cir. 2015) (en banc) (referring to *Newell*'s rule as "proper[]"). The district court here recognized this difference. It "neither [mis]understood state law to preclude consideration of relevant proffered mitigation, nor to impose a minimum threshold before such mitigation could be considered." Consistent with that (correct) view of the law, the district court understood Judge Bradshaw to have "considered the mitigation [evidence] proffered to show prejudice, but [Judge Bradshaw] determined that it carried insufficient *weight* to alter the sentence." In my view, the district court correctly interpreted Judge Bradshaw's decision and the majority unfairly assumes that Judge Bradshaw didn't follow the law when nothing from his order compels such a conclusion. Judge Bradshaw stated that the information revealed from Washington's psychological evaluation for

the post-conviction review proceedings would not "have altered the sentence imposed."[7] Notably, Washington's able and zealous habeas counsel does not even contend Judge Bradshaw committed an *Eddings* error as to the psychological evidence.[8]

Washington has not met his burden of showing prejudice under *Strickland*. That is, the omission of the new mitigation

[7] In discussing Washington's evidence of substance abuse, Judge Bradshaw concluded that the asserted drug and alcohol dependence did not affect Washington's "ability to conform his actions to the demands of society." The quoted language "echoes the causal nexus test of" Arizona's (former) statutory mitigating factor for diminished capacity. *See McKinney*, 813 F.3d at 810; Ariz. Rev. Stat. § 13-703(G)(1) (2008). We held in *McKinney* that the causal nexus test applied in the context of this mitigating factor "does not violate *Eddings*." *McKinney*, 813 F.3d at 810. Had Judge Bradshaw said nothing more, it could be inferred that he failed to consider Washington's evidence for purposes of non-statutory mitigation. But Judge Bradshaw didn't stop there; the very next sentence in his order shows that he in fact considered the evidence. He concluded that the evidence of substance abuse, considered alone or together with other mitigation evidence, would not "have mitigated against the sentence [Washington] has received." The conclusion that the evidence of substance abuse lacked a causal nexus to the crime was thus appropriate because "a court 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).

[8] Washington's only assertion of an *Eddings* error is his claim that Judge Bradshaw was wrong to conclude that he could not consider the reversal of James Mathers' conviction as a mitigating factor. That contention is part of a claim we unanimously reject in a memorandum disposition filed concurrently with this opinion. Even if Judge Bradshaw failed to follow the law, it wouldn't justify the majority's de facto presumption of prejudice. An *Eddings* error by the post-conviction review court would mean, at most, that we give little or no weight to the state court's conclusion on prejudice. Such an error would not eliminate the need to assess prejudice under *Strickland*.

evidence did not deprive Washington of "a fair trial," *see Strickland*, 466 U.S. at 687, nor does the omission undermine my confidence that the trial "produced a just result," *see id.* at 686.

* * *

Washington and his two co-defendants were convicted and sentenced to death for the murder of Sterleen Hill and the attempted murder of Ralph Hill. Anyone following this case is aware that one of Washington's co-defendants had his conviction overturned and the other had his sentenced vacated. Under these circumstances, there is a temptation to bend the governing legal standards to equalize the outcomes for the three defendants in an effort "to achieve what appears a just result." *Holland v. Florida*, 560 U.S. 631, 673 (2010) (Scalia, J., dissenting). However enticing the impulse, that is not our role. Ours is the duty to apply the law to determine whether Washington has met his high burden of showing a constitutional violation that deprived him of a fair trial. He has not.

Today's decision is neither just nor faithful to *Strickland*'s standard. The majority "succumbs to the very temptation that *Strickland* warned against"—cherry-picking the record "to second-guess counsel's assistance" through the "distorting" lens of "hindsight." *Rompilla*, 545 U.S. at 408 (Kennedy, J., dissenting). The majority also discredits the sentencing judge's own conclusion—based on his front-row seat at trial—that the evidence presented on post-conviction review would not have made a difference. Washington received a fair trial. The only injustice here is our unwarranted interference with Arizona carrying out the penalty lawfully chosen by the sentencing judge. We cannot bend the legal standards to "correct" Judge Bradshaw's choice against leniency. Although Judge Bradshaw had the

power to temper justice with mercy, in our role as federal appellate judges on habeas review, we do not.

I respectfully dissent.

APPENDIX E

NOT FOR PUBLICATION

FILED

APR 17 2019

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

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

THEODORE WASHINGTON, Petitioner-Appellant, v. CHARLES L. RYAN, Warden, Respondent-Appellee.	No. 05-99009 D.C. No. CV-95-02460-JAT MEMORANDUM*

Appeal from the United States District Court
for the District of Arizona
James A. Teilborg, District Judge, Presiding

Submitted September 26, 2018**
Pasadena, California

Before: GOULD, CALLAHAN, and N.R. SMITH, Circuit Judges.

Arizona state prisoner Theodore Washington was sentenced to death in 1987 for the first degree murder of Sterleen Hill. Washington appeals the district court's denial of his petition for writ of habeas corpus under 28 U.S.C. § 2254. On appeal, Washington raises three certified issues and four uncertified issues. In a

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

** The panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

concurrently filed published opinion, we address Washington's certified claim for ineffective assistance of counsel, and grant relief on that issue. We address Washington's remaining claims here, and on all these claims we affirm the district court.

1. Although Washington filed his habeas corpus petition before the effective date of the Antiterrorism and Effective Death Penalty Act of 1996, his appeal is subject to the certificate of appealability (COA) requirements of 28 U.S.C. § 2253. *Slack v. McDaniel*, 529 U.S. 473, 478 (2000). We construe uncertified issues raised on appeal as a motion to expand the COA. Ninth Cir. R. 22-1(d), (e); *Mardesich v. Cate*, 668 F.3d 1164, 1169 n.4 (9th Cir. 2012). We conclude that reasonable jurists could disagree as to the propriety of the district court's resolution of the uncertified issues and therefore expand the COA and address them on the merits.

2. The trial court's failure to sever Washington's case from Fred Robinson's did not result in prejudice so fundamental as to deny his due process right to a fair trial. We review denial of a severance motion for abuse of discretion. *See, e.g. United States v. Cuozzo*, 962 F.2d 945, 949 (9th Cir. 1992). The primary inquiry in determining whether a failure to sever was prejudicial to the defendant is whether the evidence is easily compartmentalized. *United States v. Patterson*, 819 F.2d 1495, 1501 (9th Cir. 1987). Here, the evidence of Fred Robinson's prior

abductions of Susan Hill was reasonably easy to separate from the evidence pertaining to the murder of Sterleen Hill. Washington's lawyer established that Washington was not present for the prior abductions, and both the prosecution and defense noted that Washington was not involved with the prior abductions in their closing arguments. Finally, the trial court offered limiting instructions, which the jurors are presumed to have followed. *See Cheney v. Washington*, 614 F.3d 987, 997 (9th Cir. 2010). Washington therefore cannot show prejudice. There was no abuse of discretion in denying severance.

3. The trial court did not err in applying the statutory cruel, heinous, and depraved aggravating factor under Ariz. Rev. Stat. Ann. § 13-751(F)(6). Because the statute is written in the disjunctive, the trial court only needed to find one of the elements proven beyond a reasonable doubt to apply the aggravator. *See State v. Carlson,* 48 P.3d 1180, 1191 (Ariz. 2002). The trial court's finding that the killing satisfied the cruelty prong, which was affirmed by the Arizona Supreme Court, is amply supported by substantial evidence in the record. Sterleen Hill was forced to listen helplessly as her husband was shot and then wait as the shotgun was reloaded, knowing that she would be next. The trial court's conclusion that the suffering was reasonably foreseeable is also supported by the evidence. Washington had been told before the invasion that the "real purpose of the trip to Yuma was to take out a drug dealer and get his dope and his money." And he was,

at a minimum, present while Sterleen Hill was bound and forced to lie on the floor in preparation for the execution-style shootings of her and her husband. The trial court's application of the cruelty aggravator was not arbitrary and capricious and did not violate Washington's due process rights.

4. There is sufficient evidence to support Washington's conviction. When assessing whether sufficient evidence exists to support a conviction, we determine "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) (emphasis in original). Under this standard, the evidence shows that Robinson, Mathers, and Washington discussed going to Yuma on the day of the crimes. The evidence further shows that Washington was seen in Robinson's car with Mathers and Robinson leaving Banning on the night of the crime wearing a red bandana and a tan trench coat. Moreover, Ralph Hill's description of one of his attackers as a young black man wearing a red bandana with a moustache and long sideburns matched Washington's appearance that night. Ralph knew Robinson, who is also black, and testified the man he saw was not Robinson. The jury could reasonably conclude that Washington was one of the culpable intruders. Also, the shotgun used to shoot the Hills and a tan trench coat containing a slip of paper with Eric Robinson's name on it were found in a nearby field. A few hours after the murder,

Washington called his girlfriend from Yuma, telling her he was stranded. From all this evidence, a rational trier of fact could have found beyond a reasonable doubt that Washington participated in the crime.

5. We are also not persuaded that Washington's counsel on direct appeal was constitutionally ineffective for failing to raise a sufficiency of the evidence challenge. To establish ineffective assistance of counsel, Washington must show that his appellate counsel's performance fell below an objective standard of reasonableness under prevailing professional norms at the time and that the ineffective assistance resulted in prejudice. *Correll v. Ryan*, 539 F.3d 938, 942 (9th Cir. 2008) (quoting *Strickland v. Washington*, 466 U.S. 668, 694 (1984)). Clarke testified that he made a tactical decision to focus on other issues on appeal and there is nothing to suggest this decision was unreasonable. Even if Clarke erred by failing to raise the issue on direct review, the evidence adduced at trial was sufficient to support Washington's conviction. As a result, Washington cannot show a reasonable probability of a different outcome but for Clarke's alleged error; without prejudice, this claim fails.

6. The trial court did not unconstitutionally apply the "pecuniary gain" aggravator. The pecuniary gain aggravator applies when "the defendant committed the offense as consideration for the receipt, or in expectation of the receipt, of anything of pecuniary value." Ariz. Rev. Stat. Ann. § 13-751(F)(5). The

expectation of pecuniary gain must have been "a motive, cause, or impetus for the murder and not merely the result of the murder." *State v. Hyde*, 921 P.2d 655, 683 (Ariz. 1996). The evidence shows that Washington was advised that the real purpose of the trip to Yuma was to "knock off a dope dealer" and "take his coke and take the cash." In addition, Washington forced his way into the Hills' home, repeatedly demanded drugs or money from the couple, and searched for and took items of value from the Hills' home. The application of the pecuniary gain factor is supported by evidence in the record and was not "so arbitrary or capricious as to constitute an independent due process or Eighth Amendment violation." *Lewis v. Jeffers*, 497 U.S. 764, 780 (1990).

7. Washington's death sentence is not constitutionally inadequate under *Enmund v. Florida*, 458 U.S. 782 (1982), and *Tison v. Arizona*, 481 U.S. 137 (1987). For a death sentence to be constitutional under the Eighth Amendment, the state must show that (1) the defendant was a major participant in the felony committed, and (2) the crime was committed with reckless indifference to human life. *See Tison*, 481 U.S. at 158. The evidence supports the trial court's conclusion that Washington was a major participant in the crime. Washington entered the Hills' home and forced them into the master bedroom while demanding drugs and money. Ralph Hill saw Washington riffling through drawers before he was shot. And the gun used to shoot the Hills was recovered near the trench coat Washington

was seen wearing that day. The evidence likewise supports the trial court's finding that the crime was committed with reckless disregard for human life. Washington and his partner entered the Hills' home armed and forced the couple to lie face down while demanding drugs and money. Whether or not Washington pulled the trigger, he was present and failed to render aid to the Hills. *See Dickens v. Ryan*, 740 F.3d 1302, 1316 (9th Cir. 2014). Washington was a major participant in the tragic acts of that day. The Arizona court's determination that Washington was eligible for the death sentence is therefore well supported by the evidence in the record.

8. The district court did not err in denying Washington's motion to expand the record because Washington cannot show cause for his failure to develop the facts in the state PCR proceedings or that failure to admit the evidence resulted in a fundamental miscarriage of justice. *See Keeney v. Tomayao-Reyes*, 504 U.S. 1, 11–12 (1992).

9. In conclusion, on all the claims discussed in this memorandum disposition, we **AFFIRM** the district court and deny relief.

APPENDIX F

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Theodore Washington,

Petitioner,

v.

Charles L. Ryan, et al.,

Respondents.

NO. CV-95-02460-PHX-JAT

JUDGMENT IN A CIVIL CASE

Decision by Court. This action came for consideration before the Court. The issues have been considered and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that, pursuant to the Court's Order filed May 26, 2017, judgment is entered denying the habeas relief on Claims 3, 4, 5, 8-B, 8-C, 10, 11 (in part), 13, 14-B, 14-C, 15-A and 15-B and denying Petitioner's Amended Petition for Writ of Habeas Corpus, nunc pro tunc to June 9, 2005. Petitioner to take nothing and this action is hereby dismissed.

Brian D. Karth
District Court Executive/Clerk of Court

May 26, 2017

By s/ S. Quinones
Deputy Clerk

APPENDIX G

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

Theodore Washington, Petitioner, v. Dora B. Schriro, et al.,[1] Respondents.	No. CIV 95-2460-PHX-JAT DEATH PENALTY CASE **MEMORANDUM OF DECISION AND ORDER**

Petitioner Theodore Washington ("Petitioner") seeks federal habeas relief from his 1987 conviction and resulting death sentence. Petitioner filed an initial habeas petition in this Court on November 9, 1995, before the effective date of the Antiterrorism and Effective Death Penalty Act ("AEDPA"), Pub. L. No. 104-132, 110 Stat. 1214 (Apr. 24, 1996). (Dkt. 1.)[2] Accordingly, the provisions of the AEDPA do not apply to this case. Lindh v. Murphy, 521 U.S. 320, 336 (1997).

In an Amended Petition filed on May 27, 1997, Petitioner raised seventeen claims. (Dkt. 20.) In an Order filed August 9, 1999, the Court determined that Claims 1, 2, 3 (in part), 6, 7, 8-A, 9, 11 (in part), 12, 14-A, 16 and 17 were procedurally barred. (Dkt. 64.) The Court determined that Petitioner was entitled to review on the merits of Claims 3 (in part),

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[1] Dora B. Schriro is substituted for her predecessor as Director, Arizona Department of Corrections, pursuant to Fed. R. Civ. P. 25(d)(1).

