No. 18–8386

IN THE
SUPREME COURT OF THE UNITED STATES

MICHAEL APELT,
PETITIONER,
-vs-
CHARLES L. RYAN,
RESPONDENTS.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION

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CAPITAL CASE

QUESTIONS PRESENTED FOR REVIEW

1) Should this Court grant certiorari to review the Ninth Circuit's AEDPA-governed determination that Apelt was not prejudiced by counsel's deficient performance, where Apelt seeks only to correct perceived case-specific errors by the Ninth Circuit?

2) Should this Court grant certiorari to determine whether a state court's failure to hold an evidentiary hearing renders its factual determinations unreasonable under 28 U.S.C. § 2254(d)(2), where the Ninth Circuit did not reach that issue, another case in the pipeline presents a superior vehicle to resolve the question, and Apelt's position lacks merit?

3) Should this Court grant certiorari to review Apelt's inherently fact-bound challenge to the Ninth Circuit's determination, under AEDPA, that the state court reasonably rejected his intellectual-disability claim?

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INTRODUCTION

Petitioner Michael Apelt has presented no compelling reason for this Court to grant certiorari in this aging capital case. He has not established that the Ninth Circuit Court of Appeals' decision conflicts with a decision from another United States Court of Appeals or a state court of last resort, that the Ninth Circuit decided an important question of federal law not yet settled by this Court, or that the Ninth Circuit "decided an important federal question in a way that conflicts with relevant decisions of this Court." U.S. SUP. CT. R. 10.

To the contrary, Apelt's claims are fact-intensive and the errors he alleges generally affect only his case. *See* SUP. CT. R. 10 ("A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law."); *Butler v. McKellar*, 494 U.S. 407, 429 (1990) (Brennan, J., dissenting) ("[The] Supreme Court's burden and responsibility are too great to permit it to review and correct every misstep made by the lower courts in the application of accepted principles. Hence the Court generally will not grant certiorari just because the decision below may be erroneous.") (quotations omitted); *Layne & Bowler Corp. v. Western Well Works, Inc.*, 261 U.S. 387, 393 (1923) ("[I]t is very important that we be consistent in not granting the writ of certiorari except in cases involving principles the settlement of which is of importance to the public, as distinguished from that of the parties, and in cases where there is a real and embarrassing conflict of opinion and authority between the Circuit Courts of

Appeals."). And to the extent Apelt raises novel or unsettled issues, his case is a poor vehicle to resolve them.

STATEMENT OF THE CASE[1]

This case arises from events occurring more than 30 years ago, when Apelt, his former girlfriend, Anke Dorn, and his brother, Rudi, traveled to the United States from their native Germany.[2] *State v. Apelt*, 861 P.2d 634, 638 (Ariz. 1993). They embarked on a quest to find a wife for Apelt; along the way, they "met and 'conned' a series of women, spinning tales of wealth and intrigue." *Id.* at 638. The group's American excursion culminated in Cindy Monkman's violent death in the desert outside Phoenix, and Apelt's residency on Arizona's death row.

After spending some time in San Diego (where the brothers falsely represented themselves as wealthy businessmen), the trio found themselves in the Phoenix area. *Apelt*, 861 P.2d at 638. There, on October 6, 1988, the brothers met Annette Clay. *Id.* Clay soon introduced the men to her friends, sisters Cindy and Kathy Monkman. *Id.* The brothers claimed to be banking and computer experts. *Id.* Apelt immediately set his sights on Cindy, telling her within hours of meeting her, "[Y]ou're the woman I want to marry," and, "[M]e you marry." *Id.*

Within a few days, Clay and Cindy became suspicious of the brothers' story and investigated it. *Id.* The women determined that the brothers were registered at an

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[1] Respondent derives his factual statement from the Arizona Supreme Court's opinion affirming Apelt's convictions and sentences on direct appeal. AEDPA directs this Court to presume these facts are correct. *See* 28 U.S.C. § 2254(d)(2), (e)(1).

[2] To avoid confusion, Respondent refers to Petitioner Michael Apelt as "Apelt" and to his brother, Rudi Apelt, as "Rudi."

inexpensive motel, rather than the expensive one they had identified; the women then located the Apelts' room at that motel and discovered Dorn, whom they had not met. *Id.* The following day, the Apelts, enraged, accused Clay and Cindy of ruining their security clearances and costing them their jobs and work visas. *Id.* The Apelts claimed that Dorn was a family friend whose husband was in the hospital. *Id.* at 638–39. Feeling guilty, and apparently believing the brothers' story, Clay and Cindy suggested various ways in which they could help the men reclaim their jobs or find new ones. *Id.* at 354. After the Apelts had refused each of their suggestions, Clay asked in frustration, "[W]hat do you want us to do, marry you?" The brothers replied, "[Y]es." *Id.*

