APPENDIX

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APPENDIX A

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 18-99005
D.C. No. 2:01-cv-00384-SRB

[Filed November 7, 2022]

DANNY LEE JONES,
Petitioner-Appellant,

v.

CHARLES L. RYAN,
Respondent-Appellee.

ORDER AND AMENDED OPINION

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

Argued and Submitted February 16, 2021
San Francisco, California

BEFORE: S.R. THOMAS, and HAWKINS, and
CHRISTEN, Circuit Judges

App. 2

Order;
Amended Opinion by Judge S.R. Thomas;
Dissent from Order by Judge Bennett;
Dissent from Order by Judge Ikuta

SUMMARY*

Habeas Corpus / Death Penalty

The panel filed an amended opinion, denied a petition for panel rehearing, and denied on behalf of the court a petition for rehearing en banc, in a case in which the panel, applying the appropriate standards pursuant to the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), reversed the district court's judgment denying Danny Lee Jones's habeas corpus petition challenging his Arizona death sentence, and remanded to the district court with instructions to issue the writ.

In Claim 1, Jones asserted that his trial counsel was constitutionally ineffective by failing to request a mental health expert in advance of the sentencing hearing. The panel held that the state court record demonstrates that trial counsel was constitutionally ineffective by failing to secure a defense mental health expert, and that, pursuant to 28 U.S.C. § 2254(d)(1), the Arizona Supreme Court's contrary conclusion was an unreasonable application of *Strickland v. Washington*, 466 U.S. 668 (1984), and its progeny. Holding that the state post-conviction review (PCR) court's decision was also based on an unreasonable

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

determination of the facts under 28 U.S.C. § 2254(d)(2), the panel agreed with Jones that (1) the PCR court employed a defective fact-finding process when it denied PCR counsel's funding request for a defense neuropsychological expert, effectively preventing the development of Claim 1; and (2) the state court's failure to hold a hearing on Claim 1 resulted in an unreasonable determination of the facts. The panel wrote that if the state court had reached the question of *Strickland* prejudice, the panel would be required to afford the decision deference under AEDPA, but because the PCR court did not reach the issue of prejudice, the panel reviewed the issue de novo. Noting that Jones was diligent in attempting to develop the factual basis for the claim in state court, the panel wrote that the district court did not err in its expansion of the record, and the panel considered the evidence developed in the district court in conducting its de novo review. The panel wrote that on de novo review, it must weigh the aggravating factors against the mitigation evidence, as developed in the state court record that was available, but not presented. The panel also considered the mitigation evidence that was presented. Reweighing the evidence in aggravation against the totality of the available mitigating evidence, the panel concluded that there is at least a reasonable probability that development and presentation of mental health expert testimony would have overcome the aggravating factors and changed the result of the sentencing proceeding. The panel therefore concluded on de novo review that Jones demonstrated *Strickland* prejudice, and, accordingly, reversed the district court's denial of relief on Claim 1.

In Claim 2, Jones asserted that his trial counsel was constitutionally ineffective by failing to seek neurological or neuropsychological testing prior to sentencing. The panel wrote that counsel's failure to promptly seek neuropsychological testing ran contrary to his obligation to pursue reasonable investigations under *Strickland*, and in particular, his obligation to investigate and present evidence of a defendant's mental defect. The panel therefore concluded that the PCR court's decision that defense counsel's performance did not fall below an objectively reasonable standard was an unreasonable application of *Strickland*, and that Jones satisfied § 2254(d)(1). The panel also held that the state PCR court's decision was based on an unreasonable determination of the facts, satisfying § 2254(d)(2), where the PCR judge made factual findings regarding the necessity of neuropsychological testing, not on the basis of evidence presented by Jones, but on the basis of his own personal conduct, untested memory, and understanding of events—and by plainly misapprehending the record, which included a forensic psychiatrist's testimony, six years earlier, strongly suggesting that neuropsychological testing was essential. Because the PCR court did not reach the issue of prejudice, the panel reviewed the issue de novo. Noting that Jones was diligent in attempting to develop the factual basis for the claim in state court, the panel wrote that the district court did not err in its expansion of the record, and the panel considered the evidence developed in the district court in conducting its de novo review. The panel concluded that Jones demonstrated *Strickland* prejudice because there is a reasonable probability that had such testing been conducted, and

had the results been presented at sentencing, Jones would not have received a death sentence. The panel wrote that, in combination, the testing results and the presentation of contributing factors would have dramatically affected any sentencing judge's perception of Jones's culpability for his crimes, even despite the existence of aggravating factors.

Because the panel determined that Jones is entitled to relief and resentencing on the basis of Claims 1 and 2, the panel did not reach whether new evidence presented at the federal evidentiary hearing fundamentally altered these claims such that they were unexhausted, procedurally defaulted, and excused in light of *Dickens v. Ryan*, 740 F.3d 1302 (9th Cir. 2014) (en banc), and *Martinez v. Ryan*, 566 U.S. 1 (2012). The panel likewise did not reach the merits of any of Jones's other claims.

Judge Bennett, joined by Judges Callahan, R. Nelson, Bade, Collins, Lee, Bress, Bumatay, and VanDyke, dissented from the denial of rehearing en banc. He wrote that the panel improperly and materially lowered *Strickland*'s highly demanding standard and failed to afford the required deference to the district court's findings—essentially finding that no such deference was due. He wrote that the court should have taken this case en banc (1) to secure and maintain uniformity in our case law; (2) because this case involves issues of exceptional importance; and (3) so that the Supreme Court, which has already vacated this court's judgment once in this case, does not grant certiorari a second time and reverse.

Judge Ikuta, joined by Judges Callahan and VanDyke, dissented from the denial of rehearing en banc. She agreed with Judge Bennett that even if the panel had been correct in conducting a de novo review of the state court's decision, it erred in failing to defer to the district court's factual findings. In her view, however, the panel had no business conducting such a de novo review in the first place. She wrote that in reaching the issue of prejudice de novo, the panel mischaracterized the state court opinion and disregarded the admonitions of the Supreme Court to give such opinions proper deference.

COUNSEL

Amanda Bass (argued) and Leticia Marquez, Assistant Federal Public Defenders; Jon M. Sands, Federal Public Defender, District of Arizona; Federal Public Defenders' Office, Tucson, Arizona; Jean-Claude André, Bryan Cave Leighton Paisner LLP, Santa Monica, California; Barbara A. Smith and J. Bennett Clark, Bryan Cave Leighton Paisner LLP, St. Louis, Missouri; Kristin Howard Corradini, Bryan Cave Leighton Paiser LLP, Chicago, Illinois; for Petitioner-Appellant.

Jeffrey L. Sparks (argued), Assistant Attorney General, Capital Litigation Section; Lacey Stover Gard, Chief Counsel; Mark Brnovich, Attorney General of Arizona; Office of the Attorney General, Phoenix, Arizona; for Respondent-Appellee.

ORDER

The opinion filed June 28, 2021, *Jones v. Ryan*, 1 F.4th 1179 (9th Circ. 2021) is amended and superseded by the opinion filed concurrently with this order.

The full court has been advised of the petition for rehearing en banc. A judge of this Court requested a vote on the petition for rehearing en banc. A majority of the non-recused active judges did not vote to rehear the case en banc. Fed. R. App. 35. The petition for panel rehearing and for rehearing en banc is DENIED. No further petitions for panel rehearing or rehearing en banc will be entertained.

Amended Opinion by Judge Sidney R. Thomas

S.R. THOMAS, Circuit Judge:

Danny Lee Jones, an Arizona inmate on death row, appeals the district court's denial of his petition for writ of habeas corpus on remand from this court and the Supreme Court of the United States. Applying the appropriate standards pursuant to the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), we conclude that Jones was denied the effective assistance of counsel at sentencing. We reverse the judgment of the district court and remand for further proceedings consistent with this opinion.

App. 8

I[1]

A

On March 26, 1992, in Bullhead City, Arizona, Jones and his friend Robert Weaver spent the day drinking and using crystal methamphetamine in Weaver's garage. At some point, a fight broke out, and evidence at trial indicated that Jones hit Weaver over the head multiple times with a wooden baseball bat, killing him. Jones then went inside the house where he encountered Weaver's grandmother, Katherine Gumina. Jones struck Gumina in the head with the bat and knocked her to the ground. Jones then made his way to a bedroom where he found Tisha Weaver, Weaver's seven-year-old daughter, hiding under the bed. Evidence showed that Jones hit Tisha in the head with the bat, and either strangled her or suffocated her with a pillow. Jones fled to Las Vegas, Nevada, where police eventually arrested him. He was indicted in Arizona on two counts of murder in the first degree, and one count of attempted murder.[2]

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[1] In accordance with our obligation under *Cullen v. Pinholster*, 563 U.S. 170 (2011), to consider only the state court record in conducting our 28 U.S.C. § 2254(d) analysis, this recitation of the facts looks only to that record. Evidence developed at the federal evidentiary hearing is included later in the limited contexts where *Pinholster* does not circumscribe our consideration of such evidence.

[2] Gumina initially survived the attack and was in a coma for seventeen months before eventually dying from her injuries. The prosecution never amended the indictment after Gumina died.

B

A public defender was assigned to Jones's case. At the time, the public defender had been an attorney for a little more than three years, and he had never been a lead attorney on a capital case. He requested $5,000 from the trial court for expert witnesses. The court authorized $2,000, which the public defender split between a crime scene investigator and an addictionologist.

The jury convicted Jones on all counts. Judge James Chavez scheduled the sentencing hearing for three months later. About six weeks before the hearing, counsel took his first trip to Reno, Nevada, in order to speak with Jones's mother, Peggy Jones[3], and Jones's second step-father, Randy Jones, in order to investigate potential mitigation evidence.

At sentencing, the public defender presented testimony from two witnesses: investigator Austin Cooper and Randy Jones. Cooper testified about evidence regarding an alleged accomplice. Randy explained that he married Peggy when Jones was seven years old.[4] He explained that Peggy gave birth to Jones when she was only fifteen years old and had numerous complications during the pregnancy and delivery. Randy testified that Jones suffered multiple head injures when he was growing up, and that when Jones

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[3] To avoid confusion, we refer to the members of Jones's family by their first names.

[4] The record is inconsistent whether Randy and Peggy married when Jones was seven or eight years old.

was thirteen or fourteen his personality began to change drastically. Jones started lying, cutting classes at school, drinking, and doing drugs. Jones's first step-grandfather introduced him to marijuana when he was about ten years old, and Jones was an alcoholic by the time he was seventeen.

The trial court appointed the Chief of Forensic Psychiatry for the Correctional Health Services in Maricopa County, Dr. Jack Potts, to examine Jones and provide a report to the court pursuant to Rule 26.5 of the Arizona Rules of Criminal Procedure.[5] Defense counsel called Dr. Potts to testify at sentencing. Dr. Potts stated that in conducting his review, he spent four hours interviewing Jones in prison, one and a half of which were spent administering a personality test. He also spoke to Jones for a couple of hours the day before testifying at the sentencing hearing. He interviewed Peggy by phone for thirty minutes, and he spoke to Randy for one hour the day before testifying. During Dr. Potts's testimony, the following colloquy took place:

> Q. Do you feel you have been provided with adequate data, coupled with your in-person examination of the defendant, to make a conclusion for mitigating findings that you did?

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[5] The Rule provides: "At any time before the court pronounces a sentence, it may order the defendant to undergo a mental health examination or diagnostic evaluation. Unless the court orders otherwise, any report concerning such an examination or evaluation is due at the same time as the presentence report."

A. . . . . I believe everything I reviewed and what I have heard about the case and reviewed with the defendant, his comments to me. I would have liked, and I think I have – I think it would be valuable to have had some neurologic evaluations, not – by a neurologist, clinical exam, such as a CAT scan, possibly an MRI, possibly EEG, possibly some sophisticated neurological testing, because I think there's very strong evidence that we have . . . , I believe, of traumatic brain injury, and there's some other evidence that I believe we may have organic neurologic dysfunctions here that has gone on since he's been about 13. So, there's some other testing that I think would be valuable to have to pin down the diagnosis. . . .

Q. And you think that further testing might shed some additional light on, perhaps, some of these factors you listed and maybe why Mr. Jones behaves in the way he did on March 26, 1992?

A. Yes. I think it could help in clarifying and giving us etiology as the behavioral components, the explosive outbursts, the aggression, the mood changes, and the changes that occurred in his personality as noted by his mother when he was about 13, 14 years old.

Q. In your opinion, could that information possibly provide . . . a significant mitigating

factor as to what would be relevant to the issues at this hearing?

A. Clearly I think it would be corroborative of my clinical impressions and my diagnostic impressions in my report.

Dr. Potts discussed the fact that Jones's first step-father physically and verbally abused Jones, and stated that it was "unequivocal" that Jones carried that abuse with him into his adult life. Dr. Potts also stated that, given the long history of substance abuse and other psychological problems in Jones's family, Jones was predisposed for substance abuse or a possible affective disorder. Dr. Potts did not, however, give a specific diagnosis, but stated: "I think . . . to a reasonable degree of medical certainty that the defendant suffers from a [cyclothymic] disorder, which is a mood disorder, possibly organic syndrome, secondary to the multiple cerebral trauma that he's had as well as the prolonged substance abuse."

Dr. Potts testified that the drugs and alcohol Jones had on the day of the murders would have had a significant effect on Jones because "it's real clear that the brain is much more susceptible when it's been injured by drugs. Furthermore, when you're on drugs, you are more susceptible to the acts of aggression under amphetamines." He further stated that "I believe in my experience in cases like this, is that had it not been for the intoxication, the alleged offense would not have occurred."

Dr. Potts also submitted a six-page report to the court. The report included approximately two pages

describing Jones's social development and history, including his medical history, one page of analysis, and one page of recommendations. Dr. Pott's report was due to the court on November 29, 1993, but he did not complete it until December 3. He was late because he did not receive the Presentence Information Report ("PSR") from the Mohave County probation department until December 1. Dr. Potts also testified at sentencing that he was under "significant time pressure" in preparing the report. Dr. Potts concluded that "Mr. Jones' capacity to conform his conduct to that of the law was clearly impaired at the time of the offenses. . . ." He therefore recommended that an aggravated sentence should not be imposed.

After Dr. Potts testified, counsel moved for a continuance so an expert could conduct psychological testing. Counsel stated: "It's not a delay tactic . . . [I]t's not something I planned on doing until . . . very recently after the report was done, after talking with Dr. Potts, after exploring all these issues." Notably, however, counsel did not speak to Dr. Potts about the report until December 7, the night before sentencing. The sentencing judge considered and rejected the motion:

> THE COURT: . . . . I also know that there were funds made available to the defense at some point and you used them to hire [an addictionologist]. . . . [I]f there were any follow-up questions of a psychological or neurological nature, I would think that the

defense would have followed them up.

COUNSEL: But, Your Honor, respectfully, . . . I didn't realize this issue was that important until Dr. Potts brought it up or I would have certainly asked for the funds earlier.

The judge found the following aggravating factors for Weaver's murder: (1) Jones "committed the offense as consideration for the receipt, or in expectation of the receipt of anything of pecuniary value"; (2) Jones "committed the offenses in an especially heinous or depraved manner"; (3) Jones was "convicted of one or more other homicides . . . which were committed during the commission of the offense."

Under Arizona's then-existing death penalty statute, the trial judge held an aggravation/mitigation hearing to determine whether a death sentence was warranted. Ariz. Rev. Stat. § 13-703(B) (1993). The judge had to impose a death sentence if he found "one or more of the [enumerated statutory] aggravating circumstances . . . and that there [were] no mitigating circumstances sufficiently substantial to call for leniency." *Id.* § 13-703(E).

The judge found four non-statutory mitigating factors: (1) Jones suffered from long-term substance abuse; (2) he was under the influence of drugs and alcohol at the time of the offense; (3) he had a chaotic and abusive childhood; and (4) his longstanding substance abuse problem may have been caused by

genetic factors and aggravated by head trauma. The judge found the same aggravating and mitigating circumstances for Tisha's murder, but he also found that Tisha's having been less than fifteen years old was an additional aggravating factor. The judge sentenced Jones to two death sentences for the murders, and twenty-five years without the possibility of parole for the attempted murder. The Arizona Supreme Court affirmed Jones's conviction and sentence on direct review. *State v. Jones*, 917 P.2d 200 (1996).

C

Prior to filing Jones's state post-conviction review ("PCR") petition, PCR counsel sought authorization from the court for the funding of several experts.

As relevant here, the PCR court rejected counsel's request to appoint a neuropsychologist. The court stated that while Dr. Potts might not have been a defense expert, he did a good job, gave "defense opinions," and there was no reason to believe that an expert appointed for the defense "would have been any different." The court concluded by stating that based on Dr. Potts's testimony, "I don't really see any grounds for any additional psychiatric or psychological testing."

On July 1, 1999, counsel filed the PCR petition, raising twenty-five claims. Among the petition's exhibits were a declaration from defense trial counsel and an affidavit from Peggy. At an informal conference on February 23, 2000, the court ruled on several of Jones's claims, and set others for an evidentiary hearing. In particular, the court denied Claim 1 (as numbered in this appeal) on the merits. The court set

Claim 2 (as numbered in this appeal), as well as other claims, for evidentiary hearing.

At the evidentiary hearing, Randy, Peggy, and defense trial counsel testified. Randy testified that he first spoke to counsel in July 1992, a few months after Jones's arrest. During this conversation, Randy told counsel about Jones's head injuries, as well as his struggles with substance abuse and stints in rehabilitation programs. Randy next spoke to counsel when he came to visit Peggy and Randy at their home in Reno in October 1993, about six weeks before sentencing.

Peggy testified that she had provided counsel with a chronology of Jones's life during counsel's visit. Peggy remembered sharing about Jones's difficult birth and the physical abuse she and Jones suffered at the hands of Jones's biological father and first step-father. Peggy shared that Jones had a good home life and a normal childhood once she married Randy, when Jones was about seven or eight years old.

Trial counsel testified that at the time he was appointed to represent Jones, he had been an attorney for three and a half years and his experience with capital cases consisted of having been second chair at the penalty phase in one prior case. He stated that his strategy for defending the killing of Robert Weaver was self-defense, so he hired Dr. Sparks as an addictionologist to testify about Jones's state of mind. Dr. Sparks opined at trial that because of the drugs Jones ingested, he was unable to premeditate the killings. Dr. Sparks was not called to testify at sentencing.

When PCR counsel asked trial counsel if he visited Jones's family early enough in the case to adequately develop mitigation evidence, trial counsel responded that Dr. Potts was able to make effective use of the information obtained from the family. He said that Dr. Potts was a "very favorable mitigation witness for the defense." He stated that it felt to him like Dr. Potts was part of the defense team, even though he was appointed as a court expert. Finally, counsel stated that he did not consider the need for testing by a neuropsychologist until Dr. Potts suggested it to him on December 7, 1993, the evening before Jones's sentencing hearing.

In the affidavit he provided as an exhibit to the PCR petition, trial counsel stated that he asked the court for $5,000 for expert witnesses at trial. When the trial court authorized only $2,000 of the $5,000 he requested, he "was of the opinion that it would be fruitless to ask the court for additional funding for any other needed experts such as an independent psychiatrist or psychologist." Counsel added that he did not ask his supervisor for any money because he believed that the public defender's office did not have sufficient funds for retaining expert witnesses.

After the hearing, the PCR court denied Claim 2 as well as the remaining pending claims. As to Claim 2, the court stated that "[t]he report and testimony of Dr. Potts[,] who was appointed by the Court, adequately addressed defendant's mental health issues at sentencing."

Jones filed a petition for review in the Arizona Supreme Court, which it denied on February 13, 2001.

D

Jones subsequently filed his federal petition for habeas relief. The district court granted an evidentiary hearing with regard to Claims 1 & 2 based on trial counsel's failure to secure the appointment of a mental health expert and failure to move for neurological and neuropsychological testing.

The district court subsequently dismissed both ineffective assistance of counsel ("IAC") claims. The court denied Claim 1 because counsel's "failure to seek the appointment of a mental health expert in a more timely manner did not prejudice Petitioner." The district court explained that "the Court has not been presented with evidence confirming that Petitioner suffers from neurological damage caused by head trauma or other factors. Therefore, Dr. Potts's finding at sentencing remains the most persuasive statement in the record that neurological damage constituted a mitigating factor." The district court dismissed Claim 2 after finding that Jones could only prove that he suffered from AD/HD residual type and possibly a low level mood disorder. The district court "conclud[ed] that the trial court would have assigned minimal significance to testimony indicating that Petitioner suffered from ADHD [sic] and a low-level mood disorder, and that this weight would not have outbalanced the factors found in aggravation."

E

Jones timely appealed the district court's denial of his petition for a writ of habeas corpus. We reversed the district court and concluded that Jones received

IAC warranting relief on his claims regarding his counsel's failure to secure the appointment of a mental health expert, failure to timely move for neurological and neuropsychological testing, and failure to present additional mitigation witnesses and evidence. *See Jones*, 583 F.3d at 636.

The State petitioned for certiorari. The Supreme Court granted the petition, vacated our judgment, and remanded the case for further consideration in light of *Pinholster*. *See Ryan v. Jones*, 563 U.S. 932 (2011).

On remand from the Supreme Court, we remanded the case to the district court to consider, under *Martinez v. Ryan*, 566 U.S. 1 (2012), and *Dickens v. Ryan*, 740 F.3d 1302 (9th Cir. 2014) (en banc), "Jones's argument that his ineffective assistance of counsel claims are unexhausted, and therefore procedurally defaulted, and that the deficient performance by his counsel during his post-conviction relief case in state court excuses the default." *Jones v. Ryan*, 572 F. App'x 478 (9th Cir. 2014) (Mem.). We expressed "no opinion on any other issue raised on appeal," and noted that "[t]hose issues are preserved for later consideration by the Court, if necessary." *Id.*

On remand, the district court rejected Jones's arguments. The district court determined that Jones's claims had not been fundamentally altered, and therefore, they had previously been exhausted and were not subject to de novo review. Additionally, the court concluded that PCR counsel was not ineffective as required by *Martinez*, so any default would not be excused anyway. 566 U.S. 1. Jones filed a timely notice of appeal and stated that he was also appealing "all

prior orders disposing of other claims, either on the merits or procedurally."

II

We review de novo a district court's dismissal of a habeas petition. *Sexton v. Cozner*, 679 F.3d 1150, 1153 (9th Cir. 2012). We review a district court's findings of fact for clear error. *Stanley v. Schriro*, 598 F.3d 612, 617 (9th Cir. 2010).

Because Jones filed his petition after April 24, 1996, AEDPA applies to our review of this petition. *See Summers v. Schriro*, 481 F.3d 710, 712 (9th Cir. 2007). Under AEDPA, habeas relief may not be granted unless the state court's decision was: (1) "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States;" or (2) "based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d)(1)–(2).

"A state court decision is 'contrary to' clearly established Supreme Court precedent if the state court applies a rule that contradicts the governing law set forth in Supreme Court cases *or* if the state court confronts a set of facts materially indistinguishable from those at issue in a decision of the Supreme Court and, nevertheless, arrives at a result different from its precedent." *Lambert v. Blodgett*, 393 F.3d 943, 974 (9th Cir. 2004) (citing *Lockyer v. Andrade*, 538 U.S. 63, 73 (2003)) (emphasis in original).

A state court's decision is an "unreasonable application" of federal law if it "identifies the correct

governing principle from [the Supreme] Court's decisions but unreasonably applies that principle to the facts of the prisoner's case." *Id.* (internal quotations and citation omitted). The Supreme Court has explained that the exceptions based on "clearly established" law refer only to "the holdings, as opposed to the dicta, of th[e] Court's decisions as of the time of the relevant state-court decision." *(Terry) Williams v. Taylor*, 529 U.S. 362, 412 (2000) ("*Terry Williams*"). Circuit precedent may not clearly establish federal law for purposes of § 2254(d), but we may "look to circuit precedent to ascertain whether it has already held that the particular point in issue is clearly established by Supreme Court precedent." *Marshall v. Rodgers*, 569 U.S. 58, 64 (2013).

With respect to § 2254(d)(2) claims, "a state-court factual determination is not unreasonable merely because the federal habeas court would have reached a different conclusion in the first instance." *Wood v. Allen*, 558 U.S. 290, 301 (2010). If "'[r]easonable minds reviewing the record might disagree' about the finding in question, 'on habeas review that does not suffice to supersede the trial court's . . . determination.'" *Id.* (quoting *Rice v. Collins*, 546 U.S. 333, 341–42 (2006)).

If a petitioner can overcome the § 2254(d) bar with respect to the claims the state court did address, he must also demonstrate that he is entitled to relief without the deference required by AEDPA. *See Panetti v. Quarterman*, 551 U.S. 930, 953–54 (2007).

Where the state court did not reach a particular issue, § 2254(d) does not apply, and we review the issue de novo. *See Rompilla v. Beard*, 545 U.S. 374, 390

(2005); *see also Weeden v. Johnson*, 854 F.3d 1063, 1071 (9th Cir. 2017) ("Because the [state court] did not reach the issue of prejudice, we address the issue de novo.").

Pursuant to *Pinholster*, our § 2254(d) analysis is limited to the facts in the state court record. 563 U.S. at 185. However, in narrow circumstances, when we review a claim de novo, and when a petitioner satisfied the standard for an evidentiary hearing in federal district court pursuant to § 2254(e)(2) by exercising diligence in pursuing his claims in state court, we may consider the evidence developed in federal court. *See id.*; *see also id.* at 212–13 (Sotomayor, J., dissenting); *see also Schriro v. Landrigan*, 550 U.S. 465, 473 n.1 (2007).

III

In Claims 1 and 2, Jones alleges that his counsel provided IAC at sentencing. To prove a constitutional violation for IAC, Jones must show (1) "that counsel's performance was deficient," and (2) "that the deficient performance prejudiced the defense." *Strickland v. Washington*, 466 U.S. 668, 687 (1984). Counsel's performance is deficient if, considering all the circumstances, it "fell below an objective standard of reasonableness . . . under prevailing professional norms." *Id.* at 688. Under this objective approach, we are required "to affirmatively entertain" the range of possible reasons counsel might have proceeded as he or she did. *Pinholster*, 563 U.S. at 196.

To establish prejudice under *Strickland*, a 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. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694. Under the prejudice prong, "[a] reasonable probability is one 'sufficient to undermine confidence in the outcome,' but is 'less than the preponderance more-likely-than-not standard.'" *Lambright v. Schriro*, 490 F.3d 1103, 1121 (9th Cir. 2007) (quoting *Summerlin v. Schriro*, 427 F.3d 623, 640, 643 (9th Cir. 2005) (en banc)). It is therefore "not necessary for the habeas petitioner to demonstrate that the newly presented mitigation evidence would necessarily overcome the aggravating circumstances." *Id.* (quotation marks and citation omitted). However, "[a] reasonable probability means a 'substantial,' not just 'conceivable,' likelihood of a different result." *Shinn v. Kayer*, 141 S. Ct. 517, 523 (2020) (quoting *Pinholster*, 563 U.S. at 189).

To answer the prejudice inquiry, we must "consider all the evidence—the good and the bad," *Wong v. Belmontes*, 558 U.S. 15, 26 (2009) (per curiam), and "reweigh the evidence in aggravation against the totality of available mitigating evidence," *Wiggins v. Smith*, 539 U.S. 510, 534 (2003). The totality of available mitigating evidence includes evidence "both . . . adduced at trial, and the evidence adduced in the habeas proceeding[s]." *Terry Williams*, 529 U.S. at 397.

Our review of a *Strickland* claim under § 2254(d) is "doubly deferential," requiring the court to apply AEDPA deference on top of *Strickland* deference. *Knowles v. Mirzayance*, 556 U.S. 111, 123 (2009).

If the state court had reached the question of *Strickland* prejudice, we would be required to afford

the decision deference under AEDPA. However, because the state court reached only the deficient performance prong of Jones's IAC claims, we review only that prong under § 2254(d), and we review the prejudice prong of his claims de novo. *See Weeden,* 854 F.3d 1063 at 1071 ("Because the [state court] did not reach the issue of prejudice, we address the issue de novo."); *see also Rompilla*, 545 U.S. at 390 (same); *Wiggins*, 539 U.S. at 534 (same).

IV

A

In Claim 1, Jones asserts that his trial counsel was constitutionally ineffective by failing to secure a defense mental health expert. He asserts that his right to counsel was violated when his attorney failed to request a mental health expert in advance of the sentencing hearing. For the reasons below, we agree.

"[C]ounsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." *Strickland*, 466 U.S. at 691. As the Supreme Court has stated, there is a "belief, long held by this society, that defendants who commit criminal acts that are attributable to a disadvantaged background or to emotional and mental problems, may be less culpable than defendants who have no such excuse." *Boyde v. California*, 494 U.S. 370, 382 (1990) (quotation and emphasis omitted).

Therefore, "'[i]t is imperative that all relevant mitigating information be unearthed for consideration at the capital sentencing phase.'" *Wallace v. Stewart*,

184 F.3d 1112, 1117 (9th Cir. 1999) (quoting *Caro v. Calderon*, 165 F.3d 1223, 1227 (9th Cir. 1999) (brackets in original)). Classic mitigation evidence includes mental disorders, mental impairment, family history, abuse, physical impairments, and substance abuse. *Sanders v. Davis*, 23 F.4th 966, 985 (9th Cir. 2022); *Summerlin*. 427 F.3d at 641; *see also Terry Williams*, 529 U.S. at 396 (noting that counsel has an "obligation to conduct a thorough investigation of the defendant's background," citing American Bar Association ("ABA") Standards for Criminal Justice 4–4.1, commentary, p.4–55 (2d ed 1980)). "That investigation should include examination of mental and physical health records, school records, and criminal records." *Correll v. Ryan*, 539 F.3d 938, 943 (9th Cir. 2008).

Counsel's failure to investigate and present evidence of a defendant's mental defect constitutes deficient performance. *Terry Williams*, 529 U.S. at 396. In light of *Terry Williams*, we have also held that counsel's performance may be deficient "if he 'is on notice that his client may be mentally impaired,' yet fails 'to investigate his client's mental condition as a mitigating factor in a penalty phase hearing.'" *Caro v. Woodford*, 280 F.3d 1247, 1254 (9th Cir. 2002) (quoting *Hendricks v. Calderon*, 70 F.3d 1032, 1043 (9th Cir. 1995)). Such performance is deficient because "[a]t 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). The failure to "make even [a] cursory investigation" into available means of obtaining additional funding for expert witnesses may

amount to deficient performance under *Strickland*. *See Hinton v. Alabama*, 571 U.S. 263, 274 (2014).

Additionally, the 1989 ABA Guidelines[6] in effect at the time of Jones's sentencing, explain that in capital cases, "[c]ounsel should secure the assistance of experts where it is necessary or appropriate for: . . ." "the sentencing phase of the trial," and the "presentation of mitigation." ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases, Guideline 11.4.1(d)(7), p. 16 (1989). The Guidelines explain that "[i]n deciding which witnesses and evidence to prepare for presentation at the sentencing phase, counsel should consider the following: . . . Expert witnesses to provide medical, psychological, sociological or other explanations for the offense(s)[.]" *Id.* at Guideline 11.8.3(F)(2), p. 23–24.

The Guidelines also note that, among the topics the defense should consider presenting at sentencing, is "[m]edical history (including mental and physical

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[6] We may look to the ABA Guidelines as indicators of the prevailing norms of practice at a given time. *See Strickland*, 466 U.S. at 688 ("Prevailing norms of practice as reflected in American Bar Association standards and the like . . . are guides to determining what [performance] is reasonable, but they are only guides."); *see also Rompilla*, 545 U.S. at 387 n.7 (using language of 1989 and 2003 ABA Guidelines to evaluate performance at 1988 trial); *Florida v. Nixon*, 543 U.S. 175, 191 (2004) (using 2003 ABA Guidelines to evaluate counsel's performance at trial); *but see Bobby v. Van Hook*, 558 U.S. 4, 8 (2009) ("*Strickland* stressed, however, that American Bar Association standards and the like are only guides to what reasonableness means, not its definition. We have since regarded them as such." (citations and quotations omitted)).

illness or injury, alcohol and drug use, birth trauma and developmental delays)" as well as "[e]xpert testimony concerning [the client's medical history] and the resulting impact on the client, relating to the offense and to the client's potential at the time of sentencing." *Id.* at Guideline 11.8.6(B)(1)&(8), p. 25–26.

"The timing of this investigation is critical." *Allen v. Woodford*, 395 F.3d 979, 1001 (9th Cir. 2005) (quotation and citation omitted); *see also Heishman v. Ayers*, 621 F.3d 1030, 1036–37 (9th Cir. 2010). The Supreme Court has found constitutional error "where counsel waited until one week before trial to prepare for the penalty phase, thus failing to adequately investigate and put on mitigating evidence." *Allen*, 395 F.3d at 1001 (citing *Terry Williams*, 529 U.S. at 395). "If the life investigation awaits the guilt verdict, it will be too late." *Id.* (citation and quotation omitted).

"[L]egal experts agree that preparation for the sentencing phase of a capital case should begin early and even inform preparation for a trial's guilt phase[.]" *Id.* "Counsel's obligation to discover and appropriately present all potentially beneficial mitigating evidence at the penalty phase should influence everything the attorney does before and during trial[.]" *Id.* (citation and quotation omitted). Moreover, the 1989 ABA Guidelines state that "[c]ounsel should conduct independent investigations relating to the guilt/innocence phase and to the penalty phase of a capital trial[,]" and "[b]oth investigations should begin *immediately upon counsel's entry into the case and should be pursued expeditiously*." ABA Guidelines for the Appointment and Performance of Counsel in Death

Penalty Cases, Guideline 11.4.1(A), p. 13 (1989) (emphasis added); *see also id.* at Guideline 11.8.3, p. 23 ("[P]reparation for the sentencing phase, in the form of investigation, should begin immediately upon counsel's entry into the case.").

The state court record demonstrates that counsel's failure to timely seek a mental health expert fell below "prevailing professional norms." *Strickland*, 466 U.S. at 688. The state court record shows that counsel was on notice that Jones may have been mentally impaired, yet counsel failed to investigate Jones's mental condition as a mitigating factor, and he failed to obtain a defense mental health expert. Counsel was in possession of medical records showing that Jones formerly attempted suicide at age twenty-two; Peggy told counsel that Jones experienced extreme moods swings, but these swings stabilized when he had been medicated with lithium; and Peggy and Randy told counsel that Jones was "often a disturbed child," and they had to seek psychiatric help for him at age nine. This evidence would have led a reasonable attorney to investigate further and obtain a defense mental health expert. *See Wiggins*, 539 U.S. at 527–28.

An investigation into Jones's mental health should have been pursued far in advance of when counsel requested that Jones undergo a mental health examination pursuant to Arizona Rule of Criminal Procedure 26.5. Counsel should have obtained a defense mental health expert well before the start of the guilt phase of Jones's trial, but instead, he waited to make this request until after Jones had already been

convicted on September 13, 1993. *See Allen*, 395 F.3d at 1001.

Obtaining the court-appointed, independent expert's short and cursory evaluation did not satisfy this duty. *See Lambright*, 490 F.3d at 1120–21. ("Counsel may not rely for the development and presentation of mitigating evidence on the probation officer and a *court appointed* psychologist. . . . The responsibility to afford effective representation is not delegable to parties who have no obligation to protect or further the interests of the defendant." (emphasis added)).

Moreover, Dr. Potts's evaluation and opinions were limited in that he was a psychiatrist not trained in matters involving organic brain function—information that a neuropsychologist could have developed and presented. Dr. Potts had no obligation to further the interests of the defendant, even if he did present a defense-favorable opinion, and his expertise and evaluation did not extend to the precise topic—organic brain function—that was essential in Jones's case.

Finally, the state court record establishes that the failure to obtain a defense expert here cannot be justified as a reasonable strategic decision. First and foremost, counsel's failure to obtain a mental health expert was based not on strategy, but on lack of preparation, which left counsel unaware of the importance of this evidence. Counsel failed to speak adequately to Jones and Jones's family to obtain a full picture of Jones's mental health history. For instance, even though when Jones was interviewed for the PSR, Jones reported he was "mentally abused by his first step-father, and later physically abused by a second

step-father," and he characterized his childhood as "bad and unhappy," when questioning Dr. Potts at sentencing, defense counsel brushed aside a mention of Randy's physical abuse, referring to it as "clearly a mistake," even though the information came from Jones himself.

Given this lack of preparation, unsurprisingly, counsel stated that he never even considered the need for testing by a neuropsychologist until Dr. Potts suggested it to him the evening before Jones's sentencing hearing. He attested that

> prior to meeting with Dr. Jack Potts, M.D. on December 7, 1993 to discuss his evaluation of Danny Jones, [he] was not aware that neurological or neuropsychological testing was necessary and available which could determine the exact nature of injuries to Danny Jones' brain from long term substance abuse and head injury and the resulting affect on his behavior and conduct.

This failure fell below a reasonable standard of performance given the indications that Jones likely suffered from some form of mental illness.

Although we need "not indulge '*post hoc* rationalization' for counsel's decisionmaking that contradicts the available evidence of counsel's actions," *Harrington v. Richter*, 562 U.S. 86, 109 (2011) (quoting *Wiggins*, 539 U.S. at 526–27), even imagining one potential strategic reason for counsel's failure to obtain an expert—that the defense could not afford one—the failure to attempt to obtain a defense expert was

neither reasonable nor informed. In the declaration he provided in the state PCR proceeding, defense counsel stated that he believed "the Mohave County Public Defender's Office did not have sufficient monies for retaining expert witnesses," and so he "did not ask Mr. Everett [the Mohave Public Defender] for any funding for additional necessary experts in *State vs. Jones*." But according to Kenneth Everett's affidavit provided to the state PCR court, "[i]n the last quarter of 1993, approximately Seven Thousand ($7,000.00) Dollars would have been available for experts . . . in regard to all cases that the Public Defender had in that last quarter, including the Danny Lee Jones case." Everett also stated that during the relevant time period, counsel "perhaps could have expended additional funds for experts for additional mitigation evidence," although he did recognize that counsel needed "to be circumspect" about requesting such funds.[7] But, contrary to the Supreme Court's ruling in *Hinton*, counsel never even looked into requesting funding through the Public Defender's Office. *See Hinton*, 571

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[7] Counsel could also have gone back to the trial court for additional funding. In granting only $2,000 of counsel's $5,000 request for funding, the court stated that:

> If this is all you need pretrial, you may need more at trial, and then of course the sentencing hearing if we get that far, so—but, I am willing to go $2,000 prior to trial, and then with the understanding that I am willing to listen again if you need more.

Jones, 583 F.3d at 629 n.2. Although this statement may not have been specifically included in the state court record, there is no doubt the PCR court was aware of it; the same judge who sentenced Jones to death presided at his PCR hearing.

U.S. at 274 (trial attorney's failure to request additional funding was deficient when he mistakenly believed he had received all the funding available).

In sum, the state court record demonstrates that trial counsel was constitutionally ineffective by failing to secure a defense mental health expert. Thus, pursuant to § 2254(d)(1), the Arizona Supreme Court's contrary conclusion was an unreasonable application of *Strickland* and its progeny.

B

Alternatively, Jones argues that the state PCR court's decision was based on an unreasonable determination of the facts under § 2254(d)(2). He argues that the court employed a defective fact-finding process with respect to Claim 1 when it denied PCR counsel's funding request for a defense neuropsychological expert, effectively preventing the factual development of this claim. He also asserts that the state court's failure to hold a hearing on Claim 1 resulted in an unreasonable determination of the facts. We agree with both arguments.

Under § 2254(d)(2), a petitioner may challenge a state court's conclusion that is based upon an unreasonable determination of the facts. We have noted that § 2254(d)(2) challenges "come in several flavors." *Taylor v. Maddox*, 366 F.3d 992, 1000 (9th Cir. 2004), *overruled on other grounds by Murray v. Schriro*, 745 F.3d 984, 999–1000 (9th Cir. 2014). For instance, we have stated that a petitioner may overcome the § 2254 (d)(2) bar if the fact-finding "process employed by the state court is defective." *Id.* at 999 (citing *Nunes*

v. Mueller, 350 F.3d 1045, 1055–56 (9th Cir. 2003)). "We have held repeatedly that where a state court makes factual findings without an evidentiary hearing or other opportunity for the petitioner to present evidence, the fact-finding process itself is deficient, and not entitled to deference." *Hurles v Ryan*, 752 F.3d 768, 790 (9th Cir. 2014) (amended) (quotations omitted); *see also Perez v. Rosario*, 459 F.3d 943, 950 (9th Cir. 2006) (amended) ("In many circumstances, a state court's determination of the facts without an evidentiary hearing creates a presumption of unreasonableness.").

This rule applies with greater force where a judge bases factual findings on their own personal conduct, untested memory, or understanding of events in the place of an evidentiary hearing. *See Hurles*, 752 F.3d at 791 (finding it "especially troubling" when a judge's factual findings involved her own conduct and were based on her "untested memory and understanding of the events").

Similarly, a fact-finding process may be fatally undermined "where the state courts plainly misapprehend or misstate the record in making their findings, and the misapprehension goes to a material factual issue that is central to petitioner's claim." *Taylor*, 366 F.3d at 1001; *see also Wiggins*, 539 U.S. at 528. And likewise, a fact-finding process may be deemed defective when the end result requires the court to make a finding on "an unconstitutionally incomplete record." *Milke v. Ryan*, 711 F.3d. 998, 1007 (9th Cir. 2013). For a petitioner to prevail on these types of § 2254(d)(2) arguments, however, "we must be satisfied that any appellate court to whom the defect is

pointed out would be unreasonable in holding that the state court's fact-finding process was adequate." *Taylor*, 366 F.3d at 1000.

The PCR court's decision not to hold a hearing on Claim 1 amounted to an unreasonable determination of the facts. The court ruled on Claim 1 without holding an evidentiary hearing because it found that Dr. Potts essentially satisfied the role of a defense mental health expert. In response to PCR counsel's argument that a defendant is entitled to his own mental health expert in capital cases, not a court-appointed independent expert, the court explained that:

> Dr. Potts was a very good expert. He was defense oriented. The prosecutor, I can remember, was very upset about that. . . . I'm going to deny [this claim] because I don't think counsel was ineffective as far as Dr. Potts.

The fact that the PCR court made this factual finding regarding Dr. Potts's role without holding an evidentiary hearing or opportunity for Jones to present evidence, suggests that the PCR court's fact-finding process was deficient. *See Hurles*, 752 F.3d at 790. However, the process was even more unreasonable because, even though more than six years had passed, the judge based this finding solely on his own untested memory and personal impression of Dr. Potts's role in the sentencing hearing. *See id.* at 791. The judge who presided over Jones's state PCR proceeding was the same judge who sentenced him to death, and in denying a hearing on this claim, the judge relied primarily on his personal recollection of Dr. Potts's testimony and his memory that the prosecution was

upset that Dr. Potts testified favorably for the defense. There is no evidence the PCR court considered anything else in denying the request for a hearing.

The PCR court "plainly misapprehend[ed]" the record in making its finding that Dr. Potts satisfied the role of a defense mental health expert. *See Taylor*, 366 F.3d at 1001. Dr. Potts was not a defense expert, and the fact his conclusions were favorable to the defense does not support that he filled that role. Nothing about the circumstances of Dr. Potts's testimony suggests otherwise. Dr. Potts testified at Jones's sentencing hearing that he regularly prepares psychological reports requested by the courts, that "at times are favorable apparently for the State" and at other times are favorable "for the defense[.]" He also explained that in other cases like Jones's, he had found little or no mitigation for the defendant. Moreover, the limited amount of time Dr. Potts spent on his report and the level of analysis and detail that report provided do not support the conclusion that he was an advocate for the defense team. Dr. Potts submitted only a six-page report to the court. He agreed that he was under "significant time pressure" in preparing the report because he received the PSR late from Mohave County. He met with Jones for a total of four hours at the prison, and spent one and a half hours of that time administering an MMPI personality test. On the day before he testified, Dr. Potts also spoke to Jones for "a couple of hours," Peggy for about thirty minutes, and Randy for one hour. Dr. Potts also specified that it would have been helpful and

> valuable to have had some neurologic evaluations, not – by a neurologist, clinical exam, such as a CAT scan, possibly an MRI, possibly EEG, possibly some sophisticated neurological testing, because I think there's very strong evidence that we have – well, there's clear evidence that we have, I believe, of traumatic brain injury, and there's some other evidence that I believe we may have organic neurological dysfunctions here that has gone on since he's been about 13. So there's some other testing that I think would be valuable to have to pin down the diagnosis.

Nothing about Dr. Potts's role in the sentencing hearing suggests that he had stepped into the shoes of a defense expert.

The PCR court's decision not to fund a defense mental health expert fatally undermined the fact-finding process, in part because that decision resulted in the court ruling on an unconstitutionally incomplete record. Without funding for a mental health expert, it was impossible for Jones to demonstrate that he had been prejudiced by counsel's failure to obtain one during the course of Jones's criminal proceedings. Jones could not demonstrate the inadequacy of counsel's mitigation case without providing the mitigation evidence that could have been presented by a defense neuropsychological expert. Moreover, without funding, Jones could not show that a defense neuropsychological expert would have presented materially different evidence than that already provided by Dr. Potts. By failing to provide additional

funding to develop Jones's mental health mitigation evidence, the state court, as Jones phrases it, created "its own self-fulfilling prophecy," by preventing the development of the claim before it was even presented.

We emphasize that we are not suggesting that any denial of an evidentiary hearing or denial of funding for an expert would lead to a deficient fact-finding process in state court. Our determination is expressly limited to the facts of this case, where, as described above, the court denied the evidentiary hearing based on his own recollection of a sentencing proceeding six years prior, where the state's own expert had opined on the stand that further neurological testing was desirable.

For these reasons, we conclude that any appellate court would conclude that the PCR court's factual determination as to Dr. Potts and its fact-finding process with respect to Claim 1 were unreasonable and inadequate. *See Taylor*, 366 F.3d at 1000. Accordingly, Jones has satisfied the requirements of § 2254(d)(2).

C

Although § 2254(d) typically also applies to the prejudice prong of a petitioner's IAC claim, here, the PCR court did not reach the issue of prejudice, and so we review the issue de novo. *See, e.g., Weeden*, 854 F.3d at 1071.

