

No. 22–982

In the
Supreme Court of the United States

RYAN THORNELL,
Petitioner,

v.

DANNY LEE JONES,
Respondent.

*On Writ of Certiorari to the
United States Court of Appeals for the Ninth Circuit*

PETITIONER BRIEF ON THE MERITS

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**CAPITAL CASE
QUESTION PRESENTED**

Did the Ninth Circuit violate this Court's precedents by employing a flawed methodology for assessing *Strickland* prejudice when it disregarded the district court's factual and credibility findings and ignored evidence in aggravation and the State's rebuttal when it reversed the district court and granted habeas relief?

PARTIES TO THE PROCEEDING

The petitioner (Respondent-Appellee below) is Ryan Thornell, Director of the Arizona Department of Corrections, Rehabilitation, and Reentry. The respondent (Petitioner-Appellant below) is Danny Lee Jones.

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OPINIONS BELOW

The amended panel opinion reversing in part the denial of habeas relief, and the order and dissenting opinions regarding denial of panel rehearing and rehearing en banc are reported at 52 F.4th 1104. Pet. App. 1–112. The original opinion reversing in part the denial of habeas relief is reported at 1 F.4th 1179. Pet. App. 113–65. The district court’s order denying habeas relief on remand is unpublished. Pet. App. 188–240.

This Court’s opinion remanding this case to the court of appeals is reported at 563 U.S. 932. The court of appeals’ first opinion in this case reversing in part the denial of habeas relief is reported at 583 F.3d 626. The district court’s initial orders denying habeas relief are unpublished, as are the state court’s orders denying post-conviction relief. The Arizona Supreme Court’s opinion affirming Jones’s convictions and death sentences on direct appeal is reported at 917 P.2d 200. Pet. App. 241–85.

JURISDICTION

The Ninth Circuit denied rehearing and filed its amended opinion reversing in part the denial of habeas relief on November 7, 2022. On January 31, 2023, Justice Kagan extended the time to file the petition for writ of certiorari until April 6, 2023. Petitioner timely filed a petition for writ of certiorari on April 6, 2023. This Court granted the petition on December 13, 2023. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The Sixth Amendment provides: “In all criminal prosecutions, the accused shall enjoy the right ... to have the Assistance of Counsel for his defence.” U.S. Const. amend. VI, § 1.

INTRODUCTION

Over 30 years ago, Danny Jones murdered Robert Weaver and Robert’s 7-year-old daughter Tisha. A jury convicted Jones of both murders, and the trial court sentenced him to death. After conducting its own independent review, the Arizona Supreme Court affirmed Jones’s convictions and sentences. After hearings in both the state and district court, those courts denied Jones’s claim that he was denied the Sixth Amendment right to the effective assistance of counsel at sentencing.

Now, a Ninth Circuit panel has assumed the role of sentencer and twice reversed Jones’s death sentences. In an exercise of judicial fiat, the panel first granted Jones relief by relying on new evidence developed in the federal proceedings, in contravention of the Antiterrorism and Effective Death Penalty Act (“AEDPA”). After this Court directed it to correct its error, the panel pivoted. With a purported limited consideration of Jones’s newly developed evidence, the panel again granted Jones relief. This time, the panel professed to cabin its ruling within the confines of *Strickland* and its progeny.

In reality, the panel spurned two levels of required deference to manufacture its own desired outcome. First, the panel failed to give even cursory deference to the district court’s findings of fact, ignoring one of the most basic principles of appellate review. The

panel also erroneously decided that the district court was not entitled to assess and consider the expert witnesses' credibility when making factual determinations. Second, the panel did not seriously consider the weighty aggravating evidence or how an Arizona sentencing court would have weighed the aggravation and mitigation. This contravened *Strickland's* requirement that reviewing courts show deference to state law and consider *all* of the evidence.

And so, on a record of its own choosing, the panel once again granted relief. Ten Ninth Circuit judges believed that rehearing en banc was warranted. Joined by eight other judges, Judge Bennett identified the same maladies Petitioner raises here: that the panel failed to afford any deference to the district court's factual determinations and that the panel misapplied *Strickland*. Pet. App. 71. For the second time in 14 years, Petitioner seeks this Court's intervention to correct the Ninth Circuit's egregious error.

STATEMENT

A. Jones's murders of Robert and Tisha Weaver, and attempted murder of Katherine Gumina.

On the evening of March 26, 1992, Jones was with his friend Robert Weaver, in the Bullhead City, Arizona, home where Robert lived. Pet. App. 242. A mutual friend, Russell Dechert, had taken Jones and Robert to the house, left at about 8:20 p.m., and told the men that he would return at 9:00 p.m. *Id.* at 243. While in the garage, Jones suddenly attacked Robert with a baseball bat, beating him in the head at least three times. *Id.* Jones then went into the house, where Robert's grandmother, Katherine Gumina, was watching television, and Robert's 7-year-old daughter,

Tisha, was coloring. Jones attacked Katherine with the bat, striking her in the head. *Id.* Tisha ran to her parents' bedroom and hid under the bed, but Jones dragged her out, beat her with the bat, and asphyxiated her either by strangulation or suffocation. *Id.* at 243. In addition to striking Tisha on the back of her head, Jones struck her with such force on the side of the head that she suffered a wound several inches wide, extending from her left ear to her left cheek. Pet. App. 273–74.

Jones returned to the garage. While he was loading Robert's gun collection into Katherine's car, Robert regained consciousness and tried to flee. *Id.* at 244. Jones attacked him again with the bat, this time killing him. *Id.* Dechert returned to the house just before 9:00 p.m. and knocked on the front door. *Id.* Jones walked out the front door and quickly closed it. *Id.* Jones told Dechert that Robert and his wife Jackie had left, but that they would return in 30 minutes. *Id.* Dechert left with an uneasy feeling and heard Jones reenter the house. *Id.* Jackie came home at 9:10 p.m., finding Robert dead on the garage floor, Katherine unconscious on the living room floor, and Tisha dead in a bedroom. *Id.* at 244–45.

Jones's attack on Robert caused "multiple contusions and lacerations of the central nervous system caused by multiple traumatic skull injuries." *Id.* at 245. Jones murdered Tisha in the same manner, with the addition of asphyxiation by either strangulation or suffocation. *Id.* After the crimes, Jones fled to Las Vegas where he was eventually arrested. *Id.* at 245–46.

The State charged Jones with two counts of premeditated first-degree murder and one count of

attempted first-degree murder. *Id.* at 246. Katherine later died of her injuries, but the State elected not to amend the indictment. *Id.* “At trial, [Jones] 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.” *Id.* The jury convicted Jones on all counts. *Id.*

B. Sentencing

Soon after the guilty verdicts and before sentencing, trial counsel Lee Novak requested that Jones undergo a mental health examination pursuant to Arizona Rule of Criminal Procedure 26.5.¹ Pet. App. at 190. The court appointed Dr. Jack Potts, who was Chief of Forensic Psychiatry for the Correctional Health Services in Maricopa County. *Id.* at 10. Dr. Potts reviewed the presentence report, evaluated Jones, and authored a report prior to sentencing. *Id.* at 191.