Apelt moved in to Cindy's apartment and Rudi moved in to Clay's. *Id.* The relationship between Clay and Rudi, however, quickly dissolved based on Rudi's lies. *Id.* Rudi moved into the motel with Dorn, but Apelt convinced both Clay and Cindy that Rudi had returned to Germany. *Id.* On October 28, 1988—less than 1 month after meeting him—Cindy secretly married Apelt in Las Vegas. *Id.*

Having already deceived Cindy into believing he was wealthy, Apelt convinced her that, in Germany, couples customarily purchase large life-insurance policies for investment purposes. *Id.* Apelt and Cindy initially sought a one-million-dollar policy but they were quickly turned down; instead, they applied for one worth $400,000. *Id.* Cindy paid the first month's premium by check. *Id.*

Meanwhile, driving Cindy's car, the brothers and Dorn enjoyed a series of shopping sprees. *Id.* They browsed high-end goods like Rolex watches and Jaguar

cars. *Id.* "Their pattern was to fill out a purchase contract, make a nominal down-payment with assurances that they would pay cash upon receiving money from sources in Germany, and then never return." *Id.* During one of these shopping excursions, Apelt told Dorn that he would become rich if Cindy died unnaturally. *Id.* He also used Cindy's income to pay Rudi's and Dorn's living expenses. *Id.* Between her marriage and her death, Cindy withdrew more than $4,000 from her checking account. *Id.*

In late November, the insurance agent notified Apelt and Cindy that they had only been approved for a $100,000 policy. *Id.* On November 30, the couple applied for a $300,000 policy from a different company. *Id.* Around the same time, Rudi and Dorn reserved a rental car for December 9; they specifically requested a vehicle with a large trunk. *Id.* Cindy and Apelt soon learned that they would not be approved for the $300,000 policy without additional background information, which Cindy submitted. *Id.* Rudi contemporaneously cancelled the rental car's reservation. *Id.* The $300,000 policy was approved on December 22, 1988, contingent on Cindy delivering payment for the premium. *Id.* That same day, the insurance agent delivered the previously obtained $100,000 policy to the couple. *Id.*

On December 23, Cindy and Apelt took Cindy's car to a mechanic for repairs and rented a Subaru for transportation. *Id.* Separately, Apelt, Rudi, and Dorn rented a vehicle with a large trunk—as they had planned to do on December 9. *Id.* Apelt promised Rudi and Dorn a "lot of money," and the trio hatched a plan to kill Cindy that evening. *Id.* at 639–40. They decided to meet in front of a German restaurant and

then caravan to the desert, where they would kill Cindy. *Id.* Apelt agreed to bring Cindy and to ensure that she could not see where they were going. *Id.*

Around 7:15 p.m., Apelt, driving the rented Subaru, arrived at the designated meeting point, where Rudi and Dorn were waiting in the large-trunked rental vehicle. *Id.* Cindy was not visible in the Subaru. *Id.* Dorn and Rudi followed Apelt to the desert. *Id.* Rudi and Apelt got out of their respective cars while Dorn waited inside the rental vehicle. *Id.* The men were gone for about 5 minutes; when they returned, the group drove back to the motel, showered, and changed clothes. *Id.*

The Apelts and Dorn then went to a restaurant and requested a table for four, pretending to be waiting for Cindy. *Id.* When Apelt arrived home in the early morning hours, Cindy's friends had left multiple worried messages on her answering machine, inquiring about her whereabouts because she had failed to appear for a planned dinner. *Id.* Apelt spoke to Clay and claimed that Cindy had left their apartment around 7:00 p.m. after receiving a telephone call from an angry man, and had then failed to meet Apelt at a restaurant as promised. *Id.* Clay went to the apartment and found Cindy's purse there. *Id.* She called the police. *Id.*

The following afternoon, December 24, Cindy's body was found in the desert. *Id.* She had been stabbed five times, her throat had been slashed, and her face and body had been bruised. *Id.* Nearby was a length of nylon cord and a beach towel soaked in blood. *Id.* Tire tracks in the vicinity were consistent with the tires on the car Dorn and Rudi had rented. *Id.* Shoeprints on Cindy's face and next to her body were consistent with a particular type of Reebok tennis shoes. *Id.*

The brothers thereafter deployed a meticulously coordinated plan to conceal their involvement in Cindy's murder. Speaking to police, Dorn and Rudi corroborated Apelt's story about the night of Cindy's death: Cindy had left her apartment around 7:00 p.m. and had agreed to meet the group later at a restaurant. *Id.* Apelt, Rudi, and Dorn took the rented Subaru to the river bottom, where Apelt drove it aggressively, attempting to alter the tires' tread so the car could not be connected to the crime scene. *Id.* When Apelt returned the vehicle, two of its tires had flat spots and needed to be replaced. *Id.*

On New Years' Eve, using money they had borrowed against Cindy's insurance policy, the trio flew to Illinois to attend Cindy's funeral. *Id.* Apelt cried during the service. *Id.* at 640–41. However, Kathy Monkman saw Apelt laughing as he drove away from the event. *Id.* Later that night, Apelt commented to Dorn that he regretted killing Cindy but that she had signed her death warrant when she had signed the insurance papers. *Id.* at 641.