Pinholster limits our § 2254(d) analysis to the facts in the state court record. 563 U.S. at 185. However, *Pinholster* does not prevent us from considering evidence presented for the first time in federal district court in reviewing the merits of Jones's claims de novo. As the district court found, Jones satisfied the standard

for an evidentiary hearing pursuant to § 2254(e)(2)[8]. That provision permits federal district courts to hold evidentiary hearings and consider new evidence when petitioners have exercised diligence in pursuing their claims in state court. *See id.* ("Section 2254(e)(2) continues to have force where § 2254(d)(1) does not bar federal habeas relief."); *see id.* at 212–13 (Sotomayor, J., dissenting); (*Michael*) *Williams v. Taylor*, 529 U.S. 420, 436–37 (2000).

Though § 2254(e)(2) limits the discretion of district courts to conduct evidentiary hearings, *Pinholster*, 563 U.S. at 203 n.20, it does not impose an express limit on "evidentiary hearings for petitioners who ha[ve] been diligent in state court." *Id.* at 213 (Sotomayor, J. dissenting); *see also Landrigan*, 550 U.S. at 473 n.1. Here, the federal district court determined that Jones had been diligent in attempting to develop the factual basis for Claims 1 and 2 in state court, and the State

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[8] Section 2254(e)(2) states that

> If the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows that—
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> (A) the claim relies on—
>
> (i) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or
>
> (ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and
>
> (B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

does not contest that determination now. The state court record shows that Jones was diligent. His PCR counsel requested funding for a neuropsychologist and "a thorough and independent neurological assessment" to assist in the development of Claims 1 and 2, but the PCR court denied the request. Therefore, the district court did not err in its expansion of the record, and we consider the evidence developed in federal district court in conducting de novo review of Jones's claims.

To prevail on his IAC claim, Jones must demonstrate that his trial counsel: (1) performed deficiently; and (2) Jones's defense was prejudiced by that deficient performance. *Strickland*, 466 U.S. at 687. He has done so.

For all the reasons set forth previously in our § 2254(d)(1) analysis, Jones has demonstrated that counsel's performance fell below an objective standard of reasonableness and below the prevailing professional norms at the time of Jones's proceedings.

Additionally, Jones has demonstrated that counsel's failure to obtain a defense mental health expert for the penalty phase of Jones's trial prejudiced the defense. Jones has demonstrated that there is a "reasonable probability" that had such an expert been retained, "the result of the proceeding would have been different." *Id.* at 694.

There is a reasonable probability that had counsel secured a defense mental health expert, that expert would have uncovered (and presented at sentencing) a

wealth of available mitigating mental health evidence.[9] The main mitigation witness in state court was Randy, Jones's second step-father. Randy erroneously testified that Jones enjoyed a stable home life after age seven, when Randy married Jones's mother, and yet the trial court found that his testimony was sufficient to prove a number of non-statutory mitigating circumstances. Had counsel secured a mental health expert, that expert could have provided substantial evidence —through neuropsychological testing or otherwise —that Jones suffered from mental illness, including evidence supporting any of the diagnoses made by experts in federal district court: (1) cognitive dysfunction (organic brain damage and a history of numerous closed-head injuries); (2) poly-substance abuse; (3) post-traumatic stress disorder ("PTSD"); (4) attention deficit/hyperactivity disorder ("AD/HD"); (5) mood disorder; (6) bipolar depressive disorder; and (7) a learning disorder. The experts retained in Jones's federal habeas proceedings provided significant evidence of these conditions, demonstrating that such evidence could have been uncovered and presented at sentencing.

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[9] The Arizona Supreme Court concluded that Jones's chaotic and abusive childhood and mental illness, discussed below, did not constitute mitigating factors because Jones failed to demonstrate a connection to his conduct on the day of the murders. But this rationale for discrediting Jones's mitigating evidence was contrary to clearly established Supreme Court precedent. The Supreme Court has held that a sentencer in a capital case may not "refuse to consider, as a matter of law, any relevant mitigating evidence" offered by the defendant. *Eddings v. Oklahoma*, 455 U.S. 104, 114 (1982) (emphasis omitted); *see McKinney v. Ryan*, 813 F.3d 798, 811–12 (9th Cir. 2015).

Dr. Pablo Stewart, Chief of Psychiatric Services at the Haight Ashbury Free Clinic in San Francisco, California, testified at the federal evidentiary hearing. He estimated that he spent 130 hours working on Jones's case, in contrast to the four hours Dr. Potts was able to spend with Jones prior to sentencing. Dr. Stewart diagnosed Jones with cognitive dysfunction, PTSD, polysubstance abuse, and mood disorder. He ultimately concluded that "[t]he circumstances surrounding Mr. Weaver's death are a direct consequence of [Jones's] abused and unfortunate past."

Dr. Stewart testified to a number of factors that may have contributed to Jones's cognitive dysfunction that occurred before Jones was even born. He noted that Jones's mother, Peggy, worked in a chrome hub cab plating factory when she was pregnant with Jones, and chrome exposure may negatively affect a baby's birth. He testified that Peggy's prenatal diet was also of concern: Peggy reported that during her pregnancy with Jones, her diet consisted of cigarettes, coffee, and mayonnaise sandwiches. He expressed that the use of nicotine during pregnancy has been directly linked to cognitive dysfunction in children and caffeine exposure results in more difficult births. He also specified that Jones's father beat Peggy during her pregnancy such that there was a potential for physical trauma to the fetus. And he testified to Jones's traumatic and difficult birth: Jones was born in the breech position, with the umbilical cord wrapped around his neck, and forceps were used. He testified that any of these factors could have been potential contributors to Jones's cognitive dysfunction.

Dr. Stewart testified that Jones had suffered multiple serious head injuries over the course of his life, and he went into much greater detail than Randy had provided regarding Jones's head injuries at the state PCR proceeding. Randy had testified that Jones fell off a roof when he was approximately thirteen, fell off a scaffolding when he was approximately fifteen, was mugged while serving in the Marines, and experienced spontaneous blackouts around the age of four. By contrast, Dr. Stewart described an incident where Jones "was about eleven (11) years old, he fell, head-first off a roof onto the metal frame of a horizontal dolly, in an attempt to retrieve a ball. His eye hit the metal bar of the dolly. He was unconscious for about five (5) to ten (10) minutes." He also noted the fall when Jones was fifteen, but additionally, he explained that "[a]s a young adult, Danny had at least three (3) car accidents where he lost consciousness." Further, "when Danny was about five-and-a-half (5 ½) years old, Peggy found Danny regaining consciousness, lying underneath the swing set. She suspected Eland, Danny's first step-father, had hit Danny or thrown him off the slide. Danny's face was red and he vomited, indicating he had a concussion." Dr. Stewart elaborated on the mugging Jones suffered while in the Marines: he was "found lying unconscious in a ditch along the highway, by a Morehead City Police Officer, who took him to the hospital. Danny had been mugged and beaten with a two-by-four."[10]

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[10] Jones self-reported this incident, including to Dr. Stewart and Dr. Scialli, and corresponding medical records show treatment for a head abrasion, but the district court found there was no evidence of acute trauma.

Dr. Stewart discussed PTSD and explained that Jones suffered numerous traumatic experiences early in his life: he watched his first step-father hold a jigsaw to his mother's neck and threaten to kill her, he watched that same step-father shoot a gun at his mother, and on two separate occasions, his second step-father, Randy, pointed a gun to his own head and threatened to kill himself in front of Jones. He also noted that Randy beat Jones for no reason with a belt with a buckle and engaged in other forms of severe physical discipline.

On cross-examination the state challenged Dr. Stewart's PTSD diagnosis because Dr. Stewart stated that Jones "had PTSD at the time of the murders," but did not state that Jones was having a flashback while committing the crimes. Dr. Stewart responded by explaining that while the media tends to show PTSD as being a person "who is thinking he's being ambushed and he takes people hostage," that only occurs "very, very rarely." He explained:

> The much more overwhelmingly more common thing that occurs is a person having a short fuse; a person overreacting to a situation; a person finding themselves challenged by some things and then just going off; a person—and that's PTSD. A person who drinks too much and then gets into fights, those are the more common thing. But those don't sell movies or books.
>
> But that's the more common presentation. So that's why I'm saying in the case of Mr. Jones, it's absolutely clear that he suffers from PTSD, in my opinion, and that he carries that with him

> throughout his entire life. Certainly on the day of these murders, that was going on.

Dr. Stewart also testified that Jones's first step-grandfather forced Jones to drink alcohol when he was only nine years old, and that it appeared the grandfather used alcohol to get Jones drunk so it would be easier to sexually abuse him. Dr. Stewart described the sexual abuse "as full contact sexual abuse, including sodomy, including oral sex, both the providing it and receiving it." Jones became a daily marijuana user when he was in junior high, he used one gram of cocaine every weekend in high school, and he reported using LSD two hundred times. Dr. Stewart explained that the substance abuse appeared to have stemmed from Jones's genetic predisposition, and also because Jones used drugs starting at a very young age to self-medicate as a means of coping with his mental defects and past trauma.

The district court did not credit or discuss Dr. Stewart's testimony that Jones suffers from cognitive dysfunction, apparently because the court doubted Dr. Stewart's credibility based on his purported "willingness to present an opinion on a factual issue"—specifically, Jones's allegation that someone named "Frank" killed Tisha. The district court mistakenly stated that Dr. Stewart opined on the viability of Jones's theory that a third party had been involved in the crime. In fact, Dr. Stewart opined that Jones had not previously mistreated or abused any child, that Jones had a "history of submissive, almost child-like behavior, against older males," and that Jones's "psychological profile supports the events as

described by [Jones] on the night of the crimes." Dr. Stewart thus observed that killing a child is not consistent with Jones's psychological profile. When pressed on cross-examination whether he "believed" Jones's version of events over the jury verdict, Dr. Stewart again affirmed his assessment that Jones's story was consistent with Jones's psychological profile. Dr. Stewart did not purport to contradict the jury's findings.

Dr. Alan Goldberg, a psychologist in Arizona with a speciality in neuropsychology, conducted a battery of tests that covered multiple domains of cognitive functioning. Dr. Goldberg gave Jones approximately twenty-five tests and found that "when we look at the patterns across many different kinds of tests . . . we see a consistent inconsistency in performance, that is, the performance is problematic on a number of tests that all have an attention component to them." He ultimately diagnosed Jones with a learning disability, attention deficit disorder, and "Bipolar Disorder, Depressed."

Jones submitted reports from additional experts, including Dr. David Foy, a professor of psychology at Pepperdine University. Dr. Foy diagnosed Jones with PTSD, polydrug abuse, depressive disorder, compromised cognitive emotional functioning, and various learning deficits. Dr. Foy described the numerous instances of life-threatening family violence Jones witnessed growing up, and found that on at least two occasions Jones used a baseball bat to protect himself: (1) when Jones threatened to kill Jones's first step-father if he did not stop beating Jones's mother,

Peggy; and (2) in order to stop Jones's first step-grandfather from continuing to sexually abuse him. Dr. Foy concluded that

> [t]he constant threat of sudden verbal attacks or severe physical punishment in Danny's home environment would be expected to produce an essential state of wariness or hypervigilance . . . [and] would be expected to lead to a heightened suspiciousness and combat readiness as a systematic way of responding, even in situations which later proved to be non-life threatening.

Finally, Jones submitted a declaration from his younger sister, Carrie. She said that, as a child, Jones twice watched Randy point a gun at his own head and threaten to kill himself. She stated that contrary to Randy's testimony during sentencing, Randy was both verbally and physically abusive to Jones, and that Jones threatened to kill Randy if he kept beating Peggy. Carrie also confirmed that Jones suffered numerous head injuries while growing up.

The State called three experts to testify in response at the federal evidentiary hearing. Dr. Herron treated Jones from 2003 to 2005 for depression and anxiety, and stated that he believed that the bipolar diagnosis was reasonable, but that he detected no signs of neurological dysfunction, cognitive impairment, or PTSD, though he could not rule out those conditions. Dr. Herring, a clinical neuropsychologist, interviewed and tested Jones. Based on those results, she determined that Jones does not suffer from cognitive impairment or AD/HD. Dr. Scialli testified that based on his evaluation, he could diagnose Jones with alcohol,

amphetamine, and cannabis dependence and AD/HD residual type at the time of the murders. He disputed the PTSD diagnoses of Jones's experts, as there was no indication that Jones re-experienced the traumatic event at the time. He explained that phrases such as "cognitive dysfunction" or "cognitive impairment" are not diagnostic definitions, but are used "idiosyncratically" as "terms of art" with no fixed meaning, and he asserted Jones could not be classified under any category of cognitive dysfunction as defined by the Diagnostic and Statistical Manual of Mental Disorders. He also testified that although he diagnosed Jones with AD/HD residual type, there is no link between AD/HD and violent behavior.

Dr. Potts also testified and explained that he had not been tasked with providing mitigation evidence at sentencing and had not conducted the extensive testing he felt was required. Potts explained: "I was not an expert for either party. I was the Court's expert in looking at some issues. I was not—it was clear I was not hired for mitigation, nor was I hired for aggravation." The trial court had ordered Dr. Potts to perform an evaluation for the court pursuant to Rule 26.5 of the Arizona Rules of Criminal Procedure. In accord with this role limitation, Dr. Potts had testified at Jones's sentencing: "My main role is working with Maricopa County Superior Court, criminal division, coordinating competency evaluations, other forensic, and working with patients. I also have clinical responsibilities. . . . [I] [p]rimarily do reports as requested by the Court." When asked whether or not he had enough "points of data" to pull from in reaching his conclusions, he stated:

> [T]here's a clear distinction between a mitigation specialist, and I'm no mitigation specialist. I may be a part of a team of mitigation, but I'm clearly not a mitigation specialist in the realm of what is dealt with now in capital cases. . . .
>
> Mine was a cursory examination. . . . [I]nterviewing one family member certainly is not adequate, I believe, for what would be considered capital mitigation. It is below the standard of care.

He stated that, prior to his testimony at sentencing, he had recommended that defense counsel seek neuropsychological testing for Jones. During cross-examination, the State tried to get Dr. Potts to admit that he only called for neurological testing, not neuropsychological testing, but Dr. Potts explained that "[s]ophisticated neurological testing would include that."

He described the reports submitted by the additional experts at the habeas proceeding as the "documents I think one would expect to see in mitigation. . . . I believe they're very, very helpful, and I think—I know I would have liked to have had the exhaustive nature of these reports." He stated that he found his role constrained by his court-appointed status, and therefore "did not make diagnoses," because his "role was not to make diagnoses . . . and that's why I would not have. I could have . . . but that was not the nature or tenor of any of this report . . . ."

Defense trial counsel testified that Dr. Potts "did not act as a neutral, detached court-appointed expert.

He actively assisted us in developing mitigation, planning strategy to a much larger degree than what he indicated." He explained that he had "numerous phone conversations" with Dr. Potts, they met together the night before Dr. Potts testified, and Dr. Potts "stressed to ask for the continuance for the additional testing."

Notwithstanding the defense lawyer's testimony that Dr. Potts "did not act as a neutral, detached court-appointed expert," and "actively assisted in developing mitigation, planning strategy," the district court's conclusion that Dr. Potts was a "de facto defense expert" was clearly erroneous. As a court-appointed expert, Dr. Potts' findings were not confidential, he had "no obligation to protect or further the interests of the defendant," *Lambright*, 490 F.3d at 1121, and he did not sufficiently "assist in evaluation, preparation, and presentation of the defense," *Ake*, 470 U.S. at 83. Dr. Potts stated repeatedly that he was a neutral expert and found his role limited as such.

We need look no further than the defense lawyer's treatment of Dr. Potts to recognize that he was not prepared, nor thought of, as a defense expert. As we have recognized, the "duty to provide the appropriate experts with pertinent information about the defendant is key to developing an effective penalty phase presentation." *Caro,* 280 F.3d at 1255 (citation omitted). A review of Dr. Potts' entire case file shows that only 31 pages came from the defense lawyer. The defense lawyer even admitted at the evidentiary hearing in the district court that because Dr. Potts was

a court-appointed expert, he specifically chose *not* to send Dr. Potts all available mitigation evidence:

> THE COURT: So before Dr. Potts issued his report that turned out to be favorable to you, would you necessarily have provided all of the information you had collected on Mr. Jones?
>
> WITNESS: No, I would not, because it was – after he got started, it was apparent he wanted to help us. And at that point, then, his role, I supposed, changed. And then our relationship was a little different.
>
> Initially, I would screen what I sent him, because I honestly didn't know what we were going to get from him.

Dr. Potts' report was dated December 3, 1993, and the defense lawyer did not get the report until two days before the sentencing hearing started on December 8, 1993. Until at most two days before the sentencing hearing, nobody considered Dr. Potts as a defense expert, and the defense lawyer had only given Dr. Potts 31 pages to review. As we held in *Bean v. Calderon*: "When experts request necessary information and are denied it, when testing requested by expert witnesses is not performed, and when experts are placed on the stand with virtually no preparation or foundation, a

capital defendant has not received effective penalty phase assistance of counsel." 163 F.3d at 1079.

The district court also concluded that no prejudice resulted because the State's experts were more credible than the petitioner's. The district court erred in doing so. It was improper for the district court to weigh the testimony of the experts against each other in order to determine who was the most credible and whether Jones had presented "evidence *confirming* that [he] suffers from neurological damage caused by head trauma or other factors." We have held that a district court should not independently evaluate which expert was most believable or try to find a definitive diagnosis:

> The district court dismissed evidence of Correll's brain injury, concluding that any organic brain injury played no role in Correll's crimes. The district court's conclusion was based on the judge's own evaluation of two conflicting experts. But in the procedural context of this case, the district court's role was not to evaluate evidence in order to reach a conclusive opinion as to Correll's brain injury (or lack thereof). The district court should have decided only whether there existed a "reasonable probability" that "an objective fact-finder" in a state sentencing hearing would have concluded, based on the evidence presented, that Correll had a brain injury that impaired his judgment at the time of the crimes.

Correll v. Ryan, 539 F.3d 938, 952 n.6 (9th Cir. 2008) (citation omitted).

This is not to say, of course, that a district court is prohibited from making credibility determinations. However, the ultimate focus is on whether the new evidence was "sufficient to undermine confidence in the outcome" which is different from "the preponderance more-likely-than-not standard.'" *Lambright*, 490 F.3d at 1121 (quoting *Summerlin*, 427 F.3d at 640).

The district court also concluded that Jones's mental conditions "do not constitute persuasive evidence in mitigation because they do not bear a relationship to Petitioner's violent behavior." However, if the sentencing court had decided not to consider the mitigating mental condition evidence, it would have run afoul of *Eddings*, which held a sentencer in a capital case may not "refuse to consider, as a matter of law, any relevant mitigating evidence" offered by the defendant. 455 U.S. at 114.

The testimony provided at the federal evidentiary hearing demonstrates the types of mitigation evidence that could and should have been presented at the penalty phase of Jones's trial. For instance, the evidence demonstrates that, had counsel retained a defense mental health expert, that expert could have provided testimony explaining the factors that contributed to Jones's cognitive dysfunction, including: (1) prenatal chrome and nicotine exposure; (2) his mother's malnutrition during pregnancy; (3) fetal trauma from beatings by his father; (4) a traumatic birth; (5) several severe head injuries; or (6) Jones's substantial and extensive drug and alcohol abuse, which began when he was eight or nine years old. Any such evidence would have been significantly more

probative of Jones's mental state and more persuasive in reducing Jones's culpability than Dr. Potts's conditional findings, compiled after far less preparation time and testing, and comprising only a six-page report. These factors illustrate how unfortunate circumstances outside of Jones's control combined to damage his cognitive functioning and mental health at the time of his crimes.

Likewise, the mental health experts' testimony in the district court proceedings demonstrates that had trial counsel retained such an expert for sentencing, he or she could have provided evidence that Jones's mental state was impaired by drugs and alcohol at the time of his crimes. He or she also could have offered context for his substance abuse and insight into how Jones's long-term self-medication affected his brain. As demonstrated at the federal evidentiary hearing, any mental health expert engaged by the defense team would have attempted to explain Jones's lifelong history of substance abuse and its physical effects on Jones's brain. This would have included compiling a family history and hard data regarding Jones's brain function. It also would have included information addressing how and when Jones's substance abuse began. As the federal proceedings revealed, Jones turned to substance abuse at an extremely young age in order to self-medicate in response to the trauma he experienced from being physically and sexually abused and as a result of repeatedly witnessing violence directed at his mother. A mental health expert would have relayed that Jones suffered sexual abuse from age nine until age thirteen at the hands of his step-grandfather, who introduced him to marijuana and

alcohol at age nine in order to facilitate that abuse. A mental health expert could also have explained the trauma Randy inflicted on Jones by detailing how Randy physically and emotionally abused Jones, engaged in various forms of severe physical discipline, and threatened suicide in front of Jones and his family.

To be sure, the expert testimony was not wholly one sided. The State's experts disputed some of the diagnoses. For example, Dr. Scialli disagreed with Dr. Stewart's PTSD diagnosis and noted there was no sign that Jones was re-experiencing a trauma at the time of the murders. But a conclusive diagnosis was not necessary for a sentencer to consider the wealth of evidence that Jones suffered from some form of mental illness and how that illness contributed to his commission of the crimes.

Testimony explaining Jones's history would have significantly impacted the overall presentation of Jones's culpability with respect to his mental state, and painted a vastly different picture of Jones's childhood and upbringing. The mitigation case actually presented to the sentencing court suggested that while Jones had undergone a traumatic early childhood, he enjoyed a largely normal childhood and supportive family after the age of six. And because so little preparation had been done, Dr. Potts erroneously testified at sentencing that Jones did not suffer child abuse once Randy and Peggy married. Notably, Randy was the only mitigation witness who testified at Jones's sentencing, and defense counsel was unaware that Randy too was an abuser. Had counsel procured a mental health expert, the mitigation case would have told the story of an

individual whose entire childhood was marred by extreme physical and emotional abuse, which in turn funneled him into early onset substance abuse that exacerbated existing cognitive dysfunction.

In short, the sentencing judge "heard almost nothing that would humanize [Jones] or allow [him] to accurately gauge his moral culpability." *Porter v. McCollum*, 558 U.S. 30, 41 (2009). The mitigating evidence would have been powerful in painting a complete portrait of Jones's life.[11] Without it, the sentencing judge had little to counterbalance the aggravating factors.

Indeed, the decision of life or death was given to the sentencing judge with a false picture of Danny Jones's life. The sentencing judge had no idea any physical abuse lasted past Jones's sixth birthday, and he had no idea that the tremendous abuse likely played a key role in leading Jones down the path of polysubstance abuse that he ultimately traveled. "This evidence adds up to a mitigation case that bears no relation to the few

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[11] *See Penry v. Lynaugh*, 492 U.S. 302, 319 (1989) ("'[E]vidence about the defendant's background and character is relevant because of the belief, long held by this society, that defendants who commit criminal acts that are attributable to a disadvantaged background . . . may be less culpable.'"), *abrogated on other grounds by Atkins v. Virginia*, 536 U.S. 304 (2002); *Eddings*, 455 U.S. at 113–15 (explaining that consideration of the offender's life history is a "part of the process of inflicting the penalty of death" (citation omitted)); and *McKinney*, 813 F.3d at 821.

naked pleas for mercy actually put before the jury . . . ." *Rompilla*, 545 U.S. at 393.[12]

"We have held . . . that a defendant was prejudiced when, although counsel introduced some of the defendant's social history, he did so in a cursory manner that was not particularly useful or compelling." *Stankewitz v. Woodford*, 365 F.3d 706, 724 (9th Cir. 2004) (citation and quotation marks omitted) ("*Stankewitz I*"); *see also Bean*, 163 F.3d at 1081 ("[T]he family portrait painted at the federal habeas hearing was far different from the unfocused snapshot handed the superior court jury."). Here, as in *Stankewitz I*, "[a] more complete presentation, including even a fraction of the details [Petitioner] now alleges, could have made a difference." 365 F.3d at 724.

As part of our prejudice analysis, we must "reweigh the evidence in aggravation against the totality of available mitigating evidence," *Wiggins*, 539 U.S. at 534. Here, the sentencing court found that (1) Jones "committed the offense as consideration for the receipt, or in expectation of the receipt of anything of pecuniary value"; (2) Jones "committed the offenses in an especially heinous or depraved manner"; and (3) Jones was "convicted of one or more other homicides . . . which were committed during the commission of the offense."[13]

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[12] "Although, for the purposes of resolving this issue, we evaluate prejudice in the context of judge-sentencing, the result is the same." *Summerlin*, 427 F.3d at 643.

[13] Notably, while the Arizona Supreme Court affirmed the trial court's finding that Jones's crimes were for pecuniary gain, the

On de novo review, we must weigh these factors against the mitigation evidence, as developed in the state court record that was available, but not presented. We also consider the mitigation evidence that was actually presented. The only mitigation witness in this case was Jones' second step-father Randy Jones. Randy testified, second-hand, about Jones's birth, abuse at the hands of his first stepfather and his drug abuse. Randy omitted his own physical and mental abuse of Jones, which started when Jones was six, and Jones's sexual abuse by his step-grandfather. The available evidence that was not presented included numerous neurological disorders, including brain damage, and an extraordinary abusive childhood. The available additional mitigating evidence was powerful,

Therefore, "reweigh[ing] the evidence in aggravation against the totality of available mitigating evidence," we conclude there is at least a reasonable probability that development and presentation of mental health expert testimony would have overcome

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Court also found that "Tisha, a 7-year-old child, did not present an obstacle to defendant's goal of taking Robert's guns." And the Arizona Supreme Court reversed for lack of evidence on the trial court's finding that Jones killed Tisha to eliminate her as a witness. Plainly, it was not necessary to kill a seven-year-old girl or her grandmother in order to steal guns, but these senseless murders are consistent with an outburst by someone suffering from organic brain injuries and other serious medical disorders. Thus, evidence of Jones's cognitive dysfunction, his childhood, and his upbringing are especially relevant to his culpability and our ultimate determination that there is a reasonable probability that such evidence may have affected the sentencing court's determination.

the aggravating factors and changed the result of the sentencing proceeding. *Pinholster*, 563 U.S. at 198 (quoting *Wiggins*, 539 U.S. at 534). Under Arizona law, these "mitigating circumstances [were] sufficiently substantial to call for leniency." Ariz. Rev. Stat. § 13-703(E) (1993). Our conclusion is supported by the *Strickland* prejudice analysis conducted by the Supreme Court and our court in similar cases.

In *Porter*, which involved a double homicide, the aggravating factor for which the defendant was sentenced to death was that the murder was "committed in a cold, calculated, and premeditated manner." *Porter*, 558 U.S. at 32–33, 42. The mitigation defense was similar to the one presented in Jones' case. *Id.* at 33–36. However, given the available mitigating evidence, including abuse, troubled family history, and evidence of mental disorders, the Supreme Court concluded that *Strickland* prejudice existed, even affording AEDPA deference to the state court's determination of lack of prejudice. *Id.* at 41–44.

Terry Williams involved a homicide preceded by a prior armed robbery and burglary, and succeeded by auto thefts, and two violent assaults on elderly victims, one of whom was left in a vegetative state. *Terry Williams*, 529 U.S. at 368. However, the Supreme Court concluded that failure to investigate and present evidence of family abuse and mental capacity was sufficient to satisfy the *Strickland* prejudice standard. *Id.* at 395, 398.

Rompilla involved a capital case in which the jury found that the murder was committed by torture, that Rompilla had a significant history of felony convictions

indicating the use or threat of violence, and that the murder was committed in the course of another felony. *Rompilla*, 545 U.S. at 378. Nonetheless, the Supreme Court granted relief under *Strickland*, concluding that counsel had failed to investigate and present evidence of family history, substance abuse and the circumstances underlying the petitioner's criminal history. *Id.* at 382, 390–393.

In *Wiggins*, the Supreme Court granted relief because mitigating evidence such as severe family abuse, sexual abuse in foster care, and diminished mental capability was not presented to the jury. *Wiggins*, 539 U.S. at 535.

Penry involved a brutal rape and murder, where the jury found that the act "was committed deliberately and with the reasonable expectation that the death of the deceased or another would result" and that there was "a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society." 492 U.S. at 307, 310. Nonetheless, the Supreme Court granted relief because the defendant was unable to introduce evidence of mental retardation and family abuse as mitigating factors. *Id.* at 340.

Our case law has yielded similar results. *Sanders* involved a brutal assault and homicide. *Sanders*, 23 F.4th at 970–71. However, despite the nature of the crime, and prior convictions, we held that failure to investigate and present evidence of social history and mental health evidence satisfied the *Strickland* prejudice standard. *Id.* at 985–86, 995.

In *Andrews v. Davis*, 944 F.3d 1092, 1100 (9th Cir. 2019), the petitioner, who had previously been convicted of another murder, was convicted of a triple homicide and rape. However, we concluded that failure to investigate and present evidence of social history, family background, abuse, and mental health was sufficient to satisfied the *Strickland* prejudice standard. *Id.* at 1121.

In *Stankewitz v. Wong*, 698 F.3d 1163 (9th Cir. 2012), we held that the petitioner had established *Strickland* prejudice when counsel failed to investigate and present mitigating evidence, which included a history of family abuse, anger management issues, and substance abuse. *Id.* at 1168–69, 1176.

Avena v. Chappell, 932 F.3d 1237, 1252 (9th 2019) involved the commission of "two brazen murders during a night of malicious criminal activity." The defendant was also "implicated in the violent death of another inmate," and had "assaulted a police officer" while awaiting trial for the two murders. *Id.* at 1252. Nonetheless, we concluded that the *Strickland* prejudice standard had been satisfied by failure to investigate and present evidence of childhood abuse and substance abuse. *Id.* at 1252–53.

In *Correll*, which involved a triple homicide, the court found that the crimes had been especially heinous, cruel, or depraved and had been committed with the expectation of pecuniary value. *Correll*, 539 F.3d at 942, 959; *see State v. Corell*, 148 Ariz. 468, 485 (1986). We concluded that "there was a substantial amount of mitigating evidence available, which, when taken together, [was] sufficient to raise a presumption

of prejudice under the Supreme Court's standard in *Wiggins*." *Correll*, 539 F.3d at 953–54. The evidence included family abuse, substance abuse, and evidence of mental illness. *Id*. at 952–54.

In *Douglas v. Woodford*, 316 F.3d 1079 (9th Cir. 2003), the defendant had gruesomely sexually assaulted two teenage girls and then strangled them to death. *Id*. at 1082–83. Yet we concluded that the failure to investigate and present evidence of family history and mental health issues was sufficient to establish *Strickland* prejudice. *Id*. at 1088, 1091.

In *Summerlin*, we found *Strickland* prejudice even with the finding that the defendant "committed the offense in an especially heinous, cruel, or depraved manner." *Summerlin*, 427 F.3d at 641 (citation omitted). We concluded that the failure to investigate and present evidence of family history and mental illness as mitigating factors constituted sufficient *Strickland* prejudice. *Id.* at 631–34.

In *Silva v. Woodford*, 279 F.3d 825 (9th Cir. 2002), we considered a "gruesome abduction, robbery and murder." *Id.* at 828. However, we concluded that the *Strickland* prejudice standard had been satisfied by the failure to investigate and present evidence of family history, mental illness, organic brain disorders and substance abuse. *Id.* at 847, 850.

All of these cases involved brutal crimes, but with the additional common thread that counsel did not properly investigate and present available classic mitigating evidence.

Given the relevant case law, and weighing the available mitigating evidence against the aggravating factors in this case, we conclude on de novo review that Jones has demonstrated *Strickland* prejudice. Accordingly, we reverse the district court's denial of relief on Claim 1.

V

A

In Claim 2, Jones asserts that his trial counsel was constitutionally ineffective by failing to seek neurological or neuropsychological testing prior to sentencing. He asserts that the failure to do so fell below prevailing professional norms at the time. We agree.

As with Claim 1, counsel's failure to promptly seek neuropsychological testing ran contrary to his obligation to pursue reasonable investigations under *Strickland*, and in particular, his obligation to investigate and present evidence of a defendant's mental defect. *See Terry Williams*, 529 U.S. at 396 (failure to investigate and present evidence of mental defect amounts to deficient performance). The state court record shows that counsel was on notice of numerous facts from the very beginning of the representation that Jones may have had significant brain damage. "[W]hen 'tantalizing indications in the record' suggest that certain mitigating evidence may be available, those leads must be pursued." *Lambright*, 490 F.3d at 1117 (quoting *Stankewitz I*, 365 F.3d at 719–20); *see also Wiggins*, 539 U.S. at 527 ("In assessing the reasonableness of an attorney's

investigation, however, a court must consider not only the quantum of evidence already known to counsel, but also whether the known evidence would lead a reasonable attorney to investigate further."). Counsel specified in his declaration before the PCR court that "prior to trial and sentencing [he] was aware from interviews of Danny Jones and his mother and step-father that he had been rendered unconscious numerous times during his life from head injuries," as well as that "he had a significant history of serious long term substance abuse." Any reasonable attorney would understand that these details could lead to valuable, available mitigation evidence and would have pursued these leads further.

However, in the state PCR proceedings, defense trial counsel provided no strategic reason for his failure to arrange for neuropsychological testing. Instead, trial counsel stated that he "was not aware that neurological or neuropsychological testing was necessary and available which could determine the exact nature of injuries to Danny Jones' brain from long term substance abuse and head injury," nor that testing would shine a light on "the resulting affect on his behavior and conduct." Counsel's failure to appreciate the importance of such testing before the sentencing phase of trial constituted deficient performance because he failed to understand the value neuropsychological testing could provide in Jones's case, and by the time of Jones's sentencing in 1993, counsel in capital cases was expected to be versed in the role of psychiatric evidence. *See* ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases, Guideline 5.1(1)(A)(v), p. 5–6 (1989)

("Lead trial counsel assignments should be distributed to attorneys who . . . are familiar with and experienced in the utilization of expert witnesses and evidence, including, but not limited to, psychiatric and forensic evidence.").

Counsel's request for testing (and a continuance) during Jones's sentencing hearing came far too late. As noted by PCR counsel, the court denied these requests because it had granted funding earlier in the case for expert assistance, and "if there [had been] any follow-up questions of a psychological or neurological nature, [the court expected] that the defense would have followed them up." The court, therefore, was placing the burden on counsel to recognize these issues and request funding and assistance earlier in the case, which counsel failed to do because he had not invested sufficient preparation time and research to be aware that such testing was available and needed. Moreover, the timing of counsel's request for neuropsychological testing, like his request for a defense mental health expert, was in itself deficient. "[P]reparation for the sentencing phase of a capital case should begin early and even inform preparation for a trial's guilt phase." *Allen*, 395 F.3d at 1001. For this reason, the PCR court's decision that defense counsel's performance did not fall below an objectively reasonable standard was an unreasonable application of *Strickland*. Jones has satisfied § 2254(d)(1).

B

Alternatively, Jones asserts that the state PCR court's decision was based on an unreasonable determination of the facts under § 2254(d)(2). He

argues that the court precluded Claim 2's full factual development by denying PCR counsel's request to fund neuropsychological testing, and he asserts that the inadequacy of the state court's fact-finding procedures renders its rejection of this claim unreasonable. We agree.

The PCR court never addressed the facts supporting Jones's IAC claim, and it excused counsel's failure to move timely for neuropsychological testing in a vague, inconsistent order. As with Claim 1, this had the effect of precluding Claim 2's full factual development in a way that rendered the entire fact-finding process unreasonable.

At sentencing, Dr. Potts testified that he saw indicators of brain damage, and as a result, counsel requested that the court continue the proceedings so that he could seek a neuropsychological evaluation. The court, however, ruled contrary to Dr. Pott's recommendation, stating only that:

> this case has been pending a long time, and I think the evidence is *very slim, nonexistent, in fact*, that the defendant has anything that requires any kind of neurological examination. So, I am ready to proceed [with sentencing]. (Emphasis added).

Because the State did not call a competing expert, the only evidence in the record—Dr. Pott's unambiguous recommendation—suggested that a neuropsychological evaluation was necessary, contrary to the sentencing court's assessment. The sentencing

court's cursory evaluation of the record effectively foreclosed any factual development on this issue.

In the PCR proceedings, the court at least granted a hearing on the issue of counsel's ineffectiveness regarding testing, but because the court summarily denied the claim concerning the appointment of a mental health expert and denied counsel's motion for further neuropsychological testing, the evidentiary hearing was rendered almost meaningless. The court based its denial of neuropsychological testing on the court's own impressions and untested memory of Dr. Potts's sentencing testimony from six years prior. The court recalled that he "thought Dr. Potts did a good job," and "based on his testimony," the court did not "really see any grounds for any additional psychiatric or psychological testing." But Dr. Potts's testimony was that additional neuropsychological testing *was* needed. The court paradoxically explained that "[b]ased on [Dr. Potts's] testimony and the other things that I heard during that hearing, there was no grounds in my mind for obtaining a neuropsychological examination. Not one." The resulting decision dismissed the claim for neuropsychological testing in a single sentence: "The report and testimony of Dr. Potts who was appointed by the Court, adequately addressed defendant's mental health issues at sentencing."

As with Claim 1, the state PCR judge made factual findings regarding the necessity of neuropsychological testing, not on the basis of evidence presented by the petitioner, but on the basis of his own personal conduct, untested memory, and understanding of events. *See Hurles*, 752 F.3d at 791; *see also Buffalo v. Sunn*, 854

F.2d 1158, 1165 (9th Cir. 1988) (finding error when the court relied on "personal knowledge" to resolve disputed issue of fact). Additionally, in making the resulting factual finding—that neuropsychological testing was not warranted—the court "plainly misapprehend[ed]" the record. *See Taylor*, 366 F.3d at 1001. In particular, the evidence in the record—Dr. Potts's testimony—strongly suggested that neuropsychological testing *was* essential in assessing Jones's psychological state, contrary to the court's finding. Thus, by finding against the weight of the evidence, and proceeding to rule on the merits of Claim 2, the court employed a constitutionally defective fact-finding process and ruled on an unconstitutionally incomplete factual record. *See id.* at 999; *see also Milke*, 711 F.3d at 1007 (finding the state court decision rested on an unreasonable determination of the facts where the judge relied on a distorted fact-finding process and ruled on an "unconstitutionally incomplete record").

The PCR court had an obligation to allow for reasonable fact development in reaching the merits of Claim 2; the judge did not fulfill this obligation by relying on his own untested, personal recollection of the testimony Dr. Potts presented six years earlier. For this reason, Jones has demonstrated that the PCR court's decision was based on an unreasonable fact-finding process and determination of the facts, satisfying § 2254(d)(2).

C

As with Claim 1, the PCR court failed to reach the prejudice prong of Claim 2, and so we address the issue de novo. *See, e.g., Weeden*, 854 F.3d at 1071.

As with Claim 1, because Jones was diligent in attempting to develop the factual basis of this claim in state court by requesting "a thorough and independent neurological assessment," § 2254(e)(2) does not limit our ability to consider evidence presented for the first time in federal district court. *See Pinholster*, 563 U.S. at 213 (Sotomayor, J. dissenting); *see also Landrigan*, 550 U.S. at 473 n.1. The State does not contest that Jones was diligent in attempting to develop the factual basis for his claims in state court, or that we may consider this additional evidence on appeal. And having reviewed the record, we independently conclude that the district court did not err in its diligence determination and expansion of the record. Accordingly, we consider the evidence developed in federal district court in conducting de novo review of Jones's claims.

In order for us to grant relief on Jones's IAC claim, Jones must demonstrate that his trial counsel: (1) performed deficiently; and (2) Jones's defense was prejudiced by that deficient performance. *Strickland*, 466 U.S. at 687. He has done so.

Jones has demonstrated that trial counsel performed deficiently for all the reasons set forth in our § 2254(d)(1) analysis. He has demonstrated that counsel's performance fell below an objective standard

of reasonableness and below the prevailing professional norms at the time of Jones's proceedings.

Additionally, Jones has demonstrated that counsel's failure to seek neuropsychological and neurological testing prejudiced his defense. He has demonstrated that there is a "reasonable probability" that had such testing been conducted, and had the results been presented at sentencing, "the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694. While Dr. Potts presented brief, conditional findings, the results of the neuropsychological and neurological tests conducted by various experts during Jones's federal district court proceedings confirmed that Jones suffered from a variety of psychological disorders stemming from birth and exacerbated by long-term drug use and trauma that affected Jones's cognitive functioning. As explained previously, testing revealed that Jones suffered from organic brain damage, poly-substance abuse, PTSD, AD/HD, mood disorder, bipolar depressive disorder, and a learning disorder. The presentation of these results would involve presenting the contributing factors to his cognitive dysfunction, as previously described with respect to Claim 1, including that his long-term substance abuse was induced by his sexually abusive step-grandfather. At sentencing, there was no indication that Jones had suffered years of sexual abuse as a child. In combination, the testing results and the presentation of contributing factors would have dramatically affected any sentencing judge's perception of Jones's culpability for his crimes, even despite the existence of aggravating factors. Without repeating our prior analysis, we conclude this available mitigating

evidence would have created a reasonable probability that Jones would not have received a death sentence.

VI

Because we have determined that Jones is entitled to relief and resentencing on the basis of Claims 1 and 2, we need not and do not reach the issue of whether the new evidence presented at the federal evidentiary hearing fundamentally altered these claims such that they were unexhausted, procedurally defaulted, and excused in light of *Dickens v. Ryan*, 740 F.3d 1302 (9th Cir. 2014) (en banc) and *Martinez v. Ryan*, 566 U.S. 1 (2012). Additionally, we need not and do not reach the merits of any of Jones's other claims.

We reverse and remand to the district court with instructions to issue the writ of habeas corpus.

REVERSED AND REMANDED.

BENNETT, Circuit Judge, joined by CALLAHAN, R. NELSON, BADE, COLLINS, LEE, BRESS, BUMATAY, and VANDYKE, Circuit Judges, dissenting from the denial of rehearing en banc:

Danny Jones, an Arizona prisoner, brutally killed three people with a baseball bat, including defenseless seven-year-old Tisha Weaver, by dragging her from under her parents' bed, striking her multiple times with the bat, and then strangling or asphyxiating her in case the bat had not done its intended job. He received two death sentences. The Supreme Court vacated the panel's first attempt to grant Jones habeas

relief. *Ryan v. Jones*, 563 U.S. 932 (2011). The panel's amended opinion grants habeas relief again. But in doing so, the panel improperly and materially lowered *Strickland*'s[1] highly demanding standard and failed to afford the required deference to the district court's findings—essentially finding that no such deference was due.

The first error directly conflicts with Supreme Court precedent, and the second is inconsistent with our well-established rule that district court findings and credibility determinations are subject to clear error review. Thus, we should have taken this case en banc to secure and maintain uniformity in our case law. *See* Fed. R. App. P. 35(a)(1). En banc review was also warranted because this case involves issues of exceptional importance. *See* Fed. R. App. P. 35(a)(2). Not only does the panel's amended opinion allow courts to improperly grant sentencing relief to capital defendants who have been convicted of the most horrific crimes, but it also allows future panels to simply ignore a district court's well-reasoned factual and credibility findings. Finally, we should have taken this case en banc so that the Supreme Court, which has already vacated our judgment once, does not grant certiorari a second time and reverse us.[2] For these

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[1] *Strickland v. Washington*, 466 U.S. 668 (1984).

[2] The Supreme Court routinely reverses us in capital cases, including cases based on our misapplication of *Strickland*. *See, e.g.*, *Shinn v. Kayer*, 141 S. Ct. 517 (2020) (per curiam) (summary reversal); *Cullen v. Pinholster*, 563 U.S. 170 (2011); *Wong v. Belmontes*, 558 U.S. 15 (2009) (per curiam) (summary reversal); *Woodford v. Visciotti*, 537 U.S. 19 (2002) (per curiam) (summary

reasons, I respectfully dissent from our decision not to rehear this case en banc.

I. BACKGROUND

A. Murders

Jones received two death sentences for murdering his friend, Robert Weaver, and Weaver's seven-year-old daughter Tisha, so that he could obtain Weaver's gun collection. Jones committed the murders in March 1992, while he was on probation for a prior felony offense. In affirming Jones's convictions and sentence, the Arizona Supreme Court described the murders:

> In February 1992, defendant moved to Bullhead City, Arizona, and resumed a friendship with Robert Weaver. At this time, Robert, his wife Jackie, and their 7-year-old daughter, Tisha, were living in Bullhead City with Robert's grandmother, Katherine Gumina.[3] As of March 1992, defendant was unemployed and was planning to leave Bullhead City.
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> On the night of March 26, 1992, defendant and Robert were talking in the garage of Ms.

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reversal). The Court has also reversed our sister circuits for misapplying *Strickland* in capital cases. *See, e.g.*, *Dunn v. Reeves*, 141 S. Ct. 2405 (2021) (per curiam) (summary reversal); *Mays v. Hines*, 141 S. Ct. 1145 (2021) (per curiam) (summary reversal); *Smith v. Spisak*, 558 U.S. 139 (2010); *Bobby v. Van Hook*, 558 U.S. 4 (2009) (per curiam) (summary reversal).

[3] Ms. Gumina was seventy-four years old. *See Jones v. Schriro*, 450 F. Supp. 2d 1023, 1025 (D. Ariz. 2006).

Gumina's residence. Robert frequently entertained his friends in the garage, and during these times, he often discussed his gun collection. The two men were sitting on inverted buckets on the left side of the garage, and Ms. Gumina's car was parked on the right side of the garage. Both defendant and Robert had been drinking throughout the day and had used crystal methamphetamine either that day or the day before.

At approximately 8:00 p.m., Russell Dechert, a friend of Robert's, drove to the Gumina residence and took defendant and Robert to a local bar and to watch a nearby fire. Dechert then drove defendant and Robert back to the Gumina residence at approximately 8:20 p.m. and left, telling defendant and Robert that he would return to the Gumina residence around 9:00 p.m.