[2] "Dkt." refers to documents in this Court's file.

4, 5, 8-B, 8-C, 10, 11 (in part), 13, 14-B, 14-C and 15.[3] (Id.; dkts. 72, 73.) In this Order, the Court addresses the merits of those claims and finds that Petitioner is not entitled to federal habeas corpus relief.

FACTUAL AND PROCEDURAL BACKGROUND

Sometime after 11:00 p.m. on June 8, 1987, there was a knock at the front door of Ralph and Sterleen Hills' Yuma home. Through the door a man told the Hills' teenage son, Le Sean, that he had come by to pay money he owed Ralph. When Le Sean opened the door, two men forced their way into the home and attempted to grab Le Sean. Le Sean managed to evade the men and fled from the home to get help. Le Sean's parents exited their bedroom to investigate. (RT 12/10/87 at 123.)[4] In the dining room, Ralph saw the shadows of two men holding something in their hands and heard one of the men yell, "We're narcotics agents. We want the dope and the money." (Id. at 123, 133-34.) The Hills were ordered back into their bedroom, told to lie face down on the floor, and their hands and feet were bound. (Id. at 124, 127, 134-36.) One of the men ransacked the couple's bedroom while the second man stood over the couple, sometimes "screwing" a pistol in Ralph's ear. (Id. at 125-26; RT 12/9/87 at 33.) Ralph glimpsed a young black man with a mustache and long sideburns wearing a red bandana, whom he did not recognize, searching the couple's closet and dresser. (RT 12/10/87 at 125, 136-37, 147-48.) Ralph heard a man say "we better get the kid." (Id. at 126-27.) Both Hills were shot at close range with a .12 gauge shotgun, resulting in massive injuries to Ralph and killing Sterleen. A cigarette lighter holder, a watch, and a locked box containing a gold watch and coins were taken from the home.

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[3] The Court granted Petitioner's motion to reconsider its determination that subclaim 8-C was procedurally defaulted (dkt. 73), and granted Petitioner's motion to amend to add subclaim 14-C (dkt. 64 at 25, n.9, 34).

[4] "RT" refers to reporter's transcript. "ROA" refers to eight volumes of instruments and minute entries from the trial, direct appeal and post-conviction proceedings, documents 1-263. (Arizona Supreme Court No. SC87C14064). The original reporter's transcripts and certified copies of the trial and post-conviction records were provided to this Court by the Arizona Supreme Court. (See Dkts. 27, 28.)

Shortly after the shooting, Fred Robinson, the common-law husband of Susan Hill, Ralph Hill's daughter from a previous marriage, was apprehended by police fleeing the Hills' neighborhood in his tan Chevette. Robinson and Susan had been in a relationship together since 1972, parenting three children. (RT 12/8/87 at 70.) Their relationship was stormy, as Robinson verbally and physically abused Susan. (Id. at 71-72, 74, 83.) On at least three occasions, Susan had attempted to leave their Banning, California home. (Id. at 73-74, 76-82, 84-94.) Each time, however, Robinson found her and threatened her if she did not return to him. (Id.) In February 1987, Susan persuaded Robinson to take her to visit her father in Yuma. (Id. at 97.) While there, Susan informed Robinson by letter that Sterleen had obtained a peace bond against him and that he should not enter their property. (Id. at 101-02.) Thereafter, unbeknownst to Robinson, Susan left Yuma to stay with other relatives in California. (Id. at 102-03.)

In a search of Robinson's car, police found an empty .12 gauge shotgun shell box and a red bandana. During a pat search of Robinson, police found four .38 caliber cartridges. Robinson's shoes were confiscated and later matched to footprints outside the Hills' home, which evidenced a limp of the left leg, like the one Robinson had as the result of a motorcycle accident. However, neither Le Sean nor Ralph Hill, who had known Robinson for years, identified him as one of the men they saw that night. (RT 12/2/87 at 12; 12/10/87 at 148.) Le Sean believed that one of the men could have been white. (RT 12/2/87 at 55, 56.) Following the shootings, officers recovered a .12 gauge shotgun, rubber gloves, shotgun shells (expended and live) and a tan trench coat in a field near the Hills' home. (RT 12/9/87 at 166-79; 12/10/87 at 91-92.) Inside a pocket of the trench coat was a piece of paper with the name "Eric Robinson" written on it.[5] (RT 12/9/87 at 175-76.) The shotgun was subsequently determined to be the murder weapon, and had been reported missing by its owner, who lived in Banning, five months earlier. (RT 12/9/87 at 87-89.)

The day after the murder, Petitioner and Jimmie Lee Mathers, friends of Robinson,

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[5] Eric Robinson is one of Fred Robinson's sons.

were separately arrested in California.[6] They were transferred to Yuma, where they and Robinson were each charged with first degree murder, attempted first degree murder, two counts of aggravated assault, burglary and armed robbery. State v. Robinson, 165 Ariz. 51, 56, 796 P.2d 853, 858 (1990). The three defendants were tried jointly in December 1987.

At trial, the prosecution theory of the crime was that Robinson had driven with Petitioner and Mathers to the Hills' home and, while Robinson waited outside, Petitioner and Mathers employed the ruse to gain entry into the house. Once inside, they bound the Hills and ransacked their bedroom for valuables. Mathers shot Ralph after he glimpsed Petitioner, and then Mathers shot Sterleen, before they both fled the residence.

At trial, Robinson's son Andre testified that on the day of the crime, he overheard his father, Mathers and Petitioner discuss a trip to Yuma. (RT 12/8/87 at 10-11.) According to Andre, Petitioner was wearing a red headband. (Id. at 15-16.) Mathers told Andre that they were "going to Arizona to take care of some business" (RT 12/9/87 at 5), and Robinson told Truman, another of his sons, that he was going to Arizona to look for Susan (RT12/4/87 at 95-96, 132, 158-59). Both Andre and Truman observed their father and Mathers put some guns, including a shotgun, in their father's tan Chevette and later drive toward Petitioner's house, one block away. (RT 12/4/87 at 97-98, 102-04, 108-09, 124-31, 135-38, 150, 154-58; 12/8/87 at 6-7.) Shortly thereafter, Truman saw his father, Mathers, and Petitioner drive by in the vehicle, apparently on their way to Arizona. (RT 12/4/87 at 135-36.) According to Truman, Petitioner was wearing a red headband and a tan trench coat and identified the trench coat recovered near the shotgun as the one he saw Petitioner wearing the day of the murder.[7] (RT 12/4/87 at 101-02, 136, 138-42, 144-45).

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[6] Petitioner and Robinson are both black; Mathers is white.

[7] Truman's testimony regarding what he saw Petitioner wearing the day of the murder was inconsistent. (RT 12/4/87 at 101-02, 135-36, 144-45, 166-67, 169, 170-71.) He testified that he saw Petitioner wearing a red headband and a tan coat, as well as jeans and a sweater, but he also testified that the only time he saw Petitioner that day was from approximately half a block away, while Petitioner was sitting in the back of his father's car as they drove by. (Id. at 135-36, 137-40, 145-46.) Petitioner's common-law wife, Barbara

On December 15, 1987, a jury convicted the three defendants of all charges. Prior to sentencing for the first degree murder, the trial court held a joint aggravation/mitigation hearing. (RT 1/8/88.) At that hearing, evidence was admitted over defense objection that, either in or on the way to Yuma, Robinson told Petitioner that the purpose for the trip was to "take out" a drug dealer who purportedly lived in the Hills' home and that Robinson told Petitioner that "if things get rough, shoot 'em." (RT 1/8/88 at 59-60.) Petitioner presented three mitigation witnesses and urged four mitigating circumstances: (1) intoxication at the time of the offense; (2) minor role; (3) his youthfulness; and (4) familial activities. (Id. at 174-76, 89-112, 117-43.)

The trial court found two aggravating factors against Petitioner: (1) that Petitioner committed the murder in consideration for or in the expectation of anything of pecuniary value under A.R.S. § 13-703(F)(5), and (2) that the murder was committed in an especially heinous, cruel or depraved manner under A.R.S. § 13-703(F)(6). (ROA 109.) The court found that Petitioner's capacity to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of the law was not impaired in any degree; that Petitioner did not act under duress; that Petitioner was legally accountable for the conduct of others and that his participation was not relatively minor; that he could have reasonably foreseen that his conduct would cause or would create a grave risk of causing death to others; that Petitioner's age (27) was not a mitigating factor; and that "none of the other or additional factors offered" by Petitioner, including "his passive nature, [that he was a] loving father, good family man and child, friend, his desire to do things with his life or schooling, was sufficiently mitigating to overcome the aggravating factor[s] of the crime." (RT 1/13/88 at 29-30; see ROA 109 at 5.) The Court therefore sentenced Petitioner to death.

In a consolidated opinion addressing Petitioner's and Robinson's direct appeals, the Arizona Supreme Court found that the trial court had improperly considered Petitioner's

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Bryant, testified that she had never seen the tan trench coat before and had never seen Petitioner wear such a coat. (RT 12/11/87 at 4-5.)

post-arrest statements in concluding that Robinson had procured the murder by payment or promise of something of pecuniary value, but found that sufficient other admissible evidence otherwise supported this aggravating circumstance. Robinson, 165 Ariz. at 59, 796 P.2d at 861. The supreme court also affirmed the trial court's finding that the murder was both especially cruel and especially heinous or depraved. Id. at 61, 796 P.2d at 863. The supreme court agreed there was "sparse" evidence that Petitioner had been intoxicated at the time of the offense, that his role in the offense was not minor, and that his youthfulness was not mitigating. Id. at 61, 796 P.2d at 863. It found that while Petitioner was a single parent raising a young son, that fact, viewed in the context of the case, was not such a mitigating circumstance as to outweigh the aggravating circumstances; the court therefore affirmed Petitioner's death sentence. Id. It also affirmed Robinson's conviction and sentence. Id. In a separate opinion, the supreme court reversed Mathers's conviction, finding insufficient evidence established his participation in the crime. See State v. Mathers, 165 Ariz. 64, 796 P.2d 866 (1990).

Following the affirmance of his conviction and death sentence, Petitioner filed a petition for post-conviction relief ("PCR") in the trial court. (ROA 126, 141.) The PCR court held a joint evidentiary hearing on Petitioner's and Robinson's ineffective assistance of counsel claims and claims based on Mathers's acquittal on September 8-9, 1993. On August 12, 1994, following additional briefing, the PCR court denied relief on Petitioner's claims. (ROA 214.) On April 25, 1995, the Arizona Supreme Court summarily denied Petitioner's petition for review. (ROA 235.) Petitioner thereafter commenced this habeas action.

DISCUSSION

Claim 3: Failure to Sever Trial

In the exhausted portion of Claim 3, Petitioner alleges that the trial court's refusal to sever his trial from that of Mathers and Robinson, and its subsequent admission of hearsay evidence, violated his rights to due process, equal protection, and counsel under the Fifth, Sixth, and Fourteenth Amendments, and protection against cruel and unusual punishment

under the Eighth Amendment. (Dkt. 20 at 19-24.) Specifically, Petitioner alleges that the admission of evidence regarding two incidents in which Robinson coerced Susan Hill into returning to him, and evidence that the murder weapon, which had been in Robinson's possession prior to the murder, was reported missing (or stolen) by a Banning resident, posed an unconstitutional risk that Petitioner would be found guilty based solely on his association with Robinson.

The denial of a motion to sever trial of co-defendants rises to the level of a constitutional violation if it results in prejudice so great as to deny a defendant his right to a fair trial. See United States v. Lane, 474 U.S. 438, 446 n. 8 (1986); see also Zafiro v. United States, 506 U.S. 534, 539 (1993); United States v. Tootick, 952 F.2d 1078, 1082 (9th Cir. 1991). Generally, "[u]nfair prejudice is measured by the degree to which a jury responds negatively to some aspect of evidence unrelated to its tendency to make a fact in issue more or less probable." United States v. Johnson, 820 F.2d 1065, 1069 (9th Cir. 1987). Such prejudice may arise where co-defendants assert mutually exclusive or antagonistic defenses, or exculpatory evidence would be available to one defendant if he was tried separately but is unavailable if he is tried jointly. See Zafiro, 506 U.S. at 539. Such prejudice may also arise when evidence of one co-defendant's wrongdoing in other circumstances could lead a jury to conclude erroneously that a second defendant participated in the charged offense. See id. However, the denial of severance does not render a trial fundamentally unfair merely because a defendant otherwise would have had a better chance of acquittal, or when appropriate limiting instructions cure the risk of unfair prejudice. See id. at 540. The issue is "whether the state proceedings satisfied due process." Grisby v. Blodgett, 130 F.3d 365, 370 (9th Cir. 1997) (quoting Jammal v. Van de Kamp, 926 F.2d 918, 919-20 (9th Cir. 1991)). The habeas petitioner bears the burden of demonstrating that the state court's denial of severance rendered his trial "fundamentally unfair." Id. (quoting Hollins v. Dep't of Corr., State of Iowa, 969 F.2d 606, 608 (8th Cir. 1992)).

Evidence Regarding Robinson's Coercion of Susan Hill

At trial, over defense objections, evidence was admitted regarding two occasions prior

to the murder in which Robinson had forced Susan to return to their Banning home. In June 1986, two of Robinson's friends, who were armed, forced their way into the North Hollywood apartment of Susan's sister Darleen, where Susan was then staying, and tied up Darleen and her daughter. (RT 12/8/87 at 78-80.) Robinson, armed with a knife, then came into the apartment looking for Susan and found her hiding in a bedroom closet. (Id.) Susan testified that Robinson told her that he had intended to cut her and Darleen's throats, but changed his mind because Darleen's daughter was there. (Id. at 81.) Susan testified that she returned with Robinson to Banning the next day after he threatened to hurt Darleen and her daughter if she refused. (Id. at 82.) In November 1986, Susan went to Philadelphia, Pennsylvania, to live with an aunt and uncle without telling Robinson. (Id. at 84.) In January 1987, Robinson went to Philadelphia with Mathers, among others, to retrieve her. (Id. at 89-90.) Using a ruse to contact her, Robinson and Mathers grabbed Susan, forced her into a car and held her at a motel overnight, before returning with her to California. (Id. at 90-91.) Susan testified that Robinson threatened to hurt her aunt and uncle if she refused to return to California with him. (Id.)

At trial, Petitioner objected to testimony by Susan Hill regarding the North Hollywood incident. In response to that objection, the trial court instructed the jury as follows:

> Ladies and gentleman, during the course of this trial you may find evidence that applies to one defendant or another defendant, but not as to all of the defendants. Since you are the triers of fact you will have to make that determination.