After returning to Phoenix, the group flew to Los Angeles. *Id.* There, they paid a homeless man to record a message on Cindy and Apelt's answering machine. *Id.* The message was in broken English:

> Hear what I have to talk. I have cut through the throat of your wife and I stabbed and more frequently in the stomach in the back with a knife. If I don't get my stuff, your girlfriend is next and then your brother and last it is you. Do it now, if not, you see what happens. My eyes are everywhere.

Id. When he returned to his apartment and "received" the message, Apelt reported it to a German-speaking police detective and asked the detective to translate it. *Id.*

Unfortunately for Apelt, the recording entrenched his status as a suspect in Cindy's murder. *Id.*

A few days later, police began surveillance on the apartment Apelt had shared with Cindy. *Id.* To confirm that Apelt was there, an undercover officer knocked on the door, asked for a fictitious person, and left after being told he had the wrong apartment. *Id.* After the officer departed, Apelt and Rudi called police to report that three tall, black men had come to their door and threatened them. *Id.* Although police knew this had not occurred, they invited the brothers and Dorn to come to the police station the following day to prepare composite sketches of the suspects. *Id.* The group obliged. *Id.* While Apelt and Rudi were busy assisting with the sketches, officers interrogated Dorn. *Id.* She eventually confessed and police arrested the brothers. *Id.* A subsequent search of Cindy and Apelt's apartment yielded, among other things, photographs of Apelt wearing the type of Reebok tennis shoes that left the shoeprints at the murder scene. *Id.*

The brothers and Dorn continued their cover-up efforts while in jail awaiting trial. *Id.* Of particular note, Apelt wrote Rudi to communicate a plan he had devised to deflect suspicion from the brothers:

> I have a guy who is getting out in two-four days and then we'll be free in one to two weeks. It won't matter if the police have anything or not. We're in jail and won't be able to have done that, so don't do anything, okay! Because when a woman is dead, the same thing will have happened, we'll be free and I'll have the money because the police won't be able to do anything.

Id.

The State granted Dorn immunity and she testified at the brothers' separate trials. *Id.* at 641–42. Based on her testimony and the evidence set forth above, a jury found Apelt guilty of first-degree murder and conspiracy to commit first-degree murder. *Id.* at 638, 641–42. At a subsequent aggravation-mitigation hearing, Apelt's attorney offered mitigation that included Apelt's good character, age, and remorse. *Id.* at 653. The sentencing judge found three death-qualifying aggravating factors,[3] and found Apelt's mitigation insufficiently substantial to warrant leniency. *Id.* at 652. The judge accordingly sentenced Apelt to death for the murder conviction and life imprisonment for the conspiracy conviction. *Id.* at 638, 642.

The Arizona Supreme Court affirmed Apelt's convictions and sentences on direct appeal, and Apelt twice unsuccessfully sought state post-conviction relief. Pet. App. 25a–34a; *Apelt*, 861 P.2d at 638–54. Apelt thereafter filed a federal habeas petition, which the district court stayed for a period to permit Apelt to return to state court and raise an intellectual-disability claim under the newly decided case of *Atkins v. Virginia*, 536 U.S. 304 (2002). Pet. App. 34a–35a. After a lengthy evidentiary hearing, the state court found that Apelt had failed to prove "by even a preponderance of the evidence" that he is intellectually disabled.[4] *See* Pet. App. 89a–95a.

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[3] *See* A.R.S. §§ 13–751(F)(4) (offense committed by the promise of payment of something of pecuniary value); (F)(5) (offense committed with the expectation of pecuniary gain); and (F)(6) (offense committed in an especially cruel, heinous, or depraved manner).