Although there is no clear evidence of the sequence of the homicides, the scenario posited to the jury was as follows. After Dechert left, defendant closed the garage door and struck Robert in the head at least three times with a baseball bat. Robert fell to the ground where he remained unconscious and bleeding for approximately 10 to 15 minutes. Defendant then entered the living room of the Gumina residence where Ms. Gumina was watching television and Tisha Weaver was coloring in a workbook. Defendant struck Ms. Gumina in the head at

least once with the baseball bat, and she fell to the floor in the living room.

Tisha apparently witnessed the attack on Ms. Gumina, ran from the living room into the master bedroom, and hid under the bed. Defendant found Tisha and dragged her out from under the bed. During the struggle, Tisha pulled a black braided bracelet off defendant's wrist. Defendant then struck Tisha in the head at least once with the baseball bat,[4] placed a pillow over her head, and suffocated her, or strangled her, or both.

Defendant next emptied a nearby gun cabinet containing Robert's gun collection, located the keys to Ms. Gumina's car, and loaded the guns and the bat into the car. At some point during this time, Robert regained consciousness, and, in an attempt to flee, moved between the garage door and Ms. Gumina's car, leaving a bloody hand print smeared across the length of the garage door and blood on the side of the car. Robert then climbed on top of a work bench on the east side of the garage, leaving blood along

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[4] The Arizona Supreme Court's opinion later states: "The evidence at trial showed that defendant struck Tisha in the head with the baseball bat at least twice . . . . [D]efendant had struck Tisha with the baseball bat with sufficient force to create a wound several inches wide, extending from her left ear to her left cheek. He then struck her a second time on the back of her head. After delivering these two fatal blows, defendant then asphyxiated her, far exceeding the amount of violence necessary to cause death." *State v. Jones*, 917 P.2d 200, 217–18 (Ariz. 1996).

the east wall. Defendant struck Robert at least two additional times in the head with the baseball bat, and, as Robert fell to the ground, defendant struck him in the head at least once more.

A few minutes before 9:00 p.m., Dechert returned to the Gumina residence and noticed that the garage door, which previously had been open, was closed. Dechert went to the front door and knocked. Through an etched glass window in the front door, he saw the silhouette of a person locking the front door and walking into the master bedroom. Dechert then looked through a clear glass portion of the window and saw defendant walk out of the master bedroom. He heard defendant say, "I will get it," as if he were talking to another person in the house. Defendant then opened the front door, closing it immediately behind him, walked out onto the porch, and stated that Robert and Jackie had left and would return in about 30 minutes. Dechert noticed that defendant was nervous, breathing hard, and perspiring. Although Dechert felt that something was wrong, he left the Gumina residence. As he was leaving, Dechert heard the door shut as if defendant went back into the house. Shortly thereafter, defendant left the Gumina residence in Ms. Gumina's car.

At approximately 9:10 p.m., Jackie Weaver returned home from work. When she opened the garage door, she found Robert lying unconscious

on the garage floor. Jackie ran inside the house and found Ms. Gumina lying on the living room floor and her daughter Tisha lying under the bed in the master bedroom. She then called the police, who on arrival determined that Tisha and Robert were dead and that Katherine Gumina was alive but unconscious. The medical examiner later concluded that Robert's death was caused by multiple contusions and lacerations of the central nervous system caused by multiple traumatic skull injuries. The cause of Tisha's death was the same as Robert's, but also included possible asphyxiation.

After leaving the Gumina residence, defendant picked up his clothes from a friend's apartment where he had been staying and drove to a Bullhead City hotel. At some point before reaching the hotel, he threw the bat out the car window. Defendant parked the car at the hotel and hailed a taxi cab to drive him to Las Vegas, Nevada. [Jones was arrested in Las Vegas.].

. . . .

The state charged defendant with two counts of premeditated first degree murder and one count of attempted premeditated first degree murder. Although Katherine Gumina ultimately died as a result of the injuries defendant inflicted, the state chose not to amend the indictment. Defendant pleaded not guilty to all of the charges. At trial, defendant testified that he killed Robert Weaver in self-defense, that he struck Katherine Gumina reflexively and

> without criminal intent because she startled him, and that another person killed Tisha Weaver. The jury found defendant guilty of all three counts.

State v. Jones, 917 P.2d 200, 206–07 (Ariz. 1996).

B. Sentencing Proceedings

Under Arizona's then-existing death penalty statute, the trial judge held an aggravation/mitigation hearing to determine whether a death sentence was warranted. Ariz. Rev. Stat. § 13-703(B) (1993).[5] The judge had to impose a death sentence if he found "one or more of the [enumerated statutory] aggravating circumstances . . . and that there [were] no mitigating circumstances sufficiently substantial to call for leniency." *Id.* § 13-703(E).

1. State's Aggravation Evidence

In addition to the guilt phase trial evidence,[6] the State's most significant aggravation evidence was Jones's presentence report ("PSR") related to the murders and a prior 1991 presentence report ("1991 PSR") related to Jones's theft conviction for which he had received three years' probation. As the sentencing

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[5] All references to Arizona's death penalty statute are to the version in effect on December 9, 1993, when the court sentenced Jones.

[6] Under the statute, the judge had to consider the guilt phase trial evidence in determining the existence or nonexistence of aggravating and mitigating circumstances. Ariz. Rev. Stat. § 13-703(C).

judge later determined, the conflicts between the 1991 PSR and other evidence showed that Jones was "willing to lie" when it benefited him.

While the PSR contained some evidence in support of aggravation, it also contained evidence favorable to Jones. He started consuming alcohol at thirteen and became an alcoholic at seventeen. He also began using marijuana at thirteen and experimented with or used "virtually all illegal drugs he could obtain" and had become addicted to methamphetamine and cocaine by eighteen. He sustained a concussion at age nine when he fell from a roof, and at eighteen, he was "knocked unconscious by a 'mugger,' being in a coma for approximately three days."

2. Jones's Mitigation Evidence

Lee Novak, the public defender who represented Jones at trial and sentencing, presented mitigation evidence, including testimony from Jones's second stepfather, Randy Jones, and a report and testimony from Dr. Potts, a court-appointed forensic psychiatrist, who evaluated Jones.[7] Through this evidence, the trial judge learned extensive information about Jones's background. Jones's biological father had physically abused Jones's mother, Peggy, while she was pregnant with Jones. Jones's birth was traumatic—the umbilical cord was wrapped around his neck, forceps were used,

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[7] Before sentencing, the trial court had granted Novak's request to have Jones's mental health examined pursuant to Arizona Rule of Criminal Procedure 26.5. Am. Op. at 4. The court appointed Dr. Potts, the Chief of Forensic Psychiatry for the Correctional Health Services in Maricopa County. *Id.*

and Peggy's heart stopped during delivery. Jones's first stepfather, Richard Eland, physically and verbally abused Jones and his sister, Carrie. On at least one occasion, Richard hit Jones and locked him in a closet with a bar of soap in his mouth and then taped Jones's mouth shut. Richard also physically abused Peggy, and Jones had witnessed two severe incidents: one where Richard broke Peggy's jaw and another where he broke her ribs.

Jones's personality changed around age thirteen—he started lying and cutting classes, and his grades began slipping. Jones's step-grandfather and uncle introduced him to marijuana when he was around ten, and Jones became an alcoholic by seventeen and had used all popular drugs by that time. His "mood swings" and irritability increased, and he was expelled from high school as a senior.

Jones also suffered from two or three serious head injuries growing up. Dr. Potts testified that there was "clear evidence . . . of traumatic brain injury, and there [was] some other evidence that [he] believe[d] [of] organic neurologic dysfunctions . . . that ha[ve] gone on since [Jones has] been about 13." Dr. Potts explained that Jones was predisposed to substance abuse and possibly an affective disorder, given the history of substance abuse and other psychological problems in Jones's family. He stated, "[T]o a reasonable degree of medical certainty . . . the defendant suffers from a psychothymic disorder, which is [a] mood disorder, possibly organic syndrome, secondary to the multiple cerebral trauma that he's had as well as the prolonged substance abuse."

Dr. Potts's report identified seven mitigating circumstances:

1. The chaotic and abusive childhood that the defendant suffered;
2. His genetic loading for substance abuse and possibly an affective disorder;
3. His intoxication at the time of the offense with a concomitant decrease in an ability to conform his conduct to the law;
4. The potential for rehabilitation;
5. The likelihood that he suffers from a major mental illness-cyclothymia (an attenuated form of Bipolar Affective Disorder; i.e., manic-depressive illness);
6. The head trauma he suffered which increases the potential for neurologic sequelae contributing to his behavior; and,
7. His sense of remorse and responsibility . . . .

3. Trial Judge's Sentencing Decision

The trial judge found three aggravating circumstances for Weaver's murder: "(1) defendant committed the murder for pecuniary gain; (2) defendant committed the murder in an especially heinous, cruel, or depraved manner; and (3) defendant was convicted of one or more other homicides that were committed during the commission of the offense." *Jones*, 917 P.2d at 207 (citations omitted). For Tisha's murder, the trial judge found the same three aggravators plus that Tisha was under age fifteen. *Id.*

The sentencing judge's aggravating circumstance determinations show that the sentencing judge gave great weight to the aggravating circumstances:

> As to Statutory Aggravating Circumstance (F)(5), the Court finds beyond a reasonable doubt that the defendant committed the offense as consideration for the receipt, or in the expectation of the receipt of anything of pecuniary value. The evidence shows that the defendant wanted to get out of Bullhead City because of pending warrants. The defendant knew of Robert Weaver's gun collection. Defendant killed Robert Weaver to get the guns and used them to obtain a ride to Las Vegas and to obtain money for living expenses in Las Vegas.
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> As to the Statutory Aggravating Circumstance (F)(6), the Court finds beyond a reasonable doubt that the defendant committed the offenses in an especially heinous and depraved manner. The physical evidence as to Robert Weaver shows that the defendant initially struck Robert Weaver . . . with a baseball bat. The initial injuries were sufficient to cause a large pool of blood, but insufficient to cause death. Sometime later, in all likelihood after the defendant committed the assault within the residence, he returned to find Robert Weaver still alive. Blood smears at the scene showed that Robert Weaver attempted to run from the defendant around Katherine Gumina's car which was parked in the garage. . . . [T]he

defendant struck Robert Weaver in the head several more times. The last blow delivered, was delivered [sic] while the defendant knelt helplessly on the floor of the garage. The initial blows were all that were needed to kill the victim. The defendant, by continuing to beat Robert Weaver with a bat, inflicted gratuitous violence beyond that necessary to kill the victim.

In addition, after the initial blows, the victim was completely helpless to defend himself and could only make a futile effort to flee. The defendant could have taken the guns and the car with little or no resistance from Robert Weaver. The killing was, therefore, senseless.

Robert Weaver had time to contemplate his fate as he fled from the defendant. The killing, therefore, was cruel.

As to the Statutory Aggravating Circumstance (F)(8), the Court finds beyond a reasonable doubt that the defendant has been convicted of one or more other homicides, as defined in ARS 13-1101, which were committed during the commission of the offense. The jury found the defendant guilty of First Degree Murder of Tisha Weaver which occurred during the same violent episode.

. . . .

As to the Statutory Aggravating Circumstance (F)(6), the Court finds beyond a reasonable doubt that the defendant committed the offenses, with regard to Tisha Weaver, in an

> especially heinous, cruel, or depraved manner. The evidence showed that Katherine Gumina and Tisha Weaver had been in front of the television set in the living room of the residence. The defendant assaulted Ms. Gumina, causing Tisha to run and hide under her parents' bed. Physical evidence from the bedroom showed that Tisha was dragged from under the bed, struck several times with a blunt instrument, and then suffocated. She had time to contemplate her fate. She knew that something terrible had happened to her grandmother. She struggled for life with the defendant. Tisha Weaver suffered great physical and emotional pain. The Court, therefore, finds that the murder was especially cruel.
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> The Court also finds that the murder was heinous and depraved. Tisha Weaver, a seven-year old, and a helpless victim of the adult male defendant armed with a baseball bat. The murder of Tisha Weaver is senseless. She could not have stopped the defendant from stealing the guns or the car. . . . She was also beaten beyond that necessary to kill her.

The trial judge found four mitigators for both murders: "(1) defendant suffers from long-term substance abuse; (2) at the time of the offense, defendant was under the influence of alcohol and drugs; (3) defendant had a chaotic and abusive childhood; and (4) defendant's substance abuse problem may have been caused by genetic factors and

aggravated by head trauma." *Jones*, 917 P.2d at 207–08.

In rejecting other mitigators presented by Jones, the trial court explained that Jones's conduct did not arise "from an angry explosion or delusion caused by drug or alcohol use." Rather, the court found that the evidence was "more consistent with the State's theory that [Jones] committed the acts of murder so that he could steal Robert Weaver's guns." The court also noted that "[i]n the past the defendant ha[d] shown that he [was] willing to lie if it benefit[ed] him." Indeed, the court found that it was "obvious" that Jones and another prisoner had "manufactured [the] tale" that a third party had been involved in the murders.

The trial court determined that the mitigators were not sufficiently substantial to outweigh the aggravators or to call for leniency and sentenced Jones to two death sentences for the murders. *See* Ariz. Rev. Stat. § 13-703(E).[8] The Arizona Supreme Court affirmed Jones's conviction and sentence on direct review. *Jones*, 917 P.2d at 222.

C. State Post-Conviction Review Proceedings

Jones filed his state post-conviction review ("PCR") petition, raising several claims including the ones at issue: (1) sentencing counsel was ineffective for relying on Dr. Potts rather than retaining an independent neuropsychologist and neurologist ("Claim 1"), and

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[8] The court gave Jones a life sentence, without the possibility of release or parole for twenty-five years, for the attempted first degree murder of Katherine Gumina.

(2) sentencing counsel was ineffective for failing to timely seek neurological or neuropsychological testing ("Claim 2"). At an informal conference, the PCR court denied Claim 1. The court set Claim 2 for an evidentiary hearing.

At the evidentiary hearing, Jones called three witnesses: Randy, Peggy, and Novak. Randy and Peggy's testimonies were relatively short, focusing on when and what they had told Novak about Jones's life history. To the extent that they provided information about Jones's background, it was largely cumulative of the information the court heard at sentencing. *See* Am. Op. at 10–11. Novak mainly testified about his experience as a criminal lawyer, the defense's investigation into Jones's background, and decisions that he made before and during trial and in preparation for sentencing. As to Dr. Potts, Novak testified that Potts was a court-appointed expert, Potts "was great to work with," "did everything that we would have wanted someone that we had hired to do," making it feel as though Potts "was part of the defense team almost."

The PCR court denied Claim 2. The Arizona Supreme Court summarily denied Jones's petition for review.

D. Federal District Court Proceedings

Jones filed a federal habeas petition, and the district court granted an evidentiary hearing on Claims 1 and 2. Am. Op. at 12. At the evidentiary hearing, Jones called Novak and three mental health experts: (1) Dr. Potts; (2) Dr. Stewart, a psychiatrist;

and (3) Dr. Goldberg, an attorney and neuropsychologist. *Jones v. Schriro*, 450 F. Supp. 2d 1023, 1030 (D. Ariz. 2006). Jones also submitted documents, including reports from Drs. Stewart and Goldberg, a report from Dr. Foy, a psychologist, and a report from Dr. Sreenivasan, a neuropsychologist. *Id.* at 1030–34, 1032 n.6. The State called three experts: (1) Dr. Herron, a psychiatrist formerly employed by the Department of Correction; (2) Dr. Herring, a neuropsychologist; and (3) Dr. Scialli, a psychiatrist. *Id.* at 1034. The district court provided detailed summaries of Novak's and the experts' testimonies. *Id.* at 1030–38. The district court made the following findings, which noted many of the inconsistencies between the experts' testimonies and within the record evidence in discounting the significance of the "new" evidence introduced in the district court evidentiary proceeding.

Credibility of Experts: The district court properly evaluated the credibility of the experts. *Cf. McClure v. Thompson*, 323 F.3d 1233, 1243 (9th Cir. 2003) (giving "great weight" to the district court's credibility determinations in a habeas case). The district court determined that the State's experts, Drs. Herring and Scialli, were generally more credible than the defense experts, Drs. Stewart and Goldberg. *Jones*, 450 F. Supp. 2d at 1038. This was so because Drs. Herring and Scialli had previously testified for both the prosecution and criminal defendants, while Dr. Stewart had done mostly defense work, and Dr. Goldberg had never been retained by the prosecution in a capital case. *Id.* The district court also found Dr. Stewart less credible because he endorsed Jones's contention that

Jones did not kill Tisha, even though that fact had been rejected by the jury, the trial court, and the Arizona Supreme Court. *Id.* at 1033 n.7. The district court explained:

> In assessing Dr. Stewart's credibility, the Court takes into account his willingness to present an opinion on a factual issue which concerns only the guilt phase of the trial and which was resolved, with a result contrary to that reached by Dr. Stewart, by the jury, the trial court, and the Arizona Supreme Court.

Id. at 1033 n.7.[9] Indeed, the sentencing judge found it "obvious" that Jones had completely "manufactured [the] tale" that a third party named Frank had killed Tisha.

Cognitive impairment: The district court found that Jones's evidence of cognitive impairment mainly due to head injuries was not persuasive:

> Petitioner has not presented persuasive evidence regarding either the existence or the cause of his alleged cognitive impairment. In

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[9] I am puzzled how the panel concluded that "[t]he district court mistakenly stated that Dr. Stewart opined on the viability of Jones's theory that a third party had been involved in the crime." Am. Op. at 42. The district court found that Dr. Stewart "endors[ed] Petitioner's account of the crimes," *Jones*, 450 F. Supp. 2d at 1033 n.7, a conclusion supported by Dr. Stewart's statement that: "As a result, it is my professional opinion that Danny's psychological profile *supports the events as described by Danny [Jones] on the night of the crimes, including Frank's responsibility for Tisha Weaver's murder*." (emphasis added).

making their diagnosis of cognitive impairment, Petitioner's experts relied upon Petitioner's school performance, both his grades and his scores on standardized tests; the discrepancy in his performance and verbal IQ scores; and the results of other neuropsychological tests. As discussed above, alternative explanations exist with respect to Petitioner's declining school performance, including absenteeism, family stresses, substance abuse, and lack of motivation. Moreover, as Dr. Herring testified, Petitioner's standardized test scores were within the average range and do not, by themselves, suggest impairment. The gap between Petitioner's IQ scores, while notable, is not uncommon, and the fact that Petitioner scored higher on the performance subtest militates against a finding of impairment, as does the fact that Petitioner's overall IQ is solidly in the average range. Finally, in the vast majority of instances Petitioner's scores on neuropsychological tests were in the average range or above. The few scores that fell in the impaired range did not implicate any particular cognitive domain, suggesting that they were aberrations and not indicative of impairment.

The experts ascribed as the primary cause of Petitioner's cognitive impairment a series of head injuries. With the exception of the 1983 "mugging," there is no medical documentation to corroborate any of these injuries. In addition, the dates and details—and even the occurrence—of the injuries, as reported by

> Petitioner and his family, are inconsistent and hence difficult to credit. This difficulty is compounded by the contrast between Petitioner's account of the 1983 incident, in which he was mugged, struck by a two-by-four, and left unconscious for three days, and the contemporaneous medical records, which indicate that Petitioner was discovered passed out or asleep from the effects of intoxication, that he responded upon being administered medication that counteracted those effects, that he suffered no neurological damage and his only injury was a small abrasion, and that if he suffered a concussion it was "resolved" upon his discharge.

Id. at 1039 (footnote omitted).

Post-traumatic stress disorder ("PTSD"): The district court found that Jones's evidence that he suffered from PTSD at the time of the murders was unconvincing because, among other reasons, "none of [Jones's] experts completed an appropriate diagnosis using all of the criteria set forth in the DSM-IV." *Id.* at 1040. Drs. Foy and Stewart diagnosed Jones with PTSD. *Id.* at 1031, 1032 n.6. Dr. Scialli, however, testified that both Drs. Foy and Stewart's written reports failed to discuss how Jones satisfied all the criteria required to diagnose a patient with PTSD under the DSM-IV. Dr. Stewart admitted as much,[10]

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[10] Q. And can you show me in your report where you talk about that second criteria under the DSM-IV?
[Dr. Stewart]. I don't know if I have it in the report,

but insisted in his testimony that Jones met the remaining criteria—re-experiencing the trauma, avoidance, and hyperarousal. *Id.* at 1032. Dr. Scialli disagreed with the PTSD diagnosis and noted that during his examination of Jones there was no sign that Jones had re-experienced a traumatic event at the time of the murders. *Id.* at 1037.

New sexual and physical abuse evidence: The district court found that Jones's new allegations and evidence that he had been sexually abused by his step-grandfather from ages nine to fourteen and physically abused by Randy should be discounted "given their late disclosure, their inconsistency with other information in the record, and [Jones's] 'obvious motive to fabricate.'" *Id.* at 1047 (quoting *State v. Medrano*, 914 P.2d 225, 227 (Ariz. 1996)). The district court found that the alleged sexual abuse appeared for the first time in Dr. Foy's 2002 report and was based only on Jones's self-report. *Id.* at 1046. The alleged physical abuse by Randy appears in Dr. Foy's report and Carrie's declaration. *Id.* But as noted by the district court, the allegations conflicted with other information in the record. *Id.* at 1047. For example, Peggy testified at the PCR evidentiary hearing that Jones had a "good home life" and "normal childhood" once she married Randy; at the aggravation/mitigation hearing Dr. Potts testified that Jones had never disclosed that Randy was abusive; and a military medical record dated

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actually. I certainly can talk about it.
Q. In fact, your report doesn't track the DSM-IV criteria, correct?
[Dr. Stewart]. I believe you're right.

August 1983 states that Jones reported: "As far as I'm concerned [Randy] is my real dad, he's the only one that has treated me good. He has never hit me or anything."

Attention deficit/hyperactivity disorder ("ADHD"): The district court found that the evidence supported that Jones suffered from ADHD at the time of the murders but that "[ADHD] does not serve as persuasive mitigation evidence." *Id.* at 1040. The court's finding was based on Dr. Scialli's testimony that "the condition is unrelated to violent behavior." *Id.*

Mood disorder: The district court found that Jones "may suffer from a chronic, low-level mood disorder such as dysthymia," but that such condition is not persuasive mitigation evidence because "[n]one of the experts suggested a causal relationship between the condition and [Jones's] conduct during the crimes." *Id.* The district court also discounted Jones's evidence that he suffers from a major affective disorder, such as bipolar disorder, because he presented no evidence that he has experienced episodes of mania or hypomania. *Id.*

Substance abuse: The district court found that Jones was addicted to alcohol, amphetamine, and cannabis at the time of the murders. *Id.*

After setting forth its findings on the new mitigation evidence, the district court analyzed Claims 1 and 2 and determined that Jones had failed to satisfy *Strickland*'s prejudice prong. *Id.* at 1042–45. The district court found "that the new information is largely inconclusive or cumulative: it 'barely . . . alter[s] the sentencing profile presented to the sentencing

judge.'" *Id.* at 1043 (alterations in original) (quoting *Strickland*, 466 U.S. at 700). It concluded that Jones had failed "to affirmatively demonstrate a reasonable probability that [the] additional information would [have] alter[ed] the trial court's sentencing decision after it weighed the totality of the mitigation evidence against the strong aggravating circumstances proven at trial," and "[t]herefore, [Jones was] not entitled to habeas relief on [Claims 1 and 2]." *Id.* at 1043.

E. Panel's Amended Opinion

The panel reversed the district court and granted Jones's habeas petition based on Claims 1 and 2. Am. Op. at 69–70.

The panel acknowledged that AEDPA governed its review, and that Claims 1 and 2—both ineffective assistance of counsel claims—must be analyzed under *Strickland*. *Id.* at 15–19. The panel then determined that because the state PCR court had decided only *Strickland*'s deficient performance prong, AEDPA applied to that prong. *Id.* at 19. But because the panel determined that the state PCR court had not decided *Strickland*'s prejudice prong, it reviewed that piece of Jones's claims de novo.[11] *Id.* The panel held that Jones

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[11] The panel's conclusion that AEDPA does not apply is open to question. In *Harrington v. Richter*, the Supreme Court stated that we must "presume[] that the state court adjudicated the claim on the merits in the absence of any indication or state-law procedural principles to the contrary." 562 U.S. 86, 99 (2011). Among other things, the PCR court in this case found: "Testimony at the hearing showed that counsel presented the available witnesses and evidence to support mitigation. The additional witnesses and evidence suggested by petitioner would have been redundant."

had overcome AEDPA on the deficient performance prong for both claims because the PCR court's decision was both an unreasonable application of *Strickland* under 28 U.S.C. § 2254(d)(1) and based on an unreasonable determination of the facts under § 2254(d)(2). *Id.* at 20–34, 61–67. Thus, the panel reviewed Claims 1 and 2 de novo.

Under de novo review, the panel held that Jones satisfied *Strickland*'s deficient performance prong for Claims 1 and 2 because his sentencing counsel was deficient by failing to secure a defense mental health expert and neurological or neuropsychological testing before sentencing. *Id.* at 36, 68. In analyzing de novo *Strickland*'s prejudice prong, the panel took Jones's evidence at face value, while failing to appropriately credit everything on the other side of the balance— the district court's factual and credibility findings, the overwhelming aggravating circumstances, and the State's extensive rebuttal evidence.[12] *Id.* at 37–61,

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Here, however, it does not matter whether AEDPA applies to the prejudice prong—the panel should have applied clear error review to the district court's factual and credibility findings and affirmed the district court's denial of habeas relief. *See Lambert v. Blodgett*, 393 F.3d 943, 964 (9th Cir. 2004).

[12] The panel's amended opinion heavily relies on other cases involving horrific crimes and similar "classic mitigating evidence" in which the courts found *Strickland* prejudice. Am. Op. at 20, 56–60. But the panel's discussion simply shows that new mitigation evidence *can* establish prejudice, even in horrific cases. I do not dispute that proposition. Here, though, the panel erred by improperly dismissing the district court's credibility and factual findings and essentially ignoring nearly all the evidence that cut

68–69. Based on its erroneous analysis, the panel held that Jones satisfied *Strickland*'s prejudice prong for Claims 1 and 2 by showing a reasonable probability that he would not have received a death sentence had his new mitigation evidence been presented at sentencing. *Id.* at 36–37, 68–69. The panel thus granted habeas relief on Claims 1 and 2. *Id.* at 69–70.

The panel determined that the district court could properly consider Jones's new mitigation evidence and make credibility determinations, *id.* at 36, 49, and that a district court's findings are generally reviewed for clear error, *id.* at 15. The panel inexplicably decided, however, that it did not have to give deference to the district court's credibility determinations under *Correll v. Ryan*, 539 F.3d 938 (9th Cir. 2008). Am. Op. at 49–50. But *Correll* does not establish that the district court's credibility determinations here were improperly made. To begin, *Correll* does not, nor could it, prohibit a district court from making credibility determinations in assessing *Strickland* prejudice. Indeed, before *Correll* we broadly stated without qualification that "[f]actual findings and credibility determinations made by the district court in the context of granting or denying [a habeas] petition are reviewed for clear error." *Lambert v. Blodgett*, 393 F.3d 943, 964 (9th Cir. 2004). In *Correll* itself, the district court made an adverse credibility determination in assessing evidence relevant to *Strickland* prejudice, *and we reviewed such determination for clear error*. 539 F.3d at 942, 953 n.7.

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against the mitigation evidence. None of the cases cited by the panel commit those same errors.

Correll simply does not hold that it is improper for a district court to make the types of credibility determinations the district court made here in assessing *Strickland* prejudice. Nor could it have. *Strickland*'s prejudice inquiry requires a court to determine whether there is a "reasonable probability" that the sentencer would not have imposed a death sentence considering all the evidence. *See Wong v. Belmontes*, 558 U.S. 15, 19–20, 26 (2009) (per curiam). In making that determination, a court must be able to assess the weight or probable effect of the evidence on the sentencer by, for example, making credibility determinations. How else is a court to determine, when faced with conflicting evidence, whether there is a "reasonable probability" of a different outcome?

The panel first disposed of AEDPA deference. It then failed to give appropriate deference to the district court's careful and thorough evaluation of the evidence. And finally, it made its own findings and reweighed the evidence without considering all the counterevidence, in direct contravention of *Strickland*.[13] The panel,

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[13] As just one stark example, the panel's amended opinion accepts, as a matter of fact, that Jones was sexually abused by his step-grandfather. Am. Op. at 51–52, 53. But as I detail below and as found by the district court, that mitigation evidence is weak considering the entire record: it is based wholly on a self-report by Jones, whom the trial court found to be a liar; there was no persuasive corroborating evidence; and such childhood evidence is given less mitigating weight when, as here, the murders are planned and deliberate. *Jones*, 450 F. Supp. 2d at 1047. Rather than consider, as the district court did, all that "bad" evidence, which severely weakens Jones's mitigation evidence, the panel simply ignored it and found that Jones was sexually abused.

which disregarded the aggravating evidence, and the findings and determinations of the sentencing judge, the Arizona Supreme Court, and the district court, concluded that the sentencing judge "heard *almost nothing* that would . . . allow [him] to accurately gauge [Jones's] moral culpability." Am. Op. at 53 (first brackets in original) (emphasis added) (quoting *Porter v. McCollum*, 558 U.S. 30, 41 (2009) (per curiam)). This one statement encapsulates much that is wrong with the panel's amended opinion. *Moral culpability*—the sentencing judge heard that Jones had brutally, cruelly, and senselessly killed a seven-year-old girl, her seventy-four-year-old great grandmother, and her father, all with a baseball bat, and all for financial gain. To the panel, that is "almost nothing." The panel's approach watered down *Strickland*'s demanding standard and flouted our well-established rule that district court findings are entitled to deference—both were grave errors.

II. DISCUSSION

"The *Strickland* standard is 'highly demanding.'" *Shinn v. Kayer*, 141 S. Ct. 517, 523 (2020) (quoting *Kimmelman v. Morrison*, 477 U.S. 365, 382 (1986)). In assessing prejudice under *Strickland*, "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." *Strickland*, 466 U.S. at 695. "A reasonable probability means a 'substantial,' not just 'conceivable,' likelihood of a different result." *Kayer*,

141 S. Ct. at 523 (additional internal quotation marks omitted) (quoting *Cullen v. Pinholster*, 563 U.S. 170, 189 (2011)).

To answer the prejudice inquiry, we must "consider all the evidence—the good and the bad," *Wong*, 558 U.S. at 26, and "reweigh the evidence in aggravation against the totality of available mitigating evidence," *Wiggins v. Smith*, 539 U.S. 510, 534 (2003). And here, because the district court made findings about the evidence, including credibility findings, we must accept those findings unless they are clearly erroneous. *See Lambert*, 393 F.3d at 964.

The panel did none of this. Rather than consider all the evidence, including the facts of the murders and the State's rebuttal evidence, the panel accepted without question Jones's "new" mitigation evidence. It also improperly brushed aside the district court's well-reasoned factual and credibility determinations. And it failed to seriously reweigh the aggravation evidence against the mitigation evidence. It is no wonder that the panel reached the wrong result.[14]

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[14] The panel in its original opinion did not discuss how, even if its factual findings in the face of conflicting evidence were correct, the "new" evidence could possibly have overcome the aggravators, like the horrific facts of Jones's cruel and heinous murder of seven-year-old Tisha. The panel also never mentioned the trial judge's detailed sentencing findings. And the panel's original opinion made no attempt to reweigh the aggravators and mitigators. *See Jones v. Ryan*, 1 F.4th 1179 (9th Cir. 2021). The panel's amended opinion acknowledged that it must reweigh the aggravation and mitigation evidence and *claimed* to have done so. Am. Op. at 55–56. But nowhere did the panel assess the *weight* of the aggravation evidence, which was overwhelming.

As I show below, the panel would have been compelled to affirm the denial of habeas relief on Claims 1 and 2 had it properly followed the prescribed framework. I provide a detailed analysis, not simply to show that the panel erred in assessing the weight of the evidence, but also to show first, that the panel failed to comply with *Strickland*'s clear requirement that a court consider all the good *and the bad*, and second, that the panel improperly disregarded the district court's findings.

A. Mitigation Evidence

I start with the mitigating evidence. As discussed above, the trial court was presented with substantial mitigating evidence and considered four mitigating circumstances for both murders: Jones's substance abuse, the influence of alcohol and drugs on Jones at the time of the murders, Jones's chaotic and abusive childhood, and the fact that Jones's substance abuse may have resulted from genetic factors and been aggravated by head trauma. *Jones*, 917 P.2d at 207–08. But the trial court determined that these mitigating circumstances "were not sufficiently substantial to outweigh the aggravating circumstances or to call for leniency." *Id.* at 208.

According to the panel, however, there is a substantial likelihood that the sentencing decision would have been different based on eight "new" categories of mitigation evidence showing: (1) cognitive impairment; (2) poly-substance abuse; (3) PTSD; (4) ADHD; (5) a mood disorder/bipolar depressive disorder; (6) impairment by drugs during the crimes; (7) sexual abuse by his step-grandfather; and

(8) physical and emotional abuse by Randy. Am. Op. at 40, 51–52. But proper application of *Strickland* and its progeny compels a contrary result. Considering the totality of the evidence, all of this "new" mitigation evidence (some of which is not even new) is weak and would have made little, if any, difference, especially given the district court's findings which were entitled to deferential review.

(1) Cognitive impairment: The evidence of cognitive impairment is equivocal at best. The expert reports are conflicting. Dr. Stewart concluded that Jones suffers from cognitive impairment, and Dr. Goldberg diagnosed Jones with a learning disability. But Dr. Herring disagreed with those conclusions. And Dr. Scialli did not diagnose Jones with cognitive impairment. Further undermining Jones's evidence was the district court's well-supported factual findings that Jones's "overall IQ is solidly in the average range" and that the instances of head injuries were not credible, given the inconsistent stories and lack of medical documentation. *Jones*, 450 F. Supp. 2d at 1039 & n.11.[15] Jones's own mitigation evidence supported the district court's conclusion about his IQ. Dr. Potts reported that Jones's "cognitive abilities appeared to be consistent with his educational achievements" and estimated that his "I.Q. [was] within the normal range." A military record from 1983 stated that Jones's "[c]ognitive testing was normal." And Dr. Sreenivasan's report noted that Jones had a "weighted I.Q. average of

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[15] The panel had no basis for rejecting these findings by the district court, just as it had no basis for rejecting the district court's other well-supported findings.

107" in an intellectual/psychological assessment conducted by the Arizona Department of Correction in 1992. Given the conflicting evidence, Jones's cognitive impairment evidence would have had little mitigating weight. *See State v. Dann*, 207 P.3d 604, 629 (Ariz. 2009) (en banc) (giving "minimal weight" to mental health issues because of the conflicting evidence).

Moreover, in Arizona, "mental health issues are entitled to little weight when there is no connection to the crime and no effect on the defendant's ability to conform to the requirements of the law or appreciate the wrongfulness of his conduct." *State v. Poyson*, 475 P.3d 293, 298 (Ariz. 2020). And Arizona courts "will not find that a defendant's ability to conform or appreciate the wrongfulness of his conduct was impaired when the defendant's actions were planned and deliberate, or when the defendant seeks to cover up his crime." *Id.*; *see also State v. Boggs*, 185 P.3d 111, 130 (Ariz. 2008) (en banc) ("Without a causal link between the murders and his troubled childhood or mental health issues, these mitigating circumstances are entitled to less weight.").

Only Dr. Stewart found that Jones's cognitive dysfunction impaired his ability to conform his behavior to the law or appreciate the wrongfulness of his conduct. But Dr. Stewart's opinion is substantially undermined by the district court's adverse credibility finding and the conflicting expert opinions. His opinion is also severely weakened by evidence that Jones's actions were planned and deliberate and that he sought to cover up the murders. *See Poyson*, 475 P.3d at 299 ("goal-oriented" behavior, such as taking preparatory

steps or concealing crimes after the fact, "belie a claim of substantial impairment"). For example, Jones closed the garage door before striking Weaver; when a third party unexpectedly showed up at the house, Jones pretended that someone else was in the house and lied about Weaver's whereabouts to cover up the murders; and, right after the murders, Jones retrieved his belongings from a friend's house, ditched the car linking him to the crime scene, disposed of the murder weapon, and fled to Las Vegas. *Jones*, 917 P.2d at 206–07. Indeed, the trial court found that the facts showed that Jones "understood the wrongfulness of his acts and took steps to avoid prosecution."[16]

In sum, Jones's cognitive impairment evidence is weak. Given the substantial rebuttal evidence and the lack of any persuasive evidence establishing a causal link between the alleged impairment and the murders, Jones's cognitive impairment evidence would have been given only minimal mitigating weight at best.

(2) Poly-substance abuse: The evidence that Jones suffered from poly-substance abuse is not "new." The trial court was well acquainted with Jones's long-term substance abuse of various drugs and alcohol. Indeed, in sentencing Jones, the court found that his substance abuse was a mitigating circumstance. *Jones*, 917 P.2d at 207. Thus, more evidence of Jones's substance abuse would have been cumulative and made minimal difference. *See Wong*, 558 U.S. at 22 ("Some of the

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[16] The panel did not engage with the undisputed facts as to Jones's planned and deliberate conduct and his attempts to cover up his murders.

evidence was merely cumulative of the humanizing evidence Schick actually presented; adding it to what was already there would have made little difference.").

(3) PTSD: Like Jones's cognitive impairment evidence, his PTSD evidence is at best inconclusive. Drs. Stewart and Foy diagnosed Jones with PTSD. But as the district court found, their opinions are unpersuasive for many reasons. Although Dr. Stewart insisted at the evidentiary hearing that Jones had met all the DSM-IV criteria for PTSD, neither his report nor Dr. Foy's report completed an appropriate diagnosis using all the DSM-IV criteria. *Jones*, 450 F. Supp. 2d at 1040; *see Rhoades v. Henry*, 638 F.3d 1027, 1050 (9th Cir. 2011) ("The mitigating value of . . . [the PTSD diagnosis] is lessened because [the] diagnosis admittedly does not satisfy the requirements of DSM–IV for this condition."). Indeed, Dr. Stewart explained that the second DSM-IV criteria for PTSD is re-experiencing a trauma, but he admitted that he never discussed with Jones whether Jones had re-experienced a traumatic event at the time of the murders. And Dr. Foy's own diagnosis is unclear. His report noted "*probable* chronic PTSD," (emphasis added), and he stated in his deposition that his opinion only suggested that "there's a very high probability that [Jones] would be diagnosed by anyone with PTSD," *Jones*, 450 F. Supp. 2d at 1032.

And other evidence contradicted or failed to corroborate the PTSD diagnosis. Dr. Scialli disagreed with the PTSD diagnosis because during his examination of Jones there was no sign that Jones had re-experienced a traumatic event at the time of the

murders. *Id.* at 1037. Dr. Herron, who had treated Jones from 2003 to 2005, never detected any signs of PTSD. *Id.* at 1034. And even Dr. Potts, who was qualified to render a PTSD diagnosis, didn't raise PTSD as a potential issue because "[he] didn't see PTSD as a red flag" when he evaluated Jones. *Id.* at 1030.

Jones's PTSD evidence is weak on its own, and any mitigating value is reduced even more by the rebuttal evidence. Given this, Jones's PTSD evidence would have made little difference.

The mitigating value of Jones's evidence is diminished even more because he presented no persuasive evidence linking his alleged PTSD to the murders. *See Poyson*, 475 P.3d at 298. Only Dr. Stewart offered an opinion on whether there was a causal link between Jones's PTSD and the murders. But Dr. Stewart's opinion is unconvincing for several reasons: his lack of credibility, his failure to complete an appropriate diagnosis using all the DSM-IV criteria, and the evidence that Jones's actions were planned and deliberate and that he sought to cover up the murders. *See id.* at 298–99.

(4) ADHD: The district court found that Jones's ADHD was unrelated to his violent behavior, thus it was unpersuasive as mitigation evidence. *Jones*, 450 F. Supp. 2d at 1040. That finding was not clearly erroneous given Dr. Scialli's testimony that, even if Jones had residual symptoms of ADHD, the condition doesn't have "any relationship to the offenses. And so it's a very minor point." Because Jones's ADHD had no connection to his violent behavior, evidence of his

ADHD would have had little mitigating weight. *See Poyson*, 475 P.3d at 298.

(5) Mood Disorder/bipolar depressive disorder: Whether Jones suffers from a mood or depressive disorder that affected his behavior during the murders is ambiguous at best, and thus such evidence would have been given little mitigating weight. *See id.*; *Dann*, 207 P.3d at 629.

Dr. Foy diagnosed Jones with "[d]epressive disorder (either bipolar or major depression), chronic." Dr. Goldberg diagnosed Jones with bipolar disorder and depression, and Dr. Sreenivasan noted that Jones's records "point to the presence of a cyclical mood disorder (bipolar II or Cyclothymia)." But none of these doctors opined on whether such conditions impacted Jones's ability to conform his behavior to the law or appreciate the wrongfulness of his conduct at the time of the murders. Thus, their diagnoses would have been given minimal weight. *See Poyson*, 475 P.3d at 298.

Only Dr. Stewart diagnosed Jones with a mood disorder not otherwise specified (NOS), meaning Jones has a mood disorder that does not fit within any of the other DSM-IV categories, *and* concluded that it impaired Jones's ability to conform to the law or appreciate the wrongfulness of his actions during the murders. But as discussed above, Dr. Stewart's opinion is severely weakened by the district court's adverse credibility determination and the evidence showing that Jones's acts were planned and deliberate. Dr. Stewart's mood disorder diagnosis is also weakened by the rebuttal evidence, as Dr. Scialli concluded that Jones does not suffer from a mood disorder under the

DSM-IV criteria. Given the conflicting evidence of whether Jones even suffers from a mood disorder, along with the lack of any persuasive evidence connecting any mood disorder to the murders, the sentencer would have given minimal weight to Jones's mood disorder evidence. *See Poyson*, 475 P.3d at 298; *Dann*, 207 P.3d at 629.

(6) Impaired by drugs during the crimes: Contrary to the panel's implication, *see* Am. Op. at 51, evidence that Jones was impaired by drugs during the murders is not "new." The trial court knew that Jones was impaired by drugs. Indeed, the trial court found that he was under the influence of drugs and alcohol at the time of the murders and considered such fact a mitigating circumstance. *Jones*, 917 P.2d at 207. Thus, more evidence that Jones was impaired by drugs during the crimes would have been merely cumulative and made no difference. *See Wong*, 558 U.S. at 22.

(7) Sexual abuse by step-grandfather: The allegations of sexual abuse are based on Jones's self-report to Dr. Foy. *Jones*, 450 F. Supp. 2d at 1033. To begin, "[b]ecause of the obvious motive to fabricate, such self-serving testimony [would have been] subject to skepticism." *State v. Medrano*, 914 P.2d 225, 227 (Ariz. 1996). The trial court found that Jones was not credible because "[i]n the past [he] ha[d] shown that he [was] willing to lie if it benefit[ed] him." Even Jones's mother stated in her declaration that Jones "became a liar" and "would lie even in the face of circumstances where it was obvious he was lying." It is therefore unlikely that the trial court would have believed Jones's self-report with no persuasive corroboration.

And there is none. While Peggy and Randy testified that Jones's step-grandfather had introduced Jones to marijuana at a young age, which could suggest a deviant motive, such evidence does not necessarily point to sexual abuse. And during a 2001 interview with the Public Defender's investigator, Peggy and Randy said they "never saw any indication [Jones] may have been sexually abused by anyone, nor were they aware of any sexual perpetrators in the family."

Moreover, "evidence that murders were planned or deliberate and not motivated by passion or rage decreases the mitigating effect of prior childhood abuse." *Poyson*, 475 P.3d at 300. As discussed above, substantial evidence shows that Jones's actions were planned and deliberate. Given this, along with Jones's history of lying and the lack of any persuasive corroboration, the sentencer would have given Jones's self-report of sexual abuse slight mitigating weight, if any.

(8) Emotional and Physical Abuse by Randy: Although the trial court did not hear any allegations that Randy abused Jones, the extent of Randy's abuse is unclear. Dr. Stewart's report stated that Randy was "controlling" and would "hit Peggy and the children," and Dr. Stewart testified that Randy admitted that he physically abused Peggy, Jones, and Jones's sister. Jones's sister also reported that Randy had been physically abusive and very controlling. But there is conflicting evidence. In Jones's military record from 1983, it states: "Relationship with step-father was described in this manner, 'As far as I'm concerned he is my real dad, he's the only one that has treated me

good. He has never hit me or anything.'" Peggy's declaration stated, "Randy was very strict," but "Randy did not hit me or the children." Randy admitted that, looking back, he believes he was verbally abusive to his children.

Though the trial court didn't know about the conflicting evidence, it knew that Jones had a chaotic and abusive childhood, which it found to be a mitigating circumstance. *Jones*, 917 P.2d at 207–08. Thus, the new evidence about Randy would have been more evidence supporting a mitigating circumstance that the trial court already considered in sentencing Jones. The evidence, then, would have been largely cumulative and given nominal weight. *See Wong*, 558 U.S. at 22; *see also McDowell v. Calderon*, 107 F.3d 1351, 1363 (9th Cir. 1997) (holding that there was no reasonable probability that the jury would have chosen a different sentence upon introduction of evidence of sexual and substance abuse because the jury chose a sentence of death after hearing similar evidence of defendant's tragic childhood and severe physical abuse), *amended and superseded in part by* 116 F.3d 364 (9th Cir. 1997), *vacated in part on other grounds by* 130 F.3d 833 (9th Cir. 1997) (en banc). Additionally, any mitigating effect would have been diminished given the substantial evidence showing that Jones's actions were planned and deliberate. *See Poyson*, 475 P.3d at 300.

In sum, the "new" mitigation evidence is far from overwhelming, and the district court found it "largely inconclusive or cumulative." *Jones*, 450 F. Supp. 2d at 1043. The evidence of mental health issues and sexual

abuse is equivocal and would have had little mitigating value with no persuasive evidence linking such evidence to the murders. The evidence of Randy's emotional and physical abuse of Jones also would have made little difference, as there is conflicting evidence and, in any event, it is largely cumulative of the "chaotic and abusive childhood" evidence that the trial court knew about and considered in sentencing Jones. And any mitigating effect is diminished by the evidence that the murders were planned and deliberate. The remaining "new" mitigation evidence—Jones's poly-substance abuse and impairment by drugs during the murders—is not even "new"; it is cumulative and would have had little effect.