(RT 12/8/87 at 81.) After the close of evidence, the trial court further instructed the jury:

> Evidence has been introduced for the purpose of showing that one or more of the defendants committed acts other than those for which he or they are on trial.
>
> Such evidence, if believed by you, was not received and may not be considered by you to prove that person is a person of bad character or that person has a disposition to commit a crime.
>
> Such evidence was received and may be considered by you only for the limited purpose of determining if it tends to show a characteristic method, plan or scheme in the commission of other acts similar to the method, plan or scheme used in the commission of the offense in this case, which would further tend to show the identity of the person who committed the crime, if any, of that which the person is accused, and which would further tend to show a clear connection between the other act and the one which that defendant is accused so that it may be logically concluded that if that defendant committed

> the other offense, he also committed the crime charged in this case.
> For the limited purpose for which you may consider such evidence, you must weigh it in the same manner as you do all other evidence in the case.
> You are not permitted to consider such evidence for any other purpose.

(ROA 92 at 20.)

On direct appeal, the Arizona Supreme Court found that evidence regarding the North Hollywood and Philadelphia incidents was admissible "to prove Robinson's modus operandi and to prove that Robinson sent Washington to the Hill home as part of a scheme to retrieve Susan," and, "since the evidence was clearly admissible against Robinson, the absence of Washington diminishes the prejudicial impact of the North Hollywood episode [and presumably the Philadelphia incident] as to him." Robinson, 165 Ariz. at 57, 796 P.2d at 859. Thus, the supreme court concluded that evidence regarding the two incidents did not prejudice Petitioner because it did not connect him in any way to those incidents and the jury had been instructed to only consider that evidence against the defendant(s) involved in those incidents.

Petitioner argues the admission of that evidence was particularly prejudicial to him *because* he was not involved in those incidents and there was no evidence that he had knowledge of them before the murder. Petitioner asserts that the evidence showed that Robinson "had hunted Susan Hill on a number of occasions and was willing to use violence to force her to come back to him," and that persons who accompanied Robinson under similar circumstances would also appear to be willing to use violence to assist Robinson in achieving his ends. (Dkt. 85 at 31.) The Court disagrees. Jurors are presumed to follow instructions given by the court. See Weeks v. Angelone, 528 U.S. 225, 234 (2000); Belmontes v. Woodford, 359 F.3d 1079, 1082 (9th Cir. 2004), vacated on other grounds by Brown v. Belmontes, 2005 WL 694089, 73 U.S.L.W. 3564 (U.S. March 28, 2005). The trial court instructed the jury to consider evidence regarding other acts by one or more of the defendants, "only for the limited purpose of determining if [that evidence] tends to show a characteristic method, plan or scheme . . . similar to the method, plan or scheme used in the commission of the offense in this case" such that this evidence tended "to show the identity

of the person who committed" the charged offense by tending to show a "clear connection between the other act and the one which that defendant is accused so that it may be logically concluded that if that defendant committed the other offense, he also committed the crime charged in this case."

There was no evidence that Petitioner was involved in either the North Hollywood or Philadelphia incidents. The jury could not, consistent with their instructions, find that the evidence regarding those incidents tended to show a characteristic method, plan or scheme of *Petitioner* that was similar to the one used in the commission of the Yuma events. Evidence of the North Hollywood and Philadelphia incidents tended to show that Robinson involved others in his efforts to find Susan and coerce her return, but it did not tend to show that Petitioner was one of the others who had been so involved. The trial court's instructions were adequate to offset any unfair prejudice resulting from the admission of evidence regarding the North Hollywood and Philadelphia incidents.

Petitioner also asserts that the Arizona Supreme Court expressly refused to consider evidence regarding Mathers's involvement in Susan Hill's "abduction" in Philadelphia against Mathers, but did consider that evidence against him. The Arizona Supreme Court did not consider the evidence against Petitioner; rather, it held that admission of that evidence did not warrant severance because Petitioner was adequately protected by the limiting instructions given to the jury. Robinson, 165 Ariz. at 57, 796 P.2d at 859. As addressed above, this Court has reached the same conclusion. The Arizona Supreme Court's treatment of this evidence as to Mathers is irrelevant to Petitioner's constitutional claim; thus, the allegation is without merit. Because Petitioner was not unfairly prejudiced by the admission of this evidence, in light of the trial court's instructions to the jury, the denial of severance did not violate his constitutional rights.

Police Report Evidence

Petitioner argues that denial of severance unfairly prejudiced him based on the admission of evidence that the shotgun used in the murder had been reported missing to Banning police by its owner several months prior to the murder. (RT 12/9/87 at 87-89.)

Petitioner contends the admission of this evidence unfairly prejudiced him because there was no evidence that he had known that Robinson possessed the shotgun or had put it in his car before picking up Petitioner. He argues this evidence was prejudicial because "the state was unable to make any connection between [Petitioner] and the murder weapon. His fingerprints were not on the weapon." (Dkt. 85 at 32.)

The trial court admitted over defense objection testimony from a law enforcement officer relating the contents of a routine police report regarding the missing shotgun. (RT 12/9/87 at 87-89.) The supreme court held that testimony admissible because it was not offered to prove the truth of the report, but to establish the geographical location of the shotgun in Banning. Robinson, 165 Ariz. at 57, 796 P.2d at 859. It also found the significance of the hearsay testimony, which placed the weapon in Banning five months prior to the murder, was "vastly diminished by other evidence directly linking Robinson and [Petitioner] to the shotgun." Id.

Petitioner's claim appears to be wholly unfounded. The admission of evidence indicating the shotgun was stolen did not improperly link Petitioner to the gun, or implicate him as the associate of a thief. In fact, this evidence was not necessarily contradictory to Petitioner's assertion that no evidence demonstrated he knew Robinson possessed the gun or that it was in the trunk of the car. Further, Petitioner's assertion that no evidence otherwise connected him to the gun is erroneous. The shotgun was recovered from a field near the Hills' home and within yards of a trench coat, identified as one worn by Petitioner the day of the offense, in the pocket of which was a slip of paper with the name of one of Robinson's sons. There was no evidence that Robinson passed that field, much less through it, or that either Robinson or Mathers had worn a trench coat that day. Evidence that Petitioner had worn the coat that day, which was subsequently found in close proximity to the murder weapon, was sufficient to support the inference that Petitioner had either abandoned the shotgun and coat as he fled the scene, or that he had abandoned the coat as his accomplice abandoned the shotgun, as they both fled from the Hills' home. The Court cannot identify any ground on which the report's admission would have unfairly prejudiced

Petitioner.

The Court concludes that the denial of severance, and the subsequent admission of evidence regarding the North Hollywood and Philadelphia incidents and the police report regarding the shotgun, did not unfairly prejudice Petitioner so as to violate his constitutional rights. Accordingly, relief on this claim will be denied.

Claim 4: Restrictions on Cross-Examination

In Claim 4, Petitioner alleges that the trial court's refusal to permit unlimited cross-examination of witness Barbara Bryant violated his rights to due process and reliable procedures under the Fifth, Eighth and Fourteenth Amendments, and his right to confront witnesses under the Sixth Amendment. During direct examination, Bryant testified that at approximately 2:00 a.m. on June 9, 1987, Petitioner called her collect and asked her to call him back at an Arizona telephone number. (RT 12/2/87 at 110-11.) A few minutes later, Bryant called Petitioner at that number. (RT 12/2/87 at 116.) The prosecution asked Bryant the following:

> Q. When you got these calls in the middle of the night, did you ever ask [Petitioner] where he was?
>
> A. I asked him once and he said, "Arizona".
>
> * * *
>
> Q. Did you ask him what he was doing in Arizona?
>
> A. He said he was stranded.

(RT 12/2/87 at 122-23.)

On cross-examination, Bryant testified that Petitioner frequently went to gatherings for two or three days with Robinson and/or other members of Robinson's motorcycle club and would call for a ride if stranded. (RT 12/2/87 at 135-36.) When Petitioner's counsel asked Bryant what Petitioner told her when he called her the morning of June 9, 1987, the prosecution objected based on hearsay. (Id. at 137). Defense counsel argued that he was entitled to cross-examine Bryant regarding the conversation because the prosecution had opened the door, but the trial court sustained the objection and found the question had been

asked and answered on direct. (RT 12/2/87 at 137-38.) The trial court precluded cross-examination of Bryant regarding what was said in the June 9, 1987 telephone calls. (RT 12/2/87 at 144-45.) The trial court determined that Bryant could not be cross-examined about what Petitioner had said under the prior inconsistent statement exception because potential unfair prejudice outweighed its relevance. (RT 12/2/87 at 145.)

The Confrontation Clause of the Sixth Amendment guarantees the right of a criminal defendant "to be confronted with the witnesses against him." Claims raised pursuant to the Confrontation Clause generally fall into two broad categories: cases involving the admission of out-of-court statements and cases involving restrictions on the scope of cross-examination. See Delaware v. Fensterer, 474 U.S. 15, 18 (1985). The instant claim falls into the second category, which involves limitations that prevent defense counsel from exposing facts to the jury from which the jury could draw inferences regarding the reliability of a witness. Id. at 19.

"'The main and essential purpose of confrontation is to secure for the opponent the opportunity of cross-examination.'" Davis v. Alaska, 415 U.S. 308, 315-316 (1974) (quoting 5 J. Wigmore, Evidence § 1395, p. 123 (3d ed. 1940)). Impeachment of a witness's credibility and exposure of witness bias and possible motive in testifying are two purposes served by the constitutionally protected right of cross-examination. See id. at 316. However, a trial court has broad discretion in determining the scope and extent of cross-examination. See Alford v. United States, 282 U.S. 687, 694 (1931); Carriger v. Lewis, 971 F.2d 329, 332-33 (9th Cir. 1992). A trial court may impose reasonable limits on cross-examination to prevent harassment, prejudice, confusion of the issues or repetitive questioning, and to protect a witness's safety. See Delaware v. Van Arsdall, 475 U.S. 673, 679 (1986). Such limitations on cross-examination do not deny the constitutionally protected right of confrontation, but constitute legitimate evidentiary rulings entrusted to the discretion of the trial judge. See id.; Perry v. Rushen, 713 F.2d 1447, 1450 (9th Cir. 1983).

Petitioner argues that the trial court's limitation of cross-examination of Bryant regarding what he said during the telephone calls violated his constitutional right to confront

an adverse witness with prior inconsistent statements. The questioning at issue called for inadmissible hearsay. Petitioner fails to identify a basis under which such testimony would have been admissible. The prosecution did not "open the door" to such testimony; instead, Bryant volunteered information in response to a question from the prosecution requiring only a "yes" or "no" response.[8] Petitioner has not identified any inconsistency between Bryant's trial testimony and any statement previously made by her.

In sum, the trial court did not err in sustaining the objection. Even if the trial court erred, the court's ruling on this single question did not render Petitioner's entire trial fundamentally unfair. Any error by the trial court in sustaining the objection did not have a substantial and injurious effect on the verdict. See Brecht v. Abrahamson, 507 U.S. 619, 629 (1993). Federal habeas relief on this claim will be denied.

Claim 5: Sufficiency of the Evidence

In Claim 5, Petitioner challenges the sufficiency of the evidence supporting his conviction and sentences under the Fifth, Sixth, Eighth and Fourteenth Amendments. (Dkt. 20 at 26-31.) Petitioner primarily argues that there is no greater evidence to support his conviction than there was to support Mathers's conviction, which the Arizona Supreme Court found insufficient on direct appeal; therefore, he argues that he is entitled to habeas relief. However, the standard to assess the sufficiency of the evidence to support a conviction 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.[9] Jackson v. Virginia, 443 U.S. 307, 319 (1979) (emphasis added). A habeas court faced with a record of historical facts which supports conflicting inferences must presume,

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[8] Notably, Petitioner did not object to Bryant's volunteered information, presumably because it tended to support his defense theory that he was abandoned by Robinson and Mathers in Yuma prior to the murder.

[9] The standard requires a review of the evidence relevant to *Petitioner* and an assessment of whether that evidence is sufficient to sustain the conviction of *Petitioner*. Thus, how the Arizona Supreme Court resolved such a claim as to Mathers is irrelevant to the analysis.

even if it does not appear in the record, that the trier of fact resolved any such conflicts in favor of the prosecution. See id. at 326.

Applying a presumption that the jury resolved conflicting inferences in favor of the prosecution, the Court concludes that Petitioner's conviction is supported by sufficient evidence. Prior to the murder, Robinson and Mathers told witnesses they were going to Arizona, and Robinson's son heard Robinson, Mathers and Petitioner discuss going to Yuma. Both Mathers and Petitioner were seen in Robinson's car leaving Banning the evening of the murder. During the intrusion, Ralph Hill glimpsed a young black man wearing a red bandana, who was not Robinson. Immediately following the shooting, Robinson was stopped as he fled from the Hills' street. In his car, police recovered a red bandana, like one Petitioner had been seen wearing earlier in the day, and like the one Ralph Hill observed one of his assailants wearing.[10] The shotgun used against the Hills and a tan trench coat, identified as one worn by Petitioner the day of the shooting and containing a slip of paper with Eric Robinson's name on it, were found within yards of each other in a field near the Hills' home. There was no evidence that Robinson passed the field or that he could have abandoned the coat or the shotgun in the field as he fled from the Hills' street. A couple of hours after the murder, Petitioner called his common-law wife from Yuma, telling her that he was stranded, and later bought a bus ticket at the Yuma terminal to return to Banning. From this evidence, a rational trier of fact, construing all inferences in favor of the prosecution, could have found beyond a reasonable doubt that Petitioner was both present in Yuma the night of the crime and that he participated in the crime. Accordingly, habeas relief will be denied as to this claim.

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[10] The relevance of the bandana found in Robinson's car is attenuated; evidence was admitted that hairs found adhering to it were microscopically consistent with Mathers's hair and were inconsistent with either Robinson's or Petitioner's hair. (RT 12/9/87 at 112-13, 114-16, 118-19.) In addition, there was no evidence that either Petitioner or Mathers was in Robinson's car after the Hills were attacked. However, viewing the evidence in a light favorable to the prosecution, this circumstantial evidence could support the theory that both Petitioner and Mathers had red bandanas, but that Mathers removed his and left it in Robinson's car before entering the Hills' home.