[4] The state court reached the opposite conclusion as to Rudi, who had also been sentenced to death and had joined in Apelt's *Atkins* litigation. *See* Pet. App. 35a–37a. The court accordingly vacated Rudi's death sentence. *Id.*

The district court thereafter lifted the stay and, ultimately, denied relief on most of Apelt's claims. *See* Pet. App. 37a. However, relying on *Martinez v. Ryan*, 566 U.S. 1 (2012), the court excused the procedural default of Apelt's claim that counsel ineffectively investigated and presented mitigating evidence at sentencing.[5] *Id.* The court then granted habeas relief on that claim. *Id.*; Pet. App. 96a–106a. Respondent appealed that ruling and Apelt cross-appealed several other issues, including the district court's denial of his *Atkins* claim. Pet. App. 4a. The Ninth Circuit reversed the district court's order granting habeas relief as to Apelt's sentence, finding, under AEDPA's standards, that the state court had reasonably found any deficient performance was not prejudicial, *see Strickland v. Washington*, 466 U.S. 668; otherwise, the Ninth Circuit affirmed the district court's ruling. Pet. App. 1a–88a.

REASONS FOR DENYING THE PETITION

"Review on a writ of certiorari is not a matter of right, but of judicial discretion." U.S. SUP. CT. R. 10. Accordingly, this Court grants certiorari "only for compelling reasons." *Id.* As discussed previously, Apelt has presented no such reason. He has not established that a genuine conflict or important issue exists, or that this is the case to resolve any existing conflict or issue. For these general reasons, and the specific ones set forth below, this Court should deny Apelt's petition.

[5] The state post-conviction court applied an express state procedural bar to this claim during the second post-conviction proceeding because Apelt failed to raise it in earlier proceedings. *See* Resp. App. A. The court, however, alternatively resolved the claim's merits. *Id.*

I. This Court Should Not Grant Certiorari in This AEDPA Case to Review The Ninth Circuit's Routine and Case-Specific Application of *Strickland*'s Prejudice Prong.

The state court adjudicated the merits of Apelt's sentencing-ineffectiveness claim, *see* Resp. App. A, and, as a result, AEDPA circumscribed the Ninth Circuit's review.[6] *See* 28 U.S.C. § 2254(d). Nonetheless, Apelt faults the Ninth Circuit for failing to undertake an adequate "factual analysis" of *Strickland*'s prejudice prong, and proposes that the court's decision conflicts with this Court's *Strickland* jurisprudence. Pet. 11–20. According to Apelt, the Ninth Circuit too heavily emphasized the fact that Apelt premeditated Cindy's murder, at the expense of Apelt's mitigation. *Id.* By Apelt's own admission, however, this issue is, in large part, factual. *Id.* at 11 ("This Court has consistently said that *Strickland* is a fact-intensive inquiry."). Further, Apelt's legal arguments are not novel and do not reflect a circuit split in need of resolution. Rather, Apelt alleges nothing more than a misapplication of *Strickland* with no implications outside of this case.

A. The Ninth Circuit applied the correct test for *Strickland* prejudice and did not treat premeditation as dispositive of the inquiry.

Because the state post-conviction court denied relief in a summary ruling, *see* Resp. App. A, the Ninth Circuit correctly inquired whether the state-court record gave rise to any reasonable argument that Apelt had failed to show *Strickland* prejudice.

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[6] As this Court has repeatedly recognized, AEDPA safeguards the states' role in the criminal-justice system and protects the interests of comity, finality, and federalism. *See, e.g., Cullen v. Pinholster*, 563 U.S. 170, 185 (2011). Ironically, Apelt argues in this AEDPA case that the Ninth Circuit "usurped Arizona's role in sentencing state defendants for state crimes" by *restoring* a death sentence that had survived several rounds of state-court review. Pet. 2. In reality, the only court that has "usurped" Arizona's sentencing authority to date is the district court, first by casting aside a state procedural bar under *Martinez* and then by erroneously granting relief. *See* Pet. App. 96a–106a.

Pet. App. 64a–66a; *see Harrington v. Richter*, 562 U.S. 86, 102 (2011) ("Under § 2254(d), a habeas court must determine what arguments or theories supported or, as here [with a summary ruling], 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."). The court also accurately summarized *Strickland*'s prejudice inquiry in the capital-sentencing context: whether, after reweighing the aggravation and mitigation in its totality, combined with any potential rebuttal to mitigation, "there is a reasonable probability that, absent the errors, the sentencer would have concluded that the balance of aggravating and mitigating circumstances did not warrant death." Pet. App. 66a (quotations and alterations omitted); *see, e.g., Wong v. Belmontes*, 558 U.S. 15, 19–20 (2009) (*Strickland* prejudice from capital sentencing error requires a reasonable probability that the unpresented mitigation would have resulted in a life sentence in light of the aggravation and rebuttal evidence).