At the aggravation/mitigation hearing, the State alleged that Jones murdered Robert (1) for pecuniary gain pursuant to A.R.S. § 13–703(F)(5)²; (2) in an especially heinous, cruel, or depraved manner pursuant to A.R.S. § 13–703(F)(6); and (3) in the course of committing multiple murders pursuant to A.R.S. § 13–703(F)(8). Pet. App. 246. The State alleged the same aggravating circumstances as to Tisha, and additionally alleged that she was under age 15 pursuant to A.R.S. § 13–703(F)(9). *Id.* at 246–47.

¹ Petitioner cites to the rule in effect at the time of defense counsel’s motion.

² Petitioner cites to the sentencing statute in effect at the time of Jones’s offenses.

Novak argued for two statutory mitigating circumstances at the sentencing hearing. First, he argued that pursuant to A.R.S. § 13-703(G)(1) Jones's capacity to appreciate the wrongfulness of his conduct and conform it to the law was significantly impaired. Pet. App. at 274. Next, he argued that pursuant to A.R.S. § 13-703(G)(2) Jones was under unusual and substantial duress. *Id.* Novak also offered nine nonstatutory mitigating circumstances: (1) the victims' family's "indifference" to whether Jones received the death penalty; (2) a 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) history of head injuries; (8) mental illness; and (9) remorse. *Id.* at 274-75.

To prove these mitigating circumstances, Novak presented testimony from Jones's second stepfather, Randy Jones, who was also a retired sheriff's deputy. R.T. 12/8/1993, at 39, 62. Randy related that Jones's biological father physically abused Jones's mother while she was pregnant with Jones, and that Jones's first stepfather verbally and physically abused Jones. *Id.* at 41-46. Randy further testified that Jones suffered multiple head injuries as a teenager, had a history of drug and alcohol abuse, which began when Jones's first step-grandfather introduced him to marijuana at age 11 or 12, and that Jones had participated in addiction treatment programs. *Id.* at 47-50, 52-61, 65-67. Randy stated that Jones's behavior deteriorated after he began abusing drugs and alcohol and that Jones was an alcoholic by age 17. *Id.* at 51-53, 55-57, 60-62; *see also* Pet. App. 9-10, 173, 191-92.

Dr. Potts testified that he identified several mitigating factors during his examination of Jones. Pet. App. at 194. Dr. Potts described: (1) Jones’s “chaotic and abusive childhood” and the effect it had on Jones’s mental health and development (about which Dr. Potts offered details); (2) Jones’s history of significant substance abuse; (3) the likelihood that Jones suffered from an attenuated form of bipolar disorder; (4) Jones’s history of multiple head injuries; and (5) Jones’s genetic predisposition for substance abuse and affective disorders. R.T. 12/8/1993, at 80–92, 94–98, 100–04. Dr. Potts explained that head injuries usually led to “long term neurologic sequelae” that can damage the brain and make it susceptible to changes such as lower thresholds for aggression. *Id.* at 100. Dr. Potts also stated that additional testing would “clearly assist in coming to a more definitive conclusion” regarding whether Jones had brain damage, and he recommended additional testing “specifically for forensic purposes.” *Id.* at 103, 137.

Dr. Potts further explained that strong evidence suggested that Jones suffered a traumatic brain injury and he believed there was evidence of organic neurologic dysfunction beginning when Jones was 13 years old. *Id.* at 78–80. He testified that additional neurological testing would be helpful “to pin down the diagnosis” and “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.” *Id.* However, Dr. Potts opined that any additional testing “would be corroborative of my clinical impressions and my diagnostic impressions in my report.” *Id.*; *see also* Pet. App. 192–95.

After Dr. Potts testified, Novak requested a continuance to obtain the additional testing Dr. Potts recommended. Pet. App. 195. The trial court denied the request. *Id.* Novak renewed his request the next day and offered additional records purportedly documenting a head injury Jones suffered while in the Marines. *Id.* at 196. The trial court admitted the records and denied the continuance, concluding that “the evidence is very slim, nonexistent, in fact, that the defendant has anything that requires any kind of neurological examination.” *Id.*

The court found three aggravating factors as to both murders: they were committed for pecuniary gain; they were committed in an especially heinous, cruel, or depraved manner; and Jones committed multiple murders.³ Pet. App. 80–83. With respect to Tisha’s murder, the court found an additional aggravating circumstance based on her age. *Id.* at 80.

In reaching his sentencing decision, the trial judge addressed the aggravating factors in great detail, affording them substantial weight in the sentencing calculus. Pet. App. 80–83; R.T. 12/9/93 at 58–62. The court did not find any statutory mitigating circumstances, but found that Jones proved as non-statutory mitigation that he suffered from long-term substance abuse; was under the influence of alcohol and drugs at the time of the offense; had a chaotic and abusive childhood; and suffered from a substance-abuse problem that may have resulted from genetic factors and been aggravated by head trauma. Pet. App. 197; R.T. 12/9/93 at 65–67.

³ Because this case was tried before this Court’s decision in *Ring v. Arizona*, 536 U.S. 584 (2002), the trial judge found the aggravating circumstances.

In discussing the mitigation, the court observed that Jones’s conduct did not arise “from an anger explosion or delusion caused by drugs or alcohol use,” but was more consistent with the State’s theory that he “committed the acts of murder so that he could steal Robert Weaver’s guns.” Pet. App. 84. The court also noted that Jones had “shown that he [was] willing to lie if it benefit[ed] him,” and that he and a fellow inmate had “manufactured” a “tale” about another person (Frank Sperlazzo) committing the murders. *Id.* at 84, 197; *see also id.* at 276–77 (Arizona Supreme Court finding that the “evidence is not sufficient to establish that Sperlazzo participated in the crime”). The trial judge ultimately concluded that the mitigating circumstances were not sufficiently substantial to call for leniency, and sentenced Jones to death for each murder.⁴ Pet. App. 84.

The Arizona Supreme Court affirmed Jones’s convictions and sentences on direct appeal. Pet. App. 285. In its independent review of the death sentences, the court affirmed the sentencing judge’s aggravation findings, except for the finding that Jones killed Tisha to eliminate her as a witness. Pet. App. 266–74. The court concluded that the mitigation was not sufficiently substantial to call for leniency and affirmed. *Id.* at 283–84.

C. State post-conviction proceeding.

Jones filed a petition for post-conviction relief raising numerous claims, including that sentencing counsel was ineffective for: (1) relying on Dr. Potts

⁴“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.” Pet. App. 247.

instead of retaining an independent neuropsychologist and neurologist, and (2) failing to timely request neurological and neuropsychological testing. Pet. App. 176. The post-conviction court summarily denied the first claim but set the second for an evidentiary hearing. *Id.* at 15–16.