Claims 8-B & 8-C: The (F)(6) and (F)(5) Aggravating Circumstances were Unconstitutionally Applied to Petitioner

In Claim 8-B, Petitioner alleges that in applying the (F)(6) aggravating circumstance to him, i.e., that the murder was committed in an especially heinous, cruel or depraved manner, the Arizona courts expanded the narrowing construction given to that circumstance so as to violate his Eighth Amendment rights. In Claim 8-C, Petitioner alleges that in applying the (F)(5) aggravating circumstance to him, i.e., that the murder was committed in the expectation of something of pecuniary value, the state courts similarly expanded the narrowing construction given to that circumstance in violation of his constitutional rights.

> When a federal court is asked to review a state's court's application of an individual statutory aggravating . . . circumstance in a particular case, it must first determine whether the statutory language defining the circumstance is itself too vague to provide any guidance to the sentencer. If so, then the federal court must attempt to determine whether the state courts have further defined the vague terms, and if they have done so, whether those definitions are constitutionally sufficient, i.e., whether they provide *some* guidance to the sentence.

Walton v. Arizona, 497 U.S. 639, 654 (1990), overruled in part on other grounds by Ring v. Arizona, 536 U.S. 584 (2002); Lewis v. Jeffers, 497 U.S. 764, 777-81 (1990). If a state court has defined an unconstitutionally vague statutory factor, a federal court's role is to determine "whether those definitions are constitutionally sufficient, i.e., whether they provide some guidance to the sentencer." Walton, 497 U.S. at 654. Federal habeas review of the application of an aggravating circumstance to the facts by a state court then 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. See Jeffers, 497 U.S. at 780.

Especially Heinous, Cruel or Depraved Circumstance

In Walton, the United States Supreme Court found Arizona's especially heinous, cruel or depraved aggravating circumstance to be facially vague, but held that Arizona courts had sufficiently narrowed application of the circumstance so as to constitutionally channel a sentencer's discretion. 497 U.S. at 654 (cruelty); see also Jeffers, 497 U.S. at 777-81 (depravity). The Supreme Court in Walton expressly held that both the cruelty and

depravity prongs of (F)(6) have been construed by the Arizona courts in a manner that furnishes sufficient guidance to the sentence. Walton, 497 U.S. at 655. Therefore, this Court's review of the state courts' application of the (F)(6) circumstance to the facts 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. See Jeffers, 497 U.S. at 780.

Because phrased in the disjunctive, the (F)(6) factor can be established by showing especial cruelty, heinousness or depravity, alone. See, e.g., State v. Roscoe, 184 Ariz. 484, 500, 910 P.2d 635, 651 (1996); State v. Smith, 193 Ariz. 452, 461, 974 P.2d 431, 440 (1999). In this case, the trial court found, and the supreme court affirmed, that as to Petitioner the murder was both especially cruel ("cruelty prong") and especially heinous or depraved ("depravity prong").

Cruelty Prong

Petitioner alleges that the cruelty prong was unconstitutionally applied to him because Arizona courts have narrowed application of that prong such that it can only be found against the actual killer of a victim, and not an accomplice who was merely present. (Dkt. 85 at 60.) He argues that because there was no evidence that he was the actual killer, or even that he was present in the home, the cruelty finding as to him unconstitutionally expanded Arizona's construction of that prong. (Id.)

To support a finding of cruelty, the prosecution must establish beyond a reasonable doubt that the victim consciously suffered physical pain or mental anguish and that the defendant knew or should have known that the victim would suffer. See State v. Moody, 208 Ariz. 424, 471, 94 P.3d 1119, 1166 (2004); State v. Trostle, 191 Ariz. 4, 18, 951 P.2d 869, 883 (1997); State v. Amaya-Ruiz, 166 Ariz. 152, 177, 800 P.2d 1260, 1285 (1990). Arizona courts have upheld application of the cruelty prong to accomplices who did not actually kill the victim, but who were present and extensively participated in the underlying felonies when it was reasonably foreseeable that the victim would suffer. See State v. Miles, 186 Ariz. 10, 17, 918 P.2d 1028, 1035 (1996); State v. Dickens, 187 Ariz. 1, 24-25,

926 P.2d 468, 491-92 (1996); State v. Lacy, 187 Ariz. 340, 354, 929 P.2d 1288, 1302 (1996) (upholding cruelty finding against unarmed accomplice, but reducing sentence on other grounds). In State v. Carlson, the Arizona Supreme Court held there is "no vicarious liability for cruelty in capital cases absent a plan intended or reasonably certain to cause suffering. The plan must be such that suffering before death must be inherently and reasonably certain to occur, not just an untoward event." 202 Ariz. 570, 583, 48 P.3d 1180, 1193 (2002). Thus, under Arizona law, cruelty may be found as to a non-triggerman accomplice if "the defendant intended that the murder be committed in such a manner as to cause the victim to suffer or, absent intent, knew it would be so." Id. Evidence that an accomplice was present during the crime, involved in planning the details or method of the murder, or supplied the weapon used may support such finding of intent. See id.

The trial court found that Sterleen's murder was especially cruel because she experienced mental anguish as a result of the late night intrusion of armed men into her home, was bound and forced to lie face down on her bedroom floor while the room was ransacked, and then endured the terror of hearing her husband shot, followed by the pumping of the shotgun with the knowledge that she was next. (ROA 109 at 3, ¶ 5.) The trial court specifically found there was no evidence that Sterleen had been rendered unconscious prior to being shot, citing testimony of the medical examiner. (Id. at ¶ 5(e).) Further, it found that Petitioner was advised prior to the invasion that "the real purpose of the trip to Yuma was to 'take out' a drug dealer and get his dope and his money," and that he nevertheless participated in the armed invasion. (Id. at ¶ 4(a), (b).) Finally, it found that Petitioner was present and failed to act to avert the murder. (Id. at ¶ 5(b).) The Arizona Supreme Court affirmed the cruelty finding, noting that Sterleen would have experienced great distress at being bound and at the uncertainty regarding her ultimate fate. Robinson, 165 Ariz. at 60-61, 796 P.2d at 862-63.

At a minimum, the evidence demonstrates that Petitioner forcibly intruded into the Hills' home late at night, brandished weapons, and demanded non-existent dope and money from the Hills. Certainly the intrusion and the binding were planned, and Petitioner

participated in those acts. That Sterleen Hill would suffer mental anguish as a result of these acts, and that she might subsequently be killed, was entirely foreseeable. This is sufficient to establish that Petitioner knew, or should have known, that the victim would suffer. Moreover, there was evidence that Petitioner had been informed by Robinson prior to the intrusion that the purported plan was to "take out" the drug dealer that purportedly lived in the home, and that if "things got rough, [to] shoot 'em." Finding that Petitioner knew or should have known that one of the victims would suffer physical pain and mental anguish based on these facts was not so arbitrary and capricious as to violate Petitioner's constitutional rights.

Depravity Prong

Petitioner alleges that the Arizona courts unconstitutionally found depravity as to him because there was no evidence that he was the actual shooter or that he "was even in or near" the Hills' home the night of the crime. (Dkt. 85 at 57.) Petitioner argues that the statute "explicitly refers to the state of mind of the killer, not to that of a co-defendant," and that "the Supreme Court" has held that this prong "may only be applied to the 'perpetrator' of the killing." (Id. at 60.)

A finding that a murder was especially "heinous" or "depraved" focuses on the defendant's state of mind at the time of the offense. See State v. Fulminante, 161 Ariz. 237, 255, 778 P.2d 602, 620 (1988); accord State v. Jimenez, 165 Ariz. 444, 455, 799 P.2d 785, 796 (1990); Amaya-Ruiz, 166 Ariz. at 178, 800 P.2d at 1286; State v. Ross, 180 Ariz. 598, 605, 886 P.2d 1354, 1361 (1994) ("heinousness and depravity refer to a defendant's vile state of mind and attitude at the time of the murder, as evidenced by his conduct"); State v. Smith, 146 Ariz. 491, 504, 707 P.2d 289, 302 (1985). A defendant's state of mind is determined by his behavior at or near the time of the offense. State v. Lujan, 124 Ariz. 365, 372, 604 P.2d 629, 636 (1979); accord State v. Poland, 132 Ariz. 269, 285, 645 P.2d 784, 800 (1982); State v. Jeffers, 135 Ariz. 404, 429, 661 P.2d 1105, 1130 (1983); State v. Martinez-Villareal, 145 Ariz. 441, 451, 702 P.2d 670, 680 (1985); State v. Greene, 192 Ariz. 431, 440, 967 P.2d 106, 115 (1998). In State v. Gretzler, the supreme court listed five non-

exclusive factors to be considered in determining whether a murder was especially heinous or depraved and evidenced a defendant's "vile" state of mind: (1) the apparent relishing of the murder, (2) the infliction of gratuitous violence on the victim beyond the murder itself, (3) needless mutilation, (4) the senselessness of the murder, and (5) the helplessness of the victim. 135 Ariz. 42, 51-52, 659 P.2d 1, 10-11, 12 (1983); accord State v. Wallace, 160 Ariz. 424, 427, 773 P.2d 983, 986 (1989). The Arizona Supreme Court has upheld application of the depravity prong to a non-triggerman accomplice. See State v. Tison, 129 Ariz. 526, 545, 633 P.2d 335, 354 (1981); State v. Scott, 177 Ariz. 131, 143-44, 865 P.2d 792, 804-05 (1993).

In this case, the trial court appeared to base its depravity finding on the senselessness of the murder and the helplessness of the victim. (RT 1/13/88 at 28) ("There is no reasonable doubt that the murder was a senseless crime. There was no way the victim could have identified anyone. She was utterly helpless and was in no manner any threat to the defendant.") The Arizona Supreme Court affirmed the depravity finding, again, apparently based upon the senselessness of the crime and the helplessness of the victim. It stated that "[a]s difficult as it may be to define depravity, the gangland-style action of forcing two elderly persons to lay face down on the floor, tying them up, then senselessly shooting them amounts to depraved conduct." Robinson, 165 Ariz. at 61, 796 P.2d at 863.

Evidence reflected that Petitioner left Banning with Robinson and Mathers and traveled to Yuma, Arizona, the evening of the crime. Petitioner was observed wearing a red bandana and a tan trench coat. Two men invaded the Hills' home late at night, forced the elderly couple to lie face down on their bedroom floor and tied them up, while demanding drugs and money and ransacking their bedroom. After Ralph Hill glimpsed one of the assailants, a young black man wearing a red bandana, he and Sterleen were shot. Robinson was apprehended as he fled from the Hills' street. Two hours later, Petitioner called his common-law wife from Yuma, telling her that he was stranded, and later bought a ticket at the Yuma bus terminal to return home to Banning. Pursuant to a search of the Hills' neighborhood following the crime, the murder weapon, a pair of rubber gloves and a tan

trench coat, identified as the one worn earlier by Petitioner, were found abandoned in a field near the Hills' home.

This evidence was sufficient to support a finding that Petitioner was present in the Hills' home and that he was involved in the crime, even if he was not the triggerman. Further, it supports a finding of a vile state of mind due to the senselessness of the murder and helplessness of the victim. The Court concludes that the Arizona courts' finding of depravity was not so arbitrary and capricious as to violate Petitioner's constitutional rights. Accordingly, Petitioner is not entitled to relief based on the (F)(6) circumstance, and habeas relief on Claim 8-B will be denied.

Pecuniary Gain Circumstance

The Ninth Circuit has upheld the Arizona courts' narrowing of the (F)(5) circumstance. See Woratzeck v. Stewart, 97 F.3d 329, 335 (9th Cir. 1996); see also Poland v. Stewart, 117 F.3d 1094, 1099-1100 (9th Cir. 1997). Therefore, this Court's review of the state courts' application of the (F)(5) circumstance to the facts 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. See Jeffers, 497 U.S. at 780.

Under Arizona law, the prosecution must show that the expectation of pecuniary gain was "a motive, cause, or impetus for the murder and not merely the result of the murder." State v. Hyde, 186 Ariz. 252, 280, 921 P.2d 655, 683 (1996). The trial court found that Petitioner was motivated to participate in the crime by the promise that the Hills had drugs and money in their home. (ROA 109 at 2, ¶ 4.) It further found that Petitioner searched for items of value in the Hills' bedroom and that items of value were taken from the residence, although some were later recovered a distance from the home. (Id.) The Arizona Supreme Court affirmed, noting that the armed assailants had repeatedly demanded drugs and money from the Hills, Petitioner had searched their bedroom for valuables, and valuables were in fact taken from the home. Robinson, 165 Ariz. at 60, 796 P.2d at 862. These findings demonstrate that the application of the (F)(5) factor was not so arbitrary and capricious as to violate Petitioner's constitutional rights. Accordingly, habeas relief on Claim 8-C will

be denied.

Claim 10: Insufficient Enmund/Tison Findings

In Claim 10, Petitioner alleges that his death sentence violates his Fifth, Sixth, Eighth and Fourteenth Amendment rights because the prosecution failed to prove his intent to commit murder in violation of the holdings in Enmund v. Florida, 458 U.S. 782, 787-88 (1982), and Tison v. Arizona, 481 U.S. 137 (1987). (Dkts. 20 at 42-43; 85 at 61.) In Enmund, the Supreme Court held that a felony-murder defendant could only be sentenced to the death penalty if he actually killed, attempted to kill, or intended to kill. 458 U.S. at 797. In Tison, the Court expanded Enmund's rule so that a felony-murder defendant could be sentenced to death if the defendant was a major participant in the underlying felony and the defendant acted with reckless indifference to human life. 481 U.S. at 157-58; see also Greenawalt v. Ricketts, 943 F.2d 1020, 1028 (9th Cir. 1991) (finding Enmund satisfied when defendant knowingly created a grave risk of death and was an active participant in the felonies). Findings pursuant to Enmund may be made by the trial or appellate court. Cabana v. Bullock, 474 U.S. 376, 387 (1986). A state court's finding that Enmund/Tison is satisfied is sufficient if "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, 443 U.S. at 319 (emphasis added).

At sentencing, the trial court found that Petitioner was a "major factor in bringing about the crime," that he "evinced a total and reckless disregard for human life" and that he "planned to execute the victim during the armed robbery." (ROA 109 at 3, ¶ 5(c), (f).) On direct appeal, the supreme court found the requisite culpability was established because there was evidence that Petitioner "was at least present when the hands and feet of Ralph and Sterleen Hill were bound, that the Hills were terrorized with firearms, . . . [and that Petitioner] was at least present in the Hills' home when Ralph Hill was wounded and Sterleen Hill was murdered." Robinson, 165 Ariz. at 62, 796 P.2d at 864.