Applying this test, the Ninth Circuit acknowledged that Apelt's post-conviction mitigation profile, which included evidence of physical and sexual abuse, family alcoholism, and extreme poverty, *see* Pet. App. 27a–31a, "paints a very different picture of [his] background and character than was presented at sentencing," and further found no evidence that this mitigation would have triggered damaging rebuttal from the State. Pet. App. 66a. Conducting its reweighing, the court appropriately considered the facts and circumstances of the crime, including Apelt's careful planning and deliberation. *Id.* Ultimately, the court found it reasonable for the state court to

have found no prejudice, observing that, because Apelt's childhood-related mitigation did not explain his behavior in killing Cindy, it would not have offset the aggravation. *Id.* at 67a–70a ("[E]ven assuming that we might have looked more favorably on Apelt's [post-conviction petition] than the state trial court, we cannot conclude that there is no reasonable argument that Apelt was not prejudiced.").

Contrary to Apelt's interpretation, the Ninth Circuit did not find that the death penalty was appropriate merely because the State had proved premeditation. Pet. 11–20. In fact, the court first referenced premeditation to distinguish authority Apelt had cited, which involved felony-murder-type convictions. Pet. App. 67a. Further, much of the evidence the court recited formed the basis for the three aggravating factors. *See Apelt*, 861 P.2d at 652–53. And in any event, Apelt's conduct in premeditating Cindy's murder is a fact and circumstance of the offense that both affects the weight to which Apelt's mitigation is entitled and must be considered as part of individualized sentencing. *See Kansas v. Marsh*, 548 U.S. 163, 173–74 (2006) (death penalty scheme must permit sentencer to make individualized decision based on defendant's record, personal characteristics, and circumstances of crime).

Apelt further observes that the Arizona Supreme Court has occasionally reduced death sentences on independent review, *see* Pet. 13–14, and that some federal courts have found childhood-related mitigation sufficient to warrant life sentences in certain cases, *see id.* at 15–16. However, the fact-to-fact comparisons Apelt draws are not useful here because, under AEDPA, the question is whether the state court's finding of no prejudice was reasonable—not whether it was correct or consistent with decisions

from other courts. *See Richter*, 562 U.S. at 101. And in contrast to the relatively small number of outlying cases Apelt cites, Arizona courts have traditionally given minimal weight to the kind of non-explanatory childhood mitigation Apelt presented with his post-conviction petition. *See, e.g., State v. Pandeli*, 161 P.3d 557, 575, ¶ 72 (Ariz. 2007); *see also McKinney v. Ryan*, 813 F.3d 798, 817–18 (9th Cir. 2015) (en banc) (recognizing Arizona Supreme Court's adoption of constitutionally permissible causal-nexus weighing test in 2005); *see generally Mann v. Ryan*, 828 F.3d 1143, 1159 (9th Cir. 2016) (en banc) ("[C]ourts generally find explanatory mitigation evidence more convincing than humanizing mitigation evidence.").

Finally, Apelt's suggestion (devoid of supporting citations) that the Ninth Circuit erroneously asked whether a death sentence *would* have been imposed absent counsel's errors, rather than applying the *Strickland* reasonable-probability standard, is not persuasive. Pet. 17. The court in fact repeatedly cited the reasonable-probability standard, *see* Pet. App. 64a–66, and, as previously discussed, appropriately applied that standard within AEDPA's contours. This Court should deny certiorari.

B. The Ninth Circuit did not erroneously apply the "doubly deferential" *Strickland*/AEDPA review to *Strickland*'s prejudice prong.

In a two-paragraph argument, Apelt asserts that the Ninth Circuit erroneously reviewed the prejudice prong of his sentencing-ineffectiveness claim with *Strickland*/AEDPA "double deference." Pet. 18; *see Knowles v. Mirzayance*, 556 U.S. 111, 123 (2009). According to Apelt, double deference applies only to *Strickland*'s deficient-performance prong. Pet. 18. Apelt, however, overlooks that this Court has

suggested that the double-deference standard applies equally to the prejudice prong. *See Pinholster*, 563 U.S. at 189–90, 202–03; *but see Waiters v. Lee*, 857 F.3d 466, 477–78 n.20 (2nd Cir. 2017) (regarding applicability of double deference to prejudice as an open question, notwithstanding *Pinholster*, and collecting cases reflecting a disagreement in circuits).

Even if this issue needs resolution by this Court, this case is not suitable to resolve it because, as discussed in § I(C), *infra*, Apelt's claim fails even under a single layer of deference. Moreover, the portion of the opinion Apelt identifies as erroneous relates to a separate claim not at issue in this petition.[7] Pet. 18 (citing Pet. App. 86a–87a).) Admittedly (although not mentioned by Apelt), the court also recited the double-deference standard in summarizing the law applicable to the sentencing-ineffectiveness claim. Pet. App. 65a–66a. But Apelt did not explain how the court applied double deference in its prejudice analysis and, in fact, it appears to have analyzed the prejudice question through a single layer of AEDPA deference. Ultimately, as discussed above, the court asked and answered the correct question: whether "the state courts' determination of no prejudice is so unreasonable that no reasonable jurist could agree with it." *Id.* at 67a–70a. Certiorari is unwarranted.