B. Aggravation Evidence

Turning to the aggravating circumstances, the trial judge found three aggravating circumstances for each murder: (1) multiple homicides, (2) pecuniary gain, and (3) cruelty, heinousness, or depravity. *Jones*, 917 P.2d at 207. Each of these is entitled to substantial weight. And for Tisha's murder, the aggravators are even more substantial as the trial judge found a fourth aggravator: she was under fifteen years old. *Id.*[17]

The multiple homicides aggravator is the weightiest. The Arizona Supreme Court has "consistently given 'extraordinary weight' to this aggravator." *Poyson*, 475 P.3d at 302. "Even when the

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[17] As noted above, the panel barely engaged with the overwhelming aggravating evidence. Given the importance of this factor in a *Strickland* analysis, the panel's omission materially weakens the applicable standard.

multiple homicides aggravator is the only aggravator weighed against multiple mitigating factors, [the Arizona Supreme Court has] found the mitigation insufficient to warrant leniency." *Id.*

"The pecuniary gain aggravator is also especially strong and 'weighs heavily in favor of a death sentence,' when pecuniary gain is the 'catalyst for the entire chain of events leading to the murders.'" *Id.* (citations omitted). The Arizona Supreme Court agreed with the trial court's finding that pecuniary gain was the motive for the murders, as Jones wanted to leave Bullhead City because of impending warrants, Jones knew about Weaver's gun collection, and Jones "murdered Tisha Weaver and Robert Weaver as part of a plan to obtain the gun collection and leave Bullhead City." *Jones*, 917 P.2d at 215. The pecuniary gain aggravator is therefore especially strong here.

The heinous, cruel, or depraved aggravator is also entitled to great weight given the brutal way Jones murdered Weaver and Tisha. *See State v. McKinney*, 426 P.3d 1204, 1207 (Ariz. 2018); *Poyson*, 475 P.3d at 302. Weaver fell to the ground after the initial blows, and he remained unconscious and bleeding for at least ten to fifteen minutes. *Jones*, 917 P.2d at 216. He then "regained consciousness and experienced pain and uncertainty about his fate." *Id.* Even though Weaver was "helpless" and "more than likely . . . no longer physically capable" of trying to stop Jones, Jones inflicted gratuitous violence on Weaver by striking him in the head at least three more times with the bat. *Id.* at 217. Tisha also "experienced uncertainty about her fate," as she hid under her parents' bed because she

was afraid and struggled with Jones for her life. *Id.* at 216. She was a "helpless victim," being a seven-year-old child. *Id.* at 217. Still, Jones

> struck Tisha with the baseball bat with sufficient force to create a wound several inches wide, extending from her left ear to her left cheek. He then struck her a second time on the back of her head. After delivering these two fatal blows, [he] then asphyxiated her, far exceeding the amount of violence necessary to cause death.

Id. at 218.

C. Reweighing

On one side, we have the mitigating circumstances that the trial court determined were insufficient to overcome the aggravators. Added to that is the "new" mitigation evidence, which is cumulative, inconclusive, and weak. On the other side, we have several aggravating circumstances that weigh heavily under Arizona law. On balance, there is simply no substantial likelihood of a different result. The only difference between the sentencing profile before us and the one that was before the trial court is the addition of the deficient "new" mitigation evidence. This is precisely a case in which there is no *Strickland* prejudice, as the new evidence "barely . . . alter[s] the sentencing profile presented to the sentencing judge." *Strickland*, 466 U.S. at 700.

* * *

The panel failed to consider *all the evidence* in evaluating the "new" mitigation evidence, and it failed

to undertake a serious reweighing of the mitigation and aggravation evidence. That approach directly conflicts with *Strickland* and its progeny. The panel's amended opinion improperly lowers *Strickland*'s "highly demanding" standard, *Kayer*, 141 S. Ct. at 523, as now, even questionable, weak, and cumulative mitigation evidence offered in post-conviction proceedings will be enough to overcome the weightiest of aggravating circumstances. The panel compounded this error by failing to review the district court's factual and credibility findings for clear error, as mandated. In short, the panel established a new flawed approach for future panels to follow: in assessing *Strickland* prejudice, we can reweigh the evidence and make our own factual findings without regard to all the counterevidence and the district court's findings.

Because we should have fixed the panel's exceptionally important errors, I respectfully dissent from our failure to take this case en banc.

IKUTA, Circuit Judge, joined by CALLAHAN, VANDYKE, Circuit Judges, dissenting from the denial of rehearing en banc:

I agree with Judge Bennett that even if the panel had been correct in conducting a de novo review of the state court's decision, it erred in failing to defer to the district court's factual findings. (Bennett, J., dissenting from denial of rehearing en banc). In my view, however, the panel had no business conducting such a de novo review in the first place.

When a state court addresses some of the claims raised by a defendant, but not others, the unaddressed claims "must be presumed to have been adjudicated on the merits" by the state courts," subject to rebuttal. *Johnson v. Williams*, 568 U.S. 289, 293 (2013). Here the state postconviction court rejected Jones's claim that trial counsel was ineffective at sentencing without referencing *Strickland v. Washington*, 466 U.S. 668 (1984), or explaining its reasoning. Nothing in the state court's opinion rebutted the presumption that it adjudicated the prejudice prong of *Strickland* on the merits, *see Williams*, 568 U.S. at 301.

In this situation, "a habeas court must determine what arguments or theories supported or, as here, could have supported, the state court's decision; and then it must ask whether it is possible fairminded jurists could disagree that those arguments or theories are inconsistent with the holding in a prior decision of this Court." *Harrington v. Richter*, 562 U.S. 86, 102 (2011). Under a proper deferential review, for the reasons explained by the district court, the state court could have reasonably determined that Jones did not establish prejudice under *Strickland*. *See Jones v. Schriro*, 450 F. Supp. 2d 1023, 1043 (D. Ariz. 2006), *rev'd sub nom. Jones v. Ryan*, 583 F.3d 626 (9th Cir. 2009).

In reaching the issue of prejudice de novo, the panel mischaracterized the state court opinion and disregarded the admonitions of the Supreme Court to give such opinions proper deference, *see, e.g., Harrington*, 562 U.S. at 102. For these reasons, I dissent from our failure to take this case en banc.

APPENDIX B

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 18-99005
D.C. No. 2:01-cv-00384-SRB

[Filed June 28, 2021]

DANNY LEE JONES, *Petitioner-Appellant,*	)
v.	)
CHARLES L. RYAN, *Respondent-Appellee.*	)

OPINION

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

Argued and Submitted February 16, 2021
San Francisco, California

Filed June 28, 2021

Before: Sidney R. Thomas, Chief Judge, and Michael Daly Hawkins and Morgan Christen, Circuit Judges

Opinion by Chief Judge Thomas

SUMMARY*

Habeas Corpus / Death Penalty

Applying the standards set forth in the Antiterrorism and Effective Death Penalty Act of 1996, the panel reversed the district court's judgment denying Danny Lee Jones's habeas corpus petition challenging his Arizona death sentence, and remanded to the district court with instructions to issue the writ.

In Claim 1, Jones asserted that his trial counsel was constitutionally ineffective by failing to request a mental health expert in advance of the sentencing hearing. The panel held that the state court record demonstrates that trial counsel was constitutionally ineffective by failing to secure a defense mental health expert, and that, pursuant to 28 U.S.C. § 2254(d)(1), the Arizona Supreme Court's contrary conclusion was an unreasonable application of *Strickland v. Washington*, 466 U.S. 668 (1984), and its progeny. Holding that the state post-conviction review (PCR) court's decision was also based on an unreasonable determination of the facts under 28 U.S.C. § 2254(d)(2), the panel agreed with Jones that (1) the PCR court employed a defective fact-finding process when it denied PCR counsel's funding request for a defense neuropsychological expert, effectively preventing the development of Claim 1; and (2) the state court's failure to hold a hearing on Claim 1 resulted in an

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

unreasonable determination of the facts. Because the PCR court did not reach the issue of prejudice, the panel reviewed the issue de novo. Noting that Jones was diligent in attempting to develop the factual basis for the claim in state court, the panel wrote that the district court did not err in its expansion of the record, and the district court considered the evidence developed in the district court in conducting its de novo review. The panel concluded that Jones demonstrated *Strickland* prejudice because there is at least a reasonable probability that development and presentation of mental health expert testimony would have changed the result of the sentencing proceeding.

In Claim 2, Jones asserted that his trial counsel was constitutionally ineffective by failing to seek neurological or neuropsychological testing prior to sentencing. The panel wrote that counsel's failure to promptly seek neuropsychological testing ran contrary to his obligation to pursue reasonable investigations under *Strickland*, and in particular, his obligation to investigate and present evidence of a defendant's mental defect. The panel therefore concluded that the PCR court's decision that defense counsel's performance did not fall below an objectively reasonable standard was an unreasonable application of *Strickland*, and that Jones satisfied § 2254(d)(1). The panel also held that the state PCR court's decision was based on an unreasonable determination of the facts, satisfying § 2254(d)(2), where the PCR judge made factual findings regarding the necessity of neuropsychological testing, not on the basis of evidence presented by Jones, but on the basis of his own personal conduct, untested memory, and

understanding of events—and by plainly misapprehending the record, which included a forensic psychiatrist's testimony, six years earlier, strongly suggesting that neuropsychological testing was essential. Because the PCR court did not reach the issue of prejudice, the panel reviewed the issue de novo. Noting that Jones was diligent in attempting to develop the factual basis for the claim in state court, the panel wrote that the district court did not err in its expansion of the record, and the district court considered the evidence developed in the district court in conducting its de novo review. The panel concluded that Jones demonstrated *Strickland* prejudice because there is a reasonable probability that had such testing been conducted, and had the results been presented at sentencing, Jones would not have received a death sentence.

COUNSEL

Amanda Bass (argued) and Letitia Marquez, Assistant Federal Public Defenders; Jon M. Sands, Federal Public Defender; Office of the Federal Public Defender, Phoenix, Arizona; for Petitioner-Appellant.

Jeffrey L. Sparks (argued), Assistant Attorney General; Lacey Stover Gard, Chief Counsel; Mark Brnovich, Attorney General; Office of the Attorney General, Phoenix, Arizona; for Respondent-Appellee.

OPINION

THOMAS, Chief Judge:

Danny Lee Jones, an Arizona inmate on death row, appeals the district court's denial of his petition for

writ of habeas corpus on remand from this court and the Supreme Court of the United States. Applying the appropriate standards pursuant to the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), we conclude that Jones was denied the effective assistance of counsel at sentencing. We reverse the judgment of the district court and remand for further proceedings consistent with this opinion.

I[1]

A

On March 26, 1992, in Bullhead City, Arizona, Jones and his friend Robert Weaver spent the day drinking and using crystal methamphetamine in Weaver's garage. At some point, a fight broke out, and evidence at trial indicated that Jones hit Weaver over the head multiple times with a wooden baseball bat, killing him. Jones then went inside the house where he encountered Weaver's grandmother, Katherine Gumina. Jones struck Gumina in the head with the bat and knocked her to the ground. Jones then made his way to a bedroom where he found Tisha Weaver, Weaver's seven-year-old daughter, hiding under the bed. Evidence showed that Jones hit Tisha in the head with the bat, and either strangled her or suffocated her

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[1] In accordance with our obligation under *Cullen v. Pinholster*, 563 U.S. 170 (2011), to consider only the state court record in conducting our 28 U.S.C. § 2254(d) analysis, this recitation of the facts looks only to that record. Evidence developed at the federal evidentiary hearing is included later in the limited contexts where *Pinholster* does not circumscribe our consideration of such evidence.

with a pillow. Jones fled to Las Vegas, Nevada, where police eventually arrested him. He was indicted in Arizona on two counts of murder in the first degree, and one count of attempted murder.[2]

B

A public defender was assigned to Jones's case. At the time, the public defender had been an attorney for a little more than three years, and he had never been lead attorney on a capital case. He requested $5,000 from the trial court for expert witnesses. The court authorized $2,000, which the public defender split between a crime scene investigator and an addictionologist.

The jury convicted Jones on all counts. Judge James Chavez scheduled the sentencing hearing for three months later. About six weeks before the hearing, counsel took his first trip to Reno, Nevada, in order to speak with Jones's mother, Peggy Jones[3], and Jones's second step-father, Randy Jones, in order to investigate potential mitigation evidence.

At sentencing, the public defender presented testimony from two witnesses: investigator Austin Cooper and Randy Jones. Cooper testified about evidence regarding an alleged accomplice. Randy explained that he married Peggy when Jones was seven

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[2] Gumina initially survived the attack and was in a coma for seventeen months before eventually dying from her injuries. The prosecution never amended the indictment after Gumina died.

[3] To avoid confusion, we refer to the members of Jones's family by their first names.

years old.[4] He explained that Peggy gave birth to Jones when she was only fifteen years old and had numerous complications during the pregnancy and delivery. Randy testified that Jones suffered multiple head injures when he was growing up, and that when Jones was thirteen or fourteen his personality began to change drastically. Jones started lying, cutting classes at school, drinking, and doing drugs. Jones's first step-grandfather introduced him to marijuana when he was about ten years old, and Jones was an alcoholic by the time he was seventeen.

The trial court appointed the Chief of Forensic Psychiatry for the Correctional Health Services in Maricopa County, Dr. Jack Potts, to examine Jones and provide a report to the court pursuant to Rule 26.5 of the Arizona Rules of Criminal Procedure. Defense counsel called Dr. Potts to testify at sentencing. Dr. Potts stated that in conducting his review, he spent four hours interviewing Jones in prison, one and a half of which were spent administering a personality test. He also spoke to Jones for a couple of hours the day before testifying at the sentencing hearing. He interviewed Peggy by phone for thirty minutes, and he spoke to Randy for one hour the day before testifying. During Dr. Potts's testimony, the following colloquy took place:

> Q. Do you feel you have been provided with adequate data, coupled with your in-person

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[4] The record is inconsistent whether Randy and Peggy married when Jones was seven or eight years old.

examination of the defendant, to make a conclusion for mitigating findings that you did?

A. . . . I believe everything I reviewed and what I have heard about the case and reviewed with the defendant, his comments to me. I would have liked, and I think I have—I think it would be valuable to have had some neurologic evaluations, not—by a neurologist, clinical exam, such as a CAT scan, possibly an MRI, possibly EEG, possibly some sophisticated neurological testing, because I think there's very strong evidence that we have . . . , I believe, of traumatic brain injury, and there's some other evidence that I believe we may have organic neurologic dysfunctions here that has gone on since he's been about 13. So, there's some other testing that I think would be valuable to have to pin down the diagnosis. . . .

Q. And you think that further testing might shed some additional light on, perhaps, some of these factors you listed and maybe why Mr. Jones behaves in the way he did on March 26, 1992?

A. Yes. I think it could help in clarifying and giving us etiology as the behavioral components, the explosive outbursts, the aggression, the mood changes, and the changes that occurred in his personality as noted by his mother when he was about 13, 14 years old.

Q. In your opinion, could that information possibly provide . . . a significant mitigating

> factor as to what would be relevant to the issues at this hearing?
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> A. Clearly I think it would be corroborative of my clinical impressions and my diagnostic impressions in my report.

Dr. Potts discussed the fact that Jones's first step-father physically and verbally abused Jones, and stated that it was "unequivocal" that Jones carried that abuse with him into his adult life. Dr. Potts also stated that given the long history of substance abuse and other psychological problems in Jones's family, Jones was predisposed to substance abuse or a possible affective disorder. Dr. Potts did not, however, give a specific diagnosis, but stated: "I think . . . to a reasonable degree of medical certainty that the defendant suffers from a psychothymic disorder, which is a mood disorder, possibly organic syndrome, secondary to the multiple cerebral trauma that he's had as well as the prolonged substance abuse."

Dr. Potts testified that the drugs and alcohol Jones had on the day of the murders would have had a significant effect on Jones because "it's real clear that the brain is much more susceptible when it's been injured by drugs. Furthermore, when you're on drugs, you are more susceptible to the acts of aggression under amphetamines." He further stated: "I believe in my experience in cases like this, is that had it not been for the intoxication, the alleged offense would not have occurred." Dr.

Potts also submitted a six-page report to the court. The report included: approximately two pages

describing Jones's social development and history, including his medical history, one page of analysis, and one page of recommendations. Dr. Pott's report was due to the court on November 29, 1993, but he did not complete it until December 3. He was late because he did not receive the Presentence Information Report ("PSR") from the Mohave County probation department until December 1. Dr. Potts also testified at sentencing that he was under "significant time pressure" in preparing the report. Dr. Potts concluded that "Mr. Jones' capacity to conform his conduct to that of the law was clearly impaired at the time of the offenses. . . ." He therefore recommended that an aggravated sentence should not be imposed.

After Dr. Potts testified, counsel moved for a continuance so an expert could conduct psychological testing. Counsel stated: "It's not a delay tactic . . . [I]t's not something I planned on doing until . . . very recently after the report was done, after talking with Dr. Potts, after exploring all these issues." Notably, however, counsel did not speak to Dr. Potts about the report until December 7, the night before sentencing. The sentencing judge considered and rejected the motion:

> THE COURT: . . . . I also know that there were funds made available to the defense at some point and you used them to hire [an addictionologist]. . . . [I]f there were any follow-up questions of a psychological or neurological nature, I would think that the defense would have followed them up.

> COUNSEL: But, Your Honor, respectfully, . . . I didn't realize this issue was that important until Dr. Potts brought it up or I would have certainly asked for the funds earlier.

The judge found the following aggravating factors for Weaver's murder: (1) Jones "committed the offense as consideration for the receipt, or in expectation of the receipt of anything of pecuniary value"; (2) Jones "committed the offenses in an especially heinous or depraved manner"; and (3) Jones was "convicted of one or more other homicides . . . which were committed during the commission of the offense."

The judge found four non-statutory mitigating factors: (1) Jones suffered from long-term substance abuse; (2) he was under the influence of drugs and alcohol at the time of the offense; (3) he had a chaotic and abusive childhood; and (4) his longstanding substance abuse problem may have been caused by genetic factors and aggravated by head trauma. The judge found the same aggravating and mitigating circumstances for Tisha's murder, but he also found that Tisha's having been under fifteen years old was an additional aggravating factor. The judge sentenced Jones to two death sentences for the murders, and twenty-five years without the possibility of parole for the attempted murder. The Arizona Supreme Court affirmed Jones's conviction and sentence on direct review. *State v. Jones*, 917 P.2d 200 (1996).

C

Prior to filing Jones's state post-conviction review ("PCR") petition, PCR counsel sought authorization from the court for the funding of several experts.

As relevant here, the PCR court rejected counsel's request to appoint a neuropsychologist. The court stated that while Dr. Potts might not have been a defense expert, he did a good job, gave "defense opinions," and there was no reason to believe that an expert appointed for the defense "would have been any different." The court concluded by stating that based on Dr. Potts's testimony, "I don't really see any grounds for any additional psychiatric or psychological testing."

On July 1, 1999, counsel filed the PCR petition, raising twenty-five claims. Among the petition's exhibits were a declaration from defense trial counsel and an affidavit from Peggy. At an informal conference on February 23, 2000, the court ruled on several of Jones's claims, and set others for an evidentiary hearing. In particular, the court denied Claim 1 (as numbered in this appeal) on the merits. The court set Claim 2 (as numbered in this appeal), as well as other claims, for evidentiary hearing.

At the evidentiary hearing, Randy, Peggy, and defense trial counsel testified. Randy testified that he first spoke to counsel in July 1992, a few months after Jones's arrest. During this conversation, Randy told counsel about Jones's head injuries, as well as his struggles with substance abuse and stints in rehabilitation programs. Randy next spoke to counsel when he came to visit Peggy and Randy at their home

in Reno in October 1993, about six weeks before sentencing.

Peggy testified that she had provided counsel with a chronology of Jones's life during counsel's visit. Peggy remembered sharing about Jones's difficult birth and the physical abuse she and Jones suffered at the hands of Jones's biological father and first step-father. Peggy shared that Jones had a good home life and a normal childhood once she married Randy, when Jones was about seven or eight years old.

Trial counsel testified that at the time he was appointed to represent Jones, he had been an attorney for three and a half years and his experience with capital cases consisted of having been second chair at the penalty phase in one prior case. He stated that his strategy for defending the killing of Robert Weaver was self-defense, so he hired Dr. Sparks as an addictionologist to testify about Jones's state of mind. Dr. Sparks opined at trial that because of the drugs Jones ingested, he was unable to premeditate the killings. Dr. Sparks was not called to testify at sentencing.

When PCR counsel asked trial counsel if he visited Jones's family early enough in the case to adequately develop mitigation evidence, trial counsel responded that Dr. Potts was able to make effective use of the information obtained from the family. He said that Dr. Potts was a "very favorable mitigation witness for the defense." He stated that it felt to him like Dr. Potts was part of the defense team, even though he was appointed as a court expert. Finally, counsel stated that he did not consider the need for testing by a

neuropsychologist until Dr. Potts suggested it to him on December 7, 1993, the evening before Jones's sentencing hearing.

In the affidavit he provided as an exhibit to the PCR petition, trial counsel stated that he asked the court for $5,000 for expert witnesses at trial. When the trial court authorized only $2,000 of the $5,000 he requested, he "was of the opinion that it would be fruitless to ask the court for additional funding for any other needed experts such as an independent psychiatrist or psychologist." Counsel added that he did not ask his supervisor for any money because he believed that the public defender's office did not have sufficient funds for retaining expert witnesses.

After the hearing, the PCR court denied Claim 2 as well as the remaining pending claims. As to Claim 2, the court stated that "[t]he report and testimony of Dr. Potts[,] who was appointed by the Court, adequately addressed defendant's mental health issues at sentencing."

Jones filed a petition for review in the Arizona Supreme Court, which it denied on February 13, 2001.

D

Jones subsequently filed his federal petition for habeas relief. The district court granted an evidentiary hearing with regard to Claims 1 & 2 based on trial counsel's failure to secure the appointment of a mental health expert and failure to move for neurological and neuropsychological testing.

The district court subsequently dismissed both ineffective assistance of counsel ("IAC") claims. The court denied Claim 1 because counsel's "failure to seek the appointment of a mental health expert in a more timely manner did not prejudice Petitioner." The district court explained that "the Court has not been presented with evidence confirming that Petitioner suffers from neurological damage caused by head trauma or other factors. Therefore, Dr. Potts's finding at sentencing remains the most persuasive statement in the record that neurological damage constituted a mitigating factor." The district court dismissed Claim 2 after finding that Jones could only prove that he suffered from AD/HD residual type and possibly a low level mood disorder. The district court "conclud[ed] that the trial court would have assigned minimal significance to testimony indicating that Petitioner suffered from ADHD [sic] and a low-level mood disorder, and that this weight would not have outbalanced the factors found in aggravation."

E

Jones timely appealed the district court's denial of his petition for a writ of habeas corpus. We reversed the district court and concluded that Jones received IAC warranting relief on his claims regarding his counsel's failure to secure the appointment of a mental health expert, failure to timely move for neurological and neuropsychological testing, and failure to present additional mitigation witnesses and evidence. *See Jones*, 583 F.3d at 636.

The State petitioned for certiorari. The Supreme Court granted the petition, vacated our judgment, and

remanded the case for further consideration in light of *Cullen v. Pinholster*, 563 U.S. 170 (2011). *See Ryan v. Jones*, 563 U.S. 932 (2011).

On remand from the Supreme Court, we remanded the case to the district court to consider, under *Martinez v. Ryan*, 566 U.S. 1 (2012), and *Dickens v. Ryan*, 740 F.3d 1302 (9th Cir. 2014) (en banc), "Jones's argument that his ineffective assistance of counsel claims are unexhausted, and therefore procedurally defaulted, and that the deficient performance by his counsel during his post-conviction relief case in state court excuses the default." *Jones v. Ryan*, 572 F. App'x 478 (9th Cir. 2014) (Mem.). We expressed "no opinion on any other issue raised on appeal," and noted that "[t]hose issues are preserved for later consideration by the Court, if necessary." *Id.*

On remand, the district court rejected Jones's arguments. The district court determined that Jones's claims had not been fundamentally altered, and therefore, they had previously been exhausted and were not subject to de novo review. Additionally, the court concluded that PCR counsel was not ineffective as required by *Martinez*, so any default would not be excused anyway. 566 U.S. 1. Jones filed a timely notice of appeal and stated that he was also appealing "all prior orders disposing of other claims, either on the merits or procedurally."

II

We review de novo a district court's dismissal of a habeas petition. *Sexton v. Cozner*, 679 F.3d 1150, 1153 (9th Cir. 2012). We review a district court's findings of

fact for clear error. *Stanley v. Schriro*, 598 F.3d 612, 617 (9th Cir. 2010).

Because Jones filed his petition after April 24, 1996, AEDPA applies to our review of this petition. *See Summers v. Schriro*, 481 F.3d 710, 712 (9th Cir. 2007). Under AEDPA, habeas relief may not be granted unless the state court's decision was: (1) "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States;" or (2) "based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d)(1)–(2).

"A state court decision is 'contrary to' clearly established Supreme Court precedent if the state court applies a rule that contradicts the governing law set forth in Supreme Court cases *or* if the state court confronts a set of facts materially indistinguishable from those at issue in a decision of the Supreme Court and, nevertheless, arrives at a result different from its precedent." *Lambert v. Blodgett*, 393 F.3d 943, 974 (9th Cir. 2004) (citing *Lockyer v. Andrade*, 538 U.S. 63, 73 (2003)). A state court's decision is an "unreasonable application" of federal law if it "identifies the correct governing principle from [the Supreme] Court's decisions but unreasonably applies that principle to the facts of the prisoner's case." *Id.* (internal quotations and citation omitted). The Supreme Court has explained that the exceptions based on "clearly established" law refer only to "the holdings, as opposed to the dicta, of th[e] Court's decisions as of the time of the relevant state-court decision." *(Terry) Williams v.*

Taylor, 529 U.S. 362, 412 (2000) ("*Terry Williams*"). Circuit precedent may not clearly establish federal law for purposes of § 2254(d), but we may "look to circuit precedent to ascertain whether it has already held that the particular point in issue is clearly established by Supreme Court precedent." *Marshall v. Rodgers*, 569 U.S. 58, 64 (2013).

With respect to § 2254(d)(2) claims, "a state-court factual determination is not unreasonable merely because the federal habeas court would have reached a different conclusion in the first instance." *Wood v. Allen*, 558 U.S. 290, 301 (2010). If "'[r]easonable minds reviewing the record might disagree' about the finding in question, 'on habeas review that does not suffice to supersede the trial court's . . . determination.'" *Id.* (quoting *Rice v. Collins*, 546 U.S. 333, 341–42 (2006)).

If a petitioner can overcome the § 2254(d) bar with respect to the claims the state court did address, he must also demonstrate that he is entitled to relief without the deference required by AEDPA. *See Panetti v. Quarterman*, 551 U.S. 930, 953–54 (2007). Where the state court did not reach a particular issue, § 2254(d) does not apply, and we review the issue de novo. *See Rompilla v. Beard*, 545 U.S. 374, 390 (2005); *see also Weeden v. Johnson*, 854 F.3d 1063, 1071 (9th Cir. 2017) ("Because the [state court] did not reach the issue of prejudice, we address the issue de novo.").

Pursuant to *Pinholster*, our § 2254(d) analysis is limited to the facts in the state court record. 563 U.S. at 185. However, in narrow circumstances, when we review a claim de novo, and when a petitioner satisfied the standard for an evidentiary hearing in federal

district court pursuant to § 2254(e)(2) by exercising diligence in pursuing his claims in state court, we may consider the evidence developed in federal court. *See id.*; *see also id.* at 212–13 (Sotomayor, J., dissenting); *see also Schriro v. Landrigan*, 550 U.S. 465, 473 n.1 (2007).

III

In Claims 1 and 2, Jones alleges that his counsel provided IAC at sentencing. To prove a constitutional violation for IAC, Jones must show (1) "that counsel's performance was deficient," and (2) "that the deficient performance prejudiced the defense." *Strickland v. Washington*, 466 U.S. 668, 687 (1984). Counsel's performance is deficient if, considering all the circumstances, it "fell below an objective standard of reasonableness . . . . under prevailing professional norms." *Id.* at 688. Under this objective approach, we are required "to affirmatively entertain" the range of possible reasons counsel might have proceeded as he or she did. *Pinholster*, 563 U.S. at 196. To establish prejudice under *Strickland*, a 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. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694.

Our review of a *Strickland* claim under § 2254(d) is "doubly deferential," requiring the court to apply AEDPA deference on top of *Strickland* deference. *Knowles v. Mirzayance*, 556 U.S. 111, 123 (2009). Because the state court reached only the deficient performance prong of Jones's IAC claims, we review

only that prong under § 2254(d) and we review the prejudice prong of his claims de novo.

IV

A

In Claim 1, Jones asserts that his trial counsel was constitutionally ineffective by failing to secure a defense mental health expert. He asserts that his right to counsel was violated when his attorney failed to request a mental health expert in advance of the sentencing hearing. For the reasons below, we agree.

The state court record demonstrates that counsel's failure to timely seek a mental health expert fell below "prevailing professional norms." *Strickland*, 466 U.S. at 688. "[C]ounsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." *Id.* at 691. Counsel has an "obligation to conduct a thorough investigation of the defendant's background." *Terry Williams*, 529 U.S. at 396 (citing American Bar Association ("ABA") Standards for Criminal Justice 4–4.1, commentary, p.4–55 (2d ed 1980)). "Criminal cases will arise where the only reasonable and available defense strategy requires consultation with experts or introduction of expert evidence." *Hinton v. Alabama*, 571 U.S. 263, 273 (2014) (quoting *Harrington v. Richter*, 562 U.S. 86, 106 (2011)). And further, counsel's failure to investigate and present evidence of a defendant's mental defect constitutes deficient performance. *Terry Williams*, 529 U.S. at 396. In light of *Terry Williams*, we have also held that counsel's performance may be deficient "if he 'is on notice that

his client may be mentally impaired,' yet fails 'to investigate his client's mental condition as a mitigating factor in a penalty phase hearing.'" *Caro v. Woodford*, 280 F.3d 1247, 1254 (9th Cir. 2002) (quoting *Hendricks v. Calderon*, 70 F.3d 1032, 1043 (9th Cir. 1995)). Such performance is deficient because "[a]t 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). "[I]t is imperative that all relevant mitigating information be unearthed for consideration at the capital sentencing phase." *Id.* (quoting *Wharton v. Chappell*, 765 F.3d 953, 970 (9th Cir. 2014)). Moreover, the failure to "make even [a] cursory investigation" into available means of obtaining additional funding for expert witnesses may amount to deficient performance under *Strickland*. *See Hinton*, 571 U.S. at 274.

Additionally, the 1989 ABA Guidelines[5] in effect at the time of Jones's sentencing, explain that in capital

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[5] We may look to the ABA Guidelines as indicators of the prevailing norms of practice at a given time. *See Strickland*, 466 U.S. at 688 ("Prevailing norms of practice as reflected in American Bar Association standards and the like . . . are guides to determining what [performance] is reasonable, but they are only guides."); *see also Rompilla*, 545 U.S. at 387 n.7 (using language of 1989 and 2003 ABA Guidelines to evaluate performance at 1988 trial); *Florida v. Nixon*, 543 U.S. 175, 191 (2004) (using 2003 ABA Guidelines to evaluate counsel's performance at trial); *but see Bobby v. Van Hook*, 558 U.S. 4, 8 (2009) ("*Strickland* stressed, however, that American Bar Association standards and the like are only guides to what reasonableness means, not its definition. We have since regarded them as such." (citations and quotations omitted)).

cases, "[c]ounsel should secure the assistance of experts where it is necessary or appropriate for: . . ." "the sentencing phase of the trial," and the "presentation of mitigation." ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases, Guideline 11.4.1(d)(7), p. 16 (1989). The Guidelines explain that "[i]n deciding which witnesses and evidence to prepare for presentation at the sentencing phase, counsel should consider the following: . . . Expert witnesses to provide medical, psychological, sociological or other explanations for the offense(s)[.]" *Id.* at Guideline 11.8.3(F)(2), p. 23–24. The Guidelines also note that, among the topics the defense should consider presenting at sentencing, is "[m]edical history (including mental and physical illness or injury, alcohol and drug use, birth trauma and developmental delays)" as well as "[e]xpert testimony concerning [the client's medical history] and the resulting impact on the client, relating to the offense and to the client's potential at the time of sentencing." *Id.* at Guideline 11.8.6(B)(1)&(8), p. 25–26.

Moreover, "[t]he timing of this investigation is critical." *Allen v. Woodford*, 395 F.3d 979, 1001 (9th Cir. 2005) (quotation and citation omitted); *see also Heishman v. Ayers*, 621 F.3d 1030, 1036–37 (9th Cir. 2010). The Supreme Court has found constitutional error "where counsel waited until one week before trial to prepare for the penalty phase, thus failing to adequately investigate and put on mitigating evidence." *Allen*, 395 F.3d at 1001 (citing *Terry Williams*, 529 U.S. at 395). "If the life investigation awaits the guilt verdict, it will be too late." *Id.* (citation and quotation omitted). "[L]egal experts agree that preparation for

the sentencing phase of a capital case should begin early and even inform preparation for a trial's guilt phase[.]" *Id.* "Counsel's obligation to discover and appropriately present all potentially beneficial mitigating evidence at the penalty phase should influence everything the attorney does before and during trial[.]" *Id.* (citation and quotation omitted). Moreover, the 1989 ABA Guidelines state that "[c]ounsel should conduct independent investigations relating to the guilt/innocence phase and to the penalty phase of a capital trial[,]" and "[b]oth investigations should begin *immediately upon counsel's entry into the case and should be pursued expeditiously*." ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases, Guideline 11.4.1(A), p. 13 (1989) (emphasis added); *see also id.* at Guideline 11.8.3, p. 23 ("[P]reparation for the sentencing phase, in the form of investigation, should begin immediately upon counsel's entry into the case.").

The state court record shows that counsel was on notice that Jones may have been mentally impaired, yet counsel failed to investigate Jones's mental condition as a mitigating factor, and he failed to obtain a defense mental health expert. Counsel was in possession of medical records showing that Jones formerly attempted suicide at age twenty-two; Peggy told counsel that Jones experienced extreme moods swings, but these swings stabilized when he had been medicated with lithium; and Peggy and Randy told counsel that Jones was "often a disturbed child," and they had to seek psychiatric help for him at age nine. This evidence would have led a reasonable attorney to investigate further and obtain a defense mental health

expert. *See Wiggins v. Smith*, 539 U.S. 510, 527–28 (2003).

An investigation into Jones's mental health should have been pursued far in advance of when counsel requested that Jones undergo a mental health examination pursuant to Arizona Rule of Criminal Procedure 26.5. Counsel should have obtained a defense mental health expert well before the start of the guilt phase of Jones's trial, but instead, he waited to make this request until after Jones had already been convicted on September 13, 1993. *See Allen*, 395 F.3d at 1001.

Obtaining the court-appointed, independent expert's short and cursory evaluation did not satisfy this duty. *See Lambright v. Schriro*, 490 F.3d 1103, 1120–21 (9th Cir. 2007) ("Counsel may not rely for the development and presentation of mitigating evidence on the probation officer and a *court appointed* psychologist. . . . The responsibility to afford effective representation is not delegable to parties who have no obligation to protect or further the interests of the defendant." (emphasis added)). Moreover, Dr. Potts's evaluation and opinions were limited in that he was a psychiatrist not trained in matters involving organic brain function—information that a neuropsychologist could have developed and presented. Dr. Potts had no obligation to further the interests of the defendant, even if he did present a defense-favorable opinion, and his expertise and evaluation did not extend to the precise topic—organic brain function—that was essential in Jones's case.

Finally, the state court record establishes that the failure to obtain a defense expert here cannot be justified as a reasonable strategic decision. First and foremost, counsel's failure to obtain a mental health expert was based not on strategy, but on lack of preparation, which left counsel unaware of the importance of this evidence. Counsel failed to speak adequately to Jones and Jones's family to obtain a full picture of Jones's mental health history. For instance, even though when Jones was interviewed for the PSR, Jones reported he was "mentally abused by his first step-father, and later physically abused by a second step-father," and he characterized his childhood as "bad and unhappy," when questioning Dr. Potts at sentencing, defense counsel brushed aside a mention of Randy's physical abuse, referring to it as "clearly a mistake," even though the information came from Jones himself.

Given this lack of preparation, unsurprisingly, counsel stated that he never even considered the need for testing by a neuropsychologist until Dr. Potts suggested it to him the evening before Jones's sentencing hearing. He attested that

> prior to meeting with Dr. Jack Potts, M.D. on December 7, 1993 to discuss his evaluation of Danny Jones, [he] was not aware that neurological or neuropsychological testing was necessary and available which could determine the exact nature of injuries to Danny Jones' brain from long term substance abuse and head injury and the resulting affect on his behavior and conduct.

This fell below a reasonable standard of performance given the indications that Jones likely suffered from some form of mental illness.

Although we need "not indulge '*post hoc* rationalization' for counsel's decisionmaking that contradicts the available evidence of counsel's actions," *Harrington*, 562 U.S. at 109 (quoting *Wiggins*, 539 U.S. at 526–27), even imagining one potential strategic reason for counsel's failure to obtain an expert—that the defense could not afford one—the failure to attempt to obtain a defense expert was neither reasonable nor informed. In the declaration he provided in the state PCR proceeding, defense counsel stated that he believed "the Mohave County Public Defender's Office did not have sufficient monies for retaining expert witnesses," and so he "did not ask Mr. Everett [the Mohave Public Defender] for any funding for additional necessary experts in *State vs. Jones*." But according to Kenneth Everett's affidavit provided to the state PCR court, "[i]n the last quarter of 1993, approximately Seven Thousand ($7,000.00) Dollars would have been available for experts . . . in regard to all cases that the Public Defender had in that last quarter, including the Danny Lee Jones case." Everett also stated that during the relevant time period, counsel "perhaps could have expended additional funds for experts for additional mitigation evidence," although he did recognize that counsel needed "to be circumspect" about requesting such funds.[6] But, contrary to the Supreme Court's

[6] Counsel could also have gone back to the trial court for additional funding. In granting only $2,000 of counsel's $5,000 request for funding, the court stated that:

ruling in *Hinton*, counsel never even looked into requesting funding through the Public Defender's Office. *See Hinton*, 571 U.S. at 274 (trial attorney's failure to request additional funding was deficient when he mistakenly believed he had received all the funding available).

In sum, the state court record demonstrates that trial counsel was constitutionally ineffective by failing to secure a defense mental health expert. Thus, pursuant to § 2254(d)(1), the Arizona Supreme Court's contrary conclusion was an unreasonable application of *Strickland* and its progeny.

B

Alternatively, Jones argues that the state PCR court's decision was based on an unreasonable determination of the facts under § 2254(d)(2). He argues that the court employed a defective fact-finding process with respect to Claim 1 when it denied PCR counsel's funding request for a defense neuropsychological expert, effectively preventing the factual development of this claim. He also asserts that the state court's failure to hold a hearing on Claim 1

> If this is all you need pretrial, you may need more at trial, and then of course the sentencing hearing if we get that far, so—but, I am willing to go $2,000 prior to trial, and then with the understanding that I am willing to listen again if you need more.

Jones, 583 F.3d at 629 n.2. Although this statement may not have been specifically included in the state court record, there is no doubt the PCR court was aware of it; the same judge who sentenced Jones to death presided at his PCR hearing.

resulted in an unreasonable determination of the facts. We agree with both arguments.

Under § 2254(d)(2), a petitioner may challenge a state court's conclusion that is based upon an unreasonable determination of the facts. We have noted that § 2254(d)(2) challenges "come in several flavors." *Taylor v. Maddox*, 366 F.3d 992, 1000 (9th Cir. 2004), *overruled on other grounds by Murray v. Schriro*, 745 F.3d 984, 999–1000 (9th Cir. 2014). For instance, we have stated that a petitioner may overcome the § 2254 (d)(2) bar if the fact-finding "process employed by the state court is defective." *Id.* at 999 (citing *Nunes v. Mueller*, 350 F.3d 1045, 1055–56 (9th Cir. 2003)). "We have held repeatedly that where a state court makes factual findings without an evidentiary hearing or other opportunity for the petitioner to present evidence, the fact-finding process itself is deficient, and not entitled to deference." *Hurles v Ryan*, 752 F.3d 768, 790 (9th Cir. 2014) (amended) (quotations omitted); *see also Perez v. Rosario*, 459 F.3d 943, 950 (9th Cir. 2006) (amended) ("In many circumstances, a state court's determination of the facts without an evidentiary hearing creates a presumption of unreasonableness."). This is particularly the case where a judge bases factual findings on their own personal conduct, untested memory, or understanding of events in the place of an evidentiary hearing. *See Hurles*, 752 F.3d at 791 (finding it "especially troubling" when a judge's factual findings involved her own conduct and were based on her "untested memory and understanding of the events"). Similarly, a fact-finding process may be fatally undermined "where the state courts plainly misapprehend or misstate the record in making their

findings, and the misapprehension goes to a material factual issue that is central to petitioner's claim." *Taylor*, 366 F.3d at 1001; *see also Wiggins*, 539 U.S. at 528. And likewise, a fact-finding process may be deemed defective when the end result requires the court to make a finding on "an unconstitutionally incomplete record." *Milke v. Ryan*, 711 F.3d. 998, 1007 (9th Cir. 2013). For a petitioner to prevail on these types of § 2254(d)(2) arguments, however, "we must be satisfied that any appellate court to whom the defect is pointed out would be unreasonable in holding that the state court's fact-finding process was adequate." *Taylor*, 366 F.3d at 1000.

The PCR court's decision not to hold a hearing on Claim 1 amounted to an unreasonable determination of the facts. The court ruled on Claim 1 without holding an evidentiary hearing because it found that Dr. Potts essentially satisfied the role of a defense mental health expert. In response to PCR counsel's argument that a defendant is entitled to his own mental health expert in capital cases, not a court-appointed independent expert, the court explained that:

> Dr. Potts was a very good expert. He was defense oriented. The prosecutor, I can remember, was very upset about that. . . . I'm going to deny [this claim] because I don't think counsel was ineffective as far as Dr. Potts.

The fact that the PCR court made this factual finding regarding Dr. Potts's role without holding an evidentiary hearing or opportunity for Jones to present evidence, suggests that the PCR court's fact-finding process was deficient. *See Hurles*, 752 F.3d at 790.

However, the process was even more unreasonable because, even though more than six years had passed, the judge based this finding solely on his own untested memory and personal impression of Dr. Potts's role in the sentencing hearing. *See id.* at 791. The judge who presided over Jones's state PCR proceeding was the same judge who sentenced him to death, and in denying a hearing on this claim, the judge relied primarily on his personal recollection of Dr. Potts's testimony and his memory that the prosecution was upset that Dr. Potts testified favorably for the defense. There is no evidence the PCR court considered anything else in denying the request for a hearing.

The PCR court "plainly misapprehend[ed]" the record in making its finding that Dr. Potts satisfied the role of a defense mental health expert. *See Taylor*, 366 F.3d at 1001. Dr. Potts was not a defense expert, and the fact his conclusions were favorable to the defense does not support that he filled that role. Nothing about the circumstances of Dr. Potts's testimony suggests otherwise. Dr. Potts testified at Jones's sentencing hearing that he regularly prepares psychological reports requested by the courts, that "at times are favorable apparently for the State" and at other times are favorable "for the defense[.]" He also explained that in other cases like Jones's, he had found little or no mitigation for the defendant. Moreover, the limited amount of time Dr. Potts spent on his report and the level of analysis and detail that report provided do not support the conclusion that he was an advocate for the defense team. Dr. Potts submitted only a six-page report to the court. He agreed that he was under "significant time pressure" in preparing the report

because he received the PSR late from Mohave County. He met with Jones for a total of four hours at the prison, and spent one and a half hours of that time administering an MMPI personality test. On the day before he testified, Dr. Potts also spoke to Jones for "a couple of hours," Peggy for about thirty minutes, and Randy for one hour. Dr. Potts also specified that it would have been helpful and

> valuable to have had some neurologic evaluations, not – by a neurologist, clinical exam, such as a CAT scan, possibly an MRI, possibly EEG, possibly some sophisticated neurological testing, because I think there's very strong evidence that we have – well, there's clear evidence that we have, I believe, of traumatic brain injury, and there's some other evidence that I believe we may have organic neurological dysfunctions here that has gone on since he's been about 13. So there's some other testing that I think would be valuable to have to pin down the diagnosis.

Nothing about Dr. Potts's role in the sentencing hearing suggests that he had stepped into the shoes of a defense expert.

The PCR court's decision not to fund a defense mental health expert fatally undermined the fact-finding process, in part because that decision resulted in the court ruling on an unconstitutionally incomplete record. Without funding for a mental health expert, it was impossible for Jones to demonstrate that he had been prejudiced by counsel's failure to obtain one during the course of Jones's criminal proceedings.

Jones could not demonstrate the inadequacy of counsel's mitigation case without providing the mitigation evidence that could have been presented by a defense neuropsychological expert. Moreover, without funding, Jones could not show that a defense neuropsychological expert would have presented materially different evidence than that already provided by Dr. Potts. By failing to provide additional funding to develop Jones's mental health mitigation evidence, the state court, as Jones phrases it, created "its own self-fulfilling prophecy," by preventing the development of the claim before it was even presented.

We emphasize that we are not suggesting that any denial of an evidentiary hearing or denial of funding for an expert would lead to a deficient fact-finding process in state court. Our determination is expressly limited to the facts of this case: The judge denied an evidentiary hearing based on his personal recollection of a sentencing proceeding that took place six years prior—a proceeding in which the sole, court-appointed expert opined that further neurological testing was desirable.

For these reasons, we conclude that any appellate court would conclude that the PCR court's factual determination as to Dr. Potts and its fact-finding process with respect to Claim 1 were unreasonable and inadequate. *See Taylor*, 366 F.3d at 1000. Accordingly, Jones has satisfied the requirements of § 2254(d)(2).

C

Although § 2254(d) typically also applies to the prejudice prong of a petitioner's IAC claim, here, the

PCR court did not reach the issue of prejudice, and so we review the issue de novo. *See, e.g., Weeden*, 854 F.3d at 1071.