Petitioner argues there was no evidence he was present when the Hills were tied up or when Sterleen Hill was murdered. (Dkt. 85 at 61-62.) He further argues that even if

there were evidence that he was in the Hills' home, there was no evidence that he intended Sterleen Hill's death or that he was a major participant in the underlying felonies and showed reckless indifference to human life. (Id. at 62.) The Court disagrees.

Although neither Le Sean nor Ralph Hill identified Petitioner as one of the men who forced their way into the Hills' home, there was substantial circumstantial evidence connecting Petitioner to the armed intrusion. First, Petitioner was seen in Robinson's car as Robinson left Banning for Yuma, Arizona, the evening of the murder. Petitioner was observed wearing a tan trench coat and a red bandana. There was evidence that Robinson told Petitioner, either in Yuma or on the way to Yuma, that the purpose of the trip was to rob a drug dealer and to "shoot 'em" if things got "rough." Two men forced their way into the Hills home and bound the Hills. (Id. at 124, 127, 134-36.) Ralph Hill testified that one of the intruders kept poking a gun into his ear. (Id. at 124-25, 126, 134.) He also testified that he glimpsed one of the armed intruders – a young black man wearing a red bandana who was not Robinson – as the man searched the Hills' bedroom, while the other man stood over the couple. (RT 12/10/87 at 125, 126.) Robinson was apprehended as he fled from the Hills' street immediately after the shooting. A trench coat identified as the one Petitioner had been observed wearing earlier in the evening, was found abandoned a few yards from the shotgun used in the attack. There was no evidence that Robinson could have or did pass the field where these items were found following the shooting. Viewing the evidence in the light most favorable to the prosecution, a rational factfinder could find beyond a reasonable doubt that Petitioner was a major participant in the underlying felonies and that he acted with reckless indifference to human life under Enmund/Tison. Relief on this claim will be denied.

Claim 11: Ineffective Assistance of Counsel at Sentencing

In Claim 11, Petitioner alleges that counsel was ineffective at sentencing in violation of his rights to due process, equal protection, protection against cruel and unusual punishment, and counsel under the Fifth, Sixth, Eighth and Fourteenth Amendments. To establish IAC, a petitioner must show that counsel's performance was deficient and that the

deficiency prejudiced his defense. Strickland v. Washington, 466 U.S. 668 (1984).

A. Failure to Investigate and Present Evidence from Susan Hill at Sentencing

Petitioner initially alleges that trial counsel, Robert Clarke, rendered ineffective assistance by failing to interview and present testimony from Susan Hill at sentencing. In support, Petitioner attached a declaration from Susan Hill. (Dkt. 84, Ex. K) In the declaration, Hill stated that she did not believe Petitioner was involved in the murder of her stepmother and that she would have so testified at sentencing if Clarke had asked her. (Dkt. 84, ex. K at ¶¶ 9-10, 12.) Additionally, she declared that Petitioner had intervened on her behalf prior to the murder when Robinson became violent towards her and that she did not believe that Petitioner would have participated in a plan to kidnap her and return her to Robinson. (Id., at ¶¶ 8, 10, 12.) Petitioner did not present this declaration to the PCR court, nor did he call Hill as a witness during the state evidentiary hearing.

In a previous order, the Court denied Petitioner's motion to expand the record to include Hill's declaration. (Dkt. 96 at 4.) Petitioner had sought expansion in support of his Jackson insufficient evidence claim, and the Court denied the request because review of that claim was limited to the record before the state court. (Id.) In the same order, the Court also denied expansion in support of the instant claim of ineffectiveness because the exhibits Petitioner sought to expand into the record constituted new evidence that had never been presented to the state courts. (Id.) The Court concluded that Petitioner had been afforded a full and fair opportunity to develop the facts in support of Claim 11 during the state evidentiary hearing and that he had demonstrated neither cause and prejudice nor a fundamental miscarriage of justice to excuse his failure to present the new evidence in state courts. (See id. at 3, citing Keeney v. Tamayo-Reyes, 504 U.S. 1 (1992).)

The Court reaffirms this conclusion and again finds that expansion of the record to consider Hill's declaration in support of Claim 11 is not warranted. Petitioner was afforded a full and fair opportunity to develop his IAC claims during the PCR evidentiary hearing, including relevant testimony from Susan Hill. Petitioner's failure to develop, or to establish

cause and prejudice or a fundamental miscarriage of justice, precludes consideration of Hill's declaration. Absent evidence in support of deficient performance and prejudice, Petitioner has failed to establish that Clarke was ineffective in violation of the Sixth Amendment. Therefore, the Court finds that Clarke's alleged failure to interview and present testimony at sentencing from Susan Hill does not afford a basis for habeas relief.

B. Failure to Investigate and Present Other Mitigating Evidence

Petitioner alleges that counsel failed to investigate and present available mitigation regarding his family background, history of childhood abuse, learning disabilities, head injuries, delinquency, substance abuse, fatherhood and move to Banning. (Dkts. 20 at 44-47; 85 at 5-17.) As discussed above, this Court's consideration of these allegations is limited to the evidence in the state court record. That evidence relates to Petitioner's dysfunctional family background and the negative effects on his development, ingestion of alcohol from early childhood and use of illicit drugs beginning in his early teens, history of head injuries, suspected diffuse brain damage, and intoxication the night of the crime.

Relevant State Court Proceedings

At the aggravation/mitigation hearing, Petitioner's counsel presented three witnesses on Petitioner's behalf – a friend, Steve Thomas; Petitioner's mother, Willie Mae Skinner; and a half-brother, John Mondy.[11] (RT 1/8/88.) All three witnesses testified that Petitioner was a friendly and upbeat person, that he was not violent or aggressive, and that he was a caring father of his five-year old son for whom he had sought and obtained legal custody from his ex-wife. (RT 1/8/88 at 89, 92, 94-95, 120-21, 124-26, 127-28, 135, 136, 139-40.)

Thomas testified that he had known Petitioner for two or three years and that he had both worked with Petitioner and had hired Petitioner to work for him. (Id. at 90-92, 93, 103-104.) Thomas testified that Petitioner was somewhat easily influenced and gullible. (Id. at 92.) He also testified that he had never seen Petitioner drunk or high. (Id. at 107-108.)

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[11] The Court adopts the spelling used by Skinner in a letter submitted to the PCR court dated August 24, 1993, rather than the one in the trial transcript. (ROA 193.)

Petitioner's mother testified that Petitioner was the youngest of her nine children, that his father died when he was a child, and that he had dropped out of high school in the tenth or eleventh grade. (Id. at 118-20.) She acknowledged that Petitioner had served some time in prison, but also that he had worked to support himself and his son, and that he took good care of his son. (Id. at 121-22, 126-27.)

John Mondy was thirteen years older than Petitioner and was a "peace officer," who worked as a group counselor for the California Youth Authority. (Id. at 133.) Mondy testified that Petitioner was good with his hands, such as drawing, electronics and carpentry, but that he had difficulties in school. (Id. at 133-34.) Mondy testified that Petitioner could be gullible or manipulated by others. (Id. at 135-36, 140.) Mondy acknowledged that Petitioner had gotten into a few fights as a teenager and that he had served a couple of years in prison for burglary, but that Petitioner had sought and obtained custody of his son and had tried to mend his ways after leaving prison. (Id. at 137-38.)

The trial court found the mitigation insufficient to outweigh the two aggravating factors; it expressly found that Petitioner's capacity to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of the law was not impaired, that his age (27) was not mitigating, and that none of the other factors offered by Petitioner, including his passive nature, fatherhood, family relationships, and desire to do things with his life were sufficiently mitigating to overcome the aggravation. (RT 1/13/88 at 29-30.) On direct appeal, the state supreme court affirmed, finding "sparse" evidence that Petitioner had been intoxicated at the time of the crime, that his age was not mitigating, and that being a single parent was not sufficient to outweigh the aggravating circumstances. Robinson, 165 Ariz. at 61, 796 P.2d at 864.

In his PCR proceedings, Petitioner alleged that Clarke rendered ineffective assistance by failing to interview him regarding potential mitigation and by failing to present evidence of good behavior during incarceration, his unstable family background, and the absence of a violent history or propensity. (ROA 141 at 25-26.) Petitioner sought and was granted the assistance of psychologist Todd Roy, as well as authorization for a neurological assessment

(specifically, an EEG and MRI) and a neuropsychological examination to evaluate the existence of potential organic brain damage. (ROA 154, 160, 169, 172, 178-79, 184, 187-89.) Dr. Roy's report and an addendum were subsequently filed with the court. (ROA 173, 192.) Petitioner was also evaluated by psychiatrist Eva B. McCullars for the State, and a copy of her report was filed with the court. (ROA 185.)

The PCR court held a joint evidentiary hearing on Petitioner's and Robinson's IAC claims. (RT 9/8-9/93.) At the hearing, Petitioner's sentencing counsel, Robert Clarke, testified regarding his investigation and presentation of mitigating evidence. Petitioner's prison counselor, Juan Gonzales, testified about Petitioner's classification and good behavior during his confinement by the Arizona Department of Corrections ("ADOC"). In addition, Drs. Roy and McCullars testified about their respective evaluations of Petitioner. Dr. Roy cited several factors as mitigating. These included Petitioner's dysfunctional family background and its effects on his development, ingestion of alcohol beginning in early childhood and the use of illicit drugs beginning in his teens, and Petitioner's history of head injuries. Dr. Roy concluded that there were indications Petitioner had diffuse brain damage, likely resulting from head injuries and substance abuse, which would have impaired Petitioner's ability to make rational decisions, to plan and understand consequences of his behavior, and to mediate impulsivity. Based on the diffuse brain damage, Dr. Roy ruled out a diagnosis of antisocial personality disorder. Further, based on his interviews of Petitioner, Dr. Roy concluded that Petitioner had been under the influence of alcohol and cocaine the night of the crime. (RT 9/8/93 at 51, 72-73.)

Dr. McCullars agreed that Petitioner had a significantly dysfunctional family background (RT 9/9/93 at 138), but her opinion otherwise differed in most respects from that of Dr. Roy. She concluded that Petitioner had an antisocial personality disorder and testified that this diagnosis was not precluded by diffuse brain damage. (Id. at 125-27.) She explained that diffuse brain damage was present in approximately ten to fifteen percent of the population and that it did not necessarily impair an individual's functioning, noting that several prominent individuals, including presidents, have had such damage but not been

impaired by it. (Id. at 140-42.) Further, while she acknowledged that diffuse brain damage could lead to learning disabilities and, in the worst cases, to "many other problems," she testified that such individuals were "still able to think and follow their thought processes in a relatively normal way." (Id. at 141.) Moreover, she found "no evidence on gross mental status" that Petitioner was "either mentally retarded or organically disabled." (Id.) With respect to head injuries, Dr. McCullars found that Petitioner's historical reporting varied from one interviewer to another in that he did not report the same instances of head injuries to her that he had reported to Dr. Roy, and she did not appear to find the reported injuries significant. (Id. at 133.) Dr. McCullars concluded that Petitioner's "addictive potential to substances as are self-reported by him indicate a trait of a Dependent Personality Disorder." (ROA 185 at 7.) She noted that while Petitioner indicated to her that he had been under the influence of drugs the night of the crime, he had refused to discuss the details of the crime with her. (Id.) Absent corroboration and based on Petitioner's admitted history of lying, she lacked confidence in Petitioner's self-reports of drug use the night of the crime. (Id.)

Citing Strickland, among other cases, the PCR court denied relief on Petitioner's IAC sentencing claim, crediting Dr. McCullars's conclusion that Petitioner had an antisocial personality disorder and that he was poorly adjusted to living in society. (ROA 214 at 3.) It found "nothing in [Petitioner's] makeup now, nor in the opinion of the experts was there anything at the time of the offenses, which lessened his ability to differentiate right from wrong or to conform his actions to the law." (Id.) It indicated that trial counsel acted reasonably in not seeking a mental health evaluation where counsel observed nothing in Petitioner's personality or actions to cause him to suspect that a mental examination would be fruitful and that Petitioner was not prejudiced by the lack of a mental health evaluation at the time of sentencing. (Id.) The court further noted that it had been aware that Petitioner was a good or even model prisoner while jailed in Yuma and that he had minimal problems at ADOC. (Id. at 4.) It found that there were nothing but "indications" from Petitioner that he had been "drug or alcohol dependent; that he was so dependent at the time of the crimes, or that either of those dependencies affected his ability to conform his actions to the

demands of society" and that "[n]either of these, taken separately or with any other mitigating circumstance or circumstances would have mitigated against" a death sentence. (Id.) The Arizona Supreme Court subsequently denied review. (ROA 235.)

Performance Analysis

A petitioner claiming ineffective assistance "must identify the acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment." Strickland, 466 U.S. at 690. Further, the petitioner must show that "counsel made errors so serious that counsel was not functioning as the counsel guaranteed the defendant by the Sixth Amendment." Id. at 687. The performance inquiry assesses whether counsel's assistance was reasonable considering all the circumstances. Id. at 688-89. "A fair assessment of attorney performance requires that every effort 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. For instance, counsel's performance is evaluated by what reasonable counsel would have done at that time, including an evaluation of state law sentencing strategies. See Siripongs v. Calderon, 35 F.3d 1308, 1315 (9th Cir. 1994). A petitioner must overcome the presumption that under the circumstances, the challenged action might be considered sound trial strategy. Id. "A court deciding an actual ineffectiveness claim must judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct." Strickland, 466 U.S. at 690.

Petitioner alleges that Clarke performed deficiently because he conducted an inadequate investigation and failed to present available mitigation. Counsel has a duty to conduct a reasonable investigation or to make a reasonable decision that makes particular investigation unnecessary. Strickland, 466 U.S. at 690. The failure to adequately investigate and present mitigating evidence can constitute deficient performance. See Wiggins v. Smith, 539 U.S. 510 (2003). A reasonable mitigation investigation involves not only the search for good character evidence but also evidence that may demonstrate that the criminal act was attributable to a disadvantaged background or to emotional and mental

problems. See Boyde v. California, 494 U.S. 370, 382 (1990). Thus, deficient performance has been found where trial counsel failed to investigate and present substantial mitigating evidence regarding family background, borderline mental retardation and exemplary behavior in prison when potential rebuttal evidence was minimal. See Williams (Terry) v. Taylor, 529 U.S. 362 (2000). In addition, counsel who is on notice of a serious mental health issue and does not complete a reasonable mitigation investigation or provide a reasonable tactical justification performs deficiently. See Caro v. Woodford, 280 F.3d 1247, 1254 (9th Cir. 2002); Evans v. Lewis, 855 F.2d 631, 637 (9th Cir. 1988). When counsel's investigation is being assessed for reasonableness, "[t]he reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions." Strickland, 466 U.S. at 691.