[7] The cited passage addresses Apelt's claim that counsel was ineffective for failing to challenge Apelt's competence to stand trial. *See* Pet. 86a–87a. To the extent Apelt intends to challenge the Ninth Circuit's ruling on the competency-ineffectiveness claim, this case remains an unsuitable vehicle to resolve whether double deference applies to *Strickland*'s prejudice prong because the context of the statement at issue makes clear that the court applied double deference to the *deficient performance* prong. *See* Pet. App. 86a–87(a) (reciting double-deference standard and stating, "Our review of the record fails to disclose any incident or exchange that would have put [counsel] on notice that he should question Apelt's competency to stand trial.").

C. The state court's finding of no *Strickland* prejudice was objectively reasonable.

As discussed above, when a state court issues a summary ruling and AEDPA applies, a federal court must affirm the state-court decision if there is any reasonable argument to support it. *See Richter*, 562 U.S. at 101. Here, as the Ninth Circuit correctly determined, a state court could have found no reasonable probability that Apelt's post-conviction mitigation would have changed the sentencing verdict. Arguing otherwise, Apelt laments his poor childhood; views that mitigation in a vacuum, detached from the aggravation and the crime's facts and circumstances; and refers again to other cases in which defendants have received life sentences. Pet. 19–20. Under a correct analysis, considering all relevant facts, it was reasonable for the state court to reject Apelt's claim.

The sentencing judge found three weighty aggravating factors. *Apelt*, 861 P.2d at 652–53. Two of these factors involved Apelt's willingness to exchange a human life for a sum of money and thus could reasonably be afforded significant weight. *See* A.R.S. §§ 13–751(F)(4) (procuring the offense by promising pecuniary gain), and (F)(5) (committing the offense with the expectation of pecuniary gain). In addition, the A.R.S. § 13–751(F)(6) cruelty factor could reasonably be given significant weight here, given the following facts:

> The evidence that the victim was struck a number of times with great force, as well as the presence of her purse in the apartment and the presence of a towel and some nylon cord at the murder scene, indicates that she was forcibly subdued by the man she thought was her loving husband. She was conscious at least when initially attacked and may have remained conscious during the trip to the desert. Scrapes on her knees, suggesting that she was standing and then fell, as well as the

> presence of a defensive wound on one of her hands, indicate that she was conscious as she was stabbed once in the chest, four times in the back, and as her throat was slashed.

Apelt, 861 P.2d at 652–53.

Balanced against this compelling aggravation is Apelt's post-conviction mitigation. Without a doubt, Apelt appears to have experienced a dysfunctional and damaging childhood in Germany and to have been subjected to a number of traumatic events. Pet. App. 29a–31a (summarizing mitigation). However, nothing in Apelt's background explains why he killed Cindy. Nor does it explain the aggravating factors or elucidate how Apelt became a manipulative and deceitful con-artist capable of convincing sophisticated men and women (including Cindy) to accept his preposterous stories of wealth without question and to relinquish to him their own valuables. *See* Statement of the Case, *supra*.

Thus, because the omitted mitigation does not explain the offense, the state court could reasonably have given it minimal weight, and could have reasonably concluded that the substantial aggravation would have offset it. *See, e.g., Mann*, 828 F.3d at 1159; *Pandeli*, 161 P.3d at 575, ¶ 72. The Ninth Circuit did not err by determining so in its AEDPA-limited review, and this Court should deny certiorari.

II. This Court Should Not Grant Certiorari to Decide Whether a State Court's Failure to Conduct an Evidentiary Hearing Renders its Fact Finding Objectively Unreasonable under 28 U.S.C. § 2254(d)(2).

Apelt faults the Ninth Circuit for not expressly addressing his argument that the state court unreasonably determined the facts under 28 U.S.C. § 2254(d)(2). Pet. 22–24. He further asserts that he has satisfied § 2254(d)(2), and is thus entitled to *de*

novo review of his sentencing-ineffectiveness claim. *Id.* These arguments do not warrant certiorari review.

First, as Apelt readily acknowledges, the Ninth Circuit did not address his § 2254(d)(2) argument, and thus did not provide a reasoned decision on this complicated, and partially fact-bound, issue. *See* Pet. App. 64a–70a. Apelt argues incorrectly that this omission is a reason to *grant* certiorari. Pet. 22–24. To the contrary, the Ninth Circuit's failure to resolve the issue makes this case a poor vehicle for this Court to do so, as this Court would have to address the question in the first instance. In fact, should this Court wish to confront this question, another pending petition offers a superior opportunity, as the court of appeals in that case addressed the issue. *See Brookhart v. Lee*, No. 18–1197; *see also Lee v. Kink*, 2019 WL 361813 (7th Cir. 2019).