Pinholster limits our § 2254(d) analysis to the facts in the state court record. 563 U.S. at 185. However, *Pinholster* does not prevent us from considering evidence presented for the first time in federal district court in reviewing the merits of Jones's claims de novo. As the district court found, Jones satisfied the standard for an evidentiary hearing pursuant to § 2254(e)(2)[7]. That provision permits federal district courts to hold evidentiary hearings and consider new evidence when petitioners have exercised diligence in pursuing their claims in state court. *See id.* ("Section 2254(e)(2)

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[7] Section 2254(e)(2) states that

> If the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows that—
>
> (A) the claim relies on—
>
> (i) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or
>
> (ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and
>
> (B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

continues to have force where § 2254(d)(1) does not bar federal habeas relief."); *see id.* at 212–13 (Sotomayor, J., dissenting); *(Michael) Williams v. Taylor*, 529 U.S. 420, 436–37 (2000) ("*Michael Williams*").

Though § 2254(e)(2) limits the discretion of district courts to conduct evidentiary hearings, *Pinholster*, 563 U.S. at 203 n.20, it does not impose an express limit on "evidentiary hearings for petitioners who ha[ve] been diligent in state court." *Id.* at 213 (Sotomayor, J. dissenting); *see also Landrigan*, 550 U.S. at 473 n.1. Here, the federal district court determined that Jones had been diligent in attempting to develop the factual basis for Claims 1 and 2 in state court, and the State does not contest that determination now. The state court record shows that Jones was diligent. His PCR counsel requested funding for a neuropsychologist and "a thorough and independent neurological assessment" to assist in the development of Claims 1 and 2, but the PCR court denied the request. Therefore, the district court did not err in its expansion of the record, and we consider the evidence developed in federal district court in conducting de novo review of Jones's claims.

To prevail on his IAC claim, Jones must demonstrate that his trial counsel: (1) performed deficiently; and (2) Jones's defense was prejudiced by that deficient performance. *Strickland*, 466 U.S. at 687. He has done so.

For all the reasons set forth previously in our § 2254(d)(1) analysis, Jones has demonstrated that counsel's performance fell below an objective standard of reasonableness and below the prevailing professional norms at the time of Jones's proceedings.

Additionally, Jones has demonstrated that counsel's failure to obtain a defense mental health expert for the penalty phase of Jones's trial prejudiced the defense. Jones has demonstrated that there is a "reasonable probability" that had such an expert been retained, "the result of the proceeding would have been different." *Id.* at 694.

There is a reasonable probability that had counsel secured a defense mental health expert, that expert would have uncovered (and presented at sentencing) a wealth of available mitigating mental health evidence. The main mitigation witness in state court was Randy, Jones's second step-father. Randy erroneously testified that Jones enjoyed a stable home life after age seven, when Randy married Jones's mother, and yet the trial court found that his testimony was sufficient to prove a number of non-statutory mitigating circumstances. Had counsel secured a mental health expert, that expert could have provided substantial evidence—through neuropsychological testing or otherwise—that Jones suffered from mental illness, including evidence supporting any of the diagnoses made by experts in federal district court: (1) cognitive dysfunction (organic brain damage and a history of numerous closed-head injuries); (2) poly-substance abuse; (3) post-traumatic stress disorder ("PTSD"); (4) attention deficit/hyperactivity disorder ("AD/HD"); (5) mood disorder; (6) bipolar depressive disorder; and (7) a learning disorder. The experts retained in Jones's federal habeas proceedings provided significant evidence of these conditions, demonstrating that such evidence could have been uncovered and presented at sentencing.

Dr. Pablo Stewart, Chief of Psychiatric Services at the Haight Ashbury Free Clinic in San Francisco, California, testified at the federal evidentiary hearing. He estimated that he spent 130 hours working on Jones's case, in contrast to the four hours Dr. Potts was able to spend with Jones prior to sentencing. Dr. Stewart diagnosed Jones with cognitive dysfunction, PTSD, polysubstance abuse, and mood disorder, not otherwise specified. He ultimately concluded that "[t]he circumstances surrounding Mr. Weaver's death are a direct consequence of [Jones's] abused and unfortunate past."

Dr. Stewart testified to a number of factors that may have contributed to Jones's cognitive dysfunction that occurred before Jones was even born. He noted that Jones's mother, Peggy, worked in a chrome hub cab plating factory when she was pregnant with Jones, and chrome exposure may negatively affect a baby's birth. He testified that Peggy's prenatal diet was also of concern: Peggy reported that during her pregnancy with Jones, her diet consisted of cigarettes, coffee, and mayonnaise sandwiches. He expressed that the use of nicotine during pregnancy has been directly linked to cognitive dysfunction in children and caffeine exposure results in more difficult births. He also specified that Jones's father beat Peggy during her pregnancy such that there was a potential for physical trauma to the fetus. And he testified to Jones's traumatic and difficult birth: Jones was born in the breech position, with the umbilical cord wrapped around his neck, and forceps were used. He testified that any of these factors could have been potential contributors to Jones's cognitive dysfunction.

Dr. Stewart testified that Jones had suffered multiple serious head injuries over the course of his life, and he went into much greater detail than Randy had provided regarding Jones's head injuries at the state PCR proceeding. Randy had testified that Jones fell off a roof when he was approximately thirteen, fell off a scaffolding when he was approximately fifteen, was mugged while serving in the Marines, and experienced spontaneous blackouts around the age of four. By contrast, Dr. Stewart described an incident where Jones "was about eleven (11) years old, he fell, head-first off a roof onto the metal frame of a horizontal dolly, in an attempt to retrieve a ball. His eye hit the metal bar of the dolly. He was unconscious for about five (5) to ten (10) minutes." He also noted the fall when Jones was fifteen, but additionally, he explained that "[a]s a young adult, Danny had at least three (3) car accidents where he lost consciousness." Further, "when Danny was about five-and-a-half (5 ½) years old, Peggy found Danny regaining consciousness, lying underneath the swing set. She suspected Eland, Danny's first step-father, had hit Danny or thrown him off the slide. Danny's face was red and he vomited, indicating he had a concussion." Dr. Stewart elaborated on the mugging Jones suffered while in the Marines: he was "found lying unconscious in a ditch along the highway, by a Morehead City Police Officer, who took him to the hospital. Danny had been mugged and beaten with a two-by-four."

Dr. Stewart discussed PTSD and explained that Jones suffered numerous traumatic experiences early in his life: he watched his first step-father hold a jigsaw to his mother's neck and threaten to kill her, he

watched that same step-father shoot a gun at his mother, and on two separate occasions, his second step-father, Randy, pointed a gun to his own head and threatened to kill himself in front of Jones. He also noted that Randy beat Jones for no reason with a belt with a buckle and engaged in other forms of severe physical discipline. On cross-examination the state challenged Dr. Stewart's PTSD diagnosis because Dr. Stewart stated that Jones "had PTSD at the time of the murders," but did not state that Jones was having a flashback while committing the crimes. Dr. Stewart responded by explaining that while the media tends to show PTSD as being a person "who is thinking he's being ambushed and he takes people hostage," that only occurs "very, very rarely." He explained:

> The much more overwhelmingly more common thing that occurs is a person having a short fuse; a person overreacting to a situation; a person finding themselves challenged by some things and then just going off; a person—and that's PTSD. A person who drinks too much and then gets into fights, those are the more common thing. But those don't sell movies or books.
>
> But that's the more common presentation. So that's why I'm saying in the case of Mr. Jones, it's absolutely clear that he suffers from PTSD, in my opinion, and that he carries that with him throughout his entire life. Certainly on the day of these murders, that was going on.

Dr. Stewart also testified that Jones's first step-grandfather forced Jones to drink alcohol when he was only nine years old, and that it appeared the

grandfather used alcohol to get Jones drunk so it would be easier to sexually abuse him. Dr. Stewart described the sexual abuse "as full contact sexual abuse, including sodomy, including oral sex, both the providing it and receiving it." Jones became a daily marijuana user when he was in junior high, he used one gram of cocaine every weekend in high school, and he reported using LSD two hundred times. Dr. Stewart explained that the substance abuse appeared to have stemmed from Jones's genetic predisposition, and also because Jones used drugs starting at a very young age to self-medicate as a means of coping with his mental defects and past trauma.

Dr. Alan Goldberg, a psychologist in Arizona with a speciality in neuropsychology, conducted a battery of tests that covered multiple domains of cognitive functioning. Dr. Goldberg gave Jones approximately twenty-five tests and found that "when we look at the patterns across many different kinds of tests . . . we see a consistent inconsistency in performance, that is, the performance is problematic on a number of tests that all have an attention component to them." He ultimately diagnosed Jones with a learning disability, attention deficit disorder, and Bipolar Disorder, Depressed.

Jones submitted reports from additional experts, including Dr. David Foy, a professor of psychology at Pepperdine University. Dr. Foy diagnosed Jones with PTSD, polydrug abuse, depressive disorder, compromised cognitive emotional functioning, and various learning deficits. Dr. Foy described the numerous instances of life-threatening family violence

Jones witnessed growing up, and found that on at least two occasions Jones used a baseball bat to protect himself: (1) when Jones threatened to kill Jones's first step-father if he did not stop beating Jones's mother, Peggy; and (2) in order to stop Jones's first step-grandfather from continuing to sexually abuse him. Dr. Foy concluded that

> [t]he constant threat of sudden verbal attacks or severe physical punishment in Danny's home environment would be expected to produce an essential state of wariness or hypervigilance . . . [and] would be expected to lead to a heightened suspiciousness and combat readiness as a systematic way of responding, even in situations which later proved to be non-life threatening.

Finally, Jones submitted a declaration from his younger sister, Carrie. She said that, as a child, Jones twice watched Randy point a gun at his own head and threaten to kill himself. She stated that contrary to Randy's testimony during sentencing, Randy was both verbally and physically abusive to Jones, and that Jones threatened to kill Randy if he kept beating Peggy. Carrie also confirmed that Jones suffered numerous head injuries while growing up.

The hearing also made clear that Dr. Potts had not been tasked with providing mitigation evidence at sentencing and had not conducted the extensive testing he felt was required. Potts explained: "I was not an expert for either party. I was the Court's expert in looking at some issues. I was not—it was clear I was not hired for mitigation, nor was I hired for aggravation." The trial court had ordered Dr. Potts to

perform an evaluation pursuant to Rule 26.5 of the Arizona Rules of Criminal Procedure. The Rule provides: "At any time before the court pronounces a sentence, it may order the defendant to undergo a mental health examination or diagnostic evaluation. Unless the court orders otherwise, any report concerning such an examination or evaluation is due at the same time as the presentence report." In line with this, Dr. Potts had testified at Jones's sentencing: "My main role is working with Maricopa County Superior Court, criminal division, coordinating competency evaluations, other forensic, and working with patients. I also have clinical responsibilities. . . . [I] [p]rimarily do reports as requested by the Court." When asked whether or not he had enough "points of data" to pull from in reaching his conclusions, he stated:

> [T]here's a clear distinction between a mitigation specialist, and I'm no mitigation specialist. I may be a part of a team of mitigation, but I'm clearly not a mitigation specialist in the realm of what is dealt with now in capital cases. . . .
>
> Mine was a cursory examination. . . . [I]nterviewing one family member certainly is not adequate, I believe, for what would be considered capital mitigation. It is below the standard of care.

He stated that, prior to his testimony at sentencing, he had recommended that defense counsel seek neuropsychological testing for Jones. During cross-examination, the State tried to get Dr. Potts to admit that he only called for neurological testing, not neuropsychological testing, but Dr. Potts explained

that "[s]ophisticated neurological testing would include that."

He described the reports submitted by the additional experts at the habeas proceeding as the "documents I think one would expect to see in mitigation. . . . I believe they're very, very helpful, and I think—I know I would have liked to have had the exhaustive nature of these reports." He stated that he found his role constrained by his court-appointed status, and therefore "did not make diagnoses," because his "role was not to make diagnoses . . . and that's why I would not have. I could have . . . but that was not the nature or tenor of any of this report. . . ."

Defense trial counsel testified that Dr. Potts "did not act as a neutral, detached court-appointed expert. He actively assisted us in developing mitigation, planning strategy to a much larger degree than what he indicated." He explained that he had "numerous phone conversations" with Dr. Potts, they met together the night before Dr. Potts testified, and Dr. Potts "stressed to ask for the continuance for the additional testing."

The testimony provided at the federal evidentiary hearing demonstrates the types of mitigation evidence that could and should have been presented at the penalty phase of Jones's trial. For instance, the evidence demonstrates that, had counsel retained a defense mental health expert, that expert could have provided testimony explaining the factors that contributed to Jones's cognitive dysfunction, including: (1) prenatal chrome and nicotine exposure; (2) his mother's malnutrition during pregnancy; (3) fetal

trauma from beatings by his father; (4) a traumatic birth; (5) several severe head injuries; or (6) Jones's substantial and extensive drug and alcohol abuse, which began when he was eight or nine years old. Any such evidence would have been significantly more probative of Jones's mental state and more persuasive in reducing Jones's culpability than Dr. Potts's conditional findings, compiled after far less preparation time and testing, and comprising only a six-page report. These factors illustrate how unfortunate circumstances outside of Jones's control combined to damage his cognitive functioning and mental health at the time of his crimes.

Likewise, the mental health experts' testimony in the district court proceedings demonstrates that had trial counsel retained such an expert for sentencing, he or she could have provided evidence that Jones's mental state was impaired by drugs and alcohol at the time of his crimes. He or she also could have offered context for his substance abuse and insight into how Jones's long-term self-medication affected his brain. As demonstrated at the federal evidentiary hearing, any mental health expert engaged by the defense team would have attempted to explain Jones's lifelong history of substance abuse and its physical effects on Jones's brain. This would have included compiling a family history and hard data regarding Jones's brain function. It also would have included information addressing how and when Jones's substance abuse began. As the federal proceedings revealed, Jones turned to substance abuse at an extremely young age in order to self-medicate in response to the trauma he experienced from being physically and sexually abused

and as a result of repeatedly witnessing violence directed at his mother. A mental health expert would have relayed that Jones suffered sexual abuse from age nine until age thirteen at the hands of his step-grandfather, who introduced him to marijuana and alcohol at age nine in order to facilitate that abuse. A mental health expert could also have explained the trauma Randy inflicted on Jones by detailing how Randy physically and emotionally abused Jones, engaged in various forms of severe physical discipline, and threatened suicide in front of Jones and his family.

We are persuaded that testimony explaining Jones's history would have significantly impacted the overall presentation of Jones's culpability with respect to his mental state, and painted a vastly different picture of Jones's childhood and upbringing. The mitigation case actually presented to the sentencing court suggested that while Jones had undergone a traumatic early childhood, he enjoyed a largely normal childhood and supportive family after the age of six. And because so little preparation had been done, Dr. Potts erroneously testified at sentencing that Jones did not suffer child abuse once Randy and Peggy married. Notably, Randy was the only mitigation witness who testified at Jones's sentencing, and defense counsel was unaware that Randy too was an abuser. Had counsel procured a mental health expert, the mitigation case would have told the story of an individual whose entire childhood was marred by extreme physical and emotional abuse, which in turn funneled him into early onset substance abuse that exacerbated existing cognitive dysfunction.

In sum, there is at least a reasonable probability that development and presentation of mental health expert testimony would have changed the result of the sentencing proceeding. Therefore, we conclude that Jones has demonstrated *Strickland* prejudice on de novo review. *See Boyde v. California*, 494 U.S. 370, 382 (1990) ("[E]vidence about the defendant's background and character is relevant because of the belief, long held by this society, that defendants who commit criminal acts that are attributable to a disadvantaged background, or to emotional and mental problems, *may be less culpable than defendants who have no such excuse*." (quoting *Penry v. Lynaugh*, 492 U.S. 302, 319 (1989))). Accordingly, we reverse the district court's denial of relief on Claim 1.

V

A

In Claim 2, Jones asserts that his trial counsel was constitutionally ineffective by failing to seek neurological or neuropsychological testing prior to sentencing. He asserts that the failure to do so fell below prevailing professional norms at the time. We agree.

As with Claim 1, counsel's failure to promptly seek neuropsychological testing ran contrary to his obligation to pursue reasonable investigations under *Strickland*, and in particular, his obligation to investigate and present evidence of a defendant's mental defect. *See Terry Williams*, 529 U.S. at 396 (failure to investigate and present evidence of mental defect amounts to deficient performance). The state

court record shows that counsel was on notice of numerous facts from the very beginning of the representation that Jones may have had significant brain damage. "[W]hen 'tantalizing indications in the record' suggest that certain mitigating evidence may be available, those leads must be pursued." *Lambright*, 490 F.3d at 1117 (quoting *Stankewitz v. Woodford*, 365 F.3d 706, 719–20 (9th Cir. 2004)); *see also Wiggins*, 539 U.S. at 527 ("In assessing the reasonableness of an attorney's investigation, however, a court must consider not only the quantum of evidence already known to counsel, but also whether the known evidence would lead a reasonable attorney to investigate further."). Counsel specified in his declaration before the PCR court that "prior to trial and sentencing [he] was aware from interviews of Danny Jones and his mother and step-father that he had been rendered unconscious numerous times during his life from head injuries," as well as that "he had a significant history of serious long term substance abuse." Any reasonable attorney would understand that these details could lead to valuable, available mitigation evidence and would have pursued these leads further.

However, in the state PCR proceedings, defense trial counsel provided no strategic reason for his failure to arrange for neuropsychological testing. Instead, trial counsel stated that he "was not aware that neurological or neuropsychological testing was necessary and available which could determine the exact nature of injuries to Danny Jones' brain from long term substance abuse and head injury," nor that testing would shine a light on "the resulting affect on his behavior and conduct." Counsel's failure to appreciate

the importance of such testing before the sentencing phase of trial constituted deficient performance because he failed to understand the value neuropsychological testing could provide in Jones's case, and by the time of Jones's sentencing in 1993, counsel in capital cases was expected to be versed in the role of psychiatric evidence. *See* ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases, Guideline 5.1(1)(A)(v), p. 5–6 (1989) ("Lead trial counsel assignments should be distributed to attorneys who . . . are familiar with and experienced in the utilization of expert witnesses and evidence, including, but not limited to, psychiatric and forensic evidence.").

Counsel's request for testing (and a continuance) during Jones's sentencing hearing came far too late. As noted by PCR counsel, the court denied these requests because it had granted funding earlier in the case for expert assistance, and "if there [had been] any follow-up questions of a psychological or neurological nature, [the court expected] that the defense would have followed them up." The court, therefore, was placing the burden on counsel to recognize these issues and request funding and assistance earlier in the case, which counsel failed to do because he had not invested sufficient preparation time and research to be aware that such testing was available and needed. Moreover, the timing of counsel's request for neuropsychological testing, like his request for a defense mental health expert, was in itself deficient. "[P]reparation for the sentencing phase of a capital case should begin early and even inform preparation for a trial's guilt phase." *Allen*, 395 F.3d at 1001. For this reason, the PCR

court's decision that defense counsel's performance did not fall below an objectively reasonable standard was an unreasonable application of *Strickland*. Jones has satisfied § 2254(d)(1).

B

Alternatively, Jones asserts that the state PCR court's decision was based on an unreasonable determination of the facts under § 2254(d)(2). He argues that the court precluded Claim 2's full factual development by denying PCR counsel's request to fund neuropsychological testing, and he asserts that the inadequacy of the state court's fact-finding procedures renders its rejection of this claim unreasonable. We agree.

The PCR court never addressed the facts supporting Jones's IAC claim, and it excused counsel's failure to move timely for neuropsychological testing in a vague, inconsistent order. As with Claim 1, this had the effect of precluding Claim 2's full factual development in a way that rendered the entire fact-finding process unreasonable.

At sentencing, Dr. Potts testified that he saw indicators of brain damage, and as a result, counsel requested that the court continue the proceedings so that he could seek a neuropsychological evaluation. The court, however, ruled contrary to Dr. Pott's recommendation, stating only that:

> this case has been pending a long time, and I think the evidence is *very slim, nonexistent, in fact*, that the defendant has anything that

> requires any kind of neurological examination. So, I am ready to proceed [with sentencing].

(emphasis added). Because the State did not call a competing expert, the only evidence in the record—Dr. Pott's unambiguous recommendation—suggested that a neuropsychological evaluation was necessary, contrary to the sentencing court's assessment. The sentencing court's cursory evaluation of the record effectively foreclosed any factual development on this issue.

In the PCR proceedings, the court at least granted a hearing on the issue of counsel's ineffectiveness regarding testing, but because the court summarily denied the claim concerning the appointment of a mental health expert and denied counsel's motion for further neuropsychological testing, the evidentiary hearing was rendered almost meaningless. The court based its denial of neuropsychological testing on the court's own impressions and untested memory of Dr. Potts's sentencing testimony from six years prior. The court recalled that he "thought Dr. Potts did a good job," and "based on his testimony," the court did not "really see any grounds for any additional psychiatric or psychological testing." But Dr. Potts's testimony was that additional neuropsychological testing *was* needed. The court paradoxically explained that "[b]ased on [Dr. Potts's] testimony and the other things that I heard during that hearing, there was no grounds in my mind for obtaining a neuropsychological examination. Not one." The resulting decision dismissed the claim for neuropsychological testing in a single sentence: "The report and testimony of Dr. Potts who was appointed

by the Court, adequately addressed defendant's mental health issues at sentencing."

As with Claim 1, the state PCR judge made factual findings regarding the necessity of neuropsychological testing, not on the basis of evidence presented by the petitioner, but on the basis of his own personal conduct, untested memory, and understanding of events. *See Hurles*, 752 F.3d at 791; *see also Buffalo v. Sunn*, 854 F.2d 1158, 1165 (9th Cir. 1988) (finding error when the court relied on "personal knowledge" to resolve disputed issue of fact). Additionally, in making the resulting factual finding—that neuropsychological testing was not warranted—the court "plainly misapprehend[ed]" the record. *See Taylor*, 366 F.3d at 1001. In particular, the evidence in the record—Dr. Potts's testimony—strongly suggested that neuropsychological testing *was* essential in assessing Jones's psychological state, contrary to the court's finding. Thus, by finding against the weight of the evidence, and proceeding to rule on the merits of Claim 2, the court employed a constitutionally defective fact-finding process and ruled on an unconstitutionally incomplete factual record. *See id.* at 999; *see also Milke*, 711 F.3d at 1007 (finding the state court decision rested on an unreasonable determination of the facts where the judge relied on a distorted fact-finding process and ruled on an "unconstitutionally incomplete record").

The PCR court had an obligation to allow for reasonable fact development in reaching the merits of Claim 2; the judge did not fulfill this obligation by relying on his own untested, personal recollection of the

testimony Dr. Potts presented six years earlier. For this reason, Jones has demonstrated that the PCR court's decision was based on an unreasonable fact-finding process and determination of the facts, satisfying § 2254(d)(2).

C

As with Claim 1, the PCR court failed to reach the prejudice prong of Claim 2, and so we address the issue de novo. *See, e.g., Weeden*, 854 F.3d at 1071.

As with Claim 1, because Jones was diligent in attempting to develop the factual basis of this claim in state court by requesting "a thorough and independent neurological assessment," § 2254(e)(2) does not limit our ability to consider evidence presented for the first time in federal district court. *See Pinholster*, 563 U.S. at 213 (Sotomayor, J. dissenting); *see also Landrigan*, 550 U.S. at 473 n.1. The State does not contest that Jones was diligent in attempting to develop the factual basis for his claims in state court, or that we may consider this additional evidence on appeal. And having reviewed the record, we independently conclude that the district court did not err in its diligence determination and expansion of the record. Accordingly, we consider the evidence developed in federal district court in conducting de novo review of Jones's claims.

In order for us to grant relief on Jones's IAC claim, Jones must demonstrate that his trial counsel: (1) performed deficiently; and (2) Jones's defense was prejudiced by that deficient performance. *Strickland*, 466 U.S. at 687. He has done so.

Jones has demonstrated that trial counsel performed deficiently for all the reasons set forth in our § 2254(d)(1) analysis. He has demonstrated that counsel's performance fell below an objective standard of reasonableness and below the prevailing professional norms at the time of Jones's proceedings.

Additionally, Jones has demonstrated that counsel's failure to seek neuropsychological and neurological testing prejudiced his defense. He has demonstrated that there is a "reasonable probability" that had such testing been conducted, and had the results been presented at sentencing, "the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694. While Dr. Potts presented brief, conditional findings, the results of the neuropsychological and neurological tests conducted by various experts during Jones's federal district court proceedings confirmed that Jones suffered from a variety of psychological disorders stemming from birth and exacerbated by long-term drug use and trauma that affected Jones's cognitive functioning. As explained previously, testing revealed that Jones suffered from organic brain damage, poly-substance abuse, PTSD, AD/HD, mood disorder, bipolar depressive disorder, and a learning disorder. The presentation of these results would involve presenting the contributing factors to his cognitive dysfunction, as previously described with respect to Claim 1, including that his long-term substance abuse was induced by his sexually abusive step-grandfather. At sentencing, there was no indication that Jones had suffered years of sexual abuse as a child. In combination, the testing results and the presentation of contributing factors would have

dramatically affected any sentencing judge's perception of Jones's culpability for his crimes such that there is a reasonable probability that Jones would not have received a death sentence.

VI

Because we have determined that Jones is entitled to relief and resentencing on the basis of Claims 1 and 2, we need not and do not reach the issue of whether the new evidence presented at the federal evidentiary hearing fundamentally altered these claims such that they were unexhausted, procedurally defaulted, and excused in light of *Dickens v. Ryan*, 740 F.3d 1302 (9th Cir. 2014) (en banc) and *Martinez v. Ryan*, 566 U.S. 1 (2012). Additionally, we need not and do not reach the merits of any of Jones's other claims.

We reverse and remand to the district court with instructions to issue the writ of habeas corpus.

REVERSED AND REMANDED.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

No. CV-01-00384-PHX-SRB

[Filed May 24, 2018]

Danny Lee Jones, Petitioner,	)
v.	)
Charles L. Ryan, et al., Respondents.	)

DEATH PENALTY CASE

ORDER

This case is before the Court on remand from the Ninth Circuit Court of Appeals.

A quarter century ago, Danny Jones was convicted of two counts of first-degree murder and one count of attempted first-degree murder. On March 26, 1992, Jones killed his friend Robert Weaver with a baseball bat. He then attacked Weaver's seventy-four-year-old grandmother with the bat; she died from her injuries after trial, having spent seventeen months in a coma. Finally, Jones killed Weaver's seven-year-old daughter, Tisha, dragging her out from under her bed, beating

her with the bat, and then strangling or suffocating her. *State v. Jones*, 185 Ariz. 471, 477–78, 917 P.2d 200, 206–07 (1996). The trial judge sentenced Jones to death. The Arizona Supreme Court affirmed. *Id.*

After unsuccessfully pursuing post-conviction relief ("PCR") in state court, Jones filed a preliminary federal habeas corpus petition in this Court on February 28, 2001 (Doc. 1), and filed an amended petition on September 13, 2002 (Doc. 54). Jones also moved for evidentiary development. (*See* Docs. 104, 120.) The Court granted his requests for expansion of the record and an evidentiary hearing in support of Claims 20(O), (P), and (T), alleging various instances of ineffective assistance of counsel at sentencing. (Doc. 121.) After holding a three-day evidentiary hearing in March 2006, the Court denied the claims, as well as Jones's remaining habeas claims. (Docs. 220, 221.)

The Ninth Circuit Court of Appeals reversed. *Jones v. Ryan*, 583 F.3d 626, 647 (9th Cir. 2009). On April 18, 2011, however, the United States Supreme Court granted Respondents' petition for certiorari, vacated the judgment, and remanded to the Ninth Circuit for further consideration in light of *Cullen v. Pinholster*, 563 U.S. 170 (2011). *Ryan v. Jones*, 563 U.S. 932 (2011).

Three years later, after briefing and oral argument, the Ninth Circuit vacated and deferred submission of the case pending the decision in *Dickens v. Ryan*, 740 F.3d 1302 (9th Cir. 2014) (en banc). *Jones v. Ryan*, No. 07-9900 (9th Cir. Sep. 05, 2013). Shortly after the decision, the Ninth Circuit remanded Jones's case to this Court to consider, under *Dickens* and *Martinez v.*

Ryan, 566 U.S. 1 (2012), "Jones's argument that his ineffective assistance of counsel claims are unexhausted and therefore procedurally defaulted, and that deficient performance by his counsel during his post-conviction relief case in state court excuses the default." (Doc. 240-2.)

APPLICABLE LAW

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

In *Pinholster*, the Court emphasized that "review under § 2254(d)(1) is limited to the record that was before the state court that adjudicated the claim on the merits." 563 U.S. at 181. "The federal habeas scheme leaves primary responsibility with the state courts . . . ." *Woodford v. Visciotti*, 537 U.S. 19, 27 (2002). As the Court explained in *Pinholster*:

> Section 2254(b) requires that prisoners must ordinarily exhaust state remedies before filing for federal habeas relief. It would be contrary to that purpose to allow a petitioner to overcome an adverse state-court decision with new evidence introduced in a federal habeas court and

> reviewed by that court in the first instance effectively *de novo*.

563 U.S. at 182.

For claims not adjudicated on the merits in state court, federal review is generally not available when the claims have been denied pursuant to an independent and adequate state procedural rule. *Coleman v. Thompson*, 501 U.S. 722, 750 (1991). For such claims, "federal habeas review . . . is barred unless the prisoner can demonstrate cause for the default and actual prejudice as a result of the alleged violation of federal law, or demonstrate that failure to consider the claims will result in a fundamental miscarriage of justice." *Coleman*, 501 U.S. at 750. *Coleman* held that ineffective assistance of counsel in PCR proceedings does not establish cause for the procedural default of a claim. *Id.*

In *Martinez v. Ryan*, 566 U.S. 1 (2012), however, the Court established a "narrow exception" to the rule announced in *Coleman*. Under *Martinez*, a petitioner may establish cause for the procedural default of an ineffective assistance claim "by demonstrating two things: (1) 'counsel in the initial-review collateral proceeding, where the claim should have been raised, was ineffective under the standards of *Strickland v. Washington*, 466 U.S. 668 (1984)' and (2) 'the underlying ineffective-assistance-of-trial-counsel claim is a substantial one, which is to say that the prisoner must demonstrate that the claim has some merit.'" *Cook v. Ryan*, 688 F.3d 598, 607 (9th Cir. 2012) (quoting *Martinez*, 566 U.S. at 14); *see Clabourne v. Ryan*, 745 F.3d 362, 377 (9th Cir. 2014), *overruled on*

other grounds by McKinney v. Ryan, 813 F.3d 798 (9th Cir. 2015).

In *Dickens,* the Ninth Circuit held that factual allegations not presented to a state court may render a claim unexhausted, and thereby subject to analysis under *Martinez*, if the new allegations "fundamentally alter" the claim presented and considered by the state courts. 740 F.3d at 1318. A claim has not been fairly presented in state court if new evidence fundamentally alters the legal claim already considered by the state court or places the case in a significantly different and stronger evidentiary posture than it was when the state court considered it. *Id.* at 1318–19 (citing *Vasquez v. Hillary*, 474 U.S. 254, 260 (1986); *Aiken v. Spalding*, 841 F.2d 881, 883 (9th Cir. 1988); *Nevius v. Sumner*, 852 F.2d 463, 470 (9th Cir. 1988)).

In state court Dickens argued that sentencing counsel provided ineffective assistance for failing to direct the work of a court-appointed psychologist and failed to adequately investigate Dickens's background. More specifically, Dickens alleged that counsel "conducted no investigation whatsoever into the possibility [petitioner] was suffering from any medical or mental impairment," and failed to direct the psychologist to any particular mitigating evidence. In his federal habeas petition, however, Dickens included extensive factual allegations suggesting that he suffered from Fetal Alcohol Syndrome (FAS) and organic brain damage. The Ninth Circuit

> reject[ed] any argument that *Pinholster* bars the federal district court's ability to consider Dickens's "new" IAC [ineffective assistance of

> counsel] claim. The state argues that the district court cannot consider new allegations or evidence proffered for the first time to the district court. In *Pinholster,* the Supreme Court made clear that a federal habeas court may not consider evidence of a claim that was not presented to the state court. However, this prohibition applies only to claims previously "adjudicated on the merits in State court proceedings."
>
> *Pinholster* does not bar Dickens from presenting evidence of his "new" IAC claim, because the claim was not "adjudicated on the merits" by the Arizona courts. While the Arizona courts did previously adjudicate a similar IAC claim, the new allegations and evidence "fundamentally altered" that claim . . . .

Id. at 1320 (citations omitted).

DISCUSSION

At issue are three claims of ineffective assistance of counsel at sentencing. Jones previously argued that the claims were exhausted in state court, Respondents conceded that the claims were exhausted, and the Court found that the claims were exhausted. (*See* Doc. 90 at 7; Doc. 121.) The claims are as follows.

In Claim 20(O), Jones alleged that his trial counsel performed ineffectively by failing to secure the appointment of partisan mental health experts, specifically a neuropsychologist and neurologist, who could have revealed Jones's "neurological disorders and organic mental illness." (Doc. 54 at 126.) In Claim

20(P), Jones alleged that counsel performed ineffectively by failing to make a timely motion seeking neurological and neuropsychological testing. (*Id.* at 126.) In Claim 20(T), Jones alleged that counsel performed ineffectively by failing to present additional mitigation evidence focusing on Jones's abusive childhood and the effects of his head trauma and drug abuse. (*Id.* at 129.)

Pursuant to the remand order, this Court must consider whether Claims 20(O), (P), and (T), are fundamentally altered and therefore "new" and defaulted pursuant to *Dickens* and, if so, whether Jones can demonstrate cause and prejudice for the default under *Martinez*.

1. Background

A. Sentencing proceedings

Jones was represented at trial by Mohave County Assistant Public Defender Lee Novak and co-counsel Katie Carty. After Jones was convicted, on September 13, 1993, the trial court set sentencing for November 8, 1993, ordered a presentence report ("PSR"), and granted Jones's request for a mental health examination.

At a presentence conference on October 28, 1993, the court granted Novak's unopposed request to continue sentencing and ordered Dr. Jack Potts, a forensic psychiatrist, to complete his evaluation by November 29, 1993. (ROA at 32; RT 10/28/93 at 3–4.) Dr. Potts interviewed Jones on November 26, 1993. (RT 12/1/93 at 2.) He reviewed the PSR and prepared a report.

The sentencing hearing was held on December 8, 1993. Novak presented testimony from Jones's stepfather, Randy Jones ("Randy"), and Dr. Potts. Randy testified that Jones's biological father, the first husband of Jones's mother, physically abused her while she was pregnant—in one instance throwing her down a flight of stairs—and that during Jones's birth her heart had stopped and forceps had been used to deliver the child. (RT 12/8/93 at 41, 44–45.) Randy testified that when Jones was four, he experienced black-outs, and for years thereafter bruised easily due to a calcium deficiency. (*Id.* at 42–46, 65.) He testified that Jones's first stepfather, the second husband of Jones's mother, verbally and physically abused Jones, his half-sister, and his mother. (*Id.* at 42–46.) Randy also testified about various head injuries suffered by Jones, which occurred when Jones was approximately thirteen, fifteen, and nineteen years old. (*Id.* at 47–48, 49, 50, 65.) In the first two incidents, Jones had fallen off roofs. (*Id.* at 48, 49, 65–67.) The last incident, which resulted in unconsciousness and hospitalization, occurred during a mugging while Jones was serving in the Marines. (*Id.* at 50.)

Randy also testified about Jones's history of drug and alcohol use, which began when he was about thirteen, and his participation in drug treatment programs, including an in-house facility in San Francisco where he stayed for almost two years. (*Id.* at 52–61.) Randy described how Jones's behavior deteriorated after he began abusing substances; he also described Jones's behavior as improving when he was placed on lithium. (*Id.* at 51–52, 55–57, 60–61.)

Dr. Potts testified about the seven mitigating factors he identified in his report. (*Id.*) He offered detailed testimony about the first factor, Jones's "chaotic and abusive childhood" and its effect on his mental health and development. (*Id.* at 80–83.) Dr. Potts also listed as mitigating circumstances Jones's history of significant substance abuse, the likelihood that he suffered from an attenuated form of bipolar disorder, the fact that he had a history of multiple head traumas, and genetic loading for substance abuse and affective disorders. (*Id.* at 83–92, 94–98, 100–04.) In discussing Jones's head traumas, Dr. Potts noted that there were usually "long term neurologic sequelae" that can damage the brain and make it susceptible to other changes, such as lowered thresholds for aggressive outbursts. (*Id.* at 100.) He testified that additional testing would "clearly assist in coming to a more definitive conclusion" regarding whether Jones had brain damage. (*Id.* at 103.) He recommended additional neurological testing. (*Id.* at 137.)

Following Dr. Potts's testimony, Novak asked the court for a continuance to obtain the testing recommended by Dr. Potts. (*Id.* at 150–51, 165.) Novak explained that until he had received Dr. Potts's report, two days prior to the hearing, and heard his testimony, he had not realized the significance of Jones's history of head traumas with respect to possible neurological damage. (*Id.*) The prosecution opposed the request, arguing that a factual basis did not exist for neurological testing. (*Id.* at 153–54.) Novak replied that Dr. Potts had not had sufficient time prior to the hearing to obtain neurological testing after receiving

materials from the parties. (*Id.* at 154–55.) The trial court denied the request. (*Id.* at 165.)

The next day, prior to sentencing, Novak renewed his request for a continuance to obtain the testing recommended by Dr. Potts. To refute the prosecution's suggestion that Jones's head injuries and childhood abuse were wholly unsubstantiated, Novak proffered some of Jones's military medical records documenting Jones's head injury while he was in the Marines. (RT 12/9/93 at 6–8, 10–11.) The trial court admitted the records, but again denied the request for a continuance. (*Id.* at 16–17.)

In sentencing Jones, the trial court found three aggravating factors as to both murders: that they were committed (1) for pecuniary gain, (2) in an especially heinous, cruel, or depraved manner, and (3) during the commission of one or more other homicides. (ROA 117, 118.) With respect to Tisha's murder, the court found a fourth aggravating factor based on her age. (ROA 117.) The court found no statutory mitigating circumstances with respect to either murder, but found several non-statutory factors: that Jones (1) suffered from long-term substance abuse, (2) was under the influence of alcohol and drugs at the time of the offense, (3) had a chaotic and abusive childhood, and (4) that his substance abuse problem might have been caused by genetic factors and aggravated by head trauma. (ROA 117, 118.) With respect to each murder conviction, the court found that the mitigating circumstances were not sufficiently substantial to outweigh the aggravating circumstances or to call for leniency and sentenced Jones to death for each murder.

(*Id.*) The Arizona Supreme Court affirmed the convictions and sentences on direct appeal. *Jones*, 185 Ariz. 471, 917 P.2d 200.

B. PCR proceedings

During the PCR proceedings, Jones was represented by attorney David Goldberg, who filed a petition raising 25 claims. (Doc. 247-1, Ex. A.) The following claims correspond to habeas Claims 20(O), (P), and (T):

> Claim 24(I)(2): "Counsel's reliance on a court appointed psychiatrist for sentencing was ineffective." (*Id.* at 85.)
>
> Claim 24(I)(3): "Trial counsel's failure to recognize the need for neurological and neuropsychological testing and presentation of the results at sentencing was ineffective." (*Id.* at 87.)
>
> Claim 24(I)(7): "Trial counsel failed to present meaningful additional witnesses and available evidence to support Jones's proposed mitigation." (*Id.* at 91.)

In support of these claims, counsel filed several motions for appointment of experts and discovery. (*See* Doc. 90.) These included motions for disclosure of jail and prison records, including any psychiatric/ psychological evaluations, disciplinary records, grading or population placement calculations, and family history. The motions were granted. Counsel also filed motions seeking the appointment of an aggravation/mitigation specialist, an Arizona certified

criminal defense specialist, and a neuropsychologist. Following oral argument, the court denied the motions.

On April 4, 2000, the PCR court held an evidentiary hearing on Claims 24(I)(3) and 24(I)(7). Randy Jones and Jones's mother testified, as did trial counsel Novak. Randy testified that he first spoke with Novak in July 1992 by telephone, talked with him again in October 1992, when Novak and his co-counsel visited the family in Nevada, and spoke with him a third time just prior to sentencing in December 1993. (RT 4/4/00 at 10, 11, and 15.) During these conversations, Randy provided background information about Jones's childhood, head injuries, and history of drug abuse and treatment. (*Id.*) Mrs. Jones testified that she informed Novak about the details of Jones's difficult birth, his head injuries, his drug use, which began at approximately age thirteen, and the physical abuse he suffered from his first stepfather. (*Id.* at 26–36.) She also testified that she told Novak that after she married Randy, Jones "had a normal childhood as far as school [and] baseball," and that they "had a good home life." (*Id.* at 29.)

Novak testified that he began work on Jones's defense immediately, and that one of the tasks undertaken by co-counsel was to develop Jones's life history. (*Id.* at 53–54.) He testified that he considered Dr. Potts "part of the defense team." (*Id.* at 102.) He conceded, however, that if he were trying the case today he would immediately seek the appointment of a mitigation specialist. (*Id.* at 51.) He also testified that he only considered the need for a neurological exam

after Dr. Potts testified at the sentencing hearing. (*Id.* at 99.)

The PCR court denied relief on Claim 24(I)(2) without explanation or factual findings. (ROA–PCR 59 at 2.) The court denied Claim 24(I)(3) because Dr. Potts "adequately addressed defendant's mental health issues at sentencing." (ROA–PCR 73 at 2–3). The court denied Claim 24(I)(7), finding that, "Testimony at the hearing showed that counsel presented the available witnesses and evidence to support mitigation. The additional witnesses and evidence suggested by Jones would have been redundant." (*Id.*) The court concluded that "Jones has not met its [sic] burden of proof of showing deficient performance by trial counsel." (*Id.*)

2. Analysis

Jones argues that Claims 20(O), (P), and (T) are fundamentally altered and unexhausted, and that their default is excused under *Martinez* by the ineffective assistance of PCR counsel. Respondents disagree. They also contend that the principles of judicial estoppel and law of the case prohibit Jones from now arguing that the claims are unexhausted. (Doc. 247 at 26–30.)

Until the case was remanded, there was no dispute that these claims were properly exhausted in state court and subject to federal habeas review under 28 U.S.C. § 2254(d). This Court carried out that review after holding an evidentiary hearing to receive the evidence that Jones now argues renders the claims unexhausted under *Dickens* and subject to *de novo* review under *Martinez*.

This scenario, which requires the Court to determine if PCR counsel performed ineffectively by failing to exhaust claims that the parties and the Court agreed were exhausted, is seemingly inconsistent with the goals of the AEDPA as defined in *Pinholster*.[1] However, pursuant to the directive of the Ninth Circuit in its remand order, the Court addresses Jones's arguments.

A. The claims are not fundamentally altered

Jones contends that his state claims have been fundamentally altered and therefore are unexhausted and subject to *de novo* review. Citing the evidence produced in these habeas proceedings, Jones argues that the claims raised in state court have been "changed . . . in federal court to include extensive and detailed factual allegations proving that he suffers from Cognitive Dysfunction (brain damage), Poly-Substance Abuse, Post-Traumatic Stress Disorder ("PTSD"), Attention Deficit/Hyperactivity Disorder ("AD/HD") and Mood Disorder, Not Otherwise Specified ("NOS")." (Doc. 246 at 37.) Jones also cites evidence that "[c]ontributing factors to these disorders included

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[1] The Supreme Court explained that the AEDPA "demonstrates Congress' intent to channel prisoners' claims first to the state courts. *Pinholster*, 563 U.S. at 182. "It would be strange to ask federal courts to analyze whether a state court's adjudication resulted in a decision that unreasonably applied federal law to facts not before the state court." *Id.* at 182–83; *see Moore v. Mitchell*, 708 F.3d 760, 785 (6th Cir. 2013) ("*Pinholster* plainly bans such an attempt to obtain review of the merits of claims presented in state court in light of facts that were not presented in state court. *Martinez* does not alter that conclusion.").

Jones's prenatal exposure to chrome, nicotine and caffeine and his traumatic birth." (*Id.*) Finally, Jones cites the new or more-detailed allegations that "he was physically, mentally, and sexually abused throughout his childhood" and "had a series of head injuries starting with his traumatic birth and including a mugging while Jones was in the military." (*Id.*) The Court discussed this evidence in its order denying relief on Claims 20(O), (P), and (T). (Doc. 220 at 9–25.)

This new information provides additional evidentiary support for Jones's allegations but does nothing to alter the legal bases of the claims. *See Weaver v. Thompson*, 197 F.3d 359, 364 (9th Cir. 1999); *Chacon v. Wood,* 36 F.3d 1459, 1468 (9th Cir. 1994); *see also Escamilla v. Stephens*, 749 F.3d 380, 395 (5th Cir. 2014) (finding *Martinez* inapplicable where new evidence did not fundamentally alter but "merely provided additional evidentiary support" for already-adjudicated state court claim). In *Dickens*, the petitioner exhausted only a "naked *Strickland* claim" which "did not identify any specific conditions that sentencing counsel's allegedly deficient performance failed to uncover." 740 F.3d at 1319. Here, by contrast, Jones argued in PCR Claim 24(I)(2) that he was prejudiced by trial counsel's reliance on Dr. Potts, an expert appointed by the court to examine Jones and provide a report prior to sentencing, who was "untrained in the specifics of neuropsychology" and whose findings "did not reveal neurological disorders and organic mental illness." (Doc. 247-1, Ex. A at 85.) In Claim 24(I)(3), Jones alleged that trial counsel performed ineffectively by failing "to present coherent evidence of Jones's brain injuries and the resulting

effects." (*Id.* at 88–89.) Specifically, Jones alleged that trial counsel failed to pursue neurological and neuropsychological testing that could have revealed "significant frontal lobe head traumas through physical injuries and drug or alcohol abuse." (*Id.* at 88.)