Randy Jones, Jones’s mother Peggy, and Novak testified at the hearing. Randy’s testimony focused on the information he provided to Novak before sentencing. *Id.* at 177. Peggy also testified regarding the information she provided to Novak and stated that after she married Randy, Jones “had a normal childhood” and a “good home life.” *Id.* at 85, 177.

Novak testified about his work on the case and his investigation into Jones’s background. Novak stated that Dr. Potts “was great to work with,” “did everything that we would have wanted someone that we had hired to do,” and was “a valuable witness for the defense.” *Id.* at 85. The post-conviction court denied relief. *Id.* The Arizona Supreme Court subsequently denied review. *Id.*

D. Federal habeas proceedings.

Jones sought federal habeas relief, again raising his ineffective-assistance-at-sentencing claims. The district court held an evidentiary hearing on the claims.

1. The hearing evidence and the district court’s findings.

Jones presented testimony from three mental health experts: (1) Dr. Potts; (2) Dr. Pablo Stewart, a psychiatrist; and (3) Dr. Alan Goldberg, an attorney and neuropsychologist. Jones also submitted reports from psychologist Dr. David Foy and

neuropsychologist Dr. Shoba Sreenivasan. Pet. App. 85–86, 205 n.6. The State presented testimony from psychiatrist Dr. Steven Herron, neuropsychologist Dr. Anne Herring, and psychiatrist Dr. John Scialli. *Id.*

The district court’s order denying habeas relief included detailed summaries of the witnesses’ testimony and thorough factual findings based on the hearing evidence. *Id.* at 200–18. The district court found that the defense experts lacked credibility in part because Dr. Stewart’s forensic work was done “primarily for the defense,” and Dr. Goldberg had never been retained by the prosecution in a capital case and had a “working relationship” with the Federal Public Defender’s Office. *Id.* at 218. The court found Drs. Herring and Scialli to be more credible because they had both testified for the State and for criminal defendants or habeas petitioners, and Dr. Scialli had “been retained with equal frequency by the defense and the prosecution.” *Id.* at 218–19. The district court then went on to make findings based on the specific evidence presented and the “new” mitigation Jones asserted should have been presented at sentencing.

a. Cognitive Impairment.

Jones’s experts relied on school performance (grades and standardized test scores), discrepancy between performance and verbal IQ scores, and neuropsychological test results to diagnose cognitive impairment. But the district court found that other evidence explained Jones’s declining school performance, including “absenteeism, family stresses, substance abuse, and lack of motivation.” Pet. App. at 220. Moreover, Jones’s overall IQ score was “solidly in the average range.” *Id.* Further, while Jones’s experts

attributed the primary cause of his cognitive impairment to head injuries, the district court found the only evidence of those purported injuries were anecdotal reports, which were inconsistent and unsupported by documentation or medical records. *Id.* at 220–22. The district court concluded that Jones failed to establish that he suffered from cognitive impairment. *Id.* at 219–22.

b. Post-traumatic Stress Disorder (PTSD).

The court found that Jones failed to establish that he suffered from PTSD at the time of the murders, opining that “none of [Jones’s] experts completed an appropriate diagnosis using all of the criteria set forth in the DSM-IV.” Pet. App. 222. Moreover, Jones’s experts could not relate their PTSD diagnoses to Jones’s conduct during the murders.

c. Attention Deficit/Hyperactivity Disorder (ADHD).

The court found that Jones suffered from ADHD at the time of the crimes, but that the condition was unrelated to his violent behavior and thus was not persuasive mitigation. Pet. App. 222–23.

d. Mood Disorder.

The court found that Jones did not establish that he suffered from a major affective disorder. Pet. App. 223. While the evidence suggested that Jones may suffer from “a chronic, low-level mood disorder,” the court did not find that to be persuasive mitigation because “[n]one of the experts suggested a causal relationship between the condition and [Jones’s] conduct during the crimes.” *Id.*

e. Substance abuse.

The court found, “based upon the undisputed testimony, that at the time of the crimes [Jones] suffered from dependence on alcohol, amphetamine, and cannabis.” Pet. App. 223. While the court noted Dr. Potts’s findings at sentencing that Jones’s “ability to conform his conduct to the requirements of the law was impaired at the time of the murders, and that [Jones’s] use of drugs and alcohol significantly contributed to his conduct,” it did not make a specific finding concerning the correlation between Jones’s substance abuse and the crimes.⁵ See *id.* at 231.

2. Denial of habeas relief and subsequent proceedings.

Based on its findings, the district court concluded that Jones failed to demonstrate *Strickland* prejudice. See *Strickland v. Washington*, 466 U.S. 668, 694 (1984) (to prove prejudice defendant “must show that there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different”). The court explained that “the results of subsequent examinations performed by the parties’ mental health experts have not

⁵ Relatedly, the sentencing court found in its special verdict that Jones “has proven non-statutory mitigation in that [he] has a long-term substance abuse problem and that at the time of the offenses [he] was under the influence of drugs and alcohol. [Jones’s] conduct in the commission of the offenses, however, shows that [he] did appreciate the wrongfulness of his conduct and that his ability to conform his conduct to the requirements of the law was not significantly impaired.” JA 3–4, 10–11. The Arizona Supreme Court considered the question on direct review, affirmed the sentencing court’s findings, and concluded that this non-statutory mitigating circumstance was entitled to “some mitigating weight.” Pet. App. 280–81.

established a more-persuasive case in mitigation than that presented through the report and testimony of Dr. Potts” at sentencing. Pet. App. 230. The results of neuropsychological testing were “largely ambiguous and inconclusive” and failed to “demonstrate that [Jones] suffered from cognitive impairment or PTSD at the time of the murders.” *Id.* at 233–35. Moreover, the conditions that Jones *did* establish—ADHD and low-level mood disorder—“do not constitute persuasive evidence in mitigation because they do not bear a relationship to [Jones’s] violent behavior.” *Id.* at 233. Thus, Jones failed “to affirmatively demonstrate a reasonable probability that this additional information [presented at the evidentiary hearing] 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.” *Id.* at 229.

Jones appealed, and in 2009 the Ninth Circuit reversed the district court. The Ninth Circuit held that Novak was ineffective at sentencing for failing to obtain a partisan mental health expert, timely move for neurological and neuropsychological testing, conduct additional mitigation investigation, and present sufficient witnesses and evidence at sentencing. *Jones v. Ryan*, 583 F.3d 626, 647 (9th Cir. 2009). On the State’s Petition for Writ of Certiorari, this Court remanded for further consideration in light of *Cullen v. Pinholster*, 563 U.S. 170 (2011). *See Ryan v. Jones*, 563 U.S. 932 (2011).