Second, Apelt's argument fails on the merits. As Apelt recognizes, the state post-conviction court, in finding the claim not colorable, necessary accepted Apelt's factual allegations as true. *See, e.g., State v. Jeffers*, 661 P.2d 1105, 1128 (Ariz. 1983) (colorable-claim determination asks whether, "if the defendant's allegations are taken as true, would they have changed the verdict?"). In other words, the court found that Apelt's factual proffer—immune from adversarial testing at a hearing—did not suffice to prove his claim under *Strickland*. To find the court's factual determinations on that one-sided presentation unreasonable under § 2254(d)(2), and thus unworthy of AEPDA deference, because the evidence was not subjected to a hearing that could have served only to undermine it is paradoxical at best.

Apelt's proposed interpretation also is inconsistent with the language of § 2254(d)(2), which permits relief if the state court's factual determination was unreasonable "in light of the evidence presented in the state-court proceeding." If the "evidence presented" in the relevant proceeding consisted only of an untested evidentiary proffer, taken as true, the decision cannot be unreasonable merely because additional evidence was not developed.[8]

Apelt's proposed interpretation would also work an end-run around *Pinholster*, which limits federal review of claims governed by § 2254(d)(1) to evidence in the state-court record. Were this Court to construe § 2254(d)(2) as Apelt urges, an inmate whose claim was adjudicated on the merits in state court without a hearing would be foreclosed from federal evidentiary development under *Pinholster*, but could invoke the state court's failure to conduct a hearing to relieve himself of AEDPA deference under § 2254(d)(2). This, in turn, would frustrate AEDPA's goals of limiting federal evidentiary hearings and protecting comity, finality, and federalism. *See Williams v. Taylor*, 529 U.S. 420, 433–34, 436 (2000).

Finally, Apelt contends that he can satisfy § 2254(d)(2) under a correct analysis. Pet. 24–26. But he points to no specific factual determinations that are objectively unreasonable. *See Wood v. Allen*, 558 U.S. 290, 301 (2010) ("[A] state-court factual determination is not unreasonable merely because the federal habeas court would have

[8] *Brumfield v. Cain*, 135 S. Ct. 2269, 2277–82 (2015), does not help Apelt. Pet. 23–24. There, this Court found the state court's factual determination unreasonable under § 2254(d)(2), but not *because* the state court failed to conduct a hearing. Rather, that case involved state-court procedures dissimilar to those employed here, in which the state court drew factual inferences on a disputed issue from documentary evidence. Here, as discussed above, Apelt's evidence was accepted as true in its entirety, and his claim failed even where there was no material factual dispute.

reached a different conclusion in the first instance."). Nor could he point to any such determinations, as the state court made no specific factual findings in its summary ruling and, as discussed above, necessarily assumed the factual allegations to be true. For these reasons, this Court should deny certiorari.

III. This Court Should not Grant Certiorari in this AEDPA Case to Review the Ninth Circuit's Case-Specific and Fact-Bound Decision Denying Relief on Apelt's *Atkins* Claim.

Apelt contends that he is intellectually disabled and that, as a result, the Eighth Amendment bars his execution. Pet. 26–32. Though not apparent from Apelt's petition, the state court adjudicated this claim's merits; consequently, the Ninth Circuit reviewed the state-court decision with AEDPA deference, denying relief only after concluding that Apelt had not satisfied 28 U.S.C. § 2254(d). Pet. App. 73a–77a. Apelt points to no novel legal issue the Ninth Circuit resolved in making this determination, identifies no point of law the court overlooked or misapprehended, and establishes no conflict between the court's opinion and other existing precedent. *See* U.S. SUP. CT. R. 10. Instead, he misinterprets the decision below, overstates its reach, and accuses the court of making factual errors which, if errors at all, are unworthy of this Court's intervention.

First, Apelt construes the Ninth Circuit's decision to presume that a person convicted of premeditated murder cannot be intellectually disabled, and he proposes that the decision effectively "bars *Atkins* claims for defendants convicted of premeditated crimes." Pet. 27–28. Nothing in the court's opinion supports that interpretation. To be sure, in addressing *Atkins*' adaptive-behavior prong, the Ninth

Circuit observed that Apelt's "activities in the United States reflect ingenuity, cleverness, and an ability to manipulate others." Pet. App. 77a. The court's discussion on that point included, but was not limited to, Apelt's premeditation of Cindy's murder. *Id.*; *see Atkins*, 536 U.S. at 318 (noting that persons with intellectual disability "often act on impulse rather than pursuant to a premediated plan"). But the court was reviewing under AEDPA the state court's factual findings—entered after conducting a lengthy evidentiary hearing—that Apelt's premeditation and "con-artist" activities, among other factors, showed he had no significant adaptive-functioning deficits. Pet. App. 77a; *see* Pet. App. 93a–94a. The Ninth Circuit did not conclude that Apelt's premeditation conclusively rebutted a determination of intellectual disability, but instead found, under AEDPA, that this case's specific "record fairly supports the state courts' determination that Apelt does not suffer from significant deficits in adaptive behavior." Pet. App. 76a–77a.