Likewise, Claim 24(I)(7) contained specific allegations of ineffective assistance based on trial counsel's failure to present mitigating evidence of Jones's "abusive childhood"; "organic brain injury from trauma and drug abuse," including a "history of blackouts," one of which occurred while he was in the military; the effects of such trauma on his behavior; and his amenability to rehabilitation. (*Id.* at 91 & n.9.) This evidence was available through witnesses including Jones's ex-wife, family members, friends, and counselors, and from birth, education, military, and prison records. (*Id.*)

The new information presented in this Court, including the experts' opinions and the lay testimony about Jones's social history, was contemplated in the allegations raised in state court, which is why the Court allowed evidentiary development of the claims. Thus, the evidence Jones has produced in this Court supplements but does not "fundamentally alter the legal claim already considered by the state courts . . . ." *Vasquez*, 474 U.S. at 260.

In *Landrigan v. Schriro*, the Ninth Circuit held that expert testimony regarding Landrigan's organic brain dysfunction did not fundamentally alter a state claim that counsel was constitutionally ineffective for failing "to undertake a reasonable investigation of mitigating factors, including information that could have been

derived from Landrigan's biological father and his adoptive sister." 441 F.3d 638, 648 (9th Cir. 2006), *rev'd on other grounds*, 550 U.S. 465 (2007), *and vacated*, 501 F.3d 1147 (9th Cir. 2007). The court explained that the new information "does not 'fundamentally alter the ineffective assistance claim presented to the state court. It simply provides additional evidentiary support for the claim . . . ." *Id.*

Similarly, in *Lopez v. Schriro*, 491 F.3d 1029, 1041 (9th Cir. 2007), the Ninth Circuit held that the district court erred in finding the petitioner's ineffective assistance of counsel claim was unexhausted. The court explained that "Lopez did at least make the general allegations of his counsel's lack of penalty phase preparation to the Arizona Supreme Court (including improper delegation to an inexperienced subordinate and failure to prepare mental health experts), and the state court record contains some evidence of a dysfunctional childhood and alcoholism." *Id.* The claims Jones raised in state court contained more than general allegations, and they were likewise exhausted.

Because Jones has not raised a new legal theory concerning trial counsel's performance, or placed the claim in a significantly different and stronger evidentiary posture, the PCR court had a "meaningful opportunity" to consider Jones's claims. *Id.* at 257; *cf. Poyson v. Ryan*, 879 F.3d 875, 896 (9th Cir. 2018) (finding state court did not have a meaningful opportunity to consider claim that included not only new facts but "a fundamentally new theory of counsel's ineffectiveness").

Claims 20(O), (P), and (T) were not fundamentally altered by the new evidence Jones presented in federal court, and *Martinez* does not apply to these exhausted claims.

B. PCR counsel was not ineffective

Even assuming, contrary to the record, that Claims 20(O), (P), and (T) are fundamentally altered and therefore unexhausted, *Martinez* does not excuse their default because PCR counsel did not perform ineffectively.

As noted, in making the cause determination *Martinez* calls for the performance of PCR counsel to be analyzed under the *Strickland* standard. 566 U.S. at 14; *see Clabourne*, 745 F.3d at 377. "To demonstrate that the performance by PCR counsel was deficient, [petitioner] must show that counsel's failure to raise the underlying IAC claim did not 'fall[ ] within the wide range of reasonable professional assistance' and 'overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy.'" *Murray v. Schriro*, 882 F.3d 778, 816 (9th Cir. 2018) (quoting *Strickland*, 466 U.S. at 689); *see Runningeagle v. Ryan*, 825 F.3d 970, 984 n.15 (9th Cir. 2016) (noting that *Strickland* standard applies even though *Martinez* did not define the scope of PCR counsel's duty to investigate). The inquiry under *Strickland* is highly deferential, and "every effort [must] be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." 466 U.S. at 689. To satisfy *Strickland*, a petitioner must

overcome "the presumption that, under the circumstances, the challenged action might be considered sound trial strategy." *Id.*

As discussed above, Goldberg presented the allegations contained in Claims 20(O), (P), and (T) during the PCR proceedings. In support of the claims, he requested "a thorough and independent neuropsychological assessment" to discover neurological and neuropsychological disorders and their relationship to the crime. (ROA-PCR 27 at 3, 5–6; *see* Doc. 121 at 39–40.) The PCR court denied his request. (*See* RT 4/12/99 at 26.)

Goldberg also requested a mitigation specialist to locate witnesses, including neighbors, childhood friends, and fellow residents at the drug rehab clinic, to corroborate Jones's traumatic birth, abusive childhood, head injuries, drug abuse, mental illness, and issues concerning his biological father. (ROA-PCR 24 at 3–4; *see* RT 4/12/99 at 15–16.) The PCR court denied the request, concluding that a private investigator could adequately conduct the mitigation investigation. (RT 4/12/99 at 16–17.)

Goldberg sought an investigator with capital case experience. However, the court insisted that he retain a local investigator. Because the only qualified investigator in Mohave County was the defense investigator counsel used during trial, Goldberg agreed to retain him despite his belief that using the same investigator as trial counsel presented a conflict of interest. (RT 6/1/99 at 3–8.)

Jones argues that Goldberg should have done more to "educate" the PCR court on the need for a neuropsychological evaluation. (Doc. 250 at 14.) Jones's arguments, however, are conclusory and do not suggest, let alone demonstrate, that PCR counsel performed deficiently in pursuing neuropsychological evidence. (*Id.*) In addition, this Court has already determined that Goldberg "diligently attempted to develop neuropsychological evidence in support of [Claims 20(O), (P), and (T)]," but was prevented from doing so by the PCR court's denial of funds for a neuropsychological examination. (Doc. 121 at 40.)

Jones also contends that Goldberg performed an inadequate investigation into Jones's background, including obtaining additional records and information from lay witnesses showing that Jones was sexually abused by his grandfather and that Jones's stepfather Randy was physically and emotionally abusive. (Doc. 246 at 52; Doc. 250 at 15.) As the Court previously found with respect to trial counsel's performance, however, PCR counsel "did not perform deficiently by failing to uncover information not shared by [Jones] until nearly ten years after his trial." (Doc. 220 at 35 n.14.) Goldberg was never put on notice of these instances of physical, emotional, and sexual abuse. *See Babbitt v. Calderon*, 151 F.3d 1170, 1174 (9th Cir. 1998). Jones further contends that Goldberg did not do enough to convince the judge to appoint a new investigator. (Doc. 246 at 50–51.)

In support of these allegations Jones cites *Hinton v. Alabama*, 134 S. Ct. 1081 (2014), and *Panetti v. Quarterman*, 551 U.S. 930 (2007). His reliance on these

cases is misplaced. In *Hinton*, the Supreme Court held that trial counsel performed ineffectively when he presented an unqualified expert based on a misunderstanding of the state's funding statutes. *Id.* at 1089. In *Panetti*, the Court held that the petitioner's due process rights were violated by the state court's refusal to allow an examination by a defense expert to counter the court-appointed experts' opinion that he was competent to be executed. 551 U.S. at 952. Here, Goldberg performed competently by requesting an appropriate expert and investigator.

In *Martinez*, the Court created an equitable exception to *Coleman* to "protect prisoners with a potentially legitimate claim of ineffective assistance of trial counsel . . . ." 566 U.S. at 9. Without this qualification, it is possible that "no state court at any level will hear the prisoner's claim." *Id.* at 10. Here, Goldberg carried out his duty to investigate and preserve potentially meritorious claims of ineffective assistance of trial counsel. *See Runningeagle*, 825 F.3d at 984 n.15. Claims 20(O), (P), and (T) were considered by the PCR court and then, supported with new evidence, by this Court. Jones has not carried his burden of showing that Goldberg "made errors so serious that [he] was not functioning as . . . 'counsel.'" *Id.* (quoting *Strickland*, 466 U.S. at 687).

Even if Claims 20(O), (P), and (T) were procedurally defaulted, PCR counsel's performance was not deficient and the default is not excused.

3. Conclusion

As the Ninth Circuit has observed in discussing the performance of counsel at sentencing, "There will always be more documents that could be reviewed, more family members that could be interviewed and more psychiatric examinations that could be performed," *Leavitt v. Arave*, 646 F.3d 605, 612 (9th Cir. 2011). Any new mitigating evidence will place an ineffective assistance of counsel claim in a stronger posture. In this case, however, the new evidence developed in federal court did not fundamentally alter Jones's state court claims, which remain exhausted. Even if the claims were unexhausted, their default would not be excused under *Martinez* because PCR counsel did not perform ineffectively.

Accordingly, the Court rejects "Jones's argument that his ineffective assistance of counsel claims are unexhausted and therefore procedurally defaulted, and that deficient performance by his counsel during his post-conviction relief case in state court excuses the default." (Doc. 240-2.)

Having considered Jones's claims under *Martinez* and *Dickens*, this Court has not changed its conclusion that Claims 20(O), (P), and (T) be dismissed with prejudice**.**

Dated this 24th day of May, 2018.

/s/ Susan R. Bolton
Susan R. Bolton
United States District Judge

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

No. CV-01-384-PHX-SRB

[Filed August 31, 2006]

Danny Lee Jones, Petitioner,	)
vs.	)
Dora Schriro, et al., Respondents.	)

DEATH PENALTY CASE

ORDER RE: CLAIMS 20(O), 20 (P), AND 20(T)

Danny Lee Jones (Petitioner) is an Arizona inmate seeking federal habeas relief in connection with his convictions and death sentences for the first-degree murders of Robert and Tisha Weaver. On March 21-23, 2006, the Court held an evidentiary hearing regarding Claims 20(O), 20(P), and 20(T) of Petitioner's amended habeas petition. The claims allege ineffective assistance of trial counsel at sentencing based on counsel's failure to investigate and present mitigating

evidence. (Dkt. 54 at 126-29.)[1] On June 9, 2006, the parties submitted written closing arguments. (Dkts. 218, 219.) For the reasons set forth herein, the Court finds that Petitioner is not entitled to relief.[2]

STATE COURT PROCEEDINGS

1. Trial and sentencing

In 1993 Petitioner was tried in Mohave County Superior Court for the murder of Robert Weaver and Weaver's seven-year-old daughter, Tisha, and the attempted murder of Weaver's seventy-four-year-old grandmother, Katherine Gumina.[3] Petitioner was represented by Mohave County Assistant Public Defender Lee Novak. At the outset of the case, Novak was assisted by Katie Carty, a young attorney in his office.

The trial evidence showed that all of the victims were attacked with a baseball bat. The evidence also indicated that the child was dragged out from under a bed, then beaten and strangled or smothered. After the murders, Petitioner, who was unemployed and the subject of outstanding warrants, removed the gun collection from the victims' house and traveled to Las

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[1] "Dkt." refers to the documents in this Court's case file.

[2] The Court will address Petitioner's remaining habeas claims in a separate order.

[3] Ms. Gumina ultimately died as a result of her injuries, but the State chose not to amend the indictment. *State v. Jones*, 185 Ariz. 471, 478, 917 P.2d 200, 207 (1996).

Vegas, selling the guns to pay for cab fare and living expenses.

At trial Petitioner testified that he killed Weaver in self-defense and that he struck Ms. Gumina reflexively when she startled him. He further testified that while he was fighting with Weaver in Weaver's garage, Frank Sperlazzo, an acquaintance of Petitioner who was attempting to collect a drug debt from Weaver, entered the house and killed Tisha as he was stealing Weaver's guns. Also testifying on Petitioner's behalf was Dr. Lisa Sparks, M.D., an expert on addictions, who detailed the effects of Petitioner's long-term substance abuse, particularly his abuse of methamphetamine.

On September 13, 1993, the jury convicted Petitioner on all counts. The trial court set sentencing for November 8, 1993, ordered a presentence report ("PSR"), and granted Petitioner's request for a mental health examination pursuant to Arizona Rule of Criminal Procedure 26.5.

At a presentence conference on October 28, 1993, the court granted Novak's unopposed request to continue sentencing and ordered Dr. Potts to complete his Rule 26.5 evaluation by November 29, 1993. (ROA at 32; RT 10/28/93 at 3-4.)[4] Because Dr. Potts wanted

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[4] "RT" refers to the state court reporter's transcript; "ROA" refers to the three-volume record on appeal from trial and sentencing prepared for Petitioner's direct appeal to the Arizona Supreme Court (Case No. CR-93-541-AP). "ROA-PCR" refers to the four-volume record on appeal from post-conviction proceedings prepared for Petitioner's petition for review to the Arizona Supreme Court (Case No. CR-00-512-PC). The original reporter's transcripts and certified copies of the trial and post-conviction records were

to review the probation department's PSR before completing his evaluation, the court ordered that the PSR be completed by November 4, 1993, and set a further presentence conference for December 1, 1993. (RT 10/28/93 at 3-4.) The sentencing hearing was scheduled to begin on December 8, 1993. (*Id.*) On November 22, 1993, the court held a hearing at Novak's request because Dr. Potts had not yet evaluated Petitioner; following the hearing, Petitioner was transported to Phoenix for the evaluation. (RT 11/22/93 at 2; ROA 235.) Dr. Potts interviewed Petitioner on November 26, 1993. (RT 12/1/93 at 2.) At the presentence conference on December 1, 1993, the court informed the parties that it had transmitted a copy of the PSR to Dr. Potts, who had not previously received it, and indicated that Dr. Potts was to submit his report on December 6. (*Id.*) Both parties informed the court that they were arranging for witnesses to appear at the December 8 hearing. (*Id.* at 3.) Although the record does not indicate when the parties received Dr. Potts's report, it was dated December 3. (Ex. 23.)

On December 8, 1993, the sentencing hearing was held. As part of Petitioner's mitigation case, Novak presented testimony from Petitioner's stepfather, Randy Jones. Jones testified that Petitioner's biological father, the first husband of Petitioner's mother, physically abused Petitioner's mother while she was pregnant – in one instance throwing her down a flight of stairs – and that during Petitioner's birth her heart

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provided to this Court by the Arizona Supreme Court. (*See* Dkt. 14.) "Ex." refers to the exhibits admitted at the evidentiary hearing before this Court.

had stopped and forceps had been used to deliver Petitioner. (RT 12/8/93 at 41, 44-45.) Jones testified that when Petitioner was four, he experienced black-outs, and for years thereafter bruised easily due to a calcium deficiency. (*Id.* at 42-46, 65.) He testified that Petitioner's first stepfather, the second husband of Petitioner's mother, verbally and physically abused Petitioner, Petitioner's half-sister, and Petitioner's mother. (*Id.* at 42-46.) Jones also testified about various head injuries suffered by Petitioner, which occurred when Petitioner was approximately thirteen, fifteen, and nineteen years old. (*Id.* at 47-48, 49, 50, 65.) In each of the first two incidents, Petitioner had fallen off roofs; although he was treated for concussions, no medical records were available. (*Id.* at 48, 49, 65-67.) The last incident, which, according to Jones, resulted in unconsciousness and hospitalization, occurred during a mugging while Petitioner was serving in the Marines. (*Id.* at 50.) Jones also testified regarding Petitioner's history of drug and alcohol use, which began when he was about thirteen, and his participation in drug treatment programs, including an in-house facility in San Francisco where he stayed for almost two years. (*Id.* at 52-61.) Jones described how Petitioner's behavior deteriorated after he began abusing substances; he also described Petitioner's behavior as improving when he was placed on the drug lithium. (*Id.* at 51-52, 55-57, 60-61.)

Dr. Potts took the stand after hearing Jones's testimony. Dr. Potts testified that he had been unaware at the time he wrote his report that Petitioner had fallen off a roof when he was fifteen. (*Id.* at 77-78.) He noted another head injury Petitioner suffered when

he was six or seven in which he was reportedly unconscious for about twenty minutes; this incident had not been mentioned by Jones. (*Id.*) Dr. Potts also noted that he had not included in his report Petitioner's episodes of passing out when he was four. (*Id.*) However, Dr. Potts stated that these additional incidents did not cause him to alter his opinions regarding Petitioner's condition. (*Id.* at 78.) When asked whether he believed he had adequate data to offer an opinion regarding mitigating findings, Dr. Potts stated that he was always willing to review additional information, and that:

> I believe everything I reviewed and what I have heard about the case and reviewed with the defendant, his comments to me. I would have liked, and I think I have – I think it would be valuable to have had some neurologic evaluations, not – by a neurologist, clinical exam, such as a CAT scan, possibly an MRI, possibly EEG, possibly some sophisticated neurological testing, because I think there's very strong evidence that we have – well, there's clear evidence that we have, I believe, of traumatic brain injury, and there's some other evidence that I believe we may have organic neurologic dysfunctions here that has gone on since he's been about 13. So, there's some other testing that I think would be valuable to have to pin down the diagnosis. Again –
>
> Q. And you think that further testing might shed some additional light on, perhaps, some of these factors you listed and maybe why

> Mr. Jones behave[d] in the way he did on March 26, 1992?
> A. Yes. I think it could help in clarifying and giving us etiology as the behavioral components, the explosive outbursts, the aggression, the mood changes, and the changes that occurred in his personality as noted by his mother when he was about 13, 14 years of age.
> Q. In your opinion, could that information possibly provide significant mitigating, any – a significant mitigating factor as to what would be relevant to the issues at this hearing?
> A. Clearly I think it would be corroborative of my clinical impressions and my diagnostic impressions in my report.

(*Id.* at 78-80.)

Dr. Potts then identified seven factors that he considered mitigating. (*Id.*) First was Petitioner's "chaotic and abusive childhood" and its effect on his mental health and development, about which Dr. Potts offered detailed testimony. (*Id.* at 80-83.) Dr. Potts also listed as mitigating circumstances Petitioner's history of significant substance abuse, the likelihood that he suffered from an attenuated form of bipolar disorder, the fact that he had a history of multiple head traumas, and genetic loading for substance abuse and affective disorders. (*Id.* at 83-92, 94-98, 100-04.) In discussing Petitioner's head traumas, Dr. Potts noted that there were usually "long term neurologic sequelae" that can damage the brain and make it susceptible to other changes, such as lowered thresholds for aggressive outbursts. (*Id.* at 100.) He testified that additional

testing would "clearly assist in coming to a more definitive conclusion" regarding whether Petitioner had brain damage. (*Id.* at 103.) Dr. Potts recommended additional testing "specifically for forensic purposes." (*Id.* at 137.)

Following Dr. Potts's testimony, Novak asked the court for a continuance to obtain the testing recommended by Dr. Potts as additional potential mitigation and to bolster the basis for Dr. Potts's opinion, which the prosecution had challenged in part because such testing had not been conducted. (*Id.* at 150-51, 165.) Novak explained that until he had received Dr. Potts's report, two days prior to the hearing, and heard his testimony, he had not realized the significance of Petitioner's history of head traumas with respect to possible neurological damage. (*Id.*) The prosecution opposed the request, arguing that a factual basis did not exist for neurological testing. (*Id.* at 153-54.) Novak replied that Dr. Potts had not had sufficient time prior to the hearing to obtain neurological testing after receiving materials from the parties. (*Id.* at 154-55.) After briefly taking the request under advisement, the trial court denied it, noting that Novak had previously retained Dr. Sparks, who had testified at trial, and stated that "if there were any follow-up questions of a psychological or neurological nature, I would think that the defense would have followed them up" prior to sentencing. (RT 12/8/93 at 165.) The court indicated that it would review the transcript of Dr. Sparks's trial testimony before sentencing Petitioner the next day. (*Id.* at 167-68.)

The following day, prior to sentencing, Novak renewed his request for a continuance to obtain the testing recommended by Dr. Potts; to refute the prosecution's suggestion that Petitioner's head injuries and childhood abuse were wholly unsubstantiated, Novak proffered some of Petitioner's military medical records documenting Petitioner's head injury while he was in the Marines. (RT 12/9/93 at 6-8, 10-11.) The trial court admitted the records, but denied the renewed request for a continuance, stating that:

> I have read the case cited by both the State and defense, and also reviewed Dr. Potts' report. What Dr. Potts said in his report is that he believes that the defendant had head trauma which increases the potential for neurologic sequela contributing to his behavior. And at the hearing yesterday, my recollection is he was assuming based on the allegation that the defendant had fallen from a roof and hit his head, plus other allegations about head injuries, that he had mild trauma which increased the potential for aggravating the substance abuse. That's a long shot away, far away in–both in speculation and in fact from what's alleged to have occurred in [*State v. Stuard*, 176 Ariz. 589, 863 P.2d 881 (1993)].
>
> This case has been pending a long time, and I think the evidence is very slim, nonexistent, in fact, that the defendant has anything that requires any kind of neurological examination. So, I am ready to proceed.

(*Id.* at 16-17.)

In sentencing Petitioner, the trial court found three aggravating factors as to both murders: that they were committed (1) for pecuniary gain, (2) in an especially heinous, cruel, or depraved manner, and (3) during the commission of one or more other homicides. (ROA 117, 118.) With respect to Tisha's murder, the court found a fourth aggravating factor based on her age. (ROA 117.) The court rejected Petitioner's testimony that Sperlazzo killed Tisha, concluding that Petitioner had "manufactured this tale" and that "[i]n the past [Petitioner] has shown that he is willing to lie if it benefits him." (ROA 117 at 4.) The court found no statutory mitigating circumstances with respect to either murder, but found several non-statutory factors: that Petitioner (1) suffered from long-term substance abuse, (2) was under the influence of alcohol and drugs at the time of the offense, (3) had a chaotic and abusive childhood, and (4) that his substance abuse problem might have been caused by genetic factors and aggravated by head trauma. (ROA 117, 118.) With respect to each murder conviction, the court found that the mitigating circumstances were not sufficiently substantial to outweigh the aggravating circumstances or to call for leniency and sentenced Petitioner to death for each of the murders. (*Id.*) The Arizona Supreme Court affirmed the convictions and sentences on direct appeal. *State v. Jones*, 185 Ariz. 471, 917 P.2d 200 (1996).

2. Post-conviction proceedings

Petitioner sought post-conviction relief ("PCR") from the trial court. In his PCR petition, he alleged that his counsel was ineffective at sentencing for failing to

obtain a defense mental health expert, failing to timely seek neurological and neuropsychological testing, and failing to present additional evidence of Petitioner's abusive childhood, head trauma, and drug abuse; these allegations correspond, respectively, to Claims 20(O), (P) and (T) in the amended habeas petition. On April 4, 2000, the PCR court held an evidentiary hearing on Claims 20 (P) and (T), but denied a hearing on Claim 20(O). At the hearing, Randy Jones and Petitioner's mother testified, as did trial counsel Novak. Jones testified that he first spoke with Novak in July 1992 by telephone, talked with him again in October 1992, when Novak and Ms. Carty visited the family in Nevada, and spoke a third time just prior to sentencing in December 1993. (RT 4/4/00 at 10, 11, and 15.) During these conversations, Jones provided background information about Petitioner's childhood, head injuries, and history of drug abuse and treatment. (*Id.*) Mrs. Jones testified that she informed Novak about the details of Petitioner's difficult birth, his head injuries, his drug use, which began at approximately age thirteen, and the physical abuse he suffered from his first stepfather. (*Id.* at 26-36.) She also testified that she told Novak that after she married Mr. Jones, Petitioner "had a normal childhood as far as school, baseball," and that they "had a good home life." (*Id.* at 29.) Novak testified that he began work on Petitioner's defense immediately, and that one of the tasks undertaken by Ms. Carty was to develop Petitioner's life history. (*Id.* at 53-54.) He testified that he considered Dr. Potts "part of the defense team." (*Id.* at 102.) He conceded, however, that if he were trying the case today he would immediately seek the appointment of a mitigation specialist. (*Id.* at 51.) He also testified

that he only considered the need for a neurological exam after Dr. Potts testified at the sentencing hearing. (*Id.* at 99.)

In its written order, the PCR court denied relief on Claim 20(O) without explanation or factual findings. (ROA-PCR 59 at 2.) With respect to Claims 20(P) and (T), the PCR court stated:

> With regard to Claim 24I[6], petitioner alleges that trial counsel was ineffective at sentencing by failing ". . . to recognize the need for neurological and psychological testing . . ."
>
> The report and testimony of Dr. Potts who was appointed by the Court, adequately addressed defendant's mental health issues at sentencing.
>
> . . .
>
> In Claim 24I(7), petitioner alleges that "Trial counsel failed to present meaningful additional witnesses and available evidence to support Jones' proposed mitigation."
>
> Testimony at the hearing showed that counsel presented the available witnesses and evidence to support mitigation. The additional witnesses and evidence suggested by petitioner would have been redundant.
>
> The Court finds that the petitioner has not met its [sic] burden of proof of showing deficient performance by trial counsel.

(ROA-PCR 73 at 2-3). The PCR court's ruling is the only "reasoned" state court decision regarding

Claims 20(O), (P), and (T). The Arizona Supreme Court summarily denied the petition for review.

EVIDENCE DEVELOPED IN THE HABEAS PROCEEDINGS

Petitioner has presented expert testimony, based upon, inter alia, the results of neuropsychological testing, suggesting that Petitioner suffers from several psychological conditions: cognitive disorder or impairment; post-traumatic stress disorder (PTSD); poly-substance abuse; attention deficit hyperactivity disorder (ADHD); and a mood disorder. Respondents have countered with expert testimony indicating that the test results and the record as a whole do not support diagnoses of cognitive disorder, PTSD, or a mood disorder. Petitioner's experts further ascribe as a cause of Petitioner's alleged cognitive disorder or impairment a series of head injuries that occurred with some regularity throughout Petitioner's life prior to the date of the instant offenses.

1. Petitioner's witnesses

At the evidentiary hearing three mental health experts testified for Petitioner: Dr. Potts; Dr. Pablo Stewart, a psychiatrist; and Dr. Alan Goldberg, an attorney and neuropsychologist. Petitioner's trial counsel, Lee Novak, also testified. Their findings and testimony can be summarized as follows.

Dr. Potts: As discussed above, Dr. Potts performed a court-ordered psychiatric evaluation of Petitioner in November 1993. (Ex. 23.) At the evidentiary hearing, Dr. Potts testified that he had been appointed as an independent expert (RT 3/21/06 at 13); that he was not

a mitigation specialist and did not undertake an adequate mitigation investigation but instead performed only a "cursory examination" to obtain a "gross overview" of Petitioner's condition (*id.* at 32, 92); and that he had urged Mr. Novak to obtain neuropsychological as well as neurological testing of Petitioner (*id.* at 60-61). Dr. Potts acknowledged that when he prepared his report and testified at Petitioner's sentencing hearing he had obtained background information from Petitioner's parents. (*Id.* at 52-53.) His report included a "societal and developmental history," which set out information about Petitioner's childhood abuse by his first stepfather, his head injuries and extensive drug abuse, and the role genetic-loading played in Petitioner's mental-health difficulties. (Ex. 23 at 2-3.) All of these were factors that the trial court determined to be mitigating. (ROA 117, 118.)

Dr. Potts acknowledged that he did not diagnose Petitioner with PTSD, or even discuss the condition, although as a psychiatrist he was qualified to make such a diagnosis. (RT 3/21/06 at 66-69.) Dr. Potts further acknowledged that Petitioner, whose memory was intact, did not provide any information regarding physical abuse by Randy Jones or head injuries resulting from car accidents. (*Id.* at 79-80.) Finally, Dr. Potts did not note any "gross" or "obvious" cognitive deficits (*id.* at 49), and estimated that Petitioner's IQ was in the normal range (*id.* at 49-50; Ex. 23 at 3).

Dr. Stewart: Dr. Stewart evaluated Petitioner in March 2002 and testified on his behalf at the evidentiary hearing. In his declaration and testimony,

Dr. Stewart concluded that Petitioner suffers from cognitive dysfunction; PTSD; poly-substance abuse, which Dr. Stewart described as a product of genetic predisposition and self-medication; and mood disorder NOS (not otherwise specified). (Ex.1; RT 3/21/06 at 172.)

Dr. Stewart reached his conclusion that Petitioner suffers from cognitive impairment based primarily upon two pieces of data: the low scores Petitioner achieved on standardized tests from the eighth grade (RT 3/21/06 at 175-76), and the results of neuropsychological testing performed by Dr. Goldberg, specifically the gap between Petitioner's performance and verbal IQ scores (*id.* at 177). With respect to Petitioner's performance on standardized tests, however, Dr. Stewart acknowledged that absenteeism and drug use could have contributed to Petitioner's low scores. (*Id.* at 211-14.)

Dr. Stewart also offered his opinion regarding the causes of Petitioner's cognitive impairment, among which Dr. Stewart listed pre-natal exposure to chrome, caffeine, and nicotine; childhood physical, sexual, and mental abuse, including emotional and physical abuse by Randy Jones; and cumulative head injuries. (Ex.1 at 21-27; RT 3/21/06 at 178-87.) However, as Dr. Stewart conceded, the record contains contradictory information regarding many of these circumstances. For example, Petitioner's mother reported that, while Petitioner's birth was difficult, he was delivered full-term, weighing seven pounds seven ounces, and thereafter developed normally. (RT 3/21/06 at 208-09; *see* Ex. 56, Interview with Peggy and Randy Jones, 12/3/01 at 6.) The record

also includes inconsistent information with respect to Randy Jones's treatment of Petitioner and other family members. While Dr. Stewart reports that Jones was extremely abusive, both mentally and physically, to the entire household, elsewhere Petitioner had reported that he came from a good family and was not abused (Ex. 26) and characterized Jones as his "real dad, . . . the only one that has treated me good. He has never hit me or anything." (Ex. 14). Similarly, Petitioner's mother described Randy Jones as controlling but not physically abusive. (Ex. 56, Interview with Peggy Jones, 12/10/01 at 2, 4, 10, 11.)

Finally, as Dr. Stewart acknowledged, there is no documentation to support Petitioner's claims of multiple head injuries. (See RT 3/22/06 at 233-34.) With the exception of the 1983 "mugging," no medical records exist regarding any of the incidents, and the only source corroborating Petitioner's self-report is his mother's account of three head injuries Petitioner suffered as a child and adolescent. Moreover, although Petitioner has described the 1983 incident as a beating in which he was struck with a two-by-four, suffered convulsions, remained unconscious for three days (*see, e.g.*, Ex. 12 at 2), and was "almost killed" (Ex. 53 at 3), contemporaneous medical records present a very different account. The records indicate that Petitioner was hospitalized for two days after being found lying unresponsive. (Ex. 15.) Petitioner was intoxicated; there "was no apparent accident involved." (*Id.*) Initially, Petitioner "appeared to be sleeping" and responded only to physical stimuli; however, after receiving Narcon, a medication that counteracts the effects of intoxication, he responded to questions,

denying that he felt any local pain and admitting that he had consumed "many beers." (*Id.*) He exhibited "no apparent trauma," and his head was "atraumatic." (*Id.*) Further examination revealed only a "minor abrasion and a tender area over the right parietal scalp." (*Id.*) The results of neurological exams were "normal." (*Id.*) His discharge diagnosis listed "head trauma," "alcohol intoxication," and "resolved apparent concussion." (*Id.*) Significantly, Petitioner's medical records further reveal that during his subsequent treatment for alcohol abuse, his "[c]ognitive testing was normal." (*Id.*; *see* RT 3/23/06 at 401.)

Dr. Stewart also concluded that Petitioner suffers from PTSD. In his report, Dr. Stewart discussed only the first of the four criteria that must be satisfied to reach a diagnosis of PTSD according to the DSM-IV; i.e., that Petitioner had experienced a traumatic event, having witnessed and been the victim of abuse during his childhood.[5] (Ex. 1 at 27; *see* RT 3/22/06 at 237.) In his testimony, however, Dr. Stewart insisted that Petitioner also met the remaining criteria – re-experiencing of the trauma, avoidance, and hyperarousal. (RT 3/22/06 at 240.) Although he did not attempt to determine whether Petitioner experienced these conditions at the time of the murders, Dr. Stewart testified that the effects of PTSD were present in all aspects of Petitioner's life. (RT 3/22/06 at 237-43.) Thus, according to Dr. Stewart, Petitioner was "acting under the effects of PTSD" when he beat Weaver and Ms. Gumina to death with a baseball bat.

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[5] "DSM-IV" refers to the Diagnostic & Statistical Manual of Mental Disorders (4th ed. 1994).

(Ex. 1 at 32.) Dr. Stewart also adopted Dr. Foy's conclusions regarding PTSD.[6] As Respondents note, however, it is unclear whether Dr. Foy actually diagnosed Petitioner with PTSD; for example, in his report he described his finding as "probable chronic PTSD" (Ex. 5 at 10), and in his deposition Dr. Foy characterized his opinion only as suggesting that "there's a very high probability that [Petitioner] would be diagnosed by anyone with PTSD" (RT 3/22/06 at 247-48). Finally, Dr. Stewart acknowledged that Petitioner's conduct at the time of the murders could also be attributed to substance abuse, and that he could not determine the degree to which Petitioner's behavior was the result of PTSD as opposed to the use of methamphetamine and alcohol. (RT 3/22/06 at 243–44.)

Dr. Stewart also diagnosed Petitioner with a mood disorder NOS. (Ex. 1 at 24.) This diagnosis is based upon Petitioner's mental-health history, which includes a suicide attempt, psychiatric treatment using the drug lithium, and Arizona DOC records indicating that

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[6] Two of Petitioner's experts prepared reports but did not testify at the evidentiary hearing: psychologist David Foy and neuropsychologist Shoba Sreenivasan. Dr. Foy conducted a psychosocial history and evaluation of Petitioner. (Ex. 5.) He concluded that Petitioner suffers from PTSD, Polydrug Abuse, Depressive Disorder, as well as compromised cognitive and emotional functioning and learning deficits. (*Id.*) Dr. Sreenivasana did not perform any tests but prepared a report, based upon his review of the record and Dr. Goldberg's test results, concluding that Petitioner suffered from long-term poly-substance abuse as well as compromised cognitive functioning due to early onset of substance abuse and the cumulative impact of repeated head traumas. (Ex. 8.)

Petitioner was diagnosed with a bipolar disorder and treated with mood-stabilizing drugs and anti-psychotics. (RT 3/21/06 at 201-06.) Dr. Stewart acknowledged, however, that Petitioner's DOC records discuss Petitioner's depressive symptoms but include no direct indications that Petitioner exhibited symptoms of mania. (*Id.* at 260.)

Also included in Dr. Stewart's declaration is information detailing Petitioner's allegation that he had been sexually assaulted by his grandfather. (Ex. 1 at 15, 22.) The source of this information is Dr. Foy's report, which indicates that Petitioner suffered severe sexual abuse for a period of five years, from age nine to fourteen. (RT 3/22/06 at 234.) However, Randy Jones and Petitioner's mother "never saw any indication that [Petitioner] may have been sexually abused by anyone, nor were they aware of any sexual perpetrators in the family." (Ex. 56, Interview with Peggy and Randy Jones, 12/10/01 at 6.) Dr. Stewart conceded that the information concerning sexual abuse was most likely based upon Petitioner's self-report to Dr. Foy. (RT at 3/22/06 at 234-35.)

Finally, in his declaration Dr. Stewart concluded that, "The result of these mental illnesses, biological, environmental, social and other compromising factors, culminated in, at the time of the murder, an impairment in Danny's capacity to appreciate the wrongfulness of his actions and/or to conform his conduct to that required by law."[7] (Ex. 1 at 32.)

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[7] In the Conclusions Section of his declaration Dr. Stewart went even further, including a paragraph endorsing Petitioner's account

Dr. Goldberg: Dr. Goldberg performed a neuropsychological evaluation of Petitioner in February 2002 and testified at the evidentiary hearing. In his declaration, Dr. Goldberg offered "diagnostic impressions" of "attention deficit disorder and learning disability." (Ex. 12 at 7; *see* RT 3/22/06 at 303.) These impressions are based upon the results of neuropsychological examinations, including, most significantly, the difference in Petitioner's performance and verbal IQ scores as well as subtest "scatter" within

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of the crimes. (Ex. 1 at 31-34.) According to Dr. Stewart, "Danny's psychological profile supports the events as described by Danny on the night of the crimes, including Frank's responsibility for Tisha Weaver's murder." (*Id.* at 33.) In assessing Dr. Stewart's credibility, the Court takes into account his willingness to present an opinion on a factual issue which concerns only the guilt phase of the trial and which was resolved, with a result contrary to that reached by Dr. Stewart, by the jury, the trial court, and the Arizona Supreme Court.

The Court also takes note of Dr. Stewart's reliance on the following factors to support his assertion that Petitioner did not kill Tisha. First, Dr. Stewart explains, without reference to corroborating sources, that Petitioner "was by all accounts a good step-father and is now a good father." (*Id.* at 32.) Dr. Goldberg reports, by contrast, that Petitioner "had a child with a girlfriend subsequent to his divorce. This child is now 9 years old, and he has never met her." (Ex. 12 at 2.) Second, Dr. Stewart states that he believes Petitioner's version of his activities on the night of the murders because Petitioner "has a history of submissive, almost child-like behavior, against older males." (Ex. 1 at 32-33.) Yet in the same section of his declaration, Dr. Stewart observes that Petitioner "at least twice in his young life defended himself in a life-threatening situation with a baseball bat." (*Id.* at 32.) In these instances, Petitioner is alleged to have responded to abuse from adult males not in a submissive manner but by confronting them and threatening them with violence.

test results from each category. (*See* RT 3/22/06 at 284-85.) Dr. Goldberg testified that such scatter is seen in only five percent of the population. (*Id.* at 284, 338.) Dr. Goldberg further noted a "significant change" for the worse in Petitioner's grades from the first to the eighth grade. (*Id.* at 284.) According to Dr. Goldberg, a bipolar disorder "can also be diagnosed," as well as "[s]ome 'soft' neurological signs" that might be "sequelae of repeated blows to the head." (Ex. 12 at 7.) Based upon these impressions, Dr. Goldberg opined, with respect to the issue of premeditation, that "it is unlikely that this man would've been capable of violent acts without the influence of drugs and alcohol" and that "[t]his would be quite different from methodically carrying out criminal activity with intention, and after reflection." (*Id.* at 8.)

In his testimony, Dr. Goldberg acknowledged that many of Petitioner's scores on the neuropsychological tests were in the average or above-average range (RT 3/22/06 at 309-14, 321-23); that Petitioner's full-scale IQ score – 97 – is normal (*id.* at 321); that the decline in Petitioner's grades from elementary to high school could be attributable to drug use, absenteeism, and lack of interest as well as to cognitive impairment (*id.* at 334-35); that, with the exception of the "mugging" while Petitioner was in the Marines, there was no medical documentation of any of Petitioner's reported head injuries, and that the information that Petitioner had been unconscious for three days after the "mugging" was based upon his self-report rather than the contemporaneous records of the incident (*id.* at 330-34). Dr. Goldberg also acknowledged that, despite the voluminous record documenting the extensive efforts to

evaluate Petitioner's mental status, and despite the recommendations from Dr. Potts in 1993 and from Dr. Goldberg in 2002, he, Dr. Goldberg, was not aware that Petitioner had ever been subjected to any neurological testing. (*Id.* at 336-37.) Dr. Goldberg also conceded that Petitioner's rating of "severely depressed," as scored on the Beck Depression Inventory, might reflect a normal emotional response to life as a death row prisoner. (*Id.* at 319.)

Lee Novak: Trial counsel Novak testified that he did not seek appointment of a mitigation specialist. (RT 2/21/06 at 107.) According to Novak, at the time of Petitioner's trial, it was not "common practice" in Mohave County to employ a mitigation expert, and in any case there was no funding available for such an appointment. (RT 3/21/06 at 150.) He indicated, however, that co-counsel, Ms. Carty, and his investigator, Austin Cooper, gathered information about Petitioner's background. (*Id.* at 107-08.) He testified that funding through the Public Defender's Office was limited and that his superior advised him to seek funding for experts from the trial court. (*Id.* at 110.) As a result of Novak's requests, the court authorized limited funding for a crime-scene investigator and for Dr. Sparks, the addictionologist who testified at the guilt stage of trial. (*Id.* at 110-14.)

Novak also testified that Dr. Potts, although appointed and funded by the trial court, in fact served as the equivalent of Petitioner's mitigation specialist. Novak explained that Dr. Potts "did not act as a neutral, detached court-appointed expert." (RT 3/21/06 at 121.) Instead, Dr. Potts "indicated that his role was

going to be to help us." (*Id.*) In fact, Dr. Potts "actively assisted developing mitigation, planning strategy" (*id.*); he urged Novak to move for a continuance for additional neurological testing, and advised Novak to cite the case of *State v. Stuard*, 176 Ariz. 589, 863 P.2d 881 (1993) in support of the motion (*id.* at 123). According to Novak, his discussion of strategy with Dr. Potts the night before Dr. Potts testified at the sentencing hearing "was more like meetings I've had since with aggravation/mitigation experts who are part of our defense team." (*Id.* at 122-23, 125.)

2. Respondents' witnesses

Respondents called three experts to testify at the evidentiary hearing: Dr. Steven Herron, a psychiatrist formerly employed by the Department of Corrections; Dr. Anne Herring, a neuropsychologist; and Dr. John Scialli, a psychiatrist. Their findings and testimony can be summarized as follows.

Dr. Herron: Dr. Herron treated Petitioner from 2003 to 2005. The treatment consisted primarily of the management of Petitioner's medication. (RT 3/23/06 at 362, 374.) Based upon a working diagnosis of bipolar disorder, Dr. Herron treated Petitioner for depression and anxiety. (*Id.* at 363-64.) Dr. Herron stated that both depression and anxiety are common among death-row inmates. (*Id.* at 364.) He testified that he believed the diagnosis of bipolar disorder was reasonable, although he did not observe any manic or hypomanic episodes. (*Id.* at 363.) Finally, Dr. Herron detected no signs of neurological dysfunction, cognitive impairment, or PTSD, though he could not rule those conditions out. (*Id.* at 366-68, 375-76.)

Dr. Herring: Dr. Herring, a clinical neuropsychologist, interviewed and tested Petitioner and prepared a report dated November 2, 2005. (Ex. 51.) Based upon the results of the tests she performed and her review of test results obtained by Dr. Goldberg, Dr. Herring concluded that Petitioner does not suffer from cognitive impairment or ADHD. (*Id.* at 7-8; *see* RT 3/23/06 at 443.)

Dr. Herring did not repeat the tests Dr. Goldberg administered on which Petitioner performed in the average or above-average range. (RT 3/23/06 at 404-05.) She administered tests designed to measure "executive function"; according to Dr. Herring, the results of such tests would indicate whether Petitioner suffers from "even subtle cognitive dysfunction as a result of head injuries." (*Id.* at 405.) On two of these tests, the Category Test and the Wisconsin Card Sorting Test, Petitioner performed in the "well above average range." (Ex. 51 at 6.) On tests implicating another category of executive functioning ("working memory/divided attention"), Petitioner scored in the low-average to average range, with one exception. (RT 3/23/06 at 408-11, 431; Ex. 51 at 6-7.) On that test, Petitioner scored in the borderline-impaired range for shorter delay intervals. (*Id.*) However, his performance improved to the average range for the longer, more difficult delay intervals, suggesting to Dr. Herring that Petitioner's "attention and working memory really are intact." (RT 3/23/06 at 431.)

On other tests measuring memory, Petitioner's performance "fluctuated somewhat but revealed largely intact abilities." (Ex. 51 at 5.) Petitioner's scores were

lower on tests measuring immediate as opposed to delayed recall. (*Id.*; RT 3/23/06 at 413-16; Ex. 12.) According to Dr. Herring, this "atypical presentation," by which Petitioner was able to recall information more successfully after a delay, is inconsistent with memory loss due to brain injury and may indicate that Petitioner experienced anxiety or was distracted during the testing. (RT 3/23/06 at 415-16.) On tests measuring attention, Petitioner scored in the average to very superior range, with one exception, a test administered by Dr. Goldberg but "not compared to any norms." (*Id.* at 421.) While acknowledging that these tests are not "differentially diagnostic" of ADHD, Dr. Herring testified that the results Petitioner achieved are not consistent with a diagnosis of attention deficit. (*Id.* at 423.) In this context Dr. Herring also noted that there was nothing in the record suggesting that Petitioner displayed symptoms of ADHD prior to the age of seven, one of the criteria for a diagnosis of ADHD; to the contrary, the record indicated that Petitioner was a good student and that his teachers "loved" him, the latter not being a phenomenon characteristic of children with ADHD.[8] (*Id.*)

To supplement the testing performed by Dr. Goldberg and to measure additional aspects of Petitioner's executive ability, Dr. Herring administered a series of subtests of the Delis-Kaplan Executive Functioning System. (RT 3/23/06 at 434-35.) To measure cognitive flexibility, Dr. Herring administered

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[8] The record indicates that Petitioner's parents "did not consider him to have any periods of hyperactivity." (Ex. 56, Interview with Peggy and Randy Jones, 12/3/01 at 11.)

the Verbal Fluency and Design Fluency tests. On the former, analogous to the Controlled Word Association Test administered by Dr. Goldberg on which Petitioner achieved low-average scores, Petitioner's scores were all in the average range. (*Id.* at 436.) On the latter, Petitioner's scores were in the average to high-average range. (*Id.*) On a test designed to measure "inhibitory capacity" and "impulse control," Petitioner performed in the borderline-impaired range; however, in another test measuring the same domain, Petitioner's score placed him in the high-average range. (*Id.* at 436-37; Ex. 51 at 7.) With respect to the latter test, Dr. Herring testified that it was significant that in completing the test Petitioner obeyed all of the rules; Dr. Herring noted that subjects with ADHD or frontal lobe damage find it difficult to perform the test without breaking the rules. (*Id.* at 437; Ex. 51 at 7.) To measure Petitioner's verbal thinking and abstract reasoning abilities, Dr. Herring administered a "proverb-interpretation" test, on which Petitioner scored in the high-average range. (*Id.*)

Petitioner's scores on achievement tests administered by Dr. Goldberg ranged from low average (math) to average (spelling) and high average (passage comprehension). (*Id.* at 425.) On reading tests administered by Dr. Herring, Petitioner performed at the average level when compared with his age peers and the low-average level in comparison with his education peers. (Ex. 51 at 6; RT 3/23/06 at 433.) His math performance was in the lower half of the average range with respect to his age peers and in the borderline and low-average range with respect to his education peers. (*Id.*)

On tests assessing visuospatial organization and construction, administered by Dr. Goldberg, Petitioner's performance was superior. (Ex. 51 at 5; RT 3/23/06 at 426.) Dr. Herring administered a test requiring Petitioner to copy a complex drawing and then draw it from memory. Petitioner's performance in copying the figure was moderately impaired but did not "suggest that there was a major distortion in his visuospatial processing." (RT 3/23/06 at 432.)