In 2014, the Ninth Circuit remanded to the district court to consider whether “under *Martinez v. Ryan*, 132 S. Ct. 1309 (2012) and *Dickens v. Ryan*, 740 F.3d 1302 (9th Cir. 2014) (en banc),” Jones’s ineffective-assistance claims were fundamentally altered from

the claims presented in the state court, and thus procedurally defaulted. *Jones v. Ryan*, Ninth Circuit No. 07-99000, Dkt. #138. The district court found that the claims were not fundamentally altered, remained exhausted, and it again denied habeas relief. Pet. App. 179–87. Jones appealed.

E. Amended panel opinion.

On appeal for the second time, the Ninth Circuit panel again reversed the district court. The panel acknowledged that the AEDPA governed its review of Jones’s ineffective assistance claims, but concluded that the post-conviction court did not address *Strickland*’s prejudice prong and it was therefore entitled to review prejudice de novo. Pet. App. 23–24, 37, 131–32. The panel also held that the post-conviction court’s conclusion that Jones failed to establish deficient performance was unreasonable under both § 2254(d)(1) and (2). *Id.* at 24–37, 62–67, 132–44, 157–63. The panel accordingly reviewed the claims de novo.

After finding deficient performance, the panel addressed *Strickland* prejudice and held—contrary to the state post-conviction court and the district court that heard the testimony—that there was a reasonable probability that, had Novak obtained a defense mental health expert and sought neuropsychological and neurological testing, the results of the sentencing would have been different. Pet. App. 37–62, 68–70, 144–57, 163–65. The court relied on evidence presented at the federal hearing to conclude that a defense expert would have presented “a wealth of available mitigating mental health evidence” including diagnoses of: “(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." Pet. App. 39–40, 147. The panel then recounted the testimony of Jones's experts at the federal hearing and, contrary to the district court (which heard the evidence and observed the experts), accepted their testimony in full. *Id.* at 41–46, 148–52.

The panel specifically held that the district court's finding that Dr. Potts was a "de facto defense expert" was clearly erroneous based on Dr. Potts's "repeated" statements that he was a neutral expert and Novak's statement that he was initially cautious about what information he provided to Dr. Potts.⁶ App. 49–50. The panel also held that it was inappropriate for the court to "weigh the testimony of the experts against each other in order to determine who was the most credible." *Id.* at 51.

Next, the panel disregarded the district court's conclusion that Jones's mental conditions were not "persuasive" mitigation because they were unconnected to Jones's violent behavior. The panel explained that "if the sentencing court had decided not to consider the mitigating mental condition

⁶ The district court's conclusion was supported by Novak's testimony that he considered Dr. Potts "part of the defense team," Pet. App. 198, that Dr. Potts "indicated that his role was going to be to help us" and "actively assisted developing mitigation, planning strategy," and that his meeting with Dr. Potts prior to his testimony at sentencing "was more like meetings I've had since with aggravation/mitigation experts who are part of our defense team," *id.* at 209–10.

evidence, it would have run afoul of *Eddings*,⁷ 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.” Pet. App. 52. The panel did not address the district court’s finding that Jones failed to establish that he suffered from cognitive impairment.

After briefly acknowledging that the State’s experts disputed some of Jones’s experts’ diagnoses, the panel disregarded that testimony, stating that “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.” Pet. App. 54.

Finally, although the panel listed Jones’s aggravating factors and acknowledged it was required to weigh them against the mitigation evidence, Pet. App. 56–57, the panel did not discuss the aggravation, its weightiness as compared to the proffered mitigation, or how the proven aggravation and mitigation is viewed under Arizona law.

F. Denial of en banc review and Judge Bennett’s and Judge Ikuta’s dissents.

Petitioner sought en banc rehearing. The Ninth Circuit denied the petition and issued an amended opinion. Judges Bennett and Ikuta dissented from the denial of rehearing en banc. Pet. App. 70–112.

Writing for nine judges, Judge Bennett observed that the panel “improperly and materially lowered *Strickland*’s highly demanding standard and failed to afford the required deference to the district court’s

⁷ *Eddings v. Oklahoma*, 455 U.S. 104, 114 (1982).

findings—essentially finding that no such deference was due.” Pet. App. 71. The dissent faulted the panel for taking “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.” *Id.* at 93. Judge Bennett thus identified two major flaws in the panel’s approach: (1) it failed to “consider all the evidence—the good and the bad,’ *Wong [v. Belmontes]*, 558 U.S. [15,] 26 [(2009)], and ‘reweigh the evidence in aggravation against the totality of available mitigating evidence,’ *Wiggins v. Smith*, 539 U.S. 510, 534 (2003)”; and (2) it “improperly brushed aside the district court’s well-reasoned factual and credibility determinations” without first finding that they were clearly erroneous. *Id.* at 97.

Regarding the first error, Judge Bennett noted that although the panel claimed to have reweighed the aggravation and mitigation evidence, it never “assess[ed] the *weight* of the aggravation evidence, which was overwhelming.” Pet. App. 97 n.14. As for the second error, Judge Bennett faulted the panel for improperly disregarding the district court’s credibility determinations. Judge Bennett noted that, in determining whether there is a reasonable probability that a death sentence would not have been imposed, “a court must be able to assess the weight or probable effect of the evidence on the sentence by, for example, making credibility determinations.” Pet. App. 95. Judge Bennett also observed that the panel had no basis for rejecting the district court’s findings on Jones’s proffered mitigation; for example, that Jones’s

IQ was average or that some of the head injury claims were not credible. *Id.* at 99 & n.15.

Judge Bennett then conducted the *Strickland* prejudice analysis as mandated by this Court's decisions. He looked to the trial mitigating evidence, which included "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." Pet. App. 98. Judge Bennett next reviewed the "new" mitigation evidence presented in the district court, showing deference to the district court's factual and credibility findings, and concluded that "the 'new' mitigation evidence is far from overwhelming, and the district court found it 'largely inconclusive or cumulative.'" *Id.* at 99–108. Finally, the dissent turned to the aggravating factors, noting that each "is entitled to substantial weight." *Id.* at 108–10. Reweighing the original mitigating circumstances, "the 'new' mitigation evidence, which is cumulative, inconclusive, and weak," and the "aggravating circumstances that weigh heavily under Arizona law," Judge Bennett concluded that, as the district court found, "there is simply no substantial likelihood of a different result" and thus, no *Strickland* prejudice. *Id.* at 110.

Writing for three judges, Judge Ikuta also dissented, stating that while she agreed with Judge Bennett's analysis, "the panel had no business conducting such a de novo review in the first place." Pet. App. 111. Judge Ikuta wrote that, because the state post-conviction 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” and nothing in the state court’s decision “rebutted the presumption that it adjudicated the prejudice prong of *Strickland* on the merits,” the panel should have reviewed *Strickland* prejudice under 28 U.S.C. § 2254(d)’s highly deferential standard.⁸ Pet. App. 111–12.