Although Clarke could have conducted additional investigation of Petitioner's background for potential mitigation, the Court cannot conclude that Clarke performed deficiently by failing to do so. At the state evidentiary hearing, Clarke testified that he had been in practice as an attorney since 1969 (RT 9/8/93 at 149), and that he had worked for two years as a prosecutor in the early 70s (RT 9/9/93 at 5). He had tried thirty to fifty jury trials and approximately half of his practice was in criminal defense. (RT 9/9/93 at 6-7.) Additionally, Clarke had tried three or four capital cases prior to being appointed to represent Petitioner and had pleaded out ten to twelve other capital cases. (RT 9/8/93 at 149.)

In Petitioner's case, Clarke began investigating possible mitigation as he investigated the facts of the case. (Id. at 150-51.) Clarke testified that he had "very extensive discussions" with Petitioner regarding what his life was like from when he was a young man to the present. (Id. at 151.) He also testified that he had "rather extensive discussions" with Petitioner's common-law wife, Barbara Bryant, regarding Petitioner's life following his release from prison in California. (Id.) He testified that he had "rather extensive discussions" with Petitioner's brother regarding Petitioner while he was growing up, as well as with Petitioner's mother. (Id.) Clarke testified that he questioned Petitioner "very

closely" about his drug use and alcohol intake. (Id. at 153-54.) He also testified that he asked Petitioner about whether he had ever been abused and about how he was disciplined, and that he also reviewed those issues with family members of Petitioner. (Id.)

Clarke acknowledged that he did not seek Petitioner's California incarceration records, but explained that he had concluded that the California Department of Corrections was unlikely to have records relevant to potential mitigation, such as psychological records, because Petitioner had only been incarcerated for two years for burglary and was not "a hardened criminal." (Id. at 151-52.) Clarke also acknowledged that he did not seek Petitioner's school records, instead relying on family members to provide information regarding Petitioner's education. (Id. at 153.) He also acknowledged that he did not seek a mental health evaluation of Petitioner, explaining that he had not observed anything from his many lengthy meetings with Petitioner, or interviews of Petitioner's family, that suggested that such an evaluation was warranted. (Id. at 154-55.) Clarke acknowledged that he did not request Petitioner's medical history, but he questioned family members regarding any "medical problems" or "anything out of the ordinary" in Petitioner's background. (Id. at 155.) Finally, while acknowledging that Bryant told him that Petitioner had a "cocaine problem" (RT 9/9/93 at 7), Clarke testified that Petitioner had never told him that he was addicted to cocaine or that he had used cocaine the day of the crime; he had only told Clarke that he had been intoxicated the day of the crime (id. at 4-5).

Petitioner presented no evidence at the state PCR evidentiary hearing to contradict Clarke's testimony. In an affidavit submitted in support of his amended PCR petition, Petitioner averred that Clarke "never discussed the penalty phase of my trial with me until about twenty (20) minutes before the mitigation/aggravation hearing." (ROA 141, ex. C at ¶ 2.) He also averred that Clarke "never" asked him "any questions whatsoever" regarding his personal background and that because of Clarke's alleged "lack of interest," Petitioner never discussed several factors that might have been offered in mitigation. (Id. at ¶ 5.) Clarke's presentation of three witnesses at sentencing, each of whom had traveled to Yuma from at least as far away as Banning is alone sufficient to discredit the implication that

Clarke failed to prepare for the sentencing until minutes before the aggravation/mitigation hearing. More critically, Petitioner did not testify nor otherwise present evidence from any family member or Bryant to contradict Clarke's testimony at the evidentiary hearing. The PCR court clearly found Clarke more credible than Petitioner's affidavit on these points.

Further, Petitioner presented no evidence that either his school records or his California incarceration records would have revealed potential mitigation. Rather, as noted by Dr. Roy in his report and in his testimony, a single reference to Petitioner in his school records as "educable mentally retarded" was contradicted by Dr. Roy's own testing of Petitioner, which reflected that Petitioner had average or low-average intelligence and abilities and was not retarded. (RT 9/8/93 at 35.)

Nor did Petitioner establish that Clarke acted unreasonably in not seeking a mental health evaluation. Counsel performs deficiently when he is on notice of a client's serious mental health problems but fails to complete a reasonable mitigation investigation or to provide a reasonable tactical justification for not conducting such an investigation. See Caro, 280 F.3d at 1254. There was scant evidence that Petitioner had been treated for any prior mental illness or had any mental health history. In an affidavit appended to his amended PCR petition, Petitioner averred that after getting into trouble when he was fifteen, he received psychiatric counseling as part of his rehabilitation. (ROA 141, ex. C.) Petitioner reported this episode to Dr. Roy, telling him that the psychologist "concluded that the death of [Petitioner's] father left him without a male figure in his life and was responsible for the difficulties he experienced." (ROA 173 at 21.) There is no evidence regarding the nature or extent of such counseling. Petitioner also reported to Dr. Roy that in 1981 he had been taken to the Sacramento County Hospital after overdosing on LSD and passing out, and was admitted to the psychiatric unit. (ROA 173 at 16.) There is no evidence regarding the length of Petitioner's stay, treatment or diagnosis.[12] Most

[12] Dr. Roy noted that there were no confirming hospital records of that admission at the time of his report. (ROA 173 at 17.)

significantly, there is no evidence that either Petitioner, a family member or a friend ever disclosed these occurrences to Clarke or that either of these occurrences would have led to relevant mitigation. See Miniel v. Cockrell, 339 F.3d 331, 345 (5th Cir. 2003) (counsel not deficient where there was nothing in the record or counsel's interactions with client to alert counsel to potential mental problems); cf. Turner v. Calderon, 281 F.3d 851, 892 (9th Cir. 2002) (where counsel on notice that client might be mentally impaired, the failure to investigate mental condition as mitigating factor without strategic reason is deficient); Evans, 855 F.2d at 636-37 (counsel deficient where he failed to investigate client's documented history of mental problems). There was also no evidence that Petitioner, any family member or friend alerted Clarke that Petitioner had suffered several head injuries during his childhood and adolescence.[13]

Finally, it appears that Petitioner told Clarke only that he was intoxicated the night of the crime; he did not say that he had also used cocaine and that he was an alcoholic and drug addict. Absent evidence that Petitioner, or others, provided such information to Clarke, Clarke had little reason to further investigate the issue. On this record, the Court does not find that Clarke conducted an unreasonable investigation. See Wiley v. Puckett, 969 F.2d 86, 100 (5th Cir. 1992) (even if petitioner had told his counsel that he was under the influence of drugs and alcohol, there was no reason for counsel to suspect existence of mental impairment, and counsel's decision to limit investigation of potential mitigating evidence to state's witnesses was reasonable). Thus, the Court concludes that Clarke's investigation and presentation of mitigation was reasonable and that he did not perform deficiently. However, even if Clarke performed deficiently in investigating and presenting mitigation, the Court concludes that Petitioner was not prejudiced.

Prejudice Analysis

The prejudice component of the Strickland test focuses on whether counsel's

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[13] It appears that medical treatment was only sought in one of those instances, after Petitioner was involved in a car/bicycle accident when he was fifteen. (See ROA 173 at 13-14.)

deficient performance renders the result of the sentencing unreliable or the proceeding fundamentally unfair. Lockhart v. Fretwell, 506 U.S. 364, 372 (1993). Thus, under this prong, "an error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment." Strickland, 466 U.S. at 691. To demonstrate prejudice, the petitioner "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 694. A reasonable probability is a probability sufficient to undermine confidence in the outcome. Id. Discussing the prejudice standard, the Supreme Court stated in Strickland that:

> The assessment of prejudice should proceed on the assumption that the decisionmaker is reasonably, conscientiously, and impartially applying the standards that govern the decision. . . . When a defendant challenges a death sentence such as the one at issue in this case, the question is 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.
>
> In making this determination, a court hearing an ineffectiveness claim must consider the totality of the evidence before the judge . . . . Some of the factual findings will have been unaffected by the errors, and factual findings that were affected will have been affected in different ways. Some errors will have had a pervasive effect on the inferences to be drawn from the evidence, altering the entire evidentiary picture, and some will have had an isolated, trivial effect. Moreover, a verdict or conclusion only weakly supported by the record is more likely to have been affected by errors than one with overwhelming record support. Taking the unaffected findings as a given, and taking due account of the effect of the errors on the remaining findings, a court making the prejudice inquiry must ask if the defendant has met the burden of showing that the decision reached would reasonably likely have been different absent the errors.

Id. at 695-96. The additional mitigation evidence must do more than barely alter the sentencing profile already presented to the sentencing judge. Id. at 699-700.

In evaluating prejudice, a court is "asked to imagine what the effect might have been upon a sentencing judge, who was following the law, especially one who had heard the testimony at trial. Mitigating evidence might well have one effect on the sentencing judge, without having the same effect on a different judicial officer." Smith v. Lewis, 140 F.3d 1263, 1270 (9th Cir. 1998). Thus, this Court must consider Arizona law regarding the weighing of aggravating and mitigating circumstances before it can determine whether there

is a probability the result of the sentencing proceeding would have been different if the additional mitigation had been proffered. Id. at 1271. At the time Petitioner was sentenced, Arizona's death penalty statute required a judge to impose a death sentence if one or more aggravating circumstances were proven beyond a reasonable doubt and the mitigation established by a preponderance of the evidence was not sufficiently substantial to call for leniency. A.R.S. § 13-703(E) (superseded).[14]

The PCR court, before whom Petitioner was tried, heard all of the additional mitigation evidence proffered by Petitioner. It credited Dr. McCullars's finding of antisocial personality disorder and concluded that Petitioner had not demonstrated a reasonable probability that his sentence would have been different if that mitigation had been presented at trial. A federal habeas court must defer to a state post-conviction court's credibility determinations, following an evidentiary hearing, if they are fairly supported by the record. See Sophanthavong v. Palmateer, 378 F.3d 859, 867 (2004) (citing Marshall v. Lonberger, 459 U.S. 422, 434 (1983), for the holding that former § 2254(d) gave federal habeas courts "no license to redetermine credibility of witnesses whose demeanor has been observed by the state court, but not by them."); Carriger v. Stewart, 132 F.3d 463, 473 (9th Cir. 1997). This Court concludes that the PCR court's credibility determinations, and the fact-finding based on those determinations, are fairly supported by the record in this case. Moreover, the Court concludes that the additional mitigation proffered by Petitioner at the state evidentiary hearing was insufficient to make a different sentence reasonably probable had counsel presented it at sentencing.

Intoxication the Night of the Crime

Under Arizona law, intoxication at the time of a crime can constitute statutory

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[14] In Ring v. Arizona, 536 U.S. 584 (2002), the Supreme Court ruled that a sentencing judge, sitting without a jury, may not find an aggravating factor necessary for imposition of the death penalty, invalidating this aspect of Arizona's capital sentencing scheme. In Schriro v. Summerlin, 124 S.Ct. 2519 (2004), the Court held that Ring does not apply retroactively to cases, such as Petitioner's, that were already final on direct review at the time Ring was decided.

mitigation if a defendant establishes 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." A.R.S. § 13-703(G)(1). To establish this factor based on voluntary intoxication, a defendant must show either that his capacity to appreciate the wrongfulness of his conduct or that his capacity to conform his conduct to the requirements of the law was significantly impaired at the time of the offense. See, e.g., State v. Woratzeck, 134 Ariz. 452, 458, 657 P.2d 881, 871 (1982); State v. Lavers, 168 Ariz. 376, 395, 814 P.2d 333, 353 (1991). However, self-reports of voluntary intoxication at the time a crime was committed are subject to searching skepticism because of the obvious motive to fabricate. See, e.g., State v. Medrano, 185 Ariz. 192, 194, 914 P.2d 225, 227 (1996); State v. Murray, 184 Ariz. 9, 45, 906 P.2d 542, 578 (1995) (rejecting historical substance abuse as a mitigating factor where evidence of abuse was self-reported and uncorroborated). Further, a defendant's claim of alcohol or drug impairment may be rebutted by evidence that he took steps to avoid detection shortly after the murder or when it appears that intoxication did not overwhelm the defendant's ability to control his physical behavior. See State v. Rienhardt, 190 Ariz. 579, 591-92, 951 P.2d 454, 466-67 (1997); State v. Stanley, 167 Ariz. 519, 530-31, 809 P.2d 944, 955-56 (1991). In addition, a long history of drug dependence, absent evidence that a defendant was actually impaired at the time of the crime, does not constitute mitigation. See State v. Jones, 197 Ariz. 290, 312, 4 P.3d 345, 367 (2000).

In this case, the only evidence, other than self-reports, that Petitioner was under the influence of alcohol and drugs the night of the crime was Bryant's testimony that Petitioner sounded intoxicated when he called her at least two hours *after* the offense. Although Petitioner ostensibly refused to discuss the details of the crime with either PCR expert, he nevertheless conveyed to each that he was intoxicated the night of the crime. However, neither expert opined that Petitioner's capacity to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of the law were impaired, much less significantly impaired. See A.R.S. § 13-703(G)(1). Indeed, the State's expert found

Petitioner's self-report untrustworthy, and the PCR court clearly agreed. In addition, evidence supports that Petitioner fled from the Hills' home immediately after they were shot, that he called Bryant, and ultimately purchased a bus ticket to return to Banning. These facts rebut Petitioner's claimed impairment the night of the crime. The Court therefore concludes that the newly-proffered evidence of impairment would be accorded little weight.