On tests measuring sensory and motor abilities, Petitioner performed in the average range for fine motor speed and manual dexterity but in the borderline-impaired range on the TPT, a "complex perceptual motor task." (*Id.* at 5-6; RT 3/23/06 at 427-29.) The latter test measures several cognitive domains, including memory and speed of information-processing, as well as tactile perception. (*Id.* at 428.) Taking into account Petitioner's performance on other tests measuring cognitive ability, Dr. Herring opined that Petitioner's low score on the TPT reflected a difficulty with his tactile perceptual abilities rather than a problem with processing information. (*Id.*)

In her testimony Dr. Herring addressed the bases for Dr. Goldberg's conclusion that Petitioner suffers from cognitive deficiency. She explained that a child's grades in school can be affected by a variety of factors unrelated to cognitive ability. (RT 3/23/06 at 391-92.) She further noted that Petitioner's scores on his eighth grade standardized achievement tests, which placed him in the average or low-average range (*id.* at 393), were not low enough to meet the definition of cognitive impairment (*id.* at 400).

With respect to the gap in Petitioner's performance and verbal IQ scores, Dr. Herring testified that such a disparity, while significant, is not "uncommon," with eighteen-point or greater disparities in scores occurring in "ten percent of normal people." (*Id.* at 418.) More importantly, Dr. Herring noted that Petitioner's higher score occurred on the performance subtest, which measures speed and is "sensitive to any disorder that impairs mental processing," whereas his lower score occurred on the verbal subtest, which, to a greater extent than performance IQ, "assesses past learned information." (*Id.*) Therefore, according to Dr. Herring, "the fact that [Petitioner] did so much better on the performance IQ than the verbal IQ is probably more suggestive of the fact that he did not do well in school than that he is cognitively impaired, which would tend to slow people up, slows their processing speed and slows their memory." (*Id.* at 418-19.)

Finally, in addition to neuropsychological tests, Dr. Herring, like Dr. Goldberg, administered the Beck Depression Inventory II. (*Id.* at 442.) Petitioner's score placed him "in the range of normal mood." (*Id.*) This represents a stark contrast with the result reported by Dr. Goldberg, who, as noted above, found Petitioner to be severely depressed.

Although Petitioner's test results included a few scores in the impaired range on individual tests or subtests, Dr. Herring explained that these low scores were "outliers"; they could not form the basis for a finding of cognitive disorder because they did not consistently occur in any one cognitive domain. (*Id.* at 470-72, 478-79.) Dr. Herring observed that, given the

number of tests Petitioner was subjected to, sixty percent of the population would have two or more test scores in the impaired range. (*Id.* at 470.)

Dr. Scialli: Dr. Scialli examined Petitioner on October 28, 2005, and prepared a "Psychiatric Examination Report to Determine Mental State at Time of Alleged Offense," dated November 10, 2005. (Ex. 53.) Dr. Scialli testified that, based on his psychiatric evaluation of Petitioner and a review of all the records, he could diagnose Petitioner as suffering from the following conditions at the time of the murders: alcohol, amphetamine, and cannabis dependence, and ADHD, residual type. (RT 3/23/06 at 511.)

Dr. Scialli disputed the diagnoses of Petitioner's experts. He disagreed with the diagnosis of PTSD, observing that Petitioner's experts based their conclusions exclusively on a finding that Petitioner had experienced a traumatic event; they did not, according to Dr. Scialli, consider the remaining factors necessary to complete a diagnosis of PTSD. (RT 3/23/06 at 496-99.) Dr. Scialli further noted that during his examination of Petitioner there was no indication that Petitioner had "re-experienced" the traumatic event at the time of the murders. (*Id.* at 499.)

Dr. Scialli testified that none of the experts had diagnosed Petitioner with cognitive disorder as defined by the DSM-IV. (*Id.* at 500.) Dr. Scialli explained that phrases such as "cognitive dysfunction" or "cognitive impairment" are not diagnostic definitions but instead are used "idiosyncratically" as "terms of art" with no fixed meaning (*Id.* at 499-500.) According to Dr. Scialli,

Petitioner could not be classified under any of the categories of cognitive disorder established by the DSM-IV; i.e., no expert had diagnosed Petitioner with delirium, dementia, amnesiac disorder, or with cognitive disorder NOS. (*Id.* at 500-02.)

Dr. Scialli also concluded that Petitioner did not suffer from bipolar disorder. Most significant to this finding was the absence of evidence of manic or hypomanic symptoms. (*Id.* at 504.) Dr. Scialli testified that Petitioner's description of his "highs and lows" "sounded like having an average day as opposed to a down-and-out day, and that's not mania or hypomania." (*Id.*) In addition, the fact that Petitioner was prescribed, and responded positively to, lithium, did not indicate to Dr. Scialli that Petitioner suffers from bipolar disorder, because the drug is successfully used to treat a number of other conditions. (*Id.* at 502-03.)

Dr. Scialli diagnosed Petitioner with residual symptoms of ADHD. (*Id.* at 504-05.) He testified, however, that there is no link between ADHD and violent behavior. (*Id.* at 505.) He further testified that, had he been aware of Dr. Herring's testimony on the issue of ADHD before he prepared his report, he might have "come to a different conclusion." (*Id.* at 512.) In any event, the presence or absence of ADHD, residual type, is, in Dr. Scialli's opinion, a "very minor point," because the condition is not related to the offenses. (*Id.*)

Finally, Dr. Scialli's report discusses the impact of the new evidence obtained during the habeas proceedings on the issues raised in Petitioner's claims.

(Ex. 53 at 8-10.) First, Dr. Scialli found that Dr. Potts was qualified to evaluate Petitioner for neurological disorders and organic mental illness. (*Id.* at 8.) Dr. Scialli also testified that Dr. Potts's call for "sophisticated neurological testing" could not have been interpreted as a request for a neuropsychological examination. (RT 3/23/06 at 496.) Dr. Scialli also opined that the neuropsychological testing performed during these habeas proceedings fails to provide any information in addition to that which was included in Dr. Potts's 1993 report and testimony at sentencing. (Ex. 53 at 8.) Dr. Scialli also wrote and testified that Petitioner's experts failed to establish a stronger nexus between Petitioner's alleged disorders and the murders than the connection made by Dr. Potts at sentencing. (*Id.*)

3. Findings based on the new evidence

Faced with conflicting diagnoses resulting from a "latter day battle of the experts," *Sims v. Brown*, 425 F.3d 560, 584 (9th Cir. 2005), the Court necessarily takes into account the credibility of the parties' witnesses. *Cf. Ford v. Wainwright*, 477 U.S. 399, 415 (explaining the value of cross-examination in assessing "inconsistent" psychiatric evidence). Testimony elicited during the hearing indicated that Dr. Stewart's forensic work is done "primarily for the defense" (RT 3/22/06 at 231-32), and that Dr. Goldberg has never been retained by the prosecution in a capital case and presently has a "working relationship" with the Federal Public Defender's Office (*id.* at 306). By contrast, Drs. Herring and Scialli have offered testimony on behalf of both the State and criminal defendants or

habeas petitioners, with Dr. Scialli having been retained with equal frequency by the defense and the prosecution.[9] (*Id.* at 388-89, 486.) With these considerations in mind, the Court makes the following findings regarding the factual bases of Petitioner's claims of IAC at sentencing.

Cognitive impairment:[10] The Court finds that Petitioner has not shown that he suffers from cognitive impairment. This finding is based upon the reports and testimony of Drs. Herring and Scialli, the test results offered by both parties, and the Court's review of the entire record.

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[9] In previous appointments Drs. Herring and Scialli addressed some of the key issues present in Petitioner's case. Dr. Herring testified on behalf of the petitioner in *Correll v. Stewart*, 2-CV-87-1471-PHX-SMM. At an evidentiary hearing on Correll's IAC claim, Dr. Herring testified that neurological testing indicated that Correll suffered from brain dysfunction, problems with impulse control, and possible prefrontal lobe impairment. (*See* Mem. of Decision and Order dated 3/5/03.) In *State v. Stuard*, 176 Ariz. 589, 608, 863 P.2d 881, 900 (1993), Dr. Scialli, although retained by the State, testified that the defendant's boxing career could have caused brain damage and that the resulting mental impairment was causally related to the murders; according to Dr. Scialli, Stuard, suffering from dementia, "reacted suddenly and overwhelmingly when he confronted and was confronted by his victims." *Id.* at n.12.

[10] The Court uses the term cognitive "impairment" as synonymous with "dysfunction," recognizing both as terms of art describing a condition distinct from cognitive disorder, a condition recognized by the DSM-IV but which none of the experts diagnosed in Petitioner.

Petitioner has not presented persuasive evidence regarding either the existence or the cause of his alleged cognitive impairment. In making their diagnosis of cognitive impairment, Petitioner's experts relied upon Petitioner's school performance, both his grades and his scores on standardized tests; the discrepancy in his performance and verbal IQ scores; and the results of other neuropsychological tests. As discussed above, alternative explanations exist with respect to Petitioner's declining school performance, including absenteeism, family stresses, substance abuse, and lack of motivation. Moreover, as Dr. Herring testified, Petitioner's standardized test scores were within the average range and do not, by themselves, suggest impairment. The gap between Petitioner's IQ scores, while notable, is not uncommon, and the fact that Petitioner scored higher on the performance subtest militates against a finding of impairment, as does the fact that Petitioner's overall IQ is solidly in the average range. Finally, in the vast majority of instances Petitioner's scores on neuropsychological tests were in the average range or above. The few scores that fell in the impaired range did not implicate any particular cognitive domain, suggesting that they were aberrations and not indicative of impairment.

The experts ascribed as the primary cause of Petitioner's cognitive impairment a series of head injuries. With the exception of the 1983 "mugging," there is no medical documentation to corroborate any of these injuries. In addition, the dates and details – and even the occurrence – of the injuries, as reported by Petitioner and his family, are inconsistent and

hence difficult to credit.[11] This difficulty is compounded by the contrast between Petitioner's account of the 1983 incident, in which he was mugged, struck by a two-by-four, and left unconscious for three days, and the contemporaneous medical records, which indicate that Petitioner was discovered passed out or asleep from the effects of intoxication, that he responded upon being administered medication that counteracted those effects, that he suffered no neurological damage and his only injury was a small abrasion, and that if he suffered a concussion it was "resolved" upon his

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[11] A complete list of the head or brain injuries alleged by Petitioner and referred to in the record includes, in chronological order: prenatal exposure to neurotoxins in Petitioner's mother's workplace (*see, e.g.,* Ex. 1 at 25); beatings of his pregnant mother by his father (*id.* at 7); strangulation by the umbilical cord while in utero and injuries from use of forceps at delivery (*id.* at 7, 13); beatings to the head at age three by Petitioner's first step-father (*id.* at 8-9; Ex. 8 at 2); a fall off a slide (or a blow from his stepfather) at age five-and-half, six, or seven, which left Petitioner unconscious for "approximately twenty minutes" (Ex. 51 at 2; *see, e.g.*, Ex. 1 at 9, 21); a motor vehicle accident at age ten which left Petitioner unconscious (Ex. 53 at 2); a fall from a roof at age nine, ten, eleven, or thirteen, which rendered Petitioner unconscious for a "couple of minutes"(Ex. 53 at 3) or five minutes to ten minutes (Ex. 1 at 14), or did not result in loss of consciousness (Ex. 51 at 2); another fall, off a second-floor scaffold or roof, at age fifteen or sixteen, leaving Petitioner unconscious for three or four minutes (*see, e.g.,* Ex. 53 at 4) or not resulting in unconsciousness (Ex. 51 at 2); a fight in high school in which Petitioner was "knocked out" (Ex. 8 at 2; Ex. 12 at 2); the 1983 "mugging" (*see, e.g.,* Ex. 12 at 2); a fight at a wedding in 1985, which left Petitioner unconscious for "more than five minutes" (Ex. 53 at 4); "at least" three car accidents as an adolescent or young adult, all producing head injuries and unconsciousness (Ex. 1 at 21); and fights in Nevada bars (*see, e.g.,* Ex. 12 at 2).

discharge. In any event, even if Petitioner's self-reported head injuries did occur, they did not, as discussed above, result in cognitive impairment.

Post-traumatic Stress Disorder: The Court finds that Petitioner has not shown that he suffered from PTSD at the time of the murders. The Court reaches this conclusion based upon the fact that none of Petitioner's experts completed an appropriate diagnosis using all of the criteria set forth in the DSM-IV; instead, their reports focused simply on the presence of the first criterion, the experience of a traumatic event. Both Dr. Stewart and Dr. Foy failed to draw any connections between the traumatic events Petitioner experienced in his childhood and the remaining PTSD criteria. While Dr. Stewart testified that Petitioner's condition satisfied the remaining criteria, he acknowledged that he never discussed with Petitioner the effect of those criteria on Petitioner's conduct at the time of the murders. (*Id*. at 236.) Dr. Stewart also acknowledged that Petitioner's conduct during the murders could be attributed to his use of methamphetamine and alcohol, and that he could not determine with certainty the extent to which PTSD, as opposed to drugs and alcohol, caused Petitioner's behavior. (*Id*. at 243-44.)

Attention Deficit/Hyperactivity Disorder: The Court finds that at the time of the crimes Petitioner suffered from ADHD, residual type. The Court finds, however, based upon Dr. Scialli's testimony (RT 3/23/06 at 512), that the condition is unrelated to violent behavior and, therefore, the fact that Petitioner suffered from the

condition does not serve as persuasive mitigation evidence.

Mood disorder: The Court finds that the evidence does not support a determination that Petitioner suffers from a major affective disorder, such as bipolar disorder. Specifically, the record does not show that Petitioner has experienced episodes of mania or hypomania. The record and the findings of the experts support a determination that Petitioner may suffer from a chronic, low-level mood disorder such as dysthymia. Again, the Court does not consider this to be persuasive evidence in mitigation. None of the experts suggested a causal relationship between the condition and Petitioner's conduct during the crimes.

Substance abuse: The Court finds, based upon the undisputed testimony, that at the time of the crimes Petitioner suffered from dependence on alcohol, amphetamine, and cannabis.

GOVERNING LAW

Because the PCR court denied relief on Claims 20(O), (P), and (T) based on the substantive issues, the claims were "adjudicated on the merits" and are subject to the standard of review established by the Antiterrorism and Effective Death Penalty Act of 1996, 28 U.S.C. § 2254 (AEDPA).

1. Standard for habeas relief

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

> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d).

With respect to § 2254(d)(1), the Supreme Court has explained that a state court decision is "contrary to" the Supreme Court's clearly established precedents if the decision applies a rule that contradicts the governing law set forth in those precedents, thereby reaching a conclusion opposite to that reached by the Supreme Court on a matter of law, or if it confronts a set of facts that is materially indistinguishable from a decision of the Supreme Court but reaches a different result. *Williams v. Taylor*, 529 U.S. 362, 405-06 (2000); *see Early v. Packer,* 537 U.S. 3, 8 (2002) (per curiam). Under the "unreasonable application" prong of § 2254(d)(1), a federal habeas court may grant relief where a state court "identifies the correct governing legal rule from [the Supreme] Court's cases but unreasonably applies it to the facts of the particular . . . case" or "unreasonably extends a legal principle from [Supreme Court] precedent to a new context where it should not apply or unreasonably refuses to extend that principle to a new context where it should apply." *Williams*, 529 U.S. at 407.

Application of these standards presents difficulties when the state court decided the merits of a claim without providing its rationale. *See Himes v. Thompson*, 336 F.3d 848, 853 (9th Cir. 2003); *Pirtle v. Morgan*, 313 F.3d 1160, 1167 (9th Cir. 2002); *Delgado v. Lewis*, 223 F.3d 976, 981-82 (9th Cir. 2000). In those circumstances, a federal court independently reviews the record to assess whether the state court decision was objectively unreasonable under controlling federal law. *Himes*, 336 F.3d at 853; *Pirtle*, 313 F.3d at 1167. Although the record is reviewed independently, a federal court nevertheless defers to the state court's ultimate decision. *Pirtle*, 313 F.3d at 1167 (citing *Delgado*, 223 F.3d at 981-82); *see also Himes*, 336 F.3d at 853.

2. Clearly established federal law

The parties agree that *Strickland v. Washington*, 466 U.S. 668 (1984), is the relevant clearly established Supreme Court authority. *Strickland* requires a petitioner alleging ineffectiveness of counsel to show that counsel's performance was deficient and that the deficiency prejudiced his defense. *Id.* at 687.

To establish deficient performance under *Strickland*, a petitioner must show that counsel's representation fell below an objective standard of reasonableness "under prevailing professional norms." *Id.* at 687-88. As Petitioner correctly notes, failure to adequately investigate and present mitigating evidence at sentencing may constitute deficient performance. *See Wiggins v. Smith*, 539 U.S. 510 (2003).

To establish prejudice under *Strickland*, a 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. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694. Under the prejudice 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." *Id.* at 691.

The Supreme Court has emphasized that assessing prejudice in the context of capital sentencing requires the reviewing court to "reweigh the evidence in aggravation against the totality of available mitigating evidence." *Wiggins*, 539 U.S. at 534. Thus, in assessing Petitioner's allegations of prejudice, this Court must "evaluate the totality of the available mitigation evidence – both that adduced at trial, and the evidence adduced in the habeas proceeding – in reweighing it against the evidence in aggravation." *Williams*, 529 U.S. at 397-98. To establish prejudice, a petitioner must show 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." *Strickland*, 466 U.S. at 695. In making such a determination, the Court is further guided by the principle that a sentencing decision that is supported by "overwhelming record support" is less likely to be affected by deficient performance than a

decision that is weakly supported by the record. *Strickland*, 466 U.S. at 696.

The Ninth Circuit has elaborated on the standards governing a habeas court's review of a claim of IAC at sentencing, emphasizing that the sentencing court's decision "will stand if supportable" and that "[r]eviewing courts . . . conduct their review to see if the decision can be supported, rather than to see if they would have reached the same decision." *Smith v. Stewart*, 140 F.3d 1263, 1270 (9th Cir. 1998). The Court of Appeals further explained that:

> In assessing prejudice in a case like this one, we are presented with a particularly difficult practical and jurisprudential question because we are not asked to imagine what the effect of certain testimony would have been upon us personally. We are 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.

Id.

ANALYSIS

Claims 20(O), (P), and (T) allege that Novak rendered ineffective assistance of counsel ("IAC") at sentencing. In Claim 20(O), Petitioner asserts that he was denied effective assistance of counsel when Novak failed to secure the appointment of "partisan" mental health experts, in the form of a neuropsychologist and

neurologist who could have revealed Petitioner's "neurological disorders and organic mental illness." (Dkt. 54 at 126.) Claim 20(P) alleges that Novak's failure to make a timely motion seeking neurological and neuropsychological testing constituted IAC. (Dkt. 54 at 126.) In Claim 20(T), Petitioner alleges that his right to effective assistance of counsel was denied due to Novak's failure to present additional mitigation evidence focusing on Petitioner's abusive childhood and the effects of his head trauma and drug abuse. (Dkt. 54 at 129.) Petitioner alleges that this information could have been established through testimony of his ex-wife, friends, family members, and former drug counselors. (*Id.*)

Petitioner alleges that the state court's denial of his IAC claims constituted an unreasonable application of *Strickland*. (Dkt. 66 at 70, 71, 76.) The PCR court did not specifically cite the authority upon which it relied in denying relief on the claims, but the parties predicated their arguments on *Strickland*. It is reasonable to assume, therefore, that the PCR court made its decision pursuant to *Strickland*. However, the rationale it applied in doing so cannot be discerned. Therefore, this Court independently reviews the record before the PCR court, in conjunction with its *de novo* review of new evidence presented at the evidentiary hearing, to assess whether the state court, in denying Petitioner's IAC claims, "applied *Strickland* to the facts of his case in an objectively unreasonable manner." *Bell v. Cone*, 535 U.S. 685, 698-99 (2002).

For the reasons set forth below, the Court has determined that it is unnecessary to assess the quality

of counsel's performance under the first prong of *Strickland* because Petitioner has failed to meet his burden under the second prong, which requires that he "affirmatively prove prejudice." *Strickland*, 466 U.S. at 693. As the *Strickland* Court explained, "A court need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies." *Id.* at 697 ("if it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice . . . that course should be followed"); *see Smith v. Robbins*, 528 U.S. 259, 286 n.14 (2000); *Fields v. Brown*, 431 F.3d 1186, 1203-04 (9th Cir. 2005).

The Court has assessed prejudice with respect to Petitioner's sentencing-stage IAC claims by reevaluating Petitioner's sentence in the light of the evidence introduced in these habeas proceedings. The Court concludes that the new information is largely inconclusive or cumulative: it "barely . . . alter[s] the sentencing profile presented to the sentencing judge." *Strickland*, 466 U.S. at 700. Petitioner has failed, therefore, to affirmatively demonstrate a reasonable probability that this additional information would alter the trial court's sentencing decision after it weighed the totality of the mitigation evidence against the strong aggravating circumstances proven at trial. Therefore, Petitioner is not entitled to habeas relief on the following claims.

1. Claim 20(O)

The PCR court's order denying this claim was not objectively unreasonable under *Strickland*. After independently reviewing the record, the Court

concludes that counsel's failure to seek the appointment of a mental health expert in a more timely manner did not prejudice Petitioner. This is because Dr. Potts served as a de facto defense expert at sentencing and also because, as discussed below with respect to Claim 20(P), the results of subsequent examinations performed by the parties' mental health experts have not established a more-persuasive case in mitigation than that presented through the report and testimony of Dr. Potts. Therefore, even if Novak had persuaded the trial court to appoint a partisan mental health expert, there is not a reasonable probability that the court, presented with the report of a defense expert in addition to Dr. Potts, would have imposed a life sentence rather than the death penalty.

At the evidentiary hearing Novak testified that, after speaking with Dr. Potts and reviewing his report, he came to regard Dr. Potts as a mitigation expert and a member of the defense team. (RT 121-22, 134-35, 151.) Novak worked closely with Dr. Potts. He provided Dr. Potts with medical and military records and the trial testimony of Dr. Sparks. (*Id*. at 47-48, 141-44.) He also provided Dr. Potts with information relating to Petitioner's family history, and Dr. Potts spoke with Petitioner's mother and step-father about Petitioner's history of drug use, his early childhood, and his head injuries. (RT 3/21/06, at 46-47.) In turn, Dr. Potts actively assisted Novak in developing a case in mitigation. As noted above, it was Dr. Potts who recommended that Novak seek a continuance to obtain additional neurological testing. (RT 3/21/06, at 121-23, 125.)

In his report and during his testimony at sentencing, Dr. Potts offered accounts of Petitioner's chaotic and abusive childhood, including details of the abuse Petitioner suffered at the hands of his first step-father. (Ex. 23 at 2; RT 12/9/93 at 80-83.) Dr. Potts reported that Petitioner's mother told him that Petitioner's personality changed when he was around fourteen years old, and that he started to get into trouble in his early teens, around the same time he started drinking alcohol and experimenting with drugs. (Ex. 23 at 4; RT 3/21/06 at 53.) Dr. Potts referred in his report to three head injuries Petitioner suffered as a child (Ex. 23 at 3), and in his testimony at the sentencing hearing he described two additional incidents (RT 12/8/93 at 77-78, 90-91).

Dr. Potts's findings and testimony were clearly favorable to Petitioner. He concluded in his report that Petitioner's ability to conform his conduct to the requirements of the law was impaired at the time of the murders, and that Petitioner's use of drugs and alcohol significantly contributed to his conduct. (Ex. 23 at 5.) He also identified seven mitigating factors, on the basis of which he recommended against an aggravated sentence. (*Id.* at 5-6; RT 12/8/93 at 73.)

The record developed since Dr. Potts's report has added detail but also ambiguity to the diagnoses Dr. Potts offered in mitigation. Dr. Potts's report, unchallenged by other expert testimony at sentencing, found that Petitioner suffered from substance abuse and that there was a "likelihood that he suffers from a major mental illness – cyclothymia." (Ex. 23 at 5.) The report also noted many of the issues which arose

during these habeas proceedings, including the genetic factor underlying Petitioner's substance abuse and mood disorder and the likelihood that Petitioner's drug and alcohol use represented an attempt at self-medication. (*Id.* at 4.) Similarly, Dr. Potts's report placed substantial emphasis on Petitioner's head injuries; although Dr. Potts spoke of the head trauma merely as "increas[ing] the potential for neurologic sequelae contributing to [Petitioner's] behavior" (*id.* at 6), the Court has not been presented with evidence confirming that Petitioner suffers from neurological damage caused by head trauma or other factors. Therefore, Dr. Potts's finding at sentencing remains the most persuasive statement in the record that neurological damage constituted a mitigating factor. In addition, the diagnoses not specified in Dr. Potts's report, PTSD and ADHD, are the conditions about which the parties' experts were unable to agree; and, with respect to ADHD, even a finding that Petitioner suffers from a residual form of the condition is a fact of little or no mitigating value, because, as Dr. Scialli testified, it bears no causal relationship to violent conduct.

For the reasons set forth above, Petitioner is not entitled to relief on Claim 20(O).

2. Claim 20(P)

The PCR court's decision denying this claim – alleging a failure to timely seek neurological or neuropsychological testing – was not objectively unreasonable under *Strickland*.

Neurological testing

As Respondents note, Petitioner cannot show that he was prejudiced by counsel's failure to make a timely request for neurological, as opposed to neuropsychological, testing. Petitioner has presented no evidence that neurological tests such as a CAT scan, MRI, or EEG have been performed, let alone that their results would support a finding of cognitive impairment.[12] Petitioner cannot, therefore, demonstrate that he was prejudiced by trial counsel's failure to secure such testing.

Neuropsychological testing

As discussed above, the results of neuropsychological tests presented by the parties are largely ambiguous and inconclusive. They do not demonstrate that Petitioner suffered from cognitive impairment or PTSD at the time of the murders. Because the results of neuropsychological tests actually performed do not support these diagnoses, Petitioner cannot demonstrate that he was prejudiced by counsel's failure to seek neuropsychological testing.

In addition, while this Court has found that Petitioner suffers from a residual type of ADHD and a low-level mood disorder, these conditions do not constitute persuasive evidence in mitigation because they do not bear a relationship to Petitioner's violent

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[12] Petitioner's body apparently contains metallic "pellets" which prevent him from being subjected to an MRI test. (RT 3/23/06 at 380.) However, other brain-imaging processes are available. (*Id.* at 383.)

behavior. As the Supreme Court has directed, the sentencer in a capital proceeding must consider all relevant mitigation evidence. *Lockett v. Ohio*, 438 U.S. 586 (1978); *Eddings v. Oklahoma*, 455 U.S. 104 (1982). Therefore, if Petitioner had presented the trial court with evidence that he suffered from ADHD and a low-level mood disorder, the court would have been obligated to consider such information, whether or not Petitioner could establish a connection between the conditions and his crimes. *Tennard v. Dretke*, 542 U.S. 274, 287 (2004); *State v. Newell*, 212 Ariz. 389, 132 P.3d 833, 849 (2006) ("We do not require a nexus between the mitigating factors and the crime to be established before we consider the mitigation evidence."). However, the court would have been "free to assess how much weight to assign to such evidence." *Ortiz v. Stewart*, 149 F.3d 923, 943 (9th Cir. 1998); *see Eddings*, 455 U.S. at 114-15 ("The sentencer . . . may determine the weight to be given relevant mitigating evidence"). In "assessing the quality and strength" of Petitioner's mitigation evidence, therefore, the trial court could have taken into account Petitioner's "failure to establish a causal connection" between the murders and his ADHD and low-level mood disorder. *Newell*, 212 Ariz. at 389, 132 P.3d at 849. This Court concludes that the trial court would have assigned minimal significance to testimony indicating that Petitioner suffered from ADHD and a low-level mood disorder, and that this weight would not have outbalanced the factors found in aggravation.

Novak's failure to seek testing that could have revealed conditions causally unrelated to the crimes

did not prejudice Petitioner. Therefore, Petitioner is not entitled to relief on Claim 20(P).

3. Claim 20(T)

The PCR court's decision denying this claim was not objectively unreasonable under *Strickland*. This claim consists of Petitioner's allegation that he was prejudiced by Novak's failure to present additional lay witnesses to support his case in mitigation. According to Petitioner, such witnesses could have "substantiate[d] claimed mitigation based on Petitioner's traumatic birth, abusive early childhood, history of drug abuse, head injuries and the effects thereof on his behavior." (Dkt. 54 at 129.) The information "could have been established through Petitioner's ex-wife, friends, family members, and former drug counselors."[13] (*Id.*) Petitioner also alleges that he was prejudiced by Novak's failure to obtain additional birth, school, military, and prison records. (*Id.*; Dkt. 218 at 23.)

At the sentencing hearing, Novak presented the testimony of Randy Jones, who related the circumstances of Petitioner's traumatic birth; his abusive early childhood; his history of drug abuse and drug treatment, including his introduction to drugs by his grandfather; his history of head injuries; and the apparent effect of the drugs and head injuries on his behavior. (RT 12/8/93 at 39-68.) Novak admitted

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[13] At the evidentiary hearing, counsel for Petitioner indicated that Petitioner was not asserting a claim that trial counsel was ineffective for failing to call for testimony from Petitioner's mother at sentencing. (RT 3/23/06 at 531.)

records from the Washoe Medical Center where Petitioner was treated for drug withdrawal in 1986 and evaluated after a suicide attempt in 1987 (RT 3/21/06 at 144; Ex. 64); he also admitted records from the military hospital relating to the 1983 "mugging" (RT 12/9/93 at 6-7; Ex. 65). Novak obtained additional records which he provided to Dr. Potts but did not present at sentencing because the information in them "could cut both ways as far as mitigation goes." (RT 3/21/06 at 145.) These records include a letter from a drug treatment program stating that Petitioner was discharged for "noncompliance with a very hostile, angry, and threatening attitude toward staff." (Ex. 25; RT 3/21/06 at 147.) Novak chose not to admit additional military records which described the details of Petitioner's bad conduct discharge from the Marines. (RT 3/21/03 at 145.) Novak did not obtain school records, but elicited testimony from Randy Jones indicating that Petitioner's grades declined when he reached adolescence. (*Id.* at 145; RT 12/8/93 at 51-52.)

At the evidentiary hearing before the PCR court, both Randy Jones and Petitioner's mother testified in support of Petitioner's IAC claims. (RT 4/4/00 at 7-38.) Mrs. Jones provided additional details of the abuse she and Petitioner suffered at the hands of Petitioner's father and first step-father. (*Id.* at 29-32, 36.) She testified that Petitioner's grades began to decline at age fifteen or sixteen. (*Id.* at 33.) She also testified that Petitioner's grandfather got him hooked on drugs. (*Id.* at 32.) PCR counsel also presented Petitioner's eighth-grade school records. (ROA-PCR 45, Ex. L.)

Among the new mitigation information Petitioner has offered during the habeas proceedings are allegations that he was abused, emotionally and physically, by Randy Jones and that he was sexually molested by his grandfather. The information detailing the sexual abuse appears for the first time in Dr. Foy's 2002 report (Ex. 5), which Dr. Stewart relied on in his declaration and testimony (Ex. 1; RT 3/22/06 at 234-35).[14] Information concerning physical abuse by Randy Jones also appears in Dr. Foy's report and in an affidavit from Petitioner's sister. (Ex. 13.)

Although Petitioner alleges that trial counsel performed deficiently by failing to offer testimony of witnesses to corroborate this abuse, at the evidentiary hearing before this Court, Petitioner did not present the testimony of any of the witnesses cited in his petition; nor, with the exception of the affidavit from his sister, did Petitioner indicate what mitigation information could have been offered by his ex-wife, friends, family members, and former drug counselors. Petitioner did not testify at the hearing, although his self-report of the sexual abuse is presumably the basis

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[14] Although the Court's analysis relies on the prejudice prong of *Strickland*, with respect to information concerning sexual abuse by Petitioner's grandfather and physical abuse by Randy Jones, the Court additionally finds that Novak did not perform deficiently by failing to uncover information not shared by Petitioner until nearly ten years after his trial. Novak was never put on notice that sexual abuse was an issue. *See Babbit v. Calderon*, 151 F.3d 1170, 1174 (9th Cir. 1998) (counsel's failure to uncover defendant's alleged family history of mental illness was not unreasonable because none of the family members interviewed reported the occurrence of such illness).

for the information contained in the reports of Drs. Foy and Stewart. (RT 3/22/06 at 234-35.)

The Court cannot conclude that Petitioner was prejudiced by the failure of Novak to call witnesses the contents and credibility of whose testimony is unknown. The Court further observes that the sentencing judge would likely have viewed with skepticism Petitioner's more-recent allegations of sexual and physical abuse, given their late disclosure, their inconsistency with other information in the record, and Petitioner's "obvious motive to fabricate." *State v. Medrano*, 185 Ariz. 192, 194, 914 P.2d 225, 227 (1996) (defendant's "self-serving testimony is subject to skepticism and may be deemed insufficient to establish mitigation"); *see State v. Sharp*, 193 Ariz. 414, 425, 973 P.2d 1171, 1182 (1999) (self-reported, uncorroborated evidence "may be given little or no mitigation weight"). Also reducing the import the sentencing judge might have assigned to such information is the lack of a causal connection between the crimes and the new allegations of abuse. *See Sharp*, 193 Ariz. at 425, 973 P.2d at 1182 (explaining, in case involving a defendant who claimed that he had been regularly sodomized by his stepbrother over a period of eight years, that Arizona courts "require a causal connection to justify considering evidence of a defendant's background as a mitigating circumstance") (citing *Jones*, 185 Ariz. at 490-91, 917 P.2d at 219-20). As noted above, in diagnosing Petitioner with PTSD, Petitioner's experts attempted to link his childhood physical and sexual abuse with his conduct while committing the murders. However, the experts failed to extend their diagnoses beyond a finding that Petitioner experienced traumatic

events in his childhood, and therefore did not establish a nexus between the abuse and the murders.

With respect to records not previously obtained and presented at the state-court level, the Court agrees with Respondents that the records accumulated during these habeas proceedings – Petitioner's school records from first grade, medical and military records – are largely cumulative and of little mitigating value. Petitioner speculates that additional school records, drug-treatment and mental-health records, and accident reports might have been available at the time of Petitioner's trial, but such speculation, as to both the existence and the favorable contents of such records, is not sufficient to affirmatively establish prejudice. Moreover, to the extent that the information contained in unavailable records might address Petitioner's claims of cognitive impairment or other mental conditions, the results of the neuropsychological tests performed during the habeas proceedings constitute a more accurate and meaningful measure of Petitioner's functioning and thereby render such records superfluous.

For the reasons set forth above, Petitioner is not entitled to relief on Claim 20(T).

Accordingly,

IT IS ORDERED dismissing Claims 20(O), 20(P), and 20(T) with prejudice.

DATED this 29th day of August, 2006.

/s/ Susan R. Bolton
Susan R. Bolton
United States District Judge

APPENDIX E

SUPREME COURT OF ARIZONA,
In Banc.

No. CR–93–0541–AP
185 Ariz. 471

[Filed May 7, 1996]

STATE of Arizona, Appellee,	)
v.	)
Danny Lee JONES, Appellant.	)

Attorneys and Law Firms

Grant Woods, Attorney General by Paul J. McMurdie, Chief Counsel, Criminal Appeals Section, Susanna C. Pineda, Assistant Attorney General, Phoenix, for State of Arizona.

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OPINION

CORCORAN, Justice (Retired).

Danny Lee Jones (defendant) was convicted in Mohave County Superior Court of two counts of

premeditated first degree murder and one count of attempted premeditated first degree murder. The trial court sentenced defendant to two consecutive death sentences for the murders and to a consecutive sentence of life imprisonment for the attempted murder. Defendant's convictions and sentences were automatically appealed to this court. A.R.S. § 13–4033; rules 26.15, 31.2(b), and 31.15(a)(3), Arizona Rules of Criminal Procedure. We have jurisdiction pursuant to Ariz. Const. art. 6, § 5(3), and A.R.S. §§ 13–4031, –4033, and –4035.

Factual and Procedural Background

I. Factual Background

In February 1992, defendant moved to Bullhead City, Arizona, and resumed a friendship with Robert Weaver. At this time, Robert, his wife Jackie, and their 7–year–old daughter, Tisha, were living in Bullhead City with Robert's grandmother, Katherine Gumina. As of March 1992, defendant was unemployed and was planning to leave Bullhead City.

On the night of March 26, 1992, defendant and Robert were talking in the garage of Ms. Gumina's residence. Robert frequently entertained his friends in the garage, and during these times, he often discussed his gun collection. The two men were sitting on inverted buckets on the left side of the garage, and Ms. Gumina's car was parked on the right side of the garage. Both defendant and Robert had been drinking throughout the day and had used crystal methamphetamine either that day or the day before.

At approximately 8:00 p.m., Russell Dechert, a friend of Robert's, drove to the Gumina residence and took defendant and Robert to a local bar and to watch a nearby fire. Dechert then drove defendant and Robert back to the Gumina residence at approximately 8:20 p.m. and left, telling defendant and Robert that he would return to the Gumina residence around 9:00 p.m.

Although there is no clear evidence of the sequence of the homicides, the scenario posited to the jury was as follows. After Dechert left, defendant closed the garage door and struck Robert in the head at least three times with a baseball bat. Robert fell to the ground where he remained unconscious and bleeding for approximately 10 to 15 minutes. Defendant then entered the living room of the Gumina residence where Ms. Gumina was watching television and Tisha Weaver was coloring in a workbook. Defendant struck Ms. Gumina in the head at least once with the baseball bat, and she fell to the floor in the living room.

Tisha apparently witnessed the attack on Ms. Gumina, ran from the living room into the master bedroom, and hid under the bed. Defendant found Tisha and dragged her out from under the bed. During the struggle, Tisha pulled a black braided bracelet off defendant's wrist. Defendant then struck Tisha in the head at least once with the baseball bat, placed a pillow over her head, and suffocated her, or strangled her, or both.

Defendant next emptied a nearby gun cabinet containing Robert's gun collection, located the keys to Ms. Gumina's car, and loaded the guns and the bat into the car. At some point during this time, Robert

regained consciousness, and, in an attempt to flee, moved between the garage door and Ms. Gumina's car, leaving a bloody hand print smeared across the length of the garage door and blood on the side of the car. Robert then climbed on top of a work bench on the east side of the garage, leaving blood along the east wall. Defendant struck Robert at least two additional times in the head with the baseball bat, and, as Robert fell to the ground, defendant struck him in the head at least once more.

A few minutes before 9:00 p.m., Dechert returned to the Gumina residence and noticed that the garage door, which previously had been open, was closed. Dechert went to the front door and knocked. Through an etched glass window in the front door, he saw the silhouette of a person locking the front door and walking into the master bedroom. Dechert then looked through a clear glass portion of the window and saw defendant walk out of the master bedroom. He heard defendant say, "I will get it," as if he were talking to another person in the house. Defendant then opened the front door, closing it immediately behind him, walked out onto the porch, and stated that Robert and Jackie had left and would return in about 30 minutes. Dechert noticed that defendant was nervous, breathing hard, and perspiring. Although Dechert felt that something was wrong, he left the Gumina residence. As he was leaving, Dechert heard the door shut as if defendant went back into the house. Shortly thereafter, defendant left the Gumina residence in Ms. Gumina's car.

At approximately 9:10 p.m., Jackie Weaver returned home from work. When she opened the garage door,

she found Robert lying unconscious on the garage floor. Jackie ran inside the house and found Ms. Gumina lying on the living room floor and her daughter Tisha lying under the bed in the master bedroom. She then called the police, who on arrival determined that Tisha and Robert were dead and that Katherine Gumina was alive but unconscious. The medical examiner later concluded that Robert's death was caused by multiple contusions and lacerations of the central nervous system caused by multiple traumatic skull injuries. The cause of Tisha's death was the same as Robert's, but also included possible asphyxiation.

After leaving the Gumina residence, defendant picked up his clothes from a friend's apartment where he had been staying and drove to a Bullhead City hotel. At some point before reaching the hotel, he threw the bat out the car window. Defendant parked the car at the hotel and hailed a taxi cab to drive him to Las Vegas, Nevada. The police eventually recovered Ms. Gumina's car and found a pink baseball cap and a note, which were identified at trial as belonging to defendant.

When defendant arrived in Las Vegas, he gave the cab driver one of Robert's guns to pay for the fare and checked into a hotel. The next day, however, defendant met Marcia and Gary Vint and arranged to pay rent to sleep on the couch in their apartment. While at the apartment, he sold most of the remaining guns from Robert's collection. The police ultimately recovered several of the guns; two witnesses from Las Vegas testified that defendant sold them the guns, and Jackie Weaver identified the guns as Robert's.

A few days later, the Vints learned that defendant was a suspect in the Bullhead City murders. By then, defendant was staying at another apartment the Vints had rented, although his belongings were still at the original apartment. The Vints called the Las Vegas police, who arrested defendant and took possession of his belongings.

II. Procedural Background

The state charged defendant with two counts of premeditated first degree murder and one count of attempted premeditated first degree murder. Although Katherine Gumina ultimately died as a result of the injuries defendant inflicted, the state chose not to amend the indictment. Defendant pleaded not guilty to all of the charges. At trial, defendant testified that he killed Robert Weaver in self-defense, that he struck Katherine Gumina reflexively and without criminal intent because she startled him, and that another person killed Tisha Weaver. The jury found defendant guilty of all three counts.

The trial court then held an aggravation/mitigation hearing. With respect to Robert's murder, the trial court found three aggravating circumstances: (1) defendant committed the murder for pecuniary gain, A.R.S. § 13–703(F)(5); (2) defendant committed the murder in an especially heinous, cruel, or depraved manner, A.R.S. § 13–703(F)(6); and (3) defendant was convicted of one or more other homicides that were committed during the commission of the offense, A.R.S. § 13–703(F)(8). With respect to Tisha's murder, the trial court found the above three aggravating circumstances and the additional aggravating

circumstance that the victim was under 15 years of age, A.R.S. § 13–703(F)(9).

With respect to both murders, the trial court found no statutory mitigating circumstances. The court did find that defendant proved the following nonstatutory mitigating circumstances by a preponderance of the evidence: (1) defendant suffers from long-term substance abuse; (2) at the time of the offense, defendant was under the influence of alcohol and drugs; (3) defendant had a chaotic and abusive childhood; and (4) defendant's substance abuse problem may have been caused by genetic factors and aggravated by head trauma. The trial court concluded, however, that these circumstances were not sufficiently substantial to outweigh the aggravating circumstances or to call for leniency and sentenced defendant to two consecutive death sentences. The court also sentenced defendant to a consecutive sentence of life imprisonment, without the possibility of release or parole for 25 years, for the attempted first degree murder of Ms. Gumina. The convictions and sentences were automatically appealed to this court.

Issues Presented

We address the following issues raised in defendant's brief. The pretrial issues are:

1. Whether the trial court erroneously denied defendant's motion to suppress evidence that the police obtained while searching defendant's bags; and

2. Whether the trial court erroneously denied defense counsel's motion to withdraw based on a potential conflict of interest.

The trial issues are:

1. Whether the trial court erroneously denied defendant's motion for mistrial based on an alleged violation of rule 9.3(a), Arizona Rules of Criminal Procedure;

2. Whether the trial court erroneously denied defendant's motion for mistrial based on alleged improper influence on the jury;

3. Whether the trial court erroneously admitted autopsy photographs of Tisha Weaver and Katherine Gumina; and

4. Whether the trial court erroneously denied defendant's motion for mistrial based on the admission of two prior misdemeanor theft convictions as impeachment evidence.

The sentencing issues are:

1. Whether the trial court erroneously found that defendant murdered Tisha and Robert Weaver for pecuniary gain;

2. Whether the trial court erroneously found that defendant murdered Tisha and Robert Weaver in an especially heinous, cruel, or depraved manner; and

3. Whether the trial court erroneously denied defendant's motion to continue the sentencing

hearing to allow further testing to determine if defendant suffers from organic brain disorder.

Discussion

I. Pretrial Issues

A. Search and Seizure of Defendant's Belongings

Defendant raises three arguments related to the evidence the police obtained from the search and seizure of his belongings. Specifically, he challenges the seizure of his belongings by the Las Vegas police, the subsequent search by the Bullhead City police detectives, and the inventory search by the Las Vegas police. We address these arguments in turn and set forth the relevant facts as follows.

In Las Vegas, Nevada, defendant met Marcia and Gary Vint and arranged to pay them $50 per week to sleep on the couch at their apartment (the Arville Street apartment). During the first couple of days, defendant gave the Vints $50, apparently to pay for groceries. Defendant kept his belongings, which were contained in a duffel bag, a backpack, and a white trash bag, in one side of the apartment's dining room closet. The Vints also kept things in this closet.

On March 30, the Vints leased a new apartment (the Ida Street apartment), to which they planned to move on March 31. On March 30, defendant spent the night at the Ida Street apartment, although his belongings remained at the Arville Street apartment. On the morning of March 31, the Vints read in the newspaper that a person named Danny Lee Jones was

suspected of murdering Tisha and Robert Weaver. The Vints looked through defendant's belongings to verify his name and then notified the Las Vegas police that defendant was staying with them.

The police arrested defendant that day at the Ida Street apartment. The police then returned to the Arville Street apartment because the Vints told them that defendant had left some belongings there which they did not want to keep. The police took possession of defendant's belongings from the dining room closet and a .22 rifle, identified as similar to one that Robert owned, found under the living room sofa. They also conducted a cursory search of defendant's bags to check for weapons and placed the items in the trunk of the patrol car. The police did not have a search warrant.

While the Las Vegas police were still at the Arville Street apartment, two Bullhead City police detectives arrived and searched defendant's belongings, which were being stored in the trunk of a patrol car. The Bullhead City detectives, who also did not have a search warrant, identified the blood-stained clothing that defendant wore on the night of the murders. The Las Vegas police then impounded all of defendant's belongings and conducted an inventory search at the police station.