SUMMARY OF ARGUMENT

Under Federal Rule of Civil Procedure 52(a)(6), “[f]indings of fact, whether based on oral or other evidence, must not be set aside unless clearly erroneous, and the reviewing court must give due regard to the trial court’s opportunity to judge the witnesses’ credibility.” This Court has time and again affirmed the principle that courts of appeal are not entitled to substitute their own assessment of factual findings simply because they might have decided a case differently. But here the Ninth Circuit did just that, and through an incongruous view of the evidence based its decision on mere disagreement with the district court’s findings rather than clear error.

As Rule 52 makes clear, district courts are well situated to make credibility determinations in their role as factfinders. Those determinations are owed significant regard, as a court of appeals cannot view or hear the manner in which a witness delivers their testimony. This principle, again, has been recognized and affirmed by this Court. And yet the Ninth Circuit wholly rejected the district court’s credibility determinations on the pretense that such determinations deviated from the focus of the inquiry. But how may a court pass on the ultimate question without first determining the underlying basis of the

⁸ Petitioner has not presented this issue for review.

claim? In the Ninth Circuit's view, district courts may only serve as a conduit for evidence, reserving the ultimate role of arbiter of both fact and law for itself. Such treatment contravenes federal law and this Court's precedent, and it must be rejected.

The Ninth Circuit's error in disregarding the district court's factual determinations is compounded by its prejudice assessment under *Strickland*. In order to find prejudice, a reviewing court must reweigh the aggravation against the mitigation that was presented at trial, along with whatever new mitigation trial counsel allegedly failed to investigate and present. The determination is fact-bound and requires a reviewing court to assess how and to what degree the new mitigation evidence would have affected the judgment.

Prejudice lies only where there is a reasonable probability that the new mitigation would have resulted in a different outcome. But weight is not synonymous with quantity alone, and the reviewing court must first discern the quality of the new evidence. And two crucial aspects of that determination are the assessment of witness credibility and the consideration of the new evidence in light of the State's rebuttal. The district court performed that task here, filtering out unsupported or wholly incredible assertions before making the prejudice determination. In rejecting the district court's findings, the Ninth Circuit gave credence to the entirety of Jones's untested mitigation evidence. This skewed the reweighing and distorted *Strickland's* prejudice inquiry.

With a skewed view of the facts in mitigation, the Ninth Circuit panel then weighed those facts against

nothing. The panel acknowledged the aggravating circumstances, but beyond that bare recognition paid them no heed.⁹ The question now further skewed and the outcome a foregone conclusion, the panel determined that Jones's new mitigation was sufficiently substantial to call for leniency under Arizona law. This is quite the curious denouement, considering that the panel failed to discuss Arizona law in any significant regard. Had the panel done so, it would have discovered the significant weight Arizona sentencing judges confer on the aggravating circumstances that apply to Jones's brutal double murder. It also would have considered the weight Arizona judges apply to the types of mitigating evidence Jones developed. *Strickland* calls for this when requiring the impartial application of the "standards that govern the decision." 466 U.S. at 695. Rather than the "standards that govern the decision," the panel applied circuit precedent and its own evaluation of Jones's mitigation. This falls short of *Strickland's* requirements, distorts the reweighing, and must be corrected.

⁹ The sentencing judge found three aggravating circumstances as to Robert's killing and four aggravating circumstances as to Tisha's killing. The panel acknowledged the additional aggravating circumstance applying to Tisha's murder when discussing the procedural history of the case, but failed to account for it at all when conducting its *Strickland* prejudice analysis. The omission of the fourth aggravating circumstance in this context highlights the panel's disregard for the weight and impact of the aggravating circumstances.

ARGUMENT

I. THE PANEL FAILED TO ASSESS THE DISTRICT COURT'S FINDINGS OF FACT UNDER THE CLEARLY ERRONEOUS STANDARD.

“Findings of fact, whether based on oral or other evidence, must not be set aside unless clearly erroneous, and the reviewing court must give due regard to the trial court’s opportunity to judge the witnesses’ credibility.” Fed. R. Civ. P. 52. “[A] finding is ‘clearly erroneous’ when although there is evidence to support it, the reviewing court on the evidence is left with the definite and firm conviction that a mistake has been committed.” *Anderson v. Bessemer City*, 470 U.S. 564, 573 (1985). But “[t]his standard plainly does not entitle a reviewing court to reverse the finding of the trier of fact simply because it is convinced that it would have decided the case differently.” *Id.*

This Court has “stressed that the clearly-erroneous standard of review is a deferential one, explaining that ‘if the district court’s account of the evidence is plausible in light of the record viewed in its entirety, the court of appeals may not reverse it even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently.’” *Amadeo v. Zant*, 486 U.S. 214, 223 (1988) (citation omitted); *see also Cooper v. Harris*, 581 U.S. 285, 293 (2017) (“A finding that is ‘plausible’ in light of the full record—even if another is equally or more so—must govern.”). Thus, “[w]here there are two permissible views of the evidence, the factfinder’s choice between them cannot be clearly erroneous.” *Anderson*, 470 U.S. at 574.

A district court's findings based on witness credibility, moreover, must receive "even greater deference." *Anderson*, 470 U.S. at 575. This is because "only the trial judge can be aware of the variations in demeanor and tone of voice that bear so heavily on the listener's understanding of and belief in what is said." *Id.* However, the clear error standard still applies "even when the district court's findings do not rest on credibility determinations, but are based instead on physical or documentary evidence or inferences from other facts." *Id.* at 574. A reviewing court may not deviate from the clearly erroneous standard "simply because this is a constitutional case, or because the factual findings at issue may determine the outcome of the case." *Maine v. Taylor*, 477 U.S. 131, 145 (1986).

Here, the panel failed to apply the clear error standard "before effectively overturning the lower court's factual findings." *Knowles v. Mirzayance*, 556 U.S. 111, 126 (2009). As detailed above, the district court made thorough and detailed factual findings regarding the mitigation Jones presented at the federal hearing. The court found, for example, that Jones failed to prove cognitive impairment or that he suffered from PTSD during the murders, that Jones's ADHD was not persuasive as mitigation because it is unrelated to violent behavior, that Jones did not suffer from a major mood disorder, and that any low-level mood disorder was unpersuasive as mitigation because Jones failed to establish a causal relationship between the disorder and his conduct during the crimes. Pet. App. 219–23. The court went on to find that because Jones's new mitigation was "largely inconclusive or cumulative" to the mitigation presented to the sentencing judge, Dr. Potts's unchallenged report and sentencing testimony

constituted the most compelling evidence that Jones suffered from neurological damage. Pet. App. 229, 232. In sum, after hearing the new mitigation evidence, the court found that it would not have made a difference at sentencing.