Mental Impairment

Evidence was also proffered at the PCR hearing that Petitioner had diffuse brain damage, and/or antisocial personality disorder. Under Arizona law, evidence of head injuries and resulting brain damage do not carry substantial mitigating weight absent a causal connection to the crime. Cf. State v. Stokley, 182 Ariz. 505, 898 P.2d 454 (1995) (evidence of moderate to severe brain damage as a result of head injuries offset by above-average intelligence and lack of impulsivity); State v. Stuard, 176 Ariz. 589, 863 P.2d 881 (1993) (reducing death sentence where evidence established tenuous impulse control due to low IQ and substantial organic brain damage); State v. Chaney, 141 Ariz. 295, 686 P.2d 1265 (1984) (concluding that evidence of brain damage failed to establish inability to control conduct). However, major mental impairments, such as mental illness or brain damage, carry far more mitigating weight than does a personality disorder *if* such impairments demonstrate a defendant's inability to control his conduct or to appreciate the difference between right and wrong. See A.R.S. § 13-703(G)(1); State v. Doss, 116 Ariz. 156, 163, 568 P.2d 1054, 1061 (1977); State v. Richmond, 114 Ariz. 186, 197-98, 560 P.2d 41, 52-53 (1976). A personality disorder is only entitled to meaningful weight if it had some effect on a defendant's capacity to conform his conduct to the law's requirements or significantly influenced his behavior at the time of the crime. See State v. Hoskins, 199 Ariz. 127, 152, 14 P.3d 997, 1022 (2000) (significant mitigation established if defendant shows causal connection between personality disorder and commission of the crime); State v. Vickers, 129 Ariz. 506, 515, 633 P.2d 315, 324 (1981).

Although Dr. Roy concluded that Petitioner had diffuse brain damage, he did not find that such damage significantly impaired Petitioner's capacity to appreciate the wrongfulness

of his conduct or to conform his conduct to the requirements of law. Dr. McCullars, whom the PCR court found credible, found no indication that diffuse brain damage impaired Petitioner's capacity in any regard. Thus, any weight to be given to brain damage would be minimal. Further, although Dr. McCullars found that Petitioner had antisocial personality disorder, there was no evidence that it impaired Petitioner's capacity to appreciate the wrongfulness of his conduct or to conform his conduct with the law, or any causal connection to Petitioner's involvement in the crime. Thus, the weight given to that finding would be minimal.

Dysfunctional Family Background

Both experts agreed that Petitioner had a significantly dysfunctional background. Arizona courts have held that while a difficult family background, including childhood abuse, may be relevant mitigation at the penalty phase, dysfunctional family history is entitled to significant mitigating weight only if it had a causal connection to the offense-related conduct. See State v. Mann, 188 Ariz. 220, 231, 934 P.2d 784, 795 (1997); State v. Towery, 186 Ariz. 168, 189, 920 P.2d 290, 311 (1996); Stuard, 176 Ariz. at 608 n. 12, 863 P.2d at 900 n. 12. Further, the weight accorded a defendant's difficult family background may be discounted for an adult offender because adults are considered to have greater responsibility for their actions. Gretzler, 135 Ariz. at 58, 659 P.2d at 16.

While both experts concluded that Petitioner had a dysfunctional family background, neither identified any causal connection to Petitioner's participation in the offense. The only indication of any possible abuse was Dr. Roy's surmise that the discipline Petitioner received might be considered abusive by later standards. In any event, the possible effect on Petitioner of his dysfunctional family background was mediated by his being 27 years of age at the time of the crime. Petitioner's evidence of a dysfunctional family background would be entitled to little weight.

Summary

The Court concludes that it is not reasonably probable that the additional mitigation proffered by Petitioner at his PCR hearing would have been sufficient to alter his sentence

and, thus, to establish prejudice. There was evidence that Petitioner went into the Hills' home seeking drugs and money and that he knew before entering the home that one or more of its occupants might be shot, "if things [got] rough." Petitioner participated in forcing entry into the home, tying up the elderly occupants (face down on the floor) and ransacking their bedroom for valuables. Either Petitioner or his accomplice repeatedly stuck a gun into Ralph Hill's ear. Both Hills heard one intruder say that they should "get" the Hills' teenage son. Finally, after Ralph glimpsed one of his assailants, Sterleen witnessed the shooting of her husband, followed by the pumping of the shotgun, and the undoubted realization that she was next. Robinson, 165 Ariz. at 61, 796 P.2d at 863. Circumstantial evidence established that Petitioner participated in these events, even if he was not the actual shooter. These facts support that Petitioner's participation was for pecuniary gain, and that the killing was especially cruel, heinous and depraved. In opposition to this evidence, Petitioner points to claimed voluntary intoxication at the time of the crime and a chronic substance abuse problem, diffuse brain damage and antisocial personality disorder, and a dysfunctional family background. He did not show that any of these, separately or combined, impaired his capacity to control his conduct to the law's requirements or know the difference between right and wrong. Nor did he show any causal connection of these factors with the crime, to help explain and therefore mitigate his role in the murder. Thus, even if mitigating, Petitioner failed to establish that they were entitled to more than minimal weight, as the PCR court concluded. The Court finds that, after considering the totality of the mitigation evidence presented at sentencing and during the PCR, Petitioner has not demonstrated that he was prejudiced by counsel's allegedly deficient performance. Accordingly, Petitioner is not entitled to relief on this claim.

Claim 13: Ineffective Assistance of Appellate Counsel

In Claim 13, Petitioner alleges that appellate counsel was ineffective for failing to argue that there was insufficient evidence to sustain Petitioner's conviction in violation of his rights to due process, equal protection, protection from cruel and unusual punishment, and counsel under the Fifth, Sixth, Eighth and Fourteenth Amendments. (Dkts. 20 at 51-52;

85 at 72-74.) Petitioner's trial counsel, Robert Clarke, moved for acquittal and for a new trial based on insufficient evidence following the guilt phase and at the commencement of sentencing. Clarke represented Petitioner on direct appeal, but did not raise a sufficiency of the evidence claim in his opening brief.

Petitioner's co-defendant Mathers raised a sufficiency of the evidence claim in his appeal. In the course of granting relief on that claim, the Arizona Supreme Court noted that there was sufficient evidence to support Petitioner's conviction. Mathers, 165 Ariz. at 71, 796 P.2d at 873. Petitioner argues that the supreme court's decision to address an issue that was not specifically raised by him did not negate counsel's duty to raise and zealously argue the issue. (Dkt. 85 at 73.) Petitioner's claim must fail on the prejudice prong because there is no probability that if appellate counsel had raised the claim the outcome of the proceeding would have been different. See Strickland, 466 U.S. 694, 697 (finding that courts can analyze claim solely on prejudice prong, which requires a showing of a reasonable probability that absent counsel error the result would have been different). The supreme court considered the issue *sua sponte* and determined that sufficient evidence supported Petitioner's conviction. See Mathers, 165 Ariz. at 71, 796 P.2d at 873; see also discussion supra Claim 5. There is no prejudice when appellate counsel does not raise a meritless claim. See Featherstone v. Estelle, 948 F.2d 1497, 1507 (9th Cir. 1991). Accordingly, relief on this claim will be denied.

Claim 14-B: The Arizona Supreme Court Failed to Consider Mitigation Evidence in Its Independent Review

Claim 15-B: The Arizona Supreme Court Should Have Considered Mathers's Acquittal as a Mitigating Circumstance in Its Independent Sentencing Review

In Claim 14-B, Petitioner alleges that the Arizona Supreme Court failed to consider and weigh all of the mitigating evidence supported by the record in its independent review of his sentence. In Claim 15-B, Petitioner alleges that the Arizona Supreme Court should have considered Mathers's acquittal as a mitigating circumstance when it independently reviewed Petitioner's sentence on direct appeal.

The Court previously declined to determine whether Petitioner had properly exhausted Claims 14-B and 15-B, subject to further briefing by the parties regarding the issue. (Dkt. 64 at 27, 29.) The parties included additional briefing regarding the procedural status of these claims in their merits briefs. The Court has reviewed those briefs and concludes that review on the merits of Claims 14-B and 15-B is procedurally barred.

Principles of Exhaustion and Procedural Default

To properly exhaust state remedies, a 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).[15] Explicit fair presentation must be made not only to the trial or post-conviction court, but to the state's highest court. Baldwin v. Reese, 541 U.S. 27, 32 (2004).

A habeas claim may be precluded from federal review in either of 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 v. Thompson, 501 U.S. 722, 729-30 (1991). Second, a claim may be procedurally defaulted in federal court if the petitioner failed to present the claim in any forum and "the court to which the petitioner would be required to present his claim[] in order to meet the exhaustion requirement would now find the claim[] procedurally barred." Coleman, 501 U.S. at 735 n.1. This is often referred to as "technical" exhaustion because although the claim was not actually exhausted in state court, the petitioner no longer has an available state remedy. See Gray v. Netherland, 518 U.S. 152, 161-62 (1996) ("A habeas petitioner who has defaulted

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[15] Resolving whether a petitioner has fairly presented his claim to the state court is an intrinsically federal issue to be determined by the federal court. Wyldes v. Hundley, 69 F.3d 247, 251 (8th Cir. 1995); Harris v. Champion, 15 F.3d 1538, 1556 (10th Cir. 1994).

his federal claims in state court meets the technical requirements for exhaustion; there are no remedies any longer 'available' to him.").

Rule 32 of the Arizona Rules of Criminal Procedure governs when petitioners may seek relief in post-conviction proceedings and raise federal constitutional challenges to their convictions or sentences in state court. Rule 32.2 provides, in part:

> a. Preclusion. A defendant shall be precluded from relief under this rule based upon any ground:
> . . . .
> (2) Finally adjudicated on the merits on appeal or in any previous collateral proceeding;
> *(3) That has been waived at trial, on appeal, or in any previous collateral proceeding.*
> b. Exceptions. Rule 32.2(a) shall not apply to claims for relief based on Rules 32.1(d), (e), (f), (g) and (h). When a claim under [these sub-sections] is to be raised in a successive or untimely post-conviction relief proceeding, the notice of post-conviction relief must set forth the substance of the specific exception and the reasons for not raising the claim in the previous petition or in a timely manner. If the specific exception and meritorious reasons do not appear substantiating the claim and indicating why the claim was not stated in the previous petition or in a timely manner, the notice shall be summarily dismissed.

Ariz. R. Crim. P. 32.2 (West 2003) (emphasis added). Thus, pursuant to Rule 32.2, a petitioner may not be granted relief on any claim which could have been raised in a prior petition for post-conviction relief. 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 will the preclusive effect of Rule 32.2 be avoided.

Therefore, if a claim was not raised previously in state court, this Court must determine whether Petitioner has state remedies currently available to him pursuant to Rule 32. If no remedies are currently available, then the claim is "technically" exhausted but procedurally defaulted. Coleman, 501 U.S. at 732, 735 n.1. 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). However, 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 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 735 n.1.

Exhaustion Analysis

In light of the parties' supplemental briefing, the Court considers three ways in which Petitioner may have fairly presented this claim to the state's highest court: (1) by virtue of the Arizona Supreme Court's sentencing review; (2) by way of a motion for reconsideration to the Arizona Supreme Court; or (3) by including the claim in his petition for review from denial of his PCR petition.

First, the Court rejects Petitioner's contention that the supreme court had a fair opportunity to address these claims during its sentencing review. These claims could not have been exhausted as part of Petitioner's direct appeal when the supreme court conducted a sentencing review, because it is during that review that the errors are alleged to have occurred. In order to give the state's highest court the opportunity to rule on his claim of error arising during his direct appeal, the proper method was to file a motion for reconsideration with the Arizona Supreme Court. See Ariz. R. Crim. P. 31.18(b) ("Any party desiring reconsideration of a decision of an appellate court may file a motion for reconsideration in the appellate court within fifteen days after the filing of a decision by the appellate court."); Correll v. Stewart, 137 F.3d 1404, 1418 (9th Cir. 1998) (finding procedural default of claim based on error of the Arizona Supreme Court where petitioner failed to file motion for reconsideration, which is "an avenue of relief that the Arizona Rules of Criminal Procedure clearly outline."). By not filing a motion for reconsideration, Petitioner sidestepped the best method by which he could have raised these claims.

In the absence of filing a motion for reconsideration, Petitioner could have attempted to fairly present these claims at each level of the state system through his PCR petition. However, Petitioner did not present either Claim 14-B or 15-B in his first PCR petition or subsequent petition for review. Therefore, the Court finds that Petitioner did not fairly present the substance of Claims 14-B and 15-B to the Arizona Supreme Court in his post-

conviction proceedings.

Petitioner was obligated to give the Arizona state courts at least one "*fair* opportunity to act on [his] claim[]." O'Sullivan, 526 U.S. at 844. Because Claims 14-B and 15-B allege error occurring during the Arizona Supreme Court's sentencing review, that review itself did not provide the court notice of, or an opportunity to correct, the alleged error. Petitioner subsequently neglected to make use of the available methods to fairly present his claims regarding the supreme court's sentencing review, either by way of a motion for reconsideration or by including it in his PCR proceeding. Thus, Petitioner failed to fairly present these claims to the Arizona Supreme Court as required for proper exhaustion. See Bell v. Cone, 125 S. Ct. 847, 851 n.3 (2005) (finding that a petitioner must present every claim to the state's highest court if there is an available means). Petitioner is now procedurally precluded from presenting these claims in state court by Rule 32.2(a)(3) of the Arizona Rules of Criminal Procedure. This Court therefore finds that Claims 14-B and 15-B are technically exhausted but procedurally defaulted, and review on the merits of these claims is procedurally barred unless Petitioner demonstrates either cause and prejudice or a fundamental miscarriage of justice to excuse the default. Petitioner has done neither. (Dkts. 30 at 32; 85 at 74-81.) These claims are dismissed as procedurally defaulted.

Claim 14-C: The Trial Court Failed to Find That Specific Mitigation Evidence Was Sufficient to Prevent a Death Sentence

In Claim 14-C, Petitioner alleges that he proffered uncontested mitigation evidence but the trial court found that no statutory mitigating circumstances existed and that non-statutory mitigation was insufficient to overcome the aggravating factors. Petitioner argues that the trial court's findings violated his rights under the Fifth, Sixth, Eighth and Fourteenth Amendments. (Dkts. 67; 85 at 84-92.) As mitigation, Petitioner presented evidence of four factors: intoxication, youthfulness/immaturity, his positive role within his family, and evidence that his role in the offense was minor. Petitioner argues that the trial court's "refusal to consider the mitigating factors [was] unwarranted based upon the evidence presented at trial and sentencing" (dkt. 85 at 85), and the "trial court failed to abide by the

Arizona sentencing statute" because it was "required to determine the absence or presence of each of the mitigating factors by a preponderance of the evidence . . . ." (Id. at 90.) Further, he alleges that the trial court:

> gave the mitigating factors short shrift. The court misapplied the balancing test by requiring each mitigating circumstance to be sufficient to outweigh the aggravating circumstances. The sentencing court relied upon the wrong test to determine if a mitigating circumstance is to be considered further. Under Walton, the court must determine the presence or absence of each mitigating circumstance individually based upon the preponderance of the evidence and only then is the court to weigh the cumulative effect of the established mitigators against the cumulative effect of the aggravating factors. Under the proper standard of review, the finding by the sentencing court is clearly an unreasonable finding of the facts. [Petitioner] did meet his burden in establishing the presence of these mitigating factors, and these mitigators clearly outweigh the aggravators. Consequently, [Petitioner] should have been sentenced to a life term rather than death.