Before trial, defendant moved to suppress the clothing that the police obtained from the Arville Street apartment, but not the .22 rifle. The trial court held that the Vints had authority to consent to the search and seizure of defendant's property because defendant did not have exclusive authority over any area of the Arville Street apartment, the Vints believed they had

no further duty to store defendant's belongings, and defendant had no agreement for indefinite storage of his property at the apartment. The court also held that any subsequent searches or seizures were valid. We review a trial court's denial of a motion to suppress under a clear abuse of discretion standard. *State v. Atwood,* 171 Ariz. 576, 603, 832 P.2d 593, 620 (1992), *cert. denied,* 506 U.S. 1084, 113 S.Ct. 1058, 122 L.Ed.2d 364 (1993).

1. Initial Search and Seizure of Defendant's Belongings by the Las Vegas Police

Defendant argues that the Las Vegas police illegally seized his belongings from the Arville Street apartment because they did not have a search warrant and the Vints lacked authority to turn the property over to the police. Defendant first asserts that he and the Vints had established a landlord-tenant relationship and that, under Nevada law, a landlord is required to store a tenant's property safely for 30 days after the abandonment or eviction of the tenant or the end of the rental period. *See* Nev.Rev.Stat. § 118A.460(1)(a) (Supp.1995). Defendant asserts that the Vints violated this statute when they allowed the Las Vegas police to seize his belongings.

Defendant, however, raises this argument for the first time on appeal. An issue not raised below is waived absent fundamental error, and we find none here. *State v. Bolton,* 182 Ariz. 290, 297, 896 P.2d 830, 837 (1995); *see also State v. Gendron,* 168 Ariz. 153, 155, 812 P.2d 626, 628 (1991), quoting *State v. Smith,* 114 Ariz. 415, 420, 561 P.2d 739, 744 (1977) (defining

fundamental error as "error of such dimensions that it cannot be said it is possible for a defendant to have had a fair trial"). Even if we assume that this statute applies and that the Vints violated it, the remedy would be civil or criminal liability on the part of the Vints and not suppression. *See* Nev.Rev.Stat. § 118A.460(1)(a). Therefore, the argument, even if accepted, would not have affected the trial's outcome.

Defendant next argues that the seizure of his belongings was unconstitutional because the Vints lacked authority to consent to the seizure. Generally, the police must obtain a warrant before searching or seizing premises or property in which an individual has a reasonable expectation of privacy. U.S. Const. amends. IV & XIV; *see also Katz v. United States,* 389 U.S. 347, 353, 88 S.Ct. 507, 512, 19 L.Ed.2d 576 (1967); *State v. Castaneda,* 150 Ariz. 382, 389, 724 P.2d 1, 8 (1986). An exception to this requirement, however, exists where a third party with "common authority over or other sufficient relationship to the premises or effects sought to be inspected" voluntarily consents to the search or seizure. *United States v. Matlock,* 415 U.S. 164, 171, 94 S.Ct. 988, 993, 39 L.Ed.2d 242 (1974); *see also Castaneda,* 150 Ariz. at 389, 724 P.2d at 8. The state must prove consent by "clear and positive evidence."." *State v. Lucero,* 143 Ariz. 108, 110, 692 P.2d 287, 289 (1984).

In this case, the parties do not contest that defendant had a reasonable expectation of privacy regarding his belongings at the Vints' apartment or that the Vints' consent was voluntary. Thus, our inquiry focuses on the Vints' authority over and

relationship to defendant's property. The Court in *Matlock* explained that common authority exists when there is

> mutual use of the property by persons generally having joint access or control for most purposes, so that it is reasonable to recognize that any of the co-inhabitants has the right to permit the inspection in his own right and that the others have assumed the risk that one of their number might permit the common area to be searched.

415 U.S. at 171 n. 7, 94 S.Ct. at 993 n. 7; *see also State v. Heberly,* 120 Ariz. 541, 543–44, 587 P.2d 260, 262–63 (App.1978) (adopting this language). Moreover, when determining whether common authority exists, the focus is on apparent authority, rather than actual authority. *Castaneda,* 150 Ariz. at 389, 724 P.2d at 8 ("[I]f it reasonably appeared that a third party had common authority over the premises, then the consent to search would be valid.").

We find that the trial court did not abuse its discretion when it denied defendant's motion to suppress on the basis that the Vints had apparent authority to consent to the search. The uncontroverted evidence at trial was that the Vints had joint access to and control over the dining room closet where defendant's belongings were found and that defendant did not have the right to exclude them from this area. Moreover, it was reasonable to recognize that defendant assumed the risk that the Vints would allow the common area to be searched when defendant chose to leave his belongings at the Arville Street apartment.

Therefore, the seizure of defendant's belongings was proper.

2. Search by the Bullhead City Police Detectives

Defendant next argues that the warrantless search by the Bullhead City police detectives of his belongings while they were in the Las Vegas police patrol car was unconstitutional. Defendant reasons that the search does not fall within the inventory exception to the warrant requirement because the Las Vegas police department's standard inventory procedures do not include "interim" searches.

Although defendant correctly asserts that this search does not fall within the inventory exception, the evidence is admissible under the inevitable discovery doctrine. The inevitable discovery doctrine, which is an exception to the exclusionary rule, provides that illegally obtained evidence is admissible "[i]f the prosecution can establish by a preponderance of the evidence that the illegally seized items or information would have inevitably been seized by lawful means...." *State v. Ault,* 150 Ariz. 459, 465, 724 P.2d 545, 551 (1986), citing *Nix v. Williams,* 467 U.S. 431, 443, 104 S.Ct. 2501, 2509, 81 L.Ed.2d 377 (1984); *see also State v. Lamb,* 116 Ariz. 134, 138, 568 P.2d 1032, 1036 (1977) ("[E]vidence obtained as a result of an unlawful search need not be suppressed where, in the normal course of the police investigation and absent the illicit conduct, the evidence would have been discovered anyway.").

In this case, the Bullhead City police detectives searched defendant's belongings while they were in the

trunk of the Las Vegas police patrol car, which was parked at the Arville Street apartment. During the search, the detectives discovered the clothing defendant wore on the night of the murders. When the detectives finished their search, the Las Vegas police transported defendant's belongings to the police station and conducted a lawful inventory search, which we discuss below. The Las Vegas police inevitably would have conducted their inventory search and found defendant's clothing, regardless of whether the Bullhead City detectives identified defendant's clothing. Therefore, the trial court did not abuse its discretion when it denied defendant's motion to suppress the evidence on this basis.

3. Inventory Search by the Las Vegas Police

Defendant's final argument regarding the search and seizure of his belongings is that the inventory search by the Las Vegas police was unconstitutional because the police did not conduct the search pursuant to standardized criteria. Because defendant did not make this argument in his motion to suppress, our inquiry is limited to fundamental error analysis. *See State v. Bolton,* 182 Ariz. 290, 297, 896 P.2d 830, 837 (1995) (issue not raised with trial court is waived absent fundamental error).

Even if defendant had properly preserved the issue, his argument lacks merit. Inventory searches are permissible if "conducted pursuant to standardized criteria and not because of mere suspicions of criminal activity." *State v. West,* 176 Ariz. 432, 441, 862 P.2d 192, 201 (1993), *cert. denied,* 511 U.S. 1063, 114 S.Ct.

1635, 128 L.Ed.2d 358 (1994) (testimony that police policy was to list contents of vehicles taken into possession sufficient to find valid inventory search). In this case, an officer testified at the suppression hearing that the Las Vegas police conduct an inventory search whenever they obtain evidence, which includes listing each item of evidence on an impound sheet and placing the evidence into an evidence vault, and that they followed this procedure in this case. The officer's testimony is sufficient to establish that the police followed standardized criteria when they conducted the inventory search, and the search presents neither error nor fundamental error.

B. Defense Counsel's Motion to Withdraw

Approximately two weeks before trial, defense counsel learned that Cordell Reid, who was defendant's cellmate, would testify that the day before the murders he saw Robert Weaver and an unknown person arguing in the backyard of the Gumina residence, and that on the night of the murders he saw a small blue car and a white car leaving the Gumina residence. Reid's testimony would corroborate defendant's claim that he killed Robert in self-defense and that someone else murdered Tisha.

After learning of Reid, the state interviewed him and, 4 days before trial, disclosed him as a potential witness for the state. The next day, defense counsel, a public defender, moved to withdraw from representing defendant because the public defender's office previously had represented Reid, and defense counsel and another public defender had discussed the prior representation and Reid's general character. Defense

counsel argued that he would have to withdraw unless the state guaranteed that Reid would not be called as a witness. After a hearing on the issue, during which the state asserted that it did not intend to call Reid as a witness, the trial judge denied defense counsel's motion but stated that he would reconsider the issue if and when the state actually called Reid to testify.

On appeal, defendant argues that the trial court should have allowed defense counsel to withdraw because defense counsel had a conflict of interest and because the state's listing of Reid as a potential witness created the appearance of impropriety. Defendant further argues that the denial of the motion violated the United States and Arizona Constitutions because it denied defendant the opportunity to call a witness.

We will overturn a trial court's decision on a motion to withdraw only if the trial court abused its discretion. *Okeani v. Superior Court,* 178 Ariz. 180, 181, 871 P.2d 727, 728 (App.1993). In this case, the trial court acted well within its discretion. First, no conflict of interest developed in this case because neither the state nor defense counsel called Reid as a witness at trial. The trial court properly reserved ruling on this issue until any actual conflict arose, and, because Reid did not testify, we need not address whether his testimony ultimately would have resulted in a conflict for defense counsel. Second, contrary to defendant's assertions, the trial court's order did not preclude defense counsel from calling Reid as a witness. If defendant is in fact arguing that defense counsel's decision not to call Reid to testify was ineffective assistance of counsel, he must do so in a proceeding for post-conviction relief. *See*

State v. Carver, 160 Ariz. 167, 175, 771 P.2d 1382, 1390 (1989) ("We will not reverse a conviction on ineffective assistance of counsel grounds on direct appeal absent a separate evidentiary hearing concerning counsel's actions or inactions.").

II. Trial Issues

A. Alleged Violation of Rule 9.3(a), Arizona Rules of Criminal Procedure

Before trial began, defendant asked the court to exclude prospective witnesses from the courtroom. Rule 9.3(a), Arizona Rules 14, 15 of Criminal Procedure, requires the court, at the request of either party, to exclude prospective witnesses from the courtroom during opening statements and the testimony of other witnesses and to direct the witnesses not to communicate with each other.[1] In addition, rule 9.3(d) provides that when the rule has been invoked, the parties "shall nevertheless be entitled to the presence of one investigator at counsel table." In this case, the state designated Detective Jerry Duke, who also was a witness for the state, as its investigator. The trial court did not state on the record whether Duke was entitled to speak with other witnesses for the state during the trial.

At trial, Samuel Howe, a blood spatter expert for the state, testified about blood shown in photographs of the victims and the crime scene. During a recess in the middle of Howe's direct examination, defense counsel saw Duke talking with Howe and motioning toward the

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[1] A similar rule is codified at rule 615, Arizona Rules of Evidence.

photographs to which Howe's testimony had referred. Howe continued testifying after the recess, and defense counsel cross-examined him but did not ask him about his conversation with Duke.

At the conclusion of Howe's testimony, defense counsel told the court about the conversation between Howe and Duke and asked the court to strike Howe's testimony or, alternatively, to declare a mistrial. The trial judge questioned Duke about the conversation, and Duke stated that he had asked Howe about an opinion that Howe had given before the recess, because Duke had an alternative opinion, but that Howe's post-recess testimony remained consistent with his pre-recess testimony, despite the conversation. Defense counsel also asked the trial judge to question Howe about the conversation, and the judge agreed to do so. The judge stated, however, that he wanted to question the bailiff about another issue first. After questioning the bailiff, the judge did not question Howe about the conversation but instead asked whether the parties had anything further to present on either issue. Both parties stated that they did not, and the trial judge declined to strike Howe's testimony or to declare a mistrial.

On appeal, defendant argues that the trial judge should have declared a mistrial because the conversation between Duke and Howe violated rule 9.3(a). Defendant further argues that the conversation was prejudicial because Howe's testimony was the only evidence that directly refuted defendant's self-defense claim. Finally, defendant argues that the trial judge improperly refused to question Howe about

the conversation and, as a result, precluded defendant from making an adequate record.

If a witness violates rule 9.3(a), the trial court has discretion when deciding whether to admit that witness's testimony. *State v. Gulbrandson,* 184 Ariz. 46, 63, 906 P.2d 579, 596 (1995). We will reverse the trial court's decision only when the defendant shows that the trial court abused its discretion and that the defendant suffered prejudice. *Gulbrandson,* 184 Ariz. at 63, 906 P.2d at 596.

Assuming without deciding that the prohibition against talking to other witnesses applies to the investigator-witness designated under rule 9.3(d), Arizona Rules of Criminal Procedure, there is no indication that Duke improperly influenced Howe. Rather, Duke testified that Howe's pre-recess and post-recess testimony was consistent, and defendant has not presented any evidence to the contrary. Moreover, defendant chose not to cross-examine Howe regarding the conversation. Therefore, we find that the trial court did not abuse its discretion and defendant has not shown prejudice.

B. Alleged Improper Jury Influence

During the trial, defendant saw the bailiff smile at Samuel Howe, the state's blood spatter expert, when Howe took the stand to testify. Defendant disclosed the conduct to the court and asked the court to instruct the bailiff not to influence the jury. The trial court noted that it did not notice any inappropriate behavior but nonetheless questioned the bailiff about that instance and about a conversation the bailiff had with Howe

during a recess. The bailiff stated that he and Howe mostly discussed Howe's father but that the trial "probably was mentioned." The court then allowed defense counsel to question the bailiff, and during that questioning, the bailiff stated that he and Howe started their conversation next to the jury box but that they moved when the jury returned to the courtroom and that he was sure that the jury could not overhear the conversation.

After questioning the bailiff, defendant moved for a mistrial, arguing that the conversation between the bailiff and Howe created the impression for the jury that Howe was a credible witness and that the jury may have overheard the conversation. The trial court denied defendant's motion for a mistrial, stated that it would instruct the bailiff not to talk with any of the witnesses in the case, and admonished the jury to disregard any interaction between the bailiff, or any other court personnel, and any witness.

Defendant argues on appeal that the trial court should have granted a new trial because the conversation between the bailiff and Howe improperly influenced the jury. Defendant also argues that the trial court abused its discretion when it denied defense counsel's request to inquire further into the issue.

As a general rule, "[j]urors and witnesses should avoid any contact or conversation during trial." *State v. Lang,* 176 Ariz. 475, 482, 862 P.2d 235, 242 (App.1993). However, "[s]uch improper contact is not grounds for a mistrial unless the defense establishes that the misconduct was prejudicial or that prejudice can fairly be presumed." *Lang,* 176 Ariz. at 482, 862 P.2d at 242.

Moreover, we will not overturn a trial court's decision to grant or deny a new trial because of alleged improper contact with the jury absent a clear abuse of discretion. *Lang,* 176 Ariz. at 482, 862 P.2d at 242.

In this case, the trial court did not observe any inappropriate behavior by either the bailiff or Howe that would influence the jury. The court conducted an evidentiary hearing and learned that the conversation may have mentioned the trial but that the jury probably could not overhear the conversation. The court also admonished the jury to disregard any interaction between the bailiff and any of the witnesses. We therefore conclude that the trial court acted within its discretion when it determined that the conversation between the bailiff and Howe was not prejudicial.

C. Admissibility of Autopsy Photographs

Defendant argues on appeal that the trial court abused its discretion when it admitted into evidence 5 autopsy photographs of Tisha Weaver and Katherine Gumina.[2] At trial, defendant filed a motion in limine objecting to the admissibility of several photographs.

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[2] Although defendant lists the admissibility of the crime scene photographs as an issue in his brief, he concedes in the text of his brief that the trial court acted within its discretion when it admitted these photographs. We have reviewed all of the crime scene photographs. Some graphically depict the brutal nature of the crime; however, they were relevant, not unduly cumulative, and not so gruesome so as to incite or inflame the jury. *See State v. Gulbrandson,* 184 Ariz. 46, 60, 906 P.2d 579, 593 (1995). We conclude that the trial court properly admitted the photographs and find no fundamental error.

That motion did not object to the autopsy photographs of Tisha Weaver and Katherine Gumina; rather, it conceded that the autopsy photographs of Tisha Weaver "might be helpful in explaining certain medical testimony" and stated that defendant had not yet received any autopsy photographs of Katherine Gumina. At the hearing on the motion, defendant relied on his written brief. Moreover, when the state moved to admit the photographs into evidence at trial, including the autopsy photographs of Katherine Gumina, defendant stated that he had no objection. Thus, defendant has waived this argument absent fundamental error. *State v. Bolton,* 182 Ariz. 290, 297, 896 P.2d 830, 837 (1995).

We find that the admission of the photographs was not fundamental error. A photograph is admissible if (1) the photograph is relevant to an issue in the case, and (2) the photograph does not have a tendency to incite or inflame the jury. *State v. Gulbrandson,* 184 Ariz. 46, 60, 906 P.2d 579, 593 (1995). Exhibit 125 depicts bone fractures on the back of Ms. Gumina's skull, and exhibits 129–31 depict injuries to Tisha's skull and brain. These photographs were relevant to illustrate the medical examiner's testimony, to show the cause of Ms. Gumina's and Tisha's deaths and the similarities of their injuries, and to refute defendant's claim that another person killed Tisha. Finally, exhibit 132 depicts the flushed condition of Tisha's face, which supports the conclusion that she was strangled or suffocated.

Although these photographs are gruesome, they are clinical in nature. Only one depicts a victim's face.

Indeed, without any accompanying explanation, discerning which victim is the subject of each photograph is difficult, with the exception of the photograph of Tisha's face. In contrast to the other photographs, the one of Tisha's face is taken at an angle such that the blunt force injury to her head is not visible. Therefore, we conclude that the photographs were relevant and not unfairly prejudicial, and their admission was not error.

D. Impeachment with Prior Misdemeanor Theft Convictions

The trial court held a pretrial hearing to determine whether the state could impeach defendant with 5 prior convictions pursuant to rule 609(a), Arizona Rules of Evidence. Under that rule, a prior conviction is admissible to impeach if the crime "(1) was punishable by death or imprisonment in excess of one year under the law under which the witness was convicted or (2) involved dishonesty or false statement, regardless of the punishment." The convictions at issue were: (1) misdemeanor larceny in 1983, (2) felony attempted grand larceny in 1984, (3) misdemeanor theft in 1990, (4) misdemeanor theft in 1991, and (5) felony theft in 1991. After the hearing, the trial court ruled that the 1983 misdemeanor conviction was not admissible but that the 1984 and 1991 felony convictions were admissible. The court took the issue of the 1990 and 1991 misdemeanor convictions under advisement.

At a later pretrial hearing, the court again heard oral argument about the remaining two misdemeanor convictions. The state argued that the misdemeanors were admissible if they involved "moral turpitude" and

that "theft falls into that category." Defendant responded that the misdemeanor convictions should be excluded as unfairly prejudicial. Ultimately, the trial court ruled that the convictions were admissible for impeachment purposes, and the state impeached defendant at trial with these misdemeanor convictions and the two felony convictions.

On appeal, defendant argues that the trial court should have excluded the 1990 and 1991 misdemeanor theft convictions under rule 609(a) because theft is not a crime involving dishonesty or false statement. Defendant further argues that the error was not harmless because defendant's credibility was critical to his case, the convictions were relatively recent, and the convictions were related to the state's theory of the motive for the murders. In response, the state concedes that the trial court erred but argues that the error was harmless because the misdemeanor convictions were merely cumulative in light of the other properly admitted impeachment evidence.

Where a defendant raises only a general objection to evidence at trial, the argument is waived, and our review is limited to whether admission of the evidence constituted fundamental error. *State v. Walker,* 181 Ariz. 475, 481, 891 P.2d 942, 948 (App.1995); *see also* Ariz.R.Evid. 103(a)(1); Udall, *Evidence* § 12, at 18. In this case, defendant argued at trial that the convictions were inadmissible because they were unfairly prejudicial. Defendant did not assert, as he does now, that the convictions were inadmissible because they did not involve dishonesty or false statement, and therefore, he has waived this argument.

Even if we assume that the trial court erred and defendant preserved the issue, the error was harmless. Error is harmless if it can be shown beyond a reasonable doubt that the error did not affect the verdict. *State v. Lundstrom,* 161 Ariz. 141, 150, 776 P.2d 1067, 1076 (1989); *see also Chapman v. California,* 386 U.S. 18, 22–23, 87 S.Ct. 824, 827, 17 L.Ed.2d 705 (1967). Although the misdemeanor convictions were relatively recent and related to the state's theory with respect to motive, the state properly impeached defendant with the 1991 felony theft and 1984 felony attempted grand larceny convictions. Moreover, overwhelming evidence at trial connected defendant with the murders. Thus, we can conclude beyond a reasonable doubt that the error did not affect the verdict, and admission of the convictions to impeach defendant was not fundamental error.

III. Sentencing Issues

A. Aggravating Circumstances

Regarding Robert Weaver's murder, the trial court found three aggravating circumstances: (1) defendant committed the murder for pecuniary gain, A.R.S. § 13–703(F)(5); (2) defendant committed the murder in an especially heinous, cruel, or depraved manner, A.R.S. § 13–703(F)(6); and (3) defendant was convicted of one or more other homicides that were committed during the commission of the offense, A.R.S. § 13–703(F)(8). Regarding Tisha Weaver's murder, the trial court found the above 3 aggravating circumstances and that the victim was under 15 years of age, A.R.S. § 13–703(F)(9).

The state must prove aggravating circumstances beyond a reasonable doubt. *State v. Rockwell,* 161 Ariz. 5, 14, 775 P.2d 1069, 1078 (1989). Defendant does not challenge the (F)(8) and (F)(9) aggravating circumstances on appeal, and our review of the record confirms that they were proved beyond a reasonable doubt. *See State v. Greenway,* 170 Ariz. 155, 167–68, 823 P.2d 22, 34–35 (1991) (explaining that the (F)(8) aggravating factor applies to multiple murders); *State v. Gallegos,* 178 Ariz. 1, 15, 870 P.2d 1097, 1111, *cert. denied,* 513 U.S. 934, 115 S.Ct. 330, 130 L.Ed.2d 289 (1994) (finding (F)(9) aggravating factor where defendant was tried as an adult and the victim was younger than 15). We now discuss the (F)(5) and (F)(6) aggravating circumstances.

1. Pecuniary Gain

Defendant argues on appeal that the evidence presented at trial was not sufficient to support the trial court's finding that defendant committed the murders in the expectation of pecuniary gain. The trial court may not find pecuniary gain in every case in which "a person has been killed and at the same time defendant has made a financial gain." *State v. Correll,* 148 Ariz. 468, 479, 715 P.2d 721, 732 (1986). Rather, the expectation of pecuniary gain must be a motive, cause, or impetus for the murder and not merely a result of the murder. *State v. Spencer,* 176 Ariz. 36, 43, 859 P.2d 146, 153 (1993), *cert. denied,* 510 U.S. 1050, 114 S.Ct. 705, 126 L.Ed.2d 671 (1994).

We find that the record supports the trial court's finding of pecuniary gain. At the time of the murders, defendant was not working and had only a small

amount of money. Defendant was living with a friend, but on the day before the murders that friend told defendant that he could not live with her anymore. Defendant knew that warrants were pending for his arrest, and he wanted to leave Bullhead City. Finally, defendant knew about Robert Weaver's gun collection. Because ample evidence shows that defendant murdered Tisha Weaver and Robert Weaver as part of a plan to obtain the gun collection and leave Bullhead City, we conclude that the trial court properly found the aggravating circumstance of pecuniary gain.

2. Especially Heinous, Cruel, or Depraved

The especially heinous, cruel, or depraved aggravating circumstance is phrased in the disjunctive; if any one of the three factors is found, the circumstance is satisfied. *State v. Murray,* 184 Ariz. 9, 37, 906 P.2d 542, 570 (1995).

a. Cruelty

Cruelty focuses on the victim's state of mind and exists when the defendant "inflicts mental anguish or physical abuse before the victim's death." *State v. Walton,* 159 Ariz. 571, 586, 769 P.2d 1017, 1032 (1989). Mental anguish results when the victim experiences significant uncertainty about his or her ultimate fate. *Murray,* 184 Ariz. at 37, 906 P.2d at 570. Moreover, we have held that "when a victim is bludgeoned to death, the state must prove beyond a reasonable doubt that the victim experienced pain before losing consciousness." *State v. Kiles,* 175 Ariz. 358, 371, 857 P.2d 1212, 1225 (1993), *cert. denied,* 510 U.S. 1058, 114

S.Ct. 724, 126 L.Ed.2d 688 (1994) (cruelty found where victim regained consciousness).

We find that the record supports the trial court's finding of cruelty beyond a reasonable doubt with respect to both murders. Regarding Robert Weaver's murder, the trial court found that "Robert ... had time to contemplate his fate as he fled from the defendant" and that "[t]he killing therefore was cruel." The physical evidence and expert testimony at trial showed that after the initial blows, Robert fell to the ground, where he remained unconscious and bleeding for at least 10 to 15 minutes. Robert then moved between the garage door and Katherine Gumina's car, leaving a bloody handprint smeared across the length of the garage door and blood on the side of the car, and climbed on top of a work bench, leaving blood along the east wall. This evidence is sufficient to establish that Robert regained consciousness and experienced pain and uncertainty about his fate and thus is sufficient to uphold the trial court's finding of cruelty. *See Kiles,* 175 Ariz. at 371, 857 P.2d at 1225.

Regarding Tisha Weaver's murder, the trial court found that Tisha had time to contemplate her fate. She knew that her great-grandmother had been attacked, and she struggled with defendant for her life. The following evidence was presented at trial: (1) although Tisha was wearing pajamas when the police discovered her body, the beds were still made and she had not yet gone to bed when the murders occurred; (2) a child's workbook and colored pencils were in the living room; (3) Tisha's body was under the master bedroom bed with her legs spread and marks on the carpet indicated

that she had been pulled out from under the bed; and (4) the police found a black bracelet, similar to one that defendant had been seen wearing, next to Tisha's head. Although we cannot conclusively determine whether Tisha witnessed defendant attacking Katherine Gumina, sufficient evidence supports our conclusion that Tisha was awake when the murders occurred, that she hid under her parents' bed because she was afraid, and that she struggled with defendant and pulled the bracelet off his wrist. Therefore, we can conclude beyond a reasonable doubt that she experienced uncertainty about her fate and that the murder was cruel.

b. Heinous or Depraved

Heinousness and depravity focus on the defendant's state of mind and attitude at the time of the murders. *Murray,* 184 Ariz. at 37, 906 P.2d at 570. We look for the following circumstances when determining whether a crime is especially heinous or depraved: (1) apparent relishing of the murder; (2) infliction of gratuitous violence; (3) mutilation of the victim's body; (4) senselessness of the crime; and (5) helplessness of the victim. *State v. Gretzler,* 135 Ariz. 42, 51–52, 659 P.2d 1, 10–11 (1983). The last two factors are less probative of a defendant's state of mind than the first three. *Murray,* 184 Ariz. at 37–38, 906 P.2d at 570–71, citing *State v. King,* 180 Ariz. 268, 287, 883 P.2d 1024, 1043 (1994), *cert. denied,* 516 U.S. 880, 116 S.Ct. 215, 133 L.Ed.2d 146 (1995) ("[O]nly under limited circumstances will the senselessness of a murder or the helplessness of the victim ... lead to [finding heinousness or depravity]."). Additionally, evidence

that the murder was committed to eliminate a witness can support a finding of heinousness and depravity. *State v. Ross,* 180 Ariz. 598, 606, 886 P.2d 1354, 1362 (1994), *cert. denied,* 516 U.S. 878, 116 S.Ct. 210, 133 L.Ed.2d 142 (1995).

Regarding Robert Weaver's murder, the trial court found that defendant inflicted gratuitous violence on Robert, that the murder was senseless, and that Robert was helpless. After the first blows, Robert was unconscious and bleeding, and he did not pose an obstacle to defendant's goal of taking the guns. *State v. West,* 176 Ariz. 432, 448, 862 P.2d 192, 208 (1993), *cert. denied,* 511 U.S. 1063, 114 S.Ct. 1635, 128 L.Ed.2d 358 (1994) (murder is senseless if unnecessary to achieve defendant's goal). Although Robert regained consciousness, it appears that he was attempting to flee and was not attempting to stop defendant from taking the guns. Even if he was attempting to stop defendant, he more than likely was no longer physically capable of doing so. Additionally, the initial blows rendered Robert helpless. Thus, the record supports the trial court's finding of senselessness and helplessness beyond a reasonable doubt.

The record also supports the trial court's finding that defendant inflicted gratuitous violence on Robert. Gratuitous violence is violence clearly beyond that necessary to cause death. *State v. Greenway,* 170 Ariz. 155, 166, 823 P.2d 22, 33 (1991). At trial, the blood spatter expert testified that, after the initial blows, Robert regained consciousness, attempted to flee, and climbed on top of a work bench. The expert further testified that, while Robert was on the work bench,

defendant struck him at least two additional times in the head with the baseball bat, and, as he fell to the ground, defendant struck him in the head at least once more. The medical examiner testified that each of the blows defendant rendered were sufficient to cause death. We therefore conclude beyond a reasonable doubt that defendant inflicted gratuitous violence on Robert.

Regarding Tisha Weaver's murder, the trial court found that her murder was heinous and depraved because she was helpless, her murder was senseless, the only motive for her murder was to eliminate her as a witness, and defendant inflicted gratuitous violence. We agree that the murder was senseless, because Tisha, a 7–year–old child, did not present an obstacle to defendant's goal of taking Robert's guns, and that she was a helpless victim.

We find, however, that the record does not support the trial court's finding that defendant murdered Tisha to eliminate her as a witness. As we stated above, evidence of witness elimination can support a finding of heinousness and depravity. We have held, though, that such evidence must fall into one of three categories: (1) "the murder victim is a witness to some other crime, and is killed to prevent that person from testifying about the other crime"; (2) the defendant has stated that witness elimination was a motive for the murder; or (3) "extraordinary circumstances of the crime show, beyond a reasonable doubt, that witness elimination is a motive." *Ross,* 180 Ariz. at 606, 886 P.2d at 1362; *see also State v. Barreras,* 181 Ariz. 516, 523, 892 P.2d 852, 859 (1995). Moreover, the third

category occurs only in the "most extreme" cases. *Ross,* 180 Ariz. at 606, 886 P.2d at 1362 (finding only one example of third category in prior cases).

This case does not fall within the first category because there is no clear evidence of the sequence of the homicides, and we cannot determine conclusively whether Tisha directly witnessed the attack on Ms. Gumina. We leave open the question of whether "some other crime" can include a crime that was committed before the murder at issue but that occurred during the same time period as the murder at issue, such as in a case involving multiple homicides. Additionally, this case does not fall within the second category because review of the record reveals that defendant has not stated that he killed Tisha to eliminate her as a witness. Finally, this case does not fall within the third category because it is not the "extreme" case in which we can conclude beyond a reasonable doubt that witness elimination was the motive for Tisha's murder. Therefore, witness elimination does not support a finding of heinousness and depravity in this case.

The record does support the trial court's finding of gratuitous infliction of violence. The evidence at trial showed that defendant struck Tisha in the head with the baseball bat at least twice and that he then placed a pillow over her head and suffocated her, strangled her, or both. The medical examiner testified that the head injuries were most likely fatal. He also testified that Tisha may have continued breathing for a short period after the head injuries. However, defendant had struck Tisha with the baseball bat with sufficient force to create a wound several inches wide, extending from

her left ear to her left cheek. He then struck her a second time on the back of her head. After delivering these two fatal blows, defendant then asphyxiated her, far exceeding the amount of violence necessary to cause death. We therefore find beyond a reasonable doubt that defendant inflicted gratuitous violence on Tisha.

B. Mitigating Circumstances

In addition to the statutory mitigating circumstances listed in A.R.S. § 13–703(G), the sentencing judge must consider "any aspect of the defendant's character or record and any circumstance of the offense relevant to determining whether a sentence less than death might be appropriate." *State v. West,* 176 Ariz. 432, 449, 862 P.2d 192, 209 (1993), *cert. denied,* 511 U.S. 1063, 114 S.Ct. 1635, 128 L.Ed.2d 358 (1994), quoting *State v. McCall,* 139 Ariz. 147, 162, 677 P.2d 920, 935 (1983); *see also* A.R.S. § 13–703(G). The defendant must prove the existence of mitigating circumstances by a preponderance of the evidence, and the trial court has the discretion to decide how much weight to give each mitigating circumstance that the defendant offers. *West,* 176 Ariz. at 449, 862 P.2d at 209.

At the sentencing hearing, defendant asserted the following statutory mitigating circumstances: (1) A.R.S. § 13–703(G)(1) (defendant's capacity to appreciate the wrongfulness of his conduct or to conform his conduct to the law was significantly impaired); and (2) A.R.S. § 13–703(G)(2) (defendant was under unusual and substantial duress). Additionally, defendant raised the following non-statutory mitigating circumstances: (1) victims' family's alleged "indifference" to imposition

of the death penalty; (2) chaotic and abusive childhood; (3) potential for rehabilitation; (4) lack of future dangerousness if confined to prison; (5) participation of another individual; (6) history of substance abuse and intoxication at the time of the offenses; (7) head injuries; (8) mental illness; and (9) remorse.

In its special verdicts, the trial court found no statutory mitigating circumstances. The trial court did find that defendant proved the following non-statutory mitigating circumstances by a preponderance of the evidence: (1) defendant suffers from long-term substance abuse; (2) defendant was under the influence of alcohol and drugs at the time of the offenses; (3) defendant had a chaotic and abusive childhood; and (4) defendant has a long standing substance abuse problem which may be caused by genetic factors and aggravated by head trauma. The trial court concluded, however, that the mitigating circumstances did not outweigh the aggravating circumstances and were not sufficiently substantial to call for leniency. As part of our independent review, we address each mitigating circumstance defendant alleged.

1. Statutory Mitigating Circumstance (G)(1)

The trial court considered the evidence presented regarding defendant's mental health and drug use but found he had not proved by a preponderance of the evidence that his capacity to appreciate the wrongfulness of his conduct or to conform his conduct to the law was significantly impaired. *See* A.R.S. § 13–703(G)(1). Specifically, the trial court found that defendant's conduct during and after the murders,

including lying to Russell Dechert so that Dechert would leave the Gumina residence, retrieving his belongings from a friend's house before leaving town, abandoning Katherine Gumina's car, and taking a taxi to Las Vegas, showed that defendant understood the wrongfulness of his acts and attempted to avoid prosecution. Moreover, the trial court noted that the expert testimony regarding defendant's drug use before the murders was based solely on defendant's self-reporting. We agree with the trial court that the evidence of defendant's drug use and related mental health problems supported the finding of a non-statutory mitigating circumstance, as discussed below, but not the (G)(1) circumstance.

2. Statutory Mitigating Circumstance (G)(2)

The trial court also found that defendant did not prove by a preponderance of the evidence that he was "under unusual and substantial duress." A.R.S. § 13–703(G)(2). The only evidence presented at trial to establish this circumstance and the participation of another person in the crimes was defendant's testimony that Frank Sperlazzo was involved with the murders, that Sperlazzo was angry with Robert Weaver because Robert owed him money for drugs, that Sperlazzo was at the Gumina residence on the night of the murders, and that Sperlazzo killed Tisha Weaver. Additionally, although he did not testify, Cordell Reid told the state's investigator that he saw Frank Sperlazzo near the Gumina residence on the day before and the night of the murders.

This evidence is not sufficient to establish that Sperlazzo participated in the crime and that, as a result, defendant was under substantial duress. The state discredited Reid's story when it determined that Reid could not possibly have seen the Gumina residence from where he claimed to have been. Additionally, the physical evidence presented at trial showed that the three victims were attacked with the same type of blunt instrument, undermining defendant's claim that Sperlazzo killed Tisha Weaver. Therefore, we agree with the trial court that defendant has not established the (G)(2) mitigating circumstance by a preponderance of the evidence.

3. Victims' Family's Alleged "Indifference" to the Imposition of the Death Penalty

Defendant asserts that the victims' family's "indifference" to the imposition of the death penalty should be given weight as a mitigating circumstance. The record does not support defendant's assertion. Although Jackie Weaver was quoted in a newspaper article as stating that she opposed the death penalty in this case, her reasoning was that the death penalty would be "too quick" for defendant. Moreover, Jackie later stated at the sentencing hearing that she did not oppose the death penalty in this case, and her sister stated that she hoped the death penalty would be imposed. *See State v. Williams,* 183 Ariz. 368, 385, 904 P.2d 437, 454 (1995) (victim's sister's recommendation of life sentence not relevant mitigating circumstance because recommendation was out of concern for defendant's family and was unrelated to defendant);

State v. Apelt, 176 Ariz. 349, 368, 861 P.2d 634, 653 (1993), *cert. denied,* 513 U.S. 834, 115 S.Ct. 113, 130 L.Ed.2d 59 (1994) (request from victim's friend and sister that defendant not be sentenced to death not given mitigating weight). Thus, we do not give this circumstance mitigating weight.[3]

4. Chaotic and Abusive Childhood

The trial court found that defendant's chaotic and abusive childhood was a mitigating circumstance. A difficult family background is not necessarily a mitigating circumstance unless defendant can show that something in his background had an effect on his behavior that was beyond his control. *See State v. Stokley,* 182 Ariz. 505, 524, 898 P.2d 454, 473 (1995), *cert. denied,* 516 U.S. 1078, 116 S.Ct. 787, 133 L.Ed.2d 737 (1996). At the sentencing hearing, defendant's stepfather and the court-appointed expert testified that defendant suffered an abusive and chaotic childhood and that the abuse colored his behavior. Defendant's first stepfather was physically and verbally abusive to him, and defendant witnessed his mother being abused. In its special verdict, however, the trial court

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[3] Although defendant does not claim on appeal that the sentencing recommendations given by Jackie Weaver and her sister were improperly considered as aggravation evidence, we briefly address the issue. We have held that "the trial judge in a capital case is capable of focusing on the relevant sentencing factors and setting aside the irrelevant, inflammatory, and emotional factors." *State v. Williams,* 183 Ariz. at 386, 904 P.2d at 455. Nothing in the record indicates that the trial court gave any aggravating weight to the recommendations when he sentenced defendant; thus, we find no fundamental error.

did not find any connection between defendant's family background and his conduct on the night of the murders, and our review of the record does not reveal any such connection. Thus, we find that defendant's chaotic and abusive childhood is not a mitigating circumstance.

5. Potential for Rehabilitation

The trial court found that defendant did not prove his potential for rehabilitation as a mitigating circumstance. At the sentencing hearing, the court-appointed expert testified that although defendant successfully graduated from continuation school, he left a two-year drug rehabilitation program after 20 months and returned to drug use and was discharged for bad conduct from the Marines. We agree with the trial court that defendant has not established by a preponderance of the evidence that he can be rehabilitated in an institutional setting. *See Stokley,* 182 Ariz. at 524, 898 P.2d at 473.

6. Lack of Future Dangerousness if Confined to Prison

Defendant presented some evidence that he would no longer be dangerous if confined to prison for life, but we find that he failed to prove this by a preponderance of the evidence, particularly in light of the violent nature of his offenses. *See Stokley,* 182 Ariz. at 524, 898 P.2d at 473.

7. Participation of Another Individual

The trial court found that defendant did not establish by a preponderance of the evidence that another person participated in the crimes. We agree with the trial court's finding for the reasons set forth in our discussion of the (G)(2) statutory mitigating circumstance.

8. History of Substance Abuse and Intoxication at the Time of the Offenses

The trial court found that defendant had a long-standing substance abuse problem, which may be caused by genetic factors and aggravated by head trauma, and that he was under the influence of alcohol and drugs at the time of the offenses. Although defendant's impairment from voluntary intoxication does not rise to the level of statutory mitigation, we must still consider whether the impairment constitutes a nonstatutory mitigating circumstance, when viewed in light of defendant's alleged history of alcohol and drug abuse. *State v. Murray,* 184 Ariz. 9, 39, 906 P.2d 542, 572 (1995), citing *State v. Gallegos,* 178 Ariz. 1, 17, 870 P.2d 1097, 1113, *cert. denied,* 513 U.S. 934, 115 S.Ct. 330, 130 L.Ed.2d 289 (1994).

Defendant's history of substance abuse is well-documented. Defendant's stepfather testified at the sentencing hearing that by the time defendant was 17 years old, he had used many types of drugs and was an alcoholic and that defendant had attended two drug rehabilitation programs. In contrast, the evidence of

defendant's intoxication on the night of the murders comes largely from defendant's self-reporting. At trial, defendant testified that he was under the influence of methamphetamines and alcohol on the night of the murders and that, at the time, he had not slept for 3 or 4 days. Russell Dechert, who saw defendant and Robert Weaver just before the murders, however, testified that, although he knew defendant had been drinking, he was not visibly intoxicated. We give some mitigating weight to this circumstance but find that it is not sufficiently substantial to call for leniency.

9. Head Injuries

The trial court gave some mitigating weight to defendant's head injuries in that it found that the head injuries may have aggravated defendant's substance abuse problem. We have held that "[h]ead injuries that lead to behavioral disorders may be considered a mitigating circumstance." *Stokley,* 182 Ariz. at 521, 898 P.2d at 470.

At the sentencing hearing, defendant's stepfather testified that defendant experienced "black outs" when he was 4 years old due to a calcium deficiency, that he sustained head injuries when he fell from roofs at ages 13 and 15, and that he was the victim of an assault while enlisted in the Marines. Additionally, Jack Potts, M.D., who prepared defendant's rule 26.5 mental health evaluation, testified that defendant's head injuries should constitute a mitigating factor because they may have caused defendant to act more aggressively on the night of the murders. We agree with the trial court that the head trauma that defendant suffered as a child is a mitigating

circumstance, but we also agree with the trial court's conclusion that this mitigation is not sufficient to call for leniency.

In connection with this issue, defendant argues that the trial court should have continued the sentencing hearing so that Dr. Potts could conduct further testing to determine the extent of defendant's head injuries. The decision whether to grant a continuance is within the trial court's discretion, and the trial court may deny a continuance where the defendant seeks to introduce evidence already before the court. *State v. Ohta,* 114 Ariz. 489, 491–92, 562 P.2d 369, 371–72 (1977).

Before the sentencing hearing, Dr. Potts examined defendant twice. Dr. Potts, however, testified at the sentencing hearing that he did not learn of the black outs defendant experienced when he was 4 years old or of the head injury that defendant sustained when he was 15 years old until defendant's stepfather testified at the aggravation/mitigation hearing. Although Dr. Potts testified that additional neurological testing would be helpful to determine the extent and impact of defendant's head injuries and to determine whether defendant suffers from an organic neurological disorder, he also testified that the new information would not substantially change his opinion. Because the additional testing in all likelihood merely would have corroborated Dr. Potts' testimony, we conclude that the trial court acted within its discretion when it declined to grant a continuance. *But cf. State v. Eastlack,* 180 Ariz. 243, 263–65, 883 P.2d 999, 1019–21 (1994), *cert. denied,* 514 U.S. 1118, 115 S.Ct. 1978, 131 L.Ed.2d 866 (1995) (case remanded for resentencing

because defendant had not received any psychological evaluation).

10. Mental Illness

Defendant presented some evidence at the sentencing hearing that he may suffer from cyclothymia, a form of mental illness. Defendant did not, however, establish a causal connection between his alleged mental illness and his conduct on the night of the murders, nor did he provide any documented instances of his alleged illness. Thus, defendant has not established mental illness by a preponderance of the evidence, and we do not give it mitigating weight. *See State v. Stuard,* 176 Ariz. 589, 608 n. 12, 863 P.2d 881, 900 n. 12 (1993) ("[E]vidence of causation is required before mental impairment can be considered a significant mitigating factor."). *Cf. Stokley,* 182 Ariz. at 524, 898 P.2d at 473 (nonstatutory mitigating weight given where defendant had documented mental disorders).

11. Remorse

We agree with the trial court's finding that defendant failed to prove remorse by a preponderance of the evidence. *See Stokley,* 182 Ariz. at 525, 898 P.2d at 474. Although Dr. Potts testified that defendant was genuinely remorseful about murdering Robert Weaver and attempting to murder Katherine Gumina, he has not accepted responsibility for Tisha Weaver's death.

C. Independent Review

Defendant argues that the trial court improperly weighed the aggravating and mitigating circumstances.

In death penalty cases, this court independently reviews any aggravating and mitigating circumstances to determine whether the death penalty was properly imposed. *State v. Gulbrandson,* 184 Ariz. 46, 67, 906 P.2d 579, 600 (1995); A.R.S. § 13–703.01. Accordingly, we have reviewed the entire record, considering and independently weighing all of the aggravating and mitigating evidence presented. *Gulbrandson,* 184 Ariz. at 67, 906 P.2d at 600, citing *State v. Brewer,* 170 Ariz. 486, 500, 826 P.2d 783, 797, *cert. denied,* 506 U.S. 872, 113 S.Ct. 206, 121 L.Ed.2d 147 (1992).

Regarding Robert Weaver's murder, we find the following aggravating circumstances: (1) defendant committed the murder for pecuniary gain; (2) the murder was especially cruel, heinous, or depraved; and (3) defendant was convicted of another homicide that he committed during the commission of the instant offense. Regarding Tisha Weaver's murder, we find the following aggravating circumstances: (1) defendant committed the murder for pecuniary gain; (2) the murder was especially cruel, heinous, or depraved; (3) defendant was convicted of another homicide that he committed during the commission of the instant offense; and (4) the victim was under 15 years of age. Regarding both murders, we give mitigating weight to defendant's history of substance abuse, intoxication at the time of the offenses, and head injuries, but we find that the mitigating circumstances are insufficiently substantial to call for leniency.

Disposition

We have independently reviewed the record for fundamental error and have found none. *See State v.*

Kemp, 185 Ariz. 52, 67 & n. 1, 912 P.2d 1281, 1296 & n. 1 (1996). Accordingly, we affirm defendant's convictions and sentences.

FELDMAN, C.J., ZLAKET, V.C.J., and MOELLER and MARTONE, JJ., concur.