As Judge Bennett observed, in “failing to review the district court’s factual and credibility findings, as mandated” by this Court’s decisions, the panel made its “own factual findings without regard to all the counterevidence and the district court’s findings.” Pet. App. 111. In doing so, it thwarted an essential function of the district court and supplanted the district court’s determinations with its own, thus vitiating the deference clear error review requires. Even if the panel’s findings were plausible in light of the hearing evidence, it was not entitled to substitute those findings for the district court’s without first determining that the district court’s findings were clearly erroneous. *See Cooper*, 581 U.S. at 293.

And even where the panel directly scrutinized the district court’s findings, it erred by inappropriately limiting the district court’s role as factfinder. First, the panel rejected the district court’s finding that Dr. Stewart’s credibility was diminished because he endorsed Jones’s account of the crimes, including Jones’s claims that he did not kill Tisha. But the district court’s finding was supported by Dr. Stewart’s own declaration, which stated that: “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.” Pet. App. 87 n.9, 206–07 n.7; JA 128.

In assessing Dr. Stewart’s credibility, the district court took “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 206–07 n.7. The district court further found that Dr. Stewart lacked credibility because: (1) his assessment that Jones was a good father and step-father was contradicted by information from Dr. Goldberg that Jones had never met his 9-year-old daughter; and (2) that Dr. Stewart’s statement concerning Jones’s history of child-like and submissive behavior toward older males was contradicted by Dr. Stewart’s own acknowledgement that Jones had twice responded to provocations by older males by using or threatening violence with a baseball bat. *Id.*

The panel rejected the district court’s credibility finding, concluding that Dr. Stewart did not contest Jones’s guilt, but instead merely testified that he felt Jones’s psychological profile was consistent with his version of the events. Pet. App. 44–45. While the panel’s interpretation is murky, a plain reading of Dr. Stewart’s declaration makes clear that he lends some credence to Jones’s third-party defense based on his evaluation of Jones and the trial testimony. The district court’s credibility determination based solely on Dr. Stewart’s view of the facts was therefore plausible in light of the record and was owed deference.

But the panel failed to address the district court’s other bases for discrediting Dr. Stewart’s testimony, which were also supported by Dr. Stewart’s declaration. *See* JA 128. Even in the face of the panel’s novel parsing, the district court’s credibility finding further focused on inconsistencies in Dr. Stewart’s

information concerning Jones's relationship with his daughter and broader theory on how Jones reacts to provocations from older males. The panel failed to account for these additional bases, and instead rejected the district court's credibility determination on its interpretation of Dr. Stewart's opinion alone. Because the district court's credibility finding was plausible in light of the record, the panel was not entitled to disregard it. *See Amadeo*, 486 U.S. at 223 (court of appeals may not reverse factual finding that "is plausible in light of the record viewed in its entirety").

The panel also rejected the district court's findings that the State's experts were more credible than Jones's, concluding the court should not have weighed their credibility at all. Citing *Correll v. Ryan*, 539 F.3d 938 (9th Cir. 2008), the panel held that 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.'" Pet. App. 51. This, in the panel's view, constituted clear error. The panel asserted that the district court's focus should have been instead on "whether the new evidence was 'sufficient to undermine confidence in the outcome.'" *Id.* at 52.

The panel, however, misapplied its own circuit precedent. *Correll* recognizes that credibility determinations are subject to clear error review, and the Ninth Circuit has routinely applied clear error review in this context. *See Correll*, 539 F.3d at 954 n.7 (finding district court's credibility determination clearly erroneous based on "substantial corroborating evidence introduced at the evidentiary hearing");

Lambert v. Blodgett, 393 F.3d 943, 964 (9th Cir. 2004) (“Factual findings and credibility determinations made by the district court in the context of granting or denying [a habeas] petition are reviewed for clear error.”); *see also* Pet. App. 94–95 (Judge Bennett recognizing the panel’s inconsistent application of clear error review to credibility determinations).

But even if *Correll* could be read to forbid district courts from making credibility determinations, that reading would contravene Rule 52 and this Court’s interpretation of the rule. Rule 52(a)(6) “sets forth a ‘clear command’,” and “does not make exceptions or purport to exclude certain categories of factual findings from the obligation of a court of appeals to accept a district court’s findings unless clearly erroneous.” *Teva Pharmaceuticals USA, Inc. v. Sandoz, Inc.*, 574 U.S. 318, 324 (2015) (internal citations omitted). The Ninth Circuit, however, implicitly created an exception to clear-error review by holding that the district court may not make credibility determinations in the first instance. It then used this exception to justify its *de novo* review of the evidence presented at the hearing. This Court should not countenance the creation of a carveout where it has unambiguously stated that no exceptions to Rule 52(a)(6) exist.

Moreover, it was essential for the district court to assess the experts’ credibility in deciding whether Jones had demonstrated a “reasonable probability” that the sentencing court would not have imposed a death sentence with his new evidence. *See Strickland*, 466 U.S. at 694. An Arizona sentencing court would perform the same task in assessing mitigating evidence; otherwise it would be obliged to accept as true *any* mitigation presented no matter how

unpersuasive the proponent or how strong the rebuttal. *See, e.g., State v. Doerr*, 969 P.2d 1168, 1181 ¶ 64 (Ariz. 1998) (“The trial judge has broad discretion in determining the weight and credibility given to mental health evidence.”). Indeed, the panel implicitly recognized the necessity of weighing the evidence and making credibility findings when it did so (sub silentio) by accepting Jones’s expert opinions uncritically while rejecting the rebuttal testimony offered by the State’s experts.

It was equally essential for the district court to assess credibility and consider the State’s rebuttal evidence in assessing the viability of Jones’s new mitigation evidence. The State’s experts Drs. Herring and Scialli, for instance, opined that Jones did not suffer from cognitive impairment. Pet. App. 211, 216–17. In contrast, Jones’s expert Dr. Stewart concluded that Jones did suffer from cognitive dysfunction. *Id.* at 202. As any factfinder must, the district court compared the credibility and opinions of all experts in considering the proffered evidence. It determined that Drs. Herring and Scialli were more credible and persuasive, that the test results from both the State and Jones’s experts did not support cognitive impairment, and that its review of the entire record further supported the conclusion. Pet. App. 219. In addressing the etiology of Jones’s supposed cognitive impairment, the district court considered the myriad head injuries reported either by Jones or family members. The court concluded, however, that these accounts were difficult to credit because of the lack of supporting medical documentation or inconsistencies between Jones’s account and confirming reports. *Id.* at 220–22. The panel did not subject these findings to

clear error review, instead wholly accepting and crediting Jones's evidence.