(Id. at 91-92.)

The basis of Petitioner's claim is not entirely clear to the Court. In part, Petitioner appears to be arguing that the trial court failed to consider and determine the existence of each mitigating circumstance presented. However, a state court's errors in applying state law do not give rise to federal habeas corpus relief. See Ortiz v. Stewart, 149 F.3d 923, 941 (9th Cir. 1998). In any event, Arizona law does not require the trial court to itemize and discuss every piece of mitigation evidence. See Jeffers v. Lewis, 38 F.3d 411, 418 (9th Cir. 1994). In addressing the mitigating evidence, the trial court in this case listed and made a finding as to each of the factors proffered by Petitioner. The court determined that Petitioner's capacity to control his conduct was not impaired by intoxication, that his role in the offense was not minor, and that Petitioner had not established age as a mitigating factor. (RT 1/13/88 at 29-30; ROA 109 at 3-5, ¶¶ 5, 6.) The court then listed and found as mitigation Petitioner's evidence regarding his personality and commitment to his family. (Id.) Contrary to Petitioner's suggestion, the trial court did not refuse to consider the non-statutory mitigation; rather, it found that mitigation insufficient to outweigh the aggravating circumstances.

Petitioner also appears to argue that the trial court's assessment of the mitigation and balancing of the mitigation and aggravation was erroneous. The Constitution and federal

caselaw require only that the sentencer hear and consider all mitigating evidence; the *weight* to be accorded such evidence is left to the discretion of the sentencer. Eddings v. Oklahoma, 455 U.S. 104, 114-15 (1982). The record establishes that the trial court satisfied its obligation to consider all mitigation, and Petitioner's disagreement regarding how that evidence was weighted does not rise to a constitutional violation. Further, the Arizona Supreme Court conducted an independent sentencing review, during which it considered the four mitigating factors urged by Petitioner. See Robinson, 165 Ariz. at 61-62, 796 P.2d at 863-64. Even if the trial court had committed constitutional error at sentencing, a proper and independent review of the mitigation and aggravation by the Arizona Supreme Court cured any such defect. See Clemons v. Mississippi, 494 U.S. 738, 750, 754 (1990) (holding that appellate courts are able to fully consider mitigating evidence and they are constitutionally permitted to affirm a death sentence based on independent reweighing despite error at sentencing). Petitioner is not entitled to relief on this claim.

Claim 15-A: The Trial Court Should Have Resentenced Petitioner in PCR Proceedings After Mathers Was Acquitted

In Claim 15-A, Petitioner alleges that the PCR court should have resentenced Petitioner during the PCR proceedings based on the acquittal of Mathers. Although the Court previously determined that this issue was exhausted and ordered briefing of the issue on the merits, Petitioner did not address it in his merits brief. The Court nevertheless considers the claim.

Petitioner contended in his Amended Petition that the PCR court's refusal to consider Mathers's disparate treatment on direct appeal, i.e., his acquittal based on insufficient evidence, as a mitigating circumstance as to Petitioner's sentence violated Petitioner's constitutional rights. Petitioner argues that there was no more evidence against him than there had been against Mathers, but his sentence was affirmed on direct appeal. (Dkt. 20 at 55-56.) "Unexplained disparity between sentences may constitute a mitigating factor." State v. Henry, 189 Ariz. 542, 551, 944 P.2d 57, 66 (1997) (citing State v. Dickens, 187 Ariz. 1, 25-26, 926 P.2d 468, 492- 93 (1996); State v. Schurz, 176 Ariz. 46, 57, 859 P.2d

156, 167 (1993)). However, the Arizona Supreme Court's determination that insufficient evidence supported Mathers's conviction does not constitute "disparate treatment" of sentences because Mathers was acquitted of the crime and, therefore, received no sentence at all. Furthermore, both the state supreme court, see Robinson, 165 Ariz. at 62, 796 P.2d at 864; Mathers, 165 Ariz. at 71, 796 P.2d at 873, and this Court have concluded there was sufficient evidence to support Petitioner's conviction. See supra Claim 5. Moreover, Mathers's acquittal does not constitute a mitigating circumstance to be considered in connection with Petitioner's sentence because it does not relate to any aspect of *Petitioner's* character or record or to the circumstances of the crime. See Eddings, 455 U.S. at 111-12. To conclude otherwise would require an assumption that Mathers was guilty, despite the lack of sufficient evidence to establish his guilt. The PCR court did not violate Petitioner's constitutional rights by failing to consider Mathers's acquittal based on insufficient evidence as a mitigating circumstance as to Petitioner. Relief will be denied on this claim.

CONCLUSION

As discussed herein, the Court concludes that Petitioner is not entitled to habeas relief on the merits of Claims14-B and 15-B because they are procedurally barred. The Court further concludes, based on a review of the merits, that Petitioner is not entitled to habeas relief on Claims 3, 4, 5, 8-B, 8-C, 10, 11 (in part), 13, 14-C and 15-A. Accordingly, relief on these claims will be denied and this action dismissed.

Based on the foregoing,

IT IS ORDERED that habeas relief on Claims 3, 4, 5, 8-B, 8-C, 10, 11 (in part), 13, 14-B, 14-C, 15-A and 15-B is **DENIED** and that Petitioner's Amended Petition for Writ of Habeas Corpus (Dkt. 17) is **DENIED WITH PREJUDICE**.

IT IS FURTHER ORDERED that the Clerk of Court shall enter judgment in accordance with this Order.

IT IS FURTHER ORDERED that the Clerk of Court shall forward a copy of this Order to all counsel of record, the Capital Case Staff Attorney, and Noel Dessaint, Clerk of

the Arizona Supreme Court, 1501 W. Washington, Phoenix, AZ 85007-3329.

DATED this 21 day of April, 2005.

JAMES A. TEILBORG
United States District Judge

APPENDIX H

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF YUMA

STATE OF ARIZONA, Plaintiff, v. THEODORE WASHINGTON, Defendant.	No. C-14064 ORDER RE: PETITION FOR POST CONVICTION RELIEF

On September 18, 1991, the defendant (petitioner) filed his First Petition for Post Conviction Relief. He was very ably assisted in this effort by members of the Capital Representation Project of the Arizona State University College of Law. Subsequent to the filing he was appointed counsel who has filed further pleadings in his behalf.

Petitioner seeks relief from his conviction and the sentence of death upon the following bases:

1. That the disposition of the appeal by James Mathers is a mitigating circumstance which has to be considered in his case.

2. That the Indictment returned by the Grand Jury was not valid by reason of:

a. Systematic exclusion of minorities.

b. Inclusion of racially biased jurors.

c. Prejudice by reason of pre-trial publicity.

3. That the venue ought to have been changed.

4. That "cruelty" as an aggravating factor could not have been established by reason of the inability of the state to prove the order of death of the decedents.

5. That a finding by the court of "heinousness or depravity" which was based solely on the victims' helplessness or upon the senselessness of the killing is constitutionally infirm.

6. That a finding by the court of "heinousness or depravity" which is "transferred" from the one who actually kills to an accomplice who did not otherwise participate in the killing is constitutionally infirm.

7. That the court erred in failing to sever the presentence hearings of the various defendants.

8. That trial counsel (who was also appellate counsel) did not competently assist him.

9. That the Supreme Court's reversal of one aggravating factor requires resentencing.

10. That the courts have erred in concluding that there were "no mitigating circumstances" shown by the record.

11. That the record may suggest other procedural defects or errors once it has been reviewed.

On February 24, 1992, petitioner filed a Supplement to his petition for relief. Reviewing the supplement, new issues which he raises are:

V

That the same deficiencies in the record which led to the dismissal of charges against James Mathers must also apply to the petitioner, i.e., that they call for an acquittal or, at the very least, if not a complete defense constitute a mitigating circumstance.

In addition, counsel proffered further authority and argument on the issues already raised in the Preliminary Petition.

Quite truthfully, this court has a great deal of difficulty finding a basis to hold this defendant culpable which does not apply, at least equally or in a greater manner, to James Mathers. If Mathers, who was present at all times before the entry into the Hill residence, was not guilty of conspiring to rob and kill, no greater evidence seems to place this defendant at the scene.

The state's response alleges preclusion for the reason that the issues were argued, or were readily, available to be included in petitioner's appeal.

The state aptly points out that this court cannot, and it most assuredly will not attempt to review or reexamine the decision of the Supreme Court.

The court is also aware that any record which is to be examined at the appellate level must be made here. This court notes that certain issues are not properly for it to decide.

This order will approach the issues raised by petitioner serially, beginning with paragraph 8 of the initial petition.

8.1 THE DISPOSITION OF MATHERS' CASE: It is argued that this eourt should (or must) take into account the fact that

James Mathers' conviction was reversed as a mitigating factor. It is true that this court, at sentencing, viewed Mathers as the triggerman. It is also true that he is now free while the two defendants who probably did not, physically, kill anyone are on death row. This does not mean that this court can "forgive" them or reexamine their sentences which have been affirmed by the Supreme Court.

The record is silent, insofar as this court can tell, as to the Supreme Court considering the reversal of Mathers' case with regard to Petitioner's case. This court has a difficult task in finding any evidence linking Washington to the crime.

The findings in State v. Mathers, 165 Ariz. 64, at 68-70, which might apply to Washington, were:

1. "...the evidence would support a finding that Mathers said they were going to Arizona [not Yuma to take care of business..."

No evidence suggests that Washington said anything about the trip or its purpose.

2. "...that Mathers was seen helping load a duffel bag and some guns into Robinson's car..."

No evidence suggests that Washington assisted Mathers in doing the loading. In fact the record suggests it was Robinson who assisted.

3. "...that Mathers was seen in the [Robinson's] car apparently leaving Banning with Robinson and Washington."

4. "At best the evidence supports an inference that Mathers went to Yuma with Robinson and Washington, and returned from Yuma to California. It does not, however, establish that Mathers went to the Hill's home, was at the Hill's home, was in the Hill's home, or participated in the murder and other crimes."

These two areas of evidence show first, clearly, that all three of the defendants rode together from Banning to Yuma and the record supports the fact that only Mathers, apparently, was able to return to California.

But what other evidence was there of the activities of this petitioner which separates him from Mathers. From the facts found in State v. Robinson, 165 Ariz. 51, at 54-56, we know that only Robinson was seen leaving the area in his auto; that Robinson was stopped and had the red bandanna (with hairs which did not match Washington) and Mathers' duffel bag.

We know that Washington was in Yuma as he called Ms. Bryant from here. He told the officers what Robinson said about the purpose of the trip, but never said he was at or in the house. No one else placed him in the house either. The only reference was to an unidentified, black male who had a mustache.

However, the Supreme Court has accepted as true that the evidence showed that Washington entered the Hill residence while armed with a .38 caliber pistol and, though present with knowledge of the possibility or probability of a killing, did nothing to stop the same. This court must accept that as true and does.

To this court's view this may present a colorable claim for relief at some point in time, it seems most appropriate to allow counsel to make a record so it could be examined in the event that another court wishes to accept review.

8.2 & 8.3 **CHALLENGES TO THE GRAND JURY AND TO VENUE:** Such claims were long ago waived by failure to pursue them

before trial. They now present no colorable claim.

8.4 **CRUELTY AS AN AGGRAVATING FACTOR:** This exact issue was raised by petitioner and were decided by the Supreme Court. It will not be reexamined by this court.

8.5 **HEINOUS AND DEPRAVED AS AGGRAVATING FACTORS:** These matters were, raised by petitioner and were decided by the Supreme Court. They will not be reexamined by this court.

8.6 **TRANSFER OF INTENT RE: HEINOUS, CRUEL, DEPRAVED CONDUCT:** Whether this court thinks or thought Mathers was the killer is immaterial. That fact has been rejected by our Supreme Court as to Mathers but not as to Robinson or Washington. This court will not quarrel with the finding.

This issue could have been raised in the petition for review but was not. It may or may not be found to be precluded by the Supreme Court. If it wishes to revisit this issue, it may.

8.7 **FAILURE TO SEVER PRESENTENCE HEARINGS:** No factual or procedural benefit or loss is noted which is sufficient to give this claim the stature it needs to be heard.

8.8 **COMPETENCY OF COUNSEL:** As has been pointed out several times in the past, allowing trial counsel to act as appellate counsel is unwise. Since a challenge to the competency and adequacy of a defendant's representation is almost a certainty, it was unfortunate to appoint counsel who might have to examine, candidly, his own actions in behalf of his client. It is unlikely that, even should he do so quite candidly, his client would accept it as gospel.

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Ineffective assistance of counsel is appropriately raised in a Rule 32 petition. Unless the allegations fly in the face of the record, the court should hold an evidentiary hearing on the issue and rule. (State v. Valdez, 160 Ariz. 9, 770 P.2d 313.)

The issue has yet to be reached by any court and must be the subject of our examination the appellate courts are to have any record at all upon which to base any review which it may accept.

8.9 **MANDATORY REMAND UPON REJECTION OF AGGRAVATING CIRCUMSTANCE:** The Supreme Court, which rejected the use of the circumstance passed not only that issue but also whether or not that should or should not be the basis for resentencing the petitioner. It did not and this court cannot review its actions.

9. **OTHER ISSUES:** Counsel suggested that an examination of the record would substantiate other bases for relief. Counsel was appointed for petitioner and filed a supplemental petition. He added the following issues and discussed various of the issues raised in the initial petition.

9.1 **ENMUND/TISON FINDING UNSUPPORTED:** Counsel is, simply, incorrect. The Supreme Court did, specifically examine the evidence and made a finding on this issue. It is not for this court to attempt reexamination.

9.2 **RULE 20 MOTION:** This issue has, in essence, been passed upon when the Supreme Court affirmed the conviction. It will not be revisited here.

It appears that the petitioner must have a hearing on the

the issues of alleged ineffective assistance of counsel and should make a record as to any issue he believes he is not precluded from raising. All other issues are precluded or are issues already decided adversely to the defendant.

Dated this 6th day of August, 1992.

H. Stewart Bradshaw

Copies of the foregoing mailed or delivered to:

Mr. Grant Woods
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Mr. Michael Telep
and
Mr. Richard Engler
delivered