Second, Apelt contends that the state court "ignored or disregarded" certain evidence showing his intellectual disability. Pet. 29–32. Again, Apelt is mistaken. As a threshold matter, Apelt's claim relies heavily on *Moore v. Texas*, 137 S. Ct. 1039 (2017), and *Hall v. Florida*, 134 S. Ct. 1986 (2014). These cases, however, are not clearly established federal law for purposes of the 2007 state-court decision under review. *See, e.g., Lockyer v. Andrade*, 538 U.S. 63, 71–72 (2003) (defining clearly established federal law, for AEDPA purposes, as "the governing legal principle or principles set forth by the Supreme Court at the time the state court renders its decision"). Instead, the clearly established law is *Atkins*, which held that intellectually

disabled persons are ineligible for execution but left to the states the task of defining intellectual disability and "developing appropriate ways to enforce the constitutional restriction upon" executing persons with that condition. 536 U.S. at 316–37.

Removing *Moore* and *Hall* from the equation leaves little substance to Apelt's argument. In fact, his remaining allegations amount to insignificant quibbles with the state court's factual findings that certain expert opinions or other pieces of evidence are more credible than others. Pet. 29–31. Apelt's efforts to prove these findings unreasonable under § 2254(d)(2) fail for the same reasons: where the state court considered competing evidence and found some of it persuasive and some not, Apelt cannot show the state court's factual findings to be objectively unreasonable. *See Wood*, 558 U.S. at 301. This Court should deny certiorari.

CONCLUSION

Based on the foregoing authorities and arguments, Respondent respectfully requests that this Court deny the petition for a writ of certiorari.

Respectfully submitted,

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APPENDIX A

* Pinal County Superior Court Order in *State of Arizona v. Michael Apelt*, CR–14946, filed September 4, 1996.

ARIZONA SUPERIOR COURT
COUNTY OF PINAL

STATE OF ARIZONA, PLAINTIFF/RESPONDENT, –vs– MICHAEL APELT, DEFENDANT/PETITIONER.	CR–14946 ORDER

The Court, having considered the pleadings filed by the parties and having reviewed the relevant portions of the record, makes the following findings:

The following claims are precluded pursuant to Rule 32.2(a)(2), Arizona Rules of Criminal Procedure because they were adjudicated on the merits on direct appeal: Claim 16.1, Claim 16.2, Claim 16.5, and the Claim that Petitioner was entitled to ex parte proceedings to obtain expert assistance which is raised in Petitioner's supplement.

The following claims are precluded pursuant to Rule 32.2(a)(3), Arizona Rules of Criminal Procedure because they were not raised at trial, on appeal, or in Petitioner's first post-conviction relief proceeding: Claim 7, Claim 8, Claim 9, Claim 11, Claim 12, Claim 13, Claim 15, Claims 16.3, 16.4, 16.6, and 16.7, and all allegations of ineffective assistance of counsel raised in Petitioner's supplement.

The following claim is not cognizable in a post-conviction relief proceeding: Claim 8 (ineffective assistance of counsel in the first post-conviction relief proceeding).

The following claim is meritless because Petitioner fails to make a showing that counsel acted below objective standards of reasonableness in deciding what claims to raise on appeal and Petitioner fails to make a showing that the Arizona Supreme Court's decision would have been any different: Claim 10 (ineffective assistance of counsel on direct appeal).

The following claim is meritless and does not constitute a colorable claim: Claim 14 (newly discovered evidence). Accordingly, the claim is precluded pursuant to Rule 32.2(a)(3), Arizona Rules of Criminal Procedure.

Alternatively, the Court finds that Petitioner's claims of ineffective assistance of counsel at trial and sentencing fail to allege colorable claims because Petitioner fails to make a sufficient preliminary showing that counsel's performance fell below objective standards of reasonableness, and fails to make a preliminary showing that, in light of the allegations, there exists a reasonable probability that the result of the trial or sentencing hearing would have been different.

Therefore, pursuant to Rule 32.6(c) the petition for post-conviction relief is hereby DISMISSED.

Dated this 4 day of Sept, 1996.

FRANKLIN D. COXON

Judge, Pinal County Superior Court