Similarly, the district court found that Jones had failed to prove that he suffered from PTSD. Pet. App. 222. The district court's finding was based on the failure of Jones's experts "to [complete] an appropriate diagnosis using all of the criteria set forth in the DSM-IV," but instead focusing "simply on the presence of the first criterion, the experience of a traumatic event." *Id.* The court further found that Jones's experts failed to establish a connection between the supposed PTSD and Jones's conduct during the crimes. *Id.* The panel noted the conflicting evidence addressing PTSD from the evidentiary hearing, but reasoned that "a conclusive diagnosis was not necessary for the 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." *Id.* at 54. Here, the panel flatly ignored the district court's determination and considered the impact of Jones's supposed PTSD even though Jones failed to prove he suffered from it at all.

The panel placed significant weight on Jones's purported sexual abuse at the hands of his step-grandfather. Pet. App. 53–54. But the district court found that "the sentencing judge would likely have viewed with skepticism [Jones's] more-recent allegations of sexual and physical abuse, given their late disclosure, their inconsistency with other information in the record, and [Jones's] 'obvious motive to fabricate.'" Pet. App. 298 (quoting *State v. Medrano*, 914 P.2d 225, 227 (Ariz. 1996)). This is especially true considering that the sentencing court recognized that Jones "has shown that he is willing to

lie if it benefits himself.” JA 5, 12. The panel, again, failed to defer to the district court in any regard, instead uncritically adopting Jones’s narrative wholesale.

The district court properly considered the evidence before it to discern whether a fact had been proven or not. *See e.g.* Fed. R. Evid. 104(b) (“When the relevance of evidence depends on whether a fact exists, proof must be introduced sufficient to support a finding that the fact does exist.”). The panel by contrast ignored the district court’s function as gatekeeper and accepted as true every assertion offered by Jones as mitigating evidence. And in those rare instances where the panel actually reviewed the district court’s factual findings for clear error, it misapplied the standard in spite of the unambiguous commands of Rule 52 and this Court’s precedents. The panel’s interpretation of clear error review and the implications it has on a *Strickland* prejudice inquiry have no basis in law or reason and must be corrected.

II. THE PANEL MISAPPLIED *STRICKLAND*.

The panel’s improper application of clear error review is exacerbated when considered in the context of a *Strickland* prejudice reweighing. Under *Strickland*, a reviewing court must ask “whether there is a reasonable probability that, absent the errors, the sentencer ... would have concluded that the *balance of aggravating and mitigating circumstances* did not warrant death.” *Strickland*, 466 U.S. at 695 (emphasis added). And in making this assessment, the reviewing court “should proceed on the assumption that the decisionmaker is reasonably, conscientiously, and impartially applying the standards that govern the decision.” *Id.* Here, the

standards that govern the decision are the precedents of this Court and Arizona law. The district court understood this directive, but the panel failed to heed it.

First, the panel erred by dismissing the district court's findings regarding the persuasiveness of Jones's newly-proffered mitigation evidence. The district court found that several categories of mitigation—including Jones's diagnoses of ADHD and mood disorder—were not “persuasive evidence in mitigation because they do not bear a relationship to [Jones's] violent behavior.” Pet. App. 233–34. The panel criticized this finding, stating that “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.” *Id.* at 52.

But the district court had it right, and indeed acknowledged *Eddings*'s requirement that “the sentencer in a capital proceeding must consider all relevant mitigation evidence.” Pet. App. 233–34 (citing *Lockett v. Ohio*, 438 U.S. 586 (1978), and *Eddings*, 455 U.S. 104). The district court also noted, correctly, that *Eddings* permits “[t]he sentencer ... [to] determine the *weight* to be given relevant mitigating evidence.” 455 U.S. at 114–15 (emphasis added). See Pet. App. 234. Thus, the district court did not refuse to consider mitigation, but only assigned it the appropriate weight by concluding 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.” *Id.* The panel mischaracterized the district court’s weighing of evidence as a refusal to consider evidence.

The district court’s conclusion that an Arizona sentencing judge would not have given Jones’s new mitigation much weight was not an act of clairvoyance. Under Arizona law at the time, judges were obligated by statute “to return a special verdict setting forth the existence or nonexistence of the aggravating and mitigating factors listed in the statute.” *State v. Walton*, 769 P.2d 1017, 1031 (Ariz. 1989). The special verdict enabled the Arizona Supreme Court to conduct a meaningful independent review. *State v. Kiles*, 857 P.2d 1212, 1223 (Ariz. 1993). As this Court recognized in *Gregg v. Georgia*, “[w]here the sentencing authority is required to specify the factors it relied upon in reaching its decision, the further safeguard of meaningful appellate review is available to ensure that death sentences are not imposed capriciously or in a freakish manner.” 428 U.S. 153, 195 (1976).

The special verdict requirement along with the prospect of appellate review dictate that an Arizona sentencing court would follow Arizona Supreme Court precedent when assessing and weighing aggravating and mitigating evidence. Additionally, the Arizona Supreme Court could be reasonably expected to follow its own precedent when conducting its own independent review of Jones’s death sentences. See *Strickland*, 466 U.S. at 695 (“[T]he 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.”).

Mitigating evidence lacking any connection to a killing is typically afforded less weight than evidence with such a connection. *See Tennard v. Dretke*, 542 U.S. 274, 286 (2004) (“We have never denied that gravity has a place in the relevance analysis...”); *Eddings*, 455 U.S. at 114–15 (“The sentencer, and the Court of Criminal Appeals on review, may determine the weight to be given relevant mitigating evidence.”).

Under Arizona law, “poor mental health is a mitigating factor, but without a causal nexus to the crime, its weight is minimal.” *State v. Armstrong*, 189 P.3d 378, 392 ¶ 77 (Ariz. 2008); *see also id.* (evidence of bipolar disorder and ADHD entitled to little mitigating weight where a defendant does not show a diminished ability to conform or appreciate the wrongfulness of his conduct). As this Court has recognized, *Lockett* and *Eddings* have always allowed for such treatment. *See Jones v. Mississippi*, 141 S. Ct. 1307, 1315–16 (2021) (acknowledging that *Lockett* and *Eddings* “afford sentencers wide discretion in determining the weight to be given relevant mitigating evidence”) (internal quotation marks omitted). The district court therefore appropriately concluded that an Arizona sentencing court would not have been swayed by Jones’s new evidence of ADHD and a low-level mood disorder. The panel misapprehended the district court’s assessment, and in the process thwarted *Strickland*’s instruction to honor state law.

The district court further noted that the sentencing judge “would likely have viewed with skepticism [Jones’s] more-recent allegations of sexual

and physical abuse, given their late disclosure, their inconsistency with other information in the record, and [Jones's] 'obvious motive to fabricate.'" Pet. App. 238 (quoting *State v. Medrano*, 914 P.2d 225, 227 (Ariz. 1996)). It also found that the sentencing judge would have assigned this evidence little mitigating weight due to "the lack of causal connection between the crimes and the new allegations of abuse." *Id.* This was a correct assessment of Arizona law, as evidence of an abusive childhood is entitled to little weight where a defendant commits a murder past early-adulthood. See *State v. Gerlaugh*, 698 P.2d 694, 705 (Ariz. 1985) ("evidence of a troubled childhood is entitled to greater weight when the offender is a minor than when he is an adult"); see also *State v. Cropper*, 225 P.3d 579, 586 ¶ 30 (Ariz. 2010); *State v. Ellison*, 140 P.3d 899, 927 ¶ 136 (Ariz. 2006) ("[C]hildhood troubles deserve little value as a mitigator for ... murders ... committed at age thirty-three."). Finally, the district court concluded that the school, medical, and military records presented for the first time in the habeas proceeding "are largely cumulative and of little mitigating value." *Id.* at 238–39. The panel rejected the district court's conclusions, and in doing so misapplied *Strickland* and ignored Arizona law concerning the appropriate weight of Jones's mitigation.

Given the district court's findings that the new information Jones presented in federal court would not have been persuasively mitigating, Jones failed to establish that he was prejudiced under *Strickland's* standard. That conclusion becomes even clearer when Jones's new mitigating evidence is assessed, as it must be, against the background of the "entire body of aggravating evidence." See *Belmontes*, 558 U.S. at 20.

While the panel purported to apply Arizona law to conclude that Jones's mitigation was sufficiently substantial to call for leniency, it relied only on Supreme Court and Ninth Circuit precedent. Pet. App. 58. As Judge Bennett noted in his dissent, the panel's recitation of cases where relief was granted after a *Strickland* reweighing only demonstrate "that new mitigation evidence *can* establish prejudice, even in horrific cases." *Id.* at 93 n.12. But in relying on the *outcomes* of several Supreme Court and Ninth Circuit cases, the panel failed to assess and weigh the effect of the aggravating circumstances in this case, under Arizona law or otherwise.

To establish prejudice, Jones was required to show a reasonable probability that the sentencing judge (or the Arizona Supreme Court on independent review) would have rejected a death sentence after weighing "the entire body of mitigating evidence ... against the entire body of aggravating evidence." *Belmontes*, 558 U.S. at 20. The panel acknowledged this requirement and the aggravating circumstances in passing, *see* Pet. App. 56–57, but devoted its analysis entirely to the impact of Jones's mitigation. Had the panel evaluated and considered Jones's aggravation along with his mitigation, it would have been forced to conclude that the aggravating circumstances outweighed Jones's mitigation. *See Belmontes*, 558 U.S. at 26 (*Strickland* requires a reviewing court to consider "all the evidence—the good and bad—when evaluating prejudice.")

First, the sentencing court found the cruel, heinous or depraved aggravating circumstance proven as to both Robert and Tisha. The Arizona Supreme Court affirmed these findings on direct appeal, and specifically found sufficient evidence of cruelty,

senselessness, helplessness, and gratuitous violence to support both prongs of the aggravating circumstance. Pet. App. 271–72, 273–74. “The cruelty aggravator is ‘entitled to great weight.’” *State v. Poyson*, 475 P.3d 293, 302 ¶ 42 (Ariz. 2020) (citing *State v. McKinney*, 426 P.3d 1204, 1207 ¶ 15 (Ariz. 2018)); see also *State v. Smith*, 673 P.2d 17, 24 (Ariz. 1983) (even in the face of “significant” mitigation, leniency not called for “in light of the extreme cruelty and brutality of the instant crime”). Similarly, evidence of senselessness, helplessness, and gratuitous violence further enhances the weight of the aggravator. See *State v. Gulbrandson*, 906 P.2d 579, 604 (Ariz. 1995) (holding that finding of gratuitous violence and helplessness is entitled to great weight because it demonstrates a defendant’s especially heinous or depraved state of mind). Having found both prongs of the aggravating circumstance satisfied under the facts of this case, an Arizona sentencing court would have weighed this aggravating circumstance heavily in its calculus. See e.g. *State v. Kiles*, 857 P.2d 1212, 1230 (Ariz. 1993) (cruel, heinous or depraved aggravating circumstance, standing alone, would support death sentence even in the face of the defendant’s non-statutory mitigating circumstance that he was under the influence of drugs and alcohol at the time of the crimes).

The sentencing court also found the pecuniary gain aggravating circumstance as to both Robert and Tisha. The Arizona Supreme Court affirmed this finding on direct appeal, reasoning that the killings did not occur incidentally to the financial gain, but rather that Jones’s expectation of pecuniary gain was the motive, cause, or impetus for the killings. Pet. App. 267–68. And where a killing for pecuniary gain

occurs that “does not arise out of the heat of passion, fear, struggle, or attempt to escape,” but instead reflects careful deliberation, the aggravating circumstance is entitled to great weight under Arizona law. *State v. Willoughby*, 892 P.2d 1319, 1338 (Ariz. 1995); *see also Poyson*, 475 P.3d at 302 ¶ 42 (“The pecuniary gain aggravator is 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.”) (internal citations and punctuation omitted). Such a circumstance occurred here, as the evidence demonstrated that Jones had no money, no place to stay, and knew about Robert’s firearm collection. Pet. App. 267–68.

Finally, the sentencing court found that Jones committed each murder in the course of committing the other murder. Pet. App. 266. This “multiple murders” aggravating circumstance is entitled to “extraordinary weight” under Arizona law. *See State v. Garza*, 163 P.3d 1006, 1022, ¶ 81 (Ariz. 2008); *State v. Hampton*, 140 P.3d 950, 968, ¶ 90 (Ariz. 2006); *State v. Pandeli*, 161 P.3d 557, 533, ¶ 84 (Ariz. 2007); *State v. Boggs*, 185 P.3d 111, 130, ¶ 93 (Ariz. 2008); *see also Kiles*, 857 P.2d at 1230 (multiple murders aggravating circumstance, standing alone, supported death sentence even where defendant was under the influence of drugs and alcohol at the time of the crimes).

The three aggravating circumstances in common between Robert and Tisha demonstrate an exceedingly strong case in favor of death. The addition of the fourth aggravating circumstance to Tisha’s killing (her young age) further tips the balance. In contrast, Jones’s mitigation evidence, even in light of the new evidence presented in the federal

proceedings, is not sufficiently substantial to call for leniency under Arizona law. Jones already proved at sentencing that: (1) he suffered from long-term substance abuse; (2) he was under the influence of alcohol and drugs at the time of the crimes; (3) he had a chaotic and abusive childhood; and (4) his substance abuse may have resulted from a genetic predisposition and head trauma. Jones additionally proved in the federal proceedings that he suffers from ADHD and a low-level mood disorder. But Jones failed to establish a link between these disorders and the crimes, and an Arizona sentencing judge would have accorded them little weight. Had the panel properly applied *Strickland* by considering and weighing *both* the aggravation and mitigation through the lens of Arizona law, it could not have concluded that there was a reasonable probability of a different outcome.

CONCLUSION

The judgments of the court of appeals should be reversed and this case should be remanded to the district court with instruction to deny the writ.

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